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Legal limits to a sue-for-anything culture

By Peter G. Verniero

Sills Cummis - in the News

There is a belief in many quarters that America's civil justice system is broken. Some teachers, for instance, are reluctant to impose discipline in the classroom out of concern that they will be sued by students and their parents. As a result, unruly schools make it difficult for all students to learn.

Whether the problem is as widespread as some observers believe, we as a society seem to be enamored of the notion that someone must be responsible for anything bad that happens to us. Although the precise consequences of that attitude are difficult to measure, the societal costs of our growing litigation culture appear to be significant.

Philip K. Howard is the author of two books on this subject, including "The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom." A lawyer himself, Howard asserts that a sue-for-anything mentality is crippling our society. Among other ideas, he argues that teachers must be unburdened by regulations and the threat of lawsuits to restore an environment of learning in the classroom.

Howard chairs a legal-reform organization, Common Good, which enjoys bipartisan support from such politically diverse figures as George McGovern and Newt Gingrich. (Former Gov. Tom Kean, one of the most admired political leaders in America, also serves as a member of Common Good's advisory board.) The group is inviting legal scholars and others in the legal profession to attend a national conference starting today to discuss what it describes as the unreliability and inconsistency of the system.

I am not ready to sign on to all of Howard's agenda, but he operates under a powerful premise. Unless the system can do a better job at defining reasonable limits to lawsuits, the current culture will make us so nervous about being sued that we will become paralyzed as a community. Howard writes: "The air in America is so thick with legal risk that you can practically cut it and put it on a scale." His proposed solution - empowering judges to draw the outer boundaries of litigation - is worthy of serious review.

Despite their occasional critics (and even though the criticism is sometimes warranted), judges are widely respected. I see no reason why they cannot take on a larger role in allocating the risks of injury in an active society, so long as they are guided by established standards.

To be sure, I do not advocate that judges begin resolving relevant factual disputes, the traditional function of juries. Rather, we should consider giving judges the greatest possible leeway to decide whether a claim is sufficiently reasonable before allowing it to balloon into a full- scale jury trial.

The system already is equipped to have judges act in this fashion. There is a device in the law known as summary judgment. It allows judges to dismiss lawsuits when they believe there are no genuine factual issues to resolve and the case lacks merit. I suspect that many jurists would like to use that device more often but hesitate in doing so out of concern that an appellate court will reverse them. A respected trial judge once remarked to me that no lower court judge has ever been criticized for refusing to end a case by summary judgment.

That dynamic must change if we want to weed out baseless claims. The New Jersey Supreme Court took a step in the right direction 10 years ago in a little-known case, Brill vs. Guardian Life Insurance Company of America. There, the court stated firmly that in appropriate circumstances, "the trial court should not hesitate to grant summary judgment." The high court continued: "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose."

In the world of judicial-speak, those are strong words. But we seem to be in danger of retreating from that sensible position.

Clearly, all levelheaded thinkers desire a system that is open and fair. Any person with a legitimate dispute should have full access to the courts. But the opposite is also true. Claims that are frivolous, unreasonable or absurd should be dismissed swiftly. And when a trial judge makes a reasoned call in ending such a case by summary judgment, our appellate courts should resist the temptation to second-guess the decision.

Trial judges can be trusted in this gatekeeper role. If they occasionally fail (and, as humans, some of them inevitably will), our system of judicial review can correct their mistakes.

Simply put, not all of life's disappointments should be turned into a trial. Invoking the state's power in the form of legal process should be reserved for those genuinely in need of redress. We trivialize that process when anybody can sue for anything and when those who are accused are forced to settle unwarranted claims merely to make them go away.

Our civil justice system was intended for a higher purpose, and we must strive to achieve it.

Peter G. Verniero, a former justice of the New Jersey Supreme Court, practices law at Sills Cummis Epstein & Gross P.C. in Newark.

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