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TORT REFORM IN SOUTH CAROLINA: THE EFFECT OF EMPIRICAL RESEARCH ON ELITE PERCEPTIONS CONCERNING JURY VERDICTS

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I. INTRODUCTION

Tort reform has been one of the hottest issues in state politics across the country during the past two or three years.¹ In many states coalitions of insurance companies and professional groups, including medical doctors, business executives, and defense lawyers, have succeeded in persuading their legislatures to reduce the statutes of limitations in civil cases, eliminate joint and several liability, limit noneconomic damages, and enact other changes in the tort laws that may benefit defendants in civil suits.² These changes are necessary, it is claimed, because there is a crisis in the tort system. It is argued that dramatic increases in both the number of liability lawsuits and the dollar amount of judgments in these suits have brought about sharp increases in liability insurance rates for many businesses and professionals.³ For some, liability insurance has become either unaffordable or completely unavailable.⁴

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1. See Daniels & Martin, *Civil Jury Awards Are Not Out of Control*, 26 JUDGES J. 10, 10 (1987). In 1985 208 pieces of tort reform legislation were enacted in 46 states. In 1986 more than 1,600 reform measures were introduced in 44 state legislatures. *Id.* at 47; *Tort Reform Coalitions Flourish in the Midwest*, NATIONAL UNDERWRITER, July 18, 1986, at 14.

2. Daniels & Martin, *supra* note 1, at 11, 47; see also Gattuso, *The Liability Crisis: It's Not Over Yet*, IMPRIMUS, June 1987, at 3-9 (proposing various tort-law reforms). But see Stewart, *The 'Tort Reform' Hoax: Will the Tort System take the Fall for the Insurance Industry?*, TRIAL, July 1986, at 89, 91 (arguing against reforms such as abolition of contingent fees, limitation of awards, and elimination of juries).

3. *Coalition of Business Requests Civil Law Reform*, Spartanburg Herald Journal, Nov. 3, 1986, at B8, col. 4.

4. THE SOUTH CAROLINA CIVIL JUSTICE COALITION, 1987: A TIME FOR ACTION, (flier

The politics of tort reform appear to be driven by three principal factors: perceptions about the way the current system is operating, alternative normative preferences about what constitutes "justice" in tort law, and conflicts over the distribution of the material costs and benefits allocated by the tort law system. The present study focuses only on the first of these factors. In many states proponents and opponents of tort reform disagree over whether a crisis, characterized by an explosion in the number of cases filed and the size of jury awards, has developed in the civil justice system.

This study examines the perceptions of the key actors in the struggle over tort reform in South Carolina to determine whether their beliefs are consistent with the assertion that a crisis exists in the civil justice system in South Carolina. A further objective of the study is to determine whether providing a detailed empirical study of the size of jury awards and number of case filings to key elites had any impact on their perceptions.⁵ To determine whether these elite perceptions changed in response to the publication of the jury verdict study, surveys of medical doctors, attorneys, and state legislators were conducted before and after publication. Their perceptions of the changing nature of tort verdicts in South Carolina both before and after the publication of the study by Professor Hubbard are compared to his data on actual outcomes of jury trials.

II. THE IMAGE OF CRISIS IN TORT REFORM DEBATE

The rhetoric of many of the advocates of tort reform nationally paints a grim picture of the legal system. James L. Gattuso maintains:

The very existence of whole industries and countless jobs (if not more) are at risk. The culprit is the upheaval in the American tort system. . . . Recent years have seen the volume of litigation increase substantially and the size of awards skyrocket. . . . It is clear that the tort system . . . has gone seriously awry.⁶

discussing need for tort reform).

5. Hubbard, "Patterns" in *Civil Jury Verdicts in the State Circuit Courts of South Carolina: 1976-1985*, 38 S.C.L. REV. 699 (1987).

6. Gattuso, *supra* note 2, at 1, 3; see also Burrow & Collins, *Insurance 'Crisis*

The image of a "crisis" is constantly used by the proponents of tort reform: it is alleged that the insurance crisis is caused by a crisis in the civil justice system.⁷ Many of the observers of tort reform remark that the very basis of the movement for tort reform is the idea that the legal system is chronically malfunctioning, particularly with regard to juries, causing the current "insurance crisis."⁸ Moreover, "it is the characterization of this problem as a 'crisis' that has given the reform movement its driving force."⁹ The insurance industry regards this crisis as the result of runaway juries, the litigation explosion, and the out-of-control civil jury system.¹⁰ One insurance spokesman interprets a Rand Corporation study as providing evidence of "skyrocketing" jury awards in recent tort cases,¹¹ and an industry journal reports that a Department of Justice report concluded that "tort law appears to be a major cause of the insurance/affordability crisis."¹² Although the actual tone of the Justice Department's report is somewhat milder than the insurance industry suggests, the report does conclude that the "increase in the number of tort lawsuits and the level of awarded damages (or settlements) in and of itself has an obvious inflating effect on insurance premiums."¹³

Despite such rhetoric, scholars are questioning increasingly whether the alleged crisis in insurance availability and costs actually exists.¹⁴ "One fact is indisputable: in recent years there

sis'—*Texas Style: The Case for Insurance Reform*, 18 ST. MARY'S L.J. 759 (1987).

7. Gattuso, *supra* note 2, at 2; *Coalition of Businesses Requests Civil Law Reform*, *supra* note 3.

8. Burrow & Collins, *supra* note 6, at 761. Kindregan & Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law on Tort in the Name of Reform*, 18 ST. MARY'S L.J. 673 (1987).

9. Daniels & Martin, *Jury Verdicts and the 'Crisis' in Civil Justice: Some Findings From an Empirical Study*, 11 JUST. SYST. J. 321, 323 (1987).

10. See, Maher, *I.I.I. Launches New Ad Campaign*, NAT. UNDERWRITER, (Property & Casualty Insurance Edition) Dec. 21, 1984, at 2.

11. Nutter, *The Fight for Civil Justice Reform*, INSURANCE REV., Nov.-Dec. 1984, at 5.

12. *What the U.S. Government Thinks About Tort Reform*, 2 J. AM. INS. 23 (1986).

13. UNITED STATES DEPARTMENT OF JUSTICE, REPORT ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 49 (1986).

14. Burrow and Collins, *supra* note 6, at 760; Daniels, *Punitive Damages: the Real Story*, 72 A.B.A.J. 60-63 (1986); Daniels & Martin, *supra* note 1, at 46; Daniels & Martin, *supra* note 9, at 325; Kindregan & Swartz, *supra* note 8, at 681-82.

has been a crisis regarding the cost and availability of selected types of liability insurance.”¹⁵ For example, in 1984 underwriting losses increased by \$8 billion and contributed to a \$3.8 billion loss in the industry’s pretax operating income. These losses prompted substantial increases in premiums on some lines of liability insurance.¹⁶

The debate reveals two issues underlying the tort reform movement. The first is whether a “crisis” in availability and costs actually exists. The second issue is whether the tort system is the cause of the “crisis” to any substantial degree. While the argument in favor of tort reform assumes that both facts are true, the jury verdict study addresses only the latter issue. This Article addresses only key participants’ perceptions on the existence or nonexistence of this crisis.

Nationally, critics argue that there is no credible evidence to support the insurance industry’s allegation. For example, a recent survey of empirical studies concludes that “there remains a noticeable lack of statistical data supporting the insurance industry’s position regarding the allegedly devastating effects of increased size and frequency of punitive damage awards.”¹⁷ Based on a study of jury verdicts in forty-four counties, another study concludes that civil jury awards were not out of control. The data from this study demonstrated that, although there were a few jurisdictions with dramatically high average awards (mainly in New York and California), in most counties the awards were modest. In all but one jurisdiction outside New York and California the average awards were below \$50,000 and in all but three they were below \$26,000.¹⁸

In contrast to these recent empirical findings that seem to support the allegations of the opponents of tort reform, most

15. Roper, *Civil Litigation Trends in the State Courts: The Propensity to Litigate in State Trial Courts 1981-84, 1984-85*, 11 JUST. SYST. J. 262 (1986).

16. Comment, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 ST. MARY’S L. J. 1019, 1065 (1987) (unavailability of insurance result of increased premiums and reduced liability coverage)).

17. *Id.* at 1021.

18. Daniels & Martin, *supra* note 1, at 46. Similar results emerged from a recent study of jury verdicts in Texas. Burrow & Collins, *supra* note 6, at 772. The researchers concluded that “court judgments entered on jury verdicts have not ‘exploded.’” *Id.* at 772. Finally, a five state study undertaken at the University of Wisconsin shows the median award in federal civil judgments is \$15,000 while the median in state courts is only \$4,500. Stewart, *supra* note 2, at 91.

journalistic accounts of the "tort crisis," and the evidence most frequently cited by the insurance industry and its allies, consists of a series of anecdotes and horror stories about individual cases. "Typically, the cases are described in a crude fashion, with a brief account of personal injuries, followed by the ubiquitous award, often \$1 million or more, in a case portrayed as a frivolous action against a blameless defendant."¹⁹ Although many stories were cited in the debate over tort reform in one state after another, the popular versions of the cases may be inaccurate and distorted.²⁰ More importantly, even if accurately recounted, a few nonrandomly selected cases give little indication of the typical working of the civil justice system, especially when the stories are used to justify changes in states other than the states in which the events took place.

III. THE SOUTH CAROLINA TORT REFORM DEBATE

The national debate over the alleged crisis in the civil justice system provides the context for the debate over tort reform in South Carolina. Although conclusive proof of a national crisis produced by skyrocketing jury awards does not exist, the frequent media accounts of the crisis may significantly affect many South Carolinians' perceptions of the civil justice system.

In South Carolina, tort reform has been championed by the South Carolina Civil Justice Coalition, a broad array of insurance companies, medical doctors, defense attorneys and others. For the last two years they have actively lobbied the state legislature for a tort reform bill similar to that enacted in a number

19. Daniels & Martin, *supra* note 9, at 325. For example, *Nation's Business* reported that a motorcyclist who ran off the road and crashed into a parked truck collected \$4.2 million in damages from the owner of the truck. The author claims that this and other examples cited in the story "are not isolated instances but are part of a cycle that is pulling more and more businesses . . . into the liability insurance crisis." Bacas, *Liability: Trying Times*, *NATION'S BUSINESS*, Feb. 1986, at 22. A more frequently cited example was the "fat man story":

an overweight man with a history of coronary disease suffered a heart attack while trying to start a Sears lawnmower. He sued Sears, claiming that too much force was required to pull the mower's pull rope. A jury in Pennsylvania awarded him \$1.2 million, plus damages of \$500,000 for delays in settling the claim.

Id. at 22; see also *A World Without Insurance*, *FORBES*, July 15, 1985, at 40.

20. See Brill & Lyons, *The Not-So-Simple Crisis*, *AM. LAW*, May 1986, at 1 (fabricated litigation horror stories as 'props' for tort reform debate).

of other states. Although the Civil Justice Coalition does not have any formal connection to tort reform forces in other states, clearly the coalition is part of the same national movement.

The interest groups supporting the South Carolina coalition are essentially the same as those supporting the national tort reform movement. Moreover, most of the specific reforms suggested in South Carolina are part of the bread and butter of reformers everywhere. In South Carolina and in most other states, the call for tort reform includes demands for a limit on noneconomic damages, reductions in statutes of limitations for the filing of tort actions, restrictions on the award of punitive damages, and the abolition of joint and several liability.²¹

At least initially, the tort reform movement in South Carolina was justified with charges that the tort-law system was out of control and was producing an insurance crisis. In a series of press conferences announcing the formation of the South Carolina Civil Justice Coalition, its spokesman Harold W. Jacobs was reported to have proclaimed, "We have come together because something must be done about a civil justice system that is causing enormous cost add-ons to all aspects of daily life."²² The problems with the civil justice system according to Jacobs include "an explosion of lawsuits nationwide, excessive and sometimes unreasonable awards and skyrocketing litigation costs. . . . These factors have contributed to the sharp increase in rates for and decreased availability of liability insurance which are in turn driving up the cost of goods and services for all citizens."²³ Similarly, a coalition flier proclaimed that "[a]n out-of-balance civil justice system has caused liability insurance rates to skyrocket" and that "dramatic increases in both the number of liability lawsuits and the dollar amount of judgments [*sic*] . . . have brought about sharp increases in liability

21. H.2399, 107th S.C. General Assembly, 1st Sess. (1987); H.2077, 107th S.C. General Assembly, 1st Sess. (1987).

22. *Coalition of Businesses Requests Civil Law Reform*, *supra* note 3, at B8 (quoting Harold W. Jacobs). For a similar report, see *Group: Changes Needed in Civil Laws*, Columbia Record, Nov. 13, 1986, at C2, col. 4. Mr. Jacobs maintained in the spring of 1987 that he had *not* maintained that reform was needed because of a crisis in the tort system. His position in the spring was that reform was needed for reasons of "fairness" and he indicated that his concern had always had that focus.

23. *Coalition of Businesses Requests Civil Law Reform*, *supra* note 3, at B8.

insurance rates.”²⁴

Thus, one of the principal driving forces behind tort reform demands in South Carolina, as in other states, is the perception that tort judgments for plaintiffs, especially jury verdicts, have escalated sharply in number and amount in recent years. But, as noted above, remarkably little empirical evidence has been produced to support the reformers’ key tenet. In South Carolina at the beginning of the push for tort reform, no systematic data was available on trends in civil tort judgments. The absence of systematic evidence was apparent in the 1986 legislative debate over tort reform in South Carolina.

IV. EMPIRICAL STUDY OF SOUTH CAROLINA CIVIL JURY VERDICTS

In response to the need for a systematic study of civil jury verdicts, Professor F. Patrick Hubbard of the University of South Carolina School of Law, with the support of the South Carolina Law Institute, directed a comprehensive study of South Carolina civil jury verdicts during the past decade.²⁵ During the summer of 1986, a team of researchers working under the supervision of Professor Hubbard reviewed civil case files in the Courts of Common Pleas and in the Federal District Courts in South Carolina. When the search indicated that a case had been determined by a jury verdict, the case file was reviewed for more specific information about the verdict, the nature of the suit, and the parties involved. The researchers examined jury verdicts from 1976 to 1985 in the twenty-six counties that contained 80% of the population of the state. The twenty-six counties from which the data were gathered constituted a representative sample of all the counties in the state.²⁶ The findings of the study were widely distributed to groups interested in tort reform, including the media, members of the judiciary committees in both houses, members of the bar, and interest groups on both sides of the issue.

The findings of the study cast serious doubt on the assertion that there is any crisis in the tort system in South Carolina. Al-

24. SOUTH CAROLINA CIVIL JUSTICE COALITION, *supra* note 4.

25. See Hubbard, *supra* note 5.

26. See *id.* at 702-04 (describing methodology of study).

though the number of civil case filings per year did increase, the rate of increase did not reflect an "explosion," but, instead, a gradual increase, corrected for population growth, of 2% per year.²⁷ Similarly, instead of a trend of "skyrocketing" jury awards, both the mean and the median of all awards show virtually no increase over the ten-year period when the actual awards are discounted for inflation.²⁸ Because of the few product liability and medical malpractice cases, no trends or patterns in these verdicts can be reliably reported.²⁹ Moreover, the size of most awards was modest.³⁰ The following tables reveal the mean and median awards for certain categories of tort cases won by the plaintiff:

TABLE 1

MEAN AND MEDIAN VERDICTS
FOR PLAINTIFFS IN CURRENT AND
REAL DOLLARS, 1976 - 1985

Year of verdict	Median verdict excluding verdicts for defendants		Mean verdict excluding verdicts for defendants	
	Actual Amount	Discounted for inflation	Actual Amount	Discounted for inflation
76	2,090	2,090	4,107	4,107
77	2,520	2,366	10,326	9,696
78	3,500	3,055	11,020	9,620
79	4,160	3,261	25,865	20,278
80	3,029	2,093	14,483	10,008
81	3,500	2,191	15,682	9,817
82	4,250	2,507	16,096	9,496
83	4,000	2,284	68,000	38,828
84	5,000	2,740	19,854	10,880
85	5,113	2,704	27,462	14,527

27. *Id.* at 708. South Carolina does not maintain statistical data on the nature of cases filed and the jury verdict study addressed verdicts only. Thus, it is not known whether filings of tort cases has changed. The jury verdict study did indicate that the number of verdicts in tort had not shown any substantial increase. *Id.* at 722, 725.

28. *Id.* at 708.

29. *Id.* at 708, 721, 730. The median for all tort cases does not include product liability verdicts because product liability cases typically include a warranty claim as well as a tort claim. *Id.* at 721. For the median for product liability cases, see Table 2.

30. *Id.* at 722-23.

TABLE 2
PRODUCT LIABILITY PRODUCTS

Year of Verdict	Number of Prod. Liab. Verdicts	Prod. Liab. Verdicts as % of All Verdicts	Mean		Median	
			Actual	Discounted for Inflation	Actual	Discounted for Inflation
76	3	4	2,975	2,975	2,975	2,975
77	13	4	30,252	28,407	2,871	2,696
78	19	4	6,976	6,090	6,504	5,677
79	13	3	20,902	16,387	4,250	3,332
80	23	5	12,028	8,312	4,000	2,764
81	11	2	17,111	10,711	6,437	4,029
82	16	3	24,091	14,214	10,000	5,900
83	16	2	183,548	104,806	5,250	2,997
84	12	2	97,142	53,234	5,250	2,877
85	23	3	3,162	1,673	3,156	1,669

TABLE 3
ALL TORT VERDICTS

Year of Verdict	Number of Tort Verdicts	Tort Verdicts as % of All Verdicts	Mean		Median	
			Actual	Discounted for Inflation	Actual	Discounted for Inflation
76	37	54	4,673	4,673	2,068	2,068
77	210	62	10,942	10,274	2,500	2,347
78	307	64	11,092	9,683	3,142	2,742
79	298	61	16,892	13,244	4,987	3,909
80	291	58	18,528	12,803	3,000	2,073
81	358	70	16,823	10,531	3,500	2,191
82	424	70	19,252	11,539	4,550	2,684
83	445	68	86,693	49,502	3,719	2,123
84	504	74	20,675	11,330	5,250	2,877
85	568	73	31,615	16,724	5,050	2,671

TABLE 4
MEDICAL MALPRACTICE VERDICTS

Year of Verdict	Number of Med. Malp. Verdict.	Med. Malp. Verdicts as % of All Verdicts	Mean		Median	
			Actual	Discounted for Inflation	Actual	Discounted for Inflation
76	0	0	0	0	0	0
77	1	0	0	0	0	0
78	6	1	0	0	0	0
79	5	1	263,417	206,519	350,000	274,400
80	8	2	137,500	95,012	137,500	95,012
81	16	3	32,500	20,345	27,500	17,215
82	18	3	16,813	9,919	14,750	8,702
83	26	4	554,628	316,692	45,500	25,980
84	21	3	140,321	76,896	75,000	41,100
85	16	2	128,200	67,818	66,000	34,914

The questionnaire distributed to respondents in the survey asked what the respondent thought the *average* award was in the various categories.³¹ The word *average* is ambiguous: to some it refers to the mean award and to others it means median award.³² Because these two terms define entirely different concepts, it is necessary to compare the results of the survey to both figures.

In politics, often the perception of reality has a greater impact on legislative action than the underlying reality itself. If legislators and key elites continue to believe that the civil justice system is out of control in South Carolina they are likely to continue to search for solutions to the "crisis" despite objective proof of the absence of a crisis. Thus, to understand the politics of tort reform, it is not enough to know the results of a comprehensive objective study that describes trends in tort cases in the state. A study like the jury verdict study is politically relevant only if it succeeds in changing the perceptions of reality held by key elites in state politics. Consequently, the South Carolina Law Institute sponsored the present study to determine the extent to which the jury verdict study affected the perceptions of

31. See *infra* appendix.

32. The mean is the arithmetical average of a set of numbers. To compute the mean of the awards one divides their sum by the number of awards. The median is the middle entry of a set of numbers that have been rank ordered from lowest to highest. For example, for the set of numbers 12, 2, 1, the mean is 5 and the median is 2.

key elites who were involved in the political struggle over tort reform in South Carolina and whether it would have any impact on the legislative process.

V. METHODOLOGY USED GATHERING DATA CONCERNING PERCEPTIONS

The initial step in the present study was to conduct a survey of elite perceptions of the trends in civil jury verdicts in South Carolina in the fall of 1986, before the results of the jury verdict study were revealed. A follow-up survey was conducted in the spring of 1987, after the study had been released and the issue of tort reform again was debated by the legislature. A mail survey was conducted of a random sample of 150 practicing attorneys and 150 medical doctors in the state, and one-third of the members of the legislature in October of 1986. A similar sample was surveyed in April, 1987. A total of 408 valid surveys were completed. These surveys were followed up with personal interviews with the members of the House Judiciary Committee who were responsible for writing the tort reform bill, committee staff, and the principal lobbyists for and against the bill.

The analysis of the data in this study was designed to permit an assessment of whether the key elites most concerned with the issue of tort reform held accurate perceptions of the problem widely asserted to be the reason the reform is required. Respondents in both the October and April surveys were asked the same questions so that the magnitude of change of their perceptions, if any, after the publication of the jury verdict study could be assessed. In each survey respondents were asked their perceptions of whether the amount of civil litigation and the size of the average awards made by juries in South Carolina had changed over the last decade. They were also asked their perceptions of the proportion of times plaintiffs won and the average size of the awards made by juries for all tort cases, product liability cases, and medical malpractice suits.³³

33. See *infra* appendix. Question five asks, parenthetically, the respondent's perception of median award of all civil cases.

VI. PERCEPTIONS OF A TORT CRISIS IN SOUTH CAROLINA

Medical doctors have been in the forefront of the drive for tort reform in many states. In 1986 they lobbied the South Carolina legislature for a limited tort reform bill designed primarily to reduce the cost of their own malpractice insurance. When that effort failed, many doctors joined forces in 1987 with the Civil Justice Coalition to push for a more comprehensive bill. The first survey was designed to determine whether, at the beginning of the battle over the 1987 tort reform bill, most doctors believed that there was a crisis in the tort system in South Carolina. The results of the survey are presented in Table One.

In the fall of 1986, South Carolina doctors firmly believed that the tort system in this state was in the midst of a genuine crisis. Seven of ten doctors surveyed expressed the belief that the level of civil litigation had dramatically increased over the past decade. A similar percentage of doctors thought that the size of the average award made by juries had more than doubled. While the data in the jury verdict study demonstrate that these beliefs were not accurate,³⁴ the beliefs are consistent with the oft-repeated lamentations of a tort crisis gripping the country.

Doctors' perceptions of the size of median awards in tort cases reflect the popular image of a tort crisis in South Carolina. Although the jury verdict study indicated that the median award for all jury verdicts ranged over a ten year period from \$2,090 to \$5,113,³⁵ only 1.8% of the doctors surveyed correctly put the figure under \$5,113. More than half of the doctors chose a figure that was at least five times as high as the highest median, and close to one-fifth of the doctors believed that it was over \$100,000.

Doctors also perceived product liability awards to be high. More than 65% of the respondents suggested that the average award was more than \$35,000. Twenty-nine percent of the doc-

34. Hubbard, *supra* note 5, at 722, 725.

35. *Id.* at 714. If the amount of the awards is discounted for inflation, the medians are lower, and the highest median award was only \$3,055. Question five of the questionnaire explicitly referred to median awards. However, it is helpful to consider mean awards as well because the questionnaire also used the term average. Some respondents may have interpreted the term as "mean." Here, the data indicate a range of means from \$4,017 in 1976 to \$68,000 in 1983 with no discount for inflation and a range from \$4,107 to \$38,828 if inflation is considered.

tors put the average over \$100,000. Doctors even had somewhat inaccurate perceptions of the average malpractice award; three-fifths of those surveyed guessed that it was over \$100,000.

The perceptions of attorneys were more realistic than those of medical doctors, but a significant proportion of the members of the bar apparently believed that the state was in the midst of a tort crisis. As Table One shows, only half as many attorneys as doctors believed that there had been dramatic increases in the level of civil litigation in the state over the last decade. In addition, many more attorneys believed that the average size of awards made by juries had stayed the same or decreased since 1976. Nevertheless, 21.6% of those responding to the survey incorrectly asserted that the average size of awards had more than doubled in the past decade. More attorneys than doctors tended to have accurate perceptions of the average size of jury awards. Most of the errors, however, consisted of estimates that were too high. Only 2% of the attorneys thought that the median award for all cases won by plaintiffs was above \$100,000, but almost two-fifths of the respondents put the figure above \$15,000, three times the highest median award indicated by the jury verdict study.

The key elites in the struggle over tort reform are, of course, the legislators themselves. Perceptions of legislators about whether a crisis exists in the South Carolina civil justice system may directly affect what type of new legislation, if any, is enacted. Therefore, the accuracy of legislative perceptions is crucial. The data shown in Table One suggest that the perceptions of legislators in 1986 were similar to those of the state's attorneys. They were not as likely as doctors to hold perceptions consistent with the notion that a tort crisis existed in the state, but they generally perceived jury awards to be considerably more favorable to plaintiffs than they actually are. For example, one-third of the legislators believed that the level of civil litigation in the state over the past decade had increased. Fifteen percent believed that average jury awards had more than doubled in that time frame. Only 6.1% accurately perceived that the average size of the awards had actually declined when controlled for inflation. Only 6.7% of the legislators believed that median awards were over \$100,000, but less than 7% accurately put the figure under \$5,000. Many legislators perceived product liability awards to be high. Thirty-one percent believed that the average

awards were over \$35,000, and only 6.9% correctly perceived the average to be under \$5,000.

These data clearly demonstrate that on the eve of the South Carolina legislative debate on tort reform misinformation about trends in civil litigation and jury awards was widespread. In addition to the data presented in Table One, the survey showed that all three elite groups overestimated the percentage of cases that went to jury trial and the proportion of those jury trials that were won by plaintiffs. Although the jury verdict study showed that no more than 2.7% of all civil cases filed in any year resulted in jury trials,³⁶ 39% of the doctors, 12% of the attorneys, and 21% of the legislators thought that at least one-fifth of all cases filed ended up in the hands of juries. Likewise, even though in reality plaintiffs won almost exactly one-half the time (49.3%), 24% of the doctors, 35% of the attorneys, and 37% of the legislators believed that they won in at least 65% of all jury trials.

TABLE 5

PERCEPTIONS OF DOCTORS, LEGISLATORS AND ATTORNEYS OF
TORT OUTCOME IN SOUTH CAROLINA: OCTOBER 1986 SURVEY

<u>Question^a</u>	<u>Response</u>	Doctors	Legislators	Attorneys
		(N=64)	(N=33)	(N=97)
Level of Litigation	Same/Decrease	4.8%	24.2%	19.4%
	Slight Increase	25.4	42.4	42.9
	Great Increase	69.8	33.3	37.8
Size of Awards	Decrease	1.6%	6.1%	7.2%
	Same	1.6	24.2	33.0
	Some Increase	28.8	39.4	38.1
	At Least Double	71.0	15.2	21.6
Median Award (All Tort Cases)	Under \$ 5,000	1.8%	6.7%	11.5%
	\$ 5 - 15,000	22.8	36.7	49.0
	\$15 - 25,000	24.6	30.0	24.0
	\$25 - 35,000	17.5	10.0	10.4
	\$35 - 99,000	14.0	10.0	3.0
	Over \$100,000	19.3	6.7	2.1

36. *Id.* at 711-12.

Median Award
(Defective Product
Cases)

Under \$ 5,000	4.9%	6.9%	3.1%
\$ 5 - 15,000	9.8	41.4	19.8
\$15 - 25,000	11.5	17.2	14.6
\$25 - 35,000	8.2	3.4	19.8
\$35 - 99,000	36.1	20.7	33.3
Over \$100,000	29.5	10.3	9.4

Median Award
(Medical
Malpractices Cases)

Under \$ 25,000	4.9%	51.7%	14.6%
\$25 - 64,000	27.9	20.7	51.0
\$65 - 99,000	6.6	10.3	10.4
Over \$100,000	60.7	17.2	24.0

^a For complete wording of questions, see appendix.

VII. PERCEPTIONS AFTER PUBLICATION OF THE JURY VERDICT STUDY

The jury verdict study was designed to provide accurate, objective information about the civil justice system which could provide a basis for rational decision making concerning tort-law reform for South Carolina. A summary of the findings of the study was widely distributed in early January 1987. The highlights of the study also received coverage in all the major newspapers in the state. By the time the House of Representatives began its deliberations on proposals for tort reform, both the legislators and the elites pushing for and against the various reform proposals had an opportunity to correct their earlier erroneous perceptions.

The second survey in the present study was designed to determine whether the jury verdict study and subsequent accounts of its findings did have the effect of increasing the accuracy of the perceptions of key elites in South Carolina. The survey was conducted in April, after the House had completed action on tort reform for the year. The timing of the survey thus provided the opportunity for the respondents to correct earlier misconceptions about the tort system either by reading the jury verdict study or reading or hearing accounts of the study's findings in the debate over tort reform proposals. The results of the second

survey are summarized in Table Two.³⁷

One might hope that the publication of the jury verdict study would produce a significant increase in the accuracy of the perceptions of all three types of elites. However, the survey data did not fulfill this hope. For some questions, the answers in the second survey appeared to be less accurate than those in the earlier survey. The accuracy of the responses to other survey questions, however, improved marginally. For example, the proportion of attorneys who correctly perceived that the inflation-controlled size of the average jury award had decreased during the past decade, improved from 2% to 12.8%. But for every one of the other questions for each of the three elite groups surveyed, the differences between the two surveys were statistically insignificant. All of the marginal changes observed were probably attributable to chance variation rather than to any real effect of the jury verdict study or any other events.

One hypothesis that may explain the absence of any improvement in the accuracy of the perceptions of the state legislators might be that most had not examined the jury verdict study in any detail. The jury verdict study was largely a collection of charts, graphs, and statistical data that may have appeared intimidating or too time consuming to digest. The legislators are inundated with an avalanche of information on a wide variety of bills and have little staff resources to help them assimilate all data possibly relevant to their legislative decisions. Nevertheless, even after the legislators had the opportunity to listen to the debate on tort reform and had cast a vote that reflected perceptions that no crisis existed, many continued to have decidedly inaccurate perceptions of whether a tort crisis existed in South Carolina. For example, two-thirds of those responding to the second survey believed that the average size of jury awards had increased during the past decade, 40% of the legislators believed that the average award was over \$35,000, and only one in nine

37. See *infra* appendix. Although sampling error can be expected to result in modest fluctuations in the answers given in the two surveys, the statistic "Z" was used to perform a test of statistical significance. This difference of proportions test permits a determination of whether the observed differences between the two surveys are likely to have occurred by chance. If this statistical procedure results in the finding that the differences were likely to have resulted from random variation, then one must conclude that the hypothesized cause of the differences (in this case, the jury verdict study) had no measurable impact.

was able to place the average award in product liability cases under \$5,000.

TABLE 6
PERCEPTIONS OF DOCTORS, LEGISLATORS AND ATTORNEYS OF
TORT OUTCOME IN SOUTH CAROLINA AFTER PUBLICATION OF
THE HUBBARD STUDY

<u>Question^a</u>	<u>Response</u>	<u>Doctors (N=99)</u>	<u>Legislators (N=30)</u>	<u>Attorneys (N=85)</u>
Level of Litigation	Same/Decrease	9.1%	26.7%	31.4%
	Slight Increase	21.2	36.7	34.9
	Great Increase	69.7	36.7	33.7
Size of Awards	Decrease	0.0%	3.3%	12.8%
	Same	9.1	30.0	26.7
	Some Increase	25.3	46.7	44.2
	Double	65.7	20.0	16.3
Median Award (All Tort Cases)	Under \$ 5,000	6.7%	7.4%	9.8%
	\$ 5 - 15,000	22.8	29.6	52.4
	\$15 - 25,000	8.9	29.6	23.2
	\$25 - 35,000	11.1	3.7	6.1
	\$35 - 99,000	20.0	22.2	6.1
	Over \$100,000	31.1	7.4	2.4
Median Award (Defective Product Cases)	Under \$ 5,000	4.5%	11.1%	2.5%
	\$ 5 - 15,000	16.9	25.9	11.2
	\$15 - 25,000	12.4	14.8	20.0
	\$25 - 35,000	9.0	14.8	26.2
	\$35 - 99,000	30.3	22.2	33.8
	Over \$100,000	27.0	11.1	6.3
Median Award (Medical Malpractices Cases)	Under \$ 25,000	5.3%	25.0%	14.8%
	\$25 - 64,000	19.2	46.4	54.3
	\$64 - 99,000	13.8	7.1	12.3
	Over \$100,000	61.7	21.4	15.0

^a For complete wording of questions, see Appendix.

VIII. FOLLOW-UP INTERVIEW

When the findings of these surveys are considered in light of the legislative action during 1987, an apparent paradox emerges.

The perceptions of most legislators were consistent with the claims of those who bewailed the existence of a crisis produced by skyrocketing jury awards and an explosion of litigation. Yet the bill crafted by the House Judiciary Committee was predicated on the assumption that there was no crisis in South Carolina.³⁸ An overwhelming majority of the House approved the bill essentially in the form in which it emerged from committee. Therefore it appears that the legislature adopted a bill that was not based on assumptions shared by many of the members who supported it.

In order to resolve this apparent paradox, and to test this hypothesis, personal interviews were conducted with four of the five members of the subcommittee of the Judiciary Committee that drafted the bill ultimately approved by the House. The principal lobbyists who attempted to influence the committee were also interviewed. These interviews indicated that all of the members of the subcommittee and all of the lobbyists responding were familiar with the results of the jury verdict study. In fact, most of them mentioned it spontaneously in response to general questions about the committee's deliberations. All of them were able to discuss its findings in impressive detail.³⁹ As a result, all of the members of the subcommittee had highly accurate perceptions of the trends in litigation and the nature of tort awards in South Carolina. These perceptions, in turn, influenced their decision making during the drafting of a tort reform bill. When the bill reached the floor, most members apparently perceived it to be highly complex and did not trust their own understanding of the details of many of the issues and, therefore, based their vote not on their own perceptions of the civil justice system, but instead on their trust for the "experts" — the members of the Judiciary subcommittee who had spent so much time studying the issues.⁴⁰

38. Interview with Representative David Wilkins, Chairman of the House Judiciary Committee (August 17, 1987).

39. All of the members of the subcommittee were familiar with the results of the jury verdict study and similar studies from a number of other states.

40. This interpretation of why the full House accepted the committee bill was shared by lobbyists on both sides as well as by the members of the subcommittee who were interviewed.

IX. SUMMARY AND CONCLUSION

In summary, the answer to the question of whether the jury verdict study had any significant impact on the perceptions of the elites in the struggle over tort reform in South Carolina is not straightforward. When the perceptions of random samples of attorneys, medical doctors, and state legislators were examined, it appeared that the release of the report had no measurable impact. The perceptions of all three groups continued to be considerably inaccurate even after the report had been released. However, the study apparently had a major impact on the perceptions of the key decision makers—the members of the subcommittee that drafted the bill, held hearings on it, and steered it to final passage in the House. Thus, although the report directly affected the perceptions of very few people, it appears to have had a significant impact on the framework of the political debate in the House of Representatives.⁴¹

41. At the time of this writing, the State Senate had not acted on tort reform.

APPENDIX

WORDING OF QUESTIONS MEASURING ELITE PERCEPTIONS OF THE SOUTH CAROLINA TORT SYSTEM

1. The level of civil litigation in South Carolina state courts since 1976 has
 - a. decreased slightly
 - b. stayed about the same and grown no faster than the population has increased
 - c. increased slightly more than population growth
 - d. increased very much more than population growth
2. If inflation is considered (*i.e.*, awards are expressed in constant dollars), the average jury verdict in South Carolina civil cases has
 - a. decreased somewhat
 - b. stayed about the same
 - c. increased somewhat
 - d. about doubled
 - e. more than doubled

For the questions below, please fill in the blank with the number which expresses your opinion or best guess. These questions refer to all civil cases including, for example, contracts cases, motor vehicle accidents, libel, personal injury, and fraud, but excluding family matters like divorce and probate.

3. Of the civil cases filed in South Carolina, what percentage would you guess are tried and a jury verdict is rendered?
_____ %
4. Of the civil cases in South Carolina that are tried and result in a verdict by a jury, what percentage would you guess are won by plaintiff? _____ %
5. In civil cases where the plaintiff wins, what would you guess was the average (median) size of the jury verdict in South Carolina state courts in 1985? _____ %

6. In civil cases where the plaintiff won, the average jury verdict in South Carolina for injury caused by *defective product* in 1985 was \$ _____.

7. In civil cases where the plaintiff won, the average jury verdict in South Carolina in 1985 for injury from *medical malpractice* was \$ _____.

