

Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research

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I. INTRODUCTION

During the past year, insurers, manufacturers, physicians, consumer advocates, and trial attorneys have vigorously debated the costs and benefits of tort law as a mechanism for compensating and deterring injuries. The debate began with a perceived "insurance crisis," as liability insurance premiums, particularly for medical malpractice and commercial lines, increased sharply and insurance for some types of activities suddenly became unavailable at any price. When insurers linked rising rates and unavailability to trends in tort litigation, attention shifted to the legal system. In many states, as well as at the federal level, coalitions of insurers, manufacturers, health care professionals, and municipal government officials were formed to support substantive changes in tort law. Trial attorneys and consumer groups generally opposed such changes, arguing that the insurance crisis was contrived, or at least attributable to factors other than tort litigation trends.

Proponents and opponents of what became known as "tort reform" not only had different ideological positions, but also appeared to hold sharply differing views of reality. Proponents of change argued that there has been an explosion of liability lawsuits over the past several years, that recent verdicts indicate that civil juries are "out of control," and that whatever monetary benefits the tort liability system delivers to injured parties are overshadowed by the enormous costs of administering the system. Tort reform was needed, they said, to counteract these trends.¹

Opponents of tort reform argued that the litigation explosion is a myth, that the level of jury awards has remained roughly stable over the past twenty-five years, and that the level of transaction costs incurred by the liability system is acceptable given its compensation and deterrence objectives. Changes in tort law, they argued, were not necessary and might be harmful to those the system is supposed to serve.²

Each side in the debate presented statistical data that appeared to support its position. The differences in the data cited were surprising even to those wise in the ways of "lying with statistics." The two sides were talking about seemingly different worlds, yet each claimed to be telling the truth about what was occurring in the tort litigation system. How could this be?

Recent research on trends in tort litigation, conducted by the Institute for Civil Justice (ICJ) at the RAND Corporation suggests an explanation for the apparent

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1. See, e.g., *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability*, Feb. 1986; *An Update on the Liability Crisis*, Tort Policy Working Group, Mar. 1987.

2. See, e.g., *The Manufactured Crisis*, CONSUMER REP., Aug. 1986.

discrepancies among the statistics.³ The data collated and analyzed by ICJ researchers suggest that there is no longer, if there ever was, a single tort system. Instead, there are at least three types of tort litigation, each with its own distinct class of litigants, attorneys, and legal dynamics: (1) the world of ordinary accident litigation, best illustrated by the types of cases that arise out of automobile accidents; (2) the world of “high stakes” litigation, best illustrated by products liability and malpractice lawsuits, and the emerging area of business torts; and (3) the world of mass latent injury cases. Each of these worlds is characterized by a different litigation growth rate, jury verdict trend, and cost profile. Treating all these types of litigation together—as is done whenever overall statistics for tort litigation are reported—produces a picture of tort litigation that does not accurately reflect the reality of any of these worlds. Inferences about trends in one area of litigation that are based on data drawn from another are also likely to be wrong. In the recent debate over tort reform both sorts of mistakes have been made. The resulting controversy over whose statistics are “right” was unfortunate because it drew attention from the more important story behind the statistics: namely, that different types of changes are taking place in different areas of litigation, changes which may well merit different types of policy responses.

This Article addresses each of the three questions that have been at the heart of the tort liability debate. Drawing primarily on ICJ research, this Article demonstrates how the answers to these questions differ depending on which world of litigation one looks at. Finally, the Article concludes by suggesting why litigation trends and outcomes for automobile accident lawsuits, products liability and medical malpractice lawsuits, and mass latent injury lawsuits are increasingly divergent.

II. LITIGATION RATES: STEADY STATE OR EXPLOSION?

A. *The Statistical Controversy*

Some observers claim that the United States is witnessing an “explosion” of litigation that reflects a degree of litigiousness among Americans that is greater than anywhere else in the world. Others say recent court filing statistics indicate that litigation is increasing slowly, if at all. Some even argue that litigiousness in the United States is not as great as it should be; that many Americans with legitimate grievances do not pursue them in court because they lack the financial and social resources necessary to do so. Is there any area of agreement among those researchers who have looked hardest at the statistics? Is there an empirical basis for discrepant positions?

B. *What the Data Say*

Three organizations are the source of the most commonly cited data in the debate over litigation rates: the Administrative Office of the U.S. Courts, which yearly

3. The Institute for Civil Justice was founded at RAND in 1979 to conduct independent, objective policy analysis and research on civil justice issues. RAND is a private, nonprofit institution; the ICJ is supported by pooled grants from corporations, including insurance and non-insurance organizations, private foundations, trade and professional associations, and individuals.

collects, tabulates, and publishes information about filings in the federal district courts (as well as other parts of the federal system); the National Center for State Courts, a private non-profit, court-supported organization that has led the effort to develop, collect, and publish standardized annual statistics on state trial court caseloads; and the ICJ, which does not itself collect or publish caseload statistics but has invested considerable effort in reviewing and interpreting the available data in the course of its studies. As shown in Figure 1, the statistics on growth in the nation's tort filings over the last several years are somewhat different (which is one source of controversy), but the message of all is basically the same: the total tort caseload has grown very little in recent years. The differences in the numbers shown in Figure 1 mainly reflect different researchers' judgments about how to interpret what are, unfortunately, incomplete and not easily comparable data. At the ICJ we have used our own researchers' judgments, and their assessment, based on the available data, is that the total tort litigation caseload, nationwide, appears to be growing at an annual rate of about three percent per capita (that is, adjusting for population growth).⁴

However, the statistics for the overall growth in personal injury litigation hide some important differences among cases. Figure 2 uses federal district court filing data from the Administrative Office and filing statistics from the State of California—which is one of the few states that disaggregates its tort caseload—to illustrate this point. To make it easier to discern growth (or decline) in the filings in each category of case in each court system, we have computed a "change index" that takes 1975 filings as the baseline and compares each successive year's filings to the base. (The concept is similar to that of the Consumer Price Index (CPI).)

As shown in Figure 2, automobile accident case filings in California have remained relatively stable over the decade. However, the number of other types of personal injury lawsuits (product liability, medical, and other types of personal injury lawsuits) has increased substantially at a rate greater than population growth.⁵

Turning to federal district court data, we see a similar pattern: among personal injury cases, auto accident cases (and marine and aviation accident cases) have increased slowly if at all. Other personal injury cases have increased at a much faster pace; the upward slope of the curve for non-auto, non-products cases is quite similar to the slope of the non-auto case curve in California. The cases that have increased the most over the period are products liability suits, which have multiplied five-fold in the last decade.

A couple of caveats are necessary regarding the federal district court statistics. First, federal filings represent only a small fraction of the total tort caseload nationwide, about five percent according to most estimates.⁶ Consistent with this, although the rate of increase in the products liability caseload has been very large, the absolute number of such cases is still quite small—about 12,000 in 1985. Second, no one knows whether or to what extent the sharp increase in the federal products

4. J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 15 (1986).

5. See D. HENSLEY, TRENDS IN CALIFORNIA TORT LIABILITY LITIGATION (1987).

6. J. KAKALIK & N. PACE, *supra* note 4, at 13.

- **Tort filings in state courts have grown**
 - Average 2.3% annually, 1981-1984 (NCSC)
 - Average 3.9% annually, 1981-1984 (ICJ)

- **Tort filings in federal courts have grown**
 - Average 4% annually, 1981-1984 (AOC)

- **Slow growth overall: 3.0% per capita annually**

FIG. 1—DIFFERENT STATISTICS ON CASE FILINGS CARRY SAME MESSAGE

caseload represents a real increase in products cases nationwide or a shift of such cases into the federal courts from the state court system. Third, we do not know whether or to what extent the increase reflects the growth of one particular segment of the products caseload—mass toxic exposure cases (such as those filed by asbestos workers).⁷

The area of litigation in which explosive growth has already been observed and seems likely to continue in the future is mass toxic torts. Despite the attention they have received, mass latent injury cases are a small fraction of the total tort caseload nationwide. However, current legal rules, especially statutes of limitation, combine with the facts of mass latent injury cases to create a caseload explosion. This explosion occurs whenever large numbers of people suddenly become aware that they have been exposed to a potentially harmful substance that may have already caused them some physical injury or may lead to such injury in the future. Thus, in the late 1970s when it became apparent that asbestos workers might have a legal claim against asbestos manufacturers, cases surged into the courts in sites around the country where there had been extensive use of asbestos. Similarly, when evidence of injuries associated with Dalkon Shields became widely available the potential for large scale litigation became obvious. The estimates of increases in the number of lawsuits and claims regarding these two products are shown in Figure 3. These dramatic increases provide an empirical basis for the fear that exposure to toxic substances may create a deluge of litigation in future years.

In sum, when we look across the tort caseload we see a low rate of growth nationwide. But when we disaggregate that caseload (at least in those jurisdictions where that is possible) we see very different growth trends across cases. Automobile cases are characterized by stability; products liability, malpractice, and other non-auto cases are growing at a substantial rate. Mass toxic cases have “exploded” in certain areas of the country, although they still constitute a small fraction of the total tort

7. The ICJ is currently analyzing the federal caseload data to determine what fraction of the recent increase is attributable to asbestos cases.

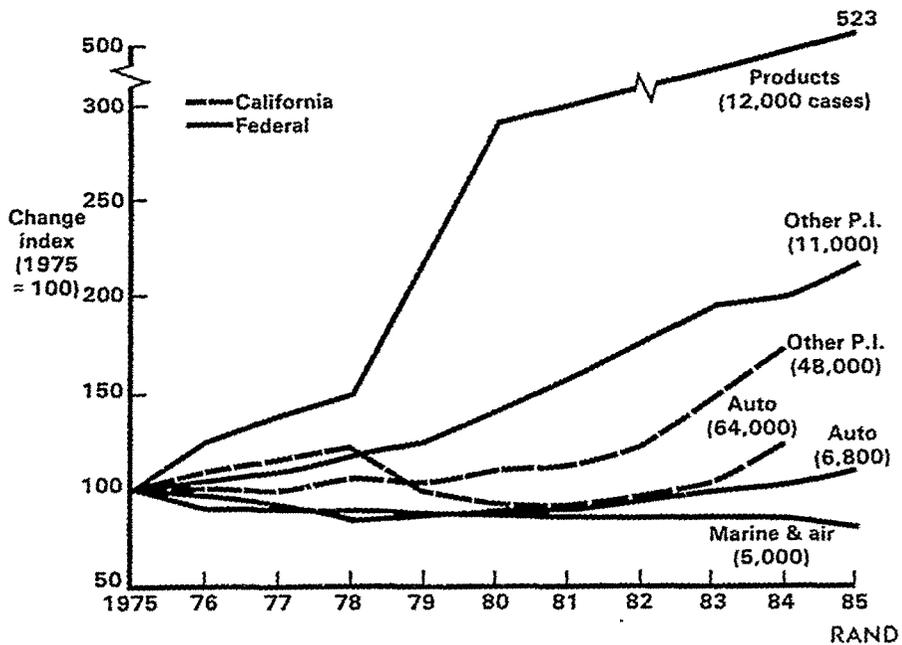


FIG. 2.—GROWTH RATES DIFFER FOR DIFFERENT CASE TYPES

caseload. Whether one observes growth or stability, then, depends on which part of the system one is looking at.

Despite the rhetoric, none of these data indicate the extent of litigiousness in the United States, or whether Americans' propensity to litigate grievances has increased, decreased, or remained the same. For that, we would need to know not only how many suits are filed, but also how many instances there are in which suits could be filed—and either are or are not. None of the researchers whose data have been cited in the recent debate has been able to collate statistics on that issue.

III. JURY AWARDS: STABLE OR OUT OF CONTROL?

A. *The Statistical Controversy*

The fierceness of the debate over the litigation explosion and the alleged litigiousness of Americans has been more than matched in the controversy over trends in jury behavior. Again, participants in the debate have presented statistics to support two very different pictures of the litigation system: one, a system in which American juries continue to respond to personal injury cases more or less the same way they did twenty years ago, and without untoward generosity toward plaintiffs, the other, a system in which juries have somehow spun out of control behaving unpredictably, delivering verdicts that are increasingly disproportionate to the injuries actually suffered by the plaintiff.

The debate over jury verdict trends, like the debate over litigation rates, has been complicated by the lack of a comprehensive database. In fact, students of jury verdict

	<u>1981</u>	<u>1986</u>
Asbestos	16,000 cases	30,000+ cases
Dalkon Shield	7,500 cases	300,000+ claims

FIG. 3—MASS LATENT INJURY CASES CAN SHOW EXPLOSIVE GROWTH

trends look with envy at the data that litigation rate analysts have available to them. While the latter cannot provide as much detail as they would like to about national trends, the former have no national data available to them at all. Although jury verdicts are usually a matter of public record, in most jurisdictions these data reside only in individual case records stored in court archives that are expensive and time consuming to access. The jury verdict data that have been dissected in the recent debate have been derived by the ICJ and a few other research organizations from jury verdict reporters. These newsletters are prepared by local or regional entrepreneurs; they provide, on a weekly or monthly basis, information on the outcomes of local jury trials to attorneys who wish to keep track of the way juries in their area are responding to different types of cases. Many of these reporters collect information only on unusual cases—big wins or losses; a few attempt to collect and report information about all verdicts delivered in their jurisdiction. Most are of relatively recent vintage; a few have been reporting verdicts for a decade or more. No one has yet been able to assemble a nationally representative sample of jury verdicts from these reporters.

The debate over jury awards has also been complicated by argument over the proper statistics to use in describing trends. The most frequently cited statistics are “medians” and “means” computed either across all awards to plaintiffs (*e.g.*, the mean award in event of a plaintiff victory) or across all jury verdicts (*e.g.*, the mean verdict for all cases tried to verdict). Here again, although some of the debaters assert that there is only one “right” statistic, the truth is that each of the statistics is valid (assuming it is computed correctly), but each tells us something different about the distribution of jury trial outcomes.

The median award is the mid-point of the distribution of jury awards to the plaintiff—the point dividing the upper half of the award distribution from the lower half. To compute the median, one simply lists all the awards in the jurisdiction under study in order of their dollar value and finds the award that is at the mid-point of the list. The value of this award will not be affected by the value of other cases. Although it is possible for many of the values in a distribution to be quite divergent from the median, in the absence of other information it is reasonable to guess that most of the

values are not too much higher or lower than the median. For this reason, it has become popular to think of the median as indicating the "typical" jury award.⁸

The mean award is the statistical average of all jury awards. To compute it, one sums the dollar value of all awards to the plaintiff in the jurisdiction under study and divides by the number of these awards. A few awards of extreme value will skew the resulting value. For this reason, some participants in the tort liability debate have argued that the use of means is inappropriate; in fact, the mean provides more accurate summary information than the median regarding the entire distribution of awards, both low value, medium value, and high value. It is the best single indicator of the award a victorious plaintiff (or losing defendant) can expect, based on past experience.

Together, median and mean awards provide useful information about the distribution of outcomes when the plaintiff wins. But plaintiffs often lose personal injury cases. In order to capture information about trends in plaintiffs' (and defendants') chances of victory, one can compute a mean verdict that treats defense verdicts as zero ("0") awards. (One simply sums all verdicts, including those for the defense, and divides the total dollar value by the total number of cases tried to verdict.) In the ICJ's reports, we term this the "expected verdict" because it is the best single statistical indicator of what the plaintiff could expect to win and the defendant expect to lose, in the period and jurisdiction under study. By tracking expected verdicts over time, we can take into account both change in the likelihood of plaintiff victory and change in the amounts awarded by juries to plaintiffs. Since the data show that both sorts of changes are occurring, this is an important indicator to watch.

Whatever the statistical indicator, when interpreting jury trends it is important to remember that we are observing only the tip of the iceberg—that small percentage of cases that actually go to verdict. Although most practitioners and scholars believe that the outcomes of settled cases are strongly influenced by the outcomes of tried cases, the exact nature of this relationship has not been subjected to systematic analysis. Perhaps more important, we do not know what differentiates settled from tried cases or how settlement dynamics have changed over time. As a result, we do not know whether a shift in the distribution of jury verdicts mostly reflects a change in jury behavior or mostly reflects a change in the nature of the cases that are being tried to verdict; in the absence of empirical studies on this point, our best guess is that it reflects both.⁹

A final source of confusion in the debate over jury verdict trends derives from the treatment of inflation. Whenever we are observing trends in monetary data over time, we expect values to increase because of overall inflation in the economy. In other words, we expect jury awards to increase because medical costs, salaries,

8. A more accurate statistical indicator of the "typical" award would be the "mode," which is simply the value that occurs most frequently. I have not encountered the use of this indicator in the tort liability debate, but it might be worthy of attention.

9. As discussed below, the ICJ has performed this type of analysis, which requires more sophisticated multivariate statistical techniques.

etc., have increased. To detect such increases, it is useful to convert all dollar amounts to a constant base year. Recent ICJ reports use 1984 dollars; some researchers report raw dollars. Again, each treatment is appropriate for a different question: constant dollars permit us to detect shifts in the dollar distribution of awards that are not attributable simply to background inflation. But raw dollars are what defendants or insurers ultimately pay, and plaintiffs receive (subject to post-trial adjustments).¹⁰

B. *What the Data Say*

Keeping these statistical problems and caveats in mind, what can we say about trends in jury awards? The ICJ's work on this subject is based on data from 1960-1985 for Cook County, Illinois and San Francisco, California. These jurisdictions were chosen for study because in each locale there is an organization that has been attempting to report all jury outcomes in civil damage cases over a twenty-five year period. We do not believe that the verdicts in these jurisdictions are matched in every particular in other jurisdictions nationwide; however, the similarity of trends over time between the jurisdictions—which are themselves different in many respects and the consistency of these trends with those seen in more fragmentary nationwide data—lead us to believe that the changes we have observed reflect underlying shifts in the distribution of jury awards.¹¹

Until recently, in both these jurisdictions, the median jury award for all personal injury cases was remarkably stable. After accounting for inflation, there was little or no change in the median award from 1960-1979 in either Cook County or San Francisco. (See Figure 4.) This stability is one source of the perception that there has been little change in jury behavior. In the past five years, the median award actually decreased in Cook County; in San Francisco, by contrast, it increased sharply. In both jurisdictions, we believe, the shift reflects changes in the composition of the jury trial caseload, rather than an underlying shift in jury behavior. In Cook County, a shift to comparative negligence may have increased attorneys' propensity to bring smaller value cases to trial. In San Francisco, the establishment of a mandatory court-administered arbitration program for smaller value cases and an increase in the lower court's jurisdictional level appear to have reduced the number of smaller value cases reaching trial. Despite these short-term shifts, we believe the underlying trend for median verdicts overall is stable.

However, as in the case of the filings data, the aggregated jury verdict data mask differences in trends of median awards in different parts of the caseload. When we disaggregate the data in both jurisdictions, we observe that median awards for automobile accident cases have been stable or declining in the two jurisdictions over most of the period. (See Figure 5.) This stability is observed also in other routine tort

10. Converting awards to constant dollars accounts for the effects of overall inflation, that is, the rate of inflation as measured by the CPI. Some of the factors that might contribute to increases in jury awards, however, such as medical costs or wage income, may be growing faster (or more slowly) than the average rate of inflation in the economy; a more detailed analysis is necessary to account for these different inflation rates.

11. The full details of the ICJ's most recent analysis of jury verdict trends are presented in M. PETERSON, *CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS* (1987).

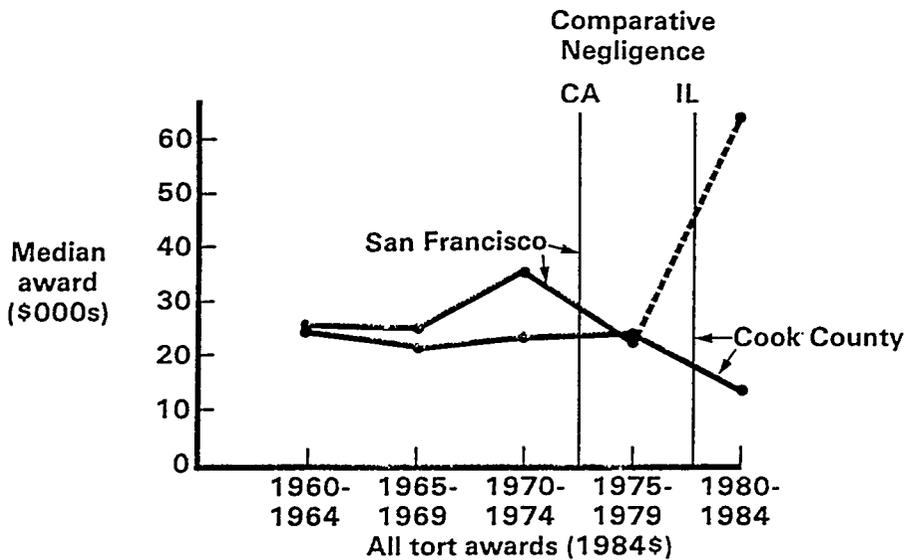


FIG. 4—TRENDS IN MEDIAN AWARDS, ALL PERSONAL INJURY CASES

litigation, such as premises liability and common carrier cases, not shown in Figure 5. In contrast, median awards for products liability cases have risen sharply. This sharp upward trend is also observed in malpractice cases, not shown in Figure 5. (Note that some fraction of the most recent increase in San Francisco is probably attributable to the caseload composition changes described earlier.) The sharp increase in median awards for products and malpractice cases cannot be discerned from the overall median statistics, because automobile cases continue to dominate the Cook County caseload and still constitute a significant, albeit smaller, fraction of the San Francisco caseload.

What about trends in mean awards? Throughout the period, the absolute values of mean awards are, as expected, higher than median awards, because in each year there were some very high awards which skew the statistical average. Overall, mean awards have risen sharply in both San Francisco and Cook County. (See Figure 6.) (Again, note that the underlying increase in San Francisco is probably not as great as shown in Figure 6, because of the change in caseload composition referred to earlier.)

When we disaggregate mean statistics, we find that there is an upward trend for lower-stakes litigation, represented by automobile accident litigation, as well as for higher-stakes litigation. However, the increase is much sharper for the latter, as can be seen by comparing Figures 7 and 8. The reason that the trend lines for both high-stakes and more ordinary litigation are going in the same direction is that there are some very high verdicts in all categories of cases.¹²

12. For additional discussion of the effect of very large awards on the distribution of means, see M. PETERSON, *supra* note 11, at 37.

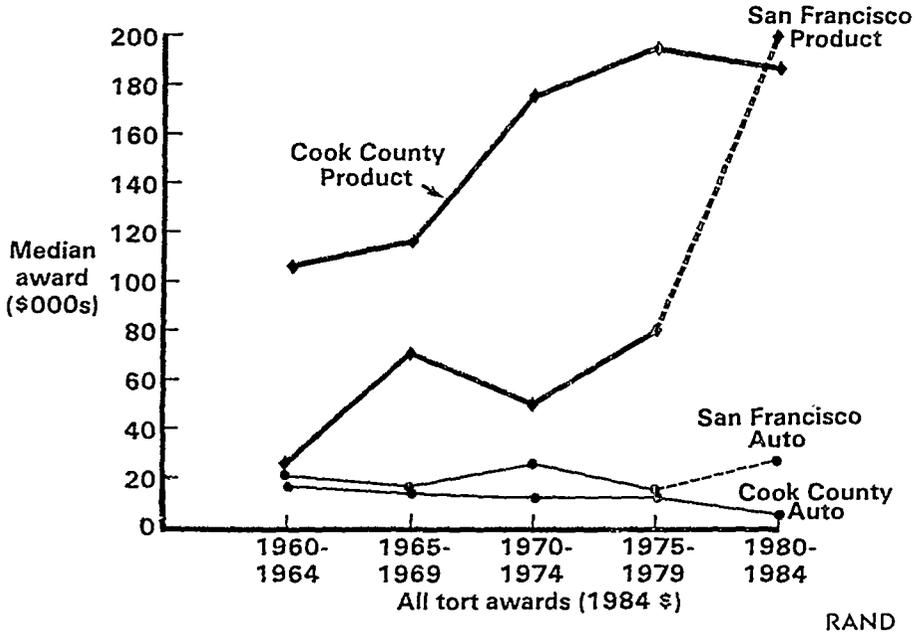


FIG. 5—TRENDS IN MEDIAN AWARDS FOR AUTOMOBILE AND PRODUCTS LIABILITY CASES

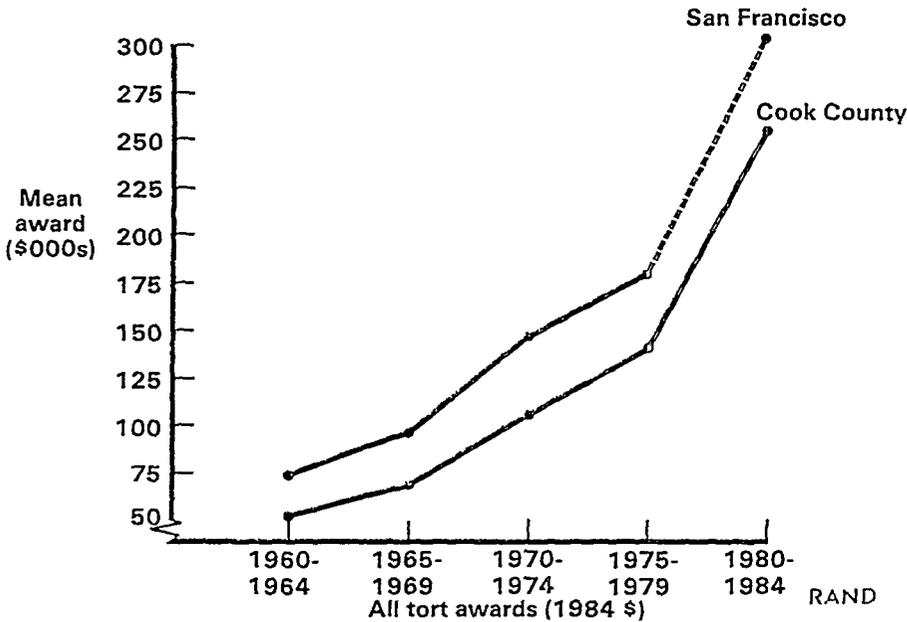


FIG. 6—AVERAGE AWARDS HAVE INCREASED SHARPLY OVERALL

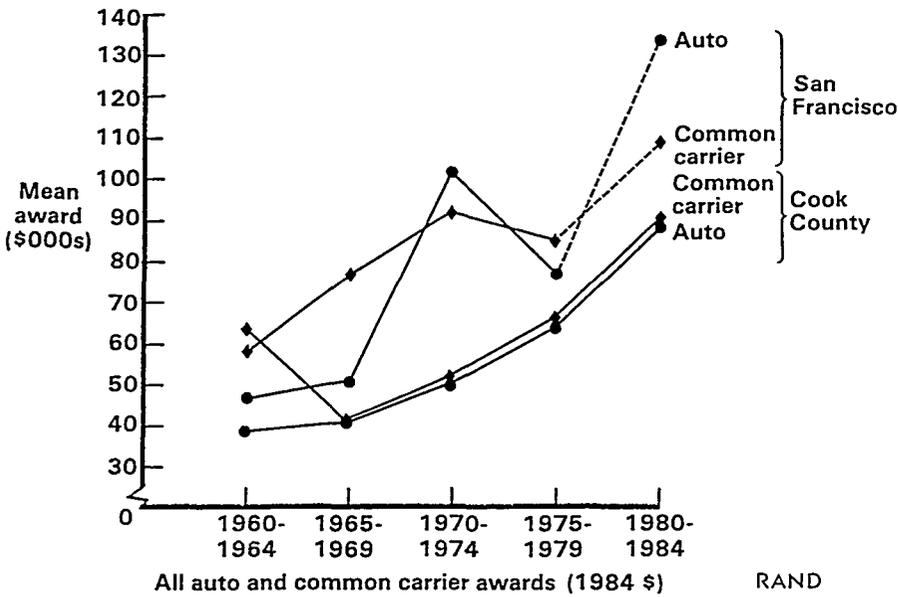


FIG. 7—TRENDS IN MEAN AWARDS FOR AUTOMOBILE AND COMMON CARRIER CASES

These data seem to support the proposition that the awards victorious plaintiffs can expect from the jury verdict system, at least in these two jurisdictions, have grown at a substantial rate in products liability and malpractice, and at a more modest rate in more routine litigation. If large numbers of plaintiffs were losing their cases, however, or if the rate of success was declining, the ultimate impact of these verdicts would be considerably moderated. But, in fact, what has been happening in these two jurisdictions is that the likelihood of plaintiffs winning cases has increased in almost every kind of suit. Thus, when we consider the cases that plaintiffs lose and plot the trend in expected verdicts, what we see is an increase for almost every type of suit. Figure 9 illustrates these trends.

No researcher has been able to assemble comparable trend data for a nationally representative sample of jurisdictions. We therefore do not know whether the trends discussed above are duplicated elsewhere in the country. We do have some fragmentary data, however, that suggest that recent pay-outs in tort cases have increased faster than the rate of overall inflation:

1. In a recent analysis of medical malpractice claims outcomes (including settlements as well as verdicts) between 1975-1984, Patricia Danzon found that "claim frequency per physician has grown at roughly ten percent a year and [average payment per claim] has increased at twice the rate of inflation of consumer prices."¹³
2. In another recently completed study, Jim Kakalik found that the average annual rate of

13. P. DANZON, *NEW EVIDENCE ON THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS*, vii (1986). Danzon's data are drawn primarily from the files of several major medical malpractice insurers, covering roughly 100,000 physicians.

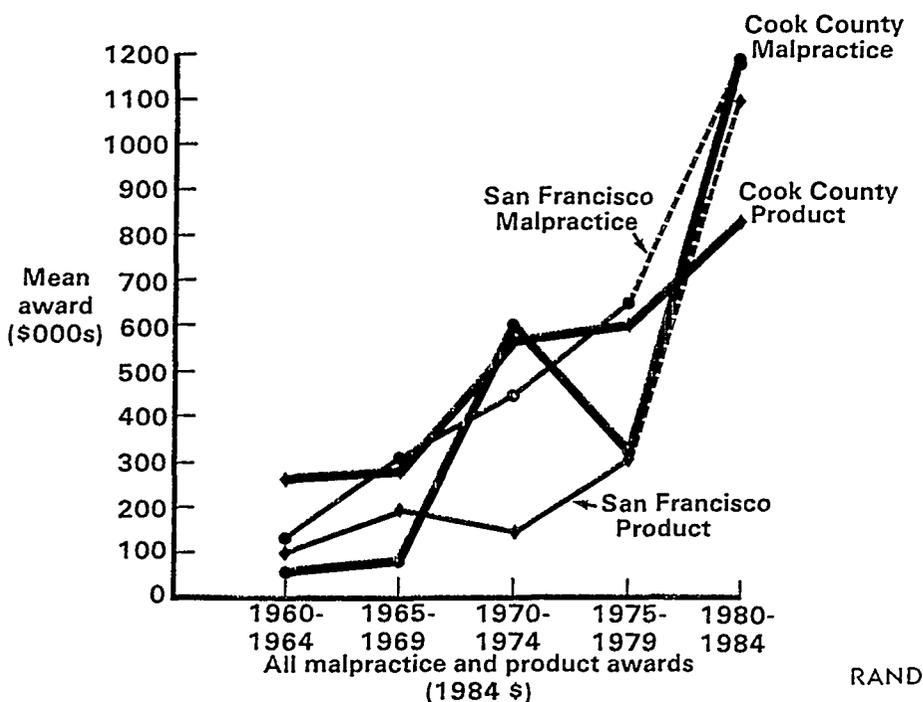


FIG. 8—TRENDS IN MEAN AWARDS FOR PRODUCTS LIABILITY AND MALPRACTICE CASES

RAND

growth in total expenditures, nationwide, to compensate tort claims (excluding transaction costs) from 1981-1985 was about twelve percent for automobile accident claims, and about seventeen percent for non-automobile claims. During the same period, the Consumer Price Index grew at an average annual rate of about seven percent.¹⁴

What explains the trends that we have observed? We do not know as much as we would like to about the factors contributing to the increases. However, previous ICJ research suggests the following:

1. In recent years, there has been an increase in the proportion of the trial cases that involve more serious injuries, and, therefore, larger medical expenses.¹⁵ This shift in caseload composition would have the effect of increasing average jury awards.
2. In addition, juries seem to be awarding more for serious injuries than they did in the past, even after accounting for overall inflation.¹⁶
3. Juries seem, increasingly, to be awarding a "premium" to plaintiffs in products liability and malpractice cases: the same injury receives more if it is product- or malpractice-related than if it results from an automobile or other more "ordinary" accident, and the gap in awards based on the context in which they occur appears to be widening. The products liability/malpractice premium is attributable, in part, to the presence of "deep pocket"

14. J. KAKALIK & N. PACE, *supra* note 4, at xii.

15. See M. PETERSON, COMPENSATION OF INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY (1984).

16. *Id.*

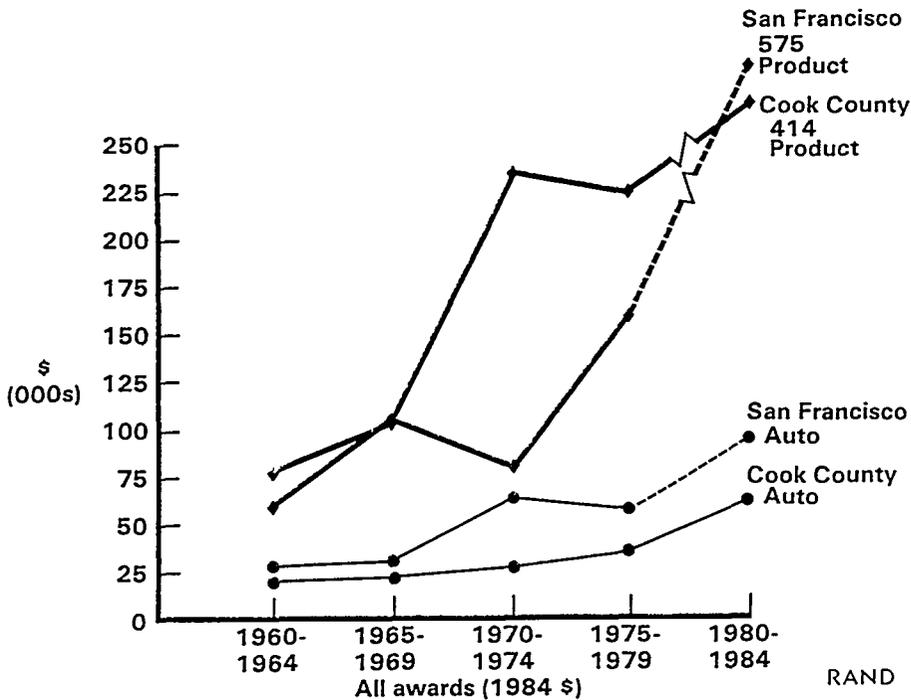


FIG. 9—TRENDS IN EXPECTED VERDICTS FOR PRODUCTS LIABILITY AND AUTO CASES

defendants in these cases, but it appears that there is an effect of casetype that is separable from the effect of defendant status.¹⁷

Although we can offer these preliminary explanations of trends, we do not know why they are occurring. For example, jurors could be becoming increasingly generous or sympathetic to injured claimants, and the presence of a “deep pocket” defendant may provide an opportunity for them to act on these instincts. Alternatively, the standards of care to which jurors are holding institutional defendants such as corporations and hospitals may be increasing. Either or both of these phenomena might explain the shift in the distribution of awards in products liability and malpractice cases. Some observers have also suggested that the quality of litigators in torts cases, particularly on the plaintiff side and in high-stakes litigation, has increased substantially, leading to greater success in the courtroom. We have much to learn about why the distribution of jury verdicts has changed over time.

IV. LITIGATION COSTS AND COMPENSATION: HOW MUCH, TO WHOM?

A third question that has been raised in the tort liability debate is more straightforward both in the asking and answering: Where does the money go? This question has been raised particularly by those who assert that the costs of

17. See A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985).

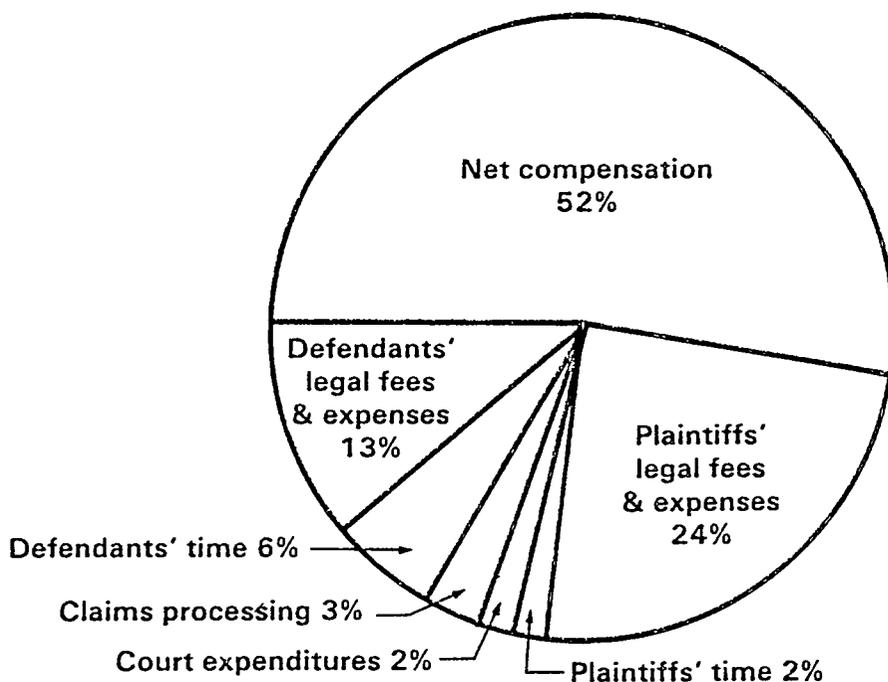


FIG. 10—ALLOCATION OF AUTO TORT LITIGATION EXPENDITURES, 1985

administering the tort system (sometimes termed its “transaction” costs) are too high. In fact, it is difficult to make any judgment about these costs without having some comparable data for other systems of compensation and deterrence and without having better data on how well the tort system itself satisfies its compensation and deterrence function—none of which is currently available. Nonetheless, the issue of the tort system’s transaction costs is clearly relevant to the ongoing debate.

The ICJ has conducted a series of studies on aggregate costs and compensation of tort liability,¹⁸ the results of which are summarized graphically in Figures 10-12. The data support the perception that different components of the system have different dynamics and outcomes: overall, plaintiffs appear to receive, in net compensation, about fifty percent of tort litigation expenditures. For automobile accident cases, they receive a slightly higher percentage of total expenditures, about fifty-two percent. For non-auto torts, they receive less, about forty-three percent. In asbestos worker injury litigation, plaintiffs receive about thirty-seven percent, which reflects the higher transaction costs associated with mass toxic injury suits.¹⁹ In addition, the ICJ’s study indicates that transaction costs have been growing more rapidly over the past five years in the non-automobile area than in automobile cases—fifteen percent compared to six percent.²⁰

18. See J. KAKALIK & N. PACE, *supra* note 4.

19. For an analysis of asbestos litigation costs through 1982, see J. KAKALIK, *COSTS OF ASBESTOS LITIGATION* (1983).

20. J. KAKALIK & N. PACE, *supra* note 4, at xii.

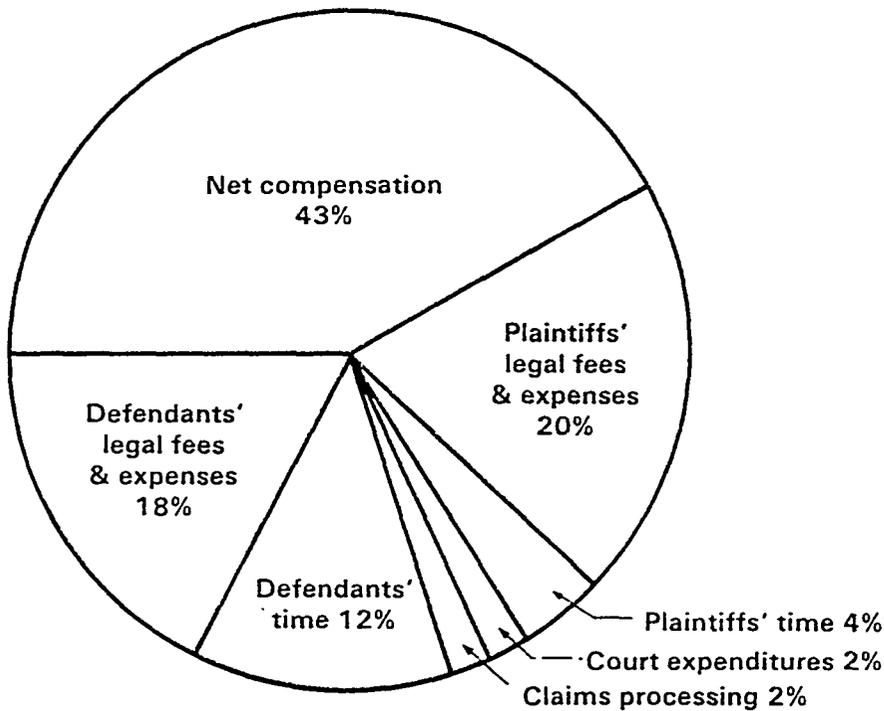


FIG. 11—ALLOCATION OF NON-AUTO TORT LITIGATION EXPENDITURES, 1985

V. THE EVOLVING WORLDS OF TORT LITIGATION

The major “finding” that emerges from our exploration of statistical data is that the tort system is increasingly fragmenting into at least three quite disparate systems of litigation, each with its own dynamics and outcomes:

1. *Routine personal injury torts* such as auto cases, which are growing slowly in frequency and costs, and whose outcomes have not changed much over the last twenty-five years;
2. *Higher-stakes torts* such as malpractice and products liability, which are growing faster in number and costs, and whose outcomes have increased dramatically over the past twenty-five years in the jurisdictions we have observed intensively, and substantially in the shorter five year period for which we have national data;
3. *Mass latent injury torts*, which tend to explode in number once they are identified, carry high transaction costs, and have highly uncertain outcomes.

Disagreements over trends in tort litigation, rather than reflecting deliberate misuse of statistics, reflect the tendencies of the participants in the tort liability debate to look at the overall system and ignore the difference in its components, or to look at only one component and assume that the trends which characterize it will be duplicated in another component.

Rather than throw our hands up at the differences in statistical trends, I think we should consider what they are telling us about the evolving worlds of tort litigation. Below I suggest some answers to this question.

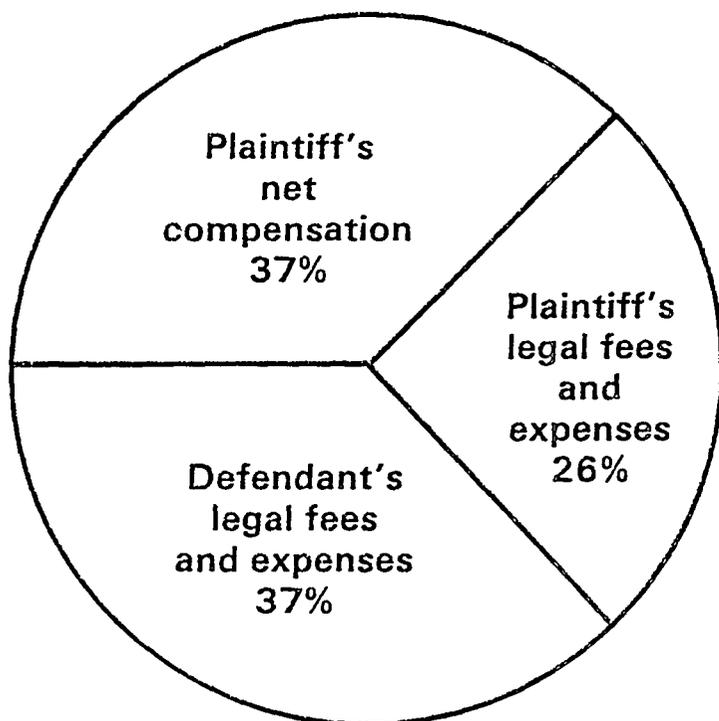


FIG. 12—ALLOCATION OF ASBESTOS LITIGATION EXPENDITURES, TO 1982

A. *The World of Routine Personal Injury Torts*

Auto accident cases epitomize this category. There is a huge volume of such cases, about half a million filed annually nationwide.²¹ Perhaps because they have been with us for so long, there has been little recent change in the substantive law related to them. Because of their high volume and the stability of law it has been possible to routinize their processing and resolution. As a result, we have seen an increasing reliance on alternative dispute resolution procedures, particularly court arbitration programs, for these cases.²²

Most of these cases involve relatively modest injuries incurred in commonplace circumstances and the parties to the dispute are ordinary citizens rather than institutions. Except in cases of very serious injury, there is little basis for large awards and the attorneys who handle them are not generally high-stakes litigators. Although the application of tort law to these cases is intended to deter bad drivers,

21. *Id.* at 15.

22. For a discussion of the use of court-administered arbitration to resolve routine damage suits, see Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, JUDICATURE, Feb.-Mar. (1986).

concerns about deterrence do not appear to motivate the attorneys who specialize in this area.

It is not surprising then, that the number of auto lawsuits is not growing significantly. Increasingly, it appears, they are being settled elsewhere, in fora that produce stable, predictable outcomes. The use of alternative procedures and settlement mechanisms produces the lower transaction costs that we observe, relative to the costs in other tort litigation areas. In sum, this world of tort litigation is the least problematic by most standards. It also remains the world in which the average citizen is mostly likely to become a participant.

B. The World of High Stakes Personal Injury Torts

Although these kinds of cases have received the lion's share of attention in the recent tort debate, they still occur relatively infrequently compared with the auto cases. They differ from routine torts along many dimensions. The law with regard to products liability in particular has changed dramatically since the early 1960s. The expansion of liability law has enabled more plaintiffs to bring suits. It has also provided the opportunity for the development of a highly specialized, well-capitalized corps of litigators on both the plaintiff and defense sides.

The stakes in these cases are usually higher than in auto torts and, because the law is perceived as volatile, the stakes are more often perceived as uncertain. Deterrence is more important in these cases than in auto and other ordinary torts. Plaintiff attorneys may be spurred to invest substantial resources in developing these cases by concerns about deterrence, as well as by the potential for large awards. And because defendants—particularly manufacturers—have an incentive to deter additional suits over the same product, defending against these cases, rather than settling them, is particularly attractive. As a result, pretrial discovery (with its associated costs in dollars and time) is a prominent feature of these cases, but alternative dispute resolution is not.

In conclusion, because the evolution of the law in this area has expanded the grounds for bringing suits, it is not surprising that more suits are being brought. By their nature, the suits involve larger and more uncertain stakes than routine cases such as auto—the injuries are more serious, the defendants have more money and more at stake, and the plaintiff attorneys have invested more. As a result, we observe higher and less predictable outcomes and higher transaction costs.

C. The World of Mass Latent Injury Torts

Mass latent injury torts are a special case of products liability torts, with special characteristics that justify treating them separately. Both substantive and procedural law in this area are evolving rapidly, and attorneys on both sides view the litigation process as problematic. Pretrial maneuvering is extensive in these cases because the latency of the injuries produces difficult legal issues; discovery is usually prolonged and costly because attorneys must collect data over extended periods to substantiate charges that the manufacturers were negligent. Because of the large number of

claims, the rapid influx of cases into courts after the harm has been identified, and the fact that such cases are often geographically concentrated, courts frequently experience overload problems that may lead to increased delay and costs.²³

Deterrence is a critical issue in these torts. Concerns about deterrence have evoked missionary zeal on the part of some plaintiff attorneys. Defendants have been willing to invest huge amounts of resources because the trials may decide the future of their corporations.

Despite the fact that alternative dispute resolution procedures have not been widely adopted for ordinary products liability and malpractice suits, there has been considerable interest in innovative procedures for dealing with mass latent injury torts. We believe this interest stems from general agreement that the cost of processing these cases under the current system is excessive.

Mass latent injury torts are the most volatile world of tort litigation. Costs, dynamic legal environment, and the uncomfortable fit between these cases and the tort system conspire to make the number, outcome, and future costs of these suits highly uncertain.

VI. IMPLICATIONS FOR POLICYMAKING

The central policy implication of my discussion is clear: Policymakers need to know what part of the system they are looking at. Deciding whether or not the system is "broken" and how to fix it is a matter for policymakers; providing accurate descriptions of that system's operation and explanations for changes that are occurring is the role of scholars and analysts. To play that role effectively, we need to ask sharper questions, target our inquiries, and look at all the appropriate data.

23. For a discussion of the problems posed by mass toxic torts, see D. HENSLER, W. FELSTEINER, M. SELVIN & P. EBENER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (1985).