

THE MYTH OF THE FRIVOLOUS LAWSUIT

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INTRODUCTION:

One of the catch phrases of tort reformers is “frivolous lawsuits” – a lawsuit that has no legal basis, or is so petty that the suit isn’t justified. Often, tort reformers cite high profile cases, such as the McDonalds coffee case¹ to try and show that the court system is “broken” and “runaway juries” routinely award ridiculous verdicts in frivolous cases.

Tort reformers promise that the legislation they propose will put an end to frivolous lawsuits by putting up various barriers that will prevent frivolous lawsuits from being filed in the first place.

What tort reformers *don’t* tell you is that the legal system already has three safety mechanisms in place to prevent, dismiss, and correct frivolous lawsuits. The first mechanism, the contingent-fee agreement prevents frivolous lawsuits from being filed in the first place.

THE CONTINGENT-FEE AGREEMENT:

Have you ever seen or heard an ad for an attorney who promises something like, “*No cost to you unless we collect!*”? Nearly every attorney that brings a lawsuit for a personal injury case does so under a contingent-fee agreement. While most people understand how the contingent-fee arrangement works, I’ll explain it in detail for those who do not.

Let’s say you’ve had an auto accident and decide to hire an attorney. If you shop around, you’ll find that contingent-fee agreements vary from attorney to attorney. Generally, they will range from anywhere from 25% to 50% of the total settlement or judgment you receive. For simplicity, we’ll say you hire an attorney on a 40% contingent-fee agreement. If you were to receive \$10,000.00, the attorney would get \$4,000.00 in that case as his fee, in addition to being reimbursed for any expenses he or she incurred in building your case. These expenses include obvious things like court filing fees and office expenses, but there some expenses in many cases that the general public doesn’t know about: expert witness fees.

What is an expert witness fee? Well, in most complicated cases – *and virtually all medical malpractice cases* – the plaintiff needs to hire expert witnesses to help prove his or her case.

In some states, you’re not even allowed to file a medical malpractice case without first having a report from an expert witness that says, in essence, the doctor in question committed malpractice.

All cases are gambles, no matter how strong the facts may be. When you hire an attorney on a contingent-fee basis, he’s gambling with his time and money. While attorneys are willing to gamble as to when, if, and how much they’ll get paid, expert witnesses generally are not.

¹ This case is the poster-child for tort reformers; they claim that a careless woman received \$2.7 million dollars for spilling hot coffee. In actuality, a 79-year-old grandmother received third-degree burns to her legs, thighs, and genitals, and settled her case for less than \$480,000 dollars. Visit <http://www.reedmorganpc.com> for more details.

Expert witnesses won't wait until your case is over to get paid – they want to be paid up front, and it's the attorney who has to pay them out of his or her pocket. As you might surmise, expert witnesses aren't cheap: they're highly qualified professionals who generally have high hourly fees.

What kind of expert witnesses might be needed in a given case? Let's take some real-life examples of experts and what they charge:

Professional Engineers: If you're suing a manufacturer because you got hurt by a product that you think was poorly designed, you'll need a professional engineer. One engineer in Garland, Texas charges \$225.00 per hour, with a 50% premium for deposition and court time. So, if that engineer spent ten hours reviewing a design, and five hours in court, that would cost your attorney almost \$4,000.00. In a complicated design case, it's not uncommon for several engineers to spend fifty or more hours evaluating the product.

Doctors: If you have a medical malpractice case, or any case where the extent of your injuries is called into question, you'll need to hire a doctor as an expert witness. Doctors, as you might guess, are expensive. Plan on having your attorney spend around \$250.00 per hour, possibly twice that much for a well-regarded specialist. In a complicated medical case, you may need three or more doctors, each of whom may have to spend ten to twenty hours – an out-of-pocket cost to your lawyer of \$10,000.00 or more.

Nurses: You'll probably need a nurse in any case where you need a doctor. While they're not as expensive as doctors, they'll still be around \$75.00 an hour. Just like doctors, they'll also probably have to spend ten to twenty hours on a case - \$750.00 or more from your lawyer's checking account.

Surprisingly, finding expert witnesses isn't easy. Often, a lawyer will have to “shop around” for experts. That means your lawyer will spend time finding experts with the right qualifications for your case. Then, he or she would gather all the pertinent materials and send them to an expert for review. Sometimes, the expert will review the records and say that they're not interested in the case. Or perhaps they'll review the records and not find anything helpful to your case. Either way, the expert will still have to be paid, and it's your lawyer who will have to pay them. It's not uncommon to go through two or three experts, and several thousand dollars, before the “right” expert is found. Of course, it's also not uncommon for a lawyer to think his or her client has a great case, only to be told by several experts that the case has little or no merit. In such an instance, that lawyer will be out-of-pocket thousands of dollars, and the client will owe nothing to the attorney – thanks to the contingent-fee agreement.

Now, if you were a lawyer with a contingent-fee agreement, would you be willing to spend thousands of your own dollars and hundreds of hours on a case you're not confident you can win? If your answer is “no” to that question, then you've just seen how *contingent-fee agreements prevent frivolous lawsuits from being filed.*

While contingent-fee agreements prevent frivolous lawsuits, they also do something even more important: They provide access to the courts to everyone. In general, a lawyer's hourly fee will be anywhere from \$100 to \$300 an hour. Not many people can afford to pay that kind of money to an attorney for more than a few hours. If you were to have to pay an hourly fee to an attorney to bring a complicated injury case to trial, you might have to spend \$50,000 on the attorney.² If contingent-fee agreements were abolished, two things would happen: Only the rich would be able to file lawsuits, and attorneys would be far more willing to file a lawsuit that doesn't have merit; when you're paid by the hour, it doesn't matter if you win or lose.

No case is "easy", and in general, the more complicated the case, the harder it is to win. Contingent-fee agreements are what attract lawyers to the complicated cases. Contingent-fee agreements are what drive lawyers to take those cases to trial, instead of settling for a fraction of what the case is really worth. Contingent-fee agreements are what allow the poorest of the poor to hold corporate juggernauts accountable for their actions in court of law.

Is it any surprise then that some special interest groups are attacking the contingent-fee agreement? They argue that it's not fair for attorneys to take such a "large percentage" of any recovery of their clients. Their arguments have worked: Some states have put limits on the percentage an attorney can take.³

Damage caps and attorney-fee caps work together to make the complicated cases less enticing for lawyers, and the consequence is that those who traditionally receive large jury verdicts – *the catastrophically injured, or the families of those who are killed* – won't be able to find attorneys to bring their case to court. The corporate entities that support tort reform won't be held accountable when they act irresponsibly or unethically, and will instead enter into confidential settlement agreements with those who are harmed by their products.

The irony is that as those corporate entities take away the individual's right to a jury trial, they're doing it under the guise of protecting the public from "greedy lawyers."

So, what happens if an inept lawyer decides to file a frivolous lawsuit? The second safety mechanism, the Summary Judgment, would be used to dismiss the suit.

THE SUMMARY JUDGMENT:

Tort reformers say that the courts are overwhelmed with "frivolous lawsuits" – lawsuits that have no legal basis, or are so petty as to not be worth the time of the court system. They say that to protect the justice system, we need to make it harder for individuals to file lawsuits.

But what if instead of putting barriers up that could prevent legitimate lawsuits from being filed, there was a tool that could quickly and easily dismiss frivolous lawsuits? What if

² In November of 1962, Otto Pritchard lost his case against a tobacco company. His lawyers were hired with a contingent-fee agreement, and his lawyers spent nearly 15,000 hours in the case. At only \$100 an hour, Mr. Pritchard would have owed \$150,000 to his lawyers.

³ New Jersey and California, for example, have complicated sliding scales of what percentages an attorney can charge in different types of cases.

this tool not only dismissed frivolous lawsuits, but could also be used to force the plaintiffs in frivolous lawsuits to pay the attorney fees of the defendant? This tool not only exists, but has been in use in America since 1937⁴; it's called the Summary Judgment.

The purpose of the summary judgment is to determine whether there is a genuine need for trial. When a party files a motion for summary judgment, they're telling the court that there is no need for trial because the facts and law applicable to the case would prevent the other side from winning.

We'll use a fictitious car wreck as an example of how a summary judgment would dispose of a frivolous lawsuit:

Mr. Smith runs a red light and slams into Mr. Jones. Mr. Smith claims the light was green, but two witnesses say the light was red. Mr. Smith is given a citation from a police officer for running a red light. Mr. Smith decides to sue Mr. Jones for mental anguish.

Mr. Jones hires a lawyer. Mr. Jones' lawyer spends a few hours drafting a motion for summary judgment. At the end of the motion, Mr. Jones' lawyer requests he be awarded attorney's fees from Mr. Smith because the lawsuit is frivolous.

The lawyer for Mr. Jones files his motion for summary judgment, and includes with it pictures of the accident scene, affidavits from the witnesses, an affidavit from the police officer, an affidavit from Mr. Jones, and a copy of the police report. All of the affidavits and the police report say that Mr. Smith ran a red light.

In such a case, the judge would most likely grant the summary judgment, and Mr. Smith's lawsuit would be dismissed. The judge could also decide to order Mr. Smith to pay for Mr. Jones' attorney's fees. In the end, Mr. Jones wouldn't be out any money, and Mr. Smith would have had his day in court.

The requirements for summary judgment vary from state to state, but in general, you need to show the court two things:

1: That the facts clearly support your side. In Texas, for example, you have to show that "reasonable and fair minded people" cannot possibly come to different conclusions about what the evidence shows. If reasonable and fair minded people could come to different conclusions about the facts of the case, then summary judgment shouldn't be granted.

2: That the law is clearly on your side. A common use of the summary judgment is to dispose of lawsuits where the statute of limitations has passed. Many states have a four-year statute of limitations for breach of contract. So, if

⁴ While the summary judgment first appeared in the District of Columbia in 1902, it was fully developed in 1937 when the Federal Courts recognized the summary judgment in the Federal Rules of Civil Procedure.

you bought a car in 1995 and tried to sue the dealer for breach of contract in 2000, you wouldn't legally be able to win – *the statute of limitations would bar you from recovery* – and the judge would grant the car dealer's motion for summary judgment. In medical malpractice lawsuits, there is a two-year statute of limitations.

Summary judgments have disposed of frivolous lawsuits for decades. They allow a defendant in a frivolous lawsuit to get out of the case quickly and without the expense of a full-fledged trial. Often, the defendants are even awarded their attorney's fees for preparation of the motion for summary judgment.

The bottom line is that because of the summary judgment, very few “frivolous lawsuits” ever make it to trial. It could even be argued that any case that makes it past summary judgment can't be a frivolous lawsuit because a **judge** – not a “runaway jury” – decided that the case had enough merit to present to a jury.

Tort reformers want to make it hard for you to file a lawsuit, harder for you to win a lawsuit, and impossible for you to collect a meaningful amount of money in a case involving serious or permanent injury. To accomplish these goals, they claim that frivolous lawsuits and runaway juries are destroying the justice system. However, tort reformers don't talk about how summary judgments have been effectively used for over 100 years to dispose of untold thousands of lawsuits.

The next time someone tries to persuade you that we need more barriers to filing lawsuits, ask them why they don't think the summary judgment is getting the job done.

Let's assume that a frivolous lawsuit makes it past summary judgment and a “runaway jury” awards more money than they should. Several judicial remedies exist to correct these verdicts.

DIRECTED VERDICTS:

Most people think that a jury can make whatever decision they want. This isn't the case at all. A judge can issue a directed verdict, which tells the jury that they must make a certain decision. Usually, a directed verdict is used when something comes out at trial that prevents the other side from winning as a matter of law. For example, it could come out that a key event happened so long ago that the statute of limitations prevents the plaintiff from winning. In such a case, there would most likely be a directed verdict for the defendant.

Less often, the evidence in a case is so strong that the judge feels that there can be only one verdict, and he or she would order the jury to return that verdict. One example would be a case where someone caught the auto accident in question on videotape, and the tape clearly shows that one of the parties to the lawsuit ran a red light, and is therefore at fault. In such a case, the judge may direct the jury to find in favor of the person who did not run the red light.

Directed verdicts are more common in criminal cases than in civil cases, because the summary judgment would typically be used to dispose of a civil case before a jury trial. However, directed verdicts can and do dispose of civil lawsuits without merit.

JUDGMENT NOT WITHSTANDING THE VERDICT (JNOV):

Everyone is familiar with the concept of appealing a decision; if you lose your case, you can generally appeal it to a higher court. However, not everyone is familiar with a Judgment Not Withstanding the Verdict (JNOV). JNOV is an acronym for Judgment *non obstante veredicto*, which is Latin for “notwithstanding the verdict”.

A losing party in a lawsuit can often file a motion with the court requesting a JNOV. A JNOV is one of the ways that a judge can reduce the dollar amount of a verdict. Some states require that an attorney file a motion for a JNOV, while other states allow a judge to issue a JNOV *sua sponte*, which is Latin for “of its own accord.”

A JNOV can set aside an entire verdict, or just parts of a verdict. Here’s a good example of how a JNOV could correct an improper jury verdict:

In many states, if a jury finds that the conduct of a defendant in a lawsuit was “knowing” and/or “intentional”, the court must double or triple the amount of a jury verdict. Let’s assume that in a medical malpractice case, a doctor made an honest mistake. Maybe he transposed the numbers in a prescription, and the plaintiff ended up taking too much medication. But, for whatever reason, the jury found that this honest mistake was intentional, and awarded \$100,000 dollars. Because the doctor’s conduct was found by the jury to be intentional, the judge would have to award the plaintiff \$300,000 dollars. However, if the evidence was very convincing that this was an honest mistake, a JNOV could eliminate the finding of the jury that the doctor’s conduct was intentional, and the plaintiff would be awarded only the \$100,000 dollar jury verdict.

Directed verdicts and JNOV’s are two mechanisms that judges have available to prevent juries from awarding damages when they should not, and to reduce jury verdicts that are clearly excessive. Of course, tort reformers don’t tell the public about these tools; they want to be able to prevent these large jury verdicts from ever occurring, and to prevent the bad press that accompanies the verdicts.

SETTLING AFTER A DECISION:

In many cases, such as the famed McDonald’s coffee case, the plaintiffs in a lawsuit will settle the case for less than they were awarded. In the McDonalds case, Stella Liebeck was awarded \$2.7 million dollars, and the judge reduced the award to \$480,000. Stella settled with McDonalds for a confidential amount less than \$480,000.

Plaintiffs and plaintiff’s attorneys are often motivated to settle because a settlement means they won’t have to go through a lengthy and potentially risky appeals process. This is

where big companies have the advantage over individual plaintiffs: A major corporation can afford to spend time and money to drag a case out for years. Settlements are extremely common, and are yet another way that very large jury verdicts are reduced.

APPEALING THE DECISION:

The majority of cases where a jury awards millions of dollars are appealed, and many times, those verdicts are reduced or overturned on appeal. For example, in the *Igen* case that was discussed earlier, the appellate court reduced the \$505 million dollar verdict down to \$19 million dollars— a *\$486 million dollar reduction*.

While some verdicts are reduced, others are overturned entirely by appellate courts. It's important to realize that the judges in appellate courts aren't overly emotional jurors, but are seasoned judges who place far more weight upon the legal issues in a case than on the emotional issues. As such, incredibly large jury verdicts are rarely upheld by the many appellate courts in our country.

Despite what tort reformers claim, large jury verdicts are the exception, and not the rule. When juries do return large verdicts, the plaintiffs usually settle for less than verdict or see the verdict reduced or overturned by an appellate court.

Our justice system is a system of checks and balances. Before someone can even bring a case, they have to convince an attorney that their case is worth gambling time and money on. The contingent-fee agreement weeds out countless cases that have no merit. Once an attorney accepts the case, a judge will most likely scrutinize the facts and law applicable to the case through a summary judgment. If the judge decides that the case has merit, then the case will be presented to an impartial jury of twelve men and women. If those twelve men and women are convinced that the plaintiff has proven his or her case, the jury will then rule in favor of the plaintiff, and award compensation for the plaintiff's injuries. The judge has an opportunity to modify, reduce, or set aside the jury's verdict. Then, the defendant has an opportunity to appeal his case to higher courts, and even more experienced judges can then modify, reduce, or set aside a jury's verdict.

The burden of proof in any case is always on the plaintiff; the deck is stacked in favor of the defendants in both civil and criminal cases. Multimillion-dollar jury verdicts rarely survive the appeals process. Yet tort reformers continue to argue that we need more barriers to file lawsuits, and statutory limitations on how much money can be awarded in the lawsuits we're able to file. The reason is that the big corporations who push for tort reform don't want the bad press and public scrutiny that accompanies trials where people are severely injured or killed. Instead, they prefer to enter into confidential settlements that the public never knows about.

Tort reform isn't about fixing a "broken" justice system; it's about protecting the public image and bottom lines of the biggest and most powerful companies in the world. Tort reform isn't about protecting doctors from high insurance rates; it's about protecting their insurers from having to pay large judgments. Tort reform isn't about keeping "greedy lawyers" from filing

frivolous lawsuits; it's about keeping those who are severely injured out of the court system and away from the public eye.