The Assault on the Civil Justice System

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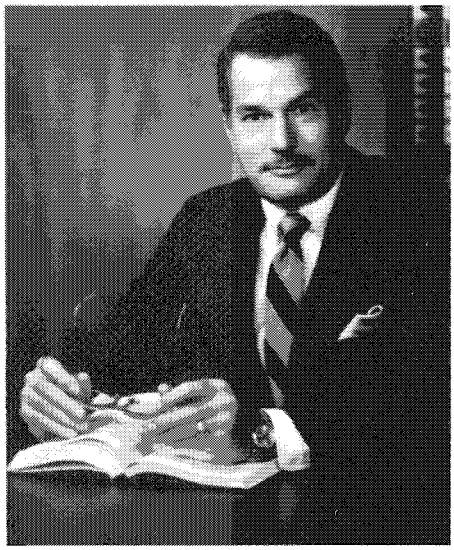
(In July, Robert L. Habush, '61, became the first Wisconsin lawyer to serve as President of the Association of Trial Lawyers. While serving as President-elect, he began to take a national stage as spokesperson for attorneys and consumers in opposition to the insurance industry. He has appeared across the country and was featured on the front page of the Wall Street Journal representing his 66,000 member association. Mr. Habush has some strong opinions on the current insurance crisis, opinions he shared at the Benchers Dinner, during the Annual Spring Program. The following article was adapted by Mr. Habush from his speech to the Benchers.

Mr. Habush has been a frequent lecturer at the Law School, teaching Trial Advocacy and the Civil Trial section of the General Practice Course.)



There is a war underway, a war on our clients, on victims, a war on our juries, a war on our judges. In effect it is an attack on the independent judiciary, the bar, an attack on the very structure of the civil jury as embodied in the Seventh Amendment and as adopted by all the states of this country. The breadth and the intensity of this attack is staggering. I have put on tens of thousands of miles in the last year or so. I have been all over. I can tell you that it is pervasive. It has totally preoccupied my mind as if I am involved in a trial that never ends. It also has given me some time to reflect between airports about how did we got into this.

Reflect with me, take a journey back with me, through the last couple decades to see why we got into this situation and how we can get out. I have the benefit of having started practice in 1961. I started trying cases in the decade when these products liabilities cases first started; when the law was in a state of change. I am able to stand back and look at three decades of civil litigation practice and get an overview that is helpful.

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First and foremost, I do not believe that the tort system is going to be totally destroyed. I must tell you that it is going to take some bad bumps and bruises, and it has already. Many of us in this room have spent most of our professional lives in a period that I would call the "golden age in torts." We celebrated decisions which opened up new areas for recovery. We applauded ourselves and others for verdicts that set new records. We educated and re-educated ourselves at seminars until we developed legions of highly skilled trial lawyers. Our juries were juries of consumers and the appellate judges were anxious to respond to society's wishes as they viewed them. We truly were intoxicated with our own ambitions. We were trial lawyers. We called ourselves the "gladiators," "equalizers," "gunfighters." We represented all the underdogs against the giants. It was glorious. Our clients benefited, and society benefited. There were countless examples of wrongs that were righted, of products that were made safer, of doctors who changed their errant practice, of hospitals that became safer. What the legendary Ralph Nader was doing in the halls of Congress, trial lawyers were doing all over the country in the courtroom.

So what happened to Camelot? When and where did we lose it? Litigation became as much an industry as the groups we were suing. We used more and more sophisticated techniques. There were more of us, and the results were better. And we tripped over each other on the way to the media to trumpet our successes. We provided Jury Verdict Research with the information of the awards and results; the very data we are now being wounded with.

The media, of course, only reports the big verdicts, the sensational. And they reported the ad damnum clause in complaints that were filed that asked for millions in cases that were not worth that much. All this caused a growing public misconception that most civil cases are very large, multi-million dollar cases.

Moreover, some very offensive business-getting practices, like that which occurred in Bhopal or Dallas, disgraced and embarrassed lawyers everywhere and aggravated the media and the public. Offensive and tasteless lawyer advertis-

ing further added to the public's perception of a litigious and sue-crazy society fueled by aggressive attorneys.

We tend to forget that a very small percentage of the population has ever had a personal injury case or an auto case, let alone product liability or medical malpractice. The public's perception of trial lawyers and the civil justice system is formed by television and very little personal experience forms the basis of attitudes. Polls that have been taken recently show that trial lawyers have been ranked very low among professions, particularly compared to doctors. People believe that our primary interest is in our fees rather than our client's causes. We were so busy getting good and helping our clients that we completely dropped the ball on public relations.

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There is a striking similarity to the plight of trial lawyers and that of organized labor. Labor, too, lost touch with the general public and the need to educate them as to the righteousness of their causes. Witness the fall in popularity of organized labor and the lack of public support when a local or national union is under siege.

The origins of the legislative crisis affecting the tort system really began in the "no-fault days" in the early 1970's. We tend to forget that a couple dozen states enacted no-fault statutes in the early 1970's. In 1975, during "Malpractice Crisis I," a couple dozen states passed various types of medical malpractice statutes. And in 1977-78, many states passed products liabilities acts which rewrote some aspects of the common law.

Therefore, many states have been bruised legislatively in the past, but the crisis of 1975-76 was basically a medical malpractice crisis. It was manageable, and it really provided a catalyst for many state trial lawyer associations to improve their organizations. But the granddaddy of them all is "Crisis 1986." Every segment of society has been adversely affected, and I want to tell you that they are all on our case. After five or six years of a savage price war in the commercial lines, the property-casualty industry decided to play "catch-up" and get even in one year. In addition to that, they decided to withdraw from certain markets, such as day care centers, governmental units, people who clean up toxic waste dumps and many others. Many of these groups had no prior claims, yet they were cancelled. Doctors, too, who had benefited from many years of very low premiums got bumped very significantly and were back at the legislators asking for help. The physician situation was further aggravated by a ridiculously small underwriting pool in which, for example, only 39 neurosurgeons were rated as a rating group in Wisconsin. In addition to that, physicians were not experience-rated. Moreover, doctor discipline of incompetents and "repeaters" was absent. All of these groups that had their premiums raised or could not get insurance anywhere were told by the insurers that the action was due to: a litigious society, juries have gone amuck, huge awards that were like a lottery, and ambulance-chasing attorneys plus a proliferation of millions of dollar awards. Anecdotes were developed of unusual cases which in each telling got more bizarre and distorted.

What was to be the legislative answer? The agenda included: caps on recovery of pain and suffering or punitive damages, restriction of plaintiff attorneys' fees, and elimination of joint and severable liability. Senator Kasten continued to press for the reversal of 30 years of products liability progress that protects consumers. Coalitions sprang up around the country; coalitions ironically called "coalitions for justice." Divergent members banded together in groups with one common enemy—us—and one agenda—dismantle the civil justice system. They were lean, they were mean and they were well funded. Only a fool would not appreciate the peril that is presently facing the civil justice system. It is truly in harm's way.

The counter-attack has started. We were very slow getting out of the gate both nationally and on a state level. But our public relations campaign that is now being waged and the information that is now being distributed has started to show some results. For instance, recently *Business News*, of all magazines, came out with an article entitled, "The Explosion in Liability Lawsuits Is Nothing But a Myth." They had an editorial that suggested that the charges of the insurance industry that the litigation system is to blame for their problems is essentially unproven. In addition to that more and more newspapers have started to realize that perhaps the allegations of a "lawsuit crisis" were untrue. In an editorial, the *St. Petersburg Times* said, "The push to tort reform is a cynical scheme to pin the blame on the courts for the current high cost of commercial liability insurance while allowing the insurance industry to escape its own fiscal mismanagement."

Recently the National Center for State Courts came out with its long-awaited report in which its statistician stated that "careful examination of available trial court data relating to tort, contract, real property rights and small claims cases provides no evidence to support the existence of a national litigation explosion."

A couple of days ago the General Accounting Office came out with a report which rebuked the insurance industry for their premium increases, which they said were excessive and unnecessary.

Congress has started investigations of the property-casualty industry. Representative Peter Redino, of Watergate

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fame, has indicated that he intends to subpoena the records of the property-casualty industry. Several other Congressmen have announced that they intend to investigate what they call the insurance scandal. Many people in the public sector are starting to become skeptical.

Amazing as it seems, when our enemies started quoting the jury statistics we had nothing to counter with. Jury Verdict Research, Inc. is a clipping service that clips headlines about jury awards. In addition, lawyers send in their results, and lawyers are not likely to report losers or the modest results. As a result, this data base included only the largest and most successful cases. In the "averages" they did not have the zeros (losses) or the low awards. The headline in *USA Today* said that the average award in a product liability verdict was $1.8 million, the average medical malpractice award is $1.0 million. Those averages are preposterous. A Rand Corporation study, which covered 20 years, indicated that the average product liability award was well under $300,000, and the average medical malpractice verdict was under $250,000. The media was either unaware of these studies or chose to ignore them.

University of Wisconsin Law School Professors Marc Galanter and Dave Trubek had done a major study of litigation in America, published in the UCLA Law Review, which studied just how litigious Americans were. Do you know what they

discovered? They discovered that on a per capita basis we are no more litigious than people who live in Denmark, Great Britain, New Zealand and that we are less litigious than people who live in Yugoslavia. In addition to that Galanter and Trubek discovered that the large increase in federal court cases was due to the federal government suing people for reimbursement of Social Security, veteran loans and student loans, and people suing the federal government for increases in their Social Security and disability benefits that had been cut out by the Reagan administration.

Daniels, of the American Bar Foundation, released a study recently in which he studied punitive damages. He reported that punitive damages were rarely awarded and when they were they were not as large as "advertised." He stated that his findings are sufficient to call into question many of the claims made in professional circles and in mass media about the civil justice system in general.

One of the more dramatic areas of general product liability litigation is general aviation. The private aviation manufacturers, most of whom are located in Kansas, have long been advocates of product liability change. In their magazine, *The Aviation Consumer* (March 1986), in the editorial entitled, "Products Liability: Who is the Real Villain?", the editor said, "There is persuasive evidence that the insurance industry may be a bigger culprit than the legal system but has erected a facade of innocence and neatly dodged all responsibility."

The National Association for the Education of Young Children said, "If you want to expose the sham being carried on by the insurance industry, look at child care." Would it interest you to know that two-thirds of the day care centers in this country were cancelled and could not get insurance and one-third had their premiums raised so that they could not afford insurance. They did a survey and discovered that 90% of the day care centers had never experienced a claim. Of those that had, the largest paid claim was $15,000. The study showed that of the premiums paid by the whole group only 6% was paid for claims.

As an example of the deceit of insurers, consider that since the early 1960's, Wisconsin has had a cap on claims against governmental units of $25,000, now $50,000. There are only two windows of responsibility, motor vehicle accidents and constitutional actions such as in police brutality cases. Nevertheless, 41 counties had their insurance withdrawn recently. This is true throughout the United States. In the village of Fox Point, where I live, the premium was raised from $25,000 to $260,000 with no claim experience that would justify such action.

What if I were to tell you of a hypothetical place which has a $180,000 limit on recovery for pain and suffering, has no contingent fee, has virtually no jury trials, and the loser pays the attorney fees and costs, and then I were to tell you that in this insurers' utopia day care centers could not get insurance, cities could not get insurance, trucking companies could not get insurance. You would probably say I am nuts. Such a place exists. Its called Ontario, Canada.

I think its time we started addressing some "sacred cows," such as client solicitation, mediation of smaller claims, attorney fees, frivolous claims and defenses; not because we are forced to, but because it is right to do so.

The Insurance Service Organization stated, "The property-casualty insurance industry must accept a major responsibility for the current financial situation." *Best's Review* said, "Trying to increase market share and generate greater premium volume to take advantage of record interest rates spawned a savage price war."

As if we did not have enough trouble, the President of the United States decided to deal himself in as well. The Attorney General "fed" him some of the "distorted horror stories" and the President decided that he should push for tort reform. The President was "appalled" by the "lawn mower" case. This is one of the horror stories: The story goes, according to the published reports, that an overweight, elderly man with a history of heart disease was trying to start his Sears lawn mower. It would not start. He kept pulling it and pulling it until he got a heart attack and he successfully sued Sears for a $1 million. The truth is: he was a 32-year old doctor in excellent physical condition with no history of heart problems. The mower had a defective part in it which made it impossible to start. After 15 strenuous pulls, he had a heart attack. There was a stipulation that the machine was defective and medical testimony establishing exertion due to the defect was a substantial factor in causing the heart attack. This is the type of "horror story" that convinced the President of the United States to go ahead with tort reform legislation.

It is not enough for the trial bar to work with consumers, to work with actuaries, to accumulate the kind of data I have quoted, I think its an opportunity for the trial bar to take a long, hard look at itself. I think its time we started addressing some "sacred cows," such as client solicitation, mediation of smaller claims, attorney fees, frivolous claims and defenses; not because we are forced to, but because it is right to do so. I happen to believe that 33⅓% is a reasonable fee in most cases. I believe that it is unnecessary for any lawyer to charge 50% contingent fee in any case. I happen to believe that lawyers who knowingly prosecute frivolous claims or defenses should be punished financially and if their conduct becomes a pattern they should be dealt with by the licensing authority. I believe that voluntary alternate dispute resolution for smaller cases is both good for the public and lawyers alike. I believe that lawyers should start contributing time and money not only to LAWPACs but also to victims' groups and consumer groups. And I believe that some of us who have benefited so well from this system should start giving something back, talking to civic groups, to grade schools, and to high schools, and that associations should create public service spots for television, not just during a crisis but continuously as a real public service.

I cannot predict the outcome of the assault on the civil justice system. I do know that I and others like myself will get the truth out and that we are hopeful that any damage will be minimized. But we trial lawyers always, like Don Quixote, pursue "impossible dreams," but also like the song, many of us have also beaten many an "unbeatable foe." I always think of the words of the famous author, Raymond Chandler, who describes his hero, which in my mind describes the trial lawyer, when he says, "Down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid." That describes trial lawyers, who will walk the "mean streets" to preserve the Seventh Amendment, the civil justice system, the independent judiciary and the jury—for if not us—who will?