

REAL WORLD TORTS: AN ANTIDOTE TO ANECDOTE

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*A true account of the actual is the rarest poetry, for common sense always takes a hasty and superficial view.*¹

I. INTRODUCTION

That there is widespread discontent with the tort system is surely an understatement. Most public discourse takes it as axiomatic that the system is seriously flawed and needs to be reformed. The term "tort reform" has been preempted by a set of tendentious critiques and proposals to reduce general levels of accountability and remedy for injury.² The noisiest proponents of tort reform, so called, have

1. HENRY DAVID THOREAU, *A WEEK ON THE CONCORD AND MERRIMACK RIVERS* 325 (Carl F. Hovde ed., Princeton Univ. Press 1980).

2. The "tort reform" addressed in this Article is the garden variety "common-sense" version that has dominated policy debate for over a decade, which emphasizes constriction of access, reduction of recovery, and curtailment of juries. See Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 *HOUS. L. REV.* 207 (1990); Linda Lipson, *The Evolution of Products Liability as a Federal Policy Issue*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE* 247 (Peter H. Schuck ed., 1991) [hereinafter *TORT LAW AND THE PUBLIC INTEREST*]; Glenn Blackmon & Richard Zeckhauser, *State Tort Law Legislation: Assessing Our Control of Risks*, in *TORT LAW AND THE PUBLIC INTEREST*, *supra*, at 272; T.R. Goldman, *Tort Reform: Interests and Agendas*, *LEGAL TIMES*, Apr. 17, 1995, at S30; Martha Middleton, *A Changing Landscape*, *A.B.A. J.* 56 (Aug. 1995). Pondering the course of "this insular reform movement," Robert Rabin observed that

cost pressure . . . [became] the driving force, the sufficient impulse for action. As a consequence, with no guiding conception of social welfare, the reforms of the 1980s became, in essence, victim take-away programs. The salient question became how benefit levels could be reduced via ceilings on noneconomic loss, disincentives to sue, elimination of parties defendant, denial of collateral source recoveries, and so forth, thereby diminishing the economic burden on a heterogeneous group of injury-producing activities.

wrapped themselves in the mantle of common sense³—certainly cause for suspicion.⁴

In this “common-sense” view, there are too many tort claims: Americans sue too readily, “at the drop of a hat”; egged on by avaricious lawyers, they overwhelm our congested courts with mounting numbers of suits, including many frivolous claims. Irresponsible juries, biased against deep-pocket defendants, bestow windfalls on undeserving plaintiffs, particularly arbitrary and capricious damages for pain and suffering and random outsize awards of punitive damages. Not only are the untold billions that the system costs an alarming drain on national wealth, but the system stifles enterprise and innovation, depriving society of useful products and services and undermining the international competitiveness of American business. To avoid these effects, we need to adopt various “tort reform” proposals to inhibit claims (e.g., loser-pays) and limit awards (e.g., eliminating joint and several liability, capping damages, etc.).

Outcroppings of this “common-sense” view are so numerous that I confine myself to a few recent examples. The first is from a long-running “public service” advertisement by the Mobil Corporation:

Americans have become a litigious lot. And no wonder. For some, the civil justice—or the tort system—has become a grand jackpot, providing windfalls to plaintiffs and their lawyers.

Jury awards for punitive damages grab headlines as they’ve spiralled into the millions, not to mention billions of dollars. And thanks to the concept of joint and several liability, plaintiffs’ attorneys trolling the waters in the hope of landing a big one, have cast their nets in an ever-widening circle that promises to choke business and clog the courts.

. . . .

Robert Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 22-23 (1988).

3. The “Common Sense Legal Reforms Act” was the ninth tenet of the ten-point “Contract with America” that was the centerpiece of the Republican Party’s triumph in the 1994 congressional elections. The emergence and import of these proposals is analyzed in Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

4. Rhetorically, “common sense” is associated with exemption from carrying any burden of proof. As Clifford Geertz observed, “religion rests its case on revelation, science on method, ideology on moral passion; but common sense rests its case on the assertion that it is not a case at all, just life in a nutshell. The world is its authority.” Clifford Geertz, *Common Sense as a Cultural System*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 75 (1983). The invocation of common sense in tort policy is examined by Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986*, 11 STUD. L. POL. & SOC’Y 95 (1991).

And these represent just the tip of the iceberg. Countless cases are settled before trial because defendants with seemingly deep pockets (big companies, professionals, etc.) are paralyzed by the threat of huge jury awards and/or the likelihood of paying damages grossly out of proportion to their share of the blame.

The result is a system out of balance, tilted to favor plaintiffs and reward their lawyers. The losses to society in the form of higher product and insurance costs, less innovation, fewer jobs and reduced availability of services are enormous.

.....
Tort reform is a front-door effort to bring down the cost of doing business, making American companies globally competitive and freeing citizens from the excessive costs of our current civil justice system.⁵

Commenting on the performance of the criminal justice system in the Simpson trial, a prominent Washington lawyer and former United States assistant attorney general observed:

The civil justice system seems equally demented, with freakish punitive damage bonanzas for persons who pour coffee on themselves or ricochet golf balls into their own foreheads. Immense class-action settlements benefit mostly lawyers, while actual victims of misfortune are further victimized by the system to which they turn for relief.⁶

Former Vice President Quayle, in his memoirs, weaves together many of these themes in the following story:

We have become a crazily litigious country. Today a baseball comes crashing through a window, and instead of picking it up and returning it to the neighbor whose kid knocked it through—and who pays the glazier's bill in a reasonable, neighborly way—the "victim" hangs on to the baseball as evidence and sues the neighbor. (Or the baseball's manufacturer. Or the glassmaker. Or usually all three.) Several lawyers are soon billing hours, and the civil docket has been further crowded by one more pointless case that's probably going to be part of the 92 percent of cases that get settled before they come to trial—but not before a huge amount of time and money has been wasted on everything from "discovery" to picking a jury that will be discharged before it ever deliberates this case that shouldn't have gotten

5. *Civil Justice: Balance the Scales*, N.Y. TIMES, Feb. 16, 1995, at A15.

6. Theodore B. Olson, *Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A16.

started in the first place. In America we now sue first and ask questions later. The system—and the mind set—are inefficient and anticompetitive. By not paying the huge legal costs their U.S. counterparts are bearing year after year, foreign companies have a tremendous advantage. American businesses and individuals spend more than \$80 billion annually on the direct costs of litigation and higher insurance premiums. Include the extra costs and the figure can top \$300 billion.⁷

In this Article, I shall examine some of the most prominent “common-sense” assertions offered as evidence of the need for reforms to reduce access and recoveries. I shall argue that these largely pass by the real problems of the tort system and offer flawed and harmful prescriptions for change based on a misreading of the patterns, trends, and effects of litigation.

In presenting contemporary knowledge about the civil justice system, I begin with the observation that obviously there are different perspectives on the performance of the system and research cannot resolve all the differences. Even when accurately informed about the system, observers may differ in their estimations of the priority and mix of goals that the system should achieve (compensation, deterrence, vindication, and so forth). Research cannot erase differences based on divergent goals, but it can identify the range of policies that are empirically viable. Not all “views” are deserving of equal respect and deference. To be credible, a portrayal of the system must take into account the extant body of reliable empirical data about the civil justice system. By this I refer to that body of information that has been systematically collected by institutions (for example, court statistics) or developed by qualified researchers using accepted methods of data collection, who make their work available for examination.

Presumably, we would not credit a view of the health care system that depicted hospital admissions as rising when the best evidence showed that they were falling; nor would we credit a perspective on educational reform that overlooked what is known about enrollments, test scores, and demographic trends. Similarly, we should not repose confidence in any view of the legal system that ignores or misrepresents basic information about its workings.

7. DAN QUAYLE, *STANDING FIRM* 312 (1994). The origins of the \$80 billion and \$300 billion figures are examined in Marc Galanter, *News from Nowhere: The Debased Debate About Civil Justice*, 71 *DENV. U. L. REV.* 77 (1993).

Unfortunately, much of the debate on the civil justice system relies on anecdotes and atrocity stories⁸ and unverified assertion rather than analysis of reliable data.⁹ In part, this is a reflection of the paucity of reliable systematic information about the working of the civil justice system. Members of the research community have urged the necessity for cultivating a stronger knowledge base.¹⁰ In a major review of the literature tellingly entitled *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, Michael Saks concluded that “[m]uch of what we think we know about the behavior of the tort litigation system is untrue, unknown, or unknowable.”¹¹ In part this is because:

Data on the litigation system’s behavior are meager. Even the most complete [available] data on federal and state court activity fall far short of answering the most pressing and fundamental questions about the performance of the litigation system. . . .

. . . .

A lack of evidence, which might seem like an insuperable barrier, has barely slowed many policy-makers, scholars, and other commentators. Their discussions about the behavior of the tort liability system often have proceeded without even assembling the fragments that do exist, much less pausing to figure out how they fit together. The result is a picture of the litigation system built of little more than imagination.¹²

8. The origin and deployment of many of the famous litigation horror stories (the psychic and the CAT-scan, the ladder in the manure, etc.) are analyzed in Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (Autumn 1989); Hayden, *supra* note 4, at 95; Steven Brill II & James Lyons, *The Not-So-Simple Crisis*, AM. LAW., May 1986, at 1, 12-17; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT’L L.J., Feb. 16, 1987, at 39. The continuing flow of such stories is promoted by sources such as “ATRA [American Tort Reform Association] Horror Stories: Stories That Show A Legal System That’s Out of Control,” which can be found on the internet at <http://aaabiz.com/atra/ath.htm>.

9. Some of the popular macro-anecdotes about the civil justice system (e.g., the United States has 70% of the world’s lawyers) are analyzed in Galanter, *supra* note 7, at 77.

10. Marc Galanter et al., *How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994); Deborah R. Hensler, *Why We Don’t Know More About the Civil Justice System—And What We Could Do About It*, U.S.C. LAW 10 (Fall 1994).

11. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1149 (1992).

12. *Id.* at 1154-56.

II. A SHORT TOUR OF ACTUAL TORTS

A. *The Dispute Pyramid*

In order to understand the system of tort litigation, it is useful to visualize it, in the standard way that legal studies scholars do, as a "pyramid" made up of successive layers.¹³ We can imagine a bottom layer consisting of all the *events* in which, for example, a particular product was used or encountered. In a small fraction of these events someone gets hurt. Let us call this layer *injuries*. Some of these injuries go unperceived; in other instances someone thinks he is injured, even though he is not. Thus we have a layer of *perceived injuries* that does not correspond exactly to injuries because it excludes unperceived injuries and includes some mistaken attributions of injury. In many cases, those who perceive injuries blame themselves or ascribe the injury to fate or chance. But some blame some human agency, a person, a corporation, or the government.¹⁴ To dispute analysts, these are *grievances*.¹⁵

Among those with grievances, many do nothing further. This may be for any of the following reasons: they think the injury is de minimis; they want to get on with their lives; they are wary of the cost of pursuing claims; or they simply do not know how to pursue the matter. But some go on to complain, typically to the person or agency thought to be responsible. This is the level of *claims*. Some of these claims are granted in whole or in part: the condition is remedied, compensation is paid, and the matter is resolved without ever reaching any formal institution. When claims are denied, they are denomi-

13. See generally Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81) (providing a conceptual framework for studying the emergence and transformation of disputes); see also Neil Vidmar, *Justice Motives and Other Psychological Factors in the Development and Resolution of Disputes*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 395, 409-13 (Melvin J. Lerner & Sally C. Lerner eds., 1981). The first major empirical application of this method was undertaken by Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81) (reporting on a survey of households estimating the rates of grievances, claims, and disputes that could have been brought to a civil court of general jurisdiction). For a brief summation of the pyramid analysis, see Marc Galanter, *Adjudication, Litigation and Related Phenomena*, in LAW AND THE SOCIAL SCIENCES 151, 183-87 (Leon Lipson & Stanton Wheeler eds., 1986).

14. Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & SOC'Y 400 (1991).

15. Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 501-02 (1991) [hereinafter Kritzer et al., *The Aftermath of Injury*]; Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC'Y REV. 875, 879-82 (1991) [hereinafter Kritzer et al., *To Confront or Not to Confront*].

nated *disputes*. Some of these are abandoned without further action, but some disputes are pursued further. In the product liability and medical malpractice areas, for example, typically this would be accomplished by taking the dispute to a lawyer. In analyzing such disputes, therefore, we call the next layer *lawyers*.¹⁶

Of the disputes that get to lawyers, some are abandoned, some are resolved, and some end up as filings in court. Let us call this the *filings* layer. Most cases that are filed eventually result in settlement.¹⁷ Typically only a small fraction reach the next layer of *trials*,¹⁸ and a small portion of these go on to become *appeals*.

There is a distinct dispute pyramid for each type of claim. Figure 1 displays the way that researchers depict the different pyramids in some common kinds of legal disputes.¹⁹

In spite of the evident differences, dispute pyramids share several important features. First, there is attrition—often very pronounced—as cases move up the pyramid; only a fraction of the possible cases runs the whole course to trials and appeals. Second, as matters proceed up the pyramid, there is selection.²⁰ The cases that survive to the next layer are not entirely representative of the cohort at a given level. For example, such survivors may involve larger injuries or involve parties that are more knowledgeable, more contentious, or better supplied with resources.

16. Kritzer et al., *The Aftermath of Injury*, *supra* note 15, at 501-02; Kritzer et al., *To Confront or Not to Confront*, *supra* note 15, at 879-82.

17. The oft-cited figures of 85% or 90% or 95% settlements are misleading: they represent the portion of civil cases that does not go to trial. But a significantly larger number of cases may be disposed of by authoritative decisions in ways other than trial. Kritzer, analyzing some 1649 cases in federal and state courts in five localities, found that although 7% terminated through trial, another 24% terminated through some other form of adjudication (arbitration, dismissal on the merits) or a ruling on a significant motion that led to settlement. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986). On judicial involvement in the settlement process, see Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

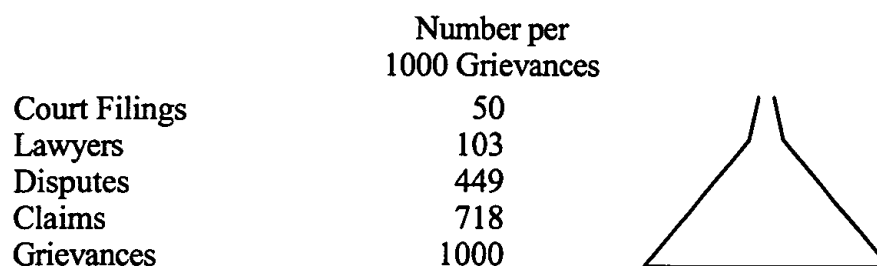
18. For example, in the federal district courts in 1994, 3.5% of all terminated civil cases (and 4.8% of tort cases) ended "during or after trial." 1994 ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT tbl. C-4. This figure includes cases that settled after commencement of trial. Compare the findings of Kritzer, *supra* note 17, at 163.

19. This figure is based on a similar figure in Miller & Sarat, *supra* note 13, at 544.

20. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). See also Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985) (proposing a model for the distribution of litigant estimates of outcomes that differs from Priest and Klein's model and leads to contrary conclusions about the litigation process); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991) (explaining why a good part of the Priest and Klein framework is at odds with the data and presenting data on failed pretrial negotiations).

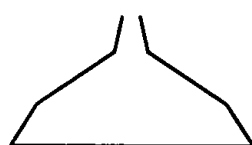
FIGURE 1: COMMON DISPUTE PYRAMIDS

(a) The General Pattern



(b) Three Deviant Patterns

	Number per 1000 Grievances		
	<u>Tort</u>	<u>Discrimination</u>	<u>Post-Divorce</u>
Court Filings	38	8	451
Lawyers	116	29	588
Disputes	201	216	765
Claims	857	294	879
Grievances	1000	1000	1000



Tort



Discrimination



Post-Divorce

Source: Adapted from Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 17 LAW & SOC'Y REV. 525, 544 (1980-81).

Third, only a fraction of the potential cases arrives at formal legal institutions like courts. Most cases are resolved at earlier stages of the process by the parties themselves, sometimes with the help of lawyers.²¹

Fourth, formal adjudication serves two purposes: courts directly resolve a significant minority of disputes, including the most complex and intractable ones; as importantly, they project the standards and threats that parties and lawyers use in "bargaining in the shadow of the law."²² It is precisely because courts project such educative and

21. Kritzer, *supra* note 17, at 161-62.

22. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing divorce litigation as bargaining in the shadow of legal rules); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering*

deterrent messages that parties and lawyers are able to resolve the vast majority of disputes without burdening the courts. Conversely, the earlier layers are important for the courts because they keep the case volume manageable by screening out cases.

Fifth, as they are broadcast to legal professionals and potential parties, the standards enunciated by the judiciary influence not only disputes that are brought to the courts, but also matters that never reach the courts. Beyond this, they influence the behavior of actors throughout society. For example, judicial decisions about product liability not only influence settlements and the bringing of cases, but also they guide the safety practices of manufacturers.²³

Although the pronouncements of the courts are uniquely influential, just what is going on throughout this complex system cannot be deduced from these pronouncements. There is no way that we can tell from the decisions in the few cases that reach the top of the system what is going on in the multitude of cases that never reach its formal layers, much less in the relations and events that the system regulates.

B. Claiming Behavior

Many critics are convinced that Americans sue "at the drop of a hat" and that recourse to court is a first rather than a last resort for an increasing portion of the population. But in fact, rates of claiming, with the exception of automobile-related injuries, are low.²⁴ In a massive national survey of claiming behavior, the Institute for Civil Justice estimated that claims were put forward in only about ten percent of all accidental injuries.²⁵ Claims were made in forty-four percent of motor vehicle injuries, seven percent of work injuries, and three percent of other injuries.²⁶ Thus, "[c]laims associated with motor vehicle accidents accounted for almost two-thirds of the total."²⁷ The Harvard study of medical malpractice in New York similarly estimated that "eight times as many patients suffered an injury from negligence as

and Indigenous Law, 19 J. LEGAL PLURALISM 1 (1981) (suggesting that shadow is cast by cost, risk, and indigenous regulation as well as by formal rules); HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 30-56 (1991) (describing the nature of the day-to-day negotiation and settlement of cases in America's civil justice system).

23. GEORGE EADS & PETER REUTER, RAND INST. FOR CIVIL JUSTICE, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION vii (1983).

24. DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 20-21 (1991).

25. *Id.* at 19.

26. *Id.*

27. *Id.*

rate declined from fifty-seven percent to fifty-six percent.⁶¹ An analysis by reliable researchers concludes that there probably has been “no noteworthy trend in plaintiff success rates.”⁶²

2. *The Size of Awards.*—Not long ago the Jury Verdict Research Services (JVRS), a widely cited reporting service, reported that award levels were steady or falling, but the data provided by JVRS are difficult to interpret.⁶³ The best available research suggests that awards have been increasing, even when adjusted for general inflation. In fifteen counties examined in the Institute for Civil Justice’s update of its jury verdict studies, median awards rose from the late 1980s to the early 1990s in thirteen counties; mean awards also increased in thirteen counties in this period.⁶⁴ However, this does not necessarily mean that juries have become unrestrained or more “generous” in the sense that they are giving larger awards in identical settings. At least two alternative explanations may account singly or in combination for the higher observed awards: (1) the composition of the pool of tried cases has changed; and (2) the cost of compensating victims has changed.

First, the cases that are tried are a subset of all cases that are filed, made up of those that are not abandoned, dismissed, or settled. Changes in filings in general jurisdiction courts (caused by, for exam-

61. ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 tbl. A.5 (1996). Daniels and Martin found mixed patterns in their 19 counties during the period from 1970–90. They concluded that increases in plaintiff success rates were associated with changes in the respective states’ tort regimes from contributory negligence to comparative negligence. STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 88-89 (1995).

62. Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 445-47 (1996).

63. JVRS reports that the median compensatory verdict dropped from \$66,698 in 1990 to \$53,000 in 1994, then rose to \$62,000 in 1995; the mean award dropped from \$564,549 in 1990 to \$451,533 in 1994, then rose slightly to \$466,456 in 1995. JURY VERDICT RESEARCH SERVICES, 1 PERSONAL INJURY VALUATION HANDBOOK, CURRENT AWARD TRENDS IN PERSONAL INJURY 4 (1996). Because JVRS does not provide information about the number of awards in its data base, there is no way to tell how thoroughly it represents the entire universe of awards. For example, the decrease in award levels that it reports may reflect changes in jury responses to similar cases; or it may reflect changes in the characteristics of the cases getting to trial; or it may reflect inclusion in the data base of a larger portion of all jury awards, offsetting the overrepresentation of larger awards suspected by many researchers.

64. MOLLER, *supra* note 61, at tbl. A.6; *see infra* tbl. 4. While analyzing jury awards in 19 counties from 1970 to 1990, Stephen Daniels and Joanne Martin found that median awards were higher in 13 of the 19 counties, 5 of the 13 in California. DANIELS & MARTIN, *supra* note 61, at 90. Daniels and Martin suggest that rising medians in California reflected rising jurisdictional amounts allowed in limited jurisdiction courts and in mandated arbitration. This development drew off significant numbers of cases, previously handled in courts of general jurisdiction, from the low end of the awards distribution. *Id.* at 89-90.

ple, raising the monetary limit of inferior courts or diverting cases into arbitration) and changes in settlement strategies may affect the make-up of the cases that get to trial and that, in turn, can affect the size of awards. In an Institute for Civil Justice study of verdict trends in Cook County, Illinois, and several California sites in the 1980s, Mark Peterson observed:

The trends over all cases suggest that the median jury award is related to the number of jury trials. Usually the median award moved in the opposite direction from changes in the number of trials: When the number of trials fell, the median increased; when the number of trials increased, the median decreased. This relationship suggests that the total number of jury trials changed primarily because the number of small cases (*i.e.*, those that involved modest damages) increased or decreased at different times.⁶⁵

The same phenomenon appears to be operating today. In the recent updating of that study by the Institute for Civil Justice through 1994, the number of jury trials fell in eleven of the fifteen sites—in many cases substantially. From 1985 to 1994, verdicts in Los Angeles fell from 459 to 292; in San Francisco from 115 to 57; in Cook County from 699 to 468.⁶⁶ As fewer cases are tried, the size of verdicts has increased.

Second, juries are instructed to award damages that make victims “whole,” but both the wholeness of victims and the means to make them whole have been changing. For example, if people live longer or have higher incomes, it will take more money to compensate them for lost wages. Again, the range of medical and rehabilitative services has grown dramatically and their costs have outpaced general inflation. In a richer world, as incomes go up and people live longer and consume more costly medical care, similar injuries may involve larger losses. A jury seeking to make whole the victim of a given kind of injury might need to award more dollars to provide a remedy “equivalent” to that conferred by earlier juries.

Mark Cooper made projections of awards incorporating high and low assumptions for increases in income levels, life expectancy, and medical costs, from 1960 to 1994. He then compared actual awards (reported by JVRS) and found them located in the range defined by his high and low estimates. He concluded that “the increase in the

65. MARK PETERSON, RAND INST. FOR CIVIL JUSTICE, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS 29-31 (1987) (footnote omitted).

66. MOLLER, *supra* note 61, at tbl. 2.

dollar value of awards over the past three decades can be attributed to a combination of inflation, and increases in real income, real medical costs and life expectancy.”⁶⁷

The combination of changing case mix and higher costs underlies Frank A. Sloan and Chee Ruey Hsieh’s finding that in the medical malpractice verdicts they analyzed,

[o]nce we accounted for general inflation and the other factors in the regressions, the coefficients of the time variables generally were not statistically significant at conventional levels. This result at least partly contradicts assertions about the “explosive growth in damage awards.” Awards have increased, but a large part of the increase reflects changes in the mix of cases brought to verdict.⁶⁸

3. *Post-Verdict Attrition.*—Jury verdicts are only part of the system of tort awards, for those verdicts are subject to judicial scrutiny and modification at post-trial and appellate stages. A line of research establishes that subsequent judicial action (and settlement in its shadow) reduces a significant portion of awards, particularly large awards and punitive damages awards, and that only a portion of the amount initially awarded is in fact collected from defendants and paid to plaintiffs. A study of verdicts of \$1 million and above returned in 1984 and 1985 found that seventy-four percent of them were reduced and only forty-three percent of the money originally awarded was paid to plaintiffs.⁶⁹ A General Accounting Office study of product liability cases in five states from 1983 to 1985 found awards reduced in fifty percent of the cases and found that only seventy-six percent of the verdict amount was paid.⁷⁰ A national study of punitive damages awards in product liability cases from 1965 to 1990 found that no punitive damages were paid in forty-six percent, part of the award was paid in fourteen percent, and the full award was paid in only forty percent.⁷¹ The total collected was roughly fifty percent of the amount

67. MARK COOPER, *THE VERDICT IS IN: JURY AWARDS UNCHANGED OVER 30 YEARS: A RESEARCH REPORT BY CITIZEN ACTION* ii (Apr. 1995).

68. Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 *LAW & SOC’Y REV.* 997, 1025 (1990) (footnote omitted).

69. Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 *JUST. SYS. J.* 349, 353 (1986).

70. U.S. GENERAL ACCOUNTING OFFICE, *PUB. NO. GAO/HRD-89-99, PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES* 45 tbl. 3.5 (1989) [hereinafter U.S. GAO, *PRODUCT LIABILITY*.]

71. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 *IOWA L. REV.* 1, 56 (1992).

awarded.⁷² Generally, punitive damages awards are less likely to be upheld and collected. A study of jury verdicts in Cook County and some California counties from 1982 to 1984 found that eighty-two percent of awards without punitive damages were collected, but only fifty-seven percent of awards that included punitive damages were collected.⁷³

4. *Does the Tort System Overpay Large Claims?*—Among the principal indictments of the tort system are that the amounts recovered by successful plaintiffs are excessive; that this is the result of jury capriciousness; that there has been an escalation of such undeserved awards, facilitated by allowing damage awards for nonpecuniary losses (often abbreviated into the phrase “pain and suffering”), which are inherently insusceptible of monetary estimation. The body of research speaks to several of these issues.

The tort system tends to undercompensate large losses and overcompensate small losses. Studies made over the past forty years concur that the most seriously injured victims collect a relatively smaller portion of their losses than do those with less serious injuries. This research, conducted by scholars, government agencies, and insurance industry groups, deals with settled cases as well as the minority of cases that go to trial. These studies, discussed below, reveal a consistent pattern in compensation payments: victims with smaller injuries tend to receive more than their economic losses while the total tort recovery of those most seriously injured is less, often much less, than their economic losses.

• Alfred Conard and his associates studied the reparations paid to all the victims of automobile accidents that occurred in Michigan in 1958.⁷⁴ Examining payments from all sources, they found:

When the economic loss was under \$1000, the chances were quite good that it would be paid for with something left over for psychic loss. But when the [economic] loss was a crushing one—over \$10,000 for instance—it was very rare that the reparation came even close to matching economic loss. Two

72. *Id.* at 58.

73. MICHAEL G. SHANLEY & MARK A. PETERSON, RAND INST. FOR CIVIL JUSTICE, POST-TRIAL ADJUSTMENTS TO JURY AWARDS 39 (1987). Eighty-eight percent of awards less than \$100,000 were paid, while only 70% of awards over \$1,000,000 were paid. *Id.* at 34. A study of punitive damages awards in Cook County from 1979 to 1984 found that 50% of awards were reduced and only 40% of the total damages were paid. MARK PETERSON ET AL., RAND INST. FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 27, 29 (1987) [hereinafter PETERSON ET AL., PUNITIVE DAMAGES].

74. ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964).

thirds of the persons with such severe losses received less than a quarter of their economic losses, with no consideration of psychic losses⁷⁵

When tort recovery was examined separately, the same pattern of underpayment of large losses prevailed: "Most . . . [victims with large losses] got less than 25 percent of their economic loss, and none passed 75 percent. The smaller the loss, the higher the percent of settlement; the larger the loss, the smaller the percent of settlement."⁷⁶

- A U.S. Department of Transportation survey of compensation of victims of automobile accidents in 1967 found the same pattern nationally:

[Moving from] the lowest economic loss class to . . . the highest economic loss class, the ratio of reparations to loss drops from 1.8 to 0.2. That is, those with small economic losses recover, on the average, nearly twice their loss, but those with high economic losses [i.e., \$25,000 and over] recover only one-fifth.⁷⁷

This calculation includes reparations from all sources, not only tort. The tort system supplied roughly one third of all the money recovered by these victims, but "recovery under tort is relatively less for large losses than for small losses."⁷⁸ Those with the smallest economic losses (less than \$499) received 74.4% of their recovery through tort; those with losses of \$25,000 and over received only 17.3% through the tort system.⁷⁹

- A 1977 survey conducted by an insurance industry research group examined 53,164 automobile personal injury claims paid by insurers (representing 61.7% of the nationwide auto insurance business).⁸⁰ This survey found:

There was a tendency for persons with small economic losses to receive more reimbursement per dollar of loss than persons with large economic losses under all types of benefit sources, government and private. As a group, persons with economic losses up to \$2,500 received payments of more

75. *Id.* at 179.

76. *Id.* at 196.

77. 1 U.S. DEP'T OF TRANSP., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 38-39 (1970).

78. *Id.* at 44.

79. *Id.* at 44-45.

80. 1 ALL-INDUSTRY RESEARCH ADVISORY GROUP, AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES (1979).

than \$2 for every \$1 of economic loss. Those with losses between \$2,501 and \$10,000 received more than \$1 for each \$1 of loss, while those with losses between \$10,001 and \$25,000 received \$.97 and the four persons with losses over \$25,000 received \$.79 per \$1 of economic loss.⁸¹

- An insurance industry study of large product liability claims closed in 1985 revealed the same pattern. Claimants whose economic loss (including estimated future loss) was under \$100,000 received payments of over five times that economic loss. The small number of claimants with \$1,000,000 or more of economic loss received payments of only fifty-eight cents for each dollar of economic loss.⁸²

The ratio of recovery to economic losses had not increased since a comparable insurance industry study conducted in 1979. The total group of 1985 claimants "received \$1.36 in tax-free payments for every \$1 of past and estimated future economic loss."⁸³ If we assume that ordinarily these claimants were paying their lawyers about one-third of the recovered amount, their net return was somewhat less than their economic losses.

- Institute for Civil Justice researchers studied claims made following all twenty-five major U.S. airline accidents between 1970 and 1984.⁸⁴ Claims were filed in 99.9% of the 2113 cases for which estimates of loss were available.⁸⁵ Total recoveries amounted to only one half (48.6%) of the economic loss to the survivors and one quarter (25.9%) of the full economic loss.⁸⁶ Recovery rates varied with the size of the loss: for the bottom 10% of the loss distribution, recovery rates exceeded 300%; the median recovery rate was 69%; while for the highest 10% of the loss distribution, the recovery rate was only 19%.⁸⁷

- Summarizing a number of studies comparing loss replacement rates for product liability, W. Kip Viscusi concluded that

the common belief that product liability awards lead to wind-fall gains is erroneous. . . . The actual value of court awards and settlements is . . . often less than the actual losses suffered by the victim.

. . . .

81. *Id.* at 17-18.

82. LAWRENCE W. SOULAR, A STUDY OF LARGE PRODUCT LIABILITY CLAIMS CLOSED IN 1985, at 18 (Alliance of American Insurers/American Insurance Association, 1986).

83. *Id.* at 17.

84. ELIZABETH M. KING & JAMES P. SMITH, RAND INST. FOR CIVIL JUSTICE, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS (1988).

85. *Id.* at 75.

86. *Id.* at viii, tbl. 5.1.

87. *Id.* at 67-68.

The data indicate that insurers tend to overcompensate small losses because insurers are willing to provide appropriate compensation for pain and suffering and to settle claims, thereby avoiding administration and litigation costs. However, insurers tend to undercompensate large losses.⁸⁸

Viscusi found that the ratio of payments to losses in product liability claims decreases in a regular fashion from 7.27 in claims with losses under \$10,000, to 0.67 in claims with losses from \$100,000 to \$200,000, to 0.25 in claims with losses over \$1,000,000.⁸⁹ In that small subset of claims that result in a court award for the plaintiff, the ratios are even more skewed: those with losses under \$10,000 recover 19.39 times their losses; but those with losses of over \$1,000,000 recover only 0.05 of their loss—before reductions for attorneys' fees.⁹⁰

- Researchers analyzing the relation between medical malpractice payments and economic loss found that “a 1 percent increase in loss yields about a 0.1 to 0.2 percent increase in compensation on average.”⁹¹ In other words, for every additional dollar of loss, the average addition to the payment is in the range of ten to twenty cents.

- A study of Florida medical malpractice cases involving birth injuries and emergency room treatment found that in both situations injuries as a whole were undercompensated⁹² and “the less serious . . . injuries . . . were better compensated.”⁹³ The study found:

Overall, cost was appreciably higher than compensation For claimants who received money, compensation equalled only 57 percent of total cost. . . .

As in past studies, the least serious injuries were comparatively well compensated. Compensation of claimants with Group I child survivors [with relatively minor impairments] were paid more than three times the estimated cost. By contrast, for Groups II, III and IV [most seriously injured children], payment was 37, 80, and 77 percent of cost, respectively.⁹⁴

88. W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 95-97 (1989).

89. *Id.* at 96 tbl. 5.

90. *Id.* at 97 tbl. 5.

91. Sloan & Hsieh, *supra* note 68, at 1019.

92. Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131, 155 (Winter 1991).

93. *Id.* at 157.

94. *Id.* at 155 (footnote omitted).

The evidence for the persistence and pervasiveness of this pattern of undercompensation of the most seriously injured is massive.⁹⁵ As a distributive mechanism, therefore, tort awards tend to undercompensate large losses and overcompensate small losses. The studies reviewed above reveal a consistent pattern in compensation payments: victims with smaller injuries tend to receive more than their economic losses while the total tort recovery of those most seriously injured is less, often much less, than their economic losses.

Many features of the tort system produce this pattern. Principally, defendants and their insurers have greater incentive to invest in contesting larger claims; the full costs of major injuries may be more difficult to assess and settlement may take place before they can be known with accuracy; policy limits may put a ceiling on large recoveries; and decision-makers may be reluctant to apply the principle of making victims "whole" in cases of catastrophic injury.⁹⁶ While claimants with small cases can use the threat of imposing transaction costs to extract "nuisance value,"⁹⁷ defendants in serious claims can use the uncertainty of recovery to extract from risk-averse claimants steep discounts from the real costs of their injuries.⁹⁸

5. *Are Awards for Pain and Suffering Capricious and Arbitrary?*—Contrary to the assertion that awards for so-called noneconomic damages are capricious and erratic, leading researchers of medical malpractice and product liability concur that such awards track the seriousness of injury.

Reanalyzing data from two malpractice studies, Randall R. Bovbjerg, Frank A. Sloan, and James F. Blumstein concluded:

[S]everity directly influences the level of [noneconomic] damages, as one would expect. In general, more severe injuries result in larger recoveries, . . . at least within the categories of physical injury. . . .

. . . .

95. Similar gradients were found in studies in Ontario in 1965 and British Columbia in 1968. These are analyzed in ONTARIO LAW REFORM COMMISSION, REPORT ON MOTOR VEHICLE ACCIDENT COMPENSATION 50 (1973).

96. See, e.g., DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 78-79 (Russell Sage Foundation, 1974); KING & SMITH, *supra* note 84, at 100-03.

97. See STEPHEN CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES (1995) (suggesting the prevalence of false and exaggerated claims among small routine matters).

98. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 183-93 (1970).

. . . [T]he current system works rationally and fairly in an aggregate sense. "Vertical" equity, the fairness between separate categories of injury, is rather good. The main problem is the absence of "horizontal" equity—the extent of variation within a single category.⁹⁹

Analyzing 6612 closed malpractice claims from Florida and a set of 1355 jury verdicts from Florida and other jurisdictions, Sloan and Hsieh found "systematic patterns underlie differences in awards" and the severity of injury is the dominant factor.¹⁰⁰ Juror performance in assessing noneconomic damages compares favorably with that of professional decision-makers. Neil Vidmar and Jeffrey J. Rice conducted an experiment that compared the decisions on pain and suffering awards by "twenty-one experienced lawyer-arbitrators"¹⁰¹ and "eighty-nine qualified veniremen,"¹⁰² who were given the task of "determining the amount of noneconomic damages for past pain and suffering and for disfigurement."¹⁰³ The results, they reported, "lend no support to the widely held view that jurors are more generous than judges or arbitrators in awarding noneconomic damages. Moreover, the data do not support the view that the reasoning of laypersons in calculating the award is substantially different from that of legally trained persons."¹⁰⁴ Finally, the authors concluded that if their lay respondents had been sitting in jury panels, their verdicts would have been "less variable than those of the arbitrators."¹⁰⁵

W. Kip Viscusi, analyzing an insurance industry data base containing 10,784 closed product liability claims, concluded that the evidence indicates that payments for noneconomic losses are neither capricious nor random, but that "pain and suffering compensation does vary in a systematic and predictable fashion."¹⁰⁶ As Viscusi explained, "[P]ain and suffering [compensation] is not entirely random, nor is it the consequence of a standard mark-up of the magnitude of the economic loss compensation. The pain and suffering compensation varies by injury class, with the nature of the effects being broadly

99. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 921-24 (1989) (footnote omitted).

100. Sloan & Hsieh, *supra* note 68, at 1025.

101. Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 891 (1993).

102. *Id.*

103. *Id.* at 892.

104. *Id.* at 896.

105. *Id.* at 897.

106. W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 219 (1988).

consistent with general perceptions regarding injury severity."¹⁰⁷ It is the systematic character of pain and suffering awards that gives caps on awards their perverse effects. As Viscusi further observed:

If the problem with pain and suffering awards is that of capricious and completely random outcomes, one would expect caps to affect the outliers that are distributed proportionally across injury types. The effect of caps is, however, much more selective, with the greatest effect being on the injury groups that have been found to involve substantial pain and suffering amounts.

The three injury groups that will be most affected [by caps] are para/quadruplegia, brain damage, and cancer. . . .

In contrast, for the great majority of injury categories, pain and suffering is not substantial in absolute terms and a cap would be irrelevant. . . .

. . . .

Imposition of a product liability cap consequently will have targeted effects. . . . To establish the basis for such caps one must make the judgment that it is the very severe injury outcomes that involve the most excessive awards.¹⁰⁸

But, as discussed above,¹⁰⁹ it is the most severely injured who are, on the whole, the least adequately compensated. Hence caps not only frustrate the compensation goal of the system, but they detract from its equity. "A proposal to cap awards might increase the degree of inequity in the manner in which pain and suffering awards are set by capping severe injuries that merit such awards and leaving the low end of the awards spectrum unaffected."¹¹⁰

In addition to undermining both the compensation and equity goals of the system, caps on nonpecuniary losses seriously compromise the vital system goal of deterrence or prevention.¹¹¹ Optimum deterrence can be achieved only when injurers are required to bear the full cost of injuries in instances when courts have determined that further

107. *Id.* at 217.

108. *Id.* at 216-17 (footnote omitted).

109. *See supra* part II.E.2.

110. Viscusi, *supra* note 106, at 217.

111. *See, e.g.,* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY 185 (1994) ("To the extent that prevention is desirable and, more importantly, obtainable, reforms that cap or limit nonpecuniary loss are counterproductive."). For an assessment of the success of tort law in deterring dangerous conduct, see Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994).

preventive measures should have been taken.¹¹² Noneconomic losses entail difficult problems of valuation (which are by no means absent in such exercises as estimation of future earnings or future medical needs) and there may well be room for improvement in such valuation. But the imposition of a cap removes the possibility of judicial achievement of optimum deterrence in cases of the most serious injuries.

6. *Do Awards for Pain and Suffering Play an Increasing Role in the Tort System?*—Rather than being a runaway element driving increases in tort recoveries, damages for nonpecuniary injuries have been growing more slowly than awards for lost wages and medical expenses.¹¹³ The portion of tort recoveries attributable to “pain and suffering” has been falling over the last fifteen years.¹¹⁴ An unambiguous and definite assertion on this point is possible due to a series of studies conducted by the Insurance Research Council (formerly the All-Industry Research Advisory Committee), an insurance industry organization that carries out research on a variety of topics related to insurance matters. Of special interest here are three reports of studies of compensation paid to persons injured in automobile accidents.¹¹⁵ The data in these reports are drawn from files of paid claims closed by insurance companies in 1977 (AIRAC 1979), 1987 (AIRAC 1989), and 1992 (IRC 1994). The data sets include all, or almost all, states. The insurance companies included write most of the auto insurance poli-

112. See Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 51 (1991) (“From a deterrence standpoint, the inclusion of nonpecuniary losses is desirable because it optimizes both care levels and activity levels.”); Bovbjerg et al., *supra* note 99, at 934 (“[I]t makes theoretical and practical sense to assess liability for more than economic loss, so that careless behavior is sufficiently deterred. To consider only economic loss places at particular risk persons with little or no earnings, such as homemakers, children, and retirees.” (footnotes omitted)); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 799 (1985) (“Unless the full costs of physical and emotional distress are properly internalized through tort law, the price of the activities that generated such injuries will insufficiently reflect their actual costs. In effect, victims of the public would subsidize the cost of high-risk activities, thereby leading to inadequate deterrence.”).

113. See *infra* fig. 5.

114. See *infra* fig. 5.

115. 1 ALL-INDUSTRY RESEARCH ADVISORY COMM., AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES (1979) [hereinafter AIRAC 1979]; ALL-INDUSTRY RESEARCH ADVISORY COMM., COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES (1989) [hereinafter AIRAC 1989]; INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS (1994) [hereinafter IRC 1994].

cies in the country (70% in the 1992 study,¹¹⁶ 60% in the 1987 study,¹¹⁷ and 61.7% in the 1977 study).¹¹⁸

One of the major concerns raised by proponents of tort reform is the payment of damages for pain and suffering, and particularly the alleged growth in such payments. Some critics assert that part of the problem is a multiplier effect: each dollar of actual economic loss (for example, medical bills and lost wages) yields some multiple in payment of pain and suffering. The AIRAC/IRC data provide good evidence about the nature of actual payments in auto accident claims, indicating that the multiplier is closer to one than it is to three (as in the proverbial "three times specials").¹¹⁹ Furthermore, the multiplier has been declining over the fifteen-year period covered by the AIRAC/IRC studies.¹²⁰

AIRAC/IRC uses the term "economic loss" to refer to all documented dollar-denominated damages related to injuries sustained in an accident (excluding property damage losses).¹²¹ The two primary elements of economic loss are medical bills and lost earnings; other potential elements of economic loss (incurred by relatively few claimants) are replacement of essential services, rehabilitation, and funeral expenses.¹²²

For each of the studies, AIRAC/IRC reports both the average economic loss and the average total bodily injury payment. The payment includes both compensation for economic loss and compensation for noneconomic loss (technically "general damages," but popularly referred to as "pain and suffering"). From the loss and payment figures, one can compute a ratio of payment to loss. This ratio has steadily decreased from 2.34 in 1977,¹²³ to 2.11 in 1987,¹²⁴ and finally to 1.87

116. IRC 1994, *supra* note 115, at 1.

117. AIRAC 1989, *supra* note 115, at 1.

118. 1 AIRAC 1979, *supra* note 115, at 6.

119. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 108-09 (2d ed. 1980).

120. *See infra* fig. 5.

121. *See, e.g.*, 1 AIRAC 1979, *supra* note 115, at 39.

122. *Id.* at 41 tbl. 5-2. In the 1987 study, excluding death and permanent total disability claims, medical expenses constituted 69% of total economic losses, lost wages 27%, with 4% left for other expenses. AIRAC 1989, *supra* note 115, at 34 (figures for bodily injury states only). The corresponding figures in the 1992 study were 75% medical, 22% wage, and 3% other. IRC 1994, *supra* note 115, at 33.

123. 1 AIRAC 1979, *supra* note 115, at 40, 47.

124. AIRAC 1989, *supra* note 115, at 31.

in 1992,¹²⁵ indicating a steady decline in the compensation for noneconomic loss.

Figure 5 displays this relationship between economic loss and pain and suffering in a way that makes very clear the pattern over time. The figure shows a series of three pie charts; one section of each pie represents economic loss and the other represents the remaining payment for pain and suffering. As Figure 5 clearly depicts, pain and suffering payments constitute a decreasing share of the bodily injury damages being paid in auto accident injury compensation.

Although the data discussed here are only for automobile injury claims, I know of no reason to believe that in other parts of the tort system payments for pain and suffering are increasing relative to economic claims.¹²⁶ Reports on the overall cost of the tort system by a prominent actuarial consulting firm suggest a pattern of relative decline in pain and suffering awards akin to that found in the AIRAC/IRC reports discussed above. It was estimated that in 1987 injury victims taken as a whole received one dollar for "pain and suffering" for each dollar they received as compensation for economic loss.¹²⁷ A report for 1991 showed that recovery for pain and suffering had dropped to ninety-five cents for each dollar received for economic loss.¹²⁸ In its latest report for 1994, the consulting firm estimated that injury victims were receiving about ninety-two cents for pain and suf-

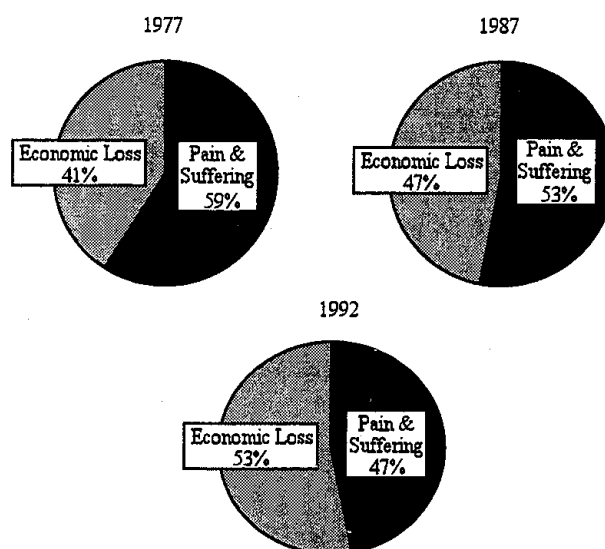
125. IRC 1994, *supra* note 115, at 79. One minor problem with these figures is that those for 1977 include all cases, while those for the other years exclude small numbers of cases involving death and permanent total disability. The 1987 report showed a national figure for 1977 omitting death and permanent total disability cases: 2.29. AIRAC 1989, *supra* note 115, at 33. This is only slightly below the 2.34 figure in the text above that includes those cases.

126. Studying damages awarded for conscious pain and suffering prior to death, David Leebron examined 256 recorded cases (82% in appellate courts). David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256 (1989). Leebron found that the award for pain and suffering averaged about 23% of the total award, *id.* at 304, and that there was a trend toward higher awards, which "reflect[ed] more an increase in the number of rare, very high awards in later periods rather than an increase in the average amount awarded in most cases." *Id.* at 302. But while awards increased, the portion attributed to pain and suffering declined: "In the cases after 1940, conscious pain and suffering averaged a fairly consistent 22% of the total award, whereas for the years prior to 1940, it averaged 37% of the total award." *Id.* at 305.

127. ROBERT W. STURGIS, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 15-16 (1989). A comparable reading of the relative magnitude of economic and noneconomic damages is found in a survey by the Texas State Board of Insurance of closed bodily injury claims (excluding product liability) above certain dollar thresholds for periods totalling 16 months over the years 1983-86. Economic damages were estimated to make up 47% of all dollars paid and noneconomic damages 46%. TEXAS STATE BOARD OF INSURANCE, TEXAS LIABILITY INSURANCE CLOSED CLAIM SURVEY 28 (Feb. 1987) [hereinafter TEXAS LIABILITY INSURANCE SURVEY].

128. ROBERT W. STURGIS: TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 8 (1992).

FIGURE 5: "PAIN AND SUFFERING" AS A SHARE OF TOTAL AWARDS



Source: 1 ALL-INDUSTRY RESEARCH ADVISORY COMM., AUTOMOBILE INJURIES AND THEIR COMPENSATION IN THE UNITED STATES (1979); ALL-INDUSTRY RESEARCH ADVISORY COMM., COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES (1989); INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS (1994).

fering for each dollar received for economic loss.¹²⁹ The trend appears to be the same as that shown in the AIRAC/IRC automobile data.

F. Punitive Damages

1. *Incidence Overall and Distribution Across Case Types.*—One of the curiosities of the discourse about civil justice is that there is far more furor about punitive damages in personal injury cases than in business dealings, although punitive damages are far more frequent in business litigation. This is evident from examination of three recent high quality collections of data about punitive damages:

(a) Stephen Daniels and Joanne Martin of the American Bar Foundation gathered data on all the jury awards in 82 sites covering more than 100 counties in 16 states for the years 1988–90.¹³⁰ They identified punitive damages awards in 4.5% of all verdicts (8.3% of verdicts for plaintiffs) at those sites for the years 1988–90. But punitive awards are not spread evenly throughout the docket. In an earlier report on their data set, Daniels and Martin reported that almost half

129. ROBERT W. STURGIS: TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 8 (1995).

130. STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995) [hereinafter DANIELS & MARTIN, CIVIL JURIES].

(49.4%) of punitive awards were in intentional tort cases; 31.7% were in business or contract cases; and 18.9% were in personal injury cases.¹³¹ Because personal injury cases are far more numerous than intentional tort cases, this means that while a substantial fraction of intentional tort cases has a punitive award (22.8%), only a tiny fraction of personal injury cases does—1.5%. Business or contract cases were in the middle, with punitive awards in 9.2% of all reported verdicts.¹³²

(b) Researchers at the Bureau of Justice Statistics (BJS) and the National Center for State Courts conducted a study of the civil courts in a sample of the 75 largest American counties for the year 1992 that provides a useful cross-section of punitive damages activity.¹³³ Of the 12,026 verdicts in the sample, plaintiffs won a total of 364 punitive damages awards—5.9% of the cases won by plaintiffs. Punitive damages were awarded to winning plaintiffs in only 3.4% of non-intentional tort cases, in 12.2% of contract cases and in 18.5% of intentional tort cases.¹³⁴ Of the total number of punitive awards, 46.4% were in contract, 10.4% in intentional torts, and 41.8% in other torts (including, but not exclusively, personal injury).¹³⁵

(c) In a recent report, the Institute for Civil Justice (ICJ) reports on punitive awards for the period 1985–94 at fifteen sites (including Los Angeles, Cook, Harris (TX), New York and Kings Counties).¹³⁶ The overall pattern or incidence corresponds to that in the Daniels/

131. STEPHEN DANIELS & JOANNE MARTIN, EMPIRICAL PATTERNS IN PUNITIVE DAMAGE CASES: A DESCRIPTION OF INCIDENCE RATES AND AWARDS 11 (American Bar Foundation Working Paper No. 8705, 1987). The business contract category included “contract cases, actions based on a violation of a presumed obligation to act in good faith (e.g., business interference, insurance bad faith, tortious interference with contract) and breach of duty or professional malpractice not involving personal injury (e.g., breach of fiduciary duty, legal malpractice, financial malpractice).” *Id.* at 24 n.5.

132. *Id.* at 13. Business and contract cases fell between these figures, with punitive damages awarded in 9.2% of all reported verdicts.

133. CAROL J. DEFRAnces ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (Bureau of Justice Statistics Special Rep. NCJ-154346, July 1995). The 75 counties had a total of 12,000 jury verdicts during the year 1992. The researchers took a sample consisting of 45 of the 75 counties, stratified to ensure that counties of various sizes were represented. They then compiled a data base consisting of all of the jury verdicts in 38 of the counties and a sample of verdicts (300 verdicts or half the total number of verdicts, whichever was larger) in the other seven counties. The total data base consisted of 6504 jury verdicts. *Id.* at 11.

134. *Id.* at tbl. 6, tbl. 8.

135. As Table 4 shows, among the 152 non-intentional tort verdicts that included a punitive damages award were eight “slander/libel” cases and 30 “other tort” cases. So the portion of punitive damages awards that definitely appears to be in personal injury cases is 31.3%.

136. MOLLER, *supra* note 61.

Martin and BJS studies.¹³⁷ Punitive damages were awarded in 3.6% of the verdicts surveyed. For the ten-year period there were punitive awards in 17% of intentional tort cases, 14% of all business cases, 2% of product liability verdicts, and 1.4% of other tort cases.¹³⁸ Of the total number of punitive awards, 47% were in business cases, 36% in intentional tort cases, 5% in product liability cases and 12% in other tort cases.

Cases involving financial rather than physical harm are the single largest cluster of punitive damages awards. In the BJS study, of the 364 punitive awards in the 45 counties in 1992, more than half were in contract, property, and professional malpractice (other than medical) cases.¹³⁹ In the new ICJ study, business cases produced 47% of the punitive awards over the 1985–94 period.¹⁴⁰ Daniels and Martin sorted their cases by the type of harm alleged: physical, financial, property, or emotional. Financial harm is not only involved in the largest number of punitive awards, but these awards occur at a higher rate in cases claiming financial harm than in cases involving other types of harm.¹⁴¹

2. *Variation from Place to Place.*—The incidence of punitive damages awards varies from one jurisdiction to another. Daniels and Martin found that from 1988–90, punitive damages awards ranged 0% in 11 counties (including New York and Kings in New York) to 15.9% of all verdicts in Travis County, Texas.¹⁴² In the new ICJ study, rates of punitive awards for the period 1985–94 ranged from 0% in Kings and Nassau Counties, New York to 6% in Jefferson County, Missouri, and Orange County, California, and 7% in Harris County, Texas.¹⁴³

The inclination to award punitive damages (and to pursue and uphold them) is an aspect of local legal culture that is little understood. The proclivity of juries¹⁴⁴ to make punitive awards does not

137. An earlier Institute for Civil Justice study of Cook County and a number of California counties from 1980–84 found punitive awards in about 1% of all personal injury verdicts, 33% of intentional torts, and 11% of “business/contract” cases. PETERSON ET AL., PUNITIVE DAMAGES, *supra* note 73, at 35.

138. MOLLER, *supra* note 61, at 35–36 & tbls. A.4, A.5.

139. DEFANCES ET AL., *supra* note 133, at tbl. 8.

140. MOLLER, *supra* note 61, at tbl. A.9.

141. DANIELS & MARTIN, CIVIL JURIES, *supra* note 130, at tbl. 6.3.

142. *Id.* at 214. In an analysis of their earlier data, Daniels and Martin aggregated their data at the state level and found that the percentage of successful verdicts with punitive awards was 2.2% in New York, 3.2% in Illinois, 13.1% in Georgia, and 22.0% in Missouri.

143. MOLLER, *supra* note 61, at tbl. A.9.

144. Punitive damages are commonly associated with jury trials, but judges can also make such awards. For example, a California judge awarded \$10 million punitive damages and \$1.185 million compensatory damages against two plaintiffs’ lawyers for fraud in toxic

seem to be correlated either with the size of compensatory awards or the size of punitive awards. The incidence of punitive damages seems to have little to do with the tendency to find for plaintiffs or to award generous compensatory damages. Thus when Daniels and Martin did their initial analysis, Kings County, New York, which had the second highest plaintiff success rate and the highest median award, had no punitive damages verdicts whatsoever.

3. *Trends in Frequency and Distribution.*—These studies differ in definitions of the categories (e.g., business cases vs. contracts), in the mix of localities, in the mix of cases proceeding to verdict, and in research methodology.¹⁴⁵ It is not possible to juxtapose them to draw any overall conclusions about trends, but individual studies contain some suggestive trend data. For example, in the new ICJ study which compares its fifteen sites for the five years periods 1985–89 and 1990–94, there is a 9% drop in the number of punitive awards from the earlier to the later period. The number of punitive awards decreased in ten locations and increased in five others.¹⁴⁶ Business cases became even more preponderant. From 1985–89 to 1990–94, the number of such awards at the 15 sites increased slightly from 230 to 232. (Hence the total number of non-business punitive awards decreased by 16% from 282 to 236).¹⁴⁷

4. *Low Frequency in Personal Injury Cases.*—A number of additional sources confirm the low frequency of punitive awards in personal injury cases generally and in product liability cases in particular. An Institute for Civil Justice study of Cook County and a number of California counties from 1980 to 1984 found punitive damages awards in about one percent of personal injury verdicts.¹⁴⁸ A study of claims closed in Texas in the mid-1980s found punitive damages were awarded in 0.6 percent of claims other than medical and 0.2 percent of medical professional liability claims.¹⁴⁹

waste litigation. Marcus & Geyelin, *Lawyers Told to Pay \$10 Million Damages*, WALL ST. J., Mar. 20, 1991. I have seen no data on the incidence of judge-awarded punitive damages.

145. For example, both Daniels and Martin and ICJ derive their data from jury verdict reporting services, whereas the BJS study is based on direct examination of court records. BJS's inclusion of more contract cases and fewer intentional torts may reflect the absence of the filtering supplied by the jury verdict services.

146. MOLLER, *supra* note 61, at tbl. A.9.

147. *Id.*

148. PETERSON ET AL., PUNITIVE DAMAGES, *supra* note 73, at 35.

149. TEXAS LIABILITY INSURANCE SURVEY, *supra* note 127, at 32. Note that the denominator here is claims, not verdicts as in the studies discussed above.

5. *Low Frequency in Product Liability Cases.*—There is more evidence about the incidence of punitive awards in product liability cases than in any other type of case.

- A study of Cook and San Francisco Counties from 1960 to 1984, based on jury verdict reporter services in those locations, found a combined total of only six punitive damages awards in product liability cases in that quarter century.¹⁵⁰
- A study of the ten “most recent volumes” of each of the West regional reporters and of all product liability cases in the United States Courts of Appeals from January 1982 to November 1984 found punitive damages awards in about 2% of 359 reported product liability cases.¹⁵¹ (In the ten cases in which punitive damages were awarded by the trial court, six were reversed and remanded on appeal; in only one was the award affirmed in its entirety.)
- An insurance industry study of large product liability cases closed in 1985 found that punitive damages were paid in only four of 442 claims, amounting to 0.7% of the total payments made.¹⁵²
- A General Accounting Office study of 305 product liability verdicts in five states in cases closed in 1983–85 found punitive damages awards in 23 (7.5% of the total and 16.9% of the 136 cases won by plaintiffs.)¹⁵³
- Daniels and Martin found punitive damages awards in 8.6% of product liability verdicts favoring plaintiffs in 1988–90.¹⁵⁴
- In the BJS study of 45 courts in 1992, there were punitive awards in 2.2% of the product liability verdicts won by plaintiffs.¹⁵⁵
- In the new ICJ study of fifteen sites, there were punitive awards in 2.4% of product liability verdicts from 1985–89 and 2.9% from 1990–94.¹⁵⁶

Michael Rustad and Thomas Koenig conducted an exhaustive search for punitive damages awards in product liability cases in both state and federal courts and discovered that there were far fewer puni-

150. PETERSON ET AL., PUNITIVE DAMAGES, *supra* note 73, at 12.

151. William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION 33, 36 (Sept.-Oct. 1986).

152. SOULAR, *supra* note 82, at 18-19.

153. U.S. GAO, PRODUCT LIABILITY, *supra* note 70. The five states were Arizona, Massachusetts, Missouri, North Dakota, and South Dakota.

154. DANIELS & MARTIN, CIVIL JURIES, *supra* note 130, at 221. In an earlier report on their data for 1981–85, they had found a rate of 8.9%. *Id.*

155. DEFANCES ET AL., *supra* note 133, at tbl. 8.

156. MOLLER, *supra* note 61, at tbl. A.5.

tive awards in product liability cases than is often assumed. They found a total of 355 punitive damages verdicts from 1965 to 1990.¹⁵⁷ Some commentators have sought to discredit this research on the irrelevant ground that it was partially funded by the trial lawyers' Roscoe Pound Foundation. But no critic has come forward with information that disconfirms it as a reading of the general magnitude of the incidence of punitive damages awards in product liability cases.¹⁵⁸ The Rustad/Koenig research enables us to identify trends *within* the product liability category. Table 3 and the accompanying Figure 6 taken from Rustad, break down punitive damages awards by time period and at the same time separate asbestos cases from those involving all other products.

157. Rustad, *supra* note 71; see also *Hearings on S. 640 Before the Senate Comm. on Commerce, Science, and Transp.*, 101st Cong., 1st Sess. (1991) (statements of Michael Rustad & Thomas Koenig).

158. The studies discussed earlier (Daniels and Martin, BJS, ICJ, Landes and Posner, etc.) each take a known set of cases and look to see how many involve punitive damages: The conclusion is a rate of punitive damages verdicts against a background of cases of a particular type in a particular time, place, and set of courts. The data collection strategy followed by Rustad and Koenig is quite different: they set out to compile a profile of *the entire universe* of personal liability personal injury verdicts in which there is a punitive damages award from 1965 through 1990 by an extensive search of "Published Appellate Opinions, Computer-Based Searches, Law Review Articles and Legal Commentaries, Court Records, Trial Verdict Reporters, Interviews with Lawyers, National Verdict Reporters, and regional and local reporters." Rustad, *supra* note 71, at 42-44.

This Herculean effort raises two problems: comprehensiveness and representativeness. Just how close is it to being the entire population of awards? Undoubtedly there are some awards that escaped this search procedure, but it seems improbable that many large or well-publicized awards were missed. As in the earlier studies there is a problem of representativeness—that is, can we generalize from features of the set of awards they collect to the features of the entire population of awards. Because the data set includes every case that was registered in any one of a large number of media, the cases that are omitted are ones that failed to register in *any* of these media. It seems unlikely that such missing cases would be large or in other ways spectacular. Hence we are probably safe in assuming that if the sample is biased it is toward over-representation of the most prominent cases and those involving larger awards.

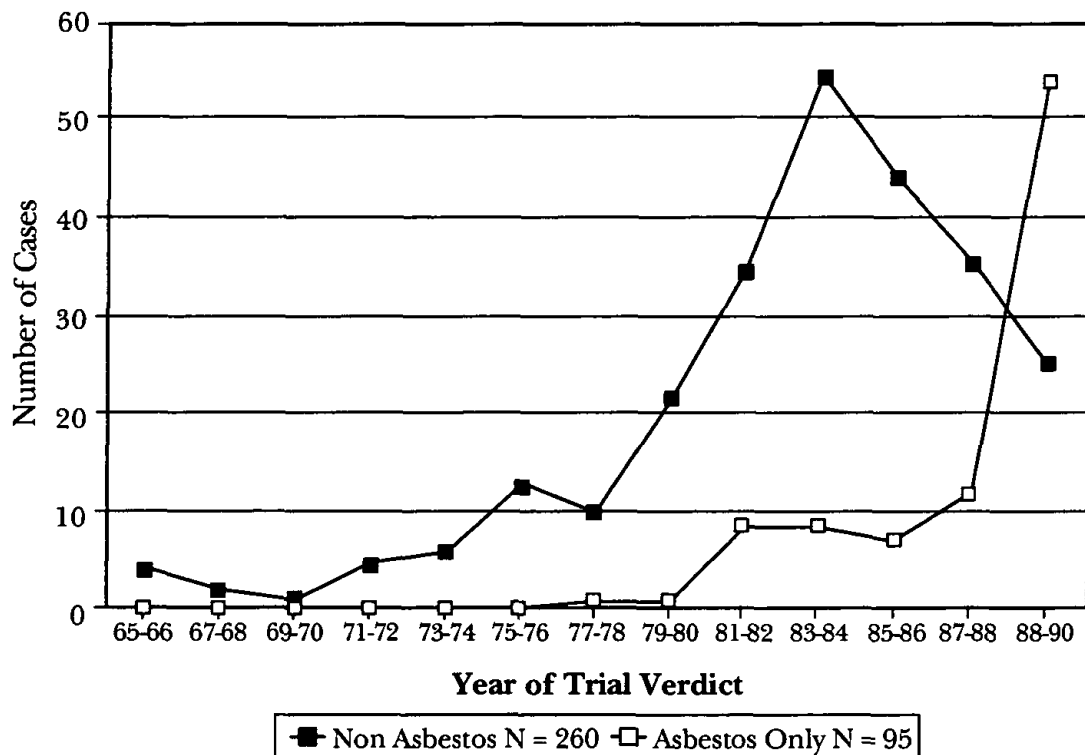
Despite the admirable thoroughness of these researchers, there is no doubt that they missed some punitive damages awards. But because their method made it more likely that cases would be missing in the earlier period than in the later, the reliability of their non-asbestos trend data is strengthened rather than weakened by the missing data.

TABLE 3: PUNITIVE DAMAGES AWARDS IN PRODUCT LIABILITY CASES, 1965-90

Years	Non-Asbestos	Asbestos	Total Verdicts
1965-70	7	0	7
1971-75	17	0	17
1976-80	39	2	41
1981-85	119	20	139
1986-90	78	73	151
Totals	260	95	355

Source: Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 38 (1992).

FIGURE 6: NUMBER OF VERDICTS BY TWO-YEAR PERIODS—NON-ASBESTOS VS. ASBESTOS CASES



Source: Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 38 (1992).

Rustad's figures show an increase in the number of punitive damages awards, although the rate of increase moderated after a rapid rise through the mid-1980s. The composition of the population of punitive damages awards changed significantly in the final five year period. Asbestos and non-asbestos cases display trend lines that are quite distinctive. Non-asbestos punitive awards fell by one third from the early

1980s to the late 1980s (from 119 to 78 or 34.5%); while asbestos awards jumped 265% from 20 to 73. In the early 1980s less than one sixth of the product liability punitive damage awards were in asbestos cases; in the 1986–90 period, almost half were asbestos cases.

Subsequent measures by BJS (for 1992) and ICJ (through 1994), summarized above, provide no reason to suspect any appreciable increase in punitive damages awards in product liability cases.

6. *Medical Malpractice.*—Daniels and Martin found that 2.5% of plaintiff victories in medical malpractice cases included a punitive award (amounting to 0.8% of all medical malpractice verdicts.)¹⁵⁹ In the BJS study, punitive damages were awarded to 3.1% of winning medical malpractice plaintiffs. Because these plaintiffs won just over one third of the time (34.7%), punitive awards were present in about 1% of medical malpractice verdicts.¹⁶⁰ In the recent ICJ study, punitive awards were awarded in 0.6% of medical malpractice cases from 1985–89 and 0.5% from 1990–94.¹⁶¹ These results comport with the Texas Insurance Commission study, noted above, that found punitive awards in medical malpractice cases were only one third as frequent as in non-medical torts.¹⁶²

Rustad and Koenig compiled a data base containing the entire population of known medical malpractice punitive damages awards from 1963 to 1993. They found a total of 270 such awards throughout the United States, which they estimated to be probably less than one percent of the medical malpractice cases decided during that period.¹⁶³ Three-quarters of these awards were in the most recent of the three decades covered in the study.¹⁶⁴ Rustad and Koenig calculated that “seventy-one percent of the multi-million dollar punitive damage awards were assessed against corporate entities.”¹⁶⁵

7. *Award Levels.*—An overall profile of award levels is provided in the BJS “snapshot” study of a sample of the 75 largest counties in 1992. The findings are summarized in Table 4.

159. DANIELS & MARTIN, CIVIL JURIES, *supra* note 130, at 221 (tbl. 6.4).

160. DEFANCES ET AL., *supra* note 133, at tbl. 7,8.

161. MOLLER, *supra* note 61, at tbl. A.5.

162. TEXAS LIABILITY INSURANCE SURVEY, *supra* note 127, at 32.

163. Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,”* 47 RUTGERS L. REV. 975, 995, 1006 (1995).

164. *Id.* at 1004.

165. *Id.* at 1010.

TABLE 4: PUNITIVE DAMAGES AWARDS FOR PLAINTIFF WINNERS IN CIVIL JURY CASES IN STATE COURTS IN A SAMPLE OF THE NATION'S 75 LARGEST COUNTIES, 1992

Case type	Plaintiff winner cases		Amount of punitive damages awarded to plaintiff winners			Percent of plaintiff winner cases (column A) with punitive damages	
	Number awarded punitive damages (A)	Percent receiving punitive damages	Total	Median	Mean	Over \$250,000	\$1 million or more
All jury cases	364	5.9%	\$267,879,000	\$50,000	\$735,000	23.7%	11.6%
Tort cases	190	4.0%	\$91,477,000	\$36,000	\$481,000	22.7%	10.1%
Automobile	55	2.4	35,535,000	25,000	641,000	19.9	7.5
Premises liability	15	1.7	1,272,000	40,000	87,000	0	0
Product liability	3	2.2	40,000	9,000	12,000	0	0
Intentional tort	38	18.5	10,926,000	25,000	286,000	13.8	8.5
Medical malpractice	13	3.1	3,120,000	199,000	245,000	31.8	0
Professional malpractice	15	15.7	6,077,000	250,000	412,000	44.0	8.5
Slander/libel	8	29.8	1,341,000	47,000	164,000	34.2	0
Toxic substance	13	6.2	26,420,000	1,692,000	1,994,000	54.7	54.7
Other tort	30	7.2	6,746,000	100,000	226,000	20.9	10.9
Contract cases	169	12.2%	\$169,528,000	\$52,000	\$1,003,000	24.4%	12.6%
Fraud	38	21.2	7,339,000	45,000	191,000	18.9	10.4
Seller plaintiff	24	5.6	1,221,000	22,000	51,000	0	0
Buyer plaintiff	47	12.4	27,446,000	27,000	581,000	28.6	11.1
Employment	46	26.8	132,759,000	179,000	2,874,000	42.1	26.1
Rental/lease	11	11.3	399,000	50,000	37,000	0	0
Other contract	2	1.8	365,000	145,000	162,000	44.4	0
Real property cases*	5	11.7%	\$6,873,000	\$85,000	\$1,375,000	40.0%	40.0%

Note: Award data were rounded to the nearest \$1,000. Zero indicates no cases in the sample. In this study, cases are classified into a single case type, though cases may involve multiple claims (such as contract and tort). Under laws in almost all states, only tort claims qualify for punitive damages. If a contract or real property case involved punitive damages, it involved a related tort claim. Punitive damage awards may be incomplete for 4 counties: Palm Beach Co., Fla., Wayne Co., Mich., Allegheny Co., Pa., and Philadelphia Co., Pa.

* Excludes eminent domain cases.

Source: BUREAU OF JUSTICE STATISTICS, SPECIAL REP., CIVIL JUSTICE SURVEY OF THE STATE COURTS, 1992, at 8 (July 1995).

Overall, the median award (i.e., the middle one, if all the awards were ranked from largest to smallest) was \$50,000 and the mean (i.e., the average) was \$735,000. (This is before any post-verdict reduction.) This indicates that there are relatively few very large verdicts, so that the average verdict is many times higher than the verdicts in the great run of cases. If we look at the breakdown by case types, we note major variation from type to type, but some general patterns as well.¹⁶⁶ In almost every kind of case, the mean award is much higher than the median, indicating the presence of a minority of very high awards. There is no evident relationship between the frequency with which punitive damages are awarded and the amount of damages awarded. Altogether, almost one quarter of these awards are for more than \$250,000 and about one award in nine is for \$1 million or more. The mean is higher for contract and property cases than for torts, and there are more high awards in contracts and property.

The new ICJ study of 15 sites portrays a higher level of punitive awards: overall, it finds a median award of \$90,000 for 1990–94 (up from \$56,000 in 1995–89) and a mean of \$1,108,000 for 1990–94.¹⁶⁷ This mean is up from \$626,000 in the earlier period—or down from \$2,698,000—depending on whether the award in the Pennzoil-Texaco case is excluded or included in the earlier total. This is a vivid demonstration of the sensitivity of the mean to the influence of a small number—here, just one—of very large awards.

Table 5 presents the median and mean awards for all the ICJ sites and compares award amounts for seven types of cases (product liability, medical malpractice, other malpractice, land liability, automobile personal injury, intentional torts, and business cases) and for the total of all types of cases, including those not listed separately.

Table 5 shows a rise overall of both median and mean awards, with the disparity between means and medians little changed.

Analyzing the trends in awards in four large jurisdictions, Daniels and Martin conclude that

the principal changes in the punitive damage award structure occurred at the upper end of the award spectrum in all four sites. . . . There were, in effect, two punitive damage systems in these sites. One changed little, except in Los Angeles, and it is comprised of the bulk of the cases. The sec-

166. Where the number of instances is very small, the figures for specific case types are not reliable for comparative purposes. For example, note that the mean for the three punitive awards in product liability cases was only \$12,000. This figure is unrepresentative of what we know about product liability cases from other sources.

167. MOLLER, *supra* note 61, at tbl. A.6.

TABLE 5: MEAN AND MEDIAN AMOUNTS OF PUNITIVE DAMAGE AWARDS, CHANGE OVER TIME AT FIFTEEN SITES

(\$000)		Fifteen Sites		
		n.	Mean	Median
PRODUCT LIABILITY	1985-89	20	1,945	321
	1990-94	23	3,000	484
Percentage Change from '85-'89 to '90-'94		+15%	+54%	+51%
MEDICAL MALPRACTICE	1985-89	10	1,214	266
	1990-94	9	1,906	365
Percentage Change from '85-'89 to '90-'94		-10%	+57%	+37%
OTHER MALPRACTICE	1985-89	37	1,126	122
	1990-94	55	1,592	189
Percentage Change from '85-'89 to '90-'94		+49%	+41%	+55%
LAND LIABILITY	1985-89	53	632	98
	1990-94	27	651	134
Percentage Change from '85-'89 to '90-'94		-49%	+3%	+37%
AUTO PERSONAL INJURY	1985-89	55	353	24
	1990-94	49	493	35
Percentage Change from '85-'89 to '90-'94		-11%	+40%	+46%
INTENTIONAL TORTS	1985-89	181	879	64
	1990-94	172	1,067	135
Percentage Change from '85-'89 to '90-'94		-5%	+21%	+111%
BUSINESS	1985-89	230	884*	61
	1990-94	232	2,716	111
Percentage Change from '85-'89 to '90-'94		+1%	+207%	+82%
TOTAL**	1985-89	512	626	56
	1990-94	466	1,108	90
Percentage Change from '85-'89 to '90-'94		-9%	+77%	+61%

* \$ 14,438,000 if *Pennzoil* verdict is included.

** Includes categories not presented here.

Source: ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 tbl. A.6, A.9.

and involved only the small proportion of cases with the highest awards, and here the change could be substantial.¹⁶⁸

When they separate out the highest 25% of punitive damages verdicts, Daniels and Martin find that the great bulk of these awards are in financial harm cases. For example, in Dallas in 1986-90, 71.4% of the highest 25% of awards were in financial harm cases.¹⁶⁹

One persistent source of concern has been the proportionality (or lack of it) between compensatory and punitive awards. Table 6 details the relationship between punitive damages and compensatory

168. DANIELS & MARTIN, CIVIL JURIES, *supra* note 130, at 231.

169. *Id.* at tbl. 6.6.

damages in the 1992 cases in the BJS study. It shows that punitive damages make up less than half the total award in these cases. In only 40% of the tort cases are punitive damages greater than compensatory damages; in only 17% are they as much as twice as large as the compensatory damages.

All these findings are about nominal awards, not those actually paid and collected. As detailed in part II.E.3 above, actual payments of punitive damages are significantly less than the amounts awarded.

8. *The Shadow of Punitive Damages: Their Impact on Settlement.*—In considering the impact of punitive damages, we should recall that full-blown trials leading to verdicts occur in only a few cases. Most cases settle.¹⁷⁰ The process of arriving at settlements has been described as “bargaining in the shadow of the law.” Where punitive damages are part of that shadow, what difference does it make? Anecdotal evidence suggests that the threat of punitive damages can be a significant factor in settlement. For example, in the litigation arising from the Buffalo Creek mine dam disaster, the possibility of punitive damages loomed large in the plaintiff’s investigatory strategy and, though not explicitly mentioned, in the settlement negotiations.¹⁷¹ Again, in air crash disasters, the plaintiffs’ undertaking not to seek punitive damages is often the quid pro quo for the defendants’ agreement not to contest liability.¹⁷² The threat to defendants is aggravated by the fact that punitive damages are usually not covered by insurance (in some places they are legally uninsurable) and may even jeopardize the coverage of the compensatory portion of the award.

The disruptive effect of punitive damages is commonly attributed to their unpredictability, often reinforced by invoking the imagery of lotteries, jackpots, and bonanzas. The uncertainty they generate is thought to exert a chilling effect on useful activity as well as a terrorizing effect on defendants, inducing them into settlements unrelated to the merits of the claim. Theodore Eisenberg and his colleagues recently undertook to test the unpredictability thesis by reanalyzing the BJS study of 75 large county courts in 1992. They found that the occurrence of punitive awards was dependent on the type of case, which presumably was a rough indicator of egregiousness of conduct, a factor on which the data set provided no direct information. But,

170. See *supra* note 17.

171. GERALD M. STERN, *THE BUFFALO CREEK DISASTER* 68, 87, *passim* (1976).

172. Roy J. Harris, Jr., *Insurers Now Settle Faster, More Cheaply, After Big Air Crashes*, WALL ST. J., July 11, 1980, at A1; Andrew Wolfson, *Air-Crash Lead Counsel Named: U.S. Judge Reaches Compromise*, NAT’L L.J., July 7, 1986, at 3.

TABLE 6: COMPENSATORY AND TOTAL AWARD AMOUNTS FOR PLAINTIFF WINNERS AWARDED PUNITIVE DAMAGES IN STATE COURTS IN A SAMPLE OF THE NATION'S 75 LARGEST COUNTIES, 1992

Case type	Number of cases with a plaintiff winner awarded punitive damages (A)	Total damage award amount			Percent of punitive damages (column A)	
		Total	Punitive	Compensatory	Greater than compensatory damage awards	At least 2 times greater than compensatory damage awards
All jury cases	364	\$545,157,000	\$267,879,000	\$277,278,000	43.0%	22.2%
Tort cases	190	\$203,467,000	\$91,477,000	\$111,990,000	40.4%	17.0%
Automobile	55	69,905,000	34,535,000	34,370,000	39.7	16.3
Premises liability	15	2,481,000	1,272,000	1,208,000	41.0	13.7
Product liability	3	125,000	40,000	85,000	38.5	0
Intentional tort	38	22,963,000	10,926,000	12,036,000	32.4	13.4
Medical malpractice	13	13,144,000	3,120,000	10,024,000	31.8	0
Professional malpractice	15	24,365,000	6,077,000	18,288,000	33.1	33.1
Slander/libel	8	3,579,000	1,341,000	2,238,000	0	0
Toxic substance	13	38,365,000	26,420,000	11,945,000	84.9	39.6
Other tort	30	28,542,000	6,746,000	21,796,000	50.2	20.5
Contract cases	169	\$332,012,000	\$169,528,000	\$162,483,000	44.9%	27.5%
Fraud	38	14,997,000	7,339,000	7,658,000	52.1	34.8
Seller plaintiff	24	3,172,000	1,221,000	1,951,000	41.2	24.0
Buyer plaintiff	47	98,754,000	27,446,000	71,308,000	32.5	20.4
Employment	46	213,437,000	132,759,000	80,678,000	50.6	34.1
Rental/lease	11	875,000	399,000	476,000	55.1	18.4
Other contract	2	777,000	365,000	412,000	55.6	0
Real property cases*	5	\$9,678,000	\$6,873,000	\$2,805,000	80.0%	40.0%

Note: Award data were rounded to the nearest \$1,000. Zero indicates no cases in the sample. Compensatory and total award amounts do not include reductions. Detail may not sum to total because of rounding. Punitive damage awards may be incomplete for 4 counties: Palm Beach Co., Fla., Wayne Co., Mich., Allegheny Co., Pa., and Philadelphia Co., Pa.

* Excludes eminent domain cases.

Source: BUREAU OF JUSTICE STATISTICS, SPECIAL REP., CIVIL JUSTICE SURVEY OF THE STATE COURTS, 1992, at 10 (July 1995).

they observed, “[i]n the day-to-day practice of law, the parties will have access to some such information.”¹⁷³ Once a punitive award was made, they found its size “quite explicable, as legal damages run, from the size of the compensatory award.”¹⁷⁴ “[A]fter controlling for other factors, the level of punitive damages awarded is strongly and significantly correlated with the level of compensatory damages awarded”¹⁷⁵—a result in line with an earlier study by Joan Schmit and her colleagues.¹⁷⁶ The Eisenberg group concluded that “[f]ar from picking numbers out of the air, jurors and judges across dozens of jurisdictions and many case categories determine punitive damages award levels with a startling consistency.”¹⁷⁷

The discernment of such predictability by researchers does not obviate the sense of unpredictability experienced by lawyers with a relevant population of one. But it does suggest that assertions about unpredictability are not derived from expert knowledge of aggregate patterns but are tendentious restatements of the perceptions of participants.

There is virtually nothing in the research literature about how these perceptions of punitive damages work out in practice. Some observers believe the shadow effect of punitive damages is immense and pernicious. For example, the ex-CEO of Monsanto asserted that “academic studies and incomplete court data so far have failed to reflect the real world of product liability. That real world is buried in the frequent and *huge private settlements* driven by the *fear* of punitive damages.”¹⁷⁸ Unfortunately, the research literature contains almost nothing on this, but several studies are now underway. Pending their

173. Theodore Eisenberg et al., *The Predictability of Punitive Damages* 18 (paper prepared for the John M. Olin Conference on Tort Reform, University of Chicago Law School, June 13-14, 1996) (on file with author).

174. *Id.* at 15.

175. *Id.* at 19. The authors confirmed explanation of the relationship between compensatory and punitive damages by analysis of two other data sets, the Institute for Civil Justice's data from Cook County and various California sites from 1960 to 1984. *Id.* 21-22.

176. Joan T. Schmit et al., *Punitive Damages: Punishment or Further Compensation*, 55 J. Risk & Ins. 453, 463 (1988) (examining a set of 59 appellate cases involving punitive awards against corporate defendants from 1978 to 1982 and finding the size of the compensatory award “a consistently and highly significant explanatory variable” and the best predictor of the size of punitive damages).

177. Eisenberg et al., *supra* note 173, at 20.

178. RICHARD J. MAHONEY, *PUNITIVE DAMAGES—ONCE IS ENOUGH* 6 (Washington University, Center for the Study of American Business, Contemporary Issues Series No. 72, May 1995). The author refers to a survey he conducted in early 1995 of large U.S. manufacturing and service corporations to ascertain product liability settlements “driven by punitive damages” over a five-year period, but does not report the methodology or findings. *Id.* at 20 n.16.

arrival, I note a few suggestive studies of closed insurance claims. In one industry study, claims officials were surveyed concerning two samples of claims. In a sample of paid claims of all sizes, claimants sought punitive damages in 3% (109 of 3663) of the claims; none were granted by the courts, but the respondents reported that in fifteen (14% of the 109) of those claims there was a "shadow effect" and that "the total loss would have been an average of 63% lower if the claimants had not sought punitive damages."¹⁷⁹ In another sample of large claims, punitive damages were sought in 10% (316) of the closed claims. In four cases, punitive damages were awarded by the courts. Respondents reported "shadow effects" in 41 claims (13% of the 316), estimating that "the total loss would have been an average of 55% lower if claimants had not sought punitive damages."¹⁸⁰ In both studies the "shadow effect" of the punitive damages across all cases was estimated at around 1% of the total payout.

The shadow of punitive damages loomed larger in Texas, according to a Texas State Board of Insurance study of 5,484 closed bodily injury claims (excluding product liability) from 1983 to 1986. Punitive damages were requested in 18.5% of all claims analyzed¹⁸¹ and were actually awarded in 0.6% of claims other than medical professional liability (and in 0.2% of those).¹⁸² The study estimated that punitive damages played a role in the settlement of 3.3% of the non-medical malpractice claims and accounted for 5.7% of total loss payments. It "noted that a significant portion of total punitive damages reported relates to one large award and settlement."¹⁸³

III. NEGATIVE EFFECTS ATTRIBUTED TO THE CIVIL JUSTICE SYSTEM

A. *Its Excessive Cost*

Critics of the civil justice system are convinced that its cost is excessive. Unfortunately, no one knows just what the costs of the existing civil justice system are. Former Vice President Dan Quayle gave wide credence to a report that "the legal system . . . now costs Americans an estimated \$300 billion a year."¹⁸⁴ This figure derives from

179. ISO DATA, INC., CLAIM FILE DATA ANALYSIS: TECHNICAL ANALYSIS OF STUDY RESULTS 87 (Dec. 1988).

180. *Id.* at 86.

181. TEXAS LIABILITY INSURANCE SURVEY, *supra* note 127, at 30.

182. *Id.* at 32.

183. *Id.* at 33.

184. Vice President Dan Quayle, Remarks at the American Business Conference (Oct. 1, 1991), available in LEXIS, Nexis Library, News Archnews, Federal News Service. The same figure appears in WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, FACT SHEET, ACCESS TO JUSTICE ACT, 1992 (Feb. 4, 1992).

casual speculation by Peter Huber, who propounded that figure in 1988 as the supposed cost of the tort system.¹⁸⁵

A more serious figure is the estimate of the actuarial consulting firm Tillinghast-Towers Perrin that the cost of the tort system (defined as the cost of liability insurance and self-insurance) in the United States in 1994 was \$151.5 billion.¹⁸⁶ Tillinghast estimates that the United States' tort expenditures are proportionately more than double those of other advanced industrial countries.¹⁸⁷ But heavier reliance on the tort system signifies not only what the United States has more of, but also what it has less of. Compared to our industrialized counterparts, we do not have an administrative state with intensive governmental regulation of risks, nor do we have a comprehensive welfare state. As the Tillinghast survey observed, "America's social welfare system is considerably smaller than that of any other country studied."¹⁸⁸ Werner Pfennigstorf and Donald Gifford, comparing compensation systems in ten European countries with that of the United States, concluded that less frequent resort to the tort system in other industrialized democracies is partially due to the presence of public entitlement systems or public and private insurance.¹⁸⁹ These "alternative compensation sources do much of the work that is accomplished under the tort system in the United States."¹⁹⁰ In short, our greater reliance on tort reflects not greater generosity to victims, but less reliance on administrative controls and social insurance.

However, estimates of the costs of the tort system, even those that are not mere conjecture, have two deeper and more significant limitations:

- First, these estimates conflate costs and transfers. It is true that, compared with other compensation systems, the tort system has high transaction costs.¹⁹¹ But a significant portion of the wealth that flows

185. A detailed account of its derivation is presented in Galanter, *supra* note 7, at 83-87.

186. STURGIS, *supra* note 127, app. 1.

187. *Id.* at 16.

188. *Id.* at 14. For discussions of the scantier coverage and lesser coordination of American social security schemes, see John M. Grana, *Disability Allowances for Long-Term Care in Western Europe and the United States*, 36 INT'L SOC. SCI. REV. 207 (1988). See also P.R. KAIM-CAUDLE, *COMPARATIVE SOCIAL POLICY AND SOCIAL SECURITY* (1978); cf. ALFRED KAHN, *SOCIAL SERVICES IN INTERNATIONAL PERSPECTIVE* 22 tbl. 2.2 (Transaction Books 1980) (1977) (comparing income, employment, and social conditions of several countries).

189. WERNER PFENNIGSTORF & DONALD G. GIFFORD, *A COMPARATIVE STUDY OF LIABILITY LAW AND COMPENSATION SCHEMES IN TEN COUNTRIES AND THE UNITED STATES* 160 (1991).

190. *Id.* at 129.

191. See Marc Galanter, *The Transnational Traffic in Legal Remedies*, in *LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL* 133, 138-39 (Sheila Jasanoff ed., 1994) [here-

through the litigation system is delivered to creditors and wronged parties who are entitled to compensation under the existing rules.¹⁹² This half (or more) of the supposed cost is a cost to defendants, but it is not a cost of the system or a cost to the country, for the wealth is not lost but only transferred to different hands. That it costs so much to effectuate these rightful transfers calls for remedy, but controlling these transaction costs should not be confounded with reducing the rights of claimants. Indeed, the potential exists to have the worst of both worlds by reducing the rights of the injured without significantly reducing the transaction costs of the system.

• Second, critics brandish estimates of costs in isolation from consideration of benefits.¹⁹³ Rather, society's accounts should reflect not only the costs but the benefits of enforcing such transfers, which afford vindication, induce investments in safety, and deter undesirable behavior. For instance, the sums transferred by successful patent infringement litigation not only are not lost, but maintain the credibility of the patent system that in turn has powerful incentive effects. To put forward estimates of gross costs—even ones that are not make-believe—as a sufficient guide to policy displays indifference to the vital functions that the law performs. America's institutions of remedy and accountability and the judges and lawyers that staff them are thereby portrayed as burdensome afflictions.

In connection with this second point, the costs attributable to present institutional arrangements are made to loom menacingly large by ignoring the costs of alternative arrangements for obtaining equivalent benefits. For example, if we were to eliminate entirely the tort system's contribution to accident prevention, presumably people and businesses would make other expenditures to prevent and minimize injury. The savings from completely abolishing the tort system would not be all the billions that flow through it—nor even all the billions spent on it, but only that increment beyond what would be

inafter Galanter, *Transnational Traffic*]. Among the justifications for using this high cost compensation system are that it produces preventive effects through deterrence and education of potential injurers, it is flexible and adaptive, and it is consonant with notions of individual responsibility. *Id.* at 136-39.

192. The Institute for Civil Justice estimated that the net compensation to plaintiffs in tort cases in 1985 was roughly half of the dollars spent on tort litigation. HENSLER ET AL., *supra* note 43, at 25-26. I know of no data about the ratio of recoveries to total expenditures in nontort litigation.

193. Robert Sturgis, the source of the previously discussed Tillinghast estimates of tort costs, reminds his audience that "we have settled upon a definition of gross cost without regard for the social and economic benefits that may be derived from the system." Robert W. Sturgis, Address to the American Insurance Association (Nov. 14, 1985), *cited in* NAT'L UNDERWRITER, Nov. 11, 1985 (on file with author).

spent on the alternative means of protection.¹⁹⁴ So a genuine assessment of the tort system would have to consider not only its costs, but both the benefits it produces and the cost of producing such benefits by alternative means.¹⁹⁵

B. *Effects on the Economy*

1. *Health Care Costs and Availability.*—Critics attribute to the present civil justice system various deleterious effects on the nation's economy. One of the more specific charges is that tort liability threatens the cost and availability of health care. Does medical malpractice liability bear significant responsibility for rising health care costs? The idea appears to be inherently improbable given that the direct cost of the whole medical malpractice system represents less than one percent of total national spending on health care. In 1994 medical malpractice premiums were 0.65% of total national health expenditures.¹⁹⁶ Of course, the presence of medical malpractice liability may be responsible for expenditures for "defensive medicine." Studies have divided on the occurrence and extent of defensive medicine, even in connection with specific procedures.¹⁹⁷ The Office of Technology Assessment (OTA) recently analyzed existing studies and supplemented them with a national survey of cardiologists, surgeons, and obstetrician/gynecologists to determine the prevalence of positive defensive medicine. The OTA defined defensive medicine as

194. See Peter L. Kahn, *Pricing the US Legal System*, CHRISTIAN SCI. MONITOR, Sept. 11, 1992, at 19.

195. See Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990). On the need for cost assessments to take into account the overlap of the tort system and administrative regulation, see Peter L. Kahn, *Regulation and Simple Arithmetic: Shifting the Perspective on Tort Reform*, 72 N.C. L. REV. 1129 (1994).

196. J. ROBERT HUNTER, MEDICAL MALPRACTICE INSURANCE: A REPORT OF THE INSURANCE GROUP OF THE CONSUMER FEDERATION OF AMERICA 1 (Sept. 1995). In 1985 medical malpractice cost 0.76% of national health expenditures. *Id.*

197. For example, one study found cesarean delivery positively associated with physician malpractice premiums and with physician-perceived risk of suit. A. Russell Localio et al., *Relationship Between Malpractice Claims and Cesarean Delivery*, 269 JAMA 366 (1993). Another study found higher cesarean delivery rates in counties with higher malpractice premiums. S.M. Rock, *Malpractice Premiums and Primary Caesarean Section Rates in New York and Illinois*, 103 PUB. HEALTH REP. 459, 459 (1988). Yet another study, however, found no relationship between cesarean delivery and the "physician's recent medicolegal experience." Gregory L. Goyert et al., *The Physician Factor in Cesarean Birth Rates*, 320 NEW ENG. J. MED. 706, 706 (1989). Most recently, a group of researchers found no association between the malpractice experience or exposure of individual physicians and higher use of prenatal resources or cesarean deliveries for the care of low-risk obstetric patients. Their study "provides no evidence for the practice of defensive medicine in low-risk obstetrics." Laura-Mae Baldwin et al., *Defensive Medicine and Obstetrics*, 274 JAMA 1606, 1610 (1995).

"ordering additional procedures primarily, but not necessarily solely, out of fear of malpractice liability risk."¹⁹⁸ The OTA concluded:

[I]n the majority of clinical scenarios used in OTA's and other surveys, respondents did not report substantial levels of defensive medicine, even though the scenarios were specifically designed to elicit a defensive response.

Based on the limited evidence available, OTA estimates that a relatively small proportion of all diagnostic procedures—certainly less than 8 percent overall—is performed primarily due to conscious concern about malpractice liability risk.¹⁹⁹

Were the whole institution of medical malpractice liability eliminated in its entirety, the direct effects on health care costs would be minimal; the indirect effects, taking into account expenditures on defensive medicine, would be larger, but not massive. We need not assume, however, that no alternative measures for compensation and deterrence would be substituted for malpractice liability. These substitutes, whatever they would be, would not be costless, and it is likely that they would stimulate at least some of the same "defensive" behavior that is found under the current regime.²⁰⁰

It is often claimed that malpractice liability affects not only the cost of health care, but its availability by driving physicians out of practice. Concern for the curtailment of the supply of physicians is particularly focused on the field of obstetrics. Two studies reviewed in the recent OTA report on defensive medicine, however, fail to confirm the existence of this linkage.

The first study examined whether New York obstetrician/gynecologists (OB/GYNs) and family practitioners (FPs) who experienced high absolute increases in malpractice insurance premiums were more likely than physicians with lower premium increases to withdraw from obstetrics practice.²⁰¹ The researchers found that "[m]edical malpractice insurance premium increases were not associated with physician withdrawal from obstetrics practice for either OB/GYNs or FPs."²⁰² The second study looked at whether state premium levels and personal malpractice claims history accounted for whether OB/GYNs

198. OFFICE OF TECHNOLOGY ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE, 103d Cong. 56 (1994) [hereinafter DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE].

199. *Id.* at 74.

200. The responsiveness of defensive medical practice to tort reform measures is discussed *infra* part IV.

201. DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE, *supra* note 198, at 69, 71.

202. *Id.* at 71.

were practicing obstetrics at all. "The study found that OB/GYNs in states with greater liability threats and who reported higher personal malpractice claims exposure were more likely to be practicing obstetrics and had higher volumes of obstetric care than their counterparts."²⁰³

2. "*Economic Well-Being*."—Assertions that the tort system inhibits the creation of jobs and the economic health of the country are so commonplace as to pass without notice. But proof of such effects is not easy to find. It seems inherently improbable that current liability arrangements represent a substantial economic detriment. For example, the cost of product liability in 1993 (measured by insurance premiums) was 13.5 cents per \$100 of retail sales—down from 25.9 cents in 1987.²⁰⁴ A recent survey of U.S. corporations' total liability risk (not confined to product liability) found that total liability costs were equal to 0.255% of total revenue, or 25.5 cents for every \$100 of revenue.²⁰⁵ From 1993 to 1994 the overall cost of risk (including workers' compensation and property risks as well as risk management) fell by 5%, while the cost of liability fell by 22%.²⁰⁶

Similar arguments have been made about the effects of the tort system generally on the economic health of the United States. A body of studies on this subject makes it possible to assess the case made by proponents of that larger assertion that the tort system is undermining the competitiveness of the American economy. So far, serious investigation has found little evidence of any significant effect on America's prosperity.

Reviewing the available data on the relation of liability to trade performance,²⁰⁷ Robert Litan of the Brookings Institution identified two major lines of argument: (1) liability adds to the cost of doing

203. *Id.*

204. J. ROBERT HUNTER, PRODUCT LIABILITY INSURANCE EXPERIENCE 1984-1993: A REPORT OF THE INSURANCE GROUP OF THE CONSUMER FEDERATION OF AMERICA exhibit A, col. N (Mar. 1995). This figure has to be adjusted to account for self-insurance.

205. TILLINGHAST-TOWERS PERRIN RISK MANAGEMENT PUBLICATIONS & RISK AND INSURANCE MANAGEMENT SOC'Y, 1995 COST OF RISK SURVEY (1995). The survey included 650 U.S.-based organizations with an average of approximately \$2 billion in revenue.

206. *Id.* at 2, 4. Total risk cost and its composition fluctuate considerably from year to year. See *id.* at 47.

207. Product liability and civil justice do not loom large in the general literature on competitiveness. In an 831-page opus, Michael Porter devotes less than half a page to product liability, observing that "a prominent example of an area where regulatory policy can work for or against national advantage is *product liability*. Product liability laws can benefit competitive advantage by acting like a sophisticated buyer to encourage the development of better products." MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 649 (1990). Porter continues, without providing or citing any supporting evidence:

business, and (2) "these costs, coupled with uncertainty over outcomes of tort litigation . . . [deter introduction of] new products or cost-saving technologies."²⁰⁸

Litan concluded that it is difficult to know the magnitude of the net cost of liability but estimates "[a]t most . . . that [cost] on average could be as high as 2 percent of the cost of all products and services sold in the United States. The effects on individual products could be much greater."²⁰⁹ Although "it could affect the *composition* of U.S. trade," he reported that "[i]t is highly unlikely that the 'liability tax,' however large it is, materially or permanently affects the overall U.S. trade balance."²¹⁰

Litan himself assembled data on the total "share of revenues [spent by particular industries] devoted to paying for and avoiding 'risk.'"²¹¹ These risk costs fluctuate widely from industry to industry and vary over time. Notably, the overall expenditure on risk costs as a share of revenues declined from a total of 0.58% of total revenues for the whole set of industries in 1978 to 0.50% of total revenues in 1984.²¹²

To determine whether differences in risk cost can account for "any of the crossindustry variation in export performance," Litan tested the correlation for "the seven industries for which both export and risk cost data are available" and found no statistically significant relationship.²¹³ Litan observed that "[i]t is not surprising that there is

In the United States, however, product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly and, as importantly, lengthy product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches.

Id. A 1991 report of the congressional Office of Technology Assessment, analyzing the competitiveness of American manufacturing, does not even mention product liability. *Office of Technology Assessment, Competing Economies: America, Europe, and the Pacific Rim*, 102d Cong. (1991).

208. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in *TORT LAW AND THE PUBLIC INTEREST*, *supra* note 2, at 127, 128. Studies of the impact of liability in five industries are reprinted in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991).

209. Litan, *supra* note 208, at 128-29.

210. *Id.* at 128.

211. *Id.* at 140.

212. *Id.* at 141 tbl. 3. The data in the table is misreported in the first full sentence of Litan's article at page 142. *Id.* at 142.

213. *Id.* at 143. Litan found:

Among the seven industries . . . there is a small, but statistically insignificant, positive correlation between the change in exports between 1978 and 1984 (either in absolute dollars or in percentage terms) and the change in the risk cost as a percentage of sales in these industries during this period. In other words,

little connection between liability costs and export performance by industry" because differences in risk costs are "rather minor" and easily can be swamped by other effects, such as changing energy costs.²¹⁴ He also noted that "foreigners may be willing to pay for the added safety that may be built into U.S.-produced goods as a result of the deterrence features of our tort system."²¹⁵

Litan suggested that the effects on innovation "are potentially much larger, but much more uncertain than the direct [cost] effects."²¹⁶ An analysis by W. Kip Viscusi and Michael J. Moore found that product liability actually had a positive net effect on innovation.²¹⁷

This effect is not uniform and may reverse once the liability costs become too great. At low product liability cost levels, increases in liability costs foster innovation. Extremely high liability costs depress innovation once the disincentive effect on new product introductions becomes dominant. For industries with extremely large liability costs . . . the net effect of product liability is to depress innovation, whereas for the great majority of firms with lower liability costs, it has a positive effect.²¹⁸

Litan examined the relation of research and development expenditures as a percentage of sales (a surrogate for innovation) for all U.S. industries and for the four industries that were the target of the largest number of federal product liability suits from 1974 to 1986. He reported that the results

do not support the alleged innovation-liability link. R&D-to-sales ratios for all industries increased rather substantially during the 1980s . . . significantly, that ratio more than doubled in the drug industry, where product liability suits have been especially prevalent. Both the industry-wide and pharmaceutical-specific trends are inconsistent with claims that liability fears have dampened innovative activities.²¹⁹

increases in risk costs tend to be associated with an *improvement* in export performance, although again this effect is not statistically significant.

Id.

214. *Id.*

215. *Id.*

216. *Id.* at 129.

217. W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 2, at 105.

218. *Id.* at 123.

219. Litan, *supra* note 208, at 145-46.

In the absence of supporting evidence, proponents of the view that the tort system undermines economic well-being rely heavily on surveys of business executives' perceptions of the system's effects.²²⁰ But assessments of the liability system in the business community are not uniform. A November 1986 Conference Board survey of risk managers of 232 major U.S. corporations with a minimum annual sales revenue of \$100 million each²²¹—written at the very height of the great furor about insurance coverage and cost²²²—totally rejected the notion that there was a major liability crisis. The survey's

most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality. . . . For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention. Liability lawsuits, which are indeed numerous, are overwhelmingly settled out of court, and usually for sums that are considered modest by corporate standards. As a management function, product liability remains a part-time responsibility in most of the responding firms. Where product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.

. . . .

The findings of the present survey also refute the general contention of a severe and deepening crisis in tort liability and insurance availability, at least for the nation's large

220. In a Conference Board survey of the chief executive officers of the 2000 largest manufacturing companies and a sample of smaller manufacturers, 42% reported that the product liability system had a major impact on their firms; 47% reported that they had discontinued product lines; 39% reported that they had decided against introducing new products; and 49% reported a major impact on international competitiveness. E. PATRICK MCGUIRE, THE CONFERENCE BOARD, THE IMPACT OF PRODUCT LIABILITY v, 6, 8, 20 (Research Rep. No. 908). Such perceptions are widespread among American business executives. An early 1992 survey of senior executives found that 62% felt "that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies." *The Verdict from the Corner Office*, BUS. WK., Apr. 13, 1992, at 66, 68. Of course these impressions are themselves not evidence of the existence or magnitude of these effects. Yet it is entirely possible that this pessimism translates into lower expectations and less success, which makes even more remarkable the absence of independent evidence for the alleged depressing effects.

221. NATHAN WEBER, THE CONFERENCE BOARD, PRODUCT LIABILITY: THE CORPORATE RESPONSE v (Rep. No. 893, 1987).

222. Hayden, *supra* note 4, at 95.

corporations. The impact on the general economy, likewise, is believed to have been minor.²²³

IV. ANALYSIS OF THE PREDICTED BENEFICIAL EFFECTS OF REFORM

Just as the present tort system is deemed responsible for many nasty consequences, claims are made for the beneficial effect of tort reforms. We are told of various desirable things that have happened or will presumably happen as a result of the enactment of reforms.

Does the cumulative fund of experience with tort reform give grounds for confidence that these good things will occur? Almost all the studies that have attempted to ascertain the effects of tort reforms have focused on medical malpractice reforms. There is a general concurrence that the reform with the strongest effect is the imposition of caps on damage awards. Caps have been found to reduce total payments to victims,²²⁴ in some studies by as much as 23%²²⁵ and 39%.²²⁶

Caps have been found to reduce underwriting risk and improve the relative profitability of insurers.²²⁷ According to one recent study, the greatest effect on insurers is to reduce the risk level of the most unprofitable firms.²²⁸ Several studies found no evidence of impact on

223. WEBER, *supra* note 221, at 2.

224. E.g., Stephen Zuckerman et al., *Effects of Tort Reforms and other Factors on Medical Malpractice Insurance Premiums*, 27 INQUIRY 167, 180 (1990).

225. Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 76 (1986).

226. Frank A. Sloan et al., *Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis*, 14 J. HEALTH POL. POL'Y & L. 663, 678 (1989). But the effects are not uniform and sometimes produce surprising results. In a study in Indiana, investigators were startled to discover that in spite of its comprehensive cap on all damages

between 1977 and 1988, Indiana's mean payment for large malpractice claims was substantially higher than the mean payments for similar claims in Michigan and Ohio, independent of sex, age, severity of injury, allegations of negligence, and year of resolution. Our results are strikingly counterintuitive. We expected Indiana's cap on damages to depress average claim severity, especially since other Indiana characteristics, for example, fewer physicians and surgeons per capita and lower urbanization . . . should also work to lower claim size. . . .

It appears that Indiana's cap has actually become a "floor"

William P. Gronfein & Eleanor D. Kinney, *Controlling Large Malpractice Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 441, 458 (1991).

227. Drucilla Barker, *The Effects of Tort Reform on Medical Malpractice Insurance Markets: An Empirical Analysis*, 17 J. HEALTH POL. POL'Y & L. 143, 158 (1992).

228. W. Kip Viscusi & Patricia Born, *Medical Malpractice Insurance in the Wake of Liability Reform*, 24 J. LEGAL STUD. 463 (1995).

premiums,²²⁹ but others found that premiums were reduced²³⁰ or increased less than they otherwise would have been.²³¹

Other reforms include restrictions on the statute of limitations, which have been found to reduce the frequency of claims²³² and collateral source offsets, which have been found to reduce payments.²³³ Apart from that, few substantial effects have been found.²³⁴ For example, a study of the effects of restrictions on joint and several liability found weak support for overall reduction of lawsuits.²³⁵ One of the leading researchers in this area cautioned that because "no one truly understands what governs trends in claims" we should be modest in predicting the results of reforms.²³⁶

Outside the malpractice area, a study of the effect of punitive damages caps found that "[t]he size of the typical verdict decreases" but there is "a much smaller effect on the posttrial amounts collected by plaintiffs than on the initial award."²³⁷ The authors of the study suggest that "much of the impact of tort reform is muted because existing judicial controls perform the same function by . . . judgment *non obstante veredicto* . . . motions or remittals."²³⁸

Virtually all of the malpractice studies confine themselves to a narrow ambit of effects—payments, premiums, insurance company losses, and profits—but rarely venture to examine the wider effects of tort reforms on the injured, on patients and consumers, and on society at large. It is often claimed that malpractice reform will encourage doctors to avoid wasteful expenditures on "defensive medicine," but the linkage between reform and such effects is far from obvious and has barely been tested. A recent Office of Technology Assessment report concludes:

229. *Id.* at 488; Frank A. Sloan, *State Responses to the Malpractice Insurance 'Crisis' of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL. POL'Y & L. 629, 642-43 (1985).

230. Zuckerman et al., *supra* note 224, at 180.

231. Glenn Blackmon & Richard Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 2, at 272, 285.

232. Sloan et al., *supra* note 226, at 665; Danzon, *supra* note 225, at 71.

233. Danzon, *supra* note 225, at 72.

234. OFFICE OF TECHNOLOGY ASSESSMENT, *IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS*, 103d Cong. 72 (1993).

235. Han-Duck Lee et al., *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings? Evidence from the State Courts*, 61 J. RISK & INS. 295, 311 (1994).

236. Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 510 (1989).

237. Thomas Koenig & Michael Rustad, *The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability*, 16(2) JUST. SYS. J. 21, 36 (1993).

238. *Id.*

There are reasons to be skeptical that traditional tort reforms can reduce defensive medicine. Physicians may not react to mere reductions in malpractice risk. Instead, they may try to limit their personal risk of suit to as close to zero as possible. In the absence of any financial penalties for doing so, such an objective is a rational response to any level of malpractice risk.

The long-standing concern about defensive medicine suggests that traditional tort reforms may not do much to reduce defensive medicine. In the early 1970s, when direct malpractice costs were quite low and when the malpractice signals were much weaker than they are today, there was still considerable concern about defensive medicine.²³⁹

To the extent that tort reform does alter physician behavior, there may be costs as well as benefits. The OTA report observes:

Tort reforms are predicted to alter physician behavior because they dull the tort signal and therefore allow physicians to make clinical judgments with less anxiety about the risk of being sued. Yet, with a reduced malpractice signal, there could be a reduction in beneficial defensive medicine as well as defensive medicine that has less clinical value. Softening the tort signal will also change only those practices that are consciously motivated by fear of liability.²⁴⁰

To assess the impact of malpractice reforms on expenditures for defensive medicine, Daniel Kessler and Mark McClellan trace the impact of reforms that directly limit liability (caps on damage awards, abolition of punitive damages, abolition of prejudgment interest, and reform of collateral source rules) on the rate of growth in expenditures for hospitalization of elderly patients suffering from two heart ailments.²⁴¹ Comparing reform with non-reform states, Kessler and McClellan conclude that enactment of reforms led to

substantially lower expenditure growth, somewhat less growth in the use of intensive procedures (but smaller effects than would explain the expenditure differences, suggesting less intensive treatments were also affected), and no consequential effects on mortality.²⁴²

239. DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE, *supra* note 198, at 81.

240. *Id.* at 83.

241. Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q. J. OF ECON. 353 (1996).

242. *Id.* at 385.

The authors point out that this effect on expenditure growth seems to fade after a few years so that "long term expenditure growth is not slower in states that adopt direct reforms."²⁴³ But subsequent growth "does not appear to offset the expenditure reductions that occur in the years following adoption."²⁴⁴ We can anticipate more along this interesting line of research as the authors (and, one hopes, other investigators) explore the generalizability of their findings (to non-hospital expenditures, other illnesses, and younger patients) and probe the robustness of the defensive medicine explanation.

Proponents of tort reform have argued that it would increase the supply of physicians, particularly in underserved areas. A recent review of malpractice reform observes: "[D]espite anecdotal reports that favorable state tort environments with strict . . . tort and insurance reforms attract and retain physicians, no evidence suggests that states with strong . . . reforms have done so."²⁴⁵

Indiana is a case in point. Indiana has "the most comprehensive and severe set of insurance and tort reforms in the nation."²⁴⁶ But the "data indicate that Indiana's population continues to have considerably lower per capita access to physicians than the national average. Moreover, the state has not markedly improved its relative position since 1975."²⁴⁷

Fewer studies have attempted to ascertain the effect of tort reform on economic performance. The most ambitious is a recent effort to trace the connection between liability reforms and economic performance, as measured by productivity and employment.²⁴⁸ The researchers found correlations with increases in productivity and employment in some industries—although none in manufacturing or health care—but these might have been an artifact of the passage of these reforms in higher growth sunbelt states. When researchers tested to see if the various reforms could explain the observed

243. *Id.* at 387.

244. *Id.*

245. Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointments, Future Success?*, 20 J. HEALTH POL. POL'Y & L. 99, 120 (1995).

246. Eleanor D. Kinney & William P. Gronfein, *Indiana's Malpractice System: No-Fault by Accident?*, 54 LAW & CONTEMP. PROBS. 169, 188 (1991). In a survey of interest groups from six states, Indiana was the only one in which the respondents thought their malpractice reforms were effective. Sloan et al., *supra* note 226, at 683 n.13.

247. Randall R. Bovbjerg, *Lessons for Tort Reform from Indiana*, 16 J. HEALTH POL. POL'Y & L. 464, 476-77 (1991).

248. THOMAS J. CAMPBELL ET AL., THE CAUSES AND EFFECTS OF LIABILITY REFORM: SOME EMPIRICAL EVIDENCE (National Bureau of Economic Research Working Paper No. 4989, 1995).

changes, the results were inconclusive.²⁴⁹ The researchers pointed out that their results were consistent not only with a hypothesis that liability restrictions improve efficiency, but with several alternative hypotheses,²⁵⁰ including that the reforms merely affected the distribution of activity rather than its efficiency, and that they actually promoted an increase in socially harmful activities by diverting resources into activities attended by greater externalities.²⁵¹

In assessing the payment reductions produced by damage caps, it is important to distinguish between compensation delivered by the system and the transaction costs. While confirming that caps succeed in reducing delivery of compensation, the studies do not examine whether the cost of delivering that compensation was reduced proportionately. From the point of view of society as a whole, it is the transaction costs that are the cost of the system: these are the costs that consume wealth that society could otherwise expend on some other desired good. In contrast, the transfer of funds from a tortfeasor to an injured victim is a cost to the defendant, but not to society as a whole. So, while we know that a cap is an improvement from the point of view of the defendant, it does not automatically follow that there is any improvement from the point of view of society as a whole. It is possible that the transaction costs of the system have undergone a relative increase as the compensation delivered by the system has declined.

Whether or not caps produce the social benefit of lower transaction costs, it is evident that this improvement for defendants comes at the social cost of aggravating the tort system's problem of vertical equity. As noted above,²⁵² there is a long-standing pattern of victims with the most severe injuries receiving compensation that is only a fraction of their losses.

V. BEYOND THE "TORT REFORM" DEBATE

A. *The "Down by Law" Syndrome*

The case for "tort reform" resembles the old joke about the man who comes to a lawyer's office and tells the lawyer that he will engage

249. *Id.* at 22.

250. *Id.* at 28.

251. *Id.* "[F]irms from states with relatively low levels of liability may have relatively low costs because they do not bear the true costs of production; this could cause a positive association between observed productivity, employment and liability reductions even if liability reductions result in the inefficient deployment of resources into externality-intensive uses." *Id.*

252. *See supra* part II.E.4.

him if the lawyer assures him that he has clear basis for legal action. After listening to a lengthy account, the lawyer tells his visitor, "Your case is absolutely airtight. The other party is dead wrong, and cannot hope to win the case. I will be happy to represent you for a retainer of \$10,000." Upon hearing this, the client hurriedly gets up to leave. The attorney protests: "But I told you that your case was good, and you agreed to hire me if it was a good claim!" "Absolutely not," replied the client, "I'm leaving town. I told you the other guy's side."

Similarly, the evidence for "tort reform"—the facts about filings, recoveries, jury performance, and economic impact—ends up undermining rather than supporting the claims of its proponents. But advocates of tort reform, unlike the client in the joke, do not propose to leave town. Instead, tort reform is proffered as if it were a precious and proven elixir that will relieve America's ailments and restore its flagging fortunes. A cynic might attribute its persistence to the sway of the powerful interest groups that would benefit from reduced legal accountability.²⁵³ There is surely an admixture of such self-serving among its advocates. But from observing this issue for a number of years, I conclude that what lends urgency and appeal to this issue is more than the pursuit of interest group advantage. The case for tort reform is not a case based on calculating analysis of data about the working of the tort system; its appeal is more elemental and its case is not analytical but narrative. It is an assemblage of stories that come in various shapes and sizes—from macro-anecdotes about the United States having seventy percent of the world's lawyers to tales of beleaguered little leagues and abandoned day care centers to stories about absurd and outrageous awards, stories that are often embellishments where they are not complete fictions.²⁵⁴ What these stories would have us believe is that the system has "spun out of control" and America, or its substantial productive citizens, has been brought "down by law."

A historian looking back at our time might well find one of the distinctive and peculiar features of late twentieth century America to be the consternation about law that gripped much of American society in the 1980s and has persisted into the last decade of the century. America, we hear, has too much law, too many lawyers, too much spending on legal services, too much litigation, an uncontrolled activist judiciary, and an obsessively contentious population that sues at the drop of a hat. "Everyone knows" that the United States is the most

253. For a listing of prominent players, see T.R. Goldman, *Tort Reform: Interests and Agendas*, LEGAL TIMES, Apr. 17, 1995, at S30.

254. For a discussion of these stories, see *supra* notes 8-9 and accompanying text.

litigious nation on earth, indeed in human history, and that excessive resort to law marks America's moral decline and portends economic disaster in an increasingly competitive world. In this "down by law" view, America's institutions of remedy and accountability, and the lawyers that staff them, are burdensome afflictions, deadweight losses that detract from the contributions of the productive. Although the horror stories and macro-anecdotes that comprise the "down by law" view have been repeatedly exposed as misleading where not fraudulent, they have displayed a remarkable resilience in occupying the public forum and setting the terms of public debate.

But why does the common sense of "down by law" exercise such dominance? In part this reflects the thin and spotty character of the knowledge base about the legal system. A fund of basic information about the working of our legal institutions, of a sort that we take for granted in discussions of the economy, or health care, or education, simply does not exist.²⁵⁵ Its absence gives full play to the media's inclination to selective reporting of apparently bizarre claims and excessive awards. Beyond that, the discourse about tort reform reflects a fundamental imbalance that is intrinsic to tort policy-making.²⁵⁶ Individual tort claims involve a battle between victims and injurers about specific items of past conduct, a battle conducted by specialized champions within the limiting forms of the judicial contest. But the debate on tort policy is prospective; the participants are potential injurers and potential victims. Among the former are large organizations that can anticipate that they will be repeat players in the civil justice arena and have the resources as well as the incentive to invest in favorable rules. Against the tangible stakes of potential injurers, those of potential victims are remote and diffuse, so they are represented in policy debate by surrogates who may have cross-cutting interests (like plaintiffs' lawyers) or competing priorities (like politicians).

B. The Missing Themes of Remedy and Access

The "down by law" view is often presented as common sense, shared by all right-thinking Americans. But its relation to widespread perceptions of the legal system is more complicated: it is a selective, foreshortened rendition of public perceptions, one that omits some widespread concerns about civil justice.

255. For discussion of this lack of an adequate knowledge base, see Galanter, *supra* note 7, at 77; Galanter et al., *supra* note 10 at 185; Hensler, *supra* note 10, at 10; Saks, *supra* note 11, at 1147.

256. KOMESAR, *supra* note 111, at 153-95.

Much of the wider public shares negative perceptions of lawyers and litigation. In a recent survey, over half the public thought it a fair criticism of most lawyers that "[t]hey file too many lawsuits and tie up the court system."²⁵⁷ Another survey found a resounding seventy-four percent who agreed that "the amount of litigation in America today is hampering this country's economic recovery."²⁵⁸

The years since World War II have witnessed a prolonged expansion of the scope and adequacy of legal remedies for many of the calamities that invade the lives of ordinary Americans. Now, many of the injured and abused, unlike the predecessors, manage to obtain some significant remedy for their losses.²⁵⁹ The new accountability imposed on society's managers and authorities has, however, provoked a fierce recoil against the civil justice system and a heightened hostility toward lawyers. The jaundiced view, which sees lawyers as fostering a civil justice system that is devouring American business and unravelling authority is more intense and more widespread among elites—i.e., among those with more wealth, education, and power. Members of such "top" groups are most likely to think lawyers too numerous, too influential, and principally responsible for the litigation explosion.²⁶⁰

257. PETER D. HART RESEARCH ASSOCS., A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 16 (1993) [hereinafter HART SURVEY]. Much of the survey data discussed in this section is derived from three national sample surveys, each conducted by telephone. Two of these surveys were conducted for the *National Law Journal*, the first in 1986 and the second in 1993. The third major survey was conducted for the American Bar Association in 1993.

The first of the *National Law Journal* surveys was published in David A. Kaplan, *The NLJ Poll Results: Take Heed, Lawyers*, NAT'L L.J., Aug. 18, 1986, at S-2 (1004 persons surveyed). A second survey, which largely replicates the 1986 survey and thus provides a useful reading of recent changes, was conducted by Penn & Schoen Associates, Inc. for the *National Law Journal* and the West Publishing Company. The results of this survey were published in Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (815 persons surveyed).

The other 1993 survey was conducted by Peter D. Hart Research Associates, Inc., for the American Bar Association. It was reported in Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 (1202 persons surveyed). More extensive data can be found in HART SURVEY, *supra*.

258. Samborn, *supra* note 257, at 20.

259. See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 675-76 (1991); Marc Galanter, *Bhopals Past and Present: The Changing Legal Response to Mass Disaster*, 10 WINDSOR Y.B. ACCESS TO JUST. 151 (1990).

260. Samborn, *supra* note 257. The same disparate pattern reappears in the Hart survey, which found that:

By and large, those who see lawyers in a more favorable light than average tend to be downscale, women, minorities, and young

. . . .

. . . Americans who are more critical than average tend to be more establishment, upscale, and male. The higher the family income and socioeconomic status, the

For all their misgivings about the legal system, most Americans do not share the sense that it oppresses large businesses. When asked which types of people were "not apt to be treated fairly by the law," respondents to a 1987 Roper survey identified the poor (54%), uneducated (47%), and blacks (33%); only 5% thought "top business executives" were treated unfairly.²⁶¹ Indeed, when asked which types of persons "the courts are too lenient with," government officials and top business executives ranked, along with heroin users and frequent offenders, just below dope peddlers.²⁶²

There is an abiding sense that the system favors the rich and powerful. In 1985, when asked whether "[t]he justice system in the United States mainly favors the rich" or "treats all Americans as equally as possible," fifty-seven percent of respondents chose the "favored the rich" response and only thirty-nine percent chose the "equally" response.²⁶³ In a new survey conducted by *U.S. News & World Report*, fully seventy-five percent of the respondents thought that the American legal system affords less access to justice to "average Americans" than to rich people—and eighty percent of these thought "much less."²⁶⁴

The views of ordinary people cut across the concerns of "tort reform" advocates who condemn lawyers for promoting excessive use of the system. Most people would like to enlarge access to the justice system rather than restrict it. A recent Yankelovich survey found overwhelming majorities favor retaining broad rights to sue. Although thirty-nine percent prefer to retain the present balance between injured and insurers, another thirty-nine percent favor reform that would "tilt things a little more in favor of those injured in accidents," and only seven percent wish to tilt more the other way.²⁶⁵

There are several competing strains of discontent with law and lawyers: elites stress the widespread resentment of "too much law"; but wider publics are also apprehensive about "not enough justice." Although "too much law" currently dominates public debate, "not

more critical the adults are. Pluralities of college graduates feel unfavorably toward lawyers, while pluralities of non-college graduates feel favorable.

HART SURVEY, *supra* note 257, at 4-5.

261. Roper Report No. 87-7 (July 1987) (on file with author).

262. *Id.*

263. ABC News/Washington Post Survey (June 1985) (USACWP.196.R24) (on file with author). A decade earlier 59% of a national sample agreed that "the legal system favors the rich and powerful over everyone else." BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 234 (1977).

264. U.S. NEWS & WORLD REPORT, News Release (Jan. 21, 1995) (on file with author).

265. YANKELOVICH PARTNERS & TALMEY-DRAKE RESEARCH & STRATEGY, NATIONAL SURVEY ON TORT REFORM 3 (Jan. 1995) (Question 5).

enough justice" is not about to disappear. Attempts to curtail the perceived excesses of litigation will inescapably collide with less vocal but equally tenacious concerns to enlarge the remedies and protections afforded by the legal system and to broaden access to them.

C. Some Real World Problems of the Real World Tort System

For now the debate on tort reform overflows with proposals to solve the "too much law" problem by reducing access and curtailing remedies; unfortunately it contains very little that reflects wider public concerns about "not enough justice." Enlarging justice is not just a matter of leaving the tort system undisturbed. That its most vocal critics misread the system does not mean that it is performing optimally. At the outset I mentioned that the "common-sense" attack on the tort system passed by the real problems of the system. Different observers have their own lists of these, but in closing I want to point briefly to several serious structural problems that surfaced in our quick tour of the system. For simplicity, I label them transaction costs, misallocation, rationing, and impaired information transmission.

Transaction Costs: Tort is an expensive way of compensating injury victims. Compared to other systems of compensating victims, tort carries high transaction costs. Because each instance of compensation involves individualized determinations of liability and damages, it is an expensive way to move money around.²⁶⁶ A very large portion of the money extracted from injurers by the tort process is consumed by the tort process itself. Analyzing data from a number of studies, RAND researchers estimated that the costs of tort litigation consumed roughly half of the \$29 billion to \$36 billion of private expenditure on that litigation in 1985.²⁶⁷ This relatively expensive system requires additional justification to offset its inefficiency as a system for compensating specific classes of injuries. The principal justification is the generation of preventive effects, a complex process misleadingly con-

266. See Galanter, *Transnational Traffic*, *supra* note 191.

267. HENSLER ET AL., *supra* note 43, at 26. This estimate was for all cases resolved after filing in courts of general jurisdiction, but did not include claims resolved without filing. Nor did it include the cost of the governmental institutions, which another team of RAND researchers estimates as \$320 million for 1982. JAMES S. KAKALIK & ABBY E. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 62 (1982). The overhead differs from one field of tort liability to another. RAND researchers concluded that, in 1985, costs amounted to 48% of total expenditures on auto tort litigation, 57% of expenditures on tort litigation that did not involve autos, and 63% of expenditures on asbestos claims. HENSLER ET AL., *supra* note 43, at 27-28. These studies do not compare costs at different points in time, but there is some reason to think that there is variation from time to time as fields become more routine or more problematic.

densed into talk of deterrence. Another is its flexibility and adaptiveness: the tort system and its personnel are in place and need not be reformulated and reinstitutionalized for every new task of risk control. Its open texture and retrospective operation permit rapid adaptation to new technologies and new encounters.²⁶⁸

Misallocation: A second and related problem is that as a distributive mechanism tort tends to have a bias: it tends to undercompensate large losses and overcompensate small losses. Victims with smaller injuries tend to receive more than their economic losses, while the total tort recovery of those most seriously injured is equal to less, often much less, than their economic losses.²⁶⁹

Rationing: The institutional capacity of the tort system is grossly insufficient to do what it promises to do. With the exception of automobile-related injuries, rates of claiming are low.²⁷⁰ It has been observed that the tort system can remain afloat so long as only a small minority of those entitled to invoke it do so. If the constraints of ignorance, inhibition, and transaction costs were lowered significantly, the system would be unable to process all the claims for which it purports to provide remedies.

Not only are relatively few claims brought, but the system has a limited capacity to adjudicate those disputes that arise from the claiming process. As more claims are brought to the system and adjudication becomes more complex and nuanced, the capacity of the system to provide adjudication has not grown apace. A shrinking portion of cases is actually resolved by trial or other forms of authoritative disposition. For example, in federal courts the percentage of civil cases reaching trial has dropped from 11% in 1961 to 3.5% in 1994.²⁷¹

Impaired Information Transmission: The shrinking of its relative capacity to provide adjudication makes the system function increasingly by transmitting signals to parties and potential parties.²⁷² But there are reasons to suspect that there are significant deficiencies in the production, transmission, and reception of the knowledge upon which the system of "bargaining in the shadow of the law" depends.

268. On the "accumulation of unregulated technologies," see Paul Shrivastava, *Societal Contradictions and Industrial Crises*, in *LEARNING FROM DISASTER*, *supra* note 191, at 259.

269. The studies establishing this pattern are reviewed *supra* part II.E.4.

270. See *supra* part II.B.

271. 1994 ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT, tbl. C-4.

272. The assumption is that most disputed claims will be disposed of by the parties (and their lawyers), who will bargain out a resolution "in the shadow of the law," while the minority of adjudicated cases contribute to the stock of signals and markers that guide negotiators, as well as potential claimants and defendants, potential victims and injurers. See *supra* part II.A.

Skewed reporting by the media and suppression of information by confidential settlements and protective orders compound the cognitive biases that attend the use of information in the litigation process.²⁷³ The efficacy of the tort system depends on a knowledge system, and we know very little about how well it works.

American tort law manages to be an expensive and inefficient way to deliver compensation, a risk regulator of uneven and largely unknown efficacy, an influential register of our moral concerns, and a remarkable enclave of individualized treatment that has survived in a world in which the ascendancy of organizations over natural persons is ever more pronounced.²⁷⁴ It richly deserves a searching examination of its genuine problems. The current debate on tort reform falls woefully short of being such an examination. A deficient knowledge base is overwhelmed by the conjunction of interest group campaigns and "down by law" folklore. We are entrapped in a skewed debate that addresses the costs (and supposed costs) of tort law with scant consideration of its benefits, of the costs of alternative ways of delivering those benefits, and of its interaction with the other systems of remedy, control, and moral education.²⁷⁵

273. Marc Galanter, *The Regulatory Function of the Civil Jury*, in VERDICT, supra note 45, at 80-87.

274. James S. Coleman, *The Rational Reconstruction of Society: 1992 Presidential Address*, 58 AM. SOC. REV. 1 (1993); JAMES S. COLEMAN, POWER AND THE STRUCTURE OF SOCIETY (1974).

275. Peter L. Kahn, *Regulation and Simple Arithmetic: Shifting the Perspective on Tort Reform*, 72 N.C. L. REV. 1129 (1994).

