

Imprimis

March 2004 • Volume 33, Number 3

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The Threat from Lawyers is No Joke

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The following is adapted from a lecture delivered at Hillsdale College on February 11, 2004, at a seminar co-sponsored by the Center for Constructive Alternatives and the Ludwig von Mises Lecture Series.

Many of us have wondered over the years what the difference is between satire and reality in the American legal system. I now have the answer: one year, 11 months, and ten days. Let me explain.

It was on August 3, 2000, that *The Onion* – America’s favorite satirical newspaper – published an article entitled, “Hershey’s Ordered to Pay Obese Americans \$135 Billion.” This piece of comic fiction reported that the chocolate company had been sued by state attorneys general in a class action over the lack of warnings on its product, over its marketing of products to children, and over its having – most insidiously of all – artificially spiked its products with nuts and crisped rice to keep people addicted. The jury, by this satirical account, had responded by granting an enormous award. “This is a vindication for myself and all chocolate victims,” said one of the plaintiffs. In addition, the company was ordered to place a warning on all of its products reading: “The Surgeon General has determined that eating chocolate may lead to being really fat.”

Well, on July 24, 2002 – less than two years later – the wire services reported that Mr. Caesar Barber of the Bronx, New York, was filing a lawsuit against McDonald’s. (He was soon joined by various other plaintiffs suing Wendy’s, Burger King, and other fast food chains.) Mr. Barber had for years been wandering into McDonald’s restaurants, apparently under the impression that they served health food, and had been receiving hamburgers and French fries instead of celery stalks. He had no idea that you could get fat from such products, and sure enough he developed heart problems and other medical conditions associated with obesity.

Although many of us greeted this lawsuit with incredulity, it was taken quite seriously by some veterans of the tobacco litigation that had succeeded so gloriously a few years earlier.



Here is a law professor from George Washington University, quoted in *Time*: “A fast food company like McDonald’s may not be responsible for the entire obesity epidemic. But let’s say they’re five percent responsible. Five percent of 117 billion dollars is still an enormous amount of money.” Northeastern University organized a conference on how to sue food makers that was attended by scores of lawyers, one of whom — a recent Rutgers law graduate — told *Time*: “It’s a very important and pressing issue and its outcome will be with us for years to come. I’m hoping to be able to build a career out of this issue.” Lawsuits against fast food restaurants were also taken seriously by the *New York Times*, which defended them as socially beneficial. Its general argument seemed to be, “We’re not saying these lawsuits should win, but what can they hurt?”

We used to know the answer to that question. And it wasn’t “nothing.”

The Older View

In Texas, a woman dentist who found out that her dentist husband was cheating on her ran him over in a Hilton parking lot. We used to see clearly that it would be wrong in such a case to sue Hilton hotels for negligent training of employees — thus for making it too easy for wives to run over their cheating husbands. But that’s what happened.

Speaking of parking lots, the proprietor of one in Framingham, Massachusetts, was sued after a thief broke into the lot, stole a car, drove off at high speed and crashed. Indeed, the family of the thief sued him for negligently making it too easy to steal a car from the lot. We used to know what was wrong with that, too.

A California man who passed out drunk on the railroad tracks sued the Union Pacific railroad because its engineer and conductor did not sound the train’s horn after seeing him — they were too busy trying to engage its emergency brakes. On the other coast, a woman who lay down on the subway tracks and was hit by a train — police concluded that she had been trying to kill herself — was awarded \$14.1 million by a New York City jury. Not only did we once know that such lawsuits are wrong — once they would not have been imaginable.

Throughout most of American history, we understood quite clearly that litigation is for most people one of the most expensive, unpleasant things that ever happens to them in their lives. It is incredibly expensive, not only mone-

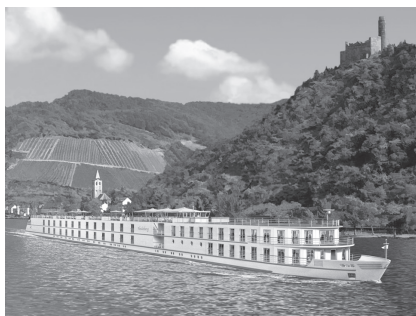
tarily, but in the time and energy it absorbs. It is an assault on the reputation of at least one party, and often both parties, as charges are leveled back and forth. It is an assault on privacy, forcing those involved to answer questions under oath, involuntarily, about what they have done. It is a breach of the social peace. It is something that tends to corrupt the participants into doing things that they would not do otherwise. So while *of course* it was recognized that litigation is necessary sometimes as a last resort, it was seen as just that — a last resort. And if you accept the idea that litigation ought to be a last resort — and ought to be embarked on only in strong cases — you will want to arrange the rules of your legal system in a way to discourage weaker cases from going forward. We do not do this today. In fact, we have intentionally dismantled such rules.

In almost every country but the U.S., legal systems incorporate a “loser pays” principle. If you sue someone and lose, you can’t just walk away. You have to contribute something to making the victim of the lawsuit whole for what he has paid. We had that same principle in our legal system throughout much of American history, but it gradually died out. We also had procedural rules discouraging ill-conceived litigation. And we had rules of legal ethics prohibiting lawyers from stirring up litigation for their own benefit. But something changed around the 1960s and 1970s. It started in the world of ideas — in the universities and the law schools. Litigation came to be seen not as a necessary evil, but as a positive good. This view can be identified with the career of Ralph Nader, and with many of the professors who began to dominate elite law schools during that period.

The Newer View

According to this new view, litigation deters wrongful conduct: The more lawsuits that are filed, the more people will behave carefully. Litigation also came to be seen as a way to redistribute wealth from those who have it to those who need it. From this perspective, the more litigation there is, the more redistributive justice the courts can impose on society. And who can be against justice?

From being a last resort, then, litigation came to be seen as socially beneficial. And lawyers who advertise with billboards saying, “Sue someone and let’s see how much money I can get for you,” are seen not as sleazy but as public-spirited.



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Given this new view of litigation, rules discouraging lawsuits ceased to make sense. This is why, starting in the 1960s and 1970s, we began changing the rules to make it easier to sue. We liberalized the rules of discovery – the rules governing how a person can demand information from his opponent. We opened the door to the “fishing expedition”: “I don’t know for sure whether you have done me any legal wrong, but please hand over the contents of your filing cabinets so that I can find out.” We made it much easier to organize class actions, by which most Americans are periodically dragged into lawsuits as plaintiffs without even knowing it. We dropped many of the rules against lawyers stirring up litigation. And we dropped traditional legal principles like “assumption of risk.” Here’s what that means: If you go to a baseball game and get conked on the head by a foul ball, the old courts would have said that you have no grounds to sue because everyone knows that foul balls happen at baseball games. This no longer makes sense, however, if the point of lawsuits is to encourage ball clubs to be careful about where they let their players send their foul balls – and to redistribute wealth. So out it went, at least in many courts.

All these developments were bound to give us more litigation, and sure enough they did. The share of America’s GNP that is devoted to litigation

has tripled over 50 years. We spend two to three times more on it, in terms of percentage of GNP, as the other industrial democracies. The figure for how much is spent annually on liability insurance in the U.S. – a relatively easy thing to measure – is now \$721 per citizen, which comes to over \$2,800 per year for a family of four. So are we getting our money’s worth?

Everyone has heard about the medical malpractice crisis that is driving doctors out of high-risk fields like obstetrics and neurosurgery. The Harvard University study of New York hospitals that is cited by both sides in this controversy is very revealing. On the one hand – and this is the part that has been best advertised – it found that in the majority of cases where people are injured by negligent care in a hospital, they never sue. True enough. But the same study also found that in the majority of cases where people *do* sue, experienced reviewers could not identify any negligence. So you have a lot of negligence with no lawsuits and a lot of lawsuits with no negligence. Is the latter somehow supposed to balance out the former?

The Harvard study also found that a great many of the lawsuits filed where no negligence was identified were nonetheless successful in obtaining money. Even though we could go on at great length about the monetary costs of law-

suits, those costs are not, in the final analysis, of prime importance. Indeed, we are a very rich country and can afford to spend a small percent of our GNP on litigation, if only for the entertainment value. The *non*-monetary costs, however, should give us real pause. For instance, at the real heart of the medical malpractice crisis is the demoralization that spreads in a profession like medicine at the knowledge that being the best possible doctor will not save you from being sued. Most doctors I think would be willing to spend high insurance premiums if they could have confidence that the legal system works rationally in identifying the doctors who ought not to be practicing. Few of them, I believe, have that confidence today.

Think of the knots that people tie themselves into, attempting to keep from being sued. We've all seen crazy warning labels, and each of us has his favorite. There's the one on an artificial fireplace log saying, "Caution: Risk of Fire"; the one on a bag of peanuts saying, "Warning: Contains Nuts"; and the one on a baby stroller saying, "Warning: Remove Child Before Folding." My favorite is the warning on the cardboard windshield sunscreen that keeps the car from getting too hot in the summer: "Do not drive with sunshield in place." This unhealthy level of caution infects many areas of our national life. Consider the unwillingness of most businesses today to give honest job references. That was one factor behind the case of the recent alleged killer nurse in Pennsylvania and New Jersey, who bounced from hospital to hospital, usually leaving under suspicion. The hospitals hadn't even bothered calling each other, because they knew they wouldn't get honest answers due to fears about lawsuits.

Effects on American Politics

This revolution in the legal system has begun to transform American politics. The part of this that gets the most press today is the litigation lobby — "big law," if you will — which has become one of the most financially robust and effective lobbies in American politics. It is among the three or four most important financial bases of the Democratic Party, and also contributes to some Republicans. But this financial involvement in politics is nothing compared to the fact that, in recent years, litigation has evolved into a kind of substitute for politics.

Until quite recently, a group of Americans who saw the need for some sweeping new law

would march in the streets, organize a letter-writing campaign to Congress or the state legislature, or try to replace congressmen or state legislators with candidates sympathetic to their cause. That was how politics was done. But today, politics is not necessary. If you want gun control or tighter control over tobacco or more environmental regulations, you can simply call 1-800-LAWSUIT. Operators will be standing by around the clock, and once you agree to give the lawyers a share of the monetary reward, you can lean back and watch them go to work.

Take tobacco. Despite years of agitation, Congress had not acted rapidly enough for anti-tobacco activists who wanted an increase in taxes on cigarettes and more regulation of advertising. The states were doing some of this, but not fast enough for activists. So what happened? We saw private lawyers flying around the country in their Lear jets, signing up state attorneys general and brokering a settlement that obtained \$246 billion for state governments and \$10 or 20 billion in fees for the lawyers. The settlement also resulted in the adoption of regulations that the elected branches of government had been unwilling to enact. We also got what amounted to a new tax on cigarettes — a tax increase unlike any other tax hike in that it did not originate in a legislature.

Soon we saw this same process of bypassing the political system being tried in other areas as well. *American Lawyer* magazine published an article on the origins of gun litigation, in which it interviewed the private lawyer (a multi-millionaire, needless to say) who had dreamed it up and flown around the country selling it to mayors. The article explained that it fit his thinking — "that the plaintiff's bar" should act as a "de facto fourth branch of government — one that achieves regulation through litigation when legislation failed." Richard "Dickie" Scruggs, the private lawyer who organized the tobacco litigation (and whose firm got approximately one billion dollars for it) was profiled in *Time*, which reported as follows: "Ask Scruggs if trial lawyers are trying to run America and he doesn't bother to deny it: 'Somebody's got to do it.'"

What are the differences between this newly contrived fourth branch of government and the three branches that the founders established in the Constitution? The differences begin with the manner of selection. Those in the fourth branch don't have to worry about those pesky things called elections — or even about getting confirmed by the Senate, as federal judges do. Nor do they have to worry about the safeguards of



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transparency that are built into our political system. Much of their activity takes place behind the scenes. Indeed, these cases nearly always are meant to be settled instead of tried, and the public is not admitted into the negotiation room. And if the public doesn't like the results, there is, frankly, not much the public can do about it. This is highly ironic: The proclaimed goal of trial lawyers is to hold every profession and industry accountable for their actions, yet they have created a litigation-based policy-making process in which they themselves are almost entirely unaccountable.

Today there are increasing reports about how environmentalists are beginning to place their trust in global warming lawsuits against the auto industry, electric utilities and the like. Racial reparations litigation is beginning to absorb much of the energy that used to go into political agitation for civil rights. You see this occurring now in so many areas that William Greider, a leading left-wing journalist, has proposed in *Rolling Stone* – in the context of discussing Senator John Edwards of North Carolina – that trial lawyers have emerged as the natural leadership of the left in America today. He may be right.

After years of refusing to govern our trial lawyers, it seems they have decided to take it upon themselves to govern us. It is not too late to do something about it. But neither is this a problem that can be solved overnight by a quick fix such as tort reform legislation. As I said before, the ideas that underlie the new legal system and way of governing were born in the academy. This is where our judges and lawyers learned them. And now these ideas are being spread among the general public by the system itself. For instance, these lawsuits teach us again and again the principle that some distant institution with a lot of money is responsible for each individual's problems. It is this distorted view of responsibility that makes thinkable today claims that were unthinkable a few short years ago. So the first step in turning things around, I would say, is to come to a real understanding of exactly what we did wrong in changing the rules of our legal system and handing the trial lawyers so much power.

Until we reverse this process, it will remain the rule that if you want to hurt someone in America, you may not be able to do it with impunity using a scalpel or a car. But you can do it with a lawsuit and no one will lay a glove on you.



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VOLUME 33 • NUMBER 3

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