ON THE RELEVANCE OF THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE: TORT SYSTEM OUTCOMES ARE PRINCIPALLY DETERMINED BY LAWYERS' RATES OF RETURN

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INTRODUCTION

The attention generated by Daubert v. Merrell Dow Pharmaceuticals, Inc. 1 reflects the perceived importance of the issue of the admissibility of scientific evidence in tort litigation. 2 In products liability litigation, whether claimants prevail often depends upon expert testimony presented on the issue of causation. 3 Unless a claimant is able to have the expert's testimony admitted, there will be little or no chance of prevailing. Thus, though it is disputed whether Daubert will extend or contract tort liability, 4 it is undisputed that its importance lies in its impact on the scope of tort liability.

Accordingly, the interest in Daubert may be seen as part of a broader focus in recent years on trends in tort liability—a focus that has produced a considerable body of literature on whether tort liabili—

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1 113 S. Ct. 2786 (1993) (holding that the Frye rule, requiring that the proponent of scientific evidence must lay as a foundation for expert witness testimony that the theory being advanced is generally accepted within the scientific community, did not survive the 1975 enactment of the Federal Rules of Evidence; instead, requiring the trial judge to make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether it could properly be applied to the matter in issue).


ity has expanded in the past thirty years. Three groupings of commentary appear in the literature: one set concludes that there has been a huge growth in tort liability; another set denies that tort liability has been substantially expanded; while a third body of scholarship

5 The 1960-90 period is not the only one in which a personal injury litigation explosion took place; the 1870-1910 period in New York also saw such a litigation explosion. See RANDOLPH E. BERGSTROM, COURTING DANGER (1992) for an analysis of the personal injury litigation explosion that occurred in New York in the 1870-1910 period. Bergstrom considers and rejects as explanations for the explosion: rapid industrialization in that period, id. at 29-51, increased danger and resultant changes in accidental death rates, id. at 41, as accident rates were not rising, id. at 55, increased population, id. at 31-34, easier access to courts and changes in laws, id. at 58-86, increases in the number of lawyers and the rise of contingent-fees advocacy, id. at 88-94, changes in the advocacy or practices of lawyers, id. at 114, and changes in the need for compensation of the populace and the likelihood of gaining it, id. at 145-66.

Instead, he attributes the litigation explosion to changes in the populace's expectations of the care they expected from their fellow citizens. "That the exercise of care remained constant (or even improved) in these forty years, but the public's expectation for care rose ahead of that exercise, is consistent with the constant incidence of injury over time and accounts for the rise in injury suits amidst the steady number of injuries." Id. at 185. The rejection of the role of contingent fees in the litigation explosion is based upon the fact that contingent fees were probably not in use in 1870 in personal injury litigation, though they had been formally legitimated twenty years earlier and did not show up in widespread use until 1890. Id. at 89-91. Bergstrom notes that "the contingency retainer was available to attorneys in 1870," but points out that "[i]ts availability did not incite the populace to inundate the Supreme Court with injury suits." Id. at 91. He concludes that "it was not . . . contingent-fees lawyering that prompted a rise in [personal] injury suits." Id.

This conclusion, effectively rejecting the possibility that a fundamental change that occurred in the financing of personal injury litigation required a considerable period of time to manifest a commensurate social impact, is questionable. Moreover, it is likely that the volume of contingent fee agreements was a lagging, not a leading, indicator of expansion of tort liability in this time frame. See id. at 91, 94. Lawyers would no doubt have been reluctant to enter into the heretofore untried contingent-fee agreements until it became clear that such agreements were financially rewarding. From that perspective, Bergstrom would be correct in concluding that contingent-fee financing did not initiate the personal injury tort explosion. However, his conclusion that they were not a major contributor does not follow from the evidence presented.


7 See, e.g., JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981); David M. Engel,
concludes that there was indeed a period of rapid growth in tort liability but that it ended in the early 1980s. As Daubert is fitted into this scholarship, its impact will likely come to be gauged by its effect on the scope of tort liability.

Tort scholars examining trends in tort liability have based their conclusions mostly upon statistical evidence (numbers of claims) and doctrinal analysis. With regard to the latter, they share the focus of Daubert commentators who are parsing the Supreme Court’s words to determine the precise dimensions of the doctrine announced in Daubert.9

At the level of the individual case, the importance of legal doctrine, including the one enumerated in Daubert, cannot be doubted. From the broader perspective of a systematic view of the personal injury tort system, however, the Daubert issue of the admissibility of certain evidence—which at the level of the specific case is often outcome-determinative—is of considerably diminished importance. From this same systemic perspective, most doctrinal issues may also be relegated to secondary importance. And perhaps, most startling, so too may be the existence and rate of injury. What is of paramount importance in accounting for the scope of liability assessed under the tort system are the financial incentives which drive the personal injury tort system; these incentives not only determine the frequency and valuation of such litigation but increasingly the outcomes as well. Although claimants’ financial incentives play an important role, plaintiffs’ lawyers’ financial incentives play the dominant role. That these truths are or ought to be self-evident may be deduced from the following unassailable propositions: our tort system today accommodates many claims for compensation for injury that would have been denied fifty years ago; changes in doctrine, evidentiary standards and procedure have been fashioned to allow this increased scope of liability; substantial increases in pain and suffering awards have accompanied the aforementioned changes; plaintiffs’ lawyers have been among

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9 See, e.g., Bernstein, supra note 4.
the chief beneficiaries of this expansion; and these plaintiffs' lawyers, as an increasingly organized interest group,\textsuperscript{10} financed by very substantial rates of return and driven by a desire for even higher rates of return, have pressed continuously for those expansionary changes. No rational person believes that the changes in doctrine, claim valuation, or evidentiary standards and procedure which have been an integral part of that expansion “simply happened.”\textsuperscript{11} That plaintiffs’

\textsuperscript{10} See Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 480 & n.43, 524 (1994) (“The speed with which the number of breast implant cases exploded on the scene is attributable in part to a well-organized plaintiffs’ bar, which now has the capital, organizational skills, and advertising techniques to seek clientele.”); Robert England, Congress, Nader and the Ambulance Chasers, AM. SPECTATOR, Sept. 1990, at 18; Richard B. Schmitt, Trial Lawyers Glide Past Critics with Aid of Potent Trade Group, WALL ST. J., Feb. 17, 1994, at A1.


Courts are both limited to and driven by the cases that litigants put before them. Their understanding of legal problems is limited to the cases before them. At the same time, however, courts are driven to develop substantive doctrines to respond satisfactorily to the full array of cases they are called upon to decide. . . .

. . . As the American procedure permits, or even encourages, the assertion of group-based claims, over time doctrines are developed and elaborated that accept some of these claims. As the valid claims emerge doctrinally, the incentive to sue and to expand the range of claims is correspondingly increased. As lawyers press these newly encouraged claims, the doctrinal law must be further elaborated, specified, and developed. The process feeds on itself so that the likelihood and importance of cross-fertilization are increased. Thus the increased pace and complexity of doctrinal evolution in the American system owes its origin to the initial incentive structure.

. . . [Also] incentives for lawyers under the American system provide a spur for bringing provocative and novel claims. If one were to ask English of Commonwealth lawyers to describe what they find most remarkable about American litigation, a common response would identify the startlingly provocative or novel extension of existing principle: “Can you imagine arguing that?” captures the type of reaction. . . . The origin of these novel developments lies in the incentive structure.

Novel claims are low-probability claims and are favored in American law by the cost rule, by the availability of contingent fees, and by the existence of public interest firms. They are further accentuated by the proplaintiff fee statutes in substantive areas. Low-probability cases, if brought often enough, succeed sometimes. Having succeeded once, they are brought repeatedly. Furthermore, once a number of cases have succeeded at trial, the supporting legal principle is then tested at the appellate level. Often the novel claim loses at the appellate level and little more is heard of the development apart from the memory of the headlines. On the other hand, sometimes these novel cases are affirmed on appeal; through a number of these decisions new legal principles are articulated and elaborated.


It has become a commonly heard criticism of the plaintiffs’ bar that, variously, the existence of more lawyers, more aggressive lawyers, or lawyers bringing more innovative cases will itself stimulate judges to expand the law in redistribu-
lawyers sought these changes does not mean that the changes came about simply because they were sought by plaintiffs' lawyers. The process is certainly more complex. Moreover, however, it is undoubtedly the conventional wisdom that these self-interested efforts by plaintiffs' attorneys have been and continue to be countered by symmetrically countervailing efforts by the defense bar. Not so. The financial benefits which flow from expansion of the tort system do not redound exclusively to the benefit of plaintiffs' attorneys—they also benefit defendants' attorneys. Expansion of liability increases the demand for defendants' lawyers' services. Increased demand results in higher utilization of defendants' attorneys and higher earnings. Additionally, as plaintiffs' lawyers' effective hourly rates of return increase, defendants seeking to retain comparable quality levels of counsel must in turn raise the rates they pay to their counsel. Because both plaintiffs' and defendants' lawyers' financial interests thus converge, we should be wary of the public policy choices that may have emanated from that convergence.

What impact have financial incentives, expressed in the form of rates of return, had on the operation of the tort system and how does this impact vary with changes in rates of return? While we know relatively little about these rates of return, there is evidence that they have increased (in inflation adjusted dollars) 400 to 700% over the past thirty years—an increase which parallels the increase in tort liability. Rates of return in contingent fee cases have thus become inordinately high; this alone should command our attention. Though the primary function of the tort system is to compensate those wrongfully injured and deter future injury, primarily by cost internalization, evidence exists which supports the conclusion that the availability of

12 See Priest, Lawyers, Liability and Law Reform, supra note 6, at 125.
13 W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 2, at 7 (5th ed. 1984) (tort law's "primary purpose is to compensate [the victim] for the damage suffered, at the expense of the wrongdoer"). Tort law also seeks to reduce the volume of injury, socialize injury cost, and maximize the gross social product. Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis 26 (1970) (it is "axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents"); see also William L. Prosser et al., Cases and Materials on Torts 1 (8th ed. 1988).
inordinately high rates of return results in increased wealth transfers that increasingly bear little relationship to underlying injury, let alone fault or the actual costs of injuries. If indeed the tort system is not efficiently compensating wrongfully injured claimants and is not deterring unsafe conduct, it is dysfunctional\(^{14}\) and is operating to penal-


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In practice, some of the resource allocations produced by tort liability seem to be the opposite of what anyone would approve. The malpractice liability of physicians has made health care more expensive, not only by increasing the amounts that physicians must be paid in order to cover their insurance premiums, but also by inducing them to undertake excessive testing in order to ward off liability. By making health care more expensive, liability has contributed to a reduction in the number of persons covered by health insurance because former buyers can no longer afford the premiums.

But higher health care prices have not induced people to suffer less accidents or diseases, as allocation theory would require. By making health care less available, liability has aggravated rather than alleviated problems of sickness and injury.
\end{quote}

Id. (citation omitted).

Indeed, \"[t]here is no ready evidence that the distribution of the economic burden of medical malpractice premiums is rationally related to the objective of the tort system to deter negligent practice.\" SPECIAL ADVISORY PANEL ON MEDICAL MALPRACTICE, STATE OF NEW YORK, REPORT 19 (1976), quoted in O'Connell, supra, at 25 (emphasis in original). More evidence that the personal injury tort system is dysfunctional is contained in other analyses of medical malpractice litigation. One study indicates that only one in ten meritorious claims ever reaches a lawyer and only half of those result in any payment to the victim. Paul C. Weiler, Medical Malpractice on Trial 13 (1991) [hereinafter Weiler, Medical Malpractice]. Another study concluded that in the hospital setting, there was only about one claim for every eight instances of malpractice. That ratio, however, includes claims that were filed where no malpractice occurred. If only claims resulting from adverse events due to negligence are considered, only one out of approximately 65 (1.53\%) adverse events led to a claim. See A. Russell Localio et al., Relation Between Malpractice Claims and Adverse Events Due to Negligence, 325 NEW ENG. J. MED. 245, 248 (1991). Most malpractice claims filed, moreover, occur in the absence of negligence—and sometimes in the absence of injury. Paul C. Weiler et al., A Measure of Malpractice 71 (1993). For example, a study of claims against anesthesiologists filed as lawsuits found nearly half to be without merit and that payments were nonetheless made in 42% of cases in which the care provided was determined to be appropriate. Frederick Chaney et al., Standard of Care and Anesthesia Liability, 261 JAMA 1599 (1989). But see Mark Taragin et al., The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims, 117 ANN. INT. MED. 780 (1992) (reporting results of a study of 12,829 New Jersey physicians involved in 8231 closed malpractice cases and concluding that unjustified payments are probably uncommon).

Moreover, of settlements and damage awards actually paid, transactional costs—most specifically, legal fees—account for almost half. Deborah N. Hensler et al., Compensation for Accidental Injuries in the United States (1991). In asbestos litigation, the fees and expenses average 61\% of the total payments of defendants and insurers—plaintiffs
large "innocent human beings from whom wealth is [being] transferred through the tortuous paths of liability and insurance." The role of inordinately high rates of return in contributing to this dysfunctional wealth transfer has not been addressed. In this Article, I seek to make the case for such scrutiny.

*Daubert's* importance, when viewed from this systemic perspective, depends upon whether it perpetuates, aggrandizes, or counters an incentive structure which facilitates the dysfunctional expansion of tort liability. The more that plaintiffs are able to successfully invoke *Daubert* to admit expert witness testimony, the more its impact will expand the scope of tort liability; conversely, if *Daubert's* overall effect is to restrict the admission of plaintiffs' expert witness testimony, it will have a contractionary effect. This analytical structure simply recognizes that for plaintiffs, getting to the jury is akin to entering the promised land.


15 Conard, *supra* note 14, at 284. As Conard also notes, "[tort law] imposes burdens on innocent individuals that are greater in the aggregate than the benefits that it delivers to injury victims." *Id.* at 305-06.

16 See Prichard, *supra* note 11, at 451 ("[T]he previous literature has largely ignored the major influences on substantive law that might be traced to the wide variation across the major common-law jurisdictions in the rules setting financial incentives for litigation.").

17 It has been suggested that society has recognized the existence of excessive incentives to litigate. See Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 339 (1982) ("[O]ne might see social attempts to reduce the volume of suits, passage of statutes to circumvent the legal system (automobile no-fault schemes, workers' compensation), and, perhaps, the notion that society is on balance too litigious, as reflecting problems of excessive private incentives to bring suit.").

18 The implicit proposition that arguably inhabits the text that jurors favor plaintiffs encounters sharp disagreement from a number of torts scholars. See, e.g., Marc S. Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201; Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 1993 DUKE L.J. 217. These arguments have not persuaded plaintiffs' lawyers to modify their behavior.

"Getting to the jury" in the *Daubert* sense may be seen as part of a broader legal trend that transcends not only *Daubert* but also the tort system. "Getting to the jury" has always been a major issue in contract law. That firmament of the first year Contracts course, Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), deliberately sought to limit the ability of the plaintiff to get to the jury with his damage claim by creating a gatekeeper role for the judge. See *Richard Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). Another well known example of shifting power from the jury to the judge was the Statute of Frauds, St. 29 Car. II, Ch.3 (1677), enacted to counter the effect of Slade's Case, Slade v. Morely, 4 Co. Rep. 91a, 76 Eng. Rep. 1072 (1602). The latter marked the victory of assumpsit over action of debt and allowed the plaintiff to reach the jury to resolve disputed areas of fact. The more modern trend in contracts has been to shift power from the judge to the jury. Thus, the development of promissory estoppel (action in reliance) enables plaintiffs to reach the jury to resolve the usually disputed facts of whether the defendant had made the promise which the plaintiff alleges he justifiably relied upon to his detriment.
Daubert's importance will also depend upon how it impacts on plaintiffs' expert witnesses. It is the thesis of this Article that the same financial incentives that drive plaintiffs' attorneys to seek to expand tort liability also apply to plaintiffs' expert witnesses, especially in envelope-pushing tort-expansionary claims. This confluence between the financial interests of the plaintiffs' bar and expert witnesses has played a major role in expanding the scope of tort liability. Recognition of this proposition by United States district court judges exercising their "gatekeeper" function may ameliorate the liability-expanding propensity of Daubert. Failure to recognize and adopt measures to counter the inherent incentive structure underlying the expert witness industry will undoubtedly lead to greater expansion of tort liability.

I. THE OVEREMPHASIS OF DOCTRINE: TORTS SCHOLARS TEACH TORT DOCTRINE

Torts scholars' views of the tort system run a wide gamut. Professor George Priest, a leading exponent of the huge growth in tort liability and critic of the intellectual basis of modern tort law and its excesses, believes that modern tort law will "reverse its current direction" and that "systemic reform... is inevitable." Despite the considerable evidence that the amount of tort litigation and resultant wealth transfer continues its substantial expansion, many torts scholars share the view that whether or not tort

The inevitable clash between the Statute of Frauds and promissory estoppel is being won by the latter. See, e.g., R.S. Bennett & Co., Inc. v. Economy Mechanical Indus., 606 F.2d 182 (7th Cir. 1979); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954). Another example is the parol evidence rule; compare RESTATEMENT (FIRST) OF CONTRACTS § 237 (1932) with RESTATEMENT (SECOND) OF CONTRACTS § 213 (1979). In contract law, the clear trend is in the direction of increasing plaintiffs' access to the jury.

In tort cases, plaintiffs' lawyers are paid on a contingent fee basis and have a significant financial incentive to get all of the elements of their cases to the jury—an incentive which can at least partially explain the trend toward increasing the power of the jury in tort litigation. See infra notes 40-43 (explaining new types of punitive damages claims). The possibility that the plaintiffs' bar's impact transcends tort is both intriguing and as yet undemonstrable.

19 See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 n.7, 2796 (1993) (Blackmun, J.); id. at 2798, 2800 (Rehnquist, C.J., and Stevens, J., concurring in part and dissenting in part) (asserting that judges are competent to determine the validity of scientific evidence pursuant to Federal Rule of Evidence 104(a)).

20 See supra notes 6-8.

21 See Priest, The Invention of Enterprise Liability, supra note 6.


23 Priest, Inevitability of Tort Reform, supra note 22, at 702.

24 See Paul B. Taylor, Encouraging Product Safety Testing By Applying The Privilege of
liability has expanded since 1960, any expansion has now terminated.25

The emphasis in these views on doctrinal change as the marker for trends in tort liability is not surprising: torts scholars are torts teachers; tort doctrine is an integral part of their daily diet. Doctrinal change, however, is neither an accurate measure of, nor a surrogate for, trends in tort liability. Claimants enter the tort system because they seek a wealth transfer in their favor. Attorneys represent such claimants to achieve a substantial rate of return on their investment


The Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability noted that the number of product liability filings between 1974 and 1985 had increased by 758 percent. These figures have been updated by the Administrative Office of the United States Courts, which reported that 1,578 product claims were filed in 1974 while 19,428 were filed in 1990, a 1,230 percent increase.

The upward trend in award verdicts is also quite steep. From 1980 to 1987, the average verdict rose from $565,000 to $1.3 million and the median verdict—less subject to the influence of abnormally large awards—increased over the same period from $225,000 to $430,000. In contrast to the overall increase in consumer prices of 38 percent, the average tort verdict rose by 135 percent and the median verdict rose by 91 percent, revealing that the increase in product liability awards rose much faster than the overall rate of inflation in the 1980s. Although this data does not separate out punitive awards from compensatory awards, Landes and Posner, in their study, point out that the average award of punitive damages was slightly greater than the average compensatory damages award.

Id. at 793-94 (footnotes omitted).

25 See Schwartz, supra note 6, at 647. Professor Schwartz claims that conservative judges, who have been increasing in number over the past ten years, id. at 685, have stopped enlarging the realm of many familiar tort doctrines in order to curtail defendant liability. Negligence-based causes of action such as bystander liability, id. at 657, infliction of economic harm, and attorney malpractice, id. at 658, have been significantly narrowed, if not abolished completely. Strict liability theory has also been less effective for plaintiffs, especially in the area of corporate successor liability. Id. at 654. But see Lester Brickman, The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?, 13 Cardozo L. Rev. 1819, 1881-84 (1992).

Furthermore, courts have vigorously affirmed the no-duty concept, Schwartz, supra note 6, at 659, as well as expanded the scope of such defenses as assumption of risk, id. at 672, and contributory negligence, id. at 674. Statutes imposing limits on certain monetary damages have also been upheld. Id. at 681.

Professors James Henderson and Theodore Eisenberg describe a "quiet revolution" in tort law between 1983 and 1990, finding that the judiciary has at least rejected further expansion of products liability doctrine, though also recognizing that trends operating elsewhere in tort law are still expansionary. See Henderson & Eisenberg, supra note 8.

Courts once favorably inclined to break new ground and to discard doctrine blocking recoveries now are inclined to reflect more cautiously on the implications of their decisions. Courts continue to break new ground and discard doctrine in ways that favor plaintiffs. But they are increasingly apt to change the law to preclude liability rather than to promote it.

Id. at 498. "[C]ourts in some states and in some doctrinal areas continue much as they have for more than twenty years, pushing outward the boundaries of liability." Id. at 542.
(of time and money). The more appropriate measure, therefore, of whether the tort system is expanding is the change in the rate of wealth transfer from defendants to claimants. By this measure, tort liability is expanding at a rate well in excess of inflation, though the rate of increase has declined in recent years.\textsuperscript{26} A commercial general liability insurance study indicates that in inflation-adjusted dollars paid claims tripled between 1978 and 1990; between 1978 and 1985, they increased at an average annual rate of 21.1\%\textsuperscript{27} compared to an average annual inflation rate for the period of 7.4\%;\textsuperscript{28} and between 1986 and 1990 they increased at a 7.8\%\textsuperscript{29} annual rate—still well above the period’s inflation rate of 4.5\%.\textsuperscript{30} In addition, commercial auto and workers compensation claim payments have also been growing well in excess of inflation.\textsuperscript{31}

Doctrinalists who describe the torts elephant from the limiting view of the anatomically familiar\textsuperscript{32} may also be faulted for failure to


\textsuperscript{27} Sean F. Mooney, Crisis and Recovery: A Review of Business Liability Insurance in the 1980s, at 1 (1992). “The analysis is restricted to amounts paid in settlement of liability claims and does not include payments for defense costs by insurance companies on behalf of policyholders” which have increased rapidly in recent years. Id. at 14 n.8. The study does not include medical malpractice, commercial auto, and workers compensation claims. See generally id.

\textsuperscript{28} Id. at 15.

\textsuperscript{29} Id. at 1.

\textsuperscript{30} Id. No data is available on the impact of this decline on the rate of increase in lawyers’ rates of return. See generally id.

\textsuperscript{31} See Insurance Research Council, Compensation for Automobile Injuries in the United States (1989); Workers Compensation Litigation Costs, NCCI Dir., Feb. 1992, at 20. Medical malpractice claims payments have increased substantially since the early 1970s but the rate of increase has been significantly curtailed in the mid-1980s by the passage of tort reform legislation by virtually all states beginning in the mid-1980s. See Mooney, supra note 27, at 29-37 (Appendix A: The Effects of Tort Reform on Medical Malpractice Insurance).

\textsuperscript{32} To be sure, some torts scholars focusing on the operation of the tort litigation system do eschew doctrinal analysis in favor of empirical studies. Thus, Professor Michael Saks has analyzed data on the number of tort lawsuits filed and rejects the view that there has been extraordinary growth in the number of tort lawsuits filed in recent decades. See Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?, 140 U. Pa. L. Rev. 1147, 1196-1205 (1992). Claim frequency analysis, however, is likely to be skewed against recognition of increasing liability. See George L. Priest, Understanding the Liability Crisis, 37 Proc. Am. Acad. Pol. Sci. 196, 198 (1988). Tort litigation is dominated by automobile collision cases which comprise well over half of all tort cases. Id. These tend to mask increases in other areas of tort litigation such as federal product liability claims which rose 761% in the 1974-86 period. Id. Moreover, claim frequency is an imperfect marker of wealth transfer. See generally Hensler et al., supra note 8; James S. Kakalik &
use traditional doctrinal analysis to discern how courts have expanded
tort liability by evidentiary rulings which in their aggregative effect
are intended outcome determinative.\textsuperscript{33} In addition, they have failed
to focus on doctrines which are directly related to wealth transfers—
for example, doctrines determining the scope of insurance policy
coverage. The rejection of contract law as a basis for insurers' liability in
favor of social insurance policy is nowhere more evident than in as-
bestos litigation.\textsuperscript{34} When faced with the certainty that defendants
would run out of money long before most claimants had received
compensation, courts elected to enlarge available insurance proceeds
by requiring every insurance company that had insured any of the
asbestos defendants over a thirty- to forty-year period to pay in the
policy limit for each and every year of insurance coverage.\textsuperscript{35} This

\textbf{Nicholas M. Pace, Cost and Compensation Paid in Tort Litigation (1986); Mark
Peterson & Molly Selvin, Resolution of Mass Torts: Toward a Framework for
Evaluation of Aggregate Procedures (1988).}

\textsuperscript{33} For an example of how a court used evidentiary rulings to create liability, see Dunn v.
Owens-Corning Fiberglas, 774 F. Supp. 929 (D.V.I. 1991), aff'd, 1 F.3d 1362 (3d Cir. 1993),
discussed in Brickman, \textit{supra} note 25, at 1844-50. \textit{See also} Pagnucco v. Pan Am. World Air-
ways, Inc., Nos. 92-9251, 92-9253, 92-9255, 1994 WL 53752 (2d Cir. Feb. 18, 1994), in which
Judge Graeffeiland in a dissenting opinion stated that while plaintiffs' attorneys "were permitted
to range far and wide with prejudicial, irrelevant testimony," defendant's counsel "was pre-
cluded time and again from presenting relevant and probative proof." \textit{Id.} at *1.

\textsuperscript{34} "No litigation in American history has involved as many individual claimants, been
predicated upon the severity of injury, consumed as many judicial resources, resulted in as
much compensation to claimants, compelled the number of defendants' bankruptcies, or been
as lucrative to lawyers as asbestos litigation." Brickman, \textit{supra} note 25, at 1819.

\textsuperscript{35} An important impetus for the judiciary's maximization of insurance proceeds for pay-
ment to asbestos claimants is often contended to be the lack of a national health insurance
program. \textit{See id.} at 1823; Jack B. Weinstein & Eileen B. Hershenov, \textit{The Effect of Equity on

The postwar role of the federal courts—particularly when they were exercising
their equitable jurisdiction—has been to protect the injured who come before them
against those who have caused or are causing unjustified harm. This judicial role
is particularly important in the absence of any alternative remedies emanating
from the executive or legislative branches.

Bear in mind that we do not have, as do other nations, a comprehensive medi-
cal-disability system. We still rely on our tort system for remedies granted by
other countries through a social welfare network. Personally, we prefer that gov-
ernmental plan for medical insurance and compensation rather than our own tort
system in the United States, but as realists, we deal with the system we have.
\textit{Id.} at 324. The motivation to expand the scope of tort liability in order to create a functional
equivalent of a national health insurance program is, of course, not limited to asbestos litigation.
Accordingly, we may anticipate that adoption of a national health insurance program,
whether that proposed by the Clinton administration or others, will lead to a contraction of
tort litigation. However, according to Professor Jeffrey O'Connell, "contrary to conventional
wisdom, the expansion of social and private health insurance, far from lessening reliance on
tort suits, in fact encourages and subsidizes them." \textit{O'Connell, supra} note 26 (manuscript at
3). Professor O'Connell maintains that in recent years, despite the explosive growth of social
and private health insurance, there has been an even greater proportional expansion of tort
“triple trigger” or “continuous trigger” doctrine increased the amount of money available to pay claimants by billions of dollars and its adoption may be regarded as the functional equivalent of congressional authority to coin money. Other examples of enlargement of liability. He demonstrates this by comparing the percentage changes in benefits paid by the principal loss-shifting systems in the 1960-88 period (tort liability, workers' compensation, private loss insurance, sick leave, social insurance, public assistance, veterans' benefits, and other public and private health insurance). See id. at tbl. 3. While tort liability's share of the total benefits decreased for the 1960-88 period despite enormous growth in amounts paid out for tort liability, the percentage substantially increased in the 1982-84 period and hugely increased in the 1984-88 period, portending even more enormous growth in tort liability upon adoption of more encompassing health insurance programs. See id. at tbls. 1-6.

36 See, e.g., Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 456 U.S. 951 (1982). In Keene, the court addressed the interpretation of standard insurance policy language; the policy provided liability coverage for sums that the insured became liable to pay as damages for bodily injury resulting during the policy period. Id. at 1039. Thus, the critical question was which asbestos-related injuries fell within which policy period. Id. at 1040. The court decided that the policies were available if they were in force when persons were exposed to Keene's products. Id. at 1044. Additionally, it decided that policies were available if they were in force when the actual manifestation of injury occurred. Id. The essential novelty of the case was the definition of injury in such a fashion so as to include a third trigger, the period between the last exposure of a claimant of the insured and the time of disease manifestation. See id. at 1058 (Wald, J., concurring). This interim period of time included the substantial bulk of the insurance coverage not only for Keene but most other asbestos defendants as well. Hence, the holding had enormous financial consequences. See id. at 1045-46. Under this “triple trigger,” insurance coverage was maximized so as to include all policies up to policy limits (less any liability claims already paid) issued in the ten or more years between the time of exposure and the time of injury. See id. at 1045-48. For Keene, one of the smaller of the asbestos defendants, this meant $423 million of insurance coverage. See KEENE CORP., 1990 ANNUAL REPORT 4 (1991); see also Brickman, supra note 25, at 1882 n.269. For other “triple trigger” holdings, see Lac D'Amiante du Quebec, Ltd. v. American Home Assurance Co., 613 F. Supp. 1549 (D.N.J. 1985), vacated as to one defendant, 864 F.2d 1033 (3d Cir. 1988); Carey Canada, Inc. v. California Union Ins. Co., 748 F. Supp. 8 (D.D.C. 1990); United States Fidelity & Guar. Co. v. Wilkin Insulation Co., 578 N.E.2d 926 (Ill. 1991); Owens-Illinois, Inc. v. United Ins., 625 A.2d 1 (N.J. App. Div. 1993). See also Berger, supra note 6, at 305 (1988); Note, Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis, 97 HARV. L. REV. 739 (1984); Charles Maher, Asbestos Extravaganza, CAL. L. W., June 1985, at 60.

Essentially the same holding, but using the nomenclature “continuous trigger,” has been reached in other jurisdictions in such cases as Armstrong World Indus., Inc. v. Aetna Casualty & Sur. Co., 26 Cal. Rptr. 2d 35 (Ct. App. 1993). The trial court opinion in Armstrong led Continental Casualty Co. and Pacific Indemnity Co. to enter into a $3 billion settlement with the Fiberboard Corporation and lawyers representing 20,000 claimants. See Continuous Trigger Applies in Injury Case, Prod. Liab. Daily (BNA), at 1 (Dec. 2, 1993).

The doublepeak that courts have resorted to both in assessing insurance company coverage and providing for claimant access to those funds is instructive. For purposes of amassing the largest possible amount of coverage for asbestos defendants, and hence for claimants, Judge Bazelon, writing for the Keene court, found as a critical element in his decision that while Keene's coverage would not extend to "liability for injuries of which Keene could have been aware of prior to its purchase of insurance," Keene, 667 F.2d at 1044, Keene at the time of the exposure of claimants to its products "could not have been aware prior to its purchase of insurance" of the injuries to be caused by that exposure. Id. at 1046. Hence, Keene and presumably most other asbestos defendants did not know and could not reasonably have
insurers' liability abound.\textsuperscript{37} Another area where judicial decision making has markedly increased wealth transfers under the tort system is punitive damages. Punitive damages are increasingly a function of contingent fee financing of tort litigation.\textsuperscript{38} The increasing propensity to award punitive damages in tort cases\textsuperscript{39} and indeed, in contract cases,\textsuperscript{40} and of assess-

known of the injuries being sustained by those exposed to its products at the time of that exposure and even long thereafter according to Judge Bazelon. See \textit{id.} at 1044. For purposes, however, of assessing the pool of assets made available to claimants, Keene and most other asbestos defendants have been repeatedly found to have failed to provide adequate warnings of the dangers of asbestos exposure of which they knew or reasonably should have known at the time of exposure. According to Judge Bazelon's reasoning in \textit{Keene}, a similar finding in other asbestos cases that the defendants knew (or should have known) the dangers of asbestos would have rendered the defendants' insurance coverage inaccessible. See, e.g., Dunn \textit{v.} Hovic, 1 F.3d 1371 (3d Cir. 1993) (a case in which Keene was a defendant).

\textsuperscript{37} After asbestos, perhaps the most impact example of judicial expansion of insurers' liability is the substantial emasculation of "pollution exclusion" clauses which appear in most commercial liability policies. These provisions limit insurance coverage to damaging environmental events that are "sudden and accidental." Insurers argued that this phrase limited coverage to "abrupt, accidental occurrences, like explosions." See Terry W. Bird & Stanley M. Spracker, \textit{The Uncertainty of Pollution Exclusion}, \textit{LEGAL TIMES}, Sept. 27, 1993, at 24. However, some courts have interpreted "sudden and accidental" in such a way as to include events that start suddenly but may cause harm over a long period. Under this broad definition, almost every damaging event could be theoretically classified as "sudden" since virtually every event's start can be regarded as "sudden." See Morton Int'l, Inc. \textit{v.} General Accident Ins. Co., 629 A.2d 831, 871-72 (N.J. 1993) ("'Sudden' is not inconsistent with an application to events that begin, but not end, abruptly . . . . As noted, 'sudden' events may begin abruptly and continue undetected for a significant period."). The New Jersey Supreme Court has held that "notwithstanding the literal terms of the standard pollution exclusion clause, that clause will be construed to provide coverage identical with that provided under the prior occurrence-based policy." \textit{Id.} at 875; see also Shell Oil Co. \textit{v.} Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 841 (Ct. App. 1993) ("'Sudden' refers to the pollution's commencement and does not require that the polluting event terminate quickly or have only a brief duration"); see also Katherine T. Eubank, \textit{Note, Paying the Costs of Hazardous Waste Pollution: Why is the Insurance Industry Raising Such a Stink?}, 1991 U. ILL. L. REV. 173, 185.

\textsuperscript{38} See Prichard, \textit{supra} note 11, at 463. [0]ne of the distinctive differences between American and British tort law is the substantially greater availability of punitive damages in America. \textit{Id.} This difference is attributable to the use of contingent fee financing of tort litigation in the United States and the American rule that each side pays its own attorney. \textit{See id.}


\textsuperscript{40} See, e.g., Olympia Hotels Corp. \textit{v.} Johnson Wax Dev. Corp., 908 F.2d 1363, 1374 (7th Cir. 1990); Russell J. Weintraub, \textit{A Survey of Contract Practice and Policy}, 1992 Wis. L. REV.
ing punitive damages against insurance companies for failure to offer policy limit settlements41 are examples of trends in judicial decision making which are quite expansive and significantly impact wealth transfer.42 Perhaps most significant from the point of view of future wealth transfer is the judiciary's acceptance of a new role for punitive damages: to supplement the jury's ability to punish and deter egregious conduct with the authority not simply to implement policy, but also to set policy as if it were a legislature or regulatory commission. A jury that awards very substantial punitive damages in order: to effectively prohibit certain business practices; to require other business practices to ban the sale of a product; or to cause its recall; is engaging in policy making. If regulatory authority has been either consigned to a regulatory commission or maintained by the legislature, then the jury is arguably usurping that legislative/regulatory role.43 In doing

1, 8; see also Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 MINN. L. REV. 1, 23 (1990) (on punitive damages generally).


42 Punitive damage claims also drive up compensatory settlement costs. See Taylor, supra note 24, at 793 n.90 ("[S]ettlements in claims where plaintiffs sought punitive damages were nearly 150 percent higher than in those where plaintiffs did not seek punitive damages, and in others the settlements were 60 percent higher.").

43 As examples of the traditional and new roles of punitive damages, compare the late 1970s Ford Pinto case and the recent GM Truck case. The Ford Pinto case, Grimsshaw v. Ford Motor Co., No. 19-77-61 (Super. Ct., Orange County, Cal. 1978), aff'd as amended, 174 Cal. Rptr. 348 (1981), involved a verdict against Ford for $126 million, $125 million of which consisted of punitive damages, for designing a car in which a low-speed, rear-end collision could spew the contents of the gas tank into the passenger compartment allowing any source of ignition to engulf the occupants in flames. It was alleged at trial that Ford knew about the defect and also knew of a $20 component that would prevent the hazard. Grimsshaw, 174 Cal. Rptr. at 361. It was also alleged that Ford calculated the number of injuries and deaths that the defect would cause and the amount that would have to be paid out in claims and determined that it would be more profitable to pay the claims rather than build the car more safely. Id. This decision gave Ford a $125 million competitive advantage—the amount the jury awarded the plaintiffs, thereby effectuating policy by depriving Ford of the profit that it would have made as a consequence of selling an unsafe product. Id. at 388. (The punitive award, however, was reduced to $3.5 million on appeal. Id.)

The recent $105 million verdict against General Motors, which included $101 million in punitive damages, Moseley v. General Motors Corp., No. 90V6276 (State Ct., Fulton County, Ga. 1993), is an example of the new role of punitive damages—to create policy. This case involved a death which was alleged to have resulted from marketing trucks which had side-mounted gas tanks outside the frame rails. Here the plaintiffs' attorney urged the jury to grant punitive damages, not to punish GM or to deprive it of any profits from its actions as was the
so, the role of financial incentives in the plaintiffs’ bars’ capture of public policy-making power is plain.

Following the money trail leads directly to the engine that drives the personal injury tort system: the contingent fee. The incentive for case in the Ford Pinto verdict, but to force GM to recall the five million trucks still on the road. He urged the jury to choose a figure of $100 million, $20 for each truck on the road. Unlike the Pinto case, however, this figure was not tied into any specific finding of savings by GM. In closing arguments he told the jury that: “We want it recalled and we want a punitive damage verdict that makes it virtually impossible not to recall it.” The jurors agreed: “I hope they’ll read this verdict and make it right.” “They need to recall the trucks,” said one juror.

“We added the extra million to let General Motors know how strongly we felt,” said another. See Billy Bowles, GM Vows to Fight $105 Million Unsafe Truck Verdict, REUTERS, LTD., Feb. 5, 1993, at 5.


any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order.

In contrast to these procedural protections, a twelve-member jury has abrogated to itself the effective authority to circumvent the statutory scheme. Although the jury could not directly order the truck off the road, they did award a verdict effectively constituting a functional equivalent of what the NHSC and the Secretary of Transportation could accomplish through the processes established by Congress.

Another example of the use of punitive damages to create policy can be seen in Carroll Air Sys. v. Greenbaum, No. 91-3240, 1993 Fla. App. LEXIS (Fla. Ct. App. Dec. 1, 1993), in which the Florida Court of Appeals affirmed an $800,000 punitive damage verdict against an employer arising out of a traffic death caused by an employee who was driving home from a business convention when legally drunk. Despite the fact that the employer neither sponsored the event nor owned the premises on which the event occurred, and despite the fact that a Florida statute provides that “[a] person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for any injury or damage caused by or resulting from the intoxication of such person,” FLA. STAT. ANN. § 768.125 (West 1986), a jury concluded that the employer was at fault because the employer, who also attended the convention, knew or should have known the employee was in no condition to drive home from the convention and was still responsible for the actions of the employee. Carroll Air Sys., 1993 Fla. App. LEXIS, at 4. The court on appeal held that, unlike a social host, an employer has a far greater ability to control the actions of its employees and should exercise such control, and in the absence thereof, can be vicariously liable for punitive damages. Id. at *8. Thus, even though the statute clearly articulates a legislative policy not to hold responsible those who sell or furnish alcoholic beverages to persons who become intoxicated and cause injury, the jury and judge essentially reversed the state’s policy by holding that an employer can now be held liable for the actions of an intoxicated employee in situations that heretofore did not result in liability. The issue is not whether the policy adopted by the jury and reviewing judges is more desirable than the one adopted by the legislature; rather, it is one of authority.

Similarly, a jury has recently attempted to set national health policy by effectively ordering the provision of insurance coverage for experimental procedures not now covered by insurance policies. See HMO Liable for Punitive, NAT’L L.J., Jan. 10, 1994, at 19 (discussing $77 million punitive damage verdict to family of woman who died after HMO denied her the ability to undergo an experimental bone marrow transplant). Since the policy is being made by
lawyers to press personal injury tort claims is the return they can earn for their efforts. As hourly rates of return have increased, more claims have been brought, resulting in expansion of the scope of liability of those assessable as liable for harm infliction.

II. RATES OF RETURN

Despite the importance of rates of return to the operation of the personal injury tort system, we know far more about the earnings of professional athletes than we do about the rates of return generated by a jury—not a state or national legislative body—the cost implications of such a decision were not considered or addressed.

Use of punitive damages as a policy-making device to create rather than simply enforce regulatory norms is recognized—albeit dimly—but with approval in Marc S. Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393 (1993). The authors argue that punitive damages "constitute the best available means for social control and moral sanction of economically formidable wrongdoers." Id. at 1396. Under the regime of punitive damages, "[p]laintiffs and their lawyers are granted authority to assume vital law enforcement functions." Id. at 1445. Then they go on to state:

The reason underlying the grant of enforcement endowments is essentially identical to the reason underlying the grant of regulatory endowments: a limited government is and ought to be too small and too overstretched to regulate every area of life and to enforce such regulations. It is and ought to be compelled to delegate its regulatory and enforcement authority to nongovernmental parties.

Id. at 1445 (emphasis added). The coupling of regulatory authority with enforcement authority as legitimate goals of punitive damages constitutes recognition of a new role for punitive damages.

James R. Posner, Trends in Medical Malpractice Insurance, 1970-1985, LAW & CONTEMP. PROBS., Spring 1986, at 37. Conventional wisdom has it that a claimant's decision to sue is based in part upon the expected return, net of legal fees, and other litigation costs.


It is a thesis of this Article that the conventional wisdom is essentially irrelevant. It is not the claimant's risk-reward structure that determines tort litigation claims but rather those of the claimant's lawyer. To be sure, asserting claims can be a time-consuming and unpleasant experience for a claimant and one that some claimants therefore eschew. Nonetheless, within relevant parameters, claimants are essentially infinite in number. See discussion infra part IV. The decision whether to sue is the lawyer's and is made on the basis of the lawyer's expected rate of return.

Even if effective hourly rates of return had not become inordinately high, there would still be a need to examine the impact of contingent fees on the tort system. Consider the policy implications of adopting a system of paying other professionals, such as doctors on a contingent fee basis: specifically, doctors would not be paid if their patients failed to recover from the treated condition but would receive higher rates of pay if their patients recovered. Would we not be concerned that doctors would thereby be motivated to: overstate the seriousness of a patient's condition in order to claim credit for the cure; induce a chronic but not dangerous illness in order to repeatedly effect a cure; prescribe treatment designed to yield patient improvement in the short term even though that treatment would be deleterious in the long term; intervene and treat illnesses of short duration even though it was in the patient's interests not to intervene because of possibly injurious consequences of intervention but rather to let the illness run its course; diagnose ill patients as well or cured in order to obtain a fee; and falsify test results to conform to fee interests?
contingent fee litigation. In part, our lack of knowledge is not accidental; contingent fee lawyers generally refuse to disclose their effective hourly rates of return. That these rates are extremely lucrative may be gleaned from the fact that lawyers for personal injury claimants routinely refuse to enter into hourly rate contracts and instead insist upon contingent fees even though this policy violates clearly stated ethical obligations.

What little we do know about rates of return is startling.


[This court has been much troubled by the fact that it has been given no information at all about the relationship between the total fees received and the total time expended by plaintiffs' lawyers in the numerous asbestos cases that they are handling. . . . This Court has been entirely frustrated in its several requests for such information. Even though the plaintiffs' lawyers with a large portfolio of such cases surely have the information readily retrievable from their time records, they have never been forthcoming with the facts—instead their submissions in response to this Court's inquiries regularly talk about everything except what this Court has asked.

Id. at *1. Rather than disclose fees already collected as required by Judge Shadur, the attorneys instead forfeit fees from several additional claimants. Id. at *2.

Typically, however, most jurists do not seek fee information from contingent fee attorneys. They do not know what the fees are and do not seek to know. See Brickman, supra note 25, at 1837 n.63. It may be that this benign ignorance is calculated. If judges formally knew fee information, they would feel immense pressure to intervene in instances where lawyers had used their superior knowledge and experience to take undue advantage of clients. See Lester Brickman, Lawyer's Fee Frenzy, WASH. POST, Aug. 16, 1991, at A29. Multi-hundred million dollar fees, and $10,000, $20,000, $30,000, $40,000, and $50,000 an hour rates of return in cases with little or no meaningful risk would likely result in significant public disapprobation and strong political pressure on judges. Avoidance of these consequences is secured by nondisclosure. See id.

Interestingly, an initiative being proposed for the November 1994 California ballot requires disclosure of hourly rates of return. See Californians For a Fair Legal System, Ballot Initiative To Limit Contingency Fees Filed with Attorney General (Oct. 19, 1993) (press release, on file with author). For the genesis of this part of the initiative proposal, see Brickman, supra note 46, at 115-25.

48 See DERK BOX, THE COST OF TALENT 139 (1993) ("The lure of obtaining a fraction of such handsome sums has caused most trial lawyers to insist on contingent fee arrangements, even if their clients can afford to pay the normal hourly rate.").

49 To be sure, most clients most of the time prefer to pay a contingent fee even when it is in their self interest and financial capacity to pay an hourly rate fee. In such cases, the lawyer is ethically obligated to so advise the client and to offer the opportunity to pay an hourly rate fee. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986); see
Although risk of nonrecovery has declined, rates of return have increased prodigiously. Over the past twenty-five years, the likelihood of a personal injury plaintiff prevailing at trial has doubled.\(^{50}\) At the same time, the average judgment, adjusted for inflation, has risen five-fold.\(^{51}\) Though there has thus been a dramatic decrease in the risk of nonrecovery, the standard contingent fee has not only not declined, it has increased.\(^{52}\) Thus the standard contingent fee today yields five to eight times as much contingent fee income, in inflation-adjusted dol-

\(^{50}\) Brickman, supra note 46, at 91. While it is conceivable that the increased trial success of plaintiffs is accounted for by plaintiffs' lawyers taking less risky cases to trial, that is implausible in light of expansion of the scope of liability of the tort system in that time period. Moreover, since most claims are settled without litigation and most filed claims are settled without trial, see O'CONNELL, supra note 14, at 84, the more significant issue is what has been the impact of greater success at trial on settlements. Some indication of this impact may be gleaned from the discussion of commercial general liability insurance payments, see supra notes 27-30, and the discussion of mass consolidations, see infra notes 86-93, 104-09. The success rate for medical malpractice litigation is approximately 30-33% (versus the 50% rate that is common for most tort litigation). See Bovbjerg et al., supra note 44, at 22 (win rate for medical malpractice trials was about 33% which is substantially lower than those for automobile cases (64%), suits against the government (48%), and products liability cases (44%)); see also Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 CORNELL L. REV. 1124, 1141 (1992) (30% win rate for medical malpractice cases); Frank A. Sloan & Chee R. Hsieh, Variability in Medical Malpractice Payments: Is Compensation Fair?, 24 LAW & SOC'Y REV. 997, 1007 (1990) (a Florida sample showed a success rate of 22% and a Kansas City sample 34%).

\(^{51}\) Brickman, supra note 46, at 100 n.281; see also PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 10 (1988).

\(^{52}\) See O'CONNELL, supra note 14, at 142 (quoting and citing sources stating that 50% contingent fees are common, including a former local bar president and prominent personal injury lawyer stating: "I agree that there has been an increase in the percentage of contingent fees . . ."); see also Mississippi State Bar v. Blackmon, 600 So. 2d 166, 176 (Miss. 1992) (Banks, J., dissenting on other grounds) ("We might judicially note a once prevailing standard contract of one third if the claim is settled without suit, forty percent where the suit is filed and fifty percent where the case actually goes to trial. It is more typically stated now as forty percent through trial and fifty percent if an appeal is taken."); LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 14 n.3 (1994) [hereinafter BRICKMAN ET AL., RETHINKING CONTINGENCY FEES]; Letter from U.S. District Court Judge Patrick F. Kelly to Lester Brickman, Professor, Benjamin N. Cardozo School of Law (Apr. 21, 1992) (copy on file with author) [hereinafter Kelly Letter] ("I am one who happens to believe there is a place for the contingency fee, yet I have no patience with across the board fees assessed at 40 to 50 per cent."). The standard rate has also increased because lawyers increasingly apply their contingent fee percentages to the gross award thereby shifting litigation costs entirely to their clients. See BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, supra, at 13 n.4; O'CONNELL, supra note 14, at 142 (quoting an attorney stating "a 50% fee will always net the client less than half the total recovery mainly because the lawyer takes his expenses out first" and quoting from a report of an ambulance-chasing investigation in Philadelphia that in many cases "the attorneys managed to get more out of the settlement than the clients"); William P. Gronfin & Eleanor D. Kinney, Controlling Large Medical Malpractice Claims: The Unexpected Impact of Damage Caps, 16 J. HEALTH POL'Y & L. 441, 450 (1991).
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lars, than it did twenty-five years ago.\textsuperscript{53} This enormous increase in contingent fee income has paralleled the enormous expansion in the scope of liability imposed on personal injury defendants.\textsuperscript{54}

The enormous increases in contingent fee income are, in turn, reflected in higher effective hourly rates of return.\textsuperscript{55} In asbestos litigation, these rates often exceed $1000 per hour and, in a significant number of such cases, rates of return are $5000 per hour.\textsuperscript{56} In asbestos cases in which there has been a mass consolidation or a megasettlement, hourly rates of return of $50,000 per hour and more have been obtained with total fees ranging from $200 million to $500 million or more.\textsuperscript{57} Enormous rates of return are not confined to asbestos claims. Contingent fees yielding thousands of dollars an hour are not uncommon in other areas of litigation, often in cases where the lawyer bears no meaningful risk of nonrecovery or low recovery.\textsuperscript{58} Class action and mass consolidation claims frequently yield enormous rates of return.\textsuperscript{59} Examples of enormous hourly rates of return from claims of multiple and large scale injury abound.\textsuperscript{60}

\textsuperscript{53} Brickman, supra note 46, at 89-90, 100-01.

\textsuperscript{54} See supra text accompanying notes 26-31, 38-43.

\textsuperscript{55} Rates of return to contingent-fee lawyers vary over a wide range. For example, one half of all tort lawsuits are automobile accident claims. Kakalik & Pace, supra note 32, at 37. In Cook County in 1984, the average automobile accident recovery was $88,000 but the median recovery was $7000. Moreover, it is apparent that most contingent fees amount to no more than several thousand dollars. See Mark A. Peterson, Civil Juries in the 1980s, at 21-22 (1987). Lawyers in such modest cases seek to raise their rates of return by increasing their caseloads and settling claims quickly. Indeed, empirical data indicates that for gross recoveries of less than $10,000, contingent-fee lawyers devote significantly less time to their cases than do hourly fee lawyers whereas for large claims, the amounts of time devoted are roughly equivalent. See Herbert Kritzer et al., The Impact of Fee Arrangement on Lawyer Effort 16-19 (1986). In this Article, I am focusing on personal injury claims that yield contingent fees of substantially greater amounts—as the examples infra indicate.

\textsuperscript{56} Brickman, supra note 25, at 1834-36.

\textsuperscript{57} Andrew Blum, Megafees in Baltimore Megacase, Nat'l J.L., Aug. 29, 1992, at 2 (mass consolidation of 55 cases estimated to have yielded—from settlements alone—$100-$125 million, and is expected to rise to over $300 million once the trials have been concluded; see also Michael Ollole & Mark Hyman, Angelos is Unlikely Point Man on Bid to Buy Orioles, Baltimore Sun, June 14, 1993, at 1A.

In a recently announced $3 billion asbestos litigation settlement between the Fiberboard Corporation, Pacific Indemnity Company, Continental Casualty Company, and lawyers representing approximately 20,000 claimants, the lawyers' share is likely to be well over $500 million—and possibly as high as $1 billion. See Continuous Trigger Applies in Injury Case, supra note 36, at 1. It is likely that these fees will have yielded hourly rates of return of $50,000 and more.

\textsuperscript{58} See Brickman, supra note 46, at 33 n.12, 77 n.186.

\textsuperscript{59} Bok, supra note 48, at 139 ("Even more lucrative are class action suits where hundreds or even thousands of potential claimants join in a single proceeding with the possibility of cumulative damage awards of awesome proportions.").

\textsuperscript{60} For example, a school bus tragedy in Alton, Texas has likely yielded fees of $25,000-$30,000 per hour. See Brickman et al., Rethinking Contingency Fees, supra note 52,
Effective hourly rates of return of such magnitude profoundly affect and influence the operation of the personal injury tort system. In succeeding sections, some of these effects will be examined.

III. THE EFFECT OF RATES OF RETURN ON TORT LITIGATION

Virtually all personal injury litigation today is done on a contingent fee basis. It is the thesis of this Article that the effective hourly rates of return yielded the plaintiffs' bar from contingent fees significantly impact on two aspects of tort litigation: (1) the volume of personal injury litigation claims; and (2) the outcomes of such claims. Increases in the effective hourly rates of return increase claims filings and resultant wealth transfers.

A. Effect of Rates of Return on the Frequency of Tort Claims

It is widely assumed that increasing lawyers' rates of return for certain litigation will increase the volume of that litigation. This assumption has been the predicate for the passage of federal fee-shifting statutes in such areas as civil rights, employment discrimination, and environmental matters. These statutes allow courts to award reasonable attorneys' fees to the prevailing party—thus raising lawyers' rates of return for representation in matters covered by the statutes. Raising rates of return has been effective in increasing the

at 55 n.24. Some water pollution claims have also yielded high hourly fees. See David Rales, $84.5 Million Offered in Tainted-Water Case, ARIZ. REPUBLIC, Feb. 26, 1991, at 1A (settlement guaranteed attorney fees of $33.8 million, but it is very likely that the hourly rates of return exceeded $30,000 in this instance).

61 BOK, supra note 48, at 139-40; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 526 (1986).

62 See Thomas D. Rowe, Jr., American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation, 1989 DUKE L.J. 824, 851-52; Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE L.J. 651, 661 [hereinafter Rowe, The Legal Theory of Attorney Fee Shifting]. It has been argued, however, that for personal injury claims, fee shifting in favor of prevailing plaintiffs diminishes litigation because such fee shifting generates the highest level of policy compliance and therefore leads to the lowest accident frequency. See Keith N. Hylton, Fee Shifting and Incentives to Comply With the Law, 46 VAND. L. REV. 1069, 1072 (1993).


64 The statutes raise lawyers' rates of return in two ways. First, certain claims seek injunctive rather than monetary relief. Claimants who cannot afford the cost of such litigation are enabled to proceed if their claims appear viable because of the imposition on losing defendants of a reasonable attorney fee cost. This is also true where the claim is for money damages but where the attorney fee cost will exceed the amount of monetary relief; the shifted attorney fee cost is not limited by the amount of money damages obtained. See Riverside v. Rivera, 477 U.S. 561 (1986); see also Farrar v. Hobby, 113 S. Ct. 566, 573, 575 (1992) (holding that a plaintiff who wins only nominal damages may nonetheless be eligible for a fee award under 42 U.S.C. § 1988 (1988), but denying this plaintiff who won only nominal damages, any fee
number of claims filed in the statutorily designated areas.\textsuperscript{65}  
The mirror image of increasing litigation by increasing rates of return is decreasing litigation by lowering rates of return. It is this latter assumption that underlies states’ adoption of limits on contingent fees and damage awards particularly in medical malpractice litigation. These fee caps most often take the form of an inverted pyramid in which the lawyer’s share diminishes as the amount of the award increases.\textsuperscript{66}  Intuitively, we would expect constraints on lawyers’ fees to reduce the frequency of litigation claims.\textsuperscript{67}  Empirical studies of the effects of mandated lower rates of return on litigation frequency have not demonstrated any clear-cut causal relationship.\textsuperscript{68}
Hence, while we do not yet have empirical confirmation of the impact of lowering lawyers' rates of return on claim frequency, it is most likely because the fee caps already legislated have not significantly reduced lawyers' revenues and because of methodological problems and insufficiencies in the data used by the studies.\textsuperscript{69}

To focus attention on lawyers' rates of return and their effects on tort litigation is to at least implicitly suggest the possibility that too high a reward structure can yield socially undesirable results.\textsuperscript{70} This Article explicitly states that thesis. Merely raising the possibility, however, of an overly generous reward structure and its implications will no doubt rankle not only plaintiffs' lawyers but many in the anti-tort reform industry who reject tort reform proposals which include caps on fees or damage awards or provisions for two-way fee shifting\textsuperscript{71} on the ground that adopting such proposals will necessarily preclude the bringing of some meritorious claims.\textsuperscript{72} These arguments—

\textit{Awards Really Like? The Untold Story from State Courts}, 14 \textit{Law & Pol'y} 77, 83-85 (1992) (finding that the "win" rate for medical malpractice claims was 29% versus 64% in motor vehicle accident claims and 46% in products liability claims).

\textsuperscript{69} It is not unlikely that the Zuckerman et al. and Danzon studies failed to accurately measure the effect of fee caps. See Zuckerman et al., \textit{supra} note 68; DANZON, NEW EVIDENCE, \textit{supra} note 68. These studies and others are further analyzed in the Appendix to this Article.

\textsuperscript{70} See infra notes 80-85.

\textsuperscript{71} Two-way fee shifting, alias the English rule, requires a plaintiff to reimburse some part of the attorney fees incurred by defendant when the latter prevails in a litigation, as well as the converse. See Thomas D. Rowe, Jr., \textit{Predicting the Effects of Attorney Fee Shifting}, \textit{Law & Contemp. Probs.}, Winter 1984, at 139; Rowe, \textit{The Legal Theory of Attorney Fee Shifting}, \textit{supra} note 62, at 651. A recent proposal for a quite modest version of two-way fee shifting occasioned considerable controversy. See, e.g., Michael Kinsley, Quayle's Case, NEW REPUBLIC, Sept. 9, 1991, at 4 (discussing the Council on Competitiveness's proposals for tort reform, including a fee shifting proposal); Dan Quayle & Talbot D'Alemberte, Liability vs. Competitiveness: An Interview, CORP. BOARD, Nov. 1991, at 1 (discussing the Council on Competitiveness's proposals for tort reform including a fee shifting proposal); Andrew Blum, Debate Still Rages on Torts, NAT'L L.J., Nov. 16, 1991, at 1; Andrew Blum, ABA Takes Softer Stand On Quayle, NAT'L L.J., Oct. 14, 1991, at 3; Andrew Blum, Quayle's Proposals Still Making Waves, NAT'L L.J., Sept. 16, 1991, at 3; Ken Myers, Professor's Study of Tort System Finds No 'Litigation Explosion,' NAT'L L.J., Sept. 7, 1992, at 4 (all discussing reactions to Quayle's proposals).

\textsuperscript{72} See Bashing Lawyers, N.Y. TIMES, Feb. 15, 1992, at A20.

[\textit{P}roposals . . . requiring a losing plaintiff to pay the defendant's legal fees, sharply curtailing contingency fees for lawyers and recklessly attacking punitive damages . . . [would] discourage . . . legitimate but risky [lawsuits] . . . . Similar arguments apply to contingency fee arrangements by which lawyers get a percentage of the winnings, but only if they win . . . . [These proposals] fail . . . to distinguish between meritorious and meretricious suits.]

\textit{Id.}; John A. Shannon, Jr., \textit{Let the Loser Pay Costs? That's 'English Rule,' Not American Way}, ARIZ. REPUBLIC, Sept. 24, 1993, at A22 ("It is generally accepted that the English Rule discourages plaintiffs who have no resources other than their own from pursuing meritorious claims."); see also OFFICE OF TECHNOLOGY ASSESSMENT, \textit{IMPACT OF LEGAL REFORMS ON MEDICAL MALPRACTICE AWARDS} 29 (1993) [hereinafter OTA] ("[R]estricting [lawyers'] fees
founded as they are on the premise that the "meritorious claim" is a well defined concept easily capable of application in a given instance—lack merit. Meritorious claims may be defined either as: (1) claims which have resulted in jury verdicts; or (2) claims which in the eye of the beholder, or of experts, are worthy of compensation regardless of jury verdicts. A definition based upon a jury's verdict (or a court's judgment) is subject to the criticism that it necessarily confers approbation on at least a few verdicts and awards which most observers (apart from the respective juries) would condemn as outrageous.\(^7\)

Defining the meritorious case on the basis of expert assessment requires that the experts either confine themselves to predictions of probability of success based upon previous jury verdicts (including the outrageous outcomes that most condemn) or eschew previous jury verdicts in favor of a very complex cost/benefit calculus. The latter would require identifying a set of policy goals of the tort system, securing widespread agreement as to those goals, and then for each tort claim, determining which outcome most effectuates those policy goals. We can all agree upon the need in a civil society to provide

\[^7\] Some common examples of highly condemned outrageous jury outcomes follow: In 1971, a 71-year-old man waiting for a subway was attacked by several youths who knocked him to the ground and, while keeping him in a choke hold, robbed him. One of the muggers continued to viciously beat him throughout the episode. While the assault was in progress, two New York City Transit Police officers heard the victim's screams and rushed to the scene to discover two of the assailants still beating him. See McCummings v. New York City Transit Auth., 613 N.E.2d 559, 560 (N.Y.), cert. denied, 114 S. Ct. 548 (1993). One of the officers alleged he shot one of the muggers five times when the mugger lunged at him. The mugger alleged he was shot while attempting to flee. One of the shots severed the mugger's spinal cord and left him confined to a wheelchair. Id. at 561. After serving his sentence he sued the Transit Authority for permitting the use of excessive force and eventually was awarded $4.3 million. Despite this large award to the mugger, the victim of the crime received no compensation at all, and could not sue his attacker because the statute of limitations had expired. See Eric Breindel, Who Says Crime Doesn't Pay, WALL ST. J., Dec. 15, 1993, at A17.

The award was upheld by the New York Court of Appeals and the United States Supreme Court denied certiorari. See McCummings, 613 N.E.2d at 564.

In another case a woman who claimed to be psychic sued a hospital, a doctor, and a scanning equipment maker claiming her psychic powers were destroyed by a hospital ordered brain scan. The jury awarded her $1.2 million although the judge later overturned the verdict. See Odd Claims, FOCUS, June 1, 1992, at 25. In 1977, a 19-year-old with a long history of emotional disturbance, threw himself into the path of a subway train as it pulled into a station on Manhattan's East Side. One of the cars ran over him, severing a leg, one arm, and part of the other. He subsequently received a settlement of $650,000. See Richard Severo, Man Who Tried to Commit Suicide Wins Settlement, N.Y. TIMES, Dec. 22, 1983, at B3. In Redding, California, a burglar fell through a skylight while attempting to steal lights from the roof of a public school. He sued the school district and received $260,000 in damages. See William M. McCormick, Civil Justice and Common Sense, CHI. TRIB., Mar. 2, 1986, at C2. In another case Sears Roebuck & Co. was ordered to pay $1 million because an overweight man had a heart attack while starting a Sears lawn mower. Id.
access to courts for redress of harms inflicted; we can all further agree
that the very existence of any legal system for determining compensation
necessarily requires that a line be drawn between the compensable
and the noncompensable. Beyond that, however, we recognize
that differences in perception as to where the line is to be drawn will
necessarily lead to widely disparate application of the "meritorious"
appellation.

The "meritorious claim" is therefore a normative, not a descrip-
tive, term which expresses a set of policy preferences. Attempts there-
fore to define claims on a scale of merit for purposes of evaluating tort
reform proposals founder on these social policy shoals. The concept
of the "meritorious claim" is of dubious value at best and adds little of
substance to either the debate over tort reform proposals or the in-
quiry into rates of return and their impact.\textsuperscript{74} Moreover, those who
oppose tort reform on the basis of denial of claimant access to press
"meritorious claims" are also inconsistent with their self-professed
pro-tort claimant position. It is not proclamation to preserve for law-
yers their oligopsonistic control over the setting of contingent fee
rates.\textsuperscript{75} It is proclamation, however, to focus on the cost of access to
the personal injury tort system and to remediate the often enormous
hourly rates of return being extracted from claimants in cases where
lawyers are not bearing any realistic payment risk.\textsuperscript{76}

**B. Effect of Rates of Return on Tort Claim Outcomes**

It is both intuitively and empirically demonstrable that plaintiffs' lawyers' rates of return affect tort outcomes. The higher the expected rate of return, the greater the effort that may be expected because

\textsuperscript{74} It is, of course, the case that fee shifting and caps on fees and damages will deter the invocation of some claims which, if litigated, would result in verdicts for plaintiffs. This has led some to reject tort reform proposals because they limit access to courts for some would-be litigants. Implicit in this criticism is the assertion that whatever the current frequency level of tort claim is, that is at least the "right" level—an assertion for which there is likely no rational basis. Moreover, unless the rejectors conclude as did Goldilocks for much the same reasons that the current frequency level is "just right," i.e., that both lower and higher tort claim frequency levels are to be eschewed—which seems quite unlikely, then the \textit{reductio ad absurdum} result of their argument is that contingent fee rates should be raised. If the volume of personal injury litigation is currently \(X\), then raising contingent fee rates to 50-75\% will raise the volume of litigation to a multiple of \(X\) as well as increase the number of positive jury verdicts. And raising the rate to 100\% will result in an even higher multiple. Lawyers presumably would then rebate part of their fees to claimants in order to induce them to litigate. Even higher than 100\% rates—by subsidizing plaintiffs' lawyers—would yield even higher levels of "meritorious" litigation.

\textsuperscript{75} See Brickman, \textit{supra} note 46, at 102-11.

\textsuperscript{76} For analysis and a proposal which focuses directly on the cost of access, see Brickman \textit{et al., Rethinking Contingency Fees}, \textit{supra} note 52. See also Peter Passell, \textit{Windfall Fees in Injury Cases Under Assault}, N.Y. Times, Feb. 11, 1994, at A1.
greater effort enhances the likelihood of prevailing. Thus, a contingent fee lawyer who will earn $10,000 if he prevails and zero if he loses will in most cases expend more effort than a lawyer in the same matter who will only earn $1000 if he prevails. To this point, this intuited argument is unexceptionable and simply recognizes the contingent fee lawyer as entrepreneurial capitalist responding to financial incentives. However, if the lawyer will receive not $10,000 upon prevailing but $1 million (or more), something beyond just additional effort (measured in units of time) may be anticipated. While there is a vast range of action between increased effort and fraudulent behavior, there is increasing evidence of socially deleterious behav-

77 Herbert Kritzer et al., The Impact of Fee Arrangement on Lawyer Effort, 19 LAW & SOC. REV. 251, 267, 273-74 (1985).
78 See Ronald Braeutigam et al., An Economic Analysis of Alternative Fee Shifting Systems, LAW & CONTEMP. PROBS., Winter 1984, at 173, 183-84 (the lawyer's incentive to invest increases with the stakes).
79 It is also apparent that contingent fees have an impact on the settlement value of claims and may additionally prolong the claim process and add substantial costs thereto. See Kelly Letter, supra note 52, at 1 ("There is no question that the expectancy of a contingency fee shapes the value [of claims] for settlement purposes, and in many instances unnecessarily requires trial.").
81 The ethical rules of many professions share a common underlying principle: if temptations are allowed to get out of hand, many will yield. To put it in raw dollar terms, if under system A people can grab $1000 by telling a lie, and under system B they can grab $1 million by telling the same lie, more people—not all, but more—will tell the lie under system B.
82 See id. at 47.
83 If the "something beyond" is improper argument to the jury, it is curable by judicial supervision, though if such improper argument is routinely engaged in, the standard of what is acceptable will likely shift in favor of plaintiffs. For an example of improper argument which was highly efficacious, see Brickman, supra note 25, at 1849. For an example of how a whole population of witnesses changed their testimony regarding market shares of various defendants in a manner to increase the value of plaintiffs' claims and corresponding to the financial interest of plaintiffs' lawyers, see Lester Brickman, The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress, 13 CARDozo L. Rev. 1891, 1894 n.13 (1992).
84 Extensive amounts of fraud committed by some contingent fee lawyers motivated by high rates of return have also been documented. In one sting operation in New Jersey, bus accidents were staged and filmed. Many of those who later filed claims from the accident were not on the bus but rather came to the scene and climbed on after the accident had occurred. Some were never on the bus at all. Some of the undercover "passengers" on the buses agreed to be treated, and were subsequently taken to chiropractors or physicians who provided 10 minute massages and heat treatments three times a week for 15 weeks. The doctors charged between $4500 to $6000 for this unneeded care and often padded the bills with other treatments that were either unnecessary or never actually took place. Hundreds of thousands of dollars of claims resulted from the operation. See Peter Kerr, 'Ghost Riders' Are Target of an Insurance Sting, N.Y. TIMES, Aug. 18, 1993, at A1.
85 Often "runners" for doctors and lawyers, who sometimes scan the police band radios for accidents, will run to the scene and hand out leaflets with phone numbers, and encourage passengers to say they suffered from back and neck injuries which are subjective in nature and therefore hard to disprove. Sometimes the runners will offer passengers from $50 to $100 to
ior,\textsuperscript{83} for example, causing the expenditure of billions of dollars annually for unnecessary medical procedures,\textsuperscript{84} or using the tort system to inflict substantial legal costs on large numbers of defendants as a means of extracting settlement offers.\textsuperscript{85}

Beyond greater effort and illegitimate activity, inordinately high rates of return affect tort outcomes by increasing claim frequency. Consider mass consolidations which are being increasingly resorted to by trial judges confronted with an overwhelming asbestos-related claims backlog.\textsuperscript{86} In most mass consolidations, the individual claims of 20, 200, or even 8000 plaintiffs, each against 15 to 40 defendants, are grouped together into one or a few mega-trials. The ostensible purpose of such a consolidation is to conserve judicial resources, control legal costs, and accelerate the resolution of plaintiffs’ claims.\textsuperscript{87} Increasingly, however, the actual purpose is to compel defendants to enter settlements on favorable terms with hundreds and thousands of unimpaired claimants as a way of clearing courts’ dockets.\textsuperscript{88} Defendants faced with claims by unimpaired persons often vigorously defend against such claims and frequently win. However, in a mass consol-

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\textsuperscript{83} See Bok, supra note 48, at 141 ("lawyers who are too strongly motivated to win can do a lot of mischief"); Olson, supra note 80, at 46 ("A job that offers enormous rewards for unscrupulousness will attract many unscrupulous people, and corrupt many people of ordinary character.").
\textsuperscript{84} See infra notes 102-03.
\textsuperscript{85} See Christi Harlan, Legal Morass: Hundreds of Businesses Wait and Run Up Bills As Tort Case Drags On, WALL ST. J., Feb. 6, 1992, at A1 (describing 36 related toxic tort suits filed in Texas state courts by one lawyer on behalf of 2729 Lone Star Steel employees, naming 372 defendants, and based upon a theory of a toxic cloud that infected workers with chemical AIDS; noting that the "cloud" allegedly resulted from the use of noxious products in the steel plant including felt tip markers and picnic tables).
\textsuperscript{86} For a more detailed analysis of mass consolidations in the asbestos litigation context, see Brickman, supra note 25, at 1873-81.
\textsuperscript{87} Id. at 1874.
\textsuperscript{88} Id. at 1825 n.90, 1852 n.138, 1857-61; see Weinstein, supra note 10, at 521 ("Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases.").
\end{flushleft}
vation, defendants are faced with greatly increased legal expenses which pressure them into settling what they regard as baseless claims.\textsuperscript{89} In addition, in a mass consolidation, with multiple plaintiffs and as many as a score or more of defendants, jurors are overwhelmed by the evidence and are unable to retain separate memories of the testimony of each of the plaintiffs, of their witnesses, or of the objects of that testimony.\textsuperscript{90} As a consequence, the damaging testimony against one defendant will very likely come to be regarded by the jury as damaging to all defendants. The inclusion of deceased plaintiffs in the consolidated case is intended to send, and probably does send, a stronger message to the jury regarding the living plaintiffs' fate than any contrary expert medical testimony. Because of these factors, a defendant faced with hundreds or thousands of claims in one trial where the jury is free not only to compensate the unimpaired but also—with little or no restraint—to award punitive damages multipliers\textsuperscript{91}—faces a bet-the-company situation. A jury verdict in the hundreds of millions and even billions of dollars is a distinct possibility.\textsuperscript{92} Such a company-terminating outcome is essentially unappealable because of the usual requirement of posting of a cash or cash-equivalent bond of at least the amount of the verdict to stay its enforcement.\textsuperscript{93} Moreover, banks providing the company with short-term "demand" credit will likely immediately terminate the line of credit—assuring bankruptcy, and thus adding to the coercive effect of the consolida-

\textsuperscript{89} See \textit{In re} Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993) (reversing Judge Weinstein's order to consolidate 44 repetitive stress injury cases). "Defendants assert that consolidation unnecessarily increases their expenses by forcing them to participate in discovery and other proceedings irrelevant to their particular actions. These costs, they say, will force them to settle what they regard as baseless claims." \textit{Id.} at 372; \textit{see also} Brickman, \textit{supra} note 25, at 1880 n.263; Lester Brickman, \textit{After Asbestos, the Next Tort-Law Fiasco}, \textit{Wall St. J.}, Oct. 21, 1992, at A17; Weinstein, \textit{supra} note 10, at 521 ("Often the pressure for block settlements comes from plaintiffs' attorneys who hope to get something for a large mass of questionable cases. Some attorneys ... will take almost any case without regard to its merit, hoping for a global settlement.") (footnote omitted).

\textsuperscript{90} See Malcomb v. National Gypsum Co., 995 F.2d 346, 352 (2d Cir. 1993) (reversing an order of consolidation of 600 asbestos cases because in a trial of 48 of the cases, the "maelstrom of facts, figures and witnesses ... was likely to lead to jury confusion" and "there [was] an unacceptably strong chance that the ... apportionment of liability [among defendants] amounted to the jury throwing up its hands in the face of a torrent of evidence").

\textsuperscript{91} Brickman, \textit{supra} note 25, at 1878-79.

\textsuperscript{92} \textit{Id.}

\textsuperscript{93} Several states require that in order to suspend a judgment, a bond in the amount of the judgment plus costs and interest must be filed. Under some circumstances, this bond may require posting 150\% of the amount of the judgment. See, e.g., \textit{La. Code Civ. Proc. Ann.} art. 2124 (West Supp. 1993); \textit{Tex. R. App. Proc.} r. 47 (Vernon 1993). If the judgment is substantial and threatens the economic viability of the defendant, the posting of the bond may be both beyond the financial capacity of the defendant and nonetheless effectively required in order to appeal the judgment.
tion. This coercive effect reaches fruition through resultant settlement offers which reflect the substantially inflated value of most of the consolidated claims.

C. Effect of Rates of Return on Tort Claim Valuation

An integral part of contingent-fee-driven expansion of tort liability is claim value augmentation—increasing the litigation value of claims by activity that is "something beyond" simply additional effort. It can hardly be disputed that the differing financial incentives motivating defendants' and plaintiffs' lawyers skew our tort system towards higher claims valuation. Personal injury tort litigation damage computation generally involves two basic elements: economic losses, e.g., lost wages and medical expenses, and noneconomic damages, principally pain and suffering. These damage components are intrinsically related. Pain and suffering awards, which are formulistically unbounded, principally function as devices to compensate contingent fee lawyers. Increases in pain and suffering awards flow directly into plaintiffs' lawyers' coffers and increase their rates of return. Typically a pain and suffering award is a three-times multiple of actual damages and constitutes nearly 50% of total tort damages. In automobile accident cases, the operative ratios are $2.11 in pain and suffering for every dollar of medical and wage loss costs and $3.00 in pain and suffering for every dollar of medical cost alone. Increases in medical costs of claimants thus yield three-fold increases in pain and suffering valuations which in turn yield a one unit increase in lawyer compensation.

94 See supra notes 80-85.
95 Other noneconomic damages are loss of consortium and disfigurement. The critical factor distinguishing noneconomic damages is that they are wholly subjective judgments.
97 WOLFRAM, supra note 61, at 528 n.21 ("[I]nflated elements of general damages, such as pain and suffering, are tolerated by courts as a rough measure of the plaintiff's attorney fees."); see 2 AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE LIABILITY FOR PERSONAL INJURY 215 (1991); cf. Priest, supra note 32, at 207-08 ("On average 47 percent of tort law damages represent nonpecuniary pain and suffering.").
98 WOLFRAM, supra note 61, at 528 n.21 ("Pain and suffering and similar nonmonetary damages probably average three times the monetary damages in personal injury claims.").
99 WIEBER, MEDICAL MALPRACTICE, supra note 14, at 55 n.36.
100 ALL INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 65-66 & tbl. 5-5, 48 & tbl. 4-17 (1989) [hereinafter AIRAC].
101 Consider a typical personal injury lawsuit with $1 of medical costs and $1 of lost wages. The settlement value is $6 (a multiple of 3 of actual damages), the lawyer's share is $2 and the client's gross share is $4 of which he nets $2. If medical expenses are raised to $12, the client's net remains the same but the lawyer's share rises to $3. Raising medical expenses to $3 raises
Given the operative mathematics of the contingent-fee-driven personal injury tort system, we would therefore expect to see that lawyer representation correlates with higher medical expenses. Indeed, this is exactly what the empirical data reveals.\textsuperscript{102} Stated plainly, use of contingent fees to finance personal injury litigation results in the expenditure of billions of dollars a year in unnecessary medical expenses. These increased medical expenditures enable attorneys to increase their rates of return.\textsuperscript{103}

In mass consolidations, one of the specific mechanisms by which higher valuations are created is the lumping together in one or more minitrials which are often a part of a mass consolidation, the claims of a few seriously injured claimants who merit substantial compensation with the claims of many who are unimpaired.\textsuperscript{104} In such circum-

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the lawyer's share to $4. Typically, the higher the medical costs, the greater the lost income so higher medical costs have a double-barreled effect.

\textsuperscript{102} A nationwide study of 46,694 auto claims paid during a two-week 1987 period, compared outcomes for claimants represented by lawyers and those not represented. See AIRAC, supra note 100, at 1-3. For the claim category of weight-bearing bone fractures, the most serious class of frequently reported injury, attorney-represented claimants had higher injury costs, largely because of more frequent medical visits, and therefore obtained higher gross recoveries. \textit{Id.} at 10, 105-06. Gross recoveries of nonrepresented claimants were lower; however, their net recoveries after payment of expenses and attorney fees were substantially higher. Specifically, the study found that represented claimants incurred more than $4800 in higher costs, mostly in the form of higher medical expenses, in order to obtain an average of $2500 less in net payment. \textit{Id.} at 105-06. However, for more subjective injury claims such as muscle strain and soft-tissue injury, represented claimants obtained higher net payments than unrepresented claimants. \textit{Id.}

For another example of the negative effects of attorney retention on claimants, see Terry Thomason, \textit{Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process}, 20 J. LEGAL STUD. 187, 221 (1991) (empirical study of New York Workers' Compensation Program finding that "claimants represented by attorneys obtained settlements that were significantly smaller than those obtained by nonrepresented claimants").

\textsuperscript{103} The conclusion that attorneys cause these increases in medical expense seems inescapable. Consider the example of auto no-fault litigation. After Massachusetts amended its no-fault law in 1988 to raise the threshold level of economic damages for bringing a lawsuit, the median number of claims-related medical treatment visits per claimant rose immediately from 13 to 30. See Sarah S. Marter & Herbert I. Weisberg, \textit{Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Liability Claims}, 10 J. INS. REG. 462, 488 tbl. 12 (1992). Even for fracture treatments, health care visits increased in 1989 by 50% following the higher no-fault threshold law. A study of automobile tort claims in Hawaii in 1990 indicated that the median number of treatment visits by claimants visiting chiropractors was $8 and that one-quarter of such claimants have more than 84 visits! See \textbf{INSURANCE RESEARCH COUNCIL, AUTOMOBILE INJURY CLAIMS IN HAWAII} 2, 26-27 (May 1991). Each such visit to a chiropractor increased a lawyer's fee by approximately the amount billed for that visit.

\textsuperscript{104} See Weinstein, supra note 10, at 480 ("[S]ome attorneys desired the cases consolidated so they could settle large numbers of both sound cases and marginally viable cases more readily. . . . Such consolidations do tend to encourage the commencement of suits of questionable merit.").
stances, juries apparently "lend" some of their sympathy for the seriously injured claimants to those who are unimpaired and significantly undercompensate the seriously injured while substantially overcompensating those who are unimpaired. In the aggregate, however, the total valuation of the claims far exceeds what individual trials would yield.

For the purposes of this Article, it is noteworthy that the coercive effect of the mass consolidation is proportionate to the number of claimants. The higher the number of claimants, the greater the pressure on the trial judge to order a mass consolidation and the greater the resultant coercive effect on defendants to pay the claims—regardless of the underlying merit of the claims or the likely outcomes of

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105 Juries' sympathy for worker-claimants is accentuated by trial lawyers acting in their self-interest. In asbestos as well as in many other types of injury claims, defendants are often out-of-state corporations while plaintiffs are often local blue-collar workers. See Brickman, supra note 25, at 1847 n.122. In addition to an appeal to local prejudice against out-of-state defendants in favor of local workers, plaintiffs' counsels encourage juries to transfer wealth from "wealthy" corporations to comparatively impervious workers. The arguments by these trial lawyers, phrased subtly, encourage the jurors who are often from lower socioeconomic classes to take advantage of the opportunity to right the wrongs done them by society by rewarding the claimants at the expense of corporate America, a surrogate for the power structure. See TXO Prod. Corp. v. Alliance Resources, 113 S. Ct. 2711, 2737 (1993) (O'Connor, J., dissenting) ("Juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from 'wealthy' corporations to comparatively needier plaintiffs.") (citations omitted). Wealth-shifting arguments made by lawyers who are the principal beneficiaries of such transfers find especially fertile ground in such locations as Brooklyn, N.Y., Philadelphia, Pa., and Beaumont, Tex. See Brickman, supra note 25, at 1849 n.128. It has been determined that New York City damage awards average $1.2 million compared to half that figure for neighboring Westchester county. Similar findings have been seen in St. Louis, Philadelphia, Chicago, and Washington, D.C. See Arthur S. Hayes, Inner-City Jurors Tend to Rebuff Prosecutors and to Back Plaintiffs, WALL ST. J., Mar. 24, 1992, at A1 (claiming that urban juries favor civil plaintiffs and go easy on criminal defendants because they identify with people whom they perceive as victims); see also Allen R. Myerson, Soaring Liability Payments Burdening New York, N.Y. TIMES, June 29, 1992, at B1 (claiming city juries are more likely than those elsewhere to favor individuals over large corporations or government agencies). Another factor that accounts for the plaintiffs' success in such appeals is the "deep pockets" of the corporate defendants. See Martin J. Bourgeois & Irwin Horowitz, Summary of Damage Award Study (unpublished study described in Neil Vidmar, Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases, 1993 DUKE L.J. 217, 259 n.146).

106 See Brickman, supra note 25, at 1873 n.231; Weinstein, supra note 10, at 480.

107 Based upon my own calculations of the effect of mass consolidations on the value of the claims consolidated, I conclude that the mega-mass consolidation often increases the aggregate value of the claims consolidated by factors of 10 to 100 times what the aggregate value would have been if the cases were litigated in a traditional fashion and the awards and settlements were then totaled. (This does not include the value of acceleration of the verdicts.) It is not surprising therefore that plaintiffs' lawyers seek mass consolidations not only in asbestos cases but in many other groupings of tort cases where large numbers of claims are possible. See, e.g., In re Repetitive Stress Injury Litig., 11 F.3d 368 (2d Cir. 1993); Brickman, supra note 89, at A17.
many of the claims if they were individually litigated. The financial
incentive to plaintiffs' lawyers to seek such outcomes is enormous. These financial incentives generate large numbers of claims which in
turn affect the outcomes of the claims by enormously appreciating
their settlement value.

IV. Litigation Frequency, Injury Rates and Rates of
Return: Concordance and Discordance

The principal purpose of the tort system is to provide compensation
to those who have been wrongfully injured. Accordingly, it
would appear that changes in the tort litigation frequency ought to be
accounted for by changes in the frequency of injury. As one commen-
tator has observed:

The first thing to determine is how many actionable injuries occur.
Such injuries are what the system seeks to compensate and deter.
Any assessment of whether the propensity to sue is increasing, de-
creasing, or remaining the same can be made only in relation to the
waxing or waning of the pool of injuries from which suits properly
arise.

There is evidence, however, that changes in the injury base are
increasingly irrelevant as determinants of tort litigation volume and
the extent of wealth transfer under the tort system. Empirical
evidence demonstrates that while tort litigation has been increasing over
the past forty years, virtually all accident rates, death-from-accident
rates, and work-related deaths have been consistently declining over

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108 A mass consolidation of over 8500 asbestos-related claims in Baltimore, Md., which is
attorney fees in the range of $150 million from settlements alone and is likely to yield more
than $300 million. See Blum, supra note 57, at 2; Olove & Hyman, supra note 57, at 1A.
109 See supra note 68. The mere indication by a trial judge that a mass consolidation is
being considered gives rise to an increased claims filing rate. Brickman, supra note 25, at 1873.
Moreover, ordering a consolidation to clear the court's docket of related claims can fall prey to
the perverse incentives engendered by the consolidation since the increased claims filing rate
may continue after the consolidation and even at a faster pace. That is, the financial incentives
are so enormous that plaintiffs' lawyers simply rush to refill the emptied consolidation pipeline
so as to induce a new consolidation. Thus, in the Baltimore consolidation discussed supra note
108, several thousand new asbestos-related claims have been filed since the consolidation. See
Blum, supra note 57, at 2.
110 See Keeton et al., supra note 13, § 2 at 7.
111 Other factors which affect litigation frequency include the defenses and immunities that
allegedly responsible parties are allowed to raise. See id. §§ 32, 40, 96.
112 See Saks, supra note 32, at 1173 (footnotes omitted). Professor Saks argues that in-
creases in claims frequency do not necessarily mean that the tort system is expanding. If the
injury base is expanding at a faster rate than claim frequency, then the tort system is actually
contracting. Id. at 1174-75.
that period. In clear counterpoint to the slowed but still substantial rate of increase in wealth transfer in the past decade is the level rate of injury from use of specific products.

Automobile accident litigation data is particularly instructive. Over the past decade, cars have become increasingly safe—a fact which is reflected in a 12% reduction of claim frequency for property damage from 1980 to 1989. However, in the same time span, claim frequency for bodily injury claims rose more than 15% and the incidence of bodily injury claims as a percentage of property damage claims rose 30%. The increase was largest in states generally regarded as "litigious."

The increase in bodily injury claims frequency in litigious states was well in excess of the rate in nonlitigious states. The comparison is made even more meaningful by factoring the rural/urban dichotomy into the comparative equation. Since driving speeds are higher in rural and low-population areas, drivers there suffer greater injury severity than those who principally drive in urban areas. Despite the greater injury severity in rural areas, the rise in the incidence of bodily

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113 See Priest, supra note 32, at 200 ("Accident rates have been consistently declining over . . . [the 1950-80 period]. For almost all accident categories, death rates have been decreasing progressively . . . "). 203 ("The data on deaths and injuries cast great doubt on the proposition that the liability crisis derives from an increase in the underlying accident rate. There is simply no evidence of a general increase in accidents.").

114 See supra note 24 and accompanying text.

115 See Priest, supra note 32, at 202 (ibl.6 (showing how such products as step ladders and power saws caused around the same number of injuries from 1981-86).


Insurance companies measure cost trends in terms of claim frequency—the number of claims paid each year for every 100 cars insured—and claim severity—the average amount per claim. They use these two figures to calculate an average loss cost per insured car, including cars not involved in accidents. These three figures enable insurers not only to track overall trends in injury and property damage claim costs, but also to see whether rising costs are being caused by an increase in the number of claims, an increase in the average cost per claim, or a combination of the two.

Id. (The rate increased from 1.10 to 1.27.)

118 See id.

119 See id.

120 "Litigious" states include California, Florida, South Carolina, and Texas and are those which lead the country in growth of tort system-derived wealth transfers. See Mooney, supra note 27, at 24. In the 1978-85 period, commercial general liability claims payments increased at almost twice the rate in litigious states versus nine nonlitigious states (333.9% versus 188.2%), and for the 1986-90 period, by almost three times (38.2% versus 12.9%). Id. at 25-26.
injury claims has been largely concentrated in major urban areas. Thus while the 1985-87 ratio of bodily injury claims to personal injury claims was less than 13 per 100 in Harrisburg, Pennsylvania, and less than 16 per 100 in Pittsburgh, Pennsylvania it was 75 per 100 in Philadelphia, Pennsylvania—a tribute no doubt to Philadelphia lawyers. The most litigious state, California, realized the greatest increase in the 1980-89 time period: 79.1% versus the national average increase of 29.8%.122

Moreover, during this time span, many states enacted seat belt laws which resulted in substantial increases in seat belt use—which would thus reduce the number of bodily injuries in auto accidents, especially in low-speed crashes typical of those occurring in urban areas.123 While increased seat belt use would have some modest effect on property damage claims incidence, it would be expected to have a significant effect on whether an auto accident resulted in bodily injury. That bodily injury claims as a percent of property damage claims have nonetheless increased—even dramatically so in certain urban areas124—may be attributable to changes in claimants' claiming behavior which can itself be attributed to self-interested activity of plaintiffs' attorneys.

Injury litigation rates are thus less and less a function of injury rates and more and more of lawyer activity. Data comparing rates of return of contingent fee lawyers on a state-by-state basis is unavailable.125 Nonetheless, it seems reasonable to assume that increased litigiousness in a state or urban area correlates both with higher numbers of lawyers and higher incomes to lawyers.126 Accordingly, the ongoing divorce between rates of injury and injury litigation—the latter increases without regard for the former—is accountable for by lawyers' rates of return.

To more fully comprehend this divorce, it is necessary to elimi-
nate the concept of injury as laypersons would use the term and substitute instead: legally cognizable claims. Injuries as defined by a layperson are finite in number. Intuitively we would assume that legally cognizable claims or actionable injuries are a smaller subset of injuries. However, if as argued here, personal injury claims have been divorced from injury, then they are infinite in number (at least within relevant ranges). Consider, for example, the urban phenomenon of pedestrians who board municipal buses that have just been involved in accidents in order to file claims for injury. The number of injury claimants can then exceed the number of passengers on the bus at the time of the accident.

Examples where tort law allows claims making to proceed unbounded by actual injury include such recently "enacted" causes of action as: fear of cancer; medical monitoring costs; contamination of air, water, or soil; mental anguish claims of bystanders to accidents; and sexual molestation claims for acts alleged to have

127 See Saks, supra note 32, at 1174 ("Tort law defines the base of actionable injuries.") (emphasis in original).
128 See O'Connell, supra note 14, at 211 (referring to a case in Boston where "240 persons filed claims for a collision between a streetcar and a truck—but the streetcar had a top capacity of 68"); Kerr, supra note 82, at A1; Greg Steinmetz, Ex-Cop Hunts Down Petty Insurance Cheats, WALL ST. J., Dec. 28, 1993, at B1.
131 See Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn. 1982) (holding that the plaintiffs could recover damages for emotional distress after ingesting water that had been polluted with a toxic chemical).
132 In one pending case, plaintiff's tractor-trailer collided with defendant's car. Defendant survived the crash but her two children did not. Plaintiff settled all claims against the defendant but continued his suit for emotional distress damages arising from his seeing defendant's two children killed. The Seventh Circuit reversed the district court's grant of summary judgment for the defendant. It held that reversal was necessary because the district court failed to realize that plaintiff was both a victim and a bystander and may have suffered emotional harm from being involved in an accident in which two children had been killed. See Kapoulas v. Williams Ins. Agency, Inc., 11 F.3d 1380 (7th Cir. 1993).

Consider further the lawsuits arising out of the school bus accident in Alton, Tex., which claimed the lives of twenty-one children. See supra note 60. Among those filing law suits were: two dozen rescuers, the bus driver, the truck driver who struck the school bus, long-lost
occurred in the distant past. In most of these instances, actual injury need not be demonstrated.

Perhaps the most successful enlargement of tort liability in the absence of actual injury but driven by inordinately high contingent-fee-producing rates of return, occurs in asbestos litigation. While thousands of claims of severe injury resulting from asbestos exposure have been documented, 60-70% of the almost 2000 claims per month per defendant being brought today are brought on behalf of unimpaired claimants asserting pleural plaque claims. Pleural plaques, thickenings on the membrane surrounding the lungs, are a marker of asbestos exposure but do not impair lung function, produce any sign or symptom, and can be detected only by chest x-ray. While some jurisdictions value pleural plaques claims at zero because they are not considered to constitute injury, other jurisdictions’ valuations range from zero to a million dollars or more. In these latter jurisdictions, there is no meaningful factual distinction between claims that are valued by juries at zero, those valued at a few thousand dollars, and those valued at ten to one hundred times more. Effectively, pleural plaque claims are entered into a lottery with outcomes determined by chance. Plaintiffs’ lawyers’ strategies are dictated by principles of portfolio management. Inordinately high effective hourly rates of return are obtainable by assembling a sufficient caseload to “hit the average.” Amassing tens of thousands of such contingent-fee-generated claims is done by arrangements with union officials, use of mobile x-ray vans brought to plant entrances and offering industrial employees the opportunity to cash in on the lottery without risk or expense, and by setting up screening centers in workplaces.

relatives of the victims, a passenger in the truck, and some employees of the truck driver’s employer who were not even at the scene. A United States Border Patrol Agent, called to help save children from the flooded bus, filed suit in 1991 for $3.4 million, alleging that she suffered permanent mental and emotional distress. See Karen Hastings, Some Lives Beyond Repair 3 Years After Bus Crash, N.Y. TIMES, Sept. 18, 1993, at A22; Josh Lamieux, School Bus Accident Tears Town Apart, L.A. TIMES, Jan. 2, 1994, at A14; Maggie Riva, Truck Driver Says He Spent Years After Bus Crash Doing Penance, DALLAS MORNING NEWS, May 7, 1991, at IA.

133 For commentary on the role of financial incentives and lawyers in civil damage claims for sexual molestation alleged to have occurred many years earlier and recalled by use of recovered-memory therapy, see Trial By Accusation, WALL ST. J., Dec. 1, 1993, at A20.
134 Brickman, supra note 25, at 1860-61, 1873 n.231.
135 Id. at 1852-53.
136 Id. at 1855-57.
137 Id. at 1857.
138 Id. at 1857-58.
139 Id. at 1838 n.69.
140 Id. at 1854 n.144.
141 Id. at 1830 n.49.
Another example of the manufacturing of tens of thousands of claims in the absence of injury is hearing loss under the Longshoremen's and Harbor Workers Compensation Act.\footnote{33 U.S.C. § 901 (1988).} Occupational hearing loss, which is covered under this Act, is indistinguishable from presbycusis—hearing loss due to age. Lawyers solicit and sign up all of the workers in a plant as well as retired workers, provide them with a medical examination, and file hearing loss claims on their behalf.\footnote{Brickman, supra note 25, at 1854 n.144.} Since it is usually impossible to determine the source of hearing loss and since under the aggravation doctrine, the employer is liable for a workers' total hearing loss even if part of it is caused by presbycusis,\footnote{Id.} most claims succeed. The motivation for lawyers to create and press these claims by the hundreds and thousands is the enormous rate of return thereby realized.

V. THE IMPACT OF RATES OF RETURN ON EXPERT WITNESS TESTIMONY

The inordinately high rates of return that plaintiffs' lawyers have been able to extract from the tort system has yielded increased claim frequency, more successful outcomes, and higher recoveries. A necessary condition for increasing rates of return has been the increased use of expert witnesses in tort litigation.\footnote{"[N]othing has led to the rise of medical malpractice and product liability suits more than the availability of such a pool of expert witnesses whose availability is advertised to plaintiffs' lawyers in legal journals." O'Connell, supra note 14, at 43. For a list of expert witness categories numbering almost 6000, see TECHNICAL ADVISORY SERVICE FOR ATTORNEYS, TASA EXPERT CODES (1993).} To be sure, it has always been commonly accepted that given enough money, an expert can be found to testify in favor of (or against) any theory of causality.\footnote{"Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount . . . ." Winans v. New York & Erie R.R. Co., 62 U.S. 88, 101 (1858); see also Terry O'Reilly, ETHICS AND EXPERTS, 59 J. AIR L. & COM. 113 (1993) (detailing a set of ethical rules for expert witnesses).} However, increasing rates of return and enriching the value of tort claims has in turn made expert witnessing more lucrative,\footnote{See FORENSIC SERVICES DIRECTORY INC., THE GUIDE TO EXPERTS' FEES (1992); Olson, supra note 8, at 157.} thereby attracting more interest in testifying. Indeed, there is no reason to believe that the same financial incentives which motivate plaintiffs' lawyers do not also operate on expert witnesses.\footnote{See Peter W. Huber, MEDICAL EXPERTS AND THE GHOST OF GALILEO, LAW & CONTEMP. PROBS., Summer 1991, at 119, 150 ("Some [experts] testify for the same financial reasons as the lawyers."). For an example of an expert witness who set up a business to cash in on}
expert witnesses induces increased commitment of experts to the causes of those for whom they are testifying. 149 Hence, higher rates of return to lawyers induce "higher valued" expert witness testimony which leads to expanded liability under the personal injury tort system and ultimately, greater wealth transfer. 150

While the defense bar no doubt matches the plaintiffs' bar dollar for dollar in payments to experts, it should be noted that the incentives acting on plaintiffs' and defendants' experts are different. 151 When an expert testifying on behalf of a claimant seeks to extend the liability envelope to heretofore untrodden ground, his incentive is not simply the fee he has or will receive for that testimony—it is the promise that if he succeeds in extending the envelope, he will have multiplied his opportunity for future fee-paying testimony by a factor of ten or even fifty fold. A $5000 fee, therefore, may be just a surrogate for $500,000 in future fees if the expert succeeds in establishing the causality link he espouses. No such similar incentive motivates the defense expert. Thus plaintiffs' expert witnesses in some cases operate under incentives more similar to than different from plaintiffs' lawyers. 152 The effect of this confluence of financial interests driven by contingent-fee-driven rates of return on tort outcomes is writ large in asbestos litigation, as the following case study illustrates.

Asbestos litigation in Texas and who operates in the same entrepreneurial fashion as a contingent fee lawyer, see Suzanne L. Oliver & Leslie Spencer, Who Will The Monster Devour Next?, Forbes, Feb. 18, 1991, at 77-78 (describing Dr. Gary Friedman who owns the Texas Lung Institute in Beaumont, Tex.).

149 See O'Connell, supra note 14, at 42 ("An expert witness . . . will often be picked not so much for his expertise as for his appearance and ability to woo and win a jury. Increasingly, medical malpractice and product liability trials are dominated by theatrically professional expert witnesses who do little else . . . .")

150 Consider the substantial demise of the American small-plane industry induced by products liability litigation and the role of expert witnesses therein. Beech Aircraft analyzed lawsuits arising from 203 crashes that occurred in the mid-1980s. In no case did federal investigators attribute a crash to faulty design or manufacturing but rather to weather conditions, faulty maintenance, and air-control errors. In every case, plaintiffs' attorneys claimed that the crash was wholly the fault of the manufacturer; these arguments were presumably buttressed by supporting testimony of their expert witnesses. Each case cost Beech Aircraft an average of $530,000; even dismissed cases cost $100,000 to $200,000 each for legal defense costs. See William M. Bulkeley, Small-Plane Makers May Get a Big Lift From Congress, Wall St. J., Oct. 19, 1993, at B1, B9.

151 To be sure, both plaintiffs' and defendants' experts share the desire for repeat business. Hence both seek a successful outcome and to be perceived as having influenced that outcome.

152 Functionally, the expert is being paid on a contingent fee basis. While his fee in that case is not contingent, if he succeeds in extending liability, he stands to earn a huge reward.
VI. Effects of the "Battle of the Experts" on Tort Litigation and Rates of Return—A Case Study

The effects of the financial incentives motivating expert witnesses are most apparent in products liability litigation where expert testimony on causation is often essential.153 Consider a typical asbestos claim. Plaintiffs present medical experts who always testify that plaintiffs have (at least) developed asbestosis—a potentially serious and even fatal disease.154 They are countered by defense experts who rarely find asbestosis.155 This "battle of experts"156 is more often won by plaintiffs’ experts, especially in cases where plaintiffs appear in court short of breath and testify to their inability to any longer perform certain physical tasks.157

If the truth lies somewhere between plaintiffs’ and defendants’ medical experts’ testimony, there is significant evidence that it is closer to defendants’—a difference that amounts to hundreds of millions and possibly even billions of dollars in higher verdicts and settlements. In a recent asbestos litigation, United States District Court Judge Carl Rubin eliminated the "battle of experts" from sixty-five pending cases and substituted court-appointed medical experts.158 Judge Rubin’s use of court-appointed experts resulted in a drastic decline in the diagnosis of asbestosis. Although plaintiffs’ experts undoubtedly would have testified that every single one of the sixty-five plaintiffs had asbestosis, the court-appointed experts found that only ten (15%) had asbestosis.159 In the September 1987 to September 1990 period, the court-appointed experts testified in sixteen cases—in only two of the sixteen did the jury find asbestosis (12.5%).160 The jury verdicts essentially followed the expert testimony. Had the usual "battle of the experts" been allowed to proceed, however, the jury

153 See Imwinkelried, supra note 2.
154 See Brickman, supra note 25, at 1846 n.112, 1847 n.120.
157 See W. Keith C. Morgan, Clinical Significance of Pulmonary Function Test. Disability or Disinclination—Impairment or Importuning?, 75 CHEST 712, 715 (1979) (stating that "it has become apparent that the degree of breathlessness claimed by any particular subject is related to the reason why he or she consulted the physician. Should the subject be claiming compensation, then he tends to exaggerate his symptoms."); see also Brickman, supra note 25, at 1848 (an excluded witness who would have testified that plaintiff who exhibited symptoms of shortness of breath inside the courtroom suffered from no such disability outside the courtroom).
158 See Rubin & Ringenback, supra note 155, at 38.
159 Twelve had pleural plaques (20%), and 42 were found to have no asbestos-related conditions (64.62%). Id. at 45.
160 Id. at 39-40.
would likely have found asbestosis in well over half the cases and millions of dollars in additional verdicts would have ensued.

CONCLUSION

The availability of inordinately high rates of return is resulting in increasingly dysfunctional wealth transfers under the tort system. The contingent fee engine which drives these rates of return is being increasingly fueled by abusive practices with little or no judicial superintendence. Too little attention is being focused on the impact of these rates of return on the tort system. To be sure, the institution of contingent fees—fees payable only upon success—is not confined to lawyers and expert witnesses. Persons working on a commission basis such as real estate brokers also are paid only upon success. Recipients of end-of-the-year or upon-successful-completion-of-the-deal bonus payments also qualify. Perhaps most prominent of those who also work for contingent fees are professional athletes. Consider the tennis or golf pro who enters a tournament; compensation will range from zero to millions of dollars—winner or winners take all. This creates great incentives for maximizing performance and no doubt adds to the public's interest in the contest. But we have no basis for belief that these incentives result in corrupt practices. However, when lawyers are too strongly motivated to prevail, the result is quite different. More claims are brought—by the thousands and tens of thousands; more experts are found who are more willing to testify as to new theories of causality; more new categories of injury are invented, in concert, to be sure, with policy-oriented jurists actively seeking social change who therefore have a symbiotic relationship both with contingent fee lawyers and juries; more harassing requests for documents are filed; more questionable tactics to manipulate juries are engaged

161 [With regard to] the relation between expansive new tort doctrines and jury empowerment . . . . It may be that jury discretion not only follows but also generates the judicial innovations that expand liability. Today's judges often seem to use the jury as a deus ex machina to relieve themselves of troublesome responsibilities, doubts and anxieties. . . .

Jurors thus serve as a buffer that insulates judges from full responsibility for what happens when their doctrinal creations get implemented. By tradition, the jury is expected to be a "black box": explanation of how it reached its decision is not even permitted (except informally, after the case is over). This lack of accountability encourages judicial irresponsibility (in this special sense). . . . By relying on the opacity of jury verdicts, judges can externalize the error and administrative costs of innovative, liability-expanding doctrines to the parties and the social system as a whole.

in; and, of course, more outright fraud is engaged in including manufacturing of evidence, staging of phony accidents, and inflation and falsification of medical bills.

The societal benefits of such behavior are dubious at best. We are confronted with a phenomenon of relatively recent origin: astonishingly high rates of return in personal injury litigation—often in the absence of the assumption of meaningful risk by the attorney. In view of the impact of these rates of return on the tort system, as delineated in this Article, it is time that we focus our attention on just what these rates of return are and what other effects are ensuing.

APPENDIX

Studies of the impact of state legislation designed to reduce the frequency and cost of malpractice suits face daunting tasks if only because of the volume and variety of tort reforms enacted. These reforms include: shortening statutes of limitations, establishing pretrial screening panels, limits on attorney fees, cost and fee shifting onto the losing party, judicial limits on the standard of informed consent, changing the rules for determining physician negligence, using clinical practice guidelines as evidence of the standard of care, restricting the use of res ipsa loquitur, collateral sources offsets, caps on damage awards, and eliminating or restricting joint and several liability. These studies, as well as others, are methodologically problematic. The various reforms were enacted at different times and some had their impact delayed by court challenges; the studies usually grouped complex reforms into single categories, thereby obscuring important variations in the reforms; collapsing different approaches to the same reform into a single binary variable diluted the estimated impact of truly effective approaches because of the watering down effect of the stronger ones; measuring malpractice claims frequency accurately on a state-by-state basis is difficult and subject to considerable error because of lack of uniformity in the data being collected from state to state and from different insurance companies; data for most states are not reliable indicators because of the relatively small subsets and the resultant high volatility that a few large claims can

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162 See OTA, supra note 72, at 23-45.
163 See id. at 59 (chart reviewing six separate empirical studies on malpractice reform).
164 Id. at 62.
165 Id.
166 Id.
167 Id. at 63.
produce;\textsuperscript{168} isolating the effects of the many changes in tort law designed to reduce the incidence of malpractice and the impetus to sue is difficult because these occurred gradually as a result of “thousands of decisions made by thousands of individual medical practitioners”;\textsuperscript{169} measurement of malpractice claims frequency trends can be distorted by changes in state malpractice laws;\textsuperscript{170} because of methodological design, claim frequency had less of an opportunity to show statistically significant results than did other measures;\textsuperscript{171} and because the assessments were for individual states, “the overall average may mask different effects in individual states.”\textsuperscript{172}

Moreover, limiting fees to 33 1/3% is likely to have only a marginal effect on claim frequency. The resultant effect is therefore likely to be statistically masked. However, because the marginal claims affected by fee caps are most likely to be high risk, high reward cases, the marginal effect is likely to be more pronounced and therefore more observable as a matter of claim severity, i.e., on the average yield per claim.\textsuperscript{173}

Like fee caps, limitations on the amount of damages for client economic losses, noneconomic damages, punitive damages, and total amounts of damages, may be expected to reduce claim frequency by reducing contingent fee attorneys’ rates of return. However, one study that examined the impact of damage caps on claim frequency found no significant effect from capping damages.\textsuperscript{174} (The methodological problems listed above apply here as well.) Another study, however, found that Maryland’s $350,000 cap on damages was effective in reducing malpractice costs.\textsuperscript{175} Other studies do, moreover, demonstrate that damage caps reduce the severity of malpractice claims.\textsuperscript{176} These studies are contradicted by a recent study of Indiana’s malpractice system\textsuperscript{177} attributing the differences in result to nuances in the Indiana statutory scheme which create incentives for

\textsuperscript{168} Cf. Mooney, supra note 27, at 24 (a study which aggregates groups of states to mitigate the volatility that a single state might reveal).
\textsuperscript{169} Id. at 30.
\textsuperscript{170} See id.
\textsuperscript{171} Id.
\textsuperscript{172} Danzor, New Evidence, supra note 68, at vii.
\textsuperscript{173} See OTA, supra note 72, at 69.
\textsuperscript{174} Id. at 64.
\textsuperscript{175} See Mooney, supra note 27, at 35.
increasing certain settlement offers and which remove the need for a formal determination of fault from the process.\textsuperscript{178}

One additional reason why contingent fee limitations have not been found to result in measurable reductions in claim frequency is that the fee limits have lacked bite. Some of the legislation has not absolutely limited attorney fees but instead gives courts discretion to adjust contingent fees.\textsuperscript{179} The enactors may well have expected judges to be liberal.\textsuperscript{180} The empirical studies, however, present no evidence as to how the courts actually regulated attorney fees. Moreover, many of the limits set by legislation were close to 33 1/3\%, which is approximately the average contingency fee level in the absence of legislative limitations.\textsuperscript{181} Finally, attorneys may have found ways to substantially evade fee caps\textsuperscript{182}—most notably by applying their contingent fee percentage to the gross award rather than the net award, thereby shifting all expenses of the litigation to the client.\textsuperscript{183} The significance of this shift of expenses to the client is accentuated by the increased propensity to bill as expenses items that were heretofore a part of the lawyer's overhead such as copying costs, regular mailing and telephone costs, and research costs. Another way in which attorneys may compensate for fee caps is to spend less time on some cases.\textsuperscript{184} (Assuming that defense costs are substantially determined by the amount of time that contingent fee attorneys devote to their cases, the evidence that defense costs are significantly lower in Indiana than in neighboring states which do not have fee caps may so indicate.)

On a more general level, tort reform legislation often turns out to be less than meets the eye. State legislation ostensibly designed to limit the growth of tort liability is, of course, always opposed by the plaintiffs' bar. Accordingly, it may be expected that the language of the statutes enacted reflects the political opposition in the form of not-always-obvious-to-the-untrained-eye limitations and exceptions. A 1988 study addresses the likely weakness of the direct dollar impact of enacted tort reforms.\textsuperscript{185} The study reported that fewer than 15\% of claims would be affected by enacted tort reforms, concluding:

\textsuperscript{178} Id. at 188-89.

\textsuperscript{179} OTA, supra note 72, at 70.

\textsuperscript{180} See Glen O. Robinson, The Medical Malpractice Crisis of the 1970s: A Retrospective, LAW & CONTEMP. PROBS., Spring 1986, at 5.

\textsuperscript{181} OTA, supra note 72, at 70.

\textsuperscript{182} See Brickman, supra note 25, at 1839 n.74.

\textsuperscript{183} Kinney & Gronfein, supra note 177, at 185.

\textsuperscript{184} Id.

\textsuperscript{185} INSURANCE SERVICES OFFICE INC., CLAIMS FILE DATA ANALYSIS 112 (1988).
TORT SYSTEM OUTCOMES

The study reinforces the finding of the Claim Evaluation Project (a study on tort reform prepared by Hamilton, Rabinowitz and Alschuler, Inc., released May 1987) that many legislative actions falling under the category of “tort reform” were heavily encumbered by exception and qualifications. Whatever the public policy merits of these exceptions and qualifications, they limit the effects of the reforms on the cost of bodily injury claims.186

The study referred to found that the many state tort law amendments legislated in 1986 were likely to have relatively little impact on wealth transfer because of exceptions and limitations included in the statutes; however, the study indicated that “a package of relatively simple, yet comprehensive, tort law changes would have resulted in a significant indemnity cost impact in virtually all of the claim situations tested.”187

186 Mooney, supra note 27, at 17.