United States General Accounting Office

Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, House of Representatives

September 1989

PRODUCT LIABILITY

Verdicts and Case Resolution in Five States

GAO/HRD-89-99

[redacted]

GAO
United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division

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September 29, 1989

The Honorable James J. Florio
Chairman, Subcommittee on Commerce,
Consumer Protection, and Competitiveness
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

In response to your request and later discussions with your office, we have collected information on damages awarded in product liability court cases. In the 1980s, there have been problems concerning the availability and affordability of liability insurance; as an outgrowth of these problems, attention has been focused on the frequency and size of damage awards. This has, in turn, led to a great deal of debate in state legislatures and in the Congress over tort reforms as a remedy.

In this study, we examined such issues as the frequency and size of awards and payments, outcomes of appeals, liability standards on which cases were decided, time and costs of litigation, and the potential effects of federal reform measures. This information was collected for cases that went to verdict in five states in 1983-85.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of its issuance. At that time, we will send copies to interested parties and make copies available to others on request.

Sincerely yours,

Lawrence H. Thompson

Lawrence H. Thompson
Assistant Comptroller General

Executive Summary

Purpose

Concerns about damage awards in product liability cases have received nationwide attention during the last 5 years. Insurers have argued that certain features of the tort liability system were the primary reasons for the mid-1980s "crisis" in the availability and affordability of liability insurance. Along with defendants' groups, insurers called for legislation to curtail perceived problems in award amounts and with the bases on which manufacturers and sellers were held liable. Consumer groups have defended the current tort system and attributed problems with the affordability of liability insurance to economic factors.

Because the Congress has been considering enacting a uniform product liability law, the Chairman of the Subcommittee on Commerce, Consumer Protection, and Competitiveness, House Energy and Commerce Committee, asked that GAO determine whether allegations about the tort system are valid. GAO also considered the potential effects of reform proposals.

Background

Insurers have argued that tort system problems have created too much uncertainty about the basis upon which liability for product-related injuries is determined and the size of damage awards. They claim that jury awards for noneconomic damages (such as pain and suffering) and punitive damages (awarded to punish manufacturers' malicious or reckless conduct) are erratic and often excessive relative to the amount of harm done. They also argue that manufacturers, increasingly, are being held liable regardless of whether the manufacturer could have known about or prevented the product's danger. Further, insurers are concerned about (1) the considerable variation in states' laws that apply to product liability and (2) the large amounts of cost and time required to resolve claims through the court system.

GAO reviewed court records of all product liability cases (305) resolved through trials in 1983-85 in five states—Arizona, Massachusetts, Missouri, North Dakota, and South Carolina. GAO also surveyed attorneys in the cases to gather information on posttrial activities and payments as well as attorneys' fees and expenses. Although GAO's findings cannot be generalized to other states, GAO reports the results of studies in other jurisdictions to give a more complete picture of the litigation of product liability cases.

Results in Brief

GAO found that in general damage awards were not erratic or excessive. GAO's study of cases in five states and data from previous studies show

that the size of compensatory awards (which include both economic and noneconomic damages) is strongly associated with injury severity and the amount of the underlying economic loss. Previous studies have also shown that the total amount awarded is frequently insufficient to cover just the economic losses when these losses are large. Some states have enacted caps to limit the size of punitive damages awards, but few punitive damage awards in the cases GAO studied would have exceeded these caps had they been applicable. (See pp. 26-29.)

When used, appeals and posttrial settlement negotiations serve to reduce the size of most extremely large awards and eliminate many of the unjustified punitive damage awards (see pp. 39-43). These processes are not used to the same extent in all states, however, and their use adds to the time and money required to resolve claims (see pp. 43-45, 48-52).

In a majority of the cases GAO studied, liability was determined to result from the defendants' negligence (see p. 30). In some other cases, manufacturers were held liable even though they were not shown to be negligent. In most such cases, however, juries and judges would have been allowed to consider the defendants' ability to have foreseen or prevented the danger in assessing responsibility (see p. 64).

GAO's Analysis

Awards Consistent With Degree of Injury

Plaintiffs were awarded compensatory damages in 45 percent of the cases studied. In these cases, trial courts awarded compensatory damages of $1 million or more only in cases involving death or permanent disability. The average compensatory award was the highest for permanent total disability ($2.1 million), followed by wrongful death ($937,000) and permanent partial disability ($524,000). In contrast, the average award for temporarily disabling injuries was $78,000. Punitive damages were awarded in 23 cases. In these cases, punitive damages were highly correlated (.71) with the compensatory damages. The relatively few large total awards (over $1 million for both types of damages) accounted for 81 percent of all award amounts. (See pp. 24-29.)

Awards Reduced Substantially Posttrial

Appeals and posttrial settlement negotiations resulted in final payments different from the initial verdicts in 30 percent of all cases, and reduced total award amounts by 43 percent. Reductions occurred in 50 percent

of the cases won by plaintiffs and in 71 percent of the cases with awards of $1 million or more. Even though these large awards were often reduced, payments in the relatively few cases with large awards constituted 73 percent of all payments. Payments of compensatory awards ranged from full payment in Arizona and South Carolina to 32 percent of the award in North Dakota. (See pp. 38-45.)

Punitive Damages Frequently Reversed

Appellate courts reversed or remanded for retrial all punitive damage awards on which they ruled. The courts ruled on 12 punitive damage awards: 9 were reversed and 3 were vacated and remanded for retrial. For only 1 of the 9 awards that were reversed, the compensatory damage award was also reversed. (See p. 37.)

Cases Took Years to Process

On average, cases required almost 2-1/2 years to move from filing of a complaint to the beginning of the trial and 12 more days for the trial itself. An appeal added an average of 10 months to the completion of the case. States differed in processing time, with state court cases taking longer than federal court cases. (See pp. 48-51.)

Attorneys' Fees Were a Large Percentage of Total Payments

Plaintiff attorneys are usually paid on a contingency fee basis. Those who were paid a fee received, on the average, 35 percent of their clients' recoveries. A few plaintiff attorneys were paid in excess of $1 million, although the median was $33,000. Over one-third of total payments by defendants were for their own legal fees and expenses. Defendant attorneys, who are usually paid on an hourly basis, received fees ranging from $1,500 to $400,000, with a median of $20,000. Defendant attorneys' fees and expenses in appealed cases were double those in cases not appealed. (See pp. 51-52.)

Defendants' Actions Considered in Majority of Plaintiff Verdicts

In the five states examined, negligence by the defendant was a basis for liability in about two-thirds of verdicts for plaintiffs, a higher rate than had been assumed previously. In 27 percent of cases in which liability was found, strict liability (liability without negligence) was the basis for the award. (See p. 30.)

Most Proposed Reforms Affect a Minority of Cases

Although enhancing uniformity across states, most of the proposed federal reforms would have affected only a minority of cases studied. In only a few cases that involved serious personal injury did the ultimate

payout exceed statutory caps that have been enacted in a few states. Two proposals—to reduce awards by (1) the degree the plaintiff was responsible for the injury and (2) the amount previously paid or to be paid by workers' compensation—would have potentially affected more awards than other reforms. (See pp. 61-64.)

Recommendations

This report includes no recommendations.

Agency Comments

Since no executive branch agency oversees product liability, we did not obtain comments from any agency.

Contents

Figures

Abbreviations

ABA	American Bar Association
GAO	General Accounting Office
ICJ	Institute for Civil Justice, Rand Corporation

Introduction

The recent "crisis" in the cost and availability of commercial liability insurance has led to extensive debate over (1) the size and number of damage awards in product liability court cases and (2) the bases on which these awards are made. In the mid-1980s, a crisis of unprecedented proportion was reported in commercial liability insurance;[1] one of the types of insurance most affected by cost increases and, consequently, availability was product liability. The cost increases were so large (for example, as much as 1,000 percent or more) that some businesses could no longer afford product liability insurance. As a result, according to reports, some aircraft manufacturers stopped producing many types of general aviation aircraft; all U.S. manufacturers of trampolines stopped production; and some pharmaceutical firms stopped research on new drugs. Insurers justified rate increases as being a response to (1) dramatic increases in the number and size of awards and (2) what they perceived to be a movement away from liability based on defendants' actions, which had resulted in insurers' inability to accurately predict their risks.[2]

This report addresses a wide range of issues concerning awards in product liability cases. Specifically, we examined verdicts in these cases to determine (1) the frequency and size of awards, (2) the legal standards on which awards are based, (3) posttrial activities and adjustments to awards, (4) litigation costs, and (5) the potential impact of proposed federal product liability legislation. This study was requested by the Chairman of the Subcommittee on Commerce, Consumer Protection, and Competitiveness, House Committee on Energy and Commerce.

Background

As concern over the insurance crisis mounted, insurers, consumer groups, and others debated its causes. Insurers and other tort reform advocates claimed that large rate increases and limits on coverage had been needed because of a "malfunctioning tort system," which had led to unpredictable claims payments. According to these tort reform advocates, significant problems in the tort system included (1) a large growth in the size of jury awards, (2) a movement away from considerations of

[1]Insurance Information Institute, Insurance Facts: 1985-86 Property-Casualty Fact Book (New York: 1985), p.6.

[2]Robert H. Malott, Member, Product Liability Coordinating Committee, Statement before the Subcommittee on Commerce, Consumer Protection, and Competitiveness: Committee on Energy and Commerce: U.S. House of Representatives (May 5, 1987), Serial no. 100-61, "Product Liability (part I)," pp. 39-55.

intent or negligence toward a de facto no-fault liability system financed entirely by manufacturers, and (3) excessive litigation costs.[3]

Consumer groups claimed that insurance problems were the result, not of a malfunctioning tort system, but of dropping interest rates coupled with insurers' pricing practices. Insurers had priced their products at unrealistically low levels in the early 1980s, said these groups, to bring in investment income when interest rates were high;[4] when interest rates and, consequently, insurers' investment income dropped, insurers had to raise their prices dramatically to cover claims. The insurance industry seemed to concede that insurance prices had to rise to some extent in the mid-1980s because of past pricing practices.[5] Insurers also acknowledged that insurance prices had previously fallen unrealistically. They stood firm in their belief, however, that a malfunctioning tort system had been the primary cause of the crisis.[6]

Recently, GAO has explored numerous issues related to the charges and counter-charges in the controversy over the causes of the crisis (see the list in Related GAO Products at the end of the report). In one report, we reviewed the growth in the number of product liability tort filings, which has also been cited as an indicator of tort system problems.[7]

Growth in Size of Awards

Only a small percentage of product liability cases are resolved through verdicts—most are resolved without a trial.[8] But dramatic growth in the

[3]Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability (Washington, D.C., 1986), p. 2.

[4]National Insurance Consumer Organization, Fact Sheet on the Insurance Crisis (1984-85), p. 1.

[5]Insurance Information Institute, Insurance Facts: 1986-87 Property Casualty Fact Book (New York, 1986), pp. 6-7.

[6]Insurance Facts: 1986-87 Property/Casualty Fact Book, pp. 51-58.

[7]U.S. General Accounting Office, Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned (GAO HRD-88-36BR, Jan. 28, 1988). Other studies also addressed this issue. The 1986 report of the Tort Policy Working Group, for example, had cited an alarming 758 percent increase in product liability tort filings in federal courts during the 11-year period ending in 1985. Additional analysis of the data by GAO, however, indicated that (1) the growth in filings was likely to have been severely overestimated and (2) substantial growth was evident in relation to only a few products, asbestos being the most prominent. A recent study is consistent with GAO's findings: Terence Dungworth, Product Liability and the Business Sector: Litigation Trends in Federal Courts (Santa Monica, Calif., The Rand Corporation, The Institute for Civil Justice, 1988), pp. 25-27. This study also reported that the growth in filings differed significantly across industrial sectors.

[8]"The Assault on Personal Injury Lawsuits: A Study of Reality Versus Myths," Public Citizen (Washington, D.C., Aug. 1986), p. 16.

size of jury awards is frequently cited as a major reason for increases in insurance rates. For product liability cases, the Tort Policy Working Group (a federal interagency task force headed by the Department of Justice) reported that nationwide, the number of verdicts of more than $1 million rose from 9 in 1975 to 86 in 1984.[9] Further, the average (mean) award increased 370 percent (from $394,000 to $1.8 million) over the same 9-year period.[10] In addition, for long-term trends since 1960 in jury awards for selected jurisdictions, available data show substantial increases, but only for extremely large awards.[11] Growth in awards for noneconomic damages and punitive damages have been cited as major contributing factors to increases in award amounts.[12,13]

Consumer groups and others contend that (1) the use of the average is misleading and (2) the data in general overstate the problem for several reasons.[14] First, because average award size is strongly influenced by a few exceedingly large verdicts,[15] consumer advocates argue the median award (midpoint) is a more accurate indicator of trends in award size;[16]

[9]Report of the Tort Policy Working Group, 1986, p. 40.

[10]The average award refers to the average of awards made in verdicts for plaintiffs. The average, therefore, does not include cases in which plaintiffs lose and receive nothing.

[11]From 1960 to 1987, the average award increased 212 percent in Cook County, Illinois, and over 1,000 percent in San Francisco County, controlling for inflation. Mark A. Peterson, Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois (Santa Monica, Calif.: The Rand Corporation, the Institute for Civil Justice, 1987), p. 22; M.G. Shanley and M.A. Peterson, Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties (Santa Monica, Calif.: The Rand Corporation, the Institute for Civil Justice, 1983), p. 26.

[12]Report of the Tort Policy Working Group, 1986, pp. 2 and 35-36.

[13]Punitive damages are awarded to punish a defendant for intentional or flagrant misconduct or to deter others in that party's position from similar conduct. Punitive damages can be extraordinarily large. See Mark Peterson, Syam Sarma, and Michael Shanley, Punitive Damages: Empirical Findings (Santa Monica, Calif.: The Rand Corporation, The Institute for Civil Justice, 1987), p. 15. According to tort reform advocates, these awards often do not reflect the seriousness of the misconduct and are excessive relative to the amount of harm done. See Tort Policy Working Group, An Update on the Liability Crisis (Washington, D.C., Mar. 1987), p. 47.

[14]Our own calculations indicate that when final, rather than preliminary, figures are used and the figures are adjusted for inflation, the reported 370 percent increase in average award drops to 104 percent.

[15]The Institute for Civil Justice has found that in San Francisco and Cook Counties, increases in awards are largely due to increases in a few very large awards. See Peterson, Civil Juries in the 1980s, p. 22.

[16]See, for example, Mark N. Cooper, Trends in Liability Awards: Have Juries Run Wild? (Washington, D.C.: Consumer Federation of America, 1986), pp. 32-34, and "The Assault on Personal Injury Lawsuits," p. 14.

most studies have found smaller increases in the median.[17] Second, consumer groups contend that averages and medians are both misleading because they do not take into consideration instances in which plaintiffs lose and receive nothing.[18] Third, since awards are frequently reduced after the initial verdict, the extent to which awards represent actual payments made by insurers is questionable.[19]

Consumer groups have also contended that growth in award size does not reflect growth in noneconomic damages but, rather, skyrocketing medical care costs, a result in part of medical advances. Because these advances have enabled more severely injured victims to survive their injuries, the victims require expensive rehabilitative services as they recover.[20]

The extent to which punitive damage awards contributed to the growth in award size has also been questioned.[21] On the basis of data from two studies of punitive damages, such awards appear to be infrequent in product liability cases. For example, the Institute for Civil Justice (ICJ) reported that during the 25-year period ending in 1984, punitive damages were awarded in only two product liability cases in Cook County (out of 334 cases with awards) and four in San Francisco (out of 226 cases with awards).[22] A study of 32 counties in 10 states found that punitive damages were awarded infrequently in product liability cases. When awarded, however, they tended to be large.[23]

Changes in Tort Liability

The tort system's primary functions are to deter wrongdoing and to compensate victims. According to tort reform advocates, the courts have

[17]Civil Juries in the 1980s. In 1960-84, in Cook County, for example, while the average award increased 212 percent, the median increased 82 percent. In San Francisco, the median award increased substantially (641 percent), but still less than the 1,061 percent increase in the average award.

[18]See, for example, "The Assault on Personal Injury Lawsuits," p. 2.

[19]See, for example, "The Assault on Personal Injury Lawsuits," p. 15.

[20]"The Assault on Personal Injury Lawsuits," pp. 15-16, and Trends in Liability Awards: Have Juries Run Wild?, pp. 16-18. Increases in the loss of income resulting from disabling injuries, growth in real income, and increases in medical care costs are among other factors cited as contributing to the growth in award size.

[21]See, for example, "The Assault on Personal Injury Lawsuits," pp. 30-31.

[22]Peterson, Sarma, and Shanley, Punitive Damages: Empirical Findings, pp. 12-15. For all civil jury trials, ICJ found significant increases in the number of punitive damage awards.

[23]Stephen Daniels, "Punitive Damages: the Real Story," ABA Journal (Aug. 1, 1986), pp. 60-63.

deemphasized the goal of deterrence in favor of compensating victims, regardless of whether the defendants caused the injury or did something wrong.[24] Tort reform advocates argue that plaintiffs and juries see manufacturers as deep pockets, who can afford to compensate for damages whether or not wrongdoing was committed in a product's manufacture, design, or marketing. These advocates also point out that because product liability law has evolved largely through case law set by court decisions instead of by legislation, any changes in the law are applied retroactively—that is, the defendants are held responsible under standards that did not exist at the time the case was filed.[25] Insurers and manufacturers complain that these recent trends in the law have made the bases for liability unpredictable and created considerable uncertainty concerning the risks of insuring and manufacturing products.[26]

The Tort Policy Working Group cited the standard of strict liability and the doctrine of joint and several liability as examples of the courts' moving away from deterrence and consideration of wrongdoing toward a de facto no-fault compensation system, financed by defendants.[27] Traditionally, a defendant's liability has been based on the standard of negligence—whether the defendant had failed to act with reasonable care. In recent years, strict liability has been used increasingly as a basis for liability in product liability cases. Under strict liability, a defendant is liable if the plaintiff proves the product (1) was dangerously defective at the time it left the defendant and (2) caused an injury, regardless of whether the defendant had been negligent.[28]

Under joint and several liability, each defendant is liable for all plaintiff's damages. The plaintiff cannot collect more than the total amount

[24]See, for example, Report of the Tort Policy Working Group, 1987, pp. 30-35; Robert L. Habush, President, Association of Trial Lawyers of America, Statement before the Subcommittee on Commerce, Consumer Protection, and Competitiveness; Committee on Energy and Commerce; U.S. House of Representatives (May 5, 1987), Serial no. 100-61, p. 118.

[25]For example, a state appellate court recently held, for the first time, that all escalators are "unreasonably dangerous per se," regardless of their benefits to society or of a manufacturer's ability to remove their risks. See Brown v. Sears, 503 So.2d 1122 (La. App. 1987); modified, 514 So.2d 439 (La. 1987); rehearing denied, 516 So.2d 1154 (La. 1988). Prior to this case, no court had ruled that escalators were unreasonably dangerous per se.

[26]According to one source, consumer advocates believe that eliminating unpredictability completely would dissipate the deterrent effect of the law and make product defects just another cost of doing business.

[27]Report of the Tort Policy Working Group (1986), pp. 30-35.

[28]See American Law Institute, Restatement of the Law, Torts, Second, sec. 402A (St. Paul: American Law Institute Publishers, 1965), ch. 14, p. 347.

of damages awarded, but may collect all damages from any defendant(s) found liable. This protects plaintiffs from receiving less than the full amount of damages when one defendant lacks resources or is relatively inaccessible. Defendants who believe they have paid more than their fair share of the damages must independently sue other defendants for contributions. According to tort reform advocates, under this doctrine, those defendants seen as deep pockets end up paying more than their proportional share of liability.[29]

Many legal scholars have documented a movement by the courts toward the use of strict liability.[30] Some of these scholars and defendant groups have objected that under strict liability, defendants are liable regardless of their ability to have foreseen or prevented unsafe aspects of products.[31] Other legal scholars have noted that for cases in which the plaintiff alleges the product carried an inadequate warning, a hybrid form of strict liability and negligence is evolving such that a defendant's ability to have known about the defect is considered.[32] Still other scholars believe that because manufacturers make profits from the products they sell, manufacturers are in the best position to cover damages resulting from unreasonably dangerous defects, regardless of whether they could have known about the defects.[33]

Tort Reform Movement

The tort reform movement began as liability insurance became less available and affordable. Interest grew in reforms to alter the rules by which claims could be brought and decided in court. With few exceptions, the reforms advocated would make it more difficult for plaintiffs

[29]See, for example, Report of the Tort Policy Working Group (1986), p. 33.

[30]See, for example, George L. Priest, "Product Liability Law and the Accident Rate," in R.E. Litan and C. Winston (eds.), Liability: Perspectives and Policy (Washington, D.C.: The Brookings Institution, 1988), pp. 194-200, and Peter W. Huber, Liability: The Legal Revolution and Its Consequences (New York: Basic Books, Inc., 1988), pp. 36-39.

[31]See, for example, American Tort Reform Association, Legislative Resource Book for Tort Reform, (Washington, D.C.: American Tort Reform Association, 1986), p. C-1, and A.D. Twerski, "A Moderate and Restrained Product Liability Bill: Targeting the Crises Areas for Resolution, University of Michigan Journal of Law Reform, Vol. 18 (1985), pp. 589-99.

[32]Henry Cohen, Tort Law Reform: Pros and Cons of Recommendations of the Tort Policy Working Group (Washington, D.C.: Congressional Research Service, 1986), p. CRS-7. In most states, under strict liability, defendants are not liable for failing to adequately warn if they could not have foreseen and warned the plaintiff about the product defect.

[33]See, for example, Jerry J. Phillips, University of Tennessee Law School, Statement before the Subcommittee on Commerce, Consumer Protection, and Competitiveness; Committee on Energy and Commerce; U.S. House of Representatives (Aug. 6, 1987), Serial no. 100-102, "Product Liability (part II)," pp. 312-13.

to win in court and would limit award amounts. Since state legislatures and state courts establish almost all tort law, the reform movement has been active primarily at the state level.

In the 1970s, concern over the escalating costs of medical malpractice insurance resulted in the adoption of tort reforms, which affected malpractice cases in many states. In the 1980s, medical malpractice was again the subject of a tort reform movement at the state level. This time, however, reforms also focused on product liability.

Each state establishes its own legal standards for product liability cases. Since manufacturers involved in interstate commerce could, potentially, be sued in any state in which their products are sold, the manufacturers contend that they are being held to different standards of liability under the different state laws. In fact, manufacturers complain that the current situation allows plaintiffs to "forum shop" (that is, to file cases in the jurisdiction they deem most likely to favor them).[34] The most effective reform in this situation, manufacturers argue, would be federal law that is applied uniformly across jurisdictions.[35] In addition to calling for a federal law, manufacturers along with other tort reform advocates have continued their efforts to pass reforms at the state level. Numerous states and the federal government have also considered reform measures for product liability in recent years. No reform proposals have been passed by the Congress. As of January 1989, a majority of states had adopted some reforms. These reforms have increased the variation in laws across states (see ch. 5 for a detailed discussion).

Product Liability Process

The potential for a product liability case arises when a person suffers bodily injury or damage to property from a product. In many instances and for a variety of reasons, an injured party may not seek compensation. If the injured party decides to seek compensation, the first step is to file a claim with the potentially liable party (for example, the manufacturer), its insurance company, or both. On the basis of data on claims

[34]Victor E. Schwartz, "State Tort Reform—Helping the System or Creating More Chaos," unpublished report (Washington, D.C.: Crowell and Moring, 1987), p. 13.

[35]See Victor E. Schwartz, Statement before the Subcommittee on Commerce, Consumer Protection, and Competitiveness; Committee on Energy and Commerce; U.S. House of Representatives (May 5, 1987), Serial no. 100-61, "Product Liability (part I)," pp. 57 and 89; and An Update on the Liability Crisis, p. 66.

filed in 1976-77, for about 27 percent of claims, lawsuits were also filed.[36]

Most plaintiffs in product liability cases are the people who were injured. They can be joined in their suits, and often are, by others, such as spouses or parents who may have incurred losses (either economic or noneconomic) as a result of the injuries. Defendants in product liability cases are usually the manufacturers of the product; product sellers are often parties in these cases as well.

Since many defendants in product liability cases do business in more than one state, plaintiffs in a product liability suit often have a choice of states and courts (that is, federal or state court) in which to file their cases.[37] A case can be filed in the state in which the plaintiff resides or, if different, in any state in which a defendant does business. No matter which state the case is filed in, the case may be heard in federal court if (1) all defendants reside in states different from all plaintiffs and (2) there is at least $50,000 claimed in damages.[38]

Depending on the case law or statutes in the state in which the case is filed, plaintiffs can allege that defendants are liable for different reasons. Most prevalent among these reasons are negligence, strict liability, and breach of warranty. Under negligence, defendants are liable if they did not exercise due care and this lack of care caused the injury. Under strict liability, defendants are liable if the product was defective and this defect made the product unreasonably dangerous and caused the injury. There are three types of defects for which defendants can be found strictly liable: (1) a flaw in the product introduced in the manufacturing process (manufacturing defect); (2) a defect in the design of the product (design defect); and (3) a failure to adequately warn of risks or give instructions (warning defect). Under breach of warranty, defendants are liable if the product failed to work as expressly or

[36]Although lawsuits were filed in a minority of claims, these lawsuits accounted for 93 percent of total payments for claims. Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results (Washington, D.C., 1977), p. 95.

[37]Although plaintiffs may have a choice of which court to file their suits in, they cannot choose which states' law will be applied in the suits. A court will usually apply the law of the state with the most significant contact with the case. This is almost always the state where the accident occurred. In addition, a defendant can ask the court to transfer the case to a more convenient court.

[38]Before May 1989, to be heard in federal court, claimed damages had to be at least $10,000.

implicitly warranted or promised. In addition to seeking monetary compensation for economic and noneconomic loss, a plaintiff in many instances also seeks punitive damages.

Plaintiff attorneys are typically paid a contingency fee. If the plaintiff wins at trial or settles out of court with a defendant, the attorney is paid a percentage (usually between 30 and 40 percent) of any money the plaintiff receives from defendants. Otherwise, if the plaintiff loses and fails to reach any settlement, the plaintiff usually pays the attorney nothing, except on rare occasions when the plaintiff and the attorney have entered into a special fee arrangement whereby costs are covered. In contrast, defendant attorneys are normally paid (1) on an hourly basis plus expenses or (2) salaries if the attornies are in-house and, thus, receive payment regardless of case outcome.

At any time following the filing of a suit, the plaintiff and the defendant (the parties) can come to an agreement that resolves the matter without further court action. If a trial ensues, the parties may still settle before a verdict is rendered. Most cases (87 percent) end before a verdict because the parties settle or the plaintiff decides not to proceed with the case. If a settlement is not reached or the case is not dropped, the trial ends with a verdict, which may be rendered by a jury or a judge. A jury verdict can be modified by the trial judge, and any verdict can be appealed. Settlement negotiations can also continue after the verdict and while the appeal is pending. Sometimes an appealed case is remanded for a new trial, in which case the trial process starts again. The entire process can be extremely time-consuming. Cases going to trial may take several years to resolve, and those that are appealed may take even longer. In some states, a plaintiff's award may include an amount for (1) prejudgment interest to make up for the defendant's not paying the award at the time of the loss or (2) postjudgment interest to make up for the defendant's not paying the award at the time the judgment is rendered or both.

Objectives, Scope, and Methodology

Our goal was to provide the requester with information on a wide range of issues concerning the litigation of, and outcomes in, product liability cases. Specifically, our objectives were to determine

- the percentage of cases in which defendants are found liable and the amounts of compensatory and punitive damage awards.
- the extent to which the standards of negligence and strict liability are used to determine liability.

- the incidence of posttrial activities and actual payments made to plaintiffs after verdict,
- the size of awards and payments relative to plaintiffs' economic losses,
- the time and cost of litigation, and
- the possible impact of proposed federal product liability legislation on (1) the outcomes of court cases and (2) the variations in laws across states.

To address these objectives, we gathered data on product liability cases resolved by a judge or a jury trial in federal and state courts in 1983-85. The state courts we studied are ones with general jurisdiction.[39]

Selection of States

We limited our review to five states: Arizona, Massachusetts, Missouri, North Dakota, and South Carolina. Through a telephone survey of the 48 states in the continental United States and the District of Columbia, we found 10 states in which all product liability cases or cases in major metropolitan areas could be identified without manually searching thousands of case files.[40] Our final selection was based on (1) the amount of information available on product liability litigation in the jurisdictions and (2) relative costs associated with obtaining the information. We eliminated two jurisdictions (Illinois and California) because product liability verdicts in those jurisdictions have been reported by ICJ. We excluded three jurisdictions (the states of Colorado, Michigan, and Minnesota) because obtaining case listings would have entailed relatively large expenditures that exceeded our resources.

Although the five states cannot be considered representative of all states, they offer a mix in terms of region of the country, degree of urbanization, numbers of manufacturers and manufacturing employees, and tort laws (see apps. I and IV). We were not able to include any of the large industrial states that reform advocates have identified as "problem" states in the area of product liability. The five states, however, have elements of product liability law, such as strict liability and joint and several liability, which have been pointed to as problems by insurers and other tort reform advocates.

[39]As opposed to courts with special, or limited, jurisdiction, courts with general jurisdiction may hear any type of case.

[40]Few states maintain files on tort cases so as to allow the efficient identification of product liability cases.

Selection of Cases

We limited our review to cases resolved through verdicts because of the (1) difficulty in obtaining information on pretrial settlements and (2) significance of these cases. Although only about 3.5 percent of all product liability claims are resolved by verdicts, these cases can be considered significant because they are (1) bellwethers for settlements that establish amounts plaintiffs could expect to receive for injuries, (2) the focus of recent criticisms concerning the tort system, and (3) the cases for which the effects of tort reforms would be most quantifiable. The reader should keep in mind, however, that these cases are unlikely to be representative of all claims since they are the cases left after settlement negotiations. We, therefore, cannot relate our findings to claims resolved prior to verdicts.

Because criticisms of the tort system have focused on suits brought by individuals (as opposed to suits by corporate entities),[41] we examined cases in which suits were brought by individuals alleging personal injury, wrongful death, or damage to property. We did not examine product liability cases that only involved disputes over contracts or damage to the product itself.

To ensure sufficient numbers of cases for our analyses, we obtained data on cases that went to verdict during a 3-year period. Since appeals can take years to resolve, we estimated that 1985 closed cases were the most recent for which we could reasonably expect all appeals to have been resolved. We treat the 3 years as one period, not three consecutive periods.

In the five states, a total of 305 cases were resolved through a trial verdict during the 3-year period.[42] Slightly more of these cases were tried in state courts (54 percent) than in federal courts. As shown in table I.1, states varied considerably in the relative number of cases tried in the two court systems. The majority of cases (244) involved personal injury.

[41] Insurance Information Institute, Insurance Facts: 1986-87, pp. 51-58.

[42] In 94 cases, a total of 277 related actions were also filed. These actions are called cross-claims, counter-claims, or "third-party" complaints and involve defendants suing other defendants, plaintiffs suing other plaintiffs, defendants suing plaintiffs, and defendants suing parties who were not part of the original suit. About one-third of the cases studied generated a related action, most of which were dismissed by the court. We did not follow all related actions to their conclusions nor do we consider them further in this report.

Much fewer cases involved property damage (37 cases) or wrongful death (31 cases).[43]

Table 1.1: Type of Court in Which Cases Tried by State

	Type of court	
State	**State**	**Federal**
Arizona	56	3
Massachusetts	22	44
Missouri	56	52
North Dakota	13	3
South Carolina	19	37
Total	**166**	**139**

Data Collection

For each case, we collected background information and data on verdicts from court records and, where available, jury verdict reporters.[44] For information on posttrial payments and other data not consistently available from court records, we surveyed attorneys—for both plaintiffs and defendants—involved in the cases. We were able to collect payment data for 77 percent of the cases. The response rates for other information ranged from 35 percent to 80 percent. Appendix I includes a description of the data collection and our strategy for identifying product liability cases. Appendix II includes questionnaires used to survey attorneys. Appendix III includes background information on the cases, as well as descriptions of products, injuries, plaintiffs, defendants, and amounts demanded.

In order to understand the verdicts and judgments in the cases studied and to examine the variability of laws across the five states, we reviewed state statutes and case law relevant to 10 aspects of the law (see app. IV). We reviewed current law (as of 1988) and the law as it existed when the majority of our 305 cases were litigated. For the remaining 45 states, we reviewed aspects of the law (as of 1988) for which summaries of statutes or case law or both already existed (see app. VI). We also reviewed recent federal product liability bills introduced in the Congress.

[43]Five cases involved personal injury and property damage. These cases have been categorized as personal injury cases in our analyses. Two cases involved personal injury and death. These cases have been categorized as wrongful death cases in our analyses.

[44]Reporters are listings or digests of court activities prepared by the U.S. government, state governments, or private organizations, usually for subscription sale.

We were able to collect data to address all our objectives with one exception. In the five states studied, we were unable to determine how awards and payments compared with plaintiffs' economic losses. Court files did not differentiate economic losses from noneconomic losses; an analysis of attorneys' responses showed that plaintiff and defendant attorneys reported inconsistencies that could not be explained. We, therefore, rely on data from other studies to address this objective. It should also be noted that our data do not allow for an assessment of the growth in product liability awards over time in the five states.

Trial Verdicts: Frequency and Size of Awards

Findings

Plaintiffs received verdicts in their favor in 45 percent of cases. Although this rate was generally consistent across jurisdictions, plaintiffs in North Dakota won at a rate greater than this and in Massachusetts at a rate lower than this. In four of the five states, the rate of plaintiff victories was higher for cases heard in state courts than in federal courts.

Awards to plaintiffs (for compensatory and punitive damages together) ranged in size from $255 to $10 million. The average award was $845,000; the median, $157,000. Twenty percent of the awards were for $1 million or more, with such verdicts accounting for 81 percent of the total amount awarded.

The size of compensatory awards varied by type and degree of injury, with the highest awards given for permanent total disability, followed by wrongful death. These differences are generally consistent with the relative economic losses for various injuries.

Punitive damages ranged from $500 to $7 million and were included in almost one-fifth of awards or 9 percent of all cases. These awards were concentrated in three of the five states. The size of punitive damage awards and compensatory damage awards were highly correlated. On average, punitive damages were triple the size of the compensatory damages, although their relative size varied considerably across states.

In 27 percent of the plaintiff victories, the basis for the decisions in favor of the plaintiffs was strict liability, sometimes in combination with breach of warranty. Almost all of the other plaintiff victories were based on negligence, alone or in combination with other theories of liability. Negligence was the predominant basis for liability in four of the five states.

Much of the criticism of the tort system has focused on the frequency and size of awards to plaintiffs. These awards have been described as erratic and excessive relative to plaintiffs' economic losses. Critics have alleged that awards for punitive damages, which are intended to punish outrageous misconduct, are excessive in their frequency and size. The basis for finding defendants liable has been described by reform advocates as too unpredictable, particularly under the standard of strict liability.

In this chapter, we report data on the number and size of awards and the theories on which liability was based. The first section includes data on the number of cases in which liability was awarded and how the incidence of liability varies according to type of court. We next consider the size of awards and how compensatory damage awards relate to injury type and severity. The last sections include data on the incidence and size of punitive damage awards and the theories on which liability was based. Appendix V presents detailed tabular information relating to the summary data discussed in the chapter. This appendix also includes supplemental information on how liability rates and awards varied according to the percentage of urban population, type of injury, and the gender of injured parties.

Frequency of Plaintiff Victories Varies Across States and Type of Court

In 45 percent of all cases, plaintiffs received verdicts in their favor (that is, were awarded damages). This success rate holds for the 14 nonjury trials held by judges and the 291 cases decided by juries. Verdicts in two states,[1] however, depart from this average (see table 2.1). Of the small number of cases (16) decided in North Dakota during the study's time period, 75 percent resulted in verdicts for plaintiffs. In contrast, in Massachusetts, plaintiffs won in 33 percent of cases. Such variation across states is consistent with another study of product liability verdicts rendered in 1980-85.[2]

Table 2.1: Cases Plaintiffs Won by State

		Cases won by plaintiffs	
State	**Total cases**	**Number**	**Percent**
Arizona	59	28	48
Massachusetts	66	22	33
Missouri	108	50	46
North Dakota	16	12	75
South Carolina	56	24	43
Total	**305**	**136**	**45**

[1]Unless otherwise specified, we are referring to cases in both state and federal courts within a state.

[2]S. Daniels and J. Martin, "Jury Verdicts and the 'Crisis' in Civil Justice," The Justice System Journal, Vol. 11:3 (1986), pp. 334-35 (in 43 counties across 10 states, plaintiff victories ranged from 0 percent to 67 percent). Differences in the rate of plaintiff victories could occur for a variety of reasons, including differences in how winnable the cases remaining after settlement negotiations are or the degree to which juries are pro-plaintiff.

The liability rates of cases tried in state and federal courts differed substantially. Overall, 52 percent of state court cases resulted in decisions for the plaintiffs as compared with 37 percent of federal court cases. State and federal courts in all states, except Arizona, showed this pattern (see table V.1). In Arizona, cases decided in federal court had a higher win rate than state court cases. Although only three cases were tried in Arizona's federal court, the different pattern in Arizona suggests that plaintiffs' win rate in each type of court depends on the state, as might have been expected.

Award Size Varies Substantially by State

The total amount of money awarded in the 136 plaintiff verdicts was just under $115 million. Awards ranged in size from $255 to $10 million. The average award was $845,000 and the median, $157,000.

In addition to the average and median awards, we also calculated the expected award. This is the average award multiplied by the proportion of cases in which liability was found and damages awarded. This measure, therefore, reflects the size of awards as well as the probability that the plaintiff will receive an award. Of the three ways of describing the typical award, the expected award is the best indicator of what plaintiffs received on the average across all cases going to verdict. In the five states studied, the expected award was $377,000.

Average, median, and expected awards for all cases mask a substantial difference between two of the five states. As shown in table 2.2, the average and expected awards in Arizona were 4 times as large as those in South Carolina; the median was over 10 times as large. When three extreme awards in Arizona (all over $7 million) are excluded, however, average awards in that state are more comparable with awards in Massachusetts, Missouri, and North Dakota.[3] The average awards in the latter three states are consistent with each other. The large expected awards in North Dakota relative to Massachusetts and Missouri primarily reflect the higher likelihood of winning in North Dakota. South Carolina had lower awards than the other states.

[3]With the three extreme awards excluded, Arizona's average award was $603,000; the median, $325,000; and the expected award, $269,000.

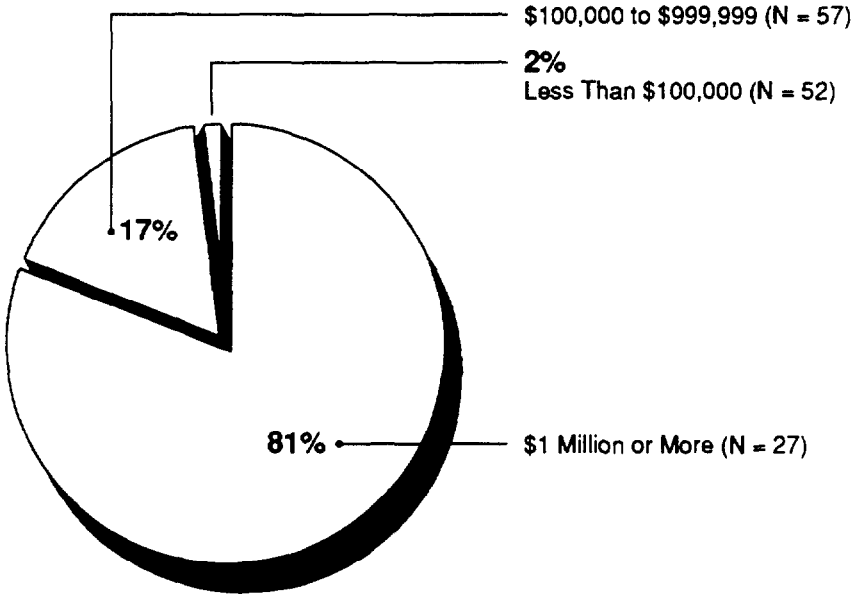
Table 2.2: Damage Awards by State

Dollars in thousands

State	Cases	Average award	Median award	Expected award
Arizona	28	$1,462	$370	$694
Massachusetts	22	709	135	236
Missouri	50	780	225	361
North Dakota	12	880	229	660
South Carolina	24	369	32	158
All cases	136	845	157	377

Consistent with other studies of liability awards,[4] a relatively small number of extremely large awards raised the average and accounted for a majority of total amounts awarded. Across all states, 27 awards (20 percent) were $1 million or more. These awards totaled $93 million and, as shown in figure 2.1, accounted for 81 percent of the total amount awarded.

Figure 2.1: Percentage of Total Amount Awarded by Award Size



[4]Michael G. Shanley and Mark A. Peterson, Posttrial Adjustments to Jury Awards (Santa Monica, Calif.: The Rand Corporation, Institute for Civil Justice, 1987), pp. 30-32.

Size of Compensatory Awards Varies by Type and Severity of Injury

Across all five states, the size of compensatory awards (that is, awards for economic damages and noneconomic damages, such as for pain and suffering) varied by type and severity of injury in a manner consistent with underlying economic loss.[5] Property damage cases had substantially lower compensatory damage awards than personal injury and wrongful death cases. The average compensatory award for the property damage cases studied was $128,000 (see table V.2 for median and expected awards). Property damage cases also had lower alleged damages, as indicated by plaintiffs' demands, than the other two types of cases (see app. III).

For all personal injury cases, the average compensatory award was $672,000. As expected, the average compensatory award was highest for permanent total disability ($2.1 million), followed by permanent partial disability ($524,000) and temporary injuries ($78,000) (see table V.3 for median and expected awards). The average compensatory award for wrongful death cases was $672,000 (see table V.2 for median and expected awards). All 21 compensatory damage awards of $1 million or more in which the severity of injury was specified were cases involving either permanent disability or death.[6]

The pattern of compensatory awards is consistent with a previous study; it found that the more severe and disabling the injury, the higher the associated medical expenses and lost income, as well as the larger the award. ICJ reported that for all tort cases in Cook County, Illinois, severity of the injury (as measured by medical costs) could explain one-half of the differences in award amounts between decisions.[7] Consistent with our findings, ICJ also reported higher awards for permanent total

[5]With only minor departures, these differences in award size by injury type and severity were apparent in all five states. We do not report the averages for each state, however, because the small number of cases in some injury categories makes these averages unreliable.

[6]Examples of personal injury cases that resulted in $1 million or more verdicts are these: a passenger in a car who was rendered quadriplegic after the car crashed because of defective brakes, an operator of an asphalt roller who suffered permanent brain damage and multiple fractures of bones when run over by the roller, and a motorcycle rider who suffered second-degree and third-degree burns over 70 percent of his body when his motorcycle exploded after colliding with a car.

[7]Mark A. Peterson, Compensation of Injuries: Civil Jury Verdicts in Cook County (Santa Monica, Calif.: The Rand Corporation, Institute for Civil Justice, 1984), p. 90.

disability than death.[8] Closed claims studies also report higher average payments as economic loss increases.[9]

The lower average total award for South Carolina is due, at least in part, to a high proportion of cases involving property damage and temporary disability, which have relatively low award amounts. In South Carolina, 58 percent of awards were for property damage and temporary disability. Missouri had the next highest percentage of awards (24 percent) in those two types of injury categories.

We could not estimate the degree to which awards are excessive relative to actual economic losses because data on economic losses were not available. Several previous studies, however, have established that although plaintiffs with small economic losses are overcompensated for their losses, plaintiffs with large economic losses are undercompensated. Although still undercompensated, in recent years plaintiffs with large losses have been more adequately compensated than in the past.[10] Previous studies have found that noneconomic damages, such as for loss of consortium (right of a husband or wife to the other's help and love), can be a substantial percentage (one-third to over one-half) of the total award even when the total compensatory award does not fully compensate for economic losses.[11]

[8]Medical and support service expenses drive up economic losses in permanent total disability cases.

[9]Alliance of American Insurers and American Insurance Association, A Study of Large Product Liability Claims Closed in 1985 (1986), p. 18; Insurance Services Office, Product Liability Closed Claims Study: A Technical Analysis of Survey Results (1977), p. 49.

[10]E.M. King and J.P. Smith, Economic Loss and Compensation in Aviation Accidents (Santa Monica, Calif.: The Rand Corporation, Institute for Civil Justice, 1988), pp. 67-71. Even without subtracting legal fees from compensation, compensation in wrongful death cases, on average, was well below estimates of actual economic losses. Rate of recovery declined from full compensation for losses below $200,000 to compensation of 60 percent for losses of $500,000 to compensation of less than 50 percent for losses of $1 million or more. Also see A Study of Large Product Liability Claims Closed in 1985, p. 18; Product Liability Closed Claim Study, pp. 47 and 49.

[11]See, for example, Economic Loss and Compensation in Aviation Accidents, pp. 89-91. The results of this study also showed that large payments for noneconomic damages are given even when economic losses are not fully covered. Thus, plaintiffs receiving large noneconomic awards are not necessarily receiving a bonus of noneconomic damages in addition to full compensation for economic losses.

Three States Show High Rate of Punitive Damage Awards

In 23 of 55 cases in which compensatory damages were awarded and punitive damages had been sought, juries awarded punitive damages; these awards totalled $28.9 million (or about 25 percent of the total amount awarded).[12] The awards had an extremely wide range, from $500 to $7 million. Their size, however, was highly correlated with the size of compensatory damages. Excluding one extreme case in which compensatory damages far exceeded punitive damages, these punitive damages had a correlation of .71 with compensatory damages. The 23 punitive damage awards had an average just under $1.3 million and a median of $400,000, which are only slightly larger than the average and median compensatory damage awards in those 23 cases (average of $906,000 and median of $375,000).

In three states, the incidence of punitive damage awards was high relative to the incidence in the other two states and in other jurisdictions. Twenty-five percent of awards in Arizona and South Carolina included punitive damages, as did 18 percent in Missouri (see table V.4). In contrast, no punitive damages were awarded in Massachusetts, which only allows punitive damages in wrongful death cases.[13] One case in North Dakota had a punitive damage award. As discussed in chapter 1, ICJ found that punitive damages were awarded in only six product liability cases in Cook County and San Francisco in the 25-year period ending in 1984. Only 2 of 32 jurisdictions in another study showed a rate of punitive damage awards as high as we observed.[14]

The size of punitive damages also varied substantially by state. South Carolina had much smaller punitive damage awards (average of $366,000) than the other three states (average of $1 million or more each; see table V.4). The average ratio of punitive damages to compensatory damages was smaller in South Carolina (1.0) and Arizona (1.8) than in Missouri (5.0). Six of the 23 punitive damage awards (four in Missouri and two in Arizona) exceeded three times the compensatory damages.[15]

[12]Punitive damages were sought in the initial complaints in 108 of the 305 cases.

[13]In Massachusetts, liability was awarded in only three wrongful death cases.

[14]Stephen Daniels, "Punitive Damages: The Real Story," ABA Journal (Aug. 1, 1986), pp. 60-63.

[15]We chose a cap of three times compensatory damages because it is (1) the midpoint of caps used in a previous study and (2) within the range of caps enacted by various states. As of December 1988, of the states with caps that limit punitive damages to a multiple of compensatory damages, Texas had the highest cap: punitive damages may not exceed $200,000 or four times the compensatory damages, whichever is greater. Only 2 of the 23 punitive damage awards in our study were over that cap. Kansas had the highest absolute cap, limiting punitive damages to the defendant's annual gross income or $5 million, whichever is less.

Three of these punitive damage awards were over $1 million. The largest difference in an over $1 million award was in a case with $3.9 million punitive damages, which was 10 times greater than the $390,000 awarded in compensatory damages.

Liability More Often Based on Negligence Than Previously Assumed

The legal standard(s) on which a finding of liability was based, according to verdict information contained in court records, is shown in table 2.3. Previous research has assumed that because strict liability is available, defendants' negligence is not an issue in many product liability cases. In almost two-thirds of the cases for which data were available, however, negligence alone (or in combination with strict liability or breach of warranty or both) was the basis for the plaintiff verdict. Strict liability, which has been evolving in the courts, was the basis for the decision (sometimes in combination with breach of warranty) in only 27 percent of all plaintiff verdicts.

We expected that liability would be based less often on negligence in the four states that allow actions based on strict liability than in Massachusetts, where strict liability per se is not allowed.[16] Contrary to expectations, in two states with strict liability (that is, Arizona and North Dakota), as well as in Massachusetts, liability was based on negligence in at least 80 percent of cases. In South Carolina, negligence was the basis for liability in 56 percent of the cases.[17] Missouri was the only state in which liability was more often (that is, in about 56 percent of cases) based on strict liability than on defendants' negligence.

Table 2.3: Bases of Liability in Cases Won by Plaintiffs

	Cases won by plaintiffs	
Basis of liability	**Number**	**Percent**
Negligence alone or with strict liability or breach of warranty or both	79	66
Strict liability alone or with breach of warranty	33	27
Breach of warranty only	8	7
Total	**120[a]**	**100**

[a]Data on liability standards were not available for 16 cases won by plaintiffs.

[16]Although Massachusetts does not allow plaintiffs to bring cases based on strict liability, its courts have noted that the Massachusetts form of breach of implied warranty offers as complete coverage as strict liability.

[17]In South Carolina, the basis for finding defendants liable was not specified for 6 of the 24 plaintiff verdicts.

Conclusions

For the most part, although the amounts awarded varied widely, verdicts in the five states studied do not appear to be as out of control or erratic as some have implied. Plaintiffs won in fewer than 50 percent of the cases. When awards were made, the size of compensatory damages was associated with type and severity of injury in a manner consistent with what is generally known about the relative economic loss for various injuries. The highest awards were granted for wrongful death and permanent total disability, which have high economic losses relative to temporary or partial disability. Previous studies indicate that although plaintiffs with large losses are more adequately compensated than before, the tort system still undercompensates for large losses.

Awards were based more often on negligence than previous research had indicated. Still, liability was based on strict liability in over one-quarter of the cases.

Consistent with previous research, the incidence and size of punitive damages varied considerably across states. In two states, punitive damage awards were negligible. In contrast, the incidence of such awards in the three other states was high relative to the rate of such awards reported for other jurisdictions. Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases.

Chapter 3

Effects of Posttrial Activities on Payments

Findings

Posttrial activities—such as trial court adjustments, appeals and settlement negotiations—resulted in final outcomes different from the initial verdicts in 30 percent of the cases. Most changes were reductions of plaintiffs' awards.

Appeals were more frequent in cases with large awards or punitive damage awards or both. Litigants appealed 73 percent of awards over $100,000, but only about one-third of smaller awards. All but 5 of the 23 punitive damage awards were appealed. Plaintiff verdicts were more frequently appealed than defendant verdicts. State differences in the rate of appeals were apparent.

Total payments to plaintiffs in all cases were 43 percent less than the amount awarded. The larger total awards and those awards with punitive damages had the largest reductions. States varied considerably in posttrial reductions to compensatory damage awards. Reductions to plaintiff verdicts occurred most often as a result of posttrial settlements.

After posttrial reductions, payments in cases with awards of $1 million or more still constituted the large majority (77 percent) of all payments (as compared with 81 percent of total amounts awarded).

Consumer groups have argued that large awards, especially those that appear to be excessive, are reduced posttrial.[1] Proponents of tort reforms contend that even if large awards are reduced,[2] they are still grounds for concern about the tort system.

In this chapter, we examine posttrial activity and the effects of that activity on actual payments. Data on adjustments by trial judges and appellate court activity are presented first. We then present data on payments and the verdicts most affected by these and other posttrial activities. The chapter concludes with a discussion of the processes most responsible for reductions to plaintiff verdicts.

[1]"The Assault on Personal Injury Lawsuits: A Study of Reality Versus Myths" (Washington, D.C.: Public Citizen, Aug. 1986), pp. 3-4.

[2]The term award refers to the initial award given by a jury or judge at verdict. In this report, the amount of this award is the focus of all posttrial activities, including posttrial adjustments made by trial court judges.

We present data on payments that attorneys in 236 cases reported to us. Data from court files indicate the following: Cases for which attorneys did not provide us with payment data are similar in level of posttrial activity to cases for which we have such data; in fact, cases without data had a slightly higher rate of appeals (see app. I).

Posttrial Activities Can Lead to Payments That Differ From Awards

A variety of posttrial activities may result in a payment that differs from the award in the initial verdict. As shown in table 3.1, these activities include (1) adjustments resulting from statutes, subrogation, or prejudgment agreements that set limits on the amount a plaintiff can recover from defendants and (2) activities litigants initiate after the verdict to try to change the verdict (that is, motions to the trial judge, appeals, and posttrial settlements).

Table 3.1: Posttrial Processes That Can Affect Award Amount and Payment After the Verdict

Mechanisms	Definition/Description	Possible effect on award
Limits on awards established by statute	Statutes limiting the amount that can be recovered from defendants (for example, in 1983-85, statutes in four of the five states required that awards be reduced by the amount of prejudgment settlements with other defendants)	Decreases verdict to the statutory limit (for example, under the law, prejudgment settlements with defendants who did not go to verdict would be deducted from the award)
Subrogation	The right of a person who is secondarily liable to succeed to the rights of the person he or she paid; for example, if an insurer pays the injured under an insurance policy, the company can then recover the amount paid from any subsequent payment to the injured	Decreases verdict by the subrogated amount; in the five states, subrogation changed the amount the defendant paid to the plaintiff; the defendant still paid the subrogated amount, but to the person secondarily liable
Gallagher Agreement (or Mary Carter Agreement)	A prejudgment guarantee by a defendant to pay the plaintiff a specific amount, to be reduced by payments from other defendants, usually in exchange for plaintiffs' agreeing to pursue their claims against nonagreeing defendants	For agreeing defendant, increases payment if guaranteed amount exceeds verdict; decreases payment if guaranteed amount less than verdict
Motion (request) to trial judge	Request to the trial judge to either change the verdict or grant a new trial	Trial judge may (1) decrease verdict (remittitur); (2) increase verdict (additur); (3) partially or completely overturn the verdict, thereby eliminating some or all awards; or (4) grant a new trial
Appeal	Request that an appellate court determine whether (1) sufficient evidence exists to support the verdict or (2) the trial judge made any major errors in ruling on specific matters	Appellate court may (1) decrease verdict, (2) increase verdict; (3) partially or completely overturn the verdict, thereby eliminating some or all awards; or (4) set aside the verdict in whole or in part and remand the case to the trial court for further proceedings
Posttrial settlement	Negotiated agreement between parties specifying how the case will be resolved	May increase the payment so that it is more than the verdict, decrease the payment so that it is less than the verdict, or specify a payment schedule for the original trial verdict

Few Adjustments Made by Trial Judges

Judges adjust verdicts either as required by statute or by granting a litigant's request. In virtually all cases decided by a jury, litigants requested the trial judge to either overturn the verdict completely, grant a new trial, or, if damages had been awarded, adjust the award amount. Because errors alleged in an appeal must have been raised at the trial, litigants may make these requests (motions), in part, to ensure that their objections to any trial activity are entered into the trial record.

Motions, statutes, or prejudgment agreements did not cause trial judges to change many verdicts.[3] As a result of statutes, in 12 cases (9 percent of plaintiff verdicts), awards were reduced by the amounts of settlements with defendants who had not gone to verdict. In another 13 plaintiff verdicts, the judge either ordered a new trial or reduced damages for other reasons.[4] In one case, the judge increased the award.

With these adjustments, the total amount awarded in the final judgments in all cases was $105,124,000, which is 9 percent less than the total awarded by verdict. The expected payment per case decreased from $377,000 to $345,000. Excluding a trial judge's reversal of a $6 million punitive damage award, the total amount awarded at final judgment was 4 percent less than the total awarded by verdict. The trial court reversed two verdicts that included punitive damages, leaving 21 punitive damage awards intact.

Appeals Filed in a Large Minority of Cases

Litigants filed a total of 172 appeals in 137 cases, about 45 percent of all cases. Multiple appeals were filed in 29 cases.[5]

Overall, 58 percent of plaintiff verdicts were appealed compared with 34 percent of defendant verdicts.[6] This difference in percentages, however, was only apparent for personal injury cases. For property damage and wrongful death cases, the rate of appeals was about the same regardless of who won the trial verdict. Across all cases, wrongful death cases were appealed more frequently than cases that involved property damage or personal injury (see table V.11).

[3]We only collected systematic information on the outcomes of posttrial motions for cases in which the jury had found for the plaintiffs. In these cases, the verdicts were unchanged at judgment in 81 percent of the cases.

[4]In one of these cases, the award was also reduced because of a prejudgment settlement.

[5]Eleven of these involved appeals at the state appellate and supreme court levels. The remaining 18 cases involved cross appeals (both the plaintiff and defendant appealed at the same time) or, in three cases, unrelated appeals.

[6]Plaintiff verdicts were infrequently appealed by plaintiffs. Among plaintiff verdicts unchanged by the judge, the plaintiff was the only party to file an appeal in one case. In 13 of these cases, both the defendant and plaintiff appealed. In the 13 cases in which the trial judge had either reduced an award (other than for a prejudgment settlement or lien) or granted a new trial, plaintiffs alone appealed 5 cases; defendants alone, 1 case; and both plaintiffs and defendants, 5 cases.

Highest Appeal Rates for Large Awards and Punitive Damage Awards

ICJ has hypothesized that parties are more likely to pursue posttrial activities for awards with punitive damages or awards with larger compensatory damages. According to ICJ, the larger the award, the more likely judges are to reduce the award because (1) the size attracts greater scrutiny and (2) the bases for awarding a large amount, especially for punitive damages, may be less precise than smaller awards, which may be more directly linked to economic loss.[7] In addition, appealing the verdict for a large award is more likely to be worth the effort and cost because the costs are low compared with the benefit—the possibility of a substantial reduction.

Consistent with the ICJ hypotheses, the rate of appeals varied by award size and the presence of punitive damages. Litigants appealed 73 percent of awards over $100,000 as compared with 35 percent of smaller awards. Of the 23 cases in which the jury had awarded punitive damages, litigants filed appeals in 18 (78 percent) of the cases (see fig. 3.1). Among cases with compensatory awards only, 54 percent were appealed.

Appeal Rates Vary by State

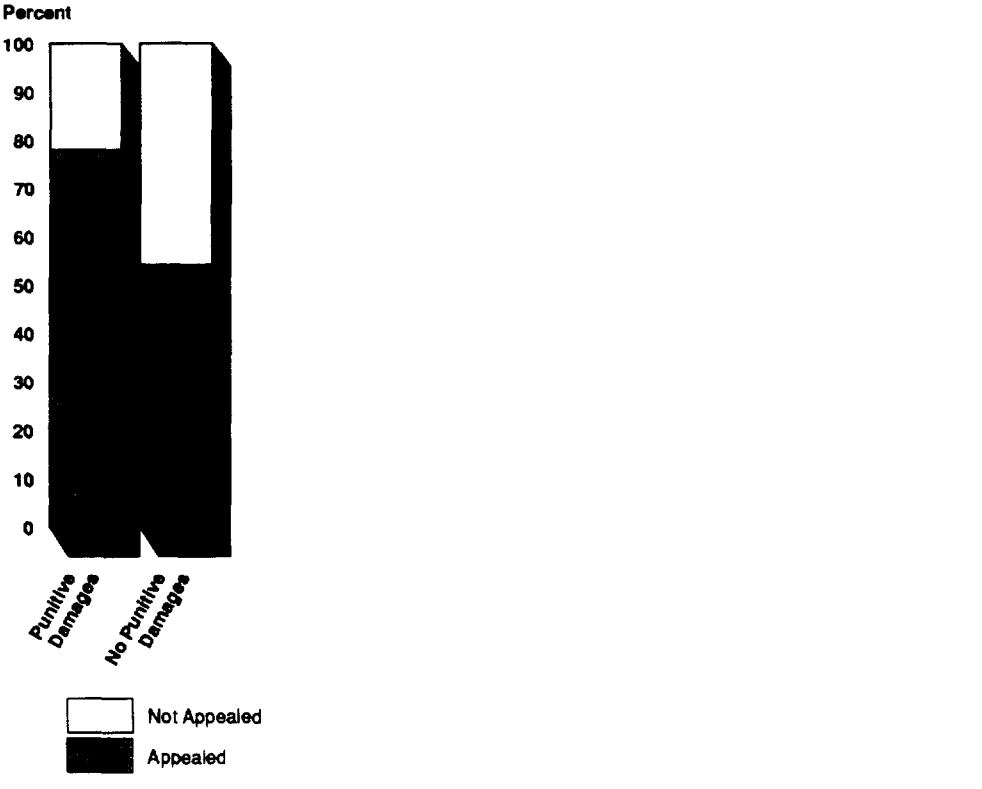
Missouri had the highest appeals rate and Arizona and South Carolina had the lowest appeals rate (see table 3.2). Missouri's higher rate of appeals holds for both plaintiff and defendant verdicts. In four states (Arizona, Massachusetts, North Dakota, and South Carolina), plaintiffs appealed defendant verdicts at about the same rate (between 22 percent and 30 percent of cases).[8]

When only compensatory awards are examined, a slightly different pattern of state differences emerges. Among cases with compensatory damage awards, Arizona and South Carolina maintained their lower appeals rate (about 39 percent each). Missouri's appeals rate, however, was more comparable with that of Massachusetts and North Dakota (between 55 and 64 percent for the three states).

[7]Michael G. Shanley and Mark A. Peterson, Posttrial Adjustments to Jury Awards (Santa Monica, Calif.: The Rand Corporation, Institute for Civil Justice, 1987), pp. 7-8.

[8]Differences in appeals rates across states may reflect, at least in part, our success in identifying all appeals. Our sources of appeals information in Missouri were the most comprehensive of the five states. There, we had access to an appellate court reporter, not available in the other four states. In states other than Missouri, we relied on court records and national computerized databases.

Figure 3.1: Percentage of Cases Appealed for Verdicts With and Without Punitive Damages



Note: For punitive damages, N = 23; for cases without punitive damages, N = 112.

Table 3.2: Appeals Rate by State

State	Total cases	Cases appealed	
		Number	Percent
Arizona	59	21	36
Massachusetts	66	27	41
Missouri	108	63	58
North Dakota	16	8	50
South Carolina	56	18	32
All Cases	305	137	45

Plaintiff Verdicts Affirmed Less Often Than Defendant Verdicts

In 61 percent of appealed cases, the appeal concluded with an appellate court decision (see table V.12). As shown in table 3.3, for the 84 cases in which the appellate courts gave a ruling, the courts affirmed the verdict in 56 percent of the cases. Appellate court decisions, however, differed markedly according to who had won the initial verdict. Of the verdicts on which they ruled, the courts affirmed 77 percent of defendant verdicts as opposed to 41 percent of plaintiff verdicts. Of the 12 punitive damage awards on which appellate courts ruled, the courts vacated 3 awards, remanding them to the lower court for retrial; reversed 7 awards; and affirmed the trial courts' reversal of 2 awards. In only one of the nine cases in which the punitive damage award was reversed was the compensatory damage award also reversed.

Table 3.3: Appellate Court Decisions

Decision	Initial verdict was for: Plaintiff		Initial verdict was for: Defendant		All verdicts	
	Cases		Cases		Cases	
	Number	Percent	Number	Percent	Number	Percent
Affirmed	20	41	27	77	47	56
Reversed/award reduced	18	37	0[a]	0	18	21
Vacated/remanded	11	22	8	23	19	23
Total	**49**	**100**	**35**	**100**	**84**	**100**

[a]No initial verdicts for the defendant were reversed

Posttrial Activities Reduce Awards by Over 40 Percent

Seventy percent of all verdicts remained unchanged, but posttrial activities changed award amounts in a substantial minority of cases (see table 3.4 and fig. 3.2).[9] In 9 percent of cases, payments exceeded awards.[10] When adjustments were made, however, they were most frequently reductions to payments in plaintiff verdicts. Payments were lower than awards in 22 percent of all cases or in 50 percent of plaintiff verdicts. In only six cases, however, did plaintiffs who had been awarded damages receive nothing. Although the outcome in a majority of cases was unchanged, the net effect of posttrial activities was to reduce by 43 percent the total amount paid across all cases, with the ratio of payments to awards about .57.[11]

Posttrial activities adjust defendant verdicts much less often than plaintiff verdicts.[12] Ninety percent of defendant verdicts were unchanged. When a payment was made, it was relatively small, averaging $72,000.

[9]Results are reported for all states combined. The only notable state difference was in the incidence and size of reductions among cases in which only compensatory damages had been awarded (see pp. 44-45).

[10]For purposes of this study, payments were defined as all moneys paid to plaintiffs by defendants who went to verdict, excluding payments for postjudgment interest, legal fees, liens, and pretrial settlements. When posttrial interest and fees appeared to have been included in reported payment, we excluded those amounts, when possible. In a study of posttrial payments in all tort cases, ICJ estimated that including postjudgment interest in its study would lower the overall ratio at least .04 but not more than .07 (Shanley and Peterson, Posttrial Adjustments, p. 72).

[11]Consistent with previous research, the proportion paid refers to the ratio of payments to awards for a group (in this instance, all cases) and not the average of ratios for individual cases.

[12]Defendants make payments in cases with defendant verdicts because of either (1) a pretrial agreement, such as a Mary Carter Agreement, or (2) a posttrial agreement, in which the defendants agree to a payment in order to avoid an appeal.

Table 3.4: Effects of Posttrial Actions on Plaintiff Awards and Defense Verdicts

Dollars in thousands

Posttrial action	Cases		Averge award	Average payment	Ratio paid/ award
	Number	Percent			
Plaintiff awards					
Reduced	52	22	$1,337	$548	.41
Unchanged	45	19	467	467	1.00
Increased	6	3	87	194	2.23
Defense verdicts					
Unchanged	120	51	0	0	[a]
Increased	13	6	0	72	[a]
All cases	236	101[b]	386	221	.57

Note: Table format was adapted from Michael G. Shanley and Mark A. Peterson, Posttrial Adjustments to Jury Awards (Santa Monica, Calif.: The Rand Corporation, Institute for Civil Justice, 1987), p. 27.

[a]The ratio is undefined because the base, average jury awards, is 0.

[b]Percent adds to more than 100 because of rounding.

Overall, posttrial adjustments did not appreciably change the percentages of cases in which defendants paid damages. After all posttrial adjustments, payments were made in 47 percent of the cases. This percentage is close to the percentage of cases in which liability was awarded in the initial verdict (that is, 45 percent).

Cases With Highest Appeals Rates Had Most Reductions

Among plaintiff verdicts, payments were reduced in about two-thirds of appealed cases as opposed to about one-third of cases that were not appealed. Among cases in which payments were reduced, the payment-to-award ratio was about .42, regardless of whether the case had been appealed.[13]

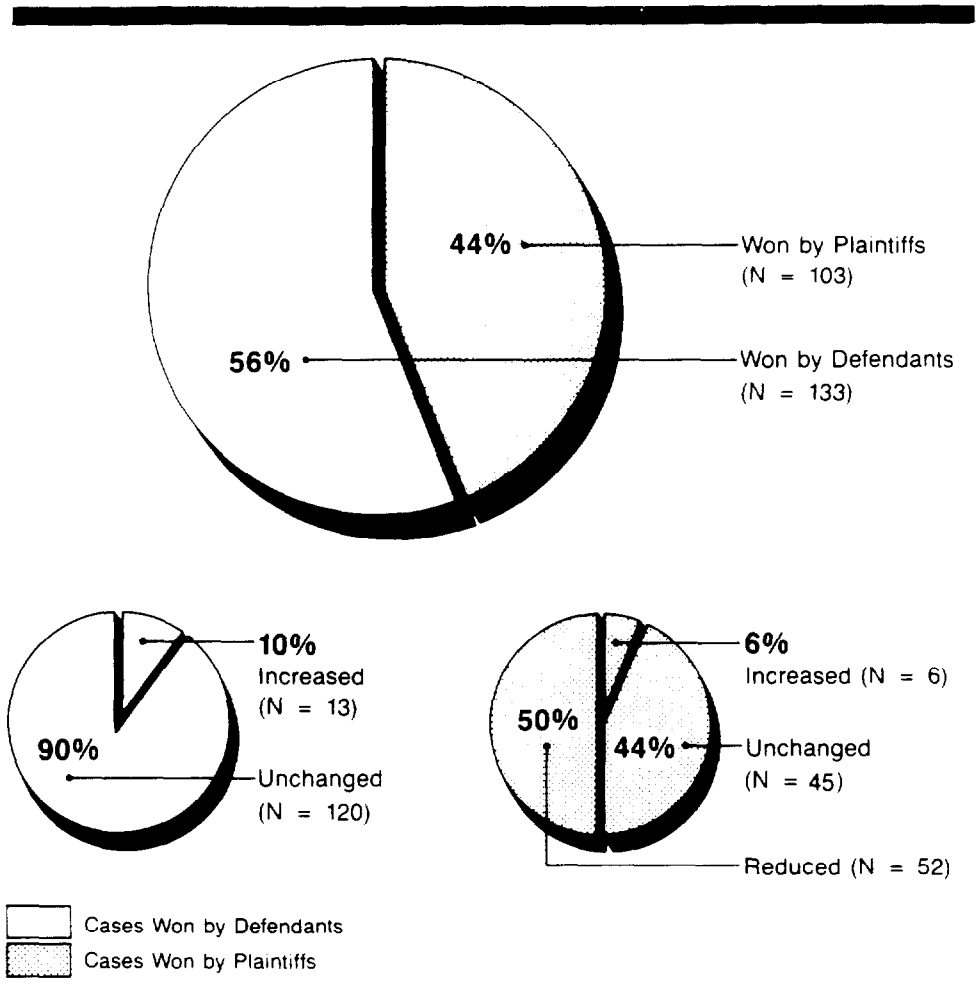
Consistent with studies by ICJ,[14] we found more and bigger reductions for plaintiff verdicts with large compensatory and punitive damage awards.[15] These verdicts were also appealed most frequently. For

[13]For cases not appealed, the ratio was .30, including all cases, and about .41, excluding three outliers.

[14]Shanley and Peterson, pp. 28-29 and 36-38, and Mark Peterson, Syam Sarma, and Michael Shanley, Punitive Damages: Empirical Findings (Santa Monica, Calif.: The Institute for Civil Justice, The Rand Corporation, 1987), p. 30.

[15]Regression analyses indicate that whether or not a case had been appealed was a better predictor of how much would be paid than either size or type of award. Among plaintiff verdicts, when whether or not a case was appealed was entered into the regression equation, size and type of award were no longer significant.

Figure 3.2: How Posttrial Activities Changed Cases Won by Defendants and by Plaintiffs



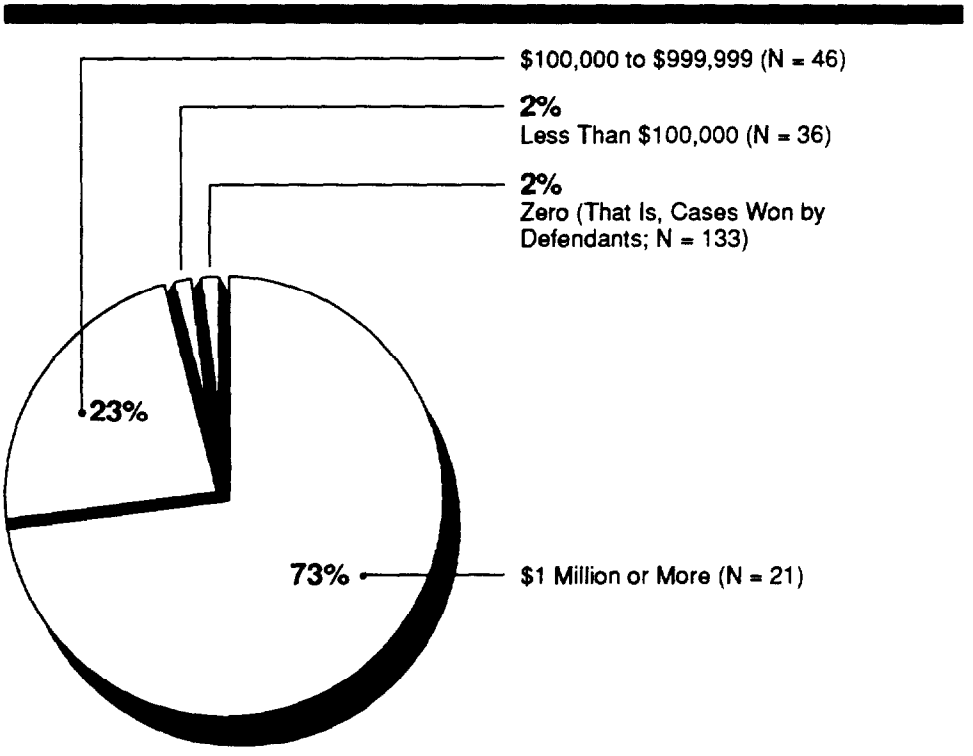
awards of $1 million or more, we found reductions in 71 percent of cases, resulting in a payment-to-award ratio of .52 (see table V.13).[16] Posttrial activities led to reductions in 45 percent of awards less than $1 million and to a payment-to-award ratio of .76.

Even with large reductions, payments in cases with awards of $1 million or more were still substantial, with the average payment being almost $2 million. Twelve of the 21 cases with awards of $1 million or more had payments of $1 million or more (those 12 comprise all payments of that size in the study). In chapter 2, we reported that $1 million awards accounted for 81 percent of the total amount awarded. Even though

[16]We obtained payment data for 21 of the 26 verdicts of $1 million or more in the five jurisdictions.

large awards incurred more and bigger reductions, the amount ultimately paid on them still represents 73 percent of total payment (see fig. 3.3).

Figure 3.3: Percentage of Total Amount Paid by Size of Verdict Award

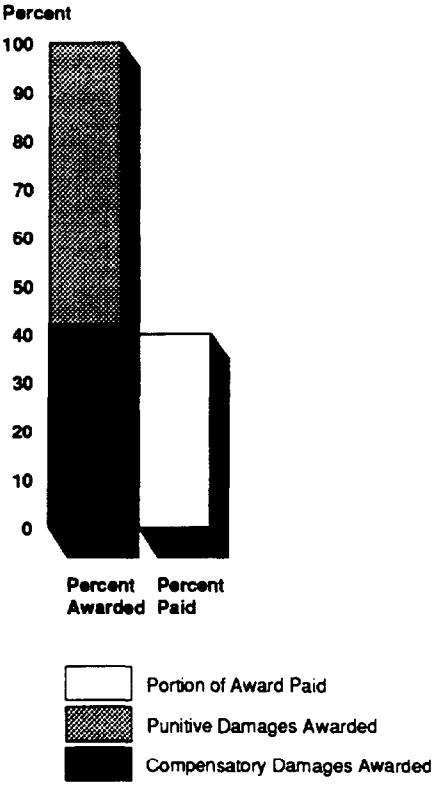


Among punitive damage awards, posttrial activities reduced 18 of the 22 verdicts for which we have payment data.[17] Interestingly, the total reductions in the 18 cases essentially eliminated the payment of the punitive damages. The percentage of total award that was punitive damages and the percentage paid are shown in figure 3.4. Awards were reduced by 60 percent, which is roughly equivalent to the 58 percent of the original award that was for punitive damages.

Large punitive damage awards sustained frequent and large reductions. Among the eight punitive damage awards of $1 million or more, appellate courts completely eliminated three awards and posttrial settlements

[17]We received payment data for 22 of the 23 punitive damage awards in the cases studied.

Figure 3.4: Payment Compared With Punitive and Compensatory Components of Awards



Note: For percentage awarded, N = 23; for percentage paid, N = 22. Payment data was not received for a verdict with a total award of $750.

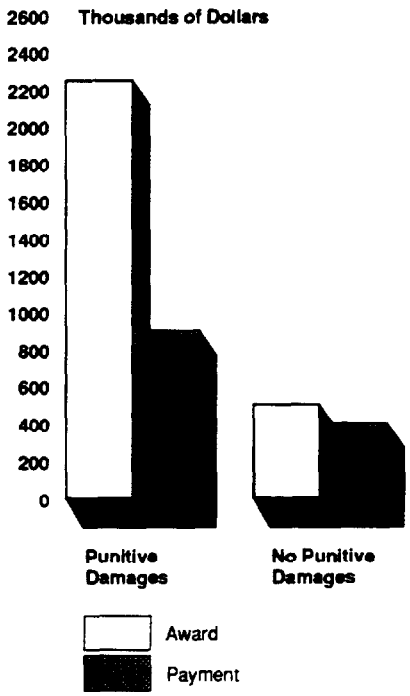
reduced the total award (both compensatory and punitive damages) for four awards by 67 percent or more.[18] The remaining award was reduced by 70 percent, but how the case was resolved was not specified. Of the three awards for $1 million or more that had exceeded three times the compensatory damages, total payments exceeded three times the original compensatory damages in one case.[19]

[18]For settled cases, we could not determine how much of the final payment was for compensatory damages and how much was for punitive damages.

[19]In that case, which had punitive damages of $3.9 million, the payment of $1.4 million was about three-and-a-half times the original compensatory damages ($390,000). In two other cases in which the total payment exceeded three t mes the compensatory damages, the compensatory damages were relatively small (compensatory damages of $3,300 and $27,000).

Awards were reduced less often and, as shown in figure 3.5, by a smaller percentage when the verdict only included compensatory damages. Posttrial processes reduced 42 percent of those awards and resulted in a 24-percent reduction in award amounts.

Figure 3.5: Average Awards and Payments for Plaintiff Verdicts With and Without Punitive Damages



Note: For punitive damages, N = 22; for cases without punitive damages, N = 81

Payments for punitive damages account, to a large extent, for differences in payment-to-award ratios by award size. We compared payments with awards by size of award for cases in which (1) only compensatory damages were awarded and (2) compensatory and punitive damages were awarded (see table 3.5). For size of award, payout rates differ less for cases with only compensatory damages than for cases with both compensatory damages and punitive damages (see table V.13).

Table 3.5: Posttrial Outcomes by Award Size

Dollars in thousands

Size of award	Cases	Average award	Average payment	Ratio paid/ award
When only compensatory damages were awarded:				
Less than $100,000	34	$36	$30	83
$100,000-$999,999	37	343	277	81
$1 million or more	10	2,746	2,022	.74
All cases	81	511	389	76
When both punitive and compensatory damages were awarded:				
Less than $100,000	2	29	37	1.28
$100,000-$999,999	9	353	183	.52
$1 million or more	11	4,226	1,645	.39
All cases	22	2,260	901	.40

States Differed in Posttrial Reductions

States differed considerably in the payment-to-award ratios when only compensatory damages had been awarded (see table 3.6). These two states also had the lowest appeals rate (see table 3.2). In Arizona and South Carolina, the ratios were larger than in the other three states. In Arizona, the payment was less than the award in a little more than one-third of the cases (6 out of 16); these reductions had a negligible effect on the proportion of the award eventually paid (.98).

Table 3.6: Type of Award and Payment-to-Award Ratios by State

	Compensatory damages only		Punitive and compensatory damages		All cases[a]	
State	Cases	Ratio paid/ award	Cases	Ratio paid/ award	Cases	Ratio paid/ award
Arizona	16	.98	7	.47	45	.60
Massachusetts	12	.77	[b]	[b]	45	.77
Missouri	31	.74	9	.26	88	.52
North Dakota	10	.32	1[c]	1.00	13	.31
South Carolina	12	1.13	5	.41	45	.75
All cases	81	.76	22[d]	.40	236	.57

[a]Includes defendant verdicts. For plaintiff verdicts, payment-to-award ratios are within .2 of ratios for all cases

[b]In Massachusetts, no punitive damages were awarded

[c]Punitive damages awarded in only one case

[d]Includes all 22 punitive damage awards for which we have data

In South Carolina, only 2 of 12 compensatory damage awards were reduced; 3 awards resulted in payments larger than the award amounts. Because of these posttrial adjustments, total payments for all 12 cases were slightly more than had been originally awarded at trial.[2]

North Dakota cases had more frequent and larger reductions than cases in the other states. Of 10 compensatory damage awards, 6 were reduced, resulting in a payment-to-award ratio of .32.

Reductions Most Often Result From Posttrial Settlements

Cases with reduced awards were most often resolved by a post-trial settlement. As shown in table 3.7, a settlement was the final action in one-half of the cases with reduced awards.

Posttrial settlements also reduced awards by a greater percentage than court action. This lower payment rate for settled cases holds for both awards with punitive damages and awards of only compensatory damages. For cases resolved through court action, verdicts that included punitive damages accounted for a disproportionate share (87 percent) of the total reduction.

Table 3.7: Posttrial Outcomes in Reduced Cases by Reason for Reduction

Dollars in thousands

Reason	Cases		Average award	Average payment	Ratio/ paid award
	Number	Percent			
Settlement	26	50	$1,598	$441	28
Court action	15[a]	29	1,405	893	64
Lien or pretrial settlement	6	12	141	84	60
Not specified	5	10	1,210	621	51
All cases	52	101[b]	1,337	548	41

[a]Nine of these cases ended with an appellate court ruling: four, with a trial court adjustment; and two with a verdict after a new trial. As might have been expected among appealed cases, whether reductions occurred as a result of a settlement or court action depended on the appeal's outcome. When the appellate court either affirmed or reversed the verdict, the court action determined the final award amount 81 percent (N=13) of the time. In cases that had been remanded, 12 (83 percent) of reductions occurred as a result of posttrial settlements.

[b]Percentage adds to more than 100 because of rounding.

[2]For a sample of cases that went to verdict in 1982-84 in Cook County, Illinois, and selected jurisdictions in California, ICJ found the relatively high payment-to-award ratio of .91. A few of these cases may have included punitive damages. See Shanley and Peterson, Posttrial Adjustments to Jury Awards, p. 45.

Conclusions

Given that payments are reduced substantially after trial, the effects of posttrial activities should be examined in any analysis of the tort system. Posttrial activities significantly affected the verdicts for which tort reform advocates have shown considerable concern. Large awards of compensatory damages (over $1 million) were paid at a rate of .74. Awards with punitive damages were paid at a rate of .40. In only one case with a $1 million or more punitive damage award did payment exceed three times the original compensatory damages.

Posttrial adjustments to compensatory damage awards, regardless of size, varied substantially across states. Payment-to-award ratios ranged from .32 to 1.12. The rates of reductions paralleled the rates of appeals. States with the lowest rates of appeals also had the fewest and smallest reductions.

Our findings are consistent with tort reform advocates' concerns that in many instances, punitive damage awards are unfounded. According to the courts' decisions, at least a significant minority of the 23 punitive damage awards were made in error. Appellate courts reversed or vacated and remanded all 12 punitive damage awards they reviewed. In only one of the nine cases in which the punitive damages were reversed were compensatory damages also overturned. These reversals, therefore, primarily reflect errors made by the lower court in awarding punitive damages, not in the liability decisions. The tort system, however, appears to be correcting these errors.

Product Liability Cases Are Lengthy and Costly

Findings

On the average, cases took about 2-1/2 years from the filing of the complaint to the beginning of the trial, with the trial itself lasting about 2 weeks. Among cases in which an appeal was filed, the time spent in the appeals process averaged 10 months.

At all phases of the litigation, South Carolina cases were handled the quickest and Massachusetts cases required the longest time. Across all states, cases in the federal courts required slightly less time than those in state courts.

In the cases studied, all of which went to verdict, one-half of plaintiff attorneys received no fees because the plaintiffs did not receive verdicts in their favor or reach a settlement. On the average, attorneys who were paid received about 35 percent of the payment recovered by the plaintiffs. Consistent with the variation in payment size, the size of plaintiff attorneys' fees varied widely.

Almost all defendant attorneys were paid for fees and expenses, with the range in fee size much narrower than that for plaintiff attorneys. Those attorneys who were involved in appeals on defendants' behalf received double the amount for fees and expenses than attorneys who were not.

For product liability cases and the tort system in general, two frequently cited concerns are the time and cost of resolving claims through the judicial process.[1] After plaintiffs bring suit, it often takes years for the case to reach a verdict and even longer for plaintiffs to receive compensation. ICJ has estimated that 42 percent of amounts paid by defendants in tort cases goes for legal fees and expenses (including fees and expenses for both plaintiff and defendant attorneys). Legal fees and expenses are only 25 percent less than the net compensation received by plaintiffs.[2]

This chapter presents information on (1) the time involved in processing product liability cases and (2) attorneys' fees and expenses. Information across states concerning the time from the filing of a complaint to the

[1]Jane W. Adler, William F. Felsteiner, Deborah R. Hensler, and Mark C. Peterson, The Pace of Litigation: Conference Proceedings (Santa Monica, Calif.: The Rand Corporation, The Institute for Civil Justice, 1982), pp. iii, 13, and 21.

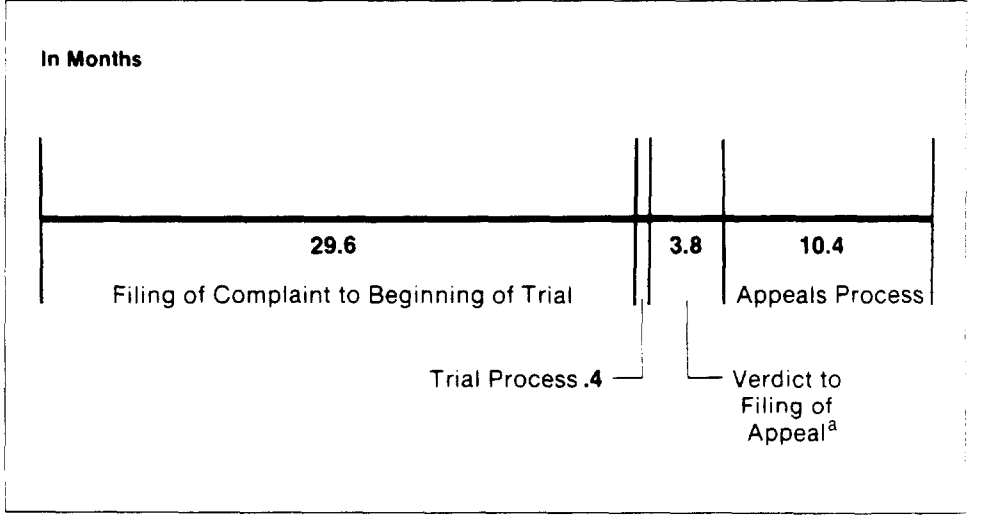
[2]James S. Kakalik and Nicholas M. Pace, Costs and Compensation Paid in Tort Litigation, (Santa Monica, Calif.: The Rand Corporation, The Institute for Civil Justice, 1986), p. 71.

end of the case (including any appeals) is presented first. Similar information is then presented for the individual states, followed by a discussion of case-processing time in federal and state courts. The chapter concludes with information on fees and expenses for both plaintiff and defendant attorneys.

Average Time for Case Processing Was 30 Months

Many cases took several years to resolve. Cases required about 2-1/2 years to move from the filing of the complaint to the verdict.[3] As shown in figure 4.1, in general, the trial process itself was relatively short, averaging nearly 12 days from the start of the trial to the verdict. Across cases, considerable variation in processing time was apparent. In 18 percent of the cases, the time interval between filing and the verdict took 12 months or less. By contrast, 8 percent of the cases required from 5 to 10 years to go through the same steps. The most lengthy case took 9.7 years from filing to verdict.

Figure 4.1: Average Case-Processing Time



[a]Primarily reflects the time required to resolve parties' motions (requests) to the trial judge (for example a motion for a new trial or a motion for a reduction in the award). During this time, parties submit briefs (arguments) in support of their positions on the motion(s) and the judge considers and rules on them.

Among cases in which an appeal was filed, the time spent in the appeals process averaged 10 months.[4] In 32 percent of appealed cases, the appeals were dismissed before an appellate court decision. Some appeals

[3]See appendix III for information on how long after the injury the case was filed.

[4]We only have data on the time spent to resolve appeals for 110 of the 137 appealed cases.

were dismissed within days of filing; others were dismissed more than 2 years after filing. Among cases in which appellate courts rendered decisions, the average time spent in the appeal process was 14 months.

States Vary in Terms of Case-Processing Time

Overall, cases in Massachusetts took the longest time to be processed and cases in South Carolina took the least. The average time between filing a complaint and the beginning of the trial in Massachusetts was almost 43 months, compared with the average of 29.6 months across all states (see table 4.1). South Carolina was the quickest, averaging 15 months from filing to trial.

Table 4.1: Average Case-Processing Time by State

In months

Time interval	Arizona	Massachusetts	Missouri	North Dakota	South Carolina	All states
Filing of complaint to trial	30.7	42.8	29.1	23.5	15.2	29.6
Beginning of trial to verdict[a] (in days)	0.3 (10)	0.5 (13)	0.3 (8)	0.3 (8)	0.1 (3)	0.4 (12)
Verdict to filing of appeal[b]	4.1	4.5	3.9	3.5	2.1	3.8
Filing of appeal to appeals resolution						
For all cases that were appealed[c]	10.0	13.4	9.9	9.7	8.3	10.4
For cases with an appellate court decision[d]	15.2	14.9	13.6	12.0	12.2	13.8

[a]These numbers are fractions of 1 month. The actual average number of days is shown in parentheses beneath the monthly average.

[b]Based on data from 123 cases for which we have complete information.

[c]The data shown are for the 110 appealed cases for which data were available.

[d]Information on processing time was available for 67 of 84 cases in which a decision was rendered.

South Carolina's shorter pretrial period may be related to the types of cases reaching verdict. These cases may be less complex than cases in the other states. As discussed in appendix III, a greater proportion of personal injury cases in South Carolina involved temporary disability, which has lower demands and awards. Cases in South Carolina also had multiple plaintiffs or multiple defendants less often, which could mean the cases were less complex. These factors do not appear to explain the difference between case-processing time in Massachusetts and the other states.

State differences in length of trial and appeals-processing time follow the same pattern as for pretrial intervals. On average, Massachusetts cases took the longest time and South Carolina cases the least.

When processing time for appeals is examined for only those cases in which appellate courts rendered decisions, the pattern was somewhat different. Massachusetts no longer took the longest time, but was one of the states that took the longest; South Carolina was not the quickest but was one of the quickest.

State Courts Took Longer Than Federal Courts in Processing Time

State court cases took more time than federal court cases at all stages of case processing, except for the length of the trial. The largest difference between type of court was almost 7 months, which occurred in the period from filing of complaint to trial (see table 4.2). For cases that were appealed, those in state courts took about 3 months longer than those in federal courts. For the subset of appealed cases that reached the stage of an appellate decision, state court cases took more than 5 months longer than federal cases.

Table 4.2: Average Case-Processing Time in State Courts and Federal Courts

In months

Time interval	Type of court	
	State	Federal
Filing of complaint to trial	33 0	26 2
Beginning of trial to verdict[a]	0 2	0 6
(In days)	(7)	(17)
Verdict to filing of appeal[b]	3 4	4 2
Filing of appeal to appeals resolution		
For all cases that were appealed[c]	11 6	9 4
For cases with an appellate court decision[d]	16 8	11 4

[a]These numbers are fractions of 1 month. The actual average number of days is shown in parentheses beneath the monthly average.

[b]Based on data from 123 cases for which we have complete information.

[c]Data shown are for the 110 appealed cases for which specific time information was available.

[d]Information on processing time was available for 67 of the 84 cases in which a decision was rendered.

Legal Fees for Attorneys a Substantial Part of Defendants' Total Payments

As discussed in chapter 1, plaintiff attorneys usually collect a percentage of any award or settlement paid to their clients. Plaintiff attorneys, therefore, risk receiving no fee (when the plaintiff recovers nothing) in exchange for the possibility of receiving substantial fees when large awards or settlements or both are made. Since most product liability cases are settled prior to verdicts and with payments, plaintiff attorneys receive fees in most product liability cases.

In the cases studied, all of which went to verdict, about one-half of plaintiff attorneys received no fee.[5] These attorneys would have incurred expenses, which, for plaintiff attorneys, are almost never reimbursed. The average amount of their expenses was $15,000, with a median of $5,000.

Plaintiff attorneys who were paid received, on the average, 35 percent of the money recovered by their clients (from both awards and pretrial settlements with other defendants). This amount is very close to the contingency fee arrangement of plaintiff attorneys in most civil cases (that is, one-third of any award). About 84 percent of plaintiff attorneys received between 30 percent and 40 percent of their clients' recoveries.

[5]We obtained fee information from 165, that is, 53 percent, of the 313 plaintiff attorneys we surveyed. The attorneys reported their fees, excluding any expenses for which they may have been reimbursed.

Because recoveries varied widely, fees for plaintiff attorneys also had a wide range, from a low of $1,000 for a $3,000 recovery to $3.4 million for a recovery of more than $6 million. Six attorneys (7 percent of those who received a fee) were paid $1 million or more. These large fees account for the relatively large average fee of $227,000 as compared with the median fee of $33,000. Seventy-nine percent of the attorneys received fees below the average. Including attorneys who received no fees, the average fee for plaintiff attorneys was $115,000.

Defendants pay their attorneys on an hourly basis, plus expenses. Unlike plaintiff attorneys, almost all defendant attorneys (98 percent) received fees.[b] Their fees, which ranged from $1,500 to $400,000, were an average of $41,000 and a median of $20,000. Including expenses, defendant attorneys received from their clients an average of $61,000 and a median of $28,000. About 25 percent of total moneys paid by defendants was for their own legal fees and expenses.

The fees and expenses of defendant attorneys varied by a number of factors. As might be expected, fees and expenses were considerably higher when clients were involved in appeals. Defendant attorneys received an average of $84,000 in fees and expenses from clients involved in appeals, as compared with $41,000 when clients were not involved in appeals. When a client was involved in more than one appeal, a defendant attorney received an average of $159,000 in fees and expenses, as compared with an average of $71,000 when a client was involved in only one appeal. The longer the time to resolve an appeal, the higher the fees and expenses. These were also higher when cases were remanded for retrial. Attorneys who represented at least one defendant located outside the state where the litigation took place had higher fees and expenses (an average of $70,000) than attorneys of in-state defendants (an average of $36,000).

We were able to obtain information on plaintiff attorneys' fees and defendant attorneys' fees and expenses for 58 cases (about 20 percent of all cases). In those cases, the average paid in fees and expenses was $186,000. Since this information is based on a small number of cases, it may not be representative of all cases in our study.

Because some attorneys reported that other firms had also represented their clients, our data should be considered the lower limit of fees and

[b]We obtained fee data for 212 (52 percent) of the defendant attorneys who received questionnaires. We obtained information on both fees and expenses from 45 percent of the defendant attorneys.

expenses. About 26 percent of plaintiff attorneys and 22 percent of defendant attorneys reported that firms other than their own had represented their clients at some point in the cases. Plaintiff attorneys received a slightly lower percentage (about 33 percent) of the recovery when their firms had not been the only ones to represent their clients, as might be expected. In contrast, the average fee for defendant attorneys doubled when their firms had not been the only ones to represent their clients. These larger fees may be related to the fact that defendants who used more than one firm were more likely to be (1) located outside the jurisdiction where the litigation was taking place and (2) involved in appeals.[7]

Conclusions

The amount of time and money involved in resolving the cases studied are comparable with the amounts that critics of the judicial process have labeled as excessive. Just to reach verdict, the average case took over 2-1/2 years, with the longest case taking more than 9-1/2 years. The average time for cases in the appeals process was 10 months. The cost of reaching a verdict averaged $168,000 per case, including plaintiff attorneys' fees and defendant attorneys' fees and expenses. This does not include court costs, the value of the time parties to the suit spent in preparing their cases, and miscellaneous expenses, such as transportation.[8]

We cannot determine the degree to which the benefits of the judicial process balance these substantial administrative costs. In addition to serving as a compensation mechanism, benefits thought to accrue from the judicial process and verdicts include facilitating the settlement of claims and providing incentives for product safety.

Two factors were associated with higher defendant litigation costs: (1) the filing of an appeal and (2) a defendant's being based outside the state in which the case was tried. It is commonly recognized that the additional effort involved in an appeal drives up litigation costs. We have no data bearing on why out-of-state defendants had higher costs. This finding is significant, however, since the majority of defendants in the cases studied were based outside the states in which the cases were

[7]Our data may especially underestimate out-of-state defendants' costs because they were more likely to have been represented by multiple legal firms.

[8]See Kakalik and Pace, pp. 42-43 and 61-62.

tried (see app. III). If this is true generally, defendants in product liability cases may incur proportionately higher litigation costs than defendants in other types of tort cases, such as medical malpractice, that may be less likely to involve out-of-state defendants.

Effects of Proposed Federal Reforms on State Laws and Case Outcomes

Findings

Since 1985, 41 state legislatures have enacted various types of tort reforms, the majority of which limit the liability of manufacturers and product sellers. As a result of these reforms, variation among state laws has increased since our study period.

A federal law would standardize the law in some major areas. No federal law would be likely to preempt state laws in all areas, and, therefore, differences would most likely remain.

Many of the federal or state reforms would have affected outcomes in only a minority of the cases studied, but many of the affected cases would have involved large payments. Proposals to reduce awards by plaintiffs' degree of responsibility or by workers' compensation payments would have potentially affected payments in more cases than other reforms.

Manufacturers, sellers, and insurers mainly attribute recent problems in the availability and cost of liability insurance to unpredictability in (1) the frequency and size of awards and (2) the circumstances under which defendants are held liable. Proposed federal reforms of product liability law have been directed at decreasing variation in laws across states, thereby decreasing the unpredictability of awards. These reforms would also tend to benefit manufacturers, sellers, and insurers by limiting the circumstances under which defendants are held liable.

Reforms have been proposed at both the state and federal levels. Almost every state has enacted at least some reforms in recent years. The Congress has not established uniform federal standards, although a number of bills have been introduced toward that end. As of August 1989, seven bills affecting product liability litigation were pending before either the House Judiciary Committee or the House Energy and Commerce Committee; three of these bills would create uniform liability standards across states.[1] One bill to create uniform standards was pending, as of August 1989, before the Senate Committee on Commerce, Science, and Transportation.[2]

[1]H.R. 129, H.R. 135, H.R. 359, H.R. 362, H.R. 1025, H.R. 1636, and H.R. 2700. Of these seven, H.R. 359, H.R. 1636, and H.R. 2700 would provide for uniform liability standards.

[2]S. 1400.

across states.[1] One bill to create uniform standards was pending, as of August 1989, before the Senate Committee on Commerce, Science, and Transportation.[2]

Considerable Variation Exists Across State Laws

Rather than making state laws more uniform, state legislative reforms have increased the variation of laws across states.[3] Since our study period (1983-85), 41 state legislatures have enacted tort reforms that changed the laws for different areas of product liability in their jurisdictions. States differ considerably in the types of tort reforms passed. The seven most frequently proposed reforms, as well as arguments for and against them, are shown in table 5.1. Some reforms affected important areas of product liability law passed by each state as of December 1988, as shown in appendix VI.

[1]H.R. 129, H.R. 135, H.R. 359, H.R. 362, H.R. 1025, H.R. 1636, and H.R. 2700. Of these seven, H.R 359, H.R. 1636, and H.R. 2700 would provide for uniform liability standards.

[2]S. 1400.

[3]Legal analyses have also noted this increased variation. See Victor E. Schwartz, State Tort Reform—Helping the System or Creating More Chaos?, unpublished draft (Washington, D.C.: Crowell and Moring, 1987).

Table 5.1: Product Liability Reform Proposals (State and Federal)

Aspect of the law	Reform proposal	Reform arguments	
		For	Against
State-of-the-art defense	In relevant strict liability actions, allow state of the art evidence to be presented or to completely bar recovery: manufacturer not liable if, at the time of manufacture, (1) product could not have been more safely designed given then-existing technology or (2) manufacturer could not have known and warned plaintiff about the product's dangerous defect	Manufacturer should not be held liable if it was not feasible to design a safer product or if product's dangerousness was unknowable at time of manufacture People injured by unreasonably dangerous products should be compensated under strict liability regardless of defendant's behavior in designing and manufacturing product	
Clear and convincing evidence standard for punitive damages	Raise the standard of evidence from preponderance of the evidence to clear and convincing evidence	Punitive damages are akin to a civil fine; a higher standard will assure these damages are limited to cases that juries are certain warrant them	Posttrial activities provide an adequate check on the appropriateness and size of juries' punitive awards
Comparative negligence	Regardless of the theory on which liability is based, plaintiff's award is reduced to the degree plaintiff's or third party's failure to discover or guard against a product's defect contributed to the injury	Plaintiff should not be able to recover to the degree own negligence caused the injury	Strict liability and comparative negligence are incompatible: jury cannot compare product's defectiveness with plaintiff's negligent conduct
Joint and several liability	For all or some (for example, noneconomic) damages, each defendant pays proportionally to his or her degree of liability or responsibility for the injury; traditionally, each defendant who was found liable could be held liable for all damages awarded and defendants could sue each other for reimbursement	Reform would assure that defendants minimally responsible would not have to pay all damages	Reform would protect liable defendants at the expense of innocent plaintiffs who would be undercompensated because some defendants cannot pay or cannot be sued
Caps on awards	Awards for certain types of damages (for example, noneconomic, compensatory, or punitive) may not exceed a set statutory limit	Unlimited jury discretion results in inflated verdicts for plaintiffs	Caps only deny award money for most severely injured; posttrial activities adequately reduce inflated awards
Collateral source rule	Allow compensation from sources other than defendants to be (1) deducted from the amount of damages defendants pay or (2) considered by the jury when determining damages: currently, compensation from collateral sources cannot be deducted from damage awards or considered by the jury	Plaintiffs should not be able to recover twice for the same injury, reimbursing other sources (for example, employers) out of damage awards removes their incentives for helping to ensure safety	Liable defendants should not benefit because the plaintiffs receive money from other sources: reducing defendants' liability decreases their incentives for helping to ensure safety

(continued)

spect of the law	Reform proposal	Reform arguments	
		For	Against
roduct seller liability	Limit the liability of product sellers to instances in which (1) the manufacturer is unable to pay or cannot be sued or (2) seller is at fault; traditionally, product seller could be held liable for harm to consumer, even if seller did not alter or mishandle the product	Plaintiffs often sue product sellers even though they are not at fault; although most sellers are not ultimately held liable they must pay litigation costs	Limiting product seller liability decreases sellers' incentive to inspect products and safeguard them from dangerous defects; suing a seller can facilitate discovery of important evidence

Laws in the five states studied show the enhanced variation introduced by state reforms.[4] As a result of reforms enacted in the five states (see table 5.2), the states now differ in three areas that were the same in 1985. For example, under the 1985 law of all five states, each defendant could be held liable for all damages regardless of that defendant's share of fault (that is, the states followed the traditional rule of joint and several liability). Under 1988 law, three states (Arizona, Missouri, and North Dakota) now restrict, to different degrees, the damages for which each defendant may be held liable. In Arizona and North Dakota, each defendant now may be held liable only for that defendant's share of damages decided by the jury. In Missouri, defendants are jointly and severally liable, but the plaintiff shares responsibility for unpaid portions to the extent the plaintiff was partially at fault for the injury.

[4]As discussed in chapter 1, the five states studied may not necessarily represent the entire spectrum of product liability laws. Thus, the extent to which variation exists among all state laws may be understated.

Table 5.2: Product Liability Laws: 1988 Laws for Five States Studied Versus H.R. 1115

Aspect of the law	AZ	MA	MO	ND	SC	H.R. 1115 cleared by Subcommittee	H.R. 1115 cleared by Committee
State-of-the-art evidence allowed in strict liability cases	Yes (all actions)	[a]	Yes (warning cases)	No	Yes (design & warning cases)	Yes (all actions)	Yes (all actions)
Rule of joint & several liability modified	Yes	No	Yes	Yes	No	Yes	[b]
Comparative negligence made available under negligence theory	Yes	Yes	Yes	Yes	No	[b]	[b]
Comparative negligence made availabe under strict liability theory	No	[a]	Yes	Yes	No	[b]	[b]
Caps on awards set	No	No	No	No	No	[b]	[b]
Availability of punitive damages limited	No	Yes	No	No	No	Yes	[b]
Clear & convincing evidence required for punitive damages	Yes	No	No	Yes	Yes	Yes	Yes
Collateral source rule modified	No	No	Yes	Yes	No	Yes	Yes
Statute of limitations for most actions (in years)[c]	2	3	5	6	3	2	2

Legend
Yes = areas in which state has enacted a reform or H.R. 1115 would reform
No = areas in which state has not enacted a reform

[a]Not applicable

[b]Bill does not address this issue; state law would control.

[c]Only state law in South Carolina was modified by recent reforms (see table IV.1)

Federal Reforms Would Decrease Variation Across States

A federal product liability law, if sufficiently unambiguous, would undoubtedly decrease variation among state laws.[5] Because federal law would most likely preempt only some of the major state laws governing product liability actions, however, state laws would still differ in some areas.[6]

No product liability bill has ever been passed by either house of the Congress,[7] although at least 24 bills to create uniform standards have been introduced over the past 10 years (14 in the House and 10 in the Senate). The bill that progressed the farthest in the 100th Congress was H.R. 1115, the Uniform Product Safety Act of 1988. Passed by the Subcommittee on Commerce, Consumer Protection, and Competitiveness, House Committee on Energy and Commerce, in December 1987, and by the Committee in June 1988, this bill would have had a major effect on some of the areas of state product liability law (see the last two columns of table 5.2). State law, however, would have continued to control areas not addressed by the bill. For example, since H.R. 1115, as passed by the House Committee on Energy and Commerce, was silent on the issue of joint and several liability, state laws would continue to differ on whether each defendant may be held responsible for all damages. Under current law in the five states studied, only defendants in Massachusetts and South Carolina would be held jointly and severally liable in all cases.

Reform opponents argue that although some federal reform proposals would introduce some degree of uniformity in the product liability laws across the states, it would introduce variation among laws applying to

[5]Some commentators have argued that the enactment of a federal law may not guarantee uniformity since courts in the 50 states, as well as federal courts in various districts, would undoubtedly interpret the law differently for different areas. For further discussion, see Henry Cohen, "Products Liability: Some Legal Issues," CRS Report 84-189A (Washington: U.S. Library of Congress, Congressional Research Service, Nov. 1, 1984). Others have argued that federal proposals have now been so refined as to bring about a minimum of conflicting interpretations. These commentators note that a federal law would be subject to different interpretations, but would provide more uniformity than the state common law systems it would replace.

[6]Some reform proponents agree that a federal bill should address only the most important product liability areas and, in so doing, achieve a compromise between federal preemption and states' rights.

[7]The only major federal legislation affecting the product liability area to pass the Congress in the last 5 years are the Product Liability Risk Retention Act of 1986 (P.L. 99-563), which permits manufacturers and sellers to purchase insurance on a group basis or to self-insure through risk retention groups, and the Childhood Vaccine Injury Act of 1986 and its amendments (P.L. 99-660; P.L. 100-203 beginning with sections 4301 and 9201; P.L. 100-177, section 110[a][1][C]; and P.L. 100-436), which require those suffering from vaccine-related injuries to be compensated from a special fund).

various tort categories within a state.[8] Such differences may introduce inequity among defendants who are sued under different tort categories since they would be held to different standards. For example, a plaintiff in a product liability case suing under a federal law similar to H.R. 1115 would recover punitive damages from a manufacturer only after meeting the "clear and convincing evidence" standard.[9] On the other hand, if the case involved an additional defendant's being sued under a different tort category (such as personal violence), the plaintiff would only have to meet the lower "preponderance of the evidence" standard to recover punitive damages from that defendant.[10] Reform advocates note that in some respects, a federal law would actually reduce differences across tort areas. Manufacturers and sellers, unlike other types of tort defendants, can be held strictly liable; thus, plaintiffs do not have to prove negligent conduct. A federal bill that would allow juries to consider whether defendants' actions were negligent in product liability cases, reform advocates argue, would bring this category of tort law more in harmony with other existing state tort laws.

Most Reform Proposals Would Have Affected Only a Few Cases Studied

Most proposed reforms, in whatever area, would potentially have affected only a minority of the cases we studied. Many of the cases, however, that would have been affected would have involved large awards. For several of the reform proposals, the most significant effect would have been on the defendants' litigation costs.

In our analysis of the possible effects of various reforms, we estimated the number of cases potentially affected and how reforms would have affected (1) whether a defendant was held liable and, therefore, a plaintiff's ability to recover damages, (2) the amount of damages awarded and paid by each party, and (3) litigation costs. The results of our analysis are summarized in table 5.3.

[8]A tort category is a type of civil wrong—such as product liability, medical malpractice, libel, slander, or personal violence—which results in personal injury, wrongful death, or property damage and for which a person can sue to recover damages.

[9]"Clear and convincing evidence" of a matter to be proved is defined as evidence that will produce in the minds of the jury (or judge, in a case tried without a jury) a firm belief that the truth of the matter is more highly probable than not.

[10]"Preponderance of the evidence" of a matter to be proved is defined as evidence that will produce in the minds of the jury (or judge, in a case tried without a jury) a belief that the truth of the matter is more probable than not.

Table 5.3: Potential Effects of Selected Reform Proposals on Case Outcomes

Reform	Cases potentially affected	Possible effects	Comments
low state-of-the-t defenses for all rict liability ases[a]	The 33 cases for which we have data in which awards based on strict liability alone or with breach of warranty (out of 120 cases in which defendants found liable); we cannot determine the number of those cases in which state-of-the-art defenses were used	Plaintiff's prospects for recovery would have been reduced in cases in which defendant can show product design or warning conformed with state-of-the-art at the time of manufacture	Proposed reforms differ as to whether state-of-the-art evidence acts to completely bar plaintiff's recovery or is merely one factor for jury to consider
aise the standard proof for unitive damages[a]	The 23 cases in which punitive damages were awarded under the lower (preponderance of the evidence) standard (out of 55 cases in which punitive damages were requested and plaintiffs won a verdict)	Amount plaintiff recovers might have decreased, to the extent higher standard would have resulted in fewer punitive damages awarded at trial; ultimate payout may have been affected less than amounts awarded since most punitive awards reduced or eliminated posttrial; time and cost of appeals for cases with punitive damages would have been reduced if higher standard resulted in fewer awards	Our finding that appellate courts reversed or remanded all punitive damage cases that they reviewed suggests that juries often incorrectly award such damages under the lower standard
low comparative egligence in all ctions	About one-half of the plaintiff verdicts (55 out of 120) for which comparative negligence was not available as a legal defense plaintiff was found partially at fault in half of the cases for which comparative negligence was available	Plaintiff's prospects for recovery would have increased in negligence cases in which plaintiff partially at fault Amount plaintiff recovers would have decreased in strict liability and breach of warranty cases in which plaintiff partially at fault; would decrease in negligence cases to the extent jury was hesitant to assign plaintiff fault and, thus, bar recovery under contributory negligence	In South Carolina and a few states not studied, law provided that plaintiff arguing negligence receives nothing if partially at fault; we cannot determine number of cases potentially affected in which defendants found not liable because plaintiff was partially at fault
mit or abolish nt & several bility	In 36 cases, multiple defendants found liable (out of 136 cases with awards); number of cases in which a defendant failed to pay is unknown	Amount plaintiff recovers would have decreased in cases in which a defendant fails to pay its share, even if plaintiff not at fault, since other defendants would have been responsible for paying only their own shares Amount some defendants pay may have changed because defendant payments would have been more consistent with their respective shares of responsibility	Defendants' costs of litigation may be reduced since one defendant need not sue other defendants for reimbursement; totally faultless plaintiff may bear some of the loss

(continued)

Reform	Cases potentially affected	Possible effects	Comments
Place a cap on noneconomic awards (assumed cap of $500,000)[a]	The 32 cases (out of 136 awards) had total compensatory (economic + noneconomic) awards over $500,000;[b] 21 cases had total compensatory payments over $500,000	Amount plaintiff recovers may have decreased; however, to the extent a cap sets the standard for award size, the average plaintiff award size may have increased if the jury was told of the cap and used it as the standard; cap may have less effect on payments than on awards since most awards were reduced after trial	Since award size is related to severity of plaintiff injury, cap would most likely affect award size for the most seriously injured
Place a cap on punitive damage awards	Eight punitive damage awards (out of 23) exceeded two times the compensatory damages; six punitive awards exceeded three times compensatory damages; two awards exceeded four times the compensatory damages; payments to plaintiffs in three cases exceeded three times the original compensatory damages[c]	Amount plaintiff recovers would have been the same in almost all cases since almost all payments fell within proposed caps; caps would have reduced the few large awards; may have lead to larger awards and payments if caps set the standards for punitive damage award size	Since largest punitive damage awards went to those with the most severe injuries, caps would have decreased amounts received by those most seriously harmed
Modify collateral source rule by allowing workers' compensation reductions[d]	The 60 work-related cases in which liability was found; on the basis of 25 responses from the 60 cases, most plaintiffs received workers' compensation and most reimbursed workers' compensation from their awards[e]	Amount plaintiff recovers would have decreased only in cases in which the plaintiff received payment from both the defendant and workers' compensation Amount each defendant pays would have been reduced by the amount of workers' compensation received	Of the 305 cases, 42 percent (130) were work-related
Limit the liability of product sellers[f]	The 15 cases in which sellers and manufacturers both found liable; 34 cases in which sellers were parties at verdict along with manufacturers, but sellers found not liable	Amount each defendant pays may not have changed since, under current system, manufacturers sometimes pay the damages and litigation costs of sellers and sellers can sue for reimbursement from manufacturers; primary savings in terms of product sellers' litigation costs; some manufacturers would have had to pay more damages	Sellers found liable at the same rate as manufacturers (36% versus 39%); sellers' liability was more often based on negligence alone than was manufacturers' liability (52% versus 41%)

[a]This standard addressed by H.R. 1115, as passed by the House Energy and Commerce Committee

[b]A cap of $500,000 was assumed since that is the most common cap existing in states that have enacted them (Alaska, Colorado, and Oregon)

[c]We could not differentiate economic and noneconomic damages

[d]These ratios span most of the range of state caps, which vary from not allowing punitive damages to exceed compensatory damages (Colorado Revised Statutes sections 3-21-102 and 13-21-102.5; Oklahoma Statutes, title 23, section 9) to allowing punitive damages to exceed four times the size of compensatory damages (Texas Civil Statutes sections 41.007 and 41.008). Although caps relating the size of punitive damages to compensatory damages are the most common, some states have limited punitive damages to a set amount.

[e]Because of the low response rate to the question concerning workers' compensation payments, we cannot assume our data are representative of all cases.

As a result of our analysis, we estimate that reforms to reduce awards—by the plaintiff's degree of responsibility for the injury (comparative

negligence) or payments from workers' compensation—would have affected more cases than would other reforms. A reform allowing state-of-the-art defenses in all appropriate product liability actions (failure-to-warn as well as design defect cases) would have affected few cases studied. This is because, during the period studied, (1) state-of-the-art evidence was barred only in Missouri defective design cases and (2) verdicts were based solely on strict liability in only 27 of the cases (33 of 123) in which defendants were found liable. Reforms to raise the standard of evidence for punitive damages or to place caps on awards would have affected cases with the largest awards.

Two limits of our analysis are important to note. First, because the effects of reforms are largely unknown, many of the estimated effects in the analysis are tenuous. For example, posttrial activities already reduce payments substantially; therefore, we estimated that reforms, such as those requiring a higher standard of evidence for punitive damages or establishing caps, may have less of an affect on the amount of plaintiffs' ultimate recoveries than on the amount originally awarded by juries or judges.[11] This may not result, however, if a reform was to alter the posttrial bargaining positions of the parties in certain ways. For example, a defendant may be more likely to appeal an award given under a higher standard of evidence; alternatively, a plaintiff may be less willing to accept a posttrial reduction of an award that is within a statutory cap.

Second, the analysis does not address the effects of reforms on the larger body of product-related cases that do not go to verdict (either because of a settlement or because a party drops out) and cases for which a lawsuit is not filed. Because our study consisted entirely of product liability cases that reached trial, our analysis of the possible effects of reforms has necessarily centered on verdicts. Although an enacted reform might affect only a small number of verdicts, the impact on cases that never reach verdict or for which a suit is not filed could be more substantial, though less directly quantifiable. For example, a reform that makes it more difficult to recover punitive damages may reduce (1) the number of requests for such damages or (2) the degree to

[11]For example, taking the aggregate ratios of payments to awards in the cases studied (see table 3.5), we would expect an ultimate payment of about $400,000 for an award of $1 million, $900,000 of which was for punitive damages. If a reform was to limit punitive damages to three times the compensatory damages, the total award would be reduced to $400,000 ($300,000 for punitive damages). On the basis of our findings, we would expect that award to be reduced to $240,000 at payment.

which plaintiffs could use the threat of punitive damages in pretrial bargaining. Because such reforms downgrade plaintiffs' bargaining position, these reforms may result in lower and earlier settlements or in different types of cases reaching verdict.

The implications of our findings for federal product liability law are discussed in chapter 6.

Implications of Our Review

Over the past few decades, the tort system as it applies to product liability has been changing. The size of awards has increased, although the extent of the increase and its causes have been matters of considerable debate. Liability has been expanded by varying degrees in different states, creating increased variation among state laws. Insurers and defendant groups have complained that these changes are indications of a malfunctioning tort system that has undermined their ability to predict risks. These insurers and defendant groups have joined with some legal scholars in advocating product liability reform to curb these trends. Consumer groups have (1) defended the changes as redressing prior restrictions on plaintiff's ability to recover damages and (2) attributed problems in liability insurance to economic factors.

In this chapter, we discuss the implications of our findings for proposed federal tort reforms. We first discuss the implications of our analyses for federal reforms in general. We then examine whether our data are consistent with concerns underlying specific reform proposals. We consider reforms related to (1) the time and costs of litigation, (2) punitive damage awards, (3) award size, (4) liability standards, and (5) product sellers' liability. We also discuss reforms related to assessing the effects of tort reforms on case outcomes and insurance rates.[1]

Although we studied a cross section of states, our findings and their implications cannot be considered representative of all states. They vary considerably in their laws, award size and frequency, use of the various liability standards, and posttrial adjustments. Different conclusions may be reached, therefore, depending upon the states studied. Where relevant, we use information from other studies to give as broad a view as possible.

Federal Reforms Would Reduce Variation in State Laws

Manufacturers, sellers, and insurers contend that (1) the variation in state laws causes defendants to be held to different liability standards and (2) a federal law is needed to supplant the patchwork of state laws (see ch. 1). Because federal reforms would establish the same standards in each state, these reforms, if sufficiently unambiguous, would make the application of product liability law for the subjects addressed more uniform in the 50 states. For some reform advocates, however, achieving uniformity may be secondary to the goal of achieving favorable

[1]We do not address concerns underlying proposals to (1) limit attorneys' legal fees, (2) reduce awards for comparative negligence, and (3) abolish joint and several liability or the collateral source rule. We have no information bearing on those proposals other than estimates on the number of cases potentially affected by each reform (see table 5.3).

reforms in at least a subset of states. While arguing for federal reforms to achieve uniformity, tort reform advocates have also continued their efforts to pass reforms at the state level. Most state reform proposals have been directed at the tort system in general; a few reforms have been specifically targeted to perceived problems concerning product liability. Since 1985, a majority of states have enacted reforms that would affect product liability. Those recent state reforms have had the effect of increasing the variation among state laws.

Proposed federal reforms may have a limited impact in two respects. First, we found that payments in only a minority of the cases studied were so extreme (in terms of award size or departures from traditional standards of liability) that they would have been affected by proposed reforms. The reforms, however, may have a broader impact on litigation costs and the large number of cases settled before verdict.

Second, federal reforms specifically targeted at product liability would have a limited effect on some problems in the tort system in general. The large amount of time and cost required to resolve claims are problems encountered in many types of civil cases, of which product liability cases are a small portion. Federal reforms that dealt only with product liability would do little to remedy the general problem of court congestion.[2]

Findings Consistent With Concerns About Time and Costs

In response to criticisms that litigation is too costly and lengthy, reforms have been proposed to institute alternative dispute resolution procedures to expedite the resolution of claims.[3,4] Consistent with arguments by those who advocate these reforms, in the five states studied, we found that (1) cases took years to reach verdict and (2) a substantial percentage of defendants' payments and plaintiffs' recoveries went for legal fees and expenses.

[2]Reforms providing for alternate dispute resolution procedures (such as mediation or arbitration) might reduce the time and cost for those product liability cases resolved under these procedures and reduce slightly some civil courts' congestion.

[3]To the extent other reforms make it more difficult for plaintiffs to recover, those reforms may increase the percentage of cases settled before trial. This would reduce litigation costs and also, by reducing courts' dockets, potentially shorten the time required to process cases going to verdict.

[4]Because of their complexity, these reforms were not considered in chapter 5.

Findings Consistent With Concerns About Punitive Damages

One of several types of proposed reforms concerning punitive damages is the proposal to raise the standard of evidence required to award such damages.[5] This reform is designed to ensure that punitive damages are awarded only when truly merited.

Tort reform advocates contend that many punitive damage awards are unjustified. Our review showed, however, that the judicial reviews currently built into the tort system eliminate many punitive damage awards. In the cases studied, appellate courts reversed or sent back for further action at the trial court level all 12 of the punitive damage awards on which they ruled.[6]

The question of whether to raise the standard of evidence for punitive damages comes down, mainly, to the issue of whether to continue to rely on controls currently in the system. Drawbacks to the present system include the additional cost and time of the appeals process.[7] In the five states studied, on average, cases were in the appeals process for 10 months. Defense costs (for attorney fees and expenses) in appealed cases were double the costs in cases that were not appealed. If reforms were to help juries and judges make more accurate decisions at the trial court level, defendants could potentially save these costs. Some critics caution, however, that reforms that make the award of punitive damages extremely difficult may dampen the deterrence function those awards are believed to serve.

[5]Our data are not relevant to other proposed reforms related to punitive damages. Some bills include proposals to institute a two-stage trial in which the amount of punitive damages is set in a separate hearing after the trial to determine compensatory damages and whether the defendant's conduct merits punitive damages. The goal of this reform is to eliminate any inflationary effects that evidence on punitive damages may have on the size of compensatory damages. Other reforms related to punitive damages include (1) establishing a uniform definition of the conduct for which punitive damages should be awarded and (2) requiring that juries be instructed to consider certain factors when setting the punitive damages amount (see ch. 5).

[6]An additional 7 cases with punitive damage awards were appealed but settled before an appellate court ruling. In general, posttrial settlements had the effect of eliminating punitive damages; that is, they resulted in payments that were lower than the original award by an amount equal to or greater than the punitive portion of the original award.

[7]On the basis of our data, we cannot evaluate other alleged drawbacks to the current system, such as the possible negative effects that might accrue from having made the award in the first place or the number of cases that would have been reversed on appeal but were never appealed because of the anticipated additional legal costs. Tort reform advocates believe that the possibility of recovering large punitive damages, even if the award is reduced posttrial, increases the incidence of requests for punitive damages and complicates the settlement process.

Concerns About Award Amounts Largely Unfounded

To control the size of awards and make their amounts more predictable, some federal bills have included proposals to place caps on certain types of damages. Caps have been proposed for compensatory awards for noneconomic damages—such as for pain and suffering—and for punitive damage awards.

Noneconomic damages have been criticized as being unpredictable and excessive relative to the amount of harm done. But even if the portion of an award labeled as noneconomic damages was unpredictable from case to case, total awards for compensatory damages—which include both economic and noneconomic damages—still show a strong relationship to the severity of the injury and underlying economic losses.[8] In the cases studied, average and median compensatory awards differed substantially according to injury severity, with awards being higher the more severe the injury. Similarly, ICJ reported that for all tort cases in Cook County, Illinois, severity of the injury, as measured by medical costs, accounted for a significant proportion of the differences in award amounts across cases. Historically, studies in which economic loss could be measured have shown that rather than being excessive relative to the loss, payments of compensatory damages do not fully compensate for large economic losses (for example, $100,000, $200,000, or larger, depending on the study).[9] In a recent study of wrongful death claims resulting from airplane accidents, payments of compensatory damages inadequately compensated for large economic loss. Even when the awards included large noneconomic damage components, the total amount of compensation provided was less than economic losses sustained.[10]

Like noneconomic damages, punitive damage awards have been criticized as excessive relative to the amount of harm done, as measured by the size of compensatory damages. Some states have enacted caps that limit punitive damages to some multiple of the amount awarded for compensatory damages; one state has set a cap as high as four times compensatory damages.[11] We found that the size of punitive damage awards

[8]Because we could not separate economic from noneconomic damages in the cases studied, we can only examine awards for all compensatory damages.

[9]Our data have no bearing on whether noneconomic damages are excessive relative to actual noneconomic loss, such as the amount of pain and suffering or loss of consortium.

[10]E.M. King and J.P. Smith, Economic Loss and Compensation in Aviation Accidents (Santa Monica, Calif.: The Rand Corporation, the Institute for Civil Justice, 1988), pp. 88-89.

[11]Texas Civil Statutes sections 41.007 and 41.008.

was, for the most part, within the statutory limits that have been established in some states. Only two awards exceeded four times the compensatory damages, and only three large awards (of $1 million or more) were greater than the more moderate cap of two times compensatory damages. Therefore, in a few cases studied, punitive damage awards were large in comparison with the compensatory damage awards; large punitive damage awards have also been documented in product liability cases in other jurisdictions. A study by ICJ found that such awards were more frequent in business contract cases than in personal injury cases, such as product liability.[12]

As with unjustified punitive damage awards, the present system already includes controls on the amounts plaintiffs ultimately recover. For extreme awards in the cases we studied, appellate processes and posttrial settlement negotiations, when used, reduced those awards. These mechanisms resulted in large reductions in cases of the most concern to insurers—verdicts of $1 million or more, especially those with large punitive damage awards.

Relying on posttrial processes to guard against excessive recoveries has some disadvantages. As discussed earlier, posttrial activities add to the already substantial time and costs required to resolve cases. Further, for compensatory damage awards, appellate processes were not used to the same degree in all states and, therefore, may not be relied upon to guard against excessive recoveries in all states. Where posttrial processes do not reduce extreme awards, other mechanisms, such as caps, may have a role to play in controlling the size of awards. Reforms imposing caps should guard against the possibility of indirectly reducing the economic damage component of awards. Little is known about how juries or parties to a settlement decide on the amounts of economic and noneconomic damages. As shown in a previous study, noneconomic damages are not necessarily a supplement received after plaintiffs are fully compensated for their economic loss. Rather, payments with large noneconomic components still fail to fully compensate for economic loss when that loss is large. If juries decide the total damages and then, at least to some extent, arbitrarily divide that total between economic and noneconomic

[12]The Court recently held that the awarding of punitive damages far in excess of compensatory damages does not violate the Eighth Amendment's prohibition against excessive fines (Browning-Ferris v. Kelco Disposal, Inc., S.Ct. No. 88-556 [June 26, 1989]). Without ruling on the subject, however, a number of justices in that case noted that juries' awarding punitive damages in absence of guidelines might be an unconstitutional violation of the Fourteenth Amendment due process clause. The Court did not rule on the due process question in the Browning-Ferris case because the issue had not been promptly raised.

damages, placing a cap on noneconomic damages might in effect eliminate some money that might have gone for economic damages.

Defendants' Liability Most Often Based on Negligence

Concerns that juries award damages without considering the defendants' conduct or degree of fault have led to a number of proposals to limit defendants' liability. One proposed federal reform would establish that defendants would not be liable for a design defect or a failure to warn if, given the state of the art at the time the product left the defendants, they could not have designed a safer product or foreseen the defect.[13] Underlying this proposal are concerns that under strict liability, defendants are being held liable in unreasonable situations such as, for example, when they had not warned against a danger from misuse that they could not have anticipated when the product left them.

In the cases we studied, liability was based on negligence in a majority of decisions. Even in those cases in which defendants were accused of being strictly liable for a design defect or for failing to warn, defenses were almost always available that would have allowed juries and judges to consider the propriety of the defendants' conduct in light of the then-existing technology or the foreseeability of the defect. In a few cases in other states and in one Missouri case and one Massachusetts case (both of which fell outside our study time period), however, appellate courts have held that defendants were liable for design defects or failing to warn—even though defendants' actions were in accord with the state of the art at the time the product was manufactured.[14]

Empirical data on the frequency of certain liability decisions cannot resolve some of the key issues surrounding the proposed reforms. A key issue is whether (1) manufacturers should be liable for all injuries caused by product defects, even those resulting from unforseen defects, or (2) those injuries should be compensated for in some other way (for example, first-party insurance or victim compensation funds).

[13]Another, more extreme proposal would limit liability to negligence and, therefore, abolish liability based on the standard of strict liability or breach of warranty. Since most of the debate has focused on the proposal to allow the state-of-the-art defense under strict liability, we evaluate the validity of concerns relevant to that proposal.

[14]In 1987, the Missouri legislature passed a statute allowing state-of-the-art evidence in failure-to-warn cases. In one Massachusetts failure-to-warn case, which fell outside our study time, the defendant was not allowed to introduce state-of-the-art evidence. Subsequently, Massachusetts courts have questioned this earlier decision, however, and have allowed such evidence to be admitted.

Some Concerns About Product Sellers' Liability Do Not Appear to Be Supported

Tort reform advocates complain that product sellers who have minimal contact with the product are often named in complaints, only to drop out before the trial because of the lack of a valid case. Reforms have been proposed to limit product sellers' liability to situations in which (1) the seller has more than minimal contact with the product (that is, committed a specific act of negligence or breached an express—usually, written—warranty), (2) the manufacturer may not be sued because it does not do business in the state where the case is filed, or (3) the manufacturer does not hold assets sufficient to pay a judgment. These reforms are primarily designed to reduce the litigation costs incurred by sellers because of frivolous suits against them.

Although we found instances in which sellers who had minimal contact with the product were brought to trial, in general, our data do not support concerns that frivolous suits are more often brought against sellers than other types of defendants. If many of the cases brought against sellers were frivolous, we would expect to find that cases against them were being dismissed by the courts at a higher rate than for cases against other types of defendants. We found, however, that cases against sellers were dismissed at the same rate as cases against other types of defendants (see app. III). In addition, sellers were found liable at about the same rate as manufacturers (see table 5.3). Sellers' liability was less often based on strict liability than manufacturers' and more often on negligence alone (see table 5.3).

Although these findings do not support concerns that a greater number of frivolous suits are being brought against product sellers, our data are limited in the degree to which we can fully assess those concerns. For example, because we could not determine the reasons suits against individual defendants were dismissed, we cannot conclusively say that frivolous suits were no more prevalent among sellers than other types of defendants.

Unavailability of Data to Assess Tort Reforms Confirmed

In the mid-1970s and again in the mid-1980s, when asked to enact tort reforms to ease a crisis in liability insurance, the Congress found little information with which to evaluate the validity of tort reform advocates' concerns or the potential effects of tort reforms on insurance rates. Some federal bills have contained proposals designed to ensure that the effects of reforms could be assessed in the future. Among these are proposals to (1) mandate a study of reforms' effects and (2) require that insurers' data on claims, their resolution, and the impact of reforms on claims be made available and reported regularly to the Congress.

Our experience in this study confirms that data with which to assess the effects of tort reforms are not readily available. The data contained in court records or the files of attorneys are neither comprehensive enough to assess reforms' effects nor easily retrieved. In the past, insurers' closed-claims files have proved to be comprehensive. Although such files were unavailable to us, state insurance commissioners, as part of their responsibilities for regulating the insurance industry, can require insurers to submit data. Obtaining data through the cooperation of state insurance commissioners, therefore, may be a possible alternative to requiring federal data collection.

Even if data were available, assessing the effects of federal reforms would be difficult, though not impossible. Previously, GAO testified that it believes a well-designed and well-executed study could evaluate whether tort reforms at the state level reduce liability insurance premiums or prevent their increase.[15] Such a study would involve comparing claims resolved in states that had enacted reforms with those in states that had not enacted reforms. Evaluating the effects of federal reforms might be more difficult. An evaluation to determine the effects of federal reforms would most likely involve comparing information on claims before reforms with information after reforms. With the exception of one study of claims arising out of policies written in 1983 and one on large loss claims closed in 1985, we currently lack systematic information on claims before reforms.[16]

Establishing mechanisms for obtaining information could ensure that data not available to us for this study would be available to address future issues concerning the relationship between tort reform and insurance rates. Such data might enable the Congress to (1) answer some questions that are very difficult or impossible to answer currently and (2) look at all claims, not just those resolved through verdicts. These mechanisms, however, would do little to resolve the debate over current tort reform proposals.

[15]Considerations in Measuring the Relationship Between Tort Reform and Insurance Premiums, statement by Joseph F. Delfico, GAO, before the House Committee on Small Business (GAO/HRD-87-11, Apr. 28, 1987).

[16]Claim File Data Analysis: Technical Analysis of Survey Results (ISO Data, Inc., 1988) examined commercial liability claims arising out of policies written during 1983. In addition, see Alliance of American Insurers and American Insurance Association, A Study of Large Product Liability Claims Closed in 1985 (1986).

Detailed Description of Methodology

This appendix provides additional details concerning our methodology, discussed in chapter 1. Information is included about (1) the selection of states, (2) the databases from which the cases were drawn, (3) data collection from case files, (4) questionnaire mailings and responses, and (5) an analysis of the effects of nonresponse on our findings.

Selection of States

Our selection of states was based primarily on the availability of data on cases filed in state court. One of the greatest obstacles to gathering data on product liability litigation is the unavailability in most states of centralized databases through which product liability cases can be identified. Because product liability cases represent a small percentage of all tort filings, identifying product liability cases without a centralized listing would entail very time-consuming searches of thousands of docket sheets or case filings or both.

To determine jurisdictions in which we could identify product liability cases without manually searching court records, we conducted telephone interviews across the 48 states in the continental United States and the District of Columbia; we interviewed court officials, attorneys, and private organizations that track product liability litigation. We identified several possible sources through which product liability cases could be identified. These included computerized databases maintained by state court administrative offices, commercial jury verdict reporters, and previous studies in which product liability cases had been identified by searching court records.

For 10 jurisdictions, we found sources that we could use to identify product liability cases. Because of resource constraints, we limited our review to 5 of the 10 jurisdictions. Our final selection was based on the (1) amount of information available on product liability litigation in the jurisdictions and (2) relative costs associated with obtaining information. We eliminated two jurisdictions (Cook County, Ill., and San Francisco, Calif.) because product liability verdicts in those jurisdictions have been reported by the Institute for Civil Justice (ICJ). We excluded three jurisdictions (the states of Colorado, Michigan, and Oregon) because the costs of obtaining case listings would have exceeded our resources.

The cases covered in this study are not to be viewed as statistically representative of all product liability cases across the country. In particular, the most populous states are not included in this study either because complete data were unavailable in those states or, in the case of

California, we did not want to duplicate previous ICJ work. The most populous state in our study is Massachusetts, which ranks 12th among the 50 states. Two of the states—Missouri and South Carolina—however, ranked above the U.S. median state population, as estimated by the Census Bureau in 1984, the middle year of our study period.

The five states that we chose offered a mix on a variety of dimensions. They are diverse regionally and in terms of urbanization. Some researchers believe greater urbanization is associated with a higher incidence and size of jury verdicts. The five states ranged from Massachusetts and Arizona—ranked ninth and tenth, respectively, among the 50 states (both with an urban population of about 84 percent)—to North Dakota, which ranks 44th (with an urban population of about 49 percent).

In terms of the dollar value of manufacturing shipments and the numbers of manufacturers and manufacturing employees, Massachusetts and Missouri rank among the top one-third of states; Arizona and South Carolina, the middle one-third; and North Dakota, the lowest one-third.

Sources Used to Identify Product Liability Cases

State Courts

For each of the five states, summaries of the following are given in table I.1: the number and type of courts studied; the type of source(s) used to identify product liability cases; the proportion of the state's population covered by those sources; and our success in sampling both jury and bench (that is, nonjury) trials. Although we attempted to gather data on verdicts rendered by either a jury or a judge, we successfully obtained data on bench verdicts only in Massachusetts's and Missouri's state courts.

Federal Courts

From the Administrative Office of the U.S. Courts, for the five states, we obtained a listing of cases that were resolved through trial verdicts in the U.S. district courts. The Administrative Office's data are generally considered to be the best source for information on product liability

cases. Six district courts cover five states, one per state, except Missouri, which has two districts—Western Missouri and Eastern Missouri.

Table I.1: Cases Covered and Sources Used in State Courts

State	Extent of state coverage: Number of courts	Extent of state coverage: Percentage of state population	Sources used to identify cases	Cases tried in courts not included in this study[a]
Arizona	9 of 15 circuit courts	88	Jury verdict reporters	All claims under $500; any claims between $500 and $2,500[b] tried by justice of the peace
Massachusetts	All 14 superior courts	100	Records of the Office of the Chief Administrative Justice and the court of appeals	All claims under $7,500, which are tried in district court, municipal court, or housing court
Missouri	All 44 judicial circuits	100	Jury verdict reporters; records of the Office of State Courts Administrator; "Missouri Appellate Court Opinion Summary"	None
North Dakota	All 53 district courts	100	Private study	Any claims under $10,000[b] tried in county court
South Carolina	26 of 46 circuit courts	78	Private study	Any claims under $1,000[b] tried in magistrate court

[a]In all states but Missouri, product liability cases with small claims could be heard in courts other than the trial courts we examined. Our sources did not cover these courts with small claims.

[b]Cases with claims of $2,000 and over could also be tried in the courts we studied.

When a complaint is filed, the plaintiff attorney indicates which standard case type (for example, "torts/personal injury—product liability") best describes the nature of the suit. To help ensure accuracy, the court clerk verifies the attorney's selection, correcting any mistakes. The clerks also record when and how the case was disposed.

Data Collection

We gathered data using the following sources:

- case files maintained at federal, state, and county courthouses;
- commercial reporters of verdicts and appeals; and
- questionnaires sent to attorneys representing plaintiffs and defendants.

Review of Court Records and Jury Verdict Reporters

In each state, we gathered information from case files, docket sheets maintained by the courts, and, when available, jury verdict reporters. We relied primarily on court records and only used reporters to fill in information missing from court records.

From these sources, we obtained background information, including a description of the incident and the parties to the suit, the disposition of the case against each defendant, the amount of compensatory and punitive damages demanded and awarded, and dates of various stages of case processing from filing to disposition. We also recorded information on posttrial activities, including appeals and settlement negotiations, as well as, when available, their outcomes.

To supplement information on appeals, we searched appellate court records—when possible—and WESTLAW, a commercial service that provides information on appeals nationwide.

Survey of Attorneys

To gather information not consistently available from court files, we sent questionnaires to plaintiff and defendant attorneys who represented the parties in the cases. For the 305 cases in our study, we surveyed 313 plaintiff attorneys and 407 defendant attorneys. Attorneys were asked to report the status of the case; payments made to date and how the amounts were determined; legal fees and expenses; various legal aspects, including the liability standards used to decide the case, affirmative defenses, and alleged defects; estimated special damages for medical costs and lost wages; and collateral source payments and reimbursements. Attorneys were assured that we would keep confidential all information that was not already on the public record, such as confidential settlements and payments as well as attorneys' fees. Appendix II contains copies of the questionnaires used to survey attorneys. In an attempt to ensure a high response rate, we followed the initial mailing with at least one more mailing of copies of the questionnaires as well as telephone calls.

Across the five states, we obtained information from 67 percent of plaintiff attorneys and 66 percent of defendant attorneys. For questions concerning payments and legal aspects of the cases, the questionnaires were designed such that a response from only one side in a dispute provided complete case data. As shown in table I.2, the per case response rates from payment data ranged between 68 and 80 percent. Only in Massachusetts did the response rate for information on posttrial payments drop below 70 percent.

We received information on fees from 53 percent of plaintiff attorneys and 52 percent of defendant attorneys. For 56 cases, we obtained complete information on fees and expenses for both sides of the dispute. For

items concerning special damages and collateral source payments, all response rates (either per party or per case) were less than 50 percent.

Table I.2: Percentage of Cases for Which Payment Data Obtained

State	Cases with data	Total cases	Percent responding
Arizona	45	59	76
Massachusetts	45	66	68
Missouri	88	108	81
North Dakota	13	16	81
South Carolina	45	56	79
All cases	236	305	77

In 69 cases, we were unable to obtain payment data. In 6 cases for which a court action was still pending, final outcomes had yet to be determined. Payments in 11 cases were part of confidential agreements. In 1 case, the attorney could not recall the size of the payment. Finally, in 51 cases, neither plaintiff nor defendant attorneys responded.

Cases for which we do not have data on payments appear very similar to those for which we have data (see table I.3). The most notable differences are in the size of compensatory damages, number of punitive damage awards, and rate of posttrial activity. The 69 cases for which we lack payment data had higher average compensatory damages, but included only 1 of the 23 cases in which punitive damages were awarded. These 69 also had a slightly higher rate of adjustment by trial judges and a slightly higher rate of appeal. These higher rates (as well as the higher average award) suggest that the cases for which we lack data would have had at least as many, if not more, posttrial adjustments as we found for compensatory awards.

Table I.3: Comparison of Cases With and Without Payment Data

	Payment data	
	With	Without
Cases	236	69
Percent liable	44	48
Cases with punitive damages awarded	22	1
Average compensatory award	$604,000	$723,000
Percent adjusted by trial judge	6	10
Percent appealed	44	49

U.S. General Accounting Office Surveys: Part A: Plaintiffs' Attorneys

U.S. GENERAL ACCOUNTING OFFICE
SURVEY OF PLAINTIFFS' ATTORNEYS REGARDING PRODUCT LIABILITY CASES

The U.S. General Accounting Office is collecting information from attorneys for all product liability cases that went to trial in selected states in calendar years 1983 through 1985. Please provide information for the case specified above. Individual responses will be kept confidential.

If you represented more than one client in this case, please complete a questionnaire for each. If you do not have separate information for each of your clients, please report the information on one questionnaire and write-in the names of the applicable clients.

NAME OF CLIENT(S): _____

_____

01. Is this case completely closed in regard to this client(s), or is it still pending?

1. [ ] Case closed

Date case closed: _____ MO/YR

(GO TO QUESTION 02)

OR (CHECK ALL THAT APPLY.)

2. [ ] Pending motion for remittitur/additur
3. [ ] Pending a new trial or motion for new trial
4. [ ] Pending appeal
5. [ ] Pending execution of judgment only
6. [ ] Other (PLEASE SPECIFY.) _____

(GO TO QUESTION 05)

02. Did this client(s) receive any post-trial payments from any defendant(s) involved in the original trial verdict?

(IF RECEIVED, INCLUDE PAYMENTS OF (1) AWARDS PLUS PRE-JUDGMENT INTEREST, IF ANY, AND (2) POST-TRIAL SETTLEMENTS; IF SPECIFIC PAYMENT TO THIS CLIENT(S) IS NOT AVAILABLE, ENTER THE PAYMENT TO BE SHARED WITH OTHER PLAINTIFFS.) (ENTER AMOUNT; IF NONE, ENTER '0'.)

1. Specific to this client(s) $ _____
2. Shared with other plaintiffs $ _____

03. How was this amount in question 02 determined? (CHECK ALL THAT APPLY.)

1. [ ] Verdict as initially specified
2. [ ] Verdict less lien amount
3. [ ] Verdict adjusted by pre-trial settlement amount received from others
4. [ ] Verdict adjusted by trial court
5. [ ] Verdict adjusted by appellate court
6. [ ] New trial verdict
7. [ ] Post-trial settlement negotiations
8. [ ] Payments from structured settlement
9. [ ] Defendant(s)' inability to pay full amount due
10. [ ] Defendant's verdict
11. [ ] Other (PLEASE SPECIFY.) _____

1

04. Is the payment in Question 02 the total amount this client(s) is/was legally obligated to receive from defendants involved in the initial verdict? (CHECK ONE; IF 'NO', ENTER, AFTER OFFSETS, TOTAL AMOUNT DUE FROM (1) AWARDS PLUS PRE-JUDGMENT INTEREST, IF ANY, AND (2) POST-TRIAL SETTLEMENTS.)

1. [ ] Yes

2. [ ] No (ENTER TOTAL AMOUNT DUE, INCLUDING PAYMENTS TO DATE)

$ _____
Total Amount Due

3. [ ] Not applicable

05. Did this client(s) receive payments from any defendant(s) who settled before the verdict? (CHECK ONE; IF 'YES', ENTER AMOUNT.)

1. [ ] Yes (ENTER AMOUNT.)

$ _____

2. [ ] No

3. [ ] Don't know

4. [ ] Not applicable (no other defendant(s))

06. Do you know how much the other plaintiff(s) who went to verdict ultimately received directly from defendant(s) who went to verdict? (DO NOT INCLUDE THIS CLIENT(S)). (CHECK ONE.)

1. [ ] Yes (ENTER TOTAL AMOUNT RECEIVED BY OTHER PLAINTIFF(S))

$ _____

2. [ ] No payment to other plaintiff(s)

3. [ ] Don't know

4. [ ] Not applicable (no other plaintiff(s))

07. What would you estimate are the total legal fees or contingency fee, if any, that you and your firm received from this client(s)? (DO NOT INCLUDE REIMBURSEMENTS FOR EXPENSES BY THIS CLIENT(S)). (ENTER AMOUNT; IF NONE, ENTER '0'.)

$_____ or

_____ % contingency fee

[ ] Case still pending

08. To date, what were your total expenses to handle this client(s)' case (include those for which you may have been reimbursed)? (ENTER AMOUNT.)

$_____

09. What was (1) the dollar amount claimed by this client(s) for special damages incurred before the trial and (2) the estimate of special damages that would be incurred after the trial?

Special damages: include medical costs, wage loss, and other monetary losses; exclude legal fees and expenses

(IF YOU DO NOT HAVE A BREAKDOWN OF PAST AND FUTURE SPECIALS, PLEASE PROVIDE TOTAL SPECIAL DAMAGES CLAIMED.) (ENTER AMOUNTS.)

1. Special damages incurred before the trial $ _____

2. Special damages to be incurred after the trial $ _____

OR

3. Total special damages (incurred before and to be incurred after trial) $ _____

2

10. Please (A) indicate whether or not each of the following sources compensated or paid benefits to this client(s) as a result of his/her losses; (B) if this client(s) received payment, please estimate the amount received from each source; and (C) where applicable, indicate whether or not the source was reimbursed as a result of a subrogation lien. (IF CASE IS STILL PENDING, DO NOT COMPLETE 'REIMBURSED THROUGH SUBROGATION LIEN'.)

SOURCE	(A) SOURCE COMPENSATED THIS CLIENT(S)? (CHECK ONE.)			(B) IF SOURCE COMPENSATED CLIENT, AMOUNT PAID (ENTER AMOUNT.)	(C) REIMBURSED THROUGH SUBROGATION LIEN (CHECK ONE.)		
	YES (1)	NO (2)	DON'T KNOW (3)		YES (1)	NO (2)	DON'T KNOW (3)
1. Workers compensation							
2. Disability payments (include payments from social security, private insurance, pension plans, etc.)							
3. Private health insurance							
4. Medicaid or Medicare							
5. Unemployment compensation							
6. Compensation from employer (other than workers compensation and payments of awards and post-trial settlements from an employer who was a defendant in the case.)							
7. Public assistance programs (Include AFDC, SSI, etc.)							
8. Life insurance							
9. Property and accident insurance (other than payments from defendant(s))							
10. Other (PLEASE SPECIFY.) _____							

11. In this case, was your firm the only one which represented this client(s) at any time? (CHECK ONE.)

    1. [ ] Yes

    2. [ ] No

IF YOU HAVE ALREADY ANSWERED QUESTIONS 12-15 ON ANOTHER QUESTIONNAIRE FOR THIS CASE, DO NOT ANSWER QUESTIONS 12-15 ON THIS QUESTIONNAIRE.

12. In the initial trial, what legal theory or theories did the judge instruct the jury to consider in deciding the case or, if a bench judgment, what was the legal theory/theories considered by the judge? (CHECK ALL THAT APPLY.)

    1. [ ] Strict liability

    2. [ ] Negligence

    3. [ ] Breach of express warranty

    4. [ ] Breach of implied warranty

    5. [ ] Intentional tort

    6. [ ] Misrepresentation, fraud, and deceit

    7. [ ] Willful and wanton negligence

    8. [ ] Breach of express contract

    9. [ ] Breach of implied contract

    10. [ ] Other (PLEASE SPECIFY.)

    _____

13. In your opinion, in addition to whether or not the product was unreasonably dangerous, to what extent, if at all, was negligence on any of the defendant(s)' part an issue in the trial? (CHECK ONE.)

    1. [ ] Little or no extent

    2. [ ] Some extent

    3. [ ] Moderate extent

    4. [ ] Great extent

    5. [ ] Very great extent

14. At the trial, what types of product defects were alleged to have caused the incident? (CHECK ALL THAT APPLY.)

    1. [ ] Design defect

    2. [ ] Defect in manufacture

    3. [ ] Failure to warn or insufficient instructions

    4. [ ] Other (PLEASE SPECIFY.)

    _____

    _____

15. If you have any comments related to this questionnaire or the items in this questionnaire, please write them in the space provided below or, if more space is needed, attach another sheet of paper.

Thank you for completing this questionnaire. Please provide the name and phone number of the person we may contact should we need to clarify any responses.

Name: _____

Tel. No.: _____

If you would like a copy of the report, please check the box. [ ]

4

U.S. GENERAL ACCOUNTING OFFICE
SURVEY OF DEFENDANTS' ATTORNEYS REGARDING PRODUCT LIABILITY CASES

The U.S. General Accounting Office is collecting information from attorneys for all product liability cases that went to trial in selected states in calendar years 1983 through 1985. Please provide information for the case specified above. Individual responses will be kept confidential.

If you represented more than one client in this case, please complete a questionnaire for each. If you do not have separate information for each of your clients, please report the information on one questionnaire and write-in the names of the applicable clients.

NAME OF CLIENT(S): _____

01. Is this case completely closed in regard to this client(s), or is it still pending?

1. [ ] Case closed

Date case closed:

_____
MO/YR

(GO TO QUESTION 02)

OR (CHECK ALL THAT APPLY.)

2. [ ] Pending motion for remittitur/additur
3. [ ] Pending a new trial or motion for new trial
4. [ ] Pending appeal
5. [ ] Pending execution of judgment only
6. [ ] Other (PLEASE SPECIFY.)

_____

(GO TO QUESTION 06)

02. What post-trial payments, if any, has this client(s) made to plaintiffs involved in the original trial verdict or to other defendants as contributions?

(INCLUDE PAYMENTS OF (1) AWARDS PLUS PRE-JUDGMENT INTEREST, IF ANY, AND (2) POST-TRIAL SETTLEMENTS. ENTER AMOUNT IF NONE, ENTER '0'.)

Amount directly to plaintiff(s) or paid to other defendants as contribution:

$ _____

03. How was this amount in question 02 determined? (CHECK ALL THAT APPLY.)

1. [ ] Verdict as initially specified
2. [ ] Verdict less lien amount
3. [ ] Verdict adjusted by pre-trial settlement amount received from others
4. [ ] Verdict adjusted by trial court
5. [ ] Verdict adjusted by appellate court
6. [ ] New trial verdict
7. [ ] Post-trial settlement negotiations
8. [ ] Defendant(s)' inability to pay full amount due
9. [ ] Defendant's verdict
10. [ ] Other (PLEASE SPECIFY.)

_____

1

04. Did the plaintiff(s) receive the amount in question 2 in one lump sum or in periodic payments according to a structured settlement? (CHECK ONE.)

1. [ ] Lump sum

2. [ ] Periodic payments

3. [ ] Not applicable

05. Is the payment made in question 2 the total amount this client(s) was legally obligated to pay to all plaintiffs involved in the initial verdict? (CHECK ONE. IF 'NO', ENTER, AFTER OFFSETS, TOTAL AMOUNT DUE FROM (1) AWARDS PLUS PRE-JUDGMENT INTEREST, IF ANY, AND (2) POST-TRIAL SETTLEMENTS.)

1. [ ] Yes

2. [ ] No (ENTER TOTAL AMOUNT DUE)

$ _____

3. [ ] Not applicable

06. Do you know how much the plaintiff(s) who went to verdict ultimately received directly from other defendant(s) who went to verdict? (DO NOT INCLUDE THIS CLIENT(S).) (CHECK ONE.)

1. [ ] Yes (ENTER TOTAL AMOUNT PAID BY OTHER DEFENDANT(S))

$ _____

2. [ ] No payment by other defendant(s)

3. [ ] Don't know

4. [ ] Not applicable (no other defendant(s))

07. What would you estimate are the total legal fees, if any, that you and your firm received from this client(s)? (DO NOT INCLUDE REIMBURSEMENTS FOR EXPENSES FROM THIS CLIENT(S)). (ENTER AMOUNT.)

$ _____

[ ] Case still pending

08. To date, what were your total expenses to handle this client(s)' case (include those for which you may have been reimbursed)? (ENTER AMOUNT.)

$_____

09. For each plaintiff involved in the initial trial verdict, what was (1) your estimate of special damages which the plaintiff incurred before the trial and (2) your estimate of the special damages that would be incurred after the trial?

Special damages: include medical costs, wage loss, and other monetary losses; exclude legal fees and expenses

(IF YOU DO NOT HAVE A BREAKDOWN OF PAST AND FUTURE SPECIALS, PLEASE PROVIDE TOTAL ESTIMATED SPECIAL DAMAGES.) (ENTER AMOUNTS.)

(WE HAVE PROVIDED SPACE FOR UP TO 5 PLAINTIFFS. IF YOU NEED ADDITIONAL SPACE, ATTACH ANOTHER SHEET WITH THE INFORMATION ON IT.)

NAME OF PLAINTIFF 1: _____

1. Special damages incurred before the trial $ _____

2. Special damages to be incurred after the trial $ _____

OR

3. Total special damages (incurred before and to be incurred after trial) $ _____

(CONTINUE TO NEXT PAGE)

(QUESTION 9 CONTINUED)

NAME OF PLAINTIFF 2: _____

1. Special damages incurred before the trial $ _____

2. Special damages to be incurred after the trial $ _____

OR

3. Total special damages (incurred before and to be incurred after trial) $ _____

NAME OF PLAINTIFF 3: _____

1. Special damages incurred before the trial $ _____

2. Special damages to be incurred after the trial $ _____

OR

3. Total special damages (incurred before and to be incurred after trial) $ _____

NAME OF PLAINTIFF 4: _____

1. Special damages incurred before the trial $ _____

2. Special damages to be incurred after the trial $ _____

OR

3. Total special damages (incurred before and to be incurred after trial) $ _____

NAME OF PLAINTIFF 5: _____

1. Special damages incurred before the trial $ _____

2. Special damages to be incurred after the trial $ _____

OR

3. Total special damages (incurred before and to be incurred after trial) $ _____

10. In this case, was your firm the only one which represented this client(s) at any time? (CHECK ONE.)

1. [ ] Yes

2. [ ] No

IF YOU HAVE ALREADY ANSWERED QUESTIONS 11-15 ON ANOTHER QUESTIONNAIRE FOR THIS CASE, DO NOT ANSWER QUESTIONS 11-15 ON THIS QUESTIONNAIRE.

11. In the initial trial, what legal theory or theories did the judge instruct the jury to consider in deciding the case or, if a bench judgment, what was the legal theory/theories considered by the judge? (CHECK ALL THAT APPLY.)

1. [ ] Strict liability

2. [ ] Negligence

3. [ ] Breach of express warranty

4. [ ] Breach of implied warranty

5. [ ] Intentional tort

6. [ ] Misrepresentation, fraud, and deceit

7. [ ] Willful and wanton negligence

8. [ ] Breach of express contract

9. [ ] Breach of implied contract

10. [ ] Other (PLEASE SPECIFY.)

_____

12. What affirmative defense(s) did the judge instruct the jury to consider in deciding the case or, if a bench judgment, what was the defense(s) considered by the judge? (CHECK ALL THAT APPLY.)

1. [ ] Assumption of risk
2. [ ] Contributory negligence
3. [ ] Product misuse or abnormal misuse
4. [ ] State of the art
5. [ ] Alteration of the product (intervening cause)
6. [ ] Useful life
7. [ ] Other (PLEASE SPECIFY.)

_____

13. In your opinion, in addition to whether or not the product was unreasonably dangerous, to what extent, if at all, was negligence on any of the defendant(s)' part an issue in the trial? (CHECK ONE.)

1. [ ] Little or no extent
2. [ ] Some extent
3. [ ] Moderate extent
4. [ ] Great extent
5. [ ] Very great extent

14. At the trial, what types of product defects were alleged to have caused the incident? (CHECK ALL THAT APPLY.)

1. [ ] Design defect
2. [ ] Defect in manufacture
3. [ ] Failure to warn or insufficient instruction
4. [ ] Other (PLEASE SPECIFY.)

_____

_____

15. If you have any comments related to this questionnaire or the items in this questionnaire, please write them in the space provided below.

Thank you for completing this questionnaire. Please provide the name and phone number of the person we may contact should we have to clarify any responses.

Name: _____

Tel. No.: _____

If you would like a copy of the report, please check the box. [ ]

4

Cases That Reach Verdict: Incidents and Parties to the Suits

This appendix includes background information on the 305 cases we studied. We first report the types of products and injuries in the incidents giving rise to the cases. Then, the parties (plaintiffs and defendants) to the suit and the amount of damages requested by plaintiffs are described. The appendix concludes with a discussion of the number of cases that qualified for litigation in federal court and the time between the incident and the filing of the complaint.

Wide Array of Products Cited in Cases

A wide array of products was cited as causing injury in the 305 cases we studied (see table III.1). A substantial minority (44 percent) of the cases were in the category of machinery-related. Vehicles were the only other single category involved in more than 10 percent of the cases.

Personal Injury Cases Were Most Common Case Type

Although there was some variation, personal injury cases predominated in all five states (see table III.2). Some examples of these injuries include a fall from a ladder, resulting in fractured bones; food poisoning; temporary hair loss after using a hair relaxer; quadriplegia from a car accident; and amputation of a limb caused by a machine.

The remaining cases are split about evenly between claims of property damage, 10.8 percent, and wrongful death, 10.1 percent. An example of a property damage case is a plaintiff's alleging that defective wiring in an appliance caused a fire that destroyed a home. Wrongful death cases involved a wide variety of products, with machinery predominating.

On the basis of descriptions in the court records, we classified the physical injuries sustained as (1) temporary or permanent and (2) partial or total. As shown in table III.3, two-thirds of the cases fell into the category of permanent partial disability. An example of such a disability is blindness in one eye—an injury that is permanent but only partially disabling. Examples of the three other severity categories are permanent brain damage (permanent total disability), a fractured tibia (temporary partial disability), and a short-term infection or illness requiring hospitalization (temporary total disability).

Table III.1: Types of Products

Product category	Cases	
	Number	Percent
Machinery	134	44
Vehicle	39	13
Food	20	7
Chemical[a]	17	6
Medical device	13	4
Ladder	12	4
Appliance	10	3
Drug	10	3
Other[b]	52	17
Not specified	2	1
Total	**309**	**102[c]**

[a]We had only three asbestos cases, far fewer than might have been expected given (1) the large number of asbestos cases filed after 1979—see Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned (GAO/HRD-88-36BR, Jan. 28, 1988)—and (2) our inclusion in the study of one state, Massachusetts, which has had a relatively large number of asbestos filings. Few trial verdicts involved asbestos, at least in part, because asbestos cases are much less likely than other product liability cases to be resolved through a trial.

[b]"Other" comprises a variety of products such as tires, airplanes, and clothing, each of which was involved in a small number of cases.

[c]Because a few cases involved multiple products, case total is more than 305 and percentage total is more than 100.

Table III.2: Types of Injury Category by State

State	Types of injury						Total cases
	Property damage		Personal injury		Wrongful death		
	Cases	Percent	Cases	Percent	Cases	Percent	
Arizona	4	7	49	83	6	10	**59**
Massachusetts	4	6	58	88	4	6	**66**
Missouri	14	13	81	75	13	12	**108**
North Dakota	2	12	13	81	1	6	**16**
South Carolina	8	14	41	73	7	12	**56**
Total	**32**	**11**	**242**	**79**	**31**	**10**	**305**

South Carolina differed notably in severity of injury. About 4 in every 10 South Carolina personal injury cases involved temporary partial disability. In no other state did this category exceed 10 percent of all cases. South Carolina also had the lowest proportion of the most severe category—permanent total disability.

In 42 percent of the cases across states, the injury occurred on the job. Fewer cases had work-related injuries in South Carolina (30 percent) than in the other four states (between 43 and 47 percent). The typical work-related injury was an accident involving machinery.

able III.3: Severity of Plaintiff's Disability

umbers in percent

	State					
everity of disability	Arizona	Massachusetts	Missouri	North Dakota	South Carolina	All states
emporary partial	10	9	9	8	42	14
emporary total	8	3	4	0	10	5
ermanent partial	66	78	74	77	37	67
ermanent total	16	7	10	15	2	9
ot specified	0	3	4	0	10	4
otal	**100**	**100**	**101[a]**	**100**	**101[a]**	**99[a]**

[a]Columns may not add to 100 percent because of rounding

Large Majority of Plaintiffs Were Parties Directly Injured by Products

As shown in table III.4, almost two-thirds of the 471 plaintiffs who went to verdict were injured parties, that is, parties who sustained physical injury or loss of property. Other plaintiffs included relatives of these injured parties and, in a few cases, an insurer or another business that was suing for reimbursement of compensation paid to injured parties. Less than 10 percent of the cases involved multiple injured parties.

On the basis of the demographic data we collected, the typical injured party was male, 34 years of age, and married (see table III.5). Of adult injured parties, almost 90 percent of them were employed full-time. About 11 percent of the injured parties were children.

Table III.4: Types of Plaintiffs Who Went to Verdict

	Plaintiffs	
Type of plaintiff	**Number**	**Percent**
Injured party	299	63
Spouse of injured party	88	19
Parent of injured party	29	6
Child of injured party	27	6
Estate of injured party	7	2
Siblings and other relatives of injured party	4	1
Others and not specified	17	4
Total	**471**	**101[a]**

[a]Column may not add to 100 percent because of rounding

able III.5: Demographic Characteristics of Injured Parties at the Time of Incident

Characteristic[a]	Percentage of injured parties[b]
Gender	
Male	64
Female	32
Not applicable (businesses)	4
Total	**100**
Average age	34 years old
Age category:	
Children (1-17 years old)	11
Adults (18-plus)	84
Not applicable (businesses)	4
Total	**100**
Marital status (adults only):	
Married	75
Single	19
Divorced, separated, or widowed	6
Total	**100**
Employment status (adults only):	
Employed full-time	90
Employed part-time	5
Not working	6
Total	**101**
Cases heard	
In home state	97
Not in home state	3
Total	**100**

[a]Response rate varies by characteristic: (1)Gender, 100%, (2) Average age, 60%, (3) Age category, 99%, (4) Marital status, 75%, (5) Employment status, 81%, and (6) Cases heard, 100%.

[b]Categories may not add to 100 percent because of rounding.

Across the five states, slightly less than half of the cases had multiple plaintiffs at the time of filing,[1] and 40 percent had more than one plaintiff at the time of verdict. South Carolina was a notable exception—only 16 percent of cases had multiple plaintiffs at verdict.

Ninety-seven percent of the plaintiffs lived in the states in which their cases were tried. Residents from other states rarely had cases litigated

[1]A total of 552 plaintiffs was named in the complaints filed in the 305 cases. Of that number, 473 plaintiffs (85.3 percent) went to trial. We did not track the reasons any plaintiffs or defendants removed themselves from cases before trial, but individuals (in multiple plaintiff cases) may have reached settlement with one or all of the defendants or removed themselves for some other reason.

in the five states we studied. We have no data with which to determine whether residents of these five states filed suits or had cases tried in other states.

Demands for Awards Ranged Widely

In 84 percent of the cases across the five states, plaintiffs requested specific amounts for compensatory damages or punitive damages or both.[2] In the 256 cases with recorded demands, a total of $781,419,000 was requested. As shown in table III.6, the average demand was much higher than the median. This large difference was due to the huge demands of a relatively few cases. Of the cases with specific amounts demanded, 23 (9 percent) had requests of $10 million or more (the largest being $55 million). On the other hand, in 52 cases (20 percent), the demand amount was $100,000 or less. Sixty-one percent of the cases had demands of under $1 million.

Table III.6: Monetary Demands by Injury Category

Dollars in thousands

Type of injury	Cases	Average demand	Median demand	Cases with demands of more than $1 million (in percent)
Property damage	25	$943	$92	16
Wrongful death	19	7,355	2,000	68
Personal injury	212	2,916	600	40
All cases	256	3,052	600	39

The average and median demand in cases varied according to type of injury claimed (see table III.6). Property damage demands were far less than those for personal injury or wrongful death. Demands for $1 million or more were far more frequent in cases of wrongful death (68 percent) and personal injury (40 percent) than in property damage cases (16 percent). As might be expected, demands in personal injury cases varied by injury severity (see table III.7).

[2]In some cases, the complaint did not distinguish between the amount of punitive damages and the amount of compensatory damages demanded. As a result, this discussion focuses on total amount demanded (for compensatory and punitive damages combined).

Table III.7: Monetary Demands by Severity Category of Personal Injury

Dollars in thousands

Severity of injury	Cases	Average demand	Median demand
Temporary partial	30	$1,027	$148
Temporary total	11	622	300
Permanent partial	146	2,954	641
Permanent total	22	6,593	4,250
All cases	212[a]	2,916	600

[a]This includes three personal injury cases that had specific monetary demands but for which the severity of injury was not specified.

Plaintiffs asked for punitive damages in 108 cases (35 percent).[3] Punitive damages were more frequently demanded in wrongful death cases (nearly 50 percent) and personal injury cases (36 percent). Just 20 percent of the property damage cases included requests for punitive damage. Plaintiffs stated specific amounts of punitive damages in 55 cases, ranging from $10,000 to $50 million, with a median of $3 million.

Variety of Defendants Named in Cases

In 57 percent of the cases, plaintiffs named more than one defendant in the complaint. By the time a verdict was reached, only about 40 percent of the cases (114) had multiple defendants.

The majority of the 468 defendants whose cases went to verdict in the 305 product liability cases were manufacturers (see table III.8).[4] Eighty-eight of the product sellers' cases went to verdict. In 117 cases, a total of 130 product sellers were named as defendants in the initial complaints. In most of these cases (102), the manufacturers of the products in question were also defendants.

[3]In four of the five states, plaintiffs could demand punitive damages in all product liability cases. In Massachusetts, such demands are typically confidential.

Table III.8: Types of Defendants

	Defendants	
Defendant type	**Number**	**Percent**
Manufacturers[a]	308	66
Sellers or distributors	88	19
Assemblers or installers	20	4
Other defendants	51	11
Not specified	1	0
Total	**468**	**100**

[a]In this category, 22 were manufacturers of component parts and 286, the finished products

Only 20 percent of defendants whose cases went to verdict were headquartered in the states in which the cases were litigated (see table III.9). This is consistent with past anecdotal and research evidence indicating that a majority of defendants in product liability cases are from outside the states in which their cases are litigated.

Table III.9: State of Defendants' Headquarters Compared With the State in Which the Case Was Tried

	Defendants	
Location of headquarters	**Number**	**Percent**
State in which case tried	94	20
Outside state in which case tried	324	69
Not available	29	6
Not applicable (that is, defendant was not a business)	21	4
Total	**468**	**99[a]**

[a]Column does not add to 100 because of rounding

Majority of Cases Could Have Been Tried in State or Federal Court

Many product liability cases may be filed in either state or federal court because of diversity of citizenship (that is, plaintiffs and defendants reside in different states). To qualify for federal jurisdiction, the home states of all plaintiffs have to be different from the home states of all defendants; during our study period, in addition, the amount of damages in question had to exceed $10,000. Two-thirds of all cases we studied met these requirements and, therefore, could have been tried in either state court or federal court.

If a case is filed in state court but meets the requirements for being tried in federal court, a party to the case can ask the court to transfer the case to federal court. In 34 cases, the courts granted a defendant's request to transfer the case from state court to federal court. Another 66 cases filed in state court could have been transferred to federal court.

but were not. We lack data on transfers from federal court to state court.

Few Cases Filed After Statute of Limitations

On the average, plaintiffs filed their cases 20 months after their injuries were discovered. Statutes of limitations existed in all five states studied, limiting the time in which a plaintiff could file a product liability action (see table IV.1). If the time between the date the plaintiff discovered the injury and the filing date exceeded the statute of limitations, the defendant had a basis to have the court dismiss the case. Out of 305 cases, only 7 were filed after the statute of limitations (see table III.10). In Arizona, where the statute of limitations for all actions was the shortest (2 years), the average length of time before a case was filed was also the shortest (just over 1 year).

Table III.10: Time Between Incident and Filing

State	In months		Cases exceeding statute of limitations[a]
	Average	Range	
Arizona	13	2–31	1
Massachusetts	21	0–55[b]	4
Missouri	22	0–99	1
North Dakota	27	2–97	1
South Carolina	18	1–62	0
All cases	20	0–99	7

[a]For each state's statute of limitations, see table IV.1.

[b]Cases that were filed within 2 weeks of the incident are shown as having "0 months."

How the Five States Studied Exemplify Variability of State Laws

Introduction

Product liability cases are almost exclusively governed by state law. State legislative and judicial action, at varying rates over the past two decades, has created considerable variation in the legal standards for product liability in different states. Business groups allege that the diversity and inconsistency in these standards complicates and impairs the legal process to the detriment of sellers, claimants, and consumers.

We examined product liability cases tried in five states between 1983 and 1985. The differing legal standards under which these cases were tried exemplify the variation in state laws throughout the country. How different laws may have affected defendant liability and how legal standards have evolved since 1985 are discussed in chapter 5.

The major differences in laws relating to product liability cases tried in the five states between 1983 and 1985 are shown in table IV.1. Many of the legal standards then in existence have changed since 1985 (compare table IV.1 with table 5.2). Although some legal standards differed during the period studied, many laws for the five states were the same.

Six differences and four similarities among the 1983-85 laws of the five states are discussed below.

Differences in Laws of the Five States Studied (1983-85)

Four of the Five States Allow Strict Liability

Four of the five states (Arizona, Missouri, North Dakota, and South Carolina) allow product liability plaintiffs to plead their cases under the theory of strict liability. Massachusetts law has not adopted strict liability per se, but its courts have indicated that Massachusetts's form of breach of warranty offers plaintiffs as complete coverage as would strict liability.

Table IV.1: Variations in Product Liability Law for the Five States Studied (1983-85)

State	Strict liability available	Comparative negligence available		Pre-judgment interest	Statute of limitations	Ad damnum clause allowed	Punitive damages allowed
		Negligence	Strict liability				
AZ	Yes	No (1983-84) Yes (1984-85)	No	None	2 yrs.	No	Yes
MA	No	Yes	[a]	12% (injury & property) 6% death	3 yrs.	Yes	Yes (but only for death cases)
MO	Yes	No (1983) Yes (1984-1985)	No	None	5 yrs. (neg. & strict liab.) 4 yrs. (breach of warranty)	Yes	Yes
ND	Yes	Yes	No (1983-84) Yes (1984-85)	6%	6 yrs. (injury & property) 2 yrs. (death)	Yes (claims less than $50,000)	Yes
SC	Yes	No	No	None	6 yrs.	Yes	Yes

[a]Not applicable

States Differed in Circumstances for Award Reduction

Some of the defenses that a manufacturer or seller may use vary by state; for cases based on negligence, in four of the five states (Arizona, Massachusetts, Missouri, and North Dakota), the jury is instructed (1) to compare the negligence of the defendant with any negligence of the plaintiff and (2) reduce the damages awarded accordingly.[1] In South Carolina, however, the plaintiff in a suit based on negligence theory is completely barred from recovering any award if the injured party's actions in any way contributed to the injury, death, or property damage.

Two of the states (Missouri and South Carolina) that allow strict liability did not allow comparative negligence as a defense in strict liability actions in 1983-85. Plaintiffs pleading strict liability in Missouri and South Carolina could recover the total amount of their damages, even if the injured party's negligence contributed to or worsened the loss. Arizona's laws were changed in 1984 to allow the comparative negligence defense in strict liability actions when that theory is pleaded in conjunction with negligence. The North Dakota Supreme Court, in a 1984 decision, made the comparative negligence defense available in any strict liability action.

[1]Comparative negligence principles were adopted for negligence-based actions in Missouri in late 1983 and in Arizona and North Dakota in 1984, midway through our study period.

Recovery of Punitive Awards Limited in Massachusetts

Four of the five states allow the plaintiff to recover punitive awards from the defendant to punish the defendant for willful, wanton, or malicious conduct. In Massachusetts, punitive awards are available only for wrongful death cases, but not in personal injury or property damage cases.

Two of the Five States Allowed Prejudgment Interest

During our study period, only Massachusetts and North Dakota provided that interest accruing from the date of the filing of the claim be added on to the final judgment. Such prejudgment interest is designed to (1) create the incentive for a quick resolution of the claim and (2) compensate the plaintiff for the loss of the award money during the litigation period. Many states do not allow prejudgment interest in tort cases. In the states that do allow such interest, the rates vary. In North Dakota, the rate is 6 percent simple interest. In Massachusetts, the rate for cases involving personal injury and property damage is 12 percent simple interest; for death cases, the rate is 6 percent simple interest.

Time Allowed for Filing a Claim Varied Greatly Among States

As indicated in table IV.1, the time period in which a product liability claim may be filed after the injury is, or should have been, discovered varied considerably among the states we studied. This time period ranged from 2 years in Arizona to 6 years for most actions in North Dakota and South Carolina.

Two States Limited Ability of Plaintiffs to Claim a Specific Dollar Amount of Damages

In three states (Massachusetts, Missouri, and South Carolina), the plaintiff was permitted, during our study period, to ask for a specific dollar amount of damages in the complaint filed with the court. This section of the complaint is known as the ad damnum (literally, "to the damage") clause. Although juries are not permitted to see the plaintiffs' complaints and should not be influenced by an overly inflated request for damages, some states have prohibited the use of this clause, for example, in Arizona; in North Dakota, the plaintiff may not use such a clause if the amount demanded exceeds $50,000.

Similarities in Laws of the Five States Studied (1983-85)

The five states studied had similar provisions for some standards of product liability law, such as joint and several liability, caps on awards, the level of evidence required for a showing of conduct warranting punitive damages, and the collateral source rule. Each defendant found liable in a product liability action tried in the five states during 1983-85 could have been made to pay for the entire amount of damages awarded

(that is, each defendant was held jointly and severally liable for the damages). No statutory cap was in effect in any of the five states in 1983-85. In order to recover punitive damages, plaintiffs in the five states needed to prove the defendant's malicious, willful, or wanton conduct by a preponderance of the evidence (that is, it was more probable than not that such conduct existed); none of the states required the tougher standard of clear and convincing evidence (highly probable). In all five states, the defendant at trial was not permitted to introduce evidence of payments made to the plaintiff (by someone other than a defendant—for example, the workers' compensation insurer) as compensation for the injury. In addition, the defendant was not entitled to have the award amount reduced by the amount of such payments to the plaintiff. These other sources of compensation, however, are usually entitled to reimbursement (that is, subrogation).

Detailed Tabular Information and Supplementary Data on Verdicts and Payments

Table V.1: Percentage of Cases Won by Plaintiffs in State Courts and Federal Courts

	State court		Federal court	
State	Cases going to verdict	Percentage of cases won by plaintiffs	Cases going to verdict	Percentage of cases won by plaintiffs
Arizona	56	45	3	10
Massachusetts	22	45	44	27
Missouri	56	54	52	38
North Dakota	13	85	3	33
South Carolina	19	53	37	38
All cases	166	52	139	36

Table V.2: Compensatory Damage Awards by Types of Injury

Dollars in thousands

Injury type	Cases	Average award	Median award	Expected award[a]
Property damage	18	$128	$56	$72
Wrongful death	17	937	500	513
Personal injury	101	672	150	280
All cases	136	633	150	282

[a]Expected award is the average award across all cases, including those won by defendants.

Table V.3: Compensatory Damage Awards by Severity of Personal Injury

Dollars in thousands

Injury severity	Cases	Average award	Median award	Expected award[a]
Temporary partial disability	15	$75	$5	$33
Temporary total disability	4	89	54	27
Permanent partial disability	70	524	172	225
Permanent total disability	9	2,073	1,579	811
All cases	101[b]	672	150	280

[a]Expected award is the average award across all cases, including those won by defendants.

[b]This includes 3 cases for which the severity of injury was not specified in the court files.

Table V.4: Incidence and Size of Punitive Damage Awards

Dollars in thousands

State	Cases	Averge award	Median award	Average ratio of punitive to compensatory damages
Arizona	7	$2,245	$750	1.8
Massachusetts	0	[a]	[a]	[a]
Missouri	9	1,107	750	5.0
North Dakota	1	1,000	1,000	4
South Carolina	6	367	175	1.0
All cases	23	1,255	400	2.8

[a]In Massachusetts, no punitive damages were awarded

Table V.5: Total Damage Awards by Types of Injury

Dollars in thousands

Injury type	Cases	Average award	Median award	Expected award[a]
Property damage	18	$128	$56	$72
Wrongful death	17	1,120	567	614
Personal injury	101	927	153	387
All cases	136	845	157	377

[a]Expected award is the average award across all cases, including those won by defendants

Table V.6: Total Damage Awards by Severity of Personal Injury

Dollars in thousands

Injury severity	Cases	Average award	Median award	Expected award[a]
Temporary partial disability	15	$335	$5	$148
Temporary total disability	4	226	154	70
Permanent partial disability	70	749	190	321
Permanent total disability	9	2,358	1,750	921
All cases	101[b]	927	153	387

[a]Expected award is the average award across all cases, including those won by defendants

[b]This includes 3 cases for which the severity of injury was not specified in the court files

Table V.7: Cases Won by Plaintiff in State Court and Federal Court by Type of Injury

	State court		Federal court	
Injury type	Cases going to verdict	Percentage of cases won by plaintiffs	Cases going to verdict	Percentage of cases won by plaintiffs
Property damage	19	74	13	31
Wrongful death	18	61	13	46
Personal injury	129	47	113	35
All cases	166	52	139	37

Table V.8: Cases Won by Plaintiff by Percentage of Urban Population

Percentage of urban population in county where case tried	Cases going to verdict	Percentage of cases won by plaintiffs
80 percent or less	72	42
Over 80 percent	233	45
All cases	305	45

Table V.9: Cases Won by Plaintiff by Gender of Injured Party

Gender	Cases going to verdict	Percentage of cases won by plaintiffs
Male	194	47
Female	86	35
Both male and female	18	57
Not applicable[a]	7	45
All cases	305	45

[a]"Not applicable" includes plaintiffs that were businesses or other groups. When a case had both persons and such groups as injured parties, the case was categorized according to the gender of the person(s).

Table V.10: Incidence of Comparative Negligence and Effect on Award

Dollars in thousands

Effect on award	Cases in which comparative negligence found	Average percentage of fault of nondefendants	Total dollar reductions in awards	Average percentage reduction in awards
Award unchanged[a]	7	31	$0	0
Award reduced[b]	27	40	1,944	38
All cases	34	38	1,944	30

[a]In these cases, the award was unchanged because, in addition to negligence, defendants were found liable under strict liability or breach of warranty standards (or both) to which comparative negligence principles did not apply.

[b]In 21 cases, the percentage reduction in award equaled the percentage of comparative negligence assessed. In 3 cases, the entire award was eliminated because the percentage of fault exceeded the percentage above that for which, by statute, plaintiffs cannot get an award. In 3 cases, the percentage reduction was lower than the percentage of comparative negligence because of the effects of pretrial settlements and the doctrine of joint and several liability.

Table V.11: Appeals Rate for Cases Plaintiffs Won and Cases Defendants Won by Injury

	Plaintiffs			Defendants		
	Cases won	Cases appealed		Cases won	Cases appealed	
Type of injury		Number	Percent		Number	Percent
Property damage	18	7	39	14	6	43
Wrongful death	17	10	59	14	8	57
Personal injury[a]	100	62	62	139	44	32
All cases[a]	135	79	58	167	58	35

[a]Excludes 3 personal injury cases (1 case won by plaintiff and 2 cases won by defendants) for which court records did not indicate whether an appeal had been filed.

Table V.12: Disposition of Appeals

	Cases won by plaintiff		Cases won by defendant		All cases	
Disposition	Number	Percent	Number	Percent	Number	Percent
Court decision on the merits	49	62	35	60	84	61
Dismissed	27	34	17	29	44	32
Not specified	3	4	6	10	9	7
Total	**79**	**100**	**58**	**99[a]**	**137**	**100**

[a]Does not add to 100 because of rounding.

Table V.13: Effects of Posttrial Actions by Size of Jury Award

Dollars in thousands

Size of award	Cases	Average award	Average paid	Ratio paid/ award
Less Than $100,000	36	$35	$30	86
$100,000-$999,999	46	345	259	75
$1 million or more	21	3,521	1,825	52
All cases	103	884	498	56

State Product Liability Laws (1988)

5 states in review	Joint & several liability limited	Comparative negligence available for		Caps on non-economic awards	Clear & convincing evidence for punitive damages	Collateral source rule modified	Ad damnum clause modified
		Negligence	Strict liab.				
AZ	Yes	Yes	No[a]	No	Yes	No	Yes
MA	No	Yes	[b]	No	No	No	Yes
MO	Yes	Yes	Yes	No	No	Yes	Yes
ND	Yes	Yes	Yes	No	Yes	Yes	Yes
SC	No	No	No	No	Yes	No	No
Other 45 states							
AL	No	No	No	No	No	Yes	No
AK	Yes	Yes	Yes	Yes	Yes	Yes	No
AR	No	Yes	Yes	No	No	No	No
CA	Yes	Yes	Yes	No	Yes	No	No
CO	Yes	Yes	Yes	Yes	No	Yes	No
CT	Yes	Yes	Yes	No	No	Yes	No
DE	No	Yes	[b]	No	No	No	No
FL	Yes	Yes	Yes	No	Yes	Yes	No
GA	Yes	No	No	No	No	Yes	No
HI	No	Yes	No	Yes	No	No	No
A	Yes	Yes	Yes	No	Yes	Yes	No
D	Yes	Yes	Yes	Yes	No	No	Yes
–	Yes	Yes	Yes	No	No	Yes	No
N	Yes	Yes	No	No	Yes	Yes	No
KS	Yes	Yes	Yes	Yes	No	Yes	No
KY	Yes	No	No	No	Yes	Yes	No
LA	Yes	Yes	Yes	No	No	No	No
ME	No	Yes	Yes	No	No	No	No
MD	No	No	No	Yes	No	No	No
MI	No	Yes	[b]	No	No	Yes	No
MN	Yes	Yes	Yes	Yes	Yes	Yes	No
MS	No	Yes	Yes	No	No	No	No
MT	Yes	Yes	Yes	No	Yes	Yes	No
NE	No	Yes	Yes	No	[c]	No	No
NV	No	Yes	No	No	No	No	No
NH	No	Yes	Yes	Yes	[c]	No	Yes
NJ	Yes	Yes	Yes	No	No	Yes	No
NM	Yes	Yes	Yes	No	No	No	No
NY	Yes	Yes	Yes	No	No	Yes	No

(continued)

5 states in review	Joint & several liability limited	Comparative negligence available for		Caps on non-economic awards	Clear & convincing evidence for punitive damages	Collateral source rule modified	Ad damnum clause modified
		Negligence	Strict liab.				
NC	No	No	[b]	No	No	No	No
OH	Yes	Yes	No	No	Yes	Yes	Yes
OK	No	Yes	No	No	Yes	No	Yes
OR	Yes	Yes	Yes	Yes	Yes	Yes	No
PA	No	Yes	No	No	No	No	No
RI	No	Yes	Yes	No	No	No	No
SD	Yes	Yes	No	No	Yes	No	No
TN	No	No	No	No	No	No	No
TX	Yes	Yes	Yes	No	No	No	No
UT	Yes	Yes	Yes	No	No	No	Yes
VT	No	Yes	Yes	No	No	No	No
VA	No	No	[b]	No	No	No	No
WA	Yes	Yes	No	Yes	[b]	Yes	No
WV	No	Yes	Yes	No	No	No	No
WI	No	Yes	Yes	No	No	No	No
WY	Yes	Yes	Yes	No	No	No	Yes
Total "Yes"	**28**	**42**	**30**	**10**	**15**	**21**	**10**

[a]Comparative negligence is available as a defense in actions in which both strict liability and negligence are claimed

[b]Not applicable

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Glossary

Ad Damnum Clause	The portion of a plaintiff's complaint that specifies the dollar amount of damages sought.
Additur	Process by which a judge assesses damages or increases a jury verdict amount as a condition of denial of motion for a new trial. This procedure is not allowed in federal courts.
Appeal	Petition to a superior court to review the decision of a lower court.
Breach of Warranty	Legal theory of liability whereby defendant is held liable for harm to plaintiff if, in product liability cases, the product failed to perform as warranted or promised. This warranty may either be express or implied.
Cap	A statutory ceiling on the amount of noneconomic or punitive damages recoverable in any one suit.
Case Law	As distinguished from statutes enacted by legislatures, case law consists of the body of law on a particular subject as formed by court judgments.
Clear and Convincing Evidence	Evidence that will produce in the mind of a jury (or judge, in a case tried without a jury) a firm belief in the truth of the matter to be proved (that it is highly probable a plaintiff's allegation is correct). This standard of evidence requires more evidence than the preponderance of the evidence standard, which is used in most civil actions, but less than the beyond a reasonable doubt standard, which is used in criminal cases.
Collateral Source Rule	Court-made rule that prohibits deducting from a plaintiff's damages any compensation he or she received from a source other than the defendant wrongdoer, such as health insurance or government benefits. In addition, the jury cannot consider such payments when deciding the award amount. Under the principle of subrogation, the source is usually entitled to reimbursement from an award.

Common Law	As distinguished from statutes enacted by legislatures, the common law comprises the body of principles and rules of action that derive their authority solely from use and custom or from court judgments (case law).
Comparative Negligence	Under the comparative negligence statute or doctrine, negligence is measured in terms of percentage, and any award is diminished by the percentage attributable to any person other than the defendant(s). Although most states have adopted comparative negligence for negligence actions, there is some dispute as to whether it applies to strict liability actions.
Compensatory Damages	Damages paid to plaintiffs to replace the loss caused by injury. They consist of economic and noneconomic damages.
Complaint	A document filed with a court in which the plaintiff gives the basis for a suit against the defendant(s). This document initiates a legal action.
Contingency Fee	A fee arrangement in which the attorney agrees to represent the client for a percentage of the recovery (that is, the plaintiff's award) in the event the plaintiff receives a favorable judgment.
Contribution	Under the principle of contribution, defendants may recover from other defendants also found liable any portion of the payment to plaintiffs that exceeds these plaintiffs' allocated share of damages.
Contributory Negligence	Negligence by the plaintiff that contributes to that plaintiff's injury. Traditionally, in a negligence action, a plaintiff found contributorily negligent could not collect any damages. This defense was traditionally not available in strict liability actions, although the related defenses of product misuse and assumption of risk were available. Many states have replaced contributory negligence with comparative negligence.
Economic Damages	Actual out-of-pocket expenses incurred by plaintiffs, such as medical expenses or loss of income.

Forum Shopping	Attempt by a party to have an action tried in a particular court or jurisdiction where that party feels he or she will receive the most favorable verdict outcome.
Joint and Several Liability	Court-made rule that holds each defendant 100-percent responsible for all the damages awarded to the plaintiff. Under this rule, a plaintiff may collect all damages from any one of the defendants found liable, regardless of the amount each defendant contributed to the plaintiff's injury. A defendant is generally entitled to sue other liable defendants for contribution.
Judgment	The final decision of a court resolving a dispute and determining the rights and obligations of the parties. It follows the verdict and granting or denial of posttrial motions.
Motion	A formal request to the court to take an action, for example, to change the verdict or to grant a new trial.
Negligence	Breach of a duty to exercise due care; it is the traditional nonintentional tort action. Unlike strict liability, which depends on the danger and defectiveness of the product, recovering under negligence depends on the defendant's lack of due care.
Noneconomic Damages	Damages paid to the plaintiff to compensate for intangible injuries such as pain and suffering.
Postjudgment Interest	Interest computed from the time judgment is issued to the time judgment is paid by the defendant(s).
Prejudgment Interest	Interest computed from the date a complaint is filed or the date the injury occurred to the date judgment is issued.
Preponderance of the Evidence	Evidence that will produce in the mind of a jury (or a judge, in a case tried without a jury) a belief that it is more probable than not that a plaintiff's allegation is correct. This is the lowest standard of evidence.

	compared with the standards of clear and convincing evidence and beyond a reasonable doubt; it is the traditional standard required for recovery of punitive damages.
Punitive Damages	In cases in which it is proved that the defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded punitive or exemplary damages in addition to compensatory damages to punish the defendant or to set an example for similar wrongdoers.
Remittitur	Process by which a judge reduces a jury verdict that he or she finds to be grossly excessive in relation to the law.
Strict Liability	A concept applied by the courts in which one who sells a product in a defective condition unreasonably dangerous to a consumer is held liable for harm caused by the defect. The plaintiff in a strict liability action need not prove that the manufacturer or seller was negligent, as is required in a negligence action.
Subrogation	The right of a person (or insurer) to be reimbursed for payments made to the plaintiff.
Tort	Any civil legal wrong other than a breach of contract that results in personal injury, wrongful death, or property damage, and for which a person can sue to recover damages, for example, product liability or medical malpractice.
Vacate	To annul (render void) a previous court's decision.
Verdict	Formal decision by the jury or judge on matters considered at trial. When the decision is made by a judge, it is called a bench verdict. The verdict precedes a judgment.
Wrongful Death Action	A type of lawsuit brought on behalf of a dead person's beneficiaries, alleging that death was attributable to the wrongdoing of another.

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