

Why the Republicans should be talking about tort reform

By PETER J. HANSEN

MOST OF THE Republican Presidential candidates include tort reform in their position papers, but none has made it central to his campaign. I think this is a mistake. No other issue so clearly offers one crucial element of an effective political campaign: a worthy object of public anger.

The anti-smoking lobby likes to say that cigarettes are the only legal product that is lethal if used as intended. Trial lawyers are the cigarettes of the economy: Their profession is the only one whose normal practice causes the rest of us to become poorer. The American Tort Reform Association estimates that America's tort system costs over \$200 billion annually, or about \$1,000 for every person in America; and this figure is increasing at a dramatic rate, four times faster than the U.S. economy. Republicans can probably deliver more money to ordinary Americans through tort reform than through tax cuts.

Moreover, the direct cost is only a small part of the story. Over 70 percent of America's obstetricians have been sued for malpractice, generally in cases involving birth defects for which there is no scientific evidence whatsoever of any medical procedure being a causal agent. Obstetricians pay huge insurance premiums.

When the John Hancock insurance company was forced to pay \$26 million to a former employee for giving him an unfavorable reference, not only did insurance

We now know how this works in practice. A boyhood friend of mine, a very liberal lawyer living in New York, likes to say that he has two kinds of clients, "the whiners and the fakers." (I'm not making that up.)

We need to restore traditional restraints on litigation, or institute new ones modeled on successful practices in other liberal democracies. America is the only western country without some form of "loser pays rule," by which the losing party in a suit pays the legal fees of the winning party.

Trial lawyers claim that "loser pays" means denying poor and middle-class people access to the legal system. This argument can be rebuffed partly in the design of the reform. "Loser pays" can be instituted via fixed charges not really reflecting the whole of legal costs, such as a fee of \$250 per day in court. More importantly, however, clearly meritorious suits which a competent attorney would expect to win, will of course find representation under any "loser pays" system.

We also need to bring some sort of limit and predictability to the system of punitive damages, either by capping them at three times actual damages, or (better yet) by eliminating them altogether. Do we really want all consumers to pay a cent or two more for hamburgers in order to make a millionaire of the woman who spilled coffee on her lap at McDonald's?

The second argument favored by trial lawyers is that our plaintiff-friendly system puts the fear of God into corporations, making them very careful about the safe-

ty of their products. The reply to this argument is to ask the person making it, Are you afraid to vacation in France? To fly to Germany on a business trip? Do these nations' "loser pays" legal systems and lack of punitive damages result in arrogant manufacturers foisting dangerous products on the public? Obviously not, for corporations know that real injuries resulting from their products will lead to settlements against them.

The Common Sense Legal Reforms Act, passed by Congress in 1995, addressed many of these issues, but was vetoed by President Clinton. The Republicans should try again, this time making all reforms applicable to state as well as federal courts. Eliminating contingency fees should also be considered. When the bill is vetoed by the President, as it surely will be, Republicans should explain to the public why the issue is so crucial. In the meantime, Presidential candidates can ask their audiences one simple question: Do we have too many lawsuits? My guess is that most Americans think we do.

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