

Straight talk about torts

When it comes to tort 'reform,' cutting through the fog can be difficult. That's why we've gone to the source: statisticians and researchers who keep a running tally of who's going to court, why, and what happens when they get there.

Carmel Sileo and David Ratcliff

Runaway litigation, exploding tort costs, courts clogged with civil cases, huge jury awards, and endless trials: Pushed repeatedly by tort "reform" advocates, these terms have gained a foothold in popular discourse, with many Americans—among them, potential jurors—believing that our society is overly litigious and that there are too many tort cases going to trial.

But reality doesn't bear out these conceptions. Data from numerous sources shows that, across the country, lawsuit filings are down. So are tort trials, damages awards, and other signs of the alleged "litigation crisis."

An analysis of the facts and figures shows some intriguing findings, including interesting differences between federal and state litigation. Federal tort litigation peaked in 1985 (probably due to asbestos cases) but has since declined. At the state level, tort litigation has dropped 10 percent over the last decade.¹

Damages awards have dropped in state courts, by as much as 56 percent, except for medical malpractice cases—but they constitute only a small part of tort filings; and trials are almost a relic of the past. (In fiscal year 2002-2003, only 2 percent of all federal tort cases went to trial, and only 5.2 percent of state cases did.²)

Furthermore, contrary to the belief that juries are overly sympathetic to plaintiffs and too easily swayed by emotion, the facts show what most trial lawyers already know: that juries are skeptical of plaintiffs' claims. This skepticism is reflected in both fewer plaintiff verdicts and lower award amounts.

In 2001, the last year for which numbers are available, state courts handled just over 100 million cases.³ Of those, 17.1 million are civil, of which 67 percent were tort claims.⁴ To put that number in perspective, state courts also convicted more than 1.5 million criminal defendants in 2002. Conviction, sentencing, and imprisonment have all increased despite a lower rate of violent crime.⁵

According to the National Center for State Courts (NCSC), it's criminal trials (not civil trials) that are responsible for court overcrowding: "Large and rising case volume often leads to a crowded docket and a swelling of a court's pending caseload. A related concern is the slowing of civil case processing, often the result of reassigning judges to the criminal docket in order to satisfy speedy trial requirements."⁶ In a recent report, the NCSC highlighted the fact that "rising caseloads may affect civil clearance rates."⁷

In short, the overcrowding in courts is real. But it can't be blamed on any upswing in civil cases.

Federal courts resolved roughly 512,000 civil cases during fiscal year 2002-2003. That represents a decrease of 79 percent from 1985 to 2003.⁸

- Of all of them, only 1,647—about 2 percent—went to trial.
- Almost two-thirds were resolved within two years of the filing date.
- Motor vehicle collisions accounted for 20 percent of the trials; products liability for 13 percent; and 10 percent of trials involved med-mal claims.

- Plaintiffs prevailed in just under half (48 percent) of all cases, and won less frequently in medical malpractice (37 percent) and products liability (34 percent) cases.
- 84 percent of successful plaintiffs received monetary damages.
- The median award was \$201,000.

One finding that may be surprising:

- Plaintiffs won more often in bench trials than they did in jury trials—54 percent to 46 percent.⁹

The state of states

Tort cases are primarily a state court matter. So how do the statistics differ at the state level?

State jury trials saw a 44 percent decline from 1992 to 2002, and bench trials dropped 21 percent.¹⁰ Of these cases, only 5.2 percent went to trial.¹¹

- Half the trials went from initial filing to final verdict or judgment within a median of 22 months; this has stayed constant since 1992.
- Motor vehicle collisions accounted for almost half of all claims.
- Plaintiffs prevailed in just over half (52 percent) of state tort trials, a rate that has also stayed constant since 1992.
- The median award to plaintiffs who prevailed was \$27,000; fewer than 20 percent received \$250,000 or more.¹²

In its analysis of state litigation in large counties, the Bureau of Justice Statistics found only one case that it could classify as a class action. That case dealt with an insurance company that tried to reclassify its claims representatives as administrative staff in order to eliminate their ability to claim overtime pay.¹³

A frequent argument by tort “reformers” is that tort cases take up too much court time and grind the judicial works to a halt. But there are three reasons that can’t be true.

First, as government statistics show, courts are primarily overcrowded because of increasing criminal caseloads and underfunding; second, both filings and trials are in a precipitous decline; and third, civil trials are handled speedily—the majority within 24 months. (The American Bar Association recommends that civil trials take two years or less to complete.)

Some trials are completed with head-spinning speed: The Bureau of Justice Statistics found that general civil trials (all tort, contract, and real property cases) took 3.7 days, on average, to conclude. Medical malpractice and employment discrimination cases took a little longer—1 to 2 weeks—and auto cases took 2.9 days.¹⁴ The long, endlessly drawn-out court battles that receive media and public attention are the exception and not the rule.

Greedy plaintiffs?

Are greedy plaintiffs using lawsuits as a kind of lottery? If so, a regular lottery might be a better bet. The numbers don’t support the idea of “windfall” jury awards:

- In state tort trials, the median damages award has gone down 56 percent since 1992, from \$64,000 to \$28,000.
- There was no difference in median damages amounts awarded in bench and jury trials.
- Awards were reduced for 16 percent of plaintiffs who won with a jury trial, but for only 6 percent of plaintiffs who won in a bench trial.
- In contributory negligence states, damages were reduced in 14 percent of tort trials, by an average of 38 percent.

- One-third of premises cases resulted in a reduction of awards because of plaintiff negligence, by an average of around 42 percent.¹⁵

And what about those “runaway” punitive damages? They are a favorite villain of the American Tort Reform Association, which claims they are crippling our country’s business and legal systems.

Well, maybe not so much:

- In state courthouses, only 6 percent of successful tort plaintiffs received punitive damages.
- The median award was \$25,000 for tort trials and \$50,000 for all civil trials.
- Punitive damages were most likely to be awarded in slander/libel cases (58 percent of winners received them). Next were cases involving intentional torts (36 percent) and false arrest/imprisonment (26 percent).¹⁶

Med-mal: the favorite myth

Medical malpractice is the center of most tort “reformers” public relations efforts, probably because of the sympathy most people have for doctors and because medical malpractice cases, when plaintiffs win them, tend to yield the highest verdicts. In 2001, about a third of med-mal trials resulted in verdicts of \$1 million or more. This is at least partly because in most cases (9 out of 10) the plaintiffs alleged death or permanent disability.¹⁷

A look at the U.S. government’s National Practitioner Databank reveals more detail about malpractice cases. Every payout (not the verdict amount but the actual amount paid) in a malpractice case has to be reported to the Databank. Its most recent annual report shows that, nationwide, the median award is \$170,000.¹⁸

Are these trials the reasons for doctors’ skyrocketing insurance premiums? Research has repeatedly shown that they are not and that insurance companies are themselves responsible for the risky business practices that have forced them to raise premiums.¹⁹ Several states that have enacted limits on medical malpractice damages have not seen a corresponding drop in premium rates.

Insurance company executives admit openly that tort “reform” has nothing to do with premiums. In 2005, American Insurance Association spokesman Dennis Kelly told the *Chicago Tribune*, “We have not promised price reductions with tort reform.”²⁰ And Victor Schwartz, general counsel of the American Tort Reform Association, acknowledged that “it is very rare that frivolous suits are brought against doctors. They are too expensive to bring.”²¹

Despite popular beliefs about unscrupulous litigants victimizing doctors, plaintiffs prevailed in only 27 percent of medical malpractice trials, about half the rate at which they prevailed in all other tort trials.²²

Business is booming

Tort filings may be down across the board, but there is one area where, it’s safe to say, business is booming. Filings of business-against-business lawsuits have shot up at the same time that personal injury filings have dropped. The Washington, D.C.-based consumer rights group Public Citizen conducted an analysis of public court records in 2004.²³ Some of its key findings:

- Businesses file four times as many lawsuits as people represented by trial lawyers do.
- Businesses that pay their lawyers an hourly fee are 69 percent more likely to be sanctioned for being frivolous filers.
- Of the top 10 jury awards in 2003, 8 were business-against-business suits.

The largest damages award the Bureau of Justice Statistics tracked in a civil case was \$90 million, which a Dallas jury awarded in a business dispute.²⁴

While many businesses file lawsuits against each other—usually for trademark or patent infringement—many others go after individuals. Companies have sued to shut down Web sites critical of them or their business practices. These cases have mostly been decided in favor of the defendants on First Amendment grounds. For instance, the Beverly Hills, California-based Bosley Medical Institute (of hair-replacement fame) sued Michael Kremer, who ran two Web sites critical of the company. A district court dismissed the lawsuit, saying that Bosley's efforts to shut Kremer's sites down had a chilling effect on his free speech rights.²⁵

The recording industry has sued many people, including teenagers, for illegally downloading music from the Internet.²⁶ And in 2005, college student David Zamos made history by being the first consumer on the receiving end of a Microsoft lawsuit to fight back—and win. The lawsuit, which took several months to resolve, began when Microsoft sued Zamos over a \$60 profit the company said he made illegally by reselling its software.²⁷

In its 2004 report, Public Citizen also listed a surprising number of lawsuits brought by physicians as plaintiffs against hospitals and HMOs. The study's authors concluded:

The overwhelming majority of Americans, both businesses and consumers, use the legal system responsibly. Public Citizen does not begrudge anyone, including corporations, the right to seek legal redress in court. We simply wish to counter the inaccurate stereotypes perpetuated by corporate lobbyists in their campaign to restrict consumers' legal rights.²⁸

Countering those stereotypes is easier when you know that the facts are on your side. And as these numbers clearly show, the myth of runaway litigation is not supported by reality. An old saw says that when you don't have the law on your side, pound the facts, and when you don't have the facts, pound the table. Tort "reformers" have been pounding the table for a long time. Now it's time to "pound the facts."

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Notes

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