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Essay

'An Accident and a Dream:' Problems with the Latest Attack on the Civil Justice System*

Daniel J. Capra**

Introduction

Law professors receive scores of publications during the year. Most pass by unread, some unnoticed. I hate to admit it, but it takes a lot to capture my attention these days. So in terms of attention-getting appeal, the publication *'An Accident and a Dream: How the Lawsuit Lottery Is Distorting Justice, and Costing New Yorkers Billions of Dollars Every Year'* (*'An Accident and a Dream'*)¹ was quite a success. *'An Accident and a Dream'*² was written by the Public Policy Institute ("PPI"), an affiliate of the Business Council of New York State, Inc.³ The goal of the publication is to persuade the public, lawmakers,

* An earlier version of this essay was published by the New York State Bar Association. See Daniel Capra, *Capra Report: A Rising Tide of Torts?*, N.Y. ST. B.J., April, 1999, at 40.

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1. PUBLIC POLICY INSTITUTE, *'AN ACCIDENT AND A DREAM: HOW THE LAWSUIT LOTTERY IS DISTORTING JUSTICE, AND COSTING NEW YORKERS BILLIONS OF DOLLARS EVERY YEAR'* (1998) [hereinafter *'AN ACCIDENT AND A DREAM'*].

2. The title *'AN ACCIDENT AND A DREAM'* derives from PPI's quotation from the license plate frame of a personal injury lawyer. The license plate frame states "ALL YOU NEED IS AN ACCIDENT AND A DREAM." *Id.* at 2.

3. The New York Times reports that the Public Policy Institute is "a New York business group pushing for lawsuit limits in New York." William Glaberson, *The \$2.9 Million Cup of Coffee: When the Verdict Is Just a Fantasy*, N.Y. TIMES, June 6, 1999, § 4, at 1.

and people like me to support the cause of tort reform in New York.

The publication is certainly timely because the cause of tort reform is being considered in New York once again. For example, New York Senate Bill 2277 would, among other things, impose substantial limits on joint and several liability; cap non-economic damages at \$250,000; limit contingent fees; and adopt a ten year Statute of Repose.⁴ A similar bill in the New York State Assembly, 1999 New York Assembly Bill No. 7545, would cap non-economic damages at \$250,000; provide a claim structure for neurologically damaged infants; impose limitations on municipal liability for injuries occurring at public recreation facilities; repudiate joint and several liability for non-economic losses; adopt a ten year Statute of Repose for all products; protect sellers from liability for manufacturing defects; and impose a schedule limiting contingent fees in malpractice actions.⁵

When I first read through *'An Accident and a Dream'* I thought it made a very compelling argument; it made me want to join the forces of tort reform. In a nutshell, the report states that tort lawsuits have become a "lottery" engineered by plaintiffs' lawyers greedy for a contingent fee;⁶ that New Yorkers are paying \$14.3 billion a year to support the "lawsuit industry," amounting to a "tort tax" of almost \$800 imposed on every person in the State;⁷ that lawyers pollute the system with advertising;⁸ that lawyers bring frivolous lawsuits and reap outrageous jury verdicts;⁹ that damages are awarded not because defendants are at fault, but because institutional defendants are deep pockets;¹⁰ and that the "runaway lawsuit industry" limits the development of new products, and prices New York companies out of the international market.¹¹

I am totally against paying a tort tax for frivolous lawsuits resulting in windfall recoveries for undeserving lawyers, at the expense of our competitiveness abroad to boot. If tort reform

4. See S. 2277, 222nd Legis. Sess. (N.Y. 1999).

5. See A. 7545, 222nd Assembly (N.Y. 1999).

6. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 2-4.

7. See *id.* at 1.

8. See *id.* at 2.

9. See *id.* at 2-4.

10. See *id.* at 3-6.

11. See *id.* at 2-3.

would prohibit these bad things, then I am all for tort reform. Instead of jumping on the tort reform bandwagon right away, I decided to investigate the foundations and premises of '*An Accident and a Dream*.' This essay is my report on the PPI report.¹² I find two fundamental flaws with '*An Accident and a Dream*.' First, its factual premises are unsupported by reliable data, and in fact most reliable data is completely contrary to the assumptions in the report. Second, even assuming that the tort system has problems, the solution of "tort reform" will not solve those problems; "tort reform" will simply shift the costs of injury recovery to some other, undoubtedly less efficient, mechanism.

This essay's critique of PPI's methodology and conclusions hopefully has some resonance beyond a single "tort reform" report. PPI's attack on the civil justice system is typical of recent attacks by the business and insurance community in response to the so-called "litigation explosion."¹³ These attacks basically make the following alarmist assertions: that the tort system is "out of control;" that people "sue at the drop of a hat" that plaintiffs' lawyers, looking only to make money, bring frivolous claims and obtain outrageous, unjustified recoveries;¹⁴ that juries favor plaintiffs and are biased against businesses; that the litigation explosion destroys our business competitiveness, inhibits innovation and research, and prevents businesses and municipalities from engaging in socially worthwhile activities; and that most of this outrageous cost is funneled to the coffers

12. Joanne Doroshow has authored a cogent and compelling response to PPI's assertions. See JOANNE DOROSHOW, *AN ACCIDENT AND A NIGHTMARE: A REBUTTAL TO AN ACCIDENT AND A DREAM* (1998) [hereinafter *AN ACCIDENT AND A NIGHTMARE*].

13. See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 *LAW & CONTEMP. PROBS.* 269, 284-85 (1989), noting the millions of dollars of advertisements sponsored by the Insurance Information Institute and others which trumpet the liability crisis. Daniels concludes that the advertising blitz has been "symbolically manipulative." *Id.* at 285. For other overheated statements about the tort system, see DAN QUAYLE, *STANDING FIRM: A VICE PRESIDENTIAL MEMOIR* 283 (1994) (stating that Americans are "crazily litigious"); *Aetna Advertisement*, *WALL ST. J.*, April 8, 1986, at § 9 (asserting that the legal system is "berserk").

14. See, e.g., Theodore Olson, *Was Justice Served?*, *WALL ST. J.*, Oct. 4, 1995, at A14 (asserting that the civil justice system is "demented" and that financial "bonanzas" are awarded to "persons who pour coffee on themselves or ricochet golf balls into their own foreheads.").

of well-heeled and politically connected plaintiffs' lawyers, rather than to the injured themselves.¹⁵

To state these assertions is basically to refute them on the basis of commonly held experience. For example, our economy does not appear to be at a competitive disadvantage; new products, particularly in the pharmaceutical field, are being released all the time; plaintiffs' lawyers are neither the most numerous nor the most affluent members of the legal profession and while the civil court system is burdened, most of the litigation we hear about is in the areas of criminal law, divorce, and high profile commercial litigation (such as *U.S. v. Microsoft*).¹⁶

So how does PPI get to conclusions that seem so far from commonly held experience? The PPI report is based on several sources of information, all of them highly questionable. PPI relies on anecdotal evidence of a few selected litigation horror stories, in which plaintiffs allegedly received outrageous monetary recoveries that they did not deserve. It goes without saying, however, that civil justice reforms cannot be based on a few extraordinary case results. More importantly, the reports of these individual instances by PPI are themselves inaccurate. PPI, as will be shown below, has chosen to tell only half the story of the few stories it chooses to tell.

PPI also relies on statistics to show the cost of the tort system, the increases in litigation, and the plethora of lawyers. These statistics, however, suffer from several fatal flaws. First, the factual foundations are often culled from biased sources. Second, the statistics are often misleading because they fail to account for important confounding factors and alternative explanations. Third, PPI lays the costs of the system solely at the feet of plaintiffs' lawyers and frivolous litigants, when in fact much of the unnecessary cost in the system results from corporate wrongdoing, causing injury, and "hardball" litigation tactics of insurance companies that deny legitimate claims. Fourth, the quasi-statistical analysis about the costs of the tort system fails to mention that the system provides the essential

15. See *id.* See also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 718 (1998) [hereinafter Galanter, *An Oil Strike in Hell*], for a discussion and refutation of some of the common refrains of the tort reform movement.

16. 163 F.3d 952 (D.C. Cir. 1999).

benefits of victim compensation and product safety. Any focus on costs without consideration of countervailing benefits is completely irresponsible.

Such irresponsible argument, clothed in numbers and factoids, should not go un rebutted, especially when it is designed to spur "tort reform." Part I of this Essay addresses the major "factual" assertions set forth in the PPI report, and shows how each of them is either unsubstantiated by the real facts, or misleading and incomplete. Part II addresses some of the major suggestions for reform espoused by PPI, and shows how these suggestions are both unfair and ineffective.

Part I. Rebuttal of PPI Factual Contentions

1. *The "Tort Tax"*

Assertion:

PPI asserts that there is a "tort tax" of \$14.3 billion per year in New York, meaning that each person in New York pays \$787 per year to fund the system of tort recovery.¹⁷

Analysis:

The most fundamental problem with the "tort tax" assertion is that it intimates a saving if tort recoveries are reduced. This is a fallacy because if people are injured, there must be some system in place to compensate their losses. The tort system that we currently have is one alternative, and there are some others, such as a nationwide system of self-insurance, and a system of social insurance such as is found in some countries. Each of these alternatives has substantial costs because injuries cannot be compensated for free. Thus, to pitch the "tort tax" as if there is some cost-free alternative to compensating injured victims is misleading and irresponsible. Professor Mark Hager has noted that the "tort tax" proponents

write as if compensation payments present a "cost" to society which would be diminished if we avoided making such payments. To the contrary, the "costs" would still be there in the form of suffered injuries. Compensation payments themselves do not create additional costs. Rather, they distribute existing costs, the costs

17. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 22-25.

of injuries, over a wider number of people, so that the injured experience less of the cost and the rest of us, through higher prices, experience more.¹⁸

Professor Marc Galanter also notes the one-sided nature of “tort tax” arguments:

The costs attributable to present institutional arrangements are made to loom menacingly large by ignoring the costs of alternative arrangements for obtaining equivalent benefits. For example, if we were to forego the tort system’s contribution to accident prevention, presumably people and businesses would make other expenditures to prevent and minimize injury. The savings from completely abolishing the tort system would not be all the billions that flow through it – nor even all the billions spent on it – but only that increment beyond what would be spent on the alternative means of protection. Therefore, a genuine assessment of the legal system would have to consider not only its costs, but both the benefits it produces and the cost of producing such benefits by alternative means.¹⁹

Thus, the fallacy of the “tort tax” argument is that it emphasizes the gross cost of the system, while making no attempt to figure out the net cost.²⁰ There is a negative inference that can be derived from the business community’s failure to make an attempt to assess the net cost of the system; business interests might be unhappy to find that the system is less costly than the alternatives. If that is so, it is much better and more lucrative for businesses to move to limit tort recovery than it is to determine whether the current system is actually doing a good job.

The tort tax assertion might have some power if PPI could break out some arguably unnecessary costs of the tort system. For example, if the costs of the system were being increased by rampant frivolous litigation, this would be a reason to think about change. Yet PPI makes no attempt to prove that even an infinitesimal amount of the “tort tax” is caused by unnecessary or frivolous litigation.

18. Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 546 (1990).

19. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 681 n.80 (1984) (citing Neil K. Komisar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990)).

20. See generally PUBLIC POLICY INSTITUTE, *supra* note 1.

It is probably wise for PPI to avoid a breakout of justified and frivolous litigation costs. The costs of frivolous litigation are undoubtedly minimal, because the current system heavily discourages frivolous claims. A lawyer who brings a frivolous claim risks substantial sanctions.²¹ Moreover, most lawyers for victims of personal injury operate by contingent fees, because their clients are ordinarily unable to front the substantial costs of litigation. The contingent fee system discourages frivolous litigation because a contingent fee lawyer has no incentive to bear the costs of bringing a frivolous claim because there is no money in it.²²

Alternatively, the "tort tax" argument could be relevant if PPI was to compare the costs and benefits of the current system with the costs and benefits of an alternative system, such as self-insurance or government compensation. No such attempt is made. PPI does have a lot of suggestions for cutting the costs of the current system; for example, repealing joint and several liability, capping non-economic damages, etc. However, no explanation is given as to how the protections of the current system, in terms of victim recovery and product safety, could be maintained. In all likelihood, the so-called savings created by the suggested reforms would give rise to increased costs due to unsafe products and the need to employ other sources of compensation (such as government funds) for those victims who can no longer receive full recovery in the courts.²³

PPI relies heavily on the report of a commission which was appointed by the Governor of New York to investigate the per-

21. See FED. R. CIV. P. 11; *Klein v. Seenauth*, 687 N.Y.S.2d 889 (N.Y. City Civ. Ct. 1999) (ordering a hearing to determine whether a lawyer's frivolous conduct justifies a monetary sanction and noting that a court in its discretion may award costs and financial sanctions against an attorney engaging in frivolous conduct).

22. For the discussion of contingent fees, see *infra* notes 321-43 and accompanying text.

23. See Michael Schrage, *Tort Reform? It's Government Interference in the Marketplace*, L.A. TIMES, March 9, 1995, at D1 (noting that limitations on tort recovery, such as damage caps, simply shift the cost of victim compensation from insurance companies to the government, meaning higher taxes). See also Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 397 (1999) (noting that tort reform proposals "uniformly and unabashedly favor defendants" and make no attempt to determine whether the resulting system of compensation is fair or efficient to all parties).

ceived "crisis" in liability insurance in the early 1980s.²⁴ This commission was chaired by Judge Hugh Jones. The Jones Commission Report was certainly critical of the tort system, but even the Jones Commission recognized that alternative systems of compensation were unlikely to work in our society.²⁵ Part of the Jones Commission Report was dedicated to an analysis of countries that adopted a system of social insurance as a means of compensating victims for personal injuries.²⁶ The Jones Commission concluded that

[f]oreign compensation systems which have been developed in the context of societies with broad government social insurance networks, and which reflect strongly-held views about the extent of collective responsibility for individual misfortune cannot be easily transferred to or even compared with the system that has grown up in our far more individualistic and market-oriented society.²⁷

Thus, to impose limits on tort recovery would shift the costs of victim compensation to government social programs, hardly the market-oriented approach that American businesses prefer.

Even if the "tort tax" argument could be addressed in isolation from the costs and benefits of alternative systems of recovery, it would be folly to rely on the PPI analysis as any indication of the true costs of the tort system. The tort tax figure is based on a study by Tillinghast-Towers Perrin, a business consulting firm.²⁸ The Tillinghast figures are vastly overinclusive. The figures include not only payouts for personal injury claims, but also the costs of *all* insurance premiums, whether related to tort liability or not.²⁹ The global cost figure also includes the costs associated with operating the insurance industry, an industry that is not noted for its efficiency.³⁰ Finally, the

24. HUGH R. JONES ET AL., GOVERNOR'S ADVISORY COMMITTEE ON LIABILITY INSURANCE, INSURING OUR FUTURE VOLUME II: REPORT OF THE GOVERNOR'S ADVISORY COMMISSION ON LIABILITY INSURANCE 215-16 (1986) [hereinafter *Jones Commission Report*].

25. See *id.* at 203.

26. See *id.* at 199-202.

27. *Id.* at 205.

28. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 22-25.

29. See *id.* at 24.

30. See *id.* See, e.g., GUY B. MASSERITZ ET AL., U.S. DEP'T OF JUSTICE, THE PRICING AND MARKETING OF INSURANCE: A REPORT OF THE U.S. JUSTICE DEPARTMENT TO THE TASK GROUP ON ANTITRUST IMMUNITIES (January 1977). See also DOROSHOW, *supra* note 12, at 4 ("The insurance industry is wasteful and ineffi-

tort costs include the costs created by insurance companies engaged in at least two distasteful "hardball" tactics: refusing to pay legitimate claims, thus forcing injured citizens to seek redress in the courts; and requiring confidentiality agreements as a condition to settlement, which means that similarly situated victims will have to bring a new litigation from scratch.³¹

The "tort tax" figure given by PPI is particularly disingenuous given the record profits of insurance companies and their executives in the last few years.³² Joanne Doroshow reports that New York auto insurers enjoyed a 117% increase in profits for the period from 1994 to 1996, from \$717 million to \$1.57 billion,³³ and that insurance premiums during that period increased markedly, by \$1.45 billion,³⁴ even though the payout by insurers over that period has remained basically constant.³⁵ She also reports that in 1997, forty-two insurance executives received compensation of more than \$5 million; nine received more than \$10 million.³⁶ Under all these circumstances, any cries about a "tort tax" are nothing but absurd and self-serving overkill.

In fact the cost of the tort system to business is remarkably low when compared to business income and profits. The cost of product liability in 1993 (measured by insurance premiums) was 13.5 cents per \$100 of retail sales, which is a decrease from 25.9 cents in 1987.³⁷ A recent survey of U.S. corporations' total liability risk conducted by Tillinghast (and not even confined to tort liability) found that from 1993 to 1994 the overall cost of risk (including workers' compensation and property risks as well as risk management per \$1000 of revenue) fell by 5%,³⁸

cient, leading to excessively high costs, because in many ways the industry is not competitive.").

31. See Michael Rustad, *How the Common Good Is Served by the Remedy of Punitive Damages*, 64 TENN. L. REV. 793 (1997) (noting how improper rejection of claims by insurers leads to increased costs of litigation).

32. See DOROSHOW, *supra* note 12, at 7-8.

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See J. ROBERT HUNTER, CONSUMER FEDERATION OF AMERICA, *PRODUCT LIABILITY INSURANCE EXPERIENCE 1984-1993: A REPORT OF THE INSURANCE GROUP OF THE CONSUMER FEDERATION OF AMERICA* exh. A, col. N (Mar. 1995).

38. See *id.*

while the cost of liability fell by 22%.³⁹ Notably, PPI does not rely on or even mention this particular Tillinghast study. Yet its findings are consistent with data collected by the National Association of Insurance Commissioners, which indicates that liability costs constituted only sixteen cents of every \$100 of retail sales in 1995,⁴⁰ which is less than 2/10 of 1%. The costs in these studies include not only those associated with jury verdicts and legal costs, but also the costs of paying for settlements.⁴¹

Thus, the talk of "tort tax" is not only misguided in looking at the costs of the tort system without considering the costs of an alternative system; it is also specious because it overstates the cost of the system to businesses. It also fails to recognize the obvious benefits of the system, that the system provides compensation to victims and correspondingly provides incentives for businesses to make safer products.⁴²

2. Tort Law as "Charity"

Assertion:

PPI asserts that the law of torts has evolved into the law of "contorts," a system that is concerned more on finding a ready source of payment for loss or injury, and less on whether anyone did anything wrong.⁴³ Quoting conservative think-tank guru Peter Huber, PPI states that the tort system will settle for a wealthy defendant when it cannot find a careless one.⁴⁴ Accord-

39. See *id.* at 4.

40. See DOROSHOW, *supra* note 12, at 7.

41. *Id.* There are other reliable indications that PPI's assertions about tort costs are wildly inflated. For example, a study by RAND Corporation calculated losses from non-fatal accidents to be 175.9 billion dollars a year. Thirty-eight percent of those costs are paid directly by the injured. Tort recovery paid only 3% of the hospital costs and covered only 7.7 billion of 175.9 billion dollars in personal losses. See DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 52-54 (1991). This means that the tort system is used to resolve far fewer cases than it legitimately could.

42. See GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 106-110 (1983) (finding that the prospect of tort liability has a beneficial effect on business conduct, leading to development of safer products).

43. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 8.

44. See *id.* For a cogent attack on Huber's sloppy methodology, spotty and selective research, and wildly exaggerated and unsubstantiated claims, see Hager, *supra* note 18.

ing to PPI, this legal bias plays into the natural bias that jurors have in favor of injured plaintiffs and against "deep pocket" corporate defendants.⁴⁵

Analysis:

With these broad assertions, PPI launches an attack on both modern product liability law, and on the system of jury trials. Yet PPI seriously misstates current product liability law and expresses a completely unwarranted mistrust in the system of jury trial.

Under modern product liability law, a defendant can be held liable for injuries caused to consumers in one of four ways: 1) if the specific product was manufactured with a defect; 2) if the product line was defectively designed; 3) if the defendant failed to warn the consumer about dangerous aspects of the product; and 4) if the defendant made misrepresentations regarding quality of the product.⁴⁶

Manufacturing defect claims arise when a product that is usually safe was manufactured with a dangerous defect in a specific instance. Illustrations of mistakes in the manufacturing process include a tire with a weak spot,⁴⁷ a gun with a safety lock that will not lock, and an automobile with faulty brakes.⁴⁸ If a single product is made with a specific manufacturing defect, the plaintiff does not have to prove that the defendant was negligent.⁴⁹ The rationale for recovery in the absence of proof of negligence is that the manufacturer is in a far better position to protect against dangerous defects in the manufacturing process than is the innocent consumer.⁵⁰ Peter Huber himself has stated that manufacturing defect cases are "rare."⁵¹ The business community would not care to admit that manufacturing mistakes, whether negligent or not, are routinely or even occasionally made.

45. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 8-9.

46. See DAVID G. OWEN ET AL., 1 MADDEN & OWEN ON PRODUCTS LIABILITY § 1:5, at 16 (3d ed. 2000).

47. See *MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916).

48. See *Healey v. Firestone Tire & Rubber Co.*, 663 N.E.2d 901 (N.Y. 1996).

49. See *Caprara v. Chrysler Corp.*, 417 N.E.2d 545 (N.Y. 1981).

50. See *id.*

51. Hager, *supra* note 18, at 550.

PPI's real complaint over "strict liability" is therefore about claims either that a product is defectively designed, or that the defendant failed to provide proper warnings concerning the dangers from use of the product. PPI asserts that businesses can be held liable for defective design or failure to warn, even though they were not "careless" or otherwise at fault.⁵² In fact claims of defective design and failure to warn are dependent on a finding of unreasonable conduct on the part of the manufacturer.⁵³ A product design creating injury is considered defective only if the design was "not *reasonably* safe."⁵⁴ A design defect can be proven only by "a comparison between an alternate design and the design that caused the injury undertaken from the viewpoint of a reasonable person."⁵⁵ That is the very standard that is "also used in administering the traditional reasonableness standard in negligence."⁵⁶ This means that a manufacturer can be held liable for a design defect only if it failed to employ a reasonable and safer alternative design.⁵⁷ As Judge Posner states, the concept of "unreasonably dangerous design" brings into play "factors of cost and risk similar to those that determine negligence, an objective standard that is independent of what the particular defendant knew or could have done."⁵⁸ Judge Posner concluded that "in a defective design case, there is no practical difference between strict liability and negligence."⁵⁹ Thus, the alleged injustice of liability "regardless of fault," trumpeted by PPI, is simply a misstatement of the law and the reality of litigation in defective design cases.

The same is true for "strict liability" claims that are based on "failure to warn." A manufacturer is liable for failure to warn

52. See generally PUBLIC POLICY INSTITUTE, *supra* note 1, at 12-13.

53. See *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983) (emphasis added).

54. *Id.* (emphasis added).

55. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 2.

56. *Id.*

57. See *id.* at 38-39.

58. *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir. 1984).

59. *Id.* (quoting *Birchfield v. International Harvester Co.*, 726 F.2d 1131, 1139 (6th Cir. 1984)). "The leading treatise on tort law is in agreement: 'The proof required of a plaintiff seeking to recover for injuries from an unsafe product is very largely the same, whether his cause of action rests upon negligence, warranty, or strict liability in tort.'" *Id.* (quoting PROSSER, HANDBOOK OF THE LAW OF TORTS 671 (4th ed. 1971)).

only if that failure was unreasonable, for instance, if the manufacturer had reason to know that the product presented a specific danger, and yet failed to provide an adequate warning about that danger. As Judge Posner stated, the "strict liability duty to warn" is "hard to distinguish in practice from the duty to warn imposed by a negligence standard. This is because the defendant, to be held strictly liable, must have been able to foresee that the product would be unreasonably dangerous unless there was a warning."⁶⁰

Thus PPI's attack on the tort system as one in which negligence is irrelevant⁶¹ is a misstatement of existing legal standards. The PPI attack on what it calls the law of "contorts" is not only a misguided attack on applicable legal standards; it is also an attack on the jury system itself. PPI states, without substantiation, that "countless jury verdicts" have been based on a misplaced desire to compensate an injured individual at the expense of a blameless defendant.⁶² PPI asserts, in other words, that juries routinely work on the "deep pocket" principle.⁶³

An accusation that strikes at the heart of the civil justice system should presumably be supported by some factual basis. The PPI report is markedly lacking in facts supporting the premise that juries have a practice of ruling against deep pocket defendants. In fact, all recent evidence is to the contrary. For example, the scholars Valerie Hans and William Lofquist engaged in an extensive, scientific study of Delaware jurors sitting in suits against corporations.⁶⁴ They observed, contrary to the unsubstantiated allegations in the PPI report, that jurors were suspicious of *plaintiffs'* claims:

The tort jurors approached their own cases with considerable suspicion about the plaintiff. Indeed, in these personal injury lawsuits, jurors focused most on the plaintiffs in the case rather than on the businesses that were sued. . . . Jurors' dubiousness about plaintiff claims led them to scrutinize the personal behavior of

60. *Flaminio*, 733 F.2d at 466.

61. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 8.

62. See *id.*

63. See *id.* at 14.

64. See Valerie Hans & William Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & Soc'y REV. 85, 89-90 (1992).

plaintiffs, trying to understand their motives and to assess the reasonableness of their claims. Seemingly no aspect of the plaintiffs' behavior was beyond question. Jurors often penalized plaintiffs who did not meet high standards of credibility and behavior, including those who did not act or appear as injured as they claimed, those who did not appear deserving due to their already high standard of living, those with pre-existing medical conditions, and those who did not do enough to help themselves recover from their injuries.⁶⁵

In contrast, the jurors were sympathetic to business, and sensitive about the costs to society of a verdict in favor of the plaintiff.

Rather than revealing jurors willing or eager to impose on business the costs of plaintiffs' injuries, our findings show that jurors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. Despite insistence on product safety and high expectations of business, jurors were generally favorable toward business, skeptical more about the profit motives of individual plaintiffs than of business defendants, and committed to holding down awards.⁶⁶

The findings of Hans and Lofquist are supported by a Department of Justice Civil Justice Survey of verdicts in state courts in the seventy-five largest counties in the United States.⁶⁷ The statistics show that tort plaintiffs are more likely to get a favorable verdict from a judge than a jury.⁶⁸ Plaintiffs won only 30% of product liability jury trials in the courts surveyed; in contrast, plaintiffs won 70% of the bench trials.⁶⁹ For all tort cases, the success rate was 47% in jury trials and 57% in bench trials.⁷⁰ These findings clearly belie the charge that juries are biased against deep pocket corporations.⁷¹

65. *Id.* at 94-95.

66. *Id.* at 93.

67. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES 6 (1999).

68. See *id.*

69. See *id.*

70. See *id.* Deborah Merritt and Kathryn Barry surveyed tort verdicts in Franklin County, Ohio, and found, consistent with the Department of Justice study, that tort plaintiffs were more likely to be successful in a bench trial than a jury trial. See Merritt & Barry, *supra* note 23.

71. In their study of verdicts in an urban county, Deborah Merritt and Kathryn Barry "found no evidence that juries penalize deep pocket institutional

The findings of Hans and Lofquist are also quite consistent with the pattern of jury verdicts in tort cases in New York. According to the New York Jury Verdict Reporter, the percentage of favorable verdicts for all tort plaintiffs went down, from 54% to 51% between 1994 and 1998.⁷² The 39% product liability success rate in New York is less than the 40% success rate nationally.⁷³ The number of verdicts of one million dollars or more has remained steady from 1989, approximately one hundred in the entire state per year,⁷⁴ and this is not considering the high probability that such verdicts are either reduced by the judge in response to a post-trial motion, or reduced by the appellate court. All these figures have caused Russell Moran, the director of New York Jury Verdict Reporter, to conclude that the "tort reform movement has already been heard, loud and clear, by its target audience: the jury."⁷⁵ Indeed, there are some reported cases in which jurors actually had to be excluded from serving in a tort case because they had been so biased by the advertising blitz trumpeting the insurance crisis and the need to limit plaintiffs' recovery.⁷⁶

In light of all these facts indicating that jurors are not biased against business and are not engaged in compensating individuals regardless of fault, it is remarkable that PPI still seeks to attack the jury system as unjust and biased. Perhaps it is just out of habit. The "tort reform" movement has been going on so long that it might be hard to stop even though it has achieved marked success in the courts. The tort reform movement may have originated years ago from a desire to level the

defendants either by imposing liability more readily or by assessing heavier damages." Merritt & Barry, *supra* note 23, at 392.

72. See Torts, Insurance & Compensation Law Section, New York State Bar Ass'n, *New York Jury Verdict Reporter: Statistical Study* 143 chart 1 (1999). See also Merritt & Barry, *supra* note 23, at 395 (noting that nationwide, median jury awards for personal injury plaintiffs declined from \$65,000 in 1990 to \$55,660 in 1996).

73. See Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 437 (1996).

74. See *id.*

75. Russell F. Moran, *Juries Are Just Saying No*, N.Y. TIMES, Jan. 16, 1995, at A17.

76. See Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805, 808-09 (1995) (noting that anti-tort publicity has biased some jurors to the extent that they have been excluded for cause because they can no longer be impartial).

playing field, but it now appears committed to tilting the field in favor of business, at the expense of the individual.

3. *Fear of Lawsuits*

Assertion:

PPI claims that the “new frontier” of liability has resulted in reduction of services and other socially worthwhile activity due to a fear of lawsuits.⁷⁷ Two of the more egregious instances alleged are that people no longer volunteer to manage children’s sports activities, due to the fear that they will be sued “personally over matters as trivial as who got to play on which team,”⁷⁸ and that employers are placed in a bind with respect to giving references for departing employees, because the employer will get sued if a truthful, negative recommendation is given. However the employer will also get sued if no recommendation is given.⁷⁹

Analysis:

The flaws in the overheated “analysis” by PPI of the evils foisted on society by the tort system are amply indicated by the two examples cited. Both are based on patently false statements of the law. The supposed threat of liability faced by volunteers is in fact non-existent. As to the litigation concerns of volunteers, Congress enacted the Volunteer Protection Act of 1997,⁸⁰ which immunizes volunteers for non-profit or governmental entities from liability for ordinary negligence.⁸¹ So PPI’s assertion on this point is nothing but a scare tactic designed to stir up lawmakers and the public.

The assertion that employers are in an impossible position with respect to employee references is also insupportable. Under New York law, an employer cannot be held liable for giving a reference about an employee unless the employee proves that the employer maliciously libeled the employee.⁸² Simply put, if the information is truthful there can be no liability.⁸³

77. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 9.

78. *Id.* at 9-10.

79. See *id.*

80. 42 U.S.C. §§ 14501-05 (1997).

81. See *id.*

82. See *Liberma v. Gelstein*, 605 N.E.2d 344, 348 (N.Y. 1992).

83. See *id.*

Even if the information is false, the employer is not liable unless the employee can prove that the employer was malicious.⁸⁴ Presumably, even PPI has no interest in protecting employers who wish to injure their former employees by transmitting information they know to be false. Once again, PPI's assertion that the tort system has harmful effects on societal conduct is nothing but a scare tactic.

Is it not true, though, that some businesses, people and even governments, often refuse to conduct certain activity out of a fear of tort liability? Certainly that is true. Indeed, the very reason for a tort system of recovery is to discourage careless conduct and encourage safety. Even PPI cannot say that this is a bad thing. The threat of tort liability has made products and conditions far safer than they otherwise would be. Playgrounds have installed padded surfaces to protect against injury to children⁸⁵ and children's sleepwear fabric is now flame-retardant.⁸⁶ Lawsuits have led to improved practice in hospitals and improved security in public buildings.⁸⁷

The common knowledge that the threat of tort liability has made products and conditions safer is supported by empirical evidence as well. Joanne Doroshow reports that the Conference Board, a business-funded research organization, surveyed the risk managers of more than two hundred major corporations.⁸⁸ The Board concluded that a notable impact of product liability is that "products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit."⁸⁹ Similarly, the Consumer Federation of America has reported that "approximately 6,000 deaths and millions of injuries have been prevented on an annual basis now because of product liability and other forces toward greater safety in our society."⁹⁰

In sum, the fear of tort liability does not lead to defensive activity *contrary to society's interests*. Rather, it leads to a safer

84. See *Foster v. Churchill*, 665 N.E.2d 153 (N.Y. 1996).

85. See DOROSHOW, *supra* note 12, at 19.

86. See *id.*

87. See *id.*

88. See *id.*

89. *Id.*

90. DOROSHOW, *supra* note 12, at 19 (quoting Testimony at Senate Subcommittee on Consumer Rights, September 23, 1993).

society for everyone. Conversely, any further limitations on tort liability will undoubtedly lead to unsafe practices, injury and even death. As an MIT research team has concluded, the tort system is "the most significant mechanism to keep risk aversion in the market."⁹¹ When the risk of liability is more and more remote, it makes economic sense that businesses will take greater and greater risks with our safety, in order to make a profit.⁹²

4. *Disincentives to Innovation*

Assertion:

PPI claims that product liability suits have caused many companies to shy away from development of new and innovative products and procedures.⁹³ PPI asserts that new and better products are not being marketed because businesses are afraid of lawsuits.⁹⁴ It states that "[t]he chilling effects of liability lawsuits and mushrooming insurance costs have been especially dramatic in the pharmaceutical field."⁹⁵ Also, fear of liability gives rise to defensive medicine, where physicians "think legally, not clinically."⁹⁶

Analysis:

If the civil justice system stifled innovation as asserted by PPI, one would expect a dearth of new products from manufacturers, especially pharmaceutical companies. Yet this is clearly not the case. In a 1991 *U.S. News and World Report* article, five firms were highlighted as "beating up foreign competitors as they slug their way to the global marketplace."⁹⁷ Four of the five

91. *Id.* at 20.

92. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) (noting the connection between the risk of liability and a corporation's interest in promoting safety).

93. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 11-12.

94. See *id.*

95. *Id.* at 12.

96. *Id.* at 11-13.

97. Eva Pomice & Warren Cohen, *The Toughest Companies in America*, U.S. NEWS & WORLD REP., Oct. 28, 1991, at 65. This article, and other evidence indicating that product innovation is not stifled by the tort system, is well-developed by DOROSHOW, *supra* note 12, at 15-17.

companies make drugs and medical equipment.⁹⁸ One of the companies highlighted was Pfizer, Inc., a New York-based pharmaceutical firm.⁹⁹ The article states that "Pfizer's marketplace victories ultimately stem from massive research investments," and noted that Pfizer put \$3.5 billion into new product development in the previous ten years.¹⁰⁰ The article concluded that Pfizer's new product lines accounted for 42% of sales, up from 13% only two years earlier.¹⁰¹ This profile is hardly consistent with PPI's vision of major companies scared away from innovation due to fear of liability suits. And it is notable that the article was written well before major new drugs like Viagra hit the market.

PPI tries to make something out of the fact that manufacturers have withdrawn from the market for vaccines for childhood diseases.¹⁰² But this cannot be due to liability concerns. Compensation for any vaccine-related injury was taken out of the tort liability system by Congress in 1986.¹⁰³ Under the National Childhood Vaccine Injury Act,¹⁰⁴ a family with a child injured by a vaccine must bring the claim before a Special Master, and there are substantial damage caps on recovery (a limit of \$250,000 for pain and suffering or death).¹⁰⁵ The severe limitations on recovery are not unlike those proposed by PPI for *all* lawsuits – making it disingenuous to argue that fear of liability has led to disincentives in the vaccine industry.

Professor Marc Galanter, a respected expert in empirical research on the civil justice system, states that the charges of reduced innovation are completely unfounded:

The facts do not support the alleged innovation-liability link. R&D-to-sales ratios for all industries increased rather substantially during the 1980s. . . . Significantly, that ratio more than doubled in the drug industry, where product liability suits have been especially prevalent. Both the industry-wide and pharma-

98. See Pomice, *supra* note 97.

99. See *id.*

100. See *id.*

101. See *id.*

102. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 13.

103. See 42 U.S.C. § 300aa (1997).

104. See *id.*

105. See *id.*

ceutical-specific trends are inconsistent with claims that liability fears have dampened innovative activities.¹⁰⁶

W. Kip Viscusi and Michael J. Moore are two respected researchers who also conclude that liability lawsuits do not stifle the development of better and safer products.¹⁰⁷ They stress an important point that PPI, in its advocacy, misses: that some products, new and old, are in fact unreasonably dangerous, and “the product liability system *should* force some firms and products out. Similarly, medical malpractice liability *should* weed out incompetent physicians who are inflicting substantial injuries on their patients. Society should not cap damages and restrict product liability simply because some costs are being imposed. The real question is whether these costs are justified given the trade-offs that are involved.”¹⁰⁸

Based on an empirical study of industries, including a survey of CEO's, Viscusi and Moore found that liability law “led to much more substantial actions to improve product safety. Actual experiences led to improvements in the safety of particular products (35%), a restructuring of the product mix to have a safer product line (33%), and improved product usage and warnings (47%).”¹⁰⁹ Based on an econometric model, the scholars concluded that “product liability has a positive effect on innovation.”¹¹⁰ This is because liability law has the salutary effect of encouraging the development of safer products.¹¹¹ Hopefully PPI is not griping about the disincentives imposed by liability lawsuits on the development of *unsafe* products.

As to development of safe products, PPI's assertion of “stifled innovation”¹¹² is simply without basis. PPI's assertions about the existence and cost of “defensive medicine” are simply that – assertions, without any factual basis set forth or even

106. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1147 (1996) [hereinafter Galanter, *Real World Torts*] (citing Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in TORT LAW AND THE PUBLIC INTEREST 127, 145 (Shuck ed. 1991)).

107. See W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovations*, in TORT LAW AND THE PUBLIC INTEREST 105 (Shuck ed. 1991).

108. *Id.*

109. *Id.* at 114-15.

110. *Id.* at 123.

111. See *id.* at 110.

112. PUBLIC POLICY INSTITUTE, *supra* note 1, at 11-12.

alluded to.¹¹³ The actual studies that have been conducted have found little or no evidence of "defensive" medicine, but a good deal of evidence of "safe" medicine in response to liability concerns.¹¹⁴

For example, the Office of Technology Assessment ("OTA") has analyzed existing studies and supplemented them with a national survey of cardiologists, surgeons, and obstetrician/gynecologists to determine whether these doctors use unnecessary procedures due to fear of liability.¹¹⁵ The OTA concluded that "[i]n the majority of clinical scenarios used in OTA's and other surveys, respondents did not report substantial levels of defensive medicine, even though the scenarios were specifically designed to elicit a defensive response."¹¹⁶ Importantly, OTA observed that with a reduced malpractice signal, there could be a reduction in *beneficial* defensive medicine.¹¹⁷ This is a recognition that the tort liability system encourages *necessary* safety practices, that could be ignored if liability laws are changed.

The respected researcher Patricia M. Danzon makes a similar point in her extensive study of medical practices.¹¹⁸ She concludes that the comprehensive data of medical testing procedures "do not show that malpractice has induced an increase in laboratory tests and X-rays, which are often viewed as the primary forms of defensive medicine."¹¹⁹ She noted that some doctors discontinued certain high-risk procedures, but that this response "was more common for generalists than for board-certified specialists and more common for older physicians."¹²⁰ In other words, the risk of liability for conducting high-risk procedures resulted in more specialization; those procedures were shifted to more highly qualified physicians. Professor Danzon concluded that "the pattern of increased referrals

113. *See id.* at 13.

114. *See* OFFICE OF TECHNOLOGY ASSESSMENT, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE, 103d Cong. 56 (1994).

115. *See id.* at 44-46.

116. *Id.* at 43-46.

117. *See id.* at 22-23 (emphasis added).

118. *See* Patricia M. Danzon, *Malpractice Liability: Is the Grass on the Other Side Greener?*, in TORT LAW AND THE PUBLIC INTEREST 176, 176 (Schuck ed. 1991).

119. *Id.* at 192.

120. *Id.* at 194.

to more technically qualified physicians is consistent with a reduction in injury risk."¹²¹

Part of the "defensive medicine" mantra is that obstetricians unnecessarily opt for cesarean delivery. However, a study of obstetrician practices published in the *New England Journal of Medicine* found no relationship between cesarean delivery and the "physician's recent medicolegal experience."¹²² Additionally, researchers found no association between the malpractice experience or exposure of individual physicians and the higher use of prenatal resources or cesarean deliveries for the care of low-risk obstetric patients.¹²³ The study "provides no evidence for the practice of defensive medicine in low-risk obstetrics."¹²⁴

5. *Reduced Competitiveness*

Assertion:

PPI asserts that tort costs leave New York companies and workers at a competitive disadvantage in the international market.¹²⁵ It relies on surveys conducted by business groups, which appear to indicate that business respondents believe that the liability system has a negative effect on business.¹²⁶

121. *Id.* at 195. See also Michael Trebilcock et al., *Malpractice Liability: A Cross-cultural Perspective*, in *TORT LAW AND THE PUBLIC INTEREST* 205 (Schuck ed. 1991). The authors contend that claims of "defensive medicine" are largely based on polls of doctors, and that these polls are unreliable, because they are

biased both in the selection of respondents and in the answers provided: it is presumably those most concerned about medical malpractice who take the time to return questionnaires, and their responses are undoubtedly influenced by the very fact of being asked to comment on the effect of liability on their practices.

Id. at 220. The authors also conclude that the liability system's benefits far outweigh the costs of any possible defensive medicine, because the data indicate that fear of liability "suggests two system impacts for which the benefits of practice changes probably outweigh the costs: physician communication to patients about treatment risks and alternatives, and hospital risk management programs." *Id.* at 231.

122. Gregory L. Goyert et al., *The Physician Factor in Cesarean Birth Rates*, 320 *NEW ENG. J. MED.* 706, 706 (1989).

123. See *id.*

124. Laura-Mae Baldwin et al., *Defensive Medicine and Obstetrics*, 274 *J. AM. MED. ASS'N* 1606, 1610 (1995).

125. See *PUBLIC POLICY INSTITUTE*, *supra* note 1, at 14.

126. See *id.* at 14-15.

Analysis:

A quick look at the economy belies the assertion that New York or American businesses are losing their competitive edge due to the liability system. The economy is clearly healthy, especially the economy in New York. The president of the Business Council of New York State has written that "economic trends in the Empire State are among the strongest in the country"¹²⁷ and has noted that in 1995 and 1996, "manufacturing investment in the state grew 33%, to more than \$10 billion."¹²⁸

Besides the obvious indicators in the economy, many studies have shown that American liability laws have little or no effect on the ability of American businesses to compete.¹²⁹ The OTA has found that the greatest influence on competitiveness is capital costs.¹³⁰ The OTA report did not even mention liability laws as a factor.¹³¹ The 1987 report of the Conference Board (a research arm of the business community) concludes that liability laws do not have a substantial negative effect on competitiveness.¹³² The Conference Board concluded that

the impact of the liability issue seems far more related to rhetoric than to reality. . . . For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention. Liability lawsuits, which are indeed numerous, are overwhelmingly settled out of court, and usually for sums that are considered modest by corporate standards.¹³³

Reviewing the available data on the effect of liability of foreign trade competitiveness, Robert Litan, of the Brookings Institution and a co-author of Peter Huber, estimates that the net cost to business of tort liability is at most 2% of the cost of all products and services sold in the United States.¹³⁴ Because this

127. Daniel B. Walsh, *Empire State's Strength*, N.Y. TIMES, Sept. 4, 1998, at A22.

128. *Id.*

129. OFFICE OF TECHNOLOGY ASSESSMENT, *COMPETING ECONOMIES: AMERICA, EUROPE, AND THE PACIFIC RIM* 3-7 (1991).

130. *See id.*

131. *See id.*

132. *See* DOROSHOW, *supra* note 12, at 17 (citing NATHAN WEBER, CONFERENCE BOARD, *PRODUCT LIABILITY: THE CORPORATE RESPONSE REPORT* No. 893 v (1987)).

133. *Id.*

134. *See* Litan, *supra* note 106, at 128.

cost is so relatively small, Litan concluded that it is "highly unlikely" that tort liability costs have any effect on American competitiveness with foreign business.¹³⁵ Litan observes that "[I]t is not surprising that there is little connection between liability costs and export performance by industry"¹³⁶ because differences in risk costs are "rather minor"¹³⁷ and are easily outweighed in importance by other effects, such as changing energy costs.¹³⁸ He also notes that "foreigners may be willing to pay for the added safety that may be built into U.S.-produced goods as a result of the deterrence features of our tort system."¹³⁹

PPI asserts that the supposedly higher tort costs in New York will cause New York to lose businesses and jobs to other states and countries where the liability laws are more pro-business.¹⁴⁰ But the liability climate has never been found to be a significant factor for businesses deciding where to locate.¹⁴¹ Joanne Doroshow points to a 1993 survey conducted by the National Federation of Business, which found that the major reason given by businesses leaving New York for their relocation is the comparative tax savings, either a lower corporate income tax in the destination location, or greater tax abatements, etc.¹⁴² Doroshow found this study consistent with a study of business executives conducted by Louisiana, which concluded that "there is no evidence of any relationship at all between the tort law of a state and that state's relative attractiveness as a place to do business."¹⁴³ The conclusion that tort laws are unrelated to business location decisions is also consistent with studies determining that physicians do not consider liability laws material in deciding where to practice.¹⁴⁴

135. *See id.*

136. *Id.* at 143.

137. *Id.*

138. *See id.*

139. Litan, *supra* note 106, at 128.

140. *See* PUBLIC POLICY INSTITUTE, *supra* note 1, at 27.

141. *See* DOROSHOW, *supra* note 12, at 18.

142. *See id.* at 17.

143. *Id.* at 18.

144. *See* Galanter, *Real World Torts*, *supra* note 106, at 1152 (discussing studies, including a study conducted in Indiana finding that an influx of doctors did not occur after tort reform, even though the reforms were specifically designed to increase the population of doctors).

6. *Municipal Liability and Anecdotal Evidence*

Assertion:

PPI claims that lawsuits against municipalities, especially New York City, are completely out of control.¹⁴⁵ Anecdotes of outrageous rewards indicate that juries believe "that the city's pockets not only are deep, but bottomless."¹⁴⁶ Suing the city has given rise to a cottage industry for lawyers, in the form of a corporation established by trial lawyers "to catalog holes, uneven slabs, and other sidewalk irregularities for which the city can be held liable."¹⁴⁷

Analysis:

To hear PPI tell it, it would seem that municipalities never do anything wrong and that all suits against them are for trivial or trumped-up matters that should not be brought into the courts. In fact municipalities, and New York City in particular, are often responsible for serious dangers and injuries.¹⁴⁸ For example, the New York City Comptroller has warned about the dangers to citizens from the City's crumbling infrastructure.¹⁴⁹ Medical malpractice in city hospitals is alarmingly high, according to the Comptroller's Annual Claims Report for 1997.¹⁵⁰ In sum, cities create significant risks to their citizens, risks that must be regulated by the system of tort liability.

PPI asserts that venal trial lawyers have targeted the City of New York by creating the Big Apple Pothole Corporation to catalog grounds for highway and sidewalk-related lawsuits.¹⁵¹ However this is a complete misrepresentation of the facts, and ignores the reason why such a watchdog corporation was made necessary. In highway or sidewalk cases, New York law makes it especially difficult for plaintiffs to recover because of the enactment of so-called "pothole laws."¹⁵² These laws require that a

145. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 1.

146. *Id.* at 15.

147. *Id.* at 14-16.

148. See generally DOROSHOW, *supra* note 12, at 13.

149. See NEW YORK CITY OFFICE OF THE COMPTROLLER, DILEMMA IN THE MILLENNIUM (1998), noted in DOROSHOW, *supra* note 12, at 9.

150. See DOROSHOW, *supra* note 12, at 9.

151. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 14.

152. See, e.g., N.Y. CITY ADMIN. CODE, § 7-201(c)(2).

municipality must receive *written notice* of a dangerous condition *before* an accident occurs or otherwise the municipality cannot be held liable.¹⁵³ Thus, if not for organizations like the Big Apple Pothole Corporation, innocent victims would have no means of recovery if they were unlucky enough to suffer the first injury from a dangerous condition. That would be so even if the condition were open and obvious to the municipality, because written notice is, for some reason, an irreducible requirement for finding municipal liability. Far from engaging in harassment of cities, trial lawyers are simply protecting the interests of citizens by giving the city the notice required by law.

Another prong of PPI's attack is based on a description of "horror cases" where plaintiffs apparently received outrageous judgments for minimal or no injuries.¹⁵⁴ Of course, anecdotal evidence, even if correctly reported, is no basis for changing a system that processes thousands of cases per year. Professor Michael Saks has noted the dangers of relying on anecdotal evidence as a basis for legal change:

The trouble with legislation by anecdote is not just that some of them are false or misleading. Even if true and accurate, anecdotes contribute little to developing a meaningful picture of the situation about which we are concerned. It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, one, ten, one hundred, or one thousand equal and opposite injustices are done to innocent plaintiffs. The proportion of cases that results in one or the other error, and the ratio of one kind of error to the other, ought to be of greater interest to serious policy-makers than a handful of anecdotes on either side of the issue. Reforms are intended to change that ratio and the tens of thousands of anecdotes the ratio summarizes.¹⁵⁵

We do not allow experts to testify at a trial that a toxic substance causes cancer, if the sole basis for the conclusion is the expert's reliance on anecdotal evidence.¹⁵⁶ Why would we dis-

153. *See id.*

154. These horror stories are found in PUBLIC POLICY INSTITUTE, *supra* note 1, at 14-16.

155. Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - and Why Not?* 140 U. PA. L. REV. 1147, 1162 (1992).

156. *See* Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 720-21 (1998).

mantle the entire system of tort recovery on the basis of a few anecdotes?

Reliance on anecdotes such as those used by PPI is particularly unwise where the system-wide evidence indicates that verdicts are not in any sense "out of control." For example, in 1997, there were about 30,000 cases filed against the City of New York,¹⁵⁷ according to the New York City Comptroller's Annual Claims Report, Fiscal Year 1997. Out of all of these claims, there were only eleven cases in which the City was required to pay more than \$2.5 million.¹⁵⁸ All of these cases involved severe injuries such as extensive brain damage, blindness, and paraplegia.¹⁵⁹

What's more, the anecdotes used by PPI are largely fictitious. Many are only loosely based on actual fact. Most do not tell the reader that the allegedly outrageous verdict was substantially reduced on either post-trial motion or appeal. The use of these "urban legends" is simply a scare tactic to create a false impression that the system is awash with frivolous lawsuits and juries that are out of control.¹⁶⁰

The urban legends relied upon by PPI are clouded in mystery, because PPI does not bother to cite any cases by name. However, research has uncovered some of these cases, and indicates that PPI's rendition of the particular "urban legend" has little basis in reality.¹⁶¹

157. See DOROSHOW, *supra* note 12, at 10.

158. See *id.*

159. See DOROSHOW, *supra* note 12, at 10. The *New York Times* reports: "In New York City, . . . 29,835 new [tort] claims were filed in 1997. In the same year 38 cases were resolved for \$1 million or more, representing 26 percent of the total paid out that year. The plaintiffs were found to have major injuries like paralysis and brain damage as a result of accidents with city vehicles and of malpractice at city hospitals." See Glaberson, *supra* note 3, at 6.

160. See 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*, 31 UCLA L. REV. 4, 65 (1983) (noting that business interests often repeat unsubstantiated or incomplete stories of certain verdicts, and eventually these litigation horror stories rise to the level of "urban legends"). See also Galanter, *An Oil Strike in Hell*, *supra* note 15 (analyzing, and debunking, some of the contemporary legends of outrageous plaintiff verdicts, including "the best known contemporary legend, the McDonald's coffee case").

161. See DOROSHOW, *supra* note 12, at 10-13 (debunking PPI's own "urban legends").

For example, PPI cites a Bronx jury's award of \$4.2 million to a woman who "slipped on a snowy sidewalk and damaged a knee joint while chasing her dog."¹⁶² This appears to be a take-off on the facts of *Ferguson v. City of New York*.¹⁶³ In *Ferguson*, the plaintiff slipped on an icy sidewalk in front of City property, that had not been cleared in over two snowfalls, despite notice to the City.¹⁶⁴ The plaintiff suffered a severe knee injury, and had to have her knee reconstructed. She now walks with a limp.¹⁶⁵ Most importantly for the power of the urban legend, the trial judge cut the verdict in half in a post-trial ruling.¹⁶⁶

PPI cites the case of a "subway mugger preying on the elderly" who was awarded \$4.3 million for being shot as he was fleeing the crime scene.¹⁶⁷ This tale is based on *McCummings v. New York City Transit Authority*.¹⁶⁸ The jury in that case found that the officer shot the plaintiff in the back, and that the plaintiff was unarmed.¹⁶⁹ This was in violation of a clear ruling of the United States Supreme Court prohibiting the use of deadly force on unarmed suspects fleeing the scene of a theft.¹⁷⁰ Moreover, the jury verdict may well have been affected by the officer's implausible account that the fleeing plaintiff was actually charging the officer when the officer shot him in the back.¹⁷¹

PPI cites the supposed case of a Bronx jury that awarded \$6 million to the family of "a drunk who fell in front of a subway train, finding him wholly without blame."¹⁷² In the actual case, *Clarke v. New York City Transit Authority*,¹⁷³ the trial judge reduced the verdict to \$1 million.¹⁷⁴ Then, on appeal, the Appellate Division reversed the entire judgment because the trial

162. *Id.* at 10.

163. *See id.* (citing *Ferguson v. City of New York*, No. 7745/89, Bronx Co. Sup. Ct.).

164. *See id.* at 10-11.

165. *See id.*

166. *See id.* at 11.

167. *See* PUBLIC POLICY INSTITUTE, *supra* note 1, at 15.

168. 613 N.E.2d 559 (N.Y. 1st Dep't 1993).

169. *See* DOROSHOW, *supra* note 12, at 11.

170. *See* *Tennessee v. Garner*, 471 U.S. 1 (1985). *See also* DOROSHOW, *supra* note 12, at 11.

171. *See* DOROSHOW, *supra* note 12, at 11.

172. PUBLIC POLICY INSTITUTE, *supra* note 1, at 15.

173. 580 N.Y.S.2d 221 (1st Dep't 1992).

174. *See* DOROSHOW, *supra* note 12, at 11.

judge had wrongly excluded evidence that could have proved that the plaintiff was at fault in falling off the tracks.¹⁷⁵ In other words, the jury that supposedly found the plaintiff "wholly without blame" was never given any evidence that the plaintiff had acted carelessly.

PPI also cites a case in which "the height of absurdity is reached"¹⁷⁶ when a jury in a medical malpractice action awarded \$27 million to the injured patient, "and another \$6 million to the members of his family, who hadn't even sued."¹⁷⁷ In the actual case, a teenager was injured from a fall and was then rendered a quadriplegic due to lack of care and maltreatment at a city hospital.¹⁷⁸ By the time of the verdict, the plaintiff was in his thirties, confined to a wheelchair, and suffering from excruciating pain, kidney failure, and various infections.¹⁷⁹ The trial judge reduced the verdict from \$27 million to \$11 million, and \$6 million of that latter figure was designated recovery for future custodial care of the plaintiff.¹⁸⁰ Such an award is not a "payment" to the members of the family, but rather a payment to the plaintiff himself, in order to defray some of the expenses caused by the hospital's gross negligence.¹⁸¹

PPI describes a \$650,000 verdict against New York City in the case of a drunk driver, who collided with another car while traveling the wrong way on the Hutchinson River Parkway.¹⁸² The jury granted recovery even though, according to PPI, it was entirely possible that the driver failed to heed obvious warning signs.¹⁸³ In the actual case, *Torelli v. City of New York*,¹⁸⁴ the Appellate Division declared that the evidence at trial "showed that wrong-way access to the Parkway via the Baychester Avenue exit could easily be had by way of a simple right turn" from a local street.¹⁸⁵ Although such a turn would, of course, be haz-

175. See *Clarke*, 580 N.Y.S.2d at 225-26.

176. PUBLIC POLICY INSTITUTE, *supra* note 1, at 15.

177. *Id.*

178. See DOROSHOW, *supra* note 12, at 11 (discussing *Ebert v. New York City Health and Hospitals Corp.*, No. 13075/77, Kings Co. Sup. Ct.).

179. See *id.*

180. See *id.*

181. See *id.*

182. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 15.

183. See *id.*

184. 574 N.Y.S.2d 5 (1st Dep't 1991).

185. DOROSHOW, *supra* note 12, at 12.

ardous, the City had failed to place any "Do Not Enter" signs on the ramp and, to compound the danger, the City had placed a number of "No Parking" signs "located so that they faced oncoming wrong way traffic, which would imply to a driver that he was headed in the correct direction."¹⁸⁶ Indeed, the City did not even dispute, on appeal, that its carelessness had created a dangerous situation.¹⁸⁷ The City simply argued that the driver must have used a different exit.¹⁸⁸ Yet there was substantial evidence that the driver had actually used the dangerous exit to enter the Parkway the wrong way.¹⁸⁹ Thus, when the true facts of the case are known, this is not an outrageous verdict at all; rather it is an instance of compensation for an innocent driver who was placed at risk and injured due to the City's carelessness. Moreover, PPI ignores the fact that the verdict was reduced by the appellate court to \$250,000.¹⁹⁰

Finally, PPI describes a case in which the Saratoga County town of Greenfield was supposedly bankrupted by a \$3.7 million verdict in favor of a man who fractured his spine while riding a toboggan down a town-owned hill.¹⁹¹ However PPI fails to note two important facts. First, the trial court reduced the award by a third.¹⁹² Second, the town board ignored warnings from a Highway Superintendent that the hill was poorly maintained, and that children were "flying down the hill and being thrown from their sleds and bruised."¹⁹³

The president of PPI, David Shaffer, was asked by the New York Times to respond to the charges that PPI had misrepresented the cases set forth in its "parade of horrors" argument. Mr. Shaffer is quoted as responding that "[i]t is impossible to include complete information about everything."¹⁹⁴ It is not impossible to include information that verdicts have been substantially reduced or overturned. And is not impossible to accurately state the facts of a reported case. The goal of PPI

186. *Id.*

187. *See id.*

188. *See id.*

189. *See id.*

190. *See Torelli*, 574 N.Y.S.2d at 5.

191. *See Sena v. Town of Greenfield*, 696 N.E.2d 996 (N.Y. 1998).

192. *See DOROSHOW*, *supra* note 12, at 12.

193. *Id.*

194. Glaberson, *supra* note 3.

appears to be to throw a bunch of fictional litigation stories into the public fray, to see what sticks. The accusation always sticks in the public mind, long after the rebuttal is forgotten.

The Phenomenon of Undercompensation of Victims

PPI's misleading anecdotal evidence lies in stark contrast with compelling evidence that victims with extremely serious injuries are being *undercompensated*. As discussed above, the average plaintiff's verdict in New York in all tort cases, according to New York Jury Verdict Reporter, is not in the millions, but it is approximately \$50,000. The portion of tort recoveries attributable to "pain and suffering" has been steadily decreasing.¹⁹⁵

Scholars investigating jury verdicts have noted a marked underpayment in cases where plaintiffs suffer major damages; this includes an insurance industry study concluding that claimants with more than \$1 million of legitimate economic loss are awarded an average of only fifty-eight cents on the dollar by juries.¹⁹⁶ Summarizing the many studies concerning loss replacement rates for product liability, the economist W. Kip Viscusi states that "the common belief that product liability awards lead to windfall gains is erroneous The actual value of court awards and settlements is . . . often less than the actual losses suffered by the victim."¹⁹⁷ Viscusi concluded that those with losses of over \$1 million recover only .05% of their total losses, economic and otherwise.¹⁹⁸ A recent study of medical malpractice awards found that every 1% increase in actual loss resulted only in an additional .01% to .02% increase in

195. See Galanter, *Real World Torts*, *supra* note 106, at 1123; David Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 305 (1989) ("In the cases after 1940, conscious pain and suffering averaged a fairly consistent 22% of the award, whereas for the years prior to 1940, it averaged 37% of the total award.").

196. See LAWRENCE W. SOULAR, RESEARCH DEP'T, ALLIANCE OF AMER. INSURERS, A STUDY OF LARGE PRODUCT LIABILITY CLAIMS CLOSED IN 1985, at 18 (1986). The findings that victims with major injuries are undercompensated is confirmed by a study of verdicts rendered in Franklin County, Ohio. See Merritt & Barry, *supra* note 23, at 315 (1999).

197. W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 95-96 (1989).

198. See *id.* at 96.

awards.¹⁹⁹ Another study of verdicts in an urban county concludes that plaintiffs with serious injuries, including death, fare less well at trial.²⁰⁰

As to settlements, the evidence again indicates undercompensation: more than 90% of tort actions settle out of court, and on average tort claims settle for 74% of their potential recovery.²⁰¹ Given the prevalence of statistics showing undercompensation of innocent victims rather than windfall recoveries, PPI's use of inaccurate horror stories is nothing short of irresponsible.

7. *The Scaffold Law*

Assertion:

PPI assails § 240 of the New York Labor Law, also known as the "Scaffold Law."²⁰² The Scaffold Law imposes a nondelegable duty to provide certain protections to reduce the chance of accidents that might occur due to elevation-related risks.²⁰³ PPI argues that trial lawyers have exploited the Scaffold Law as a "Safe Place to Sue Law."²⁰⁴ PPI claims that a construction contractor or construction site owner faces absolute liability, "even if the worker is injured after disregarding a safety warning, or after consuming alcohol or using drugs."²⁰⁵

Analysis:

The Scaffold Law holds owners and contractors liable for injuries to construction workers caused by their failure to provide certain important safety devices, such as sturdy ladders, safety belts, and the like.²⁰⁶ The Legislature recognized that

199. See Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997, 1019 (1990).

200. See Merritt, *supra* note 23, at 339-40. The authors note research indicating that "this kind of pattern derives from jurors' psychological defenses – jurors blame the victims of accidental harm when injuries are severe because they do not want to believe that such devastating injuries could happen to them." *Id.*

201. See Danzon, *supra* note 118, at 30.

202. PUBLIC POLICY INSTITUTE, *supra* note 1, at 6.

203. See *Gordon v. Eastern Ry. Supply, Inc.*, 626 N.E.2d 912, 914 (N.Y. 1993).

204. PUBLIC POLICY INSTITUTE, *supra* note 1, at 16.

205. *Id.*

206. See *Gordon*, 626 N.E.2d at 914.

special risks arise when workers are working at an elevation.²⁰⁷ The Scaffold Law is designed to place the responsibility for workers' safety against elevation-related risks squarely on the owners and contractors rather than on the workers.²⁰⁸ This is hardly unreasonable since it is the owners and contractors, not the workers, who control the safety conditions at the site.

It would, of course, be unreasonable if, as asserted by PPI, workers could recover even if they were drunk or on drugs, or even if they disregarded a safety warning. This is definitely not the case. In recent years the New York courts have imposed substantial, reasonable limitations on the scope of the Scaffold Law. These limitations are conveniently ignored in the PPI report. For example, there is no liability if the worker defied safety orders.²⁰⁹ Moreover, courts have emphasized that the application of the Scaffold Law is called for "under only very limited circumstances;" that is, only where the worker suffers harm from a risk "related to elevation differentials."²¹⁰ For example, a worker seriously injured by falling debris was held not protected by the scaffold law, because none of the safety devices required by the statute (e.g., scaffolds, hoists, stays) would have made any difference, and the worker was not above the ground at the time of the accident.²¹¹

Likewise, in *Melo v. Consolidated Edison Co.*,²¹² a worker hit by a falling steel plate that was dropped from a backhoe at a construction site was held not entitled to the protection of the Scaffold Law, because both the plaintiff and the steel plate were on the ground when the injury occurred.²¹³ The court declared that the statute addresses only "special elevation risks."²¹⁴

207. See *Misseritti v. Mark IV Constr. Co.*, 657 N.E.2d 1318 (N.Y. 1995).

208. See *Gordon*, 626 N.E.2d at 914.

209. See *id.*

210. *Lawrence v. Finch Pruyn Co.*, 891 F. Supp. 75, 78 (N.D.N.Y. 1995).

211. See *id.*

212. 702 N.E.2d 832 (N.Y. 1998).

213. See *id.* at 833-34.

214. *Id.* See also *Maggi v. Innovax Methods Group*, 672 N.Y.S.2d 404, 406 (2d Dep't 1998) ("Labor Law section 240(1) is directed at elevation-related hazards only, and recovery under the statute is unavailable where the injury results from other types of hazards even if proximately caused by the absence of a scaffold or other required safety device."); *Curtis v. Halmar Corp.*, 672 N.Y.S.2d 409 (2d Dep't 1998) (no Scaffold Law liability where the plaintiff got on a ladder to put something up that he could have reached from the ground).

Thus, the scope of the Scaffold Law is quite limited. Owners and contractors are liable only if they refuse to provide safety equipment that is necessary to protect workers above the ground, and then only if the failure or absence of the safety equipment caused the injury.²¹⁵ Owners and contractors will not be liable if the worker ignores safety warnings or refuses to use safety equipment.²¹⁶ Furthermore, there is no liability under the Scaffold Law if the defendant can show that the worker's injury was the result of the worker being drunk or on drugs.²¹⁷

Surveying the recent case law developments on the Scaffold Law, Justice Andrew V. Siracuse has concluded that "what was once considered to be a form of absolute liability has now taken on the character of negligence."²¹⁸ Because of two defenses, proximate cause and a "recalcitrant worker" defense, the courts have aggressively employed to preclude liability under the Scaffold Law. Courts have used the proximate cause requirement to excuse liability when the worker was at fault.²¹⁹ In such cases, the accident is considered proximately caused by the worker's own negligence or wrongdoing.²²⁰ Similarly, the courts have been gravitating toward the position that a worker who is negligent has essentially refused to use the safety features provided, and therefore is a "recalcitrant worker" denied the protections of the Scaffold Law.²²¹ This developing case law has led Justice Siracuse to conclude that "recalcitrance has come to mean negli-

215. See *Melber v. 6333 Main Street*, 698 N.E.2d 933 (N.Y. 1998) (no Scaffold Law liability where the plaintiff tripped over a conduit while using stilts to put up a drywall; the stilts performed the function required of them – they allowed the plaintiff to safely complete his work on the drywall; no safety devices set forth in the statute could have prevented the injury).

216. See generally Hon. Andrew V. Siracuse, *In Scaffold Cases, Courts Are Moving from Absolute to Relative Liability*, N.Y.L.J., Mar. 10, 1999, at 1 [hereinafter *Scaffold Cases*].

217. See *Kijak v. 330 Madison Ave. Corp.*, 675 N.Y.S.2d 341 (1st Dep't 1998) (no liability where defendant proves that the worker's alcohol or drug impairment was the proximate cause of his injuries).

218. Siracuse, *Scaffold Cases*, *supra* note 216, at 1.

219. See *id.*

220. See *id.* at 1 (noting that in recent Scaffold Law cases "it is hard to see how the proximate cause issue can be distinguished from a back-door reintroduction of comparative negligence").

221. See Hon. Andrew V. Siracuse, *Defense of Contributory Negligence Has Returned to Scaffold Law Cases*, N.Y.L.J., May 10, 1999, at 1.

gence" and that the "paradoxical result of lowering the threshold of recalcitrance is that Scaffold Law plaintiffs, once the most favored in law, are becoming the most severely penalized for their own negligence."²²² Thus, PPI's overheated analysis of the Scaffold Law is simply incorrect.

8. *The No-Fault Law*

Assertion:

The New York no-fault law is designed to minimize litigation of automobile accidents by providing for the automatic reimbursement of damages by insurers, in exchange for which policyholders are denied the right to sue unless they have suffered "serious injury."²²³ PPI asserts that plaintiffs' lawyers and compliant courts have expanded the "serious injury" exception so that now virtually anyone involved in an accident can claim a "serious injury" and thereby get out from under the no-fault restriction.²²⁴

Analysis:

There is simply no basis in the case law for concluding that the "serious injury" exception to the no-fault rule is being diluted or evaded. The New York courts have been quite vigilant in scrutinizing plaintiffs' claims of serious injury, and in rejecting such claims where the injuries are minor or insufficiently proven. The cases rejecting claimed injuries that were not serious are legion. For example, in *Stowe v. Simmons*,²²⁵ the plaintiff suffered "from recurrent cervical and lumbosacral spine sprain and radiculitis with specified degrees of restriction of motion."²²⁶ This was held not sufficient to meet the "serious injury" threshold.²²⁷ Similarly in *Kern v. Ash*,²²⁸ the plaintiff suffered a cervical strain and substantial neck pain, and consistently complained of "persistent" pain.²²⁹ The Court held

222. *Id.* at 5.

223. N.Y. INS. LAW § 5102 (McKinney 1985).

224. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 16-17.

225. 676 N.Y.S.2d 638 (2d Dep't 1998).

226. *Id.* at 639.

227. See *id.*

228. See 676 N.Y.S.2d 296 (3d Dep't 1998).

229. See *id.* at 297.

that these injuries were not serious enough to pass the no-fault threshold.²³⁰ In *Curry v. Velez*,²³¹ the plaintiff lost four weeks of work after a car accident, suffered sporadic back pain, and testified as being permanently unable to lift heavy objects.²³² Yet this was held not to be "serious injury."²³³

Thus the serious injury threshold clearly has been set at a high level by the courts, in accordance with the terms of the no-fault statute. Moreover, the New York courts have required that the stringent standard must be met by strong, objective proof. Claims of serious injury supported only by the plaintiff's own complaints, by affidavits of attorneys, or by conclusory affidavits by doctors, are routinely found to be insufficient. Rather, the plaintiff must present recent objective medical evidence of a serious impairment.²³⁴

The only case cited by PPI as evidence that plaintiff's lawyers and compliant courts are evading the no-fault law is *Savage v. Delacruz*.²³⁵ PPI cites that case as one in which the plaintiff was permitted to sue for injuries as minor as a sprained ankle and scars on one knee.²³⁶ In fact, the plaintiff provided uncontroverted, objective medical proof that he walked with a limp as a result of the accident, and this limp was diag-

230. See *id.* at 298.

231. 663 N.Y.S.2d 63 (2d Dep't 1997).

232. See *id.* at 64.

233. See *id.* See also *Thousand v. Hedberg*, 672 N.Y.S.2d 579, 580 (4th Dep't 1998) (diagnosed cervical and lumbar strain does not meet serious injury standard); *Williams v. Ciaramella*, 673 N.Y.S.2d 186, (2d Dep't 1998) (permanent impairment of the shoulder is not serious injury).

234. See *Cabri v. Park*, 688 N.Y.S.2d 248, 249 (2d Dep't 1999) (medical reports not sufficient to prove serious injury where they were not based on a recent examination of the injured plaintiff). See also *Castano v. Synergy Gas Corp.*, 672 N.Y.S.2d 417, 418 (2d Dep't 1998) (affidavits are rejected where tailored to meet the statutory requirements); *Merisca v. Alford*, 663 N.Y.S.2d 853, 854 (2d Dep't 1997) (quoting *Antoniou v. Duff*, 612 N.Y.S.2d 430, 430 (2d Dep't 1994) ("Conclusions, even of an examining doctor, which are unsupported by acceptable objective proof, are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury."); *Rum v. Pam Transport, Inc.*, 673 N.Y.S.2d 178, 179 (2d Dep't 1998) (plaintiff's self-serving affidavit that he was kept out of work by his injury for six months did not meet the statutory requirements); *Castano v. Synergy Gas Corp.*, 672 N.Y.S.2d 417, 418 (2d Dep't 1998) (affidavits tailored to meet the statutory requirements are insufficient; plaintiff's subjective assertions of pain are not enough).

235. 474 N.Y.S.2d 850 (3d Dep't 1984).

236. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 17.

nosed as a permanent condition.²³⁷ The court noted also that the defendant did not bother to try to submit any competent proof that the plaintiff's injuries were not serious.²³⁸ The defendant relied only on conclusory assertions from insurance counsel, and unsworn conclusory affidavits of a defense doctor.²³⁹

Savage is hardly good authority for a general assertion that the serious injury standard has been eviscerated. Even weaker is PPI's assertion that "the loosening of the serious injury standard would appear to be the most plausible explanation for a significant jump in motor vehicle tort suits."²⁴⁰ First, it is clear that the serious injury standard has not been loosened. Second, a more plausible explanation for any rise in motor vehicle tort suits is the increasing unwillingness of insurance companies to pay claims. According to the Task Force on Automobile Insurance, empanelled by Assembly Speaker Silver, independent reports indicate that "several large insurance carriers have recently instituted an across-the-board policy of refusing to settle low-value injury claims, thereby forcing an increased number of lawsuits for recovery on claims which previously would have been settled quickly as a matter of course."²⁴¹ The report also notes that "many lawsuits would not be necessary if carriers handled claims in a timely manner."²⁴² The insurance industry is a far more likely culprit in any increase in automobile tort litigation than is the plaintiff's bar. Finally, the Office of Court Administration statistics indicate that filings in automobile cases have leveled off.²⁴³ Motor vehicle filings in both 1996 and 1997 hovered around the 42,000 mark, which can hardly be deemed out of reasonable range given the number of car accidents in New York.²⁴⁴

237. See *Savage*, 474 N.Y.S.2d at 852.

238. See *id.*

239. See *id.*

240. PUBLIC POLICY INSTITUTE, *supra* note 1, at 17.

241. SPEAKER'S TASK FORCE ON AUTO. INS., ASLEEP AT THE WHEEL 1994-1998: NEW YORK'S MOVE TO THE TOP OF THE LIST IN AUTO INSURANCE RATES 8 (1998).

242. *Id.* (citing Henry E. Strawn, Director of Insurance for the American Arbitration Association).

243. See DOROSHOW, *supra* note 12, at 25.

244. See *id.*

9. *The Crisis in Liability Insurance*

Assertion:

Relying on the Jones Commission report, PPI concludes that a surge in lawsuits has created a liability crisis that must be checked by imposing limitations on tort recovery.²⁴⁵

Analysis:

Subsequent research has shown that the assertions in the Jones Commission report were unfounded. Even the Jones Commission could not categorically state that the insurance "crisis" of the mid-1980s was caused by an increase in lawsuits and recoveries. The report notes the absence of research establishing a precise quantitative linkage between tort law changes and the availability and affordability of liability insurance.²⁴⁶ It states that no research currently available quantifies the linkage or even irrefutably establishes that such a linkage exists.²⁴⁷

In fact, the evidence now indicates that the insurance crisis was caused not by lawsuits, but rather by a cyclical downturn combined with questionable underwriting practices and a drop in interest rates. The cause of the insurance "crisis" has been well-described by Professor Eliot M. Blake, an expert on the insurance industry.

Like many industries, the insurance industry operates on a cycle. This cycle is fueled by interest rates because insurers use premiums to generate investment income. When interest rates are high, insurers underwrite risks at artificially low rates in order to increase investable cash flow, hoping the ultimate investment gains from the additional premiums offset the losses resulting from charging relatively bargain prices for insurance. This process is called "cash flow underwriting." Ultimately, rates are increased when the losses from the cut-rate insurance catch up with insurers. The pattern is three years of rate increases followed by three years of declining rates. Industry experts characterize the 1985 rate surge as a direct result of an unusually long six-year price cutting war in the industry. In that cycle, investment decisions were made based on the widespread but mistaken belief

245. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 19.

246. See JONES ET AL., *supra* note 24, at 12.

247. See *id.*

that high interest rates would stay high. As a result, investment gains were not substantial enough to overcome underwriting losses, and the resulting series of rate increases has been particularly severe.²⁴⁸

Even the president and chief executive officer of American International Group, Inc., a leading insurance company, has stated that the insurance industry's "crisis" was caused by price cuts "to the point of absurdity" in the 1980s.²⁴⁹ He also stated that the criticism of the tort system was simply an excuse for industry mismanagement.²⁵⁰ This is consistent with a 1986 report on the insurance industry by the National Association of Attorneys General, which declared that the available data indicate "that the causes of, and therefore the solutions to, the current crisis lie within the insurance industry itself."²⁵¹

Professor Mark Hager sums up the cries about the insurance crisis this way:

Insurance industry propaganda has often portrayed the "insurance crisis" as a deep threat to insurance profitability posed by excessive tort liability. Evidence suggests, however, that no "insurance crisis" of this sort really exists. Instead, insurance interests have blamed tort liability for intervals of poor profit actually stemming from other causes. They have meanwhile used the excessive liability notion to justify price hikes, coverage cutbacks, and legislative "tort reform." . . . The insurance industry did experience a profit crunch during the years 1981-1983 but, as industry studies themselves acknowledge, this crunch was not the result of expanded tort liability. . . . In the climate of high interest rates that prevailed in the late 1970s, insurers sought to expand their investment levels in order to capitalize on returns yielded by high interest rates. To generate investment capital, they maximized premium inflows by aggressively writing coverage. The competition for the coverage markets which generated premium inflows

248. Eliot M. Blake, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401, 411-12 (1988).

249. Statement of Maurice Greenberg, quoted in Greenwald, *Insurers Must Share Blame: AIG Head*, BUS. INS., Mar. 31, 1986.

250. See Hager, *supra* note 18.

251. Noted in DOROSHOW, *supra* note 12, at 33. See also Kenneth S. Abraham, *The Causes of the Insurance Crisis*, in NEW DIRECTIONS IN LIABILITY 54 (1988) (discussing studies indicating that the insurance crisis was more likely precipitated by the business practices of the insurance industry rather than abuses in the tort system).

led the insurance firms actually to slash premium prices. Profits then plummeted in the early 1980s as investments soured, at the same time that premium prices were at rock bottom. Insurers then scrambled to restore profitability through price hikes and cost cutting, including coverage cutbacks. By 1986, the industry was posting record-high profits.

The profit crunch of the early 1980s prompted insurance industry pressure on state regulators and legislatures; these pressures led to successful rate hikes and "tort reform" proposals. Some states apparently passed "tort reform" with the hope of alleviating upward insurance cost pressures supposedly exerted by runaway tort liability. In the aftermath, however, insurance studies now claim the new "tort reform" laws actually create no significant opportunities for rate cutting. Premium charges, industry studies now tell us, are scarcely affected by the liability payouts curbed in "tort reform" schemes. . . . Far from solving a public crisis in insurance rates, "tort reform" begins to look more like a windfall for insurers, paid for at the expense of tort victims.²⁵²

To put it simply, there is no liability-induced insurance crisis. PPI's contention that the recovery of innocent victims must be further limited in order to protect the insurance industry is completely without factual basis.

10. *The "Rising Tide" of Tort Claims and Tort Recoveries*

Assertion:

PPI claims that there is an explosion of tort litigation in New York, evidenced by a marked increase in filings.²⁵³ This explosion has allegedly led to wildly increased recoveries for tort plaintiffs and their lawyers.²⁵⁴

252. Hager, *supra* note 18, at 568 (citations omitted). See also *Insurance Industry Losses Questioned*, SAN DIEGO UNION-TRIBUNE, June 16, 1986, at A21, in which Rep. Peter W. Rodino (D. N.J.), stated that the House Judiciary Committee Subcommittee on Monopolies and Commercial Law had, in the course of investigating the causes of the insurance crisis, discovered that the liability insurance industry received far more in premiums than it paid out in claims. Congressman Rodino noted that this finding was "extremely significant" for policymakers considering the so-called insurance crisis, because it "raises the specter of price-gouging and bloated profits" since "carriers claim they pay out more than they take in."

253. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 28-35.

254. See *id.*

Analysis:

There has been no "explosion" of tort litigation in New York. The "statistics" relied upon by PPI are misleading and incomplete. PPI reports that the number of tort claims filed in New York courts rose from 53,104 to 84,809 during the period from 1988 to 1994.²⁵⁵ However, this bare statistic of tort filings ignores an important fact. In 1992, the legislature enacted new procedures for bringing a lawsuit in New York. Before that time, a lawsuit began by serving a summons and complaint on the adversary; no legal papers had to be filed in any court. A case was not filed, and therefore not counted in the statistics, until the plaintiff purchased an index number. Many, if not most, lawsuits were settled or abandoned before an index number was purchased. Since 1992, however, an index number must be purchased at the time the summons and complaint is served, and it is at that time that the filing is counted.²⁵⁶ Many claims that were not part of the tabulation (i.e., those settled or abandoned at an early stage in the process) before 1992 are now tabulated. Thus, given the change in the very system of how claims are tabulated, there is no way to tell from the bare figure cited by PPI whether tort claims are actually up, down, or constant.

It is also notable that PPI itself asserts that much of the rise in tort claims, if any, is caused by an increase in motor vehicle accident claims.²⁵⁷ As stated previously in this Essay, any increase in automobile accident filings is more likely caused by insurance company intransigence than by plaintiff litigiousness.

Nationwide statistics collected by the U.S. Department of Justice, Office of Justice Programs, and the National Center for State Courts dispel the myth of any kind of tort explosion.²⁵⁸ Tort litigation has been stable since 1986, and in relative de-

255. See *id.* at 30.

256. See N.Y. C.P.L.R. 306-a (McKinney 1992).

257. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 31-33.

258. See STEVEN K. SMITH ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: TORT CASES IN LARGE COUNTIES at 2 (1995). See also CAROL J. DEFANCES ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JUSTICE SURVEY OF STATE COURTS (1992).

cline since 1990.²⁵⁹ The rate of tort filings in New York, according to the National Center for State Courts, is about average when compared to the other states.²⁶⁰ For example, in New York Supreme Court in 1988, there were 181 tort filings for every 100,000 persons.²⁶¹ This was more than the 79 out of 100,000 in Utah, but less than the 280 out of 100,000 figure in Tennessee.²⁶² The Office of Court Administration figures indicate that filings in non-automobile tort cases in New York have actually gone down over the last three years, from 39,237 to 36,189.²⁶³

If we want to look anywhere for a "litigation explosion" we should look to mega-lawsuits between businesses. For example, the filing rate for business contracts cases in the state courts has risen 258% since 1960, while the rise in tort cases was less than half that figure.²⁶⁴ According to data from the National Center for State Courts, ten times as many contracts cases are filed as product liability and medical malpractice cases combined.²⁶⁵ In contrast, tort suits make up only 9% of state court filings.²⁶⁶

The assertion of a litigation explosion is remarkably at odds with the findings of virtually every empirical study of the civil justice system: that there are not too many claims, but rather *too few*.²⁶⁷ The vast majority of injured individuals never bring a claim.²⁶⁸ Professor Michael Saks sums it up this way:

One of the most remarkable features of the tort system is how few plaintiffs there are. A great many potential plaintiffs are never heard from by the injurers or their insurers. The first and most

259. *See id.*

260. *See Saks, supra* note 155, at 1206 (illustrating table setting forth data from the National Center for State Courts).

261. *See id.*

262. *See id.*

263. *See New York Office of Court Administration, Report on Case Filings* (1997) (on file with author).

264. *See Paul M. Barrett, Litigation Boom? Professor Turns Up a New Culprit*, WALL ST. J., Oct. 17, 1998, B1.

265. *See Saks, supra* note 155.

266. *See NATIONAL CENTER FOR STATE COURTS, COMPOSITION OF TORT FILINGS, GENERAL JURISDICTION TRIAL COURTS* (1991, 1992) (noting that the evidence "points to tort litigation growing more slowly than civil litigation generally").

267. *See Saks, supra* note 155, at 1183.

268. *See id.*

dramatic step in this process of nonsuits is the failure of so many of the injury victims to take measures to obtain compensation from those who injured them.²⁶⁹

Professor Saks' conclusions concerning underclaiming are supported by a remarkable wealth of data. For example:

- A "study of California medical malpractice found that at most only 10% of negligently injured patients [as determined by an independent board of review] sought compensation for their injuries. Even for those who suffered major, permanent injuries (the group with the highest probability of seeking compensation) only one in six filed."²⁷⁰
- A "Harvard Medical Practice Study found that in New York State, 'eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system.'"²⁷¹
- "A major study of a wide range of civil litigation (not just torts) found that for every one thousand grievances (events for which an injury was noticed), 718 became claims (the victim brought the problem to the alleged wrongdoer's attention), 449 became disputes (the complainant and the alleged wrongdoer failed to reach an agreement on the matter), 103 were brought to the attention of a lawyer, and 50 became filed cases."²⁷² Thus, only 10% of grievances came to the attention of lawyers, and only 5% became filed cases.
- "The RAND Corporation's study of people's responses to disabling injury found that of every one hundred injured, eighty-one immediately decided to take no action at all. Of the nineteen who considered making some sort of claim for com-

269. *Id.*

270. *Id.* (citing California Medical Association and California Hospital Ass'n, Report on the Medical Insurance Feasibility Study 101 (1977)).

271. *Id.* at 1183-84 (quoting HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 7-1 (1990) (noting also that about 2500 cases of permanent total disability resulted from medical negligence in New York hospitals in 1984)).

272. Saks, *supra* note 155, at 1184 (citing Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & Soc'y REV. 525, 544 (1981)). See also B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: A FINAL REPORT OF A NATIONAL SURVEY (1977).

pensation, two dealt directly with the injurer, four with the insurer, and seven consulted a lawyer (of whom four engaged the lawyer but only two filed suit); six did nothing. Thus, 87% are not heard from by the injurer or insurer, and only 2% become filed lawsuits.”²⁷³

- “A study that examined how patients responded to medical care they deemed to be seriously unsatisfactory found that 26% did nothing, 46% changed doctors, 25% talked to their doctor directly, and 9% contacted lawyers although none of them ultimately filed a suits.”²⁷⁴
- Given the substantial evidence of underclaiming, it follows that even if there were a slight increase in filings, it would simply mean that some victims who have historically been injured without remedy have now chosen to assert their legal rights. PPI implies that litigation is itself a bad thing and that we would have a better society if there was no tort litigation at all. But of course this is not the case. It is true that frivolous litigation is a bad thing, but PPI provides no evidence whatsoever that any increased tort claim activity is frivolous. To the contrary, given the demonstrated rate of underclaiming by tort victims, there is every reason to believe that increased tort claim activity, if any, would denote the positive trend of more innocent victims asserting their legitimate rights.

As to the alleged crisis in jury awards, as opposed to filings, PPI refers to New York’s “large verdicts” and states that the median verdict for all types of cases in New York was estimated at \$273,000, “roughly five times the national median.”²⁷⁵ PPI also relies on a report by Jury Verdict Research for the proposition that New York juries “tend to award far more in damages for the most commonly claimed injuries in tort cases than juries elsewhere in the country.”²⁷⁶

This so-called “evidence” of unusually large verdicts in New York is unscientific and misleading. There are at least three major defects in PPI’s conclusion: 1) use of Jury Verdict Re-

273. *Id.* at 1185 (citing HENSLER ET AL., *supra* note 41, at 122).

274. *Id.* at 1185 (citing Marilyn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 L. & Soc’y REV. 105, 108 (1990)).

275. PUBLIC POLICY INSTITUTE, *supra* note 1, at 34.

276. *Id.*

search ("JVR") inquiries, a notoriously unscientific reporting system; 2) failure to consider post-verdict reductions; and 3) failure to mention contrary statistics from more reliable researchers. These defects will be discussed in turn.

Jury Verdict Research:

Jury Verdict Research collects information about verdicts in a most unsystematic manner. JVR relies on reporting by involved lawyers, word of mouth, media reports, and the like. JVR does not do original research into actual verdicts.²⁷⁷ JVR data is also skewed because it states a "median" without including defense verdicts and take nothing verdicts.²⁷⁸ Since defendants win most personal injury cases in New York City suburbs,²⁷⁹ it is obvious that the actual median verdict is far below that stated by JVR.

JVR itself disclaims the capacity of its data to provide the evidentiary significance attributed to it by PPI. JVR's chairman is on record as stating that "JVR has neither asserted nor published any conclusions that the average size of jury verdicts has recently skyrocketed. . . . The apparent reason for this erroneous impression [of our data] is that a number of highly publicized news articles quoting our statistics have grossly misstated them."²⁸⁰

Professor Michael Saks concludes that

no serious students of the litigation system regard [JVR] data as reliable summaries of jury behavior. The JVR data are not the product of systematic and representative sampling. The resulting sample of awards is taken disproportionately from the high end of the distribution, and the resulting summary statistics therefore overstate the size of awards. In addition, reporting practices may vary with geography, case type, and over time, such as when public controversy over awards rises. As a result, apparent changes

277. See DOROSHOW, *supra* note 12, at 24.

278. See *id.*

279. See Torts, Insurance & Compensation Law Section, *supra* note 72, at 157 chart 8.

280. *Product Liability Reform Act of 1986: Hearings on S. 2760 Before the Comm. on the Judiciary, 99th Cong., 2d Sess. 226-27 (1986).*

in award patterns may reflect little more than changes in reporting patterns and changes in the nature of the sampling bias.²⁸¹

Post-verdict Reductions:

PPI's discussion of median verdicts in New York takes place in a vacuum. No consideration is given to the fact that most large jury verdicts are substantially reduced or even completely reversed, either by the trial court pursuant to a post-trial motion, or by the court on appeal.²⁸² The *National Law Journal*, in its September 28, 1998, investigative report on large verdicts rendered in the United States, concluded that "[l]arge verdicts are frequently no more than an illusion. With relatively rare exceptions, verdicts are cut back, thrown out, settled for dramatically less than the original amount."²⁸³ The report stated that the larger the verdict, the more likely it will be revised.²⁸⁴ According to the *National Law Journal*, out of one hundred representative jury verdicts nationwide in 1994, thirty-two were set aside, and thirty-three were reduced, some by as much as 90%.²⁸⁵ Ten of the remaining cases were brought against defendants who were ultimately found unable to pay the judgment.²⁸⁶

These sample findings are consistent with studies showing a general practice of post-trial reduction of large verdicts. A study of verdicts of \$1,000,000 and above returned in 1984 and 1985 found that 74% of them were reduced and only 43% of the money originally awarded was actually paid out.²⁸⁷ Similarly, a General Accounting Office study of product liability cases in five states from 1983 to 1985 found awards reduced in 50% of the

281. Saks, *supra* note 155, at 1245. See also Daniels, *supra* note 13, at 301 (noting that Jury Verdict Research reports are not comprehensive, and tend to include higher rather than lower verdicts in the compilation, since the higher ones are more likely to be found by the unscientific methods employed by JVR).

282. See Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349 (1986).

283. Margaret Cronin Fisk, *Now You See It, Now You Don't! Vanishing Verdicts Are More and More Commonplace, Especially Thanks to the Judges*, NAT'L L.J., Sept. 28, 1998, at C1.

284. See *id.*

285. See *id.*

286. See *id.*

287. See Broder, *supra* note 282, at 353.

cases,²⁸⁸ and also found that only seventy-six percent of the total verdict amount was paid.²⁸⁹

In New York, the data showed, approximately 44% of jury awards were adjusted downward in the immediate period following the verdict and that the eventual payments to plaintiffs were, on average, 62% of the awards A good number of the cases with mega-awards are included in the post-trial adjustment calculations and heavily inflate the statistical mean, but it is likely that many of these eventually resulted in much lower actual payments to plaintiffs.²⁹⁰

Defendants paid an average of 71% of what the jury ordered.²⁹¹ As the awards got larger, the post-verdict reductions increased markedly, both in amount and percentage of the award.²⁹²

PPI's obsession with jury verdicts also ignores what appellate judges do when their turn comes. In a study of 3,542 published product liability cases that went to appeal, Professors Henderson and Eisenberg found that in both 1976 and 1983, defendants were successful on appeal about 51% of the time.²⁹³ That rate of success has improved steadily so that by 1988, defendants were winning 63.4% of the time.²⁹⁴ This rate of success is markedly higher than the rate of appellate success for all other claims civil and criminal.

This compelling data concerning post-trial reduction and reversal demonstrates that PPI's reliance on jury awards is

288. See U.S. GENERAL ACCOUNTING OFFICE, *PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES* 39 (1989).

289. See *id.* at 45.

290. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 298 (1999) (citing Brian Ostrom et al., *So the Verdict Is In - What Happens Next?*, 16 JUST. SYS. J. 97 (1993)).

291. See Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 241 n.15 (1996).

292. See MICHAEL G. SHANLEY & MARK A. PETERSON, INSTITUTE FOR CIVIL JUSTICE REPORT, *POSTTRIAL ADJUSTMENTS TO JURY AWARDS* viii (1987). See also Vidmar et al., *supra* note 290. Based on analysis of verdict reports from California, Florida and New York, Professor Vidmar concludes that juries are not overcompensating victims of medical malpractice; rather, they are reaching consistent verdicts, which are not as high as the press accounts suggest because they are often reduced by trial judges after the verdict.

293. See James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 504 (1990).

294. See *id.*

misplaced. Jury awards do not reveal what defendants and insurers are actually paying in damages. To the contrary, researchers have concluded that "the system appears to work already in much the same way that the current proposals for legal change are intended to work, namely by affecting 'excessive' awards."²⁹⁵

Contrary Research:

Most respected research on tort verdicts indicates that the number of high awards is either remaining stable or going down, even without regard to the likelihood of post-verdict reduction. Unlike the questionable "research" of Jury Verdict Reports, the New York Jury Verdict Reporter tabulates every jury verdict in the state. Moreover, as Mark Cooper of Citizen Action notes, any "increase in the dollar value of awards over the past three decades can be attributed to a combination of inflation, and increases in real income, real medical costs and life expectancy."²⁹⁶ Thus, as people live longer and the price of health care skyrockets, one could expect some increase in the amount of a typical personal injury verdict. The fact that there is no real increase indicates that, in real money terms, jury awards are in fact going down.

Summarizing a number of respected studies comparing loss replacement rates for product liability, the economist W. Kip Viscusi concludes that "the common belief that product liability awards lead to windfall gains is erroneous. The actual value of court awards and settlements is. . . often less than the actual losses suffered by the victim."²⁹⁷ In the face of all this contrary research, it is preposterous for PPI to argue that victim recoveries in New York are out of control.

11. *Polls*

Assertion:

PPI reports that "the people are fed up" with the civil justice system.²⁹⁸ PPI relies on an "authoritative survey" by Zogby

295. SHANLEY & PETERSON, *supra* note 292, at xii.

296. MARK COOPER, CITIZEN ACTION, THE VERDICT IS IN: JURY AWARDS UNCHANGED OVER 30 YEARS ii (1995).

297. See Viscusi, *supra* note 197, at 95-96.

298. PUBLIC POLICY INSTITUTE, *supra* note 1, at 36.

International which concludes that "the people overwhelmingly believe that the cost of lawsuit awards is too high, and that the current liability system needs major reform."²⁹⁹

Analysis:

It is preposterous to rely on a single poll as the basis for any kind of tort reform. Clearly, a finding that the public believes something to be true does not make it true. So even assuming that the public believes that lawsuits are a way of making "easy money" as alleged in the Zogby poll, this does not mean that it is so. As discussed earlier, the empirical evidence indicates that people with serious injuries are chronically undercompensated, and that the vast majority of injured victims do not even try to get recovery from the tort system.³⁰⁰

Stephen Daniels, a researcher for the RAND Corporation, has this to say about the usefulness of opinion polls in the tort reform debate:

It is important to re-emphasize that the poll data have nothing to do with the substance of the matters at issue. They have nothing to tell about what juries actually do, about plaintiffs and lawyers, about the amount of litigation, or about the workings of the civil justice system. The poll data tell only about people's responses to a set of questions that are designed to elicit their opinions, not their informed assessments of jury competence and related issues. Moreover, the wording of the questions can mask a bias that skews responses in the desired direction. For instance, asking people which of a list of factors is most responsible for causing the litigation explosion or the insurance crisis presumes the existence of those factors, of the explosion, and of the crisis.³⁰¹

It would also be preposterous to rely on the Zogby poll in particular as any indicator of how the public feels about the civil justice system. To use Daniels' words, that poll was one in which the wording of the questions masked "a bias that skews responses in the desired direction."³⁰² Richard Behn, the President of Numbercrunchers, Inc., a respected polling firm, has written that the Zogby poll relied upon by PPI was one in which

299. *Id.*

300. See *supra* text accompanying notes 196-201.

301. Daniels, *supra* note 13, at 308.

302. *Id.*

a "whole series of questions contain anti-tort premises" and that poll respondents "are naturally inclined to agree with a premise if only one side of the case is argued."³⁰³ Behn noted that the Zogby polling questions were argumentative, and contained no counter-argument that would have obtained a more balanced response.³⁰⁴ Specifically, the factual assertions in the questions were "incendiary." One question, for example, asked respondents their reactions to the statement that "the system is out of control and clogged by too many lawsuits."³⁰⁵ Essentially, citizens were subject to "a set of loaded data."³⁰⁶ Given these circumstances, the Zogby poll could not be considered a reliable indicator of public views of the civil justice system.³⁰⁷

Finally, it should be noted that the poll data on public views toward the tort system cuts both ways. For example, several polls indicate that most people would like to enlarge access to the justice system rather than restrict it. A 1995 Yankelovich survey found public support for the tort system.³⁰⁸ Thirty-nine percent prefer to retain the present balance between the injured and insurers. Another 39% favor reform that would "tilt things a little more in favor of those injured in accidents," and only 7% wish to tilt more the other way.³⁰⁹ Three out of four respondents believed that corporations sometimes sell dangerous products, and that tort lawsuits help to deter dangerous corporate activity.³¹⁰ While these results are subject to the same kinds of questions surrounding the Zogby poll, the points to remember are that no one can claim with any certainty that they know what the public thinks about the tort system; and that what the public thinks does not make it so.

303. Letter from Richard J. Behn, President, Numbercrunchers, Inc., to Joshua M. Pruzansky, President, New York State Bar Association 2 (June 23, 1997) (on file with the New York State Bar Association).

304. *See id.*

305. *Id.* at 1.

306. *Id.* at 2.

307. *See id.*

308. *See* YANKELOVICH PARTNERS & TALMEY-DRAKE RESEARCH & STRATEGY, NATIONAL SURVEY ON TORT REFORM 5-7 (1995).

309. *See id.* at 4.

310. *Id.* at 3.

12. *Lawyer Advertising**Assertion:*

PPI claims that lawyers, through advertising, are sending a "subliminal message" to the public that "if something bad happened to you, a lawyer will help you find someone to blame for it."³¹¹

Analysis:

PPI implies that through advertising, lawyers are drawing frivolous claims out from a state of dormancy. The allegation is that if not for advertising, these frivolous claims would remain dormant and would not be mucking up our system. This claim is particularly far-fetched given the uncontroverted evidence, discussed earlier, that most injured victims who are entitled to recovery do not pursue a legal remedy.³¹² It is highly probable that many of these victims do not pursue a remedy because they do not know how.

This is where advertising comes in. As the Supreme Court stated in *Bates v. State Bar of Arizona*,³¹³ lawyer advertising offers great benefits to the public because it helps injured people to obtain access to justice.³¹⁴ The *Bates* Court specifically rejected the assertion now made by PPI, that lawyer advertising is harmful because it "stirs up litigation."³¹⁵ The Court answered this argument as follows:

Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. . . . Among the reasons for [underclaiming] is fear of the cost, and an inability to locate a suitable lawyer. Advertising can help to solve this acknowledged problem.³¹⁶

It is ironic that the business community, which bombards the consumer with all kinds of outrageous advertisements designed to foist everything from cigarettes to vegamatics on an unsuspecting public, now complains about lawyer advertising. Why is advertising appropriate for businesses and not for law-

311. PUBLIC POLICY INSTITUTE, *supra* note 1, at 37.

312. *See supra* text accompanying note 300.

313. 433 U.S. 350 (1977).

314. *See id.* at 376-77.

315. *Id.* at 375-76.

316. *Id.* at 376.

yers? Perhaps the argument is that consumers are more easily victimized by advertising lawyers than by other advertisers. This argument was refuted by the Court in *Bates* as well, when it rejected the underlying assumptions of the argument, i.e., that the public is not sophisticated enough to realize the limitations of lawyer advertising, and that it is better kept in ignorance.³¹⁷ These assumptions, said the *Bates* Court, rest on "an underestimation of the public." The Court viewed as "dubious any justification that is based on the benefits of public ignorance."³¹⁸

There is strong evidence that lawyer advertising has substantial beneficial effects. Richard J. Cebula, a professor of economics at the Georgia Institute of Technology, used multiple regression analysis on existing empirical data and found (counterintuitively enough) that "lawyer advertising acts to raise the image of lawyers."³¹⁹ This is due to lower prices caused by advertising, and greater access to legal services for many members of the public.³²⁰

The notion that lawyers would use advertising to prey on an unsuspecting public and encourage frivolous litigation simply flies in the face of common sense. With so many injured victims failing to bring a claim, a lawyer does not have to look for frivolous cases. Moreover, frivolous cases are not cost-effective, since they are very likely to result not only in no recovery, but also in the imposition of sanctions on the lawyer. Given the low success rate for plaintiffs' claims generally in New York, a lawyer would simply be crazy to stir up frivolous litigation through costly advertising. Even PPI does not allege that plaintiffs' lawyers are crazy.

13. *Contingent Fees*

Assertion:

PPI asserts that contingent fee arrangements lead to overpayment of plaintiffs' lawyers.³²¹ The contingent fee arrange-

317. See *id.* at 375.

318. *Bates*, 433 U.S. at 375.

319. Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503, 514 (1998).

320. See *id.*

321. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 39.

ment gives lawyers "a piece of the action", and because of this, contingent fee lawyers bring frivolous claims in order to cash in on the "lawsuit lottery."³²² This is why contingent fees are outlawed in most foreign countries.³²³

Analysis:

The American legal system is notable for its dearth of legal aid for lower and middle income citizens, especially for civil cases.³²⁴ Contingent fee arrangements take up the slack. If not for the contingent fee, injured victims of moderate means would not be able to undertake the significant expense of obtaining legal recovery. Unless we want to institute a program of legal aid for civil cases, the contingent fee is absolutely necessary.

David Vuernick, the Legal Policy Director of Citizens Action, notes that any proposal to limit contingent fees is unfair because, among other things, it imposes a burden on only one side of a litigation:

Proposals to limit contingency fee agreements are unfair because they only affect consumers and their attorneys. Limiting contingency fee arrangements without limiting the amount of money that corporations can spend on their defense is one-sided. Businesses will still be able to hire the best legal defense that their money can buy, if limits are placed on contingency fee agreements, consumers may be limited in their choice of counsel. Proposals which limit contingency fees affect only one set of players in the civil justice system — consumers. Businesses sued by consumers would not be affected nor would businesses which sue other businesses be affected because they rarely rely on contingency fee agreements.³²⁵

Professor Angela Wennihan, reporting on a study of contingent fees, confirms Vuernick's assessment about the critical societal importance of contingent fees.³²⁶ She states that the contingent fee "has proven particularly well-suited to the situa-

322. *Id.*

323. *See id.* at 41.

324. *See id.* at 39. *See also* Richard Vuernick, Congressional Testimony before Senate Judiciary Committee on Contingency Fee Agreements (Nov. 7, 1995).

325. Vuernick Testimony, *supra* note 324.

326. *See* Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1648 (1996).

tion where an individual has been injured and desires to sue on the basis of the injury, but is unable to afford representation precisely because of the injury."³²⁷ She also observes that the contingent fee "has produced safer products by giving the poorest of clients the ability to haul even the largest of companies into court for producing a defective product."³²⁸ The business community's attack on contingent fees is quite ironic, given its general belief in the virtues of the free market. These free marketeers apparently have no trouble proposing substantial market limitations on the contract between injured victims and their counsel.³²⁹

The argument that contingent fees encourage frivolous litigation is illogical. In a contingent fee arrangement, a lawyer who takes a case must pay the costs of the litigation up front, for the chance of a percentage return of an ultimate recovery. It simply makes no economic sense for a contingent fee lawyer to bring frivolous litigation because there is only cost and no benefit. As Philip Corboy has stated: "Lawyers who employ the contingent fee mechanism are . . . the members of the profession whose practice is *least* protected from the forces of the marketplace and who therefore cannot afford to spend great amounts of time on cases which hold out no honest promise of success."³³⁰ This logic has been recognized by the courts.³³¹

Besides logic, the evidence shows that contingent fee lawyers provide an important function in screening out cases of dubious merit. A 1973 study by the U.S. Department of Health, Education, and Welfare found that a large percentage of tort cases brought to attorneys was rejected by them and not filed.³³² The Civil Litigation Research Project found that only half the

327. *Id.* at 1646.

328. *Id.* at 1648.

329. The same point is made by Professor Charles Silver of the University of Texas School of Law. See Silver, *Control Fees? No, Let the Market Do Its Job*, NAT'L L.J., April 18, 1994, at A17.

330. Philip Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG., Summer 1976, at 27, 32.

331. See, e.g., *Balts v. Balts*, 142 N.W.2d 66, 73 (Minn. 1966) (noting that lawyers are not likely to encourage meritless litigation, "particularly where the customary fee arrangement is a contingent one").

332. See LEON POCINCKI, ET AL., U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *The Incidence of Iatrogenic Injuries*, in APPENDIX: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 50, 50 (1973).

injury complaints brought to a lawyer became filed cases.³³³ Clearly, tort lawyers are filtering out cases of questionable merit.

Perhaps the argument against contingent fees is not that they encourage frivolous litigation, but rather that they encourage meritorious litigation that would not otherwise be brought. This is similar to the attack on advertising, discussed *supra*, that it brings claims out of the woodwork that would otherwise have lain dormant. If that is the argument, it falls of its own weight. Litigation is not an evil. Underclaiming by innocent victims is an evil. To the extent that the contingent fee reduces the deplorable rate of underclaiming in this country, it is an unmitigated good.

Much has been made, in the PPI report and elsewhere, about the fact that contingent fee arrangements are not widely employed outside the United States.³³⁴ One reason for this, however, is that many countries have a legal aid system that permits disadvantaged victims to obtain free legal aid to vindicate their legal rights. The leading example of such an alternative system is England.³³⁵ However, it is extremely unlikely that the United States would undertake the costs of socialized lawyering in exchange for the current contingent fee system. Likewise, as was recently recognized by the Canadian province of Ontario when it recently established a contingent fee system for tort cases, the alternative of simply leaving injured victims to pay for their own litigation costs up front is too harsh to even contemplate. The primary motivation was "a need to provide indigent clients access to the legal system."³³⁶ The fact that some countries leave innocent, penurious victims to their own devices is no reason to emulate them.

It is notable that the exorbitant cost of the civil legal aid system has led the British government to propose switching to an American-style contingent fee system for civil cases.³³⁷ The Association of British Insurers and the Association of Insurance

333. See DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT S-18 to S-20 (1983).

334. See Wennihan, *supra* note 326, at 1644.

335. See *id.*

336. See Wennihan, *supra* note 326, at 1645.

337. See DOROSHOW, *supra* note 12, at 27.

and Risk Managers have endorsed the proposal.³³⁸ Their reasoning is that the legal aid system did little to discourage the assertion of unmeritorious claims.³³⁹ A plaintiff's lawyer being paid by legal aid was found to have little incentive to screen out dubious cases.³⁴⁰ In contrast, the contingent fee system guarantees that plaintiffs' lawyers will refuse to bring cases that have little chance of recovery.³⁴¹ Arguing in favor of the proposal, the Executive Director of British Risk Managers states that contingent fees will make lawyers take cases "on their merits" and will reduce the number of claims being brought against businesses.³⁴² This assessment by a member of the insurance industry underscores the need for retaining the contingent fee as the most cost-effective means of access to justice for consumers, and as the best means of screening out frivolous litigation.³⁴³

14. *Too Many Lawyers*

Assertion:

PPI argues that there are too many lawyers in New York, that the number of lawyers is increasing dramatically, and that the surplus of lawyers inevitably leads to more tort litigation.³⁴⁴ PPI cites statistics indicating that New York has fifty-eight lawyers per 100,000 citizens, a higher ratio than any state except Massachusetts and New Jersey.³⁴⁵ PPI also states that most of the lawyers in New York State practice in New York City, "which also produces an exceptionally high rate of tort litigation and large jury verdicts."³⁴⁶

Analysis:

The most glaring flaw in PPI's argument is that it relies on a global statistic, the number of lawyers as a class. No attempt is made to break out the figures for the targets of PPI's ire, lawyers who bring tort claims for injured plaintiffs. There is every

338. *See id.*

339. *See id.*

340. *See generally id.*

341. *See id.*

342. *See* DOROSHOW, *supra* note 12, at 27.

343. *See id.* at 28.

344. *See* PUBLIC POLICY INSTITUTE, *supra* note 1, at 44-45.

345. *See id.* at 44.

346. *Id.*

reason to think that the increase in lawyers in New York has gone mostly, if not completely, to other practice areas. As discussed earlier, the rate of jury verdicts in plaintiffs' tort litigation has remained steady in the last ten years.³⁴⁷ What *has* gone up is the rate of litigation between businesses.³⁴⁸ Moreover, the booming financial markets have created an undeniable demand for corporate lawyers in recent years, as has the recent real estate boom. Finally, it is common knowledge that much of the increase in the lawyer population has gone into the major law firms. These firms, with hundreds of actively practicing lawyers, do not generally handle plaintiff personal injury work.

The common sense notion that any increase in lawyers is going to other areas of practice is supported by one of the few studies in this area. Professors Michael Trebilcock, Donald De-wees and David Duff conducted extensive empirical research of malpractice litigation trends in Canada and the United States.³⁴⁹ They concluded that there was "no support for the hypothesis that the growing number of practicing lawyers per capita has increased malpractice claims."³⁵⁰

Dean Robert C. Clark of Harvard Law School, in his article, *Why So Many Lawyers? Are They Good or Bad?*,³⁵¹ provides a number of cogent explanations for the growth in lawyers and none of them are related to any tort litigation crisis. Among other things, he states that "the work of lawyers concerned with international trade and finance has increased enormously; it is one of the fastest areas of growth in the market for legal services. Similarly, movements of people across borders have made immigration law one of the fastest growing areas of law practice."³⁵² He also concludes that increased diversity in our society has created a greater need for lawyers in such areas as employment, housing, and family relations.³⁵³ Furthermore, the rise in wealth levels in our society has led to an increased demand for lawyers. When essentials like food and housing are taken care

347. See *supra* text accompanying note 259.

348. See DOROSHOW, *supra* note 12, at 26.

349. See Trebilcock et al., *supra* note 121, at 205.

350. *Id.* at 218.

351. 61 FORDHAM L. REV. 275 (1992).

352. *Id.* at 292.

353. See *id.* at 291.

of, people “move on to previously neglected desires” such as an interest in the environment.³⁵⁴

Dean Clark completely rejects the notion that there has been a marked increase in plaintiffs’ tort lawyers. He concludes as follows:

Although the “litigation explosion” is popularly blamed on greedy tort plaintiffs and their avaricious lawyers, in fact there has been a disproportionate increase in recent years . . . in the extent to which litigation in federal courts is comprised of businesses suing one another in disputes arising out of their contractual dealings, intellectual property claims, and similar matters.³⁵⁵

In light of all this evidence, it is clear that PPI’s attack on tort plaintiffs’ lawyers is completely without basis.

Part II. Critique of PPI’s Proposed Reforms

Part I of this Essay has shown that there is no factual basis for limiting the recovery of tort plaintiffs. This section critiques some of the major proposals for “tort reform” advocated by PPI in its report, *An Accident and a Dream*.³⁵⁶

Some of PPI’s proposals are dependent on factual bases or policy assumptions that have already been debunked in Part I. Those specific proposals will not be discussed here. They include: 1) “chang[ing] the compensation system for plaintiffs’ lawyers”³⁵⁷ (unnecessary to discuss because it has already been shown that the contingent fee provides access to justice and helps to guarantee that lawyers will not bring questionable suits); 2) “reform[ing] liability standards governing voluntary organizations”³⁵⁸ (unnecessary to discuss because these protections are already provided under federal law); 3) “eliminat[ing] absolute liability for contractors who provide safe workplaces”³⁵⁹ (unnecessary to discuss because contractors have *no* liability if the workplace is safe, and the courts have essentially employed a negligence standard); 4) “allow[ing] employers to

354. *Id.*

355. *Id.* at 297.

356. PUBLIC POLICY INSTITUTE, *supra* note 1, at 46-48.

357. *Id.* at 47.

358. *Id.*

359. *Id.*

provide honest job references”³⁶⁰ (unnecessary to discuss because employers are already protected by the law when they give honest job references); and 5) preventing “criminals from recovering for injuries they suffer in the course of committing a felony”³⁶¹ (unnecessary to discuss because the case on which this suggestion is based was one in which the officer violated the individual’s federal constitutional rights by shooting him in the back even though he was fleeing and unarmed; those rights cannot be changed by legislation).

With these unjustified “reforms” out of the way, this Essay proceeds to address the major “priorities for change” set forth in *“An Accident and a Dream.”*

1. *Repeal of the Joint and Several Liability Doctrine*

PPI argues that the doctrine of joint and several liability is unfair because it requires a defendant to pay the entire amount of damages, “even if that defendant’s contribution to the problem was minor.”³⁶² PPI advocates a repeal of the doctrine.³⁶³

The problem with repealing the doctrine of joint and several liability is that an injured plaintiff will have to assume the risk that all of the wrongdoing defendants will be able to pay their share of the plaintiff’s full recovery. In many cases, the plaintiff will not be able to obtain recovery from all the wrongdoers; some may have gone out of business while others may have filed for bankruptcy. The question is, who should assume the risk of loss when one of the wrongdoers cannot be held financially accountable, the innocent victim or the other wrongdoers? Simply stating the question indicates the fairness of the joint and several liability rule. It makes far more sense to make the wrongdoers pay, since by definition their wrongful conduct has injured the plaintiff.

Yet despite the inherent fairness of the rule, the New York Legislature already has seen fit to impose substantial limitations on joint and several liability in personal injury cases. Under CPLR 1601, a tortfeasor who is less than 50% at fault

360. *Id.*

361. PUBLIC POLICY INSTITUTE, *supra* note 1, at 46-48.

362. *Id.* at 46.

363. *See id.*

cannot be held liable for a disproportionate amount of the plaintiff's non-economic injury.³⁶⁴

PPI wants to go further and totally repeal the doctrine of joint and several liability. All this will do is further shift the cost of injury from wrongdoing defendants to either innocent victims, or to society by way of public compensation. It is difficult to see what is gained from such a harsh result.

Perhaps it could be argued that the harshness of the repeal of joint and several liability would be counterbalanced by the societal benefit (if it can be called that) of less litigation. The research in states that have rejected joint and several liability shows that such benefits are questionable at best.³⁶⁵ Professors Han-Duck Lee, Mark J. Browne, and Joan T. Schmit have conducted empirical research on litigation trends in those states that have repealed joint and several liability.³⁶⁶ They noted an *increase* in tort litigation in these states, which they attribute in part to the fact that repeal of joint and several liability "reduces incentives for defendant safety"³⁶⁷ because it exposes wrongdoers to a lesser risk of payment.³⁶⁸ Another reason for the increase in litigation is that plaintiffs are "forced to bring separate legal actions against each tortfeasor in order to collect the value of all harms."³⁶⁹ The Professors state that a repeal of joint and several liability "forces the plaintiff to sue everybody that might conceivably be at fault, which means that insurers end up defending policy holders in more cases. . . ."³⁷⁰ Finally,

364. See N.Y. C.P.L.R. 1601 (McKinney 1996).

365. See Han-Duck Lee et al., *How Does Joint and Several Tort Reform Affect the Rate of Tort Filings?: Evidence from the State Courts*, 61 J. RISK & INS. 295 (1994).

366. See *id.*

367. *Id.* at 300.

368. See also Komesar, *supra* note 19, at 68-69 (1990) (repeal of joint and several liability would increase the number of injuries, because it is the "deep pocket" tortfeasors who are most sensitive to the incentives of the tort system; joint and several liability serves "the purpose of focusing civil liability on those potential avoiders of injury who are most likely to respond to the civil liability signal").

369. Han-Duck Lee et al., *supra* note 365, at 300.

370. *Id.* (quoting Joanne Wojcik, *Florida Rulings Cap Liability*, BUS. INS., Sept. 6, 1993, at 43-44 (quoting statement of Barbara W. Green, spokesperson for the Academy of Florida Trial Lawyers regarding a Florida court's upholding Florida's joint and several liability reform)).

the Professors discovered a very sizeable jump in the number of filings in the year before the effective date of the reform.³⁷¹

For all these reasons, any further "reform" of the joint and several liability rule is unjustified and is likely to be counterproductive.

2. *Cap on Non-economic Damages*

PPI wants to put a cap of an unspecified amount on awards for non-economic damages, such as pain and suffering.³⁷² PPI asserts that awards for non-economic damages "are concentrated in a relatively small number of cases in which a jury has decided to make an extravagant gesture."³⁷³

The injustice of a cap on non-economic damages is well-stated by Professor Neal Komesar:

The importance of these nonpecuniary losses can be seen by asking yourself whether you would be indifferent or even nearly indifferent between an uninjured state and a severely injured state, such as paraplegia, blindness, or severe brain damage, so long as your income and wealth remained constant Income and wealth are only in service of those myriad activities that make up life and living. These activities are the primary elements of life; pecuniary elements are secondary. It turns reality on its head to give transcendence to the pecuniary.³⁷⁴

Professor Komesar also notes that non-economic damage awards are necessary to deter corporations from engaging in unsafe practices:

Any determination of the desirable level of prevention that ignored nonpecuniary losses would grossly underestimate the desire for prevention. When the torts system attempts to induce the correct level of prevention, a signal sent to potential injurers that reflected only the pecuniary aspects of loss would induce far too little prevention. . . . To the extent that prevention is desirable and, more importantly, obtainable, reforms that cap or limit pecuniary loss are counter-productive.³⁷⁵

371. *See id.* at 306.

372. *See* PUBLIC POLICY INSTITUTE, *supra* note 1, at 46-47.

373. *Id.* at 47.

374. Komesar, *supra* note 19, at 58.

375. *Id.* at 59.

Virtually all scholars in economics and law agree that awards of non-economic damages are absolutely necessary to deter corporate misconduct and to protect innocent citizens.³⁷⁶ This proposition simply makes economic sense.

Part of PPI's complaint against non-economic damage awards is that they are haphazard, in that they are used only when a particular jury "decided to make an extravagant gesture."³⁷⁷

Systematic studies of jury damage awards indicate that, on average, awards are rather modest. Comparisons of compensatory awards against assessments of seriousness of injuries and economic losses indicate that awards tend to be consistent with actual losses. Some findings indicate that variability in awards may be as likely due to variability in trial evidence as to jury unreliability. Comparisons of jurors and judges with respect to assessments of damages for "pain and suffering" show that their respective decisionmaking processes are similar. Punitive damages are awarded with much less frequency and the awards are, on average, much more modest than is commonly portrayed in the mass media. Some juries do produce outlier awards that cannot easily be justified by legal criteria, but studies of post-verdict adjustment processes, such as judicial reductions and settlements between the parties, tend to very substantially alter the awards downward, particularly the larger awards. In fact, one of the most important lessons from this review is that a main focus of researchers and policy makers should be on what is ultimately paid to plaintiffs rather than jury awards. The jury system is embed-

376. See Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 51 (1991) ("From a deterrence standpoint, the inclusion of nonpecuniary losses is desirable because it optimizes both care levels and activity levels."); Randall Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 934 (1989) ("[I]t makes theoretical and practical sense to assess liability for more than economic loss, so that careless behavior is sufficiently deterred. To consider only economic loss places at particular risk persons with little or no earnings, such as homemakers, children, and retirees."); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 799 (1985) ("Unless the full costs of physical and emotional distress are properly internalized through tort law, the price of the activities that generated such injuries will insufficiently reflect their actual costs. In effect, victims of the public would subsidize the cost of high-risk activities, thereby leading to inadequate deterrence.").

377. PUBLIC POLICY INSTITUTE, *supra* note 1, at 47.

ded in a larger system that has corrective mechanisms for wayward jury verdicts.³⁷⁸

The case simply has not been made that the benefit of a cap on non-economic damages (other than adding to the profit margins of insurance companies) outweighs the diminished deterrence, greater safety risks, and substantial injustice that such a cap will impose on consumers. Moreover, any attempt to impose a cap on legitimate damages should be approached with caution because it is fraught with constitutional problems. Several courts have invalidated damage caps as violating an injured victim's constitutional rights. For example, in *Smith v. Department of Insurance*,³⁷⁹ the court held that a damage cap limit of \$450,000 for non-economic damages violated the victim's constitutional right of access to the courts.³⁸⁰ Additionally, in *Boyd v. Bulala*,³⁸¹ a statute capping total amount of damages in malpractice cases at \$1 million was held to violate the plaintiff's constitutional right to a jury trial.³⁸²

3. *Barring the Use of Post-manufacture Improvements as Evidence*

PPI states that New York law permits a plaintiff to introduce remedial measures taken by the defendant after an injury to prove that the product injuring the plaintiff was defective.³⁸³ According to PPI, this rule of evidence deters manufacturers from making repairs or other innovations, for fear that these measures will be used against them at a trial.³⁸⁴

378. Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 898 (1998).

379. 507 So.2d 1080 (Fla. 1987).

380. *See id.* at 1087-89. Interestingly, insurance companies also brought a constitutional attack on the tort reform package passed by the Florida legislature. The Florida legislature, in exchange for imposing substantial limitations on the rights of injured victims, imposed stricter regulations on insurance companies. The insurance companies were happy with the tort reforms, but attacked these new insurance regulations in *Smith*, arguing that they violated the rights of the insurance companies to due process and equal protection. The Florida Supreme Court in *Smith* rejected the insurance industry claims.

381. 672 F. Supp. 915 (W.D. Va. 1987).

382. *See id.* *See also* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997) (striking cap on non-economic damages).

383. PUBLIC POLICY INSTITUTE, *supra* note 1, at 47.

384. *See id.* at 11.

Whatever the merits of PPI's deterrence-based argument, PPI has seriously overstated the law on admissibility of subsequent remedial measures in New York. That law is described as follows in a treatise on New York evidence:

As applied to strict liability cases, the rule regarding evidence of subsequent changes depends on the legal theory asserted. When the theory is a design defect or a warning defect, liability may not be shown by subsequent changes in the design or warnings, respectively.³⁸⁵ Even though denominated "strict liability," those causes of action are based on a balancing of risk and utility factors, involving considerations of reasonable care, just as in negligence.³⁸⁶

In manufacturing defect cases (e.g., a sharp object packed in a can of tuna), the New York Court of Appeals has held that subsequent remedial measures are admissible to show the existence of a defect.³⁸⁷ However, as discussed earlier, manufacturing defect claims make up only a small minority of product liability claims.³⁸⁸ Thus, in the vast majority of product liability claims, subsequent remedial measures are inadmissible to prove a defect in a product.³⁸⁹

While PPI has completely overstated the problem it addresses, there is something to be said for excluding subsequent remedial measures when offered to prove a manufacturing defect in a specific product. It is not that exclusion is necessary to encourage remedial measures, since a business has substantial economic reasons, independent of any litigation, for making products safer for the future. Rather, exclusion of the subsequent remedial measure is warranted because

[c]hanges in the *design* are in no sense probative on whether a mishap in the *manufacturing* process caused a particular product to be defective. . . . Thus, when the only defect asserted is in manufacture or assembly (i.e., it is the particular item, not the whole line of similar items, that does not meet reasonable consumer expectations) evidence of subsequent remedial measures should be

385. *Citing Cover v. Cohen*, 473 N.Y.S.2d 378 (1984).

386. MICHAEL MARTIN ET AL., *NEW YORK EVIDENCE* 274-75 (Aspen 1997).

387. *Caprara v. Chrysler Corp.*, 417 N.E.2d 545, 551 (N.Y. 1981).

388. *See supra* text accompanying notes 46-51.

389. *See Caprara*, 417 N.E.2d at 549-51.

excluded because it is not relevant rather than because of any exclusionary rule based on balancing or policy.³⁹⁰

In sum, PPI has a valid argument that subsequent remedial measures should not be admissible to prove a defect in product liability cases. However it is an argument that has already been accepted and applied in the vast majority of these cases.

4. *Protect Retailers from Liability for Products They Sell*

PPI claims that it is unjust for a retailer to be subject to a defective product claim when the defect was caused by the manufacturer and the retailer had no reason to know that the product was dangerous.³⁹¹ PPI argues that the law should be changed to provide that a retailer could not be sued in these circumstances.³⁹²

The problem is that such a "reform" would be of little use. The Committee on Product Liability of the Association of the Bar of the City of New York, a Committee made up of both plaintiffs' and defendants' lawyers, has stated that granting immunity to retailers would have only "limited practical effect."³⁹³ The reason is that in real-life litigation, "the seller has an indemnification claim against the manufacturer for any amounts the ultimate purchaser may recover from the seller. Thus, in the typical case the seller may be named as a defendant but it is the manufacturer that assumes the real burden of defense."³⁹⁴

Sellers, therefore, do not need the protection that PPI would give them. In fact, the only situation in which seller-immunity would have a practical effect would be where the manufacturer for some reason, such as bankruptcy, could not be a source of recovery. In that situation, the question is, who should assume the risk of loss from a dangerous and defective product, the seller, who has profited from sale of the defective product, or the innocent victim? Current law says that the seller carries the risk of loss in this unusual situation. A law provid-

390. MARTIN ET AL., *supra* note 386, at 276.

391. See PUBLIC POLICY INSTITUTE, *supra* note 1, at 47.

392. See *id.*

393. *Report on the Proposed Product Liability Reform Act of 1998*, 53 REC. ASS'N B. CITY N.Y. 532, 543 (1998).

394. *Id.*

ing that a seller would *never* be liable, even if the manufacturer cannot pay for the victim's injuries, clearly is unduly harsh and its benefits to society are nil, because such a rule would ordinarily result in the transfer of the costs of a victim's injuries from the seller to the social welfare system.

5. *A Renewed Focus on Contracts*

PPI states that contractual relationships "should be given a chance to work . . . in the area of liability."³⁹⁵ PPI cites as an example an "Auto-Choice" plan, which would allow consumers to purchase a "personal protection insurance' policy" in exchange for which consumers would waive their chance to win pain and suffering damages.³⁹⁶ They would also be protected from pain and suffering claims by other consumers.³⁹⁷ In exchange for opting out, consumers would allegedly save money in premiums.³⁹⁸

It is clear, however, that a shift from a tort system to a contract system would be far more complex and problematic than PPI implies. As Professor Mark Hager states in attacking the contract-based proposals of Peter Huber: "It is tedious to feel compelled at this late date to reemphasize gaping fallacies in classical contractual paradigms. Reemphasis is needed, however, because Huber and others of a right-wing persuasion seem determined to revive classical contract arguments in all their fascinating obtuseness."³⁹⁹

The vision of tort reform by contract is one in which consumers somehow enter into individualized contractual agreements with corporations. The idea is that a consumer can individualize his safety practices and protections by agreeing in advance to waive certain tort rights that he does not think he needs, in exchange for lower prices for products. The consumer's safety is tied into the flexibility that the contract supposedly allows.

This utopian vision of free-market contracting of safety questions, between parties of substantially equal bargaining

395. PUBLIC POLICY INSTITUTE, *supra* note 1, at 48.

396. *Id.*

397. *See id.*

398. *See id.*

399. Hager, *supra* note 18, at 545.

power, is sheer fantasy. The fantasy starts with the picture of contract as a regime of infinite flexibility and individuality. In this dream, consumers and corporations, in every transaction involving risk, haggle in minute detail over the contractual allocation and cost of those risks. In the real world, of course, this will not happen. What is far more likely in a contract system is a prevalence of standard forms, unequal bargaining power, boilerplate waivers, and incomplete information for overmatched consumers. Moreover, the very idea of individualized flexibility in contracting safety risks is unworkable; the consumer would have a full-time job going over contracts for everything from cars to lawnmowers to tuna fish cans. There would also be an abundance of jobs for the hated lawyers, maybe even those plaintiffs' lawyers who would lose their jobs if the tort system were dismantled.

The undoubted result of a contract system is that corporations, the repeat players, will utilize expertise, bargaining power advantages, and standardized clauses to secure contractually lowered safety and compensation levels. This will certainly further PPI's hope of reducing expenditures, but it would not provide society with contractually improved safety.

The only example of a contract-based system specifically mentioned by PPI is the "Auto-Choice" plan, under which a motorist could agree in advance to waive tort claims in exchange for assertedly lower insurance premiums.⁴⁰⁰ But this is hardly a good example of a contract system. In fact it shows that "contract" systems end up limiting the choices of individual victims, without any corresponding benefit. Choice plans do not allow individuals who opt for traditional coverage to sue in court, if the person who injures them has opted for the no-fault "choice." Robert Hunter, an insurance actuary who has served as Federal Insurance Administrator, has stated that the "choice" plan is not based on a free-market contracting system at all:

The claim of "choice" is a fraud Choice plans do not allow suits as we know them except in the case of a fault driver hitting a fault driver. Choice rhetoric does not reveal this so people are confused. Choice no-fault has not gained consumer support in the many years it has been pushed and defeated at the state level

400. PUBLIC POLICY INSTITUTE, *supra* note 1, at 48.

Choice is designed to minimize consumer benefits. It is not a fair trade-off for giving up your right to sue.⁴⁰¹

Even if a choice system for automobile accidents was workable, the notion of extending such no-fault principles to other aspects of tort liability is extremely problematic. For example, in product liability cases, a no-fault system would be a disaster because it would not provide sufficient deterrence against unsafe products. This conclusion was reached by Professor Neal Komesar in an important study of the viability of no-fault systems:

The configuration of impact is quite different for the products liability setting than it is for the automobile setting. In the case of products liability, the prospect of deterrence through tort liability is much higher. The high per capita stakes for potential products-accident injurers make them more responsive to the incentives to prevent accidents. These high stakes also provide greater incentive for experience rating and self-insurance, which reduce the problems caused by liability insurance.⁴⁰²

The problem with a no-fault system for product liability, according to Professor Komesar, is that damage schedules will be set *politically*, by looking at a class of potential injurers and victims, rather than at real-life people in a jury trial.⁴⁰³ Thus, in a contest for influence between potential victims and injurers in setting the schedules, "the position of the high-stakes potential injurers is likely to be significantly overrepresented, and those schedules or caps will be biased downward"⁴⁰⁴ This will accordingly result in diminished deterrence of unsafe practices.

Similarly, Patricia Danzon, a researcher for the RAND Corporation, has concluded that a no-fault system will not work in medical malpractice cases.⁴⁰⁵ Danzon states that a no-fault system for medical injury would have "serious disadvantages," most importantly because litigation will still be necessary.⁴⁰⁶ She explains as follows:

401. See Statement of J. Robert Hunter to the Joint Economic Committee, Mar. 19, 1997.

402. Komesar, *supra* note 19, at 53.

403. See *id.* at 54.

404. *Id.*

405. See Danzon, *supra* note 118, at 200-03.

406. *Id.* at 200.

First, it would be necessary to show that the injury arose "out of or in the course of medical care," as opposed to being the unavoidable outcome of the underlying condition for which the treatment was sought. Litigating over cause could be as costly as litigating over fault, since it would presumably be necessary to show some "defect" in treatment. The costs of distinguishing medical injuries from adverse outcomes due to bad luck would almost certainly be higher than the costs of determining work relatedness for workers' compensation claims. Second, if this compensation were financed through liability insurance purchased by individual physicians, premium payments would consume a much larger fraction of physicians' income than under the present system. Premium fluctuations would therefore introduce greater variability into physicians' net incomes.⁴⁰⁷

Professor Danzon also observes that the no-fault system for medical injuries that is used in New Zealand has not worked out.⁴⁰⁸ She notes studies in New Zealand indicating "that the elimination of liability has led to laxer standards of medical care."⁴⁰⁹ Because the recovery under a no-fault plan is much less than the actual injuries suffered, Danzon concludes that "any no-fault scheme for medical injuries tends to evolve into a system of national health and disability insurance."⁴¹⁰ Thus, "the extreme alternative of a no-fault compensation plan, financed either by premiums paid by medical providers or by general taxes, would probably cost even more than the present system relative to benefits."⁴¹¹

407. *Id.* at 200-01.

408. *See id.* at 202-03.

409. *Id.* at 203. For a further critique of the New Zealand system, see Bryce Wilkinson, *New Zealand's Failed Experiment with State Monopoly Accident Insurance*, 2 GREEN BAG 2D 45 (1998). Wilkinson prepared his report for the New Zealand Business Roundtable and came to the following conclusions: 1) the system is now bankrupt since the costs have vastly exceeded payments into the fund; 2) the "consensus" from all parts of society is that "the system has failed to meet expectations," *id.* at 50, and "has been a source of endless controversy and dissension," *id.* at 50-51; and 3) the workplace fatality rate has risen 15% since the system has been in place, whereas the rate for other countries has gone down. *See id.* at 53. Wilkinson concludes that "[a]s other nations consider proposals to enact their own varieties of tort and liability insurance reform, New Zealand's attempt should be a cautionary tale." *Id.* at 46.

410. Danzon, *supra* note 118, at 203.

411. *Id.* at 204. It is also notable that Indiana, as part of its tort reform, instituted a professionally administered patient compensation fund to decide all losses above \$100,000. Contrary to expectations, malpractice awards in Indiana came to

Of course, PPI is not really concerned about “benefits.” The only animating concern is limiting costs. This is why PPI can argue on the one hand that tort defendants should not be held liable unless the plaintiff proves fault, and on the other hand that the tort system should be replaced by a no-fault system. The arguments appear contradictory when, in fact, both proposals lead to a reduction of rights of recovery for innocent victims, and a corresponding increase in net profits for businesses. Yet, as Danzon demonstrated, whatever costs businesses save by reducing their payments to tort victims will simply be spread to the taxpayer by way of social insurance.⁴¹² In sum, tort reform is simply not worth it.

Conclusion

PPI’s case for tort reform is not based on fact. It is simply another part of the onslaught on public opinion, generated by tort reformers, to create a mindset that the tort system is out of control. The attack looks at the costs of the tort system, but not its benefits. It is a carefully crafted attack, ostensibly looking at what is good for society, but on close analysis focusing only on corporate financial benefits to business. The attack of tort reformers favors cost savings over quality and emphasizes the corporate bottom line over safety.

Any arguable savings to business caused by the tort reforms proposed by PPI will not benefit society in the long run. Such changes would simply shift the cost of the current system to other places, such as a system of social insurance, without giving nearly the same benefits to victims that the current system provides. Moreover, a fair analysis of all of the evidence indicates that any perceived benefits to business from its tort reform initiatives will be largely, if not totally, illusory.

average one-third higher than its neighboring states, which retained traditional malpractice systems. See Galanter, *Real World Torts*, *supra* note 106. Why? The probability is that professional administrators are better able than juries to calculate damages, and therefore come closer to the correct (and higher) amount of an individual victim’s injuries. This conclusion is consistent with the studies, discussed in Part I which show that juries routinely undercompensate the more serious claims for damage.

412. See Danzon, *supra* note 118, at 197-98.