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Joan Claybrook, President

Newsweek "Civil Wars" Cover Story Presents One Side of the Battle: Report Is Filled with Falsehoods, Exaggerations, and Lacks Balance

Newsweek's Dec. 15 cover story entitled "Lawsuit Hell/Civil Wars" is a one-sided diatribe masquerading as investigative journalism. The editor wrote of the issue, "we hope you'll find our report provocative but fair." Provocative? Incendiary is more like it. Fair? Not at all.

The article reads like tabloid journalism – designed to excite and sell magazines rather than inform. It pushes readers' emotional buttons rather than providing balanced analysis that informs the public about a critical policy issue.

Moreover, by declining to present a more balanced picture of the legal system other than including a *pro forma* acknowledgment that some lawsuits have benefit and a three-sentence quote from Ralph Nader secured just before deadline, *Newsweek* piles on to such an extent that it fails to meet the test of fairness and objectivity.

In adding a partnership with NBC for week-long broadcast tie-ins and on-line chats, including one with the lead author and lawsuit "victims" described in the article, *Newsweek* has gone beyond advocacy journalism to crusade against consumers' access to the courts – a crusade without precedent even among news outlets with overt conservative leanings.

From a journalistic point of view, the article suffers from major reporting deficiencies, including an extreme lack of due diligence. The article includes:

- Many false and exaggerated anecdotes that present an unbalanced and negative caricature of the legal system.
- Major factual inaccuracies about the legal system and lawsuits.
- Proposed solutions that have no basis in experience.

Finally, the article's lead author, Stuart Taylor Jr., a commentator rather than a news reporter, is heavily biased towards business interests on tort issues and has a history of advocacy on this issue. His viewpoints, which rely largely on corporate lawyer Philip K. Howard and his book, "The Collapse of the Common Good," should have been relegated to a column. Instead, Taylor hijacked all but 10 sentences in an eight-page article to present a narrowly sourced story espousing an extreme and biased political viewpoint.

Newsweek has fallen hook, line and sinker for the myths and distortions spread by a well-organized campaign funded by the American Medical Association, insurers, tobacco companies, auto manufacturers and others to strip consumers – but, notably, not businesses – of their legal rights. Since big business dominates the political system, the civil justice system is the one branch of government in which ordinary citizens can hope to get a fair shake. That's why these entities are hell-bent on slamming the courthouse door shut.

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Newsweek Chooses Many False and Exaggerated Examples to Present an Unbalanced and Negative Caricature of the Legal System

Newsweek's article is highly unbalanced and replete with examples of "lawsuit hell" stories that are used to build a straw man. A close examination of these examples finds that most are wild exaggerations or anecdotes that were never lawsuits to begin with or have been discredited by independent sources. These examples are designed to present a false and negative caricature of the legal system.

- ***"Ryan Warner is a volunteer who runs an annual softball tournament in Page, Ariz., that usually raises about $5,000 to support local school sports programs. But not this year. A man who broke his leg at a recent tournament skidding into third base filed a $100,000 lawsuit against the city, and Warner fears he may be named as a defendant."*** [p. 44]

  ***Newsweek* fails to disclose that Ryan Warner is immune from liability.** When telephoned at his place of employment, the Warner Insurance Agency in Page, Arizona, Ryan Warner reported to Public Citizen that the injury in question occurred two years ago in 2001 and as of this date he has not been sued. Warner insurance sells a broad range of property casualty insurance, including general liability insurance to protect against civil suits. Warner also said that he had not heard of the Volunteer Protection Act of 1997.[1] Under that law, volunteers for non-profit organizations or government programs around the country, even those dealing with children, cannot be held responsible for their negligence. The authors of the *Newsweek* article, he said, did not mention that statute during their conversations with him. Further, Mr. Warner said that he is considering re-instituting the softball tournament next year.

- ***"Playgrounds all over the country have been stripped of monkey bars, jungle gyms, high slides and swings, seesaws and other old-fashioned equipment once popularized by President John F. Kennedy's physical-fitness campaign. … But some experts say that new, supposedly safer equipment is actually more dangerous because risk-loving kids will test themselves by, for instance, climbing across the top of a swing set."*** [p. 44]

- ***"…the playgrounds and playing fields are an absolute [legal] war zone.*** [p. 49]

  ***Newsweek* provides no examples from this alleged "war zone."** However, checking Howard's recent book, "The Collapse of the Common Good," reveals that his lead example showing that people don't exercise common sense because of lawsuit anxiety is the story of the cherished double slide.

  In the lead example of people not exercising common sense because of lawsuit anxiety, Howard tells the story of the double slide at the City Park in Oologah, Oklahoma. After 50 years of providing fun and recreation for the area's children it seems one unattended child fell from the slide and suffered minor injuries. The child's parents made a claim against the city and the town board then decided it had no choice but to get rid of the much-loved double

[1] (42 U.S.C.A. §14503). Public Law 105-19 was signed into law by President Clinton on June 18, 1997.

slide. Howard fails to disclose additional pertinent details, such as whether there was a history of previous injuries, or whether the slide, after 50 years of use, had fallen into dangerous disrepair. He mentions only that the child's parents made a claim. Did Howard intend to deliberately mislead us or was he not aware that an existing statute, the Oklahoma Recreational Land Use Act (RLUA), protects landowners from liability lawsuits by those injured while making recreational use of the premises.[2]

In 1981, the Consumer Product Safety Commission (CPSC) issued its first "Handbook for Public Playground Safety, which has become "the state-of-the-art" source for playground design.[3] The preface of the current edition of the guidelines reminds us:

"Playgrounds are a fundamental part of the childhood experience. They should be safe havens for children. All of us have memories of playing on playgrounds in our neighborhood park and at recess in the schoolyard. Unfortunately, more than 200,000 children are treated in U.S. hospital emergency rooms each year for injuries associated with playground equipment. Most injuries occur when children fall from the equipment onto the ground. Many of these injuries can be prevented. To address the issue of falls, these guidelines emphasize the importance of protective surfacing around playground equipment."

Again, without documentation, *Newsweek* (p. 44) writes, "some experts say that new, supposedly safer equipment is actually more dangerous because risk-loving kids will test themselves by, for instance, climbing across the top of a swing set." This assertion that modern-day playgrounds are more dangerous defies common sense. As anyone with children or grandchildren knows, today's parks are safer and more child-friendly than ever before. Incidentally, they are also much more challenging, interesting and fun for the children. The new shapes and materials (castles, pirate ships, climbing walls, soft surfaces, recycled materials, rounded edges, etc.) are all designed with the safety of the child in mind.

- ***"(In California recently, a couple won a $70 million judgment against Stanford University Hospital and two other health-care centers for failing to prevent their child from becoming disabled by a rare birth condition.)"*** [p. 47]

***Newsweek* ignored the case facts.** The jury awarded this judgment to the family of 9-year-old Michael Cook. Michael was born with the rare metabolic disorder phenylketonuria (PKU), which prevents certain amino acids from being properly metabolized. According to medical experts, the disorder occurs once every 10,000 to 15,000 births and can be detected by a test that is required by law for all newborns. If diagnosed early, it can usually be controlled with a low-protein diet."[4] The medical standard of practice is to test newborns about 24 hours after birth, but Michael's test was conducted too early, only four hours after birth. Medical experts testifying at the trial stated that if the test had been performed as required by the standard, it would have detected Michael's condition, and he could have gone on to lead a healthy life. Instead, Michael was not diagnosed until he was six years old, after

[2] (2 Okla. St. Ann. section 16-71). Court decisions construing the statute have extended the statute's immunity protection to governmental agencies. Hughey v. Grand River Dam Authority, Okla., 897 P.2d 1138 (1995) and Cox v. U.S., C.A. 10 (Okla.) 1989, 881 F. 2d 893.
[3] U.S. Consumer Product Safety Commission, Washington, D.C. 20207, Pub. No. 325.
[4] Bob Egelko, *San Francisco Chronicle*, "Brain-damaged Boy Wins Huge Verdict," September 30, 2003.

the disease had permanently impaired him. Michael's doctors testified that he now functions at a three-year-old level, is fed through a tube, and will never be able to work or live on his own.[5]

***Newsweek* failed to reveal the true cost of the judgment**. The jury awarded $56.3 million to cover the costs of future medical and attendant services, special education and rehabilitative care. Since Michael will never be able to work, $14.1 million was awarded to cover the loss of future earnings. The jury awarded only $500,000 in punitive damages, and the family can collect only half of this because California law caps non-economic damages at $250,000. Since this was a structured judgment rather than lump sum payment, with periodic payments over Michael's lifetime, the present value of the award was only $8.3 million ($6.3 million for medical expenses and $1.8 million for lost wages) – the cost to purchase an annuity to provide the payments to Michael over his lifetime.

- ***"School boards now fear that parents will sue for anything. In Kentucky, a mother sued her daughter's school after the girl had performed oral sex on a boy during a school bus-ride returning from a marching band contest. The woman blamed poor adult supervision, saying her daughter had been forced. If the case goes badly for the school system, such trips could be jeopardized."*** [p. 49]

  Newsweek implied that the girl had consensual sex on a school bus and still sued the school. According to an article in the *Lexington Herald*, after a hearing, the Board of Education ruled that the young girl was, in fact, a victim. Her only crime, it appears, was her failure to report the assault and, for that, she was suspended for two days.[6]

  ***Newsweek* failed to disclose the purpose of the lawsuit.** Instead of suing to hit the "jackpot," as implied in the article, the girl's mother specifically disavowed any claim for money damages. The suit alleges that the school has a duty to protect children and failed to properly chaperone the field trip. The suit demands that the Board of Education set up a training course to instruct employees on sexual assault, predators and victims. The case is scheduled for trial on July 26, 2004.[7]

  ***Newsweek* failed to disclose that the lawsuit was filed only after the parent exhausted her school remedies without obtaining the relief requested.** Before the lawsuit was filed, there was an investigation led by the school principal that incorrectly concluded the sexual act had been consensual. That was followed by an appeal to the Board of Education, which reversed and found that there had been no consent. Only when the Board failed to make the necessary changes, did the mother sue. This example also demonstrates that administrative remedies – the solution to "lawsuit hell" proposed by Howard and Taylor – often are not a reasonable alternative to our legal system.

[5] *Michael Cook v. Stanford Health Services, et al*., San Francisco Superior Court, No. 324905, Sept. 26, 2003.
[6] Louise Taylor, *Lexington Herald Leader*, "Lafayette Student Alleges Assault: School Board Sued Over Bus Incident," December 18, 2002.
[7] Telephone conversation with Louise Taylor, reporter, *Lexington Herald Leader*, December 16, 2003.

Newsweek's Article Contains Major Factual Inaccuracies About the Legal System and Lawsuits

The article made numerous factual assertions that portrayed the legal system in a very negative light and added credibility to the outrageous claims being made by the authors. No sources were given for the claims. For good reason – they are erroneous.

- ***"And the 'litigation explosion' of the past 30 years may be leveling off…"*** [p. 45]

  Tort filings in state courts were down from 1992-2001:
  The National Center for State Courts has done a study of filings in state courts from 1992-2001, which found:
  - In the 30 states that keep track of such data, whose populations comprise 74 percent of the U.S. total, tort filings were down 9 percent.[8]
  - In the 17 states that keep track of such data, whose populations comprise 53 percent of the U.S. total, automobile filings were down 14 percent.[9]
  - Automobile filings comprised 60 percent of the tort filings in 2001.[10]
  - In the nine states that kept track of such data from 1992 and the 17 that kept track since 1997, medical malpractice filings were down 1 percent adjusted for population growth (there are increases without adjusting for population growth).[11]

  Tort filings in federal courts are down:
  The *Federal Judicial Caseload Statistics,* kept by the Administrative Office of the U.S. Courts, show downward trends in both personal injury and civil filings from 1998-2002.
  - Civil cases filed in federal court were down 5.4 percent from 1998-2002.[12]
  - Personal injury cases declined as a portion of civil cases from 21.2 percent in 1998 to 18.3 percent in 2002.[13]

- ***"The cost to society cannot be measured just in money, though the bill is enormous, an estimated $200 billion a year, more than half of it for legal fees and costs that could be used to hire more police or firefighters or teachers…"*** [p. 45]

  This estimate comes from a study by an insurance industry consulting firm, Tillinghast-Towers Perrin, which estimated that in 2001 the "cost" of the U.S. tort system was $205 billion.[14] Such an analysis is highly misleading for several reasons. First, 35 percent of this study's puffed-up cost estimate are for insurance industry overhead (21 percent) and defense costs (14 percent). Much of this insurance overhead would exist anyway because it is unrelated to lawsuits (setting rates, administering policies, marketing, profit taking, etc.) or is a result of negligence by insurance companies' clients.

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[8] *Examining the Work of State Courts, 2002*, National Center for State Courts, 2003, p. 25.
[9] *Examining the Work of State Courts, 2002*, National Center for State Courts, 2003, p. 26.
[10] *Examining the Work of State Courts, 2002*, National Center for State Courts, 2003, p. 26.
[11] *Examining the Work of State Courts, 2002*, National Center for State Courts, 2003, p. 28.
[12] *Federal Judicial Caseload Statistics*, Administrative Office of the U.S. Courts, March 31, 2003, p. 6.
[13] *Federal Judicial Caseload Statistics*, Administrative Office of the U.S. Courts, March 31, 2003, p. 13.
[14] *U.S. Tort Costs: 2002 Update; Trends and Findings on the Costs of the U.S Tort System*; Tillinghast-Towers Perrin, February 2002.

Second, 46 percent of the "costs" are for payments made to injured plaintiffs for lost wages, medical care, and pain and suffering. These costs are the result of injuries caused by defendants and would be borne by society anyway either through government programs, charities or absorbed by the victims and their families and friends. Recently, the Congressional Budget Office (CBO) suggested that these "transfer payments" to compensate victims are not in fact "costs" because they "do not involve any use of resources to produce goods or services."[15] By mischaracterizing compensation as costs, Tillinghast inflated by nearly double its sensational $205 billion estimate, providing the raw material for a misleading public relations campaign on a so-called "tort tax.

Finally, Tillinghast acknowledges that the tort system provides indirect benefits to society that are not measured in the study. These include acting as a deterrent to unsafe practices and products.[16] While we don't encourage a monetaristic view of this issue, it's quite likely that the benefits of lawsuits – in terms of forcing changes to defective products and making professionals alter their harmful actions – result in much larger savings (in terms of lives saved and injuries prevented) than the tort system costs. This prevention argument is best illustrated by a recent study by the Bush White House examining the costs and benefits of 107 federal regulations – primarily health, safety and environmental protections – covering a 10-year period. The analysis found that: "The estimated total annual quantified benefits of these rules range from $146 billion to $230 billion, while the estimated total annual quantified costs range from $36 billion to $42 billion."[17]

- ***"…according to one estimate, doctors waste $50 billion to $100 billion on 'defensive medicine'…"*** [p. 48]

The source of this research was a 1996 study by Mark McClellan – a Bush administration economic advisor in 2001 and now head of the U.S. Food and Drug Administration. Both the General Accounting Office (GAO) and the Congressional Budget Office have derided his assertions. Although the study found that tort law changes could deliver 5 to 9 percent in savings on defensive medicine, the GAO noted that "this study did not control for other factors that can affect hospital costs, such as the extent of managed care penetration in different areas. When controlling for managed care penetration in a 2000 follow-up study, the same researchers found that the reductions in hospital expenditures attributable to direct tort law changes dropped to about 4 percent. Moreover, preliminary findings from a 2003 study [by CBO] that replicated and expanded the scope of these studies to include Medicare patients treated for a broader set of conditions failed to find any impact of state tort laws on medical spending."[18]

When CBO replicated and expanded the study in 2003, its results contradicted McClellan's 1996 study:

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[15] *The Economics of U.S. Tort Liability: A Primer*, U.S. Congressional Budget Office, p. 31, October 2003.
[16] *U.S. Tort Costs: 2002 Update; Trends and Findings on the Costs of the U.S Tort System*; Tillinghast-Towers Perrin, February 2002, p. 18.
[17] *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local and Tribal Entities*, Office of Management and Budget, Office of Information and Regulatory Affairs, September 22, 2003, p. 3.
[18] United States General Accounting Office, Report GAO-03-836, "Medical Malpractice: Implications of Rising Premiums on Access to Health Care," p. 27, August 2003. Available at http://www.gao.gov/new.items/d03836.pdf.

"CBO found no effect of tort controls on medical spending in an analysis that considered a broader set of ailments. Moreover, using a different data set, CBO could find no statistically significant difference in per capita health care spending between states with and without malpractice tort limits. …A few studies have observed reductions in health care spending correlated with changes in tort law, but that research was based largely on a narrow part of the population and considered only spending for a small number of ailments."[19]

"Malpractice costs account for a very small fraction of total health care spending; even a very large reduction in malpractice costs would have a relatively small effect on total health plan premiums. In addition, some of the savings leading to lower medical malpractice premiums – those savings arising from changes in the treatment of collateral-source benefits – would represent a shift in costs from medical malpractice insurance to health insurance."[20]

- ***"Various studies have shown that the vast majority of medical errors go undetected by patients and that nine out of 10 are never compensated. (And when patients do sue, their malpractice allegations are unfounded in as many as 80 percent of the cases, other studies suggest; [medical malpractice] insurance companies pay to settle the vast majority of claims anyway, rather than risk a big hit.)"*** [p. 48]

  We agree that most medical errors go undetected by patients and that too few patients are ever compensated. If anything, such conditions require strengthening the civil justice system, not taking away patients' legal rights as Howard proposes.

  With regard to whether malpractice allegations are unfounded, in a study of closed medical malpractice claims, University of Washington Medical School researchers found *no* settlements paid or damages awarded in "cases in which there were no significant deviations from prevailing standards of care. For those cases in which payments were made, there was general consensus among insurance company staff, medical experts, defense attorneys and the physician defendants that some lapse in the standard of care contributed to the outcome."[21]

  With regard to the claim that insurance companies pay to settle the vast majority of claims, insurance industry data refute such a claim. According to the Physician Insurers Association of America (PIAA), which through 60 member insurance companies covers 60 percent of America's private practice physicians,[22] only 33 percent of claims are paid. This figure is readily ascertainable by reading PIAA's testimony before Congress earlier this year.[23]

  When Professor Neal Vidmar, who is at the North Carolina Medical Malpractice Project at Duke University Law School, performed a study of medical malpractice lawsuits he found that, "In interviews with liability insurers that I undertook, the most consistent theme from them was: 'We do not settle frivolous cases!' . . . [Insurers'] policy on frivolous cases is based on the belief that if they ever begin to settle cases just to make them go away, their credibility will be destroyed and this will encourage more litigation."[24]

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[19] Congressional Budget Office, "H.R. 5, Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003, March 10, 2003," p. 5.
[20] Id., p. 4.
[21] Rosenblatt & Hurst, An Analysis of Closed Obstetric Claims," 74 *Obstetrics & Gynecology* 710 (1989).
[22] PIAA Web site: http://www.thepiaa.org/about piaa/what is piaa.htm. Captured on Dec. 16, 2003.
[23] Statement of Physician Insurers Association of America to House Judiciary Committee, February 28, 2003.
[24] Neil Vidmar, Ph.D., Russell M. Robinson II Professor of law at Duke Law School, "Medical Negligence, the Litigation Process and Jury Verdicts in Medical Malpractice Cases: Implications for Indiana," Dec. 2, 2002, p. 28.

Newsweek's Proposed Solutions to the Problems It Claims Exist Have no Basis in Experience

Newsweek not only has subscribed to Howard's fallacious claims about the state of the civil justice system, but Taylor's praise also extends to the "solution" for medical malpractice claims proposed by Howard. Those proposals include removing most claims "to a special court of medical experts" where "expert judges" rather than juries would review doctors' decisions. This prescription is pushed by Howard with no evidence to demonstrate that juries are not capable of fairly deciding medical malpractice cases and with no real-world experience to show that his "solutions" will work.

- ***"Rather than allow juries ignorant of medical procedure to be swayed by sympathy, judges who are experts would follow established medical standards."*** [p. 51]

  Physicians may not be any more expert than juries when it comes to assessing accountability. This idea was tested a decade ago, with disappointing results. The American Society of Anesthesiologists conducted an experiment, giving closed malpractice claim files to pairs of neutral medical experts, to see if they agreed on whether the standard of care was violated. These pairs of doctors disagreed 38 percent of the time, even though the experts were not the "hired guns" who typically testify at trials.[25] The researchers concluded: "These observations indicate that neutral experts (the reviews were conducted in a situation that did not involve advocacy or financial compensation) commonly disagree in their assessments when using the accepted standard of reasonable and prudent care."

  Jury Competence. With regard to jury competence, empirical analysis of jury verdicts suggests that juries take care in assessing pain and suffering damages in medical malpractice cases by arriving at awards that bear a reasonable relationship to the severity of the harm suffered. This finding comes from a comprehensive study of California jury verdicts in medical malpractice cases from 1993 to 1999.[26]

  The authors examined jury verdicts in medical malpractice cases in California. The authors reviewed 1,283 medical malpractice cases dating from January 1, 1993, to March 10, 1999. These cases were drawn from the Westlaw database for the *California Jury Verdict Reporter*. The analysis showed a consistent relationship between the amount of the verdict awards and the seriousness of the injury suffered by the plaintiff. The authors concluded, ***"The results reported above do not appear to support the contention that juries are systematically over-compensating plaintiffs for pain and suffering or emotional distress in medical malpractice cases."***[27]

Similar results were obtained in a study by Neil Vidmar, a nationally recognized expert on jury competence.[28] His Medical Malpractice Project at Duke University attempted to review every malpractice suit filed in North Carolina between July 1, 1984, and June 30, 1987 – 895 cases. In

[25] Posner et al, "Variation in expert opinion in medical malpractice review," 85 Anesthesiology 1049 (1996).
[26] Kelso, J.C., Kelso, K.C., Jury Verdicts in Medical Malpractice Cases, Institute for Legislative Practice, University of Pacific McGeorge School of Law (1999).
[27] Kelso, supra at 24.
[28] Vidmar N, *The Unfair Criticism of Medical Malpractice Juries*, 76 Judicature 118 October/November 1992.

compiling and analyzing these cases, Vidmar viewed court files, conducted attorney interviews, and arranged to view the closed file claims of three insurers. Information was also gathered on an additional 300 cases between 1987 and 1990. **The project concluded that, "empirical evidence from multiple sources does not support claims that medical malpractice juries are consistently pro-plaintiff, incompetent, or unjustifiably generous in determining awards."**[29]

The results in California and North Carolina are consistent with later research by Professors Vidmar, Gross & Rose on medical malpractice verdicts in New York and Florida that also documented a consistent relationship between the amount of non-economic damages awarded and the seriousness of the injury suffered by the plaintiff.[30]

In a study of jury verdicts from New York City and the surrounding metropolitan areas, jury verdicts increased with severity of injury except when death occurred, which resulted in a substantially lower award.[31] In death cases, it's not surprising that the size of the award is less than in a case of grave injury. In those who sustain grave injuries, economic costs of medical treatment for that life-altering injury are likely to be greater, and the pain and suffering would exist over a longer time period than in the case of death.[32]

Like New York, Florida law requires juries to render a verdict that specifies the individual amounts of special (economic) and general (non-economic) damages. The authors reviewed 525 medical malpractice verdicts reported by judges and their law clerks to the Florida Jury Verdict Reporter that is archived in Westlaw. The period covered was 1987 through 1996. According to the authors, it seems plausible that the judges and law clerks were likely to report plaintiff wins rather than losses, because the wins were associated with damage awards. Nevertheless, the amount of these awards, like New York (and North Carolina and California), were positively related to the severity of injury assessed on the National Association of Insurance Commissioners (NAIC) scale.[33]

In a recent Iowa Law Review article entitled, "The Role of the Jury in Modern Malpractice Law," by Philip G. Peters, Jr., claims about jury competence were carefully considered.[34] The criticisms included several related threads, two of which are summarized here. First, lay jurors lack the capacity and training needed to evaluate complex medical treatment decisions. Second, juries are more sympathetic to injured plaintiffs and biased against wealthy defendants.

Jurors have the capacity to decide medical malpractice cases. Those who question jury capacity fear juries will be confused by scientific evidence and, in their confusion, will be vulnerable to manipulation by plaintiffs' attorneys and their experts, who will elicit sympathy for injured plaintiffs. One common method used to evaluate jury capacity is to compare the outcomes reached by juries with those reached by judges. Researchers have repeatedly found that juries and judges reach extremely similar conclusions about tort liability. As a consequence, these studies provide support to the contention that juries have the capacity to understand and

[29] Vidmar supra at 118.
[30] Vidmar N, Gross F, Rose M, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DePaul Law Review 265, 296 (1998).
[31] Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards, by Neil Vidmar, Felicia Gross, Mary Rose, 49 DePaul Law Review 265 (1998).
[32] Vidmar, Gross, Rose, supra at 284.
[33] Vidmar, Gross, Rose, supra at 290-1.
[34] The Role of the Jury in Modern Malpractice Law, Philip G. Peters, Jr. 87 Iowa Law Review 909 (2002).

decide complex medical malpractice cases. In one famous study, 4,000 civil trials were reviewed and the reactions of judges and juries were compared. In nearly four out of five cases (78 percent), the judge and jury agreed, thus refuting fears about unpredictability and incompetence.[35] According to the authors, "this agreement rate is better than the rate of agreement between scientists doing peer review, employment interviewers ranking applicants, and psychiatrists and physicians diagnosing patients."[36] In another interesting study the outcomes reached by juries were compared with those reached by physician reviewers. The researchers found a surprising agreement between physician reviewers and juries. Where juries differed from the physicians, juries were consistently more lenient toward malpractice defendants than were the physician reviewers.[37]

Jurors are not biased against physicians. An expanding body of evidence suggests that rather than being biased against physicians, jurors begin their deliberations favoring physician-defendants and doubting the motives of plaintiffs in medical malpractice cases. Findings reveal that jurors are even more distrustful of plaintiffs' lawyers and believe medical malpractice suits ruin the health care system by driving up costs. This may be due in part to the constant media bombardment by the corporate interests that attack and ridicule plaintiffs and their lawyers, as in the *Newsweek* article. Peters concluded after reviewing the available studies that there is simply no evidence that juries are prejudiced against physician defendants or that their verdicts are distorted by their sympathy for injured plaintiffs. Instead, the existing evidence strongly indicates that jurors begin their task harboring sympathy for the defendant physician and skepticism about the plaintiff.[38]

These studies demonstrate that juries are fulfilling their intended role in our civil justice system. Juries are not wildly and irrationally over-compensating injured plaintiffs with huge non-economic damage awards. Juries do bring community wisdom, experience, values and common sense to their deliberations.

[35] Peters, supra at 923.
[36] Peters, supra at 923.
[37] Peters, supra at 930.
[38] Peters, supra at 934.

Newsweek's Lead Author Is Heavily Biased and Has a History of Advocacy on this Issue

Lead author Stuart Taylor Jr. is not an objective reporter, but a partisan opinion writer and columnist who long has advocated so-called "tort reform." Yet *Newsweek printed* his slanted viewpoints and anecdotes as objective news reporting.

Taylor's conclusion that "our insistence on enforcing our 'rights' has made us less free" is no surprise. In fact, he made the exact same argument in a column-cum-profile of Philip K. Howard in the *National Journal* almost two years ago.[39] Taylor's earlier anecdotal exploration of "legal fear at work in our daily lives" quotes only Howard, a senior partner at the corporate defense firm Covington & Burling. The article concludes "in your heart, you know he's right." Taylor's arguments in *Newsweek* are indistinguishable from the "radical" ambitions of Howard that he describes in the earlier article.

For many years Covington and Burling has represented the tobacco, insurance, finance, pharmaceutical and other industries, which have have poured tens of millions of dollars into creating front groups across the country to push for anti-consumer tort law changes. Many of these groups use the name Citizens Against Lawsuit Abuse. Covington and Burling was very instrumental in this effort, including acting as a financial conduit for tobacco industry money.[40]

Taylor's sympathies aren't particularly surprising. Before he became a journalist, Taylor worked as an attorney at Wilmer, Cutler & Pickering, a large corporate defense firm that has represented corporations such as Citigroup, Merrill Lynch, Tyco and Wyeth and the Automobile Manufacturers Association. While Taylor's full biography is available on the *Newsweek* Web site, his status as a former corporate lawyer – for a firm whose clients would greatly benefit from limits on the ability of injured consumers to sue – wasn't mentioned in the magazine.

A few years ago, Taylor freely acknowledged that "virtually everything" he writes is "commentary – that is, opinions growing out of reporting and analysis."[41] And, of course, Taylor is welcome to his own opinions. But for *Newsweek* to present his views – without a rebuttal or disclaimer – as a fair-and-balanced consideration of the issue is grossly misleading.

[39] Stuart Taylor Jr., "How More Rights Have Made Us Less Free," *National Journal*, February 9, 2002.
[40] For a more in-depth discussion see *The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights*, Center for Justice & Democracy and Public Citizen, July 2000.
[41] Paul D. Colford, "A Reporter's Interesting Conflict," *Newsday*, April 23, 1998.