

HALF TRUTHS, EMPTY PROMISES, AND HOT COFFEE: THE ECONOMICS OF TORT REFORM

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I. INTRODUCTION

Mr. Meyer Proctor, a seventy-year-old man, filed a product liability lawsuit against The Upjohn Company after he lost vision in his left eye. The jury awarded Mr. Proctor \$127 million.¹ Such were the facts as relayed by Senator John Danforth to members of the United States Senate during a 1994 speech in favor of a tort reform bill.² However, this recitation was not an accurate portrayal of *Proctor v. Davis* and for his part Senator Danforth never intended his story to be completely correct.³ Rather, it is very likely that Senator Danforth purposely made his rendition of *Proctor v. Davis* sound outrageous in an attempt to portray an out of control tort system, which made it difficult for businesses to operate under an onslaught of frivolous lawsuits and exorbitant jury verdicts.⁴ Anecdotal evidence, similar to the one offered by Senator Danforth, was meant to encourage tort reform.

Tort law, like many other areas of the law, is concerned with the proper allocation of costs. Torts are civil wrongs, from the Latin “tortus” which means “twisted.”⁵ In modern times a tort is an injury or wrongful

¹ CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 1 (2001).

² BOGUS, *supra* note 1, at 6.

³ *Proctor v. Davis*, 656 N.E. 2d 23, 23 (App. Ct. Ill. 1997) (The case itself actually settled for just over \$6 million. In reality the suit was a joint medical malpractice suit and product liability suited filed because Mr. Proctor’s retina had become detached after receiving an injection Depo-Medrol, a drug not tested for intraocular injection).

⁴ *See id.* (reversing trial court judgment against Upjohn); *also see* 677 N.E. 2d 918, 918 (Ill. 1997) (vacating the prior decision on procedural grounds; and 682 N.E. 2d 1203) (App. Ct. Ill. 1995) (affirming judgment against Upjohn as to compensatory damages and reducing punitive damages award).

⁵ Edward Coke, *Commentary on Littleton*, *SELECTED WRITINGS OF SIR EDWARD COKE*, VOL. I (1586) (“Torts” are so called because they are wrested or crooked, as opposed

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act for which an action will lie, distinct from a contract.⁶ Fittingly, tort law includes personal injury adjudication. It is fair then, to refine the prior statement to say that tort law is concerned with the proper allocation of costs in disputes between injured parties and those who have caused the injury.

The costs of the tort system are high to both the injured parties who lose income, quality of life, and often life itself; and to the parties responsible for the injuries who must pay damages if found liable. Tort reformers, however, ignore the costs to the injured parties, in order to decry the costs to the injuring (often corporate) parties. The American Tort Reform Association (“ATRA”) stated that in 2003, the cost of the United States tort system was \$246 billion.⁷ That amount represented a 34.5% increase in cost from 2000.⁸ By 2009, the amount had further increased to \$251.8 billion.⁹

This Article examines several arguments in favor of tort reform using economic analysis. By using economic analysis, this Article dispenses with the weak anecdotal evidence and disingenuous political rhetoric to objectively address the strengths and weaknesses of the tort system. It follows that an objective analysis, not political rhetoric, ought to determine whether there is truly a need to reform the tort system.

Part II examines the goals of tort law from an economic perspective. Part II analyzes the work of Judge Guido Calabresi who distilled the aims of tort law down into three articulable goals. Additionally, Part II analyzes a framework created by the author for objectively examining the effects of tort reform. Part III begins with a brief history of the tort reform movement. Furthermore, Part III discusses several of the major arguments employed in support of tort reform. Finally, this Article address several methods of tort reform that are often suggested or implemented by various states.

Part IV addresses several arguments against tort reform. Part IV examines a theory that tort law, being based on common law, is inherently more efficient than either state or federal legislative efforts to allocate injury costs. Finally, Part IV employs the framework developed in Part II to analyze the arguments for and against tort reform.

to that which is right and straight).

⁶ Sir William Blackstone, 3 COMMENTARIES 177 (1775).

⁷ American Tort Reform Association, *Facts About Tort Liability and its Impact on Consumers*, http://web.archive.org/web/20100731070852/http://www.atra.org/wrap/files.cgi7963_howtortreform.html (last visited May 10, 2018).

⁸ *Id.*

⁹ Towers Watson, *U.S. Tort Cost Trends 2011 Update*, <http://www.casact.org/library/st-dynotes/Towers-Watson-Tort-Cost-Trends.pdf> (last visited May 10, 2018).

II. THE GOALS OF TORT LAW

A. *Why Have Tort Law in the First Place?*

Tort law creates rules for how courts must apportion liability for accidents. Tort reformers often decry these rules as being unfair to defendants, and advocate for change. Negligence is the most common tort claim, and therefore, this Article will focus mainly on negligence rules and tort reform. In examining whether tort reform is necessary, a good starting point is whether there should be a rule of negligence at all. To answer this question, it is first necessary to picture a world in which the loss associated with an injury falls solely upon the injured party.

Assume that an individual (“Pedestrian”) intends to cross a street at a cross walk where another party (“Driver”) is making a right-hand turn. For both parties the cost of exercising no care at all is \$0 while the cost of exercising due care is \$10. Further, assume that an accident is certain to happen unless both parties exercise due care. The cost of an accident is \$100 and there is a one in ten chance that Pedestrian will be injured by Driver’s actions even if due care is exercised by both parties. If neither party exercises due care, Driver receives a payoff of \$0 and Pedestrian receives a payoff of -\$100. If Driver exercises due care and Pedestrian exercises no care, Driver receives a payoff of -\$10 (the cost of exercising due care) and Pedestrian receives a payoff of -\$100. If Driver exercises no care and Pedestrian exercises due care, Driver receives a payoff of \$0, while Pedestrian receives a payoff of -\$110 (accident cost plus the cost of exercising due care). Finally, if both parties exercise due care, Driver receives a payoff of -\$10 and Pedestrian receives a payoff of -\$20 (the cost of due care plus the cost of a one in ten chance of an accident occurring).

Game One Payoffs: Pedestrian, Driver			
		Driver	
		No Care	Due Care
Pedestrian	No Care	-100, 0	-100, -10
	Due Care	-110, 0	-20, -10

In Game One, Driver employs a dominant strategy where the Driver never exercises care. By never choosing to exercise care, Driver is able to reduce his costs to \$0. Pedestrian, however, has no dominant strategy. Pedestrian’s best outcome requires Driver to exercise due care which, as we have seen, is not in Drivers best interest. As a matter of cost savings, it can be assumed that Pedestrian will choose to exercise no care as well.

B. The Goals of Tort Law

The second question that should be raised is: if there is a rule of negligence, what should be its goal? Judge Calabresi stated that the goals of accident law are two-fold: first, the goal of accident law is justice; and second, the goal of accident law is to reduce the costs of accidents.¹⁰ With regard to the first goal, it is important to note that justice is, by nature, an abstract concept. Although what is just to one person may seem unjust to another, justice must be considered a factor in determining what rules can and should be adopted. Reducing the costs of accidents, however, is a much more concrete goal which may be discussed with less ambiguity.

Judge Calabresi has divided accident cost reduction into three sub-goals: (1) reducing the number and severity of accidents, (2) reducing societal costs from accidents, and (3) reducing the costs of administering accidents.¹¹ These sub-goals focus on three dimensions of social welfare—the allocative, the distributive, and the administrative.¹² Each sub-goal should be addressed in turn.

i. Reducing the Number and Severity of Accidents

Perhaps the most obvious sub-goal of tort law is to reduce the number and severity of accidents. This is torts in its classic role as a deterrent, influencing our behavior by raising the price we pay for negligent acts. This role is the allocative dimension of tort law.

Although Judge Calabresi argued that the fault system of liability is “absurd”¹³ and “irrational,”¹⁴ Judge Calabresi failed to offer a superior system. Furthermore, an empirical study has shown that the fault system has had a deterrent effect.¹⁵ Accidents, auto accidents in particular,¹⁶ have been reduced in part due to the effect of the fault system on insurance premiums.¹⁷

¹⁰ GUIDO CALABRESI, *THE COSTS OF ACCIDENTS—A LEGAL AND ECONOMIC ANALYSIS* 24 (1970).

¹¹ CALABRESI, *supra* note 10, at 26-28.

¹² Richard Posner, *Guido Calabresi's "The Cost of Accidents": A Reassessment*, 64 MD. L. REV. 12, 15 (2005).

¹³ CALABRESI, *supra* note 10, at 276, 285.

¹⁴ CALABRESI, *supra* note 10, at 276, 285.

¹⁵ Posner, *supra* note 12, at 18-19.

¹⁶ Posner, *supra* note 12, at 19. See also Christopher J. Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 J.L. & POL'Y 67 (1984); J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427 (2001); Richard W. Grayston, *Deterrence in Automobile Liability Insurance—The Empirical Evidence*, 40 INS COUNS J. 117 (1973); Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49 (1982).

¹⁷ Posner, *supra* note 12, at 19.

Judge Calabresi has further broken down the deterrent effect into two types of deterrence: general and specific.¹⁸ General deterrence involves attempting to discern the accident costs of activities and based on these costs “letting the market determine the degree to which. . . [those] activities are desired.”¹⁹ By contrast, general deterrence treats accident costs much the same as the costs of any other goods or activities.²⁰ If all activities accurately represent their accident costs, individuals can determine whether an activity is worth engaging in based on the cost.²¹

General deterrence works in two ways. First, it creates incentives to engage in safer activities, so long as accident costs are accurately reflected in prices.²² Second, general deterrence encourages making activities safer.²³ Often, this is achieved by encouraging a small amount of spending for general safety improvements in order to avoid higher accident costs in the future.²⁴

The second type of deterrence discussed by Judge Calabresi is specific deterrence. Contrary to general deterrence, which is individualistic and market based, specific deterrence is collective and involves decisions made through a political process.²⁵ In specific deterrence, all of the benefits and all of the costs (including accident costs) of an activity would be taken together. Collectively, decisions would be made as to the manner in which each activity should be performed and the amount of each activity that should be allowed.²⁶ Judge Calabresi acknowledges that specific deterrence is not really a feasible or even a preferable means of deterrence.²⁷

ii. Reducing Societal Costs from Accidents

Reducing societal costs from accidents is the second sub-goal of accident law. Judge Calabresi repeatedly refers to these societal costs as “secondary costs.”²⁸ This is the distributive role of tort law, which seeks to answer the question: once the costs have been properly allocated, how should the costs be distributed.

¹⁸ CALABRESI, *supra* note 10, at 68-69.

¹⁹ CALABRESI, *supra* note 10, at 69.

²⁰ CALABRESI, *supra* note 10, at 69.

²¹ CALABRESI, *supra* note 10, at 69.

²² CALABRESI, *supra* note 10, at 73.

²³ CALABRESI, *supra* note 10, at 73.

²⁴ CALABRESI, *supra* note 10, at 73-74.

²⁵ CALABRESI, *supra* note 10, at 95.

²⁶ CALABRESI, *supra* note 10, at 95.

²⁷ CALABRESI, *supra* note 10, at 95.

²⁸ Posner, *supra* note 12, at 15.

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Compensating the injured party is a fundamental feature of accident law, and to that end accident loss distribution deserves some discussion.²⁹ Judge Calabresi mentions several principal systems through which accident loss distribution can occur in our society: social insurance, private risk pooling (insurance), and enterprise liability.³⁰ The merits of each should be considered individually.

Social insurance is the easiest means to achieve a system of loss spreading.³¹ In its most basic form social insurance would involve paying taxes into a large pot from which injury victims would be compensated, therefore spreading the loss amongst all taxpayers rather than solely on the party(s) responsible for the injury.³² Realistically, social insurance could be more complicated as we determine whom to tax, at what rate to tax, and whether there is an income redistribution agenda that we are seeking to enforce.³³ For these reasons social insurance appears unattractive and would likely be difficult to sell politically.

Private risk pooling, or, more simply put, insurance, is the most common system of accident loss distribution.³⁴ Insurance consists of individuals privately or voluntarily pooling money to protect against risk. According to Judge Calabresi, there are two types of risk that insurance protects against: the risk of having above average accident costs, and the risk of having to incur costs sooner than average.³⁵ In private risk pooling, loss spreading is interpersonal in that those with above average accident costs spread the costs to those who have below average costs; similarly, those who incur accident costs early spread those costs to those who have accidents later.³⁶

Insurance can be pooled at varying degrees of complexity. Different premiums exist for different levels of proneness to accidents, and individuals are invited to share risk only with those similarly situated in accident proneness.³⁷ This flexibility in complexity allows insurance to effectively serve the needs of the pooling individuals.

Finally, the third possible means of accident loss distribution is through enterprise liability.³⁸ Under Judge Calabresi's model, enterprise liability consists of two seemingly dissimilar systems of achieving

²⁹ CALABRESI, *supra* note 10, at 44-45.

³⁰ CALABRESI, *supra* note 10, at 44-45.

³¹ CALABRESI, *supra* note 10, at 46.

³² CALABRESI, *supra* note 10, at 46.

³³ CALABRESI, *supra* note 10, at 46.

³⁴ CALABRESI, *supra* note 10, at 47.

³⁵ CALABRESI, *supra* note 10, at 48.

³⁶ CALABRESI, *supra* note 10, at 48.

³⁷ CALABRESI, *supra* note 10, at 48.

³⁸ CALABRESI, *supra* note 10, at 50.

accident loss distribution.³⁹ The first system places loss on those who are most likely to insure, or, if they choose not to insure, those who are able to bear the cost without secondary loss (i.e. those parties who are able to self-insure).⁴⁰

Enterprise liability also consists of a second system, which does not resemble the first system. The second system of accident loss distribution involves placing losses on those who are in a position to pass part of the loss on to purchasers of their products as a “pass-through” cost.⁴¹ Additionally, these parties may spread loss through manipulating the factors of production (i.e. labor and capital) that they employ.⁴²

Enterprise liability is more costly to administer than social insurance or private risk pooling.⁴³ This indicates a desire not only to achieve loss spreading, but also to place a cost on the activities the party engages in.⁴⁴ It follows that we may see enterprise liability used as a system of accident loss spreading more often in product liability or strict liability cases than in negligence cases.

iii. Reducing the Costs of Administering Accidents

Judge Calabresi does not have much to say about reducing the costs of administering accidents. However, Judge Calabresi considers it a “tertiary” sub-goal of accident law because its purpose is to reduce the costs of achieving primary and secondary cost reduction.⁴⁵ Somewhat paradoxically, he also considers it to be of the utmost importance because efficiency “comes first.”⁴⁶

One of the ideal goals of accident law is to allocate the cost of accidents to the cheapest cost avoider—in other words, the entity for whom it is cheapest to undertake steps to avoid an accident.⁴⁷ In Judge Calabresi’s estimation, however, the fault system allocates liability to individual parties, instead of groups most prone to similar accidents, with the result that accident costs are externalized to other groups.⁴⁸ One certainty of administrative cost reduction is that a case-by-case jury determination is the most expensive aspect of fault reduction.⁴⁹

³⁹ CALABRESI, *supra* note 10, at 50.

⁴⁰ CALABRESI, *supra* note 10, at 50.

⁴¹ CALABRESI, *supra* note 10, at 51.

⁴² CALABRESI, *supra* note 10, at 51.

⁴³ CALABRESI, *supra* note 10, at 54.

⁴⁴ CALABRESI, *supra* note 10, at 54.

⁴⁵ CALABRESI, *supra* note 10, at 28.

⁴⁶ CALABRESI, *supra* note 10, at 28.

⁴⁷ CALABRESI, *supra* note 10, at 250.

⁴⁸ CALABRESI, *supra* note 10, at 250.

⁴⁹ CALABRESI, *supra* note 10, at 251.

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Surprisingly, Judge Calabresi is less concerned the potential shortcomings of the fault system than he is with “the failure to give weight to the fact that it costs different parties to an accident different costs to spread the accident costs, even though they may be equally prone to that particular accident.”⁵⁰ Unfortunately, Judge Calabresi offers no real argument on how to practically reduce administrative costs. In fact, as Judge Posner points out, Calabresi arrived at his conclusions on the fault system without conducting any inquiry in to the operation of the tort system. Rather, Calabresi relied on *a priori* reasoning and semantics.⁵¹ We can assume then, that there may be an adequate means of administrative cost reduction within the fault system that Judge Calabresi fails to grasp. It may therefore be the case that the fault system does more than merely contribute to the externalization of costs. The validity of these assertions will be explored below in the discussion of whether the current tort regime or suggested tort reforms achieve the goals and sub-goals laid out by Judge Calabresi.

III. WHAT IS TORT REFORM?

A. *Brief History of Tort Reform*

Over the last few decades, one of the hallmarks of American Conservatism has been unwavering support for the corrective powers of the free market.⁵² Conservatives have been quick to turn to the market as means to address all of society’s ills including poverty,⁵³ racial discrimination,⁵⁴ and education.⁵⁵ In this narrative, the market maintained an ideal state of affairs, which was only upended when liberal politicians began to introduce the government into areas it did not belong.⁵⁶ One of those areas was torts.⁵⁷

One of the great benefits of the market narrative is that it allowed tort law to seem apolitical.⁵⁸ In reality, tort reform is anything but market driven. Instead, it is driven by a coalition of large corporations, doctors, defense lawyers, insurance companies, tobacco and gun manufacturers,

⁵⁰ CALABRESI, *supra* note 10, at 252.

⁵¹ POSNER, *supra* note 12, at 18.

⁵² JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO RILL BACK THE COMMON LAW* 7-8 (2004).

⁵³ See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-80* (1984).

⁵⁴ See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS*, 42-43 (3d ed. 1994).

⁵⁵ See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM*, 85-107 (1st ed. 1962).

⁵⁶ FEINMAN, *supra* note 52, at 8.

⁵⁷ FEINMAN, *supra* note 52, at 8.

⁵⁸ FEINMAN, *supra* note 52, at 9.

lobbyists and politicians.⁵⁹ The aim of this alliance is to reduce the costs of accidents by removing protections for injured parties.⁶⁰ In other words, tort reformers seek to lower their own costs by shifting costs to injured parties by making it more difficult to recover for injuries.

The move towards tort reform began with calls to address a series of “crises.”⁶¹ The first “crisis” came in the 1970s due to large increases in medical malpractice premiums and product liability insurance premiums.⁶² In the 1980s another “crisis” struck, this time due to a general increase in liability insurance premiums.⁶³ Finally, in the 1990s yet another batch of “crises” arose, caused by increases in product liability and medical malpractice insurance premiums.⁶⁴

Labeling rises in insurance premiums as “crises” allowed the proponents of tort reform to nationally coordinate their efforts.⁶⁵ Traditionally, tort law is a state-level matter and tort regimes may vary substantially from state to state. Yet once the “crises” began to occur, conservative leaders at the federal level found themselves advocating for tort reform. The 1994 Contract with America included references to tort reform as well.⁶⁶

As a result of the establishment of a coalition intended to achieve tort reform, combined with a political climate open to the message of insurance “crises,” tort reform has become institutionalized.⁶⁷ Groups such as the American Tort Reform Association, various think tanks, and state-level reform organizations have helped develop arguments encouraging reform by persuading legislators and voters of the need for tort reform. These organizations use their resources to lobby, support sympathetic political candidates, and even contribute to the election campaigns of local judges.⁶⁸ Due to the influence of these organizations, their arguments are worth examining.

B. Arguments for Tort Reform

Tort reformers have embraced several different lines of argument in order to achieve their goals. This Article addresses three of these

⁵⁹ FEINMAN, *supra* note 52, at 19.

⁶⁰ FEINMAN, *supra* note 52, at 19.

⁶¹ F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOEFSTRA L. REV. 437, 469-70 (2006).

⁶² *Id.*

⁶³ *Id.* at 470.

⁶⁴ *Id.* 470.

⁶⁵ *Id.* 471.

⁶⁶ *Id.* at 471.

⁶⁷ Hubbard, *supra* note 61, at 471.

⁶⁸ Hubbard, *supra* note 61, at 472.

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arguments. First, there has been an increase in litigation facilitated by greedy lawyers pushing frivolous lawsuits. Second, juries award outrageous verdicts in favor of undeserving plaintiffs. Third, the current tort regime is harmful to physicians who may be afraid to practice due to the high cost of malpractice insurance. Each of these arguments fails to stand up to scrutiny.

i. Increased Litigation and Greedy Lawyers

There is a common belief that Americans are an exceptionally litigious group.⁶⁹ Indeed, tort reformers suggest that Americans rarely miss an opportunity to take their grievances to court.⁷⁰ Some have gone so far as to make the claim that as a society “we are diminished by reliance on the court system.”⁷¹ Tort litigator Joshua Kelner has gone as far as claiming that “we are culturally disempowered by the courts, as we are made less self-reliant, less willing to assume responsibility for our own actions, and less able to cooperate for the common good. In short, we are made weaker.”⁷² Despite the ostensibly strong nature of this rhetoric, it will become clear that it is hollowed when subjected to facts.

The idea that we are a litigious society is complemented by the argument that there has been a significant increase in litigation recently.⁷³ Tort reformers would have us believe that this increased litigation is due in part to an increase in frivolous lawsuits.⁷⁴ This argument, however, fails to consider the reality that the explosion of litigation is based on legitimate injuries suffered by innocent plaintiffs. This would serve to undermine all of the arguments in favor of tort reform.

Finally, tort reformers argue that the engines driving frivolous lawsuits and encouraging the litigiousness of our society are none other than greedy plaintiff attorneys. Kelner argues that plaintiff attorneys “have both the skill and resources to capitalize upon an unsuspecting public and a permissive media in the advancement of their cause.”⁷⁵ This argument is often supplemented by reference to the great wealth that many top trial lawyers have obtained in the course of their careers.⁷⁶

⁶⁹ Roland Christensen, *Behind the Curtain of Tort Reform*, 16 B.Y.U. L. REV. 261, 265 (2016).

⁷⁰ *Id.*

⁷¹ Joshua D. Kelner, *The Anatomy of an Image: Unpacking the Case for Tort Reform*, 31 U. DAYTON L. REV. 243, 296 (2006).

⁷² *Id.*

⁷³ Christensen, *supra* note 69.

⁷⁴ Christensen, *supra* note 69.

⁷⁵ Kelner, *supra* note 71, at 250.

⁷⁶ Christensen, *supra* note 69, at 270.

ii. Hot Coffee and the Undeserving Plaintiff

A second argument in favor of tort reform centers on the frivolous lawsuits. President Ronald Reagan used to speak of a lawsuit wherein a drunk driver struck a man inside a telephone booth. Instead of suing the driver, the man turned around and sued the telephone company.⁷⁷ However, as is often the case, the politically expedient version of the case does not necessarily match the facts. In reality, Mr. Charles Bigbee, the victim, and the telephone booth was located adjacent to a highway and near a driveway. Further, the telephone booth had been placed on the same spot where a previous telephone booth had been destroyed in a similar incident less than two years earlier. When Mr. Bigbee saw the driver coming he attempted to exit the booth, but the door had jammed. Mr. Bigbee settled with the driver, who may or may not have been drunk, and sued the telephone company.⁷⁸ Once the facts are developed, President Reagan's story seems to be an entirely different case from Mr. Bigbee's experience.

Perhaps the most popular example of an underserved plaintiff is the famous McDonald's hot coffee case. In that case a seventy-nine-year-old woman, Ms. Stella Liebeck, was riding as a passenger in her grandson's vehicle, ordered a cup of McDonald's hot coffee.⁷⁹ Ms. Liebeck's grandson stopped the vehicle so that Ms. Liebeck could put some cream in her coffee, which she had placed between her knees. When Ms. Liebeck removed the lid from the Styrofoam cup, the entire cup of coffee spilled into her lap and was absorbed by her sweatpants, which resulted in third-degree burns over six percent of her body.⁸⁰ Ms. Liebeck sued McDonald's for \$20,000 to cover her medical bills and expenses. However, the jury awarded an additional \$2.7 million in punitive damages after it came to light that McDonald's had received over 700 complaints regarding the high temperature of their coffee products.⁸¹

The *Liebeck* case is often held out as an example of an undeserving plaintiff; after all who doesn't assume that hot coffee is hot? Ms. Liebeck is thus considered to be the recipient of an outrageously high jury verdict.⁸² Tort reformers argue that plaintiffs like Ms. Liebeck are undeserving because their own irresponsibility lead to their injuries. Once again, the crux of the tort reformer's argument is centered on a

⁷⁷ FEINMAN, *supra* note 52, at 23.

⁷⁸ Bogus, *supra* note 1, at 18-19.

⁷⁹ See *Liebeck v. McDonald's Rests.*, 1994 N.M. Dist. LEXIS 2.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² FEINMAN, *supra* note 52, at 24 (in reality, the judge reduced the punitive damages award back to \$480,000 and it later settled for an undisclosed amount).

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highly edited snapshot of a real case. Once this snapshot is given context, it becomes an entirely different case from the one originally described. After all, a tort system that “rewards” plaintiffs seeking redress for injuries like those portrayed by tort reformers would justifiably seem broken. The resultant “crises” would seem all the more real as well. As such, the undeserving plaintiff argument is a powerful, albeit somewhat disingenuous, tool for tort reformers.

iii. Harm to Physicians

A third argument used in favor of tort reform is that the current tort regime is harmful to practicing physicians. Physicians tend to be among the most vocal supporters of tort reform, claiming that high rates for malpractice insurance are a direct result of the tort system and doctors’ practice of defensive medicine in order to avoid lawsuits.⁸³ If such allegations are provable, it would be a devastating argument in favor of reform. However, even without proof, insurance companies have dangled the carrot of lower premiums in order to incentivize state legislatures to pass tort reform measures.⁸⁴ The defensive medicine argument, while potentially sufficient to give pause to some, is wholly unsupported by empirical evidence.

C. *Common Methods of Tort Reform*

i. Damage Caps

Instituting damage caps is a popular method used by states as a means of tort reform. Using this method, states attempt to limit various types of awards including non-economic damages,⁸⁵ punitive damages⁸⁶ and pain and suffering.⁸⁷ These reforms are often the result of insurance companies testing a reduction in liability or malpractice insurance.⁸⁸

Damage caps often conflict with state constitutions because they violate the right of a party to a trial by jury,⁸⁹ fail to grant equal protection

⁸³ Julie Davies, *Reforming the Tort Agenda*, 25 WASH. U. J.L. & POL’Y 120, 152 (2007).

⁸⁴ Stephanie Francis Ward, *New Tactic in Tort Reform Battle: Insurer Promises Lower Rates if Legislature Caps Damages*, 2 No. 23 A.B.A. J. E-REP. 4 (June 13, 2003).

⁸⁵ See e.g. MO. REV. STAT. § 538.210 (2015); FLA. STAT. ANN § 766.118 (West 2017).

⁸⁶ See e.g. GA. CODE ANN. § 51-12-5.1 (West 2017).

⁸⁷ Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 687 (2008).

⁸⁸ Christensen, *supra* note 69, at 271.

⁸⁹ See *Watts ex rel Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 633 (Mo. 2012) (finding MO. REV. STAT. § 538.210 is unconstitutional to the extent that it infringes on the jury role of determining the damages suffered by an injured party).

of the law,⁹⁰ or violate some other constitutional protection.⁹¹

ii. Changes in Liability Rules

A second tactic for tort reformers is to move goal posts by changing liability rules.⁹² This includes “making liability less strict in products liability cases, setting up procedural obstacles in medical malpractice cases, and providing immunity from suit for certain industries.”⁹³ The purpose of changing the rules is to lessen the likelihood of a suit ever being filed due to the barriers erected by reformers.⁹⁴ Once a case has been filed, however, tort reformers seek to change the landscape to favor defendants.⁹⁵

The basic fault principle in most tort cases is negligence or causing harm to someone else by failing to act with the appropriate level of care.⁹⁶ Tort reformers have sought to move away from negligence by providing immunity from suit for entire groups of potential defendants. Examples include the Protection of Lawful Commerce in Arms Act,⁹⁷ which would have had the effect of protecting both lawful and unlawful sales of firearms while prohibiting suit against gun manufacturers for injuries suffered due to the unlawful misuse of a gun. Similar immunity was granted to suppliers of raw materials used in medical implants by the Biomaterials Access Assurance Act.⁹⁸

By changing the liability rules, tort reformers can shift the cost of the accident onto the injured by making it difficult or impossible to seek redress for injuries suffered. It is questionable whether the immunity from liability of entire groups of manufacturers of dangerous products truly serves the purpose of tort law. It does, however, serve the purpose of defendants.

iii. Limiting Attorney Fees

A third way tort reform seeks to lower the cost of torts is by limiting attorney fees, specifically by restructuring contingency fees. This is a deliberate tactic to keep injured parties out of court by making it less profitable for lawyers to take cases.⁹⁹ Furthermore, this tactic limits how

⁹⁰ Estate of McCall v. United States, 134 So. 3d 894, 894 (Fla. 2014).

⁹¹ See Best v. Taylor Mach Works, 689 N.E. 2d 1057, 1057 (Ill. 1997).

⁹² Christensen, *supra* note 69, at 271.

⁹³ Roederer, *supra* note 87, at 686-87.

⁹⁴ Roederer, *supra* note 87.

⁹⁵ FEINMAN, *supra* note 52, at 32.

⁹⁶ FEINMAN, *supra* note 52, at 32.

⁹⁷ 15 U.S.C. §§ 7901-03 (2005).

⁹⁸ 21 U.S.C. § 1601 et seq. (1998).

⁹⁹ FEINMAN, *supra* note 52, at 27.

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aggressively claims are pursued, since aggressive representation is ultimately more costly.¹⁰⁰

This tactic intentionally has the effect of screening low-value cases.¹⁰¹ Filing fees, expert witnesses, travel expenses, administrative costs (including the costs of obtaining records, creating exhibits, ink, paper, etc.) all have to be paid upfront and come out of the lawyers pocket.¹⁰² These costs often add up to substantial amounts.¹⁰³ Because law is a business, and like any other business, must remain profitable, lawyers are forced to weigh the potential cost of pursuing a case against the value of the case and the likelihood of recovery. The result is that legitimate injuries with difficult facts or of seemingly low or negative value (that is, cases that would cost more to pursue than the case is worth to the lawyer) fall by the wayside.

At the same time that tort reformers seem to be concerned about the danger to their clients from perfidious plaintiffs and their unscrupulous lawyers. Professor Feinman points out that there appears to be little concern about the tactics employed or exorbitant fees charged by defense firms.¹⁰⁴

IV. ARGUMENTS AGAINST TORT REFORM

A. *Damage Caps as a Disincentive to Caution*

i. Regulation Through Litigation v. Regulation Through Legislation

One way of viewing damages is as a form of regulation. Regulation works by attaching a price to specific behaviors, making it more or less expensive to engage in the regulated behavior depending on the activity and social desirability. The assumption is that people will only violate those regulations if the benefits outweigh the costs.¹⁰⁵ In the tort system, regulation can be achieved by one of two methods: litigation or legislation.

Regulation through legislation is the preferred method for tort reformers. By using legislative tools to set the outer boundaries of tort

¹⁰⁰ FEINMAN, *supra* note 52, at 27.

¹⁰¹ FEINMAN, *supra* note 52, at 28.

¹⁰² FEINMAN, *supra* note 52, at 28.

¹⁰³ An extreme example is the Woburn, Massachusetts case at the center of the Jonathan Harr book, *A Civil Action*. In that case, plaintiff's costs (not fees, just costs) rose above \$2.5 million.

¹⁰⁴ FEINMAN, *supra* note 52, at 28.

¹⁰⁵ NICHOLAS MERCURO & STEVEN MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND* 104 (2d ed. 2006).

awards, reformers would be effectively setting the price for every type of injury regardless of the acquired manner.¹⁰⁶ In the tort reformers perfect world, tort liability would probably look similar to Game one, above. The greater burden would fall on the injured party and industries producing dangerous products would often receive immunity from suit.

This approach abandons any pretext that “the market” can cure any deficiencies in the tort system. Even if tort reformers could claim that the market approach is effective, setting caps on damages would constitute market manipulation. Trial lawyers, insurance companies, and other players in the tort system are aware of the recent jury verdicts being handed down for similar types of cases and they rely on those previous cases when it comes time to negotiate a settlement or bring a case to trial.¹⁰⁷ Damage caps change the market by creating limits on the value of cases and taking away a critical function of the jury.

It should not be claimed that all legislation is ineffective or disingenuous. Some legislatures have enacted requirements that not only limit the number of cases which may be brought, but also ensure that cases which are filed have a good chance of succeeding. For example, Illinois law requires that a medical malpractice complaint be accompanied by an affidavit declaring that the attorney has consulted with a physician who is knowledgeable in the relevant area of medicine.¹⁰⁸

On the other hand, regulation through litigation serves the market function by letting members of society—the people most likely to consume goods and services which cause injuries—decide on the price that injuring parties should pay those whom they have negligently injured. The price may vary from plaintiff to plaintiff, but that is to the benefit of all because it verdicts become tailored to the facts of a case, rather than the criteria established by a heavily lobbied legislature. Finally, tort reformers would claim that regulation through litigation is the cause of unreasonably large jury verdicts.¹⁰⁹ However, in the few cases cited as evidence of such inflated verdicts, most if not all of those cases resulted in either the trial court reducing the damages, an appeals court reducing the damages, or the parties settling for far less.

¹⁰⁶ See e.g., N.M. STAT. ANN. § 41-5-6 (West 1986) (setting the aggregate dollar amount recoverable by all persons for injury or death due to malpractice at \$600,000); IND. CODE. ANN. § 34-18-14-3 (West 2011) (setting maximum recoverable amounts based upon the date of the injury).

¹⁰⁷ Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1247-48 (2004).

¹⁰⁸ 735 ILL. COMP. STAT. 5/2-622 (West 2004).

¹⁰⁹ FEINMAN, *supra* note 52, at 41.

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ii. Moral Hazard

Legislation-created damage caps put a ceiling on damages, limiting the recovery of injured persons. As a result, if damage caps drop but insurance coverage stays the same, eventually a state of moral hazard could arise. Insurance works as a means of eliminating risk. For detrimental risks, the insured person pays a sum certain with the expectation that if the insured against risk ever does occur the insured person will be fully compensated.¹¹⁰

Moral hazard is a negative behavior that occurs when a party is insured and therefore feels that they may participate in risky behavior in which they would not engage in if they were uninsured. If states or, less likely, the federal government were to cap damages at a certain amount, it is likely that there would be a demand for insurance coverage up to that amount. Not only would this eliminate any need for doctors to practice defensive medicine, but it would actually allow doctors to take potentially beneficial risks when treating clients, because the consequences for mistakes were less damaging, if at all.

B. Existing Liability Rules Limit the Filing and Prosecution of Frivolous Law Suits

i. Defining Effective Negligence Rules

Since a rule of some type is obviously necessary, the next question is what that rule should be. Ideally it should be simple and understandable to laypeople, yet broad enough to be applicable in a range of possible situations. Put another way, there should be one simple standard for those who engage in activities that could potentially harm others.

Let us return briefly to Game One. Motor vehicle liability is founded upon a theory of negligence. In our scenario the Driver owes a duty to operate his or her vehicle in the manner that a reasonable person under similar circumstances would. That duty was breached, the Pedestrian was injured, and the breach was the proximate cause of the Pedestrian's injuries. The typical standard of care for general negligence is that of a reasonable person under similar circumstances.¹¹¹ This is an adequate rule for a system of liability that seeks to perpetuate the policy that everyone is responsible for injuries caused to others due to a lack of ordinary care or skill in the management of property.

Assume again the general parameters given in Game one. A few

¹¹⁰ A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 56 (2d ed. 1989).

¹¹¹ RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965).

changes demonstrate the difference with a negligence rule including contributory negligence. In this case the cells look similar except that in cell three the Pedestrian receives a payoff of -\$10 and Driver receives a payoff of -\$100.

Game Two Payoffs: Pedestrian, Driver			
		Driver	
		No Care	Due Care
Pedestrian	No Care	-100, 0	-100, -10
	Due Care	-10, -100	-20, -10

The shift from forcing the Pedestrian to bear the cost to a negligence rule with contributory negligence achieves two things. First it creates a dominant strategy for the Pedestrian, which is to always exercise due care. Second, it incentivizes the Driver to also exercise due care as a means of reducing the potential cost of an accident to its lowest possible level. In this way the negligence standard is able to satisfy the goal of reducing accident costs.

But what about a rule involving comparative negligence? In a comparative negligence system, the party who is the most careless bears the highest percentage of the accident cost. Again, assume that an accident has a payoff of -\$100 and is certain to happen unless both parties exercise due care (in which case there is a one in fifty chance of an accident occurring).

Exercising due care has a payoff of -\$10, while exercising some care has a payoff of -\$5. If one party exercises some care and the other does not, the one who fails to exercise some care has a payoff of -\$99 while the party exercising some care has a payoff of -\$1 plus the cost of exercising that care. When one party exercises due care and the other exercises no care, the party exercising due care has a payoff of -\$10 (the cost of exercising care) while the party exercising no care bears the full cost of the accident.

Game 3 Payoffs: Pedestrian, Driver				
		Driver		
		No Care	Some Care	Due Care
Pedestrian	No Care	-50, -50	-99, -6	-100, -10
	Some Care	-6, -99	-55, -55	-105, -10
	Due Care	-10, -100	-10, -105	-10, -10

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Game Three offers a more complex range of choices for both the Driver and the Pedestrian, but once again, under a negligence rule, the optimal choice for both parties is to exercise due care. As in Game Two, the practical value of a negligence rule lies in the fact that it incentivizes both parties to exercise due care. Through these incentives, the goals observed by Judge Calabresi are satisfied and an effective rule is discerned. Based on what is learned from Games One, Two, and Three, a negligence standard is not only a viable option, but an effective one as well.

ii. Applying Negligence Rules to Tort Reform

With the knowledge that currently existing negligence rules are capable of creating outcomes consistent with the goals of tort law, it is worth considering how often those laws are applied. It has been estimated that only ten percent of Americans injured in accidents make a liability claim and only two percent file lawsuits.¹¹² Professors Hyman and Silver have noted that the number of tort filings per 1,000 people peaked in 1990, while that amount decreased by 5 percent between 1993 and 2002.¹¹³ Why such low numbers? Professors Hyman and Silver provide six reasons why parties may choose not to sue. First, many injured patients do not realize that they have been injured, or, if they do realize that they have been injured, the statute of limitations has passed.¹¹⁴ Second, a number of injuries caused by malpractice are not serious enough to warrant a suit.¹¹⁵ Third, treatments required to overcome malpractice injuries are covered by victims own insurance.¹¹⁶ Fourth, the cost of suit is too high, whether monetarily, emotionally or both.¹¹⁷ Fifth, medical malpractice claims often have poor outcomes, which fail to cover their expenses.¹¹⁸ Finally, injured parties may use cheaper or faster alternative methods to resolve claims.¹¹⁹

Given these low numbers, the supposed explosion in litigation as portrayed by tort reformers seems dubious. In fact, Professor Herbert Kritzer conducted a study on the screening processes used by plaintiffs' attorneys in Wisconsin and uncovered some interesting facts. In

¹¹² THOMAS F. BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 3 (2002).

¹¹³ David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 *VAND. L. REV.* 1085, 1089 (2006).

¹¹⁴ Hyman, *supra* note 113, at 1113-14.

¹¹⁵ Hyman, *supra* note 113, at 1114.

¹¹⁶ Hyman, *supra* note 113, at 1114.

¹¹⁷ Hyman, *supra* note 113, at 1114-15.

¹¹⁸ Hyman, *supra* note 113, at 1115.

¹¹⁹ Hyman, *supra* note 113, at 1115.

Professor Kritzer's survey, respondents reported 53,584 contacts requesting legal representation; surprisingly nearly 70 percent of those requests were declined.¹²⁰ Furthermore, 80 percent or more of the malpractice cases were rejected.

These numbers suggest frivolous lawsuits are not flooding the courts. If anything, these numbers demonstrate that those who have suffered injuries may be underutilizing the tort system. The ability of lawyers to selectively choose the cases they accept, as well as the fact the common law negligence rules that discourage filing non-meritorious suits, results in very few potential tort cases actually being filed.

C. Limiting Attorney's Fees Would Result in Less Access to Justice

Reducing attorney's fees in legal actions is often suggested as a third type of tort reform. The most frequent payment arrangement used by plaintiffs' attorneys is the contingency fee. Under this system the attorney's fee is a percentage of the recovery if the case is successful.¹²¹ Ideally, this system allows people of modest or limited means to pursue a claim that they may not otherwise be able to pursue if required to provide payment up front.¹²² Because the plaintiffs' attorney only gets paid if there is a recovery, there is an incentive to decline cases that are weak or unlikely to result in a substantial recovery.¹²³ Many states already limit the amount an attorney may recover in a given action.¹²⁴ Perhaps unsurprising, these reforms uniformly fail to limit the amount defense firms may earn while representing clients in tort actions. The effect of this is two-fold. First, it incentivizes lawyers to screen out viable cases where there is a low likelihood of recovery or where the recovery amount is minimal. In the process, individuals who have suffered legitimate injuries are denied representation.¹²⁵ Second, it incentivizes well-financed defendants to attempt to make litigation too costly for the plaintiff to take the case all the way through an extensive trial.

In general, plaintiffs face difficult odds once a case proceeds to trial

¹²⁰ HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 69-74 (2004); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 754-57 (2002); Herbert M. Kritzer, *Contingency Fee Lawyers As Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 24 (1997); Herbert M. Kritzer, *Holding Back the Floodtide: The Real Role of Contingent Fee Lawyers?*, 70 WIS. LAW. 10, 63 (1997).

¹²¹ FEINMAN, *supra* note 52, at 27.

¹²² FEINMAN, *supra* note 52, at 27.

¹²³ FEINMAN, *supra* note 52, at 27.

¹²⁴ FEINMAN, *supra* note 52, at 28.

¹²⁵ FEINMAN, *supra* note 52, at 28.

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because only 52 percent of cases result in a favorable verdict.¹²⁶ Thus, nearly half of all cases result in no payment for the attorney representing the injured parties. In medical malpractice cases, juries return a verdict for the defense in 73 to 81 percent of cases.¹²⁷ These statistics alone demonstrate that an explosion of frivolous lawsuits is implausible. However, the tort reform responses have a legitimate tendency to keep injured parties out of court and thus denying injured parties just compensation.

V. ANALYSIS

A. *Tort Reform Fails to Achieve Either of the Main Goals of Accident Law*

i. Tort Reform Fails to Dispense Justice

“Justice” is an abstract term open to interpretation based on an individual’s personal views and preferences. Defining “justice” can be difficult, so it is often easier to describe examples of injustice rather than examples of justice.¹²⁸ However, analysis of the commonly proposed methods of tort reform necessitates a definition of justice. For the purposes of this Article, justice is defined as the fair compensation of accident victims by those liable to them for causing their injuries. Even this definition is flawed (for example, what is “fair compensation?”), yet it is sufficient for analyzing proposed tort reforms.

Using this definition, the most common types of tort reform fail to meet the goal of delivering justice to individuals whose injuries are caused by others. Caps on damages mean that some injuries or losses may lack adequate compensation, with the injured party being forced to absorb some of the cost of the accident, while the tortfeasor escapes paying some costs for which the tortfeasor has been found liable.¹²⁹ As part of a common theme, tort reform seeks to shift the cost of accidents away from injuring parties and onto those who have been injured by the negligence of others.

Attempting to change the rules of liability also fails to achieve the goal of distributing justice. No one likes a level playing field; plaintiffs prefer a legal system that favors them, and defendants and insurance companies favor a legal system that favors high burdens of proof and limited damages awards. When the legal system for negligence is similar

¹²⁶ Hyman, *supra* note 113, at 1107.

¹²⁷ Hyman, *supra* note 113, at 1107.

¹²⁸ CALABRESI, *supra* note 10.

¹²⁹ *Supra* Section III(C)(i).

or identical to the system discussed above in Game Three Payoffs: Pedestrian, Driver,¹³⁰ parties are forced to bear the costs of their own actions and the landscape is not tilted in favor of either party.

As discussed previously, tort reform seeks to avoid this level playing field by moving the goal posts.¹³¹ Often this means attempting to exempt entire industries from liability for injuries either caused by their products or by their actions.¹³² This is yet another cost shifting mechanism that intends to relieve the cost burden of accident costs on defendants by making it more difficult or impossible to hold them accountable.

Finally, and perhaps most troubling, is that an attempt to limit legal fees not only fails to address the administration of justice, but it actively seeks to deny justice to injured parties by keeping them out of the courts.¹³³ Often couched in commercially appealing terms of limiting awards to greedy plaintiffs and unscrupulous attorneys, the reality is that lawyers who cannot afford to take cases from which they are unlikely to profit often screen out lower value cases.¹³⁴ Of course insurance companies, defense counsel, defendants, other repeat players, and the politicians for whom they lobby to pass reform, are all aware of these facts, however, denying access to justice has been their goal from the beginning.

ii. Tort Reform Fails to Reduce Accident Costs

The second major goal of accident law is the reduction of accident costs.¹³⁵ This includes not just the cost of accidents per se, but also the cost of avoiding accidents.¹³⁶ Reducing accident costs is a very broad goal, which could be achieved in a variety of ways, yet tort reformers have consistently shown that reducing accident costs as a whole is not their intent. Rather, they seek to reduce accident costs to their clients, insureds, and political donors.

As discussed above, and indeed throughout this essay, the common methods of tort reform do not reduce accident costs. Instead, they shift accident costs from those liable for causing harm to the injured parties themselves. This is neither just, nor is it a reduction of costs. Further, it pushes the accident law system closer to the system we see in Game One, in which neither party has any incentive to exercise any degree of care.

¹³⁰ *Supra* Section IV(B)(i).

¹³¹ Christensen, *supra* note 69, at 271.

¹³² Roederer, *supra* note 87, at 686-87.

¹³³ FEINMAN, *supra* note 52, at 27.

¹³⁴ FEINMAN, *supra* note 52, at 28.

¹³⁵ CALABRESI, *supra* note 10, at 26.

¹³⁶ CALABRESI, *supra* note 10, at 26.

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Needless to say, an accident system in which negligence cases are treated in the manner described in Game One does not benefit society. Instead, it benefits a few corporations, insurance companies, their investors, defense attorneys (whose legal fees would remain uncapped), lobbyists, and politicians. Incidentally, it increases certain social costs, increasing those who receive disability because they cannot pay their medical bills, bankruptcy, and other added costs, which could be avoided by the liable party being held accountable.

Furthermore, reducing the cost of accidents can be divided into three sub-goals: (1) attempting to reduce the frequency or severity of accidents; (2) reducing societal costs of accidents; and (3) reducing administrative costs of accidents.¹³⁷ Each sub-goal is discussed in greater detail below. However, the outcome ultimately remains the same and the common methods of tort reform fail to reduce the cost of accidents.

B. Tort Reform Fails to Achieve the Sub-goals of Accident Law

i. Tort Reform Does Not Attempt to Reduce the Frequency or Severity of Accidents

One of the most important ways in which accident law reduces the costs of accidents is by acting as a deterrent. When the cost of negligently engaging in an activity is clear, a potential actor will weigh the costs of the negligent act and determine whether it is more than he or she is willing to bear. If the cost is too high, the potential actor will refrain from negligently engaging in that activity. However, if the cost is too low to discourage the negligent behavior, then there will be no incentive to refrain from behaving negligently.

Damage caps do not incentivize careful behavior because they limit the potential cost of negligence. Furthermore, damage caps coupled with insurance may serve to create a scenario of moral hazard in which the incentive to act carefully dissipates to the point of near nonexistence. This in turn brings us back to the situation faced in Game One, where the combination of damage caps and insurance makes the potential accident cost so low that regardless of the injured parties own level of care, the injured party will likely still end up carrying the burden of the costs of their own injuries.

It would be disingenuous to say that there has been any attempt by tort reformers to use damage caps to reduce the frequency and severity of accidents—unless the argument is that incentivizing consumers not to consume, pedestrians not to walk, and patients not to visit the doctor

¹³⁷ CALABRESI, *supra* note 10, at 26-28.

somehow achieves both of these goals. This is an absurdity given that the economy cannot function without consumers, consumers cannot consume without some sort of protection, not everyone can afford a vehicle, and medical care is essential to good health. What is really happening is not cost reduction; it is cost shifting.

Similarly, changing the rules of liability by exempting certain industries does not reduce the cost of accidents. One of the great traits of the common law is that it allows us to create new and efficient rules in order to allocate liability in accidents. This is seen in Game Three, where the party who bears the most responsibility for the injury bears the most cost. Using the legislative process to change these rules takes time (including drafting, debating and signing into law) and may not be effective at actually reducing accident costs. The existing common law rules, however, are effective at allocating liability for accident costs.

ii. Tort Reform Fails to Address Societal Costs of Accidents

Tort reform fails to reduce the allocative costs of accident as well as their distributive and/or societal costs. Three primary means through which accident loss distribution can occur were discussed above: (1) social insurance; (2) private risk pooling; and (3) enterprise liability.¹³⁸

One of the great promises of tort reform is that it will lower the cost of insurance premiums.¹³⁹ For example, insurance companies advertise reduced premiums and in return legislators make it more difficult to sue insurance companies. However, this is often not the case even when tort reform occurs. Instead, insurance premiums stay the same and we can only assume that the only change is an increase in the dividends received by those who have invested in the insurance companies.

But that is not all; indeed tort reformers claim that high insurance premiums deter some doctors from practicing anything other than defensive medicine.¹⁴⁰ However, empirical evidence debunks this story.¹⁴¹ Towers Watson¹⁴² found that between 2006 and 2011, medical malpractice direct total premiums had decreased every year despite increases in tort litigation costs.¹⁴³ This indicates that insurance premiums do not respond to tort reform as promised by reformers.

¹³⁸ *Supra* Section II(B)(ii).

¹³⁹ Stephanie Francis Ward, *New Tactic in Tort Reform Battle: Insurer Promises Lower Rates if Legislature Caps Damages*, 2 No. 23 A.B.A. J. E-REP. 4 (June 13, 2003).

¹⁴⁰ Christensen, *supra* note 69, at 268.

¹⁴¹ ROSS EISENBERRY, TORT COSTS AND THE ECONOMY, MYTHS, EXAGGERATIONS, AND PROPAGANDA 6-7 (2006), <http://www.epi.org/files/page/-/old/briefingpapers/174/bp174.pdf>.

¹⁴² *Id.* at 6 (Formerly Towers Perrin and suspected by the Economic Policy Institute of inflating tort cost numbers).

¹⁴³ TOWERS WATSON, 2011 UPDATE ON U.S. TORT COST TRENDS 4 (2012).

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While social insurance would be easy to implement, the very nature of creating a tax for the purpose of accident loss distribution in which all taxpayers share the cost of accidents would be politically unpalatable to many conservative lawmakers, even if it might be cheaper in the long run for potential clients. Similarly, enterprise liability would be a form of accident loss distribution that would run counter to tort reformers efforts to exclude certain groups from liability for accidents involving their products. If tort reform fails to reduce the cost of private risk pooling, and social insurance and enterprise liability are unpalatable, then tort reform has not succeeded in reducing the distributive costs of accidents.

iii. Tort Reform Affects Administrative Costs But Only at the Expense of Justice

Finally, tort reform does have some discernable effect on the administrative costs, but it is for the wrong reasons. As discussed above, tort reform has little to do with justice or cost reduction, instead it trends more toward cost shifting. Yet it also seeks to keep injured parties out of court. This should be viewed not as a success for tort reform, but as an alarming signal of political willingness to allow people to suffer injuries without compensation in order to protect corporate donors.

Potential plaintiffs are kept out of court by attempts to change the liability rules, damage caps, and limits on attorney fees. All of these methods make it either impossible to file a lawsuit, or not profitable for an attorney to pursue justice on behalf of an injured client. While this does result in a reduction of administration costs, it does not increase efficiency. The reductions are enabled by reduced access to the justice system, which is never an acceptable trade-off.

VI. CONCLUSION

Tort reform is not inherently flawed. Justice Oliver Wendell Holmes once wrote, “[t]he life of the law has not been logic: it has been experience.”¹⁴⁴ When experience tells us a legal rule or doctrine is not working, it is time to replace that rule or doctrine. However, tort reform as a political agenda meant to improve the lot of certain repeat players, rather than for the benefit of society as a whole, is not preferable.

The goals accident law should aspire to achieve are reducing the frequency, severity, and cost of accidents. Unfortunately, the most common types of tort reform do not achieve these goals. Rather than reduce the cost of accidents, tort reformers instead seek to shift the cost of accidents to injured parties by either limiting their recovery or making

¹⁴⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

it difficult for them to bring their case in court. For these reasons modern tort reform is ineffective and detrimental to society.