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Book Review: Lawsuit: By Stuart M. Speiser

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BOOK REVIEW

LAWSUIT: By Stuart M. Speiser*

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Reviewed by Lawrence P. Wilkins†

> Like Shakespeare's man, a lawsuit has seven ages—pleadings, pretrial procedures, pre-trial conferences, trial, post-trial procedures, final judgment, and appeal.[1]

THE SEVEN AGES of a lawsuit are portrayed in new light through the lively prose of Mr. Speiser, as he tells the backstage stories in seven major tort cases in which he or members of his firm have participated during his distinguished career.[2] More than just chronicled events observable by anyone, the author's stories reveal some of the thinking processes which turn the seven ages of a lawsuit into working tools in the resolution of controversies. More than just another collection of "stories-about-cases-the-author-has-won," the book is a discourse on the author's thesis that the American "trinity of torts" (jury trial, contingent fees, and entrepreneur-lawyers)[3] provides the best method of redressing the grievances of injured tort victims that the world's legal systems have to offer. Mr. Speiser uses his seven major cases as illustrations of how the person injured by the torts of corporate giants can make those giants answerable for their wrongdoings upon an equal footing with the individual victim, who would be no match for the economic and political power of the giants without the unique features of the American tort system. He utilizes those cases further as springboards for historical and comparative analysis, relating other illustrative cases, to demonstrate how the American tort system functions today,

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[1] F. Griffin, Jr., *Preparing Briefs that Win Cases in* COMPLETE GUIDE TO A PROFITABLE LAW PRACTICE 251. (Prentice-Hall ed. 1965). The reference is to Shakespeare's *As You Like It,* Act II, Scene VII, Jaques' lines that begin, "All the world's a stage . . . ."

[2] The major cases, in the order in which they appear in the book, are Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970); McClenny v. United Air Lines, 178 F. Supp. 372 (W.D. Mo. 1959); Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959); Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 413 F.2d 428 (2d Cir. 1969); Clemente v. United States, 422 F. Supp. 564 (D.P.R. 1976), *rev'd,* 567 F.2d 1140 (1st Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975); a case for which the author supplies no citation which arose out of the aviation disaster involving a collision between a Pan American Airways Boeing 747 and a KLM Royal Dutch Airlines Boeing 747 at Tenerife Airport in the Canary Islands on March 27, 1977. Several other cases (some of them major cases in their own right) are woven into the author's stories, but the cases above provide the framework for the book.

[3] S. SPEISER, LAWSUIT 120 (1980) [hereinafter cited as LAWSUIT].

and to show how those functions have evolved. Indeed, as the publisher's press release has claimed, the book engulfs the reader in a "living history of tort litigation," as told by a participant in an epoch of the system's evolution.

In easy, flowing narrative, illustrated by excerpts from the transcripts and court opinions, Mr. Speiser reveals counsels' strategy and techniques for remedying plaintiff's injuries, some of which work to their desired end, others of which do not. Since the book was obviously written for the lay reader,[4] the use of trial transcripts and written court opinions was risky, holding the potential for turning away the reader with no penchant for the usually dry, tedious and narrowly focused courtroom exchanges of attorneys and witnesses and the usually technical language of court opinions. The author has selected the excerpts well, however, and most are very interesting, illustrative, and complementary to the style of the book.[5] The excerpts, and the manner in which they are presented, are indispensable in giving life to this "living history."

Generously spiced with the author's personal anecdotes, these stories emanating from the aftermath of human catastrophe are as alive with the humor and spirit of mankind as with the physical and mental suffering that must be portrayed by plaintiffs' tort lawyers. In his sometimes flattering, sometimes criticizing, sometimes tongue-in-cheek, but always respectful, accounts of professional colleagues, whether cohort, opponent or judge, Mr. Speiser permits the reader to meet the actors in his dramas about revolutions in the law of torts. Clients and their families, law partners, investigators, lay and expert witnesses, bureaucrats, legislators, judges,

[4] The author goes to too much effort to describe and explain fundamental legal concepts for the work to have been aimed at a readership of lawyers. At the same time, he eschews too much in-depth analysis of the impact and ramifications of most of these concepts in relation to the legal issues being related in the story for the work to have been written as a primary source for law students. *See, e.g.*, LAWSUIT, *supra* note 3, at 31, where the possibility of a defamation suit by Ralph Nader against General Motors is considered; at 194, where the concept of defendants undertaking to act in the plaintiff's interest where no preexisting duty can be asserted is briefly mentioned; at 259, where the problem of workers' compensation benefits as an exclusive remedy arises; and, at 444, where a particularly innovative use of a motion for summary judgment is briefly related, in contrast to the devotion of nearly three pages to simply printing the table of contents of that motion.

[5] Since the technique of permitting the participants of the stories to speak directly through the excerpts is such an important and highly successful stylistic technique of the author's, he should not be criticized for the very large ratio of indented material to narrative. There are some notable exceptions, however, where the excerpts could have been encapsuled by the author and the space gained thereby devoted to thoughts by the author. *See, e.g.*, LAWSUIT, *supra* note 3, at 258, an excerpt from a pre-trial order of United States District Court Judge Albert A. Ridge; at chapter 6, several excerpts from court opinions in the *Clemente* case. On the other hand, some illustrative excerpts that were *not* provided would have added to the value of the technique. For example, at page 519, a defense tactic in a damages trial in which the point of contention was the discount rate for reducing the award to present value would have been more clearly understood by the reader if another excerpt showing the defense attorney's attempt to establish a higher rate had been provided.

defense counsel, jurors, pilots, and air traffic controllers are all real people in this book, and the author does so well in acquainting the reader with many of these people that to finish reading the book fills the reader with the feelings of sadness and disappointment one usually experiences in leaving new friends without the prospect of meeting them again and learning more about them. Viewed in this light, the book is a significant new contribution to the literature of and about law which explores the human dimensions of litigation.

In his book, *Persons and Masks of the Law,* Professor John T. Noonan, Jr. objects to the tendency of lawyers, judges, law professors and historians to write about abstractions in the law as if those abstractions are animate, sentient beings independent of the living human beings engaged in the legal process. Critical of this personification (he says impersonation would be more accurate) of legal rules and the overwhelming emphasis upon analysis and critiscism of those legal rules as distinct from the humanity of the participants he writes:

> The historians of law have not provided a counter-balance to the analytical approach. They have been generally lawyers themselves, affected by professional education and outlook. Few in number, they have been isolated in schools devoted to training practitioners. They have written the life of doctrines. The best American work in legal history, that of James Willard Hurst, has been the careful investigation of the interplay between economic forces and the legal rules. Like the sociological jurisprudence of Roscoe Pound, it is by no means exclusively centered on rules: the interests of human beings are seen as affecting the results. But it is characteristic of Hurst's focus that in a book entitled *The Growth of American Law: The Lawmakers,* he speaks of lawyers, legislators, and judges as "the principal agencies of law"; the individuals have become instruments. For the purpose of assessing the personal responsibility of the judges, legislators, and lawyers, this species of social history, like Pound's jurisprudence, is insufficiently attentive to persons. The classic model is still *The Common Law.*[6]

Mr. Speiser's history rises to Professor Noonan's implicit challenge and meets it well. It might be said that one could hardly *avoid* some commentary on the real people behind the file numbers when one is recounting the representation of the likes of Ralph Nader or Vera Zabala Clemente (Roberto Clemente's widow), or describing the peculiar difficulties of suing the estate of an Aristotle Onassis, and so Mr. Speiser's history is no better than any other literary attempt to exploit the fame of people one has known. Such a criticism of this book would be unwarranted and unfair; the humanity of the luminary personalities grace the pages of *Lawsuit* to be sure, but the greater significance of the work is its attention to the humanity of the

[6] J. NOONAN, PERSONS AND MASKS OF THE LAW 7-8 (1976).

"ordinary" participants in the process. In a segment of the chapter "Worldwide Effects of American Tort Law," entitled "Enter: Judge Peirson M. Hall," for example, the reader meets the eighty-year-old "clean-shaven Santa Claus" of a judge who worked his way from a South Dakota orphanage through a career on the federal bench that spanned thirty-seven years. The intellectual prowess of Judge Hall is humorously described by the author as he relates how the judge applied his own innovative legal theory to a difficult multi-district litigation problem arising out of the Turkish Airlines DC-10 Paris air crash of 1974, an innovation that apparently escaped the thinking of some of the preeminent aviation tort lawyers in the world until the judge announced it in his opinion.[7] Judge Hall's physical heroics become apparent to the reader in the author's poignant account of how the judge "shap[ed] an unmanageable case into a triumph of justice by the force of his will and intellect"[8] despite the ravages of cancer and heart disease.

If Judge Hall was too prominent a human being to save Mr. Speiser from the hypothetical criticism of exploiting one's great and near great acquaintences, consider his sensitive stories of a carpenter crippled in an aircraft collision in Florida,[9] a fourteen-year-old boy who was holding a rifle when it discharged into his father's back because of a manufacturing design defect,[10] a commercial pilot wrongfully accused of killing Aristotle Onassis' son,[11] and the husband and four sons of an Oregon woman who was killed in the Tenerife Airport collision of two jumbo jets.[12]

All this is not to say, however, that Mr. Speiser is beyond criticism. All too often he is content to supply only sketchy biographical information about some lawyers who are important players in his dramas. This tendency is noticeable perhaps because he so vividly describes the personalities and proclivities of *some* of the lawyer-players while supplying only the *curriculum vita* of others. For example, the reader is treated to warm recollections of an irascible, cynical, bachelor, old-style tort lawyer nicknamed "Battling Billy Hyman" who viewed litigation as a "deadly game,"[13] and whose approach to pre-trial discovery influenced the author profoundly in the early

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[7] *See* LAWSUIT, *supra* note 3, at 454-60, where the judge synthesizes federal admiralty law and state law governing damages in wrongful death actions to afford plaintiffs the opportunity to obtain relief for loss of love and affection, a result the author had attempted to obtain by asking a California judge in a California court in a lawsuit filed in California involving California defendants to apply French law for the benefit of British plaintiffs.

[8] LAWSUIT, *supra* note 3, at 468.

[9] *Id.* chapter 4.

[10] *Id.* chapter 5.

[11] *Id.* chapter 7.

[12] *Id.* chapter 8. Indeed, the author's respect for the humanity of his clients leads him to either treat them anonymously or fictionalize their names in spite of the fact that their identities can be obtained, in most instances, from public case reports.

[13] *Id.* at 185.

stages of his career. Compared to that background story, the author's rendition of the story of Charles Krause, who has been with Mr. Speiser's law firm since 1959, is extremely sparse.[14] Mr. Krause appears frequently and extensively in the book, since the author describes several trials that his partner conducts. The reader becomes quite familiar with Mr. Krause *qua* trial tactician, but never really gets a sense of *who* Chuck Krause is, or the significance of Chuck Krause's personal human traits in doing law. It would have been appropriate for Mr. Speiser to have included more of Chuck Krause, the human being, in the chapter entitled "Tort Lawyers of the 1980's." Several other lawyers are given similar treatment in the book; many more are merely listed by name and residence. While the author's desire to fraternally acknowledge as many associates, colleagues, and opponents as possible is understandable, the placement of these "honorable mentions" in an acknowledgment section would have been just as effective.

Given the author's general approach, which makes real people such an important feature of the book, one comment about the relationship of clients and attorneys is disturbing. In his discussion of the importance of specialists in delivering legal services in the age of the entrepreneur-lawyer, he tries to establish that the injured person should rely more upon the personal attorney in general practice for counseling rather than the tort specialist whom the personal attorney calls in on the case:

> Compared to the personal attention they get from a large general practice firm—whom they pay by the hour—they may feel that their treatment in a busy tort specialist's office is brusque. We try to avoid this, but it is sometimes inevitable. *Tort practice is more oriented toward dealing with judges, jurors, insurance adjusters, and defense lawyers than toward the personal counseling of clients.* Often the senior members of specialist firms are busy in court or traveling on depositions and do not have much time available for client counseling. During the preparatory stages of the case, the client's contacts are often with junior lawyers, who may not inspire as much confidence in the client as the familiar counselors at the general practice firm.[15]

It may be supposed that in a busy world, brusque treatment is sometimes inevitable. Still, when it occurs in the relationship of service professional to client, one must wonder if a change in thinking about the orientation of the practice might, at the very least, reduce the number of unsatisfactory contacts. There can be no denial that litigation specialists must spend the bulk of their time dealing with judges, jurors, insurance adjusters, witnesses, and opposing counsel. But the *reason* for those dealings is the client. The person perhaps least able to take brusque treatment in stride is the person suffering from physical and emotional trauma inflicted by the wrongful

[14] *See id.* at 310.

[15] *Id.* at 576 [emphasis supplied].

conduct of others. Often, the client's first contact with the legal profession occurs when the person seeks a remedy for tortious injuries. The client may be no more familiar with the general practice attorneys that first confer with the client than the specialists. General practice firms too are busy, and may be spending the largest proportion of their time dealing with judges, jurors, insurance adjusters, witnesses and opposing counsel. To assume that the general practice firm is more able or even more willing to provide personal client counseling will permit some clients to "fall through the cracks" in the counseling function. If the thinking is adopted that tort practice is oriented toward the client and is an extension of the client in dealing with other people necessary to vindicate the client's interests, maybe the inevitability of brusque treatment can be reduced or eliminated. It would seem that the tort specialist firm would in fact be better able to perform the vital function of client counseling than the general practice firm, since, by nature of the practice such a firm would be more educated and experienced in the particular physical, emotional, and informational needs of injured plaintiffs. So too, the direct involvement of the specialist firm with what is happening with the client's claim would suggest the specialists as the best source for information and guidance. We are all familiar with the tendency for messages to become distorted in the process of human communication. If the tort specialist—the person with the best information and experience with the needs of torts clients—assumes the general practitioner has primary responsibility for client counseling, much of the value of the specialist to the client is lost, despite the best of efforts to communicate through the general practitioner.[16] The quoted statement by the author is out of step with the generally humanistic tone of the book.

Keenly focused upon the objectives of developing, documenting, and justifying the concept of the entrepreneur-lawyer, the author presents his thesis very well. As if viewing a large segment of the American public as a jury being asked to reach a verdict about tort lawyers, he presents his case in opposition to critic-adversaries who would have the public believe such lawyers to be "fat cats, privateers, or bounty hunters."[17] He

[16] The author briefly described one specialists' firm's approach to the problem at page 297. The approach might be characterized as a specialty within a specialty; it utilizes an "interviewing attorney" whose sole function is to relieve trial attorneys from the detail of client contact. The author, sensitive to the potential for impersonal, assembly-line treatment that such an approach holds, asserts warmth, enthusiasm, and teamwork as reasons why the firm described did not fall into that trap. The obvious essential qualities of such a system are warmth, enthusiasm, and teamwork. If those qualities are maintained, there is no reason to assume that a general practice firm working with the specialists' firm could not adequately perform client interviewing and counseling functions. The problems begin when it is assumed that these qualities are extant as the client becomes involved with more than one firm and several attorneys.

[17] The quote comes from an article in The National Law Journal in the author's regular Tort Law column, where he incapsulates his thesis. Speiser, *How the Entrepreneur-Lawyer Changed the Rules of the Game*, National Law Journal, Dec. 1, 1980 at 48, col. 4. *See also* Lawsuit, *supra* note 3, at 594.

opens his presentation with the case of *Nader v. General Motors Corp.*[18] as his first "exhibit," carefully developing the background and details of the lawsuit in which Mr. Nader sought recovery against General Motors for invasion of privacy, alleging that the company had used intrusive tactics to counteract his anti-Corvair-pro-automobile-safety campaign launched in the mid-sixties. Revealing the theories and tactics employed by plaintiff's counsel, Mr. Speiser demonstrates for the reader-jury how this *"David v. Goliath"*[19] lawsuit eventually vindicated Mr. Nader's interests.[20] Then, by way of contrast, he presents opinion evidence from lawyers, judges and legal analysts from other countries to support the inference he would have the "jury" draw—that the favorable result could not have been reached anywhere else but in the American legal system.

Proceeding further into his "case-in-chief," Mr. Speiser then develops his notion of revolutionary change in the American legal system itself through historical evidence in a chapter entitled "The Early American Tort Lawyer: Colonial Times to 1950." In this chapter he presents the case histories of the SS *Eastland,* a ship sinking in which 1,100 people drowned, the *General Slocum,* a ship fire where 1,021 passengers (mostly women and children) died while the ship's captain and crew escaped, the *Titanic* disaster that killed 1,517 people, the Iroquois Theater fire that incinerated 602 Chicago theater-goers who had come to see the British musical hit "Mr. Blue Beard," and the Triangle Shirtwaist factory fire in New York City that resulted in 145 employees' deaths. Documenting the shocking results in all of these cases in attempts to obtain legal redress by families of the victims, Mr. Speiser sets the stage for his rendition of revolutions in tort practice as engineered by the twentieth-century entrepreneur-lawyers. Then, in following chapters, he traces the development of the scientific and business-management oriented tort specialist, who, using the contingent fee agreement as security for the necessarily huge investments of capital, time and effort to litigate such claims, equalizes the disparate economic and political powers of innocent injured individuals and culpable corporate giants. In these chapters, he carefully marshals his evidence (including his own involvement in revolutionary aviation tort litigation) to orient it in the direction of answering the question of why it is only in

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[18] LAWSUIT, *supra* note 3, ch. 1; *see* Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

[19] LAWSUIT, *supra* note 3, at 110.

[20] Since the book is addressed to the lay-reader, the author patiently and effectively introduces the reader to an enormous amount of legal lore and technicality. In the first chapter, for example, the reader is exposed to a definition of tort; an exposition of the common law system; an introduction to the law of defamation, privacy, intentional infliction of emotional distress, and interference with economic advantage; a discussion of conflicts of law; the concept of diversity of citizenship; the intellectual challenges of attempting to persuade a trial judge to embrace a new theory of law; the synthesizing process of analyzing common law decisions not directly on point to the case at hand; an application to the attorney-client privilege; and an illustration of the function of depositions, *inter alia.*

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America that tort plaintiffs can meet corporate defendants eye-to-eye in the legal forum. Finally, putting himself on the "witness-stand," he responds to pointed questions about the American legal system and profession in general, tort claims practice and himself in particular, and inter-related topics in a chapter called "Interview With a Tort Lawyer."

In this adversarial mode of presenting his ideas, Mr. Speiser perhaps opens himself up to criticism that the work is too one-sided. But, after all, he is trying to counter what he considers to be "bad press," and wishes to present an image of the tort lawyer sharply delineated and contrasted with the "fat cat, privateer, or bounty hunter" image. He sets himself to the task of not merely *describing* a system for a reader-jury, leaving them completely free to draw their own conclusions, but of *proving* that the system permits greater access by aggrieved persons and deters anti-social conduct by corporate entities. However, in several respects, a more balanced or complete presentation would have added measurably to the value of the book, contributing to a more precise perception of the tort compensation system without detracting from his thesis or objective.

One such area deserving more focused attention is the limitations of the entrepreneur-lawyer system in the "battle" of tort victims versus corporate giants. In many segments of the book, the author does acknowledge the fact that it is only the *seriously* injured claimant who stands a good chance of recovery against the defendant who has the resources available to employ high calibre lawyers and attrition tactics toward the lawsuit.[21] In many other segments, however, his statements create the impression that the system is open to a larger number of injured people than it actually is, that it is available and effective for persons with less than "serious" injury.[22]

The reason for this limitation on the system is implicit in the nature of two elements of the author's "trinity of torts" and their interaction: the contingent fee arrangement and the entrepreneurial approach to lawyering. The author discusses the interaction in a section of the chapter on "The Scientific Tort Lawyer" called "The Money Dynamics of Tort Litigation." There he makes the point that the key to the success of modern tort compensation systems is the willingness and ability of tort specialists to invest their own money in pursuing the plaintiff's claim. He points out that it is not unusual for attorneys to "lay out six-figure sums for processing a single case."[23] In addition, he establishes very graphically the high costs of assembling and maintaining the facilities and personnel of a specialist firm necessary to mobilize at a moment's notice against economically and

[21] *See, e.g.*, LAWSUIT, *supra* note 3, at 262, 269, 299, 587, 593-94, 597.
[22] *See, e.g.*, id. at 110, 120, 137, 151, 588-89, 595.
[23] *Id.* at 560.

politically powerful defendants and to sustain the pressure of litigation in the client's behalf. The prospect of a large fee of course makes the tort lawyer willing to make these investments, but the usual tort plaintiff has nowhere near the level of capital that could absorb fees to cover six-figure expenses plus overhead and profit margin. The contingent fee arrangement closes the gap, permitting tort specialists to proceed on the claim upon the hope that recovery in the lawsuit will enable the plaintiff to pay the fees and expenses. Therein lies the limitation: against the risk of a potential recovery ceiling of *five* figures, for example, it would be foolish to invest six-figure sums to litigate. The money dynamics work in such a way that the entrepreneur-lawyer must have *some* security for her investment. She may be willing to invest heavily in a claim, despite the risk of zero return, where there is a substantial margin between the expenditure-overhead-profit margin level of the potential fee and the ceiling of the potential recovery. In such a scheme, the injury of the client becomes an asset which provides the security for the lawyer's investments in providing professional services. If the injury-asset of the plaintiff is not large enough to attract the tort specialist's investment, the client must seek other investors in the legal services market until he finds a lawyer willing to supply the services at a lower level of investment. Assuming that a lawyer can be attracted at all, by the author's own standards, this means the client is receiving services of lesser quality.[24] This means that in a hypothetical case where a defendant injures two plaintiffs by the same conduct but produces a "serious" injury in one plaintiff and a "non-serious" injury in the other, the former plaintiff is able to seek better legal services than the latter. The author does not seem to be concerned to any great extent[25] about this anomolous feature of the system, and it would have been extremely interesting to read his thoughts as to how the anomoly can be reduced or eliminated. Mr. Speiser is concerned about gaps and anomolies in the system, as evidenced by his treatment of many issues that arose in his illustrative cases. That concern is further evidenced in direct comment in discrete sections of the book.[26] But this anomoly, which relates directly to the nature, function and effectiveness of the entrepreneur-lawyer concept that the author invested so much literary effort to develop, gets only incidental treatment. It would have improved the book if he had dispensed with his vague and undeveloped proposal to assert handgun control through products liability litigation,[27] putting that off for a later, more thought-out

[24] Quality in this sense, of course, relates to the economic ability to wage the legal battle against the corporate giants. To assume that there is a necessary and positive correlation between the economic liquidity of a lawyer and the quality of legal representation in the senses of intellectual ability and technical competence is patently absurd.

[25] In fairness to the author, he does address the problem directly in a paragraph at page 577, but there he speaks very briefly and only descriptively.

[26] LAWSUIT, *supra* note 3, at 578-81; chapter 9; *id.* at 369-72.

work, and used the space for a more balanced analysis of the entrepreneur-lawyer system.

A hypothetical to illustrate another aspect of the entrepreneur-lawyer system given little attention by the author incidentally illustrates the anomoly raised in the preceding paragraph: suppose two plaintiffs injured by an explosion caused by the negligence of a single defendant, a large corporation. Assume that both incur medical expenses of $500 and miss five days of work valued at $250, that both recover from their physical injuries and are able to return to their occupations without limitation of their earnings potential. The only difference between the two plaintiffs is in their injuries, which, under the operation of the entrepreneur-lawyer system as described by the author, produces a wide disparity in their ability to employ the most effective legal representation of their claims against the corporate defendant. The first plaintiff is struck by debris from the explosion, suffers a concussion, is rendered unconscious and experiences little if any pain from the blow. The second plaintiff receives serious but non-disabling burns from the fire of the explosion, remains conscious, and although the shock from the burns actually blocks the pain for a time, he later suffers excruciating pain. The difference in injury enables the second plaintiff to add a greater element of pain and suffering to the claim than the first plaintiff. The second plaintiff thereby has a more attractive injury-asset than the first to serve as security for the "loan" of legal services of the nature provided by tort specialists' firms. It may be argued that of course this is true because the injuries are not equal; the second plaintiff's pain and suffering makes the invasion of interests by the defendant greater and thereby more "deserving" of the greater chance for full and effective legal representation. The argument most certainly begs the question, but more importantly it is simplistic and naive about the function of the pain and suffering element of damages.

The author professes an orientation in his approach to practicing law toward the search for truth with an ever-vigilant eye toward the pragmatics of the circumstances of the case.[28] It would have been refreshing in a work of this nature to see him reveal the truths and pragmatics of the pain and suffering element of damages in addition to his "how we do it" treatment of the concept. The truth of the matter is that the second hypothetical plaintiff's pain and suffering makes the claim attractive for investment in the legal services market because it will supply the funds for payment of the contingent fee. One pragmatic notion of the matter is that the second plaintiff's claim permits the tort specialist to invest the effort in presenting a "scientific"[29] argument to the jury that pain and

[28] *Id.* at 560.

[29] Despite the author's claim, and recognizing that experts in current medical science may be called upon to testify in the pain and suffering aspects of a client's case, the per diem

suffering should be measured by a per-diem method, knowing that the jury is likely to take into account that a large award for pain and suffering will permit the contingent fee to be paid without the fee eating into the award for plaintiff's actual economic losses.[30] Pragmatically, the primal fear of fire and the widespread recognition of burn pain as particularly excruciating create the leverage necessary to overcome the usual reluctance of insurance adjusters to put any value upon pain and suffering for purposes of settlement. The adjuster knows that prayers for pain and suffering are

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argument, *per se*, is not scientific. For the commonly expressed objections to the technique on the grounds that it lends an artificial appearance of precision to a measurement that is at best imprecise and that it produces "an illusion of certainty by evidence," *see* Duguay v. Gelinas, 104 N.H. 182, 182 A.2d 451 (1962). For an analysis of pain and suffering awards in the light of recent scientific observations that challenges the propriety of that element of damages, *see* Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355 (1974). For a favorable view of the per diem argument technique, *see* Comment, *The Unit of Time Method of Computing Pain and Suffering as Portrayed on Blackboards and Charts*, 3 MARSH. J. PRAC. & PROC. 422 (1970).

[30] This of course assumes that the per diem argument can be made to the jury. Depending upon the jurisdiction, that may not be possible. The judicial trend may be to permit the argument, but currently the states are roughly equally divided into three categories; those that permit it, those that deny it, and those that permit it or deny it at the discretion of the trial judge. *See* Annot., 60 A.L.R.2d 1347 (1958) and supplemental updates. Indeed, the matter is not even as settled in Florida as the author implies at page 295 of the book. The case of Ratner v. Arrington, 111 So.2d 82 (Fla. App. 1959), which is the basis for the author's story in chapter 4 is, after all only a Florida Court of Appeals decision and only two other districts have explicitly followed it: Perdue v. Watson, 144 So.2d 840 (Fla. App. 1962) and Payne v. Alvarez, 156 So.2d 659 (Fla. App. 1963). All three of these decisions leave the matter to the discretion of the trial judge. Further, there remains the cloud of language in a Florida Supreme Court decision that has not been completely removed. Braddock v. Seaboard Air Line R.R. Co., 80 So.2d 662, 668 (Fla. 1955), contains the statement: "Their problem [the jury's problem of equating the nature of pain, embarrassment, and inconvenience with money] is not of mathematical calculation but involves an exercise of their sound judgment of what is fair and right." The case involved the issue of whether awards for future pain and suffering should be reduced to present value. The court expressly declined to pass upon the question of the propriety of the per diem argument with language that indicated it approved leaving it within the trial court's discretion. Furthermore, one might conclude that the long standing of the court of appeals decisions removes the cloud of the quoted language. However, as demonstrated by the author, the machinery of justice in the tort compensation system sometimes works very slowly, and the potential for definitive Florida Supreme Court treatment of the issue still exists.

It is appropriate here to raise another criticism of the author's approach to the book. As stated previously, the press release for the work asserted a utility for law students to learn things "not revealed in the classroom." Horizon Press News Release at 3. One tool that *is* supplied in the law school classroom is citation to authority for the assertions being made. The author asserts that the *Ratner v. Arrington* decision was a landmark decision, which it may well be, but he does not even bother to give its name or cite for law student readers. He omits to do the same with quotations, excerpts, and paraphrases of various legal authority with maddening frequency. He is critical of a generalized and abstract group of "well meaning law professors" who are critical of some features of the torts compensation system that obviously have served him and his clients very well. But my guess is that those law professors (whoever they might be) would cite to the authorities upon which they rely for their assertions so that the reader can test those assertions for himself. It may be true that the *lay* reader would have no interest in conducting such research, but the book has been promoted for use by law students, and the author's proposals for law reform almost certainly were intended for consideration by lawyers and legal scholars as well. His frequent omissions of citations extremely limit the utility and credibility of the book.

the tort lawyer's usual method of "self-liquidating"[31] the contingent fee in the lawsuit and will negotiate vigorously to discount it or disallow it altogether with the argument that the insurer is not in the business of paying plaintiff's attorneys fees. But the adjuster also knows that if plaintiff can get the case to the jury on damages, the pain and suffering element enhances the potential verdict. In a strong case on liability, the settlement value of the second hypothetical plaintiff's case goes up considerably more than that of the first plaintiff, even if the hypothetical is modified to produce conscious pain and suffering by the first plaintiff. The revolution in tort *practice* described by the author has opened up the courts to some individual plaintiffs and has enabled them to hold the corporate giants accountable for their conduct upon equal terms. It will take a revolution in tort *law*, such as the recoverability of attorney fees as tort damages, to put injured people like the first plaintiff in the hypothetical upon similar footing. An exploration by the author of the merits of such a proposal, coming from one who has been involved in a tort practice spanning four decades, would have been interesting and influential to the bench, bar, client, and classroom segments of the legal system.

One final aspect of the litigation process neglected by the author deserves notice. After building the drama of the *Nader* case for one hundred pages, he abruptly informs the reader that the lawsuit was terminated by settlement. After sixty-six pages of developing the intricacies of the "Grand Canyon Disaster" and one of the trials in chapter six, he briefly notes that the defendants' offers of settlement escalated and that most of 128 remaining cases were quickly settled. After thirteen pages of detail on the *McKusker v. Onassis* case in chapter 7 he says merely that the case was settled "[i]n short order" for $800,000. The reader is repeatedly worked up to an emotional pitch only to be bluntly told that the case was settled. The author himself admits that termination of the *Nader* lawsuit was "undramatic," and that the lawsuit ended like ninety percent of all American lawsuits.[32] This must have an effect upon the lay-reader like reading a detective story in which the detective relentlessly pursues the suspect nearly to the point of cracking the case, only to find out that the culprit pays the detective's client a large sum of money to stop the probe. Yet, about this highly important feature of the tort compensation system, the author is almost entirely mum. He offers the reason for his silence in the *Nader* case:

> Settlement negotiations are conducted in confidence, and most lawyers —myself included—believe that they should remain confidential forever, in order to free the negotiators from any inhibitions that might stall the settlement process. Therefore, I cannot tell you any details of the negotiations.[33]

[31] *See* LAWSUIT, *supra* note 3, at 569-70, 594.

[32] *Id.* at 112.

[33] *Id.* at 101.

He indulges in four breaches of this policy during the course of the book,[34] explaining in one instance that the settlement figure was significant in itself and was divulged with the consent of the client,[35] but apparently he was unable to resist the well-known tendency of tort lawyers to relate humorous anecdotes,[36] or sophisticated techniques.[37] Aside from these slips, his apology is unpersuasive. His policy is understandable, even commendable. But he could have easily overcome the inhibitions of negotiators by using the technique of the hypothetical or perhaps even a fictionalized or anonymous version of a real situation. Revelation of settlement tactics by such a renowned tort specialist would have added significantly to the value of the book for lay readers and would have provided needed discourse for consideration by law students in many law school courses on negotiation. At the very least, he could have detached himself from direct discussion of behind-closed-doors strategy and discussed one of the newest revolutions in tort practice: the "structured," "periodic payment" or annuity technique of settlement.[38] It seems that another aspect of the entrepreneur-lawyer system is at work to produce the author's silence; in a world of entrepreneurs, one must expect trade secrets to be jealously guarded. Perhaps we must wait until the author retires from the active practice to hear his trade secrets in a book entitled "Settlement." After reading Mr. Speiser's latest work, this reviewer will regard that day with mixed and conflicting emotions. In his book and his life, Mr. Speiser has done much to dispel Shakespeare's Jacques' notion of justice,[39] the fifth age of man, as well as Ambrose Bierce's definition of lawyer, litigant, litigation, and impunity,[40] against which he began this *Lawsuit*.

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[34] *Id.* at 172, 300, 353, 486.

[35] *Id.* at 486.

[36] *Id.* at 172, 353.

[37] *Id.* at 300.

[38] For consideration of the types of settlements mentioned, *see* Bowen, *Annuities and Settlement—Why and How*, Chronicle August 1976 at 2; Corboy, *Structured Injustice: Compulsory Periodic Payment of Judgments*, 66 A.B.A.J. 1524 (1980); Evans, *Structured Settlements—A Useful Tool in Catastrophic Injury Cases*, J. Mo. B. October-November 1977 at 419; Krause, *Structured Settlements for Tort Victims*, 66 A.B.A.J. 1527 (1980) [the author's law partner]; Lilly, *Alternatives to Lump Sum Payments in Personal Injury Cases*, 44 INS. COUNSEL J. 243 (1977); Sedgwick and Judge *The Use of Annuities in Settlement of Personal Injury Cases*, 41 INS. COUNSEL J. 584 (1974); Tinsman, *What's It Really Worth? Evaluating Annuities for Settlement Purposes*, TRIAL September 1978 at 30; *Annuities to Settle Cases*, 42 INS. COUNSEL J. 367 (1975).

[39] "[A]nd then the justice,
In fair round belly with good capon lin'd
With eyes severe and beard of formal cut,
Full of wise saws and modern instances;
And so he plays his part." Shakespeare, *As You Like It*,
Act II, Scene VII, THE WORKS OF WILLIAM SHAKESPEARE (Black ed. 1937).

[40] "LAWYER: One skilled in circumvention of the law.
LITIGANT: A person about to give up his skin for the hope of retaining his bones.
LITIGATION: A machine which you go into as a pig and come out as a sausage.
IMPUNITY: Wealth." LAWSUIT, *supra* note 3, at v., quoting from A. BIERCE, THE DEVIL'S DICTIONARY (1911).