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Opening Statement

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Chair, Section of Litigation

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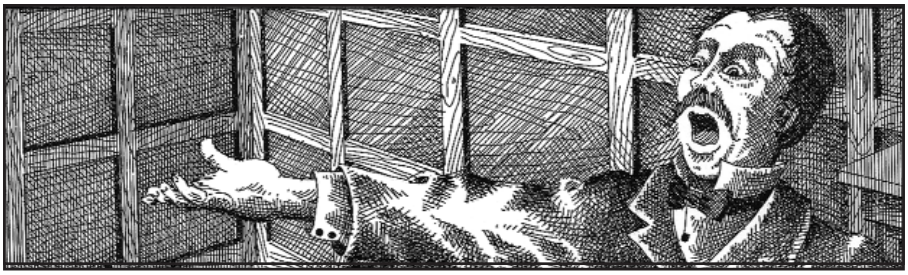

Liberty, Freedom, and Justice

by Dennis J. Drasco

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The words in this title, repeated again and again in President Bush's inaugural address on January 20, 2005, to offer hope and promise worldwide, have even greater meaning at home, at this time, for our system of justice. Fresh from the adoption of the Principles Relating to Juries and Jury Trials at the ABA Midyear Meeting in February 2005, our association is poised to give meaning to its mission statement, *Defending Liberty, Pursuing Justice*.

It would seem that the association representing our profession and our leaders in Washington, D.C., are on the same page. The reality is, however, that the liberty and freedom that defines our constitutional right to jury trial is under serious attack in Washington.

The *New York Times* has called tort reform "malpractice mythology." Tort reform is a catchphrase that has become so matter-of-fact in our lexicon that it is now synonymous with "trial lawyers"—or rather, all of the negative images that the so-called tort reformers seek to conjure up about trial lawyers.

Although we can all agree that the cost of medical malpractice insurance is high, and has burdened the medical profession, we must never lose sight of the fact that the malpractice "problem" is not caused by greedy trial lawyers, excessive verdicts, and contingent fees. It would offend the founders of our system of justice to suggest that the cure for the high cost of medical insurance is a national cap on jury awards.

First and foremost, our leaders in Washington should focus on the most significant cause of the high cost of malpractice insurance: medical errors. The single most effective way to reduce the number of large jury awards is to study the causes of malpractice and find ways to prevent them. States need to evaluate and develop effective loss-prevention programs.

Second, historically, our tort system has been the product of state law. In fact, most states have already studied their local medical malpractice insurance issues and have come up with approaches that reflect the local nature of the issue. It is not "one size fits all." Some states have adopted caps, but the result has not been a reduction in insurance costs. State judges routinely reduce jury verdicts that exceed community expectation. Other states have reduced statutes of limitation for infant claims, modified joint and several liability, or required affidavits of merit as a condition precedent to filing suit. Certainly, these and other innovations to existing state tort systems should be considered by states that are faced with the rising cost of medical malpractice insurance and its effect on available health care. Congress should not substitute its judgment for the systems that have evolved in each state over the last 200 years.

Third, the insurance industry must be accountable for its role in the equation. The fact that states that have imposed caps have not experienced a reduction in malpractice insurance premiums speaks volumes as to the effectiveness of caps. For example, until real insurance industry regulation took hold in California, which required stringent insurance regulations and advance approval of rate increases, there was no reduction in malpractice premiums. The same result occurred in Texas, Florida, Oklahoma, Ohio, Mississippi, and Nevada. Caps may not have any effect at all other than to deny severely injured plaintiffs the full measure of damages for their injuries. The truth is that declining investment returns are the direct cause of rising insurance premiums—not excessive verdicts. The cyclical nature of the insurance business and the drop in insur-

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ers' investment earnings when the market fell are the real causes of increased malpractice premiums.

Lastly, the continuing effort in Washington, D.C., comes at a time of declining case filings and jury verdicts in medical malpractice cases nationwide. In fact, the trend in payments for malpractice claims has turned sharply downward, according to industry data.

So, what does "tort reform" have to do with freedom, liberty, and justice?

The answer is nothing and plenty!

The fact is that most people who are harmed by medical errors never file suit. Likewise, the majority of people who do file suit are not awarded a verdict by the jury. Does anyone who really understands the justice system question whether courts and juries do a good job in determining whether a plaintiff is entitled to compensation?

In the age of the vanishing trial, the statistics demonstrate that the greatest single category of cases that do go to trial are medical malpractice cases. Notwithstanding the claim that juries are not capable of deciding complex medical negligence cases, doctors are very comfortable with letting juries decide cases they feel strongly about—a testament to the concept that juries get it right. Tort reform restricts our freedom and liberty and deprives our citizens of access to justice.

The freedom and liberty of our citizens to gain access to our system of justice to redress errors of medical negligence is a constitutional right—and this includes those with modest, low, or no income. What is more sacred than to ask a local jury of your peers to determine whether the standard of care has been violated by a doctor who has breached his duty to his patient and thus proximately caused injuries, and to determine a fair and reasonable measure of damages, not a penny more nor a penny less? To suggest that an arbitrary cap of $250,000, $500,000, or even $1 million dollars is sufficient to compensate for permanent physical or emotional trauma caused by a medical error is to deny a citizen of this country the liberty and freedom that we hold so dear.

Access to justice, the freedom and liberty that is at the foundation of our Constitution, entitles all people the right to a trial by a jury of their peers. American Bar Association President Robert J. Grey, Jr., in his address to the delegates at this year's Midyear Meeting, stated that the American jury is the "hand brake on the arrogance of power." The social benefit of the jury verdict goes beyond compensation to the injured. It sends a message to the medical liability system. It sends a message to the manufacturer. It sends a message that deters bad conduct.

Caps limit access to justice. Caps limit our freedom and liberty. A verdict capped at $250,000 would hardly amount to a slap on the wrist to prevent future medical errors. Perhaps raising hurdles to file a claim for damages for medical negligence would eliminate some frivolous suits. However, limits on what a judge or jury can award in a meritorious case for injuries suffered by a citizen for medical negligence stifle our freedom and liberty and do nothing to eliminate frivolous claims. By definition, a jury verdict over $250,000 is not a frivolous claim. It is a meritorious claim.

Besides being inflexible and ineffective, caps are inequitable and morally troubling. The RAND Insti-

tute for Civil Justice has reported that the plaintiffs who suffer the greatest award reduction are newborns and young children with very critical injuries, women, and the elderly. This is due to lower earnings for these groups as well as the type of injuries they suffer.

The national tort reform crusade is wrong to blame courts and lawyers for the high cost of malpractice premiums. Whether in Madison County, Illinois, or Newark, New Jersey, doctors are not afraid to face a jury, and they win more cases than they lose. Juries award plaintiffs monetary verdicts in only the most egregious cases. The cases that result in verdicts are not frivolous. Shielding the guilty is the direct opposite of liberty and freedom.

Limiting verdicts in meritorious cases will deny access to justice to scores of injured plaintiffs. Concepts of liberty and freedom should not be held hostage by politicians. The American public is entitled to know that it has the right to seek redress in its communities for injuries caused by medical negligence, to the full extent of the injuries.

Our civil justice system is the last line of defense against misconduct by negligent doctors. Lawsuits and the lawyers who bring them help to deter negligence by doctors, hospitals, and manufacturers by providing the economic incentive to be more responsible. With limitations on the right to bring a civil action, negligence and reckless conduct will go on unabated.

To add insult to injury, "tort reformers" attack lawyers who bring medical malpractice suits as if the lawyers are the problem. Lawyers do not cause medical negligence. Juries who find for the plaintiff do so to compensate an injured party who has proven medical negligence. Juries are sworn to get it right, and they do. The Principles Relating to Juries and Jury Trials adopted by the ABA in February 2005 will make it even clearer that juries understand their responsibility and will do justice.

Let us not allow the politicians in Washington to take away the freedom and liberty of the civil justice system. Let us not allow the politicians in Washington to take away access to justice for those who are the victims of medical negligence. Let us not allow the politicians in Washington to limit access to justice by imposing a national cap on medical malpractice awards. Let us not allow the politicians in Washington to violate the long-standing principles of federalism as it relates to state tort jurisdiction. Let us not blame trial lawyers who admirably represent the right of citizens to be compensated for injuries caused by medical negligence.

This truly is an issue of freedom, liberty, and justice because national tort reform is the antithesis of those concepts. As Chair of the Section of Litigation, I urge you to write and call your congressional representatives and senators. Suggest that the president's impressive inaugural in 2005 arguing for liberty and freedom worldwide applies at home to our civil justice system, and request that they vote no to federal tort reform and monetary caps on medical malpractice verdicts.