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The Ideology and the Politics of American Tort Litigation

The relationship between this article and Professor Carrington's can be described as follows. He has explained the design and operation of the American tort litigation system, including its key elements such as the jury system and class actions. I will pick up at that point and describe how that system has been under attack by forces in the United States and how it is beginning to complicate our relationships with other countries.

The protracted and bitter battle between American business and the plaintiffs' lawyers in the United States has recently spilled over into Europe. For a decade American business leaders have developed a theoretical critique of the American tort litigation system and have struggled to change the way it works. They have stimulated both an academic and a political response from those who regard the United States system as a model response to injustice and injury. Thus the system which the article by Professor Carrington describes is very much subject to challenge in the United States. It will doubtless arouse increasing controversy in Europe as well.

This article will begin by describing the arguments which the business group has used to attack the tort law system. It then traces the efforts on the political front, in Congress, state legislatures and courts, to change it. Third, it analyzes how litigation has brought the American problem to Europe and entangles relations across the Atlantic.

I. The Theoretical Attack

While anti-lawyer sentiment can be found in every place and every time and was very strong in colonial and post-colonial America, a new strain emerged in the 1990s. It was captured in speeches by Vice President Daniel Quayle in August and October 1991. He there claimed that America had seventy per cent of the world's lawyers and that they cost the American economy an estimated $ 300 billion per year. Specifically the product liability system is a huge mess that constitutes a "self-inflicted competitive disadvantage" of enormous dimensions. It represents a "litigation explosion" of unique qualities. Those costs burden American business in its competition with other countries and discourage innovation and initiative. The opponents of the tort system also pointed to the burdens on doctors and the health care industry by the propensity of lawyers to bring actions for malpractice on slender evidence, thus driving insurance

premiums up beyond the reach of many doctors. Others repeated the claims in formats that claimed more scholarship and more rigorous analysis. General claims were backed by piquant anecdotes. Professor Carrington mentions the woman scalded by McDonald's coffee, and there are other examples. From that point writers went on to condemn the members of the plaintiffs' bar in personam. They asserted that they dashed into court on the flimsiest pretexts, that they used the threat of staggering punitive damages to extort extravagant settlements, that in the settlement process they betrayed their clients and achieved unreasonable contingent fee awards for themselves.[1]

Critics of this position include Professor Marc Galanter[2] and Dean Robert Clark[3]. First, they take up the issue of numbers. Recognizing the difficulties of finding the number of lawyers from the incomplete and contradictory statistics available, Professor Marc Galanter concludes that, at 1 million lawyers. The American share of the world legal profession comes to something more like forty than seventy per cent. Both he and Dean Robert Clark believe that this is an acceptable number, given the size of the United States gross national product and the dispersed and diverse quality of the American population. Besides, other countries – including Germany which reportedly has about 120,000 lawyers – are expanding their lawyer populations so as to approach our level of saturation. Turning to the tort system they defend it as producing on the whole reasonable results. It is consistent with the American non-bureaucratic, entrepreneurial method of solving problems. Turning to comparative law, they observe that without the contingent fee and the resultant incentives to bring actions America would have to do much more by way of government support of legal aid programs, as do European states. The federal and state governments expended in 1998 only about $ 2.25 per capita on legal services while Germany and France spent $ 5, the Netherlands $ 10.50 and England $ 32.[4] Additionally European countries tend to have universal health care systems so that accident victims are not dependent on damage actions for their basic medical expenses. Defenders of the U. S. approach say that critics unfairly load the statistics by piling into the supposed costs of the tort system losses produced by the torts themselves. Somebody, perhaps the victims, would have to bear those losses if the tort system did not remedy them by assigning the costs to those who caused the problems. The skeptics argue that, despite these supposed burdens, American industry has shown itself to be capable of competing with other systems despite the tort handicap. They also note that juries have become more cautious and frequently award damages less than those judges would approve. Trends in the volume of tort litigation and the amounts of verdicts have been downward rather than upward. At the anecdotal level they pointed out that the woman in the McDonald's hot

[1] The European audience should be aware that in addition to allowing a contingent fee, the American rules relieve the losing plaintiff of responsibility for reimbursing the defendant's expenses in achieving its success.

[2] *Marc Galanter,* News from Nowhere: The Debased Debate on Civil Justice, 71 Denver Univ. L. Rev. 77 (1993); Reading the Landscape of Disputes: What We Know and Don't know (And Think We Know) about our Allegedly Contentious and Litigious Society, 31 Univ. Calif. Los Angeles L. Rev. 4 (1983).

[3] *Robert Clark,* Why So Many Lawyers? Are they Good or Bad?, 61 Fordham l. Rev. 275 (1992).

[4] Justice Update, Issue 6, Winter-Spring 1999–2000.

coffee case had, as my colleague noted, been substantially injured and had required hospital treatment. They further responded with their own horrifying anecdotes such as the cynical internal memoranda found in the files of asbestos manufacturers that revealed how clearly they had known of the health dangers posed by their product.[5]

II. Legislative Cures

The major tort reform achievement at the federal level was the passage of two statutes constricting private securities litigation.[6] That activity was fueled by a perception that there were too many lawsuits without significant merit brought against companies that had made initial public offerings of their securities. This particularly involved firms in the volatile and exciting high technology field. It was argued that the low percentage of their claims that private litigants usually achieved in settlements showed that the suits tended to lack merit. The Private Securities Litigation Reform Act of 1995[7] was passed by a two thirds majority of both the Senate and the House of Representatives that overrode President Clinton's veto. To some extent that Act heightened the substantive requirements for law suits alleging misrepresentation under federal securities legislation – it requires that plaintiff plead "with particularity" facts showing defendant had a fraudulent state of mind and it protects corporations' predictive and other "forward-looking statements." It provides that liability will not be joint and several for the full amount of damages but that defendant will be "liable solely for the portion of the judgment that corresponded to the percentage of the responsibility" of the person – such as an accountant or lawyer. It also affects procedure by staying plaintiffs' discovery so long as any motion filed by defendant is pending. It further seeks to put the function of being the lead plaintiff into the hands of the plaintiff with the largest economic stake in the action – frequently a mutual fund or other financial institution. It also limits the number of times a given security holder can be a lead plaintiff. In 1998 Congress, motivated by a tendency of plaintiffs to shift their activities into the state courts, also passed the Securities Litigation Uniform Standards Act of 1998.[8] Contrary to a long tradition in American legislation this statute imposed federal standards on litigation in state courts based on state substantive law. The scandals surrounding Enron, Worldcom, Tyco and other American firms in 2001–02 have predictably evoked outcries from one side that the reform statutes unwisely protected corporate malefactors from paying the price for their misbehavior.

The tort reform movement also claims credit for two particularized pieces of legislation. One is the General Aviation Revitalization Act of 1994 which limited liability

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[5] *David Rosenberg*, The Dusting of America: A Study of Asbestos – Carnage, Cover-Up and Litigation (Book Review), 99 Harvard L. Rev. 1693 (1986).

[6] For a review see *Victor Schwartz*, White House Action and Civil Justice Reform, 24, Harv. J. L. and Public Policy 393 (2001).

[7] 109 Stat. 737, amending the Securities Act of 1933 and the Securities Exchange Act of 1934.

[8] 112 Stat. 3227 (1998).

of the general aviation industry, that is, flying outside of the scheduled airline industry.[9] The other was the Aviation Disaster Family Assistance Act which limited the right of lawyers to approach the victims of aircraft accidents immediately after the event.[10]

Since 1945 there have also been some legislative programs involving damages to large numbers of people that have bypassed the tort litigation system. For example American prisoners of war in World War II who had suffered from prison camp conditions that violated the Geneva Convention of 1929 were paid so many dollars per day by the War Claims Commission.[11] In 1988 the United States recognized that we had in a fundamental way violated the rights of American citizens of Japanese origin by deporting them during World War II to camps far away from their homes on the West Coast without any proof of their disloyalty. Congress awarded them a flat $ 20,000 per person.[12] One observes that Congress passed special legislation attempting to remove the claims of the victims of the terrorist attacks of September 11, 2001 from the tort system. In a bill designed largely to preserve the air transportation industry it was provided that the federal government would, through an administrative process, pay amounts equal to the damages the victims would have obtained under the tort system.[13]

Other attempts to achieve federal legislation limiting tort suits foundered on the opposition of the Clinton administration which had close ties to the plaintiffs' bar and received contributions from them. As Governor of Texas George W. Bush sponsored legislation enacting tort reform. The campaign platform on which he successfully ran for president included promises of tort reform;[14] like many other items in his agenda, was shelved after the dire events of September 11th. With the success of the Republican party in extending its control of Congress in November 2002 a push for changes in the federal law governing tort actions seems highly likely.

More success has attended efforts at the state level than at the federal level. Unlike the European Union there is no uniformity in the United States in such a matter as product liability law and that gives rise to a temptation for lawyers to seek out the most friendly forum to initiate their actions. Some especially hospitable county courts pile up impressive amounts of nation-wide and even international cases. In the field of state law the chief goal of tort reform has been the capping of punitive damages, though other "reforms" have involved making the standard of proof of damages more difficult to meet, limiting damages for pain and suffering, shortening the statute of limitations period and relieving defendants at the margins of disputes from full joint and several liability.[15] This has set off a number of passionate controversies. In some

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[9] 49 U. S. C. § 1136 (g) (2).

[10] 49 U. S. C. § 1136 (g) (2) (1996).

[11] See 95 American J. of International L. 139, 142 (2001).

[12] 50 U. S. C. App. §§ 1989–1989 d.

[13] Air Transportation Safety and System Stabilization Act of 2001, 115 Stat. 230, Title IV.

[14] Judicial Reform: Courts that Work, Laws that Make Sense, at <www.mc.rnc.org/GOPInfo/Platform/2000 platform7.htm>.

[15] This legislation and the courts' reactions are covered from both sides in Symposium, Tort Liability, The Structural Constitution and the States, 31 Seton Hall. L. Rev. 563 (2001).

states tort reform legislation has been declared unconstitutional by state supreme courts as invading the prerogatives of the jury system or invading the prerogatives of the courts under the separation of powers theory. Business groups, in particular Chambers of Commerce, have responded by participating in campaigns to unseat judges who took part in such decisions. My European audience may be surprised to learn that most American state judges – as distinct from federal judges – are subject to popular votes. A particularly troubling issue is that of the financing of such campaigns, which have become very expensive in contested cases, particularly in large states. When judges receive contributions from identified individuals or corporations the integrity of decisions they make that involve those parties is suspect. For example, there is skepticism that the judges of the Texas Supreme Court who received campaign contributions from Enron were acting disinterestedly when they gave Enron a victory as against the state tax authorities.[16] Business interests contributed large sums to campaigns against judges opposed to tort reform.[17] These campaigns were sometimes disguised as efforts to unseat them because of their lack of enthusiasm for capital punishment, an issue more apt to arouse large portions of the electorate.

As the 1990s proceeded courts became more and more uncomfortable with the use of class actions in highly complicated situations involving thousands of potential claimants. In one case the courts themselves called for legislative tort reform. An ad hoc committee of judges, convened by the Chief Justice, declared that the class action was not adequate to resolve the claims involving hundreds of thousands if not millions of persons who had been exposed to asbestos products made by numerous manufacturers.[18] They called for action by Congress to provide a different dispute resolution mechanism, noting that Congress had acted with respect to the black lung illness caused by inhalation of coal dust in the mines. Other actions by the judiciary, even in the interpretation of rules of substantive law, had the effect of making certain types of actions more costly and difficult for plaintiffs. For example the Supreme Court in 1994 made it more difficult to sue persons who were marginally involved in securities cases, thus anticipating the later changes of the Act.[19] At times the federal courts have made expanded use of Federal Rule of Civil Procedure 11 so as to penalize lawyers who brought lawsuits (or raised defences) without having a good faith belief in the validity of what they filed.[20]

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[16] The most troubling case is Enron Corp. v. Spring Independent School District, 922 S. W.2 d 931 (Texas 1996), discussed in *Mary Alice Robbins,* What if Enron Cases Reach Texas Supreme Court, Texas Lawyer, Jan. 21. 2002 at page 7.

[17] Concern about the effects of the business campaign were expressed by the President of the American Bar Association, *Terry Carter,* Boosting the Bench: The U. S. Chamber of Commerce is Spending Big Bucks to Influence Judicial Elections, Am. Bar Association J. 29 (October 2002).

[18] Amchem Products, Inc. v. Windsor, 521 U. S. 591, 597–99 (1997).

[19] Central Bank of Denver v. First Interstate Bank of Denver, 511 U. S. 164 (1994).

[20] *Charles Wright & Arthur Miller,* 5A Federal Practice and Procedure §§ 1331–32 (1990).

III. The Controversy Goes Abroad

Episodically the German legal system has interacted with U. S. litigation for a long time. As early as 1956 German courts were considering whether to enforce American lawyers' claims for contingent fees[21] and by the 1990s they had occasion to reject the enforcement of U. S. judgments for punitive damages.[22]

Spectacular cases of punitive damages such as the $ 4 million awarded against a German firm in BMW v. Gore[23] made more German lawyers aware of the dramatic consequences possible in American lawsuits. That is true even though, as my colleague reports, those damages were reduced in the appeals process.

German awareness was heightened by events next door in Switzerland. Actions were brought in New York against Swiss banking firms because of their failure to seek out holders of bank accounts who had vanished during the Holocaust. Motions to dismiss the actions on various legal grounds were held in abeyance by federal district Judge Korman in order that negotiations between the parties might proceed. They went ahead in an atmosphere of moralistic denunciations of the greedy Swiss. Lawyers in a big New York firm debated whether they could represent the immoral banks without themselves becoming tainted.[24] Politicians, notably Senator d'Amato, beat the drums about Swiss misbehavior and the financial authorities in New York threatened harm to Swiss banking interests if they did not give in. In general the banks proved inept in handling the situation and in making their case to the American public. Calculations about the right choice to make must have included the possibility that inflamed American juries might award fantastic damages. The result was a settlement for $ 1.2 billion.[25] Swiss bitterness about the "blackmail" to which they were subjected was heightened when the auditors and arbitrators who were assigned the task of making payments to depositors were able to find only a few million dollars worth of Holocaust-related accounts.[26] This result came in the face of great pressure from the American side to be hyper-generous.

The Holocaust reparations movement then hit Germany itself. It took the form of a campaign to reopen the matter of compensation for persons who had been the victims of the forced and slave labor programs during World War II. A wave of lawsuits was

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[21] BGHZ 22, 161, Nov. 15, 1956; BGHZ 44, 184, Oct. 18, 1965. See comments in *Rudolf Schlesinger*, Comparative Law 805–14. (4th ed. 1980).

[22] BGHZ, 48, 312, June 4, 1992. See discussion in *Andreas Lowenfeld,* International Litigation and Arbitration 474–92 (2 d ed., 2002). The United Statees will also refuse to enforce foreign penal judgments. The doctrine goes back to Huntington v. Attrill, 146 U. S. 657 (1892). In Chase Manhattan Bank v. Hoffman, 665 F. Supp. 73 (D, Mass. 1987), the court enforced the obligation imposed on defendant to repay the debt owed the plaintiff but did not enforce the fine that was ordered in the same Belgian judgment.

[23] 517 U. S. 559 (1996).

[24] *Stephen Gillers,* Regulation of Lawyers: Problems of Law and Ethics 418–22 (6th ed. 2002).

[25] For a perspective on the settlement process see *Pierre Weill,* Der Milliarden-Deal: Holocaust-Gelder – wie sich die Schweizer Banken freikauften (2001).

[26] *Pascal Hollenstein,* 800 Millionen Dollar, Grobe Gerechtigkeit, Neue Zürcher Zeitung, 16 Juni 2002, p. 28.

filed in district courts around the United States.[27] They each purported to represent numbers of persons who had suffered from the programs as well as, in some cases, their heirs. The classes for which they spoke varied in their extent. Some included only persons who had been kept in concentration camps; others included civilian forced laborers from Eastern Europe; yet others included every person compelled to do labor in Germany. Most complaints singled out one defendant corporation but others included a whole variety of defendants including unnamed parties referred to as "Doe", the American lawyers' name for unidentified parties. Often the complaints did not specify the damages sought but the threat of huge punitive sums was in the air.

The courts pondered motions to dismiss filed by defendants on a variety of grounds, including the statute of limitations, the preemption of judicial power by the post-war treaty structure, the absence of jurisdiction over the defendants, etc. Meanwhile an army of plaintiffs' lawyers descended on Berlin for negotiations. Their campaign was coordinated by Stuart Eizenstat, the Undersecretary of State for Economic Affairs.[28] Unlike the Swiss, German industry and government were not caught unaware and were anxious to dispose of the problem in an orderly fashion. Various things went on that Germans regarded as unseemly. American lawyers held press conferences and sought to use the media to enhance the pressure on defendants. German lawyers became involved in advising the plaintiffs on matters of German law and, to some extent, international law. German lawyers tried, within the bounds of their legal system, to imitate American class action practice by filing large numbers of parallel claims. The outcome was a settlement involving the American and German governments, various other governments and the plaintiffs and the defendants in the lawsuits. It followed the German model in its format. The settlement was not "in" the lawsuits which were dismissed by agreement among the parties. It was in the form of a Stiftung created by federal legislation in Germany. German legislation terminated all other claims arising out of the forced labor system. That followed the model set in such cases as the thalidomide disaster of the 1960s and substituted an administrative solution for a judicial one.[29] It was observed with distress that, by contrast, nothing was achieved for Americans and others who were held to slave labor by the Japanese.[30]

Inspired by these achievements, plaintiffs' lawyers have recently opened a new round of lawsuits aimed at banks and manufacturers in Europe and the United States who allegedly supported the South African government during the years when it was maintaining a policy of apartheid that was universally condemned by the international community. It is too early to tell how these complaints will survive the motions to dismiss that defense counsel, by now highly experienced in these matters, will un-

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[27] For a review of this litigation from an American perspective see *Detlev F. Vagts & Peter Murray,* Litigating the Nazi Labor Claims: The Path Not Taken, 43 Harv. Int'l L. J. 503 (2002). For a different view see *Libby Adler & Peter Zumbandsen,* The Forgetfulness of Noblesse: A Critique of the German Foundation law Compensating Slave and Forced Laborers of the Third Reich, 39 Harv. J. Legislation 19 (2002).

[28] For his recollections of these events see *Stuart Eizenstat,* Imperfect Justice (2002).

[29] See *Christoph Safferling,* Zwangsarbeiterentschädigungsgesetz und Grundgesetz, 34 Kritische Justiz 2008 (2001).

[30] *Eizenstat,* supra note 28, at 350.

doubtedly bring. At the same time lawyers are bringing the reparations venture home by suing various parties connected in indirect ways with the institution of slavery in the United States as it existed before the 1860s.[31]

Meanwhile American litigation habits reached the international level in an arbitration, called Loeden commenced by a Canadian investor against the United States under the North American Free Trade Agreement. A Canadian funeral home firm was hit by a Mississippi court (and jury) verdict of hundreds of millions of dollars in a contract and unfair competition case brought by an American firm in the same business. It was hampered in appealing its case by a requirement under state law that, in order to prevent the judgment from being executed, it had to file a bond in the amount of the judgment. It is unclear to me how much relations between the American and the European legal professions have been strained by the holocaust-era settlements and the tactics used to achieve them.[32]

IV. Possible Resolutions of the Differences

The principal forum in which American ways of litigating face international challenge is the Hague Conference on Private International Law. The Hague was the birthplace of two prior agreements on international civil procedure that spanned the Atlantic – the Convention on Taking Evidence Abroad in Civil or Commercial Matters[33] and the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. There also lies the hope for an amicable resolution of questions relating to judicial jurisdiction and the enforcement of judgments abroad. Hague negotiations have been under way since 1993 with a view to producing a convention that would in effect extend outside of Europe the provisions of the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments as well as Regulation 44/2001.[34] Those agreements are referred to as "double conventions" because they connect (1) the obligation not to assert personal jurisdiction over domiciliaries of other states except on an agreed upon basis and (2) the obligation to enforce judgments of other signatory states if based upon a proper jurisdictional claim. As matters now stand there is reason to doubt whether it was a wise move to attempt to duplicate those agreements on an international plane. The European states started with a much closer alignment of substantive and procedural legal rules than a world-wide agreement would encounter.

It came as a surprise to many American lawyers that American judgments do not presently benefit from any treaty commitment by any other country to enforce such

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[31] Eizenstat, supra note 28, at 351.

[32] For an evaluation from a Swiss perspective see *Samuel Baumgartner,* Human Rights and Civil Litigation in United States Courts, 80 Wash. U. L. Q. 835 (2003).

[33] 847 U. N. T.S. 231 (1970).

[34] An earlier attempt to generate a bilateral treaty with the United Kingdom failed due to objections by the British insurance industry.

judgments.[35] As far as the outsider can judge, the negotiations have not been promising. The United States complain of being consistently outvoted at the sessions. That problem will be complicated by the rivalry on the European side between the Commission and the individual states. The Americans will have an impressive argument, if Europe takes over, that Europe should have only one vote or the United States should have fifty. The chief source of difficulty seems to have been the wide scope of jurisdiction over foreign defendants which has been claimed by the American courts. One obvious claim is that denoted "tag" jurisdiction, in which the foreign party has been served with process while in the United States on a temporary basis – for example while being en route from one part of the JFK international airport to another.[36] The British had to abandon this when they entered the Brussels system and everybody outside the United States regards this as exorbitant. The more serious problem is that of the American rule that a corporation can be sued in a state where it is transacting a substantial amount of business even though the transactions giving rise to the claim had nothing whatsoever to do with that state. This was, of course, the basis on which the German firms were sued in the forced labor cases. Surrender of some of this jurisdiction would cause political and constitutional problems particularly as it restricts the freedom of the fifty states. There would presumably have to be implementing legislation passed by the U. S. Congress and it might encounter substantial political opposition. Some modest form of agreement may yet emerge from the Hague, perhaps an agreement that the United States could still use those forms of jurisdiction but would not be entitled to the assistance of the other states in enforcing them.[37] Only judgments based on standards acceptable to the rest of the world would be entitled to recognition under that agreement.

V. Conclusion

While the United States had been free until now to run its own litigation system according to its own will that autonomy is now being undermined by the processes of globalization as it applies to the worlds of commerce and law. If it wishes cooperation abroad it will have to make some compromises in order to win that assistance. That will not come easily, given the way our litigation apparatus is embedded in the U. S. constitution and the assumptions by which American lawyers live. However, as stated above, U. S. lawyers are rethinking many of the aspects of procedure that trouble both

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[35] In the absence of a treaty recognition of U. S. judgments depends on national legislation such as Germany's Zivilprozessordnung § 328. American enforcement of foreign decrees depends on state law, including both common law rules and the so-called Uniform Foreign Money Judgments Act. See *Henry Steiner* et al., Transnational Legal Problems 712–29 (4th ed. 1994).

[36] The U. S. Supreme Court held tag jurisdiction constitutional in Burnham v. Superior Court, 495 U. S. 604 (1990). It relied heavily on the fact that such jurisdiction was widely utilized when the Constitution was drafted.

[37] For a review by a veteran of the struggle see Arthur von Mehren, Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Succeed? 49 Am. J. Comparative L. 191 (2001).

Americans and foreigners and it is to be expected that some of those aspects will be moderated. The challenge to the American legal system comes at a time when the United States predilection for doing things its own way on other fronts is presenting strains for the American government and its policies, particularly as they relate to its friends and allies in Europe. Speaking as one with significant ties and interests on each side of the Atlantic I profoundly hope that this situation can be improved and that mutual understanding, particularly among lawyers, will advance.