# *Selected Portions of:*
# Torts: Cases, Principles, and Institutions

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## About the Author

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## Notices

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# CHAPTER 1. AN INTRODUCTION TO AMERICAN TORT LAW

## *A. Principles and Institutions*

[* * *]

Tort law in the United States consists of a sprawling set of social institutions and practices. One way to see this is to observe that formal definitions of tort law do not differ much from one legal order to another. But the institutions and sociology of tort law differ radically from legal system to legal system. In this book, we will attend to formal definitions and doctrines. But we will keep an especially close eye on three features of American tort law that breathe life into the field and give it a distinctive twenty-first-century character.

First, tort law's doctrines and principles embody the law's basic norms of interpersonal obligation. Torts' jurists have argued for many decades about these principles, about what they are and what they ought to be. Some see in tort law either an instantiation or an opportunity for utilitarianism in action. Others see a science of duties and finely tailored interpersonal obligations. This book will introduce the basic controversy over tort law's moral commitments. These controversies are significant in part because they represent live debates in practical moral philosophy. But they also matter for the purpose of identifying ways to decide the hardest and most cutting-edge cases in the field, cases in which there is no obvious existing answer in the law and for which lawyers, judges, and juries will need to grasp the law's underlying principles.

Second, tort law in the United States is the starting point for a vast and far-flung set of exceedingly important social practices, ranging from contingency fee representations and highway billboard advertising, to class action litigation and claims adjustment, to contracting and risk assessment. We can barely even begin to evaluate the law of torts and its virtues and defects without taking these social practices into account. We will aim to take account of the tort system by referring to statistics and numbers and through the leading sociological, game-theoretical, and historical accounts. Indeed, to understand the distinctive features of tort law in the United States as opposed to in other legal systems, where tort law operates quite differently, these perspectives will be decisive for illuminating the real stakes in long-running controversies.

Third, American tort law shapes and is shaped by an important array of institutions, among them insurance companies, the administrative state, the jury, social customs, cost-benefit analysis, the plaintiff's bar, and more. These institutions, along with the practices noted above, powerfully influence the law of torts in the United States. We cannot understand the law without them. Indeed, we cannot understand contemporary American law more generally without placing these institutions front and center, and once we see tort law this way, the field serves as an ideal introduction to the central features of our vast and multifarious legal system.

Here, then, is the theory of this book: understanding the characteristic features of

American tort law requires exploring the field's principles, practices, and institutions. The benefit of approaching tort law this way is not only that we understand torts better, though that would be no small thing. The further payoff is that this approach allows us to turn the study of tort law into more than an obligatory first-year purgatory of fusty and old-fashioned common law rules. Instead, we take up the law of civil wrongs as an introduction to some of the most important problems faced by twenty-first-century American lawyers and lawmakers more generally. Thankfully, we can begin to think in these ways by exploring one of the field's simplest and best-known cases, a case that began as a classroom interaction between two boys in nineteenth-century Wisconsin.

## *B. An Introductory Case: The Tort of Battery*

### *1. Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891)

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. . . . At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded.

[The opinion of the court in the initial appeal provides the following additional facts:

"The plaintiff was about 14 years of age, and the defendant about 11 years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above

the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. The jury rendered a verdict for the plaintiff of $2,800. The learned circuit judge said to the jury: 'It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.' We have much of the same feeling about the case."]

The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500. . . . On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for $2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

LYON, J.

. . .

The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the

kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

. . .

Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts [is] that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. [The court explained that in a cause of action "*ex contractu"* and not "*ex delicto*,*"* a different rule of damages would be applicable in which unforeseeable damages would not be recoverable].

*[Despite upholding the plaintiff's verdict in these two critical respects, the court nonetheless ruled in a separate part of its opinion that the trial court had erroneously overruled the defendant's objection to one of plaintiff's counsel's questions. Accordingly, the court sent the case back to the trial court for another new trial.]*

### *2. Anatomy of a Torts Case*

*Vosburg v. Putney* was a simple case. By now it is an old case. But getting to the bottom of it reveals much about the complexities of American tort law right up to the present day.

At an elementary level, the case presents two kinds of questions that will run through the rest of this book and that are omnipresent in legal analysis: *questions of fact* and *questions of law*. There are, for example, questions of fact about causation. What caused the injuries to the leg? Would those injuries have come about anyway if Putney had not made contact with Vosburg on the 20th of February? There are also questions of fact about Putney's intent: what did he mean to accomplish when he reached out and kicked his classmate?

The questions of law are different. They ask not what happened, but rather what

the law is—or what it ought to be. For example, what kind of mental state does the law require for holding Putney liable? Is it sufficient that he intended to make a certain kind of contact with Vosburg? Or does Vosburg need to show that Putney further intended to harm him? Questions of law about Putney's causal relationship to Vosburg's leg injury would ask whether it is sufficient for Vosburg to show that Putney's kick increased the likelihood of leg damage that was already in motion, or that Putney's kick accelerated that damage.

Once we bring in some of the context for the court's opinion, this little case from long-ago Wisconsin also serves as a remarkable introduction to the sociology, economics, and functions of tort law. Andrew Vosburg was a slight boy whose father, Seth (a Civil War veteran), worked as a teamster at a local lumber company. According to Professor Zigurds Zile of the University of Wisconsin Law School,

> Vosburg was frequently bedridden with a succession of childhood illnesses. He caught scarlet fever at the age of eight and had two or three bouts with the measles. Yet he was raised as an ordinary country boy, obliged to do the customary chores around the homestead, endure discomfort and face the usual hazards associated with rural life. Bumps, bruises and lacerations were part of his workaday experience. Accidents just happened to Andrew; or perhaps they happened to him more often because he lacked the strength and dexterity the rigors of his environment demanded . . . .

Zigurds L. Zile, *"Vosburg v. Putney: A Centennial Story,"* 1992 WIS. L. REV. 877, 879. George Putney, by contrast, was the only son of a prominent and prosperous local family. Zile reports that George Putney was described by a contemporary as "a sucker of a boy" with "a bad temper." *Id.* at 882. In fact, George had a minor altercation with Andrew a couple weeks prior to the incident at the center of the litigation when George inexplicably prevented Andrew from retrieving his textbook before an exam.

The Vosburg family also initiated a criminal case against Putney. Passions, it seems, ran high in 1889 in Waukesha. Andrew's father went to the town justice of the peace to file a criminal complaint against George on October 19, 1889. The justice of the peace issued a warrant to apprehend George, and a trial ensued. (This was the era before special criminal procedures for juveniles.) After witness testimony and cross-examination, the court found George guilty as charged in the complaint. He was ordered to pay a fine of $10, plus costs, amounting to a total of $28.19. The conviction was later overturned on appeal.

The civil and criminal cases arising out of the schoolboy's kick soon involved substantial time and expenses. During the first jury trial in the civil suit, witnesses included Andrew, George, the boys' teacher, and Andrew's doctors. When the case was retried in the December term of 1890, the plaintiff subpoenaed eight witnesses and the defendant subpoenaed eleven. The third trial for Andrew's case seemed imminent until September 1893, when the circuit court dismissed the case for the plaintiff's failure to pay overdue court costs. In still another proceeding, Andrew's father brought a claim

against George Putney for the loss of his son's services. A jury awarded Seth $1200 in damages against George, which the Wisconsin Supreme Court later affirmed. But even then, it does not seem that the Vosburgs ever collected any damages from the Putneys, perhaps because parents are not liable for the torts of their children. At the end of this long litigation process, there is no evidence that the parties ever exchanged any money.

All told, the dispute between these families lasted for four and a half years and never produced even a dollar in actual damages changing hands. The litigation was expensive, too. Zile estimated that the Vosburgs "would have incurred costs in the amount of $263 in order to get nothing." Their lawyers probably spent considerably more in time and money in hopes of recovering a portion, usually a third, of the winnings. The Putneys probably paid at least $560 in lawyers' fees and incurred additional costs summing to a further $677. Zile, *supra*, at 977.

The outsized expenses of the *Vosburg* case are not unusual in American tort law, at least not in the narrow slice of cases that go forward to trial. Observers estimate the administrative costs of the tort system—lawyers' fees, expert witness fees, court costs, etc.—amount to between fifty and seventy cents for every dollar transferred from defendants to plaintiffs. The *Vosburg* case's costs were almost exactly in this range: the parties together incurred some $1500 in costs in a dispute over two claims that juries seemed to value at around $3700 (a $2500 claim for Andrew plus the $1200 claim for Seth). The Vosburg's lawyers would have eaten up another one-third of whatever money the Putneys paid, for a total of around $2700 in costs on $3700 worth of tort claims. This is equivalent to a costs-to-value ratio of a stunning 73 percent, a figure that is a vastly higher administrative cost figure than attaches to, say, disability claims in the Social Security system, where costs are typically closer to ten percent of the value of the claim. Tort administrative costs are vastly higher than first-party insurance administrative costs, too: victims of injuries can much more cheaply process claims for covered injuries from their own insurance companies than they can prosecute tort claims through the courts.

### *3. The Pervasiveness of Settlement*

Given how counter-productive the litigation was, one great mystery in *Vosburg* is why the families did not reach a settlement. The initial trial judge seems to have thought the matter ought to have been resolved before trial. The original appeals panel agreed. And there were settlement negotiations. By the early fall of 1889, the Vosburgs had already incurred substantial medical costs and were facing another year and a half of care, eventually costing at least $475. After the Vosburg family retained a lawyer,

> Seth and Janet Vosburg and one of their attorneys called on Henry Putney [George's father] at his store, and the incident "was talked over amongst [them]." The Putneys offered to pay Dr. Bacon's bills [about $125 accrued to date] and an additional amount of $125 towards medical and other needs in return for releasing George from any liability arising out of the February 20 incident. The Vosburgs, however, were not willing to settle for less than $700, which to them was a paltry sum, barely sufficient to

> meet the financial obligations already accrued, to set aside a reserve against outlays associated with Andrew's convalescence and potential complications, like the amputation of Andrew's diseased leg, and to pay the lawyers for negotiating the settlement. To the Putneys, by contrast, particularly if they looked at George's role as peripheral, the sum of $250 might have seemed a generous price for the nuisance value of a threatened lawsuit."

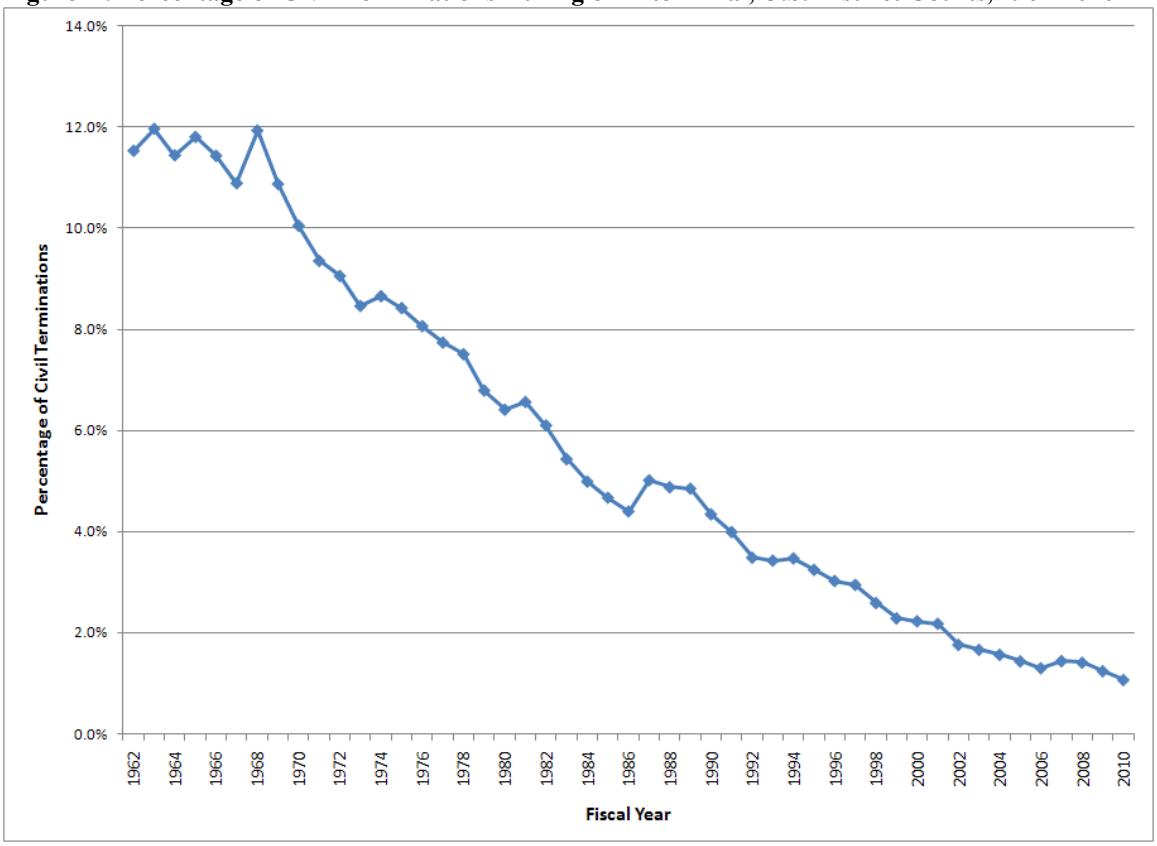
Zile, *supra*, at 894.

The startling thing is that in hindsight any one of the proposals by either defendant or plaintiff would have been in the interest of the parties. Simply dropping the litigation in return for nothing would have been better than proceeding. Given the array of choices before them, litigating the claims to judgment seems to have been the worst choice available to the parties, and yet each of them chose to litigate rather than to accept settlement offers from the other side that (again, in hindsight) were vastly better than the alternative of trial.

So why didn't the Vosburgs and Putneys settle if it was in their interest to do so? The mystery deepens when we see that virtually all cases end in settlement. One of the most important institutional features of American tort law is that it is almost entirely party-driven. The parties to a lawsuit have virtually complete autonomy in deciding whether to bring claims, how to manage those claims, and whether to withdraw from prosecuting them. The result is that almost all parties settle their disputes before trial.

Settlement has been widespread in American tort law for as long as modern tort law has existed, for more than a century and a half, and there is reason to think settlement is growing even more common in the past fifty years. In 2003, the American Bar Association Litigation Section held a symposium titled *The Vanishing Trial*, which concluded that the "portion of federal civil cases resolved by federal trial fell from 11.5 percent [of all filings] in 1962 to 1.8 percent in 2002." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004). Between 2008 and 2012, a mere "0.56 percent or slightly more than one-half of one percent of all terminations" occurred by civil jury trials. Charles S. Coody, *Vanishing Trial Skills*, A.B.A. (May 22, 2013), http://apps.americanbar.org/litigation/committees/pretrial/email/spring2013/spring2013-0513-vanishing-trial-skills.html. The following chart, compiled by Marc Galanter, who led the ABA study, shows the stark picture of settlement in civil litigation generally:

**Figure A: Percentage of Civil Terminations During or After Trial, U.S. District Courts, 1962-2010**




Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, THE POUND CIVIL JUSTICE INST. 1, 3 (2011), http://poundinstitute.org/docs/2011%20judges%20forum /2011%20Forum%20Galanter-Frozena%20Paper.pdf.

Parties settle because, as the Vosburgs and Putneys learned, litigation is expensive and time-consuming. Many parties are risk-averse; they have a preference for the certainty that settlement offers. Moreover, there is reason to think that on the plaintiffs' side, lawyers paid on a contingency basis, as a percentage of any settlement or award, will have an interest in avoiding long drawn-out proceedings. Settlement minimizes their workload, allows them to take on additional claims, and often allows them to maximize their imputed hourly wage.

Given the incentives for the parties and for the plaintiffs' lawyers, why is it then that some parties like the Vosburgs and Putneys don't settle? Looked at this way, the question is not why there are so few trials. The question is why there are any trials at all! Why doesn't everyone settle?

One especially influential view is that where a case proceeds to judgment, at least one of the two parties, and perhaps both, must have incorrectly estimated the likely value of the claim. In this account, which was first offered by George Priest and Benjamin Klein, trials are errors. *See* George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Consistent with this view, some observers suggest that the trend toward settlement since the middle of the twentieth century, at least

in the federal courts, has been driven by the enactment of the Federal Rules of Civil Procedure in 1938, which authorized pre-trial discovery and deposition procedures that allow each side to learn virtually everything about the facts of the case in advance of the trial itself. Lawyers are thus able to develop quite accurate estimates of the value of the claim—much better estimates than pre-FRCP lawyers were able to form—which in turn allow the parties to settle their cases before trial.

Another view is that parties do not settle because there is something other than dollars and cents at stake in tort disputes. Parties persist, in this view, as a matter of principle. And many argue that we should encourage them to do so. In this latter view, articulated memorably by scholars like Owen Fiss and Judith Resnik, trials are not errors. They are the public forums in which we work out our social commitments and hold our ideals up for testing. *See* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101 (2006). Of course, if trials are intrinsically valuable as public fora, then settlement rates are startlingly high. For it appears that something about the tort system—and indeed civil litigation generally—produces vast numbers of settlements and very few judgments.

### *4. The Size of the Tort System*

One way to glimpse the tort system in the aggregate is to look at the total amount of money passing through the American tort system each year. It is here that little cases like *Vosburg* connect up to the heated political controversies over tort law in the past several decades.

Insurers estimate that the money transferred in the tort system amounts to more than $260 billion per year. This is a huge amount of money, comparable to the amount the United States spends annually on old age pensions in the Social Security system. Moreover, if we look at the amount of money flowing through the tort system, we can see that it has increased sharply over the past sixty years, though that growth has slowed (and by some measures has been reversed) since the middle of the 1990s.

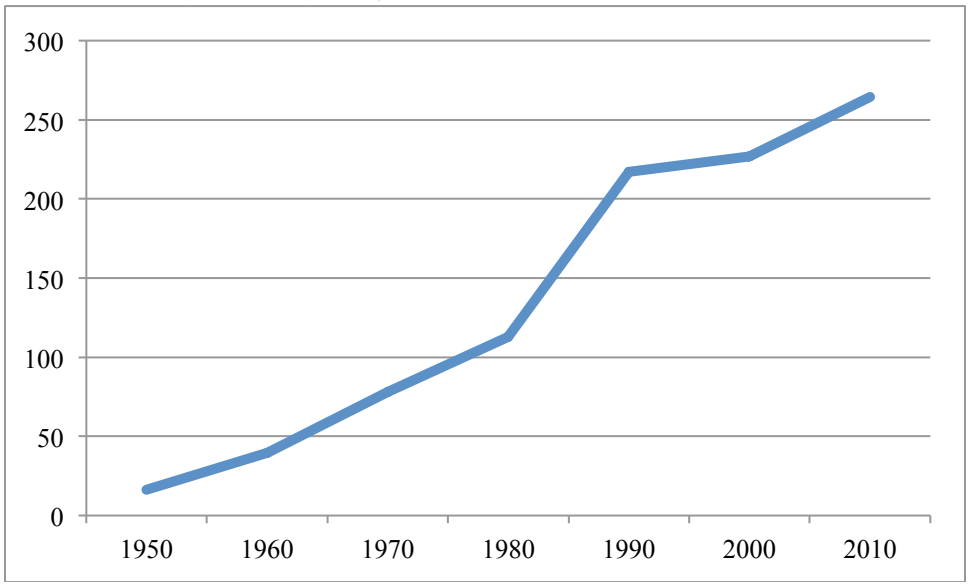
## United States Tort Costs

| Year | U.S. Population (millions) | Adjusted Tort Costs (billions) (2010) | Tort Costs as Percentage of GDP |
|---|---|---|---|
| 1950 | 152 | 16 | 0.62% |
| 1960 | 181 | 40 | 1.03% |
| 1970 | 205 | 78 | 1.34% |
| 1980 | 228 | 113 | 1.53% |
| 1990 | 249 | 217 | 2.24% |
| 2000 | 281 | 227 | 1.80% |

| | | | |
|---|---|---|---|
| 2010 | 309 | 265 | 1.82% |

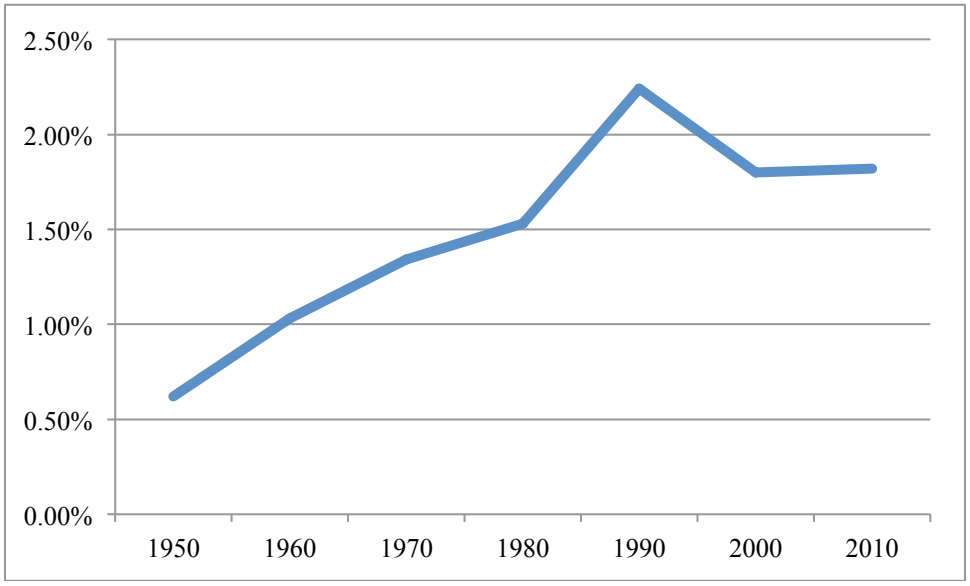
Source: Towers-Watson, *2011 Update on U.S. Tort Cost Trends*, http://www.casact.org/library/studynotes/Towers-Watson-Tort-Cost-Trends.pdf.

## Tort Costs (billions) Adjusted for Inflation




Source: Towers-Watson data, adjusted by the Consumer Price Index

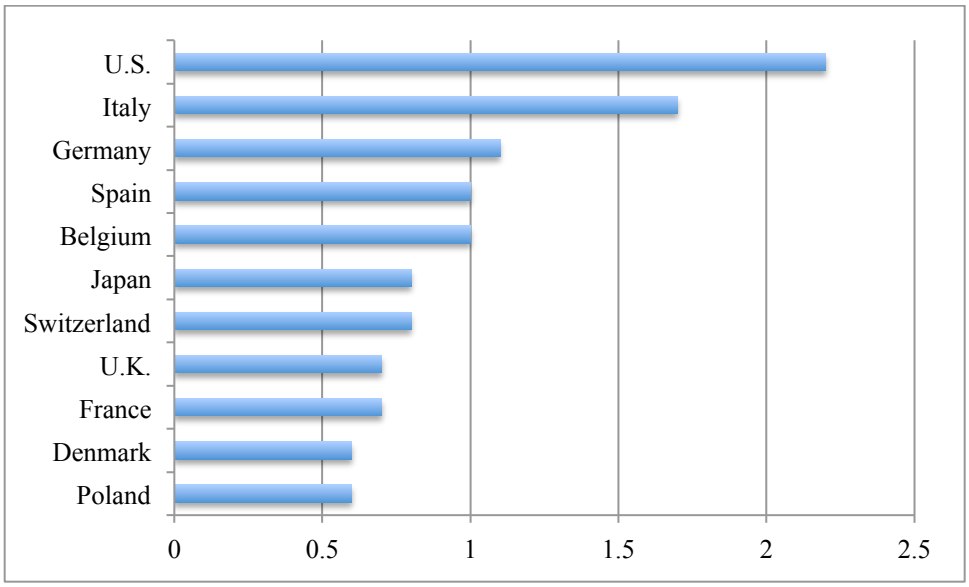
## Tort Costs as Percentage of GDP




Source: Towers-Watson data

Even with the slower growth of recent years, the figures for transfers and administrative costs in tort law are far higher in the United States than in any comparable legal system or economy.

## Comparative Tort Costs as a Percentage of GDP in 2000




Source: Tillinghast-Towers Perrin, *U.S. Tort Costs and Cross-Border Perspectives: 2005 Update*, http://www.legalreforminthenews.com/Reports/Tort_Costs_2005_Update.pdf.

There is at least one country where tort costs as a percentage of GDP are near zero: New Zealand simply abolished tort law for virtually all injuries forty years ago, replacing it with a system of social insurance.

One of the things we will want to be able to make sense of by the end of this book is why the tort system is so much bigger in the United States than it is in other countries. The answer, it turns out, is not about the substantive doctrines of American tort law, which more or less resemble the substantive tort doctrines of other developed legal systems. The real difference in American tort law lies in its institutions and procedures: jury trials, discovery, a plaintiffs' bar whose fees are contingent percentages of the plaintiff's ultimate recovery, and more.

It is worth noting that the data cited above is hotly controversial: it comes from a consultant to the insurance industry now named Towers-Watson, formerly Tillinghast or Towers-Perrin. Critics contend that the Towers-Watson data is misleading and tendentious and that the insurance industry aims to use it to promote legislation that would reduce tort costs and thus serve the interests of insurers and the tort defendants they insure. *See, e.g.*, Lawrence Chimerine & Ross Eisenbrey, *The Frivolous Case for Tort Law Change*, ECON. POL'Y INST. (May 16, 2005), http://www.epi.org/publication/bp157/. The critics complain both that certain elements of the cost calculation, such as insurance executive compensation, ought to be excluded, and that Towers-Watson and its predecessors misstate the concept of costs in the tort system. Both critiques have some force. The latter critique in particular has obvious merit. Why, after all, call the monetary transfers in the tort system the "costs" of tort law? The costs might much better be described as the underlying injuries plus avoidance costs plus the costs of administering claims when injuries happen. Is it a "cost" when tort law transfers money from wrongdoer to victim? Or is it a "cost" when a wrongdoer injured the victim in the

first place? For a general theory of the sum of accident costs, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

Despite the criticisms, however, there is also a good reason to use the insurers' data as a basic measure of the tort system. For the startling thing about tort law in the United States is that insurers' private information is *the only way* we can even possibly begin to grasp the full size and scope of the tort system. This is worth emphasizing again: the biggest insurers and only the biggest insurers are in a position to see the macro trends in the field. The reason is that the pervasiveness of private settlement ensures that there is no public repository of information about the fate of most tort claims, sometimes virtually all tort claims. Nothing in the law of torts or in the law of settlement contracts even requires that a claim be filed with a court before it is contractually extinguished in a settlement agreement. To the contrary, the parties can save money on the cost of drafting and filing a complaint and share those savings between them if they settle before filing the claim in a courthouse. There is thus often not even a single trace in the public record of a tort claim, even one that produces a substantial settlement. Indeed, many plaintiffs receive higher settlement awards precisely in return for their promise to keep the terms of the settlement and even the fact of their claim confidential—promises that are enforceable under current law, despite the protests of many well-positioned observers.

In short, the only institutions that could possibly know the overall size of the American tort system are the insurers. And that tells us a lot about the system we are studying. It is party-driven, highly opaque, radically decentralized, and vast. Taken together, these features present the tort lawyer with an important challenge: what goals or moral projects could possibly be so important as to make U.S. tort law worth its stunningly high costs?

### *5. Accident Rates and the Deterrence Goal*

One goal tort jurists often advance is the deterrence of unreasonably dangerous conduct. The logic here is simple and intuitively attractive. Tort law raises the price of injurious behavior. As a result, the logic goes, the prospect of tort liability should decrease the amount of injurious behavior in the world. Deterrence theory has further implications and wrinkles. We will return to these at a number of junctures later in the book. But the important point for now is that the risk of tort damages ought to lead rational parties to take into account the costs of their behavior in a way they might not, absent tort liability.

Of course, tort law is one of many regulatory mechanisms that aim to accomplish the goal of improving safety standards. Consider, for example, state inspection regimes for everything from housing code compliance to factory employment standards. The federal Food and Drug Administration seeks to guarantee the safety of pharmaceuticals and food products. The Federal Highway Administration's Office of Safety issues regulations and guidelines with an eye toward automobile accidents. The Consumer Product Safety Commission does the same for consumer goods. Even aside from

regulators, the market itself creates many incentives for safety on the part of market actors seeking to attract buyers, passengers, or clients.

Does tort law add to the deterrence function played by these other regulatory institutions? Formal evidence is considerably more difficult to come by, in no small part because of the difficulties described above in obtaining good information about the size and significance of tort costs. Nonetheless, anecdotal evidence suggests that in the United States tort law does shape behavior around risk and safety. We routinely read news stories about firms that claim to have made some decision—often an unpopular one—on the basis of the risk of litigation.

Consider the big picture trends in accidental and violent injuries over time. For the past half-century and more—precisely the time during which tort costs have soared—rates of accidental death have declined substantially. This is not to say that tort law has caused that decline. It might be the case that causation runs in the other direction: improvements in safety may have generated higher expectations of safety and thus led to heightened standards in tort law. Either way, the trend is striking. Since 1960, accidental deaths in the United States have fallen by nearly half.

**Table 123. Age-Adjusted Death Rates by Major Causes: 1960 to 2011**

[Age-adjusted rates per 100,000 population. Rates for 2001-2009 have been revised using population estimates based on the 2010 Census. Age adjusted death rates were prepared using the direct method, in which age specific death rates for a population of interest are applied to a standard population distributed by age. Age adjustment eliminates the differences in observed rates between points in time or among compared population groups that result from age differences in population composition. Beginning 1999, deaths classified according to tenth revision of International Classification of Diseases; for earlier years, causes of death were classified according to the revisions then in use. Changes in classification of causes of death due to these revisions may result in discontinuities in cause-of-death trends. See Appendix III]

| Year | Diseases of the heart | Malignant neoplasms (cancer) | Cerebrovascular diseases | Chronic lower respiratory diseases | Accidents [1] | Alzheimer's disease | Diabetes mellitus | Influenza and pneumonia | Chronic liver disease and cirrhosis | Intentional self-harm (suicide) |
|---|---|---|---|---|---|---|---|---|---|---|
| 1960 | 559.0 | 193.9 | 177.9 | 12.5 | 63.1 | (NA) | 22.5 | 53.7 | 13.3 | 12.5 |
| 1961 | 545.3 | 193.4 | 173.1 | 12.6 | 60.6 | (NA) | 22.1 | 43.4 | 13.3 | 12.2 |
| 1962 | 556.9 | 193.3 | 174.0 | 14.2 | 62.9 | (NA) | 22.6 | 47.1 | 13.8 | 12.8 |
| 1963 | 563.4 | 194.7 | 173.9 | 16.5 | 64.0 | (NA) | 23.1 | 55.6 | 14.0 | 13.0 |
| 1964 | 543.3 | 193.6 | 167.0 | 16.3 | 64.1 | (NA) | 22.5 | 45.4 | 14.2 | 12.7 |
| 1965 | 542.5 | 195.6 | 166.4 | 18.3 | 65.8 | (NA) | 22.9 | 46.8 | 14.9 | 13.0 |
| 1966 | 541.2 | 196.5 | 165.8 | 19.2 | 67.6 | (NA) | 23.6 | 47.9 | 15.9 | 12.7 |
| 1967 | 524.7 | 197.3 | 159.3 | 19.2 | 66.2 | (NA) | 23.4 | 42.2 | 16.3 | 12.5 |
| 1968 | 531.0 | 198.8 | 162.5 | 20.7 | 65.5 | (NA) | 25.3 | 52.8 | 16.9 | 12.4 |
| 1969 | 516.8 | 198.5 | 155.4 | 20.9 | 64.9 | (NA) | 25.1 | 47.9 | 17.1 | 12.7 |
| 1970 | 492.7 | 198.6 | 147.7 | 21.3 | 62.2 | (NA) | 24.3 | 41.7 | 17.8 | 13.1 |
| 1971 | 492.9 | 199.3 | 147.6 | 21.8 | 60.3 | (NA) | 23.9 | 38.4 | 17.8 | 13.1 |
| 1972 | 490.2 | 200.3 | 147.3 | 22.8 | 60.2 | (NA) | 23.7 | 41.3 | 18.0 | 13.3 |
| 1973 | 482.0 | 200.0 | 145.2 | 23.6 | 59.3 | (NA) | 23.0 | 41.2 | 18.1 | 13.1 |
| 1974 | 458.8 | 201.5 | 136.8 | 23.2 | 52.7 | (NA) | 22.1 | 35.5 | 17.9 | 13.2 |
| 1975 | 431.2 | 200.1 | 123.5 | 23.7 | 50.8 | (NA) | 20.3 | 34.9 | 16.7 | 13.6 |
| 1976 | 426.9 | 202.5 | 117.4 | 24.9 | 48.7 | (NA) | 19.5 | 38.8 | 16.4 | 13.2 |
| 1977 | 413.7 | 203.5 | 110.4 | 24.7 | 48.8 | (NA) | 18.2 | 31.0 | 15.8 | 13.7 |
| 1978 | 409.9 | 204.9 | 103.7 | 26.3 | 48.9 | (NA) | 18.3 | 34.5 | 15.2 | 12.9 |
| 1979 | 401.6 | 204.0 | 97.1 | 25.5 | 46.5 | (NA) | 17.5 | 26.1 | 14.8 | 12.6 |
| 1980 | 412.1 | 207.9 | 96.4 | 28.3 | 46.4 | (NA) | 18.1 | 31.4 | 15.1 | 12.2 |
| 1981 | 397.0 | 206.4 | 89.5 | 29.0 | 43.4 | 0.9 | 17.6 | 30.0 | 14.2 | 12.3 |
| 1982 | 389.0 | 208.3 | 84.2 | 29.1 | 40.1 | 1.3 | 17.2 | 26.5 | 13.2 | 12.5 |
| 1983 | 388.9 | 209.1 | 81.2 | 31.6 | 39.1 | 2.2 | 17.6 | 29.8 | 12.8 | 12.4 |
| 1984 | 378.8 | 210.8 | 78.7 | 32.4 | 38.8 | 3.1 | 17.2 | 30.6 | 12.7 | 12.6 |
| 1985 | 375.0 | 211.3 | 76.6 | 34.5 | 38.5 | 4.1 | 17.4 | 34.5 | 12.3 | 12.5 |
| 1986 | 365.1 | 211.5 | 73.1 | 34.8 | 38.6 | 4.6 | 17.2 | 34.8 | 11.8 | 13.0 |
| 1987 | 355.9 | 211.7 | 71.6 | 35.0 | 38.2 | 5.5 | 17.4 | 33.8 | 11.7 | 12.8 |
| 1988 | 352.5 | 212.5 | 70.6 | 36.5 | 38.9 | 5.8 | 18.0 | 37.3 | 11.6 | 12.5 |
| 1989 | 332.0 | 214.2 | 66.9 | 36.6 | 37.7 | 6.1 | 20.5 | 35.9 | 11.6 | 12.3 |
| 1990 | 321.8 | 216.0 | 65.3 | 37.2 | 36.3 | 6.3 | 20.7 | 36.8 | 11.1 | 12.5 |
| 1991 | 312.5 | 215.2 | 62.9 | 37.9 | 34.7 | 6.3 | 20.7 | 34.7 | 10.7 | 12.3 |
| 1992 | 304.0 | 213.5 | 61.5 | 37.7 | 33.2 | 6.3 | 20.7 | 32.8 | 10.4 | 12.0 |
| 1993 | 308.1 | 213.5 | 62.7 | 40.7 | 34.2 | 7.1 | 21.9 | 35.0 | 10.2 | 12.1 |
| 1994 | 297.5 | 211.7 | 62.6 | 40.3 | 34.2 | 7.7 | 22.6 | 33.6 | 10.1 | 11.9 |
| 1995 | 293.4 | 209.9 | 63.1 | 40.1 | 34.4 | 8.4 | 23.2 | 33.4 | 9.9 | 11.8 |
| 1996 | 285.7 | 206.7 | 62.5 | 40.6 | 34.5 | 8.5 | 23.8 | 32.9 | 9.7 | 11.5 |
| 1997 | 277.7 | 203.4 | 61.1 | 41.1 | 34.2 | 8.7 | 23.7 | 33.3 | 9.5 | 11.2 |
| 1998 | 267.4 | 202.1 | 62.8 | 43.8 | 35.6 | 8.6 | 24.2 | 24.2 | 9.6 | 11.1 |
| 1999 | 266.5 | 200.8 | 61.6 | 45.4 | 35.3 | 16.5 | 25.0 | 23.5 | 9.6 | 10.5 |
| 2000 | 257.6 | 199.6 | 60.9 | 44.2 | 34.9 | 18.1 | 25.0 | 23.7 | 9.5 | 10.4 |
| 2001 | 249.5 | 196.5 | 58.4 | 43.9 | 35.7 | 19.3 | 25.4 | 22.2 | 9.5 | 10.7 |
| 2002 | 244.6 | 194.3 | 57.2 | 43.9 | 37.1 | 20.8 | 25.6 | 23.2 | 9.4 | 10.9 |
| 2003 | 236.3 | 190.9 | 54.6 | 43.7 | 37.6 | 22.1 | 25.5 | 22.6 | 9.3 | 10.8 |
| 2004 | 221.6 | 186.8 | 51.2 | 41.6 | 38.1 | 22.6 | 24.7 | 20.4 | 9.0 | 11.0 |
| 2005 | 216.8 | 185.1 | 48.0 | 43.9 | 39.5 | 24.0 | 24.9 | 21.0 | 8.9 | 10.9 |
| 2006 | 205.5 | 181.8 | 44.8 | 41.0 | 40.2 | 23.7 | 23.6 | 18.4 | 8.8 | 11.0 |
| 2007 | 196.1 | 179.3 | 43.5 | 41.4 | 40.4 | 23.8 | 22.8 | 16.8 | 9.1 | 11.3 |
| 2008 | 192.1 | 176.4 | 42.1 | 44.7 | 39.2 | 25.8 | 22.0 | 17.6 | 9.2 | 11.6 |
| 2009 | 182.8 | 173.5 | 39.6 | 42.7 | 37.5 | 24.2 | 21.0 | 16.5 | 9.1 | 11.8 |
| 2010 | 179.1 | 172.8 | 39.1 | 42.2 | 38.0 | 25.1 | 20.8 | 15.1 | 9.4 | 12.1 |
| 2011 [2] | 173.7 | 168.6 | 37.9 | 42.7 | 38.0 | 24.6 | 21.5 | 15.7 | 9.7 | 12.0 |

NA Not available. [1] Unintentional injuries. [2] Preliminary data.

Source: U.S. National Center for Health Statistics, National Vital Statistics Reports, *Deaths: Preliminary Data for 2011*, Vol. 61, No. 6, October 2012; and *Health, United States, 2012*, May 2013. See also <http://www.cdc.gov/nchs/products/nvsr.htm>.

Source: *Statistical Abstracts of the U.S.* (2014)

Much of this change continues a trend that began long before 1960. Excluding motor vehicle accidents, accidental deaths fell from around a hundred per 100,000 people in the population annually to less than thirty by 1975.

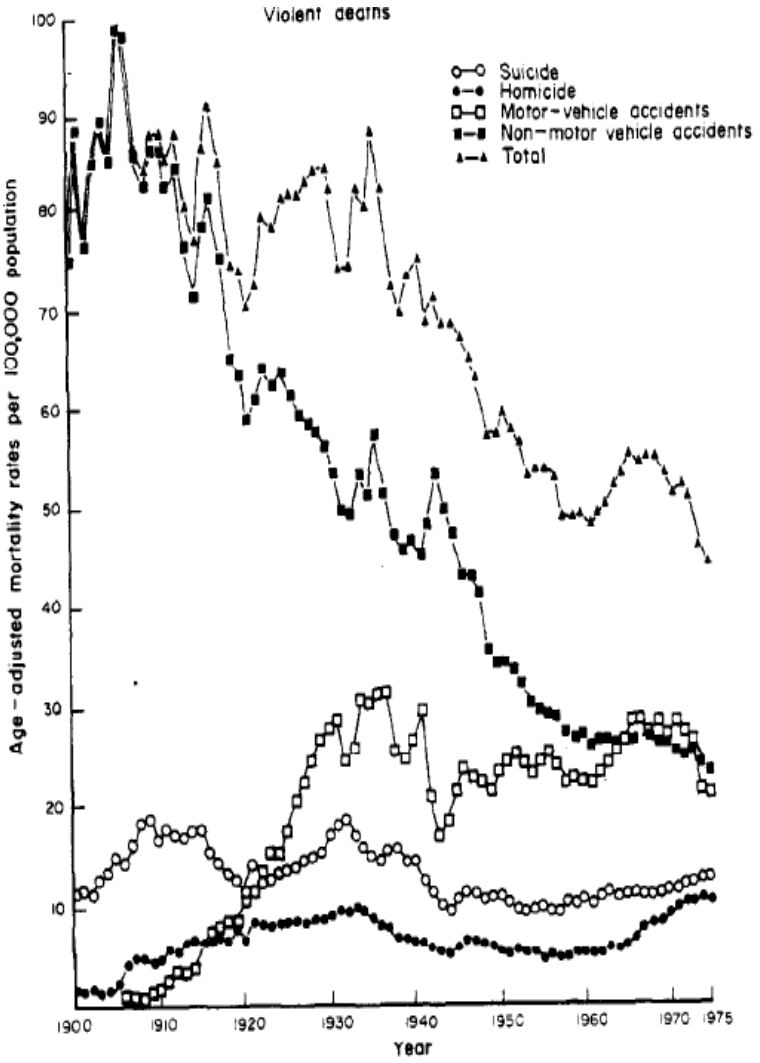
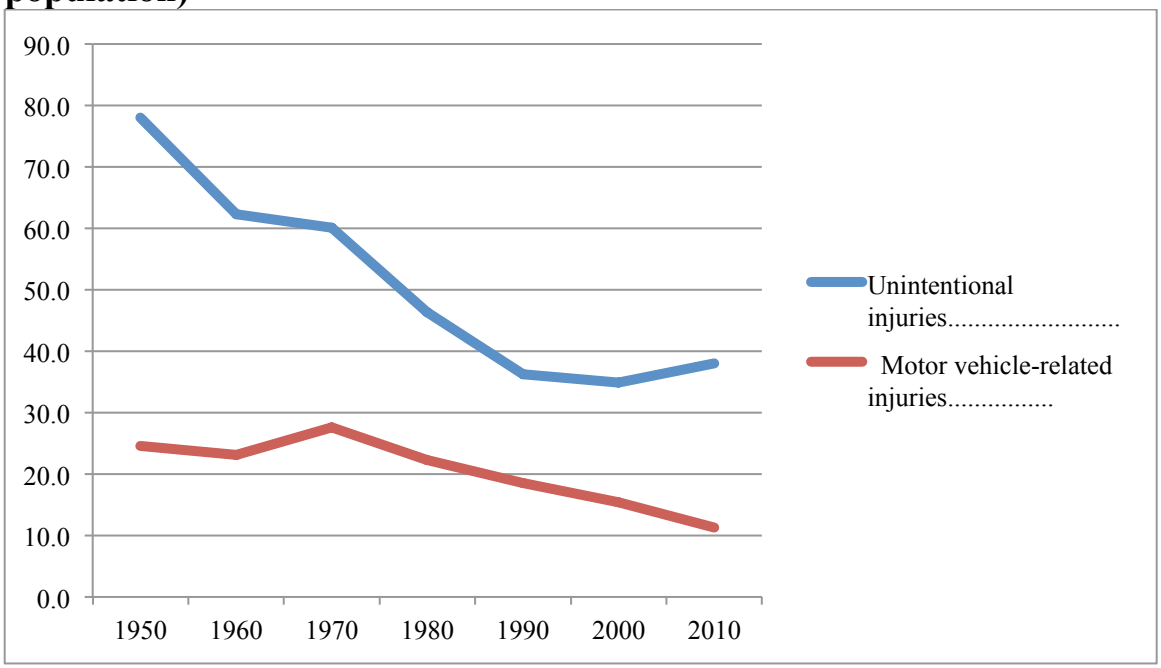



Fig. 1. Age-adjusted violent death rates by type of mortality, United States, 1900–1975. Sources of data: *Vital Statistics—Special Reports* **43**, (for 1900–1953); Grove R. D. and Hetzel A. M. *Vital Statistics Rates in the United States: 1940–1960.* U.S. Government Printing Office, 1968 (for 1954–1960); *Vital Statistics in the United States, Mortality*, 1961–1975 (for age-adjusted motor-vehicle accident and non-motor-vehicle accident mortality rates, 1961–1975); *Vital and Health Statistics*, Series 20, Number 16. U.S. Government Printing Office, 1974 [for age-adjusted accident (total), suicide, and homicide mortality rates, 1970–1975].

Even motor vehicle accidental death rates have dropped during the past sixty years.

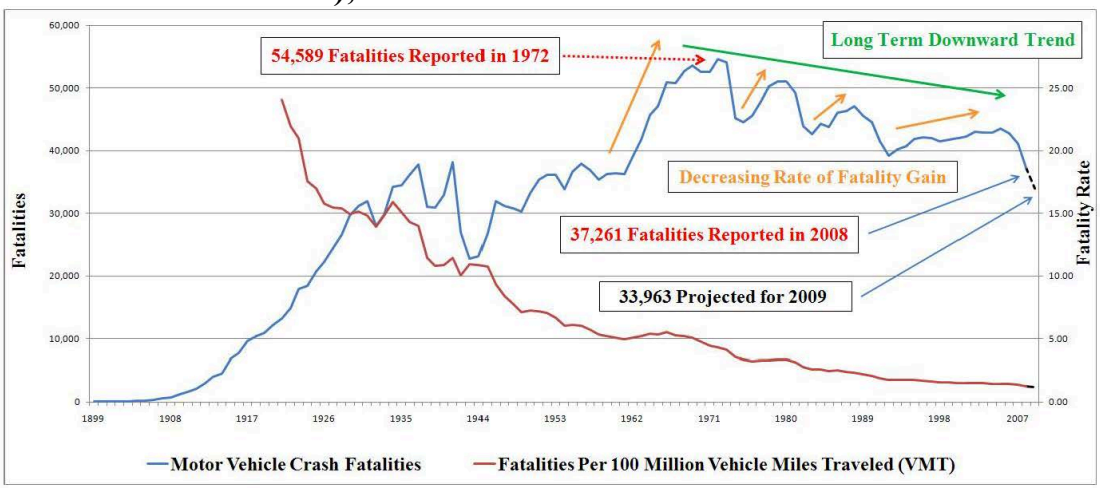
## Age-adjusted death rates for unintentional injuries and motor-vehicle-related injuries: United States, selected years 1950-2010 (per 100,000 population)




Source: Center for Disease Control and Prevention, http://www.cdc.gov/nchs/hus/contents2012.htm#020

If we adjust motor vehicle accidental death rates by miles traveled, the drop in motor vehicle traffic fatalities has been even more pronounced.

## Motor Vehicle Crash Fatalities and Fatality Rates (per Hundred Million Vehicle Miles Traveled), 1899-2009




Source: National Highway Traffic Safety Administration, *An Analysis of the Significant Decline in Motor Vehicle Traffic Fatalities in 2008*, U.S. DEP'T TRANSP. 12, (June 2010), http://www-nrd.nhtsa.dot.gov/Pubs/811346.pdf .

Yet if our goal in tort law is to deter unreasonably dangerous actions, as many observers argue it is or at least ought to be, the connections between deterrence and a case like *Vosburg* are not at all clear. Is it reasonable to think that the prospect of tort damages payments—or even the prospect of interminable tort litigation—will alter the behavior of children in a classroom? In this domain, at least, using tort law to induce appropriately safe behavior by children seems a fool's errand, at least so long as we are trying to alter the behavior of children with monetary sanctions aimed at the children themselves. (Monetary awards against the school or the teachers might be far more effective, even if controversial for other reasons.)

Many scholars believe that the notion of tort damages shaping behavior is unlikely even in other domains where it might seem more plausible than in the middle-school classroom. We will return to this problem repeatedly in this book. For now, it is sufficient to observe that the critics point to a myriad of factors that they say get in the way of translating prospective tort damages into a safer behavior. Some parties are not susceptible to being incentivized in the relevant respect by cash. Others act irrationally. Still others act rationally and are responsive to monetary incentives, but are protected from tort damages by third parties who will pay the damages, such as liability insurers or employers. Some may be sheltered from the threat of paying tort damages because they have time horizons shorter than the 4-plus years that it took *Vosburg* to conclude.

This is not to say that deterrence is an impossible goal, or that deterrence ought not be thought of as an important function of tort law. We will see considerable support for the idea that tort damages do shape behavior in many contexts. Nonetheless, the effort to shape behavior and induce safety offers at best a partial justification for tort law.

### *6. Intent and Corrective Justice in the Battery Cause of Action*

Another way we could defend tort law in light of its high costs would be to describe it as embodying our moral judgments about wrongful behavior. If tort law is thought of as philosophers often think of it, a practice of corrective justice, in which we recognize wrongdoers' obligations to repair wrongful losses, the difficulty of identifying any behavioral effects disappears. Some might think that some or much of the difficulty of the high cost of tort law disappears, too, since it might be worth a lot to pursue questions of right and wrong, and it might not be surprising that inquiries into such questions are considerably more complex (and costly) than the kinds of inquiries Social Security claims administrators or insurance claims adjusters need to make.

As with the deterrence goal, we will continue to pursue the concept of corrective justice throughout this book. For now it is important to observe that corrective justice may play an especially powerful role in accounting for the distinctive features of intentional torts. These are often distinctively wrongful acts, arising out of conduct that has little or no social value. Our law of intentional torts helps mark out such acts as wrongful. Later in the book, we will often find ourselves wondering what, if anything, makes an actor's conduct wrongful. Critics of the corrective justice concept often object that the concept offers no internal metric for distinguishing wrongful conduct from

conduct that is justified. The concept can thus seem circular: it identifies tort law, which is the law of civil wrongs, as a body of law that provides remedies for wrongful losses. But how does one know when a loss has been wrongful?

In intentional torts such as battery, wrongfulness arises out of the relationship between the defendant's intentionality and the plaintiff's injury. A plaintiff in an intentional tort suit is essentially saying, "He meant to hurt me!" In this sense, the corrective justice account poses a further question for intentional tort cases. For if a plaintiff seeking to make out an intentional tort claim is required to show that the defendant had the relevant intent, we need to know what that intent consists of.

[* * *]

5. *The Dispute Pyramid*. Before we move on, it is worth noting an important feature of the cases we have read so far, and indeed of every case we will read in this book. Not every schoolroom injury becomes a dispute. Not every dispute produces a claim. Not every claim is filed. And, as Note 3 above observes, virtually every claim that is filed settles before trial. Galanter posits the *dispute pyramid* as an effective way to conceptualize our system:

> We can imagine a bottom layer consisting of all the *events* in which . . .[i]n a small fraction . . . someone gets hurt. Let us call this layer *injuries*. Some of these injuries go unperceived; in other instances someone thinks he is injured, even though he is not. Thus we have a layer of *perceived injuries* . . . . In many cases, those who perceive injuries blame themselves or ascribe the injury to fate or chance. But some blame some human agency, a person, a corporation, or the government. To dispute analysts, these are *grievances*. Among those with grievances, many do nothing further. . . . But some go on to complain, typically to the person or agency thought to be responsible. This is the level of *claims*. Some of these claims are granted in whole or in part . . . . When claims are denied, they are denominated *disputes.* Some of these are abandoned without further action, but some disputes are pursued further. . . . [T]ypically this would be accomplished by taking the dispute to a lawyer. In analyzing such disputes, therefore, we call the next layer *lawyers*. Of the disputes that get to lawyers, some are abandoned, some are resolved, and some end up as filings in court. Let us call this the *filings* layer. Most cases that are filed eventually result in settlement. Typically only a small fraction reach the next layer of *trials*, and a small portion of these go on to become *appeals*.

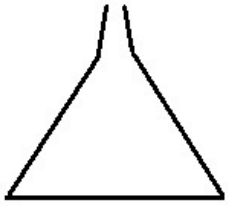
Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099-1101 (1996).

The dispute pyramid conveys the fact that very few events and perceived injuries are resolved inside a courtroom. Galanter presents some real-world dispute pyramids:

**FIGURE 1: COMMON DISPUTE PYRAMIDS**

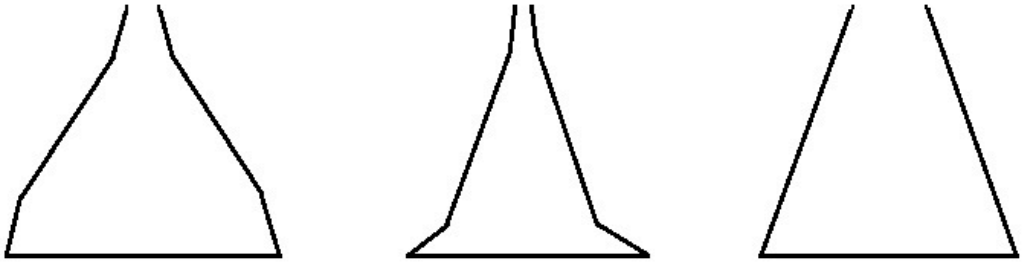
(a) The General Pattern

| | Number per 1000 Grievances |
|---|---|
| Court Filings | 50 |
| Lawyers | 103 |
| Disputes | 449 |
| Claims | 718 |
| Grievances | 1000 |



(b) Three Deviant Patterns

| | Number per 1000 Grievances | | |
|---|---|---|---|
| | Tort | Discrimination | Post-Divorce |
| Court Filings | 38 | 8 | 451 |
| Lawyers | 116 | 29 | 588 |
| Disputes | 201 | 216 | 765 |
| Claims | 857 | 294 | 879 |
| Grievances | 1000 | 1000 | 1000 |



Tort Discrimination Post-Divorce

Source: Galanter, *supra*, at 1101

What this means is that the cases in this casebook—cases that have reached an appellate court at the very top of the torts dispute pyramid—are virtually all atypical, and even bizarre. Indeed, as in *Vosburg*, these are cases in which the disputants are jointly almost always economically worse off than they would have been had they found some other way to resolve their dispute. Professor Samuel Issachoroff elaborates:

> [A]s soon as disputants enter the litigation process, they are clear losers. Whatever the stakes in a dispute between two parties, there is only one way in which they can preserve their joint welfare. Any division of the stake between them, whether it be one side taking all, or half-and-half or

> anything in between, leaves the parties jointly in the same position as when they begin their dispute: however they slice it, they will still have the entire pie to share. It is only by bringing lawyers into the mix and by subjecting themselves to the inevitable costs of litigation that the parties consign themselves to being worse off. Once lawyers and courts and filing fees and witnesses and depositions and all the rest are brought into the picture, the pie starts getting smaller and smaller. Because this is perfectly obvious, and perfectly obvious to all rational disputants right from the get go, the penchant of our casebook warriors to litigate requires some explanation.

Samuel Issacharoff, *The Content of our Casebooks: Why do Cases get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1265-66 (2001).

Are parties who choose litigation over settlement irrational actors, as the passage by Professor Issacharoff suggests? Are these disputants short-sighted fools? Or are they principled zealots? What about their lawyers? How about the Vosburgs and Putneys … ?