Jack Stout

INTERFACE

No Hard Feelings

by Jack Stout

Nearly one of every three babies born in the U.S. is taken by caesarean section. It's not bad diet, air pollution, nuclear plants, or microwave ovens. It's caused be a serious flaw in our rules for resolving disputes. Defensive medicine and the insurance crisis are the only symptoms.

In our sector of the health care industry, the symptoms vary. Hirings postponed, equipment budgets raided . . . an increase in premiums means a decrease in something. EMTs under 21 find themselves suddenly out of work – insurance won't cover their driving. In some communities, elected officials must choose between self-insuring in-house EMS operations, or closing up shop. Unable to predict insurance costs, terms, or even availability, qualified companies drop from bid competition. The crisis is real and requires attention.

Fed up with giant premiums and defensive medicine, physicians are abandoning high-risk specialties. Trusting spouses more than juries, others make themselves undesirable targets by transferring wealth to wives and husbands and dropping malpractice coverage entirely.

When the crisis first surfaced, most people saw it as a problem peculiar to the health care industry. A surplus of lawyers, the lure of contingency fees, the jury's natural tendency to sympathize with the victim, the cost and complexity of defending against a malpractice claim, deep pocket defendants . . . it seemed the health care industry was different, more vulnerable, and needed its own set of rules.

Legislation was proposed (and in some states passed) to change the rules governing negligence suits against health care providers. Meanwhile, the insurance crisis has rapidly spread to other industries, threatening to distort our entire economy. Clearly, a quick fix for the health care industry won't be enough.

Diagnosis and Treatment

On this hot topic, we have no shortage of theories, remedies, proponents and opponents. Awards are too big, so slap a limit on awards. Contingency fees create too much incentive and should be limited or banned. Absolutely credible (and handsomely paid) expert witnesses prove both sides right, and both sides wrong; bar the use of paid experts.

> ***"There exists a fundamental unfairness in our rules of resolving civil disputes."***

Insurance industry profits are down because interest rates are down; rate regulators should have been counting investment income all along.

These and other solutions are being persuasively argued, for and against. The arguments are healthy, long overdue, and even those with merit are missing the point.

No Hard Feelings

There exists a fundamental unfairness in our rules for resolving civil disputes, including disputed claims of damage for negligence. Consider this: I sue you for damages, forcing you to defend yourself at great expense and inconvenience. It turns out I'm wrong, you win, now you're broke – no hard feelings.

You were not at fault, had nothing to gain, didn't pick the fight, but now you're broke. Under the rules, if I think I might have a good case against you, I can make you share the cost to see if I

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do . . . even if I don't.

Frivolous Isn't the Point

It is true that if my suit against you is so flimsy as to be termed "frivolous," I may be forced to pay your costs of defense and even more. The idea is to punish plaintiffs and their lawyers when they abuse the legal system. Makes sense.

But what if my suit against you is neither frivolous nor successful? It was *my* decision to gamble on winning some of your money in court, and I lost. How, then, is it fair that you should share the losses?

Out of Balance

This unfairness is more than distasteful – it also gives a powerful bargaining advantage to the plaintiffs in certain kinds of lawsuits. That is, in situations where the defendant's costs of litigation greatly exceed those of the plaintiff, it becomes possible to squeeze money from a defendant without winning the suit, even with less than a 50/50 chance of winning the suit.

It's Simple Arithmetic

My case against you isn't strong, but it isn't frivolous either. My lawyer's track record is formidable, I'm sure to get the jury's sympathy, the facts and medical issues are complex, and the costs of an effective defense will be tremendous (and gone forever), even if you win. So, you (or your insurance company) estimate the cost of winning, factor in the risk of losing, and "settle out of court" for something less. (Newspapers report that you "settled out of court for an undisclosed amount," another little annoyance.)

It happens every day to defendants who could probably win – the direct and unavoidable result of the unfairness in our rules. And it has more to do with the insurance crisis than all the cases resolved in the courts.

As plaintiff in a complex negligence suit, I can empty your pockets, win or lose. That's one hell of an advantage.

The Loser Should Pay

Corrective legislation would be fairly simple. The party who loses a negligence suit, plaintiff or defendant, should be required to reimburse the prevailing party's reasonable costs of the litigation, not to exceed the amount of damages awarded. An attorney working on a contingency fee (percentage) basis would be a partial guarantor of such reimbursement, limited to the percentage he would have enjoyed in the event the plaintiff had been victorious.

Eliminating the plaintiff's unfair advantage would instantly generate certain effects: a dramatic reduction in negligence lawsuits, a dramatic reduction (but not elimination) of contingency fee cases, faster and more frequent out-of-court settlements of cases with merit, and nearly instant resolution of the crisis in insurance.

Unfairness Isn't Obvious

It does seem impossible that such blatant unfairness could have gone unnoticed and uncorrected for such a long time. Being a laymen, my first reaction is to assume I'm missing something . . . something very technical, or theoretical. Then I remember it was in the late 1960s before our legal establishment noticed that persons accused of crimes have a right to be represented by an attorney. A layman, the "birdman of Alcatraz," directed their attention. □