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***Jackpot Justice* and the American Tort System: Thinking Beyond Junk Science**

Tom Baker, Herbert Kritzer and Neil Vidmar

In 2007 the Pacific Research Institute¹ released a report, *Jackpot Justice: The True Cost of America's Tort System*, that is widely available on the internet.² The conclusion of the report is that America's tort system costs \$865.37 billion annually, amounting to an "annual price tag, or 'tort tax' for a family of four in terms of costs and foregone benefits" of \$9,827. As our report will demonstrate, **the conclusions of *Jackpot Justice* are without scientific merit and present a very misleading picture of the American tort system and its costs.**³

Research on the tort system's efficiency, its fairness and other issues are legitimate topics of empirical inquiry and are to be encouraged. Indeed, the three authors of this report have collectively devoted many years to empirical investigation of the tort system. (Summary biographies of the authors appear at the end of this report.) However, when research findings, such as those in *Jackpot Justice*, are disseminated to the public and are intended to have effects on legislative and other public policy institutions, they deserve careful scrutiny, including close examination of the validity of the theoretical underpinnings, the methodologies used, the quality of the data reported, and the conclusions that are drawn from the analyses. Scrutiny of *Jackpot Justice* in this way reveals many flaws that strongly contradict the conclusions that the Pacific Research Institute authors have made.

Our report has four sections. In Section I we draw attention to *Jackpot Justice's* misleading claims about its scientific approach to the data and the claimed scholarly consensus that underlies their research. In section II we present a detailed critique of their analyses and conclusions. In Section III we address a missing part of the equation that *Jackpot Justice* uses to speculate about the "tort tax": the cost of torts to victims. The analyses we present in this section *are simply illustrative* of the kind of data that would be needed to assess the costs and benefits of the tort system. We do not claim that our rough estimates are accurate, but they help to point to the reasoning flaws in *Jackpot Justice*. In section IV we offer examples that are intended to counter general public misperceptions of three topics that are central targets of those who argue the tort system is unfair: medical malpractice litigation, products liability, and punitive damages. These examples are intended to put a concrete face on some of the technical issues discussed in the preceding sections of our report.

A central message of our report is that ***the tort system needs to be viewed in terms of its benefits as well as its costs.*** Moreover, our report draws attention to the social and political choices involved in policies directed toward the goals of promoting responsibility, preventing injuries and compensating victims of negligence. We do not contend that the American tort system is flawless. But it is important to be aware that the corporate critics of the tort system frequently use the same tort system in their disputes with other businesses.

I. Misleading Claims and Assertions

A. Half a “Theory”

Jackpot Justice begins by asserting its goal:

...to arrive at a fuller accounting of the true cost of the U.S. tort liability system. The study provides a conservative first approximation of the total costs, both direct and indirect, and the total excess costs of the tort system⁴

A key insight is the reference to “excess costs” contained in the above statement. The researchers began with an assumption that there would be excess costs, rather than taking a scientifically neutral position which would test *if* there were excess costs. To be sure, the report subsequently concedes that “[a] thriving free-enterprise economy depends on an efficient tort system that provides proper incentives to businesses to produce safe products in a safe environment and ensures that truly injured people are fully compensated for their injuries.”⁵ Yet, in almost the same breath the report concedes that the authors “do not explore the benefits [of the tort system], of which there are many.” (emphasis added).⁶ Instead they focus on the tort system as a “massive transfer system” that takes from businesses and gives to individuals, without considering if those individuals are deserving of compensation or if business fails to compensate large numbers of individuals whom they injure.

If you only assess the costs and not the benefits, how can you assess the merits of the tort system?

Thus, from the very outset the research was fatally flawed: it started with a clear agenda and made assumptions and decisions that would advance that agenda. Stating the problem baldly, **if you only assess the costs and not the benefits, how can you assess the merits of the tort system? Clearly, the only logical conclusion is that the authors did not want to present a balanced picture.**

B. Advocacy Disguised as Science

The authors of the report make the **claim that their analysis represents a scholarly, consensus view.** They describe *Jackpot Justice* as a “fuller account of the true cost of the U.S. tort liability system” that is based on “scholarly studies by top economists and legal scholars,” that reflects a “consensus view on those who have studied these factors,” and that is based on “statistically significant results in the most prestigious academic publications.”⁷

In reality *Jackpot Justice* presents neither the true cost of the U.S. tort liability system nor a consensus view. **Not one of the numbers included in the table of tort costs in the report comes from a “prestigious academic publication” or was subject to peer review by independent experts. Most of the report’s numbers rest on insurance industry-supported studies, particularly reports from Tillinghast Towers Perrin, an industry-focused organization whose data are not available for independent public evaluation of their validity and reliability.** With one minor exception, the rest of the studies are extreme extrapolations from dated scholarly studies that, taken on their own merits, plainly do not support the *Jackpot Justice* conclusions.

Consider just one example. In Chapter 1 the report states: “Civil courts also give awards to individuals who have not suffered actual injuries and are thus not deserving of compensation.”⁸ The single source for this sweeping comment is to an unpublished Pacific Research Institute paper that deals with California’s worker’s compensation system.⁹ *Worker’s compensation schemes are not part of the tort system.* No other source is cited.

II: Technical Analysis of PRI’s Jackpot Justice Report

In this part of our response, we engage in a technical analysis of PRI’s *Jackpot Justice* report that will demonstrate that the method that PRI used to compute their “tort cost” number lacks scientific merit. Judge Richard Posner – a founding father of the economic analysis of law and a Reagan appointee to the United States Court of Appeals – put it best on the internet blog that he writes with the Nobel Prize winning economist Gary Becker. **Referring to *Jackpot Justice*’s bottom line, Judge Posner wrote, “The figure, however – the authors’ estimate of the net social loss created by our system – is, as I have tried to show, fictitious.”**¹⁰

In this rebuttal to *Jackpot Justice* we start from Judge Posner’s analysis, and go beyond it, to shed light on some major problems in the report that Judge Posner did not address. At the start, it is very

Once an injury happens, someone bears the costs, and if compensation is not provided through tort (or some other mechanism) then the injured person bears those costs, with some help from his or her health insurer (which in many cases is the taxpayer through governmental programs such as Medicare or Medicaid).

important to realize that, as Judge Posner pointed out, many of the items that the PRI report labels as “costs” are not true economic costs at all. Indeed, one of their very large items represents an estimate of the total amount of money that the tort system transfers from people who caused harm to the people that they harmed. Such transfers are one of the main goals of the tort system and are not a “social cost.” Once an injury happens, someone bears the costs, and if compensation is not provided through tort (or some other mechanism) then the injured person bears those costs, with

some help from his or her health insurer (which in many cases is the taxpayer through governmental programs such as Medicare or Medicaid).

Jackpot Justice presents its tort cost estimate in the form of a table that appears at two places in the report. The table divides the tort costs into two categories that we will analyze separately. As we observed earlier, none of the numbers in that table come from peer-reviewed studies published in academic journals. Most of the numbers are derived from insurance industry reports that have not been subject to any independent review. With one minor exception, the rest are highly dubious extrapolations from dated academic studies that were not designed for this purpose.

A. Static Accounting Costs

About forty percent of the total of the PRI report’s tort cost table – \$327 billion – is in a category that PRI calls “static accounting costs.” Despite the asserted academic and scholarly nature of the report’s tort cost estimate, all of the numbers in the static accounting costs part of the table actually begin with a “tort cost” study produced by the insurance consulting company, Tillinghast Towers Perrin. As Judge Posner noted “It is impossible to determine from Tillinghast Towers Perrin’s report what the sources for

most of its data are, and so the figures I have quoted must be taken with a grain of salt; indeed, so far as I can tell, they may be completely unreliable.”¹¹

There are at least the following problems with using the Towers Perrin numbers in this way.

First, the Towers Perrin report includes the tort transfer payments to victims as part of the “costs” of the tort system. As we have just explained, that is a fundamental error that greatly exaggerates the costs.

Second, the Towers Perrin report has not been subject to the independent peer review that is one of the hallmarks of social scientific research published in academic journals.

...the Towers Perrin estimate was “almost certainly exaggerated, given the financial connection between the firm and the insurance industry.”

Third, the public data that Towers Perrin uses come from financial reports that insurance companies prepare to enable insurance regulators to assess the solvency of insurance companies, not to make the civil justice system transparent. Because of the solvency objective, regulators deliberately designed the reporting system to require the insurance industry to err on the high side in estimating their future payments. That way insurance regulators can be more confident that insurance companies will have the money that they need to pay claims in the future.

Fourth, the solvency data present a snapshot of insurance costs that can be very misleading due to a unique insurance-industry specific business cycle called the underwriting cycle.¹² Indeed, in preparing the *Jackpot Justice* report, the authors picked the year that represented the highest point in the cycle. We explain the significance of their choice of years in a note, but the bottom line is that using the comparable figure from the most recent Towers Perrin report would cut the *Jackpot Justice* “static cost” number by more than ten percent.¹³

Fifth, nearly one-third of the Towers Perrin tort costs are allocated to medical malpractice and self-insured costs, categories for which there are no reliable, publicly available data that provide a complete accounting. Towers Perrin estimated these costs using proprietary methods and data.¹⁴

For these reasons, Judge Posner was surely correct in concluding that the Towers Perrin estimate was “almost certainly exaggerated, given the financial connection between the firm and the insurance industry.”¹⁵

The *Jackpot Justice* authors then massaged the Towers Perrin number in a variety of questionable ways that appear designed to produce an even larger estimate of “static costs” than the estimate of tort costs in the Towers Perrin report. The details of the massaging are somewhat technical, but the central problem is triple counting.

The *Jackpot Justice* authors first identify the transfer payment component of the Towers Perrin number – i.e. the amount of money that, according to Towers Perrin, gets paid to victims. That number is \$128 billion. Drawing on tax literature, they then simply assume that nearly 30% of that amount is a “deadweight loss” to society and therefore add \$36

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billion to the static cost table.

It is important to emphasize that the authors really do simply assume this number. There is no empirical support whatsoever for making this deadweight loss calculation in the tort context, and nowhere do the authors explain why this kind of transfer functions as a tax. Under their rationale, many routine business costs could arguably function in a similar fashion. Judge Posner explained the problem very well:

[The authors of Jackpot Justice] base this [calculation] on a study which found that increasing the corporate tax rate by \$1 generates 28 cents in deadweight costs. The basis of that finding was that a tax, like a monopoly markup, causes the taxpayer, like a consumer, to substitute for the taxed item or activity something that may cost society more to provide but looks cheaper because it's untaxed, or taxed at a lower rate. The authors of Jackpot Justice do not explain why a tort transfer would have the same effect. Of course, the threat of tort liability might well alter the behavior of potential injurers—indeed, it is intended to do so—but it might alter the behavior in a direction of greater efficiency, by making the potential injurers internalize accident costs. That is the objective of tort law, though imperfectly achieved. Without tort liability, firms would have weak incentives to invest in safety measures to benefit potential victims of the firms' activities, unless the victims were either their employees or their customers.

The *Jackpot Justice* authors' next step is, once again, to make an assumption. This time they assume that plaintiffs will pay to obtain, and defendants will pay to avoid, the transfer payment in an amount that equals the transfer payment plus the deadweight loss. This assumption – which is also without any empirical support in the tort context – results in an additional \$164 billion in static costs.

Finally, *Jackpot Justice*'s authors add the value of the transfers themselves to their tort cost table (while admitting in the text that transfer payments are not social costs) producing a total “static accounting cost” number of \$328 billion: the assumed \$36 billion, plus the assumed \$164 billion, plus the transfer payments of \$128 billion. This is nearly three times as much as the questionable transfer payment number with which they started and even exceeds Towers Perrin's exaggerated calculation of the costs of the tort system.

B. Dynamic Costs

The other sixty percent of the costs in *Jackpot Justice*'s tort costs table – about \$537 billion – is in a category that the authors call “dynamic costs.” With one tiny exception, the numbers in this category represent highly inflated extrapolations from very dated academic studies that were not designed to generate estimates of this sort.

Most of the “dynamic costs” fall in two categories: defensive medicine (which they label “health care expenditures”) and social costs from lost sales of new products that the *Jackpot Justice* authors claim were not produced because of concern about liability. For neither of these does the report does consider the positive effects of tort liability. Tort liability is supposed to change behavior, to make medical procedures and products safer. So the fact that doctors and manufacturers do things differently because of tort liability hardly proves that the tort system is wasteful.

The defensive medicine number (\$124 billion) in *Jackpot Justice* comes from a Price Waterhouse Coopers report that was funded by the health insurance industry as part of a Congressional lobbying campaign.¹⁶ The Price Waterhouse Coopers report drew on a reputable, if dated, academic study that measured defensive medicine; but that study looked at expenditures for only one set of diseases and, thus, does not provide a sound basis for generalizing about defensive medicine. Later research by the same academic research team called their earlier conclusions into question.¹⁷ Of course, neither *Jackpot Justice* nor the health insurance industry report cited that later research. Instead, the health industry report simply generalized from the first study to assert, without any empirical or analytical support, that ten percent of the entire cost of health care in the U.S. is attributable to defensive medicine and medical liability payments.¹⁸

Tort liability is supposed to change behavior, to make medical procedures and products safer.

The *Jackpot Justice* number for the social costs from lost sales of new products (\$367.06 billion) comes from massaging the results of an even older academic study that was not designed to produce this kind of number. On its face, a claim that there are \$367 billion per year in lost sales due to fears of products liability borders on the absurd. The total manufacturing output of the United States is about \$1.6 trillion per year,¹⁹ and the idea that estimated tort costs (from what turns out to be only 12 industries²⁰) could lead to lost sales equal to about 23 percent of manufacturing output seems more than a little far-fetched. The details of their data massaging are technical, but the over-arching theme is making questionable assumptions that produce a very high number in situations in which other assumptions would be more reasonable.

The authors of the study upon which this figure is supposedly based, Viscusi and Moore, examined a total of 186 industries to evaluate whether tort losses increased or inhibited innovation in different industries. Fully 175 of those industries had a bodily injury loss to sales ratio that predicted either no effect or a positive effect on research and development (R&D), suggesting that tort losses actually increased innovation and new product sales.

We explain in a textbox how making just one very reasonable change in a central assumption made by the *Jackpot Justice* authors cuts the total amount of lost sales that they estimate by about two-thirds. This does not mean that we accept their argument that the tort system produces a significant amount of lost sales. Instead we offer this example to further demonstrate that the *Jackpot Justice* tort costs table is a house of cards. Moreover, and as noted above, Viscusi and Moore reported that for some significant number of industries, tort losses spurred product development and added to the industries' sales of new products. Yet, in line with their decision to ignore the benefits of the tort system, the authors of *Jackpot Justice* made no effort to quantify the increased sales that could be attributed to R&D spurred by tort losses. Given that 94 percent of industries fell below the range where tort losses might depress R&D, the more reasonable conclusion is that the overall net effect of tort losses on R&D is positive, if one is willing to assume that there are the kinds of effects the *Jackpot Justice* authors want us to believe there are. Finally, the authors never take into account that many of the supposed lost products would replace existing products on the market; the question is not what lost sales of the new products are but, rather, the net difference in sales between the new products and those they replace.

In deriving an estimate of the supposed impact of "excess tort liability" on lost sales of new products, the authors draw on a study by Viscusi and Moore.¹ Through a set of questionable assumptions, the authors arrive at a figure of \$325 billion in lost sale in 2002 dollars (which adjusting for inflation becomes \$367 billion in 2006 dollars).

Viscusi and Moore's analysis examined 186 industries. For only 11 of these 186 industries did their analysis suggest that tort liability might be suppressing R&D expenditures. More specifically, Viscusi and Moore reported that a maximum expenditure on R&D occurs at a ratio of bodily injury losses to sales of about 6 percent. Viscusi and Moore reported a specific figure for bodily injury losses to sales for only one industry, the composition goods industry, which includes asbestos; for that industry, Viscusi and Moore reported a ratio of 14 percent. Viscusi and Moore describe a second industry, miscellaneous chemical products, as having "a high liability cost," but give no figure for this industry. For the other industries, which they list, Viscusi and Moore described them as "at or near the turning point for one or more of the liability variables." "At or near" is the relevant phrase.

*What do the authors of *Jackpot Justice* do with these figures? They arrive at a lost sales figure of about \$5.5 billion for the composition goods industry. From other sources, they obtained a baseline for estimating lost sales totaling about \$14.4 billion for two industries not among Viscusi and Moore's original 11. So where did the remaining \$305 billion come from? The *Jackpot Justice* authors made the assumption that the bodily injury losses to sales ratio for the remaining industries was 10 percent, an assumption they justify because it is the midpoint between the six percent where there is neither a positive or negative effect and the 14 percent experienced by the composition goods industry. Is 10 percent what Viscusi and Moore meant by "at or near" the turning point? That is very unlikely. At or near probably ranged between six (at) and eight (near) the six percent figure.*

*Assuming the general rationale of the *Jackpot Justice* authors concerning lost product sales has at least some validity [an assumption we make here only for the sake of argument], the figure that more likely represents "at or near" would be an average of seven percent. Using this instead of the author's 10 percent for industries other than composition goods, miscellaneous chemical products (we retain the *Jackpot Justice* authors' 10% figure for this industry), miscellaneous manufacturing, and apparel and other textile products, reduces the \$305 billion figure to approximately \$91 billion, which when added to the figures for the other four industries produces a total of about \$111 billion, a far cry from the authors' \$325 billion, and we have not examined any of the other dubious assumptions that the authors make in their calculation process.*

An equally telling critique comes from Judge Posner, who pointed out that the *Jackpot Justice* authors made a fundamental mistake by using the *lost sales revenue* from a product as the basis for calculating the alleged *social cost* of not producing the product. In the first place, since the product was not produced because of a concern about liability, there is a good chance that the product would have been unsafe and, therefore, the social impact of not producing the product would be positive, not negative. Second, even if the product was not unsafe, lost sales revenue is not the measure of the social welfare that results from not producing the product. The social welfare that comes from producing a product is the difference between what it costs to produce the product and the amount that people are willing to pay for it, as Judge Posner explained.

The *Jackpot Justice* authors' response to Judge Posner's critique can only be described as bizarre. They first acknowledged that Judge Posner was right about the meaning of social cost. They then explained that lost sales revenue could nevertheless be a reasonable measure of the social cost, as long as people are generally willing to pay twice the price of a product. This is a true statement, but there is absolutely no reason to believe that people in fact would be willing (and able) to pay *twice the sales price* for all of the

products that they consume! Yet, as those authors' response to Judge Posner makes clear, the measure of "dynamic costs" in the report's tort costs table depends on just that assumption.²¹

C. Excess Tort Costs

To their credit, the authors of *Jackpot Justice* do not claim that all of what they label tort costs are unwarranted. Rather in the end they want to make claims about what constitutes *excess* tort costs in the U.S.

How then did they arrive at an estimate of "excess tort costs"? They turned again to Tillinghast-Towers Perrin data and a 2002 report showing tort costs as a percentage of GDP in eleven industrialized countries. The *Jackpot Justice* authors averaged the figures for the ten countries other than the United States, and obtain a figure of 0.9 percent of GDP. They then proceeded to assert that the difference between this average percentage and the American percentage of 2.2 percent of GDP constitutes "excess tort costs."²² In other words, 59 percent of U.S. tort costs, according to these authors, are "excess."

First, there is little or no information to assess the validity of the Tillinghast Towers Perrin numbers for the ten other industrialized nations. The 2002 report from which the numbers are taken provides no source information or any information on how the numbers were arrived at. Assuming they were generated in some way by Tillinghast-Towers Perrin they probably have all the problems previously described.

Second, did the *Jackpot Justice* authors ever consider whether tort costs in other countries might differ from the U.S. because of factors that might explain why such costs are higher in the U.S.? Not surprisingly, the answer to this question is "no." We can identify at least three reasons why tort costs in other industrialized countries might be lower than in the U.S.:

1. Other countries have stronger regulatory mechanisms that eliminate the need for some types of tort claims, either by reducing injuries or by redirecting concerns about products out of the tort system.
2. Social welfare systems in other countries may reduce the need to rely upon tort claims for support and compensation after injury.
3. Tort claims are driven heavily by medical costs, and the cost of health care is much higher in the U.S. than it is in other countries.

It is difficult to quantify the first two of these, but we can roughly quantify the third, differences in health care costs using data from the Organization for Economic Cooperation and Development on health care expenditures per capita measured in U.S. purchasing power for 2005.²³ The U.S. per capita expenditure is \$6,401; the average for the other ten countries used by the *Jackpot Justice* authors for comparison of tort costs was \$2,816.²⁴ Using these figures, per capita health costs in the U.S. are 2.27 times the per capita health costs in the ten comparison countries, about the same factor by which the U.S. tort costs exceed the average of tort costs in the ten countries as computed by Towers Perrin (2.44). In other words, assuming that the Tillinghast Towers Perrin figures for the ten other countries are correct – itself a big assumption – the difference between the average for those 10 countries and the United States could be explained solely by the much higher cost of health care in the U.S., without any consideration of the differences in the operation of the tort system of the U.S. compared to the other countries.

D. Summary of Technical Analysis

For all the reasons that Judge Posner identified, plus the additional information we provided about the Tillinghast Towers Perrin reports and the Jackpot Justice author's dynamic cost numbers, the tort cost number in their report is pure fiction. The numbers rest on insurance industry reports, questionable assumptions, and highly dubious extrapolations from a small number of academic empirical studies. Moreover, the *Jackpot Justice* authors' labeling of some portion of tort costs as "excessive" rests on assumptions that cannot be supported by even a very simple analysis of their calculations.

III. The Missing Costs of Torts to Victims

The authors of *Jackpot Justice* eschew any effort to measure the cost of torts to victims in the United States. However, without considering those costs, one is ignoring the central question of whether the existing system actually is failing to do enough when it comes to compensating persons who are the victim of someone else's actions.²⁵ While we are not in a position to generate a comprehensive measure of these costs, we did consider what might go into such a measure. The result is what might best be described as a first approximation, or a very crude, estimate of the costs inflicted on tort victims. We describe below in detail what we did to arrive at an estimate. As we will repeat at the end of this section, **we do not view our estimate as something anyone should use; it is offered for illustrative purposes only.**

A good starting point, if one wants to estimate the cost of tort injuries to the victims, is a 1991 study by the RAND Corporation on compensation for nonfatal accidental injuries (excluding injuries due to medical treatment).²⁶ In their report from that study, the RAND researchers provide figures for what they label "direct costs" (medical costs) and earnings loss for each of three different types of accident settings: work, motor vehicle, and other. They note that their figures do not take into account losses associated with nonmarket activities (e.g., household tasks and the like) nor is there any consideration of noneconomic damages (pain and suffering). Of course many of the accidents do not involve torts. However, the RAND researchers asked whether the accident victims had considered filing a tort claim,²⁷ and we use the percentage considering a claim to adjust the gross figures in the RAND report. The original RAND figures are shown in Table 1 with a last line showing our estimate of the amount of loss, excluding nonmarket activities and pain and suffering, attributable to tort loss injuries.

	work	auto	other
Medical costs	\$31.5	\$24.9	\$41.5
Lost income/wages	\$51.7	\$12.1	\$14.2
% considered claiming	25%	54%	10%
Costs attributable to Tort	\$20.8	\$20.0	\$5.6

We next applied inflation adjusters to bring these figures up to 2006 dollars (the year used in *Jackpot Justice*). The medical cost index for 1988 was 138.6 and for 2006 336.2, giving a multiplier of 2.43. For income loss, we used Bureau of Labor Statistics wage data; the resulting multiplier is 1.79.²⁸ Finally, we

adjusted for population growth (1988 population = 244.5 million; 2006 population = 299.4 million). Using these procedures, we arrive at a figure of \$121.6 billion for the medical expense and lost wage components of the tort loss associated with nonfatal injuries other than medical malpractice, not counting the value of nonmarket activities.

What about nonmarket costs, or what might be labeled "lost household production?" A recent study of loss associated with medical injuries estimated the overall cost of lost household production as roughly equal to the loss of market wages.²⁹ We know of no reason that there should be a major difference in lost household production dependent on the source of the injury. Consequently, we had added an amount equal to the updated figure for lost wages based on the RAND data (\$37.4 billion) to represent nonmarket losses (other than pain and suffering). This results in a total loss for nonfatal tortious injuries other than medical injuries of \$158.9 billion.

Next, we need to add in the costs associated with medical injuries attributable to negligence. A conservative estimate is that there are a million incidents of medical negligence each year and that 100,000 of these result in death. Let us consider for now only the nonfatalities. Studdert *et al.* estimated that in Colorado and Utah the health care costs, lost wages, and lost household production associated with an estimated 4,007 "preventable adverse events" totaled \$308.3 million in 1996 dollars.³⁰ Their analysis included fatalities (8.8% of preventable adverse events) but excluded birth injuries.³¹ Unfortunately, Studdert *et al.* did not separate out the fatalities, and all we can do is guess at the proportion of the total costs came from that subset of cases. If we assume that half of the total loss was attributable to fatalities, we arrive at an average figure for non-fatalities of \$54,220, after adjusting to 2006 dollars. Applying this to the approximately 900,000 nonfatal incidents nationwide, the total of costs associated these injuries (which we take to exclude birth injuries) is \$48.8 billion.

Next we need to estimate the number of, and costs associated with, preventable birth injuries. The best study focused on birth injuries is that described by Sloan *et al.*³² Based on a review of closed claims, they focused on 613 birth injuries over a five year period. They estimated the average total economic loss as \$1.4 million per case, which when adjusted to 2006 dollars is \$2.3 million. How many birth injuries occurred nationally? If one makes the very conservative assumption that all preventable birth injuries lead to claims, and that the rate of preventable birth injuries in Florida can be generalized nationally, there would have been about 1,850 injuries in 2006 (given the number of births that year). The total cost under this assumption would be \$4.3 billion. If one makes the more realistic assumption that only a small fraction of such injuries lead to claims, say 25%, then the total cost would be \$13.2 billion.³³

Finally, we need to add an estimate of the tort losses associated with fatalities. This is difficult, and requires us to assign some economic value to the average fatality. However, we will be transparent, which will allow alternate estimates. The first question is the number of fatalities. We obtained from Center for Disease Control the number of deaths due to accidents (motor vehicle: 44,000, work: 2,500, and other: 50,000), and applied the same "claiming rate" percentages (see Table 1) to estimate the number of deaths due to torts. To this figure we added the estimated 100,000 fatalities resulting from medical negligence. This yielded a total of just under 130,000 deaths each year attributable to torts.

One way to assign a dollar value to a death would be to determine the sum of the medical costs incurred from the injury before death, lost wages, and lost household production. This is essentially what Studdert *et al* did in their medical injury study in Colorado and in Utah, although, as noted previously, they did not separate out fatality cases. If our assumption that half of the costs of non-birth injury medical

negligence comes from the fatality cases, the average fatality case in the Colorado-Utah study had a loss of about \$560,000. The method commonly used by economists is to impute a value to life by looking at the wage premium workers obtain as a function of the risk associated with various types of jobs. One economist who has written on this is W. Kip Viscusi (whom the authors of *Jackpot Justice* have looked to for figures for their analysis). Viscusi reports that the U.S. studies that have applied this method obtain estimates clustered in the range of \$4 million to \$10 million, with an average of about \$7 million.³⁴ Clearly, we have a wide range here, from about \$500,000 to \$4 million (using the lower end of the range reported by Viscusi), which yields estimates of the tort loss associated with fatalities ranging from \$65 billion to \$520 billion. For purposes of arriving at a total, we will use the figure of \$1 million per life, which provides a conservative estimate. If one prefers the high figure of \$4 million for loss of life, simply add \$390 billion to our total.

Combining our four figures, \$158.9 billion for the medical expense, lost wages, and lost household production for nonfatal accidents other than medical malpractice, \$48.8 billion for the medical expense and lost wage components of nonfatal medical negligence injuries other than birth injuries, \$13.2 billion for birth injuries, and \$130 billion for torts that resulted in fatalities, we arrive at a figure of \$350.9 billion (or, \$750 billion if one prefers the higher valuation for fatalities). Obviously we have made a number of debatable assumptions in reaching this figure. However, we have also not included anything noneconomic damages associated with nonfatal injuries.³⁵

We want to state again that we do not view this estimate as a reliable estimate of the cost of injuries and fatalities due to torts. We provide it simply to suggest that analysts seriously concerned about the costs associated with torts could have made some effort to consider the cost of torts from the victims' perspective.

IV. The Tort System as a Financial Transfer System: Medical Malpractice, Products Liability, and Punitive Damages.

Jackpot Justice refers to the tort system as a financial transfer system. In general terms we do not disagree, but it is a system that has demonstrable benefits for persons injured through negligence and for American taxpayers as well. It boils down to a public policy decision about who should bear the costs of negligence. *Jackpot Justice* takes aim at medical malpractice litigation as an example of the tort system gone awry so let us begin by considering some of the costs associated with medical negligence. We also address their two other main targets – products liability and punitive damages.

A. The Example of Medical Malpractice

Medical Negligence is Not Infrequent

The 1990 Harvard study of medical negligence examined hospital records of 31,000 patients and concluded that one out of every 100 patients admitted to hospital had an actionable legal claim based on medical negligence.³⁶ Significantly, seven of those ten persons suffered a permanent disability. Fourteen percent of the time the adverse event resulted in death and ten percent of the time the incident resulted in hospitalization for more than six months. Generally, the more serious the injury the more likely it was

caused by negligence.³⁷ Subsequent research involving Utah and Colorado found rates of negligent adverse events that were similar to the New York findings.³⁸

In 2000, The Institute of Medicine produced a report that relied on these studies and other data.³⁹ The report concluded that each year 98,000 persons die due to medical negligence and that many other patients sustain serious injuries. There are reasons to believe that this report may have underestimated the incidence of medical negligence because the studies it used were based solely on hospital records.⁴⁰ In 2004, Healthgrades, Inc., a company that rates hospitals on health care for insurance companies and health plans, concluded that the Institute of Medicine's figure of 98,000 deaths was too low and that a better estimate was 195,000 annual deaths.⁴¹ In short, there is no serious question that medical negligence not only occurs, but that it occurs at a substantial rate.

Injuries Due to Medical Negligence Have High Costs

As we described earlier, Professors Sloan and van Wert conducted systematic assessments of economic losses (medical costs, income losses, and other expenses) in Florida cases involving claims of medical negligence occurring as a result of birth-related incidents.⁴² Even though those researchers offered the caution that their assessment procedures probably underestimated losses, they found that severely injured children's economic losses were, on average, between \$1.4 and \$1.6 million in 1989 dollars. If adjusted for inflation using the consumer price index these figures in 2006 dollars translate roughly to \$2.3 million per injury. In the same study the losses of persons who survived an emergency room incident were estimated at \$1.3 million, or \$2.3 million in 2006 dollars. For persons who died in an emergency room incident the loss to their survivors was estimated at \$0.5 million, or roughly \$0.8 million in today's dollars.⁴³

Most Negligently Injured Patients Do Not Sue

The Harvard study of medical negligence found that one of every 100 patients admitted to hospital had an actionable legal claim based on medical negligence. Yet only about one in eight filed a claim.⁴⁴ Subsequent research replicated that finding. Research by Lori Andrews found that of 1,047 patients who experienced a medical error, only thirteen patients made a claim.⁴⁵ Sloan and Hsieh studied 220 childbirths in Florida that involved death or permanent injury to the infant and had the medical records reviewed by independent medical experts.⁴⁶ Only 23 of the 220 parents sought legal advice and these tended to be cases in which the child suffered very serious injuries and in which the reviewing doctors concluded that negligence was probably involved. Yet, not a single lawsuit was filed in any of the 220 cases.

There are many reasons that injured patients do not file lawsuits. Among the reasons are that they never learn that the bad outcome was due to negligence; they assume that the doctor was trying hard; and they cannot find a lawyer willing to take their case because it is too difficult or too expensive to litigate.⁴⁷

Who Pays for the Medical Malpractice Loss? A Hypothetical Example

Assume John Worker, age 35, is making \$40,000 per year in his construction job. He has a wife and two young children.⁴⁸ His total assets include \$10,000 in savings and \$15,000 equity in his home. Like millions of Americans he cannot afford health insurance. During medical treatment for a benign tumor, Mr. Worker incurred a serious injury due to medical negligence that required six months of hospitalization. Despite his eventual recovery, the injury prevents him from working for the rest of his life. He has partial

paralysis on right side of his body and chronic pain that is severe enough to frequently require strong painkillers. The uncontested economic losses (even without adjustments for inflation) are as follows:

a. Past medical bills (intensive care and rehabilitation):	\$300,000
b. Future medical bills resulting from injury at \$15,000/year for his life expectancy of 39 years to age 74:	\$585,000
c. Past income loss during year of recovery:	\$ 40,000
d. Future income loss to age 65 at \$40,000/year:	<u>\$1,200,000</u>
e. Total economic losses:	\$2,125,000⁴⁹

Because he has no health or other insurance, his state's Medicaid system will probably pick up the medical bills. Unless his wife gets a better job or relatives help out, the family may also have to rely on welfare.

And here is the transfer issue. Medicaid, Medicare and welfare programs are funded by American taxpayers. The cost of Mr. Worker's injury will be born by taxpayers, not by the party that was negligent. This is a transfer tax is totally ignored in the theorizing of the *Jackpot Justice* authors. Alternatively, however, Mr. Worker may file a lawsuit. If he is successful against the negligent healthcare provider, taxpayers will not be forced to bear the costs. Moreover, even if Medicaid pays for his medical bills while the lawsuit is in progress, Medicaid is required to file a lien against any settlement or award that results from the lawsuit in order to reimburse the taxpayers. In short, taxpayers benefit from the transfer effects of the tort system.

Pain and Suffering

Tort critics constantly denigrate pain and suffering payments with snide suggestions that such awards are unmerited. We have already drawn attention to the allegation in *Jackpot Justice*: "of every dollar paid by defendants with the claim that twenty-four cents of every tort dollar goes for "non-economic

At a Congressional hearing in 2003 a seventeen-year-old teenager, courageously testified about her psychological pain as a result of egregious medical malpractice when she was eight years old that has left her face permanently and horribly disfigured.¹ Among other side effects, she is subject to constant drooling. She described how other children made fun of her as she advanced through her teenage years. She had had one self-initiated date and it was a disaster. She told about her belief that she will never marry and have children and will have to concentrate on a career raising and training dogs because they do not discriminate on the basis of human appearances. Unfortunately, despite her apparent intelligence and warm personality and the unfairness of her condition, Heather was probably right. The audience, including the congressmen, was wiping tears as they listened to her testimony. If Heather lives to be 78 years old, an award of \$250,000—the limit for non-economic damages in many tort reform packages—would mean she would be compensated at the rate of \$3,571 per year or \$68.60 per week for her shattered life---not enough to buy a decent bag of groceries.

In North Carolina, a young mother of two children was rendered permanently blind.¹ In other cases patients lost sexual or reproductive functions, injuries that were very real but the losses could not be easily calculated like medical expenses or loss of income. In still other cases payments have been made through the tort system to orphaned infant children as a result of medical negligence that killed their mother.¹

payments, including punitive damages.” Put the punitive damages aside for now, because punitive damages are seldom given in medical malpractice cases,⁵⁰ and consider two responses to this assertion. The first is that American law has long recognized pain and suffering as a legitimate component of damages. The second is that most plaintiffs ultimately receive proportionately little or nothing for pain and suffering.

Medical malpractice settlements, whether they occur before trial or after a jury verdict, actually yield little beyond partial compensation for loss of income and medical expenses. In their study of birth and emergency room injury awards, Professor Sloan and his colleagues compared the plaintiffs’ economic losses to the amount actually received.⁵¹ On average, in cases that were settled prior to trial, plaintiffs received only 52 percent of their losses. Plaintiffs in cases that went to trial did better than plaintiffs in settled cases, ultimately receiving 22 percent more than their estimated economic losses.⁵² Patients with the most severe injuries were least likely to receive adequate compensation.⁵³ After conducting their detailed analyses Sloan and co-authors concluded that:

*few claimants received payments far above the mean for their stage of resolution categories. The fact that even plaintiffs who were successful at verdict received payments only moderately higher than economic loss contradicts the notion that courts make very excessive awards in medical malpractice cases.*⁵⁴

Summary on Medical Malpractice

Medical malpractice litigation serves as a vehicle for thinking about the costs of injuries and who should pay. To be sure, the tort system is not perfect. Many injured persons do not make claims and of necessity taxpayers bear the burden. Even when claims are filed, both sides bear substantial transaction costs. The problem is that *Jackpot Justice* does not even consider the enormous costs of medical negligence, let alone suggest an alternative system of compensation. Indeed, it is worth reiterating that, yes, the tort system is a wealth transfer system, but a competent theory should take into consideration costs and benefits; and clearly there are both benefits that accrue from the present system and enormous costs in terms of human lives and taxpayer dollars that need to be considered if it were drastically altered with no viable alternative system to replace it.

B. The Products Liability Example

Products liability is another central theme in *Jackpot Justice*. The claim is that fear of litigation stifles innovation, and lowers America’s competitive edge against manufacturers from foreign countries. The U.S. Chamber of Commerce and the American Tort Reform Association frequently report stories about “judicial hellholes” and stories about a tort system run amuck. One story on the internet and elsewhere tells of a man who purportedly injured himself while using his lawnmower as a hedge clipper, and then won \$500,000 in a lawsuit against the lawnmower company. *U.S. News and World Report* told of a trial involving a woman who threw a soft drink at her boyfriend in a restaurant, slipped on the wet floor and then won \$100,000 in a lawsuit against the restaurant. *Forbes*, *The New York Times*, and the *Los Angeles Times* have all carried the story about a woman who claimed to have lost her psychic powers after a C.A.T. scan and was awarded millions of dollars. The problem is that these stories are either total fabrications or great distortions of the facts of the lawsuit.⁵⁵

The Actual Frequency of Product Liability Awards

The best data on product liability trials comes from the Civil Justice Surveys of the U.S. Bureau of Justice Statistics. In 2001, a survey representative of the 75 largest counties in the United States uncovered the fact that there were a grand total of 144 product liability trials, 31 of which were about asbestos.⁵⁶

About 92 percent of product liability trials were jury trials. Plaintiffs prevailed over defendants in 45 percent of the jury trials and 50 percent of trials that were decided by judge alone. In asbestos trials, the median award was \$1,650,000, but it must be remembered that in asbestos cases there are often multiple plaintiffs who split the award. In other cases, which also sometimes involve more than one plaintiff, the median award was \$311,000. Often the injuries suffered by plaintiffs in product liability trials are life crippling or death. Furthermore, what is striking given the complaints about punitive damages in these cases is the fact that in 2001 punitive damages were awarded in only three product liability cases in the Bureau of Justice Statistic's sample of state courts, and two of those were in trials involving asbestos.

The Bureau of Justice Statistics also gathered data on trials in federal courts nationwide for the period 2002-2003.⁵⁷ There were 203 product liability trials in these federal courts, including two trials involving airplanes, five involving marine products, 27 involving motor vehicles and one involving asbestos. Plaintiffs won only one third of the trials. The median estimated award in all cases was \$350,000. Furthermore, in some of these cases there were multiple plaintiffs involved in the lawsuit, a factor bearing on how much each individual plaintiff received from the total award.

A large percentage of the costs in *Jackpot Justice's* table of tort costs are attributable to products liability. Claims are often made that the numbers of product liability claims are increasing. The court statistics contradict these claims.⁵⁸ The data about numbers and outcomes in the courts cover the period from 1990 through 2003. First consider asbestos trials. In 1990 there were 87 trials and plaintiffs were awarded damages in 38 of them. The year 1991 was the high point of asbestos trials. There were 271 trials and plaintiffs were awarded damages in 228 instances. The following year there were only 29 trials and the numbers dropped to single digits after that. In 2002 and 2003 there were no asbestos trials in federal courts in the United States.

But what about non-asbestos product liability trials? In the federal courts in 1990 there were 279 trials but that number has steadily dropped so that in 2000 there were 100 trials, 2001 saw 79 trials, 2002 saw 107 trials and in 2003 there were only 87 trials. Across the period from 1990 through 2003 plaintiffs won approximately only one case in three.

In short, reliable data show that product liability trials are much less frequent than claimed by advocates of tort reform and implied in *Jackpot Justice*. Also, the size of awards is much more modest than would be expected by the rhetoric against the tort system. The data also suggest that punitive damage awards in particular are infrequent. But let us examine them in more detail.

C. The Punitive Damages Example

Punitive damages awarded by juries in particular are a central theme in claims about product liability. Many stories about punitive damages have become urban legends passed around in printed form and on the internet.⁵⁹ The most famous case in recent years is the McDonald's coffee spill case in which a jury awarded the plaintiff, Stella Liebeck, several million dollars after she spilled hot coffee on herself at a

McDonald's drive through. The Liebeck case is a true case, but many people are unaware of the actual facts of the case that put the jury award in a different light. Professors William Halton and Michael McCann have reported the complete story.⁶⁰

In 1992 79-year-old Stella Liebeck ordered a cup of coffee at a McDonald's drive-through in Albuquerque, New Mexico. The coffee spilled into her lap, causing third degree burns to her thighs, buttocks, genitals and groin areas that left permanent scars. Mrs. Liebeck, a conservative Republican, sent a letter of grievance to McDonald's corporate office acknowledging that she had spilled the coffee, but claimed there was no warning about the danger of the product. She asked McDonald's to re-evaluate its coffee temperature and to check the coffee machine to determine if it was faulty, and pay her approximately \$20,000 in medical expenses. In reply McDonald's offered Mrs. Liebeck \$800.00.

Most coffee in restaurants and home coffee makers is served at 160 degrees. McDonald's coffee was served at 180 to 190 degrees...

Only then did Mrs. Liebeck consult a lawyer. The lawyer asked McDonald's for \$90,000 for her medical bills plus pain and suffering. McDonald's refused and made no counter-offer. The case went before a mediator who recommended a settlement of \$225,000. Again McDonald's refused to negotiate a settlement.

The case went to trial. Two medical experts testified about the effects of burns, including the fact that 190 degree coffee can cause third degree burns that penetrate through the skin into the underlying fat, muscle and bone. Her lawyer charged that McDonald's failed to comply with industry standards. Most coffee in restaurants and home coffee makers is served at 160 degrees. McDonald's coffee was served at 180 to 190 degrees. Other evidence produced at the trial showed that most customers were unaware of the

McDonald's had made a conscious decision to not warn its customers.

hazards of such hot coffee. McDonald's had received over 700 complaints about its coffee and had paid out over \$750,000 in previous claims. Nevertheless McDonalds had never once consulted a burn specialist. Finally, a witness for McDonald's admitted that he had seen photos of previous coffee burns from claimants and that McDonald's had made a conscious decision to not warn its customers. He dismissed the dangers as being statistically irrelevant and testified that McDonald's had no current plan to change its coffee standards.

The jury found for Mrs. Liebeck and awarded her \$200,000 for compensatory damages. However, it also found Mrs. Liebeck 20 percent responsible, which reduced the compensatory damages to \$160,000. In arguing for punitive damages, Mrs. Liebeck's lawyer noted that McDonald's sold over a billion cups of coffee each year and generated daily revenues of \$1.35 million. He argued that two days worth of coffee revenues was a sufficient and reasonable punitive award. The jury agreed and awarded \$2.7 million.

Following the verdict the trial judge reviewed the evidence and reduced the punitive award to \$480,000. McDonald's appealed but eventually the case settled for an undisclosed sum. McDonald's coffee is now sold at temperatures similar to other restaurants. Despite the abuse heaped on Mrs. Liebeck's case, McDonald's customers are safer as a result today.

Punitive Damage Awards in Perspective

Over the past thirty years respected research organizations, the federal government, and independent academic researchers have conducted a large number of studies examining jury awards in punitive damages cases. In a recent case before the U.S. Supreme Court, twenty-four scholars who had worked in this field summarized the findings. The research has found that

- Juries award punitive damages infrequently;
- Punitive damages awards have not increased in frequency;
- When adjustments are made for inflation the magnitude of such awards has not increased over the past several decades;
- Most awards are modest in size, in comparison to compensatory awards;
- The overwhelming majority of awards show a rational proportionality between actual and potential harm caused by defendants;
- The same proportionality relationship between compensatory and punitive damages exists in cases involving large punitive awards;
- Juries pay particular attention to the reprehensibility of defendants' conduct;
- Jury decision-making processes in punitive damages cases are similar to the decision-making processes used by judges in bench trials of such cases;
- The amounts of punitive awards rendered by juries and judges are similar when adjustments are made for case types;
- No evidence shows juries are biased against large businesses;
- Judges effectively exercise supervision over punitive damages in post-verdict motions or on appeal; and
- In other instances post-verdict settlements reduce or abandon punitive awards without judicial intervention.⁶¹

Using data collected by the U.S. Bureau of Justice and the National Center for State Courts Professor Eisenberg and his collaborators concluded as follows:

[T]his article shows a strong and statistically significant correlation between compensatory and punitive damages. . . . In addition we find no evidence that punitive damages awards are more likely when individuals sue businesses than when individuals sue individuals. With respect to award frequency, juries rarely award punitive damages and appear to be especially reluctant to do so in the areas of law that have captured the most attention, products liability and medical malpractice. Punitive damages are most frequently awarded in business/contract cases and intentional tort cases.⁶²

The Purposes of and Legislative Support for Punitive Damages

Punitive damages can be traced back many centuries in English law and were adopted very early into American law. At least 40 states specifically allow punitive damages.⁶³ The purpose of punitive damages is to protect society from violations of public safety or public values. They are a sanction for behavior that is judged, wanton, reckless, or in disregard for the safety and well being of others. Some states refer to them as “exemplary damages” or “vindictive damages.” In most states punitive damages may not be given in medical malpractice cases unless the doctor has knowingly engaged in reprehensible behavior, such as

sexual assault on a patient or deliberate alteration of medical records. Moreover, while the plaintiff need only prove his or her case on “the preponderance of evidence,” to receive compensatory damages, punitive damages typically require a much higher standard of proof, namely “clear and convincing evidence.”⁶⁴

Although in recent years various state legislatures have voted to put restrictions on the conditions under which punitive damages may be awarded, they still are regarded as having an important role to play in response to egregious behavior. The U.S. Supreme Court, while expressing concerns about the amounts awarded and what juries may consider in rendering them, has acknowledged that punitive damages further legitimate societal goals of retribution and deterrence.⁶⁵

The purpose of punitive damages is to protect society from violations of public safety or public values.

Business-Against-Business Disputes and Punitive Damages

In an important book on the American tort system, Professors Thomas Koenig and Michael Rustad pointed out that the real action involving punitive damage lawsuits involves businesses suing other businesses.⁶⁶ They occur frequently in trademark infringement cases and contract disputes; and on the surface many of them might be viewed as frivolous. Koenig and Rustad gave some examples:

American Express settled a punitive damages case against Chase Manhattan Corporation over Chase’s print and mail advertisements, which praised its award earned from J.D. Power and Associates for its credit cards;

Federal Express filed a lawsuit seeking treble damages over the U.S. Post Office’s “What’s Your Priority?” Advertising Campaign;

The maker of Scott paper towels sued Proctor and Gamble over its claim that Bounty paper towels were the “quicker –picker- upper.”

The frequency of business-to-business lawsuits involving punitive damages clearly undercuts the attacks by businesses against punitive damages. Punitive damages can only be given if the defendant’s behavior involves fraud or some other egregious behavior, and such claims can only be litigated under the tort system. These business disputes often involve claims for very large damages. Not only are large sums involved in the claims, they also entail batteries of lawyers on both sides and therefore huge litigation costs. It is the height of hypocrisy to claim that punitive damages are ruining the country when an injured person sues for punitive damages while ignoring the fact that large corporations regularly sue one another and regularly ask for punitive damages.

What do these business punitive damages cases look like? Let's consider a case that was appealed to the U.S. Supreme Court. Here in a nutshell are the facts about TXO Production Corp v. Alliance Resources Corp.¹ TXO, a large corporation, entered into an agreement with Alliance, a much smaller corporation, that involved transfer of oil and gas development rights to Alliance. TXO subsequently made a claim against those rights by advancing a worthless claim in an effort to renegotiate its royalty agreement with Alliance and obtain substantial royalties that were now due to Alliance. The jury concluded—and the U.S. Supreme Court agreed—that “TXO set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance.” The jury awarded Alliance \$19,000 in compensatory damages and \$10 million in punitive damages. The case was appealed all the way to the U.S. Supreme Court, which, after careful review, concluded that the award was justified.

*These business-against-business cases do not stand alone. Consider a partial sample of the so-called “blockbuster awards” discussed by Joni Hersch and Kip Viscusi in an article on punitive damages: *Timely Adventures v. Costal Mart, Inc.* (2000) for \$100 million; *Tennessee Gas Pipeline v. KCS Resources, Inc.* (1996) for \$ 114 million; *Micro/Vest v. Computerland* (1985) for \$125 million; *City of Hope National Medical Center v. Genentech* (2002) for \$200 million; *Steel Software Systems Corp. v. First Union* (2002) for \$200 million; *Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp.* (2000) for \$337.5 million; *IGEN International Inc v. Roche Diagnostics GmbH* (2002) for \$400 million.*

These business-against-business cases involve allegations of large financial losses due to fraud or related reprehensible behavior. The most central point to be taken from these examples is that businesses do not seem to have reservations about asking for punitive damages when their financial interests are at stake. We can further ask, if punitive damages are acceptable for business disputes should they not be acceptable when individuals, or in many instances groups of individuals who have been harmed, sue businesses over products that have harmed them?

Post-verdict Outcomes

The McDonald's case described above points to another often overlooked fact about punitive damages: the jury verdict is not the final word. The trial judge reduced the punitive award from \$2.7 million to \$480,000. The U.S. Supreme Court has told state courts that judges must review punitive award verdicts for fairness. Either trial judges or appellate courts review all the evidence to determine fairness and the awards are often reduced.

W. Kip Viscusi, who is cited as an important authority in *Jackpot Justice*, concluded in his book, *Reforming Products Liability*, that plaintiffs in product liability cases received only 29 percent of the original award. This is because “[c]ourts often reduce punitive damages on appeal, and defendants may negotiate a reduction . . . in return for prompt payment of the damages amount.”⁶⁷ Two other researchers, Karpoff & Lott, studied over 2000 cases involving punitive damages and found that the average post-verdict payment was never more than 17 percent of the award.⁶⁸

Summary

This discussion of products liability and punitive damages, like the medical malpractice issue, raises serious questions about the general, undocumented claims that appeal to widely available myths about the tort system. Again it is important to stress that there are substantial transactions costs in the tort system, but they occur on both sides. What should be clear is that even businesses seem to believe that there are benefits that accrue from punitive damages litigation, since there are so many business-against-business disputes represented among the jury awards.

Background to This Report

The present project was begun after one of the authors read *Jackpot Justice* and called it to the attention of the other two authors. We then contacted the American Association for Justice to ask if they were interested in sponsoring a report that critiqued *Jackpot Justice*. They were. The three authors received remuneration for their efforts.

Because our critique of *Jackpot Justice* draws attention to heavy reliance on data that is proprietary and not peer reviewed, we went an extra step and arranged to have an earlier draft of our report critiqued by several reviewers under a procedure whereby they would remain anonymous to us (although those reviewers did know our identities). We are grateful for their constructive comments on that earlier draft.

Finally, while our biographical summaries report our academic affiliations, this report and its conclusions are our own and do not necessarily reflect the positions of our respective institutions.

Summary Biographies of the Authors

Tom Baker is Professor of Law at the University of Pennsylvania Law School. His recent book, *The Medical Malpractice Myth* (U. Chicago P. 2005), pulls together the empirical research on medical malpractice and liability, examines the misperceptions behind the tort reform movement, and proposes an evidence-based approach to medical liability reform. He is the author of *Insurance Law and Policy: Cases, Materials and Problems* (Aspen 2003; 2nd ed. 2008) and many articles and book chapters relating to insurance, risk, and responsibility. He is the contributing editor of *Embracing Risk: The Changing Culture of Insurance and Responsibility* (U. Chicago P. 2002), which helped to establish the emerging sociology of risk and insurance. He has conducted empirical research on tort litigation, securities class actions, and insurance claiming following natural disaster. He has taught insurance and related courses at Columbia Law School, Yale Law School, the University of Miami School of Law, Vanderbilt University, and the Faculty of Law at the Hebrew University of Jerusalem, and the University of Connecticut. A member of the Scientific Committee of the Geneva Association for Risk and Insurance Studies, he regularly lectures on insurance in academic and professional settings. He is the founder and facilitator of the New England Insurance and Society Study Group, an interdisciplinary group of scholars engaged in insurance-related research. Before entering law teaching, Professor Baker clerked for Hon. Juan R. Torruella (1st Cir.), practiced with the firm of Covington & Burling, and served as Associate Counsel in the Office of Independent Counsel (Walsh) investigating Iran-Contra. He received his B.A. and J.D. from Harvard University, *magna cum laude*.

Herbert Kritzer is Professor of Law, William Mitchell College of Law, Saint Paul, Minnesota, Adjunct Professor of Political Science, University of Minnesota, and Professor of Political Science and Law *emeritus*, University of Wisconsin-Madison. He has conducted extensive empirical research on the American civil justice system, as well as research on other common law systems. His most recent book is *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford University Press, 2004). In addition, he is the author of *The Justice Broker* (Oxford University Press, 1990), *Let's Make*

a Deal (University of Wisconsin Press, 1991), and *Legal Advocates: Lawyers and Nonlawyers at Work* (University of Michigan Press, 1998), and is coauthor of *Courts, Law and Politics in Comparative Perspective* (Yale University Press, 1996); he is the editor of the multi-volume *Legal Systems of the World* (ABC-CLIO, 2002), and coeditor of *In Litigation: Do the Haves Still Come Out Ahead* (Stanford University Press, 2003). He has published extensively in professional journals, including leading journals in Political Science, interdisciplinary legal studies, and major law reviews. Over the last 20 years he has conducted research on the American civil justice system dealing with contingency fee legal practice, the impact of Rule 11 sanctions, alternative forms of advocacy and representation, and the adult guardianship process in Wisconsin. Research with a cross-national element has included writing on the English Rule, propensity to sue, the frequency of criminal and civil trials in England, and politics in the English judicial system. Other areas of recent work have included Supreme Court decision-making, public attitudes toward the courts, and changing patterns in state supreme court dockets. Professor Kritzer has served as a consultant and analyst for the Wisconsin Supreme Court's Office of Court Operations for a State Justice Institute funded "consumer perspective" survey of users of the Wisconsin Circuit Courts, as a consultant to the State Bar of Wisconsin on its study of Wisconsin jury verdicts, its survey of *pro bono* activities, and its current legal needs study, as a consultant to the Alaska Judicial Council for its study of fee shifting practices in Alaska, and as a consultant for the World Bank for docket profiling studies in Latin America. Professor Kritzer was a member of the Wisconsin Equal Justice Task Force, which examined issues of gender equity in the Wisconsin court system. His current research includes changing patterns in judicial elections (a first article appeared in *DePaul Law Review*), insurance defense legal practice (recently published in *Vanderbilt Law Review*), and the impact of the *Daubert* decision (recently published in the *Journal of Empirical Legal Studies*), and a study of local television news coverage of the courts and the legal profession. Professor Kritzer recently completed a term as editor of *Law & Society Review*, the leading journal in interdisciplinary legal studies. In July 2007, Professor Kritzer joined the faculty of the William Mitchell College of Law after having taught for 30 years at the University of Wisconsin-Madison.

Neil Vidmar is Russell M. Robinson II Professor of Law at Duke Law School and holds a secondary appointment in the Psychology Department at Duke. He received his Ph.D. in social psychology from the University of Illinois in 1967 and joined the Psychology Department at the University of Western Ontario in Canada in that year. In 1973 -1974 he was a Russell Sage Resident at Yale Law School and in 1974-1975 was a resident fellow at Battelle Seattle Research Institute. Vidmar remained at Western Ontario until his appointment at Duke Law School in 1987. His most recent book is *American Juries: The Verdict* (Prometheus Books 2007), co-authored with Valerie Hans. Vidmar is also co-author with Valerie Hans of *Judging the Jury* (1986), author of *Medical Malpractice and the American Jury* (1995) and editor/author of *World Jury Systems* (2000). Vidmar has written over 100 articles and chapters that include the following subjects: the tort system; the jury system; medical malpractice litigation, small claims courts; the Ontario Business Practices Act; punitive damages; independent para-legals; rights consciousness; dispute resolution; procedural justice; privacy; eyewitness reliability; death penalty attitudes; and battered woman syndrome. He was co-investigator of a study of civil juries in an Arizona Superior Court (supported by the National Science Foundation and the State Justice Institute) that videotaped the actual deliberations of 50 civil juries. Vidmar was lead drafter of amicus briefs to the U.S. Supreme Court in *Kumho Tire v. Carmichael* (1999) (expert evidence), *State Farm v. Campbell* (2003)(punitive damages) *Ledbetter v. Connecticut* (2006) (eyewitness identification) and *Philip Morris v. Williams* (2007) (punitive damages). He has lectured on judging scientific evidence for judicial education programs in the United States, Canada, England, Australia and New Zealand.

ENDNOTES

¹ The Pacific Research Institute for Public Policy, or PRI, is a non-profit think tank founded in 1979. Its stated purpose is “to champion freedom, opportunity and personal responsibility for all individuals by advancing free market policy solutions” Its activities include publications, events, media commentary, legislative testimony and community outreach. See www.pacificresearch.org

² *Jackpot Justice* at www.legalreforminthenews.com/2007PDFS/PRI_2007JackpotJusticeFinal.pdf (last visited February 17, 2008).

³ Many scientific and medical journals today properly require authors to reveal the sources of their funding. It is not clear which persons or organizations underwrote *Jackpot Justice* but, as critics, the present authors do want to reveal that, although they are independent academics associated with important institutions of learning and each has published a substantial amount of research bearing on the American tort system, this critique of *Jackpot Justice* was partially underwritten by funding from the American Association for Justice.

⁴ See *Jackpot Justice*, *supra* note 1 at 1.

⁵ *Id.*, at 2.

⁶ As we will explain, the starting point for *Jackpot Justice* is a similarly flawed analysis by Tillinghast-Towers Perrin, a firm closely tied to the insurance industry and other groups hostile to civil justice. See Towers Perrin Tillinghast, U.S. Tort Costs and Cross-Border Perspectives: 2005 Update at 11 (reporting that their report “does not attempt to quantify the benefits of the tort system,” while acknowledging that the benefits of the tort system “...include a systematic resolution of disputes, thereby reducing conflict, possibly including violence” and that “the tort system may act as a deterrent to unsafe practices and products” with the result that “compensation for pain and suffering is seen as beneficial to society as a whole.”) Available at: www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005_Tort.pdf (last visited February 17, 2008).

⁷ See *Jackpot Justice*, *supra* note 1 at 1-2.

⁸ *Id.*, at 5

⁹ *Id.*, at note 3, page 44.

¹⁰ See Richard Posner, “Is the Tort System Costing the United States \$865 Billion a Year?” available at http://www.becker-posner-blog.com/archives/2007/04/is_the_tort_sys.html (last visited February 17, 2008).

¹¹ See *id.*

¹² See Tom Baker, “Medical Malpractice and the Insurance Underwriting Cycle,” 54 DePaul L. Rev. 393 (2005).

¹³ The Towers Perrin tort cost updates include tort costs estimates for each year since 1950, and Towers Perrin has been releasing these updates on a periodic basis since 1985. As explained in the body of our response, these numbers wax and wane with an insurance business cycle called the underwriting cycle. The authors of *Jackpot Justice* based their calculations on the very highest inflation adjusted number in all of the Towers Perrin reports. They took the 2004 number -- \$260 billion -- and used the consumer price index to adjust it to a 2006 dollar amount of \$279 billion. See *Jackpot Justice*, *supra* note 1 at 15. Then, using Towers Perrin’s estimate that plaintiffs receive only 46% of this amount, they calculated the total tort transfer payments to be \$128 billion, which is the number that they use to calculate all of the static costs in their table. The most recent Towers Perrin tort cost update shows that, as we predicted, the “costs” of the tort system are declining. Why? Because the insurance underwriting cycle is now in the price-cutting phase that always follows the crisis phase. As a result, the most recent Towers Perrin report states that the “costs” of the tort system in 2006 were only \$247 billion. See Towers Perrin, 2007 Update on U.S. Tort Cost Trends.

Available at:

http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2007/200712/tort_2007_1242007.pdf (last visited February 17, 2008). This is \$32 billion – more than ten percent – less than the \$279 billion number that the *Jackpot Justice* authors used

¹⁴ Tillinghast Towers Perrin, *supra* note 6 at 17-20.

¹⁵ See Posner, *supra* note 10.

¹⁶ Price Waterhouse Coopers, *The Factors Driving Health Care Costs* (2006). Available at: <http://www.pwc.com/extweb/pwcpublications.nsf/docid/BB82984D3A7DF2A485257267003C98BC> (last visited February 17, 2008).

¹⁷ See Daniel Kessler and Mark McClellan, "Malpractice Law and Health Care Reform: Optimal Liability Policy in an Era of Managed Care," 84 *J. Public Health Economics* 175 (2002).

¹⁸ The research on defensive medicine is discussed at length in Chapter 6 of Tom Baker, *The Medical Malpractice Myth* (U. Chicago P. 2005).

¹⁹ Manufacturing figures are for 2005, and are from http://www.nam.org/s_nam/bin.asp?CID=202325&DID=233605&DOC=FILE.PDF (last visited February 17, 2008).

²⁰ While Viscusi and Moore report that 11 industries fell below their threshold, the *Jackpot Justice* authors include 12 industries in their analysis, for reasons that are not clear from the report. See W. Kip Viscusi and Michael J. Moore, "Products Liability, Research and Development, and Innovation," 101 *J. Political Economy* 161 (1993). See *Jackpot Justice*, *supra* note 1 at note 36.

²¹ See the *Jackpot Justice* authors' response to Judge Posner, *supra* note 1, available at http://liberty.pacificresearch.org/blog/id.70/blog_detail.asp (last visited February 17, 2008).

²² It is worth noting that the most recent Towers Perrin update reports that U.S. tort costs have declined by more than ten percent since 2002 to 1.87% of GDP. See Towers Perrin, *supra* note 13. We do not regard this new number as any more reliable than the old one, but it does illustrate how the Towers Perrin numbers wax and wane with the underwriting cycle.

²³ The data were obtained from <http://www.oecd.org/dataoecd/46/36/38979632.xls> (last visited February 17, 2008).

²⁴ The OECD data which we used did not show a 2005 figure for Japan; it did show a figure of \$2, 358 for 2004, which we inflated to \$2,450 for our calculations.

²⁵ Richard L. Abel, "The Real Tort Crisis -- Too Few Claims," 48 *Ohio State L. J.* 443 (1987).

²⁶ Deborah Hensler *et al.*, *Compensation for Accidental Injury in the United States* at 103, 123 (1991).

²⁷ The percent considering claiming refers only to those considering claiming under tort; it does not include claims under workers' compensation. See *id.* at 109.

²⁸ Specifically, we took the average hourly hearings in 1982 dollars for "total private" from the Bureau of Labor Statistics for 1988 (\$7.82) and 2006 (\$8.24), converted those figures to 1988 dollars (\$9.59) and 2006 dollars (\$17.21) using the BLS "inflation calculator", and took the ratio (17.21/9.58) to get our multiplier of 1.79.

²⁹ David M. Studdert, Troyen A. Brennan, and Eric J. Thomas, "Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado," 33 *Indiana L. Rev.* 1643, 1684 (2000). Actually, Studdert *et al.*, find that the lost household production associated with "preventable adverse events" was 135% of lost wages; moreover, they used a very conservative figure of \$20 per day, as the value of lost household production. Consequently, our estimate is probably a bit low.

³⁰ *Id.*, at 1659 and 1670.

³¹ Eric Thomas *et al.*, "Costs of Medical Injuries in Utah and Colorado," 36 *Inquiry* 255, 256 (1999).

³² Sloan, Frank A., Penny B. Githens, Ellen Wright Clayton, Gerald B. Hickson, Douglas A. Gentile, and David F. Partlett, *Suing for Medical Malpractice*. (U. Chicago P. 1993).

³³ Generally something fewer than 10% of preventable medical injuries result in claims. While one might expect the percentage to be close to 100% for major birth injuries, Sloan and Hsieh examined a sample of 220 adverse birth outcomes, some of which were attributable to negligence, and found that not one of them led to a claim being filed. See Frank A. Sloan and Chee Ruey Hsieh (1995) "Injury, Liability, and the Decision to File a Medical Malpractice Claim." 29 *Law & Society Rev.* 413, 418.

³⁴ W. Kip Viscusi, "The Value of Life," *New Palgrave Dictionary of Economics and the Law*, 2nd Edition Available at SSRN: <http://ssrn.com/abstract=827205>; see also Michael J. Moore and W. Kip Viscusi (1990) *Compensation Mechanisms for Job Risks: Wages, Workers' Compensation, and Product Liability* (Princeton U. P.), pp. 13-15, 69-81.

³⁵ If we assume that the pain and suffering components of the non-fatal accidents is equal to the medical expense and lost wages, we would arrive at a total figure of around half a trillion dollars (\$500 billion).

³⁶ See Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation and Patient Compensation in New York* (1990). See also Paul C. Weiler et al., *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* (1993). This and other research on the incidence of medical malpractice is collected in Chapter 2 of Baker, *The Medical Malpractice Myth*, *supra* note 18.

³⁷ Harvard Medical Practice Study, *supra* note 37 at 44, tbl. 3.2.

³⁸ See Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 *Medical Care* 261, 261 (2000).

³⁹ See Institute of Medicine, *To Err Is Human: Building a Safer Health Care System* (Linda Kohn et al. eds. 2000), http://books.nap.edu/catalog/9728.html?onpi_newsdoc112999; Lucian L. Leape, "Institute of Medicine Medical Error Figures Are Not Exaggerated," 284 *J. of the Am. Medical Assn.* 95 (2000)

⁴⁰ For example, Lori Andrews conducted a study in a large Chicago area hospital, and studied actual incidence of negligent events in hospital wards. Andrews discovered that many injuries were not recorded on the records as required, especially when the main person responsible for the error was a senior physician. See Lori Andrews "Studying Medical Error in SITU: Implications for Malpractice Law and Policy," 54 *DePaul L. Rev.* 357 (2005). Other research is consistent with the Andrews's findings. For example, in one study Dr. Thomas Julian had a panel of obstetricians review obstetric malpractice claims. He concluded, "common obstetrical risks were often not recognized or not recorded in medical records." See Thomas M. Julian et al., "Investigation of Obstetric Malpractice Closed Claims: Profile of Event," 2 *Am. J. Perinatology* 320 (1985).

⁴¹ www.healthgrades.com/media/english/pdf/HG_Patient_Safety_Study_Final.pdf (last visited February 17, 2008). The Healthgrades report estimated that there were 1.14 million "patient safety incidents" among thirty-seven million hospitalizations. Healthcare further concluded that "[o]f the total 323,993 deaths among Medicare patients in those years who developed one or more patient-safety incidents, 263,864, or 81 percent, of these deaths were directly attributable to the incidents" and that "[o]ne in every four Medicare patients who were hospitalized from 2000 to 2002 and experienced a patient-safety incident died."

⁴² Frank A. Sloan & Stephen S. van Wert, "Cost of Injuries," in Frank A. Sloan et al., *Suing for Medical Malpractice* 123, 139-40 (U. Chicago P. 1993).

⁴³ It is important to note that there was considerable variability in these estimated averages: some patients had much higher economic losses and, conversely, others had lesser economic losses. Sloan and van Wert cautioned that a major share of past losses was covered by collateral sources, such as private health insurance, or taxpayer-supported sources such as Medicare. However, even if future medical expenses, including nursing care, are covered by these other sources, loss of income and other expenses, such as care

given by family members resulting in diminished income from those family members, will not be covered. Sloan and van Wert's estimates, moreover, did not consider non-economic losses, such as pain and suffering, disfigurement, or loss of enjoyment of life's amenities. *Id.*

⁴⁴ See Russell A. Localio et al, "Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Malpractice Study," 325 *New England J. of Med.* 245 (1991). Earlier research in California by Patricia Danzon concluded that 1 in 10 injured patients filed a claim. See Patricia Danzon, *Medical Malpractice: Theory, Evidence and Public Policy* (Harvard U. P. 1985).

⁴⁵ See Andrews, *supra* note 40.

⁴⁶ Frank Sloan and C. Hsieh, "Variability in Medical Malpractice Payments: Is the Compensation Fair?" 24 *Law & Society Rev.* 601 (1990).

⁴⁷ Frank Sloan and Chee Ruey Hsieh, "Injury, Liability, and the Decision to File a Medical Malpractice Claim," 29 *Law & Society Review* 413 (1995); Herbert Kritzer, *Risks Reputations and Rewards: Contingent Fee Legal Practice in the United States* at 289 (Stanford U. P. 2004); Neil Vidmar, "Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingent Fee System, Juries and Social Policy," 38 *Loyola of Los Angeles L. Rev.* 1217, 1228 (2005).

⁴⁸ This example is elaborated in greater detail in Vidmar, *supra* note 48.

⁴⁹ In order to simplify the presentation, we have neither adjusted the damages upward to reflect inflation nor reduced the total to present value.

⁵⁰ The Bureau of Justice Statistics study found that in 2001 punitive damages were awarded in four percent of cases. See Thomas H. Cohen, Bureau of Justice Statistics, No. NCJ 206240, *Civil Justice Survey of State Courts, 2001: Tort Trials and Verdicts in Large Counties, 2001* 9 (2004). Moreover, these exceptional cases involve gross malfeasance, such as sexual assaults on patients. See Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law* at 127-128 and 140-145 (2001).

⁵¹ Frank Sloan *et al.*, *Suing for Medical Malpractice* at Chapter 9 (1993).

⁵² *Id.*

⁵³ See Sloan and Hsieh, *supra* note 46.

⁵⁴ Sloan *et al.* *supra* note 55 at 195.

⁵⁵ See Jonathan Turley, "Legal Myths: Hardly the Whole Truth," *USA Today*, January 30, 2005 at http://www.usatoday.com/news/opinion/2005-01-30-tort-reform_x.htm (last visited February 17, 2008); Stephanie Mencimer, "The Fake Crisis over Lawsuits: Who's Paying to Keep the Myths Alive" at <http://www.aliciapatterson.org/APF2102/Mencimer/Mencimer.html> (last visited February 17, 2008).

⁵⁶ U.S. Department of Justice, Bureau of Justice Statistics, *Civil Justice Surveys of State Courts, 2001* (November 2004 NCJ 206240. The survey actually uncovered 14 additional cases for which the cause of action was unknown. Very possibly these were cases like food poisoning in restaurants because these are usually classified by courts as product liability cases—restaurant food is a product.

⁵⁷ U.S. Department of Justice, Bureau of Justice Statistics, *Federal Tort Trials and Verdicts, 2002-2003*, August 2005, NCJ 208713.

⁵⁸ *Id.* at 10.

⁵⁹ See, e.g. Myron Levin, "Tall tales of outrageous jury awards have helped bolster business-led campaigns to overhaul the civil justice system," *Los Angeles Times*, August 14, 2005, C1 (available in Lexis-Nexis major newspapers file).

⁶⁰ William Halton and Michael McCann, *Distorting the Law: Politics, Media and the Litigation Crisis* at 183-226 (U. Chicago P. 2004).

⁶¹ See Brief for Neil Vidmar et al. As Amicus Curiae Supporting Respondents, *Phillip Morris v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256).

⁶² Theodore Eisenberg *et al.*, "The Predictability of Punitive Damages," 26 *J. of Legal Studies* 623 (1997)

⁶³ Michael Rustad, “The Closing of Punitive Damages’ Iron Cage,” 38 Loyola Los Angeles Law Review 1297 (2005).

⁶⁴ *Id.* at 1324.

⁶⁵ See Phillip Morris v. Williams, 127 S. Ct. 1057, (2007); State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996).

⁶⁶ Koenig and Rustad, *supra* note 50 at 78-80.

⁶⁷ W. Kip Viscusi, Reforming Products Liability at 94 (Harvard U. P. 1991). A subsequent article by Hersch and Viscusi in 2004 repeated this conclusion: “Defendants do not pay the punitive damages amounts.... Many awards have been overturned or reduced on appeal, and others have settled privately or are still under appeal.” Joni Hersch and W. Kip Viscusi, “Punitive Damages: How Judges and Juries Perform,” 33 J Legal Studies 1, 9 n. 5 (2004).

⁶⁸ Jonathan Karpoff and John Lott, “On the Determinants and Importance of Punitive Damage Awards,” 42 J.L. & Econ 527- 30 (1999). Rustad conducted a study that led to the following conclusions about the aftermath of punitive damages awards in the cases that he studied: 40% were settled between the parties; 32 % were reduced or reversed by courts; 25% were confirmed on appeal; and in 14% some of the award was paid. See Michael Rustad, “In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data,” 78 Iowa L. Rev. 1 (1992).