

Tort Reform: Taxation Without Representation

by Richard G. Halpern

[With this column, The Halpern Group departs from a policy of not commenting on political issues. We do not do so lightly. For though we are a firm that for reasons of conscience works on the plaintiffs side, we also recognize that multiple concepts and perspectives must be considered in political discourse.]

The Republican "Contract With America" received overwhelming support at the polls. Little did these voters realize that while supposedly supporting measures like welfare reform and tax reduction, they were also endorsing "tort reform" that would lead directly to expansion of welfare costs, resulting in income tax increases.

The receptiveness of the American public to the arguments of tort system critics is, on the surface, bizarre. After all, the critics represent the interests of insurance companies, large corporations, negligent doctors and tortfeasors... hardly a popular crowd. But when one looks at how the opposing arguments have been framed, the public's response is not surprising. Why? Because the tort reformers have tied their position to the immediate self-interest of the average voting-age American, while the defenders of the tort system (already laboring under the handicap of being one of the few groups held in less esteem by the public than insurers, corporations, and doctors) have not. The anti-tort reformers' arguments are valid and their facts are solid. Nonetheless, they are fighting a losing battle.

Tort reform advocates hammer away at one argument: "The tort system costs you money." Higher prices. Lost jobs. Bigger insurance premiums. Particularly in today's political and economic climate, this is no contest at all. Perceived self-interest will win every time.

That is why the defenders of the tort system must stop relying only on the sanctity of the jury system, the plight of the injured, and corporate disregard for safety, no matter how noble and true these arguments are. Another argument will carry the day. And it is easy to understand:

Tort reform will have the direct effect of costing taxpayers money.

The battle over tort reform is not a conflict between the rights of personal injury victims and the goals of unclogging our courts and creating a more efficient economy. It is, instead, an attempt by the liability insurance industry, product manufacturers, and doctors to transfer the costs of their negligent acts from themselves to the taxpayers.

Tort reform is a disguised entitlement for wealthy corporations, medical professionals, and the liability insurance industry. The obscured fact is that injured parties aren't going to pay either way **because injured parties have no money**. It's only a question of whether the plaintiff's long-term needs are going to be paid by the defendant corporation, hospital, doctor, or insurance company, as they would under our current system, or whether they'll be covered by welfare, food stamps, and Medicaid -- all of which are funded by taxes and increased debt. That's the real tort reform trade-off. The tortfeasors and their insurers pass the bill off to the tax-paying public, whom they duped into supporting tort reform in the first place.

Tort reform proponents distort the irrefutable fact that in today's America, grievous injuries to individuals result in costs to everyone in our society. Public policy can only adjust the relative distribution of those costs. The party that is least able to bear the economic burden of catastrophic injury is almost always the injured victim. A disproportionate number of plaintiffs in major personal injury and medical malpractice cases are in low income brackets to begin with, and all but the most affluent and thoroughly insured victims see their earning ability and financial resources wiped out by catastrophic injury. Absent a judgment or a settlement that shifts the financial burden to the tortfeasor, the victim has no alternative but to rely on public assistance: welfare, Medicaid, food stamps. All come out of tax dollars. Our current system permits the financial burden of the injury to be shifted from the

taxpayers (who had no part in causing the damages) to the defendants (who did cause the damages) in a successful tort action. The major thrust of tort reform is to prevent that transfer, or severely curtail it.

"Loser pays," and the limitation or elimination of the contingent fee system, despite superficial (and cynical) appeals to equity, are calculated to block recovery by victims of injury, whose worsened financial prospects make them unable to sustain the expenses of protracted litigation, no matter how grievous and legitimate the damages.

Defendant corporations and insurance companies will be able to turn the pressure of the plaintiffs legal fees to their advantage, waiting out a victim who is often already on welfare. The combination of dwindling resources and the risk of a loss in court (a risk that the plaintiff is far less able to tolerate than the defendant) will force a settlement that fails to meet the plaintiffs needs. Anything the low settlement doesn't cover will become the responsibility of the taxpayers, because the victim will either remain on or ultimately return to public assistance.

Caps on punitive damages and "pain and suffering" will completely disrupt the dynamics of the settlement process, and open a Pandora's box of consequences that will harm the public and expand the tax bill.

To the casual public observer whose knowledge of the subject has been formed by sound bites and inflated rhetoric, punitive damages and damages for pain and suffering appear to be blank checks for over-generous juries. But to corporate defendants and insurance companies, these factors represent uncertainty... factors they can't control, enemies to the bottom line. Without caps on these damages, corporations can only avoid uncertainty by making safer products. Cost-benefit calculations, which compare the liability costs of potential claims against lower expenses made possible by negligent design and production, become impossible. The resulting uncertainty creates a powerful incentive for the defendant or its insurance company to reach an out-of-court settlement to satisfy the injured plaintiffs real needs. Not to do so is to risk a much larger jury award.

Under the current system, a jury has the means to punish defendants financially, if the jury finds their behavior unconscionable. By removing this threat to the defendant or its insurer, tort reform measures guarantee that:

- There will be far fewer early settlements, because the cost to the defendant of paying a now limited jury award, or settling for a fair and reasonable sum, will have been rendered identical.
- The defendants and their insurers will be able to use the passage of time as a weapon against the victim by not settling, and extending the time the plaintiff is on public assistance.
- The amount of the tab transferred to the taxpayers will increase because victims will be on public assistance longer. At settlement or verdict, there would be a larger public assistance lien to be repaid, thus leaving a larger unpaid bill for the taxpayers. (Public assistance liens are never repaid in full, but instead are negotiated at some lower sum.)
- More victims will have to return to public assistance, and sooner, again increasing the tax burden.

Meanwhile, the growing number of victims seeking compensation will find themselves in a bind. With the uncertainty of punitive and pain and suffering damages removed, insurance companies will have little motivation to come to the bargaining table with a just settlement. The combination of more victims and fewer settlements would clog the courts, increasing costs to the system--exactly the opposite of the result claimed by tort reformers. Even if settlements continued at the current rate, plaintiffs would be increasingly forced to accept insufficient damages. In either scenario, the taxpayers pick up an extra burden.

I began by saying that this argument is easy to understand. Obviously, the mechanics by which tort reform measures will shift financial burdens to the taxpayers are quite complex, and creating a real understanding of them will require a degree of public enlightenment that is impossible in a public policy setting. The essence of the argument is simple, however: by restricting their own fiscal responsibility for

the welfare of tort victims, wealthy corporations, insurance companies and doctors are attempting to shift the financial burden of caring for injured plaintiffs not to the plaintiffs themselves, who have no resources, but to the taxpaying public, through Medicaid and other public assistance. The costs to the public created by this shift will far outweigh any of the claimed savings of tort reform. Fiscal conservatives, rather than supporting tort reform, should vehemently oppose it.

Unlike the primary arguments now being used to counter tort reform proposals, this argument appeals directly to voter self-interest.

It appeals to common sense.

It will receive significant support from **tax** reform groups.

And it has one more distinct advantage over the contentions of the tort reform advocates.

It happens to be true.

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