

THE SEVEN MYTHS OF HIGHLY EFFECTIVE PLAINTIFFS' LAWYERS

by

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To understand the genesis of America's legal crisis, we must look beyond the \$2 million car paint jobs and cups of spilled coffee. We must examine the deeper currents of American culture in which lawsuits have become our society's principal domestic drama. Today's ubiquitous legal thrillers are invariably told from the plaintiffs' perspective. In books like Jonathan Harr's *A Civil Action*, John Grisham's *The Rainmaker*, and ABC Television's *The Practice*, the story reaches the denouement when the courageous trial attorney thunders to the jury that a great wrong has been done. Somebody has to pay. But America's culture – saturated in the *drama* of the law – is in danger of forsaking the *rule* of law. To understand why, we need to address seven fictions the trial bar uses to change our culture and exploit the law: *The Seven Myths of Highly Effective Plaintiff's Lawyers*.

Myth No. 1: Corporations put profits ahead of safety, and large damage awards are needed to force corporations to act responsibly.

When Kip Viscusi at Harvard Law School studied the impact of punitive damages on safety, he found that juries award punitive damages so randomly and in such unpredictable amounts that there is no linkage between a firm's conduct and expected damages. See W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 383 (1998). In short, he found that punitive damages do not deter wrongful conduct. See W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations*, 87 GEO. L.J. 285, 288, 297, 298 (1998).

Still, every plaintiffs' lawyer demands a huge punitive damage award to "send a message." Yet most corporations do care deeply about the safety of their customers; that is the only way to survive in business today. But do profits and costs enter into manufacturing decisions? Of course. Consider the auto industry. The truth is, a vehicle *could* be made impervious to just about any kind of accident. In fact, such a vehicle *is* available. It is called an Abrams tank—it weighs close to 70 tons, and costs more than \$4 million. But the public will not buy tanks. So auto companies must make the same kind of cost-benefit analysis consumers make when they choose between large cars and smaller, less expensive cars. Moreover, instead of applauding a company for adding new safety features, the trial bar often files suit claiming the company should have made that improvement earlier.

Myth No. 2: The so-called "liability crisis" is a corporate invention.

The plaintiffs' bar claims that there is no legal crisis. See, e.g., Association of Trial Lawyers of America, *Fact Sheet: The TRUTH About The Civil Justice System*, <<http://www.atla.org>> (claiming, e.g.,

“Tort claims do not clog our courts.”). The plaintiffs’ bar also claims that punitive damages — which are central to the crisis — are in fact fairly uncommon and relatively low. *See, e.g., Joan Claybrook, Your Attack Was Sharp: Did We Hit A Nerve?*, WALL ST. J., Apr. 25, 1995.

Much of their “evidence” rests on a flawed study from the Association of Trial Lawyers of America, which was based on incomplete information. *See Michael Rustad, Final Report, Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter-Century of Verdicts* (Roscoe Pound Found., Dec. 1990). Even its author conceded that there is no comprehensive data about punitive damages awards available.

The *impacts* of lawsuits, however, can be measured. They can be measured in terms of the destruction of national wealth. A Tillinghast Towers-Perrin study reveals the U.S. tort system cost \$205 billion in 2001. *See TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2002 UPDATE, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 1* (Feb. 2003) [“hereinafter TILLINGHAST-TOWERS PERRIN REPORT”]. This amounts to \$721 for every man, woman and child in the country and represents an astonishing 14 percent increase in tort costs since 2000. *See id.* at 2; TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2000, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM (Feb. 2002)). The President’s Council of Economic Advisors reported that the cost of lawsuits is “far more than enough money to solve Social Security’s long-term financing crisis.” COUNCIL OF ECONOMIC ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 13 (Apr. 2002).

Nowhere, however, does lawsuit abuse inflict more harm than in the area of medical care. According to Jury Verdict Research, Inc., more than half of all medical malpractice awards today top \$1 million, and the average award has increased to \$3.5 million. *See JURY VERDICT RESEARCH, MEDICAL MALPRACTICE: VERDICTS, SETTLEMENTS AND STATISTICAL ANALYSIS 1* (2002). Excessive damages and unwarranted lawsuits drive doctors out of practice and raise the costs of health care through out-of-pocket payments, insurance premiums, and taxes. *See OFF. OF THE ASST. SECY. FOR PLANNING & EVALUATION, U.S. DEPT. OF HEALTH & HUMAN SERVS., CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 1* (July 24, 2002).

The U.S. Department of Health and Human Services reports that, in some states, the cost of malpractice insurance for delivering a baby heaps another \$2,000 on every mother’s OB bill. *See id.* at 13. One finding in the HHS report is truly staggering: If reasonable limits were placed on non-economic damages in medical liability cases, there would be enough money to pay for a Medicare prescription drug benefit plan *and* help uninsured Americans obtain health coverage. *See id.* at 7.

Yet the trial bar maintains that there is no tort crisis.

Myth No. 3: Punitive damages are rarely awarded or are always reduced on appeal.

This is a strange assertion. If awards were so rare, why would plaintiffs’ lawyers waste their time pleading them in every case? Why would they fight hammer and tong to block legislation placing reasonable limits on punitive awards? The answer: Settlement leverage. As Yale Law School Professor George Priest has observed, “the availability of unlimited punitive damages affects 95 percent to 98 percent of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damage claim increases the magnitude of the ultimate settlement and, increase[es] the likelihood of litigation.”¹ What about those defendants that don’t settle, and lose an eye-popping verdict at trial? In the new world of billion-dollar verdicts, oppressive bonding requirements may deprive a defendant of its right to appeal. *See Victor E. Schwartz &*

¹George L. Priest, *Punitive Damage Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996) (citing study of punitive damages in Alabama); *see Michael Hotra, There’s Trouble in Forest City*, FYI (Am. Legis. Exchange Council, Washington, D.C.), Apr. 25, 1997, at 10 (quoting Raymond Beebe, general counsel of Winnebago Industries, that “When one award could be half your company’s net worth, those dice can get pretty heavy.”); Bill Pryor, Panel Discussion, State Attorneys General and the Power to Change Law (June 22, 1999) (discussing “bet your industry lawsuits”, in REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT SPONSORED LITIGATION (Manhattan Inst. Center for Legal Pol’y 1999) at 6 [hereinafter “Pryor”]).

Leah Lorber, *Regulation Through Litigation Has Just Begun: What You Can Do To Stop It*, BRIEFLY 18 (Nat'l Legal Center for the Pub. Int., 1999) [hereinafter "Schwartz & Lorber"].

Myth No. 4: Class action lawsuits serve the public good by marrying efficiency with justice.

U.S. class action law underwent a radical transformation in 1966 when Federal Rule of Civil Procedure 23 was revised to reverse the "opt in" provision to one requiring class members to "opt out." As a result, countless thousands have been conscripted into class actions, often unknowingly, and sometimes even held in suits against their will.

Class-action impresario Bill Lerach once quipped that "I have the greatest practice of law in the world . . . I have no clients." 141 CONG. REC. 192, S17933 at S17956-57 (Dec. 5, 1995); William P. Barrett, *I Have No Clients (Attorney William Lerach Sues Public Corporations When Their Stock Prices Collapse)*, FORBES, Oct. 11, 1993, at 52. A Florida judge wrote of one lawsuit that it "appears to be the class litigation equivalent of the 'squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off." Jason Hoppin, *Florida Judge Compares Milberg to Squeegee Boy*, THE RECORDER, Apr. 16, 2002, <<http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZU1WV940D>>.

While some judges are now starting to reject these suits, it only takes one judge to bring a defendant to its knees. This is because class actions can thrive in a relatively small number of jurisdictions – many of them remote from the social consequences of bankrupting verdicts.

Consider rural Madison County, Illinois. More class action lawsuits have been filed per capita in Madison, where juries are known to be generous, than in any other county. See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It...In State Court*, 3 CIV. JUST. REP. 1, 8 (Manhattan Inst. Center for Legal Pol'y, 2001) [hereinafter "Beisner & Miller"]. Two recent verdicts from Madison County jurors came in at \$250 million and \$10 billion.²

What is drawing plaintiffs' lawyers to this court like bees to honey. One hint: The personal injury bar contributes more than 75 percent of the estimated \$800,000 given to local judges' political campaigns. According to the Manhattan Institute's Center for Legal Policy, there was a projected 3,650 percent increase in class-action filings in this one Illinois circuit court over a four-year period. See Beisner & Miller, *supra* at 12.

Myth No. 5: Litigation protects consumers when regulators fail to act.

In the federal regulatory process, safety policy is developed by a balanced, expert-led investigation of risks. Federal safety investigators and scientists want to know every pertinent fact affecting vehicle safety. In the tort process, the investigative process is anything but scientific. The legal system deliberately blinds itself to many pertinent facts through arcane and discriminatory rules of evidence. In 29 states, for example, juries are not allowed to hear that an injured plaintiff failed to wear a seatbelt. Incredibly, the fact that the driver at fault was drunk or drove through a red light is not admissible in many courts.

On the basis of courtroom polemics, juries with no technical expertise are asked to render verdicts that, in effect, set new national safety standards. For example, regulators can determine that a given vehicle part is safe. Twelve juries can find that part to be safe. But if the thirteenth jury finds it defective they can sweep away the findings of the twelve other juries and federal regulators alike. See Pryor, *supra* at 3.

Regulators seek one result – safety. Between 1966, when the Motor Vehicle Safety Act was signed, to 1990, about 250,000 lives were saved because of federal safety programs. Over a half million additional lives were saved because of public safety campaigns and advances made by the auto industry. Nevertheless, some personal injury lawyers and their surrogates believe that they "know better." Former Labor Secretary Robert

²See *U.S. Steel Settles Historic \$250 Million Case For Under \$50 Million*, Vol. 25 No. 11 ANDREWS ASBESTOS REP. 3 (Apr. 10, 2003) (discussing *Whittington v. A.C. Chesterton*, No. 02-1-113 (Ill. Cir. Ct. Madison Cty., Mar. 31, 2003)); *Philip Morris Asks Illinois High Court To Review \$10 Billion Award*, Vol. 18 No. 17 ANDREWS TOBACCO INDUS. LITIG. REP. 3 (May 16, 2003) (discussing *Price v. Philip Morris USA Inc.*, No. 00-L-112 (Ill. Cir. Ct. Madison Cty., Mar. 21, 2003)).

Reich was correct when he said that “[t]he era of big government may be over, but the era of regulation through litigation has just begun.” Robert B. Reich, *Regulation is out, Litigation is in*, USA TODAY, Feb. 11, 1999, at A15.

Myth No. 6: Corporations settle lawsuits to cover up their wrongdoing.

Trial lawyer Dick Scruggs provides the best response to this myth: “The trial lawyers have established relationships with the judges that are elected ... They’ve got large populations of voters who are in on the deal ... and it’s almost impossible to get a fair trial if you’re a defendant in some of these places.” *Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference*, (May 9, 2002), in INDUSTRY COMMENTARY (Prudential Securities, Inc. N.Y., New York) June 11, 2002, at 5.

This, of course, causes some corporations to settle even when they have a meritorious defense.

Another factor that contributes to an uneven playing field in many courtrooms is the trial bar’s ongoing campaign to demonize profits. Especially in closing arguments, the trial bar often equates profits with wrongdoing. In truth, profits are the lifeblood of our economy and produce tremendous social benefits. To cite just one example, consider General Electric—which under its previous chairman boosted profits by 650 percent. See *New Manin Charge*, ABC News, Nov. 27, 2001, <http://abcnews.go.com/sections/business/DailyNews/ge_successor_001127.html>. GE’s prosperity not only creates jobs and funds retirement and health care plans, it also allows its employees to give more to their communities. GE engineers, for instance, volunteered to raise the standards of a Cincinnati school—a school that once sent 5 percent of its students to college, and now sends 60 percent of them to higher education. Fifty-five thousand GE people from all over the world volunteer their time. See *The Charlie Rose Show* (PBS television broadcast, Oct. 21, 2001). Can anyone debate the immense social benefits created by GE’s profits during the Jack Welch years?

Myth No. 7: Like David-against-Goliath, the trial lawyers are outgunned by powerful and resourceful corporations.

This is the most cherished trial lawyer myth, perpetuated in countless movies, that there are a few Robin Hoods out there struggling against powerful corporate Sheriffs. Of course, Robin Hood didn’t fly around Sherwood Forest in a Gulfstream V, build sprawling mansions, or own a baseball franchise.

Robin Hood, after all, *gave* to the poor. Six trial lawyers and their firms took more than \$5 billion as fees for their firms from tobacco litigation – monies that many believe belong in state treasuries for health care and education. *Puff Daddies*, GEORGE, June 1, 1999, at 4. Indeed, one erstwhile Robin Hood – Peter Angelos – sued the State of Maryland for 25 percent of the state’s \$4.4 billion share of the tobacco settlement. See Kate O. Beirne, *Cash Bar: How Trial Lawyers Bankroll the Democratic Party*, 53 NAT’L REV. 26, Aug. 20, 2001. These are very rich men, but their law firms are even richer – with the resources to field an army of well-paid experts, private detectives, jury consultants and top public relations people. Against such enterprises, even the largest corporations can be intimidated.

In exposing these myths, we should not conclude that there is no need for a strong system of torts. We should conclude that our system is wildly out of balance. It is out of balance because the outcomes we used to joke about are becoming reality. Consider that no less a scholar than Harvard Law School Professor Larry Tribe is presaging a movement to grant Thirteenth Amendment protections to cats, dogs, mice, and chimpanzees. David Bank, *Is a Chimp a ‘Person’ With a Legal Right To a Lawyer in Court?*, WALL ST. J., Apr. 25, 2002, at A1. Lawyers used to joke that someday people would sue fast food restaurants. Now lawsuits filed on behalf of obese people are proliferating against fast-food chains. See, e.g., Jason L. Riley, *Salivating Over Fast Food Torts*, WALL ST. J., June 30, 2003; John Silber, *Fast-food lawsuit is fat-uous*, B. HERALD, Aug. 20, 2002, at 25.

That our culture has changed is undeniable. Neighbors have an argument. Years ago, they would have worked it out over the backyard fence. Now they sue. Repairing our legal system requires more than just passing the right legislation and electing the right judges – important as they are. It requires addressing the cultural roots from which our civil justice crisis has emerged.