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## MYTHBUSTER!

### PUNITIVE DAMAGES: RARE, REASONABLE AND EFFECTIVE

“Awards for punitive damages are almost exclusively reserved for civil claims in which the defendant’s conduct was considered grossly negligent or intentional. Unlike other forms of damage relief afforded to plaintiffs, punitive damages are intended to serve as a means for ‘punishing the defendant’ and deterring others from committing similar actions.”<sup>1</sup>

#### Contrary to popular myth, punitive damages are rarely awarded.

- In 2005, the most recent year studied by the U.S. Department of Justice (DOJ), punitive damages were awarded in only 5 percent of civil cases where plaintiffs prevailed at trial.<sup>2</sup>
- Punitive damages were awarded in only 3 percent of tort cases with plaintiff winners<sup>3</sup>; for contract cases, it was 8 percent.<sup>4</sup>
- **Medical Malpractice:** In 2005, punitive damages were awarded in only 6 cases where medical malpractice victims established liability at trial.<sup>5</sup>
- **Product Liability:** In 2005, punitive damages were awarded in only 1 product liability case with a successful plaintiff.<sup>6</sup>
- **Trends:** After examining long-term data from state trials in the nation’s 75 most populous counties, the DOJ found that
  1. The percentage of plaintiff winners receiving punitive damages before civil juries is consistently low — 6 percent in 1992, 4 percent in 1996, 6 percent in 2001 and 5 percent in 2005<sup>7</sup>;
  2. The percentage of prevailing plaintiffs awarded punitive damages in all tort trials is consistently low — 3.3 percent in 1996, 5.3 percent in 2001 and 3.6 percent in 2005<sup>8</sup>;
  3. The percentage of successful medical malpractice plaintiffs receiving punitive damages is consistently low — 1.1 percent in 1996, 4.9 percent in 2001 and 2.6 percent in 2005<sup>9</sup>;
  4. The percentage of plaintiff winners awarded punitive damages in product liability trials is consistently low — 7.7 percent in 1996, 4.2 percent in 2001 and 1.3 percent in 2005<sup>10</sup>; and
  5. The percentage of winning plaintiffs receiving punitive damages in contract cases was no greater in 2005 than in 1996, with plaintiffs’ success rate totaling 8 percent both years.<sup>11</sup>

#### Punitive damages have decreased in frequency.

Long-term DOJ data from state tort trials in the nation’s 75 most populous counties show that:

- **Tort Trials Overall:** The percentage of successful plaintiffs awarded punitive damages in tort trials declined by 33.3 percent between 2001 and 2005.<sup>12</sup>

- **Medical Malpractice:** From 2001 to 2005, the percentage of prevailing plaintiffs awarded punitive damages decreased by 46.1 percent.<sup>13</sup>
- **Product Liability:** The percentage of plaintiff winners receiving punitive damages dropped by 70.4 percent between 2001 and 2005.<sup>14</sup>

**Most punitive damage awards are modest in amount.** In 2005, the median overall punitive damage amount awarded to plaintiff winners in civil cases was \$64,000.<sup>15</sup> The median punitive damage award for all tort cases was \$55,000.<sup>16</sup> Moreover, the median punitive damage awards in tort jury (\$100,000) and bench (\$54,000) trials were not statistically different.<sup>17</sup>

**Although rare, punitive damages have critical social and financial importance because of the powerful “signals” they send.**

- In their recent book, *American Juries: The Verdict*, Professors Valerie P. Hans and Neil Vidmar explain that punitive damages have two goals: “One is to punish behaviors that, while perhaps not criminal, offend important moral values — abuses of power or the blatant disregard of the rights of others. The second goal is to deter such behaviors by making it more likely that the costs of wrongful actions will exceed the benefits. The deterrence goal is directed not only to the defendant to deter future bad actions but also to other persons or corporations who might contemplate similar unacceptable behavior.”<sup>18</sup>
- There are many instances where the imposition or threat of punitive damages has resulted in dangerous products and services being taken off the market; in cases where criminal laws are violated, the potential for punitive damages can be a more effective deterrent than criminal sanctions.<sup>19</sup> For example,
  - In October 1995, a 42-year-old Texas oil worker’s scalp was torn off when a piece of equipment exploded from a gas well, throwing him 30 feet into a stand off pipe. He suffered brain damage, vision and hearing loss, broken vertebrae, a crushed foot and ankle and a dislocated hip. The victim filed suit against the oil company for failing to install adequate safeguards to combat sudden increases in the well’s pressure. When the victim offered to exchange the \$30 million punitive damages award for safety changes, the company agreed to work with a safety engineer to institute new rules at the company.<sup>20</sup>
  - In July 1998, Aryan Nation guards chased, shot at and assaulted a woman and her teenage son after their car backfired while driving past the group’s Idaho compound. Trial testimony revealed that the organization not only failed to train and investigate security personnel but also tried to hide the absence of safety checks after the lawsuit was filed. After the jury awarded \$6 million in punitive damages, the group was barred from using the name “Aryan Nations” and agreed to transfer the compound to the victims.<sup>21</sup>
  - The Dalkon Shield IUD, first put on the market in 1971, caused pelvic infections, septic abortions, infertility and death in thousands of women. Despite receiving reports of injuries in IUD users, the manufacturer continued to defend the device, only pulling the product from the U.S. market in June 1974 after FDA intervention. After 11 punitive damages awards over a number of years, totaling in excess of \$24.8 million, the company finally agreed to urge doctors and women to remove the Dalkon Shield and offered to pay for the removal.<sup>22</sup>

**NOTES**

<sup>1</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 6 (citing *Black’s Law Dictionary*), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>2</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Civil Bench and Jury Trials in State Courts, 2005,” NCJ 223851 (October 2008) at 6, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>.

<sup>3</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 6, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>4</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Contract Bench and Jury Trials in State Courts, 2005,” NCJ 225634 (September 2009) at 6, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbajtsc05.pdf>.

<sup>5</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 7 (Table 6), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>6</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 7 (Table 6), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>7</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Civil Bench and Jury Trials in State Courts, 2005,” NCJ 223851 (October 2008) at 10, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>.

<sup>8</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 12 (Table 12), 13, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>9</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 12 (Table 12), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>10</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 12 (Table 12), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>11</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Contract Bench and Jury Trials in State Courts, 2005,” NCJ 225634 (September 2009) at 6, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbajtsc05.pdf>.

<sup>12</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 12 (Table 12), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>13</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 12 (Table 12), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>14</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 12 (Table 12), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>15</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Civil Bench and Jury Trials in State Courts, 2005,” NCJ 223851 (October 2008) at 6, found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>.

<sup>16</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 1, 6, 7 (Table 6), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>17</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009) at 6, 7 (Table 6), found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

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<sup>18</sup> Valerie P. Hans and Neil Vidmar, *American Juries: The Verdict*. Prometheus Books: Amherst, N.Y. (2007) at 305.

<sup>19</sup> See, Thomas Koenig & Michael Rustad, "The Historical Continuity Of Punitive Damages Awards: Reforming The Tort Reformers," 42 *Am. U. L. Rev.* 1269, 1324 (Summer 1993).

<sup>20</sup> Bob Van Voris, "Trial lawyers gird for political wars," *National Law Journal*, August 2, 1999; "Lawyers, client given public service award," *Corpus-Christi Caller-Times*, July 22, 1999; "Settlements; Reached After Trial," *National Law Journal*, February 23, 1998, citing *Caballero v. Esenjay Petroleum Corp. et al.*, 95-6629-A (Nueces County Dist. Ct., Tex., verdict July 3, 1997). "Man trades award for safety plan," *Associated Press*, December 2, 1997, found at <http://www.lubbockonline.com/news/120297/LD0625.html>. Although Esenjay failed to honor the agreement after the company was sold, the new owner ultimately reinstated the agreement after a second lawsuit. See, Bob Van Voris, "Trend Shows Lawyers Swapping Damages for Safety Changes," *Legal Intelligencer*, September 17, 1999.

<sup>21</sup> Nicholas K. Gerianos, "Butler reportedly has moved into a new home," *Associated Press*, October 24, 2000; "Jury finds Aryan leader negligent," *Idaho Statesman*, September 8, 2000; Kim Murphy, "Jury Verdict Could Bankrupt Aryans," *Los Angeles Times*, September 8, 2000.

<sup>22</sup> Lucinda Finley, "Female Trouble: The Implications Of Tort Reform For Women," 64 *Tenn. L. Rev.* 847, 866 (Spring 1997); *Tetuan v. A.H. Robins Company*, 738 P.2d 1210 (Kan. 1987); Mary Williams Walsh, "A.H. Robins Begins Removal Campaign for Dalkon Wearers," *Wall Street Journal*, Oct. 30, 1984; *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984).