

Rule of Law / By Philip K. Howard

## When Judges Won't Judge

America's lawsuit culture is transforming our society, but there's been little focus on why litigation spun out of control over the last 30 years. People never used to sue for hot coffee spills, or for getting fat. There was a time, in the 1970s, when a million-dollar verdict for an accident was headline news. Now people sue for billions. What changed?

Obvious villains are greedy lawyers and a culture that has lost its sense of personal responsibility. But there's a chicken that laid those eggs—the American judiciary abdicated its role as gatekeeper in the 1960s, and started letting anyone sue for almost anything. Embarrassed by their complacency on racial and gender discrimination, the white males on the bench embraced a new philosophy of judging—instead of a paternalistic model (most famously symbolized by Justice Potter Stewart's line "I know it when I see it"), judges would be merely referees in a neutral process. Instead of neutrality, however, they left a vacuum. At first gradually, and now at a blinding pace, that vacuum has been filled with new theories and escalating claims by those who see justice as an entrepreneurial activity:

Judges today consider civil justice as a private dispute, rather than a use of state power. They can't imagine on what basis they should have the authority to limit claims. Just let the two litigants slug it out in front of the jury. As one judge suggested to me, "Who am I to judge?"

But there's a victim that judges have forgotten. The reason judges must take the responsibility of deciding whether claims are excessive, as a recent decision from the House of Lords in England reminds us, is not because of fairness between the litigants, but because lawsuits affect all of society.

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The case before the House of Lords, the equivalent of our Supreme Court, could have been picked from any court in America. On a hot day in the Cheshire region of England, an 18-year-old named John Tomlinson went for a swim in the lake at Brereton Heath Country Park. Racing into the water from the beach, he dived too sharply and broke his neck on the sandy bottom. He was paralyzed for life.

Mr. Tomlinson sued the Cheshire County Council for not doing more to protect against accidents. The Council, he discovered, knew about the risks—there were three or four near-drownings every year. "No Swimming" signs had been posted, and widely ignored, for over a decade. The popularity of the park—more than 160,000 visitors every year—made effective policing almost impossible. Fearful of liability, the Cheshire Council had decided to close off the lake by dumping mud on the beaches and planting reeds.

But before the work was done, Mr. Tomlinson had his accident. The Cheshire Council should have acted sooner, as his lawyer argued, to prevent "luring people into a death trap" and to protect against a "siren song strong enough to turn stout men's hearts." The lower courts accepted this argument because the County obviously knew the danger.

The Law Lords took the appeal, and, this past August, ordered the case to be dismissed. Whether a claim should be allowed, they held, hinged not just on whether an accident is foreseeable but "also the social value of the activity which gave rise to the risk."

Permitting Mr. Tomlinson's claim, the Lords held, means that hundreds of thousands of people would not be able to enjoy the park: "There is an important question of freedom at stake. It is un-

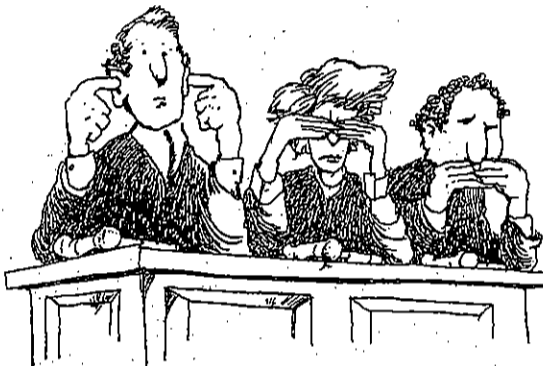
just that the harmless recreation of responsible parents and children with buckets and shovels on the beaches should be prohibited in order to comply with what is thought to be a legal duty."

The County's ineffective efforts to prevent swimming, instead of establishing negligence, the Lords held, demonstrated how a misguided conception of justice hurts the public. "Does the law require that all trees be cut down," one Lord asked, "because some youths may climb them and fall?" "Of course there is some risk of accidents . . . but that is no reason for imposing a gray and dull safety regime on everyone."

This is the missing link in American justice. Judges have lost sight of the idea that lawsuits concern not only the particular parties to the dispute, but everyone in society. The mere possibility of a lawsuit changes people's behavior. That's why judges must act as gatekeepers, deciding who can sue for what.

Law is supposed to uphold social norms of right conduct. Oliver Wendell Holmes Jr. said

that this was "the first requirement of a sound body of law." By making people potentially liable for their negligence, law provides incentives for reasonable conduct. But the converse is also true. Allow lawsuits against reasonable behavior, and pretty soon people no longer feel free to act reasonably.



Welcome to America. Mud and reeds have been dumped on natural and necessary human activities throughout American society. Playgrounds have been stripped of all physically active equipment, like monkey bars, with the effect, among others, of contributing to a crisis in childhood obesity. Health-care costs are skyrocketing, in part because paranoid doctors are in the habit of ordering unnecessary tests to provide a possible defense in case there's a lawsuit. Because of fear of legal claims, teachers can't put their arm around a crying child.

Lawsuits are easy. Whenever anything goes wrong, it's easy to come up with a theory of what might have been done differently. There could have been a warning. There could have been more supervision of the playground. The doctor could have ordered an MRI for the headache, just to make sure. Exposing people to liability against the standard of hindsight, however, creates not a safer world but one in which people simply avoid socially useful activities. Obstetricians quit. Seesaws disappear. Businesses stop giving references. The City of New York did, in fact, cut the limbs off trees near playgrounds so children would not be tempted to climb them.

All life's activities involve risk, and therefore the inevitability of accident and disagreement. The role of law is not to provide a consolation forum for those who have felt the misfortune of risk, but to support the freedom of all citizens to make reasonable choices, including taking reasonable risks. That requires judges, whenever someone makes a claim, to balance the seriousness of the risk against the social utility of the claim. Those rulings are the building blocks of our common law system, which, the English Law Lords recently reminded us, "is just the formal statement of the results and conclusions of the common sense of mankind."

Judicial activism has a bad name. It's one thing for judges to impose affirmative legislative mandates, like forced busing, but far more disruptive for judges to sit on their hands and let private litigants sue for the moon. Want to fix the legal system? Shine the spotlight on the judges.

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