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COMMENTS ON THE VIDMAR AND DIAMOND STUDIES

*Michael J. Saks**

One could not ask for two more different research approaches than those represented by the articles of Neil Vidmar and his colleagues¹ and Shari Diamond and her colleagues.²

In the data constituting the Vidmar research, no two cases are the same and only one jury decided each case.³ The Diamond data, on the other hand, are developed from a single simulated trial that was heard by a great many different decision-makers under systematically varying conditions.⁴

Each study is one of the best of its genre. Although there are many archival studies of civil jury verdicts, Vidmar's study is one of the most methodologically careful in its efforts to avoid the errors of this method, especially errors regarding misleading subtrahend estimates that plague similar research searches for the amount of general damages awarded by juries. The Diamond research is, to my knowledge, the best jury simulation study conducted to date, and therefore it probably eliminates as many of the flaws in its research approach as it is possible to eliminate.⁵

Both studies provide occasions for us to focus on key lessons about the awarding of damages by juries. While Vidmar has gone a long way toward solving one major problem of its genre, it leaves another major problem untreated. Vidmar's data highlight the dramatic vertical equity in awards: less serious injuries receive smaller awards and more serious injuries evoke larger awards, both economic and gen-

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1. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265 (1999).

2. Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1999).

3. Vidmar et al., *supra* note 1, at 280-81.

4. Diamond et al., *supra* note 2, at 303-04.

5. Of course, it is tautological to observe that the flaws inherent in each approach cannot be eliminated from that approach. Thus, the archival data are confounded and the simulation is not an actual trial.

eral.⁶ The study also follows the lead of others in noting what is interpreted to be considerable horizontal inequity: the notion that within the same injury level, there is a great deal of unexplainable variation.⁷ Thus, we simultaneously have evidence of both predictability (vertical equity) and unpredictability (horizontal inequity).

The latter finding, however, depends entirely on how we group cases to be within the same injury levels. Vidmar's study, as did those of his predecessors, used the National Association of Insurance Commissioner's ("NAIC") 9-point scale to rate the seriousness of cases.⁸ This approach has at least three shortcomings.

First, it uses only nine levels of seriousness.⁹ When thousands of cases are grouped into a mere nine categories, each category has to hold a great many cases, and those cases are not all alike; they merely are treated as if they are alike. For example, under the NAIC scheme, deafness and loss of one kidney are regarded as equal.¹⁰ If we researchers treat those two injuries as equal, but jurors distinguish between them, who is being more accurate? Our failure to capture their distinctions is regarded as their inconsistency.¹¹

Second, the NAIC scale is unidimensional whereas injuries are quite obviously multidimensional. Using merely a few of the concepts of the law of compensatory damages, injuries can vary along such separate dimensions as physical pain, mental suffering, disfigurement, disability, and loss of enjoyment of life. Injuries may differ in terms of whether they interfere with sensory or motor functions, with the physical or the mental, or with the way one looks or the way one sees. Any Procrustean effort to take injuries that normally are understood in several dimensions, and compress them into a single dimension for the convenience of researchers or insurers, is bound to lose explanatory power. One study found that the NAIC scale could account for only 44% of the variance in pain and suffering awards, compared to multi-dimensional predictions of the same awards in the same cases, which accounted for 74% of the variance.¹²

6. See Vidmar et al., *supra* note 1, at 293.

7. *Id.* at 269-70.

8. *Id.* at 281.

9. *Id.* at n.146.

10. NATIONAL ASS'N OF INS. COMM'RS, MALPRACTICE CLAIMS FINAL COMPILATION 48-66 (M. Sowka ed., 1980).

11. For a more sophisticated scale, see the one developed by David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1141-60 (1995).

12. Roselle L. Wissler et al., *Explaining "Pain and Suffering" Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181, 201-02 (1997).

Third, even if one compared the awards made for injuries that were absolutely identical, differences in those awards might still be both explainable and proper. That is because the same injury can have widely varying consequences for different plaintiffs. For example, both may have lost their hearing in an accident, but there is a considerable difference between a deaf musician and a deaf novelist.

In short, the variation in awards may not be unexplainable, but merely unexplained. The shortcomings could as easily be those of us researchers (poor measurement of injuries) rather than of jurors (poor measurement of compensation). The less effectively we researchers measure the injuries, the more "unpredictable" the awards seem to be. Jury awards may, of course, suffer from considerable and undesirable horizontal inequity, but we cannot really know how much of that there is until we researchers do our jobs better.

In the context of the Vidmar data, the Diamond study can be viewed as an extreme case: With only a single stimulus case for all jurors to react to, there is no opportunity to observe vertical equity.¹³ All variation is "horizontal." The opportunity to explain the variation on the basis of individual differences among jurors (demographic, experiential, attitudinal, etc.) is at its maximum. Diamond finds a breathtaking lack of predictability in jurors' awards in this situation with these data.

Is this unpredictability good or bad? I for one am not the least bit troubled by the finding. Indeed, I am greatly comforted by it. That there is little or no variation attributable to individual differences among the jurors is highly desirable. It means that jurors are reacting to the case, and not bringing their own biases to bear on the award to be made in the case. If it held true generally, we could stop worrying about biases and other differences among jurors, at least when it came to awarding damages. Moreover, these findings suggest that there is nothing but noise when a group of people all look at the same injury in the same case and try to set a value on it.¹⁴ Is this not exactly how we might hope the phenomenon would work?

These findings suggest, as Diamond notes, that the main task of improving jury damage awards, especially general damages, is to reduce the noise, and thereby stabilize the awards, making them more pre-

13. To be more precise, there were two versions of the same case, one with stronger and one with weaker evidence. But the injury was identical in the two versions.

14. Presumably, were there a range of cases to react to, including a range of degrees of injury seriousness, as in every other study of the matter, strong vertical equity would have been found. See, e.g., Vidmar et al., *supra* note 1; Wissler et al., *supra* note 12.

dictable.¹⁵ That can be accomplished in several ways, from increasing the size of juries¹⁶ to providing them with some meaningful guidance in translating their perceptions of injury into dollar awards.¹⁷

Both studies can be seen to implicate problems of variability as central to the challenge of understanding and managing jury awards of general damages: To more accurately evaluate the quality of jury awards, researchers and policy-makers need to measure injuries at least as well as juries measure them. And for juries to more accurately (predictably) assess the amount of damages, we need to develop methods to reduce unwanted variability.

15. Diamond et al., *supra* note 2, at 317.

16. Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 263 (1996).

17. Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243, 247-48 (1997).