THE LITIGATION EXPLOSION: RIGHTS VERSUS DUTIES

Jay S. Bybee

A number of legal periodicals and advertisements manage to cross my desk each day. Invariably the advertisements announce some symposium or a new series of books to aid the practicing lawyer in his search for new and exotic grounds for suit. Each claims to have the most recent cases, the newest theories: fifty ways to sue your brother.

The trade press, while not as commercial, has encouraged litigiousness in its own way by chronicling the exploits of celebrated lawyers and their celebrated clients. In these articles case strategies are discussed, the opposition's mistakes revealed, and the judge and jury second guessed. Even the popular press has added to this litigation consciousness by covering not only cases which set important substantive legal precedents but also suits which are distinguished mainly by the huge sums of money involved.

The disturbing increase in suits is reflected in the increase in lawyers. We now have some 600,000 lawyers with nearly 130,000 students currently in law school. By the 1990s we can expect to have over 1,000,000 lawyers in the U.S., all—as Chief Justice Burger so vividly put it—"hungry as locusts."

Notwithstanding the statistics I believe that the number of lawyers is not the primary cause of the litigation explosion. While I would not dare to suggest any one cause for our current litigiousness, I believe it is occasioned, in large measure, by undue emphasis on our common-law rights. For example, in a typical civil suit, Smith and Jones have a dispute over what Smith thinks Jones should do. Smith rushes to a lawyer who files a complaint against Jones. If the dispute is not settled, the case is assigned to a judge who renders a decision and one of the parties is declared the winner, and the other unhappily complies with the judgment of the court. If Smith wins then we say that Smith had a right to have Jones do something. If Jones wins, we say he had a right not to do what Smith wanted. In either case, our focus is only the respective rights of the parties, our use of the word *rights* referring rather imprecisely to whatever claim, privilege, power, or immunity the winning party is ultimately found possessing.

Our system of vindicating one side's allegations and declaring winners and losers before the law stands in sharp contrast to the Jewish traditions from which our common-law traditions, in part, are derived. Whereas in the example above we only consider ourselves to have won if our claims are ultimately upheld by the judge and jury, the Jews had no concept of winning or losing. In a typical dispute, according to one Jewish legal scholar, "litigation in Jewish law was in the nature of a common request for clarification." The people making the request were perfectly willing to perform their duty once they understood it. Thus, the focus was not the *rights* of the parties, but their *duties*. The only sense in which any party won was if that party fulfilled his religious duty to obey the law; as such, winning was equally available to both parties. As Israeli lawyer Amihud Ben Porath has written, in Jewish law, "the judge was not an umpire between adversaries; rather he was best qualified to tell the parties what behaviour the Law prescribed for them, so as to prevent the erring party from committing a sin. Thus exhorts the Talmud: 'Let him who comes from a court that has taken from him his cloak [to satisfy a judgment] sing his song and go his way, [since having been justly tried he has not been divested of property but rather had been relieved from all ill-gotten object].'"

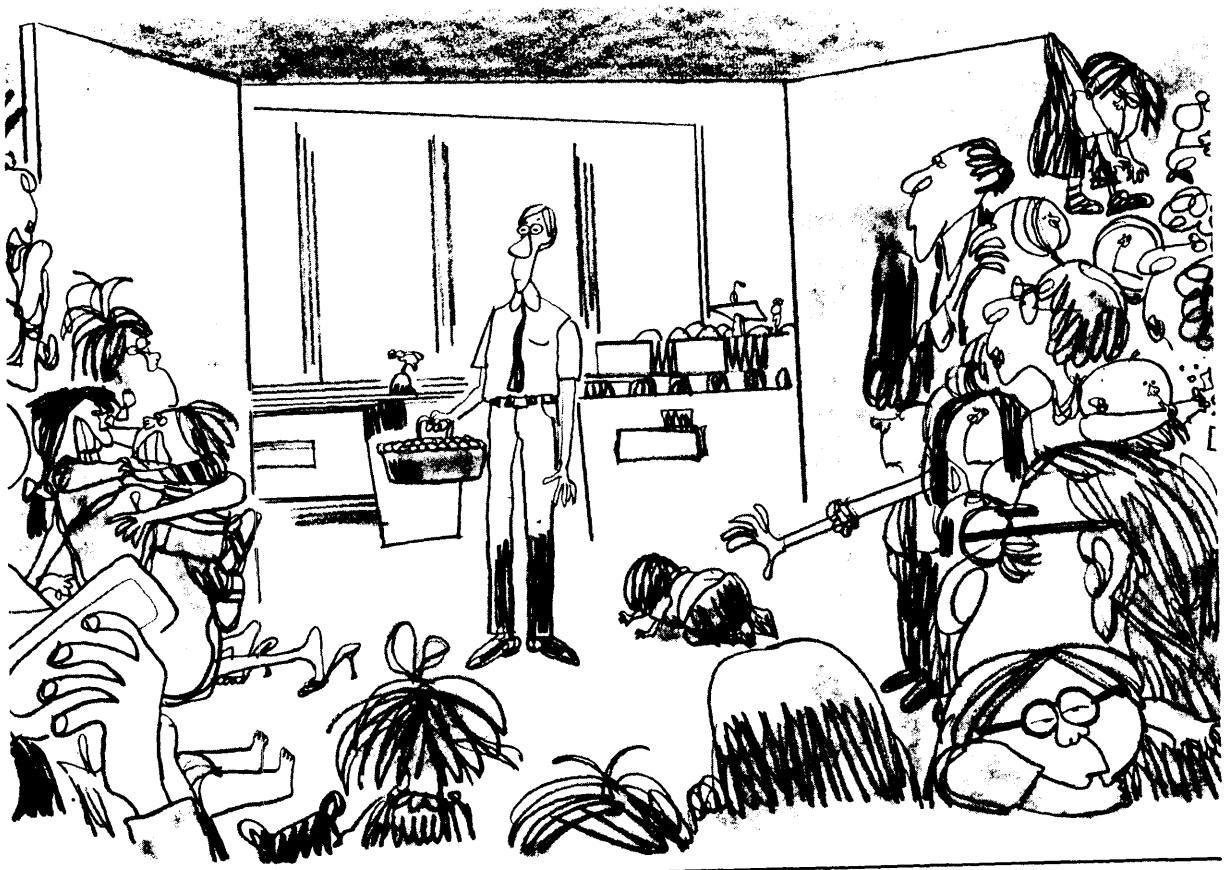
Israeli Supreme Court Justice Moshe Silberg has further explained the Jewish philosophy: "Thus, when a person refuses to pay his debt he is physically coerced to fulfill his religious obligation to pay. The concern of the court is not the creditor's debt, his damages, but the duty of the debtor, his religious-moral duty, the fulfillment of the precept by him. The creditor receives his money almost incidentally, as a secondary result of the performance of this duty." Silberg finds that, in contrast, "modern law has no interest in duties; its sole interests are rights, and the debtor's duty to pay is only a short way of indicating the possibility of a payment coerced by the creditor."

The implications of the acceptance of such a duty-orientation in this country are far reaching. First, we would eliminate many unnecessary suits. Because the duty-orientation makes obedience to the law a matter of conscience, we could avoid a large number of suits in which the responsibilities of one recalcitrant party are obvious. Second, we would see fewer suits brought out of vindictiveness or spite. Third, our fetish with large money judgments would diminish since the object of the suit would be to see the offender bring his actions in conformity with the law and not to see how much the winning party can get.

The gap between our rights-orientation and the duty-orientation of Judaism should be of particular concern to Latter-day Saints. I believe that the scriptures consistently speak of our duties to God and our fellow men. The Sermon on the Mount is filled with exhortations to forgive others their trespasses while at the same time fulfilling our obligations to them; likewise the classic address of King Benjamin. Too, we should consider whether we are not already under modern-day commandment to turn from asserting our rights to fulfilling our obligations willingly. We need look no further than the Doctrine and Covenants to read "Let no man break the laws of the land, for he that keepeth the laws of God hath no need to break the laws of the land" (D&C 58:21).

Transition from our self-centered rights-based tradition to a duty-based tradition would be difficult. The Jewish system worked in large part because it was bound by both religious and nationalistic traditions. Moreover, a duty-based tradition would not solve all of our problems with respect to increases in litigation; even duty-based traditions required resorting to a judge or court. And in any event there are times when rights simply must be defended. But as citizens, and especially Latter-day Saints having the sense of community and devotion necessary to sustain such a tradition, we should consider carefully what allegiance we owe to the law.

SUNDAY'S FOYER



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