

It's No Fun Playing Torts

So legislators and judges must step up to the plate and decide when people can sue.

By Philip K. Howard

Legal reform has settled into a kind of trench warfare, and the recent elections are unlikely to change it. Tort reformers rail against frivolous lawsuits. (Who can be against that?) Trial lawyers talk about protecting the little guy against corporate abuses. (Who can be against that?)

What's missing is a coherent vision of how justice should work—one that is fair to victims and safeguards against litigation abuse.

Last summer, John Knowles of Garden City, N.Y., was released from three years of litigation hell when a jury finally decided that he should not be ruined financially with a multimillion-dollar verdict. His sin? When playing in the Garden City Slow Pitch Softball League in 2001, he slid into home plate. The catcher, Michael Licitra, fell, broke his kneecap, and decided to sue Knowles for the nice round number of \$2 million.

Not long ago, this accident would have been considered, well, an accident. Baseball, like all other physical activities, carries certain risks. Every year there are about 15,000 fractures from recreational baseball and softball—not bad considering that 43 million Americans participate. You can't play the game without taking that chance. Risk and opportunity are the flip sides of the same coin.

But many Americans don't see it that way anymore. Something—anything—goes wrong, and it's assumed that somebody should pay. Like a switchblade, legal fangs replace the nice smile. The legal system—which should be the foundation of our freedom—fosters almost primitive feelings of fear and exploitation.

A COURT OF LAW IS NOT A DEMOCRACY

Why does justice today have this effect on otherwise normal people?

Defenders of current legal orthodoxy argue that there is a constitutional right to take almost any claim to a jury. In a December 2003 *Newsweek* essay entitled "Juries: Democracy in Action,"

Sen. John Edwards (D-N.C.) wrote, "The people who sit on juries are the same people who decide who the president should be. People who are entrusted to choose the leader of the free world are capable of weighing evidence in a courtroom."

This is powerful rhetoric, knocking tort reformers back on their heels as soon as they offer up any reform that might impinge on this so-called right.

Stirring as it sounds, however, this isn't the rule of law. Justice is not supposed to be "democracy in action," decided in mini-elections, jury by jury. The rule of law requires that judges make rulings defining what is a reasonable claim. Only then do you get consistent decisions and predictable outcomes. If any accident can go to a jury, irrespective of reasonableness, then pretty soon people don't feel free to act on their reasonable judgments.

WHERE ARE THE GATEKEEPERS?

Reviving the rule of law will require a shift in responsibility back to judges and legislatures. The core question in civil justice—who can sue for what—must be decided as a matter of law by judges, not by juries on an ad hoc basis. Is sliding into home plate a risk that our society can tolerate or not? We need to know before going out to play.

"An act is illegal," University of Virginia professor Donald Black once observed, "if it is vulnerable to legal action." By letting any claim go to a jury, we have effectively declared most life activities potentially illegal.

Most judges today don't even have an idea of this responsibility. Heedless of the broader social consequences of allowing particular claims, judges defer almost all decisions to a jury. Just let the two litigants slug it out in front of the jurors. As one judge said to me, "Who am I to judge?"

The judge in the softball case refused to dismiss the claim, saying that Knowles had "the obligation of using reasonable care to guard against a risk which might reasonably be anticipated." Hmm . . . let's think about this. Yes, sliding into home plate involves the certainty that players will occasionally get hurt. But that's inherent in the game. The town of Garden City was also sued. What could it have done differently? Ban softball?

Nor do legislators these days seem to understand their role in drawing these lines. Congress is all too reluctant to impinge on the so-called right of the people to take claims to the jury.

But lawmakers have the situation upside down. It is precisely their responsibility to decide, on behalf of the common good, when people should be able to sue and when they should not.

Law is not a free-market commodity. Suing is the use of state power by one citizen against another. It's just like indicting someone, except for money. For law to be the foundation of freedom, the power of a lawsuit must be constrained by deliberate choices by judges and legislatures, deciding which claims are valid and which are not.

There was a time when statutes commonly limited claims, such as the ones that bar citizens from suing power companies when there are power outages. And the greatest judges have emphasized that the common law requires what Justice Benjamin Cardozo called "judicial legislation," in which judges draw the lines between what is and what is not a valid claim.

DON'T BLAME THE JURY

The villain here is not the jury. Juries are generally sensible, as they were in the softball case. As one juror observed there, it was the umpire's call whether it was a valid slide, and "the umpire was impartial." But "generally" is not the rule of law.

Earlier this year, in another freak accident resulting in a broken leg (on a sledding hill in Greenwich, Conn.), a jury rendered a verdict of \$6.3 million against the town.

Juries have been given the wrong job. The Garden City jury couldn't make binding precedent that sliding is OK. Juries in asbestos cases don't have the authority to balance jobs against lawsuits. The role of the jury in our constitutional system is to resolve disputed facts, not make legal rulings on what is a valid claim.

The fault here lies with judges and legislatures. They have left a vacuum of authority, which has resulted in a kind of anarchy in which bullies and self-appointed victims use lawsuits for self-interest. Something goes wrong? Pick up the legal club and threaten someone. The effect is to infect the rest of society with fear.

As a result, we don't just have an injustice here and there; we have a slow disintegration of our social fabric. The cure for this cancer on our culture is not tort reform, but a basic shift in authority. We must restore the rule of law.

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