

Damage Control

by Jonathan Rosenbloom
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Last year, the [Big Apple Sidewalk and Pothole Protection Committee](#) sent the city map after map with 700,000 squiggles, each indicating an accident waiting to happen on a city street or sidewalk. Simply by receiving the maps, the city becomes responsible for fixing the defect, or is held liable if someone is injured by, say, tripping on a crack in the sidewalk

And that is why the pothole committee exists. Created by trial lawyers in 1982, it provides evidence and offers expert witnesses to testify. As a result of the committee's work, the city has paid out more and more money in personal injury suits. And so Mayor Michael Bloomberg's package of proposals to slash the amount that the city spends settling lawsuits takes particular aim at the pothole committee and its maps. "The maps offer no insight into whether a defect is a serious hazard or if it should be repaired promptly," the [mayor's office said](#) . Bloomberg has asked the New York City Council to approve a bill that would require more detailed description of fractured sidewalks and pitted pavements, instead of the committee's squiggles.

Last year, New York City paid out almost \$600 million in claims and judgments as a result of lawsuits, up from \$21 million in 1978. Most of these claims involved personal injury and a third of those concerned medical malpractice at city-owned hospitals. With the city struggling to close a \$5 billion budget gap, the mayor argues that the amount spent on personal injury claims is greater than the entire budgets of many city agencies and says the money "could be far better spent on social issues."

Like Bloomberg, the last three mayors tried to overhaul the system under which people sue the city and collect damages for legal wrongs. But these efforts, generally lumped together under the name "tort reform," failed in Albany, at least partly due to vigorous lobbying by trial lawyers.

In the fight over changes to the legal system, the city and business groups point to what they see as excessive awards and frivolous litigation that hamper government and business.

"We can no longer afford to be victimized by unfair and exaggerated claims brought by plaintiffs and their lawyers," former City Corporation Counsel Paul Crotty [wrote ten years later](#) . He accused trial lawyers of holding "taxpayers captive to laws no longer suited to the times," and said, "It is time New York broke free."

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On the other hand, trial lawyers and some consumer advocates say that the system of civil suits gives the powerless their only chance against big corporations and big government. [Ralph Nader](#), who has dubbed tort reform "tort deform," calls being able to sue "a unique pillar of our democracy. This is the pride of the world. Only in America can a worker dying of asbestos file a lawsuit and bring the asbestos manufacturer to court for actions two decades ago."

Limiting the right to bring suit, these advocates say, would erode the public's check on government and provide less of an incentive for the city to screen, train and discipline its employees, particularly those who make life and death decisions, such as hospital workers and police.

Efforts to change the existing laws is symptomatic of a "punish-the-victim" approach, says Hugh W. Campbell, president of the [New York State Trial Lawyers Association](#), which runs the pothole committee.

HORROR STORIES

The mayor and others who argue that the system needs change seek to bolster their arguments with anecdotes of outrageous cases. For example:

In 1983, Andre Robertson, then a player for the Yankees, was speeding down the West Side Highway and entered a turn at 60 miles per hour. Robertson lost control of the car, and his woman passenger was thrown from the vehicle. Now a paraplegic, she sued Robertson and the city. The jury found the city was largely responsible for her injuries because it had not posted a warning sign in advance of the curve, a sign that might have alerted the speeding Yankee to slow down. She was awarded \$10 million, mostly from the city, not from the shortstop.

Another case often cited is that of Daryl Barnes. A police officer saw him running down a Bronx street with an Uzi machine gun and told him to drop it. Instead, Barnes shot at the officer, who then chased him. Barnes, still armed, turned toward the officer. The police officer, reportedly thinking that Barnes was about to shoot, fired, crippling Barnes for life. Even though he pleaded guilty to assault, Barnes sued the city, charging the officer used excessive force. A jury awarded him \$76 million, which the judge reduced to \$8.9 million. The city has appealed.

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But there is another side. Advocates such as the national public interest group [Public Citizen](#) argue that the state government gave New Yorkers the right to sue the city so individuals could serve as a check on municipal recklessness. Many New Yorkers, for example, supported Iris Baez's successful efforts to win damages from the city after a police officer choked her son, Anthony, to death in 1994. She received \$3 million.

HOW WE GOT HERE

Judgments against New York City have been increasing for decades. In 1898 state law exempted the city from civil lawsuits for any alleged wrongful act, injury or damage. In 1929, the state legislature changed that, making the city "answerable equally with individuals and private corporations for wrongs of officers and employees."

But for years, the amount of money the city paid out in claims and judgments remained relatively low. That started to change in the 1970s. Former Corporation Counsel Crotty has attributed the sharp rise partly to an action taken by the state legislature in 1975. It abolished a rule that prevented plaintiffs from recovering damages from the city if they were even the slightest bit negligent or had accepted the risk of injury.

This decision made possible cases such as one, cited by the city Law Department, brought by two brothers who were seriously injured when they dove off Steeplechase Pier in Coney Island. Even though the two men had had a couple of beers and had to climb over a three-foot railing before taking the plunge, a jury ruled for the brothers, saying the city should have posted "No Diving" signs.

In response to the rapid rise in settlements against the city, the state legislature approved a number of reforms in the 1980s. But the city's costs from liability suits continued to rise, prompting Mayors Edward Koch, David Dinkins and Rudolph Giuliani to call for changes to limit suits. While some piecemeal legislation was enacted, the legislature did not approve any major changes.

In 1994 then-Mayor Giuliani and his Corporation Counsel Crotty took a [more sweeping approach](#). To dramatize what they saw as the need for change, they cited the case of a subway mugger who preyed on the elderly. A Manhattan jury awarded him \$4.3 million for injuries suffered when he was shot as he attempted to flee the scene of his crime.

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Giuliani and Crotty proposed placing a cap on how much money could be paid to compensate plaintiffs for non-economic damages, such as pain, suffering and the loss of a spouse's love. They also called for limiting the city's liability based on how much it contributed to an accident or other event.

In support of these provisions, Giuliani and Crotty relied heavily on anecdotes, cited legislation in other states and claimed that enacting similar measures in New York would save millions of dollars. They did not provide any hard evidence to back up such claims. The sole study that New York advocates of tort reform usually cite is a 1997 [public opinion poll](#) sponsored by [New Yorkers for Civil Justice Reform](#), an advocacy group. In any event, Giuliani's proposal went nowhere.

In his effort to save the city money on legal actions, Mayor Bloomberg has proposed two bills, which would require approval only by the City Council, not the state legislature. One would replace the pothole committee. The other would make owners of buildings, not the city, liable for sidewalk cracks and gaps. Now, landlords are supposed to fix any defects but are not legally liable if they do not.

ROUTES TO REFORM

A number of ideas to change the tort system have been proposed by various people at various times. Other states have approved some of them. Most require a vote by the state legislature.

The changes could be limited only to suits against the city or could extend to all civil actions, whoever the defendant. It is generally thought that limiting the proposals to lawsuits that involve the city government would stand a better chance of approval -- although past experience has shown that the legislature has been reluctant to enact even those changes.

Overall, the issue comes down to whether the current system cultivates abuse or whether it provides needed redress to victims of misdeeds by individuals, governments and businesses.

One difficulty, reformers say, are juries that award plaintiffs huge sums of city money. To solve this, some recommend removing juries from the process entirely by putting all tort actions in the

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Court of Claims where they would be heard by a judge rather than a jury. This would require a state constitutional amendment.

Critics argue that such a measure flies in the face of our entire system of justice. Serving on a jury in a civil suit is a citizen's right and one way that ordinary people participate in public policy.

But judges already hear cases involving claims against the federal or state governments, says [Walter Olson in City Journal](#). "For claimants, an important benefit would be that Court of Claims cases are resolved much faster than general court cases The city could still be sued on all the same legal grounds as now, and there would not be any set ceiling on damages."

Another approach would keep juries but limit their discretion in awarding damages. For example, New Jersey and Pennsylvania require that plaintiffs spend a minimum of \$5,000 on medical expenses before they can collect damages for pain and suffering. Currently, New York has no such rule.

Others advocate setting a limit on how much a jury can award a plaintiff for pain and suffering, regardless of the severity of the injury or recklessness of the action. Crotty has noted that well over half of tort judgments and claims are paid out for "'pain and suffering,' a highly subjective and amorphous concept."

In one case, a jury reportedly awarded a victim more than \$1 million for pain and suffering -- even though the person died only minutes after the accident. The trial judge reduced this to \$75,000.

Opponents of caps say they are arbitrary. "Who is the mayor to say that the pain and suffering of one citizen is only worth \$250,000," Hugh Campbell, of the state Trial Lawyers Association, has said.

And the critics argue that caps would unfairly deprive victims who suffer the worst injuries of their right to recovery. Conversely, defendants guilty of the most egregious actions would not be

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punished severely enough. Further, trial lawyers claim that there already is a check on excessive judgments -- appellate courts that can reduce or throw out a verdict.

City Corporation Counsel Michael Cardozo has also discussed reducing any damage award to a plaintiff by the amount the plaintiff recovers from insurance claims. Cardozo claims this would save the city \$130 million a year.

THE LURE OF THE TREASURY

Damage suits against the city have skyrocketed , the New York Times wrote in an [editorial](#) not because the city has "become significantly more careless" but because of "a legal climate in which the city is seen as an easy mark and a deep pocket."

And city government is ubiquitous. It touches the lives of New Yorkers in a way unmatched by few if any corporations. The government creates and operates sidewalks with cracks, streets with potholes, hospitals where fatal mistakes can be made, schools where children can be injured, parks where toddlers can fall.

Finally, a corporation or individual hit with millions of dollars in damages can file for bankruptcy; the city cannot. In fact, under the law, if the city and another defendant are found to be jointly responsible for an injury, and the other defendant is broke, the city has to pick up the entire tab for damages.

Over the years, the city has made a number of proposals to make it less enticing to plaintiffs. One, embraced by Mayor Bloomberg and already in effect in Ohio and Arizona, would require that plaintiffs hold less than half of the responsibility for their own injuries. Currently, the city may be held liable for its percentage of liability, even if the plaintiff was 99.9 percent at fault.

Similarly, in a case where there are two or more defendants, the city would like to have all the defendants pay damages according to their responsibility. In other words, if a jury determines that a driver is 80 percent responsible for an accident in which a motorist struck a pedestrian and the city is 20 percent responsible, the city would have to pay no more than 20 percent of the damages. Now, if the driver cannot pay, the city must make up the difference.

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Opponents argue this would place an unfair burden on the victim, who would be the big loser if the wrongdoer is not able to pay. The current system, they say, puts the onus for recovering damages where it belongs -- on defendants and on all of their actions.

Another idea would be to restrict someone's ability to sue for injuries he or she received while committing or fleeing from a crime. The city would, however, remain liable for damages if a police officer or other employee deprived someone of his or her constitutional rights.

BLAMING THE LAWYERS

Lawyers who win liability lawsuits receive as much as 40 percent of the total award. Supporters of reform claim that more money should go to the plaintiffs and less to attorneys. These critics believe if attorneys get less money from legal actions, they would be less likely to sue.

Attacking lawyers has a wide appeal. But [Nader](#) for one says it is not that simple. If lawyers got less money, he says, they would be more reluctant to take on risky cases. And he notes, the other side of the high percentage is that when trial lawyers lose, they get no money at all.

SCALES OF JUSTICE

Obviously, the city wants to reduce the amount it pays out in legal damages. But critics of changes, including Campbell of the trial lawyers, say proposals such as caps or limits to liability are the wrong approach. The way to reduce suits, he says, is to prevent the wrong from occurring in the first place.

Will the various reform proposals really reduce the city's costs in claims and judgments? And if money is saved, will it go to safety, education, or welfare? Conversely, is there any evidence that damage claims serve as a check on city government? Although city tort costs have increased over the years, are we any safer?

An ideal plan would somehow hold the city responsible for its mistakes and encourage safer streets, hospitals and schools, while at the same time saving the city money and limiting huge verdicts in frivolous cases. Striking that balance presents a daunting task under the best of circumstances, let alone in the face of a budget crisis and energetic lobbying on all sides of the issue.

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