

STRAIGHT FROM THE HORSE'S MOUTH: JUDICIAL OBSERVATIONS OF
JURY BEHAVIOR AND THE NEED FOR TORT REFORM

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I. OVERVIEW

Is tort reform motivated by a legitimate tort crisis, by false perceptions, or worse—by a business and insurance lobby that is both powerful and cunning in its use of innuendo and misinformation? Ultimately this is the question that is at the core of the empirical research underlying this article. A complete answer to this question is obviously beyond the scope of this article and likely beyond the scope of any single empirical research effort. However, the research described here is designed to add substance to the debate and to inform dialogue on the issue.

Tort reform has been discussed for at least the last several decades¹ and the debate continues unabated. Tort reform legislation has been enacted federally and in at least 34 states over the past five years, with additional legislation currently pending in Congress and numerous state legislatures.²

In general, the reformers argue that “the system is rife with frivolous lawsuits, unethical behavior by plaintiffs’ attorneys, and runaway juries.”³ Yet the evidence of a need for such reform remains questionable. It seems

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¹David C. Johnson, *The Attack on Trial Lawyers and Tort Law*, A Commonweal Institute Report (2003).

²American Tort Reform Association, <http://www.atra.org/reforms>, (last visited Apr. 11, 2007).

³Michael P. Allen, *A Survey and Some Commentary on Federal “Tort Reform”*, 39 AKRON L. REV. 909, 909 (2006).

that much of what has been written in favor of a need for tort reform is premised upon anecdotal horror stories, surveys of public opinion or analysis of jury verdicts that employs qualitative second-guessing of jury verdicts by someone who was not present at trial to actually see and assess the evidence first-hand.⁴ Each of these information sources suffer serious flaws when offered in support of a significant legislative reform agenda. By contrast, the empirical research presented by this article involved going to the most credible source available for information on whether there exists within typical state courthouses a real tort crisis—the trial judges in Texas, a state variously heralded as one of the perennial “hell-holes” of litigation⁵ and simultaneously as a judicially pro-defendant venue.⁶ It is from the observations of such informed, yet impartial observers that the authors felt that one could best assess the authenticity of a general tort crisis.

One of the most popular tools utilized in support of tort reform is the litigation anecdote. As one scholar has lamented, “[t]he use of anecdotal

⁴As Professor Vidmar describes the gist of the ammunition used by those in favor of tort reform:

The debate about the competence of the civil jury has been primarily one-sided with critics of the jury system attacking the status quo. Many of the critics represent interest groups attempting to change the tort system through attacks on its most visible institution, but editorial criticism also occasionally comes from left of the political center. The critics also include serious scholars, such as Professors Sugarman and Viscusi. Regardless of their purpose or orientation, the essence of the actual evidence set forth by these critics has consisted of the following: case anecdotes, some accurate and others inaccurate; cases of unknown representativeness; appeals to “common knowledge” and “intuition” that groups of laypersons are not up to the task; dubious statistical data sets; and flawed reasoning about the inferences that can be drawn from data about jury verdicts.

Neil Vidmar, *Scientific and Technological Evidence: Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 887–88 (1994). Professor Saks reports on research demonstrating that the public believes by a 69% majority that “the size of most cash settlements has been excessive.” Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1163 (1992).

⁵American Tort Reform Association, *Judicial Hellholes 2006*, available at <http://www.atra.org/reports/hellholes> (last visited May 10, 2007). This website of the ATRA—which describes itself as “bringing greater fairness, predictability and efficiency to the civil justice system”—annually publishes a list of the “most unfair jurisdiction in which to be sued.” *Id.* A regular member of this dubious list is the “Rio Grande Valley and Gulf Cost, Texas” which the site describes as having a “reputation as a ‘plaintiff paradise’ . . . where extremely weak evidence can net multimillion dollar awards . . .” *Id.*

⁶See David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 7–8 (2007).

evidence has been unusually popular in discussions about the nature of the litigation system.”⁷ These stories typically include ones such as the burglar falling through a skylight who recovered damages, the “well traveled and inaccurate story”⁸ of the medical malpractice claimant who claimed she had lost her powers of extrasensory perception as a result of a botched CAT scan, and the overweight man who suffered a heart attack while starting a Sears lawnmower and sued claiming a defective product. All true in part⁹—yet each story leaving out important clarifying information.¹⁰ The premise of these stories seems to be that uneducated juries are frequently wooed by sharp plaintiff trial lawyers to reach ridiculous verdicts. The point of the stories suggests that juries can no longer be trusted to find the

⁷Saks, *supra* note 4, at 1159.

⁸Vidmar, *supra* note 4, at 887.

⁹In Prof. Saks’ article discussing the tort litigation system, he recounts the following common partial truths in circulation:

One example is the case of the burglar who fell through the skylight. According to this anecdote, the burglar sued and won damages of \$206,000 plus \$1,500 per month for life. Another case involved a plaintiff in a medical malpractice action who claimed that she lost her powers of extrasensory perception due to negligent treatment with a CAT scan. She won the case and was awarded \$1 million in damages. A third example involved “[a]n overweight man with a history of coronary disease [who] suffered a heart attack trying to start a Sears lawnmower. He sued Sears, charging that too much force was required to yank the mower’s pull rope. A jury awarded him \$1.2 million, plus damages of \$550,000 for delays in settling the claim.

Saks, *supra* note 4, at 1159 n.30.

¹⁰The author dispelled the mythic power of these stories as follows:

Consider the three anecdotes presented [above.]. The “burglar” who fell through the skylight was a teenager who climbed onto the roof of his former high school to get a floodlight. . . . The fall rendered him a quadriplegic. . . . A similar accident at a neighboring school killed a student eight months earlier. . . School officials already had contracted to have the skylights boarded over so as to “solve a . . . safety problem.” . . . The payments were the result of a settlement; the case did not go to trial. . . . In the CAT scan/ESP case, the woman did claim economic loss due to her inability to perform her job as a psychic. But her claimed permanent injuries were due to severe allergic reaction to a pre-scan drug injection. The judge instructed the jury not to consider the claim for loss of ESP and associated economic damages. The judge also set aside the million dollar verdict as either excessive or inconsistent with his instructions, and a new trial was ordered. . . . In the third case, the man who suffered the heart attack was a 32-year old doctor with no history of heart disease, and the lawnmower was shown to be defective. (Citations omitted.)

Id. at 1160 n.34.

truth on matters of both liability and damages. While one would not believe that any serious social scientist would place much emphasis on such stories, they continue to persist in the media with the most outlandish stories being “repeated often in the media”¹¹ and lay people “readily [believing] that the category of undeserving plaintiffs dominates the system.”¹² Such anecdotes obviously suffer from being unrepresentative of the entire civil litigation system, but this weakness is just the beginning of the problem. Michael Saks found:

[s]ome litigation system anecdotes are simply fabricated. Others are systematically distorted portrayals of the actual cases they claim to report. More important than what we learn about these stories, perhaps, is what we learn about ourselves and our remarkable credulity. Even when true, anecdotes enjoy a persuasive power that far exceeds their evidentiary value.¹³

Other writing on the topic of a possible tort crisis involves more responsible reporting than the use of the anecdotal rumor, but is also potentially flawed or of dubious relevance to the debate over tort reform. One example of such research involves in-depth investigation into the results of a particularly high-profile lawsuit, such as Sugarman’s study of a jury’s award of over \$10 million in a toxic shock syndrome case.¹⁴ Such reporting at least avoids the urban legend status of the typical half-truth anecdote, but certainly lacks any semblance of being representative of how juries normally function on a daily basis. Other scientific research often takes a more statistical snapshot of tort lawsuits, frequently focusing upon things like plaintiff-win ratios or the relative size of damage awards in certain categories of civil lawsuits.¹⁵ Such research often suggests that

¹¹ *Id.* at 1161.

¹² *Id.*

¹³ *Id.* at 1160–61. It is not coincidence that tort reform advocacy groups, such as the American Tort Reform Association and Texans for Lawsuit Reform, provide lists of things such as so-called “Looney Lawsuits” on their webpages. See <http://www.atra.org> and <http://www.tortreform.com> (last visited May 10, 2007).

¹⁴ See generally Stephen D. Sugarman, *The Need to Reform Personal Injury Law Leaving Scientific Disputes to Scientists*, 248 SCI. 823 (1990).

¹⁵ See, e.g., MARK A. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS (The Rand Corporation 1987) (showing higher than normal plaintiff win rates in medical malpractice suits); AUDREY CHIN AND MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (The Rand Corporation 1985) (finding that corporate and health care defendants paid 30% more than

juries are biased and tend to be plaintiff-oriented in their fact finding, at least in certain classes of cases such as medical malpractice lawsuits.¹⁶ As one scholar has opined, “[t]he results of these studies differ, but most seem to conclude that juries exhibit some form of . . . prejudice when assessing liability and/or damages.”¹⁷ Such studies have been critiqued, however, on the grounds of employing improper case selection methods, comparing apples and oranges, and ignoring contrary findings.¹⁸

This issue of whether a litigation crisis exists is not only important for policy makers in the executive and legislative branches¹⁹ but also helps, to a certain degree, to answer questions going to the very constitutionality of some tort reform measures—chiefly whether arbitrary legislative caps on the recovery of actual damages are a violation of a claimant’s rights to substantive due process or right to a jury trial.²⁰ In this latter regard, different judicial perceptions at the appellate level of the legitimacy of a tort crisis underlie some different conclusions as to whether damage caps violate constitutional principles of due process and the right to a jury trial. Thus, some courts have upheld damage caps while others have rejected them with the result turning on the underlying dispute of whether or not a real tort crisis exists.²¹

other defendants paid for similar injuries); Stephen Daniels & Joanne Martin, *Jury Verdicts and the “Crisis” in Civil Justice*, 11 JUST. SYS. J. 321, 339 (1986) (finding damage awards in medical malpractice and product liability cases much higher than in other legal areas); Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U.L. REV. 69, 111 (2007) (finding, from jury verdict statistics, that “the jury favors the individual inventor.”).

¹⁶ See generally Peterson, *supra* note 15.

¹⁷ Moore, *supra* note 15, at 73.

¹⁸ An excellent review and critique of such statistical surveys can be found at Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 228–37 (1993). Professor Vidmar has himself used jury verdict data to reach contrary conclusions—that “jury decisions are, on average, temperate and reasonable.” Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U.L. REV. 1205, 1206 (1994).

¹⁹ As Professor Vidmar reports, many questionable jury verdict statistics “have been introduced in congressional and state legislative hearings on behalf of attempts to exempt classes of litigation from constitutionally mandated rights to jury trial, to put limits on the ‘pain and suffering’ component of damage awards, and to remove punitive damages from the province of the jury. Briefs in the Supreme Court cases challenging the appropriateness of punitive damages have also cited to these statistics.” *Id.* at 1212.

²⁰ See Stephen Daniels and Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 668–69 (2006).

²¹ Compare *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 536 (Va. 1989) (upholding

Given the rather obvious problems with reliance upon anecdotal evidence of jury incompetence and of previous efforts to rely upon specific case analysis or jury verdict statistics, is there a better way to objectively determine whether an authentic tort crisis exists? The authors strongly believed that asking state court trial judges – “the daily observer of the jury system in action”²² – would yield the most reliable information on the state of the jury system. The trial judge is the only one in a position to have both seen the same evidence as the jury and yet to be completely non-partisan about the proceedings. Further, the trial judge has the benefit of seeing the jury system at work in many cases and is unlikely to form views about the legitimacy of a tort crisis based upon anecdotal information about one particular case. Thus, the trial judge would “appear to be the person most capable of forming an informed and objective opinion about the value of civil juries.”²³ While at least one prior study was undertaken comparing the decision-making of jurors, judges and lawyers regarding damage awards,²⁴ and at least two other studies have considered the general opinions of federal district court judges about our jury system,²⁵ this study chose exclusively to collect data concerning the observations of state court trial judges because tort “issues are generically thought of as local matters.”²⁶

As will be explained in more detail below, this study attempted to gain objective insights on relevant issues from trial judges in a trustworthy

statutory cap of \$750,000 in medical malpractice action as rationally related to a medical malpractice crisis) *with Knowles v. U.S.*, 544 N.W.2d 183, 189 (S.D. 1996) (holding that South Dakota’s statutory cap of one million dollars was unconstitutional in the face of a lack of any empirical evidence that there was any “crisis” at all). The court in *Knowles* cited a report by the National Association of Attorneys General that concluded that “insurance premium increases were not related to any purported liability crisis, but ‘resulted largely from the insurance industry’s own mismanagement.’” *Id.* at 190 n.6 (citing Gail Eisland, *The Constitutionality of South Dakota’s Medical Malpractice Statute of Limitations*, 38 S.D. L. REV. 672, 685 n.121).

²² Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VAND. L. REV. 1055, 1074 (1964).

²³ Paula L. Hannaford, *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 247 (1998).

²⁴ Roselle L. Wissler, Allen J. Hart, and Michael J. Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges and Lawyers*, 98 MICH. L. REV. 751, 773–801 (1999).

²⁵ See generally, Michelle L. Hartmann, *Is it a Short Trip Back to Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 SMU L. REV. 1827 (2001) (surveying all federal district court judges as well as certain state court judges); David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges’ Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure*, Federal Judicial Center (2005) available at [http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/\\$File/Rule1105.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/$File/Rule1105.pdf).

²⁶ Michael P. Allen, *A Survey and Some Commentary on Federal “Tort Reform”*, 39 AKRON L. REV. 909, 910 (2006) (providing an excellent overview of possible types of tort reform at the federal level).

manner and from a high enough proportion of the Texas judiciary to yield reliable statistics that would not suffer from the same pitfalls of the litigation anecdote. The response rate was impressive, with more than three-fourths of all of the state's district judges completing the survey. Further, their responses were decisive in generally observing great confidence in the fact-finding abilities of the juries and an overall lack of either "frivolous" case filings or runaway jury awards of actual or punitive damages.

II. JUDICIAL OBSERVATIONS OF A TORT "CRISIS"

A. *Methodology*

As discussed above, the purpose of this survey was to gain insight into the observations of state court trial judges throughout the State of Texas on the primary assumptions regarding the need for tort reform acquired from direct participation and supervision over the trials that occur daily in those courts. While relatively rare, the previous judicial surveys that have been undertaken indicated that a major challenge in this empirical research would be to obtain a large and representative sampling of the objective view of members of the judiciary. The reasons for this challenge are several. First, it was believed that obtaining answers reflecting on any specific current litigation might create ethical dilemmas arising out of judge's obligations to avoid personal comment on pending litigation. The Texas Code of Judicial Conduct states in Canon 3 that a "judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."²⁷ For this reason, the authors in conducting the survey specifically advised each participant judge in writing that they "not consider any cases presently pending in your court, or on appeal from your court, in completing this survey." On the other hand, Canon 4 of the same code expressly provides that a judge "may speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice"²⁸ The survey, as structured, thus promoted the appropriate judicial involvement in a matter suitable for judicial comment while avoiding any suggestion of impartiality or bias regarding any matter before the survey's participants.

²⁷TEX. CODE JUD. CONDUCT, Canon 3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 2005).

²⁸TEX. CODE JUD. CONDUCT, Canon 4.

The other obstacle was obtaining a high enough participation rate from an audience of generally understaffed (most having no professional law clerks unlike their federal counterparts) and overworked members of the state judiciary. One author has previously indicated that a “return rate of twenty percent would be ‘normal’” from members of the judiciary²⁹ although some other studies boasted a return rate as high as 70% from the judiciary.³⁰ Between Texas state district judges’ general lack of time and possible apprehension about the propriety of their participation in a survey concerning the existence of a tort crisis, the authors were concerned about their ability to ensure a sufficiently high return rate to yield significant data.

To contend with these concerns, the authors chose a process for obtaining judicial observations that not only discouraged any comments that might be inappropriate under the Code of Judicial Conduct, but also provided an objectively verifiable level of anonymity for the judges and initiated the survey at a unique moment when the judges were “off the bench” and thinking about issues of judicial administration. The survey was unfurled at a regular meeting of the Texas district court judges held in January 2005 in Texas, where the authors distributed questionnaires to each of the district court judges in attendance accompanied with a letter explaining the purposes behind the survey. In addition to this cover letter, the survey was accompanied by a cover sheet on which the participant would include her name and district court affiliation. This was turned in separate from the actual survey response to assure anonymity. These cover sheets were utilized to help the authors determine which judges might need individual follow-up to obtain their survey response. Once the study was completed, the cover sheets were destroyed so that there is no record of which judges participated. At this conference, the authors obtained completed surveys from 97 judges. A second wave of the survey followed with the materials being mailed directly to all Texas district court judges who had not yet turned in a cover sheet evidencing their participation. This mailing effort yielded an additional 206 completed questionnaires. In sum, out of a universe of 389 Texas district court judges, we received a total of 303 completed surveys for a return rate of 78%—a percentage that compares favorably with any prior published survey of this type.

²⁹R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 94 (1991).

³⁰*See, e.g.*, Hartmann, *supra* note 25, at 1828 (reporting a 66% rate from federal judges and a 70% return rate from Texas state judges).

B. Survey Findings

1. Actual and Exemplary Damages

Consistent with the thought that more data on judicial *observations* of a possible tort crisis was necessary to the continuing debate on tort reform, trial judges were asked several questions concerning the frequency with which they had observed runaway juries. Specifically, in two separate questions, the judges were asked about the frequency with which they had observed, during the preceding four years, juries award either actual or punitive damages in an amount that they considered “disproportionately high” in light of the evidence presented at trial. Tables 1 and 2 reveal a rather large percentage who had either witnessed no such instances or a relatively small percentage.

Table 1

In what percentage of cases tried before you as presiding judge during the past 48 months, in which the jury awarded compensatory damages, do you believe that the jury’s verdict on compensatory damages was *disproportionately high* given the evidence presented during the trial?

	Frequency	Percentage
0%	196	83.4%
1-25%	35	14.9%
26-50%	2	.9%
51-75%	1	.4%
76-100%	1	.4%
TOTAL	235³¹	100.0%

Table 2

In what percentage of cases tried before you as presiding judge during the past 48 months, in which the jury awarded exemplary damages, do you believe that the jury’s exemplary damage award was *disproportionately*

³¹This total number is smaller than the complete sampling of 303 responding judges because approximately 22% of the judges indicated that they had not presided over any civil case going to a jury verdict during the preceding 48 months, typically due to a docket of only criminal law or other matters. Such judge’s observations were not sought on these topics.

high given the evidence produced during trial?

	Frequency	Percentage
0%	89	83.2%
1-25%	8	7.5%
26-50%	2	1.9%
51-75%	1	0.9%
76-100%	7	6.5%
TOTAL	107	100.0%

Thus, more than 83% of the Texas district court judges had observed not a single instance of a runaway jury verdict on either actual or exemplary damages during the preceding 48 months before the survey.³² Furthermore, less than 2% of the judges reported any frequency greater than 25% of the cases involving excessively high awards of actual damages, with the percentage of judges observing excessive punitive damage awards more than a quarter of the time being somewhat higher at roughly 9%.

Even these low figures may tend to exaggerate the instance of runaway jury verdicts because a remarkably low number of judges had felt so strongly about a jury's excessive award to actually grant relief to a defendant during the preceding 48 months based upon an excessive award of actual or punitive damages. Table 3, for example, reveals that over 85% of judges had granted relief during the past four years due to an excessive award of actual damages either not at all or in only one instance. Moreover, no judge in the entire sampling had granted such relief during the prior four years in more than three cases.

Table 3

Aside from circumstances when you have been required to apply

³²Of the relatively infrequent instances of excessive jury awards of actual damages, it is not surprising that most of these awards came in personal injury cases. Indeed, some form of personal injury lawsuit was reported as being involved in an excess award more often than any other type of lawsuit. Specifically, of the judges who had witnessed at least one disproportionately high award, 21.1% observed this phenomenon in a product liability lawsuit, 18.4% observed it in a medical malpractice lawsuit, and exactly 50% reported such an award occurred in some "other" personal injury context. The next highest instance of observation reported was 18.4% in employment litigation. The reason that this finding is not surprising relates to the subjective nature of non-economic damages that are available in personal injury lawsuits, such as for pain and suffering.

existing statutory limits on compensatory damages (i.e., medical liability cases governed by Chapter 74 of the Texas Civil Practice and Remedies Code), on how many occasions during the past 48 months have you granted some form of relief based on your determination that the jury’s verdict on compensatory damages was excessive?

	Frequency	Percentage
0	24	64.9%
1	8	21.6%
2	3	8.1%
3	2	5.4%
TOTAL	37	100.00%

What is more surprising, perhaps, than how few judges had observed excessively high jury awards was that a greater number of judges observed just the opposite—that jury awards of compensatory damages that were disproportionately *low* was a greater problem, as revealed by Table 4.

Table 4

In what percentage of cases tried before you as presiding judge during the past 48 months, in which the jury awarded compensatory damages, do you believe that the jury’s verdict on compensatory damages was *disproportionately low* given the evidence that was produced during trial?

	Frequency	Percentage
0%	132	58.1%
1-25%	43	18.9%
26-50%	27	11.9%
51-75%	16	7.0%
76-100%	9	4.0%
TOTAL	227	100.0%

Thus, whereas over 83% of Texas judges had not witnessed a single jury award too much in damages, only 58% could say the same about witnessing juries being too stingy with awards of compensatory damages. Significantly, there was also a fairly high instance (approximately 15%) of Texas trial judges observing juries refuse to make any award of punitive damages when the judge believed such an award was warranted by the evidence, as revealed in Table 5. In both instances, when asked about the

reason they believed the juries had awarded too little in actual damages or had failed to award punitive damages when the judges believed they should have, the primary rationale offered was due to “media coverage of tort reform issues.”³³ In other words, even where media coverage of a tort crisis does not result in legislative action, juries tend to use that same coverage to reduce or eliminate awards of compensatory and exemplary damages on their own initiative.

Table 5

In cases tried before you as presiding judge during the past 48 months, on how many occasions when the jury refused to award exemplary damages did you believe that the jury should have awarded exemplary damages based on the evidence presented?

	Frequency	Percent
0	183	85.5%
1	10	4.7%
2	11	5.1%
3	3	1.4%
5	1	0.5%
7	1	0.5%
10	1	0.5%
25	2	0.9%
100	2	0.9%
TOTAL	214	100.0%

These findings suggest that far from a tort “crisis” the vast majority of Texas district judges have observed no significant evidence of a need for tort reform. And when asked specifically about the topic of extending limits for non-economic damages to areas outside of medical malpractice or imposing any further limits on punitive damages, they similarly indicate

³³26.5% of judges observing excessively low actual damage awards attributed the awards to media coverage. The next highest instance of possible reasons for the jury’s action offered by the judges was “negative feelings toward the plaintiff” reported on 18.9% of the survey responses. Similarly, when asked about the their perception of the reason a jury failed to award exemplary damages when the evidence warranted such award, the most frequent response chosen by the judges was media coverage of tort reform issues. Negative feelings toward the plaintiff appeared as a rationale on 23% of the survey responses.

that no such further reforms are necessary.³⁴ Indeed, if one were to base possible additional legislation solely on the reported observations of the Texas judiciary, one might have to consider a statutory *floor* on damages rather than a ceiling since Texas juries appear to have more of a problem with giving too little than too much in damages.³⁵

2. Frivolous lawsuits

The other major category of inquiry in the survey asked Texas trial judges about instances of frivolous litigation filed in their courts. Tables 6-8 show the responses of the judges to these three remaining inquiries.

Table 6

What percentage of civil suits presented to you for a determination on the merits during the past 48 months (whether by special exception, motion for summary judgment, or trial to the bench or jury) would you characterize as frivolous?

	Frequency	Percentage
0%	125	44.3%
1-25%	154	54.6%
26-50%	3	1.1%
51-75%	0	0%
76-100%	0	0%
TOTAL	282	100.0%

³⁴In 2003, the Texas legislature adopted a \$250,000 cap on non-economic damage recoveries in medical malpractice suits against doctors. TEX. CIV. PRAC. & REM. CODE § 74.301(a) (Vernon 2005). When asked if they believed, from their observations, that a need existed for such caps to be extended to other tort lawsuits, 88.1% of the responding judges said “no.” A need for additional reform in the area of punitive damages was even more soundly rejected by the judges. Texas currently has a cap on punitive damages of two times the amount of economic damages found by the jury plus an amount equal to any non-economic damages found by the jury up to \$750,000. The statute provides that any punitive damage award not in excess of \$200,000 is permitted as an alternative. TEX. CIV. PRAC. & REM. CODE § 41.008(b) (Vernon 2005). When asked whether, from their observations, a further need existed for legislation imposing further limits on exemplary damages, 96.5% of Texas judges said “no.”

³⁵As Professor Allen reminds, tort reform need not necessarily go only one direction: “[I]t need not be the case that calls for ‘tort reform’ only refer to restricting recoveries and making the process more difficult for plaintiffs. Arguments for increasing recoveries and making the system easier for plaintiffs are just as much about reforming the civil justice system in this country.” Allen, *supra* note 3, at 911.

Table 7

On how many occasions during the past 48 months have you imposed sanctions under Rule 13 of the Texas Rules of Civil Procedure or Chapters 9, 10 or 11 of the Texas Civil Practice and Remedies Code for bringing frivolous claims?

	Frequency	Percent
0	99	65.1%
1	30	19.7%
2	11	7.2%
3	7	4.6%
4	1	1.7%
5	2	1.3%
6	1	.7%
10	1	.7%
TOTAL	152	100.0%

Table 8

Based on your experience, do you believe that there is a need for further legislation addressing frivolous lawsuits?

	Frequency	Percentage
Yes	39	13.9%
No	242	86.1%
TOTAL	281	100.0%

While 44% of the judges had not personally observed a single frivolous lawsuit in their courtroom during the prior four years,³⁶ 99% had observed no more than between 1-25% of the cases filed before them as being frivolous. Perhaps more telling—if you believe that actions speak louder than words—85% of the responding judges had at most sanctioned a lawyer

³⁶Interestingly, one judge offered a written observation that they had not witnessed a single frivolous case: “In my 50 year career I have never seen a frivolous lawsuit, one without any merit.”

under Tex. R. Civ. P. 13³⁷ only one time or less during the prior four years. Finally, over 86% of the responding judges believed that there was no need for further legislation addressing frivolous lawsuits.

III. CONCLUSION

When one separates fiction from fact, the tort landscape takes on a much different hue. Listeners to popular media might be convinced that too many people are suing and recovering too much money in America. The facts show otherwise. There has been a decline of more than 50% in the number of civil jury verdicts in Texas from 1985 to 2002.³⁸ One study has shown, for example, that the vast majority of instances of medical malpractice never result in a claim being asserted by the victim. “A great many potential plaintiffs are never heard from by their injurers or their insurers.”³⁹ This study concluded that “at most only 10% of negligently injured patients sought compensation for their injuries.”⁴⁰ Our research confirms that most Texas trial judges do not see significant numbers of frivolous filings by people who have no business suing. And what happens to those 10% of the patients who do file meritorious tort suits for their personal injuries? According to our research, such victims are much more likely to be under-compensated than they are to receive any windfall. Such results fail to achieve either of the two primary goals for tort jurisprudence—the victim does not receive full compensation and the tortfeasor goes undeterred. Such facts need to receive more prominent consideration in any future debates about a tort crisis and the need for reform.

³⁷Texas rule 13 is the Texas equivalent to Federal Rule 11 and permits judges to sanction attorneys and parties for filings made in “bad faith” or that are “groundless.”

³⁸See Justice Nathan L. Hecht, *Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B.J. 854, 854 (2006).

³⁹Saks, *supra* note 4, at 1183.

⁴⁰*Id.*