



# The Risk of Freedom

## briefing

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### Legal Predation

In its original form tort law was guided by a single principle, which was to place the victim of wrongdoing in the position he would have been in, had the wrongdoing not occurred. If, as a result of your negligence, I fall into a manhole and break my arm, the law does its best to define what this injury has cost me — by way of loss of earnings, and medical care — and obliges you to foot the bill. Such is the natural course of justice; but justice is a fragile achievement, and depends upon a culture of truthfulness and restraint.

That culture is disintegrating. It is now routine for lawyers to argue for damages that bear no relation to any fault on the part of the party forced

The transformation of tort law from an instrument of justice to an instrument of predation has been most evident in America

to pay them. In American-style class actions plaintiffs can join together to secure a settlement for all of them, on the basis of injury to only a few. The way is now open to the wholesale assault on legitimate business. The legal process is no longer a way of securing justice for a wrong, but a way of pillaging another person's profits, without the tiresome process of earning them.

The transformation of tort law from an instrument of justice to an instrument of predation has been most evident in America where, because of the jury system and the abuse of it documented in this *Briefing* by Walter Olson, the idea of compensation has been entirely replaced by that of punishment and reward. The US tort system is now forcibly redistributing \$200 billion dollars annually — more than 2 per cent of American GDP — of which the trial lawyers (who more often than not initiate the action on a 'no win, no fee' basis) take \$40 billion a year in revenues.

The lawyers in question unashamedly regard the legal process as a profit opportunity. 'Justice is now a click away', is a headline on ClassActionAmerica.com, where for \$8.95 a month customers can get information on hundreds of class action 'opportunities' and sign up to obtain 'the money that you may be due'. Lawyers survey the individual state jurisdictions, in order to bring actions in those where rewards are highest, regardless of where the alleged tort was committed. And they manipulate the jury selection, so as to ensure maximum ignorance on the jury's part, and maximum prejudice against the defendant. Juries are encouraged to punish the bad guy and reward the good, without any regard for what the one guy has actually done to the other. The result is a travesty of justice, with tort law ceasing to be an instrument for rectifying social conflicts and becoming instead a way of producing them.

This is principally to be witnessed in the medical sphere. There are now states in America where doctors will not carry out emergency surgery, and where no-one will deliver a baby. This is because it is now routine for the recipients of medical help to bring a suit of 'malpractice' against the person or hospital that provided it, so obtaining millions of dollars in damages in cases which are usually settled out of court, on account of the prohibitive cost of defending them. Medical insurance has in places risen to the level where young doctors can no longer afford to begin practising. If nothing is done, health care in America may soon be the privilege of a minority.

Although English law allows juries to award damages only in very special cases, such as libel, where reputation is the issue, this has not prevented the litigation explosion from reaching the UK. Nor has the explosion by-passed Europe. Indeed, it is a worldwide phenomenon, aided by the ability of American lawyers to 'import' cases from anywhere around the world, so as to try them in their favourite courts. Our question is: how can the benefits of litigation be secured, while limiting this escalating threat to freedom and accountability?

### Our Theme

**Litigation  
Un-Limited**

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## Courting Stupidity Walter K. Olson

While the press sometimes refers to the eye-popping awards of billions of dollars in tort cases as 'runaway' verdicts, the term is more often than not misleading, since it suggests that juries are racing off madly on a tear of their own.

Quite the contrary is usually true: Most 'runaway' juries are behaving

people,' says a Philadelphia prosecutor in an old training tape. 'They'll analyze the hell out of your case'. Thus in the 1990 obscenity trial over a Cincinnati museum's exhibition of Robert Mapplethorpe's work, the only prospective juror who regularly visited museums was dismissed for cause, it being felt that actual familiarity with those institutions put an 'unnecessary burden' on her objectivity.

We encounter a strange inversion

## Among the most powerful ways in which American lawyers can shape the outcome of trials is by exercising their rights of juror selection.

precisely as one set of lawyers has been carefully coaching and skilfully inciting them to do. They are, for the most part, not running away from anything but running towards a resolution of the case that trial advocates have portrayed to them as reasonable.

Among the most powerful ways in which American lawyers can shape the outcome of trials is by exercising their rights of juror selection. Typically, they can launch an unlimited number of 'for cause' challenges to oust prospective jurors who supposedly cannot approach the case objectively. A busy industry of consultants, how-to seminars, and jury selection handbooks offers advice to lawyers on whether or not to boot jurors based on such characteristics as hair style, hobbies, brand of car, and favoured kind of reading. The 'impartial juror' is just a fiction, declares an ad for a primer that promises to show 'how to assemble a winning jury, step-by-step'. By the mid-1990s the jury consulting business was estimated to have passed \$200 million in annual revenues.

The whole point of the process is to engage in discrimination. What makes the hypocrisy complete is that trial lawyers themselves make a very handy living suing when unwary people in other walks of life — employers, landlords, private clubs — engage in the same kinds of discrimination. For most of us, explicitly considering the religion, age or disability status of a job applicant or prospective tenant is strictly against the law and even inadvertent acts of bias can cost us everything we own in a private lawsuit. However lawyers need offer, in the words of Brandeis University politics professor Jeffrey Abramson, 'no justification, no spoken word of explanation, no reason at all beyond a hunch, an intuition' for their peremptory challenges.

A major goal of the selection process is the removal of any jurors with too strong a base of experience, knowledge or opinion about the case's subject matter. 'You don't want smart

of the once widely held premise that the courts should draw on jurors who are civically engaged and aware of the events of the day. Juror prospects have historically been drawn from such groups as registered voters, owners of real property and literate persons — all likely, on average, to display a degree of civic awareness exceeding room temperature. In much-publicised cases a vast army of recruit material — 1,017 prospects in the Los Angeles murder trial of the Menendez brothers — must now be screened in search of the few, the proud, the ill-informed. With hundreds of persons sitting for hours filling out lengthy questionnaires — 79 pages in the O.J. Simpson case — the process can take on the air of a giant college entrance exam on awareness of current events, albeit with reverse scoring. If enough questions are put to a panel of prospects, most will give at least one answer that can be seized on as evidence of their bias.

Consultants advise that 'logic plays a minimal role in the courtroom' and that the real trick is to identify the jurors' 'psychological anchors'. A brochure from the San Diego Trial Lawyers Association promotes a video entitled *Trying a Case to the Two Minute Mind: aka Trial by Soundbite*. It promises to explain how 'to streamline each element of a trial based on the fact that most jurors are used to getting a complete story within a two-minute maximum segment on the evening news. This video demonstrates the effectiveness of visual aids, impact words and even colours, to influence the jurors' perception and thought process in the least amount of time'.

'The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury,' Mark Twain famously complained. We 'swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.'

see publications for more by Walter Olson

## The Case of Asbestos

Asbestos was manufactured, sold and employed for many years, until the discovery that it is seriously carcinogenic. Its sale and use was thereafter widely made illegal, or subject to strict control. Inspired by their success with tobacco cases, trial lawyers have mined the asbestos seams for rich pickings that have little or nothing to do with any fault in those who once dealt in the product.

Here is one example: AC&S Inc., a tiny Lancaster, Pennsylvania, insulation contractor, was sued in a rural and plaintiff-friendly county in Mississippi. Not only did the firm never perform work at any of the sites where the six plaintiffs in the case worked, but it sold few products that contained asbestos. There were no conceivable grounds for ascribing liability; nevertheless the jury returned a verdict against the company for nearly \$84 million. The company filed for bankruptcy. In another case, six former railroad workers were awarded \$25 million each, even though not one of them exhibited any form of asbestos-related disease.

The long term economic impact has been estimated as a price-tag of \$250 billion ... 60% of the enormous pay-outs will consist of legal fees

So far class actions over asbestos have wrung \$54 billion dollars from corporations, who increasingly settle out of court even when there is no evidence of injury. 67 American companies, from large scale manufacturers to small local contractors have been bankrupted. To date, 6,000 companies, representing 91% of American industries, have been named as defendants. Compensation claims are coming in at the rate of 60,000 a year and rising, even though cases of serious asbestos-related illness (mesothelioma and other cancers) remain constant at 4,000 a year. The long term economic impact has been estimated as a price-tag of: \$250 billion, \$33 billion of investment forgone, 423,000 jobs not created, as well as mass redundancies and pillaged pension funds in all the corporations targeted. According to the Rand Institute for Civil Justice, 60% of the enormous pay-outs (which will continue to grow until at least 2010) will consist of legal fees. No wonder the lawyers are hard at work.

N.B.: The twin towers collapsed on 9/11 because the law forbade the architect to insulate the main uprights, as he had wished, with asbestos. Sue the law-makers?

## Class Action: The Make and Break of Movies

### Legislate don't Litigate

David J Levy

When we read of medical malpractice suits, in which someone whose life was saved by a doctor nevertheless sues the doctor for all he is worth, we are rightly indignant.

Litigation should be a remedy in the last instance for evils which our legislators wilfully refuse to address.

Consider the violent movie, typified by Quentin Tarantino's *Kill Bill*, in which audiences are invited to watch two hours of horrible torture and dismemberment, with neither the excuse of a credible plot nor the redeeming attempt at distance. There is every reason to believe that such films are both corrupt in themselves, exciting a morbid and pernicious interest in their viewers, and also corrupting, in inciting people to look on violence as a permissible and routine affair, which brings kudos and street-cred to the one who emulates it.

Our legislators have given up on the attempt to censor such movies or in any way control the habit of imbibing them — a habit that may well be addictive. Governments have a duty to contain the sources of violence and depravity, but are refusing to acknowledge it. So why not feel glad, in such cases, that litigation remains, as a way of penalizing the villains who make fortunes from our bloodlust?

The families of two people shot by teenagers supposedly inspired by *Grand Theft Auto III* are of that mind. The families of Aaron Hamel, 45, and Kimberly Bede, 19, of Moneta, Virginia, are suing Sony, Take-Two Interactive Software, Rockstar Games and Wal-Mart for \$246 million. Stepbrothers William Buckner, 16, and Joshua Buckner, 14, killed Hamel and seriously wounded Bede when they shot their cars with .22-caliber bullets in the Great Smoky Mountains. The boys told investigators they found rifles in a locked room in their home and decided to shoot randomly at tractor-trailer rigs, just like in *Grand Theft Auto III*. The families' lawyers allege the video game 'inspires and trains players to shoot at vehicles and persons.'

Even if the lawyers are wrong about this, and even if the damages claimed are, like everything in America, preposterous, are we not glad that such a case can be brought, and a blatant social evil made subject to discussion, condemnation and penalty? Surely, this is better than the hypnotised silence of our legislators, and the intimidated acquiescence of parents and teachers who dare not interfere with the appetites of the young.

David Levy is a ghost-writer.

### Lawyers on & off screen

Jim Copland

[abridged from the *National Review*]

The Ninth Circuit Court of Appeals hastened America's descent from the rule of law into the rule of lawyers.

In *Ileto vs. Glock*, the increasingly infamous court ruled 2-1 that the gun manufacturer could be held liable for selling a firearm in Washington state that wound up being used in Buford Furrow's 1999 shooting spree in California. Judges Richard A. Paez and Sidney R. Thomas, who cast the two deciding votes, were also on the three-judge panel that voted last September to stop the California recall election.

It's an ironic decision, given that it has come along with the movie adaptation of John Grisham's *Runaway Jury*; a film that is part of a familiar pattern. From *A Civic Action* to *Erin Brockovich* to *The Practice*, the media consistently depict noble plaintiffs' attorneys running bootstrap operations against nefarious corporate execs.

But fact has quickly outrun fiction. Although Glock involves no jury trial, and obviously no jury tampering, holding the gun company responsible is a travesty of justice. The killer, Furrow, had attacked staff members at a mental institution where he had arrived drunk, threatening suicide and mass murder. While pleading guilty to that assault, he reiterated mass-murder fantasies. Nevertheless, the judge failed to commit Furrow, instead letting him walk with a light eight-month sentence — barely more than time served — only months before he made good on his threats.

Furrow himself is not a defendant in Lilian Ileto's suit, and neither are the treatment facilities and state entities that let him fall through the cracks. Instead, the plaintiffs predictably went after the company that manufactured the gun that ultimately wound up in Furrow's murderous hand,

and the court's majority buys into that loopy theory of guilt through judicial activism of the worst sort. The majority not only ignores relevant California case law on negligence and nuisance, but also sidesteps a controlling California statute that exempts manufacturers in product liability claims for 'injuries or damages resulting from the discharge of a firearm or ammunition.'...

The Hollywood image of noble plaintiffs' lawyers protecting the public from evil big business is nothing but a self-perpetuated myth. As documented in *Trial Lawyers, Inc.* — a recent study by the Manhattan Institute — the plaintiffs' bar is in itself the biggest of big businesses. *Trial Lawyers, Inc.*, were it a corporation, would have annual revenues of \$40 billion — that's 50 percent more than the revenues of Microsoft or Intel, and twice those of Coca-Cola. But unlike these businesses, which sell desired products to willing consumers, Trial Lawyers, Inc. fills its coffers by exploiting the government's monopoly on 'justice,' shifting dollars coercively from one set of pockets to another while taking a huge cut for itself.

This frightening reality has been hidden from the American people, thanks to inaccurate Hollywood portrayals and the massive public-relations efforts the lawsuit industry makes on its own behalf, through political contributions (over \$500 million since 1990) and so-called 'consumer groups' that manipulate public opinion.

But Americans retain the power to reassert their authority at the polls. The trial bar's obstruction of common-sense reforms like the Class Action Fairness Act may ultimately backfire.

The full article was published on 26/11/03.

See: [www.nationalreview.com](http://www.nationalreview.com)

Jim Copland is director of the Center for Legal Policy at the Manhattan Institute.

## The Risk of Freedom Briefing Archive (1999—2004): [www.riskoffreedom.com](http://www.riskoffreedom.com)

Issue 1 > The Individual and the State

To free ourselves from risk is to risk our own freedom

Issue 2 > The science of safety

Issue 3 > Transnational Institutions

Issue 4 > The Power of NGOs

Anyone can found an NGO and thereby become a political player

Issue 5 > The Precautionary Principle

Issue 6 > Transnational Governance  
the accountability of transnational bureaucracies diminishes as their powers of legislation grow

Issue 7 > Political Correctness

the dynamics of sexual, racial and cultural power

Issue 8 > The Informal Economy

Its boom time on the black market

Issue 9 > The Defence of Freedom

Issue 10 > Uncomfortable Truths:

The more we transfer our risks to the State, the more exposed we are to the real, non-transferable dangers.

Issue 11 > Censorship

what ought to be forbidden is permitted, while what ought to be permitted is persecuted or silenced

Issue 12 > Health Creation

Why is good health causing anxiety?

Issue 13 > Addiction

When does satisfying pleasure become an addiction?

Issue 14 > Branding

Has the brand transcended the product?

Issue 15 > Advertising

Are we free to make a rational choice?

Issue 16 > Denormalization

The aim is to de-legitimize

Issue 17 > Private Policing

The vigilantes also belong to an industry

## Medical or Legal Malpractice? Avik Roy

Much has been remarked about the legal crisis in American medicine. In many parts of the country, needed services like obstetrics are difficult to find, because the costs of malpractice insurance have become unaffordable for ordinary physicians. Much less commented on, however, is the crisis which has developed in medical research, where innovative cures for devastating diseases are being jeopardized by multibillion-dollar lawsuits.

Consider the case of Wyeth, one of America's largest pharmaceutical concerns, known throughout the world for its leading infant vaccines and nutritional program. Wyeth used to sell a diet drug known as Fen-Phen which, several years ago, was found to cause heart valve damage in some users. Though there had not been any prior scientific or clinical evidence that Fen-Phen caused heart damage, and though Wyeth would certainly have pulled the drug from the market had it known, it seemed reasonable that those individuals who were injured by Fen-Phen usage were due some form of recompense. Indeed, Wyeth negotiated a settlement to a class action lawsuit worth \$3.75 billion — more than twice the medical research budget of the whole company.

For some trial lawyers, however, Wyeth's concession was seen only as an opportunity for further windfalls: as of October 2003, 78,000 additional Fen-Phen claims have been filed against the company. The first of these claimants was awarded \$1.4

to multibillion-dollar lawsuits stemming from rare incidents of muscle damage attributed to its cholesterol-lowering drug Baycol. Baycol had been subjected to rigorous clinical testing and had received stamps of approval from regulatory authorities

## Fen Phen put aside \$17b for litigation challenges — a sum that approaches the entire research budget of the U.S. pharmaceutical industry in 2002

million by a Texas jury in November. Wall Street's estimates for the ultimate Fen-Phen liability to Wyeth are as high as \$76 billion. But even the \$17 billion the company has already reserved for Fen-Phen litigation approaches what the *entire U.S. pharmaceutical industry* spent on medical research last year. Given that over 90% of the world's new medicines are discovered by the pharmaceutical industry, we will never know how many life-saving therapies for infant diseases, cancer, and AIDS have been defunded in order to finance these lawsuits.

Cures for life-threatening disease are not the only casualties of anti-pharmaceutical lawsuits. Bayer, the Cologne-based inventor of aspirin, has been forced to cut 14,000 jobs in Germany and around the world, due

in the U.S. and Europe, but the muscle effects were only seen once the drug was widely used by the public. And thus Bayer's pharmaceuticals division, which not so long ago was the largest pharmaceutical company in the world, has nearly collapsed.

The Bush Administration seeks to enact tort reform along the English model — placing caps on punitive damages and, especially, requiring plaintiffs to pay the legal fees of defendants in frivolous cases. But the Democratic Party is adamantly opposed to reform, heavily influenced by their largest financial backers, the American Trial Lawyers Association. In a system which redistributes scarce resources from medical research to trial lawyers, however, the interests of patients are often lost in the shuffle.

Avik Roy is a doctor and a writer

## Publications

*Trial Lawyers Inc.*, ed. Jim Copland. Center for Legal Policy (CLP), the Manhattan Institute, 2003. A detailed analysis of the size, scope and inner workings of America's lawsuit industry.

*The Rule of Lawyers — How the New Litigation Elite Threatens America's Rule of Law* by Walter Olson, CLP, 2003  
*The Litigation Explosion* by Walter Olson, Truman Talley Books, 1991. Seminal book in which Olson raised the alarm.

'Fiction to Fact — Rule by Lawyers On and Off Screen' Jim Copland in the *National Review* (26/11/03) <http://www.nationalreview.com/comment/copland200311260955.asp>

'Courting Stupidity — Why smart lawyers pick dumb jurors.' Walter K. Olson, *Reason*, Jan 2003 [reason.com/0301/fe.wo.courting.shtml](http://reason.com/0301/fe.wo.courting.shtml)

*Runaway Jury* by John Grisham, 1990s drama of the class actions against big business (tobacco (in the book) and gun companies (in the film version)). Also Grisham's *The King of Torts* a 21st century blockbuster where it is the profit-driven tort lawyers that are cast in a villainous light.

## www.

[www.overlawyered.com](http://www.overlawyered.com) case studies of how the American legal system is rewarding sharp practice, website founded by Walter Olson.

[www.classactionamerica.com](http://www.classactionamerica.com) where you can find a class action that is right for you.

The globalization of American Tort is allowing cases from around the world to be brought in America. A key figure is attorney, **Ed Fagan** who brought the multi-million-dollar class action against the Swiss banks on behalf of Holocaust survivors. He is now working on a case for the victims of apartheid. South African human rights lawyer, Dumisa Ntsebeza, who will lead the international legal team, says "The targets are the private US and European based multi-national industries that profited from their business dealings in South Africa during the period from 1948 to 1993," See also the Odious Debts site and *The Namibian* <http://www.namibian.com.na/2002/june/africa/026885E153.html>

Fagan is also pursuing Czech Republic's **Temelin** nuclear power plant in a class action on behalf of Austria and environmental groups. See *The Prague Post*: <http://www.praguepost.cz/news030701d.html>.

Similar developments are to be found in **Uganda**. See *Tobacco Litigation: Making Use of the US Litigation Experience* by Philip Karugaba of Mugerwa & Masembe Advocates, Uganda. Available from the UICC Globalink website (The International Tobacco-Control Network) <http://www.globalink.org/tobacco/docs/af-docs/0011karugaba2.shtml>

The Rand Institute for Civil Justice <http://www.rand.org/icj/> researches the significance of the growth of class action. One current project is research into the effect of class actions on the insurance industry <http://www.rand.org/icj/projects/insuranceclassactions/index.html>

The Class Action Fairness Act is the first legislative attempt in America to bring class actions under control. It is described at <http://www.legalreformnow.com/issues/FILES/SenateWhyTheNeedFINAL.pdf>. But the trial bar have been attempting to obstruct the Class Action Fairness Act. See **The Lawyers Committee for Civil Rights under Law — The impact of Civil Rights Cases** <http://www.lawyerscomm.org/publications/press/pdf/classactionmemo.pdf>. also [www.lawyerscomm.org/publications/pdf/classactionmemo.pdf](http://www.lawyerscomm.org/publications/pdf/classactionmemo.pdf)