

Estimating liability risks with the media as your guide

Compared with objective data, popular news magazine coverage of tort litigation paints a distorted picture of outcomes. Such bias in media accounts could affect the decision making of potential litigants.

by Daniel S. Bailis and Robert J. MacCoun

Consider an individual who has been harmed by a product or another's conduct. Before bringing a lawsuit, he or she may seek to estimate the likelihood of a successful liability claim and its likely monetary value. Or, consider a CEO who wants to develop and market a new product. Before doing so, the executive must think about the legal liability the company might face if the product is found to be harmful.

One way for potential tort claimants and targets to proceed is to investigate the statistical distribution of verdicts in related cases.¹ Indeed, the expected value of a liability award is central to economic models of tort deterrence, claiming behavior, and settlement negotiations.²

But the prospects of reaching an

DANIEL S. BAILIS recently received his doctorate in psychology from Princeton University and is now with the Health, Leisure, and Human Performance Institute at the University of Manitoba.

ROBERT J. MACCOUN is an associate professor of public policy at the University of California, Berkeley.

accurate assessment of liability by this method are quite poor. Until fairly recently,³ there were no reliable, unbiased, aggregate figures on the average jury awards for even the broadest categories of case types. Current data sets were difficult to assemble and are

plagued by limitations.⁴ In addition, psychological research indicates that people tend to rely much less on quantitative data, even when they are available, than on inferences they draw from a particular situation. This tendency can be helpful in casual circumstances, but it can also lead to serious errors of judgment.⁵

Given these factors, potential litigants in their decision making are unlikely to turn to systematic analyses of trends in jury verdicts. Instead, they are likely to rely heavily on personal experiences, colleagues' anecdotes, and reporting by the popular and business media.⁶

A longer version of this article titled "Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation" appeared in Volume 20 of *Law and Human Behavior* (1996). An earlier version was presented at the annual meeting of the Law and Society Association, Chicago, Ill., May 27-30, 1993.

This research was supported by RAND's Institute for Civil Justice. The authors thank Roberta Shanman for performing the computer searches and Marc Galanter for his helpful comments. Correspondence concerning this article should be addressed to Robert MacCoun at the Graduate School of Public Policy, University of California at Berkeley, 2607 Hearst Ave., Berkeley, Calif. 94720. Electronic mail may be sent to maccoun@violet.berkeley.edu.

1. See Galanter, *Jury Shadows: Reflections on the Civil Jury and the 'Litigation Explosion,'* in *THE AMERICAN CIVIL JURY* 15-42 (Washington, D.C.: Roscoe Pound Foundation, 1987).

2. Cooter and Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. OF ECON. LITERATURE 1067-1097 (1989).

3. Peterson and Priest, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979* (Santa Monica, Calif.: RAND, 1982).

4. MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decision Making by Civil Ju-*

A readily available source

For better or worse, the mass media provide the most readily accessible source of information on tort outcomes. Since the late 1970s, the debate over reform of the American tort system has been a popular topic in the media. Indeed, some have speculated that the media have encouraged the debate by exaggerating the extent to which litigation rates and the size of jury awards are "out of control."⁷

Although it is clear that powerful interest groups want to scale back the tort system, there is little need to invoke a conspiracy theory to explain

ries, in Litan (ed.), *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 137-180 (Washington, D.C.: The Brookings Institution, 1993). Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147-1292 (1992). Vidmar, *Making Inferences About Jury Behavior From Jury Verdict Statistics: Cautions about the Lorelei's Lied*, 18 LAW & HUM. BEHAV. 599-618 (1994).

5. Tversky and Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124-1131 (1974).

6. Edelman, Abraham, and Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y. REV. 47-83 (1992). Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585-605 (1988). Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201-271, and Galanter, *supra* n. 1.

7. Daniels, *The Question Of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-building*, 52 LAW & CONTEMP. PROB. 269-310 (1989). Galanter, *supra* n. 6. Hensler, *Taking aim at the American legal system: The Council on Competitiveness's agenda for legal reform*, 75 JUDICATURE 244-319 (1992). MacCoun, *supra* n. 4. Saks, *supra* n. 4.

HOW TO CONTROL LIABILITY COSTS

The courts created an outrageously expensive accident-insurance program that doesn't work. It's their job to undo the damage.

Suicide Payoff

A subway jump nets \$650,000

AN ASBESTOS DECISION THAT'S HAZARDOUS TO INSURERS' HEALTH

A California high court sticks them with a \$2 billion tab for claims

why such media distortions occur. The media rely on consumer interest to sell their products; stories based on a statistically representative selection of cases are unlikely to attract an audience. In terms of newsworthiness and public interest, one can assume that jury trials outrank settlements, unusually large jury awards outrank modest awards, and accidents involving malpracticing professionals or malfunctioning products outrank run-of-the-mill fender benders and slips and falls.

A consequence of statistically unusual stories is that they are likely to distort decision making by those who

are exposed to them. Especially when decisions must be made under uncertainty and pressure, people tend to equate the ease of imagining an event with the likelihood that it will occur. This can be misleading if an event is easy to imagine for reasons other than its frequent occurrence. For instance, simply reading a vivid account of a plane crash in the newspaper tends to increase people's estimates of how frequently airplanes crash in general.⁸

It is a small step to assert that people who read about million-dollar verdicts might overestimate the frequency of large jury awards. In some ways, a tendency to magnify the threat of legal sanctioning might be desirable. For example, research on

deterrent effects of criminal sanctions suggests that high-profile enforcement efforts create an exaggerated perception of legal risks, promoting compliance with the law.⁹ In the tort context, an inflated perception of liability risks may discourage negligent conduct.

But there is a risk that such distorted views would also discourage socially desirable activities and promote groundless claims.¹⁰ Further, many have argued that the media are perpetuating a misleadingly pessimistic view of the functioning of the tort system and the need for drastic reform measures.¹¹ Therefore, there is reason to suspect that the media's portrait of the civil jury is biased in a manner that has important implications for both tort disputing and pre-dispute decision making.

To evaluate the media's portrait of the civil jury more systematically, a content analysis of news magazine articles was conducted. The sample consisted of a subset of articles from *Time*, *Newsweek*, *Business Week*, *Forbes*, and *Fortune* published between 1980 and 1990 that featured tort litigation.¹² The goal was to compare the typical tort as described in the news sources with the typical tort as described by data from RAND's Institute for Civil Justice, the American Bar Foundation, the National Center for State Courts, and other sources.¹³

The types of tort liability mentioned in each article were coded, as well as the types and manufacturers of products whenever product liability

8. Slovic, Fischhoff, and Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in Kahneman, Slovic, and Tversky (eds.), *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 463-492 (Cambridge University Press, 1982). Tversky and Kahneman, *supra* n. 5.

9. See review in MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 *PSYCHOLOGICAL BULL.* 497-512 (1993). See also Saks, *supra* n. 4.

10. Garber, *PRODUCT LIABILITY AND THE ECONOMICS OF PHARMACEUTICALS AND MEDICAL DEVICES* (Santa Monica, Calif.: RAND. Government Accounting Office, 1989). *PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES* (GAO/HRD-89-99). Huber, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (New York: Basic Books, 1988).

11. See Daniels, *supra* n. 7, Galanter *supra* n. 6, Hensler, *supra* n. 7, and Saks, *supra* n. 4.

12. A detailed description of the sampling scheme appears in the full version of this article in *LAW AND HUMAN BEHAVIOR*.

13. One limitation of this approach is that a

truly national sample of civil jury verdicts has never been compiled. This precludes a direct statistical comparison of actual cases and cases reported in the national media. A potential solution would be to limit the study to a single jurisdiction, and then restrict a content analysis to local media sources. Instead, the study was directed toward national media sources to enhance the generalizability of the findings and because decision makers would be expected to rely more heavily on national than on local media sources of information. However, two caveats are in order. First, a truly representative sample of nationally available media stories has not been provided. The sample design excludes daily newspapers and more narrowly specialized business magazines, each of which may emphasize different types of cases from the major weekly news magazines in the sample. Second, because there is no exact overlap in coverage over time and geography, formal statistical tests for differences between the media sample in this study and actual court statistics would be misleading.

ity was mentioned. The editorial content of each article was assessed by noting common arguments about the "crisis" in the tort system, such as the unavailability of insurance or the litigiousness of American society. Also noted were abstract evaluations of jury trials (for example, the jury is basically fair, the jury has a "deep pockets" bias) and of settlement and other forms of alternative dispute resolution (for example, the technique avoids lawyers' fees or the uncertainty of jury decisions).

The 118 articles included 146 mentions of specific lawsuits, which were coded according to the litigants' status as individuals, government, or businesses; the injuries and losses plaintiffs had sustained; the location of the case; the determination of liability; and whether a judge or jury had made this determination. Fifty-two specific trial awards were mentioned. If specified, compensatory and punitive damage award amounts (or more commonly, just the total award) were recorded.

Findings

Product liability, medical malpractice. It was anticipated that media coverage overrepresents product liability and medical malpractice cases, which are the most controversial. Table 1 indicates the prevalence of automobile accidents, product liability, and medical malpractice among various sources of information. The first row presents estimates of the prevalence of these situations among all accidental injuries, whether litigated or not, based on a nationally representative survey of American households.¹⁴ The second and third rows present the prevalence of these situations among tort lawsuit filings and tort trials in 27 state courts.¹⁵ The final row shows the relative frequency of the three tort types among all specific mentions in the news magazine articles in the sample.

It is clear that the national news magazine articles devote much

Table 1 Accident and tort data compared with magazine coverage

	Auto	Products	Medical
Accidents ¹	18%	30%	1%
Tort filings ²	60	4	7
Tort trials ³	42	3	10
News magazine coverage	2	49	25

1. Hensler, Marquis, Abrahamse, Berry, Ebener, Lewis, Lind, MacCoun, Manning, Rogowski, and Vaiana, *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* (Santa Monica, Calif.: RAND, 1991).

2. Ostrom and Kauder, *EXAMINING THE WORK OF STATE COURTS 1993*. NCSC Publication R-169. (Williamsburg, Va: National Center for State Courts, 1995).

3. Ostrom, Rottman, and Hanson, *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 *LAW & POL'Y* 77-106 (1992).

greater attention to product liability and medical malpractice than would be expected on the basis of actual accident, litigation, or trial rates. Routine auto cases, which constitute the bulk of the state tort caseload, were all but ignored in the magazine articles.

Jury trial rates. It was anticipated that the magazine sources exaggerate the proportion of tort cases decided by a jury. Most estimates¹⁶ suggest that 90 to 95 percent of tort lawsuits are resolved without trial, more than half by private bilateral settlement. For example, only 2 percent of the tort suits in a recent study of 75 state trial courts were disposed of by a jury trial.¹⁷ In contrast, 64 percent of the resolved lawsuits mentioned in the sample of magazine articles resulted in a trial verdict: 38 percent of these were tried by a jury, 10 percent were tried by a judge, and 16 percent resulted in a verdict that was not clearly attributed to either a judge or a jury. The proportion of trials tried by juries in the media sample—55 out of 69 trials with known decision makers,

or 80 percent—is consistent with the finding that 85 percent of state court civil trials are decided by juries.¹⁸ Thus media sources do not appear to exaggerate the role of the jury in settling disputes so much as they exaggerate the proportion of disputes that result in trials.

Plaintiff win rates. It was anticipated that the news media overrepresent the rate at which plaintiffs prevail at trial. Table 2 presents plaintiff win rates for samples of actual tort trials, which range from

46 percent to 51 percent for all torts. When medical malpractice and product liability verdicts are separated, the win rates range from 27 percent to 55 percent. In the sample of magazine articles, plaintiffs won 85 percent of the time. Thus, it is clear that the media overrepresent plaintiff victories relative to their true rate.

Jury awards. How do the mean and median jury award in the distribution of magazine-reported awards compare with the mean and median of the objective distribution of jury awards? The last two columns of Table 2 present estimates of mean and median jury awards for six samples of actual jury trials. Although these figures vary considerably across years, locations, and types of torts, what is important to note is the range, from a mean of \$408,000 and median of \$51,000 to a mean of \$1.5 million and median of \$318,000. The sample of magazine articles included 43 reports of specific jury awards, with a mean of \$5.8 million and a median of \$1.8 million, about four and five times the size of the largest

14. Hensler, Marquis, Abrahamse, Berry, Ebener, Lewis, Lind, MacCoun, Manning, Rogowski, and Vaiana, *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* (Santa Monica, Calif.: RAND, 1991).

15. Ostrom and Kauder, *EXAMINING THE WORK OF STATE COURTS 1993*. NCSC Publication R-169. (Williamsburg, Va: National Center for State Courts, 1995). Ostrom, Rottman, and Hanson, *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 *LAW & POL'Y* 77-106

(1992).

16. Trubek, Sarat, Felstiner, Kritzer, and Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72-127 (1983).

17. DeFrances, Smith, Langan, Ostrom, Rottman, and Goerd, *CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES*. Bureau of Justice Statistics Special Report NCJ-154346. (Washington, D.C.: U.S. Department of Justice, 1995).

18. Ostrom, Rottman and Hanson, *supra* n. 15.

Table 2 Plaintiff win rates and jury awards

Source	Tort types	Plaintiff win rate	Mean award (in \$1,000s)	Median award (in \$1,000s)
75 state courts, 1992 ¹	All torts	50%	408	51
	Products	40	727	260
	Med. mal.	30	1,484	201
Federal courts, 1979-93 ²	All torts	46%	1,196	136
	Products	30	1,547	318
	Med. mal.	27	1,663	267
Cook County, Ill., 1980-84 ³	Products	52%	828	187
	Med. mal.	49	1,179	121
San Francisco, 1980-84 ⁴	Products	52%	1,105	200
	Med. mal.	53	1,162	156
6 California counties, 1970-90 ⁵	Products	55%	1,085	294
5 states, 1983-85 ⁶	Products	45%	845	157
Media sample	All torts	85%	5,861	1,750

1. DeFrances, Smith, Langan, Ostrom, Rottman, and Goerd, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES. Bureau of Justice Statistics Special Report NCJ-154346. (Washington, D.C.: U.S. Department of Justice, 1995).

2. Eisenberg, Goerd, Ostrom, and Rottman, "Litigation Outcomes in State and Federal Court: A Statistical Portrait." Presented at the annual meeting of the Law and Society Association, Toronto, May 1995.

3. Peterson and Priest, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979 (Santa Monica, Calif.: RAND, 1982).

4. *Id.*

5. Daniels and Martin, *Don't Kill the Messenger 'till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990*, 16 JUST. SYS. J. 69-95 (1993).

6. PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES (GAO/HRD-89-99).

Note: Award estimates have not been adjusted to constant real dollars.

mean and median court figures, and 14 and 34 times the size of the smallest figures. Thus there is little doubt that the selective reporting practices of media sources provide a tremendously distorted picture of the jury award distribution.

For several reasons, this pattern does not appear to be caused by the overrepresentation of product liability and malpractice cases, which tend to produce larger jury awards. First, the media estimates are still considerably larger than the product and malpractice estimates for court data in Table 2. Second, among the 26

awards that did not involve product or medical malpractice cases, the mean was slightly larger (\$7.4 million) and the median only somewhat smaller (\$1.5 million) than for the total sample.

Critical accounts. Because the articles were predominantly news stories rather than editorials, explicitly evaluative comments about the tort system were rare. When they did occur, they were almost exclusively critical of the tort system. Only two articles made favorable statements about juries, and only one suggested the tort system is working correctly. On the other hand, 22 percent criticized the system, suggesting it has harmful consequences for the American economy (13 percent), that Americans are too litigious (10 percent), or that lawyers fees are too high (10 percent).

A distorted picture

A comparison of media accounts of trials to aggregate data on jury verdicts leaves little doubt that national news magazines present a distorted picture of the tort litigation landscape, one that provides a dubious basis for sound decision making by potential claimants and defendants. However, this approach does not necessarily mean there is a direct link between media coverage and public beliefs about the tort system. Although such a link is quite plausible¹⁹ and there are psychological mechanisms by which such influence could occur, direct evidence for media effects on tort decision making requires future studies with different research strategies.

This study was not intended as an evaluation of how well media sources do their job. It is not the responsibility of news services to report every dispute that passes through the civil justice system. However, it is likely that the absence of comprehensive and widely disseminated

data on jury verdicts constrains the effective functioning of the civil justice system. This point is further underscored by recent studies showing that legislators and professional and legal advisers²⁰ tend to overestimate the threat of civil liability faced by their constituents and clients.

One defense of the civil jury as a fixture in the American legal system is that it serves a vital signaling function, conveying societal standards for appropriate conduct. Thus the quantity and quality of available information on past jury behavior imposes a strict limit on the public's ability to anticipate future verdicts with reasonable accuracy. The weaknesses of the media as a primary information source highlight the need for more systematic monitoring and dissemination of reliable data on tort outcomes. ♣

19. Daniels, *supra* n. 1, Galanter, *supra* n. 1, Galanter, *supra* n. 6, Singer and Endreny, REPORTING ON RISK (New York: Russell Sage Foundation, 1993), Slovic, Fischhoff and Lichtenstein, *supra* n.8.

20. Edelman, *et al.*, *supra* n. 6; Songer, *supra* n. 6.