

TORTS: PAST, PRESENT, AND FUTURE – PRESENTATION OF BRIAN PANISH*

BRIAN PANISH:

Good afternoon, everyone. Thank you for being here today. Congratulations to the Law Review, Professor Stier, Dean Prager and Victor. It's been a number of years since I first met Victor in the Russell Building in the United States Senate with Senator Specter. After we both testified, we shared a cab back, as I was heading to the airport and dropped Victor off at his great law firm, Shook, Hardy & Bacon. And Victor and his partner, Mark Behrens I think is here also, the co-director with Victor for all they do for their clients. And Victor is a true legend. As most plaintiffs' lawyers, he's kind of the Darth Vader for the plaintiffs, but that's okay because something like this in a civil justice system, there's discourse and there's debate, and that's good for our civil justice system.

I also want to thank Southwestern. It is a special place to me being born only a few miles from here, growing up close to here and going to high school and law school. And then my father had always wanted me to be a lawyer. He didn't really push us, although three brothers of mine are lawyers, and my wife's a lawyer, and my oldest daughter's a lawyer. And my second daughter, Diana, who's sitting back there, who I know will be very embarrassed, at her mother's urging, decided that she wanted to come here and be a lawyer. I wasn't involved in that at all. So, it's great to be here. It's great that we can sit here and talk about this in a real debate. And really, our civil justice system is the only thing that stands between the

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victims of negligence or product defects, and anarchy. We can't rely as consumers on the United States government regulatory departments to enforce safety laws. There are changes all the time. They don't have resources. They're subject to political pressures. The only place in America, the only country in the world, where people just like you and I can go to court on a level playing field with the largest corporations that are the defendants. Companies like Big Tobacco, Big Pharma, Monsanto or Bayer in the Roundup, and on and on and on. And it's our civil justice system, not regulation by litigation, that has really made a difference to many consumers.

We could start in the automobile regulations. In the automobile world, seat belts did not exist for many years until the need for them was shown. Airbags back in the 1950s and '60s, technology existed, but standing behind regulations, auto manufacturers chose not to put that safety device in the vehicle. I was unfortunate to be involved with General Motors in a product liability case for the defect of a gas tank which caused four young children to be severely burned.¹ And in the course of that case we learned that General Motors had conducted a cost-benefit analysis. And what they had determined is that they could fix the design for \$8.20 and prevent these rear-end collisions with the gas tank six inches from the rear.

But they also did an analysis as to how much they were paying out in the lawsuits to the victims, and they determined that it was only a few hundred thousand. And when they did the cost-benefit analysis, it was much cheaper to fight the lawsuits and let the people burn than to make the design change. And lawsuits like the *Anderson* case caused those changes. And it doesn't stop just there. If we go to the pharmaceutical industry and we look at all the things that have occurred with drugs, we know that the pharmaceutical industry is moving towards preemption.²

Now, what is preemption? Preemption closes the court room, deprives people of their Seventh Amendment right to trial by jury. And we know now through freedom of information requests that back in the Bush White House, second Bush, when Justice Kavanaugh served as the White House counsel, there are emails that have now been turned over after the Kavanaugh hearings that show that there were meetings going on between representatives and the FDA and the White House, and statutes being drafted were included. I'm sure Victor could enlighten us on this, language in each statute to preempt or stop people from bringing lawsuits against

1. See Trial Order, *Anderson v. General Motors Corp.*, 1999 WL 34868876 (Cal. Super. Ct. July 12, 1999) (No. BC116926).

2. See, e.g., *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).

pharmaceutical manufacturers under the claim that if you comply with this government minimal standard, therefore you don't have a right to go to court and make your case.

That has continued, and that trend is here, and we'll see when it gets to the Supreme Court, as Victor mentioned, on generic drugs. Contrary to the California Court of Appeal in the case of *Conte v. Wyeth*,³ the United States Supreme Court has held that you can't sue because manufacturers can't change the label. You have to have FDA approval to change the label. Therefore, if you get a bad generic, tough, you have no case.⁴ You have nowhere to go.

But then we go to the area of elder care. It's a big business in America, and if you look through the statistics and what has happened to people that are in these homes, the number of deaths and malnutrition and such, it's only been able to be stopped in some sense by state regulations primarily, not the federal government.⁵ And if you look at the area of medical malpractice, in the state of California, there's a cap, a limitation on non-economic damages of \$250,000.⁶ That has been placed since 1971 and has never changed. And across the country, caps on damages are a way to prevent people from exercising their Seventh Amendment right to trial by jury, which was initially in the United States Constitution by the founders of this country as an inalienable right, the right to trial by jury, which no other country allows in a civil case but America. And that again, is another problem that is occurring in the attempts to limit lawsuits.

And Victor talks about deep pockets.⁷ Well, in California the law of deep pockets is that you pay whatever your share of liability is, and that's fair.⁸ If you're 50% responsible, you should pay that, and that's what the law has been in California since 1987.

Now, I wanted to talk a little bit about some of the topics that are going to come up today and just to preview them. And I haven't written any law review articles at all. I've read a lot of Victor's, and I'm not really used to talking to big crowds. I'm more used to twelve people on a jury, and I certainly have learned a lot from Victor and his scholarship, and he has been a great supporter of his clients, not only in legislation, but in appellate

3. 85 Cal. Rptr.3d 299 (Ct. App. 2008).

4. See *PLIVA, Inc.*, 564 U.S. at 609.

5. See, e.g., Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act"), Welf. & Inst. §§ 15600-75 (2011).

6. CAL. CIV. CODE § 3333.2(b).

7. Victor E. Schwartz, *Rendering Justice in Key Areas of Tort Law in the Next Decade*, 49 SW. L. REV. 378, 380-83 (2021).

8. CAL. CIV. CODE § 1431.

work, and in regulatory work, which is all aspects of what the defendants, the manufacturers, deal with.

But public nuisance is a topic that Victor has written about a lot, and he's talked about the doctrine of remoteness.⁹ And I really would say to you what should the question be? Shouldn't the question be: Can public nuisance be employed as a deterrent tool to prevent widespread abuses? And I ask you, how does that come into play? I've been fortunate to have been involved in the Big Tobacco litigation representing the public entities, but that is not where it is today. Today, Juul, and new brands like Altria funded by Philip Morris targeted underage youths with spicy ads and cool gatherings on social media to addict a substantial number of children throughout our schools to tobacco. I've been retained by the school districts in the state of California to bring a case under the doctrine of public nuisance for the losses.¹⁰ The losses in staffing, grant money, and other costs the school districts have incurred are due to this illegal advertising that targets minors with a product that is dangerous to them.

And public nuisance is a way that case can be brought to deter Juul, Altria, and others that attempt to do that. And without that bit of deterrence, the Juul problem would continue, and it is a big, big problem in America. The State Attorney General of California has brought a case. There are huge costs. And the person or the entity that causes the damage should pay. One of Victor's writings discusses the question of, what's the remoteness? Well, there is no remoteness here.

It's the same thing in the opioids litigation, which is a huge problem in America. The government, cities, counties, and hospitals are incurring huge costs, while Big Pharma lines their pockets with billions of dollars. We see what's happening with some of the families in the opioid litigation, and Big Pharma companies will continue to fight it. They settled some lawsuits, but more are coming. This problem has created a public nuisance that has required the government to take action to prevent this and to hold responsible the companies that are causing this incredible epidemic in America.¹¹

So, there's much more to say. I'm honored to be here. It's great to see my old friend, Victor, who was a trial lawyer. He can tell you about the

9. See Victor Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 569 (2006).

10. *Schools Fight Against the Vaping Epidemic*, PANISH SHEA & BOYLE LLP (Oct. 23, 2020), <https://www.psblaw.com/2020/10/23/schools-fight-against-the-vaping-epidemic/>.

11. See Colin Dwyer, *Your Guide to the Massive (And Massively Complex) Opioid Litigation*, NPR (Oct. 15, 2019, 9:05 AM), <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation>.

cases that he's tried. And I can't do the imitations like Victor, and he's got a lot of great things going for him. I'm just really, really honored to be in the presence of Professor Victor Schwartz. And Victor did tell me that whenever somebody calls him Professor, that means they're calling him stupid. Like when someone calls the judge, "Judge" instead of "Your Honor." Now, I would never call Victor stupid, and I'm honored to be here with Victor.

And Victor, he doesn't travel as much. He has so many opportunities, and he traveled across the country to be here to join us, and it's such an honor to have you here, Victor, at Southwestern, the true titan of the defense.

Thank you.