

Rhetoric and reform sensationalism

By Brian J. Paul

When proponents of federal tort reform talk about the shortcomings of the American justice system, one of the first things they are likely to say is that there is “too much litigation,” which can be translated to mean too many lawyers, too many lawsuits, and too little justice. This refrain has been repeated to the point that it now passes for received wisdom in some quarters. A national poll commissioned by the American Tort Reform Association reveals that 83 percent of Americans believe there are too many lawsuits and that “greedy personal injury lawyers” are to blame. Why does this perception carry so much currency in contemporary American society?

According to Deborah Rhode, a leading scholar of the legal profession and author of “In the Interests of Justice: Reforming the Legal Profession” (Oxford University Press), the reasons have much to do with “how readily folklore passes for fact” in discussions about the litigation “crisis.” When Americans say there is “too much litigation,” it is often the litigation that is reported by the mainstream press to which they are referring. In these reports, Rhode writes, “systematic research typically plays at best a walk-on role; skewed statistical sound bites and unrepresentative anecdotes are the main attraction.”

Headlines are given over to absurdities – the absurdly high jury verdict, the absurdly low class action payout, the absurdly silly lawsuit.

Internet sources maintained by the major players in the push for reform exploit these examples of apparent excess, chronicling the more lurid aspects of the legal profession with apparent glee. Overlawyerd.com, a weblog edited by Walter Olson (dubbed an “intellectual guru of tort reform”), purports to explore a “legal system that too often turns litigation into a weapon against guilty and innocent alike” by featuring regular posts with titles calculated to invoke guffaws from public-minded citizens: “Parents Asked to Pay Alimony to Son’s Wife”; “Court Lets Law Graduate Sue [George Mason University] over F”; “Alleged Spammer Sues Spam-Complainer.”

Similarly, the American Tort Reform Association’s Web site has a direct link to a list of “loony lawsuits” – “Woman Sues Phonebook Company over Botched Liposuction”; “Viewer Vomits, Sues NBC”; “Couple Sues McDonald’s Over Tough Bagel” – and invites those with “first-hand knowledge of how the legal system has grown out of control” to submit their own tales of lawsuit lunacy.

The Web site for the Center for Legal Policy at the Manhattan Institute boasts a report on the state of “Trial Lawyers Inc.,” a euphemism for the “litigation industry” – a “behemoth” that has been carved up by “tort kingpins” into specialized “cartels.”

Reformists do not have a monopoly on hyperbole, however. Anti-reformists trot out sympathy-invoking anecdotal evidence with equal vigor. The Center for Justice and Democracy posts “real life” stories on its Web site purporting to “show what it means to be robbed of [the] ability to participate fully in life as a result of medical malpractice – and how

important non-economic compensation is for seriously injured patients" (President Bush's reform initiative would impose a cap on non-economic damages.)

On the same site is an article titled "Compensation Caps – The War on Women, Children, Seniors and the Poor." Accompanying the article, and a myriad of others with similarly provocative titles, is a cartoon depicting dollar signs pouring out of the purses of the vulnerable – the disabled, the elderly, single mothers – and into the pockets of a fat "insurance industry executive" clad in a three-piece suit smugly sitting atop a bag of ill-gotten loot.

The Foundation for Taxpayer and Consumer Rights devotes a section of its Web site to mawkish stories about patients who claim to have been harmed by medical malpractice, and how tort reform in California (a model for the Bush plan) "punishes" victims long after suffering their physical injuries. Public Citizen's Web site similarly has a section called "Survivors Speak Out," where alleged victims of medical negligence recount their experiences with careless healthcare providers and protest reform measures that would limit their redress.

Highly selective profiles like these lead to "distorted perceptions of the solution," Rhode wrote. Judge Richard Posner, who has expressed skepticism over federalizing tort reform, cautions that the system should not be revamped based on fragmentary evidence: "It would be unfortunate if interest-group politics, and anecdotes concerning outlandish lawsuits ..., were allowed to obscure the difficult policy issues."

Nobel Prize winning economist Gary Becker, who is receptive to tort reform, agrees: "a few foolish cases should not be the basis for policy."

Buried in the parade of horrors are the legitimate concerns of both sides. Proreformers worry that abusive litigation is harming productivity. A study conducted by Tillinghast-Towers Perrin estimates tort costs exceed a stunning 2 percent of Gross Domestic Product. Medical malpractice premiums are skyrocketing, more than doubling in the last three years by one account. And there is the genuine perception in the business community that litigation is stifling innovation; money that arguably could go to research and development is being diverted to defending lawsuits. Business is not alone in feeling the pinch; the judiciary has been forced to do more with less, too. Chief Justice Rehnquist reported last January that during Fiscal Year 2004, civil filings in the federal courts increased 11 percent while there was a 6 percent funding-induced reduction in certain key employees.

At the same time, anti-reformers worry that the perfect will become the enemy of the good. The United States maintains one of the highest standards of living by almost any measure, Americans are awash in affordable and safe consumer products, America's medical system is second to none in quality of care and innovation, statistics published by the U.S. Patent and Trademark Office disclose that utility and design patent applications have nearly doubled in the last decade, and Americans continue to enjoy a judicial system in which civil disputes are resolved peacefully and relatively efficiently.

William Penn was right that "truth often suffers more by the heat of its defenders, than from the arguments of its opposers." The truth underlying the debate about federal tort reform is no exception. Sensationalism rallies the troops, but it is a poor substitute for reasoned discussion.

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