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Asymmetric Information and the Selection of Disputes for Litigation

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ASYMMETRIC INFORMATION AND THE SELECTION OF DISPUTES FOR LITIGATION

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I. INTRODUCTION

WHAT explains the decision to litigate rather than settle a dispute? The standard theoretical approach to this question is a contract model that suggests that parties will litigate when the set of mutually beneficial settlement agreements—that is, the contract zone—is empty.[1] The contract zone may be empty because the parties have divergent expectations of the trial outcome or because one party has more at stake than the other.[2] The divergent-expectations explanation suggests that there are general respects in which litigated disputes differ from settled disputes and that one need not know the identities of litigants or the specific area of litigation in order to understand the differences between litigated and settled disputes. The differential-stakes explanation implies that such information is necessary.[3]

The divergent-expectations theory of selection was developed in large

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[1] The standard model was developed in William M. Landes, An Economic Analysis of the Courts, 14 J. Law & Econ. 61 (1971); John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279 (1973); and Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973).

[2] See, for example, Richard A. Posner, Economic Analysis of Law 524–25 (3d ed. 1986).

[3] For example, in order to use the differential-stakes theory to explain litigation patterns, one will need to know whether the litigants are "repeat players" or "one-shot" litigants. For discussion of these types of litigant and the differential-stakes theory generally, see Marc Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc. Rev. 95 (1974).

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part by George L. Priest and Benjamin Klein.[4] It predicts that plaintiffs should win roughly 50 percent of their cases because the ones that are litigated are those in which the outcome is most uncertain. In this set of cases, the frequency with which plaintiffs win should be the same as the frequency with which an unbiased coin will land "heads." Win rates that diverge from this 50 percent prediction can be explained by differential stakes or by other factors specific to the litigants or the area of litigation.

The evidence in favor of the 50 percent plaintiff win rate prediction is subject to debate.[5] Priest and Klein found evidence that supports it. William Baxter, who looked at antitrust cases, and Theodore Eisenberg, who examined federal court cases, rejected the 50 percent hypothesis.[6] Although the evidence is inconclusive, no alternative theory has been proposed that suggests that win rates should, in general, be greater or less than 50 percent.

This article presents a theory of the selection of disputes for litigation that, like the Priest-Klein analysis, does not require information on the identities of litigants. I show that win-rate patterns can be explained by the informational requirements of the relevant legal standard. In areas where the law requires information on the defendant's level of compliance with a legal standard and where defendants have more information on this than plaintiffs do, win rates will be low (that is, below 50 percent). If neither party has an informational advantage (the Priest-Klein model), a 50 percent win rate should be observed. Alternatively, if the legal test does not require information on the defendant's level of compliance or if the plaintiff has the informational advantage, a high win rate may be observed.

These results can be explained intuitively. Suppose that the legal test concerns the defendant's level of compliance with a legal standard and that the defendant has more information on her level of compliance than

[4] George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984); George L. Priest, Measuring Legal Change, 3 J. L. Econ. & Org. 193 (1987). An earlier discussion that anticipates the core of the Priest-Klein hypothesis can be found in William Baxter, The Political Economy of Antitrust: Principal Paper by William Baxter (Robert D. Tollison ed. 1980). For extensions of the selection model, see Donald Wittman, Is the Selection of Cases for Trial Biased? 14 J. Legal Stud. 185 (1985); Donald Wittman, Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data, 17 J. Legal Stud. 313 (1988).

[5] The plaintiff win rate is the number of disputes won by plaintiffs divided by the number of disputes. Hereafter, I will use "win rate" instead of "plaintiff win rate."

[6] William Baxter, *supra* note 4, at 23; and Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. Legal Stud. 337 (1990).

does the plaintiff.[7] As a result, the defendant has a sharper estimate than does the plaintiff of the likely outcome of a trial.

It follows that the guilty defendant will be relatively pessimistic (compared to the plaintiff) and the innocent defendant will be relatively optimistic about the outcome of a trial.[8] Assuming settlement is cheaper than litigation, disputes in which the contract zone is empty will involve only innocent defendants. Thus, guilty defendants will be more likely to settle than innocent defendants. Litigated cases will tend to oversample from the pool of innocent defendants. Thus, the selection effect predicts a tendency for litigation (where defendants have the informational advantage) to involve innocent defendants.

Another issue raised by this article is why litigation ever occurs. I argue that strategic behavior is a necessary condition for litigation. The reason is simple. Consider (again) the case in which the defendant has the informational advantage. If parties did not behave strategically, then the defendant's refusal to accept a settlement demand that falls within the contract zone for a guilty defendant would reveal her innocence. The parties would then settle on terms that reflect the defendant's true status. Thus, strategic behavior is central to any attempt to explain patterns of litigation.[9]

If parties behave strategically, it is unlikely that, in equilibrium, innocent defendants would reveal themselves by being the only ones to reject settlement demands within a certain range. In any such equilibrium, guilty defendants would have an incentive to reject similar settlement

[7] In the model presented in Priest and Klein, *supra* note 4, which is the most rigorous presentation of the standard model, neither party has an advantage in predicting the outcome of trial. Although Priest and Klein do not address this issue explicitly, the assumption underlying their model seems to be that the defendant does not have an informational advantage. Alternatively, the Priest-Klein model assumes any informational advantage possessed by the defendant cannot be used to make a more accurate prediction of the trial outcome.

The assumption that the defendant has an informational advantage is made in Lucian Ayre Bebchuk, Litigation and Settlement under Imperfect Information, 15 Rand J. Econ. 404 (1984); Barry Nalebuff, Credible Pretrial Negotiation, 18 Rand J. Econ. 198 (1987); I. P. L. Png, Strategic Behavior in Suit, Settlement, and Trial, 14 Bell J. Econ. 539 (1983); and I. P. L. Png, Litigation, Liability, and Incentives for Care, 34 J. Public Econ. 61 (1987). Although these articles have implications for the selection literature, they do not offer predictions concerning the win rate of plaintiffs in trials.

[8] For simplicity, the defendant who has violated the legal standard will be referred to as "guilty," and the defendant who has not violated the legal standard will be referred to as "innocent."

[9] See Robert Cooter & Stephen Marks, with Robert Mnookin, Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. Legal Stud. 225 (1982).

demands in order to appear innocent. It follows that the pool of defendants who reject settlement demands will include innocent and guilty defendants but that the innocent most likely will outnumber the guilty.

In sum, two propositions predict that litigation in which the defendant has the informational advantage will oversample innocent defendants. First, disputes in which the contract zone is empty will involve only innocent defendants. Second, the likely equilibrium of the settlement-negotiation process will be one in which the true status of defendants is not revealed. Given the predicted oversampling of innocent defendants in the pool of defendants who litigate, the win rate of plaintiffs should tend toward the probability of an erroneous verdict for the plaintiff (type II error). In this set of disputes, therefore, one should expect to find low win rates.

I also present a brief discussion of some of the evidence on win rates. I find that the predicted low win rates where defendants have the informational advantage is consistent with Eisenberg's data from federal court cases and with studies reporting the behavior of win rates over time in product-liability, antitrust, and employment-discrimination cases.[10]

Two additional implications of the model are discussed. One is that, in areas where the defendant has the informational advantage, attorneys' estimates of the likelihood of the plaintiff winning—which, on average, will be accurate if they make rational forecasts—will be greater than objective measures of the win rate. This may explain the simultaneous occurrence of low win rates in malpractice and product liability and reports of widespread fear of being sued in these areas. The second implication concerns doctrinal change. The selection model probably provides a better explanation of some perceived doctrinal shifts than a model that attributes change to the efforts of judges.

This article is organized as follows. Section II presents the model, which extends the standard litigation model by taking into account informational constraints and efforts to rationally predict trial outcomes. I develop conditions under which litigation (where defendants have the informational advantage) tends to oversample innocent defendants. Section III discusses the evidence supporting the selection model presented. Section IV discusses additional implications of the model.

[10] On product liability, see James A. Henderson, Jr., & Theodore Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479 (1990); on antitrust, see Steven C. Salop & Lawrence J. White, Private Antitrust Litigation: An Introduction and Framework, in Private Antitrust Litigation (Lawrence J. White ed. 1988); on employment discrimination, see Peter Siegelman, The Influence of Macroeconomic Conditions on Plaintiff Win Rates in Unpublished Federal Employment Discrimination Cases (American Bar Foundation, Working Paper No. 9012, 1990).

II. Theory

A. *Standard Litigation Model*

In the standard model of litigation,[11] the plaintiff's minimum settlement demand is equal to

$$P_pJ - C_p, \tag{1}$$

where P_p is the plaintiff's estimate of the probability of a verdict in his favor, C_p is the plaintiff's expected cost of litigating, and J is the size of the damage award if the plaintiff wins.[12] The defendant's maximum settlement offer is

$$P_dJ + C_d, \tag{2}$$

where P_d is the defendant's estimate of the probability of a verdict in favor of the plaintiff. It is assumed that C_d, C_p, and J are fixed amounts that are known by both sides. Since J is given, the stakes for the sides are the same.[13]

A sufficient condition for litigation to occur is

$$(P_p - P_d)J > C_p + C_d. \tag{3}$$

Condition (3) implies that no mutually advantageous settlement can be arranged between the defendant and the plaintiff because their beliefs differ too much relative to the costs of litigation. If parties always settle whenever settlement is mutually advantageous, then condition (3) is also a necessary condition for litigation.

An additional requirement is that the plaintiff's threat to litigate must be credible.[14] If the plaintiff's threat to litigate were not credible, the defendant would not have an incentive to make a positive settlement offer in response to the plaintiff's settlement demand. The plaintiff's threat to

[11] See the articles cited in note 1 *supra*.

[12] I have assumed that the cost of settling the suit is zero.

[13] One can easily incorporate disputes in which one party has more at stake than the judgment. An example would be a defamation suit in which part of the plaintiff's gain from bringing suit is the value of being seen defending his reputation.

[14] See, for example, Wittman, Is the Selection of Cases for Trial Biased? *supra* note 4, at 186–87; Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs, 11 J. Legal Stud. 55 (1982). This requirement can be viewed as an application of the perfectness notion in game theory; see, for example, Shavell at 74. See Nalebuff, *supra* note 7, for explicit consideration of this in a formal model of the litigation process.

litigate is credible if

$$P_p J - C_p > 0. \tag{4}$$

B. *Information and Error*

Consider a dispute where the victim (plaintiff) has suffered an injury at the hands of the injurer (defendant). Assume information is asymmetric because the defendant knows whether she violated the relevant legal standard while the plaintiff does not. Let W denote the plaintiff's rational-expectations estimate of the probability that the defendant violated the legal standard, given an injury suffered at the hands of the defendant. The plaintiff bases his estimate of W on observations that are correlated with the defendant's level of compliance with the legal standard and on information concerning the probability distributions of characteristics a court would use in evaluating compliance.

Let Q_1 be the probability that a defendant who has violated the legal standard will be found not liable (alternatively, the probability of type I error). Let Q_2 be the probability that a defendant who has not violated the legal standard will be found liable (the probability of type II error). I assume that[15]

$$1 - Q_1 - Q_2 > 0. \tag{5}$$

No attempt is made to distinguish between the plaintiff's and the defendant's estimates of the error probabilities. To simplify, I assume that both estimates are the same and equal to the corresponding objective frequencies because they are based on public information.[16]

The plaintiff's estimate of the probability of a favorable verdict is

$$P_p = W(1 - Q_1) + (1 - W)Q_2. \tag{6}$$

[15] This assumption on error probabilities is made in A. Mitchell Polinsky and Steven Shavell, Legal Error, Litigation, and the Incentive to Obey the Law, 5 J. L. Econ. & Org. 99, 101 (1989). The condition embodies two assumptions: (1) that the probability that a guilty defendant will be found innocent is less than the probability that an innocent defendant will be found innocent, and (2) that the probability that an innocent defendant will be found guilty is less than the probability that a guilty defendant will be found guilty. The assumptions are reasonable accuracy requirements.

[16] For example, if the estimates of error probabilities are based on information concerning the predispositions of judges, it is assumed that this information is known to both parties. This assumption could be relaxed by allowing one party to have more information about the judge's "leanings" than the other. For discussion of the influence of information on judges' predispositions on litigation, see George L. Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399, 408 (1980).

Under the assumption that she knows whether or not she violated the legal standard, the defendant's estimate of the probability of a favorable verdict for the plaintiff is

$$P_d = 1 - Q_1 \tag{7a}$$

if the defendant violated the legal standard and

$$P_d = Q_2 \tag{7b}$$

if the defendant did not violate the legal standard.

PROPOSITION 1. If the defendant violated the legal standard, then her estimate of the probability of a verdict for the plaintiff will be greater than or equal to the plaintiff's. If the defendant did not violate the legal standard, then her estimate of the probability of a verdict for the plaintiff will be less than or equal to the plaintiff's.

The intuition supporting proposition 1 is straightforward. If the court meets the accuracy requirement in condition (5), defendants who have violated the legal standard will have a higher estimate of the probability of a verdict for the plaintiff than will the plaintiff. Similarly, defendants who have not violated the standard will have a lower estimate.[17] The reason for this result is that the plaintiff forms his prediction of the probability of a favorable verdict by averaging over two populations of potential injurers: those who would have violated the standard (discounting the estimate by the probability that type I error does not occur) and those who would not have violated the standard (discounting the latter estimate by the probability of type II error). The plaintiff's rational-expectations estimate of a verdict in his favor therefore is less than the probability that type I error does not occur (the estimate used by a guilty defendant) and greater than the probability that type II error does occur (the estimate used by an innocent defendant).

C. Litigation and Settlement

An immediate implication of proposition 1 and the sufficient condition for litigation (see [3]) is as follows.

PROPOSITION 2. The sufficient condition for litigation is never satisfied in a dispute involving a guilty defendant.

Proof. Proposition 1 implies that (3) cannot hold if the defendant is guilty.

[17] Since $1 - Q_1 < Q_2$, it follows that, for guilty defendants, $1 - Q_1 > P_p$ unless $W = 1$, and, for innocent defendants, $Q_2 < P_p$ unless $W = 0$.

Proposition 2 implies that if all litigation were determined by the nonexistence of a mutually beneficial settlement agreement, then every instance of litigation would involve a defendant who is innocent of violating the legal standard. Thus, the win rate of plaintiffs would be equal to the rate of erroneous verdicts for the plaintiff.

The difficulty with this conclusion is that it ignores the information conveyed by the settlement process. We know that the parties will always choose to settle rather than litigate if the settlement payment is below the defendant's maximum offer and above the plaintiff's minimum demand. If only innocent defendants chose litigation over settlement, then the defendant's refusal to accept a settlement demand that falls within the contract zone for a guilty defendant would reveal her innocence. A rational plaintiff therefore would revise his estimate of the probability of a verdict in his favor, so that it reflects the belief that the defendant is innocent. Since their estimates of the trial outcome then would be the same, the parties would settle to avoid the cost of litigation.[18] In short, if parties did not behave strategically, there would be no litigation. The disputes involving guilty defendants would be settled because the parties' estimates of the trial outcome—based on information available before settlement negotiations—would permit settlement agreements to occur (that is, the contract zone would not be empty). The disputes involving innocent defendants would be settled because their refusal to accept initial settlement demands would reveal their innocence.

Now introduce strategic behavior. Suppose the plaintiff starts with an initial demand D_1 that is in the contract zone only for a guilty defendant.[19] If the defendant is innocent, she will reject this demand. Surprisingly, if the defendant is guilty, she may also have an incentive to reject the demand in order to fool the plaintiff into thinking her innocent.[20] Indeed, any outcome in which only innocent defendants reject settlement demands that fall within a guilty defendant's contract zone could not be an equilibrium because guilty defendants would also reject such demands.

Given the strategic behavior of guilty defendants, the plaintiff may not reduce his settlement demand to a level within an innocent defendant's contract zone.[21] To see this, suppose the frequency with which the defen-

[18] The parties would settle (for some positive amount) if plaintiff's threat to litigate remained credible, that is, if $Q_2J - C_p > 0$. If his threat were not credible, then the plaintiff would drop his claim (equivalently, settle for zero dollars).

[19] Specifically, D_1 is greater than $[W(1 - Q_1) + (1 - W)Q_2]J - C_p$ and less than $(1 - Q_1)J + C_d$.

[20] See Png, Litigation, Liability, and Incentives for Care, *supra* note 7.

[21] A demand within an innocent defendant's contract zone would be one that is less than $Q_2J + C_d$.

dant rejects the ith settlement demand, given that she is guilty, is S_i. Equilibrium requires $S_i > 0$ for each period of the negotiation process (save the last). The probability that the innocent defendant will reject the initial demand is one. Using Bayes's rule, the probability that a defendant is guilty, given rejection of the initial demand, is $S_1W/[S_1W + (1 - W)]$. The plaintiff's initial estimate of the probability of a negligence verdict is $W(1 - Q_1) + (1 - W)Q_2$, and his revised estimate is

$$\{S_1W/[S_1W + (1 - W)]\}(1 - Q_1) + \{1 - S_1W/[S_1W + (1 - W)]\}Q_2. \quad (8)$$

Because $S_1 > 0$, the revised estimate will be greater than Q_2, and the revised minimum demand will exceed the demand that would be offered to a defendant who is known to be innocent.

The possibility of strategic behavior suggests that litigation may occur because an equilibrium will not exist in which only innocent defendants reject settlement demands (alternatively, mixed strategies are necessary). The proportion of guilty defendants who reject settlement demands may be too high for plaintiffs to rationally offer settlement demands within an innocent defendant's contract zone. In response to rejections, some plaintiffs will bring suit.[22]

Among the defendants who reject settlement demands, the proportion of innocent defendants is $S_iW/[S_iW + (1 - W)]$, and the proportion of guilty defendants is $(1 - W)/[S_iW + (1 - W)]$. It follows that among rejecters of settlement demands, the innocent will outnumber the guilty if

$$S_iW < 1 - W, \quad (9)$$

which is likely to hold generally.[23] An additional reason for predicting that (9) will hold is that rejection is a signaling device, likely to be used

[22] See Png, Litigation, Liability, and Incentives for Care, *supra* note 7. Although Png's model offers a rigorous justification for the basic claim of this section, its assumptions are restrictive. His model assumes that settlement is a two-period game in which the defendant first makes an offer and the plaintiff responds by accepting or bringing suit. An alternative model is one in which the defendant makes the last move by deciding whether to accept or reject a settlement demand. In this alternative model, it is more difficult to make sense of litigation, especially litigation involving guilty defendants. The reason is that, at the end period of the game, each defendant would accept any settlement offer within the contract zone. It follows then that only two types of equilibria could result: a pooling equilibrium in which all parties settle and a separating equilibrium in which only innocent parties litigate. Litigation against guilty defendants could be explained in two ways. One is that some plaintiffs will break off settlement negotiations and bring suit before the end period arrives. The other is that the end period is not really an end period, given the likelihood of an appeal.

[23] Note that (9) holds unambiguously for any $W < 1/2$.

strategically when it is a strong signal of innocence, which is consistent with (9).[24]

The Influence of Uncertainty. A central proposition of the Priest-Klein model of selection is that disputes in which the evidence points strongly toward either innocence or guilt are more likely to settle than those in which it does not. The proposition holds in the model presented here.

Consider a dispute in which the information available to the plaintiff suggests that the defendant was far from compliance with the legal standard. In this case, W will be close to one, and Q_1 and Q_2 close to zero. Under these assumptions, rejection of a settlement demand at best will send a weak signal of innocence to the plaintiff. The plaintiff would not have an incentive to make a substantial reduction in his initial settlement demand because, he would reason, very few innocent injurers would find themselves in the defendant's position.[25] Since the likely gain from rejecting a demand within the contract zone is very small, a guilty defendant will seldom have an incentive to use rejection strategically.

Consider a dispute in which the information available to the plaintiff suggests that the defendant did not violate the legal standard. Under this assumption, the plaintiff's threat to sue will not generally be credible, so that neither litigation nor settlement will occur. If the plaintiff's threat to sue is credible, settlement is likely. Since very few of the injurers will be guilty, rejection will be a strong signal of innocence, which implies that the plaintiff should be willing to reduce his demand to a level acceptable to the defendant.

The Influence of Legal Error. Instead of a reduction in uncertainty, consider a reduction in the likelihood of legal error. In other words, the evidence specific to each dispute is no clearer, but the court is less likely to decide incorrectly (that is, Q_1 and Q_2 approach zero). A reduction in the likelihood of error increases the distance between the expected liability of an innocent defendant, $Q_2J + C_d$, and the expected liability of a guilty defendant, $(1 - Q_1)J + C_d$. This increases the zone of acceptable settlement demands for guilty defendants and increases the zone of unacceptable settlement demands for innocent defendants. The likely result is an increase in the proportion of innocent defendants who litigate.

[24] Note that there would be no incentive for a guilty defendant to use rejection strategically when $S_i = 1$.

[25] A more precise explanation follows. The plaintiff's downward revision of P_p after rejection of the initial settlement demand will be significant only if $S_1W/[S_1W + (1 - W)] < W$. Moreover, the greater the difference between $S_1W/[S_1W + (1 - W)]$ and W, the greater will be the plaintiff's downward revision of P_p. If W is very close to one, however, the difference between $S_1W/[S_1W + (1 - W)]$ and W will be very small, whatever the value of S_1.

D. *The Selection Effect and the Win Rate*

Let n_2 represent the number of innocent defendants who litigate, and let n_1 represent the number of guilty defendants who litigate. Both the Priest-Klein model and my model suggest that litigants will be drawn largely from disputes in which the evidence does not strongly suggest whether or not the defendant has complied with the relevant legal standard. Let Q_{1m} and Q_{2m} represent the mean error rates for this set of disputes. The win rate of plaintiffs can be approximated by

$$V_p = [n_1(1 - Q_{1m}) + n_2 Q_{2m}]/N, \tag{10}$$

where N is equal to the sum of n_1 and n_2.

This model suggests that innocent defendants should be the largest category of defendants who litigate. If the selection effect operates as anticipated by this model, the win rate (see [10]) will be less than the average plaintiff's initial estimate of the probability of a verdict in his favor.[26]

Is it possible to predict whether the win rate will be less than or greater than 50 percent, or whether it will fall over time? In general, the answer seems to be no. The formula for the plaintiffs' win rate (eq. [10]) can take any value between $1 - Q_{1m}$ and Q_{2m}. Plausible conditions under which the win rate will be below 50 percent, however, can be stated. It follows from (10) that, if Q_{1m} is roughly equal to Q_{2m} and if both Q_{1m} and Q_{2m} are less than 1/2,[27] then the selection effect implies that the win rate will be less than 50 percent.

The behavior of the win rate over time can also be established. Imagine the existence of some technology that reduces the likelihood of judicial error, and suppose that it reduces the frequencies of type I and type II error at equal rates. The obvious candidate for this error-reducing technology is the stock of legal doctrine.[28] Letting Z represent the stock

[26] This follows from (6). The average plaintiff's estimate of the probability of a favorable verdict is found by averaging P_p over all plaintiffs (at each point along the evidence spectrum). But the selection process described in Sec. IIC implies that, at each point along the evidence spectrum, W (the ratio of violators to injurers) is greater than the ratio of guilty defendants to defendants because a disproportionate share of the guilty injurers settle.

[27] There seems to be no reliable data on error rates. Tullock, however, argues that a rough estimate of the "probability of error" is 1/8. See Gordon Tullock, Trials on Trial: The Pure Theory of Legal Procedure 31–33 (1980).

[28] The error rates in this model may be interpreted as measuring or reflecting the frequency of inconsistent decisions that should fall as the doctrine is elaborated. Of course, whether growth in legal doctrine caused by litigation clarifies the doctrine is a subject of debate. Out of disdain for what he perceived as inescapable ambiguity in the common law, Jeremy Bentham devoted considerable effort to lobbying in favor of a civil code that could replace it. See H. L. A. Hart, Essays on Bentham 73, 76–78 (1982). Oliver Wendell Holmes, The Common Law 111–29 (1881), argued that legal standards become clearer over time.

of legal doctrine, I assume that $dQ_{1m}/dZ = dQ_{2m}/dZ < 0$. Suppose further that Q_{1m} and Q_{2m} are roughly equal, and let the common value be Q. The effect of a small increase in Z on the win rate of plaintiffs therefore is

$$dV_p/dZ = [1 - 2(n_1/N)]\,dQ/dZ + [d(n_1/N)/dZ](1 - 2Q). \qquad (11)$$

The first term in (11) is negative because $n_1/N < 1/2$. The second term also is likely to be negative because the proportion of innocent defendants will probably increase as error rates fall (that is, n_1/N will fall as Z increases), and Q will generally be less than 1/2. Thus, the win rate of plaintiffs falls with a reduction in error if the selection effect operates as predicted by this model.

The falling-win-rate prediction can be explained intuitively: the downward trend results from a reduction in the error rate and from a change in the mix of cases coming to trial. The win rate falls as the error rate falls because the number of erroneous verdicts against innocent defendants declines. Since the selection effect implies that innocents will make up the majority of defendants, the net effect of a reduction in error is a reduction in the win rate. The mix of cases coming to trial reduces the win rate because, as error rates fall, the proportion of cases involving innocent defendants will increase. The reason for this is that, other things being equal, a reduction in error will increase the zone of acceptable settlement demands for guilty defendants and the zone of unacceptable settlement demands for innocent defendants.

Two hypotheses emerge. First, assuming that error rates are relatively small, an observation of a win rate less than 50 percent is evidence that the selection effect operates as anticipated. Second, a win rate that falls over time can be taken as weak evidence that the selection effect operates as anticipated. A related, though weaker hypothesis is that the rate at which disputes are litigated should fall over time.[29]

The reason error rates fall over time is that, as doctrine develops, fewer issues relevant to the compliance question are left entirely to the jury. In the limit, the question of compliance itself is decided by the judge according to rules that have been developed in earlier cases. For an argument that is broadly similar but focuses on incentives to litigate, see William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J. Law & Econ. 249 (1976).

[29] This is a weaker hypothesis because it is also consistent with the Priest-Klein theory. The Priest-Klein model, however, does not imply that the plaintiff win rate, in most cases, will fall over time; indeed, such an observation would be inconsistent with the Priest-Klein theory.

III. Evidence

A. Predictions

The model discussed in Section II*B* is one in which the defendant has the informational advantage. If the plaintiff has the informational advantage, its implications are reversed. Thus, the general implications of this article's theory for the pattern of win rates can be summarized as follows. (*a*) In areas in which the legal test requires an examination of the defendant's compliance with a legal standard and defendants have the informational advantage, low win rates should be observed. (*b*) In areas in which the legal test requires an examination of the defendant's compliance with a legal standard and plaintiffs have the informational advantage, high win rates should be observed. (*c*) In areas in which the legal test requires an examination of the defendant's level of compliance and neither party has an informational advantage (the Priest-Klein model), win rates of 50 percent (the Priest-Klein prediction) should be observed.

Some additional implications follow. In areas of litigation in which the defendant has the informational advantage, one should observe win rates that fall over time. Since the error rate falls over time, fewer verdicts against innocent defendants (who make up the majority of defendants) will occur, and the proportion of innocent defendants who litigate will increase. Where the plaintiff has the informational advantage one should observe rising win rates over time because, as the error rate falls, fewer guilty defendants (who make up the majority) are found innocent and the proportion of guilty defendants who litigate will increase. Where neither party has the informational advantage, a stable 50 percent win rate should be observed.

Informational distinctions often can be drawn for different categories of litigation. One distinction is between contract and tort litigation. On one hand, the informational-advantage question is likely to be less clear in the contract area because contract disputes involve issues that may give either party an informational advantage. Whether there was an intention to offer or to accept, the rules governing contract interpretation, and the doctrines of mistake, reliance, and consideration all require some examination of information that the plaintiff is likely to possess. On the other hand, some tort disputes involve only the defendant's level of compliance. In these disputes, defendants will most likely have the informational advantage. Within the set of tort disputes, further distinctions can be made. Disputes involving issues of contributory or comparative negli-

gence are not likely to be ones in which either party has an informational advantage. Thus, the prediction of low win rates should be observed in tort disputes in which compliance on the part of the defendant is the principal issue.

B. Data

Tables A1, A2, and A3 of the Appendix present the win-rate data of the Eisenberg, Daniels and Martin, and Priest and Klein studies.[30] The data are consistent with the predictions of this article's model. Eisenberg's data show that win rates are generally higher in contract disputes than in tort disputes (Table A1). The same pattern is observed comparing win rates in tort and intellectual-property cases, which are likely to be similar to contract disputes in the scope of their informational demands.

Win rates within tort disputes also are in line with the model's predictions. In Tables A1 and A2, the tort disputes with win rates consistently lower than 50 percent are areas in which only the defendant's compliance matters—malpractice and product-liability litigation.[31] Eisenberg's data seem to support the general claim that the substantial areas of litigation in which the defendant is likely to possess an informational advantage are those in which win rates are low. Antitrust, malpractice, product-liability, employment-discrimination (jobs in Table A1), and civil-rights[32] cases fall in this category.[33]

[30] Eisenberg, *supra* note 6; Stephen Daniels & Joanne Martin, Jury Verdicts and the "Crisis" in Civil Justice, 11 Just. Sys. J. 321 (1986); and Priest & Klein, *supra* note 4.

[31] Table A2 may reveal another distinction among the tort disputes: win rates are lower in negligence/contributory-negligence jurisdictions. The relatively low plaintiff win rates in the "vehicular accidents" column for the Missouri counties may reflect the fact that, over most of the period covered, these counties had a contributory-negligence system while most other jurisdictions in the sample had comparative-negligence systems. See Daniels & Martin, *supra* note 30, at 331–32. One could argue that, because the informational requirements of comparative negligence are greater (degrees of negligence must be assessed under comparative negligence, while any significant negligence on the part of the plaintiff bars recovery under contributory negligence), the data are entirely consistent with the theory presented in this article. This is not clearly supported by Table A2, however, because the data measure gross instead of net awards. It is possible that the difference between measured win rates under comparative and contributory negligence in large part reflects the method of measuring awards.

[32] The "civil-rights" cases in the Eisenberg data set include Fifth Amendment claims, actions brought under civil rights statutes (42 U.S.C. §§ 1981, 1983, 1985, 1988), and discrimination claims involving federally assisted programs (42 U.S.C. § 2000). See Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 Geo. L. J. 1567, 1574 (1989).

[33] The low win rate reported in Table A1 for antitrust cases is a consistent finding (indeed, the figure in Table A1 is higher than the level reported in most studies). Baxter, *supra* note 4, at 17, reported win rates ranging from 4.9 percent in 1964 to 22.6 percent in 1970 (the seven-year average was 15.2 percent). See also Salop & White, *supra* note 10, at 40–42.

The Priest-Klein selection model implies that win rates should be 50 percent generally, and that deviations from 50 percent can be explained by differential stakes. The data ("disaggregated" into subfields of litigation) reported in the Eisenberg and the Daniels and Martin studies seem to be inconsistent with this hypothesis, unless one believes that the vast majority of areas of litigation involve parties who have different stakes.[34] The theory presented here is consistent with the disaggregated pattern of win rates and has the advantage of not being reducible to the claim that each win rate can be explained only by litigant-specific factors. The low win rates observed in antitrust, malpractice, and civil-rights litigation are not exceptional cases that need to be explained by litigant-specific theories; these are areas in which this article's hypothesized selection effect receives its strongest support.

There are other empirical problems with the differential-stakes theory. First, although it may provide a reasonable explanation of low win rates in malpractice and product-liability litigation, it does not explain satisfactorily the low win rate in employment-discrimination cases. A doctor who is a defendant in a malpractice dispute may have more at stake than the plaintiff because an adverse judgment reflects on the quality of her service. A manufacturer shares a similar concern about her product but also the concern that an adverse judgment will lead to additional suits. Neither of these explanations seems to fit in the employment-discrimination category.[35]

The second problem for the differential-stakes hypothesis is, if it explains the low win rate in product-liability tort suits, what explains the high win rate in product-liability contract disputes (Table A1)? The differential stakes theory predicts low win rates in both product-liability tort and contract disputes. To be sure, if product-liability contract disputes largely involve breaches of an express warranty, there may be less concern that an adverse judgment will lead to a flood of litigation. Still, an

[34] It should be noted, however, that Priest & Klein, *supra* note 4, at 7, suggest that their theory probably would not apply to comparative-negligence cases. Given this, the data in Daniels & Martin, *supra* note 30, may not be inconsistent with the Baxter-Priest-Klein prediction.

[35] Of course, it is possible that a defendant who loses an employment-discrimination suit may be sued by others or may incur costs in addition to damages and legal expenses. For example, an employer who cannot use a certain standardized test because it violates the disparate-impact doctrine may experience a large increase in hiring costs. The probability of suits by similar victims or of an injunction that will increase operating costs, however, is small in the typical employment-discrimination suit—a discriminatory-discharge claim. See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983 (1991). It follows that the reputational consequences of the loss of a typical employment-discrimination lawsuit are likely to be insignificant.

adverse judgment is a negative statement about the quality of the defendant's product, and this suggests that the defendant will have more at stake than the plaintiff.

The third problem (noted by Priest and Klein) is that the differential-stakes theory does not explain the high win rate in worker-injury suits against nonemployers (Table A3).[36] The informational-asymmetry model suggests a possible reason. These injuries are likely to be influenced by the care of both parties, and, since the injurer cannot observe the plaintiff's level of care, it is possible that the plaintiff has the informational advantage.

One might argue that the fact that awards are generally higher in malpractice and product-liability suits, even though win rates are lower contradicts the informational-advantage theory. Thus, it may seem unlikely that the low win rates in these areas reflect a tendency of "guilty" defendants to settle at higher rates than "innocent" defendants. Higher awards in malpractice and product-liability cases, however, are not inconsistent with the model. First, the awards are likely to be against defendants who have violated the relevant legal standard. Second, given the high cost of litigating in these areas, it is not surprising that average awards are also high. Only plaintiffs who can claim substantial awards will have an incentive to bring suit.

An alternative explanation for the win-rate pattern in tort cases is that weaker cases are being brought in anticipation of larger awards.[37] There are several reasons to doubt this. The first, noted by Eisenberg, is that win rates are low in other areas, such as civil rights, without correspondingly high damage awards.[38] A second reason is that the incentive to bring suit does not depend only on the damage award but also on the economic return from bringing suit, which requires subtracting the cost of bringing suit from the damage award (and correcting for risk, too). Unless the economic return from bringing suit is greater in product-liability and malpractice cases—and this has not been shown—there is no reason to believe that plaintiffs have incentives to bring weaker claims in anticipation of higher awards in the product-liability and malpractice areas.

Although the Priest-Klein prediction of a 50 percent win rate may hold generally in aggregated data, it does not appear to hold when the data are disaggregated across areas of litigation.[39] The theory presented here

[36] The typical defendants in the sample are nonemployer construction companies, building owners, or architects; Priest & Klein, *supra* note 4, at 43.

[37] See Wittman, Dispute Resolution, *supra* note 4, at 313, 337.

[38] Eisenberg, *supra* note 32, at 1580.

[39] See Samuel R. Gross & Kent D. Syverud, Getting to No: New Data on Pretrial Bargaining, the Selection of Cases for Trial, and Jury Verdicts in Civil Cases (unpublished manuscript, Univ. Michigan Law School 1990).

may provide an explanation for this difference. As one aggregates win rates from several litigation fields, the influence of any type of informational asymmetry characteristic of a given litigation field is diminished. Therefore, the aggregate win rate will approximate 50 percent as predicted by the Priest-Klein model, which assumes no informational advantages.

An additional though somewhat weaker prediction of my model is that, when defendants have the informational advantage, win rates should fall over time. Few empirical studies have examined the behavior of win rates over time; however, the three studies of which I am aware—one examining antitrust,[40] another federal employment discrimination cases,[41] and the third product-liability litigation[42]—reveal that win rates have been falling in these areas after an initial period of doctrinal development. The Steven Salop and Lawrence White study of private antitrust litigation reveals that the average win rate of plaintiffs fell from 17 percent before 1974 to 48 percent in the 1980s.[43] Peter Siegelman's examination of federal employment-discrimination litigation demonstrates that the win rate has fallen from 1977 to 1988.[44] James Henderson and Theodore Eisenberg's study of federal court product-liability cases reveals that, after expansions in product liability over the 1960s and 1970s,[45] the win rate has fallen over the 1980s.[46] If the low win rates observed in antitrust, employment-discrimination, and product-liability cases are due to the selection effect, as described in this article, then the fact that these win rates have been falling provides additional support for the theory.

IV. Some Additional Implications

In addition to explaining win-rate patterns, the theory presented in this article has implications on the divergence between observed win rates and perceptions of the likelihood of plaintiff success and on theories of doctrinal change.

If the selection effect operates as described here, one should expect to find plaintiffs' attorneys more optimistic than seems warranted by objective measures of win rates in areas such as malpractice and product liability where defendants have the informational advantage. Similarly, in any

[40] Salop & White, *supra* note 10.

[41] Siegelman, *supra* note 10.

[42] Henderson & Eisenberg, *supra* note 10.

[43] Salop & White, *supra* note 10, at 40.

[44] Siegelman, *supra* note 10, at 8, 15.

[45] See, for example, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, Prosser and Keeton on Torts 692–702 (1984).

[46] Henderson & Eisenberg, *supra* note 10, at 506, 508, 525.

area where plaintiffs have the informational advantage, one should expect to find overly pessimistic assessments of the plaintiff's likelihood of winning a suit. This hypothesis could be tested by comparing the average attorneys' subjective estimate of the probability of winning, say, a malpractice suit to the objective measures of win rates in malpractice cases.

I am aware of no empirical study that compares attorneys' subjective estimates of the likelihood of winning to objective measures of win rates. Press reports and the liability literature, however, generally have reflected frequently voiced concerns over doctrinal expansion and increased litigation in malpractice and product liability even though these win rates have remained well below 50 percent.[47] This may be due to a general perception on the part of attorneys that the probability of success is relatively high in these areas in spite of low win rates, which may largely reflect settlement patterns. Indeed, Peter Huber has claimed that the "likelihood of success rose from 20 to 30 percent in a product case in the 1960s to more than 50 percent in the 1980s."[48] Since Huber could not have gotten his "more than 50 percent" figure from observations of win rates, he must have arrived at it through talking to attorneys. Huber's estimate may be a reasonably accurate description of the average product-liability attorney's subjective estimate of the probability of success.

A second implication of this article concerns legal-research methodology. Both my model and the Priest-Klein selection theory imply a potential bias in concluding from court opinions that the law in a given area is shifting to either a proplaintiff or a prodefendant stance. The selection process implies that the deterrent effect of a legal regime, specifically its ability to make actors comply with legal rules, cannot easily be inferred from trends in court decisions or plaintiff win rates. In my model, for example, innocent defendants will be most heavily oversampled among litigated disputes when potential injurers are generally complying with the law.[49] Such oversampling could lead to a stream of court opinions that seem either neutral or prodefendant and, at the least, will influence the set of issues that reach appellate courts. A legal researcher who infers that the legal regime is shifting in favor of defendants could easily be wrong. The generally accepted approach of inferring a change in the legal

[47] See, for example, Robert E. Litan, Peter Swire, & Clifford Winston, The U.S. Liability System: Background and Trends in Liability: Perspectives and Policy 8 (Robert E. Litan & Clifford Winston eds. 1988).

[48] Peter Huber, Liability: The Legal Revolution and Its Consequences 10 (1988). "More than 50 percent" is a vast overstatement of the plaintiff win rate in product-liability litigation.

[49] If W is small (less than 1/2), then the proportion of defendants who reject settlement demands and are innocent, $S_iW/[S_iW + (1 - W)]$, will be greater than the proportion of rejecters who are guilty, $(1 - W)/[S_iW + (1 - W)]$, and innocent defendants will be oversampled in the set of litigated disputes.

regime from a perceived change in legal doctrine ignores the possibility that the doctrinal shift may reflect, for the most part, a change in the type of case that is being litigated.

This criticism applies to all theories that treat doctrinal change as the result of conscious efforts on the part of judges. Consider, for example, the claim that the modifications in nineteenth-century tort doctrine—revealed by the larger number of opinions discussing the level of care exercised by the defendant—reflected an effort on the part of judges to subsidize industry.[50] This ignores the possibility that, over the relevant period, the typical defendant standing before the judge may have changed from one whose lack of care was obvious to one who had taken substantial precautions. The criticism also applies to the claim that judgments in favor of defendants in product-liability cases reflect an attempt by judges to reverse the trend of expanding liability for manufacturers.[51]

Judicial-effort theories treat legal doctrine as being shaped through the collective efforts of judges. They typically fail to provide a reason why judges would decide to work together to change a particular doctrine. In contrast, selection models suggest that doctrinal change is the result of an evolutionary process. Just as the characteristics that are most likely to be observed within a species in the next generation are associated with the genes likely to be passed on to that generation, the disputes that are most likely to influence legal doctrine tomorrow are those in which the divergence in the litigants' expectations—the settlement gap—is greatest. Under the Priest-Klein model, since neither party has an informational advantage, the disputes in which the settlement gap is greatest will contain roughly equal subpopulations of innocent and guilty defendants. In the model presented here, in torts where only the defendant's care matters, disputes in which the settlement gap is greatest will contain a disproportionate share of innocent defendants. This imbalance should influence the menu of issues reaching appellate courts.

V. Conclusion

This article offers a new theory of the distinction between settled and litigated cases. The standard theory predicts a 50 percent win rate for plaintiffs. My theory predicts that the plaintiff win rate will be less than 50 percent in areas where defendants have the informational advantage in litigation and greater than 50 percent if the converse holds. A 50 percent win rate will be observed in areas where neither party has the informational advantage in litigation.

[50] M. Horwitz, The Transformation of American Law 1780–1860, at 85–99 (1977).

[51] Henderson & Eisenberg, *supra* note 10.

DATA APPENDIX

TABLE A1

PLAINTIFF SUCCESS RATES AT TRIAL BY CASE CATEGORY, FEDERAL DISTRICT COURTS, 1978–85

	Administrative Office Code	*N*	Success Rate
Contract:			
Insurance	110	2,494	.52
Marine	120	1,089	.69
Miller Act	130	285	.79
Negotiable instruments	140	560	.78
Recovery of overpayments and enforcement of judgments	150	128	.77
Recovery of defaulted student loans	152	19	.84
Recovery of overpayments of veteran benefits	153	51	.80
Other contract actions	190	6,643	.64
Contract product liability	195	252	.57
Torts: personal injury:			
Airplane	310	448	.55
Airplane product liability	315	149	.40
Assault, libel, and slander	320	490	.42
Federal employers' liability	330	890	.72
Marine	340	2,429	.59
Marine: product liability	345	46	.37
Motor vehicle	350	3,261	.60
Motor vehicle: product liability	355	392	.33
Other personal injury	360	3,808	.46
Personal injury: medical malpractice	362	697	.38
Personal injury: product liability	365	3,255	.25
Torts: personal property damage:			
Other fraud	370	716	.60
Truth in lending	371	10	.60
Other personal property damage	380	980	.59
Property damage—product liability	365	3,255	.25
Civil rights:			
Other civil rights	440	4,970	.33
Voting	441	118	.53
Jobs	442	7,165	.21
Accommodations	443	223	.43
Welfare	444	59	.47
Property rights:			
Copyright	820	243	.71
Patent	830	473	.48
Trademark	840	407	.67
Other statutes:			
Antitrust	410	586	.43

SOURCE.—Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. Legal Stud. 337, 357, table A1 (1970).

TABLE A2

PLAINTIFF SUCCESS RATES IN SELECTED TYPES OF REPORTED TORT CASES (PLAINTIFF WINS $1.00 OR MORE)

	TYPE OF TORT CASE									
	Vehicular Accidents		Product Liability		Medical Malpractice		Street Hazard		Premises Liability	
SITE	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Arizona Superior Court, 1981–85:										
Maricopa	66.1	628	44.1	58	27.8	55	42.3	26	44.0	109
California Superior Court, 1981–84:										
Alameda	66.3	83	45.8	24	33.3	24	60.0	5	46.7	30
Fresno	64.1	39	25.0	4	.0	6	33.3	3	42.9	14
Los Angeles	66.3	637	43.7	214	31.0	245	35.9	65	49.6	270
Sacramento	62.6	91	9.5	21	26.1	23	100.0	1	61.8	34
San Diego	59.0	134	30.0	20	42.1	38	33.3	10	45.3	53
San Francisco	66.2	154	44.0	25	48.3	29	40.0	5	51.0	51
Georgia Superior Court, 1982–84:										
Cobb	63.0	27	100.0	1	12.5	8	· · ·	0	25.0	4
De Kalb	46.3	95	· · ·	0	29.4	17	· · ·	0	45.0	20
Fulton	49.4	164	29.4	17	45.7	35	100.0	1	52.1	73
Illinois Circuit Court, 1981–85:										
Cook	59.9	2504	34.8	134	33.8	134	67.7	197	52.3	309
DuPage	63.2	239	.0	7	17.9	28	57.1	7	45.5	33
Kane	65.4	78	40.0	5	33.3	10	75.0	4	59.1	22
Lake	71.2	146	.0	6	47.4	19	100.0	2	38.9	36
McHenry	63.0	27	50.0	2	25.0	8	· · ·	0	55.6	9
Will	72.3	148	25.0	4	18.2	22	57.1	7	54.5	33
Winnebago	63.3	60	40.0	5	25.0	8	100.0	1	50.0	22

TABLE A2 (*Continued*)

Site	Type of Tort Case									
	Vehicular Accidents		Product Liability		Medical Malpractice		Street Hazard		Premises Liability	
	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)	(1)	(2)
Kansas District Court, 1981–85:										
Johnson	58.8	114	37.5	16	47.1	17	.0	2	38.2	34
Wyandotte	65.0	143	28.6	7	50.0	10	57.1	7	41.2	17
Missouri Circuit Court, 1981–85:										
Clay	48.6	35	50.0	4	75.0	4	. . .	0	36.4	11
Jackson	48.8	291	56.0	25	26.3	38	62.5	8	52.4	42
Platte	53.3	15	. . .	0	.0	1	. . .	0	33.3	3
New York Supreme, Civil, and County Courts, 1981–84:										
Bronx	77.7	112	66.7	15	51.2	43	74.1	27	80.3	66
Erie	64.6	48	25.0	8	15.4	13	100.0	5	48.1	27
King	67.8	304	42.9	7	46.2	130	50.0	26	58.7	104
Monroe	70.4	27	66.7	3	.0	1	.0	1	46.2	13

Nassau	50.7	215	28.6	14	33.3	90	23.1	13	31.3	80
New York	79.0	195	60.7	28	45.0	169	60.4	48	63.4	153
Onondaga	56.3	16	66.7	3	20.0	5	100.0	1	64.3	14
Queens	57.6	170	50.0	10	45.1	71	73.7	19	47.0	66
Richmond	75.6	45	50.0	2	22.2	9	.0	4	37.5	8
Suffolk	60.1	199	42.9	14	46.2	26	66.7	6	52.3	44
Westchester	49.4	87	16.7	6	17.9	39	16.7	6	30.0	30
Oregon Circuit Court, 1984–85:										
Multnomah	61.7	115	50.0	16	50.0	18	22.2	9	46.7	30
Texas District and County Court:										
Bexar, 1982–84	50.8	122	28.6	21	10.5	19	.0	1	22.9	48
Dallas, 1981–85	47.5	301	30.8	40	20.5	44	.0	1	33.3	91
Harris, 1981–85	61.3	614	36.5	85	10.9	119	47.4	18	44.8	171
Washington Superior Court, 1983–85:										
King	75.4	183	58.8	17	25.0	32	62.5	8	53.8	39
Pierce	80.0	50	60.0	5	25.0	8	33.3	3	65.6	8
Skagit	90.0	10	· · ·	0	· · ·	0	· · ·	0	.0	3
Snohomish	80.4	46	25.0	4	25.0	4	85.7	7	50.0	10
Spokane	80.3	66	60.0	5	60.0	5	.0	1	56.3	16
Yakima	81.5	27	25.0	4	50.0	6	· · ·	0	63.6	11

SOURCE.—Stephen Daniels & Joanne Martin, Jury Verdicts and the "Crisis" in Civil Justice, 11 Just. Sys. J. 321, Table A2 (1986).
NOTE.—Column 1 = the percentage of successful verdicts; col. 2 = the total number of verdicts.

TABLE A3

PROPORTION OF PLAINTIFF VICTORIES IN CONTESTED CIVIL CASES TRIED TO JURIES BY CASE TYPE, COOK COUNTY, ILLINOIS, 1959–79

	PLAINTIFF VICTORIES	
CASE TYPE	Percent	Total Cases
1. Traffic	47.4	9,987
2. Common carrier	52.3	879
3. Injury on property	47.8	1,396
4. Street hazard	55.6	399
5. Dramshop	53.8	371
6. Worker injury	66.3	775
7. Product liability	42.8	477
8. Malpractice	39.6	202
9. Assault, dignitary harm, business tort	53.9	1,013
Total traffic	47.79	10,866
Total nontraffic	52.50	4,633
Total all cases		15,499

SOURCE.—George L. Priest and Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, table 7 (1984).