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THE FEDERALIST SOCIETY, CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: DO THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE?, CONFERENCE DIALOGUE, DAY TWO, PANEL FOUR: ALABAMA: A JURISDICTION OUT OF CONTROL?

Hon. Bill Wilson

Bruce J. McKee

Hon. Harold See

Leonard Nelson

Gerald Walpin

PANEL FOUR:
ALABAMA: A JURISDICTION OUT OF CONTROL?

INTRODUCTION

THE HONORABLE BILL WILSON, MODERATOR*

Before I was politically neutered on these issues three years ago, I was in those plaintiffs' lawyers ranks, and I want to thank you. You should be my doctor; you saved me. I had low blood pressure until your report came out and it has kept it steadily up ever since.

Seeing this panel reminds me of another panel. I can't figure how it related into the Federalist Society, but I have got to tell you about it. A few months ago, I was out in New Mexico on a trail riding event, and I was listening to a local radio broadcast up above Santa Fe, Española, where the three candidates for the state senate were on an open forum. They were each given ten minutes to talk on issues, such as the spotted owl, the environment, and the logging and lumber industry. The first candidate got up and spent his full ten minutes. He said that we must preserve our environment, preserve the flora and fauna, but at the same time, we must have industry, we must have logging, we must have jobs, and we must balance everything. He had to be called down at the end of ten minutes.

The second candidate, a female, did the same thing. She wanted to take care of the spotted owl but, at the same time, have full-scale logging operations in all places, keep full employment, and let everybody go out and see the nature as it is now.

Finally, the last candidate, by the name of Phil Greco, got up and said, "Madam Chairperson, I want to answer your question directly. I will do it in thirty seconds, and I will give you the rest of my time back. You've asked me about the spotted owl," he said, "I love the spotted owl—it tastes just like chicken."

You never heard such a roar, and I heard later that he carried every box in the city. I wish someone had introduced me to him because I wanted to tell him that not only am I a judge, but I am an authority on scientists. I know we have Galileo and junk experts, but Sir Isaac Newton is my favorite and I have done an in-depth study of him. I want to tell you about one of the instances most of you probably don't know about.

One Sunday afternoon, Sir Isaac and a friend were out strolling around in this field, and they came up to a big well. Of course, they didn't have drilled wells in those days; this was a big dug well. They

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* Judge, United States District Court for the Eastern District of Arkansas.

peered over the edge, but they could not see the water. His friend said, "I wonder how deep that is."

Sir Isaac replied, "You have the right strolling companion this afternoon. If you'll find something heavy and throw it in there, I'll know how deep it is. Nobody knows gravity like I do." He continued, "I'll count it off and tell you how deep it is."

So his friend looked around but could not find a rock. Finally, Sir Isaac's friend found this big, heavy log. He grunted and rolled, kicked, and tumbled the log and, finally, got the log to the edge of the well and pushed it off.

Sir Isaac Newton began, "One thousand and one, one thousand and two, one thousand . . ."— crash! The log hit the bottom of the well. Sir Isaac calculated in his head and finally stated that the well was 120 feet down to the water.

The friend replied, "That must be the deepest dug well in the world."

They were scratching their heads and about this time they heard a tremendous noise. They turned around and saw a mule running at them at a dead run. They stepped out of the way. This mule came up and, without hesitation, just dove off head first into the well. The mule hit bottom, and now they were really confused. They scratched their heads awhile and started to walk off.

About this time a farmer came trotting up and said, "You all haven't seen my mule have you?"

"Well, we hope not," Sir Isaac replied, "but some crazy mule jumped head first in this well."

The farmer said, "Couldn't have been my mule; I had him tethered to a big, heavy log."

You may wonder how this ties in, and I am going to tell you. I got out of the Service in 1969—by the way, I had the Vietnam war won when I left. I know some of you may have been there a little later and something happened after I left, but I came back in 1969 and went to the firm of Wright, Lindsay & Jennings in Little Rock. Ed Wright, at that time, was president of the American Bar Association. He loved to tell a story about his son. When he was a little boy, they were going to have the parish priest over for lunch. That morning, before they went to mass, Ned killed a snake in the back yard. Mr. Wright told him before they went to mass, "Son, we're going to have the priest over today. If you mention one word during lunch about that snake, I'm going to take you into the bedroom and whip you." Ned was ten or eleven years old.

So they had lunch, and Ned sat there like a little boy ought to and was seen and not heard. Finally, after lunch, Mr. Wright said, "Why don't we go into the living room where we'll be more comfortable."

Ned said, "Speaking of snakes . . . ."

Well, that's how my stories tie in.

I have to tell you one more story that does relate to the law. Judge Myron Bright, who has now taken senior status on the Eighth Circuit, tells a story that he says is true. A lawyer who had lost a case in the district court was up arguing on appeal. He got up, started his argument, and said, "Your Honors, this is a contract case and a contract consists of an offer on the one hand, of an acceptance on the other hand, and at least a peppercorn of consideration."

Judge Bright interrupted him and said, "Counsel, I think you can assume we know what a contract is."

The lawyer said, "No, Your Honor. That's the mistake I made in the district court." So you can see that assumptions can be far-fetched.

Rather than outline the distinguished careers of our panelists here, I am going to assume that you, each of you, can read their resumes. Each of them is a luminary, and so at this time, I am going to call on a panelist to give us the first presentation.

ALABAMA IS NOT AN ABERRANT JURISDICTION

BRUCE J. MCKEE, FIRST PANELIST*

Thank you for the invitation to be here today. I have attended and participated in several Federalist Society programs in Alabama, and I applaud your organization's encouragement of open debates such as this.

I see my role today as bringing the views of the majority of the plaintiffs' bar in Alabama. As we get to a panel discussion or questions, I will try to make clear whether I am expressing my own personal view, which may be different from what a majority of my fellow plaintiffs' lawyers in Alabama might think.

There is no way I could summarize my ideas in ten minutes, but I have prepared a handout that is available for those of you who are interested and want to go back to look up citations to some of the economic or judicial statistics that I am going to mention.[1]

The messages that I bring to you today are these: keep an open mind, perceptions are not always reality, consider the source of the information, a few favorite tort myths and anecdotes do not tell the true story of an entire jurisdiction, and beware of the use of statistics.

If Alabama were really tort hell, then how do you explain the glowing economic statistics that are mentioned in my handout? Businesses are in the business of making money, and businesses vote with their dollars. How do you explain the billions of dollars of annual investment in Alabama if things are as terrible as the *Wall Street Journal* or *Forbes* would tell you they are? The economic facts are the reality, and the few tort myths are the false perceptions.

The Alabama substantive law that I have outlined in my handout is the reality. It is very pro-defendant: contributory negligence is still a complete defense, even in a product liability case and even in a crashworthiness case.[2] There is no recovery for the negligent infliction of mental distress; there is no compensatory damage allowed in a wrongful

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1. *See* Bruce J. McKee, *Notes and Comments for "Alabama: A Jurisdiction Out of Control?,"* 41 N.Y.L. SCH. L. REV. 637 (1997).

2. *See* Williams v. Delta Int'l. Mach. Corp., 619 So. 2d 1330, 1332 (Ala. 1993) (citing Dennis v. American Honda Motor Co., 585 So. 2d 1336 (Ala. 1991)).

death case.[3] Tort actions not filed before death do not survive to the estate.[4]

Additionally, our workers compensation law provides nearly the lowest awards in the country.[5] Attorneys' fees capped at fifteen percent are the lowest in the country.[6] The State of Alabama and its agencies still have absolute sovereign immunity.[7] Even when municipalities are guilty of torts, there is an absolute cap of one hundred thousand dollars.[8]

If you look up those examples, as well as the others I mention in my paper, I doubt there is a jurisdiction in the country where the substantive law is as twentieth century-ish, pro-business, and pro-defendant as the State of Alabama.

Now, consider the source of the negative perception of Alabama tort law. The national publications that have called Alabama "tort hell" and "out of control" are business magazines—the *Wall Street Journal* and *Forbes*. It began with an article in *Forbes* in February 1993.[9] The Alabama Administrative Office of Courts called the author of that Forbes article and said, "You've mentioned a few reported big verdicts, big cases in Alabama that we don't even recognize. We thought our statistics were complete and we would like to keep them complete. Can you tell us what the source of this information is?" He said, "Sure, I'll send it to you." The author then faxed the set of statistics, numbers, and verdicts that he was working from, which showed that the *Forbes* author had received his information from the public relations department of Torchmark Company, a big insurance company in Birmingham. So consider the source of what you are reading. It serves business interests and insurance interests, particularly in Alabama, to scare the people of Alabama into thinking that there are many big verdicts that are driving away business and driving up insurance costs; yet it is just not true.

Also in my paper, I give some statistics.[10] The largest county in Alabama, population-wise, is Jefferson County, where I practice in Birmingham. It used to be known as a very pro-plaintiff jurisdiction, but it is not anymore. Defendants are winning more trials than plaintiffs in Jefferson County. Only a handful of lawyers in the entire state now

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3. *See* ALA. CODE § 6-5-410 (1975); *see also* Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966).

4. *See* ALA. CODE § 6-5-462.

5. *See id.* § 25-5-1.

6. *See id.*

7. *See id.* art. I, § 14.

8. *See id.* § 11-93-2.

9. *See* David Frum, *Unreformed*, FORBES, Feb. 1, 1993, at 82.

10. *See* McKee, *supra* note 1, at 642-43.

handle medical malpractice cases. It is virtually impossible to win a medical malpractice case for the plaintiff in Alabama.

Now, as to punitive damages, some alternative statistics I will offer are also in my handout.[11] Beware of statistics. A lot of the statistics that you hear and read from Attorney General Thornburgh, for example, state the amount of punitive damages affirmed by the Alabama Supreme Court, compared to the supreme courts of neighboring states.[12] Well, that does not tell a true story. Many cases in other states go to the courts of appeals rather than the supreme courts, as they do in Alabama, and that does not account for all of the cases that are settled. The statistics I offer show that the total verdicts on punitive damages in the neighboring states of Mississippi and Florida were higher for the time period from 1992 to 1995 than they were in Alabama and Georgia.[13]

One favorite statistic, which is used in Alabama in these debates, is that Alabama juries awarded $200 million in punitive damages in 1994.[14] Well, that is true, but one has to look behind that. There was one fifty million dollar verdict that was reduced to two million dollars by the trial court and eventually settled for one million dollars—that was against Mercury Finance for very egregious conduct.[15] The statistic I cite says that it will cost the shareholders of Mercury Finance one penny per share to pay that judgment, yet that same year they paid their CEO more than two million dollars in bonuses.[16] So who is getting hurt here? A second verdict in 1994, for thirty-three million dollars, was completely reversed, and a new trial was ordered in favor of the defendant.[17]

Furthermore, the Administrative Office of Courts in Alabama is very computerized. It is one of the few areas in Alabama where we are ahead of the rest of the country in the administration of our state judicial system; we literally try to track every verdict. Thus, the statistics on Alabama that you can read are almost one hundred percent accurate; whereas, in many other states there is no computer tracking of circuit court verdicts and,

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11. *See id.* at 643.

12. *See* The Honorable Dick Thornburgh, *Day Two: Opening*, 41 N.Y.L. SCH. L. REV. 535 (1997).

13. *See* McKee, *supra* note 1, at 643-44.

14. *See* Linda Himelstein, *Jackpots from Alabama Juries: A String of Mammoth Awards Has Insurers Starting to Flee*, BUS. WK., Nov. 28, 1994, at 83.

15. *See* Johnson v. Mercury Fin. Co., JVR No. 133795, 1994 WL 546665 (LRP Jury); *see also* Beth Healy, *Suit Settlement Won't Push Mercury Off Its Smooth Road*, CRAIN'S CHI. BUS., Apr. 17, 1995, at 18.

16. *See* Healy, *supra* note 15.

17. *See* Davis v. Associates Fin. Services, JVR No. 125443, 1994 WL 127879 (LRP Jury); *see also* Jere Locke Beasley, *Present Punitives as Protecting the Public*, NAT'L L.J., Mar. 13, 1995, at C5.

thus, there is a significant under-count of the number of punitive damage verdicts in neighboring states.

In my handout, I cite a Utah case that was reported in the *National Law Journal*.[18] Again, why pick on Alabama? There is a punitive damage verdict in Utah, the most conservative state in the country, for $145 million against State Farm Insurance for bad faith.[19]

These big verdicts, these tort myths, these anecdotes, happen in every state and not just in Alabama. Most of the big punitive damage awards in Alabama have been fraud cases against insurance companies, where the plaintiffs deserved to get paid. Now, we could quibble about what amount is fair, but if you understood the facts of those cases, I do not think that many would disagree that a significant amount of punitive damages should have been paid in those cases.

I will now read a very short quote by Brandt Ayers. Brandt Ayers is the publisher of the *Anniston Star* and the owner of several businesses in Alabama. You may hear him on National Public Radio—that soft, melodious southern voice giving oral essays on the South. He says, in a January 1996 article he wrote for his paper, that regardless of who started it, Alabama is being falsely maligned as tort hell.[20] The facts do not support the charge. More business is coming than leaving. The doctors' captive insurance company is minting money.

It is true that excessive punitive damages have been awarded in two of the state's sixty-seven counties: Lowndes County and Barbour County.[21] Yet the classic weapons of interest group politics are being employed to whip up a climate of hysteria in order to keep people in a state of panic and to demonize the other side. The result is damage to all sides—the state judicial system and Alabama's already tattered reputation.

So certainly there are individual cases about which even I, as a plaintiffs' lawyer, would ask, "How did that happen?" But Alabama is not significantly different than any of these other states. The total overall statistics of the State of Alabama show that defendant verdicts are increasing, and jurors are not wildly pro-plaintiff. The stories that you read are planted by business and insurance interests in Alabama just to poison the jury pool in Alabama against lawsuits.

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18. *See Accident Victims Awarded $147.6M in Bad-Faith Suit*, NAT'L L.J., Sept. 9, 1996, at A15 (discussing Campbell v. State Farm Mut. Auto. Ins. Co., No. 890905231 (Dist. Ct. Salt Lake County. July 31, 1996)).

19. *See id.*

20. *See* Brandt Ayers, *Tort Hell? Helluva Fib*, ANNISTON STAR, Jan. 28, 1996, at D1.

21. *See id.*; *see also* Sperau v. Ford Motor Co., 674 So. 2d 24, 27 (Ala. 1995) (discussing $6 million punitive damage award affirmed in Lowndes County); Himelstein, *supra* note 14 (explaining punitive damage award of $50 million in Barbour County).

THE NEED FOR JUDICIAL RESTRAINT

THE HONORABLE HAROLD SEE, SECOND PANELIST*

Bruce McKee apparently left Alabama after I did, and I am pleased to hear how much better things are there now than they were yesterday, when I left.

As I understand Bruce McKee's arguments, they begin with the proposition that business is good in Alabama. Look at the Mercedes Benz plant. Mercedes came to Alabama and invested, or will invest, about three hundred million dollars in plant and equipment. What is not mentioned is that the State of Alabama paid Mercedes about three hundred million dollars in concessions. It is certainly true that related businesses have come in, or are coming in, to service the Mercedes plant and, of course, that is the reason Alabama was willing to make such an investment—that is, to hang out a sign saying "Alabama is ready for business worldwide."

The Mercedes investment has had an effect. Statistics on employment and the creation of new jobs show that back in May 1995, at the height of Mercedes's entrance into Alabama, with the announcement of plant and equipment, Alabama climbed in the rate of job creation from about twenty-fifth among the fifty states to eighteenth.[1] That was in May 1995. This figure steadily declined, and by May 1996, Alabama had dropped to forty-fourth among the fifty states in job creation.[2] There is something else going on, something beyond the investment in the Mercedes plant.

As I understand Bruce McKee's second argument, it is that many laws in the State of Alabama favor defendants.[3] It is a peculiar kind of logic to say, "Well, sure, there are some things that favor some plaintiffs, but other plaintiffs are disadvantaged; therefore, the law is fair, on balance." If there is a problem of laws that favor defendants, those laws should be

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1. *See* Statistics Compiled by Economic Outlook Center, Arizona State University College of Business (1996) (on file with *New York Law School Law Review*).

2. The monthly figures show the following rankings: June - 20th, July - 23rd, August - 26th, September - 31st, October - 31st, November - 36th, December - 30th, January - 32nd, February - 39th, March - 38th, April - 39th, May - 44th, June - 47th. *See id.*

3. *See* Bruce McKee, *Alabama Is Not an Aberrant Jurisdiction*, 41 N.Y.L.SCH. L. REV. 543, 544-46 (1997).

changed. If there is a problem in Alabama with respect to some plaintiffs, then something should be done about that.

I think Bruce McKee's third argument[4] is that, considered state-wide, there is no problem with juries. I agree. I am an advocate of the jury system. I used to be a courtroom lawyer and believe in the important fact-finding role that juries play in effecting justice.

I want to remind you, though, that judges also have a job. It is the judge's responsibility to define the law that the juries are supposed to enforce and apply. I submit to you that, in fact, this is the fundamental nature of the problem in Alabama.

But, let me return for a moment to the argument that Alabama is just like every other state, that there is no real problem. Wherever you go, from *USA Today* to *Forbes*, you can read that if you want to win a big lawsuit, you should go to Alabama.[5] There is something going on in Alabama. Whatever Mr. McKee may say about the accuracy of the figures, about how much actually got paid, comparable figures must be used to compare jurisdictions. We must compare apples to apples and oranges to oranges.

From 1974 to 1978, excluding wrongful death awards, Alabama's Supreme Court affirmed $409,000 in punitive damages; from 1979 to 1983 the figure was over four million dollars; from 1984 to 1988, over thirty-five million dollars; and from 1989 to 1993, Alabama's Supreme Court affirmed over ninety million dollars in punitive damage awards.[6]

Looking at a slightly different period of time, 1987 to August 1994, the Supreme Court of Alabama affirmed $53.1 million in punitive damages, which is over three times the punitive damage awards affirmed by the appellate courts of Tennessee, Mississippi, and Georgia combined.[7]

Business Week reports median personal injury punitive damage awards from 1990 to 1993 for ten states.[8] The two highest are Alabama and California. The reason the presidential candidates spend more time in California than in Alabama is that there are a lot more people in California. Yet despite the population differential, Alabama is in a virtual

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4. *See id.* at 545-46.

5. *See* Peter Huber, *Fleeing Alabama*, FORBES, July 15, 1996, at 92; Dick Thornburgh, *Want to Win a Big Suit? Go to Alabama*, USA TODAY, June 27, 1996, at 13A.

6. Telephone Interview with Forrest S. Latta, Attorney, Pierce, Ledyard, Latta & Wasden, Mobile, Ala. (Jan. 29, 1997).

7. *See* Linda Himelstein, *Jackpots from Alabama Juries: A String of Mammoth Awards Has Insurers Starting to Flee*, BUS. WK., Nov. 28, 1994, at 83; *see also* Thornburgh, *supra* note 5, at 13A (detailing punitive damage totals awarded by juries in Alabama, Georgia, Tennessee and Mississippi).

8. *See* Himelstein, *supra* note 7.

dead heat for first place in the nation for gross punitive damages awards. In fact, I have the cases listed here for 1994, 1995 and 1996. If we look at non-wrongful death cases in 1995, there were ninety-nine trial level cases with $120.1 million in punitive damage awards in the State of Alabama.[9] In 1996 through the month of July, just seven months, there were twenty cases with $174 million in punitive damages.[10]

If you look only at the numbers provided by the Alabama Administrative Office of Courts, you will find that in 1994, the average punitive damages award was a little over $1 million.[11] In 1995, it was over $1.2 million.[12]

There is something going on and it has a real effect on real people. This effect can be felt not only in the courtroom but also in the ordinary activities of people in their daily lives. For example, here is an invitation someone sent to me. I call it an invitation, but it is more of a dis-invitation.

> With much dismay, we announce that after sixteen years of fun, food and fellowship, the Annual Men's Christmas Party will not be held in 1995. Unavoidable financial risk, both to you and to us from potentially large punitive court awards, is an unmanageable threat we cannot ignore. We hope you understand . . . .

They cancelled their party because of their concern about what is going on. But the effects on people's lives of Alabama's tort problem are far more profound than the cancellation of Christmas parties.

Consider, a businessman named Lewis Fuller who runs a medical supply business in Alabama. He used to supply monitors for sudden infant death syndrome. They activate when a child stops breathing. The parents rush in and revive the child. Mr. Fuller no longer sells the monitors.

Mr. Fuller also used to convert vans for paraplegics who do not have the upper body strength to lift themselves into the seat of a car. He would add a winch to the van to lift the driver and help him or her into the van. Mr. Fuller no longer does that either. He says it is for the same reason he no longer makes the monitors: imagine what would happen if a cable

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9. *See* ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1995 ANNUAL REPORT 26 (1995).

10. *See* ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1996 ANNUAL REPORT 25 (1996).

11. *See* ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1994 ANNUAL REPORT 29 (1994).

12. *See* ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 9.

broke.[13] Because of this fear of tort liability, there are people who do not have jobs. There are people who cannot get products that would make their lives better.

The fundamental problem is not a problem with juries. It is a problem of the interpretation of the law. While Alabama's statutory law may be adequate on its face, the problem lies in its interpretation.

For example, we had a recent case involving BIC lighters.[14] BIC lighters are labeled with a warning to keep the product away from children. Yet our Supreme Court says such a warning may be inadequate and may justify punitive damages because it fails to warn about the attractiveness of lighters to children; it fails to warn that small children could operate lighters; and it fails to warn of the serious danger that fire can be to children.[15] So failing to put that additional notice on each lighter may result in punitive damages. That is the nature of the problem.

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13. *See* Dave Shiflett, *Alabama Jury Booty*, AM. SPECTATOR, Apr. 19, 1996, at 35, 39.

14. *See* Bean v. BIC Corp., 597 So. 2d 1350 (Ala. 1992).

15. *See id.* at 1353-54.

IS ALABAMA A JURISDICTION OUT OF CONTROL? THAT DEPENDS—

LEONARD NELSON, THIRD PANELIST*

I guess it is appropriate for me to come third in line, because I am between Bruce McKee and Harold See on the issue. I believe Alabama in some respects is a jurisdiction out of control. I think if one looks at consumer fraud cases, at bad faith actions against insurance companies, and at nationwide class actions, one could say with good reason that Alabama is out of control, and it is primarily due to activities in about two or three counties—Barbour, Lowndes and Greene Counties. There have been some huge awards down there, many of them I think unwarranted. It is possible to go to some of those counties and get a class action certified ex parte before defendants have even filed a response.[1] So there are some peculiarities in Alabama.

However, I think it is important not to paint with too broad a brush. When looking at tort reform, it is important to go sector by sector and state by state. Thus, while Alabama may be out of control in some sectors of the civil justice system, there are other sectors where it is not. For example, in some states, the medical liability system may be out of control—perhaps on Long Island or in South Florida—yet there are other states where the medical liability system probably is not out of control.

I am going to talk primarily today about the medical liability system in Alabama. First of all, I am going to give you some statistics that I think suggest Alabama is not a jurisdiction out of control. In fact, it is probably very favorable to defendants. And then, secondly, I am going to talk about some factors that explain why Alabama, in the medical liability area, is so friendly to defendants while, in other areas, it may not be.

Let us begin by looking at some figures. The amount of claims filed in Alabama has not increased at alarming levels. In 1992, out of a total of 43,866 civil cases filed in Alabama, there were only 275 medical malpractice cases.[2] That dropped in 1993 to 267 out of a total of 42,249

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* Professor and Associate Dean for Academic Affairs, Samford University's Cumberland School of Law.

1. *See Ex parte* Sizemore, 611 So. 2d 1069, 1074 (Ala. 1993) (Houston, J., dissenting) (discussing Melof v. Hunt, 718 F. Supp. 877 (M.D. Ala. 1989), a class action where the class was certified prior to defendants being given notice or the opportunity to file defensive pleadings).

2. *See* ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1993 ANNUAL REPORT 26 (1993).

cases filed;[3] down again in 1994 to 262 out of 43,002 cases filed;[4] and then up again in 1995 to 294 out of 45,050 cases filed.[5] Not a particularly large number of medical malpractice claims. These are claims actually filed state-wide.

Claims reported to insurance companies have been stable. There are quite a few insurance companies that write medical liability business in Alabama, but the largest chunk of business is held by Mutual Assurance, which used to be the captive. It was a mutual company owned by physicians; now, it is a stock company. Coastal Insurance is another company that has a good share of the market. St. Paul, which is the largest nationally, has some share of the Alabama market, and there are a few other small ones. Claims reported to Mutual Assurance have been very stable: in 1991, there were 671 claims; in 1992, there were 639 claims (it dropped); and in 1993, there were 559 claims.[6] The amount went up a little bit to 584, in 1994, and then down again in 1995, to 508.[7] So these statistics show there has actually been a decline in claim frequency. I received some data from Coastal Insurance, and their figures are about the same.[8] In fact, claim frequency has remained virtually unchanged in recent years.

What about premium levels? Well, premium levels do not seem to be particularly high in Alabama. According to data from St. Paul Fire and Marine, the national average annual rates for malpractice coverage—and this is for one million/three million dollar claim coverage for a family practitioner—ranges from $5388 in Arkansas, to about $49,000 annually in Michigan. Alabama's average annual rate is $12,860, which is clearly not on the high side. It is less than Mississippi at $12,953, less than Georgia at $13,360, and substantially less than Florida at $20,503 a year.[9] So there is nothing too alarming there.

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3. *See id.*

4. *See* ADMINISTRATIVE OFFICE OF COURTS, ALABAMA JUDICIAL SYSTEM: 1994 ANNUAL REPORT 31 (1994).

5. *See* Administrative Office of Courts, Circuit Court Civil Dispositions: FY 1995 (1995) (unpublished report on file with *New York Law School Law Review*).

6. *See* MUTUAL ASSURANCE, INC., ANNUAL STATEMENT TO THE INSURANCE DEPARTMENT OF THE STATE OF ALABAMA FOR THE YEAR ENDED DECEMBER 31, 1995, at 81-82 (1996).

7. *See id.*

8. *See* COASTAL INS. GROUP, INC., 1995 ANNUAL REPORT 58 (1995).

9. *See* ST. PAUL MED. SERVS., PHYSICIANS & SURGEONS UPDATE: 1996 MID-YEAR REPORT 8-9 (June 1996).

In fact, oddly enough, Alabama had a $400,000 cap on noneconomic compensatory damages, which was declared unconstitutional in 1991.[10] Since that time, premiums have actually dropped about $1200; so the premium rates have actually gone down in the last few years.

What about the number of plaintiffs' verdicts? These statistics are almost shocking. It has been very low. In 1991, there were only two plaintiffs' verdicts statewide against Mutual Assurance's insureds compared to 103 defense verdicts in malpractice cases. In 1990, there were five plaintiffs' verdicts, compared to 121 defense verdicts.[11] It is very tough to win a plaintiffs' malpractice action in Alabama. The average verdict those years was $288,000, in 1990, and $174,000, in 1991—not alarmingly high.[12]

What about the profitability of medical liability insurers? This has been a good line of business, particularly for Mutual Assurance. As I mentioned, Mutual started out as the physicians' captive in 1976 and converted to a stock company in 1991. It is the largest provider of professional liability insurance in Alabama. In 1993, they recorded a thirty-three percent increase in net income over the prior year.[13] In 1993, their net income was over thirty million dollars as compared to about twenty-two million dollars in 1992.[14] For the fourth quarter of 1993, they had profits of nearly eight million dollars or ninety-two cents a share, which is a pretty good increase compared to the profit of five million dollars or fifty-nine cents a share in 1992.[15] So it is very difficult to describe Alabama as a jurisdiction out of control, and in fact, if anything, it may be almost too pro-defendant.

I occasionally get calls from people, who have been injured through malpractice, who tell me that they have seen several lawyers, yet none will take their case even though liability is clear; the damages just are not high enough. I am told by some lawyers, and there are only about two firms in the state really doing medical malpractice now, that they will turn down about one hundred cases for every case they take. And, before they take a case, they want to be pretty clear there will be liability, and the special damages will have to be at least two hundred-fifty thousand

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10. *See* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991).

11. *See* MASA's Experience Last Ten Years, Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995) (containing Mutual Assurance summary information that was offered into evidence and is part of the record) (on file with *New York Law School Law Review*).

12. *See id.*

13. *See Mutual Assurance, Inc. Says Income Up 33%*, BIRMINGHAM POST HERALD, Feb. 9, 1994, at E4.

14. *See id.*

15. *See id.*

dollars. It costs about fifty thousand dollars to work up a case, so a lawyer must be careful before taking it because plaintiffs do not do well in court in Alabama in malpractice actions.

Why is this? I think it is due more to the attitudes of the participants in the system—the jurors, judges, and counsel—than the statutory reforms. As I mentioned, most tort reform measures, such as damages caps, were struck down. We had a $400,000 cap on noneconomic compensatory damages, yet it was struck down in 1991.[16] There was a million dollar cap on wrongful death actions that was declared unconstitutional in 1995.[17] Alabama is a very peculiar jurisdiction. The only thing one can recover in a wrongful death action is punitive damages. In fact, those punitive damages are proportionate to compensatory damages, but they are characterized as punitive damages.

Physicians and hospitals still command substantial respect in Alabama, especially in rural areas. Jurors, for the most part, are reluctant to find for plaintiffs. There are still close relationships between plaintiffs and their providers. The managed care market is not mature in Alabama and it is, basically, fee-for-service medicine. People have longstanding personal relationships with their doctors. In many rural counties, there is only one hospital; the citizens like their hospital and they do not want to sue it. And jurors are reluctant to return awards.

The health care sector is the largest sector of the economy in Birmingham and also has the largest number of employees. Basically, the health care sector took up the slack when the steel industry downsized. We have made a big investment in medical care in Alabama. We have two state medical schools, pretty unusual for a state the size of Alabama. Medical care is very important.

The Medical Association of Alabama, Mutual Assurance, and the Alabama Hospital Association are very potent political forces in Alabama. They have a lot of influence in the state legislature and I think they have some influence on judges too. Quite frankly, I think judges are somewhat deferential to the medical profession. There is also a real concern that if malpractice did get out of control, it could limit access in rural counties. Thus, I think there is a real concern about the possible adverse effect of malpractice litigation.

Mutual Assurance is a very tough opponent. Their announced policy states that they do not settle cases. They will pour resources into

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16. *See Moore*, 592 So. 2d 156.

17. *See* Smith v. Schulte, 671 So. 2d 1334, 1343 (Ala. 1995); Ray v. Anesthesia Ass'n, 674 So. 2d 525 (Ala. 1995); *see also* Henderson v. Alabama Power Co., 627 So. 2d 878, 893-94 (Ala. 1993) (holding that the provision of the Alabama Tort Reform Act limiting awards for punitive damages to $250,000 violated Alabama's constitutional right to trial by jury).

defending cases that, quite frankly, should never go to trial. Occasionally, that results in a big verdict. In those cases, the facts are usually egregious and the cases should have been settled. Mutual Assurance typically had an opportunity to settle them for a lot less before they went to trial, but, again, they do not settle cases. This tough stand requires that plaintiffs' attorneys carefully evaluate cases before they take them.

What about substantive law? Well, to conclude, as Mr. McKee indicated, substantive law is pretty favorable to defendants in Alabama. We have not done anything weird in medical malpractice. The standards of proof have been maintained. Loss of Chance Doctrine has been rejected,[18] and *res ipsa loquitur* is generally not available in medical malpractice cases.[19] Thus, the substantive law is very traditional in Alabama.

18. *See* McAfee v. Baptist Med. Ctr., 641 So. 2d 265, 267 (Ala. 1994).

19. *See* Rosemont, Inc. v. Marshall, 481 So. 2d 1126, 1129 (Ala. 1985).

CIVIL JUSTICE SYSTEMS IN OTHER DEMOCRATIC COUNTRIES PROVIDE MEANS TO TORPEDO THE LITIGATION EXPLOSION HERE

GERALD WALPIN, FOURTH PANELIST*

You may think after I get started that I got lost and got on the wrong panel. As a Northerner, the sole Northerner in this panel, I am not going to enter into this civil war going on in Alabama. Instead, I am going to bring us back, as I was asked to, to the general civil justice system problems in the United States by comparing us to some foreign countries. What is done in civil justice procedures in Alabama is a microcosm of the problems of our civil justice system in the entire country.

I want to read how one commentator described our civil justice system.

> [T]here is more than the normal amount of dissatisfaction with the present-day administration of justice in America . . . .
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> . . . .
>
> Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible businessman in the community.[1]

Sounds like an apt partial description of the problems today. Yet these words were actually spoken ninety years ago by Roscoe Pound.

There have been some changes in the civil justice system since then. Most, I suggest, are for the worse. The delay and expense have increased substantially, and the social engineers rampant in our courts have further exacerbated the problem by molding much of the civil justice system to function as a means of redistributing wealth—a function, I suggest, more properly left to legislatures in other democratic societies.

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1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), *reprinted in* John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark That Kindled the White Flame of Justice*, 20 J. AM. JUDICATURE SOC'Y 176, 179, 183 (1937).

The consensus among domestic and international observers alike remains that the American civil justice system is expensive, unpredictable, easily bogged down, and not productive for the society as a whole. For example, last year saw a seventeen percent rise in the national median for jury awards, including a forty percent rise in the median malpractice award from $356,000 in 1994 to $500,000 in 1995.[2]

In 1992, there were twenty million lawsuits filed in state and federal courts, one for each twelve and one-half persons in this country. In one year, 1985, analyzed by one commentator, tort litigation generated approximately $30 billion in costs.[3] The American Tort Reform Association estimates that the current cost of the American civil justice system is now up to $152 billion a year.[4]

Whatever the exact amount, and that is debatable, in the end, it is passed on to the American consumer in the form of higher prices. Interestingly, tort victims recover only about half of that cost; the remainder goes to lawyers. And while I confess that, as part of the legal profession, I did not mind the population's apparent interest in putting wealth into lawyers' pockets, I must, wearing my John Q. Citizen hat, ask whether enrichment of lawyers is in the best interests of our country.

An examination of civil justice systems in other nations yields two insights. First, that civil practice abroad, even in countries which share our common law tradition, differs from American civil practice in a number of ways. Second, that those differences act as checks on both litigation and costs of litigation such that these countries have not experienced the effects of the ongoing litigation explosion that plagues the American system.

These differences in procedure exist at every phase of a civil suit, which suggests numerous opportunities for reforming civil practice in the United States. And, I might suggest that the question of whether a band-aid change in our system, which some of our prior speakers have suggested, really can work is not the appropriate question to ask; rather, the question may more appropriately be whether we need some meaningful surgery.

One area in which the United States differs from other nations is in its provisions for class actions. Over time, class certification has become

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2. *See* Henry J. Reske, *Tort Awards Increasing: Experts Peg Rise to Decreased Publicity About Tort Reform, Profit-Driven Corporate Decision-Making*, A.B.A. J., May 1996, at 26.

3. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION iv (The RAND Corp. 1986) (estimating that in 1985, total tort litigation costs were between $29 and $36 billion).

4. *See* TILLINGHAST-TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 3 (1995).

increasingly available so that a class need not be composed of a group of persons who share an identical interest. As a practical matter, the real plaintiff, the real party in interest, is the plaintiff's attorney, not the nominal plaintiff.

The reality is that these class action attorneys make their fortunes by searching for what can be labeled a wrong, for example, to shareholders or consumers, and then use one of their many cadre of ever-ready nominal plaintiffs to bring the lawsuit. In the end, the only individual who obtains any sizeable reward from the lawsuit is the class counsel.

Great Britain, Australia, and Israel, three of the countries that I used as examples, do not welcome class action mass claims. Great Britain and Australia have effectively limited class actions to those few instances involving identical claims, not just common interests or common issue claims.[5] And, to avoid an unacceptable burden on society from class actions, Israel, which recently enacted class action procedure only for its banking industry, expressly permits, unlike the United States, class action status to be denied on the basis of the detriment to the public or to society from permitting such an action.[6]

One feature of the American civil justice system that clearly is a motivating force behind the litigation explosion is the contingent fee agreement, which effectively provides a risk-bearing co-venturer in the person of the lawyer who will expend his services knowing no payment will be forthcoming in case of defeat. England and Australia either prohibit contingency arrangements or make them unenforceable.[7] Even England is now searching for a means of making attorneys available to poor people with a meritorious claim and has, therefore, adopted a "conditional fee arrangement."[8] The arrangement limits attorneys to a

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5. *See* Letter from Philip Mandelker, Esq., member of the Israeli Bar, to Gerald Walpin, Esq. (Aug. 9, 1996) [hereinafter August 9 Letter] (on file with *New York Law School Law Review*).

6. *See* Letter from Philip Mandelker, Esq., member of the Israeli Bar, to Gerald Walpin, Esq. (May 6, 1996) (on file with *New York Law School Law Review*).

7. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1629 (1993); *see also* Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 217 n.123 (1994); Michael Tilbury & Harold Luntz, *Punitive Damages in Australian Law*, 17 LOY. L.A. INT'L & COMP. L.J. 769, 775-76 (1995).

8. The British are careful to distinguish the conditional fee from the contingent fee. *See* Letter from Andrew C. Dobson, Esq., solicitor in England, to Gerald Walpin, Esq. (June 18, 1996) [hereinafter June 18 Letter] (on file with *New York Law School Law Review*); *see also* Gerald Walpin, *America's Failing Civil Justice System: Can We Learn from Other Countries?*, 41 N.Y.L. SCH. L. REV. 647, 655-56 (1997).

maximum of twice the hourly rate in return for no fee if the client loses.[9] Separating the attorney's fee from measurement by the size of the recovery, and limiting it to double or nothing, certainly cools attorneys' interests in bringing claims that might well be lost.

Fee shifting in England, Australia and Israel—the losing party in a lawsuit pays the winning party's costs and legal fees—also creates governors against those countries speeding to become the litigious society we have here. While the amount of costs that are shifted to the losing party is subject to court review, fee shifting is obviously a significant disincentive to litigation. In contrast, with minor statutory exceptions, fee shifting as we know it is not permitted in the United States.

One of the biggest causes of the excessive cost and delay in the United States civil justice system is pretrial discovery. Experience shows that pretrial discovery amounts to about eighty percent of the costs of any major litigation. And, without the long period, often many years spent in pretrial discovery, cases could go to trial within months instead of years. The United States is unique in allowing broad pretrial discovery that includes not only document production but extensive interrogatories and pretrial depositions. England and Australia do not provide for pretrial depositions,[10] and Israel allows a deposition only when the witness is about to leave the country.[11] Pretrial discovery in those three countries is focused on document production, but, even on that subject, those countries avoid immense time and expense by mandating automatic production by each party of all documents relevant to the lawsuit.[12] While certain specific additional document discovery may be permitted in a given case, fishing expeditions are not allowed.

Of course, another factor is that the United States uses juries in civil cases while Britain, Australia and Israel do not.[13] That factor cannot be

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9. *See* Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 863 (1996); *see also* June 18 Letter, *supra* note 8.

10. *See* Letter from Andrew C. Dobson, Esq., solicitor in England, to Gerald Walpin, Esq. (June 12, 1996) [hereinafter June 12 Letter] (on file with *New York Law School Law Review*); MARK ARONSON & JILL HUNTER, LITIGATION: EVIDENCE AND PROCEDURE § 6.42 (5th ed. 1995).

11. *See* Letter from Philip Mandelker, Esq., member of the Israeli Bar, to Gerald Walpin, Esq. (June 3, 1996) [hereinafter June 3 Letter] (on file with *New York Law School Law Review*).

12. *See* ARONSON & HUNTER, *supra* note 10, §§ 6.11-12; *see also* August 9 Letter, *supra* note 5.

13. *See* Marcus A. Brown, 49 CONSUMER FIN. L.Q. REP. 109, 111 (1995); Tilbury & Luntz, *supra* note 7, at 775-76; *see also* Letter from David J. O'Callaghan, Esq., member of the Australian Bar, to Gerald Walpin, Esq. (Aug. 13, 1996) (on file with *New York Law School Law Review*); Letter from David J. O'Callaghan, Esq., member of the

ignored in evaluating our civil justice system. While the constitutional guarantee of a jury trial means that, like it or not, we are stuck with it, it does not mean that we cannot meaningfully tinker with the jury system. Punitive damages, the major part of the damage award in *BMW of North America, Inc., v. Gore*,[14] can constitutionally be left to the judge, not the jury.[15]

Regardless of where the power to assess damages lies, it is apparent that awards that are grossly excessive, like that in *Gore*, are assessed far too often, and there seems to be a trend toward awards that defy description, just like that in the *General Motors* case.[16] The problem is not limited to punitive damages but extends to compensatory awards, which include pain and suffering. Each type of award serves, essentially, as a license for sympathy verdicts.

For a variety of reasons, other civil systems have not experienced damage awards of comparable magnitude or frequency. Israel, for one, does not employ punitive damages at all.[17] Another method of controlling excessive awards is to place a cap on damages. Canada, which I will draw into this, for example, caps damage awards at a level adjusted annually according to the consumer price index.[18] The cap for nonpecuniary damages in 1995 was approximately $260,000.[19]

A variation of the cap is the tariff. Some Australian jurisdictions, in an effort to achieve consistency, place a tariff on nonpecuniary loss in defamation cases[20] to ensure that these awards are not disproportionate to awards for noneconomic loss in serious personal injury cases. British judges use a tariff as well.[21]

Australian Bar, to Gerald Walpin, Esq. (Aug. 29, 1996) (on file with *New York Law School Law Review*); June 12 Letter, *supra* note 10.

14. 116 S. Ct. 1589 (1996).

15. *See* George L. Priest, *Punitive Damages Reform: The Case of Reform*, 56 LA. L. REV. 825, 825, 837-38 (1996); Susanah Mead, *Punitive Damages and the Spill Felt Round the World: A U.S. Perspective*, 17 LOY. L.A. INT'L & COMP. L.J. 829, 857 (1995).

16. *See* Hardy v. General Motors Corp., CV-93-56 (Cir. Ct., Lowndes Co., Ala., June 3, 1996); *see also* David Lawder, *GM Ordered to Pay $150 Million Damages*, WASH. POST, June 4, 1996, at C1.

17. *See* June 3 Letter, *supra* note 11.

18. *See* PETER RICHARDSON & MACKENZIE GERVAIS, PRODUCTS LIABILITY—THE CANADIAN EXPERIENCE 167, 187 (ALI-ABA Course of Study 1995).

19. *See id.*

20. *See* Tilbury & Luntz, *supra* note 7, at 791.

21. *See* Schwarzschild, *supra* note 7, at 217-18.

Another possibility is to follow British courts, which calculate damages for lost wages based on a plaintiff's net after-tax income rather than on gross salary.[22] British courts also employ an interim damage scheme in which a defendant pays some agreed-upon amount to an injured plaintiff, and the court retains the power to modify the judgment if the plaintiff's condition improves.[23] This last approach responds to a concern that a plaintiff may exaggerate, or unnecessarily prolong, the appearance of suffering during the trial—donning the stereotypical neck brace—only to miraculously recover and enjoy a wealthy, healthy life thereafter.

Unsurprisingly, judgments in the U.K. tend to be much lower than they are here. A 1991 survey suggested that there are fewer than forty million dollar personal injury verdicts annually in England and Wales combined,[24] compared to at least seven hundred in this country.[25]

I have mentioned only some, albeit major, differences between our system and those of Britain, Australia, and Israel. I confess to being a patriotic American who would not want to live elsewhere, but that does not mean America should not learn from other countries.

Britain, Australia and Israel are generally recognized as democratic nations with open and fair judicial systems, and they do not have our problems. I suggest that our judiciary, our legal profession, and the legislatures, should seriously consider what these other countries are doing and why they do not have our problems. We need to do something about this in the United States.

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22. *See* P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1025 (1987).

23. *See* Nancy M. Simone, *Medical Malpractice Litigation: A Comparative Analysis of United States and Great Britain*, 12 SUFFOLK TRANSNAT'L L.J. 577, 595 (1989).

24. *See* Schwarzschild, *supra* note 7, at 218.

25. *See id.*

PANEL FOUR:
PANELIST RESPONSES

THE HONORABLE BILL WILSON: My friends who are biblical scholars tell me the Good Book says that sin shall taint for three generations. My great grandfather must have been a hell of a sinner, because the boll weevil ran my grandfather out of cotton farming, the pine borer ran my father out of pine timber farming, and, here, tort reform is going to run me out of the legal business. So I am glad I got a lifetime appointment before it happened.

Mr. McKee, since two people more or less jumped on you, and you went first, I guess you have the burden of proof. Would you like to respond briefly?

BRUCE J. McKEE: I will just repeat that you have to beware of statistics; you have to look much further as to amounts actually paid and to the actual facts of those cases. Also, the problem perceived in Alabama still primarily revolves around two counties.

One of the things that Brandt Ayers of the *Anniston Star* said is that the perceived crisis in Alabama is really out of two counties, Barbour and Lowndes.[1] In 1994, four cases from those two counties accounted for $114 million of the state's total punitive damage awards of over $136 million.[2]

I am not here to defend every jury result in every individual case. In my John Q. Public hat, there are cases that I would look at and think were out of line. But, again, it is unfair to characterize an entire jurisdiction as out of control; it is unfair to demonize an entire segment of the Bar, the plaintiffs' bar.

The business climate is generally good, and the perceived problem in Alabama is merely one of a well-structured and well-funded public relations campaign on behalf of the few insurance companies and manufacturers who fund them. I do defend our system as being one that is as fair as any in the country.

JUDGE WILSON: I used to practice before a judge, and when I would make my argument on a motion, he would suddenly start flopping his arms and say, "Hold up just a minute, I feel a ruling coming on." On my right here, which one of y'all feels the strongest urge to respond to this?

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1. *See* Brandt Ayers, *Tort Hell? Helluva Fib*, ANNISTON STAR, Jan. 28, 1996, at D1.

2. *See id.*

THE HONORABLE HAROLD SEE: It is certainly true that we ought to remember who is saying what, and we ought to be careful of statistics. I think the world of Brandt Ayers. He is a real gentleman. He runs a whale of a newspaper. But, he is as liberal as they come. Remember that when you listen to what Mr. Ayers has to say.

On the substantive matter, I did not become interested in this problem because of what I read in the newspapers. I became interested in this problem because of what I read in the opinions of the Supreme Court of Alabama. That is, as I suggested, where I think the problem is. It may well be true that the decisions or the awards that we are looking at come disproprotionately out of Barbour and Lowndes Counties. In fact, when we look at Barbour County, we need to look at the divisions of it. Barbour County is a rural county of about twenty-five thousand people. About eighteen thousand of those are in the community of Eufaula. The other seven thousand people are in the Clayton division of the Circuit Court of Barbour County, and it is the Clayton division that has the enormous number of cases.

Barbour County Circuit Judge William H. Robertson probably set a state record Thursday when he held scheduling conferences for 196 cases in the Clayton division of the Circuit Court. We have only seven thousand people there, yet we have 196 cases. Yes, there is a problem, and it is not a problem that is statewide in nature. But the questions are: Who is supposed to handle that problem? Who is supposed to keep it under control? Ultimately, the responsibility falls on the Supreme Court of Alabama. It is the Supreme Court, in its reading of the law, that is enticing the juries in Barbour County and the lawyers who are filing their actions.

JUDGE WILSON: When I was a panelist, it always burned me up when a moderator said anything, but I would like to make this point. In the federal system—this is the federal system only I am talking about—from 1985 through 1994, the number of cases per federal judge went down.[3] I do not know what has happened in 1995 and 1996, but there has been a lot of criminalizing of what were traditionally state crimes. So there is not any meltdown or gridlock in the federal courts, as a general rule. There are pockets where they have problems, but you

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3. *See* JUDICIAL CONFERENCE OF THE U.S., ANNOTATED REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. 139 (1990) (reporting that 273,670 civil cases were commenced in U.S. district courts in 1985 and 217,879 civil cases were commenced in U.S. district courts in 1990); *see also* ADMINISTRATIVE OFFICE OF THE U.S., FEDERAL JUDICIAL WORKLOAD STATISTICS 2 (1993) (reporting that there were 414 civil cases per judgeship in 1989, and 352 civil cases per judgeship in 1993).

can read about this in an article by G. Thomas Eisele in the *Southern Methodist University Law Review* from a couple of years ago.[4] So the federal system is not melting down.

Now, do not tell that to my people back in Arkansas, because I told them I am overworked and my docket is out of control. But one can get a trial in Arkansas within a year and one-half, and we have one of the heavier case loads in the country on a weighted case basis.

Mr. Nelson, did you have something else to say?

PROFESSOR LEONARD NELSON: Well, on the Clayton division of Barbour County, you have got to realize that that is the main business in that division. There is not much else to do there, so they give damage awards to keep the economy going in the Clayton division.

The usual justification for the large punitive damage awards in consumer fraud and bad faith cases is that Alabama, at the state level, does not have an effective consumer protection scheme and does not have adequate resources in the insurance commissioner's office. It is pitiful; I have never seen anything like it. I went down to the insurance commissioner's office to look at some of the annual reports recently. It was like a closet. The place was a mess, and there was hardly any staff. It was really a pitiful situation. And their consumer protection scheme is almost nonexistent.

By comparison, I used to practice law in the State of Washington. The State of Washington is one of the few states that does not allow punitive damages in common law.[5] It does, however, have a consumer protection statute[6] that will give you treble damages plus attorneys' fees. And, it has a very active insurance commissioner's office and a very active Consumer Protection Division in the state Attorney General's office. To me, that is a preferable scheme.

I think that would be the kind of reform I would like to see in Alabama. I do not think we need to have punitive damages in consumer fraud and insurance cases. I think what we need is a much more active Attorney General's office in the area of consumer protection and a much more active insurance commissioner's office. I think the public would be better served by that sort of reform.

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4. *See* G. Thomas Eisele, *Differing Visions-Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1936-37 (1993).

5. *See* Spokane Truck & Dray Co. v. Hoefer, 25 P. 1072, 1075 (Wash. 1891) (stating that the doctrine of punitive damages is "unsound in principle, and unfair and dangerous in practice").

6. *See* WASH. REV. CODE ANN. § 19.86 (West 1961).

JUDGE WILSON: Mr. Walpin, do you want to hit them one more time, briefly?

GERALD WALPIN: I appreciate being asked. I am going to jump in where I said I would not jump in—on the civil war in Alabama.

I want to speak as a Northerner who looks at it as something that has an appearance of unfairness, and I want to give you one case in Alabama and ask you if this really is what occurs there. It is a case in which, I confess, my firm has some involvement and that is why I know about it. It was a trial before Judge Robertson in Barbour County.

It is a case in which the judge reduced a fifteen million dollar punitive damage award to a "measly" six million dollars. It was a case in which, without going through all the facts, there was a question of the statute of limitations, which is two years. The plaintiffs admitted that if they had read the documents they had received from the insurance company, they would have understood facts that would have put them on notice. Yet the jury came in with an award, and the judge did not set it aside. What troubles me most about it, and this is what I am getting to, is that Judge Robertson was a former law partner of plaintiffs' counsel, Jere Beasley. And, in addition to being his former law partner, Judge Robertson took an active role in Mr. Beasley's failed campaign for lieutenant governor, and members of Mr. Beasley's firm had donated more than eighty percent of the campaign contributions to Judge Robertson's election to the Bench.

Now, if this really is going on in Alabama, I think this is what actually gives the state the bad name.

MR. MCKEE: I will respond to that as best I can. I am not familiar with that particular case on the facts, but in terms of the judge/lawyer connection, the Republican governor of Alabama, Fob James, called a special session earlier this year to deal with tort reform. There was a lot of negotiation between the plaintiffs' bar and the business interests in Alabama, primarily represented by the Business Council of Alabama (BCA). A proposed package of tort reform bills was agreed to by all sides—plaintiffs, governor, and the BCA. But, the next day, the BCA backed out of the deal, or what we thought was a deal.

Part of the governor's package would have, by statute, placed specific restrictions on judges hearing cases where there was involvement like you mentioned. The BCA was the party that killed that whole package of bills that would have cured that. To my understanding, the proposed statute, which did not become law, was primarily to cure that specific perceived problem in Barbour County. There is another statute, however, coming

into effect in Alabama that has to do with recusal of judges and campaign contributions.[7]

Under the new law, if a lawyer or a firm had given a trial judge more than two thousand dollars in contributions, or had given an appellate judge more than four thousand dollars in contributions, then it has to be public record and must be disclosed; and, if the opposing party seeks the recusal of that judge, it is mandatory that that judge must recuse.[8]

So, of course, as Professor See correctly stated, we will have to see how that statute is ultimately interpreted by the courts. We also have to look at court interpretations. But, presumably, the campaign contributions statute will also take care of a lot of what is perceived to be a too-cozy situation in a few particular counties in Alabama.

JUDGE WILSON: In Arkansas, I chaired the Merit Selection Committee of the Arkansas Bar Association for twelve years. We have the partisan election of judges at all levels in Arkansas. We studied every way of selecting judges, and after that study, I am against all ways of selecting them. However, the partisan election has got to be the worst way.

In any event, now it is time for questions from the audience, but first, I have just one caveat: I have a cousin who serves in the Arkansas legislature, and he has some weak points, but lack of energy is not one of them. He introduces all kinds of bills, sometimes without reading them. So when he goes to the well of the House to explain them and somebody asks him a question, and he does not have an answer, he simply says, "If you don't like my bill, just vote against it. Next question." So if you ask me a question, that is the way I am going to handle it.

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7. *See* ALA. CODE § 12-24-2 (1996).

8. *See id.* § 12-24-2(c).

QUESTION: First, just a quick comment on Mr. Walpin's presentation. You are right that in Britain and in France they do not use litigation as an impulse of social redistribution, but, on the other hand, they have so much redistribution going on in that society through other mechanisms. That does not mean we should not make the effort to change it here.

I really wanted to ask Mr. Nelson a question. I loved your presentation about the cultural forces going on in Alabama and the different strains of how, in terms of looking at the medical malpractice situation, it sounds like you have a model jurisdiction where the defendant class, you might say, or the potential defendant class, is doing everything right. And it makes me wonder if we are going into this, to some extent, in the wrong direction in terms of changing the law and bashing the trial lawyers.

Maybe it is the business community in Alabama who ought to be doing a little bit more in terms of trying to weave themselves into the community. I am wondering if BMW failed to do that,[1] or if there was some way they could have done it.

PROFESSOR LEONARD NELSON: Well, of course, the big problem with Alabama is that if you are a big out-of-state defendant, the jurors down there are not going to view you the same way as they would their family doctor. Out-of-state corporate defendants have a big problem. And, frankly, if you look at some of these cases, there are a lot of scams running. Alabama is a good state in which to run scams, because, as I mentioned, they do not have an active consumer protection division at the Attorney General level.

QUESTION: My question is about the election of the Chief Justice of the Supreme Court of Alabama. I would like comments from both Harold See and Bruce McKee about that case, which involved an eleven-month legal battle over who was the Chief Justice of our Supreme Court. And, Mr. See, you had mentioned the warning label on the BIC lighter. I think maybe a nice tie-in is, what is the warning label on an absentee ballot in Alabama?

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1. A consumer sued BMW for damages claiming fraud due to BMW's policy of not advising its dealers that it repairs cars damaged during transport if the cost of repair did not exceed three percent of the suggested retail cost. *See* BMW of N. Am., Inc., v. Gore, 116 S. Ct. 1589, 1593 (1996).

THE HONORABLE HAROLD SEE: If any of you are from Alabama, you are fully familiar with this case. Those of you with accents, like my colleague here, may not be aware of it.

In 1994, the challenger, Perry Hooper, defeated the incumbent Sonny Hornsby for the Chief Justice's seat on the Supreme Court of Alabama by approximately 167 votes. There had been, in that election, roughly fifty thousand absentee ballots cast. Apparently, Alabamians are world travelers. Of those fifty thousand absentee ballots, about 1800 were not counted. These ballots were not counted because they did not comply with the absentee ballot statute. When you vote absentee, you have a ballot that is essentially like any other ballot. However, you stick it in an envelope, and on that envelope, it tells you what you must do.

To vote absentee, you must meet certain requirements—you are out of the county on that day, you work a shift that does not allow you to get to the polls, or some similar excuse. You are required to fill in your reason for voting absentee to show that you are entitled to vote absentee. You are also required to provide your name and address, and you must sign the ballot. The ballot gives notice that it must be witnessed "by two witnesses or notarized." It uses more words than that, but that is the basic idea.[2] The purpose of these requirements is to prevent fraudulent absentee ballots from being cast and counted.

In this election, there were approximately 1800 ballots that had not been witnessed or notarized. In an effort to change the outcome of the election, Sonny Hornsby's lawyers argued that the ballots should be counted even though they were neither witnessed nor notarized. Sonny Hornsby's lawyers—one of whom was Mr. McKee—asked this question: "The statute says, 'must be witnessed by two witnesses or notarized.' What does that mean?"

Four justices of the Supreme Court of Alabama decided that even though the 1800 ballots did not have two witnesses' signatures or a notary's affidavit, they were still good enough to be counted in Sonny Hornsby's election.[3] The federal judge who reviewed the case, however, said that counting the unwitnessed and unnotarized ballots constituted broad-gauged unfairness and amounted to ballot box stuffing.

THE HONORABLE BILL WILSON: You know, if you reformers keep on down in Alabama, it will get to where a dead person won't be able to vote.

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2. *See* ALA. CODE § 17-10-7 (1975).

3. *See* Roe v. Mobile County Appointment Bd., 676 So. 2d 1206, 1226 (Ala. 1995) (stating that "Alabama law requires the counting of all absentee ballots cast in the general election . . . which contain: (1) the place of residence of the person casting the ballot; (2) the reason for voting by absentee ballot; and (3) the signature of the voter").

JUDGE SEE: There is the old story about the fellows who were out in the graveyard looking for recently deceased voters. One of them was down in the valley, and the other was up on the side of the hill. The one down in the valley says, "Okay, we got enough, let's go."

The fellow up on the side of the hill replies, "Wait a minute, not so fast, these folks up here have just as much right to vote as those down there."

BRUCE MCKEE: Judge, if I might make one quick comment. Not to go into the details of the absentee ballot case, but in Alabama, as well as apparently in Arkansas, there are about nine or ten states that I think still elect the judges from top to bottom in partisan elections, and that has also been an ongoing debate topic in Alabama for many years. However, it is totally separate from this whole perceived tort reform crisis even though, now, the two issues have seemed to coalesce.

The politics in Alabama have been dominated by Democrats for years, and it was the Republicans and business interests who, for several years, advocated bills to change the election system and go to some kind of appointed system. But, the Democratic-controlled legislature always voted that down because they could elect Democrats.

Well, now, whose ox is being gored? Now, there is a Republican governor and a Republican legislature together with the conservative, business-related Democrats who control the legislature, so the trial lawyers and the Democratic party forces are saying, "Well, let's go to some system other than elections." But the Republicans won't listen to it because now they can elect Republican judges.

My personal view has always favored some form of the Missouri system, which forms a panel to present a list of names to the governor for appointment, and then those appointments have to stand for some sort of retention election.

The election of appellate judges in Alabama, which Professor See is now involved in, is part of the perceived problem. I think the immense amounts of money that go into statewide campaigns in Alabama does a disservice to the system—a disservice to the people. Whichever side wins, the public has an unfair perception that they are bought off by business, or they are bought off by the trial lawyers. Personally, I advocate going to some kind of appointment system and getting rid of elections for judges. But the politics in Alabama being what they are, I fear I am not going to see that change any time soon.

QUESTION: There is one obvious means of tort reform that I have not heard mentioned, and I wonder what the reaction would be, particularly from the plaintiffs' bar, to the substitution of contract law for tort law—that is, the greater use of disclaimers and other sorts of exculpatory legal arrangements that would seem to have particular

application in product liability and medical malpractice cases. I would think that in Alabama, in particular, there would be some movement in that direction in the sense that the product liability laws as they now exist discriminate against the less affluent. It eliminates low-priced product alternatives from the market and increases the prices of consumer goods to the extent that the poor spend a larger percentage of their income on consumer goods. It also increases the price of Chevrolets more than it does Rolls Royces.

What, Mr. McKee, would you say to the substitution of contract for tort law, or even the elimination of tort law in certain obvious areas?

MR. McKEE: Well, my obvious answer as a plaintiffs' lawyer is, of course, "no." I certainly would not be in favor of any wholesale replacement of tort law.

The larger issue in this entire debate, I think, is the role of the jury. I view many of the attacks coming from the other side (tort reformers) as really being an attack on the jury system. I think it depends upon your own individual belief about the value or dis-value of the jury system.

In my view, the jury in America works as a part of the democratic function. There are the executive, legislative, and judicial branches. But, average citizens get their chance to speak their mind as juries, and when they see absolute frauds and scams, they should be allowed to award any kind of damages, with whatever constitutional limitations.

But, without the role of juries and punitive damages in this country, fraud on poor people would be much worse than it is today, unless we switch to a European system.[4] If we want to have a seventy or ninety percent tax rate and provide all these social services and give the Attorney General's office hundreds of millions of dollars to go around and police every insurance agent, we could do it that way, or we could do it through the jury system. I am a proponent of the current jury system.

JUDGE SEE: I am fully in support of Mr. McKee's statement about the role of the jury system. I think it is critical; I think it is vital to the nature of our American judicial system.

I do think, though, that juries deserve the help of a court that consistently applies the law the way the law is written. My objection is not an objection to the jury system. I have no problem with it. I have a serious problem with a court that is distorting statutes like that absentee ballot statute. It is serious when it takes the Supreme Court of the United

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4. *See generally* Gerald Walpin, *Civil Justice Systems in Other Democratic Countries Provide Means to Torpedo the Litigation Explosion Here*, 41 N.Y.L. SCH. L. REV. 557 (1997) (comparing and contrasting the civil justice system in America with those in England, Australia, and Israel).

States to tell the Supreme Court of Alabama, as they did in *BMW of North America, Inc., v. Gore*,[5] that "[e]lementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."[6] It was apparently Alabama's failure to provide such elementary fairness that made the *BMW* award "grossly excessive." There is a problem when judges are not doing their job properly.

GERALD WALPIN: I, too, am a believer in the jury system, despite all the problems and changes in the makeup of the jury over the decades. But that does not mean that you have to go to an extreme and say the jury is going to have the decision on every issue. We have no problem in criminal cases in saying that a jury decides whether a defendant is guilty or innocent, but the judge decides the quantum of punishment, the sanction.

Punitive damages are akin to that. It is, in effect, a sanction to be imposed, a penalty, and there is no reason why we cannot avoid this uncapped sympathy verdict—which is, I think, a cancer on our society—by saying the judges will decide the extent of a punitive damage award.

PROFESSOR NELSON: I might just mention that in medical malpractice, I would like to see more arbitration. Many states have statutory schemes authorizing pre-claim agreements to arbitrate in malpractice disputes and I would like to see something like that in Alabama. I think it would be an improvement.

QUESTION: I find it, for my part, wonderfully self-defeating that all of these nationwide scam artists not only descend in numbers on Alabama because of its lack of consumer protection laws, but they are all drawn moth-like to these three counties. They ply their scam trade in those three counties, preferentially.

I was glad to hear a distinction made between medical malpractice cases and other cases and that it was traced to its proper source, which is the difference between out-of-state defendants like BMW and in-state defendants like Mercedes. We tend to get them confused as car companies, but I am sure the two are not easily confused in Alabama.

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5. 116 S. Ct. at 1598 (holding that a two million dollar punitive damage award by Alabama Supreme Court, reduced from a four million dollar jury award, was still "grossly excessive").

6. *Id.* at 1591.

And one of the very first tort reforms I ever read about was ski resort liability relief in Colorado,[7] which sailed through a legislature much more easily than almost any other tort reform. It is one of the very rare liability situations in which you have overwhelmingly out-of-state plaintiffs suing in-state defendants, and I can only imagine the debate, such as it was. What are we waiting for? Let's give them extensive relief.

And, indeed, ski resort owners that cater, in small states, to urban visitors from other states have done among the best of any groups in state law tort reform, as you can well imagine.

What I wanted to ask, perhaps rhetorically, is that I understand perfectly well why the Alabama three county situation can arise, and I do not particularly hold it against Alabama, because if it is occurring there, I expect it is occurring somewhere else. The export of costs to shareholders in other states on behalf of a local population is what I would expect as a result of the revolution in long-arm jurisdiction, nationwide class actions, and the like. What I would like explained is the behavior in states like New York and Michigan where the brunt of the liability system falls on the local defendants, where medical malpractice law is really out of control, but there are not as many famous verdicts against out-of-state defendants.

Can you possibly explain this Yankee behavior? It makes no sense to me.

MR. WALPIN: You just explained it.

PROFESSOR NELSON: Yes, the medical malpractice situation is interesting to compare, and the only explanation I can come up with is that in Alabama, as I mentioned before, there is still this traditional way of practicing medicine, and there are longstanding relationships between the patients and the physicians. It is not unusual that people will have a family doctor for years. So the relationships are still close.

I suspect that in big urban areas, it is not the case anymore. With managed care and big HMOs, it is much more impersonal, and that may lead to a situation where jurors are much more willing to award big damage claims. So that is the only thing I can come up with right off the cuff on that.

QUESTION: Both Professors Nelson and See and Mr. McKee acknowledged that most of the problem in Alabama is centered in three counties, and all of you acknowledged that in medical malpractice, perhaps, there is in fact too much defendant protection and that the defendants are litigating cases that ought not be litigated.

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7. *See* COLO. REV. STAT. §§ 33-44-103 to -114 (1995).

In the previous day, there were a lot of panelists who mentioned that fee-shifting might be a solution for many of the problems that they saw with the American tort system. Do you think that the adoption of such a system, since there are problems in Alabama both with the defense bar and the plaintiffs' bar, would lead to a more equitable solution for everyone?

PROFESSOR NELSON: Well, I am not sure how that would work. Certainly, I would not favor it in medical malpractice cases.

In other areas, in many cases, the plaintiffs, of course, do not have the resources. They could not pay the fee if they lost. So I suppose, we then would have to require them to post some sort of bond. We would end up with the bond companies screening lawsuits to determine whether or not it was something they wanted to bet on.

I think there may be a problem. We would have to figure out some way to preserve access to the courts for relatively low income people. I do not know how we would do that.

MR. MCKEE: I am generally a proponent of the contingent fee system and an opponent of cost-shifting. In England, for example, recall that the vast majority of the population qualifies for free legal aid. Only the very rich do not get it. There is a determination of certain income levels, but vastly more than fifty percent of the population gets free legal aid, even for bringing things like personal legal action.

So, again, unless we want the tax rates that Western Europe endures to provide all these social services, we cannot do that until we are willing to close the courthouse to the poor.

Interestingly, part of the governor's tort package bill that did not pass in Alabama was the fee-shifting amendment to Rule 68 of the Rules of Civil Procedure. It would have provided that a judge could tax costs and attorneys' fees to the losing party upon looking at certain factors. And, interestingly, the trial lawyers grudgingly were willing to go along with that as part of the overall package, but it was the defense bar and the industry that opposed it because they realized that the vast number of plaintiffs in Alabama, even if taxed with costs, could never pay. Only the costs taxed against defendant corporations would ever wind up being paid. So the net cost-shifting under that system would fall ninety percent on the defendant, which is why they were against it.

MR. WALPIN: Those who oppose fee-shifting always talk about the difficulties in application. The fact is, in England for example, as it exists there, the poor still have access to the courts and the litigation is substantially below our litigation volume.

JUDGE WILSON: Mr. Walpin, my problem there is that my folks got on a boat and came over here because they didn't like the British judicial system.

MR. WALPIN: They have changed since 1776.

QUESTION: The framers wrote the solution to all of this into the Constitution, and it is called diversity jurisdiction. And, since our moderator has told us federal judges are not working as hard as they all thought they were, at the risk of getting the answer your cousin gives to everybody, would you and your colleagues on the Bench support amending the removal statutes to make it easier for BMW and, for that matter, Tyson Foods to get away from Barbour County juries and in front of federal juries?

JUDGE WILSON: Well, I don't know more we can do. We are precluded from getting active in the political arena, but I have no problem with that whatsoever. I love diversity cases.