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# Book Reviews: Lawsuit

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LAWSUIT. By Stuart M. Speiser.\* Horizon Press, New York, New York. 1980. Pp. 605. Reviewed by John A. Lynch, Jr.†

It is not surprising that a recognized leader of the plaintiff's tort bar would author a generally one-sided, preachy defense of American tort litigation. Stuart M. Speiser, a leading figure in aviation negligence and products liability litigation and author of *Lawsuit* and many useful practice books,<sup>1</sup> is not modest in his claims of the benefits of tort litigation to American society. In fact, it would probably surprise even the most querulous reader or reviewer that he would include claims that contemporary tort litigation has thwarted foreign dictatorships, has done more for America's image abroad than all her foreign aid, has bolstered local economies where it has been carried on, has breathed life into the equal protection clause of United States Constitution and, *mirabile dictu*, has lowered some insurance rates. Owing to Speiser's years of practice and experience as a prominent plaintiff's tort lawyer and his extensive historical research of this subject, *Lawsuit* is both an autobiography, in that it includes several cases litigated by the author, and an historical account of tort litigation in the United States.

In *Lawsuit*, Speiser divides American tort litigation into two eras: the period before 1950 and the period after 1950. He contrasts the two eras of tort litigation primarily by describing the leading tort cases and personalities of each one. The injured accident victim or worker in the United States in the last century and into the middle of this century generally received inadequate compensation from tort litigation. Obsessive concern for the industrialization of America fostered a keen solicitude for property rights. As Speiser indicates, not only were America's enterprises able to employ such legal luminaries as Abraham Lincoln and Clarence Darrow, but there was also great legislative, executive and even popular protection of their interests, often at the

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\* Stuart M. Speiser is a senior partner of Speiser, Krause & Madole, a prominent litigation firm with offices in New York, Washington, Los Angeles and London.

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1. Cited by the United States Supreme Court and other courts throughout the country, eighteen legal textbooks have been authored by Speiser. Some of his best sellers include: S. SPEISER & C. KRAUSE, AVIATION TORT LAW (1978); S. SPEISER, RECOVERY FOR WRONGFUL DEATH (2d ed. 1975); S. SPEISER, ATTORNEYS FEES (1973); S. SPEISER, THE NEGLIGENCE CASE: RES IPSA LOQUITUR (1972).

expense of the injury victim, particularly the injured worker.<sup>2</sup> Speiser amply demonstrates that tort litigation under the *ancien régime* often produced outrageous results.<sup>3</sup> He also blames the generally pathetic and incompetent class of lawyers who represented tort plaintiffs. These plaintiffs' lawyers were not above chasing ambulances, buying testimony, settling cases for nuisance value amounts and charging clients a fifty percent contingency fee.<sup>4</sup> Because tort practice at that time was considered an unsavory profession, many reputable lawyers found it unworthy of their talents.

In the period since 1950, injury claimants have received increasingly adequate compensation. Speiser attributes the success in recoveries by personal injury claimants in this latter era to the "trinity of torts" (a catch-phrase that nearly makes one wince), which includes: the right to trial by jury in most civil cases, contingent fee retainer agreements and the development after the late 1940's of a class of "entrepreneur lawyers." It is clearly the last element of the trinity, the rise of lawyers willing to advance considerable amounts of money to make sophisticated and scientific cases of liability and damages on behalf of plaintiffs, that has been most critical in creating a climate where plaintiffs can recover large verdicts. Such large verdicts, according to Speiser, have brought great benefits to America and to the world.

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2. A case not discussed by Speiser, *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 44 A. 809 (1898), amply demonstrates a preoccupation with protection of property rights. In *Buch*, the plaintiff, an eight-year-old boy who could not speak or understand English, was injured when his arm was caught in machinery in the defendant's mill. The plaintiff had been ordered—an order he could not understand—out of the defendant's mill prior to his injury. It was no surprise that a nineteenth century tribunal in a leading textile manufacturing jurisdiction would find no liability to a trespasser under the circumstances. What was shocking was the court's *obiter dicta*: "If, then, the defendant's machinery was injured by the plaintiff's act in putting his hand in the gearing, he is liable to them for the damages in an action of trespass, and to nominal damages for the wrongful entry." *Id.* at 262, 44 A. at 811.

3. In a 1909 fire at Chicago's Iroquois Theatre, which was advertised as "absolutely fireproof," 602 persons perished. Although the theatre's owners and builders had violated numerous safety laws and ordinances, the largest recoveries were settlements of a few dozen civil suits for \$750.00 per death. In 1911, 145 employees of the Triangle Shirtwaist factory, a New York City sweatshop, died in a fire when trapped by locked exit doors. After an unsuccessful lawsuit against the factory owners, death claims against the building owners were settled for \$75.00 each. *LAWSUIT* at 133-38.

4. Regrettably, Speiser enters a plea of self-defense for these rascals:

The early plaintiffs' lawyers were faced with the problem of overcoming the handiwork of the claims department if they were to have any chance to win the case. The plaintiffs had no claims department; so the dirty work had to be done by their lawyers, who had no one else to buy up their own witnesses or create evidence. Some plaintiffs' lawyers became pretty good at this game, which started at a time when law practice was being deprofessionalized in most states.

*Id.* at 139.

Laying the groundwork for his strident celebration of present day negligence litigation, Speiser also describes the development of substantive defenses and court practices of early industrial America in dark conspirational terms:

[T]he captains of industry knew that jurors in accident cases would probably be more sympathetic to injured people than to big business; so something had to be done to prevent injuries from impeding industrial progress by compensating its victims too freely. The defense lawyers and judges who were persuaded by these arguments were equal to the task. They erected an obstacle course designed to wear down or eliminate all but the hardest accident claimants and their lawyers.<sup>5</sup>

Such defenses included assumption of risk and contributory negligence, which remain with us today to some degree, and the fellow-servant rule. These defenses offered by industry were readily accepted by the American courts and flourished in a society committed to industrial expansion at the expense of the working class.

These defenses, which admittedly were harshly applied in industrial accident cases in this century, were the necessary foils of a defendant in a system where liability was based on fault. It might cogently be argued that the best way of eliminating the harsh consequences of these defenses would be to abandon fault as a basis of liability and recovery. This was achieved early in this century by the enactment of workmen's compensation statutes.<sup>6</sup> To a limited degree, some jurisdictions have further embraced the concept of liability or recovery without fault in so-called "no-fault" laws.<sup>7</sup>

Speiser does not advocate elimination of liability based on fault except in cases involving relatively small amounts of money.<sup>8</sup> He contends that the benefits paid under a program such

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5. *Id.* at 124.

6. As stated in the preamble of the original Maryland workmen's compensation statute: *Whereas*, The common law system governing the remedy of workmen against employers for injuries received in extra-hazardous work is inconsistent with modern industrial conditions; and injuries in such work, formerly occasional, have now become frequent and inevitable.

*Now, Therefore*, the State of Maryland, exercising herein its police and sovereign power, declares that all phases of extra-hazardous employments be, and they are hereby withdrawn from private controversy, and sure and certain relief for workmen injured in extra-hazardous employments and their families and dependents are hereby provided for, regardless of questions of fault and to the exclusion of every other remedy, except as provided in this Act.

Law of April 16, 1914, ch. 800, 1914 Md. Laws 1429.

7. An example of such laws may be seen at MASS. GEN. LAWS ANN. ch. 90, § 34A (West Supp. 1981).

8. LAWSUIT at 587.

as workmen's compensation are inherently small because they are dependent on the lobbying power of organized labor.<sup>9</sup> Speiser favors the system that bases liability on fault, despite its drawbacks, because that system, under the guidance of entrepreneur-lawyers, has yielded ever-larger recoveries for plaintiffs. Unlike workmen's compensation, the contingent fee is not measured in terms of actual time spent on settling cases or work done.

Speiser's justification of contingent fees is in fact quite defensive:

It is easy for journalists and the public to form a "fat cat" image of the plaintiff's contingency fee lawyer, since no previous author has described the obstacles to be overcome and the facilities that must be maintained to serve the public. You will not find any plaintiff's lawyers in *Fortune's* list of millionaires.<sup>10</sup>

Part of Speiser's mission is to set out for the public the "money dynamics," or practical economics, of tort litigation. Such litigation, as maintained by a scientific entrepreneur-lawyer such as Speiser, is expensive. For example, plaintiffs' lawyers advanced more than one million dollars in costs for their clients in litigation related to the 1974 crash of a Turkish Airlines DC-10 near Paris, France. Speiser states that his own firm often has paid out between five and ten thousand dollars to investigate a case to determine whether or not to take it. Such preliminary investigation, of course, protects the plaintiff's lawyer from the down side of the contingent fee system, the chance that he will recover nothing after maintaining expensive protracted litigation. Speiser notes that the capital for the costly battles with insurers and corporations comes only from the after-tax fruits of previous victories. Although Speiser does not say so explicitly, it is clear that for the tort lawyer the easy pickings in quickly settled cases are necessary to subsidize ground-breaking struggles where the plaintiff's right to recover at the outset is not clear:

[T]he plaintiffs do not buy a fixed number of hours from us — they could not afford to do so. What they are interested in is a favorable result, and if we achieve that in one case with a thousand hours work and in another case with 2000 hours work, it makes no difference to the clients.<sup>11</sup>

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9. The Maryland workmen's compensation program, in cases of benefits for permanent total disability, results in a loss of at least one-third of an injured employee's pre-tax income. While such compensation is essentially a wage supplement, the employer is responsible for other items related to a worker's injuries such as medical or funeral expenses. MD. ANN. CODE art. 101, §§ 36 & 37 (1979). Attorneys' fees for services in representing a claimant must be approved by the Workmen's Compensation Commission. *Id.* § 57.

10. LAWSUIT at 572.

11. *Id.* at 592.

A lawyer speaking from a different perspective has contended that the need to justify a contingent fee in a case that should be settled quickly has caused some lawyers to drag out settlement negotiations, aggravating court backlogs.<sup>12</sup>

The system that Speiser so stoutly defends is, in essence, a slot machine into which the plaintiff's lawyer feeds successive clients. While such litigation entails procedural risks for plaintiffs even in the most meritorious cases, the lawyer as able and as diligent as Speiser will come out ahead because of the ultimate possibility, perhaps even probability, that a jury will mulct a carefully selected deep pocket defendant.<sup>13</sup>

It is perhaps appropriate that Speiser in his role as a consummate advocate is unhampered by objectivity in describing tort litigation. Speiser points out that the deposition, when used by the defendants against his client, is one of the many "attrition tactics used by a wealthy litigant against a weaker one."<sup>14</sup> Describing his own use of a deposition, Speiser lauds discovery, particularly the deposition, as that which takes a lot of guesswork and gamesmanship out of the trial.<sup>15</sup> One of the evils of pre-1950 tort litigation, according to Speiser, was that "[t]he powerful defense counsel and the authoritative figure of the judge warned the jurors they could not indulge their natural sympathies."<sup>16</sup> Speiser makes no suggestion that the rigors of contributory negligence were ameliorated, in some instances, by jury verdicts that compromised liability and

12. Casey, *Thoughts on Revitalization of Casualty Litigation*, 1979 INS. L.J. 677, 680. Mr. Casey suggests that plaintiffs in negligence cases be notified of settlement offers by insurance companies at the time such offers are made. While such a practice might speed up the settlement process, it would seemingly be a questionable contact with an opposing represented party. See ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (A)(1).

13. It is clear that Speiser is not really very interested in all of the benefits of the jury system if the opportunity for gain is limited, as he states:

I am in favor of experiments with arbitration of claims up to \$50,000, like those which are now conducted in three federal district courts. It would be wonderful if we could maintain the right to a jury trial in every legitimate claim, but inflation and the realities of court budgets make it difficult to provide this service in smaller cases.

LAWSUIT at 597.

14. *Id.* at 30.

15. *Id.* at 46. Furthermore, Speiser contends that the use of depositions aids in the settlement of a large number of cases before they go to trial. He states that "[w]hen the opposing lawyers know the strengths and weaknesses of each other's cases, the stage is set for productive settlement discussions, and the expense and uncertainty of trial can often be avoided." *Id.*

16. *Id.* at 126. Of course, juries today are admonished not to decide cases on the basis of sympathy for the litigants. E. DEVITT & C. BLACKMAR, 2 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.02 (3d ed. 1977).

damages.<sup>17</sup> In Speiser's parochial view, anything that might prevent or limit a plaintiff's recovery, whether it be sovereign immunity, wrongful death statutes or limitation of tort plaintiffs' recovery to postjudgment interest, is a "rotten legal door" which must be noisily kicked in by "a doughty band of entrepreneur-lawyers."<sup>18</sup>

Whether the role of the entrepreneur-lawyer is "Adam Smith's free enterprise capitalism in its purest form,"<sup>19</sup> as Speiser suggests, or an exploitation of jury sympathies at great social cost,<sup>20</sup> Speiser's description of the development of this class of lawyers, as exemplified by his cases and those of his associates, is worth the reader's endurance of his turgid polemics. Aviation negligence was a wide-open field when Speiser stepped in in 1950. In 1956, when two commercial airliners collided over the Grand Canyon and then crashed killing a total of 128 persons, any plaintiff in a negligence action against the airlines was confronted with serious attitudinal problems of potential jurors. At that time, many Americans had never flown and tended to regard accidents as an inherent hazard of flying rather than the product of negligence. Undoubtedly, experienced, uniformed airline captains made highly credible defendants' witnesses. Speiser and his cohorts overcame the defendants' financial advantages with then unprece-

17. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.21, at 328-31 (2d ed. 1977).

18. LAWSUIT at 581. Even the humble law review article is an archangel's sword or an instrumentality of great wickedness, depending upon whether it shares Speiser's world view. Speiser emphasizes the important role of law review articles in overcoming "rotten legal doors that need to be kicked in." *Id.* at 579. Speaking of writers who criticize aspects of tort litigation from a different perspective, Speiser says: "It seems that journalists (and sometimes law professors) are unconcerned about the damage that they might do by turning the success of the entrepreneur-lawyers against them, claiming that it has now become easy to prove liability and that verdicts are too high." *Id.* at 574.

19. *Id.* at 344.

20. In an address delivered before the New York State Bar Association on January 17, 1899, Mr. Justice Holmes saw a paradoxical benefit in the role played by juries in litigation:

I confess that in my experience I have not found juries specially inspired for the discovery of truth. . . . I have not found them freer from prejudice than an ordinary judge would be. Indeed one reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount — a very large amount, so far as I have observed — of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community.

Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459-60 (1899).

dented nationwide coordinated discovery among the plaintiffs.<sup>21</sup> Such an effort was costly and could be justified only by recovery of large plaintiffs' verdicts. Getting a jury to return such verdicts required more than an appeal to their sympathies rehearsed on the way to the courthouse.

The Grand Canyon disaster case, which was tried in Los Angeles in 1958 by Speiser, Melvin Belli and others for the plaintiffs, required a great deal of testimony about probable lost wages and economic losses. In discussing later aircraft negligence and products liability cases, Speiser describes the increasingly sophisticated use by the plaintiffs' bar of blackboards, charts, videotapes and economists in the extremely difficult task of valuing human life and suffering. The discussion of these cases provides an effective reminder, particularly to aspiring lawyers, that cases are won largely on the basis of facts, not books or legal arguments.

For this reviewer, the most useful aspect of *Lawsuit* is the first chapter, an 118-page description of Ralph Nader's suit against General Motors in a New York state court for invasion of privacy, intentional infliction of emotional distress and improper interference with advantageous economic relations. This suit was based on alleged snooping into Nader's private life at General Motor's behest in the wake of his publication of *Unsafe at Any Speed* and his testimony about automobile safety before the Senate Subcommittee on Executive Reorganization in 1966. Shockingly, such causes of action were as novel in the United States in the late 1960's as aircraft negligence had been ten years earlier.

Speiser's description of his gathering of the elements of pleading from favorable precedent in jurisdictions other than New York to fashion a cause of action, toppling old but established precedent, constitutes an excellent description for the beginning student of how pleading changes reflect the development of the common law. Many of the devices and much of the terminology of a civil lawsuit deposition, demurrer, request for admission, summary judgment, interlocutory appeal — about which it is extraordinarily difficult to teach first year students in the abstract — come very much to life when discussed by Speiser in the context of Nader's suit. The lengthy first chapter would be an excellent teaching aid in a Civil Procedure course.

Not the least instructive fact about the Nader lawsuit was that, after much pretrial maneuvering, the case was settled. The

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21. A recent news report concerning the litigation against Procter and Gamble Co. related to its Rely tampons suggests that the coordination of discovery among plaintiffs will reduce the defendants' litigation costs because they "would have to spend only a tiny fraction of the time they otherwise might have to spend in giving and taking depositions." Dodosh, *Lawyers Urge Cost Sharing In Pursuing Tampon Suits*, Wall St. J., Dec. 11, 1980, at 29, col. 4.

contingent fee of \$115,000 amounted to less than \$30 per hour for Speiser and his associates. Speiser effused that Nader used the proceeds of the litigation "to assure the continuity of his operations and to build the permanent staff needed to fight on so many consumer fronts."<sup>22</sup> Speiser provides an excellent model description of a settlement as a victory. That alone is an important contribution to the efficient administration of justice.

In its tone, in many instances, *Lawsuit* is not far removed from vanity press. Speiser spends a substantial amount of time describing such things as his law offices and the pulchritude of his partner's wife. There is a great deal of undoubtedly unintentional humor in Speiser's giddy description of a building constructed for a Florida tort firm as a "Taj Mahal of torts." He describes further: "The new . . . building was like a vision of Camelot to us. It was a symbol of the tort lawyers' dream come true."<sup>23</sup>

As if he had not done enough pontificating throughout, Speiser, in his last chapter, provides the reader with an "Interview With a Tort Lawyer." Therein he reiterates his defense of the contingent fee tort litigation system through his answers to such difficult questions as: "So you are not a fat cat?"<sup>24</sup>

Speiser makes his case for the present system of tort litigation almost too strenuously to be taken seriously. For the reader who is willing to suffer such nonsense as descriptions of how tort litigation improves our image abroad and keeps many stenographers and hotels busy, *Lawsuit* provides a very interesting look inside civil litigation.

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22. LAWSUIT at 110. Some might contend that Nader, on the way to the Crusade, became infected with hubris, pointing to his participation in 1977 in the formation of Fight to Advance the Nation's Sports (FANS). This organization was designed to ensure sports fans, *inter alia*, "that hot dogs were warmer than beer." *Nader: Success or Excess*, TIME, Nov. 14, 1977, at 76. Fortunately, Speiser does not trace the proceeds of the suit against General Motors to FANS.

23. LAWSUIT at 296.

24. *Id.* at 594.