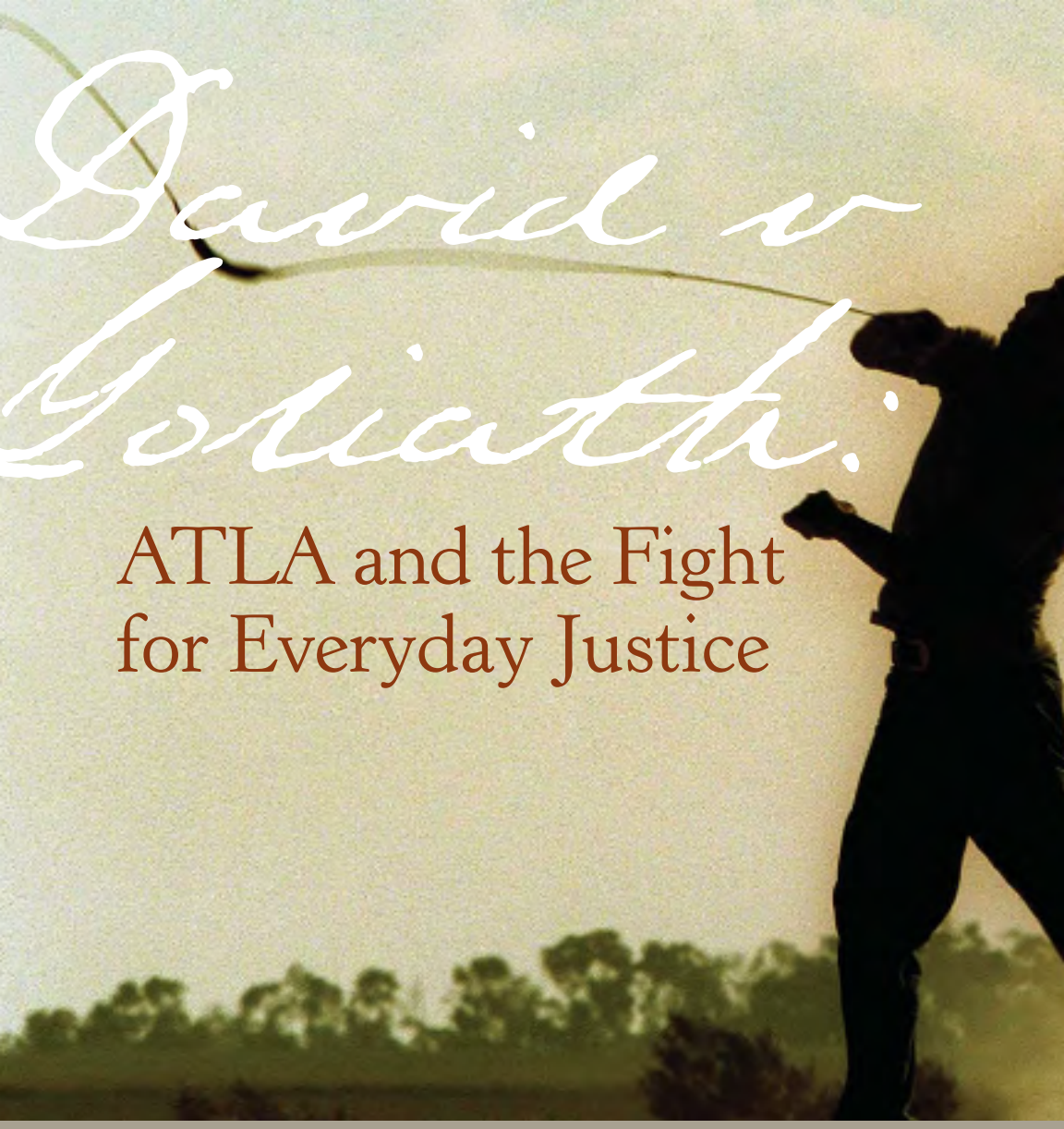

ATLA and the Fight for Everyday Justice

A fifty-year history of the challenges and accomplishments of the Association of Trial Lawyers of America

By Richard S. Jacobson and Jeffrey R. White

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David v. Goliath: ATLA and the Fight for Everyday Justice

ATLA

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To

The memory of my loving wife, Elaine Osborne Jacobson,
our daughter, Joyce Elaine Barrett-Cox,
and our granddaughter, Stephanie Elaine Barrett

And

To Jeanne Marie White and
Molly, Leslie, and Patrick White

Contents

Introduction

Bill Wagner,
Past President, ATLA

Richard Jacobson and Jeffrey White have condensed volumes of historical materials and oral interviews into a fascinating story of the birth and development of the Association of Trial Lawyers of America. In many ways it is also the story of the "personal injury practice." It is more, however. It is a valuable source book for those lawyers who aspire to help make this a better and safer world.

As World War II came to a close, personal injury practice in the United States would be unrecognizable to lawyers of today. The Yellow Page listings were just that—listings of every lawyer by name, address, and phone number. Nothing else. The contingent fee was still considered unprofessional, if not illegal, in many states. Those few lawyers who did any personal injury work were viewed with distaste by the legal community as the lower form of lawyer openly called an "ambulance chaser."

Common-law rules of assumption of risk, contributory negligence, fellow servant, open and obvious danger, and privity in express and implied warranty cases, as well as guest passenger and charitable immunity statutes, gave judges a free hand to dismiss meritorious cases and bar access to the jury. At trial, limitations on presenting demonstrative evidence and expert witnesses, and prohibition n of per diem argument made proof difficult for plaintiffs. Finally, juries were often selected for their blue ribbon community status and seldom included women, blacks, or other minorities. Most ordinary citizens were unaware that they might be compensated for injuries suffered through the fault of others. Injured persons who wanted a lawyer were often unaware of the availability of free legal advice and may never have heard of the contingent fee.

How different things are today! The Yellow Pages as well as television provide constant reminders to the public that the law gives the right to compensation for injury due to the fault of others or by defective products. The general public is swamped with information to aid in selecting from among many

lawyers. Even large commercial law firms appear dedicated to help evaluate potential claims without charge. Firms that represent industry and insurance interests have divisions within the firm devoted to personal injury practice. Appellate courts over the years have responded to the needs of consumers and have removed or severely limited the impact of many former defenses. With the near universal abolition of strict contributory negligence, the successful presentation of a claim has become easier. The liberalization of the rules of evidence, expert testimony, and final argument; the democratization of the jury; and the ascendance of more progressive judges have resulted in the creation of a modern civil justice system that is almost like an industry, supported by many varied businesses designed to help a lawyer make a winning and profitable case. Lawyers representing plaintiffs on a contingent fee basis are no longer outcasts. Their meetings are now graced with appearances by aspiring governors, legislators, and even presidents seeking approval and support.

How this came about during the past fifty years is the theme of this book. While change came as a result of many factors, it cannot be denied that the central driving force started with a small group of personal injury lawyers banding together to find education in their craft and power to drive change. The organization of a few grew over the years into a national organization with affiliates thriving in every state. It has become widely recognized for its impact on the education and training of lawyers, its principled influence in the courts, and its powers of political persuasion. It grew from a few white male workers' compensation lawyers into a band of thousands of men and women of every race and creed. ATLA and its state trial lawyer associations as affiliates have become the single most influential force for improvement and change in the "personal injury practice" in our country today.

This is the story of the people who formed, built, shaped, and changed ATLA and its state affiliates. Their creation now has national and state political action committees, news and legal magazines, regular *amicus curiae* appearances in the courts, educational materials and seminars, books, judicial education programs, public research programs, victim support programs, and many other services dedicated to providing a better world for the victims of undeserved personal injury or death, and an easier and more rewarding life for the lawyers who help them.

This is not just a history book, however. For trial lawyer organizations, there are lessons to be learned on almost every page. As the organization developed it faced many crises; some external and some internal. There were many setbacks and some narrow escapes from defeat. There were short-term and long-term heroes of the profession. Many helped the cause a lot. Many helped little. A few both helped and hurt.

In many respects the challenges facing trial lawyers, ATLA, and the state organizations today are anything but new. While the times and the opposition forces today are different in many ways from those faced by our predecessors, the underlying framework of the issues we face today is quite similar. Seeing how those issues were solved, understanding the successes and failures of those who came before will make not only an interesting read, but will prepare the reader to face many of those same problems again. We hope to solve them with the benefit of knowing and understanding the mistakes and the successes of others who have fought the good fight before.

1

Humble Beginnings

Fateful Encounter

Many great ideas are born in humble circumstances. This one began at a cocktail party.

It was the fall of 1945. At a hotel in Winston-Salem, N.C., the International Association of Industrial Accident Boards and Commissions (IAIABC) was holding its annual convention. Champagne flowed from a fountain in the middle of the room. Crocks of North Carolina moonshine, festooned with colored papers, stood invitingly alongside.

The commissioners, standing in knots of threes and fours, were the arbitrators and judges who ruled on the workers' compensation claims that arose out of two million accidents each year in the workplaces of America. Circulating comfortably among the commissioners were their hosts for this evening, the attorneys and lobbyists representing employers and workers' compensation carriers who regularly appeared before the commissioners. A bottle of rare scotch appeared and was seized upon happily by a commissioner from Portland, Oregon.

One subject of sharp discussion was a new and outspoken treatise, *Horovitz on Workmen's Compensation*, published in late l944. Negligence rules, which came to dominate the law of torts in the previous century, had been used by courts to protect American industries from responsibility for the widespread injury and death that the Industrial Revolution visited upon workers. State workers' compensation statutes were supposed to change all that. Now, Professor Horovitz charged, workers' compensation law had itself developed rules and

procedures that favored employers and shut out the law's intended beneficiaries. Horovitz cast an unwelcome spotlight on the human tragedy of workers who were killed or injured by the thousands in workplace accidents while the insurance industry, protected at every turn by friendly legislators and compliant administrators, stubbornly fought every claim for benefits.

Rarely had such stern criticism of the workers' compensation system issued forth from the pages of a scholarly treatise. And so it was with some consternation that many of the commissioners recognized the tall, ascetic man with piercing dark eyes behind horn-rimmed glasses, talking animatedly at their party. It was Samuel Horovitz.

Horovitz graduated from Harvard Law School in 1922. He first went to work as an insurance adjuster for the U.S. Casualty Company. When he saw how poorly injured workers were represented, he knew he'd found his life's work. He volunteered as a workers' compensation attorney for the Boston Legal Aid Society, a private charity. He handled without fee nearly five hundred cases before the Industrial Accident Board. His clients included not only factory workers who had lost hands or eyes, but also those suffering from industrial diseases, such as asbestosis and silicosis. He was a member of the faculty of Suffolk University Law School. He also taught at Howard University Law School in Washington, D.C., and he lectured on legal medicine at Boston University. In addition, Horovitz lobbied in the state legislature on behalf of the Boston branch of the American Federation of Labor (AF of L). His union service earned him entry as one of only two plaintiffs' lawyers to be named as associate members of the IAIABC, over the strong opposition of the insurance companies.

The other plaintiffs' lawyer was also present at that crucial cocktail party, courtesy of organized labor. Ben Marcus, counsel for the United Automobile Workers in matters of health and safety, represented the Congress of Industrial Organizations (CIO) as an associate member of the IAIABC. He had served as chairman of the workers' compensation section of the National Lawyers Guild and was active in the American Bar Association's Committee on Workman's Compensation.

He had just read *Horovitz on Workmen's Compensation*, and it was "burning a hole" in his mind. "I just had to talk to Sam," he recalled. He knew that Horovitz would be attending the Winston-Salem meeting. "The first thing I did was to seek out Sam Horovitz in the crowded room, pushing my way through the lobbyists and insurance representatives. We met. It was a meeting of like souls."

As the two men talked, the magnitude of the problem became clear. "There were tens of thousands of *litigated* workmen's compensation cases," Horovitz

realized. "About half the workers came alone, to do battle against skilled insurance counsel, doctors, and investigators." Not only were workers in desperate need of legal representation, but they needed better representation. Horovitz the law professor was convinced that "there was also need for more legal knowledge on the part of the plaintiffs' lawyer." Marcus recalled that "Sam and I began to exchange our thoughts on the present status of workers' compensation and the need—which was beginning to be felt through his book—for plaintiff lawyers to know more about the entire field."

The notion of an organization devoted to educating practitioners across the country was beginning to take shape in Sam's mind. His initial vision was of a relatively small fellowship consisting of two experienced workers' compensation lawyers from each state. They would communicate with and educate each other about legal developments around the country affecting injured workers. These lawyers, in turn, would spread the word in their own states. They would also work with unions to lobby state legislatures for more equitable laws to protect workers, increased compensation levels, and adequate fees for legal representation of the injured.

Even these modest efforts were long overdue.

Workers' Rights in the 1940s

When peacetime returned after World War II, America threw its economy into high gear. The demand for goods seemed insatiable. Factories ran at full throttle. There appeared to be no limit to what American productivity and know-how could accomplish.

Amid this wave of confidence, the dark side of the American workplace attracted little attention. Worker safety was viewed as a cumbersome nuisance to be evaded whenever possible. Some 18,000 people died in workplace accidents, and another two million were injured every year. Even more shocking was the state of the system designed to compensate the victims of workplace injuries and their families.

Early in the twentieth century, injured workers were often left without remedy due to the harsh defenses that protected employers from tort liability. Progressive reformers in nearly every state championed mandatory insurance for workers to provide compensation quickly and reliably. Workers' compensation could be called the only successful progressive "tort reform."

But the liberal impetus behind workers' compensation laws did not last. Business and insurance industry lobbyists fought for favorable legislation and against increases in benefit levels. "In many instances, amendments to workmen's compensation laws first had to have the approval of the spokesman for

the employers," explained Ben Marcus. "Accordingly, legislation was largely the creation of the employer or shaped to his liking."

The workers' compensation carriers also provided key personnel for the quasi-judicial workers' compensation administrative system. These commissioners, hearing examiners, and other administrators looked forward to returning to lucrative jobs in the insurance industry on the next turn of the revolving door. Judges—and those who wished to be judges—tended to identify closely with the business community. Even labor unions were not averse to bargaining away the rights of injured workers for greater fringe benefits, observed Marcus.

Nor did the compensation process turn out to be the simple and efficient procedure envisioned by its designers. They expected workers' compensation insurance carriers to play an essentially neutral role, collecting premiums from employers and disbursing benefits as ordered. In reality, the insurers had an enormous economic incentive to resist every claim. In the late 1940s, workers' compensation insurance took in over $600 million in premiums each year. It was the largest casualty insurance product in the world. And it was immensely profitable. For every $3 the carriers collected in premiums, they paid out only $1 to injured workers and their dependents.

They accomplished this by maintaining a highly skilled and organized defense bar of about five thousand lawyers who were paid well to defeat workers' claims. By 1954, more than 100,000 cases were being litigated before the Industrial Accident Commission Courts. The defense lawyers were backed by an industry-wide research unit that kept them abreast of the latest developments in the law. They turned workers' compensation hearings into the very adversarial proceedings the system was intended to eliminate. They litigated and expanded defenses based on "scope of employment," the "going and coming" rule, and "deviation" by the employee from strict work patterns. In essence, they succeeded in resurrecting the hated common-law defenses of contributory negligence and assumption of the risk.

The carriers also succeeded in turning the medical profession into an advocate for the defense. Physicians were almost always selected by employers or insurers. They were fully aware that if their findings too often favored claimants, this stream of income would quickly dry up.

The workers' compensation principle, as famously stated by David Lloyd George, is that "the product shall bear the blood of the workman," with the price reflecting the costs of injuries. In practice, the insurance companies labored mightily to shift much of the cost of workplace injury onto the shoulders of the injured workers themselves and onto the taxpayer. The result, wrote Professor William A. Robson in the 1951 edition of his influential book, *Justice and Ad-*

ministrative Law, was a "scandalous and wasteful" perversion of the compensation system. "The resources of numerous legal and medical practitioners were devoted to resisting the payment of compensation to an injured workman or dependents of one who was killed, regardless of human and social issues involved."

The task of securing these workers' rights to legal redress and compensation fell to a beleaguered band that Professor Tom Lambert later affectionately called "shirtsleeve lawyers." They were not the elite of the legal profession, whose families often boasted several generations of lawyers and who advanced comfortably through Ivy League law schools. The workers' lawyers came from the ranks of the Depression families. They were from farms, small towns, big cities, from the waterfront, the factories, the steel mills, the railroads, the unions, and from wise parents who instilled reverence for the law and its meaning for society. Many were Jewish or Catholic or otherwise too "ethnic" for the tastes of the blueblood firms. Many had to win a world war before getting started on a career. Some worked one or several jobs to pay their way through college and law school.

Frank Pozzi, a labor lawyer in Portland, Oregon, recalled "working on the waterfront, in the holds of ships, and in the saw mills, seeing first-hand the injuries and deaths from defective machinery and unsafe ships. To get through law school, I worked as a longshoreman. The union waived my dues to allow me to attend classes. I knew firsthand what workers had to contend with."

Solly Robins, of Minnesota, was one of six sons of an immigrant Russian tailor. His father "held court each weekend around his dining room table to hear and decide the disputes of other Minneapolis immigrants." He taught his son "respect for the law and to identify with the unfortunate and the poor." The family lost everything in the Depression. Solly had to leave college and find work with the WPA. But eventually, he worked his way through college and law school and became a lawyer for other workers.

James Jeans, law professor and environmental lawyer, played college football under the famed coach Weeb Eubank, and he paid his way through law school by coaching football himself.

Melvin Kodas, of Kansas City, fought in the war as a ferry and bomber pilot. He worked his way through law school as a clerk at the Farmers Insurance Exchange and became an adjuster after graduation. But he yearned for more independence. "A $3,000 loan started me in solo practice."

Professional independence was also important to Craig Spangenberg. Named for Illinois Supreme Court Justice Charles Craig, he knew, "ever since I was a child, I was going to be a lawyer." In his senior year at the University of Michigan Law School he obtained a list of fifty-two law firms in six cities. "I

hitchhiked from place to place, interviewed at fifty-one firms, and got one defense offer in Cleveland. After the war, I decided I was not going to be a deed, trust, probate or defense lawyer." The life of a defense lawyer, "being told what cases he will try and how to defend them," was not for him. "I liked people. I wanted to pick the cases I wanted to try for people I thought deserved to win. I didn't want to spend my life working for hire."

Many of these new lawyers began representing injured workers and personal injury victims, not only because they identified with these plaintiffs, but also because the "better" lawyers in town felt such cases were beneath them. They were not welcomed by the legal establishment. In New York, George Malinsky recalled, the building at 299 Broadway, where many plaintiffs' lawyers had their offices, was commonly referred to by defense counsel as the Den of Thieves.

They were badgered at every turn by the more "respectable" members of the bar. "One of the more common tactics against the plaintiffs' lawyers," Harry Lipsig remembered, "was to inform the Internal Revenue Service that the attorney was not reporting his full income, resulting in harassment by the IRS."

John L. Hill was president of the Texas Association of Plaintiffs' Attorneys in 1950. Even after he became Chief Justice of the Texas Supreme Court, he had vivid memories of difficulties the trial lawyers faced. "My father, who was a trucker, was very unhappy when I decided to be a plaintiffs' lawyer." Hill estimated that in 1950 there were only ten or fifteen plaintiffs' lawyers in all of Texas.

"It was a ragmop business," he explained. Trial preparation was almost nonexistent. "We didn't have all this discovery. You'd simply go over to the courthouse and try a case. All you'd have was a little pancake file with the pleading and a deposition from your client, and that was about all. If you had two or three hundred dollars invested in the file you were nervous." It was typical, he said, "to learn about your case at the same time the jury learns about it."

Voices in the Wilderness

Even before Sam Horovitz and Ben Marcus met and sketched out their plan for a national association, small groups of plaintiffs' lawyers had been coming together for mutual support. On a December night in l943, for instance, in Oklahoma City, sixteen men arrived one by one at the Skirvan Hotel, careful to be inconspicuous. They headed for an upstairs back room for the first meeting of the Negligence and Compensation Lawyers of Oklahoma. The group was led by Homer Bishop, who would become ATLA's fourth president, and James Rinehart, who was to serve in the Oklahoma state senate for twenty years. It was

the first plaintiffs' lawyer group to organize on a statewide basis. "We started our organization before Sam started his," Rinehart quipped, "because the need was more severe down here."

In Boston, the gathering place for plaintiffs' lawyers in early 1945 was wryly called the "Penthouse," a room on the roof of an old ten-story building on Tremont Street. After a full work day, they came to talk about their cases and to trade ideas, fortified by food stacked on tables and liquid refreshments at a bar. Nathan Fink, who had an office in the building, hosted this social hour at his own expense. Although most were personal injury lawyers, they closely followed Sam Horovitz's workers' compensation battles with the insurance companies and Industrial Accident Boards.

A thousand miles away another group of tort and workers' compensation lawyers met in restaurants and homes around Detroit. Samuel Charfoos organized the Compensation Attorneys of Detroit with a three-fold agenda: changing Michigan's outdated workers' compensation laws, persuading the legislature to raise the state's dismal compensation limits, and combating harassment by the insurance companies. "We became aggressive in seeking reforms," Charfoos said, "and Sam Horovitz's 1944 book on workmen's compensation conditions throughout the country became required reading." A leading member of the group was the most prominent compensation lawyer in the state, Ben Marcus.

Charfoos urged Marcus to ask Horovitz to address the Detroit group on the need for solidarity among workers' compensation attorneys and the necessity for a national association. Marcus extended the invitation to Horovitz. "I asked him and his wife to be guests at my home," Ben said. "Sam gave a marvelous speech to standing applause." It was a dramatic speech that inspired the group to pledge support to a national organization when and if it was formed.

Another group of workers' lawyers in and around Portland, Oregon, in the early 1940s called themselves the Blackstone Club. Gus Solomon, later a federal district court judge, organized the group, along with B. A. Green, a well-known labor lawyer. Working conditions in Portland were horrible, according to Solomon. There were few effective federal laws, minuscule benefits, and virtually no protection for the worker. The Blackstone Club quickly grew to about fifty labor and plaintiff lawyers. "They were concerned about the rough deals being perpetrated on the plaintiff lawyers and their clients by the insurance industry," recalled Solomon. "Their first focus was on reforming the jury selection system, where discrimination by class, occupation, and economic status was prevalent. We were successful in getting through legislation to change the system."

The Blackstone Club had disbanded by the time Sam Horovitz came to

Portland in 1946 for the next IAIABC meeting. But its aims and ideals were still strong among its leaders. Sam was able to call forth that idealism and establish the organization he and Ben Marcus had envisioned, all in the space of four hours, including lunch.

A Room at the Inn: The Birth of NACCA

After their Winston-Salem encounter, Sam Horovitz and Ben Marcus kept in touch with frequent letters and telephone calls. Their plan for a national organization was beginning to take shape. The enthusiasm that greeted Horovitz's speech to the Compensation Attorneys of Detroit convinced them that the time was right to launch the new association. The occasion would be the 1946 IAIABC annual meeting in Portland, Oregon.

The two worked out a plan of action. Horovitz had a list of about twenty-five people in the Portland area who had subscribed to his book. "They must be liberal minded if they'd buy a book written by a plaintiffs' lawyer," he told Marcus. "Why don't you call them up and tell them I will give them a little speech? But don't tell them we want to form an organization." Marcus had also drawn up a list of prospects from the members of the Workmen's Compensation Committee of the National Lawyers Guild. He remembered the IAIABC commissioner from Oregon to whom he had given the bottle of scotch in Winston-Salem. The grateful commissioner provided names of other labor lawyers who might be invited.

In the end, nine lawyers agreed to meet at the Heathman Hotel in Portland, on August 16, 1946, and they would found the organization that was to become the Association of Trial Lawyers of America. They included some of the leading advocates for workers' rights. Five had been members of the Blackstone Club.

B. A. Green was the most famous labor lawyer in Oregon. He had represented virtually every trade union in Portland and was the principal attorney for the AF of L. He had made a name for himself defending the International Workers of the World (the Wobblies), a radical union linked to communists and anarchists. By 1946, however, he was in poor health and did not try cases.

Green's partner, Jim Landye, 43, was a quiet intellectual. He attended the University of Oregon Law School when Wayne Morse, later a liberal U.S. Senator, was its dean. Morse inspired Landye to represent working people. He would become the association's second president.

Nels Peterson, another partner of Green, had earned his law school tuition as a professional boxer. He was chairman of the Progressive Party, having followed Henry Wallace out of the Democratic Party. Of the nine founders,

Peterson was the most active in the association, serving on the Board of Governors from l952 to 1956 and participating in ATLA affairs into the 1990s.

Gus Solomon was one of the most active civil rights lawyers in Oregon and a powerful labor figure. He represented the Farmers' Union and the seasonal migrant workers in the canneries. Solomon became a federal judge in face of opposition that included death threats and unfounded allegations that he had been a communist. A law school classmate of Ben Marcus, he served as an advisor to Horovitz even after taking the bench.

Bill Lord was probably the best known workers' compensation attorney in the state. His father had been Governor of Oregon and ambassador to Argentina. Lord was the principal attorney for the CIO, representing waterfront workers and longshoremen. It was said that he never turned away a worker in need of $5 or $l0. He died shortly after the new organization was founded.

Ben Anderson was Lord's partner. A quiet, soft-spoken man from a working class background, he was a farmer as well as a personal injury lawyer.

Harry George, a former school teacher, handled workers' compensation claims and some trials. He became an active associate editor of the *NACCA Law Journal.*

Walter Gillard was a defense lawyer and attorney for the State Industrial Commission with a reputation for treating plaintiffs fairly. He came to the meeting only to accompany his friend, Ben Anderson.

Don Richardson had recently joined the Green, Landye firm. He practiced labor law, but he was not a trial lawyer and took no part in the association's affairs after 1946.

Two other lawyers, Walter Evans and Maurice Sussman, were present at the beginning of the meeting, having accompanied other invitees, but left quickly.

Before meeting the entire group, Horovitz sat down with Green, Landye, and Peterson in Green's office to lay out his ideas. He also met several of the attorneys for lunch at the hotel. During these discussions, Sam realized how unaware he was of some features of the workers' compensation laws in other states. "As a teacher of law, I was flabbergasted," he recalled. He modified his "founder's speech" to add greater emphasis on the need for the national organization to provide this essential legal knowledge to workers' compensation lawyers around the country.

The stage was set for the founders to meet in Horovitz's room in the Heathman Hotel—except for one small detail. Sam had forgotten to tell his wife, Evelyn, that they were about play host to Marcus and nine other guests. At the last minute, she worked frantically to make the room presentable, gathering up the children's scattered clothes and tossing them into the bathtub.

The men crowded into the room, filling the few seats and sitting on the

floor. Horovitz spoke from behind a chair, as if at a podium. As Gus Solomon remembered the meeting, Horovitz began by warning the assembled trial lawyers of a new threat. "He said there was a proposal made by the insurance industry to limit the testimony by a physician to demonstrable injuries—those injuries that could be verified by visual observation or by x-rays. Sam pointed out that this rule would be catastrophic for injured victims because physicians couldn't testify about subjective symptoms—pain and suffering—even though the doctors treating the victims were relying upon those symptoms. He shouted that this was outrageous."

Judge Solomon also recounted how vividly Horovitz had painted a picture of "the growing strength and domination of the insurance companies over consumers and over the whole field of personal injury and workmen's compensation." He warned that the lawyers for the insurance companies and state funds had long been well-organized and controlled the American Bar Association Insurance Section. They controlled the direction of legislation and they controlled the rules laid down by the IAIABC for the administrative proceedings.

"The insurance lawyers operate through the ABA's Insurance Section," Solomon quoted Sam. "Their companies or employer's corporations pay their full expenses to attend ABA meetings and insurance commission conventions and to wine and dine those in power." Horovitz also pointed out, "If you were a black lawyer, it was impossible to get into the ABA's section. If you were a Jew, you not only had to have somebody verify and support your application, but it was almost unheard of for a Jewish person to get to be an official."

"We need an organization for lawyers that specialize in representing the injured worker," Horovitz told the group. He had by now greatly expanded his battle plan. Instead of recruiting a select group of two attorneys from each state, he now proposed a broad-based organization. "There are 2,500 plaintiffs' lawyers throughout the U.S., and if we organize we can at least get half of them."

Horovitz unveiled his vision—a vision that would guide ATLA through the following decades. This association of plaintiff's lawyers would hold local and national meetings. It would develop "a central library that would be a storehouse of information for injured workmen." It would "publish a journal that would digest new decisions and discuss needed legislation to broaden the rights of the victims of industrial accidents." It would also "establish lectures at big law schools and encourage these law schools to teach courses relating to the problems of work-induced accidents."

"I was fascinated," said Solomon. "So were the other people there. This was the first time that somebody had come up with a real program to assist these injured workmen. We knew Sam Horovitz, from his talks, was a real optimist and maybe a dreamer. But he was the type of a man who could really be re-

sponsible for a new organization. And even though it might fall short of this great dream, it would be a very worthwhile organization to form."

The group voted enthusiastically to form a national organization. They agreed upon the name, the National Association of Compensation Attorneys (NACA[1]). Dues would be $1 a year. The group wanted Horovitz to be the first president, but, at Sam's insistence, Ben Marcus was elected unanimously. Horovitz was named Executive Secretary, a position in keeping with his plans to travel and build the fledgling association. Horovitz collected the $11 in dues. He and Marcus each donated an additional $500 to the treasury to set up an office. The next meeting was scheduled for Toronto the following year, coinciding again with the IAIABC convention.

As the meeting closed, Horovitz learned that at the IAIABC meeting in Portland, the insurance representatives had moved to discontinue allowing representatives of the AF of L and the CIO to belong as associate members. Horovitz and Marcus were to be expelled. The insurers had gotten wind of their plan to organize the workers' lawyers. Apparently, they had struck a nerve.

Horovitz and Marcus immediately went to work to defeat the motion. Why fight to stay in an organization that did not want them after they had started their own? Viewed in retrospect, Marcus admits, it seemed an odd first battle. However, "an adverse vote could have had an unknown effect on NACCA's start." One also suspects a certain eagerness to take on the smug insurance representatives when, for a change, they held a good hand.

It happened that the current IAIABC president was also the head of the AF of L Social Service Bureau. Horovitz telephoned the president and persuaded him to oppose the elimination of the union representatives. The president, in turn, contacted every member at the Portland meeting, many of whom had been members of the AF of L. Whatever they thought of the two lawyers, few of the commissioners wanted to take a gratuitous slap at the two largest labor federations in the nation. When the motion was placed before them in the general session, it was soundly defeated. Marcus called it "the first political action victory for NACCA." He added that the incident "illustrated to the Portland group, and to Sam and myself even more so, how important it was for us to continue our formative work for a national organization."

Marcus flew back to Detroit and immediately asked Sam Charfoos to propose that his local organization affiliate itself with NACCA. Detroit enthusiastically became NACCA's first chapter.

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[1] The name was soon changed to the National Association of Claimants' Compensation Attorneys. NACCA would become ATLA in 1965.

Sam and Evelyn Horovitz took the train back to Boston. On the way, Sam wrote each of the founders a personal note, thanking them for their support. Such personal gestures were characteristic of Horovitz, and they won him the enduring loyalty of valuable friends who would support him in the controversies to come.

He also sent each one a receipt for $1. Over the years, he paid unrelenting attention to the association's financial details. Detractors called him parsimonious and unwilling to invest in the organization's growth. However, he was generous with his own funds. In the early years, he paid NACCA's office expenses and financed the publication of the *NACCA Law Journal* out of his own pocket. That example later helped him persuade many of the more affluent NACCA members to make special contributions to meet the association's mounting expenses.

The first order of business after returning to Boston was to set up a "home office." Horovitz planned to build NACCA by speaking to plaintiffs' lawyers around the country, and he needed a trusted assistant to run its day-to-day operations.

In the summer of 1946, Sam delivered an address to a group of World War II veterans in Springfield, Massachusetts. Seated in the audience was a 29-year-old corporate lawyer and Harvard Law School graduate, Laurence Locke. Locke was transfixed. Horovitz "had the capacity for taking the most complex legal issue and reducing it to human terms. He could make you see the case, make you understand the law, not as a complex mechanism, but as a very direct human and personal thing." Horovitz described the legal battles on behalf of injured workers and their families as an epic struggle. "When a court was on the right side, it was vindicating the good; when it was on the wrong side, it was the personification of evil."

Later, after concluding a successful tax case in Boston, Locke was visiting a friend who had an office in a building on Beacon Street. He saw Sam Horovitz's name on an office door. He decided to go in and "just shake Sam's hand for his inspiring speech." Instead, Locke encountered Sam's partner, Bertram Petkum.

"Petkum laughed, asked me who I was and what I was doing and said, 'Young man, you are in the right place at the right time. I just hung up with a call from Sam in Portland, Oregon. He has just formed, with l0 others, an association of workmen's compensation lawyers. And he asked me to hire a bright competent young man to fill out the firm since he would be occupied fully in building the new association. Would you be interested in the job?'"

At the moment, Locke was not. Back in Springfield, however, the news-

paper headlines were announcing that the local American Legion post had uncovered price gouging and hoarding by meat packers. Locke had played a leading role in exposing the scandal. Soon the higher-ups at Locke's corporate law firm let him know that several clients were unhappy with Locke's actions. Anything less than total loyalty to business interests, his superiors informed him, would dim his future with the firm.

A week later Locke called Petkum and became the first professional employee of NACCA. "I hadn't walked in looking for a job, just to shake his hand temporarily, and I ended up by having him grab my hand, and I never let go for 30 years."

Locke helped Horovitz compile and write the first volumes of the *NACCA Law Journal*, he was NACCA's first treasurer and secretary, he lobbied in the Massachusetts legislature for amendments to workers' compensation laws, and he took charge of the administrative details in the office and at the early conventions. He also represented clients at workers' compensation proceedings, one of which developed into a key case in the asbestos crusade. In short, Locke kept NACCA on an even keel, enabling Horovitz to build NACCA into the effective national organization that he had described at the Portland meeting.

Admiralty and Railroad Lawyers Come Aboard

The 1947 convention in Toronto drew thirty-five people, including law professors and the attorney for the Industrial Commission of Ontario, who was the main speaker. But two events leading up to the convention foreshadowed the dramatic changes ahead for Sam Horovitz's organization of workers' compensation attorneys.

Some time before he left Boston for Toronto, Horovitz received a call from Abraham Freedman of Philadelphia. Freedman was at that time the outstanding practitioner of admiralty injury law in the country. For example, he had recently won a landmark victory in *Seas Shipping Co. v. Sieracki* (1946), where the Supreme Court held that a vessel owner's duty to provide a seaworthy vessel is absolute and permitted a lawsuit by a longshoreman injured while working on board the vessel.

"I would like to join your association," Freedman said over the phone. Horovitz explained that NACCA was organized as an association of workers' compensation attorneys, not admiralty lawyers. But Freedman had a ready response. "Isn't it just as bad to lose a leg on a boat as in a factory? I represent those who lose their legs on boats."

Horovitz met with Freedman in Philadelphia. He asked Freedman to come

to Toronto and address NACCA members on what they should know about admiralty. At the least, Sam thought, they should be able to recognize when an injured worker may have a recourse in admiralty and refer the worker to an admiralty practitioner. However, Horovitz insisted, "If you want to come, come at your own expense."

"I didn't believe Abe would be there," Horovitz later recalled. "At four o'clock in the morning in Toronto, he awoke me. He and his partner had arrived. They both wanted admiralty lawyers to be taken into NACCA. Abe made such a wonderful speech, we voted to take them in." Thomas O'Brien, who had offices in the same building as Horovitz, heard before the Toronto meeting about the invitation to the admiralty lawyers. He suggested to Horovitz that the railroad lawyers also be included. Surely it was as bad to lose a leg on a train as on a boat, he declared. So Horovitz invited O'Brien to Toronto—on condition that he also bring Bill DeParcq.

DeParcq was one of the leading railroad lawyers in the country. He was also a paraplegic, the a result of an automobile collision. Watching attorney Robert J. McDonald handle his auto accident case inspired DeParcq to enter law school himself. He eventually became McDonald's partner and later a law professor. DeParcq went to Toronto and delivered an impassioned speech on the plight of injured railroad workers.

Instinctively, the members rejected any notion of making NACCA an exclusive organization after the pattern of some specialty bar associations. From the first, inclusion was part of its mission. The NACCA membership voted to admit railroad lawyers to their growing ranks.

Inviting these two relatively small and specialized groups of attorneys into NACCA's tent soon paid off in an important victory for railroad workers and seamen. In the Federal Employees Liability Act, covering railroad workers, and in the Jones Act, applicable to seamen, Congress guaranteed injured workers the right to trial by jury of their compensation claims. In 1950, the American Bar Association proposed federal legislation that would have grafted onto those statutes an administrative scheme similar to workers' compensation that would have eliminated jury trials.

The proposals were defeated, due to the indefatigable lobbying by B. Nathan Richter of NACCA's Railroad Law Section and Abraham Freedman of the Admiralty Section. It was a setback for the prestigious ABA, which was fond of portraying itself to the Congress and to the public as the voice of the organized bar. Still, Horovitz urged caution, lest the impulse to be inclusive divert NACCA from its focus on workers' compensation claimants.

Locke once asked Horovitz how he came to choose workers' compensation as his life's work—a field that many lawyers disdained as boring and unremu-

nerative. "Of course it is not boring. Each case is a person," Horovitz insisted. "The people who work are the salt of the earth. They represent the strength of America. Instead of working to transfer money from one crook to another, from one big businessman to another, the lawyer is working to help a worker who has built our country.

"I formed NACCA to have a national movement of claimants attorneys to convince courts to broaden the law and convince legislators that they could—and should—raise the benefits," Horovitz stated. "I wanted to make the representation of injured workers a field in which reputable lawyers could respectably practice law, and not at a great financial sacrifice."

Horovitz gave the keynote speech at NACCA's 1950 convention in Oklahoma City. He decried the legal and political inadequacies of the workers' compensation system. He demanded to know why the system did not even include one of the nation's most dangerous occupations, farm workers, who suffered 4,500 deaths and 323,000 injuries each year. He also called for legislation allowing jury trials in workers' compensation cases, then available in only eight states, to free injured workers from the arbitrary decisions of the industrial boards and commissions.

The NACCA Workmen's Compensation Section fought for these goals with some success during the 1950s in state legislatures and industrial commission courts, enlisting the aid of the powerful AF of L and the CIO labor federations. Workers' compensation lawyers, led by Ben Marcus, won favorable decisions recognizing two major occupational diseases—heart failure and work stress—as compensable injuries. NACCA also mounted a nationwide campaign to make the public and policy makers aware that workers' compensation benefits had lagged far behind the rising cost of living and spiraling medical expenses.

These NACCA successes were threatened when the federal government in 1960 offered a uniform model workers' compensation act. Horovitz and Marcus charged in speeches and law review articles that the bill would wreck workers' rights. They publicly chastised labor unions who endorsed the plan. "I am shocked," Horovitz wrote to Lawrence Smedley of the AF of L Department of Social Security, that the union federation would support legislation "that would return workmen's compensation to where it existed two decades ago." NACCA succeeded in blocking adoption of the model act.

Much of NACCA's early success was powered by Horovitz's own personal conviction. As Larry Locke remarked, "Sam was a very over-powering person. What he had in his own mind, he presumed was out in the real world." Like the Old Testament prophets, Horovitz took his message to those he felt needed to hear it.

Sam Tours the South

Horovitz envisioned NACCA as a truly national lawyers' association. The new organization desperately needed to draw in new members from around the country. The advice he received from Texans Maury Maverick and Sam Adams was simple: "You go to where the lawyers are, and you speak."

So, in 1949, Sam hitched an aluminum Airstream trailer to an old Chrysler and set off to carry his gospel to the states in the south and southwest. Sam proudly called it the "Silver Bullet." From December 1949 to February 1950, that trailer would be home for Sam Horovitz and his family—Evelyn and their two young sons, Paul and David. They covered 10,800 miles, traveling through twenty-four states.

Sam spoke before thirty-two groups, according to Evelyn's notes. He gave speeches in Ponca City, Oklahoma City, and Tulsa, Oklahoma; Dallas, Fort Worth, Houston, Beaumont, and San Antonio, Texas; New Orleans, Baton Rouge, and Shreveport, Louisiana; and Atlanta and Birmingham, Alabama. He addressed two state legislatures and many law students.

His audiences included lawyers like Fred Gesevius, of New Orleans. Gesevius became a lawyer through the influence of the Jesuit priests. He saw workers' compensation practice as humanitarian and the type of law that expressed some of the fundamental tenets of his religious beliefs. He soon found himself battling against the law's mistreatment of injured workers. "With moral support from the Jesuits, I became a strong protester against the unfairness and bias of the Commissions and the legislature toward the needs of the injured workmen and their dependents. There was no organization to bring up these grievances of bias and unfairness. One day in 1949, I received a telephone call from Sam Horovitz who said he had heard of my battles for the workmen. He asked me to arrange a meeting of a few humanitarian-oriented lawyers. I did, with Ray Kierr and Alva Brumfield and several others. Sam came, addressed us in a most knowledgeable manner, and we joined the national organization."

Local NACCA members worked hard to organize these appearances. Horovitz's status as the author of a nationally recognized treatise was a major asset. For example, Gilbert Adams knew that for Horovitz to address the lawyers in Beaumont, Texas, he would need the approval of the president of the local bar, who represented a number of insurance companies. Adams casually suggested that he could get the author of "the best selling text book on workmens' compensation" as a speaker. The bar president was suitably impressed and gave his assent.

Horovitz opened his address to the Beaumont lawyers with some remarks on the law governing workers' compensation. But then he launched into his ser-

mon on the plight of the nation's injured and their need for lawyers to champion their rights. He grew more animated and his voice grew stronger as he described each example and episode of injustice. At the height of his speech, he called upon the plaintiffs' lawyers seated before him to stand, join the crusade, and join NACCA.

The bar president was aghast. "I am sure he would have paid $1,000 to kick me out of the hall," Horovitz laughed, "but it was too late." Audiences responded to Horovitz's impassioned appeals with wild enthusiasm. Oklahoma lawyer Tom Irby wrote to Larry Locke that the address in Ponca City "was like a revival meeting." Local lawyers and judges may have come to hear the author of a legal treatise, but they found "the Billy Graham of the Plaintiffs' bar."

Maury Maverick had the same reaction. He hired a hall and invited one hundred Texas lawyers to dinner at his own expense. Horovitz stood before them and painted an emotionally wrenching portrait of an America in which accidents killed over 100,000 people and maimed millions more. He urged his listeners to stand up, to enlist in NACCA as "fighters in an army against the entrenched insurance industry."

The tour was a tremendous success. Hundreds of new members from across a broad geographical expanse made NACCA a truly national voice of the workplace injury bar. By 1952, twenty-five state or regional groups had been established or were in formation. The southerners who enlisted in Sam's army would fill NACCA's leadership positions for many years to come.

How could this northerner—boyish, bookish and Jewish—galvanize these hardscrabble southern lawyers into action? By every account, Horovitz was one of those rare speakers who could speak *to* his audience without speaking *down* to them. Instead, he lifted them up. He believed so fervently in his cause, Larry Locke observed, that "like a true evangelist, he had absolutely no self-consciousness." These southerners had grown up attending tent revival meetings, and they recognized Horovitz's evangelism as the genuine article. In addition, like personal injury lawyers everywhere, they smarted from being denounced as parasites and ambulance chasers. Sam's invitation to them to join a moral crusade for a better society while at the same time making a decent living struck a deeply responsive chord.

NACCA lawyers soon discovered the powerful impact that an organized plaintiffs' bar can exert. Joe Tonahill of Jasper, Texas, holds ATLA Membership Card No. One. He was one of the founding members of the Texas Association of Compensation Attorneys. One day in 1946, his sister, a librarian, told him about a new book that he might want to read. It was *Horovitz on Workmen's Compensation.* Later, he had a long phone conversation with Horovitz and agreed to organize a NACCA chapter in Dallas. "I called Maury Maverick and

arranged to have about 40 cards sent out for a meeting at the Fort Worth Bar Association's gathering in Dallas."

The recruiting message was pure Texas vinegar. "We were sick and tired of being kicked in the balls by judges, the insurance companies, the adjusters, and the doctors—it was impossible to get a doctor to testify." The new NACCA chapter elected Jack Carter of Dallas as president and John Watts of Odessa as vice-president. Their next move was to get the attention of the powers that be. "We went all out to defeat a judge who was a specialist in cutting plaintiffs' verdicts and granting mistrials to the insurance defense counsel." The plaintiffs' lawyers defeated the judge in the next election. "We celebrated our victory with a banquet, and there was standing room only. The supreme court judges were there. We gained our recognition."

After Horovitz returned to Boston, he summed up his experience in an article in the 1949 *NACCA Law Journal* entitled "What I Saw." It became NACCA's guiding manifesto. "Ignorance favors the defense and by ignorance the innocent injured worker suffers. NACCA's central mission therefore is to educate lawyers regarding the rights of injured workers and accident victims. Plaintiffs' lawyers must be familiar not only with their own state law, but also the liberal trends in other states. Law schools should include courses in workers' compensation. Legislators must be educated to the need for increasing workers' compensation payments. The right to trial by jury must be expanded." He concluded: "In wider knowledge lies the future hope of the two million injured annually in the United States—potential clients demanding your best efforts."

The King of Torts

One more telephone call to Horovitz would mark the beginning of a dramatic transformation of NACCA and its mission. At the 1948 convention at the Hotel Commodore in New York City, Horovitz received a telephone call from San Francisco. "My name is Melvin Belli," the caller said. "I want to join your organization."

Horovitz hadn't heard of Melvin Belli, but he guessed that Belli "must be a rich man" because he calculated that the long-distance call had cost at least $50. As they talked, Horovitz became increasingly concerned. "You want us to take in the tort lawyers, but we don't want the tort lawyers," Horovitz said. "The only ones we want are lawyers who represent injured workers." Belli had a ready response: "Isn't it as bad for a person, who may well be a worker, to lose his leg in a taxicab as in a shop?"

Horovitz finally relented. "Mr. Belli, if you want to come to our next convention in Cleveland at your own expense and talk to us, that'll be okay." Belli

was scheduled to be in Switzerland at that time but promised to fly back for the 1949 convention. Horovitz thought he had got rid of the tort lawyer, but Belli kept his promise and came to Cleveland.

No tort lawyer has made a deeper imprint on the practice of personal injury law than Melvin M. Belli. He was born in Sonora, California, in 1907 to a pioneer family. His grandfather was a school headmaster, his father a successful banker. After graduating from the University of California Boalt School of Law in 1933, Belli began his legal career by undertaking the seemingly hopeless cases of prisoners referred by a Catholic priest. "I met Father George O'Meara of San Quentin. He convinced me to take the cases of prisoners, principally on Death Row. Once the man was convicted, there was no public defender."

Eventually, he turned his attention to civil cases and built a successful personal injury practice. His critics—and there were many as his career unfolded—complained of his vast ego, his love affair with the media spotlight, and his penchant for public statements and actions that seemed to reinforce the stereotype of the greedy trial lawyer. Belli himself would not entirely disagree. But his faults are overshadowed by his innovative contributions to the representation of injury victims—innovations that have become fundamentals for trial lawyers.

The first was the use of "demonstrative evidence." Courtrooms had long been the domain of the spoken word. Juries were told the case, sometimes in soaring oratory, more often in the lawyers' dull drone. For one so eloquent, Belli intuitively appreciated the limits of the spoken word. He learned from his criminal defense experience that the lawyer can reach people more effectively by showing them what happened as well as telling them. "In criminal law the District Attorney was allowed to be so explicit that he brought the deceased into the courtroom, the deadly bullet or the gun, the fingerprint, or the fetus in a bottle," Belli said. "He let the jury get the smell of death."

Other tort lawyers were starting to use demonstrative evidence, but none was more energetic and creative than Belli. Into the courtroom he brought x-rays, diagrams, aerial photographs, working models, entire skeletons—anything that might help the jury understand his case. (It pleased him to be photographed driving around San Francisco in his red convertible with Elmer, his favorite skeleton, in the passenger seat.) Many trial judges stubbornly resisted these devices. "Even a simple blackboard for illustrative use was at times a full-blown battle," Belli recalled. Eventually, he won broad acceptance of demonstrative evidence, establishing precedents that allow present-day trial lawyers to use videotape, computer animation, and even virtual reality presentations.

Belli's second contribution was a concept set forth in his 1951 law re-

view article entitled "The Adequate Award." It was, Professor Tom Lambert stated in 1956, the "most striking development in personal injury law in the last decade." As Belli explained, even after educating the jury, the plaintiffs' lawyer was faced with the problem of educating judges. Trial judges and appellate courts aggressively reduced the jury's award through devices such as remittitur. Frequently, their yardstick was the maximum amount that an appellate court had upheld in similar reported cases.

Of course, only a tiny fraction of tort cases make it into the case reporters. The chances of finding truly similar cases are slim. Moreover, using older precedents shortchanges plaintiffs by ignoring the drain of inflation. Belli called upon plaintiffs' attorneys to look at the invisible law—the large number of verdicts and settlements—to help establish and defend an adequate award for injured plaintiffs. Belli edited a section of the *NACCA Law Journal* devoted to reporting significant verdicts and settlements, a feature that developed into the present-day *ATLA Law Reporter*.

Belli's third contribution to plaintiffs' attorneys was ATLA's teaching ethic. The sharing of information among attorneys was his greatest contribution. Belli smashed the notion that trial lawyers who develop a successful argument, or jury presentation, or settlement technique should jealously guard such trade secrets. Belli practiced as well as preached the idea that no trial lawyer "owns" the information or techniques that come his or her way. Progressive development of the law—and the survival of the plaintiffs' bar itself—demands that every lawyer build upon and add to the common storehouse of knowledge.

Belli certainly did not invent the notion of trial lawyers sharing information. That was, after all, a vital part of the mission Sam Horovitz had set for NACCA. What Horovitz had in mind, however, was attorneys from different parts of the country educating each other concerning recent judicial decisions and legislative developments in compensation law in the various states. Belli called upon them to share techniques, trial strategy, information about an expert or a witness, what to look for in discovery, and what arguments and evidence were most effective. In short, he wanted them to share the inside information that trial lawyers tended to hoard for themselves as an edge over the competition. It was Belli who elevated the sharing of secrets to a virtue.

Verne Lawyer was a successful criminal lawyer in 1953 when he attended a NACCA meeting in Chicago. "It was the first experience I had where lawyers were giving of themselves to other lawyers. They were telling their secrets to each other. They held nothing back. Mel Belli was the leader, encouraging every lawyer who had an idea that might be of value to share it." As Belli was fond of saying, when the flame is shared from candle to candle, no one's light is di-

minished; everyone's is increased. Without that simple notion ATLA's education program, and perhaps ATLA itself, might have faded without a trace.

When Mel Belli stood before the NACCA attorneys at their Cleveland convention in 1949, many had never heard of him. But they would not forget. Tall, with broad shoulders, a square jaw, and a confident smile, he was not simply good looking. He was Hollywood-handsome. *Life* magazine would dub Belli the "King of Torts" in a 1954 feature article. But to measure his stature, royal or otherwise, by his famous courtroom victories misses his essential character. Belli truly loved the intellectual machinery of the law of torts, a relatively open field that was ripe for new theories and innovative techniques. Creative imagination, the talent for looking at the familiar in a new way, is not common in the law. But it flashes through Belli's speeches and writings, notably his multivolume treatise, *Modern Trials*. It was about to be visited upon the assembled attorneys in Cleveland.

"Sam Horovitz gave Belli the floor and that was all any of us needed," said Sam Charfoos. "When Mel got through, we were in legal ecstasy. We had never seen anybody who could communicate so well and had such an important message to give on what counted the most to us. He spoke for two hours on demonstrative evidence and the need for the adequate award. When he got through we couldn't wait to elect him president and get back to our offices to start doing what he did."

Horovitz, too, was won over. "He made one of the best speeches on behalf of the tort lawyers and I could not stop him," Horovitz said. "We voted in all the tort lawyers." In fact, Belli made a run for the presidency at that convention. But it was a bit too much, too soon. Herman Wright observed that many felt Belli "was a little too flamboyant. And that is why he lost. It was not because he wasn't impressive. It was simply that he was too impressive."

The following year, at the 1950 convention, Belli's election was practically a foregone conclusion. His supporters included the current president, Homer Bishop, and Perry Nichols, whose reputation for trial tactics matched Belli's. Indeed, Horovitz's personal choice for the slot, Silas Blake Axtell, seconded Belli's nomination. The stage was set as Bishop read to the delegates a telegram from U.S. Congressman Frank R. Havenner, inviting NACCA to hold its next convention in San Francisco, Belli's home town. Belli delivered a carefully crafted and—for him—most unusual speech. Gone were the flamboyant flourishes and outrageous overstatements. Instead, he declared that "adulation must not be the NACCA trial lawyer's aim." The NACCA trial lawyer's high calling is the duty to help those less fortunate, a "duty of humility."

President Bishop, caught up in the momentum, declared that at the conclusion of the convention, "Melvin M. Belli, the new president, will take over."

John Watts rushed to the rostrum and suggested that perhaps the regular procedure of nomination and election be followed. Nichols, presiding over the nominations, remarked lightly, "I have heard of steam rollers, but never one rolling quite so fast." Watts placed Belli's name in nomination, and the ayes from the floor vote were declared to be unanimous.

Melvin Belli became a pied piper who attracted a noisy parade of tort lawyers into NACCA. Within a few years, membership skyrocketed from 300 to 1500. NACCA would thrive, but Sam Horovitz could not suppress a pang of concern. He built NACCA to give those injured on the job more effective representation in the workers' compensation system, an essentially non-fault administrative program.

The tort system presented far different challenges. Tort liability is premised on the Fault Principle, an exercise in social democracy by ordinary Americans sitting as a jury. The influx of tort lawyers committed to developing and defending this system would drastically alter the character of the organization.

2

Defenders of the Jury

The Torts Transformation

Tort lawyers flocked to NACCA. From 300 lawyers in 1948, the association's membership skyrocketed to 8,300 in 1956. This influx of tort lawyers and the nature of the law they practiced fundamentally changed NACCA.

Sam Horovitz preached compassion and justice for American workers. His was an idealism of the highest order, and he possessed an amazing ability to imbue his followers with his crusading spirit. But it was also a somewhat abstract idealism. Workers' compensation is essentially a mandatory insurance program. The job of the workers' compensation attorney is to demonstrate to a hearing examiner or commissioner that the claimant's injury is compensable and the worker is entitled to an amount set forth in the schedule of benefits established by the legislature. An injury in the course of employment is generally compensable, regardless of whether the employer was at fault. Factual disputes are resolved without a jury in almost all states, and questions of law are relatively infrequent.

Fees for representing claimants are low. The economics of a successful workers' compensation practice require processing a large volume of claims. Some attorneys handle over four hundred claims per year. Under these conditions, emotional connection with the client is rare.

Workers' compensation continues to be the primary means of compensating injured workers. In terms of the number of cases, it dwarfs the tort system. Making workers' compensation an effective safety net, as its designers intended, would remain an important NACCA goal.

But tort law in the 1950s and 1960s was a cutting-edge field filled with drama and excitement. Tort cases captured the imagination of the public. They fascinated the news media. They attracted creative and committed young lawyers. The reason for all this excitement was, in a word, the jury.

A Brief History of the Civil Jury

If the jury's job is merely to decide issues of fact in civil cases, then what is to be lost by handing over this procedural task (which many citizens avoid if at all possible) to more competent and efficient judges, professional arbitrators, or panels of experts? In short, is the civil jury worth fighting for?

The answer is that trial by jury is not simply a procedural nicety. It is an expression of democratic political power that American citizens won for themselves by hardship, bloodshed, and war.[2]

Bulwark of Liberty

Its origins in English common law are shrouded in the mists of time. Certainly by the twelfth century trial by jury had replaced trial by battle and trial by ordeal in England. Early jurors were very like witnesses, chosen precisely because they knew the parties and were familiar with the dispute. Gradually the jury evolved into a body of impartial citizens whose verdict was based on evidence presented to them in open court. As the king extended his control over post-feudal England, the jury's role largely was to do the royal bidding, particularly in matters of enforcing the king's peace and collecting the king's taxes. Still, it carried the potential of independent judgment. The nobles who extracted the Magna Carta at swordpoint from King John at Runnymeade in 1215 guaranteed for themselves the right to trial by a jury of their peers as a shield against oppression by the Crown.

Nevertheless, the Crown generally had its way. Jurors who refused to decide as directed by the King's judges could be imprisoned, their property seized, and their families cast out. Yet, there were instances when brave jurors stood against injustice. An example is the courageous jury led by Edward Bushel in 1670. Bushel and his fellow jurors refused to convict Quakers William Penn

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[2] The story of the fight for the right to trial by jury in America, long ignored by legal scholars, is told powerfully in Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 Hastings L.Q. 579 (1993); and in Alan Howard Scheiner, *Judicial Assessment Of Punitive Damages, The Seventh Amendment, And The Politics Of Jury Power,* 91 Colum. L. Rev. 142 (1991).

and William Mead of offenses against the Crown, though the trial judge denounced the jurors in open court, deprived them of food and water, and ordered them fined and imprisoned. The case moved Parliament to prohibit coercion and punishment of jurors for reaching a "wrong" decision.[3]

In 1688, another bold jury rejected the judge's directive and acquitted seven Anglican bishops of seditious libel for refusing to follow the instructions of the King. News of the verdict triggered such cheering and celebration in the streets near the courthouse that the judge could not make himself heard in his own courtroom. The case led to enactment of the English Bill of Rights.[4]

In the colonies, in 1735, John Peter Zenger, the publisher of the *New York Weekly*, was charged with criminal libel for criticizing the governor. Attorney Andrew Hamilton successfully persuaded the jury to reject the judge's statement of the law and stand as a shield against the despotic tendencies of government.

The jurors in these cases were celebrated as heroes, both in England and the colonies. Treatises on both sides of the Atlantic extolled the virtues of the jury as "the principal defense of English liberties." Indeed, a leading historian called this "the heroic age of the English jury."[5]

What of the jury's role in civil actions? Shortly before the American Revolution, the English courts handed down a decision that would have momentous impact on the rights of the new Americans.

English Inspiration for the Seventh Amendment

John Wilkes was the younger son of an English a middle class family. After sowing scandalously wild oats at university, he married well and settled into estate society. His improved social station ushered him into the circle of the political friends and allies of William Pitt, then leader of the opposition party. With their help, Wilkes won a seat in Parliament.

Wilkes became the most popular political figure in England. He was elected to the House of Commons on a populist platform of economic and electoral

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[3] The story of Bushel's case is rendered in lively detail in John Guinther, THE JURY IN AMERICA ch. 1 (1988), an important and extensive study of the jury conducted for the Roscoe Pound Foundation.

[4] A detailed account appears in 1 J. Kendall Few, IN DEFENSE OF TRIAL BY JURY 144-47 (1993), a valuable sourcebook published by the American Jury Trial Foundation containing a wealth of contemporary documentary authority and original art work depicting history's champions of trial by jury.

[5] J. M. Beattie, "London Juries in the 1690s," in TWELVE GOOD MEN AND TRUE, at 214 (J.S. Cockburn & Thomas A. Green eds., 1988).

reform. Even when Parliament expelled him, his Middlesex constituents returned him there with ever larger majorities. Ben Franklin, who was in England representing the colonists, reported the wild enthusiasm of Wilkes' supporters at election time, filling the streets and shouting "Wilkes and Liberty."

Wilkes also wielded a very sharp pen. Soon he was publishing, anonymously, a newspaper called the *North Briton.* For forty-four issues, during 1762-63, London's coffee houses buzzed with talk of Wilkes' outrageous and satirical excoriations of various government officials. In No. 45, he made the mistake of accusing the prime minister, speaking for the King, of lying in a speech to Parliament. Secretary of State Lord Halifax, acting as the rough equivalent of our Attorney General, had had enough. He issued a general warrant for anyone suspected of involvement in the *North Briton.* Forty-nine men were caught up in the dragnet, including Wilkes and his printer. His home was ransacked, documents and other property seized, and Wilkes soon found himself locked up in the Tower of London.

Persecution by the Crown made Wilkes even more popular. "Forty-five" became the rallying cry for those who opposed the government's heavy-handedness. The number was painted on houses miles away from Wilkes' district. The young nephews of King George III would aggravate their grumpy uncle by running into his office shrieking "45" and running out again.

Wilkes was immensely popular on this side of the Atlantic, as well. Along with Pitt and Edmund Burke, he spoke out in the House of Commons in defense of the colonists. He was reputed to be a member of the secret radical society, Sons of Liberty, which included Samuel Adams and John Hancock and which drew inspiration from Wilkes' populist writings.[6]

So when Wilkes fought back in the courts, Americans followed the unfolding drama with rapt attention. The scandal has been compared to Watergate. One could not pick up a newspaper or gazette throughout the colonies without reading reports of Wilkes' legal jousting with the King's ministers. And Wilkes bested them at every turn.

After extricating Wilkes from prison on a point of parliamentary privilege, the court ruled that the general warrant used for the searches and seizures was blatantly illegal. Wilkes then proceeded to sue the agents of the Crown who authorized and executed the warrant. The jury awarded £1,000 (reckoned to be about $1.5 million in current dollars) to Wilkes and £300 to Huckle, the printer. Wilkes later returned to court and won a verdict of £4,000 against Halifax him-

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[6] Wilkes was a widely admired figure among independence-minded colonials. *See* George Rude, WILKES AND LIBERTY (1962).

self. Verdicts and settlements in suits by other victims of Halifax's heavy-handedness eventually cost the Crown an estimated £100,000 —$150 million.

When the jury rendered its decision in favor of Wilkes, the crowds gathered near the courthouse cheered, church bells pealed, and some onlookers berated the jurors for not awarding more. It was a rather unusual public response to a tort verdict.

The government, though, was outraged. It appealed, contending that the verdict was grossly excessive because both Wilkes and Huckle were treated well, and suffered little harm.

Lord Chief Justice Pratt, soon to become Lord Camden, upheld the verdict. Not only is the determination of damages within the sound discretion of the jury, he stated, it is also their role to award additional damages "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[7] It was the first modern punitive damages case.

Americans celebrated Wilkes' victory. Professor Akil Amar notes that it "was probably the most famous case in late eighteenth-century America."[8] Accounts appeared in newspapers and pamphlets throughout the colonies. The *Boston Gazette* declared: "By this important decision, every Englishman has the satisfaction of seeing that his house is his castle." The colonists sent Wilkes gifts and contributions for his political campaigns. The cities of Wilkes-Barre, Pa., and Wilkesboro, N.C., bear his name. Some named their children after him (including, infamously, the Booths).

The English court's decision would soon lead the Americans to insist on the same rights for themselves and to guarantee the right to a jury in civil cases in the Seventh Amendment. The Wilkes case remains an important landmark in the common law. In *Feltner v. Columbia Pictures Television, Inc.* (1998), Justice Clarence Thomas, writing for a unanimous Supreme Court reaffirming the traditional and constitutional role of the jury to decide issues of damages, relied on the *Wilkes* precedent.

If the jury enjoyed a golden age in late seventeenth-century England, it flourished even more when transplanted to the New World. Before the Pilgrims set foot on Plymouth Rock, they agreed upon a charter, the Mayflower Compact, which guaranteed the right to trial by jury. Every colony would follow suit. Like their English cousins, the colonists came to see the jury "as a bulwark of

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[7] Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and Huckle v. Money, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763).

[8] Akhil Reed Amar, *Fourth Amendment First Principles,* 107 Harv. L. Rev. 757, 772 (1994).

liberty, as a means of preventing oppression by the Crown."[9] In the years that led up to the Revolutionary War, they desperately needed that protection.

Colonial governors appointed by the Crown used criminal prosecutions and civil forfeitures to enforce the hated Stamp Acts and other unpopular tax laws. Colonists successfully presented their cases to local juries. Some juries even awarded damages against officials for having the temerity to try to collect the taxes.[10] England responded by removing many cases to jury-free vice-admiralty courts, where cases were decided by judges beholden to the King. Attempts by colonial governors to redetermine the damages assessed by civil juries ignited "a flame of patriotic and successful opposition."[11] The Privy Council in London claimed the authority to review and reverse the verdicts of colonial juries in hundreds of civil cases. "The fight over jury rights," Dean Roscoe Pound wrote, "was, in reality, the fight for American independence."[12]

Finally the colonists felt compelled to declare their independence. Knowing that they were leading their neighbors and communities into a bloody war with a world power, and that each would surely swing from the gallows if that war were lost, the signers published to the world their grievances against the king, which included "depriving us in many cases of the benefits of Trial by Jury."

Instrument of Self-Government

It was muggy and hot. They were tired. To maintain secrecy, they kept the windows closed, though they might gladly have thrown them open if not for the biting flies and the stench of garbage piled in the streets. It was September 1787. Welcome to Philadelphia.

The delegates to the constitutional convention, about half of them lawyers and all of them white men, had been meeting for nearly four months to forge a new national government, and they were desperate to return home. So when Hugh Williamson of North Carolina rose, five days before adjournment, to propose a guarantee of the right to trial by jury in civil cases, a collective groan must have gone up from the delegates. George Mason, however, quickly seconded the motion.

James Madison, the driving force at the convention, must have cast a wary

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[9] Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918).
[10] Renee B. Lettow, *New Trial For Verdict Against Law: Judge-Jury Relations In Early Nineteenth Century America,* 71 Notre Dame L. Rev. 505, 517 (1996).
[11] 2 The Complete Anti-federalist 149 (H. Storing ed. 1981).
[12] Roscoe Pound, The Development Of Constitutional Guarantees Of Liberty 69-72 (1957).

eye at his fellow Virginian. Mason, a leading opponent of a strong central government, had authored Virginia's Declaration of Rights. But he knew full well that the delegates had no plans to add such a declaration to their outline for the structure of government. Nor did anyone favor extending their stay in Philadelphia. What could be the point of proposing a right to a civil jury at this late hour? Was it, as some later claimed, a set-up?

On September 15, the delegates voted overwhelmingly against adding a civil jury right. It was a near-fatal mistake. As George Mason rode out of Philadelphia in his carriage, he carried a copy of the proposed Constitution which would be presented to the states for ratification. He jotted down his chief objections: The absence of a Bill of Rights and the lack of a right to a jury in civil cases.

Those who feared a powerful central government, like Revolutionary firebrand Patrick Henry, were already planning their opposition. They were acutely aware that the failure of the weak central government under the Articles of Confederation would win them few followers. But the absence of a Bill of Rights, highlighted by the delegates' outright rejection of the civil jury, gave the Antifederalists an issue that could rally widespread opposition to ratification.

Mason's strategy—if indeed it had been a set-up—worked. The Antifederalists argued that under the Constitution, judges, not juries, would decide civil cases in federal court. The right of citizen jurors to punish governmental abuses, established by the *Wilkes* case, would be lost. The right to present one's case to a jury of fellow citizens not beholden to powerful interests—a right for which they had so recently shed their blood—would be cast aside.

The federalists were forced to defend their unpopular rejection of the civil jury. Alexander Hamilton attempted to explain that they, too, admired the jury, but that the scope of the right should be left to Congress. The former revolutionaries now felt considerably less enthusiastic about the jury's power. Surely the need for a bulwark against despotic government was gone, now that government was in the hands of Congress, the elected representatives of the people.

But Congress, the Antifederalists shot back, was a big part of the problem. Madison himself argued in a famous passage in the Federalist Papers, that the danger facing the new government was not the would-be king or petty tyrant. Half a century ahead of Karl Marx, he foresaw the conflict caused by "the various and unequal distribution of property."[13] The Constitution's function was

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[13] The Federalist, No. 10.

"not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[14]

Precisely, responded the Antifederalists. An explicit constitutional guarantee of trial by jury was essential because ordinary citizens could not depend on Congress to protect them from depredations by the powerful elite. The national government was distant from their concerns and would be captured by the wealthy few. Federal judges would be drawn from that class and, as Blackstone warned, would tend to identify with those of their own social rank. The common people could depend only on themselves, sitting as jurors.

There were pragmatic realities underlying this political debate. America's success as a trading power had given rise to a relatively wealthy commercial class. Most Americans, however, were farmers. Like today, they depended on credit to weather the uncertainties of the harvest and the commodities markets. When they could not pay, creditors—often mercantile interests in New England and New York—took them to court. Plantation owners and small growers alike appealed with increasing success to local juries to mitigate the harshness of the law, prompting creditor interests to demand "reforms" that made it more difficult to obtain a trial by jury.

The recession that followed the Revolutionary War made the situation even more desperate. Hard currency was hard to come by and some states made matters worse by printing large amounts of paper money. Disputes between debtors and creditors roiled through state courts and legislatures. Many saw the rejection of the civil jury as the work of creditor interests who were heavily represented at the Constitutional Convention.[15]

The Antifederalist arguments for the civil jury resonated with a broad segment of society. The one right that every one of the newly independent states guaranteed to its citizens was the right to a jury trial. Juries meant direct citizen participation in government. Speakers during the ratification debates often proclaimed that the jury box was at least as important to true democracy as the ballot box. Thomas Jefferson even ventured, "Were I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative."

Public opposition to the abolition of the civil jury grew and threatened to

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[14] The Federalist No. 51. Madison, it should be noted, was chiefly concerned with protecting the propertied class from the majority.

[15] Landsman, *supra* at 597. On the jury right as protection for the debtor class, see Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Cases,* 128 Univ. of Pa. L. Rev. 829 (1980).

scuttle ratification of the entire Constitution.[16] The Federalists finally prevailed, only by promising that the first Congress would add a Bill of Rights with the right to a jury in civil cases. Madison himself drafted the set of amendments, including the Seventh:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

These words, engraved on a plaque at the entrance to the ATLA headquarters building in Washington, D.C., embody ATLA's mission.

Early nineteenth-century juries exercised extraordinary power. They were often called upon to decide issues of law as well as fact. Indeed, Chief Justice John Jay, in a rare jury trial conducted by the Supreme Court, instructed the jurors that they could resolve disputed questions of law as they saw fit.[17] They might recall witnesses or ask additional questions of a witness, even after deliberations had begun.

As an exercise of democracy the civil jury was an impressive success. The settlers in the New World had neither the resources nor the desire to recreate the elaborate court system they had left behind. Through the jury, the common people would govern themselves. Historical records indicate that colonial juries handled a wide variety of conflicts and enforcements. In some parts of New England, juries exercised greater impact on everyday life than the legislatures.

The great westward migrations also demanded an efficient and egalitarian means of resolving legal problems. Wagon trains of hundreds of families journeyed for months across open country. Disputes were commonly resolved by juries chosen from among the travelers, with the wagon master presiding as a judge. In the new settlements, juries decided disputes based on rudimentary justice accepted by the community. Claims Clubs, for example, decided land disputes, often assuring that the local settler who worked the land received fair treatment in a dispute against an absentee owner.

In short, Americans relied on the jury as an efficient means of self-government. Democracy in the young United States was exercised in the jury box as well as the ballot box. As Chief Justice William Rehnquist wrote in a 1979

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[16] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (1833)(R. Rotunda & J. Nowak eds. 1987).

[17] Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 & n.2 (1794).

decision, "juries represent the layman's common sense and this keeps the administration of law in accord with the wishes and feelings of the community."[18]

The most famous tourist to visit America, Alexis de Tocqueville, astutely recognized that the jury is, above all, "a political institution" and "a gratuitous public school" in which Americans learned self-government by governing themselves. He reported that "the main reason for the . . . political good sense of the Americans is their long experience with juries in civil cases."[19]

The Jury Under Siege

It turned out that those cranky Antifederalists were right. The ink was barely dry on the Bill of Rights when the new life-tenured federal judiciary began to undermine the authority and independence of the jury. Nineteenth-century judges resorted to a variety of devices to control juries, including commenting on the evidence, directing verdicts, ordering new trials, and reducing damage awards through remittitur. The jury's power to decide questions of law was gradually extinguished as a class of professionally trained judges came to the bench.[20]

Professors at the newly established law schools joined in the attack. Juries were not only sentimental and unsophisticated, they wrote, they were inefficient. Even more ominously, the Supreme Court declared, "trial by jury has never been affirmed as a necessary requisite of due process of law."[21]

The civil jury was facing a battle over its very existence. The battlefield was the emerging law of torts.

The Fault Principle and Accountability

Modern tort law was forged in the fires of the Industrial Revolution. When the nineteenth century opened, tort was an obscure, vaguely defined area of law—a miscellaneous jumble of forms of action that did not fall within the law of property or contracts or the criminal law. The first torts treatise did not appear until 1851. Liability rules were ill-defined. Negligence and intentional torts coexisted with various formulations of strict and even absolute liability. It was the expansion of the railroads in the 1840s that brought tort law into focus.

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[18] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979)(Rehnquist, J., dissenting).

[19] Alexis de Tocqueville, DEMOCRACY IN AMERICA 293-96 (Bradley rev. ed. 1945).

[20] The Supreme Court made it official in Sparf v. United States, 165 U.S. 51 (1895).

[21] Maxwell v. Dow, 176 U.S. 581, 603 (1900).

Modern day railroad companies are but shrunken shadows of the economic and political giants that dominated the mid-nineteenth-century landscape. In addition to their thriving transportation business, railroads controlled telegraph communications, owned vast tracts of land and many of the boom towns thereon, and held interests in many other companies.

But the locomotives that carried progress to every part of the nation also left unprecedented injury, death and destruction in their wake. The plight of injured workers and their families, in an era that offered little in the way of a governmental safety net, forced courts to address the legal obligations of those whose activity caused harm.

Not surprisingly, the law which developed reflected the social values of the time. Three forces steered the law away from strict liability toward negligence. Lawyers representing the railroads and other industries insisted that liability must be based on proven fault on the part of the defendant (and the complete absence of contributory fault on plaintiff's part). Nineteenth-century appellate judges, frequently selected from corporate law firms, shared the belief that excessive liability could stifle America's fledgling industrial revolution. Legal scholars, notably Justice Oliver Wendell Holmes and his followers at the Harvard Law School, argued that in a system of laws that seeks to enforce moral values, liability must be based on fault.

The result was a body of law that recognized the duty of due care, but severely circumscribed liability. Governmental, family, and charitable immunities arose or were applied with renewed vigor. Substantive restrictions, such as privity of contract, limited tort liability. Damages for wrongful death were limited by statute. The most difficult barriers to compensation for injured workers were the Three Evil Sisters: contributory negligence, assumption of the risk, and the fellow-servant rule.

The early twentieth century brought a backlash. The Populist and Progressive movements, galvanized by tragedies like the Triangle Shirtwaist fire in 1911,[22] worked to break the grip of corporate special interests on government by strengthening participatory democracy, including the civil jury. Congress enacted the Federal Employers Liability Act in 1908 and the Jones Act in 1920 to provide a right of action for injured or killed railroad workers and seamen, including the right to trial by jury and relief from the defenses of contributory negligence and assumption of the risk. A few state legislatures adopted com-

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[22] For a picture of what the civil justice system might be like without ATLA, consider its shameful performance following this famous tragedy. *See* Jeffrey White, *Important Civil Trials of the Millennium, TRIAL* (March 2000); and Stuart M. Speiser, LAWSUIT 134-37 (1980).

parative negligence, placing the evaluation of plaintiff's fault in the hands of the jury. Others expanded the right to serve on juries, notably to include women.

So complete were the harsh defenses protecting employers, that legislatures turned away from fault-based liability altogether for workplace injuries. Beginning with New York in 1910, every state adopted workers' compensation programs, opting for absolute liability with limited damages for workers injured on the job. As Sam Horovitz told his audiences, workers' compensation carriers soon learned to use every loophole and defense to avoid paying benefits to workers and their families.

Defendants in the tort system had built a fortress of their own.

The Citadel

When NACCA was founded in 1946, courts had built up immunities and substantive barriers to liability into daunting obstacles for tort plaintiffs. Privity protected the makers of dangerous products. Professional silence protected careless doctors. The law of damages, Richard Gerry recalls, was macabre. "When I first started to practice law in the middle 1950s, if you went to trial you might ask the huge figure of $30,000 to $40,000 for the loss of a child. The defense attorney would go to the blackboard and begin deducting what it would have cost to raise this child to maturity. When he got through, the parents would owe money for the killing of their child." He also points out that "almost all the states had a cap on damages for wrongful death." Massachusetts, for example, limited recovery to $10,000. Railroad lawyers, according to a grizzly joke, advised engineers who hit someone on the tracks to back up and make sure it was a death case.

The law, in short, shielded the powerful from responsibility to those they harmed. Professor William Prosser's metaphor for these protective rules, a citadel, was most apt. Professor Wex Malone wrote in an article for the *NACCA Law Journal* in 1952 that tort law was facing a backlash. Liberal thinkers, primarily in Europe, argued for replacing the liability rules for manufacturers, landowners, medical practitioners, automobile drivers and others with government-backed, defined compensation programs, roughly similar to workers' compensation. Those ideas were discussed, but won little acceptance in the United States.

Instead, beginning in the 1950s, NACCA's tort lawyers set their sights on dismantling the citadel. They would succeed, and in so doing, they would build a safer America.

The plaintiffs' trial lawyers achieved a legal revolution spanning more than three decades by changing the way lawyers, courts, and Americans generally

viewed tort lawsuits. Their proposition was pleasingly simple. Holding tortfeasors accountable for the harm they cause does not simply provide compensation for the injured. It creates an economic incentive in favor of safety for everyone. As Tom Lambert famously stated, it is better to build a fence at the top of the cliff than provide an ambulance at the bottom. Liability makes it economically worthwhile to invest in fence-building and other safety measures. Harry Philo framed the accountability principle succinctly: "Liability equals accountability equals safety."

By linking liability to safety, the accountability principle became a powerful weapon against the citadel of entrenched privileges and immunities that perpetuated careless or dangerous practices. The NACCA lawyers took the railroads' old demand that there should be no liability without fault and extended it to its logical corollary: There should not be fault without liability.

The accountability principle blends seamlessly with Americans' preference for relying on market forces, rather than government regulation. Legal thinkers as diverse as Professor William Prosser, Judge Richard Posner, and Judge Guido Calabresi agree that tort liability works because it imposes the costs of injuries on those who are in the best position to minimize the risk in the first place. It takes away the advantage from the company that can charge lower prices or reap higher profits because it has cut corners on safety. It takes away the subsidy stolen from injured victims, their insurers, taxpayers, and society generally.

A second reason the accountability principle is so compelling is that it works. In "Cases that Made a Difference," ATLA documented numerous instances when defendants and even entire industries have adopted safety measures following a liability verdict. The practice of counting sponges at the end of surgery, the use of flash arresters on cans of lighter fluid and child-proof caps on drain cleaners, and numerous other safety measures are direct results of tort verdicts. Critics complained loudly when McDonald's was held liable for serving coffee up to 40 degrees hotter than other restaurants, causing serious burns to hundreds of its customers. After the verdict, however, the company turned down the temperature to a level more in line with what consumers expect from a hot cup of coffee.

Motor vehicle safety provides another example. In 1980, Milwaukee police officer Vincent Dawson was riding a Harley-Davidson police motorcycle when he was broad-sided by a car. Dawson's left leg was crushed and had to be amputated at the knee. Ted Warshafsky and Alan Gesler represented Dawson in a product liability action. Their evidence told the jury that Harley-Davidson knew such injuries were common among motorcyclists but had decided not to add a heavy leg guard. The jury returned a $1.6 million verdict for Dawson.

When Milwaukee's police department replaced its fleet of motorcycles, it demanded leg guards. On their first day, another officer was hit broadside. He walked away unhurt. "Now police motorcycles in all U.S. departments require these guards," Warshafsky reports.

In 1985, ATLA Members Monty L. Preiser and Richard Poling in West Virginia, Kenneth Pedersen in Idaho, and Ted Warshafsky in Milwaukee were all working to hold the makers of DPT vaccine to prevent diphtheria and whooping cough accountable for brain damage to hundreds of children caused by toxins in the vaccine. The ATLA DPT Litigation Group found in discovery that drug manufacturers had formulated DPT in the same way for nearly forty years without conducting tests for contraindications. Large jury awards pressured all DPT drug manufacturers to make the necessary investments to improve the safety of the vaccine.

Those examples are only the tip of the iceberg. Companies rarely acknowledge that safety improvements are motivated by liability. Nevertheless, the prospect of being held accountable is a powerful motivator. A 1989 Report by the Conference Board, based on a survey of corporate managers, concluded:

> Where products liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of products themselves. Managers say products have become safer, manufacturing procedures have been improved and labels and use instructions have become more explicit.

Tort lawsuits also promote safety by prompting governmental agencies to take action. In the late 1970s, Herman Glaser used demonstrative evidence to dramatize the dangers of flammable sleepwear for children. He dressed a doll in pajamas that met federal regulations and brushed it near a portable heater. The pajamas ignited instantly and burned the dummy to a crisp. Following a number of successful lawsuits on behalf of severely burned children, the federal Flammable Fabrics Act was strengthened, first to require warnings on flammable sleepwear, then to prohibit the use of non-retardant fabrics altogether. Regulatory actions against the Ford Pinto and the Dalkon Shield were also prompted by tort litigation.

Courts were becoming more receptive to advancing the law in the direction of fairness to injured victims and enlightened social policy. However, the accountability principle would be a cold abstraction but for the most important and uniquely American feature of our justice system. The jury breathes life into the tort system. It is the jury—the conscience of the community—that determines whether the defendant's actions fall below the standard of care. The Constitution gives ordinary Americans the responsibility to hold even the

wealthiest and most powerful wrongdoers accountable. Because of the jury, the tort system belongs to "we the people" in a way that the workers' compensation system never could.

The Tort Lawyers Take the Stage

Because of the importance of the jury, the tort lawyers who swelled the NACCA ranks during the 1950s were a dramatically different breed from the typical workers' compensation attorneys. The best were highly creative people who understood that their task was to teach and persuade the jurors within the tight strictures of time, the rules of evidence and procedure, and the patience of the judge. Trials have often been compared to theater. The effective trial lawyer carefully choreographs the presentation of the case to the audience seated in the jury box. It is no surprise, then, that many top trial lawyers seem to be thespians at heart, almost as colorful as their Broadway and Hollywood counterparts.

Suddenly, the insurance industry was not only facing Sam Horovitz and his band of oppressed compensation lawyers, men in worn gray or brown suits, bleary from overwork in the office, whom they suspected of anti-capitalist tendencies. They were confronted by the likes of Melvin Belli, a lawyer who loved the spotlight and turned heads with his cowboy boots and expensive suits lined with red silk.

Verne Lawyer describes his first encounter with Belli at a NACCA convention in Chicago: "Mel cut quite a figure. He showed up at the convention in a limousine with four or five of the best looking women I've ever seen in my life. They turned out to be TWA airline stewardesses that he had hired to come along. His office, at that time was in the TWA building in San Francisco."

Belli was certainly not the only trial lawyer with a flair for the dramatic.

Moe Levine was a trial lawyer of both style and substance. He strode onto the NACCA stage in the 1950s wearing dark green glasses and a black Fedora, its brim set straight across, and a 10-inch Havana cigar in his hand or clenched between his teeth. There was no mistaking his New York City style. Or his voice. His flowing, melodious bass, alive with power and subtlety, continues to enthrall listeners of his taped presentations of final argument. "He exuded urbanity without unction, charm without charlatanism," Orville Richardson said. "His extemporaneously spoken word had the polish of a written essay."

Moe was unmatched, says Richardson, in "the astonishing breath and depth of his medical knowledge." Most importantly, he infused his advocacy with humanity. In the personal injury field, too much preoccupied with asking how much an arm or an eye is "worth," Moe introduced a new concept—

"the whole man." Injury to any part injures the whole man and robs him "of that which makes survival in today's world tolerable—the enjoyment of living," he insisted.

In one case, a man lost his eyesight due to a defendant's negligence. The defense tried to minimize the loss, pointing out that the man had only 20/200 vision to start with. Not so, Levine answered. That small loss cast the plaintiff into "the abysmal primeval darkness which all of us so dread. Darkness becomes tolerable by the smallest candle." Blow this candle out, Moe declared "and the damages are astronomical."

Like Belli, Moe Levine possessed a shrewd sense of the trial as theater. In one case, recalled by his partner Aaron Broder, Moe represented a young girl in a medical malpractice case against a doctor in a small town. Moe arrived a few days before the trial. He walked up and down the main street saying hello to passersby and tipping his hat to the ladies. By the time the trial opened, Moe had managed to break down the biggest barrier for his client. The jury might still distrust him, but they would listen, because he was no longer a stranger.

Levine was very active in NACCA's educational programs. His message to less experienced attorneys was: Respect the jury. He had little patience with a fad adopted by some trial lawyers to flatter jurors by calling them "judges without robes." "Nonsense," he declared. "The jurors don't feel like judges, they don't get the judge's salary . . . And if you do not involve them, you have not reached them. A jury wishes to be led to a conclusion which it can express with pride."

He was also keenly aware of the dynamics of the jury process. "I have seen it demonstrated time and time again, that twelve men and women put together into a jury box and called the jury, become welded into a composite picture of the community and their verdict will reach heights they never aspired to in their own minds."

Moe was open and outspoken in his disdain for many of NACCA's leaders, which may explain why both of his bids for the presidency failed. Nevertheless, NACCA elected a succession of leaders who were colorful—even quirky—but who were as devoted as Levine both to NACCA's educational goals and to the preservation of trial by jury.

John Watts succeeded Belli as president in 1951. Watts had been president of the Texas Trial Lawyers. He came from humble origins and had to borrow a suit for his first court appearance. From the moment he could afford them, he always appeared in expensive tailored suits. His broad frame, austere manner, and piercing eyes beneath heavy dark eyebrows signaled that he was in command and would brook no nonsense. He was one attorney who was not inclined to use demonstrative evidence. "John was a poet," recalled fellow Texan Joe Tonahill, "and he used poetry effectively in his final argument."

Humor was a powerful weapon for NACCA's next president, James "Spot" Mozingo. A former South Carolina state senator, he frequently appeared in a broad plantation hat and a vest that sported the Confederate flag. He generated considerable controversy when he sent plaques to new members emblazoned with the Confederate flag. Only his disarming sense of humor prevented his colleagues from taking offense. His retort to the insurance industry spoke for many in NACCA: "I love being a plaintiffs' lawyer because I love people better than I do buildings."

Chicago lawyer James Dooley, elected president in 1953, was quiet and scholarly. "His voice was crinkly and cranky. He spoke so softly that one had to listen carefully to hear the words," noted his partner Phil Corboy. Yet the power of his intellect, most visible in his influential treatise on the law of torts, drew national attention.

The 1954 convention elected a former Kansas state governor, Payne H. Ratner, whose political stature made him a valuable speaker for NACCA's counterattack against the insurance industry.

Ben Cohen, a world traveler and proponent of comparative negligence, became NACCA president in 1955. Cohen affected some of the traits of the famed actor, Adolph Menjoe, whom he resembled physically, including the actor's pencil moustache and penchant for being seen with beautiful women.

Quitman Ross, elected in 1956, was the picture of a Southern colonel. He invariably dressed in a white suit, white shoes, a wisp tie and a sombrero.

The election of Miami lawyer Perry Nichols in 1957 gave added impetus to NACCA's educational drive. Along with Belli, Nichols was a pioneer in the use of demonstrative evidence and a leading advocate of lawyer-to-lawyer sharing and training.

These tort lawyers made it NACCA's mission to defend the right to trial by jury. And the jury, it quickly became evident, was in dire need of defenders.

Bashing the Jury

As NACCA was making trial lawyers more effective advocates for plaintiffs, the insurance industry, predictably, lashed back. Some attacks were directed at "greedy" trial lawyers. But trial lawyers have never been intimidated by charges that they represent their clients too well. Mel Belli's memorable response to those who accused him of ambulance chasing was to turn the sword around. "I don't chase ambulances. I have to get there *before* the ambulance. Otherwise, the insurance claims people will hide the evidence and talk the victims into signing away their rights."

Much more frustrating for trial lawyers were the attacks on the jury. The

insurance industry in the 1950s embarked on an extensive media campaign to discredit the jury system in tort cases. Some articles that appeared in national publications were planted by the insurance industry's public relations arm. Others, the insurers paid for outright. The tenor of these propaganda pieces is evident in some of their titles.

A January 26, 1953, piece in *Life* magazine, accompanied by a depiction of a door to a jury room, was entitled "Your Insurance Premium is Being Determined Now." *Life* followed up in its March 9, 1953, issue with, "Me? I'm Paying for Excessive Jury Awards?" The January 1957 issue of *Harpers* magazine featured an article entitled "Damage Suits: A Primrose Path to Immorality." Brochures distributed by the Association of Casualty and Surety Companies in 1957 and 1958 announced: "I Checked Up on the Cost of Auto Insurance—Here's What I Found: Juries Are Awarding Too Much of Your Money."

The industry's objective was fairly simple and completely transparent: to convince the public that juries in tort suits, swayed by sympathy for injured plaintiffs and cynically manipulated by the plaintiffs' lawyers, blindly give away huge sums in verdicts, blissfully unaware that the money comes out of their own pockets. The purpose was not, at this time, to rally support for tort "reforms" or other legislation. The insurers were speaking directly to the people who would be serving as jurors. They wanted jurors to go into the jury room believing that, whatever the evidence, a low verdict was in their own self-interest.

In 1952, shortly after the first appearance of such articles, NACCA President "Spot" Mozingo denounced them as organized insurance propaganda designed to influence prospective jurors. Two years later, President Payne Ratner repeated NACCA's condemnation of the insurance industry's "brainwashing drive."

The California Court of Appeal in 1955 confirmed that the insurance industry was deliberately tampering with juries on a massive scale.[23] The court quoted an advertisement appearing in *Life* magazine and *The Saturday Evening Post*:

> Next time you serve on a jury, remember this: When you are overly generous with an insurance company's money, you help increase not only your own premiums, but also the cost of every article and service you buy.

An article in the American Associated Insurance Companies' publication *Shop Talk* boasted, "More than one out of every three potential jurors will

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[23] Barton v. American Auto Ins. Co., 282 P.2d 559 (Cal. App. 1955).

see at least one of these advertisements appearing in *Life* and *The Saturday Evening Post*."

Another California court in 1958 pointed out the hypocrisy of insurers who object to any reference to insurance at trial, while at the same time waging "a campaign in the *Saturday Evening Post* and in *Life* magazine, designed to reach one out of three potential jurors," urging them "to carry into the jury room the thought of insurance and to consider the impact of large verdicts upon their own insurance premiums."[24]

The respected academic researcher Dr. Elizabeth Loftus found that "even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give." A cynical industry with the resources to fund a steady drumbeat of such propaganda could expect success.

By 1959, Welcome D. Pearson, editor of the *Defense Law Journal* and former president of the ABA Insurance Section, reported "a definite trend towards the defense—a tendency towards lower verdicts. Promotional activities of the defense insurance industry are beginning to pay off." In 1961, NACCA Governor I. Duke Avnet warned that the insurance industry campaign was producing "a noticeable conservatism in jury awards in personal injury cases."

Indeed, the results were so favorable that the industry decided to expand its campaign and place it on a more permanent footing. In 1959 the Insurance Information Institute (III) was established, funded by three hundred insurance companies. Described by III President Mechlin D. Moore as "a full service communication resource" for insurers and consumers, the III had seven divisions in its New York headquarters dealing with media relations, publications, advertising, legislative monitoring and disseminating information to schools. It also maintained twelve field offices.

Nor was jury-bashing limited to the popular press. A number of jurists and academics ridiculed the very notion that ordinary citizens should be entrusted with the responsibility of determining liability in tort actions.

The Chief Justice of the New York Court of Appeals, Charles Desmond, urged the Second Circuit Judicial Conference in 1963 to consider following Britain's lead in virtually abolishing juries in civil actions. Erwin N. Griswold, Dean of Harvard Law School, called jury trials "an apotheosis of the amateur," and asked, "why should anyone think that twelve men, selected from the street for their lack of general ability, have a special capacity to decide controversies between people?" The Pennsylvania Bar, prompted by the state

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[24] Causey v. Cornelius, 330 P.2d 468 Cal. App. 1958).

Chamber of Commerce, proposed an amendment to the state constitution to eliminate the civil jury.

In October 1963, the ATLA Board of Governors warned that the civil jury "is about to slip away unnoticed." The Board called upon trial lawyers to defend the jury and fight efforts to portray it "as antiquated, illiterate and unsuited to the modern world."

ATLA's response team was led by former New York Supreme Court Justice Walter R. Hart who had just published a book entitled *Long Live the American Jury*. Other team members were: Nebraska Governor Frank Morrison; respected defense attorney and author John Alan Appleman, Michigan Law School Associate Dean Charles W. Joiner, and NACCA members Al Cone, Edgar Corey, Abraham Freedman, Jack Fuchsberg, Herman Glaser, Irving Green, Herbert Greenstone, Joseph Kelner, Wilfred Lorry, Edward O. Spotts, Theodore Wurmster, and Edwin M. Young. They were joined by NACCA Editor-in-Chief Tom Lambert and S. Victor Tipton, editor of the *Journal of the Florida Academy of Trial Lawyers.*

Justice Hart publicly refuted Chief Justice Desmond's attacks in a Law Day speech on May 1, 1964. Governor Morrison wrote a scholarly, fact-jammed thesis that refuted the contentions of Dean Griswold and Judge Desmond. "The jury system is a legal aid and a political arm by which the ordinary man is exposed to government and its judicial process," he declared. Dean Joiner in his book and speeches quoted observations from famous judges and lawyers over the last two hundred years and cited psychological studies that demonstrated the reliability of "the deliberative nature of jury sessions."

In Pennsylvania, Abraham Freedman, Chair of ATLA's Admiralty Section, and Wilfred Lorry, President of the Eastern Section of the Pennsylvania Trial Lawyers Association, obtained an injunction that stopped the State Bar and the Chamber of Commerce from proceeding with its constitutional amendment to abolish the civil jury. Edward O. Spotts, President of the Western Section of PATLA sent letters to every plaintiff and defense lawyer in Western Pennsylvania urging opposition to the amendment. Ultimately, the Pennsylvania Bar and Chamber pulled the plug on their campaign.

Suing the Bashers—The Seventh Amendment Meets the First

Another tactic in the effort to stop the industry's attacks on the jury was a natural for trial lawyers: Take them to court. In 1953, Kansas attorney C.H. Morris was representing a woman who was injured when her car was struck by a Consolidated Van Lines truck. Morris sought an order holding the American Associated Insurance Company and other insurance companies who placed the ad-

vertisements in *Life* and *Saturday Evening Post* in contempt for jury tampering.[25] At about the same time, Abraham Freedman filed a similar motion in a lawsuit in the federal court for the Eastern District of Pennsylvania. J.R. Tonkoff filed a similar petition in the Eastern District of Washington. All of these attempts failed in the face of the insurers' contentions that their advertisements were protected by the First Amendment. In one instance, where the insurance company mailed reprints of an article entitled "Why Your Auto Insurance Costs So Much" directly to jurors selected to hear an auto accident lawsuit, the company's executive vice-president was found in contempt and paid a $1,000 fine.

ATLA lawyers would again resort to the courts in the wake of an extensive public relations campaign in the late 1970s and early 1980s aimed at convincing the public that excessive jury verdicts were causing a "lawsuit crisis." One New York court cut to the heart of the matter: "Despite defendants' claims that they are merely advocating tort law reform, there is the inescapable implication that the advertisements are geared toward influencing jurors and potential jurors in their decisionmaking process."[26] The court held that such ads could be restrained as illegal jury tampering. However, a federal court ruled in the case that such a restraint would violate the First Amendment.[27] Pressured by trial attorneys, the insurance commissioners of Kansas and Connecticut entered into consent decrees in which the Crum and Forster Insurance Companies agreed to stop publishing such advertisements in those states.

Plaintiffs' lawyers did win an important procedural protection for their clients. Several courts, while declining to restrict the insurance industry ads, held that the danger of creating bias in potential jurors is so great that attorneys representing injured plaintiffs must be permitted to voir dire potential jurors on whether they had seen such advertisements.[28]

The Rate Hearings Offensive

A more successful NACCA response to advertising that blamed juries for rising insurance premiums falls into the category of "Put up or shut up." Public hearings conducted by insurance commissioners in connection with their requests for increases in premiums are often little more than cozy encounters

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[25] The ads are described in detail in Hendrix v. Consolidated Van Lines, 176 Kan. 101 (1954).

[26] Quinn v. Aetna Life & Cas. Co., 409 N.Y.S.2d 473 (N.Y. Sup. 1978).

[27] Quinn v. Aetna Life & Cas. Co., 482 F. Supp. 22 (E.D.N.Y. 1979).

[28] Babcock v. Northwest Memorial Hosp., 767 S.W.2d 705 (Tex. 1989); Borkoski v. Yost, 594 P.2d 688, 693, 182 Mont. 28, 38 (Mont. 1979).

between insurers and regulators. The Board of Governors urged ATLA's state branches and affiliates to be "public representatives at rate hearings to protest, as the public's lawyer, unfair and unjustified rate increases."

The first victory came in Florida. In 1963, the state Insurance Commissioners approved an increase in auto insurance rates, citing widespread padding of auto accident claims, disproportionately large jury awards, and a rise in auto accidents in Florida. S. Victor Tipton, editor of the *Journal of the Florida Academy of Trial Lawyers*, sent a telegram to the Florida Insurance Commissioner. Tipton presented "An Anatomy of a Hike in Insurance Liability Rates," which demonstrated that the rate increases were unjustified.

The finding of claim "padding" was lifted from a series of sensationalistic articles that appeared in the *Miami News*, the city's largest newspaper. The articles purported to be an "expose of faked insurance claims, high insurance costs and high jury verdicts and false injuries." In reality, Tipton stated, the story material was furnished "by the insurance industry, which solicited the series."

Tipton and Richard Jacobson, ATLA's Director of Public Affairs and Education, had uncovered a letter from Roger Dove, the regional public relations director for the National Association of Independent Insurers, addressed to insurance companies with policyholders in Florida. As Tipton disclosed in "The Big Brainwash," the letter described the upcoming *Miami News* articles, timed for the kick-off of rate hearings, and asked the companies to supply the reporters with material for the stories. Significantly, Tipton noted, "Only one person was charged with fraud as a result of the newspaper expose—and that man was an insurance adjuster."

With respect to jury awards, Tipton cited a study conducted for the Mutual Casualty Conference and reported in the May 25, 1963, *National Underwriter*. The study found that different juries, presented with the same facts and economic loss, tend to award remarkably consistent amounts.

Based on these facts, the Florida Academy petitioned for a rehearing. The rate increase was rolled back to reflect only increases in the costs of living, hospitalization, and auto repairs.

Across the nation, trial lawyers demanded public rate hearings and appeared at those hearings armed with facts. In California in late 1963, NACCA Governor Irving Green cited a jury survey of Los Angeles and San Francisco counties by the Insurance Information Institute. The 1962 average plaintiffs' jury verdict in Los Angeles was $12,043 and in San Francisco $23,286. And plaintiffs lost almost half the cases going to a jury trial. The industry's own survey showed that "claims of high jury verdicts causing higher rates were propaganda," Green told the Insurance Commission. The Commission responded by adjusting its rate findings downward.

In Virginia, Edwin M. Young demanded public hearings and an investigation of the previous auto insurance rate hike. He noted that the Virginia Code called for public representation at such hearings, yet only insurance representatives presented evidence. Young also presented statistics indicating that jury verdicts have little effect on rates and pointed out that "the State Corporation Commission had not conducted any investigation" into the need for rate increases, as required by the law. The SCC opened its next rate hearings to the public.

In Kentucky, Theodore Wurmster and the Kentucky Association of Trial Lawyers forced the resignation of an insurance commissioner who had ordered a 1963 rate increase without a public hearing. The increase had been ordered at the behest of the National Bureau of Underwriters, Wurmster charged, with no consideration of the public interest. The acting Insurance Commissioner revised the grounds for the increase, limiting it to accidents, not jury verdicts.

During 1964-65, trial lawyers representing ATLA branches and affiliates in New York, Texas, Massachusetts, West Virginia, Michigan, North Carolina, and Pennsylvania appeared at hearings to protest insurance rate increases. They were aided by a ground-breaking statistical study in 1963 by Fitzgerald Ames, Chair of the ATLA Law and Research Committee. Despite the notorious secrecy surrounding the insurance companies' financial transactions, the study succeeded in demonstrating that the insurance industry was not suffering huge losses, as it claimed. Rather, the companies' "sleight-of-hand bookkeeping" hid massive profits. While the industry was complaining of losses due to large verdicts, Ames noted, *Weekly Underwriter* reported that the nation's top insurance companies in 1962 enjoyed record levels of investment income and net profits.

ATLA's strategy of exposing the truth about the insurance industry's profits struck a nerve. In 1966, the American Insurance Association approached ATLA president Joseph Kelner with a proposal to meet and discuss matters. Kelner named an ATLA Insurance Liaison Committee, which met with a counterpart committee from the insurance industry, headed by Bill Donovan, former head of the Office of Strategic Services in World War II. The committees met in 1967 and 1968. The industry's propaganda attacks slowed dramatically, and ATLA's protest appearances at rate hearings virtually stopped. This détente was temporary, however. In 1970, the insurance industry once again stepped up its attacks on the jury. The Board of Governors disbanded the liaison committee, concluding that efforts "to enlighten a segment of the insurance industry on the importance of the jury for society's welfare have proven fruitless." Instead, the Board directed Professor Thomas F. Lambert to embark on a state-by-state tour to rally support for the jury.

Despite ATLA's efforts, attacks on the jury continued. If public opinion polls are any indication, the campaign has taken a heavy toll on public support for the jury system. ATLA decided to take its case directly to the American people. One aim was to refute the absurd argument that jurors are incompetent to decide cases correctly—absurd because it assumes the public is fully able to discern the correct outcome of a case based on the industry's quick rendition in the media, but cannot do so in court after a full presentation of the evidence by both sides. ATLA also wanted to remind Americans of the positive virtues of the jury system that led earlier Americans to insist on a constitutional guarantee of trial by jury.

The Roscoe Pound Foundation, aided by a substantial grant from ATLA Governor James Ackerman, commissioned a scholarly and factual defense of the civil jury. *The Jury in America*, by noted author John Guinther, published in 1988, traced the history of the jury and presented the results of the largest empirical study ever undertaken of actual jury performance. The research confirmed that juries "overwhelmingly take their duties seriously." They follow the court's instructions carefully and "they are able to arrive at legally supportable verdicts in a very large majority of cases." Contrary to the stereotype painted by detractors, "jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy." One outgrowth of the attacks on juries has been a new interest in jury behavior on the part of social scientists. Recent empirical studies confirm Guinther's conclusion that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of research method, has reached that conclusion."

In 1989, veteran trial lawyer and former judge J. Kendall Few founded the American Jury Trial Foundation to compile a historical overview of the role of the jury. The result was a two-volume work, *In Defense of Trial by Jury*, which portrays the civil jury through accounts of landmark jury trials, artwork, and quotations from leading legal and judicial authorities.

In 1990, ATLA produced "The Road to Justice," a video, accompanied by teaching manuals and background materials, based on a similar video produced by the Virginia Trial Lawyers Association. It educates junior high and high school civics and social studies classes about basic legal procedures and constitutional principles, especially the right to trial by jury.

More recently, ATLA has conducted mock trials at schools around the country in which students serve as jurors. ATLA's mock trial presentations have also been a very popular feature at the Smithsonian Institution's annual Folklife Festival on the Mall in Washington, D.C.

Some encouraging signs have appeared in recent surveys of public opinion. Those who have actually served on juries overwhelmingly report that it was a positive experience and they are proud of the job they did as jurors.

In the end, trial lawyers alone will not preserve the civil jury. If Americans want to hold onto the right the Founding Fathers wanted for future generations, if they want to keep their voice as conscience of the community and hold the powerful accountable, they must value and defend it.

3

Trials and Tribulations

Finding A Firm Footing

From the moment of its founding in a Portland hotel room, NACCA was truly the extension of one man's will and vision. During the several years that followed, Sam Horovitz was not only the father of NACCA, he *was* NACCA.

The founders in Portland elected Ben Marcus as NACCA's first president. In August 1947, the forty-seven members meeting in Toronto, Canada, elected James Landye, one of the original co-founders. Landye became ill and could not take an active role in the association. He was succeeded the following year by Samuel Z. Kaplan. Although Kaplan was an excellent workers' compensation attorney, he failed to grasp the leadership reins.

As a result, the task of building, defining, and running the fledgling organization fell almost entirely on the shoulders of Sam Horovitz. Even as NACCA's presidents became more active leaders, it was Horovitz who guided and set policy for the organization.

Horovitz exercised this control largely through the sheer force of his personality. His intense devotion to the organization was legendary, and he cultivated a cadre of loyal followers in key positions. As the founder of NACCA who had worked tirelessly with little thought to personal gain, his decisions carried an irresistible moral authority. Nevertheless, NACCA needed formal provisions for its governance and finances if the organization was to build for the future upon a solid foundation.

Ironically, this association of lawyers lacked a constitution until a modest

charter was adopted at the 1950 convention in Oklahoma City. Three years later, NACCA's convention delegates adopted a substantially revised and expanded constitution. The 1953 document included a provision drafted by Max Israelson that fixed the size of the Board of Governors—two governors from each federal judicial district—and created a method for the Board's election. The 1957 New York convention, attended by eight hundred lawyers, approved a major constitutional amendment, again proposed by Israelson, to define the national offices of president, vice-president, secretary, treasurer, parliamentarian, state vice-president, board of governors and executive editor. At the same time, dues were dramatically increased from $10 to $20.

NACCA's constitution, which adopted the pattern of the New England town meeting for its membership meetings, reinforced Horovitz's power. At the annual membership meetings, any decision by the president or Board of Governors that involved finances could be overturned by a floor vote of the membership, where Horovitz enjoyed overwhelming support.

In 1950, NACCA was in financial trouble. Treasurer Joseph Schneider told members attending the Oklahoma City convention that the organization was "flat busted." Horovitz and a few loyal members had been subsidizing the organization out of their own pockets, and Horovitz had personally paid for his "Silver Bullet" tour to recruit members in the southern states. Schneider made it clear that without broader financial support, NACCA would quickly grind to halt. President Homer Bishop took the podium and asked for donations. The members immediately pledged $12,000, a considerable sum in 1950, and other donations came in from the *NACCA Law Journal's* volunteer Board of Editors and prominent trial lawyers across the country.

The episode underscored a thorny issue that would trouble the organization for much of its existence. Nearly every association experiences a tug of war between the services its members want and the resources available to provide them. An additional problem arises when those resources come primarily from member dues. The association must provide a level of service that attracts large numbers of members while keeping dues at an affordable level to attract and retain a broad membership base. No one suggested that passing the hat in times of crisis was a viable economic plan. Yet NACCA would fall back on this tactic many times as it searched for a more solid financial foundation.

The financial picture worried Horovitz for an additional reason. The influx of tort lawyers was already changing the organization. In addition to their numbers, the tort lawyers were voluntarily subsidizing NACCA operations with large donations—often at Horovitz's own request. He feared that the growing influence of the tort lawyers would relegate workers' compensation attorneys to a second-class position within the association.

No Place Like The Home Office

NACCA members around the country often visualized NACCA's national headquarters as a large, bustling place with an army of staff scurrying to and fro, doing NACCA's business under Sam Horovitz's watchful supervision. In reality, NACCA's home office at 6 Beacon Street in Boston in the 1950s consisted of six small, crowded rooms. The staff was six people, laboring under an extraordinary work load. These employees served the needs of over 8,000 members, processed billing and dues, answered the requests of lawyers, judges and academics, and published NACCA's *Law Journal* and its newsletter. The mail room was frequently piled high with forty to fifty mail bags each month. The finance department operated out of another small room with checks for dues and publications often stacked in boxes against a wall, awaiting processing. Its only bit of technology was an old Address-O-Graph machine with trays of thousands of metal plates embossed with member addresses.

The "editorial department," which produced the *NACCA Law Journal*, was squeezed into Horovitz's office until it moved in 1956 to Roscoe Pound's former residence in Watertown, Mass. NACCA, through Sam Horovitz, purchased the house along with Pound's extensive personal library, containing 8,455 bound volumes and 10,000 miscellaneous pamphlets and publications. A pledge drive to pay for repairs to the house raised over $28,000 from 86 members in a single day.

Georgetown University Law Center Professor Joseph Page remembers working at the Watertown house as assistant editor to Tom Lambert in 1960. "It was a wonderful office because it didn't look like an office. It was a big, old mansion. All of Pound's belongings, most of them, were still in the house, including his entire library. The non-legal library was in the living room, a wonderful paneled, high-ceilinged room with stuffed chairs, a very warm room where you could curl up by the fireplace and read these exotic books that he had."

Expanding Membership

NACCA continued to expand the scope of it membership. Starting with a core of workers' compensation attorneys, NACCA quickly welcomed railroad, admiralty, and, most significantly, tort lawyers. Each group was accorded its own section within the organization.

In 1957, NACCA became the first bar association in the world to establish a section for aviation injury law. "Aviation was an obscure subject then," observed leading aviation lawyer Stuart Speiser. "It was thought to be just an off-shoot

of maritime or railroad law." Speiser had been invited to the NACCA Convention in 1954 "to talk to the railroad and admiralty lawyers who had aviation cases, but did not know how to handle them. I already had cases referred to me for consultation from NACCA's leading personal injury lawyers." President Ben Cohen met with Speiser and proposed forming an aviation section.

The section was formally recognized in 1957 with Speiser as its first chairman. Other members were Lee Kreindler, Gerald Finley, John Smith, Walter Beckham, Ned Good, James Quinn, and James Bagott. Over the years they would be joined by such outstanding aviation lawyers as John J. Kennelly, Harry Gair, Tom Davis, Scott Baldwin, Bill Wagner, William Sincoff, Charles T. Hvass, Aaron Podhurst, and Charles Krause.

"One of our first tasks was to fight the Warsaw Convention that limited damages for deaths of American citizens on international flights to $8,300—and from that the airlines deducted the cost of shipping the body to the United States," reported Speiser. The United States had signed the treaty, but the Senate had not ratified it. The airlines made two strenuous attempts to amend and ratify the Warsaw Convention. The Aviation Section played a crucial role in spirited political battles that succeeded in blocking ratification by the Senate of both the Hague Protocols and the Montreal Protocol.

The list of sections would grow over the years to include:

Admiralty Law
Aviation Law
Civil Rights
Commercial Litigation
Criminal Law
Employment Rights
Family Law
Federal Tort Liability and Military Advocacy
Insurance Law
International Practice
Motor Vehicle Collision, Highway and Premises Liability
New Lawyers Division
Products Liability
Professional Negligence
Railroad Law
Small Office Practice
Social Security Disability Law
Toxic, Environmental and Pharmaceutical Torts
Workers Compensation and Workplace Injury

This trend to expand the organization's membership sparked a recurring question: Should NACCA admit lawyers who represent defendants in personal injury cases? Some members, particularly in the early years, felt that opening NACCA's doors to defense as well as plaintiffs' lawyers would enhance NACCA's credibility in the eyes of the profession, the public, and judges. Horovitz himself recognized that permitting defense counsel to attend educational programs was crucial in persuading judges to speak at them.

"When we started, some members of the judiciary hesitated to attend our meetings," Horovitz wrote in the *NACCA Law Journal*. "We were plaintiff-minded and perhaps judges felt that they should not be seen where only one side was represented." NACCA therefore opened its educational programs to all attorneys. "At some of our meetings," he noted, "defense attorneys were in the majority! In Chicago, out of seven hundred lawyers attending, about half represented non-plaintiffs." Judges were more willing to participate in such "bipartisan" gatherings. Eighteen members of the judiciary attended a program in Chicago. Judges spoke at educational meetings in New York, Los Angeles and elsewhere. Some seminars in Boston in 1954 were chaired by judges themselves.

Welcoming defense counsel into NACCA educational programs was one thing; admitting them as members was something else entirely. When the question was first raised at the 1949 convention in Cleveland, Horovitz took the floor. He argued vehemently that NACCA was, above all, a plaintiffs' bar. Its aims and purposes were devoted solely to the protection of the rights of injured victims. Other speakers noted the persistent attacks on plaintiffs' lawyers by the insurance industry and business interests. At the end of the debate, the majority voted against admitting defense lawyers.

The issue resurfaced periodically over the next 20 years. In 1969, a similar proposal prompted a passionate speech by President Orville Richardson. He reminded the Board of Tom Lambert's description of NACCA to Harvard law students as "an unvarnished bar association of plaintiff lawyers organized to represent and further the interests of injured persons." The defense "has four national bar associations, the Defense Research Institute, and a *Defense Law Journal*. We do not seek merger. Neither do they. So be it." Richardson's stirring opposition resulted in a constitutional change that put the matter to rest and firmly identified ATLA as a plaintiffs' trial bar association.

The Insurance Empire Strikes Back

Plaintiffs began winning more often and obtaining greater compensation awards. The insurance industry had no doubt just who was responsible. "NACCA is the greatest threat confronting the insurance industry," declared the

National Underwriter in 1952 in an article entitled "The Swift Rise of NACCA and the Portent of the Bigger Award." A virulent attack on NACCA appeared in the respected and widely circulated *Reader's Digest* in September 1952, entitled "And Then—Sudden Ruin."

Sam Horovitz issued NACCA's first official response to its critics in an address delivered to the 1952 convention in Houston and published in the *NACCA Law Journal.* He did not found NACCA and work ceaselessly for its success simply to fatten the wallets of greedy trial lawyers, he stated. NACCA existed because the thousands of workers and other people injured every year need it. Horovitz described the plight of injured workers in America as a scandal. He exposed the unfairness of the legal system and hypocrisy of the insurance industry exploiting every possible means of denying compensation.

He outlined NACCA's history, growth, and accomplishments on behalf of injured victims. Suppose an insurance company executive—or perhaps the ghostwriter of these attack articles—were wrongfully injured, suddenly deprived of a livelihood and facing mounting medical bills. "He would be the first to clamor for an adequate award." Yet, he would find himself facing well-paid and well-organized defense counsel devoted to delaying or denying compensation at every turn. He would find himself unable to afford legal representation if not for the plaintiffs' lawyer willing to take the case on a contingency fee basis. He would hear the insurance companies complaining loudly about high awards and crying poverty, despite the huge margin between the millions they collect in premiums and the much smaller amounts they pay out in claims.

Horovitz proved prescient on this point. Years later, an influential lobbyist, Frank Cornelius, helped persuade the Indiana legislature in 1975 to enact harsh limits on medical malpractice cases. In 1989, Cornelius himself was the victim of a series of surgical errors and medical negligence that left him confined to a wheelchair, dependent upon a respirator, and in constant pain. He was victimized a second time by the Indiana tort reform statute he helped enact, which limited his compensation to a fraction of his medical expenses and lost income. He told his story in 1994 in a *New York Times* article entitled "Crushed By My Own Reform." To his credit, Mr. Cornelius spent his remaining years warning legislators and the public that tort reform harms victims while providing none of the benefits its supporters claim.

Horovitz ended his address by quoting Roscoe Pound's remarks to a NACCA conference earlier in the year. What sets NACCA apart, Pound told the assembled trial lawyers, was that its goal was not "striving for the advancement of the economic interests of the practitioners, but thinking and working for the improvement and advancement of justice."

How should NACCA respond to the insurance company attacks? At a

1953 board meeting, NACCA leaders were sharply divided. Ben Cohen and Abraham Freedman advocated an aggressive attack on the insurance companies. Ben Marcus, Jim Dooley, and George Allen, Jr., cautioned against adopting an anti-insurance company stance and advocated more positive action to stand up for NACCA's principles. Liability insurance, after all, plays a vital role in personal injury law. It assures a source of compensation for the injured. Moreover, premiums, if properly set, shift the costs of accidents from workers and the public back to those who create the risks in the first place. The debate was heated at times, and continued into 1954, when the Board adopted the less aggressive approach: "It is not NACCA policy to attack or cast reflection upon any corporation or insurance company. Our policy is affirmative and educational, but NACCA will not tolerate unjustifiable attacks on it."

The insurance industry was not similarly inclined. Less than a year later, in 1955, *Reader's Digest* published an even more virulent assault on trial lawyers, "The Personal Injury Racket." President Payne Ratner called for action. The Board's response resembled a declaration of war. It resolved: "to attack insurance forces; enlist the ABA and other bars to cooperate with the attack as allies; publish counter articles refuting slanderous attacks; demand retraction of the *Digest's* article; enlist state affiliates to join in the attack; and start research and compile file material to help solve the problem."

Dean Roscoe Pound declared that "The Personal Injury Racket" deserved to be "thrown in the rubbish heap." Characteristically, Pound placed the attack on trial lawyers in historical perspective. "Things like that sort have been said about the lawyers since the 13th century." During his studies at Cambridge in England, he came upon medieval sermons filled with rancor and hatred against lawyers that sounded strikingly similar to modern attacks. Even today's anti-lawyer jokes are recycled. Pound retold one about the tombstone which declared, "Here lies a lawyer and an honest man." A simple rustic passing through the churchyard is said to remark, "Why the devil did they put those two fellows in one grave?"

Attacks on lawyers, Pound observed, was the typical reaction of "important elements in the community whose toes had been stepped on a bit." At the end of the Middle Ages, when lay lawyers broke the clergy's monopoly on resolving legal disputes, priests in their pulpits railed against the avaricious lawyers. Over the centuries, in England and then in America, when those in power demanded unquestioning submission, lawyers stood inconveniently in the way. They demanded representation, fair hearing, and even-handed application of the law for those who could not count themselves among the favored elite. The powerful will always strike back, said Pound, by portraying lawyers as greedy and avaricious.

To no one's great surprise, the tarring of trial lawyers continued. In 1957, President Quitman Ross condemned the "vicious and unwarranted attacks directed against us" and demanded that NACCA "openly fight the insurance industry." A particularly cynical tactic, in an era when Americans tended to trust the media, was the planting of those attacks in the guise of factual reporting. In reality, most anti-lawyer articles were not journalism at all; they were propaganda pieces handed to reporters and columnists who had little ability or inclination to look into the facts.

In 1959, the *Saturday Evening Post* lashed out against medical malpractice attorneys in an article entitled "Medicine's Legal Nightmare." The article named Melvin Belli the "greatest menace to American medical doctrine" and called for his disbarment. In February 1964, *Reader's Digest* launched yet another assault on personal injury attorneys. "Accident Fraud: Highway Robbery" was a reprint of an article had been planted in *Kiwanis Magazine* for exactly that purpose. Kiwanis responded to President Jack Fuchsberg's demand for a retraction by agreeing to publish an article setting forth NACCA's side of the story.

Television offered a tempting opportunity to tarnish the image of trial lawyers. In 1962, NACCA President John Lane complained to Federal Communications Commission Chairman Newton Minow, "For more than three years, elements of the insurance industry have advocated using TV and radio dramatic programs" to push their agenda. The occasion of Lane's telegram to the FCC Chairman was a program aired by CBS and sponsored by Armstrong Cork Company on October 10, 1962, called "Smash-Up." Lane charged that, "in the guise of a quasi-documentary, a highly fictionalized drama depicted crooked lawyers framing accident cases. An off-stage voice indicated that there were many such cases and lawyers handled them for contingency fees as high as 50 percent. The whiplash injury was made to appear contrived and a vehicle for fraud." The sole purpose of the program, Lane stated, was to persuade prospective jurors to deny compensation to legitimate claimants. It was insurance industry propaganda. In fact, an article published in *Insurance Advocate* four days before the telecast revealed that script writers for the show worked directly with the staff of the Insurance Information Institute to develop the program.

Lane also wrote to the American Bar Association and American Medical Association, pointing out that the program cast both the legal and medical professions in a dishonorable light. The FCC, pressed for decisive action by Lane and by many NACCA members who had contacted their representatives in Congress, indicated only that it was investigating "Smash-Up." Three months later, Armstrong Cork's Chairman, C.J. Backstrand, advised that "the show would not be re-run anywhere."

Some in NACCA viewed the escalating warfare with the insurance industry as an expensive and self-destructive undertaking. In the fall of 1959, a task force that included Herbert Greenstone, Perry Nichols, Fred Gesevius, Professor Thomas Lambert, Craig Spangenberg and Richard Jacobson met with insurance industry representatives at the Savoy Hotel in New York with the aim of negotiating a truce. The meeting did little more than demonstrate how little common ground existed. Nevertheless, NACCA would participate in several such meetings with the industry in an attempt at détente that ultimately proved futile.

PR: Do Lawyers Just Want To Be Loved?

Another way to fight back, some suggested, was to employ the services of public relations professionals to elevate the image of the trial lawyer in the eyes of their fellow Americans. An early, ill-fated venture in this direction was prompted by a sensational article appearing in *Life* magazine in 1954, entitled "Life and Limb." The author did not come to praise Melvin Belli in proclaiming him the "King of Torts." The article was an attack by the insurance industry on trial lawyers and on the jury system itself.

To counter such mudslinging, Albert Averbach, Chair of Public Relations Committee, and President Ben Cohen hired Professor Albert Blaustein of Syracuse University to map out a public relations campaign for NACCA. Blaustein presented two volumes of ideas and plans to enhance the pubic image of trial lawyers at the 1955 convention in Cleveland. Sam Horovitz led a floor fight in opposition, arguing that no money for the project had been budgeted. A frustrated Cohen wondered aloud, "Who was running NACCA?" The project was killed in a floor vote.

Two years later, part of the Board's response to Payne Ratner's call for a declaration of war was to name a second Public Relations Committee to "overcome the persistent propaganda attacks against the whole plaintiffs' bar." Herbert Greenstone chaired the committee, which included Edward Spotts, Bill Weisman, Ted Sindell, Al Julien, and Homer Brown. In 1958, Richard Jacobson of Boston, a seasoned newspaper reporter and feature writer, was retained to prepare fact sheets to refute the insurance industry's falsehoods. During 1959, Jacobson virtually lived in Greenstone's home in New Jersey where they developed a broad public affairs and public relations program.

In 1960, President Leo S. Karlin established NACCA's first national press publication, the *P.I. & E. Bulletin* "to explain to the general public—and even to some of our own members—what we were doing to serve the public." Published by the Public Information and Education Department and edited by

Jacobson, the *Bulletin* was a monthly, eight- to sixteen-page, newspaper-style tabloid. It carried legal news from around the country of interest to the trial bar, news from state affiliates, honors awarded to trial lawyers, editorials on major legal issues, profiles of important legal personalities, and reports of NACCA's participation in community, legislative and consumer affairs. The Bulletin ceased publication in 1964 when *TRIAL* magazine was established.

From 1971 to 1974, three outside public relation firms were retained, at substantial cost, to stem the insurance propaganda, change the trial lawyer's image, and create new ideas for public relations.

The effort often seemed futile. The Board in 1972 commissioned a study of public attitudes toward trial lawyers by Cambridge Marketing Group. Their 45-page survey, based on interviews and focus groups was presented to the Board and to the Strategy Committee. Although ATLA had committed virtually all its public affairs resources, the efforts of its most knowledgeable leaders, and considerable funds to elevate the image of the trial bar, the results were disappointing.

The survey found that the medical profession had been far more successful at generating favorable public attitudes than the legal profession. Trial lawyers rated particularly low in the public's estimation of their honesty, consumer protection, concern for the average citizen, and desire for personal publicity. However, trial lawyers were generally thought to be at the "top of the profession." Also, the public appeared ill-informed with respect to contingency fees and no-fault insurance, though letting an at-fault driver "off the hook" struck a responsive chord. An ATLA strategy committee revamped its public relations releases and speakers' manuals to incorporate the findings.

ATLA efforts to improve the image of trial lawyers were often derailed by events ATLA could not control. In 1976, Chief Justice Warren Burger sharply criticized trial lawyers, charging them both with incompetence and excessive adversariness, resulting in court congestion and runaway litigation. The following year, Burger repeated his dire prediction that society would be overrun by "hordes of lawyers, hungry as locusts." In 1985, following a tragic mishap at a Union Carbide chemical plant in Bhopal, India, that killed as many as 4,000 people and injured 500,000 more, the public was repulsed by reports of American trial lawyers, including Melvin Belli, signing up clients while authorities were still treating the injured victims. Under the leadership of Larry Stewart, ATLA formulated a code of conduct to address inappropriate advertising and solicitation of clients.

In 1998, trial lawyers who negotiated a massive settlement of claims by states against tobacco companies were awarded fees that appeared astronomical to the public, reinforcing the notion that trial lawyers were getting rich by

preying on misfortune and gaming the system. ATLA president Richard Hailey released a statement decrying opportunism on the part of some lawyers and observing that no case merited a "billion dollar fee."

Professor John D. Lyons, Dean of the University of Arizona Law School, suggested in a March 1969 article in *TRIAL*, that the attempt to elevate the public's perception of lawyers may well be fruitless. "The relationship between the public and the legal profession has always been a strange, complex, and completely illogical phenomenon," he stated. The point has been made by Abraham Lincoln and others, Lyons pointed out, that "on one hand, society loads lawyers with public and private responsibilities far beyond that of other citizens; on the other, it professes to be convinced that lawyers as a class are venal, self-seeking and pettifogging."

Thirty years later, Marc Galanter, Professor of Law and Director of the Institute for Legal Study at the University of Wisconsin, again examined the phenomenon of lawyer-bashing in a 1994 article in the *Georgia Law Review*. He made two significant points.

First, much of the damage to the image of trial lawyers during the previous two decades was deliberately inflicted by tort reformers and others as a convenient means of advancing their own agendas. By capitalizing on the public's low estimation of lawyers, they were able to convince the public of the elaborate myth that America has too many lawyers, resulting in a litigation explosion.

Galanter offered a second insight: People tend to think well of their own lawyer, while despising lawyers generally. Underlying this apparent contradiction, he suggested, may be a deeper dissatisfaction with the legal system itself. At some point during this generation, the consensus among Americans has shifted from "not enough justice" to "too much law." In the future, this attitude may change.

In the meantime, the Internet has provided a new vehicle for the proliferation of once-again-recycled lawyer jokes. "When it comes to lawyer bashing," Galanter sighs, "there is not much new under the sun."

Railroading the Plaintiffs' Lawyer

The offensive against trial lawyers was not limited to the media campaign. Some opponents of the plaintiffs' bar did not hesitate to resort to more direct assaults.

NACCA's early years took place against a backdrop of national paranoia and fears of communist conspiracies, referred to in retrospect as McCarthyism. Many in the insurance industry and among the defense bar were convinced that there was something subversive about organizing plaintiffs' attorneys. A chilling episode related by Boston lawyer Thomas E. Cargill, Jr., occurred in

1947, when he was a young lawyer at the Employers' Liability Assurance Company. Cargill's boss was Edward T. Stone, the tenth-highest paid executive in the country. Stone had heard of the newly-formed NACCA, and he ordered Cargill to prepare dossiers on its leading members. Cargill remembered the details of this assignment.

"He named especially those whom he wanted: Sam Horovitz, Joseph Bear (Sam's brother-in-law), Joseph Schneider, Nate Fink, and other early NACCA members. I spent a month on the investigation, delving into their personal and professional lives—but informing each of my assignment and why." (As it happened, Horovitz had worked for Cargill's father in his days as an insurance adjuster at U.S. Casualty.)

"There was a group of claims managers in New England known as the Claims Committee. They would meet once a month to discuss plaintiffs' lawyers throughout their five-state area. They also maintained an index file on the cases handled, personalities, and awards. Their attitudes were that all claims were essentially fraudulent and their remarks contained ethnic slurs, especially as to Jewish lawyers. Stone asked me to talk to these claims managers on the basis of my report, and to stress that Sam Horovitz was an arm-waving radical."

"I became incensed at Stone's attitude and hate, especially the unfairness in the way he intended to use my report. I walked into the office of Kenneth Parker, senior partner of the defense firm representing Employers, to which I had been assigned as a promotion for my report. 'I'm resigning,' I said. 'I intend to become a plaintiffs' lawyer.' Parker, taken aback by my remarks, probably suffered a slight heart attack. But I did become a plaintiffs' lawyer."

The fiercest practitioners of hardball tactics against trial lawyers were without doubt the railroads. Acting on their own or through the Association of American Railroads, they routinely instigated criminal prosecutions against attorneys who brought cases against them. Often they targeted lawyers who had ties with, or accepted referrals from, labor unions. "The railroads claimed that the plaintiffs' lawyers were soliciting business in violation of state laws and the ethics of the various state bar associations," said Robert Stone of Minneapolis. In addition, "state legislatures were controlled by conservative and big business interests. Legislation had been enacted to make any kind of contact directly with an injured party an act of solicitation with criminal statutes involved—fines and imprisonment." As a result, Stone recalled, in the 1950s, "every lawyer trying to handle a railroad case in the country was being hounded by sheriffs."

"Several states issued injunctions against Bill DeParcq and Eugene Rerat and tried to indict them and other NACCA railroad lawyers. The atmosphere in general was very scary, frankly, for the plaintiffs' lawyers." Plaintiffs' lawyers and

the unions fought back in the courts. In 1954, the Supreme Court of the United States handed down a pair of decisions vindicating injured workers' constitutional right to representation and the union's right to assist them by recommending competent lawyers to their members.

An even more cynical tactic was to instigate disbarment proceedings against attorneys who loaned money to their injured clients. At common law and throughout most of American history, attorneys frequently advanced money to their injured clients or co-signed loans so the clients could pay their bills and feed their families until their personal injury claims were resolved. As the Illinois Supreme Court remarked in a leading decision, *In re McCallum* (1930):

> It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. . . . [W]e are aware of no authority holding that it is against public policy or any sound reason why it should be so considered.

Indeed, such assistance on the part of attorneys representing people in dire circumstances was viewed as a laudable humanitarian gesture. Courts defined a reasonably clear and consistent rule that an attorney acts improperly only if he or she offers money to a potential client as an inducement for employment. The contingency fee gives ordinary Americans a key to the courthouse; but justice comes only to those who can afford to stay the course.

In 1954, the organized bar abruptly changed its view of humanitarian loans to clients. The American Bar Association Committee on Ethics and Grievances issued a Formal Opinion which took the position that advancing living expenses violated the Canons of Ethics. The ABA decided that the attorney's loan to the client would give the attorney a financial interest in the outcome of the case and result in a conflict of interest between attorney and client. The ABA's reasoning was strikingly weak. If the hope that the client could repay the loan gives the lawyer a stake in winning the case, it is surely no greater than the financial interest created by a contingency fee agreement itself, which is undeniably ethical. Nor could the ABA explain how that interest was in conflict with the client's own interests.

The railroads and their trade organization, the Association of American Railroads, worked aggressively to undermine their workers' ability to obtain legal representation. The worker who consulted an attorney and filed suit against the railroad often found himself out of a job. A congressional report disclosed that 97 percent of workers who settled their FELA claims without a

lawyer returned to work. Of injured workers who had the temerity to retain counsel and file suit, over 90 percent lost their jobs.

Attorneys who represented these workers found themselves hauled into disciplinary proceedings on trumped up charges before state bars dominated by defense lawyers. In fact, the AAR funded and operated its own investigatory body, known as the Claims Research Bureau, to conduct surveillance on plaintiffs' attorneys and surreptitiously interview clients in an effort to find evidence of ethical violations. As the Illinois Supreme Court noted in *In re Heirich* (1956), CRB investigators used "subornation, bribery, deceit, trickery, entrapment and false impersonation" to gain evidence that might result in the discipline or disbarment of attorneys who sued railroads on behalf of injured workers.

That evidence was turned over to the local bar, which too frequently acted as partisan for the railroads. Youngstown, Ohio, trial lawyer John Ruffalo, for example, represented injured railroad workers. He was charged with advancing living expenses by his local bar, whose president was also counsel for the B&O Railroad. The AAR also played a prominent role in the prosecution. Although the Ohio courts upheld his sanction, Ruffalo's disbarment from federal courts was struck down by the U.S. Supreme Court in *In re Ruffalo* (1968). The Court called the procedure used against Ruffalo a "trap" that violated due process.

NACCA's President, Payne Ratner, himself a railroad accident lawyer, wrote an article that criticized the ABA Advisory Opinion in the *NACCA Law Journal* in 1955. Thereafter, the Kansas bar tried to disbar him, charging him with advancing living expenses to clients. The Kansas Supreme Court threw out the charges in *In re Ratner* (1965). While stopping short of calling the bar's prosecution malicious, the court pointedly stated that much of the evidence had been furnished by railroad investigators and that some of the bar's witnesses were "distinctly hostile" toward Ratner.

The railroads' ability to manipulate some local bars into prosecuting attorneys representing railroad workers was so great that the head of the CRB boasted to the AAR membership:

> There have been successful disbarment proceedings tried in Oklahoma City, in Chicago, in Ohio, and one of the nice things that I like about all of this is that it is being accomplished in such a way that the bar associations handling these matters are convinced that such action is more in their interest than ours. And . . . they have thus far carried the load for us in practically every proceeding that has thus far been instituted.

The railroads also used their influence in state bars to attack union efforts to provide injured workers with counsel. The bars obtained injunctions for-

bidding unions to tell injured workers that any lawyer recommended by the union "will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." In two landmark decisions, *Brotherhood of Railroad Trainmen v. Virginia* (1964) and *United Transportation Union v. Michigan Bar* (1971), the U.S. Supreme Court condemned such injunctions as an infringement of the workers' First Amendment rights and their right to access to the courts.

Despite its questionable origins and dubious morality, the ABA imprimatur was sufficient to persuade the great majority of states to adopt rules forbidding attorneys to assist clients in financial straits. Many states have since rejected the ABA position. In others, however, trial lawyers continue to be prosecuted, assuring that a good deed does not go unpunished.

Another victim of hardball tactics was a highly successful personal injury trial lawyer, J. Adrian Palmquist, of Oakland, California. Palmquist gave a presentation at NACCA's 1952 convention in Houston on the subjects of the use of medical drawings as demonstrative evidence at trial and on "the effect of propaganda used by insurance companies to induce jurors to return low verdicts." He distributed to his audience professionally printed pamphlets that illustrated his talk. Following the convention, and with Palmquist's consent, the printer mailed out a number of left-over pamphlets to various attorneys, doctors and other professionals as examples of the printer's quality work. The California State Bar issued a public reprimand, finding that Palmquist had violated the then-strict rules prohibiting advertising and solicitation by attorneys. Ultimately, the California Supreme Court reversed the sanction, finding no evidence that Palmquist intended to advertise or solicit clients. *Palmquist v. State Bar of California* (1954).

Although Palmquist, Ruffalo, Ratner and other trial lawyers who fought back were eventually vindicated in the courts, no one knows how many others were simply forced to abandon the practice of law, their bank accounts drained and their reputations ruined.

A Taste of Politics

From the beginning, Sam Horovitz envisioned an association that would exert its influence in the halls of the legislature as well as in the courtroom. The first issue of the *NACCA Law Journal* declared: "Plaintiff attorneys owe it to the injured workers and their dependents to help remedy the defects" in workers' compensation laws. Horovitz pointed out that "NACCA members have already succeeded in helping improve acts in Massachusetts and Oregon."

By 1952, Horovitz had broadened his call for legislative action. "Lawyers

have yet to learn how to correct abuses of procedure and inequities of substantive law by resort to the legislatures. For many years legislators have heard the powerful voices of the insurance and employers' lobby—each a legitimate lobby, but not designed to help the victims of personal injury or death."

All through the 1950s, leaders like Homer Bishop, Payne Ratner, Melvin Belli, and Perry Nichols took to the convention floor to urge members to make NACCA an active lobbying organization. As early as the 1951 convention, and many times thereafter, Nichols urged NACCA to make use of professional lobbyists. Nichols was himself a lobbyist in the Florida legislature and had succeeded in winning passage of legislation favorable to injured plaintiffs.

At the 1954 Boston convention, Belli put the matter bluntly. "We need legislation. In the past we have attempted to put through various legislative bills. For example, in Massachusetts to increase awards in the state's compulsory auto insurance statute from $10,000 to $30,000. We couldn't get very far because we did not have the legislative backing. We need a lobby. The insurance companies have a lobby. The corporations have a lobby. Now we are large enough to have a lobby. What are we going to do about it?"

The answer was that NACCA saw itself primarily as an educational organization and would do relatively little in the way of political action for the next decade and a half.

NACCA got a taste of lobbying on the federal level in 1950 when a potent group within the American Bar Association pushed for legislation to repeal the Federal Employees Liability Act, which provides a statutory tort action for injured railroad workers, and the Jones Act, establishing a cause of action for the wrongful death of a seaman. Instead, those workers would be covered by workers' compensation. The maritime and railroad industries had long resisted inclusion in state workers' compensation programs. Now, however, the notoriously stingy state benefit schedules looked far more attractive than the federal statutes, which afforded plaintiffs the right to trial by jury and traditional tort damages. The industries lobbied heavily in Congress and drummed up support in academic circles and within state bar associations.

Abraham Freedman, chairman of the NACCA admiralty section, embarked on a tour to raise political opposition to the proposal in Congress. Railroad Section chairman Nathan Richter, supported by Bill DeParcq and Eugene Rerat, alerted congressmen and senators to the serious constitutional ramifications of the measure. Sam Horovitz himself started a grassroots drive to enlist NACCA members to protest to their state bars and through them to the ABA.

The bill died in Congress.

In 1953, Larry Locke started a legislative section in the *Law Journal* to chart the progress in Congress and the states of laws affecting the rights of injured

workers. That year, NACCA established a Committee on Legislation, which included Payne Ratner, former Governor of Kansas, "Spot" Mozingo, a former South Carolina state senator, and Perry Nichols. The committee succeeded in winning enactment of favorable legislation in several states during the 1950s, before it ceased operation.

NACCA's reluctance to become involved in lobbying or significant political action was due primarily to the opposition of one man: Sam Horovitz. Although he urged NACCA to participate in legislative activities, Horovitz believed, perhaps naively, that the association could achieve its aims by contacting legislators and testifying at public hearings. The notion of hiring professional lobbyists and making contributions to the campaigns of politicians struck him, and many others, as beneath the dignity of their profession.

Horovitz also feared that involvement in lobbying and political activity would cost NACCA its tax exempt status. That would deal a mortal blow to NACCA's educational programs, which Horovitz viewed as the core of NACCA's mission. This obstacle was real, though it later proved surmountable. Nevertheless, Horovitz's staunch opposition effectively doomed early proposals to become more politically active.

Self-Inflicted Wounds

Not every tribulation that afflicted NACCA during this period was inflicted by the railroads or insurance companies. Trial lawyers have, on rare occasion, proved quite capable of harming themselves and their cause. One such instance occurred in 1952 at the convention in Houston.

It is often assumed that trial lawyers are liberal Democrats. No doubt some are guilty as charged. But the political orientation of ATLA members spans approximately the same spectrum as the general population. On the right to trial by jury and access to justice, ATLA members speak with one voice. But other issues that divide Americans also divide trial lawyers. They may be important issues, but the association has invariably suffered when members have tried to capture NACCA for their side.

In August 1952, Houston was sweating through a heat wave. McCarthyism was at its height and many feared that communists were infiltrating American government and institutions. In the sweltering ballroom of the Shamrock Hotel, a group of Texas lawyers led by NACCA President John Watts interrupted a discussion of the *NACCA Law Journal* to insist that the members attend to a matter of overriding importance. They moved that all NACCA members be required to take a loyalty oath to the United States.

The loyalty oath was not at all an original idea. Conservatives demanded

that government workers, union members, teachers, and even actors swear loyalty. There was little evidence that a single communist agent bent on overthrowing the U.S. government was ever uncovered by the oath. It had become a symbolic weapon against liberals, dissenters, ethnic groups, and those who were simply not patriotic enough to suit the right wing. In this instance, it was clear that the targets of the motion were Samuel Horovitz and other liberal northerners.

Horovitz rose in response: "Lawyers are officers of the court and do not have to take a loyalty oath." The New York delegation immediately registered its opposition to the motion.

NACCA Governor Jerome Yesko of New Jersey described the raucous events that came "within inches of destroying NACCA":

"The Texans were in a mood for a drive against Communism and directed their drive against Sam and the eastern leadership bloc. The Texans maintained this group were members of the National Lawyer's Guild, which had come under attack by McCarthy as a Communistic organization." The Texans expected to lead the organization, and they wanted to rid NACCA of any taint. "The convention became wild, vicious and venal. There were heated words, near fisticuffs," Yesko said.

John Watts was presiding over the debate as members shouted for the floor. Looking back, NACCA Admiralty Section leader Sam Levenson saw this as a critical moment for NACCA. "If the motion had passed, NACCA would have broken up because all the eastern lawyers would have pulled out. None of them would have signed the loyalty oath. The meeting became more boisterous. It could have wound up in an actual fist fight, actual violence."

At that moment, several NACCA leaders moved to the podium. Joseph Tonahill, a friend of both Horovitz and Watts, moved Watts away from the podium, allowing George Allen, Sr., of Virginia to step forward. A small man of patrician dignity with a powerful voice, Allen quelled the uproar and enabled many of the eastern members to make a judicious exit. The motion was never put to a vote.

Horovitz later confided to Yesko that he felt "terribly wounded" by the attack. Herman Wright, who later became vice-president, remembered the Houston crisis as "the most dangerous NACCA ever faced." Joe Tonahill added that "NACCA owes a great debt to George Allen, Sr."

A similar incident played out in 1966 at ATLA's Mid-Winter meeting. Jack Travis of Mississippi made allegations, which proved groundless, that Harry Philo and Dean Robb had been communists. In that instance, Henry Woods defended the two and diffused the tense situation before the Board, which unanimously rejected a motion to expel the two.

The Houston crisis offered an important lesson for the trial lawyers. Success would depend on keeping the association's focus on the civil justice issues that united them. They would have to check their ideologies at the door.

Beyond Horovitz

Sam Horovitz maintained close control over NACCA both through the loyalty and respect of the membership—earned by his unstinting service—and his firm hold on budgetary matters. Nevertheless, during the 1950s he faced an increasing number of challenges that sought to loosen his hold.

In 1953, the year following the "loyalty oath" crisis, Horovitz faced the first serious challenge to his control of the organization's finances. It was another blistering hot day, with temperatures in Chicago reaching 100 degrees as NACCA members convened at the Edgewater Hotel. Orville Richardson, Horovitz's favored candidate for president, was narrowly defeated by Chicagoan James Dooley, in what came to be called the "subway election." Dooley and his campaign manager, Leo Karlin, had persuaded a large number of local lawyers to come to the convention, where their membership fee was duly paid, and they voted for Dooley.

Ben Cohen placed a proposal before the membership to transfer NACCA's budgetary and dues collection operations from Boston to Chicago. The debate grew loud and bitter. The members understood that this was a battle for control over the future of their association.

Many tort lawyers increasingly saw Horovitz and the eastern bloc of members as keeping the organization in a stranglehold to maintain it as primarily a workers' compensation association. Breaking Horovitz's grip on the purse strings would open the door to new leadership. New Orleans tort lawyer Alva "Kingfish" Brumfield spoke for many of the tort members as he addressed Horovitz during the floor debate. "Sam, this is no longer your baby. You gotta give it up, this baby, and let it grow up in the hands of others."

Horovitz rose and delivered an emotional address to the General Assembly. He framed the issue in a manner that would give even the most disgruntled tort lawyers pause: "What kind of an organization are we to be?" he asked. "Are we to be a democratic organization in which all the members control the finances [through their votes at the business meeting], or are we to be one in which the Board of Governors controls the finances?" Dooley himself refused to back the motion. In a close vote by secret ballot, the motion was defeated.

Horovitz had beat back the first serious challenge to his authority. However, his frequent threats to take his disagreements with the Board over their heads to the general business meeting created animosity. Even some of his ad-

mirers came to see Horovitz as unwilling to share control over NACCA and unwilling to allow it to grow.

One such conflict boiled over in 1957. As Craig Spangenberg described the dispute, Horovitz "had a bitter fight over an educational appropriation with Perry Nichols, who was then president. Perry wanted to expand education for trial lawyers—one of his goals and mine, too. Horovitz, whom I greatly respected, just wouldn't let go and really controlled the growth of the organization because he ran the budget committee and they had a contingency fund. Sam would not budget anything that expanded the tort lawyers' role."

"Sam threatened a floor fight. Perry, a courageous and forthright leader who never backed down, decided to forego a contest at that time to spare a break-up of the organization," Spangenberg said.

Another floor fight arose when it was proposed to change the organization's name from the National Association of Claimants' Compensation Attorneys to the National Association of Claimants' Counsel of America. It was a small change, but Horovitz adamantly opposed the loss of "Compensation" in the name, which signified to him a further subordination of workers' compensation attorneys to the tort lawyers. This time he was defeated, and the name was changed.

Horovitz was also frequently at loggerheads with Tom Lambert over control of the *NACCA Law Journal*. When Lambert became editor-in-chief after Roscoe Pound retired in 1955, he demanded full editorial control. Horovitz was equally insistent upon having the final word. The test of wills dragged on through board meetings, specially-appointed committees, elections of officers, and presidential interventions. Ultimately, Lambert won full responsibility as editor-in-chief for all operations of the *Law Journal* and, later, the *Newsletter*.

In the 1960s NACCA was fighting to expand its educational programs and to counter an aggressive drive by the insurance industry against the legal rights of injured victims. These developments demanded more money, new ideas, and a growing membership. Among the officers and the Board of Governors a consensus was forming that Horovitz's stranglehold on the association's finances must end.

Craig Spangenberg was chosen to head a committee to meet with Horovitz at the 1963 convention in Minneapolis. He carried a proposal from the Board. Horovitz would be honored for his many achievements and be presented with a bronze plaque at the general business meeting. He would then step down and become NACCA's executive editor emeritus.

The committee negotiated with Horovitz for three days. At first he rejected the proposal outright. He then demanded life membership on the Board, with a vote and the right to participate in all board activities. The committee,

concerned that his influence with many NACCA members would disrupt new growth proposals, refused.

Horovitz, who was then 65 years of age, decided to take the issue to the floor in a full debate at the membership meeting. Morgan Ames of Connecticut, former national secretary, described Horovitz's address to the Assembly: "It was before a full house. Sam was intense and passionate. He described emotionally how he had created the organization, how he had run it single-handed from his office, how he had sacrificed his own personal interests and his private practice and watched over it as it developed and prospered."

Spangenberg, leading those seeking Horovitz's retirement, felt a heavy responsibility. "It was important we win this fight because the organization needed room to grow. I don't think any organization can last if one man dominates it. It can't. It can't develop new leadership, new replacements, get new ideas. Even the greatest oak tree in time will fall over of its own weight." He laid the facts before the membership and concluded simply. "Sam, we all love you, but it is time for you to step aside."

The vote was nearly as dramatic as the debate. Many of Horovitz's loyal supporters would have stood by him in any battle. Some were bitter. "I remember my anger and my outrage at the way Sam was being retired from a job that he had performed so faithfully for so many years," said Norman Kripke, one of NACCA's most active leaders. "I felt he was not getting what he justly deserved. It was probably the most horrifying experience I had in all my happy years at NACCA."

The results were close. Horovitz lost. He graciously accepted the title of executive editor emeritus and the bronze plaque amidst a thunderous standing ovation. Over the years, he would hear the applause of grateful trial lawyers many times.

Sam Horovitz died at the age of 87 on July 8, 1985.

4

A University Without Walls

Teaching Trial Law to Trial Lawyers

Educating, training, and informing plaintiffs' lawyers may well be ATLA's most enduring contribution to civil justice. For many years, law schools devoted scant attention to trial advocacy. Many new lawyers simply followed the routines of the more experienced attorneys in the firm. Others simply took their first cases to court and did the best they could. They learned by trial and error—literally. Experience could be a very expensive teacher, for lawyer and client.

Early plaintiffs' trial lawyers were no match for defense counsel, who were well-trained by their firms and who had access to the latest information circulated by the insurers' legal departments. Without a skilled, educated plaintiffs' bar, the right to a jury trial would be a hollow promise and would likely have died of disuse.

Modern tort cases are not won by eloquence alone; they are built with hard evidence and expert testimony. NACCA was born in a legal world that was caught in the Dark Ages for the plaintiffs' bar. If a doctor or engineer proved to be an effective witness in a case, or if discovery turned up a particularly damaging document, other plaintiffs' lawyers were unlikely to learn of it. There were simply no channels for disseminating such knowledge. Indeed, successful lawyers often jealously guarded such valuable information from their competitors.

Trial skills are also essential. What makes a persuasive opening statement? What is an effective way to communicate complicated engineering or medical

evidence to the jury? How can plaintiff's counsel cross-examine a popular local physician? Some lawyers were highly skilled in these areas, but only a few fortunate courtroom spectators might learn from them. Sharing skills and strategies became the bedrock foundation of NACCA's education program. It's philosophy was simple: the trial lawyer's best teacher is a good trial lawyer.

Education Conventions

NACCA pursued its educational mission almost immediately. Its earliest endeavors took place at the annual conventions and reflected Sam Horovitz's vision of a small, collegial organization. At the 1948 New York meeting, there were only about thirty lawyers in attendance, representing fourteen states. They met around a long table. Horovitz would describe a case, and the conferees explained how the victim would fare in their jurisdictions. The following year, Horovitz invited featured speakers to address the group.

As membership grew, the educational programs expanded in number and sophistication. The 1950 annual meeting at the Biltmore Hotel in Oklahoma City was the first full-blown NACCA convention. More than six hundred people, hailing from every state, attended three days of political and educational seminars. The main meeting hall was crowded with scores of legislators from Texas, Mississippi, and Florida as well as Oklahoma. Also present were the Democratic nominee for Governor of Oklahoma, the President of the Oklahoma State Senate, two U.S. congressmen, state court judges, bar association presidents, and labor union officials.

The educational program featured Perry Nichols, who made a dramatic presentation that included the first exhibit of demonstrative evidence. That modest tool was a brochure, *What is a Life Worth? A Day in the Life of Danny.* The booklet illustrated the struggles faced each day by a brain-injured accident victim. Members also discussed the nation's top personal injury verdicts at that time with the attorneys who won them: Perry Nichols ($250,000), Nathan Richter ($250,000), and Melvin Belli ($225,000).

The 1951 convention, at the Mark Hopkins Hotel in Mel Belli's hometown of San Francisco, saw the torts section come into its own. The week-long program included forty-three sessions on torts and medical science. The medical program featured a trip to a local hospital to observe a surgical operation. Experienced trial lawyers lectured on specific topics of importance to plaintiffs' lawyers. Over one hundred judges and academics, attending as invited guests, enriched the discussions.

The overwhelming success of the convention programs led Sam Horovitz to organize and present additional seminars at an ever-growing list of cities

across the country. In 1952, he hired a plane to carry eighteen speakers on a teaching tour to eight cities, which the local affiliates financed. By 1966, ATLA was conducting six two-day regional seminars in major cities and twenty-five one-day seminars at smaller sites, in addition to extensive programs at the annual and midwinter conventions.

The core of the NACCA faculty in the 1950s consisted of about thirty seasoned and dedicated lawyers who barnstormed around the country at considerable personal expense and effort to educate other lawyers. The roster included: Mel Belli, Perry Nichols, James Dooley, Harry Gair, Orville Richardson, Nathan Richter, Abraham Freedman, Moe Levine, Craig Spangenberg, Jim McArdle, James "Spot" Mozingo, Homer Bishop, John Watts, Lou Ashe, Bill DeParcq, Leo Karlin, Joseph Schneider, Ben Marcus, Alva Brumfield, Payne Ratner, Eugene Rerat, Arthur Mandell, Joe Tonahill, George Allen, Jr., Francis Hare, Jr., Quitman Ross, Ben Cohen, Sam Hewlett, Roscoe Pound and Tom Lambert.

Orville Richardson expressed the ebullient spirit of this team. "Oh, hell, there was a lot of circus spirit to it. We were all having fun. The reason is, we were beat down for years. They had educated, well-paid, excellent trial lawyers for the defense. There were only a few of us poor guys struggling along to keep up with them. Now here we were coming along with new ideas and new techniques. A self-confidence was built up—which is a great thing. We knew we could get out and battle these guys down to the line."

Bill Hicks, the trial lawyer who discovered and shared the "smoking gun" document in the Pinto case, observed that "the way you could receive help from each other and give help to each other created a genuine affection among the various members throughout the entire organization." To admiralty lawyer Raymond Kierr, NACCA was "closer to being a fraternity than any Greek letter society."

Without doubt, Melvin Belli and Perry Nichols were the top stars of the ATLA show.

Nichols was nearly equal to Belli in popularity, though his teaching style was very different. A 6' 5" former football player, Nichols was an imposing speaker. Verne Lawyer described him as "a very dynamic, big, good-looking man with a lot of energy, imagination and an almost startling ability to persuade, not only lawyers but juries."

In 1950, Perry Nichols had the first strictly plaintiffs' practice in Florida. In fact, it was the most complete personal injury firm in the nation. Housed in its own building, dubbed "the Round House" because of its unusual shape, the firm had divisions for each specialty of practice. Each of the seven or eight trial teams had its own investigator and support staff. The firm boasted an in-house photographic department, a doctor, and a medical library.

Like Belli, Nichols was an innovator in the use of demonstrative evidence.

But he also taught trial lawyers how to organize their law firms for the most efficient and effective case preparation. In his own firm, nothing was left to chance. J.B. Spence, a partner and one of the foremost medical malpractice lawyers in the country, said that Nichols ran the firm like a football team. "It was drill, drill, drill; work, work, work. Spend money on a case and go to the courthouse. We didn't settle too many cases; we tried cases." And they won some of the highest personal injury verdicts in the country. However, as another partner, Bill Colson, points out, "Perry made a basic decision to give away his 'secrets'—to share his knowledge—even though he could have retained a monopoly, since there was nobody near in competition."

Nichols also advised trial lawyers on the fine points of lobbying state legislators in support of bills that favored the rights of injured victims and against adverse legislation. As a former lobbyist for the state's largest race track, Hialeah, Nichols knew his way around the legislature, and he spent a great deal of time lobbying Florida lawmakers on behalf of injured victims.

The Belli Seminars

Beginning in 1950, and continuing for over four decades, ATLA's annual convention was preceded by what can only be described as a unique learning experience. The "Belli Seminar" was a loosely organized, rapid-fire program of about twelve hours stretching over two days. Those crowded into the hotel ballroom would hear fifty, sixty or more of the nation's most famous trial lawyers and attorneys involved in the most notable cases of the day. Each speaker would distill his or her message into a presentation of about ten minutes. The speakers leaped wildly from one subject to another. Sometimes speakers failed to appear, while others were added at the last minute, or even later. No one, including Belli, knew what the speakers would say before they said it. The whole untidy affair was moderated by Belli himself, who frequently interjected his own comments that could be at once irreverent, erudite and hilarious.

The relationship between the Belli Seminars and ATLA's convention educational program was often testy. Detractors complained that the event was a showcase for Belli's huge ego, that his outrageous comments inevitably made their way into the press, to the embarrassment of those who wanted to elevate the image of trial lawyers, and that some speakers had little to offer beyond boasting of their victories or soliciting referrals. ATLA sometimes attempted to put maximum distance between its convention program and Belli's program. At other times, ATLA attempted, with only limited success, to impose some control and discipline over the seminars.

Whatever its faults, the Belli Seminar never failed to excite and energize the

lawyers who flocked to it every year. For them, the program was a rush of priceless information and ideas under conditions of barely contained chaos. Melvin Kodas, who played a vital role in trial lawyer education, described his first seminar: "Belli was a cat unto himself. I was amazed at his grasp of tort law generally. But what was inspirational to me was the line-up of speakers—almost all NACCA members—who appeared on his program at five and ten-minute intervals. What a grasp of law they had! How free they were in giving out information and advice! I left there with six or seven legal tablets, written on both sides of every page. I was loaded with notes, writing as fast as I could and trying to keep up with the speakers." As Dean Robb explained, "The Belli seminars were a fast-moving way to become a better lawyer quickly and a means to teach young lawyers to stand up and challenge the old way of doing things." No matter how big the room, the Belli Seminar was always standing room only.

Belli had come to the same realization that Moe Levine, Tom Lambert, and Sam Horovitz had hit upon. Education is not only information. It is also inspiration. The most important message he conveyed to trial lawyers, he said, was that "it is possible to win cases, to make a living obtaining compensation for the injured, and that this life's work was indeed worthwhile."

Often it was the inspiration young lawyers took from the convention programs that made the most lasting impact. Bob Begam summed up his reaction to attending a NACCA convention in 1958: "When you went away from a Moe Levine lecture on how to sum up a case, you were full of inspiration. I couldn't wait to get into the courtroom to do my own thing."

Howard Specter recalls: "I was just blown away. I was right out of law school working for a plaintiffs' firm when I went to the 1959 New York convention." He listened to Melvin Belli and Louis Nizer, he saw Dean Robb and Harry Philo present the first edition of their *Lawyers Desk Reference*, and he heard Tom Lambert speak about the progress in drafting Section 402A of the Restatement of Torts. "I came back with a mind that was expanded beyond anything that ever happened in law school," he said.

Herman Glaser was also at that 1959 convention. "I went to Belli's program and became excited. It was inspirational. Then I heard Tom Lambert speak, and I was overwhelmed. It made me realize that tort law had a social conscience and served a public purpose needed in this country—to be concerned and care for people."

Rood's Rangers

When Edward Rood became NACCA's 16th President in 1961, he immediately turned the association's educational program in a dramatic new direction.

Until then, NACCA's strategy had been to present extensive programs in a handful of major cities. They succeeded in attracting large audiences. However, the seminars were simply too far away for many trial attorneys. At the same time, the seminars relied heavily on local affiliates for organization and speakers. There were well-founded suspicions that some speakers maneuvered themselves onto the program primarily to attract referrals from the less experienced lawyers in the audience.

Rood put together a new team of volunteers to travel at their own expense to the smaller towns around the country. The objective of the "Rood Rangers," as they dubbed themselves, was to take NACCA's educational program right to the doorsteps of as many trial lawyers as possible.

The original Rood Rangers were: Fielding Atchley, Albert Averbach, Russell Barker, Walter Beall, Lorenzo Chavez, Bill Colson, William Arthur Coombs, Al Cone, C. Lawrence Elder, Bill Frates, Fred Freeman, Jack Fuchsberg, Herbert Greenstone, Hugh Head, Sam Hewlett, Roscoe Hogan, Charles Hvass, Max Israelson, Leo Karlin, John Lane, Verne Lawyer, Marvin Lewis, Eugene Phillips, Ed Pollock, Stanley Preiser, Leon RisCassi, Quitman Ross, Craig Spangenberg, Jack Travis, and Ted Warshafsky.

Warshafsky, a former Marine whose life never was the same after viewing Hiroshima in 1945, joined NACCA in 1959. He was already an accomplished young trial lawyer, involved in pro bono work among the Puerto Rican community in Milwaukee. When he heard Craig Spangenberg speak, he knew "there was nothing I wanted in life but to become a trial lawyer." For six years, Ted traveled with Rood's Rangers and their successors to nearly every state, at his own expense. "It was a wonderful, a marvelous experience," he recalled. Rood "had a missionary sense, a sense of evangelism."

The Rangers presented "How to Handle a Tort Case from Beginning to End" to audiences in forty-eight states. They traveled by car, by private and commercial airplane, and once by a horse-drawn ice sled over a frozen Utah lake. Rood personally led them. He was once struck by a hit-and-run driver at an airport and suffered a broken leg. He was carried, leg in a cast, to and from planes. But he never stopped.

Verne Lawyer said their mission was to make "lawyers with expertise in the tort field available to share their secrets and experience with anybody willing to come and listen and pay the registration fee." He added that the effort provided a boost for membership. In some areas, he explained, NACCA had stopped growing because well-known and established lawyers guarded the lucrative referral business by dominating local seminars. Rood, however, fielded his own team. They were not interested in harvesting referrals, but in making better trial lawyers. "We would do a one-day seminar and Ed would pitch the

group to become members. We had a two-for-one package—$10 to attend the seminar and a free membership. It was extremely effective."

For Harry Philo, "one of the most interesting field trips was in 1964. We took one week and all forty lawyers traveled and spoke throughout the entire State of California." They addressed groups of lawyers in Los Angeles, Orange County, Monterey, Santa Barbara, San Francisco, and Sacramento. "We signed up more than 900 new members that week," Philo said.

A diary kept by John Lane gives the flavor of one, perhaps typical, trip. Seven trial lawyers boarded a lumbering, propeller-driven plane in Memphis, arriving in Washington, D.C., at 10 p.m. They rented a station wagon and drove to Richmond on a two-lane road for a seminar that started at 8 a.m. sharp. The group piled back into the car and drove to Washington airport, where the last plane to Wilmington was ready to take off. Jack Fuchsberg managed to persuade the crew to reopen the hatch and let the lawyers board. After the Wilmington seminar, they rented a car to go to Asbury Park, N.J. The hotel there was closed for the winter, but a lone clerk rented them rooms without service or hot water. The seminar went as planned, with 350 in attendance.

Fog foiled their plans to fly to Ohio for the next seminar. So they set out again by car, with Craig Spangenberg at the wheel, inching through the thick fog. They finally arrived in Akron at 7:15 a.m. and, after a shower and a shave, appeared before a roomful of Ohioans at 8:30. From there, the group drove to South Bend, Ind., crawling through a paralyzing blizzard, and finally to Champaign, Ill., for their final presentation.

Teams of Rangers fanned out across the country. In all, over 10,000 lawyers attended the seminars. NACCA's membership grew to 22,000.

Rood's inspiration and energy ushered in a period of presidential emphasis on education, dramatically expanding the educational mission started by Sam Horovitz. John Lane, elected president in 1962, a tall, handsome and articulate West Virginian, continued Rood's Rangers and personally directed the effort in the western states to strengthen new affiliates.

The following year, President Jacob Fuchsberg initiated a drive to elevate NACCA to an organization of truly national scope that could speak for the American trial bar. A veteran Rood's Ranger himself, Fuchsberg recognized the program's value in recruiting new members and enhancing NACCA's stature. He enlarged the program and infused it with spirited evangelism. He succeeded in changing the organization's name to the American Trial Lawyers Association to reflect its national aspirations (though the name would soon change once more).

Bill Colson, a former partner of Perry Nichols and a firm believer in the philosophy of sharing knowledge, assumed the presidency in 1964. He im-

mersed himself in the seminar program, giving it a new focus on trial competence and a new name, the "University Without Walls." Jack Fuchsberg supported Colson's educational drive with a $20,000 donation from the Fuchsberg Foundation.

Joseph Kelner, elected in 1965, continued the education drive, with an additional focus on public awareness of safety issues. He and his brother Milton co-authored a booklet entitled *Stop Murder by Motor,* which ATLA widely distributed to call Americans' attention to the carnage on the highways. The booklet aided the enactment of the National Highway Transportation Safety Act.

ATLA's next president, Al Cone, maintained the seminar programs and co-authored with Vern Lawyer *The Art of Persuasion in Litigation.* They donated the book's considerable profits to ATLA's educational programs.

Samuel Langerman was elected in 1967. He reshaped ATLA's fifty-eight one-day seminars into twenty two-day regional seminars. Recognizing the increasing importance of product liability, Langerman succeeded in recruiting outstanding academic scholars to speak at ATLA programs, including Professors William Prosser, John Wade, Joseph Page, Fleming James, and Robert Leflar.

Orville Richardson, elected in 1968, was a disciple of Dean Roscoe Pound with a philosophical temperament. Richardson hired Professor William Schwartz to be General Director of the association and established an Education Department to support the growing program.

In 1967, ATLA President Al Cone and Verne Lawyer, Chairman of the National Seminar Committee, publicly recognized the sixty-three members of ATLA's "faculty" of teachers who had made possible the phenomenal program of the 1960s. They were honored as "the leading members of the American Trial Bar who, having earned the distinction of being great trial lawyers, had willingly become educators and gained the respect of their profession. . . . to these unselfish men the entire American Bar owes a debt of gratitude."

Francis H. Hare, Jr.
Richard D. Grand
Samuel Langerman
Robert E. Cartwright
Jacob W. Ehrlich
John J. Lane
William E. Erickson
Bill Colson
Ray Ferrero, Jr.
Edward B. Rood
Ward Wagner, Jr.
Robert G. Begam
John J. Flynn
Sidney S. McMath
George T. Davis
Danny Jones
Marvin E. Lewis
Morgan P. Ames
Al J. Cone
William M. Hicks
J.B. Spence
Samuel D. Hewlett, Jr.

Philip H. Corboy
W.T. Barnes
Verne Lawyer
Harry M. Philo
F. Lee Bailey
Joseph Kelner
Joe H. Tonahill
Leon L. Wolfstone
Ted Warshafsky
George W. Shadoan
Charles T. Hvass
Lawrence F. Scalise
Melvin L. Kodas
Hyman Barshay
Neil G. Galatz
Philip H. Magner, Jr.
Walter C. Beall
J. D. Lee
Tom H. Davis
Richard M. Markus
Thomas F. Lambert, Jr.
John E. Norton
Lex Hawkins
B. James George, Jr.
Dean A. Robb
Jacob D. Fuchsberg
Percy Foreman
Israel Steingold
Stanley E. Preiser
Ronald L. Goldfarb
Ronald I. Meshbesher
Edward M. Swartz
James E. Hullverson
William Tomar
Warren C. Schrempp
Charles Kramer
Henry B. Rothblatt
Dennis C. Harrington
Russell M. Baker
Jack A. Travis, Jr.
Craig Spangenberg

ATLA's Educational Program Matures

During its first twenty years, NACCA succeeded in raising the level of knowledge and skill of the plaintiff's bar. The concept of lawyer-to-lawyer education, inaugurated by Sam Horovitz and led by a succession of talented presidents, had made a dramatic and lasting impact. But the membership was growing in numbers and sophistication. At the same time, political battles were demanding more attention from the president and top leaders. If the educational programs were to expand and improve, a full-time professional staff would be essential.

Until 1959, there was no education department or staff. Each president acted as his own educational director, deciding where the programs would be presented, who would speak, and what subjects would be addressed. In fact, designing, preparing and presenting educational programs became the major function of the presidency.

From 1959 to 1968, education was part of the responsibilities of the Public Information and Education department. The staff director for the new de-

partment was Richard Jacobson. His responsibilities extended to preparing brochures for each speaking event, mailing announcements to every lawyer in the states where the seminars were planned, and providing for press coverage. The president was firmly in charge of the seminar content, however. For convention programs, the Chair of each section was responsible to the president for preparing programs and selecting speakers.

ATLA's educational program also included a significant effort to enhance the teaching of the art of trial advocacy in the nation's law schools. Retired U.S. Supreme Court Justice Charles E. Whittaker, in an article in the *Kansas Law Review,* called upon experienced trial lawyers to donate their time and effort to improve the teaching of advocacy in law schools. His sentiment was echoed by other judges and law school deans around the country.

ATLA President Jacob Fuchsberg, head of the Fuchsberg Family Foundation, responded with a $10,000 grant to ATLA to establish such a program. President Bill Colson, with Robert Klonsky and Seymour Colin, inaugurated the Law Student Training Program with pilot projects at Fordham, Rutgers, and New York University Law School. Top trial lawyers, including William F.X. Geoghan, Jr.; Joseph Kelner; Moe Levine; and Donald A. Novok, presented actual trial demonstrations and arguments. In addition, the program provided for on-the-job training for third-year students and recent law graduates. The response was overwhelming. As Fuchsberg told Yale law students, "The interest shown by scores of law schools everywhere in the country indicates how greatly it is needed." Within a few years, nearly every law school established a required course in the basics of trial advocacy.

In 1968, Professor William Schwartz was named General Director and an Education Department was created. Schwartz took a personal interest in the new department. In cooperation with RCA, ATLA produced four volumes of "Counseling Cassettes." Top trial lawyers narrated their own successful versions of a trial, including interviewing the client, selection of a jury, opening statement, use of experts, cross-examination, and final argument. Schwartz personally edited the cassettes, which were very popular and led ATLA to produce other audio-visual educational aids.

In 1967, Lawrence Smith, then a member of the Young Lawyers Committee, hit upon a truly inspired idea: a book that would serve as a primer in basic trial advocacy for young lawyers. President Samuel Langerman appointed Jack Norton, Chairman of the Basic Trial Advocacy Committee, to head the project.

Norton recruited fifteen young lawyers to write a book that would cover handling a personal injury suit from the initial client interview to final argument or settlement. They included some of the brightest of ATLA's young

members: Tom Anderson; Wade Dahood; Robert Dudnik; Francis H. Hare, Jr.; Lex Hawkins; James Hulverson; J. D. Lee; James Leonard; John E. Norton; Stanley E. Preiser; C. Glennon Rau; Paul D. Rheingold; Lawrence J. Smith; Shannon Stafford; and Ward Wagner, Jr. The result of a year's labor by the volunteer authors was *Anatomy of a Personal Injury Lawsuit.*

Anatomy became a perennial best seller among ATLA publications. Its three editions over twenty-two years earned nearly $100,000 in profits. Equally important, the book provided a template for ATLA's Basic Trial Advocacy program.

ATLA launched its BTA program nationwide, using law schools as sites where possible. State affiliates assisted in presenting the program and supplied local speakers, for which they received a share of the attendance fees. The program also served to recruit new members by discounting the price of admission and the book from $25 to only $5 for those who joined ATLA. "It is still my opinion," Norton told the Executive Committee in 1968, "that the foundation of our association's growth is with the younger lawyer, and he is best reached by the BTA program."

By 1976, the state affiliates were becoming increasingly restive with ATLA's control over the program. They had demonstrated their ability to conduct successful seminars and desired a greater share of the revenue. ATLA's Education Chairman, Howard Specter, working with Robert Begam, and Theodore Koskoff arranged to transfer the BTA programs to the states. In their place, ATLA launched the Circuit Seminar Program, which presented advanced courses in advocacy annually in each of the federal Circuits. That program continued until 1982.

In 1981, *Anatomy* went into its second edition. Larry Smith, as Chairman of the book committee, and Norton, as Editor, dramatically expanded the book, and updated its scope to include strict liability for defective products.

The third edition, published in 1991, departed from the basic trial advocacy format. In place of the young lawyer authors, the third edition featured contributions from some of the country's leading trial attorneys. They included: Gerry L. Spence, Victoria C. Swanson, Dale Haralson, Linda Miller Atkinson, Nicole Schultheis, Arthur H. Bryant, Roxanne Barton Conlin, David B. Baum, Paul N. Luvera, Deanne C. Siermer, Howard Nations, Peter Perlman, James J. Leonard Jr., Abraham Fuchsberg, Philip H. Corboy, Susan J. Schwartz, Dr. Michael A. Karton, Harvey F. Wachsman, Carole L. Gutterman, Douglas B. Abrams, and Michael S. Gillies.

In the mid-1970s, a growing number of state bars were imposing Continuing Legal Education requirements. ATLA developed courses and pursued accreditation by state bars to help trial lawyers satisfy the mandatory

CLE requirements. By 1984, ATLA was certified in all states to offer accredited CLE courses.

Building on its successful national seminars, ATLA established the National College of Advocacy in 1971. Theodore Koskoff championed the development of this post-graduate teaching project for trial lawyers based on actual courtroom practice. ATLA entered into a partnership with Hastings Law School in California to conduct the program. The relationship soon foundered, however, in disputes over materials and revenue. Despite efforts by Henry Woods to mediate, ATLA and Hastings parted company after only one year.

The program grew into three colleges, held in Washington, D.C., Reno, Nevada, and, beginning in 1978, Miami, Florida An "Advanced College" was added for more experienced trial lawyers. Eventually, all ATLA's educational programs were placed under the control of the NCA and its professional staff.

ATLA also took part in developing the National Institute of Trial Advocacy (NITA), an advanced educational project that was a joint effort by ATLA, the ABA, and the American College of Trial Lawyers. The project prompted heated debate by the Board, because NITA required a contribution of $35,000 and would compete with ATLA's own programs. Nevertheless, Theodore Koskoff, ATLA's leading education proponent, favored participation. In retrospect, Koskoff concluded that the NITA program was effective, if expensive. NITA featured workshops where the students could deliver summations and conduct cross-examinations on videotape and receive in-depth critique from the faculty, which included many of ATLA's top trial lawyers.

Another leader who left his personal philosophical imprint on virtually every phase of ATLA's teaching programs was Harry Philo. His motto—"We are lawyers on the side of people"—became ATLA's motto. Philo was a featured speaker at nearly every convention program and many seminars, carrying his two heavily-laden artists' portfolios filled with trial exhibits and materials to the podium. His lectures on products liability and employee safety emphasized to lawyers that safety is not merely "common sense." Safety engineering is a science, he emphasized. Attorneys needed to take advantage of the knowledge and expertise accumulated by industrial organizations, associations, and government regulatory agencies devoted to the science of safety. His *Lawyers Desk Reference* included an extensive collection of such valuable sources.

The 1980s saw a sustained effort to improve the quality and professionalism of the educational program. President David Shrager in particular sought to insulate the selection of speakers from political considerations and to impose quality control over the program contents. The Education Department, prompted by Education Committee Chair Peter Perlman and guided by Education Director James E. Rooks, Jr., expanded the development of books and manu-

als. In addition, programs were recorded on audio and, later, videotape for wider distribution and to provide "education in the office" for lawyers who could not attend the live seminars.

In 1988, a new Educational Advisory Group formally promulgated the Association's educational policies. The twelve-point policy statement adopted by the Board of Governors set forth the goals of encouraging participation of women and minorities in educational programs, fostering cooperation rather than competition with state and local trial lawyer associations, and preventing abuse of programs by speakers seeking to advance their personal or political goals.

As technology opened new possibilities in the presentation and dissemination of legal information, ATLA was quick to take advantage of the advances. Audio and video tape and CD-ROM made educational programs accessible to more trial lawyers than ever before. Teleseminars and web-based programming over the Internet promise to bring lawyers together to share knowledge in ways that Sam Horovitz could scarcely have dreamed possible. Although ATLA's political battles would at times take center stage, ATLA has never forsaken its educational mission.

Publications and Research

A well-attended ATLA annual convention now draws some 3,000 trial lawyers; several thousand more attend seminars and programs each year. But *TRIAL*, the *ATLA Law Reporter* and other ATLA publications land on the desks of all 55,000 ATLA members each month. ATLA publications represent the most direct tangible membership benefit.

The Law Journal

Sam Horovitz's first task after founding NACCA was to begin work on the first issue of the *NACCA Law Journal*. In the 1940s, plaintiffs' lawyers were truly practicing in the dark. Appellate decisions were published, of course, but few lawyers could afford to maintain an extensive library beyond the decisions in their own states. There were no publications that identified and analyzed decisions important to the torts or workers' compensation attorney. The academic law reviews and journals disdained personal injury law in favor of loftier subjects. The proliferation of legal news publications, pioneered by the *National Law Journal*, would not appear until the mid-1970s. It took months for an important legal precedent in the area of personal injury law to filter through the legal community, if it were noticed at all.

An even greater problem was the absolute void in information about cases at the trial level. This was, Melvin Belli said, the "invisible law." News of verdicts and settlements, detailing the theories alleged, the documents uncovered, and the experts who testified—the very nuts and bolts necessary to build an effective personal injury case—was simply unavailable. Information sharing was a luxury available only to insurance defense attorneys. Each plaintiff's lawyer had to reinvent the wheel. Belli's powerful "Adequate Award" would have been little more than an interesting theory without the availability of information concerning verdicts and settlements.

Sam Horovitz published Volume One of the *NACCA Law Journal* in 1948, funded largely out of his own pocket. Its circulation rose from 1,600 in 1948, to 4,200 in 1952, to over 50,000 when the final volume was published in 1979. Horovitz made no apology for the staunchly pro-plaintiff orientation of the new publication, in contrast to the studiously objective tone of the academic law reviews. "We do not pretend to be a neutral or vacillating Journal," he declared. "But we do claim to be accurate and to report cases, events and legislation with as much accuracy as is humanly possible." He insisted that the *Law Journal* be issued in hard-cover so it would more likely be kept by lawyers and judges and used for research and quotation.

To lawyers accustomed to the staid law reviews published under the auspices of leading law schools, the early volumes of the *NACCA Law Journal* came as a bit of a shock. Each volume opened with a provocative and inspirational lead editorial in which Horovitz preached the gospel of NACCA and defended it against the slings and arrows launched by the insurance industry. There followed reports of leading recent court decisions of interest to each NACCA section—Torts, Workers' Compensation, Admiralty, Aviation, and Railroad Law—along with analysis and commentary on the progress of the law. On occasion, the Journal republished academic law review articles and speeches of interest to personal injury lawyers. Horovitz established lectureships supporting Mark deWolf Howe at Harvard, Arthur Larsen at Cornell, Stefan A. Riesenfeld at Minnesota, Reginald Parker at Arkansas, Wex Malone at Louisiana State, and Roscoe Pound at the University of Southern California. The *Journal*, has been cited in 73 state and federal court opinions.

Another section, "Reports and Notes from Everywhere," was a chatty rendition of the news inside NACCA. Based largely on reports from associate editors in every state, Horovitz reported on convention and seminar programs, activities of the branches and affiliates, his personal speaking schedule, and other miscellany.

Finally, with editorial assistance from Melvin Belli, the *Journal* listed "Verdicts Over $50,000," to aid trial lawyers in determining and obtaining an "ad-

equate award" for their clients. Publishing the amounts of verdicts and settlements would become a source of controversy, particularly among those concerned about the image of the trial lawyer. A move at the 1953 convention to eliminate "Verdicts over $50,000" failed when Orville Richardson defended the listing as "a service for the plaintiff lawyers." In 1957, Sam Horovitz responded to an attack by the Defense Research Institute, which had just launched its own journal. "Verdicts," he argued, provided a guide "on the basis of trial-proven experience to enable the inexperienced to obtain the full measure of damages."

The prestige of the *NACCA Law Journal* within the legal community rose enormously in 1952, when Roscoe Pound, former dean of the Harvard Law School and one of the greatest legal authorities of the century, became Editor-in-Chief.

Pound, at the age of 83, had already put his mark on American law as a leader of the legal realists. He contended that the law must not be isolated from the rest of human endeavor, and he was a strong advocate of using the tools of the social sciences to guide legal decisions. This interdisciplinary view would play an important role in the tort law revolution—and product liability in particular—that would follow in the next decade. Horovitz had been a student of Pound's at Harvard.

Pound's range of scholarship was amazingly broad. His considerable library included botanical studies and Chinese classics, which he read in Chinese. He was the author of the Encyclopedia Britannica entry on the legal rights of women. In 1948 he contributed an article to the *NACCA Law Journal* on the Republic of China's Workmen's Compensation program. He had a prodigious memory, including a remarkable ability to recite baseball statistics.

Pound was also a firm believer in the accountability principle. In a speech at the Chicago Convention in 1953, Pound declared that "imposing liability may coerce the greatest degree of vigilance and diligence to prevent injury." Referring to the twin aims of tort law, he recognized that "the function of prevention is reinforced by the function of reparations." To those who objected that tort immunities were well-settled principles of law, he responded: "The law is not settled until it is settled right."

Roscoe Pound was no mere figurehead as Editor-in-Chief. He arrived at his office promptly at 7:20 a.m. and worked until 5:30. He personally authored three volumes of the *NACCA Law Journal.* He was also a tireless speaker on NACCA's behalf. Sam Horovitz remarked that Pound traveled "throughout the country to our branches. He made fifteen speeches in one year and spoke to eight bar associations."

NACCA dedicated its 1954 winter meeting in Boston to Dean Pound. Despite a terrific blizzard, more than 1,200 lawyers attended. The Chief Justice of

New Hampshire's Supreme Court arrived in a bakery truck when all other transportation was at a standstill. He was introduced to the convention as "Master of the Rolls," a reference to one of the highest judicial offices in Britain.

In his address, Pound outlined the "Tasks of NACCA." Foremost was "the task of making prompt, inexpensive and adequate reparation available to the one in eighteen of the population of the country who come to need it each year."

Dean Pound retired in November 1955. The following year, the Roscoe Pound Foundation was created, with Pound's wife Lucy as its first president, to further Dean Pound's goals for social jurisprudence. The *NACCA Law Journal* staff, cramped for space in Boston, moved into Pound's former house in Watertown, Mass., which NACCA, through Sam Horovitz, had purchased.

Dean Pound designated Professor Thomas F. Lambert, Jr., to succeed him as Editor-in-Chief in 1955. Pound had met Lambert at the New England Law Institute, a private seminar association headed by ATLA officer Joseph Schneider, where Lambert was a featured lecturer. His background was impressive, even to Roscoe Pound. He had been a champion debater and orator during his undergraduate years at U.C.L.A. He won a Rhodes scholarship to Oxford, where he received bachelor's and master's degrees in jurisprudence. During World War II, he served as legal officer on General Omar Bradley's staff. He was trial counsel at the Nuremburg Trials under U.S. Chief of Counsel Justice Robert H. Jackson. He prepared the U.S. brief against the Nazi Party and delivered the U.S. trial address against party chief Martin Bormann. Lambert became a Professor of Law at Boston University and then dean of Stetson Law School in Florida.

Lambert, who idolized Dean Pound, became a zealot in NACCA's educational program. His mastery of case law, his raconteur style, his wry humor, and his passionate commitment to justice meant standing room only wherever Tom Lambert took the podium. He quickly became the "voice of ATLA," enlightening and inspiring trial lawyers around the country.

Robert Cartwright recalls, "When I heard him talk about some of the great landmark tort cases in such exciting terms, I was fascinated. If I became involved, perhaps I could do better in my practice as a trial lawyer and accomplish some social good and public purpose."

In the course of four decades and thousands of pages in the *Law Journal* and *Law Reporter*, Tom Lambert gave ATLA members the benefit of his insight and observation on the development of the law of torts. In 1990, ATLA President Russ Herman paid tribute to Lambert's unique contribution:

> From his very first articles it was obvious that Tom's pen was like no other in the world of legal literature. Placed among the staid

> and stodgy law reviews which prize blandness and neutrality of style, a Lambert article is unmistakable. In his hands, the description of a widow's grief becomes a haunting ballad ("It was bluebell time in Kent"); the hypocrisy of some insurance companies becomes the target of razor-edged sarcasm in his description of bad faith ("The friendly fiduciary Holy Grail Insurance Company displays to its dependent insured its backside"); and the progress of the common law becomes a pageant of biblical scope ("Comparative Negligence on the March"). He quoted Milton as easily as Musmanno; Plato as well as Prosser. And all of this he presented in an adjective-laden, alliterative, inspirational prose style. He has been called ATLA's Poet Laureate.

Over the years, Lambert coined numerous pithy aphorisms that encapsulated the essence of the tort law revolution. ATLA, he said, existed as "an organization to comfort the afflicted and to afflict the comfortable." He declared safety to be "the civil religion of us all," and that those who ignored the progressive development of the law were "walking backwards into the future." His most famous "Lambertism" is one that has been so often repeated without attribution that it springs automatically to mind when tort lawyers explain the accountability principle: "A fence at the top of a cliff is better than an ambulance in the valley below."

Lambert's view of the trial lawyer as a professional is probably best captured in a short article entitled "NACCA: Rumor and Reflection," published December 6, 1956, in the *Harvard Law Record* and reprinted in the *Congressional Record* in 1957. Addressing law students still pondering their own direction in life, Lambert painted this portrait of the trial lawyer's calling:

> [A] lawyer can put his prowess to the fullest at the personal injury bar and, without glossing or poeticizing the raw realities involved in litigating the claims of those who have been victimized by accident; he can find self-fulfillment without irony, disdain, quiet desperation or bitterness. . . . [A trial lawyer] can earn his way into the surtax brackets and enjoy creature comforts in amplitude, and yet make himself, if he be so minded, into a civilized man. . . . . This kind of enriched professional life can be achieved in personal injury practice and the only awful kind of aging—the slow desertion of ideals—can be avoided.

Unfortunately, the *NACCA Law Journal* became the focus of a persistent struggle between Sam Horovitz, the Executive Editor, and Tom Lambert, the Ed-

itor-in-Chief. In 1958, assistant editor-in-chief Charles Ed. Clark resigned, citing Horovitz's attempts to control the staff. Soon after, at a meeting of the Board of Governors, Horovitz submitted his resignation, only to withdraw it later. Lambert also resigned, but returned when he was granted greater editorial control.

During the 1960s, these recurring disputes, as well as Lambert's heavy work load, caused the *Law Journal* to fall ever farther behind schedule. In 1967, the Board drafted Professor William Schwartz to produce the next volume. "The Governors approached me, saying that they had had complaints from members that the *Journal* had not come out on time for three years," Schwartz said. "They asked me to write Volume 32 on a contract basis." Schwartz restructured the *Journal's* contents, adding personal injury articles by Dean William Prosser, Ralph Nader, Professor Joseph Page of Georgetown University, and a criminal law article by Massachusetts Supreme Judicial Court Justice Paul Liacos. Tom Lambert authored an editorial and an article, "The Common Law is Never Finished." Schwartz wrote the remainder of the 800-page volume.

Lambert then returned to full editorial control. Succeeding volumes appeared about every two years, consisting largely of articles that had appeared in Lambert's "From the Editor's Scratchpad" column in the *ATLA Law Reporter*.

Those who have worked on a law review in law school recognize that such publications require a large staff devoting considerable time to the task. Allowing the *Law Journal* to remain with Lambert as a part-time effort in addition to his other responsibilities inevitably doomed the enterprise. Volume 37 was delivered to members in 1979, far behind schedule. Following unsuccessful attempts to rejuvenate it, the Board finally discontinued the publication.

In many ways, the demise of the *ATLA Law Journal* was a tragedy of lost opportunity. The *Journal* might have concentrated on soliciting and publishing high quality law review articles dealing with tort law, the jury, and access to justice, countering a distinct bias in favor of business and corporate defendants in the academic law reviews. The *Journal* disappeared just as the need for solid scholarship supporting the tort system and the right to trial by jury was becoming critical.

The Law Reporter

In 1957, the *NACCA Law Journal* was augmented by ATLA's first monthly newsletter, designed to provide more timely reports of appellate decisions and verdicts and settlements.

Early issues of the *NACCA Newsletter* bore a resemblance to high school newsletters of the time. Starting with 8-page, then 16-page issues, its un-

adorned typewriter font was printed on a different pastel-colored paper each month. The *Newsletter* in its early years included NACCA news from around the country, grainy photographs of the Board of Governors and NACCA officers, columns by the President (entitled "The Prez Sez"), and schedules of seminars and conventions.

From its inception, however, the *Newsletter's* primary mission was to report cases of interest and import to NACCA members. The very first issue in October 1957 reported decisions dealing with manufacturers' liability without privity, liability of suppliers of food products and pharmaceuticals, the application of *res ipsa loquitur* in exploding bottle cases, automobile accident cases, and construction site fatalities.

In that first issue, Lambert boldly stated that the *Newsletter's* purpose was "making our society a little better legal residence for the millions who are injured every year in our mechanized society." The notion that the law is not some immutable ideal, but an evolving organism was, at that time, radical enough. The idea that a publication summarizing recent cases should not simply be a passive chronicler of legal events, but should aim to affect positive change in the law, was astonishing. Lambert was unapologetic. Trial lawyers, he advised, must be able "to distinguish monuments from ruins," and must recall that "*stare decisis* should not be confused with the law of mortmain."

The *NACCA Newsletter* did not report progressive tort decisions merely to celebrate them, though Lambert did that with vigor. The *Newsletter*, in its creator's view, would actually play a part in bringing about progressive change. Lambert explained his purpose at the outset:

> The cases catalogued in each issue can be used as swords and shields, not as ornaments but as instruments. As a great salesman put it, 'Last year one million quarter-inch drills were sold—not because people wanted quarter-inch drills, but because they wanted quarter-inch holes.'

This mission quickly became the sole focus of the *Newsletter*. The ATLA news features were transferred to *P.I. & E. Bulletin*, the Public Information and Education Department's monthly newsletter, started in 1960 (and succeeded by the *ATLA Advocate* in 1986), and to *TRIAL* magazine, which first appeared in 1965. Even photographs were removed to other publications to give maximum space for the summaries of cases. The *Newsletter* soon grew to forty-eight pages, an optimum size for the type of printing presses the publication relied upon.

The actual preparation of each issue of the *NACCA Newsletter*, later rechristened the *ATLA Law Reporter*, was itself a remarkable process. Lambert's column, "From the Editor's Scratchpad," began as a page or so of his comments

on court decisions, along with reports from NACCA meetings and his speaking engagements. "Scratchpad" grew into a full-blown exegesis of headline cases. Most were appellate decisions that Lambert placed in the vanguard of tort law on the march. He took great care to compliment the author of the court's opinion for courage, compassion and clear-eyed perspicacity. He believed that judges needed to be reassured that they would not be "cast into darkness" for taking a progressive position, but would be "embraced by the fraternity of those who labor in the vineyards." Lambert produced a prodigious forty to fifty pages of closely-spaced handwritten prose, bristling with citations to cases, articles and treatises, occupying about ten pages in each issue. Lambert renamed his column "Tom on Torts" in August 1980.

The bulk of each issue of the *Newsletter*, and now the *ATLA Law Reporter*, published summaries of important cases in a growing list of legal areas. These were produced by an exceedingly bright and hardworking staff of young attorneys. Joe Page recalls that he and fellow assistant editor Paul Rheingold in the early 1960s would search through the West advance sheets as they arrived with reported decisions from all the federal and state courts. Each assistant editor specialized in several areas of law and composed summaries of the court opinions they deemed most significant. The current staff uses much the same process, though the number of topic areas has grown to twenty-five, and the advance sheets have been replaced by much more timely online sources of court opinions.

The reporting of verdicts and settlements is an extension of the lawyer-to-lawyer philosophy that undergirds ATLA's education program. The *Law Reporter* summaries include not only the amounts recovered, but also the facts, theories alleged, important discovery obtained, and experts who were employed. In short, they provide a resource for other trial lawyers with similar cases to build upon. Most reports are based on letters from the attorneys involved in the case, with added information solicited by the editors, who must select the most significant for publication. The editors also carefully index the published reports for researching attorneys.

The *Law Reporter* staff has maintained a remarkable record for accuracy in reporting trial-level cases. On one occasion, dissatisfaction with the decision to report a case generated its own lawsuit. The November 1977 issue presented a summary of *Dubree v. American Motorcycle Ass'n,* in which a spectator at a motocross race was severely injured when a motorcycle went out of control and crashed into the crowd. ATLA attorneys filed suit on her behalf against the race promoters, owners of the race track, and the manufacturer of the motorcycle and succeeded in obtaining a substantial settlement. The ATLA lawyers submitted the information to the *Law Reporter*, which formed the basis

for the published summary. The regular attorney for the plaintiff's family sued ATLA, alleging that publication of the facts of the case amounted to an invasion of plaintiff's privacy. The editors were disconcerted when they arrived at their offices to find a complaint naming them in a lawsuit seeking compensatory and punitive damages. They prepared a solid defense, and the court promptly dismissed the suit.

Over 40,000 case reports illustrate an almost limitless variety of tortious conduct. Perhaps the most bizarre is *Gonzales v. Sacramento Memorial Lawn*, 25 ATLA L. Rep. 348 (Cal. Super. Ct. 1982), handled by ATLA member Leo M. O'Connor. The mortuary negligently hired and failed to supervise a young woman, despite clear indications that she was mentally disturbed. She formed a strong emotional attachment to the body of a young man being prepared for burial. Shortly before the funeral, she hijacked the hearse containing the casket and fled to a secluded spot in the mountains, where police finally took her into custody. Necrophilia in a female is almost unheard of in the annals of psychiatry. The woman, who seemed not to have read the annals, admitted to twenty to forty previous acts of necrophilia. The family brought suit. Inexplicably, and despite the high standard of care expected of those who handle the human remains of loved ones, the defendant elected to go to trial. The jury returned a verdict for the plaintiff.

In 1976, the *ATLA Newsletter* became the *ATLA Law Reporter*. When ATLA moved its headquarters to Washington, D.C., in 1977, Tom Lambert chose to remain in Boston to teach Torts at Suffolk University Law School. He continued to write "Scratchpad" and "Tom on Torts," but the staff no longer benefited from his wisdom and guidance in their daily work. However, the young editors gained independence to make changes in the style and appearance of the publication to make it more readable and useful to practicing trial lawyers. To accommodate expanding areas of law, ATLA began the *Product Liability Law Reporter* in 1983 and the *Professional Negligence Law Reporter* in 1986.

In this way, the *ATLA Law Reporter* has kept the trial lawyer focused on the cutting edge, preserving every advance as a stepping stone for others to build upon. As Lambert foresaw, the *Law Reporter* helped trial lawyers push the law forward, even as it recorded their accomplishments. The *Law Reporter* has been cited in 18 court opinions. Chapter 5 describes the torts revolution that unfolded in the pages of the *Law Reporter*.

TRIAL Magazine

TRIAL made its debut in January 1965. The inaugural issue coincided with the change of the association's name from the National Association of

Claimants' Compensation Attorneys (NACCA) to the American Trial Lawyers Association. Like the new name, the new publication signaled the association's readiness to take on a prominent national role as the voice of the trial bar.

TRIAL was born of the vision of presidents Jacob Fuchsberg and Bill Colson for "a national legal news magazine, highlighting legal and societal stories from Congress, academia, community organizations, business entities, and labor." Its first purpose was to reach not only trial lawyers, but also the nation's opinion makers, including judges, legislators, law professors, and the media.

Turning this vision into reality proved to be a challenge. In August 1964, Richard Jacobson, director of ATLA's Public Information and Education Department, was given a starting budget of $50,000 and a three-month deadline for the first issue. Fuchsberg, Colson, and Jacobson met their deadline, and then held their breaths. "Our first issues [had to] have an immediate blockbuster impact," said Fuchsberg.

That first issue, which ran forty-eight pages, was sent to 22,000 ATLA members; to the news media; to state and federal elected officials; and to academic, community, and union groups. The focus was "Top of the News," which included coverage of a debate in New York State over the use of the juries in personal injury cases, an official report of the increasing profits for casualty insurance companies, and the American Medical Association's twenty-one "prevention commandments" for doctors concerned about malpractice suits.

The magazine also included columns on medicine, the judiciary, aviation, drugs, and consumer protection. ATLA President Bill Colson addressed the trial bar's role in the turbulent civil rights struggle. There was also a look at the drive for safer car design, "New Key to Halt Road Deaths," which featured commentary by Ralph Nader. Finally, "Offerings for the Busy Lawyer" listed recent books and reports that might prove useful in preparing personal injury cases.

Readers responded with more than eight hundred letters praising the new magazine.

The issues that followed examined environmental law, the rising crime rate, and antiwar protests, as well as medical malpractice and automobile insurance. *TRIAL* strove for a balanced presentation of issues, frequently publishing articles by authors whose views differed from ATLA's. Some notable authors included consumer advocate Joan Claybrook, civil rights attorney Morris Dees, law professor Alan Dershowitz, and District of Columbia Circuit Judge Patricia M. Wald. Contributors from the U.S. Congress have included Senators Ernest F. Hollings, Edward M. Kennedy, Howard Metzenbaum, and Sam Nunn.

In 1976, *TRIAL* expanded from bimonthly to a monthly publication. It began concentrating on its trial lawyer audience, rather than a general reader-

ship. Its focus gradually shifted from legal news stories to bylined articles on substantive issues of law and practical articles on conducting litigation. *TRIAL* staff worked continually to improve not only the content, but also the quality of the design, layout, and printing of the magazine.

Over the years, *TRIAL's* editorial staff has won numerous news writing awards for the monthly "News and Trends" column. *TRIAL* articles are frequently cited in judicial opinions, law reviews, and in the general press. Its imaginative covers, most often using a visual metaphor for the content inside, have also received important awards.

In the January 1984 issue, ATLA President David S. Shrager wrote, "We can feel justly proud of *TRIAL's* achievements." Nevertheless, Shrager saw room for improvement and dramatically overhauled the magazine. "I insisted there be a theme for every issue with ongoing articles of current interest—with institutional and book publishing advertising in front of the book and services in the back," he said. "I wanted not only substantive value but style."

Not every ATLA venture into publishing scored a success. In 1988, at the request of ATLA President Bill Wagner, ATLA launched *Everyday Law*. The new magazine was directed at the general public, explaining the law and providing practical advice for common problems faced by people. *Everyday Law* incurred development costs in the year and a half of its publication, but it failed to attract a significant readership. The Board of Governors in July 1989 decided to end the publication.

It is difficult to penetrate the crowded market of general circulation magazines. Most new starts fail. It may be, however, that *Everyday Law* was simply a bit ahead of its time. The 1990s witnessed a surge of interest in legal issues, reflected in the popularity of CourtTV, law-related network television shows, and law-related Internet sites. The future may yet see ATLA providing information directly to the public concerning their legal system and their legal rights.

The Exchange

One could say that the ATLA Exchange began on a shoestring. In 1958, President Al Julien had established what would now be called a database—product liability case information carefully noted on index cards and stored in shoeboxes in his New York office. All ATLA members had the opportunity to contribute to it; every member was entitled to obtain information from it. NACCA Governor Arnold Elkind of New York recognized that this Products Liability Exchange was a valuable asset to the trial bar.

In 1961, President Edward Rood insisted that this resource be transferred from private ownership to NACCA's control. Julien acquiesced. President Fuchs-

berg named Arnold Elkind Chairman of the new ATLA Products Liability Exchange. Elkind expanded the reporting of product defects to the Exchange, forged cooperative relationships with consumer organizations, and assisted members testifying in legislative hearings on product safety. "My desire through these measures," Elkind said, "was to set in motion machinery to make ATLA the leading public service organization devoted to consumer protection against defective products and dangerous drugs."

In 1970, Elkind was appointed by President Nixon to be Chairman of the National Products Safety Commission. He conducted a nationwide series of hearings on unsafe products and wrote the final report to the President and Congress, which placed the blame for a large number of household accidents on defective products. The report led to the formation of the Consumer Product Safety Commission. ATLA's trial lawyers were witnesses at many of the public hearings, describing their actual product liability court cases. Upon his retirement from the Commission, Elkind donated all the investigative papers on unsafe products to the Exchange, doubling its size.

A great deal of staff effort has been devoted to building the Exchange files. The key has been the same lawyer-to-lawyer sharing of information that has powered much of ATLA's education and information activities. An attorney whose client was injured by a punch press, for example, can obtain a file that includes summaries of other punch press lawsuits located by the Exchange as well as a list of other inquirers handling punch press cases. The bulk of the file consists of materials submitted by ATLA attorneys who have handled similar cases. This might include the names and deposition testimony of design and safety experts, documents obtained in discovery from the manufacturer, and other useful information. The scope of the Exchange has also been expanded to include medical malpractice.

The advent of computers and the Internet made it possible to transform the Exchange into an online resource. More information and more useful information can be delivered faster to ATLA members. Even more sophisticated methods of sharing information surely lie ahead.

The Exchange philosophy has always been that requiring each plaintiff's attorney to reinvent the wheel is not only inefficient; it prevents some injured victims from obtaining justice at all. By making information and expertise readily available to the plaintiff's lawyer, the Exchange plays an important role in protecting access to justice for tort victims.

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Trial Lawyers' Legacy: A Bill of Rights for a Safer Society

As the 1950s drew to a close, tort lawyers stood on the threshold of a revolution. The common law, accustomed to evolution at a glacial pace, was changing rapidly. And NACCA lawyers were at the front lines.

Modern tort law, forged in the Industrial Revolution, made fault the basis for liability. But tort lawyers in the 1950s knew that the law they inherited was largely a rule of nonliability. Nineteenth-century judges had protectively circumscribed the liability of America's fledgling industries. A century later, the law of torts was still held hostage by powerful special interests. As Verne Lawyer said most succinctly, "the 1950s were a wasteland of tort law."

It was a time, David Shrager points out, when too many of those who were at fault in causing injury were shielded from responsibility for their conduct. "Contributory negligence in its harshest form characterized the common law in most states; assumption of the risk was the rule rather than exception in tort cases arising from construction site accidents. The medical profession's conspiracy of silence thwarted meritorious malpractice cases, and *caveat emptor* was the order of the day in products liability suits." Antiquated immunities also protected governmental entities, property owners, and charitable hospitals.

In short, declared Harry Philo angrily, the law granted to the country's most powerful special interests "a legal license to maim and kill."

Those powerful interests were not inclined to yield their special advantages without a fight. To wage and win that battle became ATLA's chief mission. As stated by Harry Gair, "The coordinating purpose of a national organization of mature lawyers is not the achievement of larger verdicts. Their unifying aim must be combating the injustice that exists in the laws and antiquated procedures as it affects the victims of torts." This was the purpose of ATLA's educational program.

The ATLA lawyers waged their battle on many fronts. During the period from about 1960 to 1984, ATLA lawyers reoriented the law's fundamental outlook from the protection of privilege to the protection of people. "What we were doing," said Ted Warshafsky, "was to humanize the industrial revolution."

This Chapter describes the breadth and pace of the tort revolution, reflected in the appellate and trial level cases reported in the *Newsletter/Law Reporter*. For all the changes it brought, the tort revolution did not tamper with the foundations of the common law. Few truly new torts were minted. Courts generally did not impose liability on previously innocent conduct. Instead, the victories for injured victims consisted in tearing down the barriers, immunities and privileges that had allowed defendants to escape responsibility for their misconduct. Trial lawyers were clearing the way for juries to hold wrongdoers accountable.

The result has been that companies and industries, acting in their own economic self-interest, have taken steps to minimize their liability by maximizing safety. It is sometimes said that making the price of a product or service reflect liability costs forces the consumer to buy an insurance policy that pays off only if the consumer is injured. This is nonsense. What Americans are buying is accountability. It pays off every time a person is not injured by a product or service because the company has decided to invest in safety.

By the end of these twenty-five years, ATLA lawyers had constructed a Bill of Rights for a Safer Society. These are cases—and lawyers—that truly made a difference.*

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* A few words about this survey of the law: The cases cited here were chosen from over 22,000 reports in the *NACCA News Letter* and *ATLA Law Reporter* in 1960-84. They are not necessarily the first or the most famous in their particular fields. In some instances, the law stated in these cases has been limited or overturned by subsequent decision or legislation.

The names in **boldface** are ATLA members who were counsel in the cases. Our intent is to recognize members who played a role in the progressive development of the law. To them we owe a great debt. Unfortunately, records are neither complete nor infallible. To those who deserve credit, but are not named, we sincerely apologize.

I. The Right to Safe Products

The adoption of strict products liability was, Tom Lambert stated, "the most spectacular sunburst of creative activity in the history of the common law." Because the hazards posed by dangerous products affect nearly every aspect of modern life, this development has had a profound impact on the daily lives of all Americans.

The doctrine's basic elements, negligence and warranty, were not new in 1960. But they had long since become unworkable in an era of mass production, marketing and distribution. Tort law stubbornly clung to liability theories developed for a marketplace of tinkers and traders. Few consumers purchased goods directly from the manufacturer, yet warranty law insisted on privity of contract. Negligence liability demanded specific proof of carelessness of someone working for the remote manufacturer, proof that was generally within the exclusive control of the defendant. The law needed to recognize that American industry had outgrown the special protections put in place during its infancy.

The Sound of Citadels Falling

The modern products liability era started with the 1960 landmark decision in a case brought by a NACCA trial lawyer, Nathan Baker. *Henningson v. Bloomfield Motors* allowed a plaintiff, who was injured when the steering mechanism in her car failed, to sue the manufacturer in implied warranty without privity of contract or proof of negligence.[29]

Warranty, however, is a contract action. There was a growing conviction that product safety was a matter of societal interest beyond the bargaining parties. Dean William Prosser forecast the rise of strict tort liability in his landmark article, "The Assault Upon the Citadel."[30] That assault came quickly. The California Supreme Court in *Greenman v. Yuba Power Products*, declared in an opinion by Justice Roger B. Traynor that manufacturers shall be strictly liable in tort to those injured by defective products.[31] Soon after, in 1965, the American Law Institute, with Prosser serving as Reporter, articulated a standard

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[29] Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A 2d 69, 3 NACCA News L. No. 8, at 3 (1960)(**Nathan Baker**).

[30] William L. Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960).

[31] Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1963), 6 NACCA News L. 35 (1963)(**William F. Reed**).

of strict liability in tort in Restatement (Second) of Torts, Section 402A, for "any product in a defective condition unreasonably dangerous to the user or consumer."

The citadel of privity did not fall suddenly or without warning. As in many areas, courts allowed some deserving plaintiffs access to justice by devising exceptions and limitations. The immunities and barriers to liability would gradually erode until a forward-looking court swept them away entirely. In the case of defective products, much of the erosion was occasioned by the lowly soft drink bottle, which not only exploded with alarming frequency,[32] but also surprised consumers with a variety of sickening unadvertised contents.[33] It was in one exploding bottle case in 1944, argued by Melvin Belli, that Justice Traynor explored the notion of strict tort liability in a concurring opinion.[34] The majority, however, would venture only so far as to permit plaintiffs to rely on *res ipsa loquitur* to reach the jury on the negligence issue. Courts not only broadened the scope of *res ipsa*, but also recognized a higher duty and an exception to the privity rule for suppliers of food, drink, and cosmetics.[35] In another Belli case, an appellate court extended warranty without privity to the manufacturer of polio vaccine.[36] By the time the California Court decided *Greenman*, and certainly by the time the ALI drafted §402A, the citadel of privity was already collapsing.

ATLA lawyers around the country urged their courts to adopt strict liability, arguing that manufacturers who put products into the stream of commerce are in the best position to minimize their dangers and to spread the cost of in-

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[32] Roscoe Pound, *The Problem of the Exploding Bottle*, 40 B.U. L. Rev 167 (1960).

[33] Coast Coca-Cola Bottling Co. v. Bryant, 112 So. 2d 538 (Miss. 1959), 3 NACCA News L. No. 10 at 14 (1960)(**Sanford E. Morse**)(roach); Macon Coca-Cola Bottling Co. v. Chancey, 112 S.E.2d 811 (Ga. App. 1960), 3 NACCA News L. No. 10 at 12 (1960)(**S. Gus Jones** and **Neal D. McKenney**)(cigar butt); Tetreault v. Coca-Cola Bottling Co., 181 A.2d 98 (R.I. 1962), 5 NACCA News L. 172 (1962)(**Vincent J. Chisholm**)(mouse); Shoshone Coca-Cola Bottling Co. v. Dolinski, 420 P.2d 855 (Nev. 1966), 10 ATLA News L. 22 (1964)(**William L. Hammersmith** and **Loyal Robert Hibbs**)(mouse); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970), 13 ATLA News L. 347 (1970)(**Jack H. Simmons**)(prophylactic).

[34] Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (1944).

[35] Swift & Co. v. Wells, 110 S.E.2d 203 (Va. 1959), 3 NACCA News L. No. 1 at 3 (1959)(**Manny Emroch**)(Virginia rejects privity rule in food cases); Greenberg v. Lorenz, 183 N.Y.S.2d 46 (N.Y. App. Div. 1959), 4 NACCA News L. No. 3 at 22 (1961)(**Alfred S. Julien**)(strict liability of grocer for food containing sharp metal pieces.); Bathory v. Proctor & Gamble Dist. Co., 306 F.2d 22 (6th Cir. 1962), 5 NACCA News L. 162 (1962)(**Saul M. Leach**)(scalp injuries caused by permanent wave solution).

[36] Gottsdanker v. Cutter Laboratories, 6 Cal. Rptr. 320 (App. Ct. 1960), 3 NACCA News L. No. 11 at 6 (1960)(**Melvin M. Belli, Lou Ashe, Richard F. Gerry**).

juries. By the end of the next decade, nearly every state had adopted strict products liability.[37]

Opponents loudly condemned the doctrine as a heresy that eliminated fault as a basis of liability. A stern tort critic, Professor George Priest, accused Prosser, Traynor and others of conspiracy to replace fault with a workers' compensation-type regime in all areas of tort—product liability being only the first step toward absolute liability.[38] Later, tort reformers would claim that strict liability eliminated fault and was responsible for an "insurance crisis."[39]

The fact is that strict liability strengthened the fault principle by removing outdated barriers that shielded makers of dangerous products. The doctrine made little or no change in the standard of care for manufacturers. Liability for manufacturing defects was about the same as it had been under warranty law, but defendants could no longer hide behind disclaimers, notice requirements, and lack of privity.

Liability for design defects stirred considerably more debate among courts and commentators, due in part to the inartful drafting of the Restatement. Many courts applied the standard of whether the product was dangerous beyond the expectation of the ordinary consumer.[40] Others used the familiar negligence calculus of a risk-utility balancing of various factors.[41] However

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[37] Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965), 8 NACCA News L. 183 (1965)(**Leonard M. Ring**); McCormack v. Hankscraft, 154 N.W.2d 488 (Minn. 1976), 10 ATLA News L. 363 (1967)(**John F. Eisberg** and **Solly Robins**); Clary v. Fifth Avenue Chrysler Center, 454 P.2d 244 (Alaska 1969), 12 ATLA News L. 163 (1969)(**Theodore R. Dunn** and **Warren R. Matthews, Jr.**); Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969), 12 ATLA News L. 164 (1969)(**Sam L. Levinson** and **Ronald J. Bland**); Bolm v. Triumph Corp., 305 N.E.2d 769 (N.Y. 1973), 17 ATLA News L. 34 (1974)(**Paul W. Beltz**); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973), 17 ATLA News L. 35 (1974)(**Dennis L. Tomlin**); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976), 19 ATLA News L. 378 (1976)(**Robert Orseck; William M. Hicks** for AFTL as amicus); Back v. Wickes, 378 N.E.2d 964 (Mass. 1978), 21 ATLA L. Rep. 450 (1978)(**Albert P. Zabin**)(warranty without privity). By 1986, only Delaware, Virginia, and North Carolina had not adopted strict liability.

[38] George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,* 14 J. Legal Stud. 461 (1985).

[39] *See*, A Report of the Tort Policy Working Group of the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (U.S. Dept. of Justice, Feb. 1986).

[40] Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979), 23 ATLA L. Rep. 36 (1980)(**Thomas M. Reavley**, **Ronald D. Krist**, and **Harvill E. Weller**)(consumer expectations test).

[41] Morningstar v. Black and Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979), 22 ATLA L. Rep. 370 (1979)(**Stanley E. Preiser, Donald R. Wilson, Monty L. Preiser, R. Joseph Zak**, and **Ted M. Kanner**)(risk utility test). The California Supreme Court devised a standard that made use of both tests: Barker v. Lull Engineering Co., 573 P.2d 443 (Cal. 1978), 22 ATLA L. Rep. 150 (1979)(**Frank S. Hills**; **David B. Baum** and **Leonard Sacks** for California TLA as amicus).

phrased, the consensus that emerged amounted to a negligence standard for design defects that eased the evidentiary problems faced by plaintiffs suing a remote manufacturer. Courts uniformly emphasized that strict liability did not impose absolute liability. Liability was "strict" in the sense that plaintiffs need not prove negligent conduct; the unreasonably dangerous condition of the product spoke for itself.

In sum, as Prosser acknowledged, very few injury-causing products would subject defendants to strict liability that could not have resulted in negligence or warranty liability.[42] This was also the experience of trial practitioners.[43] Even Professor Priest, in a rare moment in legal literature, admitted error. Further research, he wrote, had convinced him that Prosser and other supporters of §402A had intended only to remove unrealistic barriers that made it difficult for plaintiffs to prove liability.[44]

Hard to Keep a Good Idea Down

Following acceptance of strict liability and its underlying policy of consumer protection, ATLA attorneys urged its extension to wide variety of situations. Strict liability was extended beyond manufacturers and sellers to others who placed defective products into the steam of commerce.[45] The category of "prod-

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[42] William Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 803 (1966).

[43] Paul Rheingold, *Expanding Liability of Product Suppliers*, 2 Hofstra L. Rev. 521, 531 (1974); James Beasley, PRODUCT LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 303-39 (1981).

[44] George L. Priest, *Strict Liability: The Original Intent*, 10 Cardozo L. Rev. 2301 (1989).

[45] Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769 (N.J. 1965), 8 ATLA News L. 221 (1965)(**Bernard Chazen**)(lessor or bailor); Price v. Shell Oil Co., 466 P.2d 722 (Cal. 1970), 13 ATLA News L. 146 (1970)(**Arne Werchick** and **Jack H. Werchick**)(commercial lessors and bailors); Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976), 19 ATLA News L. 51 (1976)(**John M. Bader** and **Robert Jacobs**)(commercial lessor of rental truck liable to injured bystander when defective brakes failed); Hanberry v. Hearst Corp., 81 Cal. Rptr. 519 (App. 1969), 12 ATLA News L. 467 (1969)(**Roy B. Woolsey**)(liability of Good Housekeeping magazine for giving seal of approval to shoes that were defective and caused fall); Kosters v. Seven-Up Co., 595 F.2d 347 (6th Cir. 1979), 22 ATLA L. Rep. 153 (1979)(**Michael J. Roberts**)(franchisor liability for defective design of soft drink carton bearing its name); Dyches v. Benjamin Franklin Federal Savings & Loan, 22 ATLA L. Rep. 129 (Ore. Cir. Ct. 1979)(**Gary E. Rhoades** and **Charles P. Duffy**)(supplier liability of bank that gave depositors discount on defective bicycle); Hamilton v. Treadwell Ford, 27 ATLA L. Rep. 52 (Ala. Cir. Ct. 1984)(**James A. Yance** and **Richard Bounds**)(insurance company that sold totaled car with sticking accelerator back into stream of commerce is subject to strict product liability to pedestrian injured when driver lost control).

ucts" expanded.[46] Most significantly, the doctrine was extended to protect not only purchasers and consumers but bystanders and anyone else who might be harmed by a defective product.[47]

Much of the trial lawyers' work was battling against defenses that were inconsistent with the goal of making products safer. Courts held, for example, that the consumer's failure to discover the product's defect or guard against it is no defense to strict liability.[48] Nor does misuse of the product absolve the manufacturer of liability where the misuse was reasonably foreseeable.[49] Courts also rejected the "open and obvious danger" defense, for the sensible reason that the law should discourage misdesign, rather than encourage it in its most obvious

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[46] Cunningham v. McNeal Memorial Hosp., 266 N.E.2d 867 (Ill. 1970), 13 ATLA News L. 414 (1970)(**Nat P. Ozmon; Edward Kionka** for ATLA as amicus)(strict product liability applied to blood transfusion tainted by hepatitis); Sisk v. Times Mirror Co., 19 ATLA News L. 430 (Ariz. Super. Ct. 1976)(**Tom Davis** and **Burton J. Kinerk**)(map maker liability for aviation chart that failed to show mountain); Halstead v. United States, 535 F. Supp. 782 (D. Conn. 1982), 25 ATLA L. Rep. 344 (1982)(**James M. Kearns, John J. Cotter,** and **Thomas H. Cotter**)(erroneous navigational map as defective product); Dubin v. Michael Reese Medical Ctr., 393 N.E.2d 588 (Ill. App. 1979), 22 ATLA L. Rep. 296 (1979)(**Nat P. Ozmon**)(excessive x-ray radiation as a product, not service).

[47] Swearingin v. Sears, Roebuck & Co., 376 F.2d 637 (10th Cir. 1967), 10 ATLA News L. 125 (1967)(**John E. Shamberg, Charles S. Schnider, Joseph P. Jenkins**)(passing police officer struck in eye by debris thrown by Sears lawnmower); Elmore v. American Motors Corp., 451 P.2d 84 (Cal. 1969), 12 ATLA News L. 53 (1969)(**Edward L. Lascher**)(where defective Rambler went out of control and crashed into another automobile, the occupants of the other car could sue the manufacturer of the Rambler); Guarino v. Mine Safety Appliance Co., 255 N.E.2d 173 (N.Y. 1969), 13 ATLA News L. 34 (1970)(**Aaron J. Broder**)(plaintiff injured while trying to rescue a coworker whose gas mask failed could sue mask manufacturer); Court v. Grzelinski, 379 N.E.2d 281 (Ill. 1978), 22 ATLA L. Rep. 126 (1979)(**Nat P. Ozmon** and **Mark Novak**)(fireman injured while fighting fuel-fed auto fire could sue automaker); Macaluso v. Henderson & Assoc., Ariz. Maricopa County, Super. Ct., 29 ATLA L. Rep. 11 (1986)(**Larry Anderson** and **Jack Anderson**)(third parties injured in collision caused by negligent supplier of trailer tire); Mahoney v. Carus Chem. Co., 510 A.2d 4 (N.J. 1986), 29 ATLA L. Rep. 244 (1986)(**William J. Cook**)(product supplier liable to injured fireman).

[48] O.S. Stapley Co. v. Miller, 447 P.2d 248 (Ariz. 1968), 12 ATLA News L. 66 (1969)(**Samuel Langerman** and **Robert D. Myers**); Lippard v. Houdaille Indus., 715 S.W.2d 491 (Mo. 1986), 29 ATLA L. Rep. 436 (1986)(**Stephen F. Meyerkord**).

[49] Moran v. Faberge, Inc., 332 A.2d 11 (Md. 1975), 18 ATLA News L. 72 (1975)(**Martin H. Freeman**)(teenager poured perfume around lit candle); Harless v. Boyle-Midway Div., 594 F.2d 1051 (5th Cir. 1979), 22 ATLA L. Rep. 465 (1979)(**Jackson G. Beatty**)(teenager inhaled Pam cooking spray to get high and died, manufacturer liable for inadequate warning where misuse was foreseeable in view of 45 prior similar deaths); Fitzsimmons v. General Motors Corp., 24 ATLA L. Rep. 290 (E.D. Ark. 1980)(**Sidney S. McMath** and **Sandy S. McMath**)(settlement for injuries in crash of TransAm where driver lost control during misuse invited by GM advertising).

form.[50] The only accepted defense was assumption of the risk in its narrowest sense: where the user voluntarily exposes himself or herself to a known risk.[51] Additionally, courts held, conformity to customary industry practice or standards did not necessarily render a product nondefective.[52]

The increased accountability of manufacturers has had a tremendous impact on safety in all areas of everyday life. About half of product liability cases involve workplace injury, enabling many workers to obtain substantially more in damages than is provided by workers' compensation. Automobiles and pharmaceuticals were improved. Household products, including many that were especially dangerous to children, have become safer.[53]

The Jury's Loudest Message: Punitive Damages

In most cases, the law demands no more than that those responsible for unreasonably dangerous products compensate those they have harmed. But tort law also

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[50] Micallef v. Miehle, 348 N.E.2d 571 (N.Y. 1976), 19 ATLA News L. 140 (1976)(**Melvin Block**); Uloth v. City Tank Corp., 384 N.E.2d 1188 (Mass. 1978), 22 ATLA L. Rep. 98 (1979)(**Frederic N. Halstrom**)(liability for negligent design of garbage truck with unguarded shear point, an open and obvious danger); Holm v. Sponco Mfg. Co., 324 N.W.2d 207 (Minn. 1982), 26 ATLA L. Rep. 104 (1983)(**Joseph W. Anthony**)(worker operating aerial ladder electrocuted by power line, rejecting open and obvious defense).

[51] Luque v. McLean, 501 P.2d 1163 (Cal. 1972), 15 ATLA News L. 490 (1972)(**Robert E. Cartwright,** CTLA as amicus)(foot mangled by unguarded portion of power lawnmower; contributory negligence, open and obvious, assumption of risk not applicable in strict liability. "The only form of plaintiff's negligence that is a defense to strict liability is voluntarily and unreasonably proceeding to encounter a known danger."); Olson v. A.W. Chesterton, 256 N.W. 2d 53 (N.D. 1977), 21 ATLA L. Rep. 2 (1978)(**Lowell O'Grady, Ralph S. Oliver** and **Alvin A. Anderson**)(similar); Correia v. Firestone Tire & Rubber Co., 446 N.E. 2d 1033 (Mass. 1983), 26 ATLA L. Rep. 153 (1983)(**Robert V. Costello**)(comparative fault not applicable to strict liability, defenses limited to voluntary assumption of known risk or unforeseeable misuse).

[52] Bexiga v. Havir Mfg. Co., 290 A.2d 281 (N.J. 1972), 15 ATLA News L. 235 (1972)(**Robert J. Cardonsky**)(punch press); Rexrode v. American Laundry Press Co., 674 F.2d 826 (10th Cir. 1982), 25 ATLA L. Rep. 64 (1982)(**Jerry K. Levy**).

[53] Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962), 5 NACCA News L. 211 (1962)(**Stanley J. Bangel**)(death of child from drinking furniture polish); Moore v. Jewell Tea Co., 253 N.E.2d 636 (Ill. App. 1969), 12 ATLA News L. 495 (1969)(**James A. Dooley**)(exploding can of Drano drain cleaner); Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), 18 ATLA News L. 421 (**John A. Lloyd, Jr.**)(television set which burst into flames due to electrical design flaw); Tucker v. Okla Homer Smith Mfg. Co., 24 ATLA L. Rep. 86 (E.D. Wis. 1980)(**Robert A. Slattery** and **Dennis M. Grzezinski**)(baby crib side rail collapsed, injuring infant); Cunningham v. Quaker Oats Co., 24 ATLA L. Rep. 249 (W.D.N.Y. 1981)(**Edward M. Swartz**)(award for brain damage to infant who choked on Fisher Price toy figure).

recognizes that certain misconduct is so egregious and blameworthy that society should not tolerate it. The jury is authorized to impose punitive damages to punish the defendant and deter others from engaging in similar misconduct. It is one of the rare circumstances when ordinary citizens are empowered to send a message that even the most powerful corporations must heed. Indeed, as discussed in Chapter 2, one reason the first Americans insisted on the Seventh Amendment was to preserve this power of the jury to assess punitive damages.

Any doubts that punitive damages could be combined with strict liability were quickly resolved. However characterized—egregious misconduct, willful and wanton misconduct, or gross negligence—jury awards of punitive damages have almost invariably involved manufacturers who knew the dangers of their product but put them on the market anyway. In many instances, the manufacturer also concealed the dangers from consumers and government safety agencies.[54] Punitive damages play a particularly important role in product safety. As one court explained:

> Compensatory damages are often foreseeable as to amount . . . . Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.[55]

The classic example was the Ford Pinto, discussed in Chapter 6.[56]

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[54] Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (Ct. App. 1967), 10 ATLA News L. 310 (1967)(**John Wyn Herron** and **Dennis B. Conklin**)(maker of MER/29 ignored indications that drug could cause eye cataracts and concealed information from FDA); Roginsky v. Richardson-Merrell, Inc., 9 ATLA News L. 101 (S.D.N.Y. 1966)(**William F.X. Geoghan**); Moore v. Jewel Tea Co., 253 N.E.2d 636 (Ill. App. 1969), 12 ATLA News L. 495 (1969)(**James A. Dooley**)(defendant's prior knowledge of explosive hazard of drain cleaner); Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984), 27 ATLA L. Rep. 242 (1984)(**Douglas E. Bragg**)(defendant had actual knowledge of risk of pelvic inflammatory disease associated with its Dalkon Shield, but concealed information and provided no warnings); Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), 29 ATLA L. Rep. 138 (1986)(**H. Douglas Nichol**)(asbestos supplier not only knew of hazards and failed to warn, but affirmatively suppressed information).

[55] Fischer v. Johns-Manville Corp., 512 A.2d 466, 477 (1986), 5 PLLR 148 (1986)(**Karl Asch**).

[56] Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981), 24 ATLA L. Rep. 442 (1981)(**Arthur N. Hews, Mark P. Robinson, Ellis J. Horvitz, Michele Van Cleve, Gerald H.B. Kane**, and **Byron M. Rabin**)(automaker decided it was cheaper to pay compensatory damages than install safeguards costing under $10 to prevent post-collision fires).

For all the controversy surrounding punitive damages in products liability cases, the threat of potentially large awards has been powerful beyond their actual numbers. Juries rendered only 355 punitive damage awards in product liability cases between 1965 to 1990, many of which were reduced by the courts.[57] Nevertheless, those cases involved some of the most dangerous products in America.

Dalkon Shield

The story of the Dalkon Shield contraceptive device is one of unbelievable arrogance. Beginning in 1970, the A.H. Robins Co. sold more than 2 million of these IUDs in the United States. Unknown to the women and their doctors, but well known to Robins, was that the device's multi-filament nylon tail string acted as a wick for bacteria, causing serious pelvic inflammatory disease. Robins withdrew the Dalkon Shield from the market in 1974, following numerous reports of infections and septic abortions associated with it.

By 1975, there were more Dalkon Shield lawsuits in the federal courts than any other type of product liability case, outnumbering even asbestos cases. According to Paul Rheingold, Trustee of the Dalkon Shield Litigation Group, documents uncovered by the Group established that Robins not only knew of this danger but misled doctors and failed to warn patients—misconduct that warranted punitive damages.[58] The plight of the victims finally convinced Congress to enact the Medical Device Amendments of 1976, which placed medical devices within the regulatory jurisdiction of the FDA.

The egregiousness of Robin's actions is reflected in a scathing denunciation delivered by District Judge Miles W. Lord to Robins's president and top officials, seated in the courtroom before him in 1984.

> If one poor young man were, without authority or consent, to inflict such damage upon one woman, he would be jailed for a good portion of the rest of his life. Yet your company, without warning to women, invaded their bodies by the millions and caused them injuries by the thousands.

In 1985, Robins came to an agreement with the Dalkon Shield Litigation Group to set up a $2.5 billion trust to compensate up to 200,000 women victims.

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[57] Michael Rustad, DEMYSTIFYING PUNITIVE DAMAGES IN PRODUCTS LIABILITY CASES: A SURVEY OF A QUARTER CENTURY OF TRIAL VERDICTS (Roscoe Pound Foundation 1991).

[58] Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984), 27 ATLA L. Rep. 242 (1984)(**Douglas E. Bragg**)(upholding punitive award).

Flammable Fabrics: Dressed to Kill

The very notion of using flammable fabrics to make pajamas and nightgowns for children seems unbelievably irresponsible. Yet for years the makers of children's sleepwear did just that. A dismaying stream of cases told the stories of children who brushed against stoves or heaters and were quickly engulfed in flames.[59] Those who survived endured excruciating pain and a lifetime of disfigurement. Yet, manufacturers and retailers ignored calls from within their own industry to use flame-retardant materials. They argued lamely that their products complied with the 1953 Federal Flammable Fabric Act, a standard they knew was so lax that virtually any fabric, even ordinary newspaper, could pass it. A jury finally decided that marketing highly flammable sleepwear for children warranted punitive damages.[60] The Flammable Fabrics Act standard was thereafter amended to require fire-retardant material in sleepwear.

Football Helmets

Harry Philo was angry when he sat down to write "Second Down for Football Safety," for the August/September 1969 issue of *TRIAL*. He castigated helmet manufacturers Rawlings, Wilson, Spaulding, and MacGregor for refusing to fund research and testing of their products. Over the previous thirty-five years, he stated, four hundred professional, college, and high school football players had died from head injuries and five to ten thousand suffered severe concussions because the helmet they were wearing "does not protect against reasonably foreseeable blows." There were thirty-six deaths in 1968 alone.

In a subsequent *TRIAL* article appearing in January 1977, Philo's mood had not much improved. Newer helmets were better at preventing impact to the head. But the designs, particularly the fixed face mask, transferred much of the force of impact to the neck area, delivering "a karate chop to the spine." At a meeting attended by the leading helmet manufacturers, one representative

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[59] Dowd v. Riegel Textile Corp., 10 ATLA News L. 60 (N.H. Super. Ct. 1966)(**Stanley M. Brown**); Roman v. Riegel Textile Corp., 15 ATLA News L. 171 (Conn. Super. Ct. 1972)(**Vincent M. Zanella, Jr.**); Ross v. John's Dept. Stores Corp., 464 F.2d 111 (5th Cir. 1972), 15 ATLA News L. 362 (1972)(**Adolph J. Levy**); Stillwagon v. Sawyer Mills Factory Outlet, 20 ATLA L. Rep. 396 (N.H. Super. Ct. 1977)(**Robert Hinchey, James H. Schulte** and **William A. Mulvey, Jr.**); Stich v. K-Mart Apparel, 23 ATLA L. Rep. 60 (Wis. Cir. Ct. 1979)(**Robert L. Habush**).

[60] Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn. 1980), 23 ATLA L. Rep. 250 (1980)(**James R. Tschida**)(punitive damages for child's burns when flammable pajamas ignited; compliance with Flammable Fabrics Act no defense).

complained, "All we are doing is turning head injuries into neck injuries." In 1975, there were an estimated nineteen deaths and forty to fifty spinal cord injuries, including quadriplegic injuries. Liability lawsuits focused attention on a problem that had remained hidden for too long.[61] Colleges adopted football helmet safety standards in 1978 and high schools in 1980. *Sports Illustrated* reported in 1990 that for the first time in sixty years no high school or college football player had died from a head or spinal injury. Why? One factor, according to *Sports Illustrated*, was the improvement in helmet safety driven by tort liability.

Thousands of Americans alive today—we cannot know who they are—can walk and work and raise families of their own because trial lawyers fought to hold the makers of dangerous products accountable for safety.

II. The Right to Workplace Safety

The safety of workers, the first focus of NACCA, remained an important concern for trial lawyers during 1960-84. Attorneys for workers aggressively pursued liberal construction and application of workers' compensation statutes. They fought attempts by carriers to deny benefits on grounds that job-related injuries were not suffered "in the course of" employment because they occurred during a lunch break or were the result of horseplay among coworkers, successfully arguing that these were foreseeable aspects of the job.[62] They also made inroads against the "going and coming" rule, which is premised on the notion that a worker should not be covered while traveling to and from work.[63]

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[61] Wittkopp v. Ridell, Inc., 11 ATLA News L. 314 (Mich. Cir. Ct. 1967)(**Harry M. Philo**)(settlement for high school player for brain damage resulting in permanent coma); Stead v. Riddell, Inc., 19 ATLA News L. 470 (S.D. Fla. 1975)(**Carl Rentz**)(verdict for paralyzing injury to high schooler); Monahan v. Wilson Sporting Goods Co., 21 ATLA L. Rep. 469 (D. Mass. 1978)(**Michael E. Mone**)(settlements for two high school players rendered quadriplegic); Wright v. Ridell, Inc., 24 ATLA L. Rep. 375 (E.D. Ky. 1981)(**Francis D. Burke, Kathryn Burke, Stephen W. Owens**)(verdict for high school player who was rendered quadriplegic).

[62] State Compensation Ins. Fund v. Workers Comp. App. Bd., 434 P.2d 619 (Cal. 1967), 11 NACCA News L. 90 (1968)(**Theodore Groezinger**)(injury during employer-permitted swim during coffee break); Royall v. Industrial Comm., 476 P.2d 156 (Ariz. 1970), 14 NACCA News L. 89 (1971)(**Stephan S. Gorey**)(injury in fall while making personal phone call during coffee break); Carvalho v. Decorative Fabrics Co., 366 A.2d 157 (R.I. 1976), 20 ATLA L. Rep. 143 (1977)(**Howard I. Lipsey**)(injury due to horseplay on the job may be compensable).

[63] Snyder v. General Paper Corp., 152 N.W.2d 743 (Minn. 1967), 11 NACCA News L. 91 (1968)(**Paul D. Tierney**)(death from choking on dinner during business trip compensable where employer provided meal costs); Smith v. Workmen's Compensation Bd., 447 P.2d 365 (Cal.

Perhaps the most significant accomplishment has been to expand the types of compensable injuries to include disease, repetitive motion disability, and job-related stress.[64]

Trial lawyers fought to extend workers' compensation coverage to farm workers and other unprotected groups.[65] They also brought tort remedies to bear on situations where the workers' compensation program fell short in protecting employees. For example, courts have permitted workers to sue the workers' compensation insurance carrier for negligence in inspecting the workplace for hazards[66] or for the carrier's bad faith denial or delay of benefits.[67]

Workers' compensation benefits are notoriously low, and many claimants would fare better if they could bring an action in tort. Although workers' compensation statutes provide that the statutory scheme is the worker's exclusive remedy against an employer, creative advocacy by trial lawyers has opened some avenues back into the tort system. Employers may face tort liability for willfully or recklessly exposing workers to hazards or fraudulently concealing

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1968), 12 ATLA News L. 43 (1969)(**Sydney Halem**)(requirement that employee bring his own car to work made injury on the way to work compensable); Gordon v. H.C. Smith Co., 612 P.2d 688 (Mont. 1980), 23 ATLA L. Rep. 252 (1980)(**Thomas M. Keegan**)(electrician entitled to compensation for injury while traveling between work sites where employer provided a travel allowance).

[64] Ricciuiti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960), 3 NACCA News L. No. 11, at 3 (1960)(**Paul F. Shaughnessy**)(beryllosis developed while making neon signs); Koenig v. General Foods, 21 ATLA L. Rep. 441 (N.J. Super. Ct. 1978)(**Adrian I. Karp**)(employee's paralysis caused by stress after being accused of theft by employer and subjected to lie detector); Albanese's Case, 389 N.E.2d 83, 22 ATLA L. Rep. 198 (1979)(**Laurence S. Locke** and **Bertram A. Petkum**)(mental disorder caused by work stress constitutes personal injury for workers' compensation); Peoria County Belwood Nursing Home v. Industrial Comm'n, 487 N.E.2d 356 (Ill. App. Ct. 1985), 29 ATLA L. Rep. 171 (1986)(**Jerome Schur**)(gradual injury due to repetitive trauma is compensable).

[65] Gutierrez v. Glaser Crandell, 202 N.W.2d 786 (Mich. 1972), 16 ATLA News L. 41 (1973)(**Ben Marcus**)(exclusion of farm workers and piecework workers from workers' compensation coverage denied equal protection to the poorest workers and minorities).

[66] Fabricius v. Montgomery Elevator Co., 121 N.W.2d 361 (Iowa 1963), 6 NACCA News L. 85 (1963)(**Thomas F. Daley, Jr.**); Nelson v. Union Wire Rope Co., 199 N.E.2d 769 (Ill. 1964), 7 NACCA News L. 67 (1964)(**James A. Dooley**); Ray v. Transamerica Ins. Co., 158 N.W.2d 786 (Mich. App. 1968), 11 NACCA News L. 367 (1968)(**George L. Downing**); Ruth v. Bituminous Casualty Co., 427 F.2d 290 (6th Cir. 1970), 14 NACCA News L. 42 (1971)(**Richard M. Goodman** and **James A. Tuck**); Beasely v. MacDonald Engineering Co., 249 So. 2d 844 (Ala. 1971), 14 NACCA News L. 63 (1971)(**William M. Acker, Jr.**).

[67] Vigue v. Evans Products, 608 P.2d 488 (Mont. 1980), 23 ATLA L. Rep. 300 (1980)(**John Hoyt**)(workers' compensation carrier liable for bad faith in handling claims).

dangers, such as toxic chemicals or asbestos.[68] Employers who illegally hire minors may also lose the protection of the exclusivity provision.[69]

Railroad and maritime workers are not covered by state workers' compensation statutes. Congress has mandated remedies for these workers, and ATLA attorneys have fought for their liberal application. The Federal Employers Liability Act provides a cause of action for injured railroad employees, affording them the right to trial by jury and comparative negligence.[70] In addition, the Safety Appliance Act and Boiler Inspection Act impose absolute liability for injury caused by defective railroad equipment.[71]

Congress enacted the Jones Act in 1920 to extend those remedies to seamen. Admiralty lawyers have worked to afford Jones Act protection to those who are not sailors, but are subject to the same perils.[72] They have also pressed the courts to expand recoverable damages under general maritime law to be equivalent to those available for land-based injury.[73]

ATLA members have also been active in obtaining compensation for in-

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[68] Mandolidis v. Elkins Industries, 246 S.E.2d 907 (W.Va. 1978), 21 ATLA L. Rep. 434 (1978)(**James Kent**)(workers' compensation exclusivity does not bar suit for intentional harm or willful and wanton misconduct); Johns-Manville Prods. Corp. v. Contra Costa Super. Ct., 612 P.2d 948 (Cal. 1980), 23 ATLA L. Rep. 297 (1980)(**George W. Kilbourne** and **Steven Kazan; Joseph Posner** for CTLA as amicus)(employer could be liable in tort for fraudulently concealing from workers the dangers of asbestos); Blankenship v. Cincinnati Melacron Chem. Corp., 433 N.E.2d 572 (Ohio 1982), 25 ATLA L. Rep. 194 (1982)(**Jerald D. Harris**)(employer who knowingly exposes workers to toxic chemicals may be liable in tort, including punitive damages).

[69] Whitney-Fidalgo Seafoods, Inc. v. Beukers, 554 P.2d 250 (Alaska 1976), 19 ATLA News L. 467 (1976)(**Milton M. Souter**).

[70] Kernan v. American Dredging Co., 355 U.S. 426 (1958), 1 NACCA News L. No. 7 at 9 (1958)(**Abraham E. Freedman**)(the purpose of FELA is to shift the costs of injuries onto the railroads as a cost of doing business); *see, e.g.,* Arthur v. Akron, Canton & Youngstown R.R. Co., N.D. Ohio, 20 ATLA L. Rep. 140 (1977)(**Richard Grieser**)(jury verdict for injuries to brakeman under FELA).

[71] Rodgers v. Seaboard Coast Line R.R., 22 ATLA L. Rep. 378 (Fla. Cir. Ct. 1979)(**Robert J. Beckham**)(engineer who suffered loss of hearing due to excessive noise inside cab could assert violation of Boiler Inspection Act).

[72] Allen v. John F. Beasley Co., 20 ATLA L. Rep. 300 (W.D. Tex. 1977)(**William S. Rader**)(mechanic working on construction of a bridge across the Mississippi River could be a "seaman" for purposes of the Jones Act); Lunsford v. Fireman's Fund Ins. Co., 635 F. Supp. 72 (E.D. La. 1986), 29 ATLA L. Rep. 355 (1986)(**Robert T. Garrity**)(cleaning woman on yacht deemed a Jones Act "seaman").

[73] Petition of Den Norske Ameerikalinje A/S, 276 F. Supp. 163 (N.D. Ohio 1967), 11 NACCA News L. 9 (1968)(**Abraham E. Freedman**)(recovery under Jones Act of punitive damages against vessel owner for captain's wanton disregard of safety of crew by refusing to order launching of lifeboats following collision, resulting in 10 deaths); Moragne v. State Marine Lines, 90 S. Ct. 1772 (U.S. 1970), 13 ATLA News L. 249 (1970)(**Charles J. Hardee; David B. Kaplan** for ATLA as amicus)(wrongful death suit may be brought under general maritime law).

jured seamen, longshoremen and others working on or around ships. Members of ATLA's Admiralty Law Section have represented workers covered by the Longshoreman's and Harbor Workers Compensation Act, which provides "maintenance and cure" benefits for injury as well as a cause of action against vessel owners for hazards that render a vessel "unseaworthy."[74] The range of hazards has expanded to include assaults by fellow seamen.[75]

The success of product liability has also greatly benefited workers. In fact, about half of all product liability awards arise out of workplace injuries. Industrial machinery demands particular care in design to guard against injury. A punch press, for example, operates by slamming two halves of a massive die together with many tons of force. Between cycles, the worker must reach in to clear out the finished pieces and insert new metal sheets. As Harry Philo explains, it is not enough to simply tell workers to "Be Careful." The most cautious operator will on occasion become distracted or careless. In addition, many machines continue in service for decades, with increased chances of malfunction. The same is true of cutting machines, extruders, conveyors with unguarded inrunning rollers, and forklift trucks lacking operator protection. Philo recalls that, in his days as a union organizer, he often met and shook hands with assembly line workers. Few hands had all their fingers. The steady pressure of lawsuits has forced manufacturers to provide safety equipment with their machines and take steps to ensure it would be used.[76]

Perhaps the most dangerous workplace in America is the farm. Tractors,

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[74] Seas Shipping. Co. v. Sieracki, 328 U.S. 85 (1946)(**Abraham E. Freedman**)(owner's nondelegable duty to provide a seaworthy vessel); Parks v. Simpson Timber Co., 388 U.S. 459 (1967), 10 ATLA News L. 204 (1967)(**Philip A. Levin**)(longshoreman injured leg when he walked on package of doors and fell through).

[75] Claborn v. Star Fish & Oyster Co., 578 F.2d 983 (5th Cir. 1978), 22 ATLA L. Rep. 60 (1979)(**Richard F. Pate**)(stabbing by fellow seaman); Borras v. Sea-Land Services, Inc., 586 F.2d 881 (1st Cir. 1978), 22 ATLA L. Rep. 60 (1979)(**Jack Steinman** and **Harry A. Ezratty**)(seaman suffered mental breakdown due to verbal abuse by captain).

[76] Gronlie v. Positive Safety Mfg., 212 N.W.2d 756 (Mich. App. 1973), 17 ATLA News L. 75 (1974)(**Harry M. Philo**)(punch press); Roy v. Star Chopper Co., 442 F. Supp. 1010 (D.R.I. 1977), 21 ATLA L. Rep. 106 (1978)(**Leonard DeCof**)(worker's hand was drawn into unguarded rollers; employer's negligence no defense to manufacturer's liability); Miller v. International Harvester Co., 24 ATLA L. Rep. 3 (Wis. Cir. Ct. 1980)(**Robert L. Habush**)(manufacturer of front-end loader liable for design that invited purchaser to remove or refuse overhead guard); Foley v. Clark Equipment Co. (Pa. Ct. Comm. Pleas 1981), 25 ATLA L. Rep. 52 (1982)(**Joseph A. Coffey**)(defective forklift truck); Franchetti v. Intercole Automation, Inc., 529 F. Supp 533 (D. Del. 1982), 26 ATLA L. Rep. 104 (1983)(**David H. Erisman**)(worker's hand caught in nip point of calendar machine; court rejects open and obvious defense).

augers, and hay balers often lack even the most basic safeguards that would be found in factory machines. Workers are often migrants or teenagers in farm families. And when disaster strikes, the worker may be alone and unable to summon help. In one horrifying case, for example, a farmer whose arm was being chewed up by a baler fought against the machine for hours until he was rescued.[77] Lawsuits by ATLA members have obtained compensation for farm victims and pressured manufacturers to reduce this harvest of harm.[78]

III. The Right to Safe Transportation

Americans spend a great deal of time getting from here to there. Too many never make it. Carnage on the highway was killing 50,000 people and injuring approximately 2 million more *each year*. ATLA members worked to make transportation safer by imposing accountability on those who create undue risks.

Eliminating Immunities

During the 1920s about thirty states enacted Guest Statutes that barred a nonpaying passenger injured in an accident from suing the driver for negligence. Backers argued that it was unfair to allow an ungrateful hitchhiker to sue the kind-hearted driver who offered a ride. Like so many hitchhiker stories, the litigious passenger was little more than an urban legend. In reality, most passengers are relatives or friends of the driver, whose medical bills and other losses ought to be covered by the negligent driver's insurance. Beginning with the California Supreme Court in 1973, nearly all states recognized the irrationality of guest statutes, invalidating them on constitutional or public policy grounds.[79]

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[77] Wright v. Hesston Corp., 22 ATLA L. Rep. 327 (S.D. Tex. 1979)(**Paul Jensen**)($10 million compensatory verdict).

[78] Aderhold v. Forest City Mach. Works, 23 ATLA L. Rep. 324 (Ark Cir. Ct. 1979)(**H. David Blair**)(punitive damages for injury to boy by unguarded drive shaft of grain cart); Billings v. Hesston Corp., 1 PLLR 42 (S.D. Tex. 1981)(**Rockne W. Onstad**)(farmer drawn into hay baler); Keller v. Vermeer Mfg. Co., 26 ATLA L. Rep. 395 (N.D. Dist. Ct. 1983)(**Francis Breidenbach**)(farmer was drawn into hay baler); D.L. v. Huebner, 329 N.W.2d 890 (1983), 27 ATLA L. Rep. 108 (1984)(**Robert W. Lutz**)(13 year old boy lost hand in farm forage wagon).

[79] Brown v. Merlo, 506 P.2d 212 (Cal. 1973), 16 ATLA News L. 56 (1973)(**Reginald M. Watt; Robert E. Cartwright** and **Leonard Sacks** for California TLA as amicus); Henry v. Cauder, 518 P.2d 362 (Kan. 1974), 17 ATLA News L. 52 (1974)(**Michael G. Norris; Patrick Kelly** for Kansas TLA as amicus)(guest statute unconstitutional denial of equal protection); Primes v. Tyler, 331 N.E.2d 723 (Ohio 1975), 18 ATLA News L. 287 (1975)(**Christopher T. Cherpas** and **Donald P.**

Another immunity that kept many accident victims from seeking legal recourse was the judge-made rule against tort suits between family members. The origin of the rule was said to be the legal unity of husband and wife in the eyes of law. That rationale made little sense, even in nineteenth-century America. The more modern justification—that tort suits between family members would ruin family harmony and invite collusive suits—was little better. Barring suits for intentional torts often shielded wrongdoing to preserve a family harmony that was already destroyed.[80]

The immunity is equally unjust in automobile negligence actions. The primary objective of the injured party, of course, is to obtain payment from automobile liability insurance for medical expenses and other losses facing the family. As one court asked, Why should every person injured by the negligent driver be entitled to seek compensation except his own family?[81] The fact is that the only beneficiary of the rule was the insurance company, which had collected its premiums from the family and then turned its back.

By 1957, a dozen states had to some extent abrogated the immunity for suits between spouses. There followed a steady stream of decisions abolishing spousal immunity in tort actions.[82]

Similarly, courts jettisoned the common-law rule barring suits between parent and child. The Alaska court explained that if compensation for a child's injuries cannot be obtained from liability insurance, "the cripple as well as the parent will have to stagger beneath the load. To tell them that the pains

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Traci); Manistee Bank & Trust v. McGowen, 232 N.W.2d 636 (Mich. 1975), 18 ATLA News L. 393 (1975)(**Bruce C. Gockerman; Clifford H. Hart** and **Sheldon L. Miller** for Michigan TLA as amicus); Ramey v. Ramey, 258 S.E.2d 883 (S.C. 1979), 22 ATLA L. Rep. 434 (1979)(**Michael Parham; Joel D. Bailey** and **Charles B. Macloskie** for S.C.TLA as amicus).

[80] Roller v. Roller, 79 Pac. 788 (Wash. 1905)(court dismissed a suit by a plaintiff against her father, who had brutally beaten and raped her, citing the need to preserve family harmony). *Cf.* Windauer v. O'Connor, 477 P.2d 561 (Ariz. App. 1970), 14 NACCA News L. 2 (1971)(**Herbert E. Williams**)(rejecting interspousal immunity; where husband shot wife, for which she had divorced him and he had been sent to prison).

[81] Immer v. Risko, 267 A.2d 481 (N.J. 1970), 13 ATLA News L. 248 (1970)(**Milton D. Liebowitz**).

[82] Self v. Self, 376 P.2d 65 (Cal. 1962), 5 NACCA News L. 267 (1962)(**Robert H. Lund** and **John R. Brunner**); Mosier v. Carney, 138 N.W.2d 343 (Mich. 1965), 8 ATLA News L. 312 (1965)(**Robert Abram**); Windauer v. O'Connor, 477 P.2d 561 (App. 1970), 14 ATLA News L. 2 (1971)(**Herbert E. Williams**); Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972), 15 ATLA News L. 305 (1972)(**Boyde Hovde**); Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978), 21 ATLA L. Rep. 338 (1978)(**Monty L. Preiser**); Imig v. March, 279 N.W.2d 382 (Neb. 1979), 22 ATLA L. Rep. 203 (1979)(**M.J. Bruckner**); Fernandez v. Romo, 646 P.2d 878 (Ariz. 1982), 25 ATLA L. Rep. 245 (1982)(**William B. Revis** and **David L. Sandweiss; John Foreman** for Ariz. TLA as amicus).

must be endured for the peace and welfare of the family is something of a mockery."[83]

Responsibility for accidents often extends beyond the drivers involved. The next chapter recounts the efforts of trial lawyers to make automakers liable for unsafe, uncrashworthy cars. They also held governments and contractors accountable for failing to design and maintain roadways with safety in mind.[84] Utility companies were also responsible for locating poles and obstructions too near busy highways.[85]

Another major transportation hazard has been the railroad grade crossing. There are some 164,000 intersections between railroad tracks and streets or highways in the United States. Many have only minimal warnings of oncoming trains, and too often the motorist's view is obstructed by overgrown vegetation. Working against the bitter opposition of the railroads, ATLA attorneys have played a substantial role in forcing railroads to make grade crossings reasonably safe.[86]

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[83] Hebel v. Hebel, 435 P.2d 8 (Alaska 1967), 11 NACCA News L. 13 (1968). *See*, Schenk v. Schenk, 241 N.E.2d 12 (Ill. App. 1968), 11 ATLA News L. 399 (1968)(**Frank M. Brady** and **John Morel**)(father was struck by auto driven by 17-year old daughter); Gelbman v. Gelbman, 245 N.E.2d 192 (N.Y. 1969), 12 ATLA News L. 37 (1969)(**David C. Gilberg**)(mother's suit against 16-year-old son); Streenz v. Streenz, 471 P.2d 282 (Ariz. 1970), 13 ATLA News L. 199 (1970)(**Ronald W. Carmichael** and **N. Pike Johnson**); Rigdon v. Rigdon, 463 S.W.2d 631 (Ky. 1970), 14 ATLA News L. 52 (1971); Gibson v. Gibson, 479 P.2d 648 (Cal. 1971), 14 ATLA News L. 99 (1971)(**John M. Poswall** and **Morton L. Friedman**); Falco v. Pados, 282 A.2d 351 (Pa. 1971), 14 ATLA News L. 447 (1971)(**Norman Seidel** and **Gus Milides**).

[84] Luddy v. State, 258 N.Y.S.2d 303 (Ct. Cl.), 11 NACCA News L. 119 (1968)(**Carroll J. Mealey**)(state liable for fatal accident where roadway was moved, but old guideposts remained, leading driver off road); Murdoch v. City of Philadelphia, 14 ATLA News L. 52 (E.D. Pa. 1971)(**S. Gerald Litvin**)(negligently designed highway); Ortiz v. State, Ariz. Super. Ct., 20 ATLA L. Rep. 28 (1977)(**William T. Healy**)(road too narrow for posted speeds); Drew v. Laber, 383 A.2d 941 (Pa. 1978), 21 ATLA L. Rep. 152 (1978)(**Dale A. Betty**)(municipal liability to injured pedestrian for design of narrow roadway); Bouras v. State, 22 ATLA L. Rep. 391 (Ind. Super. Ct. 1979)(**W. Scott Montross**)(improperly banked highway curve caused loss of control).

[85] Vanasse v. New England Tel. & Tel., 25 ATLA L. Rep. 150 (N.H. Super. Ct. 1981)(**Paul R. Cox**)(utility liability for negligent placement of pole near roadway); Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947 (Cal.), 26 ATLA L. Rep. 389 (1983)(**Thomas P. Cacciatore**)(telephone company liable for locating phone booth dangerously close to busy highway).

[86] Southern Pacific Ry. v. Watkins, 435 P.2d 498 (Nev. 1967), 11 NACCA News L. 168 (1968)(**F.R. Breen, C. Clifton Young** and **Jerry Carr Whitehead**); Cage v. New York Central R.R., 386 F.2d 998 (1968), 11 NACCA News L. 132 (1968)(**Leonard Price** and **Louis M. Tarasi**)(collision at dangerous crossing); Southern Pac. Transp. Co. v. Lueck, 535 P.2d 599 (Ariz. 1975), 18 ATLA News L. 396 (1975)(**Dale Haralson; Robert G. Begam** for Ariz. TLA as amicus)(compensatory and punitive damages in grade crossing collision; contributory negligence no bar where railroad was guilty of wanton or reckless misconduct and railroad's own study showed need for automatic gates);

One For the Road

At least half of serious auto accidents involve alcohol. Even before the campaign against drunk driving became a strong grass-roots movement, ATLA members were suing for sobriety. An important step was the recognition that driving while intoxicated is not mere negligence; it is reckless disregard for the safety of others, warranting punitive damages.[87] On another front, lawsuits have forced police to take drunk driving seriously, imposing liability where officers stopped drunk drivers, but allowed them to continue their impaired journey to tragedy.[88]

An obvious method of dealing with the problem of drunk drivers is to shut off the flow of alcohol at its source. Bars and taverns that served drinks to customers who were obviously intoxicated, or sold liquor to minors, enjoyed immunity from liability under the reasoning that the drunk, not the drink, was the proximate cause of the accident. In a landmark decision, the New Jersey Supreme held that a tavern could be liable for negligently serving alcohol to a patron who thereafter injured the plaintiff in an auto crash.[89] Nineteen other states recognized similar common-law liability for commercial liquor vendors who serve drinks irresponsibly.[90]

Shibley v. St. Louis-San Francisco Ry., 533 F.2d 1057 (8th Cir. 1976), 19 ATLA News L. 224 (1976)(**Robert L. Jones, III**)(collision at grade crossing protected only by cross bucks); Churchill v. Norfolk & Western R.R., 383 N.E.2d 929 (Ill. 1978), 22 ATLA L. Rep. 3 (1979)(**Thomas F. Londrigan**)(punitive damages in grade crossing collision for willful violation of statute in obstructing crossing); National Bank v. Norfolk & Western R.R., 383 N.E.2d 919 (Ill. 1978), 22 ATLA L. Rep. 8 (1978)(**Jerome Mirza**)(similar).

[87] Ingram v. Pettit, 340 So. 2d 992 (Fla. 1976), 19 ATLA News L. 149 (1976)(**David R. Lewis**); Taylor v. Superior Court, 598 P.2d 854 (Cal. 1979), 22 ATLA L. Rep. 439 (1979)(**Jerome M. Jackson; Leonard Sacks** for CTLA as amicus).

[88] Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984), 27 ATLA L. Rep. 338 (1984)(**Alan R. Goodman**)(**Camille F. Sarrouf** and **Frederic N. Halstrom** for ATLA as amicus).

[89] Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959), 3 NACCA News L. No. 4 at 3 (1960)(**Seymour B. Jacobs** and **Fred Freeman**)(common law liability of liquor vendor for overserving patron who caused accident).

[90] Weaver v. Lovell, 262 N.E.2d 113 (Ill. App. 1970), 14 NACCA News L. 22 (1971)(**Jerome Mirza**); Campbell v. Carpenter, 566 P.2d 893 (Ore. 1977), 20 ATLA L. Rep. 390 (1977)(**Charles Paulson** and **Elden M. Rosenthal**); Cimino v. Mitford Keg, Inc., 431 N.E.2d 920 (Mass. 1982), 25 ATLA L. Rep. 199 (1982); O'Hanley v. Ninety-Nine, Inc., 421 N.E.2d 1217 (Mass. App. 1981), 25 ATLA L. Rep. 202 (1982)(**Irving H. Sheff**)(liquor vendor liability to injured intoxicated patron); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983), 26 ATLA L. Rep. 297 (1983)(**Donald J. Sullivan**)(common law dram shop liability of tavern owner who sells liquor to minor who injures plaintiff); Hutchens v. Hankins, 303 S.E.2d 584 (N.C. App. 1983), 26 ATLA L. Rep. 299 (1983)(**Alexander P. Sands**)(common law dram shop liability of tavern who served visibly intoxicated patron who injured plaintiff).

IV. A Right to Safe Surroundings

The common law, with its roots in agrarian society, had long been protective of the rights of landowners. They enjoyed broad immunity from liability for injuries on their property, even those that were foreseeable and easily preventable. By 1960, the time was long overdue for the law to focus on protecting people.

One step was to rid the law of the artificial status classifications that minimized the responsibility of landowners to those coming onto their property. Landowners owed no duty to trespassers and only a bare duty to warn licensees of dangers on the property. In cases brought by ATLA attorneys, courts began to erode these harsh classifications, particularly in the case of child trespassers and adult trespassers whose frequent entry onto the property was known to the owner.[91] By 1972, only five states failed to provide special protection for child trespassers. Other decisions expanded the landowner's duties to invitees to include not only warning but removal of the hazard.[92] Finally, in a landmark decision, the California Supreme Court abolished status classifications altogether, holding that a landowner must use reasonable care to protect all entrants regardless of their status.[93] Other jurisdictions quickly followed.[94]

Using either this broad duty of reasonable care or the traditional duty toward business invitees, ATLA attorneys obtained compensatory awards for shoppers injured by unsafe conditions in stores.[95]

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[91] Patterson v. Proctor Paint Co., 235 N.E.2d 765 (N.Y. 1968), 11 ATLA News L. 171 (1968)(**Herman Glaser** and **Alfred S. Julien**)(enhanced duty to protect known child trespassers); Pridgen v. Boston Housing Auth., 308 N.E.2d 467 (Mass. 1973), 17 ATLA News L. 162 (1974)(**Eugene F. Sullivan**)(boy fell down elevator; owner owed a duty to prevent injury to known trapped or endangered trespassers); Eaton v. R.G. Watkins & Sons, Inc., 23 ATLA L. Rep. 104 (Mass. Super. Ct. 1980)(**Jan R. Schlichtmann**)(duty to foreseeable child trespasser who drowned in gravel pit).

[92] Csizmadia v. P. Ballentine & Sons 287 F.2d 423 (2d Cir. 1961), 4 NACCA News L. No. 5, at 1 (1961)(**Philip Baroff**)(fall on a slippery warehouse floor, due care required not warning, but removal of the hazardous condition).

[93] Rowland v. Christian, 443 P.2d 561 (Cal. 1968), 11 ATLA News L. 289 (1968).

[94] Barrett v. Foster Grant Co., 321 F. Supp 784 (D.N.H. 1970), 13 ATLA News L. 448 (1970)(**Paul J. Liacos**); Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. 1972), 15 ATLA News L. 300 (1972)(**Harry W. Goldberg**); Basso v. Miller, 352 N.E.2d 868 (N.Y. 1976), 19 ATLA News L. 329 (1976)(**Abraham Epstein** and **Bernard S. Epstein**); Soule v. Massachusetts Elec. Co., 390 N.E.2d 716 (Mass. 1979), 22 ATLA L. Rep. 242 (1979)(**Sanford A. Kowal**)(utility liable to trespassing boy electrocuted by uninsulated power line).

[95] Macon v. Montgomery Elevator Co., N.D. Ala., 20 ATLA L. Rep. 127 (1977)(**Betty C. Love**)(patron's foot injured by escalator); Loterno v. Alexander's Inc., 21 ATLA L. Rep. 178 (N.Y. Sup. Ct. 1978)(**Alan I. Zasky**)(department store customer slip and fall on transparent plastic coat hanger);

Unhappily, crime is a fact of life. Courts began to make business owners—especially innkeepers, who owe a high duty of care to guests—responsible for taking reasonable security precautions. In a case that received national attention, singer Connie Francis won a verdict against a motel after she was raped by an intruder in her motel room.[96]

In 1982, a guest was robbed and raped in her room at the Stardust Hotel in Las Vegas. Evidence showed that the hotel had lost an average of five hundred guest room keys per week, had in circulation 101 master keys, and had not rekeyed or changed its locks since its 1957 construction. Following the jury's award of punitive damages, most Las Vegas hotels rekeyed their guest rooms.[97]

Increasingly, other business owners were held liable for failing to provide security against foreseeable criminal attacks.[98]

Landlord-tenant law also moved away from its agrarian roots to protect tenants against unreasonable risks of injury.[99] Courts held that, as a matter of public policy, a lease carries with it an implied warranty that the premises are habitable. Landlords, too, faced liability for failing to provide security against foreseeable criminal attacks on tenants.[100]

Soots v. Dart Drug Corp., 25 ATLA L. Rep. 419 (Md. Cir. Ct. 1982)(**David M. LaCivita** and **Robert A. Flack**)(customer injured when display of storm doors fell on her).

[96] Garzilli v. Howard Johnson Motor Lodge, 19 ATLA News L. 306 (E.D.N.Y. (1976)(**Richard Frank**).

[97] King v. Stardust Hotel, 29 ATLA L. Rep. 38 (Nev. Dist. Ct. 1985)(**Joseph I. Cronin**).

[98] Earl v. Colonial Theater, 19 ATLA News L. 343 (Mich. Cir. Ct. 1976)(**Paul D. Sherr**)(shooting of theater patron); Mullens v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983), 26 ATLA L. Rep. 200 (1983)(**Albert P. Zabin**)(rape of student on campus due to lax security); Demange v. Whitman College Bd. of Trustees, 24 ATLA L. Rep. 6 (E.D. Wash. 1980)(**Joseph J. Ganz** and **Robert B. Henderson**)(award against college for sexual assault on student).

[99] Mayer v. Housing Authority, 202 A.2d 439 (N.J. App. 1964), 7 ATLA News L. 225 (1964)(**Fred Freeman**)(landlord liability for negligent supervision of play area); Davis v. Royal Globe Ins. Co., 11 NACCA News L. 165 (La. Parish Ct. 1968)(**James O. Manning**)(landlord liability for brain damage to tenant's child from eating lead paint flakes); Myer v. Philadelphia Housing Auth., 27 ATLA L. Rep. 252 (Pa. Ct. C.P. 1984)(**James E. Beasley**)(housing authority liability for burn injuries and deaths of tenants due to lack of smoke detectors); Reeves v. Property Managers, 416 So. 2d 717 (Ala. 1982), 25 ATLA L. Rep. 418 (1982)(**Stephen D. Heninger**)(exculpatory clause in lease invalid).

[100] Johnston v. Harris, 198 N.W.2d 409 (Mich. 1972), 15 ATLA News L. 253 (1972)(**Lawrence S. Charfoos**)(elderly tenant mugged in doorway of poorly secured apartment building); Samson v. Saginaw Professional Bldg. Inc., 224 N.W.2d 843 (Mich. 1975), 18 ATLA News L. 56 (1975)(**Peter F. Cincinelli, John F. Harrigan, Eugene D. Mossner**)(landlord of commercial building liable to secretary of lawyer-tenant for criminal attack by mental patient of another tenant); Blum v. Certified Furniture Leasing, 18 ATLA News L. 93 (Md. Cir. Ct. 1975)(**George W. Shadoan**)(verdict and punitive damages for rape-murder of tenant against owner of apartment complex that hired attacker); Jackson v. Warner Holdings, Ltd., 617 F. Supp. 646 (W.D. Ark. 1985), 29 ATLA 86 (1986)(**Buddy Garner**).

V. The Right to Safe Medical Care

Medical malpractice is perhaps the most difficult area of tort law for plaintiff's lawyers. Doctors are held not to the "reasonable person" standard, but to the usual and customary practice in the profession. That is, the law permits the medical profession to set its own standard of care. Moreover, juries are reluctant to return verdicts against doctors; medical malpractice defendants win about 70 percent of trials, a far larger percentage than other tort defendants.

Still, the root cause of medical malpractice lawsuits is medical malpractice. Medical negligence kills an estimated eighty thousand Americans annually.[101] Studies from the 1970s to the 1990s consistently have found that only about 10 to 12 percent of the victims of medical negligence actually file a lawsuit.

Perhaps the single greatest obstacle to allowing plaintiffs to present their case to the jury is the "conspiracy of silence." This phrase, coined by Melvin Belli, describes the extreme reluctance of doctors to give testimony against another doctor. A survey published in *Medical Economics* in 1961 found that fewer than one in three physicians were willing to testify in favor of a patient, even in cases of clear and egregious malpractice. Without such expert testimony, plaintiffs' cases were summarily dismissed.

Slowly, ATLA attorneys succeeded in making inroads against this barrier. For example, they urged liberal application of *res ipsa loquitur* by courts. In some situations, such as where surgeons have left sponges or forceps inside the patient or where plaintiff awoke from surgery with an unexplained injury, courts permitted the jury to find negligence without expert testimony.[102]

In most cases, however, plaintiffs need the opinion of a medical expert with respect to the standard of care. Many plaintiffs ran up against the "locality rule," which originated at the height of judicial protectionism in 1880 and

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[101] *See,* Harvard Medical Practice Study, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York,* New England Journal of Medicine (July 25, 1991).

[102] Easterling v. Walton, 156 S.E.2d 787 (Va. 1967), 10 ATLA News L. 311 (1967)(**Robert T. Winston**)(surgeon left laparotomy pad in patient's abdomen, plaintiff could rely on res ipsa without expert opinion); Newman v. Spellberg, 234 N.E.2d 152 (Ill. App.), 11 NACCA News L. 212 (1968)(**George C. Rabens**)(where patient suffered perforated esophagus during gastroscopic exam, expert testimony not required because injury would not ordinarily occur in the absence of negligence); Pharmaseal Laboratories, Inc. v. Goffe, 568 P.2d 589 (N.M. 1977), 20 ATLA L. Rep. 443 (1977)(**James R. Toulouse**)(expert testimony not needed for negligence that would be apparent to lay person with common knowledge); Jones v. Harrisburg Polyclinic Hosp., 437 A.2d 1134 (Pa. 1981), 25 ATLA L. Rep. 55 (1982)(**Donald J. Farage**)(res ipsa applied where patient sustained nerve injury during surgery).

required that the medical expert not only be familiar with the relevant standard of care, but also practice in the same locality as the defendant. The rule reinforced the conspiracy of silence: Obviously the medical practitioners least likely to testify against a doctor are those who live and work in the same community. Any justification for the rule has disappeared with the advent of modern communications, education, and national accrediting standards. In 1968, the Massachusetts Supreme Judicial Court, which had first enunciated the locality rule, abolished it, as did many other courts.[103]

Another route around the conspiracy of silence was the informed consent doctrine, based on the principle that a patient does not consent to a procedure unless informed of the risks. Courts agreed with patients that "respect for the patient's right of self-determination" demanded that the standard for determining whether a risk should be disclosed should not be whether disclosure was the usual practice and custom of the profession. Instead, the inquiry should be whether the reasonable patient would need the information to make an informed choice of treatment, a standard that does not require the opinion of a medical expert.[104]

ATLA lawyers also sought to make hospitals accountable for malpractice occurring within their walls. One advance was the corporate negligence doctrine, which recognizes that a hospital owes a duty to its patients to use reasonable care in granting staff privileges and supervising doctors.[105]

For years, many hospitals had been able to avoid accountability because of charitable immunity. The rule was imported into American law by a court that

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[103] Brune v. Belinkoff, 235 N.E. 2d 793 (Mass. 1968), 11 ATLA News L. 141 (1968)(**Meyer H. Goldman**); Naccarato v. Grob, 180 N.W.2d 788 (Mich. 1970), 14 ATLA News L. 47 (1971)(**Konrad D. Kohl**)(pediatrician held to national standard of care); Kronke v. Danielson, 499 P.2d 155 (Ariz. 1972), 16 ATLA News L. 107 (1973)(**Fred J. Pain, Jr.** and **William B. Revis**); Gambill v. Stroud, 531 S.W.2d 945 (Ark. 1975), 18 ATLA News L. 440 (1975)(**Sidney S. McMath**); Pharmaseal Labs v. Goffe, 568 P.2d 589 (N.M. 1977), 20 ATLA L. Rep. 442 (1977)(**James R. Toulouse**); Wentling v. Jenny, 293 N.W.2d 76 (Neb. 1980), 23 ATLA L. Rep. 283 (**John T. Carpenter**).

[104] Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972), 15 ATLA News L. 202 (1972)(**Earl H. Davis**); Wilkinson v. Vesey, 295 A.2d 676 (R.I. 1972), 15 ATLA News L. 477 (1972)(**Leonard Decof**); Cobbs v. Grant, 502 P.2d 1 (Cal. 1972), 16 ATLA News L. 27 (1973)(**William Shannon Parrish**); Cornfeldt v. Tongen, 262 N.W.2d 684 (Minn. 1977), 21 ATLA L. Rep. 234 (1978)(**John F. Eisberg** and **Solly Robins**); Scott v. Bradford, 606 P.2d 554 (Okla. 1979), 23 ATLA L. Rep. 187 (1980)(**Gary L. Brooks**); Harnish v. Children's Hosp. Med. Center, 439 N.E.2d 240 (Mass. 1982), 25 ATLA L. Rep. 386 (1982)(**Joseph G. Abromovitz**).

[105] Darling v. Charleston Community Mem. Hosp., 211 N.E.2d 253 (Ill. 1965), 8 ATLA News L. 287 (1965)(**John Alan Appleman**); Pedroza v. Bryant, 677 P.2d 166 (Wash. 1984), 27 ATLA L. Rep. 98 (1984)(**Daniel F. Sullivan**).

was apparently unaware that the doctrine had already been abolished in England.[106] Public policy, it was said, favored religious and nonprofit hospitals and a patient accepting free treatment should not be so ungracious as to sue for negligent treatment, threatening the institution's ability to continue its good works. But modern nonprofit hospitals are operated as businesses, fully capable of both rendering the level of care found in profit-making facilities and obtaining liability insurance. Courts found no sound reason to demand that the victim of negligent medical care involuntarily subsidize the hospital merely because it is funded by donations rather than patient charges.[107]

The chief beneficiary of the conspiracy of silence is, of course, the malpractice insurance industry. ATLA members have had to battle unfair practices designed to enforce the conspiracy. One such tactic has been for defense counsel to meet with plaintiff's treating physician, in the absence of plaintiff's counsel. Since plaintiff's doctor and the defendant are often insured by the same malpractice carrier, such interviews can be occasions for witness tampering and intimidation.[108] Other cases have involved retaliation against doctors who testify for patients.[109]

In 1974, Senator Warren G. Magnuson (D-Wash.), chairman of the Senate Commerce Committee, questioned whether malpractice suits actually resulted in safer medical care. ATLA President Robert Cartwright responded with numerous examples of cases that made a difference. In the operating room, for example, the changes made by hospitals in response to malpractice suits included: Sponge and instrument counts before closing the patient, electrical grounding of anesthesia machines to prevent explosions and fires,

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[106] McDonald v. Massachusetts General Hosp., 120 Mass. 432 (1876).

[107] Hungerford v. Portland Sanitarium, 384 P.2d 1009 (Ore. 1963), 6 NACCA News L. 196 (1963)(**Virgil Colombo**); Darling v. Charleston Community Mem. Hosp., 211 N.E.2d 253 (Ill. 1965), 8 ATLA News L. 287 (1965)(**John Alan Appleman**); Villarreal v. Santa Rosa Medical Ctr., 443 S.W.2d 622 (Tex. Civ. App. 1969), 12 ATLA News L. 382 (1969)(**Lee Mendelsohn**); Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo. 1969), 12 ATLA News L. 472 (1969)(**Burton H. Shostak**); Lutheran Hospitals & Homes Society v. Yepsen, 469 P.2d 409 (Wyo. 1970), 13 ATLA News L. 196 (1970)(**John Burk** and **Ernest Wilkerson**).

[108] Miles v. Farrell, 549 F. Supp 82 (N.D. Ill. 1982), 26 ATLA L. Rep. 187 (1983)(**John D. Hayes** and **Philip H. Corboy**)(plaintiff's treating physician may not testify as defendant's medical expert; duty of confidentiality also bars contact by defense counsel); Klieger v. Alby, 373 N.W.2d 57 (Wis. App. 1985), 29 ATLA L. Rep. 19 (1986)(**Randall E. Reinhardt**).

[109] L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968), 11 ATLA News L. 297 (1968)(**Theodore R. Cubbison**)(cancellation of dentist's liability coverage because he testified for the plaintiff in a malpractice action amounted to intimidation of a witness and a clear violation of public policy).

padding operating tables to avoid broken bones, and use of colorized solutions to avoid mix-ups.

ATLA members also succeeded in holding other professionals accountable for professional negligence, including psychotherapists,[110] accountants,[111] and, of course, trial lawyers themselves.[112]

VI. The Right to Fair Treatment by Insurance Carriers

In Good Hands?: First-Party Insurance

Misfortune is a fact of life. Insurance does not change that fact, but it allows a prudent individual to take steps so that the tragedy of injury, damage, or death is not compounded by economic hardship. The very symbols that insurers choose for themselves—the umbrella, the "good hands," the Rock—reflect the fact that insurance is more than a mere contractual arrangement. The policyholder necessarily relies on the good faith of the insurer for security in the worst of times. When an insurance company wrongfully denies

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[110] Tarasoff v. Regents of the University of California, 529 P.2d 553 (Cal. 1974), 18 ATLA News L. 49 (1975)(**George A. McKray; Leonard Sacks** for CTLA as amicus)(therapist may be liable for failing to warn target of patient's threat); Anonymous v. Berry, 22 ATLA L. Rep. 473 (Fla. Cir. Ct. 1979)(**William C. Gentry** and **Mary K. Phillips**)(psychologist liable for sexual abuse of patient); Evans v. Rippy, 23 ATLA L. Rep. 62 (Fla. Cir. Ct. 1980)(**Tony Cunningham**)(sexual abuse of children); Zipkin v. Freeman, 436 S.W.2d 198 (1968), 12 ATLA News L. 198 (1969)(**George A. Spencer**)(psychotherapist misused "transference" phenomenon to engage in a sexual relationship with a patient); Walker v. Parzen, 24 ATLA L. Rep. 295 (Cal. Super. Ct. 1981)(**Marvin E. Lewis**)(similar); Durnflinger v. Artiles, 673 P.2d 86 (Kan. 1983), 27 ATLA L. Rep. 55 (1984)(**Deborah Carvey**)(staff doctors at state mental hospital negligently released a mental patient who then killed several family members; doctors liable for failure to warn victims).

[111] Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969), 13 ATLA News L. 71 (1970)(**Russell S. Wunschel**)(accountant who certified that corporation was solvent liable to investor who relied on that statement); Chisolm v. Scott, 526 P.2d 1300 (N.M. Ct. App. 1974), 18 ATLA News L. 21 (1975)(**Edward T. Curran**)(accountant liability for tax deficiency due to negligent preparation of client's return); H. Rosenblum, Inc, v. Adler, 461 A.2d 138 (N.J. 1983), 26 ATLA L. Rep. 251 (1983)(**Donald Horowitz**)(extending the accountant's duty to all persons who foreseeably rely on the accountant's work).

[112] Jennings v. Sawyer28 ATLA L. Rep. 476 (Wash. Super. Ct. 1985)(**David J. Balint**)(missed statute of limitations in personal injury case); DeMello v. Rodriguez, 28 ATLA L. Rep. 132 (Hawaii Cir. Ct. 1985)(**James Krueger**)(punitive damages against personal injury attorney who failed to investigate facts and sued wrong defendant); Giesick v. Belli, Ashe & Choulos, 29 ATLA L. Rep. 141 (Cal. Super. Ct. 1986)(**James S. Bostwick** and **Pamela J. Stevens**)(firm liable for assigning inexperienced associate who failed to properly investigate medical malpractice action).

payments owed under a first-party policy, such as life, disability or medical insurance, forcing the insured to take the company to court, a judgment limited to the amount of benefits due under contract is woefully inadequate. Plainly, a tort remedy is necessary to secure the right to fair treatment by insurance companies.

ATLA members succeeded in holding insurance companies liable under various theories for extra-contractual damages.[113] William Shernoff is credited with developing "insurance bad faith" as an independent tort. A decision by the California Supreme Court placed this cause of action on a solid footing. A roofer had injured his back in a fall. Despite ample medical evidence that the roofer was permanently disabled, his disability insurer insisted his condition was a sickness, entitling him to only three months of benefits. The company then embarked on an unconscionable course of delay, harassment, and cover-up that ultimately led a jury to assess both punitive damages and compensation for mental distress. Affirming, the court of appeal emphasized that an insurance policy includes an implied covenant of good faith and fair dealing on the part of the insurer.[114]

Gambling with Policyholders Money: Third-Party Insurance

Liability insurance, indemnifying an insured's liability to a third party, presents a similar problem. Contractual remedies are inadequate where the insurer has refused in bad faith to accept a reasonable settlement offer within pol-

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[113] Fletcher v. Western National Life Ins. Co., 89 Cal. Rptr. 78 (Ct. App. 1970), 13 ATLA News L. 409 (1970)(**Arthur N. Hews** and **Ronald H. Prenner**)(punitive damages for unjustified denial of disability payments); Eckenrode v. Life of America, 470 F.2d 1 (7th Cir. 1972), 15 ATLA News L. 354 (1972)(**Keith L. Davidson**)(liability for intentional infliction of mental distress in denying benefits to widow under life insurance policy); Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973), 16 ATLA News L. 343 (1973)(**Alvin Hirsch; Leonard Sacks** for CTLA as amicus)(bad-faith refusal to pay proceeds of fire insurance policy); Silberg v. California Life Ins. Co., 521 P.2d 1103 (Cal. 1974), 17 NACCA News L. 293 (1974)(**John C. McCarthy**)(bad faith denial of medical insurance benefits); Douglas v. Mutual Life Ins. Co., 19 ATLA News L. 243 (Miss. Dist. Ct. 1976)(**Abe A. Rotwein**)(verdict with punitive damages for bad faith refusal to pay life insurance benefits); Bibeault v. Hanover Ins Co., 417 A.2d 313 (R.I. 1980), 23 ATLA L. Rep. 343 (1980)(**Philip M. Weinstein, Martin W. Aisenberg, Leonard Decof**)(bad faith refusal to pay uninsured motorist benefits); Weiner v. Blue Cross/Blue Shield, Fla. Cir. Ct. (1986), 29 ATLA L. Rep. 408 (1986)(**Larry S. Stewart** and **David W. Bianchi**)(company illegally cancelled group health family coverage after one child became quadriplegic and another contracted AIDS).

[114] Egan v. Mutual of Omaha Ins. Co., 133 Cal. Rptr. 899 (Ct. App. 1976), 20 ATLA L. Rep. 5 (1977)(**William M. Shernoff** and **Stephen L. Odgens**).

icy limits. Such tactics gamble the policyholder's own assets, which are at risk if a liability judgment exceeds policy limits.

Another landmark California case illustrates the point. A tenant who fell through a defective stair sued her landlord, who was insured for up to $10,000. Plaintiff offered to settle for $9,000, but the insurer refused. A jury ultimately awarded the tenant $100,000. The California Supreme Court held that the insurer was obligated by an implied covenant of good faith and fair dealing to consider the interests of its insured as important as its own when deciding whether to accept an offer within policy limits. Breach of that duty rendered the company liable not only for the $90,000 excess judgment, but also for the mental anguish it caused the insured.[115] Other courts adopted the tort of insurance bad faith, based on common-law or statutory duties toward the insured in the decision whether to settle within policy limits.[116]

VII. The Right to Governmental Safety and Protection

Even a King Is Accountable: The Demise of Sovereign Immunity

"The King can do no wrong." Not a bad maxim for a monarchy, but hardly fitting a democracy whose Declaration of Independence recites a lengthy and detailed list of His Royal Majesty's wrongs. Nevertheless, the doctrine that the state cannot be sued without its consent was imported into American law without explanation in 1821. As government grew and assumed a larger role in the lives of its citizens, it became clear that this absolute immunity could not endure.

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[115] Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967), 10 ATLA News L. 124 (1967)(**Marvin E. Lewis; Edward L. Lascher** for CTLA as amicus).

[116] State Farm Mut. Automobile Ins. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967), 11 NACCA News L. 54 (1968)(**Alton D. Kitchings**); Thompson v. Commercial Union Insurance Co., 250 So. 2d 259 (Fla. 1971), 15 ATLA News L. 20 (1972)(**David R. Lewis**); Garner v. American Mut. Liability Ins. Co., 107 Cal. Rptr. 604 (Ct. App. 1973), 16 ATLA News L. 350, 460 (1973)(**Edward Freidberg** and **Nathaniel S. Colley**); Rova Farms v. Investors Ins. Co., 323 A.2d 495 (N.J. 1974), 17 ATLA News L. 428 (1974)(**Robert F. Novins**); Campbell v. GEICO, 306 So. 2d 525 (Fla. 1974), 18 ATLA News L. 158 (1975)(**Lefferts L. Mabie, Jr.**)(punitive damages); Royal Globe Ins. Co. v. Superior Court, 592 P.2d 329 (Cal. 1979), 22 ATLA L. Rep. 172 (1979)(**Leonard Sacks** for CTLA as amicus)(bad faith action based on Unfair Practices Act); Pickett v. State Farm Mut. Auto Ins. Co., 23 ATLA L. Rep. 340 (Fla. Cir. Ct. 1980)(**Fred A. Hazouri**); DiMarzo v. American Mut. Ins. Co., 449 N.E.2d 1189 (Mass 1983), 26 ATLA L. Rep. 202 (1983)(**Michael E. Mone** and **Patricia L. Kelly**)(bad faith refusal of auto insurance carrier to settle claim within policy limits; plaintiff sued as assignee of insured under state Consumer Protection Act).

Judicial attack on this citadel opened with the decision by the California Supreme Court to abolish the governmental immunity of the state.[117] There followed an avalanche of decisions striking down the immunity of states or their political subdivisions.[118] As the Colorado Supreme Court stated, "The monarchical philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against government in today's society."[119]

A few courts also rejected efforts to reintroduce this immunity in the form of a requirement that an injured plaintiff file a notice of claim within a very short period of time,[120] or by imposing a cap on the amount of recoverable damages.[121]

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[117] Muskopf v. Corning Hospital District, 359 P.2d 457 (Cal. 1961), 4 NACCA News L. No. 2, at 1 (1961)(**P.M. Barceloux** and **Burton J. Goldstein**).

[118] Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962), 5 NACCA News L. 129 (1962)(**Robert L. Habush**); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962), 5 NACCA News L. 262 (1962)(**William DeParcq, Charles Hvass, Eugene Rerat, Donald Rudquist, Israel Steingold** for NACCA as amicus); Carroll v. Kittle, 457 P.2d 21 (Kan. 1969), 12 ATLA News L. 326 (1969)(**John E. Shamberg, Charles S. Schnider, Jabob F. May,** and **Harold K. Greenleaf, Jr.**); Perkins v. State, 251 N.E.2d 30 (Ind. 1969), 12 ATLA News L. 431 (1969)(**John D. Clouse**); Hopper v. State, 473 P.2d 937 (Idaho 1970), 13 ATLA News L. 151 (1970)(**George A. Greenfield** and **Don J. McClenahan**); Proffitt v. State, 482 P.2d 965 (Colo. 1971), 14 ATLA News L. 258 (1971)(**Gertrude A. Score** and **John S. Carroll**); Krause v. State, 274 N.E.2d 321 (Ohio App. 1971), 14 ATLA News L. 495 (1971)(**Steven A. Sindell**)(suit arising out of Kent State shootings; sovereign immunity rejected as denial of equal protection); Ayala v. Philadelphia Bd. Public Educ., 305 A.2d 877 (Pa. 1973), 16 ATLA News L. 207 (1973)(**Stephen M. Feldman**); Hicks v. State, 544 P.2d 1153 (N.M. 1975), 18 ATLA News L. 391 (1975)(**Hal Haralson, Dale Haralson, Turner Branch**); Nieting v. Blondell, 235 N.W.2d 597 (Minn. 1975), 18 ATLA News L. 450 (1975)(**Gordon W. Shumaker** and **Adrian Herbst** for MTLA as amicus); Davies v. City of Bath, 364 A.2d 1269 (Me. 1976), 19 ATLA News L. 426 (1976)(**Carl O. Bradford**); Jones v State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977), 21 ATLA L. Rep. 56 (1978)(**James W. Jeans**); Vanderpool v. State, 672 P.2d 1153 (Okla. 1983), 27 ATLA L. Rep. 152 (1984)(**John W. Norman** and **Ronald W. Horgan**).

[119] Evans v. Board of County Comm'rs, 482 P.2d 968, 969 (Colo. 1971), companion case to Flournoy v. School Dist. 482 P.2d 966 (Colo.), 14 NACCA News L. 146 (1971)(**John S. Carroll** and **Walter L. Gerash**).

[120] Grubaugh v. City of St. Johns, 180 N.W.2d 778 (Mich. 1970), 13 ATLA News L. 491 (1970)(**Eugene D. Mossner**)(60-day notice requirement violates due process); Reich v. State Highway Dept., 194 N.W.2d 700 (Mich. 1972), 15 ATLA News L. 199 (1972)(**Andrew Wisti** and **Gordon J. Jaaskelainen**)(60-day notice requirement unconstitutional); Jenkins v. State, 540 P.2d 1363 (Wash. 1975)(**Daniel F. Sullivan**)(notice-of-claim requirement violative of equal protection).

[121] White v. State, 661 P.2d 1272 (Mont. 1983), 26 ATLA L. Rep. 197 (1983)(**Erik B. Tueson**)($300,000 limit on damages recoverable against state held unconstitutional).

The Public Duty Doctrine

One function of government is to assure the safety of its citizens. Nevertheless, government entities have generally been held immune from liability for negligent failure to carry out that responsibility. Even where sovereign immunity has been curtailed, they were shielded by the "public duty" rule: A duty owed to the public in general is owed to no one in particular. Enlightened courts limited or abolished this doctrine to permit recovery by persons foreseeably endangered by negligent public officials.

For example, where government has undertaken a program of safety inspections designed to protect a particular class of persons, officials owe a duty to carry out their responsibilities with due care.[122] Where the government has assumed custody or control over a potentially dangerous person, it may be liable to those who might foreseeably be endangered by the person's negligent release.[123]

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[122] Adams v. State, 555 P.2d 235 (Alaska 1976), 20 ATLA L. Rep. 28 (1977)(**Robert M. Libbey** and **Douglas J. Serdahely**)(injury and deaths of hotel patrons after state fire inspectors failed to remedy known fire hazards); Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979), 22 ATLA L. Rep. 405 (1979)(**Thomas H. Mohr**)(city liable for injuries in apartment building fire where municipal inspectors were negligent in conducting safety inspections and enforcing fire safety ordinances); Raymer v. United States, 482 F. Supp. 432 (W.D. Ky. 1979), 23 ATLA L. Rep. 53 (1980)(**Charles Allen Williams** and **Damon Vaughn**)(liability for negligent safety inspection of mining equipment).

[123] Merchants National Bank v. United States, 272 F. Supp. 409 (D.N.D. 1967), 10 ATLA News L. 283 (1967)(**John D. Kelly**)(government liability where veteran administration psychiatrists released homicidal mental patient who then murdered wife); Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975), 18 ATLA News L. 188 (1975)(**George W. Shadoan**)(U.S. liable under FTCA for U.S. mental hospital's release of dangerous mental patient as "recovered" who then killed his wife); Reiser v. District of Columbia, D.D.C. (1975), 19 ATLA News L. 11 (1976), *affd* at 563 F.2d 462 (D.C. Cir. 1977)(**Brendan V. Sullivan**)(parole board placed parolee, convicted of homicide and rape, in employment that gave him access to women's dormitory, where he raped and killed a resident); Grimm v. Arizona Board of Pardons and Paroles, 564 P.2d 1227 (Ariz. 1977), 20 ATLA L. Rep. 147 (1977)(**John G. Stompoly**)(parole board liability for gross negligence releasing dangerous felon who shot plaintiff); Doe v. State, 22 ATLA L. Rep. 50 (Fla. Cir. Ct. 1979)(**Roger Blackburn, Ira Leesfield,** and **Walter Beckham**)(negligent supervision of convict on work-release program who escaped and committed rape and assault); Payton v. United States, 636 F.2d 132 (5th Cir. 1981), 24 ATLA L. Rep. 146 (1981)(**Edward L. Hardin, Jr.**)(parole board liable for negligent release of dangerous prisoner); Bellavance v. State, 390 So. 2d 422 (Fla. App. 1980), 24 ATLA L. Rep. 151 (1981)(**Mary Friedman** and **Bill Hoppe**)(state hospital liable for negligent release of dangerous mental patient who attacked child); Payton v. United States, 636 F.2d 132 (5th Cir. 1981), 24 ATLA L. Rep. 146 (1981)(**Edward L. Hardin, Jr.**)(parole board's negligent release of dangerous prisoner not within the discretionary function exception to the FTCA); Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986), 29 ATLA L. Rep. 368 (1986)(**Robert H. Wagstaff**)(negligent supervision of parolee who murdered several family members).

In no area is the public duty rule more entrenched than in criminal law enforcement. Some courts carved out an exception to this immunity where police assumed a special duty to protect a particular victim.[124] Other courts abolished the public duty rule altogether.[125] Local governments have also been held liable for negligence when responding to 911 emergency calls.[126]

VIII. The Right to Workplace Dignity

Work is a vital part of most people's lives, providing not only a livelihood, but also a measure of dignity and self-worth. Americans cling tenaciously to the ideal that they should be hired, promoted, or fired on the basis of merit and ability. While the law recognizes that most employment decisions are private matters, legislatures and courts have stepped in to eliminate particularly odious discrimination.

ATLA members were in the vanguard of enforcing public policy and statutory rights through private causes of action, making use of both federal and state anti-discrimination laws to combat racial discrimination in em-

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[124] Schuster v. City of New York, 154 N.E.2d 534 (N.Y. 1958), 2 NACCA News L. No. 5, at 3 (1958)(**Harry H. Lipsig**)(city's promise of protection to an informant gave rise to a special duty to protect him from attack); City of Jacksonville v. Florida First National Bank, 339 So. 2d 632 (Fla. 1976), 20 ATLA L. Rep. 3 (1977)(**Nathan Bedell, John A. DeVault, III** and **William C. Gentry**)(police failed to follow established procedures to protect children from abuse by father; by establishing a program to provide police protection to abused children, the city had undertaken a special duty toward victims); Sorchietti v. City of New York, 482 N.E.2d 70 (N.Y. 1985), 28 ATLA L. Rep. 298 (1985)(**Fred Queller** and **Martin S. Rothman**)(police liability for stabbing attack on child by divorced father where police had assured mother of protection).

[125] Ryan v. State, 656 P.2d 597 (Ariz. 1982), 26 ATLA L. Rep. 4 (1983)(**Frank Lewis**)(state liable for negligent release of dangerous juvenile from detention center); Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984), 27 ATLA L. Rep. 338 (1984)(**Alan R. Goodman; Frederic N. Halstrom** for ATLA as amicus)(police failure to arrest drunk driver; public duty rule abolished); Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986), 29 ATLA L. Rep. 393 (1986)(**Charles B. Doleac** and **Bernard J. Robertson**)(similar).

[126] Zytkewick v. Riley, 24 ATLA L. Rep. 171 (Mich. Cir. Ct. 1981)(**Frank D. Eaman**)(recovery by rape victim where police arrived, but left after cursory investigation, while victim was being raped in upstairs bedroom); DeLong v. County of Erie, 457 N.E.2d 717 (N.Y. 1983), 26 ATLA L. Rep. 440 (1983)(**Philip H. Magner**)(woman stabbed to death while officers were directed by 911 dispatcher to wrong location); Schear v. Board of County Comm'rs, 687 P.2d 728 (N.M. 1984), 27 ATLA L. Rep. 388 (1984)(**Joseph M. Fine; William G. Gilstrap** for NMTLA as amicus)(liability for police failure to respond to call reporting rape in progress); Letter v. City of Portland, Or. Cir. Ct. (1986), 29 ATLA L. Rep. 464 (1986)(**James G. Rice**)(negligent handling of 911 call by operator).

[127] Taylor v. Safeway Stores, Inc., 333 F. Supp. 83 (D. Colo. 1971), 14 ATLA News L. 460 (1971)

ployment.[127] Progress was also made on behalf of women battling gender-based discrimination in the workplace.[128]

In 1967 Congress sought to protect older workers under the Age Discrimination in Employment Act, 29 U.S.C. § 621. A few district courts, departing from the majority view, held that, in addition to reinstatement and back pay, monetary damages for emotional distress and punitive damages may be awarded as necessary to give full effect to the ADEA.[129]

Although labor unions have greatly advanced the rights of workers, most American workers are not covered by a union contract. Generally, employers have been free to fire at-will employees for good reason, bad reason, or no reason at all. However, ATLA lawyers have persuaded courts to allow legal remedies to employees who were terminated for reasons that violate strong public policies.[130]

IX. The Right to Emotional Wellbeing

The law has been slow to recognize that psychological injury can be as damaging as a physical blow. Courts, seeking to keep liability within manageable

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(**Kenneth N. Kripke** and **Douglas E. Bragg**)(class action against race discrimination in employment); Green v. Montgomery Ward Co., Wash. Super. Ct., 19 ATLA News. L. 323 (1976)(**J. Gregory Casey**)(award for unequal treatment of black employees with job injuries); Westinghouse v. Massachusetts Comm'n Against Discrimination, Mass. Super. Ct. (1977)(**Mark E. Schreiber**), 20 ATLA L. Rep. 367 (1977)(cause of action for racial discrimination in promotion based on state civil rights law); Haddix v. Port of Seattle, 21 ATLA L. Rep. 355 (Wash. Super. Ct. 1978)(**Gary L. Wolfstone** and **Edward A. Dawson**)(state law cause of action for racial harassment by job foreman).

[128] Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1975), 18 ATLA News L. 108 (1975)(**Howard A. Specter**)(class action under Title VII for discrimination against women in hiring and promotion at insurance company); West v. Roadway Express, Inc., 24 ATLA L. Rep. 405 (Ohio Ct. C.P. 1981)(**John L. Wolfe**)(verdict for secretary who was sexually harassed and fired for rejecting boss's advances).

[129] Coates v. National Cash Register Co., W.D. Va., 20 ATLA L. Rep. 79 (1977)(**Gary L. Bengston**)(award under ADEA for workers terminated because of age, including damages for pain and suffering); Karjolic v. Illinois Bell Tel. Co., N.D. Ill. (1977), 21 ATLA L. Rep. 116 (1978)(**Ernest T. Rossiello**)(punitive damages and damages for mental distress allowed).

[130] Nees v. Hocks, 536 P.2d 512 (Or. 1975), 18 ATLA News L. 333 (1975)(**Elden M. Rosenthal**)(employee wrongfully discharged because of time on jury duty); Pstragowski v. Metropolitan Life Ins. Co., 19 ATLA News L. 323 (D.N.H. 1976)(**Roger B. Phillips**)(wrongful discharge of whistleblower); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980), 23 ATLA L. Rep. 294 (1980)(**Joseph Posner** for CTLA as amicus)(worker discharged for refusing to participate in illegal price-fixing); Sides v. Duke Hospital, 328 S.E.2d 818 (N.C. App. 1985), 28 ATLA L. Rep. 252 (1985)(**Kathy A. Klotzberger** for NCTLA as amicus)(nurse was harassed and fired in retaliation for testifying for plaintiff in a malpractice case).

limits and wary of the possibility of fraudulent claims, have traditionally required objective corroboration of the injury.

Outrageous! Intentional Infliction of Emotional Distress

Tom Lambert proposed a simple test for recognizing a valid claim for intentional infliction of emotional distress. Recount the facts to a random stranger on the bus or subway. If your listener exclaims "That's outrageous!" you have a case for the jury. Increasingly courts permitted juries to award damages for mental distress and punitive damages in such cases.[131]

Negligent Infliction of Mental Distress

The law has long recognized pain and suffering due to injury as compensable general damages. An early expansion of this rule allowed recovery for specific psychological harm precipitated by a physical impact event.[132] Courts abolished the physical impact requirement as unnecessary where plaintiff could show physical consequences of psychological injury.[133] Later

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[131] Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964), 8 ATLA News L. 2 (1965)(**Peter Makris**)(landlord who planted listening devices in husband and wife's bedroom liable for invasion of privacy); Rugg v. McCarty, 476 P.2d 753 (Colo. 1970), 13 ATLA News L. 447 (1970)(**William A. Trine** and **Morris W. Sandstead, Jr.**)(harassment and invasion of privacy by bill collectors); Rockhill v. Pollard, 485 P.2d 28 (Or. 1971), 14 ATLA News L. 370 (1971)(**William Wiswall**)(mother recovered for intentional infliction of mental distress against doctor who refused to treat her injured infant); Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976), 19 ATLA News L. 385 (1976)(**Dante G. Mummolo** and **Hal Levitte**)(employer fired restaurant workers in alphabetical order to force thief to come forward); Malandris v. Merrill Lynch, Pierce, Fenner & Smith, 447 F. Supp. 543 (D. Colo. 1977), 21 ATLA L. Rep. 243 (1978)(**William R. Fishman** and **David H. Drennen**)(stock brokerage liable for fraud, deceit and tort of outrage in defrauding couple of life's savings).

[132] Di Mare v. Cresci, 373 P.2d 860 (Cal. 1962), 5 NACCA News L. 179 (1962)(**Marvin E. Lewis**)(fall on a defective stairwell activated latent schizophrenia); Gentile v. United States, 12 ATLA News L. 166 (E.D.N.Y. 1969)(**Alfred S. Julien**)(award for anxiety where defendant lost catheter in plaintiff's body, causing fear that it might injure a vital organ); Zeller v. American Safety Razor Corp., 443 N.E.2d 1349 (Mass. App. 1983), 26 ATLA L. Rep. 344 (1983)(**Norman J. Fine** and **Paul R. Sugarman**)(where doctor lost surgical blade inside plaintiff's body, she suffered disabling fear that it might migrate to vital area); Eagle-Picher Indust. v. Cox, 481 So. 2d 517 (Fla. App. Ct. 1985), 29 ATLA L. Rep. 183 (1986)(**Jane N. Saginaw**)(fear of developing cancer after exposure to asbestos).

[133] Battalla v. State, 219 N.Y.S.2d 34 (N.Y. 1961), 4 NACCA News L. No. 7, at 4 (1961)(**Leon**

courts permitted recovery for emotional distress unaccompanied by physical illness.[134]

Bystander Recovery

Courts have extended this rule to allow recovery for emotional distress occasioned by fear for the safety of another who is endangered by defendant's negligence.

Early courts permitted recovery limited to those persons who were themselves in the zone of danger created by the defendant's negligence.[135] The California Supreme Court, in a case where a mother suffered emotional trauma when she saw an automobile run over her child, replaced the zone-of-danger rule with a three part test: Whether the plaintiff was located near the accident, whether the shock was caused by direct sensory impact, as opposed to hearing about the event later, and whether the plaintiff was closely related to

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Segan)(ski lift attendant failed to fasten seat belt of 9-year-old girl; liability for girl's fright and hysteria, leading to physical illness); Caposella v. Kelley, 8 ATLA News L. 312 (N.Y. Sup. Ct. 1965)(**Harry H. Lipsig**)(award for wrongful death of man who suffered fatal heart attack when defendant's car went out of control and ran into his yard); Niederman v. Brodsky, 261 A.2d 84 (Pa. 1969), 13 ATLA News L. 2 (1970)(**Jerrold V. Moss**)(award for heart attack precipitated by negligent driver's near-miss).

[134] Molien v. Kaiser Foundation Hosp., 616 P.2d 813 (Cal. 1980), 24 ATLA L. Rep. 53 (1981)(**Herbert W. Yanowitz**)(where doctor and hospital negligently and falsely informed wife she had syphilis, causing collapse of marriage, defendants could be liable for negligent infliction of emotional distress without physical injury); Paugh v. Hanks, 451 N.E.2d 759 (Ohio 1983), 26 ATLA L. Rep. 302 (1983)(**A. Russell Smith**)(negligent infliction of emotional distress where defendants lost control of their cars and crashed into plaintiffs' house; cause of action without physical injury, zone of danger or requirement of physical consequences of distress); Johnson v. Supersave Markets, Inc., 686 P.2d 209 (Mont. 1984), 27 ATLA L. Rep. 395 (1984)(negligent infliction of mental distress where grocery store failed to tell collection agency that plaintiff had paid bill, leading to arrest and detention of plaintiff); *See also* Prince v. Pittston, 63 FRD 28 (S.D. W. Va. 1974), 23 ATLA L. Rep. 396 (1980)(**Gerald M. Stern**)(settlement for survivors of Buffalo Creek flood disaster who were absent during destruction of their community, but who suffered psychological harm).

[135] State v. Thomas, 173 F. Supp. 568 (D. Md. 1959), 3 NACCA News L. No. 2, at 3 (1960)(**Saul M. Schwartzbach**)(where woman was killed in auto accident, husband and child who were also in car could recover for emotional distress); Kinard v. Augusta Sash & Door Co., 336 S.E.2d 465 (S.C. 1985), 29 ATLA 28 (1986)(**Miles Loadholt** and **Terry E. Richardson**)(South Carolina recognizes negligent infliction of emotional distress; requires zone of danger, close relationship to victim, and physical manifestation).

the victim—"nearness, nowness, and closeness."[136] Approximately 20 states adopted this approach to bystander recovery.[137]

X. The Right to Access to Justice

The legacy left by a generation of trial lawyers was not a civil justice system in which injured plaintiffs always win. Their goal was a system that gives injured plaintiffs their day in court. In three other important developments, affecting many areas of tort law, ATLA members succeeded in holding open the courthouse doors.

Comparative Negligence: Fine-Tuning the Scales of Justice

The harsh doctrine of contributory negligence originated in an 1809 English decision. Injured plaintiffs who were even slightly at fault were left without remedy, regardless of the defendant's negligence. Congress, enacting the FELA, and a handful of state legislatures, took the first steps to replace this doctrine with comparative fault. ATLA member Henry Woods, who was instrumental in Arkansas' adoption of comparative negligence by statute in 1955 and who authored the leading treatise on the subject, credits ATLA's support for the accelerated pace of adoption of comparative fault by the courts. Although some states allowed reduced recovery only where plaintiff was less than 50 percent

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[136] Dillon v. Legg, 441 P.2d 912 (Cal. 1968), 11 ATLA News L. 305 (1968)(**Archie Hefner**).

[137] Archibald v. Braverman, 79 Cal. Rptr. 723 (Ct. App. 1969), 12 ATLA News L. 280 (1969)(**Zerne P. Haning, III**)(negligent infliction of emotional distress for mother who did not witness accidental injury to son from gunpowder illegally sold by defendant, but who witnessed injury moments after the explosion); Leong v. Takasaki, 520 P.2d 758 (Hawaii 1974), 17 ATLA News L. 291 (1974)(**Charles S. Lotsof**)(where boy witnessed death of step-grandmother, absence of a blood relationship did not bar recovery); D'Ambria v. United States, 338 A.2d 524 (R.I. 1975), 18 ATLA News L. 243 (1975)(**Girard R. Visconti**)(parents saw mail truck strike child); Shepard v. Superior Court, 142 Cal. Rptr. 612 (App. 1977), 21 ATLA L. Rep. 98 (1978)(**Norman A. Sauer**)(where defective lock on Pinto rear door allowed children to be thrown onto highway, *Dillon* allowed emotional distress recovery for parents); Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982), 25 ATLA L. Rep. 296 (1982)(**Paul R. Huscher**)(bystander recovery for woman who witnessed brother's death in forklift rollover); Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983), 27 ATLA L. Rep. 53 (1984)(**Ron Morgan**)(sons watched as father was fatally struck by vehicle); Versland v. Caron Transport Co., 671 P.2d 583 (Mont. 1983), 26 ATLA L. Rep. 441 (1983)(**Richard W. Anderson** and **Donald Molloy**)(adopts *Dillon* where plaintiff witnessed running-down death of spouse); Nevels v. Yeager, 199 Cal. Rptr. 300 (App. 1984), 27 ATLA L. Rep. 346 (1984)(**Ned Good**)(negligent infliction of emotional distress for mother who arrived at accident scene 10 minutes after daughter was struck by defendant's vehicle); James v. Lieb, 375 N.W.2d 109 (Neb. 1985), 28 ATLA L. Rep. 443 (1985)(**David J. Cullan**)(brother saw sister hit by garbage truck).

negligent, most courts adopting comparative principles adopted the "pure" form, which permits recovery of any percentage of fault.[138]

The Discovery Rule

Statutes of limitations protect defendants from stale claims by plaintiffs who "sat on their rights." The limitations period for personal injury actions generally begins when the defendant committed the tortious act. Courts have recognized, however, that strict adherence to this rule becomes inequitable where the plaintiff could not have known of the injury until long after the misconduct. The result has been widespread adoption of the rule that a cause of action does not accrue until the plaintiff knew, or through reasonable diligence should have known, of the tortious injury.

Early cases adopting the discovery rule included those in which a foreign object was negligently left inside the body of a patient.[139] The rule was later extended to many tortious wrongs whose harm may not be manifest until many years later.[140] The discovery rule exception to the statute of limitations

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[138] Maki v. Frelk, 229 N.E.2d 284 (Ill. App. 1967), 10 ATLA News L. 209 (1967)(**Bradley D. Steinberg**)(comparative fault where plaintiff's fault is less than defendant's); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975), 18 ATLA News L. 190 (1975)(CTLA as amicus)(pure comparative fault adopted); Placek v. City of Sterling Heights, 275 N.W.2d 511 (Mich. 1979), 22 ATLA L. Rep. 69 (1979)(**Sheldon L. Miller**); Alvis v. Ribar, 421 N.E.2d 886 (Ill. 1981), 24 ATLA L. Rep. 212 (1981)(**John Bernard Cashion**); Claymore v. City of Albuquerque, 634 P.2d 1234 (N.M. App. 1980)(**William H. Carpenter**), *affd sub nom* Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981), 24 ATLA L. Rep. 98 (1981); *cf.* Hall v. A.N.R. Freight System, Inc., 717 P.2d 434 (Ariz. 1986), 29 ATLA L. Rep. 124 (1986)(**G. David Gage** and **Amy G. Langerman**)(Arizona pure comparative negligence statute held constitutional).

[139] *E.g.,* Morgan v. Grace Hosp., 144 S.E.2d 156 (W. Va. 1965), 8 ATLA News L. 193 (1965)(**W.H. Ballard II**)(sponge left in patient by surgeon); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967), 10 ATLA News L. 232 (1967)(**Robert W. Gauss**)(similar).

[140] Schenebeck v. Sterling Drug, Inc., 291 F. Supp. 368 (E.D. Ark. 1968), 12 ATLA News L. 225 (1969)(**Henry Woods** and **Thomas C. Hullverson**)(impaired vision caused by Aralen, a blood pressure drug); Renner v. Edwards, 475 P.2d 530 (Idaho 1970), 14 NACCA News L. 73 (1971)(**Melvin J. Alsager**)(extending discovery rule in medical malpractice beyond foreign object cases); Harig v. Johns-Manville Products Corp., 394 A.2d 299 (Md. 1978), 22 ATLA L. Rep. 227 (1979)(**John T. Enoch**)(asbestos); Franklin v. Albert, 411 N.E.2d 458 (Mass. 1980), 24 ATLA L. Rep. 105 (1981)(**Michael Mone**)(adopts discovery rule in malpractice case alleging failure to diagnose Hodgkin's disease); Dawson v. Eli Lilly & Co., 534 F. Supp. 1330 (D.D.C. 1982), 25 ATLA L. Rep. 464 (1982)(**Aaron M. Levine**)(DES case); Hansen v. A.H. Robins Co., 335 N.W.2d 578 (Wis. 1983), 26 ATLA L. Rep. 371 (1983)(**J. Michael Egan; Randall E. Reinhardt** for Wisconsin TLA as amicus)(Dalkon Shield); Maughan v. Southwest Servicing, Inc., 758 F.2d 1381 (10th Cir. 1985), 29 ATLA L. Rep. 149 (1986)(**Dale Haralson**)(leukemia due to exposure to uranium).

is not simply a procedural matter. Rather, it is essential to preserving plaintiffs' right of access to justice.[141]

Family Values: Loss of Consortium and Prenatal Torts

The common law was careful to protect property interests, but was stingy when it came to family relationships and the notion that an injury to one family member harms the others. For example, the law long recognized a husband's claim for loss of consortium caused by tortious injury to his wife, itself a property-related concept. But other family interests received no similar legal protection.

ATLA attorneys moved the courts to remove this discriminatory treatment. Courts quickly recognized a wife's claim for loss of consortium of her injured husband.[142] Some have also permitted claims for loss of society of their seriously injured or killed child.[143] A handful of courts have allowed loss of society claims by a child whose parent has been seriously injured.[144]

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[141] Kenyon v. Hammer, 688 P.2d 311 (Ariz. 1984), 27 ATLA L. Rep. 436 (1984)(**James J. Leonard, Kenneth P. Clancy, Michael J. O'Melia** with **William B. Revis** and **Amy G. Langerman** for Arizona TLA as amicus)(legislative abolition of discovery rule held unconstitutional).

[142] Deems v. Western Maryland R.R., 231 A.2d 514 (Md. 1967), 10 ATLA News L. 188 (1967)(**James G. Perry**); Millington v. Southeastern Elevator Co., 289 N.E.2d 897 (N.Y. 1968), 11 ATLA News L. 244 (1968)(**Alfred S. Julien** and **Herman Glaser**); Durham v. Gabriel, 258 N.E.2d 236 (Ohio 1970), 13 ATLA News L. 192 (1970)(**Fred Weisman**); Diaz v. Eli Lilly & Co., 302 N.E.2d 555 (Mass 1973), 16 ATLA News L. 442 (1973)(**Paul R. Sugarman**); City of Glendale v. Bradshaw, 503 P.2d 803 (Ariz. 1972), 16 ATLA News L. 446 (1973)(**G. David Gage**); Pesce v. Sama Corp., 126 Cal. Rptr. 451 (App. 1975), 19 ATLA News L. 44 (1976)(**Mitchell Levy** and **Jack Tenner**); Rodriguez v. Bethlehem Steel Corp., 525 P.2d 669 (Cal. 1974), 19 ATLA News L. 94 (1976)(**Ned Good**); General Electric Co. v. Bush, 498 P.2d 366 (Nev. 1972), 19 ATLA News L. 95 (1976)(**James F. Boccardo** and **William O. Bradley**); Hopson v. St. Mary's Hosp., 408 A.2d 260 (Conn. 1979), 22 ATLA L. Rep. 52 (1979)(**Stephen I. Traub**)(either spouse may recover for loss of consortium).

[143] Currie v. Fiting, 134 N.W.2d 611 (Mich. 1965), 8 ATLA News L. 159 (1965)(**Peter F. Cincinelli** and **Eugene D. Mossner**); Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975), 18 ATLA News L. 184 (1975)(**Robert L. Habush** and **Howard A. Davis**); Hair v. County of Monterey, 119 Cal. Rptr. 639 (App. 1975), 18 ATLA News L. 186 (1975)(**Jack Miller**); Bullard v. Barnes, 468 N.E.2d 1228 (Ill. 1984), 27 ATLA L. Rep. 300 (1984)(**George Elsener, Robert J. Glenn** and **Robert Drummond** for ITLA as amicus)(pecuniary loss under wrongful death statute includes loss of society of minor child).

[144] Berger v. Weber, 267 N.W.2d 124 (Mich. App. 1978), 21 ATLA L. Rep. 386 (1978)(**Thomas H. Hay**); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980), 23 ATLA L. Rep. 388 (1980); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981), 25 ATLA L. Rep. 4 (1982)(**Nick Critelli** for Iowa TLA).

At common law, an unborn child was not viewed as a legal person apart from the mother. A tortfeasor could not be liable to a child injured in the womb, though the damage might affect the child's entire life. Tort lawyers pressed courts to eliminate this harsh immunity. Early decisions recognized a cause of action for a child injured after the date of viability. Most courts quickly allowed an action for prenatal injury to a child. A logical extension was to permit an action for preconception torts, committed before the child is even conceived.[145]

Similarly, an unborn child was not viewed as a "person" for purposes of the wrongful death statute. Again trial lawyers succeeded in ridding the law of this artificial and baseless immunity.[146] Many courts now permit an action for "wrongful birth" to recover for added childrearing expenses resulting from defendant's negligence.[147]

Conclusion

The result of this remarkable revolution in tort law was that America was a safer place in the mid-1980s than it had been in the 1950s. Much credit is owed to state and federal judges who courageously took to heart the principle that Roscoe Pound enunciated and Tom Lambert repeated: "The law is not settled until it is settled right." But it was the trial lawyers who took those forward-looking opinions and combined them with tactics that won cases. The Bill of Rights for a Safer Society is their great legacy.

After 1984, the progressive development of the common law slowed dramatically. Empirical studies soon confirmed what trial lawyers were observing first-hand. Appellate decisions expanding the scope of liability dwindled.

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[145] Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977), 20 ATLA L. Rep. 480 (1977)(**Robert C. Stroedel**)(cause of action for preconception tort where plaintiff suffered brain damage in utero due to defendant's negligence in blood transfusion to mother eight years earlier).

[146] White v. Yup, 458 P.2d 617 (Nev. 1969), 12 ATLA News L. 427 (1969)(**Richard W. Horton**); Volk v. Baldazo, 651 P.2d 11 (Idaho 1982), 25 ATLA L. Rep. 364 (1982)(**William J. Brauner; Jeffrey R. White** for ATLA as amicus); Amadio v. Levin, 501 A.2d 1085 (Pa. 1985), 29 ATLA L. Rep. 14 (1986)(**Jill M. Follows** and **Alan Schwartz**).

[147] Naccash v. Burger, 240 S.E.2d 825 (Va. 1982), 25 ATLA L. Rep. 298 (1982)(**Haynie S. Trotter**)(failure to test for Tay-Sachs disease); Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1982), 26 ATLA L. Rep. 106 (1983)(**Samuel H. Pemberton, Jr.; Bryan P. Harnetiaux** and **Robert Whaley** for Washington TLA as amicus)(costs of raising deformed child due to negligent genetic counseling by defendant); Jones v. Malinowski, 473 A.2d 429 (Md. 1984), 27 ATLA L. Rep. 197 (1984)(**Patricia M. Flannery**)(cost of raising child due to negligent sterilization).

Trial judges were dismissing more cases by directed verdict and summary judgment. Juries themselves were finding liability less often.[148]

To an extent, this simply reflected the success of ATLA lawyers. Many of the most egregious privileges and immunities had been cast aside by the courts. Additionally, some aspects of the law had simply reached the limits defined by the Fault Principle.

The expansion of strict product liability which began with the New Jersey Supreme Court's *Henningson* decision reached its limit with another controversial decision by that court. In *Beshada v. Johns Manville Corp.*,[149] the court ruled that a manufacturer could be held liable for failure to warn of dangers that were unknown at the time of sale. The decision stirred a firestorm of criticism. Many in the legal community argued that to hold a company liable for failing to warn of an unknown danger simply could not be squared with the Fault Principle. The New Jersey court itself soon retreated from "super-strict" liability.[150] In a similar vein a few years later, the California Supreme Court in a DES case indicated it had reached the outer limits of strict liability. No less an eminence than Justice Stanley Mosk ruled that prescription drug makers were not subject to design defect liability, and that they could be liable only for failure to warn of known dangers.[151]

Finally, and soon to be of greatest immediate concern to ATLA, the fierce tort reform battle was taking its toll. The massive public relations campaign of the insurance industry was tainting the pool of potential jurors by portraying most personal injury cases as baseless or frivolous. At the same time, powerful special interests lobbied hard for legislative favors that threatened to rebuild the citadel of immunity from accountability. To preserve the tort system and the right to trial by jury, ATLA would transform itself again. It would change from an organization primarily concerned with the education and training of plaintiffs' lawyers into an effective lobbying voice in the state legislatures and in Congress.

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[148] Theodore Eisenberg and James Henderson, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change,* 37 U.C.L.A. L. Rev. 479 (1990)

[149] Beshada v. Johns-Manville Corp., 447 A.2d 539 (N.J. 1982), 25 ATLA L. Rep. 340 (1982)(**Alan M. Darnell**).

[150] Feldman v. Lederle Laboratories, 479 A.2d 374 (N.J. 1984)(**James I. Peck, IV**; **Arthur Ian Miltz** for ATLA-NJ as amicus).

[151] Brown v. Superior Court (Abbott Laboratories), 751 P.2d 470 (1988).

6

Tort Crusaders

The common law aims to do justice one case at a time. But to appreciate the trial lawyers' efforts to make America safer requires a look at forests as well as trees. Many plaintiffs today can obtain adequate compensation for injury because trial lawyers waged long and often discouraging battles against corporate irresponsibility. Equally important, many people are alive and healthy today because accountability led companies to minimize hazards and because litigation often prompted governmental safety agencies to act.

These crusades often began with an idea—a new way of looking at making companies accountable for creating unreasonable risks. ATLA's educational programs were an ideal hothouse for developing and spreading new ideas. Turning these ideas into reality required hard-fought campaigns in the courts that demanded extraordinary commitment from many plaintiff's lawyers. ATLA was there to foster the cooperation and information-sharing that ultimately opened the courthouse doors to many injured claimants. These are just a few of the crusades in which trial lawyers built a better America.

Crashworthiness: Designing for Safety

Melvin Belli was one of the first to appreciate that ATLA's education programs were not simply a means of transmitting information. Education was also a matter of learning new ways of looking at tort law. When people are harmed

because the law fails to hold accountable those who could eliminate the risk, sometimes all that is needed is a good idea.

In Craig Spangenberg's opinion, "ATLA's role in the courts and the public arena was responsible in great measure for today's automobile safety." The traditional approach by such entities as the National Safety Council was to focus on the driver. The part of the car generally blamed for accidents was "the nut behind the wheel." Although "Drive Carefully" is always worthwhile advice, it ignores the role of the design of the car itself in causing harm on the highway.

Harold Katz was a labor lawyer in Chicago, representing unions and union members. He had authored a number of books and articles on labor law and workers' compensation and was an early active NACCA member. "I would attend the conventions religiously," he recalled, "including the Melvin Belli seminars."

Early in the 1950s, the medical profession was awakening to the fact that deaths and injuries in automobile accidents were a major public health problem. What caught Katz's attention as he looked at the medical literature were the complaints by doctors that so many accident victims suffered severe injuries inflicted by the interiors of their own cars as they were hurled against the windshield or metal dashboard or were impaled on the steering column.

At about the same time, Katz learned of a report on crash injury research by the U.S. Air Force at the Cornell University Medical Colleges. Colonels John Moore and John Stapp observed in experiments that severe injury resulted when strong deceleration forces in a crash were concentrated on a small area of the human body. Injuries could be minimized, they reasoned, by diffusing or diverting these forces. In other words, occupant safety was a matter of physics. And therefore, thought Katz, it was a matter of reasonable design. Yet, the researchers pointed out, carmakers virtually ignored safety in designing automobile interiors.

It occurred to Katz that trial lawyers themselves had a blind spot. Auto accident litigation focused primarily on the negligence of the drivers. The few negligence actions against auto manufacturers looked only to whether a defect had caused the accident. "I realized that in most accidents there are really two collisions," Katz stated. The first occurs when the car hits another vehicle or some other object. "But the second accident—and the one that does the damage—is what happens to your body after you have the first accident." In fact, Katz learned, about four times as many injuries were the result of this "second collision" as were caused by the initial impact.

A fair number of the new cars rolling off any assembly line will be involved in accidents. Collisions are not merely foreseeable; they are a certainty. Add to that the fact that many safety improvements which could prevent death

or serious injury were relatively simple: seatbelts, padded dashboards and steering wheels, effective door latches, and retractable steering columns. Safe design did not appear to be out of reach. But the Big Three car makers focused their research and development on power and style. Not only had there been no safety improvements for at least fifteen years, the Air Force report stated, but "the new model automobiles are increasing the rate of fatality- and injury-producing accidents." This would not change, Katz decided, until automakers were held accountable for their failure to protect occupants.

He laid out his ideas in a paper he presented to the NACCA trial lawyers at the 1955 annual convention in Cleveland and in an article published in the *Harvard Law Review.*[152] He declared:

> The placing of millions of automobiles on the road by automobile manufacturers without utilizing in the slightest the tremendous engineering resources to design the safest practical car constitutes the most stupendous creation of risk and neglect of duty in modern times. Put in human terms, based on the estimate of disinterested investigators, this neglect results annually in the unnecessary deaths of 18,000 persons.

Katz promoted his idea of crashworthy design around the country, not only to lawyers, but to interested physician groups, and to state and federal legislators. But his hope for change was in tort law. "History teaches us there is no greater incentive for limiting damages to human life and for improvement in the quality of products than the threat of legal liability."

The automakers' reaction was disappointing, though not surprising. In October 1961, General Motors president John F. Gordon told the National Safety Congress:

> The general thesis of these amateur engineers that cars can be made virtually foolproof and crashproof . . . is wholly unrealistic. . . . The suggestion we abandon the hope of teaching drivers to avoid accidents and concentrate on designing cars that will make collisions harmless is a perplexing combination of defeatism and wishful thinking.

The first verdict for injury caused by the negligent design of a car's interior was won in 1962 in South Carolina by NACCA President James "Spot"

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[152] Harold Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars,* 69 Harv. L. Rev. 863 (1956).

Mozingo. A 17-year-old girl was rendered paraplegic by the gearshift lever of a 1949 Ford, which penetrated her spine.[153] A few years later, however, the Seventh Circuit dealt a setback to safety, holding that an automaker should not be required to anticipate that its cars might be involved in collisions.[154] Judge Roger Kiley wrote a powerful dissent, citing Katz's latest article on crashworthiness. Nevertheless, other courts adopted the Seventh Circuit's reasoning.

Katz was bitterly disappointed that his ideas had not sparked the revolution in liability and auto design he had expected. But he was mistaken. It took nearly two decades for the impact of his seminal ideas to be widely felt.

A second-year student at Harvard Law School read Katz's article with intense interest. Ralph Nader was captivated with its central thesis, the duty to design for safety, and he made it the focus of his paper on medico-legal problems.

When General Motors introduced the Corvair, GM proudly advertised its "revolutionary" swing-axle independent rear suspension. Drivers soon discovered, however, that the Corvair had a frightening tendency to go out of control. From 1959 to 1964, despite the rising toll of injuries and deaths in Corvair rollovers, General Motors steadfastly refused to change its design. In 1965, Harry Philo reported that 160 lawsuits had been filed alleging defective design of the Corvair. In addition to Philo, Louis Davidson, Eugene Pavalon, and Leonard Ring were active in Corvair litigation. Davidson invited Nader to attend ATLA's Corvair litigation planning sessions. Some of what Nader learned there became the basis of his groundbreaking book, *Unsafe At Any Speed.*

Nader took his campaign for safer auto design to Washington, D.C. In 1965, Senator Warren G. Magnuson, Chairman of the Senate Commerce Committee, held hearings on auto safety, using the Corvair to make his point. Senator Abraham Ribicoff opened a broad investigation of General Motors' dominance of auto industry and its design emphasis on speed and style, rather than safety. Nader worked as an unpaid advisor to Ribicoff's staff. Several ATLA attorneys testified at the hearings.

GM made the colossal blunder of hiring a private detective agency to discredit Nader. Investigators followed Nader relentlessly and even sent young women to lure him into a compromising situation. (An attractive brunette approached him in a drug store and invited him to her apartment to discuss foreign policy. Only in Washington.) When the Ribicoff committee and the pub-

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[153] The South Carolina Supreme Court upheld the award and adopted the crashworthiness doctrine in Mickle v. Blackmon Cherokee, Inc., 266 S.E.2d 173 (S.C. 1969), 12 ATLA News L. 142 (1969)(**James P. Mozingo**).

[154] Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966)(**Theodore Lockyear, Jr.**).

lic learned of GM's tactics, it was a public relations disaster for the automaker. Nader, represented by ATLA lawyer Stuart Speiser and his associate Paul Rheingold, sued General Motors for invasion of privacy. The case was settled for $425,000 which Nader, with poetic justice, used to fund additional consumer watchdog initiatives.

Nader recognized that federal regulations alone would not bring about safer cars. In 1963, in an article published in NACCA's *P.I. & E. Bulletin*, he reminded trial lawyers:

> Imposition of civil liability for negligent design has always been a properly severe task master for greater product integrity. When the common law speaks, its words breathe a retroactive moral judgment on a particular act, or acts, that cannot be duplicated by the prospective impact of legislation whose costs of compliance can be charged to the consumer. Voluntary caution and change is encouraged by civil liability for past behavior.

Nader bluntly told the trial lawyers their shortcomings. In the eight years following Katz's article, he said, "the development of case law involving unsafe vehicular design has scarcely begun." Rhetoric alone would not win cases. Lawyers needed a thorough knowledge of automotive technology, and they needed to work cooperatively with automotive engineers, most of whom depended upon the industry for their livelihood.

ATLA responded by launching teaching seminars on car design, beginning at the 1964 annual convention. David Sindell was on the program. "We had a thousand people in the audience. We started the program by having experts on car crashworthiness go into the details on the causes of accidents and prevention. . . . We had charts on the wall. We had diagrams, motion pictures, and demonstrative evidence." The seminars brought the science of safe automotive design to lawyers in all parts of the country. ATLA's focus on auto safety continued in 1965, with the publication of a brochure, *Stop Murder by Motor* by ATLA President Joseph Kelner and his brother Milton. ATLA distributed nearly 1 million copies to unions, schools, government agencies, and the public.

Kelner made auto safety the central focus of his presidency. A highly publicized seminar in New York, calling for federal auto safety standards, attracted major media attention. The *New York Times* published an editorial supporting ATLA's call. President Lyndon Johnson wrote to commend ATLA for alerting Americans to "the slaughter on our highways," and he pledged to submit "a comprehensive highway safety act" to Congress. Senator Robert Kennedy addressed ATLA's New York meeting, condemning the auto industry's indifference to safe design. "In Detroit," he declaimed, "the laurels go to the

engineer who designs a flashy but deadly chrome gadget for the dashboard, who takes a dime out of the brake mechanism or shaves the cost—and performance—of a tire." In Congress, Senator (and ATLA member) Vance Hartke, along with Rep. James A. Mackay introduced the bill, noting ATLA's strong support. The legislation was ultimately enacted as the National Traffic and Motor Vehicle Safety Act of 1966, along with a companion measure to help the states, the Highway Safety Act of 1966.

Meanwhile in the courts, ATLA lawyers were pressing trial and appellate judges to reject the restrictive *Evans* position. "Give *Evans* the back seat!" urged Tom Lambert in the pages of the *ATLA Law Reporter*. In 1967, Nader and former NACCA assistant editor Joseph Page co-authored a law review article, which was reprinted in the *ATLA Law Journal*,[155] providing legal ammunition for practitioners battling for adoption of the crashworthiness doctrine in courts around the country.

The breakthrough came the following year when the Eighth Circuit in *Larsen v. General Motors* rejected the Seventh Circuit's *Evans* reasoning.[156] Judge Floyd Gibson pointed out that auto collisions are obviously foreseeable and held that a manufacturer owes a duty to consumers to design a reasonably crashworthy vehicle. Courts quickly lined up on the side of design safety. Finally, after thirty states had rejected *Evans,* the Seventh Circuit reversed itself and adopted the crashworthiness rule.[157] Reports of successful cases began appearing in the *ATLA Law Reporter* involving dangerous design features like pop-open doors, flimsy roof structures, uprootable seats, bone crushing knobs, chisel-like rear view mirrors, and "lance" steering columns.[158]

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[155] Ralph Nader and Joseph Page, *Automobile Design and the Judicial Process*, 55 Calif. L. Rev. 645 (1967), reprinted in 32 ATLA L.J. 52 (1968).

[156] Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), 11 ATLA News L. 204 (1968)(**Norman W. Larsen**).

[157] Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977), 20 ATLA L. Rep. 451 (1977)(**W. Scott Montross, Earl C. Townsend** and **Windle Turley**).

[158] Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D Pa 1969), 12 ATLA News L. 230 (1969)(**Elwood S. Levy**)(award for passenger injured when roof supports collapsed during rollover); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973), 17 ATLA News L. 35 (1974)(**Dennis L. Tomlin**)(driver injured when her head struck the pronged Ford ornament at the center of the steering wheel); Huddell v. Levin, 395 F. Supp. 64 (D. N.J. 1975), 18 ATLA News L. 104 (1975)(**James E. Beasley** and **John R. Bennie**)(uncrashworthiness of Chevy Nova head restraint leading to fatal head injury); Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), 24 ATLA L. Rep. 435 (1981)(**Larry S. Stewart**)(award including punitive damages for uncrashworthy subcompact car where seat left track and driver's head struck A-pillar); MacCuish v. Volkswagenwerk, A.G., 27 ATLA L. Rep. 203 (Mass. Super. Ct. 1984)(**Michael Flynn** and

Once accepted, the notion of crashworthy design found application in a wide variety of settings. Courts imposed liability on the manufacturers of aircraft, passenger trains, mobile homes, and even snowmobiles that were unreasonably dangerous in the event of a crash.[159] Plaintiffs' lawyers also won verdicts based on the "hostile exterior design" of cars that posed an unreasonable danger to pedestrians.[160] There was no reason why other elements of the highway environment should not also be designed to be "forgiving" in the event of a crash. For example, electric companies were held liable for installing utility poles that snapped off instead of bending over when hit by a vehicle.[161]

Litigation for safe auto design also energized support for federal safety regulations. In 1974, ATLA President Robert Cartwright launched a national public relations drive for safer automobiles. He joined with the Insurance Institute for Highway Safety in supporting mandatory seat belts and air bags. Cartwright urged representatives in Congress to oppose efforts by the auto industry to eliminate or delay production of such safety features as head rests, side guard door beams, stronger bumpers, seat belt interlocks, and air bags. He accused the car makers of "lobbying for death and destruction for the sake of a dollar." Testifying before a congressional committee considering the legislation, Cartwright pleaded, "Don't compromise with death." ATLA's efforts saved seat belt interlocks and air bags from political extinction.

The crashworthiness doctrine served as the basis for Ford's liability for the design of the Pinto, whose gas tank was vulnerable to rupture in rear-end collisions, resulting in fuel-fed fires.

The horrible burn injuries and deaths in Pinto crashes gave rise to dozens

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Thomas G. Hoffman)(in low-speed collision, rear seat in VW van detached and pop-out window opened, allowing plaintiff to be partially ejected).

[159] Votour v. American Honda Motor Co., 27 ATLA L. Rep. 10 (Fla. Cir. Ct. 1983)(**Barbara J. Pariente** and **Fred A. Hazouri**)(lack of crashbars to protect lower leg on motorcycle); Singleman v. Island Helicopters, Inc., 22 ATLA L. Rep. 305 (S.D.N.Y. 1979)(**Stanley J. Levy** and **Michael W. Foster**)(helicopter); Smith v. Ariens Co., 377 N.E.2d 954 (Mass. 1978), 22 ATLA L. Rep. 83 (1979)(snowmobile).

[160] Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972), 15 ATLA News L. 160 (1972)(**M. Gene Blackburn** and **Thomas McCullough**)(motorcycle passenger's leg was mutilated by blades protruding from car's hubcaps); Mieher v. Brown, 278 N.E.2d 869 (Ill. App. 1972), 15 ATLA News L. 52 (1972)(**Carl E. Kasten**)(truck lacked rear bumper, so that bed of truck pierced auto's windshield); Miller v. General Motors Corp., 20 ATLA L. Rep. 194 (Cal. Super. Ct. 1977)(**Daniel J. Monaco**)(bicyclist injured by tail fin of parked Cadillac).

[161] Bernier v. Boston Edison Co., 21 ATLA L. Rep. 101 (Mass. Super. Ct. 1977)(**George A. McLaughlin**).

of lawsuits. Bill Hicks and Francis "Brother" Hare, Jr., were pioneers in the Pinto litigation.[162]

The best known case, however, involved a Pinto that was struck from behind after it stalled on Interstate 15 in California. The fuel tank exploded, burning to death Lily Gray, 55, the driver, and severely burning 13-year old Robert Grimshaw. The jury returned a $125 million punitive damage award, which was subsequently reduced to $3.5 million.[163] The case became a lightning rod for controversy concerning punitive damages in products liability.

Tort reform advocates held up the *Grimshaw* verdict as an example of a "runaway jury." ATLA's response was simply to point to the evidence. President Tom Davis made the case in the April 1978 issue of *TRIAL*. Internal Ford documents showed that before the first Pinto rolled off the assembly line, Ford's own crash tests showed gasoline pouring out of the fuel tank following moderate rear-end impacts. Even more damning was an internal memo uncovered by Bill Hicks and shared with other plaintiffs' attorneys. Ford engineers were not only aware of the hazard, but predicted that about 180 people would be burned to death and another 180 would be severely burned. These tragedies could be prevented by modifications costing about $10 per car. However, after estimating Ford's liability for compensatory damages, the memo concluded that it would be cheaper to put the car on the market without the safeguards and simply pay the victims. Davis stated this "cold-blooded accounting procedure" made it essential that punitive damages be available. Ford had also lobbied the Nixon administration to delay federal fuel system safety regulations. It was estimated that Ford gained about $200 million by skimping on fuel system safety.

In September 1978, Ford finally recalled the Pinto. However, other makes and models were also vulnerable to post-collision fires.[164]

As the number of highway fatalities began to decline, Harry Katz could take satisfaction in the results of his long crusade. In July 1991, ATLA Presi-

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[162] Havlick v. Ford Motor Co., 18 ATLA News L. 146 (Fla. Cir. Ct. 1975)(**Bill Hicks** and **Bill Colson**); Kaminski v. Ford Motor Co., Ala. Cir. Ct., 20 ATLA L. Rep. 56 (1977)(**Francis Hare, Jr.**).

[163] Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (App. 1981), 24 ATLA L. Rep. 442 (1981)(**Arthur N. Hews, Mark P. Robinson, Ellis J. Horvitz, Michele Van Cleve, Gerald H.B. Kane, Byron M. Rabin, Leonard Sacks**).

[164] Shifko v. Ford Motor Co., 19 ATLA News L. 474 (Mich. Cir. Ct. 1976)(**Sheldon L. Miller** and **Richard F. Schaden**)(1970 Ford LTD station wagon); Ryan v. International Harvester, 20 ATLA L. Rep. 54 (Ill. Cir. Ct. 1976)(**C.E. Heiligenstein**)(pickup truck); Elias v. Ford Motor Co., 714 F.2d 109 (1st Cir. 1983), 26 ATLA L. Rep. 300 (1983)(**Frederic N. Halstrom**)(1972 Ford Mustang); Cota v. Harley-Davidson Motorcycles, Inc., 684 P.2d 888 (Ariz. App. 1984), 27 ATLA L. Rep. 246 (1984)(**Richard D. Grand** and **James G. Heckbert**)(motorcycle); General Motors Corp. v. Edwards, 482 S.W. 2d. 1176 (Ala. 1985), 29 ATLA L. Rep. 13 (1986)(**R. Ben Hogan, III**)(1980 Chevrolet Chevette).

dent Michael Maher presented Katz with the Association's Weidman-Wysocki Citation in Excellence for embodying the "spirit of uncommon diligence to our mission."

Aviation: Friendlier Skies

Air travel today is remarkably safe. And ATLA's trial lawyers played a part in that enviable record. Two New York lawyers, Stuart Speiser and Lee S. Kreindler, got ATLA's Aviation Law Section off the ground and helped make plaintiffs' lawyers more effective in holding airlines and aircraft manufacturers accountable for the safety of their passengers.

In 1950, Stuart Speiser was "the only crop-dusting lawyer in New York City." After flying with the U.S. Army Air Force during the war, and then graduating from Columbia Law School, Speiser hoped to combine law with his love of flying. There were no openings at the New York firms that represented airlines, so he struck out on his own with a single client, a crop-dusting service in Israel. Then a negligence lawyer asked his help representing a passenger injured in the crash of a DC-6 at Love Field in Dallas.

Speiser discovered there was a desperate need for good legal representation for injured passengers and their families. Family lawyers typically referred cases to auto negligence or admiralty lawyers who were ill-equipped to handle them. Almost no attorney had represented plaintiffs in more than one aviation crash case. "I was the first pilot-lawyer to became a specialist on the plaintiff's side of aviation cases," he recalled. Soon he was working with firms that needed his expertise on liability issues.

At the NACCA convention in 1955, president Ben Cohen asked Speiser to organize the Aviation Law Section, which he would chair for the next 10 years. His successor was Lee S. Kreindler.

Lee Kreindler began his aviation law career in 1952, representing a severely injured passenger of a National Airline DC-6 that crashed in New Jersey. The Civil Aeronautics Board was unable to determine the cause of a propeller malfunction that led to the accident. Kreindler scoured the manuals, interviewed expert mechanics, and even went to work in the Long Island propeller plant to learn how the propellers were manufactured. At trial, he succeeded in establishing gross negligence on the part of the airline in failing to replace propellers that were discovered to be defective. The experience convinced him that plaintiffs' lawyers needed to investigate the causes of air crashes and share information with other attorneys for victims of the same crash.

In the early 1950s, victims of air crash disasters were losing many of their cases. The problem was with their lawyers, according to Speiser and Kreindler:

They lacked both information and coordination. "The plaintiff lawyers would come into court and say 'the accident would not have happened if it were not for some negligence,'" Kreindler states. But *res ipsa loquitur,* letting the facts speak for themselves, was no match for the airlines' presentation. Pilots and engineers, carefully chosen for their jury appeal and appearing in full uniform, testified to the reliability of their equipment and the thoroughness of their training and safety procedures. A study in the *Virginia Law Review* in 1951 identified twenty-four aviation accident cases that had been submitted to the jury on a *res ipsa loquitur* theory. The juries returned defense verdicts in twenty-two of them.

It was obvious to both Speiser and Kreindler that if plaintiffs were to prevail, their attorneys needed to identify the specific cause of the crash and the negligence of the airline. This was no light undertaking. The fact that the Civil Aeronautics Board investigated all crashes and made its reports available was a mixed blessing. Attorneys accustomed to handling auto accident cases were overwhelmed by the mass of highly technical data. Expert investigation of crashes was expensive and time-consuming. Plaintiffs' lawyers could not hope to shoulder the cost of preparing cases unless they pooled their resources.

They also needed to cooperate with each other. The airlines naturally coordinated the defense of the numerous cases arising out of a single crash. This gave them a marked advantage over the individual plaintiffs' lawyers who were frequently unaware of what was happening in other cases.

One of the worst airline disasters in history provided the occasion for a cooperative effort by plaintiffs' attorneys. NACCA provided the setting. On June 30, 1956, two planes collided over the Grand Canyon, killing 126 persons. Twenty-five lawyers representing victims and families met at the NACCA convention in 1957 to explore ways to work together. Among them were Melvin Belli, William DeParcq, James Dooley, Irving Green, Everett Halverson, Dennis Harrington, Moe Levine, James Markel, James McArdle, Orville Richardson, and Craig Spangenberg. Stuart Speiser, as Chair of the new Aviation Law Section, presided.

The lawyers agreed to work with a network of attorneys to oversee case preparation, discovery, depositions, and expert testimony. Speiser's firm would work on liability issues as well as circulate a newsletter to keep the members of the group informed of developments. Each lawyer paid $250 per case into an expense fund.

The results were dramatic: Plaintiffs won most of their cases. "The Grand Canyon case broke the pattern of isolation and dispersion that had been maintained so carefully by the airline insurers in the past," Speiser stated. It was also "a milestone in establishing aviation negligence law as a recognized specialty"

and set ATLA's Aviation Law Section on the path to becoming one of the best organized and most effective groups within ATLA.

Building on the Grand Canyon experience, members of the Aviation Law Section have represented the victims of every major commercial airline disaster. These include the 1974 crash of a Turkish Airline DC-10 over France when a cargo door flew open, killing 346; the crash of an Air Force cargo plane that was evacuating orphans from Saigon in 1975, killing 172; the crash after takeoff of an American Airlines DC-10 in 1979 at O'Hare Airport, killing 275.

The worst airline disaster in history took place on the ground. On March 27, 1977, a Pan Am 747 collided with a KLM 747 on a foggy runway in Tenerife, Canary Islands. Both planes burst into flames, killing 576 passengers and crew. Representative verdicts and settlements arising out of these incidents were reported in the *Law Reporter.*[165]

A major obstacle to obtaining adequate compensation for victims on international flights has been the Warsaw Convention of 1929. This agreement, which the United States signed in 1934 and whose signatories now include nearly every nation that flies, imposed absolute liability on airlines for injuries or deaths during international flights. However, the amount of damages recoverable was limited to $8,300. Much of the effort of aviation trial lawyers was focused on establishing willful or gross negligence which was not subject to the damage limits.

The Aviation Law Section worked to eliminate these restrictions and put Americans on international flights on the same liability footing as domestic air passengers. They did not eliminate the damage cap, but succeeded in raising the limit to $16,500 (Hague Protocols), to $75,000 (Guatemala Protocols), and then to $100,000 (Montreal Protocols).

The battle in 1966 over the Hague Protocols to amend the Warsaw Convention indicated ATLA's growing influence in Congress. After the Senate Foreign Relations Committee voted 16 to 1 to ratify the Hague Protocols, Aviation Section leaders Lee Kreindler and Tom Davis argued to senators that ratification would lock the United States into an unjust treaty and pass up the opportuni-

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[165] *See* In re Paris Air Crash of Mar. 3, 1974, 427 F. Supp. 701 (C.D. Cal. 1977), 20 ATLA L. Rep. 150 (1977)(**Lee S. Kreindler**); Friends for All Children v. Lockheed Aircraft Corp., 497 F. Supp. 313 (D.D.C. 1980), 24 ATLA L. Rep. 158 (1980)(**Oren R. Lewis**)(Vietnamese orphan crash)(citing additional cases); Lamb v. McDonnell Douglas Corp., 25 ATLA L. Rep. 209 (Cal. Super. Ct. 1982)(**Ned Good**)(O'Hare crash)(collecting prior cases by **Wylie Aitken, Ned Good, John Kays,** and **Richard B. Goethals**); Baker and Blackmon v. Pan American World Airways, 22 ATLA L. Rep. 208 (W.D. Wash. 1979)(**Jan Eric Peterson, James F. Leggett, D.A. Burr**)(Tenerife crash), with additional settlements collected at 22 ATLA L. Rep. 254 (1979).

ty to negotiate a better agreement. The effort was so effective that the State Department on November 15, 1965, announced America's intent to denounce and withdraw from the Warsaw Convention due to the arbitrary limits on damages to American travelers. The aviation lawyers hoped this would trigger the demise of the Warsaw Convention's special treatment of international air carriers. The following May, however, the State Department, under pressure from the airlines, abruptly reversed course and approved a compromise—essentially a private agreement among the major international carriers—that raised the damage cap to $75,000 while retaining absolute liability and the willful misconduct exception. The ATLA Aviation lawyers denounced this betrayal.

They met with greater success in 1983. The airlines succeeded in bringing the Montreal Protocols, amending the Warsaw Convention, to the full Senate for a floor vote. The Protocols would set the limit on damages at $100,000, but eliminate the willful misconduct exception to the limit. Senator Joseph Biden underscored the impact of the proposed treaty on safety. "If the willful misconduct exception is eliminated, examinations into airline fault will be eliminated. And I feel that this would reduce the incentive for airlines to be safety conscious." The aviation lawyers worked diligently with ATLA's Public Affairs lobbyists to rally opposition. On March 8, the Senate voted against ratification, only the second time in fifty years that a treaty had been rejected by the full Senate. Senator Ernest F. Hollings, a key opponent of ratification, reported the outcome in a May 1983 *TRIAL* article entitled "Defeat of the Montreal Protocols: Victory for Airline Passengers."

Plaintiff's lawyers opened another front in aviation disaster litigation with the early application of strict products liability to the manufacturers of aircraft and aviation equipment.[166] Where the evidence pointed to a mechanical or design defect in the aircraft as the cause of the crash, plaintiffs succeeded in holding the manufacturer accountable.[167] In addition, ATLA aviation lawyers

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[166] Goldberg v. Kollsman Instrument Corp., 191 N.E.2d 81, 6 ATLA News L. 122 (N.Y. 1963)(**Stuart M. Speiser**).

[167] Noel v. United Aircraft Corp., 219 F. Supp. 556 (D. Del. 1963), 6 NACCA News L. 166 (1963)(**Joseph G. Feldman** and **Stephen M. Feldman**)(liability of manufacturer of Lockheed Constellation that crashed near New Jersey due to propeller overspeed); King v. Douglas Aircraft Co., 159 So. 2d 108 (Fla. App. 1963), 7 NACCA News L. 42 (1964)(**Alan R. Schwartz**)(strict liability of manufacturer of engine in DC-7 which crashed due to fatigue defect); Llewellyn v. Braniff Int'l Airlines, 14 ATLA News L. 302 (Cal. Super. Ct. 1971)(**Irving R. Green**)(settlement against Lockheed in crash of Lockheed Electra with allegedly defective wing); Knuth v. Boeing Aircraft Corp., 15 ATLA News L. 152 (S.D.N.Y. 1972)(**Jacob D. Fuchsberg**)(settlements in crash

have held the federal government accountable for negligent inspection and certification of aircraft by the FAA, and for the negligence of air traffic controllers.[168] Airlines have also been found liable for failing to take security precautions against terrorism.[169]

The success of these aviation lawyers has made air travel safer for everyone. Even the liability insurance industry has recognized the impact of their crusade. For example, John V. Brennan, president of United States Aviation Underwriters stated:

> [P]roducts liability litigation has a positive effect on aviation safety. Aircraft manufacturers recognize the need to concern themselves with adequate warning and safe design of their products. This awareness is the result of a very aggressive legal profession using our courts to shed light on products liability injuries . . . In conclusion, we have a legal system which in its own way has encouraged the growth of the biggest and safest and most efficient aviation environment in the world.

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of Boeing 707 due to fire caused by lack of lightning resistant features); In re Paris Air Crash on Mar. 3, 1974, 20 ATLA L. Rep. 353 (C.D. Cal. 1977)(**Lee S. Kreindler**)(settlements against McDonnell Douglas for crash of DC-10 when cargo door flew open); Sackheim v. Japan Air Lines Co., 20 ATLA L. Rep. 398 (Ill. Cir. Ct. 1977)(**John J. Kennelly**)(settlements against McDonnell Douglas for defectively designed ground spoilers on DC-8, which caused crash near Moscow); In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), 23 ATLA L. Rep. 355 (1980)(**John J. Kennelly**)(permitting punitive damages against DC-10 manufacturer McDonnell Douglas); Donahue v. McDonnell Douglas Corp., 24 ATLA L. Rep. 306 (Cal. Super. Ct. 1981)(**Bruce Walkup**)(jury verdict for death of a salesman in Chicago crash).

[168] Matteschei v. United States, 600 F.2d 205 (9th Cir. 1979), 22 ATLA L. Rep. 353 (1979)(**Thomas F. Schrag**)(negligence of air traffic controllers); Dickens v. United States, 545 F.2d 886 (5th Cir.), 20 ATLA L. Rep. 156 (1977)(**Joseph D. Jamail**)(air traffic controller negligence); Clemente v. United States, 422 F. Supp. 564 (D.P.R. 1976), 20 ATLA L. Rep. 110 (1977)(**Charles F. Krause, Donald W. Madole**)(liability of FAA for negligence in connection with crash, killing baseball star Roberto Clemente); United Scottish Ins. Co. v. United States, 692 F.2d 1208 (9th Cir. 1982), 26 ATLA L. Rep. 53 (1983)(**Richard F. Gerry**)(negligent inspection and certification of aircraft by the FAA).

[169] Evangelinos v. TWA, 550 F.2d 152 (3d Cir. 1976), 19 ATLA News L. 273 (1976)(**Donald L. Very**)(airline liable for injuries during an Arab terrorist attack at Athens Airport in 1973); Hernandez v. Air France, D.P.R. (1978), 21 ATLA L. Rep. 209 (1978)(**Melvin M. Belli** and **Jorge Ortiz Brunet**)(attack by Japanese terrorists at Tel Aviv airport); Aboujid v. Gulf Aviation Co., 437 N.Y.S.2d 219 (Sup. Ct. 1981), 24 ATLA L. Rep. 158 (1981)(**Stuart M. Speiser** and **Lawrence B. Goldhirsh**)(Palestinian terrorist attack at Entebbe).

White Death

Another crusade was waged by an intensely dedicated cadre of ATLA lawyers to hold the asbestos industry accountable for its heartbreaking legacy of death, illness and disability.

For many years, asbestos was the "miracle mineral," an inexpensive and fireproof insulator widely used in buildings and factories. During World War II, the government used vast amounts of asbestos to insulate pipes on ships. The Johns Manville Corporation, the world's largest asbestos supplier, prospered.

Workers cutting asbestos materials or ripping out old insulation looked as if they were working in a snowstorm as tiny asbestos fibers filled the air. What the workers did not realize—but what Manville and others in the industry had known for decades—was that these workers were dying with every breath. The tiny fibers entered their lungs and lodged there. They could not be dissolved or coughed up. In 1964, Dr. Irving Selikoff, director of Environmental Science Laboratory at Mt. Sinai Hospital in New York, definitively established the link between inhalation of asbestos fibers and lung cancer and other diseases. The most fearsome was mesothelioma, which sentenced its victims to a lingering and painful death.

East Texas lawyer Ward Stephenson lost his first asbestos case in 1966. Who knew the stuff could cause cancer? Not us, claimed the asbestos suppliers. Stephenson was convinced the industry was lying. His next client was Clarence Borel, a 57-year-old asbestos installer who was dying of cancer. The eleven asbestos manufacturers he named as defendants pleaded ignorance of the dangers prior to Dr. Selikoff's findings in 1964. Stephenson papered the country with scores of letters to medical associations, libraries, unions and other organizations. Eventually he uncovered some eighty-six published articles, some of which appeared in medical journals prior to 1938, linking asbestos to lung disease. In 1971, the federal court jury returned a verdict for the plaintiff. The defense appealed to the Fifth Circuit, retaining leading torts scholar W. Page Keeton.

During the appeal, Stephenson was diagnosed with incurable bone cancer. Confined to a hospital bed, he set up short wave radio equipment waiting for word of the Fifth Circuit's decision. He died on September 7, 1973, four days before the Fifth Circuit issued its opinion. But someone at the court, aware that Stephenson was on his deathbed, had telephoned him prior to the public announcement with the news that the verdict had been upheld.

The Fifth Circuit's opinion detailed the industry's knowledge, dating from the 1930s, of asbestos-caused disease. Citing Keeton's own writings, the court

held for the first time that strict liability as set forth in Restatement §402A applied to asbestos.[170]

The crusade was taken up by a young South Carolina attorney, Ron Motley, who educated himself to become one of the most knowledgeable lawyers in America on the medical aspects of asbestos. Like Sam Horovitz, Motley was driven by an evangelical conviction of the absolute rightness of his cause. He was convinced that the industry's decades-long cover-up had to have left a paper trail. Motley and Pittsburgh lawyer Thomas Henderson doggedly pursued every rumor and oblique reference that might turn up documents, leading them to dusty boxes of papers that lay forgotten in offices, warehouses, or in private homes.

Among their most important finds was a set of letters in 1935 between Sumner Simpson, president of Raybestos-Manhattan and Vandiver Brown, general counsel for Johns-Manville. The correspondence revealed their efforts to prevent publication of an article in a trade magazine concerning asbestos disease among British workers. The same Vandiver Brown explained that the company's purpose in seeking legislation to shield it from tort liability was to "eliminate the shyster lawyer and the quack doctor" and, above all, to "eliminate the jury system."

In addition, Henderson obtained deposition testimony from Johns-Manville's own medical director that the company had rejected his suggestion in 1952 that warning labels be placed on asbestos products. With this ammunition in hand, Motley was able to obtain compensatory and punitive damage awards against the company. The Asbestos Litigation Group made certain that the growing mountain of damning documents became available to attorneys for asbestos victims around the country.

Finally, with the number of claims escalating and its liability insurers denying further coverage, Johns-Manville filed for Chapter 11 bankruptcy in 1982. The asbestos trial lawyers worked to prevent the company from using reorganization to avoid its responsibility to injured workers. In 1986, the company established the Manville Trust, funded initially with $815 million in Manville stock and entitled to 20 percent of Manville profits, to pay the claims of asbestos victims. Marianna Smith, ATLA executive director, was hired as the trust's executive director.

Other asbestos companies were forced to address the rising tide of claims by injured workers. Some sought refuge in Chapter 11. Others banded together

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[170] Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), 16 ATLA News L. 417 (1973)(**Ward Stephenson**).

to explore ways to resolve claims. A group that eventually became known as the Center for Claims Resolution, entered into negotiations with plaintiffs' attorneys, notably Motley, his partner Joseph Rice, and Eugene Locks. They hammered out a plan under which the plaintiffs' lawyers filed a class action suit on behalf of all present and future asbestos victims who had not yet filed claims against CCR companies. On the same day, the parties filed a proposed settlement which established and funded a plan that resembled a workers' compensation program. In place of tort actions, victims were to submit medical evidence of asbestos-caused disease to plan administrators and would receive an offer of compensation according to a formula.

Many expected the global settlement, supported by asbestos defendants seeking an end to litigation, claimants' attorneys seeking mass settlement of numerous cases, and courts seeking to remove an ever-growing backlog of asbestos filings from their dockets, to win quick approval. The only roadblock was a stubborn Texas asbestos lawyer, Fred Baron.

Baron in many ways matched the working-class success stories of many of the early plaintiffs' trial lawyers. His family moved to Texas from Illinois when Fred was 9. He worked his way through school and took his law degree at the University of Texas in 1971. "I had long hair," he recalls, and idealism. He went to work at a small Dallas firm that handled labor and civil rights cases, which brought him to an asbestos insulation plant where "workers were dying like flies." He filed his first asbestos case in 1973 as a class action, reflecting his civil rights experience, but the federal court rejected the use of a class action for personal injury victims. In 1975, the firm would not support his representation of individual asbestos victims. Apart from idealism, Baron had few assets. "I had a wife, two kids, and $10,000. No one would lend me any money." Nevertheless, he struck out on his own.

Asbestos litigation was in its infancy, making use of the damning documents uncovered by Motley and Henderson. Baron joined the small coalition of asbestos lawyers informally sharing evidence and information in a cooperative effort. Over the years, Baron's firm handled tens of thousands of cases. Unlike Motley, who shared the work on cases with a network of other attorneys, Baron controlled and worked up each claim as an individual case. Each victim, he believed, was entitled to decide the direction of his or her case. "The Seventh Amendment defends the individual," he told a gathering at ATLA's Chicago convention in 1994.

On that issue, Baron stood nearly alone. Asbestos attorneys had come to the conclusion that the system could no longer handle case-by-case litigation. Structuring a compensation program that encompassed all claimants against

the industry appeared to them the best way to get compensation to victims efficiently and equitably. Though he did not fault Baron's principled stance, Motley stated that "Fred is behind the times."

But Baron would not yield. John Aldock, lead defense counsel in the global class action settlement, offered a princely sum to settle Baron's inventory of pending asbestos cases. Baron turned down the offer and intervened in the case, representing objectors to the proposed settlement. He spent over $4 million in the effort and retained Harvard professor Laurence Tribe to handle the objectors' case, which Baron fully expected to reach the Supreme Court.

Baron's request that ATLA participate as *amicus curiae* brought the controversy before the Board of Governors meeting in Des Moines in 1995. Motley and Baron presented their positions. Motley argued that the settlement package was essential to obtaining billions of dollars in insurance money and distributing it to asbestos victims in a fair manner. Baron responded that the provisions of the settlement fell far short of fairness to victims and placed class counsel in the ethically questionable position of settling their own pending tort lawsuits for good value while trading away the tort rights of future victims. Each governor rose to address the Board in a sometimes heated exchange of views.

Amy Langerman, chair of the Amicus Curiae Committee, proposed in a motion that ATLA refrain from opposing class action settlements generally or impugning class counsel. Instead, ATLA should defend the core value of its mission, the right to trial by jury. ATLA opposed the settlement solely because it eliminates the rights of future asbestos victims to jury trial without affording them a realistic opportunity to make a knowing and intelligent waiver. The Board approved.

ATLA filed an *amicus* brief in the federal district court in Pennsylvania, and subsequently in the U.S. Supreme Court. It emphasized the importance of the Seventh Amendment right and pointed out that the settlement agreement could easily have preserved that right by allowing future asbestos victims to opt out of the settlement within a reasonable time after discovering their asbestos disease.

Fred Baron had the rare experience of being vindicated by the Supreme Court of the United States—twice. In its first decision, the Court invalidated the settlement, finding that the huge class, with its conflicts between the interests of present and future claimants, was beyond the authority of the courts under the federal rules.[171] The Court did not reach the constitutional question.

Two years later, the Court was presented with a similar class action settlement, attempting to resolve all future claims against Fibreboard Corp. out of a $1.5 bil-

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[171] Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

lion "limited fund." Class members were given no opportunity to opt out. ATLA again participated as *amicus curiae,* filing the only brief that called the Court's attention to the asbestos victims' loss of their Seventh Amendment rights.

Once again, the Court invalidated the settlement—this time making the jury right a lynchpin of the decision. Justice David Souter stated that the mandatory class settlement "obviously implicates the Seventh Amendment jury trial rights" of future claimants and "compromises their Seventh Amendment rights without their consent." Providing a compensation scheme of this scope, the Court strongly suggested, was a matter for Congress.[172]

The struggle to obtain justice for thousands of Americans who will develop asbestos disease for years to come remains unfinished.

Heroes and Horrors: Pharmaceutical Harm to Children

Two national nightmares have shaped the ambivalent attitudes of Americans toward pharmaceutical drugs.

The summer of 1951. And 1952. And 1953. Each was more terrifying than the last for America's families as the polio epidemic spread. The virus attacked the spinal cord and the brain, often causing permanent paralysis. How it spread and how it chose its victims seemed random; precautions could only be guessed at. Children were forbidden to share drinking cups or toys; swimming pools and summer camps were padlocked. The young victims filled the austere hospitals, lying in long rows of beds in high-ceilinged wards. Some might one day walk, painfully, with heavy metal braces; others would not. A few suffered complete paralysis and could move only their eyes, imprisoned for life. Family visits were limited to once or twice a month. One writer noted, "A child in bed with polio never forgot the sound made in the corridor by his mother's high-heeled shoes."

Little wonder then that Dr. Jonas Salk, inventor of the polio vaccine, became an overnight American hero—and along with him, the entire pharmaceutical industry. Americans looked forward to an era in which vaccines and other "miracle drugs" would rid the world of disease. The major pharmaceutical houses looked forward to immense profits. Although these private corporations held the fates of millions in their hands, Americans had little patience with governmental red tape that might delay the availability of the next breakthrough. This was a prescription for disaster.

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[172] Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

Disaster was not long in coming. In 1955, a year after the Salk vaccine became available, over two hundred people who received vaccine manufactured by Cutter Laboratories, mostly children, were almost immediately struck down by polio. The tragedy led to a landmark lawsuit in California.

Representing two of the striken children against the drug maker were Melvin Belli and two future ATLA presidents: Belli's former partner Lou Ashe and Richard Gerry, who was fresh from law school. Gerry handled most of the discovery, seeking an answer to why the children contracted polio from a vaccine that should have contained only dead polio virus. In a stack of documents that the trial judge had ordered Cutter to produce during trial, Gerry found the smoking gun. "[T]hey hadn't followed Salk's formula. They were cutting costs and cutting corners. As a result, six lots of vaccine got through with live virus and caused poliomyelitis in 204 people." The jury returned verdicts totaling $148,000, an exceptional figure in 1958 for injuries to children.[173]

The California Court of Appeal, affirming, adopted warranty liability without privity, and the state supreme court denied review. Because sellers of food and drugs were traditionally held to a higher degree of care, the decision was not universally applicable. Not until 1963, in *Greenman v. Yuba Power Products,* did the California Supreme Court fully articulate the doctrine of strict products liability, overshadowing the foreward-looking Court of Appeal decision. Nevertheless, *Gottsdanker v. Cutter Labs* was the first of many cases against pharmaceutical manufacturers that served as bellwether cases on the cutting edge of product liability law.

Ironically, Cutter's mistake foreshadowed science. Dr. Albert B. Sabin developed an oral vaccine that used live, though weakened, polio virus. The Sabin vaccine quickly became the vaccine of choice. However, six to eight people each year contracted polio from the vaccine. There were rare instances, initially denied by the drug companies, of "contact polio" which struck people in contact with the vaccinated person. Following *Gottsdanker,* ATLA attorneys succeeded in imposing liability on drug companies for these tragedies.[174]

As companies developed and marketed multiple vaccines which were more convenient, they introduced increased risks. Quadrigen, combining polio, tetanus, pertussus, and diphtheria toxoids, made for an unstable combination

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[173] Gottsdanker v. Cutter Laboratories, Cal. Super. Ct. 1958 (**Melvin M. Belli, Lou Ashe, Richard F. Gerry**), *aff'd*, 6 Cal. Rptr. 320 (App. Ct. 1960).

[174] Drye v. Lederle Laboratories, Okla Dist Ct 1964 (**John Chiaf** and **O.A. Cargill**)(Sabin oral vaccine; verdict for polio); Givens v. Lederle Laboratories, 556 F.2d 1341 (5th Cir. 1977), 20 ATLA L. Rep. 476 (1977)(**Michael D. Martin**)("contact" polio).

that sometimes caused fevers as high as 108 degrees and potential brain damage. Plaintiffs charged that the manufacturer had rushed the vaccine to market without adequate testing for adverse reactions. Upholding verdicts for injured children, courts also rejected the argument that approval by the FDA preempted tort liability.[175]

Litigation involving another multi-vaccine, DPT (diphtheria, pertussus and tetanus), focused on the whole cell pertussus toxoid which contained endotoxins that caused seizures, encephalopy, and paralysis in some children. Plaintiffs argued that the company was negligent in failing to bring to market a fractionated, safer vaccine that had been developed in 1974.[176]

Other ATLA members secured compensation for plaintiffs injured by a wide variety of drugs which, despite FDA approval, inflicted serious harm. They included Aralen, a blood pressure drug which caused eye damage and blindness in some people;[177] Chloromycetin, which caused aplastic anemia fatal to some children;[178] and birth control pills.[179]

But the hardest fought battles involved drugs linked to birth defects.

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[175] Tinnerholm v. Parke Davis & Co., 285 F. Supp. 432 (S.D.N.Y. 1968), 11 ATLA News L. 195 (1968), aff'd 411 F.2d 48 (2d Cir. 1969), 12 ATLA News L. 221 (1969)(**Jacob D. Fuchsberg** and **Richard E. Shandell**); Stromsodt v. Parke-Davis & Co., 257 F. Supp. 991 (D.N.D. 1966), 9 ATLA News L. 298 (1966), aff'd, 411 F.2d 1390 (2d Cir. 1969), 12 ATLA News L. 483 (1969)(**Melvin M. Belli, Seymour L. Ellison,** and **Mark R. Vogel**).

[176] Larson v. Eli Lilly and Co., 17 ATLA News L. 119 (Mo. Cir. Ct. 1974)(**C. Marshall Friedman**); Holcomb v. United States, 25 ATLA L. Rep. 466 (S.D.W. Va. 1982)(**Monty L. Preiser, Stanley E. Preiser, Richard D. Lindsay** and **William S. Druckman**); Triplett v. Lederle Laboratories, 28 ATLA L. Rep. 331 (Fla. Cir. Ct. 1985)(**Larry S. Stewart** and **David W. Bianchi**); Graham v. Wyth Laboratories, 31 ATLA L. Rep. 312 (D. Kan. 1988)(**Andrew W. Hutton** and **Ted M. Warshafsky**).

[177] Sterling Drug Co. v. Cornish, 370 F.2d 82 (8th Cir.1966), 10 ATLA News L. 3 (1967)(**Thomas Hullverson**); Yarrow v. Sterling Drug Co, 263 F. Supp. 159 (D.S.D. 1967), 10 ATLA News L. 3 (1967)(**Ellsworth E. Evans**); Schenebeck v. Sterling Drug, Inc., 291 F. Supp. 368 (E.D. Ark. 1968), 12 ATLA News L. 225 (1969)(**Henry Woods** and **Thomas C. Hullverson**); Basko v. Sterling Drug, Inc., 416 F.2d 417 (2nd Cir. 1969), 13 ATLA News. L. 153 (1970)(**Morgan P. Ames**); Schaller v. Sterling Drug, Inc., 13 ATLA News L. 258 (D. Kan. 1970)(**Gerald L. Michaud** and **Bradley Post**).

[178] Love v. Parke Davis & Co., 5 NACCA News L.50 (Cal. Super. Ct. 1962)(**James Boccardo**); Incollingo v. Parke-Davis and Co., 12 ATLA News L. 505 (Pa. Ct. Common Pleas, 1969)(**James E. Beasley**); Timper v. Parke-Davis and Co., 13 ATLA News. L. 33 (N.Y. Sup. Ct. 1970)(**Guy I. Smiley**).

[179] Meinert v. G.D. Searle & Co., 13 ATLA News L. 175 (N.Y. Sup. Ct. 1970)(**Alfred S. Julien**)(phlebitis caused by birth control pill); Tobin v. G.D. Searle & Co., 13 ATLA News L. 192 (E.D. Mich. 1970)(**Rodney A. Klein, Saul Leach**)(blood clot); Ahearn v. Ortho Pharmaceutical Co., 20 ATLA L. Rep. 224 (Cal. Ct. App. 1977)(**Salvador A. Liccardo**)(blindness).

Tragedies at the Beginning of Life

In 1960, Dr. Frances O. Kelsey was the newest medical examiner at the FDA when she was assigned to review an application by Richardson-Merrell, Inc., for approval of a new wonder drug, Kevadon. The drug was already widely used in Europe as a sedative and to reduce morning sickness in pregnant women. Both the company and FDA officials expected quick approval. Kelsey did not know it yet, but the folder on her desk held the makings of a national nightmare that could well overshadow the polio summers. Over the next two years, Merrell, impatient to get its product into millions of American medicine cabinets, pressured the FDA for its approval. Kelsey, however, was suspicious. She would not be bullied into quick approval for Kevadon, Merrell's trade name for thalidomide.

What raised her suspicion was reminiscent of Sherlock Holmes' famous non-barking dog.[180] The studies using mice and rats Merrell submitted revealed no adverse effects of the sedative. But the animals did not get sleepy, either. Perhaps thalidomide affected rodents differently than humans, and animal testing did not reveal its dangers. Kelsey had little authority to deny the application. FDA rules then called for approval unless the agency could prove the drug was unsafe. All she could do was stall for time by asking for additional studies.

The world would soon learn that thousands of babies were being born in Europe with horrific birth defects. Many had no arms or no legs. Some had other internal deformities or brain damage. Half did not survive. In the face of a world-wide outcry, Merrell finally notified doctors of the dangers and withdrew its FDA application in December 1961.

There were an estimated 10,000 "thalidomide babies." About a dozen were born in the United States to women who obtained the drug overseas or from doctors who had received free samples from Merrell. But the stubborn FDA doctor had saved the country from an immense tragedy. Frances Kelsey became a national hero, honored by President Kennedy with the President's Award for Distinguished Civilian Service. At the same time, Congress moved to strengthen the FDA's power to keep dangerous drugs out of the United States.

All this was of intense interest to Craig Spangenberg as he received a letter from a group of Canadian lawyers. Unlike the United States, Canada had approved thalidomide at the end of 1959. Inexplicably, the government waited until March 1962 before banning the drug. There were an estimated 150 Canadian thalidomide babies, facing a lifetime of hardship and medical expense. Yet there were no lawsuits. Those who consulted attorneys found that Canadian

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[180] Arthur Conan Doyle, "Silver Blaze" in THE MEMOIRS OF SHERLOCK HOLMES.

law did not permit contingency fee agreements. They would have to pay an hourly rate for a lawyer engaged in the arduous task of suing a major pharmaceutical corporation. Worse yet, if they lost, they would be obligated to pay the defendant's legal expenses. None of the families could afford justice under those terms.

A group of attorneys decided to consult a U.S. lawyer. Some investigation led the families to Spangenberg. He agreed to represent several of the victims and set to work. Spangenberg's penchant for dogged research paid off. He discovered that the Canadian government had approved Merrell's license largely on the basis of a medical journal article praising the drug. The author turned out to be a friend of the son of Merrell's Board chairman. In effect, "the goddamned drug company had written the article itself," said Spangenberg. The author, who had received a supply of pills from Merrell, was himself responsible for three deformed babies. Spangenberg felt he had a solid basis for a lawsuit.

After Spangenberg obtained settlements for several plaintiffs, he suggested that the company offer compensation to all the Canadian victims. Merrell's board balked: Why should the company obligate itself when many of the families would likely never hear of Craig Spangenberg or consider filing suit? The response enraged Spangenberg, and he redoubled his efforts.

Finally, he hit upon what was then a novel tactic. He filed a class action lawsuit in federal court on behalf of a few U.S. and all Canadian victims. It was a long shot: The federal rules governing class actions at that time were very restrictive. He overcame one obstacle, obtaining jurisdiction over the foreign members of the class, by employing the little-used device of an opt-in class. Canada's Ministry of Health, which had been sending a $50 monthly stipend to the victims, was able to provide addresses of class members. After the judge indicated he might permit the class action to proceed, the company surrendered. Merrell set up a trust administered by the Canadian government that would pay each of the victims an average of about $200,000.

Donald P. Traci, of Spangenberg's firm, and Arthur T. Raynes would continue to press claims for other North American thalidomide victims until the last cases were settled in 1984.[181]

On the heels of the close call with thalidomide, President Kennedy introduced legislation to strengthen the FDA. ATLA assisted in the effort to assure

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[181] *E.g.*, Diamond v. Richardson-Merrell, Inc., 12 ATLA News L. 165 (E.D. Pa. 1969)(**Arthur G. Raynes**)(settlement for first suit for thalidomide birth defects where drug was given in U.S. hospital).

that the agency carried out its mission. In 1964, a Senate subcommittee chaired by Hubert H. Humphrey reported on the FDA's performance. Senator Humphrey commended ATLA's assistance. "In many cases NACCA's information [from its Products Liability Exchange] has proven valuable to the FDA." In addition, ATLA members testified at hearings concerning MER-29, Percodan, Chloromycetin, Envoid, Oraflex and other drugs. On the basis of this information, the Humphrey committee determined that the FDA was seriously deficient in its collection of information, recordkeeping, testing, and issuance of warnings. The *P.I. & E. Bulletin* noted editorially that the association "is entitled to some of the plaudits from the public" for helping protect Americans from dangerous drugs.

The thalidomide experience awakened Americans to the dangers that pharmaceuticals might pose to unborn children and made the FDA much more vigilant. Nevertheless, a number of drugs approved for sale in the United States were responsible for birth defects. Holding pharmaceutical companies accountable proved to be a daunting task. It was a crusade that frequently involved Merrell.[182] It also revealed a disturbing number of instances of false information submitted to the FDA.

The immediate obstacles were similar to those faced by plaintiffs' trial lawyers in the early aviation crash cases: highly technical subject matter, the high cost of investigating cases, and a defense strategy of isolating plaintiffs' counsel in separate cases. ATLA attorneys developed a powerful weapon to overcome these disadvantages: the litigation group.

In 1960, the FDA approved Richardson-Merrell's application to market MER/29, a new drug designed to lower cholesterol. By 1962, the company removed MER/29 from the market after hundreds of complaints that the drug caused cataracts and other side effects. The FDA accused Merrell of falsifying data in its application and failing to disclose information concerning the adverse effects of the drug. The company and several of its scientists were indicted in December 1963 and pled *nolo contendere* to the charges.

Paul Rheingold, who had been a Harvard Law classmate of Ralph Nader and assistant editor of the *NACCA Law Journal* under Tom Lambert, was then working at the Speiser firm, where he had observed the advantages of cooperative efforts in the Grand Canyon litigation. He was also the author of a brilliantly prescient law review article on the liability of drug manufactur-

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[182] Wm. S. Merrell Co. of Cincinnati became an operating division of Richardson-Merrell, Inc. (formerly Vick Chemical Co.) in 1960, until it was acquired by Dow Chemical and operated as Merrell Dow Pharmaceuticals.

ers.[183] In 1961, the first civil suits were filed against Merrell. The number would eventually exceed 1,500. In 1963, ATLA lawyers from thirty law firms who had been in contact with the ATLA Exchange met in Chicago to coordinate efforts in handling cases. Rheingold took the lead in forming the ATLA MER/29 Litigation Group, which grew to 288 members by 1967.

The Group was directed by a committee, which delegated much of its day-to-day authority to Rheingold, as trustee, and was supported by fees paid by its members. Much of the Group's work was as a clearinghouse for information. Rheingold produced a newsletter alerting members of developments in all areas of the litigation. Information packages containing discovery documents, summaries of interrogatories, and medical studies for use at trial were made available. The Group coordinated discovery, conducting depositions and interrogatories of Merrell personnel for use by all members. Rheingold presented a two-day "MER/29 School" to prepare attorneys for trial and prepared *amicus curiae* briefs on important legal issues.

The impact of these group efforts was tremendous. Juries held the company liable to its victims.[184] Group members also established the availability of punitive damages in product liability cases.[185] Significantly, over 95 percent of the cases were settled on favorable terms to plaintiffs as a result of solid preparation, saving plaintiffs the expense and risk of taking their cases through trial and appeal. Rheingold summed up the lesson learned:

> The MER/29 litigation was probably the outstanding example of group activity and pre-development of cases performed on a voluntary basis, without judicial oversight . . . indicating that multiple litigation could be handled without judicial supervision.

The Mer/29 Litigation Group served as the template for many successful cooperative efforts by ATLA attorneys, including litigation groups involving drugs associated with birth defects, such as DES and Bendectin.

DES, short for diethylstilbestrol, was a synthetic form of the female hormone estrogen. It was produced by several hundred manufacturers and prescribed to over 1.5 million pregnant women during the 1950s and 1960s to

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[183] Paul D. Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability,* 18 Rutgers L. Rev. 947 (1964).

[184] *E.g.,* Ostopowitz v.Richardson-Merrell Corp, 9 ATLA News L.348 (N.Y. Sup. Ct. 1966)(**William F.X. Geoghan**); Dishinger v. Richardson Merrell Co., 13 ATLA News. L. 121 (N.Y. Sup. Ct. 1970)(**Harry H. Lipsig**).

[185] Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398 (Ct. App. 1967), 10 ATLA News L. 310 (1967)(**John Wyn Herron** and **Dennis B. Conklin**).

prevent miscarriages until it was taken off the market in 1971. DES was never patented and producers using a standard formula frequently marketed the drug under its generic name.

There were two major problems with DES: it did not work, and it caused a host of serious medical problems. Most seriously, the mothers' use of DES was associated with a cancer known as clear cell adenocarcinoma in about one in every thousand DES daughters, vaginal precancerous cell changes, and deformities of the uterus and cervix which contributed to birth injuries in their own children.

Thousands of lawsuits were filed by members of the ATLA DES Litigation Group against the manufacturers. Hundreds of thousands of documents relating to DES were gathered, demonstrating not only the harm caused by DES to daughters in the womb but also that drug companies knew or should have known of the danger if they had tested adequately. As the first cases proceeded, according to LeRoy Hersh, "doctors did not know the extent of the problem or how widespread it was throughout the nation." One function of the ATLA DES Litigation Group was to launch an educational campaign to alert the public and the medical profession of the danger.

The problem facing many DES daughters was that by the time the abnormalities manifested themselves, perhaps twenty or thirty years later, any record or memory of which manufacturer had made the pills used by the mother was often lost. Failure to prove that the defendant supplied the specific product that caused the alleged harm ordinarily warrants judgment for the defense.

ATLA attorneys resorted to uncommon legal theories to obtain justice for DES victims. For example, where plaintiff could identify all or most of the possible manufacturers, some courts allowed an "alternative liability" theory, shifting the burden to each defendant to prove that it could not have supplied the pills used by plaintiff's mother.[186] Some plaintiffs who could establish that several manufacturers acted together to market DES in hazardous form, could sue under a "concerted action" theory.[187] The most creative means of addressing the plight of DES daughters was fashioned by the California Supreme Court, which imposed liability on all manufacturers who supplied DES in the relevant location and time period, but assessed damages on each in proportion to its

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[186] Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich. 1984), 27 ATLA L. Rep. 370 (1984)(**Lawrence S. Charfoos, J. Douglas Peters, Charles Nichols**).

[187] Bichler v. Eli Lilly and Co., 436 N.E. 2d 182 (N.Y. 1982), 25 ATLA L. Rep. 290 (1982)(**Alfred S. Julien**).

share of the market.[188] Using the flexibility of the common law, ATLA attorneys were able to prevent the makers of an undeniably dangerous product from hiding behind the anonymity of the marketplace.

Not far beneath the surface of these cases, seeking to impose liability for birth defects occurring after use of drugs during pregnancy, lies the most difficult problem for plaintiffs: scientific proof of causation. The strong correlation between thalidomide or DES and birth abnormalities made causation a minor issue. In the case of a relatively weak teratogen, the issue looms large, frequently requiring the jury to decide between competing experts on matters of considerable complexity. In this arena, corporate defendants launched a vigorous attack on the jury's role, climaxing in three major decisions by the U.S. Supreme Court. Once again, pharmaceutical cases served as a bellwether for product liability law generally.

In 1953, a doctor at Merrell suggested to his superiors that the millions of women who experience morning sickness during pregnancy would be a profitable market for an antinausea drug. Merrell combined three substances believed to control nausea, including an antihistamine, and filed a new drug application with the FDA in 1956. A mere twenty-eight days later, the FDA approved Bendectin. Over the next twenty-eight years, some thirty-three million women would for take the drug. During those years, Merrell conducted large epidemiological studies of women who took Bendectin, showing, the company declared, no statistically significant association between the drug and birth deformities. Nevertheless, in the 1970s, reports of limb abnormalities surfaced among users of the drug. Over the course of the next decade, hundreds of cases were filed against the company and plaintiffs' attorneys formed a Bendectin Litigation Group.

In 1983, Barry Nace obtained the first major judgment, a $750,000 compensatory damage verdict for a twelve-year-old girl born with part of one hand missing.[189] Two weeks after the verdict was affirmed on appeal, Merrell announced it was removing Bendectin from the market, not because it was unsafe, it said, but because the cost of defending the drug in court had become

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[188] Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), 23 ATLA L. Rep. 194 (1980)(**Jay H. Sorenson**). *See also* Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984), 27 ATLA L. Rep. 468 (1984)(**Michael S. Manzza, John L. Messina, John S. Glassman**); McCormack v. Abbott Laboratories, 617 F. Supp. 1521 (D. Mass 1985), 29 ATLA L. Rep. 88 (1986)(**Peter N. Munsing** and **Edward M. Swartz**).

[189] Oxendine v. Merrell Dow Pharmaceuticals, Inc., 26 ATLA L. Rep. 202 (D.C. Super. 1983)(**Barry J. Nace** and **Thomas H. Tate**), aff'd 506 A.2d 1100 (D.C. 1986), 29 ATLA L. Rep. 232 (1986).

"prohibitive." Meanwhile, other Bendectin cases foundered, resulting in defense verdicts or adverse judicial rulings.

It was another Bendectin case, again brought by Barry Nace, that focused on expert testimony. In *Daubert*, plaintiff's expert testified that Bendectin causes birth defects, based on recalculation of the data in Merrell's own epidemiology studies. The Ninth Circuit reversed, ruling that the expert opinion did not satisfy the "general acceptance" criterion of the *Frye* test, which had previously been applied almost exclusively to novel scientific theories or techniques in criminal cases. The U.S. Supreme Court, however, held that Federal Rule of Evidence 702 was intended to liberalize the admissibility of expert testimony and eliminated the *Frye* test. The Court went on, however, to assign to trial judges the role of gatekeeper to assure that the evidence presented to the jury is not only relevant, but reliable.[190]

In subsequent decisions, the Court attempted to clarify the judge's role. However, the Court failed to articulate its underlying premise that rejecting unreliable expert opinion should be the responsibility of judges, rather than jurors. Causation and other scientific matters are, after all, issues of fact rather than law. Judicial robes do not infuse the wearer with greater insight into scientific matters. A group of twelve or even six ordinary citizens is likely to possess greater knowledge and experience in such matters than a single law-trained judge. Most importantly, the "gatekeeper" role invites precisely the type of judicial arbitrariness that the constitutional right to trial by jury was designed to prevent. It is the role of the jury, not the judge, that is protected by the Seventh Amendment.

Broad incursions into the jury's role by federal courts under the guise of "gatekeeping" represents one of the most serious threats to the continued vitality of the civil jury.

The Last Citadel: Tobacco

One of the first products subjected to the emerging law of product liability was the most dangerous product on the market. Tobacco is responsible for an estimated 450,000 deaths annually and untold suffering and loss. These are not due to accident or misadventure; they are the result of the product's intended use. For decades the tobacco industry succeeded in muting scientific and medical evidence that cigarettes were both carcinogenic and addictive. Even before the adoption of strict products liability, some ATLA lawyers invested a

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[190] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

great deal of energy and resources to bring the facts to light and hold tobacco companies accountable.

In 1957, James McArdle and Dennis Harrington of Pittsburgh filed one of the first tobacco product liability lawsuits. Otto Pritchard developed lung cancer after years of smoking Chesterfields. McArdle collected thousands of articles, medical reports and documents establishing the industry's awareness of the link between cancer and smoking at the very time their advertisements and endorsements by such celebrities as Arthur Godfrey insisted that Chesterfields were pure and wholesome. In response to the suit, the tobacco company adopted a strategy that the industry would follow for forty years: Litigate every case vigorously and never settle. Pritchard's case lasted seven years until, in March 1965, the trial judge directed a verdict for the defendant, ruling that plaintiff had assumed the risk. The Third Circuit Court of Appeals ordered a retrial which defendant won.[191]

A 1960 lawsuit brought by Alva Brumfield and Melvin Belli against the Reynolds Tobacco Company resulted in a defense verdict.[192] Another, filed in 1960 by Lawrence Hastings on behalf of Edwin M. Green, who died of cancer at age 40 after smoking three packs of Lucky Strikes a day for twenty-five years, eventually suffered the same fate.[193] So did a handful of other cases.

And yet some progress was made. "Although no plaintiff ultimately recovered any damages," explained J. D. Lee, former ATLA president and founder of ATLA's Tobacco Litigation Group, "these eleven cases generated opinions in the state and federal courts that supplied the ammunition on how the tobacco industry continued to market a product which its leaders knew to be a dangerous health hazard." Plaintiffs' lawyers had begun the process of uncovering evidence that the tobacco industry was well aware of the dangers of smoking. The cases also gave impetus to the Cigarette Labeling and Advertising Act in 1965, requiring warning labels on cigarette packages.

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[191] Pritchard v. Liggett & Meyers Tobacco Co., 295 F.2d 292 (3d Cir. 1961), 4 NACCA News L. No. 9 at 3 (1961)(**James P. McArdle** and **James E. McLaughlin**)(reversing a directed verdict for defendant, court found sufficient evidence to go to the jury on implied and express warranty); Pritchard v. Liggett & Meyers Tobacco Co., 350 F.2d 479 (3d Cir. 1965), 8 ATLA News L. No. 239 (1965)(**James P. McArdle** and **James E. McLaughlin**)(following defense verdict in the second trial, court found error in the instruction on assumption of risk, stating that plaintiff could not be charged with knowing the risk of cancer, "which defendant, with its professed superior knowledge, extensively advertised did not exist"; the court ordered a third trial).

[192] Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963).

[193] Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963), 6 NACCA News L. 152 (1963)(**Lawrence V. Hastings**).

Following that legislation came what Lee called the "second wave" of lawsuits. Plaintiffs' attorneys now had solid evidence that the industry knew its cigarettes cause cancer. Ironically, however, the Labeling Act gave the manufacturers their strongest defenses. Those who continued to smoke despite the package warnings, they argued, assumed the risk. Moreover, they argued with great success that the federal law preempted state tort causes of action.

The second wave of tobacco litigation culminated in the marathon ordeal of the Cipollone family and their lawyer, Marc Z. Edell. Rose Cipollone started smoking Chesterfields in 1942, at age 16, emulating the sophisticated and beautiful women in magazine ads and reassured by Arthur Godfrey, whose popular radio show was sponsored by the company. She developed lung cancer in 1981 and died three years later.

Edell filed suit in 1983 against the manufacturer, alleging that defendant had not warned consumers of the dangers of smoking, had used its advertising to minimize or misrepresent the hazards and had withheld scientific evidence associating cigarettes with lung cancer. During discovery, Edell won an important ruling by District Judge H. Lee Sarokin which overturned a magistrate's protective order forbidding dissemination of documents obtained from the defendant. Judge Sarokin declared:

> Under the First Amendment, the public has the right to know what the tobacco industry knew and knows about the risks of cigarette smoking and what it did and did not do with regard to that knowledge.[194]

Following a four-month trial, a federal jury returned a verdict of $400,000 for the Cipollone family, the first jury award against a cigarette maker for smoking-related illness. The Third Circuit reversed, however, ruling in part that many of plaintiff's state law claims were preempted by the federal Cigarette Labeling and Advertising Act. The Supreme Court of the United States, after almost a decade of litigation and appeal in the case, ordered a new trial. The Court held that, while some of plaintiff's claims directly related to advertising were preempted, the Labeling Act did not bar other claims, including fraud, misrepresentation, and conspiracy by the company.[195] ATLA participated as an *amicus curiae.*

The protracted litigation had taken its toll. Edell estimated that his firm had spent up to $1 million on the case. (The defense had spent an estimated $75

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[194] Cipollone v. Liggett Group, Inc., 106 F.R.D. 573 (D.N.J. 1985).

[195] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

million through the first trial.) After the Supreme Court decision, he was forced to withdraw. Many observers felt that, although Edell had made important strides in the tobacco crusade, the case demonstrated the immense difficulty in holding accountable an industry that is willing and able to devote almost limitless resources to ward off liability.

The stage was set for a third wave of litigation, which moved beyond individual victims' suits to class actions brought by ATLA attorneys on behalf of injured smokers. Trial lawyers also aided a group of state attorneys general in bringing suit on behalf of states to recover the costs of caring for the victims of tobacco-caused diseases. That litigation pressured the cigarette makers in 1997 to agree to a massive $368 billion settlement.

A highly partisan Congress killed the settlement. ATLA opposed the deal, primarily because, as president Howard Twiggs stated in *TRIAL*, it would allow the industry to buy immunity from accountability. The terms of the global settlement not only eliminated lawsuits by individual victims, but also weakened regulation by the FDA. Nevertheless, some members of Congress took the opportunity to condemn trial lawyers involved in the settlement for collecting large contingency fees in such an "easy" case. In late 1998, actions on behalf of individual states resulted in some 20 agreements totaling over $200 million.

Some ATLA attorneys involved in the crusades against unsafe automobiles, asbestos disease, airline disasters, pharmaceutical harms, and tobacco deaths succeeded and earned substantial fees for their efforts. Many, particularly early pioneers, did not. But they all took part, along with thousands of Americans who served as jurors in these and other civil actions, in making America safer by holding even the most powerful corporations and industries accountable for their conduct.

7

Respect and Revolution

The mid-1960s to the mid-1970s was a time of turmoil in America. ATLA members were at the center of a revolution in tort law. Other areas of the justice system were rocked by radical change, including the rights of criminal defendants, civil rights, environmental protection, and a dramatic expansion of federal programs.

What role would ATLA play in this changing world? It was no longer the small, brash upstart. Its growing membership and successful programs suggested to some trial lawyers that ATLA should strive to take its place as a respected and influential legal institution, an alternative to the staid American Bar Association. But efforts to expand the association's concerns beyond personal injury practice to other pressing social and legal issues yielded mixed results. ATLA was not immune to the ideological divisiveness in America generally.

ATLA also needed to put its own house in order. The progress women and minorities were making in society underscored the work that ATLA needed to do to make equality a reality for its own membership.

Still, the plaintiffs' bar succeeded in developing an institution, the Roscoe Pound Foundation, dedicated to the serious study and progressive advancement of the law.

What's In a Name?

The most visible sign that the trial lawyers intended to expand the scope of their organization was its name. The association has undergone a succession

of name changes since its founding in 1946 as NACA (National Association of Compensation Attorneys). In 1948 the name was modified to the National Association of Claimants' Compensation Attorneys (NACCA). The addition of "Claimants" was intended to reflect the expansion of the association beyond workers' compensation to include the admiralty and railroad sections, as well as tort lawyers. In 1960, the organization made a further adjustment, becoming the National Association of Claimants' Counsel of America.

On August 2, 1964, NACCA changed its name to the American Trial Lawyers Association, again seeking to reflect the broader scope of its membership and mission. The change prompted a protracted lawsuit over use of the name, brought by the American College of Trial Lawyers, a small honorary organization of civil plaintiff and defense attorneys and criminal trial lawyers whose membership is limited to those invited by virtue of their exceptional trial skills and experience. The College alleged that the name chosen by ATLA was confusingly similar to its own name and threatened to harm its reputation.

Craig Spangenberg (himself a member of the College), James Ackerman, Jacob Fuchsberg, Sam Langerman and Robert Cartwright successfully defended ATLA's use of the name in California Superior Court. The Court of Appeal reversed, however, finding sufficient likelihood of confusion on the part of the public to warrant injunctive relief.[196] While ATLA's petition for rehearing was pending, the parties reached a compromise settlement. Most important to ATLA was the right to keep its acronym, which it had used for nearly a decade. In January 1973, ATLA, with a membership of 27,000, became The Association of Trial Lawyers of America.

Stepping Onto the National Stage

The social upheaval of the 1960s brought challenges to America's system of justice. College campuses and cities faced growing, sometimes violent protests. A drug culture entered mainstream society and flourished there. Americans were demanding racial justice, equality for women, and protection of the environment.

Many ATLA members as individuals were actively involved in these issues, often representing demonstrators, civil rights workers, or groups seeking change.

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[196] The court was unable to resist observing that it "is somewhat ironical that even with this 'marked skill and distinction'" in trial advocacy claimed by ACTL "the plaintiffs lost this case in the trial court." Ball v. American Trial Lawyers Assn., 14 Cal.App.3d 289, 303 n.9 (Ct. App. 1971).

But ATLA as an organization, initially at least, was a passive, and not always attentive observer. Its focus was on the tort law revolution and on building its educational programs. When ATLA spoke, it was usually only to its members, not to the pubic at large. However, the unfolding decade would see ATLA try to take a more active role in social and governmental issues.

Three areas of dramatic change that had a direct impact on America's legal system were the expansion of the constitutional rights of criminal defendants, the civil rights movement, and environmental protection.

ATLA and the New Rights of the Accused

In a series of controversial decisions, the Supreme Court imposed limits on police searches and interrogations and broadened the right to counsel and the right to jury trial in criminal cases. But those rights ring hollow for defendants who lack competent legal representation. U.S. Supreme Court Justice Thomas C. Clark in October 1963 at a Public Defenders Association meeting in Miami, called upon the bar to provide legal representation for indigents. In response, ATLA President Jacob Fuchsberg urged ATLA's 14,000 members "to support national and local state agencies and provide competent legal representation for the criminal accused too poor to hire a lawyer." Former President Orville B. Richardson, who as the president of the Missouri State Bar attended the Miami meeting, headed a new ATLA Committee for Justice for Indigent Persons.

The Florida Supreme Court promptly accepted ATLA's offer. Chief Justice E. Harold Drew stated to Fuchsberg that it was "particularly gratifying to have the voluntary tender of the services of experienced advocates who comprise the membership of your organization." New York and Massachusetts courts also accepted ATLA's offer.

It was one thing to volunteer the services of personal injury lawyers; it was quite another to ensure they were capable of providing competent representation in criminal matters. ATLA turned its talent for educating trial lawyers to the training of criminal defense attorneys.

From an early age, Verne Lawyer knew his calling. Raised on an Iowa farm, as a teenager he journeyed to the gold-domed courthouse in Des Moines to watch trials. Verne worked his way through college and law school, holding down two and three jobs simultaneously. He tried his first criminal case by court appointment the day before being admitted to the bar—and won. He launched a successful criminal defense practice and married Vivian Justice, who also became a trial lawyer.

After attending one of Melvin Belli's seminars in 1952, Vern decided to turn to civil practice. He became one of the most energetic of Rood's Rangers. He spoke in forty-nine states, and, as a licensed pilot, he often ferried other speakers to their seminars.

In 1964, Verne received a telephone call from president Bill Colson asking him to create a Criminal Law Section within ATLA. Civil practitioners needed to be prepared to provide effective assistance of counsel when appointed to represent indigent defendants, Colson explained. The new section would become a teaching vehicle to do just that. "I told Colson I would be delighted to do it," Verne recalled. Colson confided that he selected Verne as the first chairman over "an old friend of ours" who also wanted to head a section for criminal lawyers. That friend was Mel Belli, who had recently defended Jack Ruby, the killer of Kennedy assassin Lee Harvey Oswald.

Working with Al Cone, Verne quickly organized the section and assembled a distinguished and experienced faculty of volunteers from among nationally recognized and successful practicing criminal trial attorneys. The group included the renowned F. Lee Bailey; George Davis, who represented Caryl Chessman in a death penalty case that provoked a national debate over capital punishment; Jacob Ehrlich, the dean of criminal trial lawyers and author of *Never Plead Guilty*; William Erickson, trial practice expert and later Chief Justice of the Colorado Supreme Court; Percy Foreman, one of the top defense lawyers in the country; John J. Flynn, a defense attorney in the *Miranda* case; Professor B. James George of the University of Michigan; Ronald Goldfarb, author of *Ransom*, which exposed the bail bond scandal; Ron Meshbesher of Minneapolis; Stanley Preiser, who successfully defended the Governor of West Virginia against corruption charges; Henry Rothblatt of New York; Warren Schrempp of Omaha; Iowa Attorney General Lawrence Scalise; George Shadoan of Washington, D.C.; Joe Tonahill, Texas co-counsel with Melvin Belli in the Jack Ruby trial; and Dr. Herbert Speigel of Maryland, a psychiatrist and expert on eyewitness testimony.

Professor George and Verne Lawyer put together a program, "How to Defend a Criminal Case from Arrest to Trial," which they subsequently turned into a successful book. Now that the accused was entitled to counsel, Verne explained, ATLA members "had to recognize that the day was rapidly coming when they were going to be called upon, whether they liked it or not, by court order to defend persons charged with crimes." They got the message. "The Criminal Law Section program turned out to be the best attended up to that time of any ATLA seminar," Verne stated. "We followed up with seminars across the country."

An outgrowth of the seminars was a study of crime conditions in various

cities, directed by Danny Jones and based on the practical observations of seasoned criminal trial lawyers. The report, *Crime in American Cities*, called upon government to address the root causes of the rising crime rate: poor education, substandard housing, and lack of economic opportunities.

The Criminal Law Section prospered during the 1970s and 1980s, due almost entirely to its outstanding seminars and CLE programs. One of its best was a program jointly sponsored by the Criminal Law and Military Law Sections at the annual convention in San Francisco in 1981, which drew a record number of attendees. Featured speakers were again leaders in their field: Richard "Racehorse" Haynes, Stanley Preiser, F. Lee Bailey, Henry Rothblatt, and Benjamin Civiletti. During the 1980s, the section boasted over 4,000 members.

The Criminal Law Section has diminished in numbers and activity. Part of the explanation lies in the ever-increasing complexity of criminal defense work. The National Association of Criminal Defense Lawyers, by specializing in that field, was able to offer high quality programs and materials. It was, perhaps, inevitable that ATLA, taxing every resource to meet the assault on tort victims' rights, would devote less attention to the criminal defense bar. In addition, the increasing cost of attending ATLA conventions discourages many criminal defense lawyers, who are frequently younger, less affluent lawyers, from small firms or public defenders. Nevertheless, active members continue to work to carry out the section's educational mission.

One active member, Jack Zimmerman sees "hope that the recent attack on the Bill of Rights in the aftermath of the terrorist attacks will catch the attention of civil law attorneys who are feeling the effect of tort reform efforts." Recognizing that "both movements limit the rights of the individual litigant," Zimmerman suggests, may prompt ATLA's leadership to raise the level of interest and resources devoted to criminal defense trial lawyers.

Civil Rights and Civil Unrest

The civil rights movement also made a direct impact on the justice system. A handful of courageous federal judges strove to implement the desegregation mandate of *Brown v. Board of Education* with all deliberate speed—backed if necessary by federal marshals and troops. As Congress wrestled with the Civil Rights Act, demonstrators, marchers, Freedom Riders, and protesters challenged segregation, particularly in the South. They met stiff opposition. Some opponents were overt segregationists; others disagreed with the means and pace of integration. The deep divisions in American society were mirrored in the trial bar.

Many ATLA members were early activists in the civil rights cause, includ-

ing Dean Robb, Harry Philo, Ted Warshafsky, Dan Karlin, Norman Kripke, Dan Sullivan, Bernard Cohen and Philip J. Hirschkop.

Hirschkop became involved, with Robb and Philo, in 1963 in Danville, Va., defending demonstrators who were victims in one of the worse mass beatings by city officials in the history of the South. They won a major victory that allowed blacks to remove state criminal cases to the federal courts. The following year, Robb asked the Board of Governors to support lawyers litigating Mississippi civil rights cases and to help more than one hundred volunteer law students prepare cases for trial. The Board declined.

Bernard Cohen and Hirschkop successfully challenged the constitutionality of Virginia's antimiscegenation statute, prohibiting interracial marriages, in a case that they ultimately won in the U.S. Supreme Court in 1965.

Many other ATLA lawyers joined the civil rights movement through the Lawyer's Constitutional Defense Committee, directed by Hirschkop, including presidents Bill Colson, Jacob Fuchsberg, Sam Langerman and J. D. Lee. Important as these individual efforts were, Hirschkop recalled with some bitterness, ATLA as an organization "was notoriously absent" from active participation. "In the years when civil rights was in the formative stages, ATLA had a fairly sorry performance." In retrospect, however, Hirschkop conceded that "perhaps some of us, like myself, had unreasonable expectations in our earlier years."

Bloodshed on the Ideological Divide

It was understandable that those who were passionately committed on important social issues wanted ATLA's support. Their argument was powerful: If ATLA aspires to be the national leader of the trial bar, it must exert moral leadership on the important legal issues facing the country. On the other hand, plaintiffs' attorneys do not share a common overarching ideology. On the right to trial by jury and access to justice, ATLA members are united. But their views on controversial social and political questions span the spectrum of opinions held by Americans at large. For one faction to commit the organization in the service of some other cause, however worthy, risks self-destruction. It was a lesson trial lawyers should have learned from the fiasco at the 1952 Houston convention, where Southern conservatives attempted to impose an anticommunist loyalty oath on ATLA members.

Contrary to the media-created label of "liberal trial lawyers," there has always been a strong element of conservatism among the trial bar, including such powerful ATLA leaders as Jack Travis, Herbert Bennett, Roscoe Hogan, George Allen, Jr., and Joseph Berger. Travis sincerely believed that the civil

rights movement was backed by a communist conspiracy, a suspicion fed by information from his personal friend Senator James Eastland, Chairman of the Senate Committee on Unamerican Activities. In the Committee's view, the National Lawyers Guild, to which Robb, Philo, and many other lawyers in the civil rights effort belonged, had "communist leanings."

Some conservatives were not content to simply agree to disagree on the issue of civil rights. Phil Hirschkop recalls that conservatives kept the civil rights lawyers out of ATLA positions of power by accusing them of being communists or communist sympathizers, a tactic known as "red-baiting." Even groundless accusations could be devastating, both professionally and personally. Hirschkop was himself the target of such false accusations during his campaign to be Board Governor from Virginia, which he lost by one vote. Harry Philo was also targeted by red-baiting conservatives. Daniel Karlin, a National Seminar Program Chairman, disclosed that on more than one occasion he was pressured to drop Philo from national programs. "It was always from an unidentified source or just a telephone call," Karlin stated, but he refused to cut "one of the best programs we ever had" based on the allegations.

At the 1967 mid-winter meeting, Travis moved to oust Robb and Philo from ATLA. He produced a letter which appeared to be from Senator Eastland, containing testimony before the Unamerican Activities Committee, suggesting the two were communists. Robb, addressing the Board with tears in his eyes, denied every allegation. After heated debate, the Board rejected the motion.

The red-baiting resurfaced one last time during the election of officers in 1978, and it backfired dramatically. The slate of Mel Block, Ray Ferrero, and Jack Travis was expected to win handily over Theodore Koskoff, Harry Philo and John Norman. Shortly before the election, an anonymous letter was distributed to members at the convention rehashing the allegations against Philo. Revulsion at the tactic resulted in defeat of the entire Block ticket. The clear message from the membership was that such attacks were unworthy of those who would lead ATLA.

Urban Unrest

Trial lawyers, like other Americans, reacted with horror as urban riots erupted in American cities in 1968. On April 15, ATLA President, Sam Langerman, condemned the riots and looting and offered the help of ATLA members "to restore law and order and protect individual rights of all concerned."

The Board of Governors adopted a resolution recognizing "the frustrations of the unfortunate inhabitants of the ghettos of our cities" and "the rights of lawful and peaceful protest and presentation of grievances." Langerman cre-

ated a Committee on Urban Crisis, chaired by Warren Schrempp and Robert Begam. The committee report recommended ATLA support of the Urban Area Project conducted by the Lawyers Committee for Civil Rights Under Law, as well as those portions of the Report of the National Advisory Commission on Civil Disorder concerning the role of lawyers in dealing with the urban crisis.

The Board, however, adopted a resolution that focused primarily on restoration of law and order. In December 1968 President Richardson delivered a somber message that "we seem engulfed in violence." He cautioned that "a frightened people has produced a frightened society and has led to the demand for rigorous repression and retaliation." But he also accused "bleeding hearts" who "have persuaded the courts to give excessive protection to wrongdoers at the expense of victims and social protection," a characterization that provoked heated discussion by the Board. ATLA's leaders were not immune to the fears felt by many Americans.

What ATLA said was perhaps less significant than the fact that ATLA's leaders saw it as ATLA's place and responsibility to issue a statement. ATLA was beginning to view itself as the national voice of trial lawyers, speaking not only to trial lawyers but to Americans.

Environmental Action

The late 1960s witnessed greater public concern for ecology and preserving the environment. Many trial lawyers shared those concerns. But the legal tools designed to obtain redress for personal injury were cumbersome and ill-suited to environmental problems. Nevertheless, a handful of exceptionally dedicated trial lawyers succeeded in combining elements of personal injury law, property concepts, and equitable remedies to impose accountability for environmental harm.

Among them was Victor J. Yannacone, an ATLA member and son of a NACCA workers' compensation attorney. As executive director of the Environmental Defense Fund in 1969, Yannacone was a leader in environmental battles to protect that nation's water from pollution and pesticides. At about the same time, a courageous and aggressive ATLA lawyer in Birmingham, Roscoe Hogan, created the Alabama Coordinating Committee for Improved Environment, pressuring candidates to take a public stand on environmental issues.

Together, Yannacone and Hogan persuaded ATLA President Sam Langerman to assemble an Environmental Law Committee. Core members of the committee were Professor James Jeans, Norman Landau, Paul Rheingold, Lee Kreindler, Henry Miller and Bernard Cohen. The Committee held its first meeting in 1969. Its first project was an Environmental Protection Litigation

Seminar. Attendance was so great that the seminar had to be moved from the hotel auditorium to a motion picture theater nearby. *TRIAL* magazine devoted its August/September 1969 issue to the theme: "Can Law Reclaim Man's Environment?"

The following year, at Hogan's insistence, ATLA launched its Environmental Essay Contest. Law school students around the country were invited to bring "new, imaginative solutions to bear on one of the most complex problems of society—the destruction of the environment." The contest attracted strong support by law school deans, including Guido Calabresi of Yale Law School. In 1980, the Roscoe Pound Foundation took over sponsorship of the contest.

ATLA's Environmental Law Section addressed environmental problems on the federal level. James Jeans and Bernard Cohen testified before Congress in support of the Clean Air Act, which was signed into law by President Nixon in 1971. The Act authorized the Environmental Protection Agency to set limits on hazardous emissions into the air. Similar protections were enacted the following year in the Clean Water Act.

A major step toward environmental accountability was the recognition of environmental destruction as a violation of a public trust. In 1968, Bernard Cohen received a telephone call from Ted Pankowski, of the Izaak Walton League. "My civil rights are being violated," he complained. "A developer wants to fill in 17 acres of the Potomac River at the Huntington Creek Estuary." Cohen did not see the connection at first. "How does this violate your civil rights?" he asked.

Pankowski replied that an old U.S. Supreme Court case, *Illinois v. Illinois Central Railroad*, held that government cannot give away the bottom of navigable waters of the United States to private parties. Rather, navigable waters are held in trust for future generations.

Cohen read the case and was amazed. "God, here is a wonderful old Supreme Court case, buried in the cobwebs of history, that has incredible potential for public good." Cohen and Pankowski, joined by Victor Yannacone, obtained an injunction in federal court. The developer "walked away from a multi-million dollar project," and the estuary still exists today.

Cohen saw the broad implications of the public trust doctrine. "If government could hold the bottom of navigable waters in trust for generations yet unborn, why couldn't it hold the air and water in trust for everybody—why not all environmental assets?" This principle, promoted by ATLA, was incorporated into the National Environmental Policy Act of 1969.

Three ATLA members, Norman Landau, Richard Gerry and Fred Baron, served on a commission that reviewed the activities of the Superfund program and submitted vital recommendations to continue the fund's role in the cleanup of toxic waste sites.

Another group of ATLA lawyers, led by Norman Landau, Paul Rheingold and Stanley Levy, became outspoken advocates of using lawsuits to clean up the environment. Rheingold and Landau co-authored ATLA's *Environmental Law Handbook*, which sold over ten thousand copies, and later the *Toxic Tort Handbook*, which was nearly as popular. "There is a growing realization, even an alarm," Levy told the 1989 ATLA Convention, "that industrial processes and chemicals have created a toxic time bomb and that the magnitude of the risk is still not fully appreciated."

As ATLA ventured beyond personal injury into areas of public concern, its leaders no longer saw ATLA as the ugly duckling or the shunned stepchild of the legal profession. ATLA, they believed, was a national legal institution. They saw no reason, for example, why ATLA's views on legal issues should not be accorded the same respect as those of the American Bar Association. One sore point, as Dan Fogel explained, was that the Senate gave great weight to the ABA's assessment of judicial nominees, though the organization was heavy with corporate lawyers who seldom saw the inside of a courtroom. "ATLA, composed of many, many trial lawyers trying cases in those courts, was not even asked its views."

When President Nixon nominated Clement Haynesworth to the Supreme Court, president Leon Wolfstone fired off a telegram to the White House, which he read to a press conference, stating that ATLA opposed the nomination and felt Haynesworth was unqualified—a position that was ratified by the Board only after the fact, with Fogel's leadership. The Association also opposed Nixon nominee Harold G. Carswell, prompting General Director William Schwartz to speculate, perhaps only half in jest, that ATLA may have won a place on Nixon's enemies list.

ATLA's ambition to become a respected legal institution was also reflected in *TRIAL* magazine. During this period, *TRIAL* featured in-depth coverage of many pressing issues beyond the practice of personal injury law. These included freedom of the press, the environment, the right of privacy in the computer age, and the powers of the president.

But before ATLA could truly lay claim to credibility and respect, it had to put its own house in order.

Diversity in Membership

Minority Lawyers

That ATLA did not step to the forefront as an early champion of civil rights, given its focus on personal injury, was perhaps understandable. ATLA's neglect

of its own minority membership was not. As an organization formed by attorneys who had been excluded and oppressed by the establishment bar, ATLA should have been an early leader in actively recruiting black, Hispanic and Asian trial lawyers. Women and minorities were entering the practice of law in unprecedented numbers. For many years, however, ATLA conventions remained a largely unbroken sea of male Caucasian faces, due to years of inattention and missed opportunities.

One example was the failure to act upon overtures by the black National Bar Association seeking closer ties. In 1973, Judge William Thompson, President of the National Bar Association, appeared before ATLA's Board of Governors at the invitation of Bill Colson and J. D. Lee. Thompson proposed co-operative projects between the two organizations. The Board voted funds to help the National Bar, but the idea of co-operative projects quietly died.

Again, in 1984, at the prompting of Vice President Sheldon Miller, Dennis Archer, an ATLA member and President of the National Bar Association, proposed that "both Bars come together on some joint projects since we both philosophically had the same point of view." His letter went unanswered. Archer, who later became a Justice of the Michigan Supreme Court, pointed out that the American Bar Association was actively seeking closer ties with the National Bar Association and that Hispanic and Asian bar organizations would likely follow the lead of the NBA. By the time ATLA decided to approach the minority bars for support in the battle against tort reform, it found that they had already forged close relationships with the ABA.

In 1979, ATLA's highest ranking black lawyer was Lembhard "Lem" Howell, a governor from Washington state, and member of the Executive Committee. Howell called the Board's attention to the need to recruit minority members. ATLA responded by setting up an ATLA booth at the convention of the National Bar Association in Washington, D.C. The effort yielded only two applications. Howell urged ATLA to reach out more aggressively. "There was no question that ATLA has something to offer to minorities—or it wouldn't be the success it is."

Concrete action was finally taken in 1988, when Jack Hayes, ATLA Governor and Co-Chair of ATLA's Minority Program, raised the "unspoken issue of discrimination and political side-stepping." Hayes, a white lawyer from Chicago, had successfully raised the status of the black lawyers in the Chicago Bar Association. In an article in the ATLA Advocate, Hayes called the lack of minority membership in ATLA a serious problem. He followed up at a Board meeting in July declaring: "It is imperative that ATLA develop minority action programs." A black attorney, E.G. Woodhouse III, of Boston, presented a paper

that laid out in concrete terms both the need to attract minorities and "what minorities now in ATLA could do about" achieving this.

President Bill Wagner submitted, and the Board adopted, a resolution to "make it a priority to promote minority participation within ATLA." The resolution created a high-level committee to further that goal, called upon all Board members to contact minority organizations in their states to promote minority participation in ATLA, directed the Law Student Committee to contact and recruit minority students, provided for ATLA materials to be distributed at no cost to minority organizations, and directed *TRIAL* magazine to devote space to minority group activities.

ATLA achieved a landmark with the election in 1997 of Richard Hailey, its first African-American president. Perhaps more significant was the fact that minority membership had grown to record numbers. By 1999, 1,448 ATLA attorneys, 2.5 percent of the membership, were identified as minority members.

Women Trial Lawyers: Invisible No More

On any given day in courthouses across the country, it is not unusual to observe that many of the lawyers walking quickly in the halls, conferring with clients, and addressing juries are women. The words of Supreme Court Justice Joseph P. Bradley, upholding exclusion of Myra Bradwell from the Illinois bar in 1873, because "the law is too complex and too harsh in reality for feminine gentility and sensibilities," ring hopelessly antique.

In 1970, only 2.8 percent of the nation's lawyers were women. By 1978, women comprised 9.2 percent of the 441,000 practicing lawyers. In 1976, women were less than 1 percent of ATLA members. That percentage rose to more than 5 percent in 1982 and 15 percent in 1999. That increase was due in large measure to the leadership and example of strong women trial lawyers.

For many years, the few female law graduates were steered away from trial work into probate or family law—a kind of professional redlining. Then too, some leaders of the trial bar, in and out of ATLA, suffered from what Harry Philo called "the ideological disease of sexism."

Linda Atkinson, now a partner in Philo's firm, recalls what it was like to attend ATLA seminars as a student member in the early 1970s. The problem was not overt discrimination. Rather, "male members were not conscious of the need to develop either participation or a place for women in ATLA who were trial lawyers. It was a matter of visibility."

Some of the early women ATLA members were introduced to ATLA by

male mentors. Later, they themselves became mentors and role models for younger attorneys. Each dealt with discrimination in her own way.

Amelia Lewis received her law degree in 1924 and was promptly denied membership in the Association of the Bar of the City of New York due to "inadequate powder room space." She joined NACCA in 1957 as one of its first female members. After practicing in New York City for thirty-three years, she moved to Arizona and built another successful practice. She recalled one incident when a prosecuting attorney approached the bench and complained, "I never had a woman lawyer on the other side before. I don't know what to do when she cries." Lewis calmly stated, "Your Honor, in all the years that I've been trying cases, I've always tried to be a gentleman." She frequently spoke to women trial lawyers at ATLA programs. Her advice to the female attorney was to "ignore male discrimination and go on to prove her supremacy and competence as a trial lawyer."

Janet Freeman of New Jersey raised a family of three daughters and spent eleven years in night classes to obtain her law degree at Rutgers University and a Masters in Sociology from Columbia. She practiced with her husband, Fred, an ATLA Governor in 1964. In 1969, she was elected the first woman state delegate to the Board of Governors. The by-laws at that time did not envision that a state "committeeman" might be a woman. When told that ATLA was finally recognizing women lawyers, she quipped, "Oh, they recognized us all right. They just don't know where to put us."

Elizabeth "Betty" Thompson of Virginia, has a hard-nosed credo. "I think discrimination may have always been there, but anybody who wants to do anything bad enough can succeed." Thompson earned her law degree in 1948. She opened her own office, taking cases that other lawyers felt were too much work. "That was when I really started practicing law. I learned that one cannot be a trial lawyer and be lazy." Her work won the respect of Virginia lawyers who elected her president of both the Virginia Trial Lawyers Association and the Virginia State Bar. "I am not a woman lawyer," she emphasized. "I am a lawyer." Without denying the importance of ridding the bar of gender bias, she cautioned women against assuming they are victims of discrimination. That can become a "crutch" that holds them back.

Marie Macri Lambert graduated in 1944 from New York University Law School, first in her class and Editor of the law review. Nevertheless, she recalls, she endured a long march along "the discrimination trail." Even as an officer of the New York State Trial Lawyers Association, she found herself doing typing and arranging meeting rooms. "The men expected it because I was a

woman." Ultimately, her ability was recognized. After nineteen years she was elected the Association's first woman president."

Lambert joined ATLA in 1955. "In the early NACCA meetings I was a curiosity. The male members paid no attention to me." She served as vice-chairman of the ATLA tort section in 1964-67. In 1976, she was elected the Association's second woman member of the Board of Governors. Two years later, she became the first woman elected judge on the Surrogate's Court of New York, where she served for twelve years. Marie Lambert received a long list of awards recognizing her achievements as a lawyer and judge and her humanitarian work.

Betty Love of Birmingham, Alabama, a member since 1965, stated that she had "no conscious recollection of ever suffering discrimination within ATLA. I was mentored in my early career by a number of male lawyers and in recent years I have had the pleasure to be a mentor for both women and male trial lawyers." What she found at ATLA was "a network of friends—men and women—in all the states who responded quickly and generously when I had need."

Dianne Jay Weaver, mother of four and a former elementary school teacher, began legal life as a defense lawyer along with her sole partner, her husband, Ben Weaver. What changed her life was a case in which her insurance client's actions were to blame for catastrophic injuries to a very young boy. "We had offered a large settlement, but the case went to verdict—a defense verdict." Dianne said. "The insurance executive on the case sent me a case of champagne to celebrate. I was disgusted and hurt." She told Ben, "I don't want to do this any more," and together they informed the insurance company that they were withdrawing from their cases. "My husband and I realized we just had thrown away a law practice, and we had two small children at home. But it was the best thing that ever had happened to us. We became plaintiffs' lawyers." She joined ATLA in 1982, later serving on the Board of Governors, and has been a featured teacher and speaker at the National College of Advocacy.

Despite the presence of these strong examples, women were for many years seldom represented in ATLA committees, sections and national offices. The reason, states Linda Atkinson, was that "women were invisible. We would show up at meetings and the administration thought we were secretaries or spouses. This invisibility had to stop, because the practicing bar was going to be 50 percent women at some time, and we had to train women for leadership roles."

If there was one turning point for women lawyers in ATLA, according to Atkinson, it was the 1974 Michigan Trial Lawyers Joint Conference with the Women's Lawyers Association. The Conference addressed the questions of how

the law meets—or fails to meet—the problems of women in society. *TRIAL* magazine covered the event. "The fact that it was reported, that a Conference was held with major subjects being addressed by lawyers who were women trial lawyers and who wanted to be trial lawyers on the side of people, was a major step for many of us who were still in formative levels of our careers."

Another step was initiated by Barbara Robb the following year. At the annual convention in Toronto, ATLA and its Auxiliary jointly sponsored an educational program at the annual meeting entitled "Women in the Law." Robb organized the programs.

In 1977, women lawyers in ATLA decided to take matters into their own hands. At a meeting in Atlanta, they addressed the problem of bringing women into the mainstream of ATLA life. Present were Victoria Heldman, Lillian Dyke, Connye Harper, Amelia Lewis, Betty Love, Mercedes Samborsky, and Linda Atkinson. The concrete result of the meeting was the Women's Caucus, formally convened in Houston in 1979.

"The Caucus name was not chosen idly," Atkinson said. "It was not a special interest group standing apart from ATLA. Rather, a 'caucus' by definition was a group with certain interests within a larger group for the purpose of advancing the larger group." The Caucus was there "to make ATLA aware that its greatest good was furthered by the increased participation of women who are trial lawyers."

The Caucus resolved to place women in the education and section programs, offer programs geared to the needs of women, gain full participation of women in ATLA governing bodies and publications, and recruit women as trial lawyers. Much of the Caucus' work centered around canvassing women trial lawyers, identifying those who were qualified and willing to serve on various committees and sections. The Caucus provided information concerning election rules to potential candidates for ATLA offices. It also insisted that women be represented in trial lawyer publications and on educational programs.

The Women's Caucus also reached out to the ATLA Auxiliary. "We recognized the value of the work of Auxiliary members as part of the political and professional goals of ATLA," Linda Atkinson said. In 1980 at Montreal, the Women's Caucus and the Auxiliary jointly sponsored a breakfast meeting addressed by California Supreme Court Chief Justice Rose Bird. The joint meetings continued through 1985.

By 1990, these efforts were showing concrete results. Two national officers and seven governors were women. Over 125 women were chairs, vice-chairs or committee members on major ATLA departmental groups. Roxanne Barton Conlin would become President of the trial bar's two major foundations—the Civil Justice Foundation and the Roscoe Pound Foundation. In 1992, Conlin

was elected ATLA's first woman president. Pamela Anagnos Liapakis became the second in 1995. By the time Mary Alexander became president in 2002, more women were working their way up the leadership ladder.

A New Breed

One additional development during the 1960s and 1970s both was fostered by ATLA and would profoundly affect ATLA's future. The leaders of the plaintiffs' bar were no longer night school graduates, despised by their state bars and despising them in return, outgunned by well-prepared defense lawyers, walking into courtrooms armed with little more than courage, compassion, and perhaps a blackboard. The progressive development of the law, the increasing skill and sophistication of ATLA lawyers, and the contingency fee system had combined to elevate a new breed of plaintiffs' lawyers to prominence.

These successful trial lawyers were at the helms of highly organized and capitalized law firms. Stuart Speiser points out that ATLA's education and information resources enabled young lawyers to become good trial lawyers more quickly than their predecessors. They knew the value of thorough preparation and recognized that a good tort case depends heavily on good science.

They also learned how to establish and manage strong plaintiffs' law firms. In the early 1950s, Perry Nichols delivered educational programs that were nearly as popular and engaging as Melvin Belli's. The Nichols law firm was the premier plaintiffs' law firm until its partners went their separate ways in 1967. Three of ATLA's presidents came from that firm: Nichols, Bill Colson and Bill Wagner. And Nichols was committed to sharing the secrets of building a successful torts practice with every trial lawyer willing to listen. It was said of Nichols that he looked like Fred MacMurray and talked like Lyndon Johnson. Packed audiences at ATLA educational programs watched and listened intently as he explained the nuts and bolts of setting up a plaintiffs' law firm.

Firms headed by this new breed of "entrepreneur lawyers," as Speiser calls them, grew to prominence in major cities across the country in the 1960s and 1970s. Some, like the California firms headed by Bruce Walkup and James Boccardo, followed the Nichols pattern, with six to eight partners. Others had only one or two, each heading a team of associates. Some concentrated on specialized fields, such as Speiser's aviation firm or David Harney's medical malpractice law firm. Others practiced a wide variety of tort law. But all were devoted to the art and science of preparing major tort cases for trial by jury.

Most importantly, they plowed the fees from their growing successes back

into their law firms. Despite their inability to offer public stock, obtain government subsidies and tax incentives, or even borrow much beyond their physical assets, these firms managed to accumulate sufficient liquid capital to finance major tort lawsuits. Money enabled tort firms to employ the best people and technology, weather the delaying tactics of defendants, and invest tens of thousands of dollars in the investigation and preparation of cases for trial.

An instructive example of the emerging plaintiffs' lawyer is Philip H. Corboy, whose Chicago law firm is widely regarded as one of the most successful. Corboy came from an Irish Catholic family that boasted more than its share of policemen. He chose a different course. After graduating first in his class at Loyola University School of Law in 1949, he spent two years working for famed plaintiffs' trial lawyer James A. Dooley. Then he struck out on his own as the sole partner of his own firm until he added Thomas Demetrio in 1983.

Corboy's success with juries became legendary. He did not lose a verdict until 1987—and that loss was overturned on appeal. A large number of those verdicts were over $1 million.

The significance of the Corboy firm is not simply its list of large verdicts, but the fact that it is in many ways typical of the emerging leadership of the plaintiffs' bar. The new plaintiffs' firms select their cases carefully on the basis of merit, both as to liability and damages. It is not unusual for a firm to decline nineteen of every twenty cases that come through its doors, particularly in the difficult areas of medical malpractice and product liability. Corboy explains that it is a disservice both to clients and the legal system to pursue cases where the damages are small or where fault is dubious.

Successful firms prepare cases for trial, not for settlement. Corboy himself is fond of stating that the formula for a successful trial lawyer is Competence, Credibility and Charisma. Although press reports often focus on the last item, meticulous preparation is the hallmark of modern successful lawyers. The contingency fee not only makes it possible for injured victims to hire top lawyers, it also enables those lawyers to retain leading experts and make use of expensive demonstrative evidence, such as a scale model of the accident scene or a video presentation of plaintiff's condition. It was not unusual for Corboy's firm to spend over $100,000 to prepare an auto accident case with serious injuries or $200,000 in a medical malpractice case. Many defense lawyers, competing with each other for hourly retainers from insurance companies, are hard pressed to match that effort.

Like their predecessors, these tort lawyers share a devotion to the jury system. But they are no longer outsiders, combating the establishment. They are

part of the establishment, driven by a desire to advance and be accepted there. Corboy, for example, has been president of the Chicago Bar Association, holder of several important posts in the American Bar Association, active in the Illinois Democratic party and a major contributor to charitable causes.

The new breed of plaintiffs' lawyers was also much wealthier than NACCA's first generation. They were not fabulously wealthy, as measured against the top echelons of other segments of the legal profession. But they possessed the resources to invest not only in lawsuits, but in the law itself. They served in major organizations devoted to legal scholarship. They invested in political action to resist hostile attacks by legislatures on common-law rights. They also provided the support for a living monument to the progressive development of the law.

The Roscoe Pound Foundation

The Roscoe Pound Foundation owes its existence, in part, to the cold New England winter of 1956. Dean Pound, who was then Editor Emeritus of the *NACCA Law Journal,* lived in a venerable house at 304 School Street in the Watertown suburb of Boston. When the water pipes burst that winter, Pound decided he'd had it with the old house and arranged to move into the Hotel Continental in Cambridge. Sam Horovitz saw the house as an ideal home for NACCA's editorial staff, which was crammed into two rooms at 6 Beacon Street in Boston. Pound sold the house to Horovitz, who was reimbursed by NACCA.

With the house came Pound's library of over 8,000 books which reflected the intellectual breadth of a remarkable man. They included scholarly works on philosophy, sociology, history, law, and botany, in which Pound held a Ph.D. As befitting a man who could read and converse in twelve languages, there were books in German, Greek, Chinese, Japanese, French, and Italian. Pound had also built an extensive collection of books on the Civil War. The house contained a hidden staircase that reputedly had been used to hide slaves fleeing north on the underground railroad.

Pound used the proceeds of the sale to establish the Roscoe Pound Foundation. His wife, Lucy, was president until her death in 1959; Pound then served as president until he died in 1964. Horovitz, Nathan Fink, and Joseph Schneider were the original trustees.

In 1964, former ATLA President Jack Fuchsberg became the Foundation President and reorganized it with the objective "to engage in scientific, educational and literary endeavors for the public welfare." Fuchsberg headed the Foundation until 1972 when Herbert Bennett succeeded him. The mission of the Foundation, Bennett said, was "to act as a catalyst to bring about better

administration of justice for all Americans" by fostering research into social problems and recommending action to America's leaders.

The Foundation planned to build new quarters on the site of an abandoned schoolhouse on Garden Street in Boston, near the Harvard Law School campus. It would house the Pound library and the Horovitz Workers Compensation library, as well as ATLA's administrative headquarters as a tenant. Philip H. Corboy and James Ackerman headed fund-raising committees for the $1 million Roscoe Pound-American Trial Lawyers Research Center. Abner Sisson served as Chair of the Building Construction Committee.

The building was at last completed in 1968. On September 28, Chief Justice Earl Warren dedicated the cornerstone at a ceremony attended by 1,000 U.S. Senators, governors, state supreme court justices, law school deans, professors, lawyers, law students, and community leaders. In his address, the Chief Justice gave tribute to the role of the trial lawyer: "Our Constitution and laws—in the last analysis—are only meaningful when trial lawyers have the courage and the zeal to stand up in court and assist them. . . . A right without an advocate is as useless as a blueprint without a builder or materials."

Following the dedication and a luncheon, the Trustees voted to create the Earl Warren Conferences on Trial Advocacy in the United States. Their objective was to "align the practice of trial law with the needs of modern society, taking into account newly developed social instruments and programs."

From 1972 to 1989 fifteen Warren Conferences were held in various parts of the United States. Each attracted distinguished legal scholars, practitioners, and community leaders. The Foundation published the findings and recommendations of each conference. Topics included prison reform, the First Amendment, the power of the presidency, the right of privacy, the jury system, the death penalty, church and state, ethics in government, product safety, and health care.

The Pound Foundation also undertook a variety of projects focusing on law and trial advocacy in the public interest. In the early 1970s, with the help of the ATLA Education Department and a grant from the Office of Law Enforcement Assistance of the U.S. Department of Justice, Pound produced two sets of films. "Civil Trial Advocates" used prominent judges and ATLA lawyers as actors to dramatize various aspects of the civil justice system in action. "The Adversaries" did the same in the context of criminal trials. In 1971, Joseph Kelner, as Chairman of the Foundation Special Projects Committee, published *Our Highway Roulette: America's Untested Cars*, investigating shortcomings in the testing and inspection of newly-manufactured vehicles.

The Pound Foundation is largely supported by donations by ATLA members—including, beginning in 1970, voluntary contributions solicited in ATLA

dues statements. Although the governing board of trustees has always been heavily dominated by former ATLA presidents and officers, the Foundation is a separate and distinct entity and includes non-ATLA members on its board. Indeed, the Foundation has jealously guarded its independent status, dealing at arm's length in its arrangements with ATLA. This was particularly true as ATLA became more deeply involved in political action.

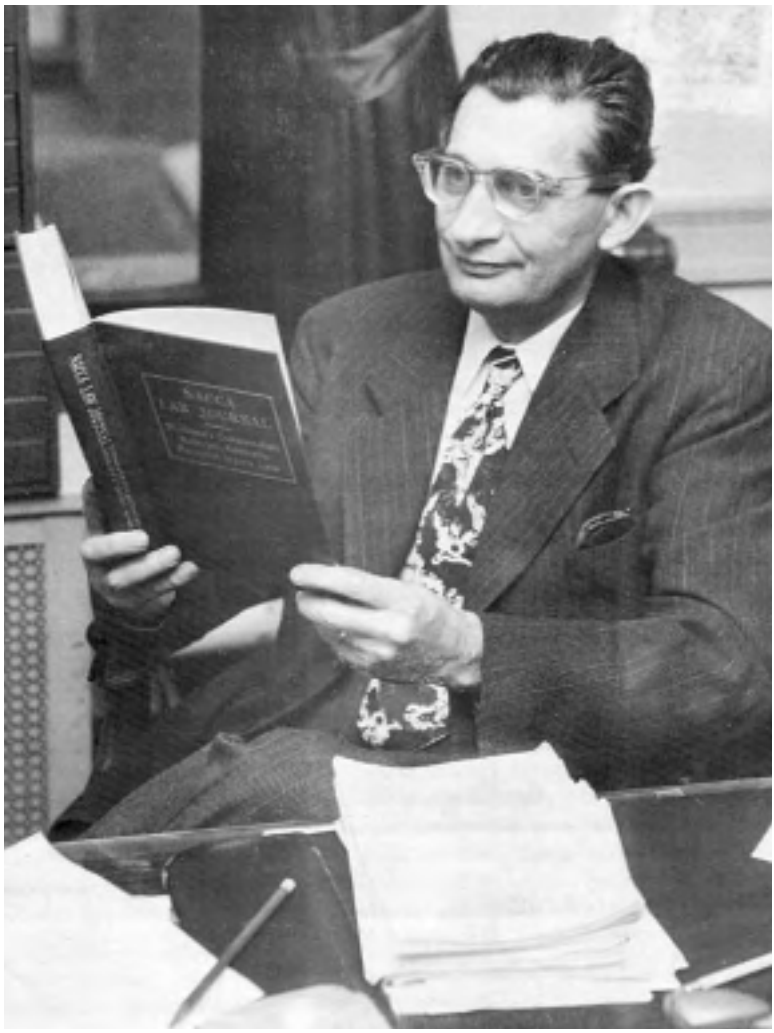
This caution was rewarded when, in 1974, ATLA's lobbying activities and fundraising for political action aroused the interest of the Internal Revenue Service. In an action that some suspected was politically motivated, the IRS audited the Foundation, assessed a penalty of $5,000 for minor filing irregularities, and suggested that the Foundation had violated its tax-exempt status by commingling funds with ATLA. The Foundation's Executive Director, Richard Jacobson, working with its accountant, was able to document that the funds had been solicited and used solely for the Foundation's proper purposes, primarily to finance its building in Boston. Although ATLA had collected some of these funds for the Foundation, they were kept in segregated accounts. In 1976, the IRS announced that it would continue to recognize the Foundation's tax-exempt status.

In 1976 ATLA began preparing to move its headquarters to Washington, D.C., and the Foundation put its Cambridge building on the market. A sale to an international consulting firm was derailed by court action by a group of Harvard University professors and neighbors. In 1978, Harvard University itself bought the building for $900,000 to house its Continuing Education Department.

At that time, ATLA was facing acute financial difficulties. The costs of financing and moving into its newly-acquired headquarters, combined with the heavy demands of ATLA's legislative battles against no-fault and medical malpractice legislation, put the Association in a precarious position. The Pound Foundation, which would also occupy the building, was able to help. The Board and the Trustees authorized an $800,000 loan from the Foundation to ATLA, to be repaid with interest and secured by the Washington headquarters building. The Roscoe Pound Foundation was ATLA's landlord until the 15-year promissory note was repaid.

In 1986, ATLA and the Pound Foundation formalized their relationship as separate and distinct organizations. The Foundation agreed to pay ATLA for administrative and legal services. The agreement reaffirmed the Foundation's complete independence in matters of policy. The following year, the trustees voted to change the name from the "Roscoe Pound-American Trial Lawyers Foundation" to simply the "Roscoe Pound Foundation."

During the 1980s, the Foundation redoubled its efforts to foster legal schol-



Samuel Horowitz peruses the NACCA Law Journal

Max Israelson

Co-founder Ben Marcus

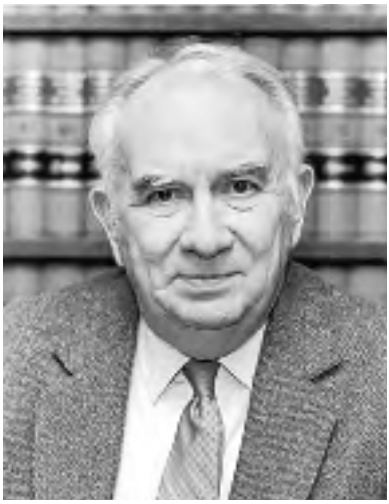
Leonard Ring with Sen. Paul Simon

Craig Spangenberg

Law Professor and early assistant editor of NACCA Newsletter *Joseph Page*

No-fault warrior Paul R. Sugarman

1957 Board of Governors: Seated: C. Lawrence Elder, Carl Gussin, Lou Ashe, Albert A. Williams, Perry Nichols, Craig Spangenberg, Edward B. Rood, Herbert Greenstone, Max Israelson, Charles N. Segal. Standing: Edward O. Spotts, Arnold Elkind, Si Weisman, Stanley J. Bangel, Theodore Sindell, J. Newton Esdaile, Henry Berger, Earl H. Davis, Alfred A. Fiedler, Leonard R. Kincaide



Harry Philo "Lawyer on the side of the people"

Melvin Belli

Inaugural issue of Trial magazine featuring Bill Colson on the cover

1974 Board of Governors: Top row: Bill Wagner, Walter Emroch, David Shrager, H.A.D. Oliver, James Pyles, David Baum. 2nd row: Morris Bruckner, Herbert Greenstone, Stuart Cowan, Jack Olender, Frank Gregory, Ted Rachlin, Unidentified, James Lawyer. 3rd row: Melvin Block, Lembhard Howell, Howard Nedved, Unidentified, Unidentified, Peter Perlman, Unidentified, Frank Guarini, Judson Francis, Irwin Birnbaum. Seated: John Norman, Robert Begam, Ward Wagner, Robert Cartwright, Leonard Ring, Tom Davis, Jack Travis.

Homer H. Bishop

Verne Lawyer

Ben Cohen receives a helping hand from James "Spot" Mozingo

George E. Allen, Sr.

Laurence Locke

Amicus veteran Amy Langerman

Leonard Schroeter, Constitutional Challenge "Guru"

Asbestos Litigation pioneer Ron Motley

Longtime Treasurer Joseph Schneider

Sen. Daniel Inoue with Peter Perlman

Lembhard Howell

Richard Gerry, Gov. Jerry Brown, and Harry Philo

Bill DeParq, Richard Markus, and George Allen

James Ackerman

Texan Michael Gallagher

Moe Levine

Prof. Thomas F. Lambert, Jr.

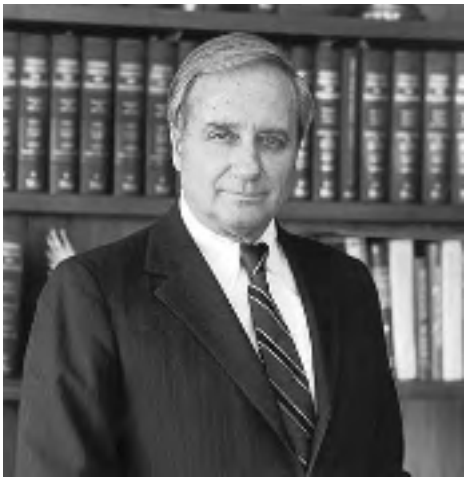
Joe Tonahill, co-founder of Texas Trial Lawyers and holder of ATLA Membership Card No. 1

(l to r) Melvin Belli, Roscoe Pound, James Dooley, Charles Segal

Ted Warshafsky

Henry Woods

Joseph Kelner



Thomas E. Cargill

Leonard M. Ring

Stanley Preiser

Marie Macri Lambert

Theodore I. Koskoff

J.D. Lee (l) and Dean Robb (r) with thalidomide hero Francis O. Kelsay

(l to r) Linda Miller Atkinson, Roxanne Barton Conlin, and Anita Hill

arship and dialogue. In 1984, on the retirement of Jacobson as its executive director, the Pound Foundation established the Richard S. Jacobson Award for Excellence in Teaching of Trial Advocacy. Travis Lewin, professor of law at Syracuse University was the first winner.

In 1990, the Foundation created the Elaine Osborne Jacobson Award for Women in Health Care Law—the first award for women law students committed to a career to prevent abuse to women and the elderly and prevention of fraud in medical care. That same year, the Pound Foundation assumed direction of the annual Roscoe Hogan Environmental Essay Contest and built an endowment for the project, which grants three awards annually.

The Pound Foundation has published a series of monographs, studies and symposium reports. They include a 1985 monograph by leading tort scholar Professor Marshall Shapo based on his landmark defense of the tort system prepared for the American Bar Association, *Towards a Jurisprudence of Injury*. Tort law, Shapo concluded, "is a mirror of American society."

The Foundation hosted and published reports of the Pound Roundtable Discussions, in which about a dozen scholars and leading authorities addressed significant social-legal issues. The 1988 reports, for example, focused on health care, including *Liability, Medicine and the Law: Expanding the Dialogue*, and *Developing Flexible Dispute Resolution Mechanisms for the Health Care Field*. A series of papers published in 1990 looked at injury prevention, focusing on farm safety, industrial accidents, and occupational diseases.

One of the Pound Foundation's most notable contributions was the publication in 1987 of *The Jury in America*. The book was the culmination of three years of research by author John Guinther. The object of this extensive inquiry, according to Foundation vice-president David S. Shrager, was to show that "the American system of justice could look to trial by jury as the outstanding form of participatory democracy." Guinther's work examined the historic origins of the jury's power, including a dramatic description of the trial of William Penn, where courageous jurors resisted fines, imprisonment, and deprivation rather than return a conviction that violated their consciences. After examining previous jury studies, Guinther presented the results of the Pound Foundation's empirical study of jury behavior. His conclusion was that juries "are, on the whole, remarkably adept as triers of fact" and take seriously their responsibilities as the conscience of the community.

In 1989, the Foundation supported and published the most comprehensive empirical analysis ever undertaken of punitive damages in products liability cases, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter of a Century of Trial Verdicts*. Author Professor Michael Rustad examined nearly every punitive damages verdict returned in products cases from

1960 to 1985. His findings refuted the wild claims that runaway juries routinely imposed huge punitive damage awards on product manufacturers.[197]

The Roscoe Pound Foundation succeeded in preserving the essence of Dean Pound's philosophy of social jurisprudence and his vision of the common law in service of the public good. Its efforts earned a solid reputation for fairness and scholarly competence.

In 2000, the Foundation became the Roscoe Pound Institute. The new name reflected a dramatic shift in its mission: to become the nation's foremost plaintiff-oriented think tank. Much of its work now centers on its annual Forum for State Court Judges, which brings together members of the judiciary and leading academics to consider issues of importance to state court judges. The Institute also publishes the *Civil Justice Digest*, which is sent to several thousand judges and law professors and provides analysis of legal issues and important decisions free of the pro-defendant slant found in many other publications.

If ATLA's leaders in the 1960s were eager for ATLA to take its place on the national stage as the representative of trial lawyers, they would soon get their wish. But it was not to be in the realms of scholarship or broad public policy. It would be a bread-and-butter issue that would dominate ATLA's attention from 1967 to 1976. It would be a pitched battle over the basic values of accountability and the jury system. In a word: No-Fault.

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[197] This research was also published in Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data,* 78 Iowa L. Rev. 1 (1992).

8

No Fault

Just as ATLA was making gains in advancing the rights of tort victims in America's courthouses, an ominous development roiled though the nation's legislatures, challenging ATLA's mission of preserving the civil jury. A plan to remove automobile accident claims from the civil justice system sparked a national debate. The battle over no-fault automobile insurance would preoccupy ATLA from 1967 to 1976. It would set the stage for the second transformation of ATLA, from a primarily educational association to one committed to defending the tort system and the civil jury through political action.

A Massachusetts Surprise

On a hot day in Boston, August 15, 1967, an impatient Massachusetts House of Representatives was eager to wrap up its session. The Chairman of the Ways and Means Committee reported out a compromise auto insurance bill, known as the Keeton-O'Connell Plan, primarily "to appease bickering among the insurance companies."

Representative Michael Dukakis, a former student of law professor Robert Keeton, asked the Speaker "for five minutes to present my plan." The bill, which had been rejected five months earlier by the Joint Insurance Committee as "worthless," was not expected to go anywhere. Dukakis, perhaps, just wanted some publicity.

Dukakis spoke for an hour in an emotional presentation of no-fault auto

insurance to lawmakers who were becoming increasingly impatient to leave. There was a demand for a voice vote. "The bill is lost," the Speaker ruled. But Dukakis demanded a roll call. Incredibly, the tally was 133-85 in favor. The House erupted in noisy confusion as the Speaker gaveled helplessly. No one in the House had read the 71-page bill. No one, save Dukakis, had even seen the printed text. The House clerk sheepishly admitted discarding all the copies. "We thought the bill was dead," he said. Nevertheless, auto no-fault had won its first legislative victory.

As the bill headed for the Massachusetts Senate, the Massachusetts Trial Lawyers Association (MATLA) suddenly found itself at the center of what would soon become a nationwide effort to change the area of tort law that affects the largest number of Americans.

An Old Idea Resurrected

J. D. Lee would later marvel at how rapidly "no-fault insurance traveled from a text book law, proposed by two law school professors, through the insurance industry's profit mill up and down the legislative corridors of all the 50 states and into the Chambers of the U.S. Senate and House of Representatives."

The idea of no-fault auto insurance as a substitute for the tort system had made the rounds of academe in the 1920s. In 1928, the Columbia University Council for Research in the Social Sciences appointed a distinguished committee of jurists and scholars to study the problem of compensation for injury in the relatively new area of automobile accidents. Following three years of extensive study, the committee recommended a no-fault compensation program modeled after workers' compensation. Several state legislatures entertained the proposal, but none adopted it. The American Bar Association in the 1950s proposed a similar automobile compensation system, which earned a sharp condemnation by Roscoe Pound. The ABA later opposed no fault.

The idea was revived in 1964 by two law professors, Robert Keeton of Harvard and Jeffrey O'Connell of the University of Illinois, who called their proposal the Basic Protection Plan for Traffic Victims. Variations of the plan were soon put forward by the American Insurance Association and others.

In its simplest form, the plan called for car owners to buy personal injury protection coverage to cover their own medical expenses and lost wages up to a threshold amount of $10,000. For compensation for personal injuries and death in an auto accident, victims would look to their own insurer, which would pay benefits regardless of who was at fault. Only in the case of serious injury, with losses above the threshold, could accident victims sue the at-fault driver in tort.

The arguments for no-fault were appealingly simple. First, the costly tort

process of determining fault was said to be a dead loss to the system. "Transaction costs" (and proponents made clear that the contingent fees of trial lawyers was their chief target) siphoned away money that should go to injured victims. Second, the tort system resulted in what O'Connell called "gross inequities." Some injured drivers obtain compensation, but many others receive nothing. These included drivers who were themselves at fault, those injured by uninsured and judgment-proof drivers, and those injured in single-car accidents. No-fault, proponents argued, would benefit everyone (except the trial lawyer) by cutting out the tort middleman.

The plan had one huge problem: Cost. By promising benefits to all the accident victims who are not compensated by the tort system, the plan would greatly increase the number of compensated claimants, while the number of car owners paying premiums remained about the same. It was obvious that increased payouts would far outstrip any savings in transaction costs. But proponents recognized that they could attract broad public support only by promising lower rates.

They therefore proposed to reduce the value of the product.

The largest cut in benefits was the elimination of compensation for pain and suffering. Some plans also used what were essentially deductibles. For example, the American Insurance Association plan did not compensate the first thirty days of lost wages. Additionally, the AIA and other plans would reduce benefits by amounts received from collateral sources such as a driver's own health insurance benefits.

Most states followed the common law rule that a tortfeasor was not entitled to a setoff for benefits plaintiff has received from private medical insurance, workers' compensation, government programs such as Medicare and Medicaid, or from other sources. Plaintiffs seldom recover twice for an injury, however. Nearly all these programs demand reimbursement from any tort judgment. By eliminating these repayments, no-fault would increase the costs of those public and private programs, essentially forcing them to subsidize auto insurance.

Even with reduced benefits and hidden subsidies, opponents pointed out, there was no clear showing that no-fault would lower premiums for drivers. Moreover, no-fault insurance still retained a middleman—the insurance company. The contingency fee lawyer has a financial stake in obtaining full compensation for the accident victim. The financial self-interest of the insurer is exactly the opposite—to pay the injured victim as little as possible.

But the trial lawyers' most serious objection was a matter of values, rather than economics. No-fault's supporters viewed the notion that wrongdoers should be held accountable as outdated. Juries, they stated, could not match the

efficiency of the insurance industry in processing claims. They hindered progress. Keeton and O'Connell made juries sound almost un-American.

The two professors were energetic and effective salesmen for their plan in the media, at meetings of bar associations and trade groups, and in legislative hearings. Often their sales pitch was liberally sprinkled with attacks on trial lawyers. It did not help that, after ATLA initially invited Jeffrey O'Connell to speak at the 1967 mid-winter meeting in New Orleans, he was unceremoniously disinvited. O'Connell sent a scathing letter to ATLA indicating that he viewed the matter as a personal affront.

Battling Back in Massachusetts

In Massachusetts, MATLA and ATLA pursued a strategy for defeating no-fault by exposing the plan as a fraud. It would not lower insurance premiums, but it would reduce compensation to innocent victims and reward negligent drivers.

The trial bar was already trailing badly in the race to win public opinion. Newspaper, television, and radio commentators quickly embraced the Keeton-O'Connell plan as a "bargain" and a "superb answer" to the rising cost of auto accident insurance. They repeated the glowing promises of lower premiums and prompt payment of claims up to $10,000 without the necessity of hiring a lawyer. Radio and television messages urged audiences to call their state senators and urge their support. The only people who could possibly be opposed, the *Boston Globe* opined, were "the ambulance-chasing members of the legal profession who have fattened on the existing tort system." Massachusetts Senate President Maurice Donahue told MATLA president Tom Cargill that letters to the Senate were running 10 to 1 in favor the measure.

The MATLA leadership, led by Cargill, Paul Sugarman and ATLA Governor Abner Sisson, held an emergency meeting to decide how to fight back. They had about two months to turn the tide before the state senate vote.

Professor David J. Sargent, dean of the Suffolk University Law School and a dissenting member of the original Advisory Committee from which the Keeton-O'Connell Plan emerged, stepped forward to lead the public opposition. He traveled the state speaking out against the plan, providing down-to-earth explanations of the disastrous consequences for innocent accident victims. Sargent and Sugarman debated Keeton and other advocates of the plan. At the same time, MATLA dispatched "truth squads" to visit television and radio stations and the editors of every newspaper in the Boston area, pleading for more even-handed coverage and a chance to give the public the facts. ATLA set up its own "truth and facts" committee, headed by Richard Jacobson.

The first hopeful sign came quickly. The *Boston Globe* reversed itself and

agreed to publish a front-page story detailing the trial lawyers' side of the argument. The *Boston Herald Traveler*, the largest newspaper in New England, devoted three consecutive days of coverage to a debate between Professors Sargent and Keeton.

Meanwhile, MATLA was working closely with ATLA's Auto Reparations Committee, chaired by Craig Spangenberg. The Committee enlisted a group of political allies who would be strong witnesses at the senate hearing. Among them was Paul A. Tamburello, President of the Massachusetts Bar Association, who denounced no-fault on television, radio and at city and county bar associations. Massachusetts Insurance Commissioner S. Eugene Farnam, in a memorandum to lawmakers, questioned the plan's constitutionality and warned that it "could double the claims frequency," leading to increases in premiums. Massachusetts Superior Court Chief Justice G. Joseph Tauro challenged the claim that the plan would reduce court congestion. Judge James R. Lawton, former Registrar of Motor Vehicles, pointed out the increased potential for fraudulent claims under the plan.

Justice Edward F. Hennessey, the foremost authority on motor vehicle law in Massachusetts, predicted greater costs and litigation. Dr. Calvin Brainard, Chairman of the Department of Finance and Insurance of Rhode Island University, conducted a study of the bill under the sponsorship of the William E. Meyer Institute of Legal Research, the same foundation that had funded the original study by Keeton and O'Connell. His conclusion was that no-fault would provide less protection at greater cost for good drivers while giving more protection at lower cost for bad drivers.

In September 1967, the Senate Ways and Means Committee kicked off its hearings. Keeton and O'Connell spoke in favor of the Bill. Sargent, Cargill, and Sugarman opposed. The National Association of Independent Insurers and the American Mutual Insurance Alliance also called for rejection. On September 19, the committee voted 9-1 against the bill. After heated debate, the full Senate voted to kill the proposal and sent it back to the House. There, Dukakis reintroduced his bill. This time the House on November 1, 1967, voted 128-91 to reject it.

The trial lawyers had won a major victory.

Spangenberg's Counteroffensive

Plaintiffs' lawyers around the country breathed a collective sigh of relief, expecting they'd heard the last of the Keeton-O'Connell plan. ATLA's officers, especially Craig Spangenberg, were convinced otherwise.

Spangenberg would direct and define ATLA's response to no-fault over the next decade. The Ohio lawyer was ideally suited for the challenge.

He was already a successful trial lawyer in Cleveland in 1952 when Melvin Belli came to town with his traveling NACCA trial seminar. Spangenberg immediately saw the big picture. "I felt injured people—the victims of society—really deserved good representation. I saw in ATLA-NACCA a great opportunity for young lawyers to get that kind of training and insight into trial work." Defense firms "took the cream of the law school crop," he said. ATLA's mission was to raise the skills of the plaintiffs' bar and "give victims an even chance in the courtroom." He himself had learned trial practice from his partner and mentor Marvin Harrison. As a tireless traveler with Rood's Raiders, Spangenberg felt he was repaying an obligation to inform and inspire other attorneys.

His boyish face and characteristic bow tie lent him the appearance of a youngish college professor. Not far below the surface was a sharp intellect and a fierce idealism, undimmed by personal ego or ambition. The highest calling of every lawyer, he believed, is justice. "If you have an unjust, savage society, then a couple million years of evolution don't amount to much."

Spangenberg was convinced that most Americans, when they sit as jurors, are not satisfied with being compassionate. They desperately want to be "champions of justice," he said. "I found out that people who had some sense of sympathy would give you a little money. But if they were convinced that they were giving you justice, they would give you a lot of money."

And if juries are champions of justice, ATLA must be the champion of the jury.

Over the years, ATLA's leaders turned to Craig Spangenberg with their most difficult and delicate problems. Those included negotiations with the insurance industry over attacks on trial lawyers and juries, the retirement of Sam Horovitz, and ATLA's defense in the lawsuit brought by the College of Trial Lawyers over the use of its name.

In 1963, as vice-president, Spangenberg was the clear front-runner to be ATLA's next president. He withdrew at the last minute when his partner and mentor Marvin Harrison died unexpectedly. He felt it would be unfair to his partner's widow not to devote himself full-time to the firm's business, on which her benefits depended.

Even as the MATLA lawyers celebrated their victory in Boston, Spangenberg could see a long battle ahead. He was struck by the depth of the public's dissatisfaction with automobile insurance. In Congress, the Senate Commerce Committee scheduled hearings on consumer auto insurance complaints, and the Department of Transportation was planning a study of the entire auto insurance problem. Spangenberg fully expected that Keeton, O'Connell, and their insurance industry supporters would carry their proposal to every state

legislature around the country. He predicted, privately at least, that some states would be lost.

Spangenberg ordered Richard Jacobson to publish a special issue of *TRIAL* magazine at the end of 1967 devoted to automobile insurance. The Board of Governors authorized an emergency expenditure of $50,000 for the publication to address consumer concerns from all points of view. The *Great Debate* special issue was an extraordinary example of providing a forum for debate and letting the public judge the result. It included a call for federal action from Senator Warren Magnuson, Chairman of the Senate Commerce Committee, as well as articles from both Professors Keeton and O'Connell. Other contributors were Professor Sargent, James Kemper, president of Kemper Insurance Co., Professor Daniel P. Moynihan, Professor Harry Kalvin, Dr. Calvin Brainard, and a spokesman for the Defense Research Institute.

Assembling a grass-roots movement through ATLA members across the country to oppose no-fault would seem simple enough. But this was unfamiliar terrain for ATLA, and its first steps were hesitant. In November 1967, president Langerman sent an urgent memo asking every major policy maker in ATLA to set up a counter-thrust against no-fault. The memo offered the recipients a kit, prepared by Richard Jacobson, consisting of quotable material. But Langerman insisted the kit not be used "until a method of counter-attack . . . is provided for your area or state" and until ATLA developed "a positive program to remedy the deficiencies in the present system."

ATLA would also fumble in getting its public relations campaign on a solid footing. In 1971, as the pressure for no-fault was building, President Richard Markus hired a Chicago public relations firm. When Marvin Lewis took office the following year, he fired the Chicago firm and retained a New York public relations firm. In 1973, Leonard Ring canceled that contract and retained the New York firm of Howard Rubenstein.

In 1969, it was clear that the more the public learned about no-fault, the less they liked it. In a large survey by State Farm Insurance of its policyholders, 94 percent of four million respondents stated that they favored the fault principle. A Department of Transportation study found that 60 percent expressed satisfaction with the current fault system. Proponents responded by turning up the pressure on state legislators. Arkansas, California, Maine, and New York established blue ribbon commissions to investigate the desirability of no-fault.

The first state to be lost, it turned out, was Massachusetts. Three major insurance groups had been exerting intense political pressure for a no-fault plan. In July 1970, an amended version of the Keeton-O'Connell bill was suddenly revived on the Senate floor. On August 5, MATLA leaders received a telephone call from Philbert Pelligrini, Chairman of the Senate Insurance Com-

mittee, advising, "You better get down right away if you want do something with the bill." Abner Sisson and David Sargent hurried to the State House after calling Sugarman and Jacobson, who were at the ATLA annual convention in Miami. But last minute maneuvers were of no avail. The bill passed and Governor Frank Sargent signed it into law on television.

The trial lawyers had failed to prevent passage, but they had succeeded in limiting the law's impact. The $10,000 threshold for economic damages had been reduced to $2,000, and the medical threshold of $2,000 was reduced to $500. In addition, they persuaded legislators to hold the insurers to their promise of lower premiums by mandating a 15 percent reduction in rates. Six insurance companies refused to write coverage at the lower rates and appealed to the Massachusetts Supreme Judicial Court. The court ultimately ruled that the 15-percent reduction was unconstitutional except for bodily injury coverage.

At the very time that Massachusetts lawmakers were casting their votes, Spangenberg, Orville Richardson, and Samuel Langerman were conducting a no-fault "teach-in" at the convention in Miami to make clear ATLA's position. Spangenberg's opening remarks were somber. "I have no hope we will save the fault system as you knew and loved it. The question is whether we can save enough of the fault system so that you might survive." At present, he stated, "ATLA has absolutely no plan for any compromise. Our position is: We are for the fault system and against all no-fault plans." Then he dropped a bombshell. "Secretly, I am one who thinks we have to compromise a little."

He explained that powerful forces were behind the no-fault drive. The AIA stock companies, who were losing market share to independents and mutuals, "felt their economic salvation lay in changing the present system to a group health system." In addition, he anticipated that the U.S. Department of Transportation study would favor no-fault, prompting a federal no-fault bill. One compromise, he suggested, might be to allow small claims to go to arbitration to ease court congestion.

Langerman warned against the complacency of many ATLA members who were confident that no-fault legislation would get nowhere in their states. Those lawyers "do not understand the political oomph of this problem. No-fault plans will not wither and die." Orville Richardson agreed. The problem, he suggested, was broader than automobile accident victims. "The fact is there are injured people not getting adequate care." Like other ATLA leaders, Richardson advocated national health insurance. He saw the best defense against no-fault was a good offense: Trial lawyers becoming politically active in support of universal health care for Americans injured under any circumstance.

The Oct./Nov. 1970 issue of *TRIAL* magazine published another debate that

included articles by Senators Philip Hart and Warren Magnuson, who had developed and introduced a federal no-fault bill. It also included ATLA's own position paper, authored primarily by Spangenberg, which incorporated ideas suggested at the teach-in.

No-Fault in the States

After Massachusetts said yes to no-fault, similar battles were waged in statehouses across the country. In 1971, New York Governor Nelson Rockefeller introduced the AIA no-fault plan. "The failings of the present system," he declared, "are traceable to its fundamental tort system principles and must be completely overhauled by a no-fault first-party system." He ordered State Insurance Commissioner Richard Stewart to promote the proposal even before it was debated in the legislature.

The New York State Trial Lawyers, led by Seymour Colin and its president Stanley Danzig, worked to forge alliances with other influential organizations. Jacob Fuchsberg teamed up with Reid Curtis, New York Regional Director for the Defense Research Institute (DRI), to oppose Rockefeller's proposal. Fuchsberg and Curtis contended that the plan would strike at the benefits of union and municipal workers, create an unfair and discriminatory rating system for New York drivers, boost administrative costs, and discourage tourism.

The trial lawyers also worked closely with the New York State Bar Auto Reparations Committee to inform the public of the disadvantages of the plan. Additional support came from the National Association of Independent Insurers. NAII president Vestal Lemmon, representing the major writers of auto insurance in the state, told the Assembly Committee that the present system could be made more responsive "without shifting insurance costs from the guilty to the innocent."

Governor Rockefeller's plan failed. The Assembly voted, after considerable debate, for a compulsory first-party plan that imposed few restrictions on lawsuits.

In 1971, the AIA targeted Delaware for an easy win. Led by president Oliver V. Suddard, the Delaware Trial Lawyers Association not only opposed the AIA plan, but offered an insurance reform bill of its own. DTLA's Delaware Motorist Protection Plan (DMPP) established no threshold. It required insurance companies to add first-party coverage to existing policies that would pay benefits for medical costs and lost wages, regardless of fault, while continuing to provide liability coverage.

The AIA bill failed; Delaware's legislature adopted the DMPP. Leonard Ring, writing in the 1974 *Notre Dame Law Review* stated: "Two years after the

enactment of the Delaware Plan, claims have been reduced by 70 percent," demonstrating that "where the victim's medical and wage losses are covered, the incentive to make further claims was extinguished in all but the serious cases."

In Hartford, Connecticut, hometown of the U.S. insurance industry, ATLA and the Connecticut Trial Lawyers Association in 1969 defeated the most formidable no-fault proposal to date. The Cotter Bill—named for state insurance commissioner William T. Cotter who had devised it—would have eliminated general damages and placed no-fault under the administration of the insurance commissioner. Unlike most other proposals, the Cotter plan commanded the support of the entire auto insurance industry, as well as that of the AFL-CIO. David Sargent quickly dubbed it "The Insurance Industry Relief Act."

The legislative debate turned acrimonious at times. The AFL-CIO backtracked on its support of the bill, calling for removal of the abolition of pain and suffering damages and limits on income and disability payments. The chief actuary of the state Insurance Department conceded that no actuarial study supported the claim that the plan would reduce premiums by 10 percent. The Committee voted to reject the Cotter Plan.

In 1972 in Colorado, the unlikely combination of *The Denver Post*, the Rocky Mountain Farmers Union, and Common Cause secured enough signatures to place a no-fault referendum on the ballot. ATLA set up an office in Norman Kripke's Denver suite and set to work, forming coalitions to oppose the referendum, promoting public debates, issuing news releases, and promoting forums on television and radio, on college campuses, and in union halls. Leonard Ring traveled to Colorado and told a television forum that the 25 percent savings claimed by no-fault's supporters was a "bald-faced mistruth." Charles Hewitt, Jr., an actuary for Allstate, backed Ring up. Other referendum opponents were the Colorado Grange, the American Automobile Association, the Colorado Chamber of Commerce, and the Colorado Farm Bureau. The referendum was defeated. A year later, however, the legislature enacted a compulsory first-party liability act with some restrictions on lawsuits. In 2003, Colorado repealed its no-fault law, finding that the experiment had failed. Insurers, such as giant State Farm, supported the repeal.

Among ATLA's allies in these battles, the American Bar Association and the state bar associations played a crucial role. In 1954, the ABA had itself proposed an automobile no-fault plan. Fifteen years later, the organization made an about-face. In 1969, the ABA House of Delegates was asked to adopt the report and recommendations of a special ABA Commission in favor of no-fault. Orville Richardson, a member of the House of Delegates, led the oppo-

sition. Aided by Raymond Kierr and Walter Beckham, Richardson quietly lobbied the various ABA sections and defeated the resolution. Many of the state bars followed suit.

Plaintiffs' lawyers had long had a prickly relationship with the American Bar Association. Nevertheless, ATLA's leaders in the 1960s urged members to join the ABA and become active in their state bars. Henry Woods noted that "a lot of plaintiffs' lawyers began to emerge as leaders in their own state bars—Orville Richardson in Missouri, Paul Sugarman in Massachusetts, Walter Beckham in Florida, Raymond Kierr in Louisiana, Phil Corboy in Illinois and others." Later, other ATLA leaders would serve as presidents of their state bars, including Mark Mandell of Rhode Island, Leo Boyle of Massachusetts, and Todd Smith of Illinois.

Woods himself had encouraged Arkansas trial lawyers to become active members of the Arkansas State Bar Association. In 1973 he became the first plaintiffs' lawyer to head that organization. The Arkansas trial lawyers would not have succeeded in blocking no-fault, Woods acknowledges, without the support of the Arkansas Bar.

Woods also organized the Presidents of the State Bar Associations, which also played an important role. Although the organization included many defense lawyers, it actively opposed auto insurance proposals. "We were in constant communication with each other all over the country. We met at meetings of the American Bar Association where we had our own caucuses. I know we got the ABA to oppose no-fault."

Constitutional Challenges

In states that passed no-fault, trial lawyers achieved some success in challenging the legislation on constitutional grounds. The first target was the Massachusetts statute. In a lawsuit filed by an injured motorist covered by the act, MATLA President Robert Cohen sought a declaratory judgment that the statute violated the state constitutional right to a remedy, trial by jury, due process and equal protection. The case made its way to the Massachusetts Supreme Judicial Court, where ATLA filed an *amicus* brief. However, the court upheld the act, emphasizing that the legislature enjoys broad leeway and a presumption of constitutionality when it fashions economic regulation.[198]

In 1972, Leonard Ring employed an innovative tactic to challenge Illinois' no-fault statute. Rather than wait for an auto negligence case in which to raise

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[198] Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971)(**Robert Cohen**).

his constitutional arguments, Ring filed a "taxpayer's suit," based on the standing of a taxpayer to contest the use of pubic funds to implement an invalid law. After a trial at which Ring introduced evidence of the disparate impact of the statute on the poor and people in rural areas, Judge Daniel Corvelli ruled that the act employed "discrimination of the rankest kind, impossible for the Court to rationalize, justify, or maintain." The Illinois Supreme Court affirmed, holding that the statute violated the prohibition in the Illinois Constitution against special legislation.[199]

The following year, the Michigan Trial Lawyers Association president Harry Philo and ATLA Board member Sheldon Miller tested the constitutionality of Michigan's law. The trial judge ordered a full-blown trial that lasted eighteen months. The insurance industry retained the state's top lawyers to defend the statute.

"It was a beautiful experience," Miller said. "It was the only time in the history of this country that the proponents of no-fault had been subjected to taking the oath, getting on the witness stand, and being cross-examined." Philo explained their trial strategy: "No-fault was a way to reduce premiums, the legislators were told. On cross-examination, every single expert backed off that. At the end there was no testimony by anybody that no-fault would reduce premiums." The trial court ruled that the statute violated equal protection.

The case made three trips to the Michigan Supreme Court, which ultimately held that the statute violated procedural due process. Motorists who were compelled to buy insurance were given no protection against arbitrary or unfair rates, or refusal or cancellation of coverage.[200]

In 1973, the Florida Supreme Court struck down that state's no-fault law, boldly undertaking the constitutional review that the Massachusetts court had evaded. Because the statute infringed on the fundamental right to a remedy specifically guaranteed by the state constitution, the legislation was not entitled to the presumption of constitutionality accorded to mere economic regulation. The court declared:

> The Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such

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[199] Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972)(**Leonard Ring**).

[200] Shavers v. Attorney General, 267 N.W.2d 72 (Mich. 1978)(**Harry M. Philo** and **Sheldon L. Miller**).

right, and no alternative method of meeting such public necessity can be shown."[201]

By 1976, ATLA and its state affiliates had compiled an impressive record of successes. Twenty-six states had enacted legislation referred to as "no-fault." Only fourteen of these jurisdictions, however, imposed significant restrictions on tort suits. The remaining states enacted "add-on" statutes that provided for first-party coverage in addition to tort liability. More importantly, none of the fourteen states passed no-fault in its proposed form, with its $10,000 threshold and restrictions on economic loss benefits. Spangenberg's strategy of seeking compromise had paid off. Hawaii imposed the highest threshold—$6,000. In the other states, trial lawyers succeeded in persuading legislators to set far lower threshold amounts, while easing limits on benefits.

Showdown in Congress

Facing failure to sweep the statehouses, no-fault proponents turned to Congress. The first federal bill was introduced in May 1970. S. 945, following a series of high-profile hearings, died in committee. Anticipating that proponents would be back, ATLA president J. D. Lee in 1972 named vice president Leonard Ring to forge a counter-offensive. Ring and Craig Spangenberg embarked on a three-prong strategy against federal no-fault, which included public education, legislative advocacy, and ATLA's own insurance reform plan.

The first priority was to put together a serious campaign to educate the public and the media. David Sargent, according to then General Director William Schwartz, was an obvious choice. "He took a very complex subject and made the dangers of no-fault understandable by the common person." Another goal of the campaign was to energize local groups of trial lawyers. Marvin Lewis, described by Schwartz as "a hard driving orator of the old school," traveled to all fifty states to address lawyer groups.

Spangenberg prepared a comprehensive "white paper" that spelled out ATLA's official position: the American people overwhelmingly support the fault principle. The major auto insurance problems plaguing consumers stemmed from industry practices such as classification of risks, cancellation and non-renewal of coverage, and delay in claim settlements. The paper recited a mountain of statistical evidence regarding the incidence of claims, court congestion, and accident rates. ATLA suggested that providing first-party insurance of up to

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[201] Kluger v. White, 281 So. 2d 1 (1973)(**Jeffrey M. Fenster**).

$2,000 for economic loss, without eliminating tort remedies, would resolve up to 95 percent of claims. In short, as Spangenberg told a Senate hearing in 1971, "government and business should serve the rights of the individual, rather than redesign his rights to serve the needs of the private insurance industry."

Both Spangenberg and Ring took on heavy speaking schedules in the nationwide campaign, often driving themselves to the point of exhaustion. On one occasion, Spangenberg was scheduled to testify on Capitol Hill on the same day he was to appear with Michael Dukakis in a televised debate in New York. An enterprising staffer managed to hire an off-duty hospital ambulance to meet Spangenberg at La Guardia airport. He was able to lie down in the back for some needed rest during the trip to the television studio in Manhattan. Following the debate, the ambulance met him outside the studio and whisked him back to the airport for a return flight to Washington. For once, Spangenberg's self-effacing nature did him a disservice. With just a little publicity, he could have enjoyed a good fifteen minutes of fame as the personal injury lawyer who was chased by an ambulance.

Meanwhile, Leonard Ring was expanding ATLA's Washington office to serve as a national intelligence center. Working with congressional lobbyist C. Thomas Bendorf, Ring created a "key man" committee of ATLA activists in each state. These committees not only received the latest information and materials from Spangenberg and Ring, they also reported back with intelligence on the concerns of the legislators and their constituents. The objective, according to Spangenberg, was "to get people politically active in the states, to organize state groups, to lobby aggressively with their senators. There was a lot of fund raising for political action committees. We couldn't hope to match the other side, but at least we could let the senators know that we supported our friends."

Other ATLA task forces, under the direction of Texans Michael Gallagher and Herman Wright, fanned out across the country, seeking out and meeting with individual trial lawyers who might join ATLA and become involved in the legislative battle. They signed up nearly one thousand new members in 1972 alone.

The second element of the counter-offensive focused directly on federal lawmakers. As expected, Senators Magnuson, Hart and Frank Moss introduced a new federal bill, S. 354, in January 1973. Ring and Spangenberg's objective was simple: Persuade fifty-one senators not to vote in favor of S.354. No political observer would have suggested that they had the slightest chance of success.

As state after state adopted some form of no-fault, senators who had not studied the issue viewed it as the progressive wave of the future in auto insurance. The Nixon Administration, speaking through its popular Secretary of

Transportation and former Massachusetts governor, John Volpe, threw its support behind a federal bill. To top it off, the chief sponsor, Commerce Committee Chair Warren Magnuson, was one of the senate's most powerful legislators. He had never lost a floor fight.

Ring and Spangenberg aimed to neutralize some of this support by stripping away the proposal's false, pro-consumer facade, particularly the promise of a 25-percent reduction in premiums by eliminating tort suits and attorney fees. "Leonard made the political decisions," Spangenberg explained. "My major function was to teach legislators the facts."

The Magnuson-Hart bill relied heavily on the Department of Transportation's mammoth 1971 study, with its recommendation in favor of federal no-fault legislation. Spangenberg, who with Orville Richardson was a member of an advisory committee which participated in the study, suspected that DOT's conclusions were not supported by the information it had collected. That data was laid out in twenty-four volumes of figures and analysis furnished by the insurance industry on its closed claims. So Spangenberg invested in a portable calculator—not a common, inexpensive, or small device at that time. Seated in the library of ATLA's Washington office, often until two or three in the morning, he worked his way through the dense columns of statistical reports. What he found was inaccuracy, shaky assumptions, and outright error. Most importantly, the data did not support DOT's rosy predictions. "The conclusions were totally slanted," Spangenberg complained. An accurate computation of DOT's own data indicated that premiums would most likely *rise* by as much as 25 percent.

He presented his findings to lawmakers in testimony at a 1972 Senate committee hearing. Milliman and Robertson, the actuaries who had worked up the cost projections for S. 354, were forced to admit that their estimates of savings were surrounded by caveats. In fact, they conceded that their full reports could well indicate *increases* in auto insurance costs.

Years later, studies of actual claims experience proved Spangenberg's predictions were correct. Auto insurance rates for consumers in states that had adopted no-fault not only rose, but rose higher than rates in the states that kept the fault system.

The best data, of course, was in the possession of the insurers themselves, including no-fault opponent Allstate Insurance Company. And no one can crunch numbers quite like an insurance company. Prompted by Spangenberg's findings, Allstate undertook a study of its huge database. In April 1975, Allstate announced its conclusion that the federal proposal would increase premiums for its policyholders in forty-five states by 4 to 97 percent. Allstate's vice president told the Senate Commerce Committee that S. 354 "will increase the cost of automobile insurance to most Americans and in many instances

increase the costs dramatically." The chief appeal that no-fault held for the average driver was fading rapidly.

The third prong of the ATLA attack was to put forth its own set of reforms to address real problems in the auto insurance system. ATLA's Federal Automobile Insurance Reform Act (FAIR) proposed:

- Federal regulation of the insurance industry, its rates, and practices
- Minimum insurance policy limits and uninsured motorist coverage
- Prohibition of arbitrary denials of coverage or renewals by carriers.
- Higher safety and crashworthiness standards for automakers.
- Removal of unsafe and drunk drivers from the road.
- Arbitration of small claims

The Magnuson-Hart bill passed the Senate in May 1974 by 53 to 42, but the House failed to act and the issue was dead for that session. But its sponsors reintroduced S. 354 in the next Congress. A procedural vote on March 31, 1976, proved to be the climax of the no-fault battle.

When the bill emerged from a subcommittee of the Senate Commerce Committee, ATLA was faced with a decision. Should the measure be allowed to proceed to the floor for an up-or-down vote? Defeat by a vote of the full Senate would deal a crushing blow to no-fault's supporters. If the bill passed, however, no-fault would likely become the law of the land. Or should ATLA ask its friends in the Senate to move to refer the bill back to committee where it might be effectively bottled up?

Tension grew in the ATLA office as the association's leaders and lobbyists reviewed their tally sheets time and again. The vote would be very close, and several names had question marks. Time was running out as lobbyist Tom Boggs pressed for an answer. Leonard Ring, as chair of the Public Affairs Committee, called for quiet. "Let's go for the referral."

The meeting broke up, and the lobbyists rushed to the Hill. Ring and the rest of the no-fault warriors at ATLA headquarters paced nervously. The phone call came. The Senate had voted 47-46 to refer the bill back to committee. It was instantly clear to Ring and the others that the trial lawyers would have lost a straight up-or-down vote in the Senate. "Imagine what I would have been called," he mused later, if he had bet ATLA's fortunes on the floor vote.

Though it was not immediately apparent, ATLA won the no-fault battle that day. S. 354 died in committee. No state adopted no-fault after 1976, and several states repealed their statutes. Nor would any federal proposal come as close to becoming law.

The ten-year battle taught ATLA some valuable lessons. One was the value of strong leadership. ATLA could not afford to be hesitant in its defense of the jury system, nor uncertain in its message. The ATLA presidency became a full-time, if unpaid job. ATLA also learned the value of focused, well-organized action by local members. The blandishments of a Washington lobbyist can often be overmatched by a few purposeful messages from influential residents of the legislator's home district. Organizing such "grass roots" efforts requires a great deal of infrastructure in the form of a committed and well-trained staff armed with the latest technology.

ATLA also learned from the chief mistake of no-fault's proponents, symbolized by the very name, "no-fault." O'Connell, Keeton, and their insurance company allies frequently analogized their plan with workers compensation, a non-fault system that quickly won universal acceptance. But they misread their history. Americans in the 1920s embraced workers compensation, not because they had rejected the fault principle. They were dissatisfied with a tort system that failed to enforce the fault principle and shielded employers from accountability.

No-fault's proponents assumed that Americans placed little value on the tort function of assigning blame for accidents. In fact, as opinion polls repeatedly and overwhelmingly showed, the public viewed the elimination of fault as the most objectionable feature of the plan. The idea that bad drivers would not only get off scott-free, but would actually be subsidized by good drivers was the chief reason cited for opposing no-fault.

It is no surprise that when O'Connell and others resurrected their plan in the mid-1990s, they dropped the no-fault label and instead chose to call it "Choice."

One additional lesson that many in ATLA took from the no-fault experience was the importance of political action. A vocal group of ATLA members had long urged the association to jump into political action with both feet. Testifying before legislative bodies and asking lawyers to call their representatives was not enough, they argued. ATLA needed to use professional lobbyists and, most importantly, to raise and distribute money as political campaign contributions. ATLA's leadership resisted. Many viewed such special interest lobbying and political giving as distasteful and demeaning to the association. It was hugely expensive and threatened the educational programs that had brought ATLA growth and respect.

The no-fault battle, the looming tort reform wars, and a band of determined Texans, would change all that.

9

Reluctant Warriors

During the 1950s, NACCA transformed itself from a small group of workers compensation attorneys into the leader in the education of tort lawyers and the development of tort law. Its success was remarkable. By 1972, ATLA membership had climbed to 27,000 trial lawyers. Its publications and educational programs were nationally recognized for their innovation and impact. Its role in improving the competence and effectiveness of the plaintiffs' bar had won respect even from its adversaries.

Those efforts would continue and flourish in the coming decades. But ATLA was about to transform itself a second time.

No-fault's victory in Massachusetts in 1967, practically on the doorstep of ATLA's home office in Boston, caught trial lawyers by surprise. When Professor O'Connell and his insurance industry supporters took their plan on the road, trial lawyers awoke to its full ramifications for the common law tort system. By 1973, nineteen states had adopted some form of auto no-fault, and Congress was poised to impose its especially harsh version on the entire country.

Nor was the no-fault concept limited to auto accidents. Proposals to establish non-tort compensation schemes for product and medical injuries were already being discussed. The American Medical Association suggested a no-fault type of plan to replace medical malpractice suits. Professor Jeffrey O'-Connell, co-author of the auto no-fault plan, put forth the idea of replacing all of personal injury tort law with a first-party no-fault system. Professor George Priest, as it turned out, had been partly right when, as noted in Chapter 5, he

suspected a movement to cast aside the fault principle. But it was not leftist academics or tort lawyers who were doing the conspiring. It was the insurance industry and some of their powerful clients. Liability based on fault placed their exposure in the hands of a group of people they could not control and refused to trust—the American jury.

Robert Begam put the matter plainly. The danger trial lawyers faced "is not a threat that the defense bar will beat us in the courtroom." Instead, he explained:

> The threat is that the adversary system of justice in our country will disappear. We will not have a system of justice that is appropriate to a democratic society like that we have had, but have a collectivist form of justice with automatic fixed response and scheduled responses, which is what the casualty insurance industry would like. It would be much more simple if we were a big workman's compensation system because they could underwrite that and make a lot of money and not have any risk. Insurance companies don't like risks.

ATLA's battle against automobile no-fault was, in the larger context, a fight to preserve the Fault Principle and right to trial by jury in the rest of tort law.

No-fault also forced trial lawyers to face the very real danger that their hard-won gains in the courts could be undone by legislative fiat. Demonstrative evidence and the adequate award meant little if lawmakers could simply padlock the courthouse doors. Many trial lawyers came away from the struggle over no-fault with the conviction that their survival, and that of the jury-based tort system, demanded that ATLA become politically active, including the politics of campaign contributions.

If the critical figure in NACCA's first transformation was Melvin Belli, the pivotal figure in its second was Leonard Ring. The two men could hardly have been more different. Belli, the tall Californian, had movie-star looks and a stage presence that was always "on." Ring was a stocky, plain-speaking Chicagoan whose dark eyes beneath thick brows showed intense determination. He was neither intimidated by nor particularly enamored of the limelight, and he had little tolerance for nonsense. Belli led a parade of tort attorneys into NACCA. Leonard Ring's role would be to prevent many of them from walking out.

There were the many trial lawyers who passionately believed in ATLA's educational mission and who viewed entanglement in political action as a dangerous threat to the future of the association. Advocates of political action answered with near-religious fervor that ATLA would be doomed if it did not wield clout in the halls of the legislatures. It fell to Ring in those cru-

cial years to hold the association together. If Belli was in his element as master of ceremonies of his own three-ring circus, Leonard Ring was fated to walk the tightrope.

Early Adventures in Lawmaking

Lobbying legislators had always been part of the association's mission. Sam Horovitz envisioned NACCA's leaders pleading the workers' case to lawmakers for fairer compensation laws. His first *NACCA Law Journal* in 1948 included a section devoted to legislation, and subsequent volumes faithfully reported statutory developments from around the country affecting injured workers.

It was Horovitz, later a staunch opponent of political action, who issued the first call for a NACCA legislative lobbying effort in the states. "There are some things that no court, lawyer or union can do for injured persons," he said in the *NACCA Law Journal* in 1952. "If a compensation act provides that the maximum an injured man with a wife and five children can obtain is $25—less than mere subsistence—the court cannot raise it a single penny." It was the job of claimants' lawyers to speak directly to legislators, who "for many years have heard [only] the powerful voices of the insurance and employers' lobby." Horovitz declared. Indeed, Horovitz himself testified before the Massachusetts legislature and succeeded in persuading lawmakers to raise the compensation limit for loss of a leg from $5,000 to $35,000.

At NACCA annual conventions during the 1950s, Melvin Belli and Perry Nichols regularly urged the trial lawyers to undertake lobbying efforts in their states. In 1953, NACCA established its first Committee on Legislation. Active members were Payne H. Ratner, who had been governor of Kansas; "Spot" Mozingo, a South Carolina State Senator; and Perry Nichols, who lobbied for the Academy of Florida Trial Lawyers in Tallahassee. The Committee met with some successes, but disappeared within a few years.

In 1963, the Board of Governors established a Legislative Committee to track tort legislation in the states. The Board viewed this information service "as important to the plaintiffs' bar as the knowledge of court trial techniques." At the same time, however, the Board adopted a strict policy "to refrain from influencing any legislation and not engaging in legislative activity."

Leon RisCassi, who had served as majority leader of the Connecticut State Senate, chaired the new Legislative Committee. A tall, urbane, successful trial lawyer and polished politician, RisCassi fashioned a comprehensive NACCA legislative program. Its central feature was a research and resource service within the Public Information and Education Department at the home office. The service prepared studies of legislative and judicial trends affecting tort law, col-

lected bills from around the country and prepared model legislative proposals, all to be disseminated to members in the states. A committee liaison was assigned to each state capital to collect information and contact legislators. In addition, in 1968 ATLA established a Washington, D.C., office, staffed by a consultant to monitor congressional activities. RisCassi was succeeded by Theodore Koskoff, Jerry Yesko, and Jerry M. Finn, all of whom abided by the ban against direct lobbying.

Finn, writing in *TRIAL* magazine in 1971, predicted that "in the next 25 years, I envision the Legislative Section becoming the single most important arm of the association." He predicted that each state would have a legislative section with a lobbyist "who will follow daily the activities of his state legislature," and a "key man" to report developments to the national office. ATLA's Washington office would track pending bills on Capitol Hill and provide experts to represent ATLA's views to Congress. Tellingly, he did not envision direct lobbying of legislators, fundraising or campaign contributions for candidates.

These were the activities that prompted intense opposition among ATLA's leadership and much of the membership. Founder Sam Horovitz was the most outspoken opponent, and lined up behind him were many who had built the association, its educational programs, and its publications. Educating the public and their lawmakers on issues affecting tort law was, of course, an important responsibility of trial lawyers. But doling out cash to candidates, buttonholing lawmakers, and making deals in the cloakroom on particular bills smacked of the worst kind of special interest politicking. They feared it would tarnish the image of the trial lawyer and would call into question the credibility and integrity of ATLA's educational program, which attracted new members and even the attendance of judges.

On a more pragmatic level, Horovitz argued firmly and frequently that political lobbying would jeopardize ATLA's important nonprofit tax status. Moreover, political action would compete with education for funds. How could the organization afford both activities without settling for second-best? Throughout the 1950s and 1960s, Horovitz and his many supporters effectively blocked proposals to involve ATLA in political activity beyond simply informing legislators of ATLA's viewpoint. Until no-fault.

During the early years of the no-fault battle, ATLA's presidents worked both to develop ATLA's educational priorities and to defeat no-fault legislation. Orville Richardson, elected in 1968, was a great admirer of Roscoe Pound and worked closely with General Director Professor William Schwartz to place the educational program on a solid footing. He also played a central role in persuading the ABA to reverse its position and withhold its endorsement of no-fault insurance.

Leon Wolfstone, who became president in 1969, was a teacher at heart. An inveterate pipe smoker, he insisted that his photographs, including his presidential portrait, include his black bulldog pipe clenched between his teeth. Wolfstone took an active role in creating the Environmental Law Committee and in producing a professional responsibility handbook authored by Professor James Jeans. He also expanded ATLA's legislative research service in Washington and designated Orville Richardson and Craig Spangenberg to represent ATLA as participants in the Department of Transportation study of no-fault.

The following year, Richard Markus, at age 39, became the youngest ATLA president. A law professor, former editor of the *Harvard Law Review* and former Justice Department appellate lawyer, Markus initiated a joint venture between ATLA and Hastings Law School to establish the college of advocacy. He also worked with Melvin Kodas to produce a series of films on civil and criminal law, funded by a $90,000 grant from the Justice Department. Markus would be responsible—indirectly—for the Board's first approval of an ATLA political action committee.

The True Believers

ATLA's strategy in the no-fault battle was essentially a tell-the-truth campaign. Craig Spangenberg and other ATLA leaders testified persuasively before congressional committees and provided legislators with fact sheets and position papers. ATLA also sought to influence legislators by influencing their constituents through a public education offensive. However, a growing number of members believed ATLA could not achieve its legislative goals without engaging in targeted campaign contributions to candidates. The truest of believers in this type of political action was a group of Texas trial lawyers.

By the mid-1960s, the Texans had shrewdly anticipated that the battle to protect tort victims and the right to trial by jury would shift to the legislatures. As Tom Davis explained in memorable Texas fashion, defendants had trial lawyers and their clients in their gun sights. "Most shotguns have two barrels, and it doesn't make any difference which one hits you. It is not enough to win in the courthouse any more. We have also got to win in the state house."

For that reason, the Texas Trial Lawyers Association established the first successful political action program for the plaintiffs' bar, Lawyers Involved For Texas (LIFT). The group was led by Judson Francis, Bill Edwards, Herman Wright and Michael Gallagher. Largely because of the antipathy of the national leadership toward political action, their focus was on the states. Along with Leonard Ring, Judson Francis and the Texans traveled across the country

presenting the state associations with their formula for political action based on the Texas LIFT experience.

Judson Francis was an outside-the-box thinker who stands out, even in an organization with an abundance of creative minds. The life's blood of political action is money, and plenty of it. Judson Francis was very good at devising ways to raise those funds. The mechanisms and fundraising strategies he put in place proved essential to the success of LIFT, and later, to ATLA's political action effort. But his most important contribution was his perceptive insight into the changing mentality of the plaintiffs' bar during the 1960s. Judson Francis was convinced, as perhaps no one else at the time, that trial lawyers not only could be persuaded to contribute heavily to political action, they wanted to do so. They would demand it. They just did not know it, yet.

The plaintiffs' bar had benefited greatly from ATLA's education and training. Progressive advances in the law accomplished by ATLA lawyers made larger recoveries possible. The attorneys Stuart Speiser called "entrepreneur lawyers," tort lawyers who invested significant resources in the cases they accepted, were coming into their own. They recognized that they operated in a legal environment that could turn distinctly hostile due to anti-plaintiff legislation. These lawyers, Robert Begam explained, were not averse to getting involved in politics. "For a lawyer to say he doesn't want to become involved, is absurd, because he is, by definition, in the political process whether he wants to be or not. The legal process is the end product of the political process."

Many had also got a taste of politics during the no-fault battle. They knew how difficult it was to persuade a legislator who had not only met with but received a campaign check from an insurance industry lobbyist. LIFT had demonstrated to Francis that successful trial lawyers view an effective political action program as a sound investment in preserving the advances they had painstakingly won in the courts. And Francis knew they would contribute to that investment in amounts that would have flabbergasted NACCA lawyers a decade or two earlier. He never accepted the argument that political action would drain resources from ATLA's educational programs. Trial lawyers could afford guns and butter if they wanted; but guns were what they needed now. The only real force holding ATLA back, in Francis' opinion, was the leadership's short-sighted commitment to its educational priority. He expected a fierce battle.

The Texans' opening salvo took place one morning in early 1971. In typical Texas fashion, the group stormed into the Cleveland office of president Richard Markus. Markus himself downplayed the drama of the confrontation,

but the Texans' demand was unequivocal: immediate action to cut the education budget and use the money to create a political action machine for a legislative drive against no-fault. Markus replied that he had no authority to take such an action and suggested they take their demands to the Board of Governors at the next meeting. The Texans did exactly that.

At the midwinter meeting at Caesar's Palace in Las Vegas, they made their case for political action on the model of Texas LIFT. "We wanted ATLA to start immediately to develop a PAC legislative effort in each state," said Gallagher, who spoke for the group. However, he found that "there was a great deal of opposition to ATLA becoming legislatively involved."

"The Board said it was wrong for ATLA to support a candidate and then ask him what his views were on political matters," Gallagher said. The Texans had no use for such squeamishness: campaign money spoke loudly and directly. According to Gallagher, Texas trial lawyers always demanded to know whether a candidate was committed to their issues. "If you are not, we will have an opponent for you; we will work hard to make sure he wins democratically." To the argument that lobbying was unprofessional, he countered that "it was immoral to represent a client in the courtroom but let others destroy his rights in a legislative assembly."

Maine Remembered

In truth, the choice facing the Board was not as black-and-white as the Texans painted it. No one on the Board suggested that ATLA sit silent on the sidelines as a legislature prepared to gut the rights of workers and consumers. But the Texas brand of political action, relying heavily on the persuasive power of large campaign donations, was not the only model for effective legislative action, as the fiscal conservatives on the Board well knew. Indeed, the undisputed dean of fiscal conservatives, longtime Maine Governor Herbert Bennett, was himself a political activist of a different stripe. Bennett and the Maine Trial Lawyers Association had demonstrated that legislative activism could be adapted to New England frugality.

In 1963, Bennett attended a NACCA organizational meeting in New York, where Herman Glaser dramatically outlined the inadequacy of verdicts under legislative limitations. A handsome and articulate six-footer, Bennett was a dyed-in-the-wool New Englander, conservative in budgetary matters and wary of untested ideas. Nevertheless, he realized at that meeting that "if we were to have a viable plaintiffs' bar in Maine and protect the public interest, we had to get fairer laws on the books." Defense lawyers dominated the state bar association, the selection of judges, and the legislature. In terms of protecting the

rights of the injured, he said, "We were one of the most backward states in the country."

Bennett returned to Maine and formed the Maine Trial Lawyers Association, serving as its first president in 1964. His first order of business was to establish a legislative committee. With the help of ATLA's Public Affairs and Legislative Departments, Bennett assembled a package of bills to advance the rights of injured victims. They abolished limits on wrongful death awards, eliminated charitable and governmental immunity, liberalized workers compensation laws, replaced contributory negligence with comparative fault, and reformed the jury selection process.

Bennett carefully avoided presenting the bills as partisan or special interest legislation, forging alliances with moderates where possible. He persuaded Republican state senator Ed Sternes to introduce the proposals in the legislature, despite the opposition of the Republican State Committee. Rather than hire a professional lobbyist, Bennett designed an energetic and aggressive key-man system. "I utilized the lawyers in every single county in the state, assigning them to state senators and representatives in their area. I got commitments from them to personally visit and discuss the legislation with each legislator—not call on the telephone." The lawyers paid their own expenses. MTLA members also became active in the Maine State Bar Association, influencing that organization to endorse the proposals.

Within two years, all of the MTLA bills were enacted. *TRIAL* magazine featured the victory in a lead story entitled "Maine Heads the Nation." Bennett would represent Maine on the Board of Governors for twenty-six years, a record for continuous service, and serve as president of the Roscoe Pound Foundation from 1971 to 1975.

The Maine trial lawyers' accomplishment is all the more impressive in that it is much more difficult to obtain passage of favorable legislation than to block unfavorable bills. It is tempting to speculate whether this rendition of political action would have succeeded on a national level against the massive onslaught of the tort reform lobby. ATLA did make effective use of the key-man strategy. At the moment, however, the Board was faced with an insistent demand to rewrite ATLA's budget and shift its priorities to building a nationwide political action program on the LIFT model.

Green Light

At the Las Vegas meeting, the debate grew heated and the differences seemed irreconcilable. Markus and the pro-education majority maintained control of the meeting and of the budget. The Board authorized the expenditure of

$150,000 to lay the groundwork for a political action program—though it was not denominated as such—by expanding the Washington office to include a lobbyist and assist the state organizations. The vote was seen by many at the time as a victory for the education establishment, while allowing the political activists to try out their ideas within ATLA. It was a momentous step, however. The political faction took the vote as a green light. As Herman Wright recalled, "the Texans went all out, many neglecting their law practices to push task forces in many states along the success trail of LIFT." There remained the critical question of whether the plan could be made to work. And if so, could politics and education coexist within one organization?

The political activists moved ahead vigorously. In the 1971 ATLA elections, the Texans ran their own slate of candidates, headed by Marvin Lewis. His opponent was Theodore I. Koskoff, the current vice-president who had risen through the chairs and was the most prominent defender of ATLA's educational program. After a bitter, hard fought contest, and with the support of politically-minded members who traveled to the convention from Texas, California, and Oregon, Lewis emerged victorious by a slim margin. Texan Herman Wright was elected vice-president.

Lewis' presidency focused primarily on fighting no-fault legislation. He traveled to all fifty states to encourage action on the state level. He hired a professional lobbyist, C. Thomas Bendorf, to work in the Washington office, and worked for Board approval of a budget for political action.

"Opportunity is often missed," according to Tom Lambert, "because it comes around in overalls looking like hard work." All the infighting and speechifying over political action would have been for naught if supporters had failed to follow through with the hard work of establishing effective PACs in the states that would generate the funds needed. That task fell primarily to a team of Texans, led, somewhat incongruously, by Chicago attorney Leonard Ring.

Ring was a comparative latecomer to ATLA, joining in 1963. He was not a veteran of the great educational drives of the 1950s. As president of both the Illinois Bar Association and Illinois Trial Lawyers Association, he had a keen sense of organizational politics. He knew what it took to make an organization run. He was also as true a believer in political action as any Texan.

Ring had served on the front lines in the no-fault battles. As Chair of the Auto Reparations committee, he worked closely with Craig Spangenberg to produce position papers and critiques of no fault proposals. On another front, in 1972, Ring brought a successful constitutional challenge to the Illinois no-fault law. That effort would serve as one model for ATLA's constitutional chal-

lenge program during the fight against tort reform in the next decade. Ring appreciated the importance of these two responses to legislative assaults—public information and judicial challenges. But he felt strongly that they could not serve as ATLA's primary line of defense. Effective, well financed political action was indispensable. And if anyone could make that happen for ATLA, it was the Texans.

The Texas lawyers, for their part, recognized that Ring's organizational and leadership qualities would be a tremendous asset in achieving their agenda. By 1969, Ring was working with the Texas group, quietly advancing that goal.

Following the 1971 Board vote, Ring worked tirelessly with a team of Texans to set up state political action committees around the country. The Texas formula called for each state association to create a political trust headquartered in the state capital, inaugurate a mandatory fundraising system, and develop state key-man committees to cultivate contacts with senators and congressmen. In addition, each state organization was to hire a knowledgeable full-time executive director and form a task force for aggressive membership recruitment.

The task forces were especially suited to the Texans' evangelical style. They were composed of dedicated volunteers. Working with the state organization, the task force would invade the major cities, advancing block by block, even office building by office building, through the business district, calling on plaintiffs' lawyers. Their message was direct: Your practice depends upon joining ATLA, joining the state trial lawyers association, and donating to the political action committee. One of the most successful groups, headed by Michael Colley of Ohio, called themselves "We Seven—the Young Bucks." Working in five states in 1972, the group recruited three hundred new members.

The next step in getting ATLA's political action program off the ground took place in an airplane. In 1972, vice-president J. D. Lee, accompanied by ATLA governor Norman Lane, flew in Lee's private plane to Dallas to meet with Judson Francis. They flew on to Austin to view LIFT in action and meet with Phillip Gauss, TTLA's legendary executive director, who was instrumental in the LIFT operation. On the return flight to Dallas, Lee asked Francis to set up an ATLA political action program on the LIFT model. Francis agreed, suggesting that it be called the Program for Active Citizenship.

Lee and Francis were well aware that opposition to the program still ran strong. Distrustful of ATLA's Boston staff, Lee set up the new political action headquarters in Francis' Dallas office. A budget for the Dallas office was approved by the Board in 1972 at the personal insistence of Craig Spangenberg

and over the strenuous opposition of Sam Horovitz. When Francis submitted the bills incurred to establish the office and reach out to the state organizations, the Boston office refused to pay them. The ATLA's treasurer denied that PAC had authority to incur expenses. Director of Public Affairs Richard Jacobson, acting for Lee, finally obtained payment.

Opponents of political action launched a frontal assault in 1972. ATLA's General Director requested an opinion as to the legality of an ATLA PAC from the law firm of Rackerman, Sawyer, and Brewster—the same Boston firm that had set up the trust establishing the Roscoe Pound Foundation. Their opinion was that the PAC would violate federal regulations. It appeared that Sam Horovitz's dire predictions—that involvement in political action would cost ATLA its tax exempt status and doom its educational programs—might come true.

As the education supporters moved to block budget appropriations for the PAC, the Texans obtained a second opinion—this one from a Dallas law firm—which concluded that the PAC was legally within the Federal Election Commission Act. Nevertheless, the Boston office refused to pay expenses totaling $5,321 for fundraising training for state presidents until President Cartwright personally intervened. The national office also rejected the bill submitted by the Dallas law firm. In 1975, President Ward Wagner obtained a definitive legal opinion from the prominent Washington firm headed by Edward Bennett Williams. That opinion concluded that ATLA's political action fund—by then known as the Attorneys Congressional Campaign Trust (ACCT)—was in compliance and finally laid the question to rest.

On the other side of this internal struggle, the advocates of political action grew increasingly frustrated by what they saw as interference by the national leadership. Their frustration boiled over, ironically, during the presidency of their greatest ally, Leonard Ring.

Ring's Trial by Fire

Leonard Ring guided the development of ATLA's new political action committee from its inception. The Board approved the ACCT fund in 1972, and Ring was selected as the first Chair of its Board of Trustees. Serving also as Chair of the Public Affairs committee during much of that same period, he built up ATLA's Washington office and congressional lobbying team. As president in 1973-74, his primary accomplishment was to keep ATLA from tearing itself apart.

Ring was quite surprised when the Texas lawyers urged him to run for the presidency in 1973, rather than Texan Herman Wright, the current vice-

president. But the Texans apparently doubted Wright's commitment to political action and explained to Ring that Wright was simply "not the man of the hour." Ring met with Wright in the latter's home. Wright was disappointed, but accepted the decision. Ring might well have taken note of the alacrity with which the Texans could shift their personal loyalties. He won the presidency without opposition.

Things went badly from the start. The outgoing Board met early in convention week to consider renewing a 5-year contract for General Director Bill Schwartz. There was considerable opposition to renewal.

Schwartz had compiled a fine record in reorganizing and administering the home office. Consistent with his professorial background, however, he was strongly pro-education. In fact, Ring claimed, "Schwartz had opposed ATLA's entrance into political action and had even attempted to scuttle it." On the other hand, Ring felt that attempting to run the ATLA organization from Cambridge without an experienced Executive Director, while at the same time running the office in Washington, would be impossible. So he pleaded with board members to reconsider their opposition, and he worked with Craig Spangenberg to fashion a new contract. To Ring's consternation, Schwartz rejected the proposal, forcing Ring to return to the Board with news that he was unable to close the deal. Schwartz resigned before any Board action. He returned to teaching at Boston University School of Law, where he later became Dean. That board meeting, Michael Colley later recollected, "was the turning point in ATLA for the political action era."

Ring assembled a search committee to find a replacement. He hired Joseph Levine, a lawyer, television station vice-president, and former newspaper editor. In June 1974, ten months into his contract and at the height of a congressional battle, Levine resigned, declaring that he "couldn't take it any longer." It was left to Ring's successor, Bob Cartwright, to find another Executive Director for ATLA. The fact that ATLA by this time was operating out of two home offices—Boston and Washington—was obviously compromising effective leadership and could not continue.

A threat to the unity that Ring was trying to maintain came from three thousand miles away. The California Trial Lawyers Association, one of the most well-organized and well-financed state organizations, voted to chart its own lobbying course, on both state and national levels. The Californians proposed to open their own Washington office, complete with their own congressional lobbyist. Ring traveled to California to address the group and managed to keep CTLA in the ATLA fold.

A serious confrontation took place in 1974 at the New Orleans convention. Ring was in his hotel suite when he received a phone call from Judson Francis.

He wanted to speak to Ring about the PAC, and there would be a few people with him.

"They came up to my suite," Ring said. "There were not a few. There were at least thirty in the group. It was a Texan delegation." What they had in mind was stripping the president of any control over ATLA lobbying activities, turning political action into a virtually autonomous unit. "They informed me that they thought Tom Bendorf was the man who should take over the complete lobbying of ATLA. Nobody else should make the decisions but Tom Bendorf."

Ring had little time to consider his options as the delegation stated its position. He had no idea what the Texans might do. For Ring to renounce control of political action, after having built the PAC from the ground up with Judson Francis, was unthinkable. Even if Ring had confidence in Bendorf, how long could the association continue with a divided leadership? To pass the problem on to the Board, as Markus had done, was now too risky. The Board was unlikely to yield to the demands, and the Texans might well bolt the organization entirely, taking many active and valued members with them. A wrong move could split the association into two.

Ring's response was terse. "Gentlemen, I've heard what you said. I'm the elected President and I'm going to be very busy now. Good day." He had spoken from political instinct, and it was exactly the right response. He made it very clear that their demand was a threat, not simply to himself or to the office, but to ATLA and the authority of its elected leadership. Regardless of his undeniable support of their political action goals, the Texans could count on Ring fighting them on this ground. The delegation made its way out. Michael Gallagher, one of the group, called later to apologize.

But Ring was more interested in talking to Bendorf, convinced that the lobbyist played a part in the Texans' power play. A few minutes later, Bendorf arrived at the suite, fully expecting to be fired. He was not.

C. Thomas Bendorf was hired as ATLA's lobbyist in 1971 and was well regarded as an uncompromising advocate for ATLA. He had a rare knowledge of the insurance industry's arcane bookkeeping and an even rarer ability to explain the facts behind the numbers to lawmakers. Ring's estimation of Bendorf's abilities was not as high as the Texans'. In fact, he had hired prominent lobbyist Tommy Boggs on a consultant basis to assist in the upcoming no-fault battle in Congress, a move that had angered Bendorf.

But Ring had an instinctive feel for ATLA's precarious position at that time in Congress. "We had one floor fight after another in Congress with a hastily organized cavalry. We actually were far weaker than we were given credit for."

If ATLA's legislative team appeared to be in disarray some of those battles would surely be lost. Ring told Bendorf, as he had made clear to the Texans, there could be only one boss in this organization and it would be the leader elected by the members. Bendorf chose to stay.

The confrontation proved to be a turning point. The Texans may have recognized that they could ill afford to lose Ring's support. They may also have realized, on reflection, that their adversaries in business and the insurance industry would be overjoyed at a rift in the plaintiff's bar. For whatever reason, they did not seriously challenge the leadership of ATLA again. Leonard Ring had managed to keep his footing on the tightrope.

At the same time, the tide had clearly turned in favor of ATLA's involvement in political action. The no-fault battle had changed many minds. Every succeeding president gave top priority to building ATLA's legislative muscle. Leonard Ring would continue to play an important role in that effort, heading ATLA's political action committee until 1978 and serving as a trusted advisor to ATLA leaders for many more years.

Leaders of the PAC

The Board of Governors had authorized the establishment of a political action program in late 1972. Leonard Ring oversaw the effort. The Federal Election Campaign Act of 1975, enacted in the aftermath of Watergate, established the modern entity of the Political Action Committee as a separate segregated fund subject to Federal Election Commission regulations. The Williams and Connolly law firm began the process of assuring the appropriate filings and regulatory compliance. Bylaws were drafted and the name Attorneys Congressional Campaign Trust, favored by Ring, was adopted. In late 1975, ACCT was given final approval and commenced operations.

The essential element of ATLA's political action program, of course, was a reliable means of generating a steady stream of campaign contributions. ACCT would require fundraising on an unprecedented scale. To accomplish this, ATLA turned to the inventive Judson Francis, who had been continually working with state associations. In 1975, Francis was appointed Chair of the Communications Liaison Committee, and was responsible for ATLA's political fund raising. He committed every waking moment to the job. He traveled constantly, meeting with state organizations and prepared numerous reports on their progress.

As the head of LIFT, Francis had raised a great deal of money for Texas candidates. He estimated, for example, that LIFT raised approximately $25,000 for Senator John Tower. Most of these contributions were in the form of checks

for $200 to $500, which LIFT delivered to the candidate. Francis made good use of his skills and Texas experience to put in place effective means of giving and collecting contributions to ATLA PAC. Francis never forgot that ATLA PAC was built on a foundation of state trial lawyer associations, and he made certain that the state political action funds received a share of the contributions.

In 1979, Robert Begam established the "M Club," whose goal was to garner pledges of $1000 from one thousand members. The M Club reached its target in 1986.

In 1985, ACCT became ATLA PAC. It is worth noting that, although the work of ATLA PAC has been vitally important, a relatively small segment of ATLA members actively contribute. Robert Begam complained in 1986 that, after ten years of operation, only about 8,000 of ATLA's approximately 50,000 members had made a contribution, generating about $4 million per two-year election cycle. The doctors' PAC, by comparison, raised $12 million.

"Civilian control" by ATLA's elected leaders became a central feature of ATLA PAC. Initially, the Board of Trustees consisted of six members selected by the Board of Governors. In 1978, Tom Davis expanded the Board to ten with the addition of seats for the President, President-elect, Immediate Past President, and Chair of the Public Affairs Department. The Board grew to fourteen in 1984 with four positions allocated to the states with the highest per capita contributions and increased PAC membership. The trustees elect a chair. Those who have served are:

Leonard Ring	(1972-78)
Robert Begam	(1978-85)
Michael Maher	(1986-88, 1992-94)
Robert Habush	(1988-89)
Eugene Pavalon	(1990-92, 1994-95)
Barry Nace	(1995-97)
Larry Stewart	(1997-99)
Mark Mandell	(1999-2000)
Richard Middleton	(2000-01)
Fred Baron	(2001-02)
Leo Boyle	(2002-03)
Mary Alexander	(2003-04)

Advising the Trustees was a team of experienced lobbyists. Tom Bendorf, ATLA's full-time lobbyist, worked with Tommy Boggs, a consultant with strong ties to the Democratic party. Robert Begam added the lobbying firm of Timmons and Coralogus. Bill Timmons was the head of White House Congressional Relations for the Nixon Administration; Tommy Korologos worked in

the Nixon White House. This combination gave ATLA PAC the resources to work with legislators of both parties. The lobbyists did not vote, however. Control over ATLA PAC always remained with the Trustees.

The work of ATLA PAC is often misunderstood by the press and the public, Begam explained.

> ATLA PAC is the method by which we pay our dues to participate in the political process in Washington. . . . This means you have to, as a matter of practical politics, establish good relationships with the political leadership if you are going to defend against legislation that you do not want. Now the very first contribution we make every year, the maximum contribution allowable, is to the Senate and House Republican and Democratic campaigns. This establishes your credentials. That gives you access to the people you want to talk to and to the people to whom you want to get you message across.

With respect to contributions to individual lawmakers or candidates, ACCT initially targeted committee chairs or other key positions. Beginning in 1988, the level of donations allowed ATLA PAC to evaluate each potential recipient on the basis of his or her position on important ATLA issues.

The notion that these contributions buy votes is ludicrous, Begam emphasized. Even if lawmakers' votes were for sale, ATLA could not afford them; it certainly could not outbid the insurance, business and medical interests arrayed against it. However, lawmakers listen to ATLA because "we are part of the political scene in Washington. They respect us. I think primarily we win our issues because we are right. But it's a long way from being right and persuading others that you are right. You have to pay your dues to play in the game."

Keys to Success

Another critical component of ATLA's political action program must not be underestimated. The "key-person" concept has been part of the organization from its beginning. It is naturally suited to ATLA, with its tradition of volunteerism and whose members live and work in cities and towns all across the country.

In the home district or state of every member of Congress is a network of personal relationships. There are longtime friends, teachers, neighbors, business associates, fellow church members, and others. These are the representative's personal roots in the community. The key-person program identifies those ATLA members from a lawmaker's district who could contact the legislator and whose views would likely have an impact.

This is an area in which the state associations have proven invaluable. Her-

bert Bennett made effective use of key-person contacts in the Maine trial lawyers' campaign to modernize that state's laws. The Texans and other task force leaders who organized state political action funds also took care to identify key members in those states. Leonard Ring credits Tom Bendorf with emphasizing the importance of this type of grass roots lobbying, stating that a call or visit from a respected person from "back home" can be more effective than a presentation by a professional Washington lobbyist. On several occasions during the no-fault battle, Ring called upon key persons to come to Washington to visit with their senators and representatives in Congress.

Maintaining an effective key-person network is a difficult and labor-intensive task. In 1984, President David Shrager warned in *TRIAL* magazine that ATLA could not afford to neglect this work. He wrote that "many trial lawyers have been lured into a fool's paradise," believing that political fundraising and campaign contributions were sufficient to protect the tort system and the rights of injured victims. "We shall prevail, not as a function of how much money is in the till of election campaign giving, but how we react at the grass-roots level in fighting for what we believe."

Nevertheless, by 1986, President Peter Perlman and President-elect Robert Habush realized that the key-person program had deteriorated to the point of non-existence. They called upon Russell Herman bring it back to life.

It was an obvious choice. Few trial lawyers—few people in any walk of life—can match the combination of fiery evangelism, compelling salesmanship, and boundless energy that is Russ Herman. With a small amount of ATLA PAC money and the help of an army of volunteers he recruited from around the country, Herman built an extensive database of invaluable contacts and connections. That network would play a vital role time and again in bringing ATLA's message to lawmakers.

Rivalry

The combination of large amounts of money and political power—or the proximity to it—was a heady mixture that could be expected to feed personal ambition and institutional tensions. Much of the internal politics of the Board of Trustees revolved around the rivalry between its two most active members, Leonard Ring and Robert Begam. The tensions between their loyalists were strong enough to affect ATLA's own national elections.

As president in 1976, Begam carried out a dramatic reorganization. Begam's wholesale replacement of 137 ATLA committees with an administrative structure he had devised, combined with his success in assuring that his successors would continue his policies, alarmed Ring. Ring and others complained open-

ly that ATLA was being run by a closed clique. "The organization was getting to a point that one person was going to control it and run it," recalled Ring. "It wasn't long before talented ATLA members were not willing to be part of that type of a scheme," he added. "They just walked away." It did not help that Begam also succeeded in expanding the ACCT Board of Trustees to include ATLA's four top officers, which paved the way for Begam's election as chair, replacing Ring, in 1978.

ATLA presidents who succeeded Begam were generally perceived as Begam allies until the election of Scott Baldwin, backed by Ring, in 1984. Robert Habush was elected at the 1986 convention in Chicago with Ring's support. "We organized and within four weeks we had over 400 votes just from Illinois alone." Ring obtained a change in the ATLA PAC bylaws limiting the Chair to a two-year term, ending Begam's tenure.

This rivalry provided for lively internal politics during this period, but it did not affect the operations of ATLA PAC. A conflict with more serious ramifications, however, was brewing in the state organizations.

State Problems

ATLA's relations with the state trial lawyer associations has been, as Bill Wagner summarized, "turbulent." The state associations are separate entities independent from ATLA. They are governed by their own elected boards and officers, and they assess their own dues. A significant number of plaintiffs' lawyers belong to their state association or to ATLA, but not both. Although the state associations are committed to the same ideals and goals as ATLA, they often find themselves in competition with the national organization for attendance at educational programs, membership, and voluntary contributions.

Judson Francis became the most prominent spokesman for "states' rights." Ward Wagner stated that "Judson was instrumental in awakening the mentality of the ATLA officers, the Board of Governors and the state trial lawyers affiliates to the necessity to develop strong state-funded membership organizations." Wagner added, "I had to work very hard to get Judson's ideas, for the most part, accepted by those who were not Judson's fans."

One point of contention was how much states should control the spending of ATLA PAC money. In 1986, as chair of the Communication Liaison Committee (CLC), Francis suggested a grant be given by ATLA to each state to defray the costs of maintaining their PAC staffs. The proposal met strong opposition from the Board of Governors, which would have no control over how the grant money was spent. Nevertheless, President Peter Perlman, won approval for a State Development Fund, permitting grants of about $25,000 per

state. The following year, a formula was agreed upon which allocated the grants in proportion to the amount of contributions raised and the number of new ATLA members enrolled by the state.

Francis pressed for even greater control by the states over the disbursement of PAC funds. In August, President Bill Wagner found it necessary to circulate a letter to the state presidents, executive directors, and delegates informing them that Francis had misrepresented ATLA policies and procedures in his campaign. "It should be made clear that if you rely upon Judson Francis' representations concerning ATLA policies, procedures or programs, you do so at your own risk." Francis resigned in 1988 as CLC Chair.

Judson Francis, however, had not created the tension between the state affiliates and the national organization. A few local trial lawyer organizations, whose stories are told in Chapter One, actually predated NACCA. Sam Horovitz worked to establish and foster independent, self-governing state organizations. In a 1952, *NACCA Law Journal* article, he noted that 20 state associations were active, many of which held regional meetings and published their own newsletters. By 1977, with the founding of the New Hampshire Trial Lawyers Association, every state boasted its own ATLA affiliate.

In 1967, an attempt was made to change affiliates into state chapters of ATLA under ATLA's direct control. President Sam Langerman noted in his column in the *ATLA Newsletter* that it was essential that the affiliates support ATLA's national goals, while ATLA assisted the affiliates in addressing their local problems. "This kind of reciprocal support and cooperation, he noted, "has not always been present." He also complained that the officers of some state affiliates called few meetings and appeared to be interested only in perpetuating their own positions. Nevertheless, he had to concede, the proposal to bring the affiliates under ATLA's control failed to overcome resistance by the states. "We have concluded, therefore, that any proposed changes in our affiliate structure must permit local autonomy in many important areas."

An unfortunate result of this autonomy, as presidents Cartwright and Begam both noted, was that the affiliates at times were at cross-purposes with ATLA. The state affiliates and the national organization took steps to address that issue.

To maintain a continuity of relationship with ATLA, the affiliates created the National Association of Trial Lawyer Executives. NATLE became the formal organ to deal with ATLA's State Development Fund. It also served as a vehicle for the affiliates to iron out their own differences and present a unified position to the ATLA Board of Governors. Beginning in 1975, ATLA invited the state ex-

ecutive directors to attend board meetings and national elections. The following year, NATLE was given a seat on the Board of Governors.

The ATLA Board adopted guidelines for the operation of the state development funds, which were paid in monthly installments, and grantees were required to submit periodic progress reports. In 1986, the Board approved applications from twenty-five states and authorized grants totaling $433,000. The projected return to ATLA in the form of new membership dues and increased PAC contributions was $1,977,954. By 1989, the program's budget was $977,500. During the 1990s the program was folded into the Partnership For Progress program, providing grants to the state affiliates with fewer strings attached.

Judson Francis, the zealot for strong state affiliates, could be abrasive, overbearing, and downright maddening. But, as the tort wars raged throughout the country, the state trial lawyers associations he had empowered proved to be valuable partners in ATLA's defense of tort victims and the civil jury.

Tort reform battles were fought in every state legislature during the 1980s. The national organization could not fight on fifty fronts and could not duplicate the local expertise and access of the state affiliates. At the same time, the state associations depended upon ATLA's resources to confront their well-funded adversaries. An expanded State Relations Department provided valuable support and development for state legislative, political, and membership activities.

10

TORT WARS: The Jury Under Siege

Doctors, on strike and picketing on the steps of state legislatures. Warnings in *Time* and *Newsweek* that the end was near for playgrounds, high school football, and even religious counseling, all because of juries. The Supreme Court, which had rarely concerned itself with state tort law, publicly worrying about "runaway" verdicts. The President and Vice President of the United States accusing "crazy juries" of undermining America's competitiveness. Congressional Republicans, champions of "devolving" power from the federal government to the states, working for a federal override of state tort law to stifle the voice of American civil juries.

These are the Tort Wars.

The War Against the Jury

By the mid-1970s, ATLA lawyers could take pride in their accomplishments. In a couple of decades—breakneck speed as the common law evolves—trial lawyers had rid the law of many loopholes and immunities. True, Harry Philo frequently pointed out, many "unreasonable privileges" remained. But most courts had come to accept that tort liability was not simply a means for compensating individual victims. Accountability was a powerful incentive for investing in making America safer.

The legal revolution was returning the jury to the vital role that the Bill of Rights intended. Americans serving as jurors increasingly were called upon to exert a measure of influence over the powerful private interests that affect their lives. As de Tocqueville observed when the republic was new, the civil jury is an act of faith in the ability of Americans to govern themselves.

During the final quarter of the twentieth century, many of the wealthiest and most powerful special interests in America poured untold millions of dollars into a campaign to cripple the civil jury. They lashed out at "frivolous" lawsuits and "greedy" trial lawyers. But above all, as more than one observer pointed out, "tort reform" was a war against the jury.

At the outset, enemies of the jury won an important victory: They got to pick the name. "Tort reform" gave their agenda a benign, progressive label that was entirely undeserved. Tort "deform," as Ralph Nader and others called it, was more accurate. But the tort reform label stuck. Unlike the proponents of workers' compensation or automobile no-fault, most tort reformers did not set out to eliminate tort liability. Insuring against such liability was, after all, the liability insurance industry's bread and butter.

It was juries that drove them crazy.

To insurers, the jury is an unpredictable wild card that upsets their actuarial expectations. Manufacturers complained it was irrational to allow lay jurors to second-guess their product designers. Doctors personally resented being haled into court to defend their conduct to untrained jurors. In reality, many studies confirm, juries do not behave unpredictably or irrationally. Nevertheless, the centerpiece of the tort reform campaign was a cynical and fraudulent attack on Americans who serve as jurors. Its rhetoric painted a caricature of juries, incompetent to understand the facts and easily led by plaintiffs' lawyers to award huge sums based on teary sympathy for the injured plaintiff. In sum, the reformers argued, America can no longer afford either the common sense or the democracy that the jury represents.

With such powerful enemies, the civil jury might well have disappeared, as it nearly has in England, had not ATLA put its fortunes—even its very existence—on the line as the primary defender of the civil jury in America.

This was not inevitable. To say that trial lawyers were simply defending their economic self-interest misses the true importance of their struggle. Most trial lawyers are convinced—justifiably—that they could achieve at least as much financial success if they had to enter a different area of legal practice. They choose to represent injured victims and families.

Trial lawyers might have reached a *modus vivendi* with the insurance industry and defense interests. In response to some early attacks, the association made overtures to both the insurance industry and the medical profession to

find common ground and address legitimate grievances. But ATLA could not accommodate rewriting the law to shield wrongdoers from accountability to their fellow citizens. When even the most successful plaintiffs' lawyer looks around the courtroom, the people he or she most closely identifies with are not the defense attorneys, business people or other professionals. It is with the ordinary citizens sitting in the jury box. The trial lawyers' fealty to the jury made any accommodation to tort reform impossible.

Mad Doctors and Malpractice: Tort Reform in the 1970s

An early example of tort reform swept the state legislatures in the early 1970s. It had long been held that an architect's or builder's liability for negligence ended when the completed building was turned over to the owner. As courts began to reject this privity defense, many architects, engineers, and builders feared they might be held liable for injuries in buildings many years after completion. They campaigned successfully in most state legislatures for special statutes of repose that barred lawsuits a certain number of years after construction. Some victims found that the time for filing suit had expired before they were injured. ATLA attorneys succeeded in challenging the statutes as unconstitutional in a number of states, but most courts upheld the laws. The success of this lobbying effort was not lost on another group of tort defendants: Doctors.

The aggressive campaign to limit the rights of the victims of medical malpractice was a scandalous display of greed and betrayal by several powerful interests who loudly lay claim to the public's trust. It was prompted by a "crisis" caused by the most irresponsible elements of the liability insurance industry, which cynically blamed juries. Doctors allowed themselves to be co-opted into abandoning the welfare of their own patients in a quest for immunity from lawsuits. Lawmakers bowed to special interest groups, legislating in the dark with little evidence that malpractice suits were responsible for the crisis or that their "reforms" would improve matters.

Most Americans got their first look at the medical malpractice "crisis" in the early summer of 1975. Doctors and hospitals around the country opened their mail, and they were shocked. Their malpractice insurance carriers had raised their premiums, some by as much as 500 percent. Others discovered they could not renew coverage or obtain insurance at all.

The carriers declared that rising malpractice claims forced these increases. They urged their policyholders to support a package of tort reforms that would remedy the problem. State medical societies, many of which already

had close relationships with major malpractice carriers, made political action for tort reform a top priority.

By May, the national news magazines featured photographs of angry doctors picketing at state capitols, demanding tort reform. Soon there was even more disturbing news: Doctors were going on strike.

Physicians in several localities announced that until the legislature acted to assure them liability insurance at lower prices, they would stay home. *Time* and *Newsweek* carried images of darkened hospitals in California and New York. This was no merely symbolic job action. In northern California, where the strike lasted over five weeks, two-thirds of the 150 hospitals were performing emergency surgery only. Some four thousand hospital workers were laid off in San Francisco alone. In the four counties that included Los Angeles, twenty-two thousand beds were empty. In New York City, hundreds of doctors turned away all but emergency patients. Physicians in the Midwest followed suit. Soon *Newsweek* reported that "doctors' strikes seem to be erupting all across the nation," spreading "like measles in a nursery."

To most Americans this was unthinkable. Families began to fear that when their baby was due, or their children were seriously injured, or their elderly parents fell ill, their doctor would not be there. Public panic was heightened by incidents such as one at a suburban Illinois hospital, reported by the *Chicago Tribune*. "The emergency call that a patient was having a cardiac arrest came booming over the hospital's loudspeaker system." But most of the hospital's physicians were out on strike. According to the reporter, the only available doctor "pretended he didn't hear," as he talked to the reporter about malpractice premiums. "No doctor showed up during the five minutes that the cardiac victim's life hung in the balance. He died."

The well-organized doctors lobbied hard in statehouses around the country. State medical societies presented a package of proposals to legislators. Its centerpiece was a cap on the amount juries could award to an injured patient, no matter how serious the harm. And they were not above playing on their patients' fears. Office brochures and bill stuffers urged patients to contact their legislators to support tort reform. Otherwise, their doctors would be gone.

The Insurance Shell Game

How did the best health care system in the world arrive at the point where those most seriously harmed by medical carelessness would be deliberately sacrificed to reduce the insurance premiums of highly paid doctors and hospitals?

The doctors and the insurance companies were right about one thing. The number of medical malpractice cases had indeed increased steadily beginning

in the mid-1960s. This was a measure of success, not failure. In 1965 Congress enacted Medicare and Medicaid, programs that opened the health care system to many elderly and poor Americans. At the same time, the number of workers covered by group health insurance was increasing. The numbers of hospital admissions, surgeries performed and prescriptions written all rose dramatically. The number of incidents of malpractice, of course, rose as well.

Technology, the growth of hospital-based care, and what critics decried as "assembly-line medicine" made it possible for doctors to treat many more patients. But they also eroded the bond between patient and physician. Finally, the reluctance of the medical profession to police its own ranks bears some responsibility for the increase in litigation. Numerous studies confirmed that a large percentage of malpractice cases were attributable to a small number of physicians, most of whom were not disciplined by the profession.

A steady increase in malpractice claims does not itself trigger a sudden crisis in malpractice insurance, if premiums are rationally based. But they are not. They appear to rise and fall with little regard to developments in the tort system. What the increase in claims did was expose a dangerous pathology in the liability insurance industry itself. This "crisis" was largely self-inflicted.

Craig Spangenberg often emphasized that an insurance company is a house divided. As an underwriter, it collects premiums to cover the future liabilities of policyholders. But it is also an investor, earning income on those premium dollars before they must be paid out. For many years, medical malpractice as well as product liability policies provided "occurrence-based" coverage: premiums paid in 1972 bought liability coverage for negligent acts that occurred during 1972, though it might be several years before the claims become payable. In the meantime, the company earned a significant income by investing premiums.

During 1975-80, for example, the nation's largest medical malpractice insurer, St. Paul Fire and Marine, collected $717 million in premiums, paid out $70 million in losses, and earned over $91 million from investments.

When the economy is good and investments are yielding high returns, there is a great temptation for insurers to cut prices to increase market share and thus obtain more dollars to invest. As price wars heated up, carriers sold insurance at prices they knew were not adequate to meet anticipated claims, counting on investment income to make up the shortfall. Such "cash-flow underwriting" was rampant during the stock market boom in the late 1960s and early 1970s. *Forbes* magazine described the situation this way in April 1976:

> What happened was this: It was normal practice for these companies to invest an amount equal to their legal surpluses in common stocks—figuring if they could just break even on the underwriting,

a rising stock market would give them a nice profit. This encouraged a rather greedy attitude: Why not shave rates to generate more premiums to invest in the market?

Then the market plummeted. The Dow Jones Index fell from a high of 1297 in 1973 to 578 in 1974, inflicting massive capital losses on the entire property-casualty industry. The sudden drop in investment income, following years of underpriced premiums and rising claims, led underwriters to panic. This, according to analysts both inside and outside the industry, was why doctors and hospitals received notices of huge premium increases in early 1975.

Abusive cash-flow underwriting also made coverage unavailable in certain markets. The market decline not only reduced investment income, but also reduced the value of the companies' capital assets from $16.6 billion to $7.8 billion. To maintain the ratio of premiums to surplus required by state regulations and good underwriting practice—typically 4 to 1 or less—many insurers were quick to cancel or restrict coverage. An affordability problem became a crisis of availability.

As it happened, the market rebounded. In about a year and a half, the insurers' portfolios would have regained all their previous value. But most carriers panicked, sacrificing their policyholders to fix their balance sheets quickly. They placed the blame, conveniently, on medical malpractice losses.

The term "loss" here has a peculiar Alice-in-Wonderland quality. Most of the increased premiums were not paid out to successful plaintiffs. In fact, much of the "loss" never left the companies' coffers.

For example, St. Paul collected almost $54 million in premiums from doctors nationwide in 1975 but paid out only $15.5 million in claims and expenses. However, St. Paul also designated $38 million as "reserves" for payment of anticipated claims arising out of 1975 occurrences but not yet payable. On St. Paul's books, these reserves were listed as "losses," although the money remained with St. Paul.

In fact, St. Paul never paid close to the projected $38 million in claims. By 1985, after paying virtually all claims arising out of 1975 occurrences, total payments amounted to only $28 million. 1976 was even more dramatic. St. Paul collected $104 million in premiums, reflecting the premium increases that so angered the doctors. Ten years later, it had paid only $29 million in claims, expenses and fees for 1976 events. The company complained loudly of massive "underwriting losses." In reality, the company was earning a healthy income from investing their "losses."

The story was similar throughout the industry. The U.S. General Accounting Office in a 1987 report, estimated that from 1975 to 1985, the med-

ical malpractice industry did not suffer a $653 million loss as it claimed, but rather made profits of $2.2 billion!

The Flight of Argonaut

Although the stock market decline affected the entire industry, the trigger for the mid-1970s crisis was the greed of a single company. In 1971, Teledyne Corp., the aircraft and electronics conglomerate, saw that handsome profits could be made from investing malpractice insurance premiums. Its subsidiary, Argonaut Insurance Company, entered the medical malpractice insurance market and quickly captured a large share of the market by its aggressive pricing. However, large investment profits failed to materialize. In 1974, Argonaut increased premiums by 198 percent in New York and 380 percent in Northern California. Angry protests from Argonaut's 40,000 insured physicians had little impact. The company had already decided to pull out of the malpractice insurance market.

In New York alone, 27,000 doctors were suddenly without coverage. Argonaut initially blamed lawsuit losses. However, Argonaut's president admitted in testimony before the New York legislature that during the entire time it insured New York doctors, the company had collected $35 million in premiums, but had paid out only $24,000 in claims! The rest was lost in bad investments, or simply disappeared. Other carriers, already struggling with their own investment losses, were in no position to pick up Argonaut's former customers. An American Bar Association report blamed Argonaut's abrupt departure for the crisis in eight of the eleven states identified as experiencing malpractice insurance problems.

Doctors on the Statehouse Steps

The insurance industry's answer to these problems was to launch a multi-million dollar advertising campaign blaming their woes on incompetent juries. For example, St. Paul took out full page ads in ten major publications. One that appeared in *Newsweek* asked, "Did the Jurors Smile When They Made This Award? They Didn't Know it was Coming Out of Their Own Pockets."

The insurers recognized, however, that doctors were far more credible to legislators and the public than insurance companies. The industry put together its tort reform package and persuaded the doctors to take the lead in pressing for the legislation. As doctors received their notices of rate increases or cancellations, they reached for easy remedies.

Ironically, the insurers' tort reform agenda did not offer what the doctors truly desired: Immunity from being haled into court where their judgment

would be second-guessed by lay jurors. The liability insurers had no intention of eliminating malpractice lawsuits. Their goal was to rewrite tort rules to limit losses and make them more predictable. The medical establishment allowed itself to be manipulated into serving as a lobby for the industry's wish list.

In most statehouses, the people's elected representatives turned in a sorry performance. Frequently, they were legislating out of panic as angry doctors appeared on the statehouse steps and in the hallways. Often, they were simply legislating in the dark.

In 1975, Idaho became the first state to adopt medical malpractice tort reforms. California, the focus of widespread doctor strikes, quickly followed. Its Medical Injury Compensation Reform Act (MICRA) featured a $250,000 ceiling on noneconomic damages, shortened statutes of limitations, and limits on attorney fees.

Indiana's 1975 statute was even more restrictive. It imposed a $500,000 cap on all damages—medical expenses and lost income as well as noneconomic damages. The negligent physician (in reality, the physician's insurer) was responsible only for the first $100,000. The next $400,000 was paid out of a patients' compensation fund, created from a surcharge on physicians. The statute imposed the burden of any additional damages on the severely injured patient.

The Indiana enactment illustrates the well-organized campaign the tort reformers waged at the state level. The Indiana State Medical Society raised $250,000 for the tort reform effort. Four of its attorneys drafted the legislation and worked full time for its passage in collaboration with the insurance companies. Public relations experts were hired. Two lobbyists, a Republican and a Democrat, met with legislators. Most importantly, the medical society was able to call upon four thousand doctors to assemble anywhere they were needed to put public pressure on the legislators. It did not hurt the effort that Indiana's governor was a doctor.

In Virginia, St. Paul insured 80 percent of the state's doctors, operating under a special arrangement with the Virginia Medical Society. The company circulated a position paper to members of the General Assembly claiming that it was suffering huge losses. Unless the Assembly imposed a cap of $750,000 on all damages, premiums would skyrocket and insurance might become unavailable altogether.

The General Assembly asked the State Corporations Commission, which regulates insurance, to investigate. The SCC reported that there was no crisis in either affordability or availability in Virginia. No malpractice awards in the state's history had even come close to $750,000. In other words, the proposed cap would not have saved the insurance companies a dime and would have no effect on doctors' premiums. Virginia's legislators proceeded to ignore the

study they had themselves requested. Under pressure from St. Paul and the Virginia Medical Society, the General Assembly enacted the industry proposal in a rush at the end of the legislative session.

Doctors v. Lawyers

Why are doctors perennially at loggerheads with trial lawyers? After all, the trial lawyer is instrumental in obtaining compensation for the wrongfully injured patient to pay for needed medical treatment. Malpractice specialists turn away 90 to 95 percent of potential plaintiffs after an initial inquiry, providing patients and their families with credible assurance that an unhappy outcome was not caused by negligence. In addition, good doctors benefit when the relatively few incompetent or careless physicians are held accountable, a function that the medical establishment has not performed well.

Nor can doctors complain of unfair treatment at the hands of the tort system. Doctors and hospitals effectively set their own standard of care: they are not held to the reasonable person standard used in most tort cases, but to the level of customary and accepted practice in their particular fields. Medical malpractice defendants consistently win at least two-thirds of cases that go to trial.

Doctors, who complain of increases in malpractice premiums, have also seen their incomes rise dramatically. AMA figures indicate that the percentage of gross income that doctors pay for malpractice coverage has remained fairly stable at about 4 percent to 5 percent. The passion with which they denounce the tort system clearly reflects more than concern over high insurance bills.

Many doctors openly confess to a visceral dislike for the tort system. They resent the protracted disruption and intrusion into their practices. They despise the notion of being judged by lay jurors with no medical training. Even when they win, doctors view the mere fact of being sued as a black mark on their reputations. For these reasons, the American Medical Association and state medical societies have long worked to remove malpractice disputes from the tort system altogether.

An early medical society proposal to replace juries with "impartial medical panels" of physicians was the focus of the 1957 NACCA convention in New York City. Harry Gair delivered an impassioned denunciation and embarked on a speaking tour to oppose the notion that doctors should be the sole and final arbiters of medical negligence. In 1962, NACCA members successfully persuaded the ABA House of Delegates to reject the proposal. Nevertheless, the medical community would propose variations of this plan during the next four decades.

From the beginning, ATLA viewed the "crisis" as primarily a structural

problem within the liability insurance industry. Its only criticism of doctors was that the profession failed to discipline the relatively few physicians who were responsible for much of the malpractice. ATLA made several overtures to doctors to discuss issues and perhaps find common ground. ATLA also took the initiative in drafting informed consent guidelines and agreed to a pilot program for arbitration of small malpractice claims. But there was little interest on the part of organized medicine for a cooperative relationship. President Richard Markus' report to the Board of Governors in 1971 was typical. "Despite strong affirmative efforts by ATLA," he stated, "the AMA is totally unwilling to be involved in any discussions with ATLA." Even at the height of the legislative battle, at a Conference of State Legislatures in May 1976, President Robert Cartwright renewed ATLA's offer of mutual cooperation in addressing the crisis. The response from AMA President Malcolm Todd was chilly silence.

Instead, and inexplicably, the AMA shelved its own proposals and threw its support behind the insurance industry's agenda to limit the rights of their patients. Enactment of tort reforms would not spare the doctors from being called into court before a lay jury. What they accomplished, as the St. Paul figures indicate, was to increase the profits of the highly profitable medical malpractice insurance industry.

The trial lawyers, for their part, placed on their own shoulders the burden of fighting for the victims of malpractice in legislatures across the country.

Fighting Back

It is fair to say that ATLA initially did not fully grasp the nature of the battle it had taken on. It did not appreciate the depth of the medical establishment's determination to fight for tort reform. It was surprised by the doctors' ability to organize a disciplined lobbying and public relations campaign. Nor was ATLA's organizational structure set up to effectively combat the wave of legislative proposals that swept the country.

ATLA's initial strategy was the one that had succeeded in the no-fault battle. The leadership was confident that when Americans and their representatives learned the facts behind the crisis and the true nature of the "reforms," the initial support generated by the insurance industry's public relations campaign would evaporate. ATLA therefore concentrated on exposing the facts about medical malpractice and tort reform.

President Cartwright testified to Senator Warren Magnuson's Commerce Committee about the positive impact of tort law. Cartwright cited a long list of successful medical negligence cases that had prompted hospitals, doctors, and medical equipment manufacturers to institute safety measures. Cartwright

concluded that "the evidence is, frankly, overwhelming" that accountability "promotes and encourages safety, and that immunity breeds irresponsibility."

Cartwright also appointed Richard Markus, Ward Wagner, Craig Spangenberg, and Leonard Ring to a Medical Malpractice Policy Committee to set forth ATLA's views in an official position paper. The result was "A Position of Responsibility," which explained that accountability for harm caused by substandard treatment is essential to assuring high quality medical care. ATLA also published *Quality Care: The Citizen's Right*, a three-volume collection of medical articles, studies, and news media investigative reports on malpractice issues, for ATLA members to use as a resource in dealing with legislatures, courts or the media.

The June 1975 issue of *TRIAL* was devoted entirely to "The Medical Malpractice Vise." Articles examined the issues from the perspectives of doctors, legislators, hospital administrators, governmental regulators and public interest advocates. President-Elect Ward Wagner emphasized that at the core of any solution to the malpractice problem must be the welfare of the patient.

ATLA's defense of the tort system was supported by the results of a closed claim study conducted by the Department of Health, Education and Welfare in 1972. The study found that relatively few injured patients filed claims. Over 70 percent were closed without payment, and only about 1 percent of claimants recovered over $50,000. The facts certainly did not support the reformers' charge that greedy lawyers were stirring up an explosion in litigation. Eli P. Bernzweig, Executive Director of the HEW Commission concluded: "The root cause of medical malpractice cases is medical malpractice."

ATLA's informational campaign made some headway, but it became clear that the trial lawyers had underestimated their opposition. Leonard Ring later observed that doctors had "become politically adept to a far greater degree than ATLA." Most importantly, Ring said, "doctors quickly accepted their individual obligation to put up money for political action committees to be effective on the state level."

Ring and many other ATLA leaders were determined to put the Association on a war footing.

A New Home: ATLA Goes to Washington

The tort reform drive in the mid-1970s could not have come at a worse time for ATLA. The leadership was heavily involved in the federal no-fault battle, which was rolling inexorably to a vote in Congress. Meanwhile, ATLA's expansion had led to an unwieldy proliferation of member committees. The national staff, on the other hand, was small. Some twenty-five staffers produced

all the publications, operated the Exchange, and ran the educational programs and conventions, and provided membership services. The membership itself remained sharply divided on the extent to which ATLA should be involved in lobbying activity, and relationships with some state organizations were strained.

In short, ATLA was not prepared to wage major political battles to defend the tort system.

The retirement of Sam Horovitz marked the symbolic end of the process of transforming NACCA from a small group of workers' compensation attorneys to a broad-based national association of tort trial lawyers. A second transformation, into an organization committed to acquiring and using political influence in Congress to defend the tort system, was marked by an equally symbolic event: the relocation of ATLA's home office in 1977 from Boston to Washington, D.C. The proposed move became the focal point of the last real battle between those determined to preserve ATLA's education priorities and the advocates of political action.

In 1966, when the ATLA home office was still located in Dean Pound's old house in Boston, President Al Cone suggested that the association move its headquarters to Washington, D.C. "This is where the action is—the nerve center of the nation," he told the Board of Governors. The Board turned down the proposal and, in 1970, the national headquarters took up residence in the new Roscoe Pound-American Trial Lawyers Research Center in Boston.

At the Toronto convention in 1975, President Ward Wagner again proposed relocating to Washington. For Wagner, the logic was compelling. "That is where every major decision was going to be made that would affect the future of the guy in the street. And the guy in the street was protected only by ATLA. We are his voice." The Board of Governors approved a motion to amend the ATLA bylaws to authorize the move. However, the motion required the assent of two-thirds of the members present at the general business session.

At the meeting, the motion triggered a heated confrontation between members advocating political action and those committed to education. The debate became so intense that order had to be restored by separating the partisans to opposite sides of the hall. When a vote could finally be taken, there were 214 in favor of the move and 141 against. The motion had failed.

Wagner was determined to try again at the 1976 convention in Atlanta. This time he resorted to some political lobbying of his own. "I knew that for the Association to do the job that had to be done in Congress, we had to be in Washington. I got involved in lobbying the Presidents of all the state trial lawyers and their delegations coming to the convention. I wanted the vote on the floor of the convention to be overwhelming."

ATLA Governor Tom Anderson of California moved the bylaw amend-

ment, and, once again, a bitter debate ensued. The education faction had come prepared for a floor fight. Looking back ten years later, Scott Baldwin understood why emotions ran high. "ATLA had its physical roots in Boston with the Pound Foundation and library. That was the feeling. It was reluctance to cut ties with the past and the feeling it would be end of the Pound era and the beginning of a political era." But was not only nostalgia that mobilized substantial opposition. Some members foresaw—quite correctly—that political action would mean handing over vast amounts of cash to candidates in an attempt to compete with industries and lobbies that could outspend ATLA many times over. How could ATLA at the same time maintain and develop its educational programs and information resources that were the foundations of its success?

Still, it was obvious to members on both sides that the education forces were fighting a rear-guard action. Federal no-fault had only recently been shelved in Congress. California and Indiana had just enacted onerous limitations on medical malpractice suits, and other states were lined up to copy them. Many state associations were already organized, making political contributions, and actively lobbying against tort reform bills. Federal product liability legislation was on the horizon. Members were beginning to view an education-only ATLA as unrealistic and attachment to the Boston site as sentimentality that ATLA could not afford.

Again the debate grew heated, and again the antagonists had to be separated. When the vote was tallied, the political advocates had won. Wagner did not get the overwhelming victory he wanted, however. The motion passed by only four votes.

The national office moved to Washington in the spring of 1977, to a five-story building at 1050 31st Street, in the Georgetown section. That summer, ATLA held its first convention in the nation's capital. ATLA took every opportunity to showcase its newly expanded presence in Washington. The educational program, organized by Paul Rheingold, entitled "Who Regulates Public Health?", focused on governmental regulation of health care and prescription drugs. Members heard speakers from the federal government and from Washington-based public interest organizations. They also attended briefing sessions on Capitol Hill and met with individual senators and representatives.

An ATLA Makeover

As ATLA was preparing to settle into its new quarters, incoming president Robert Begam moved quickly to consolidate the transformation to political action. He prepared ATLA to be an effective lobbying presence in Washington with an unprecedented revamping of its administrative structure.

It was obvious to Begam that the committee structure had grown like a neglected garden. "We had 137 committees, none of which were staffed but every one had a letterhead and a chairman," Begam explained. "Some of them hadn't functioned or done anything for years. But every once in a while, some committee chairman, or a committee with a letterhead, would write to a Congressman or a Senator, claiming to speak for ATLA. We couldn't tolerate that in Washington. You can't run a political movement without discipline, without direction, without having structure of who makes the policy and who speaks for the Association. So by the stroke of a pen, I abolished 137 committees."

That pen stroke had the impact of an earthquake. Hundreds of members who served on the committees as volunteers were caught by surprise, and many viewed their summary dismissal as a personal affront. Begam confessed later, "I think the biggest mistake that I made was not being sufficiently sensitive to the personal feelings of those who felt they were abused by the reorganization. I wound up offending a lot of people who to this day some have never forgiven me." Nevertheless, he insisted, "a new organizational structure made sense and was necessary for our political effectiveness."

That new structure consisted of eight departments, each chaired by an ATLA member and directed by a staff person: Finance, Administration, Internal Affairs, Communications, Education, Professional Research and Development, State Relations, and National Affairs. Begam further ensured the stability of ATLA's new configuration by entering into agreements with those whom he would support as his successors, Tom Davis, Michael Colley and Theodore Koskoff, to continue his policies. That step, which Begam viewed as sensible, prompted complaints that ATLA had been taken over by a Begam "clique."

Begam took several other steps that would affect ATLA for years to come. The association created the ATLA Education Fund in 1977 under section 501(c)(3) of the tax code. The Fund was entitled to mail *TRIAL* and the *Law Reporter* at nonprofit rates and to receive tax deductible gifts. ATLA itself became a corporation to make the most effective use of ACCT in compliance with the newly-enacted Federal Election Campaign Act of 1975.

Finally, Begam pressed for an increase in membership dues, along with a $50 voluntary donation. At Begam's request, Bill Wagner prepared a report setting forth the need for the increase to meet political action expenses, the cost of a proposed three-year membership drive, and maintaining high standards of the education and publication programs. Wagner cautioned that, although a dues hike may be recommended by the Board and approved at the convention business meeting, the ultimate test would come when members received their dues notices. They would vote "with their dollars or with their

feet." In the end, the membership made its will known. By the end of 1980, membership had increased to 35,000, from about 27,000 in 1973.

Tom Davis stepped into the presidency in 1977, determined to follow through on Begam's plans. A former president of the Texas Trial Lawyer Association, Davis was a true believer in political action. Unfortunately, Davis inherited heavy financial commitments following the purchase of the new headquarters in Washington. He also faced resistance from some members of the Executive Committee and Home Office and Budget Committee who favored educational programs, opposed the Washington move, or resented Begam's reorganization. The tensions were played out in budget battles. Davis ordered an across-the-board cut of 3.5 percent for all departments and pressured the Roscoe Pound trustees to sell the Roscoe Pound Research Center in Cambridge to Harvard University to improve ATLA's financial picture.

Michael Colley in 1978 brought to the presidency an understanding of the commitment and sheer legwork required to build a political organization. Colley learned the nuts and bolts of political organization in the Ohio Republican Party, rising from a precinct captain to National State Committeeman. He was active in the task forces that built the state PACs through hard work, marching from city to city and knocking on the doors of lawyers to explain ATLA's political mission, recruit them as ATLA members, and solicit their PAC contributions. "It was exhilarating and inspiring," Colley said. As president he focused his efforts on "coalescing ATLA into a powerful national political force."

State Affiliates on the Front Lines

Regardless of ATLA's political development, defending against medical malpractice tort reform in fifty state legislatures was not a battle that could be waged by ATLA alone—whether from Boston or Washington. This struggle differed from no-fault, where the national insurance companies and their lobbyists swept into the state capitals to present their plans. As the state legislatures were considering malpractice reforms, the liability insurers were in the background. It was the doctors—respected and influential members of the legislators' local communities—who testified at hearings and visited with legislators. They turned the malpractice insurance crisis into a hometown issue.

Effective opposition would require an equally focused and committed cadre of trial lawyers with roots in the community, who were willing to devote their effort and resources. The state trial lawyer associations stepped forward as the primary defenders of the civil justice system.

One of the hardest fought battles took place in Florida. The Florida

Medical Association initiated an aggressive lobbying campaign, funded by a $300 assessment on each of Florida's 15,000 doctors. The Academy of Florida Trial Lawyers (AFTL) and a group of moderate physicians had agreed to support legislation to address legitimate grievances of the medical community based on recommendations by the Florida Insurance Commissioner. The FMA defeated that proposal and orchestrated passage of its own senate bill in two hours, without any senator having read it. The trial lawyers were able to block measure in the House.

FMA in 1984 launched a referendum campaign for a constitutional amendment to cap damages, eliminate joint and several liability, and lower the standard for summary judgments. It paid one dollar per signature to gather 370,000 names to put its measure on the ballot. AFTL organized Floridians Against Constitutional Tampering (FACT), led by Ira Leesfield, to fight back. ATLA President Scott Baldwin called an emergency meeting of the Board of Governors and other leaders to hear Bill Colson report on the campaign. The Florida trial lawyers received help in the form of individual donations from those present and a grant of $400,000 from ATLA. In an eleventh hour court challenge by the AFTL, the Florida Supreme Court ruled the referendum unconstitutional.

The medical association returned to the legislature and succeeded in passing a new tort reform statute in 1986. The following year, the Florida Academy mounted a successful court challenge. The Florida Supreme Court in *Smith v. Dept. of Insurance* (1987) held that the damage cap violated the state constitutional guarantees of access to the courts and the right to trial by jury.

In 1988, FMA attempted to place another referendum on the ballot that would impose a $100,000 cap on general damages in all tort actions. The Florida Academy waged an expensive campaign, spending some $8.4 million to oppose the ballot initiative. Under the leadership of John Romano, the trial lawyers retained a team of expert consultants, purchased message ads on radio and TV, and enlisted the support of 254 groups, including Mothers Against Drunk Driving, the Gray Panthers, the AFL-CIO, environmental organizations and community groups. The referendum was defeated at the polls, 58-42 percent.

Once again, the tort reformers turned to the legislature. After protracted conflict with the trial lawyers, they ultimately succeeded in obtaining passing a broad tort reform measure, which Governor Jeb Bush signed into law in 1999.

Other state trial lawyer associations were facing similar battles. In some states where passage appeared inevitable, the trial lawyers used their leverage to modify or eliminate the harshest provisions in exchange for their pledge not to oppose the legislation. Forty-nine states enacted some medical malpractice tort reform during the mid-1970s to early 1980s. These varied great-

ly, but included damage limits (seventeen states), modification or abolition of the collateral source rule (sixteen states), screening panels (thirty states), statutes of repose (twenty-six states), and elimination of the doctrine of res ipsa loquitur (fourteen states).

The only state in which trial lawyers and their allies prevented the passage of tort reform was West Virginia. The insurance industry brought ever-increasing pressure to bear on the legislature. Finally, in 1986, they succeeded in enacting a cap on non-economic damages. The legislators, however, insisted on several insurance reforms as well, primarily reporting and disclosure requirements.

The insurers were outraged and moved quickly to make an example of the small state and to warn off others who might require insurers to open their books to regulators. The carriers abruptly abandoned the medical providers who had supported their prolonged tort reform campaign. Within days of the statute's enactment, all five companies writing medical malpractice coverage in West Virginia announced they would no longer do business in the state. Every doctor and hospital in the state would be left without any source of liability insurance. The governor called a special session of the legislature to deal with the emergency. Reluctantly, the lawmakers stripped the insurance reforms from the statute. Doctors continued to provide the public face of tort reform, but there was little doubt who wielded the power.

Tort Reform's Failure: Promises Broken

By the end of the 1970s, nobody was happy with tort reform. Plaintiff's lawyers saw significant inroads on the rights of their clients in nearly every state. On the other hand, the insurance industry failed to win widespread passage of its most desired proposals, particularly damage caps and statutes of repose. In many states, trial lawyers could not prevent tort reform altogether, but succeeded in softening its most onerous provisions. The "crisis" also focused attention on the industry's secretive business practices and prompted demands for transparency. The National Association of Insurance Commissioners, for example, required that, beginning in 1975, carriers report malpractice coverage separate from their figures for general liability insurance.

Doctors certainly had cause for disappointment. For their substantial efforts in support of tort reform, physicians were no closer to their ultimate goal of removing malpractice claims from the tort system. At best, they merely limited the size of the judgments their insurers would have to pay. Adding to the doctors' sense of betrayal was the fact that, in state after state, tort reform did not reduce their malpractice insurance premiums as promised. For

example, two months after California's legislature enacted MICRA, California's malpractice carriers hiked premiums by as much as 400 percent. Their rates would remain extraordinarily high for the rest of the decade.

The story was the same in other states. In 1976, a year after Indiana imposed its stringent cap on all damages in malpractice cases, insurers filed for a 300-percent rate increase. And in Ohio, after winning a cap on damages, malpractice insurers applied for increases in premiums of 145 percent for doctors and 160 percent for hospitals. The applications were withdrawn only after the Ohio State Medical Association filed suit to block the increases. The insurers received "only" a 30-percent rate increase in August 1976.

ATLA had argued from the outset that tort reform was doomed to fail as a means of lowering malpractice premiums. First, as the insurance industry well knew from its own underwriting experience, damage caps and other reforms affect only a small number of claims. Insurers would not realize enough savings to reduce premiums.

The U.S. General Accounting Office in 1986 confirmed tort reform's failure in a report entitled *Medical Malpractice—Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms.*

For example, the president of the Washington State Physicians Insurance Association, the state's major liability insurer, testified to legislators that passage of the company-backed bill before them would reduce premiums by 25 to 30 percent. Shortly after the bill passed, the insurer applied for a rate *increase.*

In 1987, after Florida enacted a $450,000 limit on noneconomic damages, Aetna Life and Casualty Co. and St. Paul Fire and Marine Insurance Co. applied to the state insurance commission for substantial increases in malpractice premiums. Both carriers informed the commission, based on their own closed claim studies, that the damage cap affected so few cases that it would have no impact on reducing insurance rates.

Another factor for failure, as any trial lawyer could have pointed out, is that damage caps remove any incentive for insurers to reach compromise settlements in cases where liability is clear. An in-depth study of Indiana's experience ten years after imposing a cap on all damages, found that plaintiffs were winning a greater percentage of jury verdicts and that the average award had increased. Similar results were observed in Virginia.

Finally, there was no reason for the doctors to expect that insurers would pass any tort reform savings along to them. Although there are a substantial number of insurers writing medical malpractice coverage, in most states one or two carriers dominate the market. Companies are free to use any reduction in payments to malpractice victims to increase their profits, pay dividends to stockholders, or reward their top executives.

On June 28, 1984, Tom Bendorf testified on behalf of ATLA before the Subcommittee on Health of the House Ways and Means Committee. He stated that during 1975-82, malpractice insurers took in about $10 billion in premiums, but paid out only $2.2 billion in claims. The industry actually made more on its investments than it paid out in claims. But instead of sharing its good fortune with its policyholders, the industry was gearing up a new round of traumatic rate hikes. After all, the insurance industry's tort reform goal was to maximize profits, not to reduce premiums.

Even Doctors Sometimes Need Trial Lawyers

Doctors were outraged. Many accused the industry of price gouging. The Southern California Physicians Association, for example, suspected that the 486-percent increase in the premiums demanded by Travelers Insurance Co. was unwarranted. The doctors retained California Trial Lawyers Association President William Shernoff to file suit. According to Shernoff, "Travelers, instead of losing money, had made tremendous profits. Travelers had collected $131 million in premiums and paid out less than 25 percent of that in claims losses." The lawsuit ultimately resulted in a settlement in 1981, in which Travelers agreed to refund an estimated $50 million to SOCAP members.

In Colorado in 1986, over one hundred doctors retained ATLA member William Hansen to bring a similar lawsuit against Physicians Insurance Company of Colorado. The trial judge found that PHICO had engaged in fraud and misrepresentation and that the "only purpose of the misrepresentation was to create a sense of crisis and panic among doctors to justify enormous increases in premiums." The Colorado Supreme Court upheld the action.

Another cause for the doctors' unhappiness with their insurance industry partners was the forced changeover from "occurrence" policies to "claims made" coverage. Insurers, led by industry leader St. Paul Fire and Marine, took advantage of the crisis, when doctors felt desperate to maintain coverage, to require the switch. Under the new policy, the premium paid in a given year covered only the claims that became payable in that year, regardless of when the underlying malpractice occurred. This minimized the "long tail," which required carriers to predict liability several years into the future and led to reckless underwriting.

However, the industry was heavy-handed in forcing the changeover to what the doctors viewed as less coverage. For example, a physician who retired or left practice would need to buy several more years of coverage against claims that might later become payable. Angry physicians again resorted to court to redress their grievances. ATLA member Leonard DeCof filed a class action on

behalf of physicians against the four largest malpractice carriers—St. Paul, Hartford, Aetna, and Travelers—charging that they acted together to control prices through coercion, intimidation and boycott in violation of the Sherman Antitrust Act. The U.S. Supreme Court ruled in 1978 that the alleged violations were not shielded by the McCarren-Ferguson Act, and the carriers settled for an undisclosed sum.

The doctors' disaffection with commercial insurers led physicians in many states to form their own malpractice insurance carriers. Many of the smaller commercial carriers left the market, unable to compete with these "bedpan mutuals." Although St. Paul retained its position as the largest carrier, by the end of the 1980s physician-owned liability insurers had captured about half of the malpractice insurance market.

Another Decade, Another Crisis

Tort reforms did not fix the structural defects in the insurance industry. In the early 1980s, a rising stock market and improving investment returns led insurers once again to cut premiums. The business cycle turned, and the precipitous drop in investment markets in 1983-84 triggered another "insurance crisis." This crisis affected the broader property-casualty insurance market, and much of the reform effort focused on product liability. However, malpractice insurers also hiked rates sharply, prompting a second wave of medical malpractice tort reform. Many states added more severe limits on malpractice suits to those already in place. Proposals for federal restrictions on malpractice lawsuits were introduced in Congress but made little headway.

This time around, some public officials were skeptical of the insurance industry's assertion that rate increases were made necessary by profligate juries. For example, a study conducted by the attorney general of Minnesota analyzed claims filed during 1982-87, in Minnesota, North Dakota, and South Dakota, states where St. Paul Fire and Marine and the Minnesota Medical Insurance Exchange were the only malpractice carriers. The facts contained in the report were in dramatic contrast to the overblown tort reform rhetoric. Only 27 percent of closed claims resulted in compensation to the victim, with an average payment of $14,542. The frequency of claims remained virtually unchanged during the period, while the average payment actually decreased slightly. But doctors' malpractice premiums had tripled! After Minnesota Insurance Commissioner Michael Hatch announced the results in an interview on ABC's *Nightline* on February 14, 1989, St. Paul quickly announced it would reduce premiums.

The doctors were no longer content with backing the insurance industry's tort reform agenda. In 1988, the AMA rolled out the latest version of its plan

to take medical negligence cases out of the hands of juries and out of the tort system altogether. *A Proposed Alternative to the Civil Justice System in Medical Liability Disputes* called for a fault-based, multi-tiered administrative system. A patient who filed a medical malpractice claim with the medical board would appear first before a claims reviewer who might offer a settlement or dismiss the claim. The patient could appeal to a peer review body which would make an independent judgment as to whether the provider had failed to meet the appropriate standard of care. From there the patient could appeal to a hearing examiner and then to a panel of the medical board itself. Judicial review of the board's decisions was limited, and juries were conspicuously absent.

ATLA president Pavalon responded pointedly: "The state medical boards have failed miserably in their primary function of policing doctors. Why then should they be entrusted with the awesome responsibility of deciding the outcome of medical malpractice cases?"

ATLA advanced its own proposal that focused on improving the quality of care through greater regulation of hospitals and more aggressive action by medical boards to clean up the profession. In addition, consumers would have access to the national practitioner data bank (which collects information on malpractice settlements currently unavailable to the public) and peer review results so that market forces could weed out incompetent providers. ATLA also advocated streamlining the civil justice system by providing for prejudgment interest and developing a system for handling small claims at the state level with simplified rules of proof and limits on the use of experts and on discovery. To stabilize the insurance market, ATLA proposed mandatory experience rating.

Malpractice insurance premiums ultimately came down when the investment climate again led to price competition in the late 1980s. For example, during 1988-90, St. Paul, the largest carrier, reduced rates an average of 14 percent in thirty-four states where it sold coverage. Significantly, premiums were reduced regardless of whether the state had adopted stringent tort reforms, moderate reforms, or nearly none.

With the economic slowdown in 2001, the insurance industry, predictably, campaigned for even more medical malpractice tort reform.

At the end of over two decades of struggle, the two sides remained as polarized as ever. The health care system faced new problems. HMOs and other managed care plans, many operated by insurance companies, posed a significant threat to doctors' independence, as well as their incomes. With their emphasis on profits, some managed care plans undermined the quality of care for patients. But the poisoned atmosphere of the tort wars made constructive cooperation between doctors and trial lawyers nearly impossible.

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Advertising, Ethics and Image

The medical malpractice insurance "crisis" occupied ATLA's attention during 1975-77. Thereafter the lobbying of state legislators for ever more stringent tort reforms never really stopped. Nevertheless, from about 1978 until the second "crisis" in the mid-1980s, ATLA leaders were able to give attention to other pressing matters.

In *Bates v. State Bar of Arizona* (1977), the U.S. Supreme Court handed them a tough one indeed.

The twentieth century may have been the Age of Advertising, but for most of that century, advertising by lawyers was condemned as unethical solicitation, punished by discipline and even disbarment. The powerful American Bar Association, self-proclaimed guardian of the profession's ethics, promulgated a strict ban on soliciting business from the public. Although the ABA could not itself enforce its Code of Professional Conduct, nearly every state supreme court adopted rules patterned on the Code for the regulation of attorneys practicing in the state.

As the ABA saw it, soliciting clients through advertising demeaned the profession, reducing attorneys to the level of purveyors of laundry soap. It was also misleading to the public, the ABA explained, because legal services are not fungible goods easily described in competitive ads. Others took a more jaundiced view of the ABA's prohibition, charging that the rule enabled the guild of established lawyers to maintain their favored position.

As late as the 1970s, even the most liberal states permitted only carefully prescribed "dignified" notices addressed to the public. Just about the only permissible advertising was found in the telephone yellow pages, where language and design were regulated in minute detail.

The Supreme Court in *Bates* swept away those restrictions. Two Arizona attorneys who wanted to advertise inexpensive legal services argued that the ban deprived consumers of important information concerning the availability of legal services and served to maintain artificially high prices. The Court agreed, holding that advertising of legal services was commercial speech, protected by the First Amendment if truthful and not deceptive. The Court rejected "any justification that is based on the benefits of public ignorance." It was the first of a string of decisions by the Court supporting the First Amendment protection of lawyer advertising.

That constitutional protection proved to be a two-edged sword that divided the ranks of ATLA's trial lawyers. Many, particularly younger practitioners, welcomed the decision. They pointed out that historically insurance companies had prevented injured victims from asserting their rights by dissuading them from even consulting a lawyer. Adjusters felt no ethical pangs about contacting victims soon after an accident and obtaining quick and cheap settlements. Often they told victims that hiring an attorney would be expensive and delay their compensation. Advertising offered an effective way to counter these tactics by informing injured persons of legal representation available to them on a contingency fee basis. Some young attorneys were also suspicious that established trial lawyers, who obtained clients through referrals, were not eager to allow advertising competitors into their domain.

Older, established trial lawyers also remembered their history. For many years, the organized bar had denigrated plaintiffs' lawyers as sleazy ambulance chasers. Tasteless advertising by the personal injury bar would hand their opponents a potent argument that such attorneys were not to be trusted—by the public or by jurors.

The tension between the two camps dominated ATLA's efforts to deal with attorney advertising. Fortunately, the ATLA president who faced these challenges was a lawyer whose abiding passion was the professionalism of and respect for the trial bar.

Professionalism in the Service of Plaintiffs

No trial lawyer was more closely identified with ATLA's education program than Theodore I. Koskoff. He had established the National College of Advocacy and built it into the nation's premier training program for trial lawyers. He

had appeared at hundreds of seminars, and his "What is a Trial Lawyer?" remains one of the most famous speeches ever delivered at an ATLA program.

Koskoff's election as president in 1979 did not signal a return to an education-only agenda for the association. The no-fault and medical malpractice battles made it clear to all that ATLA needed an aggressive political action program, and Koskoff was committed to continuing that course. However, under his leadership, education and professionalism of the trial bar gained new prominence.

The American Lawyer's Code of Conduct

Plaintiffs' lawyers never embraced the ABA Code of Professional Responsibility as the definitive statement of their own ethical responsibilities. "When I looked at the Code," said Koskoff, "I was embarrassed by its bias." Many of its provisions favored the large corporate law firm and disfavored small practitioners and "the kinds of people that we represented, the small people, the consumer." For example, the ABA Code prohibited an attorney from making a loan to help a needy client meet living expenses until his or her case was resolved. Defense lawyers cynically used the rule not only to force injured plaintiffs into paltry settlements but also to punish plaintiffs' attorneys who made such humanitarian loans.

During the 1970s, the ABA undertook a major revision of its Code. Arnold & Porter attorney Robert Kutak headed a commission of ABA lawyers that drafted a new set of ethics rules in 1981. In many ways, Koskoff concluded, the new Model Rules of Professional Conduct were even worse than the Code. In speeches around the country, he denounced the ABA draft as "self-protectionism, pretentious posturing and bearing no relationship or benefit to the public."

Koskoff was especially incensed by the erosion of the lawyer-client relationship in the Model Rules' provisions regarding the attorney-client privilege and the adversarial process. The Kutak Commission proposed that an attorney owed a duty not only to the client, but also to the court and even, to a limited extent, to the adversary party. In the corporate law context, this was seen as a liberalizing step. Corporations are, after all, artificial creations of state law. Much of their legal work lies outside the adversarial atmosphere of litigation, in drafting and negotiating agreements and forging mutually beneficial relationships. Even the question of who is the "client" can be problematical. The officers, managers, employees and shareholders of a corporation may have divergent interests. Loyalty to the "client" might reasonably be leavened with loyalty to the integrity of the legal process.

However, divided loyalties do not serve the interests of individual human clients—injured plaintiffs or criminal defendants. In preserving the confidentiality of attorney-client communications or zealously representing the client in court, Koskoff insisted, the lawyer's duty to the client must be paramount. "You have to have integrity in fighting for the client that you represent. One client. That was my major complaint with the Kutak Commission."

Not content with simply criticizing the ABA product, Koskoff formed a commission to draft a code of ethics for trial lawyers. The project was funded by the Roscoe Pound Foundation and drew upon the expertise of law professors James Jeans and Irwin Birnbaum. Koskoff especially relied on Professor Monroe Friedman, then Dean of Hofstra Law School and author of *Ethics in an Adversary System*.

The final product, *The American Lawyer's Code of Conduct*, was not adopted by any state. Koskoff was not dismayed, however. The ATLA Code presents an alternative view of the ethical duties of trial lawyers for consideration in law schools and by state courts.

Certifying Trial Lawyers

Koskoff met with greater success in establishing one of the trial bar's most innovative programs, the National Board of Trial Advocacy.

Trial practice requires special skills and training. The time when any newly-minted J.D. might competently represent a client in a courtroom is long past. As early as 1950, President Homer Bishop declared at NACCA's convention, "Lawyers must specialize if they are to maintain their effectiveness for their clients." However, the ban on advertising deprived consumers of this information and of any objective criteria by which to gauge a trial lawyer's special skills.

The Pound Foundation, with Koskoff as its president, recommended a program to certify trial specialists, not unlike the national certification of specialists in the medical profession. "Lawyers would not be able to go into the courtroom just because they were lawyers," Koskoff explained, "any more than doctors can go into the operating room just because they are doctors. They need special qualifications. They need special training. They need some certification stature that would distinguish them so the public would know to whom they could go." In 1977, in the wake of the *Bates* decision, the Board of Governors gave Koskoff the go-ahead.

He worked closely with Professor James Jeans of the University of Missouri Law School, a long-time proponent of trial practice certification. They knew it was vitally important to win acceptance of NBTA certification by the

state bars, many of whom had their own certification programs. Even after *Bates*, states were authorized to prohibit false or misleading advertising. Informing the public that attorneys were NBTA certified was essential.

Koskoff was aware that the ABA had already tried and failed. "The problem with their model specialization program wasn't that it was a bad program, it was okay. The problem was that it was politically unpalatable to the people in the states."

Koskoff and Jeans were determined to avoid that pitfall. They researched the existing state standards from around the country and drafted a set of NBTA standards that were consistent, where possible. They also required that applicants in states with a trial practice specialization program be certified by the state bar. Koskoff and Jeans were also careful to avoid any appearance that NBTA would give an unfair advantage to ATLA members. In addition to establishing rigorous objective criteria, they also organized NBTA to allow it to act as independently as possible from ATLA, though it was initially funded entirely by the association.

Most importantly, they obtained the participation of a variety of organizations as cosponsors, including the National Association of Women Lawyers, the National Association of Criminal Defense Lawyers, the National District Attorneys Association, the American Board of Professional Liability Attorneys, the International Society of Barristers, and others. The Board itself consisted of thirty-six prominent trial lawyers, judges, and legal educators.

By 1979, the National Board of Trial Advocacy was accepting its first applications. The primary requirements were that the attorney have at least five years experience in civil practice, including experience as lead counsel in at least fifteen major cases tried to verdict; peer recognition by other practitioners and judges; forty-five hours of continuing legal education within the past three years, and a passing grade on a six-hour written examination. In addition, NBTA required that the attorney be recertified every five years.

In 1981-83 the National Board of Trial Advocacy struggled to attract enough applicants. Koskoff fought off attempts to cut its budget. By 1983, NBTA was operating in the black. Eventually, it became truly independent and graduated to its own office in Wrentham, Mass..

The efforts to avoid conflicts with the state bars paid off. The supreme courts of Minnesota and Alabama upheld the right of attorneys advertise their NBTA certification to the public. In 1989, however, the Supreme Court of Illinois censured Robert Peel, who had placed on his letterhead a statement that he was certified as a civil trial specialist by the NBTA. The Illinois court held that the statement was misleading because the NBTA program was not a

legitimate "certification" program. Peel took the case to the Supreme Court of the United States, with ATLA's *amicus* support. The Court reversed. Taking particular note of NBTA's rigorous and objective standards, the Court held that for an attorney to inform the public that he or she was certified by NBTA was not even potentially misleading.[202]

Looking back, Ted Koskoff took pride that ATLA took the lead in advancing the professionalism of trial practitioners. Boasted Koskoff, "We didn't leave it to the ABA."

Lawyers on the Side of People

Harry Philo, who assumed the presidency in 1980, was another very familiar face at ATLA education programs. He had come to ATLA in 1961 by way of the union movement in Michigan. As shop steward and United Auto Workers official, he often greeted workers on the assembly lines. Philo realized with dismay that nearly every hand he shook was maimed or scarred by some industrial accident. Over the years, thousands of attorneys at ATLA's product liability seminars watched Philo's familiar shuffle to the front of the room, his tall frame slightly stooped as he hauled satchels of documents, posters and exhibits to lay out on tables. From the seminar podium, Harry Philo challenged the conventional thinking of a generation of trial lawyers.

Accident prevention, he declared, is not a matter of pious slogans, like "Drive Carefully" or "Safety First." It is hard science. The law began to advance, Philo stated, "when we, the trial lawyers, began to understand that the answer was safety engineering. The answer was biotechnology. The answer was ergonomics and industrial hygiene. When we started to understand that, we were able to put it on the record and prove our cases in the trial courts. We had records that could not be beaten in the appellate courts."

To prepare cases, lawyers needed to learn from and make use of people who had spent their careers developing these disciplines in industrial standards groups, academia, and governmental regulatory bodies. Philo, with Dean Robb, assembled a wealth of such resources in their *Lawyers Desk Reference*, which became an indispensable tool for countless product liability attorneys since its first publication in 1964.

Harry Philo best explained the rationale for a fault-based tort system rather than an administrative compensation regime. "The problem is that when the taxpayer pays, you don't get a safer society. When the wrongdoer has to pay, then

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[202] Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990).

you get a safe society." Throughout his long career within ATLA, he also pressed for greater participation by women and minorities.

Shortly before he took office as president, he surveyed the progress made by the Association. "It has taken us a while to realize who we were and what we were," he wrote. "We are basically lawyers on the side of people."

Philo's successor, Richard Gerry, also came to the law from the labor movement. As a seaman, he served as an official in the militant National Maritime Union before earning his law degree at Columbia in 1956, at the age of 32. Returning to his native California, Gerry applied for his first job at Melvin Belli's firm. "I showed him my resume and told him my background," Gerry recalled. "He said he would give me a job, asked how much I needed to live on. I told him $300 a month 'That's your salary,' he said."

Gerry quickly discovered he was the only other lawyer in the office. "He didn't have any other attorneys. They all had quit. He'd been without anybody for three to four months. There were probably a couple hundred files in the office." Among those cases were the landmark Cutter Salk vaccine case and the Grand Canyon airliner disaster case.

Gerry, a brawny, blunt-speaking man with a disarming smile, did not neglect ATLA's political action program, and he worked with Philo in cementing relationships with the state organizations. However, he also focused renewed attention on the Association's educational activities. He added six basic trial advocacy courses in various cities in addition to the two main sites of the National College of Advocacy. In addition, he galvanized support within ATLA for the emerging field of environmental litigation.

The Life of Staff

Howard Specter, elected in 1982, a soft-spoken trial lawyer from Pittsburgh, presented trial lawyers with a fresh perspective. He viewed education and political action as twin goals, though he readily admitted that he personally leaned toward ATLA's education mission.

Specter, a veteran in personal injury litigation, was in the forefront of some of important progressive changes in the law. He demonstrated that innovative use of private antitrust actions could serve not only to protect small businesses against economic predators, but also to vindicate personal rights. Specter's first antitrust suit in 1966 was on behalf of a professional basketball player, Connie Hawkins, who was blacklisted by the National Basketball Association.

Another development that held out the promise of an effective remedy for victims of discrimination was the newly-expanded use of class actions

under the federal rules. In 1970, he filed suit against Liberty Mutual Insurance Company on behalf of women who performed the work of claims representatives but were not given the same job status or salary as their male counterparts. As a result of Specter's suit, thousands of female employees in the company were reclassified and given equal pay. He brought a similar successful class action on behalf of women who were denied jobs as stock brokers.

The problem Specter saw was that too many of the attorneys who were beginning to bring such cases were strangers to the courtroom. Who better to wage this type of litigation than the lawyers "who spend their lives in the pit trying cases, taking depositions and cross-examining witnesses"—the same trial lawyers, in other words, who have been successfully representing injured plaintiffs. Specter moved to include this field in ATLA's educational programs. "Discrimination laws alone do not stop discrimination," he said. "You need trial lawyers and judges to put teeth into the laws." Specter also promoted greater participation of women lawyers in ATLA, appointing many to leading positions and actively supporting the work of ATLA's Women Trial Lawyers Caucus.

Specter and president-elect David Shrager devoted a great deal of attention to a side of ATLA that was often taken for granted: the association's professional staff. Specter felt that declining morale and lack of dynamism were undermining ATLA's effectiveness. As Specter saw it, the most important responsibility of the executive director is to provide leadership for the association's staff. He replaced Francis J. Bolduc, who had been executive director for nine years. ATLA's in-house lobbyist, C. Thomas Bendorf, agreed to serve while the Board conducted a thorough search for a permanent executive director.

When David Shrager took command in 1983, he had already announced that his top priority was a thorough reorganization of the ATLA staff. "We tend to forget the extent to which ATLA, a voluntary membership organization, depended on the staff," he explained. After taking a hard look at the internal workings of the organization, Shrager felt major changes were overdue. His experience as head of the Home Office and Budget Committee made him particularly well qualified for that task.

He remapped the departments so that all aspects of a particular function, such as the education programs, were brought together in a single department with a single chain of command. He also appointed a single ATLA member to oversee each department, providing the leadership with direct insight into how well the staff was performing and what it needed to carry out its mission.

In April 1984, Shrager and president-elect Scott Baldwin nominated Marianna Smith, a law school professor and ATLA's educational director, for the ex-

ecutive director spot. Shrager felt that Smith, former Associate Dean of American University's Washington College of Law, would provide a valuable means for reaching out to the academic community.

Lawyers from the Skies

The presidency of Scott Baldwin, a taciturn country lawyer who had made his mark representing asbestos victims, represented a slight shift in direction for ATLA. As a matter of internal politics, Baldwin ended the succession of ATLA leaders who had come up "through the chairs" of important committees and were identified with a powerful group of trial lawyers loosely associated with Robert Begam. Baldwin, a former president of the Texas Trial Lawyers Association, was, in the Texas tradition, an uncompromising advocate of political action.

Baldwin focused ATLA's attention on eliminating "abuses of the discovery process by which corporate defendants attempted to grind the rights of innocent victims into the ground." Responding to claims by Chief Justice Warren Burger that frivolous lawsuits posed a growing problem for the civil justice system, Baldwin pointed out, "The contingent fee system, upon which the plaintiffs' bar operates, discourages the filing of frivolous lawsuits. Defendants' attorneys are paid on an hourly basis and this tends to encourage frivolous defenses, frivolous motions and other dilatory processes."

However, events on the other side of the world renewed the sharp controversy within ATLA: How can trial lawyers use advertising and solicitation to assure access to the legal system for injured plaintiffs without so degrading the public's image view of trial lawyers that justice for those same victims is jeopardized?

In 1984, a leak at a Union Carbide plant in Bophal, India, sent clouds of toxic methyl isocyanate gas into neighboring slums, killing over 2,000 and injuring numerous others. A handful of American lawyers, most notably and publicly Melvin Belli, jetted to Bhopal to sign up Indian victims of the tragedy as clients. Belli announced, "I am here to bring justice and money to these poor little people who have suffered at the hands of those rich sons of bitches."

Media commentators expressed disgust. Typical was a December 13, 1984, editorial in the *Washington Post*: "The air was filled with poison. Then it was filled with lawyers, descending in airplanes with the hope of turning awful misery to advantage."

Baldwin reacted strongly. Although it would be wrong for attorneys to meet with victims uninvited, "experience teaches that in such catastrophes, as in Bhopal, time is of the essence. Every lawyer has seen evidence covered up, destroyed and secreted. The only antidote is to be on the scene early. I cannot

criticize an attorney who goes to the scene to determine the truth of what really happened."

The Board, however, held a different view. Its concern was with the damage to the public image of trial lawyers. In a resolution expressing "deepest sympathy for the victims," the Board declared that ATLA "is disturbed by the reported conduct of those American lawyers who, according to newspaper reports, precipitously filed class action lawsuits, held press conferences, and undertook the representation of thousands of Bhopal victims while some victims were being admitted to hospitals." The Board appointed a committee, led by Larry Stewart, to investigate the ethics and solicitation issues raised by the tragedy. The probe concluded in 1987 with a sharp rebuke of wholesale solicitation of unrepresented clients in such catastrophes.

ATLA's leaders were clearly concerned that incidents of blatant solicitation undermined their effectiveness in combating tort reform. President Robert Habush stated that the conduct of lawyers who appeared at Bhopal, as well as at train derailments and airplane crashes, "was ghoulish. It was repugnant. It made everything easier for our enemies to push through what was then conveniently labeled anti-lawyer legislation." Habush proposed, and the Board adopted, resolutions against frivolous lawsuits, unlawful solicitations, frivolous defenses and excessive legal fees.

On July 31, 1988, at its convention in Kansas City, ATLA adopted a strict Code of Conduct for its members regarding solicitation. The Code prohibits any ATLA member from personally contacting an injured person for the purpose of soliciting potential clients if no request was made. It also forbids members from initiating contact, such as using direct mail, within 10 days of an accident. Although ATLA cannot punish lawyers who violate these provisions, President Eugene Pavalon expected the Code to go "a long way to insure trial lawyers conduct themselves in an ethical and professional manner and that the privacy of victims and their family is respected."

At the same time, ATLA moved to address the broader issue of attorney advertising. In 1988, President Bill Wagner appointed an Advertising Policy Committee to formulate a policy for the association. After two years of study and debate, the APC concluded: "It is in the best interest of the public, the judicial system, and the legal profession that the public be adequately informed of the availability of legal services." The APC noted that a very small number of attorney discipline cases involved advertising abuses. The APC condemned false and misleading ads, but proposed that ATLA recognize "that lawyers have the right to advertise their services in accordance with the disciplinary rules of the various states."

The ATLA Board of Governors debated the APC resolution and on May

4, 1990, adopted a "Resolution on Lawyer Advertising." The resolution shifted the focus from the benefits of informing consumers to condemnation of unethical advertisements. It called upon state bars and the United States Supreme Court to prohibit attorney advertising that may cause "harm or disrepute to the civil justice system or to the legal profession." The resolution also condemned, "direct solicitation of clients who, because of their particular circumstances, are vulnerable to undue influence."

ATLA would have the opportunity to present its views directly to the Supreme Court. There, ATLA would find itself in the unusual position of supporting the state bars, to the consternation of ATLA members who recalled the oppression and harassment of plaintiffs' lawyers by some state bars. However, the leadership was determined to counter the tort reformers' strategy of shifting the public's attention from the rights of the injured to the supposed self-interest of the trial bar.

ATLA lent its *amicus* support to a state bar prohibition against targeted direct mail advertising in *Shapero v. Kentucky State Bar* (1988). The Kentucky bar had disciplined a bankruptcy attorney who mailed fliers to persons facing foreclosure proceedings, offering his services. ATLA's *amicus curiae* brief argued that targeted direct mail is analogous to in-person solicitation, intruding on the privacy of recently injured victims. The decision to defend the prohibition prompted angry letters from some ATLA members, who argued that the rule left injured victims open to high-pressure tactics by insurance adjusters to sign releases without legal advice.

The Court rejected the ATLA argument, ruling that the direct mail solicitations were well within the First Amendment protections of commercial speech by attorneys. A mail solicitation does not pose a danger of overbearing the potential client; the recipient can simply toss it away. They are also easier to police by the bar than in-person contacts.

Shortly thereafter, the Florida Bar adopted a rule prohibiting attorneys from using targeted direct mail to solicit personal injury clients within thirty days of an accident. Former ATLA president Larry Stewart worked closely with the Florida Bar in drafting the rule. The bar's first enforcement action was against a legal clinic unsympathetically named Went For It, Inc.

Predictably, Went For It challenged the rule as an affront to the First Amendment. ATLA's Amicus Curiae Committee was closely divided on whether to support the rule in the Supreme Court. The Executive Committee decided to file a brief in support of the Florida Bar.

ATLA argued that Florida's rule was narrowly drawn to further important state interests. At stake was not simply the image of the legal profession, ATLA argued. Targeted solicitations immediately following an accident, wide-

ly viewed as offensive by the public, prejudiced potential jurors against personal injury plaintiffs. Justice Kennedy, during oral argument, disparaged this link to juror attitudes. But ATLA presented the results of several empirical studies which found that lawyer advertising caused many people to view trial lawyers as less credible and more likely to pursue frivolous lawsuits. They also had less respect for plaintiffs who retain lawyers who advertise. Most importantly, a significant number admitted that this attitude would affect their decision as jurors in personal injury cases. The Court's decision in *Florida Bar v. Went for It* (1995), upheld the thirty-day ban.

Public Image and Partisan Politics

If ATLA appeared, at times, overly defensive of the trial lawyers' public image, it was because their adversaries were so offensive. Insurance companies are not particularly beloved among Americans. Nor are corporations that cause injury. The tort reformers' hope for success lay in changing the subject of the debate, from the harms they have caused in pursuit of profit to the supposed greed of trial lawyers. Above all, it was necessary to erase from the public mind the memorable description, popularized by Philip Corboy in a 1976 article, of the contingency fee as the average American's "Key to the Courthouse."[203]

The plaintiffs' law firm is, of course, a small business operated for profit, as successful trial lawyers from Perry Nichols to Stuart Speiser have pointed out. The costs of maintaining a well staffed and equipped law firm and preparing tort cases for trial are considerable. Unlike most businesses, there is no way to do this with other people's money. No venture capital or public offering of stock finances tort cases. The lawyer must rely on his or her own judgment and skill to select meritorious cases and present them effectively. If the case is lost, there will be no bailout. This entrepreneurial spirit and self-reliance has faded from corporate America. Instead, big business has devoted untold millions in pursuit of the worst kind of corporate welfare: a subsidy of substandard goods and services through lack of full accountability.

ATLA leaders have, from time to time, tried to elevate the public's perception of trial lawyers. Beginning in 1956, a succession of public relations consultants and other experts have proposed various courses of action. Tangible results have been meager. Many trial lawyers shared the skepticism of presi-

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[203] Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 Litigation 27 (Summer 1976).

dent David Shrager. "Lawyers never need to covet popularity from any group other than their clients." Their job is "not to reflect majority interest but the needs and rights of individuals. Whether people like us or not, to me is neither here nor there."

During the 1990s, however, such detachment became a luxury that trial lawyers—and tort victims—could no longer afford. Tort reform degenerated from a debate over legal principles and social policy into the swamp of partisan politics.

No political party owns the justice system or holds a monopoly on preserving the jury. For that reason, ATLA has always worked effectively with elected representatives on both sides of the aisle, and ATLA PAC has supported candidates who shared ATLA's views of the jury and justice system, regardless of party affiliation. However, Republicans during the 1990s chose lawyer-bashing as a campaign strategy and devoted considerable energy running against "liberal Democrat trial lawyers."

Vice President Dan Quayle, speaking to the American Bar Association in August 1991, launched a broad attack on America's lawyers, asserting that lawsuits were hampering the competitiveness of American businesses.

The public's favorable reaction to Quayle's lawyer bashing was duly noted by the man at the top of the ticket. George H. W. Bush, in his nomination acceptance speech to the 1992 Republican Convention declared that his opponent was "backed by every trial lawyer who ever wore a tasseled-loafer," and he looked forward to "climbing into the ring with the trial lawyers." His stump speeches complained that "sharp lawyers are running wild," and Bush campaign ads shouted, "Stop the Trial Lawyer Takeover of the White House."

These attacks were puzzling—and not simply because tasseled loafers were most closely associated with Ivy Leaguers like Bush. Insurance and medical lobbyists in Arkansas reported that Governor Bill Clinton was open to tort reform in that state. Tort reform lobbyists openly worried in the *Legal Times* that the Bush-Quayle campaign risked alienating some Democrats in Congress whose support they needed to pass tort reform.

But the Republican strategy of demonizing trial lawyers was not designed to enact tort reform. Its purpose was to elect Republicans. Republican pollster Frank Luntz, widely credited with formulating the congressional Republicans' message, offered this advice:

> It's almost impossible to go too far when it comes to demonizing lawyers. . . . [Make] fun of the trial lawyers and the radical consumer advocates. . . . They truly are one group in American society that you can attack mercilessly.

Newt Gingrich and congressional Republicans who swept into control of Congress in 1994 made extensive use of anti-lawyer rhetoric. They conducted hearings into the harms caused by lawsuits, informally dubbed the "War Crimes" hearings. The 1996 GOP Presidential nominee, Bob Dole, in televised debates and on the stump, continued the Republican formula, accusing President Clinton of being "in the pocket of the trial lawyers."

Unhappily, Luntz was right. The Republican attacks signaled that trial lawyers were fair game. Lawyer jokes became a staple of talk shows and Internet sites. At the somber Supreme Court, oral argument in *Florida Bar v. Went For It* in 1995 was interrupted by bursts of laughter from the audience as the Justices traded one-liners on the public image of trial lawyers.

The GOP exploited this anti-lawyer sentiment with considerable success—although Bush, Quayle, Gingrich, and Dole all entered the private sector rather sooner than they had hoped. For their part, trial lawyers made no appeals for sympathy. Representing tort victims has never been a vocation for the thin skinned, and trial lawyers were capable of defending themselves.

ATLA's Mission to Put Personal Injury Lawyers Out of Business

Melvin Belli answered accusations of tort lawyer greed with a serious challenge: "Let them put me out of business, all these corporations and doctors and insurance companies. If they stopped behaving negligently, and injuring and maiming people, I wouldn't have these cases. I would have to do something else."

ATLA worked on a variety of fronts as if it were determined to accomplish just that, making America a safer society. In an ongoing project called "Cases that Made A Difference," ATLA identified and publicized numerous instances in which holding wrongdoers accountable has resulted in safer products, workplaces, transportation, hospitals, hotels, and many other areas.

ATLA did not rely solely on the safety incentive of tort liability. Trial lawyers also assisted government agencies working to build a safer society. In 1963-64, for example, ATLA opened its files to Senator Hubert Humphrey's Senate subcommittee working to improve FDA regulation of potentially dangerous drugs. Several years later, led by president Joseph Kelner, ATLA pressed for the creation of the National Highway Traffic Safety Administration. Since that time, ATLA attorneys have worked with NHTSA to improve motor vehicle safety standards and remove dangerous vehicles from the nation's highways. For example, ATLA provided injury information to the highly respected Center for Auto Safety, which CAS used in its successful petition to recall three million dan-

gerous child safety seats. Clarence Ditlow, III, executive director of the CAS, stated "As a result of assistance provided by ATLA, millions of Americans children ride more safely today."

In the early 1970s, ATLA worked with the National Commission on Product Safety, whose chair, Arnold B. Elkind, had been head of ATLA's Products Liability Exchange. ATLA's trial lawyers testified at many of the Commission's public hearings, laying the foundation for Congress to establish the Consumer Product Safety Commission.

In 1980, ATLA President Harry Philo initiated a program in which the ATLA Exchange shared information and exchanged speakers with the CPSC. And in 1990, trial lawyers heeded the call from President Russ Herman to submit their information concerning dangerous consumer products to the CPSC.

In 1988, ATLA initiated an ongoing project to combat court secrecy. ATLA worked with leading investigative journalists and used its own media relations department to inform the public of safety hazards that defendants tried to hide through confidentiality orders and secret settlements. ATLA also backed "sunshine" legislation in many states to prevent courts from sealing records that contained information about dangers to public health and safety.

In 1998, president Mark Mandell initiated a multi-faceted program, "Keep Our Families Safe," which included an extensive media campaign focused on protecting America's children from harm.

The Civil Justice Foundation

In 1986, ATLA undertook another initiative to build a better America by establishing the Civil Justice Foundation. This foundation grew out of ATLA's cooperative work with some forty consumer and victims' groups that had come together at the urging of president Peter Perlman and the leadership of Roxanne Conlin to preserve the legal rights of accident victims. The Foundation's purpose is "to provide support and money to injured consumers through the organizations that represent them and to researchers looking for methods of prevention of injuries and treatment."

ATLA funded the Civil Justice Foundation with a $150,000 grant and provided it with an office and staff. CJF trustees who generously aided the initial fund-raising efforts included ATLA members Abraham Fuchsberg, Eugene Pavalon, Ronald Motley, Dianne Jay Weaver, and Monica M. Jimenez. More than a thousand trial lawyers around the country became founding supporters. Roxanne Conlin, former Assistant Attorney General of Iowa and future ATLA president, became the Foundation's first President in 1986. She was aided

by Joan Claybrook, former head of the National Highway Traffic Safety Administration and president of Public Citizen.

"We envisioned," said Conlin, "a foundation that would nurture small support organizations, help disseminate information, act as a clearinghouse, encourage injury-prevention research and spearhead the discovery of new ways to improve the lives of those already injured." In its first two years, the Foundation distributed more than $500,000 in modest grants to groups pursuing those goals. For example, grants were awarded to:

The International Dalkon Shield Victims Education Association, which works on behalf of the estimated 320,000 women worldwide who have suffered infections, infertility, miscarriages, and even death due to the Dalkon Shield IUD.

The People's Justice Alliance, a nationwide network of consumer and victim advocacy organizations.

People Against Hazardous Landfill Sites, a consumer rights and education group.

The Johns Hopkins Injury Prevention Center to support research focused on labeling for children's toys.

The National Safe Workplace Institute, supporting projects to promote workplace safety.

The Western Law Center for the Handicapped, which provides legal services for the disabled.

Former president Richard Gerry makes an important point: "The image of the trial bar and the trial lawyer depends upon the public's ideas about justice. The only way you're going to have a good image of a trial lawyer is to have a good image of the law." In the mid-1980s an even more powerful and well-financed coalition special of interests launched a new tort reform campaign whose image of the law was their own reform of the Golden Rule: Those with the gold make the rules.

12

Tort Wars II: The 1980s

Déja vu

As the 1980s opened, a repeat of the insurance crisis was a train wreck just waiting to happen.

The insurance industry's success in blaming juries for the crisis of the mid-1970s lulled the industry, state regulators, and the public into ignoring the true cause of the crisis. When investment prospects turned rosy once again, liability insurance companies fell into their favorite self-destructive pathology of cash-flow underwriting.

Industry observers warned that insurers were setting themselves up for a new crisis. "Rate War Rips Casualty Insurers," a *Business Week* headline stated on December 8, 1980. Average prices had dropped by 10 percent in 1979, and 15 percent in 1980. In the publication's opinion,

> executives of the nation's $100 billion property-casualty insurance industry have the shortest memories in corporate America. In the mid-1970s when the industry came perilously close to collapse. . . most insurers vowed never again to engage in self-destructive competition. But as insurers report their results for the third quarter of 1980, it appears that the lessons of the last downturn are being forgotten.

Inflation during the early 1980s, pumped up interest rates to nearly 20 percent. With returns like that, the liability insurance market turned into a frenzy of competition for customers. In December 1984, the National Association of Insurance Commissioners condemned this price competition as responsible for the industry's mounting underwriting losses. The Insurance Services Office, which provided ratemaking information to the industry, warned that "the price for commercial insurance was decreasing, sometimes sharply, as insurers vied for premium dollars to invest at high interest rates" with the result that "commercial insurance in the United States was being sold at below cost, even when investment income was considered." But insurance companies plowed right on past the danger signs.

Cash-flow underwriting reached an almost ridiculous extreme with "retroactive" insurance. For example, a consortium of carriers wrote coverage for the MGM Grand Hotel in Las Vegas several months *after* the hotel burned down. As reported in *Business Insurance* January 10, 1983, the companies were confident they could invest the premiums and reap a healthy profit before they had to pay claims.

The bubble burst in 1984, when interest rates and stock prices plummeted. Once again, underwriters panicked. They moved assets into reserves, forcing cancellations and nonrenewals, and drastically hiked premiums—often by several hundred percent.

Reinsurers

A small group of reinsurers played a large part in bringing about the insurance crisis of the 1980s. Reinsurers provide "umbrella" or excess coverage that allows the primary insurer both to spread the risk and free up surplus to sell more primary coverage. Most reinsurers were foreign entities, wholly beyond the regulatory powers of the states. By far the most important was Lloyds of London, which accounted for an estimated 25 to 40 percent of the American reinsurance market in the early 1980s.

Lloyds was already sailing on stormy seas, as Eugene Pavalon pointed out. The company faced record maritime losses and the collapse of the British pound sterling. It was also hit with scandal. Two underwriters had siphoned off some $55 million from a Lloyds member syndicate to buy yachts, villas, and a French pornographic film entitled "Let's Do It." No one was surprised when Lloyds declared in 1985 that its profits fell short of expectations. Taking a lesson from its American cousins, the company blamed American judges and juries for its woes.

Lloyds and other reinsurers issued a blunt ultimatum to American insur-

ance companies: unless limits were imposed on American tort liability, the reinsurers would invest their assets elsewhere. In 1985-86, they walked away from the American market.

The impact was devastating for American liability insurers, who suddenly found their reserves woefully inadequate. This accelerated the stampede of American insurers to raise premiums and cancel coverage until new sources of reinsurance were formed.

The Making of a "Lawsuit Crisis"

Business Week on March 10, 1986, wrote a fitting summation of the situation:

> During the price war, a popular technique called "cash-flow underwriting" probably caused the most damage to insurance balance sheets. Abandoning traditional underwriting standards, insurers competed fiercely for premium dollars they could invest in high-yield debt. They planned to pay losses against policies with the earning generated by high interest rates. When interest rates fell just as claims began to pour in, the party ended.

With careful management, these mistakes can be corrected. But instead, the industry has spent most of its time and energy lately mobilizing attacks on the U.S. tort system.

The Insurance Information Institute's idea of addressing these problems was to launch a $6.5 million national advertising campaign. Its aim, announced on the front page of the *Journal of Commerce* on March 19, 1986, was to "change the widely held perception that there is an 'insurance' crisis to a perception of a 'lawsuit crisis.'" The *Wall Street Journal* declared this to be "the definitive war to curb damage awards in lawsuits."

The public relations campaign opened with a series of "Lawsuit Crisis" advertisements in many national publications. The ads blamed lawsuits for a wide variety of calamities: vaccine makers were shutting down, local governments were cutting services, schools were canceling sports programs, obstetricians were not delivering babies, and even the clergy was afraid to give pastoral counseling. The ads urged the public to support reforms to "fix" the legal system.

The Insurance Information Institute and the newly-formed American Tort Reform Association, a formidable coalition of insurance and business groups, flooded the mainstream media with dire "news" about the crisis.

ATRA in particular made effective use of visual images. One ad showed a bumper sticker on a sports car which read, "Hit me. I need the money."

Another featured a pregnant woman in front of a closed obstetrics office and unhappy children at a closed swimming pool. ATRA was permitted to place its posters on buses and in subway stations in New York, Philadelphia and Chicago. Passengers on American Airlines were treated to a thirty-minute ATRA video on tort reform.

Journalists often accepted these assertions at face value, but those who investigated the facts found a different story. *Consumer Reports* published the results of its investigation in an August 1986 article whose title reflects its findings: "The Manufactured Crisis: Liability Insurance Companies Have Created a Crisis and Dumped It on You." The television news program *60 Minutes* reported on January 10, 1988, that alarmist claims that obstetricians, municipalities, school sports programs, and the clergy were cutting services due to liability concerns were "without basis in fact." The "lawsuit crisis" was, in the words of Ralph Nader, "one of the most unprincipled public relations scams in the history of American industry."

Washington Weighs In

This tort reform campaign also had an unmistakably partisan political overtone as the Republican administration in Washington entered the fray.

Business interests working through the Department of Commerce lobbied hard for federal support for tort reform. As early as July 15, 1982, according to Ralph Nader, a cabinet meeting discussed the demands from insurers, the chemical industry and machine tool industry for relief from state product liability laws. Despite the Reagan administration's ideological opposition to preemption of state laws, Commerce got the green light to support the manufacturers' tort reform proposals in Congress. President Reagan himself told an ATRA gathering that jury awards were starting "to eat away at the fabric of American life."

Tort reformers scored a major coup in 1986 with the publication of the Reagan Administration's *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*. The Report of the Working Group, headed by the administration's political point man, Attorney General Edwin Meese, was an unabashedly political document, containing neither original research nor objective analysis. The Working Group cobbled together anecdotes, statistics from dubious sources, and misinterpretations of data that were disavowed even by their authors. Nevertheless, the Report was cited as the principal justification for the enactment of tort reform in forty-two states.

The Working Group acknowledged that a major cause of insurance un-

availability and premium increases of "several hundred percent" was irresponsible price-cutting by liability insurers. However, the administration opposed any interference with the insurance marketplace. Instead, it proposed to interfere with the civil justice system.

ATLA's response was to seek out and publicize the most comprehensive and reliable research on conditions in the liability insurance and civil justice fields. Empirical studies conducted by the National Center for State Courts, the Rand Corporation, the U.S. General Accounting Office, the American Bar Foundation, independent researchers, and the insurance industry itself sometimes made for dry reading. But they demonstrated convincingly that the civil justice system was not the cause of the latest "crisis." It was merely a convenient scapegoat.

Most notably, the property-casualty industry, which publicly claimed it lost $25 billion in 1985, actually achieved a net profit of $2 billion that year and racked up a record $12.7-billion profit in 1986. The General Accounting Office forecast that the industry could expect even larger profits in the years to come. Not surprisingly, property-casualty insurance company stocks consistently outperformed the Dow Jones average.

War on Fifty Fronts

Much of the tort reform battle during the 1980s was fought in the state legislatures. Tort reformers lobbied hard for their agenda in nearly every state assembly. Many bills were specifically directed at product liability and medical malpractice lawsuits. Others imposed restrictions on all tort actions for personal injury. Once again, caps on noneconomic damages, elimination of joint and several liability, and modification of the collateral source rule were frequent proposals. Manufacturers also pressed for punitive damage caps, statutes of repose and a state-of-the-art defense. Limits on contingency fees, changes in the rules of evidence, and numerous other changes were advanced. Thousands of bills were dumped into the state legislative hoppers during 1986-88. Over 350 bills were introduced in California alone. Trial lawyers in every state devoted unprecedented effort and money defending the basic right of Americans to seek legal redress from those who wrongfully injured them.

In several states, tort reformers employed a new, more fearsome tactic: placing tort reform on state ballots in the form of voter initiatives.

Ballot initiatives require huge amounts of money. Backers must comply with any number of election rules, collect tens or hundreds of thousands of voter signatures supporting placement on the ballot, and wage a state-wide election campaign in which the initiative is the candidate. Tort reformers

had the good fortune of having deep corporate pockets that could fund such efforts.

Ballot initiatives are also very expensive to oppose. Instead of dealing with a finite number of key legislators, trial lawyers were required to persuade voters throughout the state to oppose the measure at the polls. They would have no opportunity to work with legislators to ameliorate the harshest elements of the proposal. And a successful referendum is much more difficult than a statute to repeal, amend, or challenge in court.

Dale Haralson, president of the Arizona Trial Lawyers Association, described for the Board of Governors his state's experience in fighting a ballot initiative in 1986. AzTLA spent $3,650,000 to defeat Proposition 103 which would have amended the state constitution to allow caps on damages, regulation of the contingent fees, and other tort reforms. The Arizona trial lawyers raised money through voluntary contributions and special assessments and cut every other part of the state organization's budget. On election day, AzTLA emerged victorious—but $500,000 in debt. Even when tort reformers lose at the ballot box, Haralson warned, they can bleed their opponents dry.

In 1988, the insurance industry placed initiatives on the ballot in California, Florida and, again, in Arizona. In all, the industry spent an estimated $150 million on their referendum campaigns for no-fault auto insurance and tort reform. The California Trial Lawyers Association spent $13 million to defeat the initiatives in a stunning victory. In Florida and Arizona, the state associations also prevailed, but drained their treasuries to do so. Others were facing similar circumstances. President Bill Wagner warned that some state organizations were in such dire straits that they might leave the organization. "And that meant ATLA was at a crisis," he said.

Pleas for direct ATLA financial assistance to the states led to contentious debates at the Board of Governors. ATLA could not meet all the financial needs of the state organizations. Even if the money could be found, how could ATLA assure it was spent responsibly without destroying the autonomy of the local affiliates? ATLA's strategy for battling tort reform needed to address these problems.

Many Hands

Peter Perlman, elected in 1985, was the first ATLA president to face the new wave of tort reform. Famous for his perpetually sunny smile and incorrigibly loud sports coats, he was one of the very few presidents who ran unopposed for every ATLA office, parliamentarian to president.

His first order of business was to shore up the state organizations. He won

Board approval for a State Development Fund which would provide grants of $25,000 to the state associations to build their membership and political action activities. The following year, SDF grants were made proportional to state contributions to ATLA PAC and the increase in state members who joined ATLA. ATLA held frequent strategy sessions with the state organizations and provided the latest research and analysis for their use. ATLA also assisted in producing advocacy ads for television, radio and newspapers.

Perlman's disarming ease made him an effective ATLA spokesman, even in front of suspicious audiences. "Just look at the facts, folks," he often began. The property-casualty industry was at that moment enjoying record profits and a healthy prognosis. Yet it feels entitled to a subsidy from injured workers and consumers. Lloyds of London insures movie stars' legs, satellites, and Persian Gulf tankers, Perlman continued, but complains that American courtrooms are too risky. Thanks to McCarran-Ferguson, the entire industry enjoys a unique license to fix prices and manipulate markets in a way that would land any other business at the wrong end of a federal antitrust prosecution.

Most importantly, Perlman recognized that this crisis was much broader and more destructive than that of the mid 1970s. This was not simply a matter of well-off doctors complaining about higher premiums. Local governments, mom-and-pop businesses, even day care centers were facing hardships and looking for solutions. And the facts, when delivered by the trial lawyers—especially when delivered by trial lawyers—were not getting through.

Perlman developed a radically different strategy. ATLA would no longer try to be the sole defender of the tort system and voice of injured victims. It was time for victims to speak for themselves and for trial lawyers to work with other organizations who could speak credibly for workers and consumers.

Perlman had seen the effectiveness of this approach while serving as ATLA's liaison to the Florida Academy of Trial Lawyers during their battle against medical malpractice tort reform. "The key to the success they had in Florida was that they were able to bring to their effort consumer groups, black and Spanish groups, the retired elderly groups, and employee groups," he said. Perlman was also convinced that injured victims could speak for themselves. "They did not have the self-interest image that the trial lawyers had; they could get to the issues much easier than the trial lawyers could."

He met with Ralph Nader, Public Citizen's Joan Claybrook, representatives from the Consumer Federation of America and other groups. Soon he had the nucleus of a consumer coalition, working through a committee headed by Claybrook and Roxanne Conlin. ATLA's mid-winter meeting in Orlando in 1986 was dedicated entirely to reaching out to other organizations. The coalition grew to thirty groups speaking for thirty-five million people.

The State Attorneys General Strike Back

ATLA's efforts received a welcome assist from a group of state attorneys general, the governmental officials who exercise regulatory enforcement over the insurance industry. The Ad Hoc Committee on Insurance of the National Association of Attorneys General delivered a sharp rebuttal to the Reagan Administration Working Group. Their 1986 report stated unequivocally that the insurance crisis "is not caused by the civil justice system but by the unrestrained price cutting recently undertaken by the industry when it attempted to obtain as much new business as possible to invest premiums at the then high interest rates." The attorneys general also found no evidence that the proposed tort reforms would prevent a similar crisis in the future.

The state attorneys general followed up with a two-year investigation, subpoenaing numerous industry documents and deposing hundreds of witnesses. On March 22, 1988, they filed lawsuits under the Sherman Anti-Trust Act that would ultimately include twenty-one states as plaintiffs. The suits alleged that U.S. insurers conspired with Lloyds and other reinsurers and the Insurance Services Office to make insurance unaffordable or unavailable to many businesses and governmental entities.

Texas Attorney General Jim Mattox minced no words. This was "the most insidious consumer fraud perpetrated upon the American public in decades. . . . These defendants simply could not pass up the temptation to conspire to force up insurance rates by creating what appeared to be an insurance crisis in this country."

The states' federal antitrust lawsuit was destined for a long ride on a legal roller coaster. In September 1989, U.S. District Judge William Schwartzer dismissed the suit, holding that the McCarran-Ferguson Act exempted the industry's conduct from federal antitrust law. Two years later, the Ninth Circuit reversed, ruling that actions amounting to a boycott or coercion were not protected. The U.S. Supreme Court in June 1993 ruled that the suit could proceed, but imposed a narrow definition of boycott that made it more difficult for the states to prove their case.

That proof would never be tested in court. In October 1994, the parties reached a settlement. The defendants agreed to pay $36 million to the states. In addition, the Insurance Services Office would be restructured to reduce its control over the rates set by insurers. Unfortunately, in a tremendous disservice to consumers, the state attorneys general agreed to seal most of the evidence they had uncovered. However, their aggressive investigation confirmed ATLA's own analysis of the insurance crisis and kept the industry itself uncomfortably in the spotlight.

A Call to Arms

When Robert Habush assumed the presidency in 1986, he took command of a heavily embattled garrison. ATLA was facing a flood of "lawsuit crisis" propaganda, hundreds of tort reform proposals in state legislatures, and special interest legislation affecting products liability, admiralty and aviation cases in Congress.

In the past, most trial lawyers were content to stand back and let their skilled leaders and lobbyists wage their legislative battles. Those leaders and lobbyists, in fact, preferred that the rank and file not get too actively involved. Not this time. Habush issued a "call to arms" in *TRIAL* and at every gathering he could address. This time, he stated, no trial lawyer could stand on the sidelines. All were needed, not only for their political action contributions, but also to devote their time and energy to ATLA's committees, communicate their views to their representatives, and take every opportunity to educate the public about what they stand to lose.

Habush knew he could not take for granted that all trial lawyers would answer the call enthusiastically. He had won the presidency after a hard-fought and expensive election campaign, defeating the popular incumbent vice-president, Sheldon Miller. Habush needed to gain the respect and support of those who had wanted a different hand at the helm.

He earned that respect and support by giving ATLA what it most desperately needed: strong leadership. ATLA was battling for its very survival, he insisted. He worked ceaselessly through eighteen-hour days to bend every element of the association toward winning that battle.

Habush launched a "truth campaign" to respond to inaccurate media reports with facts and figures that exposed the fraudulent nature of the "lawsuit crisis."

He also pushed for repeal of the McCarran-Ferguson Act, to clear the way for federal regulation of the insurance industry. He pointed out that insurance had become as important to American business as water and electricity. "They have become a damn big utility," Habush told Congress. Yet they were wholly unregulated, except by ineffective state insurance commissioners. What was needed, he told lawmakers, was "direct regulation by the Federal Trade Commission."

More Tort Reform Failure

The insurance industry was starting to feel its back against the wall.

The expensive campaign to sell tort reform as the cure for high premiums was coming back to haunt the industry. Like the doctors, businesses

found that tort reform did not spell relief. The Alliance of American Insurers told New Jersey lawmakers that "liability insurance rates would go down" if they capped damages, eliminated joint and several liability and rejected the collateral source rule. The lawmakers complied. Yet, New Jersey experienced rate hikes that would earn it a place in the top ten states with the largest premium increases during 1985-98. The pattern was repeated in state after state.

Even the Insurance Services Office, which guides ratemaking for the industry, abandoned the carefully cultivated notion that tort reform would reduce insurance costs. It announced in October 1986 that "ISO cannot immediately reflect any cost effects of tort reform in its filings." In fact, the ISO conducted an extensive study which proved convincingly that tort reform *cannot* lower premiums. The 1987 study, *Claim Evaluation Impact, National Overview,* examined the impact of damage caps, relaxation of the collateral source rule, modification of joint and several liability, limits on contingent fees, limits on punitive damages, modification of comparative negligence rules, and other reforms. ISO concluded that the effect of these reforms on insurers' indemnity payments, and therefore on premiums, "generally ranged from marginal to imperceptible."

This spelled trouble for the insurers' legislative and public relations agenda. In a November 7, 1988, editorial, the *National Underwriter* bluntly stated, "Let's face it. The only reason tort reform was granted in many states is because people accepted our argument that it was needed to control soaring insurance rates." Now, the industry needed to "prepare for the backlash."

Legislative attention, which the industry welcomed when tort reform was its sole focus, was becoming decidedly uncomfortable. State lawmakers began calling for greater disclosure by insurance companies. In addition, criticism of the McCarren-Ferguson antitrust exemption by ATLA and consumer organizations was attracting congressional attention. Federal regulation could become a real possibility. The industry appeared willing to jettison the myth that an out-of-control tort system was driving premiums skyward.

The Insurance Information Institute, inventor and top salesman of the "lawsuit crisis," finally acknowledged the truth. In 1987, the III published *The Liability Crisis—A Perspective,* which was also printed in the *Villanova Law Review*. Senior Vice President Sean Mooney, stated:

> The basic factor behind the large price increases in commercial liability insurance in 1985 and 1986 was a six-year period of intense price competition . . . . The incentive of increased investment income from high interest rates led to a period of deep price cutting. The

> interest rate factor alone would have caused wide gyrations in the price of liability insurance, absent other considerations of excessive competition and developments in tort law.

The III continued to complain that there were too many lawsuits and that tort law was unfair to defendants. But the promise of the "lawsuit crisis" campaign—to bring down the high cost of insurance—became, in Watergate parlance, "inoperative."

The Tort Reform Cult

Robert Habush recognized that the insurance industry was being pushed out of the tort reform driver's seat. ATLA and the jury system were facing a new and more dangerous alliance.

They were small businesses, day care centers and ski resorts. They were professionals such as architects and accountants. They were city and town governments and charitable organizations.

"These people have now organized into a very effective political force that really doesn't give a damn anymore about insurance even though they were screwed by insurance companies. That's not their agenda," Habush explained. "They believe they should never be sued no matter what they do." In their view, the tort system serves no good or useful purpose. It was something run by lawyers for their own benefit, and it threatened their own good work. "This became a religion with them. It had nothing to do anymore with the cost of the insurance," Habush declared. "It's become a cult."

And they were far more difficult to oppose. Unlike the insurance industry and big corporations, these small businesses, local governments, and charities were tort reformers with human faces. They received sympathetic portrayals in the media, and often touched people in lawmakers' home districts. Debunking the insurance industry's propaganda was no longer sufficient. "Legislators knew intellectually that there was no litigation explosion in their states," Habush said. "But they also wanted to be reelected."

Habush had put his finger on a profound shift in legal thinking. The true believers in the tort reform cult reflected a broader movement driven by ideology, politics and money. It would be several more years before most trial lawyers recognized its full import .

The mid-1970s were unhappy times in many boardrooms, where the captains of business and industry increasingly blamed heavy-handed government regulation for economic malaise and "stagflation." Many Americans were becoming disaffected with government. The notion that government was the

problem, rather than the solution, was building up a head of steam and soon would carry Ronald Reagan to the White House.

Law and Economics

Meanwhile, a handful of conservative scholars was fleshing out an ideological platform for the new movement. "Law and Economics," most closely identified with University of Chicago academics, soon became all the rage on law school faculties.

Its premise is fairly straightforward: optimum efficiency is achieved when economic relationships are freely negotiated in a fully informed marketplace. The function of the law is to enforce those relationships. Contract is king. Tort law, which reallocates the costs of injury to the party that created the risk, is illegitimate. Juries in particular are incompetent and inefficient.

Like many theories of surpassing elegance on paper, this one leaves a great deal to be desired as a rule of law for the real world. First, consumers in real world markets face grossly unequal information and bargaining power. History has yet to record the first consumer who was able to negotiate a change to the warranty for an appliance at Wal-Mart or power tool at Home Depot. In addition, many who are wrongfully injured had no part in negotiating the risks. Workers, children and bystanders are often injured by products they did not themselved purchase. Finally, it is unexplained why the decisions of Americans as consumers are deemed infallible, while the same Americans sitting as jurors and presented with much more information are not to be trusted.

Nevertheless, books and law review articles, bristling with graphs and mathematical formulae, expounded upon the Law and Economics theories. Popularizers like Peter Huber promoted them to a broader audience. The idea that the law ought to be the handmaiden of economic efficiency and corporate well being quickly gained a following, not only in the business community, but among judges.

This was not a spontaneous enlightenment. It was the result of an extensive and expensive campaign by a handful of major corporations, insurance companies, and conservative foundations. Extensive research by the Alliance for Justice, published in 1991 under the title *Justice for Sale: Shortchanging the Public Interest for Private Gain,* exposed the massive financial backing of the movement. Nan Aron, president of the Alliance, stated that business interests "invested millions of dollars in a multi-faceted, comprehensive and integrated campaign to mold a new American jurisprudence that favored protecting and enhancing corporate and private gain over preserving social justice and individual rights."

The Alliance described the flow of vast sums of money poured by major

corporations into a network of conservative public interest law firms, think tanks, and even law schools to "build a new legal vision" in which the chief purpose of the law was not to provide legal redress for injury, but to act as an "adjunct of the market place." Corporate underwriters for this effort included Exxon, Pfizer, RJR Nabisco, General Electric, Dow Chemical, Monsanto and Aetna Life and Casualty, individually or through their trade associations. Contributions supported "public interest" law firms that promoted business interests, such as the Pacific Legal Foundation. The funds also financed seminars to educate judges in the theories of Law and Economics.

Much of this money flowed through conservative foundations. The Olin Foundation, for example, had donated some $13 million by 1990 to law and economic programs in law schools. The Richard Mellon Scaife Foundation gave millions to promote the work of conservative legal scholars and law students and to sponsor defense-oriented public interest law firms. The Smith Richardson Foundation donated to universities to promote the study of law and economics. The Lyne and Harold Bradley Foundation was the leader in financial grants, doling out over $75 million between 1985 and 1990, largely to think tanks and organizations that made the intellectual case for transforming the legal system.

Among the happy recipients of this corporate cash, the Alliance noted, were the American Enterprise Institute, the Federalist Society, Free Congress and Educational Fund, the Heritage Foundation, the Manhattan Institute for Policy Research, and the University of Chicago.

Certainly most Americans did not follow the theories and manifestoes of these organizations and scholars. But the basic message affected popular opinion: tort law is unfair to American businesses and corporations, which were being bullied and victimized by injured plaintiffs and their lawyers. It was, in the words of ATLA Public Affairs Director Linda Lipsen, a kind of "corporate populism." A seeming oxymoron, but sometimes that is the nature of a cult.

A New Battlefield

Generals often fail because they march onto a new battlefield with a strategy from the previous war. Bob Habush did not make this mistake. ATLA could not fight alone in defense of the civil justice system, as it had in the 1970s. The onslaught was simply too well organized and well financed. Moreover, legislators and the public, unconcerned by the blatant self-interest of tort reformers seeking to avoid accountability, often dismissed the message from trial lawyers as self-serving. Peter Perlman had astutely found an effective way to make the voice of victims heard: let the victims speak for themselves.

Habush's first move was to forge the collection of consumer, senior, environmental, and labor organizations that Perlman had recruited into a politically effective grass-roots coalition. A new Director of Field Operations was charged with organizing these groups at the local level. Major organizations included Consumer Federation of America, Consumers Union, Public Citizen, Public Interest Research Groups (PIRG), along with education and labor groups. They met frequently in Washington, D.C., to exchange information and discuss their common goals and strategies. Those organizations, in turn, worked with their local chapters and affiliates.

Soon coalition groups were active in sixty cities in thirty states. They attracted media attention at press conferences where defective products were put on display and victims could tell their stories. They appeared at legislative hearings, dispelling the myth that only self-interested trial lawyers opposed tort reform.

ATLA broadened its national public relations program. In 1987, ATLA kicked off a series of touring media events. The first was the "National Campaign Against Toxic Hazards." It was followed by "National Victims Day," the "National Unsafe Products Road Tour," and "Insurance Companies Pay No Taxes." The coalition also proposed a model insurance reform act aimed at breaking the cycle of cash-flow underwriting by requiring that rates be actuarially justified.

Habush brought with him fifteen years of state lobbying experience, and he wasn't shy about wielding whatever political clout he could bring to bear on legislators. He could speak to the fine points of joint and several liability. "But I wanted to talk political action money. I wanted to talk politics. I wanted to talk power—power represented by thousands of trial lawyers who in turn represented hundreds of thousands of little people and millions of the public seeking their rights in courts."

This political straight talk was amplified by a network of politically savvy and connected trial lawyers around the country who could be counted on to deliver ATLA's message directly to their representatives. Habush tapped Russ Herman for the job of rejuvenating ATLA's neglected key-person network. Herman and his team of Louisiana volunteers burned up the phone lines tracking down and recruiting members with access to legislators. In a matter of months he had built a dependable and responsive army of grass roots volunteers who made certain that legislators would hear ATLA's side of the story.

Habush worked to strengthen the state trial lawyer associations through State Development Fund grants to increase membership and augment political action activities. He also insisted that ATLA put its own house in order, supporting Board resolutions that condemned lawyer solicitation at disaster

sites, frivolous lawsuits, and excessive fees. His strategy was to remove the misconduct of some lawyers as a front-line issue and keep the focus on the loss of consumer and worker rights under tort reform.

By the end of his term, Habush had committed every available ATLA resource to the defense of the civil justice system.

Gentle General

Eugene I. Pavalon stepped up to the presidency of ATLA in 1987. From the outset, he faced high-stakes crises inside and outside the organization.

Internally, Pavalon had to deal with the unexpected resignation of executive director Marianna Smith, who had accepted an offer to head the Manville Trust. Following a nation-wide search for a new executive director, ATLA selected Thomas H. Henderson, Jr., Counsel of the District of Columbia Bar and a sixteen-year veteran of the Department of Justice, where he had served as Chief of the Public Integrity Section.

Externally, ATLA was battling tort reform at both the state and federal levels. Pavalon continued to build upon the essential elements of ATLA's battle plan: the victims' coalition, a high-profile "truth campaign," hard-nosed lobbying and political action, and the State Development Fund. Like Habush, Pavalon relied on his experience. He had successfully lobbied Illinois state legislators to change the wrongful death statute, increase workers' compensation payments, adopt comparative negligence, and eliminate the guest statute. His temperament and style, however, were markedly different from his predecessor's.

Eugene Pavalon became a trial lawyer when he was hired by Louis Davidson, an early leader of the Illinois plaintiffs' bar. "Lou spoke about personal injury law as if it was almost sacred," Pavalon recalled. "Trial law was a profession fundamentally important to society."

In the early 1960s, Davidson and Pavalon were involved in the Corvair litigation against General Motors, working with David Harney, Dean Robb, Harry Philo, Barney Masterson and other attorneys. At one of their meetings, "a tall, skinny, dark haired young man started to ask questions. He was very, very intense. He kept asking about the social and economic impact of what we were doing," to the considerable annoyance of some of the litigators. That was Pavalon's first encounter with Ralph Nader, who was gathering information that would ultimately become *Unsafe At Any Speed.*

Pavalon and Nader struck up a friendship that would be renewed as ATLA worked with its consumer coalition partners. "I've always looked at our practice as representing individuals and asking the question: What are we doing

for society? Nader's book was all about that concept—the human element of why our civil justice system is so damn important—especially for safety."

Pavalon, whose practice included labor law, also worked to win the support of the AFL-CIO. He employed a soft-spoken emphasis on the reasonableness of ATLA's position. But there was no mistaking his determination to defend the justice system. "We always have to approach our legislative programs and agenda with the thought of some balance and equity," he noted. Insurance companies are entitled to a profit. But the crisis faced by their customers was the result of the industry's own mismanagement and greed. When the tort reformers used that crisis to justify eroding the rights of ordinary Americans, he stated, "trial lawyers had no choice but to speak out."

Hands Across the Water

Bill Wagner, elected president in 1988, followed the battle plan laid out by his predecessors. He kept Robert Habush, Eugene Pavalon, Leonard Ring, Robert Begam and other seasoned veterans in key ATLA positions. He also set about improving ATLA's internal structure.

Wagner came to ATLA from the same Florida powerhouse plaintiffs' firm that produced ATLA presidents Perry Nichols and Bill Colson. Like many trial lawyers who learned their trade at the Nichols firm, Wagner came to ATLA with an appreciation for organization and sound business practices.

As chair of the Home Office and Budget Committee during the 1970s, he spearheaded the drive to make the HOBC an independent standing committee elected by the Board, shielded from the influence of the president or the machinations of any small clique of ATLA insiders. "We had to eliminate the internal fighting that took place each year as to how we spent money," he explained. Budget decisions were getting tangled in political alliances and personal relationships. "We were getting bigger in membership and spending money on a lot more things. We knew the HOBC would have to be a business, operated as a business, and not just like a typical boy scout meeting." He insisted that every HOBC decision be supported by sound economic reasoning, and his presentations to the Board were invariably accompanied by charts and pages of statistics.

Wagner also pushed for the creation in 1974 of the position of President-Elect, who would step up to the presidency the following year. "It was important to have some continuity," he insisted. Given the association's size and the importance of its activities, "it was simply irresponsible to wait until the annual convention to select a leader for the coming year."

As a Florida State Committeeman and later as ATLA Governor repre-

senting Florida, Wagner witnessed a productive cooperation between ATLA and the state organization. When no-fault was being considered in Florida's legislature, "we had Leonard Ring and Craig Spangenberg come to Florida and help us in our legislative battles. I remember how just so God awful thankful we were that these ATLA leaders would come halfway across the country to help us."

Wagner also extended ATLA's vision beyond America's shores. Samuel Horovitz had long envisioned the formation of trial bar associations in Europe. Wagner turned that vision into reality by supporting the establishment in London the Association of Personal Injury Lawyers (APIL).

"I am proud of APIL," he said. Wagner recalled the skepticism of the English lawyers who felt that there was too great a division between barristers and solicitors to create a single trial bar association. "I got them in a room, told them about ATLA's experiences and the obstacles ATLA overcame and its effect on legislative policies and on clients' rights. He predicted there would eventually be a single trial bar in England, as in the United States.

APIL quickly grew to nine hundred members. The 1989 Mid-Winter Convention featured a joint educational program of American trial lawyers, British barristers and solicitors. In April 1992, the Lord Chancellor's office approved a committee report establishing a single trial bar, eliminating the rigid divisions between barristers and solicitors. The formation of APIL may yet serve as a first step in restoring the right to trial by jury in the nation of its birth.

At about the same time and a little closer to home, Canadian ATLA member Bruce Hillyer was meeting with a small group of his fellow personal injury attorneys at a restaurant in Ontario. In a story not unlike NACCA's own founding, the group was convinced of the need to organize to combat no-fault proposals and other inroads against the rights of their clients. In September 1991, the Ontario Trial Lawyers Association held its first meeting, electing Hillyer president, John McLeish vice-president, Andrew Snelius secretary, and Jay State treasurer. OTLA stood along side Canada's other affiliate, the British Columbia Trial Lawyers Association, and quickly grew to become Canada's largest trial lawyers' association.

Bill Wagner also called upon trial lawyers to take a hard look at their profession as a business, particularly at how they treat their clients. "Lawyers have to start thinking about clients as consumers who will—and should—insist on fair treatment."

"Clients have a right to accurate and specific information about what they should expect from the lawyer who takes their case," he insisted. Nor should attorneys charge excessive contingency fees in cases where progress in the law has reduced the risk of nonrecovery. Wagner also suggested that trial lawyers

may need to consider absorbing some litigation expenses, rather than imposing all costs on the client.

Unless lawyers take responsibility for their profession, he warned, "the public is going to get fed up and say to the legislature, 'You go out and do it.'" The result may be the end of the entrepreneur trial lawyer and control of the profession by a government regulatory agency.

Kicking Open the Doors

Russell Herman, who became president in 1989, spent much of his career urging trial lawyers to give to ATLA. He was a stocky, pugnacious evangelist on fire with the righteousness of ATLA's cause. But when he attended his first Board meeting as a newly-elected governor in 1985, he was not at all thrilled by the experience.

Russ followed in the footsteps of his father, a prominent NACCA trial lawyer. Harry Herman had gone to Tulane on a work assistance scholarship, Russ recalled. "He swept floors, worked as a janitor, cleaned toilets and a lot of other things. But he had a great deal of dignity and also a lot of resentment. There was great inequity in the law. He promised, no matter how well established, or whatever he achieved, he would continue to represent people who most needed lawyers."

"My brother and I would make house calls with my dad. One of the great lessons we learned was that he was not just in this profession to give legal advice or fight cases in the court. His chief obligation was to help restore human dignity."

Russ joined ATLA in 1967, following his own graduation from Tulane University Law School. He devoted himself to the Louisiana Trial Lawyers Association, where he held every office, including president. Finally, his fellow trial lawyers drafted him to represent them as a governor on the ATLA Board. "I kept telling them to get somebody else. Finally, I missed a meeting and they nominated me."

What he saw at his first Board meeting was a handful of leaders who set ATLA's course, with the rest of the Board and state delegates expected to follow "like cows." "They were a bunch of snobs," he complained. "They didn't want anybody to talk."

But that was not entirely the case, as Herman soon learned from Leonard Ring. "I probably would have resigned from the ATLA board after my first year had it not been for Leonard. He put his arm around me and said, 'You don't know me but I know you. Come out and let's talk.'" Two hours they talked, and Russ Herman was on wholeheartedly on board.

He put his zeal and organizational abilities to work by taking on the formidable task of rebuilding ATLA's "key-person" network, which proved to be a powerful weapon in the tort reform battles in Washington. That effort also created a contingent of enthusiastic supporters who appreciated Herman's dedication and propelled him to the presidency.

Herman opened doors and swept away elitism wherever he found it. He appointed women, African-Americans and Hispanics to committees at every level. He demanded that women and minorities appear as speakers on educational programs, and he reorganized the elections committees to encourage women and minorities to move into the top elected offices. Fittingly, his mother's great aunt was Emma Lazarus, who penned the famous words inscribed on the Statue of Liberty. The influx of new and diverse faces would change the complexion of ATLA for the decade of the 1990s and beyond.

He accomplished this without the slightest pretense of tact or diplomacy. "I am a pretty abrasive guy. I am result-oriented." Looking back, he acknowledged, he might have chosen a more temperate approach. "But results speak for themselves."

Sunshine in the Law

It was Russ Herman who pressed forward with one of ATLA's most important initiatives to build a better America.

When Carol Barbee collapsed while gardening, her husband rushed her to the nearest emergency room, where doctors at first treated her for an apparent heart attack. By the time they discovered that the cause of Carol's distress was the failure of an artificial valve that had been implanted in her heart, it was too late. The manufacturer, Shiley, Inc., was well aware of such valve failures. For years, the company had settled numerous lawsuits by victims, insisting on nondisclosure of crucial documents and forbidding plaintiffs and their attorneys from discussing any aspect of their cases. Carol Barbee was a victim of court secrecy.

She was not the only victim. A congressional investigation determined that Shiley's secrecy not only hampered prompt treatment by doctors, it deprived researchers of crucial information for developing techniques for early and accurate detection of valve fractures. And it kept the FDA in the dark. At least three hundred people died due to failure of their Shiley heart valves. The congressional investigation concluded that there were "numerous instances where death might have been averted" had Shiley not concealed the danger behind a veil of secrecy.

Carol Barbee's death shone a light on one of the most disturbing legal de-

velopments during the 1980s. Courts had always exercised their inherent power to protect information from public disclosure for good cause, such as to prevent disclosure of a company's trade secrets. During the 1980s, however, tort defendants abused this protection. In court-approved settlements and protective orders, they insisted on the return of all documents obtained in discovery and on confidentiality concerning the facts of the case. In some instances, courts sealed the entire record, essentially making the case disappear from public view altogether.

The purpose of secrecy tactics was to avoid embarrassing publicity, to make it more difficult for other victims to pursue their claims in court, and to keep government regulators at bay. Drug companies, automakers, producers of toxic wastes, and other defendants took shelter in secrecy. The result was that Americans were injured and killed by dangers that should have been known to safety agencies, the medical community, and the public.

Plaintiffs' lawyers themselves were drawn into complicity when defendants demanded secrecy as the price of document discovery or an adequate settlement. Some attorneys felt that their obligation to their clients left little choice but to agree.

The Board of Governors in May 1989 adopted a resolution calling upon courts and trial lawyers to resist unwarranted secrecy agreements and orders. A few months into his presidency, Russ Herman declared an all-out war on the practice. He inaugurated a series of ATLA Alerts, which shone the media spotlight on products whose dangers had been kept secret. Drain cleaners, electrical heat tapes, garage door openers, and the drugs L-tryptophan and theophylline were highlighted in press briefings that included statements by injured victims and formal notifications to federal safety agencies urging action.

TRIAL published a series of articles condemning court secrecy. Joan Claybrook and Robert Adler pointed out that hiding information about product hazards undermined the efforts of the CPSC, FDA and other agencies to protect consumers. Francis Hare, Jr. and James Gilbert, leading members of the independent Attorneys Information Exchange Group and co-authors of *Confidentiality Orders*, the only text on the subject, outlined strategies for resisting secrecy. Hare and Gilbert, along with Stuart Ollanik, expanded their work into a book, *Full Disclosure*, published by ATLA Press. Other *TRIAL* articles by Eugene Pavalon, James Lowe, Martin Freeman and Robert Jenner advocated the public's right to information about dangerous products.

At the same time, a handful of investigative journalists was working to expose some of the dangers to consumers that defendants had kept hidden. *Washington Post* reporters Benjamin Weiser and Elsa Walsh prepared a series entitled "Public Courts, Private Justice." Among their disclosures were documents

showing that General Motors and pharmaceutical maker McNeill Labs were able to hide fatal dangers in their products through aggressive use of secrecy orders. Reporters Barry Meier of *Newsday* and Steve McGonigle of the *Dallas Morning News* uncovered similar abuses. Daniel Zwerdling of National Public Radio's *All Things Considered* reported on Zenith television sets that sometimes burst into flames due to a defective electrical component. The company settled hundreds of claims in exchange for secrecy, including one incident that nearly burned down the state capitol building in Austin Texas, killing a man. ATLA joined with the Society of Professional Journalists in 1990 to conduct a conference on court secrecy and support the journalists' efforts to uncover hidden dangers.

ATLA filed *amicus* briefs in several courts, supporting petitions to lift unwarranted protective orders. ATLA also worked for legal changes to restrict the use of court secrecy in matters affecting public health and safety. Two prominent successes were the Sunshine in Litigation Act, adopted by the Florida legislature, and an anti-secrecy rule adopted by the Texas Supreme Court.

Michael Maher, elected president in 1990, pressed forward with the campaign to "demolish the wall of secrecy." ATLA Alerts, he pointed out, offer trial lawyers "the rare opportunity to help countless people *before* any harm is done." His successor, Bob Gibbins, continued the ATLA crusade. As vice-president, he personally appeared on ATLA's behalf in a Texas court and successfully argued in support of a motion to lift a protective order involving Shiley heart valves.

This campaign was intended to prevent deaths and injuries. One other effect, however, was to take the wind out of the sails of the tort reform efforts. The ATRA *Reformer* complained:

> We don't know whether ATLA has planned this or not, but their so-called "Anti-Secrecy Campaign" has had a tremendously disruptive effect on our work in a number of states. State legislators have been candid with us about their reasons; they say they get much better press in exposing the bogeyman of corporate secrecy than they do in holding dull hearings on the need to abolish things like the collateral source rule.

Building For the Future

By 1991, the wave of tort reform had diminished somewhat, and Bob Gibbins was able to focus on building ATLA's membership, which had been eroding for ten years. He established the New Lawyer category to offer more afford-

able membership to starting attorneys. Gibbins also gave well-earned recognition to ATLA's long-time members. Borrowing a title of honor often used by Tom Lambert, he established ATLA Stalwarts, trial lawyers who have belonged to ATLA for twenty-five years or longer. Gibbins also presided over the entrance of the first inductees into the ATLA Hall of Fame, to "acknowledge and honor those members who have made extraordinary contributions to ATLA, the civil justice system, and the overall public interest in America."

Roxanne Barton Conlin began her term as president in the summer of 1992, just at the time when President Bush was ridiculing trial lawyers in tasseled loafers. Her gift to ATLA was her boundless energy. She traveled constantly, defending the civil justice system and collecting "enough tiny soaps, shampoos, and hand lotions to supply all of Iowa's shelters for battered women and the homeless for the next year." Indeed, with her support, ATLA cosponsored a program focused on preventing violence against women. She also made structural changes in ATLA's outreach effort to women and minorities.

Barry Nace, of Washington, D.C., brought to the presidency in 1993 a depth of experience in pharmaceutical litigation. As plaintiff's counsel in the *Daubert* case, Nace knew the importance of expert testimony, and he made the crucial link between fair rules regarding experts and the right to trial by jury. Indeed, he wrote most often and most passionately in *TRIAL* magazine of the importance of the Seventh Amendment and the role of the civil jury in holding powerful corporations accountable.

Larry Stewart came to office in 1994, after devoting a great deal of his time and effort to improving the professionalism of ATLA and of ATLA attorneys.

Looking back, Stewart viewed the years culminating in his presidency as a period during which ATLA "seemed to mature as an organization." For many years, ATLA had depended heavily upon the personal skills of a powerful president. Steps toward more openness and professionalism began with Bill Wagner, who appointed David Shrager to reform the Education Program and remove it from the direct control of the president.

Stewart pushed these developments forward. Under his leadership, the Organization and Home Office Committee undertook a top-to-bottom review to make the association more streamlined and effective. The budget of the president was brought within the overall ATLA budget, subject to oversight by the Board. In addition, the Executive Director was made the CEO of ATLA, removing much of the day-to-day control of staff operations from the president. Stewart also held a financial summit to examine ATLA's long-term financial picture and make improvements in the organization's financial operations.

As president, he soon faced a situation that no ATLA president had confronted: a Congress in which both houses were controlled by Republican majorities committed to reforming away the tort rights of Americans. Battles on Capitol Hill consumed much of his time and much of ATLA's resources, but he also attended to long-range improvements.

He addressed a problem that had plagued the association since the days when Sam Horovitz had to pass the hat at Board meetings to raise funds for worthwhile projects. Stewart, Robert Habush and ATLA Executive Director Thomas Henderson laid out the blueprints for an Endowment that would provide a stable source of funding for academic research and public information about the civil justice system. However, the 1994 congressional elections required ATLA to shelve those plans and deal with more immediate political exigencies.

13

Tort Reform On Capitol Hill

Fights on Many Fronts

In 1981, ATLA faced a new, fiercely conservative administration and a Congress that was developing a definite rightward tilt. Trial lawyers no longer had the luxury of debating whether political action was seemly. The hard-won rights of tort victims would soon be in the congressional crosshairs.

Automobile no-fault ceased to be a serious threat in Congress following its dramatic defeat in 1976, though Professor O'Connell continued to repackage his proposal. ATLA fought pitched battles in Congress in the 1980s over admiralty and aviation, as well as product liability. Robert Habush summarized the situation, with some exasperation, "They were coming at us by air, land and sea."

In March 1983, for example, the Administration sought ratification of the Montreal Protocol to amend the Warsaw Convention and restrict recoveries for victims of international aircraft accidents. ATLA's advocacy behind the scenes led to a surprise defeat on the Senate floor. It was only the second time in fifty years that the Senate had rejected a treaty in a floor vote.

Another victory was the defeat of the Commercial Fishing Vessel Liability and Safety Act of 1986. The bill would have prohibited suits under the Jones Act for certain injuries to seamen and would have imposed a cap of $500,000 on awards for death or permanent disability on the high seas, exclusive of med-

ical expenses. The bill was reported out of the House Merchant Marine and Fisheries Committee with overwhelming support.

The House leadership was so confident of passage that it placed the CFVLSA on a suspension calendar where debate was limited, amendments were prohibited, and a two-thirds vote was required. ATLA's lobbying team worked quietly while the Admiralty Law Section rallied its members to contact their representatives in Congress. It was the only time during the 1980s that ATLA had to face a roll call vote on the floor of the House on one of its issues. On August 13, 1986, the bill failed to obtain even a simple majority, losing by a vote of 180 to 241.

Stunning victories such as these solidified ATLA's reputation as a lobbying force to be reckoned with in Congress.

Medical malpractice reform proposals also surfaced periodically. Representatives Richard Gephardt and Henson Moore introduced a bill in 1984 that was the subject of hearings. Gephardt subsequently declared his opposition to any tort reform and in the 1990s became one of the civil justice system's most ardent defenders. In 1991, President Bush lent his support to a cap on noneconomic damages in malpractice cases, which gained little headway.

Medical malpractice reform became a serious issue in Congress when President Bill Clinton introduced his ambitious Health Security Act in 1993. It was a complicated proposal—Americans would purchase health insurance from large "alliances," and providers would operate within a managed care system. Buried deep within the mammoth 1,368-page bill were provisions that concerned trial lawyers directly. The bill would limit contingency fees and impose requirements that plaintiffs exhaust alternative dispute resolution procedures before proceeding to trial. Payments from federal or state programs, such as Medicare or Medicaid, or private insurance would be subtracted from malpractice awards. The legislation also included a pilot program for shifting liability from individual providers or hospitals to the alliances. These provisions were calculated to win the support of physicians and the insurance industry. The White House had good reason for optimism: Early public support, according to some polls, topped 70 percent.

Because the tort reform provisions were incorporated into a much larger and more popular bill, ATLA's ability to lobby against them was limited. ATLA's political action committee had steadily increased its activity. Between 1989 and 1994, ATLA PAC contributed more than $5.5 million to candidates for Congress. But that amount was dwarfed by the estimated $100 million spent by special interests during 1993-94 alone in lobbying, advertising, and congressional campaign contributions in connection with health care reform.

The legendary Tommy Boggs, who had served as ATLA's outside lobbyist

from the time he was retained by Leonard Ring and Bob Begam in the early 1970s, played an important role. Boggs first met with administration officials to urge deleting the tort reforms altogether. He pointed out that the doctors' support for a large federal managed care program would be lukewarm at best. On the other hand, trial lawyers generally supported health care reform. The White House turned down the idea, though it promised to resist pressure from medical providers to add a cap on damages.

Boggs then persuaded the House leadership, which was parceling out the bill to various committees, to send the malpractice reform provisions to the House Judiciary Committee. After a delay of four months, Chairman Jack Brooks scheduled the bill for mark up. Boggs was unable to gain majority support for elimination of the tort reforms. However, a Democratic amendment altered the preemption provision so that the federal legislation would not only supersede the pro-plaintiff court rules in many states, it would also override the pro-defendant tort reforms adopted by other states, such as California. The amendment effectively drained away the support of tort reformers, which the Clinton administration had counted on. In the end, the Health Security Act never emerged from the dozen or so committees that were scrutinizing its component parts. The experience left trial lawyers more than a little wary of the Clinton administration.

Overshadowing all these battles during the 1980s and 1990s was the protracted war on the rights of those injured by dangerous products.

Federal Product Liability Reform

The campaign for Congress to rewrite state product liability law had its origins in a federal inter-agency task force created during the Ford Administration. In early 1976, the Commerce Department noted a steady stream of reports from manufacturers and businesses complaining of sharp increases in product liability insurance premiums. Business publications forecast a flood of one million product liability lawsuits. They publicized various "horror stories," such as the supposed lawsuit by a man who was injured when he lifted his lawnmower to trim a hedge—a story eventually shown to be bogus.

The White House formed an Interagency Task Force on Product Liability that included representatives from the Departments of Commerce, Treasury, Justice, Labor, Transportation, and other agencies. Law professor and casebook author Victor E. Schwartz was appointed Chairman of the Working Task Force, which undertook a year-long study of the issue.

The Task Force published a Final Report in October 1977, which concluded that the tort system was basically sound. Most manufacturers were able

to obtain insurance, and there was little evidence of a crisis. The actual number of lawsuits was only about 77,000, and many of the purported horror stories turned out to be fabrications. It was true that premiums had risen sharply since 1974. However, the price hikes were not justified by the moderate increase in size and number of product liability awards.

In fact, the Task Force found, liability insurance rates were not based on actual loss data at all, but on "incurred" losses, that is, subjective predictions of future payouts. Industry spokesmen frequently stated that product liability insurance was "practically given away" to gain market share during 1971-74. Some insurers were clearly engaged in "panic pricing" as claims arose under those policies and income from stock market investments declined. The Task Force found some cause for concern due to uncertainty and nonuniformity of legal rules among the states.

In congressional hearings, ATLA generally praised the Final Report, with one major reservation. There was not a shred of evidence to support the notion that uncertainty or nonuniformity in state court decisions was responsible for the jump in premiums. Rather, the evidence gathered by the Task Force clearly pointed to the reckless and irrational practices of the insurance industry.

The Interagency Task Force continued its work, and in October 1979 it published in the *Federal Register* a Model Uniform Product Liability Act, authored by Victor Schwartz. The Uniform Act was offered for the states to adopt voluntarily as an alternative to Restatement of Torts §402A, the black-letter formulation of strict liability followed by the large majority of states.

Under the Uniform Act, strict liability would apply to manufacturing defects, but plaintiffs alleging design defects or failure to warn would have to prove negligence. The Act recognized defenses where the safety improvement was beyond the state of the art at the time of manufacture, where the injury was caused by misuse, or where injury occurred after the end of the useful safe life of the product. The UPLA was premised on the notion that certainty and uniformity in the law would reduce transaction costs and reduce the wild swings in insurance pricing. Its overall thrust was to tie liability to the ability of a reasonably careful manufacturer to avoid the harm.

In this respect, although it was clearly designed to roll back some pro-plaintiff trends in the most progressive state courts, the Uniform Act could claim a basic intellectual honesty. That would soon evaporate as legislators added provisions, such as statutes of repose and damage caps, which protect manufacturers who are indisputably at fault.

ATLA opposed state adoption of the Uniform Act, arguing that Restatement §402A was fairer to injured plaintiffs. Workers injured by industrial machinery would be particularly disadvantaged by the Act's defenses. Most impor-

tant, ATLA argued, development of the law should be left to the courts, rather than legislatures. In the end, only nine states enacted legislation based on the Uniform Act. All of those states significantly modified or omitted portions of the proposed model.

Failure of product liability legislation to win wide support at the state level led manufacturers and insurers to lobby Congress to impose uniform laws from Washington. Following hearings before the House Commerce Committee, Chairman John Dingell and the committee's ranking Republican, James Broyhill, drafted a federal product liability bill based on the Model Uniform Product Liability Act. ATLA's response was to point out that considerable uniformity already existed among the states. Moreover, because the legislation left the job of application and interpretation to individual state courts, the measure was unlikely to achieve any greater nationwide uniformity on most key issues.

In June 1982, Wisconsin Republican Senator William Kasten introduced his own federal product liability bill. Like its predecessor, Kasten's bill died in Congress. However, it provided a rallying point for manufacturers seeking federal limitations on lawsuits. Kasten reintroduced his bill, known as S. 44, in 1983.

A legal analysis prepared for Commerce Secretary Malcolm Baldridge indicated that broad business support for the Kasten bill was obtained by adding specific provisions that rewarded particular corporate interests. The result was to turn the measure into a Christmas tree, hung with provisions to benefit particular special interests.

A typical example was a provision inserted at the insistence of Dalkon Shield maker A.H. Robins that would bar punitive damages after the first punitive damage award. The provision, which would also benefit Ford, DES maker Eli Lilly, and asbestos suppliers, was added by Republican Sen. Paul Trible of Virginia, A.H. Robins' home state. Although Trible had declared during his 1982 election campaign that product liability should be reserved to the states, *Congress Watch* pointed out, he reversed his position after receiving hefty political contributions from the tort reform coalition.

Pressure to support the measure placed the conservative Reagan Administration in an awkward position. The conservative Heritage Foundation's *Mandate for Leadership* was widely viewed as the blueprint for the Reagan Administration's conservative revolution. Its plan, prepared with input from the National Association of Manufacturers, called for eliminating the Consumer Product Safety Commission and reducing other federal health and safety reg-

ulation. The *Mandate* asserted that state product liability law was a far superior means of promoting safety and that "regulators can never hope to be as efficient as a national court system imposing judgments in . . . cases brought by consumers."

At the same time, imposing federal liability rules clearly contradicted the Administration's position against federal intrusion into matters traditionally left to the states. The President's Council of Economic Advisors initially objected to the Kasten bill as inconsistent with principles of federalism. Voices sensitive to state sovereignty, such as the Conference of State Court Chief Justices and the National Conference of State Legislatures, urged the administration to leave product liability law to the states. The Defense Research Institute, the principal national organization of defense attorneys, staunchly opposed federal product liability reform legislation, arguing that reforms should be enacted at the state level. DRI would reverse its stance in 1992.

Eventually, the political necessity of keeping the solid support of big business prevailed over principle. In September 1984, President Reagan personally endorsed the Kasten bill, stating that "experience has shown" the states cannot do the job, and that a federal uniform law was needed to ease "the burdens of higher costs borne by manufacturers and consumers resulting from differences among state product liability laws." Republicans' commitment to federal product liability legislation was never seriously questioned thereafter.

S. 44 passed the Senate Commerce Committee in March 1984. In July, at the ATLA convention in Seattle, the guest of honor at the membership luncheon was U.S. District Court Judge Miles Lord, who had presided over a major Dalkon Shield lawsuit and had denounced the conduct of A.H. Robins executives. Every table was filled in the large hall when President David Shrager entered the room and took the microphone.

"I received a telephone call a few minutes ago from a United States Senator," Shrager announced. "He told me that they were going to have a roll call on the Kasten bill which would decimate the products liability rights of consumers. We have very little time to react politically."

Shrager asked the assembled trial lawyers to telephone their senators immediately to urge the bill's defeat. A bank of twenty phones was set up in an adjoining room. For the next two and a half days, the phones were in almost constant use as ATLA members worked to get through to their senators on the other side of the country. "This was the ultimate in key-man committee action," Shrager said. He later explained that he had received intelligence that "there might be mischief in Washington while we were at the convention." With the help of the local affiliate, he made contingency plans for setting up the

phone bank on a moment's notice. Due to his foresight and the efforts of many trial lawyers, the 98th Congress adjourned without a vote on the Kasten bill.

The Senate Commerce Committee reported some version of federal product liability reform five more times. At the beginning of the 99th Congress, Senator Kasten introduced S. 100, entitled the Product Liability Act, which closely resembled S. 44. On May 16, 1985, a motion to report S. 100 failed by an 8-8 vote. In December, Commerce Committee Chair Senator John C. Danforth introduced a revised bill which focused on penalizing plaintiffs who rejected offers of settlement and imposed a cap on damages. Danforth expressed confidence that the bill could pass both houses in 1986 and be signed by President Reagan later that year.

On June 25, 1986, Democratic Senator Daniel K. Inouye from Hawaii, who had not taken a public position on the bill, rose to address the Commerce Committee. He delivered his message in a deliberate, emotional presentation. "It's easy for those who have not been the victims to be setting caps," he stated. He described the plight of a young woman, unable to have a family because of pelvic inflammatory disease cause by the Dalkon Shield. "What price tag do you put on that?" he asked. He gestured slightly toward his own right sleeve, empty after losing his arm while serving in the United States Army in World War II. He observed that the amount he had received in payments for his disability exceeded the proposed cap. He voice fell even lower. "If a man lost the use of all four limbs, I just cannot in good conscience, knowing the pain and suffering that person will experience for the rest of his life, [say this] is worth only $250,000."

Linda Lipsen, who attended the hearing as a lobbyist for Consumers Union, stated that, when Inouye ended his statement, there were tears in members' eyes on both sides of the aisle. Senator Danforth called it "as persuasive as anything I've heard since I've been in Congress." Republican committee member Ted Stevens of Alaska, announced that he would vote against the bill.

The was reported out by the Commerce Committee on June 26 by a vote of 10 to 7. The full Senate, however, did not take final action on the measure, in part, some have speculated, because the Republican leadership feared that Senator Inouye would deliver his speech on the floor of the Senate itself.

In the 100th Congress, the focus of activity shifted to the House. On February 18, 1987, H.R. 1115 was introduced and referred to the House Energy and Commerce Committee. Supporters of the bill shifted their arguments from the need for uniformity to the need to address the "insurance crisis" of the mid-1980s. They were supported by the report of an interagency "working

group" headed by Attorney General Edwin Meese. Unlike the Interagency Task Force of the previous decade, the Working Group made little effort to uncover the facts concerning product liability litigation. Rather, the report was little more than a position paper, marshalling arguments in favor of the Administration's tort reform agenda.

After extensive hearings and a long and tortuous committee process, which included more than a dozen subcommittee and committee mark-up sessions stretching over fourteen months, as ATLA battled every inch of the way, the Committee voted 30-12 to report the bill. It was sequentially referred to the House Committee on the Judiciary where solid opposition by Committee Chair Peter Rodino essentially doomed H.R. 1115. Similar opposition by Rodino's successor, Jack Brooks, kept future bills from being reported out of committee until the Republicans gained control of the House body in 1994.

Quayle and Competitiveness

By the early 1990s, the tort reform campaign had became a caricature of itself. Supporters seldom cited the need for uniformity in the law, as they added provisions to benefit particular industries. Nor did they claim an "insurance crisis," as the industry was racking up record profits and once again reducing its rates. Indeed, the insurance industry was no longer in the driver's seat. Tort reform had become enmeshed in partisan politics at the national, even presidential, level. Gone were the discussions of social policy and substantive legal principles, conducted with a modicum of respect for opposing views. The Republican leadership took ownership of the issue, demonizing trial lawyers and juries and making campaign promises to protect their political supporters from claims for compensation by injured workers and consumers.

The new rationale for federal product liability reform was compressed into a single, simplistic buzzword: Competitiveness. With the economy in the doldrums, many Americans began to doubt the ability of American businesses to keep ahead of foreign competitors, particularly the Japanese. "Competitiveness" became a concern in the public policy debates on a whole range of issues. President Bush established yet another inter-agency group, the Council on Competitiveness, chaired by Vice President Dan Quayle. An important part of the Council's message was that high jury verdicts were adding to the prices of American products and making them less competitive in the global marketplace.

In fact, quite the opposite was true. Overall, U.S. exports to other countries had steadily increased. Industries losing to foreign competitors invariably blamed labor costs and regulatory burdens, not liability. Tellingly, imports

climbed even faster. Japanese or German cars sold in the U.S. are subject to the same product liability rules as Ford or GM. Yet, foreign manufacturers were eager to compete in the U.S. market.

The Council on Competitiveness changed the nature of the debate. It maintained barely a pretense of improving the principles of civil liability. The Council treated tort reform as a political issue, a vehicle for winning the re-election of the President. Polling indicated that lawyer-bashing scored well among voters, so trial lawyers, rather than safety and compensation, became the issue. The 1992 presidential campaign was a turning point.

Vice President Quayle fired the opening salvo. Desperate to shake a persistent and somewhat unfair image as an intellectual lightweight, Quayle decided to take on the powerful legal establishment. On August 13, 1991, he stood before the annual meeting of the American Bar Association. Opening with a quip comparing himself to Daniel in the lion's den, he proceeded to deliver a stinging attack on the tort system, declaring that America was drowning in a sea of lawsuits that sapped the competitiveness of American businesses.

In truth, Quayle was on fairly friendly turf, addressing an audience dominated by corporate and defense lawyers. What grabbed the headlines was Quayle's complaint that the United States has 70 percent of the world's lawyers.

It was an astonishing figure. It was also completely fictitious, as ABA President Talbot D'Alemberte stated in a response to the Vice President's speech. Nevertheless, Quayle's mission was accomplished. "My line about the United States having 70 percent of the world's lawyers was the sound bite of the day," he gushed in his memoir. It brought "something completely new to my vice-presidency: an avalanche of good press, the best I would have in my four years in office."

The popular reaction to Quayle's lawyer bashing was not lost on President Bush, who had previously shown little interest in the civil justice system. He vowed to "get in the ring" to fight the trial lawyers and to eliminate "crazy, out-of-control" jury awards.

In a particularly inept attempt at insult, Bush complained that candidate Bill Clinton was supported by "every lawyer that ever wore a tasseled loafer." Tasseled loafers were invented by the Alden Shoe Co. in the early 1950s and quickly became *de rigueur* among young Ivy League grads who were looking for something stylish and, as the company boasts, "appropriate for both the boardroom and the country club." In other words, these were shoes for people just like George H. W. Bush.

The lawyer-bashing energized ATLA's political activity. ATLA PAC contri-

butions rose from about $50,000 monthly in the early 1980s to more than $150,000 in the mid-1990s. Campaign donations, which had focused primarily on Senate candidates, were expanded to include more candidates for the House and state political parties to get out the vote. The Republican assault had the effect of skewing those contributions heavily in favor of Democrats, though ATLA PAC continued to support those Republicans who defended the tort system and the rights of the injured.

A Shift in Strategy

During the 101st Congress, the Senate Commerce Committee reported out a version of the Kasten bill on May 22, 1990, by a roll call vote of 13 to 7. The full Senate took no action before adjournment.

In the 102nd Congress, Senator Kasten introduced S. 640 with thirty-six cosponsors. The Committee favorably reported the bill, again by a vote of 13 to 7. It was sequentially referred to the Committee on the Judiciary, which held a hearing but took no further action. On September 10, 1991, supporters twice failed to muster the 60 votes needed to invoke cloture on the motion to proceed in the full Senate. The votes were 57-39 and 58-38.

In the 103rd Congress, Senators Jay Rockefeller and Slade Gorton introduced S. 687, the Product Liability Fairness Act. The bill was reported out of the Commerce Committee in November 1993. The measure came to the Senate floor at a most inopportune time for ATLA. Alan Parker, who had succeeded Tom Bendorf and served as Public Affairs Director for ten years, announced his departure early in 1994. By April, when Linda Lipsen came from Consumers Union to assume the chief staff lobbyist position, ATLA could count on only 29 votes of the 41 needed to block a motion to close debate. ATLA leaders and staff worked feverishly to gather additional support. Majority Leader Senator George Mitchell scheduled back-to-back votes on motions for cloture on June 28 and 29. When the dust settled, ATLA had once again prevailed by a narrow margin. The second vote was 57-41.

The 1994 elections gave Republicans control of both houses of Congress for the first time in forty years. This was partly due to the fiasco over health care reform and partly on the strength of House Speaker Newt Gingrich's Contract With America. One plank of the Contract, situated incongruously among the promises to devolve power from the federal government to the states, vowed to impose on the states "common sense" federal tort reforms.

ATLA's leaders and lobbyists worked to adapt to the new legislative ter-

rain. Timmons and Company, a lobbying firm that included Bill Timmons and Tom Korologos, had been retained by Leonard Ring and Bob Begam in the mid-1970s. The firm's strong Republican ties, which matched the Democratic Party ties of the Boggs firm, assumed even greater importance.

The Republican ascendancy also led ATLA to make a dramatic change in its lobbying strategy. For many years, ATLA had achieved an impressive record of success by playing an "inside game." ATLA focused on key committee chairs and a few others whose hands held the levers of power in Congress. In the Senate, for example, ATLA relied on the support of three powerful Democrats to block various anti-plaintiff bills. Chairman of the Judiciary Committee's Subcommittee on Courts, Howell Heflin, a former Chief Justice of the Alabama Supreme Court, possessed both an encyclopedic knowledge of the Senate rules and a sure sense of the personal relationships among the senators that was important in garnering key votes. Senator Howard Metzenbaum, a member of the Judiciary Committee, was a powerful champion of consumer protection. Commerce Chairman Ernest "Fritz" Hollings of South Carolina was a determined protector of the rights of workers.

When committee control passed to the Republicans after the 1994 elections, ATLA shifted its strategy to concentrate on the "outside game." ATLA relied more than ever on grass roots organizations and community contacts who might be persuasive to particular members of Congress. An example is Senator Jay Rockefeller, Democrat from West Virginia, who was a supporter and even a sponsor of various tort reform bills. The efforts of the West Virginia Trial Lawyers Association and other local organizations put the Senator in touch with West Virginia workers and others who would be harmed by the legislation. Rockefeller eventually changed his position and delivered a moving speech to the Board of Governors in 1997, announcing that he had "come home" on the issues of protecting the tort rights of workers and consumers.

On the opening day of the 104th Congress, January 4, 1995, House Judiciary Committee Chairman Henry Hyde introduced H.R. 956, entitled the Common Sense Legal Standards Reform Act of 1995, triggering one of the longest and most bitter congressional battles over tort reform. The bill was soon split into three. A "loser pays" measure, designed to make plaintiffs pay the legal bills of successful defendants, passed the House, but failed in the Senate. A second bill dealt with securities litigation, and ATLA played no active role in lobbying against it. The focus of ATLA's attention was the third bill, which imposed a variety of limitations on product liability lawsuits.

The tone of the debate was evident in early 1995, as Republican leaders held hearings where witnesses described the hardships their businesses suf-

fered due to trial lawyers bringing lawsuits. Republicans dubbed them the "War Crimes hearings."

The bill passed the House on March 10, 1995, by a vote of 265 to 161. On the Senate side, a similar bill was reported out of committee on April 6. The bill spent three weeks on the floor of the Senate as Majority Leader Robert Dole tried to muster the requisite 60 votes to shut off debate. Finally, the fourth cloture motion passed on May 10, by a vote of 61 to 37.

A Conference Committee appointed to resolve the differences between the House and Senate bills faced a difficult task. Conservative Republicans on the House floor added provisions to the bill that went far beyond product liability suits, including restrictions on medical malpractice suits and punitive damage limits in all tort actions. Dole was forced to negotiate with the House Republicans to agree to strip away the extraneous provisions that would have lost votes in the Senate. After nearly a year in conference, the committee issued a Conference Report bill, renamed the Common Sense Product Liability Legal Reform Act of 1996. The Senate passed the Conference Report on March 21. The cloture motion passed 60-40, without a single vote to spare. The House followed suit a week later, voting 259 to 158.

After an unusual ceremony at the Capitol, where Senate Majority Leader Dole declared that President Clinton must choose between "hard-working American consumers who pay for jackpot verdicts" and "smooth-talking, get-rich-quick trial lawyers," the bill was sent to the President's desk.

President Clinton was not opposed to tort reform generally. For example, on August 16, 1994, he signed the General Aviation Revitalization Act, which limited punitive damages and created a federal eighteen-year limit on product liability suits involving noncommercial small aircraft. Trial lawyers had opposed the legislation since its introduction in 1986, but Clinton backed the measure as "sensible" tort reform that would bring economic growth back to the industry.

Clinton also signed a number of narrowly focused tort reform measures. For example, the Bill Emerson Good Samaritan Food Donation Act of 1996, exempted nonprofit organizations and persons who donate food and grocery products to nonprofits for distribution to the needy, from liability for food-related illness. The Volunteer Protection Act of 1997 protected individuals who volunteer for nonprofit organizations or government agencies from negligence liability. Section 161 of the Amtrak Reform and Accountability Act of 1997 tightened standards for punitive damages and limited overall damage awards stemming from rail passenger transportation accidents. The Biomaterials Access Assurance Act of 1998 exempted suppliers of raw materials and medical

implant component parts from product liability actions if they met certain contractual and product specifications. Finally, the Y2K Act, signed into law by President Clinton in 1999, limited the liability of defendants in connection with anticipated (but ultimately nonexistent) Year 2000 computer failures. Most of those enactments reflected successes in ATLA's lobbying efforts to scale back the harshest provisions in the original bills.

At the end of April 1996, ATLA's leaders and lobbyists were on the edges of their seats. Scraps of gossip from the White House indicated the President was leaning first one way, then the other, on whether to sign the products liability bill. Senator Dole and Speaker Newt Gingrich held news conferences to condemn the President as "in the pocket of the trial lawyers." On May 2, President Clinton, seated at his desk in the Oval Office, announced his decision. The bill "would hurt families without truly reforming the legal system," he stated. "It would mean more unsafe products in our homes," and "let wrongdoers off the hook. I cannot allow it to become law." It was President Clinton's fifteenth veto.

A Simple, Powerful Message

On April 22, 1997, a fine compliment to the Association of Trial Lawyers of America appeared—of all places—on the editorial page of the *Wall Street Journal:*

> Over the years, ATLA has developed a reputation for success on Capitol Hill with a simple but powerful message that the right to a jury trial embedded in the Seventh Amendment should be preserved at all costs.

ATLA's reputation was earned by hard work. Presenting ATLA's "simple but powerful message" to Congress dominated much of the work of ATLA's presidents during this period. Pamela Anagnos Liapakis came to the presidency in 1995, to face the full brunt of the tort reform agenda of the new Republican majority. A first-generation American of Greek descent, Liapakis proudly stated that her father had taught her "about democracy and citizen juries. I was proud that my ancestors were the source of both, and thus a source of this nation's greatness and goodness." She pointed out that "the jury invests our legal system with a legitimacy and incorruptibility that has stood unbowed for more than 200 years. Juries have reined in excessive government, given voice to the weak and vulnerable, and forced the reckless to take responsibility for their acts"

As president, Liapakis worked tirelessly to defeat 25 bills in Congress that threatened in one fashion or another to undermine the jury and undo the

rights of plaintiffs. Her concern with preserving those rights against hostile legislators is reflected in one of her lasting innovations. ATLA's List examines contested races for House and Senate seats and endorses those candidates who are committed to the civil justice system. In that way, ATLA members can be assured that their own contributions to candidates will work to protect their clients' rights.

Trial lawyers who have met Howard Twiggs, elected president in 1996, have come away feeling a little more pride in their profession. He is the classic gentlemanly southern lawyer. But beneath his courtly manner is a lawyer of fierce conviction. After graduating from Wake Forest law school, he worked for two years at a firm doing insurance defense work. On the eve of a promotion to junior partner, he resigned, unable in good conscience to devote himself to finding ways to deny compensation to injured people. Watching Moe Levine at a seminar in Winston-Salem motivated him to join ATLA.

Twiggs made increased participation by minorities and women a top priority for ATLA. He worked to increase the visibility and effectiveness of both the Minority Caucus and the Women Trial Lawyers Caucus. Much of the attention on Capitol Hill during his presidency was focused on a bill to impose a global settlement in the litigation by the states against the tobacco industry. The settlement called for payments to the states totaling $368 billion. But it also would have given the industry immunity from accountability by precluding or severely restricting lawsuits. From the outset, many expected easy passage for the legislation. Moreover, several leading ATLA attorneys represented states favoring the settlement. Twiggs placed the matter before the Board of Governors, summing up his own view in two words: "Never compromise." As a matter of principle, he stated, ATLA could not "let Congress take away the right of people to sue an industry that had lied more, profited more, and whose products had killed more than any industry in history." The board voted to oppose the tobacco bill, which ultimately went down to defeat.

Richard Hailey, whose "entire extended family in the South were either sharecroppers or domestic workers," grew up in Philadelphia. As a youngster, he happened to be in the courthouse when Cecil Moore, who would later become the fiery leader of the Philadelphia NAACP, made an appearance. "I watched him as he eloquently presented defenses for two misdemeanor clients who looked like they could hardly pay bus fare to get downtown." Hailey vowed to become a trial lawyer.

He earned his law degree from Indiana University and an L.L.M. from Georgetown University Law Center. After serving on a wide range of ATLA committees and offices, he became president in 1997. He quickly faced an announcement by the U.S. Chamber of Commerce of a massive assault on trial lawyers. "These corporations are the same folks who have spent literally billions of dollars trying to protect themselves and their profits from the people they hurt," said Hailey. He called upon ATLA members whose friends or clients were members of local chambers to use their influence to restrain the national Chamber.

Hailey led the fight to defeat new auto no-fault insurance bills introduced in both houses of Congress and in several states. As Hailey pointed out, the proposals came at a time when insurance companies were giving themselves credit for reducing auto insurance premiums. At the same time, ATLA was also fighting legislative and administrative proposals that would limit damages in railway accidents and shield railroads from responsibility for safe grade crossings.

Hailey was the first ATLA president who was not only knowledgeable but enthusiastic about the use of new technology, particularly email and the Internet. He pressed for ATLA to upgrade its own capabilities. For several years, ATLA had an Internet presence within Law Journal Extra. Under Hailey's leadership, the association launched its own web site, ATLA Online, with expanded and secure services. The Exchange Online quickly followed, allowing ATLA members to obtain important Exchange materials within minutes, rather than days.

One of Hailey's most gratifying moments, he recalled, occurred at the 1998 convention in Washington, D.C., where he introduced guest speaker Coretta Scott King at the membership meeting and presented the Harry M. Philo Trial Lawyer of the Year Award to Ron Motley.

Looking Toward the Future

Mark Mandell stepped into the presidency in 1998 with plan to raise the profile of trial lawyers in their communities with a comprehensive, multifaceted public education program. The theme, he announced at the outset, was "Keep Our Families Safe." The program enlisted ATLA's media relations department, working with and through state trial lawyers associations to provide a Consumer News For Families newspaper column and Family Safety brochures on a variety of topics through ATLA's media contacts and web site. A related initiative was the ATLA Auxiliary Bicycle Helmet Safety program, working with local groups to provide helmets to families who could not afford them.

The program also included the Lawyers' Challenge for Children. "The goal is for each trial lawyer in the country to take one case for free for a child," he explained, including abused children, children waiting to be adopted, and children "lost" in the foster care system.

Mandell also established a Judicial Independence Committee to counter unfair and politically motivated attacks on judges for particular decisions. The committee, consisting of state supreme court judges and ATLA leaders, provided a rapid response to set the record straight and refute the frequently distorted accusations leveled at judges who often cannot defend themselves in the public press.

Looking toward the future, Mandell implemented long-range planning to guide ATLA's development. Most important, he launched the Robert L. Habush ATLA Endowment, named in honor of its first president.

Bob Habush, along with Larry Stewart and ATLA Executive Director Tom Henderson, had worked tirelessly for the creation of an endowment "to provide funding for programs that will counteract the campaign of misinformation being waged by interest groups that would sacrifice justice for dollars." The realization of their plans had to wait, however, as ATLA focused its resources on the new political realities following the 1994 elections. Mark Mandell was finally able to make the Endowment a reality in 1998.

The Endowment recognizes that the future of the civil justice system demands that trial lawyers reach out beyond their own ranks to promote understanding of the ideals of the common law, constitutional rights and the civil jury. Its Public Education Institute is designed to carry on an extensive public education campaign to counter the distortions and propaganda disseminated by opponents of the civil justice system. It will also create course materials to educate students in the role of the civil justice system and individual rights in our democracy.

At the same time, the Endowment funds efforts to reach out to judges and to legal academics, who have been heavily lobbied in recent years by corporate interests. Endowment grants fund the Civil Justice Digest, a newsletter provided to ten thousand judges that reports on developments on key civil justice issues. The Endowment also supports the highly regarded Roscoe Pound Foundation annual forum for state appellate judges and will fund new education forums and conferences for both federal and state trial court judges.

The Endowment's Law School Institute will focus on building ties with the academic community to ensure that consumer-oriented scholarship is no longer neglected in legal education. In addition, the Endowment distributes grants to the Roscoe Pound Institute and others to conduct solid academic re-

search in areas affecting the public debate on tort law, access to justice, and the right to trial by jury.

The Endowment since 1998 has received $18 million in contributions and pledges. The Endowment's grants and other activities are funded by the interest earned by those funds. Larry Stewart credits the Endowment with providing a new level of financial stability to ATLA's efforts to preserve a civil justice system.

ATLA's next president, Richard Middleton, grew up on a Virginia farm and graduated from Washington and Lee law school in 1976. He started out practicing admiralty law in Savannah, Ga. Soon, however, he began representing asbestos victims, working with and learning from Ron Motley. Motley and Scott Baldwin steered him to ATLA.

Middleton sought out groups of lawyers who could contribute their special talents to ATLA's goals. As president-elect, he initiated the Labor Liaison Committee. ATLA members with ties to the AFL-CIO and other labor organizations worked with the unions' legal staffs on issues where labor could act as a more effective messenger than trial lawyers. As president, he worked out a cooperative agreement with AARP to help provide legal representation to AARP members. He also launched the Lawyers Marketing Committee, which was designed to heal rift with those attorneys who advertise on television. In addition to its successful educational program on marketing legal services, the committee supports production of television messages to publicize the virtues of the civil justice system.

Middleton spent more time testifying on Capitol Hill than most ATLA presidents, particularly as Congress was considering Patients' Bill of Rights legislation and bills affecting the liability of HMOs. Generally, he was able to gain a fair hearing for ATLA's views. "Because I grew up in a family of primarily Republicans," he noted, "I felt very comfortable in dealing with the Republican as well as the Democratic leadership in Congress."

Fred Baron, whose background and whose signal victory for the civil jury in the battle on behalf of asbestos victims was recounted in Chapter 6, assumed the presidency in 2000. He played an active role in the presidential campaign of Vice President Gore against George W. Bush, who made tort reform a major part of his campaign. Looking to ATLA's future, Baron established the Leaders Forum, recognizing those law firms that committed themselves to a high level of donations to ATLA PAC.

Baron was also concerned by the changing demographics of ATLA's membership. For many years, much of ATLA's membership consisted of lawyers on the upward climb of their careers. These were the trial lawyers who benefited most from ATLA's education and information-sharing programs. As Baron took office, he noted that ATLA's membership was not only declining, but it was getting older. ATLA was not attracting and keeping enough young members. He initiated several projects designed to begin the long-term process of reversing these trends. One was to recognize that young lawyers are increasingly more oriented toward obtaining information and conducting legal research online. "Membership," he stated, "is related directly to services." And providing services to young lawyers means investing substantial resources to develop ATLA Online into "a world-class web site" that can help level the playing field by providing access to all the useful information ATLA has available.

Another initiative was to transform ATLA's Legal Affairs Department into a national law firm, the Center for Constitutional Litigation. CCL serves ATLA, state trial lawyer associations, and other clients in litigation to challenge tort reform and other laws that impede access to justice. CCL also operates ATLA's amicus curiae program. CCL is a service with very high visibility, according to Baron, a concrete example of ATLA's fight for everyday justice.

Trial Lawyers Care

A placid, sunny morning greeted the East Coast on September 11, 2001. At 8:45, most ATLA staff were at their desks or on their way to work, unaware that a nightmare would soon unfold. Throughout the morning, they watched television news coverage of the horror at the World Trade Center. Looking out the windows of ATLA's Washington headquarters, they could see the ugly smear of black smoke that rose above the Pentagon, where a hijacked plane had smashed into the west wall. The news reported that a fourth plane had crashed into a Pennsylvania field. The dangerous world suddenly was very close.

In New York, 2,792 people died in the terrorist attacks; 189 lost their lives at the Pentagon, and all forty-four passengers died in the Pennsylvania crash. The number of seriously injured would climb higher. On the evening of September 11, President Bush called the attacks "acts of mass murder." Some wondered whether negligence on the part of the airlines, the airports, or others had enabled the hijackers to carry out their deadly attacks. As in the past, lawsuits would expose the lapses in security and remedy them.

The ATLA leadership unanimously felt that initiating litigation during this time of shock and grief was precisely the wrong response. On Thursday morning, September 13, in a bold and unprecedented move, ATLA President Leo

Boyle issued a call to America's trial lawyers for a moratorium on lawsuits arising out of the tragedy. Although ATLA held no authority to enforce the moratorium, the moral force of its position was sufficient. By the following January, only four lawsuits had been filed.

The airline industry was pursuing its own concerns. On September 14, only three days after the attacks, airline industry representatives made their way to Capitol Hill to plead for a $15-billion bailout package, which they increased to $24 billion within a few days. Although their haste was unseemly, no one doubted that the airlines were facing financial ruin. Even before the attacks, the industry was in a precarious position. Already burdened by debt, airlines were expecting their worst losses in a decade due to a sharp decline in business travel before September 11.

What was shocking was that the airline lobbyists also demanded immunity from liability for the deaths and injuries in the terrorist attacks. ATLA publicly urged congressional leaders to "not leave the victims behind." Police and firefighters, as well as those working in the devastated buildings, and their families, should not be abandoned. Leo Boyle met with House Minority Leader Richard Gephardt and his staff to discuss possible ways to provide for compensation for the victims of September 11. Additional meetings were held with Senate Majority Leader Tom Daschle and Judiciary Committee Chair Patrick Leahy.

When Congress convened on September 21, companion bills were introduced in the House and Senate which provided for a victims compensation fund. The provision was essentially a framework patterned after the Price-Anderson Act, which provides for a federal compensation fund in the event of a nuclear accident. Both houses passed the measure, and President Bush signed it into law the following day.

The legislation establishing the Victims' Compensation Fund was little more than a bare framework. The details of administering the plan and allocating funds were to be set forth in regulations. Larry Stewart devoted a great deal of his time making certain that the regulations promulgated by the Justice Department carried out the intent of Congress that victims obtain full compensation.

But ATLA did much more. ATLA announced that trial lawyer volunteers would represent families seeking compensation from the victim's fund, without charge. This would become the most massive pro bono effort in the history of the bar, incorporated under the name, Trial Lawyers Care. Working in partnership with the New York Trial Lawyers Association, and the state trial lawyer associations of New Jersey, Massachusetts, Connecticut and others, ATLA undertook the intensive process of locating, screening, and training

volunteer trial lawyers in the complexities of the fund's regulations. Approximately 1,200 attorneys would represent 1,500 claimants in complying with the regulations and obtaining compensation. In addition to the countless hours of free legal services provided by the volunteer attorneys, ATLA members and staff, along with New York Trial Lawyers Association and other affiliates, also donated approximately $1 million to provide support staff, office facilities, and equipment. TLC's effort proved to be a success. By December 22, 2003, the Fund's mandatory filing deadline, claims had been filed on behalf of 95% of the victims.

President Boyle stated that the tragic events of September 11 "broke America's heart." But trial lawyers in one grand gesture put their hearts before all else.

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Friends Of The Court

While trial lawyers were defending the tort system in Congress and in fifty state legislatures, the civil jury was coming under sharp attack on yet another front. This was, perhaps, an even more damaging assault. The assailant was the branch of government that Alexander Hamilton called "the least dangerous": the federal judiciary.

The Seventh Amendment was intended to prevent unelected federal judges from usurping the role of the jury. Yet it is the federal judiciary itself that is responsible for enforcing the Seventh Amendment. A judiciary that had lost faith in the jury would be dangerous indeed.

Undermining the judiciary's faith became the goal of a determined and well-financed group of tort reformers. Frustrated by the failure to achieve nationwide legislative adoption of their agenda, they turned their attention to the courts.

The American Tort Reform Association initially served as the umbrella organization for business and insurance interests seeking tort reform through judicial action. In 1989, the Product Liability Coordinating Committee, whose members included the U.S. Chamber of Commerce, the National Association of Manufacturers, other trade associations, and many individual companies, assumed the leadership role. Their stated goal was to limit or eliminate the power of juries to render verdicts against big business. Often they urged courts to impose restrictions that many legislatures had already rejected. Some demands, barring the courthouse doors to injured

victims altogether, were so extreme that no legislature would seriously have considered them.

For lawyers defending victims' rights, the courtroom is a far different arena from the legislature. Political action and campaign donations count for little among the life-tenured federal judiciary. Precedent and policy loom large. Jerry Palmer, a founder of ATLA's constitutional litigation program, emphasized that the courts offered a more level playing field against corporate special interests.

But the judicial forum also presents its own challenges. The Reagan and Bush administrations filled hundreds of seats on the federal bench with nominees who were carefully selected for their conservative ideology. Equally important was the massive campaign against the jury in the general media and in various educational programs and publications aimed specifically at judges. Its message was unrelenting: juries are irrational and must be reined in. The impact on federal judges was inevitable. Researchers observed the effects of a "quiet revolution" beginning in the mid-1980s, especially in the area of products liability. There was a measurable increase in judges' use of summary judgment and directed verdicts to take cases away from juries, and they more frequently overturned plaintiffs' jury verdicts. At the same time, appellate courts dramatically slowed the progressive development of tort law. Among federal judges, faith in the common sense and conscience of American jurors was fading.

Corporate interests pressed the courts for new and unprecedented restrictions on the role of civil juries. ATLA fought such "judicial tort reform" primarily through its *amicus curiae* and constitutional litigation programs.

Amicus Curiae

From the start, NACCA boasted an active *amicus curiae* program. Sam Horovitz envisioned NACCA lawyers filing briefs that would educate and persuade courts to develop the law on behalf of injured workers. This was a bold and farsighted plan at a time when *amicus curiae* briefs by private organizations were relatively rare.

From 1950 through the mid-1970s, ATLA filed more than 60 *amicus* briefs in state and federal courts. Some of these cases made significant contributions to the development of tort law and are noted in Chapter 5. ATLA argued for expanded liability for unsafe products, inroads on governmental immunities, and more liberal damage remedies for personal injury. Prior to 1969, the U.S. Supreme Court regularly reversed lower courts' interference with the role of the jury, particularly in suits by injured seamen and railroad

workers. ATLA filed *amicus* briefs in support of petitions for *certiorari* in such cases, many of which were prepared by ATLA members Arthur J. Mandell and Paul S. Edelman.

Beginning in the 1960s, many state trial lawyer associations started *amicus* programs of their own. Programs in Arizona, Arkansas, California, Illinois, Louisiana, Michigan and Ohio were especially active. Some of their contributions are also credited in Chapter 5. However, they often depended on the efforts of one or two energetic members and lacked sustained and consistent performance.

By far the most sophisticated program was developed by the California trial lawyers. CTLA established a permanent *amicus curiae* committee of talented and dedicated attorneys. During the 1970s, under the leadership of Edward I. Pollock and with the prolific brief writing of Leonard Sacks, CTLA promoted major advances in tort law in the nation's leading progressive court.

In 1975, president Robert Cartwright revamped ATLA's program, using the CTLA model. A standing Amicus Curiae Committee was charged with guiding ATLA's participation in cases presenting legal issues of importance to ATLA members and their clients. In 1982, president Howard Specter established a more detailed set of objective criteria to guide the committee's decisions. ATLA members from around the country with expertise in relevant fields of law gave generously of their time and energy, preparing an average of four to six briefs annually. In the mid-1980s ATLA helped eliminate unfair restrictions on attorney advertising in *Wall v. Mississippi State Bar* (Miss. 1983), make municipalities more accountable for police failure to detain drunk drivers in *Irwin v. Town of Ware* (Mass. 1984), and impose punitive damages against suppliers of asbestos in *Jackson v. Johns-Manville Sales Corp.* (5th Cir. 1986).

In 1986, ATLA upgraded and expanded its program by assigning a permanent staff counsel to the Amicus Curiae Committee to prepare briefs and assist the committee in its work. Volunteers continued to lend their valuable talents, and ATLA was soon able to file twelve to fifteen briefs each year. Fortunately, ATLA expanded its *amicus* program just in time to meet a growing threat to plaintiffs' rights.

Judicial Tort Reform

The tort reform lobby during the 1980s grew increasingly unhappy with the limited success of its very expensive campaign in the legislatures. Every state had adopted some tort limits. Many other "reforms" were rejected. In addition,

trial lawyers and their allies succeeded in modifying and ameliorating many of the harshest proposals. The special interests that were most heavily invested in tort reform—product manufacturers and insurance companies—became convinced they would see very little benefit until tort reforms were imposed nationally.

They took their agenda to Congress. There, with remarkable lobbying skill, ATLA derailed a succession of federal tort reform bills.

The "reform" lobby also turned to the federal courts. Their ambitious goal was to persuade the U.S. Supreme Court to impose tort reform on the nation as a matter of federal constitutional law. The result is a case study in the ability of powerful special interests to impose their agenda on a federal judiciary that was designed to be insulated from power politics.

The tort reformers' strategy was focused and disciplined. The goals they selected were controlling punitive damages, choking off plaintiffs' ability to present expert testimony; and, where possible, shutting the courthouse doors entirely for some plaintiffs through broad federal preemption of state tort law. They relied on a simple message: irrational juries are out of control.

PLAC and ATRA kept teams of lawyers busy turning out *amicus* briefs to be filed in trial and appellate courts around the country. Law professors received grants to produce law review articles which were duly cited as authority. Journalists and newspaper editors received press kits, and authors were recruited to write op-ed pieces. Jury bashing was becoming a subsidized media pastime.

This was not an inexpensive strategy. Over the years, tort reformers poured immense money and resources into this effort. Ultimately, they succeeded in placing their issues—punitive damages, federal preemption, and expert testimony—on the docket of the Supreme Court of the United States.

The battle over judicial tort reform was waged in more than twenty Supreme Court decisions during the 1980s and 1990s. ATLA participated in every case, using its *amicus* briefs to engage the Court's attention to fundamental principles of access to justice and the jury's role in the civil justice system. ATLA reminded the Court that juries cannot be viewed as some rogue government agency that must be reigned in. Rather, the jury is the constitutional voice of the people.

ATLA was speaking to a decidedly conservative Court, increasingly driven by principles of strict construction, states' rights and judicial restraint. ATLA offered the Court a framework that demonstrated that traditional tort remedies were consistent with these values. Plaintiffs won a number of important victories. However, the Court also added to the authority of judges to control juries in civil cases.

Punitive Damages: No "Bright Line"

Nowhere does the civil jury's voice speak louder than when it awards punitive damages against a defendant who has engaged in egregious misconduct. Historically, the doctrine of punitive damages is closely intertwined with the right to trial by jury. The jury's authority to award punitive damages was recognized in 1763 in John Wilkes' famous case, described in Chapter 2. Americans adopted the Seventh Amendment in part to ensure that American juries had that authority as well. By 1851, the Supreme Court observed that it was "well settled" that the appropriate amount of punitive damages was within the broad discretion of the jury.

This discretion to tailor an award to the circumstances of a particular case makes punitive damages an especially effective deterrent. If the amount of potential liability awards is predictable, companies are tempted to proceed with their harmful conduct and simply add the predicted liability costs to the price of their product or service.

A classic example is the Ford Pinto case. Before the first car rolled off the assembly line, Ford knew that even moderate rear-end collisions would result in fuel-fed fires. An internal memo estimated that 180 people would be burned to death and 180 more would be severely injured. Nevertheless, the memo estimated, it would be cheaper to pay the compensatory tort claims of victims than to spend less than $12 per car to minimize the risk. So the company proceeded to sell cars it knew would kill, a decision that prompted juries to award a number of large punitive verdicts against Ford.

Still, punitive damage awards are relatively infrequent in personal injury cases. The most thorough survey of state and federal courts, conducted by Professor Michael Rustad, found only 355 punitive damage verdicts in product liability cases between 1965 and 1990. Almost invariably, like the Pinto, they involved deliberate marketing of a dangerous product. Often, the company also engaged in a cover-up of the injuries and deaths caused by its product. In addition, the study found that most large punitive awards were reduced by trial or appellate courts.

Undeterred by the absence of any real crisis, tort reformers focused on taking away the jury's power to tailor punishment to the circumstances. Proposals were introduced in every state legislature. But despite a vigorous and expensive lobbying campaign, by the mid-1980s only nine states had imposed caps on punitive damages. So the tort reform lobby turned to the Supreme Court of the United States. All they needed was a theory.

That task apparently fell to a group of law professors and their research assistants. The theory they devised was truly worthy of academics with gener-

ous budgets. Large punitive damage awards, they postulated, violate the Eighth Amendment prohibition against "excessive fines." No court had ever viewed the Excessive Fines Clause as a limit on any sort of damages in civil cases. The Supreme Court held as early as 1833 and as late as 1977 that the Excessive Fines Clause, like the rest of the Eighth Amendment, applies only to criminal prosecutions. Nevertheless, the tort reformers argued, the Clause was based on the Magna Carta's prohibition in 1215 against excessive "amercements" which, properly interpreted, included punitive damage awards. For centuries, they argued, American and English common law courts had managed to miss this point.

The tort reformers made this argument in a steady stream of certiorari petitions. After deciding two cases without reaching the issue, the Court squarely addressed the Eighth Amendment issue in *Browning-Ferris Industries v. Kelco Disposal, Inc.* (1989).

Staff counsel preparing the ATLA *amicus curiae* brief quickly learned that the case presented some unusual difficulties. Petitioners' "amercements" argument relied on precedents that were somewhat older than what one typically sees in tort cases. One cited authority, for example, was *Le Gras v. Bailiff of Bishop of Westchester,* 10 Edw. II, pl. 4 (C.P. 1316). How does one even locate a copy of such a decision? The West Reporters were of no help. Calls on some of Washington, D.C.'s most formidable law libraries came up empty. Ultimately, *Le Gras* and other ancient cases were located—in ATLA's own library! The Selden Society in England during the 1930s had collected and republished many early common law cases and commentaries. The Society presented a set to the renowned scholar, Roscoe Pound, who later donated his extensive collection to ATLA. Once again, ATLA was indebted to Dean Pound.

The Court in *Browning-Ferris* handed the tort reformers a resounding defeat. Justice Blackmun's opinion was in substantial agreement with the position advanced in ATLA's brief. The Eighth Amendment, was aimed at curbing the prosecutorial power of the government in criminal matters; the Excessive Fines Clause simply did not apply in private civil actions.

Justice O'Connor wrote a separate opinion that opened, "Awards of punitive damages are skyrocketing." As a result, she wrote, companies were wary of developing beneficial products. "Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market," she warned, citing the *amicus* brief of the Pharmaceutical Manufacturers of America. The tort reformers' aggressive public relations campaign had found a sympathetic ear with Justice O'Connor, despite reliable empirical data from government sources that demonstrated otherwise.

Less than five months later, major publications, including the *Washington Post*, published full-page advertisements boasting that American pharmaceutical firms had doubled their research and development budgets over the last five years and that U.S. companies far outpaced the rest of the world in bringing new medicines to market. The ads, designed to influence lawmakers on pending legislation, were paid for by none other than the Pharmaceutical Manufacturers of America.

At the same time the *Browning-Ferris* majority closed the door on the Eighth Amendment argument, Justices Brennan and Marshall conveniently opened another one. In a concurring opinion, they suggested that excessive punitive damage verdicts might violate substantive due process, citing several decisions from the despised *Lochner* era, dealing with legislative penalties. Defendants retooled their arguments and persuaded the Court to consider the substantive due process issue in *Pacific Mutual Insurance. Co. v. Haslip* (1991).

ATLA argued forcefully in its *Haslip amicus* brief that the decisions Americans make in the jury room are not subject to scrutiny under the due process clause. In that respect, they are similar to the decisions Americans make in the voting booth. A court's rulings regarding evidence and procedure and instructions to the jury on the applicable law are properly reviewable. But the jury is the voice of the people, and trial by jury, with procedural protections, is the epitome of due process.

Washington attorney Bruce Ennis, representing the plaintiffs, defended the jury's broad authority under the common law, delivering what the *National Law Journal* called "one of the best oral arguments" of the Term. A telling exchange occurred as counsel for Pacific Mutual addressed the Court. Asked what limits the Court should impose on punitive damages, the insurance company's attorney responded that awards should be capped at a fixed dollar amount and limited to a multiple of actual damages, with additional provision for limited attorney fees for plaintiffs. The phalanx of well-dressed corporate counsel watching the argument nodded in agreement. But Justice O'Connor, the Justice who was probably the most receptive to the call for restraints on punitive damages, dismissively interjected that this detailed list "was a lot" to read into the Due Process Clause.

That exchange encapsulates the tension that runs through the Supreme Court's punitive damages decisions. Defendants and their tort reform supporters insist upon clear and predictable caps on awards. The Justices, generally unhappy with unrestrained jury awards, could find no principled way to import the mathematical specificity of a statute into the broad and majestic guarantee of due process of law.

The *Haslip* Court, over Justice O'Connor's lone dissent, firmly declared that the common-law method of allowing juries to assess punitive damages comported with procedural due process. Justice Blackmun, again writing for the majority, rejected the notion that the Constitution drew a "mathematical bright line" limiting jury awards. However, Justice Blackmun ventured further, suggesting that a particular award might be so extremely excessive as to violate substantive due process. Justice Scalia warned in his concurring opinion that this vague substantive limit would require the Court to return again and again to decide the validity of specific awards.

That is precisely what happened. Each Term brought a flood of *certiorari* petitions challenging individual punitive damage awards from around the country. The Court, for the moment, set aside the notion of a limit based on economic substantive due process, a theory the Court has roundly rejected in every other area of law. The Justices focused instead on procedural due process protections. *TXO Production Corp. v. Alliance Resources Corp.* (1993), upheld a large punitive award that was 527 times that actual damages. In an effective oral argument, marked by testy exchanges with Justice O'Connor, Professor Laurence Tribe successfully argued that punitive damages should take into account the potential harm, as well as the actual damage, resulting from a defendant's misconduct. In *Honda Motor Co. v. Oberg* (1994), the Court held that federal procedural due process requires states to provide judicial review of punitive awards for excessiveness, irrespective of the state's constitutional guarantee of trial by jury.

The Court finally overturned a punitive award in *BMW of North America, Inc. v. Gore* (1996), a consumer fraud case in which defendant had sold a new car to the plaintiff without disclosing that it had been repainted. At issue was not the jury's verdict, but a $2 million punitive damage award issued by the Alabama Supreme Court after setting aside the jury award. Justice Stevens, for the majority, concluded that defendant had insufficient notice that its conduct might result in such a large award. Courts were instructed to use three "guideposts"—reprehensibility, the ratio to the harm or potential harm, and comparison to other penalties—in determining whether a punitive award is excessive. Justice Scalia, joined by Justice Thomas, dissented, reiterating his position that nothing in the Constitution authorizes such an intrusion into state tort law.

By the century's end, the tort reformers were not significantly closer to achieving their objective of imposing predictable limits on punitive damages. The Court consistently maintained that no mathematical bright line could be drawn to limit jury awards. However, many state courts and lower federal courts saw in the Court's decisions a green light for more stringent review of jury verdicts.

It must have occurred to some tort reformers that rewriting America's law of torts was getting to be expensive. Rivers of corporate cash flowed into the coffers of lobbyists, consultants, public relations firms, tort reform associations, conservative legal foundations, "grass roots" organizations and the rest of the tort reform industry—not to mention contributions to politicians. It might even have occurred to a few that some money, which ultimately comes from customers, might be devoted to delivering safer products and services.

Even success in enacting legislation that tilts the law in favor of defendants affects the tort system only at the margins. Some tort reformers, particularly among product manufacturers, would prefer to close the courthouse doors to such lawsuits altogether. But no legislature in the country stood ready to, for example, forbid severely injured women from suing the maker of a dangerously defective medical device which caused their harm. The unelected federal judiciary, however, was another story. And this time, the reformers had a theory.

To the Founding Fathers, federal preemption was not a problem; it was a solution. Under the Constitution's system of dual sovereignty, Americans are subject to both state and national laws. Where the two are in conflict, the pragmatic Founding Fathers provided in the Supremacy Clause that federal law trumps state law. A long line of Supreme Court decisions stretching over nearly two centuries has held that federal law supersedes state law on a particular matter only if that is what Congress clearly intended. The "touchstone" of preemption, the Court emphasized, is congressional intent.

As Congress enacted a proliferation of federal safety statutes in the 1960s and 1970s, businesses argued, and Congress quite sensibly agreed, that companies could not be expected to comply with federal requirements and with fifty different sets of state regulations. For that reason, many regulatory statutes—the National Highway Transportation Safety Act, Railroad Safety Act, and Federal Hazardous Substances Act to name but a few—expressly preempt inconsistent state standards or requirements. However, it is one thing to intend that federal regulations trump state administrative regulations. It is quite another to say that federal regulation excuses an industry from liability under state tort law for injuries it has caused. Historically, administrative regulation and tort liability have been viewed as complementary means of enhancing safety. Indeed, some safety statutes, such as the NHTSA, explicitly provide that compliance with federal regulations does not exempt any person from liability at common law.

The Supreme Court at first recognized this distinction. Even in the heavily regulated field of nuclear power, the Court stated in *Silkwood v. Kerr-McGee* (1984) and *Goodyear Atomic Energy Corp. v. Miller* (1988), preemption of state

authority to issue direct commands to companies does not preclude damage awards for personal injury. A tort verdict is not a governmental command that a company or industry alter its conduct. It is, instead, an indirect incentive for safety that leaves the decision in the company's hands.

When the Court addressed the issue in *Cipollone v. Liggett Group, Inc.* (1992), its view had changed. Rose Cipollone died of cancer caused by cigarettes. The lower court ruled that the family's wrongful death action against the manufacturer was preempted by the Cigarette Labeling Act, which required the now-familiar package warnings and expressly preempted state law "requirements or prohibitions." Congress obviously did not want each state to devise its own conflicting package warnings, but nothing in the voluminous legislative history suggested that Congress intended to deprive smoking victims of the right to bring tort actions against cigarette manufacturers.

The Justices indicated during oral argument that they were not interested in ascertaining what Congress actually intended. Rather, suggested Justices Scalia and O'Connor, isn't tort law simply another form of state regulation? ATLA attorney Marc Edell, representing the plaintiffs, answered that the purpose of tort law is compensation, not regulation. This led to an odd, but crucial exchange with Justice Stevens. What if a state court, in addition to awarding compensation, also enjoined the defendant from selling its product in its defective condition? Edell was taken aback. No state permits injunctive relief in product liability cases, he responded. Stevens, however, was not convinced.

Edell was obviously correct. There is no reported case of any court issuing an injunction in a product liability action against the sale of the unreasonably dangerous product. The error underscores the limitations of a Court whose members are steeped in federal statutory actions but have little state court experience presiding over common law cases. Justice Stevens, writing the plurality opinion in *Cipollone*, departed from the Court's prior focus on the clearly expressed intent of Congress. Instead, the Court held that the plain meaning of "requirement" in the statute easily encompasses common-law duties. The Court proceeded to find that some state causes of action are preempted, while others are not.

The Court traversed much of the same territory in *Medtronic, Inc. v. Lohr* (1996). By 1976, thousands of women had been injured by the Dalkon Shield IUD. In fact, Dalkon Shield cases outnumbered even asbestos cases in federal courts. Congress enacted the Medical Device Amendments to the Food, Drug and Cosmetics Act to authorize the FDA to regulate medical devices. The statute also preempted inconsistent state "requirements." Not a single member of Congress suggested that the industry should be shielded from the claims of injured women. Nevertheless, during the 1990s, manufacturers argued that Congress

had actually intended to protect the industry from liability. In twenty of twenty-two federal decisions, reflecting of the growing hostility of the federal judiciary toward state tort law, courts held that the statute preempted product liability causes of action.

The Supreme Court's decision in *Medtronic*, holding that none of Ms. Lohr's state causes of action were preempted, was a major defeat for the industry. Justice Stevens, again writing for a plurality, dismissed Medtronic's attempt to rewrite legislative history as "implausible" and "perverse." However, he again accepted the notion that preemption of state "requirements" can bar product liability lawsuits. In a passage hearkening back to his exchange with Edell in the *Cipollone* oral argument, Stevens stated that a tort action can be regulation because "a court hearing a common-law cause of action [might] issue a decree that has the effect of establishing a substantive requirement."

The Court extended judicial preemption even farther in *Honda Motor Corp. v. Geier* (2000), where plaintiff alleged that her car was unreasonably dangerous because it lacked air bags, though federal regulations did not require them at that time. Even though a provision in the National Traffic and Motor Vehicle Safety Act expressly preserves common law liability suits, the Court held that plaintiff's cause of action was impliedly preempted. In the Court's view, such lawsuits were in conflict with the Act's overall regulatory scheme. In less than a decade, the intent of Congress, once the "touchstone" of preemption, had become largely beside the point.

Expert Testimony: Judges Judging Science

Long gone are the days when an eloquent argument or gripping testimony by the accident victim could carry a case to verdict. In tort actions today—certainly in medical malpractice and product liability cases—expert opinion is essential to survive summary judgment and to convince sophisticated and skeptical juries. Obtaining good expert testimony has always been exceedingly difficult for plaintiffs. Medical experts are notoriously reluctant to testify against their professional brethren. Experts in product safety or design generally depend upon manufacturers for their livelihood. One of ATLA's major contributions to expanding access to justice for tort victims has been to promote the sharing of information concerning qualified experts who could testify in support of plaintiffs.

Among the many restrictions common law judges placed on the use of experts in court was a requirement announced in the 1913 case of *Frye v. United States*, that expert opinion be based on scientific principles or methods that have gained "general acceptance" in their particular field. *Frye*, for ex-

ample, held the results of an early polygraph machine inadmissible. The standard was widely criticized, and in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) a unanimous Supreme Court held that Congress eliminated the *Frye* test when it enacted the more liberal standard in the Federal Rules of Evidence. However, Justice Blackmun did not end there. He wrote for the Court that judges must act as "gatekeepers" to ensure that unreliable expert evidence does not reach the jury.

The dubious premise—that federal judges are necessarily more adept at handling scientific evidence than Americans sitting in the jury box, many of whom have greater education or experience in the sciences—was unquestioned. However, *Daubert* did preserve one bright-line rule that protected the jury function. Justice Blackmun emphasized that the judge's focus "must be solely on principles and methodology, not on the conclusions that they generate." In other words, it is for the judge to determine whether x-rays are a reliable way to diagnose broken bones. The jury decides whether an expert's interpretation of an x-ray, after cross-examination and rebuttal by the opposing party, is believable.

The Court made further inroads on the jury's role in *General Electric Co. v. Joiner* (1997), where an electrician developed lung cancer allegedly due to exposure to PCB's in transformers. The trial judge, looking at the epidemiological studies relied on by plaintiff's two experts, did not dispute their methodology. She simply did not believe the conclusions drawn by the experts. Chief Justice Rehnquist rejected the clear distinction between methodologies and conclusions, stating the judge can exclude expert testimony where there is "simply too great an analytical gap between the data and the opinion proffered." In other words, a plaintiff is not entitled to a jury determination of the credibility of expert testimony until he or she has first convinced the trial judge.

The Court next addressed the judge's gatekeeper role in *Kumho Tire Co. v. Carmichael* (1999), where an engineer testified that a tire blowout on a minivan, leading to a fatal accident, was caused by a manufacturing defect in the tire. The tire company and its supporters viciously attacked the intelligence of jurors and the ability of ordinary Americans to understand technical evidence.

Oral argument took a bizarre turn when Justice Stephen Breyer attempted to focus counsel's attention on "the hardest question." How could any judge believe that a tire which failed only after being driven 100,000 miles must have been defective? As plaintiff's counsel was responding, Justice Scalia interrupted: Surely courts cannot allow any expert with a "cockamamie theory" to testify and "just dump it all before the jury." Scalia's remarks drew laughter from the audience, but there was no mistaking their hard edge. Ordinary Ameri-

cans serving as jurors are not smart enough to tell "junk science" when they see it. It takes a judge, Justice Scalia stated, to discard expert opinion "that contradicts common sense."

Lost in this exchange was the fact that it was the van, not the tire, that had been driven 100,000 miles. (Plaintiff was the sixth owner of the van, and the parties had been unable to discover when the tire had been installed.) Justice Breyer repeated his 100,000-mile assertion three times, and others on the Court referred to it. Incredibly, not one of the Justices seemed to recognize a fact that would have been obvious to just about any jury of ordinary citizens. Anyone who has shopped for tires—and has shopped again to replace them—knows that no tire lasts nearly that long.

The Founders believed there was far more common sense to be found in the broad experience of ordinary Americans than in the sometimes narrow view of judges. The *Kumho* argument is another example of how right they were.

Not all the news from the Supreme Court was bad for American juries. In a pair of decisions described in Chapter 6, the Court invalidated class action settlements that deprived asbestos victims of their right to a trial by jury. Nevertheless, it was clear at the end of the twentieth century that it was not 1789 anymore. The civil jury is no longer the widely popular and revered institution it once was. Its need for strong defenders was never greater.

Counter attack: Constitutional Litigation

By the mid-1980s, as more states enacted tort reform statutes, Jerry Palmer and Leonard Schroeter, two veterans of the Amicus Curiae Committee, became convinced that ATLA needed to go on the offensive in the courts. The two spearheaded the creation of the Constitutional Challenge Committee, which would not only encourage *amicus* briefs in cases on appeal, but also the filing of original lawsuits attacking tort reform. Palmer pointed out that the judicial arena represented a more level playing field than legislatures, where ATLA could not hope to outspend its tort reform opponents. Schroeter articulated a basic jurisprudential philosophy for ATLA: tort remedies rest on fundamental constitutional principles that are violated when legislatures arbitrarily impose restrictions on remedies.

That idea was novel enough, given that tort lawyers seldom had occasion to rely on constitutional law. What was truly radical was the plan promoted by Palmer and Schroeter to rely on state constitutions. A decade earlier, a trend in criminal cases known as the "new federalism" relied on state constitutional protections. A student note in the 1976 *American Criminal Law Review* by Jef-

frey White, who later served as staff counsel for ATLA's Amicus Curiae and Constitutional Challenge committees, argued that courts ought to give independent meaning to state constitutional guarantees, based upon their state history and policy. The following year, Justice William Brennan, in a widely heralded article for the *Harvard Law Review*, also encouraged state courts to rely on state constitutional rights. These were the elements ATLA would use to mount constitutional challenges to tort reform.

ATLA's constitutional litigation program proved to be a remarkable success. Initially, the committee recruited volunteers to track legislation in every state and analyze potential conflicts with state "open courts" or "right to remedy" guarantees, many of which had not been extensively examined by courts. The committee also presented constitutional scholars and litigators who spoke to packed audiences at ATLA conventions. Their objective was not only to develop theories that ATLA might employ in its *amicus* briefs, but also to aid tort lawyers in raising constitutional issues in their own cases.

The counterattack made its way from classroom to courtroom. During the next two decades, more than one hundred court decisions in twenty-five states struck down various tort reform provisions as violative of state constitutional guarantees. Resting on an independent state ground, these decisions were not subject to review by the U.S. Supreme Court. An early success was *Carson v. Maurer* (N.H. 1980), in which ATLA filed an *amicus* brief. The New Hampshire Supreme Court held that the state's tort reform legislation violated the state equal protection provision. In *Sofie v. Fibreboard Corp.* (Wash. 1989), the Washington Supreme Court struck down a cap on noneconomic damages in an eloquent reaffirmation of the state's constitutional guarantee of trial by jury. The Ohio Supreme Court in *Morris v. Savoy* (Ohio 1991), took the unusual step of citing ATLA's *amicus* brief for its empirical evidence that limits on damages do not result in lower liability insurance premiums.

Another success, particularly for Kansan Jerry Palmer, came in *Kansas Malpractice Victims Coalition v. Bell* (Kan. 1988), invalidating that state's medical malpractice damage cap. The case was not a conventional medical malpractice suit, but an original action seeking a declaratory judgment. Palmer was a strong advocate of such proactive attacks on tort reform, but they presented difficult problems, both procedurally and strategically. Even in states where procedural rules might allow trial lawyers standing to challenge tort legislation, many thought that cases involving actual injured plaintiffs would demonstrate the harsh results of tort reform most effectively.

Nevertheless, there are great advantages to being able to control the scope of constitutional challenges and to obtain prompt judicial review without wait-

ing for years as challenges to particular provisions made their way through the appellate courts.

ATLA decided to develop an in-house capacity to bring constitutional challenges to laws restricting tort actions. ATLA's expanded program had its first opportunity to mount such a challenge in 1995 when the Illinois legislature enacted a draconian omnibus tort reform measure by stealth of night. Without hearings, the legislature passed a 67-page measure that included caps on noneconomic damages, changes to joint and several liability, waiver of medical privacy for plaintiffs in medical-malpractice actions, and a variety of other measures. Working behind the scenes with leaders from the Illinois Trial Lawyers Association and Harvard law professor Laurence Tribe, the new effort enjoyed success as the Illinois Supreme Court struck the enactment down in its entirety in *Best v. Taylor Machine Works, Inc.* (Ill. 1997).

While the Illinois case was pending, Ohio's General Assembly created the most mammoth tort reform statute ever, making pro-defendant changes to more than 100 sections of the Ohio Code dealing with liability, evidence and procedure, and damages. The 246-page legislation sought to overturn or nullify prior decisions rendered by the Ohio Supreme Court that held various earlier tort reforms unconstitutional. The Ohio Academy of Trial Lawyers, led by a past president, Don C. Iler, was determined to bring a rapid challenge to the law. The Academy enlisted ATLA's constitutional challenge program to do the legal work, this time, as co-counsel.

It was a uniquely framed lawsuit to realize Iler's vision of an original action in the Ohio Supreme Court. The complaint sought writs of mandamus and prohibition against the state's trial courts, to prevent them from applying a statute that was contrary to the constitutional determinations of the state supreme court. In framing the issue that way, the case presented the tort reform law as a challenge to the Court's own constitutional authority. The petitioners were the Ohio Academy, the Ohio AFL-CIO, and two taxpayers, Richard Mason, the Academy's executive director, and William Burga, president of the labor union. The complaint named all the state's trial judges as class defendants, naming four judges from far flung districts as class representatives. Recognizing the importance of the battle, some 200 organizations filed amicus briefs, primarily in defense of the legislation. Supporters even placed pro-tort reform messages on billboards located on roadways leading to the courthouse, presumably to catch the attention of justices traveling to work.

The September 1998 argument marked the first time an ATLA staff attorney argued a case to a state supreme court. ATLA Senior Director for Legal Affairs Robert S. Peck opened the argument by emphasizing the separation of powers issues and defending the petitioners' standing. He shared argument

time with Iler, who focused on the statute's violation of the single-subject rule. On August 15, 1999, the court handed down its decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999). While accepting the separation of powers and single-subject arguments as definitive, the court placed the tort-reform measure in the larger context of attempts by the legislative branch to dominate the government of the state. The history of the Ohio Constitution makes clear the drafters intended to protect the judicial branch from legislative overreaching. Picking up that history from the petitioners' brief, the court concluded that the statute, by attempting to dictate matters that were the responsibility of the judicial branch and by attempting to nullify the court's constitutional decisions, violated the separation of powers mandated by the constitution, as well as the state constitutional right to a remedy, right to trial by jury, due process, and bar against multi-subject legislation. The court struck down the statute in its entirety.

Success in challenging tort reform statutes in Ohio and other states prompted ATLA in 2001 to transform its Legal Affairs department into a law firm, the Center for Constitutional Litigation, P.C., dedicated to safeguarding constitutional rights and continuing the pioneering work of the constitutional challenge program.

The Future of Torts and Juries

Professor Wex Malone wrote in a prescient article in the *NACCA Law Journal* in 1952 that personal injury law was facing a critical crossroads. The previous hundred years had witnessed the rise of negligence principles. The party found by a jury to be at fault was obliged to make the victim whole. But a competing idea was gaining acceptance in Europe, which offered limited, predefined compensation to accident victims. The costs were borne by the entire enterprise as a cost of doing business, irrespective of fault. Malone pointed to workers' compensation programs, universally adopted in the United States in response to the failure of the negligence system to redress workplace injuries, as a prime example of a European-style compensation system. Could such a system take the place of fault-based compensation for injuries due to medical malpractice, dangerous products, or automobile accidents?

ATLA made its choice. The organization began as an association of attorneys representing injured workers in the administrative world of workers compensation, and ATLA members never abandoned that mission. But ATLA has become the champion of the American model, promoting the precepts that those who are at fault should pay for the injuries they cause and that Americans serving as jurors should play the central role in holding wrongdoers accountable.

There continue to be pressures to abandon the fault-based compensation system and replace it with a private administrative mechanism. Tort reform itself is part of this larger picture. Tort reform does not eliminate the costs of wrongful injury. Instead, it places more of those costs on injured victims themselves and on their families. And more of those costs will be borne by the rest of society in the form of higher health care costs, insurance premiums, and taxes—with no corresponding incentive for those who cause injuries and deaths to invest in safety.

What tort reform does is rob ordinary Americans of their role of identifying blameworthy conduct and holding even the most powerful corporations accountable for the harm they cause.

Trial lawyers have defended the American jury well. But they cannot fight alone. The civil jury will endure in America because the American people demand to keep their voice. ATLA has made great strides in educating and informing Americans about their jury system. Looking to the future, that may be ATLA's important mission.

Afterword

Howard Twiggs
Past President, ATLA

A century ago, the lamplighter brought light to our streets at night. You could tell where he had been by the trail of lighted lamps he left behind. Working with a half century's worth of documentation and the memories of hundreds of key participants, ATLA's historians, Richard Jacobson and Jeffrey White, have given us a vivid, well-researched, and very engaging account of the lights left behind by those who created NACCA and guided its evolution into ATLA—the greatest force ever created that is dedicated to preserving and expanding the rights of those injured through the actions of others. They have told how the visionaries who started ATLA have built a safer society for all Americans, building a responsible—and responsive—civil justice system, one case at a time. Our system is not perfect, but it is still the envy of the world.

Looking toward the future, we cannot help but wonder what it holds for ATLA as it fights to preserve the civil justice system and its foundation—the American jury and the democratic principles it brings into our courts. Not all of the answers about what we we will encounter are obvious, but some are.

First, we know that we need to continue doing what we already do well and to keep on improving on it—in the education of trial lawyers for which ATLA is justly famous; in the acquisition and sharing of the information that enables ATLA members to give their clients unsurpassed representation; and in encouraging collaboration and collegiality through the work of our membership sections and litigation groups and through our stimulating conventions.

Second, we know that our civil justice system will continue to be challenged. Our opponents cynically play on the fears of Americans. During the past quarter century, business interests—notably the insurance industry, large manufacturers, and the medical associations—have spent millions of dollars to promote a distorted view of our legal system. They market the lie that Amer-

icans suffer from rampant litigiousness and that the only cure is to restrict the rights of injured people. ATLA will need to continue to respond to these attacks built on lies, confident that the truth is on our side. We will also continue to give to consumers and the injured the best representation on Capitol Hill that is available to any group in America. If that support does not come from ATLA, it will come from nowhere.

Third, we know that, while we protect and defend the tradition of trial by jury, we need not be fearful of changes to the civil justice system that constitute true reform. There are many improvements that can and must be made, and ATLA will welcome and, indeed, work for them vigorously.

Fourth, we need to keep working with others who share our goals and our commitment. There are many such groups, including labor unions, environmentalists, advocates for the rights of women and the elderly, the many organizations of minority lawyers, organizations that work to improve and certify the professionalism of lawyers, civil rights and civil liberties group, and many others. We also need to encourage and support the growing number of nonpartisan authors and scholars whose works support the civil justice system. Telling the stories of those who must turn to the courts for justice—like that of the courageous farm injury survivor Steve Sharpe—will help to inform public opinion.

Finally, with that unity of purpose to protect consumer rights and to get the truth out, we must be willing to fight on and to give no ground on our clients' rights. ATLA has never bargained away rights of consumers or those injured by the fault of others, and it must never do so in the future. The foes of the jury system have an appetite which will only grow if fed by concessions. *No* encroachment on trial by jury is acceptable. *No* "one-size-fits-all" limitation on damage awards is fair. *No* one group of Americans should have to sacrifice its rights in the hope that the rights of others can then be made more secure. If anyone should suggest that concessions are necessary in our defense of the civil justice system, ATLA must say, as it has always said, not just "No" but "Hell, No!"

So as we look to the future, we know that ATLA will be up to the difficult tasks we face. Among those who work for a better civil justice system for America, ATLA will still lead the charge.

One of the greatest providers of ATLA's inspiration and intellectual base, the late Professor Tom Lambert, used to encourage us to relish the challenges of the future with a story that may be apocryphal but still describes well our members' attitude. Tom spoke of a tourist who visited Washington and took a cab to the

National Archives to see the Declaration of Independence up close. When he emerged from the cab he saw inscribed on the building's entablature a phrase from Shakespeare's *The Tempest:* "What's past is prologue." Being unfamiliar with the line, he asked the cab driver, "What's that mean?"

"It means," the driver answered, "you ain't seen nothin' yet."

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ATLA Hall of Fame

In the entrance of ATLA's headquarters in Washington, D.C., is a stone plaque that honors the memory of those who have made the greatest contributions to ATLA and its ideals. Engraved in stone is this declaration, followed by the names of those honored.

Association of Trial Lawyers of America Hall of Fame

This memorial is dedicated to the men and women of ATLA who have made extraordinary contributions to the civil justice system, the public welfare of all Americans, and to this Association. These individuals, in their pursuit of the public good and a safer society, epitomize the ideals and integrity of the trial lawyer.

Robert E. Cartwright, Sr. (1925-1998)
Samuel B. Horovitz (1898-1985)
Theodore I. Koskoff (1913-1989)
Perry Nichols (1915-1983)
Alfred S. Julien (1910-1989)
Francis H. Hare, Sr. (1904-1983)
James A. Dooley (1914-1978)
Lou Ashe (1908-1981)
Moe Levine (1908-1974)
Leonard M. Ring (1923-1994)
Melvin Belli (1907-1996)
Jacob D. Fuchsberg (1914-1995)
Craig Spangenberg (1914-1998)
Thomas F. Lambert, Jr. (1914-1999)

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A fifty-year history of the challenges and accomplishments of the Association of Trial Lawyers of America.

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BALANCING THE SCALES
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