

## LITIGATION TRENDS IN FLORIDA: SAGA OF A GROWTH STATE

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## I. INTRODUCTION

In 1986, the long-simmering disputes among trial lawyers, insurers, doctors, and many businesses erupted into a public war of words. The Chamber of Commerce's national representative announced that the judicial system had "gone berserk" and litigation was "America's equivalent of a national lottery."<sup>1</sup> Headlines across the nation decried "sky-high damage suits,"<sup>2</sup> and local media opined the "Lawsuit Crisis is Hitting Florida Hard."<sup>3</sup>

In contrast to the popular press, academic literature reached the diametrically opposite conclusion that there was no litigation explosion. Professor Marc Galanter, perhaps the leading scholar of the civil justice system, concluded that the "evidence of current American litigation does not suggest that rates of civil court filings are dramatically higher than in the recent past."<sup>4</sup> Similarly, Robert Roper, Director of the Court Statistics and Information Management Project of the National Center for State Courts, found "no evidence to support the often cited existence of a national 'litigation explosion' in the state trial courts during the 1981-84 period."<sup>5</sup> Finally, one of Florida's most distinguished trial court judges, Gerald T. Wetherington, Chief Judge of Florida's Eleventh Judicial Circuit, reported that he saw "nothing to suggest any unusual increase in tort filings in the country or in Dade County [Miami]."<sup>6</sup>

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1. Conniff, *Too Many Americans Are Looking to Sue*, St. Petersburg Evening Independent, Mar. 11, 1986, at 7a, col. 1.

2. Gest & Work, *Sky-high Damage Suits: The Impact on Consumers, Business and Professions*, U.S. NEWS & WORLD REP., Jan. 27, 1986, at 35.

3. Treweek, *Lawsuit Crisis Is Hitting Florida Hard*, Gainesville Sun, Mar. 17, 1986, at 15a, col. 1.

4. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 7 (1986).

5. Roper, *The Propensity to Litigate in State Trial Courts, 1981-1984, 1984-1985*, 11 JUST. SYS. J. 262, 268-69 (1986).

6. G. Wetherington, *Testimony Before Academic Task Force For Review of the Insurance and Tort Systems* (Oct. 30, 1986) (transcript vol. 2, at 39).

Recognizing that meaningful dialogue about solutions cannot occur until public decisionmakers understand what is real and what is myth, many states and organizations sponsored commissions and task force projects to investigate the tort and insurance systems.<sup>7</sup> Unfortunately, most of these commissions consisted of the interest groups most directly affected by the tort and insurance systems: trial lawyers, doctors, and insurance industry and business representatives.<sup>8</sup> Operating under unrealistically short deadlines and without adequate staffs, these commissions frequently issued split reports with nearly half of the representatives dissenting.<sup>9</sup> Even when investigators had no direct interests in the tort and insurance systems, their conclusions were conflicting and appeared motivated by political considerations rather than a desire to objectively analyze the facts. On one hand, the Report of the Tort Policy Working Group, established by the Reagan administration Justice Department, described an "extraordinary increase" in the number of lawsuits, which was "outpaced" only by the increase in the average tort award.<sup>10</sup> On the other hand, the National Association of Attorney Generals concluded that "the evidence shows no vast or explosive increases in claims or payments to victims."<sup>11</sup>

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7. See generally STATE OF MD., REPORT OF THE GOVERNOR'S OVERSIGHT COMMITTEE ON LIABILITY INSURANCE (Dec. 1986); STATE OF MASS., LIABILITY IN MASSACHUSETTS: TOWARD A FAIRER SYSTEM, REPORT OF THE GOVERNOR'S TASK FORCE ON LIABILITY ISSUES (Dec. 1986) [hereinafter *LIABILITY IN MASS.*]; STATE OF MO., MISSOURI TASK FORCE ON LIABILITY INSURANCE (Jan. 1987); STATE OF N.M., REPORT OF THE INTERIM LEGISLATIVE WORKMEN'S COMPENSATION COMMITTEE ON LIABILITY INSURANCE AND TORT LAW REFORM (Dec. 1986); STATE OF N.Y., GOVERNOR'S SPECIAL COMM. ON LIABILITY INSURANCE, TESTIMONY FROM THE DIRECTOR OF THE ALLIANCE FOR CONSUMER RIGHTS (Feb. 1986); STATE OF TEX., REPORT OF THE HOUSE/SENATE JOINT COMMITTEE ON LIABILITY INSURANCE AND TORT LAW AND PROCEDURE (Jan. 1987).

8. See STATE OF FLA., REPORT OF THE GOVERNOR'S TASK FORCE ON EMERGENCY ROOM AND TRAUMA CARE (Mar. 1987) [hereinafter *FLA. TRAUMA CARE*]; *LIABILITY IN MASS.*, *supra* note 7, at 2; STATE OF WASH., REPORT OF PROFESSIONAL LIABILITY SUBCOMMITTEE OF LEGAL ACTION TASK FORCE 2 (Dec. 1986).

9. See *FLA. TRAUMA CARE*, *supra* note 8; OHIO STATE BAR ASS'N, SPECIAL AD HOC COMMITTEE ON PRODUCT LIABILITY (Sept. 1986); STATE OF WASH., REPORT OF THE TORT REFORM COMMITTEE TO THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON ON THE 1986 TORT REFORM ACT (Jan. 1987).

10. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 47 (Feb. 1986).

11. F. BELLOTTI, J. VAN DE KAMP, L. THORNBURG, J. MATTOX, C. BROWN, & B. LAFOLLETTE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE, PREPARED FOR THE NATIONAL ASSOCIATION OF ATTORNEY GENERALS, conclusion #2 (May, 1986).

The Florida legislature also established a task force to study the lack of affordable and available liability insurance, determine its causes, and report recommendations for change in the state's insurance and tort systems.<sup>12</sup> Unlike other efforts, however, Florida's Academic Task Force for Review of the Insurance and Tort Systems ("Task Force") did not consist of representatives of divergent interests; instead, its five members were the three major Florida university presidents and two businessmen with distinguished public service backgrounds, selected by the university presidents.<sup>13</sup> The Task Force also differed from other efforts because its budget was sufficient to hire an extensive staff of academics and other professionals with expertise in law, insurance and finance, economics, and medicine.<sup>14</sup> Finally, the Task Force was given almost two years to report to the Florida legislature, instead of the more typical sixty or ninety day deadlines under which other groups operated.

This article's authors were members of the professional staff for the Task Force. A critical starting point for the Task Force was to understand what really is happening in the Florida courts. Is Florida experiencing a "litigation explosion"? Are Florida citizens more litigious than other states' residents? Are Florida juries in fact "out-of-control"? This article discusses these issues. Section II reports changes in the number and types of lawsuits filed.<sup>15</sup> Section III considers another measure of litigiousness, the frequency of jury trials,<sup>16</sup> and section IV describes verdicts and judgments.<sup>17</sup> In each instance, the Florida experience is compared with those of other jurisdictions. The data presented in these sections suggests that although Florida litiga-

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12. Tort and Insurance Reform Act of 1986, ch. 86-160, 1986 Fla. Laws 160.

13. Members of the Florida Academic Task Force for Review of the Insurance and Tort Systems include the Chairman, Marshall M. Criser, President of the University of Florida; Edward Thaddeus Foote II, President of the University of Miami; Preston H. Haskell, President of the Haskell Company, Architects/Engineers/Contractors; P. Scott Linder, Chairman of Linder Industrial Machinery Company; and Dr. Bernard F. Sliger, President of Florida State University.

14. Members of the research staff of the Florida Academic Task Force for Review of the Insurance and Tort Systems include the Executive Director, Carl S. Hawkins; Guy Anderson, Professor of Law, J. Reuben Clark Law School, Brigham Young University; the Associate Director, Donald G. Gifford, Professor of Law, University of Florida; Dr. David J. Nye, Associate Professor of Finance and Insurance, University of Florida; Joseph W. Little, Professor of Law, University of Florida; Dr. Roger D. Blair, Professor of Economics, University of Florida; Bernard L. Webb, Professor of Business Administration, Georgia State University; and Marvin A. Dewar, M.D.

15. See *infra* notes 20-61 and accompanying text.

16. See *infra* notes 62-69 and accompanying text.

17. See *infra* notes 70-92 and accompanying text.

tion rates have dramatically increased in recent years — rates of increase not observed in most other states — Florida's current litigation patterns are approximately the same as the national average. The article then addresses, in section V, possible explanations for the increases in litigation.<sup>18</sup> Finally, section VI considers why recent increases in Florida litigation rates have exceeded those in other jurisdictions.<sup>19</sup>

## II. FREQUENCY OF LITIGATION

### A. State Courts: Florida

Official statistics gathered by the State Court Administrator's Office (the SCAO) can show whether civil litigation in Florida has substantially increased.<sup>20</sup> Reliable statewide data for Florida is available from 1979, when this office began collecting statistics from each of the State's judicial circuits.

The data shows that the number of civil lawsuits filed in Florida has increased substantially in six of the last seven years in Florida, and the increase has outpaced the increase in Florida's population during this period. Table 1 shows the total number of civil filings in the state circuit courts for each year, and the rate of change from the previous year, and compares this rate of change with the increase in Florida population.<sup>21</sup>

Over a seven-year period, the number of civil complaints filed increased 50.7 percent, or approximately twice the increase in Florida's population. These changes in the frequency of the litigation rate are graphed in Figure A.

A more complete picture of the litigation rate in Florida would reflect trends in county court filings, involving damages amounts of less than \$5,000,<sup>22</sup> illustrate that litigation trends in the county courts

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18. See *infra* notes 93-113 and accompanying text.

19. See *infra* notes 115-129 and accompanying text.

20. See OFFICE OF THE STATE COURTS ADMINISTRATOR, SUPREME COURT OF FLA., SUMMARY REPORTING SYSTEM, COUNTY COURTS SUMMARY REPORT (Jan. 1, 1979 - Dec. 31, 1986) [hereinafter COUNTY COURTS 1979-1986]; OFFICE OF THE STATE COURTS ADMINISTRATOR, SUPREME COURT OF FLA., SUMMARY REPORTING SYSTEM, CIRCUIT COURTS SUMMARY REPORT (Jan. 1, 1979 - Dec. 31, 1986) [hereinafter CIRCUIT COURTS 1979-1986].

21. CIRCUIT COURTS 1979-1986, *supra* note 20; UNIVERSITY OF FLA., FLORIDA ESTIMATES OF POPULATION: APRIL 1, 1986, STATES, COUNTIES, AND MUNICIPALITIES 27 (Feb. 1987) [hereinafter FLORIDA ESTIMATES OF POPULATION].

22. Florida county courts have original jurisdiction over all criminal misdemeanor cases not heard in the circuit courts, all violations of municipal and county ordinances, and all causes of action filed on or after July 1, 1980, in which the matter in controversy does not exceed \$5,000, except those within the exclusive jurisdiction of the circuit courts. FLA. STAT. § 34.01 (1985).

closely parallel those in the circuit courts. These case filings increased 47.8 percent from 1979 to 1986.<sup>23</sup>

The principal focus of media and legislative concern in Florida has not been with litigation in general, but rather with personal injury and other tort suits that arguably create a sense of "crisis" in the state's tort and insurance systems. This more restricted group of cases comprises a modest portion of all legal complaints filed in Florida. In 1986, for example, tort actions constituted eleven percent of all civil complaints filed in Florida circuit courts.<sup>24</sup> Categories of cases account-

23. The changes in the numbers of county court civil case filings are displayed in the following table.

FOOTNOTE TABLE I  
FLORIDA COUNTY COURTS TOTAL CASE FILINGS

Year	Total Filings (1)	% Annual Change (2)	Florida Population (in thousands) (3)	% Annual Change (4)	% Increase in Litigation in Excess of Population Growth (5)=(2)-(4)
1979	202,888	—	9,448.5	—	
1980	229,310	9.3	9,747.0	3.2	6.19
1981	260,935	13.8	10,106.0	3.7	10.1
1982	269,206	3.2	10,375.3	2.7	0.5
1983	257,333	(4.4)	10,591.7	2.1	(6.5)
1984	257,024	(0.1)	10,930.4	3.2	(3.3)
1985	292,870	14.0	11,287.9	3.3	10.7
1986	328,627	12.2	11,657.8	3.3	8.9
Total % of Increase for 8-Year Period		62.0		23.44	38.60
Average Annual Compound Growth Over 8-Year Period		7.1		3.1	4.0

COUNTY COURTS 1979-1986, *supra* note 20.

24. OFFICE OF THE STATE COURTS ADMINISTRATOR, SUPREME COURT OF FLA., SUMMARY REPORTING SYSTEM, CIRCUIT COURTS SUMMARY REPORT (Jan. 1, 1986 - Dec. 31, 1986) [hereinafter CIRCUIT COURTS 1986].

ing for a larger share of total litigation are domestic cases (49.3 percent), property cases (14.7 percent), and contract and indebtedness cases (17.2 percent). Figure B illustrates the respective percentage for each of these types of litigation.

The "negligence" classification as the SCAO defines it approximates total tort filings in Florida.<sup>25</sup> As seen in Table 2, tort case filings in Florida have increased over 70 percent during the past seven years.

TABLE 1  
FLORIDA CIRCUIT COURTS, TOTAL CASE FILINGS

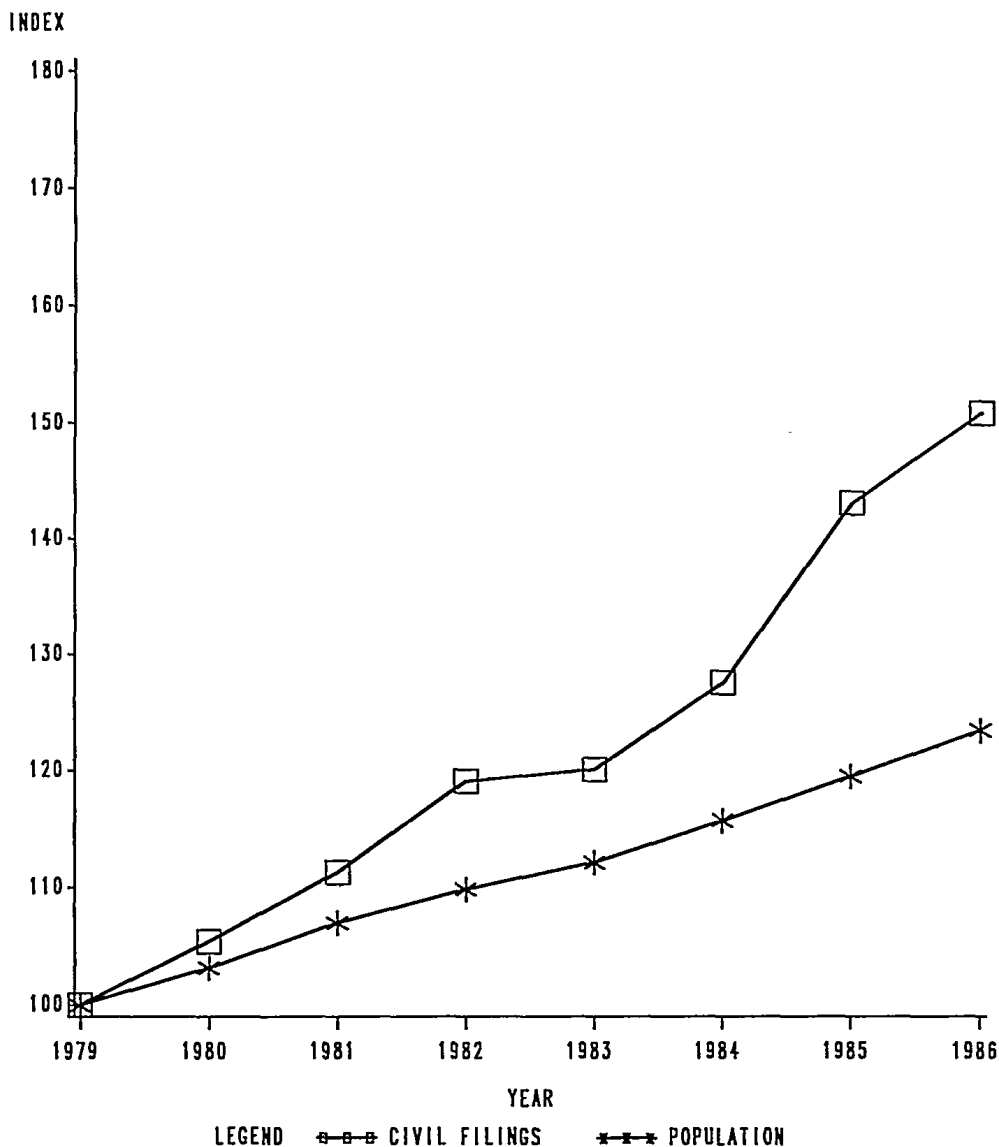
Year	Civil Lawsuits Filed (1)	% Annual Change (2)	Florida Population (in thousands) (3)	% Annual Change (4)	% Increase in Litigation in Excess of Population Growth (5) = (2)-(4)
1979	202,198	---	9,448.5	---	
1980	213,160	5.4	9,747.0	3.2	2.2
1981	224,973	5.5	10,106.0	3.7	1.8
1982	240,973	7.0	10,375.3	2.7	4.3
1983	242,758	0.9	10,591.7	2.1	(1.2)
1984	257,837	6.2	10,930.4	3.2	3.0
1985	288,961	12.1	11,287.9	3.3	8.8
1986	304,607	5.4	11,657.8	3.3	2.1
Total Percent					
Increase for					
8-Year Period					
		50.7		23.4	27.3
Average Annual					
Compound Rate					
of Growth Over					
8-Year Period					
		6.0		3.1	2.9

Source: SCAO Summary Reporting System Manual (1986) (case filings) and Florida Estimates of Population (1986) (population)

25. OFFICE OF THE STATE COURTS ADMINISTRATOR, SUPREME COURT OF FLA., SUMMARY REPORTING SYSTEM, CIRCUIT COURTS SUMMARY REPORT 88 (Jan. 1, 1985 - Dec. 31, 1985). The SCAO includes in its "negligence" category all matters relating to all forms of liability suits involving negligence-related death, injury, or damage to property or property interests,



FIGURE A  
CIVIL FILINGS COMPARED TO POPULATION: FLORIDA



SOURCE: TABLE 1

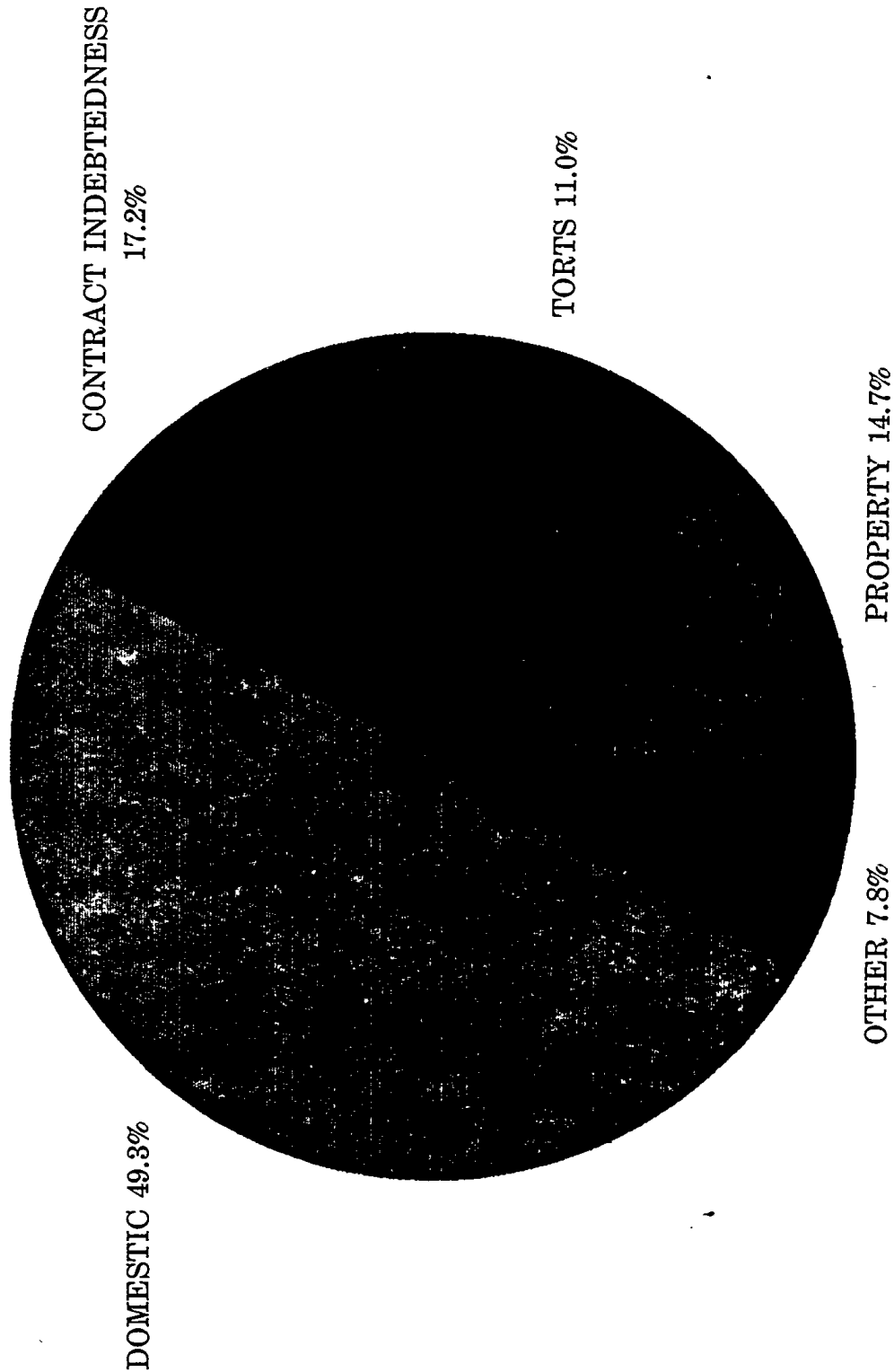
### B. *State Courts: Nationwide*

Reliable data on nationwide litigation trends is sparse and often contradictory. The National Center for State Courts' (the Center) analysis of tort litigation trends is the most comprehensive available.<sup>26</sup>

including claims for statutory relief on account of death or injury. This category includes medical malpractice claims and automobile connected negligence.

26. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1984, at 182 (1986).

## TYPES OF CIVIL CASES FILED: FLORIDA



SOURCE: OFFICE OF THE STATE COURTS ADMINISTRATOR,  
SUMMARY REPORTING SYSTEM ANNUAL REPORT, 1986

TABLE 2  
FLORIDA CIRCUIT COURTS  
TOTAL NEGLIGENCE CASE FILINGS

Year	Total Negligence Case Filings (1)	% Annual Change (2)	Florida Population (in thousands) (3)	% Annual Change (4)	% Increase in Litigation in Excess of Population Growth (5) = (2)-(4)
1979	19,513	—	9,448.5	—	
1980	20,785	6.5	9,747.0	3.2	3.3
1981	20,966	0.8	10,106.0	3.7	(2.9)
1982	23,478	12.0	10,375.3	2.7	9.3
1983	23,684	0.9	10,591.7	2.1	(1.2)
1984	25,775	8.8	10,930.4	3.2	5.6
1985	28,502	10.6	11,287.9	3.3	7.3
1986	33,536	17.7	11,657.8	3.3	14.4
Total Percent Increase for 8-Year Period		71.9		21.3	50.6
Average Annual Compound Rate of Growth Over 8-Year Period		8.0		3.1	4.9

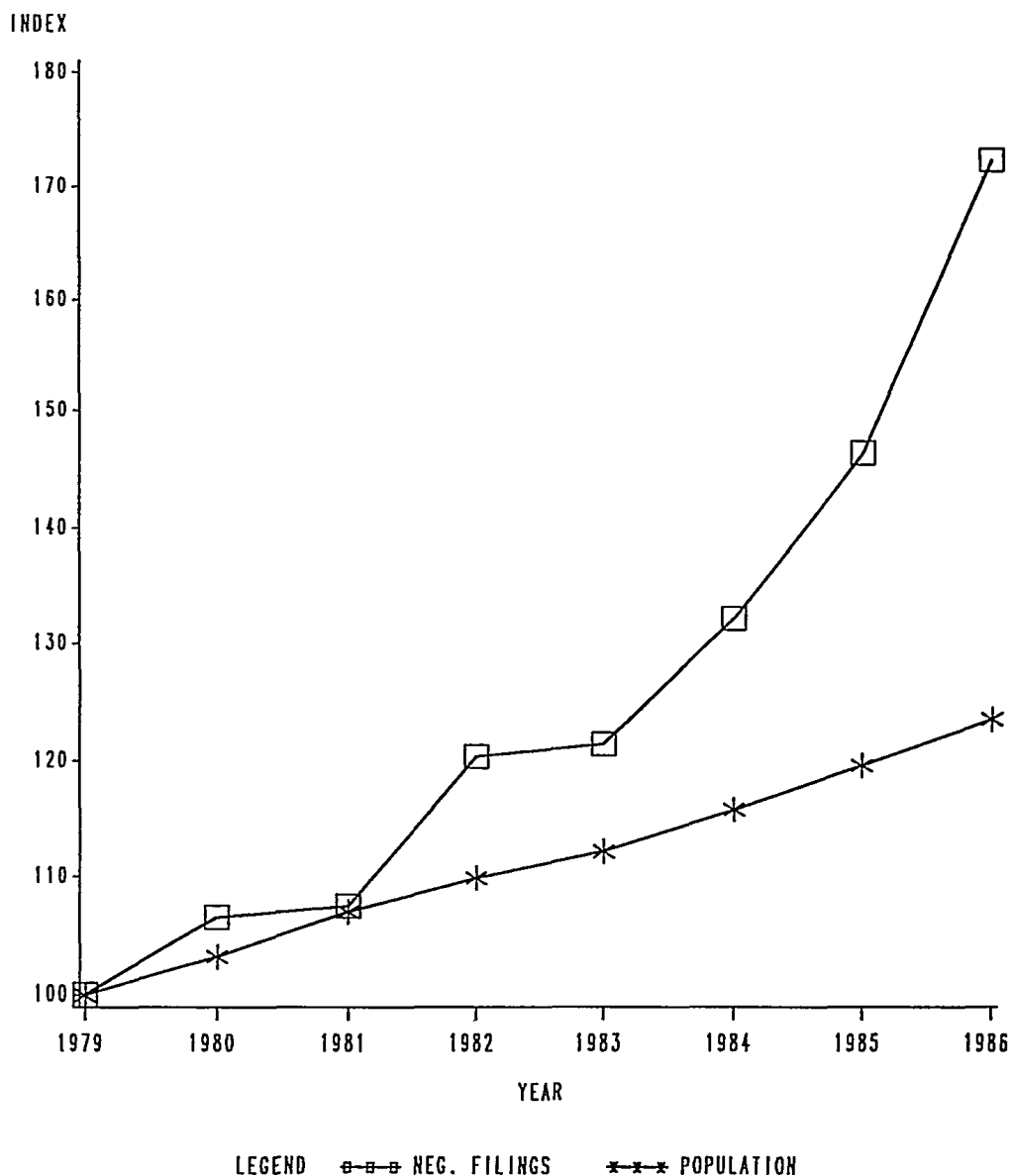
Source: SCAO Summar Reporting System Manual (1986) (case filings) and Florida Estimates of Population (1986) (population)

This analysis uses data from seventeen court systems in thirteen states, including Florida, that reported comparable tort data for 1978, 1981, and 1984.<sup>27</sup> Information from other jurisdictions was unavailable. Although the data from some of the thirteen states was incomplete, the Center considered the available data representative.<sup>28</sup> In these thirteen jurisdictions, the Center found that all tort filings increased

27. *Id.*

28. *Id.* at 173.

FIGURE C  
STATE NEGLIGENCE FILINGS COMPARED TO  
POPULATION: FLORIDA



SOURCE: TABLE 2

nine percent from 1978 to 1984, while the population increased eight percent. During 1978 through 1981, tort case filings increased only two percent, while the population of those states grew four percent. Between 1981 and 1984, the population grew another four percent and tort filings increased by seven percent. In terms of individual state

experience, however, more states experienced decreases in tort case filings than experienced significant increases during the 1981-84 period.

Examining data from a broader array of civil cases including contract and property claims, the Center noted substantial increases in litigation rates during the late 1970s, but it concluded that any "litigation explosion" had peaked in 1981.<sup>29</sup> Specifically, the Center found that tort, contract, and real property filings increased fourteen percent from 1978 to 1981, while population in the reporting states increased only three percent. From 1981 through 1984, however, new case filings actually decreased four percent while population increased by another three percent.<sup>30</sup> Although this analysis tends to rebut the claim of a general increase in litigation after 1981, the tort case statistics described in the previous paragraph suggest a modest increase in *tort* cases — those cases most relevant to evaluating whether a litigation increase has contributed to a tort and insurance "crisis."

In summary, the Center's statistics show a very modest increase in tort litigation — an increase only slightly higher than the population increase. The caseload statistics from the Florida SCAO, however, show significant increases in litigation rates — both for tort cases and all civil suits. Although the current frequency of litigation appears to be no higher in Florida than in other parts of the country,<sup>31</sup> the historical *rate of increase* in litigation in Florida appears to be greater than that reflected in the Center's statistics.

### C. Federal Courts: Florida

Although most tort actions are filed in state courts, a small percentage of tort actions is filed in federal courts, based on either the citizenship diversity<sup>32</sup> or federal question jurisdiction.<sup>33</sup> A comprehensive

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29. *Id.*

30. *Id.* at 174.

31. *See infra* notes 53-54, 67-69 and accompanying text.

32. Federal courts have diversity jurisdiction over all civil actions "between citizens of different states" when the amount in controversy is \$10,000 or more. 28 U.S.C. § 1332(a)(1) (1982). For an example when diversity jurisdiction applies, see *International Paper Co. v. Ouellett*, 107 U.S. 805 (1987), in which property owners on the Vermont side of Lake Champlain brought a nuisance claim against International Paper Company, located on the New York side of Lake Champlain, for polluting the lake. *Id.* at 807. Citizens of two different states, Vermont and New York, were involved in the suit, and the amount in controversy was over \$10,000. Therefore, the suit was properly filed under diversity jurisdiction in federal district court. *See id.*

33. Federal courts have federal question jurisdiction over all civil actions that "arise under" the Constitution of the United States, or pertain to any aspect of federal law or treaty of the United States. 28 U.S.C. § 1331 (1982). For an example of when federal question jurisdiction

overview of Florida litigation rates must include federal as well as state filings; otherwise, a substantial change in state court filings may be nothing more than a shift of cases from federal to state court when both courts have jurisdiction. Because most federal court tort claims fall under citizenship diversity jurisdiction, tort actions filed in federal courts are concentrated in those categories where out-of-state tort defendants are likely. For example, only a small number of medical malpractice suits will be filed in federal courts, because in most malpractice claims the plaintiff and the defendant-doctor reside in the same state. On the other hand, products that injure consumers or other users are frequently manufactured or distributed by corporations that are not citizens of the State of Florida for diversity purposes. Accordingly, federal tort actions are more likely in areas such as products liability claims than in medical malpractice suits.

Total federal court civil filings for Florida's three federal court districts have decreased approximately ten percent since 1979.<sup>34</sup> This statistic is misleading when standing by itself. From 1979 through 1981, total civil case filings in the Southern District of Florida, the largest of the three Florida districts, decreased nearly fifty percent. This change is due almost entirely to a flurry of land forfeiture cases involving tracts in the Big Cypress Swamp National Preserve during the years immediately prior to 1979.<sup>35</sup> Since 1981, total federal civil filings in Florida have increased 17.4 percent, slightly more than the 14.5 percent increase in Florida population during this same period.

Even excluding 1979 through 1981, Florida's federal courts have not experienced the substantial growth in total litigation as have the state courts. Yet a mere shift of filings from state to federal courts because of perceived federal court advantages does not explain the increase in state court litigation. Even in Florida's federal courts, case filings since 1981 have outstripped population growth.

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applies, see *Metropolitan Life Ins. Co. v. Taylor*, 107 U.S. 1542 (1987). Taylor was fired from his job when he filed a supplemental claim for medical benefits after his doctors pronounced him fit to return to work. He sued the Metropolitan Life Insurance Company in state court for reinstatement of his benefits and various other tort claims. The insurance company had the case moved from state court to federal court when it was determined that Taylor's disability claim fell under a federal act, the Employee Retirement Income Security Act of 1974. *Id.* at 1545. When a claim arises under the United States Constitution, or involves federal acts or treaties, it may be brought under federal question jurisdiction in federal court. 28 U.S.C. § 1331 (1982).

34. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICAL ANALYSIS AND REPORTS DIVISION, FEDERAL JUDICIAL WORKLOAD STATISTICS, Tables C1 and C3 (Jan. 1, 1979 - Dec. 31, 1986).

35. Telephone conversation with Stuart O'Hare, Operations Manager of the United States District Court, Southern District of Florida (June 17, 1987).

TABLE 3<sup>35</sup>  
FLORIDA FEDERAL COURTS CIVIL CASE FILINGS 1979 THROUGH 1986

Year	All Districts				Middle District		Northern District		Southern District	
	Number of Actions Filed	% Change from the Prior Yr	Number of Actions Filed	% Change from the Prior Yr	Number of Actions Filed	% Change from the Prior Yr	Number of Actions Filed	% Change from the Prior Yr	Number of Actions Filed	% Change from the Prior Yr
1979	11,387		3,478		732		7,177			
1980	8,806	(22.7)	3,590	3.2	758	3.6	4,458	(37.9)		
1981	8,358	(5.1)	3,639	1.4	764	0.8	3,955	(11.3)		
1982	9,054	8.3	3,927	7.9	978	28.0	4,149	4.9		
1983	9,899	9.3	4,344	10.6	1,104	12.9	4,451	7.3		
1984	10,622	7.3	4,822	11.0	1,308	18.5	4,492	0.9		
1985	11,958	12.6	5,318	10.3	1,175	(10.2)	5,465	21.7		
1986	10,208	(14.6)	4,710	(11.4)	1,168	(0.6)	4,330	(20.8)		
Cumulative Change (7 Years)		(10.4)		35.4		59.6		(39.7)		
Annual Average Rate of Change		(1.5)		4.4		6.9		(7.0)		

Source: Administrative Office of the United States Courts, Federal Judicial Workload Statistics (1979 through 1986)

36. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 34.

In contrast to the relative stability of total civil filings, tort actions filed in Florida's federal courts increased 84.2 percent from 1979 through 1986.<sup>37</sup> By far the largest increase occurred in the District Court for the Middle District of Florida, as illustrated in Table 4.

#### D. *Federal Courts: Nationwide*

Professor Marc Galanter's work is the leading analysis and interpretation of nationwide federal court litigation statistics. Professor Galanter concludes, "We are not faced with an inexorable exponential explosion of cases, but rather with a series of local changes, some sudden but most incremental, as particular kinds of disputes move in and out of the ambit of the courts."<sup>38</sup>

TABLE 4  
FLORIDA FEDERAL DISTRICT COURTS TORT CASE FILINGS

Year	Florida Total	% of Change	Florida Northern District	Florida Middle District	Florida Southern District
1979	590		63	266	261
1980	871	47.6	67	415	399
1981	668	(23.3)	74	283	311
1982	778	16.5	75	356	347
1983	840	8.0	107	351	382
1984	874	4.0	108	407	359
1985	984	12.6	110	443	431
1986	1087	10.5	85	577	425
Total Percent Increase for 8-Year Period		84.2			
Average Annual Compound Rate of Growth Over 8-Year Period		10.8			

Source: Administrative Office of the United States Federal Judicial Workload Statistics (1979 through 1986)

37. *Id.*

38. See Galanter, *supra* note 4, at 4-5.



A careful reading of Galanter's analysis suggests that his data shows substantial increases in nationwide litigation rates, but his interpretation explains these increases as a result of something besides what others characterize as

[a] hypertrophy of [American] legal institutions — manifested in the presence of too much law, too many lawyers, excessive expenditures on legal services, too much litigation, an obsessively contentious population enthralled with adversary combat, and an intrusive activist judiciary — and a concomitant erosion of community, decline of self-reliance, and atrophy of informal self-regulatory mechanisms.<sup>39</sup>

Galanter contends that the available data does not warrant the inflated language of "hyperlexis." Based on his examination of studies showing even higher litigation rates in some locales during colonial times, he believes that current litigation rates are not unprecedented.<sup>40</sup> Galanter further argues that the increased exercise of legal rights by ordinary citizens often produces a safer, more just society.<sup>41</sup> He gives the example of a restaurant owner who, fearing litigation if an intoxicated patron causes an automobile wreck and a resulting injury, teaches his employees how to recognize when a customer is intoxicated. Further illustrating the desirable effects of litigation, Galanter cites the University of Georgia's halting of preferential academic treatment for athletes, and other abuses, after a jury awarded \$2.57 million to Dr. Jan Kemp, who had been dismissed for protesting such academic charades.

This article does not consider the relative benefits and costs of increased litigation. Research conducted by the authors for the Academic Task Force, however, suggests that benefits of increased litigation are often overlooked. A survey of 699 randomly selected attorneys practicing personal injury law in Florida, including a roughly equal distribution of plaintiffs' attorneys and defense attorneys, showed that 83.4 percent of all attorneys identified "greater knowledge of legal rights" as a substantial reason for the increase in litigation rates. Almost ninety percent of the respondents considered "greater

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39. *Id.* at 38.

40. *Id.* at 29, 31.

41. *Id.* at 5; Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 41 (1983).

access to attorneys" a factor.<sup>42</sup> To the extent that the increase in litigation rates results from greater filings of meritorious claims, such increased litigation clearly has some desirable consequences. Any value judgment weighing the costs and benefits of increased litigation on the basis of the facts presented here alone is impossible. The resolution of this important issue requires facts and evaluations of public policy considerations beyond the scope of this article.

Galanter does agree there has been "a dramatic rise" in federal tort filings during the past fifty years.<sup>43</sup> He finds federal court filings per capita nearly doubled during a recent twenty year period, from a rate of 0.5 per thousand population in 1960 to 0.9 per thousand population in 1980. Further, he concludes from his analysis of civil case studies conducted by other researchers<sup>44</sup> that tort cases as a percentage of all civil filings have increased substantially.<sup>45</sup>

Analyzing a time period roughly comparable to the Florida statistics in this article (the nine-year period from 1975 through 1984) Galanter finds total civil filings in the federal courts increased 122.9 percent.<sup>46</sup> He notes, however, that this increase was not attributable to litigious individuals, but rather to the unprecedented efforts by federal officials to collect overpayments of government benefits and to remove social

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42. During 1987, the professional staff of the Academic Task Force research team developed two survey instruments to measure the attitudes and normative practices of Florida tort lawyers. One instrument was targeted at plaintiff attorneys, and the second at defense attorneys. The plaintiff survey contained 173 multiple choice completion items, and the defense instrument contained 141 multiple choice completion items. The instruments were designed by Professor Gifford, and subsequently reviewed by research team members Professors Nye, Hawkins, Little, and Blair, and social psychologist consultant Dr. Cary Mills. Rayford Taylor, Executive Director of the Florida Bar, also reviewed both instruments. Steve Masterson, Executive Director of the Florida Academy of Trial Lawyers, specifically reviewed the plaintiff attorney survey. James Dixon, Executive Director of the Florida Defense Lawyer's Association, reviewed the defense attorney survey. A total sample of 1,500 Florida tort attorneys was randomly selected: 750 plaintiff attorneys were drawn from the membership of the Florida Academy of Trial Lawyers, and 750 Defense Attorneys were drawn from the membership of the Florida Defense Lawyers Association. Both surveys were mailed in February, 1987. The overall response rate was 43% (31% for plaintiff attorneys and 55% for defense attorneys). An item analysis was conducted across all respondents for each instrument, employing Lotus 1-2-3.

43. Galanter, *supra* note 41, at 37.

44. *Id.* at 40, 42 (citing ARTHUR YOUNG & CO., & PUBLIC SECTOR RESEARCH, INC., AN EMPIRICAL STUDY OF THE JUDICIAL ROLE IN FAMILY AND COMMERCIAL DISPUTES Table 10 (1981)); Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 281-82 (1976); McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 LAW & SOC'Y REV. 823, 829 (1980-1981).

45. Galanter, *supra* note 41, at 42.

46. Galanter, *supra* note 4, at 15.

security disability recipients from the eligibility rolls. Such government collection actions increased 6,683 percent, while social security disability suits increased 412 percent.<sup>47</sup>

Tort filings, on the other hand, increased at a more modest rate of 46 percent over the nine year period, according to Galanter. He explains this significant increase as largely the result of a 272 percent jump in products liability cases; all other categories of cases increased only 17 percent during the nine-year period.<sup>48</sup> Galanter argues that the products liability increase is not evidence of a general rise in litigiousness, but rather due to the emergence of one type of case — asbestosis litigation — during the timeframe in question.<sup>49</sup> Additionally, he asserts that at least one other product, the Dalkon Shield, probably accounted for a substantial share of this increase.<sup>50</sup>

Galanter's argument that the increase in tort filings should be discounted because it results largely from specific products liability cases is unconvincing. Such categories of cases should be excluded only if they are idiosyncratic, and if dramatic increases in comparable types of cases are unlikely to recur in the future. Studies conducted for the Rand Corporation's Institute for Civil Justice<sup>51</sup> and for the American Law Institute<sup>52</sup> speculate, however, that such cases may be the prototype of future tort litigation — litigation increasingly dominated by toxic torts and the deleterious consequences of specific products. If this is true, then recent increases in federal tort cases are not aberrations, but are likely to indicate future litigation trends.

Even discounting Galanter's explanation for the increase in tort litigation in the federal courts, the nationwide upward trend is less than in Florida courts, both federal and state. If Galanter's explanation is valid, then tort litigation rates in Florida courts are increasing at a rate dramatically faster than in the federal courts nationwide.

#### E. *Comparison of Florida Litigation Rates with Other Jurisdictions' Litigation Rates*

Recent public debate about Florida's tort and insurance systems often has assumed that Florida's plight is worse than that of other

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47. *Id.* at 17.

48. *Id.* at 21.

49. *Id.* at 24.

50. *Id.* at 25.

51. See D. HENSLER, W. FELSTINER, M. SELVIN, & P. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 110-11 (1985); J. KAKALIK, P. EBENER, W. FELSTINER, & M. SHANLEY, COSTS OF ASBESTOS LITIGATION 6 (1983).

52. See Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 188, 196 (1987).

jurisdictions. The *increase* in Florida litigation rates during the past seven years is substantially greater than the increases reported in studies in other jurisdictions.<sup>53</sup> After these increases, however, Florida's litigation rates are comparable with, or slightly less than, rates in other jurisdictions. Table 5 displays the rate of civil case filings per 100,000 population for representative jurisdictions provided by the National Center for State Courts for 1984.<sup>54</sup> The total includes twenty-six states and the District of Columbia. Unfortunately, statistics singling out *tort* filing rates in various jurisdictions are not available.

#### F. *Variations in Litigation Rates Among Representative Florida Counties*

Comparing tort case filings among various Florida counties<sup>55</sup> shows that tort litigation rates for urban areas are substantially greater than for counties with less population density. This is true not only in absolute numbers, but also when the population figure is held constant. A possible explanation for the variance is the greater accumulation of potential defendants in urban areas. Florida litigation statistics corroborate the research result of Dr. Patricia Danzon, a leading scholar of medical malpractice litigation, who finds that medical malpractice claims rates increase as the extent of urbanization, a measure of population density, increases.<sup>56</sup> Table 6 compares litigation rates in various Florida urban and non-urban counties.<sup>57</sup>

#### G. *Types of Cases*

Frequency of litigation is only one factor to examine in assessing demands on the legal system and on those who pay liability judgments. The complexity of the case and the amount of liability judgments are

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53. Compare *supra* notes 20-25 and accompanying text (frequency of litigation in Florida state courts) with *supra* notes 26-31 and accompanying text (nationwide trends in frequency of litigation).

54. See NATIONAL CENTER FOR STATE COURTS, *supra* note 26, at 74-79.

55. The data presented in this section should not be directly compared with the data in the previous section for two reasons. First, the countywide information refers to *tort* filings only, not total civil case filings. Second, the data in this section is for the year 1986; the data in the previous section is for the year 1984.

56. P. DANZON, MEDICAL MALPRACTICE 82-83 (1985).

57. CIRCUIT COURTS 1986, *supra* note 24; UNIVERSITY OF FLA., SUMMARY REPORTING SYSTEM, CIRCUIT COURTS SUMMARY REPORT (Jan. 1, 1986 - Dec. 31, 1986); FLORIDA ESTIMATES OF POPULATION, *supra* note 21.

TABLE 5  
TOTAL CIVIL CASE FILINGS 1984

Jurisdiction	Case Filings per 100,000
Total -- All Jurisdictions	6,514.51
District of Columbia	22,513.80
Wisconsin	6,601.17
California	6,301.44
North Carolina	6,189.78
FLORIDA	6,060.77
Ohio	5,923.42
Illinois	5,744.06
Kentucky	4,901.90
Minnesota	4,662.13
Pennsylvania	4,131.19

Source: National Center for State Courts, Annual Report (1984)

also important. Ten cases involving rear-end collisions will be reported in the statistics as ten negligence claims, but the demands these cases place on the tort system pale in comparison to the systemic demands of a single medical malpractice case with a quadriplegic victim.

Unfortunately, the SCAO did not collect statistics on types of tort cases until 1986. In that year, automobile negligence accounted for 57.6 percent of all tort cases.<sup>58</sup> Professional malpractice cases, including claims against doctors, lawyers, and other professionals, composed only 4.2 percent of the total, and products liability cases were only 2.3 percent of the total. The relative proportions of the types of tort cases are illustrated in Figure D.

More detailed caseload statistics from Dade County<sup>59</sup> reveal a dramatic shift over the past six years in the type of negligence cases:

58. CIRCUIT COURTS 1986, *supra* note 24.

59. G. WETHERINGTON, CIVIL TORT STUDY (May 1986) [hereinafter CIVIL TORT STUDY 1986] (study conducted by Administrative Office of the Courts, Eleventh Judicial Circuit, Dade County, Fla.); G. WETHERINGTON, CIVIL TORT STUDY (Apr. 1987) [hereinafter CIVIL TORT STUDY 1987] (study conducted by Administrative Office of the Courts, Eleventh Judicial Circuit, Dade County, Fla.) A comparison of the composition of the negligence caseloads in Dade County in 1986 with that of the entire state shows that the types of cases are similar in most regards,

TABLE 6  
CASE FILINGS PER 100,000 POPULATION  
FLORIDA COUNTIES (CIRCUIT COURTS, 1986)

		Case Filings per 100,000 Population during 1986
Statewide		2612.9
Urban Counties:		
Broward	(Fort Lauderdale)	2934.3
Dade	(Miami)	3138.2
Duval	(Jacksonville)	2623.9
Hillsborough	(Tampa)	2971.2
Orange	(Orlando)	2898.4
Pinellas	(St. Petersburg)	2376.1
Representative Non-Urban Counties:		
Alachua	(Gainesville)	1940.9
Charlotte		1756.6
Lafayette		2021.3
Leon	(Tallahassee)	2437.8
Putnam		2105.2

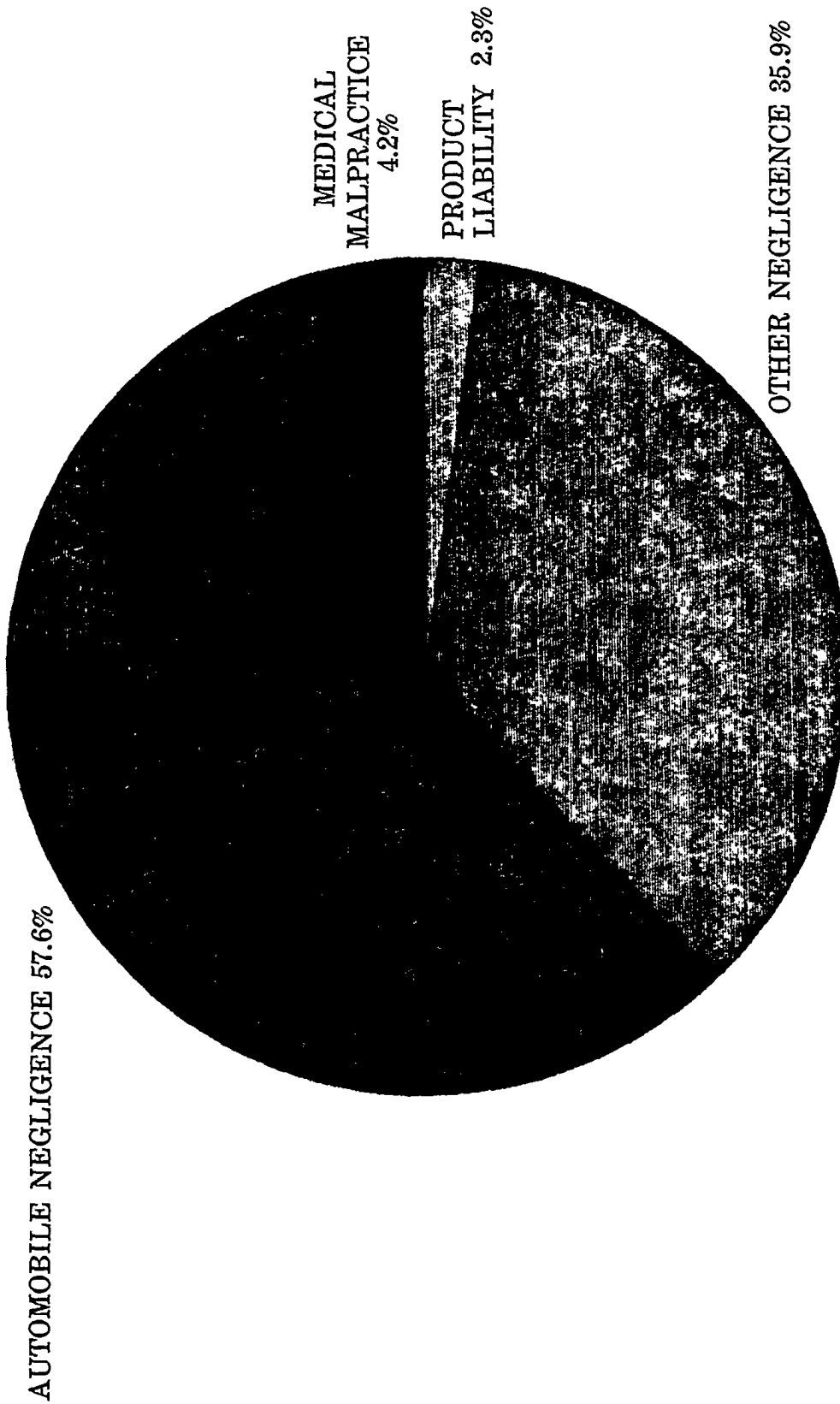
Source: SCAO Summary Reporting Systems Manual (1986)

but that Dade County has a modestly higher proportion of medical malpractice suits and a modestly lower proportion of products liability cases.

FOOTNOTE TABLE II  
FLORIDA TORT CASES

Type of Tort Case	Percentage of Negligence Cases	
	Statewide	Dade County
Medical Malpractice	4.2%	5.1%
Produce Liability	2.3%	1.2%
Auto Negligence	57.6%	58.3%
Other Negligence	35.9%	35.4%

FIGURE D  
1986 STATE NEGLIGENCE FILINGS: FLORIDA



SOURCE: OFFICE OF STATE COURTS ADMINISTRATOR,  
SUMMARY REPORTING SYSTEM ANNUAL REPORT 1986

automobile negligence cases<sup>60</sup> have decreased, while "other negligence" cases have increased, as shown in Table 7.

The relative rates of change for Dade County's population, all negligence cases, automobile negligence cases, and other negligence cases are illustrated in Figure E.

TABLE 7  
NEGLIGENCE CASE FILINGS  
DADE COUNTY, FLORIDA

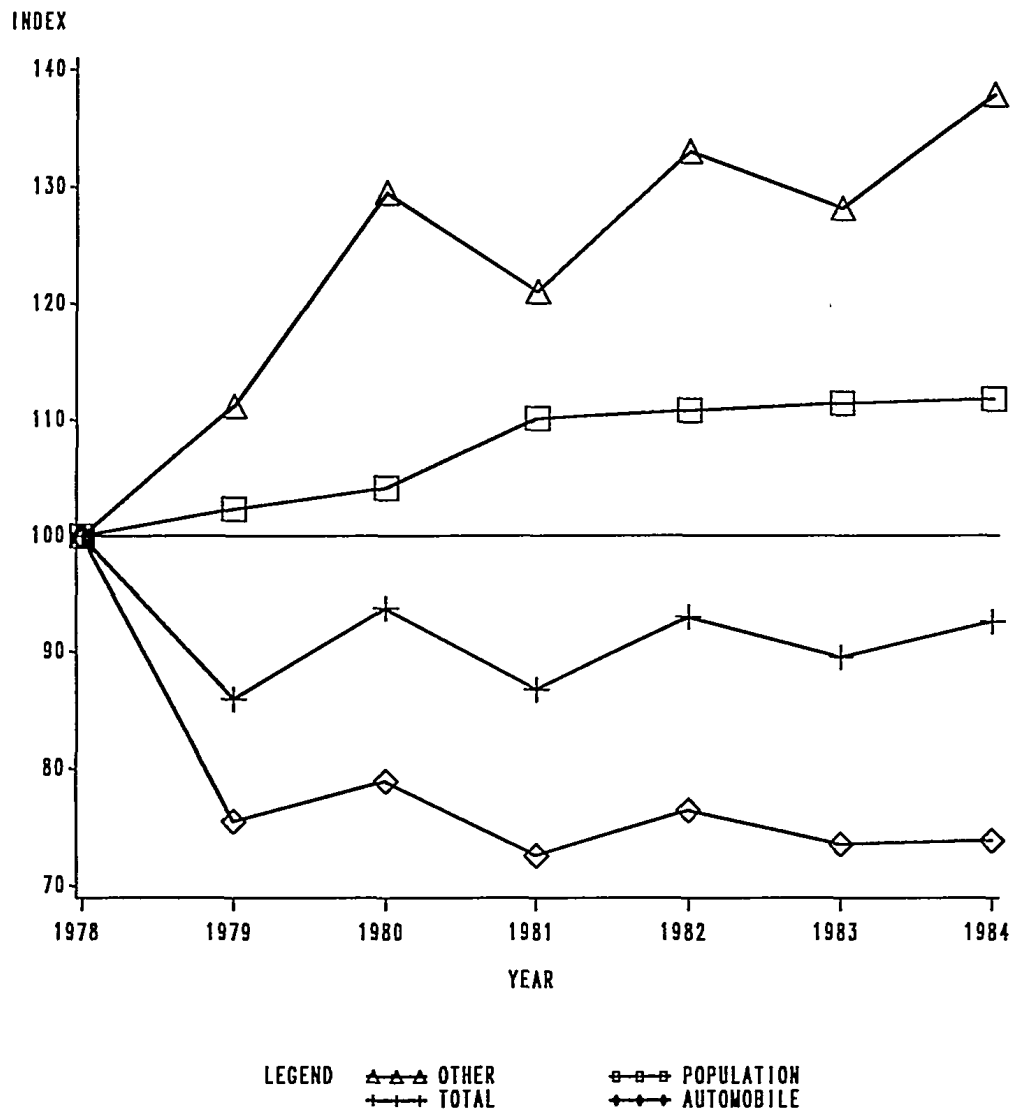
Year	Total Negligence	% Annual Change	Auto Negligence	% Annual Change	Other Negligence	% Annual Change
1978	7,085	—	5,010	—	2,075	—
1979	6,092	(14.0)	3,785	(24.5)	2,307	11.3
1980	6,642	9.0	3,955	4.5	2,687	16.5
1981	6,149	(7.4)	3,639	(8.0)	2,510	(6.6)
1982	6,591	7.2	3,833	5.3	2,758	9.9
1983	6,345	(3.7)	3,687	(3.8)	2,658	(3.6)
1984	6,561	3.4	3,703	0.4	2,858	7.5
Total %						
Increase for						
8-Year Period						
		(7.4)		(26.1)		37.7
Average Annual						
Compound Rate						
of Growth for						
8-Year Period						
		(1.3)		(4.9)		5.5

Source: Wetherington, *Civil Tort Studies* (1986 and 1987)

60. The decline in automobile negligence cases in Dade County from 5,010 cases in 1978 to 3,785 cases in 1979 is probably the result of changes in Florida's no-fault system. *See* FLA. STAT. § 627.737 (1985). Prior to 1976, persons injured in automobile accidents were entitled to pursue common law negligence claims whenever defined medical expenses exceeded \$1,000 or the claimant suffered one of seven types of defined medical injuries. FLA. STAT. § 627.737(2) (1975), *amended by* FLA. STAT. § 627.737 (1985). The amendment eliminated the \$1,000 medical expenses as an alternative threshold for entry into the tort system and restricted the types of injuries that allow a claimant to sue in tort. FLA. STAT. § 627.737 (1985). The net effect of these changes probably was to reduce the frequency of common law automobile negligence claims.



FIGURE E  
NEGLIGENCE CASE FILINGS COMPARED TO POPULATION:  
DADE COUNTY, FLORIDA



SOURCE: TABLE 1 AND TABLE 7

The greater detail available from Dade County during this period shows a shift in negligence cases from the "automobile" category to the "other" category. Generally, "automobile" cases are more routine, easier to litigate and result in smaller damage awards than "other negligence" cases. This change from "automobile negligence" to "other negligence" is therefore significant, signaling a shift to more complex cases placing greater demands on both the legal and insurance systems.

Data available from other jurisdictions parallels the Dade County trends. As a percentage of all civil jury trials, automobile accidents in San Francisco decreased from 53 percent during 1960-1964 to only 28 percent during 1980-1984;<sup>61</sup> in Chicago, automobile cases decreased from 58 percent to 53 percent during the same period. In contrast, both jurisdictions experienced substantial increases in the percentages of all civil cases represented by medical malpractice, products liability, business/contract disputes, and intentional torts.

### III. FREQUENCY OF JURY TRIALS

#### A. *Recent Trends in Florida and Other Jurisdictions*

The frequency of jury trials is sometimes used to measure litigiousness. For example, Rand Corporation studies of trends in trials and verdicts,<sup>62</sup> upon which the United States Attorney General's recent report<sup>63</sup> relies, examine the frequency of jury trials and not the frequency of filed complaints. The difference between these two measures of litigiousness is critical. The frequency of jury trials depends not only on plaintiffs' propensity to file lawsuits, but also on plaintiffs' and defendants' ability to settle suits prior to a jury trial. Therefore, examining only the frequency of jury trials may skew conclusions about litigiousness, because jury trial rates depend as much upon defendants' reluctance to settle claims as they do upon the litigiousness of plaintiffs.

Only a small percentage of cases filed in Florida courts actually proceed to a jury trial. For the five years 1980 through 1984, jury trials accounted for only 1.2 percent of all dispositions.<sup>64</sup> The percentage of cases proceeding to trial decreased 37.4 percent, from 1.6 percent of all Florida dispositions in 1979 to 1.0 percent of dispositions during 1985.

Table 8 shows that the number of jury trials in Florida actually decreased slightly over the last seven years. Coupled with the increase in case filings described earlier, this decrease suggests that lawyers

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61. M. PETERSON, *CIVIL JURIES IN THE 1980'S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS* 13 (1987).

62. M. PETERSON, *supra* note 61; M. PETERSON, *COMPENSATION OF INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY* (1984); M. PETERSON, *THE CIVIL JURY; TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979* (1982).

63. OFFICE OF THE ATTORNEY GENERAL OF THE U.S., *AN UPDATE ON THE LIABILITY CRISIS: TORT POLICY WORKING GROUP* (Mar. 1987).

64. CIRCUIT COURTS 1979-1986, *supra* note 20.

TABLE 8  
FLORIDA CIRCUIT COURTS JURY TRIALS

Year	Number of Jury Trials	% Annual Change	Total Number of Case Dispositions	Jury Trials as Percent of Dispositions
1979	2,759	—	178,077	1.6
1980	2,346	(15.0)	196,450	1.2
1981	2,686	14.5	210,013	1.3
1982	2,867	6.7	220,890	1.3
1983	3,032	5.8	244,301	1.2
1984	2,555	(15.7)	241,609	1.1
1985	2,630	2.9	272,172	1.0
Total Change During 7-Year Period	(129)	(4.7)	94,095	

Source: SCAO Summary Reporting Systems Manual (1986)

for both parties are settling a significantly higher percentage of cases prior to trial.

During a similar period of time, 1980 through 1984, a Rand Corporation Institute for Civil Justice Report found that civil jury trials increased six percent in Cook County (Chicago) and decreased thirty-nine percent in San Francisco.<sup>65</sup> The significant decrease in jury trials in San Francisco was attributed to local factors, including a change in the jurisdictional limits of the Superior Court, where the likelihood of jury trials was greater, and increased use of arbitration.<sup>66</sup>

*B. Selected National Jury Trial Rates Compared to Rates From Selected Florida Urban and Non-Urban Counties*

Jury trial statistics can be used to compare the rate of jury trials in Florida with that in other jurisdictions, and also to compare the rate of jury trials among various locales in Florida. Table 9 compares

65. M. PETERSON, *supra* note 61, at 6-7.

66. *Id.* at 7-9.

the jury trial rates per 100,000 population for Chicago and San Francisco with jury trial rates for the entire State of Florida, for selected urban counties, and for selected non-urban counties.

As illustrated in Table 9, the number of jury trials per 100,000 people is considerably less in all Florida counties than in San Francisco. Only Dade County approaches the jury trial rate of Cook County (Chicago). The statistics show a clear pattern of higher jury trial rates in Florida's urban counties than in other Florida counties. The rate of jury trials in Dade County, for example, is twice as great as in

TABLE 9  
JURY TRIALS PER 100,000 POPULATION, 1980 - 1984

Locale		Number of Jury Trials Per Year Per 100,000 Population
Cook County	(Chicago) <sup>67</sup>	57
San Francisco		91
Florida		26
Urban Counties:		
Broward	(Fort Lauderdale)	35
Dade	(Miami)	50
Duval	(Jacksonville)	22
Hillsborough	(Tampa)	37
Orange	(Orlando)	20
Pinellas	(St. Petersburg)	14
Other Counties:		
Alachua	(Gainesville)	13
Charlotte		7
Lafayette		0
Leon	(Tallahassee)	24
Putnam		11

Source: SCAO (for Florida) and Peterson (1987) (for Cook and San Francisco Counties)

67. *Id.* at 7.

Leon County, five times as great as in Putnam County, and eight times as great as in Charlotte County. At the other extreme, Lafayette County saw no jury trials in civil cases during the entire five-year period surveyed.

Once again, jury trial rates among comparable locales in Florida confirm Danzon's finding that the degree of urbanization is the most powerful predictor of litigation rates.<sup>68</sup> Because the relation of this factor to Florida litigation trends is so important, section V will discuss it more extensively.<sup>69</sup>

#### IV. VERDICTS AND JUDGMENTS

##### A. *Florida*

No reliable statewide statistics are available for the proportion of trials that result in liability or for the amounts of judgments in litigated cases in Florida. In lieu of this missing data, this section reviews data available from Dade County;<sup>70</sup> the next section will compare this Florida data to similar data from other jurisdictions.

##### 1. Liability

Contrary to popular opinion, juries do not always, or even almost always, award damages to injured plaintiffs. Chief Judge Wetherington's studies in Dade County show that plaintiffs win 60.0 percent of all trials, including 57.2 percent of automobile negligence cases, and 64.5 percent of "other liability" cases, but only 42.9 percent of product liability cases and 53.9 percent of medical malpractice cases.<sup>71</sup>

##### 2. Amounts of Compensatory Awards

"Average" amounts of verdicts vary dramatically depending upon whether *means* or *medians* are used. The *mean* of a group of verdicts is the quotient of total verdict amounts and number of verdicts. The *median*, on the other hand, is simply the middle amount in a descending list of verdicts. In other words, half of the verdicts are more than the median and the other half of the verdicts are less than the median. When a few verdicts are substantially greater than the rest, the *mean* and the *median* differ greatly. To look at one, and not the other, may be misleading. The *median* verdict more accurately indicates what an

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68. P. DANZON, *supra* note 56, at 82.

69. See *infra* notes 111-16 and accompanying text.

70. See CIVIL TORT STUDY 1986, *supra* note 59; CIVIL TORT STUDY 1987, *supra* note 59.

71. See CIVIL TORT STUDY 1986, *supra* note 59; CIVIL TORT STUDY 1987, *supra* note 59.

ordinary jury is doing in a typical case. It would be an error to suggest that juries are "out-of-control" based upon a high *mean* figure, which may be skewed by a handful of very large verdicts. On the other hand, to the extent that insurers and other defendants do in fact pay the entire amounts of large verdicts and judgments, the *mean* and the *frequency* of paid amounts determine their total outlay.

Chief Judge Wetherington's studies in the Eleventh Judicial Circuit (Dade County) demonstrate that the choice between *median* and *mean* sometimes leads to apparently opposite conclusions.<sup>72</sup> When the *median* is substantially lower than the *mean*, the difference is due to a relatively small number of very large verdicts. The *median*, or typical, verdict in cases involving a jury award to the plaintiff was between \$25,000 and \$50,000. The *mean*, or average, award was \$263,567. The figures differ because 5.4 percent of the verdicts (excluding default judgments) exceeded one million dollars. Chief Judge Wetherington's studies separately analyzed automobile claims, products liability claims, medical malpractice claims, and "other torts." The mean amounts and distribution of the verdicts (excluding punitive damages) are displayed in Table 10.

As shown, the mean award of all cases, \$263,567, is large, but most verdicts are \$50,000 or less. There is also considerable discrepancy between the \$102,911 mean award in the routine case typified by automobile negligence, and the \$888,767 mean award in a complex case such as medical malpractice. These figures show that the jury system produces modest awards in typical cases, but that a few jury awards, concentrated in areas such as medical malpractice, are quite large.

### B. *Florida Compared to Other Jurisdictions*

How does this Dade County data compare to data from other jurisdictions? The best available statistics on verdict amounts come, once again, from the Institute for Civil Justice studies of litigation results in Cook County and San Francisco.<sup>73</sup> The verdict statistics from these locales came from 1980-1984, somewhat earlier than the 1985-1987 period covered by the Dade County statistics. Therefore,

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72. *Id.* The figures in Table 10 are the combined totals of all verdicts, including verdicts over one million dollars from January, 1985 to March, 1986, and April, 1986 to March, 1987. The summary and analysis in this section ignore those judgments identified as default judgments. Default judgments are neither accurate reflections of how the civil justice system operates in a contested proceeding, nor are they likely to lead to payment by an insurance company or uninsured defendant.

73. See M. PETERSON, *supra* note 61.

TABLE 10  
JURY AWARDS OF DAMAGES, JANUARY 1985 - MARCH 1987  
DADE COUNTY, FLORIDA

		All Cases	Auto Negligence	Products Liability	Medical Malpractice	Other Liability
<u>Money Award</u>		<u>Number of Trials</u>				
[% Figure is the Percent of Total Plaintiff Verdicts]						
\$	0	19	9	0	3	7
		2.5%	3.5%	0%	4.8%	1.7%
	1 -					
	25,000	340	131	12	6	191
		44.6%	51.0%	48.0%	9.7%	45.7%
	25,001 -					
	50,000	91	36	1	5	49
		11.9%	14.0%	4.0%	8.1%	11.7%
	50,001 -					
	250,000	202	56	9	21	116
		26.5%	21.8%	36.0%	33.9%	27.8%
	250,001 -					
	500,000	43	13	2	6	22
		5.6%	5.1%	8.0%	9.7%	5.3%
	500,001 -					
	750,000	20	4	0	7	9
		2.6%	1.6%	0.0%	11.3%	2.2%
	750,001 -					
	1,000,000	6	1	1	2	2
		0.8%	0.4%	4.0%	3.2%	0.5%
>	1,000,000	41	7	0	12	22
		5.4%	2.7%	0.0%	19.4%	5.3%
<u>Mean</u> (excluding Punitive Damages)		\$263,567	\$102,911	\$117,341	\$885,767	\$248,381

Source: Wetherington, *Civil Tort Studies* (1986 and 1987)

assuming that verdicts are increasing at least at the rate of inflation, the Dade County verdicts appear unfairly inflated compared to the earlier verdicts from Cook County and San Francisco. Yet, the similarities are striking. As shown in Table 11, plaintiffs prevail in 60 percent of Dade County trials, 61 percent of Cook County trials, and 60 percent of San Francisco trials.

Although the damage awards may vary somewhat between categories, awards in Dade County from 1985 through 1987 are significantly similar to the Cook County and San Francisco results from 1980 through 1984. The comparison suggests that if the time periods were comparable, the awards would probably be *smaller* in Dade County than in Cook County or San Francisco.

The Institute for Civil Justice's study of Cook County and San Francisco is extremely important because it presents data on jury verdicts for the entire period of 1960 through 1984, when tort law

TABLE 11  
COMPARISON OF DAMAGE AWARDS

	Dade County (1985 - 1987)	Cook County (1980 - 1984)	San Francisco (1980 - 1984)
All Tort Cases			
Mean	\$263,567	\$187,000	\$302,000
Median	\$25,000 - 50,000	\$13,000	\$63,000
Malpractice			
Mean	\$885,767	\$1,179,000	\$1,162,000
Median	\$50,000 - 250,000	\$121,000	\$156,000
Products Liability			
Mean	\$117,341	\$828,000	\$1,105,000
Median	\$25,000 - 50,000	\$187,000	\$200,000
Automobile			
Mean	\$102,911	\$88,000	\$131,000
Median	\$25,000 - 50,000	\$7,000	\$29,000
% of Million Dollar Verdicts (All Cases)			
	5.4%	3.5%	5.6%

Source: Wetherington (1986 and 1987) (Dade County) and Peterson (1987) (Cook County and San Francisco)



became substantially more plaintiff-oriented.<sup>74</sup> The jury results from both locales show substantial increases in the percentage of cases that plaintiffs won, and in the average or mean size of the damage award for the plaintiff. From 1980 through 1984, personal injury plaintiffs were 30 percent more likely to win a favorable verdict in Cook County than they were from 1960 through 1964; similarly, San Francisco plaintiffs were 20 percent more likely to win.<sup>75</sup> During the same twenty-year period, the average, or mean size of a plaintiff's verdict increased a dramatic 358 percent in San Francisco and 217 percent in Cook County.<sup>76</sup> The net effect of these parallel changes is that the "expected award," or the amount an insurer rationally would predict for comparable cases, rose 448 percent in San Francisco and 307 percent in Cook County.<sup>77</sup> Almost all the changes in mean jury awards and likelihood of liability occurred between 1975 and 1984. For both locales, these trends were stable from 1960 through 1975. The complete picture should reflect, however, that although median, or typical awards in San Francisco increased 142 percent from the 1960-1964 period to the 1980-1984 period, they actually decreased 46 percent in Cook County.<sup>78</sup>

The Rand Corporation's studies illustrate two different tort systems. Most cases continued to produce relatively modest recoveries. A few cases, however, account for a disproportionate amount of the total damages awarded. The 5.6 percent of the San Francisco cases that resulted in million dollar verdicts accounted for over half of the total money awarded.<sup>79</sup> In Cook County, the 3.5 percent of all plaintiffs obtaining million dollar verdicts accounted for 85 percent of all damages awarded. To some extent, these high awards now occur in all types of cases, but they remain largely concentrated in a few "high stakes" categories, including medical malpractice and products liability. During the past twenty years, jury awards increases in these areas rose significantly faster than did awards in more routine cases. Table 12<sup>80</sup> illustrates the comparative rates of change in median and mean awards for two "high stakes" categories of cases, medical malpractice and products liability, and for one category of typically routine cases, automobile negligence.

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74. See W. PROSSER & R. KEETON, *THE LAW OF TORTS* 18-19 (5th ed. 1984).

75. *Id.* at 35.

76. *Id.* at 36.

77. *Id.* at 35.

78. *Id.* at 29.

79. *Id.* at 33.

80. *Id.* at 21, 22.

TABLE 12  
INCREASES IN JURY AWARDS BY CASE TYPE COMPARING  
1960-1964 AND 1980-1984

	Cook County		San Francisco	
	Mean	Median	Mean	Median
Automobile	138%	61%	185%	38%
Medical Malpractice	2167%	246%	830%	144%
Products Liability	212%	82%	1016%	641%

Source: Peterson, *Civil Juries in the 1980s* (1987)

### C. Punitive Damage Awards

Punitive damages have been a particular target of those advocating fundamental reforms of the tort system.<sup>81</sup> Traditionally, under Florida law, punitive damages were awarded only when the jury found the defendant's conduct to be wilful, wanton, or reckless.<sup>82</sup> Florida's Tort and Insurance Reform Act of 1986 addressed punitive damages in several ways, but the provisions will "sunset," or expire, in 1990 unless the legislature reenacts this legislation.<sup>83</sup> Under this legislation, before pleading punitive damages, the plaintiff must show by evidence in the record or proffered evidence that a reasonable basis for recovery of punitive damages exists.<sup>84</sup> Punitive damages awards in a broad range of specified personal injury cases are limited to three times the amount of compensatory damages; the plaintiff receives only 40 percent of any such award, with the remainder going to the State of Florida.<sup>85</sup> The apparent rationale for this last provision is that while punitive damages may be desirable in some cases to punish or deter defendants for their egregious conduct, plaintiffs should not receive significant windfalls over and above what is necessary for compensation.

Considering the amount of attention directed to punitive damages, such awards are relatively infrequent both in Florida and elsewhere.

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81. See generally Arndt, *Warn Court Costs Threaten Industry Survival*, NAT'L UNDERWRITER, Feb. 15, 1985, at 48; Haggerty, *Insurer Plans Two-pronged Attack to Slow Punitive Damages Roller Coaster*, NAT'L UNDERWRITER, July 13, 1984, at 4; Williard, *The Lawsuit Crisis: Two Perspectives*, INS. REV., May, 1986, at 60-61.

82. *Dr. P. Philips & Sons v. Kilgore*, 152 Fla. 578, 582, 12 So. 2d 465, 467 (1943).

83. Tort and Insurance Reform Act of 1986, ch. 86-160, 1986 Fla. Laws 160.

84. FLA. STAT. § 768.72 (Supp. 1986).

85. *Id.* § 768.73.

Only 6.7 percent of all cases in which plaintiffs received compensatory damages in Dade County also resulted in punitive damage awards during the time period covered by Judge Wetherington's study; no plaintiffs in products liability cases and only 4.8 percent of successful medical malpractice claimants received punitive damages.<sup>86</sup> Overall, only 4 percent of all plaintiffs received punitive damages. The highest proportion of those who did receive punitive awards was in the "other negligence" category, which includes old-fashioned "punch in the nose" battery cases and other intentional torts for which punitive damages traditionally have been awarded. The median amount of the punitive damage award is unknown, but the mean amount is \$124,409, substantially less than might be expected.

Research from other jurisdictions suggests that the Dade County experience is roughly comparable to that of other locales. Dr. Stephen Daniels, Research Fellow for the American Bar Foundation, studied punitive damage awards for the 1980s in over forty sites in ten different states.<sup>87</sup> Daniels found that 4.7 percent of the 23,129 verdicts surveyed included punitive damages, and of the 13,154 verdicts that awarded plaintiff compensatory damages, 8.2 percent also awarded punitive damages.<sup>88</sup> Daniels also calculated that the *median*, or typical award, which cannot be determined from the Dade County study, was less than \$30,000 in all locales outside of California.<sup>89</sup> According to Daniels, the median punitive damage award is relatively small because intentional torts, rather than more typical personal injury cases, make up the bulk of punitive damage cases. Finally, Daniels notes the likelihood that punitive damage awards, particularly larger ones, will not be paid in full but rather will be reduced by the trial or appellate court, or through continued settlement negotiations between the parties.<sup>90</sup>

A 1987 study conducted by researchers at the Rand Corporation's Institute for Civil Justice is consistent with the Dade County and Daniels studies, but finds significant upward trends in both the frequency and severity of punitive damage awards.<sup>91</sup> The Rand researchers found that the number of punitive damage awards in Cook

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86. CIVIL TORT STUDY 1986, *supra* note 59; CIVIL TORT STUDY 1987, *supra* note 59.

87. S. Daniels, Aggregate Patterns in Punitive Damages and Products Liability Verdicts 2-3 (1987) (unpublished paper) (available from American Bar Foundation, Chicago, Ill.).

88. *Id.* at 8.

89. *Id.* at 9.

90. *Id.* at 10-11.

91. M. PETERSON, S. SARMA, & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 8-22 (1987).

TABLE 13  
PUNITIVE DAMAGE AWARDS, JANUARY 1985 - MARCH 1987  
DADE COUNTY

	All Cases	Auto Negligence	Products Liability	Medical Mal- practice	Other Liability
	Number of Trials [% Figure is the Percent of Total Plaintiff Verdicts]				
Frequency of Awards Less Than \$1,000,000	50 6.6%	5 1.9%	1 4.0%	3 4.8%	41 9.8%
Frequency of Awards Greater Than \$1,000,000	1 0.1%	0 0.0%	0 0.0%	0 0.0%	1 0.2%
Mean Award (includes only cases with punitive awards)	\$124,409	\$155,800	\$100,000	\$204,500	\$93,960

Source: Wetherington, *Civil Tort Studies* (1986 and 1987)

County had almost doubled between the late 1970s and the early 1980s and had also increased dramatically in San Francisco. The likelihood that liable defendants will be assessed punitive damages is more than twice as great in San Francisco as in Miami. As in Florida, however, the greatest likelihood of punitive damage awards occurs not in the prototypic personal injury case, but in commercial disputes involving fraud, unfair business practices or bad faith. The last twenty-five years have seen a combined total of only six punitive damage awards in products liability cases in Cook and San Francisco Counties.

The Rand researchers also found a significant trend toward increases in punitive damage amounts. From 1980 through 1984, they concluded that the median punitive damage award trebled in both jurisdictions, reaching \$43,000 in Cook County and \$63,000 in San

Francisco. The mean, or average, amount of the punitive damage awards also increased 300 percent in Cook County.<sup>92</sup> The Cook County average, however, was influenced heavily by two extremely large punitive damage awards in medical malpractice cases.

Unfortunately, no data is available in Florida to assess the trend in frequency or severity of punitive damage awards over time.

## V. POSSIBLE EXPLANATIONS FOR FLORIDA'S DRAMATIC LITIGATION GROWTH

A comparison of the data presented above for Florida and for other jurisdictions warrants two conclusions. First, Florida's current litigation rates, judgment amounts and punitive damage experience are all roughly comparable to those in other areas of the country. In terms of litigation, Florida is by no means a "worst case scenario." Second, unlike most of the rest of the country, litigation frequency in Florida has increased dramatically during the past seven years. In other words, Florida has caught up to the national norms.

This section will explore that element of the Florida experience that differs from most other jurisdictions. Why has litigation frequency increased so dramatically in this state? This single question contains two related, but separate, issues: why are litigation rates increasing, and why is this increase dramatically greater in Florida than in most other jurisdictions?

### A. *Reasons for Increased Litigiousness Nationwide*

From an etiological perspective, there are three possible reasons for increased litigation frequency. First, the number of tortious injuries may be increasing. Second, a higher percentage of those injured by the acts of culpable defendants may be filing lawsuits. And third, more non-meritorious lawsuits are being filed; that is, plaintiffs are filing suit even when objective, historical facts do not indicate that their injuries result from culpable conduct by defendants.

To analyze the causes of increased litigation in Florida, one must determine whether available information suggests the likelihood of an increase in tortious injuries, a greater propensity on behalf of the population to resort to the courts or both factors. If the population is more litigation prone, it probably is impossible to distinguish whether

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92. *Id.* The mean for San Francisco actually decreased during the 1980s because the awards for the earlier period included one award of \$13.4 million.

this trend is because a higher percentage of meritorious claims are filed or because more non-meritorious complaints are filed. In all likelihood, an increase in one results in an increase in the other. Neither plaintiffs nor their attorneys always know whether their lawsuits are meritorious. As an increasing percentage of meritorious claims is filed, the number of "false positives" probably increases at an even greater rate.

Any discussion of the frequency of tort litigation should begin with a model of what Trubek, Grossman, Felstiner, Kritzer, and Sarat describe in the *Final Report for the Civil Litigation Research Project* as the "dispute pyramid."<sup>93</sup> Trubek begins with a baseline, the number of injuries resulting from activities that arguably create liability. The number of lawsuits that tort claimants file is a function of how many injuries result from conduct that the courts may regard as warranting recovery. As population and economic activity increase, more occasions for tortious injuries arise.

Evidence suggests that the number of lawsuits filed represents a relatively small percentage of the injuries resulting from arguably tortious conduct. For example, Danzon has shown that one of every 126 patients admitted to California hospitals received an *iatrogenic injury* — that is, an injury caused by medical treatment.<sup>94</sup> Danzon concludes that only one in ten of the negligently injured patients filed a claim against their physicians, and only half of those filing claims were eventually compensated.<sup>95</sup>

Trubek observed a similar process of claims screening in a more general study of over 5,000 households in five judicial districts.<sup>96</sup> The researchers surveyed only grievances that members of these households sustained in eight defined areas: tort, consumer, debt, discrimination, property, government, post-divorce, and landlord-tenant. Of those individuals with a grievance, 71.8 percent complained to the offending party. Of those individuals who complained, 63 percent were rebuffed initially, thus creating what the researchers defined as a "dispute." Only 11.2 percent of these disputes resulted in the filing of a lawsuit and only 18.7 percent of the disputes involving torts resulted in the filing of a lawsuit.

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93. See D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER, & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT 17-21 (1983); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85-87 (1983).

94. P. DANZON, *supra* note 56, at 4.

95. *Id.*

96. Trubek, Sarat, Felstiner, Kritzer & Grossman, *supra* note 93, at 85-87.

The percentage of injured claimants that seeks the services of a lawyer is unknown. Once an injured party contacts a lawyer, however, the 229 plaintiffs' attorneys who responded to a Survey of Attorneys the authors conducted for the Task Force indicated that lawsuits were filed in 54.5 percent of the grievances that their clients brought to them.<sup>97</sup> Table 14 shows which factors played a substantial role in decisions not to file a legal complaint.

The survey also sought the opinions of plaintiffs' and defense attorneys practicing regularly in the tort system as to why litigation rates in Florida are increasing. Table 15 indicates the percentage of responding attorneys who identified the listed factor as *contributing substantially* to the increased likelihood that people will exercise their legal rights.

Each factor appears to play a substantial role in increased litigation rates. Greater knowledge of legal rights results from both an overall increase in sophistication about worldly affairs, and increased media focus on the legal system and recovery for personal injuries. Undoubtedly, television advertising by lawyers has contributed to this greater awareness of litigation alternatives. Increased access to lawyers also results from the increasing numbers of lawyers per capita. Word of mouth referrals play a large role in the increase in the litigation rate, as more people who have had contacts with lawyers encourage others to seek legal alternatives. A generation ago, many ordinary citizens had no personal contact with attorneys, and neither had their friends, families, or co-workers. Now, possibly because of the dramatic increases in divorces, many people are advised to "talk with the lawyer who represented me" when they have a serious grievance of any kind.

The suggestion that impersonal relationships between claimants and potential defendants contribute to the increase in litigation parallels Danzon's finding that urbanization is directly related to claims frequency. Lieberman of Business Week asserts in his book, *The Litigious Society*, that litigiousness results when breakdowns in community and family bonds produce feelings of impersonality, a lack of communication between individuals, and a growing suspiciousness toward others.<sup>98</sup> Medical malpractice exemplifies this phenomenon because the breakdown in doctor/patient communication is attributable in part to an increase in specialization. Family physicians who have ongoing relationships with their patients are less likely to be sued than specialists

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97. See *supra* note 42 and accompanying text.

98. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 17, 186-87 (1981).

TABLE 14  
WHY GRIEVANCES DON'T BECOME LAWSUITS

	Reason for NOT Filing Complaint	% of Cases in Which Reason Played Significant Role
1.	Lack of legal merit; <i>i.e.</i> , circumstances surrounding claimant's injury probably do not establish valid claim for relief	49.1
2.	Probable inability to prove claimant's allegations in a court of law	26.6
3.	Probably cannot get juris- diction over defendant and/or service of process over defendant	5.8
4.	Defendant is probably judgment-proof	17.4
5.	Size of claim is too small to warrant the plaintiff attorney's representation of claimant	26.3
6.	The claimant would not be a credible and convincing witness in the courtroom	7.2
7.	Attorney is too busy with other cases	8.3
8.	Conflict of interest with other clients	5.4

Source: Survey of Florida Tort Lawyers (1987)

whose relationships with patients are short term and impersonal.<sup>99</sup> Similarly, a leading cultural anthropologist who has studied the legal system intensively suggests that although community public opinion

99. See L. FRIEDMAN, TOTAL JUSTICE 90 (1985); W. ROBERTSON, MEDICAL MALPRACTICE: A PREVENTIVE APPROACH 17 (1985).



TABLE 15  
WHY MORE PEOPLE SUE

	Reason for Increased Litigation	% of All Attorneys Identifying Reason	Plaintiffs' Attorneys	Defense Attorneys
1.	Greater knowledge of legal rights	83.6%	92.0%	78.2%
2.	Greater access to attorney	88.4%	83.9%	91.2%
3.	More impersonal relationships between claimants and potential defendants such as doctors or manufacturers	75.8%	77.8%	75.0%
4.	Greater belief that society should aid individual disadvan- taged by accidents	53.2%	48.5%	56.1%
5.	Greater awareness that damage awards usually are paid by insurance companies	70.4%	46.8%	84.7%

Source: Survey of Florida Tort Lawyers (1987)

once acted as a strong regulator of society, individuals in today's increasingly fragmented, urbanized, and mobile society turn to the state as chief regulator and seek legal recourse.<sup>100</sup>

Another explanation for the increased litigation against members of the medical profession, and increased litigation in general, is a marked attitudinal change in the general population. People today are less willing to attribute tragedy to fate, the supernatural, or chance. A scientifically oriented culture emphasizes cause and effect, and believes that if a person participates in an activity that results in an

100. See L. NADER, NO ACCESS TO LAW: ALTERNATIVE TO THE AMERICAN JUDICIAL SYSTEM 4-5 (1980).

injury, then human action was a preventable "cause" of the injury. Nowhere can this cultural trend be better observed than in the increased litigation against obstetricians. Fifty years ago, society regarded the death of a newborn or the mother as an inherent risk of childbirth. Today, anything other than a normal birth is considered an aberration that must have a cause; increasingly this cause is adjudged to be the malpractice of the attending physician. When the attitude that tragedies will not, and should not, happen is combined with a pervasive belief in cause and effect relationships, any human actor identified with the tragedy is more likely to be seen as a potential defendant.

Seventy percent of the attorneys responding to the Survey of Florida Tort Lawyers conducted by the Task Force indicated that a belief that the increased awareness that damage awards usually are paid by insurance companies contributed substantially to the increase in litigation rates. Other commentators have suggested that the awareness by judges and juries that insurance companies can spread the costs of damage awards among their numerous policyholders marks them as "deep pocket" defendants who should pay when tragically injured plaintiffs seek redress.<sup>101</sup> Arguably, this philosophy affects not only the principals of the legal system, but also injured parties deciding whether to file claims. The survey results suggest that at least some potential plaintiffs are influenced when they realize that the insurance company, not the defendant, will pay.

The lawyers responding to the survey identified factors that add up to a larger shift in attitude in legal culture, pointing toward an ethic that Lieberman calls "total redress,"<sup>102</sup> and Stanford University law professor Lawrence Friedman calls "total justice."<sup>103</sup> Total redress or total justice means basically that citizens expect and demand fair treatment at all times, and if injured, are more assertive in demanding compensation from the wrongdoer.<sup>104</sup> To some, this trend is a narcissistic one in which individuals often deny responsibilities for their own actions and shift blame to others.<sup>105</sup> Other commentators view the increased litigiousness as a healthy sign that courts are increasingly performing their intended function of compensating individuals injured by others' wrongful conduct.<sup>106</sup>

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101. See A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 60-61 (1985).

102. J. LIEBERMAN, *supra* note 98, at 31.

103. See L. FRIEDMAN, *supra* note 99, at 43.

104. *Id.*

105. See Earle, *The Fantasy of Life Without Risk*, FORTUNE, Feb. 16, 1987, at 113.

106. See J. LIEBERMAN, *supra* note 98, at 7.

B. *Why is the Increase in Litigation Rates  
Substantially Greater in Florida?*

The analysis presented earlier<sup>107</sup> documents that Florida has experienced a dramatic increase in tort litigation during the same period of time that litigation rates in most other jurisdictions have been stable. Those factors identified by commentators and Florida lawyers as being responsible for increased litigation, however, appear to apply pervasively throughout American jurisdictions.

Why, then, is the litigation growth rate in Florida dramatically greater than in other jurisdictions? This section first discusses some of the few empirically derived conclusions that exist regarding differences in litigation rates among various locales. It then contrasts the characteristics of Florida's population and economy during recent years with those of the remainder of the nation. Together, these descriptions suggest some explanations of why Florida's litigation rates are increasing substantially faster than nationwide trends.

1. Prior Empirical Research on Litigation Rates

In her study of closed medical malpractice claims files, Danzon found only two variables that correlated with the frequency and severity of claims.<sup>108</sup> Danzon found that the most significant and powerful predictor of claim frequency and severity is the extent of urbanization, even after controlling for higher physician and lawyer density in urban areas and for the more pro-plaintiff malpractice legal decisions in urbanized states.<sup>109</sup> Danzon defined the extent of urbanization as the percentage of the population living in places where the population exceeded 25,000 in 1970.<sup>110</sup> Without replicating Danzon's multiple regression analysis, a comparison of case filings per 100,000 population for urban counties and other counties in Florida (see Table 6)<sup>111</sup> appears to confirm this factor. When Danzon sought to isolate which characteristics of urban society correlated with higher claims frequency and severity, she found higher awards by urban courts were one factor contributing to higher frequency of claims. She also determined that complexity of medical facilities, per capita income, and welfare and unemployment rates were not significantly correlated with malpractice

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107. See *supra* note 53 and accompanying text.

108. P. DANZON, *supra* note 56, at 82-83.

109. *Id.*

110. *Id.* at 69.

111. See *supra* note 55 and accompanying text.

claims rates. The other factor Danzon found to be significantly correlated with malpractice frequency and severity was judicial acceptance of certain pro-plaintiff common law doctrines relating to medical malpractice prior to 1970, including abolition of the locality rule, charitable immunity, *respondeat superior*, and admission of informed consent.<sup>112</sup>

Danzon's research eliminated several possible explanations for greater claims rates. She found, for example, that claims frequency and claims severity are *not* a function of the number of lawyers.<sup>113</sup> Nor are claims frequency and severity significantly related to per capita income, the percentage of the population on welfare, the employment rate, or the extent of court delay.<sup>114</sup>

## 2. Florida Demographic and Economic Trends

An analysis of demographic and economic trends for Florida, when considered against the analysis of Danzon and the commentators discussed in the previous section, suggests certain factors that are more significant influences on litigation frequency in Florida than in most other areas of the country. Most obviously, Florida's population and its economic activity have expanded during the past seven years at rates substantially greater than the increases for the country as a whole.<sup>115</sup> For the reasons described below,<sup>116</sup> when substantial population growth results from in-migration from other jurisdictions, litigation rates logically should increase at a rate substantially in excess of the arithmetic increase in population. Further, any increase in tortious injuries probably correlates more directly with expanded economic activity than with expanded population. Just as tortious injuries became a substantial factor in American society during the nineteenth

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112. P. DANZON, *supra* note 56, at 82-83. Danzon notes that these figures may exaggerate the effect of these four doctrines. The higher figures may be partially explained by the fact that states adopting these doctrines tend to have higher claim frequencies for other reasons. Despite this possible overstatement of the effect of the laws, however, Danzon concludes that adoption of pro-plaintiff common law doctrines prior to 1970 did have a significant, measurable effect on the frequency and severity of claims. *Id.*

113. *Id.*

114. *Id.*

115. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT SUPPLEMENT at Chart — Selected Data-Regions and States (1987). United States Bureau of the Census figures show a 6.4% increase in total United States population, and a 19.8% increase in total Florida population during the time period from 1980 to 1986; *see also* 1986 FLORIDA STATISTICAL ABSTRACT 630 (A. Shoemyen 20th ed. 1986). Building permit activity in 1985 in the State of Florida was 17.63 housing units authorized per 100,000 population; total United States building permits authorized was 7.23 per 100,000 population. *Id.*

116. *See infra* notes 128-29 and accompanying text.

century industrial and transportation expansion,<sup>117</sup> Florida's dramatic increase in tortious injuries is probably the result of what has been described as "an unparalleled period of economic expansion."<sup>118</sup> Along with the additional 1.5 million people, 850,000 jobs and a 50 percent increase in total personal income<sup>119</sup> comes the other side of the coin: more injuries and therefore more lawsuits. This factor does *not* suggest that Florida residents are more litigious when faced with personal injury arguably resulting from someone else's tortious conduct, but instead that they incur more personal injuries resulting from tortious conduct. More construction, more amusement parks, more freeways, and more bars produce more injuries.

In addition to expanding Florida's tort producing base, newcomers, as natives have long recognized, are changing the state of Florida. These changes may increase tort litigation in two different ways. First, the state is becoming more highly urbanized.<sup>120</sup> Newcomers are moving to cities and suburbs rather than to Florida's rural areas. Under Danzon's analysis, therefore, increases in tort claims frequency and severity are predictable.<sup>121</sup> Whether this correlation is a function of greater tortious injuries in urbanized communities, or a greater likelihood that someone will sue when injured, is unclear, but both are probably true. Large cities contain more doctors and hospitals, more automobiles, and more premises that result in more tortious injuries. Further, because businesses and other potential defendants are concentrated in urban areas, venue is more likely to be found there. Finally, the more impersonal relationships in the hustle of an urbanized area make it more likely that grievances will not be resolved informally and will therefore lead to litigation.

Most in-migrants come from jurisdictions with higher per capita litigation rates. Prior to 1979, litigation frequency rates in Florida were somewhere between the lower litigation rates of nearby southern

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117. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-108 (1977).

118. See Koenig, *The Danger Ahead*, FLA. TREND/Y.B. 1987, at 46.

119. *Id.*

120. See A. MORRIS, *THE FLORIDA HANDBOOK, 1987-1988*, at 572 (1987-1988); 1986 FLORIDA STATISTICAL ABSTRACT, *supra* note 115, at 3. Census figures from 1970 and 1980 show a 48.1% increase in the total urban population, and only a 23.2% increase in the total rural population. In 1980, the percentage of total Florida population for urban Florida was 84.3%; for rural Florida, it was 15.7%. See also Statistical Yearbook 1987, FLORIDA TREND/Y.B. 1987, at 52-53 (showing greatest population increases during 1981-1986 in urban counties such as Palm Beach, Hillsborough, Broward, and Orange).

121. P. DANZON, *supra* note 56, at 82-83.

states and the higher national norms.<sup>122</sup> Since then, litigation rates in Florida have become roughly comparable with nationwide norms and those of jurisdictions such as New York, Ohio, and Michigan — precisely the states from which the in-migrants most often come.<sup>123</sup> In addition to becoming a state of urban dwellers, Florida is also becoming a state of people with roots in the northeast and midwest instead of in the south. Floridian characteristics such as educational levels<sup>124</sup> and numbers of physicians<sup>125</sup> increasingly resemble those of northern states, rather than Florida's southern neighbors. One may speculate that more physicians result in more medical maloccurrences that may become claims, and perhaps higher educational levels make residents more likely to assert their rights. Thus, these positive trends of more medical services and higher educational levels also apparently bring with them the comparatively greater northeastern and midwestern propensity to litigate.

Finally, in-migration of significant numbers of people from other states and countries is inherently disruptive to Florida's existing social and cultural norms. By definition, newcomers do not share the sense of community of more permanent residents; commentators such as Friedman<sup>126</sup> and Lieberman<sup>127</sup> see the breakdown of this stability as a cause of the litigation increase. Chief Judge Wetherington pointed to the "highly mobile type of community"<sup>128</sup> Miami has become, and the city's ability to "sustain a boat lift of 150,000 people in the '79-'80 period"<sup>129</sup> as highly dramatic examples of the disruption of in-migration. Massive migration from New York and Ohio may be less dramatic,

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122. See NATIONAL CENTER FOR STATE COURTS, *supra* note 26, at 184.

123. Statistical Yearbook 1987, *supra* note 120, at 52. As the source of new residents moving into the State of Florida, New York ranks number one. Following New York are Ohio, Georgia, Michigan, New Jersey, Pennsylvania, and Illinois.

124. 1986 FLORIDA STATISTICAL ABSTRACT, *supra* note 115, at 651. 1980 figures for high school graduates in Florida show 66.7%, a statistic that approximates the Illinois figure of 66.5%, the Indiana figure of 66.4%, the New York figure of 66.3%, and the Michigan figure of 68.0%. Conversely, other southern states show figures of 56.5% (Alabama), 56.4% (Georgia), 54.8% (Mississippi), and 56.2% (Tennessee). *Id.*

125. *Id.* at 650. In 1982, the number of active physicians per 100,000 persons in Florida was 181, a figure relatively higher than most other southern states (Alabama, 132; Georgia, 148; Mississippi, 113), and comparable with the higher numbers in the northern states (Illinois, 194; Ohio, 172; New Jersey, 204; Pennsylvania, 200).

126. See L. FRIEDMAN, *supra* note 99 and accompanying text.

127. See J. LIEBERMAN, *supra* note 98 and accompanying text.

128. Wetherington, *supra* note 6, at 40.

129. *Id.* at 41.

but these newcomers also contribute to a society less stable and probably more litigious than Florida rural communities of a generation ago, where natives knew everyone and their grandparents.

At the most extreme, one can speculate about the propensity to litigate of those who migrate to Florida. The person living in another state or county who decides to pull up stakes and move to Florida possesses a personality profile less likely to acquiesce in the limited economic prospects in the "rust-belt," or the severely restricted political and economic liberties in Cuba. People with this psychological make-up may be less willing to "take their lumps" after an injury, and more likely to seek the advice and assistance of a lawyer.

In short, the legal system probably reflects the hidden costs of Florida's economic vitality and ethnic diversity. The Florida resident of 1988 is both more likely to be injured by tortious conduct than the 1965 counterpart, and more likely to sue when injured. All of this analysis, of course, says nothing about the injuries sustained by or caused by tourists, a much more important factor in Florida than elsewhere.

## VI. CONCLUSION

Is there a litigation explosion in Florida? The term "litigation explosion" is a pejorative political characterization appropriately used, if at all, by politicians and editorial writers, not by those studying the civil justice system. Hard numbers show that litigation rates are increasing more rapidly in Florida than elsewhere, but even after the increase, Florida's litigation rate is approximately the same as the national norm.

Have the residents of Florida suddenly gone litigation crazy? The data suggests a more restrained conclusion. Determining the causes of thousands of lawsuits a year, and the reasons why thousands of others were not filed both in 1986 and in earlier periods, is difficult and perhaps impossible. A reasonable interpretation of the evidence, however, suggests that the increase in Florida litigation rates is due in part to increasing numbers of tortious injuries, and in part to a greater likelihood that litigation will result after injuries.

