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Nicole L. Mott
National Center for State Courts, nicmott@udel.edu

Valerie P. Hans
Cornell Law School, valerie.hans@cornell.edu

Lindsay Simpson

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What's Half a Lung Worth? Civil Jurors' Accounts of Their Award Decision Making

Nicole L. Mott,[1] Valerie P. Hans,[1,2] and Lindsay Simpson[1]

Jury awards are often criticized as being arbitrary and excessive. This paper speaks to that controversy, reporting data from interviews with civil jurors' accounts of the strategies that juries use and the factors that they consider in arriving at a collective award. Jurors reported difficulty in deciding on awards, describing it as "the hardest part" of jury service and were surprised the court did not provide more guidance to them. Relatively few jurors entered the jury deliberation room with a specific award figure in mind. Once in the deliberation room, however, they reported discussing a variety of relevant factors such as the seriousness of the injury, the plaintiff's age, and occasionally even more esoteric items such as the impact of inflation. Two frequent topics of discussion, attorneys' fees and insurance, suggest that jurors attempt to estimate the actual impact of an award on both defendant and plaintiff. This descriptive account may help to inform the debate about whether jurors require additional guidance or information in the award process.

INTRODUCTION

In 1999 a California jury made headlines when it ordered General Motors to pay 4.9 billion dollars to plaintiffs who were severely burned when their car's gas tank exploded following a rear-end collision (O'Neill, Weinstein, & Malnic, 1999). The jury found that a defect in the gas tank had caused the explosion. Although the jury's substantial punitive damage award against GM was slashed by the trial judge (Hong, 1999), the size of the award only reinforces the concerns of many citizens that the damage awards of civil juries are out of control.

Media coverage that overrepresents jury awards (Bailis & MacCoun, 1996; Garber & Bower, 1999), coupled with advertising campaigns by business and industry lamenting a litigation "crisis" (Daniels & Martin, 1995), have created widespread perceptions that civil juries are modern-day Robin Hoods, happy to transfer wealth from large corporate entities to plaintiffs regardless of the actual negligence of the

[1]Department of Sociology and Criminal Justice, University of Delaware, Newark, Delaware 19716.
[2]To whom correspondence should be addressed; e-mail: vhans@udel.edu.

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defendant. Surveys of current legal commentary about jury damage awards find widespread sentiment, at least among the public and some stakeholders, that awards are unpredictable, excessively large, and based on illegitimate factors (see discussions in Saks, 1992; Vidmar, 1995; Viscusi, 1988; Wissler, Evans, Hart, Morry, & Saks, 1997).

Systematic research on civil jury awards paints a more reassuring picture than media coverage and advertising (Bailis & MacCoun, 1996; Daniels & Martin, 1995; Ostrom, Rottman, & Goerdt, 1996). Archival analyses of jury verdicts and awards typically find a strong correlation between the amount of injury and the size of jury awards. Saks, Hollinger, Wissler, Evans, and Hart (1997) conclude there is vertical equity in jury awards with more serious injuries resulting in higher awards. Furthermore, a good deal of the variation in jury awards can be predicted by a small number of legally relevant variables including the seriousness of the injury (Peterson, 1984).

Although research has been successful at debunking some of the most excessive claims regarding jury awards, it has generated relatively little information about why apparently similar injuries receive different awards (the horizontal inequity identified by Saks et al., 1997). More to the point, what do jurors actually do when they attempt to arrive at monetary awards in their cases? There is little work on the nuts and bolts of the jury decision process—the influential factors, strategies, and mechanics that jurors employ to reach an award. First, what are the factors or issues that jurors consider relevant for determining an award? Second, how do jurors combine the relevant information from trial into a dollar amount? And finally, what computational techniques are used in deliberations? This article provides new information about these aspects of award decision making through an analysis of jurors' accounts of how their juries arrived at awards in tort and contract cases.

Prior Research on Damage Awards

Before describing our own research project, it is useful to catalogue briefly what is known about jury decision making concerning damage awards (excellent summaries may be found in Greene, 1989; Greene & Loftus, 1998).

Strategies

First, past research has offered some explanations for how jurors compute a monetary award. Greene (1989) identified two contrasting methods: the "Gestalt" approach and the component sum strategy. In the first, jurors identify a single sum of money that to them appears to be just, fair, and appropriate considering the facts and other dimensions of the entire case. Greene (1989) calls this the "Gestalt" approach in that it reflects a holistic strategy rather than a detailed itemization of the damages in the case. In contrast, jurors using a component sum strategy arrive at monetary amounts for specific injuries (such as lost wages or medical bills) and then combine those amounts into a final award (Greene, 1989). Empirical evidence, primarily from mock juror studies, shows that jurors frequently report using a component sum strategy (Goodman, Greene, & Loftus, 1989; see also Selvin & Picus, 1987, in one of the few studies of award decision making with actual jurors).

How individual jurors combine their distinctive views to come up with a

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group award is of interest, but there is only limited information about it. Guinther (1988) asked jurors in 38 federal civil trials in Philadelphia to respond to posttrial questionnaires exploring how jurors arrived at their final awards. In 40% of the trials in which there was substantial disagreement on an award, jurors said they submitted individual award figures and averaged them together to arrive at a final result.

Diamond and Casper (1992) undertook a close analysis of mock jury deliberations and award recommendations in their experiment on antitrust instructions. They found that the median predeliberation award of mock jurors was the best predictor of the final jury award; the average and mode were also good predictors. Actual numerical averaging of individual award preferences was rare, though. Instead, researchers concluded that the strong predictive value of the central tendency measures was due to the fact that mock jurors in the middle of the award range (rather than outliers) had a stronger impact on the deliberation process. Diamond and Casper also discovered that deliberation inflated the award; after deliberation, a mock jury's award was about 26% higher than the average predeliberation awards of its members.

Factors

Second, predominantly mock jury research has been done on the impact of specific factors that jurors evaluate for making award decisions. According to Greene and Loftus (1998), jurors consider the plaintiff and the defendant, their respective conduct, and the award requests by lawyers and experts. Other studies have found that prior knowledge or beliefs which jurors take into deliberations with them (e.g., Cantor, Mischel, & Schwarts, 1992; Finkel, 1995; Rothbart & Lewis, 1988; Smith, 1991) can affect awards; Hart, Evans, Wissler, Feehan, and Saks (1997) observed that when injuries did not coincide with jurors' prior knowledge about how accidents occur, the awards were more variable. The seriousness of the injury is a self-evident factor, with higher amounts for plaintiffs with more severe injuries (Wissler et al., 1997). Jurors also consider the plaintiffs' age and gender (Goodman et al., 1989; Goodman, Loftus, Miller, & Greene, 1991).

Another factor is the extent to which jurors consider insurance (either the plaintiff's or the defendant's) in reaching an award. Guinther (1988) reports that 13% of actual jurors in his sample admitted to considering plaintiffs' insurance. The defendant's insurance may be a factor as well. In Broeder's (1959) early mock jury study on the impact of insurance, he found informing mock jurors that a defendant was insured raised the award given to the plaintiff slightly, but mentioning the existence of insurance and warning jurors to disregard the information apparently drew more attention and enhanced its impact, creating even higher awards.

Whether or not the defendant is an individual or a corporation makes a difference in the amounts awarded. Archival analyses (Chin and Peterson, 1985; Ostrom et al., 1996) and mock jury studies (Hans, 1996, 2000; Hans & Ermann, 1989; MacCoun, 1996) have found that juries award more to plaintiffs suing business corporations as opposed to individual defendants. The differential awards have been variously attributed to case selection, deep pockets bias, and greater risks and responsibilities characteristic of corporate entities. Whatever the cause, the

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defendant's identity may contribute to the horizontal inequity that Saks and others have observed.

In addition to case-relevant dimensions such as the seriousness of the injury and the extent of a plaintiff's losses (Wissler et al., 1997), some attention has been paid to the influence of extralegal factors such as attorneys' fees. Although jurors are technically barred from considering them, Raitz, Greene, Goodman, and Loftus (1990) found that one fourth of the mock jurors in their study ranked attorneys' fees as an important factor during the award process, reportedly adding funds to cover the amount that the plaintiff would likely pay to a plaintiff's attorney.

Damage award recommendations suggested by authority figures such as experts influence jurors (Broeder, 1959; Greene, 1989; Raitz et al., 1990). Although jurors may view attorney recommendations with some skepticism, the ad damnum or attorney's suggested award has an important anchoring effect on damage awards (Chapman & Bornstein, 1996; Zuehl, 1982, as cited in Greene, 1989). Jurors also react to caps or limits placed on awards; Saks et al. (1997) report that in such cases mock jurors may actually increase the size of pain and suffering awards. Similarly, Anderson and MacCoun (1999) found that jurors may inflate compensatory awards such as for pain and suffering to compensate for the court's restriction on awarding punitive damages.

Methodological Considerations

The different methodologies used thus far to study jury awards have characteristic strengths and weaknesses (MacCoun, 1993). Archival analyses (Chin & Peterson, 1985; Ostrom et al., 1996) deal with actual cases and awards, but are limited in that they only allow scholars to hypothesize about how the verdict and award were reached (Vidmar, 1994). Mock jury studies permit causal statements about the impact of independent variables (Diamond & Casper, 1992; Landsman, Diamond, Dimitropoulos, & Saks, 1998) but mock jurors are not actually deciding a real plaintiff's award and the impact of variables could differ.

The method employed in this study, posttrial interviews with actual jurors that probe the factors influencing their awards, provides another way of examining the jury award process. It builds upon existing knowledge about jury awards with a complementary and significant perspective, that of the jurors themselves. MacCoun (1996) notes that posttrial interviews have some advantages in that they involve real jurors whose verdicts have had actual consequences on the parties; as such, the results are more generalizable. In our study, we asked jurors specific questions involving the mechanics, strategies, and factors that went into their decision making.

Perhaps the most serious limitation of posttrial interview methodology pertains to the validity of jurors' verbal reports to explain how they and their fellow jurors arrived at a damage award. Nisbett and Wilson (1977) concluded that people are commonly unaware of or mistaken about their "higher order cognitive processes" (p. 231). Gaps in memory can also cause error. Thus, our methodology is limited in that the results cannot be used to infer the cognitive processes of individual jurors. Instead, the results are based on the issues and topics that jurors said were discussed by the jury as a whole during deliberations.

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It is also quite possible that a different group of cases would produce a distinctive set of issues discussed by jurors in award deliberations. The sample was small (N=36) and represented cases from one jurisdiction. In other jurisdictions or with other samples of cases, jurors might well discuss different topics or take different approaches to deciding on awards. All the same, this sample did include the range of civil cases that are typically found in state trial courts of general jurisdiction. While these limitations exist, the current study is valuable as an in-depth exploration of jurors' accounts of how they reached awards in a variety of actual cases.

METHOD

Participants

This study of the jury award process was based on a larger project in which jurors from civil cases with at least one business or corporate party were interviewed after the trial (Hans, 2000; Hans & Lofquist, 1992). Every civil jury trial occurring during a 1-year time period at a state trial court of general jurisdiction was identified, and all cases with at least one business or corporate party were selected for inclusion in the study. Judges gave researchers permission to access jurors' names, addresses, and telephone numbers. Jurors received up to three letters and 10 telephone calls requesting participation in this study.

The overall participation rate was 64%, resulting in approximately 7 of 12 jurors from each case. A total of 269 total jurors from 36 different cases were interviewed. The full sample included 28 tort cases and 8 contract cases. In this study, 26 of the 36 juries[3] reached awards for the plaintiff. Of these 26 cases, there were 7 automobile accident cases, 6 contract cases, 6 malpractice cases, 3 worker injury cases, 3 asbestos cases, and 1 product liability case. In the jurisdiction, attorneys were not permitted to recommend specific award amounts for pain and suffering or for a total award.

Comparisons were made between available civil jury award data and the sample cases to assess the typicality of this sample. These sample data reflect the common pattern of relatively low median awards and higher mean awards due to the impact of a small number of extremely high awards. Rounding plaintiff awards to the nearest thousand dollars for analysis, the median of the 26 awards was $120,000 and the arithmetic mean was $724,230. Five judgments were 1 million dollar awards or more, two of which were multimillion. These high awards were for plaintiffs who were paralyzed or required lifetime nursing care. The median and mean awards in this sample are somewhat higher than the average awards in the National Center for State Courts (NCSC) national sample, at least for the tort cases (see Ostrom et al., 1996). Focusing just on the tort cases, the median award in our sample was

[3]In one additional case, the jury found for the defendant and arrived at a defense award on counterclaims. The full set of questions was not asked of jurors in the defense award on counterclaims, so the case is not included in the analyses reported in this paper. Some analyses reported in Hans (2000) include the defense award case. So mean and median awards and reported use of factors in award decisions presented in Hans (2000) differ slightly from the data presented in this article.

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$83,320, compared with a median of $69,300 for individual plaintiff versus business defendant tort cases in the NCSC national sample reported by Ostrom et al. (1996, p. 237, Fig. 6).

Although these comparisons are helpful to get a general sense of how this sample matches the national picture of jury awards, we caution about making inferences about the process of jury decision making from them, following Vidmar's (1994) advice. Higher mean awards could be evidence that these juries were unusually proplaintiff or generous, but they could just as well reflect case selection, local settlement practices, and so on.

Demographic characteristics of the participants showed a broad range of jurors. Of the jurors who participated in the study, 55% were female, 91% were White, and 66% were married. There were 37% who had graduated from high school, and 25% had a college degree. Religious affiliation questions revealed mostly Protestants (41%) or Catholics (42%). Their household income from the previous year was less than $20,000 for 11% of the jurors, between $20,000 and $40,000 for 32%, between $40,000 and $60,000 for 36%, and over $60,000 for 21%.

Procedure

Interviews were conducted with the jurors after they completed their jury service. Jury panels in this jurisdiction served for 2 weeks. As required by the trial court's judges, no juror interviews were requested until the entire jury panel served on all cases. The lapse time between trial and interview was a median of 50 days, a mean of 56.5 days, and a range from 20 to 137 days.[4] The interview began with questions about jury selection, the trial, and jury deliberations. Most relevant for this study were questions on the awards. Jurors were asked to describe in their own words how their jury arrived at an award in the case. Drawing on research by Greene and her colleagues, specific questions were asked about three dimensions of the award decision-making process: what factors the jury considered, what strategies were used, and the mechanics of the calculations.

To maximize comprehensive and accurate reports, all jurors were asked open-ended questions about their jury experiences. After these recall methods, each juror was given a typed list of potential factors to further prompt specific factors their jury may or may not have discussed or used during award decisions. The list included the following factors: the age of the plaintiff at the time of the accident, the plaintiff's salary at the time of the accident, how many years the plaintiff might have continued working, future raises and promotions that the plaintiff might have received if he or she continued working, whether the defendant could afford a large amount, whether the defendant was a corporation, the value of the award amount in the future if invested now, the impact of inflation on the plaintiff's annual salary if he or she had continued working, the attorneys' fees that must be paid for bringing the lawsuit, taxes to be paid on the amount awarded in damages, whether the

[4]The timing of juror interviews was evaluated for quality of recall. Jurors clearly identified witnesses, plaintiffs, and key evidence in the cases. The jurors were generally not able to specifically recall judges' instructions, unless it pertained to an element discussed in jury deliberations (Hans & Lofquist, 1992).

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plaintiff's insurance covered some of the expenses, the seriousness of the injury, past medical expenses, future medical expenses, pain and suffering, and loss of consortium.

Jurors were also asked about the overall strategies they employed to arrive at a final award amount. Adopting some of the strategies proposed by Greene (1989), interviewers further prompted jurors with a list for recognition of strategies they may have otherwise missed. The list included the following strategies: whether they multiplied expected earning by expected work life, started with one amount and adjusted it because it seemed too low or too high, based the decision on other cases they knew about, had each juror submit a figure and calculated the mean, had each juror submit a figure and the highest and/or lowest figure was dropped and the mean was calculated, without calculation picked a number that seemed just and fair, or used none of the above strategies. Approximately 95% of the jurors reported using at least one of the specific strategies, leading the researchers to infer that the most common strategies employed by jurors were included.

In a similar fashion, the interviewers asked jurors about the mechanics of calculating the award. Jurors indicated whether the members of the jury used a calculator, used a blackboard or easel, performed mental arithmetic, made paper and pencil calculations, or made no precise calculations to arrive at their award.

Finally, jurors were asked about issues of particular interest, for instance: "Did you adjust the award according to the amount that you thought the attorney would get?" "Did you discuss whether the award should be increased for pain and suffering?" "Did you have a specific award figure in mind before the start of deliberations?" and "Did you have any concerns about the ability of the company to make those kinds of payments?"

Jurors responded to the open-ended questions, which were later coded into various possible responses. The responses indicated whether the jurors incorporated the variable during their deliberations and/or award decisions. The possible responses were as follows: (1) The jury used the factor; (2) the jury discussed the factor, but did not use it; (3) the jury neither discussed nor used the factor. If the answer could not be clearly coded into one of these three options, it was coded as ambiguous. Finally, coders indicated when the question was (4) not applicable to the case (e.g., lost wages for a contract case). A reliability test of the coding system showed high agreement (86%) between coders.

However, jurors within a jury sometimes disagreed about whether specific factors had been merely discussed or actually used in the decision. Inspecting the within-jury agreement, it was discovered that jurors agreed more often about whether a factor played any role versus how or if the factor was integrated into the final decision. Thus, the authors decided to collapse the two options into one broad category that represented the juror's statement that his or her jury had *either* used *or* discussed the factor. The combination of the two responses can be justified by research on cognition (e.g., Nisbett & Wilson, 1977) that finds that while people are not able accurately to report or recognize the influence a stimulus has on a given response, or their cognitive processes, people can report on events, such as whether a topic was discussed, more accurately. Average

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intrajury reliabilities were derived for each variable. The reliabilities ranged from .42 to .99. Only three variables produced reliabilities below .51.[5]

The results were analyzed according to two different methods, an average jury rate and a majority rule. The jury rate was a calculation of the percentage of jurors per case who reported using or considering each variable in their decision process. Thus, if 5 jurors of the 10 who were interviewed stated that they considered or used attorneys' fees in their award process, the jury rate for that case was .50. The authors then calculated the mean of these individual jury rates to determine the average jury rate for each variable.

To provide a fuller sense of the most important variables, the authors also calculated the proportion of juries in which a majority of the jurors engaged in such behaviors. We arrived at these "majority rule" proportions by determining the majority view within each jury. A jury was identified as considering a particular factor if more than half of the jurors interviewed from each case reported discussion or use of the factor. So, for example, if six jurors of nine from one case stated that their jury had used or discussed the plaintiff's medical insurance during deliberations, we counted that jury as having used or discussed insurance. We then reported the number of juries that qualified under the majority rule divided by the total number of relevant cases. The two methods produced similar results in all but one variable, whether taxes must be paid on the award, as discussed below.

RESULTS

The results provide an interesting window on the award decision-making process. Jurors complained about the lack of instruction they were given to decide on an award. Nevertheless, the research findings in general indicate that jurors considered a variety of relevant factors such as the seriousness of the injury, expected earnings, the age of the plaintiff, medical expenses, pain and suffering, and even more esoteric items such as the impact of inflation. Regarding extralegal factors, most jurors acknowledged discussing or considering attorneys' fees in reaching an award. The defendant's ability to afford a large amount or insurance issues were discussed in a minority of deliberations, suggesting that jurors attempt to estimate the actual impact of an award on both parties.

Arriving at Awards Was Challenging

Few jurors (11%) reported that they had a specific number in mind at the start of jury deliberations. Therefore, they often struggled with how to begin the award process. Based on the interviews, a number of jurors expressed confusion and concern about the lack of guidance in the award process provided by the judge. Many were surprised that the courts did not provide them with more direction. "If we had found in [the plaintiff's] favor, we had to decide on an amount. Which was

[5]The reliabilities were low for the mechanics of mental arithmetic (.42) and paper and pencil (.45). Jurors reasonably could have reported individual use as opposed to jury use, as these are individual behaviors. The other variable with a low intrajury agreement was whether the defendant had insurance.

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a surprise to me because I thought the judge would have some suggestions about that. He gave us guidelines on how to make a decision, but not as much as I would think he'd give" (C33-J2).[6]

One juror singled the award process out as "the hardest part" of jury service:

> Out of anything I can say I hated, that was the part I hate the most. Because I just don't think it was fair that we had to put a dollar amount on this . . . we weren't given a minimum . . . we weren't given a maximum. We were told to go into the room. Lock yourselves in there and don't come out until you have a dollar amount. And I thought that was very unfair, especially when we were just regular everyday citizens. And we have no idea what is ordinary and customary in a case like this. . . And I think if we could have had some type of guide, monetary guideline, as to okay this is the minimum, this is the maximum, and then you decide. But I mean it was like, if we said he's awarded a dollar was this satisfactory? We didn't know. I thought that was very unfair (C35-J4).

Others complained that they were not told critical information, such as whether past medical expenses had been covered by insurance: "They didn't tell us too much. The jury knows less than anybody" (C6-J4). Similarly, "we were looking for guidance but couldn't get guidance, because there really isn't any. And I think you need something. I mean, you know, how do you know how much half a lung is worth? And it's really hard to know. It's hard to determine that. My idea of what a quality of a person's life was, was very different than a lot of other jurors" (C12-J2).

Factors Considered in Tort Cases

Tort cases (a total of 20) were separated from contract cases since some of the factors proposed were inappropriate for the contract cases, such as past medical expenses and compensation for a plaintiff's lost salary due to injury (see Table 1).

The age of the plaintiff was reportedly considered by 12 of the 20 tort case juries, where the average jury rate was .69. If a plaintiff was older, the award was accordingly adjusted. One juror mentions that the age was the basis for multiple calculations: "Yes, the age of the plaintiff, yes, that was a factor. It had to be a factor because that's where we made a lot of calculations from, his age. We determined at the time of the accident from that point on in earning capabilities and his medical costs" (C1-J6). One juror reports, regarding a plaintiff's age, "I think things that might have figured into it was the age of the plaintiff. She's certainly past being a spring chicken, as a matter of fact her life seemed to sort of be over. Now you know none of us can say that for sure but you know when you get messed up and you lost out on your child; the marriage is certainly over. I just think there was a lot of traumatic things that snowballed" (C16-J7).

The number of juries in which a majority of jurors said they considered future medical expenses was 12 of the total 20 tort cases (see Table 1). Eleven (55%) of the 20 tort case juries considered past medical expenses, and 9 (47%) of the relevant 19 considered the plaintiff's salary at the time of the accident. Just 4 (24%) of the 17 relevant tort case juries identified future raises and possible promotions the plaintiff may have received had he or she continued working.

The issue of consortium arose in 12 (80%) of the 15 relevant tort cases. When

[6] Jurors' quotes are edited slightly to improve readability.

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Table 1. Tort Cases: Factors Considered in Award Discussion

Factor	Majority rule method[a]	Average jury rate method[b]
Loss of consortium	12/15 (80%)	78%
Age of the plaintiff at the time of the accident	12/20 (60%)	69%
Future medical expenses	12/20 (60%)	59%
Past medical expenses	11/20 (55%)	54%
Years the plaintiff may have continued working	9/18 (50%)	62%
Plaintiff's salary at the time of the accident	9/19 (47%)	52%
Future raises and promotions plaintiff may have received	4/17 (24%)	26%

[a]Indicates the number of juries in which more than half of the jurors in the case reported discussion and/or use of each factor. Percentages are provided within the parentheses. Note the small denominator when analyzing percentages in place of the proportions. The denominator reflects the number of cases in which the factor was relevant to the case facts.
[b]Indicates the average percentage of jurors per case who reported discussion and/or use of each factor. The percentage of jurors per case was calculated, then the jury rates were averaged across each variable.

consortium issues were relevant, a large number of juries at least discussed the issue as they determined an award. However, jurors frequently treated loss of consortium claims derisively and awarded nothing or token amounts (Hans & Hallerdin, 1992).

Factors Considered in All Award Cases

All 26 award cases were combined for analysis of the remaining factors (see Table 2). Most significant, seriousness of the injury or loss was taken into account by 22 (85%) of the 26 juries. That is consistent with the percentage derived from the average jury rate method. One juror contrasts the different levels of injury

Table 2. All Cases: Factors Considered in Award Discussion

Factor	Majority rule method[a]	Average jury rate method[b]
Seriousness of the injury or loss	22/26 (85%)	78%
Attorney's fees to bring the lawsuit	22/26 (85%)	77%
Pain and suffering	19/26 (73%)	71%
Whether defendant has insurance	9/26 (35%)	40%
Value of the award in the future if invested now	8/26 (31%)	33%
Impact of inflation	6/25 (24%)	32%
Whether defendant could afford a large amount	6/26 (23%)	30%
Whether defendant was a corporation	6/26 (23%)	33%
Whether plaintiff's insurance covered any expense	4/26 (15%)	21%
Taxes to be paid on the award	1/26 (4%)	19%

[a]Indicates the number of juries in which more than half of the jurors in the case reported discussion and/or use of each factor. Percentages are provided within the parentheses. Note the small denominator when analyzing percentages in place of the proportions. The denominator reflects the number of cases in which the factor was relevant to the case facts.
[b]Indicates the average percentage of jurors per case who reported discussion and/or use of each factor. The percentage of jurors per case was calculated, then the jury rates were averaged across each variable.

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seriousness, as follows: "The seriousness of the injury was definitely one of the points we all had to consider. Again, is it going to impair her for life, is it just going to impair that she can't play tennis much?" (C2-J5).

Another juror mentioned that the seriousness of the injury figured into an equation, reasoning that a larger award should be given to a more serious injury, "the degree of illness you have gets more money, and I had determined in my mind how many, '*x*' times this amount of money. So what I figured is, we'll give '*x*' amount of dollars for the lowest rate, and if you're sicker you get 2 times that or 3 times that, and that's the way most of them thought of doing it" (C4-J7).

Most juries (22 of 26, or 85%) discussed attorneys' fees even though, according to the courts, it is not appropriate to consider such factors when arriving at an award. The mock jury study by Raitz et al. (1990) found one fourth of their sample ranked attorneys' fees as an important (of their top three) consideration for determining the award. The current results reveal a substantially higher rate of discussion.

One third of the total award was frequently cited as common knowledge for the proportion of the award to be given to the attorney for his or her services. Two jurors' statements exemplify this: "We talked about attorney's fees like I told you that we figured that he would be getting a third" (C16-J5). And, "Yes, uh, this was all part of the compromise in the jury room, that we give '*x*' amount of dollars, the lawyer's gonna get this much, usually they get a third. That's very easy to figure out. We subtracted that from the original amount. And we decided that the original amount that, after the lawyer's fees was, was not enough money" (C18-J1). One juror who worked in the legal system proudly admitted he followed the instructions and did not consider attorneys' fees, yet the other jury members felt the fees were important:

> Oh this one I forgot: that the attorney's fees must be paid for bringing the lawsuit. The one thing that I said, and every time it came up, I repeated it, that's not our problem, that is [the plaintiff's] problem, he hired an attorney, what he has to pay him, that's his problem not ours, we can't even discuss that. And I did, cause I could remember when I went back to work I told the attorneys, I said I kept telling them 'We can't talk about that,' and they were very impressed with that, because that was true. . . . I guess what I was trying to stress and a few other people, we can't give him more money to cover the attorney fees. So we did discuss that. (C18-J7).

Breaking down the numbers of jurors who said that their jury had either discussed or used the factor of attorneys' fees, 33% of the jurors reported that their jury used the factor in some way in their award decision making. Another 47% said they discussed attorneys' fees, but claimed that the jury had not incorporated them into their final award calculations.

Pain and suffering was also among the more frequent topics of jury deliberation. While it was discussed by many juries (19 of 26, or 73%), some felt it was the purpose of the whole award, "that was the whole award, pain and suffering" (C23-J1). Others felt it was just one component:

> We tried to look at, um, first of all were her lost wages, which were, uh, [the attorney] had put into evidence at the end of the trial and so we looked at that and so we said, 'Ok. She should be compensated for the lost wages.'. . . Then we looked at what her medical bills were and put that up on the board . . . then we got into major discussions

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> as far as well, how much money based on suffering, so to speak or, you know, she should be awarded for all this aggravation, et cetera. And that took some time, going through that discussion, but then basically we tried to base it on those three specific issues, and then add it up and come up with a number (C5-J2).

Over one third of the juries reported that their jury had engaged in discussion of the defendant's insurance. The interviews suggested that some jurors may have increased their award preferences as a result of the defendant's insurance, while other jurors insisted that the award amount not be adjusted to take insurance into account. One juror in a medical malpractice case, for example, reflected on the different reactions to insurance in the juror's case: "Well, they have insurance, you know they'll pay for it. That wasn't in my mind. What was in my mind was they may have insurance but if they're not guilty this will damage their reputation as a doctor. That was what was in my mind you know. So I didn't think about their affording it. And I figured if they did do something. . . . I figured if they did then the insurance would pay for it" (C16-J5).

One factor produced significantly different results depending on which method of analysis was used. Whether the jurors considered that taxes may have to be paid on the award was considered by only one jury using the majority rule method. However, the average jury rate method revealed a rate of 19%, which incorporates small numbers of juror reports per case, thus producing larger numbers.

Strategies Used in Arriving at Awards

Jurors reported using various strategies to calculate an award amount (see Table 3). A simple method was to have each member of the jury submit a figure and then calculate the arithmetic mean. Other scholars have suggested that this

Table 3. Strategies Considered for Arriving at an Award

Factor	Majority rule method[a]	Average jury rate method[b]
Start with one amount, decrease it because it was too high	17/26 (65%)	59%
Start with one amount, increase it because it was too low	11/26 (42%)	45%
Without calculation, pick a number that is just and fair	9/26 (35%)	46%
Multiply expected earnings by expected work life	10/24 (42%)	45%
Each juror submit a figure and calculate the mean	3/26 (12%)	13%
Base the decision on other cases jurors knew about	1/26 (4%)	12%
None of the strategies listed	1/26 (4%)	6%
Each juror submits a figure; drop the lowest and highest number, then calculate the mean	0/26 (0%)	4%
Each juror submits a figure; drop the highest number and calculate the mean	0/26 (0%)	0.4%
Each juror submits a figure; drop lowest number and calculate the mean	0/26 (0%)	0.6%

[a]Indicates the number of juries in which more than half of the jurors in the case reported discussion and/or use of each strategy. Percentages are provided within the parentheses. Note the small denominator when analyzing percentages in place of the proportions.
[b]Indicates the average percentage of jurors per case who reported discussion and/or use of each factor. The percentage of jurors per case was calculated, then the jury rates were averaged across each variable.

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may be used when there are widely different views of the appropriate award (Guinther, 1988; Kalven & Zeisel, 1966). This approach was considered in just 3 (12%) of the 26 cases, again identifying consideration as more than half of the jurors in a case who reported that their jury discussed and/or used the strategy.

Variations of the arithmetic mean did not receive much use. Each juror submitting a figure, then dropping the highest and/or lowest figure and calculating the mean with the resulting numbers was not used by a majority of jurors in any of the cases. Using a form of a trimmed mean is a more complicated statistic and thus may not have been considered by the jurors. However, when the jury started with one number and then adjusted it because it seemed too high (17 of 26 cases, or 65%) or seemed too low (11 of 26 cases, or 42%) was in essence similar to an adjusted mean. Combined, 19 (73%) of the 26 cases used one or both of these intuitive adjustment methods. Jurors may conceptually feel a number is too large or too small, and adjust from there without actually using precise mathematical methods. For example, one juror reported, "We went about trying to get on a dollar value, and we did it on an average, . . . each of the 12 jurors decided what they thought they ought to get, we added 'em up and we divided it by 12, and looked at that figure. The figure looked kinda, a little weird, so we upped some" (C4-J7). Some jurors reported that the award was basically a compromise, "Yes, uh, some of the jury just off the top of their head picked a figure. The final award was a lot less than the figure that they gave out because it all boiled down to compromise of the jurors" (C18-J1).

Another intuitive method was that without calculation jurors picked an amount that seemed just and fair. This was reportedly used by 9 (35%) of the 26 juries. Multiplying expected earnings by expected work life was also utilized in 9 (35%) of the 26 cases. In only 1 (4%) of 26 cases did the jury report basing the award amount on other cases that the jurors knew about. All cases but one reported using at least one of the options listed in the interviews, with only 7% of the total individual jurors or 6% using the average jury rate method reporting they used none of the listed strategies.

Mechanics Used in Arriving at Awards

Juror responses were quite varied to questions about the mechanisms they used to arrive at an award. Since jurors could report using multiple mechanisms for arriving at the award, the responses are not mutually exclusive. Using paper and pencil or a blackboard or easel to arrive at an award were the most common methods, 12 (46%) and 10 (38%) of the 26 cases, respectively (see Table 4). Comparatively, these results are fairly consistent with the percentage results from the jury rate method (.46 and .34, respectively). Using a calculator or mental arithmetic was also common (8 of the 26 cases, or 31% for both). In 2 (8%) of the 26 cases, jurors indicated they did not use any precise calculations. Reliabilities for intrajury agreement were low for using paper and pencil and a calculator. Generally, these are more individual computational methods, and thus other jurors may not be cognizant of mental arithmetic done by other jurors.

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Table 4. Mechanisms Used for Arriving at an Award

Mechanism	Majority rule method[a]	Average jury rate method[b]
Paper and pencil	12/26 (46%)	46%
Blackboard/easel	10/26 (38%)	34%
Mental arithmetic	8/26 (31%)	40%
Calculator	8/26 (31%)	36%
No precise calculations	2/26 (8%)	15%

[a]Indicates the number of juries in which more than half of the jurors in the case reported use of each mechanism. Percentages are provided within the parentheses. Note the small denominator when analyzing percentages in place of the proportions.
[b]Indicates the average of jurors per case who reported use of each mechanism. The percentage of jurors per case was calculated, then the jury rates were averaged across each variable.

DISCUSSION

This study represents a unique look inside the private world of jury damage awards. Jury awards are the targets of substantial reform efforts, yet many attempts at reform are predicated on sensational anecdotes and incomplete understanding of how juries arrive at awards. By examining the strategies and factors that jurors say they employ in arriving at awards, this study corroborates some previous research as well as introduces new issues. Our study provides some evidence to allay at least some of the fears of capriciousness and irrationality in juror decisions. However, the results also confirm that a substantial majority of juries discuss the legally impermissible factor of attorneys' fees. Furthermore, plaintiff and defendant insurance coverage appears to be a factor in a minority of cases.

Before turning to the particulars, it is appropriate to note several limitations. First we reiterate that the findings may be affected by the fact specificity of the cases in this dataset. Second, as with any interview study that relies on self-reports, it is often difficult for participants to recall accurately what occurred and what influences specific factors had on their own decisions or those of others. Other methodologies such as experimental research are better equipped to test the impact of the variables that these jurors reported considering during award deliberations. Jurors who reported discussing a particular factor, strategy, or device choice may not have been influenced by it. There is the complicating issue in this study that multiple jurors reported what happened on their jury, thus providing some converging (and sometimes conflicting!) information about the role of specific factors in award decision making.

The conservative approach was to combine "discussion" and "use" of the variables because of some disagreement among jurors about whether or not various factors had been simply discussed or had been employed in the award process. It is worthwhile, though, to reflect on why jurors disagreed about the role of a particular factor. This is not surprising in retrospect; particular variables may have been remembered more accurately, or been more salient to some jurors than others.

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Some jurors may have responded to the question in terms of how they themselves reacted to the factor, rather than following the request to talk about the factors that affected the group. Despite these limitations, analysis of the accounts of jurors who decided actual tort and contract cases about their process of decision making makes a novel contribution to a literature that up to now has relied primarily on archival and experimental research to assess jury award decision making.

Factors in Tort Cases

The jurors' responses indicated that most jurors considered a number of components as they embarked on award decision making. Some factors were more concrete than others. For instance, medical bills quantify the future and past medical expenses, and many juries in the tort cases discussed these medical expenses. The plaintiff's salary and years he or she might have worked had the incident not occurred were reportedly considered by a significant number of juries. Once again, quantifying these factors is done more easily than factors like pain and suffering and even inflation, and the ease of use may have contributed to their inclusion into the award process.

Factors in Contract and Tort Cases

Perhaps the most striking finding is that approximately 80% of the jurors reported that their juries had either discussed or employed the factor of attorneys' fees in their award decision making. This is an important and surprising figure. Anecdotally, it has been widely presumed that juries take attorneys' fees into account, but up to now there has been only scattered evidence that jurors paid attention to them—such as jury questions to the judge during deliberation about attorneys' fees. Our data show higher numbers than Raitz et al. (1990), who found one fourth of their mock jury sample considered attorneys' fees. In the present study, the jurors deciding on the cases of real plaintiffs appeared to be attempting to estimate the effect that the award would have on both parties, and attorney fee payments are a component of that equation even though legal rules may forbid their consideration. Kalven (1958) proposed that jurors use the inclusion or exclusion of attorneys' fees as a bargaining tool. When jurors disagree on the award amount, discussion of the attorneys' fees may rationalize the proposed award. Two other factors frequently discussed and/or used by the juries were seriousness of the injury or loss and pain and suffering. Many jurors reported these two issues were tantamount to defining what comprised an award.

Another issue discussed by jurors was insurance coverage—both that of the defendant and that of the plaintiff. Guinther (1988) found that 13% of his sample lowered the awards if they thought the plaintiff had insurance. The present results, of course, indicate that jurors discussed the issue, not whether they adjusted the award due to insurance as done in Guinther (1988).

Along similar lines, issues of whether the defendant had insurance or could afford a large amount, and whether the defendant was a corporation, were considered by some juries. This raises the issue of whether jurors were treating the

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corporate defendants as deep pockets, compensating plaintiffs more when they sued well-insured or wealthy corporations. This interview study cannot speak to that issue beyond observing that a minority of juries discussed the fact that a defendant was likely to be insured or was a corporation. Interestingly, several mock jury studies of the deep pockets hypothesis that have varied the financial assets of a defendant have found that varying financial assets does not significantly affect liability decisions or award amounts (Hans, 2000; Landsman et al., 1998; MacCoun, 1996). Corporate identity appears to be more significant than financial assets (Hans, 2000; MacCoun, 1996).

Strategies

Jurors were also asked about the strategies that they used to arrive at an award. The results taken as a whole support the view that jurors take a component sum approach, albeit with a dash of Gestalt! The strategy most often reported was using an intuitive form of an adjusted mean, also known as an anchor and adjustment strategy. None of the juries in this study said they considered and/or used a trimmed arithmetic mean calculated by dropping the lowest figure, the highest figure, or both. Jurors did not use a precise equation or formula. Rather, they combined figures for specific amounts, then adjusted the awards apparently using collective ideas about the appropriateness of the total sum.

Parallel to the anchoring and adjustment strategy, about one third of the juries reported they chose a number that seemed just and fair. There was a pattern among the calculation methods juries discussed. The juries were not using mathematical equations per se, but they employed estimations and commonsense adjustments to arrive at an acceptable award. The "just and fair" approach bears a resemblance to the Gestalt alternative advanced by Greene (1989), yet there appears to be a fair amount of calculation and adjustment that jurors engage in as the arrive at the "just and fair" number.

Confirming Diamond and Casper's (1992) mock jury study, the simple calculation of an arithmetic mean was rarely used alone in this study; only a few of the 26 juries reportedly employed this method. Instead, calculating the mean may be used as a starting point and the numbers are adjusted accordingly. Occasionally a simple mean calculation was used as the final award, but it was usually a last resort or a compromise. As one juror succinctly stated, "We each put down the amount we thought he should get. It was totaled up and divided by twelve" (C4-J1). An encouraging finding was that only 2 of the 26 juries claimed they made no precise calculations; most jurors report using some method to calculate the final award amount. This goes against the pure Gestalt notion that jurors pluck an attractive number from the air.

CONCLUSION

This interview study offers a jurors'-eye view of the award decision process, providing some converging evidence that jurors consider a wide variety of factors

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as they determine awards in civil cases. The study dispels at least some of the grounds for believing that jurors are capricious and unpredictable in their award deliberations, while raising other concerns such as the ubiquitous consideration of attorneys' fees. Taking the jurors' perspective was valuable for another reason—it illustrated the great challenge that jurors face as they attempt to place dollar values on awards with little or no help from attorneys or the court.

Many jurors reported confusion and the desire to ask for further instructions. While enhancing juror understanding of complex legal issues is relevant to current reform (Dann & Logan, 1996), this study underscores the need to reevaluate the refusal to provide greater guidance to juries in the award process. One juror was frustrated because she was left "floundering," unable to ask questions about the case:

> I don't know, I guess I kinda felt too though that we would have more access to hear exactly what had happened over again, to ask any questions, and that was where when they put us in the jury room. I was kinda like you mean we just have to decide and we don't get to ask any more questions? I think there should be someone there maybe who you can ask some of those questions to. They are so intent on no one else prejudicing you so therefore you're not really allowed, I mean all these things say that the juror, the bailiff I think swears before they take the jury out that they are not gonna talk to him about the case, and all this sort of thing. And it's like wait a minute, why leave us floundering here, why don't you let us ask some questions and give us some answers and I don't know I just feel like there should be a little more instructions there (C8-J6).

Providing greater guidance to jurors facing the task of arriving at jury awards would likely be politically problematic and controversial. Nevertheless, it may be worth considering the types of instructions, additional information or resources, including comparative data about similar cases, that would be helpful to juries as they deliberate on damage awards, as Saks, Baldus, and their colleagues have done (Baldus, MacQueen, and Woodworth, 1995; Saks et al., 1997).

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