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Some Comments on the Litigation Explosion

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My comment must start with a strong commendation of Attorney General Bell for recognizing the crisis created by the current "litigation explosion" in our courts and for providing leadership in seeking means for alleviating and perhaps even solving it. I am sure that the Justice Department's new Section on Improvement in the Administration of Justice will prove invaluable, both as an originator and a clearinghouse for compiling and evaluating new ideas and as a means for putting them into effect. Dan Meador makes an ideal selection as assistant attorney general to head it.

I also must commend the Justice Department for its decisions on the scope of the new agency's activity. As I see it, three aspects of this are significant. First, the agency's commission is broader than simply trying to solve the problem for the federal courts by restricting the present basis of federal jurisdiction and thus pushing the problem in an exacerbated form over to the state courts. Instead it is tackling the problem in general and seeking to find overall solutions. Second, in seeking to improve the administration of justice, it is considering inadequacies of the present system and is not confining its efforts solely to cutting down on the quantity of litigation. Third, the agency is not confining its attention to procedural reforms, but also is giving consideration to substantive law reform that affects the administration of justice.

This Section of the Justice Department has the potential for rendering an extremely valuable service to the people of the United States through the years to come, and you may, Mr. Attorney General, find that you wish to have your administration remembered in the future primarily for this significant accomplishment.

Incidentally, I offer now a suggestion of one substantive topic that the Section may wish to place on its agenda. The Federal Tort Claims Act[1] was passed in 1946. At the time, it was a new venture and was regarded as a rather radical departure. As a result, numerous practical compromises were required to pass the statute, creat-

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1. Federal Tort Claims Act of 1946, ch. 753, tit. IV, 60 Stat. 842 (codified in scattered sections of 28 U.S.C.).

ing many uncertainties, gaps, and inconsistencies. A judicial gloss of over thirty years has now developed, and carefully drafted statutes in the general field of tort immunity have been adopted in several states. The time now seems ripe for a complete overhaul of the FTCA, making use of the experience and learning that have developed in the meantime.

Perhaps I can offer a few scattered suggestions for fruitful lines of inquiry and investigation in tackling the problem of the litigation explosion. Excessive litigation can be alleviated by discouraging the bringing of unwarranted actions and by expediting the handling of the other actions.

1. *Discouraging improper actions.* The common law discourages the instigation of entirely unjustified and harassing criminal prosecutions through the tort action of malicious prosecution. By analogy, most states now have developed a similar tort action for the wrongful bringing of a civil suit. This action is sometimes called malicious prosecution, too, but the *Restatement of Torts* calls it wrongful civil proceedings.[2] The potential for liability under this action can discourage frivolous actions, but it produces still another lawsuit, one that requires a number of very delicate and difficult factual and policy decisions. The action has some other drawbacks, and I suggest that we might improve on it by taking an idea from the English practice.

In Great Britain the costs charged against the losing party in a civil action cover not only the court expenses, but also the winning party's costs of litigation, including his attorney's fees. We need not go all the way to the English practice unless we decide to use it, as they do, as a substitute for the contingent-fee system. It nevertheless would be extremely useful, I think, to authorize the trial judge, if he determines that the bringing of the suit was entirely without justification, to award litigation costs, including attorney's fees, to the defendant. If the plaintiff is indigent, these costs also might be charged against the attorney. The practice also might apply when the defendant puts up a frivolous defense or unjustifiably delays the trial, with the result that appropriate litigation costs are charged to him. When a motion for discovery is made unjustifiably broad for the purpose of harassment, the other party's expense in responding might be made a part of the allocated litigation costs. None of this would require a second trial, since the judge who had heard the original trial would have heard and observed enough to enable him

2. RESTATEMENT (SECOND) OF TORTS §§ 674-681B (1977).

to pass more intelligently on the matter than could a judge and jury in a second trial.

A second means of reducing the amount of litigation in the courts is the use of arbitration boards to handle minor actions for comparatively small amounts of money. This procedure, I understand, already is being considered by the Meador Section, and as the experience of some states indicates, it may turn out to be very useful. Perhaps some day, too, we may determine the proper way to utilize panels of professionals in suits for professional negligence. This might help to meet the widespread objection that juries are not qualified to pass judgment on the conduct of professionals. To date, we do not seem to have found the right formula. Many of the current malpractice statutes seem to have been passed for the primary purpose of making the plaintiff's presentation of his case more difficult by adding to the time and expense of litigation.

2. *Expeditious handling of suits.* A second way of alleviating the current litigation explosion is to expedite the handling of the suits and thus dispose of cases in a shorter period of time. Again, I offer one or two unrelated suggestions.

In the early days of the common law, tort actions were quite simple. The plaintiff did not need to prove fault; he needed to prove only that the defendant had injured him. Recovery was limited to direct injury and involved no difficult causation decisions. Damages were confined to specified amounts for designated injuries. Legal philosophers have called this primitive law. It involved justice, but a very rough justice since cases that differed were treated entirely alike. With the passage of time, the law has become distinctly more refined. We have developed that marvelous legal device called the "standard," such as the one for determining negligence—what a reasonable, prudent person would do under the same or similar circumstances. This device provides for uniformity in the treatment of cases, but also allows for individualization according to the particular facts of each case. Dean Pound called the attainment of these standards "the maturity of law."[3] The maturity of law is as comparable to primitive law as custom-made justice is to assembly-line justice. Although custom-made justice is an accomplishment of which we properly have been proud, it comes at a cost, and the expense may be more than we now can afford. Custom-made justice takes much time and a considerable amount of effort. With the amount of litigation that the courts now have before them, can we

3. *See* 1 R. POUND, JURISPRUDENCE 422-28 (1959).

afford to expend this quantum of time and effort in every case? Should we cut down on the number of difficult decisions—issues in a trial—or on the breadth of discretion and the number of factors that must be taken into consideration in exercising it? This is a very difficult problem, but it needs careful consideration in the present emergency. A somewhat rougher justice perhaps may be regarded as more just than justice delayed.[4] Perhaps, for example, we should reconsider Mr. Justice Holmes' proposal that the regular standard for negligence gradually be replaced through experience by negligence per se—court-made rules that would apply in the normal case, but that might give way to the regular standard in extraordinary circumstances amounting to an "excuse" for not complying with the rule of law.[5]

Another means of expediting the disposition of cases is through the more efficient use of pretrial techniques. In the hands of many judges, pretrial practice has proved very effective, but the techniques need to be refined in the light of experience and taught to more judges.

Trial by jury originated in England, and perhaps we can learn something from the experience there. It now has been essentially eliminated in all trials except criminal prosecutions and defamation actions. There has been no feeling of loss of inalienable rights and, as a result, no inordinate delay of trial or complaint about the whimsicalities of juries. Have we perhaps been repeating a shibboleth, or are we bound by constitutional provisions?

I have one other thought. When one speaks of the litigation crisis, he thinks of the greatly increased number of cases now being filed or of the malpractice and products-liability emergencies created by the unavailability of liability insurance or the very great increases in the amount of the insurance premiums. A severe problem on the reverse side, however, arises out of the expense of litigation. A person who has been injured due to malpractice or to a dangerously defective product is often unable to obtain anything but nominal relief. The expense of prosecuting a suit in either of these areas is now so substantial that an attorney cannot afford to take it on a contingent-fee basis unless it involves a very substantial sum of money—no matter how certain the liability. Thus the person

4. *See* JOHN FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 6-15, 189 (1969).

5. *See* Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 70 (1927); O. HOLMES, THE COMMON LAW 123-24, 149-52 (1946); *cf.* RESTATEMENT (SECOND) OF TORTS § 288A (1965) (providing for excuses from liability for conduct that is negligent per se because it violates a legislative enactment).

who incurs a real, but moderate, injury is frequently left without adequate relief. Somebody ought to do something about this!

Mr. Attorney General, you and your assistant, Mr. Meador, are adventurously engaged in a very vital task. We wish you good luck. You will need it, but to the extent that hard work brings it about, we feel sure you will have it.