



Center for Justice & Democracy
80 Broad St., 17th Floor
New York, NY 10004
Tel: 212.267.2801
Fax: 212.764.4298
centerjd@centerjd.org
<http://centerjd.org>

For release
December 7, 2003

Contact: Joanne Doroshow
212/267-2801

**Statement of Joanne Doroshow, Executive Director,
Center for Justice & Democracy
On the *Newsweek* Cover Story of December 15, 2003: “Lawsuit Hell”**

As an organization dedicated to educating the public about the importance of the civil justice system, we believe it is imperative to correct the record when we see stories that feed into a false and dangerous perception that the system is overflowing with frivolous lawsuits. Such is this week’s *Newsweek* cover story, *Lawsuit Hell*.

Our efforts are not made easy when, as in the *Newsweek* article, the argument is made primarily based on anecdotes that are often not cited by name or even by date so they can be checked for accuracy. Our experience has been when journalists or researchers have tracked down anecdotes in similar articles, they find in virtually every situation that these cases have been misrepresented, exaggerated, described improperly or incompletely or otherwise misused to make a point. This research will take some time, although we do note right off that many so-called “cases” cited by *Newsweek* to support its opinion were never even filed.

In the meantime, to assist readers trying to interpret this article, here is what we do know:

The *Newsweek* article fails to discuss statistics on litigation, which actually show overall that tort (personal injury) litigation is decreasing in this country. Far from “exploding,” tort lawsuit filings have *decreased* 9 percent since 1992, according to the country’s most accurate and comprehensive overview of state court litigation statistics. (Examining the Work of State Courts, 2002, a joint project of the Conference of State Court Administrators, the Bureau of Justice Statistics and the National Center for State Courts’ Court Statistics projects.)

The *Newsweek* article contains no actual data to support its opinion that Americans today are “sue-happy” – in fact, the data shows the exact opposite is true. Each year, one in six Americans sustains an injury serious enough to cause some economic loss. Yet for the typical injury, “the injured person does not even consider the notion of seeking compensation from some other person or entity...” Only 10 percent ever file a claim, which includes informal demands and insurance claims. Only two percent file a lawsuit.” The study concludes that these statistics are at odds with any notion that we live in an overly litigious society. Compensation for Accidental Injuries in the United States, Rand Institute for Civil Justice (1991).

The *Newsweek* article argues throughout that Little League coaches may be sued at the slightest provocation, apparently unaware that in 1997, Congress passed a law that immunizes Little League coaches from negligence lawsuits. Under the Volunteer Protection Act of 1997, volunteers for non-profit organizations or government programs around the country -- even those dealing with children -- can no longer be held responsible for their negligence.

The *Newsweek* article alleges that legal liability has led to more unsafe playgrounds; this is completely untrue. In 1991, the Consumer Product Safety Commission (CPSC) issued its “Handbook for Public Playground Safety,” which has become “the state-of-the-art source for accident claims.” According to independent researchers in this area, “Concerns of legal liability arising from failure to meet the recommended guidelines of the CPSC have led to a widespread upgrading of playgrounds in schools, public parks, and day-care centers.” In many situations, insurers have played a large role in forcing compliance with CPSC standards and other safety changes. Wallach, Frances, found at The World Playground Park & Recreation, Products and Services Web Directory, <http://www.world-playground.com/Article.htm>. Gilchrist, Julie, Schieber, Richard A. & David A. Sleet, “Legislative and Regulatory Strategies to Reduce Childhood Unintentional Injuries,” 10 *Unintentional Injuries In Childhood* 111, (Spring/Summer 2000).

The *Newsweek* article calls juries overly sympathetic, emotional, and unable to handle complex issues, but close observers of the jury system, including judges, believe the opposite. Judges, who have more intimate knowledge of the system than anyone, have “a high level of day-to-day confidence in the jury system.... Only 1 percent of the judges who responded [to a 2000 survey of the entire federal judiciary] gave the jury system low marks....Ninety-one percent believe the system is in good condition needing, at best, only minor work.... Overwhelmingly ...judges said they have great faith in juries to solve complicated issues....Ninety-six percent said they agree with jury verdicts most or all of the time. And nine of 10 judges responding said jurors show considerable understanding of legal issues involved in the cases they hear.” Allen Pusey, “Judges rule in favor of juries: Surveys by Morning News, SMU law school find overwhelming support for citizens' role in court system,” *Dallas Morning News*, May 7, 2000.) Virtually every independent jury scholar has expressed the same confidence in the jury system. Stephen Daniels and Joanne Martin, authors of an exhaustive analysis of juries, found there to be “little or no empirical information available regarding many of the claims made by the reformers about juries and the civil justice system.” *Civil Juries and the Politics of Reform*, Evanston: Northwestern University Press (1994). Similar findings were made by Professor Valerie Hans in her recent book, *Business on Trial: The Civil Jury & Corporate Responsibility*. *Business on Trial: The Civil Jury & Corporate Responsibility*, New Haven and London: Yale University Press (2000).

The *Newsweek* article includes a number of wild exaggerations—largely discredited—about costs of the legal system and “defensive” medicine. The article states that the legal system’s “costs to society” are an estimated \$200 billion a year, but fails to explain that this widely-discredited figure includes all insurance premiums, as well as the immense costs of operating the incredibly wasteful and inefficient insurance industry, or that most of the costs of the system are the result of corporate wrongdoing causing injury, or that such numbers fail to factor in the cost savings, particularly to the taxpayer, of compensation and product safety. As Ralph Nader noted in congressional testimony, “If consumer advocates came to Congress asking for a complete overhaul of the nation's regulatory laws based on made up and mischaracterized numbers like these, we would rightfully be laughed out the door.” Committee on Commerce, Science and

Transportation, Sept. 19, 1991. The U.S. General Accounting Office has also criticized evidence used to support the notion that the tort system encourages unnecessary defensive medicine, including the U.S. Department of Human Services (HHS) for publishing a wildly inflated estimate, based on an improper methodology, of potential savings from defensive medicine. GAO notes that some defensive medicine is good medicine, managed care discourages bad defensive medicine, and doctors do defensive medicine because they make money from defensive medicine. Analysis of Medical Malpractice: Implications of Rising Premiums on Access to Health Care, General Accounting Office, GAO-03-836, August 2003.

Newsweek supports placing all medical malpractice cases into an heavily bureaucratic administrative tribunal run by medical professionals, yet the article fails to make any reference to past failures with such systems. The Virginia Birth-Related Neurological Injury Compensation Program, similar to this proposal and in place for 15 years, has hurt patients, has done nothing to help doctors with their insurance problems and has allowed the state to become a safe harbor for negligent and reckless doctors who should not be practicing medicine at all, according to series of investigations in the *Richmond Dispatch*. Virginia's Joint Legislative Audit and Review Commission has now suggested "abandoning or overhauling" the program and "ridding the board of its heavy presence of medical professionals." Bill McKelway, "Brain Injuries Spur No Action; Case Review, Required by Law, Is Not Being Done, Va. Study Found," *Richmond Times Dispatch*, Jan. 14, 2003; Bill McKelway, "Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," *Richmond Times Dispatch*, Nov. 13, 2002; Liz Szabo & Elizabeth Simpson, "Birth Injuries Get 'Minimal Review; State Report Says Board Must Hold Doctors Accountable,'" *Virginian-Pilot*, Nov. 15, 2002. Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002. Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002. Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003. There are many other reasons why such systems are unfair to patients and will lead to more medical errors. See, e.g., <http://centerjd.org/MassTestimonyF.pdf>

The Newsweek article blames litigation for the "culture of secrecy" that exists in hospitals, yet history shows that when you remove litigation as a factor, secrecy still exists. In Massachusetts, for example, where nearly all hospitals fall under the state's charitable immunity laws that cap their liability at \$20,000, hospitals are still "vastly underreporting their mistakes to regulators and the public." According to *Boston Magazine*, "doctors, either out of shame, a fear of being sued or disciplined, or anxiety about their reputations, rarely talk openly about their errors.... The biggest challenge is finding a way to break the culture of silence in hospital corridors that has long crippled efforts to cut medical errors, just as the blue wall of silence has stifled police investigations." Doug Most, "The Silent Treatment," *Boston Magazine*, Feb. 2003.

The Newsweek article blames litigation for the astronomical rate hikes that many doctors are experiencing; there is a wealth of evidence demonstrating that the reason rates are rising has nothing to do with the legal system. Volcanic eruptions in insurance premiums for doctors have occurred three times in the last 30 years – in the mid 1970s, again in the mid-1980s, and now today. The cause is always the same: a severe drop in investment income for insurers compounded by underpricing in prior years. Each time, insurers have tried to cover up their mismanaged underwriting by blaming lawyers and the legal system. Americans for Insurance Reform's study, *Stable Losses/Unstable Rates*, shows that since 1975, medical malpractice paid claims per doctor in this country have tracked medical inflation very closely (slightly higher than

inflation from 1975 to 1985 and flat since). In other words, payouts have risen almost precisely in sync with medical inflation. Moreover, contrary to what the insurance and medical lobbies have alleged, the years 2001 and 2002 saw no “explosion” in medical malpractice insurer payouts or costs to justify sudden rate hikes. In fact, rather than exploding, inflation-adjusted payouts per doctor dropped from 2001 to 2002. These data confirm that neither jury verdicts nor any other factor affecting total claims paid by insurance companies that write medical malpractice insurance have had much impact on the system’s overall costs over time. See, <http://www.insurance-reform.org>.

The *Newsweek* article states that teachers are not disciplining students for fear of litigation; it fails to include statements by teachers who do not support this view. In a statement responding to President Bush's proposal to provide some immunity to teachers who hit children – a law which did pass – Bob Chase, President of the National Education Association, said, “Our members tell us the single thing that they would like, to restore discipline and order to classrooms, is to lower class size. That's the proven way to improve discipline and learning. Governor Bush's proposal is simply a call for another piece of federal legislation. We'd rather the President of the United States focused on proven solutions such as class size.” Telephone interview with Becky Felischauer, NEA Senior Professional Associate, January 2, 2001, confirming quotation cited by Burns, Jim, “Bush wants Congress to pass teacher protection act,” October 18, 2000, CNSNews.com, found at <http://childrenfirstamerica.org/DailyNews/00Oct/10180011.html>. Jamie Horowitz, spokesperson for the American Federation of Teachers, said, “I question how much of an issue this really is.... Not only do we provide our members with million dollar liability insurance, but also the school districts provide them with liability coverage, generally....Even though we provide our members with million dollar coverage, we've never had a million dollar client. I don't think fear of lawsuits is keeping teachers from doing their jobs, and so I question the extent of the problem” Telephone interview with Jamie Horowitz, January 2, 2001, confirming quotation cited by Burns, Jim, “Bush wants Congress to pass teacher protection act,” October 18, 2000, CNSNews.com, found at <http://childrenfirstamerica.org/DailyNews/00Oct/10180011.html>.

The *Newsweek* article mentions almost nothing about the critical benefits of our civil justice system. Society benefits in countless ways as a result of lawsuits: they prevent future injuries by removing dangerous products and practices from the marketplace and spurring safety innovation; they educate the public to unnecessary and unacceptable risks associated with some products and services through disclosure of facts discovered during trial; and they provide authoritative judicial forums for the ethical growth of law. See CJ&D’s study, *Lifesavers*, <http://centerjd.org/free/Lifesavers.pdf>. The power and authority of juries represents an important counterweight to the dominance of organized moneyed interests elsewhere in our government. *Newsweek* ignored all of this in its article. It also ignored observations by doctors like Dr. Wayne Cohen, who in 1995 was medical director of Bronx Municipal Hospital, who said, “The city was spending so much money defending obstetrics suits, they just made a decision that it would be cheaper to hire people who knew what they were doing.” Dean Baquet and Jane Fritsch, “New York’s Public Hospitals Fail, and Babies Are the Victims,” *New York Times*, March 5, 1995.

The *Newsweek* article fails to provide readers with any background information on the law firm that Phil Howard, head of the group “Common Good,” represents, so readers can make a more informed opinion as to his proposals to eliminate the jury system. Howard represents the law firm of Covington & Burling. Covington & Burling is not simply a firm that

has represented some of our country's most unsafe industries, like tobacco and chemical. It is actually one of the principal architects of the so-called "tort reform" movement, seeking to immunize industries by taking power away from juries and replacing it with administrative systems over which politicians – and special interest money - have more control. Throughout the 1990s, Covington served as a funnel for tobacco money to so-called "tort reform" groups, both at the national and state level, and sometimes helped to set up those groups. Center for Justice & Democracy and Public Citizen, The CALA Files (1999).