ARE JURIES COMPETENT TO DECIDE LIABILITY IN TORT CASES INVOLVING SCIENTIFIC/MEDICAL ISSUES? SOME DATA FROM MEDICAL MALPRACTICE

Neil Vidmar*

I. Introduction

Complaints about the competence of juries to decide legal disputes, particularly civil disputes, accompanied the development of the jury system in England and have continued through the history of American law up to the present.¹ While part of the current debate has centered on the jury's propensities with respect to damage awards,² another part has involved its competence and biases with respect to decisions on liability, particularly when the case involves scientific or medical testimony.³ A basic assertion of jury critics is that juries are regularly led astray by "junk science" or "hired gun" experts, or at the least are confused by scientific and medical testimony involving esoterica that are beyond the competence of laypersons.⁴

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⁴ See Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom (1991); Jeffrey O'Connell & C. Brian Kelly, The Blame Game (1987); Johnson et al., supra note 3, at 1370-71. For additional discussion, see David L. Faigman, Struggling to Stop the Flood of Unreliable Expert Testimony, 76 Minn. L. Rev. 877 (1992); William V. Luneberg & Mark A. Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation, 67 Va. L. Rev. 887 (1981); Joseph Sanders, Scientific
An example of this type of criticism is presented by law professor David Sugarman in a 1988 issue of *Science*, the prestigious journal of the American Association for the Advancement of Science. Sugarman begins his article by describing a products liability case, *West v. Johnson & Johnson Products, Inc.*, involving toxic shock syndrome resulting from the use of tampons. The jury awarded the plaintiff $500,000 in compensatory and $10 million in punitive damages. The trial judge concluded that the award was excessive and the result of “passion and prejudice” because the plaintiff had offered insufficient proof of economic loss and had fully recovered from her illness. The award was reduced to $100,000 in compensatory and $1 million in punitive damages. Using *West* as an example, Sugarman drew this conclusion about the jury’s competence on the question of liability:

Jurors selected at least in part for their ignorance about the topic at hand are asked to decide extremely difficult scientific issues: Was it TSS or was it scarlet fever? Could JJP have discovered TSS before the [Center for Disease Control] did? Would it have done so through better testing and follow-up studies? Should the consumer complaints JJP received have put the company on notice that something serious was afoot? Of course, the jury is aided in the process by the testimony of experts. What that means in practice is that it must resolve a dispute between sophisticated witnesses, whose scientific credibility the jurors are unlikely to accurately appraise.

*West v. JPP* is hardly an isolated instance of this phenomenon. It is repeated in nearly every medical malpractice and product design defect case coming to trial . . .

Sugarman is hardly alone in using anecdotal evidence to argue that juries are incompetent in trials involving scientific or medical evidence.

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* Sugarman, *supra* note 3.


* Sugarman, *supra* note 3, at 823.

* Id. at 823 (emphasis added).

Professor Kip Viscusi’s book on products liability, and for example, begins with a series of case anecdotes that includes the well-travelled and inaccurate story of the Philadelphia woman who was awarded $1 million after she claimed a CAT scan caused her to lose her psychic powers. Popular and influential writer Peter Huber’s books are sprinkled with examples of cases allegedly demonstrating the incompetence of juries, even though the cases used frequently misrepresent the facts. As I will document below, similar anecdotes are used to make arguments that juries are incompetent to decide medical negligence.

The debate about the competence of the civil jury has been primarily one-sided with critics of the jury system attacking the status quo. Many of the critics represent interest groups attempting to change the tort system through attacks on its most visible institution, but editorial criticism also occasionally comes from left of the political center. The critics also include serious scholars, such as Professors Sugarman and Viscusi.
gardless of their purpose or orientation, the essence of the actual evidence set forth by these critics has consisted of the following: case anecdotes, some accurate and others inaccurate; cases of unknown representativeness; appeals to “common knowledge” and “intuition” that groups of laypersons are not up to the task; dubious statistical data sets; and flawed reasoning about the inferences that can be drawn from data about jury verdicts.17 While we must consider the possibility that these jury critics could ultimately prove to be right, careful analyses indicate that to date they have produced no evidence to support their claims that withstand scientific scrutiny.18

The debate about the competence of the jury, however, could have major consequences. The claims about the jury’s lack of intellectual ability and its biases are used to bolster arguments for no-fault alternatives to the present tort system19 or to exclude or limit certain classes of legal disputes from the constitutional right to trial by jury.20 Daubert v. Merrell Dow Pharmaceuticals,21 the recent Supreme Court decision on the admissibility of scientific evidence, might provide the mechanism for such exclusion in individual cases. While Daubert was limited to setting guidelines for admissibility, an incisive article by Professor Joseph Sanders makes it clear that considerations of jury competence to judge science were at the heart of the decision, and that it gives considerable latitude to judges to decide what the jury may hear.22 Panelists and audience participants at Emory Law School’s Thrower Symposium23 and at recent symposia on Daubert at the 1994 Association of American Law Schools Annual Meetings24 have also expressed concerns that trial judges who are suspicious of

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Vidmar, supra note 2, at 224-41 (discussions involving the use of anecdotes by other scholars).

17 For articles reviewing these problems and citing other references that raise methodological problems with the data used by opponents of the civil jury system, see Saks, supra note 9; Vidmar, supra note 2; Neil Vidmar, Making Inferences About Jury Behavior from Jury Verdict Statistics: Cautions About the Lorelei's Lied, 18 LAW & HUM. BEHAV. (forthcoming 1994).

18 Vidmar, supra note 17.

19 See, e.g., Sugarman, supra note 3; Paul C. Weiler, Medical Malpractice on Trial (1991).

20 See, e.g., Johnson et al., supra note 3. For more discussion and references see Lempert, supra note 3; Carrington, supra note 1; Schuck, supra note 1.


22 See Faigman, supra note 4; Sanders, supra note 4.


jury competence could utilize the broad authority of Daubert to make rulings on scientific or medical matters that would gut the heart of a plaintiff's or defendant's case and effectively remove the most meaningful part of the dispute from the jury.\footnote{See also Sanders, supra note 4; 15 Cardozo L. Rev. 1745 (1994) (entire volume).}

One need not subscribe to extreme scenarios about the demise of juries in tort cases to recognize that better data are needed to inform the debate about the abilities and predilections of juries in cases involving scientific and medical evidence. As a step in this direction, I will review arguments about jury incompetence in medical malpractice cases and summarize some data bearing on their liability decisions. My discussion is based on a book in production that I have given the title of The Civil Jury and Medical Negligence and which will also address jury performance with respect to damage awards and other matters.\footnote{Neil Vidmar, The Civil Jury and Medical Negligence (forthcoming, University of Michigan Press).} My primary intent here is limited to showing the direction that informed debate about jury competence should take, but in the process I present evidence that contradicts the facile conclusion that juries are more often wrong than right when deciding malpractice cases.

II. CRITICISMS OF MEDICAL MALPRACTICE JURIES

Assertions about the incompetence of medical malpractice juries are similar to those set forth by Professor Sugarman. A 1988 report by the American Medical Association's Specialty Society Medical Liability project argued as follows:

Juries are not optimally suited to decide the complicated issues of causation and duty of care. Under the best of circumstances, the determination of professional liability is not easily made by laymen.

With respect to the major elements of liability—duty of care and causation—the parties almost always must present expert testimony, which the jurors cannot evaluate independently.

[J]uries can never be as effective at deciding these cases as specialized hearing offices because jurors are exposed to the medical issues
only once and thus they cannot develop an institutional memory to aid them in deciding a specific dispute. This not only impairs their ability to decide each case, but it also leads to inconsistency in verdicts across cases.\textsuperscript{27}

Concerns about the effects of juror emotions and sympathies are closely intertwined with the concerns about competence. The North Carolina Hospital Association, for instance, claimed:

There is no way to predict how a jury will rule on a particular set of facts . . . . [T]oday juries often make awards regardless of the “fault” of anyone—out of sympathy for an injured person. More and more the public attitude is that insurance will compensate the injured party and the defendant will not sustain any loss . . . ; too often juries appear to award on [the] basis of emotion as opposed to facts and/or realistic evaluation of case circumstances.\textsuperscript{28}

Similarly, in a 1992 videotape produced by the Manhattan Institute for Policy Research and narrated by Walter Cronkite, former Surgeon General C. Everett Koop related a hypothetical case involving a child born with cerebral palsy, a condition beyond the control of the doctor who attended the delivery.\textsuperscript{29} Dr. Koop asserted that “if [the child’s family] attempt to sue their physician they’re very likely to find a sympathetic jury that will award something to that family, not necessarily because they think the doctor is guilty of negligence or malpractice but because their sympathy for the family dictates it.”\textsuperscript{30}

\textsuperscript{27} American Medical Association Specialty Society Medical Liability Project, A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based Administrative System 7-10 (1988) (hereinafter AMA Report); Johnson et al., supra note 3, is a rewritten version of this report and makes the same claims. See also U.S. Dep’t of Justice, Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability 63 (1986) (“Lay juries are a very poor mechanism for second-guessing the judgment of established mainstream scientific and medical views.”) [hereinafter DOJ Report]; Laurence R. Tancredi, Compensating for Medical Injuries, 1986 N.Y. St. J. Med. 370 (1986) (asserting that juries lack the ability to evaluate medical responsibility).

\textsuperscript{28} Letter from North Carolina Hospital Association, quoted in U.S. General Accounting Office, Medical Malpractice: Case Study of North Carolina 21-22 (1986).

\textsuperscript{29} Liability: Injustice for All (Manhattan Institute for Policy Research) (1992).

\textsuperscript{30} Id. See also Waune E. Green, Attorneys Try to Defuse Sympathy in Injury Cases, Wall St. J., April 18, 1990, at B1.
As a final example, in Health Care Law and Policy Professor Clark Havighurst makes the following argument:

Although it is customary in our adversary system to regard a jury trial as a “black box” the outcomes of which (on nonlegal questions) are granted a powerful presumption of legitimacy, realism compels recognition that juries are often poorly positioned to choose reliably between the well argued, but often highly confusing theories of the two sides’ experts. As a result they often fall back on such irrelevancies as the witnesses’ demeanor and style of presentation or sympathy for the plaintiff’s plight or the defendant’s reputation.\(^\text{31}\)

Sifting through these claims, we can identify a number of distinct assertions bearing on malpractice juries’ performance:

1. Juries are typically biased in favor of plaintiffs and against doctors.
2. Most cases, perhaps all malpractice cases, are technically complex and revolve exclusively around these technical questions.
3. There is a clear answer to any dispute about technical questions and doctors can resolve the dispute impartially.
4. Juries are naive about experts and about the adversary process and are easily misled by “hired gun” experts.
5. Jury verdicts on liability depart significantly from those that would be rendered by doctors—in a direction that favors plaintiffs.

III. SOME DATA BEARING ON THE ASSERTIONS ABOUT MALPRACTICE JURIES

I now want to examine each of these assertions in the light of research findings. A primary data source for my analysis arises out of a project on medical malpractice litigation at Duke Law School that was supported by grants from the Robert Wood Johnson Foundation and the State Justice Institute.\(^\text{32}\) As part of this project, we examined the court records for an


\(^{32}\) See Neil Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 Judicature 118,
estimated ninety-five percent of the malpractice cases filed in state and federal courts in North Carolina between July 1984, and the end of June 1987; a sample of 895 cases. Of these cases, 9.4 percent eventually were decided by a jury. Data were also collected for a sample of 326 cases in North Carolina state courts between July 1987 and the end of December 1989. Of these, 7.7 percent were decided by a jury. We also collected data from 149 closed claim files of three medical malpractice liability insurers in North Carolina that covered roughly the same period as the court file data. In addition, we undertook systematic observations of malpractice trials in North Carolina and conducted interviews with jurors who rendered the verdicts in those trials. Additionally, I and my students undertook a number of experimental studies involving veniremen awaiting jury duty in various North Carolina courts.\textsuperscript{83} I will also utilize data from studies undertaken by other researchers around the United States.

A. Are Jury Decisions Biased in Favor of Plaintiffs?

Over the past decade a number of studies have collected representative data on the rates at which plaintiffs prevail at trial.\textsuperscript{84} I have summarized these data in Table 1. The table gives the lead author of the study, the verdict dates covered, the jurisdiction, the size of the sample, and the plaintiff win rate. The win rate is defined as a verdict in favor of the

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\textsuperscript{83} See Vidmar, supra note 2; Neil Vidmar & Jeffrey J. Rice, Assessments of Noneconomic Damage Awards in Medical Malpractice: A Comparison of Jurors With Legal Professionals, 78 IOWA L. REV. 883 (1993); Neil Vidmar et al., Damage Awards and Jurors’ Responsibility Ascriptions in Medical Versus Automobile Negligence Cases, 12 BEHAV. SCI. & L. 149 (1994).

\end{flushleft}
plaintiff regardless of the amount of damages awarded. As can be seen from the table, the win rates ranged from a low of 13.5% to a high of 53%, but the median win rate for all studies was 29.2%.98 In short, plaintiffs won slightly fewer than three cases out of ten.

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98 The mean win rate was 29.6%.
### TABLE 1.

<table>
<thead>
<tr>
<th>Source</th>
<th>Dates of Verdicts</th>
<th>State/ Jurisdiction</th>
<th>Sample Size</th>
<th>Win Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vidmar</td>
<td>1984-1987</td>
<td>North Carolina</td>
<td>84</td>
<td>20%</td>
</tr>
<tr>
<td>Vidmar</td>
<td>1987-1989</td>
<td>North Carolina</td>
<td>25</td>
<td>16%</td>
</tr>
<tr>
<td>Danzon (1985a)</td>
<td>1974-1976</td>
<td>California</td>
<td>420</td>
<td>28%</td>
</tr>
<tr>
<td>Danzon (1985b)</td>
<td>1983</td>
<td>Florida</td>
<td>322</td>
<td>13.8%</td>
</tr>
<tr>
<td>NAIC (1980)</td>
<td>1975-1978</td>
<td>Nationwide Study</td>
<td>2539</td>
<td>13.5%</td>
</tr>
<tr>
<td>Peterson (1987)</td>
<td>1960-1964</td>
<td>San Francisco</td>
<td>95</td>
<td>27%</td>
</tr>
<tr>
<td></td>
<td>1965-1969</td>
<td>San Francisco</td>
<td>88</td>
<td>35%</td>
</tr>
<tr>
<td></td>
<td>1970-1974</td>
<td>San Francisco</td>
<td>98</td>
<td>43%</td>
</tr>
<tr>
<td></td>
<td>1975-1979</td>
<td>San Francisco</td>
<td>81</td>
<td>32%</td>
</tr>
<tr>
<td></td>
<td>1980-1984</td>
<td>San Francisco</td>
<td>55</td>
<td>53%</td>
</tr>
<tr>
<td>Peterson (1987)</td>
<td>1960-1964</td>
<td>Cook Co., IL</td>
<td>56</td>
<td>25%</td>
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<tr>
<td></td>
<td>1965-1969</td>
<td>Cook Co., IL</td>
<td>68</td>
<td>29%</td>
</tr>
<tr>
<td></td>
<td>1970-1974</td>
<td>Cook Co., IL</td>
<td>100</td>
<td>29%</td>
</tr>
<tr>
<td></td>
<td>1975-1979</td>
<td>Cook Co., IL</td>
<td>134</td>
<td>33%</td>
</tr>
<tr>
<td></td>
<td>1980-1984</td>
<td>Cook Co., IL</td>
<td>162</td>
<td>49%</td>
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<tr>
<td>Daniels (1990), at 13-14</td>
<td>1981-1985</td>
<td>46 Counties in 11 States</td>
<td>1.886</td>
<td>32.4%</td>
</tr>
<tr>
<td>Gross &amp; Syverud (1992) at 335</td>
<td>1985-1986</td>
<td>California</td>
<td>65</td>
<td>29.2%</td>
</tr>
<tr>
<td>Bovbjerg et. al (1991) at 22</td>
<td>1980-1985</td>
<td>5 Jurisdictions</td>
<td>426</td>
<td>33%</td>
</tr>
<tr>
<td>Clermont &amp; Eisenberg (1992) at 1162</td>
<td>1979-1987</td>
<td>Federal Courts/ Nationwide</td>
<td>759</td>
<td>30%</td>
</tr>
<tr>
<td>Tanquin et al. (1992) at 782</td>
<td>1977-1992</td>
<td>New Jersey</td>
<td>988</td>
<td>24%</td>
</tr>
<tr>
<td>Sloan et al. (1993)</td>
<td>1986-1989</td>
<td>Florida</td>
<td>37</td>
<td>27%</td>
</tr>
</tbody>
</table>

* estimate: Data base was approximately 6000 claims of which 7% went to verdict = 420.

* These data include an unknown, but probably small, number of bench trials.
Since I have criticized others for the misuse of data, let me offer two caveats about interpretation of the data in Table 1. First, as I have explained elsewhere, there are serious problems in making comparisons of jury verdicts without knowledge of the base of cases from which trial cases arise and knowledge of which cases are selected for trial. The average strength of the defendants' liability in cases may vary across time or between jurisdictions and, thus, juries may be deciding different types of cases rather than deciding cases differently. The second point, which is somewhat related to the first point, is that there is evidence which suggests that cases with clear defendant liability tend to be settled, resulting in trial cases that are uncertain or that favor the defendant. In the most extreme hypothetical, if none of the cases that went to trial were meritorious on the issue of liability, a twenty-nine percent plaintiff win rate, or even a one percent win rate, would be too high and would indicate jury bias. However, data from other studies indicates that a substantial number of meritorious cases do result in trials, negating the extreme hypothetical.

Even keeping these caveats in mind, the data in Table 1 appear to contradict the claim that jury verdicts disfavor doctors since doctors prevailed at trial in over 70 percent of the cases. Moreover, as I have described elsewhere, my interviews with jurors who rendered verdicts in malpractice cases and experiments with persons called for jury duty indicate that jurors frequently have attitudes that are tilted in favor of doctors and many express suspicion of the plaintiff's motives in filing a lawsuit. In essence, many jurors want to believe that doctors try to do their jobs; that doctors are subject to making honest mistakes for which they perhaps should not be held accountable; that some plaintiffs are just out to make a fast buck; and that jury awards as reported in the media, are much too high. My findings about these attitudes are supported by results from studies conducted by other researchers. Of course, these attitudes are not uniformly...
held. Some jurors are neutral while other jurors have pro-plaintiff or anti-doctor biases. However, we must keep in mind that juries are composed of twelve persons who must reconcile conflicting attitudinal views during their deliberations. Furthermore, my interviews with actual jurors suggest that, most of the time, jurors diligently try to follow the judge's instructions to set aside biases and judge the case on the evidence presented at trial.44

I do not want to claim that the data that I have summarized above are dispositive of the issue of juror biases, but they certainly seem to contradict the claim that juries are out to get doctors regardless of the absence of evidence proving negligence.

B. Are All Malpractice Cases Technically Complex and Do They Turn Exclusively on Technical Issues?

I do not want to argue that medical malpractice cases are always simple.45 Indeed, they can involve terribly arcane and complex matters. Juries can be faced with conflicting expert testimony. Frequently there is the matter of causation, including the difficulty of separating the effects of a pre-existing disease or injury from the injury alleged to have resulted from negligence. Moreover, much of contemporary health care is provided through a team approach which can vastly complicate the task of deciding who is responsible for how much of the injury. The case might even involve additional allegations, such as a product liability claim against a manufacturer of drugs or medical equipment. All of the behaviors of the health care providers must be judged against standards of prevailing medical practice.

Nevertheless, brief summaries of some cases that were won by plaintiffs at trial in North Carolina46 are instructive on the issue of technical complexity:


44 Vidmar, supra note 26; Vidmar, supra note 32, at 124.

45 See Vidmar, supra note 26. See also Frank M. McClellan, MEDICAL MALPRACTICE: LAW, TACTICS, AND ETHICS (1994).

46 These cases are derived from 21 jury trials won by plaintiffs in trials occurring between July 1984 and June 1989. See Vidmar, supra note 26.
Case 110511: After surgery on plaintiff’s coccyx, silver nitrate placed on wound, causing second degree burns and scars.
Case 125516: Plaintiff admitted to hospital with fever; feeding tube inserted into lung rather than stomach, necessitating partial lung removal; patient relapsed and feeding tube inserted into other lung, severely injuring it. Patient now needs nursing home care.
Case 133752: During knee surgery, improper intubation into esophagus; tube removed once and reinserted, again improperly. Patient suffocated and died.
Case 155501: Surgeon performed unauthorized tubal ligation during an abortion.
Case 159529: During cancer chemotherapy patient given 10 times required dosage, resulting in nerve damage, paralysis, organ damage, and loss of sexual function.
Case 3-00-810: Patient in detoxification facility given Dilantin despite his strong protests that he was allergic to it. Patient became critically ill.
Case 3-24-703: Pregnant woman with hypertension, anemia, and mononucleosis went into hospital and began labor. High-risk specialists did not appear and baby was born with severe brain damage.
Case 3-25-924: Permanent paralysis and brain damage following drug overdose administered to patient subsequent to heart surgery.
Case 3-33-702: Surgery on wrong foot of young male child resulting in permanent minor disability.
Case JDS-02: Pediatrician incorrectly estimated delivery date of fetus in an imperiling breech-footling position; sent mother home instead of to hospital despite the fact that his own medical records had several obvious indications that labor was imminent. Mother went into labor, and an emergency Caesarian failed to prevent a severely brain-damaged child.
Several comments are in order about these selected case summaries. Each resulted in a victory for the plaintiff. A one or two sentence summary is a gross simplification of the medical issues and ignores medical testimony presented by both sides, particularly the defense. However, while some of these examples are more arguable than others, I offer them merely to raise the question of whether, on their face, the key issues in these cases were merely technical and were beyond the comprehension of a group of twelve laypersons.

I could as easily have chosen similar cases from the seventy-nine percent of North Carolina jury trials in which the defendant prevailed. Consider just one of them for purposes of illustration.

Case C86-461D: A woman in her mid-fifties with a long history of various medical problems suffered from severe urinary incontinence due to a hypertensive bladder. After many consultations and tests involving different urologists, she was told of a surgical procedure, called sacral rhizotomy, involving the severing of nerves to the bladder. After undergoing more tests and extensive discussions with the urologist and the neurosurgeon she opted for the surgery despite being fully aware that the consequence would be the need to catheterize herself six times a day for the rest of her life to expel urine. She also was told that she would probably be subject to frequent urinary infections.

The surgery was not successful, and, in addition, she became rectally incontinent and required a colostomy. The trial against both the urologist and neurosurgeon involved lengthy and detailed testimony about the technically arcane art of reading cystometrograms and whether they indicated "urge" or "stress" bladder incontinence and whether less radical treatments should have been tried before the surgery. There was also an issue of whether the neurosurgeon had properly performed the surgery. Despite all of these complicated matters, the crux of the case involved whether the plaintiff had been fully informed of the risks of the elective surgery. She swore she had not been informed, but both doctors testified that they had fully discussed them with her, and their testimony was backed by notations in the medical records. The
jury sided with the doctors, largely on the matter of credibility.

My examples are intended to raise several issues. Are all cases so technically complicated that jurors cannot understand them? Even in cases with technically complicated matters, as in the urinary incontinence case, are the technical matters frequently intertwined with issues of credibility between patient and doctors? I have no data that will reasonably allow me to estimate the percentage of cases that may not be so technically complicated or the percentage of technically complicated cases that also involve crucial issues of credibility about who said or did what or who was or was not fully informed about risks. I do not know that anyone has such systematic data. I will, however, venture the opinion that the percentage of these types of cases is not small; they occurred too frequently in the cases that we studied.

C. Is There Always a Clear Answer to Debates About the Technical Medical Issues and Can Doctors Decide Them Impartially?

As a starting point for considering these questions, let me point out that, as a number of authors have recently demonstrated, legal conceptions of science as a concrete body of infallible knowledge and methodologies are directly contradicted by studies of the sociology of science. This statement holds true regardless of whether the discipline is nuclear physics, biochemistry, psychology, or medicine. Scientific (and medical) facts are contingent on experimental or interpretative conventions within relevant communities of scientists and the cultural interpretation that the members of these communities give to facts. Within broad categories of disciplines, subcategories of professional expertise develop. To take a re-

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48 See supra note 27 and accompanying text for assumptions by authors that there is a more or less clear-cut answer to medical negligence issues.
cent example, the Bendectin litigation pitted epidemiologists against toxicologists. Footnote 49 Within medicine, distinctions are made between board certified and non-board certified physicians, between general practitioners and specialists, between colorectal surgeons and proctologists, et cetera. Footnote 50 Since the practice of medicine is art as well as science, medically respectable experts within the same discipline have disagreements about correct surgical procedure. Anyone who has acquired a new dentist and heard her mutter under her breath about the previous dentist's craftsmanship on a dental crown can quickly grasp the flavor of these controversies, the contingent nature of health care practice and ambiguity in the determination of "facts."

Without belaboring this argument, let me turn to some data. Professors Henry Farber and Michelle White studied 252 malpractice cases against a large hospital. Footnote 51 The hospital was self-insured and, whenever a negligence claim was made, the legal staff asked physicians within the relevant medical specialty to review the medical files in order to determine whether to contest liability or seek a settlement. Since these physicians' assessments were not discoverable and the hospital had an incentive to encourage accurate assessments, the results are quite interesting. The medical experts were asked to consider whether correct treatment was provided, whether treatment failed because of inadequate or tardy care, and whether the alleged harm was causally related to the treatment. Working from the table provided in their study, Footnote 52 I calculated that almost one third of the cases were classified as ambiguous, either because the reviewing experts were undecided about the quality of care or because the reviewers disagreed in their assessments. The actual figures were as follows: 31.7 percent classified as bad quality care, 37.71 percent classified as good quality care, and 30.6 percent classified as ambiguous quality care.

Other research indicates that the majority of cases judged by reviewing doctors to have no liability are eventually dropped and that the majority of cases judged to have liability are settled. This suggests that cases that go to trial may tend to involve those in which medical care is ambiguous or in

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Footnote 49 Sanders, supra note 47.
Footnote 50 See ROSEMARY STEVENS, AMERICAN MEDICINE AND THE PUBLIC INTEREST (1971).
Footnote 52 See VEDMAR, supra note 26.
which even defense experts are in some disagreement.53

In short, the argument that there is always a correct answer to the	rightness or wrongness of medical judgment and treatment deserves close
scrutiny.64

While the above discussion raises the question of whether doctors can
resolve a medical dispute when asked to assume the role of neutral evaluator,
it also appears that many doctors are not neutral when it comes to
the matter of malpractice. As one part of the Harvard Medical Malprac-
tice Study,65 a sample of forty-seven physicians practicing in the State of
New York in 1988 were interviewed about their attitudes toward medical
malpractice.66 Based on these interviews the authors of the Harvard study
drew the following conclusion:

Physicians tended to equate a finding of negligence with a judgment
of incompetence. Thus, although willing to admit that all doctors
make mistakes, physicians were often unwilling to label substandard
care as negligent and were opposed to compensation for iatrogenic
injury.67

This last finding strongly suggests that, on the whole, doctors might not be
objective in finding negligence in malpractice cases even if there were a
clear answer to the technical issue of negligence.68

53 See Sloan et al., supra note 34; Gross & Syverud, supra note 34; Taragin et al., supra
note 34.

64 For other literature bearing on the unreliability of physicians' judgments of medical negligence
see Troyen Brennan et al., Reliability and Validity of Judgments Concerning Adverse Events Suffered by
Hospitalized Patients, 27 Med. Care 1148 (1989); Robert Caplan et al., Effect of Outcome on
Physician Judgments of Appropriateness of Care, 265 J. Am. Med. Ass'n 1957 (1991); Neal
dawson et al., Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopatho-
logic Conferences, 8 Medical Decision Making 259 (1988); Samuel S. Weir et al., Expert Testi-
mony Based on Decision Analysis: A Malpractice Case Report, 5 J. Gen. Internal Med. 406
(1990) (“Expert Testimony in malpractice cases is often subjective and biased.”).

65 Harvard Medical Malpractice Study Group, Medical Care and Medical Injur-

66 Id. at ch. 9-37.

67 Id. at Executive Summary p. 10, 67-68.

68 For data generally consistent with the Harvard Study's findings see Sara C. Charles et al.,
Physicians' Self-reports of Reactions to Malpractice Litigation, 141 Am. J. Psychiatry 563 (1984);
Sara C. Charles et al., Sued and Non-sued Physicians' Self-Reported Reactions to Malpractice Lit-
igation, 142 Am. J. Psychiatry 437 (1985); J. Douglas Peters et al., An Empirical Analysis of the
Medical and Legal Profession's Experiences and Perceptions of Medical and Legal Malpractice, 19
D. Are Jurors Naïve About Experts' and Easily Misled?

The most consistent finding in our interviews with North Carolina jurors is that they quickly grasp the essential nature of the adversary process whereby each side attempts to find experts that support its position. It would be surprising to expect otherwise since the process of cross-examination almost invariably challenges the motives as well as the opinions of the other side's experts. For example, plaintiffs' experts are asked how much they are paid for their testimony, how often they testify, and for which side they testify. In addition, defense experts are asked about which side they testify for and about any collegial or friendship relations with the defendant. Jurors are frequently shocked when they learn that some experts are paid as much in one or two hours as they make in a week. In the jury trials that I observed, there was only one expert that I would unequivocally classify as a "hired gun," and the jurors had no illusions about him. As one juror exclaimed, "It's outrageous; he sits on his boat in Florida until someone calls him to testify and he'll say anything if you pay him." In a number of trials that we observed, defendants called many more witnesses than plaintiffs. However, many of their experts were close colleagues or had some other professional ties to the defendant. During our interviews jurors would raise questions about the objectivity of these experts.

Discussions about the interests and motives of doctors were not uncommon during jury deliberations. On the other hand, most jurors were impatient with the long, tedious process of recitation of the experts' credentials that lawyers for both sides undertake in qualifying their experts; they preferred to get to the substance of the testimony.

Jurors attempted to understand the content of expert testimony and they were sensitive to instances in which an expert's opinion was not on solid ground. The case of the incontinent woman in case C86-461D, described above, is an example. Recall that the interpretation of the meaning of cystectomygrams and their bearing on stress versus urge incontinence was an important part of the trial. The lawyers and the experts for both

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49 See Vidmar, supra note 26.
50 For a few jurors, however, their tendency to favor doctors caused them to perceive this as a good thing. In one case, for example, a juror remarked that an out-of-state expert had no business judging how North Carolina doctors practiced medicine.
sides did a superb job of tutoring and explaining the issues to the jury. We interviewed seven of the twelve jurors shortly afterward; four of them appeared to clearly understand the technical evidence. The expert urologist for the plaintiff was a highly qualified professor from an out-of-state teaching hospital. The jurors understood that there was a difference of medical opinion about what the proper course of diagnosis and treatment for the patient should have been. However, during cross-examination of the plaintiff’s expert, it was uncovered that the plaintiff’s lawyer had failed to provide his expert with some medical records that, the defense contended, pointed in favor of their position. The plaintiff’s expert, taken by surprise, admitted that he wished he had seen them but, perhaps caught in the role of an adversary expert, said that the records would not have made much difference to his medical opinion. During their deliberations this matter was extensively discussed by the jurors and, while they still believed the plaintiff’s expert had a credible opinion, they decided that the doubt should be resolved in favor of the defendants.

Examples similar to the incontinence case were not uncommon in the juror interviews that we conducted in other cases. This does not mean that every juror understood the case. Frankly, some of them might even be uncharitably characterized as thick, uninterested, or bullheaded. But it must be kept in mind that the jury is composed of twelve persons and usually the more interested, brighter jurors took a leadership role during deliberations.

E. To What Extent Do Juries Deviate From How Neutral Doctors Would Decide Liability?

This is the key question. In fact, depending on the answer, it may more or less trump the previous questions that I have discussed. The most basic criticism of medical malpractice juries, insofar as liability is concerned, is that they deviate from “objective” evaluations of negligence. Recall the American Medical Association’s assertion that juries are biased, that their intellectual abilities are far below what is required to fairly judge medical

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61 See Vidmar, supra note 26. Valerie P. Hans & Sonja Kuntjak Ivkovich, Jurors and Experts, 16 ADVOC: MAG. FOR DEL. TRIAL LAW. 17 (1994), conducted extensive interviews with Delaware jurors who decided complex cases involving medical evidence. They also concluded that jurors were critical of expert witnesses and attempted to evaluate the content of their testimony.
negligence, and that their verdicts are inconsistent across cases. If this is true, then a comparison of jury verdicts against neutral medical evaluation should yield large disparities. In its 1992 Annual Report the Physician Payment Review Commission flatly stated that “physician’s probably apply the standard [of medical care] differently than do juries.” Consider some studies bearing on this matter.

Professor Mark Taragin and his colleagues obtained data on medical malpractice cases from the New Jersey Medical Insurance Exchange, a physician-owned insurance company that provides liability insurance to approximately sixty percent of New Jersey’s doctors. In order to aid its decision on whether to contest liability in malpractice claims, the company obtains nondisclosable assessments of the case from a physician or panel of physicians from the same medical specialty as the physician against whom the claim is made. Working from these evaluations, Taragin and his colleagues were able to classify cases as “defensible,” “indefensible,” or “unclear” with respect to the standard of medical care. The cases were also classified according to the seriousness of the injury. Of a total of 8,231 malpractice claims filed between 1977 and 1992, sixty-two percent were classified as “defensible,” twenty-five percent were classified as “indefensible,” and thirteen percent were “unclear.” Altogether, jury trials accounted for twelve percent, or 988, of the 8,231 cases. Of these cases that went to trial, plaintiffs won twenty-four percent.

Taragin compared the jury verdicts on liability against the judgments of negligence rendered by the insurance company’s physician evaluators and against the ratings of injury severity. The jury verdicts were positively correlated with the physicians’ evaluations of negligence at a level of statistical significance that exceeded the .001 confidence level. Plaintiffs won only twenty-one percent of cases classified as defensible, but won thirty percent of the unclear cases and forty-two percent of the indefensible cases. Additionally, the severity of the plaintiff’s injury was not correlated with whether the plaintiff won or lost. Put simply, jury verdicts on

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63 See AMA REPORT, supra note 27; DOJ REPORT, supra note 27; Johnson et al., supra note 3; Tancredi, supra note 27.
64 PHYSICIAN PAYMENT REVIEW COMMISSION, ANNUAL REPORT (1992).
65 Taragin et al., supra note 34.
66 Id.
67 Id. at 781.
liability were positively related to physicians' judgments about negligence. Moreover, there was no support for the hypothesis that juries are prone to find doctors liable simply because a plaintiff suffered an injury.

Consider also that Taragin hypothesized that many of the cases classified as "defensible" may have been misclassified. The physicians' judgments of negligence were made very early in the case, often before all relevant information was known. Taragin also suggested that the "neutral" reviewers may err in favor of fellow physicians and that the insurance company itself may err toward concluding that no negligence occurred in order to avoid making unnecessary payments. I would add to Taragin's insights about the fallibility of the classification system that the medical reviews would be inclined to have a paucity of information from the plaintiff's perspective, including evidence on credibility and other non-technical issues that often move the case in the plaintiff's favor. In short, jury decisions might be even more concordant with "objective" standards than Taragin's data indicate.

Other studies corroborate Taragin's results. Professor Frank Sloan and his colleagues intensively studied a sample of 187 Florida malpractice cases that were terminated between 1986 and 1989. The cases involved either birth-related injuries or injuries allegedly resulting from care in hospital emergency rooms. For purposes of the study, Sloan had independent panels of four physicians review each case using records from insurer files, interviews with claimants, and abstracts of hospital charts. These panels rated each case according to whether any of the medical professionals named as defendants contributed to or caused the outcome and whether their actions deviated from the standard of care.

Thirty-seven of the 187 cases went to trial and plaintiffs prevailed in only ten of them. The liability ratings of the physician panels were positively related to the outcome at trial. As Sloan phrased their conclusion, "[d]efendants thought by the evaluators to have been not liable lost at

67 Id. at 782.
68 The study of Sloan et al., supra note 34, at ch. 6, had panels of doctors, acting as neutral raters for research purposes. The doctors made ratings of negligence in three stages, each with increasing amounts of information. The ratings changed as a function of new information.
69 Id.
70 Id.
verdict in less than a fifth of the cases.\footnote{Id.} The sample size of jury trials in Sloan's study was small and the findings were not statistically significant, but they are remarkably similar to the New Jersey findings.

A third study was conducted by Stephen Daniels and Lori Andrews at the American Bar Foundation.\footnote{Stephen Daniels and Lori Andrews, \textit{The Shadow of the Law: Jury Decisions in Obstetrics and Gynecology Cases}, in \textit{Medical Professional Liability and the Delivery of Obstetrical Care} (Victoria F. Rostow & Roger J. Bulger eds., 1989).} From an initial sample of 364 obstetrics and gynecology cases, they identified twenty-three labor and delivery cases in which it was alleged that the injury was caused by the improper use of oxytocin, a drug dating back to 1910 that is used to induce labor.\footnote{Id. at 190.} Medical knowledge regarding oxytocin is well established, including circumstances in which it is contra-indicated. Plaintiffs won 14 of 16 cases in which evidence of contraindicated use of oxytocin was present at trial. Plaintiffs lost six of the seven cases in which evidence of contraindication use was lacking. Daniels and Andrews concluded that “juries appear to have responded in no uncertain terms to the misuse of an old, established technology whose limitations and contra-indications were well known and widely disseminated.”\footnote{Id. at 191.} They also concluded that juries did not overwhelmingly decide in favor of plaintiffs even when the injuries were severe.

These three studies, then, go against the claim that jury liability verdicts are biased or capricious or significantly deviate from professional medical judgments.

IV. Conclusion and Commentary

Multiple studies using different methodologies, conducted by different authors, and addressing different facets involved in the debate over the competence of juries to decide liability in medical malpractice cases appear to contradict the claims that juries are biased against doctors and that most cases are too technically complex to be reasonably decided by a group of laypersons. Anecdotes about the widespread malperformance of juries do not stand up to systematic data. While each of the various data sets that I have reviewed may be subject to some methodological criticisms,
their cumulative consistency in supporting the rationality of jury verdicts in malpractice cases is telling.

The above conclusion is not to be interpreted as saying that every jury gets it right. Rather, the proper interpretation is that the data indicate that juries are not systematically biased against doctors and that in the preponderance of cases they make reasonable decisions. In evaluating jury performance we must also consider alternatives to the jury. I have raised the question of whether leaving the decision on negligence to doctors, as the American Medical Association urged, is a good idea because the evidence indicates that doctors themselves may be unreliable and biased judges of malpractice.

None of this is to say that the trial process could not be improved to enhance juror comprehension. The jurors that we interviewed were frequently critical of poor and confusing presentations by lawyers and experts and confusing instructions from judges. Neither do the empirical data suggest that judges should abandon the idea of screening out highly questionable expert evidence. The findings do indicate, however, that jurors should be given credit for having intellectual capabilities and judg-

78 See AMA Report, supra note 27; Sugarman, supra note 3.
79 In this Article I do not consider the question of whether trial judges could do a better job of deciding the liability issues. Comparative data on judge versus jury decision-making are rare. However, a study by Gary Wells, Naked Statistical Evidence of Liability: Is Subjective Probability Enough?, 62 J. PERSONALITY & SOC. PSYCHOL. 739 (1992), found that when judges were presented with fallacious statistical reasoning, many made logical errors; in fact, their performance was not different from groups of college students presented with the same evidence. Stephan Landsman & Richard Rakos, A Preliminary Inquiry into the Effect of Potentially Biassing Information on Judges and Jurors in Civil Litigation, 12 BEHAV. SCI. & L. 113 (1994), conducted an empirical study that found that trial judges were as susceptible to the influence of inadmissible information as jurors. See also THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS (Stephen Fienberg ed., 1989) (case studies of erroneous judicial decisions). Other studies indicate that, overall, judges agree with jury decisions on liability. See HANS & VIDMAR, supra note 1, at 116-20; R. Perry Sentell, The Georgia Jury and Negligence: The View from the Trenches, 28 GA. L. REV. 1 (1993); R. Perry Sentell, The Georgia Jury and Negligence: The View From the Bench, 26 GA. L. REV. 85 (1991). GORDON BERMANT ET AL., PROTRACTED CIVIL TRIALS: VIEW FROM THE BENCH AND BAR (Federal Jud. Ctr., 1981), report that while they screened, culled, and simplified evidence for jury trials in order to make it comprehensible for laypersons, when the trial was before a judge alone they tended to present everything on the assumption that the judge would sort it out. In short, bench trials were factually more complicated. Combining Wells', Landsman's and Rakos' findings that judges were not superior to laypersons with the possibility of more complicated trials before judges leads to the conclusion that judges might do a worse job with scientific evidence than a group of twelve laypersons.
ment. Nothing in the data argues against experimenting with procedural modifications such as bifurcated trials, special verdicts, neutral experts, or special masters to assist the jury. 77

In this Article, I have limited the analysis to the issue of deciding liability. The debate about malpractice juries also involves charges of bias, irresponsibility, and profligacy in rendering damage awards. 78 However, in recently published articles, I have shown that the claims that malpractice juries give awards according to the depth of defendants pockets and that pain and suffering constitute the vast proportion of awards do not survive careful scrutiny. 79 Empirical data yield no support for the assertion that, all else equal, juries award damages differently if the defendant is a health care provider or the negligent driver of an automobile. 80 Empirical evidence lends no support to the assertion that juries award pain and suffering damages more generously than legal professionals. Indeed, the data suggest that because jury verdicts result from the combined judgments of six or twelve persons, juries likely yield more consistent awards than would be obtained from judges or individual arbitrators. 81

The introduction to this article began with an example of Professor Sugarman’s claims against the civil jury system that lumped products liability and medical malpractice cases together. In the same vein that I have demonstrated the dangers of relying on anecdotes to make conclusions about jury behavior, I also want to caution against overgeneralizing the findings about malpractice juries to products liability cases, or for that matter, to other types of cases. Products liability cases may be different in both the complexity of the issues and the types of evidence presented to the jury.

Fewer data on jury performance regarding negligence in products liability cases exist than for medical malpractice cases. Professor Joseph Sanders conducted interviews with jurors in one case involving Bendectin litigation. 82 He found that the jury did not perform well in that case, but

78 See, e.g., Vidmar, supra note 2.
79 Id. See also Vidmar & Rice supra note 33; Vidmar et al., supra note 33.
80 Vidmar, supra note 2; Vidmar et al., supra note 33.
81 Vidmar & Rice, supra note 33.
82 Joseph Sanders, The Jury Deliberations in a Complex Case: Havener v. Merrell Dow
he suggested that at least part of the problem lay in the trial process rather than in inherent weaknesses in the jury system itself.\textsuperscript{88} Molly Selvin and Larry Picus, two researchers at the Rand Corporation’s Institute for Civil Justice, interviewed jurors in an asbestos case and also concluded that jury performance was less than optimal.\textsuperscript{84} Professor Richard Lempert undertook a detailed evaluation of the quality of jury verdicts in nine complex trials.\textsuperscript{88} Lempert concluded his review as follows:

Throughout this review, strengths of the jury emerge. A close look at a number of cases, including several in which jury verdicts appear mistaken, does not show juries that are befuddled by complexity. Even when juries do not fully understand technical issues, they can usually make enough sense of what is going on to deliberate rationally, and they usually reach defensible decisions. To the extent that juries make identifiable mistakes, their mistakes seem almost attributable not to conditions uniquely associated with complexity, but to mistakes of judges and lawyers, to such systemic deficiencies of the trial process as battles of experts and the prevalence of hard-to-understand jury instructions, and to the kinds of human errors that affect simple trials as well.\textsuperscript{88}

Without question, more research is needed on jury behavior in product liability trials. However, drawing upon the insights from the case studies of medical malpractice described earlier, let me offer the observation that not all product liability trials are likely to be as complex as Bendictin or asbestos trials, and even for those cases with highly technical components, there may be additional crucial matters involving judgments of human motives and actions that traditionally have been considered within the proper purview of the jury.

As a striking example, let me return to the beginning of this article and Professor Sugarman’s exemplar case of West v. JJP. Professor Sugarman raised some important questions that he believes the jury had to decide in finding JJP liable: Could JJP have discovered toxic shock syndrome

\textsuperscript{88} Id. at 65. \textit{See also} Sanders, \textit{supra} note 4; Sanders, \textit{From Source to Evidence: The Testimony on Causation in the Bendictin Case}, 46 STAN. L. REV. 1 (1993).
\textsuperscript{84} MOLLY SELVIN \& LARRY PICUS, \textit{THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE} (1987).
\textsuperscript{88} Lempert, \textit{supra} note 3.
\textsuperscript{88} Id. at 234.
before the Centers for Disease Control and Prevention? Should the consumer complaints JJP received have put the company on notice that something serious was afoot? I will pose my own question: Are these purely technical questions or are they ones that involve more ordinary judgments of the knowledge and behaviors of corporate actors? I need go no further than a reading of the decision of the California Court of Appeal in that case. \(88\) Apparently the jury heard and saw evidence bearing on consumer complaints to JJP that bore directly on prior corporate knowledge about the product's defects and about JJP's failure to conduct additional testing in the light of many warnings that serious illnesses were associated with use of the tampons. \(89\) It also heard and saw evidence about the instructions on the tampon box and heard from the plaintiff about her perceptions of the attributes and use of the product. \(90\) There were, of course, other issues and evidence at the trial; but the crucial point to be made is that the trial judge's comments about jury prejudice were directed to damages, not to the issues of liability, as Professor Sugarman's comments on the case incorrectly imply. Indeed, the California Court of Appeal stated:

We also reject JJP's assertion that the "passion and prejudice" of the jury, noted by the trial court, necessarily "infected" the jury's determination of liability. Even if the excessive damage awards were the product of passion and prejudice, it does not necessarily follow that the verdict as to liability was similarly influenced. . . . In this case the trial court's order conditionally granting a new trial was plainly limited to the issue of excessive damages, and the court's use of the word "reprehensible" in reference to JJP's conduct indicates that it found substantial evidence to support the verdict as to liability. \(91\)

An important lesson about "passion and prejudice" can be learned from the use of West v. JPP as an example of jury incompetence in deciding liability and from my more extensive analysis of jury performance in medical malpractice cases. To wit: the debate over jury competence has often

\(87\) See Sugarman, supra note 3.
\(89\) Id.
\(90\) Id.
\(91\) Id. at 465.
been ruled more by "passion and prejudice" than by reasoned analysis and data. To be sure, until recently, good data have been lacking and still more are needed to get a veridical picture of jury performance in tort cases involving scientific and medical issues. Nevertheless, this Article should at least raise some doubts about extravagant claims of jury bias and incompetence, about the need for radical reforms, and about calls for more judicial intervention.