

TOP 8 REASONS FOR THE Recent Surge in Blockbuster Verdicts

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Over the past decade—and especially since 2012 — the size of the largest jury verdicts has increased dramatically. While most verdicts are not “blockbusters,” these trends suggest the flood began to rise slightly in 2008 after several years of declining, as illustrated in Figure 1. Then, in about 2012, the dam broke, leading to the record high-water mark of 2014, thanks to a series of multibillion-dollar verdicts in tobacco, medical devices and pharmaceutical litigation. Although averages dipped in 2017, last year’s multibillion-dollar talc verdicts mean that 2018 may have been another record year.ⁱ

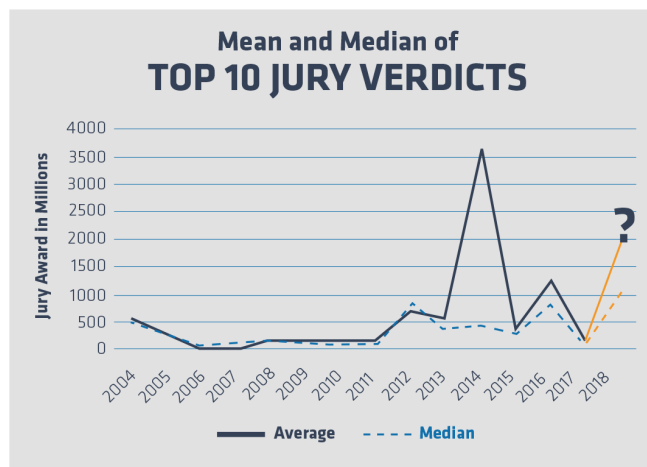


Figure 1

It's not hard to see why some feel juries are out of control. A doughnut shop in Muscogee County, Georgia, was recently sued, and although the demonstrated medical expenses totaled no more than \$100,000, the jury returned a verdict of \$7 million.ⁱⁱ And in Clayton County, Georgia, a jury recently returned what may be the most appalling verdict in personal injury lawsuit history: \$1 billion.ⁱⁱⁱ It's gotten so bad that insurance companies are leaving industries where nuclear verdicts have negatively impacted their claims-loss ratios.^{iv}

What might have caused this “new norm” of blockbuster verdicts? Here are eight potential reasons.

- 1 First, our whole culture has been impacted by the expansion of internet access. Smartphone ownership has increased from about 30 percent of all adults in 2011 to about 75 percent in 2018. This means that news about big verdicts spreads instantly all over the country. Whether potential jurors read about billion-dollar verdicts in their morning newspapers, hear about them on cable news or see the headlines on their smartphones, such verdicts act as a benchmark for what might constitute a legitimate damages award. The net effect is to normalize blockbuster verdicts.
- 2 Further, thanks to the internet and the 24-hour cable news cycle, people are exposed to other benchmarks against which they could evaluate what constitutes a reasonable damages award. Every day, we hear about different corporations' net worth, multibillion-dollar mergers, buyouts, bailouts and tax breaks, not to mention stock markets riding a rocket ship to ever-higher profits. To many jurors, it seems as though corporate America's ability to generate wealth knows no bounds.
- 3 Attorney advertising has likely contributed as well. In 2011, just a year before damages averages began to rise so dramatically, legal advertising increased significantly. Between 2010 and 2011, money spent on legal ads rose 18 percent, compared to only 3 percent for the rest of TV advertising.^v Many of these solicitations were about asbestos, pharmaceuticals and medical devices – the very case types that would drive an increase in peak damages.
- 4 Moving from the larger culture to the American legal culture, lawsuit filings went up immediately following the Great Recession of 2008. This is a familiar pattern, seen all the way back to the Great Depression of the 1930s. Furthermore, a number of studies have shown a correlation between economic indicators and jury behavior. In *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets* (2003),^{vi} Eric Helland and Alexander Tabarrok reported, for example, that as a county's poverty rate went up from 4.1 to 21.9 percent, the average award tripled, from about \$400,000 to just over \$1.3 million. In line with this, between 2006 and 2011, economic conditions and damages displayed a strong relationship. As shown in Figure 2, as consumer confidence fell in 2008, the top 10 damages averages rose. Plotting sentiments about the economy and damages year by year yields two curves that are almost mirror images of one another.

Average "Top 10" JURY VERDICTS VS. CONSUMER COMFORT LEVEL

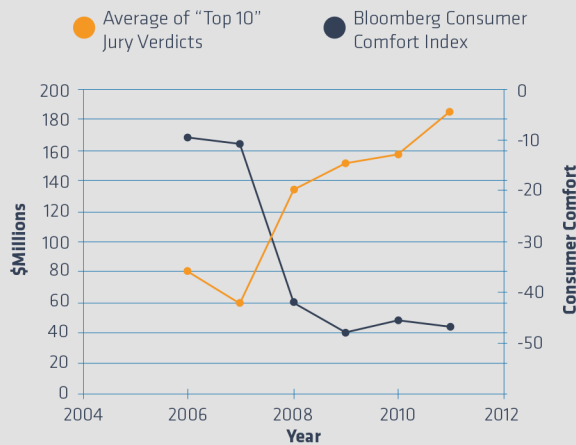


Figure 2

Within a few years of the Great Recession, consumer confidence began to rise again, but instead of going back down, peak verdict numbers continued to climb even higher.

- 5 Damages did not recede following the Great Recession because, according to Miguel Moya and Susan T. Fiske in *The Social Psychology of the Great Recession and Social Class Divides* (2017),^{vii} events like it threaten people's sense of control. Such a "threatened sense of control (as in economic crisis) triggers mechanisms to restore control; one may be collective thinking and collective action." In *The Great Recession and Group Based Control: Converting Personal Helplessness into Social Class In Group Trust and Collective Action* (2016), Immo Fritzsche concurs:^{viii} When people feel they're losing control over the world around them, it can, as it were, throw a switch in the brain, turning "helpless individuals into collective actors...automatically."
- 6 How this impetus toward collective action might affect a lawsuit is suggested by *Growing Up in a Recession* (2014) by Paola Giuliano and Antonio Spilimbergo.^{ix} Analyzing several large cross-cultural and historical data sets, they concluded that "large macroeconomic shocks experienced during the critical years of adolescence and early adulthood, between the ages of 18 and 25, shape preferences for redistribution and that this effect is statistically and economically significant.... The effect is quite general and persistent."
- 7 To date, no empirical investigation of the Giuliano and Spilimbergo (2014) "Great Recession Hypothesis" has appeared in the literature, but proprietary studies using largescale DecisionQuest research samples appear supportive. Since 2008, DQ has probed our focus group, mock trial and survey

participants on how the Great Recession has affected them. In each of 27 separate studies with a total of 716 surrogate jurors, conducted all over the country in a variety of case types, we asked, "Have you personally been affected by the current economic situation?" Each of these studies also asked participants to award compensatory or punitive damages, or both. An analysis of this aggregated sample showed that the recession cohort (again, those who came of age in the 2008-2009 time frame) were significantly more likely to award higher damages if they reported being adversely impacted by the economy (red line in Figure 3). By contrast, people in this cohort who had not been so affected awarded lower damages (blue line).

DAMAGES AVERAGES BY RECESSION IMPACT

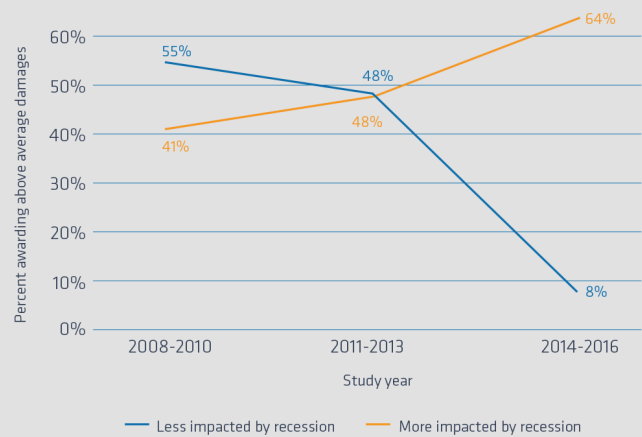


Figure 3

More recent survey data collected by DecisionQuest suggests this age cohort may indeed be more in favor of a redistribution of wealth via the court system than other age groups.

ATTITUDES ABOUT REDISTRIBUTION

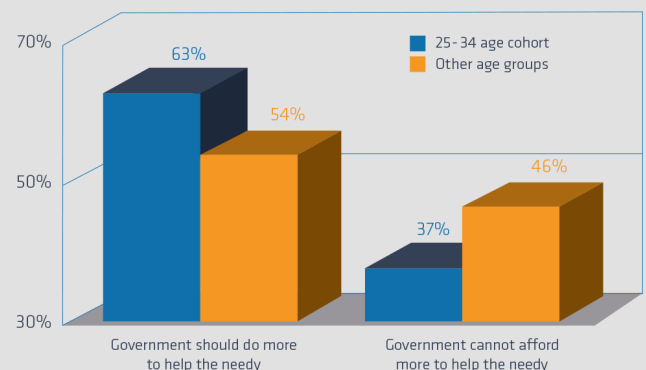


Figure 4

- 8 Finally, it is well established in the literature that damages stem from jurors' punitive sentiments toward (usually) a corporate defendant, as shown in Figure 5.

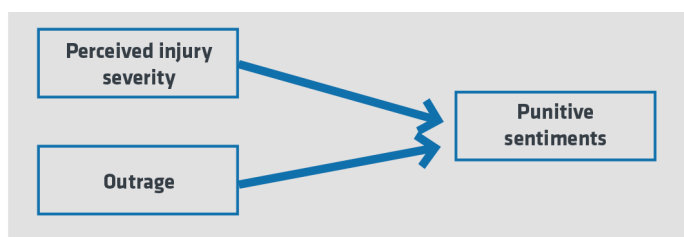


Figure 5

Punitive sentiments, reflected in both punitive damages and pain and suffering noneconomic damages, are driven by two things: the perceived severity of the plaintiff's injuries and jurors' outrage at the defendant's behavior.^x It seems unlikely that the perceived severity of the injuries seen in our courts has changed – disfigurement and death mean today what they did 20 years ago – but what has changed is juror outrage, or more precisely, the dollar value of that outrage.

In summation then, this "outrage inflation" occurs in a culture where the ever-increasing net worth of big corporations is instantly accessible with a few clicks on a smartphone, where every new and highly publicized blockbuster jury award sets the benchmark for what constitutes a reasonable award and where at least a swath of the population, now about 28 to 35 years old, views the redistribution of immense corporate wealth as something to be desired. If all this is true, then as the Great Recession cohort begins filling American jury boxes, we will likely see a level of juror activism that is unlikely to abate for a full generation or more.

Understanding how your case is affected by juror attitudes and predispositions – based on case-specific research – and helping you build a strategy to address them are the challenge DecisionQuest professionals face with our clients every day.

- i. https://www.stltoday.com/news/local/crime-and-courts/talc-cancer-verdict-of-billion-from-st-louis-jury-sends/article_c15e7f98-fce0-5a74-80ee-45371d5e98b1.html
- ii. <http://www.galawsuitreform.com/georgias-legal-environment-consistent-downward-trend/>
- iii. <https://cmlawfirm.com/legal-alert-georgia-jury-awards-1-billion-on-premises-liability-case/>
- iv. <http://www.dcvelocity.com/articles/201872--nuclear---verdicts-take-toll-on-insurance-firms---appetite-to-underwrite-trucking-risk/>
- v. Kantar Media
- vi. https://www.jstor.org/stable/10.1086/344560?seq=1#page_scan_tab_contents
- vii. <https://spssi.onlinelibrary.wiley.com/doi/full/10.1111/josi.12201>
- viii. https://www.researchgate.net/publication/310477691_The_Great_Recession_and_Group-Based_Control_Converting_Personal_Helplessness_into_Social_Class_In-Group_Trust_and_Collective_Action
- ix. https://www.jstor.org/stable/43551580?seq=1#page_scan_tab_contents
- x. Sunstein, Cass R., Growing Outrage (January 5, 2018). Forthcoming, Behavioural Public Policy. Available at SSRN: <https://ssrn.com/abstract=3097224>



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