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TORT REFORM: AN IMPORTANT ISSUE FOR WOMEN

by Lucinda M. Finley*

Author's Note:

Advocates for women's rights and women's health have been largely absent from the legislative debates over tort law reform. This silence is unfortunate, because legislative efforts to cut back on compensation for people injured by unsafe products can have a serious, but often overlooked, adverse impact on women. Many modern product liability disasters have involved products used almost exclusively by women, often in connection with reproduction -- the anti-nausea drug thalidomide, which produced horrifying birth defects; the drug DES, which causes cancer and infertility; the IUD Dalkon Shield, which was sometimes fatal and frequently caused sterilizing pelvic inflammatory disease; breast implant devices, which can cause serious auto-immune system diseases such as lupus or can permanently disfigure a woman; the acne-treatment drug accutane, which if taken during early stages of pregnancy produces serious birth defects.

These products that adversely affect women's reproductive health often injure in ways that can devastate a person's life but without a great deal of accompanying lost earning capacity. Yet damages for the non-wage loss aspects of injury, those aspects frequently labeled as "emotional," especially when suffered by women, are precisely the sort of compensation that has been under relentless attack in the legislative efforts to cut back on tort recoveries.

Various versions of federal bills to reform product liability law, including cutting back on the type of damages that are so important in the case of reproductive injuries, have been introduced in Congress for several years. During the most recent Congress, such a bill, S. 640, heavily backed by the Bush administration and by former Vice President Quayle's Council on Competitiveness, appeared to have the best chance for enactment since the initial introduction of tort limitation bills. Because of my research and writing on potential gender bias in tort law, including the law of damages, I was asked to testify before the Senate Judiciary Committee about whether S. 640 would have any adverse impact on the ability of women and the elderly to receive full recoveries for their injuries.

What follows is the written testimony that I presented. My responses to questions posed by individual Senators are not included. Although a few weeks after these hearings the Senate Judiciary Committee did narrowly vote to send the bill to the floor for consideration by the full Senate, S. 640 died soon thereafter, the victim of a filibuster. I was informed that my testimony pointing out several ways in which the bill could have an adverse impact on women who suffer reproductive injuries was influential with several Senators.

With a new administration now in Washington, the impetus for adopting federal legislation to make it more difficult for injured people to recover from manufacturers of defective products has cooled. In many states, however, similar tort reform bills continue to get introduced, and several states, including New York, have adopted laws limiting damage recoveries in some of the ways I discuss in the following testimony. Anyone interested in better protecting women's health, particularly reproductive health, should be concerned about the general trend of such tort reform laws. This will require wading through and looking underneath legal jargon such as "joint and several liability," "economic loss damages," and "punitive damages," to understand the impact of changes in these doctrines on women, and on the incentive for manufacturers to invest greater resources in researching potential adverse affects on women's health. It is my hope that the following testimony will help alert individuals and groups concerned about women's health to some of the important policy issues lurking under these legal doctrines, particularly the way the type and amount of damages that can be recovered are defined.

* A former faculty member of Yale Law School, Professor Finley currently teaches at the University at Buffalo School of Law and has recently served as Chair of the Torts Section of the Association of American Law Schools. The following testimony is but a small sample of Professor Finley's scholarship in the arena of gender bias in tort law. Professor Finley is currently incorporating her research into a book focused on the issues of injuries caused by Diethylstilbestrol (DES).

Testimony on S. 640, Uniform Federal Product Liability Law

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August 5, 1992

I welcome the opportunity to offer my views to this Committee on several aspects of S. 640, a bill to establish a uniform federal product liability law. I will first address § 306 of S. 640,¹ which proposes that liability for non-economic damages² shall be several³ only.

I. COMMENTING ON PROVISIONS FOR SEVERAL LIABILITY FOR NON-PECUNIARY LOSS

By eliminating joint and several liability for non-pecuniary loss, § 306 of the bill will make it more difficult for tortiously injured people to collect the full amount of damages they are entitled for components of their injury other than out-of-pocket costs and lost income. It shifts the burden of an insolvent defendant, or a defendant practically immune from judgment as in a situation of underinsurance or exhaustion of insurance limits, from other tort-feasors to the already wrongfully injured person. In analogous contexts, such as the exclusion from income of personal injury damages in § 104(a)(2)⁴ of the Internal Revenue Code, Congress has repeatedly endorsed the social policy choice that injured people should not be further burdened in ways that reduce their recoveries, since it is often only their tort recoveries that provide some small measure of comfort or continued self-sufficiency. For similar reasons,

¹ S. 640, 102 Cong., 2 Sess. § 306 reads in relevant part:

(a) In any product liability action, the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to such defendant in direct proportion to such defendant's percentage of responsibility as determined under subsection (b) of this section. A separate judgment shall be rendered against such defendant for that amount.

(b) For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

(c) as used in this section, the term-

(1) "noneconomic damages" means subjective, nonmonetary losses including, but not limited to, medical expenses, loss of earnings, burial costs, loss of use property, costs of repair or replacement, cost of obtaining substitute domestic services, rehabilitation and training expenses, loss of employment, or loss of business or employment opportunities; and

(2) "product liability action" includes any action involving a claim, third-party claim, cross-claim, counterclaim, or contribution claim in a civil action in which a manufacturer or product seller is found liable for harm caused by a product.

² Economic or pecuniary loss refers to out-of-pocket expenses and income loss such as lost past or future wages, medical expenses, and caretaking expenses. Non-economic or nonpecuniary loss includes pain and suffering, emotional distress, psychological harm -- aspects of injury that do not directly cost the injured person money.

³ *Joint and several liability*: Responsible together and individually. The person who has been harmed can sue and recover from both wrongdoers or from either one of the wrongdoers. BLACK'S LAW DICTIONARY 914 (6th ed. 1990).

⁴ This section excludes from gross income for tax purposes money received as compensation for personal injury or sickness.

this Committee should recognize that shifting the burden of an uncollectible portion of a judgment onto an injured person, in derogation of a jury's judgment about what amount of money is necessary to provide for that person's needs and restore to her some semblance of a better life, is an unwise and harsh social policy.

Section 306 seems highly unlikely to produce any corresponding social benefit, such as reduced insurance costs or improved business performance.⁵ It is unlikely to reduce insurance costs, because the type of risk assessment upon which such costs are based looks at the risks of the insured's activity, not at the possibility that the insured may in some future suits be a joint tort-feasor with a judgment proof defendant. This provision may simply increase legal costs of collecting judgments. Pursuit, defense and collection of tort claims would be more time-consuming and thus more costly to settle as more issues are injected into the calculation of damages.

There is another fundamental reason why § 306 is unwise social policy. Tort reform provisions that reduce the amount of or make it more difficult to recover non-pecuniary loss tend to have an adverse impact on women, the elderly, children, and less affluent members of society. Any arrangement that privileges or prefers pecuniary loss damages over recovery for non-pecuniary loss replicates and thus intensifies the wage inequities of the market. Loss of income and employment opportunities are the major aspect of pecuniary or economic loss damages. Those who earn more, or who are presumed to be likely to enter high-paying careers in the future, receive greater amounts of economic loss compensation. In an economy where women and people of certain races earn less than white men, and by virtue of still-prevalent stereotypes are presumed to be not as likely to attain future high-paid jobs, these already disadvantaged people are likely to recover less for economic loss.⁶ People such as the elderly, whose income producing days may be behind them, are likely to recover little or nothing for economic loss.

For people disadvantaged in the wage-earning market, and thus also disadvantaged by a tort system that privileges economic loss as the most important sort of recovery, non-economic damages can serve as an important way of making recoveries for the same injuries more commensurate with the recoveries that highly paid workers receive. For example, if a retired person, a female clerical worker with children to support, and a male corporate executive all suffer a permanently debilitating injury from the same defective product, their lost income damages will vary widely, even though the injury may be just as painful and devastating to each of them and to all of their loved ones and dependents. The amounts that a jury may award for non-pecuniary loss can help bring the total recoveries for the elderly person and the clerical worker closer to that of the executive. And, these non-pecuniary founts of damages may be even more crucial for the elderly person and for the clerical worker than for the economically well-off executive. The executive is more likely to have a pension plan, stock options, and investments that can help continue his family's standard of living and provide for his children's education. For the clerical worker, who was just struggling to make ends meet before the accident, whether or not she can collect her full non-pecuniary damages may well make the difference in whether her family can retain its home and whether her children can ever receive a higher education.

⁵ Similar provisions recently enacted in some states have not produced any yet empirically verified insurance savings or increases in "business competitiveness." See Milo Geyelin, *Tort Reform Test: Overhaul of Civil Law In Colorado Produces Quite Mixed Results*, WALL ST. J., March 3, 1992, at A1, A4.

⁶ For works discussing the problems of bias in tort awards for pecuniary loss, see Richard Abel, *A Critique of American Tort Law*, in *THE POLITICS OF LAW* 185, 188-190 (David Kairys ed., 1982); Richard Abel, *Pounds of Cure, Ounces of Prevention, Review of Compensation and Support for Illness and Injury*, 73 CALIF. L. REV. 1003, 1005-1012 (1985); Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. LAW & FEMINISM 41, 51-54 (1989).

Any provision, such as § 306, that limits recovery for non-pecuniary loss, rests on an essentially flawed premise that economic loss is the most important kind of harm that tort victims suffer.⁷ This type of provision also assumes that what can be objectively measured in money is somehow more real than those aspects of an injury, such as pain or shame or infertility, that do not have a verifiable marketplace equivalent.

These premises are flawed because they seriously underestimate the importance and compensatory validity of non-pecuniary loss damages. While we can "compensate" for economic loss by replacing the money spent or foregone, it is less obvious how a monetary recovery for pain, for humiliation, for loss of the ability to engage in certain activities or to relate to one's loved ones can compensate. If by "compensate", we mean cure or restore the lost capacity even economic loss damages, of course, do not compensate or make whole any better than non-economic loss damages. While neither form of damages can compensate by making the pain go away or restoring the ability to engage in certain activities, non-pecuniary loss damages can compensate in a meaningful way by enabling the injured person to obtain better therapy, or better counseling, or new skills training to overcome the disability, or to afford other activities that may bring back some of the lost fullness of the human experience.⁸ Non-pecuniary loss damages can restore an important measure of control over one's life by providing the financial ability to pursue options that otherwise would not exist. Thus, they can improve the lives of injured people in a meaningful way.

This point was stressed over and over again by several DES victims whom I interviewed. These women said that while no amount of money could restore their fertility or give them back their cancer-ravaged reproductive and sexual organs, they were entitled to compensation. Their recoveries enabled them to afford some things to provide fulfillment and alleviate the void of a childless marriage.

This example of women rendered infertile by their exposure to DES brings up another problem with limitations on non-pecuniary loss. Many kinds of devastating injuries caused by defective products, especially reproductive injuries or injuries to sexual function, do not lead to high economic loss. Rather, it is often the non-pecuniary aspects of the injury that are the most profound and devastating, and the most deserving of compensation. Congress recognized the real and devastating nature of harm to dignity, esteem, and sense of self as recently as last November, when it passed the Civil Rights Act of 1991⁹ to compensate for non-pecuniary loss for victims of employment discrimination. The Report¹⁰ accompanying that Act is replete with recognition that the most significant aspect of injury may often be the non-pecuniary. Although this congressional recognition came in the context of the harm caused by discrimination, such as sexual harassment, the same observation about the nature of harm and the importance of compensating the non-economic aspects of injuries holds true in the context of defective products.

Consider DES or the Dalkon Shield, two unsafe products that have deprived many women of their ability to have children, or have caused many couples to go through the tragedy of a miscarriage. DES has also left some men with severely deformed sexual organs, unable to perform sexually and with their entire sense of self and masculinity shredded.¹¹ Consider certain pesticides or industrial solvents, which

⁷ See e.g., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTER'S STUDY, 2 A.L.I. 161 (1991).

⁸ See *id.*

⁹ Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 [codified at 42 U.S.C. §§ 2000e-2000e16 (West. Supp. 1992)].

¹⁰ H.R. Rep. No. 102-40, 102nd Cong., 1st Sess. (1991).

¹¹ See e.g., transcript of the conference before the Hon. Jack B. Weinstein, U.S. District Court, Eastern District of New

have rendered exposed men unable to produce children or unable to function sexually. Consider breast implants, which may, in addition to causing serious auto-immune diseases, disfigure a woman in such a sensitive way that her self-esteem and ability to have normal intimate relationships may be forever devastated. Or consider a defective woodworking product or power tool, which may leave the injured user disfigured in ways that leave her income earning capacity intact, but subject her to social ridicule or shame, and eviscerate her self-esteem.

Because reproductive and sexual injuries are not likely to lead to significant wage loss, but can be personally devastating, non-pecuniary loss damages are the principal type of compensation for these injuries. There are far more known instances of products that have injured women's reproductive capacity than men's, partly because far more cosmetic or reproductive-related products have been developed for women's bodies than for men's. Because injuries to this fundamental aspect of human life tend to be compensated, if at all, largely through non-pecuniary aspects of damages, cutbacks in recoveries for non-pecuniary loss can have a particularly adverse impact on women.

Reproductive capacity, the ability to share physical and emotional intimacy with other people, personal appearance, and self-esteem are all aspects of injuries that primarily affect people in non-pecuniary ways. These aspects of injury may well be far more serious and lasting than a loss or reduction in earning capacity. Full compensation for non-pecuniary loss is a way that our tort system signals that these are important aspects of human life -- at least as important as the ability to earn a certain level of money. Non-pecuniary loss compensation is also a way that our tort system signals to product manufacturers and sellers that they have to regard and protect these fundamental aspects of human life through more diligent testing, consideration of alternative designs and safety features, or full disclosure of risks.

Currently, the tort system is the only available vehicle for protecting these human interests that cannot be reduced to out-of-pocket loss. While health insurance, disability insurance, workers' compensation, and other insurance or administrative compensation devices can protect against economic loss, the tort system is the only place to which injured people can turn when the non-pecuniary fabric of their lives has been torn. Any legislative curtailment of people's right to collect fully for these damages, or legislative enactment that makes it more difficult for injured people to collect fully for these damages, sends the perverse social message that we value someone's ability to earn a paycheck more than his/her ability to have a child, or to love, or to be an emotionally intact person.

I urge this Committee to weigh carefully the adverse societal, gender, age and class implications of making it harder for people to recover fully for non-pecuniary loss.

II COMMENTS ON § 303(C): PUNITIVE DAMAGES FOR DRUGS AND MEDICAL DEVICES.

Another provision of S. 640 that I would like to comment on is § 303(c).¹² This proposal to curtail punitive damages when a drug or device has received pre-market approval by the FDA would have a drastic impact on the many women injured by reproductive drugs and medical devices.

York, in *In re DES Litigation*, May 27, 1992.

¹² Which states in relevant part;

(1) Punitive damages shall not be awarded pursuant to this section against a manufacturer or product seller of a drug... which caused the claimant's harm where-

This provision in S. 640 would give preemptive effect to FDA approval of or "general recognition" of the safety of a drug or device, although the criteria the FDA uses in determining whether to give approval do not mirror and have never been intended to reflect tort law standards. The FDA, hampered by limited resources, cannot usually independently verify industry-supplied information, nor can it independently test.¹³ Instead, tort suits have often been a complementary supplement to FDA regulatory processes. The information that has been divulged as a result of tort litigation has, on several occasions, challenged "general recognition" of a drug or device's safety, and consequently prompted the FDA or other regulatory agencies to reassess drugs or devices or to demand more rigorous safety data from the manufacturers.

Information divulged as a result of tort suits can assist the regulatory efforts of the FDA. For example, lawsuits involving breast implant devices, in which the manufacturers provided the FDA with information about risks, have exposed manufacturers who failed to test or adapt the product, despite mounting awareness of health dangers.¹⁴ The prospect of being able to recover punitive damages has served as an incentive for plaintiffs to keep searching for information and this has often benefited public health and safety. Punitive damage recoveries have also helped insure that the high costs a plaintiff often incurs in uncovering or analyzing product safety information do not come out of the compensatory portion of an injured person's award.

(A) such drug or device was subject to pre-market approval by the Food and Drug Administration with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm or the adequacy of the packaging or labeling of such drug or device, and such drug was approved by the Food and Drug Administration; or

(B) the drug is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations. The provisions of this paragraph shall not apply (i) in any case in which the defendant withheld from or misrepresented to the Food and Drug Administration or any other agency or official of the Federal Government information that is material and relevant to the performance of such drug or device, or (ii) in any case in which the defendant made an illegal payment to an official of the Food and Drug Administration for the purpose of securing approval of such drug or device.

(2) Punitive damages shall not be awarded pursuant to this section against a manufacturer of an aircraft which caused the claimant's harm where-

(A) such aircraft was subject to pre-market certification by the Federal Aviation Administration with respect to the safety of the design or performance of the aspect of such aircraft which is caused the claimant's harm or the adequacy of the warnings regarding the operation or maintenance of such aircraft;

(B) the aircraft was certified by the Federal Aviation Administration under the Federal Aviation Act of 1958 (49 App. U.S.C. 1301 et seq.); and

(C) the manufacturer of the aircraft complied, after delivery of the aircraft to a user, with Federal Aviation Administration requirements and obligations with respect to continuing airworthiness, including the requirement to provide maintenance and service information related to airworthiness whether or not such information is used by the Federal Aviation Administration in the preparation of mandatory maintenance, inspection, or repair directives.

The provisions of this paragraph shall not apply in any case in which the defendant withheld from or misrepresented to the Federal Aviation Administration information that is material and relevant to the performance or the maintenance or operation of such aircraft.

¹³ For an analysis of how the limited resources and limited expertise of the FDA made it overly dependent on information provided by the pharmaceutical companies, and led to the approval of DES for use during pregnancy based on only very limited and methodologically unsound testing. See DIANA DUTTON, *WORSE THAN THE DISEASE: PITFALLS OF MEDICAL PROGRESS* 31-90 (1988).

¹⁴ See Alison Frankel, *From Pioneers to Profits*, *THE AMERICAN LAWYER*, at 82-91 (June 1992).

While the bill would still allow punitive damages when the defendant withheld information from or made misrepresentations to the FDA, the bill does not appear to allow for punitive damages in the unfortunately all too common situation of a callous failure to thoroughly test or retest a drug or device, even in the face of increasing evidence of problems. Inadequate testing plagued DES, and contributed to FDA approval of a drug that turned out to be what one federal judge recognized as among the major public health disasters of this century.¹⁵ Failure to test, or even to inquire about whether a foam developed for industrial uses ought to be used in the human body, contributed to the still unfolding problems of breast implants. And it has just been announced in the *New England Journal of Medicine* that Ritodine, a previously FDA-approved drug to prevent premature labor, is ineffective, highly risky, and sometimes fatal to women.¹⁶ The study that has brought these problems to light was much more thorough and methodologically sound than the insufficient testing done prior to FDA approval. Why should a person injured by one of these products be deprived of the opportunity to meet the stringent burden necessary to establish that the manufacturer's indifference to the risk or unwillingness to know the dangers, meet the criteria for awarding punitive damages?

The prospect of punitive damages can provide a powerful incentive for manufacturers to learn more about the risks and effectiveness of drugs and devices before human casualties start mounting. Reducing the circumstances under which a jury can impose punitive damages on the manufacturers of drugs or devices will reduce incentives to rigorously test such products and to thoroughly disclose information to the FDA.

¹⁵ See remarks of the Hon. Jack B. Weinstein, May 27 and June 10, 1992. Transcript of hearings, *In Re DES Litigation*, (E.D. N.Y. 1992).

¹⁶ See Gina Bari Kolata, *Drug to Aid Birth is Found Ineffective and Risky*, N.Y. TIMES, July 30, 1992, at A1.