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ARTICLE: Judicial Tort Reform in Texas

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SUMMARY:

... Legislatures are the source of most of the changes we think of as tort reform - caps on damages, limitations on joint and several liability, requirements that payments from collateral sources be deducted from damages, pre-screening procedures for medical malpractice cases, restrictions on expert testimony, shorter statutes of limitations or statutes of repose, heightened proof standards, and restrictions on punitive damages. ... Until 2003, the tort reform lobby in Texas did not have the votes to pass its legislation without support from, or acquiescence of, some of its opponents. ... But the Texas Supreme Court held as a matter of law that the physician was under no duty to disclose that the mastectomy might turn out to be unnecessary because that "is not a risk that is "inherent to' [sic] and "inseparable from' the surgical procedure itself. ... At that time, a health care liability claim was defined as "a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient" ...

TEXT:

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I. Introduction

Legislatures are the source of most of the changes we think of as tort reform - caps on damages, n1 limitations on joint and several liability, n2 requirements that payments from collateral sources be deducted from damages, n3 pre-screening procedures for medical [*2] malpractice cases, n4 restrictions on expert testimony, n5 shorter statutes of limitations or statutes of repose, n6 heightened proof standards, n7 and restrictions on punitive damages. n8

These changes are products of the political process. Candidates for the legislature (and governor and other executive-branch offices) declare themselves to be for or against tort reform. Their campaigns are funded, in part, by the political action committees (PACs) of insurance companies, doctors, and tort reform associations, if they are proponents, or by the PACs of plaintiffs' lawyers and labor unions if they are opponents. Tort reform, or opposition to it, appears in the platforms of the political parties, and the same interests that support candidates help fund the parties. During campaigns candidates debate the merits of tort reform or, if both are for it, the depth of their zeal for it.

[*3] But courts can initiate tort reform too, and they are doing so. n9 It is courts, after all, who ultimately decide whether to impose tort liability. Tort law is still largely common law; courts made it, and they can unmake it. They can

abolish old principles that expanded liability and recognize new principles that limit it. Legislation has to be interpreted and applied; courts can do so expansively or charily. Most importantly, courts that are hostile to litigation generally, or to tort liability in particular, have many opportunities to affect outcomes through their application of rules of procedure, evidence, and jurisdiction, or, in some instances, through rule-making.

At least in states where judges are elected, they are subject to some of the same political forces that are at work on legislators: public displeasure with "lawsuit abuse;" insurance rate increases that the public attributes to the tort system; perceptions that damage awards are excessive, that too much litigation is lawyer-driven, and that litigiousness is harming the country's ability to compete worldwide; and public relations campaigns that reinforce all those beliefs.

Texas is a good laboratory for the study of tort reform, including judicial tort reform. The movement in Texas began almost thirty years ago, when the governor appointed a commission headed by W. Page Keeton, then retired dean of the University of Texas School of Law, to recommend solutions to a perceived crisis in medical malpractice insurance. n10 Almost every session of the legislature since then has considered legislation restricting tort liability, and a great deal of it has passed. When George W. Bush became governor in 1995, he made tort reform one of the four [*4] priority issues of his administration, n11 and it has remained high on the agenda of his successor. n12

In 2003 the Texas Legislature passed the most comprehensive package of tort reform laws yet - laws that capped non-economic damages in most medical malpractice cases at \$ 250,000, curtailed class actions, created a safe harbor for drugs and other products that meet government standards, barred punitive damages unless the jury is unanimous, and adopted fee-shifting rules. n13 Texas is one of the states - perhaps the state - in which tort reformers have had the most success. n14 The number of civil jury verdicts in Texas declined more than 50% from 1985 to 2002, a drop attributed in part to tort reform. n15

All state judges in Texas are elected in partisan elections. In most judicial races, tort reform interests and plaintiffs' lawyers are among the most important sources of funding. The number of judges is large: 615 on the trial bench, n16 eighty judges on the fourteen [*5] intermediate appellate courts, n17 and nine on the supreme court. n18 The Texas Supreme Court does not have criminal jurisdiction, so in supreme court elections tort reform does not have to compete for attention with high-profile criminal law issues like sentencing, treatment of crime victims, and the death penalty. The state has twenty separate media markets in which statewide candidates need to buy advertising, n19 so campaigns are expensive. Perhaps because successful supreme court candidates have to be adept campaigners and fundraisers, the court has become a stepping stone to "higher" office. n20

II. Tort Outcomes in the Texas Supreme Court

The impartiality of the Texas Supreme Court in tort cases has been in controversy for many years. In the 1980s the court became dominated by justices elected with the support of the plaintiffs' bar. n21 In 1987 the television program 60 Minutes broadcast a segment entitled "Justice for Sale," which exposed the extent of financial ties between the plaintiffs' bar and members of the court. n22 The Texas Medical Association and other defense interests [*6] mobilized for the 1988 elections. n23 Twelve candidates for the Supreme court raised a total of \$ 10 million for their campaigns that year. n24 Karl Rove, employed as a consultant by Republican court candidates, advised his clients to emphasize the theme of tort reform. n25 All incumbents backed by the plaintiffs' bar were defeated. n26 Since 1994, no Democrat has won a seat on the court. n27

In recent years, the court has been accused of pro-defendant bias. An interest group that analyzes the court's decisions each year says the court often ignores settled precedent, jury determinations, and the authority of the legislature "when the interests of defendants are at stake." n28 The authors of a law review article reviewing the court's work say "politically motivated courts have taken up the task [of undermining the jury] by casting aside decades, even centuries of common law precedent to "limit' the role of lay jurors in deciding societal norms." n29 An appellate judge has written that "the appearance of bias [in favor of defendants and insurance companies] [*7] leads one to the conclusion that the current Court favors its judgment over that of a jury." n30

In the spring of 2006, I taught a seminar at the University of Texas School of Law called "Tort Law in the Texas Supreme Court." The ten second and third-year law students n31 in the seminar each researched a different aspect of the court's treatment of tort cases. This article is to a large extent the product of their research. In the aggregate, their work demonstrates that the court's tort law decisions disproportionately favor defendants and that the disparity cannot be readily explained by factors other than a determination to limit tort liability.

A. Winners and Losers n32

Defendants won 87% of the tort cases decided with opinion n33 by the Texas Supreme Court in 2004 and 2005. In these two calendar years, the court issued sixty-nine opinions in tort cases. n34 Cases in which the underlying dispute was a tort issue but the matter decided by the supreme court was something else - e.g., insurance coverage n35 - are not included in these figures.

[*8] Identifying winners and losers is not as easy as it sounds. In some cases, there is more than one claim and each side prevails on at least one. In others, the petitioner gets only partial relief, e.g., the court upholds an award of compensatory damages but disallows the award of exemplary damages. For purposes of this analysis, if petitioners received any relief they were treated as winners; if the petitioner received no relief, the respondent was considered the winner. n36 In three cases, n37 defendants who nominally lost because the Texas Supreme Court held that they were not entitled to succeed on pleas to jurisdiction nevertheless were classified as winners because the court's discussion of the merits assured that they would prevail on remand. n38 Applying these criteria, plaintiffs were winners in nine cases n39 and defendants in sixty. n40 (See Table 1).

[*9] [*10]

B. Wal-Mart Cases n41

A different way to gauge the court's even-handedness would be to compare its treatment of plaintiffs and defendants with that of other state courts of last resort, but that poses difficulties. One is that identifying all the tort decisions by all the supreme courts and classifying each as a plaintiff-win or a defendant-win would be a massive research undertaking. Another is the difficulty of controlling variables: different jurisdictions might have significant differences in the quality of lawyers, types of litigants, and kinds of tort litigation.

Those difficulties can be minimized by comparing outcomes of cases nationwide against a single litigant. A suitable example is Wal-Mart. Wal-Mart is said to be the most frequently-sued tort defendant in the country, and until recently it reportedly had a policy of appealing all adverse judgments. n42 In any event, it generates enough state supreme court decisions to permit comparison. Wal-Mart stores are physically similar, they sell similar products, and presumably they observe similar safety precautions, employee training regimens, and litigation policies. The torts for which Wal-Mart is sued are similar from state to state - most are claims for premises liability, false imprisonment, or wrongful discharge. It probably can be assumed that the company engages local lawyers with roughly similar levels of experience and skill.

In the years from 1998 through 2005, n43 the Texas Supreme Court decided twelve cases in which Wal-Mart was a tort defendant. n44 In the rest of the country, state courts of last resort [*11] decided eighty-one such cases in the same time period. n45 Wal-Mart won all twelve of its cases in the Texas Supreme Court. In the rest of the country, it won forty-five of the eighty-one cases, or 56%.

[*12] It is possible, of course, that Wal-Mart just happened to have more meritorious cases in Texas than elsewhere, or that legislation or established local tort doctrine gave Wal-Mart advantages in Texas that it did not have elsewhere. But on inspection, the Texas Wal-Mart cases do not seem to turn on any significant difference in controlling legal principles; they look a lot like Wal-Mart cases elsewhere except for the uniformity of outcome.

Disproportions of the sort that appear in the Wal-Mart cases and the two-year results of all tort cases may raise eyebrows, but by themselves they prove nothing. There might be systemic features that produce such a disparity even if the court is even-handed as between the two sides of the docket. The next section of this article explores the possibility of such explanations.

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III. Possible explanations

A. Petitions Denied

The Texas Supreme Court decides appeals from the intermediate courts of appeal. In all respects that are relevant here, there is no direct review of trial court decisions, and the supreme court's review of courts of appeals decisions is discretionary. The court grants only a fraction of the petitions for review that it receives, and not all of those are decided with opinion. Perhaps the preponderance of defendant wins would disappear if we considered the cases in which the court denied review as well as those it decided. The hypothesis would be that the preponderance of defendant victories in the decided cases would be offset by a preponderance of plaintiff victories in the cases in which the court leaves results in the courts of appeal undisturbed by denying review.

Ideally, one would identify the exact pool of petitions from which the Texas Supreme Court selected the cases it decided, but that is impossible because there is no fixed time period within which petitions for review must be acted on. Most of the cases decided in 2004-2005 came in response to petitions filed in 2002, 2003, and 2004, but some petitions filed in those years had not yet been acted upon by 2005, and some were no doubt acted upon earlier than 2004. The best that can be done is to select a subset of petitions filed within the relevant time period and assume they are representative of the pool from which the decided cases were drawn. The sample used here comprises all the petitions filed with the supreme court in 2004. n46

The total number of petitions filed n47 in 2004 was 726, n48 of which 258 were identifiable as tort cases. Of those, sixty-five, or 25%, were plaintiff victories. The cases in which the supreme court [*14] denied review were not predominantly plaintiff victories, and plaintiff success in the petitions-denied cases does not offset the defendant success rate in the decided cases. Indeed, the defendants' success rate of 75% in cases not taken is nearly as dramatic as their 87% success rate in decided cases.

Another hypothesis might be that trial courts err more often in favor of plaintiffs than defendants, and appellate decisions therefore will predictably and properly favor defendants disproportionately. Testing that hypothesis is, if not impossible, beyond the reach of this article. n49

B. Rogue Courts of Appeals

Another explanation might be that cases from a few pro-plaintiff courts of appeals distort the picture in the supreme court - that the supreme court is merely redressing the mistakes of intermediate courts that rule too often in favor of plaintiffs. There is no perfect way to identify pro-plaintiff courts of appeals, but for our purposes we can use "Democrat" as a crude proxy for "pro-plaintiff." No one believes that all Democratic judges are pro-plaintiff and all Republicans are pro-defendant, but there is no doubt, at least in Texas, that if there are pro-plaintiff judges, they are unlikely to be Republicans. To whatever extent courts with Democratic majorities are not pro-plaintiff, use of this proxy will overstate, rather than underestimate, the likelihood of pro-plaintiff decisions emanating from the courts of appeals.

Three of the fourteen courts of appeals had more Democratic than Republican judges during some part of the period from 2002-2005. n50 Seventeen of the sixty defendant victories in the supreme [*15] court were cases that plaintiffs had won in the three predominantly Democratic courts, n51 which indicates that appeals from those courts do make the supreme court's record appear somewhat more pro-defendant than it otherwise would be. (See Table 1). But even if all

the appeals from these three courts are entirely excluded from the analysis, the supreme court's record is forty-four defendant victories to eight plaintiff victories - an 83% win rate for defendants.

Table 1. Tort Decisions in the Texas Supreme Court, 2004-2005

	Total	Plaintiff Wins	Defendant Wins
All cases	69	9	60 (87%)
Excluding cases appealed from Democratic Courts of Appeals	52	8	44 (83%)
Excluding cases applying tort reform statutes	64	9	55 (86%)
Excluding cases from Democratic courts and cases applying tort reform statutes	47	8	39 (81%)

[*16] Nor can it be said that the supreme court is merely ratifying pro-defendant decisions by the courts of appeal. Twenty-six of the defendant victories were reversals of cases plaintiffs had won in intermediate courts on which all of the judges were Republicans - courts that no one suspects of being pro-plaintiff. The theory that the supreme court is merely redressing an imbalance created by pro-plaintiff intermediate courts is unsustainable.

C. Tort Reform Legislation n52

Yet another possibility is that the court's pro-defendant decisions are the result of tort reform legislation. The hypothesis would be that the court is merely carrying out the pro-defendant mandates of the legislature. The tort reform movement in Texas began long ago, but until quite recently the modifications of common law tort principles were limited largely to medical malpractice issues. Not until 2003 did the Texas Legislature pass a comprehensive tort reform passage, and most of those changes only applied to cases tried after September 1, 2003. Perhaps for that reason, tort reform legislation played a small role in the supreme court's tort decisions of 2004 and 2005. Tort reform statutes were at issue in only five of those cases, and in all five cases the relevant statute was the Medical Liability and Insurance Improvement Act (MLIIA). That act was first passed in 1977 and was amended and expanded repeatedly until 2003, when its provisions became so numerous and various that the legislature dispersed them to other areas of the statute books and repealed the MLIIA as a distinct statute. n53 The initial purpose of the act was to reduce malpractice insurance premiums by making it more difficult for plaintiffs to recover, n54 and the successive modifications have been explicitly [*17] aimed at providing medical defendants with more protection against tort claims. n55 It is not surprising, therefore, that each of the five 2004-2005 decisions involving the act resulted in victories for the defendants.

Because such a small fraction of the tort decisions involved the MLIIA or any other tort reform statute, they fall far short of explaining the disproportionate success rate of defendants in the Texas Supreme Court. If those five cases are excluded, defendants still won fifty-five of sixty-four cases for a success rate of 86%. (See Table 1). Moreover, it is hard to say that all of these five decisions were compelled by legislation; as described below, n56 several of them were the product of defendant-friendly interpretations. Thus, legislative mandates account for at most a small fraction of the court's pro-defendant outcomes.

If neither the rogue-court theory nor the legislative-mandate theory by itself explains the overwhelming margin of defendant success, neither do they do so cumulatively. Excluding all the cases from predominantly Democratic courts of appeals and all the cases that involve tort reform legislation, defendants still won thirty-nine of forty-seven cases - a margin of 81%. (See Table 1).

Quantitatively, defendants enjoy an overwhelming success rate in the Texas Supreme Court for which no

ideologically neutral explanation is readily apparent. The next step is to look at the decisions themselves and evaluate them qualitatively. If the cases are being decided through even-handed application of established principles of substantive law and procedure, the fact that they massively favor one side of the docket is not in itself an objection.

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IV. How Defendants Win

Perhaps the most interesting fact about the Texas Supreme Court's recent tort decisions is that they have not extensively modified substantive tort law principles. n57 In some states significant tort reforms have been effected by the courts, but the Texas Supreme Court generally has left the restriction of tort liability through changes in substantive law to the legislature. In previous years the Supreme Court did enact some tort reforms on its own, such as restrictions on exemplary damages, n58 but most of the defendant successes surveyed here did not result from judicial modifications of substantive tort law. The court's restraint with respect to modifying substantive law is not matched by equal restraint in statutory interpretation, construing pleadings, applying procedural rules, and reviewing evidence.

A. No-Evidence Determinations n59

1.

"A Lot of No Evidence" n60

The most controversial method of producing defendant victories is by holding that there is no evidence to support a plaintiff's verdict. n61 The Texas Supreme Court is doing this far [*19] more frequently now than in the past, particularly in tort cases. In a twelve-month period n62 in 2004-2005, the court found no evidence in eighteen n63 (82%) of the twenty-two n64 cases in which a no-evidence [*20] claim was presented. All of the decisions holding no evidence favored defendants, n65 and all but three were tort cases. n66 (See Table 2). In seventeen of the decisions, the evidence had seemed probative to the jury, the trial judge, and the court of appeals, but the supreme court reversed. n67 If the court tends to grant review in no-evidence cases only when it has already determined that there is no evidence, it would not be surprising to find that reversals outnumber affirmances. But it seems unlikely that the court reviews the evidence as thoroughly in deciding whether to grant review as it does in cases it accepts, and if it does not, then other factors must explain which cases get accepted for no-evidence review.

Table 2: No-Evidence Claims in Texas Supreme Court

		Total	No-Evidence Claim Denied	No-Evidence Claim Sustained
2005 Term	All cases	22	4	18 (82%)
	Tort cases	19	4	15 (79%)
1986 Term	All cases	16	11	5 (31%)
	Tort cases	8	6	2 (25%)
1966 Term	All cases	15	7	8 (53%)
	Tort cases	8	6	2 (25%)

[*21] Twenty years earlier, at the height of the plaintiffs' bar's influence, the court sustained only five n68 (31%) of the sixteen no-evidence claims it entertained, n69 and sustained no-evidence claims in only two of eight tort cases. (See Table 2). Only one of the court's five no-evidence determinations overturned a court of appeals holding that there was evidence to support the verdict. n70

Does this mean the present court is just restoring no-evidence review to the level that prevailed before the plaintiff-friendly court relaxed it? Apparently not. Analysis of cases from 1966 - before the court became politicized to the extent that it has been since the 1980s - shows that the modern court decides more cases on no-evidence grounds, and finds no evidence more often, than it did in [*22] 1966. In that year the court decided fifteen no-evidence claims, n71 and sustained the no-evidence claim in eight (53%). Only two of the successful no-evidence claims that year were in tort cases. n72 (See Table 2).

[*23] The extent of the present court's use of no-evidence determinations appears to be unprecedented. The propriety of the standards of review being used has been questioned, and not just by the court's usual critics. n73 James A. Baker, a Republican justice from 1995-2002, n74 has written that what the court is now doing "cannot be reconciled with the Texas Constitution's prohibition of the Texas Supreme Court weighing evidence and judging credibility." n75 He was referring to a constitutional provision stating that decisions of the courts of appeals are "conclusive on all questions of fact," n76 which for more than a century has been understood to deny the Texas Supreme Court jurisdiction over such questions. n77 A prominent member of the defense bar, in a paper presented to the judicial section of the state bar, asserted that the current review standard is difficult to reconcile with either that provision or the constitutional right to jury trial. n78 On occasion, even members of the present court have questioned the constitutionality of the court's evidentiary review. n79

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2. Examples from the No-Evidence Determinations n80

Objective evaluation of the merits of the court's no-evidence decisions is a practical impossibility. It requires careful scrutiny of masses of testimony and documentary evidence, an enterprise that in the Texas Supreme Court occupies much of the time of nine justices, nine staff attorneys, eighteen law clerks, and a number of interns. Summarizing the evidence is potentially misleading; evidence omitted from the summary may have influenced the court's decision. Nevertheless, descriptions of a few of the court's no-evidence determinations may provide a sense of the court's approach.

An injured seamstress, Hernandez, claimed the Haggar Clothing Company discharged her in retaliation for her filing a workers' compensation claim. n81 The company contended she was discharged pursuant to a policy that no employee could remain on leave of absence for more than one year for any reason. n82 The dispositive issue was whether the employer uniformly enforced this absence policy. n83 The plaintiff presented evidence that after she was terminated, another injured employee was allowed to remain on leave for three years. n84 The court said this was no evidence that the leave policy was not uniformly enforced stating, "the evidence shows, at most, that three years after Hernandez was terminated, Haggar failed to officially discharge one employee who had been on leave for over a year. This simply does not amount to more than a scintilla of evidence that Haggar's explanation for firing Hernandez was false." n85 Because there was no evidence to contradict Haggar's defense of uniform enforcement, the plaintiff's evidence of retaliation was "immaterial." n86 The per curiam opinion, issued [*25] without dissent, gave no further explanation as to why Haggar's treatment of the other employee did not constitute some evidence of discriminatory enforcement. n87

Volkswagen of America, Inc. v. Ramirez n88 is instructive because it produced a colloquy among the justices which illuminates some of the issues that the court's aggressive review of evidence raises. Plaintiffs' decedent was killed when a Volkswagen Passat crossed the grassy median of a divided highway and collided with decedent's car. n89 Plaintiff contended that a defective wheel bearing assembly caused a wheel to come loose on the Passat, which caused its driver to lose control. n90 Volkswagen contended that damage occurred after the Passat crossed the median, when it collided with decedent's car, and therefore was not causal. n91 A metallurgist testifying as an expert for the plaintiffs testified that defects in the bearing assembly caused it to disintegrate, dislodging the wheel and causing the car to fishtail across the median. n92 He said pieces of grass found mixed in the grease in the wheel hub could only be explained if the bearing failure occurred before the car crossed the median. n93 The jury found that a defect in the

Passat was a producing cause of the accident. n94

The court found that there was no evidence that a defect caused the accident. n95 The expert's testimony was "an unsupported conclusion," not backed by any testimony, tests, skid marks, or other physical evidence to prove that it is more probable than not that a mechanical defect caused the driver of the car to veer across the [*26] median. n96 The majority said the grass in the wheel hub "is just as consistent with the wheel coming off in the median after the Passat went out of control as it is with a wheel separation prior to entering the median." n97 It said the expert failed to explain how the detached wheel could have stayed in the wheel well as the Passat traveled through the median and collided with the decedent's car. Because the expert's opinions were "conclusory on their face" they amounted to no more than a mere scintilla of evidence, which under established Texas law is no evidence. n98

Dissenting, Chief Justice Wallace Jefferson said:

While [the expert's] causation testimony is neither ironclad nor exhaustive, it is surely some evidence that the Passat's bearing failure ... ultimately caused a catastrophic accident Rather than indulging every reasonable inference in favor of the jury's finding, the Court adopts a contrary approach, tipping the scale in the opposite direction to dismiss as "conclusory" expert testimony that supports the verdict. n99

In response to the dissent, Justice Hecht said the expert's opinion as to what happened is no evidence that it actually did happen:

Whether his conclusions were valid cannot, on this record, be measured by objective tests that actually associate microscopic conditions with producing causes, or by statistical correlations between such conditions and bearing failures, or by analyses in the professional literature of the science of metallurgy An expert must show that his views have the support of established, objective [*27] observations or a well-considered consensus of at least a substantial segment of the scientific, technical, or specialized community to which he belongs. n100

Not all of the court's no-evidence decisions are controversial. An example that seems eminently correct is a case rejecting an attempt to hold Texas A&M University liable for the negligence of the director and prop assistant for a campus drama club production. n101 The plaintiff claimed they were employees of the university, but the court held that there was no evidence that they were more than independent contractors, noting that they "performed the specialized task of directing a play, were paid by the job, furnished their own props, had no contract, and were not on TAMU's tax rolls." n102 Evidence that the university had power to "terminate them if they refused to comply with a demand demonstrates only a minimal degree of control that exists in any working relationship and is no evidence of a level of control detailed enough to indicate employee status." n103 This was really a substantive law decision; the critical question was whether to classify the plaintiff as an employee or an independent contractor, and that was clearly a question of law. Such decisions, even if expressed as no-evidence determinations, are clearly within the appropriate scope of appellate power.

Those are not the only legitimate types of no-evidence decisions, of course. No one doubts that courts must sometimes reject a jury's view of the evidence, even when the jury's view is shared by the trial judge and the intermediate appellate court. Reasonable minds can differ as to what reasonable minds could believe, and someone has to have the final say. But that gives courts of last resort vast unreviewable powers that are limited only by the court's own sense of self-restraint. How courts exercise these powers is "of enormous importance to the principled operation of [*28] any legal system that pretends to be governed by legal principles rather than a desire to achieve particular results." n104

B. Procedural Decisions n105

The Texas Supreme Court has adopted procedural rules that benefit defendants. An obvious example is a rule that a defendant who fails to respond when sued can avoid default judgment unless the evidence shows the defendant "knew it was sued but did not care. An excuse need not be a good one to suffice." n106 Thus, the court vacated a judgment against a doctor who was personally served with a malpractice suit, failed to respond, and offered no excuse other than the statement that he did not realize he had been sued. n107

The present court allows parties to use mandamus to challenge pretrial rulings n108 - a change that does not necessarily favor one side of the docket but which appears to have been used mainly by defendants. n109 Against the advice of its rules advisory committee, the court changed the Texas summary judgment rule in 1997 to make it easier to obtain summary judgment on no-evidence [*29] grounds. n110 On its face this change is neutral. But the change favors defendants in practice because defendants are more likely than plaintiffs to file summary judgment motions and to make no-evidence claims.

Sometimes the court allows defendants to complain on appeal about matters they could have challenged at trial but did not. One such case produced what seems to be an especially egregious result. n111 While performing elective back surgery on the plaintiff, the defendant surgeon failed to notice that the plaintiff had lost a great deal of blood, and in the forty-five minutes it took to arrange for a transfusion, the plaintiff suffered severe and permanent brain damage. n112 A jury found the defendant hospital liable for its negligence in connection with the transfusion and for allowing the surgeon to practice, which in Texas is called a "malicious credentialing" claim. n113 It also found the surgeon and the anesthesiologist liable, and apportioned damages 40% to the hospital, 40% to the surgeon, and 20% to the anesthesiologist. n114 The hospital's share of the \$ 28.6 million in damages was \$ 11.4 million. n115

On the hospital's appeal, the supreme court held that there was no evidence that would have required the hospital to deny privileges to the surgeon, n116 even though the hospital should have known that he had been sued ten times for malpractice, was a suspected drug addict, had treated patients improperly, and had [*30] operated on the wrong limbs of two patients. n117 The hospital did not challenge the finding that it had been negligent with respect to the transfusion, n118 but demanded a new trial of all issues on the ground that submitting the credentialing issue probably caused the jury to apportion a larger share of the damages to the hospital than it would have assigned had that issue been excluded.

The plaintiff contended the hospital had not preserved that point. The hospital's counsel had declined the trial judge's offer to submit two apportionment questions, one for the hospital's negligence and one for the credentialing claim. n119 The supreme court conceded that accepting that offer would have made it possible to determine how much of the hospital's liability was attributable to each of the hospital's alleged wrongs and thus would have cured the apportionment problem that the hospital complained of on appeal. n120 But the court held that the hospital's objection to submitting the credentialing claim at all was sufficient to preserve its right to appeal on the apportionment ground. n121 This ruling cleared the way for the court to hold that the apportionment of 40% of the responsibility to the hospital was tainted, which in turn tainted the finding with respect to punitive damages, which the court said required a new trial on the entire negligence claim. n122 The upshot is that by passing up an opportunity at trial to avoid the key apportionment problem, the defendant was able on appeal to prevail not only on that issue, but to win a complete new trial on the negligence issue which it had not even challenged on appeal. n123

In another case, a defendant was allowed to object to the amount of an award of exemplary damages in a second appeal to the supreme court, even though he had not objected at trial, in the court of appeals, or in his first appeal to the supreme court. n124 On the first appeal, the supreme court directed the court of appeals to reconsider the amount of compensatory damages. n125 After that court reduced [*31] the compensatories from \$ 7.15 million to \$ 300,000, n126 the defendant appealed to the supreme court again, contending for the first time that the \$ 1 million exemplary damage award was excessive. n127 The supreme court entertained this complaint on the ground that it arose only when the court of appeals reduced the amount of compensatory damages and therefore had not been waived by the defendant's

failure to raise it earlier. n128 This decision is the more remarkable because the court did not contend that the action of the court of appeals had created an unconstitutional ratio of exemplaries to compensatories. n129

Courts often have some latitude in deciding how to apply a procedural rule in specific cases - whether to entertain a theory a party did not advance at trial, whether a trial judge's decision amounts to an abuse of discretion, whether to permit a party to appeal on a point not properly raised at trial, and whether to remand or render judgment. By their nature, such discretionary decisions cannot be shown to be right or wrong. In the cases reviewed here, however, procedural calls that went in favor of plaintiffs n130 seem less remarkable than the following cases that went in defendants' favor.

In one of the Wal-Mart cases, the court adopted a new and significantly more defendant-friendly rule of substantive tort law even though the defendant had not objected to a jury charge based on [*32] the old law. n131 The trial court had charged the jury that the defendant was liable for tortious interference with a prospective contractual agreement if the defendant intentionally and unjustifiably prevented the contractual relation from occurring with the purpose of harming the plaintiffs n132 - a conventional statement of the law used in many previous Texas cases. n133 The defendant, Wal-Mart, did not object to this charge. On appeal it argued only that there was no evidence to support the jury's verdict that Wal-Mart wrongfully interfered or that Wal-Mart was not justified in acting as it did. n134 Nevertheless, the court adopted a new rule that "to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant's conduct was independently tortious or unlawful," n135 which the court said would require the plaintiff to prove that the defendant's conduct would be actionable under some other recognized tort. n136 Applying this newly narrowed definition of tortious interference, n137 the court concluded that no evidence supported the plaintiff's claim. n138 Adopting new legal theories not [*33] urged by the parties is by no means unheard of, n139 and I am not among those who think it is improper. But this is often criticized as judicial activism when its effect is to expand tort liability, so it is curious to see it done by a court that disclaims activism. n140

In one case, a result that might seem unduly pro-defendant is probably explainable by virtue of the procedural posture of the case. During voir dire in a medical malpractice case, n141 prospective jurors were asked, "Is there anybody here that feels that you could not sit on a medical case and make a decision as to whether the doctor acted within or below the standard of care?" n142 One member of the panel raised his hand, identified himself as a lawyer, and said, "If I were in your shoes, I would want to know that I have spent most of my professional career on the defense side" in malpractice cases. n143 In response to further questions, he said he would relate very much to the defendant's lawyers and would tend to look at matters from the defense lawyers' perspective. At the same time, he denied that the plaintiff would "start a little bit behind" in his eyes and said he would do his best to be objective. n144

The plaintiff moved to strike the juror for cause, the trial judge refused, and the jury returned a verdict for the defendant. n145 The court of appeals said the juror should have been struck for bias, but the Texas Supreme Court reversed, saying that "having a perspective based on 'knowledge and experience' does not make a veniremember biased as a matter of law." n146 With the case in this [*34] posture, the trial judge's decision to seat the juror was error only if the juror's answers disqualified him as a matter of law. If one believes interpreting and evaluating prospective jurors' answers in voir dire is a matter best left to the trial judge's discretion, the supreme court was right to reject the plaintiff's appeal.

C. Interpreting Tort Reform Statutes n147

Whether appellate courts should help the legislature carry out a tort reform agenda poses some interesting questions. As a general proposition, common law courts ought to pay attention to the legislature's signals and interpret legislation in a way that helps the legislature achieve its objectives. The practice of treating violations of statute as negligence per se reflects this belief. So does the practice of attempting to construe statutes consistently with legislative intent. On the other hand, there is, or used to be, a principle that statutes in derogation of the common law are to be construed narrowly, and one might argue that sound jurisprudence will be best served if the courts police a boundary between the popular will, as reflected in legislation, and the accumulated wisdom and experimentation that are reflected in the

common law.

For present purposes, let us accept a strong notion of legislative supremacy - the common law exists at the sufferance of the legislature, courts have no mandate to protect the common law, and courts should attempt to ascertain the legislature's objectives and help carry them out. Even under those assumptions, interpreting tort reform legislation in the way that most restricts liability is not always justifiable, because such legislation rarely has an undiluted liability-restricting purpose.

Until 2003, the tort reform lobby in Texas did not have the votes to pass its legislation without support from, or acquiescence of, some of its opponents. Until that year the Texas legislature was controlled by Democrats. Many of those Democrats, like their Republican colleagues, were pro-tort reform, but there was enough opposition to, or skepticism about, tort reform to block legislation that anti-tort reform forces strongly opposed. As a result, tort reform legislation contained many compromises.

[*35]

1. Interpreting the MLIIA

For example, one of the earliest tort reform efforts, enacted in the MLIIA in 1977, n148 addressed the then-novel theory of informed consent. Under that theory, a physician can be held liable for negligently failing to inform a patient of a risk that would be material to a reasonable patient. n149 The MLIIA accepted this theory but modified it by creating a panel of lawyers and doctors to specify which risks physicians must disclose or need not disclose. n150 The idea was to enable physicians to protect themselves from liability by giving patients the information specified by the panel, but also to allow patients to proceed under the informed consent theory if the physician failed to give the specified information.

In 2004, the court denied recovery to a woman who alleged her breasts were unnecessarily removed because of a physician's erroneous diagnosis. n151 That risk was on neither of the panel's must- [*36] disclose list nor its need-not-disclose list. The plaintiff contended, and the court agreed, that such cases are controlled by the general duty imposed by the statute "to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent." n152 The court of appeals had held that whether the physician had violated this duty was a fact question. But the Texas Supreme Court held as a matter of law that the physician was under no duty to disclose that the mastectomy might turn out to be unnecessary because that "is not a risk that is 'inherent to' [sic] and 'inseparable from' the surgical procedure itself." n153

The statute did not contain that limitation, and although the court had said (in previous cases holding in favor of plaintiffs) that the physician's duty is to disclose "inherent risks," it had not previously used the term as a limitation. n154 The reason for limiting the duty to inherent risks is hard to discern. If there is a good reason not to require disclosure of the risk of misdiagnosis, it would seem to be precisely because that is an inherent risk in all medical treatment, and requiring its disclosure in all treatments would merely clutter up consent forms. n155

One might argue that a physician should not be required to disclose the possibility of misdiagnosis because that risk should be obvious to a reasonable patient - but that would seem to be subsumed by the ultimate fact issue: whether the risk is one that if disclosed would have affected the decision of a reasonable patient. Moreover, the statutory scheme does not seem to take the view that obvious risks need not be disclosed: it requires a surgeon [*37] performing a radical mastectomy to disclose that the risks include "loss of the skin of the chest requiring skin graft" and "recurrence of malignancy." n156

Whatever its reasons for doing so, the court denied recovery by applying a limitation not in the statute itself. This might be defended on the ground that it helps carry out the underlying legislative purpose - if that purpose were only to protect physicians from liability. But it is clear from the statute itself that the legislative purpose in enacting the

informed consent section of the MLIIA was not unidirectional; it was calibrated to both preserve and limit the cause of action. The court's interpretation therefore cannot be said to be one that is compelled, or even indicated, by the goal of helping the legislature achieve its aims.

Another case involving interpretation of the MLIIA presents a possibly closer question. In 1995, another tort reform effort added to the MLIIA a requirement that a plaintiff asserting a "health care liability claim" must submit

a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed. n157

At that time, a health care liability claim was defined as "a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient" n158

[*38] A woman brought a battery claim against an anesthesiologist who allegedly administered a general anesthetic after assuring her he would use only a local. n159 She did not file an expert report, and the court of appeals held that none was required because under her battery theory she "does not allege and need not prove that [the defendant] deviated from any standard of medical care, health care, or safety," and her claim therefore was not a health care liability claim. n160 The supreme court reversed and dismissed the plaintiff's case, arguing that the battery claim was just artful pleading to circumvent the expert report requirement. n161

The court interpreted the statute as if it said an expert's report must be filed in all cases against health care providers, when the statute by its terms seems to require such a report only in cases involving an alleged departure from accepted standards of medical care. n162 If the purpose of this statute was merely to erect a hurdle that some malpractice plaintiffs would be unable to overcome, this interpretation would advance the legislative goal. But if it was to weed out at an early stage malpractice claims that will inevitably fail because of the plaintiff's inability to supply expert testimony that will eventually be required, it is overkill to demand that the report be [*39] filed when there is no reason to think there will be any need for the expert's testimony.

A more typical interpretation question arises when a court construes a statute that was passed with the unqualified purpose of precluding liability. One such provision in the MLIIA was a statute of limitations that barred health care liability claims after two years from the date of the tort or the completion of treatment, n163 even if the plaintiff was unable to sue within the limitations period because of incapacity. n164

The Texas Supreme Court was asked to decide whether to apply this statute of limitations to a sexual assault claim brought on behalf of a mentally incapacitated nursing home patient. n165 The claim alleged that the nursing home negligently failed to protect the patient from another patient who was a known sexual predator. The question for the supreme court was whether this was an ordinary negligence claim, which would not have been time-barred because the patient's incapacity would have tolled the statute of limitations, n166 or a health care liability claim, which would be governed by the MLIIA's no-tolling provision.

The MLIIA provision by its terms applied to claims for "treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety" n167 The plaintiff, the four courts of appeals that had considered similar questions in other cases, and three justices of the supreme court thought it was a premises liability claim, not a health care liability claim. n168 They argued that the plaintiff was claiming a departure from the standard of ordinary care that applies in negligence cases [*40] generally, not the special standard of medical care that applies in malpractice cases. n169 But a 5-4 majority brought the plaintiff's claim within the statute by the argument (unconvincing, in my opinion) that professional medical judgment must be employed to determine what a nursing home

should do to protect its patients from sexual assault. n170

One might argue that a court is justified in interpreting a statute expansively when it is part of a sweeping legislative mandate. Interestingly, none of the opinions in this case made any such argument. Indeed, none acknowledged that the decision was an expansive reading of the statute, or even that how expansively to read it was an issue. The majority mentioned that the statute was part of an effort "to address what the Legislature described as a medical "crisis [that] has had a material adverse effect on the delivery of medical and health care in Texas," n171 but gave no clue as to whether, or how, that affected its decision.

Three dissenting justices did advert to legislative purposes. They argued that treating ordinary negligence claims as malpractice claims would shift the cost of those claims from health providers' general liability insurers to their malpractice insurers, thereby frustrating the legislature's announced purpose of reducing malpractice premiums. n172 That argument produced an interesting rejoinder from Chief Justice Jefferson, who seemed to imply that it would be improper to take into account the statute's connection with tort reform; he said the court "must find [the legislature's] intent in its language, and not elsewhere." n173 He said the dissent's [*41] interpretation of the statute "is defensible as a matter of policy, [but] it is not faithful to the statute's plain text." n174

2. Interpreting Liability-Expanding Statutes

If tort reform statutes should be interpreted to bar as much liability as possible, is the opposite true of statutes the overall purpose of which is to expand liability? Like the federal Tort Claims Act and similar statutes in other states, the Texas Tort Claims Act abrogated the traditional sovereign immunity that barred tort suits against governments. In Texas as elsewhere, the abrogation was by no means total. The new liability was carefully limited by monetary caps and other conditions. One of those conditions was a notice requirement, which the claimant could meet either (A) by giving written notice describing the incident, the time and place of occurrence, and the damage or injury claimed, or (B) by showing that "the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." n175

The Texas Supreme Court interpreted alternative (B) so restrictively that a state agency was held to have no actual knowledge of an accident that had been immediately reported to the agency and thoroughly investigated by the agency's safety officers. n176 Although the statute required only actual knowledge of [*42] an injury, the court required proof that the governmental unit had "knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved." n177

The legislature's easy-to-meet actual notice alternative may have been unwise, and if the legislature's dominant purpose was to limit governmental liability the court might be justified in imposing restrictions not required by the legislature itself. But this was a statute the overall purpose of which was to expand governmental liability, yet the court interpreted it in a way that restricts liability more severely than the language requires.

None of these decisions (nor any other decisions that I am aware of) contains any discussion of the rather important question: Should the court try to help advance the legislature's tort reform agenda? It is hard to believe that the judges failed to recognize that what they decided would help determine the scope of tort reform in Texas, but if they did recognize that, they studiously avoided saying so.

V. Should Courts be Tort Reformers?

"Tort reform" is a misnomer if the objective is merely to reduce liability. Changes that bar or reduce recovery without addressing what is wrong with the law are not reforms at all. Caps on damages are an example. They deny recovery to the most seriously injured plaintiffs without remedying whatever defects in the law that produce the awards that are thought to be excessive, n178 [*43] and their value in achieving the oft-stated goal of reducing insurance premiums is

debatable. n179 All too often, "reforms" do nothing to simplify, clarify, or rationalize the law, and instead make it more cumbersome and irrational.

Generally, courts are better equipped than legislatures to see what is really wrong with tort law. Courts are more likely to understand how it can best be fixed, and to appreciate how a doctrinal change is likely to affect the actual course of litigation and adjudication. This is especially true of courts like the Texas Supreme Court, whose docket includes a very large proportion of tort cases, and whose judges therefore should have tort law expertise.

But judicial tort reform has its disadvantages, too. Legislative tort reform is the product of a transparent and accessible process. Legislation is proposed by the governor, individual legislators, lobbyists for pro-tort-reform organizations, and study commissions. The bills go through committee hearings at which anyone can have a say, although the testimony usually comes mostly from the interest groups on either side of the issue. The interest groups urge their constituents to make their views known to legislators. Committee staff analyze the legislation and try to explain its implications. In floor debate, every member of the legislature has an opportunity to ask questions about the legislation, voice objections, and offer amendments. For better or worse, procedural requirements such as rules requiring approval by supermajorities, and parliamentary maneuvers such as filibusters, give determined opponents leverage that sometimes enables them to demand compromises. Disagreements between the two houses require more compromises. The governor has a veto power which, even if used infrequently, gives him or her a say in shaping the legislation.

When tort law is changed judicially, the process is considerably less transparent or accessible. The public and interest groups could keep track of the issues presented in petitions for [*44] review, note which petitions are granted, read the parties' briefs, file amicus briefs, and attend oral arguments. But as a practical matter, there is little public input in the presentation of issues, and none in the decision-making itself. And the public will have no advance warning if courts change the law in cases in which the parties did not ask them to do so, as the Texas Supreme Court did in one of the cases discussed above. n180

Insofar as real reform is concerned, legislatures and courts both have their strengths and weaknesses. A case can be made that courts, having made the law that now seems in need of reform, ought to take responsibility for reforming it. In some instances, the Texas Supreme Court seems to be trying to do that; for example, it adopted a new no-duty rule that dissenting justices called "an attempt to judicially cabin widespread and oft-abused mass-tort claims that have arisen from latent workplace injuries caused by substances like silica and asbestos." n181 But in many instances, the form of judicial tort reform being practiced by the Texas Supreme Court bears even less resemblance to true reform than the legislature's "tort reform."

The impression that the court is result-oriented is reinforced by its willingness to decide cases that have little precedential value. The statutes and rules controlling the court's jurisdiction were revised in the 1980s to allow it to focus on questions of "importance to the jurisprudence of the state," n182 but the court's tort decisions include cases interpreting statutory language that by the time of decision had been amended to moot the question being decided n183 and numerous fact-specific no-evidence cases. n184

[*45] The court's eagerness to review evidence is a reform only if one believes that allowing juries to decide facts is a defect. Rescuing defendants from their own lawyers' mistakes is a reform only if defendants are a disadvantaged class that cannot compete with plaintiffs on a level field. Construing tort reform statutes to restrict liability even more than the language requires is a reform only if subverting legislative compromises is a legitimate judicial activity. When the court makes it difficult for plaintiffs to prevail, not by changing the law but by ad hoc decisions that give the trial bench and the bar little guidance beyond the impression that the court will try to find a way to defeat recovery, n185 the court does little to correct deficiencies in the law.

VI. Conclusion

Legislative tort reform proceeds from convictions about the effects tort liability has on the economy. One of those convictions is that it is necessary to restrict medical malpractice liabilities in order to reduce health care costs, keep down insurance premiums, and prevent physicians from abandoning communities or specialties in which liability risks are thought to be high. n186 As to tort liability generally, it is thought that maintaining a good business climate, fostering economic competitiveness, and stimulating job growth require that the costs of injuries be borne more often by the injured. These represent conscious choices to prefer the interests of one group over another, at least in the short run. Legislatures make choices of that kind all the time. They decide to tax corporations instead of individuals, to subsidize farmers but not small businesses, [*46] and to regulate real estate brokers but not insurance agents. We accept that politics is largely a contest among various economic interests, and that the winners will serve the interests of their supporters.

Some people might argue that it is naive to expect courts to behave any differently, at least when they are elected. The electorate presumably has some awareness of the ideology of the judges it chooses, even if it chooses them primarily on the basis of party affiliation; in Texas, at least, only the most obtuse voter could fail to realize that Republican candidates are more likely than Democrats to believe tort liability needs to be curtailed. But advancing an ideology by adopting congenial legal principles is one thing; advancing an anti-tort ideology simply by refusing to allow plaintiffs to succeed is quite another.

Legal Topics:

For related research and practice materials, see the following legal topics:

Education Law Instruction Extracurricular Activities Publications Healthcare Law Actions Against Healthcare Workers Tort Reform Torts Malpractice & Professional Liability Healthcare Providers

FOOTNOTES:

n1. See, e.g., *Cal. Civ. Code* § 3333.2(b) (West 1997) (limiting non-economic damages recoverable in medical malpractice claims to \$ 250,000).

n2. See, e.g., *Ga. Code Ann.* § 51-12-33(b) (2000) (providing that there "shall not be a joint liability among the persons liable").

n3. See, e.g., *Cal. Civ. Code* § 3333.1(a) (West 1997) (granting defendants in medical malpractice actions the right to introduce evidence of collateral payments made to plaintiffs from insurance providers or other collateral sources).

n4. See, e.g., *Kan. Stat. Ann.* § 65-4901 (2002) (providing that parties to a medical malpractice action may request the appointment of a "medical malpractice screening panel").

n5. See, e.g., *Mich. Comp. Laws § 600.2169* (2000) (placing numerous restrictions on who can qualify to testify as an expert in a medical malpractice action).

n6. See, e.g., *Kan. Stat. Ann. § 60-513(b)* (2005) (providing that, for most tort actions, "in no event shall an action be commenced more than ten years beyond the time of the act giving rise to the cause of the action"); *Kan. Stat. Ann. § 60-513(c)* (2005) (providing that "in no event shall such an action [medical malpractice] be commenced more than four years beyond the time of the act giving rise to the cause of action").

n7. See, e.g., *Cal. Civ. Code § 3294(a)* (West 1997) (requiring plaintiffs to establish an alleged tort "by clear and convincing evidence" before exemplary damages may be awarded).

n8. See, e.g., *Ala. Code § 6-11-21(a)* (2005) (providing that, except under limited circumstances, "no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars (\$ 500,000), whichever is greater").

n9. See, e.g., *Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964, 967 (Conn. 1997) (undermining the collateral source rule by holding that the common law rule barring double recovery precluded plaintiff from suing a motorist because plaintiff was compensated by a collateral source - underinsured motorist insurance); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 649 (Md. 1992) (overruling precedent that allowed plaintiffs to recover punitive damages for torts arising out of a contractual relationship where "implied malice" could be shown, with a requirement that "actual malice" be established, regardless of the tort's nature); *Collens v. New Canaan Water Co.*, 234 A.2d 825, 831-32 (Conn. 1967) (holding that punitive damages are limited to the actual "amount of the expenses of litigation in the suit, less taxable costs").

n10. Michael S. Hall et al., *House Bill 4 & Proposition 12: An Analysis with Legislative History*, 36 *Tex. Tech. L. Rev.* 1, 3 (2005).

n11. See George Lardner, Jr., *Tort Reform: Mixed Verdict*, *Wash. Post*, Feb. 10, 2000, at A6 (observing that just days after taking office Texas Governor George Bush proclaimed curtailing "junk lawsuits" to be an emergency situation demanding the Legislature's immediate attention).

n12. See Hall et al., *supra* note 10 (noting that Texas Governor Rick Perry's campaign platform favored a cap on non-economic damages in medical malpractice cases).

n13. These provisions were enacted in a single piece of legislation, H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003), and have now been codified in numerous locations. See *Tex. Civ. Prac. & Rem. Code Ann.* §§ 26.001-26.003 (Vernon 2003) (addressing class actions and fee-shifting rules); *Id.* §§ 74.301-74.302 (setting limits on non-economic and economic damages); *Id.* §§ 82.007-82.008 (creating a rebuttable presumption in favor of a defendant in certain product liability actions); *Id.* § 41.003(d) (providing for exemplary damages only in the case of a unanimous jury verdict).

n14. See Terry Carter, *Tort Reform Texas Style*, 92 *A.B.A.J.* 30, 35 (Oct. 2006) (describing the extent of tort reform in Texas, reporting that it has had "devastating" effects on both plaintiffs' and defense lawyers, and quoting some legislators as saying the movement in Texas has gone too far).

n15. See Justice Nathan L. Hecht, *Jury Trials Trending Down in Texas Civil Cases*, 69 *Tex. Bar J.* 854, 854 (Oct. 2006) (reporting 6,253 verdicts in civil cases in 1985 and 3,006 in 2002). Justice Hecht states that tort reform could not account for all of this decrease because jury trials also have declined in other jurisdictions where there have been fewer changes in substantive law. *Id.* at 856.

n16. *Id.* at 854.

n17. Office of Court Administration, State of Texas, Texas Judiciary Online - Texas Appellate Courts, <http://www.courts.state.tx.us/appcourt.asp> (last visited Nov. 7, 2006).

n18. Tex. Const. art. V, § 2a.

n19. Tex. Ass'n of Broadcasters, About TAB, <http://www.tab.org/about.php> (last visited Nov. 7, 2006).

n20. In 1998, Justice John Cornyn was elected attorney general. He advanced to the U.S. Senate in 2002. See U.S. Senate, Senator John Cornyn, http://www.senate.gov/pagelayout/senators/one_item_and_teasers/cornyn.htm (stating that Justice John Cornyn was elected to the United States Senate in 2002); U.S. House of Representatives, Congressman Lloyd Doggett, <http://www.house.gov/doggett/bio.htm> (stating that Justice Lloyd Doggett was elected to the United States

House of Representatives in 1994); Tex. Attorney Gen., About Tex. Attorney Gen. Greg Abbott, http://www.oag.state.tx.us/agency/agga_bio.shtml (stating that Justice Greg Abbott was elected attorney general in 2002).

n21. See Kyle Cheek & Anthony Champagne, *Judicial Politics in Texas* 40 (David A. Schultz ed., Peter Lang 2005) (stating that in the 1980s, successful judicial campaigns for the Texas Supreme Court were financed significantly by individual plaintiffs' lawyers).

n22. *Id.* at 172.

n23. *Id.* at 42.

n24. *Id.*

n25. Frontline: Karl Rove - The Architect (PBS television broadcast Apr. 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/architect>; Dana Milbank, *The Political Mind Behind Tort Reform*, *Wash. Post*, Feb. 25, 2003, at A21, available at <http://www.washingtonpost.com/ac2/wp-dyn/A61747-2003Feb24?language=printer>.

n26. See *Cheek & Champagne, supra* note 21, at 42 ("It was the reform message coupled with the financial backing from civil defense interests and the increasing strength of the Republican Party that led to the defeat of all the plaintiff-backed incumbents.").

n27. *Id.* at 50.

n28. Texas Watch Foundation, *Obstacle to Justice: A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families* (2005), at 5, available at <http://www.texaswatch.org/documents/CWYIR2004-2005.pdf>; see also Texas Watch Foundation, *Facing a Stacked Deck: Families at the Texas Supreme Court* (2004), at 2, available at <http://www.txwfoundation.org/courtwatch/CW%20YIR%202003-2004.pdf> ("Recent decision-making from the Court reflects a growing hostility toward individual plaintiffs and a willingness to overlook abuses by corporate

and government defendants.").

n29. Michael Shore & Judy Shore, *Personal Torts*, 58 *SMU L. Rev.* 1045, 1045-46 (2005).

n30. Phil Hardberger, *Juries Under Siege*, 30 *St. Mary's L.J.* 1, 6-8 (1998). When he wrote this article, Hardberger was chief justice of the Fourth Court of Appeals in San Antonio. He is now mayor of San Antonio.

n31. The students were Eugene Barr, Katie Berry, Elaine Edwards, Carlos Garcia, Chris Lee, Cristina Lunders, Andrew Nelson, Brian Phelps, Ian Shelton, and Matthew Shrum. Some of their individual contributions will be noted in connection with specific sections of this article; other papers no less valuable dealt with subjects not covered in this article. The papers are on file with the author. The conclusions, of course, are my own and may or may not represent the views of the students.

n32. This section draws on the work of Katie Spring Berry. See *supra* note 31 and accompanying text.

n33. Including *per curiam* opinions.

n34. Most cases sought compensation for personal injury, death, or property damage, but there were also a few claims for defamation and other non-physical torts.

n35. See, e.g., *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 *S.W.3d* 198, 201 (Tex. 2004) (holding that the commercial general liability policy excluded coverage only when the plaintiff's injury was caused by breach of a professional standard).

n36. This means that all mixed results are counted as victories for petitioners. If petitioners are more likely to be the defendants in cases reviewed by the court, this may tend to overstate the defendant victories. But it appears that about 75% of the petitioners seeking review are plaintiffs. See *infra* notes 47-48 and accompanying text. So to whatever extent this methodology overstates defendant victories, that seems to be a function of the disproportionate rate at which the court accepts defendants' appeals.

n37. *City of San Antonio v. Johnson*, 140 S.W.3d 350 (Tex. 2004); *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004); *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004). One of the plaintiff victories, *In re Kansas City S. Indus. Inc.*, 139 S.W.3d 669 (Tex. 2004), might also be illusory because it was merely a decision that the defendant could not proceed by mandamus; but since only one member of the court expressed a view that the plaintiff should lose on the merits, that case is counted as a plaintiff victory; see *id.* at 671 (Hecht, J., concurring).

n38. See, e.g., *Tex. Dep't of Criminal Justice v. Simons*, 197 S.W.3d 904 (Tex. App. - Beaumont 2006, no pet. hist.) (dismissing defendant's interlocutory appeal and remanding to the lower court; the court of appeals dismissed plaintiff's claim based on the supreme court's discussion of merits in *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004)).

n39. *Austin Nursing Ctr. Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005); *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005); *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005); *Lorentz v. Dunn*, 171 S.W.3d 854 (Tex. 2005); *In re Omni Hotels Mgmt. Corp.*, 159 S.W.3d 627 (Tex. 2005); *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631 (Tex. 2005); *S. Indus., Inc.*, 139 S.W.3d 669 (Tex. 2004); *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004); *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123 (Tex. 2004). One additional case was decided in favor of the plaintiff, but the court subsequently granted the defendant's motion for rehearing and eventually decided the case in favor of the defendant; see *F.F.P. Operating Partners, L.P. v. Duenez*, 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 (Tex. Nov. 3, 2006) (reversing a jury verdict for plaintiff).

n40. *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005); *Creditwatch Inc. v. Jackson*, 157 S.W.3d 814 (Tex. 2005); *Diamond Offshore Mgmt. Co. v. Guidry*, 171 S.W.3d 840 (Tex. 2005); *Diamond Shamrock Ref. Co., L.P. v. Hall*, 2005 WL 119950 (Tex. 2005); *Diversicare Gen. Partners v. Rubio*, 185 S.W.3d 842 (Tex. 2005); *Freedom Newspapers of Tex. v. Cantu*, 168 S.W.3d 847 (Tex. 2005); *Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462 (Tex. 2005); *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615 (Tex. 2005); *Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005); *Haggard Clothing Co. v. Hernandez*, 164 S.W.3d 386 (Tex. 2005); *Hearst Corp. v. Skeen*, 159 S.W.3d 633 (Tex. 2005); *In re Living Ctrs. of Tex. Inc.*, 175 S.W.3d 253 (Tex. 2005); *Military Highway Water Supply Corp. v. Morin*, 156 S.W.3d 569 (Tex. 2005); *Murphy v. Russell*, 167 S.W.3d 835 (Tex. 2005); *Qwest Int'l Commc'n, Inc. v. AT&T Corp.*, 167 S.W.3d 324 (Tex. 2005); *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005); *R.R. St. & Co. Inc. v. Pilgrim Enters. Inc.*, 166 S.W.3d 232 (Tex. 2005); *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835 (Tex. 2005); *Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580 (Tex. 2005); *Tri v. J.T.T.*, 162 S.W.3d 552 (Tex. 2005); *In re U.S. Silica Co.*, 157 S.W.3d 434 (Tex. 2005); *U.S. Silica Co. v. Tompkins*, 156 S.W.3d 578 (Tex. 2005); *W. Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005); *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559 (Tex. 2005); *Alexander v. Lynda's Boutique*, 134 S.W.3d 845 (Tex. 2004); *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113 (Tex. 2004); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417 (Tex. 2004); *Binur v. Jacobo*, 135 S.W.3d 646 (Tex. 2004); *Blevins v. Tex. Dep't. of Transp.*, 140 S.W.3d 337 (Tex. 2004); *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681 (Tex. 2004); *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004); *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004); *City of San Antonio v. Johnson*, 140 S.W.3d 350 (Tex. 2004); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004); *Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370 (Tex. 2004); *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84 (Tex. 2004); *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466 (Tex. 2004); *Ford Motor*

Co. v. Ridgway, 135 S.W.3d 598 (Tex. 2004); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541 (Tex. 2004); *Garza v. Garcia*, 137 S.W.3d 36 (Tex. 2004); *Harris County v. Sykes*, 136 S.W.3d 635 (Tex. 2004); *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004); *IHS Cedars Treatment Cent. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794 (Tex. 2004); *Joe v. Two Thirty-Nine Joint Venture*, 145 S.W.3d 150 (Tex. 2004); *Martinez v. Val Verde County Hosp. Dist.*, 140 S.W.3d 370 (Tex. 2004); *M.O. Dental Lab v. Rape*, 139 S.W.3d 671 (Tex. 2004); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004); *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131 (Tex. 2004); *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004); *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244 (Tex. 2004); *Schneider Nat'l. Carriers Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004); *Shell Oil Co. v. Khan*, 138 S.W.3d 288 (Tex. 2004); *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338 (Tex. 2004); *Tex. Dep't. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004); *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351 (Tex. 2004); *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203 (Tex. 2004); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004); *Ysleta I.S.D. v. Monarrez*, 177 S.W.3d 915 (Tex. 2004); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94 (Tex. 2004).

n41. This section draws on the work of Carlos Garcia, Brian Phelps, and Chris Lee. See supra note 31 and accompanying text.

n42. See Richard Willing, *Lawsuits follow growth curve of Wal-Mart*, USA Today, Aug. 14, 2001, at A1 (reporting that Wal-Mart is sued more often than any entity except the U.S. government and that Wal-Mart aggressively fights cases even when it would be cheaper to settle).

n43. And the first two months of 2006.

n44. *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566 (Tex. 2006); *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735 (Tex. 2003); *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003); *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706 (Tex. 2003); *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502 (Tex. 2002); *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812 (Tex. 2002); *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001); *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278 (Tex. 1999); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91 (Tex. 1998); *Wal-Mart Stores, Inc. v. Gonzales*, 968 S.W.2d 934 (Tex. 1998); *Wal-Mart Stores, Inc. v. Deggs*, 968 S.W.2d 354 (Tex. 1998); *Wal-Mart Stores, Inc. v. Resendez*, 962 S.W.2d 539 (Tex. 1998).

n45. *Ex parte Schaeffel*, 874 So. 2d 493 (Ala. 2003); *Wal-Mart Stores, Inc. v. Smitherman*, 872 So. 2d 833 (Ala. 2003); *Bowers v. Wal-Mart Stores, Inc.*, 827 So. 2d 63 (Ala. 2002); *Wal-Mart Stores, Inc. v. Patterson*, 816 So. 2d 1 (Ala. 2001); *Wal-Mart Stores, Inc. v. Rolin*, 813 So. 2d 861 (Ala. 2001); *Meyer v. Wal-Mart Stores, Inc.*, 813 So. 2d 832 (Ala. 2001); *Ex parte Wal-Mart, Inc.*, 809 So. 2d 818 (Ala. 2001); *Ex parte Wal-Mart Stores, Inc.*, 806 So. 2d 1247 (Ala. 2001); *Cloninger v. Wal-Mart Stores, Inc.*, 794 So. 2d 364 (Ala. 2001); *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166 (Ala. 2000); *Wal-Mart Stores, Inc. v. Manning*, 788 So. 2d

116 (Ala. 2000); *Cackowski v. Wal-Mart Stores, Inc.*, 767 So. 2d 319 (Ala. 2000); *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201 (Ala. 1999); *Ex parte Wal-Mart Stores, Inc.*, 729 So. 2d 294 (Ala. 1999); *Wal-Mart Stores, Inc. v. Thompson*, 726 So. 2d 651 (Ala. 1998); *Wal-Mart, Inc. v. Stewart*, 990 P.2d 626 (Alaska 1999); *Wal-Mart Stores, Inc. v. Regions Bank Trust Dept.*, 156 S.W.3d 249 (Ark. 2003); *Wal-Mart Stores, Inc. v. Tucker*, 120 S.W.3d 61 (Ark. 2003); *Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634 (Ark. 2002); *Wal-Mart Stores, Inc. v. Regions Bank Trust Dept.*, 69 S.W.3d 20 (Ark. 2002); *Wal-Mart Stores, Inc. v. P.O. Mkt., Inc.*, 66 S.W.3d 620 (Ark. 2002); *Wal-Mart Stores, Inc. v. Taylor*, 57 S.W.3d 158 (Ark. 2001); *Wal-Mart Stores, Inc. v. Londagin*, 37 S.W.3d 620 (Ark. 2001); *Wal-Mart Stores, Inc. v. Binns*, 15 S.W.3d 320 (Ark. 2000); *Mason v. Wal-Mart Stores, Inc.*, 969 S.W.2d 160 (Ark. 1998); *McKown v. Wal-Mart Stores, Inc.*, 27 Cal. 4th 219 (Cal. 2002); *Wal-Mart Stores, Inc. v. Clough*, 712 A.2d 476 (Del. 1998); *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005); *Martino v. Wal-Mart Stores, Inc.*, 861 So. 2d 430 (Fla. 2003); *Gump v. Wal-Mart Stores, Inc.*, 5 P.3d 407 (Haw. 2000); *Happel v. Wal-Mart Stores, Inc.*, 766 N.E.2d 1118 (Ill. 2002); *Wal-Mart Stores, Inc. v. Bailey*, 831 N.E.2d 742 (Ind. 2005); *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349 (Ind. 2005); *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891 (Ind. 2002); *Gutierrez v. Wal-Mart Stores, Inc.*, 638 N.W.2d 702 (Iowa 2002); *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781 (Ky. 2004); *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003); *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000); *Smith v. Wal-Mart Stores, Inc.*, 6 S.W.3d 829 (Ky. 1999); *VaSalle v. Wal-Mart Stores, Inc.*, 801 So. 2d 331 (La. 2001); *Goins v. Wal-Mart Stores, Inc.*, 800 So. 2d 783 (La. 2001); *Hunter v. Wal-Mart Supercenter of Natchitoches*, 798 So. 2d 936 (La. 2001); *Davis v. Wal-Mart Stores, Inc.*, 774 So. 2d 84 (La. 2000); *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762 (La. 1999); *Kennedy v. Wal-Mart Stores, Inc.*, 733 So. 2d 1188 (La. 1999); *Reed v. Wal-Mart Stores, Inc.*, 708 So. 2d 362 (La. 1998); *Coleman v. Wal-Mart Stores, Inc.*, 720 So. 2d 1208 (La. 1998); *Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961 (Me. 2000); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998); *Montgomery v. SmithKline*, 910 So. 2d 541 (Miss. 2005); *Powermate, Inc. v. Rheem Mfg. Co.*, 880 So. 2d 329 (Miss. 2004); *Wal-Mart Super Ctr v. Long*, 852 So. 2d 568 (Miss. 2003); *Yoste v. Wal-Mart Stores, Inc.*, 822 So. 2d 935 (Miss. 2002); *Wal-Mart Stores, Inc. v. Frierson*, 818 So. 2d 1135 (Miss. 2002); *Wal-Mart Stores, Inc. v. Johnson*, 807 So. 2d 382 (Miss. 2001); *Carter v. Wal-Mart Stores, Inc.*, 757 So. 2d 959 (Miss. 1999); *Davis v. Wal-Mart Stores, Inc.*, 724 So. 2d 907 (Miss. 1998); *Wal-Mart Stores, Inc. v. Howell*, 729 So. 2d 196 (Miss. 1998); *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809 (Mo. 2003); *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439 (Mo. 1998); *Holden v. Wal-Mart Stores, Inc.*, 608 N.W.2d 187 (Neb. 2000); *Simpson v. Wal-Mart Stores, Inc.*, 744 A.2d 625 (N.H. 1999); *Coates v. Wal-Mart Stores, Inc.*, 976 P.2d 999 (N.M. 1999); *Tyrrell v. Wal-Mart Stores, Inc.*, 97 N.Y.2d 650 (N.Y. 2001); *James v. Wal-Mart Stores, Inc.*, 552 S.E.2d 140 (N.C. 2001); *Ward v. Wal-Mart Stores, Inc.*, 790 N.E.2d 328 (Ohio 2003); *Davis v. Wal-Mart Stores, Inc.*, 756 N.E.2d 657 (Ohio 2002); *Hunter v. Wal-Mart Stores, Inc.*, 773 N.E.2d 554 (Ohio 2002); *Davis v. Wal-Mart Stores, Inc.*, 759 N.E.2d 785 (Ohio 2001); *Meadows v. Wal-Mart Stores, Inc.*, 21 P.3d 48 (Okla. 2001); *Shoup v. Wal-Mart Stores, Inc.*, 61 P.3d 928 (Or. 2003); *Brown v. Wal-Mart Disc. Cities*, 12 S.W.3d 785 (Tenn. 2000); *Hall v. Wal-Mart Stores, Inc.*, 959 P.2d 109 (Utah 1998); *Guijosa v. Wal-Mart Stores, Inc.*, 32 P.3d 250 (Wash. 2001); *Baughman v. Wal-Mart Stores, Inc.*, 592 S.E.2d 824 (W. Va. 2003); *Rohrbaugh v. Wal-Mart Stores, Inc.*, 572 S.E.2d 881 (W. Va. 2002); *Belcher v. Wal-Mart Stores, Inc.*, 568 S.E.2d 19 (W. Va. 2002); *Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663 (W. Va. 2001); *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328 (Wis. 2004); *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 223 (Wis. 1998); *Wal-Mart Stores v. Clark*, 969 P.2d 550 (Wyo. 1998).

n46. It might have been better to consider all the petitions filed in all the years from which the 2004 and 2005 decisions could have been drawn, but due to the large numbers of petitions filed each year, that would have been an onerous undertaking.

n47. Our purpose here is merely to determine whether petitioners are disproportionately plaintiffs; hence this total includes both petitions granted and petitions denied.

n48. The list of petitions denied was compiled for me by the then-clerk of the supreme court, Andrew Weber, to whom I am grateful.

n49. Even if one could ascertain a representative number of trial court results, it is not clear what one would do with them. Examining only judgments that are appealed would provide no basis for drawing conclusions about the correctness of trial court results generally, and accepting appellate reversals as the gauge of error would not reveal whether those decisions were proper.

n50. The three predominantly Democratic courts were the Sixth (Texarkana), the Eleventh (Eastland), and the Thirteenth (Corpus Christi). I ascertained the political affiliations of all the judges on the courts of appeals from 2002 through 2005. It is possible that some of the supreme court cases were decided in the courts of appeals earlier than 2002, but I believe these courts were Democratic in previous years too.

n51. From the Corpus Christi Court of Appeals: *Diversicare Gen. Partners v. Rubio*, No. 02-0849, 2005 WL 2585490 (Tex. 2005); *Freedom Newspapers of Tex. v. Cantu*, 168 S.W.3d 847 (Tex. 2005); *Hafi v. Baker* 164 S.W.3d 383 (Tex. 2005); *Haggar Clothing Co. v. Hernandez* 164 S.W.3d 386 (Tex. 2005); *In re Living Ctrs. of Tex. Inc.*, 175 S.W.3d A64253 (Tex. 2005); *Military Highway Water Supply Corp. v. Morin*, 156 S.W.3d 569 (Tex. 2005); *In re U.S. Silica Co.*, 157 S.W.3d 434 (Tex. 2005); *Bostrom Seating Inc. v. Crane Carrier Co.*, 140 S.W.3d 681 (Tex. 2004); *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466 (Tex. 2004); *Garza v. Garcia*, 137 S.W.3d 36 (Tex. 2004); *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004); *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004); *In re Van Waters & Rogers Inc.*, 145 S.W.3d 203 (Tex. 2004); *Volkswagen of Am. Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004).

From the Texarkana Court of Appeals: *Dillard Dep't Stores v. Silva*, 148 S.W.3d 370 (Tex. 2004); *Humble Sand & Gravel Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004); *Shell Oil Co. v. Khan*, 138 S.W.3d 288 (Tex. 2004).

None of the cases came from the Eastland Court of Appeals. The plaintiff victories included one case from a Democratic courts of appeals, *Storage & Processors Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004), in which the plaintiff won in the Texarkana Court of Appeals and the supreme court affirmed.

n52. This section draws on the work of Katie Spring Berry. See supra note 31 and accompanying text.

n53. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

n54. The initial act was passed to address what the Legislature described as a medical "crisis [that] has had a material adverse effect on the delivery of medical and health care in Texas." Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(6), 1977 Tex. Gen. Laws 2039, 2040 (formerly *Tex. Rev. Civ. Stat. Ann. art. 4590i*, § 1.02(6)), repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884; see also Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884 (reiterating the Legislature's concern about the gravity of an ongoing "medical malpractice insurance crisis" caused in part by an increased number of health care liability claims since 1995).

n55. In 2003 the legislature explained that further restrictions were necessary because there was still an ongoing "medical malpractice insurance crisis" caused in part by an increased number of health care liability claims since 1995. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884.

n56. See *infra* Part IV.C.1.

n57. For one notable exception, see *Sturges*, 52 S.W.3d at 713 (creating a new definition of tortious interference with prospective advantage). The case is described *infra* in the text accompanying notes 131-40; see also *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004) (adopting a new method of deciding whether manufacturers who supply silica and similar products owe a duty to warn users of the dangers of the product).

n58. See, e.g., *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994) (holding that trial of a punitive damages issue must be bifurcated and the court of appeals must detail the evidence on which its finding of sufficiency of evidence is based).

n59. This section draws on the work of Christina Lunders, Elaine Edwards, and Eugene Barr. See *supra* note 31 and accompanying text.

n60. "[A] lot of no evidence is still no evidence." *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 148 (Tex. 2004). Elaine Edwards used this phrase in the title of her paper on the court's no-evidence cases.

n61. These decisions can come after the fact, when the court reviews a judgment in favor of a plaintiff, or when a defendant is granted summary judgment on the ground that there is no evidence that would require trial. No-evidence decisions do not invariably favor defendants, but in negligence cases they tend to do so because normally plaintiffs bear the burden of production and proof on most issues.

n62. Cristina Lunders used cases decided from Sept. 1, 2004 to Aug. 31, 2005, so that the most recent time period would correspond to those used in her comparisons to 1986 and 1966, when those dates marked the beginning and end of the supreme court's term. Now the court attaches no significance to those dates, so elsewhere this article uses calendar years.

n63. See *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915 (Tex. 2005) (holding that there was no evidence that there was gender discrimination); *Diamond Shamrock Ref. Co., L.P. v. Hall*, 168 S.W.3d 164 (Tex. 2005) (holding that there was no evidence that employer knew of the risk of injury and did nothing); *Freedom Newspapers v. Cantu*, 168 S.W.3d 847 (Tex. 2005) (holding that there was no evidence of actual malice); *Meyer v. Cathey*, 167 S.W.3d 327 (Tex. 2005) (holding that there was no evidence of breach of fiduciary duty); *Qwest Int'l Commc'ns v. AT&T Corp.*, 167 S.W.3d 324 (Tex. 2005) (holding that there was no evidence of actual knowledge of extreme risk of harm); *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005) (holding that there was no evidence that the city knew that a new plan would result in plaintiff's property damage); *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212 (Tex. 2005) (holding that there was no evidence of malice); *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 386 (Tex. 2005) (holding that there was no evidence of wrongful discharge); *W. Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005) (holding that there was no evidence that the apartment complex's acts or omissions caused the injuries); *GMC v. Iracheta*, 161 S.W.3d 462 (Tex. 2005) (holding that there was no evidence that the fire and death were caused by a defect); *Hearst Corp. v. Skeen*, 159 S.W.3d 633 (Tex. 2005) (holding that there was no evidence of actual malice); *Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580 (Tex. 2005) (holding that there was no evidence that the negligent actor was an employee); *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84 (Tex. 2004) (holding that there was no evidence of negligence); *Haggar Apparel Co. v. Leal*, 154 S.W.3d 98 (Tex. 2004) (holding that there was no evidence of substantial limitation); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004) (holding that there was no evidence of causation); *Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370 (Tex. 2004) (holding that there was no evidence of malice); *Humble Sand and Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004) (holding that a new trial was warranted to decide if warning would be effectual); *First Valley Bank v. Martin*, 144 S.W.3d 466 (Tex. 2004) (holding that there was no evidence of malicious prosecution).

n64. For the remaining four cases, see *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005) (holding that there was evidence that the professional associations were liable); *U.S. Silica Co. v. Estate of Tompkins*, 156 S.W.3d 578 (Tex. 2005) (holding that there was evidence of significant exposure to the product); *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607 (Tex. 2004) (holding that there was evidence of liability); and *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004) (holding that there was evidence of defamation). One of the cases - *Fort Worth Osteopathic Hosp. Inc. v. Reese*, 148 S.W.3d 94 (Tex. 2004) - counted as a defendant victory because the court granted defendant's petition as to one plaintiff but also rejected the defendant's no-evidence claim as to another plaintiff. See supra note 40 for the list of cases. Reese is not included here because it was decided before the one-year period used in this analysis of no-evidence claims.

n65. All of the decisions rejecting no-evidence claims favored plaintiffs.

n66. The non-tort cases were *Ysleta I.S.D.*, 177 S.W.3d at 915 (holding that there was no evidence of gender discrimination), *Meyer*, 167 S.W.3d at 327 (holding that there was no evidence of breach of fiduciary duty), and *Haggart Apparel Co.*, 154 S.W.3d at 98 (holding that there was no evidence of substantial limitation in the gender discrimination case).

n67. In the other two cases, the supreme court upheld no-evidence determinations by the court of appeals. See *Romero*, 166 S.W.3d at 212 (holding that there was no evidence of malicious credentialing); *Dillard Dep't Stores*, 148 S.W.3d at 370 (holding that there was no evidence of malice).

n68. See *Cox Enters., Inc. v. Bd. of Trustees*, 706 S.W.2d 956 (Tex. 1986) (holding that there was no evidence that the meeting violated the Open Meetings Act); *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176 (Tex. 1986) (holding that there was no evidence of the defective automobile's market value); *Wilcox v. Hillcrest Mem. Park*, 701 S.W.2d 842 (Tex. 1986) (holding that there was no evidence of breach of warranty); *Chastain v. Koonce*, 700 S.W.2d 579 (Tex. 1985) (holding that there was no evidence of unconscionability); *Williams v. Steves Indus., Inc.*, 699 S.W.2d 570 (Tex. 1985) (holding that there was no evidence of gross negligence).

n69. For the remaining eleven cases see *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986) (holding that there was evidence of mental anguish); *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588 (Tex. 1986) (holding that there was some evidence that the defendant failed to adequately warn consumers); *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986) (holding that there was some evidence that the respondents were liable on a promissory note); *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544 (Tex. 1986) (holding that there was some evidence of breach of an express warranty for a product); *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n.*, 710 S.W.2d 551 (Tex. 1986) (holding that there was some evidence that the defendant had waived the application deadline); *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432 (Tex. 1986) (holding that there was sufficient evidence of fraudulent misrepresentation); *Am. Airlines, Inc. v. Swest, Inc.*, 707 S.W.2d 545 (Tex. 1986) (holding that there was some evidence that the plaintiff did not breach its C.O.D. contract); *Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308 (Tex. 1986) (holding that there was some evidence that the plaintiff was disabled); *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex. 1986) (holding that there was some evidence that there was loss of inheritance); *Stanglin v. Keda Dev. Corp.* 713 S.W.2d 94 (Tex. 1986) (holding that there was sufficient evidence to support an execution sale); *Barclay v. Campbell*, 704 S.W.2d 8 (Tex. 1986) (holding that there was sufficient evidence that there was a material risk involved in the medical procedure).

n70. *Spoljaric*, 708 S.W.2d at 432 (holding that there was sufficient evidence of fraudulent

misrepresentation).

n71. See *Flowers v. Steelcraft Corp.*, 406 S.W.2d 199 (Tex. 1966) (holding that the defendant had the burden of proving that it was not the company the plaintiff intended to sue on a contract claim; the defendant had failed to present any evidence on that issue, so orders dismissing the defendant were reversed); *Quilter v. Wendland*, 403 S.W.2d 335 (Tex. 1966) (holding that there was sufficient evidence of a contract that established that the plaintiffs were third party contract beneficiaries of the decedent); *McClary v. Jones*, 404 S.W.2d 314 (Tex. 1966) (holding that there was no evidence that the defendant's negligence proximately caused the personal injury to the plaintiff); *Cont'l Oil Co. v. Doornbors*, 402 S.W.2d 879 (Tex. 1966) (holding that there was no evidence of a reformation of the contract); *Dennis v. Dial Fin. & Thrift Co.*, 401 S.W.2d 803 (Tex. 1966) (holding that there was sufficient evidence of malice in a claim for exemplary damages for fraud); *Hendricks v. Curry*, 401 S.W.2d 796 (Tex. 1966) (holding that there was no evidence to support the judgment that the minor child was a dependent and neglected child); *Transp. Ins. Co. v. Polk*, 400 S.W.2d 881 (Tex. 1966) (holding that there was sufficient evidence to support the jury finding of the value of the insured's wife's nursing services); *U.S. Fid. & Guar. Co. v. Morgan*, 399 S.W.2d 537 (Tex. 1966) (holding that there was sufficient evidence of property damage covered by an insured peril); *Royal Indem. Co. v. H.E. Abbott & Sons, Inc.*, 399 S.W.2d 343 (Tex. 1966) (holding that there was no evidence of the implied consent of the insured to allow another driver to drive insured's car); *Hartford Accident & Indem. Co. v. Hale*, 400 S.W.2d 310 (Tex. 1966) (holding that there was no evidence that the injury to the plaintiff's husband was sustained in the course of his employment); *Tenn.-La. Oil Co. v. Cain*, 400 S.W.2d 318 (Tex. 1966) (holding that there was no evidence that a fiduciary relationship existed between the plaintiff and the defendant); *Bukovich v. Bukovich*, 399 S.W.2d 528 (Tex. 1966) (holding that there was no evidence that there was a material change of circumstances since the entrance of the prior custody order); *Pon Lip Chew v. Gilliland*, 398 S.W.2d 98 (Tex. 1965) (holding that there was sufficient evidence that the employer committed assault and battery on a customer); *Hart v. Van Zandt*, 399 S.W.2d 791 (Tex. 1965) (holding that there was some evidence that the defendant doctor was negligent in his treatment of the plaintiff, and evidence that that negligence proximately caused plaintiff's injuries); *First Nat'l Bank v. Thomas*, 402 S.W.2d 890 (Tex. 1965) (finding that there was some evidence of conversion).

n72. See *McClary*, 404 S.W.2d at 314 (holding that there was no evidence of the defendant's negligence proximately causing the personal injury to the plaintiff); *Royal Indem. Co.*, 399 S.W.2d at 344 (holding that there was no evidence that the insured gave implied consent to allow another driver to drive insured's car).

n73. Those critics have been severe. See, e.g., *Obstacle to Justice*, *supra* note 28, at 8 ("When confronted with evidence against defendants, the Court often ignores the factual findings of a jury and substitutes its own judgment."); Michael Shore and Judy Shore, *Personal Torts*, 58 *SMU L. Rev.* 1045, 1075 (2005) ("The Texas Supreme Court continues to remove decisions from juries to create its own judge-made rules of reasonable and unreasonable conduct.").

n74. Justice Baker was appointed to the court by then-Governor Bush and subsequently elected to a full term.

n75. James A. Baker, *The End of Trends in the No-Evidence Standard of Review*, (paper delivered Sept. 12, 2006, to The Mahon Inn of Court, Fort Worth, Texas, on file with the author).

n76. Tex. Const. art. V, § 6.

n77. See *Choate v. San Antonio & A.P. Ry. Co.*, 44 S.W. 69 (1898) (holding that the Texas Supreme Court does not have jurisdiction concerning questions of fact).

n78. See W. Wendell Hall, *Standard of Review of Sufficiency of the Evidence in Texas After City of Keller v. Wilson* at 17-18 (paper presented at the Annual Judicial Section Conference on Sept. 12, 2006, on file with author).

n79. See, e.g., *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 917 (Tex. 2004) (Jefferson, C.J., joined by O'Neill, J., dissenting) (suggesting that the majority had engaged in a review of factual sufficiency even though it is constitutionally bound to review only legal sufficiency); *Sw. Bell Tel. Co.*, 164 S.W.3d at 633 (O'Neill, J., concurring) ("The Court misstates the role that truly undisputed evidence should play in a legal sufficiency analysis and impermissibly expands the Court's scope of review.")

n80. This section draws on the work of Elaine Edwards, Eugene Barr, and Matt Shrum. See *supra* note 31 and accompanying text.

n81. *Haggard Clothing Co. v. Hernandez*, 164 S.W.3d 386 (Tex. 2005).

n82. *Id.* at 387.

n83. The court had previously held, in *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 451 (Tex. 1996), that an employer who terminates an employee pursuant to the uniform enforcement of a reasonable absence-control provision cannot be liable for retaliatory discharge.

n84. *Haggar Clothing Co.*, 164 S.W.3d at 388-89.

n85. *Id.* at 389.

n86. *Id.* at 388.

n87. The only explanation the court gave for dismissing this evidence was that the second employee went on leave over two years after Hernandez was terminated, did not receive a salary while on leave, and never returned to work at Haggar. *Id.* at 388-89. But Hernandez did not receive a salary or return to work either. The court did not argue that discriminatory enforcement could only be shown by acts prior to or contemporaneous with the plaintiff's discharge, or that Haggar had changed its policy by the time the second employee's leave exceeded one year.

n88. 159 S.W.3d 897.

n89. *Id.* at 901.

n90. *Id.* at 901-02.

n91. *Id.* at 902.

n92. *Id.*

n93. *Volkswagen*, 159 S.W.3d at 911.

n94. *Id. at 901.*

n95. *Id. at 912.*

n96. A second expert, an accident reconstructionist, also testified that the accident was probably caused by a defect in the Passat, but the court held that his testimony was not reliable and therefore also constituted no evidence. *Id. at 906.*

n97. *Id.*

n98. *Volkswagen, 159 S.W.3d at 911.*

n99. *Id. at 916-17.*

n100. *Id. at 912-13* (Hecht, J., joined by Owen, J., concurring).

n101. *Tex. A&M Univ. v. Bishop, 156 S.W.3d 580, 581 (Tex. 2005).*

n102. *Id. at 585.*

n103. *Id.*

n104. William V. Dorsaneo III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 *S. Tex. L. Rev.* 225, 243 (2005).

n105. This section draws on the work of Eugene Barr, Carlos Garcia, Brian Phelps, and Matt Shrum. See *supra* note 31 and accompanying text.

n106. *Fid. and Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 576 (Tex. 2004).

n107. *Cary v. Alford*, 203 S.W.3d 837 (Tex. 2006).. The court of appeals had reversed the trial court's decision to set aside the default judgment. *Alford v. Cary*, No. 12-04-00314, 2005 WL 2665442 at 5 (Tex. App. - Tyler, Oct. 19, 2005) (not reported in S.W.3d.). The supreme court's decision was to vacate and remand the court of appeals decision, so that court remained free, at least in theory, to uphold the default judgment. The defendant's reasons for failing to respond are not mentioned in the supreme court's brief per curiam opinion, but are set out in the court of appeals' opinion. *Id.* at 2.

n108. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004).

n109. That is not to say defendants' use of mandamus is always successful. See, e.g., *In re Omni Hotels Mgmt. Corp.*, 159 S.W.3d 627 (Tex. 2005) (denying defendant's application for mandamus to transfer case to different court); *In re Kansas City S. Indus. Inc.* 139 S.W.3d 669 (Tex. 2004) (refusing to permit defendant to proceed by mandamus on the ground that appeal provided an adequate remedy).

n110. See Tex. R. Civ. P. 166(i) (permitting movants to require respondents to present evidence without presenting summary judgment evidence themselves).

n111. *Romero*, 166 S.W.3d at 212.

n112. *Id.* at 218.

n113. *Id.* at 219. Under a Texas statute designed to protect hospitals from claims arising from their credentialing decisions, the hospital could not be liable for allowing the surgeon to practice unless the plaintiff showed that the hospital acted with malice. *Tex. Occ. Code Ann. § 160.010(b)* (Vernon Supp. 2002). At the time of this decision, the malice could be shown by proving that the hospital acted with "conscious indifference to the rights, safety, or welfare of others." *Id.* The 2003 tort reform bill changed that to require proof of "a specific

intent by the defendant to cause substantial injury or harm to the claimant." *Tex. Civ. Prac. & Rem. Code Ann. § 41.001(7)* (Vernon 2005).

n114. *Romero, 166 S.W.3d at 219.*

n115. *Id.*

n116. *Id.*

n117. *Id. at 231* (O'Neill, J., joined by Medina, J., concurring).

n118. *Romero, 166 S.W.3d at 220.*

n119. *Id. at 228-29.*

n120. *Id. at 229.*

n121. *Id.*

n122. *Id. at 230-31.*

n123. *Romero, 166 S.W.3d at 220.*

n124. *Bunton*, 153 S.W.3d at 50.

n125. *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002).

n126. *Bunton v. Bentley*, 176 S.W.3d 18 (Tex. App. - Tyler 2003, pet. denied).

n127. *Bunton*, 153 S.W.3d at 53.

n128. *Id.*

n129. "The court of appeals correctly noted that the 3:1 damage ratio in this case is in line with ratios upheld by the Supreme Court" *Id.* at 54. The Texas Supreme Court nevertheless concluded that the evaluation required by *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), must be undertaken anew when the ratio changes.

n130. See *Austin Nursing Ctr. Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005) (permitting a person suing on behalf of a tort victim's estate to maintain a survival action filed before plaintiff had qualified as personal representative); *Lorentz v. Dunn*, 171 S.W.3d 854 (Tex. 2005) (same); *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005) (holding that defendant was not entitled to separate inferential rebuttal issue on proximate cause); *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631 (Tex. 2005) (holding that filing whistleblower suit before expiration of 60-day period allowed for agency grievance procedure does not deprive trial court of jurisdiction).

n131. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001).

n132. *Id.* at 715.

n133. *Delz v. Winfree*, 16 S.W. 111, 112 (Tex. 1891); *Santa Fe Energy Operating Partners, L.P. v. Carrillo*,

948 S.W.2d 780, 784, n.2 (Tex. App. - San Antonio 1997, writ denied); *Herider Farms-El Paso, Inc. v. Criswell*, 519 S.W.2d 473, 476 (Tex. Civ. App. - El Paso 1975, writ ref'd n.r.e.); *Cooper v. Steen*, 318 S.W.2d 750, 753 (Tex. Civ. App. - Dallas 1958, no writ).

n134. *Sturges*, 52 S.W. 3d at 715. The court argued that "Wal-Mart's evidentiary challenge here raises the question of what harm must be proved to constitute tortious interference" and therefore allowed the court to decide that the charge was not a correct statement of the law even though Wal-Mart had not objected to the charge. *Id.* at 715.

n135. *Id.* at 713.

n136. *Id.*

n137. The court acknowledged that it was required to assess Wal-Mart's no-evidence argument "in light of the jury charge to which Wal-Mart did not object, even though the charge does not correctly state the law." *Id.* at 727. But it also said that under the new rule, "we must look to see whether there is evidence of harm from some independently tortious or unlawful activity by Wal-Mart." *Sturges*, 52 S.W.3d at 727. Two concurring justices believed that it was improper to change the law in a case in which the defendant had not properly preserved the issue, but believed there was no evidence to support the judgment even under the old law stated in the charge. *Id.* at 729 (O'Neill, J., joined by Hankinson, J., concurring in part and concurring in the judgment).

n138. *Id.* at 728.

n139. See, e.g., *Sindell v. Abbott Labs., Inc.*, 607 P.2d 924 (Cal. 1980) (recognizing market share liability as new theory for mass tort cases); *Sargent v. Ross*, 308 A.2d 528 (1973) (abolishing rule that lessor owed no duty to persons injured on leased premises).

n140. For a heated exchange of charges of "activism" by members of the court, see *In re Doe*, 19 S.W.3d 346, 351 (Tex. 2000) (O'Neill, J.) ("For this Court to impose a standard different than that our Legislature chose would usurp the legislative function and amount to judicial activism."); *id.* at 365 (Enoch and Gonzales, J.J., concurring) ("The Court's decision is based on the language of the Parental Notification Act as written by the Legislature and on established rules of construction. Any suggestion that something else is going on is simply wrong.").

n141. *Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005).

n142. *Id.* at 384.

n143. *Id.*

n144. *Id.*

n145. *Id.* at 385.

n146. *Hafi*, 164 S.W.3d at 385.

n147. This section draws on the work of Katie Spring Berry and Matt Shrum. See supra note 31 and accompanying text.

n148. *Tex. Rev. Civ. Stat. Ann. art. 4590i*, §§ 6.01-6.07 (Vernon Supp. 1978) (the law in its current, modified form is at *Tex. Civ. Prac. & Rem. Code Ann. § 74.101-107* (Vernon Supp. 2004-05)).

n149. The statute codified one version of that theory:

In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

Tex. Civ. Prac. & Rem. Code Ann. § 74.101 (Vernon Supp. 2004-05) (formerly *Tex. Rev. Civ. Stat. Ann. art. 4590i*, § 6.02 (Vernon Supp. 1978)). The word "only" apparently was used to preclude use of an alternative theory that allowed a plaintiff to argue that he or she would have withheld consent if properly informed, even if a reasonable patient would still have consented. See, e.g., *Arena v. Gingrich*, 748 P.2d 547 (1988) (holding that to show causation a patient need only show that he or she would not have consented).

n150. *Tex. Rev. Civ. Stat. Ann. art. 4590i* § 6.03(b) (Vernon Supp. 1978). The statute provided that a physician who had given the prescribed warning would be rebuttably presumed to have obtained the patient's informed consent. If the physician failed to give a warning that was prescribed, he or she was rebuttably presumed to have been negligent. *Id.* § 6.07(a).

n151. *Binur v. Jacobo*, 135 S.W.3d 646, 657 (Tex. 2004).

n152. *Id.* at 654. The statute did not specifically state that this principle was to control cases arising from risks not on either of the panel's lists, but the court had given it that interpretation in previous decisions. See *Barclay v. Campbell*, 704 S.W.2d 8 (Tex. 1986) (holding plaintiff entitled to benefit of informed consent statute with regard to risk of drug side effect); *Peterson v. Shields*, 652 S.W.2d 929 (1983) (holding that plaintiff was entitled to benefit from the statute with regard to risk of nerve damage). The only discussion in either case of risks that would not be covered by the statute was a sentence in *Barclay* stating that a drug risk would not be covered if it arose from a defect in the drug or from negligent human intervention. *Barclay*, 704 S.W.2d at 10.

n153. *Binur*, 135 S.W.3d at 655.

n154. *Barclay*, 704 S.W.2d at 9-11; *Peterson*, 652 S.W.2d at 930-31.

n155. See, e.g., *Harnish v. Children's Hosp. Med. Center*, 387 Mass. 152, 439 N.E.2d 246 (1982) (holding that physicians need not disclose "risks, like infection, inherent in any operation").

n156. 25 *Tex. Admin. Code* § 601.2 (h)(2)(i)(1) (Vernon 2005).

n157. *Tex. Civ. Prac. & Rem. Code* § 74.351(r)(6) (Vernon 2005).

n158. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (formerly *Tex. Rev. Civ. Stat. art. 4590i*, § 1.03(a)(4)). In 2003, it was amended to include also "professional or administrative services directly related to health care." *Tex. Civ. Prac. & Rem. Code* § 74.001(a)(13) (Vernon 2003).

n159. *Murphy v. Russell*, 167 S.W.3d 835, 837 (Tex. 2005).

n160. *Russell v. Murphy*, 86 S.W.3d 745, 750 (Tex. App. - Dallas 2002, rev'd on other grounds).

n161. *Murphy*, 167 S.W.3d at 839.

n162. It might be argued that the language in the definition of "health care liability claim" about "health care or safety" is broad enough to include battery claims, but that language too is preceded by the phrase "departure from accepted standards," and battery does not require any proof of a departure from accepted standards. All the plaintiff need establish is an intentional unconsented harmful touching. Standard of care is a negligence concept and is not an issue in a battery case. The court acknowledged that expert testimony might not be necessary for a plaintiff to prevail in a suit for battery, but said the legislature intended to make an expert's report a threshold requirement even in such cases.

It is difficult to imagine what an expert might say "regarding applicable standards of care" that might be relevant in a battery case. The court's answer was that standard of care issues as to which expert testimony would be necessary might arise if the physician argued that emergency circumstances warranted general anesthesia without the patient's consent, or that the general anesthetic was administered without the physician's knowledge. But the possibility that the physician's defenses might create a need for expert testimony scarcely supports the proposition that the legislature therefore intended to require the plaintiff to file an expert's report even when there is no indication that any such issues will arise.

n163. See *Tex. Civ. Prac. & Rem. Code Ann.* § 74.251 (Vernon 2005) (prescribing a special two-year statute of limitations for health care liability claims). At the time the case was heard, this statute was identified as *Tex. Rev. Civ. Stat. art. 4590i*, § 10.01, and the court's discussion of it uses that citation.

n164. Minors under age twelve were given until their fourteenth birthday to file suit, but otherwise the limitations period "applies to all persons regardless of minority or other legal disability." *Id.*

n165. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850-53 (Tex. 2005).

n166. See *Tex. Civ. Prac. & Rem. Code Ann. § 16.001(b)* (Vernon 2005) (tolling the general statute of limitations during legal disability).

n167. Quoted from the former *Tex. Rev. Civ. Stat. art. 4590i*, § 1.03(a)(4) (Vernon Supp. 1978).

n168. *Diversicare*, 185 S.W.3d at 853-55.

n169. *Id.* at 857.

n170. *Id.* at 850-51.

n171. *Id.* at 846, quoting Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(6), 1977 Tex. Gen. Laws 2039, 2040 (formerly *Tex. Rev. Civ. Stat. art. 4590i*, § 1.02(6)), repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (The court also cited the legislature's 2003 statement of its "concern about the gravity of an ongoing medical malpractice insurance crisis caused in part by an increased number of health care liability claims since 1995.") (citing Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884.).

n172. *Diversicare*, 185 S.W.3d at 862-63 (O'Neill, J., dissenting, joined by Brister, J. and Green, J.).

n173. *Id.* at 861 (Jefferson, C.J., concurring and dissenting in part) (quoting *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920)).

n174. *Id.* The Chief Justice agreed with the dissenters that the sexual assault claim was a premises liability

claim and therefore not within the statute's definition of health or medical care, but thought the statute's use of the term "safety" included safety issues unrelated to health care. *185 S.W.3d at 801*. ("While it may be logical to read into the statute a requirement that a safety related claim also involve health care, there is nothing implicit in safety's plain meaning nor explicit in the MLIIA's language that allows us to impose such a restriction.") *Id.* But surely there is nothing in the language that precludes it from being given its logical reading, either.

n175. *Tex. Civ. Prac. & Rem. Code Ann. § 101.101(c)* (Vernon 2005).

n176. *Tex. Dept. of Criminal Justice v. Simons*, *140 S.W.3d 338, 341-42* (Tex. 2004). The plaintiff was a prison inmate who lost an eye and the hearing in one ear when he was struck by the handle of a 48-inch wrench when the supervisor of a work detail mistakenly engaged a power shaft on a tractor. The prison authorities immediately took statements from the supervisor and the other inmates in the work detail, sent safety officers to investigate, and took a tape-recorded statement from the plaintiff at the hospital. *Id. at 339-342*. But the court held that an agency "cannot acquire actual notice merely by conducting an investigation, or even by obtaining information that would reasonably suggest its culpability." *Id. at 348*. Surprisingly, the court decided this issue even though its ultimate holding was that the issue could not properly be raised on interlocutory appeal and the correct disposition therefore was to dismiss the appeal. *Id. at 349*.

n177. *Id. at 344* (quoting *Cathey v. Booth*, *900 S.W.2d 339, 341* (Tex. 1995)).

n178. See *Morris v. Savoy*, *576 N.E.2d 765, 771* (1991) (noting that the cost of caps on malpractice damages is borne solely by the persons most severely injured by medical malpractice); see also Dan B. Dobbs, *The Law of Torts 1072* (2000) ("Assuming that damages should be limited in some way, a cap is exactly the wrong way to do so, since the cap gives a full recovery to the least injured but only a limited portion of the damages suffered by the most seriously injured.").

n179. See David Hyman and Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem?* *90 Cornell L. Rev.* 893, 984 (2005) (citing studies indicating that litigation rates and premiums will fall on their own when providers improve the quality of care).

n180. See *Sturges*, *52 S.W.3d at 711*, discussed *supra* at notes 134-38.

n181. *Humble*, *146 S.W.3d at 203* (O'Neill, J., joined by Schneider, J., dissenting).

n182. The general grant of jurisdiction is to review an error of law by a court of appeals that is "of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction" *Tex. Gov't. Code Ann § 22.001(a)(6)* (Vernon 2005). The rules of appellate procedure import that standard into other bases of jurisdiction as well. See Kurt Kuhn, Address at the 16th Annual Conference on State and Federal Appeals at The University of Texas Continuing Education Legal Program: What Issues are Important to the Jurisprudence of the State? (June 2, 2006), available at http://conferences.utcle.org/law/cle/conferences/archive/AP06/15_Kuhn_AP06_ses15_ppt.pdf.

n183. *Murphy*, 167 S.W.3d at 837 n. 6; *Romero*, 166 S.W.3d at 212.

n184. See cases discussed in Section IV supra.

n185. I am told the supreme court's law clerks have a joke: "When can a plaintiff win in the Texas Supreme Court? When one insurance company sues another."

n186. The bases for this conviction are questioned in Bernard S. Black, Charles M. Silver, David A. Hyman, & William M. Sage, Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002, 2 J. Empirical Legal Stud. 207, 255 (2005) (relying on a comprehensive dataset maintained by the Texas Department of Insurance that includes all insured closed medical malpractice claims for 1988-2002, the authors conclude that "no sudden rise in claim frequency, payments, defense costs or jury verdicts preceded or accompanied the premium spike that occurred in Texas after 1998").