

EDITORIAL

The Litigation Lottery: Tort Reform

The purpose of tort law is twofold: to compensate the victim of a wrongful act and to punish the perpetrator. From the point of view of society, these are admirable goals, but in practice tort law does little to accomplish either. First, most victims of wrongful acts are probably not compensated at all or compensated very little. For example, in New York City, taxicab drivers are required by law to carry a minimum of only \$25,000 liability insurance. This means that even if an intoxicated taxicab driver causes a serious accident, the victim can recover only \$25,000 from the insurance company. Unless a deep pocket can be found, that is the extent of the compensation for the victim. Most medical malpractice claims occur either because of unfavorable outcomes that result in monetary loss or a poor doctor-patient relationship. Further, in the overwhelming majority of cases of bad outcomes, it's simply bad luck or bad protoplasm but not malpractice. If a surgeon amputates the wrong leg at surgery, you'll probably be compensated quite well. If a bear chews off your leg in the wilderness, you'll get nothing at all (unless a deep pocket owns the wilderness).

Why should compensation be limited to those who are "fortunate enough" to be damaged by someone with deep pockets. That's just the way it is. It's not that the monetary judgment against a person with deep pockets is more, it's that the person with deep pockets is actually able to pay it, whereas the poor defendant is unable to pay it.

Second, the overwhelming majority of "perpetrators" are not punished at all. Their malpractice carrier pays the bill and society at large is "punished" because it endures the rise in malpractice insurance premiums that inevitably ensue.

Further, what's punishment to a poor defendant may not be punishment to a rich one. For example, \$1M in damages may really hurt a solo practitioner, but not a multi-million dollar hospital. Defendants also can be damaged by "luck." Killing a million dollar executive is more expensive than killing a cashier, even though the act of killing is the same for both.

So what is the solution? First, society at large could compensate all victims based on a financial schedule, which is linked to their actual financial loss irrespective of whether they are a victim of bad luck or a wrongful act. (Thus, it wouldn't make a difference whether you lost your leg to a surgeon or a bear.) Such a system would be roughly analogous to workman compensation paradigm. The savings in legal fees and outlandish awards for trivial damages would likely more than offset the increased number of victims who are compensated.

Second, the "perpetrator" should be subject to two kinds of prosecution and punishment. The first is based on statute, the second on peer review. Applicable laws should be simple and straightforward. (This is true for all laws.) The violation, for

example, of practicing medicine or doing surgery while under the influence of drugs or alcohol is unlawful, and if convicted, a physician is liable for punishment.

Peer review prosecutions are a much more difficult matter and require a sensible approach. Since medicine remains part art and part science, only those transgressions of standards of care that are accompanied by gross evidence of incompetence should be subject to punishment such as revocation of licensure. For more equivocal cases, sanctions such as limited privileges or required training might be appropriate.

No matter what, though, the present system is nothing more than a litigation lottery. Spill a hot cup of coffee on your lap at a restaurant and you're a millionaire. Spill a hot cup of coffee on your lap in your own home and you're a Klutz.

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