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# Responding to the attack on trial lawyers and tort law

**By Leonard M. Salle, President  
Commonweal Institute  
Menlo Park CA**

The Commonweal Institute report, *The Attack on Trial Lawyers and Tort Law*, of which the Introduction and Section 1 are included in this issue of *the Verdict*, shows how a right-wing movement in combination with corporate interests is undermining tort law and the public's confidence in and respect for trial lawyers in the United States. The report makes it clear that unless there is a credible counter to these forces, and soon, there could be irreparable damage to the entire US civil litigation system.

In Canada, the situation regarding trial lawyers and tort law has many similarities to that in the US. The Canadian public has been influenced by right-wing and corporate media, much of it emanating from the US, to have a negative view of trial lawyers and to perceive a need for tort reform. Even the Internet is used for adverse propaganda purposes; for example, *overlawyered.com*, a website that attacks US trial attorneys, also targets those in Canada.

However, Canadian trial lawyers, unlike their American counterparts, do not have to contend with a highly organized right-wing assault or a government that is dominated by hard-right ideology. This is fortunate, because it means that trial lawyers in Canada have an opportunity to develop a response to the corporate and right-wing attacks with a reasonable expectation of relatively rapid success. Trial lawyers in the US can also fight back successfully, but it will be more difficult and positive results will undoubtedly be slower in coming.

We should not assume that, because the situation in Canada is not as dire as it is in the US, there is no urgency. With regard to the need to take almost immediate action, it is worth noting that the "extremist" views of the Reform Party are quite similar to those of the US Republican Party mainstream. Twenty years ago mainstream Republicans considered those views as being extreme, and liberals considered the right-wing ideologies as being no threat. Time has proven them wrong. Canadian trial lawyers and liberals would do well to learn from this piece of recent history.

In a July 13, 2004 article for the *National Review*, Dan Dunsky wrote:

"If Canadian elections bore Americans, don't feel bad, they bore Canadians, too. Still, the recent one was the most exciting in some time. Not because of who won (the Liberals — surprise!) but because June 2004 may end up being to Canada's conservative movement what November 1964 was to American conservatism.

"Barry Goldwater's legacy was to unite social conservatives and Western anti-establishment and anti-government populists. Stephen Harper, Canada's Conservative-party leader, may well leave the same mark on this country".<sup>1</sup>

## RESPONDING TO THE ATTACK

There are two key elements for responding to the attack on trial lawyers and tort law. The first is to create a liberal infrastructure of advocacy organizations that can serve as an independent voice for a wide range of liberal policy, including a system of tort law serving the public interest. As stated in the Introduction to the Commonweal Institute report, "Trial lawyers, too, would benefit from credible independent voices educating

and persuading the public of the value of a robust system of tort law." The importance of Infrastructure is that it comprises the organizations and functions that support a movement based on underlying ideologies or principles, e.g., holding corporations responsible for harms to individuals or the public. Specific issues, such as having caps on pain and suffering awards, can be addressed much more powerfully if they can be set in the context of underlying principles that the public has come to accept.

The second key element is to pursue executable strategies in rapidly and effectively countering attacks on tort law. These strategies fall into two broad categories: (1) those that can best be accomplished by the infrastructure of advocacy organizations, and (2) those that trial lawyers and their organizations can undertake solely for themselves, or in concert with the infrastructure. It should be noted that the strategies presented in this article are not intended to be all-inclusive. Actions by trial lawyers and their organizations take place on a regular basis throughout Canada. Many of these could be characterized as being strategies or tactics. It is also recognized that there may already be activity related to some of the suggested strategies and tactics. Moreover, developing strategies is an ongoing process that must respond to the dynamic nature of the legal policy environment.

Before getting into specific strategies, it is first necessary to consider what needs to be done to create a liberal infrastructure. The first step in creating a liberal infrastructure is to identify the functions it must serve. An example of a function is: "*Establishing frames, metaphors, and specific language that can be used to advance underlying ideology as well as specific issues.*" Once the functions are determined, it will then be possible to specify what existing and new organizations, including special service organizations such as those that do polling and conduct focus groups, will be needed to execute the functions. To be effective, the new organizations and the whole infrastructure will have to operate in a business-like manner, with clear objectives, appropriate staffing, and professional management. Respected liberals with business expertise could be recruited to take a lead in creating what essentially will be a new industry: the promotion and support of liberal values and policies. The involvement and imprimatur of respected liberal business leaders can encourage funding support from many sources, including foundations as well as individuals.

Cultivating strategic allies is also a vital step in creating the infrastructure. TLABC already does coalition development and is affiliated with many organizations with similar goals and agendas.

Trial lawyers are not the only ones under attack from the right-wing and business interests. Public education and teachers, organized labor, environmentalists, family planning organizations, and government employees, along with a wide range of liberal organizations, are also under attack. It therefore makes strategic sense for trial lawyers to develop and/or strengthen relationships with organizations representing these constituencies for the purpose of countering the attacks. Funding is a critical issue and a powerful motive for cooperation. What is important to recognize here is that the responsibility for creating and funding an infrastructure need not be borne by trial lawyers alone. It can be shared by a broad community of those who have a common interest in creating a liberal infrastructure, including those sources that will be attracted by the involvement of business leaders.

## INFRASTRUCTURE STRATEGIES

The following strategies are summarized for convenience.

- A Long-Term Approach. This means developing forward-looking strategies that make it possible to be proactive on a short-term tactical basis, and simultaneously advance a long-term agenda.
- A Marketing Approach. This will involve the use of sophisticated marketing methods to gain broad public and political support for a robust system of tort law.

- Development of Effective Language. This will include specific language, metaphors, and framing that can be used by trial lawyers and their organizations. Framing is a critical concept. For example, trial lawyers should never use the term “tort reform”, except perhaps with quotation marks, for the word “reform”, which implies a problem that needs fixing, is a favorable frame for the opponents.
- Dissemination of Favorable Language. New framing and wording should be widely disseminated to trial lawyers and infrastructure organizations to ensure consistency, frequency and force of messaging. Infrastructure organizations will incorporate the new framing, language, and metaphors into specific issue campaigns such as those opposing caps on pain and suffering.
- Repetition of Specific Language and Frames. Repetition of a frame reinforces it. Consistent use of properly-framed messages through multiple channels is necessary before a concept will lodge firmly in “the public mind.”
- Distribution of Articles and Other Materials. Regularly prepare short articles, research digests, and press releases for the media. Since this material will be provided by independent voices, it will have an aura of authority and authenticity.
- Formation of Speakers’ Bureaus. Infrastructure organizations can establish speakers’ bureaus that have a corps of regular speakers covering a broad range of issues, including civil law. These speakers would be provided with the latest language and framing to incorporate into their presentations.
- Humor. Appropriate infrastructure organizations could provide material to well known liberal cartoonists and humorists that they might be able to incorporate into their work. Humor can be used as a positive force, as well as one that can point up the weaknesses of opponents.

## INTERNAL STRATEGIES

The following are strategies that would be executed by trial lawyers and their organizations.

- Use New Framing and Language in Specific Issue Campaigns. Trial lawyer organizations will operate directly, independently of infrastructure organizations, in certain issue campaigns, but can do so in ways that consistently take advantage of the framing and language that the infrastructure groups develop. In this way, the infrastructure groups and the trial lawyer organizations will mutually reinforce the preferable new frames.
- Avoid Using the Opposition’s Frames. This would include avoiding terms like “frivolous law suits” and, as previously mentioned, “tort reform.” Negation is not sufficient (e.g., “awards are not excessive”), because the negative still reinforces the harmful frame. Instead, the frame needs to be replaced (e.g., replace with “adequate settlements”).
- Do Not Tell or Laugh at Lawyer “Jokes.” Trial lawyers, and their publications and organizations, should not tell attorney jokes, or have attorney–hostile objects on display. These “jokes” play into the opposition strategy to create a negative public image of trial lawyers.
- Devise Sharp Responses to Lawyer Jokes. This would provide material that would enable trial lawyers to respond effectively to those who tell lawyer “jokes” or who pass along emails with attorney jokes, cartoons, or anecdotes. The responses could include “jokes” against opponents.
- Provide Material to Infrastructure Organizations. With information about lawsuits that have served the public interest or gotten compensation for an individual who had been harmed, infrastructure groups can reach wider audiences in a positive manner.
- Establish Speakers’ Bureaus and Provide Materials for Speakers.

This strategy is likely to be synergistic with infrastructure speakers’ bureaus. Speakers should be encouraged to use the new language and framing whenever addressing public audiences or appearing in the media, and could be provided with appropriate presentation materials.

- Cultivate Allies. This was mentioned above in the context of creating an infrastructure. Additionally, allies could provide mutual support on legislative issues. Persons from the Speakers’ Bureaus could make presentations to allied organizations.

This article is intended to show that trial lawyers and their organizations can respond effectively to corporate and right-wing attacks on both tort law and trial lawyers themselves. The financial resources needed to respond to the attack are there, but they must be focused and well utilized. The skills and knowledge are there, but they must be organized and well directed. The knowledge of how to proceed is there – indeed, the right-wing has provided a road map of what works. Trial lawyers must now show the determination to follow their own version of that road map, and the imagination to create some new roads of their own.

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## Reference

- 1 Dunsky, Dan. “The New Kids in The Hall” *National Review*. July 13, 2004. Viewed August 30, 2004 <http://www.nationalreview.com/comment/dunsky200407130829.asp>

