

Open Letter to Plaintiff Trial Lawyers

August 2012

Dear Plaintiff Trial Lawyers of America:

The common law of torts, which came from England to the Thirteen Colonies, has been elaborated in tens of thousands of judicial decisions with one basic message – if a person suffers a wrongful injury or harm, he or she can seek redress in court with a trial by jury. This is the civil justice system working through the evolving law of torts. It is this body of law that especially focuses on protecting the physical integrity of human beings, their reputations and their property.

The two initiators of the common law are the plaintiff and the attorney. Over the years these two movers have challenged and prodded the courts into building the greatest civil justice system in the world – one that, despite its insufficient usage, strives to keep up with community values and the risks of existing and new technologies.

The civil justice system, when not straitjacketed, works to compensate victims for various losses, punish the perpetrators in the more heinous cases and deter future injudicious or reckless behavior. The courtroom door is more open to claimants due, in substantial part, to the contingent fee. The injured, poor or not, only pay their attorneys in cases where they prevail.

As a judicial system of public decision-making, it has to conform to a range of refereeing far beyond what is in place for decisions by legislatures, executive agencies and global corporations. Disputes are first refereed by the very nature of the adversary system and its rules of evidence and cross-examination. The judge referees the interpretation of the law and the jury referees the facts. Then the judge referees the jury's decision followed by the appeals courts. The entire process is open.

Trial counsel expanded the embrace of tort law with a refereed steadiness, expressed so concisely by the former Dean of the Harvard Law School, the celebrated Roscoe Pound, who wrote: "The common law must be stable but it cannot stand still."

Unfortunately, even before the massive assault on the tort system by the corporatists and their ideological allies, the civil justice courts did not serve enough of the millions of people suffering injury or illness caused by negligent or intentional behavior. The costs of specific litigation, such as medical malpractice or complex corporate torts, removed all but the cases with the most accessible evidence and greatest damages from the calculus of the trial attorney. By comparison with other countries, however, the American law of torts, with all its limitations – textually and operationally – remained far superior and continued to evolve, though haltingly, through the decisions of some of the finest judicial minds in our country. Until, that is, the 1980s, when the backlash by the wrongdoers' lobby and their ever profitable insurance company bell-ringers intensified their attacks.

Until that decade, the common law had expanded to include damages for pain and suffering, the infrequent but necessary punitive damages, loss of consortium, joint and several liability, comparative negligence, and other doctrines. Again and again, plaintiff attorneys could take credit for bringing cases, having little chance of success, but nonetheless enlarging the core of more humane legal arguments presented in open court. Sometimes pioneering trial lawyers prevailed against powerful defendants, with far greater resources, such as the asbestos and tobacco industries. This benefitted their clients and our society as well.

The law of torts cannot stand still because evolving expectations by society toward greater care, caution and anticipation atrophy or are repressed if they are not regularly transformed into prudent legal rights and responsibilities.

It cannot stand still because the evidence acquired in the course of litigation pierces the veil of corporate and professional secrecy and allows the use of newly discovered information in the preventative process of health and safety regulation. For example, evidence acquired in tire products liability cases led to the federal tire safety law of 1966.

Having initiated and materially gained from their overdue and proper expansion of the common law of torts, plaintiff lawyers should more vigorously embrace a presumed trusteeship to defend what they helped bring about. Such a trusteeship could be invaluable in confronting the tidal wave of what grotesquely became known as "tort reform." This corporate lobbying drive first focused on state legislatures. This assault was amply greased by falsehoods and campaign cash and ultimately shaped the elected judiciary in many states. Blatant insurance industry propaganda, along with occasional insurance or reinsurance company strikes, or tactical refusals-to-sell insurance coverage, got headlines.

The "tort reform" juggernaut gathered steam in the 1980s as a peculiar phenomenon began to emerge. At the same time that some trial lawyers achieved very considerable wealth from their breakthrough litigation successes, their resistance, once muscularly organized, began to flag before the gathering storms. This anomaly only worsened in the 1990s and in the first decade of the 21st century. Although riches were amassed by the creative litigators involved in asbestos, tobacco and other mass tort victories for workers, patients and public health policies, inadequate resources were directed toward countering the commercialist movement that infected elections, legislatures and the judicial confirmation process to shred tort law.

The recent history in Texas illustrates this point only too well. Commencing in 1991, the wealthiest trial bar in the country lost legislative battle after legislative battle designed to destroy the wrongful injury remedies of injured Texans. It started with the weakening of the workers compensation law by an increasingly antagonistic legislature. In drumbeat succession, lawyers for people harmed by negligent or chronically incompetent physicians and manufacturers of defective products were rendered less and less able to pursue the legitimate rights of their clients in the courts.

"Tort reform" laws tied the hands of judge and jury – the only people who see, hear and evaluate the evidence before them in open court. Both absentee state legislators and judicial candidates who show their responsiveness to the legislating of judicial outcomes that were uniquely anti-plaintiff in tort cases were flooded with campaign money. From corporate interest, money talked

loudly. Now the judiciary, especially the Texas Supreme Court, and the indentured Texas legislature and governor, have cruelly turned against these innocent victims and their attorneys, restricting their meaningful access to the courthouse.

The venerable Texas Constitution of 1935 said, "The right of trial by jury shall remain inviolate." In 2003, the ravenous corporatists, including of course the insurance industry, decided to take on an important section of the Texas Constitution and of Texas democracy. Their millions of dollars placed a provision on a statewide ballot initiative. The proposed constitutional amendment "Prop 12" would, in the words of Craig McDonald, director of Texans for Public Justice, "take power away from communities, judges and juries and give the Texas Legislature the absolute unfettered power to grant special interest groups special protections from the harm they might cause in the future and dismantle the checks and balances system that's been the backbone of our government." Passing the amendment was considered an uphill struggle in the opinion of some observers who overestimated the resolve and smarts of the trial lawyers. Corporate cash, that could easily have been matched but wasn't, and deceptive television ads won the vote for Mammon, Greed and Cruelty by a margin of 51 to 48 percent of those who chose to vote. The predictable further weakening of Texas tort law followed. The resolve of the trial bar in protecting the law of torts was inadequate or inept.

Why have the Texas trial lawyers – no shrinking violets to past contests of power – lost again and again? Needless to say they had the arguments, the evidence, the heart-rending cases of avoidable deaths, injuries, illnesses and family anguish. They had the contrast of corporate bosses, with rubber-stamping boards of directors, paying executives huge compensation and bonuses even while these bosses were taking down their own companies, workers and shareholders. Remember Enron. After all, these years of "tort deform" paralleled the greatest corporate crime wave in American history. Weren't there several dozen trial lawyers each worth hundreds of millions of dollars and even a billion or two who could contribute the money and talent needed to get the truth to the people and mobilize ready and able citizen and labor groups to build the voting power needed to preserve tort law in Texas? It seemed that the very traits of individualism and self-regard that drove them to their courtroom victories – cases involving asbestos, tobacco, medical devices and toxic release – hindered the kind of sustained, collective organization that so many advocates pleaded with them to support.

The sterling, publicized work of Texans for Public Justice led by Craig McDonald and Andrew Wheat (www.tpj.org) with its tiny budget was an operating example of what an expanded public investment would have accomplished. By contrast the "tort deform" lobby spawned many well-funded state-based astro-turf groups against so-called "lawsuit abuse," and several national groups as well.

The loss of the constitutional referendum in Texas was the result of poor strategy, a low advocacy budget, compared to the corporation's expenditures, excessive delegation by leading trial lawyers to their unimaginative professional association in Austin and especially the exclusion of ideas and participants by their misguided consulting firms.

Loss after loss in state after state – severe limits on damages, abolition of joint and several liability and the collateral damage rule, restrictions on expert witnesses and jury autonomy – revealed another vulnerability of the trial lawyers that did not go unnoticed by their adversaries.

The trial lawyers had no second strike capability to roll back bad legislation once enacted. Moreover, they had no power, or chose not to exercise it, to improve tort law that had fallen behind the times. They signaled to the corporate insurance lobby that they could be steamrolled again and again, unlike groups who regroup and become stronger after suffering a defeat. They relied on campaign contributions instead of full-bodied grassroots campaigns. Their presumed trusteeship had little energy or capacity for self-renewal.

All the missteps of the trial lawyers did not keep their corporate opponents from constantly magnifying the power of the trial bar so as to raise more money and give the impression that they were fighting Goliath when in reality *they* were the giants, from the U.S. Chamber of Commerce on down. The trial lawyers were like Davids with broken slingshots.

To be sure, the trial lawyers and their civic allies are not without their history of victories in New York, Florida, Ohio, Illinois and other states during this period. But they have been smaller and less frequent in the past twenty years. The biggest victories are defensive – holding the shrinking fort – with truly offensive turnarounds going the way of the Mauritius Dodo bird. The “mighty” trial lawyers of California cannot even mount an inflation-adjusted campaign to bring the 1976 cap on pain and suffering – a stagnant \$250,000 lifetime cap – up to 2012 dollars or about \$1 million. This is the case even though the then and current Governor Jerry Brown in his 1992 statement expressed his regret for supporting such a draconian limit that has caused so much deprivation, cruel mimicry in other states and a required reduction in adjudicated jury verdicts above that limit for horrendous injuries from medical malpractice.

To be sure, plaintiff lawyers have developed some sterling ways to teach the public about their legal rights – such as the Peoples Law School seminars. They collaborated in the late '80s with the Johns Hopkins School of Public Health to publicize consumer product defects and other harmful conditions based on their proven case files. But these good efforts are not diffused throughout the country and often fade away. Seventy thousand fulltime plaintiff trial lawyers can do much, much better for the lives, the health and safety of the American people for whom they are the first responders.

Their potential is seen in the adoption of a proposal I made more than thirty years ago for them to start a public interest law firm that they called Trial Lawyers for Public Justice (now called Public Justice) – a nonprofit organization to take important cases that commercial law practices would not undertake. The success of Public Justice (www.publicjustice.net), led by the resourceful Arthur Bryant, is convincing evidence of how much more could have been done in state after state with modest draws on the trial bar's discretionary income.

As detailed in the work of Joanne Doroshov's Center for Justice and Democracy (www.centerjd.org), studies have shown that civil litigation by the injured is in decline by several measures. Far fewer than 10 percent of actionable tortious acts ever move to the stage of a legal complaint. It is harder and harder for these Americans to have their day in court. People slated for jury pools are constantly misled and lied to by the barrage of propaganda in print, TV and radio about the civil justice system (again, see www.centerjd.org). Actual trials are declining in number and court budgets are being radically cut in some states.

I was introduced to the law of torts at Harvard Law School in 1955 by the legendary Warren Seavey's case book and in 1956-1957 by the writings of Professor Thomas F. Lambert, Jr., the director of the first trial association known as NACCA (The National Association of Claimants' Compensation Attorneys). The *Nader v. General Motors Corp.* case¹ brought by leading trial attorney and author of the treatise *The American Law of Torts*, Stuart Speiser, helped advance the right of privacy and is often included in legal casebooks.

For decades I have testified, written and fought for the legal rights and remedies of wrongfully injured children, women and men in the workplace, marketplace, home and environment. Illustratively, in 1986 I traveled to more than forty states to help stem the massive assault on the tort system fronted by the insurance lobbies, often with the formidable J. Robert Hunter whose expert testimony as a leading property-casualty insurance actuary impressed many a state legislator in that critical year.

In almost every state, there were a few trial lawyers who stood very tall on the trial lawyer association ramparts against the tortfeasors' lobbies. The vast majority paid their modest annual dues and practiced law. Year after year the ramparts weakened. Our country's tort law can be considered mortally wounded in many states with the congressional minions of the wrongdoers' battalions thirsting to federalize and codify downward the entire common law of the fifty states – for a “mess of pottage.”

It is time to call for a grand, multifaceted mobilization of the American people who believe in their constitutional right of trial by jury and their full day in court based on the principle and affordable practice that every wrongful injury requires a righteous remedy and fair compensation paid by the perpetrators of those harms. This should be a movement for responsibility and accountability for those wrongdoers. Plaintiff trial lawyers should come out of their cloistered and defeatist corners to lead this community-based restoration and expansion of refereed civil justice and deterrence under law.

If you are interested in this call to action and what it will take to effectuate, please call or write to me ASAP for further elaboration and a mutual exchange of suggestions.

Sincerely yours,



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¹ *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

