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Allowing Plaintiffs to Select Damage Multipliers: A Proposal to Increase Access to Justice

by
Jef De Mot & Ben Depoorter

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Jef De Mot* & Ben Depoorter**

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Abstract

This Article advances a proposal that would substantially increase access to justice for valuable lawsuits that are currently deterred by litigation costs. In our proposed system, a plaintiff is allowed to select a damage multiplier, which determines the amount of damages recoverable if the case is won. Courts then randomly select cases for litigation with a probability inverse to the multiplier chosen by the plaintiff.

Keywords: litigation, access to justice, negative expected value suits

* Ghent University, Center for Advanced Studies in Law and Economics, Universiteitsstraat 4, 9000 Ghent, Belgium

** Ghent University, Center for Advanced Studies in Law and Economics, Universiteitsstraat 4, 9000 Ghent, Belgium and University of Miami Law School, 1311 Miller Drive.

1. Introduction

Frivolous law suits, spectacular punitive damage awards, and surprising jury verdicts all seemingly stand in testament to the notion that the level of litigation in today's society is excessive.[1] However, from a societal point of view it can also be argued that there are an inadequate number of lawsuits.[2] If too few lawsuits are filed, too few potential tortfeasors will invest adequately in precaution. Economic theory predicts that a victim will file a lawsuit only if the expected benefits of a trial outweigh the expected costs. Thus, even when a victim has a highly meritorious claim, i.e. when the probability of winning is high, a potential plaintiff will not file a lawsuit if the litigation costs outweigh the expected benefits of trial. In such circumstances, substantial public, as well as private gains could be attained by increasing access to justice. By creating negative value suits, litigation costs undermine the deterrent effect of tort law. Surely, if tortfeasors can prevent certain accidents at low costs, the absence of a reasonable expectation of facing a lawsuit is problematic (Dari-Mattiacci & Parisi, 2005).

This Article advances a proposal that would substantially increase access to justice. The proposal has two components. First, under the proposed system a plaintiff is allowed to choose a damage multiplier, which determines the amount of damages he or she receives if their case is won.[3] Second, courts randomly select cases for trial with a probability inverse to the multiplier selected by the plaintiff. In essence, this proposal introduces a flexible damage multiplier which inversely affects the probability of adjudication.

The advantages of the proposal are threefold. First, by reducing the costs of litigation relative to the gains, a multiplier increases access to justice for some individuals that would otherwise not pursue claims with substantial merit. Consequently, the deterrent function of the legal system will be improved. Second, our proposal will reach these objectives without inducing excessive precautions. Because the random element of adjudication is set off against the increased damages of the multiplier, the expected loss of a

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[1] See, e.g., Galanter, 1983;Barnes, 1993.

[2] There may be an inadequate amount of lawsuits because plaintiffs do not adequately take into account the positive effects of their lawsuits on the deterrent function of the tort system. This problem will be acute when the social benefits of a lawsuit outweigh the private gains of the plaintiff (Shavell, 1982).

[3] The proposal can be applied to civil actions where damages are sought.

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suit remains more or less equal for the defendant in our proposal.[4] Third, the system operates without any need for information on behalf of the government regarding litigants' trial costs. Under the proposal, a plaintiff simply chooses a multiplier in function of his or her own trial costs.

We proceed as follows. Part 2 describes the proposal and outlines the main effects. Part 3 contains a formal exposition of our proposal. Part 4 discusses a number of possible objections to our proposal. Part 5 provides some possible modifications to the proposal. Part 6 concludes.

2   Proposal

A simple numerical example demonstrates the effect of our proposal. Suppose there are three groups of victims seeking compensatory damages for accident losses. Victims in Group 1 face trial costs of $50, victims in Group 2 will incur trial costs of $100, and finally, victims in Group 3 will be met with $300 in trial costs. The following assumptions apply to each group: (1) Each victim has suffered a compensable harm of $100, (2) there is a 70% probability of obtaining compensation at trial (assume further that the plaintiff and defendant share this estimate), (3) the trial costs of the defendant are $50, and finally (4) each party bears their own trial costs, as is the case under the American rule. Accordingly, victims in Group 1 will be willing to go to court: the expected value of trial is positive (0.7x$100 - $50 = $20). Victims in Group 2 will not go to trial: the expected value of litigation is negative (0.7x$100 - $100 = -$30). Likewise, victims in Group 3 will not go to trial under the current system (0.7x$100 - $300 = - $230). Although victims in all three groups have a rather meritorious claim (70% chance of victory), only those in Group 1 have a credible threat of suit. As a result, only victims in Group 1 are likely to receive a settlement offer.

Under our proposal, victims in all three groups have a credible threat to sue. Our proposal operates as follows: first, a plaintiff is allowed to choose a damage multiplier which determines the amount of damages he or she receives in the event that the trial is won. For example, if the victim chooses a multiplier of 3, he or she will not receive $100, but rather $300.

[4] This stands in contrast to systems of "pure multipliers" (without a random element of adjudication). Under a pure multiplier system, there is a risk that the multiplier will be set either too low (leading to inadequate precautions) or too high (leading to excessive precautions). A multiplier that brings about first-best deterrence must be chosen by striking a balance between the supply of lawsuits and the need to internalize costs. See Hylton & Miceli, 2005.

Second, a victim is only allowed to bring the case to trial with a probability that equals the (multiplicative) inverse of the selected multiplier. In our example, the victim will have a 33.3% (1/3) chance that the case will be allowed to proceed. Thus, there is a probability of 66.6% that the case will not be selected for adjudication. If we return to the example above, we see that the victims in Group 2 will be offered a positive settlement amount under our proposal if they select a multiplier of 3. Note that the settlement amount approximates the expected judgment ($70). The expected value of trial for a victim in Group 2 thus increases from -$30 to $36.67 (1/3x(0.7x$300 - 100)). In this instance, there is a probability of 1/3 that the victim will be allowed to try their case in court. The victim has a 70% chance of obtaining $300 (3x100) while incurring trial costs of $100. However, with a probability of 2/3, the plaintiff will not be allowed to pursue his claim before the courts. In that event of course, the plaintiff is left empty-handed. Meanwhile, the defendant's expected losses under our system amount to $86.67 (1/3x(0.7x$300 + $50)) when faced with a victim belonging to Group 2. If the parties divide the settlement surplus equally, the victim will receive a settlement of $61.67. Clearly, victims in Group 3 are not aided much by a multiplier of 3. The expected value of the case remains negative (since 0.7x300 - 300 < 0). But if this type of victim selects a multiplier of 5, this suit too will obtain a positive expected value (since 0.7x500 - 300 > 0).[5] It is obvious that any plaintiff, regardless of the amount of trial costs faced, can select a multiplier that would allow the suit to obtain a positive expected value. Note that the government does not need to obtain any information about plaintiffs' trial costs to allow the system to operate.

   The intuitive explanation is as follows: the expected benefits for the plaintiff remain the same irrespective of the magnitude of the damage multiplier they choose. The combination of the selected multiplier and the inverse probability of trial (being allowed) has a canceling effect. In the example above, if the plaintiff selects a multiplier of 3, the expected benefit equals $70 (1/3 x 0.7 x $300). If the plaintiff selects a multiplier of 5, the expected benefit still remains $70 (1/5 x 0.7 x $500). While the expected benefits remain the same, the expected costs of litigation decrease when the selected damage multiplier is relatively higher. A high multiplier reduces the probability that the case will be allowed to proceed and that trial costs will be incurred. In the absence of a damage multiplier, the expected cost of litigation equals $100 for a plaintiff in Group 2. With a damage multiplier of 3, litigation costs must be adjusted by the 33.3% probability that the trial will occur, therefore reducing the (expected) costs to $33.33 (100/3). If the

[5] In fact, the suit attains positive expected value (PEV) as soon as the multiplier exceeds 30/7.

plaintiff had selected a multiplier of 10, the expected costs would further be reduced to $10 (100/10). In summary, the combination of a damage multiplier and an inversely related probability of adjudication does not affect the benefits of litigation, yet it certainly decreases the costs thereof. Thus, the overall effect is an increase of the expected value of the plaintiff's claim. A larger multiplier leads to a larger expected value of trial because expected trial costs are lowered. This proposal thus enables a victim to file a legitimate lawsuit that would have typically gone un-filed due to the prohibitive costs relative to the potential gains.

At first glance, one may fear that this system will be so detrimental to potential tortfeasors that they will be induced to take excessive precautionary measures. Indeed, injurers may ultimately pay an amount far greater the value of the actual harm done. However, this argument fails to recognize that victims (are allowed to) litigate only with a probability that is inversely related to the damage multiplier. For example, even if a plaintiff in Group 3 would select a multiplier of 5, the expected loss for the defendant "only" equals $80 (1/5 x (0.7 x 500 + 50)). If the plaintiff had a PEV claim to begin with, then the expected loss of the defendant would have been larger: 0.7x100 + 50 = $120. Also, note that most parties will settle prior to the selection of a multiplier.

How will the current proposal alter the behavior of litigants? First, by selecting a multiplier, a plaintiff creates a credible threat of initiating a lawsuit. For this reason, many defendants will be inclined to settle as soon as a multiplier is selected by the plaintiff. In fact, the simple availability of a multiplier in general may be sufficient to induce settlement offers. A risk neutral plaintiff will likely select the lowest possible multiplier that is still capable of sufficiently creating a credible threat of litigation to the defendant. The multiplier, as selected by the plaintiff, will be affected also by potential optimism regarding the relative trial costs of the parties. As the formal exposition in Part 3 demonstrates, a risk neutral plaintiff will often select the highest possible multiplier. This offers two benefits to the plaintiff. First, because the expected costs are minimized with a maximum multiplier, the plaintiff's expected value is maximized in the event that the case goes to trial. Second, a high multiplier may maximize a defendant's settlement offer if the plaintiff's trial costs exceed those of the defendant. This is because a high multiplier works in favor of the party with the highest relative litigation costs.[6] The larger the multiplier, the more the

[6] Consider the following numerical example where the trial costs of the plaintiff are lower than those of the defendant. Assume a dispute where $100 is at stake and both parties believe that there is an 80 percent probability that the plaintiff will win the case at trial. Imagine further that the plaintiff's costs of litigation ($90) are lower than the defendant's ($150). The plaintiff's claim has a negative expected value (0.8x$100-$90=-$10). If (as we assume for the sake of simplicity) the plaintiff

difference between parties' expected trial costs is reduced. In reality, plaintiffs may seldom ask for large multipliers due to risk averseness. A risk averse plaintiff, who prefers certain outcomes over uncertain events (even if the expected benefits are identical), will be sensitive to the probability of not being selected for trial. For this reason, a risk averse plaintiff will generally prefer lower multipliers.

Our proposal shares common ground with a recent article by Rosenberg and Shavell that introduces a system of random adjudication (50 percent) with double damages (2005). Although our proposal shares with that of Rosenberg and Shavell the fundamental idea of introducing a random element to adjudication, [8] our proposal is fundamentally different in terms of application and implementation. First, our focus is not on reducing the amount of litigation. Instead, we hope to increase access to justice in general. Second, we aim to improve the deterrent function of the tort system by bringing to life so-called negative value suits that have merit but are currently not filed because of litigation costs. Instead, the proposal by Rosenberg and Shavell exclusively targets cases that would be filed regardless. [9] Third, our proposal introduces a multiplier selected by the plaintiff rather than a system of double damages with conditional adjudication. In our view, it is sensible to allow plaintiffs to select the multiplier themselves because the government generally has less information on litigation expenditures of potential plaintiffs in any given dispute.[10]

is faced with a choice between a multiplier of 2 or 3, he or she will select the lower multiplier. If the parties agree to divide the surplus from bargaining equally, a multiplier of 2 creates an expected settlement of $95 (the expected value of the plaintiff is $80-$45=$35, the expected cost of the claim for the defendant is -$80-75=-$155). With a multiplier of 3, the expected value of settlement falls to $90 (the expected value of the plaintiff is $80-30=$50, the expected loss of the claim to the defendant is -$80-50=-$130). An inverse multiplier of 1/3 has a relatively greater impact in reducing the defendant's litigation costs and, in the process, reduces the settlement offer the plaintiff can hope to receive.

[7] Rosenberg & Shavell, 2005 (proposing a system of random adjudication with double damages).

[8] Both proposals adapt to the context of litigation fundamental law enforcement policy insights. See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169, 183-82 (1968) (explaining the fundamental trade-off in enforcement policy between the levels of certainty and severity of sanctions). See also James D. Miller, Using Lotteries to Expand the Range of Litigation Settlements, 26 J. LEGAL STUD. 69, 69 (1997) (showing that litigants might settle after agreeing to participate in a lottery). Both are cited in Rosenberg & Shavell, 2005, 1722, fn. 2.

[9] We stress that our system could also be of use for positive expected value suits, especially litigation involving relatively high trial costs (see further).

[10] Trial costs may differ substantially from case to case and from plaintiff to plaintiff (e.g. different psychological costs). Note that a system of double damages and a 50

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Similar to the proposal outlined in this article, institutional measures such as fee shifting, class actions, and insurance and subsidies for legal expenses and legal representation address issues of litigation costs and access to justice. While existing instruments rely on subsidies by third parties (from the plaintiffs to the attorney in class action litigation, from the losing litigant in a system with fee-shifting) or public investments in private litigation (subsidies for legal expenses), our proposal does not involve any redistribution from and to and from any third parties.[11]

3   Model

In this Section we present a formal exposition of our proposal.

3.1 Assumptions and Notations

Throughout the analysis we will apply the following symbols:

P_p = the estimation by the plaintiff of the plaintiff's chance of success

P_d = the estimation by the defendant of the plaintiff's chance of success

J = the damage award

C_p = the trial costs of the plaintiff

C_d = the trial costs of the defendant

M = the multiplier chosen by the plaintiff

We adopt the following (initial) assumptions. Both parties are risk neutral, filing and settling lawsuits is costless (but there are costs to litigate a claim), parties know each other's estimation of the plaintiff's probability of success at trial [12] (and there is no asymmetric information on other aspects as well), the litigation expenditures of the parties are fixed, and both parties pay their own trial costs. If the parties settle, they divide the surplus equally (this is the Nash bargaining solution). Some of these assumptions will be relaxed further on in the model.

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percent chance of adjudication may promote some, but not all negative expected value suits with merit.

[11] A further comparison of our proposal with existing measures that address access to justice (fee shifting, contingency fees, litigation insurance, etc.) is beyond the scope of the current project. Also, we do not engage in a broad cost-benefit analysis of our proposal. Instead, our analysis is focused on the impact of the proposal on legal claims that have negative value due to litigation costs.

[12] More precisely, the estimations are common knowledge.

Let us first describe how our proposal fits within the chronology of legal disputes. Currently, without applying the proposal, a plaintiff either files suit or not. After a claim has been filed, the parties will either settle or go to trial. If the parties go to trial and the plaintiff wins the case, the plaintiff obtains a damage award. Likewise, in our proposal, a plaintiff can, again, elect to either file suit or not. However, under our proposal, if the suit is filed and the parties do not settle, the plaintiff can select a multiplier. A lottery system then determines whether the plaintiff is allowed to litigate their claim. [13] If the case is not chosen to proceed, the legal dispute comes to an end. If the plaintiff may proceed, the parties are thus given another chance to settle the claim. Otherwise, the plaintiff may go to trial. If the parties go to trial and the plaintiff prevails, the plaintiff obtains a damage award multiplied by the selected multiplier.

3.2   The Selection of the Damage Multiplier by the Plaintiff

Without our proposal, a plaintiff cannot credibly threaten to go to trial if $C_p > P_p.J$. No settlement offer settlement offer by the defendant will be forthcoming. Under our proposal, a plaintiff can select a multiplier M. Accordingly, the plaintiff has a probability of 1/M that their claim will be allowed to go to court. If randomly selected for trial, the expected value of the claim will equal $P_p.M.J - C_p$ and the expected losses of the defendant will equal $P_d.M.J + C_d$. After the plaintiff chooses a certain M and is allowed to proceed, the parties will settle if, and only if, $P_d.M.J + C_d \geq P_{.pM}.J - Cp$. This equation can be rewritten as follows: $C_p + C_d \geq (P_p - P_d).M.J$. In case of a settlement, the likely amount will consist of $P_p.M.J - C_p + \frac{1}{2}.(P_d.M.J + C_d - P_p.M.J + C_p)$.[14]

Let us examine the gains the plaintiff expects for any given multiplier M. If the parties go to trial, the expected value of the plaintiff who chooses a certain M equals: $1/M.(P_p.M.J - C_p) + (1-1/M).0 = P_p.J - C_p/M$. If the plaintiff chooses an M which is likely to induce a settlement, the plaintiff will expect to obtain $1/M.(P_p.M.J - C_p + \frac{1}{2}.(P_d.M.J + C_d - P_p.M.J + C_p) + (1-1/M).0 = P_{.p}J + \frac{1}{2}.(P_d.J - P_p.J + (C_d - C_p)/M)$. We need to distinguish between the following conditions:

[13] The random selection of cases for trial may be perceived as arbitrarily reducing access to justice to some plaintiffs. However, the beneficial effects of the proposal are assured by the fact that many defendants will settle claims in light of the possibility that a multiplier will be selected by the plaintiff. Also, it is important to consider that the merits of the proposal must be evaluated against the current situation where negative value suits are neither filed nor settled. For a discussion, see Part 4 below.

[14] This is the Nash bargaining solution.

Condition 1: If $P_p \leq P_d$, the parties will always settle after the plaintiff has chosen a certain M, no matter what M the plaintiff selects. The plaintiff will choose M to maximize:

$$S = P_p \cdot J + \frac{\left(P_d \cdot J - P_p \cdot J + \frac{(C_d - C_p)}{M} \right)}{2}$$

(1)

What multiplier will a risk neutral plaintiff likely select? At the limit, M must be high enough to… in order for the legal claim to reflect a positive expected value. Hence, the minimum multiplier (M_{min}) must satisfy $P_p \cdot M \cdot J - C_p \geq 0$ or $M_{min} = C_p / (P_p \cdot J)$. Whether the plaintiff will ask for a M greater than M_{min} depends on the relative litigation costs of both parties. If the costs of trial are higher for the plaintiff than for the defendant ($C_p > C_d$), the plaintiff will select the highest multiplier possible (M_{max}).[15] A higher multiplier would reduce the difference between the expected trial costs of both parties. Formally, S increases when M increases:

$$\frac{\partial S}{\partial M} = -\frac{(C_d - C_p)}{2 \cdot M^2} > 0, \ \ when \ C_p > C_d$$

(2)

Conversely, if the defendant's litigation costs exceed those of the plaintiff ($C_d \geq C_p$), the plaintiff will select M_{min}. That is because any further increase of M, benefits the defendant more than the plaintiff.[16]   Formally, S decreases or remains the same if M increases:

$$\frac{\partial S}{\partial M} = -\frac{(C_d - C_p)}{2 \cdot M^2} \leq 0, \ \ when \ C_p \geq C_d$$

(3)

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[15] M_{max} could be imposed by law (see further). If not, a risk neutral plaintiff would choose an infinitely high M.

[16] Actually, when $C_p = C_d$, the plaintiff will be indifferent.

Condition 2: If $P_p > P_d$, the decision to settle depends on the choice of M.

If the plaintiff chooses an $M > (C_p+C_d)/(P_p-P_d).J$, the parties will proceed to trial. In that case, the plaintiff needs to maximize $P_p.J - C_p/M$. The plaintiff will select an M that is as high as possible (M_{max}) and will expect to gain $P_p.J - C_p/M_{max}$. If the plaintiff selects an $M \leq (C_p+C_d)/(P_p-P_d).J$, the parties will settle. If $C_p>C_d$, the plaintiff will select a maximum M, equaling $(C_p+C_d)/(P_p-Pd).J$ [17]. We denote this maximum as $M_{max'}$. The plaintiff thus expects to gain $P_p.J - C_p/M_{max'}$. [18] When $C_p \leq C_d$, the plaintiff selects M_{min}. The plaintiffs expects to gain $\frac{1}{2}.(P_d.J + C_d/M_{min})$. [19] We now must distinguish between two sub-conditions:

Condition 2.A. If $C_p>C_d$, the plaintiff balances $P_p.J - C_p/M_{max}$ against $P_p.J - C_p/M_{max'}$. The plaintiff will choose M_{max} and the parties will go to trial when $M_{max} > M_{max'}$. When $M_{max}> M_{max}$, the plaintiff will select M_{max} and the parties will settle.

Condition 2.B. If $C_p \leq C_d$, the plaintiff balances $P_p.J - C_p/M_{max}$ with $\frac{1}{2}.(P_d.J + C_d/M_{min})$. Since $M_{min} = C_p/P_p.J$, the plaintiff will ask for M_{min} and the parties will settle when $(P_p- \frac{1}{2}.P_d).J \leq C_p/M_{max}$ $(C_d/C_p).P_p.J$. Since $C_d \geq C_p$, this is always true. In other words, when $C_p \leq C_d$, the plaintiff will select M_{min} and the parties settle.

3.3. Risk aversion and endogenous trial expenditures

A risk-averse plaintiff will be particularly sensitive to the chance of not being selected for trial. The sensitivity to this probability will obviously induce the selection of a lower M. A risk-averse plaintiff is thus unlikely to select M_{max}. As the plaintiff's risk aversion increases, the optimal multiplier for a risk-averse plaintiff will be closer to the minimum multiplier M_{min}. More formally, the plaintiff will increase M as long as the marginal benefits

[17] Since we consider the case $M \leq (C_p+C_d)(P_p-P_d).J$.
[18] When the plaintiff chooses $M_{max'}$, the expected value of the plaintiff equals the expected loss of the defendant, since for any $M \leq M_{max'}$ the parties settle and for any $M > M_{max'}$ the parties litigate. Consequently, the settlement surplus is equal to zero at $M_{max'}$.
[19] When the plaintiff chooses M_{min}, his expected value of trial is zero (by definition of M_{min}).

from an increase (larger settlement amount or larger expected value of trial) outweigh the marginal costs of risk. [20] [21]

A multiplier increases the stakes of litigation. As such, it can be expected that the expenditures on cases selected for trial will increase accordingly. Plaintiffs have a greater incentive to win and will spend more time and resources to obtain (multiplied) damages. Likewise, defendants will have an increased incentive not to lose the case. If the plaintiff increases his or her trial expenditures in proportion to the increased stakes (from C_p to $M.C_p$), the lawsuit retains its negative expected value. After selecting M and receiving permission to proceed, the expected value of the plaintiff will remain negative:[22]

$$P_p.M.J - M.C_p = M. (P_p.J - C_p) < 0 \qquad (4)$$

Although expenditures are likely to rise, this increase will generally be lower than the increase of the stakes. This follows from the assumption that parties will make the most worthwhile legal investments. In other words, the marginal return of the investment decreases as a party makes additional investments. Empirical research has confirmed that the expenditures of the parties do not rise as rapidly as the amount awarded in trial or settlement.[23]

4   Potential Objections

(1) The proposal is unfair to a plaintiff. One may well argue that the proposed system is unfair because not all plaintiffs are treated equally as some claims are admitted to trial and others are not. A few responses are in order. First, plaintiffs with identical trial costs are treated equally if they select the same multiplier. All plaintiffs have the same probability of selection for trial. Some litigants will be lucky, others will not be so fortunate. Second, most cases will settle before the plaintiff has filed suit and has selected a multiplier. Risk aversion among parties will induce many settlements prior to the official filing stage. Hence, random selection occurs only with regard to plaintiffs that have

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[20] Note that risk aversion may increase the settlement frequency for two reasons. First, the costs of risk may widen the settlement range. Second, risk aversion induces lower multipliers and thus decreases the amounts at stake. Smaller amounts at stake reduce the chance that relative optimism will cause litigation.

[21] For the influence of risk aversion on the defendant, see further.

[22] For the sake of simplicity, we hold P_p constant.

[23] See Kakalik, J.S. et al, 1984.

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not settled prior to the filing stage. Third, even if some plaintiffs are left empty-handed under the proposed system, plaintiffs with negative expected value suits often receive nothing under the current system. From this viewpoint, the proposed system enhances fairness.

Finally, the legal system generally treats individuals with similar characteristics differently for the purpose of cost savings and efficiency. For example, when ten individuals consistently speed on the highway during the course of one year, it is probable that some of the offenders will receive several speeding tickets while others may not receive any tickets at all. The scarcity of resources for monitoring traffic law violations, which also applies to the broader range of law enforcement activities, necessitates a certain element of randomness (Rosenberg & Shavell, 2005).

(2) The proposal is unfair to a defendant. The random element of adjudication also impacts defendants. Defendants will face trial only if the claim of the plaintiff is selected for trial. As a result, some defendants will not have to compensate victims and others will be forced to pay disproportionately high damages in comparison to the harm they caused. This may be regarded as unfair. However, the same remarks made above apply with equal force here. Most prominently, parties may settle prior to the case being filed. Moreover, it is important to recognize that the proposed system would enhance the deterrent effect of the tort system by creating a credible threat of litigation in disputes where a plaintiff has a strong legal claim.

(3) The proposal adversely affects risk-averse parties. Because the stakes are increased, our proposal imposes additional risks on individuals involved in legal disputes. To the extent that parties are risk averse, these risks must be considered a cost of the system. The plaintiff faces the risk that his case will be eliminated at the filing stage. However, the risk of not being selected is an improvement over the certainty of not receiving compensation, as is quite common in the current approach of negative value suits.[24] For the defendant, the system imposes a potential cost that is the multiple of the actual harm inflicted on the victim. However, this risk can be avoided through settlement. Consider also that with higher degrees of risk aversion among parties, it is more likely that claims will settle prior to filing.[25]

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[24] Of course, even under the current situation there are situations in which a plaintiff with a NEV suit obtains a settlement amount (e.g. when the plaintiff has insurance for legal expenses).

[25] The random element of litigation creates a risk for the plaintiff that the case will be terminated without relief; for the defendant the multiplier imposes an additional risk of damages being increased. See Rosenberg & Shavell, 2005, 1727-28.

(4) The proposal will induce frivolous lawsuits and weak cases. As a potential drawback, our proposed system may attract frivolous lawsuits. Plaintiffs with very weak cases, who would otherwise not undertake any action, might be compelled to select a high multiplier in the hope that their case might randomly be selected for trial. In the advent of this possibility, defendants who are very risk averse might be inclined to make settlement offers. Yet, the attraction of frivolous suits is not necessarily an insurmountable problem. To a large extent, abuse of the system can be avoided by allowing judges to punish plaintiffs who bring frivolous lawsuits with increased sanctions. Aside from frivolous suits, our proposal also makes it easier to file rather weak - but not frivolous - cases. In the following section we suggest some modifications that would reduce the incidence of weak cases.

(5) The proposal will be used for lawsuits with positive expected values. Another point worth considering is that the system might be used by plaintiffs for whom the system is not intended: plaintiffs with claims that have a positive expected value. Obviously also these plaintiffs may benefit from the reduction in expected trial costs created by our proposal. [26] Although some plaintiffs with PEV suits may attempt to use the multiplier, there is reason to believe that this will only occur in a limited set of cases. Interestingly, plaintiffs with high trial costs are especially likely to benefit from our proposal. Only for these plaintiffs may the reduction in expected trial costs outweigh the risk of not being selected for trial. Suppose a plaintiff with trial costs of $800 selects a multiplier of 2. The expected trial costs decrease from $800 to $400. Plaintiffs with low trial costs do not have as much to gain from choosing a multiplier. Suppose that the trial costs of the plaintiff are $200. By selecting a multiplier of 2, the plaintiff gains only $100. Assume further that litigants are risk averse. The increased

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[26] As an example, consider the following situation: A plaintiff has a highly meritorious claim with a probability of trial victory of 90%. The amount at stake is $1,000. The plaintiff's trial costs are $800. The plaintiff has a claim with a positive expected value but the trial costs are close to the expected value of the judgment ($900). Suppose that the defendant's trial costs are only $200. The plaintiff wants a minimum settlement amount of $100 ($900-$800), while the maximum settlement amount acceptable to the defendant is $1,100 ($900+$200). If the parties divide the settlement surplus equally, they will settle for an amount of $600. Although the plaintiff does not need a multiplier to obtain a positive settlement offer, he or she will select this option, especially if the plaintiff is not too risk averse. Suppose for simplicity purposes that a risk neutral plaintiff selects a multiplier of 2. The expected value becomes $500 (1/2x(0.9x2,000-800)). Now the expected losses of the defendant are $1000 (1/2x(0.9x2,000+200)). The parties will settle for $750 instead of $600.

risk of not being allowed to go to court is worth taking mostly then by plaintiffs with high trial costs.[27]

(6) The proposal will increase trial expenditures. As the stakes increase, expenditures will rise for those cases that are selected for trial. Plaintiffs will now have a greater incentive to win and will therefore spend more time and resources to obtain (multiplied) damages. Likewise, defendants will have an increased incentive not to lose. However, it should be recognized that, first, due to risk aversion, plaintiffs will often select a relatively small multiplier.[28] Second, cases with a high multiplier have a low chance of being selected for trial. Consequently, trial expenditures will seldom be incurred in these cases.

(7) The proposal will increase the amount of litigation. Obviously, the proposal will increase the amount of litigation.[29] However, it is questionable whether a system of selected multipliers will substantially increase the workload of the judiciary. First of all, a dispute will only be allowed to go to court with a probability of 1/M. When faced with high trial costs relative to the potential damage award, a plaintiff will need to select a large multiplier. Such disputes will rarely make it to trial. Second, the parties will often settle the dispute prior to the selection of a multiplier by the plaintiff; especially if the parties are risk averse. This result occurs because (a) the potential risk widens the settlement range; and (b) risk averse plaintiffs will generally select a modest multiplier. Lower multipliers reduce the amount at stake, inducing additional settlements.[30]

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[27] Notice the difference with the system proposed by Rosenberg and Shavell (2005). Our proposal is of particular use to plaintiffs with high trial costs. Such plaintiffs are more likely to select a multiplier and, consequently, many of these cases will never make it to court. By contrast, in Rosenberg and Shavell's proposal, cases with low and high trial costs are treated the same: all cases have a 50 percent chance of being eliminated.

[28] And the lower the multiplier, the greater the settlement frequency.

[29] However, note that, if the system would also be used for PEV suits, a multiplier can also reduce the amount of litigation. See Rosenberg & Shavell, 2005.

[30] The parties only go to trial when the multiplier is larger than $(C_p+C_d)/(P_p-P_d).J$. The trial costs (C_p+C_d) are by definition relatively larger because the plaintiff's claim has negative expected value.

5 Possible Modifications

In this section we suggest a few modifications of our proposal. These variations address some of the remaining objections to our proposal.

5.1 Limiting the Multiplier

We have discussed how risk neutral plaintiffs will often select the maximum multiplier available. In reality, however, plaintiffs are risk averse usually and may often select a multiplier that is much lower. Nonetheless, some plaintiffs with weak cases may select large multipliers in order to exploit risk aversion on the part of defendants. This could largely be prevented by imposing a cap or ceiling on the size of the multiplier a plaintiff can choose. For example, plaintiffs could be obliged to select a multiplier in a range between 1 and 3. [31] By limiting the multiplier, potential abuses of the system are curbed, while reducing potential trial expenditures for cases that do end up going to trial. However, it should be noted that a restriction on the size of the multiplier will prevent some victims from creating a credible threat of suit.[32]

5.2 Tying the Multiplier to the Merits of the Case

We have seen that the system may attract frivolous suits and that this problem could partially be solved by either increasing the sanctions for frivolous suits or by capping the multiplier to a certain maximum. However, these measures do not prevent the system from attracting weak - though not frivolous - claims.[33] Weak cases could be deterred somewhat by tying the multiplier to the merits of the case. If the court finds the case to be relatively weak from an ex-ante perspective but strong enough for a plaintiff victory, the court could lower the multiplier that the plaintiff selected.[34]

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[31] Additionally, the system could be restricted to claims up to a certain value, e.g. $5000. Alternatively, the maximum multiplier could be linked to the amount at stake: the higher the amount at stake, the lower the maximum multiplier.

[32] Some victims may have such substantial trial costs that the maximum multiplier allowed by law is smaller than the minimum multiplier they need to make their suit have positive expected value.

[33] Note that a maximum multiplier can prevent many, but not all weak cases from being filed.

[34] An analogy exists with fee shifting systems that are conditioned on the margin of victory: in many legal systems with fee shifting, indemnification awards tend to be more generous in cases where the loser's legal or factual position appears weak.

5.3 Restricting the Proposal to Negative Expected Value Suits

If for some reason we wanted the system to be restricted to lawsuits with negative expected value, this could be achieved, in theory, in two ways:

1. Ex ante: If the plaintiff selects a multiplier, the court could immediately estimate whether the claim could be filed without the system (that is, verify whether the expected costs are larger than the expected benefits of the case at trial). If the answer is in the affirmative, the court could then refuse the plaintiff's multiplier. Needless to say, courts (or court officials) will sometimes make errors when performing this task. When courts are assigned such tasks, it is inevitable that a certain number of cases with positive expected values will move through the system, while some negative expected value cases will be denied the use of a multiplier.

2. Ex post: Perhaps more realistically, in the court's final decision, it could refuse to apply the damage multiplier if it feels as though the claim would have been filed in any event, even without the system. This approach creates greater risks for the plaintiff, but it reduces transaction costs relative to the ex ante approach.

6 Conclusion

In this paper we propose a new system that may stimulate valuable claims. Our proposal introduces a flexible damage multiplier which inversely affects the probability of adjudication. A plaintiff is allowed to select a damage multiplier while, at the same time, their access to the courts is restricted with a probability equal to the inverse of the damage multiplier he or she selected. While the expected benefits of litigation remain the same under this system; the expected costs drop. This increases the overall expected value of lawsuits.

Our proposal has some disadvantages that can be eliminated to some extent. Most notably, the system may attract frivolous lawsuits and may also advance lawsuits involving weak claims. These disadvantages can be largely avoided by increasing the sanctions for frivolous suits, by introducing a maximum multiplier, and by tying the multiplier to the merits of the case.

Finally, an interesting feature of this system is that it is unlikely to substantially increase the workload of the civil justice system. Our proposal will induce many more settlements than it will generate additional litigation. The system should function to increase deterrence at relatively low cost. We do not propose a wholesale adaptation of this system. To be sure, we recommend implementing this system on a minor scale first. Only after a thorough analysis of the results would a further expansion would be appropriate.

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