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A Profile of Tort Litigation in Georgia and Reflections on Tort Reform

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I. INTRODUCTION

Tort reform is once again the subject of intense public and political interest. States that adopted substantial tort reform measures in the late 1980s enacted revisions and additional measures in 1995.[1] The Congressional Joint Conference Committee recently approved a bill that would have imposed preemptive federal reform on certain aspects of state tort law.[2] In academic

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[1] *See, e.g.*, Civil Justice Reform Amendments of 1995, P.A. 89-7, 1995 Ill. Legis. Serv. 233 (West) (capping punitive damages at greater of $500,000 or three times economic damages, abolishing joint liability, and prohibiting punitive damages altogether unless conduct undertaken "with evil motive or with a reckless and outrageous indifference . . . to the rights of others"); Act of April 26, 1995, Pub. L. 278-1995, 1995 Ind. Legis. Serv. 391 (West) (modifying joint and several liability in products liability cases, strengthening assumption of risk defense, providing for government standards defense, and limiting punitive damages to greater of three times economic damages or $50,000); Act of May 25, 1995, Ch. 287, 1995 Okla. Sess. Law Serv. 1337 (West) (providing for three categories of punitive damages described *infra* note 166); Act of April 20, 1995, Ch. 19, 1995 Tex. Sess. Law Serv. 108 (Vernon) (limiting punitive damages to $200,000 or two times economic damages plus amount equal to any noneconomic damages up to $750,000); Act of May 18, 1995, Ch. 136, 1995 Tex. Sess. Law Serv. 971 (Vernon) (eliminating joint liability for defendants less than 51% at fault).

[2] Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong., 2d Sess. (approved Mar. 14, 1996). The House of Representatives and Senate had previously passed different versions of this legislation. Common Sense Product Liability and Legal Reform Act of 1995, H.R. 956, 104th Cong., 1st Sess. (1995) (approved Mar. 10, 1995); Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess., (1995) (approved May 10, 1995).

There were substantial differences between the bills as originally passed by the House and Senate. Generally speaking, the original House bill included more far-reaching tort reform than its Senate counterpart. For a concise summary of the bills as originally passed by the House and Senate, see *Federal Torts Reform*, Prod. Liab. Rep. (CCH) No. 833, at 7 (May 30, 1995).

The differences between the House and Senate bills were reconciled in the conference committee. The bill as approved by the conference committee limits the application of strict liability against retailers, imposes limitations on punitive damages, abolishes joint-and-several liability for noneconomic damages, creates defenses based on user intoxication, misuse, and alteration of the product, and establishes federal statutes of limitation and repose for products liability claims. For a concise summary of the bill as approved by the conference committee, see *Common Sense Product Liability Legal Reform Act of 1996*, Prod. Liab. Rep. (CCH) No. 854, at 5 (Mar. 19, 1996) [hereinafter *Reform Summary*]. For background on this federal legislation, see H.R. CONF. REP. No. 481, 104th Cong., 2d Sess. 25 (1996). For background on the original House and Senate bills, see *Common Sense Legal Reforms Act of 1995: Hearings on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995); H.R. REP. NO. 63, 104th Cong., 1st Sess., pt. 1 (1995); H.R. REP. NO. 64, 104th Cong., 1st Sess., pt. 1 (1995); S. REP. NO. 69, 104th Cong., 1st Sess. (1995).

circles, the American Law Institute is considering a new Restatement of Products Liability,[3] which is viewed by many to be more of a "reform" than a "restatement" of existing law.[4] The national debate over health care has generated various proposals to reform medical malpractice law.[5]

While this Article was in page proofs, President Clinton vetoed the bill. Neil A. Lewis, *Clinton Vetoes Liability Limits in Product Suits*, N.Y. TIMES, May 3, 1996, at A1.

[3] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995).

[4] *See, e.g.*, Roland F. Banks & Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411, 412 (1993) (disagreeing with *Restatement* authors that requiring plaintiff to produce reasonable alternative design in design defect cases reflects "overwhelming majority of cases"); Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 TENN. L. REV. 1105, 1105 (1994) (describing as "disturbing," "surprising," and "radical" proposed changes regarding liability for distribution of products and interpretation of "unmerchantability" for purposes of Article 2 of UCC); Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173, 1173 (1994) (arguing that authors of Restatement "have decided to follow their own instrumentalist views rather than the dominant case law in the subject and reintroduce nineteenth-century concepts of 'fault' into modern products liability law in the form of negligence"); Jerry J. Phillips, *Achilles' Heel*, 61 TENN. L. REV. 1265, 1266 (1994) (wondering if "dramatic" abandonment of strict liability in favor of negligence for design and warning defects will leave Restatement "high and dry like an abandoned ship as the sea of progress moves forward"); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 688 (1995) (noting proposed changes in plaintiffs' ability to present evidence in design cases "call into question the claim of the Draft to be a Restatement of the Law, at least as the law is practiced"); Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167 (1995) (criticizing proposed Restatement's treatment of design defect as not supported by case law, policy, or economics).

[5] Some commentators advocate the adoption of enterprise liability, under which the focus of medical malpractice litigation would shift from individual health care providers to health care organizations such as hospitals or HMOs. *E.g.*, Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381 (1994); Barry R. Furrow, *Enterprise Liability and Health Care Reform: Managing Care and Managing Risk*, 39 ST. LOUIS U. L.J. 79 (1994). Enterprise liability was the cornerstone of malpractice reform in President Clinton's original health reform proposal. S. 1775, 103d Cong., 1st Sess. (1993).

Other commentators argue that the historical commitment to a resource-blind, customary practices standard of care in malpractice cases cannot survive the injection into the system of the lower economic strata by a national health care plan. They propose that courts recognize standards of care that take into account the reality of wealth stratification as it affects health care delivery. *E.g.*, James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 CORNELL L. REV. 1382 (1994).

Professor O'Connell argues that the personal injury tort system as a whole must be considered as a factor of rising medical costs. He proposes a "no fault" system that would

The phrase "tort reform" generally connotes changes in legal doctrine intended to reduce the number of suits filed, make it more difficult for plaintiffs to prevail, or reduce the amount of awards made to successful plaintiffs. These objectives stem from the conviction that tort litigation has gotten out of hand. The political rhetoric of tort reform exclaims that there are "too many lawsuits and runaway juries."[6] Excessive litigation is thought to produce a number of social ills, including increased insurance costs, decreased international competitiveness by American industry, and delayed access, if any, by American consumers to beneficial drugs or other products.[7] This encapsulated[8] case for tort reform rests

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allow parties to eliminate pain and suffering claims in return for prompt and periodic payment for the injured party's actual economic losses plus a reduced claimant's attorney fee. Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303 (1994).

[6] The claim that there are too many lawsuits and excessive jury awards has been a feature of the tort reform political rhetoric for at least a decade. The Tort Policy Working Group in President Reagan's administration found that tort reform was needed, in part, because of "the extraordinary growth over the last decade in the number of tort lawsuits and the average award per lawsuit." TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 2 (1986).

Vice President Dan Quayle continued this theme in his highly publicized critique of the legal system before the American Bar Association in August of 1991. *Do We Have Too Many Lawyers?*, TIME, Aug. 26, 1991, at 54. In supporting the Access to Justice Act of 1992, H.R. 4155, 102d Cong., 2d Sess. (1992), Representative Hamilton Fish commented that "the American people . . . believe there are too many lawsuits, . . . too many excessive damage awards." Press Conference with Vice President J. Danforth Quayle, Rep. Hamilton Fish (R-NY), Sen. Charles Grassly (R-IA), *in* FED. NEWS SERV., Feb. 4, 1992, *available in* LEXIS, News library, Script file. Senator Rod Grams (R-MN.), lending his support to the current proposed federal products liability reform, remarked that "89% [of Americans] believe that too many lawsuits are being filed in America today. Our current system benefits lawyers and the dishonest. It treats both plaintiffs and defendants unfairly. Inconsistent laws force both sides to sacrifice time and money on unpredictable litigation." 141 CONG. REC. 6231-32 (daily ed. Apr. 4, 1995).

[7] The legislative history of the Common Sense Product Liability Legal Reform Act of 1996 recently approved by the conference committee, discussed *supra* note 2, is replete with examples of three perceived socially dysfunctional effects of the current tort system: reduced international competitiveness, stifled innovation, and delayed or denied public access to new products. In terms of reducing competitiveness, Patrick J. Head, vice president and general counsel for the FMC Corporation, testified that there is "widespread consensus that American businesses need to improve their competitiveness by reducing costs, by expanding the markets for their products, and by pursuing innovation" and noted that "[o]ur current product liability system undermines all of these efforts." *Hearings*, *supra* note 2, at 100. Similarly, Charles E. Gilbert, president of Cincinnati Gilbert Machine Tool Company,

on empirical assumptions about the number of tort claims, the frequency and size of plaintiff verdicts, and the effect of tort litigation on insurers, manufacturers, health care providers, and others.

Although the political rhetoric for tort reform is grounded in empirical assumptions about civil litigation patterns, there are surprisingly few hard data to confirm or refute these assumptions. Tort law has been the historic province of the states, and an estimated ninety-five percent of tort litigation occurs in state courts.[9] Most states, however, do not maintain uniform and

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testified that the international competitiveness of U.S. machine tool manufacturers suffers because foreign tool builders, relatively new to the market, "do not bear the significant long-tail exposure of U.S. builders" to products liability suits. *Id.* at 52.

In terms of stifling innovation, a report by the American Medical Association presented to the Senate Committee on Commerce, Science and Transportation stated that the current products liability system is having a "profoundly negative impact on the development of new medical technologies" because "product liability suits have exposed manufacturers to unacceptable financial risks." S. REP. NO. 69, *supra* note 2, at 9 (quoting testimony of Richard Kingham, Apr. 5, 1990). Similarly, Peter Chevalier, vice president of Medtronic, Inc., testified before the House Committee on the Judiciary that "the current product liability and litigation system in the U.S. is stifling and discouraging the ability of medical device manufacturers to innovate in this country" so much so that Medtronic "recently moved the headquarters [of] the business unit responsible for managing the development of breakthrough technologies, from our Minneapolis Corporate Center to the Netherlands." H.R. REP. NO. 64, *supra* note 2, at 10.

Finally, in terms of delaying or denying public access to new products, Pace University Professor of Law M. Stuart Madden submitted to the House Committee on Commerce a report indicating that 36% of American manufacturers have withdrawn products from the world market, 47% have withdrawn products from the domestic market, 39% have decided not to introduce new products, and 25% have discontinued new product research because of liability costs. H.R. REP. NO. 63, *supra* note 2, at 9. Similarly, Julie Nimmons, President and C.E.O. of Schutt Sports Group, one of two remaining U.S. manufacturers of football helmets, testified before the Senate Committee on Commerce, Science and Transportation about a baseball safety product her company did not make because no supplier would accept the potential liability associated with providing the raw materials. S. REP. NO. 69, *supra* note 2, at 46.

[8] For more detailed discussions, see THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991); LIABILITY: PERSPECTIVE AND POLICY (Robert E. Litan & Clifford Winston eds., 1988); TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE (Peter H. Schuck ed., 1991); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987).

[9] TRENDS IN TORT LITIGATION—THE STORY BEHIND THE STATISTICS 6 (Deborah R. Hensler et al. eds., 1987) [hereinafter TRENDS].

comprehensive records of civil litigation in general and tort litigation in particular. The National Center for State Courts (NCSC), in conjunction with other organizations, publishes annual reports on state court caseloads.[10] The NCSC reports are based on data supplied by state court administrative offices. The data supplied by these offices are not comprehensive, uniform, or detailed. Until recently, fewer than half the states provided the NCSC with such basic information as the number of tort claims filed and disposed of in a given year.[11] The limited data on tort litigation provided by these states are quite general. Most do not distinguish between different types of tort claims or describe the frequency and size of plaintiffs' verdicts.

Academic studies are another source of empirical data regarding tort litigation. The Rand Corporation's Institute for Civil Justice has published a number of reports, including several longitudinal studies of jury verdicts in San Francisco and Chicago.[12] Other studies focus on a particular jurisdiction,[13] a particular type of tort

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[10] These reports are a joint project of the Conference of State Court Administrators, the State Justice Institute, the Bureau of Justice Statistics, and the National Center for State Courts' Court Statistics Project. The most recent report is BRIAN J. OSTROM & NEAL B. KAUDER, NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1993 (1995) [hereinafter NCSC WORK OF STATE COURTS 1993].

[11] The information contained in the NCSC's annual reports comes from published and unpublished sources supplied by state court administrators and appellate court clerks. The published sources are typically official state court annual reports, while the unpublished sources include internal management memoranda and computer generated outputs. As such, the level of detail contained in the NCSC's annual reports is strictly limited to the level collected at the state level. As of 1993, the most recent year for which data is available, only 27 states keep specific track of the number of tort actions as a subset of all civil claims filed in a given year. Currently, only 10 states differentiate between categories of tort cases filed (*e.g.*, automobile accidents, premises violations, medical malpractice, or products liability), only 10 states keep track of the ultimate disposition of tort cases as a whole, and only two states (Florida and Wisconsin) do both.

[12] *E.g.*, MARK A. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS (1987); MICHAEL G. SHANLEY, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980 (1983); MICHAEL G. SHANLEY & MARK A. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS (1987).

[13] *E.g.*, Patrick Hubbard, *"Patterns" in Civil Jury Verdicts in the State Circuit Courts of South Carolina: 1976-1985*, 38 S.C. L. REV. 699 (1987); David J. Nye et al., *The Causes of the Medical Malpractice Crisis: An Analysis of Claims Data and Insurance Company Finances*, 76 GEO. L.J. 1495 (1988) (medical malpractice claims in Florida).

claim,[14] or a particular facet of tort doctrine.[15] These studies are useful, but limited, in informing the tort reform policy debate. They are useful in that they supply some empirical evidence for discussing the assumptions that underlie the debate. They are limited in that they tend to focus on a narrow point in time or a single facet of a complex problem. Deborah Hensler, one of the most prominent social scientists in this field, likened the interpretation of existing data to reading tea leaves.[16] She described the problem as follows:

> Information about the nation's state and federal courts is incomplete and sometimes unreliable. As a result, the analyst interested in advising decision makers about the actual state of affairs in the civil justice system is forced to rely on a combination of analyses of public record data, inferences from academic research on specific aspects of civil litigation, and expert judgment. At times, one feels uncomfortably like the fortune-teller who reads tea leaves to determine the circumstances and future of her clients.[17]

Similarly, Michael Saks compared the student of civil litigation to a paleontologist.[18] Just as a paleontologist extrapolates a whole dinosaur from a few bones, the policy analyst bases her "under-

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[14] *E.g.*, HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990), *discussed in* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) [hereinafter *Inside the Quiet Revolution*]; James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) [hereinafter, *The Quiet Revolution*].

[15] *E.g.*, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not "Moral Monsters"*, 47 RUTGERS L. REV. 975, 985-1042 (1995).

[16] Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?*, 16(2) JUST. SYS. J. 139 (1993).

[17] *Id.* at 140.

[18] 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).

standing of the tort litigation system . . . upon evidence that is surprisingly incomplete and inadequate."[19]

Fact-based studies of tort litigation in Georgia are almost nonexistent.[20] Georgia is one of many states that does not provide the NCSC with any information regarding tort litigation patterns. Georgia does not provide such information because it is not compiled. It is not compiled because these data are not systematically maintained by local courts and reported to the Administrative Office of the Courts.[21] Because the data are not routinely collect-

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[19] *Id.*

[20] One notable exception is the series of articles by Professor R. Perry Sentell, Jr. surveying the perceptions of judges and attorneys on jury performance in negligence actions. Both judges (state and federal) and attorneys (plaintiff and defense) reported a high level of satisfaction with the performance of juries in negligence cases. R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59 (1992); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Trenches*, 28 GA. L. REV. 1 (1993).

[21] *See, e.g.*, JUDICIAL COUNCIL OF GA. & ADMIN. OFFICE OF THE COURTS, NINETEENTH ANNUAL REPORT ON THE WORK OF THE GEORGIA COURTS, 1991-1992 (1994) (providing Georgia case-related information without reference to tort litigation patterns). The collection and reporting of court case-related information is one of the traditional functions of state-level Administrative Offices of the Courts (AOC). In Georgia, as is typical in a significant number of states, the data maintained by trial courts and reported to the AOC are restricted to the number of criminal and civil actions filed and disposed of in a given year. At most, these filings are broken down into felony, misdemeanor, general civil, and domestic relations cases. No attempt is made to differentiate between categories of torts (*e.g.*, automobile accidents, premises violations, medical malpractice, or products liability). Furthermore, no attempt is made to record the disposition of each case (*e.g.*, settlement, transfer, default judgment, or trial). Finally, for those cases that went to trial, no information is tabulated as to the verdict or, if the plaintiff won, as to the damages awarded. *Id.* Unless such detailed information is collected on a systematic basis, it is virtually impossible to identify trends in a state's tort system.

The obstacles to actually gathering such data are manyfold. Not all courts have computer systems capable of keeping track of civil litigation data. Moreover, the courts that do have automated recordkeeping systems do not all use the same software package. Thus, even those courts with computerized recordkeeping capability may not be able to collect and maintain the same information. Data collection is not costless and clerks' offices may not have the resources to devote to this task. Data collection may require judgement, such as whether to classify a particular case as a products liability, premises liability, or automobile accident claim. Clerks' office personnel may not have the training to make such judgments. Court clerks lack incentives to engage in the data collection useful to inform tort reform policymaking because such information is not especially helpful to them in their primary task of managing court dockets. From a docket management perspective, it does not matter whether a civil case is contract or tort, or what damages were awarded. Finally, superior court clerks in Georgia are independently elected officials whose position is created by the

ed and reported, it is impossible to answer such elementary questions as: How many tort cases are filed in Georgia courts? What types of claims are brought? How many go to trial? How often do plaintiffs prevail? What is the typical damage award when the plaintiff does prevail? These questions, empirical in nature, are fundamental to the tort reform debate.

Our study begins to provide some of the information needed to construct a profile of tort litigation in Georgia. We examined the official court records of over 43,000 civil cases filed in four Georgia counties between 1990 and 1993. We then compiled detailed information from all of the more than 2,100 personal injury cases within that group. The data are presented in the tables included in the Appendix.

While we were compiling data from four Georgia counties, the National Center for State Courts and the Bureau of Justice Statistics (BJS) conducted a study of civil litigation in the nation's seventy-five largest counties, including Fulton County, Georgia, for fiscal year (FY) 1992. This project has yielded two reports: one describing tort filing and disposition patterns[22] and the other examining civil jury verdicts.[23] When possible, we have compared the FY 1992 Fulton County data with that compiled from our study of four Georgia counties. The resulting evidence presents a preliminary profile of tort litigation in Georgia.

As set forth in more detail below, our major findings are that: (1) tort cases constitute a small percentage of civil litigation; (2) the number of tort filings has not increased over the four year period; (3) a large percentage of tort cases involves relatively simple disputes; (4) only a small percentage of tort suits filed actually go to trial; (5) plaintiffs and defendants enjoy almost equal rates of success in the cases that go to trial; and (6) in those cases in which

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Georgia Constitution. Superior court clerks have a tradition of maintaining their independence and resisting efforts to centralize their operations in a way that would be needed if uniform civil litigation data were to be systematically collected and reported.

[22] STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES (1995) [hereinafter BJS TORT CASES IN LARGE COUNTIES].

[23] CAROL J. DEFRANCES ET. AL., BUREAU OF JUSTICE STATISTICS, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (1995) [hereinafter BJS CIVIL VERDICTS IN LARGE COUNTIES].

These reports are discussed in more detail *infra* note 28.

the plaintiff does prevail, compensatory damages tend to be relatively modest in amount and, outside of Fulton County, punitive damages are rarely awarded.

We begin our paper by describing our research methodology in Part II. In Part III we present and analyze the data that support the findings listed above. Our paper concludes in Parts IV and V with a brief discussion of the implications of these findings for the tort reform debate, both on a state and federal level.

II. METHODOLOGY

Research methodology issues include selection of study sites, time period, case coding instrument, data collection and verification procedures, and analysis.

A. SELECTION OF STUDY SITES

Study sites were not selected in statistically random fashion but were chosen to reflect different regions and types of cities in the state. The final selection of Bibb, Gwinnett, Irwin, and Oconee Counties insures diversity in region as Bibb is in central Georgia, Gwinnett in the greater metropolitan Atlanta area, Irwin in the southern part of the state, and Oconee in the general northeastern sector. There is also considerable diversity in locale as Bibb represents a rather sizeable urban area (but exclusive of Atlanta), Gwinnett is a major suburb of Atlanta, Irwin is a small, rural community, and Oconee represents a traditionally rural county currently dealing with considerable development.

We did not collect data from Fulton County because, as noted earlier,[24] the National Center for State Courts and the Bureau for Justice Statistics were doing so at the same time. Concerted efforts were made to render our data collection instrument compatible with that used by the NCSC and BJS to facilitate comparison of our results with that research. The representative character of the study sites and the availability of Fulton County data, then, insure that the resulting profile offers a good picture of tort litigation in Georgia courts.

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[24] *Supra* notes 22-23 and accompanying text.

B. TIME PERIOD/SAMPLING

The four years of 1990 through 1993 were selected primarily because they offered the most recent evidence. Available and related research on patterns of tort litigation has focused on earlier time periods.[25] This more recent perspective, then, provides a basis to compare earlier trends and profiles. A related factor in the selection of 1990 through 1993 was the fact that the court clerk files in Gwinnett were automated in 1990. This allowed a more efficient identification of tort cases and avoided a more costly search of civil litigation files in that jurisdiction.

Data were collected on all 2118 tort cases filed in the four counties during the four year time period. There was, then, no sampling of tort cases in any of the four years. The resulting profile is based on all tort litigation filed in the superior courts[26] in the four counties during the specified time period and the FY 1992 data from Fulton County contained in the BJS reports on Tort Cases in Large Counties[27] and Civil Jury Cases and Verdicts in Large Counties.[28]

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[25] *E.g.*, TRENDS, *supra* note 9; Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443, 443-67 (1987); Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321 (1986).

[26] Both our study and those conducted by NCSC and BJS gather data from the trial courts of general jurisdiction (*i.e.*, superior courts). It should be noted, however, that in some Georgia counties tort claims can also be brought in state courts. *See generally* GA. CONST. art. VI, § 1, ¶ 6 (1983) (establishing judicial subdivisions and authorizing creation of state courts); O.C.G.A. § 15-7-4(2) (1994) (granting state courts jurisdiction over most civil actions). Bibb and Gwinnett Counties have state courts while Irwin and Oconee Counties do not. Gwinnett's automated recordkeeping system includes both superior and state court cases.

We did not collect data from Bibb County State Court because the relevant clerk's office is completely separate from the clerk of the Superior Court. In both offices, it was necessary to go through every civil case file to identify tort cases. Limitations of time and money constricted our efforts to do this. As a result, we decided only to study tort litigation in superior court as that jurisdiction was more likely to include the more serious and consequential claims. Virtually all national research on tort litigation has used courts of general jurisdiction (*i.e.*, superior courts) as the basic point of reference. Therefore, not including Bibb County State Court data is neither unusual nor compromises the reliability of our general findings. Thus, our four county data pool includes all the tort cases filed in Gwinnett, Irwin, and Oconee Counties and all the tort cases filed in superior court in Bibb County during the four-year period.

[27] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22.

[28] BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23.

The NCSC/BJS research focused on the nation's 75 largest jurisdictions. A sample of 45 counties was randomly selected from these 75 jurisdictions. Fulton County (Atlanta) was one of the 45 randomly selected counties.

C. CASE CODING INSTRUMENT

Our case coding instrument was designed to be compatible with a similar instrument used by the NCSC and BJS in their study of civil litigation in large counties. The coding form allowed extraction of information regarding the parties, the attorneys, the type of claim, the nature of the injury, the type and timing of disposition, and damages (if any).

Three samples of civil cases were randomly selected from each of the 45 counties for FY 1992: (1) a sample of general civil cases (*e.g.*, torts, contracts, property); (2) an additional sample of tort cases; and (3) a sample of civil trials. If a given jurisdiction had less than 300 civil trials during FY 1992, then the universe of trials was selected. If there were more than 300 civil trials in FY 1992, then a sample of those trials was randomly selected.

Prior to analyzing the data collected in the first and second samples, the data sets were merged. Specifically, the sample of general civil cases was combined with the second, additional sample of tort cases. This combined sample, then, includes a disproportionate number of tort cases. As such, it constitutes the basis for our description of tort litigation in Fulton County. For additional information, see BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 6.

During FY 1992, there were 120 civil trials in Fulton County. Consequently, the NCSC/BJS data set includes the universe of civil trials for that time period. These data serve as the basis for our description of tort trial outcomes and damage awards in Fulton County. For additional information, see BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23, at 11.

The Fulton County data regarding tort filings, dispositions, and verdicts were collected as part of these studies. The published studies, however, often do not report Fulton County figures separately. Rather, they report patterns based on aggregate data collected from 45 jurisdictions, including Fulton County. Brian Ostrom, Director of the National Center for State Courts' Court Statistics Project, provided us with the Fulton County data. A computer disc containing the disaggregated Fulton County data is on file with the authors. Brian Ostrom also provided us with information on NCSC/BJS sampling procedures over the telephone. Telephone Interview with Brian Ostrom, Director of the National Center for State Courts' Court Statistics Project (Sept. 6, 1995).

When comparing the Fulton County data base with the four-county data we collected, it is important to keep some basic differences in mind. First, our four-county data base covers four years, 1990 through 1993. The Fulton County data set only includes information for fiscal year 1992. Second, the Fulton County data set consists of random samples drawn from the total civil docket and, within that, is disproportionately weighted for torts. Our four-county data base consists of the universe of tort cases (*i.e.*, all tort cases filed from 1990 through 1993). Third, the Fulton County data base consists of cases disposed in FY 1992, while our data were taken from cases filed from 1990 through 1993. These differences do not make comparisons impossible, but they should be recognized in any descriptive profile of tort litigation in Georgia.

D. DATA COLLECTION AND VERIFICATION PROCEDURES

Data collection and verification procedures in research of this type are time-consuming, labor-intensive processes. The complete effort consisted of several distinct stages: (1) performing on-site examination of individual tort litigation records and completion of coding instrument; (2) building a computer file with that case-level data; (3) checking the reliability of individual computer files; (4) correcting any coding errors; (5) conducting preliminary statistical tests in a second reliability test; (6) correcting any remaining coding errors; and (7) conducting final statistical analyses. This process insures that the data are reliable (*i.e.*, that errors in data collection have been identified and corrected).

E. LIMITATIONS

Before describing the profile revealed by the data, some words of caution are in order. First, the bulk of the data comes from four counties that, although representative, were not randomly selected. Therefore, the profile is not strictly generalizable to the entire state in a statistical sense. As we explain later, however, the consistency of the Georgia data with those generated elsewhere suggests an overall pattern that we think probably holds true for most of the state.

Second, there is an element of judgment involved in classifying a case as a tort. Some commercial disputes arguably could be classified as breach of contract or tort (*e.g.*, tortious interference with business or fraud). While efforts were made to properly classify each case, our data set might not include every case in which a business tort or fraud claim appeared in commercial disputes. We are quite confident, however, that the data are complete and accurate with regard to physical injury torts.

Third, data regarding damages may be incomplete in two respects. Court records often only note that some amount of damages were awarded and rarely distinguish either elements of compensatory damages or compensatory and punitive damages. Thus, most of the data on damages are reported as "undifferentiated." Moreover, court records usually contain no information on amounts paid in settlement. Consequently, we can say very little

about that significant dimension of tort litigation. Appropriate caution, then, must be exercised when drawing any conclusions about the frequency, type, and size of damages in tort litigation in the jurisdictions studied.

III. A PROFILE OF TORT LITIGATION IN GEORGIA

Our profile of tort litigation in Georgia focuses on five dimensions: (1) filing patterns; (2) types of cases; (3) disposition patterns; (4) the number and outcomes of trials; and (5) damage awards. The overall profile revealed by the data is not one of a system in crisis. The data show that tort cases constitute a small percentage of civil filings, that filing rates are not increasing, that most tort cases involve simple disputes that are most often settled within a year of filing, that few cases go to trial, that plaintiffs win slightly more than half of those trials, and that damage awards are modest in amount. With the possible exception of damages, this profile is consistent with litigation patterns described in other recent studies.

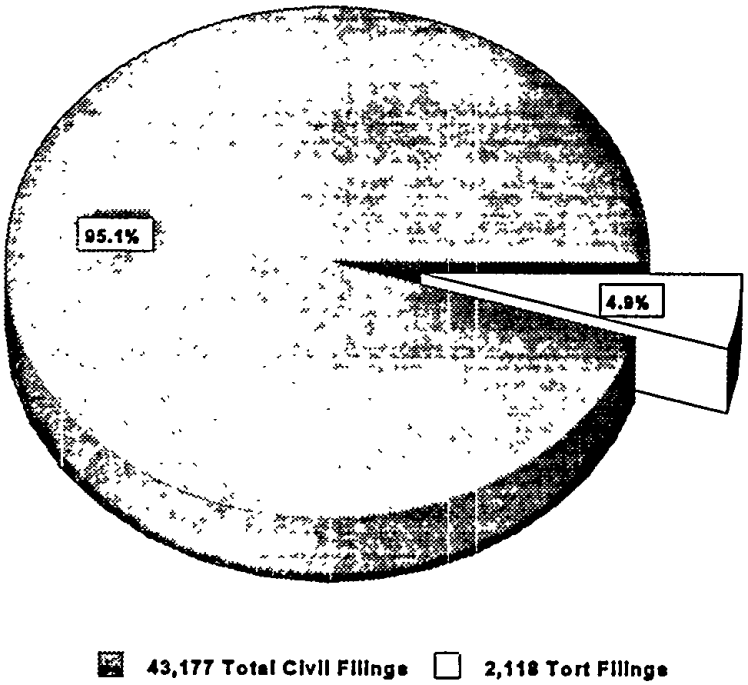
A. TORT FILINGS

1. Filings as a Percentage of Civil Cases. There were 43,177 civil cases[29] filed in Gwinnett, Bibb, Oconee, and Irwin Counties during the four-year period of our study. Of these, only 2,118 cases were identified as tort claims. Thus, tort claims accounted for only 4.9% of the civil cases filed in all four counties over the four year period. See Figure 1.

[29] We followed the classification scheme used by the Georgia Administrative Office of the Courts (AOC). Under this system, civil cases include those sounding in contract, real property, tort, domestic relations, and a variety of miscellaneous matters such as asset forfeitures, appeals from lower courts, and bar admissions. JUDICIAL COUNCIL OF GA. & ADMIN. OFFICE OF THE COURTS, *supra* note 21.

Figure 1

Tort Claims as Percentage of Total Civil Filings
in Four Georgia Counties
1990-1993



Data taken from Table 1 in Appendix.

There were some variations in filing patterns among counties. Tort cases comprised a larger percentage of civil cases filed in Bibb County than in the other three counties. Over the four year period, 7.8% of the civil cases filed in Bibb County were tort claims compared to 3.6% in Gwinnett, 4.4% in Irwin, and 6.1% in Oconee. See Tables 2-5.

The civil docket in all four counties was dominated by domestic relations matters. In Irwin and Oconee counties, domestic relations cases comprised approximately half the civil litigation docket, while such cases accounted for more than 70% of the civil claims filed in Bibb and Gwinnett counties. See Tables 2-5.

The BJS Tort Cases in Large Counties study found that tort claims comprise approximately 10% of civil case filings in major

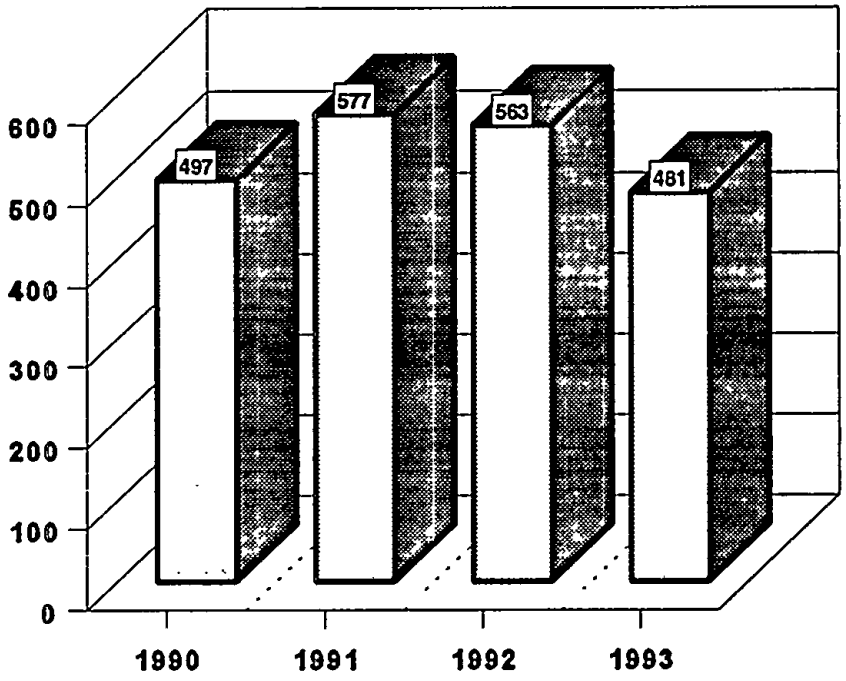
urban courts in 1992.[30] Thus, tort claims occupy a smaller portion of the overall civil caseload in the four Georgia courts examined than found in many jurisdictions.

2. Changes in Filings over Time. The data also indicate that there was not any significant increase—much less an explosion—in tort filings during the four-year period. The number of tort filings increased in some counties in some years and decreased in others. See Tables 2-5. In the aggregate, however, there were actually fewer tort cases filed in 1993 than in 1990. The overall pattern is one of stability and not growth. See Figure 2.

[30] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 2.

Figure 2

Total Number of Tort Cases Filed
Four Georgia Counties
1990-1993



Data taken from Table 1 in Appendix.

This pattern is also consistent with that found in national studies. The NCSC Work of State Courts 1993 study tabulated changes in tort filings in twenty-seven states between 1991 and 1993. While there was substantial variation among states, on average, tort filings decreased by 6% over this period of time.[31] Indeed, the BJS Tort Cases in Large Counties study reports that "[t]he number of tort case filings has remained stable since 1986."[32] See Figure 3.

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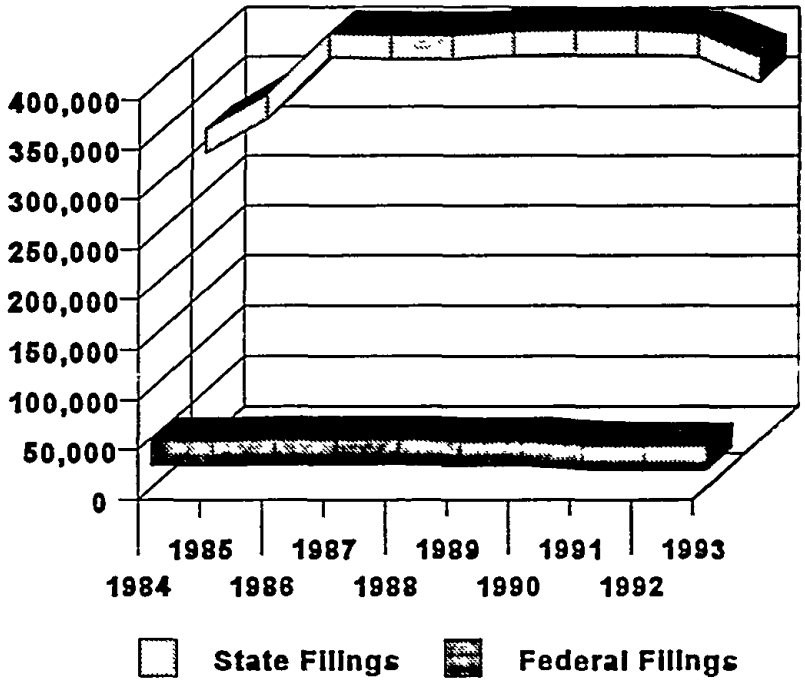
[31] NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 22.
[32] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 2.

Figure 3

National Tort Filings
1984-1993



Data taken from BJS TORT CASES IN LARGE COUNTIES, *supra* note 22.

3. Filings per 100,000 Population. In order to compare rates of litigation in different jurisdictions, it is necessary to make adjustments for population. One common basis for comparison is the number of filings per 100,000 population.

In our four-county study, there were variations in filing rates among and within jurisdictions over time. See Table 6. One point stands out, however. There were far fewer tort filings per 100,000 population in Gwinnett County than anywhere else. The average number of filings per 100,000 population over the four year period for Gwinnett (65.9) was less than half that for Irwin (144.81), Oconee (150.35), or Bibb (157.51) Counties.

The relatively low filing rate for Gwinnett might be explained by its proximity to Fulton County. That is, perhaps tort claims that might be brought in Gwinnett County are filed in Fulton County to take advantage of the reputedly more generous Fulton County juries.[33]

Tort filings in Fulton County for FY 1992 are reported in a recent NCSC publication.[34] During FY 1992, there were 1117 tort claims filed in Fulton County, producing a filing rate of 177 tort filings per 100,000 population.[35] In terms of absolute number of filings, there are clearly more tort suits filed in Fulton County on an annual basis than in any of the other four counties we studied. Yet, when compared to other large cities and when adjusted for population, Fulton County litigation rates appear more modest. Both the absolute number of filings and the filing rate per 100,000 for Fulton County were lower than 43 of the 45 jurisdictions included in the NCSC report.[36] Moreover, the tort filing rate per 100,000 population for Fulton County was virtually identical to that for Bibb County (176) for calendar year 1992. See Table 6.

If we combine the Fulton County tort filing rate for FY 1992 with the tort filing rates for the other four Georgia counties for calendar year 1992, we can estimate a tort filing rate for all five counties. According to this calculation, there were approximately 142 tort cases filed for every 100,000 residents of these counties in 1992. See Table 6.

This figure suggests that Georgians file fewer tort suits than residents of many other states.[37] The NCSC Work of State Courts

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[33] The five largest verdicts in Georgia tort cases were rendered by Fulton County juries. *See generally* Ken Goodall & Ann Wooler, *Kaiser Verdict Nears Georgia Record*, FULTON COUNTY DAILY REP., Feb. 6, 1995, at 2 (highlighting individual juror's reasons for awarding large verdict in recent medical malpractice case).

[34] NATIONAL CENTER FOR STATE COURTS, THE COURT STATISTICS PROJECT: CASELOAD HIGHLIGHTS (1995) [hereinafter NCSC CASELOAD HIGHLIGHTS]. These data were compiled as part of the BJS studies on civil litigation in large counties. These studies also produced BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, and BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23.

[35] NCSC CASELOAD HIGHLIGHTS, *supra* note 34, at 2.

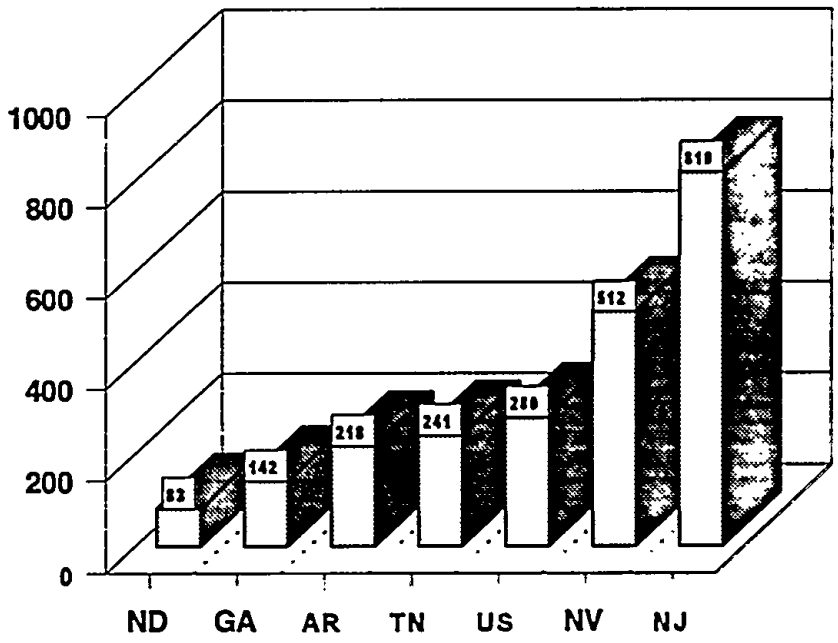
[36] *Id.*

[37] Another explanation could be that Georgians file tort suits in other states. However, this would appear to be a plausible litigation strategy only in products liability cases. Other large categories of tort claims (automobile, premises liability, and medical malpractice) tend to involve highly localized events that would not lend themselves to a choice of forums.

1993 report includes rates of tort filings per 100,000 for 29 states for the year 1993. The filing rates range from a low of 83 filings per 100,000 in North Dakota to a high of 819 per 100,000 in New Jersey.[38] The 1992 estimated tort filing rate for the five Georgia counties (142 per 100,000) is lower than the 1993 filing rates reported for 23 of the 29 states included in the NCSC report. While this comparison is not perfect, it does suggest that Georgians are not especially litigious when compared to residents of other states. See Figure 4.

Figure 4

Tort Filings per 100,000 Population
by Jurisdiction



Data for ND, AR, TN, US, NV, and NJ taken from NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 22 (figures for US based on 29-state average); data for GA taken from Table 6 in Appendix.

[38] NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 22.

4. Tort Filings per 1000 Attorneys. In addition to examining tort filings adjusted for population, it is possible to look at them adjusted for the number of active attorneys in the relevant jurisdiction. One might hypothesize that filing rates would be higher in jurisdictions with greater numbers of lawyers. If this were true, the tort filing rates would be highest in Fulton County and lowest in Irwin County.[39] Our data reveal that this is not the case. Fulton and Irwin counties had almost identical filing rates (146 tort filings per 1000 attorneys), which were considerably lower than comparable rates found in Bibb (576) and Gwinnett (438) counties. See Table 7. It would appear, then, that the sheer number of attorneys does not dictate tort filing rates.[40]

Gwinnett County presents an unusual combination of having a low filing rate per 100,000 population (65.9), but a relatively high filing rate per 1000 attorneys (438). Compare Tables 6 and 7. This may be explained in terms of the comparatively fewer number of attorneys practicing law in Gwinnett County. The ratio of attorneys to 1000 population is much lower in Gwinnett than it is in Fulton or the other three counties.[41] Thus, while there are fewer

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[39] According to state bar records, Fulton County is home to 8053 attorneys, while Irwin boasts only 75.

[40] Patricia Danzon reached a similar conclusion in the context of medical malpractice litigation, finding that "lawyer density has no net effect on claim frequency." PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY 75 (1985).

[41] The ratio of attorneys to population can be calculated by the following formula:

$$\frac{\text{active attorneys in the circuit}}{\text{population}} \times 1000$$

Using state bar records for the number of attorneys in the judicial circuit or county and census figures for population, we calculated the attorney-per-1000-population ratio for the five Georgia counties for 1992 as follows:

$$\text{Bibb:} \quad \frac{465}{152{,}200} = 3.055 \text{ attorneys/1000 population}$$

$$\text{Fulton:} \quad \frac{8{,}053}{664{,}600} = 12.117 \text{ attorneys/1000 population}$$

tort claims per 100,000 population filed in Gwinnett County, there are also fewer attorneys to handle them.

At this point, then, our profile reveals that tort claims are a small percentage of civil cases, that filings, at least in the recent past, have not increased in number over time, that Georgians file tort claims at a rate per 100,000 population that is considerably less than the rate found in many other states, and that the number of attorneys in a jurisdiction does not appear to influence the rate of filing. We now take a closer look at the characteristics of tort claims filed in Georgia courts.

B. CHARACTERISTICS OF TORT CASES FILED IN GEORGIA COURTS

1. Types of Claims. In an influential article, Deborah Hensler argued that there is no single tort system; instead, there are "three worlds" of tort litigation, each with its own set of defining characteristics and operational norms.[42] The largest world consists of relatively simple claims, typified by automobile accidents.[43] The second world involves "high stakes" litigation such as medical malpractice and products liability.[44] Complex mass latent injury

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Gwinnett: $\frac{577}{390{,}900}$ = 1.476 attorneys/1000 population

Irwin: $\frac{75}{8{,}600}$ = 8.720 attorneys/1000 population

Oconee: $\frac{264}{18{,}700}$ = 14.117 attorneys/1000 population

[42] Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 OHIO ST. L.J. 479 (1987).

[43] *Id.* at 494-95. Hensler characterizes the world of auto torts as being doctrinally stable, subject to routine processing, and involving modest injuries incurred under commonplace circumstances. As such, these claims are most amenable to alternative dispute resolution.

[44] *Id.* at 495. Hensler comments that in the world of medical malpractice and products liability cases the stakes are usually higher than in auto torts. Potential recovery is higher than in the typical automobile accident case. The law is perceived as more volatile and plaintiffs' attorneys appear to be motivated by concerns about deterrence. At the same time, defendants (particularly manufacturers) want to avoid encouraging additional suits over the same product. These factors combine to inhibit settlement. As a result, expensive and time-

torts (*e.g.*, asbestos) make up the third world.[45] Under this framework, the vast majority of tort claims filed in the counties we studied belong to the world of simple claims.

Tort claims arising from automobile accidents accounted for almost 60% of the tort docket in Bibb County and for 70% or more of the tort claims filed in Gwinnett, Oconee, and Irwin counties. See Table 8A. Combined, medical malpractice (3.6%) and products liability (1.3%) account for less than 5% of the total tort claims filed during the four-year period. Approximately 10% of the tort claims involved dangerous property (premises liability). See Table 8A.

The claims mix in Fulton County for FY 1992 was similar, but not identical. The tort docket in Fulton County had a higher percentage of medical malpractice (6.1%), products liability (6.1%), and premises liability (15.2%) cases than found in the other four Georgia counties. Correspondingly, Fulton County's percentage of automobile accident cases (51.8%) was less than that of the other counties. See Table 8B.

These differences are not surprising. Other studies suggest that medical malpractice claims are filed with greater frequency in urban than rural areas.[46] Moreover, we would expect there to be a greater number of products liability claims filed in Fulton County where venue would lie for most nonresident corporate manufacturers.[47]

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consuming pretrial discovery (and not alternative dispute resolution) becomes a prominent feature of these cases.

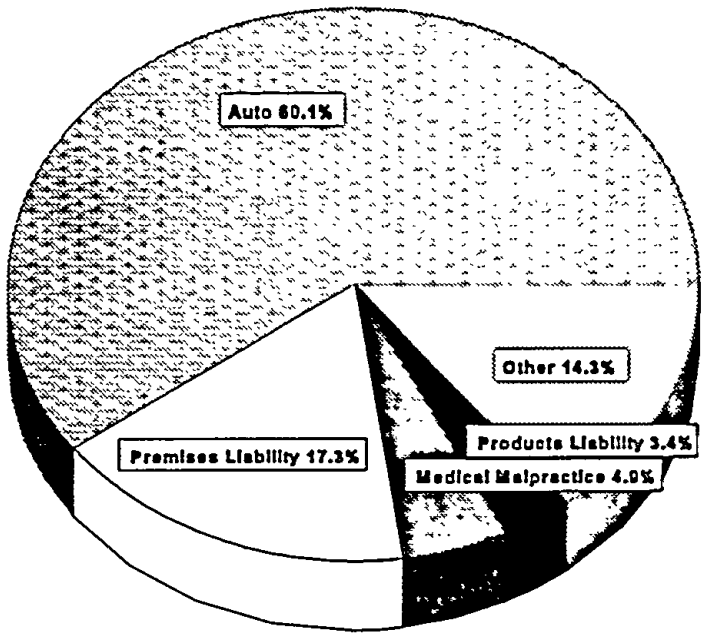
[45] *Id.* at 495-96. Hensler writes that mass latent injury torts are the most volatile world of tort litigation. Both substantive and procedural law in this area are evolving rapidly, pretrial maneuvering is extensive, and discovery is usually prolonged and costly. These characteristics, the missionary zeal of some plaintiffs' attorneys, and the high economic stakes pose obstacles to low-cost settlement of claims. Nevertheless, innovative procedures for dealing with mass latent injury torts are evolving (including alternative dispute resolution) from the general agreement that the cost of processing these cases under the current system is excessive for both sides. *See, e.g.*, Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899 (1996) (offering administrative law concepts as partial solution to mass tort problems).

[46] *See, e.g.*, DANZON, *supra* note 40, at 74 (asserting that urbanization is most significant factor in frequency of claims).

[47] Under a certificate of authority to do business in the state, the Secretary of State, who resides in Fulton County, becomes the registered agent of the corporation upon whom process may be served. O.C.G.A. § 9-11-4(d)(1) (1994 & Supp. 1995). For the purposes of determining venue, each nonresident foreign corporation is deemed to reside (if nowhere else) at least in the county where the registration is kept—Fulton County. § 14-2-510(b)(1).

The mix of claim types found in these Georgia counties is in keeping with national data. The BJS Tort Cases in Large Counties study found that the composite urban tort docket is dominated by automobile accident cases (60.1% of all tort claims), followed by premises liability (17.3%), medical malpractice (4.9%) and products liability (3.4%).[48] While the four-county Georgia data reveal a comparatively greater dominance of automobile accident claims than does the BJS study, the relative ranking of claim types is the same. The higher percentage of medical malpractice and products liability cases in Fulton County and in the BJS study is likely explained by the more distinctly urban composition of the courts studied. The significant point, in our view, is how similar the claims mix found in the BJS Tort Cases in Large Counties study is to that found in the Georgia courts. See Figures 5a, 5b, and 5c.

Figure 5a
Profile of Tort Litigation by Type of Claim
National
FY 1992

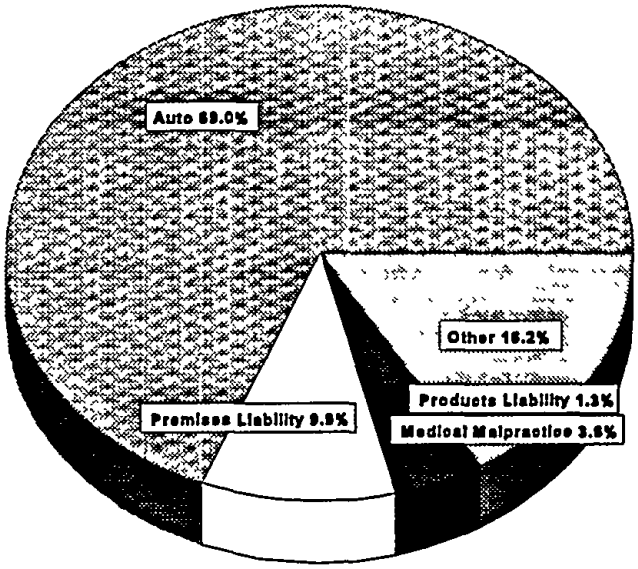


Data taken from BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 2.

[48] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 2.

Figure 5b

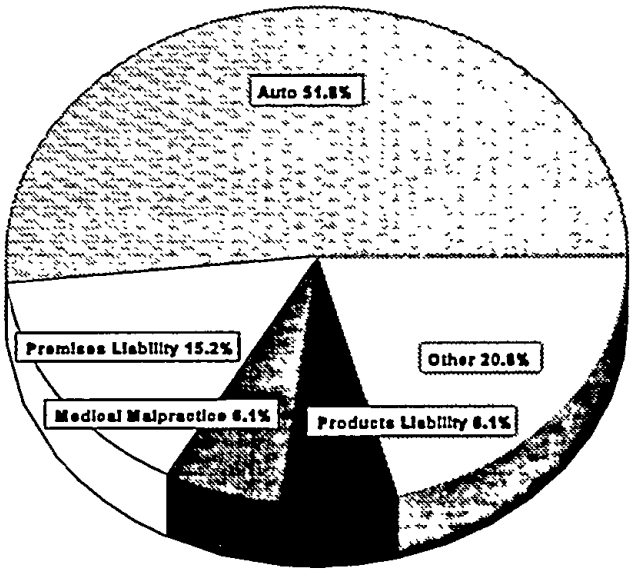
Profile of Tort Litigation by Type of Claim
Four Georgia Counties
1990-1993



Data taken from Table 8A in Appendix.

Figure 5c

Profile of Tort Litigation by Type of Claim
Fulton County
FY 1992



Data taken from Table 8B in Appendix.

2. Number and Types of Litigants and Attorneys. Other indicia of complexity are the number of parties and attorneys involved in litigation. The most common pattern of litigation we found was a single plaintiff suing a single defendant with each party represented by a single attorney. See Tables 9-11. Seventy-nine percent of the tort cases filed involved a single plaintiff and more than 96% involved two or fewer plaintiffs. Plaintiffs were represented by a single attorney in 75% of the cases and by two or fewer attorneys in more than 96% of the cases. A single defendant was named in almost 66% of the cases, and more than 90% of the cases involved two or fewer defendants. Although defendants were more likely to have multiple counsel than were plaintiffs, 92% of the cases involved two or fewer defense attorneys. See Table 10.

Individuals were plaintiffs in approximately 96% of the cases.

Insurance companies, presumably exercising subrogation rights, were plaintiffs in 3% of the cases. Individuals were defendants in 82.6% of the cases. Insurance companies (4.8%), financial institutions (0.8%), hospitals or other medical institutions (3.0%), other businesses (26.1%), and governmental agencies (3.0%) were named as defendants in only a minority of cases. See Table 9.

The BJS Tort Cases in Large Counties study found a higher percentage of business (39.6%), hospital (4.6%), and governmental (5.4%) defendants than we found in the four Georgia counties.[49] The higher percentage of institutional defendants may be explained in part by the relatively higher percentage of products liability and medical malpractice cases in the national urban caseload. The prevailing litigation pattern found in the Georgia data of a single individual plaintiff suing a single individual defendant is consistent with the dominance of automobile accidents in the overall caseload.

C. PATTERNS OF DISPOSITION

It is well known that only a small percentage of civil cases results in a formal trial.[50] Most civil litigation is resolved by settlement,[51] pretrial motion,[52] or by other means.[53] Our data are consistent with this general pattern. Relatedly, we also found that Georgia tort cases are disposed more quickly than in many other jurisdictions.

1. Method of Disposition. Our four-county pool of cases consisted of the 2118 tort claims filed from 1990 through 1993. Of these cases, 1838 (87%) were disposed during this time.[54] Of the 1838 cases filed and disposed, 104 were resolved by jury trial (5.6%) and

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[49] *Id.* at 4.

[50] *See, e.g.*, DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT (1983) (reporting that only 8% of filings went to trial, though termination of 31% of cases reflected some judicial involvement such as arbitration or dismissal); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 161-62 (1986) (reporting that fewer than 10% of lawsuits require trial for resolution).

[51] *See, e.g.*, BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 2 (stating that 73% of tort cases were settled); NCSC WORK OF STATE COURTS, 1993, *supra* note 10, at 24 (reporting that nearly three-quarters of all tort cases are disposed through settlement).

[52] The most common procedural devices are a motion to dismiss pursuant to O.C.G.A. § 9-11-12(b) (1994 & Supp. 1995) and a motion for summary judgment pursuant to § 9-11-56(c).

[53] For instance, a party may prevail on a motion for a change of venue pursuant to § 9-10-50.

[54] Of the cases filed in the four counties, 280 were still pending as of December 31, 1993.

16 were resolved by bench trial (0.9%). Thus, formal trials were used in only 6.5% of cases filed and disposed during the four-year period. See Table 12A. A smaller percentage of tort cases was resolved by trial in Fulton County. According to BJS data, jury trials were used in 4.2% of the Fulton County tort cases disposed in FY 1992, while an additional 0.6% was resolved by bench trial.[55] See Table 12B.

The trial rates for Fulton and the other four Georgia counties are within the range of trial rates reported in other states. The most recent NCSC annual report found that trials were used in 7.7% of the tort cases disposed in eleven states in 1993.[56] The BJS Tort Cases in Large Counties study, however, reported that only 2.9% of tort claims are disposed by trial.[57] Although the NCSC was involved in the preparation of both reports, neither report attempts to explain the different figures. The NCSC trial rate figure is based on state-wide data while the BJS data are limited to urban courts. Perhaps the lower trial rate reported in the BJS study reflects the relatively more congested dockets of major urban courts. In any event, the percentage of tort cases disposed by trial in Georgia courts appears to lie within the range reported in other jurisdictions.

The BJS Tort Cases in Large Counties study reports that a higher percentage of medical malpractice claims (6.9%) are resolved by jury trial than other types of tort claims, such as suits stemming from automobile accidents (2%).[58] We found a much smaller difference. The percentages of jury trials in automobile accident and medical malpractice cases in our four-county pool were 4.6% and 5.3% respectively. Premises liability claims were more likely to result in jury trials (7.6%) than any other type of tort in our pool

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[55] The Fulton County data were collected by the NCSC as part of the BJS study on tort cases in large counties. Telephone Interview with Brian Ostrom, *supra* note 28.

[56] NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 24. There is considerable variation among states, however. Trials were used to dispose 17% of the tort cases in Texas, while only 1.9% of tort dispositions in Hawaii involved trials. *Id.*

[57] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 3.

[58] *Id.* at 2-3; *see also* David B. Rottman, *Tort Litigation in the State Courts: Evidence from the Trial Court Information Network*, STATE CT. J., Fall 1990, at 4, 8-10 (summarizing and examining 1988 NCSC report and noting higher percentage of medical malpractice trial verdicts compared to other types of tort claims).

of Georgia cases.[59] Interestingly, not a single products liability claim was resolved by trial—jury or bench—during the four-year period in the four counties we studied. Moreover, there was only one jury trial in a products liability case in Fulton County in FY 1992.[60]

Settlements account for the vast majority of nontrial dispositions in the Georgia pool of cases. In most instances, there is no formal court designation of a settlement. We assumed that cases disposed by consent decree, agreed judgment, or voluntary dismissal with prejudice were settled. If our assumption is correct, then almost two-thirds of the cases filed and disposed during the four-year period were settled by the parties. See Table 12A. Settlements accounted for 74.2% of the dispositions of tort claims in Fulton County in FY 1992.[61] See Table 12B. In all five counties, the remainder of the cases were disposed by pretrial dismissals, summary judgment, default judgment, or other procedures. Again, this dimension of Georgia's tort litigation profile is quite similar to that found in recent national studies.[62] See Figures 6a, 6b, and 6c.

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[59] These figures were calculated by dividing the number of jury trials for a given type of claim (from Table 15A) by the number of claims filed for the same type of claim (from Table 8A).

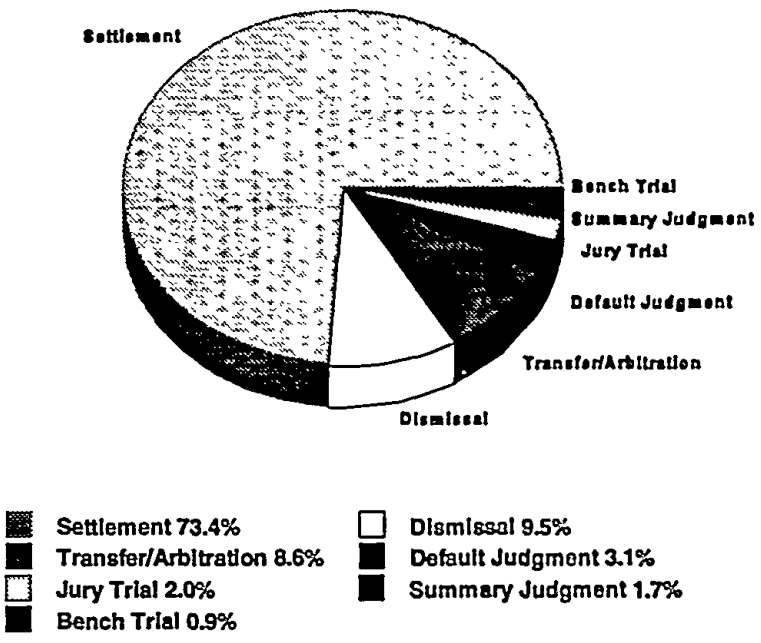
[60] The Fulton County data were collected by the NCSC as part of the BJS study on civil verdicts in large counties. Telephone Interview with Brian Ostrom, *supra* note 28.

[61] *Id.*

[62] An estimated 73% of tort cases were disposed by agreed settlement in the pool of cases studied by the BJS. BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 3.

Figure 6a

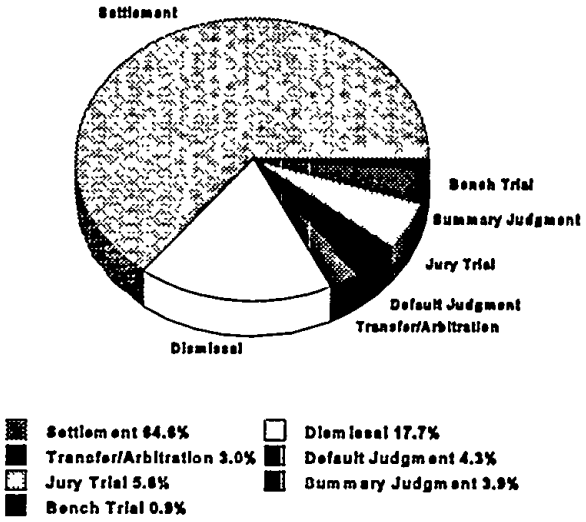
Profile of Tort Litigation by Type of Disposition, All Torts
National
FY 1992



Data taken from BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 2.

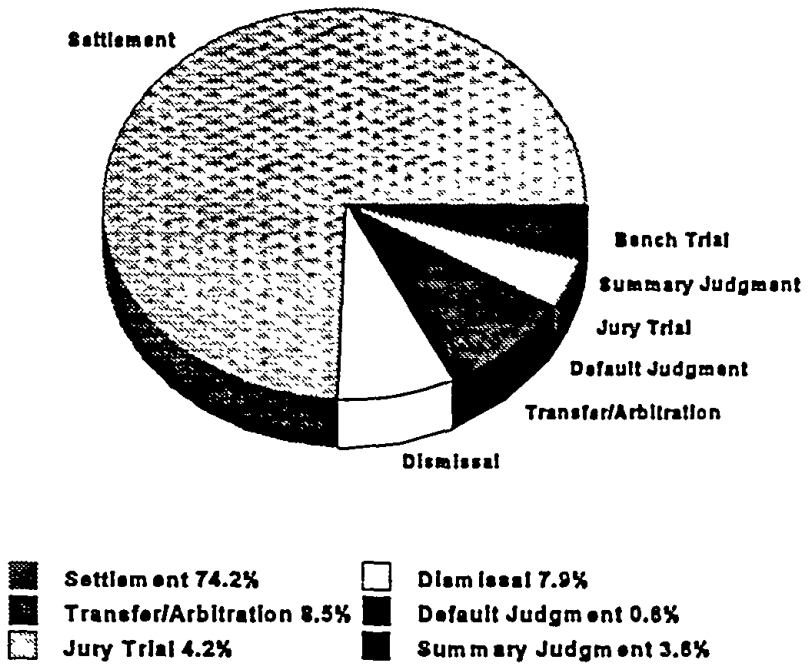
Figure 6b

Profile of Tort Litigation by Type of Disposition, All Torts
Four Georgia Counties
1990-1993



Data taken from Table 12A in Appendix.

Figure 6c
Profile of Tort Litigation by Type of Disposition, All Torts
Fulton County
FY 1992



Data taken from Table 12B in Appendix.

2. Case Processing Time. In its study of civil litigation in major urban courts, the BJS reported that the average time between filing and disposition for all tort claims resolved in FY 1992 was 19.3 months, with automobile accident claims concluded most expeditiously (16.7 months) and medical malpractice (26.4 months) and products liability (25 months) claims requiring more time on average to resolve.[63] In the aggregate, 44% of tort cases in large urban courts were disposed within one year of filing, and 74% were

[63] *Id.*

disposed within two years.[64] Somewhat surprisingly, jury trials took less time to process (average of 29.5 months) than bench trials (average of 31 months).[65]

Georgia courts appear to process cases more expeditiously than courts examined in the BJS study. This may be, in part, a function of the fact that our data pool consisted of cases filed while the BJS data pool consisted of cases disposed. The average case processing time for all tort cases in the forty-five jurisdictions sampled by BJS was 19.3 months.[66] The average time between filing and disposition in Fulton County was 13 months.[67] Tort cases in the four Georgia counties we examined had even a shorter average time between filing and disposition.[68] In the aggregate, the average tort case was disposed in 10.6 months after filing. Automobile claims were resolved more quickly (8.7 months) than medical malpractice actions (9.1 months), while products liability claims took the longest time to resolve (12.2 months). See Table 13E.

Fifty-eight percent of the Fulton County tort cases were disposed within one year of filing and 87% within two years.[69] In our four-county pool, 64% of the cases filed in 1990 or 1991 were disposed within one year of filing and 89.9% were disposed within two years. See Table 14. Jury trials in the four counties took longer to resolve (15.7 months) than bench trials (11 months). See Table 13F. Thus, it appears that tort claims were processed more quickly in Fulton and the four Georgia counties we studied than in the urban courts included in the BJS study. See Figures 7A & 7B.

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[64] *Id.* By way of comparison, the American Bar Association suggests that, ideally, 90% of all civil cases should be disposed within one year, 98% should be concluded within 18 months, and all should be disposed within two years of filing. STANDARDS RELATING TO TRIAL COURTS § 2.5 (ABA 1987). As demonstrated in the next several paragraphs, Georgia courts came closer to meeting these standards than did the urban courts included in the BJS study.

[65] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 4.

[66] *Id.* at 3.

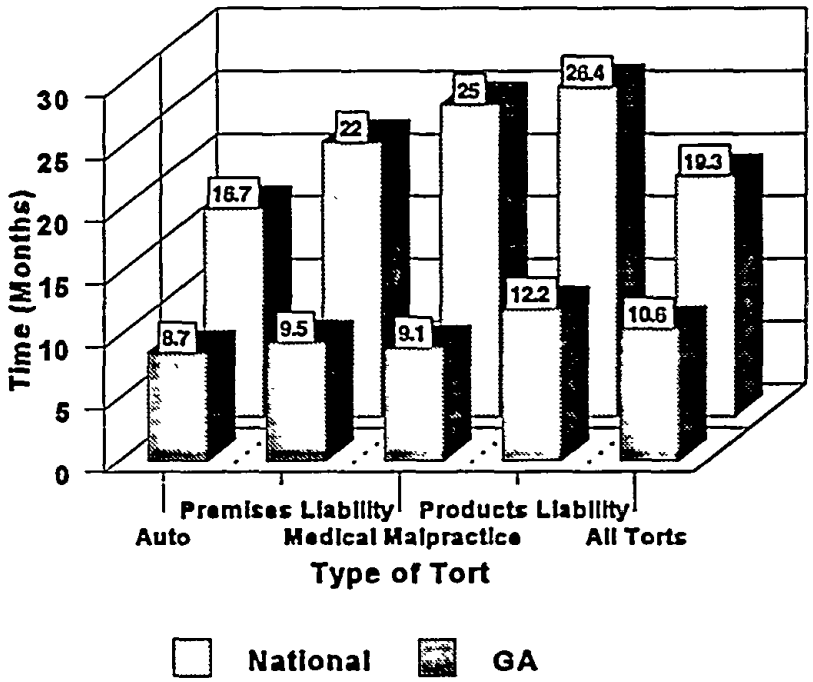
[67] *Id.* app. tbl. 2, at 8.

[68] We looked at 1785 cases that were filed and disposed between 1990 and 1993. Court records did not contain the date of disposition for 21 cases. Thus, our pool for calculating disposition time was 1764 cases.

[69] BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, app. tbl. 2, at 8.

Figure 7a

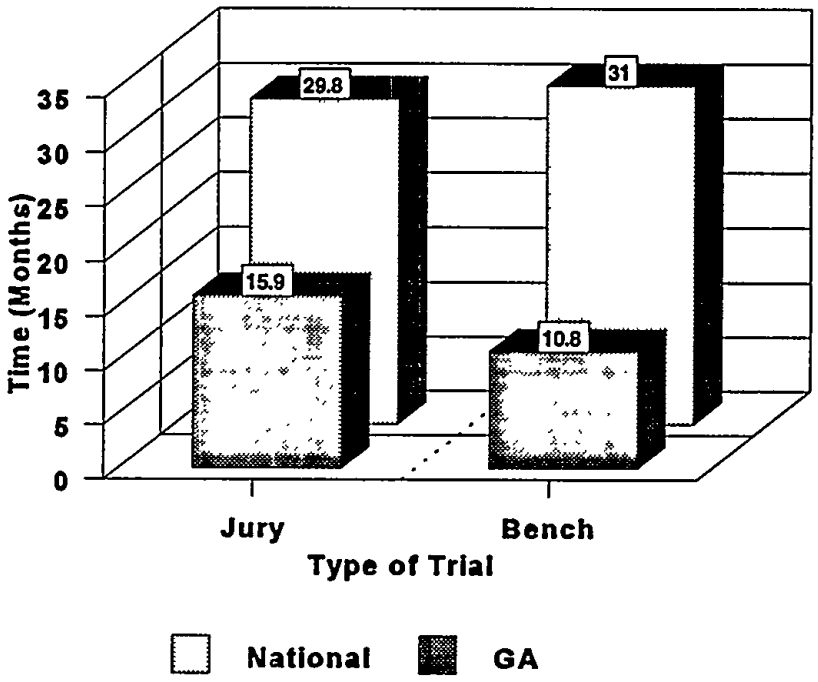
Case Processing Time by Type of Tort



National data taken from BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 3; data for GA taken from Table 13E in Appendix.

Figure 7b

Case Processing Time by Type of Trial



National data taken from BJS TORT CASES IN LARGE COUNTIES, *supra* note 22, at 3; data for GA taken from Table 13E in Appendix.

Again, it is important to bear in mind that some of the differences in average case disposition time may stem from differences in the data pools. The BJS data pool consisted of cases disposed in FY 1992 while our data set consisted of cases filed in four Georgia counties from 1990-1993. The BJS data undoubtedly includes cases that were filed more than four years prior to disposition. Such cases would not appear in our study. Nonetheless, two points support our conclusion that Georgia courts, on the whole, process tort cases more quickly than the courts included in the BJS study. First, in the BJS study, Fulton County had a lower average disposition time than the average time of the other forty-four jurisdictions. Second, both Fulton and the other four Georgia counties had a higher percentage of cases disposed within one and two years of filing.

D. A CLOSER LOOK AT CASES DISPOSED BY FORMAL TRIAL

There were 104 jury trials in our pool of cases. We were able to determine a "prevailing"[70] party in 102 of these trials. The outcomes in the other two jury trials were difficult to characterize.[71] In the aggregate, plaintiffs prevailed in slightly more than half the cases (53 out of 102, or 52%) that were tried before a jury. See Table 15A. This pattern varied some by county and by type of claim. For example, plaintiffs prevailed in only 45% of the jury trials in Bibb County, but in 54.7% of the Gwinnett County jury trials.[72] Overall, plaintiffs enjoyed their highest success rate in automobile accident cases (38/67; 57%), while prevailing in half (2/4) of the medical malpractice and only 38% (6/16) of the premises liability jury trials. See Table 15A.

In Fulton County in FY 1992, there were seventy-five jury trials in tort cases.[73] The plaintiff prevailed in thirty-four of these trials (45.3%); the defendant prevailed in thirty-nine trials (52%); and the outcome was mixed in two cases (2.7%). Juries found for the plaintiff in half the automobile accident trials, but in only one of nine (11.1%) medical malpractice trials. See Table 15B.

The Georgia data on outcomes of jury trials again parallel those contained in recent studies of tort trials in other jurisdictions. The recent BJS study of jury verdicts in large counties examined over

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[70] A victory for the plaintiff was measured solely in objective terms of whether an award of damages was made; hence, an award of one dollar would be tallied as a plaintiff victory, albeit pyrrhic in nature.

[71] In one Gwinnett County case, the jury returned a verdict for the defendant. The court entered a judgment for the plaintiff, however, pursuant to a "high-low" settlement agreement entered into by the parties prior to trial. Murray v. Smith, No. 92-A-02461-3 (Super. Ct. Gwinnett County Oct. 10, 1992). In terms of consumption of judicial resources, this case is properly characterized as a jury trial. In terms of outcomes, however, it is more like a settlement because the payment was made pursuant to an agreement by the parties. In the other nonclassified jury trial, an Oconee county jury awarded $1000 in punitive damages to the plaintiff and $1000 in punitive damages to the defendant. The judge offset these awards and entered a judgment that both parties take nothing. Terry Enters., Inc. v. Phoenix Co., No 90-CV-225-G (Super. Ct. Oconee County May 5, 1992).

[72] Some of the difference might be due to the greater number of automobile accident cases tried in Gwinnett (41) than in Bibb (19). *See* Table 15A. Typically, plaintiffs prevail more often in automobile accident cases than on other types of tort claims. NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 25. However, even within this category of cases, Bibb County juries ruled for the defendant more often than for the plaintiff (by a margin of 10 to 9). *See* Table 15A.

[73] Telephone Interview with Brian Ostrom, *supra* note 28.

9400 tort jury trials. These data reflect an overall plaintiff success rate of 49.9%, with plaintiffs prevailing in a higher percentage of automobile (60%) than premises liability (43%), products liability (40%), or medical malpractice (30%) jury trials.[74]

The comparatively high success rate (50%) of Georgia plaintiffs in medical malpractice trials outside of Atlanta is misleading because of the small number of jury trials (4). There are good reasons to believe that, as a general proposition, the plaintiff success rate in Georgia medical malpractice trials is much lower. As previously mentioned, the plaintiff prevailed in only one of nine malpractice trials in Fulton County in FY 1992. Moreover, a representative of one of the state's largest medical malpractice insurance carriers has stated that its insureds win almost 80% of all cases that go to trial.[75]

Georgia plaintiffs fared much better in bench than in jury trials. Plaintiffs prevailed in 13 of the 16 (81.3%) bench trials conducted in Bibb and Gwinnett Counties during the four-year period. See Table 16. A study of federal trials over a ten-year period also found that plaintiffs prevailed more often in bench trials than they did before juries for a variety of tort claims, including medical malpractice and products liability.[76] The Georgia data tend to support the observations of Professors Clermont and Eisenberg that "[p]ractitioners and policymakers who believe that plaintiffs as a group always do better before juries are wrong. Academicians who predict that judge and jury win rates equalize are wrong. We can say that both prevailing intuition and prevailing theory will find in the data no direct evidence in support."[77]

E. DAMAGE AWARDS

The one dimension in which the Georgia data most significantly deviates from national figures involves damage awards. The

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[74] BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23, at 4. The NCSC reports a plaintiff success rate of 51% in all tort cases. NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 25.

[75] *The Layman's Lawyer: The Jury on Trial* (WPBA television broadcast, Atlanta, Ga., May 4, 1994) (statement of James J. Leonard, Jr., claims counsel for MAG Mutual Insurance Company) (videotape on file with author).

[76] Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

[77] *Id.* at 1173.

awards made to successful plaintiffs in our four-county set of cases were substantially lower than those reported in Fulton County; also, Fulton County awards were lower than those reported in other urban areas.

The recent BJS report on verdicts in civil jury trials reports median[78] jury awards for a variety of tort cases.[79] These data were taken from the 4584 trials in which the plaintiff prevailed that were tried in large urban courts during FY 1992.[80] The median verdict for all tort claims was $51,000.[81] The median jury award was highest for products liability claims ($260,000), followed in descending order by medical malpractice ($201,000), premises liability ($57,000), and automobile claims ($29,000).[82] A similar pattern, but with somewhat larger numbers, is reported in a recent national survey of 1994 jury verdicts.[83]

The Georgia jury verdicts in the four counties we examined were

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[78] Statistical reports of jury awards frequently refer to the mean or median award for a particular category of case. The mean is a statistical average and the median is the midpoint, or 50th percentile, of distribution. In the context of jury-verdict data, the mean tends to be much higher than the median. *See, e.g., infra* note 83 (listing examples of means and medians by claim type). This is because one unusually high award in an otherwise unchanging distribution will pull the mean higher without affecting the median. For a discussion of the use of statistical means and medians, see Saks, *supra* note 18, at 1249-50.

[79] BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23.

[80] *Id.* at 5. Included in the pool of plaintiffs' verdicts are 142 products liability, 403 medical malpractice, 845 premises liability, and 2280 automobile cases. The remaining trials involved claims for a variety of torts such as libel, slander, and other intentional torts.

[81] *Id.*

[82] *Id.*

[83] The following chart is drawn from *Current Award Trends in Personal Injury, 1995 Edition*, 1 Pers. Inj. Valuation Handbook (LRP) No. 1.20.1, at 4, 11, 15, 19, 23 (1995).

Products Liability
1994 median award.....$509,344
1994 mean award.....$2,377,613

Medical Malpractice
1994 median award.....$392,790
1994 mean award.....$1,342,493

Premises Liability
1994 median award.....$75,000
1994 mean award.....$331,108

Automobile Accident
1994 median award.....$25,000
1994 mean award.....$215,899

All Torts
1994 median award.....$57,250
1994 mean award.....$517,841

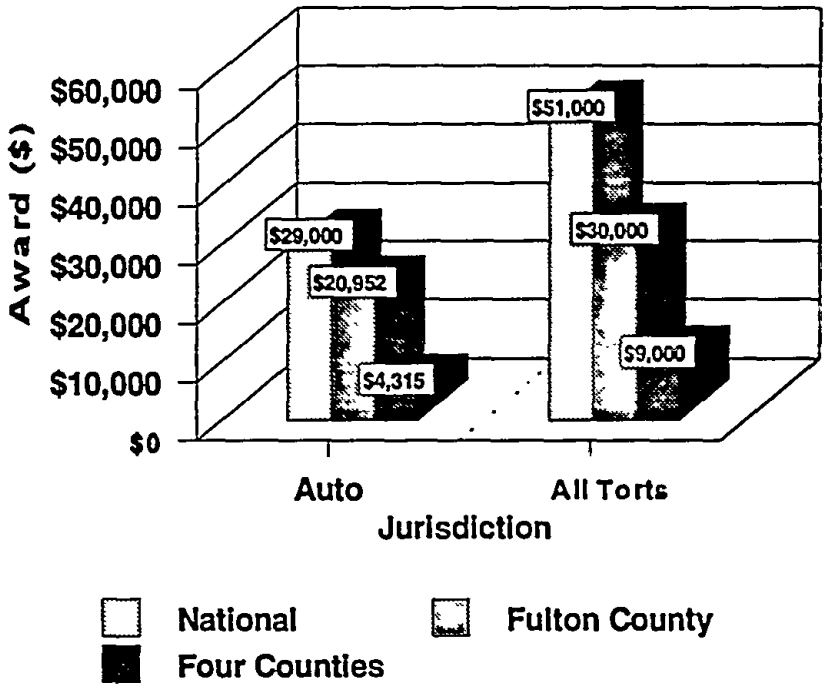
much lower. Of the fifty-three jury trials in which the plaintiff prevailed, undifferentiated damage awards ranged from $100 to $500,000 with the median being $9000. See Table 17A. The median award for the plaintiff in an automobile accident case was only $4315. See Table 17A. Further refinement of the Georgia four-county damage award data for premises liability, products liability, or medical malpractice would not be productive because of the small number of plaintiff jury verdicts in each category of claim. Nonetheless, court records from the four Georgia counties in our data set reveal far greater moderation in verdict size than reflected in the national data and tort reform rhetoric.

Damage awards in Fulton County are higher than those found in our four-county study, but lower than those reported by BJS for other major urban areas.[84] The median undifferentiated damage award in the thirty-four Fulton County tort jury trials in which the plaintiff prevailed in FY 1992 was $30,000. See Table 17B. For automobile accident trials, the median award to a successful plaintiff was $20,952. See Table 17C. Again, there were too few Fulton County products liability (1), premises liability (2), and medical malpractice (1) trials in the BJS data set to compute figures for median awards. For a comparison of median awards for "all torts" and automobile accident cases from our four-county study, Fulton County, and the BJS study, see Figure 8.

[84] Telephone Interview with Brian Ostrom, *supra* note 28.

Figure 8

Median Jury Awards for Auto and All Torts



National data taken from BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23, at 5; data for Fulton County taken from Tables 17B and 17C in Appendix; data for Four Counties taken from Table 17A in Appendix.

The NCSC Work of State Courts 1993 characterized punitive damage awards as a rarity, finding that such damages were awarded in only six percent of the cases in which the plaintiff prevailed.[85] Other researchers have also documented the infrequency of punitive damage awards in tort cases.[86] We found only two punitive damage awards in the four counties during the four-

[85] NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 25. The NCSC report appears to be based on data collected for and reported in BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23, at 6.

[86] *E.g.*, MARK PETERSON ET. AL, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 12 (1987); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 33 (1990); William M. Landes & Richard R. Posner, *New Light on Punitive Damages*, REG. 33 (1986); Rustad, *supra* note 15, at 36.

year period.[87] One punitive damage award was made by a Gwinnett County jury and the other by a Bibb county judge. In both cases the amount of the punitive damages was $50,000. Thus, our sample supports previous studies that concluded that punitive damage awards "are few in number and not 'crushing' in size."[88]

Punitive damages were awarded with greater frequency in Fulton County in FY 1992. BJS reports that punitive damages were awarded in ten of the thirty-four plaintiffs' verdicts (29%) in Fulton County in FY 1992.[89] The median punitive damage award was $26,000, while the highest award was $1,250,000. See Table 17C.

These data prompt two observations. First, they tend to support the conventional wisdom that Fulton County is the venue of choice for plaintiffs in most tort cases. Damage awards appear[90] to be higher and punitive damages appear to be awarded with greater frequency in Fulton County than in other Georgia counties for similar categories of cases.[91] Second, Fulton County damage awards appear to be less severe than those made in other large urban areas. The median damage award for "all torts" in Fulton County in FY 1992 ($30,000)[92] was forty-one percent less than the median award in the composite of the forty-five jurisdictions studied by BJS ($51,000).[93]

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[87] Richardson v. Roberts & Arrow Exterminators, No. 92-A-00514-1 (Super. Ct. Gwinnett County May 5, 1993); Sullivan v. Preston, No. 93-002218 (Super. Ct. Bibb County Dec. 10, 1993). We are not including an Oconee County case in which a jury awarded both the plaintiff and the defendant $1000 in punitive damages. The trial judge offset the awards and entered a judgment that neither party recover any damages. Terry Enters., Inc. v. Phoenix Co., No. 90-CV-225-G (Super. Ct. Oconee County May 5, 1992).

[88] Rustad, *supra* note 15, at 24.

[89] Telephone Interview with Brian Ostrom, *supra* note 28.

[90] We use the word "appear," because the Fulton County data are for only one year and therefore may not accurately reflect award patterns over time.

[91] The higher frequency of punitive damage awards in Fulton County also may suggest that such awards are concentrated in particular venues within a particular jurisdiction. Professor George Priest found a concentration of punitive damage awards in Bullock and Lowndes Counties in Alabama. *Hearings*, *supra* note 2, at 150 (statement of George L. Priest).

[92] Telephone Interview with Brian Ostrom, *supra* note 28.

[93] BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23, at 5.

F. SUMMARY

The profile of tort litigation in Georgia that emerges from court records does not suggest a crisis. Tort claims account for a relatively small share of the civil docket. The number of tort filings has remained stable over the four-year period. On a per capita basis, tort filings in these Georgia counties (including Fulton County) lie on the low end of averages found in other states. Relatively simple automobile accidents make up a large majority of all tort claims filed. High stakes products liability and medical malpractice litigation do not appear in great numbers. The vast majority of tort claims are settled, and less than seven percent go to trial. The average case is disposed within a year of filing. Plaintiffs prevail in slightly more than half the cases that are tried before a jury. When the plaintiff does prevail, compensatory damages tend to be modest in amount, and outside of Fulton County, punitive damages are exceedingly rare.

This profile is based only on the four-year experiences of four counties and one year of data from Fulton County. Thus, there is no statistical assurance that it reflects the litigation patterns in other parts of the state. Yet, with the exception of damage awards, the profile revealed in our study is remarkably consistent with litigation patterns described in national studies. The pattern of tort filings as a small percentage of civil cases, marked by low to moderate growth, simple claims, few trials, and rare punitive damage awards is one that emerges in a number of recent studies.[94] This consistency suggests that, although there will be some local variations, the preceding profile likely is representative of state patterns.

IV. IMPLICATIONS OF THE GEORGIA TORT LITIGATION PROFILE ON TORT REFORM

A. REFORMING THE RHETORIC OF TORT REFORM

Legal reform is not simply an abstraction. It is intended to improve the legal system's operation when measured against some

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[94] *E.g.*, BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23; BJS TORT CASES IN LARGE COUNTIES, *supra* note 22; NCSC WORK OF STATE COURTS 1993, *supra* note 10.

criteria.[95] As Professor Saks observed, "[p]roposed reforms in substantive law must be evaluated against images of a predicted future without that change and a future with the contemplated changes."[96] No matter which goals are deemed most important, the starting point in discussing reform is an accurate picture of the system as it presently exits. Without knowing how the tort system does work, we cannot begin to assess what changes, if any, are needed to make it work better. Legal reform grounded in misperception may be ineffective or counterproductive to the intended goals.[97] Within the specific context of tort reform, Part III indicates that there are fewer tort suits filed, resulting in fewer trials, fewer plaintiff verdicts, and lower damage awards than are popularly perceived.[98]

This is not to say that tort reform is unjustified, but the primary political justification appears to be based on inaccurate perceptions of the system. Proponents of reform must identify actual problems and explain how reform proposals will address these deficiencies. Once the policy debate goes beyond the rhetoric of "too many suits and runaway juries," the complexity of tort reform becomes clearer. Consider the impact of various tort-reform proposals on two commonly stated goals of tort law: compensation and redressing wrongs.

1. Reform and the Compensatory Function. A leading text

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[95] A number of different "criteria" might be used. Compensation, deterrence, and corrective justice are three commonly stated objectives of the tort system. Deciding which goals are most important is, of course, both controversial and fundamental. Regardless of which goal is considered primary, however, one cannot determine how *well* the tort system is performing without having an accurate picture of how the system *is* performing.

[96] Saks, *supra* note 18, at 1150.

[97] One example of tort reform producing counterproductive results is medical malpractice review panels. At one time, such panels were touted as a reform that would reduce litigation costs by efficiently screening out frivolous claims and facilitating settlement of meritorious claims. Stephen Shmanske & Tina Stevens, *The Performance of Medical Malpractice Review Panels*, 11 J. HEALTH POL. POL'Y & L. 525, 527 (1986). In practice, however, medical malpractice review panels have tended "to lead to more formal disputes which take longer to resolve at a greater cost." *Id.* at 535.

[98] A 1993 poll of 800 Georgians revealed the extent of the misperception. BEDFORD GROUP, GEORGIA CIVIL JUSTICE FOUNDATION VOTER SURVEY (1994). Those surveyed estimated that 40% of the civil cases filed were tort claims, that personal injury filings were increasing at an estimated rate of 37% per year, and that the average jury award to a successful plaintiff was over $200,000. For a comparison of public perception of tort litigation with actual litigation patterns, see Thomas A. Eaton & Susette Talarico, *Personal Injury Litigation in Georgia*, VERDICT: J. GA. TRIAL LAW. ASS'N, Spring 1995. at 27.

describes tort as "a body of law . . . directed toward the compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests."[99] A cogent critique of tort law might focus on its deficiencies as a compensation system. A substantial body of evidence now indicates that the tort system delivers compensation to only a small percentage of potential claimants and does so at a high cost.

The vast majority of individuals suffering accidental injuries never initiate a claim. According to a Rand study, only about 10% of accident victims seek some form of compensation.[100] Of those who do, some deal directly with the injurer (2%) or her insurance company (4%), but most consult an attorney (7%).[101] Only 4% of accident victims actually hire an attorney, however, and only 2% file a lawsuit.[102] The recent Harvard Medical Practice Study found that, for every one malpractice claim filed, there are almost eight that are not.[103] These and other studies suggest that, "at the outset of the litigation process, a large number of potential

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[99] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5-6 (5th ed. 1984).

[100] DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 121-22 (1991).

[101] *Id.*

[102] *Id.* at 122. These are averages; the individual claim rates that comprise these averages vary considerably according to type of injury. As an example, for auto accidents, 26-31% elect to sue, but for medical malpractice only about 10% do so. *Id.* at 116; *see also* WEILER ET AL., *supra* note 14, at 70 (examining findings of Harvard Medical Practice Study that only 13% of patients negligently injured filed suit).

[103] HARVARD MEDICAL PRACTICE STUDY, *supra* note 14, at 7-1. This finding is discussed in WEILER ET AL., *supra* note 14, at 69. Many of those injured by negligent medical care were quite old or suffered only a minor injury. Even when the figures were adjusted to count only those potential malpractice claims with significant injury, formal claiming was rare. "Even with respect to these more 'valuable' tort claims . . . the aggregate gap between potential and actual paid tort claims is approximately 5 to 2." *Id.* at 7-1.

For other studies of claiming patterns in the medical malpractice context, see Roger Feldman, *The Determinants of Medical Malpractice Incidents: Theory of Contingency Fees and Empirical Evidence*, ATLANTIC ECON. J., July 1979, at 59, 62 (finding higher claims rates in areas where there were more surgery, higher personal incomes, lower lawyer earnings, and state laws that required high standard of informed consent); John H. Lavin, *Which Patients Are Most Likely to Sue?*, MED. ECON., Jan. 9, 1984, at 107 (discussing nine criteria developed by major malpractice insurance company for determining which patients are most likely to file lawsuits); Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 L. & SOC'Y REV. 105, 107-08 (1990) (finding that of those patients that received seriously unsatisfactory medical care, 26% did nothing, 46% changed doctors, 25% complained directly to their physician, and 9% contacted lawyers although none ultimately filed suit).

plaintiffs . . . never initiate a claim."[104]

Initiating a claim, of course, does not guarantee payment of compensation. Of the small percentage of potential tort plaintiffs who initiate a claim, some receive no payment at all. The difficulty in securing compensation through tort is more pronounced for some types of claims than for others.[105] Medical malpractice claims are especially difficult. One frequently cited study estimates that half the medical malpractice claims settled out of court are disposed without any payment.[106] By comparing estimates of injuries caused by negligent care with court filings, Patricia Danzon calculated that only four percent of California patients who suffered documented negligent injuries during their hospitalization received any compensation from the legal system.[107]

One might also question whether tort litigation distributes compensation dollars in the most socially optimal way. A number of studies suggest that tort litigation systematically overcompensates those with minor injuries and undercompensates the most seriously injured.[108] Yet, the bulk of the compensation paid

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[104] Saks, *supra* note 18, at 1185.

[105] It is widely believed that plaintiffs secure compensation more frequently in automobile accident cases than for other types of tort claims. *See, e.g.*, NCSC WORK OF STATE COURTS 1993, *supra* note 10, at 25 (finding 60% success rate for plaintiffs in auto accident cases versus 43% for premises liability, 40% for products liability, and 30% for medical malpractice). Hensler and her colleagues report that claimants who retain legal counsel are more likely to secure some payment than those who attempt to negotiate directly with the injurers or their insurers. HENSLER ET AL., *supra* note 100, at 136-38. They also report that "the vast majority [of plaintiffs represented by counsel] had been successful in obtaining payment." *Id.* at 137.

[106] DANZON, *supra* note 40, at 42. The study notes that about 90% of all medical claims are settled out of court.

[107] *Id.* at 22-25. Danzon's figures are consistent with those derived from the HARVARD MEDICAL PRACTICE STUDY, *supra* note 14, at 7-1 (finding that less than 1 in 16 (6%) of injured patients ultimately receive compensation). Both the Danzon and Harvard studies are discussed in WEILER ET AL., *supra* note 14, at 62.

[108] *See* JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION 21 (1988) (finding that compensation paid varied widely across decedents); ELIZABETH M. KING & JAMES P. SMITH, COMPUTING ECONOMIC LOSS IN CASES OF WRONGFUL DEATH 1 (1988) (arguing that legal and economic treatment of wrongful death cases has varied considerably raising question of "equity and equal justice"); ELIZABETH M. KING & JAMES P. SMITH, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS 3 (1988) (finding that survivors of ten air accident cases were not fully compensated and actual compensation varied widely among survivors with similar injuries). Summarizing these three Rand studies involving aviation accidents, Saks writes that, on average, tortfeasors in airliner accidents paid out 26 cents for every dollar of social cost incurred, from which another 20% is deducted to cover legal fees. Saks, *supra* note 18, at 1217. Furthermore,

under the tort system goes to the small percentage of claimants with the most serious injuries. Over half of the total compensation dollars disbursed in medical malpractice litigation is paid to five percent of the successful claimants.[109]

While the tort system delivers most of its compensation to only a small percentage of those who might be legally deserving,[110] it does so at a high cost. In the aggregate, only about half the money spent on tort litigation goes towards compensating accident victims. The other half is consumed by legal fees and other transaction costs.[111] Thus the tort system operates with a 50% overhead on compensation. The transaction costs in automobile accident litigation (48%)[112] are lower than they are in medical malpractice (55%),[113] non-auto torts (57%), or asbestos cases (63%).[114] By comparison, most first-party insurance and no-fault systems are far more efficient in providing compensation. For example, the cost of administering the workers' compensation system is estimated to be roughly 20%.[115]

Saks deduces a pattern of overcompensation at the low end of economic losses (under $100,000) and a pattern of undercompensation where the economic losses exceed $250,000. *Id.* at 1218.

[109] PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 48 (1991). Professor Sugarman also notes that this 5% of successful plaintiffs represents "perhaps two or three of every 1,000 victims of malpractice." Stephen D. Sugarman, *Doctor No*, 58 U. CHI. L. REV. 1499, 1502-03 (1991) (reviewing WEILER, *supra*).

[110] We use the term "legally deserving" to mean persons who have a valid legal claim for compensation under governing principles of substantive tort law.

[111] JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 74 (1986). These transaction costs include defendants' and plaintiffs' legal fees and expenses, defendants' and plaintiffs' time and effort, court costs, and the costs of claims processing. *See also* Hensler, *supra* note 42, at 492 (summarizing Kakalik and Pace findings).

[112] Hensler, *supra* note 42, at 492.

[113] WEILER, *supra* note 109, at 53.

[114] Hensler, *supra* note 42, at 492-94.

[115] 1 ALI, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 119 (1991); *see also* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1560 (1987) ("Blue Cross-Blue Shield first-party health insurance administrative costs are 10% of benefits; SSI disability insurance administrative costs are 8% of benefits; Workers' Compensation disability insurance administrative costs are (a much criticized) 21% of benefits."). However, there are recent reports suggesting that the transaction costs of processing workers' compensation claims in some states are increasing at an alarming rate. *See, e.g.*, Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983, 984 (1993) (citing increase in employer expenditures for workers' compensation from $2 billion in 1970 to an estimated $62 billion in 1992).

Given this picture, one might expect tort reform efforts to focus on ways to improve the efficiency of compensation.[116] Indeed, a great deal of academic literature is so directed. A variety of no-fault proposals have surfaced in recent years that purport to offer some compensation to a greater number of deserving persons more efficiently and with no greater aggregate cost than the current tort system.[117] No-fault systems would expand the pool of potential claimants, thereby addressing the phenomena of so few people being compensated under the tort system.[118] They would reduce the transaction costs of compensation by reducing the number of disputed fact issues and by using administrative instead of

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[116] A different response would be to argue that compensation is not the sole or even the primary goal of tort law. The purposes of tort law are much more complex. A major function of tort law is to redress *wrongs* rather than to (or at least in addition to) compensate for *losses*. This point was emphasized by Oliver Wendell Holmes, who recognized that compensation could be provided more efficiently by government or private insurance. OLIVER WENDELL HOLMES, THE COMMON LAW 96 (1881). He wrote that the "cumbrous and expensive machinery" of tort litigation to "redistribute losses" should be limited to circumstances where the defendant's conduct can be characterized as wrongful. *Id.* The transaction costs of determining whether a wrong has occurred, and if so, the extent of the loss, will be necessarily higher than those incurred by simply compensating losses.

The law and economics literature postulates that tort liability is a deterrent to unreasonably dangerous conduct. The relative inefficiency of tort law as a compensation system could be justified if it deterred a sufficient number of injuries, though the extent to which tort law actually deters is debated by scholars. For a recent review of the theoretical and empirical literature on this point, see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 443 (1994) (concluding that "tort law, while not as effective as economic models suggest, may still be somewhat successful in achieving its stated deterrence goals").

[117] *See, e.g.*, Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993) (advocating no-fault system for mass toxic torts); Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908 (1993) (advocating no-fault system for medical malpractice); *cf.* Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016 (1993) (advocating elective personal injury protection coverage as alternative to no-fault proposals).

[118] At the top of Professor Henderson's list of theoretical benefits of a no-fault system for medical injuries was that "[m]ore injured patients would receive compensation." James A. Henderson, Jr., *The Boundary Problems of Enterprise Liability*, 41 MD. L. REV. 659, 670 (1982). Given the huge gap between the number of iatrogenic injuries and claims currently made under the tort system, the potential increase in the number of injured patients who could receive compensation under a no-fault system is great. For this reason, most serious medical no-fault proposals contain limitations on who is entitled to benefits. Professor Weiler's proposal would limit coverage to patients who suffer serious injuries. Weiler, *supra* note 117, at 923.

litigation processes.[119] Aggregate costs would be controlled in no-fault regimes by limiting the amount of recovery.[120]

Although no-fault systems have been in place for many years,[121] there has been little recent legislative interest in this type of reform. Since 1985, only a few limited no-fault programs

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[119] Weiler estimates that his system could "slash the present administrative share of the claims dollar from nearly sixty percent to less than thirty percent." Weiler, *supra* note 117, at 935.

[120] For example, under Weiler's no-fault medical liability system, patients would be entitled to compensation only when they suffered a significant disability caused by their medical treatment. The administration of this program would make use of a legal-medical device known as "designated compensable events" (DCEs). "DCEs are formulas that spell out that if a patient undergoes a certain medical procedure (for example, hernia repair) and later displays a particular outcome (for example, infarction of the bowel)," the latter injury would be automatically compensable for the disabling loss as described in the plan's benefit schedule. *Id.* at 919-20, 933.

[121] Workers' compensation is one of the oldest no-fault systems in the United States and certainly the most comprehensive. The first state workers' compensation acts began to appear in the early 1900s. Many of these statutes were invalidated on constitutional grounds. *See, e.g.*, Ives v. South Buffalo Ry., 94 N.E. 431, 441 (1911) (striking down New York's workers' compensation act as a taking of property without due process of law under the state and federal constitutions). The United States Supreme Court upheld the constitutionality of a subsequent New York workers' compensation statute in New York Cent. R.R. v. White, 243 U.S. 188 (1917). Within three years of the *White* decision, all but eight states had adopted workers' compensation laws. *See generally* ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 5.20-.30 (1995) (discussing origin and growth of workers' compensation laws in U.S.); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982) (tracing development of workers' compensation laws).

Shortly after the wide-spread adoption of workers' compensation systems, commentators began advocating the application of no-fault principles to automobile accidents. *See generally* Robert S. Marx, *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164 (1925) (advocating compulsory no-fault scheme for automobile accidents); Weld A. Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392 (1919). Various automobile no-fault proposals surfaced over the years, but none were adopted in the United States until Massachusetts did so in 1971. During the 1970s, approximately half the states enacted some form of no-fault automobile insurance law. These laws varied significantly among the states in terms of whether the no-fault insurance was required or optional and under what circumstances a person injured in an automobile accident could bring a tort suit. During the 1980s, many states scaled back their no-fault laws. For a history of no-fault automobile insurance in the United States, see ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW 2D §§ 2:8-:20 (1992). For an economic assessment of various no-fault automobile insurance plans, see STEPHEN J. CARROLL ET AL., NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS 46 (1991).

have been enacted,[122] and these have not been widely used.[123] Legislative reluctance to embrace no-fault systems may be due to a number of concerns, including whether such systems are administratively workable,[124] whether overall costs will be too large if the pool of potential claimants is expanded,[125] whether a

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[122] Florida and Virginia have adopted narrow no-fault schemes for compensating babies who suffer neurological impairment during delivery. Florida Birth-Related Neurological Injury Compensation Plan, FLA. STAT. ch. 766.301-.316 (1995); Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000 to -5021 (Michie 1994 & Supp. 1995). For a detailed discussion of these systems, see Julian D. Bobbitt, Jr. et al., *North Carolina's Proposed Birth-Related Neurological Impairment Act: A Provocative Alternative*, 26 WAKE FOREST L. REV. 837 (1991) (describing both Virginia and Florida "bad baby" compensation programs and proposed version in North Carolina).

Congress has enacted legislation creating a no-fault compensation scheme for persons injured by vaccinations. National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 1976 U.S.C.C.A.N. (90 Stat.) 1113 (orginally codified at 42 U.S.C. § 247b(j)-(i) (1976)), *repealed by* Pub. L. No. 95-626, § 202, 92 Stat. 2574 (1978); National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified at 42 U.S.C. §§ 300aa-10 to -34 (1994)). For a history and overview of these statutes, see Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387 (1987); Arnold W. Reitze, Jr., *Federal Compensation for Vaccination Induced Injuries*, 13 B.C. ENVTL. AFF. L. REV. 169 (1986).

[123] Bobbitt reports as of mid-1991, three and a half years after the Virginia Act went into effect and two and a half years after the Florida Act went into effect, only two compensation claims had been filed in Virginia (both initially rejected and under appeal) and twelve in Florida (eight accepted and four under investigation). Bobbitt, *supra* note 122, at 854 n.114. Reitze reports that as of mid-1985, 1604 lawsuits were filed under the Swine Flu Act, of which there were 706 dismissals, 52 judgments where liability was stipulated, 307 trials (where the government won 259), and 167 cases still pending. Reitze, *supra* note 122, at 184-85; *see also* Lisa J. Steel, Note, *National Childhood Vaccine Injury Compensation Program: Is This the Best We Can Do for Our Children?*, 63 GEO. WASH. L. REV. 144, 159 (1994) (concluding that although federal act has been beneficial to many claimants, it has not met stated congressional intent of making awards to injured vaccinees "quickly, easily, and with certainty and generosity").

[124] Critics of medical no-fault plans believe that defining the triggering mechanisms for coverage would be as difficult as determining a doctor's fault under the current tort system. *See, e.g.*, Guido Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 U. TORONTO L.J. 131, 137 (1977); Richard A. Epstein, *Medical Malpractice: Its Cause and Cure* (arguing that no-fault medical insurance would increase administrative burdens by expanding range of covered injuries), *in* THE ECONOMICS OF MEDICAL MALPRACTICE 245, 257-58, 262 (Simon Rottenberg ed., 1978); Robert E. Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 594 (1973) (arguing that no-fault plans do not alleviate causation problems inherent in malpractice claims).

[125] *See, e.g.*, MAXWELL J. MEHLMAN, SAYING "NO" TO NO-FAULT: WHAT THE HARVARD MALPRACTICE STUDY MEANS FOR MEDICAL MALPRACTICE REFORM 48 (1991) (concluding that costs of no-fault system could be greater than present tort system when costs of many more claims and system administration are combined). *Contra* William G. Johnson et al., *The Economic Consequences of Medical Injuries*, 267 JAMA 2487 (1992) (concluding that no-fault system would not be notably costlier than the current tort system).

no-fault system will lose the deterrent force of tort,[126] and whether the system is just.[127] For all or some of these reasons, legislatures do not appear inclined to address tort law's compensation deficiencies through the adoption of no-fault systems.[128]

Other less radical reform proposals would attempt to improve the efficiency of tort compensation through modification of existing doctrine. Professor Weiler advocates various reforms of damages law, such as modifying the collateral source rule, limiting recovery for pain and suffering, and awarding attorneys' fees to successful plaintiffs in medical malpractice actions.[129] Weiler maintains that the combination of these proposals would get a greater percentage of the compensation dollar to those with the greatest real need (*i.e.*, those with net economic loss). Professors O'Connell

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[126] For a thoughtful examination of how different no-fault systems might affect deterrence, see Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093 (1993). Professor Arlen concludes that no-fault automobile plans are likely to dilute the deterrent effect of tort and lead to an increase in expected accident costs. *Id.* at 1113-14. She also believes that Professor Weiler's no-fault medical liability proposal fails to provide sufficient incentives to hospitals to monitor the quality of care given by physicians. *Id.* This problem is exacerbated by establishing levels of recovery that are less than the full social cost of the risk of patient injury. *Id.* On the other hand, the substitution of a no-fault compensation system for mass toxic torts might improve deterrence by making liability more certain. *Id.* at 1105.

[127] In commenting on Weiler's no-fault medical liability proposal, Saks suggests that "[s]eriously injured malpractice victims earning over $60,000 annually might ask why they and their families, the innocent victims of someone else's mistake, should have to lose income, perhaps permanently, perhaps along with their homes, while the people whose negligence caused their catastrophes should be put to no trouble at all." Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693, 723-24 (1994).

[128] Indeed, Georgia repealed its no-fault automobile insurance law in 1991. 1991 Ga. Laws 538 (removing all no-fault provisions from Georgia Motor Vehicle Accident Reparations Act originally at O.C.G.A. §§ 33-34-1 to -16.3 (1990) and replacing them with extensively revamped compulsory automobile liability insurance system now found at O.C.G.A. §§ 33-34-1 to -8 (Supp. 1994). For a discussion of this repeal, see Maximilian A. Pock, *Annual Survey of Georgia Law: Insurance*, 43 MERCER L. REV. 285 (1991); Tom Opdyke, *No Fault Insurance No Longer Required in Georgia as of Today*, ATLANTA J. & CONST., Oct. 1, 1991, at D3.

The lack of enthusiasm for no-fault systems is not confined to the legislature. By a three-to-two margin, voters in California recently rejected Proposition 200, which would have established a no-fault automobile insurance system. B. Drummond Ayres, Jr., *Cougars and Lawyers Come Out Ahead in Propositions on California Ballot*, N.Y. TIMES, Mar. 28, 1996, at A11. For an analysis of this proposal, see Kathy M. Kristof, *Will Initiatives Lead Us to Promised Land or to Wolves*, L.A. TIMES, Mar. 24, 1996, at D2.

[129] WEILER, *supra* note 109, at 47-69.

and Sugarman have advanced reforms of a similar nature.[130] The Manhattan Institute recently proposed regulation of contingency fees as a way of stimulating earlier settlements and increasing net payments to claimants.[131]

While every state has enacted a variety of tort reform measures in recent years,[132] there is little indication that these reforms were intended to improve the compensatory function of tort. Professor Sugarman, one of the most vigorous critics of the tort system, has described the tort reform proposals of the Reagan and Bush administrations, as well as those enacted by the states, as "one-sided."[133] That is, most tort reform packages bluntly attack the "too many suits and runaway juries" perception rather than address the more real, subtle, and difficult problem of how to

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[130] Jeffrey O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L. REV. 591; Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333; Stephen D. Sugarman, *Serious Tort Reform*, 24 SAN DIEGO L. REV. 795 (1987). For an additional analysis of this approach, see generally Sugarman, *supra* note 109.

[131] LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES (1994). The principal features of the proposal are as follows:

> (1). Contingency fees may not be charged against settlement offers made prior to plaintiffs' retention of counsel.
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> (2). All defendants are given an opportunity to make settlement offers covered by the proposal, but no later than 60 days from the receipt of a demand for settlement from plaintiffs' counsel. If the offer is accepted by the plaintiff, counsel fees are limited to hourly rate charges and are capped at 10% of the first $100,000 of the offer and 5% of any greater amounts.
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> (3). Demands for settlement submitted by plaintiffs' counsel are required to include basic, routinely discoverable information designed to assist defendants in evaluating plaintiff claims. In turn, to assist plaintiffs in evaluating defendants' offers, discoverable material "in the . . . [defendant's] possession concerning the alleged injury upon which [the defendant] relied in making his offer of settlement" must be made available to plaintiffs for a settlement offer to be effective.
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> (4). When plaintiffs reject defendants' early offers, contingency fees may only be charged against net recoveries in excess of such offers.
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> (5). If no offer is made within the 60 day period, contingency fee contracts are unaffected by the proposal.

Id. at 27-28 (footnotes omitted) (alterations in original). This proposal was recently presented to California voters in Proposition 202 and narrowly defeated. Ayres, *supra* note 128, at A11.

[132] *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 212-23 (1990) (surveying sources and scope of 1980s tort reform movement in United States).

[133] Sugarman, *supra* note 109, at 1513.

compensate deserving persons more efficiently.

Interestingly, the major provisions of the proposed federal tort reform initiatives also do not purport to address compensation problems. Caps on punitive damages[134] and limitations on joint and several liability[135] do not directly reduce transaction costs or help deliver compensation to a greater number of legally deserving injured parties.[136] As with most state tort reform measures, these federal proposals would simply reduce the wrongdoers' financial exposure—an approach consistent with the "too many suits and runaway juries" formulation of the problem. Indeed, restrictions on joint and several liability will actually *prevent* injured persons from securing full compensation in some circumstances.[137]

The foregoing discussion is not intended to support or oppose any particular set of reforms. Rather, our purpose is to illustrate some of the policy judgments that must be made in deciding whether, and if so how, to reform tort doctrine to better serve compensatory objectives. Even if one agrees that the tort system does not compensate in a socially optimal way and that this is an important goal, reform is still a complex matter. Viewing "too many suits and

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[134] *See, e.g.*, Common Sense Product Liability Legal Reform Act of 1996, *supra* note 2, § 108(b)(1) (capping punitive damages in products liability actions at greater of $250,000 or two times compensatory damages, requiring bifurcated proceedings, and requiring clear-and-convincing-evidence standard to be met for award of such damages; *id.* § 108(b)(2) (capping punitive damages at *lesser* of $250,000 or two times compensatory damages for small businesses).

[135] *Id.* § 110 (abolishing joint liability for noneconomic loss in products liability cases).

[136] A cap on punitive damages could indirectly advance compensation goals in that limited exposure to punitive damages leaves more funds available to pay compensatory damages. This might be important in mass products cases where the defendant is threatened with bankruptcy. Moreover, a uniform cap might reduce the unpredictability of punitive damages, thereby facilitating settlements. Uniform rules on joint and several liability might indirectly improve the efficiency of tort compensation by facilitating settlements of mass tort cases. *See* Jean M. Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 TEX. L. REV. 1701, 1746-50 (1995) (concluding that lack of uniformity has made this area of tort law confusing and unpredictable).

[137] Suppose, for example, a plaintiff suffers severe burns when an insolvent drunk driver collides with a car that has a defectively designed gas tank. Assume further, that a jury apportions 80% of the fault to the drunk driver and 20% to the manufacturer. Under the traditional common-law rule of joint and several liability, the plaintiff could collect 100% of her damages from the manufacturer of the defective automobile. Under the conference committee version of H.R. 956, however, the plaintiff would receive compensation from the manufacturer for only 20% of her pain-and-suffering damages. Common Sense Product Liability Legal Reform Act of 1996, *supra* note 2, § 110.

runaway juries" as the primary problem with the tort system is not only inaccurate, but obscures the complexity of policy considerations facing legislators.

2. Returning to Basic Principles: Tort Reform and Redressing "Wrongs" in a "Fair" Manner. Tort law has long been thought of as a mechanism for correcting wrongs.[138] If the defendant's wrongful conduct caused the plaintiff some harm, it is only fair to require the defendant to make the plaintiff whole. Under a corrective justice model,[139] tort litigation is simply "a contest between the two parties, and the legal challenge [is] determining a mechanism for producing the fairest adjustment to their relationship after the loss has occurred."[140] Thus, the proper focus of tort doctrine should be on the *fair* adjustment of loss based on a fact-specific, individualized determination of fault, causation, and harm. If corrective justice is the primary ordering principle, then compensation and deterrence are not goals, but merely "fortuitous by-products" of tort litigation.[141]

Some reform measures that are difficult to justify in terms of the "too many suits and runaway juries" view of the tort system or in terms of improving the compensation function might be justified in terms of basic fairness. Two of the proposed federal reforms, caps on punitive damages and modification of joint and several liability, fall into this category.[142]

Limitations on the range of civil punishment might be justified on the basis of fairness without regard to whether the number and size of punitive damage awards produce social dysfunction. A

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[138] KEETON ET AL., *supra* note 99, at 2.

[139] The most fully developed and best known modern expositions of corrective justice, as derived from the teachings of Aristotle, have been provided by Jules Coleman and Ernest Weinrib. *E.g.*, Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992). For an exhaustive compilation of the writings of Coleman and Weinrib, as well as a valuable exploration of the contrasts and similarities between distributive and corrective justice, see Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992). *Cf.* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 201-06 (1981) (arguing that theory of corrective justice as derived from teachings of Aristotle is often mistakenly believed to be rival to economic approach).

[140] WEILER, *supra* note 109, at 44.

[141] *Id.* at 45.

[142] *See supra* note 2 and accompanying text (summarizing these proposals); *supra* notes 134-137 and accompanying text (discussing these proposals and their relationship to compensatory function of tort law).

comparison of punitive damages with criminal sentencing is revealing. In the criminal justice system, both the conduct giving rise to charges and the range of punishment if convicted are fixed prior to the commission of the offending act. The wealth of the criminal defendant is not especially relevant in determining the sentence. Current trends in criminal sentencing—especially the federal sentencing guidelines—emphasize uniformity, predictability, and minimization of discretion.[143] Support for uniform sentencing guidelines is driven in substantial part by the belief that uniform sentences are fairer than ad hoc determinations of punishment.[144]

Punitive damage awards in tort, on the other hand, are neither uniform nor predictable. Juries are given considerable latitude in deciding whether the defendant's conduct merits punishment and, if so, how much of an award is needed to punish and deter the wrongdoer.[145] The same fairness concerns that underlie criminal sentencing reform might support tort reform of punitive damages.[146] That is, legislation that brings greater uniformity

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[143] The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .

Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(B) (1994).

[144] *See, e.g.*, U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 2 (1994) (noting that disparities resulting from ad hoc determinations of punishment were primary reason behind formation of Guidelines); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 230-51 (1993) (writing that Congress designed legislation to bring certainty and fairness to a sentencing system under fire for imprecise parameters and lack of guidance to judges in sentencing); William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 572 (1992) (commenting that main purpose of Guidelines is to avoid confusion and disparity in sentences that accompanied pre-guidelines sentencing system).

[145] *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2720 (1993) (plurality opinion) (rejecting argument that constitutional limits on size of punitive damages should be some multiple of compensatory damages and adopting general "reasonableness" standard of review); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (holding jury discretion inherent in common-law method for assessing punitive awards not unconstitutional per se). *But see* BMW of North Am. v. Gore, 64 U.S.L.W. 4335 (1996) (a "grossly excessive" punitive damage award violates due process).

[146] Compare the reasons cited for adopting uniform sentencing guidelines (discussed *supra* notes 143-144) with criticisms leveled at punitive damages by Justices of the Supreme Court. *See, e.g.*, *BMW of North Am.*, 64 U.S.L.W. at 4339 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the

and predictability to punitive damages can be supported on grounds of fairness, even if such awards are not frequent and do not produce significant social dysfunction. The policy choice facing legislators is whether these fairness concerns take precedence over the supposedly beneficial deterrent effects of punitive damages.[147]

Similarly, reform of joint and several liability might be justified in terms of fairness. The common-law rule of joint and several liability renders each defendant responsible for the entire loss when

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conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."); *TXO Prod. Corp.*, 113 S. Ct. at 2729 (O'Connor, J., dissenting) ("[T]he lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict [on punitive damages]."); *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring) ("[T]he generality of the instructions may contribute to a certain lack of predictability."); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (suggesting that "skeletal" guidance given by jury instructions regarding punitive damages is "scarcely better than no guidance at all"); Smith v. Wade, 461 U.S. 30, 88 (1983) (Rehnquist, J., dissenting) (arguing that "elastic standard[s]" applicable to punitive awards "give[] free reign to the biases and prejudices of juries"); *see also* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) (arguing that combination of vague standards and extensive jury discretion raises serious questions about fairness of punitive damages); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (analyzing constitutionality of prevailing punitive damages procedures and proposing reforms that include statutorily mandated punitive damage caps, bifurcated trials, heightened burden of proof, and application of criminal safeguards of Fourth, Fifth, and Sixth Amendments).

[147] Theoretically, punitive damages provide beneficial deterrence when, due to underclaiming or other reasons, liability for compensatory damages does not create a sufficient incentive to defendants to avoid creating excessive risks. *See generally* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 150-51 (1987) (describing various functions of punitive damages in United States, England, and Germany); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1146-47 (1989) (developing prescriptions for use of punitive damages to serve goal of deterrence in light of underlying fairness considerations); David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125 (1989) (explaining punitive damages in terms of economic efficiency).

Critics argue, however, that the uncertainty and unpredictability of punitive damages fatally undermine any deterrent effect. *E.g.*, E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057 (1989) ("The central failing of punitive damages . . . is *unpredictability*."); Ellis, *supra* note 146, at 33-39 (arguing that vague standards and jury discretion seriously harm fairness). *But see* Michael Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1073 (1989) (commenting on Professor Elliot's article and arguing that Elliot's analysis offers little plausible evidence to support his empirical claim that punitive damages do not deter corporate misconduct).

Most of the academic debate about the benefits and detriments of punitive damage awards is theoretical, not empirical, in nature. Simply put, there is no more empirical support for the proposition that punitive damages produce beneficial deterrence than there is support for the proposition that punitive damages overdeter.

their culpable conduct contributes to producing the plaintiff's indivisible injury.[148] Under the common-law rule, the risk that one of the defendants lacks the resources to pay for his share of the harm rests with the other defendants. The rule of joint and several liability is said to encourage plaintiffs to search for "deep pocket" defendants who, although only marginally culpable, would be legally obligated to pay for the insolvent defendants' share of the loss. There certainly have been such cases.[149] Proponents of reform maintain that, as a matter of fairness, a defendant should only have to pay damages corresponding to its percentage of fault or responsibility.[150] Defenders of the common-law rule argue that it is fair to require one defendant to bear the risk of other defendants' insolvency because they each caused the entire indivisible injury.[151]

From a corrective justice point of view, the case for reform turns on the strength of these competing—and, in our view, reasonable—notions of fairness. A policymaker concerned about corrective justice could support reform of joint and several liability without believing that instances of deep pocket injustice are common. In this framework, it is irrelevant that most tort cases do not involve multiple defendants and, hence, do not implicate joint and several liability issues. The primary, relevant question is which conception of fairness should prevail—a question that may be easier to ask than to answer.

3. Reformulating the Problem(s). The simplistic "too many suits and runaway juries" formulation of the problem is seductive because it allows for simple solutions. It is a relatively simple task to enact legislation that reduces the number of suits filed, makes it more difficult for plaintiffs to prevail, and reduces the size of

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[148] RESTATEMENT (SECOND) OF TORTS § 875 (1965). For an application of the common-law rule of joint and several liability in Georgia, see Mitchell v. Gilson, 211 S.E.2d 744 (Ga. 1975).

[149] *See, e.g.*, Gehres v. Phoenix, 753 P.2d 174, 177-78 (Ariz. Ct. App. 1987) (holding city and tavern responsible for insolvent drunk driver's 95% share of liability); Walt Disney World Co. v. Wood, 515 So. 2d 198, 199-202 (Fla. 1987) (finding defendant, who was 1% at fault, legally responsible for 86% of plaintiff's damages).

[150] *E.g.*, Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1127 (1989).

[151] *See, e.g.*, Richard W. Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 U.C. DAVIS L. REV. 1147 (1989) (arguing very nature of indivisible injury requires that defendants bear risk of potential insolvency of codefendants).

awards made to successful plaintiffs. This has been the dominant approach to the legislative tort-reform movement to date. The profile of tort litigation in Georgia that we described in Part III casts doubts on the accuracy of this formulation of the problem. A principled discussion of tort reform must move beyond the political rhetoric of "too many suits and runaway juries" and confront a host of far more complex questions: How might the system be reformed to allow a greater number of legally deserving claimants to receive compensation more efficiently? Can society afford to compensate all who are injured by the culpable conduct of others? If not, how should the legal system prioritize competing claims for compensation? Are no-fault systems preferable to existing tort litigation? Does the tort system provide beneficial deterrence against unreasonable risk creation? How important is it to have a system whereby ordinary citizens can hold governments, businesses, and other institutions accountable for personal injuries caused by their conduct?[152] What is the fairest distribution of loss when several parties contribute to the harm? These are by no means the only relevant questions. They are examples, however, of the sort of issues that policymakers ought to confront and that are obscured by the simplistic and inaccurate perception of the tort system that dominates current political dialogue.

B. STATE OR FEDERAL REFORM?

Until recently, most serious tort reform efforts originated in the states.[153] This is not surprising because most tort litigation occurs in state courts and is governed by state substantive law.[154]

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[152] In a provocative article, Professor Neubauer and Stephen Meinhold found that race may be an important factor in explaining public attitudes about litigation. David Neubauer & Stephen S. Meinhold, *Too Quick to Sue? Public Perceptions of the Litigation Explosion*, 16(3) JUST. SYS. J. 1 (1994). In a survey of 745 registered Louisiana voters, African-American respondents overwhelmingly agreed with the statement that "anyone should be able to use the legal system to their advantage," while white respondents overwhelmingly agreed with the statement that "people are too quick to hire a lawyer and go to court." *Id* at 11. Through multivariate analysis that considered social characteristics, previous litigation experience, and political attitudes, the authors found that, "among all respondents, race, not resources, is the dominant variable. Indeed, the richest blacks are more supportive of going to court than the poorest whites." *Id.*

[153] *See supra* note 1 (providing examples of state tort reform efforts).

[154] TRENDS, *supra* note 9, at 6.

Although federal tort reform is not without precedent,[155] it is not common. The question of whether tort reform policymaking should take place at the state or federal level was put in issue when both the Senate and House of Representatives passed far-reaching tort reform bills in the spring of 1995.[156]

The case for federal reform rests on the propositions that uniform tort rules are needed to achieve national economic policy and that states acting independently are either powerless or unlikely to enact appropriate reforms. A plausible case can be made that uniform products liability standards are desirable because of the interstate character of product manufacturing and distribution.[157] Manufacturers can legitimately complain that the existence of fifty different legal standards for product design and warnings complicates the national distribution of products. The proposed federal legislation (H.R. 956), however, does not address the most significant aspects of this problem. It does not impose a uniform standard for determining the adequacy of a product's design or warning. Instead, H.R. 956 addresses secondary issues such as punitive damages and joint and several liability. A national cap on

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[155] One of the earliest examples of federal tort reform was the enactment of the Federal Employees Liability Act (FELA), 45 U.S.C. § 51, in 1908. FELA created a body of federal law to handle occupational injuries of railroad workers. More recent examples include the adoption of a federal statute of repose for general aviation accidents and federal preemption of certain failure-to-warn product liability claims. *See* General Aviation Revitalization Act of 1994, 49 U.S.C.A. § 40101 note (West Supp. 1995) (providing 18 year statute of repose for general aviation accidents); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524-25 (1992) (holding that Federal Cigarette Labeling and Advertising Act of 1965 preempted state common-law tort claims based on alleged inadequate warning).

[156] *See supra* note 2 (describing these bills).

[157] *See* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. (forthcoming Oct. 1996) (concluding that need for uniformity justifies federal products liability standards). For earlier discussions on this point, see O. Lee Reed & John H. Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 NEB. L. REV. 389, 436-49 (1984) (discussing adverse effects of widely varying products liability standards on manufacturing), and David A. Rice, *Product Quality Laws and the Economics of Federalism*, 65 B.U. L. REV. 1 (1985) (arguing that tension between centralized marketing and decentralized legal decisionmaking results in product quality protection subsidy for consumers in states with high levels of legal protection). For discussions of why federal reform of punitive damage awards in products liability cases is needed, see Dennis N. Jones et al., *Multiple Punitive Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1 (1991); Victor E. Schwartz et al., *Multiple Imposition of Punitive Damages: The Case for Reform, in Hearings, supra* note 2, at 139. For a discussion of how differences in state contribution laws make settlement of mass tort claims more difficult, see Eggen, *supra* note 136, at 1746-50.

punitive damages and limitations on joint and several liability may reduce a manufacturer's overall financial exposure, but they do nothing to clarify the standards underlying its design and warning obligations. Even if H.R. 956 were enacted, a lawnmower manufacturer would be subject to design and warning liability standards that might vary considerably from state to state.

Proponents of federal reform also maintain that state level reform is insufficient because individual states lack any incentive to develop law with national policy in mind. Instead, they will develop doctrine that systematically favors its own citizens/plaintiffs over out-of-state defendants.[158] This pro-plaintiff bias was starkly articulated by Justice Richard Neely of the West Virginia Supreme Court as follows:

> The fact of the matter is that as a state judge I can do nothing to make the overall law more sensitive to concerns of national economic policy. The best I can do, and I do it all the time, is make sure that my own state's residents get more money out of Michigan than Michigan residents get out of us. This I call the competitive race to the bottom and it is at the heart of the structural problems presented by uncoordinated local jurisdictions.[159]

There are several responses to this claim. First, even if Justice Neely's observation is accurate, it would not justify federal reform of tort law in which both plaintiffs and defendants tend to be citizens of the forum state, such as medical malpractice. Presumably, state courts and legislatures can strike a reasonable balance between the competing interests of its citizens who create risk of physical injury and those who are injured. Second, there are reasons to doubt whether state law systematically favors in-state

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[158] H. REP. NO. 64, *supra* note 2, at 9.

[159] RICHARD NEELY, THE PRODUCTS LIABILITY MESS 71-72 (1988). Justice Neely reiterated this point in Blankenship v. General Motors Corp., 406 S.E.2d 781, 783 (W. Va. 1991) (commenting that doctrine adopted by West Virginia Supreme Court intended to make national tort system more rational would only punish West Virginia residents without improving tort system for anyone else). *See also* 2 ALI, *supra* note 115, at 261; V. Schwartz et al., *supra* note 157, at 141 (discussing individual state's inability to remedy unfairness and other negative effects of multiple punitive damage awards).

plaintiffs as Justice Neely claims. In the 1970s and 1980s, state legislatures enacted tort reform measures that tended to favor defendants' interests. One of the harshest critics of the tort system has characterized most state legislation in this area as unfairly "one-sided."[160] This legislative pattern continues today.[161] Nor does judge-made law appear to systematically favor plaintiffs as Justice Neely suggested. After examining over two thousand court opinions, Professors Henderson and Eisenberg concluded that judicial decisions in the late 1980s tended to favor products liability defendants, not plaintiffs.[162] Thus, neither courts nor legislatures appear to be as unsympathetic to defendants' interests as some proponents of federal reform have argued.[163]

The most important consideration, however, is not whether state courts and legislatures are biased, but the preemptive effect of federal reform. One consequence of state control of tort law has been variation and experimentation. Each state has been free to decide for itself what mix of doctrine best balances the competing interests of plaintiffs and defendants. Allowing states to serve as laboratories of experimentation has been viewed generally as a positive aspect of federalism.[164] Nowhere has there been more

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[160] Sugarman, *supra* note 109, at 1513.

[161] *See supra* note 1 (providing examples of recent state tort reform statutes).

[162] *See* Eisenberg & Henderson, *Inside the Quiet Revolution*, *supra* note 14, at 741 (providing statistical assessment of previous study revealing largely same result); Henderson & Eisenberg, *The Quiet Revolution*, *supra* note 14, at 522-25 (describing empirical assessment revealing pro-defendant judicial trends).

[163] For a more elaborate analysis of whether federal tort reform is needed to counteract state bias against nonresident defendants, see Thomas A. Eaton & Susette M. Talarico, *Testing Two Assumptions About Federalism and Tort Reform* (forthcoming in special symposium prepared jointly by *Yale Journal on Regulation* and *Yale Law and Policy Review* to be published in Fall 1996). We are not the only commentators to question whether state courts and legislatures evidence any bias against nonresident tort defendants for other treatments of this issue. *See* Robert M. Ackerman, *Tort Law and the New Federalism: Whatever Happened to Devolution?* (forthcoming in special symposium prepared jointly by *Yale Journal on Regulation* and *Yale Law and Policy Review* to be published in Fall 1996); G. Schwartz, *supra* note 157.

[164] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). For discussions of the benefits of allowing states to experiment with formulation of tort doctrine, see Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COMM. 1, 21-23 (1990) (discussing laboratory view of federalism and denouncing infringements upon state lawmaking); Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503, 507 (1987) (observing that states offer competing laboratories in which real-life experimental solutions to problems can be attempted).

state experimentation than in tort reform. Over the past ten years, all fifty states have enacted statutes that address a variety of tort issues. More than thirty states have reformed joint and several liability and punitive damages law since 1985,[165] with significant differences in approaches and detail.[166]

Perhaps the strongest case for preemptive federal reform lies in the area of mass torts. Even here, however, most reform proposals and academic commentary focus on jurisdictional, procedural, or choice-of-law issues. *See, e.g.*, ALI, COMPLEX LITIGATION PROJECT (Proposed Final Draft, Apr. 5, 1993); Symposium, *American Law Institute Complex Litigation Project*, 54 LA. L. REV. 843 (1994) (collecting articles commenting on various aspects of the project's completion); William W Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1538 (1995) (arguing that creating federal substantive law covering claims that lead to large scale litigation would cause substantial problems including intruding into states' traditional role as laboratories for developing tort law).

There are, however, some serious proposals for substantive federal reform of mass tort litigation. *See, e.g.*, Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 788-92 (1995) (advocating federal substantive tort reform as mechanism for dealing with problems of mass torts); *cf.* Eggen, *supra* note 136, at 1746-50 (advocating global federal legislative or federal common-law reform of contribution and joint and several liability rules).

[165] *See* BMW of North Am. v. Gore, 64 U.S.L.W. 4335, 4351-52 (1996) (Appendix to Dissenting Opinion of Ginsburg, J.) (summarizing state statutes reforming punitive damages); Eggen, *supra* note 136, at 1717-20 (summarizing state statutes modifying or abrogating common-law rule of joint-and-several liability).

[166] For example, some states abolished joint and several liability only when the plaintiff is at fault. *E.g.*, O.C.G.A. § 51-12-33 (Supp. 1995). Other states abolished the doctrine for certain types of damages but not for others. *See, e.g.*, CAL. CIV. CODE § 1431.2 (West 1995) (abolishing joint and several liability for noneconomic loss but retaining doctrine for economic loss). Yet another approach is to place a cap or limit on a defendant's joint and several liability but without distinguishing between types of damages. *See, e.g.*, LA. CIV. CODE ANN. art. 2324 (West Supp. 1992) (limiting joint and several liability to 50% of plaintiff's recoverable damages); S.D. CODIFIED LAWS ANN. §§ 15-8-11 to -22 (1995) (limiting joint liability to not more than twice fault when defendant is less than 50% at fault).

A comparison of Oklahoma and Georgia law on punitive damages illustrates some of the different approaches states may choose. Oklahoma law focuses on the defendant's culpability and provides for three categories of punitive damages: (1) if the jury finds the defendant acted in reckless disregard for the rights of others, punitive damages are limited to the greater of $100,000 or economic damages; (2) if the jury finds the defendant acted intentionally and with malice, punitive damages are limited to the greater of $500,000 or two times economic damages; and (3) if the jury finds the defendant acted intentionally and with malice in life-threatening conduct, the cap is lifted. Act of May 25, 1995, Ch. 287, 1995 Okla. Sess. Law Serv. 1337 (West).

Georgia, on the other hand, has fewer gradations of culpability but distinguishes between products liability and other tort claims. Georgia law imposes a cap of $250,000 for punitive damages in all tort cases except products liability. O.C.G.A. § 51-12-5.1(g) (Supp. 1995). The cap may be lifted if the defendant is found to have acted with a specific intent to harm others. O.C.G.A. § 51-12-5.1(f). There is no cap on punitive damages in products liability

Compare, for example, reform measures enacted by the Georgia General Assembly with those contained in proposed federal legislation. First consider the area of punitive damages. The Common Sense Product Liability Legal Reform Act of 1996 would have placed limits on the amount of punitive damages that can be awarded against a product manufacturer.[167] The Georgia legislature, however, singled out products liability as the one type of tort claim in which a cap on punitive damages should not be imposed.[168] Presumably, the Georgia General Assembly concluded that uncapped punitive damages provide needed deterrence in the products liability context.[169]

On the other hand, the Georgia punitive damage legislation contains two protections not found in the proposed federal law. Under Georgia law, a product manufacturer is subject to only one punitive damage award based on a design or warning defect, "regardless of the number of causes of action which may arise from such act or omission."[170] The proposed federal products liability reform package contains no similar provision. Thus, Georgia provides product manufacturers with greater protection against multiple punitive damage awards than the proposed federal reform. Moreover, under the Georgia legislation 75% of the uncapped punitive damage award is paid to the state,[171] thereby reducing any perceived windfall to the plaintiff or her attorney.

The proposed federal legislation also modifies joint and several liability doctrine in a way different from that adopted by the

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claims. There is, however, a limit on the number of punitive damage awards that can be assessed against a manufacturer based on the same design or warning defect. O.C.G.A. § 51-12-5.1(e)(1). Moreover, 75% of the uncapped punitive damage award in a products liability case goes to the state. O.C.G.A. § 51-12-5.1(e)(2).

[167] Common Sense Product Liability Legal Reform Act of 1996, *supra* note 2, § 108. The bill would cap punitive damages in most products liability actions at the greater of $250,000 or two times compensatory damages. *Id.* § 108(b)(1). The bill would limit punitive damages to the *lesser* of $250,000 or two times compensatory damages in products liability claims against small manufacturers. *Id.* § 108(b)(2). The bill also would authorize the court to award punitive damages in excess of the cap in cases involving "egregious conduct." *Id.* § 108(b)(3). For the actual text of these provisions as well as an overall summary of the bill, see *Reform Summary*, *supra* note 2, at 7.

[168] O.C.G.A. § 51-12-5.1; *see supra* note 166 (describing statute in further detail).

[169] *See supra* note 147 and accompanying text (discussing deterrent effects of punitive damages).

[170] § 51-12-5.1(e)(1).

[171] § 51-12-5.1(e)(2).

Georgia General Assembly. The proposed federal law distinguishes between economic and noneconomic loss by retaining joint and several liability for the former and abolishing it for the latter.[172] The federal legislation does not distinguish between culpable and innocent plaintiffs. Both could turn to "deep pocket" defendants for recovery of economic loss but not for pain and suffering. The Georgia statute, in contrast, distinguishes between innocent and culpable plaintiffs but not the type of injuries they suffer. The innocent plaintiff can recover all of her damages from any defendant.[173] Joint and several liability is abolished for both economic and noneconomic injury only when the plaintiff is at fault.[174]

Are the federal solutions proposed in H.R. 956 better than those adopted by Georgia or other states? Do these Congressional proposals strike a better balance between the competing interests of plaintiffs and defendants than did the Georgia General Assembly? While the answers to these questions may be debated, one point is certain. If ultimately enacted, H.R. 956 would put an end to experimentation with punitive damages and joint and several liability reform in Georgia and every other state.[175] In light of the paucity of reliable data regarding the operation and impact of the tort system, we question the practical wisdom of imposing a single set of rules on all states. We share the concerns expressed by Professor Eisenberg, who testified before the Senate on a previously proposed federal products liability statute:

> The changing nature of products liability law makes me cautious about wishing for Congress to implement a single rule. For the rule Congress adopts had better be a good one, since it may preempt further experimentation and change by the states. I see no basis for believing that the rules embodied in [a previous version of a

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[172] Common Sense Product Liability Reform Act of 1996, *supra* note 2, § 110. For the actual text of this provision as well as an overall summary of the bill, see *Reform Summary*, *supra* note 2, at 7.

[173] O.C.G.A. § 51-12-33.

[174] *Id.*

[175] Federal legislation intended to preempt state tort law will preclude further state experimentation through the operation of the Supremacy Clause. *See, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524-25 (1992) (holding that Federal Cigarette Labelling and Advertising Act of 1965 preempted state common-law tort claims for inadequate warning).

> federal products liability statute] are superior to the collection of rules embodied in various state laws and to the ability of the states to adopt the best rules of their sister states, as those rules evolve over time. The one thing we do know is that state product liability law does change. I worry that Congress may freeze the law with the wrong set of rules at a time when there is no clear reason to do so.[176]

V. CONCLUSION: A PLEA FOR MORE INFORMED POLICYMAKING

The profile of tort litigation in Georgia revealed in court records is not one of a system in crisis. Yet no knowledgeable observer would deny that the system can be improved. Although comprising only a small percentage of the civil caseload, tort litigation is big business. A Rand study estimated that the total expenditures nationwide for tort litigation in 1985 were between twenty-nine and thirty-six billion dollars.[177] With that many dollars at stake, lobbyists and litigators will continue to press for "reform" that most greatly benefits their clients.

Although we have argued here that tort reform policymaking is more complex than simply counting the number of suits filed and their outcomes, debates about the role of tort litigation in society are likely to retain a significant empirical dimension. Legislators at the state and federal level will continue to need more and better information on how the tort system operates and the impact it has on various parties. At the very least, policymakers need reliable data regarding the number of suits filed, their characteristics, how they are processed, and their effect on individuals and institutions.

Studies such as ours, and even the more ambitious studies conducted by Rand, the BJS, and the NCSC, cannot provide all the needed information. These studies are after the fact, time consuming, expensive to conduct, and have an inherently short useful life.

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[176] S. REP. NO. 69, *supra* note 2, at 65 (testimony of Professor Theodore Eisenberg, Professor of Law, Cornell University in response to post-hearing questions of Senator Rockefeller).

[177] KAKALIK & PACE, *supra* note 111, at 66. A more recent study found that juries awarded an estimated $1.9 billion in compensatory and punitive damages in tort cases tried in 45 jurisdictions during FY 1992. BJS CIVIL VERDICTS IN LARGE COUNTIES, *supra* note 23, at 5.

Policymakers in 1997 will ask "what is happening now," not "what happened in 1993." What is needed is an ongoing process of data collection and analysis.

Any effort to engage in trial-level data collection must begin with the court clerks. They are the people who would be burdened by and responsible for data collection. Court clerks can help plan for computer hardware and software compatibility and ensure that data needed by policymakers are systematically maintained. Collecting and maintaining data are not costless and resources will be needed to support such a project.

Significant efforts at tort reform have now been made in each of the past three decades. Each time, policy debate has focused on the empirical dimensions of the civil justice system. Each time, policymakers lament the dearth of reliable data. Steps should be taken now to ensure that policymakers are better informed the next time the subject of tort reform moves to the center of the political arena.

APPENDIX

TABLES

TABLE 1
Profile of Civil Litigation in Four Counties: 1990 - 1993

Type of Litigation	Year				
	1990	1991	1992	1993	Total
General Civil[a]	21.5% (2046)	18.0% (1970)	15.7% (1809)	14.3% (1596)	17.2% (7421)
Domestic	71.0% (6766)	70.1% (7694)	73.3% (8466)	74.0% (8239)	72.2% (31,165)
Tort	5.2% (497)	5.3% (577)	4.9% (563)	4.3% (481)	4.9% (2118)
Other[b]	2.3% (220)	6.7% (733)	6.1% (705)	7.3% (815)	5.7% (2473)
Total Civil	100.0% (9529)	100.1% (10,974)	100% (11,543)	99.9% (11,131)	100% (43,177)

[a] This category includes contract and real property cases.

[b] This category includes asset forfeiture, appeals from lower courts, admission to the bar, and missing cases.

TABLE 2
Profile of Civil Litigation in Bibb County: 1990 - 1993

Type of Litigation	Year				
	1990	1991	1992	1993	Total
Contract	11.5% (289)	10.1% (297)	6.5% (211)	6.7% (236)	8.5% (1033)
Real Property	0.9% (22)	1.3% (39)	1.2% (39)	1.3% (46)	1.2% (146)
Domestic	75.8% (1904)	76.5% (2246)	80.8% (2615)	79.0% (2786)	78.2% (9551)
Tort	8.1% (201)	8.3% (244)	8.3% (268)	7.0% (245)	7.8% (958)
Other*	3.5% (89)	3.3% (97)	2.9% (93)	6.0% (211)	4.0% (490)
Missing	0.3% (8)	0.5% (14)	0.3% (9)	—	0.3% (31)
Total Civil	100.1% (2513)	100% (2936)	100% (3235)	100% (3524)	100% (12,209)

* This category includes asset forfeiture, appeals from lower courts, and admission to the bar.

TABLE 3
Profile of Civil Litigation in Gwinnett County: 1990 - 1993

Type of Litigation	Year				
	1990	1991	1992	1993	Total
General Civil*	24.2% (1531)	19.5% (1418)	18.2% (1380)	16.8% (1147)	19.5% (5476)
Domestic	71.6% (4536)	69.8% (5071)	72.4% (5496)	73.5% (5022)	71.8% (20,125)
Tort	4.0% (256)	4.0% (291)	3.3% (253)	3.0% (199)	3.6% (999)
Other	0.1% (12)	6.6% (482)	6.1% (460)	6.8% (462)	5.1% (1416)
Total Civil	99.9% (6335)	99.9% (7262)	100% (7589)	100.1% (6830)	100% (28,016)

* This category includes contract and real property.

TABLE 4
Profile of Civil Litigation in Irwin County: 1990 - 1993

Type of Litigation	Year				
	1900	1991	1992	1993	Total
General Civil	20.7% (55)	20.7% (61)	14.7% (36)	13.4% (44)	17.3% (196)
Real Property	3.8% (10)	2.0% (6)	0.4% (1)	1.5% (5)	1.9% (22)
Domestic	47.4% (126)	42.0% (123)	52.2% (128)	56.7% (186)	49.7% (563)
Tort	3.4% (9)	6.8% (20)	4.5% (11)	3.0% (10)	4.4% (50)
Other	24.8% (66)	28.6% (84)	28.2% (69)	25.3% (83)	26.7% (302)
Total Civil	100.1% (266)	100.1% (294)	100% (245)	99.9% (328)	100% (1133)

TABLE 5
Profile of Civil Litigation Oconee County: 1990 - 1993

Type of Litigation	Year				Total
	1990	1991	1992	1993	
Contract	32.7% (136)	29.9% (144)	27.8% (132)	22.7% (102)	28.3% (514)
Real Property	0.7% (3)	1.0% (5)	2.1% (10)	3.6% (16)	1.9% (34)
Domestic	48.2% (200)	52.8% (254)	47.8% (227)	54.5% (245)	50.9% (926)
Tort	7.5% (31)	4.6% (22)	6.5% (31)	6.0% (27)	6.1% (111)
Other	10.8% (45)	11.6% (56)	15.6% (74)	13.1% (59)	12.9% (234)
Total Civil	99.9% (415)	99.9% (481)	99.8% (474)	99.9% (449)	100.1% (1819)

TABLE 6
Rate of Tort Filings per 100,000 Population: 1990 - 1993*

County	Year			
	1990	1991	1992	1993
Bibb (superior only)	133.87	160.94	176.13	159.11
Gwinnett (state & superior)	72.53	78.11	64.71	48.23
Irwin	104.05	231.61	127.59	115.98
Oconee	175.95	120.13	165.68	139.65
Fulton[a]	—	—	177	—
Average	93.89	104.70	142.22[b]	80.91

* $\frac{\text{\# of torts}}{\text{population}} \times 100{,}000$

[a] Fulton County (Atlanta) data include all torts filed in FY 1992. These data were collected by the National Center for State Courts in its Civil Justice Survey of State Courts.

[b] Estimate based on five counties studied.

TABLE 7
Rate of Tort Filings per 1,000 Attorneys: 1990 - 1993*

County	Year			
	1990	1991	1992	1993
Bibb[a]	483.17	564.81	576.34	513.62
Gwinnett[a]	497.08	543.92	438.47	323.57
Irwin[b]	128.57	263.15	146.66	128.20
Fulton[a, c]	—	—	146.28	—
Oconee[b]	123.01	82.39	117.42	93.42

* $\frac{\text{\# of torts}}{\text{\# of attorneys}} \times 1{,}000$

[a] Data are calculated based on number of active attorneys in county.

[b] Data are calculated based on number of active attorneys in judicial circuit.

[c] Number of torts in Fulton County (Atlanta) totals 1178 and includes all torts filed in FY 1992. These data were collected by the National Center for State Courts in its Civil Justice Survey of State Courts.

TABLE 8A
Type of Claim in Tort Litigation in Four Counties: 1990 - 1993

Type of Claim	County				
	Bibb	Gwinnett	Irwin	Oconee	Total
Auto	59.4% (569)	77.8% (777)	70.0% (35)	73.9% (82)	69.0% (1463)
Dangerous Animal	0.2% (2)	1.0% (10)	—	0.9% (1)	0.6% (13)
Premise Liability	13.9% (133)	6.6% (66)	16.0% (8)	3.6% (4)	9.9% (211)
Medical Malpractice	3.8% (36)	3.6% (36)	—	3.6% (4)	3.6% (76)
Other Professional Malpractice	0.6% (6)	0.5% (5)	—	0.9% (1)	0.6% (12)
Products Liability	1.9% (18)	0.9% (9)	—	—	1.3% (27)
Slander/Libel	0.6% (6)	—	—	—	0.3% (6)
Other*	18.8% (180)	8.8% (88)	14.0% (7)	17.1% (19)	13.9% (294)
Combination	0.8% (8)	0.8% (8)	—	—	0.8% (16)
Total	100% (958)	100% (999)	100% (50)	100% (111)	100% (2118)

* Examples include fraud, conversion, and safety conditions at place of employment (Federal Employers' Liability Act).

TABLE 8B
Type of Claim in Tort Litigation in Fulton County: FY 1992*

Type of Claim	Fulton County (Atlanta)
Auto	51.8% (762)
Premise Liability	15.2% (223)
Products Liability	6.1% (89)
Medical Malpractice	6.1% (89)
Toxic Substance	0.6% (9)
Other	20.2% (298)
Total	100% (1470)

* Data taken from BJJ TORT CASES IN LARGE COUNTIES, *supra* note 22.

TABLE 9
Type of Litigants in Tort Litigation in Four Counties: 1990 - 1993*

Type of Litigant	County				
plaintiffs	Bibb	Gwinnett	Irwin	Oconee	Total
Individual	93.4% (895)	99.4% (993)	94.0% (47)	81.1% (90)	95.6% (2025)
Insurance Company	4.7% (45)	1.0% (10)	6.0% (3)	14.4% (16)	3.5% (74)
Bank/Financial Institution	0.2% (2)	—	—	0.9% (1)	0.1% (3)
Hospital/Medical	0.1% (1)	—	—	—	.05% (1)
Other Business	2.3% (22)	0.7% (7)	2.0% (1)	4.5% (5)	1.7% (35)
Government Agency	—	0.1% (1)	—	—	.05% (1)
Other	—	—	—	—	—

TABLE 9 (continued)

defendants	Bibb	Gwinnett	Irwin	Oconee	Total
Individual	74.5% (714)	89.2% (891)	88.0% (44)	91.0% (101)	82.6% (1750)
Insurance Company	4.6% (44)	4.5% (45)	6.0% (3)	8.1% (9)	4.8% (101)
Bank/Financial Institution	1.1% (11)	0.5% (5)	—	0.9% (1)	0.8% (17)
Hospital/Medical	3.2% (31)	2.8% (28)	—	3.6% (4)	3.0% (63)
Other Business	34.6% (331)	19.3% (193)	22.0% (11)	16.2% (18)	26.1% (553)
Governmental Agency	3.7% (35)	2.8% (28)	—	—	3.0% (63)
Other	—	0.4% (4)	—	—	0.2% (4)

* Percentages and sums for totals are not calculated as some cases had multiple plaintiffs and/or defendants. The percentages listed refer to the proportion of cases that included the specific type of litigant. For example, 82.6% of all cases had an individual defendant, while 4.8% of all cases included an insurance company as defendant.

TABLE 10
Number of Litigants in Tort Litigation in Four Counties: 1990 - 1993

Number of Litigants	County				
plaintiffs	Bibb	Gwinnett	Irwin	Oconee	Total
Cases w/1 Plaintiff	87.3% (836)	71.5% (714)	74.0% (37)	78.4% (87)	79.0% (1674)
Cases w/2 Plaintiffs	11.2% (107)	23.8% (238)	20.0% (10)	18.9% (21)	17.8% (376)
Cases w/3 Plaintiffs	0.5% (5)	3.8% (38)	2.0% (1)	0.9% (1)	2.1% (45)
Cases w/4 Plaintiffs	0.5% (5)	0.7% (7)	2.0% (1)	0.9% (1)	0.7% (14)
Cases w/5 Plaintiffs	0.1% (1)	0.1% (1)	—	0.9% (1)	0.1% (3)
Cases w/6 or 7 Plaintiffs	0.2% (2)	—	2.0% (1)	—	0.1% (3)
Cases w/12 or 13 Plaintiffs	0.2% (2)	0.1% (1)	—	—	0.1% (3)
Total	100% (958)	100% (999)	100% (50)	100% (111)	99.9% (2118)

TABLE 10 (continued)

defendants	Bibb	Gwinnett	Irwin	Oconee	Total
Cases w/1 Defendant	68.1% (652)	64.0% (635)	66.0% (33)	68.5% (76)	65.9% (1396)
Cases w/2 Defendants	24.0% (230)	25.7% (257)	24.0% (12)	26.1% (29)	24.9% (528)
Cases w/3 Defendants	4.6% (44)	6.8% (68)	6.0% (3)	4.5% (5)	5.7% (120)
Cases w/4 Defendants	1.3% (12)	1.6% (16)	2.0% (1)	—	1.4% (29)
Cases w/5 Defendants	0.8% (8)	1.3% (13)	2.0% (1)	—	1.0% (22)
Cases w/6 Defendants	0.5% (5)	0.3% (3)	—	—	0.4% (8)
Cases w/7 Defendants	0.4% (4)	0.4% (4)	—	0.9% (1)	0.4% (9)
Cases w/8 Defendants	—	0.2% (2)	—	—	0.1% (2)
Cases w/10 or More Defendants	0.3% (3)	0.1% (1)	—	—	0.2% (4)
Total	100% (958)	100.4% (999)	100% (50)	100% (111)	100% (2118)

TABLE 11
Number of Attorneys in Tort Litigation in Four Counties: 1990 - 1993

Number of Attorneys	County				
	Bibb	Gwinnett	Irwin	Oconee	Total
plaintiffs					
Cases w/0 Attorneys	2.0% (19)	1.5% (15)	—	0.9% (41)	1.7% (35)
Cases w/1 Attorney	78.7% (754)	72.2% (721)	82.0% (41)	74.8% (83)	75.5% (1599)
Cases w/2 Attorneys	17.4% (167)	22.9% (229)	18.0% (9)	22.5% (25)	20.3% (430)
Cases w/3 Attorneys	1.8% (17)	2.5% (25)	—	—	1.9% (42)
Cases w/4 Attorneys	0.1% (1)	0.6% (6)	—	0.9% (1)	0.4% (8)
Cases w/5 or More Attorneys	—	0.3% (3)	—	0.9% (1)	0.2% (4)
Total	100% (958)	100% (999)	100% (50)	100% (111)	100% (2118)
defendants					
Cases w/0 Attorneys	24.0% (230)	16.6% (166)	24.0% (12)	18.0% (20)	20.2% (428)
Cases w/1 Attorney	46.1% (442)	41.7% (417)	58.0% (29)	60.4% (67)	45.1% (955)
Cases w/2 Attorneys	22.8% (218)	32.6% (326)	14.0% (7)	17.1% (19)	26.9% (570)
Cases w/3 Attorneys	4.4% (42)	6.7% (67)	4.0% (2)	3.6% (4)	5.4% (115)
Cases w/4 Attorneys	1.8% (17)	1.6% (16)	—	0.9% (1)	1.6% (34)
Cases w/5 or More Attorneys	0.9% (9)	0.7% (7)	—	—	0.8% (16)
Total	100% (958)	99.9% (999)	100% (50)	100% (111)	100% (2118)

TABLE 12A
Type of Disposition—All Torts Disposed in Four Counties: 1990 - 1993*

Type of Disposition	County				
	Bibb	Gwinnett	Irwin	Oconee	Total
Disposed at Trial					
Jury Verdict	5.0% (40)	5.8% (53)	5.0% (2)	9.3% (9)	5.6% (104)
Bench Verdict	1.5% (12)	0.4% (4)	—	—	0.9% (16)
Disposed w/out Trial					
Settlements - Voluntary Dismissal w/Prejudice	58.1% (461)	67.3% (611)	55.0% (22)	69.1% (67)	63.2% (1161)
Settlements - Agreed Judgment/Consent Decree	0.8% (6)	1.8% (16)	2.5% (1)	2.1% (2)	1.4% (25)
Summary Judgment	6.4% (51)	2.0% (18)	7.5% (3)	—	3.9% (72)
Default Judgment	7.1% (56)	1.3% (12)	10.0% (4)	7.2% (7)	4.3% (79)
Dismissals[a]	17.0% (135)	19.0% (172)	20.0% (8)	11.3% (11)	17.7% (326)
Arbitration	0.1% (1)	0.1% (1)	—	—	0.1% (2)
Transfers	3.9% (31)	2.3% (21)	—	1.0% (1)	2.9% (53)
Total Disposed**	99.9% (793)	100% (908)	100% (40)	100% (97)	100% (1838)

[a] This category includes voluntary dismissal without prejudice before trial, lack of prosecution, and lack of service.

* Dispositon described is for primary defendant and primary plaintiff only in multiple litigant cases.

** This does not include cases pending (n=280).

TABLE 12B
Type of Disposition—All Torts Disposed in Fulton County: FY 1992*

Type of Disposition	Fulton County
Disposed at Trial	
Jury Verdict	4.2% (14)
Bench Verdict	0.6% (2)
Disposed w/out Trial	
Settlements - Agreed Judgment/Consent Decree	74.2% (245)
Summary Judgment	3.6% (12)
Default Judgment	.6% (2)
Dismissals[a]	7.9% (26)
Arbitration	.3% (1)
Transfers	8.2% (27)
Total Disposed**	99.6% (329)

[a] This category includes lack of prosecution and lack of service.

* These data were obtained (in disk form) from the National Center for State Courts, in Williamsburg, Virginia.

** Number of total disposed does not equal 100% because of one case with missing data.

TABLE 13A
Average Time Between Filing and Disposition in Tort Litigation in Bibb County: 1990 - 1993*

Type of Claim	Year			
	1990	1991	1992	1993
Auto	11.7 (124)	9.8 (132)	8.8 (133)	5.8 (82)
Dangerous Animal	—	19.2 (1)	—	8.9 (1)
Premises Liability	13.4 (17)	17.2 (26)	10.6 (28)	6.9 (19)
Medical Malpractice	6.1 (10)	8.2 (5)	10.6 (5)	4.0 (4)
Other Professional Malpractice	—	3.5 (3)	20.6 (1)	7.8 (1)
Slander/Libel	18.9 (1)	—	16.7 (1)	7.6 (3)
Products Liability	13.7 (6)	19.5 (3)	16.8 (3)	7.3 (1)
Other	14.2 (28)	10.7 (36)	12.2 (40)	7.9 (30)
Combination	—	15.8 (1)	17.8 (2)	—

* Average number of months between filing and disposition (n= number of cases). Averages were rounded to nearest month. In cases with multiple litigants, disposition time was calculated for primary defendant and primary plaintiff. There were 21 cases (disposed of without trial) with missing data for disposition date in the entire sample. Cases disposed exclude both pending and transferred cases.

TABLE 13B
Average Time Between Filing and Disposition in Tort Litigation in Gwinnett County: 1990 - 1993*

Type of Claim	Year			
	1990	1991	1992	1993
Auto	9.6 (193)	9.4 (219)	10.2 (191)	5.8 (96)
Dangerous Animal	6.0 (4)	8.8 (1)	5.4 (1)	10.7 (2)
Premises Liability	13.0 (15)	8.6 (15)	11.6 (19)	7.2 (6)
Medical Malpractice	17.4 (6)	11.9 (14)	10.0 (8)	7.5 (6)
Other Professional Malpractice	11.7 (3)	—	—	3.5 (1)
Slander/Libel	—	—	—	—
Products Liability	6.6 (4)	9.7 (2)	—	—
Other	13.4 (18)	9.9 (24)	11.4 (16)	6.1 (12)
Combination	2.4 (1)	25.4 (1)	12.8 (3)	—

* Average number of months between filing and disposition (n= number of cases). In cases with multiple litigants, disposition time was calculated for primary defendant and primary plaintiff. There were 21 cases (disposed of without trial) with missing data for disposition date in the entire sample. Cases disposed exclude both pending and transferred cases.

TABLE 13C
Average Time Between Filing and Disposition in Tort Litigation in Irwin County: 1990 - 1993*

Type of Claim	Year			
	1990	1991	1992	1993
Auto	16.6 (6)	9.0 (16)	7.1 (6)	3.9 (3)
Dangerous Animal	—	—	—	—
Premises Liability	23.2 (2)	3.2 (2)	—	5.9 (1)
Medical Malpractice	—	—	—	—
Other Professional Malpractice	—	—	—	—
Slander/Libel	—	—	—	—
Products Liabiltiy	—	—	—	—
Other	33.0 (1)	8.5 (2)	20.6 (1)	—
Combination	—	—	—	—

* Average number of months between filing and disposition (n= number of cases). In cases with multiple litigants, disposition time was calculated for primary defendant and primary plaintiff. There were 21 cases (disposed of without trial) with missing data for disposition date in the entire sample. Cases disposed exclude both pending and transferred.

TABLE 13D
Average Time Between Filing and Disposition in Tort Litigation in Oconee County: 1990 - 1993*

Type of Claim	Year			
	1990	1991	1992	1993
Auto	8.0 (21)	12.2 (19)	7.6 (21)	4.5 (14)
Dangerous Animal	—	—	5.7 (1)	—
Premises Liability	—	12.4 (1)	7.0 (1)	3.3 (1)
Medical Malpractice	—	6.8 (1)	—	5.9 (1)
Other Professional Malpractice	—	—	—	—
Slander/Libel	—	—	—	—
Products Liability	—	—	—	—
Other	12.0 (6)	12.2 (1)	13.7 (6)	8.8 (2)
Combination	—	—	—	—

* Average number of months between filing and disposition (n= number of cases). In cases with multiple litigants, disposition time was calculated for primary defendant and primary plaintiff. There were 21 cases (disposed of without trial) with missing data for disposition date in the entire sample. Cases disposed exclude both pending and transferred cases.

TABLE 13E
Average Time Between Filing and Disposition in Tort Litigation in Four Counties by Type of Claim: 1990 - 1993*

Type of Claim	Year				
	1990	1991	1992	1993	Total
Auto	11.4 (4)	10.1 (4)	8.4 (4)	5 (4)	8.7
Dangerous Animal	6.0 (1)	14 (2)	5.5 (2)	9.8 (2)	8.8
Premises Liability	12.4 (3)	10.3 (4)	9.7 (3)	5.8 (4)	9.5
Medical Malpractice	11.7 (2)	8.9 (3)	10.3 (2)	5.8 (3)	9.1
Other Professional Malpractice	11.7 (1)	3.5 (1)	20.6 (1)	5.6 (2)	10.3
Slander/Libel	18.9 (1)	—	16.7 (1)	7.6 (1)	14.4
Products Liability	10.1 (2)	14.6 (2)	16.8 (1)	7.3 (1)	12.2
Other	18.1 (4)	10.3 (4)	14.4 (4)	7.6 (3)	12.6
Total	12.6 (7)	11.3 (6)	11.6 (7)	6.9 (7)	10.6

* mean of four-county averages for year (n=# of county averages)

TABLE 13F
Average Time Between Filing and Disposition in Tort Litigation in Four Counties for Jury and Bench Trials: 1990 - 1993

	Jury Trials	Bench Trial
Range (in Months)	4.8 - 47.6 (n=104)	0.8 - 26.1 (n=16)
Mean (in Months)	15.7	11.0

TABLE 14
1990 and 1991 Cases Disposed of Within One and Two Years and Cases Pending in Four Counties*

Cases Filed in 1990 and Disposed Within 1 Year	Cases Filed in 1990 and Disposed Within 2 Years	Cases Filed in 1991 and Disposed Within 1 Year	Cases Filed in 1991 and Disposed Within 2 Years
63.6% (316/497)	91.1% (453/497)	64.3% (371/577)	88.0% (508/577)
1990 and 1991 Tort Cases Pending by Year**			
1990	**1991**	**1992**	**1993**
2.6% (913/497)	4.7% (27/577)	10.5% (59/563)	37.6% (181/481)

* Cases Disposed/Cases filed.

** Cases Pending/Cases filed.

TABLE 15A
Outcomes of Tort Jury Trials in Four Counties: 1990 - 1993

A. Proportion	Bibb	Gwinnett	Irwin	Oconee	Total
% Jury Trials of All Torts filed	4% (40/953)	5% (53/996)	4% (2/50)	8% (9/11)	5% (104/2118)
% Jury Trials of All Torts Disposed	5% (40/762)	5.9% (53/886)	5% (2/40)	8% (8/96)	6% (104/1784)
B. Trial Outcomes					
For Plaintiff	45% (18)	54.7% (29)	50% (1)	55.5% (5)	51% (53)
For Defendants	55% (22)	43.4% (23)	50% (1)	33.3% (3)	47.1% (49)
Other*	—	1.9% (1)	—	11.2% (1)	1.9% (2)
Total	100% (40)	100% (53)	100% (2)	100% (9)	100% (104)

C. Trial Outcomes by Type of Claim

Auto	plaintiff	47% (9)	61% (25)	50% (1)	60% (3)	57% (38)
	defendant	53% (10)	39% (16)	50% (1)	40% (2)	43% (29)
	total	100% (19)	100% (41)	100% (2)	100% (5)	100% (67)
Premises Liability	plaintiff	40% (4)	40% (2)	0% (0)	0% (0)	38% (6)
	defendant	60% (6)	60% (3)	0% (0)	100% (1)	62% (10)
	total	100% (10)	100% (5)	100% (0)	100% (1)	100% (16)
Medical Malpractice	plaintiff	100% (1)	33% (1)	0% (0)	0% (0)	50% (2)
	defendant	0% (0)	67% (2)	0% (0)	0% (0)	50% (2)
	total	100% (1)	100% (3)	100% (0)	100% (0)	100% (4)
Products Liability	plaintiff	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	defendant	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	total	100% (0)	100% (0)	100% (0)	100% (0)	100% (0)
Other	plaintiff	40% (4)	33% (1)	0% (0)	100% (2)	47% (7)
	defendant	60% (6)	67% (2)	0% (0)	0% (0)	53% (8)
	total	100% (10)	100% (3)	100%(0)	100% (2)	100% (15)
Total	plaintiff	45% (18)	56% (29)	50% (1)	63% (5)	52% (53)
	defendant	55% (22)	44% (23)	50% (1)	37% (3)	48% (49)
	total	100% (40)	100% (52)	100% (2)	100% (8)	100% (102)

* The "other" verdict in Gwinnett refers to a case where the defendant won the case but the plaintiff was awarded $25,000. The "other" verdict in Oconee consisted of offsetting punitive damages ($1000 for the plaintiff and $1000 for the defendant).

TABLE 15B
Outcomes of Tort Jury Trials in Fulton County: FY 1992*

	General Outcomes[a]			
	for plaintiff	for defendant	other	total
Verdict	45.3% (34)	52.0% (39)	2.7% (2)	100% (75)
Outcomes by Type of Claim				
Auto	50% (20)	45% (18)	5% (2)	100% (40)
Premises Liability	22.2% (2)	77.8% (7)	—	100% (9)
Medical Malpractice	11.1% (1)	88.9% (8)	—	100% (9)
Products Liability	50% (1)	50% (1)	—	100% (2)
Other	66.7% (10)	33.3% (5)	—	100% (15)
Total	(34)	(39)	(2)	(75)

[a] These include 72 jury verdicts and 3 directed verdicts.

* These data were obtained (in disk form) from the National Center for State Courts, in Williamsburg, Virginia.

TABLE 16
Outcomes of Tort Bench Trials in Four Counties: 1990 - 1993

	County				
	Bibb	Gwinnett	Irwin	Oconee	Total
A. Proportions					
% Bench Trials of All Torts Filed	1.3% (12/958)	0.4% (4/999)	— (0/50)	— (0/111)	0.8% (16/2118)
% Bench Trials of All Cases Disposed	1.6% (12/762)	0.5% (4/887)	— (0/40)	— (0/96)	0.9% (16/1785)
B. Trial Outcomes					
For Plaintiff	83% (10)	75% (3)	—	—	81% (13)
For Defendants	17% (2)	25% (1)	—	—	19% (3)
Total	100% (12)	100% (4)	0	0	100% (16)

C. Bench Trial Outcomes by Type of Claim

Auto	Plaintiff	100% (6)	50% (1)	0% (0)	0% (0)	88% (7)
	Defendant	0% (0)	50% (1)	0% (0)	0% (0)	12% (1)
	Total	100% (6)	100% (2)	100% (0)	100% (0)	100% (8)
Premises Liability	Plaintiff	100% (1)	0% (0)	0% (0)	0% (0)	100% (1)
	Defendant	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	Total	100% (1)	100% (0)	100% (0)	100% (0)	100% (1)
Medical Malpractice	Plaintiff	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	Defendant	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	Total	100% (0)	100% (0)	100% (0)	100% (0)	100% (0)
Products Liability	Plaintiff	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	Defendant	0% (0)	0% (0)	0% (0)	0% (0)	0% (0)
	Total	100% (0)	100% (0)	100% (0)	100% (0)	100% (0)
Other	Plaintiff	60% (3)	100% (2)	0% (0)	0% (0)	71% (5)
	Defendant	40% (2)	0% (0)	0% (0)	0% (0)	29% (2)
	Total	100% (5)	100% (2)	100% (0)	100% (0)	100% (7)
Total	Plaintiff	83% (10)	75% (3)	0% (0)	0% (0)	81% (13)
	Defendant	17% (2)	25% (1)	0% (0)	0% (0)	19% (3)
	Total	100% (12)	100% (4)	100% (0)	100% (0)	100% (16)

TABLE 17A
Damages in Tort Jury Trials Where Plaintiff Prevailed in Four Counties: 1990 - 1993

A. Auto	Bibb	Gwinnett	Irwin	Oconee	Total
Range - Undiff	$250-17,200 (n=9)	$100-125,425 (n=25)	$16,003.38 (n=1)	$2815.22-5005.40 (n=3)	$100-125,425 (n=38)
Mean - Undiff	$5048.97	$20,448.92	N/A	$3606.87	$15,354.94
Median - Undiff	$2500	$9000	N/A	$3000	$4315.49
Range - Punitive	0	$50,000 (n=1)	0	0	N/A
Mean - Punitive	0	N/A	0	0	N/A
B. Premises Liability					
Range - Undiff	$3385.52-217,500 (n=4)	$10,000-47,300 (n=2)	0	0	$3385.52-217,500 (n=6)
Mean - Undiff	$124,262.88	$28,650	0	0	$76,456.44
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0
C. Medical Malpractice					
Range - Undiff	$59,300 (n=1)	$75,000 (n=1)	0	0	$59,300 -75,000 (n=2)
Mean - Undiff	N/A	N/A	0	0	$67,150
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0

TABLE 17A (continued)
Damages in Tort Jury Trials Where Plaintiff Prevailed in Four Counties: 1990 - 1993

	Bibb	Gwinnett	Irwin	Oconee	Total
D. Products Liability					
Range - Undiff	0	0	0	0	0
Mean Undiff	0	0	0	0	0
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0
E. Other					
Range - Undiff	$50,000-500,000 (n=4)	$272.08 (n=1)	0	$400-3000 (n=2)	$272.08-500,000 (n=7)
Mean - Undiff	$176,405.35	N/A	0	$1700	$101,327.64
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0
F. Total					
Range - Undiff	$250-500,000 (n=18)	$100-125,425 (n=29)	($16,003.38) (n=1)	$400-5005.40 (n=5)	$100-500,000 (n=53)
Mean - Undiff	$72,634.09	$22,199.82	N/A	$2844.12	$37,385.52
Median - Undiff	$14,400	$9151.67	N/A	$3000	$9000
Range - Punitive	0	$50,000 (n=1)	0	0	N/A
Mean - Punitive	0	N/A	0	0	N/A

TABLE 17B
Damages in Tort Jury Trials Where Plaintiff Prevailed in Fulton County: FY 1992*

Damages	Jury Verdicts for Plaintiff
Range - Undifferentiated (n=34)	$764 - $2,125,000
Mean - Undifferentiated	$177,243.16
Median - Undifferentiated	$30,000
Range - Punitive (n=10)	$5,000 - $1,250,000
Mean - Punitive	$208,520.10
Median - Punitive	$62,000

* These data were obtained (in disk form) from the National Center for State Courts, Williamsburg, Virginia.

TABLE 17C
Damages in Tort Jury Trials Where Plaintiff Prevailed by Type of Claim in Fulton County: FY 1992*

	auto	premise liability	medical malpractice	product liability	other
Range - Undifferentiated	$3761 - 1,000,000	$252,160 - 564,113	N/A	N/A	$764 - 900,000
Mean - Undifferentiated	$97,083.43 (n=23)	$408,136.50 (n=2)	$2,125,000 (n=1)	$81,000 (n=1)	$119,800.45 (n=11)
Median - Undifferentiated	$20,952	N/A	N/A	N/A	$27,500
Range - Punitive	$5,000 (n=1)	$200,000 (n=1)	$198,701 - 1,250,000 (n=2)	—	$9,500 - 250,000 (n=6)
Mean - Punitive	N/A	N/A	$724,300.50	—	$73,583.33
Median - Punitive	N/A	N/A	N/A	—	$26,000

* These data were obtained (in disk form) from the National Center for State Courts, Williamsburg, Virginia.

TABLE 18
Damages in Tort Bench Trials Where Plaintiff Prevailed in Four Counties: 1990 - 1993

	Bibb	Gwinnett	Irwin	Oconee	Total
A. Auto					
Range - Undifferentiated	$1002.48 - 32,500 (n=5)	$10,100 (n=1)	0	0	$1002.48-32,500 (n=6)
Mean - Undifferentiated	$10,921.80	N/A	0	0	$10,784.83
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0
B. Premises Liability					
Range - Undifferentiated	$134.16/mo (n=1)	0	0	0	$134.16/mo (n=1)
Mean - Undifferentiated	N/A	0	0	0	N/A
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0
C. Medical Malpractice					
Range - Undifferentiated	0	0	0	0	0
Mean - Undifferentiated	0	0	0	0	0
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0

TABLE 18 (continued)

	Bibb	Gwinnett	Irwin	Oconee	Total
D. Products Liability					
Range - Undifferentiated	0	0	0	0	0
Mean - Undifferentiated	0	0	0	0	0
Range - Punitive	0	0	0	0	0
Mean - Punitive	0	0	0	0	0
E. Other					
Range - Undifferentiated	$0 -100,000 (n=5)	$27,607.42 (n=1)	0	0	$0-100,000 (n=6)
Mean - Undifferentiated	$25,067.50	$27,607.42	0	0	$21,312.90
Range - Punitive	$50,000 (n=1)	0	0	0	N/A
Mean - Punitive	N/A	0	0	0	N/A
F. Total					
Range - Undifferentiated	•	•	0	0	•
Mean - Undifferentiated	•	•	0	0	•
Range - Punitive	$50,000 (n=1)	0	0	0	N/A
Mean - Punitive	N/A	0	0	0	N/A

• This total was impossible to calculate given nature of verdict in one case and missing data.