

Juries Advance Common Good

While tort reformers fuss, American judicial system embodies democracy in action.

BY JAMES R. MURRAY
AND WILLIAM F. GREANEY

The Lawsuit Abuse Reduction Act of 2004 was passed by the U.S. House of Representatives last Tuesday with two worthwhile goals: (1) to strengthen the federal rule of procedure (Rule 11) that imposes sanctions on lawyers for filing frivolous lawsuits, and (2) to establish more restrictions on inappropriate “forum shopping” in certain personal injury cases. No responsible attorney opposes either of these goals. The bill, in one form or another, is meritorious.

The troubling aspect of the legislation is not its substance but the shrill voices in support of the bill—through testimony based largely on rhetoric and anecdotal evidence—by groups purporting to speak on behalf of the American public. Most notable is the voice of Common Good, a self-described “bipartisan legal reform coalition dedicated to restoring the foundation of reliable law.”

Testimony from Common Good Chair Philip Howard, a partner at the large national corporate law firm of Covington & Burling, portrays a court system out of control. He lays blame for an array of societal ills squarely on two distinct culprits: judges and juries. Supposedly, judges allow personal injury cases to go to juries; juries award excessive damages for kids getting hurt on playgrounds; monkey bars disappear; kids get fat. This is quite an indictment.

The central theme is that judges refuse to judge and that juries are irrational in their deliberations. By failing to rule on issues of

who-can-sue-for-what, judges supposedly fail to articulate what is reasonable and responsible societal behavior. In turn, juries are labeled as unpredictable and easy targets for injured claimants and excessive damage awards. The classic view of juries as democracy-in-action, according to Howard, is “exactly what’s wrong with the current legal system.”

MISGUIDED AND DANGEROUS

These themes are misguided and dangerous. They are misguided because studies and experience simply fail to support the few anecdotal stories advanced as the norm. They are dangerous because they attempt to shake public belief in institutions we should respect.

Judges establish and follow coherent and predictable standards all the time. The legal instructions given to juries for tort negligence cases (the biggest problem by far in Common Good’s worldview) are inherited from English common law and have been refined and tested by courts and state legislatures for decades. Judges are now using summary judgment procedures in civil cases (in which the case is resolved by legal motions and not given to a jury) at rates higher than ever before. A recent exhaustive study by the American Bar Association showed that tort cases have decreased dramatically in the last 40 years. In 1962, tort cases constituted 81 percent of all jury trials; in 2002, 26 percent.

Courts and legislatures have even removed entire substantive areas from the jury’s province: employee benefits, bankruptcy, most aspects of environmental protection, even the meaning of words in insurance policies. More than half of the states restrict punitive damages or generally impose limits on damages awards.

Finally, extreme damage awards (the anecdotal “evidence” relied upon in the Common Good cam-

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paigned) are actually rare (although understandably highly publicized) and are nearly always reduced by the trial judge or on appeal. The punitive award in the infamous McDonald's "hot coffee" verdict was reduced, for example, by the trial judge.

JUDGES IN CONTROL

Even if one wants to credit anecdotal evidence, there are at least as many powerful examples of judges taking firm control of their courts and their cases. In *Kirlan Venture Capital Inc. v. Regis*, a Washington state court judge last year imposed sanctions of \$400,000 on the local office of a large national law firm under the state equivalent of Rule 11 for including what the court perceived as excessive and frivolous claims in a complaint. (For good measure, the judge also awarded \$100,000 in sanctions against the client for encouraging the lawyers to "bulk up" the complaint, apparently for additional settlement leverage.)

After conducting a Rule 11 hearing during which the judge heard evidence as to whether the lawyers had conducted "reasonable inquiry" into the bases for adding allegations of defamation, civil conspiracy, and unfair business practices, the court issued an extensive opinion analyzing the factual support for the allegations in the complaint and the roles exercised by supervising and junior attorneys in the drafting process. The judge concluded that several of the claims were not supported by reasonable inquiry into fact or law or were asserted for improper purposes.

The court admonished that "attorneys are not gladiators engaged for purposes of single-warrior combat. Attorneys who believe they are in 'the business' to do their clients' bidding are in the wrong business."

As any practitioner knows, this is not an isolated or extraordinary ruling. The actions of this judge and others like her in enforcing basic tenets of acceptable litigation conduct simply do not fit the profile of the lethargic, unprincipled jurist that

Common Good consistently holds out as the present-day American norm.

The fact is, American judges work hard. Most are paid less money than associates at large corporate law firms. They do the best they can with limited resources and support.

As to juries, the evidence is that they are, in fact, quite predictable. A review of monthly jury verdicts compiled in any American jurisdiction consistently reveals roughly similar damages awards for roughly similar facts.

Of those tort cases that go to jury verdict, plaintiffs win slightly less than half, and the average award remained constant in the 1990s. The median amount of plaintiffs' verdicts during the 1990s was \$51,000, and only about 4 percent of awards included punitive damages.

Anyone who has ever been involved in a jury trial (as trial counsel, consultant, or a member of the panel) knows full well that jurors work hard to follow their instructions from the court. They take their oaths very seriously. Jurors may view the world through a prism of experiences different than those of the lawyers who try the case or legal commentators, but that is no reason to deride their collective judgments.

Thomas Jefferson knew a little something about the "Common Good." He wrote to Thomas Paine that trial by jury was "the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution." Juries are democracy in action. The most important question is whether one views that as a good or bad thing.

James R. Murray is a trial lawyer in Seattle and teaches trial advocacy at the University of Washington School of Law. He was formerly a partner at Covington & Burling in Washington, D.C. William F. Greaney is a litigation partner at Covington & Burling in Washington, D.C. The views expressed are those of the authors and not necessarily those of their firms.