

**MATERIALS
ON
TORT REFORM**

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The Human Face of Tort Reform

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Kathy and Scott Olsen's son Steven is blind and brain-damaged after an HMO refused to give him an \$800 CAT scan when he was two

88. For more of Professor Sugarman's recent scholarship, see *DOING AWAY WITH PERSONAL INJURY LAW* (1989), *SMOKING POLICY: LAW, POLITICS AND CULTURE* (WITH RABIN) (1993), *PAY AT THE PUMP'' AUTO INSURANCE* (1993), *REGULATING TOBACCO* (WITH RABIN 2001), and *TORTS STORIES* (WITH RABIN) (2003). Some of his recent articles include: *Performance-Based Regulation: Enterprise Responsibility for Reducing Death, Injury and Disease Caused by Consumer Products*, 34 *Journal of Health, Policy, Politics and Law* 1035 (2009); *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry* (with Nirit Sandman), 56 *Duke L. J.* 1403-1490 (2007); *Cases in Vaccine Court—Legal Battles Over Vaccines and Autism*, 357:13 *New England Journal of Medicine* 1275 (September 27, 2007); *The "Necessity" Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, 2005 *Issues in Legal Scholarship* 1-153 The Berkeley Electronic Press © 2005; *Pain and Suffering: Comparative Law Perspective*, 55 *DePaul L. Rev.*, 399 (2005).

89. Pamela Gilbert is a partner in the law firm of Cuneo Gilbert & LaDuca, LLP, based in Washington, DC. Cuneo Gilbert & LaDuca fights for consumers, businesses, workers and

years old. While walking in the woods, Steven had fallen on a stick that penetrated into his eye socket. His eye was fixed in the emergency room, but the doctors never bothered to check whether there had been brain damage. Steven was sent home and his condition worsened. By the time the brain damage was discovered, it was too late. A jury awarded Steven \$7.1 million in non-economic compensation for his life of darkness, loneliness, pain, physical retardation and around-the-clock supervision. However, the judge was forced to reduce the amount to \$250,000 because of a law capping non-economic damages in California, where the Olsens lived.

Janey Fair's high school daughter Shannon and 26 other people were killed in a bus accident in Carrollton, Kentucky while on a church outing. The accident was caused by an uninsured drunk driver who hit the bus in a head-on collision. But the crash didn't kill anyone. The bus passengers died because the bus had a defective fuel tank that ruptured and engulfed the vehicle in flames.

Charles Prestwood is an Enron retiree who lost his retirement savings—\$1.3 million, all in Enron stock—in Enron's death spiral. He never had a choice: when the company he worked for was bought by Enron his stock was automatically converted over. But Prestwood wasn't concerned. Ken Lay and Jeff Skilling and the rest of the Enron management told their employees and their investors that Enron was the safest investment imaginable and that the company was going to have a fantastic future. Prestwood believed all of those lies until he was locked out of his accounts and was unable to sell his shares as the stock tanked and the company went bankrupt. His retirement savings of over a million dollars was reduced to \$8000.

These courageous individuals, and hundreds of thousands like them, are the flip side of the "tort reform" movement. They are the human beings who are personally and devastatingly affected by the nefarious proposals that carry such legalistic and non-threatening names as caps on noneconomic damages, abrogation of joint and several liability, and elimination of aiding and abetting liability. I have had the good fortune to get to know Kathy Olsen, Janey Fair and Charles Prestwood in my work

governments using the tools of litigation, lobbying and public advocacy. She heads up the lobbying practice at the firm and is the former Executive Director of the U.S. Consumer Product Safety Commission (CPSC). She has over 20 years of experience in consumer advocacy in Washington, D.C. She has testified before the U.S. Congress over 50 times and made dozens of appearances in the national print and electronic media. She is a graduate from Tufts University and received her law degree from New York University in 1984. Gilbert served as Consumer Program Director at the U.S. Public Interest Research Group from 1984-1989 where she specialized in civil justice and consumer protection issues. She worked for Public Citizen's Congress Watch, one of Washington's largest consumer advocacy organizations, first as Legislative Director and then as Executive Director from 1989-1994. She served as Executive Director of the CPSC from 1995-2001, that agency's senior staff position. After she left the government, Gilbert served as Chief Operating Officer of M & R Strategic Services, a national firm that lobbies and conducts grassroots and media campaigns around public policy issues. Gilbert joined the Cuneo Law Group in 2002 and became a named partner in 2003. Her recent scholarship includes, *Class Action Legislation Will Deny Americans a Fair Day in Court*, 6 Class Action Litig. Rep. (BNA) 108 (2005).

defending access to the civil justice system for victims of negligent, reckless or criminal conduct. Each of them traveled to Washington, DC to tell their stories and to educate policymakers about what happens to real people when their legal rights are taken away.

I met Kathy Olsen when she came to lobby Congress against adopting the California law that places a limit of \$250,000 on the amount of damages a person injured by medical malpractice can recover for "pain and suffering." "Pain and suffering," or "non-economic" damages, are awarded to compensate for losses that are not easily quantifiable. Economic damages are generally comprised of lost wages and medical expenses. Non-economic damages compensate people for losses that are not monetary, but are nonetheless very real, including pain, suffering, loss of quality of life, discomfort, embarrassment, anguish, and shame.

Proponents of capping pain and suffering damages claim that injured persons are still "made whole" because there is no limit on compensation for their out-of-pocket expenses. But try explaining that to a woman who loses her ability to ever bear children, a child whose childhood is stolen away because of prolonged illness or injury, or parents who lose their children, all due to medical negligence. In fact, caps on pain and suffering affect only the most unfortunate victims—those who are permanently or catastrophically injured—because only the most seriously injured individuals ever receive over \$250,000 in pain and suffering awards. Moreover, placing limits on pain and suffering damages has discriminatory results because it targets a very specific population—low-wage, or non-wage, earners. In other words, those most affected by caps on pain and suffering are women, children, and the elderly.

Like Kathy Olsen, Janey Fair's life was forever altered the day of the devastating bus crash that killed her daughter and so many other members of her church. Days after the crash, lawyers representing the Ford Motor Company, the manufacturer of the bus chassis, converged on Carrollton, Kentucky to offer cash settlements to the victims. Janey and her husband wouldn't settle. They wanted to learn what had happened in the crash and why so many people had died. Ford tried to blame the tragedy on the drunk driver who caused the accident. And it was true that, but for the drunk driver, the accident would never have occurred. But the litigation also uncovered another truth—that the school bus carrying Shannon Fair and the other parishioners had a deadly defect. The drunk driver caused the accident, but the deaths were caused by the defective gas tank and the ensuing fire.

Janey Fair came to Washington to lobby Congress against limitations on joint and several liability in product liability lawsuits. This legalistic term was at the heart of the Fairs' successful suit against Ford. Under joint and several liability, if more than one person or entity is responsible for an injury, they may each be held liable for all the damages. Joint and several liability is critical in cases, like the Kentucky bus crash, in which there is an insolvent defendant. In this case, that defendant was the drunk

driver who had no insurance. Without joint and several liability, Ford would try to put as much blame as possible on the driver, and then only be responsible for the portion of the damages that the jury deemed to be Ford's fault. The victims of the crash would receive only a portion of their losses, and Ford would escape most of its responsibility. Under joint and several, on the other hand, Ford is responsible for all the damage caused by its negligence. It can't escape accountability just because there happened to be another party that was also negligent.

Compared to the Olsen and Fair families, Charles Prestwood seems to have gotten off pretty easily. He lost only money, albeit his life savings. All told, it is estimated that investors in Enron collectively lost about \$40 billion due to the fraud perpetrated by Enron's executives and their accomplices. That doesn't include the incalculable damage that was done to the public's trust in the financial markets by the greed-induced lies and manipulations carried out by these presumably upstanding members of the business and Wall Street communities.

Charlie Prestwood traveled from his home in Houston, Texas to lobby the Bush Administration to support his side in the shareholders' lawsuit against the Wall Street banks that orchestrated the Enron fraud. Because Enron went bankrupt, its accounting firm collapsed and its lawyers had limited assets and insurance, legal action against the investment banks that helped to mastermind the fraudulent schemes was the only recourse for victims to recover any significant portion of their Enron losses. Internal Enron documents and testimony of bank employees detailed how the the banks engineered shame transactions to keep billions of dollars of debt off Enron's balance sheets and create the illusion of increasing earnings and operating cash flow. It seemed only fair that those banks should be held accountable to the defrauded investors who had nowhere else to turn to for redress.

The shareholders managed to reach settlements of over \$7 billion with a number of Enron's banks, and were working on preparing for trial against the remaining banks who assisted Enron's fraud, when they were stopped in their tracks by a ruling in the Fifth Circuit Court of Appeals. In a 2-1 decision, the court ruled that, while the banks' conduct was "hardly praiseworthy," because the banks did not themselves make any false statements to the market about their conduct, they could not be held liable to the victims even if they knowingly participated in the scheme to defraud Enron's shareholders. The shareholders appealed the case to the Supreme Court, which brought Mr. Prestwood out to the east coast.

Charlie Prestwood, along with a number of his fellow Enron victims, came to Washington to urge the Bush Administration to side with the defrauded shareholders and against Enron's banks in the Supreme Court case. They held press conferences and even had a meeting with Christopher Cox, then Chairman of the Securities and Exchange Commission. The victims did manage to convince Cox of the merit of their position, and Cox subsequently recommended that the Bush Justice Department sup-

port holding the banks accountable for the Enron fraud. Unfortunately, the Justice Department took a different view and filed a brief in the Supreme Court urging that aiders and abettors of securities fraud, such as Enron's Wall Street banks, should not be held responsible under the securities laws. The Supreme Court ultimately adopted the Bush Administration's view, and the remaining Enron banks were dismissed from the suit. While the \$7 billion Enron settlement is still today the largest securities fraud settlement in history, it returned less than 20 cents on the dollar back to the defrauded investors.

Kathy Olsen, Janey Fair and Charlie Prestwood represent millions of Americans who suffer unspeakable harms because of someone else's negligent, reckless, or criminal conduct. We owe them, and hundreds like them, a great debt of gratitude for being willing to take time from their busy lives to speak out in favor of a strong and accessible civil justice system. They are the human faces of "tort reform," and policymakers and opinion leaders should never forget them when they consider whether to limit access to justice in America.