Estimating liability risks with the media as your guide

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. Indeed, the expected value of a liability award is central to economic models of tort deterrence, claiming behavior, and settlement negotiations.

But the prospects of reaching an accurate assessment of liability by this method are quite poor. Until fairly recently, 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. 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.

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.

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.”

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
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 ASPEROS 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 case 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.

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

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11. See Daniels, supra n. 7, Galanter supra n. 6, Henriss, 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
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 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. The second and third rows present the prevalence of these situations among tort lawsuit filings and tort trials in 27 state courts. 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 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 estimates 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. 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—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.

Table 1 Accident and tort data compared with magazine coverage

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<th>Auto</th>
<th>Products</th>
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<tr>
<td>Accidents</td>
<td>18%</td>
<td>30%</td>
<td>1%</td>
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<tr>
<td>Tort filings</td>
<td>60</td>
<td>4</td>
<td>7</td>
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<tr>
<td>Tort trials</td>
<td>42</td>
<td>3</td>
<td>10</td>
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<tr>
<td>News magazine coverage</td>
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<td>49</td>
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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).
6. Ostrom, Rottman and Hanson, supra n. 15.
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 plausible 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 advisers 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.