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MYTHBUSTER!

JURY VERDICTS – CONSISTENT AND CONSERVATIVE

IT IS DIFFICULT FOR VICTIMS TO WIN CIVIL CASES BEFORE JURIES.

- In 2005, the most recent year studied by the U.S Department of Justice (DOJ), plaintiffs succeeded in 53.2 percent of civil jury trials, compared to 65.7 percent of civil bench trials (*i.e*, cases decided by a judge), a difference deemed statistically significant.[1]

- Plaintiffs prevailed in 51.3 percent of tort cases before juries, while winning before judges 56.2 percent of the time.[2] The DOJ found no statistically significant difference in win rates between bench and jury trials for tort cases.

- **Focus on Medical Malpractice.** Plaintiffs succeeded in only 22.7 percent of jury-decided cases, while winning before judges 50 percent of the time.[3]

- **Focus on Products Liability.** Plaintiffs had a low rate of success before state juries in non-asbestos product liability trials, winning in just 20.7 percent of cases. Injured victims prevailed more often in asbestos cases, succeeding in 53.8 percent of jury trials.[4]

JURIES ARE NOT ANTI-BUSINESS OR ANTI-PHYSICIAN; IN FACT, THE OPPOSITE IS TRUE.

- **Focus on Business Cases.** Cornell University Law Professor Valerie P. Hans and Duke University Law Professor Neil Vidmar, leading experts in the field of jury research, "explored the claims of doctors and business and corporate executives about unfair treatment by juries but the empirical evidence does not back them up. The notion of the pro-plaintiff jury is contradicted by many studies that show both actual and mock jurors subject plaintiffs' evidence to strict scrutiny."[5] The professors explained that "[a]lthough the research finds that juries treat corporate actors differently, the differential treatment appears to be linked primarily to jurors setting higher standards for corporate and professional behavior, rather than to anti-business sentiments or a 'deep pockets' effect. Members of the public, and juries in turn, believe that it is appropriate to hold corporations to higher standards, because of their greater knowledge, resources, and potential for impact."[6] Hans and Vidmar concluded that the "distinctive treatment that businesses receive at the hands of juries is a reflection of the jury's translation of community values about the role of business in society."[7]

- **Focus on Medical Malpractice.** Interviews with North Carolina jurors who decided medical malpractice cases led Professor Vidmar to conclude that "many jurors initially viewed the plaintiffs' claims with great skepticism. Their attitudes were expressed in two main themes. First, they said that too many people want to get something for nothing, a skeptical attitude about claiming… . Second, they expressed the belief that most doctors try to do a good job and should not be blamed for a simple human misjudgment."[8] Vidmar added, "Indeed, these attitudes were even expressed in some of the cases in which jurors decided for the plaintiff. One jury that gave a multimillion-dollar award for a baby with severe brain injuries was very concerned about the possible adverse effect on the doctor's medical practice. This does not mean that in every such case jurors held these views. Sometimes, evidence of the doctor's seemingly careless behavior caused jurors to be angry about what happened. However, even in these latter cases, the interviews indicated that the jurors had initially approached the case with open minds."[9]

JURIES ARE COMPETENT AND ABLE TO HANDLE COMPLEX CASES.

- Empirical studies consistently show juries to be capable, effective and fair decision-makers who can weigh complex cases.[10] For example,

    - After reviewing their own work and relevant scholarship, Professors Hans and Vidmar reported that "[j]urors' individual and collective recall and comprehension of evidence are substantial. Jurors critically evaluate the content and consistency of testimony provided by both lay and expert witnesses, and do not appear to rubber stamp expert conclusions."[11] Moreover, "[m]ost members of the public adhere to an ethic of individual responsibility, and many wonder about the validity of civil lawsuits. A skeptical approach is reflected in civil jurors' initial stances as they evaluate the testimony and form narrative accounts from the conflicting adversary presentation of evidence."[12] Hans and Vidmar determined that "strength of the evidence presented at the trial is the major determinant of jury verdicts. Similarly, civil jury damage awards are strongly correlated with the degree of injury in a case. These reasonable patterns in jury decisions go a long way toward reassuring us that juries, by and large, listen to the judge and decide cases on the merits of the evidence rather than on biases and prejudice."[13]

    - University of Missouri-Columbia Law Professor Philip G. Peters, Jr. analyzed three decades of empirical research on jury decision-making and reached the following four conclusions: "First, negligence matters. Weak cases rarely win, close cases do better, and cases with strong evidence of medical negligence fare best. Second, the agreement rate between juries and experts is very high in the class of cases that most worries critics of malpractice litigation, that is, cases with weak evidence of negligence. Juries agree with expert reviewers in eighty to ninety percent of these cases. That is a better agreement rate than physicians typically have with each other. Third, the agreement rate is much lower in cases with strong evidence of negligence. Doctors consistently win about fifty percent of the cases that experts believe the plaintiffs should win. Fourth, the consistently low success rate of malpractice plaintiffs in cases that expert reviewers feel they should win strongly suggests the presence of one or more factors that systematically favor medical defendants in the courtroom, such as better litigation teams or pronounced jury reluctance to find doctors liable. From the perspective of defendants at least, jury performance is remarkably good."[14]

    - After examining systematic studies spanning five decades, Professors Hans and Vidmar found that judges agree with jury verdicts in most cases. According to their 2008 article

in *Judicature*, "Most judges say that jurors make a serious attempt to apply the law, and they do not see jurors relying on their feelings rather than the law in deciding on a verdict."[15]

- A recent survey of Texas state district court judges by Baylor University Law School faculty, the Dean of Baylor's Graduate School and the President of Mercer University found overwhelming support of juries. According to the 2007 study, over 83 percent of respondents had not observed a single instance of juries awarding excessive compensatory or punitive damages in the four years before the survey.[16] In addition, during the preceding four years, more than 86 percent had never or only in one instance granted relief to a defendant because a jury awarded excessive compensatory damages.[17] Moreover, "no judge in the entire sampling had granted such relief during the prior four years in more than three cases."[18]

- In a 2005 survey of Georgia superior and state court judges by the University of Georgia's Survey Research Center, over 97 percent of respondents indicated that jury verdicts were disproportionately high in only zero to five percent of cases in their courtrooms within the last 24 months.[19] In addition, "[t]here was not a single comment indicating that damages awarded by juries exceed amounts proven by the evidence."[20] The respondents' infrequent use of *remittiturs* (*i.e.*, judicial orders reducing excessive jury verdicts) – employed in only zero to five percent of cases within the last two years – also confirmed that damages rarely exceed amounts justified by the evidence at trial.[21] In terms of non-economic damages, over 98 percent of respondents said they were not disproportionately high given the evidence presented to the jury.[22]

JURY VERDICTS ARE FAR LOWER THAN COMMONLY BELIEVED.

- In 2005, the most recent year studied by the DOJ, the overall median damage award in state civil jury trials was $30,000.[23] The median in state civil bench trials was statistically similar, totaling $24,000.[24]

  After examining long-term data from the nation's 75 most populous counties, the DOJ found that the overall median jury award in state civil cases had declined by 40.3 percent since 1992.[25] More specifically, "[w]hen adjusted for inflation, the median damages awarded in general civil jury trials declined from $72,000 in 1992 to $43,000 in 2005…."[26]

- Regarding state tort cases, the DOJ reports that in 2005 the median jury award was $24,000, an amount statistically similar to the median award in bench trials — $21,000.[27]

  Long-term data from the nation's 75 most populous counties show a steep decline in jury-decided tort awards: The median damage amount decreased by 53.5 percent, from $71,000 in 1992 to $33,000 in 2005.[28]

- **Focus on Medical Malpractice.** The median jury award in state medical malpractice cases was $400,000.[29] In contrast, state judges handed down a significantly higher median damage award to medical malpractice victims, $631,000.[30] It is important to note that these median amounts do not account for post-trial activity (such as award modifications) and appeals.[31]

  After undertaking extensive jury verdict research, Professor Neil Vidmar told the U.S. Senate that "the magnitude of jury awards in medical malpractice tort cases positively correlated with the

severity of the plaintiffs' injuries, except that injuries resulting in death tended to result in awards substantially lower than injuries resulting in severe permanent injury, such as quadriplegia. I and two colleagues conducted a study of malpractice verdicts in New York, Florida, and California. We also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury."[32]

- **Focus on Products Liability.** DOJ data show that the median jury award in non-asbestos product liability cases was $456,000[33]; the median jury award in asbestos cases was $721,000.[34] It is important to note that these medians do not account for post-trial activity (such as award modifications) and appeals.[35]

- **Focus on Punitive Damages.** The median jury award in state tort trials was $100,000.[36] This amount, according to the DOJ, was not statistically different from the median punitive damage award of $54,000 in tort bench trials.[37]

  DOJ statistics from the nation's 75 most populous counties also show that civil juries rarely award punitive damages to victorious state tort plaintiffs. In 2005, plaintiff winners received punitive damages in about 5 percent of civil jury trials; the percentage ranged from 4 percent in 1996 to 6 percent in 1992 and 2001.[38]

HIGH JURY VERDICTS ARE FREQUENTLY REDUCED AFTER TRIAL.

- In a recent study of post-trial activity for a sample of verdicts in California and New York, the Rand Corporation's Institute for Justice reported that "both settlement and appeal are more common in cases with larger jury verdicts"[39] and "often lead to substantial reductions in the amount defendants ultimately pay to plaintiffs."[40]

- **Focus on Medical Malpractice.** As Professors Hans and Vidmar explain in *American Juries: The Verdict*, "[t]he fact that the jury verdict is not the end of litigation is often overlooked in discussions of the role of the jury. This is especially true of medical malpractice trials."[41] According to the authors, "[r]esearch consistently indicates that outlier verdicts seldom withstand postverdict proceedings. The judge may reduce the award by *remittitur* (the legal term for a reduction), or the case may be appealed to a higher court at which time the award may be reduced. Perhaps most common of all, the plaintiff and the defendant negotiate a posttrial settlement that is less than the jury verdict. Plaintiffs are willing to negotiate lesser amounts," the researchers added, "because they need the money immediately and cannot wait for the years it will take to get the money if the case is appealed. Also, there is a risk that an appeals court will reduce the award or even overturn the verdict."[42] In the end, the plaintiff "negotiates a settlement around the defendant's insurance coverage."[43]

  For example, "[s]ome of the largest medical malpractice awards in New York that made national headlines ultimately resulted in settlements between 5 and 10 percent of the original jury verdict actually being paid."[44] Similarly, "Vidmar's Illinois study found that settlements in his sample of large jury awards averaged only 43 percent of the original verdicts."[45]

  Research by University of Illinois Law Professor David A. Hyman and colleagues from the University of Texas, New York University Law School and Georgetown University Law Center also show that most med mal jury awards receive post-verdict "haircuts."[46] According to the Texas data:

- "Seventy-five percent of plaintiffs received a payout less than the adjusted verdict (jury verdict plus pre-judgment and post-judgment interest), 20 percent received the adjusted verdict (within ± 2 percent), and 5 percent received more than the adjusted verdict."[47]

- "Overall, plaintiffs received a mean (median) per-case haircut of 29 percent (19 percent), and an aggregate haircut of 56 percent, relative to the adjusted verdict."[48]

- "The larger the verdict, the more likely and larger the haircut. For cases with a positive adjusted verdict under $100,000, 47 percent of plaintiffs received a haircut, with a mean (median) per-case haircut of 8 percent (2 percent). For cases with an adjusted verdict larger than $2.5 million, 98 percent of plaintiffs received a haircut with a mean (median) per-case haircut of 56 percent (61 percent)."[49]

- "Insurance policy limits are the most important factor explaining haircuts."[50]

- "Most cases settle, presumably in the shadow of the outcome if the case were to be tried. That outcome is not the jury award, but the actual post-verdict payout. … The parties surely bargain in the shadow of the jury, but in most cases, the terms of the bargain are shaped by the shadow of coverage."[51]

- "Because defendants rarely pay what juries award, jury verdicts alone do not provide a sufficient basis for claims about the performance of the tort system."[52]

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NOTES

[1] U.S. Department of Justice, Bureau of Justice Statistics, "Civil Bench and Jury Trials in State Courts, 2005," NCJ 223851 (October 2008)(revised April 9, 2009) at 3 (Table 2), found at http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf.

[2] U.S. Department of Justice, Bureau of Justice Statistics, "Tort Bench and Jury Trials in State Courts, 2005," NCJ 228129 (November 2009) at 4 (Table 4), found at http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf.

[3] *Ibid*.

[4] *Ibid*.

[5] Valerie P. Hans and Neil Vidmar, "The Verdict on Juries," 91 *Judicature* 226, 227 (March-April 2008), found at http://www.ajs.org/ajs/publications/Judicature_PDFs/915/Hans_915.pdf.

[6] *Ibid*.

[7] *Ibid*.

[8] Valerie P. Hans and Neil Vidmar, *American Juries: The Verdict.* Amherst, NY: Prometheus Books (2007) at 331.

[9] *Ibid*.

[10] For an extensive list of studies demonstrating the competence of juries, *see, e.g.,* Testimony of Professor Neil Vidmar, Russell M. Robinson II Professor of Law, Duke Law School, before the U.S. Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 10 ("The overwhelming number of the judges gave the civil jury high marks for competence, diligence, and seriousness, even in complex cases …Systematic studies of jury responses to experts lead to the conclusion that jurors do not automatically defer to experts and that jurors have a basic understanding of the evidence in malpractice and other cases. Jurors understand that the adversary system produces experts espousing opinions consistent with the side that called them to testify. Moreover, jurors carefully scrutinize and compare the testimony of opposing experts. They make their decisions through collective discussions about the evidence.… We also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury.") (citations omitted). *See also*, Marc Galanter, "Real World Torts: An Antidote to Anecdote," 55 *Md. L. Rev.* 1093, 1109, n. 45 (1996), citing Michael J. Saks, *Small-Group Decision Making and Complex Information Tasks* (1981); Robert MacCoun, "Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries," in *Verdict: Assessing the Civil Jury System* 137 (Brookings Institution, Robert E. Litan ed., 1993); Christy A. Visher, "Juror Decision Making: The Importance of Evidence," 11 *Law & Hum. Behav.* 1 (1987); Richard O. Lempert, "Civil Juries and Complex Cases: Let's Not Rush to Judgment," 80 *Mich. L. Rev.* 68 (1981).

[11] "The Verdict on Juries," *supra* n.5, at 227.

[12] *Ibid*.

[13] *Id*. at 226-227.

[14] Philip G. Peters, Jr., "Doctors & Juries," 105 *U. Mich. L. Rev*. 1453, 1454 (May 2007), found at http://www.michiganlawreview.org/assets/pdfs/105/7/peters.pdf.

[15] "The Verdict on Juries," *supra* n.5, at 227.

[16] Larry Lyon et al., "Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform," 59 *Baylor Law Review* 101, 109 (Table 1), 110 (Table 2) (2007), found at http://www.texasbar.com/Template.cfm?Section=Texas_Bar_Journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19852.

[17] *Id.* at 110, 111 (Table 3).

[18] *Id*. at 110.

[19] Thomas A. Eaton, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," 41 *Georgia L. Rev.* 431, 434, 435 (Tables 1 and 2), 436 (2007), found at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1333&context=fac_artchop.

[20] *Id*. at 436.

[21] *Id*. at 436, 437 (Table 3).

[22] *Id*. at 437, 438, 439 (Tables 4 and 5), 440.

[23] "Civil Bench and Jury Trials in State Courts, 2005," *supra* n.1, at 3 (Table 2).

[24] *Ibid*.

[25] *Id.* at 10 (Table 11).

[26] *Ibid.*

[27] "Tort Bench and Jury Trials in State Courts, 2005," *supra* n.2, at 5 (Table 5).

[28] "Civil Bench and Jury Trials in State Courts, 2005," *supra* n.1, at 10 (Table 11).

[29] "Tort Bench and Jury Trials in State Courts, 2005," *supra* n.2, at 5 (Table 5).

[30] *Ibid*.

[31] *Ibid*.

[32] Testimony of Professor Neil Vidmar, *supra* n.10, at 10.

[33] "Tort Bench and Jury Trials in State Courts, 2005," *supra* n.2, at 5 (Table 5).

[34] *Ibid*.

[35] *Ibid*.

[36] *Id*. at 6, 7 (Table 6).

[37] *Ibid*.

[38] "Civil Bench and Jury Trials in State Courts, 2005," *supra* n.1, at 10 (Table 11).

[39] Seth A. Seabury, "Case Selection after the Trial: A Study of Post-Trial Settlement and Appeal," RAND Working Paper No. WR-638-ICJ (May 1, 2009), at 3, found at http://www.rand.org/pubs/working_papers/WR638/.

[40] *Id*. at 17.

[41] *American Juries*, *supra* n.8, at 333.

[42] *Id.* at 334-335.

[43] *Id.* at 335.

[44] *Ibid*.

[45] *Ibid*.

[46] David A. Hyman et al., "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003," 4 *Journal of Empirical Legal Studies* 3 (March 2007), found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914415.

[47] *Id.* at 3-4.

[48] *Id.* at 4.

[49] *Ibid*.

[50] *Ibid*.

[51] *Id*. at 4, 59.

[52] *Id*. at 4.