A TRIAL JUDGE'S VIEW OF TORT REFORM

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It is a privilege to be asked to give the Arthur T. Vanderbilt Lecture sponsored by the Harvard Law School Association of New Jersey. The Vanderbilt name evokes a time when legal giants strode the earth, and the late Chief Justice was in the forefront of these giants.

I reread the tributes to him which appeared in a volume of the New Jersey Reports just after his death in September, 1957 and was reminded once again of the extraordinary contributions he made in three distinct roles — political leader, legal educator and Chief Justice of a great court.

My own associations with him were humble indeed — delivering books from Chief Judge Forman, for whom I clerked, to the Chief Justice at his home in Short Hills, and standing before him in the beautiful courtroom in the State House Annex as Chief Justice Vanderbilt administered the oath to new attorneys.

Early in my legal career a sentence jumped out of a Vanderbilt opinion which has remained with me ever since. I shall return to that sentence at the conclusion of my remarks.

When I read the list of previous Vanderbilt lecturers I wonder why your president, Josh Levin, selected me for this role. I am not a scholar nor a wise appellate judge or justice. I am simply a trial judge who, day after day must deal with subjects about which he knows very little, if anything.

This was brought home to me forcefully a few years ago when, late one afternoon, an application for a temporary restraining order arrived my way. I glanced quickly at the papers, noticing that they had something to do with sports. The case was entitled *Bridgeman v. NBA.* I donned my robe and swept majestically into the courtroom. A crowd of lawyers awaited. I introduced the session, stating that "I see we have the case of *Bridgeman v. National Baseball Association.*" The lawyers rose in a body, "Judge, it's basketball, not baseball."

My subject tonight is a trial judge's view of tort reform. I suspect that when I have finished, there will be those who conclude

* Senior U.S. Judge, District of New Jersey. This article is a reproduction of the Arthur T. Vanderbilt Lecture given by Judge Debevoise before sponsors of the event, the Harvard Law School Association of New Jersey.

that I know even less about torts than I do about professional sports.

My thesis is quite simple. It is this: by expanding the kinds of cases in which plaintiffs can recover damages, by permitting virtually uncontrolled recoveries for pain and suffering and for punitive damages, courts have actually injured the classes of persons they have sought to help.

I am not addressing the broad economic effects of our present tort law, whether it discourages innovative medical treatment and product advances, whether it drives insurance rates so high that businesses and non-profit organizations cannot function, whether jobs are lost because of the tort law's effects upon the competitive position of American businesses. These are questions for economists and former Vice President Quayle. I simply want to recount observations from the perspective of the courtroom. The incidents are anecdotal, but I think they suggest that we do indeed have some problems.

It seems to me that the priorities in any system of compensation must be, first — to provide for the medical treatment and rehabilitation of the victim and, second — to replace lost income, past and future. Of secondary importance is an award for pain and suffering and of truly low priority is an award for punitive damages.

Yet today, particularly in the area of mass torts, we see some fortunate plaintiffs recovering large awards, which include substantial amounts for pain and suffering and often for punitive damages, while thousands of other injured plaintiffs wait and receive nothing — not even for medical expenses or for lost income. It may well be that the huge initial awards have bankrupted the defendant or defendants, exhausted their insurance and there will never be a recovery for the unlucky thousands. This might well be described as the jackpot theory of justice.

We have seen this phenomenon in the asbestos cases. There have been many substantial jury awards, and, on the eve of trial, faced with the *in terrorem* effect of such awards, substantial settlements. In those cases the plaintiffs, and their attorneys who have received their contingent fees, have fared well. But the thousands of unpaid plaintiffs, many of whom have suffered grievous losses, wait.

The courts have acted with extraordinary creativity to deal with this kind of problem — for example, note the work of Judge Weinstein in New York, Judge Weiner and other district court judges in Philadelphia and Judge Keefe here in New Jersey. But, I

would suggest, the system within which they have to work is badly skewed. There are limited resources to pay awards, and before these resources are used to pay huge amounts for pain and suffering and any amounts for punitive damages, every victim should have been compensated for his medical and rehabilitation expenses and loss of income.

Our law of damages is largely the product of the common law — court made law. Courts and individual judges are inevitably moved by the predicaments of the individual parties who appear before them. In the case of an injured plaintiff and a defendant who has committed a tort, particularly where the defendant is insured, natural sympathies move a court to be as generous as possible to the injured person. But by succumbing too easily to these sentiments in an effort to do good in a particular case, courts may in fact be doing great harm.

First let's look at the area of pain and suffering. It is certainly not unreasonable for a victim to receive some monetary compensation for pain and suffering. But there is no escaping the subjectiveness of this question and the fact that some losses simply cannot be made whole with money. By improvidently expanding the kinds of injuries for which pain and suffering awards can be recovered, and by placing virtually no limits upon the amounts of such awards, we have contributed to the situation where some plaintiffs receive huge awards and many receive nothing.

The New Jersey Supreme Court's decision in *Portee v. Jaffee*,[1] in combination with its earlier decision of *Falzone v. Busch*,[2] represents to me a situation where a court unwisely expanded the kind of situation where a person could sue for emotional injury. The circumstances would tear at one's heartstrings. A mother had to stand by for 4-1/2 hours as her seven year old son was trapped and crushed between the elevator door and the wall of the building. The boy died while still trapped, his mother a helpless observer. The Court allowed the mother to recover for emotional distress.

In combination *Falzone* and *Portee* overruled previous law to the effect that some physical impact upon the plaintiff was required before there could be recovery for emotional injuries caused by a negligent defendant. Recognizing the potential for expansive use of this new law, in *Portee* the Supreme Court sought to define with precision the circumstances in which recovery would

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[1] 84 N.J. 88 (1980).

[2] 45 N.J. 559 (1965).

be permitted. One requirement was a marital or intimate, familial relationship between plaintiff and the injured person.

However, time erodes the best intentions, and last June the Court expanded a marital or intimate familial relationship to include cohabiting persons. In *Dunphy v. Gregor*,[3] the test became whether the bystander who observed the victim's injury had a relationship with the victim that was substantial, stable and enduring. I leave it to your imagination to conjure up the circumstances in which a bystander will seek to persuade a jury that he or she had a substantial, stable and enduring relationship with an injured person.

This expansion of the circumstances in which a person can recover for emotional distress must be viewed in conjunction with the huge amounts which can be recovered for pain, suffering, emotional distress. No dollar figure could ever compensate a parent for the loss of a child. This being the case, a jury or a judge can award practically any sum.

How unpredictable this factor is was illustrated for me this past fall in a products liability case. The plaintiff's right hand had been crushed in the rollers of a textile machine. The injuries were severe; the pain and suffering were great and continuing. I submitted the case to the jury with the usual charges on the subject. On the third day, just before the jury was to announce a verdict, the parties settled for $845,000.

It is my practice when a civil case settles during a trial to hold a panel discussion with the jurors and the attorneys. The attorneys can question the jurors and the jurors can critique the attorneys. During the course of these discussions in this particular case it developed that no verdict had been reached during the first two days because one juror held out for a verdict of no liability. He was won over on the third day. On the question of damages, most of which was for pain and suffering, one juror sought to award $10,000,000. Agreement was ultimately reached at $3,500,000.

You might think that the plaintiff and his attorney would have been kicking themselves for accepting a mere $845,000. Actually not. The defendant was a Dutch company; it had no business or assets in the United States; there was no treaty under which the Netherlands was obligated to enforce a judgment of an American court. Apparently, a judgment for anything approaching $3,500,000 would have been against public policy if plaintiff sought

[3] 136 N.J. 99 (1994).

to enforce it in the Netherlands. There would have been a new trial at least as to damages, at which time the huge amount for pain and suffering would have been drastically reduced. I will have more to say about Dutch law in a moment.

I am not suggesting that there is something inherently wrong with pain and suffering awards. I am suggesting that it is bad public policy to permit enormous awards for that kind of injury before assuring that all victims can at least recover their medical expenses and lost income.

There are indications that some courts are becoming more conscious of the overall consequences of increasing awards for intangible injuries. A year ago, the California Supreme Court was asked to introduce bystander liability. In *Huggans v. Longs Drug Stores*,[4] a pharmacy had negligently provided an improper drug dosage for the two month-old child of the plaintiff parents. Among other damages the parents sought recovery for emotional distress. The court declined to permit such damages, reasoning that: (i) the potential liability of all health providers would be enlarged; (ii) malpractice premiums would be increased; and (iii) all medical costs would be increased.

I don't know that the Supreme Court of California had any reliable data to support the three reasons it gave for denying recovery of bystander emotional distress. But at least it did not leap blindly into the unknown and adopt a new rule of law which had a potential for major social consequences. It left such a change, if it is to be made, to the legislature which is in a position to assemble data and consider all the consequences of a proposed change.

Punitive damages is the other form of recovery which consumes resources available to compensate victims. In theory, these damages are designed as punishment so as to deter wrongful conduct. In the case of a single tortious episode, theory may approach reality. But in a multiple or mass tort situation punitive damages make no sense at all. Each plaintiff is entitled to recover such damages, which results in punishing a defendant over and over again. More objectionable is the fact that the award of such damages may result in the lucky first plaintiffs, the jackpot winners, consuming the resources available to the defendant and its insurance carriers before the remaining victims recover their medical expenses and lost income.

Another recent California case illustrates how unpredictable

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[4] 862 P.2d 148 (Cal. 1993).

and devastating punitive damage awards can be. A health maintenance organization refused to pay for autologous bone marrow transplant procedures for a woman with breast cancer, asserting that it was not covered by its contract with patients. As you probably know, this treatment involves removing bone marrow from a cancer patient, administrating a very high dosage of chemotherapy — far higher than would be possible without removal of the bone marrow — and then restoring the patient's bone marrow. This treatment has proved efficacious in the treatment of some forms of cancer. Its effectiveness is not established with respect to other forms of cancer. Medical opinions differ with respect to the efficaciousness of this treatment for breast cancer. It is expensive treatment and cost private sources in California $212,000 when the HMO refused payment.

The woman involved in the California case raised the $212,000 and obtained the treatment from private sources. She lived for eight months after the treatment. After she died, the woman's family sued the HMO which had denied the treatment and recovered the $212,000 paid to the private provider; $12.1 million in compensatory damages (which no doubt included pain, suffering, and emotional distress) and $77 million in punitive damages, for a total of $89 million.

Newspapers reported that women's health advocates praised the award. They should have wept. Did they consider the thousands of women, children and men who rely on this HMO for their medical and hospital care? Did they think of the effect that decisions like that will have upon the cost and availability of medical coverage throughout California?

This is a very common kind of suit — a plaintiff seeking to compel an insurance company or health plan to pay for an autologous bone marrow transplant. Refusal is based upon the policy or plan provision that the plan does not cover experimental procedures.

Generally, the plan administrators are not heartless beasts trying to deprive desperately ill persons of needed medical care. They are responsible for administering a plan as written, using the limited funds available to them to provide for the medical needs of all members of the plan.

Unanticipated demands upon plans, and court decisions that impose obligations not provided for when plan premium rates were set, result in other kinds of cases. Early this year, an elderly man living only on social security and a small pension was being

peppered by lawsuits brought by doctors and hospitals for unpaid bills incurred during the course of his treatment for cancer. He was covered by a union welfare plan, but the plan failed to pay his medical bills. He sued the plan to compel payment. It developed that the plan had been overwhelmed by rising medical costs occasioned by many factors, including, no doubt, payments for treatments which were not anticipated when the levels of employer payments had been agreed upon. As a result, the plan could pay only a fraction of its members' bills.

A Third Circuit case, *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*,[5] illustrates another effect of unanticipated medical costs. I don't have to discuss the various legal issues involved in the case. The facts illustrate the point I am making. The union and the employer had negotiated for a health plan, with the employer paying specified monthly amounts. The plan administrators had to increase the amounts of the payments in order to meet increased costs. When the collective bargaining agreement came to an end, the employer, either unwilling or unable to pay the higher premiums, withdrew from the plan, thus ending coverage for all employees. During the period of bargaining impasse, plaintiff's husband incurred extraordinary medical expenses in connection with a heart attack from which he ultimately died. As a result of the plan termination, plaintiff-widow was left without insurance coverage and was obligated to pay enormous medical expenses, wiping out the meager estate her husband bequeathed to her.

When we permit unlimited awards for pain and suffering and when we permit large awards for punitive damages in actions against health plans, we overlook the harm we may be causing countless persons who depend upon those plans for payment of their medical and hospital bills.

Our system for awarding damages is not the only rational system. I just completed another products liability case in which Dutch substantive law was applicable. The product involved was zirconium metal powder. It was shipped from a German company to an American company which sold it to the plaintiff, a distributor of metal products in Amsterdam. The product exploded into flames when the plaintiff mixed a portion for resale.

The plaintiff's home was burned to the ground; he was horribly burned over most of his body; his wife was badly burned; he spent three months in a burn unit and many more months in reha-

[5] 62 U.S.L.W. 2428 (U.S. Dec. 28, 1993) (No. 93-7048).

bilitation. He remains forever terribly scarred in face and body. He sued the German seller and the American reseller, charging a lack of an adequate warning.

The parties agreed that Dutch law as it existed in 1988, the date of the explosion, was applicable. The law on liability was similar to American products liability law. The law on damages was quite different.

The medical expenses must have been enormous, but no doctor testified for either side and no medical expenses were proven. The plaintiff and his wife provided eloquent testimony about his treatment, pain and suffering. There was no medical recovery because every cent of the plaintiff's medical care had been provided without cost to plaintiff under the Dutch health care system. Unlike the law in the United States, double recovery of medical expenses is not allowed under Dutch law. You cannot recover both from a medical plan and from a defendant.

Plaintiff's claim for property damage was limited to $25,000, because his fire insurance had paid $175,000 of his $200,000 fire loss. Loss of income, to the extent not covered by the Dutch social security system, was recoverable.

As for pain and suffering, referred to in the Dutch law as immaterial damages, Dutch courts generally consider the same factors as American courts consider. No maximum amount was established under the Dutch code, but as a matter of practice, degrees of severity have been established, with monetary amounts being associated with each degree. The largest award in the most severe category of immaterial damages was a 1992 award of 300,000 Netherlands guilders — or about $150,000.

As for punitive damages, there are none. As the expert legal opinion submitted in evidence in the case stated, "Under Netherlands law the function of tort law is to compensate injured plaintiffs. It is not a function of Netherlands tort law to regulate the behavior of potential tort feasors or to mete out punishment to actual tort feasors."

It would be interesting to study how quickly and completely the Dutch system compensates injured victims and the amount of court and attorney time and expense it spends in delivering this compensation. It would be interesting to compare the Dutch experience in this regard with the American experience.

American jurisdictions are beginning to face up to the problems to which I have referred. The Oregon Basic Health Service Act adopted a rational approach to providing medical cover-

age to 120,000 persons who were not qualified for medicaid but who fell below the federal poverty level. The proposed plan recognized that medical resources are limited; it established, in a descending order of priority, a schedule of medical conditions and treatments; it established the cost of providing the treatments and left it to the legislature to determine how far down the list coverage could go — it all depended upon how much the legislature was willing to appropriate. This was a clear recognition that we can only provide those medical services which we are willing to pay for. I see no room in that system for a court to enter the picture and order that treatment be provided to a greater degree than that authorized by the plan. An autologous bone marrow transplant for any given condition would either be provided or not provided, depending upon the decision of the legislature.

Georgia has addressed the problem of punitive damages in products liability cases. The legislature recognized that if punitive damages are simply to deter, the punishment should be imposed once. To impose multiple punitive damage awards in mass tort situations goes beyond deterrence and serves only to reward some plaintiffs and their attorneys unduly and to deprive other plaintiffs of the ability to recover anything.

The Georgia statute contains no ceiling on the amount of the punitive damages award. But it allows but one recovery, regardless of the number of cases against a particular defendant. The plaintiff who collects the punitive damages award must pay 75% of the award to the state treasury.

Numerous other proposals are surfacing — for example, extending genuine no fault concepts, removing some kinds of claims from the courts. Some of the proposals are unsound; some look interesting.

Whatever the proposals are, the organized bar seems unreceptive. Last February I received the following notice: "Emergency Meeting To Alert Members To Radical Legislative Proposals To Drastically Limit If Not Totally Eliminate New Jersey Citizens' Access To The Courts" — all in capital letters, no less. In fact, although the proposals may have been unwise, they were far from radical. They merely nibbled around the edges of the problem.

Much serious work is being done in tort reform. Better it would be if the organized bar joined these efforts — not to sabotage them but to find fairer, more efficient ways of distributing limited resources among injured people.

At the beginning of these remarks I referred to a sentence in

an opinion authored by Chief Justice Vanderbilt which has remained with me through the years. In *State v. Culver*,[6] written three months before his death, Chief Justice Vanderbilt stated: "The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice."[7]

I would suggest that the conditions and needs of the times have changed, requiring that we carefully scrutinize facets of our tort law, particularly as it relates to awards for pain and suffering and for punitive damages. We should not permit rules which were appropriate when formulated to become instruments of injustice.

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[6] 23 N.J. 495 (1957).
[7] *Id.* at 505.