

Continued from page 1 shows that a patient's ability to win big remains a distinct possibility.

In fact, for the fourth time since 1995, when Lawyers Weekly first began compiling jury data, the largest verdict of 2007 was rendered in a medical-malpractice trial.

On Oct. 11, a Superior Court jury awarded a permanently disabled child, who was injured during birth, more than \$26 million after finding two doctors at Boston's Brigham & Women's Hospital liable.

Elizabeth N. Mulvey of Boston persuaded the jury that the physicians' eight- to 10-hour delay in performing a Caesarean section on the mother led her client to ultimately suffer severe cerebral palsy and hypoxic encephalopathy.

The \$26 million award is the largest medical verdict ever recorded by Lawyers Weekly, exceeding a \$23.4 million award reported in 2005.

"You don't see large verdicts like this every day, but I've been involved in a trial with a verdict that was almost as big as this one from the defense side," says veteran medical attorney Charles P. Reidy III of Boston.

"I would bet you that neither [party] ever would have predicted in their wildest imagination that a juror would award this sum of money," he adds. "But the bottom line is that, in terms of telling clients what could happen, verdicts like this require lawyers to clearly let them know that a big number is a possibility."

If the number of multi-million-dollar jury awards is an accurate barometer of success, 2007 was also an excellent year for plaintiffs outside the medical-malpractice arena.

For the third straight year, the top five verdicts all exceeded the largest award handed out in 2004, which was \$9.41 million.

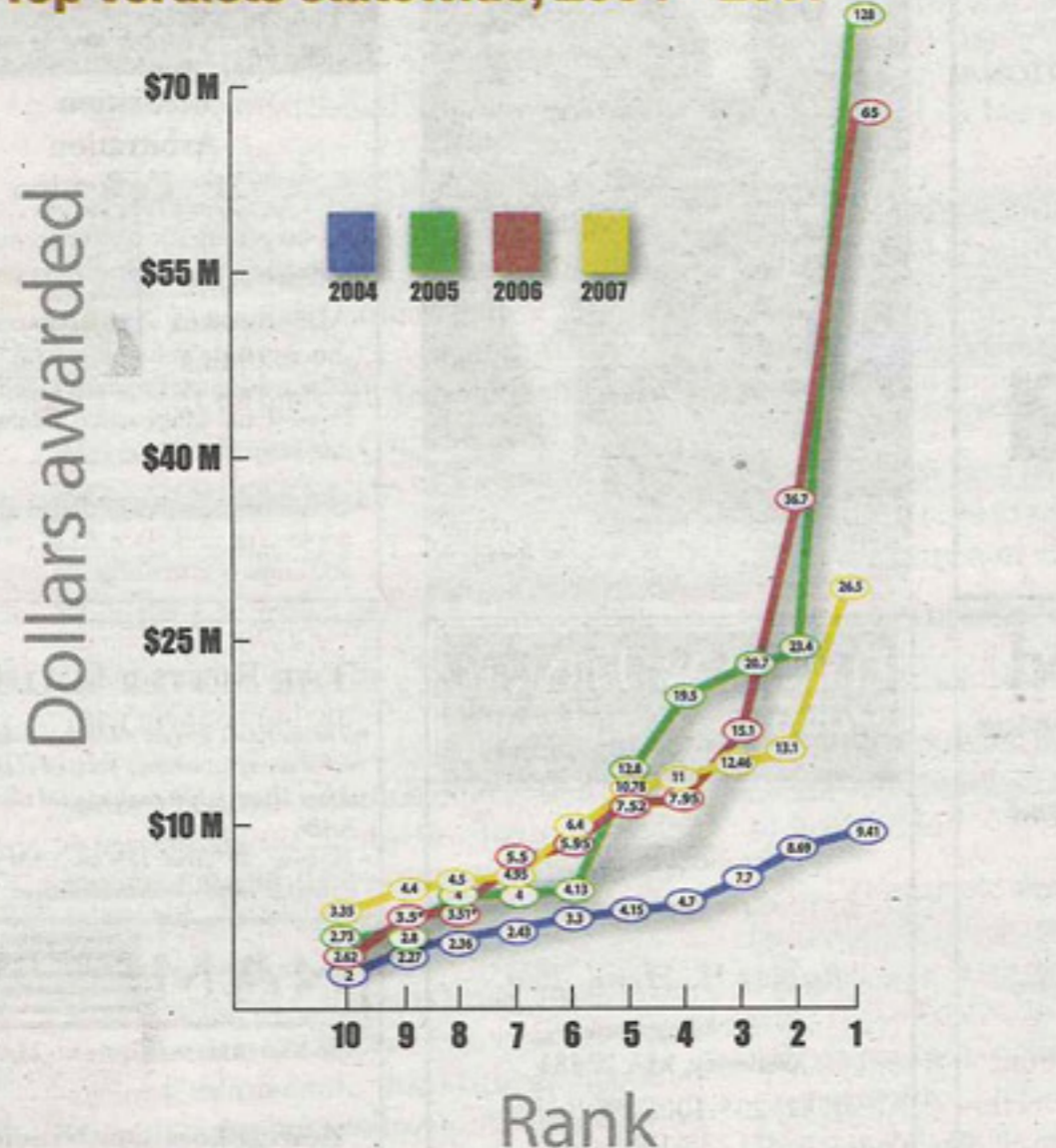
The top five of 2007 also all exceeded \$10 million—a feat accomplished only once before, in 2005.

"A lot of big verdicts are coming from cases that involve catastrophic injuries, where you're finding that medical expenses in this day and age are going to be in the eight-figure range," observes James D. Gotz of Boston.

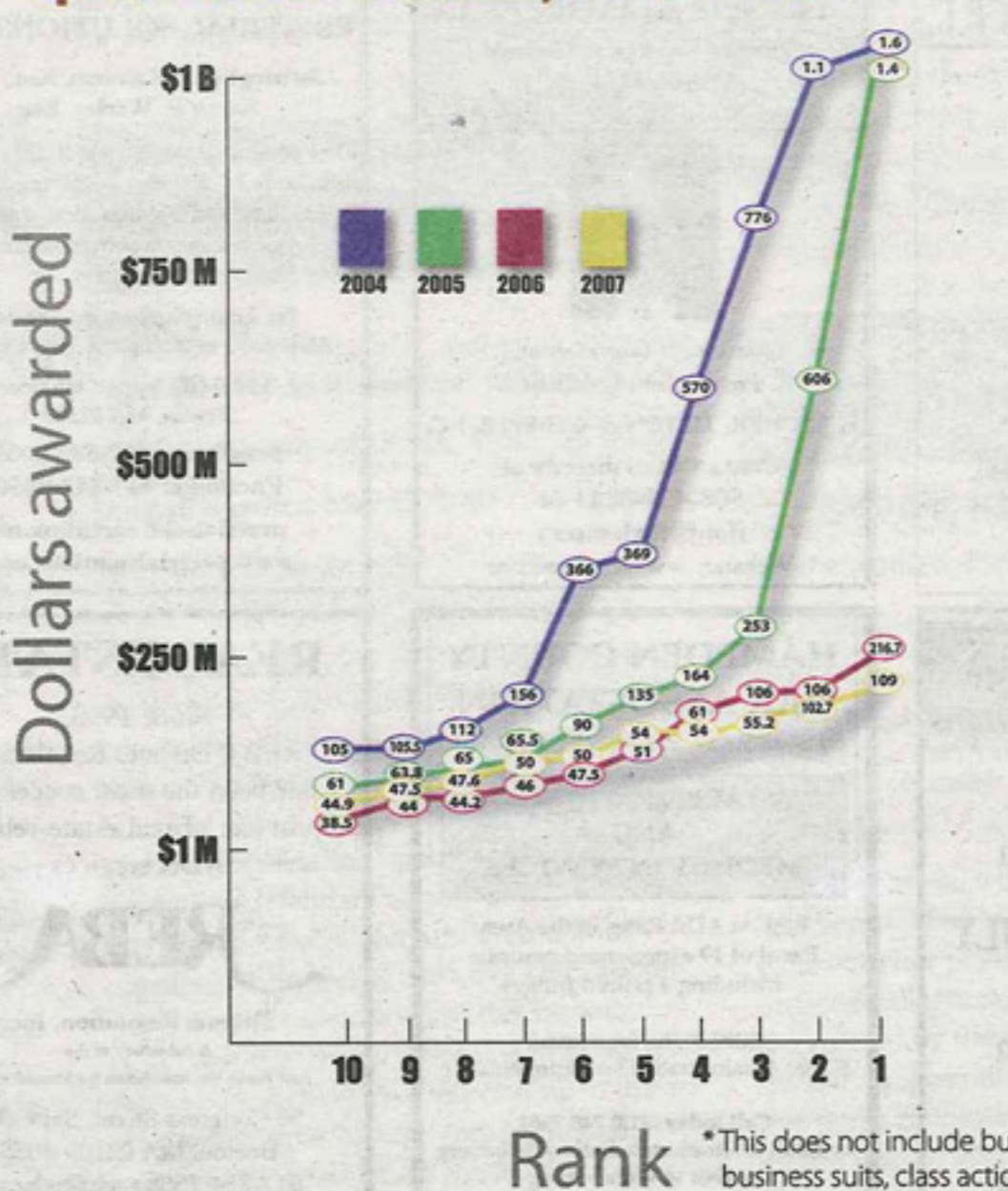
Gotz should know: He earned the second largest verdict of the year—a \$16 million award for a client who lost use of his arms and legs after being hit by a car outside a Salem commuter rail station.

"I don't think these are examples of runaway juries," says Gotz. "You're talking about situations, in many cases, where special damages are going to be an issue. So once liability is established, you're going to continue seeing big awards."

Top verdicts statewide, 2004 - 2007



Top verdicts nationwide, 2004 - 2007*



*This does not include business-against-business suits, class actions or consolidated cases.

The five largest jury verdicts

1 \$26.5 MILLION (medical malpractice)

Bejarano, et al. v. Goldberg, et al.
Suffolk Superior Court
Date of verdict: Oct. 11, 2007
Plaintiffs' attorneys: Elizabeth N. Mulvey and Florence A. Carey, Crowe & Mulvey, Boston
Status of verdict: Post-trial motions

On the eve of trial, Elizabeth N. Mulvey felt confident as she sized up her case.

The evidence she was about to present, she says, would show that her client became permanently disabled as a direct result of negligence by the doctors at Brigham & Women's Hospital who helped deliver him.

The defendants, who were residents working the 11 p.m.-7 a.m. shift, had failed to recognize that the baby was in distress and subsequently did not recommend a Caesarean section to the attending physician, according to Mulvey.

"The evidence about when the injury occurred was very strong," she recalls. "My thought was that, once we proved that the injury hap-

pened on the doctors' watch, the entire case would come together."

But, despite her confidence in the evidence she was to present, there were no settlement talks prior to trial.

"I can't tell you why there was never any discussion of a resolution prior to trial," she says, "because I felt all along that this was a really good case. Generally, you don't get to try a case as strong as this. But the fact is that there wasn't any settlement offer, which actually made it easier because we knew from the get-go that we would have to put this case to a jury."

Even with the strength of Mulvey's case, it was not without its challenges.

2 \$13.1 MILLION (motor vehicle negligence)

Dodge v. Tezel
Suffolk Superior Court
Date of verdict: June 29, 2007
Plaintiff's attorney: James D. Gotz, Kreindler & Kreindler, Boston
Status of verdict: Post-trial motions

Although it has been said that a picture is worth a thousand words, James D. Gotz has learned that, in a personal-injury case, sometimes a picture is worth \$13 million.

Thanks in part to a series of photographs taken by Salem police officers minutes after a car driven by a Turkish college student struck his client, rendering him permanently paralyzed from the chest down, Gotz was able to dispel the defense's argument that road conditions—not the defendant—were responsible for the catastrophic injuries.

The case unfolded on an April afternoon in 2005 when plaintiff William Dodge was hit by a car driven by defendant Arda Tezel, who was believed to be traveling between 42 and 47 miles per hour in a 30 mph zone.

The impact lifted the plaintiff, who was in

a crosswalk at the time, off the ground, shattered the car's windshield and ultimately fractured the plaintiff's spine and tore open his scalp.

"Our biggest challenge here was dealing with the fact that this accident happened on a road known to be dangerous at a time when it was raining and when my client was wearing dark clothes," Gotz says. "But with those photos, we were able to show that, although the defense was laying it on pretty thick, the road had good enough visibility that the [driver] should have been able to avoid all this."

Gotz also claims that an error by the defense's accident reconstruction expert did major damage to the opposing side's theory that speed was not a factor.

The expert reportedly based his calculations on tests he had performed using a two-door

car, rather than a four-door, which the defendant was driving at the time of the accident.

"He used the wrong kind of car, and once he acknowledged that mistake, all of his conclusions were off. I simply sat down and didn't need to ask any more questions of him," he says.

Once the road and weather condition evidence was in place, Gotz says it became a simple matter of presenting his client's extensive injuries to the jury. Rather than do that by submitting detailed testimony from the plaintiff, Gotz opted for a low-key approach.

"We tried to be understated and not hit the jury over the head with it, because the feeling was that the injuries spoke for themselves," he explains. "Mr. Dodge only took the stand for 15

minutes or so; instead we had his sister testify in order to talk about what his life was like before this situation."

That left Gotz with one last challenge: the defendant, who had fled to Turkey after the collision and was not present at trial.

Although a warrant for his arrest had been issued in connection with a criminal charge that arose out of the crash, the jury was not permitted to hear that fact. Instead, it was instructed that it could draw an adverse inference from the man's absence.

"The judge did not allow me to comment on the arrest warrant, but I don't think there's any question that his absence was not lost on the jury," says Gotz.



MULVEY



GOTZ

3 \$12.46 MILLION (patent)

Diomed Holdings, Inc. v. AngioDynamics, Inc. and Vascular Solutions, Inc.
U.S. District Court
Date of verdict: March 28, 2007
Plaintiff's attorneys: Michael A. Albert, Michael N. Rader and John L. Strand, Wolf, Greenfield & Sacks, Boston
Status of verdict: On appeal

Sometimes, even the most complex trials are decided through old-fashioned credibility impeachment on cross-examination.

Such was the case in a hotly contested federal patent case that was tried last year.

"Even though this was a very scientific case, at the end of the day a lot of what was convincing to the jury had to do with evidence that came directly from the defendants," recalls Michael A. Albert. "We were able to impeach them with their own e-mails, in which they basically admitted some of the critical facts they were trying to deny at trial."

At the conclusion of the two-week trial in March, the jury awarded plaintiff Diomed

Holdings more than \$12 million in patent-infringement damages from the two defendant companies.

The patent, which covered a method for treating varicose veins with laser energy, required the tip of a laser fiber inside a vein to make contact with the vein wall.

"Essentially, the defendants were saying that the tip of their laser fiber wasn't in contact with the vein wall, and we were saying that it was," says Albert.

Through expert testimony and some fancy video re-creations of the treatment, Albert says he was able to present the evidence necessary to back up his client's claim.

But it was his ability to confront key defense witnesses with their own e-mails that provided the corroboration needed to connect with the jury, he says.

"We had obtained during discovery some internal e-mails in which the defendants' own engineers essentially admitted that vein-wall contact [in their product] was occurring," says Albert. "At trial, those same witnesses tried to say that when they had written those e-mails, they hadn't really understood how the procedure worked and subsequently had learned they were wrong."

With those written admissions in evidence, Albert says he felt comfortable that the jury would find the defense position not credible.

"At one point during the trial, we had one of those e-mails up there. We were questioning a defense witness about them, and he was dodging and weaving about what he had written," he says. "While that was happening, we saw one of the jurors just laugh. I think the point was clear then that these people were doing whatever they could to try to get away from what they had earlier said."



ALBERT

4 \$11 MILLION (eminent domain)

Exelon Edgar, LLC and Boston Edison Company, et al. v. Massachusetts Water Resources Authority
Norfolk Superior Court
Date of verdict: Nov. 30, 2007
Plaintiff's attorneys: Jeffrey A. Tocchio, Drohan, Tocchio & Morgan, Hingham; Mark S. Bourbeau, Bourbeau & Associates, Boston
Status of verdict: Post-trial motions

When deliberations began at the end of what is believed to be the longest civil trial in Norfolk County history, Mark S. Bourbeau thought there was little more he could do in front of the jury until a verdict was rendered.

It turns out the opposite was true. At the start of the 10th day of deliberations, Judge John P. O'Connor Jr. informed jurors that, if they thought it would be helpful, he would allow the lawyers to re-argue any of the points of contention.

Less than an hour later, the jury accepted the offer and asked both sides to address an issue

holding up deliberations.

"We only had a few minutes to prepare, and then we each got about 10 minutes to give a mini-closing argument," says Bourbeau. "I've never done something like that before. I thought it was unusual, but it was obviously helpful because the next morning they came in with [an \$11 million] verdict."

The verdict was rendered in an eminent domain case against the Massachusetts Water Resources Authority for property it had taken on the Quincy-Weymouth border in

1999 and 2003.

The trial, which spanned eight weeks, involved claims by Boston Edison and several other plaintiffs that they had not been adequately paid for the property and that the MWRA project reduced the value of the land.

With a number of complicated issues on the table, Bourbeau says it was not un-

til the lawyers re-addressed the jury that an end to the marathon trial finally was in sight.

"It was an exhilarating experience as a trial lawyer because it forced you to focus on a particular issue long after the case had gone to the jury and argue a point you knew was critical to the deliberations," he says. "Other lawyers told me it was the best part of my argument."



TOCCHIO



BOURBEAU

5 \$10.78 MILLION (patent; antitrust)

CytoLogix Corp. v. Ventana Medical Systems, Inc.
U.S. District Court
Date of verdict: Aug. 16, 2007
Plaintiff's attorneys: Jack R. Pirozzolo and Vickie L. Henry, Foley Hoag, Boston
Status of verdict: On appeal

Having already established liability to a different jury in a 2003 trial, the main issue in the second part of the patent infringement case that lead counsel Jack R. Pirozzolo and Vickie L. Henry were arguing in federal court involved damages.

"From a professional experience, it's a lot more fun going into a trial knowing that the jury should award damages, and the issue is really only going to be how much," Henry says.

Their client, plaintiff CytoLogix Corp., had proved that an Arizona-based competitor committed patent infringement and trade secret misappropriation.

The suit dealt with a unique slide-staining product CytoLogix had developed that assisted pathologists in diagnosing cancer and other diseases.

Despite the fact that the liability question was affirmed on appeal and seemingly was out of the way, the lawyers say they ran into difficulty when it came time to gear up for trial No. 2.

"[The defense] tried very hard to dispute liability and essentially undermine the earlier verdict," recalls Henry. "It took a lot of time to get there, and ultimately the judge rebuffed their efforts. But they fought tooth and nail to re-try it."

Adding to that complication, the jury in the second trial, Henry points out, also had to decide an unrelated issue dealing with an antitrust violation.

"The antitrust issue actually ended up having to do with some different technologies, so the jury was really hearing two cases at the same time, and that was hard," she says.

Henry credits Judge Rya W. Zobel—in an effort to separate the issues for the jury—for allowing the lawyers to address the jury with transition statements between witnesses.

"Before a witness testified, the attorneys were allowed to explain what the jury was about to hear and, in some cases, what it was they had just heard," she says. "We were able to talk to the jury all through the trial to basically tell them which claims the witness was going to be talking about and what the significance of it was."

At the end of the three-week trial, the jury awarded the plaintiff \$10.78 million in damages.



PIROZZOLO