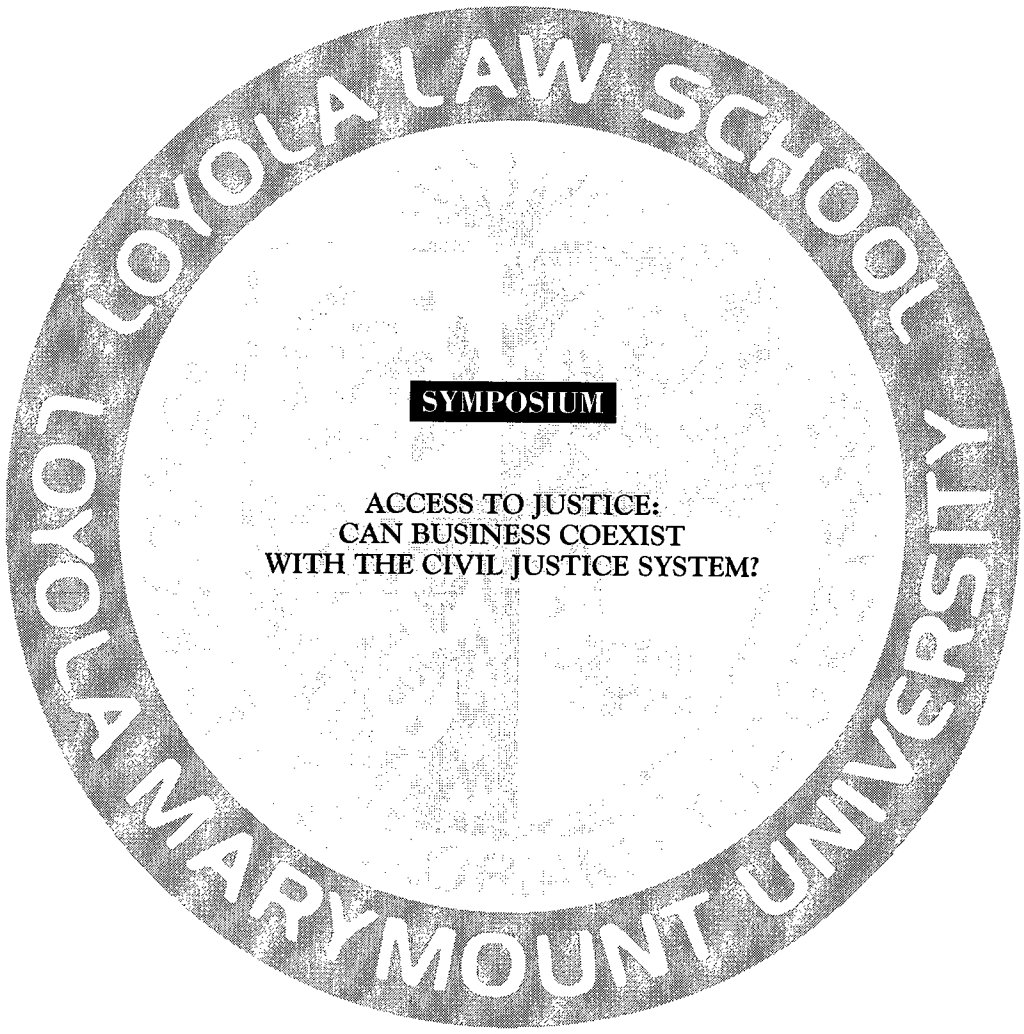
LOYOLA LAW REVIEW

OF LOS ANGELES



SYMPOSIUM

ACCESS TO JUSTICE: CAN BUSINESS COEXIST WITH THE CIVIL JUSTICE SYSTEM?

SPRING 2005 VOLUME 38 NUMBER 3

IS THE "CRISIS" IN THE CIVIL JUSTICE SYSTEM REAL OR IMAGINED?

*Steven B. Hantler**

*Mark A. Behrens***

*Leah Lorber****

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[1] or a nearly $3

* Assistant General Counsel for government and regulation at the DaimlerChrysler Corporation (director of the Company's litigation communications function, as well as the Class Action Group, Consumer Litigation Group; and legal reform activities); J.D., Wayne State University of Michigan. Senior fellow at the Pacific Research Institute. Mr. Hantler has written extensively on the tactics employed by plaintiffs' lawyers in suing large corporations and in targeting certain industries. Recently, he published *The Change in How We Deal with Crisis: The Seven Myths of Highly Effective Plaintiffs' Lawyers,* VITAL SPEECHES OF THE DAY, Oct. 1, 2003, at 761. He also has a quarterly column on litigation issues published in *Litigation Management Magazine.* He is widely quoted on television and in business magazines and newspapers about high profile litigation.

** Partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. B.A., 1987, Economics; University of Wisconsin-Madison; J.D., 1990, Vanderbilt University. Mr. Behrens served as Associate Articles Editor of the *Vanderbilt Law Review.*

*** Counsel in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. B.A., Journalism, and English, Indiana University; J.D., *magna cum laude* from Indiana University. Ms. Lorber was a member of the Order of the Coif at Indiana University and served as Articles Editor of the *Indiana Law Journal.*

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.[2] 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.[3]

---

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; *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://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/04&DATAMODE='''; 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* http://sos.state.nv.us/nvelection/2004General/ElectionSummary.htm'''; 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.[4] 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.[5] Effective and reliable transfer mechanisms tend to have four attributes: They are

---

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.[6] 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."[7] 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.[8]

In 2003, the U.S. tort system cost $246 billion.[9] This is more than the amount of federal revenue collected from the corporate income tax.[10] It also is "far more than enough money to solve Social Security's long-term financing crisis"[11] 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."[12] In 2003, this aggregate cost translated to $809 per

---

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.

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.

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.[13] In 2004, the aggregate cost increased to $845 per U.S. citizen.[14] 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.[15]

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[16] to $246 billion.[17] Tort costs represented only 0.6% of America's gross domestic product ("GDP") in 1950, 1.3% of GDP in 1970,[18] and more than 2% of GDP by 2001.[19]

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.[20] 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.[21]

---

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.

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.

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.[22] On average, tort trials reach a verdict or judgment in a little more than two years.[23]

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."[24] 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."[25]

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

---

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/mmtvlc01.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.").

who made a defective product can escape responsibility, while in another case, liability is imposed regardless of whether the product was defective or whether the product caused the harm.

Yale University law professor George Priest studied this nexus between liability and safety and found little evidence that the expansion of liability law enhances safety.[26] His analysis showed that although the annual numbers of tort suits and liability insurance premiums rose sharply during the 1980s, injury rates for consumers and workers, death rates from medical procedures, and aviation accident rates declined no faster than they had been declining in the 1970s, when premium costs and the volume of tort suits were much lower.[27] He concluded that "the basic doctrines of modern law largely neglect the most effective methods of accident control."[28]

Another study published several years later reached a similar conclusion. This study found that while low and modest damage awards can enhance safety, high damage awards can produce a negative effect.[29] The problem the authors uncovered was that in response to high liability costs that make a new product more expensive to produce, companies would decrease research and development on innovative safety methods rather than assume the risk of high levels of liability that come with novel products.[30] When

---

26. *See* George L. Priest, *Products Liability Law and the Accident Rate*, *in* LIABILITY: PERSPECTIVES AND POLICY 184 (Robert E. Litan & Clifford Winston eds., 1988).

27. *Id.* at 187–93.

28. *Id.* at 222.

29. *See* W. Kip Viscusi & Michael J. Moore, *Product Liability, Research and Development, and Innovation*, 101 J. POL. ECON. 161, 174–75 (1993).

30. *See id.* at 175. For example, prior to the enactment of the General Aviation Revitalization Act in 1994, the products liability system added costs of "$70,000 to $100,000 per [light airplane] built and shipped," while the cost of U.S. automobiles increased by "hundreds of dollars per car sold." *See* THE BROOKINGS INSTITUTION, THE LIABILITY MAZE 18–19 (Peter W. Huber & Robert E. Litan eds., 1991). In the late 1980s, approximately 15% of the costs of American-made machine tools was attributed to products liability costs. *See Bill To Amend The Federal Aviation Act of 1958 Relating To General Aviation Accidents: Hearings on H.R. 2238 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong. 47 (1987) (testimony of Robert M. Malott, Chairman and Chief Executive Officer, FMC Corporation). Similarly, as a result of liability costs, the costs of a single dose of DPT vaccine rose from 12 cents in 1980 to about $12 dollars in 1987. *See id.* at 49.

damages became excessively high, companies would either stagnate or withdraw from the market altogether.[31]

Finally, Dr. Viscusi of Harvard Law School released a study a few years ago that considered whether risky behavior is deterred in states that allow punitive damages compared with those that do not.[32] He reviewed an "extremely wide range of risk measures—toxic chemical accidents, toxic chemical accidents causing injury or death, toxic chemical discharges, surface water discharges, total toxic releases, medical misadventure mortality rates, total accidental mortality rates, and a variety of liability insurance premium measures."[33] Dr. Viscusi concluded that "[s]tates with punitive damages exhibit no safer risk performance than states without punitive damages."[34] In fact, he found no overall difference with regard to safety and environmental performance, and "there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages."[35]

In his analysis of these results, Dr. Viscusi observed that while

---

31. For example, due to unwarranted products liability litigation, Merrell Dow Pharmaceuticals withdrew its anti-nausea morning sickness drug, Bendectin, from the market in 1983. *High Court Hears Views on Bendectin*, CHEM. MKTG. REP., Apr. 5, 1993, at 13. The drug had been approved by the U.S. Food and Drug Administration and was widely acclaimed by health care professionals, but Merrell Dow's legal defense costs were far in excess of the amount received in annual sales of Bendectin. *Id.* For similar reasons, G.D. Searle & Co. (a subsidiary of Monsanto) withdrew the Copper-7 intrauterine device from the market in 1986, even though the product had been approved by the FDA and used for many years. *See* Betsy Morris, *Monsanto Unit Stops Marketing Its IUDs in U.S.*, WALL ST. J., Feb. 3, 1986. Two of three companies manufacturing the DPT vaccine stopped producing it in 1984 in light of rising products liability costs. S. REP. NO. 105-32, at 10 (1997). The Centers for Disease Control and Prevention subsequently asked doctors to stop vaccinating children over age 1 to conserve the limited supply of the vaccine. *Id.* While these provide a few examples, the problem is widespread. A 1988 survey by the Conference Board of more than 2,000 chief executive officers found that 36% of the companies had discontinued product lines as a result of actual liability experience and that 11% of the companies had done so based on anticipated liability problems. *Id.* at 8.

32. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 298 (1998).

33. W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381, 381 (1998).

34. Viscusi, *supra* note 32, at 298.

35. *Id.* at 287.

the potential for punitive damages adds to the costs of risks, thereby making safety precautions more attractive, juries award punitive damages in such a capricious manner that there is no linkage between the expected punitive damages and the firm's risk actions: "[W]hen firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect."[36] He also found that there is no need to augment the safety incentives provided by the market, government regulation, and compensatory damages.[37] Rather, the increased costs of paying punitive damages "lead to higher prices and other adverse economic effects."[38]

II. TRENDS TOWARDS LESS EFFICIENCY, PREDICTABILITY, TIMELINESS AND FAIRNESS

The delicate balance between costs and benefits is being pushed further off-kilter by several national trends in civil litigation. These trends include: (1) the skyrocketing costs of litigation, (2) the growing disconnect between costs and fault, (3) the use of the civil justice system for non-compensatory purposes, (4) the relaxation of the traditional elements needed to file a tort claim, (5) the deprivation of reliable and important information provided to juries, and (6) the creation of "judicial hellholes."[39] This section of the Article discusses the way each of these developments contributes to creating a legal system that is less efficient, predictable, timely, and fair.

A. Trend 1: The Skyrocketing Costs of Litigation

1. Windfall Damages

Windfall compensatory awards—namely pain and suffering damages—are quickly approaching arbitrary punitive damages awards as a major contributor to the crisis in the civil justice system.[40] Arbitrary punitive damages awards have long been

36. Viscusi, *supra* note 33, at 383.

37. *Id.*; *see also* Viscusi, *Social Costs*, *supra* note 32, at 310–11, 317.

38. Viscusi, *supra* note 32, at 311.

39. The American Tort Reform Association, a client of Shook, Hardy & Bacon L.L.P., has a trademark claim to the term "judicial hellholes."

40. *See* Hon. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401 (2004); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment"*, 54 S.C. L. REV. 47

criticized as contributing to the crisis in the civil justice system, as the opportunity to obtain "jackpot justice" tends to encourage the filing of meritless lawsuits.[41]

This trend toward excessive pain and suffering awards appears to be in response to efforts by the Supreme Court of the United States to rein in "grossly excessive"[42] punitive awards.[43] Since the 1990s, recognizing that the arbitrary nature of punitive damages awards threatens constitutional due process guarantees, the Court has developed legal rules governing both the amount and procedures for their assessment.[44]

(2002).

41. The problem of arbitrary punitive damages awards spurring meritless litigation has been identified in numerous areas of the law, not just tort litigation. *See* Paul J. Siegel, *Cutting-Edge Developments in Compliance: Labor & Employment Law Issues*, 1230 PRAC. L. INST. 487, 531 (2001) (lowering the threshold for punitive damages would promote the filing of meritless or avoidable litigation in employment law); Michael A. Berch & Rebecca White Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure,* 69 MISS. L.J. 715, 727 n.49 (1999) (observing that the "right to be free from a punitive damages claim affords the party opposing such a claim protection from the expense of having to litigate meritless claims and the concomitant increase in the settlement value of a case once a claim for punitive damages is added"); Note, *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1774 (1996) (stating that punitive damages in tort litigation lead to the situation where "plaintiffs bring[] meritless suits and receiving a windfall to which they are not entitled"); Richard M. Phillips & Christine E. Plaza, *Reforming Securities Litigation*, BUS. L. TODAY, July–Aug. 1995, at 27 (in securities litigation, the award of "punitive damages unrelated to any economic loss creates enormous exposure for defendants that in turn generates immense pressure on these defendants to settle even meritless claims"); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1156 (1984) (writing that "[a] byproduct of the continued success that plaintiffs have experienced in obtaining large punitive damage awards is the now universal practice of plaintiffs alleging and demanding punitive damages in an effort to increase the ultimate recovery from juries, and to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award").

42. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 n.10 (1991).

43. *Id.* at 21–22. The Court noted in 1974 that few objective guidelines existed for measuring punitive damages and that "[c]onsequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

44. The court requires sufficient checks on the unlimited use of jury

Unfortunately, pain and suffering damages are starting to supplement punitive damages awards as a source of "jackpot justice" damages for plaintiffs. The issue, which somewhat mirrors the punitive damages debate, is that there is no objective formula for valuing pain and suffering awards.[45] It is difficult to assess another person's pain and suffering and then translate it into its financial equivalent; "[j]uries are left with nothing but their consciences to guide them."[46] Because pain and suffering awards are inherently subjective, courts generally uphold them absent a finding that the award "shocks the conscience."[47] Therefore, juries can be inappropriately swayed to increase the plaintiff's pain and suffering award by evidence that is directed away from the plaintiff and toward the wrongdoing of the defendant. This misuse of "guilt evidence" upends the fundamental purpose of pain and suffering awards—which is to compensate the plaintiff.

Through this technique, the defendant is "punished," but the award is not subject to the extensive legal controls that help assure

---

discretion in the procedures governing the award and review of punitive damages. *See Gertz*, 418 U.S. at 350; Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994). The court has also established substantive limits on the amount of punitive awards. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993). Additionally, there is a three-pronged constitutional test that considers the reprehensibility of the misconduct, the relationship between the penalty and the harm to the plaintiff, and the civil and criminal penalties for comparable misbehavior. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575–85 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–25 (2003) (refining the *Gore* test). Lastly, appeals courts may take a "thorough, independent review" of the constitutionality of an award, rather than deferring to the trial court's decision making. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 441 (2001). *See generally* Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (2000) (discussing punitive damages reform approaches).

45. As one commentator noted, "Courts have usually been content to say that pain and suffering damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide." Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 912 (1989).

46. Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985).

47. Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1052, 1068 n.148 (2004).

that real punitive awards do not cross the constitutional line.[48] These inflated compensatory damage awards also, in turn, can be used to justify higher punitive damages than otherwise would be constitutionally permissible.[49] As one federal appeals court judge wrote: "Without rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law's rationality and predictability—two essential values of the rule of law."[50] The inefficiency and unfairness of the current system snowball when these inflated compensatory damage awards, in turn, are used to further justify higher punitive damages in the same trial.[51]

---

48. Examples abound. The Mississippi Supreme Court in May 2004 overturned a $48 billion compensatory award against Janssen Pharmaceutica; the original award in this pharmaceutical products liability case was $100 billion, $10 billion for each of six plaintiffs regardless of their actual damages, injuries, ages, medical histories and other individual factors. The court explained: "Essentially, Plaintiffs' counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury. In awarding each Plaintiff $10 million across the board, the jury responded to this inflammatory and improper argument." Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 62 (Miss. 2004). For a more extensive discussion of this case, see Victor E. Schwartz, Leah Lorber & Rochelle M. Tedesco, *Taking a Stand Against Lawlessness in American Courts: How Trial Court Judges and Appellate Justices Can Protect Their Courts From Becoming Judicial Hellholes*, 27 AM. J. OF TRIAL ADVOC. 215 (2003). Similarly, in April 2004, a Jefferson County, Texas state court jury rendered a $1 billion verdict against Wyeth Pharmaceuticals in a wrongful death fen-phen case. The verdict included $100 million in damages for pain and suffering, in addition to approximately $1.6 million in economic damages and a $900 million punitive award. The $100 million pain and suffering verdict was clearly the result of evidence of the defendant's alleged wrongdoing. The trial court allowed the plaintiffs to argue that the company committed a felony in its dealings with the federal Food & Drug Administration, rendering the Texas statutory limits on punitive damages inapplicable; the punitive award of nine times the compensatory damages was built on this figure. Coffey v. Wyeth, No. E-167-334 (Jefferson Cty. Dist. Ct. Apr. 27, 2004).

49. In *State Farm*, the U.S. Supreme Court recognized that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process," and that a ratio of four to one is "close to the line of constitutional impropriety." 538 U.S. at 425. If the underlying compensatory damages award results from an inflated pain and suffering award, the resulting punitive award would be a multiple of the already overstated compensatory damages.

50. Niemeyer, *supra* note 40, at 1401.

51. *See supra* note 47.

2. Multiple Penalties for the Same Misconduct

Problems of inefficiency and unfairness are multiplied when defendants are repeatedly assessed punitive damages for the same misconduct. Punitive damages are "intended to punish the defendant and to deter future wrongdoing."[52] They have nothing to do with compensating plaintiffs for their injuries.[53] Each individual plaintiff can be made whole through compensatory damages, which provide payment for economic losses (such as lost wages and medical expenses) and noneconomic injuries (such as pain and suffering awards). Subjecting a company to multiple punitive damage awards for the same act or course of conduct is the civil law equivalent of double jeopardy, and, in mass tort litigation, a company can be assessed punitive damages literally hundreds or thousands of times.[54]

Multiple punitive damages serve neither a compensatory nor a deterrence function. Certainly, a responsible defendant should provide *compensation* to each individual plaintiff when numerous plaintiffs are injured because of a single wrongful act by the defendant. Once the plaintiffs are made whole, however, it is not logical to *punish* the defendant over and over for the same wrongful act.[55] With multiple punitive damages awards, individual plaintiffs

---

52. *Cooper Indus., Inc.*, 532 U.S. at 432. *See also Gertz*, 418 U.S. at 350 (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded to punish the defendant, to teach the defendant not to "do it again," and to deter others from similar behavior).

53. *See* PROSSER, WADE & SCHWARTZ'S TORTS 549–50 (Victor E. Schwrtz et al., eds., 10th ed. 2000).

54. As one commentator wrote, "[A] single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages,* 72 VA. L. REV. 139, 142 (1986); *see also* Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 51 (1983).

55. *See, e.g.*, Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, BRIEFLY, Dec. 2003, at 1 (explaining that although common sense informs a parent's decision to "not punish a child more than once for the same wrong-doing," the U.S. "civil justice system has strayed from common sense and basic fairness").

receive and the defendant is assigned disproportionate costs. Thus, multiple punishment significantly skews the transfer mechanism of the civil justice system.

Assessing multiple punitive damages also is an inefficient way to deter future misconduct. First, there is the very real possibility of over-deterrence. Faced with the potential onslaught of numerous multi million- or billion-dollar punitive awards arising from, for example, a single error in a product design, companies may just as readily avoid engaging in beneficial behavior as in misconduct. As long ago as 1967, the distinguished Judge Henry Friendly of the United States Court of Appeals for the Second Circuit observed the likelihood of "over-severe admonition"[56] inherent in repetitive punitive awards: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."[57]

This (over)deterrence also comes at a cost, both to the judicial system and the economy. Repetitive lawsuits for punitive damages use up a great amount of judicial resources, tying up court time and personnel. Corporate defendants may also be forced to allocate a disproportionate amount of financial resources to legal defense and liability costs instead of to research and development. Further, as one federal judge observed, the availability of multiple punitive damages against the same defendant is "the major obstacle to settlement of mass tort litigation and . . . the prompt resolution of the damage claims of many thousands of injured plaintiffs."[58] In addition to delaying settlement, the perception that earlier awards against the defendant may be matched or topped drives up settlement

56. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 n.7 (2d Cir. 1967).

57. *Id.* at 839 (addressing availability of multiple punitive damages awards in products liability cases).

58. Hon. William W. Schwarzer, *Punishment Ad Absurdum*, CAL. LAW. Oct. 1991, at 116. The Third Circuit Court of Appeals has also cited Judge Schwarzer, noting his conclusion that "the potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained." Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir. 1993) (en banc) (Weis, J., dissenting) (citing *Asbestos Litigation Crisis in Federal and State Court: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong. 132–133 (1992) (statement of Hon. William W. Schwarzer)), *modified*, 13 F.3d 58 (3d Cir. 1993).

costs.[59]

Multiple punitive damages are unfair to both plaintiffs and defendants. The problem for plaintiffs can be readily seen in the mass tort context, where multiple punitive damage awards effectively transform the judicial system into a legal lottery. The repeated award of windfall punitive damages to earlier-filing plaintiffs "imperils [a defendant's] ability to pay compensatory claims [to future claimants] and its corporate existence."[60] When companies are forced into bankruptcy by multiple punitive awards, individual future plaintiffs receive less or no compensation, and entire communities are affected.[61] As for defendants, courts and

---

59. For example, consider reactions to the $1 billion-plus verdict in the first primary pulmonary hypertension ("PPH") case to go to trial in the fen-phen litigation. Coffey v. Wyeth, No. E-167-334 (Jefferson County Dist. Ct. Apr. 27, 2004). The award included $900 million in punitive damages and was handed down by a Jefferson County, Texas jury in April 2004. (The case is currently on appeal.) Peter Kraus, a lawyer at Waters & Kraus in Dallas, stated "There's no question that [the $1.013 billion award] will have an impact on what plaintiffs' lawyers are willing to take, and it's going to embolden more plaintiffs' lawyers to try more of those cases." Reed Abelson & Jonathan D. Glater, *A Texas Jury Rules Against A Diet Drug*, N.Y. TIMES, Apr. 28, 2004, at C1. Tommy Fibich, a Houston plaintiffs' lawyer, echoed that sentiment: "I've got . . . a PPH case and clearly this verdict has made me think it was worth more than it was yesterday." Brenda Sapino Jeffrey, *$1.01 Bil. Fen-Phen Verdict Faces Cap*, LEGAL INTELLIGENCER, May 4, 2004, at 4.

60. Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990); *see also* Bishop v. Gen. Motors Corp., 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

61. As of Jan. 11, 2005, at least 74 companies had sought Chapter 11 protection as a result of asbestos litigation. *The Fairness in Asbestos Injury Resolution Act: Hearing Before the Sen. Comm. on the Judiciary* (2005) (statement of Mr. Craig Berrington, General Counsel, American Insurance Association), 2005 WL 61512. The impact of these bankruptcies is well-documented. The National Economic Research Associates found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. *See* JESSE DAVID, THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES (U.S. Chamber of Comm. ed., 1993), *at http://www.nera.com/image/5832.pdf* (last visited June 10, 2005). Additional costs that were brought upon workers and communities include up to $76 million in worker retraining, $30 million in increased healthcare costs, and $80 million in payment of unemployment benefits. *Id.* Moreover, for every ten jobs lost at a company from an asbestos bankruptcy, the community can lose eight from the "spillover effect." Jerry A.