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Perhaps the most recent and detailed analysis of this issue in the context of medical liability and obstetrical care is contained in the 1989 report of the National Academy of Science Institute of Medicine's Committee to Study Medical Professional Liability and the Delivery of Obstetrical Care which has just been brought to my attention by a Task Force Member. While I have not had time to review this report in any detail, I have summarized their conclusions on the question of "tort reform". According to the study's Preface, the Institute of Medicine appointed a "distinguished interdisciplinary committee" (see attached list of participants) to evaluate the data relating to the effects of medical professional liability issues on access and delivery of obstetrical care. The preface continues that this study was a response to an inquiry of the American Academy of Pediatrics along with several other groups who believed that more attention to professional liability issues was "urgently" required. Here are there general findings on the basic question of legislative solutions to the problem:

a) Every state but West Virginia has enacted legislation modifying common-law tort doctrine that is intended to relieve the medical liability crisis; many are discussing additional reforms.

b) After evaluating these reforms (and reviewing the Danzon analyses, a 1987 Report of the General Accounting Office and others) the committee concluded that only a modest reduction in medical malpractice claim frequency and size of awards has been achieved. The committee also concluded that "the many deleterious side effects of the tort system for resolving obstetrical claims - resulting in distortions of health care delivery patterns - have not been reduced by those tort reforms." (See Attachment to follow, Volume I page 127).

c) The committee believes that the problems created by the medical professional liability issues in obstetrics represent a serious threat to the delivery of obstetrical care in this nation. However, although some of the tort reforms already in place have merit, they do not appear sufficient to stem the exodus of obstetrical providers from the profession or to solve the attendant problems caused by the current professional liability climate in obstetrics.

d) On the basis of its findings - that the costs of the current system in terms of impaired obstetrical care are great, that tort reforms are so far largely ineffective, and that data evaluating the merits of proposed alternatives to the tort system are lacking- the committee concludes that state legislatures should not focus on further reform efforts within the existing tort system but should instead redirect their energies toward developing alternatives to

the traditional tort system for resolving medical malpractice claims and toward implementing these alternatives in certain circumstances.

e) The committee recommends that states consider three proposals for additional research and implementation on a limited basis: the no-fault designated compensable events scheme (including those variants enacted in Virginia and Florida discussed above), the AMA-Specialty Society's fault based administrative system, and legislation authorizing the use of contractually determined legal relationships governing medical professional liability between providers and patients. The committee also recommends that the Federal Government provide grant funds to finance studies of proposed legislation and to begin pilot projects for limited implementation of various solutions.

Despite these findings, keep in mind that some commentators still feel that it may be too soon to draw any definite conclusions about the impacts of tort reform measures. According to Brenda Trolin of the NCSL a minimum of five years is needed before cases processed under previous systems clear the courts. Several additional years must pass before a sufficient number of cases have been processed through systems to determine whether changes have had the desired consequences.

And Patricia Young formerly of the Legislative Research Agency reminds us : "Because of the variations in state constitutions and laws regarding tort reform, identical reform measures may have dissimilar impacts in each state. Thus, even those reform measures which appear promising require careful consideration in the context of an individual states circumstances to determine potential ramifications. Opponents frequently argue that constitutional rights-including equal protection, access to courts, and trial by jury- are violated be certain reform measures. Also, reform measures can encourage or discourage lawsuits. Although some measures may facilitate and expedite resolution, they may also encourage claims which would not otherwise be made."

One of the keys to better understanding of this issue is more and better information. Most agree that this general lack of statistical data is a problem. According to Stephan Carroll ("Assessing the Effects of Tort Reforms, 1987 at viii): "The kinds of data needed to assess the effects of reform are generally not now available... Three types of new data collection systems need to be considered: 1) systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims; 2) special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify reform's winners and losers; and 3) systems for

collecting information both on the other factors that impinge on the behavior of participants in the tort system, and therefore have to controlled for, and on economic outcomes and injuries".

14. ROBERT HUNTER ("CHANGES IN INSURANCE SERVICES; HOW THE PUBLIC IN TREATED"): Given limits of time and space I will only summarize in "bullet" form Hunter's many recommendations contained in the publication called "How to Tame the Insurance Industry Cycle and Make the Legal System More Efficient- A Suggested Legislative Agenda for 1987" by Robert Hunter and Jay Angoff. Hunter's central premise is that limiting the ability of severely injured people to sue and be compensated for their injuries does not bring down insurance rates (see above for additional discussion of this issue). He proposes many reforms including: Requiring disclosure by insurance companies of data on actual income and payouts on different types of insurance; permit group insurance/risk-retention group programs; allow banks to write liability insurance; establish joint underwriting associations which provide insurance to those who can't get insurance in the voluntary market; establish state reinsurance programs which would authorize self-insureds to pay the state a premium in return for which the state would agree to pay all claims above a certain specified amount; establish state run insurance companies; establish interstate compacts for interstate reinsurance programs; prohibit arbitrary cancellations of policies; require experience rating where good risks pay less than those who are bad risks; to allow the market to work competitively despite the McCarren-Ferguson Act, establish flex-rating which would allow insurance companies to raise or reduce rates without insurance commissioner approval within a "zone of reasonableness"; beef up enforcement by properly funding and staffing state insurance agencies; close the "revolving door" by discouraging or limiting the practice of hiring industry people to regulate the industry; establish an office of Insurance Consumer Advocate which would represent the consumer point of view at rate hearings and ensure that the insurance regulators do not rubber stamp insurance company rate requests; prohibit the pass through of lobbying expenses; require risk management by insurance purchasers and self-insureds which should reduce the frequency and severity of claims; allocate medical malpractice insurance costs more equitably. For example, doctors in high risk specialities pay for the risks that should be shared by others, doctors are broken down by insurance companies into to many categories with too few doctors in some categories, doctors pay for malpractice that could be more easily be borne by hospitals, and doctors are not experienced rated; insurance companies should disclose names of doctors involved in claims and the amount of those claims. This information should be made available to various organizations and the public in general; limit lawyers fees

on both sides. Hunter focuses on defense costs and contends that defense legal fees have doubled in ten years. States could limit defense fees by disapproving any rate that included within it more than a certain percentage (he suggests 25%) for defense costs which would force the insurer to keep an eye on fees insuring that a greater percentage of the money flowing through the system would end up in the hands of the injured person; penalize frivolous actions on both sides including frivolous motions and objections by defendants lawyers who charge by the hour; to encourage accountability to the public, prohibit secrecy agreements which prevent disclosure of the details of a settlement and other information about the case; encourage offensive collateral estoppel which prevents re-litigation of certain facts (i.e. once a fact is established it can be used in future cases); pass back collateral source benefits by requiring the defendant to pay the full amount of a verdict but excuse the source of collateral benefits from paying such benefits to the extent they are already included in the jury verdict and then require the source of the collateral benefits to reduce the cost of those benefits across the board based on these savings; create incentives to settle including penalizing defendants for refusing to make reasonable offers to settle, and penalizing plaintiffs for making unreasonable demands; and last but not least, establish alternatives to the tort system including no-fault systems (particularly for relatively minor injuries), arbitration, mediation, mini-trials, and other dispute resolutions systems. However, Hunter is careful to point out that cases involving defective products should be subject to common law principles without any limits on either compensatory or punitive damages: "The stories of A.H Robins and the Dalkon Shield, Ford and the Pinto gas tank, Richardson-Merrell and MER-29, and Johns-Manville and asbestos are just a few of the scandals unearthed as a result of tort litigation. And it was only the fear of more litigation, and of large awards for both compensatory and punitive damages, which finally forces these and other dangerous products off the market and encourages the development of less dangerous substitutes."

15. CHANGES IN TIME IN THE LAW OF LIABILITY AND DAMAGES: "Liability, Perspectives and Policy" edited by Robert E. Litan and Clifford Winston of the Brookings Institution in Washington, D.C. (1988) provides insight not only into the question of how tort law has evolved over the last thirty years but also presents an excellent overview and summary of the many issues we have attempted to review in this memorandum and related attachments. Here are the key findings:

a) Tort law is largely based not on statutes but on common law, a body of legal principles developed case by case by judges, primarily those in state courts. It is difficult to

generalize about the status of tort law in all jurisdictions but certain important changes in doctrines have occurred in the past several decades, all of which have expanded the system's function in spreading losses:

* Whether by applying the negligence test in a flexible fashion or by imposing liability on parties whose behavior is causally related to accidents but who are not necessarily negligent (so-called strict liability) the courts have increased manufacturer's liability for defective products. Certain courts have held that a product can be defective even if it conforms to prevailing regulatory standards and if the manufacturer had no knowledge at the time of design or production that it would entail the risks later attributed to it in litigation.

* The negligence standard itself has been extended through litigation to impose liability on a wide class of service providers not previously accustomed to being sued. Day care centers, ski lift, ice rink, and amusement park operators, tavern and restaurants, and not-for-profit organizations have all been taken to court for failures to warn of certain dangers and for the careless conduct of their employees. The exposure of these defendants to liability claims has been widened by the doctrine of joint and several liability, which allows prevailing plaintiffs to recover up to the full amount of a total damage award from any single defendant if the other defendants are unable to pay , and by the collateral source rule, which prohibited juries from reducing damages by subtracting insurance monies or other compensation plaintiffs receive from other sources.

* The concept of contributory negligence has been relaxed in many states so that negligent plaintiffs are no longer totally barred from recovery. Instead, they find their damages reduced by the proportion by which their negligence contributed to their injury. In addition, beginning with the Federal Tort Claims Act of 1946, which waived the federal government's sovereign immunity, courts have made state and local governments liable for tort suits.

* Courts have relaxed the standards the plaintiffs must satisfy in proving, under either the negligence or strict liability doctrine, that defendants have caused their injuries. This trend has been manifested primarily in product liability and so-called toxic tort cases, which have frequently required courts to decide whether plaintiffs' injuries have been caused by their exposure, often over long periods of their lives, to substances recently discovered to be associated with the development of cancer or other serious diseases. Courts have adopted a long range of rules to determine causation in such cases. Some have placed liability on the first or last source to which plaintiffs can establish they were exposed; others have made all

manufacturers of the substance jointly and severally liable. In one noted case involving the exposure of Vietnam veterans to the chemical Agent Orange, a federal court actively encouraged a $180 million settlement even though no hard scientific evidence had been uncovered that linked the chemical to the medical infirmities claimed by the plaintiffs.

* Finally, courts in certain jurisdictions have liberally interpreted statutes of limitation, which bar plaintiffs from recovering if they wait too long after suffering injury to file suit. In many toxic tort, product liability and medical malpractice cases it is difficult to determine when injury actually occurs. It could develop decades later when the symptoms of disease become observable. Although jurisdictions differ widely on this issue, the trend has been for courts not to invoke the statute of limitations to bar suits involving long-latent injuries.

These observations appear to be more or less consistent with the more detailed and critical analysis of these trends contained in Peter Huber's book "Liability, the Legal Revolution and Its Consequences" (1988).

b) The calls for reforming the civil justice system are less urgent now (1988) than they were in "recent months". As in previous insurance cycles, increases in premiums have moderated. In some instances, coverage that was withdrawn has reappeared. In 1986 the property and casualty industry earned 11.6 percent on its equity, a return lower than the manufacturing sector average of 13 percent during the past decade but still considerably better than the disappointing performance of the previous two years.

c) The issues raised by the most recent crisis will not disappear. If nothing else, the dramatic increases in premiums and curtailments of coverage have called greater attention to the nation's civil justice system - whether it is working satisfactorily, and if not why - then at any point in recent memory. Moreover, interest in these issues will intensify if and when the underwriting cycle reverses course and turns against the industry once again. Chances are that it will in five to ten years.

d) Injuries pose three different and potentially conflicting challenges for all societies. One is to efficiently deter behavior that cause injuries. A second and related objective is to exact retribution against those responsible (the criminal law is a key component of this function). The third challenge is to compensate victims for their injuries. Compensation may be supplied by the government or the private sector (through insurance), and may or may not be linked to specific injuries or types of accidents. Tort law-rules allowing accident victims to seek compensation through

the judicial system from the parties responsible - can be considered a mechanism for meeting all three of these challenges.

e) Of the millions of insurance claims filed each year, typically only 2% are resolved through litigation. Of cases brought to court, less than 5% are tried to verdict; the rest are settled.

f) The amounts actually received by successful plaintiffs are often much smaller than those originally awarded by juries due to trial judge and appellate overrides and/or the inability of some defendants to satisfy the judgement. In one study of 198 tort verdicts between 1984 and 1985 that resulted in awards of 1 million or more the final distributions to plaintiffs were on average 30% less than the original award. Successful plaintiffs received the jury award in only 51 cases.

g) As Rand noted average awards in tort cases in San Francisco and Cook County increased sharply, considerably faster that growth in real GNP and real prices of medical services.

h) Awards in medical malpractice cases and products liability cases were significantly higher and increased at a faster pace than those for personal injury cases generally.

i) Much of the Cook County and San Francisco increases are due to "explosive growth" in jury awards of $1 million or more (Cook County-Two verdicts between 1960 to 1964 accounting for 4% of all personal injury awards; 67 verdicts between 1980 to 1984 accounting for 85% of awards; San Francisco- only 3.8 % of all personal injury case produced $1 million plus awards which accounted for half of the total amounts awarded).

j) From the liability insurers point of view these statistics cause problems - Insurers can only remain profitable if they set their premiums to cover total expected claim costs, and large dollar claims increase uncertainty about the range of possible losses.

k) The greater frequency of large dollar awards can be partly explained by increases in non-economic damages - pain and suffering - as well as increases in punitive awards in certain cases. One commentator (George Priest, see page 10) finds that non-economic damages generally account for 30% to 40% of all tort damage awards and for even higher proportions of very large awards. Patricia Danzon draws similar conclusions according to Litan/Winston.

l) There are gaps in existing compensation programs and devices. For example, more than 30 million people in this

country remain uninsured for medical purposes at any given time, and perhaps more than 20 million are uninsured throughout a given calendar year. In addition, many of those with insurance have limited coverage, especially for the catastrophic medical expenses often associated with major tort litigation. Gaps also exist in programs designed to compensate for income losses, although such coverage (provided through public and private disability programs) probably has increased over time. There is little evidence that expanded tort liability has efficiently filled in the gaps left by public and private the network of compensation plans. In fact, it may be undermining the compensation objective by inducing private insurers to withdraw coverage and raise premiums at the expense of low income consumers.

m) While they have broadened the availability of compensation, more liberal liability doctrines and larger damage awards and settlement may have overdeterred, forcing socially worthwhile products, services and activities to be curtailed, withdrawn from the market or eliminated.(A classic example of this phenomenon is the loss of physicians willing to perform obstetrics, as discussed in this memorandum under "Availability of Services" above and in the Danzon article contained in chapter 4 of this book. Similar effects are observed by Peter Huber in chapter 5 regarding hazardous waste facilities.)

n) Delivering compensation through the tort system is very expensive. According to Rand the United States spent between $29 million and $36 million in 1985. Of that amount less than half the total ($14 billion to $16 billion) was paid to plaintiffs as damage awards; the rest went to lawyers and court administrators. Researchers at New York University, using a variety of methodologies, have arrived at similar estimates for administrative costs.

o) Because these costs are so high, interest has grown in supplementing or replacing the tort system with alternative means of compensation similar to the worker's compensation system. Most suggestions would place some sort of cap on total compensation - especially for pain and suffering - in return for automatic eligibility. More ambitious proposals envision separate funds, financed by taxes on employees or employers or both, to pay compensation awarded to victims of medical malpractice or exposure to toxic substances. But the limited experience with alternative compensation programs in the United States has not been encouraging. The federal black lung program, was established in 1969 to provide temporary compensation for an estimated 100,000 miners with pneumoconiosis. But due to broadened eligibility provisions by Congress, 542,000 miners, spouses and dependents have received benefits under the program by the end of 1981. Because of this experience, future proposals to establish compensation programs are unlikely to be given serious

consideration by Congress or state legislatures unless they are accompanied by convincing demonstrations that their costs can be contained. The New Zealand experience, which does not cover disease or sickness, has not been evaluated comprehensively; and is of probable limited value in the United States which is larger and has a more heterogeneous population. In short, we simply do not know whether society would be better off if the process of identifying risks and hazards were further centralized by replacing the tort system with more intensive regulation.

p) Nevertheless, the most effective way of avoiding much of the transaction cost would be to provide ways of compensating injured parties that do not require the high fact-finding expenses characteristic of tort litigation. This suggests a tradeoff: relaxed standards for eligibility but limits on compensation, especially for non-economic damages. The Product Liability Reform Act of 1986 (S. 2760) offers the tradeoff within the tort system itself by giving plaintiffs incentives to accept manufacturers settlement offers that limited non-economic damages components. This approach could be generalized to all types of tort cases; although it is not clear whether an expedited settlement process would result in net savings.

q) Stiffer regulation of liability insurance rates or policies will not solve the liability crisis and conceivably could be counterproductive. Tighter regulations by some states will only induce some carriers in those states to reduce coverage they offer or even withdraw entirely. The only way in which regulation of the property-casualty industry might be significantly improved is to strengthen solvency regulation by state insurance agencies. At the Federal level, it is unclear whether repeal of the McCarran-Ferguson Act would have a significant impact on insurers.

r) Virtually all tort reform measures would reduce compensation available through the system. In fact, there is evidence, at least for medical malpractice cases, that tort reforms have already reduced the frequency of claims and the growth rate of insurance premiums (he cites the 1987 update of the Tort Policy Working Group under the Reagen Administration contained in your first packet). But deterring injury is also an objective of tort law, and reducing compensation could weaken deterrence. The problem facing policymakers is that relatively little empirical information is available to indicate how tort compensation could be modified without compromising deterrence.

s) Judges should encourage juries to evaluate the costs and benefits of the behavior of both plaintiffs and defendants in tort cases in deciding which parties should bear the loss from the accident at issue.

t) The search for cost effective reforms should focus on modifications of the tort system to reduce uncertainty and eliminate inappropriate levels of compensation while retaining a fault-based rule of liability (which while costly and inefficient is probably less expensive than no-fault systems). Accordingly, there is a strong case for limiting non-economic damages in tort cases (as well as for more restrictive statutes of limitation and periodic payment of future damages, according to Danzon) but only in a way that takes into account the age of the injured party and the severity of the injury. By reducing non-diversifiable risk, such changes would also reduce the volatility of insurance premiums.

u) Finally, while some may be disappointed by the failure of Congress to enact comprehensive tort reform legislation, the experiments now being conducted by the states may prove more useful in the long run. Given the uncertainties about economic effects of different legal rules, we may one day be grateful that reform proceeded in the relatively uncoordinated fashion that it has in recent years. Today we simply know too little to be confident that any major overhaul of the U.S. tort system would produce more benefit than harm.

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May 2, 1989

The Honorable Dave Donley
Chair
House Labor and Commerce Committee
P.O. Box V
Juneau, AK 99811

Re: Constitutional concerns raised by HB 166
Our file: 663-89-0459

Dear Representative Donley:

You have asked for our opinion on whether HB 166 or any part of HB 166 raises constitutional concerns. In addition you have requested a "report as to whether any courts have overturned any of the 'tort reform' measures addressed in HB 166, the reasons for the ruling and the ultimate outcome of the cases."

In general, any time the legislature acts there is a possibility that constitutional boundaries will be involved. When legislative action centers on individual rights within our justice system, concern about the constitutionality of the measure is heightened. General concerns about equal protection, due process, and the right to have a jury decide a claim are all presented by HB 166.

Specifically, there are two major areas of concern presented by HB 166. These are the sections dealing with the statute of repose (section 2) and the "cap" on noneconomic damages (section 15).

This memo will focus on the general state of the law concerning statutes of repose and caps on noneconomic damages.

STATUTE OF REPOSE

House Bill 166 proposes in section 2 to enact a six-year "statute of repose" that would limit a person's right to bring a cause of action for personal injury, death, or property damage to six years from the earliest of: the date of purchase

of a product; 1/ the date of substantial completion of construction; or the date of the last act alleged to have caused the injury, death, or property damage.

Statutes of repose are quite different than statutes of limitation. As one court defines the difference:

> A statute of limitation bars enforcement of an accrued cause of action whereas a statute of repose not only bars an accrued cause of action, but will also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute . . . .
>
> A second distinction may be made with reference to the event from which time is measured. A statute of limitation runs from the date the cause of action arises; that is, the date on which the final element (ordinarily damages, but it may also be knowledge or notice) essential to the existence of a cause of action occurs. The period of time established by a statute of repose commences to run from the date of an event specified in the statute, such as delivery of goods, closing on a real estate sale or the performance of a surgical operation. At the end of the time period the cause of action ceases to exist.

Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4 Dist. Ct. App. 1987).

The Utah Supreme Court, in describing the difference between a statute of repose and a statute of limitations, noted:

> Statutes of repose . . . are different from statutes of limitations, although to some extent they serve the same ends. See McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am.U.L.Rev. 579, 582-87 (1981) (discussing the two types of

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1/ House Bill 166 does not clarify if the "date of purchase" is the "initial" date of purchase or some other date of purchase. Since products are often resold, this could become an issue if not clarified.

statutes and variations of statutes of repose). A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action. . . .

To be constitutional, a statute of limitations must allow a reasonable time for the filing of an action after a cause of action arises. Horn v. Shaffer, 151 P. 555 (1915); Saylor v. Hall, Ky., 497 S.W.2d 218 (1973). In Wilson v. Iseminger, 185 U.S. 55, 62, (1902), the United States Supreme Court stated:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Since a statute of repose begins to run from a date unrelated to the date of an injury, it is not designed to allow a reasonable time for the filing of an action once it arises. Therefore, a statute of repose may bar the filing of a lawsuit even though the cause of action did not even arise until after it was barred and even though the injured person was diligent in seeking a judicial remedy. . . . Indeed, a statute of repose may cut off a cause of action even though it is filed within the period allowed by the relevant statute of limitations.

Berry v. Beach Aircraft, 717 P.2d 670, 672 (Utah 1985) (some citations omitted). Thus, the major difference between a statute of repose and a statute of limitations is that a statute of repose can cut off a cause of action before a person even

recognizes he or she has one. A statute of limitations begins to "run" after the cause of action arises.

There has been one Alaska Supreme Court decision concerning a statute of repose. In Turner Construction Co. v. Scales, 752 P.2d 467 (Alaska 1988), the Alaska Supreme Court ruled that Alaska's six-year statute of repose on suits against design professionals was unconstitutional. In so doing, the supreme court followed an equal protection analysis. Although the court found that the "interest in redressing wrongs through the judicial process is a significant one" under Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983), the court held that no fundamental interest was at stake. 752 P.2d at 471.

Because no fundamental constitutional right was involved under State v. Erickson, 574 P.2d 1 (Alaska 1978) (see also Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984), for a helpful explanation of equal protection analysis in Alaska), 2/ all that was necessary to justify the statute was a fair and substantial relationship between the means and the ends of the statutory requirement. The court found that the goal of avoiding "state claims by shielding certain defendants from potential future liability" was a legitimate

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2/ Under Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), the state supreme court outlined the following three-step analysis in equal protection cases. I include it as a guide to consider in analyzing equal protection issues.

1. First ask what the weight of the constitutional interest impaired is. Depending on the primacy of the interest involved the state will have a lesser or greater burden in justifying its legislation.

2. Next ask what purpose the statute serves. Depending upon the level of review, the state may be required to show purposes that at the low end of the scale are simply "legitimate objectives" all the way to a "compelling state interest" at the upper end.

3. Finally, question what the state's interest is in the particular means employed to further its goals. The state's burden differs in accordance with the determination of the level of scrutiny and goes from a "substantial relationship between the means and ends" to a much closer fit.

government purpose, but that there was no "substantial relationship" between the means and the ends of the statute, and that the statute was thus unconstitutional. 752 P.2d at 472.

The court noted in its decision that it was "not persuaded" by a number of rationales presented by other courts to justify a distinction between design professionals and others. The court rejected the reasoning that a distinction is valid because design professionals do not have continuing control over access to and maintenance of property while owners, tenants, and others in possession do. The court also rejected distinctions based upon who may sue design professionals (a large group) versus landlords and tenants (a smaller group). Finally, the court did not accept distinctions based on the theory that design professionals have special expertise and their work cannot be completely tested, unlike standard goods manufactured by "standard processes." 752 P.2d at 471.

After rejecting the above rationale the court found the six-year statute of repose unconstitutional. However, in its final statement, the court noted that the statute of repose eliminated the statutory right of contribution among tortfeasors. Therefore, under joint and several liability one defendant could end up liable for 100 percent of the damage. The court noted, "the statute of repose . . . does not entirely abrogate liability for defective design work, but shifts it. Thus, the potential interest of joint tortfeasors in obtaining contribution, in addition to the claimant's interest in suing a particular party, must be considered." 752 P.2d at 472. The court further noted that because of this "shift" in responsibility there was no substantial or rational relationship between the means and the ends of the statute. The court found that there would even be a disincentive for owners not to finance construction projects which might "be greater than their proportional measure of liability shift, because they may be liable for a product over which they have no control," Id.

It is the mention of the joint tortfeasor act and the effect of joint and several liability on it that calls the Turner decision into some question. In the fall of 1988 Alaskan voters passed Ballot Proposition #2, which abolished joint and several liability in Alaska (except for environmental torts, see, e.g., 1988 Inf. Op. Att'y Gen. (Nov. 2; 661-89-0172) in Alaska. Because Alaska no longer has joint and several liability, there would no longer be the "shift" of responsibility found in Turner. What would exist, however, is a shift of liability from tortfeasors back onto the victim. What the court would decide given this situation is not certain, but the same analysis

applied in Turner disapproving the shift of liability onto other tortfeasors would most likely be applied to a shift onto a victim.

Turner dealt with design professionals, not products liability or medical malpractice, but the equal protection analysis applied would be the same. Thus, if HB 166 became law, the court would use the same equal protection analysis used in that case to determine the constitutionality of the statute of repose in section 2 of the bill.

Because there is no fundamental right involved (even though there is a "significant interest") the standard of review concerning the statute of repose in HB 166, should it become law, would still be whether or not there is a "fair and substantial relationship" between the means and the ends of the statute. Although this is a low standard of review, a court would also ask what the legislative goal was in enacting the statute. If the court found a legitimate goal, then the court would analyze whether or not the means utilized by the statute fit the ends, or the goal, of the statute. While it is not possible to be completely certain what the state supreme court would hold concerning the statute of repose suggested by HB 166, as mentioned above it is unlikely that the court would approve of such a drastic shift of liability back onto a victim.

OTHER STATES

Other states have split in their decisions on the constitutionality of statutes of repose. One commentator notes that

> vigorous legal challenges to such statutes have brought mixed results. Claims of the unconstitutionality of such statutes have failed, as some courts have been prepared to accept remarkable arguments that the challenged statutes of repose do not offend the equal protection clause because they are rationally related to some legitimate state purpose.

M. Madden, Products Liability 209 (2d ed. 1988). While, as Professor Madden notes, many courts find statutes of repose constitutional, many also find them unconstitutional. A denial of equal protection is often the main reason courts find statutes of repose unconstitutional, but due process and the "open courts" requirement (granting access to the courts and remedies for all

injuries) of some states are also major issues in determining constitutionality. 3/

One of the more comprehensive cases outlining issues concerning statutes of repose comes from North Dakota. In Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986), the North Dakota Supreme Court did an exhaustive study of its statute of repose and found it unconstitutional. Hanson involved a products liability statute of repose. In Hanson, a young man was killed when an earth mover "jumped backwards" upon start and ran over him. The earth mover had been purchased 19 years earlier, and North Dakota's statute of repose barred a cause of action unless brought within 10 years of purchase. Thus, the wrongful death action brought by the young man's mother was barred by the statute of repose. In analyzing its statute, the North Dakota Court used an equal protection analysis similar to the Alaska Supreme Court in Turner (although the court called their standard of review "intermediate" scrutiny, it was actually very similar to the Alaskan standard in Turner). It is important to note that one of the reasons the North Dakota Court found its statute unconstitutional was that the court found the purpose the statute of repose sought to achieve, i.e., controlling insurance rates, might not be achieved by the statute. This suggests that unless statutes of repose can actually be shown to control rates, they will be less likely to be found constitutional. Among the stated goals in HB 166 is the goal to "increase the availability and affordability of insurance" and "to reduce costs associated with the tort system." Hanson suggests that unless the statute of repose included in HB 166 can be shown to actually result in these goals the measure may be unconstitutional.

As noted in Hanson, many other courts have found their statutes of repose to be unconstitutional. Among states finding statutes of repose unconstitutional are Alabama, Lankford v. Sullivan, Long and Hagerty, 416 So. 2d 996 (Ala. 1982); Utah, Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985); Rhode Island, Kennedy v. Cumberland Engineering Co., Inc., 471 A.2d 195

3/ "Open courts" provisions are contained in 37 state constitutions. These provisions allow access to courts and sometimes allow for a remedy for every injury. Alaska does not have an "open courts" provision in its constitution, but to a certain extent a combination of due process rights and the right to trial grant the same rights as an "open courts" provision. See, Lucas v. U.S., 757 S.W.2d 687, 690 (Tex. 1988).

(R.I. 1984); New Hampshire, Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983); Wyoming, Phillips v. ABC Builders Inc., 611 P.2d 821 (Wyo. 1980); Kentucky, Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); South Dakota, Daugaard v. Baltic Coop Bldg. Supply Assoc., 349 N.W.2d 419 (S.D. 1984); and Ohio, Gaines v. Preterm-Cleveland; 514 N.E.2d 709 (Ohio 1987). See Hanson, 389 N.W.2d at 321.

As Hanson notes:

> Courts which have declared statutes of repose unconstitutional have done so on the bases of different constitutional rights. Some courts have relied at least in part on "open courts" provisions in state constitutions. Berry; Daugaard; Lankford. Courts have also relied in part on the due process clauses of state constitutions. Berry. Statutes of repose have also been declared violative of equal protection provisions of Federal and State constitutions. Heath. Some courts have used a combination of these constitutional provisions along with state wrongful death constitutional provisions to invalidate statutes of repose. Berry, Kennedy, and Saylor.

389 N.W.2d at 321, 322 (citations omitted).

On the other side of the issue, Florida, North Carolina, Oregon, Massachusetts, Tennessee, Colorado, Indiana, Illinois, New Jersey, Wisconsin, and Nebraska have all upheld statutes of repose. Courts upholding statutes of repose have reasoned that there is a necessity to be able to predict an end to liability, thereby reducing the "tail" of liability actions; thus, it is hoped, reducing insurance rates. In Hanson, the court noted these cases and their reasonings:

> Pullum v. Cincinnati, 476 So.2d 657 (Fla. 1985) [statute of repose does not violate equal protection clause]; Tetterton v. Long Mfg. Co., Inc., 332 S.E.2d 67 (N.C. 1985) [statute of repose does not violate equal protection or State constitutional provision on open courts]; Davis v. Whiting Corp., 674 P.2d 1194 (Ore. App. 1984), cert. denied, 679 P.2d 1367 (Or. 1984) [statute of repose does not violate due process, equal protection, or access to court provisions of the constitution]; Stutts v. Ford Motor Co., 574 F.Supp. 100 (M.D.Tenn. 1983) [statute of repose does not

> violate open court provisions of State constitution]; Yarbro v. Hilton Hotels Corp., 655 P.2d 822 (Colo. 1983) [statute of repose does not violate due process or equal protection]; Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1982) [statute of repose does not violate State open court provision]; Thornton v. Mono Mfg. Co., 54 Ill.Dec. 657, 425 N.E.2d 522 (Ill.App. 1981) [statute of repose does not violate due process]; Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972) [statute of repose does not violate equal protection clause of Federal Constitution].

389 N.W.2d at 322 n.7 (some citations omitted).

In one illustrative case, Gaines v. Preterm-Cleveland, 514 N.E.2d 709 (Ohio 1987), the issue was the constitutionality of a medical malpractice statute of repose. The facts involved a woman who brought suit against a health care organization. A doctor for the organization had told her that her IUD had successfully been removed when in actuality it had not. Three and one-half years later, the IUD had perforated her uterus and was embedded in her left ligament. Pain and permanent damage resulted. Relying on Ohio's four-year statute of repose, the lower court granted summary judgment against the plaintiff.

The Ohio court had previously held that a four-year statute of repose could not constitutionally bar claims of minors or plaintiffs who in exercise of reasonable diligence discovered their injury after the four-year period. Mominee v. Schebarth, 503 N.E.2d 717 (Ohio 1986); Hardy v. Ver Meulen, 512 N.E.2d 626 (Ohio 1987). In Gaines, the plaintiff was not outside the four-year period, but she had less than one year left in which to pursue her claim. The court held that the legislature had intended there to be at least one year allowed in which a person could bring a claim. 514 N.E.2d at 717.

The Ohio court in Gaines focused on the "reasonableness" of the period allowed in which to bring a claim. If less than a year was allowed, the court noted:

> This person is unique in the law of medical malpractice. [S]he has the misfortune of belonging to the only class of litigants who do not have a reasonable period for seeking legal recourse . . . . A person in this class of persons is not any less injured than other malpractice victims nor has he been less vigilant in monitoring the

> quality of his medical care. Yet his legal rights are abridged and even cut off completely for no other reason than the fortuity of timing. We fail to discern any rational basis for distinguishing such a person from other medical malpractice litigants. The injury suffered is no less real, nor is the claim necessarily less meritorious ....
>
> No reasonable grounds can be conceived which would justify denying a full year for filing a claim to a single class of litigants based solely on when they were able to discover the existence of a claim.

514 N.E.2d 709 at 715.

The court held that the statute of repose also denied due process, and said:

> Although it may be stated that this severance of rights might conceivably bear 'a real and substantial relation to the . . . general welfare of the public' by decreasing the sheer numbers of medical malpractice claims, thereby reducing malpractice insurance premiums and lessening the cost of health care, no evidence of such an effect has been brought forward. However, even assuming [the Ohio statute] has actually achieved this end, we find the means of achieving it are unreasonable and arbitrary, and violative of due process.
>
> . . . the severance of an individual's right to pursue a claim based on when he discovers the existence thereof is not justified by any distinguishing feature of such a person or of his claim. The fact that he did not discover his claim until after three years had passed does not necessarily indicate that he 'slept on his rights' since in many cases he will be unaware that he had any rights . . . Nor does the relative delay in his discovery suggest that the injury is trivial or the claim unfounded. In sum, we can envision no reason for cutting off the rights of such persons that is not unreasonable or arbitrary.

Id.

In Gaines, although Ohio (unlike Alaska) has an "open courts" provision, the Ohio court also clearly focused on the equal protection and due process problems presented by statutes of repose. As the Utah Supreme Court noted in Berry v. Beech Aircraft, 717 P.2d 670, 678 (Utah 1985), there are quite a few cases based solely on equal protection analysis that find statutes of repose unconstitutional:

> For cases holding statutes of repose unconstitutional on equal protection grounds, see, e.g., Shibuya v. Architects Hawaii Ltd., 647 P.2d 276 (Hawaii 1982) (architects and builders statute of repose); Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973) (architects and builders statute of repose); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (architects and builders statute of repose); Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978) (architects and builders statute of repose); Kallas Millwork Corp v. Square D Co., 225 N.W.2d 454 (Wis. 1975) (architects, engineers, and designers statute of repose).

CONCLUSION

This letter has outlined the issues involved and the general bases courts have used in analyzing the constitutionality of statutes of repose. As I have noted, the Alaska Supreme Court has found one statute of repose unconstitutional. In Turner Construction Co. v. Scales, the Alaska Supreme Court disapproved of the shift of liability caused by Alaska's statute of repose. Although Proposition #2 has removed joint and several liability from most torts, under HB 166 the shift of liability would still occur, but now it would be back onto the victim. While we cannot be certain of the outcome of a new Alaskan case concerning a statute of repose, the analysis used in Turner would be the same.

CAP ON NONECONOMIC DAMAGES

In 1986, the Alaska Legislature enacted a cap in all personal injury cases of $500,000 for noneconomic damages, except in cases of disfigurement or severe physical impairment. AS 09.17.010. In section 15, HB 166 seeks to limit noneconomic damages to $50,000 in wrongful death cases. In other personal injury cases, the $500,000 limit, with exceptions, stands.

Caps on economic damages in other states appear to apply across the board rather than just to wrongful death. I have been told that a committee substitute for HB 166 will

probably extend the limit on noneconomic damages to situations other than wrongful death.

A recent ABA journal article noted that among other states, Florida, Idaho, Illinois, New Hampshire, North Dakota, Ohio, Texas, and Virginia have struck statutory limits on noneconomic damages. The article also notes that "constitutional challenges to caps on noneconomic damages have been based on federal and state rights to equal protection, substantive due process, access to courts, and to a trial by jury." 74 A.B.A.J. 24 (1988).

I have attached an article concerning caps on noneconomic damages from the Washington Law Review. Silva, Washington's Noneconomic Damages Limit, 63 Wash. L. Rev. 658 (1988). This article contains a table of reported decisions on the constitutionality of medical malpractice and tort reform damage limits. As the table notes, (at least) 12 courts have found damage limits unconstitutional while seven have upheld them. Id. at 675.

In Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988), the Texas Supreme Court, in a case certified to it by the Fifth Circuit, found a $500,000 cap on medical malpractice damages unconstitutional. In so doing, the Texas court compiled an exhaustive description of other U.S. courts and their actions. As the Texas court noted:

> At least thirteen states other than Texas have enacted damage limitation provisions into their medical malpractice statutes. Each statute has different characteristics, and the state courts have divided on the constitutionality of the various caps. See, e.g., Smith v. Department of Insurance, 507 So.2d 1080, 1087-89 (Fla.1987) ($450,000 limit on noneconomic damages violated "open courts" provision of Florida Constitution); Wright v. Central Du Page Hospital Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 743 (1976) ($500,000 cap constituted "special law" in violation of Illinois Constitution); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 836-38 (1980) ($250,000 limit on noneconomic damages violated equal protection guaranteed by New Hampshire Constitution); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D.1978) ($300,000 ceiling violated equal protection clause of North Dakota Constitution); Duren v. Suburban Community Hospital, 24 Ohio Misc.2d 25, 482 N.E.2d

> 1358, 1361-63 (C.P.1985) ($200,000 limit on general damages violated Ohio and federal constitutions); Fein v. Permanente Medical Group, 38 Cal.3d 137, 211 Cal. Rptr. 368, 695 P.2d 665, 679-84 (1985) ($250,000 ceiling on noneconomic damages held constitutional); Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585, 598-601 (1980) ($500,000 cap upheld); Sibley v. Board of Supervisors, 462 So.2d 149, 154-58 (La.1985) ($500,000 cap upheld) modified on reh'g, 477 So.2d 1094, 1109-10 (La.1985) (latter opinion ordering conditional remand on state equal protection challenge); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 668-69 (1977) ($500,000 cap upheld in plurality opinion joined by only three judges, with three others dissenting as to constitutionality, and one judge declining to reach constitutional issues because opinion was merely advisory). Compare Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399, 410-16 (1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 233 (1977) (case remanded for fact findings pertinent to constitutional attacks on damage caps).

757 S.W.2d at 689.

Lucas involved a fourteen-month-old boy who was paralyzed for life due to the negligent administration of a penicillin shot. As you can see from Lucas's list, the reasons for finding caps unconstitutional parallel the reasons for finding statutes of repose unconstitutional. "Open courts" and equal protection are again called into question.

The cases noted concern caps on noneconomic damages in general, not just for wrongful death. The same concerns apply, but there is less argument in support of noneconomic damages when the victim is deceased. At least one court has upheld the constitutionality of a wrongful death statute that limited recovery for all damages to $45,000 for a decedent who left no dependents. Pollock v. City & County of Denver, 572 P.2d 828 (Colo. 1977).

The plaintiffs in Pollock lost their five-year-old child. They were not dependent on the child, and thus the $45,000 limit applied. The parents attacked the limit on equal protection grounds, arguing that it was illogical to allow dependants to recover unlimited damages, while parents could recover

only up to $45,000. The court held that since a dependent would have to show actual damages to recover more than $45,000, and since nondependents can survive without the money better than dependents, there was a legitimate societal interest in limiting recovery.

The same arguments could extend to HB 166's cap on non-economic damages in wrongful death cases. However, it is possible that the Alaska Supreme Court could consider the limit a violation of equal protection. If the cap is extended to all non-economic damages, the constitutionality will be even more questionable.

CONCLUSION

The cap on noneconomic damages in the current version of HB 166 would affect only wrongful death cases. I have been told that this cap may be extended to other noneconomic damages, so I have attached the Washington Law Review article cited herein for your information. This article covers the state of the law concerning caps on noneconomic damages in general, and as you can see, the courts split on the constitutionality of caps on noneconomic damages.

We hope that this memo is of use to you. There may be other constitutional issues raised by HB 166, and this memo is simply an outline of two major areas of concern. If you have further questions, please let us know.

Sincerely,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Elizabeth J. Kerttula
Elizabeth J. Kerttula
Assistant Attorney General

EJK:prm

Attachments

cc: Robert Evans
Legislative Liaison

Art Peterson
Regulations Attorney

277-4864

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CHAIRMAN EMERITUS

August 5, 1988

Mary A. Pierce
Executive Director
Medical Indemnity Corporation of Alaska
4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503

Re: Effective Tort Reform Legislation

Dear Ms. Pierce:

You, like many other executive officers of medical societies and physician sponsored insurers, are likely involved in continuing efforts to obtain passage of effective tort reform.

At the May 1988 Physician Insurers' Association of America Annual Meeting I had the opportunity to discuss the importance of the "fine print" in tort reform legislation. So many people in the audience requested copies of my slides that I prepared the attached annotated version of those slides.

The information on pages two through four can be used as a checklist in reviewing tort reforms you may be considering. Actuarial techniques can be used to evaluate how much "fine print" in the tort reform language might affect the value of the reforms.

If you have any questions about this material, or if I can be of any other assistance to you, please feel free to call me or my associate, Spencer Gluck.

Very truly yours,

Allan Kaufman -SG.

Allan Kaufman, F.C.A.S.

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AK/pr
cc: D. Bickerstaff

How Effective is Tort Reform?

Read the Fine Print

Tort reform can work.

The largest "laboratory" to date has been the medical professioanl liability system in California. Here, a package of tort reforms including many of the currently popular elements was passed following the mid-seventies medical malpractice insurance crisis. At that time, California joined New York and Florida among the national leaders in medical liability costs. Today, California's medical liability costs are far closer to the national average.

Patricia Danzon, currently at University of Pennsylvania, compared medical liability costs from 1975 to 1984 in a number of states with and without tort reforms, calculating these average savings associated with various types of tort reforms:

Caps on non-economic loss	23%
Collateral sources offsets	11-18%
Contingency fees limitations	3%
Reduced statute of limitations	8% per year
Structured settlements	Not tested
Joint & Several Liability	Not tested

Of course, these estimates of savings are in comparison to what costs otherwise would have been, and represent average results for the states studied.

Remember, successful tort reform means that costs are lower than they otherwise would have been. It is unlikely that tort reform will produce costs below the starting point for an extended period.

Tort reform can also fail.

Or be relatively ineffective. Or be less effective than it might have been. For each of the types of reform listed above, there have been a number of variations in bills which have passed, and even more in bills which have been considered. Small differences in wording can have profound implications, some of which may be unintended. To evaluate an existing or proposed tort reform, be sure to read the "fine print".

We've worked on many variations of tort reforms in proposals, bills, and laws in a number of states. The following list illustrates some of the possible variations and important factors which affect the value of those reforms. The list begins with a ball-park estimate of the savings which the reforms might produce for medical professional liability.

Limitations on Non-Economic Loss

Estimated savings can range from zero to fifty percent, depending on:

1. Amount of Limitation. Proposals range from complete elimination to a $1,000,000 limitation.

2. Per Incident or Per Claimant. This distinction is significant, but without proper attention the wording of the law may not even be clear.

3. Flat or Graded. Flat limitations are more common. Graded limitations usually apply the maximum to only the most serious cases and then grade the limitation down for less serious cases (e.g. in proportion to "capacity to enjoy life").

4. Definition of Non-Economic Loss. For example, future wage loss in one jurisdiction is considered speculative and therefore non-economic.

5. Variation by Claimant Characteristic. For example, the limitation may vary by age of claimant and/or degree of injury.

6. Indexation of the Limitation for Inflation.

Collateral Source Offsets

We've estimated savings in this area from zero to fifteen percent.

1. Mandatory or Judgmental Offset. Possible wordings include: "evidence may be introduced"; "judge/jury may consider"; or "judge/jury shall reduce".

2. Offset by Judge or Jury. There's opinion (although no evidence) that offset by the judge produces greater savings.

3. Exceptions to Offset. Possibilities include medicare, life insurance, public insurance, insurance paid by claimant, insurance with subrogation provisions, insurance paid by employer.

4. Past Damages Only or Past and Future Damages. The language of a number of current laws appears to apply to past damages only, whether or not this was intended when the law was written.

5. Offset for Premium Paid by Claimant.

Contingency Fee Limitations

Estimated savings range from zero to ten percent.

1. Selected Schedule. Most limitations take the form of some kind of schedule. That schedule may include percentages higher than current prevailing fees.

2. Schedule Variations. Most schedules vary the percentage by size of award. Others may also vary the percentage by case disposition (i.e., claim, suit, trial, appeal).

3. Treatment of expenses. Are trial, court and expert fees counted as part of the schedule or in addition to the schedule fee? Alternatively, is the award/settlement reduced by expenses before the fee is applied?

Statute of Limitations

We've estimated savings ranging from zero to fifteen percent.

1. Cutoff Period. We've seen anywhere from two years to ten years.

2. Cutoff by Occurrence Date or Discovery Date. Another possibility is both, e.g. "four years from incident or two from discovery, whichever is later".

3. Definition of Discovery Date. "Did discover" or "could have discovered" or "should have discovered" etc.

4. Statute of Repose or Statute of Limitations. A statute of repose operates more restrictively. The courts may decide which it is; careful wording in the law can cause it to operate as a statute of repose.

5. Exceptions. The potential list includes infants, foreign objects, continuing treatment, drugs or radiation, and concealment or fraud.

Periodic or Structured Settlements

Estimated savings range from zero to ten percent.

1. Optional or Mandatory.

2. Size Requirements. For example, "awards over $250,000" or "awards with future damages over $100,000".

3. Applied to Economic Loss, Non-Economic Loss, or both.

4. Treatment of Inflation. Examples include inflation calculated at the jury's discretion, at a fixed rate specified by statute, or at a fixed relationship with a stated index.

5. Court Rules on Treatment of Inflation and Interest. This item refers to conditions before the change in law. Previous assumptions regarding inflation and interest may have been specified in statute or in case law. In other instance it may be difficult to determine prevailing assumptions.

6. Payment Periods. Possibilities include a specified payment period (e.g., 10 years), a specified maximum payment period, payment for life expectancy.

7. Payments May or May Not Terminate at Death. Frequently, some payments terminate (e.g., medical costs) while others may not (e.g., wage loss).

8. Financial Guarantees Required. For example, insurer with specified Best's rating.

9. Treatment of Attorney's Fees. In some instances, attorney's fees may be completely exempted from periodic payments. Other possibilities include lump-sum payments with required present value calculations or separate rules for scheduled payments.

Joint and Several Liability

We haven't estimated significant savings to doctors in this area.

1. Economic Versus Non-Economic Losses. A number of existing versions abolish joint and several liability for non-economic losses only.

2. Proportionate Liability in All Cases or Only Below A Threshhold. For example, some laws establish proportionate liability for those under 50% liable, but provide that all damages may be assessed against those over 50% liable.

3. Among Whom are Damages Apportioned. For example, in a case involving a work-related injury, may the employer be included?

* * * *

Summary and Conclusion

There is evidence that tort reform can be an effective means for reducing the growth in liability costs. Still, simply passing a tort reform bill by no means ensures that savings will be realized. It is no accident that we included zero in each possible range of results. Some versions of tort reform may even increase costs. The fine print of the law, the court instructions used to implement the law, and court interpretations of the law will all act to determine the effectiveness of a tort reform measure. An important first step is to read the fine print.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box V, State Capitol
Juneau, Alaska 99811-4100
Mail Stop 4100
(907) 465-3991

March 20, 1989

MEMORANDUM

TO: Representative Dave Donley

ATTN: Ginger Baim

FROM: Patricia Young
Legislative Analyst

RE: Tort Reform and the Cost and Availability of Liability Insurance
Research Request 89.311

You requested that we provide a review of tort reform measures adopted in other states during the last ten years. Specifically, you wished to know what effects such legislation has had on the cost and availability of liability insurance.

> One certainty exists regarding issues of tort reform and liability insurance: "this is not a race for the short-winded, and it is one which started only recently." ("Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," Volume II, New York, 1986, p. 62.)

A comprehensive review and condensation of the entire tort reform movement in the United States within the last ten years cannot be performed within the current legislative session. In addition to the major proposals--limits on non-economic damages, abolition or restriction of punitive damages, abolition of collateral source rules, restrictions on contingency fees, elimination of joint and several liability, reduction of statute of limitations, penalties for "frivolous" suits, and establishment of alternative resolution procedures--states have considered a variety of specific topics such as medical malpractice and sovereign immunity. Volumes describing and debating the merits of proposed and enacted legislation are published annually. Although relevant, much of this material would provide information of limited value.

Generally, it is too soon to accurately judge the effect of tort reform measures. According to Brenda Trolin, insurance specialist with the National Conference of State Legislatures (NCSL), a minimum of five years are needed

before cases processed under previous systems clear the courts. Several additional years must pass before a sufficient number of cases have been processed through new systems to determine whether changes have had the desired consequences. Ms. Irolin noted that the impacts of medical malpractice reform measures passed in the mid-1970s are only recently beginning to be meaningfully charted.

Because of the variations in state constitutions and laws regarding tort reform, identical reform measures may have dissimilar effects in each state. Thus, even those reform measures which appear promising require careful consideration in the context of our own circumstances to determine potential ramifications. In some states, opponents argue that constitutional rights--including equal rights to protection, access to courts, and trial by jury--are violated by reform measures. Also, reform measures can encourage or discourage lawsuits. Although some measures--such as Hawaii's Court Annexed Arbitration Program--may facilitate and expedite resolution, they may also encourage claims which would not otherwise have been made.[1]

Further complicating the tort reform issue, there is no direct relationship between laws regarding liability and cost and availability of insurance. According to "Insuring Our Future: Report of the Governor's Advisory Commission on Liability Insurance," New York, 1986, "no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists." Proponents of tort reform argue that changes which restrict liability or limit damage awards will reduce insurance costs; however, a variety of factors--including changes in underwriting practices and costs, investment returns, market behavior, domestic interest rates, and the national economy--determine actual costs. According to Franklin Nutter, president of the Alliance of American Insurers, "It is clearly impossible to say that if you adopt a certain tort reform, you will get 'X' reductions in premiums."[2]

---

[1]This alternative dispute resolution program is a mandatory, nonbinding program designed to handle all tort cases with a probable jury award value of $150,000 or less. Arbitration must be completed within nine months from the date of service to the last defendant. Litigants may select a private arbitrator, or an arbitration commission administrator will assign one to hear the case and deliver a judgment. A litigant who wishes to appeal a judgment must do so within 20 days of the arbitrator's award. If the court does not alter the award by at least 15 percent in favor of the appealing party, that party is required to pay reasonable costs and fees, costs of jurors, and attorney's fees up to $5,000.

[2]Quoted in Public Citizen, "The Impact of Tort Changes on Insurance Rates," attached.

The tort liability issue is one requiring careful consideration in all of its parts. While reform is championed by the insurance industry as the solution to the "insurance crisis," it is worth noting that there are other avenues to cost containment, such as the development of more effective risk management programs and regulation of the insurance industry.

I have attached the following items which you may find useful: "The Impact of Tort Changes on Insurance Rates," "The Need for .nsurance Reform," and "What People are Saying About Liability Insurance and Victims' Rights," Public Citizen, 1986-87; Brenda Trolin, "Controlling Liability Insurance Costs: State Actions and Future Initiatives in the Area of Civil Justice Reform," State Legislative Report, Vol. 11, No. 1, January 1986; a portion of "Insuring our Future: Report of the Governor's Advisory Commission on Liability Insurance," volume II, New York, 1986; Stephen J. Carroll and Nicholas Pace, Assessing the Effects of Tort Reforms, the Rand Institute for Civil Justice, 1987; "Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms," United States General Accounting Office, December 1986; "The Economic Impact of the Texas Liability Law System," a report submitted to the Texas Civil Justice League, January 1989; Insurance Services Office, "Claim File Data Analysis: Overview," December 1988; Brenda Trolin, "Controlling Liability Insurance Costs: State Initiatives in the Area of Insurance Regulation," Vol. 11, No. 6, May 1986; "Justice for All," The Association of Trial Lawyers of America; and information on the effects of tort reform on insurance rates, published by the National Insurance Consumer Organization.

I hope that this information is useful. If you have further questions, I recommend that you contact Brenda Trolin, NCSL, at (303) 623-7800, as an excellent source of information on this topic.

Attachments

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Assessing the Effects of Tort Reforms

Stephen J. Carroll
With Nicholas Pace

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The Institute for Civil Justice, established within The RAND Corporation in 1979, performs independent, objective policy analysis and research on the American civil justice system. The Institute's principal purpose is to help make the civil justice system more efficient and more equitable by supplying policymakers with the results of empirically based, analytic research.

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Assessing the Effects of Tort Reforms

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Contents

I. INTRODUCTION

Liability insurance availability and affordability problems became widespread in the early 1980s. These problems touched off extensive debate over the need for changes to the body of laws governing compensation for personal injury or property damage—the tort system. By 1986, most state legislatures were considering modifications to their tort systems. In at least 41 states, the debate over what has come to be known as tort reform led to changes in the law.[1]

The debates, and resulting changes in the law, have given rise to widespread concern about how we should go about measuring the effects of tort reforms. These concerns have been accompanied by confusing, and sometimes conflicting, claims for what it is we want or need to know in order to assess the effects of changes in a state's tort system, how we might go about developing that knowledge, and what data we need to perform the required research.

This report offers a framework for assessing the effects of tort reforms. It provides a coherent structure for systematically thinking about how research can contribute to the policy debate over tort reform. Specifically, the report has three purposes:

- To alert policymakers to the issues that need to be considered when assessing tort reform.
- To suggest the kinds of research that would illuminate the major policy issues.
- To offer some guidance to data collection efforts by identifying the generic kinds of data needed.

This report does not provide step-by-step instructions for assessing the effects of reforms. Nor does it provide a list of specific research projects to be performed. Research designs will be needed to translate the general guidance provided here into specific research projects.

We do not suggest that all the studies discussed here are worth undertaking. Research and data collection efforts can be extremely costly; it is possible that the value of the information obtained in any particular study will be less than the cost of obtaining the information. Both public officials and private interests concerned with tort reform

[1]Some proponents of reform argue that relatively few states have undertaken significant reform and that many of the so-called reform states made changes to their tort systems so minor as to be negligible. The Appendix summarizes the tort reforms enacted in 1986.

issues will have to evaluate the likely benefits of each project, relative to its costs, to decide if the effort is worthwhile.

LIMITATIONS OF THE TORT REFORM DEBATE

While the nature of the debate varies from place to place, depending upon a variety of local factors and circumstances, certain limitations characterize the debate almost everywhere.

The debate focuses almost exclusively on the questions of whether, and if so, how much, the tort system affects the increasing cost and declining availability of liability insurance. Reform proponents argue that liability insurance is increasingly costly and sometimes unavailable because the tort system is increasingly expensive. In their view, the only way to control insurance costs is to modify the tort system to make it less expensive.[2] Their opponents counter that malfunctions in the operation and regulation of the insurance system are the cause of the problems, and reform would disadvantage injured claimants while having little effect on insurance premiums or availability.[3] Other issues affecting the tort system and questions of how reform might affect it are raised from time to time, and seriously considered on occasion. But, by and large, concern over insurance costs overshadows other considerations.

In fact, however, effects on insurance costs and availability are no more than byproducts of the tort system's operations. The system serves fundamental social purposes: It provides basic forms of protection, encouraging or discouraging certain kinds of behavior; it establishes the rules for compensating those who have suffered losses through the actions of others; and it offers the context for resolving civil disputes arising out of injuries or property damage. Significant changes, for better or worse, to the system's ability to deter unduly risky behavior, to fairly compensate injured parties, or to encourage rapid and decisive dispute resolution are arguably as important as changes in insurance rates and, in any event, cannot be disregarded in any evaluation of reform.

Second, the debates tend to focus on the performance of some individual segment of the tort system, disregarding its relationship with the entire system. But a change in any one part of such a complex system can reverberate throughout the system. We cannot understand

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[2]See, for example, "The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations," Sidley & Austin, May 1986.

[3]See, for example, Thomas G. Goddard, "Testimony before the Liability Insurance Commission of the Iowa Legislature," Tucson, AZ, September 2, 1986.

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observations of any one part without considering how it affects and is affected by what is going on elsewhere in the system.

Reform proponents, for example, argue that the growing use of the legal system contributes to increasing costs.[4] Their opponents respond with a barrage of statistics indicating that the number of lawsuits is growing slowly, if at all. Throughout this debate, all sides tend to focus on the number of lawsuits, paying little attention to the behavior of parties in negotiating claims prior to the filing of a suit.[5] But any change in the general patterns of those pre-suit negotiations can have dramatic impact on the relationship between the frequency of lawsuits and the costs of the system.[6] Again, the interpretation of data on events in one part of the system (e.g., court filings) depends on events in other parts of the system (e.g., the resolution of claims before suits are filed).

Third, the debates are severely constrained by data limitations. Proponents of reform would insist that some particular change in the tort system is needed to bring about certain improvements, but they generally lack the data to estimate the amount of improvement if the change were made. Opponents, adamantly predicting that the change would result in disastrous consequences, are equally unable to provide estimates of the magnitude of the disaster.

Many public and private institutions collect data relevant to the tort and insurance systems. However, their data collection systems focus on information needed to inform and manage their own affairs; they rarely capture the kinds of data needed to address the debate issues. The extensive data collected by state insurance regulators, for example, are relevant to rate-making and solvency concerns[7] and do not include

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[4]See, for example, Robert D. Kilpatrick, "Solving the Lawsuit Crisis," address to the Rotary Club of Chicago, June 17, 1986. The "litigation explosion" thesis as initially put forth by commentators concerned with the long-term viability of the courts is reviewed in Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," *UCLA Law Review*, Vol. 31, No. 1, October 1983, pp. 4-71.

[5]See, for example, "Are Caseloads Really Increasing?, Yes . . . Thomas B. Marvell, Not Necessarily . . . Stephen Daniels," *The Judges Journal*, Summer 1986, p. 35.

[6]If defendants generally become less forthcoming in dealing with claimants, perhaps to discourage growth in claims or to ease cash flow pressures, there could be an increase in the frequency of lawsuits even though claims are neither more prevalent nor larger than in the past. Conversely, if defendants frequently make more attractive settlement offers, perhaps because the legal system seems increasingly sympathetic to the plaintiff, an increasing fraction of claims could be disposed before they reach suit; therefore, the rate at which suits are filed could be unchanged even if people are, in fact, increasingly likely to perceive themselves as having been injured and to seek compensation.

[7]Commissioner Fletcher Bell (Kansas), chair of the National Association of Insurance Commissioners' Legal Liability Insurance Task Force, NAIC News Release, Kansas City, MO, June 12, 1986.

the information needed to determine how any particular change to the tort law might affect the number and sizes of claims, the amounts paid to claimants, or any of the other concerns that lie at the heart of the reform debate. Similarly, few courts collect data in sufficient detail to identify particular types of civil cases. The caseload information they have generally lumps tort and other types of civil cases together and cannot be used to examine tort reform issues.[5]

Finally, the debate gives rise to widespread demands, particularly by various public authorities, for additional data. For the most part, these demands come from persons primarily concerned with their own state's tort or insurance system and focus on data for their state. Demands for data on tort and insurance affairs in one state are seldom coordinated with demands in other states. There is little recognition that comparing the outcomes of claims across states is critical to assessing the effects of tort reform. However, data for an individual state may prove to be of some value.

Moreover, the demands for data have not emerged from systematic research plans. Once collected, the data may prove to be useless to address the concerns of policymakers. Even worse, if the data collected omit elements essential to a critical analysis, the entire database will be unable to support the analyses policymakers require.

ASSESSING THE EFFECTS OF REFORMS

The tort reform debate is likely to continue. Proponents of reform express dissatisfaction with the extent of reform in many states, suggesting that the changes are inadequate. It is likely they will seek additional changes in subsequent legislative sessions. At the same time, opponents of reform are going to seek rollbacks of what they consider to be the more onerous changes in tort law.

Aside from the ongoing political debate on the need for tort reform, a dispassionate view of the system suggests another critical issue: In our ignorance of how these reforms will affect the system, we have almost certainly made some mistakes. Even when the reforms were adopted with general agreement, other parts of the system may be affected with undesirable consequences; and where the effects of reform were anticipated, their magnitude may be either greater or less than intended. The debate over how to fine-tune the system could prove to be as heated as the debate over whether reform was needed in the first place.

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[5]See National Center for State Courts, *State Court Caseload Statistics. Annual Report 1984*, Williamsburg, VA, 1986, for a discussion of the data maintained by state court systems.

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Future debates over tort reform will lead to demands for evaluations of the past reforms. States contemplating tort law changes will want to learn from the experiences of others.

Public officials and private parties have made it clear that they expect results to follow reform. States that enacted reforms will be pressured to examine the results of those reforms. ("Have we gotten what we thought we were going to get when we went along with reform in the first place?")[9]

Further complicating the situation, the demands for evaluation and data are sometimes maneuvers among political adversaries rather than serious requests for policy-relevant information. This contributes to the problem of identifying the research that would illuminate the policy debate and the data needed to conduct that research.

Thus, the debate continues, with many demands for information but little regard for the data and research needed to provide it. At the same time, new or enhanced data systems are in demand, and some are being put into place without much regard for the kinds of research they might support or the ways in which that research is linked to policy concerns. Conflicting demands have led to a system of data collection and research requirements that can fairly be described as chaotic.

More fundamentally, there is no coherent framework for evaluation. To our knowledge, no one has tried to make clear what we need to know: how information on one subject relates to information on another, what kinds of approaches are appropriate for trying to get which kinds of information, and so forth.

CLAIMANTS AND DEFENDANTS

We use the word "claimant" to refer to the person, organization, or institution pursuing a claim whether or not they have filed suit. Similarly, we use the word "defendant" in reference to the person, organization, or institution against whom a claim is brought, again without regard to the filing of a lawsuit. In general, we do not distinguish between the defendant and, if there is one, the insurer. In discussing the effects of reform on settlement negotiations, for example, we would refer to the "defendant's offer" rather than to the "offer made by the defendant or insurer."

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[9]See, for example, William D. Hager "The Commissioner Comments," in *Iowa Insurance Quarterly*, Vol. II, Fall 1986.

OVERVIEW OF THIS REPORT

Section II begins with an overview of the connections between tort reform and the societal outcomes of policy interest. The overview suggests four basic kinds of policy questions in assessing the effects of tort reform. Subsequent sections focus on each of these questions in turn, discussing the kinds of research needed to illuminate the question, the strategies that might be used to do the work, and the kinds of data needed to conduct the research. Section VII presents our suggestions for what can be done now.

Analyses of the effects of tort reforms ultimately involve comparisons of states that have enacted the reforms of interest to states that have not. The Appendix lists the reforms that were enacted in each state in 1986.

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II. WHAT DO WE NEED TO KNOW?

Much of the reform debate focuses on the relationship between the tort system and the costs and availability of insurance. Most demands for tort reform evaluations and the data needed to conduct them concentrate on information presumed relevant to the connection, if any, between the tort and insurance systems. But analyses concerned exclusively with this relationship would be grossly inadequate and could be misleading. This section discusses the information policymakers need to assess the effects of reforms.

AN OVERVIEW OF THE TORT SYSTEM

The objectives of the tort system are numerous and conflicting, and not all are explicit. The balance among them is subject to continual change as social perceptions and preferences change. Nevertheless, the objectives can be defined in terms of the system's effects on three major areas of social concern:

- The economic and social well-being of the society at large.
- The injuries and grievances suffered by individuals and groups within the society.
- The prompt, efficient, and just resolution of disputes.

The tort system can affect these areas indirectly through legal rules. The rules influence the behavior of people and institutions and, to the extent that they modify behavior, influence our economic and social well-being, the injuries we suffer, and the outcomes of resulting disputes. Figure 1 depicts one view of the connections among legal rules and the social purposes served by the tort system.

Productive behavior refers to the everyday activities of businesses, organizations, and individuals producing the goods and services we all enjoy: for example, the activities of manufacturers producing goods, the actions of health professionals providing medical services, the behavior of drivers providing private or public transportation, and the activities of insurers providing insurance. But as Fig. 1 indicates, productive behavior sometimes results in injuries or grievances, which, if not informally resolved by the parties, become disputes.

Disputes are resolved through interactions among people—claimants and defendants, their legal representatives, judges, jurors, mediators,

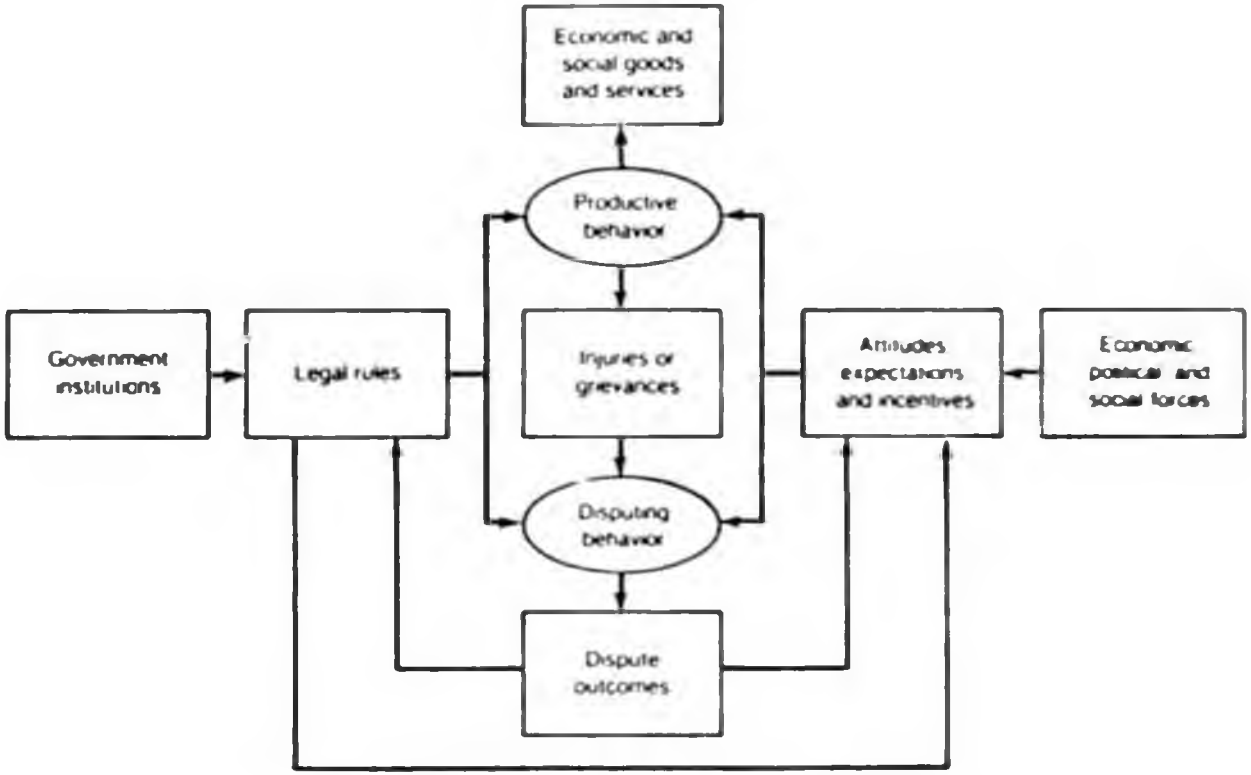

Fig. 1—A conceptual view of the tort system

arbitrators, and so forth. The behavior of those involved in dispute resolution are affected by legal rules, but they are also affected by the parties' attitudes, expectations, and incentives, which, in turn, are shaped by numerous economic, political, and social forces.

Parties' disputing behaviors determine the outcomes of disputes. Dispute outcomes, in turn, influence attitudes, expectations, and incentives of individuals and institutions. Finally, productive behavior is affected by both legal rules and individuals' and institutions' attitudes, expectations, and incentives.

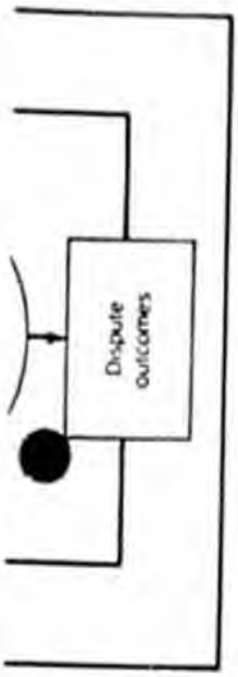

FIG. 1—A conceptual view of the tort system

Consider the relationship between tort reform and insurance costs. Assume some change in legal rules. For that change to have any effect, it must stimulate a change in someone's disputing behavior. If those involved in resolving disputes are unaware of the change in the law, or simply choose to disregard the change, dispute outcomes will remain the same. Unless there is some change in dispute outcomes, the losses insurers expect to incur are unaffected and insurers have no incentive to modify underwriting practices or premiums.

Suppose, on the other hand, that the change in the law induces some change in the disputing behavior of those resolving claims. A cap on awards for pain and suffering, for example, might lead defendants confronted with substantial claims to offer less in settlement than they would if the potential trial award were unlimited. Similarly, plaintiff attorneys might scale down their demands in cases where potential verdicts are constrained by the cap. The changes in disputing behavior may, in turn, result in different dispute outcomes. Large claims, for example, might settle for less when awards for pain and suffering are capped than if there been no cap. Underwriters and others forecasting the outcomes of future disputes may observe that some types of disputes are now being resolved at lower cost than used to be the case and revise their expectations of future costs accordingly. To the extent that premiums reflect expected future costs, they will then decrease.

Thus, dispute outcomes are the signals sent by the system to those engaged in productive activities (e.g., insurers). To bring about changes in those activities (e.g., lower insurance premiums), dispute outcomes must be changed. But, outcomes will change only when dispute resolution behavior is modified.

BASIC POLICY QUESTIONS

The view of the system offered above suggests four basic policy questions needed to assess the effects of reforms.

How Soon Can We Expect to See the Effects of Reforms?

Reforms will not affect dispute outcomes until dispute resolution behavior changes. Behavioral changes will not occur overnight; some reforms may never affect anyone's behavior. Time must pass before a new law takes full or even measurable effect because it takes time for participants in the disputing process to adjust their behavior.

The implementation of laws has received surprisingly little study. Therefore, we need to study the ways laws are implemented, the amount of time necessary for behavioral changes, if any, to occur, and the ways disputes are resolved during these transition periods as behavior responds to changes in the law.

Have Reforms Affected the Outcomes of Disputes?

The effects of reform on the costs of the system are clearly a major policy concern. But a number of other outcomes are also worthy of study. Filing patterns can be affected by changes in the law: Reform can affect litigants' perceptions of the rate of return to litigation, and thus, the incentive to litigate. Reform can also affect whether litigants perceive the law in a jurisdiction as sympathetic to their position and thus, their interest in pursuing the dispute there rather than some other forum.

Reforms that affect either the costs of litigation or litigants' perceptions of the rate of return can affect disposition patterns. More or fewer cases might be settled rather than pursued to trial; cases might be encouraged to settle earlier or later.

Reforms can directly affect litigation costs. Additionally, changes in either disposition patterns or in filing patterns or both are likely to affect the public and private costs of litigation.

We need analyses of the effects of reform on costs, including the amounts paid injured parties in compensation and the transactions costs incurred. To place those results in their proper context, we need analyses of the effects of reforms on filing and disposition patterns.

Who Won? Who Lost? How Much?

If reform affects the outcomes of any dispute, someone must pay, and someone else be paid more or less than would have been paid without reform. The winners in reform are those who pay less, or are paid more; the losers are those who pay more, or are paid less.

Regardless of the concerns that motivated any particular reform, effects on the equity of the system cannot be neglected. Who won? Who lost? How much? Who paid the price of reform?

Did Reform Affect Economic Outcomes or Injuries?

Finally, while the debate has focused on the costs of the system, the indemnification of injured parties is only one of the tort system's purposes. The system also shapes our basic obligations to each other and influences the structure and policies of our social and economic institutions. Modifications to the tort system, whether or not they have cost or equity effects, may affect producers' and service providers' decisions regarding the kinds, characteristics, and prices of the goods and services they make available to society. Changes in these decisions can result in changes in the constellation of goods and services consumed by society and, consequently, in society's well-being.

At the same time, changes in the kinds and characteristics of available goods and services can generate changes in the frequency and severity of the injuries incurred by the use of goods or services.

More generally, tort reforms can affect pressures on manufacturers and service providers to keep goods and services associated with liability claims off the market or to make them safer. Whether society gains or loses when products or services are withdrawn from markets or are modified depends on value judgments regarding the usefulness of the product or service, the costs of modification, the costs of injuries, and related issues. Whatever those judgments might be, policymakers need to assess the effects of reforms on the deterrence function of the system.

III. HOW SOON CAN WE EXPECT TO SEE THE EFFECTS OF REFORM?

IMPLEMENTATION PROBLEMS

Validity and Interpretation

Changes in the law are rarely implemented immediately, and, in fact, may never be fully implemented. Whether, and to what extent, a law of uncertain validity affects the outcomes of disputes is an open question. It is possible that a reform will not be fully effective so long as its status is uncertain.

California's medical malpractice tort reform package, enacted in 1975, is an example of implementation delay due to sequential constitutional challenges to each of its provisions. It took more than a decade of litigation to finally determine the legitimacy of the law. The degree to which the outcomes of medical malpractice cases resolved during the transitional period were affected by the reform package is unknown. If the law did not become fully effective until the mid-1980s, analyses of its effects based on earlier data may be misleading.

The implementation of a reform can also be delayed by questions of interpretation and application. Consider, for example, a cap on damages for pain and suffering. The wording of the statute may not be clear as to whether the cap applies to the award assessed against each defendant in a multiple-defendant case or to the aggregate award provided to the plaintiff. It may not be clear whether the cap applies to cases in the system at the time the law was passed or only to cases filed after its effective date. Independent of the intentions of those who framed the law, there may be disputes as to the legitimacy of those intentions.

Operational Procedures

Even when the meaning of a reform is clear, its effect remains problematic until it is put into operation. A law becomes more than words on paper when it causes someone to do something. It must specify who must do what, what measures are to be used to discover whether they have done it, and what should be done if they haven't.

Consider, again, the example of a cap on awards. Assuming constitutional and interpretative issues have been resolved, the cap must still

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be enforced. One possibility is to instruct the jury not to award more than the specified amount for pain and suffering. Appropriate jury instructions, possibly requiring itemization of the components of the award, must be developed.

What if the judge believes that the jury has disregarded the cap, returning an award that includes an excessive amount for pain and suffering? Rules are needed to establish the judge's responsibility and the factors he must consider.

Alternatively, enforcement of the cap might be left to the judge, leaving the jury free to return any award it deems appropriate. Here, too, rules establishing the judge's responsibility and authority in enforcing the cap are needed.

California's medical malpractice reform package illustrates the problem of operational procedures. The package includes a limitation on contingent fees in the form of a fee schedule. In California, however, contingent fees are not reported. There is no reason to suppose that plaintiff attorneys are charging fees other than those specified by the reform,[1] but there is no way to systematically examine how that provision of the law operates nor is there a way to systematically enforce the law.

Recognizing the Effects of the Law

The vast majority of civil cases are resolved in settlement negotiations. Because parties are free to settle a dispute on any mutually acceptable terms, settlement negotiations are affected by changes in the law that alter parties' bargaining positions and strategies. These strategies, in turn, reflect expectations of the likely outcome of the claim if pursued to verdict and the costs of litigation.

But expectations of verdicts and litigation costs may not change the instant a reform is enacted. Attorneys, claims adjusters, and others involved in the negotiating process may require time to learn what difference a change will make. Will the first verdict returned under the new legal regime change expectations? Or will it take two verdicts, or ten verdicts, or ten years of verdicts before the settlement negotiation process is changed? The effects of reform will be realized only after people become aware of the change in bargaining strength brought about by the change in the law.

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[1]The California State Bar Association is investigating an allegation that an attorney collected an excessive fee in a medical malpractice suit. See John Kendall, "Trial Lawyer Chief's Fee Dispute Will Go to Bar," *Los Angeles Times*, October 7, 1987, p. 21.

RESEARCH REQUIREMENTS

To learn more about the nature and effect of implementation problems, three kinds of analyses are needed to focus on the timing of reform activities, the behavior of participants in disputes pending complete implementation of a reform, and the differential effects of alternative implementation strategies.

The Timing of Reform Activities

Conducting studies before fundamental questions are resolved may misconstrue the effects the law will have once it is fully in place. Policymakers and researchers need to know the timing of activities that influence the implementation process. When were constitutional challenges resolved? When were questions regarding the interpretation of key terms and phrases finally answered? More generally, when did the law become certain? The answers to these questions govern both the timing of future research and the interpretation of research results.

Behavior Pending Implementation

Policymakers and researchers need to know how parties involved in dispute resolution—judges, jurors, attorneys, claims adjusters, and so forth—behave during the implementation process when the status of a reform is uncertain. Do they conduct themselves as though the reform had not been enacted, as though its validity or interpretation was unquestioned, or somewhere in between? How long does it take to learn the practical consequences of a new law? How do people behave when the status of a new law is certain but its practical consequences are still unknown because cases to which it applies have not yet gone to trial? The answers to these questions determine how much we can rely on analyses of reforms conducted before reforms are fully implemented; they also provide guidance on interpreting analysis results to anticipate the likely effects of the reforms once fully implemented.

Alternative Implementation Strategies

Depending on the nature of the reform, there may be several ways of going about implementation, each with its own implications for the speed and magnitude of the reform's effects. Policymakers need to know the differential effects of alternative implementation strategies.

For example, a reform requiring compensation from collateral sources to be offset could be implemented by instructing the jury to adjust for such sources in arriving at its award. Alternatively, the jury

might award whatever it deems appropriate, and the judge would deduct collateral source compensation. The method used may affect both the speed of implementation and the effects of the reform itself. Developing jury instructions may take more or less time than developing rules for judges. Having juries account for collateral source payments may result in awards that differ from adjustments made by judges.

STRATEGIES FOR STUDYING IMPLEMENTATION

General Approach

Case studies of the behavior of people involved in dispute resolution are an appropriate strategy for studying tort reform implementation. We need to examine their actions when the law is uncertain, and after the law is certain but its effects are still unknown. In either case, research needs to probe the expectations and perceptions of the parties and their reasons for acting as they did.

We can initiate studies now to examine how people today are negotiating in the new environments created by the reforms enacted last year. Consider for example, California's Proposition 51, modifying the doctrine of joint and several liability. Researchers can investigate the settlement policies of presumably affected institutions, such as government agencies, to identify how they are responding to the change in the law. By studying other states that have similarly modified their tort systems, researchers can identify the common themes that run through different implementation experiences.

Retrospective studies of implementation are also possible. During the mid-1970s, a number of states modified their laws relevant to medical malpractice. Researchers can examine the experiences of those involved in medical malpractice disputes to develop an understanding of how people behaved during the transition period.

An Example: Implementing California's Judicial Arbitration Program

In 1978, the California State Legislature enacted mandatory judicial arbitration to alleviate increasing civil caseloads, stabilize court costs, and reduce time to disposition and other burdens on litigants. An analysis of implementation by the local courts demonstrates both the

methods of implementation analysis and the kinds of results that can be obtained.[2]

The analysis was primarily based on interviews with court officials and practicing attorneys in courts representing different-sized jurisdictions and different sections of the state. In each court, the researchers interviewed the judge responsible for directing the arbitration program, the court executive officer or the deputy or both, the arbitration administrator, and attorneys who were familiar with the program.

The study found that local courts made very different implementation decisions in adopting a series of rules or policies to establish their program's operating procedures. In doing so, some of the courts consciously deviated from statutory provisions and Judicial Council rules. And where local discretion was permitted, local courts opted for different approaches. For example, although Judicial Council rules set forth a detailed timetable for the sequence of steps in the arbitration process, some courts deviated from those rules: Some adopted special practices to accelerate the process; others deliberately pursued a "no-monitoring" policy once an arbitrator was assigned to a case.

It may be that each court's implementation decisions resulted in the arbitration program best suited to its needs, given the resources available to it and the demands on it. Nonetheless, these decisions profoundly affected the degree to which each court's program achieved the stated goals. Failing to take account of local courts' implementation decisions would result in very misleading conclusions. For example, some courts required that all litigants whose cases were assigned to arbitration appear at a settlement conference prior to arbitration. In these courts, the arbitration program actually increased pressures on court resources, not because arbitration programs necessarily burden courts, but rather because these courts chose to expend judicial resources to ease burdens on the arbitration program.[3]

Data Requirements

The most basic data requirement is information on the timing of implementation activities: when reforms were enacted, what their

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[2]Deborah R. Hensler, Albert J. Lipson, and Elizabeth S. Rolph, *Judicial Arbitration in California: The First Year*, The RAND Corporation, R-2733-ICJ, 1981.

[3]These courts offer an intriguing example of the ways in which means and ends can become inverted in the implementation process: They were expending approximately 30 minutes of judicial time per case to avoid overburdening a program that was meant to relieve pressure on the judicial system.

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To study the implementation process, we need data on the experiences, activities, and perceptions of attorneys and claims managers. Researchers need to interview and observe people involved in dispute resolution to understand what they are doing and why; their objectives and goals; and how changes in the law have affected their objectives, perceptions, and disputing strategies.

Consider, again, the study of California's judicial arbitration program. The researchers interviewed executive, legislative, and judicial personnel involved in the design of the program. They interviewed local court officials who decided how the program would be implemented at the local level or were responsible for its subsequent operation, or both. They interviewed attorneys who served as arbitrators and attorneys whose cases had gone before arbitrators. The interviews included representatives of all those involved, except litigants, in the resolution of disputes applicable to the program.

In addition to interviewing representatives of different perspectives, the researchers purposely selected study sites that span the range of the jurisdictions involved in the program. This allowed them to examine whether the formal rules and statutory provisions were being implemented in a uniform manner and, if not, how differences in implementation decisions were linked to differences among the sites. They could thus identify the factors affecting implementation and the features of the law that, if changed, might induce the originally desired behavior.

Studies of the implementation of reforms can be conducted while the implementation process is under way. In fact, implementation studies would probably yield more accurate results if undertaken while those involved are still engaged in the process. Studies deferred to some future date will suffer the problems of recall and rationalization that often plague retrospective studies.

Initiating studies now of how those involved in dispute resolution are behaving and how their behavior changes in response to reform could inform the current policy debate. Policymakers are pressed to make judgments on the need for further reforms, or on the need to undo past reforms, on the basis of what seem to be the effects of reforms, whether or not the reforms have had sufficient time to influence behavior. Implementation studies can suggest how much we can base policy on what is happening in the tort system now. For example, implementation studies may find that important players in the system

[4]The Appendix is a step toward the creation of this database.

have not yet adapted to the reforms, and we cannot base policy on the assumption that their current behavior will continue.

Implementation studies will also guide the timing of studies of the effects of reforms. We need to know the degree to which reforms have been implemented before we can decide when to study their effects.

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IV. HAVE REFORMS AFFECTED THE OUTCOMES OF DISPUTES?

The policy debate centers on the effects of reform on "costs," meaning defendants' and insurers' aggregate outlays—the sum of indemnity payments to injured parties and legal defense costs. But there are several other types of dispute outcomes that could be affected by reform. While these are less directly related to insurance costs—they are nonetheless important and need to be considered.

DISPUTE OUTCOMES

Aggregate Outlays

The basic question is: How have defendants' and insurers' aggregate outlays been affected by reform? In considering how research can help answer this question, it is important to recognize that aggregate outlays include several different components. Outlays comprise indemnity plus defense costs. Indemnity, in turn, is the product of the frequency of claims, the percentage of claims closed with payment, and the average size of paid claims.

Reforms can impinge on different components of outlays in different ways, affecting one but not another, or affecting two or more components in the same or in different directions. To fully appreciate effects of reforms, we need to identify effects on outlays and on components of outlays. We want to know whether changes in aggregate outlays came about because of changes in the amount of indemnity paid or because of changes in defense costs or both. To the extent that indemnity was affected by reform, we also want to know whether those effects resulted from changes in claim frequency, or in the fraction of claims closed with payment, or in the size of payments, or in a combination of the three.

Patricia Danzon's study of the effects of medical malpractice reforms on the frequency and magnitude of claims illustrates the importance of analyzing separately the components of outlays.[1] She found that the introduction of arbitration of medical malpractice cases increased outlays. Does this imply that arbitration resulted in larger

[1]Patricia M. Danzon, *New Evidence on the Frequency and Severity of Medical Malpractice Claims*, The RAND Corporation, R-3410-ICJ, 1986.

indemnity payments? No: She also found that arbitration contributed to increased claim frequency. (Presumably arbitration offered a less expensive means for resolving disputes, encouraging parties to make claims otherwise too small to warrant pursuing when only the more expensive, traditional means were available.) Because the frequency of smaller claims grew, the size of the average paid claim declined. But because there were more claims overall, total outlays increased.

Disposition Patterns

Changes in the law can affect the point at which a dispute is resolved (before suit was filed, filing, just before trial, etc.). Litigants' decisions about whether to make an offer, how much, or whether to accept an offer made by the other side partially depend on their expectations of the financial consequences of pursuing the matter. Legal changes that affect either the expected recovery or the costs of litigation can influence negotiating strategies on both sides. And if either side's negotiating strategy changes, the dispute may settle earlier (or later) in the process.

Reforms that reduce either the odds that the plaintiff will prevail at trial or the likely size of the award will reduce both sides' expectations of the expected recovery. A settlement offer that would have appeared inadequate to the claimant prior to the reform may be acceptable after the reform. On the other hand, the defendant might be more willing to risk trial after the reform and, consequently, be less forthcoming in settlement negotiations. The net effect on disposition patterns will depend on how much claimants' expectations change relative to the changes in defendants' expectations.[2]

Reforms that affect the uncertainty of dispute outcomes can also affect disposition patterns. Reforms that reduce the uncertainty of dispute outcomes will encourage settlement and reduce the need for protracted litigation. Caps on awards, for example, can reduce the difference between plaintiff's and defendant's expectations as to the value of a case and lead to more rapid resolution. Conversely, reforms

[2]Suppose a reform generally reduces claimants' expectations more than defendants' expectations. While defendants may now make lower settlement offers (because they are a little *more optimistic* about their chances at trial should the offer be declined), claimants will be relatively more willing to accept defendants' offers (because they are, comparatively, a lot *more pessimistic* about their trial prospects). Both the fraction of claims resolved before a suit was filed and the fraction of suits resolved before trial will likely increase. Conversely, if defendants generally believe the reform had a comparatively large effect on trial prospects while claimants see the effect as being much smaller, defendants may substantially reduce their settlement offers while claimants' settlement demands decline only a little. If so, fewer claims will be resolved before suit and fewer lawsuits settled before trial than without reform.

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that increase the uncertainty of dispute outcomes can widen the gap between claimants' and defendants' expectations, reducing the prospects for settlement and, where settlement is still feasible, increasing the amount of time and effort to reach settlement.

Changes in disposition patterns are important in themselves; the time to disposition is obviously of interest to the parties. Disposition patterns are also a key factor in interpreting changes in the frequency of lawsuits and signal the effects of reforms on parties' negotiating strategies. Disposition patterns can be a significant factor in the costs of litigation: Reforms that lead to disposition at an earlier stage in the process can reduce the amounts of public and private resources expended to resolve the dispute.

Filing Patterns

In many cases, claimants have some flexibility as to when and where a suit is filed. Attorneys might rush to the courthouse prior to the effective date of a reform they consider unfavorable to their position, or they might delay filing until after the effective date of one they deem favorable to their position.[3]

Similarly, tort reforms can affect the desirability of pursuing a claim in one jurisdiction compared to another (e.g., in federal rather than state court or in one state rather than another).

These choices are of concern on their own merits: Does it serve society's interest to shift the location of disputes from this jurisdiction to that? Does the creation of incentives to file lawsuits early or late generate unnecessary litigation?

Moreover, these choices affect the interpretation of information on the effects of reform. A surge in litigation following on the heels of reform could result from significantly enhanced plaintiffs' expectations of recovery, inducing claims by parties who, before reform, found the rate of return to litigation so low that they did not bother pursuing their claim. Alternatively, the surge could result from a rush to the courthouse as claimants who deemed the reform prejudicial to their position sought to pursue their claim before the reform took effect. These are very different interpretations of the same observation; to sort out the real effects, policymakers need information on how reform affected filing patterns. Similarly, policymakers need to distinguish a

[3]An extreme example of the reform effects on the timing of litigation is the commentator who argues that Florida plaintiffs should delay filing suit for three years in the hope that a reform law favorable to the defense with a three-year sunset provision would not affect their case. George L. Priest, "Tort Reform Legislation . . . Is Only Smart," *The Wall Street Journal*, February 11, 1987, p. 26.

change in a jurisdiction's litigation rate due to a change in the law from a *shift* in litigation from one jurisdiction to another.

Transactions Costs

The transactions costs of litigation are the sum of plaintiffs' costs, defense costs, and public costs. They are the "overhead" costs of the system in the sense that the services purchased are not desired for themselves. Rather, they are means to ends: the deterrence of injurious behavior, the compensation of injured parties, and the resolution of disputes. To the extent that reform increases (decreases) transactions costs, society must expend more (fewer) resources to achieve those ends.

Reform can affect the transactions costs of litigation in a number of ways. On the plaintiffs' side, any reform that reduces the plaintiff's recovery will reduce the amount (but not the share) paid the plaintiff attorney on a contingent fee basis. Limits on contingent fees can reduce both the amount of plaintiff's costs and the share of recovery paid in legal fees. To the extent that defendants are represented on an hourly fee basis, any reform that reduces (increases) the amount of litigation activity will reduce (increase) defendants' costs. Because the public costs of litigation are related to the stage at which a case is disposed, any reform that affects disposition patterns can affect public costs.

STRATEGIES FOR STUDYING THE OUTCOMES OF DISPUTES

General Approach

In studying the effects of reforms on dispute outcomes, policymakers can concentrate on aggregate outcomes and need not be concerned with individual claims. The question at hand is not how John Doe's claim was affected by reform, but rather, how reform influenced all claims.

Because all the claims resolved in a state at about the same time were resolved in the same legal environment, differences among their outcomes cannot cast light on how reform affected the outcomes of claims. This suggests a research approach based on comparing aggregate outcomes across states to see if a dispute outcome—say, aggregate outlays—systematically differs from one legal environment to another. Alternatively, we could compare aggregate outcomes in a state in years

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before and after reform. An even more powerful approach would be to combine both approaches in an analysis across states over time.[4]

Because outcomes can be affected by a variety of factors other than the legal environment, other factors need to be taken into account. Suppose, for example, that the population of State 1 tends to be more sympathetic toward the plaintiffs' perspective than the population of State 2. If these states had identical systems of tort law, we would expect the average size of paid claims (magnitude) in State 1 to exceed the average size of paid claims in State 2. If State 1 enacted a reform that tended to reduce magnitude, the average size of paid claims thereafter would be less than if the reform had not been introduced. But the magnitude of paid claims in State 1 might still exceed the magnitude in the State 2, despite this reform, if the effect of the population differences was greater than the effect of the reform. And even if the reform had an effect sufficient to outweigh the effect of the population differences, the effect of the reform would be greater than the observed difference in magnitude between the two states.

Multivariate statistical analyses are an effective method for controlling the effects of other factors in comparing the aggregate outcomes of claims across states, over time, or both. Figure 2 suggests the nature of the statistical analysis. Suppose the solid lines indicate the claim frequency in each of six hypothetical states over the 1974–1984 period. Neglect the dashed lines for the present. Assume the following:

- States A, B, C, and D are highly urbanized while states E and F are generally rural;
- States A, B, D, and E had adopted pro-plaintiff common law doctrines prior to 1974, while States C and F had not adopted these doctrines by 1984;
- States A and D adopted mandatory collateral source offset in 1975, effective as of 1976; and
- States B, C, E, and F made no changes to their tort rules over the 1974–1984 period.

The data presented in Fig. 2 show that claim frequency is generally higher in States A through D than in States E and F, suggesting that highly urbanized states have greater claim frequencies than do less urbanized states. The slopes of the lines for States B and E and, before enactment of collateral source offset in 1976, in States A and D are generally steeper than are the slopes of the lines for States C and F. This pattern suggests that the growth rate of claim frequency is

[4]Research on the effects of any particular type of reform is limited by the opportunities to observe that type of reform. The Appendix lists the reforms enacted in 1986.

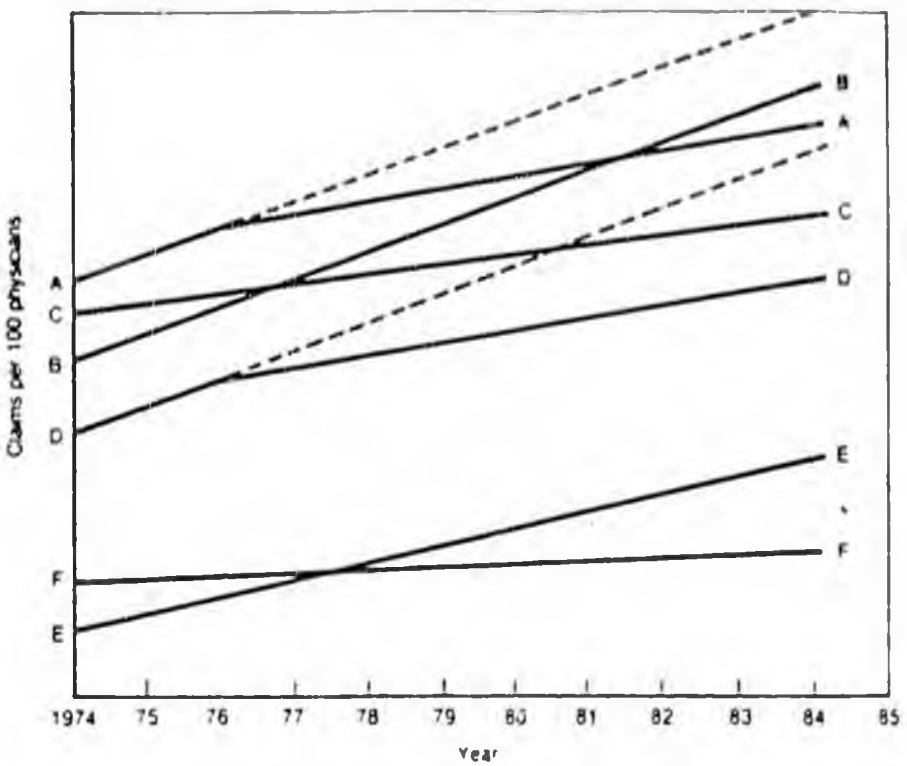
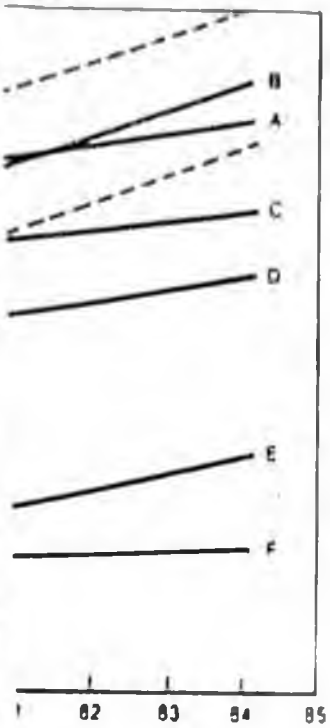


Fig. 2—Hypothetical comparisons of aggregate outcomes of claims

generally greater in states that had adopted pro-plaintiff common law doctrines. Finally, the slopes of the lines for States A and D are less steep after 1976 than before. The adoption of mandatory collateral source offset slowed the growth in claim frequency in the two states that enacted that reform.

Note that the lines for the states that did not enact reforms—States B, C, E, and F—are straight over the entire period. Because there are no "kinks" in those lines, we conclude that the growth rate of claim frequency was constant over the entire period in all four states. The dashed lines indicate what claim frequencies would have been in States A and D if each state's claim frequency had grown over the 1976-1984 period at the same rate as the 1974-1975 period. The vertical distance between the dashed line and the solid line for State A and for State D shows the effect of reform on claim frequency in each state.



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This stylized example neglects the complexities encountered in analyzing real data. Growth rates, for example, are rarely constant and so do not result in straight lines like those shown in Fig. 2. Year-to-year fluctuations in growth rates generate zig-zag lines over time that are far more difficult to interpret. The analyst, on the other hand, is not dependent on visual inspection of graphs but can employ powerful statistical methods to search out the patterns and relationships in the data.

An Example: Assessing the Effects of Reforms on the Frequency and Magnitude of Medical Malpractice Claims

Patricia Danzon used multivariate statistical methods to assess the effects of tort reforms on the frequency and average size of medical malpractice claims closed in 1970 and 1975–1978.[5] She subsequently updated her results using data on claim frequency and size for 1974–1984.[6] The units of observation were not individual claims, but individual states in each year. Each study attempted to explain claim frequency per 100 physicians and the average size of paid claims, by state and year.

The first study examined the effects of legal rules present in a state, such as the number of pro-plaintiff common law doctrines the state had adopted by 1970, and whether the state had adopted a cap on total awards or on pain and suffering awards. To control for other influential factors, the analysis controlled for aspects of each state's medical environment and demographic composition such as the percentage of the population over age 65, the percentage of physicians belonging to a state or local medical society, and the number of lawyers per 100,000 population. The second study employed basically the same kinds of variables.

Danzon was able to estimate the effects of caps on awards (a 19 percent reduction in the average size of paid claims according to the initial study, a 23 percent reduction according to the follow-up study). Similarly, she showed that statutes permitting or mandating the offset of collateral benefits reduced both the frequency of claims (by 14 percent) and the average size of paid claims (by 11–18 percent) relative to comparable states without collateral source offset. Among the other factors

[5]Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims*, The RAND Corporation, R-2870-ICJ/HCFA, 1982. Danzon uses the word "severity" in reference to the average size of paid claims.

[6]Patricia M. Danzon, *New Evidence on the Frequency and Severity of Medical Malpractice Claims*, The RAND Corporation, R-3410-ICJ, 1986.

affecting claims, Danzon found urbanization a highly significant factor that explains much of the observed difference among states in claim frequency and magnitude. Per capita income, the unemployment rate, and the number of attorneys per capita had no statistically significant effect after controlling for urbanization.

Data Requirements

The research approach suggested above requires information, by state and year, on the outcomes of disputes, the legal environments, and the other factors that might have affected outcomes. The outcomes of interest include the following: claim frequency; the percentage of claims closed with payment; the average size of paid claims; disposition patterns or the fraction of claims closed before suit, after suit but before trial, and after trial; filing patterns; plaintiffs' and defendants' costs of litigation; and public costs of litigation. Note that data on individual claims are not required to address these issues; statewide aggregate measures of dispute outcomes will suffice.

Construction of the legal variables poses few conceptual problems. However, the number of variables that can be included depends on the number of states that have adopted the laws of interest. If only one state enacts some reform, there is no way to distinguish that reform's effects from those of any other factor unique to that state. Even if several states enact the same type of reform, but opt for different variants of the reform (e.g., a cap on awards for pain and suffering at $500,000 in one state, at $250,000 in another state), it may be impossible to estimate the differential effect of each variant. In such cases, it is necessary to define a legal variable for the type of reform and use the same variable for every state that adopted a reform of that type, regardless of differences among the variants. This approach essentially estimates the average effect for each type of change in the law.

The identification of the "other factors" that might influence dispute outcomes can be difficult. Theory, the experiences of practitioners, and the results of previous research are the major guides to identifying factors that need to be controlled to separate out the effects of legal variables. For example, Danzon observes that hospital admission rates for the elderly are roughly twice as high as those for persons under 65 and that a previous study had found a higher rate of negligent injury per admission for the elderly. Her theory suggests that claims will be more frequent when injuries are more frequent. This combination of theory, observation, and the results of research led her to control for the fraction of a state's population over 65. However, there is no simple formula or certain guide to the selection process and no list of all

the "right" factors to include in the analysis; different analyses require that different factors be controlled. "Other" factors expected to influence one dispute outcome will not necessarily be the same as "other" factors expected to influence another dispute outcome.

The measurement of "other factors" can also present difficulties. For example, Danzon argues that the number of malpractice incidents in any period depends on the frequency, types, and quality of medical treatment among other factors, but these data are not readily available. Accordingly, she used "proxy" variables such as the number of nonfederal physicians in patient care per 100,000 population and the percentage of physicians belonging to a state or local medical society.

The interpretation of the results for other factors can be problematic. For example, Danzon's first study found that urbanization had a significant effect on claim frequency. Why? We can speculate, but the fact is that we do not know.

To provide variance in the legal environment (which differs from state to state but not within states), the analyses must include states with and without reform. And because of the need to control for other factors, a number of states must be included. This, in turn, requires the collection of data for most, if not all, states. Data for a single state or even a small number of states is not sufficient to accurately assess the effects of reform. In addition, data for each state are needed for a number of years before and after reform. Studying the years before reform means researchers can control better for whatever trends existed beforehand.

Finally, to make meaningful statements about the effects of reform, policymakers must be able to apply specific research results to disputes in general. That means data must pertain to the universe of claims or to a representative sample of claims.

V. WHO WON? WHO LOST? HOW MUCH?

Regardless of the concerns that motivated any particular reform, effects on the equity of the system cannot be neglected. Who won? Who lost? How much? Who paid the price of reform?

THE EFFECTS OF REFORM ON INDIVIDUAL CLAIMS

Recovery

Any change in the outcomes of claims resulting from reform raises questions regarding the adequacy and equity of compensation. To address these questions policymakers need to know how patterns of recovery among various types of claimants and against various types of defendants are affected by reform. More specifically, policymakers need information on how changes in the law affect the probability of recovery, the amount successful claimants recover, and claimants' net recoveries, by type of claimant and type of defendant.

Consistency/Predictability

We have few value-free standards as to what anyone ought to be awarded for an injury, but we do have some basic standards of equity: Similarly situated people ought to be treated alike; dissimilarly situated people ought to be treated differently in ways consistent with the dissimilarity. Translated into the concerns of the tort system, similarly injured people ought to recover about the same amount and more seriously injured people ought to recover more than less seriously injured people.

Consistency, a fundamental equity issue, is intimately related to another issue of some concern in this area: predictability. The legal system is more consistent as the amount recovered is more closely related to the seriousness of a claimant's injuries; that is, when the variance of outcomes, given the characteristics of claims, is smaller. A reduction in the variance of recovery, other things equal, increases the predictability of outcomes. Insurers have argued that a growing lack of predictability is a major contributing factor to the availability and affordability problem. They maintain that they are unable to offer insurance when the likely outcomes of future claims are so unpredictable that they cannot "price" their product. Reforms that increase the

predictability of outcomes reduce the difficulty of determining the appropriate premium for insurance.

Disposition Patterns, Filing Patterns, and Transactions Costs

The issues of the effects of reform on aggregate disposition patterns, filing patterns, and transactions costs also arise with respect to individual claims. For example, both claimants and defendants have an interest in the effects of reform on disposition patterns. Both care when the defendant must pay, and the claimant must be paid, whatever compensation is agreed to or awarded by the court. And the stage of disposition and, possibly, the time to disposition might affect the parties' legal costs. But there is no reason to believe that reform will affect all claims in exactly the same way; equity considerations thus make the question of which kinds of claims are affected in what ways an important policy concern.

STRATEGIES FOR STUDYING THE OUTCOMES OF INDIVIDUAL CLAIMS

General Approach

Statistical analyses of the relationship between legal rules and the outcomes of individual claims, controlling for the claims' characteristics and for other influential factors, are needed. The approach is similar to that taken to analyze reform effects on aggregate claims. Here, however, the focus is how reforms have affected the outcomes of particular kinds of claims: How did reform affect small claims? Or large claims? Or claims against some type of defendant? Or claims brought by some type of claimant? And so forth.

Here, too, differences among the outcomes of disputes resolved in a single state at about the same time cannot result from differences in legal environments and, so, cannot cast light on the issue of how reform affected the outcomes of claims. The analysis must, therefore, compare the outcomes of individual claims across states, over time, or preferably both.[1]

The analysis must take account of claims' characteristics: the severity of the claimant's injury, the medical costs and lost income, whether the claimant was disabled and, if so, how much and for how long. The

[1]The Appendix lists the reforms enacted in 1986, implying the states in which analyses of various types of reforms can be conducted.

characteristics of the parties to the dispute might also affect the claim's outcomes. For example, juries might return larger awards to plaintiffs when the defendant is an institution than when the defendant is an individual. Institutional defendants might offer more in their settlement than individual defendants, other things equal, because the potential consequences of failing to settle are relatively greater for them. The net effect of these patterns is consistently greater recovery by claimants against institutional defendants compared to individual defendants.

Again, characteristics of the social and economic environment within which a claim is pursued can affect its outcomes. These factors must be considered.

An Example: Assessing the Effects of Parties' and Claims' Characteristics on Jury Verdicts

Audrey Chin and Mark Peterson examined how parties' and claims' characteristics affect jury verdicts, using data for all civil jury trials reaching verdict in cases for money damages in Cook County (Chicago), Illinois, between 1960 and 1979.[2] Because the data pertain to a single legal environment, they do not address the effects of the law on the outcomes of trials.

Chin and Peterson examine four sets of factors affecting jury awards: (1) case type (e.g., automobile accident, malpractice, intentional tort); (2) the type of plaintiff—individual, corporation, government and, if the plaintiff was an individual, his or her characteristics, (3) the defendant's type and characteristics; and (4) the type, number, and severity of the plaintiff's injuries and losses.

Parties' characteristics explained some of the differences in awards. For example, after accounting for the type of lawsuit and the plaintiffs' injuries and losses, black plaintiffs received, on average, 25 percent less than whites with the same injury, and corporate defendants paid more than individual defendants, with the premium increasing from 23 percent in the 1960s to 40 percent in the 1970s.

If similar data were available for several other jurisdictions that had enacted reforms, the analysis could be replicated for each jurisdiction and the results compared to determine whether the results were systematically related to the presence or absence of particular laws. We could see, for example, if the premium paid by institutional defendants is affected by the presence of caps on awards.

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[2]Audrey Chin and Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials*, The RAND Corporation, R-3249-ICJ, 1985.

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An Example: Assessing the Effects of Reforms on the Outcomes of Medical Malpractice Claims

Patricia Danzon and Lee Lillard used a cross-sectional, time-series approach to estimate the effects of reforms on the outcomes of individual medical malpractice claims.[3] Their objective was to estimate the total effect of reform; they did not attempt to understand who won or lost as a result of reform. Nonetheless, their study used data on individual claims and, thus, provides an example of the approach suggested above.

Danzon and Lillard drew on individual claims' data from two surveys of insurance companies' claim files closed in 1974 and 1976. Both surveys were broadly representative of claims against physicians and hospitals. They also used data from other sources on the legal environment of a state (e.g., whether the state had limited contingent fees or modified the collateral source rule) to examine two claim outcomes: the stage of disposition and the amount of payment, if any. The researchers introduced variables to control for the severity of the injury, the claimant's characteristics and economic loss, the defendants' characteristics, and the ease of proving negligence.

Danzon and Lillard used multivariate statistical techniques to estimate the effects of tort reforms. For example, they found that imposing limits on contingent fees reduced settlement amounts (by 9 percent), the proportion of cases dropped (by 5 percent), and the share of cases going to trial (from 6.1 percent to 4.6 percent).

If Danzon and Lillard had performed a separate analysis of, say, severe injury claims, the results would have shown how those claimants were affected by reform. Similarly, they could have performed separate studies of the effects of reform on claimants with a specific income or separate analyses of claims brought against physicians. The data and general approach used in their study could have been used to study reform's winners and losers.

Data Requirements

To analyze the effects of reform on the outcomes of individual claims, researchers will need detailed data on individual claims of the sort generally obtained through "closed-claim" studies. The data must identify the outcomes and other characteristics of individual claims.

[3]Patricia M. Danzon and Lee A. Lillard, *The Resolution of Medical Malpractice Claims: Modeling the Bargaining Process*, The RAND Corporation, R-2792-ICJ, 1982, and Patricia M. Danzon and Lee A. Lillard, *The Resolution of Medical Malpractice Claims: Research Results and Policy Implications*, The RAND Corporation, R-2793-ICJ, 1982.

Researchers will also require indicators of the legal rules that applied to each claim. While the data for this type of study are reasonably straightforward, they tend to be very expensive and difficult to obtain.

Studies of the effects of reform on the outcomes of individual claims can be conducted with data on particular types of claims. The data need not describe the universe of claims or even a representative sample of all claims. For example, if policymakers are concerned with the impact of reform on severely injured claimants, research requires samples of severe-injury claims in states with and without reforms, for years before and after reforms. These data would suffice for an analysis that indicates whether reform has resulted in severely injured people receiving X percent more or Y percent less, recovering Z percent more frequently or Q percent less frequently, and so on. If we do not know how the number of severe-injury claims compares to the number of less-severe injury claims, we cannot then inflate the findings to a statewide aggregate; but that is not the primary concern of this type of study.

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VI. DID REFORM AFFECT ECONOMIC BEHAVIOR?

Producers of goods and providers of services run the risk that someone will claim to have been injured by their goods or services. The costs of defending against such claims and compensating claimants, either directly (self-insurance) or through insurance, presumably enter into decisions as to the types and prices of products and services that will be offered. Reforms that affect the frequency and severity of claims can change these decisions and, consequently, the kinds and prices of the goods and services available to society. These changes, in turn, could result in changes in the frequency and severity of injuries.

ECONOMIC OUTCOMES

The Availability of Goods and Services

Producers and service providers must decide what products or services they will offer, on what terms, and in which markets. They may choose not to enter, or to withdraw from, markets in which the potential liability costs added to the other costs of doing business exceed the perceived benefits of entering, or remaining in, the market. Asbestos is an example of a product once used widely but now withdrawn because of mounting liability costs. Potential liability costs are claimed to threaten the availability of both existing and promising new vaccines,[1] severely constrain birth-control options in the United States,[2] have virtually ended the production of light piston-engined aircraft,[3] and have caused manufacturers of child car safety seats to refuse to place new products on the market.[4]

Insurance is the most apparent example of a service withdrawn from some of its markets in response to concerns over liability-related costs.

Reforms that reduce potential liability costs, reduce pressures on producers of "risky" goods and services to cease production. Reform

[1]Edmund W. Kitch, "Vaccines and Product Liability: A Case of Contagious Litigation," *Regulation*, May/June 1985, pp. 11-18.

[2]Michele Galen, "Birth-Control Options Limited by Litigation," *The National Law Journal*, October 20, 1986.

[3]Jack Cox, "The Christen Husky," *Sport Aviation*, August 16, 1986.

[4]Malcolm Baldrige, "Product Liability Woes Hurting U.S. Industries," *Journal of Commerce*, April 28, 1987.

may result in the continued availability of a product or service that otherwise would have been withdrawn from the market.

Whether or not it is in the social interest to "save" a product from being withdrawn depends on the value of the product relative to its risks. It has been argued that the value of vaccines to society so greatly exceeds their risks that the current system for compensating for vaccine-related injury needs to be changed to reduce deterrent effects.[5] Similarly, much of the current tort reform debate is concerned for the social consequences of insurance withdrawals. On the other hand, despite the many disputes over who was responsible for what in the asbestos arena, there seems to be general agreement that our society is better off for asbestos being withdrawn from some of its past applications.

Whether or not society is better off when a product or service is withdrawn from a market depends on a combination of facts and value judgments. The factual questions, in principle amenable to research, address the product's uses and dangers: Who uses the product for what purposes? What substitutes are available? What would those who use the product do if it were not available? What injuries are likely to occur from its use or the use of substitutes if the product is not available?

The Costs and Characteristics of Goods and Services

Producers and service providers may respond to increases in their liability (or liability insurance) costs by increasing the prices of their products and services, passing a part of the increase on to their customers. Some will continue to purchase the product while others find the product no longer attractive. Consumers thus bear part of the costs of the liability system. Reforms that reduce, or limit increases in, producers' and service providers' liability costs can reduce the costs borne by consumers.

The price of liability insurance is a prominent example of a service whose price reflects the costs of the liability system. In fact, the primary argument put forth in support of tort reform is that reducing the costs of the tort system will result in lower insurance prices.

Producers and service providers may attempt to reduce their liability exposure and, hence, liability costs by modifying their products and services. Modifications might involve changes that reduce the risk of a product-related injury or the severity of injuries that may occur. Or

[5]Committee on Public-Private Sector Relations in Vaccine Innovation, Institute of Medicine, National Academy of Sciences, "Vaccine Supply and Innovation," National Academy Press, Washington, D.C., 1985.

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they might involve changes primarily designed to enhance their defense in the event of a liability claim, such as doctors ordering unnecessary tests as a hedge against malpractice claims.[6]

Modifications that affect the safety of a product or service may also affect its ease of use or its suitability for certain tasks. Safety devices on power tools reduce both the risk of injury and the ease with which they can be used. Modifications can also change the cost of producing the product or providing the service. Some consumers may consider the modifications unnecessary or unwarranted; increased costs resulting from what consumers consider to be unnecessary changes are losses.

If reform reduces producers' and service providers' liability exposure, they will be less inclined to engage in liability-driven modifications to their products. Whether or not this is socially desirable depends upon the same kinds of evaluations that arise in considering the availability of products and services. How much does the modification reduce the danger of the product? Does it limit the usefulness of the product? What does the modification cost and who pays the bill?

Development of Innovative Products and Services

Research and development is inherently risky because there is no assurance that something of value will result. Potential liability must be included in the cost side of the equation for a new product or service to justify the R&D effort. For example, researchers are slowing efforts to test and market computers with artificial intelligence because they fear potential lawsuits.[7] Reforms that reduce the potential liability costs of products or services might stimulate research efforts and the rate of technical innovation.

Macroeconomic Outcomes

If tort reforms bring products to market that otherwise would have been withheld, or change the characteristics or prices of the products, the economy as a whole is influenced. Some say that the high costs of our liability system have impaired U.S. competitiveness.[8] Reducing those costs would improve U.S. firms' ability to compete with foreign firms, increasing their sales both here and abroad. If these claims are

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[6]Roger A. Reynolds et al., "The Cost of Medical Professional Liability," *Journal of the American Medical Association*, Vol. 257, January 1987, pp. 2776-2781.

[7]William J. Broad, "Does the Fear of Litigation Dampen the Drive to Innovate?" *The New York Times*, May 12, 1987, p. 17.

[8]Malcolm Baldrige, "Product Liability Woes Hurting US Industries," 1976.

valid, tort reforms that reduce liability costs could result in improvements in the U.S. trade balance, increased employment, and a higher rate of overall economic growth.

THE FREQUENCY AND SEVERITY OF INJURIES

Liability concerns can lead producers and service providers to withdraw "risky" products and services from the market or to modify them to reduce their risks. Reforms that reduce liability concerns may ease these pressures, resulting in more, and more serious, injuries.

STRATEGIES FOR STUDYING ECONOMIC OUTCOMES AND THE FREQUENCY AND SEVERITY OF INJURIES

General Approach

In principle, the statistical approaches described in previous sections could be used to analyze the effects of reform on economic outcomes and the frequency and severity of injuries. In practice, however, these approaches are frequently, though not invariably, infeasible.

The statistical approach can be used to study the reform effects on the availability, characteristics, and prices of products or services sold only on local markets. Suppose that we wanted to study the effects of reform on the frequency of a medical test. We might assume that most doctors are sensitive to their state's legal environment, but not to other states' legal environments. If so, doctors in states that undertook reforms might be under less pressure to "build a file" in anticipation of a possible claim and, therefore, less frequently administer tests they consider unnecessary. Assuming sufficient data on test frequency and other variables could be obtained, we could see whether there was a systematic relationship between the enactment of a reform and the rate at which some tests were given.

However, products and services are frequently sold on national markets. If producers do not develop and distribute different versions of their products in states with different liability standards, the availability, characteristics, and prices of products will not vary across states with different tort laws. If some states introduce reforms, producers will either modify their products or they will not. If they do, the changes will affect the products sold in all states. Thus, the effects of reform cannot be estimated by relating economic outcomes in different states to their legal environments.

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An Example: Assessing the Effects of Reforms on Medical Malpractice Insurance Premiums

Frank Sloan used the multivariate statistical approach to assess the effects of tort reforms on medical malpractice insurance premiums.[9] The analysis was based on premium data for a standardized policy paid annually by physicians in three fields in each state between 1974 and 1978.

Sloan characterized a state's legal environment by variables such as whether there was a cap on recovery. To control for other factors that might influence premiums, he used real per capita income and the numbers of surgical operations, lawyers, and patient-care physicians, respectively, per capita. These variables were selected on the basis of theory (the number of surgeries per capita, because injury is more likely when a surgical procedure is performed) and the results of previous research (per capita income, because an earlier study found it related to malpractice premiums).

The empirical results gave no indication that the reforms considered had any significant effect on premiums. Sloan suggests that insurers probably base premiums on expected outlays which, in turn, reflect the frequency and severity of claims. Because state-specific data on claim frequency and severity are not available for 1974 and thereafter, he could not control for these important factors. This result demonstrates the importance of adequately controlling for influential factors other than legal rules.

An Example: Assessing the Effects of Product Liability Standards on Product Safety

George Eads and Peter Reuter wanted to analyze the effects of product liability laws and other factors on the safety of consumer products.[10] Because there was no reason to believe that firms respond in different ways to the differences among states in their product liability laws, they could not statistically relate measures of product safety to legal environments. In any event, there were no comprehensive data on the frequency of injuries arising from defective products. Even if there were, their interpretation would be problematic. The mix of products and users changes over time in ways that affect the injury

[9]Frank A. Sloan, "State Responses to the Malpractice Insurance 'Crisis' of the 1970s: An Empirical Assessment," *Journal of Health Politics, Policy and Law*, Vol. 9, No. 4, Winter 1985, pp. 629-646.

[10]George Eads and Peter Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation*, The RAND Corporation, R-3022-ICJ, 1983.

rate, even when firms act with equal care at all times. Hence, the efficacy of changes aimed at increasing product safety could not be judged by analyzing accident data. These problems are typical difficulties encountered in assessing the effects of reforms on economic behavior.

Because statistical approaches were not feasible and direct measurement of outcomes (product safety) was impossible, Eads and Reuter conducted a series of case studies of how firms organized their efforts to ensure that the design of products was not unsafe. They interviewed officials of nine large manufacturing firms, one large retailer, and several other organizations with an interest in product safety.

Of all the various external social and economic pressures, product liability had the greatest influence on product design decisions. But because the linkage between good design and a firm's liability exposure remains tenuous, product liability sends an extremely vague signal: It tells the firm that it must be careful or it will be sued, but it does not say how to be careful or how careful to be. Eads and Reuter felt that the connection between the law and product design is weak and even major changes in the law would have little effect on consumer product safety except when significant changes occurred in the overall costs of product claims.

Data Requirements

Data requirements are uncertain because, at this point, we cannot identify clear research strategies; but the requirements will surely be highly specialized. We cannot simply invent a single data collection system to conduct research on all of these issues; rather, we will have to tailor data collection systems on a case-by-case basis.

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VII. WHERE DO WE GO FROM HERE?

The available data are generally not sufficient to assess the effects of tort reforms. We do not systematically collect information on the behavior of participants in the system, on the outcomes of claims—either aggregate or individual—on economic outcomes, or on injuries. Nor do we systematically collect information on the factors that influence behavior or outcomes. Improved data systems are needed to assess the effects of tort reforms.

While the need for better data is clear, data collection efforts are expensive in terms of the direct costs of collecting the data and the indirect costs of diverting the attention and energies of those from whom the data are collected. Data collection efforts are warranted only when their benefits, measured by the value of the research they make possible, outweigh their costs. Both the benefits and costs of a data collection effort depend on which data are collected, in what amounts, from whom, and how. The next step toward assessing the effects of tort reform is to develop detailed designs for data collection efforts. These designs can then be evaluated to determine whether their benefits outweigh their costs.

We sketch out the conceptual issues that must be addressed in designing the data collection efforts needed for research on tort reform; the design of data collection systems is beyond the scope of this report.[1]

WHAT DATA SHOULD BE COLLECTED?

A data collection effort that is not focused on specific questions may overlook elements essential to the analysis. At the extreme, a database missing critical data elements can turn out to be largely worthless in terms of its ability to support the analyses policymakers require. At the same time, data collection undertaken without regard to the eventual use of the data may waste resources on efforts that eventually prove useless.

Analyses of the implementation of tort reforms will require data on the behaviors, expectations, and perceptions of participants in the

[1]The design of a data collection effort also involves a number of operational issues—developing a sampling frame, designing and testing instruments and procedures, and so forth—that cannot be addressed until detailed research specifications have been developed.

resolution of claims. Precisely what information will be needed from which participants depends on the reforms being studied.

The data needed to assess the effects of reforms on dispute outcomes include:

- the aggregate outcomes of disputes, by state and year,
- relevant characteristics of each state's legal environment, by year, and
- the other factors that influence the outcomes of disputes, by state and year.

We discussed several specific aggregate outcomes of policy concern: claim frequency, the percentage of claims closed with payment, the average size of paid claims, disposition patterns, filing patterns, plaintiffs' and defendants' costs of litigation, and public costs of litigation. Data collection and analysis efforts can focus on one, a few, or all of them, depending on policymakers' concerns relative to the costs of collecting and analyzing the data.

Detailed data on the characteristics of individual claims are needed to assess reform's winners and losers, or, alternatively, the effects of reform on various kinds of claims. Specifically, we need data on:

- the outcomes and characteristics of individual claims, for claims resolved in reform versus nonreform states or differences in states before and after reform, or both;
- relevant characteristics of each state's legal environment; and
- other factors that can affect the claims' outcomes.

Several outcomes of individual claims are relevant to the policy debate: the probability of recovery, the amount of recovery, net recovery, the consistency/predictability of outcomes, disposition patterns, filing patterns, and transactions costs. Here, too, data collection and analysis efforts can focus on one, a few, or all of them, depending on policymakers' concerns relative to the costs of collecting and analyzing the data.

Analysis of economic outcomes and injuries will require information on the availability, characteristics, and costs of goods and services of particular policy interest and on the frequency and severity of injuries.

Theory, the experiences of practitioners, and the results of previous research will help identify the other factors that need to be controlled to separate out the effects of the legal variables. There is no simple formula for the selection process and no list of all the "right" factors to include in the analysis. For that matter, different analyses require control of different factors. The factors expected to influence one dispute

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IN WHAT AMOUNTS?

The degree to which research can provide useful information is limited by the quantity and quality of the available data. More elaborate data collection systems can provide more accurate, more detailed data that enhance the accuracy of research and its relevance to policymakers' needs. But the cost of data collection efforts increases with their scope. Those involved in the design process must weigh the costs of an expanded effort against the benefits of more accurate results.

Analysis of reform requires data on outcomes and the factors that affect them, by state and year. Analysis of who won or lost from reform requires data on the outcomes and other characteristics of individual claims. The numbers of states and years or the number of claims for which data are required depend on the tradeoff between the costs of collecting and analyzing data and the need for accuracy in the results. At a minimum, research will need data for several states that have implemented each type of reform of interest. As the number of states and years or claims for which data are collected increase, analysis can more accurately estimate reform effects, but at greater cost.

Similarly, policy debates sometimes focus on particular types of claims and hinge on the issue of how reform affects those types of claims. For example, the problems child care centers or municipalities encounter in obtaining insurance are the focus of particular concern in the tort reform debate. Participants in the debate might find assessments of the effects of reform on those institutions particularly relevant; estimates of the effects of reform on all institutions or on the availability of insurance in general would be inadequate.

If existing data systems happen to maintain data in a form that permits identification of particular claims, it may be possible to collect the data needed to perform separate analyses of the effects of reform on them. If not, new data systems will have to be developed and put into operation before separate analyses can be conducted. The development and implementation of new data systems can dramatically increase the costs of the data collection effort. Here, too, design efforts must address the tradeoffs between the increased value of data collection systems that obtain a high level of detail and their higher price tags.

The availability of "baseline data" is an important factor in the design of data collection efforts: To estimate the effects of any reform,

it is necessary to compare "what is" after reform with "what would have been" had the reform not occurred. Data on the value of some outcome after reform are not sufficient in themselves to assess the effects of reform. At a minimum, data on the values of an outcome prior to reform will be needed to compare to that outcome's postreform values.[2]

Baseline data sufficient to estimate how outcomes would have changed over time without reform will be needed to accurately assess the effects of reforms. These data will generally include information on the outcomes of interest and on the other relevant variables before reform. Data collection efforts that capture detailed data "from now on" are not going to provide data from the past; baseline data on past performance will have to be collected.

The need for appropriate baseline data, in turn, implies that the feasibility and costs of collecting retrospective information must be considered in deciding on the level of detail.

FROM WHOM?

The insurance industry is the obvious source of data on the aggregate outcomes of claims. Aside from claims against self-insured individuals and organizations, the insurance industry is the one place where all claims eventually appear. The kinds of information insurance companies record for management purposes include much of the data needed to assess the aggregate performance of the tort system; a variety of reporting systems that capture data from insurers exists. In principle, data on the outcomes of closed claims (e.g., indemnity paid, mode of and time to disposition, and the jurisdiction in which the claim was brought or a lawsuit filed) could be routinely compiled to generate an ongoing database that would suffice for studies of aggregate outcomes.

The insurance industry may seem like an obvious source of data on the outcomes and characteristics of individual claims. However, the information it collects may not include some of the data needed to assess the effects of reforms on various kinds of claims or claimants. For that matter, some relevant information may not even be known to

[2]However, most of the issues of the current policy debate have dynamic patterns of their own: They are changing over time and would have changed from the prereform year even without reform. Research cannot simply attribute all differences between the value of an outcome this year and some earlier year to reform. Rather, research must somehow account for the dynamics of the process—estimating where the system would have been this year in the absence of reform—and compare that estimate to where the system is given the presence of reform.

insurers. Insurance companies, for example, may not routinely obtain information on claimants' wealth; their data, therefore, would not suffice for a study of the effects of reform on relatively poor claimants.

Claimants and defendants tend to be "one-time" participants in the system and the involvement of any particular claimant or defendant is generally unanticipated. We have no means of predicting in advance who will be claimants or defendants, and there are no centralized systems to which claimants or defendants must report. But if the policy debate raises questions regarding the effects of reforms on particular types of parties or claims, and if insurance companies do not routinely obtain the information needed to distinguish them, then special surveys of claimants or defendants or both will be needed.

In principle, all the information required to assess the effects of reforms on aggregate outcomes and on the outcomes of individual claims (winners and losers) could be obtained from lawyers. However, there are no data systems that routinely collect information from lawyers; obtaining such data would require the creation of entirely new systems and the development of monitoring techniques to ensure that the proper data are provided in a timely manner for all cases. Because of the large number of lawyers from whom information would be needed, these systems would be extremely cumbersome and expensive. Attorney-client privilege issues might also limit the data that could be obtained through attorneys. Nonetheless, there may be particular policy questions that hinge on data available only from attorneys. Special surveys of attorneys might be needed to obtain these data.[3]

The courts routinely collect significant amounts of information. But they generally collect data for their own administrative needs, and the data tend not to be useful for assessing the effects of tort reforms. It may be possible for the courts to provide more useful information on an ongoing basis. In particular, data on the aggregate numbers of cases filed and disposed and on the means of and time to disposition, by case type, could be very helpful.

The courts obtain information on such matters as the type of suit and the alleged injuries indirectly in a variety of documents—complaints, answers, motions, and so forth—designed for purposes other than data collection. Using court personnel to review these documents and extract information would undoubtedly strain court resources; but it may be possible to devise forms that plaintiffs and defendants, or their representatives, could fill out and submit to the court.

[3]Because claims can be resolved before a lawyer is involved, the litigants known to the bar are self-selected samples of all litigants. And because the basis for self-selection is likely to be related to outcomes of interest, the sample would be inappropriate for many kinds of analyses.

Although the insurance industry seems an appropriate source for much of the requisite data, several problems must be addressed. Insurance companies may not have access to important information such as collateral source payments. Differences occur among companies in the kinds of information they obtain for a claim, the definitions of various characteristics of a claim, and the coding systems they use. Data on claims against self-insureds would have to be collected separately. "Double counting" is a problem in claims against two or more defendants because, except by chance, the defendants will have different insurers and there would be duplicate reports of the same claim.

The Insurance Services Office (ISO), a nonprofit corporation that makes available advisory rating and other services to the insurance industry, is now collecting information on at least 12,000 individual claims in 27 states that have modified their tort systems.[4] These will include a sample of large claims (over $25,000) arising out of policy year 1983 and closed after July 1, 1985, or still open, a sample of all claims closed during the month of May 1987, and a sample of all governmental claims from policy year 1983. These data will provide a first step toward the development of a database sufficient to assess the effects of reform.

Because almost all the claims in the database will have closed soon after reforms were enacted, their outcomes may not reflect the full impact of reform.[5] However, these data should suffice to establish a baseline with which the outcomes of future claims can be compared.

In collecting these data, ISO will presumably have worked through the problems of obtaining compatible information from different insurance companies. Their procedures should provide guidelines to such issues as consistent definitions of data elements.

NEXT STEPS

The next step in assessing the effects of reform is to design and evaluate data collection systems that could be used in the future to capture data on the performance of the tort system. We suggest

[4]Insurance Services Office, *Insurance Data: A Close Look*, 1987.

[5]ISO intends to have experienced claims managers estimate the values of each claim in its new legal environment. This approach is the only way to obtain an early estimate of the impact of reform. Nonetheless, because the claims managers will have had relatively little experience with the new legal environments, their estimates may not fully reflect the impact of tort reforms. Pending analyses of the implementation process, there is no way to determine the degree to which they, or anyone else, are able to anticipate the eventual effect of reform on claims' outcomes.

consideration of three types of new data collection systems. One comprises systematic efforts to obtain data from insurers and self-insured defendants on the aggregate outcomes of liability claims. Ideally, these efforts would result in systems for collecting these data on an ongoing basis to support continuing analyses and monitoring of the overall effects of reform. The second type of system would involve the design of special surveys of claimants, the bar, and insurers to obtain the detailed individual claim information needed to identify reform's winners and losers. Finally, we need to explore the feasibility of systems for collecting information on the other factors that influence participants in the tort system and must, therefore, be included in analyses, and on economic outcomes and injuries.

Once feasible designs are constructed, they need to be evaluated to determine whether the research they will support is sufficiently important to warrant the costs of the data collection and analysis efforts.

Appendix

STATE TORT REFORM ENACTMENTS, 1986

Table A.1 summarizes the principal tort reforms enacted during 1986. The remainder of this appendix describes the provisions of those reforms.

A. COMPARATIVE/CONTRIBUTORY NEGLIGENCE (CN)

CONNECTICUT	HB 6134—Damages will be diminished by the plaintiff's percentage of fault.
ILLINOIS	SB 1200—Plaintiffs who are more thar 50 percent at fault are barred from recovery, and the jury would be instructed as to 15 possible barring effects. The law applies to negligence actions and product liability actions brought under a strict liability theory.

B. JOINT AND SEVERAL LIABILITY (JSL)

1. All Tort Suits

ALASKA	SB 377—The application of joint and several liability is now limited for low fault defendents (less than 50 percent at fault) as they cannot be held jointly liable for more than two times the apportioned percentage of damages.
CALIFORNIA	Prop 51—Joint and several liability has been abolished for all noneconomic damages.
COLORADO	SB 70—Outright abolition of joint and several liability nas been approved.
CONNECTICUT	HB 6134—A measure abolishing joint and several liability has been enacted; each defendant is liable only for their attributed share of damages; Orphan Share Clause: Defendants are liable for that portion of an uncollectible sum that is proportionate to their share of the entire judgment but may not be forced to pay the entire uncollectible amount.

Table A.1

STATE TORT REFORM ENACTMENTS, 1986

STATE	CN	JSL	DAM	PUNI	AFMS	CSR	PPJ	INTX	DRAM	GOV	MMPL	MISC
Alabama										2		
Alaska		1	1	1		1	1	1			2	1
Arizona					1				2			1
California		1										
Colorado		1	3	1		1			2	2	2	3
Connecticut	1	1			1	1	1		2	2	2	
Delaware											2	
Florida		1	1	1		1	1					
Georgia					1					2		
Hawaii		1	1	1	1	1	2			2	2	1
Idaho					1				2			
Indiana					1	1		1	2		2	2
Illinois	1	1		1	1	1				2	2	
Iowa				3	1		1		2	2	2	3
Kansas			2		3		2				2	2
Louisiana									2			2
Maine					2		2		2	2	2	
Maryland			1				1				2	
Massachusetts			2		2	2					2	
Michigan		1	2		1	3	1	1	2	2	2	1
Minnesota			1	1	1	1		1				
Mississippi										2		
Missouri			2							2	2	
Montana			2							2		
Nebraska					1			1				
New Hampshire		3	3	1	1				2	2	2	1