

An antidote to anecdotes

Suing for Medical Malpractice, by Frank A. Sloan, Penny B. Githens, Ellen Wright Clayton, Gerald B. Hickson, Douglas A. Gentile, and David F. Partlett. University of Chicago Press, 5801 S. Ellis Avenue, Chicago, Ill. 60637, 312-702-7740. 1993. 276 pages. \$37.50.

by Neil Vidmar

Anecdotes, "common knowledge," and statistics—or more accurately, claims about statistics—occupy center stage in the ongoing debate about the performance of the tort liability system in medical negligence cases. For example, it has been asserted that up to half of malpractice suits are frivolous; that claimants are overcompensated, undercompensated, or capriciously compensated; that damage awards, and settlements, are based on seriousness of injury rather than negligence; that as much as 50, or even 80, percent of awards in large lawsuits is for pain and suffering; and that juries are pro-plaintiff, anti-doctor, and prejudiced against "deep pocket" defendants.

Until very recently, the bases of the claims went without serious examination. The overdue scrutiny now reveals that many of the anecdotes are unrepresentative or demonstrably false; that "common knowledge" is often based on unquestioned myths; and that the statistics are frequently drawn from scientifically flawed data bases, interpreted with flawed logic, or, in some instances, made up out of thin air. The problem, however, is that good data from scientifically sound, reliable studies have not been available to counter propaganda from interest groups (which exist on both sides of the debate) or to correct misimpressions by serious scholars of the tort system. *Suing for Medical Malpractice* makes an important contribution toward filling the data void.

Sloan et al.'s book reports an interdisciplinary study of malpractice lawsuits involving permanent injuries or

death arising from birth-related medical treatment and from hospital emergency room care in Florida. The study involves claims that were closed between 1986 and 1989. The team began with interviews of a sample of plaintiffs that appears representative of Florida claims of these types of cases.

The claimants were interviewed at length regarding their health status before the injury and about the nature and consequences of the injury, the nature of doctor-patient relationships and decisions to file claims, the nature of relationships between clients and their lawyers, and about other matters relating to the litigation process. Next, for each case, independent panels of physicians, expert in the relevant specialties, reviewed the medical records and made evaluations of the injuries, negligence, and causation. The superb methodological approach required the panel experts to make decisions in three stages involving increasing degrees of medical information. Finally, a careful attempt was made to estimate the cost of the injuries.

Findings

Many of the findings contradict widely held views about medical malpractice litigation. For example, mothers whose children experienced injuries at birth were above average in health and prenatal care. Plaintiffs were as likely to sue physicians with whom they had a long-term relationship as they were to sue those who were their physicians for the first time. While economic motives were important, lawsuits also involved noneconomic motives arising from perceived inadequate communication from the doctor, a desire for more information, or a desire for retribution. Claimants experienced difficulty in obtaining legal representation, sometimes being referred to several lawyers before they found one who would take their case.

In the end, however, most claimants were satisfied with their legal represen-

tation. Although the authors note that the research methodology may have "seriously" underestimated future medical expenses, the mean, or average, estimate of economic loss for birth-related injuries was \$1.2 million; for emergency room injuries, the estimate was \$0.5 million. A substantial share of these economic losses was covered by collateral sources.

Case outcomes were compared with the physician panels' judgments of liability. The analyses indicated that the tort system did eliminate many non-meritorious cases before substantial litigation costs were incurred. The weeding-out of these cases was probably a result of information about the nature and circumstances of the injury that became available early in the discovery process. The ultimate compensation to injured parties was, on average, substantially below the estimates of economic losses and varied by stage of dispute resolution. Claimants who settled before trial received 48 percent of economic loss, and those settling during trial received 83 percent. Claimants who won at trial received 22 percent more than economic loss. Compensation was positively related to the neutral physicians' judgments of negligence.

There are some things to criticize about the research. For example, the data are derived from the claimants' perspective; the estimates of economic damages are open to debate; the estimates of plaintiff compensation do not give adequate attention to the added costs of lawyer fees and expenses, which must be added into the figures paid by defendants; some of the disaggregated data have small sample sizes; and the study involves only two types of medical malpractice injuries and is limited to the state of Florida. Nevertheless, the criticisms are matters of degree and should not detract attention from the methodologically sound findings of the study. In fact, this review does not do justice

to the rich insights the book provides about medical malpractice litigation.

A different picture

A major lesson to be learned from *Suing for Medical Malpractice* and another recent book, Weiler et al.'s *A Measure of Malpractice* (1993), is that when we move from dependence on anecdotes, "common knowledge," and unreliable statistics to careful, systematic empirical studies, a different picture of the medical malpractice tort system emerges from that promoted by interest groups, popular writers like Peter Huber, and serious but mistaken legal scholars.

For instance, contrary to assertions by critics of the tort system, claimants

do not appear on average to be over-compensated or compensated independently of the issue of negligence. Frivolous cases do not appear to be a major problem. On the other hand, neither does the tort system receive the vindication of the alternative picture that the plaintiffs' bar sometimes promotes. Many negligently injured parties do not receive any compensation, and even for those who become litigants, compensation, more often than not, falls substantially short of economic loss.

A single study, even a good one, cannot tell us everything we need to know about the medical malpractice litigation system, but Sloan et al.'s study tells us a lot, and it adds significantly to

the small but growing body of empirical literature on the tort system. The knowledge that emerges from a book like this cannot resolve the value issues inherent in the malpractice tort debate, but it does begin to give a more accurate description of how the system operates. *Suing for Medical Malpractice* should be read by legal and medical scholars who want to rely on more than their intuitive assumptions, by social scientists who study the legal system, and by all those interested in making rational policy decisions. It is a good antidote to anecdotes, and antidotes are sorely needed. □

NEIL VIDMAR is a professor of social science and law at Duke University.

Expounding on the Supreme Court

by Jay W. Stein

In recent years, books about the U.S. Supreme Court have appeared at the rate of about one a month. This does not count those about subtopics such as individual justices, salient cases, and constitutional law and interpretation, or law books geared toward lawyers and judges.

To explain this phenomenon, one might consider the news media's inclination to sensationalize certain judicial nominations, the media entertainment and glamour value of court cases, and a litigious society that may encourage the notion of fighting one's case all the way to the Supreme Court.

Other possible reasons are political. According to some authors, the Court appears to be changing the Constitution to the point of non-recognition; others argue that too little change is insufficient to meet the demands of the modern world. Events such as the Robert Bork nomination, writes one author, transformed the way people view the nature and extent of judicial power in politics, leaving public understanding of the courts and their role confusing.

The record number of graduates entering the legal profession and the expansion of law school faculties and programs are also responsible for increased interest in the Court. The

The Supreme Court A to Z: A Ready Reference Encyclopedia, edited by Elder Witt. Congressional Quarterly Books, 1414 22nd St., N.W., Washington, D.C. 20037, 800-638-1710. 1993. xiii, 528 pages. \$110.

The Oxford Companion to the Supreme Court of the United States, edited by Kermit L. Hall. Oxford University Press, 200 Madison Avenue, New York, N.Y. 10016, 800-451-7556. 1992. xx, 1032 pages. \$45.

A History of the Supreme Court, by Bernard Schwartz. Oxford University Press, 200 Madison Avenue, New York, N.Y. 10016, 800-451-7556. 1993. viii, 465 pages. \$30.

The Supreme Court Justices: Illustrated Biographies, 1789-1993, edited by Clare Cushman. Congressional Quarterly Books, 1414 22nd St., N.W., Washington, D.C. 20037, 800-638-1710. 1993. xxi, 576 pages. \$39.95.

Our Nine Tribunes, The Supreme Court in Modern America, by Louis Lusky. Praeger Publishers, 88 Post Road West, Westport, Conn. 06881, 203-226-3571. 1993. xviii, 213 pages. \$49.95.

The Supreme Court: A Citizen's Guide. By Robert J. Wagman. Pharos Books, 200 Park Ave., New York, N.Y. 10166, 800-221-4816. 1993. ix, 342 pages. \$21.95.

The Supreme Court in the Federal Judicial System, Fourth Edition, by Stephen L. Wasby. Nelson-Hall Publishers, 111 N. Canal St., Chicago, Ill. 60606, 312-930-9446. 1993. xiii, 429 pages. \$24.95.

The Supreme Court of the United States: An Introduction, by Thomas G. Walker and Lee Epstein. St. Martin's Press, 175 Fifth Avenue, New York, N.Y. 10010, 212-674-5151. 1993. xii, 207 pages. \$12, paper.

“publish or perish” mentality among many professors and the lure of the high visibility the media give to Supreme Court nominations, personalities, and actions keep manuscript production high at law schools and universities. Finally, and perhaps most importantly, a hunger for demystifying the Court, for wanting to know just what is going on, pervades the minds of many citizens.

This essay provides an overview of several books about the Supreme Court that appeared in 1992 and 1993. It notes prefatory information from authors, editors, and publishers on their justifications for adding to a belabored topic. It also briefly describes the contents and tone of the books. The goal is not to provide a critical review, but to show some of the varied categories of books available to readers interested in learning more about the Supreme Court.

Encyclopedic

The Supreme Court A to Z is an exciting volume for repeated browsing. It contains alphabetically listed essays on most topics about the Supreme Court one is apt to consider, such as the names of justices, concepts, and cases. Abundant illustrations embellish the articles on “Internment,” “Sedition,” and “Contract,” helping one visualize *Korematsu v. U.S.* (1944), *Debs v. U.S.* (1919), and *Dartmouth College v. Woodward* (1819), respectively.

The editors see the Court as the nation’s or people’s court rather than as part of the Washington bureaucracy. Their purpose is to enhance public knowledge about it and facilitate access to its services. Advisory editor Elder Witt recalls his own long fascination with the Court (since third grade in Tennessee) and draws on his previous work, *Guide to the U.S. Supreme Court*.

The Oxford Companion to the Supreme Court of the United States offers a more comprehensive treatment. Its articles approach the Court both as a unique legal body and as a hybrid political, social, economic, and cultural institution.

The chief task of this alphabetical tome is to illuminate how the Court performs the crucial role of preeminent guardian and interpreter of the Constitution. The articles, essay-like

and of varying length, are about leading cases (more than 400), selected both for their impact on the Court’s evolution and on society generally. They are also about justices (details of their family, education, and achievement), concepts (such as due process and equal protection), operations (from judicial clerks to workloads), physical facilities, substantive topics (from abortion to school prayer), procedures (how social demands are mediated into legal responses), and vocabulary and phrases (technical terms such as “writs” and court-invented phrases such as “with all deliberate speed”). Technology has its influence in articles such as “Lexis” and “Westlaw.” The articles are meticulously cross-referenced and indexed.

The longest article, a chronological essay, is titled “History of the Court.” It is divided into subtopics of “Establishment of the Union, 1789-1865”; “Reconstruction, Federalism, and Economic Rights, 1866-1920”; “Depression and the Rise of Legal Liberalism, 1921-1954”; and “Rights Consciousness in Contemporary Society, 1955-1990.” Each describes major developments in the Court within the context of social change during the stated period. Appendices include the U.S. Constitution, detailed tables on nominations and succession of the justices, and Court trivia and traditions.

Both the *Oxford Companion* and *Supreme Court A to Z* fulfill an encyclopedia’s purpose of enabling ready access to authoritative knowledge in succinct portions. In contrast to a treatise or narrative, the alphabetical arrangement of the topics lends a distinctive objectivity. The major difference between the two is in size. *Oxford* has more than a thousand topical entries; *A to Z* about 350.

Both include painted or photographic portraits of the justices. The only other illustrations in *Oxford* are in the articles on architecture and rooms in the Supreme Court building. In contrast, the artwork in *A to Z* is numerous and varied; much of it illustrates specific cases, issues, concepts, or biographical details. Both have articles on major cases (*Youngstown Sheet and Tube Co. v. Sawyer*, for example) and major topic areas, such as civil

rights. While both books include cross-references in the text, *Oxford’s* are more detailed and frequent. Both have lengthy indexes. Both are as up to date as Clarence Thomas, yet neither has an index entry for President Clinton. Appendices in both include the text of the U.S. Constitution, assorted data tables, and the list of case names cited. *Oxford*, however, appends more facts and analysis and repeats the case names in the index.

Oxford is for the more research-oriented user. Its nine pages of contributors, whose articles carry their bylines, include professors in law and other fields. *A to Z* is more oriented to a popular audience.

Historical

Bernard Schwartz begins his preface to *A History of the Supreme Court* with the reason for his work: the need for a “good one-volume history of the United States Supreme Court,” because other histories are “too massive” to be usable except by scholars or “too short and hence largely superficial.” Schwartz, the Chapman Distinguished Professor of Law at the University of Tulsa, acknowledges a growing number of people who want to learn more about “the institution that plays such a vital part in polity.”

The work tells the story of the Court as it paralleled the nation’s development since its first session in 1790. The theme is that of the Court as both a mirror, which reflects the development of the society it serves, and a motor, which helps to move society toward the dominant jurisprudence of the day.

In chronological order, 12 of the chapters bear names of chief justices, and four focus on the impact of individual “watershed cases”: *Dred Scott v. Sandford* (1857), *Lochner v. New York* (1905), *Brown v. Board of Education* (1954), and *Roe v. Wade* (1973). These cases, according to the author, had a major influence on American society and on the Court itself.

Numerous subheadings break up the monotony of historical writing and make the book somewhat more readable for the non-specialist. But 50 pages of end notes leave no doubt that the work is well documented, and the range of sources

further reflects the in-depth research of a distinguished scholar who has written 40 books on the law and the history of the Supreme Court.

Biographical

Those responsible for *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, admit that biography of public figures is really history. The 106 essays of this project of the Supreme Court Historical Society, 13 written by editor Clare Cushman, aim to expand public awareness and understanding of the U.S. Supreme Court. They depict the 106 justices (through Clarence Thomas) in the aura of their awesome power to decide what the U.S. Constitution means and to review acts of Congress and decisions of every other court for their constitutionality. Possession of that power expresses a sound basis for succinctly chronicling the justices—who they were and are, whence they came, and how they achieved.

A scintillating essay by Leon Silverman, president of the Supreme Court Historical Society, compares and contrasts the justices' families, childhoods, education, and politics. It notes that, unlike for election to Congress or the presidency, the Constitution lists no requirements or qualifications to be a federal judge. It concludes that despite their differences, all justices have ultimately shared a commitment to the rule of law under the Constitution and that scholars and constitutional authorities generally agree that the nation is fortunate in the overall results of its method of selecting justices.

Each biography is accompanied by a portrait of the justice, along with two or more characterizing illustrations, ranging from cartoons and family poses to historical and political settings.

Chief Justice William Rehnquist wrote the forward. The appendices include a list of members of the Supreme Court, books and articles about each justice (the most entries are for John Marshall, 12, Oliver Wendell Holmes, 11, and Felix Frankfurter, 10), and books for young readers (the most are about Sandra Day O'Connor, 8, John Marshall, 7, and Thurgood Marshall, 6). Conspicuously absent is a list of writings by the justices, probably imply-

ing that, with rare exception, their active authorship relates to the opinions they write. Written with sensitivity and presented in an attractive format and folio size, this is an inviting "coffee table" volume for casual reading.

Analytical

The critical and provocative nature of *Our Nine Tribunes: The Supreme Court in Modern America* is apparent from a sampling of its chapter titles: "Fragmentation of the Court and the Loss of Simplicity," "Sup with the Devil: The Supreme Court's Self-Inflicted Wounds," and "Judicial Review, A Wasting Asset?"

The book is a criticism of the proclivity of the nine justices to allow their personal aspirations, and their conceptions of the public welfare, to obscure the more important need of preserving the Court's effectiveness and the institution of judicial review. Author Louis Lusky, emeritus professor of law at Columbia University, sees danger for both the Court and the country in the unwillingness to curb or place limits on the Court's tendency to remake the Constitution.

Partly due to a sense of omniscience and omnicompetence, according to Lusky, the Court enters fields in which it has no legitimate business, and into maladministration of the field in which it does have legitimate business. It arrogates control over areas previously managed by other sources of authority, elbowing aside state government, family, school, and trade unions. The result, he foresees, may be the weakening and destruction of judicial review, which already is failing to achieve peaceable settlement of divisive social differences and is actually exacerbating the differences. The author illustrates his thesis in an entire chapter and an appendix on the celebrated Footnote 4 to Justice Stone's opinion for the Court in *United States v. Carolene Products Corp* (1938).

At issue in the case was whether a piece of economic regulation in legislation was entitled to a presumption of constitutionality if supported by any rational basis. As a primary source of the "strict scrutiny" principle, the author writes, the footnote led to subsequent misconceptions of its meaning

and applications of it to support causes foreign to its thesis.

Lusky's critical manner, however, does not carry throughout the book. For example, he ends his chapter on the racial cases with this uncritical statement: "All in all, the Court has handled racial issues comparatively well."

Instructional

The American public knows far less about the U.S. Supreme Court than about Congress or the presidency, despite the appearance of so many books in recent years. The Court has no public relations apparatus and is generally secretive about its internal processes, expecting its rulings to speak for themselves. Moreover, public education about its function and role is lacking, a result of the "mystery of the law" and the very limited attention paid to it in schools and the media.

The Supreme Court: A Citizen's Guide is a panorama of the 200-year existence of the U.S. Supreme Court and its central place in American political and legal controversy. Author Robert J. Wagman, an investigative reporter and Washington columnist for the Newspaper Enterprise Association, provides an uncritical description of the issues that have engaged the Court, the battles over confirmation, and the struggles with the presidency and Congress during some of the most dramatic constitutional crises in American history.

Concise and readable, the book includes the history of the Court, biographies of every justice, 100 of the most important decisions, 10 of the "worst" decisions (the lists have no surprises), and a description of the Court's operations. Appendices contain a glossary, a bibliography, and tables of appointments.

As a "citizen's guide," the book reaches out to the ordinary reader who has a serious desire to acquire information about the Court. Uncritical and not at all showy or entertaining, it follows a step-by-step approach in presenting a general overview of the judicial system, its history, setting, and role.

A different emphasis characterizes *The Supreme Court in the Federal Judicial System*, by Stephen L. Wasby, a political