

# PERSONAL RESPONSIBILITY V. CORPORATE LIABILITY: HOW PERSONAL INJURY LAWYERS SCREEN CASES IN AN ERA OF TORT REFORM

Mary Nell Trautner

## ABSTRACT

*Who is ultimately responsible for the harms that befall us? Corporations who make dangerous products, or the consumers who use them? The answer to this question has a profound impact on how personal injury lawyers screen products liability cases. In this chapter, I analyze results from an experimental vignette study in which 83 lawyers were asked to evaluate a hypothetical products liability case. Half of the lawyers practice in states considered to be difficult jurisdictions for the practice of personal injury law due to tort reform and conservative political climates (Texas and Colorado), while the other half work in states that have been relatively unaffected by tort reform and are considered to be more "plaintiff friendly" (Pennsylvania and Massachusetts). While lawyers in reform states and non-reform states were equally likely to accept the hypothetical case with which they were presented, they approached the case in different ways, used different theories, and made different*

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*arguments in order to justify their acceptance of the case. Lawyers in states with tort reform were most likely to accept the case when they focused on the issue of corporate social responsibility – that is, what the defendant did wrong, how they violated the rules, and how they could have prevented the injury in question. Lawyers in non-reform states, however, were most likely to accept the case when they believed that jurors would feel sorry for the injured child and not find their client at fault for the injury.*

Who is ultimately responsible for the harms that befall us? Corporations that make dangerous products, or the consumers who use them? The answer to this question has a profound impact on how personal injury lawyers screen products liability cases. Contrary to popular public opinion, personal injury lawyers are highly selective about the cases they pursue, often accepting only a small percentage of cases with which they are presented. And while individuals who have suffered a compensable injury do occasionally pursue cases on their own with success, lawyers are generally thought to be a necessary, but not sufficient, condition for obtaining compensation through the civil justice system (Kritzer, 1996, 1997, 2004; Martin & Daniels, 1997; Michelson, 2006). In this way, plaintiffs' lawyers act as gatekeepers to justice.

In addition, most scholars of torts<sup>1</sup> have argued that the tort compensation system has a number of positive functions. The most obvious is that people suffering from injuries receive monetary compensation, which aids in the recovery and/or caretaking process. This compensation is designed to make the plaintiff "whole" again in the aftermath of an injury, by replacing lost wages, providing for lost earning capacity, and reimbursing past medical expenses as well as those the plaintiff may incur in the future. Tortfeasors are also often asked to compensate for a plaintiff's pain and suffering, emotional anguish, disfigurement, or loss of enjoyment.<sup>2</sup> But the benefits extend beyond paying damages to individuals. Through lawsuits, civil litigants and plaintiffs' lawyers also expose dangers and risks that have otherwise gone unnoticed by regulators, and the criminal side of law, for example, the dangers posed by exposure to asbestos, silicone breast implants, or the bad batch of Firestone tires. As a result, personal injury litigation benefits the public interest by punishing and guarding against such things as unsafe products, workplace hazards, unfair employment practices, and preventable medical errors (Koenig & Rustad, 2001). Personal injury

litigation, in other words, acts not only as a deterrent to “bad” behavior, encouraging self-regulation (Bogus, 2001) but also directly impacts public policy (Burke, 2002). Many of the safety laws we now take for granted (e.g., seatbelts, drug tests, warning labels, machine guards) initially arose from personal injury lawsuits.

Since the mid-1980s, tort law has come under attack a number of times by corporate and business interests seeking to restrict their legal liability and responsibility for financial compensation (Haltom & McCann, 2004). Most states have since passed some type of tort reform. Some have capped the amount of money a plaintiff may receive for his/her injuries, generally agreed to be the most severe change to tort law. Others placed restrictions on joint and several liability. Until reform, all wrongdoers could bear equal financial responsibility for an injury under joint and several liability, regardless of comparative fault. For example, if Doctor A was 10 percent responsible for a patient’s death, and Doctor B was 90 percent responsible, but lacked insurance, a plaintiff could collect all monetary damages from Doctor A. Other reforms have added requirements for expert witnesses (such as having particular credentials or filing particular reports at a designated time), or restricting the venue or jurisdiction in which a lawsuit may be filed.

Some researchers argue that tort reform depresses the number of personal injury lawsuits filed by lawyers (Daniels & Martin, 2000; Finley, 1997; Kessler & McClellan, 1996; Sharkey, 2005). Studies suggest that because some tort reforms impact the monetary values of cases, lawyers screen cases more carefully than they would without such reforms (Daniels & Martin, 2000, 2001). However, few empirical studies test anecdotal accounts of more careful lawyer screening by comparing the screening process pre- and post-reform, or comparing screening patterns of lawyers in states affected by tort reform with lawyers who practice in states without tort reform. How does tort reform impact the process by which lawyers evaluate cases? If lawyers do indeed screen cases differently under tort reform, what are the broader social implications of those screening methods and processes?

Knowing how lawyers screen cases also represents an important addition to understanding the trajectory of disputes. Socio-legal scholars have built up a great deal of knowledge about the disputing process, that is, how people identify injuries or events as grievances, some of which turn into disputes, some of which ultimately end in trial. This process is commonly referred to as the “disputing pyramid” (Felstiner, Abel, & Sarat, 1980–1981). The pyramid illustrates that there are many fewer trials than there might possibly be because some potential cases fall out at each stage.

While the upper portion of the pyramid deals mainly with the final stages of disputes, the lower part captures what Felstiner, Abel, and Sarat call the “naming, blaming, and claiming” process. It examines if, how, and when people decide to mobilize the law, and is strongly associated with the literature on legal consciousness (see, for example, Ewick & Silbey, 1998; Merry, 1990; Nielsen, 2000). The foundation of the pyramid can be characterized as most concerned with questions of how people define events as troubles, particularly as legal troubles, and how, if at all, they attempt to resolve their disputes. At each subsequent step in the process, potential cases disappear from the pyramid. Not all people who have an injury, for example, think of it as a problem that can be remedied. Not all individuals identify who is to blame for that injury, and even fewer request compensation, and so on.

While the legal consciousness literature provides information about the early stages of disputes, and we know a great deal about their later stages (e.g., trials and outcomes of trials), we know very little about the stage of the disputing process that involves lawyers. In fact, all that we know for certain is that fewer cases are channeled from the lawyer’s office into the legal system than came into it seeking redress. But how does this process work? What role does lawyer screening, whether for cases or clients, play in the disputing process? One reason so little is known about this stage is that most studies examine the disputing process from the perspective of the potential litigants, rather than from that of outside parties such as lawyers who ultimately “transform” the dispute. Consequently, studying how lawyers screen cases represents an important addition to the knowledge of the disputing process.

## **1. BACKGROUND ON CASE SELECTION AND PRODUCTS LIABILITY CASES**

Previous studies of case screening suggest that lawyers make decisions about cases following a rational choice model, accepting cases which offer many rewards and few risks, and declining those which offer few rewards and many risks. Because plaintiffs’ lawyers work on a contingency basis, they receive financial compensation only if they win a case. Should they lose, it is the lawyers – not the clients – who bear the entire cost of working up the case. These costs, particularly for complex cases such as those involving products liability or medical malpractice claims which require the use of

expert witnesses, can easily approach \$100,000 or more. As a result, lawyers' best interests require screening cases as carefully as possible, selecting only those which promise a return on their investments (Kritzer, 1996, 1997; Parikh, 2001).

While case selection is doubtless driven by lawyers' financial concerns, these decisions are embedded in broader social and legal environments that impact lawyers' evaluations of the potential risks and returns associated with cases. Thus, analyses of case screening should incorporate not only the financial aspects associated with cases, but also the broader contexts in which screening decisions are made. Tort reform, especially lawyers' perceptions of reform and the attitudes of potential jurors in their community, influence how lawyers decide which cases to accept and which to decline.

Given the financial costs associated with products liability cases, screening decisions for these cases are especially important. Most products liability cases require the use of expert witnesses, and often require that products be tested and redesigned, representing important cost centers for each case. There are no systematic, verifiable data on the use of or expenses associated with civil cases; nearly all the information legal scholars have gathered come from attorney self-reports (e.g., Daniels & Martin, 2001–2002; Grow, 2003), or from publicity surrounding particular cases. Lawyers in my interviews reported that they routinely spent \$50,000–\$100,000 on expert witnesses in products liability and medical malpractice cases – expenses that are only recouped if a case is won (or settled) for a large enough amount to cover expenses, attorney fees, and victim compensation. Given these investments, few lawyers would be inclined to invest tens or hundreds of thousands of dollars in a case unless they felt very strongly that the case had a better-than-average chance of winning.

Products liability cases also capture the influence of the wider culture. While they account for just a very small percentage of personal injury trials (2 percent according to the Bureau of Justice Statistics, see Cohen & Smith, 2004), many high-profile personal injury cases are products liability cases. The McDonald's hot coffee case, or prescription drug cases like Fen-Phen or Vioxx, make these cases prominent in the public consciousness due to media attention (Haltom & McCann, 2004; Lofquist, 2002; Vidmar, 1998). It is not surprising that many complaints about "frivolous lawsuits" which include warnings that lawsuits pose dangers to business and American free enterprise, and call for increased "personal responsibility" (all slogans of the tort reform movement), most often follow high-profile products liability cases (and medical malpractice cases), rather than cases in other areas of personal injury. As a result, lawyers' perceptions of how the local populace

responds to such cultural shifts become an underlying factor in the case screening process, as lawyers working in these areas must contend with jurors' pre-existing attitudes and expectations of products liability cases in general as they work up and argue their particular case.

Another reason to focus on products liability cases is that state-level tort reforms are most often targeted at products liability cases (or medical malpractice cases), especially reforms that cap pain and suffering and/or punitive damage awards, change joint and several liability, and increase requirements for expert witnesses and scientific evidence (Baker, 2005; Koenig & Rustad, 2001; Zegart, 2004). Much of the previous research on personal injury lawyers has focused on those who specialize primarily in lower value cases such as auto accidents (Daniels & Martin, 1999, 2000; Kritzer, 1997; Parikh, 2001; Van Hoy, 1997, 1999). However, such lower value cases are relatively unaffected by these changes in the letter of the law. Studying cases and areas of practice affected by multiple aspects of culture, including the structure of law, represent a promising avenue for research on how tort reforms shape lawyer's case selection. For analytic leverage on the effects of tort reform on the case screening process, I interviewed lawyers selected from two kinds of states: two "restrictive" reform states (widely viewed as difficult states in which to practice personal injury law), and two "open" non-reform states, considered to be more "plaintiff friendly."

## 2. RESEARCH DESIGN

I focus my analysis on the evaluation of a hypothetical products liability case, assessed by lawyers who handle products liability and/or medical malpractice cases almost exclusively, the most specialized and complex sub-specialties of the broad field of personal injury. Unlike more routine personal injury cases such as car accidents, products liability cases are in a unique position to give us insight into the ways in which economics, culture, and law intersect in the case screening process, leading to a richer understanding of the disputing process as a whole.

Texas and Colorado are widely considered to be difficult states in which to practice personal injury law (ATRA, 2004; Daniels & Martin, 1999, 2000, 2001; Martin & Daniels, 1997; Schneyer, 2002). Both states are heavily dominated by conservative politics, and both have passed a large number of tort reforms which severely limit the rights of injured parties to seek redress. According to the American Tort Reform Association (ATRA, 2004), Colorado has passed more tort reforms, in more issue areas, than any other

state since 1986, and the pro-reform Colorado Civil Justice League boasts that Colorado is “noted as a national leader on reform” (2004). Texas follows as the state with the second most reforms in all issue areas. These include modifications on economic damages, punitive damages, scientific and technical evidence, products liability, medical malpractice, class actions, and others.

In contrast, Massachusetts and Pennsylvania are considered by both plaintiff and defense attorneys to be “friendlier” toward plaintiffs than to corporations (Boynton, 1999; Harris Interactive, 2004). Philadelphia is one of only 13 areas in the United States named as a “judicial hellhole” by ATRA and its members (ATRA, 2003), and, along with Boston, is listed as one of the 25 local jurisdictions with the “least fair and reasonable litigation environments” by a poll of corporate attorneys (Harris Interactive, 2004). Massachusetts and Pennsylvania have each passed very few tort reform measures. Massachusetts has passed a small-scope modified rule of joint and several liability which applies only to public accountants, and has modified attorney’s fees in medical malpractice cases. Pennsylvania has passed just two reforms: a similarly small-scope joint and several liability rule and a venue change for medical malpractice cases (all cases must be filed in the county where the malpractice occurred).

I conducted in-depth, face-to-face interviews with equivalent numbers of plaintiffs’ lawyers from each of the four states regarding their screening practices. To minimize intra-state variation, I sampled lawyers from a single large city in each state (San Antonio, Denver, Philadelphia, and Boston). The sample is restricted to lawyers who specialize in plaintiffs’ products liability or medical malpractice, and those who have practiced for at least five years in order to capture a sense of changes over time. I interviewed a total of 83 lawyers (20 in Boston and 21 in each of the other three cities).

### **3. THE VIGNETTE**

During each interview, I gave each lawyer<sup>3</sup> a hypothetical products liability case to evaluate. In this vignette, a 12-year-old child became permanently paralyzed from the waist down after losing control and being thrown from a hypothetical toy called a “roller stick.” Roller sticks, the vignette explains, are “something of a cross between in-line roller skates and pogo sticks” – that is, they travel at a high velocity and can make vertical leaps into the air. Based on a law school examination question,<sup>4</sup> the vignette gave a limited set of purposefully ambiguous facts that lawyers could use to evaluate

the case: it described the history of the product, the extent of the injury, the conduct and characteristics of both the victim and the defendant, and the feasibility of an alternative design of the roller stick.

After giving a brief description of the toy itself, the vignette reveals that roller sticks have been associated with a number of previous injuries: in the three years since roller sticks have been in the market, two children have been killed, 10 seriously injured, and 50 slightly injured in roller stick accidents, caused by excessive speed or jumps over 3 ft off the ground. The reader then learns that an add-on safety feature, a "damper," can limit the speed and height at which roller sticks can travel, and virtually eliminate all accidents associated with it. Dampers are required for all roller sticks sold in Europe.

At this point, the vignette explains the price differential associated with the safety device. Normally sold for \$150, dampers add an extra \$50 to the overall cost of roller sticks. Moreover, American children prefer the velocity and jumping ability of models without roller sticks, making the higher-costing, safer alternative difficult or impossible to sell. As a result, the manufacturer of the roller stick in question, "Star Toy Corporation," added warnings to their entire roller sticks and owner's manuals, "clearly and adequately" cautioning about the dangers of excessive speeds or jumps. The child, in question, however, was not aware of these warnings – he/she<sup>5</sup> was so eager to play with the roller stick that he/she did not read the warnings on the stick or those in the owner's manual, and was soon thrown from the roller stick after losing control, resulting in permanent paralysis from the waist down. The vignette concludes with the child and his/her family wanting to sue the Star Toy Corporation and asking if the reader will accept the case.

The vignette was well-received by the lawyers I interviewed, and many remarked that it was a good hypothetical in that it had interesting facts and covered all the factual points that they thought about when evaluating cases. This is an important point, for, in order for vignettes to be maximally useful, the stories must appear real and plausible to those who are responding to it (Barter & Renold, 1999; Neff, 1979).

#### **4. ACCEPTING AND DECLINING PLAINTIFF'S CASES**

When asked if they would accept the hypothetical case, lawyers responded in a variety of ways. While the majority of lawyers gave clear "yes" or "no" answers to the question of whether they would accept the case described in the vignette, a significant number gave "middling" responses such as

**Table 1.** Hypothetical Case Acceptance Patterns.

Would You Accept This Case?	Number of Respondents (% of Sample)
No	12 (15)
Probably not	2 (2)
Refer the case to another lawyer	5 (6)
Maybe	8 (10)
Probably/seriously consider	12 (15)
Yes	42 (52)
Total	81 (100)

“probably,” “probably not,” or “maybe.” Table 1 shows these responses along with the number and percentage of lawyers who fell into these different response categories.

As shown in Table 1, most lawyers accepted the case outright (52 percent) or felt that they probably would (15 percent), while only 14 (17 percent) absolutely rejected or said that they would likely not accept the case. While those who said they would refer the case to another lawyer technically did not accept the case, they are excluded in the following analyses because their reasons for personally declining the case are ambiguous. For example, those who referred the case may have felt that it was a good case, but perhaps not closely aligned enough with their particular expertise in products liability work to justify pursuing it themselves. Other interpretations are also possible. I also exclude lawyers in the “maybe” category. These lawyers were so ambivalent, seeing both the positives and the negatives of the various aspects of the case, they really felt they could not make a decision without a great deal of further investigation. These two categories of responses, “refer to another lawyer” and “maybe” were evenly distributed among potential clients (name of the child injured in the vignette) and cities in which lawyers worked (analyses not shown). Removing “maybe” and “refer” cases does not affect interpretation of potential gender, race, or geographic influences on responses. This leaves a sample size of 68, analyzed by collapsing “Probably Not” and “No” into a single “No – decline” category, and “Probably/Seriously Consider” and “Yes” into a single “Yes – accept” category. These are shown in Table 2. The analytic decision to eliminate the middle categories from further analysis improves interpretability of the potential role of legal culture on decisive lawyer’s responses to the hypothetical vignette.

As Tables 1 and 2 show, most lawyers in the sample said they would accept the hypothetical case (about 80 percent). Yet lawyers gave varying

**Table 2.** Acceptance Rates of Hypothetical Case (Collapsed Categories).

Would You Accept This Case?	Number of Respondents
Decline	21% ( <i>n</i> = 14)
Accept	79% ( <i>n</i> = 54)
Total	100% ( <i>n</i> = 68)

reasons for accepting the case; different constellations of factors led lawyers to evaluate the case positively.

The analyses that follow show how lawyers interpreted the different case components that were presented in the vignette, beginning with the legal issues surrounding the damper and warnings, followed by lawyers' various interpretations of the conduct and other characteristics of the defendant, and then how lawyers interpreted the behavior and characteristics of the potential plaintiff. I also consider how interpretations of these case components and lawyers' acceptance or rejection of the hypothetical case are related, noting differences between lawyers in reform states and non-reform states.

## 5. INTERPRETATIONS OF CASE COMPONENTS

The main portions of the vignette were written in such a way that they could each have been interpreted in a variety of ways. I had anticipated that some lawyers would see some features as being strong deterrents to taking the case, while others would interpret those same elements more favorably. I describe the different interpretations that lawyers had of three sets of elements: (1) the legal issues surrounding the dampers and warnings; (2) the characteristics and conduct of Star Toy Corporation, the potential defendant; and (3) the characteristics and conduct of the injured child and his/her family, the potential plaintiff.

### *5.1. Warnings, Dampers, and the Legal Hierarchy of Product Safety*

The main theory surrounding U.S. products liability law is that unless a product is defective, no manufacturer or distributor of that product may be

held liable for any harm caused by that product (Dobbs, 2000). There are three primary ways that a product may be legally found defective: (1) through its *design*, meaning that every product in that line is defective or unreasonably dangerous in the same way (the Ford Pinto, for example, had a design defect, in that the gas tank for every Pinto was located near the rear bumper, causing the car to explode when impacted); (2) through its *manufacture* or production, meaning that the flaw is random, and does not affect every product in the line (for example, a single candy bar that contains shards of glass); or (3) through its *marketing* or *warnings* to consumers, meaning that if a product may be harmful when used improperly, it should contain a warning explaining proper and improper usage (a hairdryer that failed to warn about dangers when used in/near water, for example, might have a warning defect). States then have different thresholds that products must meet (or fail to meet) in order to legally be defined as defective in their particular jurisdiction.

In their evaluation of the case, the majority of lawyers made arguments as to why roller sticks should – or should not – be considered defective products under law using one of these main theories of liability. No lawyer made the argument that roller sticks had a *manufacturing* defect, since by design, *all* roller sticks are compromised by too much speed and height. Many lawyers, however, argued that roller sticks had a *design* defect, since all roller sticks without dampers could result in accidents when traveling very high or very fast. As one San Antonio lawyer explained, “Roller sticks, when operated the way they can be normally operated by children, can kill them. So that’s an unreasonably dangerous product by definition” (SA-1).

Some lawyers argued that roller sticks had a *marketing* defect. They questioned whether the warnings were “clear and adequate” as the vignette had suggested. Typically, lawyers mentioned that the wording and placement of the warnings, as well as the sophistication and comprehension of their intended recipient might all be problematic for the manufacturer, as this Denver lawyer suggests: “What’s a clear and adequate warning? Is that a clear and adequate warning to a twelve-year-old, or the twelve-year-old’s parents?” (D-19). For this lawyer, the very definition of “clear and adequate” warning depends on who is the intended reader of the warning. A San Antonio lawyer echoes this concern about the intended audience and elaborates on other issues that warnings raise. He says,

Even if a product has warnings, those warnings need to take into account the factors of readability, visibility and target audience. In other words, are the warnings the type a user is prone to see, understand, and follow. The last point can be difficult, but there are some instructions that, if followed, would make the product unusable. The manufacturer

knows nobody is going to follow such a warning, and putting it on the product does not shield them from liability if they know the product is going to be used in a fashion that is customary for the product, even though the directions say otherwise. (SA-4)

Several other lawyers voiced similar concerns about warnings that will not be followed due to incompatibility with the use of the product (e.g., a diving board which warns users to “not dive”), thus making the warnings “useless” and “ineffective” safety improvements.

Many of the lawyers found the warnings issue attractive because of the “engineering hierarchy” of product safety. This hierarchy says that manufacturers should do their best to eliminate risks associated with products, which they can do in a variety of ways, as this Philadelphia lawyer explains:

If a product has a risk, the first thing you do is design the risk out. If you can't design the risk out, you install a guard on the product that prevents people from being exposed to the risk. If you can't install a guard, then you warn about the risk. (P-16)

For manufacturers, warnings are the simplest, cheapest, and some lawyers would argue, least effective way to make a product safe, while designing a risk out of the product is the most difficult and typically the most expensive. One reason that designing risk out of a product is so difficult, as many lawyers pointed out, is due to the importance of retaining a product's utility. Several gave examples of products in which designing out a hazard compromised the usability of a product, as did this Boston lawyer: “We can design the hazards out of a fan if we take the blades off, but now it doesn't work anymore as a fan” (B-10). Instead, he explained, fan makers *guard against* risk by putting cages around the blades and/or manufacturing blades out of rubber so that fingers and hands cannot be accidentally amputated.

For a safer alternative to be considered reasonable, it must be both practical and financially feasible. Many products carry some risks that cannot be designed away or guarded against in a practical or feasible manner. A Philadelphia lawyer shows this dilemma using the example of an automobile:

I can make a car that will never allow any occupant to be injured in any accident. I'll just build it like a Sherman tank. I can do it. I can make it out of heavy gauge steel, I can put plates around it, and that person will never be hurt. Any product [can be safe] if you go crazy enough. But it's no longer functional, and people can't buy it because it's so expensive. So . . . it's an issue. The cost of safety and improvements is a factor. (P-16)

In the vignette, dampers were presented as a way in which to guard against the risk associated with roller sticks, and they increased the purchase price of the toy from \$150 to \$200. Some lawyers saw the dampers as

a reasonable, affordable alternative, while others believed that the dampers both changed the utility of the product and raised the cost of the roller sticks so much that it was not a practical, financially feasible alternative.

Contrast the following statements made by two Boston lawyers. The first argues that dampers are not a reasonable solution to the risks associated with roller sticks because of the significant price increase and because consumers did not respond to the safer design, while the second thinks nothing of the increase in price:

I'm sensitive to the fact that this particular safety device dramatically raises the price of the product and so that concerns me. Most safety devices that I have come in contact with are small, increase the product's price by a very small fraction. This is obviously a significant increase ... My biggest reservation is the cost because it's going to increase the price of the product by one-third, and that's a big chunk. And apparently ... there has been some effort by some manufacturers to market the device with dampers and they've gotten burned by it, so I think that is significant. (B-13)

I certainly would not reject it out of hand because of this idea that the safety device would cost fifty bucks. Or that thus far the marketing of the safety device has not been effective ... This defense of the high cost of the safety device and its unacceptability, I've dealt with on numerous occasions. And it's very much a by-product of the marketing of the device itself. In other words, if they sell it as a safe device, if they sell safety as an important factor, ... then there will be greater acceptability. Most people are concerned about the safety of their children. Any failure of the market with respect to increased costs for a safety device that may protect a child is usually due to the fact that the company has not marketed well the idea of safety ... So even if I learned about these problems during the case, even if I learned this was the defense, I'm not buying it. (B-14)

These two different perspectives on the practicality and feasibility of the dampers come from lawyers who both practice in the same city. Previous studies of tort reform and the legal profession suggest that such changes in the legal environment lead to changes in lawyers' behaviors. The implicit assumption is that lawyers working in states with tort reform (and the accompanying social and cultural changes) behave similarly to other lawyers in their states and differently from lawyers in states without tort reform, including how they screen cases. As a result, the expectation is that lawyers within each city would have highly similar perceptions of the various components of the hypothetical case. While there were disagreements on the issue of feasibility of the dampers in all four cities (lawyers who accepted the case, regardless of reform status, were more likely to see the dampers as feasible), as well as disagreements about the adequacy of the warnings, and the conduct of both the defendant and the plaintiff, within subsamples of lawyers from particular cities, there were also patterns of overall differences between lawyers in reform versus non-reform states. I discuss each of these

below, including their implications for acceptance of the case and access to justice.

#### *5.1.1. Roller Sticks as Legally Defective*

U.S. states have different definitions of product safety and different thresholds that manufacturers must meet to not be liable for any harm their products may cause. Pennsylvania courts, for example, instruct jurors that products are defined as defective under state law under the following conditions:

The Manufacturer, Distributor, Wholesaler, etc. of a product is the guarantor of its safety. The product must be provided with every element necessary to make it safe for its intended use, and without any condition that makes it unsafe for its intended use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for its intended use, or contained any condition that made it unsafe for its intended use, then the product was defective, and the defendant is liable for all harm caused by the defect. (Pennsylvania Suggested Standard Civil Jury Instructions § 8.02)

A number of Philadelphia lawyers mentioned this law, which is generally interpreted as being tough on corporations and very favorable to plaintiffs. Consider the remarks of P-2. When asked if he would accept the hypothetical case, he replied, "That's easy. I'll take that case in a minute." Among other reasons he gave for his enthusiasm for the case was his restatement of the jury instructions given above:

The test for defective products under our Supreme Court's decisions is if the item lacked any feature that would have made it safer, and that the safety device was known and feasible. That makes a defective product, that's all I need ... Pennsylvania law is that the product is on trial, the actor's conduct is not. Contributory negligence is not a defense. You want to look at this product and say, if this product had a fixed damper to it that was part of the product, and couldn't be removed, this accident never would have happened. That's the way it should have been sold, and that's the only way it could have been sold safely. And that's it. Whatever the 12-year-old did or didn't do has no relevance whatsoever to this. (P-2)

This lawyer, and many others in Philadelphia, interpreted the law as being on his side. For him, the case is simple: the law requires safety features, the roller stick lacked a safety feature, therefore the product is defective.

In contrast, a recent tort reform in Colorado provides that "a product liability action may not be taken if the product was improperly used or if the product provided warning or instruction that, if heeded, would have prevented the injury, death, or property damage" (Colorado Product Liability Reform, SB 03-231, 2003). Unlike in Pennsylvania, where the

**Table 3.** Reform Status and Case Acceptance.

Case Disposition	Reform State	Non-Reform State
Declines	26% ( <i>n</i> = 9)	15% ( <i>n</i> = 5)
Accepts	74% ( <i>n</i> = 25)	85% ( <i>n</i> = 29)
Total	<i>n</i> = 34	<i>n</i> = 34 $\chi^2 = 1.425$

\**p* < .05, \*\**p* < .01, \*\*\**p* < .001.

product had to be rendered safe, in Colorado, warnings can be interpreted as an “absolute defense.” Warnings absolve product manufacturers of all liability under all circumstances, provided that the warnings can be followed. Laws such as these are generally interpreted to be more favorable to corporations and less so to plaintiffs.

Given such differences in states’ orientations to products liability cases, dramatic variation in the acceptance of the vignette based on whether a lawyer is practicing in a reform or a non-reform state is to be expected. Table 3 presents the relationships between acceptance rates and reform status.

As Table 3 shows, tort reform alone does not predict whether lawyers accept the case described in the vignette. While lawyers in non-reform states appear to be more likely to accept the case than those in the reform states, the differences between the two are not statistically significant.

### 5.2. Characteristics and Conduct of the Defendant

Just as lawyers interpreted the legal defectiveness differently, lawyers also interpreted the characteristics and conduct of the defendant in different ways. These interpretations were not always consistent within single cities, or even within the distinction between reform and non-reform states. Most lawyers commented one way or another on either the characteristics of the defendant (Star Toy Corporation), the conduct of the defendant, or both.

A number of lawyers commented – or made implicit assumptions about – the size of Star Toy Corporation. Generally lawyers assumed Star to be a large corporation, which, in their eyes, is a better defendant to have, as this San Antonio lawyer explains:

The most practical consideration of all of this is, what are their assets? Is it a mom and pop operation? The fact that there are European sticks, maybe made by Star too, leads

me to believe that it's a big corporation. Because obviously, this child, her injuries are way off the scale. So it's a multi-million dollar potential recovery. If it's a mom and pop company that doesn't have anything going for them, it'd be just like chasing, it'd be like trying to get blood out of a turnip. The most practical consideration is, what kind of assets and what kind of insurance coverage does Star have? (SA-17)

Lawyers preferred Star to be a large corporation because they believe that a larger recovery is more likely than with a small company because of financial holdings and assets. Moreover, some believed that there were likely several large corporations that could be sued in the case:

There's probably a number of deep pockets to sue. There's the Star Toy Corporation. There's probably somebody else who distributed it. There may be parts that were manufactured by another company that sold them to Star. There may be, whoever sold it – whether it's Wal-Mart or K-Mart, or Target, whoever she bought this from. It could be in the line of distribution, so there's a *number* of potential defendants to sue. (D-8)

In this reasoning, even if Star Toy was not a large, multi-national corporation, there are likely some “deep pockets” to be found somewhere in the case. One Boston lawyer, combining both arguments made above, hypothesized that the case might be more successful by going after the retailer rather than the manufacturer, since retailers increasingly have a great deal of influence over the pricing of products. He says,

You may have a better argument here arguing against the retailer. I'm thinking of a Wal-Mart or some big huge company where the money is just unbelievable and *they* are the ones that are dictating if these things have dampers on them or not, because they want to sell them at a certain price point, and they don't care about anything except the price point ... They wanted volume sales, and *that* a jury can identify with ... If it was a mom and pop operation [selling the product], even though the mom and pop organization is doing everything for the same reasons that Wal-Mart is doing it, you wouldn't get the chance ... They'd have no economic coercion over the manufacturer to tell them to sell them cheaper one versus the more expensive one. I mean, once it's in the marketplace, who can make them the fastest wins. And the retailer pretty much decides what they pay. (B-17)

But generally, lawyers focused less on the characteristics of Star Toy Corporation, and more on the corporation's conduct. By far, the most common way in which lawyers talked about the behavior of Star was by making a morality-based argument as to why the corporation's actions and motives would make a jury angry: lawyers argued that the Star Toy Corporation acted irresponsibly by choosing to prioritize their bottom line over the safety and well-being of American children. As one San Antonio lawyer put it, “There was obviously an alternative design, but because of the economics involved, they wouldn't profit as well. Profits over safety ... I think [the case] has a good piss-off factor” (SA-8). Lawyers liked

the presentation of the hypothetical case because it allowed them to paint a dark portrait of Star, and a number of lawyers peppered their evaluation of Star's behavior and duty with emotional appeals and remarks to an imagined jury, as did this Denver lawyer:

They can obviously design the hazard out with a safety device. They did so when the law required them to do so. When the law had made no such requirement of them, they eliminated that safety device ... But I think you got the jury, you got a lot of factors in any case that you take is their anger. Is their anger here? And I think the anger is, they're selling it to Europeans with this safety device and they're dumping their unprotected product on Americans. Americans! We're in America! I think it has great jury appeal ... The jury is going to get angry. If there's a law, they'll abide by the law to make it safe. But if the law doesn't make the manufacturer make the product safe, then they're not going to do it. (D-19)

Over half of the lawyers I interviewed (54 percent,  $n = 44$ ) made an argument about corporate social responsibility(CSR) and what they believed to be Star's poor choices. Following this line of reasoning, it is not making a profit or the nature of the roller stick itself that makes Star liable, but because they prioritized profit over safety by providing only a warning about the dangers involved rather than doing something more tangible about it. The following Philadelphia lawyer explains this argument in greater detail, and extends the argument to automobiles – should auto manufacturers, he asks, be allowed to save money on safety features by just adding warnings to cars?

In this scenario the industry decided [they're] not going to put this safety device on because [they] care more about money than about kids ... So they will sacrifice these kids at the altar of profit and I think that is wrong. You cannot have a feasible safety device that's going to prevent it and not put it on there because of money. I think that's morally wrong. You go tell this little paralyzed girl we had a safety device that would have protected her ... A warning is generally and usually a poor excuse for bad design. So, using this analogy in this case, car manufacturers shouldn't give you seat belts, airbags, bumpers that reduce the force of an accident, shatter-proof glass, they should give you none of that. They should just give you a warning – hey you could get hurt in an accident. You could get killed. If we put in an airbag and seatbelts it's going to cost us more money. We won't be able to sell as many cars. Tough luck! Your kid gets paralyzed even though we could have put in an airbag or a seatbelt. Tough luck for your kid. I think that's wrong. I think that's dead wrong. (P-20)

A number of lawyers made similar arguments, likewise filled with passionate anger about Star's behavior, as does this Denver lawyer, who also invokes the legal hierarchy of product safety discussed previously:

American manufacturers have chosen not to put [dampers] on their machines even though they're successful [at preventing injuries]. They sell them as options, and they

know if they sell them as options people won't buy them. And they know that they're going to have cases like this. The question is not whether you're gonna have injuries, the question is when and where. It's a given. You're going to have injuries, they know it, and yet they are selling these products without safety devices. And they've made a conscious choice, knowing that they're going to face litigation. And they say, 'screw it.' That's what they've done here in this hypothetical. They said, 'We'll face the litigation because we think we can make enough profit.' Despite the fact that there is going to be a trade-off of dead and seriously injured children. And it is absolutely gross for them when they have a guard that is available. But instead of putting that on the machine, they put a warning on when they know damn well that the warning is going to be ineffective. They have a duty. They have duty when they have a product that is foreseeably hazardous – to design out that hazard if they can economically and ecologically do so. If they can't do that they have a duty to put a guard on it if they economically and ecologically can do so, which they can here. And thirdly, and *only if* they can't do the first two, should they use a warning. (D-5)

So how well does this argument predict lawyers' willingness to accept the hypothetical case? Table 4 presents results of case selection for lawyers making – or not making – arguments about CSR, regardless of reform status.

The results are striking. While making *no* argument about CSR makes little difference in case selection, *making* the CSR argument is significantly associated with case acceptance. Only a single lawyer (among 40) who argued that Star was irresponsible declined the case anyway.

Table 5 shows the interactions between a state's tort reform status and the CSR argument. The first panel presents results from reform states, whereas the second looks at CSR in non-reform states.

Analyzing acceptance rates separately by reform status shows that lawyers in *reform* states dominate in the observed pattern of accepting cases when arguments of corporate responsibility are made. Every reform state lawyer who made an argument about CSR accepted the case. More lawyers in non-reform states make no CSR argument, although that does not appear

**Table 4.** Corporate Social Responsibility and Case Acceptance.

Case Disposition	CSR Argument	No CSR Argument
Declines	2.5% ( <i>n</i> = 1)	46% ( <i>n</i> = 13)
Accepts	97.5% ( <i>n</i> = 39)	54% ( <i>n</i> = 15)
Total	<i>n</i> = 40	<i>n</i> = 28
		$\chi^2 = 19.44^{***}$

\**p* < .05, \*\**p* < .01, \*\*\**p* < .001.

**Table 5.** Corporate Social Responsibility and Case Acceptance by Reform Status.

Case Disposition	Reform States		Non-Reform States	
	CSR argument	No CSR argument	CSR argument	No CSR argument
Declines	0% ( <i>n</i> = 0)	56% ( <i>n</i> = 9)	5% ( <i>n</i> = 1)	33% ( <i>n</i> = 4)
Accepts	100% <sup>a</sup> ( <i>n</i> = 18)	44% ( <i>n</i> = 7)	95% ( <i>n</i> = 21)	67% ( <i>n</i> = 8)
Total	<i>n</i> = 18	<i>n</i> = 16	<i>n</i> = 22	<i>n</i> = 12
	$\chi^2 = 13.77^{***}$		$\chi^2 = 5.13^*$	

\**p*<.05, \*\**p*<.01, \*\*\**p*<.001.

<sup>a</sup>Notably, 39 percent of reform state lawyers who made a CSR argument and who accepted the case (*n* = 7), and 29 percent (*n* = 2) of reform state lawyers who accepted the case without making a CSR argument did so believing that they had a very strong chance of losing. Only one lawyer in the non-reform states accepted the case thinking that they could very well lose.

to have a significant impact on their likelihood of accepting or declining cases. The pattern of overwhelmingly accepting cases where CSR arguments are made is evident among lawyers in non-reform states as well. Comparing lawyers from reform and non-reform states on the CSR factor indicates that they behave in broadly similar ways: when they argue that the Star “behaved badly,” lawyers were likely to take the case regardless of their state’s reform status.

Of course, not all lawyers made an argument about morality or CSR. Many lawyers instead focused on the characteristics and conduct of the potential plaintiff in the vignette, the 12-year-old child and his or her family.

### 5.3. Characteristics and Conduct of the Plaintiff

Of each of the core case components that I have discussed (legal issues surrounding the dampers and warnings, conduct of the defendant), none received as many mixed interpretations as did the conduct of the potential plaintiff. As they tried to guess how a jury would react to the case, lawyers were split as to whether the child would be perceived as blameless or as essentially at fault for the accident.

A number of lawyers felt that the age of the victim would work in their favor by eliciting sympathy from a jury. As one Denver lawyer explained, “A child is always a desirable plaintiff. It’s very difficult for a jury to dislike any child.” She further explained that while victims are often blamed for

contributing to their own injury, “none of it applies to kids. They get the presumption of goodness and innocence in the minds of the jury and in the minds of the defense lawyer” (D-8). Many lawyers told me that the age of the child was a very significant factor for them in the evaluation of the case. “Now if you gave the same facts with an adult,” a Boston lawyer told me, echoing the statements made by several others, “that would be a different story. I would expect the adult to read the warning. I would not expect a 12-year-old [to do so]” (B-7).

A few lawyers also made gendered arguments about the desirability of the case. For some, a paraplegic girl was an especially good client because of the loss of the chance of future motherhood, making her even more sympathetic to a potential jury, as this Philadelphia lawyer explains:

This little girl's going to be a sympathetic plaintiff. She's got a horrible injury, paralysis from the waist down. She won't have a normal life. She won't have a normal marriage. And she won't be able to bear children, probably. It's going to be a horrible future that she's going to have, and she deserves fair compensation for that. (P-5)

In addition, some lawyers made gendered arguments with regard to boys. Not only can children be “forgiven” for not reading warnings, but this is especially true for boys, some lawyers said, making a “boys-will-be-boys” argument. “He's not like you and I who are full-grown adults and we can make up our own minds as to whether we want to accept that risk,” a Denver lawyer told me. “He's, you know, sort of overwhelmed by his youthful enthusiasm and the fact that every 12-year-old boy thinks that they're indestructible” (D-11).

Not all lawyers were convinced that the child's age would work in their favor. Several expressed concerns that by age 12, a child should know better and be able to behave in a more reasonable manner. As one Boston lawyer put it, “My [own] son is twelve, so I have a concept of what twelve-year-olds do and what they understand. So I don't think that the jury is going to let a 12-year-old off the hook they way they would let a 3- or a 6-year old off the hook” (B-3). In other words, this lawyer is concerned about “contributory negligence,” a legal term which means that the plaintiff is partially to blame for his or her injury (Dobbs, 2000). In some states (including both Colorado and Massachusetts), if a plaintiff is found to be more than 50 percent at fault for the injury in question, the defendant cannot be held liable or made to pay any damages whatsoever. Of the lawyers I interviewed, 42 percent ( $n = 34$ ) expressed concerns about contributory negligence. Some worried about the fault that would be assigned to the child, as B-3 expressed earlier. Others, however, were concerned that the *parents* of the child would be

blamed by a jury for lack of supervision, rather than blaming Star Toy Corporation for the lack of safety provisions. A Denver lawyer describes how he imagines a jury would react to this case. He says,

The parents would basically be put on trial for, ‘How could you let your son do this, use this dangerous device, why didn’t you read the warnings, why didn’t you monitor your son’s use? It’s really *your* fault and not the manufacturer’s.’ ... A jury would say personal responsibility should be that people should be held to warnings. And if it says don’t do something, don’t do it, and don’t hold the manufacturer responsible for doing something you’re told not to do. And if you didn’t read the warnings, that’s your own stupidity. A jury could certainly come against you on the plaintiff. (D-1)

In other words, D-1 argues that jurors in his community would not assign liability to the manufacturer of the roller stick. Instead, they would find the parents to be at fault for essentially being a bad parent – for not reading the warnings to their child, for not supervising their child’s play, or even for being the one to purchase an obviously dangerous product for their child. Thus, the behavior of the plaintiff, like the behavior of the defendant, and the meaning of the dampers and warnings, is fraught with multiple meanings and interpretations by the legal actors who must evaluate them.

When lawyers described their concerns over “personal responsibility,” that is, whether a jury would believe that the client was partially to blame for his or her injuries, it appeared that such a belief would be strongly associated with declining the case. If lawyers believe that a jury will find their client responsible for their own injury, it makes sense that they would decline the case. For example, a Denver lawyer suggests that the issue of personal responsibility makes the hypothetical a “case [that] could easily be lost” (D-9). Believing that jurors would prefer to place responsibility on the parents of the child rather than on the manufacturer in order to create distance between the injury and the possibility of a similar injury occurring to their own child, he explains,

Most jurors are looking for a way to explain how this could never happen to them or their kid. Most jurors will say, ‘Well this wouldn’t happen to me because I would have read the warnings myself.’ ‘This wouldn’t happen to me because my kid reads warnings.’ ‘This wouldn’t happen to me because my kid wouldn’t do this excessively.’ ‘This wouldn’t happen to me ... blah, blah, blah, blah, blah.’ Nobody wants to embrace the fact or admit the fact that this could happen to them. It’s too scary. It’s too scary to embrace the fact that I as a juror have a 12-year-old, and next week I might have a 12-year-old that’s a paraplegic. That’s too much to emotionally handle, so everybody comes in and they try to mentally, in their own mind, explain away how this couldn’t happen to them. And when they explain how it couldn’t happen to them, they’re finding some reason why they are different than the plaintiffs in front of them. (D-9)

Given D-9's careful consideration of a potential jury's reaction to the plaintiffs' behavior, and his own admission that the case might not win, one would expect him to decline the case. Yet he did not. D-9 accepted the case, as did many other lawyers who recognized the potential for the personal responsibility argument.

As shown in Table 6, believing that a jury might find his client to be at fault seems to matter little whether or not the lawyer accepted or declined the case. It is *not* worrying about personal responsibility that is strongly associated with accepting the case. In the following tables, the presence of a personal responsibility argument indicates that lawyers raised the issue of potential responsibility by a plaintiff, while "no personal responsibility argument" means that the issue was not even raised in their discussion of the hypothetical.

Several patterns are obvious in the interaction of reform status and personal responsibility. Table 7 shows the influence of "personal

**Table 6.** Personal Responsibility and Case Acceptance.

	Personal Responsibility Argument	No Personal Responsibility Argument
Declines case	44% ( <i>n</i> = 12)	5% ( <i>n</i> = 2)
Accepts case	56% ( <i>n</i> = 15)	95% ( <i>n</i> = 39)
Total	<i>n</i> = 27	<i>n</i> = 41
		$\chi^2 = 15.57^{***}$

\**p* < .05, \*\**p* < .01, \*\*\**p* < .001.

**Table 7.** Personal Responsibility and Case Acceptance by Reform Status.

Case Disposition	Reform States		Non-Reform States	
	Personal responsibility argument	No personal responsibility argument	Personal responsibility argument	No personal responsibility argument
Declines	38% ( <i>n</i> = 8)	8% ( <i>n</i> = 1)	67% ( <i>n</i> = 4)	4% ( <i>n</i> = 1)
Accepts	62% ( <i>n</i> = 13)	92% ( <i>n</i> = 12)	33% ( <i>n</i> = 2)	96% ( <i>n</i> = 27)
Total	<i>n</i> = 21	<i>n</i> = 13	<i>n</i> = 6	<i>n</i> = 28
		$\chi^2 = 3.804^+$		$\chi^2 = 15.715^{***}$

<sup>+</sup>*p* < .10, \**p* < .05, \*\**p* < .01, \*\*\**p* < .001.

responsibility” in how lawyers accept and decline cases in reform and non-reform states.

Lawyers in reform states are much more likely to believe that jurors in their state might blame the victim for their injury than they were to believe that jurors would regard their victim as “innocent.” The majority of lawyers who mentioned the idea of contributory negligence were from reform states (21 reform state lawyers did so, whereas only six non-reform state lawyers did), suggesting that this mantra of the tort reform movement has certainly hit home with lawyers practicing in those states. The results suggest that lawyers in non-reform states are driving the dominant relationship between *not* mentioning personal responsibility and accepting the case. Lawyers in reform states were about equally likely to accept the case regardless of whether they mentioned personal responsibility or not.

## 6. SUMMARY AND CONCLUSION

When someone is harmed, who is ultimately responsible? Corporations that make dangerous products, or the consumers who use them? Answers to these questions have profound impacts on the case screening process and how justice is framed and experienced by lawyers in the aftermath of injury. This process, in turn, impacts the ultimate trajectory of disputes. Among the important findings in this research is that while lawyers in reform states and non-reform states were about equally likely to accept the hypothetical case with which they were presented, they approached the case in different ways, used different theories, and made different arguments in order to justify their acceptance of the case.

Lawyers in non-reform states had little concern over the jury blaming the victim for their injury, and readily accepted the case. In order for lawyers in reform states to accept the case, however, they *had* to make an argument about the irresponsibility of the product manufacturer. They had to focus on what their defendant did wrong by stressing the duty that corporations have to ensure and promote safety and well-being, especially the safety of children. The product manufacturer’s behavior had to be called into question, characterized as compromising children’s safety not out of necessity, but out of a motivation for profit and increased sales.

These findings are consistent with those from my research on the process by which lawyers screen cases and clients (Trautner, 2006). There I argued that tort reform leads plaintiffs’ lawyers to change the party on which they select cases, from a focus on plaintiffs to a focus on the defendants. Because

tort reformers have been successful in linking corporations and victimhood in a narrative that focuses on runaway juries and astronomical damage awards, to win cases in a reform state lawyers believe that it is corporate defendants that must be shown to be villains, *not* victims. Plaintiff's lawyers appear to be responding less to changes in law than to perceived changes in public attitudes and beliefs. Thus, plaintiff's lawyers want cases in which defendants can be easily shown to have been bad (negligent) and both legally and factually responsible for the outcome (liability). The important change is a shift from a traditional focus on plaintiffs to a new focus on defendants. The findings from this analysis are consistent with other findings that emphasize the characterization of defendants as critical to lawyers in reform states. Every reform state lawyer who made an argument about CSR accepted the case. However, there was no discernable pattern that distinguished reform state lawyers with regard to personal responsibility.

What, if any, are the implications for these different styles of case screening for the broader questions of how lawyers mediate access to the civil justice system? If lawyers are accepting roughly the same number of cases in reform and non-reform states (an arguable claim, to be sure), and are even accepting some of the same kinds of cases, as I have shown here, does it make any difference if they are doing so using different approaches and theories of liability?

One thing I have tried to show is the importance of studying lawyer decision-making and the case screening process comparatively. While scholars have long recognized the importance of legal environments for organizational and individual decision-making (e.g., Edelman, 1990, 1992; LoPucki, 1996; Sutton, Dobbin, Meyer, & Scott, 1994), and the effects of tort reform on lawyers' practices and access to justice (Baker, 2005; Daniels & Martin, 2000, 2001; Haltom & McCann, 2004; Van Hoy, 1999), most previous studies of personal injury lawyers and case screening have focused on lawyers in only one city or state (Daniels & Martin, 1999, 2000, 2001; Kritzer, 1997, 2004; Parikh, 2001; Van Hoy, 1999). Although Van Hoy (2004) argues that such studies are helpful because such analysis avoids getting bogged down in jurisdictional details, there are several obvious merits of comparative studies like the one I conducted.

Plaintiffs' trial lawyers across the United States, regardless of legal regulations or jurisdiction, screen cases carefully and attempt to accept "winnable" cases and decline "non-winnable" ones. Analyzing lawyers' responses to vignettes, I show that if acceptance rates alone are considered, lawyers do seem rather similar across jurisdictions. But as I have shown here and elsewhere (Trautner, 2006), how lawyers define cases as "good" and

“bad” varies significantly by legal environment. The lack of comparative design in many previous studies appears to have masked some of the localized subtleties and nuances of lawyers’ approaches to case screening, as well as the effects of tort reform on the case selection process. Comparative analysis that holds particular background “facts” comparable (as using vignettes does in this contrast between lawyer’s case selections in reform and non-reform states does) can demonstrate how localized legal environments shape the ways lawyers frame cases. Beyond issues of case selection, those ways of framing cases and presenting them to juries can have dramatically different effects on the success, value, and overall impact of the case to the vitality and health of tort law in general.

To return to a theme raised earlier, this study also addresses the general disputing process. Fewer cases leave the lawyer’s office than come into it, but we know very little about how that winnowing process occurs – especially from the perspective of lawyers themselves. I have tried to fill this gap. Understanding more about what happens in the office – that lawyers frame cases in ways they expect to appeal to what they believe the jury will find compelling in the context of their own localized legal cultures matters, both analytically and substantively. In reform states, that means lawyers frame their cases by downplaying sympathy and characteristics of the client and emphasizing the social irresponsibility of the defendant. In non-reform states, cases are framed by appealing to emotion, either by orchestrating sympathy for the plaintiff or by making a jury angry at the irresponsibility of the defendant.

My findings also suggest that more research is needed on the relationship between the practices of personal injury lawyers and a more complex and nuanced idea of legal environments. Following the work of Edelman (2008) and Edelman and Suchman (1997), among others, the legal environments of organizations (including law firms) are composed of more than legal rules and the direct cultural changes that accompany them. Lawyers and law firms interact with and interpret those legal rules in ways that transform the laws in action. As organizations respond to laws and legal changes, that is, they are simultaneously constructing new legal regimes and new institutionalized norms. I have begun to show here how lawyers actively construct the meaning of tort law and tort reform through their practices, including case evaluation. Formal changes to tort law, such as caps on non-economic damages, do not carry with them prescriptions of how lawyers are to respond to a newly enacted legal culture. Rather, lawyers give tort reform meaning through their interpretation of and response to those legal changes.

## NOTES

1. I use “tort law” and “personal injury law” interchangeably. “Tort law” is a broad term that encompasses a wide range of wrongs, not all of which are physical. As Dobbs (2000) says, “Tort law is more than injury law because it includes rules for wrongs that cause economic and emotional injury even when no physical harm of any kind has been done” (pp. 9–10), for example, slander or libel. In contrast, people usually refer to “personal injury law” as the portion of tort law which deals directly with physical injuries caused by another (Dobbs, 2000).

2. Dobbs (2000, p. 1052) lists several activities that diminish one’s quality of life, such as no longer being able to “see a sunset, or hear music, or engage in sexual activity.”

3. Two lawyers did not receive the vignette due to time constraints, and neither responded to follow-up emails requesting their evaluation of the hypothetical case.

4. The vignette was written for a law school torts examination by Harry S. Gerla, Professor of Law, University of Dayton, who generously gave me permission to use the case in my interviews with lawyers.

5. Four different children’s names were used in the vignette, which were then randomly assigned to lawyers. The names used were Greg or Anne Baker, or Tyrone or Tamika Jackson. These particular names were chosen based on previous research on names and labor market discrimination (Bertrand & Mullainathan, 2003).

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