

THE MYTH OF “NUCLEAR VERDICTS”

Insurers Do Not Pay What Juries Award: They Pay Far Less

A new Cato Institute book, *Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped*, written by six top medical malpractice researchers, examines data about, among other things, jury verdicts and insurance payouts.¹ Much of the data come from Texas, which in 2003 was subjected to an insurance industry anti-jury campaign so extreme that lawmakers responded by severely weakening the power and authority juries and stripping patients of their legal rights.²

According to the insurance industry, today’s jury verdicts have gone “nuclear.” Such rhetoric is being used to justify current price-gouging of commercial policyholders, including doctors and hospitals who purchase medical malpractice insurance.³ But as the authors found, industry campaigns focused on jury verdicts are disingenuous, “based on an incomplete and potentially misleading factual foundation.”⁴

*The reason: There is a “large gap” between what juries award and what insurers actually pay, which is far less.*⁵

When injured patients go to court, win their case and obtain a jury verdict in their favor, the vast majority receive far less than what a jury awards.

- Seventy-four percent of patients receive less than what a jury awards whether the wrongdoer is a physician, hospital or nursing home.⁶
- On average, juries award about twice as much as an injured patient ultimately receives, and the larger, or more “nuclear” the verdict, the relatively less the injured patient receives.⁷
- When verdicts are more than \$2.5 million, 95 percent of patients receive less than that – on average 55 percent less.⁸
- If a verdict exceeds \$10 million, the patient receives on average 65 percent less than the verdict.⁹

Medical malpractice insurance policy limits (often extremely low) are the principal reason why patients receive so little compared to the verdict.

- While health care providers carry medical malpractice insurance, it is often minimal and insufficient to cover the harm they cause.
 - In Texas, while there is a “widely held belief that policies with \$1 million per occurrence limits are standard,” the authors found that between 1986–2003, “the median nominal policy limit was \$500,000. Only 34 percent of the policies had nominal limits of \$1 million.... By contrast, 33 percent had nominal limits of \$200,000 or less.”¹⁰
 - The researchers found that “this standard size has not changed, to our knowledge, since at least the 1980s, even though nominal prices have more than doubled since then. This suggests that real policy limits are likely dropping in other states too.”¹¹
- Injured patients collect, on average, only 15 percent of verdicts that exceed a provider’s policy limit.¹² This can create enormous injustices, as the following two examples described by the authors demonstrate:
 - “Brain damage to 55-year-old. Adjusted verdict of \$24.8 million in 2010 dollars; settled for the physician’s policy limit of \$334,000 in 2010 dollars (\$200,000 limit in nominal dollars).”¹³
 - “Injury to a 44-year-old. Adjusted verdict of \$2.2 million in 2010 dollars; settled for the physician’s policy limit of \$147,000 in 2010 dollars (\$100,000 limit in nominal dollars).”¹⁴
- While cases involving newborns who are catastrophically injured may result in higher jury verdicts, “perinatal physicians carry less insurance than other physicians and have reduced their insurance coverage over time.” That means these babies can be severely undercompensated for the lifetime of care they will require.¹⁵

The reasons health care providers may underinsure even though adequate insurance policies are readily available are at least two-fold.¹⁶

- Health care providers likely know that if they purchase inadequate insurance and commit malpractice, injured patients are less likely to file a claim against them.
 - Plaintiffs’ lawyers told the authors that it is so difficult for patients to collect anything exceeding policy limits that lawyers typically cannot afford to take cases when doctors are grossly underinsured, allowing negligent providers to get away with paying nothing and leaving victims with no compensation.¹⁷
- Health care providers likely know that despite underinsuring, there is little risk they will have to cover the difference personally if a jury rules against them, and even if they are on the hook for something, the amount will be “modest in size.”¹⁸

- In only 0.6 percent of cases did physicians make any out-of-pocket payments, and most of these were “relatively small.”¹⁹
- Only 2 percent of damages paid beyond policy limits are covered by defendants, including so-called “deep pocket” institutional defendants like hospitals.²⁰
- The authors “asked a number of Texas medical malpractice plaintiffs’ lawyers whether and when they try to collect above limits from physicians or other defendants. All agreed that they would not pursue a case against a physician if the physician’s policy limits were insufficient to justify bringing the claim. Absent unusual circumstances, they treated policy limits as a hard cap on recovery.”²¹

NOTES

¹ Bernard S. Black et al., *Medical Malpractice Litigation*, Cato Institute (2021). (All page numbers refer to the Kindle edition.)

² *Id.* at 79-80.

³ *See, e.g.*, Amy Buttell, “Nuclear Verdicts Escalate,” *Inside Medical Liability* (First Quarter 2021), https://www.mplassociation.org/Web/Publications/Inside_Medical_Liability/Issues/2021/Q1/Articles/Nuclear_Verdicts_Escalate_Verdicts.aspx; Bethan Moorcraft, “Medical professional liability ‘nuclear’ jury verdicts on the rise,” *Insurance Business America*, December 2, 2020, <https://www.insurancebusinessmag.com/us/news/healthcare/medical-professional-liability-nuclear-jury-verdicts-on-the-rise-240846.aspx>. *See also*, J. Robert Hunter, Joanne Doroshow and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation*, Center for Justice & Democracy and Consumer Federation of America (March 2020), <http://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation>

⁴ Black et al, *supra* note 1 at 103.

⁵ For simplicity, our jury verdict data include pre- and post-judgment interest, which the authors refer to as “adjusted” verdicts.

⁶ Black et al, *supra* note 1 at 79-80, 87.

⁷ *Id.* at 79-80.

⁸ *Ibid.*

⁹ Black et al, *supra* note 1 at 87.

¹⁰ *Id.* at 113.

¹¹ *Id.* at 115-116.

¹² *Id.* at 95-96.

¹³ *Id.* at 97.

¹⁴ *Id.* at 98.

¹⁵ *Id.* at 121.

¹⁶ *Id.* at 104 105.

¹⁷ *Id.* at 111.

¹⁸ *Id.* at 79-80, 103.

¹⁹ *Id.* at 109-110.

²⁰ *Id.* at 101-102.

²¹ *Id.* at 104.