TWO PROPOSALS ON TORT REFORM; IT WOULD BE QUITE EASY TO REFORM TORT LAW IN WAYS THAT ARE FAIR TO VICTIMS AND DEFENDANTS. FIRST, SMALL CLAIMS SHOULD BE TAKEN OUT OF THE SYSTEM; SECOND, RULES SHOULD BE CHANGED IN SERIOUS INJURY CASES; Podium The National Law Journal July 4, 1988 Monday

THE NATIONAL LAW JOURNAL

The National Law Journal

July 4, 1988 Monday

SECTION: Pg. 46 (col. 1) Vol. 10

LENGTH: 1941 words

HEADLINE: **TWO PROPOSALS ON TORT REFORM**;
IT WOULD BE QUITE EASY TO REFORM TORT LAW IN WAYS THAT ARE FAIR TO VICTIMS AND DEFENDANTS. FIRST, SMALL CLAIMS SHOULD BE TAKEN OUT OF THE SYSTEM; SECOND, RULES SHOULD BE CHANGED IN SERIOUS INJURY CASES; Podium

BYLINE: Stephen D. Sugarman

BODY:

Podium

IT WOULD BE QUITE EASY TO REFORM TORT LAW IN WAYS THAT ARE FAIR TO VICTIMS AND DEFENDANTS. FIRST, SMALL CLAIMS SHOULD BE TAKEN OUT OF THE SYSTEM; SECOND, RULES SHOULD BE CHANGED IN SERIOUS INJURY CASES

I

Although multimillion-dollar torts cases involving gravely injured victims grab the headlines, the overwhelming majority of personal injury claims are made by temporarily disabled people who obtain relatively modest awards. The current system for processing these small cases requires an enormous expenditure of time and money, and still it fails to serve the interests of its ostensible clients: the injured victims.

Surely what most temporarily disabled people want and need is prompt payment of their medical bills and other injury-related expenses, and reasonably generous wage-replacement benefits. What the tort system usually gives are delayed payments of highly unpredictable amounts that track neither what the victim needs nor what the victim initially would have said he or she deserves.

Moreover, most people surely don't want the amount of their protection to depend upon such factors as whether their temporary disability arose through an accident or through illness; whether their disability was someone else's fault or their own; or who their lawyer, the claims adjuster or the defendant happens to be.

With this in mind, I propose a trade-off that would remove nearly all short-term disability cases from the tort system. First we would assure all, or nearly all, temporary disability victims promptly paid, employment-based medical expense and wage loss compensation. In return, less seriously injured victims would give up their rights to sue for pain and suffering and for economic losses that are otherwise insured.

TECHNICALLY, accomplishing this trade-off would not be difficult because it would be based on the typical arrangements many employers already have.

Employers would be required to provide income replacement in two parts. For disabilities lasting more than one week but less than six months, employees would be covered by temporary disability insurance that would pay 85 percent of their pre-disability, aftertax, income. This type of insurance is readily available through the private market, and it could be provided separately or added to workers' compensation policies. Alternatively, this insurance could readily be arranged through the public sector, as has long been demonstrated by the (more modest) compulsory, temporary disability insurance programs now in place in five states, including. New York and California. For disabilities lasting less than a week, employees would be able to draw on traditional sick leave accounts, which could accrue at a rate of, say, one day for every month the employee had worked.

Although most American workers already benefit from some sort of employee health insurance, it is widely recognized that too many employees still don't have adequate protection or have family members who aren't covered. Instead of requiring employers to provide better health benefits, as some have suggested, perhaps it would be wiser -- and politically more practical -- to try additional incentives first.

My strategy would be to exempt an employer with a suitable health insurance plan from the obligation to provide short-term medical benefits under workers' compensation. (Moving those medical benefits out of workers' compensation and into private health plans would have the additional benefit of removing about two-thirds of all the claims from the

workers' compensation system.)

ON THE TORT side of the trade-off, three changes would be necessary. First, victims would be barred from suing for the already compensated first six months of lost income. Second, victims no longer would be able to claim in tort for otherwise compensated medical expenses -- as they can today in most states. Third, victims would be able to claim pain and suffering damages in tort **only** if they were disabled for more than six months, or if they suffered a serious and permanent impairment or disfigurement. This screening out of less serious injuries from pain and suffering compensation is modeled after Michigan's highly successful auto no-fault law, which has removed nearly 90 percent of personal injury auto claims from the tort system.

Why impose a threshold on pain and suffering damages? First, since people rarely choose to insure themselves against pain and suffering arising from modest and minor injuries when they buy their own insurance, why should all of us be forced to pay for it through the tort system? Second, this sort of pain and suffering is readily feigned and, in any case, serves to give substantial nuisance value to otherwise small personal injury claims. Finally, much of the money now nominally paid for pain and suffering in the less serious injury cases goes to pay the plaintiff's lawyer, who would no longer be needed under the proposed reforms.

If this proposal were adopted, a great deal of administrative costs would be squeezed out of the system -- including significant, non-insured lost time and paper-pushing costs that defendants now incur in cooperating with insurers in the processing of claims. Since the aggregate payout of the tort system would decline significantly, this should leave employers as a class more than comfortably able to pay for the new first-party benefits envisioned by the plan. In fact, full payment by employers need not be required. As in Social Security, for example, an employer-employee cost-sharing arrangement would also be acceptable.

Incidentally, motorists in most states would benefit from this proposal through significantly lower liability insurance premiums. Although this proposal would take away a great deal of business from lawyers, that is hardly a good reason for opposing it.

II

For those people whose disability makes them unable to work or carry out their normal activities for more than six months or who have suffered a serious and permanent impairment or disfigurement, I propose reshaping tort law so that it would bear a greater resemblance to modern compensation systems than does the tort law system today. Once again, a trade is proposed that seeks to make victims and defendants better off -- at the expense, at least in part, of lawyers.

Four desirable characteristics of modern compensation plans ought to be incorporated into the tort system:

Such modern compensation arrangements as workers' compensation, Social Security disability, and health insurance do not penalize claimants for being at fault in causing their own disability (unless they deliberately injured themselves). By contrast, the tort law of nearly all states now calls for a reduced award when the victim's negligence contributed to his or her own injury. This should be changed.

Modern compensation schemes should function without victims needing to pay a large chunk of their benefit for lawyers. Therefore, I propose that tort defendants be required to pay successful tort plaintiffs' reasonable legal fees (both in settled cases and when plaintiffs win at trial -- except when the defendant has made a better settlement offer that was rejected by the claimant). This is long-standing practice in Great Britain, where the arrangement works smoothly. However, because of U.S. tradition, the claimant's lawyer should be paid a percentage of the award (set on a sliding scale such as 33 percent on the first $50,000, 25 percent on the excess up to $250,000, and 15 percent on any additional excess award) rather than on an hourly basis. Judges should have the power in exceptional cases to increase or decrease the lawyer's award.

Modern compensation schemes and private insurance benefits are usually integrated with other compensation sources. Other things being equal, it is desirable to have efficient, broad-based sources pay first and to have other sources fill in where needed. To put tort law in this mode would mean, at a minimum, that tort damages would not be recoverable for losses otherwise compensated by the victim's basic social insurance (such as Social Security and Medicare) and employee benefits (such as health insurance, wage-continuation plans, long-term disability insurance and workers' compensation). Traditionally, tort law has taken the opposite approach, treating such sources of compensation as collateral and ignoring them for tort purposes. I propose a broad reversal of the collateral sources rule.

Modern compensation systems pay rather little, and often nothing, for pain and suffering. Tort law, by contrast, provides for enormous sums of general damages to those seriously injured victims who are lucky enough to have the right evidence, a talented lawyer, a sympathetic jury, and so on. It has been estimated, for example, that of all the money paid out in medical malpractice awards in Florida, about 40 percent of it goes out in the form of pain-and-suffering awards to those 2.7 percent of claimants who recover such awards of more than $100,000. General damages are not completely incompatible with modern compensation systems, however.

That most states' workers' compensation programs make some award for the impairment itself in partial permanent disability cases suggests that people place some compensation value on large intangible losses. Even in New Zealand, where personal injury law claims have been essentially abolished and replaced with a comprehensive accident compensation scheme, moderate sums are paid out (on a no-fault basis) for impairments and pain and suffering -- up to a maximum of 27,000 New Zealand dollars. But unlimited general damages awards are inappropriate. Instead I propose a moderate ceiling of, say, $150,000 per victim, which should suffice as well as serve the goals of soothing the outrage of the wronged victim and punishing the wrongdoer.

THE NET EFFECT of the proposed package for defendants would mean a significantly reduced total payout in personal injury cases as well as much greater certainty in the amount that is owed in individual cases. That, in turn, should lead to

the prompt settlement of many cases that are now litigated.

For victims, the trade would also be advantageous. Most successful claimants would have more reliable coverage of their actual out-of-pocket losses -- because they would have their legal fees paid and would not suffer reduced recovery when they are also at fault. Because of the ceiling on pain-and-suffering damages, of course, a few victims would receive enormously reduced tort awards. But this could be a socially desirable result; lottery winners should be restricted to those who choose to play the lottery.

Were this proposal enacted, the lawyers' take would be sharply reduced -- especially in the large recovery cases where the lawyers, too, now hit the jackpot. Still, claimant lawyers would receive fair compensation for work actually done; and that work probably will be reduced because of the simplification of damage rules.

In sum, it would actually be quite easy to reform tort law in ways that are fair to victims and to defendants. Neither administrative infeasibility nor economic impracticality stands in the way. What is needed, rather, is a new political coalition. Consumer and victim groups must realize that their interests are different from those of the plaintiffs' bar, and business and insurance interests must give up the Reagan administration's idea that they can -- or even should -- simply roll back victims' rights. Shorn of their lawyers, the real parties in interest ought to be able to see that a sensible compromise is readily within their grasp that will make both sides better off.

.

LOAD-DATE: April 16, 2011

Source: **Legal > / . . . / > The National Law Journal**
Terms: **("Two Proposals on Tort Reform")**
View: Full
Date/Time: Thursday, November 17, 2011 - 3:17 PM EST

In