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GETTING TO NO: A STUDY OF SETTLEMENT NEGOTIATIONS AND THE SELECTION OF CASES FOR TRIAL

*Samuel R. Gross**

*Kent D. Syverud***

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A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.¹ Much of our civil procedure is justified by the desire to promote settlement and avoid trial.² More important, the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate.³ These are powerful forces, and they produce settlement in a very high proportion of litigated disputes. Once in a while, however, the process fails and a case goes to trial.

Why do these failures occur? One answer is obvious. For every trial, there is at least one person — an attorney, a client, a claims manager — who said “no” to a settlement. Who said no, and why? We asked lawyers and we received a wide range of answers: “The client was stubborn”; “The plaintiff wanted too much”; “We didn’t think their case had any merit”; “They just wouldn’t pay anything”;

1. The dissenters are usually academics. See, e.g., Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55; Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL. 102-44 (1986); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); cf. A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Deterrent Effects of Settlements and Trials*, 8 INTL. REV. L. & ECON. 109 (1988) (noting that trials may deter injury-causing behavior more than settlements). Practitioners who prefer trial to settlement are rare but vocal. See Charles W. Rubendall II, *I Hate Settlements: A Defense Lawyer’s Lament*, FOR THE DEFENSE, Feb. 1990, at 11; Connie Bruck, *Born to Try*, AM. LAW., Nov. 1984, at 109.

2. Court-annexed mediation and arbitration plans are designed to promote settlement in many states. See Deborah R. Hensler, *What We Know and Don’t Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 271 (1986) (noting active mandatory arbitration programs in 18 state court systems). Federal trial courts apply Rules 16 (pretrial conference), 23 (class actions), 26(b) (discovery of insurance agreements), and 68 (offers of judgment) of the Federal Rules of Civil Procedure to encourage settlement. See Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599 (1989); Evans v. Jeff D., 475 U.S. 717 (1986) (justifying one reading of Rule 23 by its tendency to promote settlement of class actions); FED. R. CIV. P. 26(b)(2) advisory committee’s note (1970) (discovery of insurance agreements will promote settlement in some cases); Marek v. Chesny, 473 U.S. 1 (1985) (justifying one reading of Rule 68 by its tendency to promote settlement).

3. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 504 (1985).

"It was a family feud and a matter of pride"; and so on.⁴ Everyone seems to agree that these vetoes are not random, but a great deal more is needed to explain why few disputes are tried while the great majority are not.

Over the past decade scholars have developed two major theoretical frameworks that address this question. One holds that a trial represents a failure in parties' *predictions* of the behavior of the court: a trial will occur when the parties make inconsistent and self-serving errors in their estimates of the likely judgment. This theory has been developed primarily in the work of George Priest and Benjamin Klein.⁵ A competing view of litigation describes trial as a failure of *bargaining* between the parties, the unintended outcome of strategic plays that misfire. Among legal scholars, the most prominent exponents of this theory are Robert Mnookin, Lewis Kornhauser, Robert Cooter, and Stephen Marks.⁶ These two views of litigation embody different understandings of the nature of settlements, and they have quite different implications for the composition of the small subset of cases that are selected to go to trial.

The absence of data on pretrial negotiations has handicapped development of this topic.⁷ This article is an attempt to begin to correct that problem. We report on a statewide sample of 529 civil jury trials that were conducted in California State Superior Courts between June 1985 and June 1986. Our data include information on settlement negotiations and on the size of the jury award, if any. Our hope is to learn something about how pretrial bargaining works by examining those cases in which it did not work — a method similar, perhaps, to studying the operation of an assembly line by looking at the rejects.⁸

4. These explanations are taken from telephone interviews in 1990 and 1991 with lawyers representing parties in civil cases that have recently gone to jury trial in California Superior Courts. See *infra* Part II.

5. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); George L. Priest, *Reexamining the Selection Hypothesis*, 14 J. LEGAL STUD. 215 (1985).

6. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

7. The literature on settlement is extensive, and includes a number of efforts to test theories of the litigation process against data from litigated cases or simulations. For a comprehensive survey that concludes that empirical research has lagged far behind theoretical advances, see Robert Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989). Few previous studies attempt to analyze data concerning settlement demands or offers in cases that went to trial. One exception is George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORGANIZATION 193 (1987), which is critiqued in Robert Cooter, *Why Litigants Disagree, A Comment on George Priest's "Measuring Legal Change"*, 3 J.L. ECON. & ORG. 227 (1987). Another is Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC. REV. 515 (1984).

8. We are aware, of course, that bargaining in cases that go to trial differs systematically

Both of the existing theoretical frameworks are helpful in describing our findings. Priest and Klein's intuitively appealing model of the selection of cases for trial provides a useful starting point for examining actual litigation. From that starting point we proceed to find strong evidence of strategic bargaining of the sort described by Mnookin, Kornhauser, Cooter, and others — and more than a hint that such bargaining is a major force in determining which cases fail to settle. Neither of the frameworks, however, fully explains the patterns that we observe. On the one hand, several of Priest and Klein's hypotheses — in particular, the claim that the outcomes of trials will gravitate to a fifty percent plaintiff success rate — are inconsistent with actual settlement negotiations and trial outcomes. On the other hand, the formal strategic bargaining models that have been developed lack sufficient detail to explain the remarkably diverse selection patterns that exist in different types of litigation.

Pretrial bargaining and the selection of cases for trial cannot be understood in the abstract. To explain the settlement negotiations and the outcomes in these cases, it is necessary to consider the social and economic context of the litigation, including: (1) the nature of the parties and the relationships between them; (2) their arrangements for paying their attorneys; (3) the existence or absence of insurance to pay the damages and the costs of litigation; and (4) the division of settlement authority between defendants and their insurers. Differences in these variables from one type of case to another help explain conspicuous differences in the pretrial behavior of the parties, and in the judgments they obtain in court.

We begin, in Part I, with an overview of the two existing theoretical frameworks for understanding the selection of cases for trial. In Part II we describe our research methods. In Part III we explain why a good part of the Priest and Klein framework, and particularly the fifty percent implication, is at odds with the data. We then address evidence of both selection effects and strategic bargaining in two different subsets of the cases: personal injury trials (Part IV) and trials of claims arising from commercial relations between the parties (Part V). We conclude in Part VI by suggesting a set of testable hypotheses that look to the nature of the parties and their attorneys' fees and insurance arrangements to explain trial success rates and settlement behavior.

from bargaining in cases that are settled. See Marc Galanter, *Conceptualizing Legal Change and Its Effects: A Comment on George Priest's "Measuring Legal Change,"* 3 J.L. ECON. & ORGANIZATION 235 (1987). See generally Herbert M. Kritzer, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990).

I. TRIAL AND SETTLEMENT THEORIES

A. *Priest and Klein on the Selection of Cases for Trial*

Trials are most likely to occur in close cases. This is a common observation by trial lawyers, and the core assertion of Priest and Klein's influential model of litigation.⁹ The model's most influential elements — the "selection hypothesis," which is an attempt to explain why trials occur primarily in close cases, and the "fifty percent implication," which is a specific prediction that follows from the selection hypothesis — are both built around this claim.

The Selection Hypothesis

In the initial formulation of their theory, Priest and Klein envision an array of disputes of a single type around the governing decision standard. Each time an injured pedestrian sues a motorist, for example, the dispute involves some degree of defendant culpability that may fall short of, reach, or exceed the standard of negligence applied by courts to that type of case. Phrased more generally, the proof presented by the parties may reach or fall short of what is required under the decision standard. Priest and Klein assume (initially) that the judge or jury asks simply whether the plaintiff reached the threshold level of proof. The margin by which the proof exceeds or falls short of that threshold is irrelevant to the decision.

Irrelevant to the decision, perhaps, but crucial to the litigants. The parties do not know in advance how the court will evaluate the evidence. Therefore, they must guess the answer to the critical question: On which side of the line will this case fall? Such a guess can be quantified as an assessment of the probability of a judgment for the plaintiff — 90%, 50%, 10%, or whatever. Given this assessment, we can calculate the "expected judgment" at trial, which is simply that probability multiplied by the amount of the damages at issue (which Priest and Klein initially assume to be fixed).

The critical step in Priest and Klein's theory is an assumption that the parties' bargaining postures can be determined directly from their assessments of the likely outcome at trial. Building on economic models of litigation developed by Landes, Posner, and Gould,¹⁰ the Priest and Klein model equates a plaintiff's minimum settlement demand¹¹

9. Priest & Klein, *supra* note 5, at 12-17; see also Priest, *supra* note 5, at 216-21 (restating the hypothesis and its underlying assumptions).

10. See William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

11. Trial lawyers and judges refer to settlement proposals from plaintiffs as "demands" and

with the plaintiff's *estimate* of the expected judgment at trial, *minus* the plaintiff's litigation costs. Similarly, the defendant's maximum settlement offer equals the defendant's *estimate* of the expected judgment at trial, *plus* the defendant's litigation costs.

Priest and Klein assume that the parties will settle whenever the defendant's maximum offer is greater than the plaintiff's minimum demand. Because litigation costs are *added* to the defendant's maximum offer and *subtracted* from the plaintiff's minimum demand, settlement will normally occur. Indeed, if plaintiffs and defendants always agreed in their predictions of trial outcomes, there would be no trials at all. But the parties do not always agree, and their disagreements can lead to very different assessments of the expected judgment. As a result, the plaintiff's minimum demand will sometimes exceed the defendant's maximum offer. In that situation, Priest and Klein assume the parties will not settle.¹² Regardless of the outcome, Priest and Klein tacitly assume that the parties neither bargain nor litigate strategically. The litigants make demands and offers, they settle or try cases, solely because of what they expect the court will do, and not at all because of how they expect opposing parties to respond.¹³

Given these assumptions, Priest and Klein demonstrate that the cases that go to trial will be concentrated among disputes close to the decision standard. A case where the motorist's conduct was a little bit negligent (or almost negligent) is more likely to be tried than one where the motorist was egregiously negligent (or meticulously careful). Why? Because incompatible estimates of the judgment are much more likely close to the decision standard (where a small error may push a plaintiff's prediction over the line and cause her to expect a large judgment rather than nothing at all) than far from the standard (where it would take a larger error to lead the plaintiff to make a mistake in her prediction of the court's decision). Priest and Klein's selection hypothesis, then, is that tried cases tend to cluster close to the governing decision standard, regardless of the underlying distribution of disputes relative to that standard.

The Fifty Percent Implication

The general prediction of the selection hypothesis — that trials will tend to be close cases — is difficult to confirm or refute. Since it is a comparative assertion (cases tried are closer to the decision standard

to settlement proposals from defendants as "offers." We follow that convention here. Economists often refer to demands as "asks" and offers as "bids"; legal scholars and appellate judges tend to lump both together under the term "offer."

12. Priest & Klein, *supra* note 5, at 13.

13. *Id.* at 7.

than cases settled), it requires data on both settlements and trials. Worse, the data would have to quantify a notoriously slippery concept, the weight of evidence on disputed claims.¹⁴ As a result, nobody has made a credible attempt to test the selection hypothesis directly against data from real cases.¹⁵ However, by adding a couple of additional assumptions to this hypothesis, Priest and Klein developed a more specific prediction that is, apparently, quite testable: that plaintiffs will tend to win fifty percent of cases that go to trial, regardless of the proportion of cases in which they would prevail in the underlying distribution of disputes from which trials are selected. To a remarkable extent, this "fifty percent implication,"¹⁶ which Priest also describes as the "principle empirical heuristic of the model,"¹⁷ has come to overshadow the more general selection effect.

The selection hypothesis already requires that only a small proportion of litigated disputes proceed to trial. In a typical set of disputes, only a small minority of cases is close to the standard for decision; if many cases are tried, many of those will necessarily lie far from that line. For the fifty percent implication, Priest and Klein add two further restrictions. First, the parties on both sides must have equal stakes in the dispute. This means that each side stands to lose (or gain) as much as the other, and that their costs in pursuing the litigation are equal. Second, plaintiffs and defendants (or their attorneys) must be, in aggregate, equally successful at predicting the outcomes of cases — they must have equivalent information, experience, and skill.

Using these assumptions, Priest and Klein provide a mathematical demonstration that the plaintiffs' success rate will gravitate to fifty percent.¹⁸ For our purposes, a commonsensical description will serve equally well. Under this model, a trial will occur only when one party makes a bad guess and goes to trial when it should have settled. We have assumed that (1) these are mostly close calls, (2) the parties are equally good at making their guesses, and (3) they have equal stakes, so neither side is more motivated than the other to gamble. Given

14. Cf. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY, A LEGAL AND EMPIRICAL ANALYSIS 40, 512-48 (1990) (data for a study of the processing of capital murder cases includes over 175 separate items that bear on the strength of the evidence of the defendant's guilt).

15. But cf. Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision To Litigate or Settle*, 19 J. LEGAL STUD. 145 (1990) (using undergraduates in a negotiation game to test the decision to settle or litigate hypothetical disputes, and finding that the distribution of unsettled disputes does not differ significantly from the entire distribution of disputes negotiated).

16. Priest & Klein, *supra* note 5, at 5; Priest, *supra* note 5, at 219.

17. Priest, *supra* note 5, at 218.

18. Priest & Klein, *supra* note 5, at 17-22 & n.42.

these restrictions, there is no reason to expect one side to make many more mistakes than the other; on the contrary, it is natural to expect these mistakes to be about evenly divided.¹⁹

If any one of the assumptions that underlie this hypothesis is false, the hypothesis will not hold. Empirical analyses of the fifty percent implication have handled each of these assumptions differently. When the hypothesis is applied to actual data reporting trial outcomes in civil cases, researchers tend either to overlook the assumption of a low litigation rate²⁰ or to find that the assumption is satisfied once they discover that most cases of a particular type, or in a particular jurisdiction, have settled.²¹ The second assumption — that the sides are equally skilled at predicting outcomes — is often simply ignored.²² The assumption of equal stakes, by contrast, receives a great deal of attention. Priest and Klein and other researchers focus on deviations from it — on asymmetric stakes — as the primary explanation for deviations from the fifty percent hypothesis.²³

One further assumption is attached to the fifty percent hypothesis, although (unlike the others) it is not essential. In their major formulation of this hypothesis, Priest and Klein assume that the cases litigated involve determinations of liability only, not damages.²⁴ Priest and Klein do argue that a more complex version of the hypothesis can be applied to disputes over damages,²⁵ but this point has been generally overlooked. Instead, researchers have tested a hypothesis that by its terms is restricted to disputes over liability against sets of cases that plainly include many disputes over damages as well.²⁶

19. See *id.* at 17; Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1572 (1989). For an early version of this intuition, see William Baxter, *The Political Economy of Antitrust*, in *THE POLITICAL ECONOMY OF ANTITRUST* 16 (Robert D. Tollison ed., 1980).

20. See, e.g., Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185, 200 (1985).

21. See, e.g., J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

22. See, e.g., Priest & Klein, *supra* note 5, at 30-55.

23. *Id.* at 40 (emphasizing differential stakes as explaining low plaintiff success rates in medical malpractice and products liability cases); see also Ramseyer & Nakazato, *supra* note 21, at 284-85 (suggesting asymmetric stakes as one explanation for high (and low) plaintiff victory rates in Japanese cases).

24. Priest & Klein, *supra* note 5, at 9; Priest, *supra* note 5, at 226.

25. Priest & Klein, *supra* note 5, at 29-30; Priest, *supra* note 5, at 226-32. For a discussion applying the complex version of the Priest and Klein hypothesis to some of our own data, see *infra* text accompanying notes 54-61.

26. In Priest and Klein's own test of the 50% implication, using tried cases in Cook County, Illinois, they attempted to restrict the data to cases where only liability was contested by excluding cases involving default judgments, directed verdicts, or admissions of liability by the defendant. Priest & Klein, *supra* note 5, at 31 n.59. As Priest and Klein acknowledge, however, cases involving disputes over both liability and damages probably remained in the dataset. *Id.* at n.60.

However limiting its assumptions, the fifty percent hypothesis has the virtue of being easy to remember, and apparently easy to test. It seems that such tests require only information about trial outcomes, which are much more accessible to researchers than settlement negotiations. And tested the fifty percent hypothesis has been, on datasets as diverse as wrongful death cases in Japan, civil rights cases in federal courts, challenges to federal agency decisionmaking, and state court appellate decisions.²⁷ The tests, however, are often unsatisfying. On the one hand, a finding of a fifty percent success rate is too rarely accompanied by an inquiry into whether the underlying assumptions of the model are actually met. On the other hand, a deviation from a fifty percent rate can almost always be explained as a failure of one or more of these essential assumptions rather than a failure of the hypothesis itself.

B. *Bargaining Theory and the Disposition of Litigated Disputes*

Pretrial bargaining is strategic. The predicted trial outcome may inform a litigant's strategy, but it cannot determine it, since even a perfect prediction leaves crucial questions unanswered: What fraction or multiple of the expected judgment should the litigant offer, and when? How quickly and in what fashion should she respond to an offer by the other side? Under what circumstances should a party make a sincere offer? An outrageous demand? An insincere threat to go to trial? Despite extensive research, no general theory even claims to describe the optimal settlement strategy. Bargaining remains an art rather than a science.

Bargaining theory has provided an interesting and complex view of the process that leads cases to be tried. The first major statement of that view was presented in Robert Mnookin and Lewis Kornhauser's 1979 article, "Bargaining in the Shadow of Law: The Case of Divorce."²⁸ The central point of this article is consistent with Priest and Klein's framework: litigants order their private, out-of-court negotiations around the substantive law and procedure that will be applied if the negotiations break down and the court steps out of the shadows to adjudicate the dispute. But Mnookin and Kornhauser also argue that an array of other factors affect negotiating behavior in divorce cases,

In our study, as well as in our experience as litigators, a large fraction of cases go to trial with both liability and the amount of damage disputed by the parties.

27. See Eisenberg, *supra* note 19; Ramseyer & Nakazato, *supra* note 21; Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1011; Wittman, *supra* note 20, at 201.

28. Mnookin & Kornhauser, *supra* note 6.

some of which are largely independent of the expected judgment.²⁹ These factors include: (1) differences among litigants in how they value monetary and nonmonetary stakes in the litigation; (2) differences in the degree of uncertainty about the outcome, and in the risk aversion of the litigants; (3) the transaction costs and the litigants' ability to bear them; (4) the litigants' feelings toward each other; and (5) strategic behavior.

Much of the work of bargaining theorists has focused on this last factor, strategic behavior. Mnookin and Kornhauser used "strategy" to mean behavior in which litigants *misrepresent* their intentions, desires, or chances of winning in order to obtain an advantage in settlement negotiations.³⁰ Each party has an *opportunity* to lie because the opponent cannot know the other side's prediction of the outcome at trial, preferences with regard to settlement, or attitudes toward the risk of trial. Each party also has an *incentive* to lie: by lying it may increase its share of the gains from settlement — the trial costs avoided by both plaintiff and defendant.

In a later article Robert Cooter, Stephen Marks, and Robert Mnookin use a broader definition of strategy and attempt to construct a model that identifies those subsets of cases where strategic bargaining behavior is most likely to cause trials.³¹ In this model, as under the Priest and Klein framework, it is a necessary condition for settlement that the defendant's expected judgment, plus trial costs, exceeds the plaintiff's expected judgment, minus trial costs. For Cooter, Marks, and Mnookin, however — unlike Priest and Klein — this condition is not sufficient to generate a settlement. Even parties that stand to gain from a settlement must bargain successfully over the distribution of those gains. A litigant's "strategy" consists of the moves she makes to maneuver the opponent into giving her as much of the settlement gains as possible. The array of possible strategies is virtually unlimited.

How does a litigant choose a strategy? At each step in the negotiations she will consider both how the opposing party will react to a possible move and how the court might rule at trial. Thus, a defen-

29. *Id.* at 966, 974. For Mnookin and Kornhauser, an anticipated result in court is described as a "bargaining endowment created by legal rules," rather than as the "expected judgment." The difference in terminology captures a significant difference between the types of cases studied by Mnookin and Kornhauser and by Priest and Klein. Priest and Klein focused primarily on monetary disputes — cases in which the resolution of all the issues at stake is reduced to one term, the damage award. Mnookin and Kornhauser studied divorce, an area of litigation in which nonmonetary issues — including child custody — are generally mixed in with monetary stakes.

30. *Id.* at 972-73.

31. Cooter et al., *supra* note 6, at 225.

dant may reject a plaintiff's demand that is better than the outcome the defendant expects at trial, but not as good as the settlement the defendant expects after further negotiations. Such a refusal is a calculated gamble — a judgment that the chance of a more advantageous settlement is worth the risk of a trial with a higher expected cost to the defendant. Trials, according to the model, consist largely of cases where gambles like this did not pay off — where hard bargaining strategies caused negotiations to fail. They can occur even when neither party is unduly optimistic about the judgment.

Cooter, Marks, and Mnookin suggest several ways to test whether it is strategic behavior or optimism about trial results that causes trials. First, strategic behavior is implicated whenever there is a high rate of trials among cases where the outcome is easy to predict (and thus difficult to predict erroneously, whether optimistically or pessimistically).³² Second, repeat litigants (such as insurance companies) whose opponents are not repeat litigants are more likely to favor hard bargaining strategies, since by doing so they will influence the expectations of future opponents. The model predicts a higher rate of trial in such cases than in cases where repeat litigants sue other repeat litigants.³³ Finally, the model predicts a higher rate of trial under the American rule, where each side pays its own fees, than under the British rule, where the loser pays both sides' fees. If party optimism drove cases to trial, one would expect the opposite to be the case.³⁴

These tests all look exclusively to rates of trial relative to settlement for traces of strategic bargaining, rather than to the pattern of demands, offers, and judgments. Unfortunately, none of the tests³⁵ is as easy to employ as the fifty percent hypothesis. It turns out to be quite difficult to determine which classes of cases have the most predictable outcomes, in part because of the possibility of bias in the subset of cases that go to trial. The available data do not always reveal whether the real party in interest (or the party controlling the settlement negotiations) is a repeat player; moreover, it is extraordinarily difficult to "hold all other things equal" in comparing a class of cases to which the American rule applies and a class of cases to which the

32. *Id.* at 242-44.

33. *Id.* at 241.

34. *Id.* at 244-46 (explaining that optimistic parties are more likely to favor trial under the British rule because the optimistically expected victory will carry with it a recovery of attorneys' fees).

35. Cooter, Marks, and Mnookin also suggest a fourth test for discerning evidence of strategic behavior. Their model implies that increasing the costs of negotiating a settlement will increase the probability of settlement. *Id.* at 240. Priest & Klein's model suggests the opposite. *See id.*

British rule applies. As a result, empirical research in the past decade has produced little direct evidence of strategic bargaining in cases that go to trial.³⁶ Most research on bargaining in litigation consists instead of modeling games that restrict the structure of offers, demands, and access to information in ways quite alien to actual litigation.³⁷

II. DATA AND METHODS

Our own analysis of why some disputes go to trial is based on information about cases that did. Our main source of data is a set of 529 civil jury trials that were concluded in the California State Superior Courts (the courts of general jurisdiction) between June 1985 and June 1986. The data are taken from reports in *Jury Verdicts Weekly (JVW)*, a jury verdict reporter that covers the entire state of California.³⁸ These reports include information on the nature of the claims; the identity of the parties, their lawyers, and their expert witnesses; the amounts demanded and offered in settlement negotiations; and the length of the trials, and their outcomes.

The 529 trials that we examined are a nonrandom (but, as far as we can tell, reasonably representative) sample of approximately 38% of the cases reported in *Jury Verdicts Weekly* in 1986.³⁹ Four of these trials ended in hung juries; the rest in verdicts. Approximately 70% of the trials were personal injury cases of one sort or another — vehicular negligence (21.7%), nonvehicular negligence (29.1%), medical malpractice (12.3%), or products liability (7.4%). About half of the remaining trials (14.7%) concerned claims growing out of commercial relations of one sort or another — real estate (5.3%), employment (4.7%), or commercial transactions (4.7%). About 7% of the trials involved other torts — conspicuously battery and false imprisonment (which we have grouped together as torts involving the use of unlawful force) (4.2%). Of the remaining cases, the only sizeable category is

36. Mnookin and Kornhauser do discuss evidence of strategic bargaining in divorce cases from their own observation of contested divorces in California. Mnookin & Kornhauser, *supra* note 6, at 972-73; see also HERBERT M. KRITZER, LET'S MAKE A DEAL 103-05 (1991) (discussing evidence that defendants are more likely to engage in strategic bargaining than plaintiffs).

37. For descriptions of bargaining models and their restrictive assumptions, see KRITZER, *supra* note 36, at 86-98; Cooter & Rubinfeld, *supra* note 7, at 1078-82 and John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157, 160-61 (1989).

38. *JVW* is also the primary source for the California portion of the civil jury verdict database of the Rand Corporation's Institute for Civil Justice. See, e.g., MARK A. PETERSON, CIVIL JURIES IN THE 1980s: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS at xiii (1987); MICHAEL G. SHANLEY & MARK A. PETERSON, POST TRIAL ADJUSTMENTS TO JURY AWARDS 14 (1987); MICHAEL G. SHANLEY & MARK A. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980 at viii (1983) [hereinafter SHANLEY & PETERSON, COMPARATIVE JUSTICE].

39. See Appendix A for a more complete description of the sample.

insurance (4.0%), which consists primarily of bad faith claims by individuals against their own insurance companies. (See Table 1.)

TABLE 1
JURY VERDICTS WEEKLY DATA

Sample — 529 Civil Jury Verdicts in California State Superior Courts, June '85 - June '86.

<u>Nature of Claims</u>			
Vehicular Negligence	21.7%	(115)	PERSONAL INJURY 70.5% (373)
Nonvehicular Negligence	29.1%	(154)	
Medical Malpractice	12.3%	(65)	
Products Liability	7.4%	(39)	
Real Estate	5.3%	(28)	COMMERCIAL 14.7% (78)
Employment	4.7%	(25)	
Commercial Transactions	4.7%	(25)	
Unlawful Force	4.2%	(22)	OTHER TORT 7.0% (37)
Unfair Practices	1.7%	(9)	
Professional Malpractice	1.1%	(6)	
Insurance	4.0%	(21)	MISCELLANEOUS 7.8% (41)
Indemnification	1.7%	(9)	
Condemnation	1.1%	(6)	
Miscellaneous	0.9%	(5)	

Our data, of course, are no better than the source from which they are drawn. The information in *JVW* is obtained primarily from the attorneys who tried the cases.⁴⁰ Sometimes the lawyers complete

40. Unless otherwise attributed, this paragraph is based on a telephone interview with Kenneth Raymond, President and Publisher of *Jury Verdicts Weekly*, by Samuel R. Gross (Jan. 23, 1987).

questionnaires that can be found in occasional issues of the publication, and send them in unsolicited; more often they are contacted by mail or by telephone. *JVW* claims to include reports on over 90% of California civil jury verdicts. Estimates by independent scholars are lower, but still high.⁴¹ *JVW* prefers to use information from both sides, and (if necessary) to reconcile inconsistencies. In some cases, however, *JVW* relies on the report of a single party, and once in a while it reports two versions of information on certain items. We are presently conducting a telephone survey of attorneys who have tried cases that are reported in *JVW* to obtain an estimate of the reliability of the reported data on offers and demands. Preliminary indications suggest that these data are quite reliable.⁴²

A great deal of our analysis focuses on offers and demands. *JVW* sometimes reports changes in the demands or the offers in a case, or in both, either before or during trial. Whenever more than one offer or demand is mentioned, we have chosen the *highest* offer and the *lowest* demand, regardless of time or sequence. In other words, our coding conventions are biased toward convergence in the pretrial negotiations.⁴³

We have also assembled a second, smaller data set. It consists of all real estate, employment, and commercial transaction trials in *JVW* over a ten-month period from July 1989 to April 1990 — 109 trials in all. We use these cases to supplement our sparse data on commercial relations trials. In addition, we conducted brief telephone interviews with 86% of the plaintiffs' attorneys and 59% of the defense attorneys in these cases, and obtained some limited information on fee arrangements, on insurance, and on the attorneys' general views of the cases.

We attempt to use these data to examine both the process of case selection for trial and the pretrial bargaining strategies of the parties. The assertions we make in the process are not all equally well supported. In some cases we can draw strong conclusions from clear data. Frequently, however, we are limited by one of two problems. First, while our sample is large enough for many purposes, the numbers of cases in many subsamples are too small to support statistically reliable conclusions. We are aware of that limitation, even where we have not censored our speculations.⁴⁴ Second, we have no direct data

41. See SHANLEY & PETERSON, *COMPARATIVE JUSTICE*, *supra* note 38, at 80 (finding that in 1974 and 1979 *Jury Verdicts Weekly* reported at least 84% of Superior Court jury verdicts in San Francisco County).

42. See *infra* Appendix A.

43. For a more complete description of our coding, see Appendix A.

44. Part of the reason we are willing to speculate on the basis of small numbers is that a much larger data set drawn from *Jury Verdicts Weekly* will soon be available to us and other

on some critical elements of the process we attempt to describe. Thus, while we do have some data on settlement negotiations in cases that were tried, we have no comparable information for cases that were not; we do not even know their frequency. As a result, we can only make indirect inferences about general pretrial bargaining strategies. We also lack systematic information on some patterns that we assert with confidence — for example, that virtually all the personal injury defendants in our sample were insured, and that virtually all the personal injury plaintiffs hired attorneys on contingent-fee contracts. We have no particular qualms about those assertions — they are almost certainly correct — but they are not observations.

III. THE FAILURE OF THE FIFTY PERCENT IMPLICATION

What drives cases to trial? To answer that question, we start with Priest and Klein's analysis of the selection of cases for trial, and particularly with the fifty percent implication. The trials we examined, like the Cook County cases with which Priest and Klein first tested the fifty percent implication, represent only a tiny fraction of the claims that might have gone to trial.⁴⁵ Likewise, the overall pattern of outcomes of these cases resembles the Cook County trial outcomes reported by Priest and Klein: 51.4% of all trials resulted in judgments for the plaintiffs, and 48.6% in judgments for defendants.⁴⁶ At a glance, our data appear to confirm that, given a low trial rate, plaintiff success in court does approach 50%.

Glances can be misleading. While at first it looks as though these data provide strong support for the fifty percent implication, a closer examination shows that this hypothesis is inconsistent with our observations. The inconsistency becomes apparent when we reconsider the data after performing each of two essential operations: disaggregating the types of claims, and constructing meaningful measures of plaintiff success.

A. *Disaggregating Types of Claims*

The unit of analysis in the Priest and Klein framework is a set of

researchers. The Civil Justice Institute of the RAND Corporation has assembled data on over 6500 trials, from 1980 through 1985, and is in the process of placing them in the public domain under Grant No. SES-871-5-3 from the Law and Social Science Program of the National Science Foundation.

45. Only 2% of personal injury case dispositions in California Superior Court in 1985-1986 occurred at or after a jury trial. 1987 JUD. COUNCIL OF CAL. ANN. REP. 115.

46. Priest and Klein's aggregate Cook County data showed 48.47% of all trials resulted in verdicts for plaintiffs, and 51.53% in verdicts for defendants. Priest & Klein, *supra* note 5, at 31-34.

similar disputes, such as automobile-pedestrian collisions, rather than all civil disputes that enter courts of general jurisdiction.⁴⁷ When we divide our sample of cases into subsets based on the types of claims that were litigated, the overall plaintiff judgment rate of approximately 50% immediately breaks down into several different rates that are either above or below 50%. The largest general category — negligence (50.9% of all cases) — seems to stay close to the magic line: 49.1% of negligence cases resulted in judgments for the plaintiff. This rate, however, is in itself a misleading amalgam. When we look separately at the largest subgroup — vehicular negligence cases (21.7% of the total) — the rate of plaintiff judgments jumps to 57.9%; among the nonvehicular negligence cases it is only 42.5%. In other types of cases the proportion of plaintiff judgments is even further from 50%: products liability, 42.1%; medical malpractice, 29.2%; and commercial litigation, 87.0%. (See Figure 1.)⁴⁸

It is curious that the global proportion of plaintiff verdicts, across all trials, is close to 50%, especially because that pattern has also been observed in other datasets.⁴⁹ In itself, however, this fact says little about the fifty percent implication. Such an overall rate would tend to confirm the hypothesis only if it were produced by aggregating subsets of similar cases (automobile accident cases, slip and fall cases, and so on) each of which was also characterized by a fifty percent success rate. Otherwise, a global success rate of 50% might represent the average of divergent plaintiff judgment rates in the underlying subsets of cases. As we have seen, that is precisely the case.⁵⁰

47. See *id.* at 7-8.

48. Figure 1 describes several differences as "significant at .01 level," "significant at .05 level," and so on. These statements, and many similar references throughout the article, reflect calculations of statistical significance. Statistical significance — commonly denoted by "p-values" — is a measure of the probability that a deviation from an expected pattern of events as extreme as that observed, or more extreme, would have occurred if the process that produced the observed pattern were mere chance. Thus a p-value of .01 (or a statement that a difference is "significant at the .01 level") signifies that the observed deviation from the expected pattern, or a more extreme one, would have occurred by chance no more often than one time in one hundred. By a venerable but arbitrary scientific convention, findings are said to be "statistically significant" if they could have occurred by chance one time in twenty or less often — that is, if they have a p-value of .05 or smaller. Note that the *smaller* the p-value the *greater* the confidence that the results do not reflect mere chance fluctuations. There are numerous methods of calculating statistical significance. Unless we refer to some other test statistic, all statements of statistical significance in this article are based on χ^2 (Chi-square) calculations. See DAVID FREEDMAN ET AL., STATISTICS 437-506 (1978).

49. See, e.g., Priest & Klein, *supra* note 5, at 31-34; Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990) (presenting a method to assess the fifty percent hypothesis).

50. One lesson here is that the plaintiff success rate depends on where the researcher cuts the deck in defining the categories of disputes, since the labels conceal varying degrees of heterogeneity. For example, our vehicular negligence cases, although relatively homogeneous, could be subdivided among multiple vehicle accidents (86 in the sample); automobile-pedestrian collisions

Figure 1
PERCENT "PLAINTIFF VICTORIES":
Award > \$0

B. Constructing Meaningful Measures of Plaintiff Success

The more fundamental (and less noticed) problem with the fifty percent implication lies in its measure of plaintiff success. The essence of Priest and Klein's theory is that pretrial demands (by plaintiffs) and

(15 cases); passenger-driver disputes (10 cases); and automobile-bicycle collisions (4 cases). Our "other negligence" category is quite heterogeneous; it includes slip and fall claims (42 cases); automobile accidents arising from a defect in highway design or automobile repair (30 cases); workplace injuries (27 cases); and collisions involving trains, boats, planes, or golf-carts (12 cases).

offers (by defendants) represent the parties' predictions of the likely outcome at trial. Under this theory trials occur when one side or both err in these predictions, and the error or errors drive the two sides' predictions apart. Concretely, if the plaintiff predicts that she will get much more at trial than she is actually likely to get, or if the defendant predicts that she will get much less, or if both make such mistakes, then both sides are likely to conclude that they will do better by proceeding to trial than by accepting a settlement on terms that the other side will agree to. Priest and Klein conclude that, in general, when errors of this sort occur, plaintiffs will be victorious at trial approximately fifty percent of the time.

But what does it mean for a plaintiff to be victorious at trial? Throughout most of their discussion, Priest and Klein describe a judgment for the plaintiff, in any amount, as a "plaintiff victory."⁵¹ This description is based on the assumption that the lawsuits at issue concern liability only, and that the damages are stipulated. We will return to that assumption; for the moment we will focus on the general description of a "plaintiff victory."

It is a rare civil case in which *any* judgment for the plaintiff can be counted as a victory. Given the monetary and nonmonetary costs of going to trial, a judgment for the plaintiff of \$500, or even \$5000, does not usually mean that she was correct in predicting that a trial would be more beneficial than a settlement. Often, a judgment of that sort means that her side would have been better off if the claim had been dismissed outright, even on the eve of trial. In addition, in most cases that go to trial the plaintiffs have been offered some amount of money in pretrial negotiations. A plaintiff who turns down an offer and goes to trial is hoping for a judgment that is, at the very least, *greater than what she has already been offered*. To define any nonzero judgment as a "plaintiff victory" is to ignore that reality entirely.⁵²

We have constructed two separate measures of plaintiff success that address this problem. Under the first measure we define a plaintiff as "successful" if she obtained a judgment greater than \$10,000. Under the second measure we define a plaintiff as "successful" if she obtained a judgment greater than the largest settlement that she was offered. Both of these measures probably overstate the rate of plaintiff success as it is actually experienced by the parties. We doubt that

51. Priest & Klein, *supra* note 5, at 7, 17.

52. This insight is implicit in Donald Wittman's analysis of settlement. See Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988). For a perceptive discussion on defining plaintiff "success" in constitutional tort litigation, see Eisenberg, *supra* note 49, at 516-17, 523-24.

many cases can be tried to a jury verdict in a California Superior Court for \$10,000 or less in legal fees and out-of-pocket expenses (even disregarding nonmonetary costs).⁵³ Similarly, a plaintiff who obtains a judgment that is only slightly greater than the last settlement offer that she received will necessarily be worse off than if she had accepted the settlement, since she will have incurred considerable additional fees, expenses, and delay. Moreover, there is a chance that the jury's verdict will be reduced or modified by the trial court or on appeal, or that the plaintiff will incur additional expenses and delay in collecting the judgment.

Despite the fact that both of these measures overstate the true rate of plaintiff success, the overall rate by either measure is considerably below 50%. Across all cases, 45% of the judgments in our sample were greater than \$10,000, and only 41.8% were greater than the best offer (probably the better measure of true plaintiff success). Moreover, when these measures are applied separately to the different categories of claims, they diverge even further from the predicted fifty percent rate: vehicular negligence — 42.1% greater than \$10,000, 38.4% greater than offer; nonvehicular negligence — 36.6% greater than \$10,000, 33.3% greater than offer; products liability — 42.1% greater than \$10,000, 38.9% greater than offer; medical malpractice — 29.2% greater than \$10,000, 30.2% greater than offer; commercial litigation — 80.5% greater than \$10,000, 80.0% greater than offer. (See Figures 2 and 3.)

53. Our assessment of the costs of a Superior Court jury trial is based primarily on anecdotal information. Our own data are consistent with this assessment, but provide only indirect support. Specifically, the average trial in our data lasted nine days, plus an additional day or more for jury deliberations; the medians are seven days and half a day, respectively, and 85% of the trials lasted four days or more (plus deliberations). Needless to say, preparation time is almost always much longer than trial time. Plaintiffs called, on average, two expert witnesses per trial; they called at least one expert in 83% of the trials. Finally, verdicts of \$10,000 or less were uncommon. They occurred in 34 trials — 6.5% of all cases, 12.4% of the cases with nonzero verdicts.

Figure 2
PERCENT PLAINTIFF VICTORIES I:
Award > \$10,000

C. Liability, Damages, and the Measure of Success

As we noted, Priest and Klein intended to apply their fifty percent hypothesis in its original form to "disputes in which damages are stipulated and the only issue is whether the defendant is liable."⁵⁴ Of course, civil trials in American courts do not always focus exclusively on liability. The nature of the issues in dispute, however, has no implications for the problems we have discussed above. Regardless of the

54. Priest & Klein, *supra* note 5, at 29.

Figure 3
PERCENT PLAINTIFF VICTORIES II:
Award > Offer

* Difference from 50% significant at .1 level

** Difference from 50% significant at .05 level

*** Difference from 50% significant at .01 level

issues at trial — liability alone, damages alone, or liability and damages — to count all plaintiff verdicts as victories is a mistake. A small judgment — by our assumption, \$10,000 or less — will not compensate the plaintiff for her trial costs, whatever the issue on trial. Likewise, whatever the issue in pretrial negotiations — predicting disputed damages given undisputed liability, discounting known damages to account for uncertain liability, or predicting uncertain damages and uncertain liability simultaneously — if a plaintiff goes to trial and recovers less than she was offered by the defendant, she has failed. The selection hypothesis and the fifty percent implication predict that

such failures will be evenly divided between plaintiffs and defendants, but they are not.

Priest and Klein do recognize that in some trials damages are the issue, because "liability is either expressly conceded or mutually expected."⁵⁵ Unfortunately, this implies that trials are fought *either* over liability *or* over damages, but not both. They also understand that their method of interpreting outcomes (counting all nonzero judgments as plaintiff victories) can only be applied to trials of liability, since in disputes over damages some awards will represent "spurious plaintiff victories."⁵⁶ Their findings, therefore, depend on an implicit contention that, among the trials they examined, damage disputes were rare. Priest and Klein, however, never actually claim that such cases were in fact rare;⁵⁷ judging from our own data, such a claim would have been extremely doubtful. Our reading of the *Jury Verdicts Weekly* reports has confirmed our prior belief (based on practice and anecdotal evidence) that in most civil trials *both* liability *and* damages are at issue.⁵⁸ Indeed, in many cases the two issues merge — for example, because juries apply unstated norms of retributive justice in deciding how much money to award. As an experienced personal injury lawyer explained to us, "It is a fact well known to every practitioner and claims adjuster that the same broken leg will be worth a lot more if the defendant was negligently speeding at thirty-five miles over the speed limit rather than ten miles over the speed limit."⁵⁹

Priest and Klein do attempt to apply the fifty percent implication to trials in which damages alone are in dispute. In such cases, they predict that "verdicts will fall within some narrow range" with a me-

55. *Id.*

56. *Id.* at 31 n.60.

57. Priest and Klein attempted to reduce the number of disputes over damages by excluding default judgments, directed verdicts, and cases in which defendants admitted liability. Having done so, however, they concede that they "cannot, at this point, determine the volume of such cases that remain." *Id.* We also excluded defaults and directed verdicts; we retained cases with admitted liability — 18 out of a total of 529.

58. The case descriptions in *Jury Verdicts Weekly* indicate that both liability and damages were disputed in the majority of trials in our sample. The same is probably also true for most of the remaining cases, where it is not apparent, but there is no direct way to tell from the publication. For example, one cannot assume that damages are conceded merely because a defendant fails to present an expert witness to contest damages, since defense attorneys commonly contest damages exclusively through cross-examination of the plaintiff and the plaintiff's experts.

59. Memorandum from Nicholas Rine to the authors (Nov. 20, 1990) (on file with the authors). Sometimes damages and liability merge from the opposite direction. "Heavy damages, and particularly permanencies and disfigurements, can influence a jury on liability, an issue which *should* be completely separate from damages." George Vetter, *How to Evaluate a Personal Injury Case — and Settle it Favorably*, 33 FOR THE DEFENSE 9, 13 (1991). This observation is consistent with an extensive body of experimental psychological research that shows that attributions of blameworthiness are driven by the level of harm to the victim. See DAVID J. SCHNEIDER ET AL., PERSON PERCEPTION 78-80 (1979).

dian halfway between the defendant's offer and the plaintiff's demand.⁶⁰ In other words, in these cases they expect half of the plaintiffs to recover a sum that is *higher* than the defendant's best offer. Under this model, a plaintiff only "wins" if she obtains a judgment that is greater than the offer, *plus* half the difference between the offer and the demand. Presumably, in cases where both liability and damages are in dispute, Priest and Klein would say that the fifty percent line will lie somewhere between this new measure of success and zero.

This new measure of plaintiff success is more exacting than our second measure (displayed in Figure 3), "Judgment Greater than Offer." If this measure were applied to any fraction of the cases in our data, the rates of plaintiff success depicted in Figure 3 would be even lower. As a result, it would drive the overall level of plaintiff success even further from 50% — to some level *less than* 41.8%. The use of this measure would also have the same effect on all the categories of personal injury trials in our sample (in all, 70.5% of the total): plaintiffs' success in vehicular negligence cases would be *less than* 38.4%; in nonvehicular negligence cases, *less than* 33.3%; in products liability cases, *less than* 30.2%. In short, our data, both for the entire set of trials and for the dominant subset of personal injury trials, are even more inconsistent with Priest and Klein's general model as applied to cases with disputed damages than with the simple fifty percent hypothesis.⁶¹

Why does the fifty percent hypothesis so thoroughly fail to describe these outcomes? One reason, we believe, is that the model on which it is based fails to incorporate important elements of the economic and social structure of litigation. In the sections that follow, we attempt to explain patterns of trial and settlement in terms of that structure. Since the context of litigation varies greatly from one area to another, we examine the major categories of claims separately.

IV. PERSONAL INJURY TRIALS

Personal injury trials set the tone for all the jury trials in our sample. The low overall rate of plaintiff success is due almost entirely to a somewhat lower rate in this majority subset. Why do personal injury plaintiffs usually fail at trial? To answer this question, it is useful to

60. Priest & Klein, *supra* note 5, at 29-30.

61. The discussion so far leaves open the possibility that this new measure of success might explain why the plaintiff success rate in some of the smaller categories of cases is *greater than* 50%. This possibility is apparent for the commercial trials, most of which resulted in judgments greater than the offer. In fact, as we explain in note 116 *infra*, our data on pretrial bargaining in the commercial cases show that Priest and Klein's prediction is no more true in that category than in personal injury litigation.

look to the bargaining that precedes trial. We look first at zero-offer cases — cases in which the defendant offered the plaintiff nothing at all in settlement negotiations. We interpret zero offers as strategic moves by personal injury defendants, and we attempt to explain why plaintiffs lose most zero-offer personal injury trials by considering the costs and risks of trial and the fee arrangements between the plaintiffs and their lawyers. This analysis also helps to explain the trial outcomes in cases with low offers, and in those with positive offers generally, but our ability to predict is attenuated at each stage. At the end of this section, we look at distinctive patterns in two subsets of personal injury litigation: vehicular negligence cases (in which zero offers are uncommon, and strategic bargaining in general seems low), and medical malpractice litigation (in which there is an extremely high proportion of zero-offer trials).

A. Zero-Offer Cases

The first thing to notice about a zero offer is that it is *not* a defendant's unbiased prediction of the outcome of a personal injury trial. Certainly it is not a plausible prediction of the costs of a trial to the defense, since going to trial will inevitably entail considerable expense, even if the defendant wins.⁶² Similarly, a zero offer cannot represent an unbiased prediction of the verdict at trial, because there is inevitably some probability, however low, that the plaintiff will recover damages. If the harm that the plaintiff has suffered is serious, the expected value of a judgment will be reasonably high even in the face of a low probability of success.⁶³

Since a zero offer is not a prediction of the cost of the case to the defendant who makes the offer, or even a prediction of the expected value of the judgment, it follows from Priest and Klein's economic

62. This is true even if a procedural system shifts some or all of a prevailing defendant's trial costs and attorney's fees to the plaintiff, since that recovery and its magnitude can never be predicted with certainty.

63. Zero, of course, may be an unbiased estimate of the expected value of a trial for the defendant if the defendant has a serious counterclaim against the plaintiff. In fact, however, only three of the zero-offer personal injury cases in our sample included counterclaims that went to trial. It is also theoretically possible that in a rare case zero might be an unbiased estimate of the expected value of a trial for the defendant, *late in the game*, even in the absence of a counterclaim. This is true because the possible recovery of sunk litigation costs (if they are high enough) could conceivably offset the possible award of damages (if the chances of a judgment for the plaintiff are low enough). We explore this possibility in more detail in Appendix B *infra*, and show that such situations are extremely unlikely in general, and particularly so in personal injury cases. In any event, this remote possibility, even if it did occur, could not by itself explain why no offer was made *earlier* in the case, before sunk costs became a large factor, at a time when the expected value to the defendant of continuing the litigation was necessarily negative. As we have explained, however, our zero-offer trials are all cases in which no offer was ever made. See *supra* text at note 43.

model that such offers should be rare. They are not. In 25.2% of the personal injury trials (and 26.3% of all trials) in our sample, the defendant offered *nothing* in settlement negotiations.

The prevalence of zero-offer personal injury trials can only be explained by strategic bargaining on the part of the defendants. The cost of taking these cases to trial is high. The mean damage award for the zero-offer personal injury trials in our sample was approximately \$108,000 (\$328,000 for trials with plaintiff verdicts) — not counting litigation expenses. (See Table 2.) Obviously, the defendants' refusal to bargain in these cases is not a forecast of their prospects at trial, but an attempt to influence the behavior of their opponents. They might be attempting to induce some plaintiffs to dismiss their cases by threatening to impose trial costs on them, even though in the process the defendants themselves would incur costs greater than potentially acceptable settlement offers. Defendants might also be attempting to generate risk for plaintiffs in personal injury litigation by enforcing a policy of periodic refusal to settle, in order to induce risk-averse plaintiffs, as a class, to accept settlements below the expected value of their claims.⁶⁴ Finally, defendants might be making zero offers in order to discourage litigation in future cases, or in order to bring cases to trial in which they hope to set formal or informal precedents that affect future cases.⁶⁵

The defendants' strategic motives in zero-offer cases are particularly apparent when we compare the outcomes of those cases to the outcomes in low-offer trials. The mean award at trial *decreases* dramatically when the offers increase from zero to positive but comparatively small sums: from \$108,000 for zero-offer cases, to \$28,000 for cases with offers up to \$10,000, and \$37,000 when the offer is between \$10,000 and \$20,000. (See Table 2.) It seems likely that many or most of these low offers (unlike zero offers) are in fact discounted forecasts of the expected value of the outcomes at trial.

For the defendant who makes it, a zero offer must be a strategic maneuver. For the plaintiff who receives it, however, zero could well be an unbiased estimate of the expected value of the trial. A plaintiff who goes to trial and receives an adverse judgment does not simply gain nothing, she *loses* the costs of pursuing the case to conclusion. As a result, the net recovery for the plaintiff may be positive (if there is a

64. See Timothy Swanson, *Bargaining With Repeat Players: The Impact of Insurance Company Defendants on Tort Litigation* 15 (1989) (unpublished manuscript, on file with the authors) (giving this explanation for the refusal of insurance companies to make offers in nearly 18.5% of 242 tort cases in the United Kingdom).

65. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

TABLE 2
PERSONAL INJURY TRIALS
MEAN AWARDS

(n)	All Verdicts † (n)	Plaintiff Verdicts ††
Zero Offer	\$108,265 (91)	\$328,402 (30)
Offer Up to \$10K	\$28,014 (96)	\$74,705 (36)
Offer \$10-20K	\$37,133 (40)	\$67,515 (22)
Offer \$20-50K	\$88,647 (63)	\$186,159 (30)
Offer \$50-100K	\$203,350 (32)	\$342,484 (19)
Offer \$100-250K	\$475,983 (24)	\$713,974 (16)
Offer Over \$250K	\$1,426,333 (15)	\$2,139,499 (10)
All Cases	\$163,261 (361)	\$361,578 (163)

† For column, $p < .01$ ($F = 7.768$)

†† For column, $p < .01$ ($F = 5.096$)

judgment for the plaintiff that exceeds the trial costs), negative (if there is a judgment for the defendant, or a judgment for the plaintiff in an amount less than the trial costs), or zero (if there is a judgment for the plaintiff in an amount that equals the trial costs). One consequence of Priest and Klein's selection hypothesis is that plaintiffs faced with zero offers ought to go to trial in those cases in which they pre-

dict that they will recover judgments that are (at a minimum) greater than the trial costs. Moreover, assuming that the plaintiffs have reasonably good information on the pattern of trial outcomes (or, in any event, that their information is not significantly worse than that of the defendants), plaintiffs ought to be correct in their predictions and recover judgments greater than trial costs approximately 50% of the time.⁶⁶ As a result, in trials in which defendants offered no money in pretrial settlement negotiations, plaintiffs (according to Priest and Klein) ought to recover judgments *greater than zero* a good deal more often than 50% of the time.

The data are inconsistent with this prediction. Overall, only 40% of the cases with zero offers resulted in plaintiff judgments in any amount,⁶⁷ and of those, several percent more were judgments under \$10,000. Among personal injury trials the proportion of judgments greater than zero in cases where no settlement was offered is even lower, 33%.⁶⁸ (See Table 3.)

Why do plaintiffs go to trial and lose so frequently in cases in which they are offered nothing in settlement? We have identified two major explanations which, by extension, also shed some light on the plaintiff success rate in all personal injury trials with low positive offers.⁶⁹

1. *The Expected Value of a Trial, Given the Offer*

Imagine that you are a plaintiff in a car accident case. You have suffered significant injuries that might be found to be the responsibility of the defendant driver. If liability is found, the damages will be reasonably high — \$100,000 or more. Liability, on the other hand, is uncertain. Your best estimate is that you have a 20% chance of persuading the jury that the defendant was at fault. Finally, assume that the cost of taking the case to trial (from the point at which it is clear that the defendant will offer no money as a settlement) is \$10,000. In this situation the expected value of a trial is equal to the expected size of a plaintiff's verdict, multiplied by the probability of obtaining such

66. It is hard to see how a trial following a zero offer could possibly focus solely on damages rather than liability. However, if these trials (or some of them) were somehow concerned with damages only, then Priest and Klein would predict that they would produce a set of judgments of which 50% would be greater than the mean of the demand plus the offer — which, given no offer, means that 50% of the judgments would be greater than half of the demand. This measure, of course, would only reduce the plaintiff success rate.

67. Difference from 50% significant at .05 level.

68. Difference from 50% significant at .01 level.

69. In section IV.D *infra*, we also discuss a third explanation that applies primarily to medical malpractice cases.

TABLE 3

	Proportion of Cases with Zero Offers	Proportion of Awards > 0 in Zero-Offer Trials
PERSONAL INJURY	25.6% (93/363)	33.0% (30/91) (a)
Vehic. Neg.	15.0% (17/113) (c)	43.8% (7/16)
Non. Vehic. Neg	20.0% (30/150) (d)	36.7% (11/30)
Products Liability	21.6% (8/37) (e)	42.9% (3/7)
Medical Malpractice	60.3% (38/63) (f)	23.7% (9/38)
NON-PERSONAL INJURY	28.9% (39/135)	56.4% (22/39) (b)
ALL CASES	26.5% (132/498)	40.0% (52/130)

Difference between (a) and (b) significant at .05 level

Differences between (c) and (f), (d) and (f), and (e) and (f) significant at .05 level

a verdict, minus the trial costs. Given these assumptions, your *lowest* estimate of the value of the outcome of a trial will be \$10,000 ($\$100,000 \times 20\% - \$10,000 = \$10,000$). In other words, it makes sense for you to take this case to trial even though your chance of winning is only one in five because the amount you will gain if you do win is several times the trial costs you will lose if you do not.⁷⁰ If situations like this are common among zero-offer cases, then it is natural to expect plaintiffs to persevere in many cases, and to lose most of the trials that follow. This will happen whenever the expected judgment (assuming the plaintiff wins) is much greater than the costs of bringing the case to trial.

Judging from our sample, zero-offer personal injury trials are very good bets for plaintiffs, even though they lose outright two thirds of the time. The mean judgment, as we have seen, is about \$108,000. We

70. Cf. Gordon Tullock, *Negotiated Settlement*, in *LAW AND ECONOMICS AND THE ECONOMICS OF LEGAL REGULATION* 45-46 (J.-Matthias Graf von der Schulenburg & Göran Skogh eds., 1986); Jeffrey M. Perloff & Daniel L. Rubinfeld, *Settlements in Private Antitrust Litigation*, in *PRIVATE LITIGATION: NEW EVIDENCE, NEW LEARNING* 149 (Lawrence J. White ed., 1988). John Coffee labels this plaintiff's perspective on taking cases to trial as a "portfolio" theory because the plaintiff's attorney benefits from taking a portfolio of such cases to trial even if most result in defense judgments. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney*, 86 COLUM. L. REV. 669, 704-06 (1986).

have only sketchy information on the costs of these trials to the plaintiffs' side — they averaged 8.1 days, and the plaintiffs called an average of 2.1 expert witnesses per trial — but we are confident that the mean trial costs (from the point at which settlement was abandoned) were not nearly that high.

This same calculation applies, in slightly attenuated form, when the defendant makes a positive offer that is much smaller than the plaintiff's estimate of the expected judgment if the plaintiff prevails. For example, assume that the defendant offers \$20,000 to settle the same car accident case we have described. Given that offer, the expected value of trial will equal (or exceed) the offer if the probability of a plaintiff judgment is merely 30% ($\$100,000 \times 30\% - \$10,000 = \$20,000$). Obviously, plaintiffs in this situation will do better, on average, by going to trial whenever the probability of winning exceeds 30%. In other words, when we observe low rates of plaintiff success in personal injury trials, we may simply be seeing what happens when plaintiffs respond rationally to the strategic refusal of defendants to make adequate offers.

The pattern of plaintiff success rates across the range of offers is consistent with this description of the plaintiffs' behavior. As the offers increase, the proportion of plaintiff judgments also increases, from 33% for zero-offer cases, to 37.5% for cases with offers of \$10,000 or less, to 55% when the offer is between \$10,000 and \$20,000, and so forth. (See Table 4.) This is what we expect: plaintiffs who have the option of a cash settlement are less likely to take probable losers to trial.

As we have seen, however, a judgment for the plaintiff is not necessarily a plaintiff's victory. We have used two alternative measures of plaintiff success that hit closer to the mark: award greater than \$10,000, and award greater than offer. Unfortunately, as we have noted, these new measures are also imperfect. Among cases with offers under \$10,000, a judgment that is merely greater than the offer may be far lower than the trial costs; among cases with offers over \$10,000, a judgment over \$10,000 may still be less than the offer. In both situations, an apparent plaintiff victory is actually a loss. Such errors are tolerable when we make comparisons across substantive categories of cases, since they are likely to occur in approximately the same manner on both sides of the comparisons. (In that context, the fact that these measures produce consistent results also increases our confidence in them.) The problem is more acute for comparisons within substantive categories, across groups of cases with offers that

TABLE 4
PROPORTION OF PERSONAL INJURY AWARDS

	Award Greater Than \$0 †	Award Greater Than \$10K and Award Greater Than Offer ††
Zero Offer (91)	33.0%	28.6%
Offer up to \$10K (96)	37.5%	25.0%
Offer \$10-20K (40)	55.0%	35.0%
Offer \$20-50K (63)	47.6%	38.1%
Offer \$50-100K (32)	59.4%	40.6%
Offer > \$100K (39)	66.7%	46.2%
All Cases (361)	45.2%	33.0%

† For column, $p < .01$

†† For column, p is nonsignificant

are uniformly greater than \$10,000, or no greater than \$10,000, or zero.

We have attempted to minimize this difficulty by constructing a combined measure of plaintiff success: the proportion of damage awards that are *both* greater than the offer *and* greater than \$10,000. This measure is displayed in the right-hand column of Table 4; it too shows an increase in the rate of plaintiff success as the offers increase, but the pattern is not statistically significant.

2. *Financing Litigation, Risk Aversion, and the Contingent-Fee Structure*

The logic of going to trial in the face of a zero offer (or a low offer) only applies if the plaintiff is prepared to risk losing the costs of trial. The plaintiff must be willing, in effect, to gamble \$10,000 in fees and

expenses for the chance of drawing a winning ticket, worth \$100,000 or more, on every third or fourth try. For most plaintiffs, this is not a meaningful option. The real parties in interest on the defense side of personal injury cases are almost always repeat players at the game of litigation — usually insurance companies, occasionally businesses or governments. Personal injury plaintiffs, however, are always individuals — one-shot players who cannot spread their costs across a multiplicity of cases. As a result, personal injury plaintiffs are, in general, quite risk averse with respect to litigation costs. If they were required to risk their own money to bring cases to trial in the face of zero offers, many plaintiffs would be financially unable to pursue their claims. Even plaintiffs who could manage to pay the costs of trials would be extremely reluctant to do so, since the likely consequence of a trial would be a debt of thousands or tens of thousands of dollars. This is a scary prospect under the best of circumstances, but to a plaintiff who has recently suffered a serious loss or injury it might be intolerable.

Fortunately for personal injury plaintiffs, there is a way out of this difficulty: It is the uniform practice in California for personal injury plaintiffs' attorneys to contract for their services on a contingent-fee basis.⁷¹ Contingent-fee contracts enable plaintiffs to transfer responsibility for trial costs to their attorneys. These attorneys — unlike plaintiffs — are likely to be (comparatively) risk neutral with respect to such costs, both because they have greater resources and because they are repeat players. They can afford to finance their clients' cases, and they can gamble on the chance of winning an occasional big judgment even if in the process they have to invest in several losing trials. The position of the plaintiffs' attorneys limits the strategic bargaining power of the defendants in personal injury cases, and restores some balance to pretrial negotiations.⁷²

Contingent-fee contracts have another strategic consequence for

71. The typical contingent fee contract for a plaintiff's attorney in a personal injury case provides that the lawyer will be paid 33% of any settlement at or before the pretrial conference, and 40% of any later settlement or judgment. It also provides that out-of-pocket expenses of litigation (filing, service fees, the cost of discovery and investigation, expert witness fees, and so on) will be advanced by the attorney, and recovered from any settlement or judgment. If they are not recovered, the plaintiff is, *in theory*, liable to the attorney for these expenses. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. REV. 29, 52-53 (1989). In practice, attorneys rarely attempt to collect expenses from personal injury clients, both because it would be impractical and because such a practice might drive away future clients.

72. A massive literature examines the effects of contingent fees on litigation behavior. The most recent and comprehensive contributions include KRITZER, *supra* note 8, Daniel L. Rubinfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis* (Aug. 15, 1990) (unpublished manuscript on file with the authors), and Thomas J. Miceli & Kathleen Segerson, *Contingent Fees For Lawyers: The Impact on Litigation and Accident Prevention*, 20 J. LEGAL STUD. 381 (1991).

bargaining in zero-offer cases. If a defendant offers nothing whatever to a plaintiff represented by a lawyer on a contingent fee, the plaintiff has no incentive to avoid trial. A plaintiff in that situation can routinely instruct his lawyer to proceed to trial even if the expected outcome of the trial does *not* exceed the expected trial costs, since the plaintiff (unlike the lawyer) has essentially nothing to lose (again, a weaker version of this same scenario occurs when the defendant does make an offer, but an extremely low one). This creates a bargaining advantage for the personal injury plaintiff, and his lawyer: both stand to gain in settlements because the lawyer can claim in negotiations that her client will insist on trial, regardless of cost, unless he receives a significant offer.⁷³ However, since a freshly unrepresented client is not a frightening opponent, this threat will not be credible if the attorney can easily withdraw from the case when it becomes apparent that her interests and those of her client have diverged.⁷⁴

Fortunately for the collective interests of personal injury plaintiffs and their attorneys, lawyers are constrained in their ability to withdraw under such circumstances. Needless to say, plaintiffs' personal injury lawyers do try to restrict their practice to cases that will return a profit. Their major method is to screen the cases at intake. Judgments at that point, however, are necessarily imperfect. As information develops in the course of discovery and investigation, attorneys inevitably discover that they were wrong in some of their initial assessments. An attorney who makes this unhappy discovery may be able to withdraw from the case and cut her losses, but there are obstacles. Some lawyers will feel personally or professionally obligated to stay and pursue their clients' goals, even at a cost to themselves. If the case is close to trial, the judge may not permit the attorney to withdraw.⁷⁵

73. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 199 (1987). This is an example of the general advantage of being able to credibly plead weakness in the negotiations: because the lawyer lacks authority to accept a nuisance offer, she can insist upon receiving a significant one. Cf. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 53 (1960).

74. Geoffrey Miller argues that it is in the interests of both the plaintiff and the attorney to permit withdrawal in this situation. The plaintiff is saved by withdrawal from the risk that the attorney will underlitigate the case; the attorney is saved from staying on in a case that is a money-loser. Miller, *supra* note 73, at 211. In practice, the plaintiff may be much more concerned about how to find an able replacement attorney on the eve of trial than about the risk that the current counsel will prosecute the case with insufficient enthusiasm.

75. Under Rule 2-111(2) of the California Rules of Professional Conduct, a member of the bar must, before withdrawing, take reasonable steps to avoid prejudice to the rights of his client, including giving due notice to his client and allowing time for employment of other counsel. A lawyer who wants to withdraw shortly before a scheduled trial may have difficulty meeting these requirements, particularly if the trial court refuses a continuance. See *Vann v. Shilleh*, 126 Cal. Rptr. 401, 404-05 (1976) (stating that it is unethical to seek withdrawal on eve of trial merely because client has rejected a negotiated settlement).

If the lawyer does withdraw and the client's case is dismissed as a consequence (most likely because no other attorney would take the case at that point), there is a risk (albeit a small one) that the client will complain to the state bar, or even sue for malpractice.⁷⁶ Some attorneys will shy away from this risk, however slight. Finally, plaintiffs' attorneys must continue to attract a stream of new, nonrepeat player personal injury clients. To compete effectively for such clients, attorneys try to establish reputations as fighters who are dogged in their loyalty to their clients' interests. It is damaging to that sort of image to become known as a lawyer who might desert a client when the going gets rough.

We have no way to evaluate the severity of these constraints. In general, lawyers are extremely influential in shaping their clients' decisions; quite likely they get their way, sometimes, even when that means dismissing a case outright rather than proceeding to a trial that would cost the client nothing.⁷⁷ In other cases, no doubt, plaintiffs' lawyers withdraw from no-offer cases with no qualms and no consequences to their positions or reputations. On the other hand, it is also clear from conversations with personal injury lawyers that sometimes they do go to trial in losing cases that they would rather drop. To the extent that this happens, it too will depress the plaintiff success rate at trial.

As we have noted, plaintiffs obtained judgments (in any amount) in only 33% of the zero-offer personal injury trials (30/91). Given the ubiquitousness of contingent-fee contracts for plaintiffs' personal injury lawyers, this is hardly surprising. Contingent-fee arrangements are less common outside of personal injury litigation. For example, in our survey of plaintiffs' attorneys in commercial cases⁷⁸ we found that 42% of their clients paid them entirely or in part by the hour, and an additional 24% of the clients advanced all or part of the out-of-pocket expenses of litigation. As we expect, plaintiffs who must pay some or

76. It is unlikely, however, that the disgruntled client would actually obtain either sanctions or a judgment against his former attorney. See AMERICAN BAR ASSN., STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY, "CHARACTERISTICS OF LEGAL MALPRACTICE" 344 (1989) (reporting that only 16 of 720 cases in a national sample of legal malpractice trials involved allegations of improper withdrawal, and only 2 of those 16 cases resulted in judgments greater than \$5000).

77. The attorney's power to influence the settlement is certainly great when there is an offer. See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 109-12 (1974). As a result, a defendant who does make an offer may be able to exploit the plaintiff's attorney's interest in avoiding the cost of trial. See Paul Clayton, *Creating Risk in Negotiation and Settlement Techniques*, 1966 INS. L.J. 465, 472 (urging claims adjusters to create risk for plaintiffs' attorneys, who bear the cost of litigation, by making positive offers that are less than the cases are worth to their clients).

78. See *infra* text accompanying notes 117-18, 124, and 152.

all of the costs of trial are more selective in taking cases to court, and they win more often when they do. Plaintiffs obtained judgments (in some amount) in 56.4% of the nonpersonal injury zero-offer trials.⁷⁹

B. *Positive-Offer Cases*

If the defendant makes no offer, the plaintiff has nothing to lose by going to trial. However, when the defendant makes a positive offer, even a low one, the plaintiff can do worse at trial, so risk aversion emerges as a factor. A personal injury client will probably prefer to take a \$150,000 settlement over a 30% chance of getting \$1 million at trial, knowing that otherwise she will probably end up with nothing. As a result, plaintiffs will accept offers that are well below their estimates of the expected value of the judgment at trial.⁸⁰ They are most likely to do so in cases with low probabilities of success at trial; this will increase the plaintiff success rate in nonzero-offer cases that do go to trial. And indeed, as we expect, plaintiffs do succeed more often at trial as the offers increase from zero.⁸¹

There is no general method to assess the magnitude of this effect. The plaintiff's willingness to risk trial will depend in part, of course, on the size of the offer, and on the size and likelihood of the expected damage award. It may also depend on the plaintiff's financial resources, her earning capacity, her expenses, her health, and her subjective risk preferences. For any particular offer, however, there is an objective line below which risk aversion is not a factor. The value of an offer to the plaintiff depends in part on the out-of-pocket litigation costs that her attorney has already incurred, since those expenses normally will be deducted from the settlement. From the client's point of view, any offer that is not greater than the sunk out-of-pocket expenses is, functionally, a zero offer that can be rejected at no risk.

Our data suggest that for many of the personal injury cases in this sample, that line fell somewhere around \$10,000. By both measures displayed in Table 4 (judgment greater than zero, and judgment greater than the offer and greater than \$10,000), the success rates for zero-offer cases and for those with offers up to \$10,000 are similar to

79. See *supra* Table 3.

80. The nature of this risk creates a potential conflict between personal injury plaintiffs and their attorneys, since the attorneys (assuming they handle a steady stream of personal injury cases) would do better by gambling on the expected value. See Miller, *supra* note 73, at 200. And indeed, personal injury plaintiffs' lawyers have told us that some of their less scrupulous colleagues are notorious for persuading clients to turn down substantial offers and go to trial in cases with very high damages, and high probabilities of no recovery.

81. See *supra* Table 4.

each other — within 4%, in one direction or the other⁸² — but the rates for cases with offers over \$10,000 are at least 10% higher.⁸³ Perhaps this means that for most personal injury cases that might realistically have gone to trial in California Superior Courts in 1985 and 1986, offers of \$10,000 or less were not “real money” offers — they were too small in relation to the possible damage awards and the sunk litigation costs to offer any serious temptation to the plaintiffs.⁸⁴

As the offers increase above \$10,000, the mean awards also rise, rapidly, always keeping ahead of the offers.⁸⁵ As with zero offers, this pattern among high-offer personal injury cases can only be explained in strategic terms. Otherwise, one would have to assume that some collective failure of intelligence has prevented the defendants from noticing that they frequently lose badly in these cases when they go to trial. More likely, insurance companies systematically offer only a fraction of the expected value of personal injury judgments in cases with substantial damages, knowing that most plaintiffs will not risk a defense judgment. When plaintiffs do take these cases to trial, the insurance companies end up paying awards that average much more than they might have paid in settlement (plus trial expenses to boot), but the policy presumably pays off in lower settlements among the far larger set of cases that are not tried.

We have seen that, on average, it pays for plaintiffs to take zero-offer cases to trial. But what about cases where offers are made? In financial terms, a trial is only a success for the plaintiff's side if the judgment is greater than the offer by more than the plaintiff's trial expenses. In Table 5 we present the means of the award minus the offer for the personal injury trials in our sample, by size of offer, and also the means of the available indicators of the plaintiff's trial costs: the length of the trial and the number of expert witnesses called by the plaintiff.

In aggregate, personal injury plaintiffs who go to trial improve considerably on the highest offers they receive in pretrial bargaining. This is true for offers of all sizes, but the amounts the plaintiffs gain vary greatly. At the high end of the scale the picture is simple. In trials with offers of \$50,000 to \$100,000, plaintiffs averaged \$120,000

82. For both measures, these differences are not statistically significant.

83. For both measures, the differences in the rates of plaintiff success between cases with offers up to \$10,000 and cases with offers over \$10,000 are significant at the .01 level.

84. This explanation is consistent with the possibility that some cases in these same courts are not realistic candidates for trial, and are handled on different terms from the rest because all parties realize that, regardless of the outcome, the stakes are much too small to bear the process costs of trial. See H. LAURENCE ROSS, *SETTLED OUT OF COURT* 106-13 (1970).

85. See *supra* Table 2.

TABLE 5
PERSONAL INJURY TRIALS

	Mean of Award Minus Offer (n)†	Mean Trial Length, Days (n)††	Mean Number of Plaintiff Experts (n)†††
Zero Offer	\$108,265 (91)	8.1 (78)	2.1 (93)
Offer up to \$10K	\$ 21,983 (96)	6.0 (83)	1.7 (96)
Offer \$10-20K	\$ 20,490 (40)	6.7 (37)	2.3 (40)
Offer \$20-50K	\$ 51,123 (63)	8.1 (53)	2.7 (63)
Offer \$50-100K	\$120,381 (32)	9.7 (27)	2.8 (32)
Offer \$100-250K	\$310,878 (24)	12.4 (22)	3.5 (24)
Offer Over \$250K	\$965,999 (15)	21.0 (11)	4.9 (15)
All Cases	\$115,806 (361)	8.1 (311)	2.4 (363)

† For column, $p < .01$ ($F = 3.521$)

†† For column, $p < .01$ ($F = 11.435$)

††† For column, $p < .01$ ($F = 11.981$)

more than they were offered in settlement, and as the offers continue to increase the mean difference between the awards at trial and pretrial offers increases by more. The length and cost of high-offer trials also increases with the offers, but not by enough to change the central fact about the outcomes of these trials: Those few personal injury plaintiffs (and plaintiffs' attorneys) who risk trial in high damage cases will, on average, get much more money than they were offered in settlement. Most of them will not share this bounty (only 46.2% of plaintiffs with offers over \$100,000 recover judgments greater than the offer⁸⁶) but for those willing and able to gamble, the expected recovery is very good.

At the low end of the range of offers, the expected value of a trial

86. See *supra* Table 4.

to the plaintiff is not so clear. The mean of award minus offer drops dramatically between zero-offer cases and those with offers up to \$10,000 (from over \$108,000 to nearly \$22,000), and remains at about that level for trials with offers between \$10,000 and \$20,000. Low-offer cases are somewhat cheaper to try than most, especially those with offers of \$10,000 or less (6.0 days and 1.7 plaintiff's experts, on average, compared with 8.1 and 2.1, respectively, for zero-offer cases). It is possible that, on average, these trials pay for themselves: \$20,000 may be enough to cover the fees and other costs of a six-day trial with one or two expert witnesses. That conclusion, however — unlike the calculation for high-offer and for zero-offer trials — is far from obvious.

This set of low-offer trials may include a fair number of cases with clear conflicts between the interests of plaintiffs and those of their lawyers. We have argued that for many personal injury plaintiffs offers of \$10,000 or less are effectively close to zero. A major reason is that a large portion of any settlement in that range will go to repay the plaintiff's attorney for out-of-pocket pretrial expenses. For the client in such a case, a trial may be a very good risk: it costs him little or nothing, and his position can hardly get worse and may get much better. For the attorney, on the other hand, going to trial means not only risking substantial amounts of labor and money, but giving up a settlement that would at least cut the lawyer's existing losses.

This type of conflict can occur in cases with offers of any size, depending on the sunk costs and the expectations for trial. It will be an issue, for example, in any zero-offer case in which the anticipated cost of trial is higher than the expected value of the judgment. In fact, most zero-offer cases that go to trial seem to be good risks for the plaintiffs and their lawyers alike. Judging from the data, such conflicts are most common in cases with low positive offers; in this sample, those with offers up to \$20,000. This is a large subset of the personal injury trials — 38% of the total — and the average added recovery at trial for these cases is only about \$21,500. We suspect that for some cases in this group — perhaps many — the attorneys would predictably have done better to settle, and knew it, but their clients reasonably preferred to go to court.

* * *

So far we have looked at data for all personal injury trials as a group. Most of the patterns we have seen hold for each component category of personal injury litigation — vehicular negligence, nonvehicular negligence, medical malpractice, and products liability. Of course, there are probably a great many differences between these

categories that we have not been able to detect. We have, however, noticed two significant variations on the overall trends — one for vehicular negligence, and one for medical malpractice.

C. *Vehicular Negligence Cases*

The traffic accident trial is the cultural archetype for civil litigation in late twentieth-century America. It is the most common type of case and the most familiar. In many subtle ways, our views of civil trials in general seem to be formulated by reference to car accident cases.⁸⁷ In fact, however, vehicular negligence trials are not typical of personal injury trials, let alone civil trials in general.

In Table 6 we present the mean awards, and the means of award minus offer, for vehicular negligence trials, by size of offer. These values deviate from the overall pattern for personal injury cases in two important respects:

(1) Perhaps the clearest evidence that we have found of strategic bargaining in personal injury cases generally is the high aggregate value of judgments in zero-offer trials.⁸⁸ Vehicular negligence trials do not fit this pattern. For all other personal injury trials, the mean award drops from \$128,827 for zero-offer cases to \$36,049 for those with positive offers of \$10,000 or less; for vehicular negligence cases, it remains essentially unchanged (\$11,873 versus \$13,362). (See Figure 4.)

(2) For personal injury trials in general, the mean of the difference between the award and the offer follows a pattern similar to that for the mean award. It is relatively high for zero-offer cases, drops sharply for low offer cases, and increases rapidly as the offers increase over \$20,000.⁸⁹ For vehicular negligence cases, the mean of award minus offer starts low and remains low regardless of the size of the offers, except for a small group of cases ($n=9$) with offers over \$100,000. (See Figure 5.)

Two features of vehicular accident cases may explain these anomalies.

Predictability. Vehicular negligence trials are common, and, judging from *JVW* reports, they fall into repetitive fact patterns to a much greater extent than trials in any other category. As a result, their outcomes may be more predictable than those of other trials. This pre-

87. For example, it is our strong impression that when law professors spin hypotheticals that involve civil trials, they often involve car accidents.

88. See *supra* text accompanying notes 63-66.

89. See *supra* Table 5.

TABLE 6
VEHICULAR NEGLIGENCE TRIALS

	Mean Award†	Mean of Award Minus Offer††
Zero Offer (16)	\$ 11,873	\$ 11,873
Offer Up to \$10K (34)	\$ 13,362	\$ 7,347
Offer \$10-20K (20)	\$ 31,906	\$ 15,870
Offer \$20-50K (22)	\$ 51,436	\$ 13,368
Offer \$50-100K (11)	\$ 77,455	—\$ 1,182
Offer Over \$100K (9)	\$502,771	\$238,327
All Cases (112)	\$ 69,562	\$ 28,421

† For column, $p < .01$ ($F = 12.734$)

†† For column, $p < .05$ ($F = 3.710$)

dictability is enhanced by the nature of the underlying conduct. Most California jurors probably feel at a loss when asked to judge escalator design, or the standard of care for newborns with congenital heart defects; their decisions may be quirky. Evaluating the conduct of a driver on a freeway poses fewer difficulties: the jurors will have extensive knowledge of the issues, personal experience at the task, and a common vocabulary.

Low stakes and low costs. Vehicular negligence cases are relatively cheap to try. The average trial lasts 5.4 days, compared to 9.5 days for

Figure 4
Mean Award by Offer Size

other personal injury trials,⁹⁰ and includes 2.1 plaintiff's experts, compared to 2.5 in other personal injury cases.⁹¹ These cases also involve comparatively low stakes. The mean judgment is approximately a third of that for other personal injury trials — roughly \$68,000, compared to \$202,000.⁹² This difference in stakes is also reflected in the pretrial bargaining. The mean difference between the demand and the offer is about \$270,000 for other personal injury trials, but only \$93,000⁹³ for vehicular negligence trials.

Strategic bargaining may have little value in this predictable, high volume, low cost and low stakes area of litigation. The infrequency of zero offers suggests that is so: the defendants made no offers in 15% of vehicular negligence cases (17/113), compared to 30% of other personal injury cases (76/250).⁹⁴ The zero-offers that were made may have been intended, for the most part, to discourage nuisance value suits and other low value claims, rather than to influence future litigation.

90. $p < .01$ ($F = 27.554$).

91. $p < .04$ ($F = 4.904$).

92. $p = .15$ ($F = 2.056$).

93. $p < .01$ ($F = 6.759$).

94. $p < .01$.

Figure 5
Mean of Award Minus Offer by Offer Size

tion in high value cases; that would explain the low mean judgment in those zero-offer vehicular cases that did go to trial.

Predictability also seems to affect the size of the offers that are made. The mean vehicular negligence offer in this sample was 60% of the mean trial award, compared to 30% for other personal injury cases. This suggests that there is less strategic bargaining (at least on the defense side); it is harder to play on a plaintiff's risk aversion when she has a pretty good idea of what to expect. When these offers are refused, the plaintiffs (on average) do only moderately better at trial. Moreover, the size of the plaintiffs' gains at trial (if any) is not systematically related to the size of the offer (except perhaps among the highest offer cases) — probably because the defendants' bargaining strategy is not related to the size of the offer.

This explanation implies that, as compared to other personal injury trials, vehicular negligence trials are more likely to be chance events: They are disproportionately cases that fell through the cracks of a comparatively efficient settlement process, rather than ones that were pushed to trial by deliberate bargaining strategies. It also implies that the trial rate for vehicular negligence cases should be lower than for other categories of personal injury litigation. This appears to be

true, at least in California.⁹⁵

D. Medical Malpractice Cases

Other researchers — including proponents of the fifty percent implication — have noted that plaintiffs lose the great majority of medical malpractice trials.⁹⁶ This is also true for our sample, as we have seen, but it does not distinguish medical malpractice from other personal injury claims. By every meaningful measure, the rate of plaintiff success is well below 50% for all personal injury trials, and only slightly lower for medical malpractice trials. In particular, plaintiffs won awards greater than the offers in 38.9% of products liability trials, 38.4% of vehicular negligence trials, 33.3% of other negligence trials, and 30.2% of medical malpractice trials.⁹⁷ What does distinguish medical malpractice litigation is the proportion of zero offers.

In other areas of personal injury litigation, the great majority of trials occur after the defendant has offered some settlement to the plaintiff. There were zero offers in only 15% of the vehicular negligence cases, 20% of the nonvehicular negligence cases, and 21.6% of the products liability cases.⁹⁸ But in 60% of the medical malpractice trials in our sample, defendants made no offer at all. Why the vast disparity? A large part of the answer lies in the peculiar insurance arrangements in medical malpractice cases.

Contingent-fee contracts give plaintiffs a strategic bargaining advantage in *all* personal injury litigation. The personal injury plaintiff's attorney can credibly claim that her client will insist on a trial, regardless of the costs, unless she is given some cash in settlement. The defense attorney in most types of personal injury litigation cannot make

95. In 1988-1989, 0.9% of all Superior Court dispositions of vehicular personal injury cases in California were "after contested trial," compared to 2.4% for other personal injury cases. For 1987-1988 the comparable figures are 1.4% and 2.6%; for 1979-1980, 2.3% and 5.2%. These numbers are derived from 1990 JUD. COUNCIL OF CAL. ANN. REP. 66 (Table 6). Note, however, that the category "vehicular personal injury," as used in the Judicial Council report, is not identical to our "vehicular negligence" category.

96. Priest & Klein, *supra* note 5, at 38 (noting plaintiff success rate at trial in Cook County at 39.6%); Patricia M. Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 348 (1983) (noting roughly 25% plaintiff success rate at trial); Stephen Daniels & Lori Andrews, *The Shadow of the Law: Jury Decisions in Obstetrics and Gynecology Cases*, in 2 MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 161, 173-75 (Victoria P. Rostow & Roger J. Bulger eds., 1989) (finding plaintiff success rate in medical malpractice cases to be lower than the overall success rate in almost all counties sampled); Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process* 12 (National Bureau of Economic Research Working Paper No. 3428, 1990) (noting that of 13 medical malpractice cases tried to a judgment in court, all 13 were won by the defendant).

97. See *supra* Figure 3.

98. See *supra* Table 3.

a parallel claim. Although the defendant is normally insured, and thus pays none of the costs of defense of the litigation, the typical liability insurance contract gives complete control over settlement to the insurance company, which must take both trial costs and potential judgments into account in evaluating settlements.⁹⁹ Given this positional advantage, it is not surprising that in most types of personal injury litigation, the insurers make positive settlement offers in the great majority of cases.

Insurance arrangements in medical malpractice cases are different. Many professional liability insurance policies sold to physicians in the United States require the consent of the physician to any nonzero settlement of a medical malpractice suit that the insurer negotiates.¹⁰⁰ Almost all physician malpractice policies sold in California during the late 1970s and early 1980s contained such a "consent-to-settle" clause.¹⁰¹ The insurance company remains responsible for any defense costs that might be caused by the ensuing failure to settle. In other words, the defendant doctor in a medical malpractice suit often can veto all offers without risking personal liability for defense costs, or for any judgment within the policy limits.¹⁰² Case reports in *Jury Verdicts Weekly* indicate that California doctors do exercise their contractual right to veto settlements on a regular basis.¹⁰³

99. See Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1118-19 (1990).

100. *Id.* at 1175-76 (tracing history of consent-to-settle clauses in medical malpractice policies).

101. Telephone Interview with Robert Scholl, medical malpractice defense attorney at Patterson, Ritner, Lockwood, Zanghi & Gartner, Los Angeles (June 10, 1991). Mr. Scholl reports that in every case he defended during the relevant period, the physician's insurance policy required the insured's consent to a settlement.

102. In some cases the doctor may be restrained in vetoing settlements by fear of liability in excess of the policy limits. Liability limits in medical malpractice policies are high, however, and judgments are unlikely to exceed them because California limits by statute noneconomic damages in medical malpractice cases to \$250,000. See Medical Injury Compensation Reform Act of 1975, CAL. CIV. CODE § 3333.2(b) (West Supp. 1991). Insurance companies could also attempt to control physician vetoes by adjusting the future premiums for troublesome doctors. In fact, medical malpractice rates are rarely adjusted to reflect past claims experience with a particular policy holder. See John E. Rolph, *Some Statistical Evidence on Merit Rating in Medical Malpractice Insurance*, 48 J. RISK & INS. 247 (1981). But see MASS. GEN. L. ch. 175A, § 5C, at 569-76 (West Supp. 1989) (requiring merit rating). A few medical malpractice insurance policies apparently do impose a penalty on a doctor who withholds consent to a settlement negotiated by the insurer. For example, one policy provides that, in the event a settlement is vetoed, "the [insurer's] liability . . . for the claim shall not exceed the amount for which the claim could have been so settled plus the costs and expenses incurred with [the insurer's] consent up to the date of such refusal." Bernard D. Hirsh, *Insuring Against Medical Professional Liability*, 12 VAND. L. REV. 667, 680 (1959). Such provisions, however, are uncommon.

103. *Jury Verdicts Weekly* reports that doctors vetoed settlements in 11 of 63 medical malpractice trials in our sample (17.4%). All 11 trials were zero-offer cases; in two of them a hospital was a codefendant at trial. Doctor vetoes were reported in 23.7% of all the zero-offer malpractice cases (9/38), and in 39.1% of the zero-offer cases in which a physician was the sole defendant at trial (9/23). Insured defendants are also reported to have vetoed a settlement in

The effects of the physician's right to veto settlements are predictable. A doctor who is sued for malpractice, and who is convinced that she will win at trial, is likely to insist that the case be tried. She has little or nothing to lose, and trial is likely to result in a type of victory that is unobtainable through pretrial negotiations. The doctor may insist on trial when the insurance company would be willing to pay a modest amount to save substantial trial costs; she may even do so when the case could be settled for a pittance. As a result, in a high proportion of medical malpractice cases in which the plaintiff is likely to lose, the defense will offer nothing.

On the other side of the bargaining table, the plaintiff who receives a zero offer in a medical malpractice case may also insist on a trial. Since her attorney is paid on a contingent-fee basis, she too has little or nothing to lose. In some cases, the plaintiff's attorney may well wish to withdraw from the litigation at this point, but, for reasons discussed above, withdrawal may be difficult.¹⁰⁴ In other cases, the attorney may be happy to take cases to trial even where there is a small probability of success, because the rare victory will more than compensate for the frequent losses.¹⁰⁵ The net result is a high proportion of trials with zero offers, the vast majority of which result in zero judgments. In our sample, plaintiffs recovered judgments in fewer than one quarter of the zero-offer medical malpractice trials.

This pattern becomes starker when we divide the medical malpractice cases by the status of the defendant. In 43% of our medical malpractice cases a hospital was a defendant; in the remainder, individual physicians were the only defendants. There were zero offers in 65.7% of the individual physician cases (compared to 53.6% of hospital cases). The outcomes of the individual physician zero-offer medical malpractice trials were extremely one-sided: fewer than 9% resulted in judgments for the plaintiffs in any amount. (See Table 7.) It seems likely that in many of these trials everybody expected that the defense would win, and that the cases could have been settled for a fraction of the trial costs if the physician defendants had not insisted on proceeding to judgment.

three other trials in our sample: one dental malpractice case, one legal malpractice case, and one products liability case. See also Syverud, *supra* note 99, at 1178-79 & n.176 (reporting physician vetoes in 14% of California physician malpractice trials occurring between 1987 and 1989). Because defense attorneys in many cases may feel ethically bound not to disclose information about their clients' settlement instructions, these reports probably capture only a fraction of the total number of cases in which defendants have vetoed settlements pursuant to a consent-to-settle clause in an insurance policy.

104. See *supra* notes 74-77 and accompanying text.

105. See *supra* text accompanying notes 69-70.

TABLE 7

	Proportion of Cases with Zero Offers	Proportion of Awards > 0 in Zero-Offer Trials
MEDICAL MALPRACTICE	60.3% (38/63) (a)	23.7% (9/38)
Indiv. Def.'s Only	65.7% (23/35)	8.7% (2/23) (c)
Hospital Def.	53.6% (15/28)	46.7% (7/15) (d)
OTHER PERSONAL INJURY	17.8% (53/298) (b)	39.6% (21/53) (e)

Differences between (a) and (b), and between (c) and (e) significant at .01 level

Difference between (c) and (d) significant at .05 level

The outcomes of zero-offer malpractice trials with hospital defendants were markedly different. In 46.7% of those cases the plaintiffs obtained judgments in some amount — over five times the rate for individual physician cases. This disparity may again be attributable to insurance arrangements: Hospital liability insurance, unlike physician's professional liability insurance, often leaves the hospital holding a substantial "self-insured retention," which requires the hospital to pay for settlements and judgments up to a substantial deductible (often as high as \$500,000), and to pay at least a portion of the defense costs.¹⁰⁶ In other words, hospitals, unlike physicians, frequently must pay some of the costs of refusing to bargain.¹⁰⁷

106. DEPARTMENT OF HEALTH AND HUMAN SERVS., REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE 153, 174-75 (1987); James R. Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, LAW & CONTEMP. PROBS., Spring 1986, at 37, 42-44. Physician policies generally have no deductible. PATRICIA M. DANZON, *MEDICAL MALPRACTICE* 129 (1985).

107. A good example is the recent case of *Moerdyke v. Baldwin*, 35 JURY VERDICTS WKLY., July 5, 1991, at 10 (Santa Clara Super. Ct. Feb. 7, 1991). In this case the physician defendant was sued for negligence for waiting two hours for a vaginal delivery of a brain-damaged baby rather than performing a cesarean. The doctor made no offer and won a defense judgment after a three-week trial. Apparently the alleged negligence was restricted entirely to this single physician. Nonetheless, the hospital defendant settled before trial for \$15,000.

It is possible that juries simply like doctors better than hospitals in all medical malpractice cases, regardless of whether an offer was made. Such a bias, however, would not, on its own, explain these trial outcomes since a conspicuous pattern of that sort ought to affect the bargaining behavior of the parties, and change the mix of cases that go to trial to compensate for this bias. In any event, if such a bias did exist and were not completely discounted in settlement negotiations, one would expect to see doctors succeeding at trial substantially more often than hospitals when positive offers are made, as well as when no offers are made. Our limited data on medical malpractice trials with positive settlement offers (there are 12 such cases with physician defendants only, and 13 with hospital defendants) do not support this hypothesis. Doctors obtained defense verdicts in 8 of 12 cases; hospitals obtained a defense verdict in 7 of 13 cases.

Other researchers have attributed the low rate of plaintiff success in medical malpractice trials to differences between the stakes of the defendant and of the plaintiff. They argue roughly as follows: Because an adverse judgment in a malpractice trial harms a doctor's professional reputation, the defendant stands to lose more from a defeat at trial than the dollar amount the plaintiff will gain. Therefore, malpractice defendants will be more anxious to avoid chancy trials than will malpractice plaintiffs, and they will make attractive offers in order to avoid trial in doubtful cases. As a result, the cases that do not settle will be disproportionately those in which the defendants are confident of victory, leading to a high defendant success rate at trial.¹⁰⁸

This "standard argument" implies that the high rate of defendant success in medical malpractice trials is an anomaly. In fact, that rate is only marginally higher than for personal injury cases generally, if at all. The argument also implies that defendants achieve this high level of success by settling more cases than they would if the stakes on both sides were equal. It should follow that medical malpractice cases go to trial at a lower rate than other cases. In fact, the opposite appears to be the case. Only about 2% of California personal injury suits go to jury trial.¹⁰⁹ National studies indicate that at least 6-7% of medical malpractice suits reach jury trial, and perhaps as many as 10%.¹¹⁰

108. See Priest & Klein, *supra* note 5, at 40 ("An adverse judgment may harm the reputation of the doctor, which would mean that the doctor would have more to lose from a defeat at trial than the dollar judgment the plaintiff gains. If so, doctors . . . may settle cases selectively, conceding those in which there is a greater likelihood of defeat . . ."); Wittman, *supra* note 52, at 341 ("[T]he side with the additional costs will want to settle those cases that it has a low probability of winning. For example, in order to avoid the negative publicity and reduced demand for her services if she loses, a doctor facing malpractice would tend to settle those cases that she was unlikely to win."); James W. Hughes, *The Effect of Medical Malpractice Reform Laws on Claim Disposition*, 9 INTL. REV. L. & ECON. 57, 68 (1989) (summarizing Priest and Klein's and Wittman's analyses of stakes in malpractice litigation in part as: "If physicians perceive that the damage to their professional reputation from losing at trial is larger than the damage from settling, they will only pursue to verdict those claims that they are confident of winning.").

109. See, e.g., 1987 JUD. COUNCIL OF CAL. ANN. REP. 115 (reporting rate for jury trials during the 1985-1986 fiscal year). The official California statistics do not break out medical malpractice cases from other forms of personal injury litigation when describing frequency and manner of case disposition.

110. See NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MEDICAL MALPRACTICE CLOSED CLAIMS, 1975-1978, 75 (M. Patricia Sowker ed., 1980) (reporting that of 42,778 claims closed during 1975-1978, 2926 (or 6.83%) resulted in trials which reached a jury verdict); see also Danzon & Lilliard, *supra* note 96, at 347-48, 376 (reporting that 7% of medical malpractice claims in a national sample were litigated to verdict). Since the data in both of these studies include many claims that were dropped before suit was filed, it follows that the percentage of filed lawsuits that go to trial is even greater than 7%. Assuming (as Thomas Metzloff estimates) that one third of medical malpractice claims are settled without a suit being filed, the trial rate for filed cases should be 50% higher than the rate for all claims. Thomas Metzloff, *Researching Litigation: The Medical Malpractice Example*, LAW & CONTEMP. PROBS., Autumn 1988, at 199, 219.

We agree with one premise of this argument: The unusual pattern of malpractice settlement negotiations and trial outcomes is attributable to doctors' nonmonetary stakes in going to trial. We disagree, however, on two other matters: What those stakes are, and whether they motivate physicians to *avoid* trials.

First, the argument assumes that the audience that determines a doctor's professional reputation is sensitive to the outcomes of medical malpractice cases. This may or may not be true. It also assumes, as a corollary, that this audience will react differently to a settlement and to an adverse judgment. A settlement, presumably, will have little reputational impact because it will not be widely known, whereas an adverse judgment will attract attention and have a serious reputational impact. In practice, however, there may be little difference between the two. On the one hand, the fact of a settlement will be known (at a minimum) to the defendant, the plaintiff, the plaintiff's family and close friends, the attorneys on both sides, the judge (if the case came close to trial), all other defendants, the expert witnesses on both sides, the insurance companies involved, and (usually) the hospital with which the defendant is affiliated. This is not an insignificant set. On the other hand, few medical malpractice trials are covered by the media. Frequently, they receive no notice at all beyond the circle of people who would know about a settlement anyway, plus the jurors who decide the case.

Second, the standard argument also assumes that the major non-monetary costs of malpractice litigation are reputational. It seems plausible to us that the main issue is frequently psychological — the harm to the physician's self-image and self-esteem.¹¹¹ To the extent that the physician's concern is pride rather than reputation, the larger audience an adverse judgment may receive matters little, since the critical observer is the physician herself.¹¹²

Finally, the argument tacitly assumes that doctors can determine the size of malpractice settlements. This is not true. While they do often have the power to veto settlements, they cannot require their insurance companies to make offers. It is possible that insurers some-

111. See AMERICAN MEDICAL ASSN., SPECIAL TASK FORCE ON PROF. LIAB. & INS., REPORT I, PROFESSIONAL LIABILITY IN THE 80'S 20 (1984) (discussing symptoms of anger, loss of nerve, stress, and depression in physicians sued for malpractice); Eugene M. Dean, *Professional Liability Claims*, INDEPENDENT ADJUSTOR Fall 1963, at 6 (malpractice insurer observing that physician's self-assurance is often at stake in settling or trying claims, as well as reputation and standing among colleagues).

112. Related social and professional issues may be at work. Several doctors have told us that many of their colleagues view malpractice suits as an attack on their profession by lawyers, and feel that physicians (and hospitals) who settle claims they could fight and win are letting down the side.

times offer additional money in malpractice cases in order to protect the reputation of their clients, or that the doctors occasionally add some of their own money to the pot to achieve settlements. For the most part, however, the main cause of the extremely high rate of defendant success in medical malpractice cases seems to be the converse of what the standard argument posits. It is not that doctors are *avoiding* trials when they fear they will *lose*, but that they are *seeking* trials when they expect to *win*.¹¹³

From the doctor's point of view, trial is different from settlement not so much because it poses a special danger, but because it presents a unique opportunity: the opportunity to obtain vindication.¹¹⁴ Hence doctors insist on offering no money when they believe they will win at trial, and they almost always do win when no money has been offered. They can afford to insist on this vindication both because they have the power to veto settlement, and because their stake in avoiding trial is artificially low, since they bear none of the trial costs.

V. COMMERCIAL TRIALS

When we look beyond personal injury litigation the range of cases expands greatly, and the task of explaining the patterns of settlement negotiations and trial outcomes becomes even more daunting. Personal injury cases, for all their diversity, are limited to a common terrain on the issue of damages: physical and psychological injuries to human beings, and their economic consequences. In other civil trials the jury may be required to place a monetary value on anything from the territory of a fast-food franchise to the reputation of a defamed politician.

In this section we focus on the three largest categories of nonpersonal injury trials in our data; together they account for about 15% of

113. This analysis is consistent with Priest and Klein's general model for the effect of asymmetric stakes on trial outcomes. See Priest & Klein, *supra* note 5, at 24-29. We differ from Priest and Klein's original analysis in specifying the distinct stakes in a settlement and in a judgment, and in tracing how these stakes influence settlement behavior in medical malpractice cases. See also Priest, *supra* note 7, at 208-09 (noting that asymmetric stakes in malpractice cases imply not only that defendants will be more likely to settle cases they expect to lose, but also that they will be more likely to try cases they expect to win).

114. Our view that doctors are *seeking* trials in order to obtain vindication is supported by several reported cases in which doctors sued their insurers and attorneys for the damage to their reputations that resulted when a malpractice case was settled. See, e.g., *Shuster v. South Broward Hosp. Dist. Physician's Prof. Liab. Ins. Trust*, 570 So. 2d 1362 (Fla. App. 1990); *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979); *Felibility v. Damon*, 72 N.Y.2d 112, 527 N.E.2d 261, 531 N.Y.S.2d 778 (1988); *Aquilina v. O'Connor*, 59 A.D.2d 454, 399 N.Y.S.2d 919 (1977). On the other hand, doctors are less likely than other personal injury defendants to sue their insurers for *failing* to settle. See Syverud, *supra* note 99, at 1173. But see *Spray v. Continental Casualty Co.*, 86 Or. App. 156, 739 P.2d 40 (1987).

the total (78/529). They are claims based on commercial transactions (25 cases), claims by employees against their employers or former employers (25 cases), and claims arising from real estate transactions (28 cases). These are diverse sets of trials, but they have an important element in common. In each case, a commercial relationship between the parties predated the dispute. They also share another trait that has already been mentioned: in these cases, unlike the personal injury litigation, plaintiffs win a majority of the trials.

Plaintiffs obtained judgments greater than zero in 87% of the commercial cases in our main sample (67/77). This pattern is reasonably consistent across subcategories, with the rate ranging from 79% in real estate trials to 100% in employment trials.¹¹⁵ The distribution becomes less lopsided when we look at more realistic measures of plaintiff success, but only slightly. Across all commercial cases, plaintiffs obtained judgments greater than \$10,000 in 80.5% of the trials (62/77), and judgments greater than the defendant's best offer 80% of the time (52/65).¹¹⁶

Why are the outcomes of the trials of commercial cases so radically different from the results of the personal injury trials? We have identified three differences between personal injury and commercial litigation that might explain the disparity. First, legal fees: contingent-fee arrangements appear to be less common in each of these categories of commercial cases than in any category of personal injury cases. Second, insurance: commercial claims are less likely than personal injury claims to be covered by liability insurance. Third, variability: commercial trials are less frequent than personal injury trials, and the factual and legal issues within each category of commercial litigation are generally more diverse.¹¹⁷

115. See *supra* Figure 1.

116. See *supra* Figures 2 & 3.

As we have noted, see *supra* notes 60-61 and accompanying text, Priest and Klein predict that in trials that concern damages alone (because liability is not contested), the median judgment will be halfway between the plaintiff's demand and the defendant's offer (as opposed to a median of zero, which they predict for trials in which liability alone is disputed). As we explained above, this measure can only reduce the observed rate of plaintiff success, and therefore further disconfirm their hypothesis in personal injury litigation, where plaintiffs win consistently less often than 50% of the time. But what about the commercial cases, where the observed rate of plaintiff success is *above* 50%? Does this measure correctly predict the median judgment in the commercial cases? Again it does not, largely because in these cases both offers and demands are, overall, much smaller than judgments. As a result, 67% of the judgments (39/58) are greater than the mean of the offer plus the demand (difference from 50% significant at .01 level), and the median judgment is \$37,500 more than that standard.

117. Commercial cases also differ from personal injury cases in four other respects that may be relevant to success rates at trial. (1) Counterclaims are considerably more common in these cases (which means that measurements of plaintiff "success" are occasionally problematic, see *infra* Appendix B). (2) Punitive damages are more frequently sought, and more frequently awarded, in the commercial cases than in any category of personal injury litigation. (3) Awards

Our original data include only a small sample of commercial trials ($n=78$), and they lack information on fee and insurance arrangements. We have therefore added a second sample to our data: all 109 real estate, employment, and commercial transaction trials that were reported in *Jury Verdicts Weekly* from July 1989 to April 1990 — four years after the trials in our original dataset. We have supplemented the *JVW* reports of these more recent cases with information from telephone interviews with the plaintiffs' and defendants' attorneys.¹¹⁸ In addition to asking the attorneys why the case failed to settle, we questioned them about insurance coverage and about arrangements for paying attorneys' fees and litigation costs.

When we examine the pattern of offers, demands, and awards in both samples of commercial trials, it is apparent that there is no single paradigm for settlement negotiations and trial outcomes in this group. Instead, there are three distinct patterns: one for the commercial transaction cases, another for the employment cases, and a third for the real estate cases.

A. Commercial Transaction Cases

There are twenty-five commercial transaction cases in our 1985-1986 sample and fifty in our 1989-1990 sample. Most of these trials involve disputes over the sale or financing of goods or services. The array of products at issue is impressive; it includes advertisements, a Ford Mustang, a bowling alley, a cargo ship, a nursing home, and a wine distributorship. In almost all cases, the parties knew each other well before the dispute arose, and in most the evidence turns on the economic consequences of dealings between the parties over a substantial period.

By any measure, the plaintiff success rate across our two samples of commercial transaction cases is both consistent and high. Plaintiffs obtained nonzero awards in 83% of the 1985-1986 cases and in 72% of the 1989-1990 cases; plaintiffs obtained awards greater than the defendants' highest offers in 75% of the 1985-1986 cases, and in 69% of the 1989-1990 cases. In addition, our two samples of commercial transaction cases share three other noteworthy and consistent traits.

First, the frequency of commercial transaction trials is stable

of prejudgment interest are much more common in the commercial cases in our sample than in the personal injury cases. (4) The winning commercial litigant, unlike the winning personal injury litigant, can often recover her attorney's fees from the loser. See *infra* Appendix B. These factors are subjects of ongoing research by the authors.

118. As noted previously, we completed interviews with 86% of the plaintiffs' attorneys and 59% of the defendants' attorneys in these cases. See *supra* text following note 43.

across time: 4.7% of the 1985-1986 trials involve a commercial transaction (25/529), as do 4.5% of the trials in the 1989-1990 issues of *Jury Verdicts Weekly* from which we drew our second sample (50/1113).

Second, the plaintiffs in the commercial transaction cases, by and large, make measly demands. Among the personal injury cases, the mean plaintiff's demand is considerably greater than the mean award—\$262,000 to \$161,000¹¹⁹—and only 19.5% of trials (69/354) produced awards greater than the demands.¹²⁰ Among commercial transaction cases, these relationships are reversed. For the 1989-1990 sample of commercial transaction trials, the mean demand is less than the mean award — \$415,313 to \$477,880 — and 52.4% of the trials (22/42) ended with verdicts in excess of the demands.¹²¹

Third, defendants frequently refuse to offer anything to settle commercial transaction cases. Although not as common as in medical malpractice litigation, zero offers occur in 44% of the 1985-1986 cases (7/16) and 43% of the 1989-1990 cases (20/47) — almost twice as often as in the personal injury cases.¹²²

In sum, commercial transaction trials fall into a distinctive pattern: a high rate of plaintiff success, a stable trial rate, many measly demands by the plaintiffs, and many zero offers by the defendants. We think that the low incidence of contingent fees and of liability insurance, coupled with the relative infrequency of commercial trials and the diversity of claims and issues, may account for this pattern.

Fee Arrangements. Only 35% of the plaintiffs in our 1989-1990 sample of commercial transaction trials (14/40) paid their lawyers on a straight contingent-fee basis of the sort that is almost universal in personal injury cases. Most of the plaintiffs either paid by the hour or

119. This pattern is consistent across the subcategories of personal injury litigation: \$134,000 mean demand versus \$69,000 mean award for vehicular negligence trials; \$256,000 mean demand versus \$127,000 mean award for nonvehicular negligence trials; \$287,000 mean demand versus \$127,000 mean award for medical malpractice trials. For products liability trials, the difference is comparatively small, but the mean plaintiff's demand still exceeds the mean award (\$644,000 versus \$633,000).

120. This pattern, too, is consistent across subcategories: vehicular negligence, 19.1% (21/110); nonvehicular negligence, 19.2% (28/146); products liability, 25.7% (9/35); medical malpractice, 17.5% (11/63).

121. The difference between the rates of awards greater than demands for personal injury cases and for commercial transaction cases is significant at the .01 level.

We have only 11 commercial transaction cases in our 1985-1986 sample with data on the plaintiffs' demands — too few for any useful statistical inferences — but these limited data are consistent with the patterns for the 1989-1990 cases: the mean demand was less than half the mean award (\$324,000 and \$676,000, respectively), and 7 of the 11 trials (64%) ended in awards greater than the demands.

122. The rates of zero offers for these two samples differ from the zero-offer rate for the 1985-1986 personal injury cases at the $p < .1$ and $p < .01$ levels, respectively.

had a combination of an hourly and a contingent-fee arrangement.¹²³ Many plaintiffs in commercial transaction cases also advanced out-of-pocket litigation expenses, a practice that is (we believe) very uncommon in personal injury suits.¹²⁴ Altogether, 80% of the plaintiffs (32/40) had to advance some money to their attorneys (for fees or expenses or both) in order to proceed to trial. In other words, most commercial transaction plaintiffs who proceed to trial in the face of low or nonexistent offers risk losing a great deal of money. Unlike personal injury plaintiffs, they must pay in cash for the privilege of going to court — money that they will not recover unless they win a substantial victory.

These fee and cost arrangements confer a major advantage on the opposition. Defendants can use zero offers and low offers far more effectively in commercial transaction cases than in personal injury litigation. If a defendant credibly maintains that nothing will be offered in settlement, the plaintiff must choose either to walk away from the case or to front substantial funds in order to proceed to a trial with an uncertain outcome. If the defendant makes a low offer (compared to the probable judgment), it may nevertheless seem attractive given the delay, the expense, and the risks that the plaintiff must otherwise incur. These factors may lead the plaintiffs themselves to discount the value of their cases in settlement negotiations — to demand (and often, we infer, to accept) settlements well below the trial value of their claims.

To some extent, this effect is two-sided. Civil defendants rarely hire attorneys on a contingent basis, and almost always pay by the hour. In personal injury litigation, insurance companies pay attorneys' fees and other defense costs, but in commercial transaction cases the defendants are frequently uninsured.¹²⁵ As a result, in some cases both sides will be reluctant or unable to risk the process costs of trial. Those cases will be particularly likely to settle.

There are strong reasons, however, to believe that the effects of fee arrangements are not symmetrical, but that defendants often have an advantage over plaintiffs. Since defendants do not need to prove an affirmative case in order to achieve their goals, they may be able to minimize their legal costs, at least in the early stages of litigation. More important, commercial defendants frequently have greater resources than the plaintiffs, and they are almost always at least as well

123. Forty-eight percent of plaintiffs (19/40) paid their attorneys by the hour; another 15% (6/40) paid an hourly fee and gave the attorney a contingent fee as well.

124. Forty percent of plaintiffs (16/40) advanced all the litigation expenses; another 15% (6/40) advanced a portion of these expenses.

125. See *infra* text accompanying notes 127-28.

endowed. The defendants, therefore, are better able to bear the cost and the risk of litigation.¹²⁶

The commercial transaction trials in our sample may be the failures of a generally successful bargaining strategy by the defense. Given their advantages, defendants in commercial transaction cases can afford to play chicken. They say, in effect, "I don't believe the plaintiff has the resources and the determination to take this case to trial so I'll offer a measly settlement or nothing at all." Most plaintiffs take the offer (or drop the case). When this bluff is called, the defendants usually lose. Nonetheless, it is entirely plausible that these defendants, as a group, discourage trials of more than enough serious claims to outweigh their losses in the cases that do go to trial. The plaintiffs' behavior in these cases also seems to make good sense. Given the costs and uncertainties of trial, it is not surprising that plaintiffs only proceed to trial when they have an uncommonly good chance of success.¹²⁷

Insurance Coverage. We have information about insurance coverage in only twenty-two of the fifty 1989-1990 commercial transaction trials. These limited data show that insurance is certainly not universal in commercial transaction litigation; in thirteen of the twenty-two trials there was no insurance coverage, and in three more there was partial coverage or a coverage dispute. By comparison, insurance is (we assume) virtually universal in personal injury litigation.

126. Nearly half the plaintiffs in our two samples combined were individuals (45%, 33/74), while 89% of the defendants (66/74) were businesses. In 53% of the cases one business sued another. Most of the remaining cases — 37% of our combined sample — were suits by an individual against a business. In 8% one individual sued another, and in 2% a business plaintiff sued an individual defendant.

127. Our view of the effect of fee arrangements is consistent with the pattern of success rates across types of cases: lower rates of plaintiff success in personal injury cases, higher rates in commercial cases. Within the category of commercial transaction cases, however, the outcomes of our 1989-1990 trials involving cases in which plaintiffs advanced fees and costs (or some of them) and those in which they did not do not differ significantly. This should not be a surprise; it is a predictable consequence of the ubiquitous problem of "sample selection bias." See Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 AM. SOC. REV. 386 (1983). In personal injury litigation, contingent fees are (we assume) universal; in commercial relations cases they are the exception. We cannot assume that those cases that have this unusual feature are otherwise similar to the rest. On the contrary, it is likely that they were selected for this fee arrangement because they are unusual in other ways that defeat comparisons. For example, in an area of litigation where the custom is hourly fees, plaintiffs' attorneys may agree to contingent fees only in those cases where they are most confident of victory. Commercial defense attorneys, who are accustomed to bargaining with plaintiffs who pay their lawyers by the hour, may not adjust their strategy in these uncommon contingent-fee cases. They may continue to make zero offers or low offers in an attempt to drive risk-averse plaintiffs with good cases from the field. As a result, commercial transaction cases with contingent-fee contracts (and thus with less risk-averse plaintiffs) will be more likely to proceed to trial than those with hourly fees, but in both categories, plaintiffs will usually win. The greater selectivity of plaintiffs in choosing to go to trial in hourly-fee cases will simply balance the greater selectivity of plaintiffs' lawyers in choosing to take contingent-fee cases.

The relative infrequency of insurance could help produce a pattern of humble demands, zero offers, and a high plaintiff success rate, in several ways. Insurance companies pay final judgments. Uninsured defendants are less likely to be able to pay, and more likely to resist collection efforts. This will lead plaintiffs to discount the value of cases in settlement negotiations with many uninsured defendants,¹²⁸ and will make them more reluctant to go to trial in uncertain cases since the jury award (if any) must also be discounted by the probability of collection. By contrast, plaintiffs may demand more from insurance companies, and may be more willing to take them to trial in risky cases, since any judgments they obtain will be considerably more valuable. On the other side, insurance companies may be more prone to make real settlement offers than defendants with limited resources, both because they know plaintiffs are more likely to take them to court, and because they will in fact be obliged to pay any judgment within the policy limits.

Equally important, in the absence of insurance the defendant, rather than an insurance company claims supervisor, has ultimate authority in settlement negotiations. The defendant, of course, is far less likely than a claims adjuster to be experienced in litigation and pretrial negotiation, and far more likely to be personally embroiled in the dispute and with the plaintiff. As a result, defendants are likely to negotiate unpredictably. In some cases they may be unduly pessimistic, excessively cautious, or anxious to avoid trial; those cases usually will settle. Other times, they will err in the opposite direction — they will underestimate the value of a claim, overestimate the likelihood of a defense verdict, or permit spite to govern their settlement behavior. In those cases, they may make meager offers, or none, and the disputes are more likely to end in trial.

Our data on offers and awards, and our interviews with the trial attorneys, provide limited support for this theory. In twelve of the thirteen cases where there was no insurance, the settlement offer was less than or equal to the award; in half of the cases where there was insurance the offer exceeded the award. The lawyers mentioned spite and emotion as reasons for the failure to settle in seven of thirteen cases where there was no insurance, and in only one of six cases where insurance fully covered the claim.

128. Plaintiffs in California civil cases are entitled to discover information about the defendants' insurance coverage, CAL. CIV. PROC. CODE § 2017(b) (West Supp. 1991), and they routinely do so. The importance of this information is illustrated by the lawyers' reactions when it is not provided. Some plaintiffs' attorneys in our sample, when asked why a case failed to settle, explained bitterly that the defendants had lied about their insurance coverage.

Infrequency and Diversity of Claims. Commercial transaction trials are infrequent — fewer than for any category of personal injury litigation — and the issues in each case seem unique.¹²⁹ As a result, attorneys on both sides may be better able to predict trial outcomes in personal injury cases — which follow relatively common, repeat scenarios — than in the commercial transaction cases. Not only is the task more difficult in commercial transaction cases, but the lawyers are likely to have less experience in trials and less skill in predicting their outcomes.

According to Priest and Klein, when the parties are unable to foresee the outcomes of trials, the pretrial bargaining process will fail to operate as a systematic selection process. Instead, the distribution of judgments at trial will increasingly resemble the distribution of the merits of the entire body of cases.¹³⁰ Applied to our data, this theory implies that a large majority of commercial transaction suits are meritorious — which may be true.

Uncertainty about trial outcomes may affect success rates by a different mechanism. Unpredictability is a greater cost to the more risk-averse party, which will usually be the plaintiff.¹³¹ That is doubly true if the plaintiff is obliged to continually pay out more money in order to keep in the game. The overall uncertainty about results in commercial transaction cases thus operates as yet another incentive for plaintiffs to accept heavily discounted settlements.

B. *Employment Cases*

There are twenty-five employment-related trials in our 1985-1986 sample and twenty-nine in our 1989-1990 sample. In 76% of the cases in our first sample, and 82% of the cases in our second sample, a fired employee sued a former employer for wrongful discharge (often including a claim of race, age, sex, handicap, or sexual preference discrimination in the complaint).¹³² The remaining cases are disputes

129. For example, the issues in the commercial transaction cases in our 1989-1990 sample included the liability of a guarantor for a bankrupt debtor's revolving line of credit, a common carrier's liability when a cargo of apple flakes is contaminated by the odor of perfume, the extent of an accountant's fiduciary duties to his partners upon the breakup of the partnership, and the duty of a television station's creditor to keep its collection actions from driving away advertisers.

130. Priest & Klein, *supra* note 5, at 22.

131. See *supra* text accompanying note 71-72.

132. A recent study finds that federal employment discrimination litigation, like the state employment cases in our samples, primarily involves discharge-related disputes. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991). For a comprehensive study of 120 wrongful termination trials that occurred in California Superior Courts between 1980 and 1986, see JAMES DERTOUZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* (Rand Corp. R-3602-ICJ, 1988) [hereinafter RAND WRONGFUL TERMINATION STUDY].

over failures to hire, promote, or pay commissions. All but one of the plaintiffs in the employment cases were individuals.

On the three factors we have discussed that distinguish commercial trials from personal injury trials, employment cases resemble commercial transaction cases but are less extreme. Insurance coverage, again, is not universal.¹³³ On the other hand, most employment plaintiffs (unlike most commercial transaction plaintiffs) were represented by contingent-fee lawyers,¹³⁴ although about half (11/21) advanced some or all of the fees and costs of litigation. Finally, while employment trials are not particularly diverse, they are infrequent, and (as we will see) peculiarly unpredictable.¹³⁵ As a result, we find (as we expect) that employment plaintiffs, like commercial transaction plaintiffs, succeed at trial more often than personal injury plaintiffs.¹³⁶

That general comparison, however, conceals another equally interesting finding that cannot be explained by reference to these three factors. Unlike the samples of commercial transaction trials, our two samples of employment cases are glaringly inconsistent. By any measure, the rate of plaintiff success drops dramatically between 1985-1986 and 1989-1990. Plaintiffs *always* obtained awards greater than zero in our first sample; in our second sample this rate fell from 100% to 66% (19/29).¹³⁷ Similarly, the plaintiff obtained an award greater than the defendant's best offer in 88% of the employment cases in our first sample (21/24), and in 52% of the cases in our second sample (15/29).¹³⁸

The drastic drop in plaintiff success rates was accompanied by an *increase* in the rate of zero offers and a *decrease* in the frequency of employment trials. Defendants made zero offers in only 8.3% of the

133. Our data on insurance in employment cases are too sparse to permit any stronger generalization. We have information on only eight cases — two defendants were insured, four were not, and two had partial or disputed coverage. The Rand Wrongful Termination Study, *supra* note 132, at 23-24, found that 52% of defendants had no insurance coverage, and that 12% had insurance covering legal expenses, but not any sums paid in settlements or judgments.

134. Seventy-three percent of the employment plaintiffs in our 1989-1990 cases (16/22) were represented on a straight contingent fee basis. See also RAND WRONGFUL TERMINATION STUDY, *supra* note 132, at 37 (reporting that in a survey of plaintiffs' attorneys in 120 wrongful termination cases, all respondents reported working on a contingent fee, with most charging 40%). The fee arrangements in the employment cases are consistent with Herbert Kritzer's general conclusion that American lawyers who represent individual plaintiffs (unlike lawyers for businesses and governments) are generally paid on a contingent basis, regardless of the types of litigation. See KRITZER, *supra* note 8, at 58. Across all the commercial cases in our 1989-1990 sample, 60% of the individual plaintiffs (33/55) but only 29% of the business plaintiffs (9/31) had simple contingent fee contracts with their lawyers.

135. See *infra* text at notes 137-49.

136. See *supra* Figures 1, 2, and 3.

137. $p < .01$.

138. $p < .01$.

employment cases in 1985-1986 (2/24); by 1989-1990 the rate of zero offers more than tripled to 28% (8/29).¹³⁹ Employment trials comprised 4.7% of all cases tried in our 1985-1986 sample (25/529), but dropped to 2.6% of the trials reported in the issues of *Jury Verdicts Weekly* from which we drew our 1989-1990 sample (29/1113).¹⁴⁰

What explains these changes? The most persuasive answer is that employment law in California changed drastically in favor of employers between 1985 and 1989. In 1988, in *Foley v. Interactive Data Corp.*,¹⁴¹ the California Supreme Court abolished tort causes of action in most discharge cases. After *Foley*, wrongfully discharged plaintiffs can still sue for breach of an express or implied contract, but the elements of a contract cause of action are usually more difficult to prove than the elements of a tort action, and the contract remedies are more circumscribed. In particular, punitive damages and damages for emotional distress, which were commonly awarded in our sample of 1985-1986 cases, and were commonly requested in the 1989-1990 cases, were effectively foreclosed by this decision and by a subsequent ruling applying *Foley* retroactively to all cases, regardless of when they were filed.¹⁴²

The *Foley* decision still permits a tort action for wrongful discharge, and tort damages, if the firing violates a public policy that is designed to protect third parties. Thus a tort action is preserved for employees fired because they refuse to commit a crime or to disclose unsafe or illegal activity.¹⁴³ But in 1989, a series of California appellate decisions further limited recoveries even in these remaining tort actions. The courts held that the emotional distress accompanying a wrongful discharge is an "employment-related injury" covered by worker's compensation, and thus cannot be the basis for damages in a tort suit.¹⁴⁴

These changes in the underlying law of wrongful discharge may

139. $p < .01$. See RAND WRONGFUL TERMINATION STUDY, *supra* note 132, at 27 (finding that defendants made no offer in 27% of the 120 wrongful termination cases tried between 1980 and 1985).

140. $p < .01$.

141. 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988).

142. *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 258 Cal. Rptr. 592, 772 P.2d 1059 (1989). See Michael J. Brady, *The Revolution in California Tort Law*, FOR THE DEFENSE, Mar. 1991, at 10, 12.

143. See *Foley*, 47 Cal. 3d at 370, 765 P.2d at 380. Prior to 1986, relatively few wrongful termination complaints alleged a violation of public policy. See RAND WRONGFUL TERMINATION STUDY, *supra* note 132, at 15-16 (8% of 400 cases surveyed).

144. See *Jenkins v. Family Health Program*, 214 Cal. App. 3d 440, 262 Cal. Rptr. 798, 803 (1989); *Pinchon v. Pacific Gas & Elec. Co.*, 215 Cal. App. 3d 29, 260 Cal. Rptr. 677, 683 (1989); *Zilmer v. Carnation Co.*, 212 Cal. App. 3d 488, 263 Cal. Rptr. 422, 427 (1989).

well have produced the differences we observe in our two samples of employment cases. The trials in our 1989-1990 sample were based on complaints filed in the mid-1980s, when discharged plaintiffs were enjoying great success at trial on tort claims. Then, in December 1988 — after they had invested years of their time and thousands of dollars in their lawsuits — plaintiffs and their lawyers were confronted with a change in the governing law that reduced both the likelihood of recovery and the amount of recoverable damages. Many defendants undoubtedly responded by refusing to offer anything in cases that had some merit under the old law, but little under the new. Thus, the observed increase in the rate of zero offers. Some risk-averse plaintiffs and their attorneys may have reacted to the change in law by dismissing their cases or settling for small sums — hence the drop in the trial rate in employment cases. But other employment plaintiffs apparently insisted on trial because of their accumulated personal and economic stake in the disputes,¹⁴⁵ and because their contingent-fee arrangements with their lawyers permitted them to proceed to a trial without bearing the entire cost,¹⁴⁶ while their attorneys may have been reluctant or unable to withdraw at such a late date. The result: a sharply lower success rate in the cases that were taken to trial.

The difference between these two samples illustrates a general truth about this type of data. An analysis of trial outcomes over a short period provides no more than a snapshot of the process of litigation. Its value as a long-term description depends on the stability of the rules that govern the game. In this case, those rules changed dramatically between observations, and the outcomes in our later sample reflect, in part, the short-term effects of that change.

Indeed, we suspect that the extraordinary rate of 100% plaintiff verdicts in our 1985-1986 sample was itself, in part, a short-term reaction to earlier changes in the law. The tort cause of action for wrongful discharge that *Foley* eliminated in 1988 was first suggested in dicta by the California Supreme Court in 1980,¹⁴⁷ and then explicitly recognized in a series of intermediate appellate court decisions from 1980 through 1986.¹⁴⁸ Quite likely, neither the parties in the 1985-1986 dis-

145. Six of the employment lawyers we interviewed told us that their cases went to trial because the plaintiff wanted a trial. In one case, the plaintiff wanted "a day in court"; in another the plaintiff wanted "justice"; in a third the plaintiff felt "seriously wronged." One of the remaining plaintiffs wanted a trial because "she felt she had a good case."

146. One of the lawyers we interviewed told us his wrongful discharge employment case went to trial because the plaintiff thought "she had nothing to lose" after the defendant refused to offer anything in settlement. In four other cases, the lawyers also mentioned the refusal of the defendant to make an offer as a reason the case was tried.

147. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1334 (1980).

148. *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986); *Khanna*

charge trials nor their attorneys had adjusted their expectations to accommodate this new (pre-*Foley*) rule. Certainly, they had no experience with which to predict its effects.¹⁴⁹

One of the least controversial findings in the research on the outcomes of litigation is that the substantive rule of decision for a type of claim does not determine the success rates of the parties in contested cases.¹⁵⁰ This finding, however, must be qualified — it applies in the long run, if the legal rules are stable. When the rule of decision changes there is likely to be a short-term shift in the direction of the new rule, until the parties adjust their case loads and their expectations to accommodate the new status quo. If the rules continue to change, trial outcomes may continue to track those changes without ever reaching an equilibrium.¹⁵¹ This appears to be what happened in employment discharge litigation in California in the 1980s.

C. Real Estate Cases

Our samples' real estate-related trials — twenty-eight in 1985-1986 and thirty in 1989-1990 — involve diverse claims. They include charges of fraud by buyers, sellers or lessees of residences, offices, and farms, and complex grievances against agents, brokers, or lenders handling a real estate transaction. Our interview data for real estate cases are meager. They suggest that a majority of the plaintiffs are represented on a contingent-fee basis (12/20), that about half pay at least some of the fees and expenses of litigation (10/20), and that fewer than half of the claims are covered by liability insurance (4/12). Given these patterns, it is (again) not surprising that plaintiffs succeed more often in real estate trials than in personal injury trials.¹⁵²

The trends in real estate trials between 1985-1986 and 1989-1990 are similar to those in employment cases. Plaintiffs obtained nonzero awards in 70% of the 1989-1990 cases (21/30), a slight (and non-

v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); *Rulon-Miller v. IBM Corp.*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); *Crosier v. United Parcel Serv.*, 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983); *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

149. The Rand Wrongful Termination Study, *supra* note 132, at 27, finds a less lopsided rate of plaintiff success in cases tried between 1980 and 1984, with plaintiffs winning 75% of cases between 1980 and 1982, and only 50% during 1983 and 1984. Our sample implies that the plaintiff success rate increased substantially in 1985-1986. For the Rand Study's analysis of these patterns of plaintiff success, see *id.* at 27-28.

150. See *supra* text accompanying notes 10-27.

151. See James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 522-27 (1990).

152. See *supra* Figures 1, 2, and 3.

significant) drop from the 78.6% success rate in 1985-1986 (22/28). The drop is considerably greater when we use the more realistic measure of success, judgment greater than offer — 54% in 1989-1990 (15/28) versus 76% in 1985-1986 (19/25).¹⁵³ Trial rates also declined, from 5.3% of the cases in our first sample (28/529) to 2.7% in our second (30/1113).¹⁵⁴ Defendants made zero offers in 12% of our 1985-1986 real estate cases (3/25) and in 43% of our 1989-1990 cases (12/28).¹⁵⁵

Why do plaintiff success and trial rates drop among the real estate cases, while the zero offer rate increases? We do not know. We are not aware of any drastic change in the law that applied to real estate disputes in California between 1985 and 1990. Our best guess is that economic changes in the underlying activity caused these shifts. There were, of course, major swings in California real estate markets in the 1980s, and it is quite plausible that, in some manner, these market cycles produced the changes we see in settlements and at trial. It should come as no surprise that some of the forces that make litigation a moving target for research are generated outside the legal system.

VI. CONCLUSION: SOME EMPIRICAL HYPOTHESES

We set out to study settlement negotiations by examining the verdicts in civil jury trials, and the abortive bargaining that preceded those trials. We found that the pattern of trial outcomes varies greatly across categories of cases. By any meaningful measure, plaintiffs lose a strong majority of personal injury trials, but they win most commercial trials. We also found unmistakable evidence of strategic bargaining by civil defendants; the clearest signs of this are the zero-offer cases, trials in which the defendants simply refused to consider negotiated settlements. The proportion of trials that follow zero offers (like the proportion of plaintiff victories) varies considerably from one type of case to another. It is particularly high in medical malpractice cases, apparently because many physician defendants insist on trial in order to obtain vindication.

Given this sort of strategic bargaining by defendants, we have shown that it is in plaintiffs' economic self-interest to pursue many cases that they are likely to lose, as well as those that they expect to win. This will produce a low plaintiff success rate at trial, *if* plaintiffs can afford to act on their economic interests. In general, plaintiffs are

153. $p < .1$.

154. $p < .01$.

155. $p < .05$.

able to do so in personal injury cases because their litigation costs are financed by attorneys who work for contingent fees, and because the damages they might collect are guaranteed by the defendants' insurance companies. In commercial cases — where plaintiffs' lawyers are usually paid by the hour, and defendants are usually uninsured — many plaintiffs can only afford to take likely winners to trial. Moreover, judging from their demands, even then they would frequently have settled for less than the award if they had been given an opportunity to do so.

The most general conclusion we can draw from all this is that the main systemic determinants of success at trial and in pretrial bargaining are contextual and relational. This applies even to the outcome at issue — success. We have written at length about “plaintiff success” without addressing a point that is implicit in most discussions of trial outcomes: the assumption that a trial is a zero-sum game, that a “victory” for the plaintiff is necessarily a “defeat” for the defendant. In fact, from the point of view of the parties this may be false. If the defendant offers \$100,000 to settle a case but the plaintiff demands \$1,000,000, a verdict of \$500,000 may be a great improvement for both sides. Of course, success in a risky venture is always relative; we need to know what the actor could have achieved otherwise. For the defendant who could have negotiated a lower settlement by offering more, or the plaintiff who could have obtained a higher settlement by demanding less, a \$500,000 award is a failure. But if for some reason bargaining positions were fixed — perhaps because of poor information, or animosity, or strategic bargaining — the same outcome is a clear victory for all.

In fact, win-win trials seem to be rare. In this sample, only 15% of the trials (71/477) produced awards that were greater than the offer but less than the demand, and in some of these cases the entire gain for one side, or both, will have been consumed by the trial costs. Lose-lose trials may be much more common; their frequency depends on trial costs, about which we have very limited information. In any event, it is clear that in most trials there is at least one loser. In that situation it makes sense to discuss the “success rates” of the sides. We have focused on the success rate of plaintiffs. This is the conventional measure. It is also more defensible than any available measure of the success rate for defendants since the data show that defendants are more likely than plaintiffs to engage in strategic bargaining based on nonmonetary stakes, or on stakes whose monetary value does not de-

pend solely on the outcome of the case at hand.¹⁵⁶

We face a more complex set of contextual and relational issues when we try to describe the forces that effect success at trial. The litigants' resources make a difference, particularly their wealth. Their conduct is influenced by their relations with outside parties — their desire to preserve or create a reputation, for example, or to discourage future litigation, or to limit (or increase) future settlements. Perhaps the most interesting issues, however, are those that are generated in the interactions between the litigants and their allies.

Few parties approach litigation by themselves. With rare exceptions they need lawyers to represent them; if they are defendants, they usually also need insurers to pay the judgments, if any, and the costs of litigation. A litigant's lawyer, or her insurance company, is an ally in the traditional military sense of the word. They seek the same ultimate outcome, and they are bound to each other by formal mutual obligations. Nonetheless, they may have vastly different resources and power, and their interests and preferences sometimes diverge. Such differences can crop up in the relationship between defendants and defense counsel, but the more common and significant problems concern those allies who play at litigation (at least in part) with their own money: plaintiffs' lawyers (if they are paid on a contingency) and insurers. In both cases, the additional resources that the ally provides are critical to the case, and in both cases the ally's interests will often conflict with those of the party in whose interests it is formally obliged to act.

Several of the patterns that we found in these data suggest general propositions (or, perhaps more accurately, intermediate level propositions) that may be testable. Each of the following assumes that the described circumstance is a change from its opposite, but that otherwise all else remains unchanged.

1. If plaintiffs rather than their attorneys are required to advance trial costs (including attorneys' fees), and to bear the risk of failing to recover those costs, the trial rate will decline and the plaintiffs' success rate at trial will increase.

Once stated, this hypothesis seems obvious: to the extent that plaintiffs are obliged to bear the costs and risks of litigation, they will be more selective in the cases they pursue. Plaintiffs' attorneys, by contrast, have greater resources and many more opportunities to make money in litigation. When they foot the bill, they can take rational

156. See KRITZER, *supra* note 8, at 157.

gambles, including rational longshots. This difference easily explains the observed fact that plaintiffs succeeded at a considerably lower rate in personal injury cases (where their attorneys carry the costs) than in commercial litigation (where they frequently do not). The hypothesis is based on an assumption that plaintiffs are individuals or companies with modest resources; in contexts where that is not true, it will not apply.

2. *If one side stands to lose more from a defeat at trial than the other side gains, its success rate at trial will increase and the trial rate will decrease; if one side stands to gain more from a victory at trial than the other side loses, its success rate at trial will increase and the trial rate will increase.*

This proposition describes the consequences of unequal stakes in litigation in sufficient detail to predict patterns of outcomes. It is misleading to think of a party's stakes in a trial as a unitary figure — the expected value of the case.¹⁵⁷ Instead, each side attaches separate values to each possible outcome, and their stakes may be unequal (or equal) with respect to victories, or defeats, or both.¹⁵⁸

The best example of the first sort of inequality is greater risk aversion on the part of plaintiffs. In this context, risk aversion *means* that a loss will harm the affected party more than the monetary value of an equivalent gain. If both sides are equally risk averse then the effects will cancel out, but if one is more so there will be a systematic effect on the outcomes. Plaintiffs are usually individuals; in general, they are more risk averse than the corporations and insurance companies they usually oppose — *if* they have something to lose. Therefore, we find that plaintiffs succeed more often at trials after significant offers (which they must risk losing) than at trials after zero offers. Similarly, plaintiffs succeed more often in commercial trials, where they frequently risk losing the trial costs, than in personal injury cases, where

157. This view is implicit in some of Priest and Klein's analysis. See, e.g., Priest & Klein, *supra* note 5, at 26-27 (describing how risk aversion lowers the stakes in a dispute for the risk-averse side).

158. Of course, the parties may also have unequal stakes in a settlement, or in a failure to settle. For example, a repeat player litigant may believe that it will be harmed in future cases if it settles a claim, or if it settles for a significant amount of money, at least if the settlement becomes well known. Unfortunately, it is extremely difficult to describe the consequences of unequal stakes in the outcomes of pretrial negotiations, for several conceptual reasons (in addition to the enormous difficulty of obtaining data): (1) Some of the factors that may create unequal stakes — publicity, for example — are merely potential consequences of a settlement; they may or may not come to pass, and the parties may attempt to control them as a part of their settlement strategy. (2) It is difficult (at best) to determine whether a settlement is a success or a failure, for one side or for both. (3) The main consequences of a *failure* to settle (unlike the consequences of a settlement or a judgment) are contingent, since a trial still follows.

that risk is borne by the less risk-averse plaintiffs' lawyers. On the defense side, this type of asymmetry may operate in some product liability cases, where defendants worry that a judgment at trial may cost them heavily in future claims based on defects in the same product.¹⁵⁹

The second type of inequality occurs conspicuously in medical malpractice cases. Other researchers have argued that physicians (like manufacturers in product liability cases) face special reputational costs that magnify the harm they suffer from adverse malpractice judgments.¹⁶⁰ In fact the inequality seems to be different: defendants in malpractice cases seem to derive a special nonmonetary value from vindication at trial that is not a cost to the plaintiffs, and that they could not achieve by other means.¹⁶¹ Accordingly, we found both a high rate of defendant success at trial and a comparatively high trial rate.¹⁶²

3. *If the parties on one side of a set of cases are repeat litigants, their success rate at trial will increase.*

This hypothesis is merely a special case of the previous one. Favorable outcomes at trial are likely to have extra value for repeat litigants, and unfavorable outcomes may impose extra costs, because of their effects on future settlements. Therefore, we expect such parties to invest in settling likely losers, and in bringing likely winners to trial. In ordinary civil trials, the repeat litigants are all defendants: insurance companies, large corporations, and governments.

4. *If defendants are given the authority to veto settlements, but their insurers are required to pay damage awards and the costs of trial, the trial rate will increase and the plaintiffs' success rate at trial will decrease.*

This effect, as far as we know, is restricted to medical malpractice litigation. However, if insurance contracts that require the consent of the insured for a settlement become common in any other area, the same pattern is likely to arise.¹⁶³ Our hypothesis is based on an as-

159. See Priest & Klein, *supra* note 5, at 40.

160. See *supra* note 108 and accompanying text.

161. See *supra* text accompanying notes 109-14.

162. Some plaintiffs in defamation cases may be similarly motivated to take cases to trial in order to obtain public vindication. This might account, in part, for the high success rate by plaintiffs in defamation trials against defendants. See Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 468. In that context, however, this effect would not be likely to produce a high trial rate, since the desire for vindication has to be sufficiently strong to overcome a gloomy outlook on financial recovery: the majority of verdicts that defamation plaintiffs win are reversed by the trial judges or on appeal. *Id.* at 468-69.

163. As noted at note 103 *supra*, consent-to-settle clauses occur, at least occasionally, in non-

sumption that the defendants have some nonmonetary stake in winning at trial; if they did not, there would be no reason for them to seek veto power over settlements. Insurance contracts that grant defendants this power allow them to pursue that nonmonetary value at little or no financial cost.

5. *In cases with high damages, if the defendants have great resources the plaintiffs' success rate at trial will decrease.*

Some of this effect might be produced by the process described in hypothesis (3): defendants with large resources are likely to be repeat litigants with long-term interests in protecting their trial records. In addition, plaintiffs are more willing to take risky cases to trial against such defendants (in the typical case, a well-insured defendant) because they know that it will be easy to collect any judgments they win. On the defense side, insurance companies and other deep pocket defendants are more reluctant than poorer defendants to risk losing high-damage cases, because their exposure is greater. An individual's financial risk at trial is limited by her net worth, and by the legal and practical restrictions on the execution of judgments; in a case with high damages, that limit might be a fraction of the potential judgment. By contrast, the exposure of an insurance company or a large manufacturing corporation is, in this context, functionally unlimited.¹⁶⁴ Our findings are consistent with this hypothesis: plaintiffs lose most personal injury trials — against defendants who are almost always insured — but win most commercial trials — against defendants who are usually uninsured.¹⁶⁵ However, the difference in plaintiff success rates between personal injury and commercial trials is overdetermined. It is also expected because personal injury plaintiffs (unlike commercial plaintiffs) rarely, if ever, pay their own trial costs (hypothesis (1)), and

medical professional liability policies and in products liability policies. See Syverud, *supra* note 99, at 1176-77.

164. On the other hand, in cases where an individual defendant's exposure is significant but less than her net worth, the defendant will be more risk averse than an insurance company, and less willing to face a trial. In some cases, this will also apply to small and medium-size business defendants.

165. The Rand Wrongful Termination Study, *supra* note 132, reports that among the wrongful discharge cases that they studied, plaintiffs succeeded most often when the defendants had insurance that covered both defense costs and liability. *Id.* at 28. As they point out, however, this finding is difficult to interpret. Among other things, we do not know the size of the claims in these cases relative to the net worth of the defendants, or whether there were systematic differences between the minority of insured claims and the remainder. In addition, in the period covered by that study wrongful discharge law in California was in a state of flux. See *supra* notes 141-49 and accompanying text. As a result, success rates in discharge cases fluctuated widely from one year to another. If there were any concomitant temporal changes in the extent and nature of insurance coverage for discharge claims, these fluctuations could cause almost any possible apparent relationship between insurance and outcomes.

because they are more likely than commercial plaintiffs to face repeat litigant defendants (hypothesis (3)).

* * *

A great deal of our analysis has focused on the role of insurance companies — as one might expect, given their centrality in American civil litigation. In conclusion, it is useful to say a bit about their primary interests in litigation, in order to provide an overview of some of the problems inherent in any attempt to explain patterns in the outcomes of trials.

One of the startling facts about civil jury trials is that a very small number of verdicts accounts for most of the damages that juries award. In our data, for example, 54% of the damages in personal injury trials were awarded in 3% of the cases. Indeed, 35% of all damages are awarded in just 1% of the cases. These few high judgments inflate the size of the mean judgment in any set of cases far above the median; for example, the mean nonzero negligence judgment in our sample is \$208,000, and the median is \$58,000.

Because of this distortion some researchers argue that the mean verdict is an unrepresentative and misleading measure of the outcomes of civil cases.¹⁶⁶ This is true, in part. For a plaintiff, a mean so heavily influenced by rare large verdicts is an inflated estimate of the value of a claim; the median is closer to the mark. The plaintiff is unlikely to cash in on the remote chance of a grand prize, and no market exists in which she can sell her claim to someone who is in a better position to extract its full value. For the defense, however, the picture is different. Insurance companies are in the business of settling and litigating claims. If they take risks in cases in which huge verdicts are possible but unlikely, they will, in time, get hit. For them, the mean expected judgment is an excellent estimate of the cost of a case.

In other words, the estimated value of a claim to a civil plaintiff is usually considerably smaller than its estimated cost to the insurer on the other side of the case. This effect (by definition) increases the range of mutually advantageous settlements, and ought to increase the settlement rate by comparison to litigation between parties that are similarly situated with respect to the possibility of exceptionally large judgments.

For insurance companies, a major goal (if not *the* major goal) in pretrial negotiations must be to avoid huge verdicts.¹⁶⁷ This objective

166. See, e.g., Stephen Daniels & Joanne Martin, *Myth & Reality in Punitive Damages*, 75 MINN. L. REV. 1, 39-43 (1990).

167. This goal explains the increasingly common "high-low agreement," under which a plaintiff who proceeds to trial agrees with the defendant's insurer that if the verdict is above a

has mischievous consequences that complicate any simple model of the selection of cases for trial. For example, it seems plausible that cases with high stakes will be more likely to go to trial than smaller cases, since the larger the stakes the less (proportionally) the parties stand to gain by saving trial costs.¹⁶⁸ On the other hand, the larger the stakes, the higher the risk of a huge verdict, and the greater the insurer's incentive to offer a settlement that the plaintiff cannot afford to refuse. Similarly, other researchers have plausibly argued that as uncertainty about the outcomes of a set of cases increases, more of them will go to trial, since the parties' predictions will be increasingly likely to diverge.¹⁶⁹ But greater uncertainty also increases the proportion of cases that insurance companies will be anxious to settle because they present the risk of huge verdicts, which ought to decrease the trial rate. Quite likely, different insurers react differently to these competing incentives.

Finally, to the extent that insurance companies do focus on the danger of rare off-scale verdicts, their settlement and trial behavior will be quirky and somewhat unpredictable because they have so few cases to inform their decisions. Economic theories of trial and pretrial bargaining call to mind the standard image of a competitive market: numerous individuals intelligently pursuing independent self-interests. Social reality, as usual, is inconsiderate of global theories. In this case it provides a competing image that is less susceptible to statistical prediction: stragglers picking their way in the dark, trying to avoid an occasional land mine.

certain "high" figure, the plaintiff will collect only that figure. In return, the insurer agrees to pay the plaintiff a "low" figure even if the verdict is for the defendant at trial. In other words, the insurer receives insurance against a runaway high judgment, and the plaintiff receives insurance against a defense verdict or a very low judgment. See John L. Shanahan, *The High-Low Agreement*, FOR THE DEFENSE, July 1991, at 25.

168. See Priest & Klein, *supra* note 5, at 33-34.

169. See, e.g., Ramseyer & Nakazato, *supra* note 21, at 290.

APPENDIX A: THE JURY VERDICTS WEEKLY DATA

1. *The 1985-1986 Sample*

The main data set that we discuss in this article consists of 529 trials that are reported in volume 30 (1986) of *Jury Verdicts Weekly* (*JVW*). Specifically, we coded data on every case that went to a jury for deliberations in a California State Superior Court, and that was reported in *JVW*, volume 30, issues 1 through 7, 14 through 18, and 27 through 33. The sample does not include the following types of items that are reported in *JVW* at least occasionally: federal cases, cases in other states, bench trials, any cases that did not go to the jury (nonsuits, directed verdicts, and so on), and "interesting settlements." The dates of the verdicts in these trials range from June 17, 1985, through June 24, 1986, but the cases are concentrated in the middle of that period. (See Table A.)

TABLE A
VERDICT DATES FOR TRIALS IN THE 1985-1986 JVW
SAMPLE

1985	June	2
	July	4
	August	28
	September	66
	October	58
	November	46
	December	63
1986	January	53
	February	46
	March	44
	April	57
	May	34
	June	4
	Total	<hr/> 505

This data set amounts to a nonrandom convenience sample of 38% of the 1402 California Superior Court jury verdicts reported in volume 30 of *JVW*. The issues of *JVW* that were included were not chosen by any systematic sampling procedure, but there is no obvious way in which the somewhat haphazard selection is likely to have biased the data. More important, our confidence in the representativeness of the sample is bolstered by the fact that the distribution of cases in it closely resembles the distribution of all cases reported in *JVW* volume 30, in two important respects: (1) The proportion of defense judg-

ments in the sample is 48.6% (255/525), while for all cases in volume 30 it is 47.4% (664/1402); and (2) The distribution of the sample trials across counties is strikingly similar to the distribution for the entire volume. (See Table B.)

2. Coding

For each trial that it reports, *JVW* publishes a precis that includes the names of the parties; the date of trial; the court and judge; the name of each attorney, and the city, town or county where he or she works; the nature of the cause(s) of action; a brief narrative summary of the claims; the terms of pretrial settlement demands and offers; the verdict; the jury vote (under California law, a civil jury verdict requires the votes of three quarters of the jurors);¹⁷⁰ the length of the trial; the length of the deliberations; and the name, specialty, and place of residence of each expert witness. Data from these reports were coded and compiled under our direction; they include information on all the items reported in *JVW*, except that no systematic attempt was made to code the narrative summaries.

For the most part, information in *JVW* was coded directly as given. On some items, however, we had to develop more elaborate coding conventions. A few of these deserve mention.

Offers and demands. In some cases, *JVW* reports multiple offers or multiple demands (or both), or conflicting information from the two sides on one or both of these items. In these situations we coded the highest offer mentioned by *JVW* and the lowest demand. In other words, our coding is biased toward convergence in pretrial negotiations.

Award. We coded the jury's verdict, in dollars, taking into account any reduction in the award based on a jury finding that the plaintiff was partially negligent. We did not take into account awards of cost or attorneys' fees, remittiturs, or any other modification of the verdict by the trial court judge.

Multiple claims and multiple parties. Some cases involved multiple plaintiffs or multiple defendants, multiple claims by a single plaintiff against a single defendant, or some combination of these circumstances. In these cases, the entries for offer, demand, and award are combined, both across parties on the same side, and across claims. Thus, the "offer" coded is the highest amount that all defendants offered to pay to all plaintiffs, on all claims; the "demand" is the lowest amount that all plaintiffs were willing to accept from all defendants for

170. CAL. CIV. PROC. CODE §§ 613, 618 (West 1976).

TABLE B
DISTRIBUTION OF CASES BY COUNTY FOR ALL TRIALS IN JWV
VOLUME 30, AND FOR 1985-1986 SAMPLE

County	JWV Vol. 30		Sample	
	(n)	%	(n)	%
Alameda	67	4.8	25	4.7
Amador	1	0.1	0	—
Butte	14	1.0	5	0.9
Calaveras	0	—	0	—
Colusa	1	0.1	1	0.2
Contra Costa	26	1.9	7	1.3
Del Norte	1	0.1	0	—
El Dorado	9	0.6	1	0.2
Fresno	32	2.3	12	2.3
Glenn	1	0.1	0	—
Humboldt	7	0.5	2	0.4
Imperial	2	0.1	1	0.2
Kern	21	1.5	8	1.5
Lake	3	0.2	1	0.2
Lassen	1	0.1	0	—
Los Angeles	449	32.0	176	33.4
Madera	2	0.1	2	0.4
Marin	16	1.1	7	1.3
Mendocino	6	0.4	2	0.4
Merced	10	0.7	5	0.9
Modoc	1	0.1	0	—
Monterey	27	1.9	4	0.8
Napa	9	0.6	2	0.4
Nevada	4	0.3	3	0.6
Orange	70	5.0	34	6.5
Placer	2	0.1	1	0.2
Plumas	1	0.1	0	—
Riverside	24	1.7	10	1.9
Sacramento	40	2.9	15	2.8
San Benito	2	0.1	0	—
San Bernadino	40	2.9	19	3.6
San Diego	63	4.5	18	3.4
San Francisco	177	12.6	53	10.1
San Joaquin	22	1.6	6	1.1
San Luis Obispo	14	1.0	3	0.6
San Mateo	38	2.7	13	2.5
Santa Barbara	13	0.9	5	0.9
Santa Clara	76	5.4	33	6.3
Santa Cruz	14	1.0	8	1.5
Shasta	7	0.5	4	0.8
Siskiyou	1	0.1	1	0.2
Solano	13	0.9	9	1.7
Sonoma	21	1.5	10	1.9
Stanislaus	13	0.9	2	0.4
Tehama	4	0.3	2	0.4
Trinity	1	0.1	1	0.2
Tulare	8	0.6	1	0.2
Tuolumne	3	0.2	3	0.6
Ventura	17	1.2	8	1.5
Yolo	7	0.5	3	0.6
Yuba	1	0.1	1	0.2
	1402	100.0%	527	100.2%

all claims; and the "award" is the total that all defendants were required to pay to all plaintiffs under the terms of the jury verdict.

Counterclaims. In some cases *JVW* reports a claim by the defendant against the plaintiff. (*JVW* calls these "cross claims," but they are commonly known as "counterclaims.") When both a claim and a counterclaim go to trial, *JVW* occasionally reports up to six numbers to describe the settlement negotiations and jury verdict: the plaintiff's demand on the claim and offer on the counterclaim; the defendant's offer on the claim and demand on the counterclaim; and the jury verdict on both the claim and the counterclaim. In these cases, we coded the *net* position of the parties in bargaining and the *net* jury verdict. Thus, the "offer" coded is the defendant's offer on the claim minus the defendant's demand on the counterclaim; the "demand" coded is the plaintiff's demand on the claim minus the plaintiff's offer on the counterclaim; and the "award" coded is the jury verdict on the claim minus the jury verdict on the counterclaim.

Party reversals. In a small number of the nonpersonal injury cases in the sample, the *JVW* report revealed that the primary dispute was a counterclaim — that the party listed as "plaintiff" was better described as "defendant," and vice versa. In these cases we reversed party designations. In all but a few of these cases, the counterclaim by the party listed as "defendant" was the only claim that actually went to trial.

3. *The Reliability of JVW Data on Offers and Demands*

Since May 1991, research assistants working with us have been conducting telephone interviews with the trial attorneys in cases reported in recent issues of *JVW*. We conduct most interviews within six weeks of the date of the *JVW* report. One purpose of these interviews is to check the reliability of the reported *JVW* data on pretrial offers and demands. As of this writing, we have completed interviews with all attorneys in 89 cases. These trials were reported in *JVW* volume 35 (1991), issues 14 through 18. They constitute 68.5% (89/130) of the California Superior Court trials that went to juries that are reported in these issues.

In the interviews, each attorney is asked to recall the highest offer made by the defendant in the case. If the attorney gives any answer other than what is reported in *JVW*, he or she is then told what *JVW* reported, and asked if that information is correct or incorrect. The same procedure is followed for the plaintiff's lowest demand.

Offers:

- (i) In 79% of the cases (70/89), both attorneys agreed with the

JVW data on pretrial offers. In two thirds of these cases (48/70, or 54% of the total sample), both attorneys' agreement was "uncued" — that is, the attorneys volunteered the same information that *JVW* reports without being told of the *JVW* report. (In 4 of the 48 uncued cases *JVW* reported a disagreement between the attorneys on the offer(s) made, and the attorneys expressed the same disagreement in their interviews.) In the remaining 22 cases in which both sides agreed with *JVW*, one attorney initially could not remember the offer(s), or reported something different than *JVW*, but then agreed with the *JVW* information when it was given. In each of these cases the other attorney volunteered the *JVW* data at the outset.

(ii) In 16% of the cases (14/89), one attorney did not agree with the *JVW* report on pretrial offers, even after it was presented, while the other agreed with *JVW*. In some of these cases, of course, the *JVW* report is probably a correct description of the settlement negotiations.

(iii) In 6% of the cases (5/89), both attorneys disagreed with *JVW* on pretrial offers. In most of these cases the attorneys described a late round of bargaining that *JVW* apparently missed. It is likely that in these cases the *JVW* data are wrong.

Demands:

(i) In 74% of the cases (66/89), both attorneys agreed with the *JVW* data on pretrial demands. In two thirds of these cases (43/66, or 48% of the total sample) the agreement was uncued on both sides. (In 8 of these 43 uncued cases *JVW* reported a disagreement between the attorneys on the demand(s) made, and the attorneys expressed the same disagreement in their interviews.) In the remaining 23 cases in this group, the agreement was cued on one side.

(ii) In 22% of the cases (20/89), one attorney disagreed with the *JVW* report on the pretrial demands, even after it was presented, while the other agreed with *JVW*. As with the demand data, in some fraction of these cases the *JVW* report is undoubtedly correct.

(iii) In 3% of the cases (3/89), both attorneys disagreed with the *JVW* data on pretrial demands. Again, these 3 cases probably reflect *JVW* errors.

Zero-offer cases:

In 22 of the cases (25%) *JVW* reports that no offer was made. In 2 of these 22 cases both attorneys told us that a positive offer had been made, and in 1 of the 67 cases in which *JVW* reports an offer one attorney said that in fact there had been no offer.

APPENDIX B: RECOVERIES BY DEFENDANTS AND THE EXPECTED VALUE OF THE OUTCOMES OF TRIALS

Under California law, the prevailing party at trial is entitled to recover its "costs" from the losing party.¹⁷¹ Since defendants can sometimes obtain positive recoveries at trial, it is theoretically possible for a defendant's unbiased prediction of the expected value of trial to equal zero, or even to be positive, when the defendant has no counterclaim against the plaintiff.¹⁷²

Consider the following example. A defendant estimates that there is an 80% probability of a defense verdict at trial; if the defense does win at trial, \$12,500 in court costs will be taxed against the plaintiff. It will cost the defendant \$2,000 in nonrecoverable attorneys' fees to bring the case to trial, and if the plaintiff wins, the defendant estimates the likely judgment will be \$40,000. In this situation, the defendant's prediction of the net expected value of trial is zero: $80\% \times \$12,500 - \$2,000 - 20\% \times \$40,000 = \$10,000 - \$2,000 - \$8,000 = 0$. Clearly it would be rational for this defendant to offer nothing to settle the case, even absent any strategic considerations. If the defendant estimated that its recoverable costs would be \$15,000 (all other things being equal), the net expected value of the trial would be a \$2000 recovery for the defendant.

This peculiar configuration can only occur (even in theory) in a case with large sunk costs. The expected value of the potential recovery of future costs is necessarily negative. The actual future expenditure of money can at best be offset by later recovering that expenditure; since that recovery is always uncertain, its expected value is always less than the expenses themselves. In other words, the situation we have described can only occur late enough in the game so that compensable defense costs that have already been incurred have mounted to the point that they exceed the expected value of the plaintiff's recovery at trial.

In practice, defendants can only hope to break even at trial (or come out ahead) if their sunk costs exceed the expected value of plaintiff's recovery by a large margin. They must anticipate a cost award

171. CAL. CIV. PROC. CODE § 1032 (West Supp. 1991). In addition, CAL. CIV. PROC. CODE § 998 provides that a party may serve an offer upon the opposing party up to ten days prior to trial "to allow judgment to be taken in accordance with the terms [of the offer]." If the defendant makes such an offer and it is declined, and the plaintiff party "fails to obtain a more favorable judgment," the defendant is entitled to its costs "from the time of the offer" even if it does not prevail at trial. CAL. CIV. PROC. CODE § 998(c) (West Supp. 1991).

172. See *supra* note 63.

that also compensates them for the nonrecoverable expenses of taking the case to trial.

The California Code of Civil Procedure defines recoverable "costs" narrowly: filing fees, jury fees, discovery costs, service costs, and so on.¹⁷³ Ordinary witness fees are compensable, but expert witness fees are not unless the expert was court appointed. More important, attorneys' fees are not recoverable unless recovery is provided by contract or statute, or under one of a number of narrow nonstatutory legal theories. As a result, shifting of attorneys' fees is very uncommon in California, at least in personal injury cases.¹⁷⁴ Awards of attorney fees are mentioned in *Jury Verdicts Weekly* reports for only 5 of the 130 zero-offer trials in our sample. In most cases, attorneys' fees are by far the largest component of the expense of litigation. (In many cases, the fees for retained experts — which are also nonrecoverable — are the next largest item.)

As a practical matter, the possibility that the expected cost recovery will balance the expected damage award is limited to cases with a substantial likelihood that a victorious defendant will recover attorneys' fees, and to cases with extremely low legal costs.

An unbiased zero estimate of the trial outcome is particularly improbable in a personal injury case. The most common basis for attorney fee shifting is a contractual provision — obviously, a rare event in tort litigation. In addition, an award of costs (or of attorneys' fees) has no value unless it can be collected. Personal injury plaintiffs are, by definition, individuals; typically, they have moderate resources at best. An award against such a plaintiff that is large enough to be weighed in the balance is also likely to be uncollectible (or at least, to be worth far less than its nominal value).

In two contexts, the possibility of a positive recovery by the defendant looms larger, and thus the inference that a zero offer reveals strategic bargaining seems less justified:

(1) Suits based on written contracts. Boilerplate and form contracts often include attorneys' fee-shifting provisions. In suits based on these contracts, defendants who have invested a considerable amount in attorneys' fees may well estimate that the expected value of a trial is zero or positive. Such cases are heavily concentrated in the commercial relations category in our data.

(2) Suits with government defendants. Government entities are

173. CAL. CIV. PROC. CODE § 1033.5 (West Supp. 1991).

174. See Mark A. Saxon, *Recovery of Attorneys' Fees by the Non-Contracting Defendant*, CAL. ST. B.J., Apr. 1980, at 150; James D. Acoba, *Recovery of Attorney's Fees in Actions to Enforce Contracts: California Civil Code Section 1717*, 12 W. ST. U. L. REV. 751 (1985).

frequently represented exclusively by full-time government staff lawyers. In that situation, governments may have effectively fixed legal costs: they don't hire more attorneys to handle unexpected work, and they don't fire their present attorneys if the case load is unexpectedly light. To the extent that this is true for a government defendant, the additional fee incurred in bringing a case to trial is zero. Obviously, this puts the government in a position in which (at least in terms of simple financial outlays) it may break even or do better at trial even if it only recovers the usual "costs." The same argument would apply to any other defendant that operates under a regime of fixed legal expenses via a large retainer or some other unusual arrangement.