

Our Civil Legal System: What Does It Say About Our Values?

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Litigation in America has sharply increased in recent years. Eighteen million new lawsuits were filed in state and federal courts in 1989; this is nearly one lawsuit for every ten U.S. citizens. Federal court lawsuits have risen from 89,112 in 1960 to 127,280 in 1970 to 197,710 in 1980 to a staggering 251,113 lawsuits in 1990, and no reliable evidence has surfaced suggesting this rapidly increasing pace is slowing down. It is estimated that individuals, businesses, and government spend over 80 billion dollars annually on lawsuit costs. It is estimated that another 300 billion dollars is spent avoiding liability. That combined cost equates to more than \$12,500 per capita in the U.S.! Unless something is done to stem this tidal wave of litigation, court costs may well surpass that of social entitlements and national debt costs in magnitude. The American standard of living could become severely eroded if this litigation crisis is not quickly recognized and solved.

Our courts are among our most valuable national assets. Their purpose is noble. They were designed by our country's founders to: (1) interpret unique and complex legal dilemmas; (2) resolve disputes that are irresolvable in other arenas or which have failed to be resolved elsewhere after valid attempts; and (3) to protect individuals and society from those in our midst who cannot or will not abide by normative rules designed to protect us all. The courts were meant to be a temple of last

resort; disagreements, arguments, disputes, alleged harms, and social interpretations were supposed to be negotiated by thoughtful citizens in venues apart from the courts. Only particularly vexing matters were expected to be plead in our courts. Today, it seems, not only are our courts being asked to address petty matters; they seem all too frequently to be claimants' first venue for redress. As a frequent courtroom observer, the author has personally witnessed defendants inform judges that a formal notice of lawsuit constituted their original awareness that a dispute between them and the plaintiff existed. Our courts must be returned to their intended duties and spared from being turned into perverted versions of "The People's Court". Our legal system must be reformed if it is to avoid sliding into disrepair, disrepute, and disarray.

This essay examines a worrisome facet of our legal system: the awarding of inordinately large punitive

damages in civil law-suits. Two relevant claims are posited relevant to such high awards: (1) most legal rulings come to be interpreted by the general public as reflecting society's values; and (2) some disturbing interpretations result when astronomical awards become common. In examining and evaluating civil lawsuit judgments, it is necessary to probe other facets of the law that indirectly affect how cases are pursued, factors that impinge upon a case's calendar or cost or that influence the eventual award.

A lawsuit is a formal claim, by one party, the plaintiff, that they have been wronged by another party, the defendant. Such claims are civil in nature. Personal accountability is determined in a civil court and consequences for culpability can range widely depending on the case at hand (ie: restitutions, orders to perform, injunctions, and cease and desist orders). The most notorious and sensationalized class of penalties involved for civil misdeeds is the demand that a liable defendant pay large sums of money to aggrieved plaintiffs. Such amounts are called damages. Damages come in two forms: (1) compensatory or actual damages, those monies that are interpreted as being directly related to the wrongful acts proven in the case; and (2) punitive damages, monies in excess of compensatory or actual damages that are interpreted as added punishment and/or deterrent for the type, intent, and/or extent of a guilty defendant's wrong doings. Actual or compensatory damages awarded to a successful plaintiff are determined and limited in amount by case facts; however, in most jurisdictions, punitive damage awards, determined by civil juries, have virtually no limits. On limited occasions, appellate courts have determined that certain punitive damages have exceeded legal reasonableness; however, even in many of these adjusted award circumstances, lowered damages have still resulted in staggering damage awards.

Damages have come to form and then reflect societal values. We have collectively and symbolically decided, through our laws and precedents, that wrongdoers should compensate aggrieved parties. Such a decision reflects the Biblical adage: "A man reaps what he sows." Justice is meted out; wrong is purged. But, it is not as simple as that! Guilty parties frequently do not bear the total or direct burden of civil judgments; we, the public, indirectly pay the vast proportion of most incurred judgments. Liability insurance provides the single largest source of adjudicated damages and only a paltry percentage of paid out, sizable judgments comes directly from a defendant's personal resources. Not only is the sizable proportion of assessed judgments being paid for by

uninvolved parties; these innocent contributors to the insurance fund providing payments to insured wrongdoers are assessed ever increasing premiums for their own personal insurance by insurers as judgments incurred by others increase both in frequency and in average amount. Disturbing social value distortions emerge from these circumstances; these skewed perceptions include: (1) all litigated wrongful deeds are not personally punished, only those judgments unprotected by insurance come to discomfort, inconvenience, or hurt the sued party; and (2) although judged wrongful acts may indeed exact a price, the locus of that cost is often not directed at the wrongdoer, but indirectly at the insurance company's cash reserves.

The value message being transmitted here seems to be: If you can afford lots of insurance, you can escape direct penalty of court imposed judgments; however, if insurance is beyond your means or if insurance coverage is ignored or waived by individuals or groups, they risk being ravaged by lawsuit judgments. The poor and ignorant become victimized by the very legal system that was designed to prevent such victimage.

Punitive damages are sometimes necessary; sometimes huge awards are the only way wrongdoers get the message that they have wronged others and that their deeds are deemed unacceptable. This is especially true in multiple case offenses or in repeat cases where defendants did not or would not get the court's message. Punitive damages, by their very definition, are meant to serve as punishment and/or deterrence. Punitive damages were not designed to create a huge sum lottery for plaintiffs in civil cases and their lawyers.

I propose that the punisher -- the State -- receive the punitive damages. It is the State's interests that allow such damages; it is the State's right to collect damages. If such were the case, fewer "sympathy" or "greed-driven" mega awards would be given. Some huge awards would still be given, but these would be less driven by "deep pocket" motives and more likely driven by truly punitive motives.

Also, I propose that lawyers get none of the punitive awards. Lawyers are entitled to be compensated for aiding defendants get fair payment of actual damages; however, it stretches the imagination to think that lawyers should profit from the punishment of defendants. Lawyers receiving more than defendants after costs are factored in seems obscene! Lawyers should be paid for their work, not on jury award amounts. After all, physicians are paid for medical services rendered whether the patient is totally cured, partly cured, or dies. The outcome does not alter

the fee. Architects are paid to build buildings; they get the same fee whether the building is fully occupied or if it remains empty. Soldiers are paid to fight -- win, or lose, or draw. Why should lawyers be different? The present system conveys the attitude that lawyers are special, better than others. Public attitude toward lawyers [a truly necessary group of professionals] centers around greed, deception, and connivance. The law is too often seen not as a legitimate and noble means of social control but as a gimmick by which shifty, sleazy lawyers invent and celebrate ways for those rich enough to afford their services to subvert, avoid, or prevent society's legal intentions.

In addition to high jury-determined award amounts, finances impact legal actions in other ways. Litigation is a costly pursuit. Although high awards seem to attract many litigants, there are substantial costs incurred in pursuing jackpot civil court decisions. There are several social costs incurred in complex, lengthy civil court procedures. One such cost is lost wages/salaries of common witnesses. While some businesses do compensate employees for time taken to bear witness in court, all do not, especially in cases involving numerous discovery depositions or interrogatories, and/or lengthy courtroom testimony. Unemployed, commissioned, or self-employed witnesses often go uncompensated for their time. In state civil cases, subpoenas are only valid within a given state's jurisdiction. Potential witnesses from out-of-state cannot be compelled to come to court, but are asked, out of civic duty, to appear to bear witness. Too frequently, out of state witnesses refuse to leave their employment and come to court unless their travel, meal, and lost wage expenses are paid by the subpoenaing attorney. In cases where such witnesses' testimony is vital to a case, such payment is typically made. Such expenditures raise the cost of litigating cases and often cause financial hardship for litigants. Values pertinent to witnesses' time are brought to the fore here. Expert witnesses almost always are compensated for their efforts. It seems that an artificial hierarchy of witnesses and their corresponding worth has evolved. No longer is the word the most honored treasure in court; the speaker's status seems to determine words' value.

In some case types, successful plaintiffs are compensated by the losing party; however, such is not the case for all plaintiffs. In numerous cases, a plaintiff is spared burdening, up-front out-of-pocket financial costs for lawyers. Contingency fees replace such up-front costs. Contingency fees are gambles taken by lawyers that they will win cases and will then be remunerated with either a stated flat fee or a negotiated percentage of an eventual

court judgment or an out-of-court settlement. Such circumstances send some philosophically depressing messages to prospective litigants. If you have what appears to be an easily won case, you have an enhanced chance of getting a very skilled and highly compensated lawyer to accept your case on contingency, but if your prospective case seems marginally winnable or even more risky, you may face representation rejection unless you have up-front money. Complicated, important, and worthy cases that need and deserve legal hearings too often go untaken or become litigated by less than exemplary counsel.

Successful lawsuit defendants, on the other hand, are rarely compensated by losing plaintiffs. Recommendations have emerged for a "loser pays" rule, whereby the loser in the lawsuit pays the winner's litigation costs. Limits in this plan are proposed to "prevent parties from incurring disproportionate expenses for the purpose of penalizing the loser." This would require amending the U.S. legal Code. The present system conveys the message that plaintiffs are somehow more worthy than are defendants. The "English system" would help restore the long standing claim that "justice is blind;" that "all are equal under the law."