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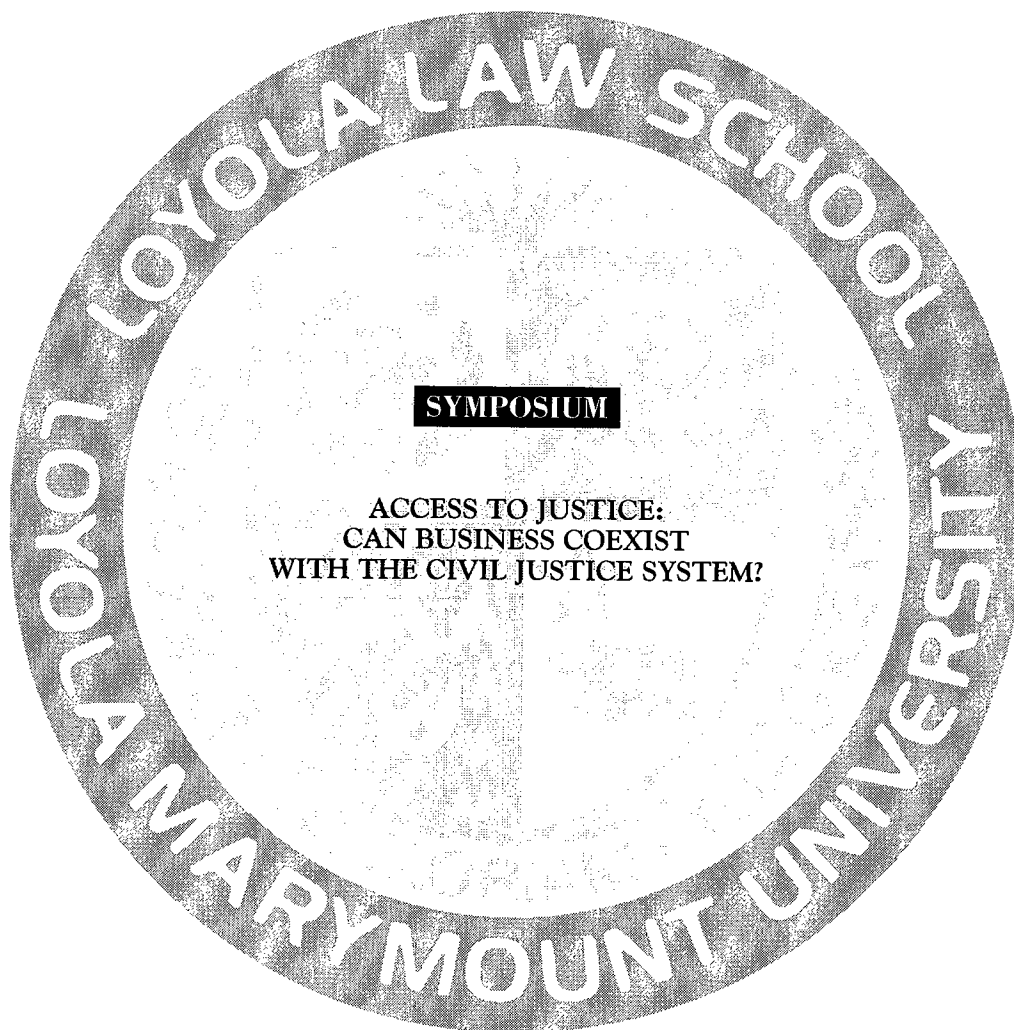
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## IS THE “CRISIS” IN THE CIVIL JUSTICE SYSTEM REAL OR IMAGINED?

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Over the past two decades, the American civil justice system has become increasingly inefficient, unfair, and unpredictable. Coupled with the litigation culture spurred by these breakdowns, the nation's courts, on the whole, are losing their ability to administer justice. In recent years, anecdotes of verdicts that shock the collective conscience have become part of civil justice lore: a \$4 million verdict for a bad paint job on a doctor's luxury car<sup>1</sup> or a nearly \$3

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1. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994) (ordering remittitur of \$2 million of \$4 million punitive award, where compensatory damages were \$4,000), *rev'd*, 517 U.S. 559 (1996) (ruling \$2 million punitive

million verdict for a woman who spilled a cup of McDonald's coffee when she removed the lid after leaving a drive-through window.<sup>2</sup> These cases represent just the tip of the iceberg. In many cases, the civil justice system simply breaks down because the end result of a lawsuit tends to be driven more by business concerns than the appropriate legal outcome.

Frustration with the civil justice system is widespread. Doctors are choosing where to practice based on liability laws and insurance rates, companies are offsetting their increased liability costs by raising prices and cutting jobs, and, when people need to use the civil justice system themselves, they are finding it overburdened with unnecessary claims. As the 2004 election has shown, the public is becoming more aware of how a failure in the civil justice system affects their own lives. In response to the public's concerns, both major party presidential candidates endorsed certain civil justice reforms, and a number of state ballot initiatives favoring civil justice reform passed.<sup>3</sup>

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award was grossly excessive so as to violate constitutional due process and setting forth guidelines for future review of punitive awards).

2. *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1999) (\$2.7 million punitive award and \$160,000 compensatory award); see Andrea Gerlin, *A Matter of Degree: How a Jury Decided that One Coffee Spill Is Worth \$2.9 Million*, WALL ST. J. EUR., Sept. 2, 1994, at 1.

3. For example, California Proposition 64, an initiative narrowing the scope of California Business and Professions Code Section 17200, the "unfair competition" law, passed 59% to 41%. See *Votes For and Against Statewide Ballot Measures*, Nov. 2, 2004, at [http://www.ss.ca.gov/elections/sov/2004\\_general/contents.htm](http://www.ss.ca.gov/elections/sov/2004_general/contents.htm); see also Florida Department of State Division of Elections, Official Results, Constitutional Amendment (Florida's Amendment No. 3, the Medical Liability Claimant's Compensation Amendment, a measure limiting lawyers' contingency fees in medical malpractice cases, passed 63.6% to 36.4%), at [http://sos.state.nv.us/nvelection/2004General/ElectionSummary.htm](http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE=''>http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE=''</a>; State of Nevada, 2004 Official General Election Results, Nov. 2, 2004 (Nevada's Question 3, a measure limiting noneconomic damages in medical malpractice cases, passed 59.34% to 40.59%; Nevada's Question 4, a trial lawyer-backed measure undercutting medical liability reform through insurance regulation, failed 34.71% to 65.22% and Nevada Question 5, a measure forbidding legislative reductions of liability, failed 37.16% to 62.78%), at <a href=); Statewide Candidates' Abstract—Official Wyoming General Election Results—Nov. 2, 2004 [hereinafter Wyoming Election Results] (Wyoming Amendment C, passed 124,178 to 110,169, and authorizes the legislature to set up a panel to review

As policy makers around the country take their cues from these trends and look for ways to enhance the ability of the courts to administer justice, it is important to start with a baseline understanding of what the American civil justice system is intended to achieve. The American civil justice system has two purposes: to compensate people for injuries caused by others, and to deter future misconduct of the type that caused those injuries.<sup>4</sup> This Article explores some of the ways in which the civil justice system is falling short of these twin purposes, the impact that these failings have on the economy and the democratic process, and the trends that, if left unimpeded, will knock the scales of justice further out of balance. Finally, the Article suggests ways the civil justice system can be fixed to remove the incentive for abuse.

### I. FAILURES OF THE CIVIL JUSTICE SYSTEM

The American civil justice system is a "transfer mechanism": It transfers compensation from those who cause injuries to those who sustain injuries for which the law provides relief.<sup>5</sup> Effective and reliable transfer mechanisms tend to have four attributes: They are

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medical malpractice cases before they go to court), at <http://soswy.state.wy.us/election/2004/results/04-gsum.htm>; Colorado Cumulative Report Official Results, Nov. 23, 2004 (Colorado Amendment 34, a trial lawyer-backed initiative to significantly expand ability to sue builders over alleged construction defects, defeated 23.45% to 76.55%), at <http://www.sos.state.co.us/pubs/elections/general/COLORADO-CUMULATIVE.htm>. *But see* Oregon's November 2, 2004, General Election Abstract of Votes, State Measure No. 35, at <http://www.sos.state.or.us/elections/nov22004/g04abstract.html> (Oregon's medical malpractice reform defeated 869,054 to 896,857); Wyoming Election Results, *supra* (Wyoming Amendment D, a measure to authorize legislature to limit non-economic damages for medical malpractice, defeated 115,981 to 117,602). Under an unusual Wyoming rule, ballots uncast for referendum measures are counted as "no" votes. *See* WYO. CONST. art III, § 52(f).

4. *E.g.*, Daniel P. Kessler, *The Economic Effects of the Liability System*, HOOVER INST., at <http://www-hoover.stanford.edu/publications/epp/91/91a.html> (last visited June 17, 2005).

5. *See id.*; MARK GEISTFELD, ECONOMIC ANALYSIS IN A UNIFIED CONCEPTION OF TORT LAW 22 (Boalt Working Papers in Pub. Law, Paper No. 33, 2003) ("Any tort rule can be conceptualized as a transfer mechanism between the right-holder and duty-holder, which in turn poses the economic question of whether a fair tort rule satisfies the efficiency-equity criterion."), at <http://repositories.cdlib.org/boaltwp/33>.

efficiency, timeliness, predictability and fairness.<sup>6</sup> At present, the U.S. tort system, as a whole, is losing ground in all of these areas.

*A. Costs of the United States Tort System*

The United States tort system is far and away the most expensive in the world; “our dispute-driven system requires troubling amounts of resources, such as the time of claimants, attorneys, judges, and juries.”<sup>7</sup> In 2002, the President’s Council of Economic Advisors compared the U.S. civil justice system with tort systems in other countries and found that the U.S. system is more than twice as expensive as the average cost of other major industrialized nations.<sup>8</sup>

In 2003, the U.S. tort system cost \$246 billion.<sup>9</sup> This is more than the amount of federal revenue collected from the corporate income tax.<sup>10</sup> It also is “far more than enough money to solve Social Security’s long-term financing crisis”<sup>11</sup> and could pay for all the following government programs *combined*: “Education, training, and employment; general science; space and technology; conservation and land management; pollution control and abatement; disaster relief and insurance; community development; Federal law enforcement and administration of justice; and unemployment compensation.”<sup>12</sup> In 2003, this aggregate cost translated to \$809 per

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6. Steven B. Hantler, Remarks at General Motors Roadshow, After the \$4.9 Billion GM Verdict: Is Silicon Valley the Next GM? (Sept. 23, 1999) (“an economist would also say the indicators of a well-functioning transfer mechanism are, in the case of compensation transfer, that it be done fairly, predictably, timely and cost-effectively”) (transcript available at <http://www.fed-soc.org/Publications/Transcripts/gmsiliconvalley.htm>).

7. Steven Garber, *Should We Give Up On Medical Product Liability?*, RAND REV., Summer 2004, at <http://www.rand.org/publications/randreview/issues/summer2004/38.html>.

8. COUNCIL OF ECONOMIC ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM 1–2 (2002) [hereinafter CEA REP.] (citing TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2000, TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM (2002)), available at [http://www.whitehouse.gov/cea/tortliabilitysystem\\_apr02.pdf](http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf).

9. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2004 UPDATE, TRENDS AND FINDINGS ON THE COST OF THE U.S. TORT SYSTEM 2 2004 [hereinafter U.S. TORT COSTS: 2004 UPDATE], available at [http://www.towersperrin.com/tillinghast/publications/reports/Tort\\_2004.pdf](http://www.towersperrin.com/tillinghast/publications/reports/Tort_2004.pdf).

10. CEA REP., *supra* note 8, at 17.

11. *Id.*

12. *Id.*

U.S. citizen, which was the equivalent of over a 5% tax on wages for each wage earner.<sup>13</sup> In 2004, the aggregate cost increased to \$845 per U.S. citizen.<sup>14</sup> In real life terms, the U.S. tort system is costing three months of groceries, or six months of utility payments, for average income American families.<sup>15</sup>

Further, tort costs are growing increasingly faster and at a disproportionate rate. From 1984 through 2003, the costs of the tort system increased by 367%, from \$67 billion<sup>16</sup> to \$246 billion.<sup>17</sup> Tort costs represented only 0.6% of America's gross domestic product ("GDP") in 1950, 1.3% of GDP in 1970,<sup>18</sup> and more than 2% of GDP by 2001.<sup>19</sup>

### B. Ability to Compensate Claimants

The U.S. tort system is inefficient, slow, and unpredictable. Plaintiffs are now receiving less than 50% of the money spent on litigation, and their recovery for actual economic loss amounts to only 22% of those costs.<sup>20</sup> Moreover, their claims take a long time to resolve. Product liability cases (excluding asbestos cases) take an average of nearly three years from filing to verdict or judgment.<sup>21</sup>

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13. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE 1 (2003) [hereinafter U.S. TORT COSTS: 2003 UPDATE], available at [http://www.towersperrin.com/tillinghast/publications/reports/2003\\_Torts\\_Costs\\_Update/Tort\\_Costs\\_Trends\\_2003\\_Update.pdf](http://www.towersperrin.com/tillinghast/publications/reports/2003_Torts_Costs_Update/Tort_Costs_Trends_2003_Update.pdf).

14. U.S. TORT COSTS: 2004 UPDATE, *supra* note 9, at 2.

15. Steven B. Hantler, *The Seven Myths of Highly Effective Trial Lawyers*, No. 42 CIV. JUST. FORUM 6 (Center for Legal Pol'y, Manhattan Inst. Apr. 2004).

16. TILLINGHAST-TOWERS PERRIN, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE (1995) (costs were \$67 billion in 1984).

17. U.S. TORT COSTS: 2004 UPDATE, *supra* note 9, at 2 (showing the average annual increase in tort systems cost).

18. *Id.* at 2.

19. Press Release, Tillinghast-Towers Perrin, U.S. Tort Costs Climbed to \$205 Billion in 2001 (Feb. 11, 2003), at [http://www.towersperrin.com/tillinghast/press/2003\\_press/pr02112003.htm](http://www.towersperrin.com/tillinghast/press/2003_press/pr02112003.htm).

20. *See id.* at 2-3. A 1986 study by the RAND Institute for Civil Justice found that for a variety of tort cases, including product liability, it took between \$16 million to \$19 million in resources to deliver between \$14 billion to \$16 billion in compensation to plaintiffs. *See* JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIVIL JUSTICE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 69 (1986).

21. *See* Thomas H. Cohen & Steven K. Smith, *Bureau of Justice Statistics Bulletin: Civil Trial Cases and Verdicts in Large Counties, 2001*, 8 (Apr.

Medical malpractice cases take nearly as long.<sup>22</sup> On average, tort trials reach a verdict or judgment in a little more than two years.<sup>23</sup>

In addition, the amount of compensation plaintiffs receive tends to be arbitrary and unpredictable; it does not reflect the plaintiffs' actual loss. Harvard Law Professor W. Kip Viscusi, who studied this issue, observed that "[l]arge loss claims tend to be undercompensated, and lower loss claims tend to be overcompensated."<sup>24</sup> Some plaintiffs may receive windfall verdicts while other plaintiffs with similar claims receive little or nothing. Steven Garber, senior economist at the RAND Institute for Civil Justice, explained that "[t]he disparities stem from several factors: difficulties in determining causes of injuries; differences in skill and charisma among attorneys and expert witnesses; varying attitudes of individual judges and juries; and somewhat infrequent, but sometimes enormous, punitive damage awards."<sup>25</sup>

### C. Ability to Deter Misconduct

It also is questionable whether the tort system achieves its second goal: to make goods and services safer by deterring undesirable business practices. The tort system is supposed to create incentives for parties most able to prevent and reduce risks to do so. But that can only happen when the responsible parties are aware of the potential for tort liability and can take corrective steps. The deterrent aspect of the civil justice system does not work when liability is applied haphazardly. For example, in one case, a party

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2004) (survey of state courts of general jurisdiction in nation's seventy-five largest counties found that non-asbestos products liability cases take 35.1 months to resolve, compared with 25.6 months for all tort cases, 21.7 months for real property cases, and 21.5 months for contract cases), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtv1c01.pdf>.

22. *See id.* (listing 33.2 months as the average length for a medical malpractice case).

23. *See id.*

24. W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 52 (1991).

25. Garber, *supra* note 7, at <http://www.rand.org/publications/randreview/issues/summer2004/38.html>; *see also* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 291 n.138 ("Whether a plaintiff receives any compensation at all in a product liability case depends on various matters of chance such as the relative skills of the attorneys on each side, the composition of the jury, and the timing of case resolution relative to the timing of information about injury causation coming to light.").

