

Legal liability in the USA

- the hearts and minds war

Aspen Opinion

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Introduction

For at least thirty years the American tort system has been a graveyard for insurers hoping that justice and fairness would prevail. Jurors had created an environment where too often both value of money and common sense had been lost. Add to that, the many judges elected on the back of generous campaign contributions from plaintiff lawyers and there were trials where to be a defendant with a good case was hopeless.

But step by step, dramatic changes have been occurring so that an appraisal of their cumulative effect is timely.

One defence strategy to get fair verdicts has proved so effective that the changed climate has chilled the plaintiff trial lawyers and forced them onto the defensive. Whereas they used to be confident that selecting a pro-plaintiff jury would generally not be a problem, now the worry is that a majority of panel jurors from which they whittle down the final number during voir dire, may be hostile - even in some of the more notorious state courts.

In contrast therefore to the usual view of the American tort market as a disaster zone, this Aspen Opinion is focussing on the positive aspects. However, despite this dramatic turnaround, it would be foolish to underestimate the ongoing dangers of a runaway jury or from certain judges... but the tide has undoubtedly turned.

Defence interests

Defence interests can be regarded as a combination of big business, insurers and the medical profession. Generally too, this camp is supported by Republicans and currently it has the ear of the White House. Supported by vociferous lobbying groups, one common purpose has been to seek statutory law reform at state and federal levels. They wanted to cap damages; to tackle punitive awards and to achieve a variety of procedural and substantive changes like the law on joint and several liability.

Besides statutory reform (now accelerating), another three points have also been significant:

- Colossus software for measuring damages for bodily injury claims has proved itself a forceful and deflationary negotiating tool.
- Case law (particularly *Daubert v Merrell Dow*) has excluded reliance on junk science experts to bolster flimsy cases.
- The Supreme Court in *State Farm v Campbell* slashed a punitive damage award, laying down tougher guidelines.

Due to the plaintiff lawyers' lobbying power and campaign donations, statutory reform on Capitol Hill and at state level has never been easy. Accordingly, a new and vital battlefront was opened - to win the hearts and minds of the American people.

Winning the hearts and minds

History may show that it was not statutory reform but the success of the hearts and minds war that did most to curb the worst excesses of the US tort scene. The strategy was simple enough: to make the public understand that the excesses of the jury system were creating problems in both provision and cost of medical care; in causing corporate failures, company closures, unemployment and rising insurance premiums. This strategy, almost imperceptible for so long, has now derailed the litigation gravy-train.

Superficially, this success gets masked by headline stories of occasional rogue verdicts like a recent one in Florida. In April 2006 the plaintiff was awarded US\$28 million for problems from a 2001 operation that allegedly went wrong. The parties had been expecting an award of about US\$1.5 million (this award is likely to be reduced by the judge anyway and under Florida's new capping provisions, would not be possible for a negligent event today either).

It suits defence interests to ensure that the public reads and hears of these rogue awards to fuel outrage

But behind the headlines, the relentless and more important drift of the mass of both awards and verdicts has the plaintiff attorneys in real difficulty. The excesses of the past are returning to haunt them. This PR initiative has been so effective that it has assisted both at the political level (with statutory tort reform recently making useful progress especially at state level) but more importantly with jurors.

Juror awareness

Due to concerted highlighting of problems caused by runaway juries, prospective jurors increasingly now sympathise with the defence. Awareness of how the tort system has been abused is widespread. TV campaigns, articles in magazines, repeated debates in the media and endless sharply honed jokes against plaintiff trial lawyers have been very effective - to the extent that even the term trial lawyer is disappearing as plaintiff lawyers are redefining themselves as attorneys for consumer justice.

This defence campaign has created catchphrases including jackpot justice, runaway juries, frivolous lawsuits, personal responsibility, junk lawsuits, junk science, greedy trials lawyers, lottery mentality and the bête noire of them all - the McDonald's coffee case. These terms are widely used by defence attorneys at trial to sway the jury but the sworn in jurors are already familiar with them. Defence questions like these to jurors during voir dire (see further below) are typical:

- 'Would you feel comfortable being part of a runaway jury? Comfortable letting this plaintiff win a personal lottery?'
- 'Are you worried about the rising cost of medical bills and consumer goods due to greedy plaintiffs and their attorneys?'
- 'Are you worried about this type of claim causing hospital closures?'
- 'Do you believe people should take responsibility for their own actions - that stuff happens and nobody should be blamed just to make lawyers rich?'
- 'Would you feel comfortable delivering jackpot justice like in the McDonalds coffee case?'

The American people have become concerned about the delivery of competent healthcare at affordable cost and are increasingly ready to blame plaintiffs and their attorneys. This has tipped over into a general sense that the tort system is to blame for rising premiums, factory closures and jobs being exported to India and elsewhere. Insurers now win at least two-thirds of medical malpractice claims. They are delivering lower awards or throwing out plaintiffs' claims that rightly or wrongly would previously have succeeded.

Juror awareness (continued)

Of course, with billions at stake in earnings for plaintiff lawyers, the struggle is ongoing and they are fighting back. The Association of Trial Lawyers of America (ATLA) is arguably the most powerful lobbying influence in the USA. In protecting the interests of plaintiff attorneys, ATLA supports a website (www.peopleoverprofits.org) to win or retrieve lost public and congressional support. It takes every opportunity to attack insurers and to pinpoint where it believes money from big business is distorting the judicial and legislative process.

Shock findings

The majority of civil trials in the USA are decided by a jury, though bench trials by judge alone do occur. The success of the strategy to educate jurors is demonstrated by the shock findings that judges today tend to be better disposed and more generous to plaintiffs than jurors. Statistics from the US Department of Justice show that judges found in favour of plaintiffs two-thirds of the time whereas juries only did so about half the time.

The cumulative effect of (1) lower tort awards, (2) more verdicts for the defence and (3) statutory law reforms has been to make trial lawyers less trigger-happy than their ongoing public image. It is now harder than ever to get a lawyer to run a moderately sized and well-founded medical malpractice claim worth say US\$100,000 because the risks are too great. Even in states where damages have been capped at US\$300,000, many lawyers decline instructions because the risk / reward ratio is unattractive.

Bureau of Justice statistics

- Tort claims in the top 75 state courts fell 20% from 250,000 per annum in 1997 to 200,000 in 2003
- Car-wreck claims filed fell 14% over a fifteen year period
- Between 1992 and 2001, median awards of damages fell a startling 56%
- In 2001, the median award for a winner was US\$37,000
- In 2001, the median punitive damage jury award was only US\$50,000

Despite this data, the public continues to believe that the number of tort claims is rising fast and that damages are out of control.

The Bush message

The President is intent on using Capitol Hill to sideline those remaining states that will not pass tort reform laws, something the President says he learned from his experience as Governor of Texas. He sees a nationwide law as the key to curbing what he repeatedly calls junk lawsuits. In a hostile speech against the tort system and plaintiff attorneys the President said: '...the fastest growing industry is the lawsuit industry.' The drumbeat of this message is well received, even if not apparently supported by Government statistics.

In Madison County, Illinois - a location notorious for delivering pro-plaintiff results, President Bush lambasted the medical claims laws 'It's a system that's just not fair. It's costly for the doctors; it's costly for small businesses; it's costly for hospitals; it is really costly for patients. Because junk lawsuits are so unpredictable, they drive up insurance costs for all doctors. The people of America must understand that every time you read about big jury verdicts or out-of-court settlements or lawsuits being filed here or there, you're paying for it. This liability system of ours is out of control. Medical liability reform is a national issue and it requires a national solution. It's important for the ...senators ...to recognize the significance of the problem and get a meaningful, real medical liability bill to my desk so I can sign it in the year 2005.

'Junk lawsuits affect more than just the medical field. According to a recent study, frivolous litigation has helped drive the total cost of our tort system to more than US\$230 billion a year. That's the equivalent of US\$3,200 for every family of four.' This message has reverberated throughout the USA and no doubt has helped to quash many frivolous lawsuits but also to reduce damages from the heady heights to which they had soared. Congress has not yet delivered a medical reform Bill to the White House but another attempt at legislation is under way. At least federal reform of the class actions laws (see below) has been achieved.

Smaller awards

If juries continue generally to award smaller sums, this strikes deep into the modus operandi of the typical plaintiff law firm. Whereas defendant lawyers may well work for a fixed fee when defending claims, plaintiff attorneys work on a contingency fee basis. If a jury would have awarded US\$2 million in 2000 but today awards only US\$600,000, then this hits the plaintiff's lawyer hard. A 30% contingency fee falls from US\$600,000 to US\$180,000. That reduces the profitability of that case and the cash flow to fight other claims.

Add to this factor the lower chances of now even winning a jury verdict at all and it becomes plain why there are cheaper settlements and less claims being advanced to trial. Trials lawyers must now pick their plaintiffs and their juries with extreme care.

Alternative Dispute Resolution

Another clever method being used to curb the power of runaway juries and biased judges has been a concerted push to sideline the court system by enforcing compulsory Alternative Dispute Resolution (ADR) as part of tort reform. The selling-point has been that ADR can be quicker and cheaper for all parties. Circumventing judges and juries has not been part of the message but doing so has helped insurers considerably. ADR, as now embraced, has been effective in different ways.

Compulsory screening of claims, especially medical malpractice, has prevented many actions being commenced. In an increasing number of states, mediation or arbitration is now compulsory before any claim reaches trial.

Voir dire

Jury selection is undertaken by the voir dire procedure and is perhaps now the most important part of the American trial process. In some states, selection may take days. Prospective jurors must answer questions under oath - always orally and sometimes in writing as well. Selection always was an art form but now with so much hostility towards them, plaintiff lawyers are increasingly being forced to hire jury consultants (or to use focus groups) to enable them to identify or profile (usually) six suitable jurors from the panel of perhaps thirty. Finding even six who are neutral or at least not inwardly or openly hostile is becoming increasingly difficult.

Watching voir dire in action is fascinating but leaves an impression that the American public when scrutinised (and they may well not be alone in this) is so mixed up with so many conflicting, deeply held and (sometimes) ill-formed and unshakeable prejudices that damages claims would be better handled by judge alone. Judges too have their prejudices but are at least trained to deliver justice according to the evidence.

Such is the known prejudice of jurors that in 2005, a plaintiff lawyer was forced not to call an eminent Indian medical consultant in person because he wore a turban. Instead, his evidence was read to the jury. Despite the geographical and racial differences, the lawyer knew that his presence would have been unwelcome due to prejudice against the Middle East!

The McDonald's case

During jury selection in a recent trial in Florida, the dominant prejudice against plaintiffs (among a surprising variety) stemmed from the McDonald's coffee case. This is an excellent example of how the PR battle has been won by defence interests. Mention of this verdict by one juror led to several more agreeing that they thought plaintiffs had it too easy with jackpot justice awards - the very words have sunk in to the public psyche. But a deeper analysis of that scalding by coffee case reveals that the jury was not out of its collective mind. The judge had derided McDonald's conduct as being 'reckless, callous and wilful.'

The McDonald's case (continued)

The trial lawyers see the case like this: the award to the 79 year old woman who sustained third degree burns (as a passenger in a stationary car and not the driver of a moving car as was widely portrayed) reflected a punishment of McDonald's for deliberately and knowingly serving coffee at 50 to 60 degrees Fahrenheit over the temperature at which severe burns will not occur. At the actual temperature of about 190 degrees, the plaintiff's severe burn occurred almost instantly. Coffee at home is normally only served at 130 -140 degrees.

McDonalds accepted that their coffee was not fit for human consumption at this temperature. They did not explain (or chose not to do so) why they would not reduce the temperature - despite admitting that they had known of seven hundred reported scaldings over ten years.

The plaintiff had offered to settle for her medical bills of US\$20,000 but McDonalds refused. The award including punitive damages, as approved by the judge and as discounted by 20% for the plaintiff's own negligence for spilling the coffee, was about US\$470,000. Though this result was not absurd for a painful and permanently disabling injury, the perception of a runaway jury and jackpot justice for an ill-deserving driver is now too deeply entrenched in the public imagination to be changed now.

American jurors (and probably global opinion) have accepted a spin that McDonalds were innocent victims of an out of control tort system where negligent people got jackpot damages for their own stupidity.

Statutory tort reform

In 2005, 400 bills were presented in 48 states - all seeking some form of tort reform. 32 states enacted laws. Add this activity to previous statutory reform and to ongoing attempts to push through legislation on Capitol Hill and a picture emerges of a big majority of states taking different forms of action to tackle the problems that have hurt insurers.

Silica

After the asbestos litigation slowed, trials lawyers continued to pocket huge fees from the success of the tobacco litigation but they have been looking for another mass tort - a claim that could be successfully run for tens of thousands in class actions. Mould came and went. It was not the answer. Welding-Rod claims, benzene, lead paint poisoning and a number of others have fuelled some profitable business for plaintiff lawyers – but none had the legs to be an ongoing easy earner like asbestos.

Silica (continued)

From the pack, silica claims emerged as a strong front-runner, though never likely to be a problem on the scale of asbestos. Claims for ill-health due to silica dust exposure blossomed. All that ended in June 2005 with a strong smell of cordite when Texan Judge Janis Graham Jack let fly with both barrels at the plaintiff lawyers and their hired experts. She has done right-minded citizens everywhere a big favour by exposing the way that mass tort litigation had been abused. Judge Jack was in charge of 10,000 claims in class actions called **In re Silica Products Liability Litigation, docket No 1553**.

The plaintiffs lost following a tough discovery order made against them, revealing data that enabled defence lawyers to expose what may yet prove to be criminal misconduct. Insurance veterans of the asbestos litigation always knew that the great majority of victims compensated in class actions were not ill and never would be. In a sense, what happened with many silica claims was more of the same - only far worse.

Silica - double dipping

In their search for business, a coterie of plaintiff lawyers had browsed their closed asbestos files where claimants had been awarded damages. Many had also been exposed to silica dust at work too. There were grounds to argue that these persons could also now blame silica for respiratory and other problems. The name of the game was to find mixed dust claims - any workplace where operatives were exposed to a variety of dusts all or any of which could be blamed to double or triple dip. The next move was to organise mass screenings and to group everyone into costly class actions so that those uninjured would get compensated as part of a deal forced upon defendants by sheer weight of numbers.

Available therefore to join in claims were employees from countless industries where silica dust / mixed dust exposure had occurred. Some but seemingly only a small minority had sustained any health problems. 10,000 plaintiffs joined consolidated class actions to come before Judge Jack. She castigated the lawyers, medical experts and screening companies and warned that criminal enquiries were being made, pointing out that:

- Based on expert research there should only be about 1,200 silica related illnesses per annum throughout all the USA and that the death rate had been falling.
- Despite this, in 2002 there had been 10,642 claims filed in Mississippi followed by another 10,000 or so in 2003 and 2004. Previously, in 2000 and 2001, there had only been a mere 116 claims.
- At least 6,000 plaintiffs had already been asbestos claimants.
- Twelve doctors, associated with lawyers and mobile screening companies, had given opinions on 9,083 of them but had never actually seen the patients.
- One doctor used the same wording in reports for 3,167 patients. Allegedly, he did not know the criteria for diagnosing silicosis and had never met one patient.

Silica - double dipping (continued)

- One doctor had his secretary fill out blank forms while another gave opinions on 1,239 patients in 72 hours.
 - There were suggestions that some doctors were paid more if their opinion supported a claim.
 - In her view, the claims were 'manufactured for money,' - a reference no doubt to the fortunes that plaintiff lawyers and their medical experts could make from a successful class action.
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The fall-out

The implications of this judgment go beyond the remaining silica claims. Encouraged by Judge Jack's outspoken criticism, defence lawyers have been seeking to get judges in ongoing asbestos litigation to investigate samples of claimants to check the underlying medical testimony. A federal judge in Philadelphia has issued subpoenas against forty-five doctors who advised up to 200,000 plaintiffs. In Pittsburgh, the judge has ordered that 1,000 out of 150,000 plaintiffs in an asbestos lawsuit be sent questionnaires to test the reliability of the medical diagnoses.

Suspicion

Welding-Rod lawsuits became fashionable over the last few years based on alleged linkage of manganese fumes with Parkinson's disease and neurological damage. In a class action in Cleveland Ohio, there is suspicion (no more than that yet) about possible double-dipping by previous toxic tort claimants coupled perhaps with an attempt to swing countless uninjured plaintiffs through as part of the class. These plaintiffs are now being questioned to establish whether the underlying evidence of a medical problem actually exists. Allegedly, 40% of the plaintiffs have already made silica or asbestos claims. If proven, this type of behaviour by the trial lawyers can only help to make it easier for jurors to empathise with defence interests on thousands of other unrelated claims.

Beta Project

The US Chamber's Institute for Legal Reform has helped this attack on the toxic tort industry. Its secret database called the Beta Project is available to approved attorneys. It red-flags inter-linkage between plaintiffs, doctors, screening companies and trial lawyers and is helping to expose the type of incestuous situations so criticized by Judge Jack. Its availability will enable co-ordinated nationwide defence strategies.

ATLA commented that the Beta Project was one more example of 'insurers spending their ill-gotten gains to create obstacles to justice.' This rings very hollow.

All roads no longer lead to Madison County

Judicial Hellholes, published annually by the American Tort Reform Association, is essential reading for those wishing to study tales of forum shopping and tainted litigation. For example, it has done a great service by highlighting the lack of impartiality in Madison County and several other courts like South Florida where judges and juries generally have had no problem in finding generously for plaintiffs on the flimsiest of evidence. Campaign contributions to elected judges have been a significant feature in Illinois.

Plaintiff lawyers know which courts to avoid and which ones have been virtual rubber stamps marked Win. The Class-Action Fairness Act of 2005 introduced federal curbs designed to prevent some of the abuses inherent in class actions including forum shopping. The new law prevents class actions gravitating from outside the state to courts such as in Madison or Jefferson County when to do so means suing defendants in a jurisdiction without a bona fide connection.

Forum shopping has not simply been an inter-state issue. In states where there has been tort reform, one issue often now tackled has been preventing plaintiffs from moving even within the state to those courts that always have had a receptive jury pool. Nevertheless, as President Bush highlighted, in those states where local politicians will not clamp down on known problems, federal law reform is the cure but in the meantime their citizens are not immune from the hearts and minds campaign - and that is being felt both in court and in politics.

Stuff happens

This has been a risky defence sometimes adopted by defence attorneys, the danger being that it could antagonise many jurors. Now, with the shift in the nation's mood, it receives a better hearing. The defence simply means that not every moment of bad luck or misfortune can be turned into a tort claim. This argument arises especially in medical malpractice claims or any claims where, whatever the issue on primary breach of duty, there remains an argument on causation or on the overall feel of the claim. Jurors are now receptive to this concept because of some of the wilder excesses of pro-plaintiff verdicts in the past - the McDonald's coffee case perceived to be among them.

Failure to diagnose a heart or cancer condition leading to a spouse's death is an example of where today's jurors may well conclude that stuff happens. However careless the doctor may have been, jurors have been reported as increasingly ready to conclude 'that the plaintiff would have died anyway' linked with 'what good is money to the grieving widow when what she really wants is her husband back. Stuff happens!'

Claims over the wrongful death of a child used to be guaranteed to bring a large award to the parents. That is no longer so. Decisions increasingly reflect a different jury instinct based on stuff happens - life is full of bad luck, unhappiness, and misfortune - why burden all of us with a big award that we will pay for in the end. Awarding money will not bring happiness.

Silent tort reform

A traditional starting point in American politics has been that Democrats create federal regulations and that Republicans, given the chance, de-regulate. Thus, federal standards on many safety issues like vehicle design, toys or bedding have been created by Democrats to protect consumers. If the standards, due to powerful lobbying by manufacturers, were lower than the known state of the art (albeit an improvement on nothing at all), then trial lawyers in state courts would win awards because of higher standards imposed locally.

Now, the federal agencies, supported if not prompted by defence interests, in a Republican dominated environment, are creating regulations that explicitly pre-empt any state laws so that the local courts must apply the new regulated federal standards. This reverse of strategy at a federal level has seen changes in bedding standards, the drug industry and hotly contested attempts to create vehicle safety standards that are argued to be much lower than needed, especially for SUVs.

It is too early for this new approach yet to have impacted forcibly on product liability claims but over time, this strategy will neuter the power of local courts to apply any higher standards. Attorneys will be driven to decline to run expensive actions when the prospects of success are so much reduced. If the manufacturer has abided by a federal standard, then this will be a sufficient defence against arguments about the state of the art. On the downside, will regulations be abolished or changed if there is a return to a Democratic environment?

Love insurers?

Just because the American public has grown less enamoured with the plaintiff camp does not mean that insurers are now loved. Even though negativity against plaintiffs and their lawyers is now stronger than at any time in the history of tort claims, most of the American public are wary of insurers too. The large number of successful bad faith claims against insurers arising from adjuster misconduct is testimony that, besides not dealing fairly with genuine third party claims, insurers do not look after their own policyholders either. Perhaps as the next phase of winning more hearts and minds, insurers should further tighten the noose on the trials lawyers by ensuring that the insurance industry is respected rather than distrusted.

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