

The unfair criticism of medical malpractice juries

Empirical evidence from multiple sources does not support claims that medical malpractice juries are consistently pro-plaintiff, incompetent, or unjustifiably generous in determining awards.

by Neil Vidmar

Judging from published accounts, medical malpractice awards in the United States are out of control:

- In 1985 major U.S. newspapers and an American Medical Association task force on liability insurance reported that Jury Verdict Research, Inc., of Solon, Ohio, had found that the average medical malpractice jury award was \$962,258.

- In 1987 Dr. Otis Bowen, secretary of health and human services in the Reagan administration, asserted that the jury system "has become more a lottery than a rational system for compensating the injured."

- In 1988 St. Paul Fire and Marine Insurance, the country's largest insurer of hospitals, reported that the average malpractice jury verdict had by 1986 increased to \$1.5 million.

- An article in a 1989 issue of *California Law Review* asserted that between 1975 and 1985 the average malpractice award increased from \$220,108 to \$1,017,716.

- When the *National Law Journal* reported its largest jury awards for 1990, it concluded there was a "noticeable move toward bigger jury awards," with

medical malpractice included among the top money earners.

- In 1991 the Bush administration proposed placing a cap on pain and suffering awards in malpractice cases, presumably on the assumption that this component of damages is one of the causes of "runaway" verdicts.

- A June 1992 newspaper article, reporting a rise in one company's rates for medical negligence liability insurance and fears that the "malpractice

crisis" may be making a comeback, stated that such crises were "fueled by million-dollar jury awards."

- Professor Paul Weiler's recent scholarly treatise, *Medical Malpractice on Trial*, alleges that "... jurors have become accustomed to huge award requests, and they are more willing to reach into the deep pockets of malpractice insurers to compensate the victims generously—more willing than when they encounter the victims of au-

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1. For these references and others, see generally, Localio, *Variations on \$962,258: The Misuse of Data*

on *Medical Malpractice*, 13 L. MED. & HEALTH CARE 126 (1985); Bowen, *Congressional Testimony on Senate Bill S. 1804*, 257 J. AM. MED. ASS'N 816, 818 (1987); Blum, *Malpractice: Claims Down, Costs Are Up*, NAT'L L.J., Jan 23, 1989, at 1, 20; Leahy, *Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines*, 77 CAL. L. REV. 1483, 1485 (1989); *Jury Awards for Damages Grow Bigger by the Year*, NAT'L L.J., Jan 21, 1991, at S3; Hiltz, *Bush Enters Malpractice Debate with Plan to Limit Court Awards*, N.Y. TIMES, May 13, 1991, at A1; Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989); AMERICAN MEDICAL ASSOCIATION, A PROPOSED ALTERNATIVE TO THE CIVIL JUSTICE SYSTEM FOR RESOLVING MEDICAL LIABILITY DISPUTES: A FAULT-BASED, ADMINISTRATIVE SYSTEM, 7-11 (1988); Griffith, *What It Will Take to Solve the Malpractice Crisis*, MED. ECON., Sept. 27, 1982, at 193; Domenici & Koop, *Sue The Doctor? There's a Better Way*, N.Y. TIMES, June 6, 1991, at A25; Ready, *Claims Against Doctors on Rise*, RALEIGH NEWS AND OBSERVER, June 9, 1992, at ¶1; Weiler, *MEDICAL MALPRACTICE ON TRIAL*, 48 (1991).

tomobile accidents, for in these cases the insurance premiums at risk are paid directly by the jurors themselves."¹

Medical malpractice litigation draws heated opinions from physicians, insurers, plaintiff and defense bars, consumer groups, and legislators. It plays a central role in discussions about "the litigation explosion," the "insurance crisis," and the need for tort reform. As the above examples indicate, the jury is frequently singled out as a primary cause of the trouble. Malpractice juries are alleged to be incompetent, erratic, biased against doctors, and

prone to giving huge and unwarranted damage awards.

To what extent are these claims valid? This article reviews an emerging body of empirical literature that constructs an image of medical malpractice juries at substantial variance with these widely held views. As a starting point, findings from Duke University Law School's Medical Malpractice Project, which broadly examined malpractice litigation in North Carolina, are presented. The data from this study are supplemented with findings from studies of other jurisdictions around the United States.

2. See Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System-And Why Not?*, 140 U. PA. L. REV. 1147, 1227-28 (1992); Sloan & Hsieh, *Variability in Medical Malpractice Payments: Is*

the Compensation Fair?, 24 LAW & SOC'Y REV. 997, 1005 (1990); DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY* 32 (1985).

The Medical Malpractice Project

The Medical Malpractice Project attempted to review every malpractice suit filed in North Carolina between July 1, 1984, and June 30, 1987—895 cases. Information was also collected on more than 300 other cases filed in a sample of North Carolina counties between July 1987 and December 1990. Using court records, these cases were followed from beginning to termination. In addition, several medical liability insurers provided access to their confidential files. Lawyers from the plaintiff and defense bars were interviewed. A number of trials were observed in their entirety, and the jurors were interviewed afterward. Experiments were also conducted with jurors to obtain information that could not be validly inferred from interviews and court statistics.

Of all the malpractice suits filed in North Carolina during the period covered in the study, about 40 percent were terminated without a payment to the plaintiff, about 50 percent resulted in a settlement, and about 10 percent eventually were decided by a jury. The trial rate was similar to the trial rates for medical malpractice cases found in other jurisdictions.² The surprising findings—surprising at least with respect to the claims made against juries—involved trial outcomes. The plaintiff prevailed on the issue of liability in just one case in five.

As to damages, there were only four large awards out of 117 cases that went to trial. A child that suffered brain damage at birth received \$3.5 million (subsequently reduced to \$2.9 million). In another case the jury awarded the plaintiff's estate \$1.28 million when, during knee surgery, an anesthesiologist improperly placed an intubation tube in the lungs, suffocating the patient. A third case involved another anesthesiology accident that resulted in severe brain damage, and the plaintiff and her husband were awarded a total of \$750,000. An adult who was administered a drug after heart surgery and suffered permanent paralysis and brain damage received \$1 million.

After these cases, the next highest jury award was \$300,000. The *average* damage award in cases that plaintiffs



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won was \$367,737, but the average was inflated by the four large awards described above.³ An alternative summary statistic, the *median*, or midpoint of the distribution, is not as influenced by large awards: it was just \$36,500. If we consider all 117 jury trials, that is, include those in which defendants prevailed, the expected value for plaintiffs who went to trial was \$65,961. These findings are very different from the widely prevailing assertions about malpractice juries. To reiterate, plaintiffs won only one case in five, and when they did win the median award was only \$36,500.

Other studies

How does North Carolina compare with other states? Patricia Danzon's study of medical malpractice in California found a plaintiff win rate of 28 percent,⁴ and in a subsequent study in Florida she reported a rate of about 14 percent.⁵ Gross and Syverud found California plaintiffs won in 29 percent of medical malpractice cases,⁶ and the Rand Corporation's Institute for Civil Justice study of verdicts in Chicago and San Francisco found rates varying between 25 percent and 50 percent; median damage awards in 1980-84 were \$121,000 and \$156,000, respectively.⁷ Stephen Daniels at the American Bar Foundation collected data on jury verdicts from 43 counties in 10 states between 1970 and 1985.⁸ He found that on average, plaintiffs prevailed on the liability issue in about 32 percent of trials. Across jurisdictions, however, the win ratios varied from 8 to 56 percent. Median awards in these jurisdictions ranged from \$40,000 to more than \$1 million. Thus, North Carolina is not atypical with regard to plaintiff win rates and probably not with respect to jury awards either.⁹

How, then, can the North Carolina data and those from these other studies be reconciled with the reports cited at the beginning of this article claiming average malpractice awards in the \$1 million range? First, the Jury Verdict Research, Inc., and the *National Law Journal* statistics were obtained from screening newspaper reports, voluntary submissions from plaintiff lawyers, and other non-comprehensive sources. Likewise, St. Paul Fire and

Multimillion dollar jury verdicts are the exception, not the rule.

Marine Insurance based its report on figures obtained from Jury Verdict Research, Inc. Neither newspapers nor plaintiff lawyers are inclined to report cases in which no award or a small award was given. In short, those data were not derived from a representative sample of cases.¹⁰

Second, as already noted, statistics relying on averages can be vastly inflated by a relatively few high awards. Recall that while the average award in North Carolina (when the plaintiff prevailed) was \$367,737, the median award was \$36,500. The research by Daniels,¹¹ Sloan and Hsieh,¹² and Rand's Institute for Civil Justice¹³ show similar discrepancies between average and median awards.¹⁴ Multimillion

dollar jury verdicts do occur, but they are the exception, not the rule.

A bias against plaintiffs

The low success rates for plaintiffs at trial would seem to contradict the assertion that jurors are biased against doctors, but they raise the opposite question: are jurors biased against plaintiffs? The bias may not be strong, but it is fair to state that plaintiffs usually bear an extra burden of proof. During this author's observations of trials, it was not unusual to hear more than one prospective juror during voir dire say that "too many people sue their doctors," or "it is just going to raise the health insurance rates for the rest of us." While jurors who were so explicit in voicing their attitudes were usually excused for cause, these same sentiments, in more subtle forms, remained in many of the jurors chosen for trial. In post-trial interviews, these jurors said things such as, "[The plaintiff] was just trying to blame the doctors and [the] hospital for a life-long problem," "too many people are unfair to doctors," and "the doctors were just trying to help his wife [who died] and he shows his ingratitude by suing them." Even in cases where the verdict was for the plaintiff, jurors worried about the effect on the doctor's reputation and finances: "We all felt so sorry for him"; "we worried about

3. See Localio, *supra* n. 1, at 127 for a discussion on the use of averages and medians as summary statistics.

4. Danzon, *supra* n. 2, at 38.

5. Danzon, *Report on Awards for Noneconomic Loss in Manne* (Ed.) MEDICAL MALPRACTICE POLICY GUIDEBOOK (Florida, 1985).

6. Gross & Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 334-35 (1991).

7. Peterson, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY 17, 21 (1987).

8. Daniels, "Jury Verdicts in Medical Malpractice Cases," Paper Presented at the Annual Meeting of the Law and Society Association, (June 8-11, 1989).

9. Differences in plaintiff win ratios (and damage awards) across jurisdictions are at least as likely to be due to differences in the ways that cases are selected for trial as they are to be due to differences in the behavior of juries. In North Carolina, for example, the operating policy of a major liability insurer is to make every reasonable effort to settle the case if a finding of liability is likely; other insurers seem to be following this strategy. My discussion with a liability claims manager in Wisconsin, however, indicated that a higher percentage of claims, particularly larger claims, were likely to be contested through trial. Local legal cultures, including the attitudes and strategies of the litigants, the local bars and

courts, the pressures on court dockets, and the availability of alternative dispute resolutions mechanisms, influence the types of cases taken to juries.

As an example, the Rand studies, Peterson *supra* n. 7, showed that between 1960 and 1984 median malpractice jury awards in San Francisco almost trebled and those in Chicago more than trebled. However, there is indirect evidence that the juries were deciding different cases in the two time periods. In San Francisco the number of trials by juries was almost 50 percent less in 1980-84, possibly due to a vigorous alternative dispute resolution program, while the number of trials in Chicago increased by almost 300 percent. Thus, comparing win rates or awards over time or across jurisdictions without knowing about the total number of cases or settlement rates is comparing apples and oranges. We can't conclude changes in win ratios or awards are necessarily due to changes in jury behavior because juries may be deciding very different cases. Saks, *supra* n. 2, discusses these data problems in more detail with respect to the whole tort system.

10. See Localio, *supra* n. 1, at 126; Saks, *supra* n. 2, at 1245-46; Daniels, *supra* n. 1, at 299-302.

11. Daniels, *supra* n. 8.

12. Sloan & Hsieh, *supra* n. 2, at 1008.

13. Peterson, *supra* n. 7, at 20-34.

14. Other data discussed by Saks, *supra* n. 2, at 1249-51 further illustrate this point.

whether his insurance would cover it.”

Despite widespread claims in popular literature and legal writings that contemporary Americans are overly litigious and partial to victims,¹⁵ David Engel has documented a set of attitudes in our society that say people should accept misfortunes and not blame others.¹⁶ Hans and Lofquist interviewed many jurors who served in trials involving corporate defendants, including hospitals. One of their most striking findings was that jurors seemed to scrutinize the motives of the plaintiffs in bringing suit more than the actions of the defendants alleged to have caused the injuries.¹⁷ Additional research by Greene, Goodman, and Loftus has shown that publicity about “the insurance crisis” and “irresponsible” jury awards has affected many citizens, causing jurors to behave conservatively in assessing liability and damages.¹⁸

Interviews with jurors in North Carolina yielded data very consistent with these findings. Jurors often were suspicious of the plaintiff’s decision to bring suit and frequently mentioned their concerns about the effects of verdicts on insurance rates and other social costs of large damage awards. They also propounded beliefs similar to those described by Engel: “We all go through hardships in life . . . and we won’t always be able to blame or get what we think we deserve”; “an award should be what is fair for both sides”; “. . . she should not get rich because of this accident, and accidents do happen . . .”; “I have a hard time giving enormous amounts of money to victims.”

Juror conservatism regarding the

plaintiff’s burden of proof is only one factor in the plaintiff’s low win rate; malpractice cases selected for trial may often be weaker cases on the evidence. There are multiple reasons why weaker cases go to trial.¹⁹ Sometimes plaintiff lawyers miscalculate the merits of their cases. In suits involving multiple defendants, some settle with the plaintiff, leaving for trial only those whose liability is more questionable. In other instances, the legal and psychological commitment that an attorney makes to the plaintiff during earlier stages of the litigation process makes it difficult to drop an unpromising suit in the later stages; thus the lawyer “rolls the dice.” The misperception that juries are biased in favor of plaintiffs may also influence which cases are selected for trial.²⁰

Clermont and Eisenberg recently conducted a study of litigation outcomes in federal courts nationwide in which they compared plaintiff win rates in suits tried by juries versus those tried by judges.²¹ The win rate for medical malpractice suits was 29 percent for cases tried before juries, whereas it was 50 percent for bench trials. These findings regarding juries are generally consistent with the North Carolina data and with other studies, but the higher win rate in bench trials appears contrary to the proposition that juries are more pro-plaintiff than judges. The authors conclude, however, that while there may be some small difference in the way that judges and juries treat cases, most of the difference is probably the result of the types of cases that are selected for the two modes of trial. They hypothesize that, generally, litigants and their attorneys have serious

misperceptions of how juries and judges will respond to the evidence in medical malpractice cases.²² While much more needs to be learned about the dynamics of case selection, a major lesson from these various sets of data is that the charge that juries are pro-plaintiff, or anti-doctor, is not supported.

Jury competence

Next, consider the question of competence. This is one of the most problematic issues in assessing jury performance, because it is difficult to obtain even expert consensus on what constitutes negligence. For example, recent research by Farber and White reported that when neutral medical experts were asked to judge whether incidents in which injuries suffered by hospital patients fell short of professionally accepted standards, the experts could not decide or were in disagreement 30.5 percent of the time.²³

Nevertheless, some insights about competence can be gleaned from the North Carolina research. There can be little argument that malpractice juries often have a complicated task. They may be asked to determine causality, negligence, and damages, and to apportion responsibility among multiple defendants. (Forty-eight percent of North Carolina malpractice suits involved four or more defendants.) Jurors may also have to separate the effects of pre-existing injuries or diseases from any injury or aggravation of a pre-existing condition caused by the alleged malpractice. They hear conflicting evidence from experts regarding complicated etiologies, medical procedures, and standards of care. Yet the view espoused by some that these are technical matters that only medical doctors are competent to decide²⁴ is not always warranted.

The central issues in many of the trials in the North Carolina study did not involve technical issues, despite a lot of testimony on these subjects, but rather the credibility of the doctor or other health care providers compared with the credibility of the plaintiff. For example, in a case involving permanent incontinence following an operation, the jurors heard highly conflicting evidence from competent experts on both sides regarding esoteric medical

15. See e.g., Huber, *LIABILITY: THE LEGAL REVOLUTION AND IT'S CONSEQUENCES* (1988); Olson, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991); Weiler, *supra* n. 1, at 47-58.

16. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC'Y REV.* 551, 558-62 (1984).

17. Hans & Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 *LAW & SOC'Y REV.* 85 (1992).

18. Greene, Goodman & Loftus, *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 *AM. U. L. REV.* 805, 814-15 (1991).

19. See Gross & Syverud, *supra* n. 6, at 364-66; Danzon, *supra* n. 4, at 51; Danzon & Lillard, *Settlement out of Court: The Disposition of Medical Malpractice Claims*, 12 *J. LEGAL STUD.* 345, 365-69 (1983); Farber and White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 *RAND J. OF ECON.* 199 (1991).

20. Clermont & Eisenberg, *Trial by Jury or Judge:*

Transcending Empiricism, 77 *CORNELL L. REV.* 1124 (1992).

21. *Id.* at 20.

22. *Id.* at 1156-1166.

23. Farber & White, *supra* n. 19, at 204. The 30.5 percent figure is derived from my calculations from their data.

24. See AMERICAN MEDICAL ASSOCIATION, *supra* n. 1, at 19-35, 69-70, 73-78. The Harvard Medical Malpractice Study, PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK (1990) raises other questions about physicians deciding negligence. A survey of physician attitudes about negligence and iatrogenic injury led to 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 standard care as negligent and were opposed to compensation for iatrogenic injury.” at 10.

issues. These issues were important, but in the end the case came down to whether prior to the operation the patient was fully informed of the potential risks. After the trial, the jurors said that they believed the doctors' testimony, supported by the medical records, that the risks of the operation had been thoroughly discussed in advance, over the plaintiff's testimony that they had not. Another case involved a patient who died in the hospital. The trial pitted her husband's testimony about what various nurses and doctors did and did not do in response to the woman's complaints about symptoms of severe stress against the testimony and records of the hospital staff.

In other trials, the technical matters were not so complicated that they were beyond the reach of lay persons. An obstetrician miscalculated a delivery date and, as a consequence of treatment based on that assumption, the baby suffered severe brain damage. The evidence showed that the obstetrician continued to rely on the date of the mother's last menstrual period despite the fact that his records also showed that other key indicators of the stage of pregnancy were not consistent with the initial estimate. In post-trial interviews, the jurors demonstrated they understood these issues. Similarly, the interviews showed that the most influential jurors in the incontinence case described above demonstrated a reasonable grasp of the difference between types of incontinence and why the experts for the two sides disagreed.

Not every case is technically easy and not every juror understands the evidence. The interviews showed, however, that when competent attorneys and experts carefully and repetitiously presented the technical issues, many of the jurors did grasp the essentials of the case. Undoubtedly, juries sometimes misunderstand cases, as do judges and other professional dispute resolvers,²⁵ but the critics who charge that juries almost always misunderstand cases have failed to offer proof for their assertion.

Size of awards

The bottom line on which many critics evaluate jury performance is damages. The critics may still point to the \$3.5

million and \$1.2 million awards documented in the North Carolina study and similar awards that have been given in other jurisdictions nationwide. Although median awards are much lower, the million dollar verdicts command attention. Can damage awards of this size be justified?

Often overlooked when such awards are given is that in many instances the consequences of a medical accident can be financially devastating. Consider two examples. A baby suffered severe brain damage at birth and died 2½ years later. The parents accepted a settlement offer of \$750,000. The settlement would appear to be a windfall for the parents, even if their emotional distress was considered. The fact, however, is that the county health service, which had taken responsibility for the child, tendered a bill of \$675,000.²⁶ In another case a baby with severe brain damage had a statistical life expectancy of 72 years. The child will grow to the size of an adult but will be blind, deaf, retarded, incontinent, unable to use its arms and legs or even sit in a chair, highly susceptible to infections, and will require frequent physiotherapy to prevent bed sores. Based on this, the plaintiff's experts calculated damages to be in excess of \$6 million. The more interesting part of the story is that after obtaining opinions from three of its own experts, the lowest figure the defendant could arrive at was substantially more than \$2 million.²⁷ Recall that the \$3.5 million North Carolina award also involved a child that suffered severe brain damage at birth.

The three \$1 million-plus jury verdicts in the North Carolina study can usefully be compared with settlements. Although our data on settlements do

25. See e.g., Gross, *Expert Evidence*, 1991 WISCONSIN L. REV. 1113, 1121-1124 (1991).

26. Lawyer fees and reviewing expert fees plus any additional expenses incurred directly by the parents were not available but these must be considered in ascertaining whether anything remained of the balance of the settlement. On the other hand, Wayne Parker of Medical Mutual of North Carolina has pointed out to me that liens by health agencies are sometimes negotiated downward, and that recent legal decisions in other states may serve to help plaintiffs avoid making restitution to health agencies altogether. (Personal communication to the author, June 21, 1991).

27. Mr. Parker, *id.*, also pointed out that in reality severely injured babies have a shorter life expectancy than the figures given in actuarial tables,

not comprise a random sample, one structured settlement of \$9 million was documented involving failure to timely diagnose and treat meningitis in a 4-year-old girl. Ultimately, her arms and legs had to be amputated. A number of other settlements approached the \$3.5 million verdict, and others substantially exceeded the \$1.2 million verdict. Unless it can be assumed that defendants and their liability insurers occasionally engage in acts of charity on a grand scale, the principal remaining hypothesis is that defendant liability was reasonably clear and that the damages were considerable. These settlement data do not prove anything about the appropriateness of the large jury verdicts in the specific cases in which they were rendered, but they certainly suggest that the verdicts could have been reasonable.

Other research has shown that damage awards are directly related to economic loss. Danzon concluded that "[d]amage awards are strongly influenced by the plaintiff's economic loss and by the law defining and sometimes limiting compensable damages."²⁸ Bovbjerg and others found that "severity of injury alone explains about two-fifths of the variation" and hypothesized that much of the variation in verdicts "may legitimately reflect claimant's precise individual circumstances, as the tort system intends."²⁹ Similarly, Sloan and Hsieh concluded that "compensation of personal injuries is not as haphazard as is often alleged."³⁰

Punitive damages

Another claim against malpractice juries is that they routinely award punitive damages and assess large sums for those damages. Daniels and Martin contradicted these assertions in a

so the inheritors of the plaintiff's estate may eventually reap the balance. This is an excellent point, but it speaks to the law and not to the task that jurors are given: they are instructed that *the law* requires them to calculate the award on the basis of testimony about life expectancy. Members of one jury that I interviewed specifically raised their own doubts about life expectancy but said they felt bound to follow the judge's instructions.

28. Danzon, *supra* n. 4, at 50.

29. Bovbjerg, Sloan & Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NORTHWESTERN L. REV. 908, 923 (1989). To be accurate Bovbjerg et al also conclude that wide variation within categories of injury severity was substantial and expressed doubts about the consistency of awards.

30. Sloan & Hsieh, *supra* n. 2, at 1025.

large-scale study of jury verdicts in a sample of jurisdictions around the United States.³¹ Their data indicated that for all types of cases, the median award when punitive damages were given was less than \$25,000. Out of a total of 1,917 medical malpractice cases in which punitive damages were requested, the jury awarded them in only 18 cases, a success rate of less than 1 percent.³²

The North Carolina data are consistent with the Daniels and Martin results. Two cases were recorded in which punitive damages were awarded. In one, the complaint charged that the doctor performed an unauthorized tubal ligation on a patient during an abortion. The jury awarded \$1 in compensatory damages and \$6,000 in punitive damages. The other case involved an oral surgeon who refused to stop a molar extraction despite the patient's complaint of excruciating pain. The pleadings included assertions of lack of consent, false imprisonment, and battery. The jury's total award, including the punitive damages component, was \$7,000.

Pain and suffering

Recently, Jeffrey Rice and this author undertook an experiment to explore another aspect of the damages issue.³³ The awards jurors rendered were compared with those given by experienced legal

professionals, a frequently suggested alternative to juries. Rather than medical and other special damages, the study centered on the more subjective component of damages, namely pain and suffering and disfigurement. Legal commentators and researchers have suggested that the non-economic component of damages is the locus of problems with jury awards, and it is the focus of many tort reform efforts.³⁴ This is also one area of damages singled out in President Bush's proposal for medical malpractice reform.³⁵

From the Malpractice Project files a case was chosen in which a 32-year-old woman underwent elective surgery for a bunion on her foot. While she was under general anesthesia, someone in the operating room placed a red-hot sterilized instrument on her knee, causing second- and third-degree burns. The woman experienced considerable pain and suffering from the burn for some weeks afterward and required a skin graft by a plastic surgeon. Despite this treatment the end result was a permanent, large, unsightly scar on her knee and a lesser scar on her hip from the skin graft. The synopsis of the case gave the details of the incident and reported critical portions of her testimony about the pain and about her embarrassment over the scars. Color photographs of the scars were included. The jurors and arbitrators were

informed that the doctor admitted liability for the accident and conceded \$7,000 in medical and other damages but that the lawyers for the two sides could not agree on the amount of the award for the pain and suffering and disfigurement. After instructions on the law, the subjects were asked to render a damage award and then answer some additional questions.

Twenty-one experienced North Carolina arbitrators took part in the study. All were senior lawyers, representing both plaintiff and defense bars; six were former judges. The 89 jurors were from Durham and Greensboro, North Carolina, who volunteered to participate while they were awaiting a call to the courtroom.

The awards of the arbitrators, including the \$7,000 in special damages, ranged from \$15,000 to \$75,000. The median award for all 21 arbitrators was \$57,000, a figure very close to the \$58,300 award rendered by the panel of three arbitrators in the actual case. The jurors' awards ranged from \$4,000 to \$198,000; the median award was \$47,850. Although the median award for the jurors was about \$10,000 less than that of the arbitrators, this difference was not statistically significant. There were no gender, education, or income differences among the groups of jurors. Other data collected in the experiment showed that the jurors made distinctions between the components of pain and suffering and of disfigurement in a manner similar to that of the experienced arbitrators. Other analyses showed that estimates of the awards that might be given by 12-person juries were less variable than those that would be expected from individual judges or arbitrators. In other words, across a series of cases juries would yield more stable estimates of damages than individual judges.

The jurors in the experiment did not actually deliberate as a panel and, of course, there were other artificial aspects of the simulation. On the other hand the study had the merit of providing arbitrators and jurors with exactly the same case and allowed a comparison with the award rendered in the original case.³⁶

A more recent experiment put the "deep pockets" hypothesis, as articu-

31. Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990).

32. *Id.* at 38.

33. Vidmar & Rice, "Assessments of non-economic damage awards in medical negligence: a comparison of jurors with legal professionals". Paper presented at the Bi-Annual Meeting of the American Psychology-Law Society, San Diego, CA. (March 12 & 15, 1992).

34. See e.g., Bovbjerg et al., *supra* n. 29; Weiler, *supra* n. 1, at 54-61; *AMA: A Proposed Alternative*, *supra* n. 1, at 7-11; Tort Policy Working Group, United States Department 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 39-45 (1986); Tort Policy Working Group, United States Department of Justice, AN UPDATE ON THE LIABILITY CRISIS 33-38 (1987).

35. See Hiltz, *supra* n. 1.

36. The advantages of this method can be demonstrated by comparison with a recent study by Bovbjerg, et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5 (1991). Those authors drew upon a large data base to compare actual jury awards in medical malpractice cases and automobile injury cases involving death. Using multiple regression analyses to attempt to control for variables "known to influence verdicts," the authors concluded that malpractice awards were almost three times larger than automobile injury awards.

Id. at 18-21, 36. However, Bovbjerg et al. are cognizant of the fact that malpractice cases and automobile injury cases differ along many dimensions not controlled for in their analyses. It is, therefore, impossible to ascribe the effect to "deep pockets." Among the differences between the two types of cases are the following: the process by which cases are selected for trial appears to differ drastically, with malpractice plaintiffs winning less than 30 percent of trials and personal injury plaintiffs winning 50 percent or more, see Clermont & Eisenberg, *supra* n. 20; malpractice cases typically involve multiple defendants whereas automobile cases involve single defendants; the automobile injury may involve contributory negligence on the part of the injured party while this is much less likely in the case of a malpractice injury; the malpractice case that goes to trial is much more likely to involve an attorney who specializes in malpractice cases, whereas an automobile injury is more likely to involve a general legal practitioner; and malpractice litigation has become so highly specialized that in comparison to automobile injury trials there is likely to be more and better evidence on the extent of damages at trial. There are more differences that can be added to this list, but the important point is that very plausible alternative explanations cannot be ruled out. Thus, while the simulation method of the Vidmar and Rice study, *supra* n. 33, has its limitations, the methodology ensures that any differences that are obtained are not the result of confounding factors.

lated by Weiler and others,³⁷ to an empirical test. Jurors heard about a teenager who suffered a severe injury that resulted in considerable pain and suffering. For half the jurors the accident was ascribed to medical negligence; for the remaining jurors it was ascribed to negligence in operating a motor vehicle. The average award rendered against doctors and hospitals was not different from that rendered against automobile drivers.

The North Carolina jurors who were interviewed often expressed uneasiness about having the responsibility for deciding damages, saying they felt the court did not give them enough guidance. They were very aware of the adversary process and tended to be skeptical of the amount of damages claimed by plaintiff lawyers. Yet, particularly when liability was also at issue, defense lawyers were hesitant to suggest alternative figures because of the fear that jurors would infer an admission of negligence. In fact, a survey of North Carolina malpractice trials indicated that while plaintiffs almost always presented expert evidence on damages, defendants seldom did. In one case, jurors who gave the plaintiff a sizeable award complained about the defendant's failure to offer his own experts on the matter of damages. These concerns voiced by the jurors do not suggest they are incompetent to award damages, but rather that they do not like this task and want more guidance. The findings also indicate that jurors attempt to exercise their duty as responsibly as they can.

Unsupported claims

In summary, aggregate empirical evidence drawn from multiple sources lends no support to claims that juries are consistently pro-plaintiff, incompetent, or deliver unjustifiably generous awards. Of course, there may be instances where juries behave irresponsibly or incompetently, but the findings indicate that such instances are the exception.

Why, then, have claims about misbehavior on the part of malpractice juries persisted? There are several inter-related explanations. First and foremost, it seems that lawyers, doctors, and policy makers are prone to

Jurors attempt to exercise their duty as responsibly as they can.

treat aggregate statistical data on jury verdicts as if they were a simple matter when they are not.³⁸ Newspaper accounts are likely to report only large verdicts, and they usually do not provide enough details to allow the reader to determine whether the award was justified, leaving the impression that these cases are more typical than exceptional. Another explanation lies in the misuse of anecdotal cases and statistical data by interest groups with political agendas. Stephen Daniels has documented how insurance companies and other business organizations with goals of broad tort reforms have manipulated figures and anecdotes about jury misbehavior in advertisements, press releases, and articles.³⁹ He concludes that the purpose has been to create perceptions of a tort "crisis" in the minds of the public and government officials, making them amenable to changes in the law. Medical malpractice juries have played a prominent role in these propaganda efforts. Another explanation is the dearth of systematic data and scholarly scrutiny of jury behavior in malpractice cases that has existed until the past several years. This article serves as a beginning effort to provide such data to lawyers, judges, politicians, and other policy makers.

Alternatives

Our research has uncovered problems. Interviews with jurors indicated that they would like more guidance from the court, particularly on the matter of dam-

ages. Perhaps it is time to consider some limited experiments aimed at assisting juries on this matter.⁴⁰ At the same time, the results of such experiments must be systematically and thoroughly evaluated before they are considered for adoption on a permanent basis.

Finally, it should be noted that the data reviewed in this article do not address the issues of costs, delays, anxieties, and uncertainties of trials. Plaintiffs and defendants alike suffer extensively through the litigation process. Assuming that the American tort-based system of dealing with claims of negligence, including medical malpractice, will remain in place for the near future, it can be strongly argued that negotiated settlements and forms of alternative dispute resolution can be preferable to trial by jury.

Much of the Duke University Law School's Medical Malpractice Project has been devoted to finding alternatives, and during the past several years, through the Private Adjudication Center, it has assisted involved parties by helping to provide other means to resolve their malpractice disputes. These alternatives have included mediation, arbitration, and a private, voluntary form of summary jury trial labelled a jury determined settlement.⁴¹ Most of the time both sides have indicated that these procedures were a satisfactory way of resolving their disputes.

Nevertheless, when such efforts fail and a trial becomes necessary, the findings of systematic empirical research strongly suggest that the jury system has been unjustly maligned. Existing evidence simply does not support the criticisms made against juries in medical malpractice cases. □

37. Weiler, *supra* n. 1, at 48; Tort Policy Working Group (1986), *supra* n. 34; Tort Policy Working Group (1987), *supra* n. 34.

38. See Saks, *supra* n. 2, for an extensive discussion of how facile assertions about all aspects of the tort system conflict with the realities.

39. Daniels, *supra* n. 1; see also Daniels & Martin, *supra* n. 31, at 9-27; Saks, *supra* n. 2, at 1154-68.

40. See Weiler, *supra* n. 1, at 54-61; Bovbjerg et al., *supra* n. 29 at 938; for discussion of ideas about providing jurors with schedules and valuation scenarios.

41. See Vidmar & Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 *F.L.A. ST. U. L. REV.* 89 (1991).

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