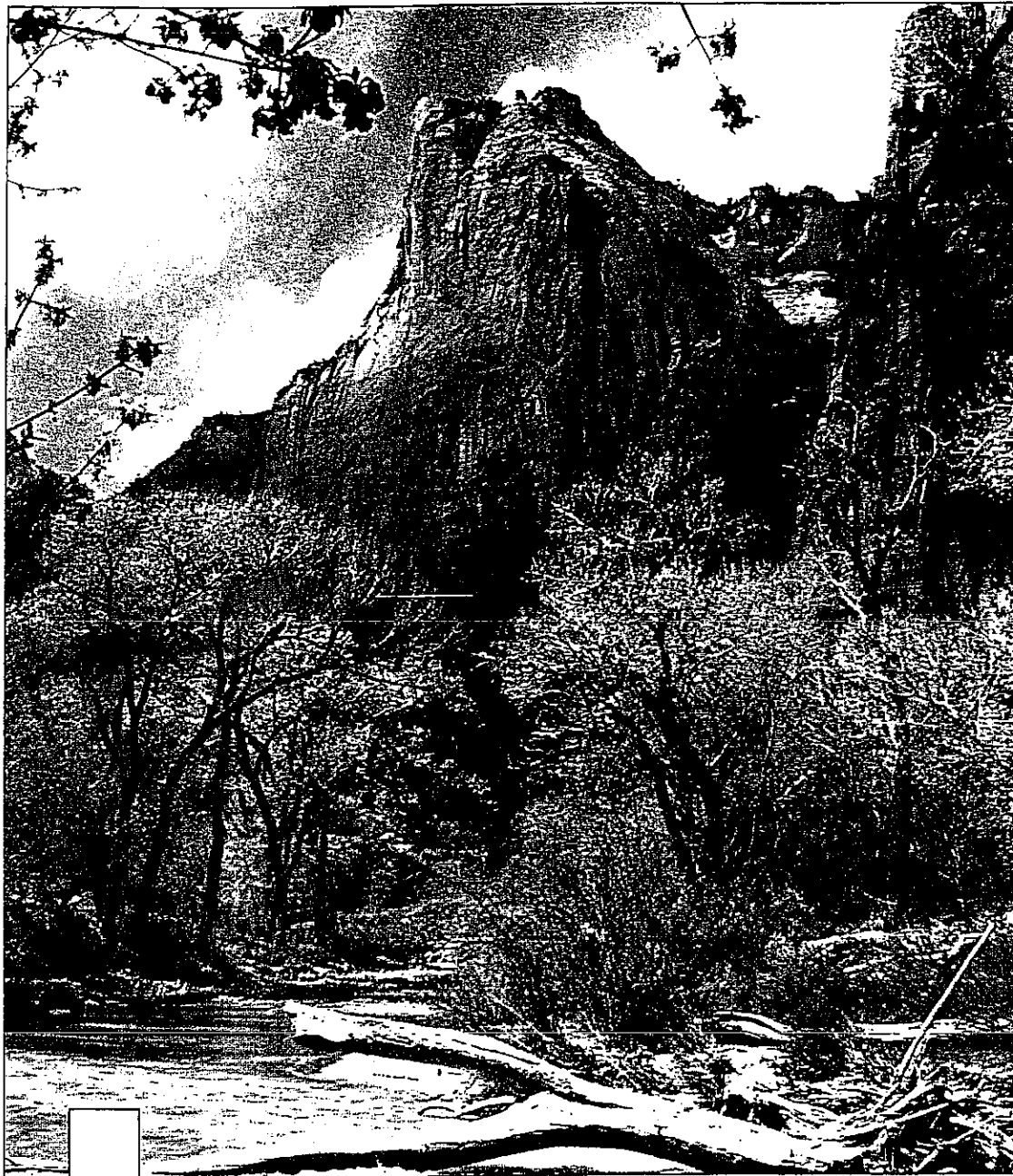


# UTAH BAR JOURNAL

Vol. 8 No. 5

May 1995



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# “Loser Pays” — Justice for the Poorest and the Richest, Others Need Not Apply

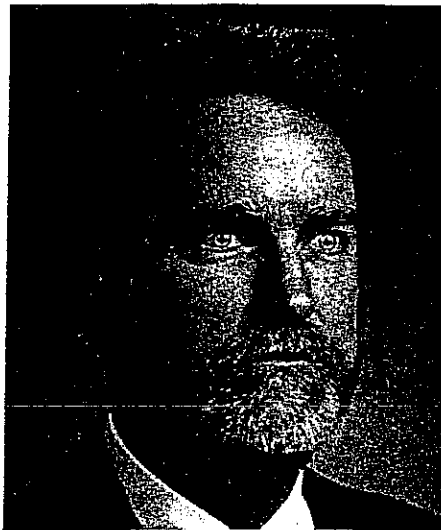
By Francis J. Carney

Pauline Hughes isn't much impressed with the "loser pays" system. Her husband, William, died of complications of a gallbladder surgery in a London hospital. She sued the hospital for malpractice, won a verdict at trial, but lost it on appeal. In the end, Mrs. Hughes owed her lawyers \$150,000, contingent fees being illegal in Britain. What's worse, she also was liable for the bills of the hospital's lawyers, leaving her not only with a dead husband but \$300,000 in debt.<sup>1</sup>

Had Mr. Hughes died in this country, his family would be out nothing for legal fees. Their predicament was but an accident of Mr. Hughes' birth or, more to the point, of his death. By dying in Britain, his family's wrongful death action became subject to the "English Rule," an idea now advanced as a remedy to the "crisis" in tort litigation.

The English Rule in one variation or another is the subject of several bills now before Congress. As of this writing, the "Common Sense Legal Reform Act of 1995" has passed the House of Representatives and will require, with some limitations, an award of attorney's fees to the prevailing party in all diversity suits. A similar bill applies to securities actions.

There is a flood of civil litigation in America that's costing us billions (three hundred of them according to Dan Quayle), dulling our competitive edge in world markets, and plaguing us with parasitical lawyers fattened on juicy contingent fees. Or so we are told by the insurance companies and the Republicans. But if we listen to the trial lawyers and their allies, we're informed that in reality there is a well-financed conspiracy by the insurance industry and corporate interests to strip from injured consumers the power to hold



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the malefactors of great wealth accountable for their misdeeds.

Whatever the truth is, we've all heard the overheated propaganda from both sides of the "tort reform" issue. Whether there really is a tort crisis is not the subject of this article, although I will say that I have seen little evidence for it in seventeen years as a defense attorney. The "loser pays" proposal is one issue on which I agree with the trial lawyers: it will reduce litigation, but at a cost none of us will want to bear.

## DOES THE ENGLISH RULE WORK FOR THE ENGLISH?

A chief argument in support of the "loser pays" rule is that it has worked for England for years and would work here as well. The English have no less justice than we, and have it at a far cheaper price, or so the argu-

ment goes. The American Rule where each side pays its own lawyers is an aberration and our country is paying a steep price for its risk-free litigation tradition that benefits no one but a few lucky plaintiffs and an overpopulation of lawyers. So let's get in step with the rest of the world and make the losers pay all of the lawyers' bills.

An argument not without some superficial appeal. But there is a flaw: the system doesn't work in Britain. Using the civil courts in Britain is too expensive and too risky for all but the poorest and the richest. Don't take my word for it. Take the word of a leading conservative publication, *The Economist*.

The present British system, *The Economist* recently editorialized, denies access to justice to huge numbers of people. The middle class, not having the benefit of the government legal aid available to the poor, can neither afford lawyers nor risk paying the costs of a loss. Some British studies show that as many as 85% of all accident victims never even attempt to collect any compensation, a main reason being the fear of legal expenses. And this from a publication that isn't a mouthpiece of the plaintiff's bar nor generally known for an anti-business slant.<sup>2</sup>

The editors of that respected magazine go so far as to recommend that Britain immediately dump the "loser pays" rule and permit contingent fees: "Abandoning the 'loser pays' rule in Britain and introducing contingency fees would make it possible for millions more people to use the courts, whatever their wealth. Admittedly, such changes would mean more litigation, though that is the inevitable and, up to a point, the desirable result of providing more access to the courts for more people."

It's ironic that sensible minds in Britain are thinking of abandoning the "English Rule" while some Americans are proposing that we adopt it. Is the "American Rule" really so bad compared to what the rest of the world has? Again, here's what the Brits have to say: *"So much fury is leveled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly."* It sounds like we ought to think carefully before we switch to something that might leave us worse off.

#### THIS HAS BEEN TRIED HERE ALREADY

It's not as if only mad dogs and Englishmen go out in the midday sun. The "loser pays" system is something that has been tried here before. The Florida Medical Association once had the idea that a "loser pays" statute would deter frivolous medical malpractice claims and was able

to push through a bill in 1980. Four years later, they were begging for its repeal. There were indeed fewer suits overall. But while the successful plaintiffs got their attorney's fees out of the insurance companies, it rarely worked the other way around. This attempt at tort "reform" was permanently shelved.

There's a reason that similar efforts have gotten nowhere in the Utah Legislature: organized medicine knows they don't work and doesn't support them. As recently as the last legislative session, a "loser pays" bill for all medical malpractice cases was introduced but died from the lack of any support.<sup>3</sup>

#### LET'S GET REAL

Let's put the abstractions aside and imagine a live breathing client under a "loser pays" system. Jennie Smith comes to you with having just learned of an unnecessary nine-month delay in the diagnosis of her breast cancer. After hearing her story, reviewing the records, and speaking with a doctor or two, you're willing to take her case. You know that Ms. Smith works as a paralegal and couldn't possibly afford your hourly fee nor the rates charged by the experts you'll need to hire, so you agree to

take her case on a contingency and front the costs.

The claim has some merit and you can locate experts to testify that the standard of care was breached. However, you also know that the defense will have credible experts to testify that the care was appropriate and that, even if it wasn't, there's no evidence that the delay harmed your client in any measurable manner.

The likely defendants are a radiologist, a family practice physician, and a hospital. They are sure to hire experienced lawyers and each of those lawyers will be billing their client's insurer at about \$135 an hour.

Does Ms. Smith want to pursue the claim? You might first want to tell her that there are no assurances that she will prevail. You might want her to know that at least three-quarters of all medical malpractice cases tried result in defense verdicts. And of course you're going to tell her that the "loser pays" system requires that she pay all the defense fees if the trial doesn't go her way. And don't forget to tell Ms. Smith that the defense fees could easily exceed \$100,000, and would be treated just like any other judgment. Her new

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home in the lower Avenues, her paycheck, and in fact everything she owns might be subject to execution. Is Jennie Smith ready to risk everything to make her point?

Let's suppose she is. The case is filed and trial nears. The settlement conference is underway. I can almost hear the defense lawyer now: "Ms. Smith, my client understands your feelings and sympathizes with your problems. But \$50,000 is a very fair offer. I am sure that your counsel here has explained to you that the losing side must pay the winner's costs and legal fees. It's my obligation to tell you and your counsel that my client alone has incurred fees to date of more than \$35,000. I suspect that the other two defendants have spent at least that much. Those fees are likely to double if we go to trial. Bearing that in mind, will you please carefully consider our offer?"

Is the insurance company going to swing this club? You bet it will. On the other hand, will the insurance company, be influenced by the threat of having to pay a plaintiff's attorney fees? Perhaps slightly, but not very much so, and certainly not as

much as the plaintiff will be. This club is a stalk of stale celery for the plaintiff but a Louisville Slugger for the defense.

Those with nothing to lose, or those who won't be floored by payment of defense fees, will go forward and sue as they did before. But everyone else with an average income, a home with a mortgage, and some savings put aside will think long and hard before filing any claim that isn't a sure and certain winner. The "loser pays" system is a kick in the teeth to all but the poor, who can't pay legal bills anyway, and the rich, who can, but won't go broke if they have to.

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*"This club [loser pays] is a stalk of celery for the plaintiff but a Louisville Slugger for the defense."*

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That's exactly what the proponents of the "loser pays" system intend: not so much to deter "frivolous" claims as to reduce the

total of all tort actions. And to deter them not because people know their claims have no basis, but because they can't afford to be wrong.

The "loser pays" fans take losing at trial to mean an action was "baseless." It doesn't. A trial victory does not equate with being right; a loss doesn't mean being wrong. Plausible claims go down the tubes for any number of reasons, ranging from arcane procedural ones to whether the jury disliked the plaintiff. Infrequent are the cases where a juror will admit that a defense verdict was a simple or easy one to reach. Our vanities as trial lawyers aside, most trials are close-fought battles that might have gone the other way if tried again another day with another jury.

An obvious point to lawyers but not so obvious to the rest of the world. Really, how many of us have defended claims that were really baseless or frivolous? A few, for sure, but certainly not very many of them. If most claims, therefore, aren't "frivolous," then the effect of the "loser pays" system is to deter people with legitimate claims from pursuing them. If we want to deter "baseless" claims, then let's do it honestly and enact a "baseless claims" statute. Indeed, we already have one, at least on the state level, and we still have Rule 11 in the federal courts.

The proponents of the "loser pays" proposals trumpet the rights of injured people to "full recovery," by not having winners at trial bear the expense of their own lawyer's fees. They do have a point. But they would also cause average people to avoid the courthouse because a loss would wipe them out, while there's no such fear for the wealthy or the poor.

Try to right a wrong — but if it doesn't go as planned, welcome to Chapter 7. There's no doubt that there are frivolous lawsuits and absurd verdicts in our system. To some extent we can deal with both. But they may in the end be part of the price we have to pay for keeping the doors to the courthouse open for all of us.

<sup>1</sup>I am indebted to John F. Vargo's excellent article, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice", 42 *Am.U.L.Rev.* 1357 (1993) for the story of Pauline Hughes and recommend it for anyone interested in a more thorough treatment of the subject.

<sup>2</sup>"Bring the Balance Back", *The Economist (UK)*, January 14, 1995, pp. 13, 29.

<sup>3</sup>H.B. 447 (failed and not heard in committee).

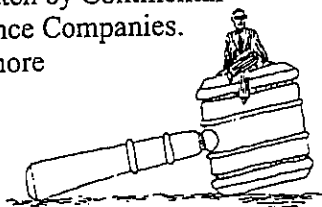
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