

Place a cap on “pain and suffering” in tort actions

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BSC 403: Legal Issues in the Workplace

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Analysis

January 22, 2012

Tort reform is a phrase that has been mentioned quite often in the last few years. It is such a mainstream topic that almost every one of today's presidential hopefuls has stated their opinion and has included this issue in their program (Serafini, 2012). When asking any random person on the street, whether the US needs a tort reform, most of them will respond with a definite yes. However, asking the same group of people to specify what tort actually is, will force most of them to admit that they have no idea what tort and its reform really stands for (Salandof, 2011). This general idea, that the tort law is bad and needs to be reformed is caused by an extensive effort of certain lobby groups, which have the power and finances to publicly present it in such a way. These people, sponsored by insurance companies and other businesses that would benefit from this change, are working around the clock, talking to politicians, paying for advertisements and promoting their agenda in such way that, to the general public, it seems to be a great, but more importantly a necessary idea. One of their goals is to place a cap on payments for pain and suffering in all the states. They are claiming, that with no cap people take advantage of the current system and we all suffer because of the greed of the few (Salandof, 2011). So, although lobby groups and their propaganda would have people believe that tort reform is crucial and essential, this analysis of the issue is set out to prove the opposite, that the current tort law system is working perfectly fine and there is no need to have it altered in any way.

The main reason, why most of the general public, which is not interested in looking at the issue more closely, believes that today's tort law is flawed, is due to the activities of US Chamber of Commerce, which is, in its core, a lobby group dedicated to help businesses roar. Considering that its biggest clients are insurance companies, it makes sense why they work hard to reform the tort law and why one of their most sought after goals is to get a cap placed on all non-monetary damages in all of the 50

states. Their number one weapon in the fight for public's opinion is their depiction of what they call frivolous lawsuits, or lawsuits that are ridiculous, even outrageous to any reasonable person. Among the most favorite ones are the phone booths incident and the McDonald's coffee case.

The phone booth incident, is so famous, it has even been used by President Reagan to justify why American Tort Reform Association needs to exist and why this reform is so crucial. The widely known and discussed story says that a man was standing in a phone booth; when a drunk driver came out of nowhere; hit the phone booth, injuring the man inside. The man, instead of suing the driver sued the telephone company that made the phone booth (Kwon, n.d.). Outrageous? Of course, if it would have happened that way. However, the real story is, that Mr. Bigbee saw the car coming, he tried to get out of the phone booth, but the door was stuck and he was trapped inside, the car hit him and he lost his leg because of the accident. There were witnesses that testified that he tried to escape but was unable to (Kwon, n.d.). Even this might not seem like an adequate reason to sue the phone company; after all they can't check all the phone booths all the time, right? Well, this phone booth was a little different, it was on a dangerous intersection and has been hit numerous times in the past, last time happening just 20 months before Mr. Bigbee's accident. Therefore, the danger of this phone booth getting hit by a car is anything but unforeseeable. Hence, when all the facts are weighted, it definitely was the phone company's fault, due to their negligence in phone booth maintenance as well as phone booth placement.

The other, very famous and often used, story is the story of the old lady who spilled McDonald's coffee in her lap while driving, then sued McDonald's for the coffee being too hot. How absurd, everybody knows that coffee is hot and the fact that she can't multitask while driving is only her fault, right? Wrong, this story has also been

greatly modified, leaving out many key factors. First, Ms. Liebeck was not driving; she was in the passenger's seat and the car was parked. Second, yes, she did, accidentally, knock the coffee over, spilling it into her lap, however the temperature of the coffee was 190 degrees Fahrenheit, approximately 90 degrees Celsius, drinking it at that temperature would cause third degree burns to tongue and mouth in 2 to 3 seconds, so the fact that she has spilled it, is not that relevant here (Lectlaw, 2010). She suffered third degree burns to 16% of her body, requiring debridement, skin transplants and whirlpool treatments costing tens of thousands of dollars. She was on disability for more than two years, healing from her injuries. She contacted McDonald's asking them for 20 000 dollars, to cover her medical expenses, but they refused and offered her 800 dollars as compensation (Salandof, 2011). To further prove the negligence of the fast-food chain, it has been discovered that prior to this accident, they received over 800 complaints of coffee being too hot and people burning themselves with it (Salandof, 2011). So, once again, the existence of negligence from the McDonald's side is quite evident. There are tens, maybe hundreds of similar stories around, but the simple fact remains, that they are either grossly altered, leaving out crucial facts, or completely fabricated, made up with no factual grounds at all.

After, learning the truth about the world of tort cases, it is rather clear that the entire movement has no real grounds to stand on. Their number one argument for reform, frivolous lawsuits is artificially blown out of proportions, however the sad thing is that most people do not know the real facts and are bombarded with these fabricated stories on almost daily basis thanks to advertisements that US Chamber of Commerce and other lobby groups can afford thanks to large amounts of funds they receive from their sponsors, insurance companies. That is why, many states have already passed a legislation altering their state tort laws to include caps on non-monetary damages,

including pain and suffering. However, most of the people are not really aware of what these reforms really represent, a great example of that is a man in Texas, which was seeking compensation for his injuries due to negligence and was turned down due to a recent reform that his state, state of Texas, has passed, called the Proposition 12 thanks to an overwhelming support of Texas citizens. To his surprise, that was a reform for which he had voted, but he, as many others, was deceived on what it actually represented (Salandof, 2011). In other words, a legislation that he himself helped to pass is now keeping him from receiving all the funds he needs to live a fulfilling life.

Another aspect, which tort reform lobby is trying to use to persuade the public to support them is the factor of insurance costs. They are claiming that by placing a cap on non-monetary damages the health insurance rates would decrease making it more affordable for people to obtain health insurance, thus lowering the rate of the uninsured in the country. However, the experience from Texas, a state where most of the reforms have been applied, including caps on pain and suffering, in 2003 and, which proposers of the reform wanted to use as a pilot program for the rest of the nation, has been very negative. Since its launch in 2003, the percentage of uninsured people has increased, the cost of medical insurance has doubled, cost of health care has increased to a double of national average, and the number of doctors in the understaffed parts of the state has declined (Texas Experiment, 2009).

The last point made in the previous paragraphs brings up another so-called benefit of caps, it is estimated that limiting doctor's liability and putting a cap on damages available for malpractice lawsuits, would add incentive for doctors to practice in the particular state, meaning it should bring more doctors into the state to lower the patients per doctor ratio in that particular state. But, this also has been proven to be false, according to a study done by Public Citizen group, which examined where doctors

like to practice, there is no relation between the amount of malpractice premiums set in the state and the amount of doctors that practice there. In fact, doctors choose to reside in states with higher quality of life, not lower caps on damages (Why Doctors, 2004).

Another argument raised by the reform lobby is the affordability of insurance for doctors, they claim that by placing a cap on non-monetary damages the amounts of money paid out for malpractice lawsuits would decrease drastically, and therefore the insurance companies would lower rates of their malpractice insurance for doctors. But, this has also been proven to be false, research has shown that malpractice insurance rates in states that adapted caps does not differ from the states that have no caps on damages (Texas Watch, n.d.).

Not only do these caps provide no real benefits to the general public, they have also been accused of being discriminative of women, children and the elderly. The reason being, that with cap on non-monetary damages, most people rely on the economic damages, which are calculated out of person's earning capacity (Kennedy, 2002). Thus, an injured woman would most likely receive much less than a man injured in the same way. It also really hurts the people that are seriously injured, since most other cases never reach the cap anyway, and these people have the rest of their lives to rely on the money awarded to them as non-monetary damages. A story of Colin Gourley is a great example of this. The pregnancy of Ms. Gourley was going fine, until one day she felt that something was wrong, so she went to the hospital to see her doctor. There, she was told that nothing was wrong and both of her twin boys were just fine, however her troubles did not end there, she kept feeling worse and worse, until she ended up in the ER where they found out that her placenta started to discriminate against one of the babies, providing all the nutrients to only one of them, she had an emergency delivery of the babies on the spot. However, the damage has been done already and one of the boys,

Colin, suffered from serious mental condition due to the lack of oxygen and nutrients during the last few moments of her pregnancy. Today, at 16 years old, he is not able to take care of himself and needs assistance with everything he does. This case has taken place in Omaha, Nebraska, where a cap on non-monetary damages has been passed. The family sued the doctor and won, the jury, unaware of the cap set in the state, awarded them 5.6 million dollars in non-monetary damages, however the cap in the state was set at 1.25 million, so the award was reduced to that amount after the trial ended. A professional estimate stated that it would cost about 6 million dollars for Colin to have a normal, fulfilling life. Now, his parents are struggling to come up with a solution to the 6 million dollar question, what will happen to their son after they are gone (Salandof, 2012). There are numerous such cases out there, and although the amount awarded might sound extremely high, when the fact that it's for the entire life of the given person is taken into account, which in many instances is much more expensive than that of an average human due to special needs, it is often not even enough. Caps absolutely destroy these families and their chance of having a normal life.

The question of constitutionality also comes into the light when discussing caps. Considering that one-size-fits-all cap on damages takes the decision about what the fair award is for that particular case out of the hands of the jury, and places it in the hands of lawmakers, it is evident that such legislation is not following the basic rights given to every individual under the US Constitution (Fact Sheet, 2011). There have been a number of cases all over the United States where courts ruled that such limits on damages are unconstitutional. Among others, it violates the equal protection, the right to trial jury, as well as separation of powers (Fact Sheet, 2011).

The evidence that caps on non-monetary damages provide benefits only to insurance companies, which then, do not pass them down to their customers, is

indisputable. Therefore, these caps have no positive effects for the general public or the healthcare industry whatsoever. Placing these limits on the non-monetary damages is detrimental to the individual, healthcare industry, law system and the society as a whole.



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