

WAS TEXAS TORT REFORM NECESSARY? AN UPDATE ON THE JUDGES’
VIEW OF JURY VERDICT ACCURACY.

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I. INTRODUCTION

Texas has long recognized the right to trial by jury as one of our citizens’ most precious rights. The open courts provision of the Texas Constitution “includes at least three separate constitutional rights: (1) courts must actually be operating and available; (2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies

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must be afforded.”¹ In recent years, tort reform has had a major impact on jury trials in the state of Texas. In 2007, in a prior article, we asked whether tort reform was motivated by a legitimate tort crisis, by false perceptions, or by a business and insurance lobby that harnesses misinformation to dodge the protections afforded to individuals by the 7th Amendment of the United States Constitution.²

A decade later, we revisit the issues presented in our original article and introduce a few others: Are tort reform initiatives and pervasive arbitration agreements infringing upon the open courts provision of the Texas Constitution? Are such initiatives a necessary check on juries run amok? Considering how strongly elected judges believe that “ordinary people have a better sense of justice than some politicians” and that juries generally arrive at the correct answer, the continued rhetoric of tort reform and legislative forays regarding tort reform seem unfounded. As one judge from this most recent study suggests, we may have gone too far down the tort reform road.³

II. DESPITE LEGISLATIVE ACTION, TORT REFORM ADVOCATES STILL PERCEIVE LAWSUIT ABUSE

Beginning in the 1980s, tort reform became a high-profile topic of debate for attorneys, judges, legislators, and the public. As of the 2014 state legislative sessions, both Congress and forty individual state legislatures had passed tort reform legislation in the form of damage caps on non-economic or punitive damages.⁴ This count does not include other types of tort reform legislation, such as abolishing joint and several liability, allowing collateral source evidence to diminish recovery, and increased strictures placed upon the recovery of punitive damages.⁵

The Texans for Lawsuit Reform political action committee (TLR PAC) claims its “goal is to make Texas civil courts balanced, fair, and predictable.”⁶ TLR PAC does more than lobby; it has invested substantial financial

¹Tex. Workers’ Comp. Comm’n v. Garcia, 893 S.W.2d 504, 520 (Tex. 1995).

²*Id.*; Bradley J.B. Toben et al., *Straight from the Horse’s Mouth: Judicial Observation of Jury Behavior and the Need for Tort Reform*, 59 BAYLOR L. REV. 419, 419 (2007).

³Survey, *Survey of Texas District Judges*, RESULTS (2018) (unpublished survey) (on file with author).

⁴See AMERICAN TORT REFORM ASSOCIATION, Tort Reform Record 17–38 (June 2017).

⁵*Id.* If we were to categorize these types of legislation as tort reform, then all 50 states currently have some type of tort reform enacted.

⁶*Reform Legislation in Texas, 1995-2017*, TEXANS FOR LAWSUIT REFORM, <https://www.tortreform.com/content/reforms> (last visited December 21, 2018).

resources to influence political races.⁷ According to the National Institute on Money and State Politics website, “followthemoney.org,” Texans for Lawsuit Reform has given \$42,315,909 to 529 different political office filers over the last twenty-three years.⁸

The Texas push for major legislative reform came to a head during the 78th legislature in 2003, when the Texas Legislature made over thirty changes to a dozen different topic areas of the law.⁹ These changes included requiring a unanimous verdict to award punitive damages,¹⁰ changing the *forum non conveniens* statute to simplify the dismissal process, and establishing caps on non-economic damages recovered against medical or health care providers.¹¹ The last of these required a constitutional amendment which passed by 51.1%, which is a narrow margin of approval when it is unknown whether voters understood the potential impact the change would have on their rights.¹² Despite the sweeping nature of the legislative changes, the 2003 legislation did not satisfy tort reform advocates, who have continually proposed and sought passage of legislative initiatives in subsequent legislative revisions.¹³ In the 81st legislative session, legislators made a dozen changes to seven different topic areas of the law bearing upon tort recovery.¹⁴ An additional half dozen were passed in the 82nd and 83rd legislatures.¹⁵

Significant among these state-level changes is the addition to Article 1 of Subsection (g) of the Texas Government Code, which requires the Supreme Court of Texas to “adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence.”¹⁶ The changes further require an award of attorney’s fees to the prevailing party in

⁷ See *Texans for Lawsuit Reform*, FOLLOW THE MONEY, <https://www.followthemoney.org/entity-details?eid=4675> (last visited December 21, 2018).

⁸ *Id.*

⁹ See *Reform Legislation in Texas, 1995-2017*, *supra* note 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² OFFICE OF THE SECRETARY OF STATE, RACE SUMMARY REPORT: 2003 CONSTITUTIONAL AMENDMENT ELECTION (2003).

¹³ See *Reform Legislation in Texas, 1995-2017*, *supra* note 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ TEX. GOV. CODE ANN. § 22.004(g).

a suit.¹⁷ Referred to as the “Loser Pays” legislation,¹⁸ the law is intended to be “the cure for courts choked with the costs of ‘junk’ lawsuits.”¹⁹

The question then becomes: are “junk lawsuits” actually choking the justice system or raising costs in any meaningful way? In 2007, during the initial phase of this survey, 44% of judges had not observed a single frivolous lawsuit in their courtroom during the prior four years; and 99% had determined that somewhere between 1-25% of the cases pending before them were frivolous.²⁰ If frivolous lawsuits continue to “choke” the system, surely the judges who determine whether a suit is frivolous are in the best position to discuss the frequency of these types of lawsuits. Virtually every judge surveyed reported that the number of frivolous lawsuits filed in their court was below 25% and perhaps as low as 1%.²¹ Not only was the percentage of frivolous cases low, but the judges can weed out these few meritless claims using existing mechanisms – no further reform required.

Tort reform initiatives continue to be pushed at the federal level as well. In early March 2017, the House passed two bills on tort reform, with another currently pending.²² The first of these is the Lawsuit Abuse Reduction Act of 2017.²³ The bill would amend Rule 11 of the Federal Rules of Civil Procedure to require the court to impose sanctions on any attorney, law firm, or party that would violate the rule.²⁴ The Furthering Asbestos Claim Transparency (Fact) Act of 2017 would require public disclosure by trusts of quarterly reports with information regarding claims based on exposure to asbestos.²⁵ The result of this bill, when combined with the Fairness in Class Action Litigation Act, is to limit federal courts’ ability to certify class actions, among other things.²⁶ Furthermore, in June 2017, the House passed H.R. 1215, the Protecting Access to Care Act, which would impose a nationwide cap of \$250,000 for pain and suffering in malpractice suits.²⁷ Each of these laws

¹⁷TEX. CIV. PRAC. & REM. CODE ANN. § 30.021.

¹⁸Morgan Smith, *Texas’ Next Tort Reform Battle: “Loser Pays”*, THE TEX. TRIBUNE, March 11, 2011, <https://www.texastribune.org/2011/03/11/loser-pays-a-winner-in-the-texas-legislature/>.

¹⁹*Id.*

²⁰Toben et al., *supra* note 2, at 433.

²¹See Toben et al., *supra* note 2, at 432.

²²H.R. 720, 115th Cong. § 2 (2017); H.R. 985, 115th Cong. §§ 103, 202 (2017).

²³H.R. 720.

²⁴*Id.*

²⁵H.R. 906, 115th Cong. (2017).

²⁶H.R. 985, 115th Cong. (2017).

²⁷H.R. 1215, 115th Cong. (2017).

would significantly affect access to the federal court system, potentially leading disputing parties to seek out other methods of resolution.

III. ARBITRATION AGREEMENTS – FURTHER EROSION OF THE 7TH AMENDMENT

In the early twentieth century, mandatory arbitration agreements were rarely used because courts refused to enforce them.²⁸ However, in 1925, Congress passed the Federal Arbitration Act (FAA) with the goal of “quickly resolv[ing] disputes” and “plac[ing] arbitration agreements upon the same footing as other contracts.”²⁹ Scholarly research suggests that Congress initially intended to limit the FAA to apply only to federal actions and to interstate commercial transactions, and not to preempt state law or apply to employment contracts of any kind.³⁰ If the FAA did not solve the problem, the adoption of the Federal Rules of Civil Procedure in the 1930s should have addressed the supposed chaos in jury trials which the FAA was intended to manage.

Since the passage of the FAA, the United States Supreme Court has greatly expanded both the scope of matters considered to be appropriate for arbitration, as well as the power of arbitrators.³¹ Arbitration presupposes that a private forum is better for conflict resolution than jury trials. In theory, arbitration can shorten and lessen the cost of discovery, offer an arbitrator or panel of arbitrators with specific expertise in the disputed field, and lead to a speedier resolution.³² This premise, however, has not been the universal experience. Instead of predictable rules of civil procedure and evidence, an arbitrator has significant discretion in the handling of discovery and evidence.³³ Moreover, the cost savings predicted have not been recognized in actuality. Evidence of whether arbitration is superior to litigation is often

²⁸Judge Craig Smith & Judge Eric V. Moyer, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 287 (2012).

²⁹*Id.*

³⁰David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 445–46 (2011).

³¹See Smith & Moyer, *supra* note 28, at 287; see also Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm*, 42 SW. L. REV. 131 (2012) (For further discussion of U.S. Supreme Court arbitration jurisprudence since enactment of the FAA).

³²4 AM. JUR. 2D *Alternate Dispute Resolution* § 161 (2018).

³³*Id.* at § 147.

anecdotal and case-specific, leading to prejudices and preferences rather than empirical evidence that arbitration provides a tangible benefit.³⁴

Today, the federal courts have extended the enforceability of arbitration contracts to a virtually unrecognizable level. The U.S. Supreme Court has declared a “national policy favoring arbitration,” opening the door to federal preemption and the expansion of arbitration far beyond commercial, arms-length transactions.³⁵ Now, the enforceability of arbitration clauses is a federal substantive issue which applies even to *Erie*-type diversity cases.³⁶ Furthermore, the issue of whether an arbitration agreement is unconscionable now must be determined by the arbitrator, unless the complainant is specifically arguing that the arbitration agreement is unconscionable.³⁷

The Texas legislature and courts have implemented changes to arbitration parallel to those in the federal system. Enacted in 1997, Chapter 171 of the Texas Civil Practice & Remedies Code validates arbitration agreements and gives them the same enforceability as other contracts.³⁸ In Texas, unenforceable aspects of an arbitration agreement are severable from the remainder of the arbitration agreement, and the one-sided nature of a provision in an arbitration agreement does not invalidate the entire agreement.³⁹ Furthermore, it appears that a determination of whether the original policy objectives of arbitration have been achieved matters less than a determination that the parties should have freedom of contract to enter into the agreement, notwithstanding the reality that many arbitration provisions are offered to a party on a “take it or leave it” basis.⁴⁰

Indeed, while there are material benefits to arbitration when the contracting parties have equal bargaining power, those benefits are diminished and even evaporate in the context of consumer and employment

³⁴E. Norman Veasey & Grover C. Brown, *An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions*, 70 BUS. LAW 407, 410–18 (2015).

³⁵*Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 345–46 (2010); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967).

³⁶*Prima Paint Corp.*, 388 U.S. at 404–05.

³⁷*Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 80 (2010).

³⁸TEX. CIV. PRAC. & REM. CODE ANN. § 171.001; Anita J. Barksdale, *Arbitration in Texas: Valid or Invalid?*, 30 CORP. COUNS. REV. 247, 252 (2011).

³⁹*See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 230 (Tex. 2014).

⁴⁰*See In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 192 (Tex. 2007).

contracts, given the parties' disparate bargaining positions.⁴¹ Issues "arise when large corporate entities insist upon arbitration agreements in contracts that consumers cannot negotiate."⁴² The resulting adhesion contract is even more problematic when all of the major industry players in a given sector require arbitration.⁴³ This industry-wide approach essentially requires consumers to succumb to the arbitration agreement or forego insurance, cellular phone service, and other goods and services.

IV. IS ALL OF THIS REALLY NECESSARY? WHY JURIES GET IT RIGHT

Despite tort reform advocates' belief that our judicial system needs to guard against runaway jury verdicts, incompetent judges, and frivolous lawsuits,⁴⁴ the current evidence indicates that juries usually come to a judicially-acceptable answer, and not by coincidence.⁴⁵ By the time a lawsuit reaches a jury for determination, it has survived a number of legislatively and judicially-created mechanisms designed to promote judicial efficiency and dismiss baseless claims.

⁴¹Smith & Moye, *supra* note 28, at 296.

⁴²*Id.* at 295–96.

⁴³*Id.* at 296.

⁴⁴The economy has three enemies: taxes, regulation, and, for lack of a better word, liability. President Donald Trump has managed to slay two of these dragons by backing tax cuts and aggressive deregulation of entire economic sectors but there's little he can do about the cost of litigation. Mostly, it's a matter for the states and they, like it or not, need to act before activist lawsuits help choke off the recovery.

It's a problem that's been building for years, particularly as it regards the alleged misappropriation of trade secrets. The number of suits on this issue increased by at least 14 percent per year between 2001 and 2012 with Texas, surprisingly, as ground zero.

Plaintiffs looking for large payouts have ample reasons to bring their complaints to Texas. *Juries find for the plaintiffs almost 70 percent of the time even though the complaints being litigated involve intellectually challenging concepts that may be beyond the scope of the average trial judge to fully comprehend. And because there are big bucks involved—everything is big in Texas after all—the incentives to go to trial are considerable.* (emphasis added).

See infra Part V; *See also* Peter Roff, *Texas Jury Verdicts Threaten Economic Growth*, THE DAILY CALLER (July 10, 2018, 11:20 PM), <http://dailycaller.com/2018/07/10/texas-jury-verdicts-threaten-economic-growth/>.

⁴⁵*Infra* Part V.

Before discovery begins, a litigant can ask that the cause of action be dismissed if the claim has no basis in law or fact.⁴⁶ Once discovery begins, a party can file a motion for summary judgment that will be granted if there is no genuine issue of material fact as to some or all of a party's claim or defense.⁴⁷ The doctrines of *res judicata*⁴⁸ and collateral estoppel⁴⁹ further limit the courts. The affirmative defense of *res judicata* precludes a party from litigating a claim if a final decision on the merits has already been made with respect to an identical prior claim.⁵⁰ The affirmative defense of collateral estoppel prevents the litigation of issues adjudicated in a prior proceeding.⁵¹ Furthermore, if the court finds the action brought by litigants to be frivolous, it can sanction the violating party.⁵²

All these mechanisms prevent a lawsuit from proceeding before a jury is even empaneled. Once the jury is selected, a court still has the power to find that there is legally insufficient evidence to bring the claim and dismiss the case based on an instructed verdict or judgment as a matter of law.⁵³ By the time the court reaches the point of placing the factual determinations in the hands of the jury, the judge has determined that there are both pleadings and proof sufficient to warrant the jury being asked to determine those fact questions.⁵⁴ When the jury returns a verdict, a judge still has the power to evaluate the factual sufficiency of the evidence.⁵⁵ Specifically, a court can grant a new trial "when the damages are manifestly too small or too large."⁵⁶

Tort reform advocates seem to view themselves as powerless within the system, when in reality, the system is already designed to weed out non-meritorious claims.⁵⁷ When asked: "What type of further legislation, if any, do you believe would appropriately address frivolous lawsuits?", many judges in our prior and current survey noted that available mechanisms were

⁴⁶TEX. R. CIV. P. 91a; FED. R. CIV. P. 12(b)(6).

⁴⁷TEX. R. CIV. P. 166a; FED. R. CIV. P. 56.

⁴⁸*Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

⁴⁹*See John G. & Marie Stella Kennedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 288 (Tex. 2002).

⁵⁰*Travelers*, 315 S.W.3d at 862.

⁵¹*See John G.*, 90 S.W.3d at 288–89.

⁵²TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001, 10.004; FED. R. CIV. P. 11.

⁵³TEX. R. CIV. P. 268; FED. R. CIV. P. 50.

⁵⁴TEX. R. CIV. P. 278; FED. R. CIV. P. 50.

⁵⁵TEX. R. CIV. P. 320; FED. R. CIV. P. 59–60.

⁵⁶TEX. R. CIV. P. 320.

⁵⁷*See infra* Part V.

sufficient to address frivolous lawsuits.⁵⁸ Two judges noted that rather than creating additional legislation, attorneys need to take advantage of the tools available to them, and further observed that, when dealing with frivolous lawsuits, “some defendants do not file the appropriate motion, or any motion at all,” and that “lawyers are afraid to ask the court to invoke sanctions” even when warranted.⁵⁹

A survey conducted of sitting district judges in Texas revealed that not only did these judges believe juries reach the right result in the majority of cases, but they believe juries award damages that are proportionate to the claimed injuries, or more frequently, damages that are lower than the judge believed the evidence warranted.⁶⁰

As explained in more detail below, the goal of this later study was to gain insight on relevant issues from those individuals who are “the daily observer[s] of the jury system in action”—Texas trial court judges.⁶¹ The results show judges possess a strong confidence in the ability of jurors to get the right answer, as well as an absence of the alleged disproportionately high jury verdicts and frivolously filed lawsuits.⁶² These statistics confirm the assertion that the mechanisms already in place to avoid these issues do work.

V. JUDICIAL OBSERVATIONS OF A TORT “CRISIS”

A. Methodology

The purpose of this survey was to revisit and gain additional insight into the observations of state court trial judges throughout the State of Texas on primary assumptions regarding the need for tort reform. The judges’ opinions have been acquired from the best vantage point—direct participation and supervision over the trials that occur daily in their courts. Our prior judicial survey sought to address a major challenge in empirical research from other judicial surveys: how to obtain a large and representative sampling of the objective views of members of the judiciary. The reasons for this challenge are several. First, obtaining answers reflecting on any specific current litigation could create ethical dilemmas arising out of a judge’s obligations

⁵⁸Survey, *supra* note 3, RESULTS.

⁵⁹Survey, *supra* note 3, RESULTS.

⁶⁰Bradley J.B. Toben et al., *Trial Judges Pronounce Their Verdict on Texas Juries and Cases*, 70 TEX. B.J. 958, 959 (2007).

⁶¹Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1073 (1964).

⁶²*See supra* Part V.

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.” For this reason, the authors in conducting the survey specifically advised each participant judge in writing to “not consider any cases presently pending in your court, or on appeal from your court, in completing this survey.”⁶³

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, [and] the administration of justice” Each of the surveys we have conducted has promoted 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, resulting in a statistically robust data set.

The other obstacle was obtaining a high enough participation rate from an audience of generally understaffed (most state judges have no professional law clerks, unlike their federal counterparts) and overworked members of the state judiciary. One of our original article’s authors, an academic sociologist, previously indicated that a “return rate of twenty percent would be ‘normal’”⁶⁴ from members of the judiciary, although some other studies boasted a return rate as high as 70% from the judiciary. 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 data significant enough to establish reliable conclusions.

To replicate the successful accumulation of data in the first survey, the authors attempted to mirror the process. The authors sent questionnaires to each of the district court judges accompanied with a letter explaining the purposes behind the survey.⁶⁴ In addition to this cover letter, the survey was accompanied by a cover sheet on which the participant would include his or her name and specify the district court in which he or she sat. This sheet was turned in to the authors 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. In sum, out of a universe of 389 Texas district court judges, we

⁶³ Survey, *supra* note 3, CORRESPONDENCE.

⁶⁴ Survey, *supra* note 3, CORRESPONDENCE.

received a total of 256 completed surveys for a return rate of 65.8%—a percentage that compares favorably with any prior published survey of this type. Of those 256 respondents, 208 judges presided over at least one civil trial which went to jury verdict in the 48 months preceding the survey. One reason for the slightly lower return rate in this survey than the prior was that it was not launched initially at a judicial conference. That “first wave” approach to the survey yielded an additional 97 surveys returned, for an overall return rate of over 80%. The return rate for mailed surveys was comparable between the two studies.

B. Compensatory and Exemplary Damages

This survey focused on evaluating jury awards of compensatory and exemplary damages. In analyzing tort reform principles, the question is simple: do juries frequently overcompensate plaintiffs, such that there is a need for damage caps to reign in these rogue verdicts? Returns from the judges themselves do not show that many juries seem to overcompensate plaintiffs. In fact, in every category of damages about which the judges were queried, an overwhelming majority of judges found that every jury award of damages was proportional to the evidence given at trial.⁶⁵ Those judges who found that juries had occasionally handed down a disproportionate award of damages, based on the evidence at trial, actually found that it is more likely that a jury would *undercompensate* a plaintiff, rather than overcompensate a plaintiff.⁶⁶

C. Survey Findings

1. Disproportionately High Jury Verdicts

a. Actual and Exemplary Damages

Considering businesses’ and insurance carriers’ continued fear of excessive jury verdicts, the survey asked the trial judges several questions concerning the frequency with which they observed any such disproportionate jury verdicts. Specifically, in two questions, the judges were asked about the frequency with which they observed, during the preceding five years, juries awarding actual or punitive damages in an amount they

⁶⁵ See *supra* Part V.

⁶⁶ See *supra* Part V.

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considered “disproportionately high” in light of the evidence presented at trial.⁶⁷ Tables 1 and 2 reveal an overwhelmingly large percentage of judges who either never witnessed such an instance, or who witnessed the behavior in a small percentage of cases. In the table below, we have provided the original questions and data from this section of the survey.

b. Compensatory Damages

Question #1:

In what percentage of cases tried before you as presiding judge during the past 60 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?⁶⁸

Answer %	Number of Judges	Percentage of Judges
0%	177	85.10%
< 1%	2	0.96%
1% - 5%	15	7.21%
6% - 10%	10	4.81%
11% - 15%	0	0.00%
16% - 20%	1	0.48%

Thus, 85.1% of the Texas district court judges presiding over civil jury cases observed not a single instance of a disproportionately high jury verdict on either actual or exemplary damages during the preceding sixty months before the survey. These results are consistent with the previous data collected in 2007, in which more than 83% of Texas district court judges had not observed a single instance of a runaway jury.⁶⁹ Tort reform measures did

⁶⁷ See *supra* Part V.

⁶⁸ Survey, *supra* note 3.

⁶⁹ Toben et al., *supra* note 2, at 428.

not increase the number of juries reaching the right result; in fact, tort reform had no discernible effect on jury outcomes. By any measure, juries appear to have “gotten it right” all along.

Only approximately 14.9% of judges had seen *even one instance* of disproportionately high jury verdicts in the preceding five years. Each judge who identified at least one case of a disproportionately high verdict then was asked to categorize the type of case in which this occurred. Personal injury cases made up the highest frequency of cases in which judges saw at least one disproportionately high compensatory damage award.⁷⁰ This result is not surprising, given the inherently subjective nature of non-economic damages recoverable in personal injury cases. One would expect a high degree of subjectivity given the nature, duration and severity of the injury, and the credibility of the witnesses.

The data leads to a 1.2475% overall composite percentage estimation of cases with disproportionately high jury verdicts.⁷¹ This result suggests that either juries were returning verdicts well-supported by the evidence, pre-tort reform, and/or that in the opinion of Texas judges, tort reform has not affected the *correctness* of verdicts in any statistically significant way.

In those rare instances where judges noted disproportionately high jury verdicts, the results were not significant enough to warrant post-verdict relief. A remarkably low number of judges felt so strongly about a jury’s excessive award as to actually feel obliged to grant post-verdict relief to a defendant (during the preceding sixty months based upon an excessive award of actual damages). Table 3, for example, reveals that almost 95% of judges declined to grant relief during the past five years due to an excessive award of actual damages, or did so only once. We provide the survey data below.

Question #4:

Aside from circumstances when you have been required to apply 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 sixty months have you granted

⁷⁰Survey, *supra* note 3, RESULTS. In Question 2, 34% of the cases noted by judges were personal injury cases.

⁷¹Survey, *supra* note 3, RESULTS. Methodology: Based on each individual answer to question 1 in the survey; multiplying the total percentage by the number of judges who indicated that percentage and then dividing that by the total number of judges.

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some form of relief based on your determination that the jury's verdict on compensatory damages was excessive?⁷²

Numerical Responses	<u>Frequency</u>	<u>Percentage</u>
0	27	81.82%
1	4	12.12%
25	1	3.03%
40	1	3.03%
Total	33	100%

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c. Exemplary Damages

Question #11:

In what percentage of cases tried before you as presiding judge during the past sixty months, in which the jury awarded exemplary damages, do you believe that the jury's exemplary damage award was disproportionately high given the evidence produced during trial?⁷⁴

Answer	Number of Judges	Percentage of Judges
0%	82	91.11%
1%	1	1.11%
10%	1	1.11%
20%	1	1.11%
33%	1	1.11%
50%	2	2.225%
100%	2	2.225%

⁷²Survey, *supra* note 3.

⁷³Survey, *supra* note 3, RESULTS.

⁷⁴Survey, *supra* note 3.

Total	90	100.00%
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In the past sixty months, ninety of the responding judges had seen at least one case in which a jury awarded exemplary damages; yet, less than 10% of those judges found that the jury's award of exemplary damages was disproportionately high, based upon the evidence produced at trial⁷⁵ Some judges did feel that they saw more than one case with an excessive verdict; and thus, we can analyze this data in terms of cases as well.

Response	Number of Judges	Cumulative Percentage Values
0%	82	0
1%	1	1
10%	1	10
20%	1	20
33%	1	33
50%	2	100
100%	2	200
Total	90	364

Taking into account all cases in which the judge felt the jury awarded a disproportionately high exemplary damages figure, the data reveals only a composite percentage estimation of 4.04% of cases with disproportionately high exemplary damages.⁷⁶ In approximately 91.1% of cases where a jury awards exemplary damages, the trial judge agrees that the jury's award is correct based upon the evidence adduced at trial.⁷⁷ While various observers might quibble on the exact dollar figure to award, a margin of overcompensation of only 4.04% does not appear to justify mandatory statutory damage caps that remove juror discretion in awarding damages.

⁷⁵Survey, *supra* note 3, RESULTS. Two hundred and two judges responded to Question 10 with 83 judges indicating that they have presided over at least one case, in the past 60 months, where exemplary damages have been awarded.

⁷⁶Survey, *supra* note 3, RESULTS.

⁷⁷Survey, *supra* note 3, RESULTS.

Furthermore, more than 85% of judges have not seen *either* an excessive compensatory damage award *or* an excessive exemplary damage award in their prior five years on the bench.⁷⁸ The numbers themselves do not lead to the conclusion that juries arbitrarily or frequently award undeservedly high damages such that the legislature should trump jury discretion. Tort reform has created a culture in which jurors, reluctant to be vilified as “McDonald’s jurors,” undercompensate, rather than overcompensate plaintiffs, according to the judges.⁷⁹

2. Disproportionately Low Jury Verdicts

Rather than seeing a rash of runaway juries, district judges reported that they were far more likely to see miserly juries.⁸⁰ In both compensating and punishing through damage awards, jurors undercompensated substantially more frequently, in the judges’ eyes, than they overcompensated.⁸¹

a. *Compensatory Damage Awards*

Question #5:

In what percentage of cases tried before you as presiding judge during the past sixty 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?⁸²

Answer	Number of Judges	Approx. Percentage

⁷⁸Survey, *supra* note 3, RESULTS. One hundred seventy-seven judges out of two hundred and eight who responded indicated 0% for both Question 1 and Question 11.

⁷⁹Stella Liebeck, a seventy-nine-year old woman, suffered second and third degree burns to her upper inner thighs, buttocks, genital areas, and lower abdomen. Plaintiff’s Amended Complaint for Damages, *Liebeck v. McDonald’s Rests., P.T.S., Inc.*, No. CV-93-02419, 1993 WL 13651163 (N.M.D. Oct. 5, 1993). As part of the exemplary damages evidence, jurors heard that McDonald’s had seen comparable injuries many times before. Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, p. A1,4.

⁸⁰See Survey, *supra* note 3, RESULTS.

⁸¹See Survey, *supra* note 3, RESULTS.

⁸²Survey, *supra* note 3.

		of Judges
0%	112	54.90%
1%-10%	23	11.27%
11%-20%	15	7.35%
21%-30%	16	7.84%
31%-40%	4	1.96%
41%-50%	13	6.37%
51%-60%	4	1.96%
61%-70%	2	0.98%
71%-80%	6	2.94%
81%-90%	2	0.98%
91%-100%	7	3.43%
Total	204 ⁸³	100.00%

The data revealed that 45.1% of judges had seen at least one instance of a jury returning a disproportionately low compensatory damage award. The number of judges who have seen a disproportionally low award (45.1%) is more than triple the number (14.9%) of those who reported seeing a disproportionately high award of such damages. Rather than rampant runaway juries overcompensating undeserving plaintiffs, the numbers, if anything, show that plaintiffs are more often undercompensated by juries. While these numbers alone may not tell the whole story about how disproportionate the verdicts have been (either high or low), should the slight chance of a disproportionately high verdict be the reason to cap compensation to plaintiffs who are deserving of more?

b. Exemplary Damage Awards

Question #13:

In what percentage of cases tried before you as a presiding judge during the past sixty months, in which the jury awarded exemplary damages, do you believe that the jury's

⁸³Survey, *supra* note 3, RESULTS. Two hundred and four judges responded to this question. Four judges who responded to Question one did not indicate a response to Question five.

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exemplary damage award was disproportionately low given the evidence produced during trial?⁸⁴

Answer	Number of Judges	Percentage of Judges
0%	68	82.92%
2%	1	1.22%
10%	1	1.22%
25%	1	1.22%
50%	2	2.44%
60%	1	1.22%
80%	2	2.44%
90%	2	2.44%
100%	4	4.88%
Total	82	100.00%

Approximately 17% of judges who presided over a case where the jury awarded exemplary damages believed that, in at least one such case, the jury's award was disproportionately low compared to the 10% of such judges who believed that the exemplary damages were disproportionately high.⁸⁵ This data does not support the theory that juries award excessive punitive damages; rather, it suggests that if juries miss the mark on damages, they more commonly shoot low than high. Interestingly enough, when asked the reason why the judges felt that the jury's verdict on exemplary damages was disproportionately low, the most common reason was media coverage of tort reform issues.⁸⁶

These findings suggest that the vast majority of Texas district judges have observed no significant evidence of a need to take the fact-finding process away from juries and place it in the hands of arbitrators or to perpetuate or

⁸⁴Survey, *supra* note 3.

⁸⁵Survey, *supra* note 3, RESULTS.

⁸⁶Survey, *supra* note 3, RESULTS. In response to Question 14, "Media coverage of tort reform issues" was identified as the most common reason for a disproportionately low verdict of exemplary damages, almost twice as common as the next reason on the list. "Media coverage of tort reform issues" came in at 35% with "Misunderstanding of the law regarding exemplary damages" as the second most common reason with 18%. Survey, *supra* note 3³, RESULTS.

implement tort reform initiatives. When specifically asked about extending limits for non-economic damages to areas outside of medical malpractice or imposing further limits on punitive damages, judges overwhelmingly indicated that no such further reforms are necessary.⁸⁷ Rather, the evidence indicates that judges most frequently find juries to be correct, or, if anything, too stingy with awards.

3. Frivolous Lawsuits

One goal of tort reform is to rid the system of frivolous lawsuits. Is tort reform needed to limit frivolous or bad faith filings, or do existing mechanisms already address the problem? Procedurally, many legal avenues of relief are available to defendants for frivolous filings, and those remedies are available long before the jury sees the case. Procedural rules and statutes provide for dismissal of pleadings filed in bad faith or claims made without a good faith basis in their viability whether in law or in fact.⁸⁸ Specific statutes, such as the Texas Deceptive Trade Practices Act, provide for attorneys' fees and other penalties for claims which are frivolous or brought in bad faith.⁸⁹ Defendants can file for summary judgment if either there are no genuine issues of material fact or if the claimant has no evidence of an essential element of a claim or defense.⁹⁰ During trial, a defendant can move for a directed verdict if there is no evidence or legally insufficient evidence of the claim.⁹¹ Following the jury's verdict, the defendant can still challenge both the legal and the factual sufficiency of the jury's verdict.⁹² At each of these stages, the law takes the outcome out of the hands of the jury because there are certain threshold levels of proof that must be met to sustain an award of damages. Even when a jury awards damages that a judge does not deem warranted, the judge can act to remedy the problem.

Question #18:

What percentage of civil suits presented to you for a determination on the merits during the past sixty months (whether by special exception, motion for summary

⁸⁷ Survey, *supra* note 3, RESULTS.

⁸⁸ See TEX. R. CIV. P. 13; TEX. CIV. PRAC. & REM. CODE ANN. § 10.001.

⁸⁹ See, e.g., TEX. BUS. & COM. CODE ANN. § 17.50.

⁹⁰ TEX. R. CIV. P. 166(a).

⁹¹ See TEX. R. CIV. P. 268.

⁹² TEX. R. CIV. P. 301.

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judgment, or trial to the bench or jury) would you characterize as frivolous?⁹³

Answer	Number of Judges	Percentage of Judges
0%	101	41.57%
< 1%	14	5.76%
1%	29	11.93%
2%	21	8.64%
3%	11	4.53%
4%	5	2.06%
5%	29	11.93%
6%	1	0.41%
10%	20	8.23%
15%	6	2.47%
20%	5	2.06%
35%	1	0.41%
Total	243 ⁹⁴	100.00%

Almost 59% of judges reported at least one case before them that they would classify as frivolous, but many of these cases were disposed of using the existing procedural and statutory tools which predated tort reform.⁹⁵ If the case reached the deliberation stage, the jury usually saw the case was frivolous, and the judges rarely needed to grant relief based on an excessive damages finding by the jury.

In Question 4, we asked judges, “[A]side from circumstances when you have been required to apply 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

⁹³Survey, *supra* note 3.

⁹⁴The number of judges answering this question is greater than the previous number of 208 because this includes judges who have not presided over a jury trial, but who still have dealt with civil suits having a different disposition such as special exception, summary judgment, or bench trial. Survey, *supra* note 3, RESULTS.

⁹⁵Survey, *supra* note 3, RESULTS.

sixty months have you granted some form of relief based on your determination that the jury's verdict on compensatory damages was excessive?"⁹⁶ Of the twenty-eight judges who noted at least one excessive verdict in response to Question one, only six judges answered that they had granted some form of relief in response.⁹⁷

Most tellingly, an overwhelming majority of judges felt no need for further legislation addressing frivolous lawsuits.⁹⁸

Question #17:

Texas legislation imposes limits on the amount of exemplary damages that can be recovered against a defendant (*See* TEX. CIV. PRAC. & REM. CODE § 41.008.) Based on your experience in cases tried before you during the past sixty months, do you believe that there is a need for legislation imposing further limits on the number of exemplary damages that may be recovered?⁹⁹

Yes	2	0.97%
No	204	99.03%
Total	206	100.00%

As indicated in the chart above, less than 1% of surveyed judges believe there is a continued need for additional legislation imposing further or additional limits on the recovery of exemplary damages, whereas more than 99% believe no such need exists. There is a clear and overwhelming consensus that judges believe there is no need for the creation of new, additional limits on the recovery of exemplary damages.

The surveyed judges are nearly as unified in their opinion that additional legislation addressing "frivolous" litigation is not necessary. While 42% of judges had not personally observed a single frivolous lawsuit in their courtroom during the prior five years, 99% observed no more than between 1–2 of the cases filed before them as being frivolous.¹⁰⁰ Furthermore, an

⁹⁶Survey, *supra* note 3.

⁹⁷Survey, *supra* note 3, RESULTS.

⁹⁸Survey, *supra* note 3, RESULTS.

⁹⁹Survey, *supra* note 3.

¹⁰⁰Survey, *supra* note 3, RESULTS.

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overwhelming percentage of judges (more than 90%) believed that there was no need for further legislation addressing frivolous lawsuits.¹⁰¹

VI. CONCLUSION

Despite media hype and anecdotal evidence, the data has been clear and consistent over the past decade. As is sometimes observed, anecdotes are not synonymous with data. Judges find that rather than the disproportionately high jury verdicts promised by tort reform advocates, they are more likely to see a disproportionately low jury verdict given the evidence presented at trial.¹⁰² As such, they are rarely forced to grant post-verdict relief based on disproportionately high compensatory damages. They rarely see frivolous lawsuits; and therefore, are rarely forced to impose sanctions based on the bringing of frivolous claims. An overwhelming number of trial court judges do not perceive a need for further tort reform legislation.

If juries get it right, why are tort reform advocates, insurance carriers, and businesses so afraid of allowing disputes to be heard by a jury of their peers? Perhaps the answer is in the question: they are afraid because juries *do* arrive at the correct answer.

¹⁰¹ Survey, *supra* note 3, RESULTS.

¹⁰² See *supra* Part V.