

THE AMERICAN CIVIL JURY FOR AUSLÄNDER (FOREIGNERS)

NEIL VIDMAR*

I. INTRODUCTION

In an important essay on comparative analysis of civil law, Herbert Bernstein drew attention to the risks of an author misunderstanding procedural law when he or she lacked a fundamental, system-neutral conceptual framework of a country and lacked first-hand experience with the various laws of that country.¹ Herbert and I occasionally talked about this problem of misunderstanding regarding the American civil jury. In this special issue devoted to the memory of Professor Bernstein, Paul Carrington has placed the American civil jury into its political context.² This Article complements Professor Carrington's Article by addressing the empirical issues related to the actual performance of the American civil jury and the constraints that the legal system has developed to correct occasional errant decisions by lay adjudicators.

Legal practitioners and scholars whom I encounter in my travels outside the borders of the United States frequently challenge me to explain the "crazy," "outrageous" system by which we allow groups of untutored lay persons to decide civil disputes.³ Invariably, they bring up the recent *McDonald's* case⁴ in which a civil jury in New Mexico awarded a woman \$160,000 in compensatory damages and \$2.7 million in punitive damages just because she spilled coffee on

Copyright © 2003 by Neil Vidmar.

* Russell M. Robinson II Professor of Law, Duke University.

1. Herbert Bernstein, *Whose Advantage After All? A Comment on the Comparison of Civil Justice Systems*, 21 U.C. DAVIS L. REV. 587, 587-88 (1988).

2. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79 (Special Issue 2003).

3. For a very recent example, see Kevin Sinclair, *Fat Chance of Justice for the Real Victims of Scandals*, S. CHINA MORNING POST, July 31, 2002, at 15 (reporting inaccurately the *McDonald's* case and a number of other unsubstantiated anecdotes about the American tort system).

4. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994).

herself.⁵ My inquisitors are frequently surprised to learn that for years McDonald's had kept its coffee many degrees hotter than home-brewed coffee or the coffee of its competitors; that for over five years it had been aware of the problem of serious burns resulting from the coffee through over 700 complaints but had never consulted a burn specialist, reduced the temperature of its coffee, or warned consumers; and that the seventy-nine-year-old woman who was injured suffered second and third degree burns to her private parts.⁶ They are also surprised to learn that the plaintiff had tried to settle the suit for a much more modest amount before trial, initially around \$20,000 to cover her medical expenses, and that the jury's punitive damage award was equal to two days' worth of the McDonald's corporation's profits from selling coffee.⁷ Finally, almost everyone is ignorant of the fact that the trial judge subsequently reduced the punitive damage award to \$480,000 for a total award of \$640,000,⁸ and that the case was later settled for an undisclosed, presumably lesser, amount.⁹

One source of misunderstanding in the *McDonald's* case is incomplete media reporting about the details of the case. This problem is endemic with media coverage of jury awards. A number of studies have carefully documented the fact that mass media newspapers and television tend to report jury awards selectively, focusing on large awards, ignoring small awards and defendant verdicts, and not providing complete details about issues put to the juries or matters preceding trial or following the jury verdict.¹⁰ In addition, industry groups generally opposed to the tort system frequently distort infor-

5. See generally Michael McCann et al., *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001); see also Samuel Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1, 4-7 (1996); Nancy S. Marder, *Juries and Damages: A Commentary*, 48 DEPAUL L. REV. 427, 427-29 (1998).

6. See McCann et al., *supra* note 5, at 121.

7. THOMAS KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW 7-8 (2001).

8. Marder, *supra* note 5, at 429.

9. McCann et al., *supra* note 5, at 130.

10. STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 60-91 (1995); KOENIG & RUSTAD, *supra* note 7, at 6-8; NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS 11-22 (1995) [hereinafter VIDMAR, MEDICAL MALPRACTICE]; Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks With the Media As Your Guide*, 80 JUDICATURE 64 (1996); Oscar Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 771-74 (1995); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1159-60 (1996).

mation about jury awards in order to further their political agendas.¹¹ Moreover, some legal commentators who have made claims about the legal system¹² may be less than informed about the empirical realities of jury behavior.

I do not suggest that the American civil jury is a perfect institution. Jury decisions are sometimes questionable, but systematic empirical research examining their performance according to various criteria and in the context of the judicial constraints and other dynamics of the legal system presents a picture quite different from public perceptions both within the United States and abroad.

This brief Article does not present a comprehensive survey of empirical research. Rather it highlights research that addresses some of the most misunderstood aspects of the American civil jury system. The Article first discusses research bearing on jury performance, followed by a discussion of the jury system as it is embedded in the broader context of procedural law and practice.

II. JURY PERFORMANCE AND BEHAVIOR

A. Agreement Between Judges and Juries

The American civil jury system is often contrasted unfavorably with the judge-driven systems in continental Europe and elsewhere in the world.¹³ In comparison to those systems that usually involve more than one judge and a process of evidence development that keeps much of the power in the hands of the judges, the American civil jury is embedded in an adversarial system of litigation in which the parties develop the evidence and a single judge presides at trial.¹⁴ Moreover, in contrast to other systems, the American state trial judge is usually elected or at least subject to recall by voters, rather than appointed.¹⁵

11. See DANIELS & MARTIN, *supra* note 10, at 245.

12. See, e.g., PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* (1994).

13. Herbert Bernstein's article cautioned against facile comparisons between systems and pointed out that the German system of civil procedure had many "adversarial" components that many scholars either did not acknowledge or, he suggested, were unaware of. Bernstein, *supra* note 1, *passim*.

14. STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 4 (1984).

15. See generally Carrington, *supra* note 2, at 89 (noting that "[a]ll American judges are selected in part because of their political predispositions, and most are accountable in some way to the people they serve.").

Keeping these distinctions in mind we can examine the degree to which civil jury verdicts differ from how the judge would have decided the case.

In a famous study undertaken in the 1950s, Harry Kalven and Hans Zeisel asked the presiding judges in approximately 4,000 civil trials to give their opinions about how they would have decided the case that the jury heard.¹⁶ Kalven and Zeisel then compared each judge's response to the jury verdict.¹⁷ Judges and juries agreed on the issue of liability in personal injury cases seventy-nine percent of the time, that is, four cases out of five.¹⁸ The trials involving judge/jury disagreement were about evenly split between plaintiffs and defendants, contradicting the claim that juries tend to favor plaintiffs.¹⁹ When plaintiffs prevailed, the jury award was, on average, about twenty percent higher than what the judge would have awarded.²⁰ Kalven and Zeisel appropriately cautioned that the judge's decision should not be considered an absolute criterion of jury performance since there is no "correct" answer to a trial.²¹ Nonetheless, their data did show that, more often than not, judges and juries saw the case the same way.²²

It is reasonable to be concerned that the findings by Kalven and Zeisel are a half-century out of date. In the intervening decades civil lawsuits and trial evidence have, arguably, become more complex. However, there are contemporary findings consistent with those of Kalven and Zeisel. Larry Heuer and Steven Penrod persuaded judges from thirty-three states to provide detailed analyses of a sample of cases.²³ The judges rated their satisfaction with the jury's verdict²⁴ and indicated what their own verdict would have been in each case.²⁵ The rates of judge and jury agreement were similar to those found by Kalven and Zeisel.²⁶ Disagreements between judge and jury were not related to how complex the judge perceived the evidence to

16. See Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063 (1964).

17. *Id.*

18. *Id.* at 1065.

19. *Id.*

20. *Id.*

21. *Id.* at 1063.

22. HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* 62-64 (1966).

23. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 32 (1994).

24. *Id.* at 39.

25. *Id.* at 46.

26. *Id.*

be.²⁷ Heuer and Penrod concluded that “our data do not support the proposition that judges and juries decide cases differently [or that trial] complexity influences the rationality of jury decision making”²⁸ Hannaford et al. studied 153 civil cases from Arizona. Their research asked the judge to make detailed evaluations of the trial evidence and to indicate how he or she would have decided the case. As in the Kalven and Zeisel and Heuer and Penrod studies there was high agreement between judge and jury. Moreover, the agreement rate was unaffected by the complexity of the trial or the number of experts.²⁹ Still another study conducted by the National Center for State Courts in California found that judicial estimates of the direction and strength of the evidence were generally consistent with the jury verdicts.³⁰

B. Other Criteria By Which Jury Performance Can Be Assessed

While the above studies did indicate that the judge/jury disagreements were not due to the difficulty of the case, it is possible that by combining “simple” cases with “complex” cases, jury misunderstandings were underestimated. In contrast to the run-of-the-mill car-accident trial that may have only a few witnesses and last no more than a few days, we must consider the possibility that cases involving medical malpractice, products liability, numerous plaintiffs or defendants, or multiple weeks of trial may confuse the jury because of the complexity of the evidence, the sheer quantity of the evidence, or the complexity of the law.³¹

Richard Lempert examined twelve cases that various sources had suggested were complex trials.³² He drew attention to the fact that trial length, by itself, is not an adequate measure of trial complexity, nor is conflicting expert testimony.³³ In two of the twelve cases Lempert concluded that the expert evidence was so difficult and so esoteric that only an expert trained in that field could adequately under-

27. *Id.* at 48-49.

28. *Id.* at 49.

29. Paula L. Hannaford et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 *LAW & HUM. BEHAV.* 359, 373-75 (2000).

30. G. THOMAS MUNSTERMAN ET AL., *A COMPARISON OF THE PERFORMANCE OF EIGHT- AND TWELVE-PERSON JURIES* 63-69 (1990).

31. Heuer & Penrod, *supra* note 23, at 30-31. Judges and legal scholars do not always agree on what constitutes a complex case.

32. Richard Lempert, *Civil Juries in Complex Cases: Taking Stock after Twelve Years*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 181, 185-89 (Robert E. Litan ed., 1993).

33. *Id.* at 190.

stand it.³⁴ Presumably this would include most judges as well as juries. In the other cases the esoteric evidence was only peripheral to the main issues in dispute. Considering each case in its totality, Lempert concluded that there was no clear evidence of the juries being befuddled; indeed, from a legal scholar's perspective, the jury verdicts were, on balance, defensible.³⁵

Medical malpractice trials constitute one category of cases deemed too complex for juries. Doctors in particular have been highly critical of juries.³⁶ Malpractice trials do have at least two unique aspects. First, the case usually requires that the jurors understand something about the medical condition that brought the patient to the physician in the first place and the medical procedures used by the doctor. Second, the actions of the doctor or hospital must be judged by a standard of medical care. In most personal injury cases the jury is instructed to judge negligence according to a "reasonable person" standard, i.e., how did the actions of the defendant compare with the standards that a reasonable person would employ?³⁷ In contrast, negligence in medical malpractice is judged by a "standard of medical care," i.e., what would a reasonable and prudent doctor or hospital in this particular field of medicine and in this community have done?³⁸ At trial the jurors have to hear evidence on the standard of medical care and use it to assess the medical provider's actions. For this reason, doctors, hospitals, and their medical insurance companies argue that only doctors are competent to understand the complex medical issues and to determine the appropriate standard of care.³⁹ Although one might question whether physicians' self-interest as members of a guild of health-service providers allows them to be objective, it is still interesting to consider the statement by the Physician Payment Review Commission in its 1992 report to Congress: "physicians probably apply the standard [of medical negligence] differently than do juries."⁴⁰

34. *See id.*

35. *Id.* at 194.

36. VIDMAR, MEDICAL MALPRACTICE, *supra* note 10, at 4-5.

37. *Id.* at 123.

38. *Id.* at 123-24; Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 896 (1994).

39. *See* Kirk B. Johnson et al., *A Fault-based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1370-71 (1989).

40. PHYSICIAN PAYMENT REV. COMMISSION, ANN. REP. TO CONGRESS, at 186 (1992).

A study by Mark Taragin and four of his colleagues allows us to test the Physician Payment Review Commission's assertion empirically.⁴¹ Taragin obtained access to liability insurer files for lawsuits that occurred in New Jersey between 1977 and 1992.⁴² In each case, whenever a medical "incident" that might constitute malpractice was reported to the insurance company, one or more physicians was summoned to assess the case for negligence.⁴³ The insurance company wanted neutral, objective ratings to determine if attempts should be made to settle the case or if it should be defended in a trial.⁴⁴ These assessments were strictly confidential "work product" that could not be obtained by the plaintiff or revealed at trial. Of 8,231 cases in the study, 988, or twelve percent, eventually resulted in a jury verdict.⁴⁵ Taragin compared the jury verdicts with assessments of the defendant-physician's care by an insurance company relying, in part, on peer review by other doctors and found a correlation between the independently assessed quality of care and the likelihood of a jury award.⁴⁶ Plaintiffs won twenty-four percent of the cases that went to trial, but the verdicts tended to be consistent with the physician-ratings of negligence.⁴⁷ That is, when plaintiffs won, the ratings tended to favor negligence or were ambiguous; when plaintiffs lost, the ratings indicated no negligence had occurred or negligence was uncertain.

The Taragin findings are supported by two additional studies based on smaller samples of malpractice cases. Henry Farber and Michelle White studied 465 malpractice cases involving a particular hospital.⁴⁸ Like the New Jersey study, the files contained confidential assessments of negligence made by physicians.⁴⁹ Only twenty-six cases went to jury trial and the hospital prevailed in all but four of

41. Mark I. Taragin et al., *The Influence of Standard of Care & Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780 (1992).

42. *Id.*

43. *Id.* at 780-81.

44. *Id.* at 782.

45. *Id.* at 781.

46. *Id.* at 780-81.

47. *Id.* at 782.

48. See generally Henry Farber & Michelle White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. LEGAL STUD. 777 (1994) [hereinafter Farber & White, *Dispute Resolution in Medical Malpractice*]; Henry Farber & Michelle White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND J. ECON. 199 (1991).

49. Farber & White, *Dispute Resolution in Medical Malpractice*, *supra* note 48, at 787.

them.⁵⁰ Two of the plaintiff wins involved cases rated by the experts as “bad” medical care and the other two were rated as “ambiguous.”⁵¹ Thirteen of the remaining cases that were won by the defendants were rated as “good” care and the rest as “ambiguous.”⁵² In a third study, Frank Sloan and his co-authors examined a sample of thirty-seven cases that went to trial in Florida.⁵³ The medical records were reviewed by panels of doctors working as part of Sloan’s research team. Of the twenty-four cases in which the plaintiffs prevailed, defendants were twice as likely to have been rated by the independent physicians as negligent.⁵⁴ The reverse was true for the thirteen cases that the plaintiffs lost at trial.⁵⁵

The other category of trials often deemed to be too complex for juries is products liability cases. Kip Viscusi studied products liability verdicts in a sample of data from a trade industry organization.⁵⁶ He found that plaintiffs won only thirty-seven percent of cases, a figure that is comparable to that found in other research.⁵⁷ His main conclusion about these verdicts was as follows:

Once a claim has reached the court, its outcome rests on the factors leading to the injury, the nature of the arguments presented, and the legal doctrine governing the suit. The size of the [injury] loss has no statistically significant impact on the prospects of a claim, for juries do not appear to be swayed by large and catastrophic losses.⁵⁸

C. Juries and Expert Evidence

Much of the debate about the ability of juries to deal with complex expert testimony that appears in major civil trials is focused upon scientific techniques and findings that were developed and used in trials in the last quarter of the twentieth century. The rise of DNA evidence and the introduction of epidemiological evidence in asbestos,

50. *Id.* at 790-91.

51. *Id.* at 795 tbl.6.

52. *Id.*

53. *See generally* FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* (1993).

54. *Id.* at 167-68.

55. *Id.*

56. W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* xii (1991).

57. *See, e.g.*, STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 169 (1995); Carol J. DeFrances & Marika F.X. Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996*, BUREAU OF JUSTICE STATISTICS BULLETIN (September 1999); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE UNIV. L. REV. 433, 447 (1996).

58. VISCUSI, *supra* note 56, at 51.

birth defect, and environmental pollution cases provide the best examples.

As part of a study involving medical malpractice litigation, I conducted interviews with jurors who had just finished serving on juries that had decided such cases.⁵⁹ The cases involved surgery for urinary incontinence, a brain-damaged baby, a woman who died from a ruptured bowel, a woman who became blind and alleged failure to make a timely diagnosis, and a death involving an allergic reaction to a contrast dye.⁶⁰ All involved expert testimony about causation and all involved battles of experts. In three of the five cases the verdicts favored the defendants.⁶¹

Interviews with the jurors in the first four cases indicated that at least some of the jurors had a basic grasp of the main medical issues and recognized the basic points of disagreement between the opposing experts.⁶² In the urinary incontinence case, for example, a woman with severe urinary incontinence undertook elective surgery to sever the nerves to her bladder, a procedure known as a sacral rhizotomy.⁶³ She knew in advance that one result of the procedure would be that for the rest of her life she would have to expel her urine by self-catheterization, with a risk of frequent urinary tract infections.⁶⁴ The surgery did not correct the urinary incontinence; instead she became rectally incontinent as well.⁶⁵ She filed a lawsuit claiming that her urologist had misdiagnosed the cause of her urinary incontinence, that the surgeon had not conducted the proper pre-surgery tests and severed the wrong nerves, and that the surgeon had not fully informed her of the risks of the surgery.⁶⁶ The experts disagreed about “urge” versus “stress” incontinence and how cystometrograms that measure bladder functioning should be read.⁶⁷ Regarding the defendant’s performance of the surgery, there was a dispute about nerve blockage.⁶⁸ The issue of informed consent pitted the plaintiff’s testimony against that of the surgeon, who claimed he had discussed all of

59. VIDMAR, *MEDICAL MALPRACTICE*, *supra* note 10, at 9.

60. *Id.* at 127-60.

61. *Id.* at 131, 142, 155.

62. *Id.* at 131-32, 136-37, 141-42, 150-51.

63. *Id.* at 127-28.

64. *Id.* at 129.

65. *Id.* at 128.

66. *Id.*

67. *Id.* at 129-31.

68. *Id.* at 128-29.

the risks.⁶⁹ The experts on both sides supplemented their oral testimony with numerous charts and graphs.⁷⁰ In short, the trial had many of the characteristics that cause doctors to claim that laypersons have no business deciding medical malpractice cases. After the verdict, my law students and I interviewed the jurors and discovered that, as a group, the jurors had a basic intellectual grasp of the case.⁷¹ The jurors ascribed their understanding of the issues to clear and repetitive tutoring by the trial witnesses.⁷²

None of the malpractice cases allow an unequivocal answer as to whether the jury reached the “correct” result, but they do clearly show that the jurors were not passive in evaluating the experts or their testimony. In most cases, jurors were able to identify basic disagreements between the experts. In the ruptured bowel case several jurors used the term “hired gun” to describe the plaintiff’s expert, a label that may well have been appropriate in that instance.⁷³ In the blindness case, jurors were similarly skeptical of the defendant’s experts based on perceived bias resulting from their collegiality with the defendant.⁷⁴ Jurors also considered the absence of evidence and the incompleteness or convoluted nature of expert testimony.⁷⁵ Most importantly, the jurors in each case evaluated the testimony in the context of other trial evidence.

In another study of experts, Sanja Kutnjak Ivkovich and Valerie Hans conducted tape-recorded interviews with fifty-five jurors who served in civil trials involving medical malpractice, workplace injury, products liability, asbestos, and a motor vehicle accident.⁷⁶ The number of experts averaged more than four for each case and the majority were physicians.⁷⁷ Ivkovich and Hans found that rather than uncritically accepting expert opinion, most jurors appeared aware that the experts were called as part of the adversary process and expressed

69. *Id.* at 129-30.

70. *Id.* at 128-29.

71. *Id.* at 131-32.

72. *Id.* at 131.

73. *Id.* at 141.

74. *Id.* at 150-51.

75. *Id.* at 131, 150, 158.

76. Sanja Kutnjak Ivkovich & Valerie Hans, *Jurors and Experts*, 16 *ADVOCATE: THE MAGAZINE FOR DELAWARE TRIAL LAWYERS* 17, 18-19 (1994) [hereinafter Ivkovich & Hans, *Jurors and Experts*]; Sanja Kutnjak Ivkovich & Valerie Hans, *Jurors’ Evaluation of Expert Testimony: Judging the Messenger and the Message*, 28 *LAW & SOC. INQUIRY* (forthcoming Spring 2003) (manuscript at 17-19, on file with author and cited by permission of the original authors) [hereinafter Ivkovich & Hans, *Judging the Messenger*].

77. Ivkovich & Hans, *Jurors and Experts*, *supra* note 76, at 18.

reservations about them from the outset of the trial.⁷⁸ The interviews showed that jurors tended to evaluate experts on the basis of credentials, motives, general impressions, and the content and presentation of their testimony.⁷⁹ However, the importance accorded these factors varied from juror to juror, expert to expert, and case to case.⁸⁰ The jurors also offered their views on what constituted good and bad witnesses. Good witnesses were described as good teachers with sound credentials and acceptable motives for offering their testimony.⁸¹ The jurors' judgments of what made a bad witness garnered less agreement among the jurors who were interviewed, but they did not ignore or uncritically accept the testimony of experts.⁸² Ivkovich and Hans concluded that:

[W]hen jurors are faced with the difficult task of evaluating evidence that is outside their common knowledge, they rely on sensible techniques: assessing the completeness and consistency of the testimony and evaluating it against their knowledge of related factors. For especially complex topics, the jury relies on its members who possess greater familiarity with the subject matter of the expert testimony.⁸³

In recent research, my colleagues and I were allowed to videotape the actual deliberations of fifty civil juries in the state of Arizona.⁸⁴ The expert testimony in the sample varies from trial to trial but includes medical testimony about the causes of injuries and their severity, accident reconstruction, standards of business practices, amounts of economic losses and other complicated matters. Consistent with the American adversarial procedural system, in almost every case the contending parties have their own experts who provide conflicting testimony, often described as the "battle of experts." Although our analyses of these data are incomplete, our preliminary findings are very consistent with the conclusions of previous research.⁸⁵ The jurors question the substantive bases of the experts' opinions, and they contrast one expert's opinion with that of an opposing expert or the evidence produced by fact witnesses and circum-

78. *Id.* at 20; Ivkovich & Hans, *Judging the Messenger*, *supra* note 76, at 63.

79. Ivkovich & Hans, *Jurors and Experts*, *supra* note 76, at 19-20.

80. Ivkovich & Hans, *Judging the Messenger*, *supra* note 76, at 64.

81. Ivkovich & Hans, *Jurors and Experts*, *supra* note 76, at 20-21.

82. Ivkovich & Hans, *Judging the Messenger*, *supra* note 76, at 28-29.

83. Ivkovich & Hans, *Jurors and Experts*, *supra* note 76, at 20.

84. Shari Seidman Diamond et al., *Juror Discussion During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. (forthcoming 2003) (manuscript on file with author).

85. For a review of our preliminary findings, see Neil Vidmar & Shari Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1179-80 (2001).

stantial evidence. Arizona jurors are encouraged to ask questions of witnesses.⁸⁶ A few examples from as yet unpublished data help to illustrate the attention they often give to expert testimony.

In one case, the plaintiff asserted severe back and leg pain from an injury. As is not infrequent with plaintiffs, he had pre-existing injuries and health problems. The treating physician and another physician testified for him regarding tests performed and the prescribed treatment. Here are some of the questions the jurors asked those experts:

Why no medical records beyond the two years prior to the accident? What tests or determination besides subjective patient's say so determined [your diagnosis of] a migraine? What exact symptoms did he have regarding a migraine? Why no other tests to rule out other neurological problems? Is there a measurement for the amount of serotonin in his brain? What causes serotonin not to work properly? Is surgery a last resort? What is indothomiacin? Can it cause problems if you have prostate problems?

In an automobile injury case an overweight plaintiff alleged injury to her knee that required surgery. An accident reconstruction expert and the plaintiff's diagnostic radiologist both testified. Jurors asked the radiologist the following questions:

Did you see the tears in the meniscus? Do you see degeneration in young people and what about people of the plaintiff's age? Is a tear in the meniscus a loosening, lack or gash in the cartilage? Can you tell the age of a tear due to an injury? Can you see healed tissue in a MRI? Do cartilage tears heal by themselves? Can healed tears appear younger than they really are?

A defense medical expert in the case was asked: Could the plaintiff have sustained a blunt meniscal tear during the accident? Could one tear cause another tear? Questions to the plaintiff's reconstruction expert included the following:

Not knowing how she was sitting or her weight how can you be sure she hit her knee? Would these factors change your estimate of fifteen feet per second travel speed? If a body in motion stays in motion, and she was continuing motion from prior to the impact, how did this motion begin and what do you base this on? How tall is the person who sat in your exemplar car to reconstruct the accident and how heavy was he? What is the error in your ten miles-per-hour estimate? Is the time of fifty to seventy milliseconds based on an estimate of the size of the dent? Do you conclude that the Olds was slowed and pushed to the left by the Lincoln and [if so] how would the plaintiff move to the right and forward?

86. Ariz. R. Civ. Pro. 39(b)(10).

The above examples are not consistent with an image of unintelligent, passive or credulous jurors. This fact is further demonstrated by the jurors' discussions in the jury room. Consider just one example. In a motor vehicle case the jurors used each other as sources to fill in their own recollection, but this moved into a commentary about notable aspects of the plaintiff and his physician, drawing upon their own experiences and information from other witnesses:

[Discussing medical testimony]

Juror 2: When did the independent medical exam occur?

Juror 7: July 1998.

Juror 2: Right.

[All jurors talking at once]

Juror 3: And [plaintiff] had all of those prior injuries he didn't disclose.

Juror 2: I thought that was weird. It wasn't like they had to go to different doctors. It was all in one file.

Juror 5: It's not unusual for doctors to disagree.

Juror 7: His [treating doctor's] ability to treat patients seems to just prescribe more drugs.

Juror 2: It is just my opinion but [the plaintiff's] doctor wasn't very good, and at least this witness today knew.

Juror 6: I would like to see [the exhibit about his medication] again. I just want to see what happened after the accident.⁸⁷

The comment from Juror 6 indicates the updating that jurors sometimes undertake—they encounter a piece of evidence during the trial, they consider it further, and then they want to see the material again in light of what has transpired. Likewise, jurors draw on their experiences and the evidence they have received.

In short, the data obtained from comparing jury verdicts against those of judges, medical experts or other criteria, from juror interviews and from our study of the Arizona juries all yield the conclusion that, in general, civil juries approach the issue of liability with diligence and intelligence. Taken together, the studies lend no support to critics who claim that juries are incompetent.

D. Jury Bias

Claims are also made that civil juries are biased in favor of plaintiffs and against businesses like McDonald's. However, statistics indi-

87. Diamond et al., *supra* note 84, at 39.

cate that across the United States defendant doctors win, on average, almost eight out of ten cases that are decided by juries, and products liability defendants prevail in about six of ten cases.⁸⁸ These statistics, of course, do not speak directly to bias because it could be that the defendants deserved to win at an even higher rate. Thus, other data are needed to put these statistics into perspective.

Valerie Hans has conducted the most extensive investigation of the claim that civil juries are biased in favor of plaintiffs.⁸⁹ Her research involved claims by individuals against corporate defendants.⁹⁰ Hans conducted extensive interviews with jurors who had decided these cases, surveys of juror attitudes, and experimental studies that manipulated key variables bearing on the bias hypothesis.⁹¹ She found no support for the argument that juries are uniformly sympathetic to plaintiffs who bring claims against businesses, concluding instead that:

[J]urors are often suspicious and ambivalent toward people who bring lawsuits against business corporations. Jurors and the public are deeply committed to an ethic of individual responsibility, and they worry that tort litigation could be fraying the social fabric that depends on a personally responsible citizenry.⁹²

Hans also addressed the related claim of anti-business bias. She concluded that:

The jurors . . . did not display the widespread hostility to business litigants that is commonly asserted. Instead, jurors and the public supported business as a general rule, and worried about how excessive litigation might detrimentally affect the strength of the business community. Jurors expressed concern . . . [whether an award] might lead to a loss of jobs or otherwise harm the company.⁹³

Hans' conclusions are consistent with the findings of other researchers.⁹⁴ There is no consistent evidence supporting the claim of jury bias against businesses or deep pocket defendants, or the obverse claim

88. See, e.g., DeFrances & Litras, *supra* note 57, at 6 tbl.5.

89. VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* (2000).

90. *Id.* at 17.

91. *Id.* at 17-21.

92. *Id.* at 216.

93. *Id.* at 217.

94. See VIDMAR, *MEDICAL MALPRACTICE*, *supra* note 10, at 11-45 (documenting low plaintiff win rates); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 *LAW & SOC'Y REV.* 121, 143 (1996) (finding that "existing evidence argues against a deep-pocket interpretation of jury patterns"); Taragin et al., *supra* note 41, at 783-84 (finding that, in medical malpractice cases, unjustified judgments against physicians are uncommon).

that juries decide cases solely out of sympathy for the injured plaintiff.

Our Arizona research indicates that scrutiny of the plaintiff's claims takes place not only during the time the witness is testifying, but also before and after. In one case, a woman injured in an accident claimed serious back problems. Here is an example of an exchange that took place in the jury room:

Juror 2: She suffered from the injury.

Juror 4: Now there is only one thing I want y'all to think about. Every doctor that she had testify said she could not sit for longer than fifteen minutes after that accident. Every doctor said that. I want you to know [waving her notes] that the entire trial from 2 to 3 pm she did not move in that chair. I took notes as to every single day. I can tell you exactly how long that woman sat in her chair the entire trial.

Juror 1: Know something? I was moving more than she was. She sat like a rock.

[Laughter from other jurors]

Juror 4: Every one of you [jurors] moved. You either crossed your legs, moved this way, you sat back

This case was not unusual. In another trial where the plaintiff claimed a leg injury, jurors noticed that she was wearing high heels and showed no sign of injury as she stepped off the witness stand. In still another case, a juror saw the plaintiff smoking during a recess and said that as a result she was prejudiced against him. The juror stated that her observation prejudiced her against the plaintiff despite the objections of two other jurors, one who was a smoker and another who argued that smoking was not relevant.

E. Assessing Damages

It is jury damage awards that get the attention of the news media and the public. It is safe to say that the McDonald's case would have gained no attention from the media if the award had only been several thousand dollars. Studies indicate that media coverage is heavily skewed toward cases involving large damage awards.⁹⁵ Of course, this skews public perceptions of the jury. In American courts a major distinction is made between compensatory damages—that is, those in-

95. Bailis & MacCoun, *supra* note 10, at 436; Chase, *supra* note 10, at 771; Steven Garber & Anthony Bower, *Newspaper Coverage of Automobile Product Liability Reports*, 33 LAW & SOC'Y REV. 93, 119-20 (1999).

tended to compensate an injured party for economic losses and for pain and suffering—and punitive damages.

In a major study of 1992 verdicts in a sample of the largest urban state courts, Brian Ostrom and his colleagues concluded that the typical jury award was “modest.”⁹⁶ The median jury verdict, including punitive damages, was \$52,000; however, because of some very high awards, the arithmetic mean of those awards was much higher, \$455,000.⁹⁷ About eight percent of awards exceeded \$1 million and the mean amount of the awards varied by case type, with malpractice, products liability, and toxic torts generating the largest awards on average.⁹⁸ In contrast, automobile and premises liability cases had much lower awards.⁹⁹

Many of the same jurisdictions were assessed again in 1996.¹⁰⁰ The median amount of the jury award for plaintiffs who won at trial was \$35,000, with about nineteen percent of winners receiving over \$250,000, and an estimated seven percent receiving \$1 million or more.¹⁰¹ Of a total of 5,060 jury trials in which the plaintiff prevailed, there were only 212 cases (about four percent) that resulted in punitive damages.¹⁰² Of these, about twenty-two percent involved intentional torts and forty-nine percent involved contract cases.¹⁰³ In tort cases considered as a whole, the median punitive award was \$27,000 compared to a median punitive award in contract cases of \$76,000.¹⁰⁴

Deborah Merritt and Kathryn Barry undertook a very detailed examination of jury verdicts in the state of Ohio over a twelve-year period.¹⁰⁵ They concluded that, despite the rhetoric and newspaper coverage of large awards, win rates in most personal injury claims

96. Brian Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 237 (1996).

97. *Id.*

98. *Id.* at 238 fig.8.

99. *Id.*

100. DeFrances & Litras, *supra* note 88, at 1.

101. *Id.* at 8 tbl.7.

102. *Id.* at 8 tbl.7, 10 tbl.9.

103. *Id.* at 10 tbl.9.

104. *Id.*

105. Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 317 (1999) (specifically examining products liability and medical malpractice cases).

were low and jury awards were declining.¹⁰⁶ Indeed, the amounts awarded to plaintiffs were relatively small in most cases.¹⁰⁷

Mary Rose and I undertook a more detailed examination of punitive awards in Florida,¹⁰⁸ a state that has a reputation for errant juries.¹⁰⁹ Our data included all available punitive damage awards by juries from 1998 through June 2000.¹¹⁰ We discovered that there were, on average, about twenty-three punitive awards per year in Florida, and that the amount of the punitive damages was, on average, about two-thirds of the compensatory damages.¹¹¹ That is, for every dollar awarded in compensatory damages in these cases an additional sixty-seven cents was awarded in punitive damages. One of the most striking findings was that despite much discussion regarding the propensity of Florida juries to award punitive damages in products liability cases, during the time period studied only twenty such cases were submitted to the jury with instructions that they were allowed to consider punitive damages.¹¹² Some of the studied cases involved claims for asbestos exposure,¹¹³ while the remainder, at least on their face, involved claims of egregious conduct by the defendants.¹¹⁴ Motor vehicle accidents involving impaired or reckless drivers, for example, constituted over twenty-three percent of all punitive awards.¹¹⁵ For all cases in which punitive damages were awarded, the median award was \$151,871, and, for the majority of categories of cases, the median ratio of punitive damages to compensatory awards was at or below one to one.¹¹⁶ Overall, punitive damages did not exceed compensatory awards, suggesting that the punitive awards could have been reasonable.¹¹⁷

In another study of punitive damages verdicts, Theodore Eisenberg and his colleagues concluded that there was no evidence that

106. *Id.* at 398.

107. *Id.* at 389-90.

108. Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. ON LEGIS. 487 (2001).

109. *See id.* at 488-89.

110. *Id.* at 490-91.

111. *Id.* at 492-93 tbl.1.

112. *Id.* at 496. Of those twenty cases, punitive damages were awarded in sixteen. *Id.*

113. *Id.* at 496-97. Fifteen of the sixteen cases where punitive damages were awarded related to asbestos injuries. *Id.*

114. *Id.* at 494-96.

115. *Id.* at 495.

116. *Id.* at 500-01 tbl.3.

117. *Id.* at 503.

punitive damages were more likely when individuals sued businesses than when they sued individuals¹¹⁸ and that juries appeared especially reluctant to award punitive damages in medical malpractice and products liability cases.¹¹⁹ They concluded their article by stating that “[u]nless the case involves an intentional tort or a business-related tort (such as employment claims), punitive damages will almost never be awarded.”¹²⁰

F. Amounts and Variability of Compensatory Awards

Despite the data showing that the average compensatory award is modest, the data also indicate that many medical malpractice and products liability verdicts do involve very large awards.¹²¹ One of the first things that a non-American must take into consideration is that, unlike most other countries, the United States does not have a universal health care system and costs must be borne by the parties or their insurers. The second issue is that the costs of medical treatment to a severely injured person can be very large, potentially running to millions of dollars over the lifetime of a quadriplegic, for example. Viewed in this light, it should not be a surprise that some jury awards are very large.

Frank Sloan and Stephen van Wert studied the economics of 187 medical malpractice cases in Florida from 1998 and 1999.¹²² The cases involved birth and emergency room injuries.¹²³ Their team of economists interviewed claimants and analyzed their medical and financial records.¹²⁴ The economists’ estimates of the total economic loss resulting from each injury included past and future health care costs, past and future income losses, and “non-market” losses such as care for dependent children and income lost by family members who had to abandon their jobs to care for the injured party.¹²⁵ The figures were adjusted to account for insurance benefits and government assistance.¹²⁶ For children who survived a birth-related injury, the average

118. Theodore Eisenberg, et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 624-25 (1997).

119. *Id.* at 637.

120. *Id.* at 659.

121. *See, e.g.*, Vidmar & Rose, *supra* note 108, at 501 tbl.3.

122. *See generally* Frank A. Sloan & Stephen S. van Wert, *Cost of Injuries, in SUING FOR MEDICAL MALPRACTICE* 123 (1993).

123. *Id.* at 125.

124. *Id.*

125. *Id.* at 125-26.

126. *Id.* at 125.

total economic loss was estimated at over \$1.5 million (in 1989 dollars), with some cases exceeding \$2 million.¹²⁷ The loss to the estates of those who died as a result of negligence averaged \$605,000, and reached \$1.3 million for the most seriously injured parties.¹²⁸ For persons who died as a result of negligence, the loss to their estate averaged \$520,000.¹²⁹ Sloan and van Wert cautioned that because many records were missing from the data, their estimates probably “seriously underestimated” the losses.¹³⁰ Of course, the same types of losses could be expected from negligent injuries from other causes, such as dangerous products.

The other important finding from the work of Sloan and van Wert was that there was considerable variability of estimated economic losses between persons, even persons with roughly similar injuries.¹³¹ For example, the economic losses to a twenty-year-old person would likely be greater than the losses to a sixty-year-old person, simply because the younger person would be expected to live much longer. Similarly, the economic losses of a person who earned \$300,000 per year would be greater than those of an otherwise similar person who earned \$30,000 per year.

The conclusions of Sloan and his colleagues speak only indirectly to the performance of juries. There is no question that estimating damages is a difficult process, especially because American law allows monetary compensation for general damages, frequently labeled “pain and suffering.”¹³² Michael Saks has cogently pointed to the fact that experienced insurance claims adjusters show considerable variability in their valuations of claims.¹³³ In another study, Gerald Williams provided a group of experienced lawyers with the same case facts, but randomly assigned the attorneys to the role of plaintiff or

127. *Id.* at 138 tbl.7.2.

128. *Id.* at 143 tbl.7.4.

129. *Id.*

130. *Id.* at 145.

131. *See id.* at 168.

132. For reasons that I will not elaborate on here, “pain and suffering” is a misleading term, since general damages encompass many factors other than just pain. *See* Neil Vidmar et al., *Jury Awards and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 274 (1998).

133. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1214-15, 1222 (1992).

defendant.¹³⁴ Lawyers representing both sides showed great variability in their valuations of the case.¹³⁵

In a series of two experiments, my students and I explored jury performance another way—by comparing the damage awards recommended by lay persons who had been called for jury service with awards recommended by senior lawyers, including lawyers who had served terms as judges.¹³⁶ In the first experiment, the jurors and the lawyers were presented with a detailed case description of a young woman who suffered a serious burn and resulting scar on her knee as a result of medical negligence.¹³⁷ The materials also contained photographs of the scar.¹³⁸ The doctor had admitted he was negligent and conceded medical bills and lost wages, so the only issue was the amount of money the woman should receive for her pain and suffering and disfigurement.¹³⁹ The jurors and the senior lawyers did not differ in the average amount of money that they awarded.¹⁴⁰ However, both individual jurors and lawyers showed considerable variability in the amount awarded,¹⁴¹ suggesting that estimating this type of damage award is a subjective process. Note, however, that jury awards are the result of combining perspectives from between six and twelve persons, depending on the particular jurisdiction, while the award rendered by a judge is by the judge alone. On the other hand, the judge has the experience of having decided prior cases and has knowledge of awards rendered by other judges or juries whereas the jurors have little or no prior experience. Nevertheless, I was able to use the data to show that it was highly probable that by combining their individual perspectives, the jury valuation of damages in the case would be significantly less variable than that of an individual judge.¹⁴² In other words, juries can be expected to be more reliable than judges in making this decision. My second experiment was similar in methodology except that the subjects involved a different set of jurors and lawyers and an injury more serious than the burned knee.¹⁴³ The results of this second experiment supported the conclu-

134. GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 6 (1983).

135. *Id.*

136. VIDMAR, *MEDICAL MALPRACTICE*, *supra* note 10, at 224.

137. *Id.* at 222-24.

138. *Id.* at 223.

139. *Id.*

140. *Id.* at 225 tbl.19.1.

141. *Id.*

142. *Id.* at 227-28.

143. *Id.* at 230.

sion from the first experiment, that juries would be expected to be more reliable decision-makers than judges.¹⁴⁴

G. Jury Consideration of Insurance and the Effects of Damage Awards

Is there any validity to the claim that jurors are profligate with defendants' or their insurers' money? Critics of the jury system might argue that juries are irresponsible because the jurors see the money award coming from the rich person or corporation and do not consider the aggregate impact of large awards on financial costs that must be borne by all of society. As a general rule, these claims about jury profligacy are not only unsupported by systematic research, but findings suggest just the opposite – that juries tend to be very skeptical of plaintiffs' claims about damages. As described above, in her research in cases involving individuals suing business defendants, Valerie Hans found that jurors were quite concerned about the amount of damages and their impact on the business.¹⁴⁵ I uncovered similar concerns in my interviews with jurors in medical malpractice cases.¹⁴⁶ These basic conclusions seem well supported by the window into the actual jury room that is provided by the Arizona jury project.

The Arizona data show a wide concern among jurors about plaintiffs receiving money that they do not deserve. Here are some exchanges that took place among two juries:

Jury Example 1:

Juror 5: Every time somebody gets hurt they want to sue somebody.

Juror 7: I agree.

Juror 5: Nobody wants to take responsibility for their own actions anymore.

Juror 7: Everything is someone else's fault.

Juror 8: I wonder if he needs assistance anyway

Juror 5: Well, he had insurance.¹⁴⁷

Jury Example 2:

Juror 6: That is another thing that was not brought up: How much of this medical has been paid?

144. *Id.* at 232.

145. See Hans, *supra* note 89, at 189.

146. VIDMAR, MEDICAL MALPRACTICE, *supra* note 10, at 217.

147. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1877-78 (2001).

Juror #5: They never tell that.

Juror #3: Insurance usually covers chiropractic care. Why should we give her above and beyond what she is probably going to get [for future medical expenses] on her insurance?¹⁴⁸

The data show that insurance is a common theme in jury discussions.¹⁴⁹ To the apparent surprise of many legal scholars and practitioners, a much larger percentage of discussion involves exchanges about the possibility that the plaintiff's medical bills and other losses are covered by insurance than about whether the defendant has insurance. Jurors often compare the plaintiff's current health with health problems that existed prior to the alleged injury or minimize the impact of the injury on the life of the plaintiff by comparing the injury with their own life experiences or those of family and friends. Consider one final example from a trial involving an automobile injury in which the jurors are discussing the plaintiff's pre-accident medical condition:

Juror 4: The witness started to say something about her insurance and then dropped it. So there are a lot of things we may never find out about.

Juror 5: That was a lot of force [that struck plaintiff].

Juror 8: Oh yeah, that's what I was thinking.

Juror 4: And you know how hard her work is. I have no doubt this woman has pain.

Juror 8: That whole issue of degenerative disc disease. She probably has it, but it should not factor in . . . and if she was in the type of pain she was in yesterday . . . [referring to a "life in the day of plaintiff" videotape.]

Juror 2: Yes, if that was really her level, geez . . .

Juror 8: I have a friend who is going in for back surgery and his pain varies from day to day. I mean it will be interesting to watch the whole videotape. Are we going to watch the whole thing?

Juror 3: A lot of people go to work with fused backs.

Juror 1: Doesn't this degenerative back disease really hurt her chances? I mean they have not really proved to me that this was one instance that caused her back problem.

148. *Id.* at 1891.

149. *Id.* at 1876.

Juror 8: Well, I think that at the end the judge will instruct us on what to consider and what not to, we haven't seen the whole thing yet.

Juror 1: I thought the doctor's testimony was most useful. I mean, her daughter could never have seen what actually happened.¹⁵⁰

H. Judges' Assessment of Jury Performance

There is a final way of assessing jury performance, namely the opinions of trial judges who view the performance of the jury system on a daily basis and over many trials. Surveys show that the vast majority of trial judges give high marks to jury performance. In 1987, the *National Law Journal* conducted a survey of 348 state and federal judges regarding their views of juries.¹⁵¹ Among other questions, the judges were asked what percentage of the time they disagreed with jury verdicts in trials over which they had presided. The vast majority of judges expressed little disagreement with the verdicts.¹⁵²

Another survey of 800 state and 200 federal judges who spent at least half their time on civil cases was sponsored by the Aetna Life and Casualty Company and carried out by Louis Harris and Associates in 1987.¹⁵³ Ninety-eight percent of state judges and ninety-nine percent of federal judges indicated they believed that juries make a "serious effort to apply the law"; a majority did not believe that the feelings of jurors about the parties often cause them to make inappropriate decisions.¹⁵⁴ The judges were also asked if they would like to see a limitation on the use of juries in complex civil cases involving highly technical and scientific issues.¹⁵⁵ A majority of judges said they would not like a limitation and a majority was opposed to restrictions on jury trials for "complicated business cases."¹⁵⁶

Perry Sentell surveyed samples of state and federal judges in the state of Georgia.¹⁵⁷ Eighty-seven percent of judges indicated that they

150. Diamond et al., *supra* note 84, at 40.

151. *The View from the Bench: A National Law Journal Poll*, NAT'L L.J., Aug. 10, 1987, at S-2, S-8.

152. *Id.*

153. Louis Harris & Assocs., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges who Spend at least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731 (1989).

154. *Id.* at 746.

155. *Id.* at 747.

156. *Id.*

157. R. Perry Sentell, *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991).

agreed with the jury verdict in approximately four cases out of five.¹⁵⁸ Moreover, even when judges disagreed with the jury, only fourteen percent indicated that it was their belief that the jury was pro-plaintiff, and only six percent believed it was because the jury did not understand the case.¹⁵⁹

I. Outlier Verdicts

Research on general performance of civil juries should not obscure the fact that aberrations do exist. A small minority of juries make errors in deciding liability or go overboard in awarding damages. We should not expect otherwise. Just as appellate courts sometimes decide that a judge was in error in deciding the law or even in rendering a decision on the facts, we cannot expect the jury to be an errorless decision-maker or to never be influenced by passion or prejudice. Yet, it is this minority of cases that make headlines and influence perceptions of the jury as irresponsible or incompetent.

Sometimes jury awards that are arguably in error are not necessarily the fault of the jury. American litigation takes place in an adversarial atmosphere with each party responsible for developing the evidence and presenting it under established rules of procedure and evidence at trial.¹⁶⁰ Joseph Sanders, for example, conducted a case study of a trial involving the morning sickness drug, Bendectin, that was alleged to have caused birth defects.¹⁶¹ The jury decided in favor of the plaintiff, but Sanders concluded that the jury was wrong.¹⁶² Sanders observed that the problem was not necessarily the fault of the members of the jury, but instead resulted from “both the judicial instructions and the evidentiary rules concerning the admissibility of research articles.”¹⁶³ In research on medical malpractice cases, I discovered that in a number of instances, the defendant argued the case around liability and, in contrast to the plaintiff, said very little about damages.¹⁶⁴ In final instructions before deliberation, the judge instructs jurors that they are legally required to decide the case only on

158. *Id.* at 116 tbl.1.

159. *Id.* at 116-17.

160. *See generally* LANDSMAN, *supra* note 14; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

161. Joseph Sanders, *The Jury Deliberation in a Complex Case: Havener v. Merrell Dow Pharmaceuticals*, 16 *JUST. SYS. J.* 45 (1993).

162. *Id.* at 65.

163. *Id.*

164. VIDMAR, *MEDICAL MALPRACTICE*, *supra* note 10, at 83-84.

the evidence introduced during the trial.¹⁶⁵ Since jurors heard only estimates of damages from the plaintiff, they were bound to make their decision based on that evidence.¹⁶⁶ In interviews after the trial some jurors expressed dissatisfaction because they believed that the plaintiff's figures were too high but they felt bound to follow the judge's instructions and award damages based on the plaintiff's damage estimates.¹⁶⁷

On the other hand, it is also likely that, on occasion, jury awards are rendered out of passion or prejudice or perhaps just incompetence.¹⁶⁸ Some highly suspicious verdicts involving multi-million dollar compensatory awards in medical malpractice cases are documented in another article.¹⁶⁹ Although the alleged behavior of the medical professionals in these cases presents grounds for jurors (or any other person) to feel anger towards the defendants, the huge compensatory damage awards are difficult to defend. Errant jury verdicts, and even some that are not so errant, are embedded in a wider system of formal and informal controls that corrects the errors. This is often not recognized by persons outside the American legal system—or indeed the American public.

III. THE JURY SYSTEM EMBEDDED IN A SYSTEM OF FORMAL AND INFORMAL CONTROLS

A primary element in the system of controls is the fact that a jury verdict does not become a valid verdict unless the trial judge, who also heard the evidence, agrees and enters a formal judgment in the case. As occurred in the *McDonald's* case, the judge has the power to reduce the award through a legal device called remittitur. Remittitur gives the plaintiff the option of accepting a lowered award or asking for a new trial.¹⁷⁰ A new jury trial is a costly and risky undertaking because the jury in the second trial may be very stingy with damages

165. *Id.* at 188-89.

166. *Id.* at 240-41.

167. *Id.* at 241.

168. See Steve Cohen, *Malpractice: Behind a \$26-Million Award to a Boy Injured in a Surgery*, in Vidmar, *MEDICAL MALPRACTICE*, *supra* note 10 at 95 (examining the likelihood of such an incident in a medical malpractice case).

169. Vidmar et al., *supra* note 132, at 287-90.

170. David Fink, *Best v. Taylor Machine Works, the Remittitur Doctrine, and the Implications for Tort Reform*, 94 NW. U. L. REV. 227, 227 (1999). Some judicial decisions have placed limitations on the extent to which the trial judge may reduce awards. See Note, *Remittitur Abolished as an Unnecessary Practice Leading to Inconsistent Results*, 64 WASH. U. L.Q. 271, 276 (1986).

or even decide the defendant is not liable. Additionally, the judge may even set aside all or part of the liability verdict or damages and order a new trial if he or she decides that the evidence did not justify the verdict. Further, the losing party always has the option of appealing the verdict to a higher court.

These formal mechanisms are accompanied by a system of more informal processes. In post-verdict negotiations, the plaintiff often settles for an amount less than the verdict. One reason is that if the defendant appeals the case, the plaintiff faces a long and costly appeal process. Even if the plaintiff eventually prevails on all matters, he or she may not receive the money for many years. Additionally, in many instances the award, even if justified on the facts, may be in excess of the defendant's insurance coverage or other assets. Even though they could potentially do so, plaintiffs' lawyers are extremely reluctant to foreclose on assets of the defendant.¹⁷¹ In most instances their reluctance was reported as a basic sense that foreclosure would be unfair.¹⁷² Additionally, such aggressive action could potentially redound negatively on the lawyer's reputation.

A "high-low" agreement is another informal, presumably recent, development in litigation that takes place before or even during trial.¹⁷³ In such arrangements the parties stipulate that if the jury decides in favor of the defendant or awards damages below a certain specified amount, the plaintiff will receive the low amount specified by the agreement.¹⁷⁴ On the other hand, if the award exceeds an agreed high amount, the defendant will pay no more than that specified high amount.¹⁷⁵ Such agreements protect some of the interests of both parties—the plaintiff will receive some money and the defendant is protected against a very large award. These agreements may occur in advance of trial when the parties cannot reach agreement on the amount of a settlement and decide to let the jury determine damages while still protecting both parties' interests. Additionally, sometimes during trial the evidence proceeds in unexpected ways, creating uncertainty about the verdict and causing the parties to become risk averse and reevaluate the strength of their respective cases.

171. Tom Baker, *Blood Money, New Money and Moral Economy of Tort Law in Action*, 35 *LAW & SOC'Y REV.* 75, 285 (2001).

172. *Id.*

173. See Steven R. Gabel, *High/Low Settlement Agreements: Method for Dispute Resolution*, 73 *MICH. BAR J.* 74, 74-75 (1994).

174. *Id.* at 74.

175. *Id.*

Typically, neither trial judges nor juries are aware of the existence of high-low agreements. Parties are not required to disclose the agreement to anyone; indeed, parties usually specify that such agreements are confidential. Similarly, any post-verdict settlement between the parties is usually accompanied by a confidentiality clause. The secrecy of settlements prevents accurate assessments of the extent of post-, pre-, or mid-trial agreements that alter the amount provided for by the verdict or the precise means by which such settlements are reached.

There is some research that provides a window into these verdict adjustment processes. For example, Ivy Broder reviewed a sample of 198 jury awards of \$1 million or more that occurred between 1984 and 1985.¹⁷⁶ In just slightly more than a quarter of the cases, the plaintiff received the entire award.¹⁷⁷ However, on average the final amount was fifty-seven percent lower than the original verdict.¹⁷⁸ Similarly, Michael Shanley and Mark Peterson researched a sample of 161 verdicts from Cook County, Illinois (Chicago) and concluded that the payout of the awards was reduced in a significant number of cases, but did not provide more details.¹⁷⁹

Felicia Gross, Mary Rose, and I examined post-trial adjustments of jury awards in samples of medical malpractice cases from New York, Florida, and California.¹⁸⁰ Like the other researchers, we found substantial evidence of post-trial adjustments of awards, even though our data allowed only a very conservative estimate of those adjustments.¹⁸¹ We found that the very large “outlier verdicts” were adjusted the most.¹⁸² In some of the larger verdicts, the plaintiff eventually settled for an amount that was less than ten percent of the award.¹⁸³

I also documented post-verdict adjustments in a recent study of medical malpractice cases in Pennsylvania that were closed between

176. Ivy E. Broeder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349, 350 (1986).

177. *Id.* at 353.

178. *Id.*

179. MICHAEL G. SHANLEY & MARK A. PETERSON, *POSTTRIAL ADJUSTMENTS TO JURY AWARDS* viii (1987).

180. Vidmar et al., *supra* note 132, at 280-81.

181. *Id.* at 298.

182. *Id.*

183. *Id.*

1999 and 2001.¹⁸⁴ A substantial number of cases had high-low agreements in which the high amount was substantially below what the jury awarded.¹⁸⁵ In other cases the parties negotiated settlements after the verdict was rendered.¹⁸⁶ Of twenty-two cases involving jury verdicts of \$5 million or more, the final payment to the plaintiffs ranged between six percent and forty-six percent of the jury verdict, with the average settlement being twenty-two percent of the jury award.¹⁸⁷ As in previous research, the largest awards tended to be reduced the most.¹⁸⁸

IV. CONCLUSION

A substantial body of systematic empirical studies indicates that the American civil jury system is not as erratic or unreasonable as portrayed in the media. Whether it involves issues of liability, responses to experts, attention to the judge's instructions or damage awards, the civil jury performs much better than many people believe. If this were not so, surely the civil jury would have been abandoned, or at least drastically curtailed, despite the guarantee of the right to jury trial in the U.S. Constitution and the constitutions of individual states. American society could not afford the caprice and craziness ascribed to juries. Examined from this pragmatic perspective, it should not be surprising that the empirical research into the performance of the civil jury yields a generally positive picture, especially when considered in the context of the formal and informal controls on errant verdicts.¹⁸⁹

Taken along with the civil jury system's political and symbolic roles that Professor Carrington discusses in this volume, I hope this brief review helps to correct some fundamental misunderstandings about the civil jury. I offer it in the spirit of informed comparative

184. Neil Vidmar, *Juries and Jury Verdicts in Medical Malpractice Cases: Implications for Tort Reform in Pennsylvania* (Jan. 28, 2002) (unpublished manuscript, on file with author) [hereinafter Vidmar, *Juries and Jury Verdicts*]; see also Neil Vidmar, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. (forthcoming Fall 2002) (manuscript at 33, on file with author).

185. Vidmar, *Juries and Jury Verdicts*, *supra* note 184, at 18.

186. *Id.*

187. *Id.*

188. *See id.*

189. Careful students of the civil justice system agree that it is not always a very efficient system of resolving disputes or providing compensation to persons injured by the negligence or misdeeds of another. However, the inefficiencies are often ones that prevent injured persons from being compensated rather than inefficiencies involving overcompensation. See Saks, *supra* note 133, at 1287-88.

civil procedure that my wise, scholarly colleague and dear friend Herbert Bernstein drew to our attention.