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JURIES AND DAMAGES: A COMMENTARY

Nancy S. Marder*

INTRODUCTION

When a jury awarded Stella Liebeck \$2.7 million in punitive damages after she had suffered third-degree burns from a spilled cup of McDonald's coffee,¹ many members of the public and press denigrated the result,² describing it as "outrageous"³ and the jury as "run-

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1. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994).

2. See, e.g., *A Case for Iced Coffee*, WALL ST. J., Aug. 26, 1994, at A10 ("Iced coffee may not be just for summer anymore, thanks to a jury in Albuquerque, N.M. Last week it awarded Stella Liebeck, 81, \$2.9 million in damages for burns she suffered after spilling a cup of McDonald's coffee on herself."); Robert A. Clifford, *Justice System Corrects Its Outrages*, CHI. TRIB., Sept. 29, 1994, § 1, at 24 (describing the McDonald's case as "an example of the system gone berserk," but correcting itself with the judge's reduction of the punitive damages award); Maura Dolan, *Huge Jury Awards Seldom Live Up to Their Billing; Lawsuits: Plaintiffs Often Pocket Far Less, Study Finds*, L.A. TIMES, Nov. 26, 1996, at A1 ("The scrutiny from appellate courts is often mild compared to the disdain that huge awards generate among the public. The \$2.9 million awarded to an elderly woman who received severe burns after spilling McDonald's coffee in her lap became fodder for tort reformers and talk show hosts."); Randy Harris, Letter to Editor, *Litigation Explosion*, L.A. TIMES, Apr. 4, 1995, at B6 (describing McDonald's case as "infamous"); *Has the "Litigation Explosion" Blasted Away Common Sense?*, L.A. TIMES, Mar. 22, 1995, at B6 [hereinafter *Litigation Explosion*] ("There indeed are some excessive verdicts; the \$2.7 million a New Mexico jury awarded a woman who was scalded when she spilled a cup of McDonald's coffee on her legs is the most recent egregious example."); Thomas Olson, *Spilled Coffee and Leaky Valves Spur Reform of Lawsuit Awards*, PITTSBURGH BUS. TIMES & J., Apr. 10, 1995, available in 1995 WL 7907075 ("Probably the most celebrated—and ridiculed—punitive damage award in recent years was the case involving the now infamous McDonald's coffee.").

3. See, e.g., Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill Is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1 ("Public opinion is squarely on the side of McDonald's. Polls have shown a large majority of Americans—including many who typically support the little guy—to be outraged at the verdict."); Andrea Gerlin, *How Jury Gave \$2.9 Million for Coffee Spill McDonald's Callousness Was Real Issue, Jurors Say, in Case of Burned Woman*, PITTSBURGH POST-GAZETTE, Sept. 4, 1994, at B2, available in 1994 WL 8232627 (same); Olson, *supra* note 2, at 1995 WL 7907075 ("Even if it was a truly outrageous result, our judicial system can throw out outrageous results, as they did in the McDonald's case.") (quoting John Gismondi, a plaintiffs' litigator with Gismondi & Margolis); Aric Press, *Are Lawyers Burning America?*, NEWSWEEK, Mar. 20, 1995, at 32, 35 ("The American Tort Reform Association bought radio ads in the Washington area using the Liebeck case as its key example of an 'outrageous' lawsuit."); John Taylor, *Coffee Ruling Spurs Popeye's To Halt Sales*, OMAHA WORLD-HERALD, Sept. 8, 1994, available in 1994 WL 8593317 ("I thought [the award] was outrageous.") (quoting

away."⁴ What was often ignored in these accounts of the case was that the eighty-one-year-old woman's injuries were very serious,⁵ that McDonald's had known about the problem of its exceptionally hot coffee⁶ but had declined to warn consumers⁷ or to change the temperature at which it served its coffee,⁸ and that the trial judge subsequently reduced the \$2.7 million punitive damage award to \$480,000.⁹

Sheila Liebeck's case, though involving punitive damages, illustrates several problems with the way in which civil juries' damage awards in general are covered in the press and perceived by the public. One

Pat Kelley, treasurer for Rigel Corp., which holds the franchise for 14 Kentucky Fried Chicken restaurants and 66 Godfather's pizza restaurants)). See generally Olson, *supra* note 2, at 1995 WL 7907075 ("There are runaway damages and outrageous awards." (quoting Chris Hague, a partner at Meyer, Unkovic & Schott, who represents both plaintiffs and defendants in civil cases)).

4. See, e.g., Chi Chi Sileo & David Cogan, *Does Legal Debate Rely on Rhetoric Over Reason?*, INSIGHT ON THE NEWS, May 29, 1995, at 15 ("Advocates of legal reform immediately pointed to the [Liebeck] award as yet another instance of runaway litigation, 'frivolous' lawsuits and vindictive juries."). But see *id.* ("Far from being a symbol of runaway litigation, say opponents of legal reform, the [Liebeck] case is an example of the civil-justice system working to protect ordinary citizens."). See generally Stephen Budiansky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50, 52 ("Insurers and manufacturers have spent millions publicizing tales of runaway litigation, of outrageous multimillion-dollar punitive-damage awards . . . Much of it is exaggerated."); Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18 ("While most juries will resist the pressure, it only takes a single runaway jury to send shock waves through an entire industry.").

5. See S. Reed Morgan, *A Slow Burn Over Fast Food; Don't Blame a Runaway Jury for a Recent Verdict Against McDonald's*, RECORDER, Sept. 30, 1994, at 8 ("To critics of the original jury awards, the case is an example of runaway juries . . . The facts, of course, point in an entirely different direction. . . Third-degree burns do not heal without skin grafting, debridement and whirlpool treatments . . .").

6. See *id.* ("McDonald's admitted that it has known about the risk of serious burns from its scalding hot coffee for more than 10 years."); see also Nicolle Bratkovics, *Restaurant Adviser Assists in Coffee Spill Verdict*, LEGAL INTELLIGENCER, Aug. 22, 1994, at 1 ("Evidence at trial indicated that McDonald's coffee is served at 180-190 degrees, and was at least 165-170 degrees when it was spilled. In contrast, . . . coffee brewed at home is generally 135-140 degrees."); Richard Grossman, Editorial, *As a Matter of Law: Punitive Damages Serve a Purpose*, POST-STANDARD (Syracuse, N.Y.), Sept. 12, 1994, available in 1994 WL 5600240 ("Post-verdict reports in the McDonald's case indicate that they deliberately make their coffee unreasonably hot.").

7. See Morgan, *supra* note 5, at 8 ("McDonald's admitted that it did not warn customers of the nature and extent of this risk and could offer no explanation as to why it did not.").

8. See *id.* ("McDonald's witnesses testified that it did not inten[d] to turn down the heat. As one witness put it: 'No, there is no current plan to change the procedure that we're using in that regard right now.'").

9. See, e.g., Clifford, *supra* note 2, § 1, at 24 (noting that "studies support the conclusion that the judicial system inevitably corrects what the public deems to be outrageous . . . [G]enerally only 11.2% of the punitive damages awards are collected after appeal."); Dolan, *supra* note 2, at A1 ("Unbeknown to most, the award was reduced by a court and settled for less than \$640,000 [including compensatory damages]."); *Litigation Explosion*, *supra* note 2, at B6 ("In the McDonald's case, the judge cut the punitive award to \$480,000; jury awards in other cases are quite often reduced significantly after trial as a result of appellate court action or settlement.").

problem is that awards that are dramatic are the ones that receive press attention. The more mundane, less sensational damage awards that are decided by juries everyday are often overlooked. One consequence of such coverage is that jury verdicts appear to be more inconsistent than they actually are. Another problem is that the damage awards that are described in the press are not the ones that are necessarily received. A jury's award does not mark the end of the process; the verdict must still be reviewed by the judge. This means that both press and public may be judging damage awards prematurely, before judges have reviewed them.

Neil Vidmar, in a study of pain and suffering awards,¹⁰ and Shari Diamond, in a study of damage awards,¹¹ provide empirical evidence that challenges the popular view of "runaway" juries reaching "outrageous" verdicts. Vidmar, from his analysis of data found in verdict reporters from three states,¹² concluded that juries are not running wild in their award of damages for pain and suffering in medical malpractice suits; rather, they are reaching consistent awards, which are not as high as the press accounts suggest because they are often reduced by trial judges in the post-verdict period.¹³ Diamond, using jury-eligible citizens who engaged in deliberations, found that there is variability in pain and suffering awards, but that the variability is reduced by using juries rather than individual decisionmakers and could be further reduced by giving juries guideposts.¹⁴

I. VIDMAR'S STUDY

A. Background

Vidmar, after reviewing the literature on pain and suffering awards, noted that a common problem for researchers is how to determine how much of a jury's award is attributable to economic losses and how much is attributable to pain and suffering because the jury is usually not required to specify. In one method, "the subtrahend method," researchers subtract the economic losses from the total verdict; the remainder is attributed to non-economic losses, such as pain and suffering.¹⁵ This method, however, is inexact. To address this problem,

10. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265 (1999).

11. Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1999).

12. Vidmar looked at commercial verdict reporters from California, Florida, and New York.

13. See *infra* note 19 and accompanying text.

14. Diamond et al., *supra* note 11, at 318.

15. Vidmar et al., *supra* note 10, at 270-72.

Vidmar looked at jurisdictions that require the jury to specify damages for each element of the award. California, Florida, and New York require the juries to separate economic from non-economic awards.¹⁶ Therefore, Vidmar turned to the commercial verdict reporters for each of these states and examined medical malpractice verdicts during the years 1985-1997.

Among his results, Vidmar found that the awards increased with severity of injury, except when death occurred;¹⁷ that the non-economic component of the award was between 50 to 60% percent of the total award;¹⁸ and that the post-verdict awards that plaintiffs received were lower than the initial jury awards.¹⁹ In New York, approximately 44% of awards were adjusted, mostly downward, by the judge in the post-verdict phase, while in Florida and in California the reductions were less dramatic.²⁰

B. Additional Questions

Vidmar has uncovered a useful source of data in the commercial verdict reporters, but they raise additional questions. Although Vidmar recognized that these sources have their limitations and should not be taken at face value,²¹ he does not explore as fully as possible some of the questions that data from these reporters raise.

1. Geography

One question, for example, is whether there is a geographical effect of which Vidmar should be aware in limiting his data sets to Califor-

16. See CAL. CIV. PRO. CODE § 625 (West Supp. 1998); FLA. STAT. ANN. § 768.042 (West 1997); N.Y. C.P.L.R. 4111(d) (McKinney Supp. 1998).

17. Vidmar et al., *supra* note 10, at 294 (California); *id.* at 291 (Florida); *id.* at 284 (New York); *id.* at 296 ("Awards increased with injury severity, except that there was a sharp decrease when death occurred.").

18. *Id.* at 296 ("In all three states, the percentage of the total, unadjusted damage awards exceeded 50%, on average, for all cases . . ."); *id.* (finding that the percentage of the award for non-economic damages was 60% in California); *id.* at 292 (finding that the proportion of the award for non-economic damages was 54% in Florida); *id.* at 285 (finding that the percentage of the award for non-economic damages was 58% in New York).

19. *Id.* at 295 (noting that in California, the median and mean verdict awards were reduced by about 10% through post-verdict adjustment); *id.* at 292 (observing that in Florida, post-verdict awards were lower than jury awards, but noting that the adjustments were "substantially smaller" in Florida than in New York); *id.* at 286 ("[T]he mean payment to the plaintiff was approximately 62% of the jury verdict[]" based on the New York data.).

20. *Id.* at 298 (providing summary).

21. See *id.* at 267 ("[T]hese data sets present a number of methodological problems . . ."); *id.* at 281 (noting that the data sets are not comprehensive and selection may not have been random); *id.* at 295 (recognizing there may be differences in the litigation patterns of the three states and the way in which the data in the reporters were compiled).

nia, New York, and Florida. Are these states representative in their litigation patterns and legal cultures? Or are there some special characteristics (They are on the coasts? They are populous states? They have large immigrant populations?²²) that should limit any conclusions drawn from data from these three states? Do awards from these states tend to be higher or lower than those from other states? It would be useful for Vidmar to explain why he thinks his data, though limited to these three states, can tell us something useful about pain and suffering awards that is applicable beyond these states.

Another question raised by geography is whether there are any county patterns that Vidmar can discern from these reporters. All three verdict reporters identify in which county the case was heard. The reason this information could prove useful is that in criminal cases there has been considerable debate about whether juries in some counties are acquitting criminal defendants at higher rates than the rest of the country. The so-called "Bronx jury," drawn largely from a community of minority jurors, has been characterized as acquitting, whether based on reasonable doubt or nullification, at higher rates than juries in other geographical areas.²³ Are Bronx juries acting differently in medical malpractice cases than juries in other counties? Or, is the Bronx jury effect, to the extent it exists, limited to criminal cases? A county-by-county analysis of damage awards might reveal a Bronx jury effect, not only in the Bronx but in other counties as well. This effect would be important to identify because it might be

22. See, e.g., Deborah Sontag & Celia W. Dugger, *The New Immigrant Tide: A Shuttle Between Worlds*, N.Y. TIMES, July 19, 1998, at A1 (describing New York as "the American city with the largest and most diverse population of immigrants, living side by side in neighborhoods where the very fact of their double identity [with their new home and their homeland] is a bond"); *id.* at A12 ("So fluid is the exchange between the homeland and New York that it alters both places. People move back and forth, money moves back and forth, ideas move back and forth.").

23. There is debate about whether Bronx juries, and juries in other largely urban, minority areas, are acquitting at an unusually high rate. According to one writer, Bronx juries are not acquitting at unusually high rates, but are acquitting merely at the high end of the norm. See Roger Parloff, *Race and Juries: If It Ain't Broke*, A.B.A. J., June 1997, at 5, 6 (concluding that the acquittal rate for jury trials in the Bronx of black defendants charged with felonies was 43.6% in 1995 and 39.1% in 1996). *But see* Benjamin A. Holden et al., *Racism on Trial*, MONTREAL GAZETTE, Oct. 7, 1995, Weekly Review, at B1 (claiming that in the Bronx, "black defendants are acquitted in felony cases 47.6% of the time—nearly three times the national acquittal rate of 17% for all races"). Parloff, while challenging others' figures of Bronx acquittal rates as "nearly triple" those of the national average, acknowledged that the figures he offered indicate that the rates of acquittals in the Bronx "are high for state courts in New York, and probably for state courts nationwide." Parloff, *supra*, at 6. From the interviews he conducted with Bronx judges, prosecutors, and defense attorneys, however, he concluded that these juries are likely to be acquitting, not because of nullification, but because of greater juror skepticism of police testimony. See *id.* at 7.

that once these outlier counties are excluded the damage award results are even more consistent than Vidmar has found.

2. Selection Criteria

Other questions raised by Vidmar's use of data from the verdict reporters are how are cases selected for inclusion in the reporters and what difference might this make? All of the reporters Vidmar relied on are commercial and may have different selection criteria as to which cases they include. Vidmar acknowledged this problem: "The data sets are not comprehensive of all cases, and there is evidence that the selection may not be random."²⁴ He described the *New York Jury Verdict Reporter*, his source for the New York data, as containing "approximately 90% of all personal injury verdicts in Metropolitan New York and surrounding counties,"²⁵ whereas his Florida source, the *Florida Jury Verdict Reporter*, is neither random nor comprehensive; rather judges and law clerks decide which cases to forward for publication.²⁶ With respect to the *California Jury Verdict Reporter*, Vidmar did not say how selection is decided. Vidmar acknowledged a difference in approaches (except for California), but then proceeded to treat all the data the same, selection differences notwithstanding.

From my own experience as a law clerk,²⁷ I have seen that the decision whether to submit an opinion for publication is made quite carefully. At the district court level, we usually submitted an opinion for publication if we thought it made a contribution to the law. The reasoning was similar at the court of appeals level, much to the consternation of the Supreme Court, which has responded to this growing trend toward unpublished appellate opinions²⁸ by occasionally deciding to hear such cases.²⁹ If an opinion simply applied the law of the circuit to the facts of the case, then the opinion became a memoran-

24. Vidmar et al., *supra* note 10, at 281.

25. *Id.* at 282.

26. *Id.* at 290.

27. I had the good fortune to clerk for Judge Leonard B. Sand in the Southern District of New York in 1988-89, for Judge William A. Norris on the Court of Appeals for the Ninth Circuit in 1989-90, and for Justice John Paul Stevens at the United States Supreme Court in 1990-92.

28. See, e.g., William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 282 (1996) ("[I]t is hardly surprising that published opinions today account for less than a third of federal circuit terminations. The decline in publication is unfortunate because the traditional, fully reasoned written opinion serves a number of vital functions.") (footnotes omitted).

29. See, e.g., *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993) ("We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.").

dum decision, which was unpublished³⁰ and could not be cited as precedent.³¹ Thus, there may be a significant difference in the mix of cases contained in the various reporters when one reporter includes almost all cases that are decided in a jurisdiction, whereas another leaves the decision to the discretion of judges and law clerks, who may be highly selective.

3. *Subject Matter*

Vidmar also chose to focus on medical malpractice cases and this decision raises the question whether the results would be different in other kinds of cases. In an earlier study, Vidmar had concluded that there is no support for the assertion that jurors treat medical malpractice and auto negligence cases differently.³² He also intends in the future to extend the scope of cases by conducting additional studies in which he would look at product liability and automobile negligence torts cases.³³ One question then is whether there is anything special about medical malpractice cases that might lead to results that are only applicable to medical malpractice cases. Another question is the role that insurance plays. The verdict reporters indicate whether or not the parties had insurance.³⁴ It would be interesting to know whether pain and suffering awards increased or decreased based on who had insurance. In federal court,³⁵ and in some state courts, including California³⁶ and New York,³⁷ the jury is not allowed to know

30. See 21 MOORE'S FEDERAL PRACTICE 359-78, Rule 36-1 (1998) (Opinions, Memoranda, Orders; Publication).

31. See *id.* at 359-79, Rule 36-3 ("Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent . . .").

32. Neil Vidmar et al., *Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases*, 12 BEHAV. SCI. & L. 149, 157-59 (1994).

33. Vidmar et al., *supra* note 10, at 267.

34. See, e.g., *Anguiano-Delpino v. Sanchez*, 3 TRIALS DIGEST 3D 154, available in 1997 WL 852659, at *5-6 ("The insurance carrier was Norcal Mutual Insurance Company for defendant John Sanchez and The Doctors Company for defendant John Petraglia.").

35. See FED. R. EVID. 411 ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.").

36. See CAL. EVID. CODE § 1155 (West 1997) ("Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing."). In civil trials in California, the court may instruct the jurors as follows: "There is no evidence before you that the defendant has or does not have insurance for the plaintiff's claim. Whether such insurance exists has no bearing upon any issue in this case. You must not discuss or consider it for any purpose." CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS (BAJI) § 1.04 (8th ed. 1986).

37. See, e.g., *Constable v. Matie*, 608 N.Y.S.2d 10, 11 (App. Div. 1993) (holding that a new trial was required because evidence of insurance should not have been admitted); *Griffen v. Corporation of the Church of the Assumption of Mechanicville*, 218 N.Y.S.2d 141, 142 (App. Div. 1961) (holding that "the persistent insinuation by plaintiff's counsel before the jury of the liability insurance coverage of the appellant church was prejudicial" and therefore reversing the

whether the parties have insurance. In other states, such as Florida,³⁸ the jury is allowed to know about insurance, but not about policy limits.³⁹ Yet, because this information is reported in the verdict reporter, a researcher could nevertheless determine whether there are any correlations between insurance coverage and pain and suffering awards.

By focusing on medical malpractice cases, Vidmar also has the opportunity to examine the ways that gender might influence pain and suffering awards. The verdict reporters include the names of the parties, which are usually (though not always) sufficient to ascertain gender, and at least one reporter explicitly indicates the gender of the plaintiff.⁴⁰ It would be interesting to know if female plaintiffs receive higher or lower damage awards in these medical malpractice cases. Within the medical practice, there have certainly been indications of gender bias, with studies showing that doctors have taken women's complaints of pain less seriously than those of men;⁴¹ that women receive less aggressive medical treatment, particularly with respect to heart attacks, than do men;⁴² and that medical research has been limited to all-male studies in the past, with the results simply assumed to

judgment and ordering a new trial); Note, *Admissibility in New York of Evidence Alluding to the Fact that the Defendant is Insured*, 14 ST. JOHN'S L. REV. 319, 319 (1940) ("As a general rule, evidence in a negligence action that the defendant is insured against liability is inadmissible.").

38. Florida's rule, FLA. R. CIV. P. 1.450(e), which required that medical malpractice actions be conducted without any reference to insurance or the joinder of an insurer as a co-defendant, was deleted in 1984.

39. See *Stecher v. Pomeroy*, 244 So. 2d 488, 490 (Fla. Dist. Ct. App. 1971) (holding that "while it was error for the trial court to permit evidence as to the amount of insurance coverage, such error was harmless").

40. The verdict reporter in Florida provided plaintiff's sex as part of plaintiff's information. See, e.g., 98 Florida Jury Verdict Reporter 2-19, available in 1997 WL 862879.

41. See, e.g., Lee A. Green & Mack T. Ruffin, *Differences in Management of Suspected Myocardial Infarction in Men and Women*, 36 J. FAM. PRAC. 389, 392 (1993) ("'If men are more likely to have [myocardial infarctions], then men with chest pain are more likely to have heart disease than women with chest pain' is not a valid inference, although it would appear to be one that physicians in this study group made, whether consciously or not.").

42. See, e.g., Chelmer L. Barrow, Jr. & Kirk A. Easley, *The Role of Gender and Race on the Time Delay for Emergency Department Patients Complaining of Chest Pain to be Evaluated by a Physician*, 15 ST. LOUIS U. PUB. L. REV. 267, 276 (1996) ("[F]emales have been determined to receive less aggressive treatment of coronary artery disease than their male counterparts, despite the fact that women may experience a higher mortality rate from heart disease.") (footnote omitted); Green & Ruffin, *supra* note 41, at 389 ("Women appear to receive not only less intensive invasive treatment for ischemic heart disease than men, as previous studies have shown, but also less aggressive noninvasive treatment."); Leslee J. Shaw et al., *Gender Differences in the Noninvasive Evaluation and Management of Patients with Suspected Coronary Artery Disease*, 120 ANNALS INTERNAL MED. 559, 564 (1994) ("Our study of 840 patients showed a relative likelihood for further diagnostic testing in men that was approximately two times greater than that observed in women."); Lawrence K. Altman, *Study Finds Heart Treatment Differs for Men and Women*, N.Y. TIMES, Nov. 13, 1991, at A18 ("Men are twice as likely as women to receive newer life-saving treatments for heart attacks, a study . . . has found.").

be the same for women.⁴³ My own hypothesis is that there would be a gender difference, but it must remain a hypothesis until Vidmar or others provide the empirical data to support or refute it.⁴⁴

4. *Supplementary Interviews*

Although Vidmar points out that his analysis of the data in the verdict reporters will not tell us whether the jury reached a reasonable damage award,⁴⁵ supplementary interviews with jurors and judges might begin to answer that question.

It would be possible to do a sampling of follow-up interviews with jurors and judges. Follow-up interviews with jurors would provide some information as to their reasoning: How did they go about determining pain and suffering awards? What were they trying to achieve? Although the verdict reporters do not provide the jurors' names, this information is a matter of public record and would be available at the courthouses where the trials took place.

Similarly, a sampling of follow-up interviews with judges might also yield useful information. The verdict reporters provide the names of the presiding judges, so some of these judges could be interviewed or sent a questionnaire. It would be useful to know the judges' rationales: When do judges adjust damage awards upward or downward and why? Are they consistent in their treatment of pain and suffering awards? There are a variety of procedural mechanisms that allow the

43. See, e.g., Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of a Disease and Its Legal Regulation*, 3 TEX. J. WOMEN & L. 7, 15 (1994) (providing reasons often given to justify the exclusion of women from medical research trials, including the effects of their hormonal cycles and the possibility of pregnancy); *id.* at 16 (describing how the medical definition of AIDS was based on studies of gay men, with the assumption that women would be affected in the same way, but women did not suffer Kaposi's Sarcoma as did gay men, and they did experience a range of reproductive system effects, which the men did not); Denise Grady, *Study Says H.I.V. Tests Misstate Women's Risk*, N.Y. TIMES, Nov. 6, 1998, at A18 ("Women infected with H.I.V. may be at a more advanced stage of infection and at a higher risk of developing AIDS than men with identical results on certain blood tests . . ."); *id.* ("The researchers suggest that official treatment guidelines, used for both sexes even though they are based on research only in men, should be changed to recommend earlier treatment for women."); Altman, *supra* note 42, at A18 ("One possible explanation [for men being twice as likely as women to receive more life-saving treatments for heart attacks] is that the initial studies proving the value of the treatments were carried out chiefly in men.").

44. See, e.g., Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 82 (1995) ("Medical malpractice awards to the women in our sample were almost three times more likely to include a pain and suffering component as those given to men. This finding is consistent with past research showing the male victims receive less in non-economic damages than female victims.").

45. See Vidmar et al., *supra* note 10, at 281 ("Additionally, we cannot stress too strongly the fact that our data do not provide any criteria for assessing whether the jury decisions were right or wrong.").

judge to adjust the jury's damage award. The trial judge could decrease or increase the award through judicial remittitur⁴⁶ or additur⁴⁷ respectively. Or, the trial judge might have to reduce the award because it exceeded a statutory cap established by the state legislature.⁴⁸ In addition, the appellate court could reduce the award were the losing party to appeal. Other reasons that an award might be adjusted after the verdict would be that the parties reached a settlement prior to appeal or the defendant had no collectible assets or insurance with which to satisfy the award.

Of course, this would not be the first time that researchers have looked to judges to try to provide a benchmark for evaluating jury decisions. This was, after all, the approach taken by Professors Harry Kalven and Hans Zeisel in their landmark study of the jury, *The American Jury*.⁴⁹ They compared jury verdicts with judges' assessments of those verdicts, and concluded that judges and juries agreed about 75% of the time;⁵⁰ when they disagreed, it was over the evidence or in the grey areas, in which judges believed that juries had more discretion to act in accordance with community values, even if those decisions were sometimes contrary to the law.⁵¹ Although this approach of contrasting judge and jury decisions has a serious methodological flaw, in that there is no reason to use judges as a benchmark and to believe that they have the right answer any more than the jury does, at the very least this information would provide an additional data point. Admittedly, even if the judge agreed with the jury's award, that would not mean that the jury had reached the right number. Rather, all that it would mean is that judge and jury were at least consistent with each other. And since consistency in damage awards is something that Vidmar is interested in examining, judge interviews or questionnaires that supplement the verdict reporters might help in this respect.

46. Remittitur, "[t]he power to reduce damages," is recognized "by virtually all judicial systems." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.4, at 560 (2d ed. 1993).

47. Additur, which is "the power to increase damages . . . has not been accepted in all courts," *id.*, largely because it did not exist under common law, leading the Supreme Court to hold in *Dimick v. Schiedt*, 293 U.S. 474 (1935), that additur violated the Seventh Amendment. *Id.* However, some state courts have upheld its constitutionality under state law. See FRIEDENTHAL ET AL., *supra* note 46, at 561.

48. See Koenig & Rustad, *supra* note 44, at 79 ("Twenty-one states have enacted some reform measure limiting non-economic damages in health care litigation. . . . [T]ort reformers have succeeded in capping non-economic damages in medical malpractice cases in several states.") (footnote omitted). Among states that have passed statutes limiting pain and suffering awards in medical malpractice suits are Michigan, Wisconsin, and Utah. See *id.* n.331.

49. HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

50. *Id.* at 56.

51. *Id.* at 115-16.

C. Possible Reforms

One of Vidmar's conclusions is that a jury's damage award, including the amount it provides for pain and suffering, is often subject to adjustment during the post-verdict period, and this goes unrecognized.⁵² One of the challenges, then, is how to educate the press and public as to the interim nature of the jury's damage award. The goal should be to encourage the press to focus its reporting on the damage award ultimately approved by the judge rather than on the initial award reached by the jury.

The reason this shift in focus from damage award to adjusted award is so important is that the press and public will continue to have a skewed vision of juries and their damage awards. They will continue to believe that the awards are too high and that the jury is at fault when, in fact, neither is true. These misperceptions could be corrected if the press and public knew that the awards are often reduced and that the jury is not the only actor in the decisionmaking process. Although Vidmar is cautious about proposing ways to do this, perhaps because he is a social scientist with a healthy respect for the limitations of any one empirical study, I, as a law professor, am less constrained and am willing to speculate on possible reforms.

1. Delay Damages Announcement

One way to shift public focus from the jury's damage award to the judge's adjusted award is to delay the release of the jury's damage award until the judge has made the appropriate adjustments, and then have both awards announced at the same time. The delay would allow the public to learn about the jury's award, not in isolation as it currently does, but as part of the judicial process, in which the judge also has a role to play.

Under the current system, in which the jury award is announced to great fanfare and publicity, by the time the judge adjusts the award, assuming adjustments are required, both press and public have lost interest in the case and the judge's action receives little public notice. After all, it is far more dramatic to hear about a \$2.7 million punitive damage award than it is to hear about an award of \$480,000 some time later when the facts of the case have already begun to fade.⁵³

The delay in the announcement of the jury's damage award might require changes in the judge's instructions and the juror's oath. To

52. Vidmar et al., *supra* note 10, at 298-99.

53. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at *1 (D.N.M. Aug. 18, 1994).

ensure that the jury's damage award is not announced until the judge has made any necessary adjustments might require the jurors to swear to maintain silence and the judge to instruct the jurors that they are not to disclose this information until the judge has acted on the award.⁵⁴ Requiring the jurors to keep silent on a matter, if only for a limited period of time, is not unprecedented. Grand jurors must swear to maintain the secrecy of the grand jury proceedings and not reveal what takes place in the proceedings or in the juryroom to those outside.⁵⁵ At least federal courts in two states, Connecticut and Louisiana, prohibit petit jurors from revealing to outsiders what occurred during their deliberations⁵⁶ and at least one court did the same in a recent high-profile case.⁵⁷ In other federal courts, judges instruct jurors at the close of the trial that they are free to talk to others, but they are not required to talk to anybody.⁵⁸

2. *Educate Public About Damage Awards*

An alternative is for the court to emphasize to the press and public that the jury's damage award is an "interim" award. The judge could make this point in open court at the time when the jury announces its damage award, and it would be reflected in the public record. Every

54. See generally Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 541-44, 546 (1997) (suggesting that courts, using the juror's oath and the judge's instruction, impose some limitations on a juror's disclosures of jury deliberations, if only for a limited amount of time, to preserve the integrity of the jury's verdict).

55. See FED. R. CRIM. P. 6(e)(2) ("A grand juror . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . . A knowing violation of Rule 6 may be punished as a contempt of court.").

56. See CONN. FED. LOC. CT. R. 12(e)(1) ("No juror shall respond to any inquiry as to the deliberations or vote of the jury or of any other individual juror, except on leave of Court . . .") (emphasis added); LA. FED. LOC. CT. R. 47.5E(c)(2) and 47.5M & W(c)(2) ("No juror who may consent to be interviewed shall disclose any information with respect to . . . the deliberations of the jury."). See generally Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 310 (recommending a statute "making it a crime for anyone without court permission to seek information from jurors about their deliberations, or for jurors to provide such information").

57. See *United States v. Cleveland*, No. 96-207 Section "R," 1997 U.S. Dist. LEXIS 10718, at *1, *4 (E.D. La. July 22, 1997) (instructing jurors in a high-profile criminal case that "absent a special order by [the judge], no juror may be interviewed by anyone concerning the deliberations of the jury"), *aff'd*, 128 F.3d 267, 270 (5th Cir. 1997) ("A juror in this case . . . is only prevented from being interviewed about the private debates and discussions which took place in the jury room during the time leading up to the jury's rendering of its verdict.").

58. See, e.g., KAN. FED. LOC. CT. R. 123 (a)(9) ("No juror has any obligation to speak to any person about any case and may refuse all interviews or comments."); OKLA. FED. LOC. CT. R. 47.2 ("Upon discharge from service, each juror is free to discuss, or refuse to discuss, said juror's service with any person if the juror so desires."); WYO. FED. LOC. CT. R. 309(b) ("No juror has any obligation to speak to any person about any case and may refuse all interviews and comments.").

time the judge refers to the award, he or she could preface it with the word "interim." This would serve to remind those in the courtroom that the jury's damage award is subject to revision by the judge, and should be viewed as only the first step in the process of determining an appropriate figure. The hope would be that when the press reports on the jury's damage award it would note that the award is only an interim figure, and that the final figure would be determined by the judge. It would also be the press's responsibility to report on the damage award after it has been adjusted by the judge.

3. *Encourage Early Judicial Involvement*

Another approach would be to involve the judge early in the process of determining the damage award rather than waiting until after the jury has reached its determination. This proposal connects Neil Vidmar's research with that of Shari Diamond.⁵⁹ Diamond suggested that the judge provide guidelines to the jury in setting damage awards. Diamond's proposal also has support from Vidmar's study. Whatever guidelines the judge uses to adjust a jury's damage award in the post-verdict period, the judge could also share with the jury in the pre-verdict period. The judge could provide the jury with whatever guidelines, range, or past comparable cases the judge would draw from to decide what the appropriate damage award should be and simply share this information with the jury before, rather than after, the jury reaches its damage award.

4. *Expand the Judicial Role*

An even more radical reform would be to limit the jury to a liability finding and leave the damage award completely in the hands of the judge. Even today, trials are often bifurcated, with the jury determining liability, and if there is a finding of liability, then the trial enters the damages phase and the jury determines damages. Although Vidmar does not suggest allowing the judge to make the damages determination, certainly others have.⁶⁰ To advocate such a proposal, however, one would have to have a great deal of faith in judges and a lot of skepticism about juries.

59. See *infra* Part II.

60. See generally *Development in the Law—The Jury's Capacity to Decide Complex Civil Cases*, 110 HARV. L. REV. 1489, 1498 (1997) ("[J]udges can bifurcate tort trials so that jurors can consider liability issues without being burdened by the calculation of damages.").

D. Objections

Objections to the above proposals are likely to come from several different fronts. Judges, attorneys, and members of the press are all likely to want to preserve the status quo.

Judges will resist the suggestion that they become more actively involved in determining damages at an earlier stage in the proceedings. They are likely to explain that decisions about damages are properly left to the jury to decide in the first instance. Similarly, they are unlikely to want to replace the jury in deciding a damage award because it is a difficult determination to make and one for which little guidance exists and for which the judge does not have any particular expertise or training. In general, judges are likely to be wary about intruding upon decisions that they believe are properly within the province of the jury.

Attorneys are also likely to resist greater judicial involvement in determining damage awards. They want the highest possible damage award, and are unlikely to want to give up what they perceive as the potential for a windfall award from the jury. Even if a judge's involvement in determining damages means less risk for the attorney, it also means a reduced chance of a windfall. Attorneys are also likely to disfavor juror silence until the judge has adjusted the jury's verdict because then the attorney's victory will seem less pronounced and the award less likely to attract public attention.

Members of the press would undoubtedly object to the proposal that jury damage awards not be announced until the post-verdict phase when the judge has had the opportunity to make any necessary adjustments. The press could point to the First Amendment⁶¹ and argue that the trial is open to the public, that the damage award that is reached by the jury is public information, and that the jurors need to be held accountable for their decisions. In addition, the press could point to the jurors' First Amendment right to speak to the press, if they so choose. The press's desire to focus on the jury's award rather than the judge-modified award is because the jury's award is likely to be higher and more sensational; it will sell more newspapers. It is not surprising that Stella Liebeck was portrayed in the press as a plaintiff who brought a frivolous lawsuit and was rewarded with an exorbitant amount of money by a jury system gone awry. Such a story is likely to have popular appeal, whereas a careful examination of the facts and arguments does not have the same appeal.

61. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

The press is also unlikely to be persuaded that, because the judge describes the jury's damage award as "interim," it should adopt that convention as well. Again, the press is likely to take refuge in the First Amendment: It will decide how to describe a jury award and will resist deferring to the court's description. Moreover, there are some legal procedures that the press continues to describe incorrectly, and this may be one of those procedures. For example, when the United States Supreme Court denies a petition for a writ of certiorari, it is not upholding a lower court decision;⁶² rather, it is simply exercising its discretion⁶³ and declining to accept the case for review.⁶⁴ The press continues to describe the Court's action incorrectly. Just as it may make for a better story to describe the Court as having taken some point of view on the lower court case, so too, it may make for a better story if the jury's damage award is seen as final rather than as an interim award in an extended process.

E. A Recommendation

My recommendation is that the jury's damage award should not be disclosed until the judge's adjustments can also be announced. It seems unlikely that there would be a First Amendment problem because the jury's damage award would only be delayed, not permanently concealed. Courts have said that the First Amendment is not absolute and is subject to time, place, and manner restrictions.⁶⁵ This would simply be a time restriction.

62. See, e.g., *Affirmative Action; Ban may be Legal but Isn't Wise*, STAR TRIB. (Minneapolis), Nov. 5, 1997, at 22A (describing the Supreme Court's denial of certiorari as "up[holding] one state's ban on affirmative action"); Stuart J. Davis, Letter to Editor, *High Court Has Upheld 2d Amendment Limit*, N.Y. TIMES, Dec. 19, 1993 (describing the Supreme Court's denial of certiorari in *Quilici v. Village of Morton Grove*, 464 U.S. 863 (1983), as "up[holding] without comment a United States Court of Appeals decision").

63. See SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

64. "Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., opinion respecting the denial of the petition for writ of certiorari).

65. See, e.g., *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (upholding as constitutional the trespass conviction of demonstrators who gathered in front of a jail to protest its segregation of inmates and who refused to disperse after warnings by the sheriff); *Poulos v. New Hampshire*, 345 U.S. 395, 414 (1953) (upholding as constitutional a state law requiring a license to hold religious services in a public park); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.46, at 1139-40 (5th ed. 1995).

I do not have much faith in judges being able to modify the press's descriptions simply by using the word "interim" to describe a jury's damage award. If the Supreme Court cannot persuade the press to describe certiorari accurately, then it seems equally unlikely that courts will be able to persuade the press to describe a jury's damage award as interim.

Although I certainly do not support the proposal that judges take over the role of determining damage awards, I do think there is merit in having judges more involved in the determination at an earlier stage. One reason judges should not be deciding damages is that these are decisions for which there is no right answer, and so it seems appropriate to turn to a jury to obtain a community sense of what an appropriate amount might be. To explore further the guidance that judges might provide to juries without usurping their proper role, I turn to Shari Diamond's research and the role she described for judges and juries in the assessment of damage awards.

II. DIAMOND'S STUDY

A. *Background*

Diamond, like Vidmar, investigated damage awards, but used a different method for her inquiry. She showed jury-eligible citizens a videotape of a products liability case.⁶⁶ Before the mock jurors viewed one of six versions of the videotape, they completed a questionnaire in which they provided certain demographic and background information.⁶⁷ Immediately after the viewing, each juror completed another questionnaire, indicating how he or she would have decided the case. The mock jurors were then assigned to six-person juries, where they deliberated and reached a verdict.⁶⁸

Among her results, Diamond found that while background characteristics showed only a "modest association"⁶⁹ with verdict preferences, certain attitudinal variables were associated with verdict

66. The case involved plaintiff Boyd suing American Beryllium Corporation ("ABC") for damages based on Boyd's claim that he had suffered lung damage after exposure to a product manufactured by ABC during his work as a plasterer for ABC. See Diamond et al., *supra* note 11, at 303.

67. *Id.* at 304-05.

68. *Id.* at 305.

69. *Id.* at 306-07.

preferences.⁷⁰ Nine attitudinal variables enabled the researchers to predict 67% of the individual jurors' liability decisions.⁷¹

With respect to damages, however, there was less predictability. This was the case for pain and suffering awards in particular, for which jurors receive little guidance, rather than for economic losses, for which jurors hear much testimony.⁷² Although there was greater variability in damage awards than there was for liability, Diamond noted that there was slightly less variability for juries' damage awards than there was for individual jurors' damage awards.⁷³ These results led Diamond to two conclusions: that it may be preferable to return to twelve-person juries rather than the current six- or eight-person juries, and that it may be useful for courts to provide jurors with guideposts for determining damages.⁷⁴

B. Observations on Methodology

Before pursuing Diamond's conclusions, several observations on her method are in order. The first is that by using jury-eligible citizens rather than students, Diamond avoided one of the pitfalls of many jury researchers. Those who use students as mock-jurors must assume that students are representative of the jury population in general, but of course, students differ in significant ways. At the very least, they are from a distinct age group; they may have more education than the general jury population; they are likely to have limited or no work experience; and their marital status is likely to be single with no dependents. Even in federal court, where the trial judge typically conducts a very limited voir dire,⁷⁵ the types of questions that are asked

70. *Id.* at 309-11 (listing the attitudinal variables associated with a verdict preference for the defendant, including whether jurors thought plaintiffs receive more than they ought to, whether they favor business, oppose regulation, believe smokers have themselves to blame for smoking-related illnesses, and believe witnesses tend to give testimony favoring the side that hired them).

71. *Id.* at 313.

72. Diamond, *supra* note 11, at 313-14.

73. *Id.* at 315-16.

74. *Id.* at 317-18.

75. The federal rules of civil and criminal procedure give federal judges the discretion to decide whether to allow attorneys to conduct the entire voir dire or merely to supplement questions asked by the court. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a). According to one survey, based on 420 completed questionnaires, approximately three-fourths of federal district judges conduct the voir dire without oral participation of the attorneys. See GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 5-20 (1977). The trend is toward judge-conducted voir dire. See John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1158 (1978). Barbara Babcock has suggested that when judges conduct voir dire they do not do so with the same thoroughness as attorneys. Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 546 (1975).

of prospective jurors (How long have you lived in the jurisdiction? What kind of work do you do? What is your marital status? What kind of work does your spouse do? Do you have any children, and if so, what kind of work do they do? Have you served on a jury before, and if so, was it criminal or civil, and did it reach a verdict?)⁷⁶ are likely to receive very different answers from students than from a jury-eligible population. Diamond avoided this methodological weakness, prevalent in many mock-jury studies, by using jury-eligible citizens.

The second observation is that Diamond avoided another pitfall by using deliberating juries rather than simply relying on individual jurors in her study of damage awards. Researchers often treat an individual's verdict preference or assessment of damages as equivalent to that reached by a jury,⁷⁷ but of course when they do so, they fail to take into account the effects of the deliberation process. A jury verdict or award is not just the sum of the individual preferences.⁷⁸ If it were, there would be no need to have deliberations. The jurors could simply submit their ballots at the end of the trial, as they do in Brazil.⁷⁹ But in this country, jurors are asked to deliberate. One reason is that we assume that there is a give-and-take that occurs so that jurors who might have entered the juryroom with one point of view might leave the juryroom persuaded of the correctness of a contrary point of view.⁸⁰

76. See, e.g., *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980) (transcript of jury selection).

77. See, e.g., Michael J. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY 45 (1974); Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL. 410 (1975).

78. One writer suggested that such studies should not even be called simulated juror studies: "It is not clear whether we can even meaningfully speak of simulated jurors without employing a group deliberation. Investigations of these individual phenomena would be more appropriately referred to as studies of individual judgment rather than of simulated jurors." Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305, 305 n.1 (1976).

79. JEFFREY ABRAMSON, *WE, THE JURY* 205 (1994) ("In Brazil, federal juries do not deliberate. At the close of evidence, jurors are individually polled in writing, a secret ballot is taken, and the majority prevails. Such a procedure stands in stark contrast to our own, where deliberation is the essence of a juror's duty.") (citing HERMAN G. JAMES, *THE CONSTITUTIONAL SYSTEM OF BRAZIL* 122 (1923)).

80. Jurors could also change their views because they feel pressured to conform. See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 185 (1988) (describing two possibilities, one in which jurors change their vote because they are persuaded that another position is correct and the other in which jurors succumb to the majority view simply because they feel pressured to do so). This undoubtedly occurs, see, e.g., William Finnegan, *Doubt*, *NEW YORKER*, Jan. 31, 1994, at 48 (offering a personal account of the author's capit-

Perhaps the best-known example of the transformative power of deliberations is the movie *12 Angry Men*,⁸¹ which depicts a fictional jury deliberation. Each of the jurors, with the exception of Henry Fonda's character, entered the juryroom convinced of the defendant's guilt. After hours of heated debate, sparked by Fonda's questions, doubts, and arguments, the jury, however, emerged with a unanimous verdict of not guilty. Although studies have shown that it is difficult, if not extremely unlikely, for one or two people to change the opinions of the entire group, as Fonda did, it is possible for three or four people, or a sizable minority, to produce such a change.⁸² Diamond, by focusing her study on the result reached by the jury, rather than just the individual juror, acknowledged the critical role that deliberations play.

Another point acknowledged by Diamond is the difficulty in defining what is meant by "pain and suffering." It is a nebulous phrase, for which there is no one understanding. It is precisely in situations such as this, when there is no right answer, that we turn to the jury to provide at least *an* answer. The expectation is that jurors, drawn from a fair cross section of the community, will be representative of the community and will engage in a deliberative process through which consensus is reached, and that the judgment arrived at will reflect the values of the community.⁸³ What is required of the jury is an interpretation of the phrase "pain and suffering" and how it applies to the facts of the case.⁸⁴ The jurors cannot help but bring their values to the task. Diamond acknowledged as much when she asked jurors about attitudes that she thought likely to inform their decisionmaking in her test products liability case: from current smoking behavior to opinions

ulation to the other jurors, despite his reservations), but it is certainly not the ideal form of deliberation.

81. *12 ANGRY MEN* (Metro-Goldwyn-Mayer/United Artists 1957).

82. Despite Henry Fonda's ability to convince 11 other jurors to change their votes in the movie, *see id.*, "outcomes like this one almost never occur in real life." VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 110 (1986). Research has shown that the "[p]ressures to conform to the group are strong," and "[i]t is only when a minority juror has initial support, in the form of other jurors with similar views, that the probability that a juror will sway the majority or hang the jury improves." *Id.* Otherwise, the lone dissenters typically capitulate, and "[t]he majority almost always wins." KASSIN & WRIGHTSMAN, *supra* note 80, at 182; *see* KALVEN & ZEISEL, *supra* note 49, at 488 ("[I]n the instances where there is an initial majority either for conviction or for acquittal, the jury in roughly nine out of ten cases decides in the direction of the initial majority. Only with extreme infrequency does the minority succeed in persuading the majority to change its mind during the deliberation.").

83. *See* Marder, *supra* note 54, at 470-74 (describing how the jury should ideally function).

84. Jurors must often engage in interpretation. *See* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. REV. (forthcoming July 1999). For example, jurors are called upon to decide whether the government has proven its case "beyond a reasonable doubt" in a criminal case or whether a defendant has taken "reasonable care" in a negligence case. *Id.*

about big business to their views on how much money is required for a person to be wealthy to how much money it would take to compensate an injured person for various types of injuries.⁸⁵ She described these as "internal guideposts" that a juror might use in reaching a determination about pain and suffering awards.⁸⁶

C. Possible Reforms

1. Increase Jury Size

One reform that Diamond proposed is a return to the twelve-person civil jury.⁸⁷ Diamond suggested this change because it would reduce variability in jury damage awards. Diamond had noted greater variability among individual jurors' awards, but reduced variability among jury awards, particularly for economic damages.⁸⁸ By increasing the number of participants on the jury, any idiosyncracies of individual jurors would be minimized.⁸⁹

Diamond's proposal to increase jury size would help not only to make jury damage awards more consistent but also to make the jury more representative of the community. Although this is not a benefit Diamond explicitly sought, it would be another benefit. If civil juries consisted of twelve jurors, rather than six or eight, then the chances that they would include members with different backgrounds, perspectives, and life experiences, assuming the venire was broadly drawn,⁹⁰ would be increased.

85. Diamond et al., *supra* note 11, at 309-11.

86. *Id.* at 305

87. *Id.* at 317.

88. *Id.* at 318.

89. *Id.* ("By pooling contributions from twelve rather than six sources, the larger jury would be likely to arrive at a more reliable estimate of an appropriate damage award. Whether the jury is assessing economic or general damages, the effect of pooling should be to reduce the influence of idiosyncratic estimates.") (footnote omitted).

90. Some commentators have noted that venire lists are often limited to voter registration lists, and when jurors are drawn from only one type of list, the representativeness of the venire is compromised. See, e.g., David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 803-11 (1977). To overcome this problem, some recommend supplementing the voter registration list with multiple lists, such as lists of those who have driver's licenses, pay utilities, or receive welfare benefits or unemployment compensation. See *id.* at 826; see also Dennis Bilecki, *Program Improves Minority Group Representation on Federal Juries*, 77 JUDICATURE 221, 222 (1994) (recommending the use of driver's license and identification card registration records as a supplement to voter registration records to expand jury pools to include minority groups that have been underrepresented in the past). Other commentators have recommended "stratified selection" in which prospective jurors for the venire are summoned proportionally "to obtain a qualified list with racial demographics identical to that of the population." Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 276 (1996). But see *United States v. Ovalle*, 136 F.3d 1022 (6th

The debate over the size of the civil jury is hardly new. In the 1970s, academics, judges, and lawyers debated the issue, with courts taking steps to reduce the size of the civil jury,⁹¹ and academics urging preservation of the twelve-person civil jury.⁹² Courts were struggling to save time and money, and reducing jury size allowed them to achieve both those objectives. Meanwhile, academics were worried that smaller juries would be less representative of the community at large and there would be less consistency from verdict to verdict.⁹³ Although many judges today continue to support the smaller civil juries, especially now that they have had a fair amount of experience with them,⁹⁴ Diamond's research points to why the twelve-person civil jury still remains the ideal.

2. *Provide Guideposts*

Diamond's research also led her to take up Peter Schuck's suggestion that courts provide juries with "schedules,"⁹⁵ or in Diamond's language, "guideposts"⁹⁶ so that they have some guidance as they struggle to determine damage awards. Diamond is a little vague about what form these guideposts might take. One possibility is for courts to give juries a distribution of awards in comparable cases. Of course, the difficulty is in deciding which cases are comparable. But, as Diamond pointed out, the task is similar to the one faced by the drafters of the *United States Sentencing Guidelines*⁹⁷ as they tried to figure out past practices in an effort to determine an appropriate range of sentences for particular crimes.⁹⁸ There are other forms the guidepost could take, from a list of factors that a jury could consider

Cir. 1998) (holding the practice violative of 28 U.S.C. § 1862 and the equal protection component of the Fifth Amendment).

91. In civil cases in federal court, the number of jurors is not fixed, but cannot go below six. See FED. R. CIV. P. 48. In *Colgrove v. Battin*, 413 U.S. 149, 160 (1973), the court held that a jury of six members did not violate the Seventh Amendment right to a jury trial in a civil case.

92. See, e.g., Richard Lempert, *Uncovering Nondiscernible Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715-24 (1971); Hans Zeisel & Shari Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281 (1974).

93. Zeisel, *supra* note 92, at 715-20.

94. "Improving Jury Selection and Juror Comprehension," Workshop cosponsored by the Federal Judicial Center and the Institute of Judicial Administration at New York University School of Law (Dec. 13, 1996).

95. Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 325-26 (Robert E. Litan ed., 1993).

96. Diamond et al., *supra* note 11, at 318.

97. U.S. SENTENCING GUIDELINES MANUAL (1998) [hereinafter SENTENCING GUIDELINES].

98. See Diamond et al., *supra* note 11, at 320.

but would not be bound to follow, to the judge's view of an appropriate award. In each instance, the goal would be to give the jury some indication of a range or ballpark figure.

a. Advantages

Giving the jury some form of guidepost seems quite sensible in many ways. If jurors had more information about pain and suffering awards to guide them, in the same way that they have information about economic losses, then they would find their job as jurors less frustrating. They would not feel that they were simply inventing a figure, but rather, that the figure they reached had some foundation.

Providing jurors with the tools they need to do their job, in this case guideposts with information about awards in comparable injury cases, is consistent with a modern movement to equip juries properly so that they can perform their tasks well. For example, some courts are now giving jurors notebooks and allowing them to take notes during the trial, on the theory that it helps jurors to pay attention during the trial and helps them to recall evidence and testimony during deliberations.⁹⁹ Courts have also begun to provide jurors with written copies of the judge's instructions so that they can refer to them in the juryroom.¹⁰⁰ State courts in Arizona have gone even further, allowing jurors to ask questions by submitting them in writing to the judge during the trial.¹⁰¹ Judge Michael Dann, a state court judge in Arizona who has spearheaded many of these efforts,¹⁰² has abandoned the

99. See, e.g., ABA/BROOKINGS INSTITUTE, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 18-19 (1992) (recommending notetaking); KASSIN & WRIGHTSMAN, *supra* note 80, at 128-29 (considering why there is so much resistance to allowing jurors to take notes); David Margolick, *A Call for the Jurors to Take Bigger Roles in Trials*, N.Y. TIMES, Jan. 1, 1993, at A19 (reporting on notetaking recommendation).

100. See, e.g., ABA/BROOKINGS INSTITUTE, *supra* note 99, at 24-25.

101. See Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, Nov. 4, 1995, at A9 (summarizing Arizona's reforms which "will permit jurors to take notes, question witnesses through the judge and, in some cases, discuss evidence while a trial is in progress").

102. See THE ARIZONA SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994) (including a list of recommendations and a proposed bill of rights for jurors); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280-83 (1994) (describing some of Arizona's more controversial reforms to its jury system, including giving jurors preliminary jury instructions, allowing them to ask questions in writing, telling jurors that they can discuss the evidence before the close of trial in a civil case, giving judges discretion about the timing of instructions, and having the judge and jury engage in a dialogue if the jury has reached an impasse); William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 1 (reporting that Arizona has adopted 18 of the jury reform panel's 55 recommendations); Junda Woo, *Arizona Panel Suggests Package of Reforms to Empower Juries*, WALL ST. J., Oct. 25, 1994, at B12 (describing the proposals of a reform panel, headed by Judge B. Michael Dann, which include: allowing jurors to take notes and ask questions, providing glossaries to jurors, having lawyers do mini-

traditional *Allen* charge,¹⁰³ delivered to a jury that has reached an impasse, and has replaced it with a judge-jury conversation in which he tries to figure out if he or the lawyers can provide the jury with additional information that will enable it to overcome the impasse.¹⁰⁴ Giving juries guideposts about past damage awards would be consistent with all of these current efforts to ensure that the jury has the tools it needs to perform its job properly.

Another advantage to giving juries a guidepost for damage awards is that it would help them to avoid vastly inconsistent awards. Diamond drew upon the work of Michael Saks and colleagues,¹⁰⁵ who noted that when mock jurors were given information about the distribution of awards in comparable cases, the variability of pain and suffering awards was substantially reduced. Even if jury awards are not as inconsistent as the press and public might think, any reduction in inconsistency of jury awards could only be beneficial for the institution of the jury.

b. Disadvantages

Providing a jury with a guidepost, however, is not without its disadvantages, and these would depend, to some extent, on what form the guidepost took. Any guidepost might signal to jurors a loss of faith in the jury, or at least a questioning of its capacity to determine damages on its own. Moreover, a guidepost would wrest some power from the jury, particularly if jurors felt bound to adhere to it. Even if jurors did not feel bound by the guidepost, whoever fashions the guidepost would wield much power. Furthermore, jurors may be influenced by the guidepost even if they do not rigidly adhere to it.

c. Caveats

Thus, there are several caveats that accompany the design and use of any guidepost. The first is that whoever is given responsibility for

summations, passing out written summaries of lengthy depositions, urging lawyers and judges to simplify their language, providing counseling sessions after stressful trials, instructing jurors that they can discuss the evidence before the end of trial, and increasing the jurors' pay and the diversity of the venire).

103. If a jury has decided that it has reached a deadlock, then the judge can deliver an "*Allen* charge," approved in *Allen v. United States*, 164 U.S. 492, 501-02 (1896), which is "a sharp punch to the jury, reminding [the jurors] of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict. We specifically have approved the use of such a charge." *United States v. Anderton*, 679 F.2d 1199, 1203 (5th Cir. 1982) (citations omitted).

104. See Dann & Logan, *supra* note 102, at 283.

105. Diamond et al., *supra* note 11, at 320.

compiling the guidepost will have a certain amount of influence. If this task falls to the judge, then the judge will have added power.

Second, there are lessons to be learned from the *Sentencing Guidelines* experience.¹⁰⁶ The guidepost should remain merely a guidepost and should not become a mandatory schedule to which jurors must adhere. The *Sentencing Guidelines* allow federal judges little discretion in terms of sentencing.¹⁰⁷ They were implemented largely because Congress decided that sentences meted out for the same crime varied too greatly from judge to judge.¹⁰⁸ The *Sentencing Guidelines* were an effort to bring uniformity to federal sentencing.¹⁰⁹ One effect of the *Sentencing Guidelines* has been to shift the sentencing discretion that once belonged to the judge, to the prosecutor.¹¹⁰ The prosecutor, in deciding how to charge a defendant, is in effect deciding how that defendant will be sentenced if he or she is found guilty, now that the judge no longer has discretion to alter that sentence in any significant way. A guidepost that functions as the *Sentencing Guidelines* currently do would shift power that now resides with the jury and would place it in the hands of the judge, or whoever was given responsibility for creating the guidepost.

Third, much care has to be taken with the way any guidepost is framed. Empirical studies have shown that the same information

106. See SENTENCING GUIDELINES, *supra* note 97.

107. *Id.*

108. See, e.g., Donald A. Dripps, *Judicial Sentencing: The Soul of Justice or a Ghost in the Machine?*, TRIAL, Apr. 1996, at 60, 61 ("Of course, Congress intended the commission's guidelines to greatly restrict the discretion of sentencing judges, who hitherto exercised vast and practically unreviewable authority over sentencing."); William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 571 (1992) ("Prior to the new federal sentencing guidelines, federal judges exercised virtually unreviewable discretion when sentencing. Too often, Congress decided, this discretion resulted in unwarranted disparities in sentences imposed on similar defendants convicted of similar crimes.").

109. See Dripps, *supra* note 108, at 61; Wilkins, *supra* note 108, at 572 (describing Congress as having the following three goals in passing the Sentencing Reform Act of 1984: honesty in sentencing, reasonable uniformity in sentencing, and proportionality in sentencing); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 633 (1992) (explaining that "the Commission emphasized the theme of uniform sentences in the statute"); see also Sheila Balkan, *Sentencing Matters*, TRIAL, Oct. 1996, at 74 (reviewing MICHAEL TONRY, SENTENCING MATTERS (1996)) ("Based on promises of making sentencing fair by making punishments proportionate to crime and ending racial and class disparities in sentencing for similar crimes, imposing a scaled approach to sentencing became the justification for the current system.").

110. See, e.g., Balkan, *supra* note 109, at 74 ("Certainly one reason for the disparity [still present in sentencing] is the power given to prosecutors to influence the sentences of cooperative defendants so they receive more lenient sentences than those under the guidelines. This is a power not given to judges.").

worded in different ways can produce different responses from jurors.¹¹¹

3. *Special Verdicts/Interrogatories*

An alternative that Diamond did not consider is the special verdict or the general verdict and interrogatories. These are procedural devices that are already available in federal¹¹² and state¹¹³ courts and provide a means by which trial judges can give some structure to a jury's reasoning process. Under the Federal Rules of Civil Procedure, the trial judge can submit written questions to the jury and the jury returns a special verdict in the form of written findings of fact.¹¹⁴ Or, the judge can have the jury return a general verdict, but answer interrogatories that have been posed to it by the judge.¹¹⁵ With either method, the judge is outlining the way the jury should approach the issue, step by step. Although these methods are typically used to assist the jury in rendering a verdict, they could also be used for a damage award.

This alternative is not without its drawbacks. Many of the criticisms that can be made about guideposts are equally applicable to these procedural mechanisms. Once again, the power of the jury is being somewhat redistributed to the judge. The judge designs the questions that are to be answered by the jury, and thus, the judge plays a more intrusive role in structuring the jury's deliberations, a task that is typically left in the jury's hands. Academics are likely to be wary of this reform because it enhances the judge's power. Judges are likely to resist because they worry about intruding on the jury's deliberations. Attorneys are likely to object because they remain ever hopeful that their client will receive the wildcard damage award, which is less apt to occur if the judge is involved in shaping the jury's determination.

111. See Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995).

112. See FED. R. CIV. P. 49(a) (Special Verdicts) and 49(b) (General Verdict Accompanied by Answer to Interrogatories).

113. See, e.g., CONN. GEN. STAT. ANN. § 52-224(a) (West 1997) ("In a special verdict the jury shall find the facts . . ."); MD. R. CIV. P. 2-522(c) (Michie 1998) ("The court may require a jury to return a special verdict in the form of written findings upon specific issues."); N.Y. C.P.L.R. 4111(b) (Consol. 1997) ("When the court requires a jury to return a special verdict, the court shall submit to the jury written questions susceptible of brief answer or written forms of the several findings which might properly be made . . ."); *id.* at 4111(c) ("When the court requires the jury to return a general verdict, it may also require written answers to written interrogatories submitted to the jury upon one or more issues of fact.").

114. See FED. R. CIV. P. 49(a) (Special Verdicts).

115. See FED. R. CIV. P. 49(b) (General Verdict Accompanied by Answer to Interrogatories).

4. Recommendations

With the recommendations Diamond suggested, there is no need to choose one over the other; they are not mutually exclusive. Jury size could be increased and a guidepost could be provided. If a guidepost is unsuitable in a particular case, then the alternative of using the special verdict or the general verdict plus interrogatories may be appropriate. In the case of guideposts or special verdicts/interrogatories, care must be taken that the jury still retains its discretion and that neither approach becomes rigid and binding. Both methods must be viewed with caution because in either case the drafter, who is likely to be the judge, will have increased power to shape and influence the damage award.

CONCLUSION

Both Neil Vidmar's and Shari Diamond's empirical studies of damage awards provide useful insights about jury behavior. Vidmar's research establishes that juries' pain and suffering awards are consistent and that they are not as munificent as they seem in press accounts once post-verdict adjustments have been made by judges. Diamond's work shows that while there is greater volatility in pain and suffering awards than in liability verdicts, there is less volatility when juries' awards are compared to individual jurors' awards. Both studies provide useful rejoinders to members of the press and public who would characterize jury verdicts as "outrageous" and who would describe juries as "runaway."

Vidmar and Diamond do not claim to know what is the "right" amount for pain and suffering awards. At most, they look to variation and consistency in jury awards and make careful comparisons between judge and jury awards, avoiding the trap of using a judge's assessment as a benchmark for what is a "correct" damage award.¹¹⁶ As Vidmar and Diamond have acknowledged, there is no right answer when it comes to damage awards, which is precisely why we rely on juries to make these determinations in the first place.

116. Although Kalven and Zeisel anticipate some of the objections that may be raised to using a judge's assessment of a case as a benchmark for evaluating a jury's assessment, see KALVEN & ZEISEL, *supra* note 49, at 50-52, they also offer reasons for relying on judges' assessments, see *id.* at 94-95, which is the approach they ultimately choose to take.