University of Southern California Law

From the SelectedWorks of Gillian K Hadfield

January 2008

Their Day in Court

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/ghadfield/40

LA Daily Journal, April 22, 2008

Their Day in Court

Comment On This Story!

FORUM COLUMN

By Gillian K. Hadfield
This article appears on Page 6

With the somber marking last week of the one year anniversary of the Virginia Tech massacre, it no doubt felt like a relief to many that a substantial majority of the families of those killed chose to accept a settlement proposal from the state and avoid litigation.

The Virginia Tech proposal echoes the tremendous effort that went in to persuading the Sept. 11 families to accept payments in exchange for waiving their rights to pursue lawsuits. The impulse to avoid litigation is increasingly widespread in American society.

The impulse is troublesome.

It is easy to think that these lawsuit-buyouts are about money. The Sept. 11 families faced years of public attack for taking money for their losses (the average payment received was about $1.7 million) and the blogosphere after the disclosure of the Virginia Tech proposal was abuzz with criticism of families who think they are entitled to payment from the state for the tragic losses they suffered. But as I learned from a recent study of the Sept. 11 families, it is clear that money has little to do with it.

The real issues at stake in the trend to wholesale lawsuit avoidance are about democracy and the critical role that courts play in achieving the ideals of self-government in a public, accessible and open forum.

When things go wrong, those who have suffered losses want to know what happened, who did or did not do their jobs and how the problems will be fixed in the future. Only in our ungenerous imagination of others do we suppose that those whose children or spouses or parents have been killed want money to buy a vacation home.

These interests - in information, accountability and change - are deeply civic in nature. It's not just that the bereaved feel entitled to an explanation; they feel a duty to do something in response to the failures or problems that their loss exposes.

When I spoke with the Sept. 11 families, for example, I frequently was told by those anguished by the decision to accept a payment rather than pursuing a civil lawsuit - against those they think might have prevented some of the deaths that followed the attacks - that they felt they had betrayed someone-their loved ones, their fellow citizens - in not doing more to find out what happened and fix things for the future.

Through the crass lens that colors lawsuits as the money-grubbing efforts of those who can't move on, we lose sight of the fundamental role that courts play in making the American ideal of civic participation in the governance of our communities effective.

By becoming plaintiffs, the ordinary citizens who, to their horror, fate picks out as the victims of both accident and wrongdoing, take on the power of the governing state. They become entitled first and foremost to obtain information, under subpoena and oath if need be, from those they designate as potentially responsible or involved. They wield the power to set the agenda for public officials such as judges and the use of public spaces such as courtrooms. They obligate judges and jurors to review evidence, hear testimony and ultimately reach an authoritative and public judgment, based on the law, about the conduct of those they have questioned. What happens in the public courtroom, triggered by the decision of an ordinary citizen to set the wheels in motion, is not subject to political expedience or the avoidance by the powerful of spectacle or blame. It is democratic participation in self-governance at its highest ebb.

Americans love to hate law and lawyers and so it has been easy, it seems, for the view to take hold that all lawsuits are bad things and that the high moral course avoids them. Witness the rhetorical advantage the Bush administration seizes when it seeks to shut down "class actions fueled by greed" that might challenge private company compliance with wiretapping requests. And fortunately for most of us,

the occasion to be a plaintiff is rare.

Few of us face that horrible call to find out why our loved ones were injured or killed or what mistakes might have been made or how such tragedies can be avoided in the future. For those who do, however, the courthouse is the place where they stand on equal footing with airline CEOs and university presidents, where their efforts to ensure that they, and we, find out what happened cannot be siphoned into voicemail, deleted from the e-mail inbox or scrapped with the junk mail.

The 9/11 Victim Compensation Fund ignored all of the non-monetary reasons for pursuing litigation, providing potential claimants with a check and nothing more in exchange for their waiver of their right to pursue a lawsuit.

The Virginia Tech settlement appears to make at least some effort to serve the civic goals of litigation - providing the families of those killed with the opportunity to question Virginia Tech officials and to be kept informed of steps the university and state are taking to avoid future tragedies, and publicizing facts previously not released about the attacks. But, as the author of the panel report that investigated the attack on behalf of the state of Virginia, W. Gerald Massengill, himself observed earlier this week, while his report found that "people did things they shouldn't have done or didn't do things they should have done" it's the function of the courts to "connect the dots" and make public judgments about those actions and inactions.

That process of public judgment and review doesn't happen unless the families of those killed, in the face of a tragic call to duty, ensure that this happens either through the litigation process or the substitutes the state offers. Those making these decisions about settlement act on behalf of us all.

Gillian K. Hadfield is the Kirtland Professor of Law and professor of economics at USC Gould School of Law.