

**TESTIMONY**

**Of Philip K. Howard**

**Chair of Common Good**

**Before The Committee On The Judiciary**

**Of The U.S. House of Representatives**

**June 22, 2004**

Thank you for the opportunity to speak with you today on the issue of “Safeguarding Americans from a Legal Culture of Fear.” I believe these hearings will play a significant role in raising public awareness of this issue, and the need for a basic shift in approach to restore predictability to our legal system.

While I’m a lawyer in private practice, I appear here as pro bono Chair of Common Good, a bipartisan legal reform coalition dedicated to restoring the foundation of reliable law. Common Good’s advisory board includes former Attorneys General Griffin Bell and Dick Thornburgh, former Deputy Attorney General Eric Holder, and former political leaders such as Newt Gingrich, George McGovern, Alan Simpson, and Tom Kean. I’ve written a fair amount on the subject, including two books, *The Death of*

*Common Sense* and *The Collapse of the Common Good*, and an essay on recent legal history in the new *Oxford Companion to American Law*.

In the past two years, Common Good has hosted five forums jointly with the American Enterprise Institute and Brookings Institution and sponsored a number of polls. What we have found is that, in dealings throughout society, Americans no longer feel free to act on their reasonable judgment. The reason is that they no longer trust our system of justice.

According to a Harris Poll, five out of six doctors do not trust the system of justice. As a result, doctors are ordering billions of dollars worth of unnecessary tests and procedures – not to address the health of their patients but to protect themselves from potential lawsuits. The nation’s leading patient safety advocates, such as Dr. Troy Brennan at Harvard, are working with our coalition because their studies show that legal fear has chilled the professional interaction needed for quality care.

In schools, teachers are unable to maintain discipline in their classrooms, fearful that they may be sued by students or parents. A recent Public Agenda poll, sponsored by Common Good, found that 78% of teachers have been threatened with legal proceedings by their students. In America today, teachers are told not to put a comforting arm around a crying child.

No part of society is immune. Playgrounds have been stripped of anything athletic. Even seesaws are disappearing because town councils can’t afford to be sued if someone breaks an ankle.

Greenwich, Connecticut, is considering outlawing winter sports on public property after one resident broke his leg sledding. In that case – a good example of

what's wrong with American justice – a father took one last run with his young son down a popular sledding hill and was tossed off his plastic dish when he hit a shallow drainage ditch at the end of the run. Falling in an awkward way, the father badly broke his leg. He sued the town, claiming that it should have taken better care of the hill. The judge gave the issue to the jury to decide, and it rendered a verdict of \$6.3 million, including \$1.5 million for pain and suffering.

The harm to society in this case is not mainly the monetary verdict, which, I suspect, will be reduced in the end by the judge. The harm is the resulting legal fear, undermining everyone's freedom to enjoy winter activities. Greenwich is now considering banning not only sledding but all winter sports on town property. Awareness of possible sledding claims has undoubtedly spread to other towns, and indeed to any private property owner who allows sledding. Why take the legal risk?

There is a missing link in American justice – rulings on who can sue for what. Any legal system requires deliberate choices, binding on behalf of society, of what is reasonable behavior and what is not. That's what the law is supposed to provide. Justice Oliver Wendell Holmes, Jr. famously defined law as “the prophesies of what courts will do.” Today, no one has any idea what a court will do – that's why Americans are fearful.

Current legal orthodoxy is that in civil cases, as in criminal cases, juries should make the ultimate decision. But juries can't set precedent; every jury is different, and their decisions are often inconsistent. One jury may make a huge award in a particular case, and another, in a similar case, may make no award at all.

Perhaps it is useful to remember that, in a criminal case, the jury is our protection against abusive prosecution using state power. A civil case, by contrast, is a use of the

state's coercive powers by a private citizen against another private citizen. A lawsuit is just like indicting someone, except that the penalty is money. The mere possibility of a lawsuit changes people's behavior.

That's why judges must continually act as gatekeepers, interpreting the principles of common law to draw the boundaries of reasonable claims. Justice Benjamin Cardozo wrote that this kind of "judicial legislation" was essential to the functioning of the common law. Holmes put it this way: "Negligence is a standard we hold people bound to know beforehand, not a matter dependent on the whim of the particular jury..."

The flaw in the sledding case is not that this particular jury went off the tracks, but that the jury was given the case at all. The threshold legal question in any accident case is whether we as a society tolerate certain risks – including sledding on a hill with its predictable imperfections of nature and of landscapes. That decision must be made by someone with authority to make it stick. Judges and legislatures have that authority. Juries do not.

The role of juries in civil cases is to decide disputed facts, such as whether someone is lying, not standards of conduct. Whether a seesaw is a reasonable risk should be decided on behalf of society as a whole, in a written ruling. The Seventh Amendment of the Constitution protects the right to a jury trial but only in "suits at common law." A judge must first decide what is a valid claim under the common law.

Trial lawyers like the unpredictability of juries, because it gives them a lever for settlement, and argue that juries are "democracy in action." But that's exactly what's wrong with the current legal system. Justice is supposed to be rendered by the rule of law, with consistent rulings and predictable outcomes, not rendered in mini-elections, jury by

jury, tolerating wildly inconsistent results for the same conduct. To quote former Yale Law Professor Eugene Rostow, the “basic moral principle, acknowledged by every legal system we know anything about...is that similar cases should be decided alike.”

The point of reform is not to put arbitrary barriers on lawsuits. Lawsuits are a vital component of the rule of law. By making people potentially liable when they are negligent, law provides incentives for reasonable conduct. But the converse is also true. Allow lawsuits against reasonable behavior, and pretty soon people no longer feel free to act reasonably. And that’s what’s happening in America today.

There’s a lot of discussion about the need to deter frivolous lawsuits and excessive claims. Fulfilling that task, however, requires judges to make decisions of what’s frivolous. Anytime there’s an accident, it couldn’t be easier to come up with a theory of what someone might have done – there could have been a warning, or more supervision, or a stronger lock on the door. Judges mustn’t be so reticent to use their common sense. It would probably help if legislatures would make clear that this is their job, for example, with legislation to the effect that, “It is the responsibility of judges to draw the boundaries of reasonable dispute, under the precepts of common law.”

Judges also must not hesitate to impose penalties when the case is frivolous. A recent case over a car accident in Indiana involved a claim that Cingular should be liable because it was foreseeable that the customer might use the phone in the car. After the case was properly dismissed, the plaintiff appealed. While the phone company won the case, the court refused to award attorney’s fees on the basis that the claim was “not frivolous.” That’s not, I submit, how we are going to restore respect for our legal system.

All life's activities involve risk, and therefore the inevitability of accident and disagreement. The role of law is not to provide a consolation forum for those who have felt the misfortune of risk; it is to support the freedom of all citizens to make reasonable choices, including taking reasonable risks. Setting limits on lawsuits is not an infringement of freedom but a critical tool of freedom. Otherwise one angry person, by legal threat, can bully everyone else.

The main loser in the current situation is the American people. It is their healthcare that is increasingly unaffordable, their schools that are disrupted by disorder, their sympathy that is chilled by fears that someone may misinterpret a kind word, or an arm around the shoulder of a crying child ... and their fun that is lost when the snow blankets a nearby hill.

Thank you for the opportunity to appear before you.