

Monetizing Misery

By Theodore Dalrymple

What's a few billion dollars between friends—or is it enemies?

When President Trump first threatened to sue the BBC for between \$1 and \$5 billion, I could not help but recall my experience as an expert witness in British tort law cases.

I soon came to the conclusion that the tort system was both corrupt and corrupting, more often than not turning justice into a game of poker.

Outright fraud, though it existed, was infrequent, but the truth was far worse than that, for the corrupting effect of the tort system was usually insidious and unconscious, or at most semi-conscious.



It happened but rarely that a plaintiff had no grounds whatever for complaint, or that he or she was making something up out of whole cloth. But it is only human nature to think that where monetary reward (which is to say compensation) is proportional to the harmful effect of an injury, the harmful effect of that injury should be far worse when it is legally actionable than when it is not. Besides, the sheer repetition of a claim leads to inflation of it.

Naturally, such a tendency to inflation is also worse where the injured party has less positive incentive to return to normal, among the negative incentives being the hope of compensation that is proportional to the harm allegedly suffered.

This is not because of conscious malingering; it is because a person is easily capable of persuading himself, without realising that he is doing so, that he is really suffering from something incapacitating.

The system offers perverse incentives that require great reserves of character to resist. I recall a case in which a young man of 20, having had a sporting injury, was so abominably treated by the hospital to which he was first admitted that, after many months of attempted corrective treatment, including many operations, his leg had to be amputated. I found in the notes evidence not of cruelty and incompetence alone, but of crime, insofar as the notes had clearly been altered in an obvious attempt to reduce evidence of the grossest negligence.

But the young man was of unusual wisdom—and probity. As soon as he was able, he returned to work, which was perfectly possible once he was fitted with an artificial leg. From the point of view of compensation, returning to work was a mistake, as his lawyer made clear: his claim would have been much larger if he had claimed to be incapable of returning to work, which, in the circumstances, no one would dare to question in court. Instead, he accepted a low offer, sufficient to buy a house adapted to his needs. His lawyer was all for holding out for much more, but the young man wanted to put the whole episode behind him and continue his life as best he could, which turned out to be very well indeed. But the incentives to have exaggerated his difficulties were very great, and such incentives often work.

Succumbing to the temptation to exaggerate the harms one has suffered turns out to be a mistake, precisely because most people who do so are not out-and-out villains. To disguise from themselves and others, therefore, the doubtful nature of the harm that they claimed to suffer, they have to continue to suffer it. They are like character actors who are so famous in a certain role that they cannot escape it, however much they

might want to.

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I was often surprised by the refusal of judges, who in my experience were generally biased in favour of the plaintiff, at least when the latter was a little man (or woman) confronting a large, rich and powerful company, to draw the most obvious conclusions about the trustworthiness of plaintiffs' claims.

For example, I was involved in more than one case in which a plaintiff claimed that, as a result of his injury or mishap, he was completely unable to leave the house, all but bedbound, when the medical records clearly indicated that he had sought vaccinations against certain tropical diseases when he went on a holiday to a distant and exotic country. One would think that this would have led, at the very least, to the disallowance of that part of his claim, but it did not. No doubt the old severe legal principle, *falsus in uno, falsus in omnibus* (false in one thing, false in everything) has been superseded, but one would expect that gross errors of memory, such as having forgotten that one went on holiday to Brazil while allegedly having been unable to get out of bed or leave the front door, would create a certain degree of scepticism towards the claim in the judicial mind. But in my experience, they did not.

I was also surprised that, where the judge thought that the damages ought to be set at, say, \$10,000 rather than the \$10,000,000 claimed, he did not draw any conclusion about the honesty of the lawyer who argued for the \$10,000,000. The difference in the award and the claim was so great that it could not have arisen merely from a slight difference in calculation, shall we say in the cost of repainting a room. But I never heard any judicial animadversions on an

outrageously inflated claim: it was as if the judges were anxious to keep the whole system going as it was. They did not want to discourage litigation; rather, the reverse. After all, our universities are turning out bearers of law degrees in unprecedented numbers.

Furthermore, both sides in litigation usually played a game of poker, with which the truth or the abstract merit of the hand that they held played very little part in their calculations. The lawyers advising the parties took the past tendency of the judge to award great or relatively small damages more into account than the facts of the case. The risk of losing and the costs thereof were uppermost in the parties' minds, so that the truly deserving received less than they deserved, and those who deserved nothing often made sums that, if not vast, were larger than those they could have made in any other way. It was often more expensive to continue an action when justice was on its side than to agree to an unjust settlement.

Needless to say, this also did not discourage litigation, especially where the plaintiff had nothing to lose because he was offered a no-win-no-fee contract, and the lawyer in turn could insure himself against losing (though perhaps not time after time).

At any rate, justice and law seemed only very tenuously connected, so much so that I was surprised when justice (or so it seemed to me) was done—albeit after years.

The legal dispute between President Trump and the BBC may reveal dishonesty in one party or both, but unfortunately, there is nothing new there. The entire tort system, as I have said, was both corrupt and corrupting, without anyone having to be personally corrupt; and I am glad to say I never met a lawyer who struck me as obviously corrupt. Was I lucky—or naïve?

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