

October 2003

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### Recommended Citation

B. M. Dann, *Jurors and the Future of "Tort Reform"*, 78 Chi.-Kent L. Rev. 1127 (2003).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/9>

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# JURORS AND THE FUTURE OF “TORT REFORM”

JUDGE B. MICHAEL DANN (RET.)\*

## INTRODUCTION

Jurors decide almost all tort cases that go to trial in the United States. Their verdicts are usually the final word in any particular case and greatly influence which injuries and deaths result in a claim in the first instance, and whether or not a case is settled. But unlike the litigants, their proxies (primarily insurance companies), and the parties’ attorneys, jurors do not have a personal stake in the outcomes of a lawsuit. However, their chances of reaching an accurate and just result are facilitated or hindered by both trial procedures and rules of evidence that affect the jurors’ abilities to understand the parties’ claims and defenses, the evidence, the applicable law, and how this law applies to the facts they find. Thus, jurors have an articulable interest, or stake, in the process used at trials to determine liability and damages.

Jurors are a fleeting constituency. They are supposed to be. Juries are composed of private citizens who serve without ambition and then disband, returning to the relative anonymity of their everyday lives. Jurors are not represented by legislative lobbyists and, traditionally at least, concerns about jury comprehension regarding procedural and legal issues have not figured prominently in legislative and judicial decision-making processes.<sup>1</sup> For these and other reasons,

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1. See generally Edmund M. Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725 (1961). Happily, conditions have changed in the past decade. Several states and individual state and federal judges have adopted, or are considering use of, procedural reforms to the traditional jury trial for the express purpose of enhancing juror understanding of the evidence and the law. For accounts of the jury reform movement, see generally JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997); Robert Boatright & Elissa Krauss, *Jury Summit 2001*, 86 JUDICATURE 145 (2002); Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH J.L.

legitimate juror needs and interests do not usually surface in “tort reform”<sup>2</sup> debates over various proposals that would modify current tort law and civil practice.

This Essay will discuss past and current tort reform proposals for their potential to enhance jury comprehension and decision making in tort litigation.<sup>3</sup> A calculus, or way of analyzing various tort reform ideas with jurors’ legitimate interests in mind, will be suggested for use by policymakers in determining whether and to what extent a given tort reform proposal might benefit juries. When a particular reform idea offers the potential to significantly assist or hinder jury decision making, that factor ought to be weighed in the balance—along with the interests of the primary stakeholders and the public at large—when legal policymakers consider those tort reform measures on their merits.

## I. CITIZENS’ VERSUS JURORS’ STAKES IN TORT LAW

The point of this Essay is that citizen-jurors, as jurors, have certain interests, or a stake, in the American tort system and in certain proposals that would change it. But their legitimate interests, as jurors, are different from those of ordinary citizens. In their roles as citizens—whether as political constituents and voters, public officials, actual or potential tort victims, defendants in a tort action, or in other civic capacities—they can be expected to have perspectives and interests different from those that jurors have. The general citizenry is, and should be, concerned about the political, economic, and moral soundness of the tort system, as well as, how it might impact their personal, business, and professional lives. While jurors are undoubt-

REFORM 213 (1999); G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216 (1996); Franklin Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 LOY. L.A. L. REV. 1249 (1997).

2. Partisans in the “tort reform” debates that ebb and flow do not agree that all proposals amount to “reform,” and they trade accusations about the other side’s real motives. Beyond what is stated here about proposals’ potential to assist or hinder the work of jurors, the author does not express any views on the wisdom, or lack thereof, of any idea or suggestion that has been advanced by others.

3. The many tort reform ideas listed in the accompanying chart were taken from recent print journal articles and from web sites of the following organizations: The American Tort Reform Association, The American Trial Lawyers Association, Center for Justice & Democracy, Citizens Against Lawsuit Abuse, The Washington Legal Foundation, Public Citizen, The Manhattan Institute, and the American Legislative Exchange Council (sponsoring the “Model Jury Patriotism Act”). See <http://www.atra.org>; <http://www.atla.org>; <http://www.centerjrd.org>; <http://www.cala.com>; <http://www.wlf.org>; <http://www.citizen.org>; <http://www.manhattaninstitute.org>; <http://www.alec.org>; respectively.

edly influenced by those beliefs or concerns, their interests as jurors are different and fewer.

The jurors' role is to decide the case before it in accordance with the applicable law, as fairly and justly as possible. That is its proper role and sworn duty. Theoretically, jurors may not act on their opinions toward the law or the tort system. As a general proposition, the law's soundness and fairness is not the jurors' legitimate concern. Rather, they are rightly concerned with how the law applies to the particular facts proven at trial and whether the result is just.

There is another important distinction between citizens' and jurors' stakes in the tort system. Citizens and policymakers should be concerned about the continued vitality of the jury as a constitutional and political institution that plays a central role in the American justice system. Jurors, on the other hand, need and expect procedures and tools that enable them to do the best possible job they can in deciding just one case. Thus, while the former are mindful of the future of juries and jury trials in the grand scheme of things, actual jurors' interests lie more in the nuts and bolts of the trial and whether jurors have the information and means necessary for a wise and fair verdict in the case before them.

Clearly, any principled description of jurors' "stakes" in tort reform will differ widely from those of litigants, insurance companies, most members of the bar, those occupations and professions that are frequently involved in tort litigation, and those who are involved in the politics of tort reform. Jurors have a unique perspective since they are expected to set aside, to the extent possible, any partisan feelings and beliefs about the tort reform agenda.

## II. WHEN AND WHERE JURORS' INTERESTS EMERGE

Jurors sit on just one case, or on a very few depending on the length of their term of service, then disband and return to the relative anonymity of their individual lives never to convene again. When they sit together during trial and deliberations, however, jurors act both as judges in resolving factual disputes and also as legislators in determining which rules of law to apply to the case (a lawmaking function, if only for that particular case). In hearing, evaluating, and deciding the facts of the case, jurors have a strong need for trial procedures, practices, and policies that enhance their abilities to understand the evidence, the applicable law, and their roles and responsibilities. These *aids to comprehension* spring from rules or

statutes of procedure, evidence law, legal instructions, substantive tort law, and from other actions and decisions of the trial judge and attorneys. Therefore, jurors will benefit from any tort reform proposal that will, by its terms or consequences, enhance jury comprehension—that is, provide jurors with tools they can use to better understand the evidence, the law, and their duties. By way of illustration, proposals to give jurors more explicit guidelines for their use in deciding whether a given product is defective or what conduct warrants the imposition of punitive damages will assist jurors in the performance of their duties. But that assistance will occur only if the new standards and definitions are communicated to the jury in a clear and comprehensible manner.

A second identifiable and legitimate concern of jurors is more ephemeral and relates to notions of respect, trust, and honesty. Jurors, like the rest of us, need to understand that their work is meaningful and that their decisions make a difference. If jurors are misled concerning the consequences of their decision in a case, or if the effects of a decision are not adequately explained to enable the informed exercise of their discretion in judging the facts and applying the law, frustration, disappointment, and even anger can result.<sup>4</sup> This is much more than a mere “feel-good” exercise to improve juror satisfaction with their general experience. I am attempting to describe procedural and legal rules and practices that keep necessary and relevant truth from the jury.

An example of a collaborative approach to instructing the jury in tort cases is the suggestion<sup>5</sup> that judges routinely tell jurors that considerations of insurance should not enter into their deliberations and decision. The suggested instruction should also convey the public

4. See generally Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL. PUB. POL'Y & L. 743 (2000); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998); cf. *Jurors Claim They Were Misled in Marijuana Trial*, TACOMA NEWS TRIB. Feb. 6, 2003 (reporting jurors felt “cheated” after not being told that defendant in federal marijuana prosecution thought he was acting in accordance with California’s medical marijuana statute).

5. Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1907–11 (2001) (recognizing the likelihood that the subject of insurance will arise and may affect jurors’ deliberations when nothing is told to them on the subject, a more sound behavioral approach is to treat the jury collaboratively and instruct them in a straight-forward manner on the subject).

policy and practical reasons why they should not be concerned with questions of insurance. Such an approach clarifies an often vexing problem for jurors, judges, and attorneys, and enhances the legal soundness of the jury's deliberations and verdict. It treats jurors as respected and responsible adult decision makers, is honest in its message, and accommodates jurors' needs to be treated in a way consistent with the deference given to the right to trial by jury. Since we expect wise and just decisions from jurors and often criticize them when a seemingly errant verdict is publicized, we should not treat them as, or worse than, children.

A recurrent tort reform proposal—the idea of capping jury verdicts for noneconomic losses in all or some tort litigation—is another example of the kind of change that represents an opportunity for such a collaborative approach to instructing the jury. In jurisdictions where caps are placed on such awards, jurors ought to hear about them and the applicable maximum amount the jury can award, if only to prevent the needless expenditure of time and effort deliberating on amounts in excess of the cap. A collaborative instruction also would avoid juror frustration, or worse, on learning that their verdict, made in ignorance of the cap, is of no consequence to the extent it exceeds the statutory limit. Alas, most jurisdictions that have enacted caps on such awards do not tell their juries about the legal limits on verdicts.<sup>6</sup>

### III. RANKING TORT REFORM PROPOSALS' "SALIENCE" WITH JURORS

Two kinds of real and proposed changes to American tort law have been identified for their potential to assist jurors: first, are those proposals that offer the hope of enhancing juror understanding of the evidence, the law, and the jurors' duties; and, second, are those proposals which by their nature suggest or require that jurors be told of the legal and practical consequences of their verdicts. There may

6. See Michael S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469, 470, 472 (1999) (arguing that informing jurors of damage caps will unduly influence jurors and distort damage awards). There are data to support the view that simply telling jurors of the amount at which damage verdicts are capped may serve as a cognitive "anchor" for jury discussions of awards. See, e.g., Greene & Bornstein, *supra* note 4, at 762. However, other studies have reported the more desirable effects of collaborative instruction that fully inform the jury of statutory provisions regarding damages together with the policy reasons for the law and the practical meaning for the jury's verdict in the case at hand. See *id.* at 755–56; Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513 (1992).

be other ways in which jurors' legitimate interests arise in certain proposals for tort reform, but the two identified here appear paramount.

These criteria can serve as twin bases for assessing and ranking the potential that many tort reform proposals hold for jurors in tort cases. In the appendix to this Essay, the author rates each proposal, using a scale of 0 to 6, in terms of their salience for jurors. A zero suggests "No Salience For Jurors," a 3 or 4 "Potential Salience," and 6 "High and Immediate Salience."<sup>7</sup>

Juror's "stakes" in sixty tort reforms are ranked by the author. Using the calculus developed in this Essay, only three are thought to have "High and Immediate Salience" for jurors. One is self-explanatory: "Improve training and education of trial judges in matters of jury comprehension and science and law topics." One would think that trial lawyers could benefit from the same regimen, but no such mention was found. The other two would add empirical data to evidence already heard on questions of central importance in tort law and of demonstrated difficulty for jurors: the standard of care in medical malpractice litigation and determinations of damages for pain and suffering. The latter are discussed at greater length below.

#### IV. TWO EXAMPLES OF REFORM PROPOSALS OF "HIGH SALIENCE" FOR JURORS

##### A. *Objective Proof of the Standard of Care in Medical Malpractice Litigation*

Widespread criticism has been leveled at the usual way of proving up a party's version of the standard of care in medical malpractice cases, that is, through opinion testimony by carefully preselected and highly paid medical experts. Most surveyed judges<sup>8</sup> and many stu-

7. See *infra* app.

8. See SHIRLEY A. DOBBIN & SOPHIA I. GATOWSKI, A JUDGE'S DESKBOOK ON THE BASIC PHILOSOPHIES AND METHODS OF SCIENCE 15 (State Justice Institute ed. 1999) (providing a national survey of 400 state trial court judges who indicated that their most serious problems with expert testimony were (1) extensive disagreement, (2) abandonment of objectivity, and (3) excessive cost); MOLLY TREADWAY JOHNSON ET AL., FEDERAL JUDICIAL CENTER, EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS 5 (2000) (surveying federal trial judges who reported that their the most frequent problems with party experts as (1) lack of objectivity, (2) excessive expense, and (3) opinions "of questionable validity or reliability").

dents of the litigation process<sup>9</sup> decry the lack of objectivity of party-retained experts, their low rate of accuracy, their high cost, their frequent lack of firsthand knowledge about the phenomena at issue, and their faulty memories. Moreover, conflicting expert testimony too often leaves lay juries with the difficult task of deciding which expert to believe and how much weight to give their opinions. The problems posed by partisan experts are not unique to medical malpractice litigation; according to evidence experts, they have plagued modern litigation for decades.<sup>10</sup>

Three modest, but effective, proposed reforms would supplement opinion testimony about the standard of care with empirical data that describes actual physician performance in like situations. The principal proposal is to use data from medical databases, where such data have been collected, to report on the nature and range of physician or nurse conduct in similar cases.<sup>11</sup> Proponents of this form of empirical evidence argue that "the verified and reverifiable collective experience of dozens, hundreds, or even thousands of cases cared for by comparably expert physicians . . ." would provide a necessary buffer for jurors from the "inevitably flawed, inaccessible, anecdotal recollection of a single [party-retained] expert."<sup>12</sup>

Advocates of another approach acknowledge that use of medical databases is preferable where the data already exist, but propose the use of surveys of similarly qualified and situated physicians concerning their approaches to care and their opinions of their peers' practices in treating like conditions where information collected in databases is inadequate. They claim that survey results will "provide a measure of objectivity and validity to the assessment of the appropriate standard of care in a malpractice case, . . . assist juries in

9. See generally Michelle M. Mello, *Using Statistical Evidence to Prove the Malpractice Standard of Care: Bridging Legal, Clinical, and Statistical Thinking*, 37 WAKE FOREST L. REV. 821 (2002); Philip G. Peters, Jr., *Empirical Evidence and Malpractice Litigation*, 37 WAKE FOREST L. REV. 757 (2002).

10. See, e.g., Morgan, *supra* note 1, at 733.

11. William Meadow, *Operationalizing the Standard of Medical Care: Uses and Limitations of Epidemiology to Guide Expert Testimony in Medical Negligence Allegations*, 37 WAKE FOREST L. REV. 675 (2002). Such databases currently exist and are available to be mined for these purposes. Moreover, the databases continue to grow rapidly and they are becoming "smarter." See Mark A. Hall et al., *Measuring Medical Practice Patterns: Sources of Evidence from Health Services Research*, 37 WAKE FOREST L. REV. 779 (2002); William M. Johnston, *As Medical Databases Grow, They Are Becoming Smarter*, ANAESTHESIA NEWS, June 2001, at 5.

12. Meadow, *supra* note 11, at 677.



choosing between the conflicting testimony of expert witnesses,”<sup>13</sup> and will supply “an additional and persuasive basis for [an] expert’s testimony. . . .”<sup>14</sup>

The third approach to supplementing the more subjective and sometimes misleading opinion testimony by party experts is the use of clinical practice guidelines (“CPGs”).<sup>15</sup> Clinical practice guidelines are “systematically developed statements . . . about appropriate health care for specific clinical circumstances.”<sup>16</sup> Initially hailed as an improvement on traditional expert testimony concerning the standard of care, CPGs appear to have fallen from favor because of their inherent vagueness, their relatively low visibility among many practitioners and because they are more aspirational in nature than purely descriptive of actual practice.<sup>17</sup> Whatever the future of CPGs in court, the rationales of the appellate decisions upholding their admission in evidence, on the theory that they constitute evidence of customary medical practice (or of the aspirational standard), appear to point the way for the admission of the other two forms of data.<sup>18</sup>

### *B. Use Prior Awards in Like Cases To Better Inform Jury Discretion in Determining Damages for Pain and Suffering*

When jurors are asked to return damage awards for pain and suffering, or for loss of life, as they are in most tort cases, they have practically no guidance in determining the amount to be awarded.

13. Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 753 (2002).

14. *Id.*

15. See STEPHEN J. SCHANZ, DEVELOPING AND IMPLEMENTING CLINICAL PRACTICE GUIDELINES: LEGAL ASPECTS 48 (1999); Angela Campbell & Kathleen Cranley Glass, *The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research*, 46 MCGILL L.J. 473 (2001).

16. Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645, 647 (2001).

17. Cramm, *supra* note 13; Mello, *supra* note 9, at 845–47.

18. See, e.g., *Wareing v. United States*, 943 F. Supp. 1504 (S.D. Fla. 1996); *Washington v. Wash. Hosp. Ctr.*, 579 A.2d 177 (D.C. 1990); *Thomas v. United States*, 530 A.2d 217 (D.C. 1987); *Darling v. Charleston Comm. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965); *Frakes v. Cardiology Consultants*, No. 01-A-01-9702-CV-00069, 1997 WL 536949, (Tenn. Ct. App. Aug. 29, 1997); see generally SCHANZ, *supra* note 15; Campbell & Glass, *supra* note 15. Assuming a proper foundation regarding soundness of methodology and similarity of subjects, statistical studies and survey results also are admissible in evidence to assist in proving the standard of care, at least to the extent allowed by Federal Rule of Evidence 703. See Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 233–35 (Federal Judicial Center ed., 2000); David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 86 (Federal Judicial Center ed., 2000).

With only the vaguest of legal instructions<sup>19</sup> and the suggestions and arguments of counsel<sup>20</sup> to guide them, jurors are regularly required to agree on an amount of money that will "fully and fairly compensate plaintiff."

From time to time during the past several years, both as part of more comprehensive "tort reform" packages and as stand-alone proposals to improve jury decision making, social scientists and legal scholars have suggested ways to guide and assist jurors in determining general damages. Chief among the ideas are proposals that jurors be informed by counsel or the court of reported empirical data describing the range of damages awarded in the recent past by other juries in similar cases.<sup>21</sup>

Jurors themselves have expressed the need for better guidance in deciding damage awards. Researchers have heard "strongly worded complaints about the ambiguity involved in their assigned task" and about their mistaken beliefs that they would receive more help from the court and the parties.<sup>22</sup>

### C. Empirical Sources of Proof May Enhance Jury Decision Making

Using information from medical databases and results of physician surveys to help establish the standard of medical care is functionally similar to providing jurors with "schedules" of past damage awards in similar cases.<sup>23</sup> First, both forms of evidence are empirical in nature—as they derive from databases of stored real-world outcomes. Both reform proposals involve evidence that is external to the case at hand, less subject to party and witness control. Also, they

19. Greene & Bornstein, *supra* note 4, at 745–47; Vidmar, *supra* note 4, at 885; see generally Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712 (2000).

20. In some states, counsel are prohibited from even suggesting a specific damage award to the jury. L. S. Groff, Annotation, *Propriety and Prejudicial Effect of Reference by Plaintiff's Counsel, in Jury Trial of Personal Injuries or Death Action, to Amount of Damages Claimed or Expected by Client*, 14 A.L.R. 3d 541, § 4 (1967).

21. See generally James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REG. 171 (1991); Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1998); Nancy S. Marder, *Juries and Damages: A Commentary*, 48 DEPAUL L. REV. 427, 447–52 (1998).

22. See, e.g., Greene & Bornstein, *supra* note 4, at 743; see generally Vidmar, *supra* note 4.

23. At least one scholar has previously noted the parallels between efforts to educate juries regarding damage determinations and the proposed use of accumulated empirical data in medical malpractice litigation. See Peter H. Schuck, *Mapping the Debate on Jury Reform, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 306, 325–26 (Robert E. Litan ed., 1993).

derive from the accumulated behaviors of other peer decision makers in unrelated but similar situations. Next, empirical sources are more frequently published, and therefore more open to inspection and criticism, than the often-anecdotal observations of the expert giving a personal opinion. Finally, statistical approaches provide a useful objective check, or yardstick, to use in judging the more subjective opinion evidence introduced by the parties.<sup>24</sup> Giving jurors a yardstick to use in assessing general damages is a technique that has also been described as the “kind of concrete, common-sense approach that one would expect a jury to understand intuitively and to appreciate easily.”<sup>25</sup>

It seems self-evident, at least to this juror-centric observer, that the proposals to objectify proof of the standard of medical care and to better guide jury discretion by informing jurors of previous awards in similar cases can only assist jurors in performing two of their most difficult tasks. Their need for help is readily apparent.<sup>26</sup>

## CONCLUSION

Jurors have a stake in tort reform proposals that will enhance juror comprehension at trial and truthfully inform them about the law's requirements and limitations where such knowledge is important to their reaching an informed and just decision in the case. These are additional important public policy considerations that ought to figure into future legislative and judicial consideration of such proposals. Jurors' needs, the public's interest in just outcomes, and the future of the jury as an institution should be given due weight, along with the interests of litigants, the bar, and the general public interest when deciding whether to adopt tort reform. Two proposals—ones that would “objectify” proof of the standard of care in malpractice litigation and provide guidance for determinations of general damages—serve as examples of reform ideas that contain the promise of more accurate, predictable, and equitable jury verdicts.

24. Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1493 (1992) (characterizing of damage “scheduling”); see also SCHANZ, *supra* note 15, at 49 (recommending jurors' use of clinical practice guidelines to assess experts' opinions).

25. Richard Lempert, *Civil Juries and Complex Cases: Taking Stock after Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 181, 209 n.61 (Robert E. Litan ed., 1993).

26. See generally B. Michael Dann, *Jurors as Beneficiaries of Proposals to Objectify Proof of the Standard of Care in Medical Malpractice Cases*, 37 WAKE FOREST L. REV. 943 (2002).

Whether jurors will benefit from these two proposals, or from any of the tort reforms given "high salience" for jurors in the appendix to this Essay, will depend on the politics of tort reform. At a minimum, policymakers should add jurors to the list of "constituencies" to consider when debating the merits of any particular reform. Jurors need all the help that tort law can provide when making the difficult decisions we require of them.

APPENDIX:  
RATING TORT REFORM PROPOSALS' SALIENCE FOR JURORS<sup>27</sup>

**0 = No Salience 6= Highest Salience**

*Abolish Claims or Establish Defenses*

1. Abolish certain categories of torts (e.g., third-party bad faith claims)	0
2. Exempt certain products or professions from liability	0
3. Immunize manufacturers and sellers of inherently unsafe products	0
4. Statutory no-fault schemes (automobiles)	0
5. Eliminate seller liability where manufacturer can be sued	0
6. Immunize sellers of products when unaware of defect	0
7. Abolish liability for unavoidably unsafe products if adequate warning given	3-4 <sup>28</sup>
8. Prohibit or limit class actions claiming alleged torts	0
9. Abolish joint and several liability and substitute comparative fault scheme	3-4 <sup>29</sup>
10. Create statutes of repose in products and medical malpractice cases	1-2 <sup>30</sup>
11. Reduce statute of limitations periods	1-2 <sup>31</sup>
12. Create a uniform national statute of limitations	0
13. Codify state-of-the-art defense for products cases	3-4 <sup>32</sup>
14. Establish defense in products cases for compliance with state and federal regulations	3-4 <sup>33</sup>

27. See *supra* text accompanying note 7 for an explanation of these ratings.

28. This requires that clear and comprehensible guidance be given to jurors concerning the adequacy of warnings.

29. This requires that clear and comprehensible guidance be given to jurors on how to allocate fault by percentage and the consequences of percentage of fault.

30. In theory, requiring claims to be brought sooner rather than later would improve the quantity and quality of evidence heard by jurors.

31. See *supra* note 30.

32. This would require that clear and comprehensible guidance be given to jurors concerning "state-of-the-art" defense.

- |   |                   |
|---|-------------------|
| 15. Establish defense in products cases where government-required warning given | 3-4 <sup>34</sup> |
| 16. Abolish punitive damages altogether   | 0                 |
| 17. Prohibit multiple punitive damage awards for same conduct                   | 3-4 <sup>35</sup> |
| 18. Enact caps on total liability of particular industries                      | 1-2 <sup>36</sup> |

*Eliminate or Limit Role of Juries*

- |   |   |
|---|---|
| 19. Trial of all tort cases to the court without jury   | 0 |
| 20. General complexity exception (no jury in trials of cases deemed "complex")  | 0 |
| 21. Special "blue ribbon juries" for technical cases or issues  | 0 |
| 22. All punitive damage claims tried by court without jury  | 0 |
| 23. Bifurcate trials of punitive damage claims (jury decides whether conduct warrants imposition, judge decides amount) | 0 |

*Preconditions to Filing and Pleading of Tort Claims*

- |  |                 |
|--|-----------------|
| 24. Forbid out-of-state attorneys from soliciting local clients for tort claims                          | 0               |
| 25. Prefiling screening panel for certain claims   | 1 <sup>37</sup> |
| 26. Require exhaustion of alternative dispute resolution procedures before filing formal court claim     | 1 <sup>38</sup> |
| 27. Give tort defendants option to require mediation prior to trial                                      | 1 <sup>39</sup> |
| 28. Require that plaintiff have and file affidavit of expert opinion regarding defect or other liability | 1 <sup>40</sup> |

33. This would require that clear and comprehensible guidance be given to jurors about regulatory language and requirements.

34. This would require that clear and comprehensible guidance be given to jurors about government-required warning.

35. This would require that clear and comprehensible guidance be given to jurors about what is and what is not the "same conduct."

36. Jurors should be clearly informed of the existence, amount, and effect of a cap.

37. Theoretically, such prefiling and pretrial procedures allow parties to focus their claims and hone the evidence.

38. See *supra* note 37.

39. See *supra* note 37.

29. Prohibit statement in pleadings of dollar amount sought 0  
 30. Prohibit claim for punitives damages in pleadings 0

*Regulation of Procedure and Evidence*

31. Mandatory settlement conferences 1<sup>41</sup>  
 32. Enact state and federal standards and definitions of elements of product claims and various defenses 3-4<sup>42</sup>  
 33. Allow proof of plaintiff's intoxication and use of drugs 3-4<sup>43</sup>  
 34. Require proof of economical and technically safer alternative design in products cases 3-4<sup>44</sup>  
 35. Prohibit evidence of ex post advances made in design and manufacture 3-4<sup>45</sup>  
 36. Bar all evidence of subsequent remedial measures 3-4<sup>46</sup>  
 37. Reduce scope and amount of discovery in all tort cases 1-2<sup>47</sup>  
 38. Greater or exclusive use of court-appointed expert witnesses 3<sup>48</sup>  
 39. Greater use of special science masters and panels for fact finding 3-4<sup>49</sup>  
 40. Improve training and education of trial judges in matters of jury comprehension on science and law topics 5-6  
 41. Objectify proof of the standard of care in medical malpractice cases 5-6<sup>50</sup>

40. See *supra* note 37.

41. See *supra* note 37.

42. This would require that clear and comprehensible standards and definitions be given to jurors of the elements of a claim or a defense.

43. See *supra* note 42.

44. See *supra* note 42.

45. This proposal would deprive jurors of sometimes-relevant information that would further inform their decision.

46. See *supra* note 45.

47. In principle, greater discovery avoids trial by ambush and enables parties to hone their presentations of evidence.

48. Jury avoids a "battle of the experts," but is denied otherwise relevant and potentially helpful opinions of privately retained experts.

49. This might keep "junk science" from the jury and allow for a more focused presentation of complex scientific evidence.

50. See *supra* Part IV.A.

- |  |                   |
|--|-------------------|
| 42. Allow jury to hear evidence of collateral source payments to plaintiffs      | 3-4 <sup>51</sup> |
| 43. Provide jurors with schedule of compensatory damage awards in similiar cases | 5-6 <sup>52</sup> |

*Verdicts in Similar Cases*

- |  |                   |
|--|-------------------|
| 44. Bifurcate trials into a liability phase and a damages phase  | 3-4 <sup>53</sup> |
| 45. Enact more specific standards for awarding punitive damages  | 3-4 <sup>54</sup> |
| 46. Require showing of "actual malice" as precondition to award of punitive damages  | 3 <sup>55</sup>   |
| 47. Exclude evidence of defendant's financial condition until conduct warranting award of punitive damages has been introduced | 0                 |
| 48. Elevate burden of proof on proving conduct warranting punitive damage award to "clear and convincing evidence"             | 0                 |

*Limiting Jury Discretion*

- |   |                   |
|---|-------------------|
| 49. Bifurcate liability and damage issues between jury and judge                          | 0                 |
| 50. Require a unanimous jury for punitive damages   | 2 <sup>56</sup>   |
| 51. Allow judge to reduce damages by amounts of collateral payments received by plaintiff | 3-4 <sup>57</sup> |
| 52. Require that plaintiff's future costs be made through periodic payments               | 0                 |

51. This would require that clear and comprehensible standards and definitions be given to jurors, as well as the consequences of receiving such benefits.

52. See *supra* Part IV.B.

53. This could result in duplication of evidence in the second phase and deprivation of some relevant evidence in both phases.

54. This would require that clear and comprehensible standards and definitions be given to jurors.

55. See *supra* note 54.

56. This could impede the ability of a clear majority to reach a verdict.

57. The consequences of this would have to be clearly communicated to jurors.



53. Enact caps on recovery of noneconomic damages	3-4 <sup>58</sup>
54. Limit punitive damage awards to a percentage of compensatory damage awards	3-4 <sup>59</sup>
55. Enact caps on recovery of punitive damages	3-4 <sup>60</sup>
56. Limit punitives to a percentage of defendant's net worth	3-4 <sup>61</sup>

*Cost-Shifting Measures*

57. Enact a "Loser Pays" rule	0
58. Eliminate or limit contingent fees	0
59. Allow juries to make defendants "whole" for defending meritless suit	3 <sup>62</sup>
60. Assign part or all of punitive damage awards to state or to public interest organization	3 <sup>63</sup>

58. The jurors must be informed of the existence and consequences of limits on the amount recoverable.

59. *See supra* note 58.

60. *See supra* note 58.

61. Must provide jurors with clear and comprehensible standards and definitions of net "net worth."

62. This would require that clear and comprehensible standards and definitions be given to jurors.

63. This should include informing the jury of the consequences of a punitive damage award, i.e., that the court or government will designate the "public interest" recipient.