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## *Informing the Tort Liability Debate: Toward a New Research Agenda*

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## ISSUE PAPER

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#### INTRODUCTION

For over a decade, policymakers, legal practitioners, scholars, and interest groups have debated the social and economic consequences of the U.S. civil justice system. Although the debate has touched on a number of issues, its major focus has been the liability system. The root issues have been the liability system's effectiveness in compensating for injuries and deterring negligent behavior and the price Americans pay for that function.

The debate intensified during the 1992 election season, when calls for reform of the tort liability system became a centerpiece of numerous political campaigns. Both proponents and critics of the current liability system backed their claims by citing statistics on case filings, jury verdicts, litigation costs, and so forth. At other times, the debate appeared to ignore relevant empirical research on Americans' legal attitudes and behaviors.

In 1993, the National Science Foundation's Law and Science Program asked the ICJ to organize and host a workshop to consider how social science research might contribute to a more informed public policy debate about the civil justice system in general and tort liability in particular. NSF's interest in the workshop was stimulated, in part, by queries from federal officials about available scientific evidence on how the legal system affects the economy. The workshop's objective was to develop an agenda for future research on the links between the legal system and the economy and society.

The workshop, held at RAND in Santa Monica, assembled leading scholars from diverse fields, including tort law and various social science disciplines. We invited scholars whose work we thought would help illuminate the relationships between law and society, whether or not that work focused directly on traditional liability concerns. Our goal was to broaden the exchange of research information across disciplines and to stimulate interdisciplinary collaboration.

The workshop addressed three basic questions:

- What are the key assumptions underlying the liability debate and how do they square with what research tells us?
- What are the central questions posed by the debate that research should address?
- What are some promising theoretical approaches and methods for addressing those questions?

## **THE TORT LIABILITY DEBATE: KEY ASSUMPTIONS AND QUESTIONS**

The workshop began with a discussion of some basic assumptions underlying the tort liability debate that require examination. We then identified many issues for future research. While much of the discussion focused on claiming and jury verdicts, assumptions in several other areas were also identified.

### **Claiming**

*Assumption: The tort system is out of control: There are too many tort claims and the number is increasing.* There was general agreement that some form of this assumption is central to the tort liability debate. The discussion explored several areas where research is needed. First, this assumption pointed to a recurring dilemma about the baseline for measuring the rate of tort claims.

Should it be the general population? The injury rate? Or the underlying legal culture? Second, what factors drive claiming and changes in claiming rates?

Here we identified several promising directions, including:

- the role of tort doctrine
- the nature or the cost of injury
- participants' expectations regarding outcomes and processes
- the mass media's role in reporting of risks and coverage of litigation
- the role of technology: new sources of injury and increased capability to detect injury
- incentives: economic need, greed, desire for an apology or a hearing
- the supply of lawyers
- changes in the demographic composition of the bar.

Many participants wanted to know how lawyer advertising and the mass media affect claiming. For example, the media appear to give disproportionate attention to a few cases with very large awards. Some participants expressed interest in seeing a systematic study of how the media report on the liability system and how the reporting influences players in the system. The workshop also discussed how societal attitudes about the appropriateness of apologizing for one's misdeeds—and legal practices that cut against such apologies—might affect litigation rates. It was agreed that a future research agenda should include analysis of fraudulent claiming: how much is there, what forms does it take, and what factors explain it?

### **Jury behavior and verdicts**

*Assumption: A basic problem with the tort liability system is the erratic behavior of juries.* Participants debated the merits of the perception of juries as capricious and unable to cope with the complexities of modern litigation. Some

argued that juries have been unfairly singled out in blaming the system for unpopular or negatively valued outcomes (such as the Rodney King defendants' case), while others felt the criticism of juries was warranted. One participant argued that getting rid of juries altogether would improve the system by reducing the uncertainty of its outcomes. Others responded that skewed media coverage, not juries per se, was responsible for the uncertainty. This discussion led to debate over the utility of longitudinal analyses of jury verdicts, given the difficulties of disentangling the effects of changes in lawyer and party litigation strategies from the effects of changes in juror attitudes. It was asserted that the focus on jury behavior tends to obscure the importance of the legal contexts in which juries operate.

The discussion identified several promising areas for research:

- Improving and augmenting current sources of data on jury behavior
- Effects of selection bias (changes over time and differences by jurisdiction and case type) on jury outcomes
- Jury understanding of expert testimony, including the effects of jury instructions, rules of evidence, and the potential use of neutral experts
- The comparative accuracy of fact-finding by juries, judges, and other possible fact-finders
- Comparative variance in liability vs. damage awards

#### **Other issues**

The discussion also ranged over a number of other issues, including the following:

**Role of judges.** Workshop members raised the question of how judges decide whether cases are important or frivolous and expressed interest in exploring judges' decisions regarding validity of scientific evidence.

**Judicial "system."** Does it really make sense to study legal behavior as a system? Or is it really an aggregation of smaller systems or, perhaps, cultures?

**Lawyers' negotiating and settlement strategies.** Do lawyers use discovery as a tactical weapon to drive up opposition costs or promote/discourage settlement? How do lawyers identify and use experts and what effect do experts have on settlement? Assuming that cases are in fact becoming more complex, what effect does this have on settlement behavior?

**Private dispute resolution processes.** There is considerable debate about the merits of privatization. Yet we don't have a clear picture of the workings of private processes. Participants generated an abundant list of potential research issues in this area: What is the magnitude of the use of private dispute resolution? What kinds of cases is it "draining" from the public system? What can be learned about the private system's outcomes and procedures? What effects does the private system have on access, courts' normative roles (i.e., precedents), public perceptions of the justice system, and public expenditures for the courts?

### **Tort Liability System's Effects on the Economy**

*Assumption: The liability system does not send clear signals to corporate decisionmakers.* Participants generally agreed that legal research has to date not obtained a clear picture of how companies respond to the threat of tort liability. They went on to debate a number of issues related to deterrence, including the nature of the loss that companies fear—dollar expense, damage to reputation, decreased market share—and the range of corporate reactions to liability exposure. There was interest in the subject of how companies estimate the

magnitude of losses from liability and what role insurance companies play in companies' perception and management of risk.

*Assumption: U.S. liability laws, especially those affecting product safety, place American firms at a competitive disadvantage.* Several workshop members argued that the importance of the "competitiveness" issue has been exaggerated. It remained unclear whether this should be regarded as a "real" issue; and if it is, how it can be framed and explored through research. Nonetheless, some expressed interest in studying the issue of a "level playing field" in international competition and a comparative analysis of liability laws' effect on creation of jobs.

The discussion several questions about the liability system's deterrence function as well as its function as a compensation system:

- What is the informational role of the tort system for product users and manufactures? Does the threat of tort action impair the flow of information? Are there changes that would enhance information flow?
- How do organizational culture and professional codes affect corporate employees' and officers' responses to liability and about the potential effects of liability exposure?
- What are the relative costs and benefits of tort as a deterrence mechanism and how do these compare with regulation and criminal law?
- How do the deterrence and compensation goals of the tort system interrelate? In particular, how would health care reform affect the need for tort-based compensation?
- What standards should be used for evaluating tort as a compensation system: transaction costs, the adequacy and equity of compensation, or other values?

Next, we discussed issues surrounding the tort system in its social and cultural contexts. The principal questions were:

- Are changes in claiming propensity a reflection of social, cultural change?
- In there an increasing divergence between formal legal rules and ordinary social norms?
- How does the public view and value the tort system, especially the role of the jury and potential trade-offs between (a) process efficiency and procedural fairness, and (b) deterrence/compensation and retribution?

#### **PROMISING THEORETICAL AND METHODOLOGICAL APPROACHES**

During the workshop's final day, we discussed promising approaches to addressing the questions facing civil-justice researchers. Many participants felt that scholarship on tort liability and civil law generally has overrelied on economic theory. They urged their colleagues to expand their conceptual horizons to incorporate different disciplinary approaches. Highlights of the discussion included innovative suggestions for studying corporate behavior, jury behavior, and the effect of the mass media.

- **Corporate behavior.** Alternative approaches to studying corporate behavior included ethnographic analysis as a way of understanding how corporate cultures affect risk management in the face of liability exposure; organization theory as a means of examining how institutional and organizational cultures affect corporate responses to liability; and information theory as an approach to charting and analyzing corporate information flows.



- **Jury behavior.** Participants suggested the use of conversation theory or discourse analysis to study jury deliberations. This approach promises to improve our understanding of how juries approach deliberations and how the dynamics of deliberations can influence outcomes.
- **Media influence on the tort liability system.** The issue of media influence had emerged at several points throughout the conference. Participants explored the possibility of using communication theory to try to quantify the media's coverage of civil legal affairs and analyze its influence.

The invitees concluded that nearly every aspect of the tort liability system is poorly understood and expressed support for some basic—albeit perhaps less innovative—work describing aspects of the system, surveying the location and contents of data sources, and tracking record-keeping operations. This was particularly true in the area of private dispute resolution, where in the absence of some initiative by researchers, records may disappear or never exist at all.

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