

# HOPE FOR THE TORT SYSTEM: CONGRESSIONAL PROPOSALS FOR REFORM

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The tort system, as it operates today, envisions a trip through the supermarket or to the car dealership as a walk through a mine field, where seemingly ordinary American businessmen and women are out to kill and maim—not just inadvertently or negligently, but intentionally. It posits a rigid dichotomy between the wholly culpable and evil, on the one hand, and the literally irresponsible victims.

The result is a radically dysfunctional tort system that invites and receives public contempt. It cruelly cheats both genuine victims and innocent defendants. The Rand Corporation recently concluded, “[T]he emerging data suggest that the tort liability system serves too many people it shouldn’t serve, or at least pays them too much, doesn’t serve enough of the people it should serve, and doesn’t serve many well enough.”<sup>1</sup> Former Attorney General William P. Barr wrote in a letter to Congress last year: “Our civil justice system is slow, expensive, uncertain, and capricious.”<sup>2</sup> Fifty percent of all liability expenses go to attorneys and transaction costs, not the victims. A recent study estimated that the American tort system generated \$152 billion in direct—not indirect—costs in 1994 alone.<sup>3</sup>

The indirect costs are even worse. Tort liability accounts for over ninety-five percent of the cost of some childhood vaccines.<sup>4</sup> The D.C. area Girl Scouts have to sell 87,000 boxes of cookies

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1. *Metaphors, and Facts, About Litigation Trends*, FACTS & TRENDS, Spring 1995, at 7.

2. 141 CONG. REC. H2873-01 (daily ed. Mar. 8, 1995) (statement of Rep. Henry Hyde (R-Ill.) (quoting former Attorney General Barr).

3. See TILLINGHAST TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 3 (1995).

4. See Richard L. Manning, *Changing Rules in Tort Law and the Market for Childhood Vaccines*, 37 J.L. & ECON. 247, 273 (1994) (finding that approximately 96 percent of the wholesale price of the vaccine against diphtheria, pertussis, and tetanus goes toward litigation costs).

each year to pay for the cost of their liability insurance.<sup>5</sup> And one out of every four obstetricians reduces or eliminates care to high-risk women for fear of being sued.<sup>6</sup>

The most tragic result is our loss of liberty. We are a liberty-loving people. We do not want the government to go through our papers, to kick down our front door, or to rummage through our belongings, so we have very strict rules about what the government can do in the investigation of even the most serious crimes.<sup>7</sup> In civil cases, however, the state casually delegates to individual lawyers those very powers through our discovery process.<sup>8</sup> The people wielding this power could be the business competitors or the personal enemies of the defendant. They are not prosecutors carefully selected and appointed, but nonetheless they exercise state power when they strip opposing litigants of their liberty in this most personal way.

The House of Representatives's tort reform proposals<sup>9</sup> are designed to start the process of restoring the word *justice* in our civil justice system. Most of our proposals are built on pure common sense. For example, in the products liability area, blameless sellers should not be held responsible for the manufacturer's conduct, and so our bill would limit the seller's liability to those cases in which the seller failed to exercise reasonable

5. See 141 CONG. REC. H2735-04 (daily ed. Mar. 7, 1995) (statement of Rep. Goodlatte).

6. See 1 INST. FOR MEDICINE, MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 40, 74 (1989). An obstetrician has a 70 percent chance of being sued during his career. See *id.* at 2.

7. See, e.g., U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

8. For example, the federal standards for discovery are remarkably broad:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

9. The Contract With America's Common Sense Legal Reform Act was introduced at the beginning of the 104th Congress as three separate bills. See Private Securities Litigation Reform Act of 1995, H.R. 1058, 104th Cong., 1st Sess. (1995); Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. (1995); Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995).

care and thereby proximately caused the harm.<sup>10</sup> Our bill would provide a defense to product liability if the claimant's drug or alcohol use was more than fifty percent responsible for the accident.<sup>11</sup> Moreover, if a jury finds a defendant one percent liable, he should not have to pay one hundred percent of the damages, and thus our bill would abolish joint and several liability in favor of a fair-share rule.<sup>12</sup> Finally, our bill would restrict somewhat the use of junk science<sup>13</sup> to bolster the causation requirement in tort law.<sup>14</sup>

Further needed reforms must await more ambitious legislative proposals. For example, even when a defendant gets to the end of what might be a five, six, or seven-year long process and is completely exonerated of liability, that defendant still loses because of all the transaction costs. We hope to change that eventually, but the legal reform legislation we have introduced is—after all—just a start.<sup>15</sup>

If we are to have effective tort reform, people must stop looking for a riskless society. We must accept that life involves risk and that losses should not be recoverable from a bystander on the flawed premise that "someone" must always pay, even for accidents. And we must remove the blinders that have made us treat the tort system as the best, or even the only, means to manage and compensate risk. When all one has is a hammer, every problem looks like a nail. We will be unable to reform our current system profoundly until we realize we have many tools besides the court system and tort law to deal with risk and injuries in our society. We have deformed the tort system profoundly by treating it as the sole answer to these problems. As a result, all

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10. See Common Sense Product Liability and Legal Reform Act of 1995, *supra* note 9, § 103.

11. See *id.* § 104.

12. See *id.* § 110.

13. See Attorney Accountability Act of 1995, *supra* note 9, § 3.

14. The above reforms were contained in the Contract legal reform legislation as originally introduced. The conference report on legal reform as finally adopted this year modified these provisions. Passed by the House on March 29, 1996 by a vote of 259-158, the conference report included both the protection for product sellers and drug-alcohol defense. It did not include provision dealing with "junk science." The report prohibits joint liability for noneconomic loss, allocating liability in direct proportion to the percentage of responsibility. These reforms apply to product liability cases, not to all tort actions. See Common Sense Product Liability and Legal Reform Act of 1995, *supra* note 9.

15. Under the Contract legislation, a full-recovery rule providing that a prevailing party would be reimbursed for all of his fees and expenses was adopted, but solely in diversity cases.

too often the motto above the courthouse door should be the admonition from Dante's *Inferno*: "Abandon hope all ye who enter here."<sup>16</sup> I hope that very soon we can restore the old motto: "Equal Justice Under Law."

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16. DANTE ALIGHIERI, *THE DIVINE COMEDY* canto III, l. 9 (1320).