

Roger Williams University Law Review

Volume 13

Issue 1 *Symposium: Genuine Tort Reform*

Article 2

Winter 2008

Jurors in the Material World: Putting Tort Verdicts in Their Social Context

Deborah R. Hensler

Stanford Law School

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Hensler, Deborah R. (2008) "Jurors in the Material World: Putting Tort Verdicts in Their Social Context," *Roger Williams University Law Review*: Vol. 13: Iss. 1, Article 2.

Available at: http://docs.rwu.edu/rwu_LR/vol13/iss1/2

This Symposia is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Jurors in the Material World: Putting Tort Verdicts in Their Social Context

Deborah R. Hensler*

“Today, a megayacht is indispensable. It’s not like 15 years ago, when a yacht was a luxury item.”¹

“If people spend their money to buy my books [in the amount of \$15 million annually], some of it comes to me. In very explicit terms, it’s democracy in action.”²

“I think there are people, including myself at certain times in my career, who because of their uniqueness warrant whatever the market will bear.”³

* Judge John W. Ford Professor of Dispute Resolution, Stanford Law School. I am grateful for comments and encouragement received from attendees at the 2007 AALS Tort Section meeting, from participants at this symposium, and from workshop participants at Chicago-Kent Law School and Stanford Law School, especially Professors Nancy Marder, Janet Alexander, and Daniel Ho. I gratefully acknowledge research assistance from Rishi Satia.

1. Olivier Millieux, head of yacht finance at ING Bank, as quoted by John Tagliabue, *For the Yachting Class, the Latest Amenity Can Take Flight*, N.Y. TIMES, Oct. 2, 2007, at C1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE1DB1739F931A35753C1A9619C8B63>. See also Valerie Cotsalas, *Resorts Respond to the Yacht Parking Problem*, N.Y. TIMES, Sept. 5, 2007, at C6, available at <http://travel.nytimes.com/2007/09/05/realestate/commercial/05yacht.html>.

2. Author Tom Clancy, as quoted in James W. Michaels, *Should Anyone Earn \$25,000 a Day?*, FORBES, May 25, 1992, at 10. Clancy was responding to the question whether he was “entitled” to earn \$15 million in a single year. “What are you, a communist?” he asked, before explaining that his earnings illustrated “democracy in action.” *Id.*

3. Leo Hindery, Jr., founder of the YES Network and currently a manager of a private equity fund, as quoted by Louis Uchitelle, *The Richest of the Rich, Proud of a New Gilded Age*, N.Y. TIMES, July 15, 2007, § 1, at 1.

“No reasonable jury could have found that the [p]laintiff was entitled to \$50 million in compensatory damages.”⁴

I. INTRODUCTION

Political rhetoric and empirical analyses regarding civil jury decision-making focus on the jury verdicts themselves, independent of or in relation to the characteristics of the cases in which such verdicts are rendered. What goes on in the world that surrounds juries—that is, in the culture that jurors are a part of—receives scant attention. There are only a few examples of jury verdict analyses that relate verdicts to the characteristics of jurors (e.g., gender, race and ethnicity),⁵ which may contain information about jurors’ place in the larger world and hence the social influences that operate on them. Most analyses of the jury decision-making *process* rely on laboratory experiments that attempt to replicate the de-contextualized world of the jury room. The lack of attention to the social context of jury decision-making is not surprising; after all, jurors themselves are instructed to base their decisions solely on the evidence presented in the courtroom.

But jurors—however instructed by judges—are real people whose lives are shaped by their social environment. In this article, I place jury verdicts in the social context in which they were delivered. Specifically, I compare the magnitude and growth rate of jury verdicts issued from 1992 through 2001 in the nation’s largest state trial courts with the material rewards accorded others—particularly executives at large corporations—as reported by the mass media. I argue that we ought to expect juries’ valuations of plaintiffs’ losses to be colored by valuations of other people’s worth in the marketplace, as exposed by the mass media. Growth in average jury verdicts that is not explained by economic inflation (e.g., growth in the Consumer Product Index, or CPI) or by changes in the composition of the civil jury trial caseload may

4. *In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 737, 741 (E.D. La. 2006).

5. For a review of empirical literature on the effects of jurors’ race on jury decision-making, see Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003).

be attributed to a phenomenon I term “social inflation,” that is, the increase over time in the amount of material wealth society perceives as adequate for certain individuals.

Jurors are not supposed to take cultural trends into account in deciding tort damages: their charge (ignoring issues of comparative negligence) is to make the plaintiff whole, meaning that if the plaintiff is an ordinary blue-collar worker or full-time homemaker, jurors are to assess economic damages (and some would argue non-economic damages as well) in relation to the plaintiff’s comparatively low status in the economic hierarchy. Outsized awards raise questions, therefore, about whether jurors have properly carried out their legal function. But the political reaction to outsized awards, particularly as expressed by members of the socio-economic elite, may be driven as much by dismay that juries are upsetting the socio-economic hierarchy, as by concerns about the economic rationality of the tort system.

My article has two objectives, one empirical and the other normative: by placing jury verdicts in the context of other contemporary data on material rewards, I hope to provoke research on my social inflation hypothesis, and seek to undermine a cultural consensus that outsized jury verdicts in tort damage suits are inherently unreasonable, that outsized executive compensation and other elite material rewards are inherently rational, and that jury verdicts and the material rewards society showers on its most fortunate members have nothing to do with each other.

II. THE DEBATE OVER JURY VERDICTS IN TORT LIABILITY CASES

Tort reform is conventionally framed by its supporters as a means of lowering costs, directly for corporations and their insurers, and indirectly for consumers and citizens.⁶ Indeed, tort

6. For a discussion of the framing of tort reform as an economic issue, see Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1237-62 (2004). For an example of business press coverage focusing on the effect of tort litigation on the economy, see Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 90 (“It’s even worse than you think. Out-of-control lawsuits are shutting down medical practices, killing businesses and costing the economy \$200 billion a year.”). For an example of academic analysis focusing on the economic impact of tort

reformers have coined the term “tort tax” to convey the notion that tort litigation imposes undesirable costs on the economy.⁷

Large jury awards, particularly for non-economic and punitive damages, are the favored exemplars of the excessive costs of tort litigation.⁸ Although the number and rate of civil jury trials have decreased dramatically,⁹ just enough trials remain to produce

verdicts, see Steven Shavell & A. Mitchell Polinsky, Op-Ed., *Vioxx Verdict's Dark Side*, BOSTON GLOBE, Aug. 23, 2005, at A15, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/08/23/vioxx_verdicts_dark_side/. Shavell and Polinsky argue that the \$253 million jury verdict in a Texas trial alleging that Vioxx caused the plaintiff's husband's death has negative import for consumer prices and pharmaceutical industry investment in research and development, and that the deterrence value of the verdict is unnecessary given regulation by the Food and Drug Administration. *Id.* They further suggest that there is no reason for the plaintiff in this Vioxx suit to receive more than the “several million dollars” typically awarded to the “surviving spouse of an automobile accident victim.” *Id.*

In this case, the jury awarded the plaintiff \$450 thousand in economic damages, \$24 million in non-economic damages (mental anguish and loss of companionship), and \$229 million in punitive damages. Associated Press, *Jury Finds Merck Liable in Landmark Vioxx Case: Widow of Texas Man Who Died After Taking Drug Awarded \$253 Million*, Aug. 19, 2005, <http://www.msnbc.msn.com/id/9006921/>. As a result of tort reform in Texas, punitive damages are limited to an amount equal to twice the amount awarded for economic damages, plus the amount awarded for non-economic damages up to a cap of \$750,000. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon Supp. 2007). Applying this formula, the punitive damage award would be capped at \$1.65 million, leaving the plaintiff with a total award of \$26.1 million. *See id.*

7. *See, e.g.*, Jim Copland, Op-Ed, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16, available at http://www.manhattan-institute.org/html/_wsj-the_tort_tax.htm; Sean Parnell, “Tort Tax” Costs Illinois Jobs, *Economic Growth*, BUDGET & TAX NEWS, Feb. 1, 2006, <http://www.heartland.org/Article.cfm?artId=18398>. A recent study by the Tillinghast business of Towers Perrin estimates the total cost of tort liability in 2005 at \$261 billion, or \$880 per capita. NAMIC Online, Study: U.S. Tort Costs Total \$261 Billion in 2005: Growth Rate for Tort Costs Is the Smallest Since 1997 (Dec. 14, 2006), <http://www.namic.org/topnews/061214st1.asp>. According to Tillinghast, per capita tort costs declined slightly in 2005 from their 2004 level. *Id.*

8. For a discussion of the portrayal of jury verdicts by tort reform supporters, see STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995).

9. According to the Court Statistics Project, from 1996 to 2005, annual tort filings in the thirty states for which detailed long-term trend data are available dropped 21%. COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2006, at 13 (Robert C. LaFountain et al. eds., 2007), http://www.ncsconline.org/D_Research/csp/2006_files/EWSC-

occasional humongous awards for the media to fasten upon¹⁰ and for tort reform supporters to highlight in sustaining their argument that the legal system has gone awry.¹¹

Large jury verdicts also provide the basis for a more high-minded critique of tort litigation: namely, that it relies on decision-making by cognitively impaired lay jurors. That Nobel laureate Daniel Kahneman and noted University of Chicago law professor Cass Sunstein have implicitly endorsed the “irrational jury” paradigm with their research on cognitive biases in jury decision-making has not been lost on tort reform advocates.¹² The asserted irrationality of jury decision-making supports additional arguments against tort litigation: that the costs it imposes on corporate defendants are largely unjustified,¹³ and that tort

2007WholeDocument.pdf. Total civil case filings in general jurisdiction courts (based on forty-three states) rose about 5% during that period, meaning that the fraction of state court civil litigation attributable to tort cases decreased. *Id.* at 12. From 1995 to 2002, the total number of civil jury trials in state courts of twenty-two states decreased 25% (from 23,453 to 17,617). National Center for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/csp/TrialTrends/CSPtrialtrends.html (last visited Feb. 18, 2008) (data available in a Microsoft Excel file which can be downloaded from hyperlink “Civil Dispositions and Trials, 1976-2002”). By 1995, the percent of all civil case dispositions attributable to jury trials had already fallen below one percent. *Id.* (same).

10. For example, in August 2005, the media trumpeted a Texas jury’s verdict of \$253.5 million (\$24.450 million in economic and non-economic losses, plus \$229 million in punitive damages) in a suit against Merck, attributing the death of the plaintiff’s husband to his use of Vioxx. Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES, Aug. 20, 2005, at A1, available at <http://www.nytimes.com/2005/08/20/business/20vioxx.html?ref=business> [hereinafter Berenson, *Jury Calls Merck Liable*]. Because punitive damages are capped under Texas law, § 41.008(b), the verdict would automatically be cut to \$26.1 million. See *supra* note 6. In fact, by fall 2007, Merck had yet to pay any of the award, which it appealed. Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Suits*, N.Y. TIMES, Aug. 21, 2007, at A1.

11. See, e.g., AM. TORT REFORM FOUND., JUDICIAL HELLHOLES: 2007 (2007), <http://www.atra.org/reports/hellholes/report.pdf>.

12. See Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074-81 (1998) (proposing that policy reforms should be instituted to control erratic and unpredictable jury awards that result from the jury’s power to value damages on an unbounded scale of dollars, such as with punitive damages).

13. See, e.g., Bruce Bartlett, *The Tort Tax: Greedy Trial Lawyers Are Slowing Economic Growth and Investment*, NAT’L REV. ONLINE, Mar. 3, 2003,

liability is unpredictable.¹⁴

Taken together, these arguments comprise a powerful attack on the theory and practice of tort litigation, and one that has proven remarkably effective over the past several decades. To date, thirty-six states have adopted limitations on non-economic damages in some or all tort suits,¹⁵ and twenty-two states have adopted caps on punitive damages.¹⁶ The United States Supreme Court has weighed in with its own tort reform measure, limiting punitive damages to a modest multiplier of compensatory damages,¹⁷ and instructing courts that juries may not consider the harms defendants have imposed on people not before the court in determining the proper amount of punitive damages, even in cases where the defendants' behavior has caused mass harms.¹⁸

But the views of tort reform that focus on its narrow pursuit

available at http://www.nationalreview.com/nrof_bartlett/bartlett030303.asp; John Engler & Dan Pero, *End Jackpot Justice*, WASH. TIMES, Jan. 28, 2005, at A17, available at http://www.nam.org/s_nam/doc1.asp?CID=201613&DI D=233023.

14. For a discussion of the political debate over the role of juries in tort litigation, see Peter H. Schuck, *Mapping the Debate on Jury Reform*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306-31 (Robert E. Litan ed., 1993).

15. NAMIC Online, Noneconomic Damage Reform, <http://www.namic.org/reports/tortReform/NoneconomicDamage.asp> (last visited Feb. 25, 2008). Thirty-four of the thirty-six states imposed caps on the absolute amount of non-economic damages. *Id.* In twenty-three of these thirty-four states the caps apply only to medical malpractice suits. *Id.* According to NAMIC, the highest courts of three states have declared limitations on non-economic damages unconstitutional. *Id.*

16. ATRA, TORT REFORM RECORD 19-31 (2007), http://www.atra.org/files.cgi/8140_Record_12-07.pdf. ATRA lists thirty-four states that have restricted punitive damages in some fashion since 1986, including raising the standard for awarding damages (e.g., requiring plaintiffs to show by "clear and convincing" evidence that a defendant's conduct was "wanton"). *Id.*

17. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) ("When the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow'" (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

18. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063-64 (2007); *see also State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant . . .").

of corporate self-interest (as perceived by tort reform critics) or its concern about reducing unjustifiable burdens on economic productivity (as perceived by tort reform supporters) miss its arguably more important political thrust, which may explain the movement's continuing focus on jury verdicts in an era of the vanishing trial. For at least some conservative critics of the tort system, the problem with relying on jury decision-making to decide tort cases is not jurors' cognitive failings, but rather their predilection for wealth redistribution.¹⁹ Under this view, juries are seeking to change America's (increasingly unequal) distribution of wealth and other resources, a distribution that favors tort critics, who are largely members of America's socio-economic elite and their political representatives.²⁰ That the plaintiff's trial bar, a beneficiary of perceived jury largess, has been a significant source of financial support to the Democratic Party²¹—which is portrayed, however unrealistically, as an

19. See, e.g., Michael I. Krauss & Robert A. Levy, *Can Tort Reform and Federalism Co-Exist?*, POLICY ANALYSIS, Apr. 14, 2004, at 1, <http://www.cato.org/pubs/pas/pa514.pdf> ("Critics of federal tort reform have usually come from the political left and its allies among the trial lawyers, who favor a state-based system that can be exploited to redistribute income from deep-pocketed corporations to 'deserving' individuals."); *Tort Reform: Sense of Rationality Brought to a Tort System Gone Amok*, REG.-HERALD, July 3, 2003, at 4A, available at http://www.wvcala.com/others_saying/news7.html ("Unfortunately, the [tort] system has transformed from a venue for dispute resolution to a tool for social justice and income redistribution."); Ed Rubenstein, *Punitive Damages*, NAT'L REV., Nov. 4, 1991, at 16, available at http://www.findarticles.com/p/articles/mi_m1282/is_n20_v43/ai_11523363 ("The legal profession has become increasingly engaged in redistributing property and income rather than protecting it. Punitive-damage awards are fingered by the White House Council on Competitiveness as a prime suspect.").

20. Perhaps not irrelevantly, in the process wealth is transferred to the least-elite sector of the bar. For some suggestive data supporting anecdotal observations of the non-elite character of the plaintiff trial bar, see Posting of Ed Morrison, *Where Did High-End Plaintiffs' Lawyers Go to Law School?*, http://www.elsblog.org/the_empirical_legal_studi/2006/12/where_did_high_e.ht ml (Dec. 4, 2006, 10:17 AM) (showing 32% of Inner Circle Trial Lawyers (hundred leading plaintiff trial lawyers, chosen by that bar) graduated from top twenty-five law schools, as compared to 64% of lawyers at the top two hundred law firms listed by the American Lawyer magazine).

21. Kate O'Beirne, *Cash Bar: How Trial Lawyers Bankroll the Democratic Party*, NAT'L REV., Aug. 20, 2001, at 26, available at http://findarticles.com/p/articles/mi_m1282/is_16_53/ai_76915714; Jim Copland, *Kerry-Edwards & Co.: Trial Lawyers, Inc. Run for President*, NAT'L

advocate of wealth redistribution²²—resonates with this view of the redistributive thrust of jury decision-making in tort cases.

III. A PROFILE OF JURY VERDICTS IN TORT LIABILITY SUITS, 1992 - 2001

Are jury verdicts in tort cases redistributive? One way juries might display such redistributive tendencies would be to routinely find in favor of individual plaintiffs who sue corporate defendants or affluent individuals, without regard to the facts of the case. Many of the tort anecdotes that highlighted the 1980s tort reform wave highlighted alleged instances of such jury awards.²³ But aggregate jury data indicate that these instances (even when correctly portrayed) were aberrant: in cases most likely to fit the paradigm of an individual plaintiff *versus* a corporation or affluent individual, such as product liability and medical malpractice suits, state and federal juries have consistently been more likely to favor defendants than plaintiffs; by contrast, in automobile accident cases, where plaintiff and defendant are more likely to be individuals of equal status, juries tend to favor plaintiffs (see Figures 1 and 2).²⁴

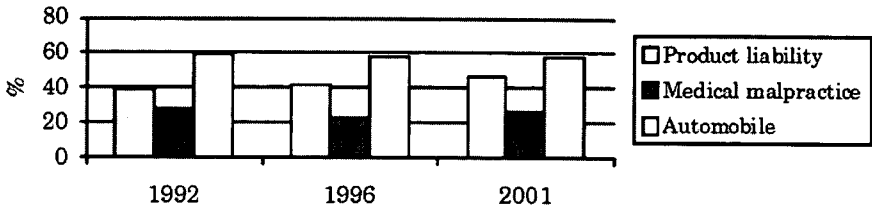
REV. ONLINE, July 8, 2004, <http://www.nationalreview.com/comment/copland200407080820.asp>; Scott Horton, *Justice in Mississippi*, HARPER'S MAG., Sept. 18, 2007, <http://www.harpers.org/archive/2007/09/hbc-90001232>.

22. See, e.g., Timothy Noah, *Income Redistribution, GOP-Style: The House Takes Money from the Poor and Spends It on the Rich*, SLATE, Aug. 6, 2002, <http://www.slate.com/?id=2069049> ("Democrats want to redistribute income downward, to the poor"); *O'Reilly Opposes Income Redistribution – Unless He's on the Receiving End!*, MEDIA MATTERS FOR AM., May 21, 2004, <http://mediamatters.org/items/200405210005>.

23. See, e.g., WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 1-5 (2004); Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America's "Lawsuit Crisis,"* WASH. MONTHLY, Oct. 2004, at 18, 19-20, available at <http://www.washingtonmonthly.com/features/2004/0410.mencimer.html>.

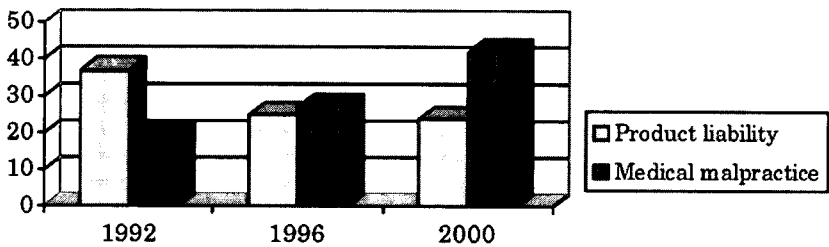
24. Evidence from jury experiments is also inconsistent with the hypothesis that juries' decisions are affected by defendant wealth. See Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 121 (1996).

Figure 1
Percent Jury Verdicts for Plaintiffs in State Court Cases
(Seventy-five Largest Counties)



Source: National Center for State Courts²⁵

Figure 2
Percent Jury Verdicts for Plaintiffs in Federal Court Cases



Source: Federal Integrated Database²⁶

25. The National Center for State Courts has conducted three surveys of civil jury verdicts in the seventy-five largest counties in the United States for 1992, 1996, and 2001. The results of these surveys have been presented in a series of Bureau of Justice Statistics (BJS) reports. CAROL J. DEFRANCES ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjcavilc.pdf> (1992 data); MARIKA F.X. LITRAS ET AL., TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf>; THOMAS H. COHEN, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001 (2004). The raw survey data are available from the Inter-University Consortium on Political and Social Research (ICPSR), <https://www.icpsr.umich.edu/> (last visited Mar. 2, 2008). The author tabulated the data in Figure 1 from the ICPSR datasets. *See id.*

26. The Federal Integrated Database includes records for all civil cases filed in federal courts over the last several decades, available from the Inter-University Consortium on Political and Social Research (ICPSR), <https://www.icpsr.umich.edu/> (last visited Mar. 2, 2008). The author tabulated the data in Figure 2 using the Judicial Statistical Inquiry Form designed by Theodore Eisenberg and Kevin Clermont. *See* Judicial Statistical Inquiry Form, <http://teddy.law.cornell.edu:8090/questata.htm> (last visited Mar. 2, 2008).

To be sure, juries might repress redistributive desires when deciding liability, only to express them when awarding damages. Most analyses of jury awards in tort cases have found that compensatory awards are consistently related to the severity of the plaintiff's injury,²⁷ but injury severity and other characteristics of tort cases that analysts have been able to measure do not fully explain variation in verdicts. Some analysts attribute such unexplained variance to jury unreliability or bias,²⁸ which might include redistributive tendencies, but Neil Vidmar and his co-authors have argued that objective differences among cases that analysts failed to measure could explain such differences.²⁹

If redistributive biases exist, it seems likely that they would be evinced more frequently in the calculation of non-economic damages, for which juries arguably receive instructions that are less clear, in comparison to economic damages, which should reflect past and future medical costs, work loss, and other "special" damages. Determining what proportion of jury awards are damages for non-economic losses from reported jury verdict data is not always possible. Using data on a variety of tort claims tried to juries in different jurisdictions over the last three decades, including product liability and medical malpractice cases, analysts have estimated variously that non-economic damages account for as little as 40%³⁰ to as much as 70%³¹ of total dollars awarded by juries to compensate losses. In an early study, Randall Bovbjerg and his co-authors found more variation generally in the non-economic portions of jury damage assessments than in the economic portions.³² Analyzing more recent jury verdict data in medical malpractice cases from New York, California, and Florida, Vidmar and his co-authors found that the non-economic portion of jury awards was correlated with injury severity, with such

27. See Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265 (1998).

28. See, e.g., W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 95-99 (1991); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 923-24 (1989).

29. Vidmar et al., *supra* note 27, at 269.

30. *Id.* at 285.

31. VISCUSI, *supra* note 28, at 102-09.

32. Bovbjerg et al., *supra* note 28, at 932-36.

damages accounting for a *lower* proportion of total compensation for more serious injuries, in comparison with less serious injuries and wrongful death cases.³³ They also found greater *variability* in the proportion of damages accorded for non-economic losses (as measured by the standard deviation) in cases of less serious injury and wrongful death.³⁴

As Vidmar and his co-authors note, variability in non-economic damages within categories of injury severity (or death) does not by itself signal jury capriciousness or bias.³⁵ Indeed, in her recent analysis of jury verdicts in medical malpractice cases in California, Florida, and Maryland, Professor Finley found a systematic relationship between the proportion of damages accounted for by non-economic losses and gender and age.³⁶ Focusing on a sample of 131 medical malpractice cases from 1992 through 2002 in which California juries awarded more than \$250,000 in non-economic damages, Finley found that for female plaintiffs, average non-economic damages accounted for 78% of average total compensatory damages, while for male plaintiffs the average was 48%.³⁷ As for age, non-economic damages accounted for 66% of total compensatory awards to plaintiffs (male and female) over sixty-five, on average, and 98%, on average, in cases of wrongful death where the victims were infants or children.³⁸ Similar gender and age differences were observed in the Florida and Maryland data.³⁹ On average, juries award less in economic damages to women, the elderly, and children—as Finley

33. Vidmar et al., *supra* note 27, at 286 tbl.2, 295 tbl.8.

34. *Id.*

35. *Id.* at 296.

36. See Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).

37. *Id.* at 1284-85.

38. *Id.* at 1287, 1292. An independent analysis of the California data for roughly the same time period reports the same patterns. See NICHOLAS M. PACE ET AL., CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 32 (2004).

39. For the Florida results of Finley's analysis, which show that the average compensatory damages awarded to female plaintiffs comprised proportionally more of non-economic damages by comparison to damages awarded to males, see Finley, *supra* note 36, at 1297-1306. Analyzing eighty-eight personal injury cases decided in Maryland between 1988 and 1999, Finley discovered that on average females received 44% more than men in non-economic damages, which makes women more likely to be affected by damages caps. *Id.* at 1307.

demonstrates by reference to individual case data—because these plaintiffs are not in the labor force, or – in the case of women – work at lower-paying jobs or provide services to their families, such as housekeeping and child care, that are not accorded a high monetary value.⁴⁰ But jurors award more in *non-economic* damages, on average, to women, either in an effort to reach a total award that the jurors believe is appropriate for the injury suffered or because, as Finley argues, jurors value the components of non-economic loss – lost reproductive ability, lost sexual function, lost intimacy – as worthy of high compensation.⁴¹ Ironically, because it imposes hard caps on non-economic damages, it is tort reform legislation itself that has a “redistributive” effect, reducing women’s compensation for injury proportionally more than it reduces compensation to similarly injured males. A RAND study of California medical malpractice data estimated that women lost an average of 39% of their total compensatory awards as a result of California’s MICRA cap, compared to a reduction of 31% for males.⁴²

In sum, direct evidence of redistributive bias in jury verdicts in tort cases is lacking. Yet, aggregate jury verdict data indicate that jury awards in tort cases have continued to grow over time, even after normal inflation has been taken into account. Figure 3 shows median and mean awards for compensatory damages only (i.e., excluding punitive damages) in product liability cases in the state courts of the seventy-five largest counties of the United States in 1992, 1996, and 2001. In some trials, juries decide awards for several plaintiffs at a time. Because I am interested in how juries assess the value of individuals’ lives and losses, the data presented in Figure 3 have been adjusted for the number of plaintiff winners.⁴³ Figures 4 and 5 show these same per plaintiff medians and means, adjusted first for overall inflation (i.e., using

40. *Id.* at 1280-81.

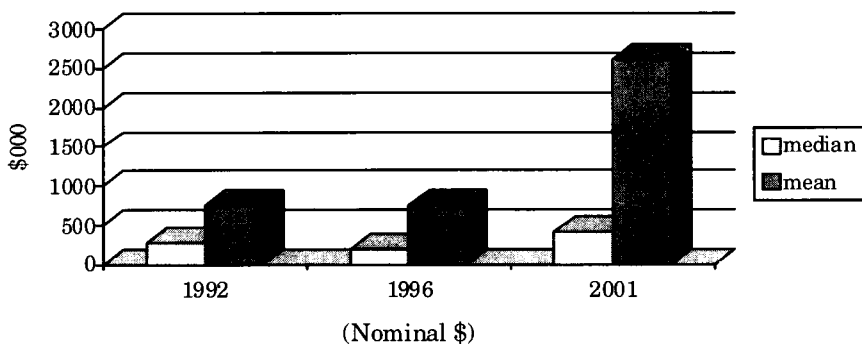
41. *Id.* at 1266, 1281-82.

42. PACE ET AL., *supra* note 38, at 33.

43. Large jury verdicts are often reduced by settlement, remittitur, and reversal on appeal. See Michael G. Shanley, *The Distribution of Posttrial Adjustments to Jury Awards*, 20 *J. LEGAL STUD.* 463, 464 (1991). Because this article focuses on jury behavior (and because information on final outcomes after jury trial is not reported systematically), this article reports original jury verdicts rather than final outcomes.

the CPI) and second for medical inflation, arguably the more appropriate inflation adjustment for tort suits, in which medical costs, on average, account for a large fraction of economic losses. During this time period, medical inflation outstripped overall inflation. After adjusting for inflation (general and medical), median product liability awards grew little in these seventy-five counties, but between 1996 and 2001, mean compensatory awards increased by about three times.

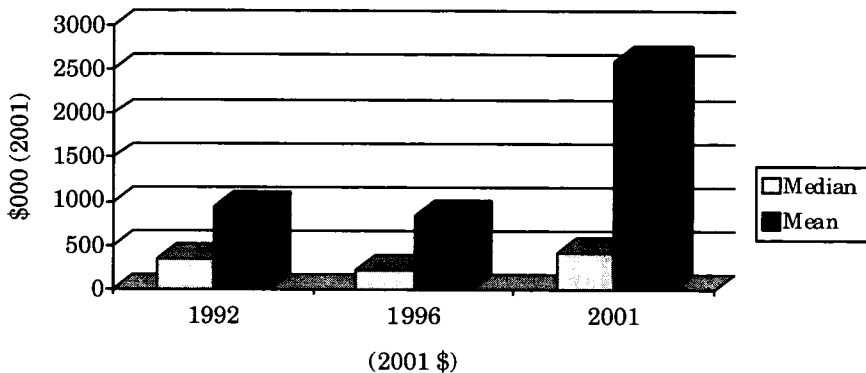
Figure 3
Per Plaintiff Median and Mean Compensatory Awards in State Court Product Liability Cases



Source: National Center for State Courts⁴⁴

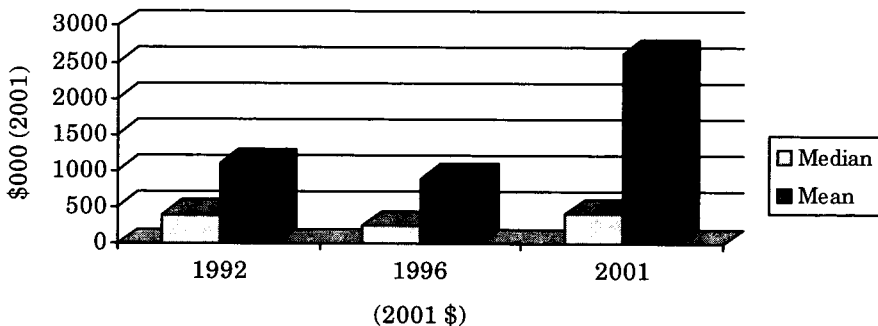
44. The author tabulated mean and median verdicts using raw National Center for State Courts civil trial survey data, archived by the Inter-University Consortium on Political and Social Research (ICPSR), <https://www.icpsr.umich.edu/> (last visited Mar. 2, 2008). The dataset included asbestos and non-asbestos product liability cases decided by juries only. See *id.* Means and medians for 1996 and 2001 were calculated for the distribution of per plaintiff awards, arrived at by dividing the total compensatory damages awarded in each trial by the number of plaintiff winners in that trial. The 1992 dataset did not permit such an adjustment. The results therefore somewhat underestimate changes over time from 1992.

Figure 4
CPI Inflation Adjusted Per Plaintiff Median and Mean Compensatory Awards in State Court Product Liability Cases



Source: National Center for State Courts (adjusted by author)⁴⁵

Figure 5
Medical Inflation Adjusted Per Plaintiff Median and Mean Compensatory Awards in State Court Product Liability Cases



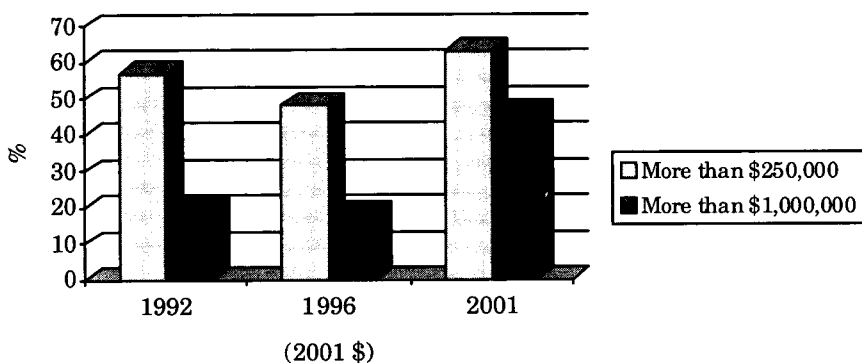
Source: National Center for State Courts (adjusted by author)⁴⁶

45. Original data from sources cited *supra* note 44, adjusted for inflation using the Bureau of Labor Statistics inflation adjuster, CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>.

46. Original data from sources cited *supra* note 44, adjusted for inflation using the medical inflation adjuster from Tom's Inflation Calculator, <http://www.halfhill.com/inflation.html>.

Mean awards, of course, reflect the presence of outliers. Usually, in jury verdict data, mean awards outstrip medians because of the presence of a small number of very large awards. As shown in Figure 6, after accounting for inflation, the frequency of high-value compensatory awards (per plaintiff) in product liability cases in the largest metropolitan state courts increased dramatically from 1992 to 2001.

Figure 6
Percent of High-Value (Per Plaintiff) Compensatory Awards
in State Court Product Liability Cases



Source: National Center for State Courts⁴⁷

Growth in mean plaintiff verdicts, coupled with large nominal awards, fuels the perception that juries are engaging in redistributive behavior (or are simply “out of control”). But longitudinal analyses of jury verdict data suggest that changes in median and mean verdicts over time may reflect differences in the *composition* of the jury trial caseload rather than changes in jury behavior. As the risks and expenses of trials have increased over time, and perhaps in response to changes in other factors as well, plaintiff attorneys’ willingness to take lower value cases to trial has diminished, resulting in juries hearing higher value cases—

47. The author calculated data using the National Center for State Courts raw civil jury survey data archived by the Inter-University Consortium on Political and Social Research (ICPSR), <https://www.icpsr.umich.edu/> (last visited Mar. 2, 2008). The dataset included asbestos and non-asbestos product liability cases decided by juries only. *See id.*

those with more substantial medical costs, work loss, etc.—than they heard in the past.⁴⁸ However, after taking certain case characteristics (e.g., defendant type) and claimed losses into account, an unexplained increase in average real dollar awards remains in the types of cases that typically involve individual plaintiffs facing off against corporations or higher status individuals.⁴⁹

III. THE MATERIAL CONTEXT FOR JURY DAMAGE AWARDS

Suppose that juries are systematically awarding more money today than in the past, even when inflation is properly accounted for, in cases that pit individual plaintiffs against more powerful individuals and corporations.⁵⁰ As a thought experiment, let us imagine what might drive such behavior. One possibility is that jurors' notions of what certain losses (including loss of life) are worth might be influenced by values that are placed on other people's lives or contributions to society, such as corporate executives' compensation packages, athletes' endorsement packages, or entertainers' salaries.⁵¹ Perhaps, in other words, in

48. See Seth A. Seabury, Nicholas M. Pace & Robert T. Reville, *Forty Years of Civil Jury Verdicts*, 1 J. EMPIRICAL LEGAL STUD. 1, 18-19, 23 (2004) (finding that jury awards in San Francisco and Cook County, Illinois grew an average in real dollars of 2.4% annually over a forty year period but that virtually all of the growth is explained by changes in the mix of case types (e.g., plaintiff and defendant characteristics, type of tort) and claimed medical and non-medical losses).

49. Taking claimed medical and non-medical losses, jurisdiction, and plaintiff and defendant characteristics into account, real dollar awards in automobile accident cases in San Francisco and Cook County actually declined an average of 1.3% annually over the forty year period. *Id.* at 21-22. Taking claimed medical and non-medical losses, plaintiff and defendant characteristics, and type of non-auto tort into account, real dollar awards in non-auto tort cases, including medical malpractice and product liability, increased about 1.6% annually. *Id.*

50. Juries could award more in total damages by awarding more for non-economic loss, relative to economic loss, awarding larger punitive damages, or even awarding more for economic loss in situations where punitive damages are not available. See Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW & HUM. BEHAV. 313, 327-28 (1999).

51. Similarly, perceptions of appropriate punitive damage amounts might be shaped by reports of corporate profits generally, as well as information on a specific corporate defendant's financial position introduced at trial. Analyzing the correlation between punitive damage awards and

addition to general inflation in costs or inflation in medical costs specifically, there is what we might term a “social inflation” factor affecting high-end jury verdicts.

In recent years, the media have devoted considerable attention to executive pay.⁵² Salaries and other remuneration for athletes, entertainers, and “celebrities” generally also receive substantial and continuing coverage.⁵³ If civil juries’ notions of the appropriate amounts to compensate plaintiffs injured or killed are shaped by their environment, we might expect such reports to help define that environment.⁵⁴

corporate profits is complicated by the very small number of punitive damage awards in product liability cases. I have not undertaken such an analysis for this article.

52. See, e.g., Ellen Simon, *Hundreds of CEOs Top \$8.3 Million Pay Mark*, USA TODAY, June 9, 2007, http://www.usatoday.com/money/companies/management/2007-06-09-ceopay_N.htm?loc=interstitialskip&loc=interstitialskip (discussing the enormous compensation America’s top CEOs receive, which eclipses subordinate executives, pro athletes, and movie stars); Ellen Simon, *Jets, Golf, Yachts, Beer: CEOs Rake in Extras*, USA TODAY, June, 9, 2007, http://www.usatoday.com/money/companies/management/2007-06-09-ceoperks_N.htm (even as CEO pay increases, companies provide their top executives with perks that include flights on corporate jets and payments for executives’ taxes). Since January 1, 2000 the *New York Times* has published more than 3,500 articles on “executive compensation.” NYTimes.com, <http://www.nytimes.com/> (last visited Feb. 18, 2008) (running an advanced search of “executive compensation”). Articles include features on the salary and perks of individual CEOs, as well as discussions of executive compensation trends. *Id.* I identified 2,655 such articles by searching “executive compensation” from January 1, 1990 – December 31, 1999, the time around which the jury verdicts I have described were delivered. *Id.*

53. Since January 1, 2000, the *New York Times* has published more than 1,800 articles on baseball player salaries, 111 of which discussed “highest-paid” players, and more than 1,600 articles on football player salaries. NYTimes.com, <http://www.nytimes.com/> (last visited Feb. 18, 2008) (running advanced searches of “baseball salary,” “baseball salary highest-paid,” and “football salary”). Hollywood.com, which boasts “over 10 million monthly visitors,” provides copious information on salaries of movie and TV actors and actresses. Hollywood.com, Salaries, <http://search.hollywood.com/movies/Salaries> (last visited Feb. 18, 2008). Salary.com provides an on-line calculator for comparing your salary, by the minute, to that of your favorite celebrity. Salary.com, Salary Timer, http://swz.salary.com/salarytimer/layoutscripts/stml_start.asp (last visited Feb. 18, 2008). You can also calculate the difference between your salary and a favorite salary, converted into Big Macs, Air Jordans, Barbie Dolls, and Lexus SUVs. *Id.*

54. I am not suggesting that jurors consciously decide to award a particular plaintiff a specific amount of money because they have heard or read reports of such an amount being paid to a particular star athlete or a

A. A Comparison of Jury Damage Awards and Executive Compensation

How to calculate executive compensation in an era of stock options, signing bonuses (“golden hellos”⁵⁵), severance packages (“golden parachutes”⁵⁶), and other perks, has been a subject of considerable scholarly attention and some dispute over the past decade.⁵⁷ For this thought experiment, I rely on *Forbes Magazine*’s annual executive compensation report, which is often cited in national news media as a source of rankings of the “richest” or “best paid” people in the United States.⁵⁸

high-profile CEO. Instead, I argue that jurors’ beliefs about the appropriate amounts to award for non-economic damages may be affected, in part, by a social environment in which large salaries and other material rewards afforded executives, athletes, and “celebrities” are frequently reported and celebrated.

55. See Elizabeth MacDonald, *Gilded Greetings*, FORBES, May 15, 2007, http://www.forbes.com/opinions/2007/05/14/golden-handshakes-ceo-oped-cz_emd_0515golden.html.

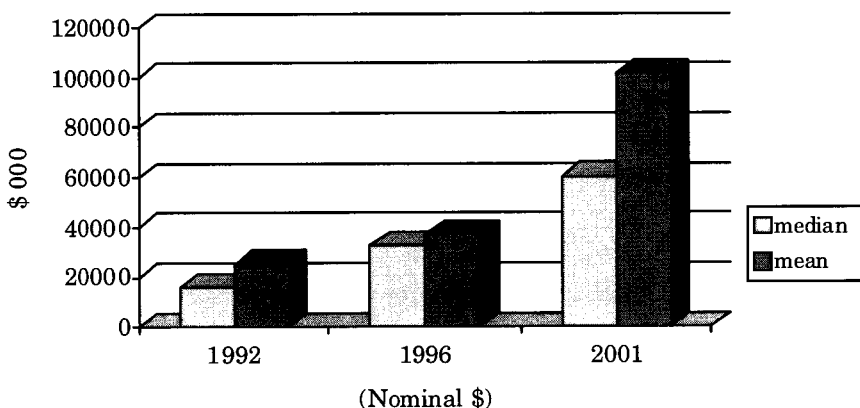
56. See Elizabeth MacDonald, *Much Too Golden Years*, FORBES, June 6, 2007, http://www.forbes.com/2007/06/05/retire-ceos-compensation-lead-comp-cx_em_0604pensions.html; Gretchen Morgenson, *The C.E.O.’s Parachute Cost What?*, N.Y. TIMES, Feb. 4, 2007, § 3, at 1, available at <http://select.nytimes.com/2007/02/04/business/yourmoney/04gret.html?n=Top/Reference/Times%20Topics/Subjects/E/Executive%20Pay>. In January 2007, Home Depot gave its former chief executive, Robert Nardelli, a \$210 million severance package, despite the company’s poor performance while under his watch. Eric Dash, *An Ousted Chief’s Going-Away Pay Is Seen by Many as Typically Excessive*, N.Y. TIMES, Jan. 4, 2007, at C4, available at <http://www.nytimes.com/2007/01/04/business/04pay.html?n=Top/Reference/Times%20Topics/Subjects/E/Executive%20Pay>. Eight months later, Chrysler Corporation gave Nardelli another chance when it appointed him as its CEO. Micheline Maynard, *Once Tainted, Now Handed Chrysler Keys*, N.Y. TIMES, Aug. 7, 2007, at A1, available at <http://www.nytimes.com/2007/08/07/business/07auto.html>; cf. Gretchen Morgenson, *A Lump of Coal Might Suffice*, N.Y. TIMES, Dec. 24, 2006, § 3, at 1, available at <http://select.nytimes.com/2006/12/24/business/yourmoney/24gret.html?n=Top/Reference/Times%20Topics/Subjects/E/Executive%20Pay> (reporting Henry McKinnell’s \$200 million severance package, Pfizer’s failed CEO).

57. See, e.g., The Harvard Law School Program on Corporate Governance, Working Papers, http://www.law.harvard.edu/programs/olin_center/corporate_governance/papers.shtml (last visited Nov. 23, 2007).

58. See, e.g., Laura M. Holson, *Billionaire Beachcombers*, N.Y. TIMES, Apr. 1, 2007, § 9, at 1 (noting that *Forbes Magazine* ranks Larry Ellison, the chief executive of Oracle, the eleventh richest man in the world); Don Van Natta Jr., *Big Coffers and a Rising Voice Lift a New Conservative Group*, N.Y. TIMES, Sept. 30, 2007, at A1 (noting that *Forbes Magazine* ranks Sheldon

Figure 7 shows median and mean total compensation for the twenty-five best paid CEOs among the 800 companies *Forbes* surveys, from 1992-2001.⁵⁹ In nominal dollars, both median and mean compensation increased fourfold over the period.

Figure 7
Median and Mean Total Compensation,
Twenty-five Highest Paid CEOs
 Source: *Forbes Magazine*⁶⁰



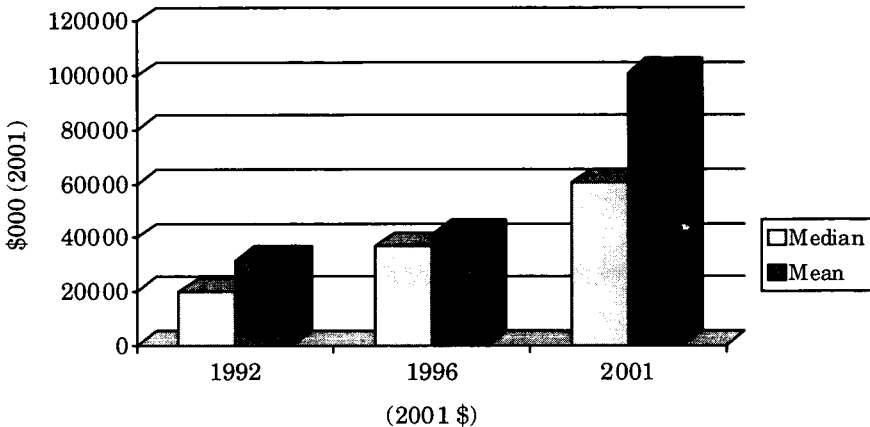
After adjusting for inflation, median and mean total compensation of these highest paid CEOs increased three-fold over the period (see Figure 8).

Adelson, the chairman and chief executive of the Las Vegas Sands Corporation, sixth among the world's billionaires).

59. Early in the period, *Forbes* reported salary, bonuses, and "other" direct compensation as components of total compensation, including the value of stock options, Eric Hardy, *Beating the Taxman*, FORBES, May 24, 1993, at 118, but by 2002 their published data ranked CEOs by total compensation only. *Forbes Best Paid CEOs*, FORBES, May 2002 [hereinafter *CEOs*]. The difference is sizeable: for example, in 1992, the median and mean salaries of the Twenty-five highest paid executives were \$1.744 million and \$2.870 million, respectively, as compared to \$15.832 and \$25.213 million in total compensation. See Hardy, *supra*.

60. Data are drawn from various articles citing compensation data for the previous year appearing in *Forbes*. See Hardy, *supra* note 59 (1992 data); Eric S. Hardy, *The Prize*, FORBES, May 19, 1997, at 166 (1996 data); *CEOs*, *supra* note 59 (2001 data).

Figure 8
Median and Mean Total Compensation of
Twenty-five Highest Paid CEOs,

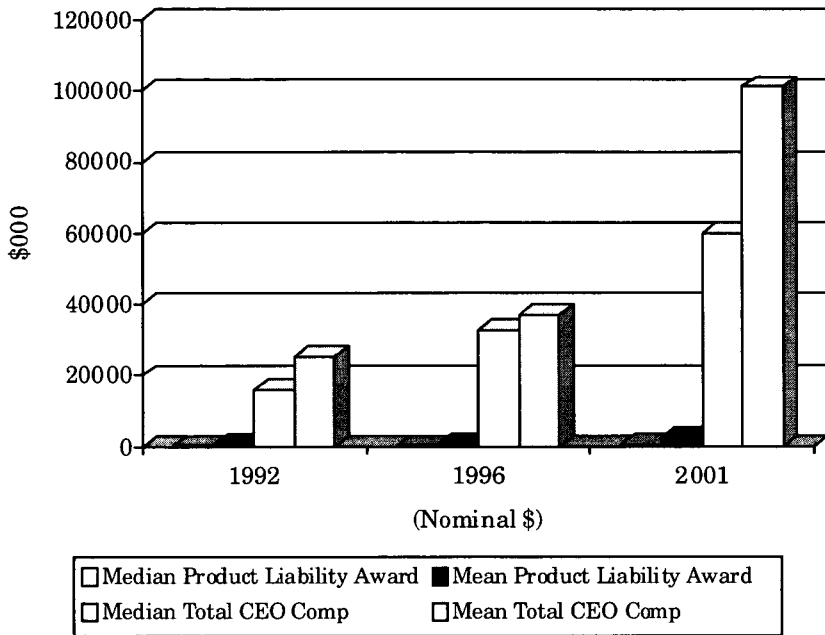


Source: *Forbes Magazine* (adjusted for inflation by author)⁶¹

Figure 9 compares median and mean total compensation packages for the twenty-five highest paid corporate CEOs to median and mean per plaintiff compensatory awards in product liability cases, for the three years for which we have jury data for a large sample of state courts. Because in my thought experiment civil jury valuations of plaintiff losses are influenced by the material rewards given to executives, celebrities, athletes, and others that are contemporaneously reported by the mass media, I use nominal rather than adjusted amounts for this comparison. I compare medians and means for the total distribution of product liability verdicts to medians and means for high-earning CEOs only because my purpose is to explore whether material rewards that attract media attention might influence jury behavior on average. In Figure 9, average jury verdict amounts are difficult to discern, because they are so dwarfed by average executive compensation amounts.

61. See sources cited *supra* notes 59-60.

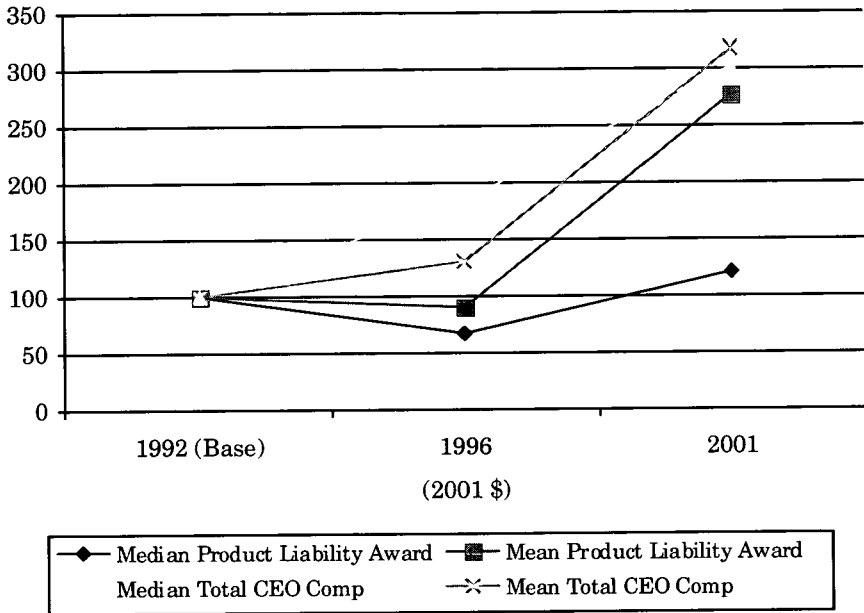
Figure 9⁶²
Per Plaintiff Median and Mean Compensatory Jury Verdicts in Product Liability Cases, Compared to Median and Mean Total Compensation for Highest Paid CEOs



How did rates of growth in average executive compensation and average damage awards in product liability cases compare? As shown in Figure 10, after adjusting for inflation, mean (but not median) per plaintiff compensatory damages awarded by juries in product liability cases rose dramatically from 1992—2001, on a trajectory that was almost identical to the growth rate of median and mean high-earning CEOs’ compensation. In sum, in cases in which they found defendants liable, civil juries deciding how much to award plaintiffs were doing so in an environment of rising material awards for others, which might have influenced their decisions.

62. Data on CEO compensation from sources cited *supra* note 61. Data on product liability awards from sources cited *supra* note 44.

Figure 10
Rate of Change in Per Plaintiff Median and Mean Compensatory Awards in State Court Product Liability Cases, Compared to Median and Mean Total Compensation for Highest Paid CEOs



B. A Comparison of Jury Awards to Other Material Awards

Compiling trend data on compensation of others—athletes, entertainers, and celebrities generally—proved more difficult. For consistency, I relied on *Forbes*'s annual lists, and focused on the top ten earners on each list.⁶³ Figure 11 compares the average single year remuneration in 2001 for *Forbes*-identified top-earning celebrities (a category including athletes, entertainers and others);⁶⁴ dead celebrities (a category including Elvis Presley and

63. *Forbes* uses different cut-offs for different lists: one list ranks the top 100 earners, another the top twenty-five, and a third the top thirteen. I chose to focus on the top ten both for consistency's sake and to provide a balanced comparison with the top jury awards, for which I was only able to identify the top ten verdicts.

64. See *Forbes.com*, The Celebrity 100, July 20, 2002, <http://www.forbes.com>.

Tupac Shakur, the rap artist);⁶⁵ top-earning CEOs;⁶⁶ and the mean of the top ten compensatory awards issued in 2001 in product liability suits nationally, as reported by the *National Law Journal*.⁶⁷ In 2001, the average compensation for top-earning corporate executives was several times the average amount earned by top-earning celebrities, and both averages were substantially greater than the mean high-end product liability award.

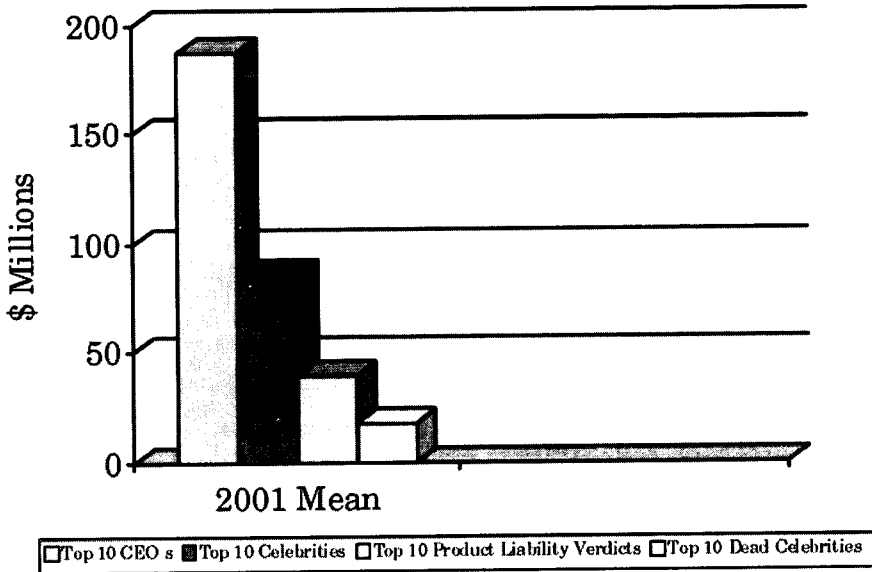
com/static_html/celebs/2002.html (follow "money rank" hyperlink).

65. See Betsy Schiffman, *Earnings from the Crypt: Top-Earning Dead Celebrities*, FORBES, Aug. 12, 2002, <http://www.forbes.com/lists/2002/08/12/0812deadintro.html>.

66. See *CEOs*, *supra* note 59.

67. See Law.com, Top 100 Verdicts at a Glance, http://www.law.com/special/professionals/2002/nlj_verdicts.html (displaying chart obtained by the *National Law Journal*'s February 2002 issue). The *National Law Journal*'s list includes a variety of case types including class actions and financial injury suits. See *id.* I selected those verdicts the journal labeled as issued in product liability cases. The top 100 verdicts included twelve product liability verdicts. See *id.* Although the journal does not report components of awards, a review of case documents and media reports found that in one case, *Boeken v. Philip Morris USA, Inc.*, 72 Cal. Rptr. 3d 454 (Cal. Ct. App. 2008), the whopping verdict of \$3.006 billion included \$3 billion in punitive damages, with the remaining compensatory award an unexceptional \$6 million. Diana Digges, *Teamwork Brings Record \$3 Billion Verdict Against Big Tobacco*, LAW. USA, Jan. 7, 2002, <http://www.lawyersweeklyusa.com/usa/1verdict2001.cfm>. I excluded this case from further analysis as the compensatory award was well below that of the one hundredth case included in the list, which was valued at \$19.4 million. In a second case, *Janssen Pharmaceutica, Inc. v. Rankin*, the \$100 million verdict was an award in a mass action involving multiple plaintiffs. See *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 35-36, 51 (Miss. 2004). Since the focus of my discussion is jury valuation of individual plaintiff worth, I excluded this verdict from my list of top awards as well. In two of the remaining cases, a large portion of the award was also attributable to punitive damages. See, e.g., Michael M. Bowden, *\$480 Million to Three Injured in Plane Crash*, LAW. USA, Jan. 7, 2002, <http://www.lawyersweeklyusa.com/usa/3verdict2001.cfm> (reporting *Cassoutt v. Cessna Aircraft Co.*). Figure 11 shows the average compensatory award in the top ten product liability cases, excluding punitive damages. According to the *National Law Journal*, at the time of its report, all of the top awards in product liability had either been settled, remitted, had motions pending at the trial court level, or were on appeal. See Law.com, *supra*. Figure 11 shows the average of the original jury awards, rather than the actual amounts—often reduced—paid after the verdict was issued.

Figure 11
Material Rewards for High-Earners in Various High-Profile Categories, Compared to High-End Compensatory Jury Verdicts in Product Liability Cases, 2001



IV. REFRAMING THE DEBATE OVER JURY AWARDS IN TORT LIABILITY SUITS

Empirical analyses of jury awards in tort liability suits focus on the relationship between damages and claimed losses. This focus is consistent with the jury’s task: to assess damages in particular cases based on the evidence of loss presented in the courtroom. But as a response to the public debate over civil jury decision-making, this analytic focus misses an important dimension of the political controversy: elite distress over the potential for jurors—generally representative of the middle and working class demographics of the population—to up-end the ever more unequal socio-economic hierarchy of the United States.⁶⁸

68. See Greg Ip, *Income Inequality Gap Widens*, WALL ST. J., Oct. 12, 2007, at A3, available at <http://online.wsj.com/article/SB119215822413557069.html>. Nancy Marder has suggested that inclusion of a broader stratum of society on juries today, by contrast with the past, may partially explain the attack on civil jury decision-making. Nancy S. Marder, *Introduction to the*

Contrast *Forbes's* coverage of tort litigation with its coverage of executive compensation. In a 2002 article entitled *The Tort Mess*, *Forbes* reporter Michael Freedman described a wrongful death lawsuit arising out of emergency medical care.⁶⁹ As described by Freedman, the jury heard “equally qualified” opposing experts testify in turn that the care afforded the victim was negligent and not.⁷⁰ The care provided had a “tragic ending,”

But doctors and insurance companies are easy targets in the hands of tort lawyers. The jury awarded the widow \$5 million, double what a similar case might have yielded just a few years ago.

The country has grown immune to verdicts like these: \$5 million for a medical tragedy; \$50 million in punitive damages for business interference . . . ; \$150 million to six Mississippi plaintiffs . . . who . . . fear they may suffer someday from asbestos-related illnesses; \$1 billion for punitive damages over the alleged contamination of 33 acres of land. . . .

In the next few years, . . . tort costs could increase twice as fast as the economy, going from \$200 billion last year [2001] to \$298 billion . . . by 2005.⁷¹

In a matter of a few paragraphs the \$5 million award to a widow ballooned into an almost \$300 billion burden on the economy—and all of us.

In a 1993 article on executive compensation entitled *Beating the Taxman*, *Forbes* reporter Eric Hardy described the highlights of the magazine's recently released executive compensation report more sympathetically.⁷² Four of the year's twenty-five best-paid CEOs worked in the health care industry, including the CEO of National Medical Enterprises, who had recently resigned “amid

Jury at a Crossroad: The American Experience, 78 CHI.-KENT L. REV. 909, 923 (2003). On wealthy Americans' belief that their place in the socio-economic status hierarchy is deserved and ought not to be undermined (for example, by reinstating a progressive tax structure), see Uchitelle, *supra*, note 3.

69. Freedman, *supra* note 6, at 91.

70. *Id.*

71. *Id.*

72. Hardy, *supra* note 59.

charges his company overbilled the government.”⁷³ “Sure, the total compensation of these four executives is a lot of money—almost one-third of a billion dollars during the last five years,” wrote Hardy,⁷⁴ “[b]ut keep in mind that three of them founded their own companies. They took the initial risk, put their own capital on the line and created more jobs for the economy. How many jobs has Hillary Clinton created?”⁷⁵

There is little evidence that civil jury verdicts in tort liability suits are redistributive.⁷⁶ Whether jurors’ valuations of plaintiffs’ losses are influenced by what they read or hear about material rewards accorded powerful executives, entertainers, athletes, and other celebrities has not, to my knowledge, been investigated. Would it be inappropriate for jurors to compare the worth of the plaintiffs before them to the worth of corporate executives, athletes, entertainers, and other celebrities? Comparing salaries across disparate categories did not seem unreasonable to *Forbes* reporters writing in 1992:

“[i]s executive pay really out of line with what we pay people at the top of other fields—our most successful heart surgeons, authors, anchormen, cartoonists and professional models?” they asked.⁷⁷

Are money managers “worth” 20 times what top executives are worth? Are singers and dancers worth more than people in whose hands rests the responsibility for much of the nation’s prosperity. . . ?

Athletes . . . fetch a lot of money these days, in part because TV allows their talent to be enjoyed by a lot of people. . . .

Given that the health of much of our economy depends on their decisions, top business executives are at least as

73. *Id.*

74. *Id.*

75. *Id.*

76. In fact, Americans are famously acceptant of economic inequality. See JENNIFER L. HOCHSCHILD, *WHAT’S FAIR?: AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE* (1981).

77. Dana Wechsler Linden & Dyan Machan, *Put Them at Risk!*, *FORBES*, May 25, 1992, at 158.

important to our society as surgeons and perhaps more so than athletes and musicians.⁷⁸

Executives themselves, Forbes reported, thought it unfair for the media to focus on their salaries, rather than, for example, Michael Jordan's.⁷⁹

Salaries, one might argue, reflect the earner's merit and indirectly their contribution to the economy. Hence, for juries to allow their assessment of damages to be shaped by executive and other figures' remuneration would be socially, as well as legally, inappropriate. But vast empirically-based literature now argues that corporate executives' compensation poorly—if at all—reflects executives' contribution to shareholders' wealth.⁸⁰ Indeed, as shown in Figure 12, there is virtually no correlation between rankings of top CEOs by their total annual compensation and

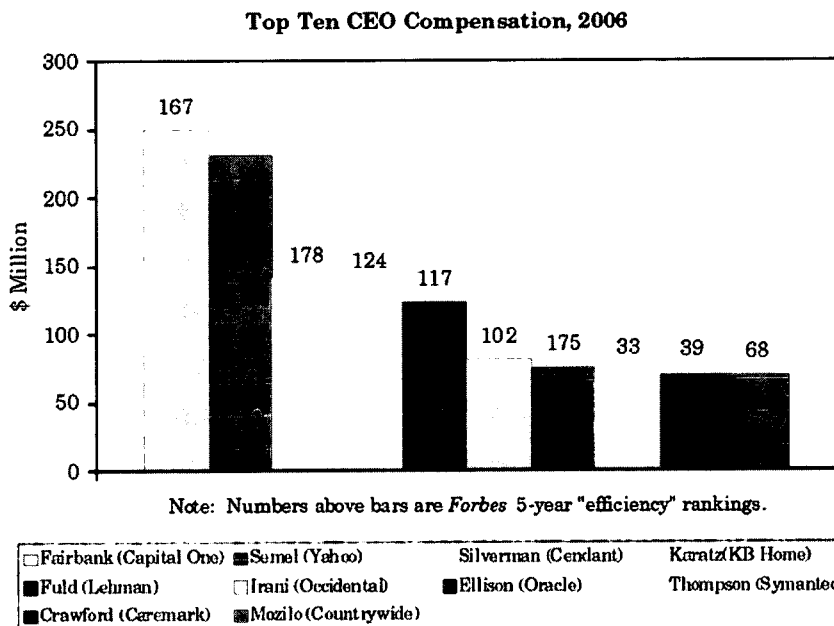
78. *Id.*

79. See Vicki Contavespi, *What About Michael Jordan's Pay?*, FORBES, May 23, 1994, at 142 ("Nine out of ten [CEOs] feel the media freely criticize executive salaries while ignoring the often much higher earnings of entertainers and athletes like Michael Jordan . . ."). For a comparison among executives, entertainers, and athletes, see Eduardo Porter, *More Than Ever, It Pays To Be the Top Executive*, N.Y. TIMES, May 25, 2007, at A1, available at <http://www.nytimes.com/2007/05/25/business/25execs.html?ex=1349236800&en=efa73831d9a85611&ei=5124&partner=permalink&exp=prod=permalink>.

80. See, e.g., Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 17 J. APPLIED CORP. FIN. 8 (2005) (reviewing research on CEO pay and evidence of a lack of relationship between pay and corporate performance); Lucian Bebchuk, Martijn Cremers & Urs Peyer, *Pay Distribution in the Top Executive Team* 6, 24-28 (Harvard Law and Econ., Discussion Paper No. 574, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=954609 (finding CEO's fraction of the total compensation awarded to the top five executives at a firm is negatively correlated with corporation performance); Lucian Bebchuk, Yaniv Grinstein & Urs Peyer, *Lucky CEOs* 1-3 (Harvard Law and Econ., Discussion Paper No. 566, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=945392 (finding that 12% of firms made one or more stock option grants to CEOs on the day that the corporation's stock was priced at its minimum, and that such "lucky grants" were in addition to, rather than a substitute for, other forms of compensation); see also Barnaby J. Federer, *While Citigroup Struggled, Its Chief Was Paid \$26 Million in 2006*, N.Y. TIMES, Mar. 14, 2007, at C9, available at <http://www.nytimes.com/2007/03/14/business/businessspecial/14citipay.html?n=Top/Reference/Times%20Topics/Subjects/E/Executive%20Pay> (noting that while Citigroup's CEO Charles Prince's pay increased, the company's "share price . . . remained essentially flat").

measure of performance as calculated by *Forbes*. Moreover, the stock options that led to enormous increases in executive compensation over the past decade may have encouraged CEOs to take risks that produced net losses to shareholders, rather than net gains.⁸¹

Figure 12
Total Compensation for Top Ten CEO Earners,
Along with Measures of “Efficiency”⁸²



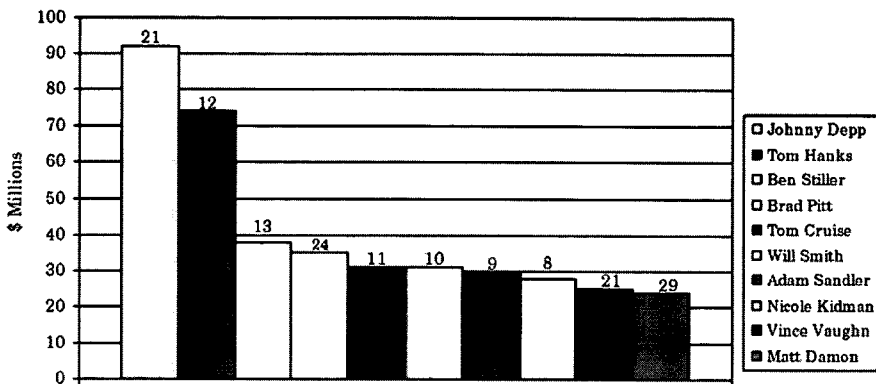
In a pattern similar to the relationship observed between CEO compensation and performance, *Forbes* also recently reported, as shown in Figure 13, that Hollywood's top earning stars are not those who earn the most for movie producers.⁸³

81. Floyd Norris, *Rethinking Risk's Role in Bosses' Pay*, N.Y. TIMES, Oct. 12, 2007, at C1.

82. Forbes.com, CEO Compensation, http://www.forbes.com/lists/2006/12/TotComp_1.html (last visited Jan. 16, 2007). "Efficiency" is a measure of CEO's performance/pay score. *Id.* *Forbes*'s efficiency ratings range from 1 to 189, with 1 being most efficient. *Id.* Such ratings are calculated only for CEOs with at least a six year tenure and compensation history; thus, missing data in Figure 12 indicate a CEO who has served for less than six years. *Id.*

83. Dorothy Pomerantz, *Ultimate Star Payback*, FORBES, Aug. 6, 2007,

Figure 13
Top Earning Hollywood Stars, 2006-2007⁸⁴



Note: Numbers above bars are film revenues earned / dollar paid to star

How facts and issues are framed by politicians, interest group representatives, and the media has powerful effects on the political attitudes and behavior of their listeners and viewers.⁸⁵ That the movement of the stock market—rather than the average wage of employees in the service industry or the number of people looking for work—is reported daily indicates that we ought to view stock prices as a measure of how healthy the economy is, although only half of Americans actually have funds invested in the market.⁸⁶ A disproportionate amount of equity value is held by the affluent elite, and—in any event—there is substantial evidence that short-term stock price movement reflects “herd behavior”

http://www.forbes.com/2007/08/03/celebrities-hollywood-movies-biz-cz_dp_0806starpayback.html.

84. Actor earnings taken from Forbes.com, The Celebrity 100, June 14, 2007, http://www.forbes.com/lists/2007/53/07celebrities_The-Celebrity-100_Rank.html (listing celebrities', including actors and actresses, entertainment earnings from June 2006 to June 2007). Film revenues earned per dollar paid to actor ratio taken from Pomerantz, *supra* note 83. Note that the ratio uses numbers from the pertinent actor's or actress's last three films. *Id.*

85. See Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

86. See Harrison Hong, Jeffrey D. Kubik & Jeremy C. Stein, *Social Interaction and Stock-Market Participation*, 59 J. FIN. 137, 137 (2004), available at <http://www.princeton.edu/~hhong/jfsocial.pdf> (about 49% of American households owned stock in 1998).

rather than economic productivity.⁸⁷ Reporting jury awards without regard to the social context—such as the losses suffered by plaintiffs or the behavior that defendants engaged in that invited a verdict against them—invites us to marvel at the unreasonableness of the magnitude of such awards. Imagine a news report announcing the Vioxx jury's \$50 million award—which Louisiana federal district court Judge Eldon Fallon found unreasonable⁸⁸—and comparing it to the \$ 40.6 million total compensation package reported for Merck's CEO Ray Gilmartin in 2004 (the year Vioxx was withdrawn from the market),⁸⁹ or to the

87. Robert R. Prechter, Jr. & Wayne D. Parker, *The Financial/Economic Dichotomy in Social Behavioral Dynamics: The Socionomic Perspective*, 8 *J. BEHAV. FIN.* 84, 96-100 (2007).

88. *In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 737, 740-41 (E.D. La. 2006). The plaintiff in the case was a former FBI agent who took Vioxx for chronic back and neck pain from 1999 – 2004. *Id.* at 738. He suffered a heart attack in 2002, at the age of 58, which he alleged was due to Vioxx. *Id.* The jury found Merck liable on two theories of liability, and awarded \$50 million in compensatory damages and \$1 million in punitive damages. *Id.* at 738-39. On defendant's motions for judgment notwithstanding the verdict and for a new trial, Judge Fallon found the liability verdict to be reasonable, *id.* at 739-40, but ordered a retrial on damages:

The [c]ourt finds that the \$50 million compensatory damages award is excessive under any conceivable substantive standard of excessiveness. The evidence suggests that the [p]laintiff may have lost nine or ten years of life expectancy as a result of his use of Vioxx. He also has past medical bills for which he may be compensated, and perhaps future medical bills as well. Furthermore, the [p]laintiff is entitled to compensation for his pain and suffering and other intangible losses. However, the [p]laintiff is retired, and therefore he cannot recover for lost wages or lost earning capacity. While the [p]laintiff may be experiencing a decrease in energy, it appears that he has been able to return to many of his daily activities. Therefore, no reasonable jury could have found that the [p]laintiff's losses totaled \$50 million.

Id. at 740-41.

89. USATODAY.com, Special Report: Executive Pay 2004, <http://www.usatoday.com/money/companies/management/2004-ceo-pay-total-chart.htm> (last visited Jan. 16, 2008) (reporting executive compensation data provided by Aon Consulting's eComp Data Services); cf. Holly Sklar, *CEO Pay Is Still on Steroids*, PROVIDENCE J., May 10, 2005, http://www.projo.com/opinion/contributors/content/projo_20050510_ctsklar.200d6ba.html (reporting Gilmartin's 2004 total compensation at \$37.8 million). Merck appointed Richard Clark to succeed Gilmartin as CEO in 2005. See Merck, Corporate Governance, http://www.merck.com/cr/company_profile/corporate_governance/home.html (last visited Jan. 16, 2008). Clark reportedly made \$6.2 million in 2006,

giant severance package, worth more than \$180 million, awarded to Henry McKinnell, the CEO of Pfizer, when McKinnell was pressured to step down because of Pfizer's disappointing performance during his tenure.⁹⁰ Putting high-end jury awards and high-end executive compensation packages "on the same page" offers a different perspective on jury decision-making in tort liability suits. Rather than deriding the occasional jury that places a high value on a plaintiff's loss, perhaps we ought to adopt Tom Clancy's perspective and view it as "democracy in action."⁹¹

including salary, bonuses, and stock options, in part in response to his success in managing the Vioxx litigation. Pharmed, Merck's CEO Made \$6.2M Last Year, http://www.pharmed.com/2007/02/mercks_ceo_made_62m_last_year/ (Feb. 9, 2007, 5:15 PM).

90. Associated Press, *Pfizer's McKinnell To Get \$180M Package*, INT'L BUS. TIMES, Dec. 21, 2006, <http://www.ibtimes.com/articles/20061221/pfizer-inc-039-s-former-chief-executive-henry-a-mckinnell.htm>.

91. *See supra* note 2.