# WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

# 2005-06

(session year)

# Assembly

(Assembly, Senate or Joint)

# Committee on Insurance (AC-In)

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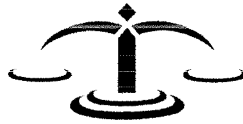

**ILLINOIS STATE BAR ASSOCIATION**

**Ole Bly Pace, III** • *President*

**May 10, 2005**

**To the Honorable Members of the Illinois General Assembly:**

Fundamental changes in the way victims of medical negligence are compensated in Illinois are being considered by the General Assembly. Some proposals under consideration could have far-reaching implications, not just for future victims, but also for the public's necessary perception that our justice system provides an equitable means of deciding between the rights of all parties. The Illinois Constitution demands no less:

> *Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.* [Bill of Rights, Sec. 12]

Because of the importance of the current debate, and the seeming lack of a factual basis for evaluating the competing claims being made, the Illinois State Bar Association commissioned Dr. Neil Vidmar, Russell M. Robinson II Professor of Law at Duke University Law School and a recognized researcher and author on medical malpractice litigation, to conduct a study in Illinois. Professor Vidmar is the author of *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets and Outrageous Damage Awards*, University of Michigan Press (1995), about which the *Journal of the American Medical Association* said: "Tort reformers have often portrayed juries in medical malpractice cases as overly generous and irresponsible ... In *Medical Malpractice and the American Jury*, the author successfully counters this portrayal with a well-reasoned, painstaking analysis of jury verdicts and damage awards ..." [See Prof. Vidmar's credentials at www.law.duke.edu/fac/vidmar/]

**Areas of Inquiry**

The resulting study, titled "Medical Malpractice and the Tort System in Illinois," set out to provide factual answers to several critical questions facing the General Assembly as it decides what, if any, changes to make in the laws governing medical malpractice:

1. Have medical malpractice claims increased?
2. Have jury trials increased?
3. Have jury awards for medical malpractice increased?
4. Have Madison and St. Clair counties earned their negative reputation insofar as medical malpractice claims are concerned?
5. Is there evidence that doctors are leaving the state or certain areas of the state as a result of jury awards?

This report provides answers to those questions, to the extent that reliable data exist to draw valid conclusions. Sources included the *Cook County Jury Verdict Reporter, Southwestern Illinois Jury Verdict Reporter*, databases in *Westlaw, Lexis,* and *Findlaw,* the U.S. Justice Department's Bureau of Justice Statistics, the American Medical Association's annual report on *Physician Characteristics and Distribution in the US,* and the National Practitioner Data Bank. These sources provided varying degrees of reliable data, as noted in the study.

It should be noted especially that detailed records on closed medical malpractice claims are collected by the Illinois Department of Insurance from all insurers that provide such coverage in Illinois, as mandated by state law. To this date, the closed claims data have not been made available to Professor Vidmar or to members of the General Assembly.

**Findings**

To examine the incidence, frequency, size of verdicts, and other aspects of the medical malpractice system in Illinois, this study looked at statewide data where available, and concentrated on two regions: Cook and DuPage counties, which comprise almost half the population of the state of Illinois and more than half the physicians; and Madison and St. Clair counties, because of specific claims that medical malpractice verdicts there are too large and too frequent.

An analysis of court filings over time, verdicts after trial, and post-verdict adjustments to awards reveals the following about Cook and DuPage counties:

1. The data show no upward trends in filings or in filings per 100 treating physicians from 1994 through 2004, when adjusted for population growth.
2. By one measure there was a modest decrease in medical malpractice trials between 1996 and 2001. Plaintiff win rates increased, but this change may be ascribed to other factors related to how cases are selected for trial.
3. A different set of data showed no increase in jury trials or in plaintiff win-rates between 2001 and 2004.
4. Settlement mechanisms such as pre-verdict high-low agreements, acceptance of the limits of the doctor's insurance policy, and other devices showed that many jury verdicts were substantially reduced in the post-verdict phase of the lawsuit.

A similar analysis in Madison and St. Clair counties reveals the following:

1. Over the period 1992-2005, only 11 jury verdicts favoring the plaintiff in medical malpractice cases were found in Madison and St. Clair county courts.
2. Only two verdicts exceeded $1 million, and one of those was overturned on appeal.
3. There is no evidence to support the perception that medical malpractice jury

trials in these counties are frequent or that jury verdicts are outrageous.

An analysis was made of the effect a $500,000 cap on non-economic damages would have had if such a cap had been placed on verdicts in Cook County and DuPage County in 2001, revealing that:

1. Of the 30 verdicts in favor of plaintiffs, the cap would have reduced the jury's verdict in ten of the cases.
2. The cap would have resulted in a minimal reduction in overall payouts to plaintiffs and would be unlikely to affect doctors' liability insurance premiums. But such a cap would result in significantly reduced compensation for some individual plaintiffs who suffered catastrophic injuries through medical negligence.

An analysis attempting to document claims that doctors may be leaving the state of Illinois for other states produced the following findings:

1. There has been a steady increase in the absolute number of Illinois' total patient care physicians in the period 1993-2003 (the latest date reliable data are available) from 24,514 in 1993 to 30,264 in 2003.
2. With some year-to-year variations, the trend is upward or steady for Ob-Gyns (1,596 in 1993 to 1,814 in 2003) and neurological surgeons (191 in 1993 to 212 in 2003).
3. The data lend no support to the claim that physicians are leaving the state, at least relative to other states.
4. American Medical Association statistics through 2003 do not support claims of a loss of doctors in Madison and St. Clair counties. Changes since 2003 may have occurred, but proponents of the claim of major losses of doctors have not substantiated their claims by citing any available sources.

In sum, the study shows the Illinois tort system does not appear to be the cause of the increase in doctors' liability insurance premiums. It is time to consider other causes.

The Illinois State Bar Association submits this report and study in the belief that decisions concerning such an important matter should be made based on facts rather than anecdotes.

Respectfully,

Ole Bly Pace III

# Medical Malpractice and the Tort System in Illinois

## A Report to the Illinois State Bar Association

**May 2005**

By

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**I am indebted to the following persons for invaluable assistance on this project: My research assistant, Kara MacKillop; Judy Nelson and Matt Melucci of the Madison County Circuit Clerk's Office; John Kirkton of the *Cook County Jury Verdict Reporter,* and Dr. Paul Lee of Duke Medical School.**

**The opinions and conclusions in this report are my own and are not necessarily the opinions and conclusions of Duke Law School.**

## Executive Summary

To examine the incidence, frequency, size of verdicts and other aspects of the medical malpractice system in Illinois, this study looked at statewide data where available, and concentrated on two regions: Cook and DuPage counties, which comprise almost half the population of the state of Illinois and two-thirds of its doctors; in addition it examined Madison and St. Clair counties, which have been characterized as "judicial hellholes."

For Cook and DuPage counties:

- The data show no upward trends in filings or in filings per 100 treating physicians from 1994 through 2004, when adjusted for population growth.
- By one measure there was a modest decrease in medical malpractice trials between 1996 and 2001. Plaintiff win rates increased, but this change may be ascribed to other factors related to how cases are selected for trial.
- A different set of data showed no increase in jury trials or in plaintiff win-rates between 2001 and 2004.
- Settlement mechanisms such as pre-verdict high-low agreements, acceptance of the limits of the doctor's insurance policy and other devices showed that many jury verdicts were substantially reduced in the post-verdict phase of the lawsuit.

A similar analysis in Madison and St. Clair counties reveals the following:

- Over a 14-year period from 1992 through the first part of 2005, only 11 jury verdicts favoring the plaintiff in medical malpractice cases were found in Madison and St. Clair county courts. Only two verdicts exceeded $1 million.

- There is no evidence to support the perception that medical malpractice jury trials in these counties are frequent or that jury verdicts for plaintiffs are outrageous.

- Insofar as medical malpractice litigation is concerned, the reputation of Madison and St. Clair counties as "judicial hellholes" is not justified.

An analysis of the data from Cook and DuPage counties revealed that a $500,000 cap on non-economic damages would have resulted in a minimal reduction in overall payouts to plaintiffs and would be unlikely to affect doctors' liability insurance premiums. But such a cap would result in significantly reduced compensation for some individual plaintiffs who suffered catastrophic injuries through medical negligence.

An analysis of data from the American Medical Association does not support the claims that Illinois in general and Madison and St. Clair counties in particular are losing doctors:

- There has been a steady increase in the absolute number of Illinois' total patient care physicians, including OB-GYNs and neurological surgeons.

- American Medical Association statistics through 2003 do not support claims of a loss of doctors in Madison and St. Clair counties.

The Illinois tort system does not appear to be the cause of the undisputed fact that doctors' liability insurance premiums showed dramatic rises. It is time to consider other causes of the insurance premium increase.

# Chapter 1

## Investigating the Tort System as the Cause of Medical Liability Insurance Increases

Let us be clear from the beginning. There is no dispute about the fact that, beginning about the year 2001, the medical liability insurance premiums for some doctors rose very dramatically in Illinois as they did elsewhere in the U.S. Thus, it is reported that one obstetrician-gynecologist saw his malpractice liability insurance premium jump from $138,031 in 2003 to $230,428 in 2004.[1] Such increases are a serious impediment to practicing doctors and ultimately could have major effects not only on their incomes, but also on the viability of their practices and the health care of the patients they serve.

The cause of the problem is hotly contested. Physicians, insurance companies and business organizations assert that the cause of the problem is the tort system in which patients file lawsuits against their doctors claiming medical negligence resulted in a serious injury. Then, they say, attempts to settle the lawsuit center on the likelihood that juries will be unfairly biased in favor of finding negligence and awarding unjustified large sums of money to the patient. In particular, they say, there is great fear of an outrageous award for "pain and suffering" above and beyond money for any incurred medical costs and lost income. Doctors and their liability insurers are forced to agree to inflated settlements because of fear that if the case goes to trial they will likely suffer even greater economic losses. This is called the "shadow effect" of jury trials.

The President of the Illinois Hospital Association is quoted as saying that large awards have risen dramatically in both size and frequency since the year 2000 and hospitals in Cook County said that their situation was especially dire.[2]

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[1] Georgina Gustin and Phil Dine, *Lax Insurance Regulation is Core of Malpractice Crisis*, SAINT LOUIS POST DISPATCH, January 1, 2005.
[2] Daniel Vock, *Legislators take Med-Mal Deadlock Head-on*, CHICAGO DAILY LAW BULLETIN February 23, 2005.

Madison and St. Clair counties in southwestern Illinois have received particular attention and have been characterized as "judicial hellholes" where juries have made unjustified awards.[3]

In contrast, plaintiff lawyers and consumer groups offer a different explanation for the problem. These groups assert that the cause lies with the business cycle in the medical insurance industry, claiming that the cycles are recurrent. In their view the problem is that insurers under-price premiums in good economic times and under-estimate future payouts. In addition downturns in the bond and stock markets where insurers invest their reserves add to the financial problems. The end result, these groups claim, is that when economic fluctuations in the business cycle squeeze income, the insurers raise their rates and blame plaintiff lawyers and juries.[4]

The Illinois State Bar Association, with 30,000 members, is the largest bar association in Illinois. It is a voluntary-membership association that provides a wide range of professional services for lawyers, and education and services for the public. Its membership includes lawyers representing plaintiffs and defendants in civil matters, as well as lawyers practicing in many other fields of law. This organization commissioned me to research the tort system as it pertains to medical malpractice litigation in Illinois. The tort system is only one part of the debate, but providing information about certain questions can shed important light on contentious issues: Have medical malpractice claims increased? Have jury trials increased? Have jury awards for medical malpractice increased? Have Madison and St. Clair counties earned their reputation as "judicial hellholes" insofar as medical malpractice claims are concerned? Is there evidence that doctors are leaving the state or certain areas of the state as a result of jury awards?

I was chosen to undertake this research because I have been studying and writing about medical malpractice litigation since 1990. In addition to

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[3] Anonymous, *Madison County: Bush in the "Hellhole*, ST. LOUIS TODAY, January 5, 2005;" William Lamb, *Illinois Trauma Cases Surge at SLU*, STL TODAY, January 10, 2005.
[4] Joseph Treaster and Joel Brinkley, *Behind those Medical Malpractice Rate Hikes*, 151 CHICAGO DAILY LAW BULLETIN (February 22, 2005),

various articles in scholarly journals and law reviews, I wrote a book on the subject, *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets and Outrageous Damage Awards*, University of Michigan Press (1995).

Writing books and articles does not come without the possibility of being perceived to have a bias. Although, as the title of the book implies, I drew the conclusion that many claims about irresponsible juries in medical malpractice trials were unwarranted, my conclusions were based on careful, systematic empirical research. Plaintiff lawyers, not surprisingly, liked the book's conclusions, but I also received praise in the *Journal of the American Medical Association,* which said: "Tort reformers have often portrayed juries in medical malpractice cases as overly generous and irresponsible.... In *Medical Malpractice and the American Jury,* the author successfully counters this portrayal with a well-reasoned, painstaking analysis of jury verdicts and damage awards...."

When I agreed to undertake the present research, the Illinois State Bar Association understood that I would draw conclusions based on whatever the evidence led me to conclude and that no restrictions would be placed on what I wrote in the report.

Because the topic is contentious and interpretations open to questions, I undertook the research with a safeguard: transparency. All of the research data will be made available to any person or group that requests it. This is actually an easy task since I drew most of my conclusions from data sources that are readily available to the public or, in the case of verdict reports, can be obtained with little effort by interest groups.

**Data Sources**

In the chapters that follow I describe the data sources, but a brief recitation here will be helpful. One primary source was verdict reporters. These included the *Cook County Jury Verdict Reporter* and the *Southwestern Illinois Jury Verdict Reporter.* These data were supplemented by databases on verdicts

and appellate courts available in *Westlaw*, *Lexis*, and *Findlaw*, primary on-line commercial sources used by legal researchers. The *Cook County Jury Verdict Reporter* is one of the oldest and most comprehensive sources of data for Cook and DuPage counties and, as I discovered, more comprehensive than other verdict reporters and more comprehensive than databases on verdicts compiled by the U.S. Department of Justice's Bureau of Justice Statistics. In addition, when crucial information was missing from verdict reports, I placed telephone calls to lawyers involved in the case and obtained that information.

The *Southwestern Illinois Jury Verdict Reporter* covers Madison and St. Clair counties and is available on-line through *Westlaw* and *Lexis*. I personally checked the accuracy of the Madison County reports by traveling to Edwardsville and reviewing every one of the medical malpractice verdicts it listed, finding no errors in the summaries, although in some instances I uncovered supplemental information about the cases.

I also researched the data compiled by the Bureau of Justice Statistics of the U.S. Department of Justice. As will be described in Chapter 3, the BJS in collaboration with the National Center for State Courts, as part of its Civil Justice Survey of State Courts, conducted nationwide surveys of civil jury verdicts in 1996 and 2001. Those surveys included the courts in Cook and DuPage counties. The data are archived by the Inter-university Consortium of Political and Social Science Data at the University of Michigan. I extracted the data for Cook and DuPage counties for those years.

Another source of data was the American Medical Association's annual report, *Physician Characteristics and Distribution in the US*. This report describes all non-federal doctors by state and separately by counties, including information about general areas of the doctor's practice. I compiled data for Illinois as a whole and separately for Cook, DuPage, Madison and St. Clair counties from 1993 through 2003. Information on 2004 will not be available for another year.

Where relevant the analyses were adjusted for population and inflation using census data and the Consumer Price Index.

In addition to these sources I researched the National Practitioner Data Bank. Created as part of the 1986 Health Care Quality Improvement Act of 1986, the NPDB reports on malpractice payments made on behalf of doctors by malpractice insurers. The reports are confidential but the NPDB makes a public file available that removes personal identifying information. I extracted data for Illinois that covered the years 1991 through 2004. A *Wall Street Journal* report criticized the NPDB as omitting many important cases, raising questions about its comprehensiveness.[5] Then, as I began to sift through the data I found so many omissions of information that I concluded it was so unreliable as to be of little use for this research.[6] I therefore omit it from further consideration in this report.

**An Unavailable Source**

One important source of data is missing from this report. The Illinois Department of Insurance compiles detailed records of closed medical malpractice claims that it requires medical malpractice liability insurers to report. In 2001 the Department compiled a report covering the years 1980 through 1999.[7] Unlike the states of Florida and Texas the data are not made available to the public. I attempted to gain access to the data collected since 1999 to bring findings up to date. Unfortunately, despite a number of requests to gain access to the data, the Department of Insurance permission was not given. The data would have provided crucial information bearing on the controversy about medical malpractice litigation. The closed claims files contain information about the frequency and magnitude of settlements as well as verdicts as well as the costs of defending those claims. Studies using the

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[5] Joseph Hallinan, *Doctor is Out: Attempt to Track Malpractice Cases is Often Thwarted---Deleting a Physician's Name from a Suit Before Settling Keeps it Out of Data Bank*, WALL STREET JOURNAL, August 27, 2004 at A1.

[6] For example, on a variable purporting to tell the forum in which a claim was settled, fully 33 percent of cases were classified in a category called "unknown /before lawsuit" or were just blank. The data are supposed to report the severity of the injury but 97% of cases had no information on this variable.

[7] CASUALTY ACTUARIAL SECTION, ILLINOIS DEPARTMENT OF INSURANCE, MEDICAL MALPRACTICE CLAIMS STUDY (2001).

Florida and Texas databases demonstrate how valuable a resource closed claim data can be in shedding light on this important and controversial debate.[8]

**The Remaining Chapters of This Report**

Chapter 2 contains a very brief overview of information about medical malpractice litigation to provide laypersons background information about the subject and give them intellectual tools to understand data that is presented in the following chapters. The chapter presents only minimal information about a complex subject. References to sources discussing the topics in greater depth are provided in the footnotes.

Chapter 3 is about Cook and DuPage counties. These two counties contain 49 percent of Illinois' total population and approximately two-thirds of its private doctors.[9] I examined medical malpractice filings and jury verdicts in those counties as summarized by the *Cook County Jury Verdict Reporter*, supplemented with additional research from on-line databanks and my telephone calls to the offices of lawyers involved in the cases.

Chapter 4 deals with jury verdicts in Madison and St. Clair counties. As noted above, these two counties have gained notoriety as "judicial hellholes" for defendants and have played a prominent role in the claims about the need for medical malpractice tort reform. I used the *Southwestern Illinois Jury Verdict Reporter* as my initial source, but supplemented it with a two-day visit examining the case files in the Madison County courthouse.

Chapter 5 turns to the very contentious and often misunderstood topic of "pain and suffering." Using the plaintiff verdicts from Cook and DuPage counties and studies by other researchers the report explores the role of "pain

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[8] See Neil Vidmar et al.., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL LAW REVIEW 315 (2005); Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 JOURNAL OF EMPIRICAL LEGAL STUDIES (2005, in press), available at http://ssrn.com/abstract=678601.

[9] Illinois also has doctors who are employees of the federal government. The doctors are not affected by the liability insurance problem because they are insured by the federal government. And lawsuits against them must be adjudicated under the Federal Tort Claims Act, which requires trial by judge alone.

and suffering" in jury verdicts and the potential impact of a $500,000 cap on these damages.

Chapter 6 looks at changes in the availability of treating doctors in Illinois and Cook, DuPage, Madison and St. Clair counties from 1993 through 2003. The purpose of this chapter is to shed light on the question of whether the availability of treating doctors has changed over the years.

Chapter 7 discusses the conclusions and limitations of the research.

**What This Report Does Not Cover**

The report is descriptive and does not pass judgment on the correctness or fairness of the individual jury verdicts that are reported, although it raises issues that will assist readers in drawing their own conclusions. Nevertheless, different parties will have different interpretations of the verdicts. The same reasoning applies to data about settlements.

The report does not investigate the economics or practices of the medical liability insurance industry. That subject is beyond my research mandate and areas of expertise. The findings about the tort system will raise questions about that subject, but they will have to be made by inference. The inference will be made explicit in Chapter 7.

# Chapter 2

## Medical Negligence and the Tort System: A Brief Primer for Laypersons

The tort system has many facets that bear on the controversy about medical negligence. This chapter is intended to describe some of the issues and empirical findings from other states as background and context for interpreting the Illinois data that I describe in subsequent chapters of this report. Each state has its own laws and legal culture, but, nevertheless, there are many similarities across states. The reader should be aware that there is a very substantial literature bearing on each of the topics discussed in this chapter.[10] It is intended only to provide guidance for other chapters in this report. Readers are encouraged to consult original sources referenced in the footnotes.[11]

## Purposes of the Tort System

There are two central purposes to the tort system: (1) to compensate persons who are injured through the negligence of others and (2) to deter future negligent behavior in (a) the person who committed the instant act of negligence and (b) deter other persons from similar negligence by informing them that they might face civil liability if they engaged in similar acts of negligence.

Compensation in tort law as it has developed in the United States involves awards of monetary damages for losses. There are two main categories of losses. In Illinois they are commonly referred to as "economic" and "non-economic" losses. For reasons that will be made clearer in Chapter 5, the latter

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[10] Studdert *et al.*, *Medical Malpractice*, 350 N ENGL. J. MED.283 (2004) provides an excellent review of the history of contemporary problems of medical liability insurance. See also, Michelle Mello et al. *The New Medical Malpractice Crisis*, 348 NEW ENGLAND JOURNAL OF MEDICINE 2281 (2003); Peter Akmajian, *A Fair and Balanced Look at Tort Reform*, FOR THE DEFENSE 33 (November 2004); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS (1995); 54 DePaul Law Review Issue Number 2 (2005) (Whole Issue).

[11] Many of the footnotes contain references to my own writings because they summarize the other literature and offer citations to the original sources.

term can be a source of confusion for non-lawyers, but for now I will use both terms.

"Economic losses" are losses like medical expenses and lost income that result directly from the act of negligence. There are usually tangible hospital bills and tax receipts to prove past economic losses. Health care experts and accountants can use these records of the past to make projections about future "economic" losses and present them to a judge or jury in the form of expert testimony. The estimates of economic losses are sometimes hotly disputed, but at least it is relatively easy to calculate them using the metric of dollars.

"Non-economic losses" have a much less tangible nature and it is difficult to apply an exact dollar metric. Non-economic losses frequently are described as "pain and suffering." How does anyone place an exact dollar figure on someone's pain?

A primary source of confusion with the term "non-economic" losses, however, is that pain and suffering is not the only element of this category of damages. There are other elements such as disfigurement, loss of companionship or loss of consortium; loss of moral guidance; loss of sexual gratification, and survival pain.[12] Non-economic damages are called "general damages" in many states. By either name they are losses for which there is no clear dollar metric by which to judge them.

In practical fact many of the legally-recognized categories of "non-economic" damages have economic consequences. For example, if someone's face is horribly disfigured it will probably cause social stigma and personal pain, but the injury may well have economic implications such as the person's ability to obtain a well-paying job or finding a spouse. Should the amount differ if the disfigured person is 10-years-old or 70-years-old? "Wrongful death" is another category. To be sure there can be severe emotional pain for survivors but there may also be severe economic consequences for surviving children or

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[12] Neil Vidmar, Felicia Gross and Mary Rose, *Jury Awards For Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DE PAUL LAW REVIEW 265,287 (1998).

for a surviving spouse or parents who were counting on the deceased person to render support and sustenance in their old age.

In our legal system the difficult task of assigning a monetary award for these less easily grasped losses has been left to the judgment of a jury. The theory behind having a jury decide is that it is composed of citizens from the community who will apply community norms to evaluate the injury's worth. The jurors are instructed by the judge to apply their "common sense and judgment" in deciding what amount is appropriate in this particular case. Community norms in Arcola, Gillespie or Cairo may be different from Rockford or Chicago.

The deterrent effect of tort law is controversial. There are some who say that were it not for the threat of lawsuits there would be more medical negligence. Other persons insist that the threat of medical malpractice causes doctors to order unnecessary tests out of fear that they may be sued if something goes wrong. No one, including doctors, disagrees with the need to take steps to prevent unnecessary injuries, but the issue is whether the threat causes costly unnecessary medicine. Empirical evidence on deterrence and over-deterrence is difficult to prove one way or the other. [13]

**Medical Negligence Occurs**

A Harvard University study of medical malpractice concluded that one out of every 100 patients admitted to a hospital had an actionable legal claim based on medical negligence. Some of these patients' injuries were minor or transient but 14 percent of the time the injury resulted in death and as many as another 7 percent of patients suffered a permanent disability. Generally, the more serious the injury the more likely it was caused by negligence. Some of the Harvard findings have been contested, but other studies, including one

[13] For a review of these issues see Michelle Mello and Troyen Brennan, *Deterrence of Medical Errors: Theory And Evidence for Malpractice Reform*, 80 TEXAS LAW REVIEW 1595 (2002).

conducted in Illinois, have supported the findings and made estimates of negligence that are even higher.[14]

## Injuries Can Have High Costs

If someone becomes paralyzed from the neck or waist down, they usually cannot work. If they are young and have children the income loss as well as medical expenses can be much more. A baby with a severe brain injury may require constant attention to avoid bedsores and other illnesses and be subject to infections. In the very recent past, many of these children had short lives. Yet, with today's advances in medicine many can be expected to live many decades. Life sustenance is an absolute moral obligation for most such instances, but there are enormous financial consequences.

A 1998 study of injuries caused by medical negligence undertaken by two economists conservatively estimated that the average economic costs for a brain-injured child was $2.25 million in today's dollars; persons who survived serious emergency room incidents had economic losses of over $2 million. In both of these estimates there was considerable variability between persons: some economic losses were much lower and in some cases they were much higher.[15]

Advances in medicine over the past decade and a half have sometimes extended survival time and improved the lives of these persons, but here again the benefits come with very major economic liabilities.

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[14] PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993) . PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993); PATRICIA DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY (1985); LINDA KOHN, JANET CORRIGAN AND MOLLA DONALDSON, EDS., TO ERR IS HUMAN: BUILDING A SAFER HEALTH CARE SYSTEM, INSTITUTE OF MEDICINE ( 2000) at <http://books.nap.edu/catalog/9728.html?onpi_newsdoc112999>; Lucian Leape, *Institute of Medicine Medical Error Figures Are Not Exaggerated,* 284 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 95 (2000).; Lori Andrews, *Studying Medical Error in Situ;Implications for Malpractice Law and Policy,* 54 DEPAUL LAW REVIEW 357 (2005).

[15] Frank Sloan and Stephen van Wert, *Costs of Injuries,* Chapter 7 in FRANK SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993)

**The Incidence of Claims is Lower than the Incidence of Injury**

The Harvard study concluded that for every person filing a claim of medical negligence, eight times as many patients injured by medical negligence did not file a claim. Other studies have yielded similar estimates. One possible reason for this low claiming rate is that the patient does not discover the medical negligence. Another reason is that plaintiff lawyers carefully screen cases and select those that have a reasonable likelihood of prevailing at trial and whose potential award justifies an investment of money, sometimes many thousands of dollars, to hire experts and many working hours before and during trial to prove the medical negligence.[16]

**Most Cases Are Settled Without a Jury Trial**

Only between 7 and 10 percent of claims go to trial by judge and jury. Somewhere between 40 to 50 percent of claims are eventually dropped by the patient during "discovery"–the pre-trial investigative stage in which the plaintiff's lawyer obtains the medical records, hires experts, and questions the defendant's experts. Of course, even in these no-payment cases the costs for defendants and their liability insurers can be expensive since they too have to pay for lawyers, experts and other litigation costs.[17]

Recent research in Florida has shown that as many as 26% of medical malpractice claims that result in payment to the claimant are settled by the health care provider through arbitration or without a formal lawsuit ever being filed. Even for claims resulting in more than a million dollars in payments 10 percent were settled without a formal lawsuit. Under 8 percent of cases with million dollar payments were settled after a jury trial. Of 34 cases resulting in payments over $5 million only two were decided by juries.[18]

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[16] PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993).
[17] Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingency Fee System and Social Policy*, 20 LOYOLA LOS ANGELES LAW REVIEW 101 (2005).
[18] Neil Vidmar, et al., *Uncovering the " Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL LAW REVIEW315 (2005).

Doctors and their insurance companies say that, nevertheless, they settle cases even for large amounts out of fear that if the case goes before a jury the amounts will be astronomically higher. This is called the "shadow effect" of jury trials. In contrast, some research findings suggest that insurers settle cases when their own internal investigation indicates that negligence did occur. However, even in such cases where negligence is judged to be likely, there may be great disagreement with the plaintiff about the amount of damages he or she should receive.[19]

Regardless of whether the claim results in payment or no payment or whether it goes to jury trial or is settled without trial, the process of resolution is slow. Between three and six years typically elapse between the filing of a lawsuit and final resolution. Some cases take even longer.[20]

**Many Malpractice Claims Have Multiple Defendants**

Because of specialization in the health care field, multiple persons may treat a patient: a primary doctor, a surgeon, a radiologist, an anesthesiologist and hospital nurses and other staff. Sometimes at the beginning of a lawsuit it is not clear which health care provider is responsible for the alleged negligent injury. Later some defendants may be dropped from the claim. In other instances the lawsuit will assert that multiple parties are responsible for the alleged negligent outcome.[21]

For some cases that eventually go to trial, one or more defendants may settle with the patient before trial. What this means is that sometimes a

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[19] Ralph Peeples, et al., *The Process of Managing Medical Malpractice Cases: The Role of Standard of Care*, 37, WAKE FOREST LAW REVIEW 877 (2002); Mark Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS OF INTERNAL MEDICINE 1780 (1992); Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingency Fee System and Social Policy*, 20 LOYOLA LOS ANGELES LAW REVIEW 101 (2005).

[20] Id. See also, ILLINOIS DEPARTMENT OF INSURANCE, MEDICAL MALPRACTICE CLAIMS STUDY, (2001); MARK KREIDER, MEDICAL MALPRACTICE CLOSED CLAIMS STUDY, Department of Insurance Commissioner, State of Washington (February, 2005).

[21] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS (1995).

plaintiff who loses at trial may have received money from other parties that were sued. Very often hospitals named as defendants because their staff was indirectly involved in the patient's treatment settle for relatively small amounts. By relatively small I mean small compared to the patient's overall damages claim. The hospital may decide to settle to avoid the risk that at trial they could be held accountable for a much larger award, even though the hospital does not believe it is negligent. Often the amount of any prior settlement from one defendant will be "set off," that is, deducted from the award the jury levies against the other defendants.[22]

**Doctors Win Most Jury Trials**

Research on medical malpractice trials across the country indicates that when the case goes to trial the juries decide in favor of the plaintiff only between 20 to 30 percent of the time. The causes of variability in win rates across states or over time are difficult to determine. While one explanation is that juries differ, other plausible explanations are that the strengths of claims differ, that lawyers vary in the cases they select for trial, and that negotiation and settlement dynamics differ over time and places. In short the data cannot tell us whether juries decide cases differently or whether juries decide different cases.

These statistics surprise many people. Part of the problem is that newspapers tend to report only cases with prevailing plaintiffs being awarded large sums of money while ignoring cases with smaller sums or cases in which defendants prevail.

Interviews with jurors who decided cases found that jurors view many claims with skepticism. They often expressed two interrelated views, namely that too many people want to get something for nothing and that doctors should not be blamed for simple human misjudgment.[23]

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[22] Id.
[23] Id.

**Deciding Negligence and Compensation in Medical Malpractice Cases**

The first task of a jury or judge is to determine if negligence occurred and if that negligence was the direct cause of the injury that the patient suffered. In many areas of tort law jurors are instructed to apply a "reasonable person" test to determine negligence, but in medical malpractice claims there is a different test—the medical standard of care used by doctors in the particular area of practice. With some rare exceptions, at trial the plaintiff is required to call an expert (or experts) proficient in that field of medicine to testify that he or she has concluded that the defendant doctor violated the standard of care. The defendant doctor usually also calls experts who have a different opinion. Each side's witnesses are cross-examined by the opposing lawyer.

There is also the issue of causation. Many medical procedures have a risk of an "iatrogenic" injury or illness. An infection may develop at the site of a surgical procedure or a prescribed drug may interact with a particular patient's biological system no matter how careful the doctor is in following the standard of care. Many persons who seek medical care are already suffering from serious illnesses or injuries and the contentious issue is whether the bad outcome was a result of negligent treatment or the underlying disease or injury. A doctor might even admit negligence but argue that the negligence was not the proximal cause of the bad outcome.

In deciding liability the jury has the facts and arguments from both sides on the standard of care and theories of causation. The judge instructs them that to prevail the plaintiff must prove the case on the "balance of probabilities." Unlike a criminal trial which uses a "beyond a reasonable doubt" standard, the judge explains that the balance of probabilities means "more likely than not." Judges usually refrain from using exact figures but find interesting ways to say the jurors must be convinced that, compared to the defendant's evidence, there is at least a fifty-one percent likelihood that the plaintiff's evidence is correct.

If the jury decides a doctor is liable it must then assess the damages. During the trial the jury will also have heard evidence about the past and

future medical, income or other economic losses of the patient that resulted from the negligence. The jurors will also have heard evidence bearing on the plaintiff's emotional and physical experiences that are an alleged consequence of the injury.

The jurors will also be instructed to apply their best skills in determining the worth of the non-economic damages, being neither generous nor stingy. Debates can ensue about whether some elements of damages such as disfigurement are non-economic losses since serious disfigurements may affect employment or marriage opportunities.

Punitive damages, even for behavior that is wanton, malicious, or fraudulent, are not allowed in Illinois for defendants in medical malpractice cases.

**Trial by Judge and Jury**

The jury's task in a medical malpractice trial is not an easy one, but often overlooked in debates about jury trials is that it is really trial by judge and jury. The judge rules on the evidence that is admissible and instructs the jury on the law. Equally important, the jury's verdict does not become legitimate or enforceable until the judge enters a "judgment" on the verdict. Having seen and heard the same evidence as the jury, the judge can set part or all of the verdict aside and order a new trial, enter a directed verdict for one or all of the defendants or reduce the amount of the damages if the judge feels the verdict is inconsistent with the trial evidence. Additionally, if the case is appealed, a panel of three or more judges may overturn parts or all of the judgment. Specific examples of judicial oversight may be seen in cases summarized in Chapters 3 and 4. In short, the jury verdict is not the final word.

**Jury Competence**

Questions are sometimes raised about whether the jury, composed of a group of laypersons, is competent to make the complicated decisions required

in malpractice cases. Likewise, it would be absurd to claim that juries always get it right; but one study found that jury verdicts were generally consistent with evaluations of whether negligence occurred that were made by neutral doctors. Other studies, while not specifically dealing with medical malpractice, show that trial judges agree with civil jury verdicts most of the time. These studies will not satisfy every critique because the decisions are judgment calls. Each side will contend that the evidence favored their position. Chapters 3 and 4 present short summaries of a number of cases and the juries' verdicts. Even though readers will not have heard the evidence that the jury heard, the summaries allow different readers to make their own evaluations. It is noteworthy that in most cases the trial judge agreed with the jury verdict—but not always.[24]

**Jury Awards Do Not Necessarily Reflect the Final Payment to the Plaintiff**

Cases are often settled for less than the jury's award. This is particularly true of very large awards. There are four main processes by which awards are reduced. The trial judge or an appeals court may reduce the award. Sometimes the two sides agree to a high-low agreement before trial, during trial or even during jury deliberations. This occurs in cases where both sides are not entirely confident about the strength of their case and become risk averse. They enter into an agreement that no matter what the jury decides the defendant will pay a certain amount to the plaintiff and if the plaintiff wins the defendant will have to pay only the agreed highest amount. Chapter 3 provides some good examples.

Sometimes a winning plaintiff will settle for less than the jury verdict in order to avoid a long delay in payment and the risk of losing if the defendant appeals. Finally, plaintiffs usually settle for the limits of the doctor(s) liability insurance coverage if the award exceeds the insurance coverage. Hospitals that

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[24] Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingency Fee System and Social Policy,* 20 LOYOLA LOS ANGELES LAW REVIEW 101 (2005).

are self-insured usually have some form of excess liability insurance to protect their assets.[25]

Chapters 3 and 4 contain examples bearing on all of these post-trial adjustments in Illinois cases.

**Liens Against Recovery**

If a patient is injured through medical negligence, his or her medical bills may be paid by taxpayer-supported Medicare or Medicaid, or by a private insurer like Blue Cross/Blue Shield. If the injured person cannot work, a private or public source may pay some or all of their expected wages. If the injured person subsequently receives a jury award or settlement from a negligent medical provider, that entity has a right to recover that portion of the award that it paid in benefits as a result of the injury. Medicare and Medicaid are required to seek reimbursement. There is very little accurate information on the extent to which this occurs and the degree of recovery but plaintiff lawyers deal with liens routinely even before they start a lawsuit. The amount taxpayers and private health insurers recover may amount to hundreds of thousands or even millions of dollars from malpractice settlements every year.[26]

**Doctors Who Are Federal Employees or State Employees**

A number of doctors and other health care providers are employees of the federal government. Some examples are doctors on military bases or Veterans Administration hospitals. These doctors may provide regular medical services including delivering babies. They too can be sued but their employer is the self-insured United States government. The doctors do not carry private professional liability insurance. Federal employees must be sued under the

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[25] Id.; Tom Baker, *Blood Money, New Money and the Moral Code of the Personal Injury Bar*, 35 LAW AND SOCIETY REVIEW 257 (2002).

[26] See HERBERT KRITZER, RISKS, REPUTATIONS AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004); Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingency Fee System and Social Policy*, 20 LOYOLA LOS ANGELES LAW REVIEW 101 (2005).

Federal Tort Claims Act that provides for trial by judge alone rather than trial by jury.

Some healthcare providers are employees of the State of Illinois and are insured by the State of Illinois, for example, state mental hospital employees. The laws of Sovereign Immunity may not shield claims of medical malpractice against these employees and in such cases claims may be decided in a jury trial.[27]

**Summary**

This chapter has presented a minimal sketch of important issues and concepts related to medical malpractice litigation. It is a complicated subject. The sketch will be helpful to laypersons in the chapters that follow.

[27] See, e.g. *Jinkins v. Lee and Medlin*, 04L-5967 (Cook County), Access Plus Jury Verdict (Tried September 27-October 7, 2004).

# Chapter 3

## Medical Malpractice Litigation in Cook and DuPage Counties

Cook County and DuPage County are the most populous counties in Illinois. Cook, with a population of more than 5.3 million persons, constitutes approximately 42 percent of Illinois' 12,600,000 citizens, and DuPage, with a population of over 900,000, accounts for another 7 percent.[28] The two combined represent almost half of Illinois' 12.6 million citizens. These two counties also accounted for 67.6% of Illinois' 30,264 non-federal "patient care" physicians in 2003.[29] A number of sources of data bearing on medical malpractice litigation are available for these two counties. This chapter draws upon those data sources to present a profile of case filings over time, verdicts after trial, and post-verdict adjustments to awards. Additionally, some data give insights about settlements.

## Case Filings in Cook and DuPage Counties: 1994-2004

The *Cook County Jury Verdict Reporter* compiles statistics on annual filings of civil litigation. John Kirkton of the *Reporter* compiled separate statistics for medical malpractice filings in Cook and DuPage counties from 1994 through 2004.[30] These data shed light on the extent to which medical malpractice lawsuits have increased over the past decade.

Before presenting these data a note of caution is in order. Case filings do not always translate into settlements or jury verdicts. In some instances the filing enables a plaintiff's lawyer to obtain medical records and other material but further investigation with the help of these records persuades the lawyer

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[28] <http://quickfacts.census.gov/qfd/states/17/17031.html>

[29] See American Medical Association, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S., 2003 edition, AMA Press 2003. Federal physicians are those employed or supported by the U.S. Government, which is self-insured for the liability of its physicians. Lawsuits against its physicians fall under the Federal Tort Claims Act, which requires trials to be conducted by judges acting without a jury.

[30] Mr. Kirkton informed me that this compilation was made available to a number of parties on both sides of the tort reform issue some time before I requested the data.

that there is insufficient evidence to continue the lawsuit and it is abandoned.[31] To the extent that this is true the statistics may overestimate the extent of medical malpractice litigation. On the other hand recent research bearing on malpractice litigation in Florida[32] uncovered the fact that the parties settled over 20 percent of all cases involving payments to claimants without a formal lawsuit being filed. For settlements involving payments over $1 million, slightly more than 10% were settled in a pre-lawsuit phase. To the extent that similar processes occur in Illinois, case filings may under-estimate payments by medical health providers and their insurers. Nevertheless, filings provide a reasonable measure of medical malpractice claiming.

Table 3.1 shows the number of filings in Cook and DuPage counties by year. In addition Table 1 also presents data on the number of non-federal treating physicians in each county per year through 2003.[33] (Physician figures for 2004 and 2005 were not available at the time this report was written.) From these two figures a third variable was constructed to show the number of lawsuits filed per number of physicians. This last statistic needs to be treated cautiously since there is a time lag between a medical incident and the filing of lawsuits. Typically, at least two years elapse between a medical incident and a claim, but in some cases the lawsuit may be filed many years after the incident. For instance, a person who was a minor when an incident occurred may file after he or she reached the age of majority, producing a long lag time.

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[31] See NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at 69-92.

[32] Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida,* 54 DEPAUL LAW REVIEW 315(2005).

[33] There are also treating physicians who are federal employees, such as those associated with military bases, Veterans Administration hospitals and the Public Health Service. The federal government assumes professional liability for these physicians. In consequence, malpractice lawsuits against federal physicians do not play a role in private liability insurance premiums.

**Table 3.1: Case Filings, Number of Treating Physicians and Filings Per Capita of Treating Physicians: 1994-2003**

| Year | Cook County | | | DuPage County | | |
|---|---|---|---|---|---|---|
| | Number of Filings | Number of Physicians | Filings/ 100 Physicians | Number of Filings | Number of Physicians | Filings/ 100 Physicians |
| 1994 | 1831 | 15,114 | 12.1 | 113 | 2,393 | 4.7 |
| 1995 | 1722 | 15,579 | 11.0 | 119 | 2,618 | 4.5 |
| 1996 | 1235 | 15,673 | 7.9 | 80 | 2,735 | 2.9 |
| 1997 | 1262 | 16,298 | 7.7 | 70 | 2,881 | 2.4 |
| 1998 | 1353 | 16,043 | 8.4 | 60 | 2,916 | 2.1 |
| 1999 | 1214 | 15,835 | 7.7 | 70 | 3,028 | 2.3 |
| 2000 | 1319 | 16,205 | 8.1 | 60 | 3,208 | 1.8 |
| 2001 | 1360 | 16,339 | 8.3 | 60 | 3,319 | 1.8 |
| 2002 | 1324 | 16,266 | 8.1 | 80 | 3,327 | 2.4 |
| 2003 | 1443 | 16,782 | 8.5 | 60 | 3,423 | 1.8 |
| 2004 | 1226 | * | * | 57 | * | * |

The table shows that filings from 2000 through 2004 in both Cook and DuPage counties were substantially lower than in 1994 and 1995. Except for a decrease in 2004, filings have remained relatively steady since 1998, although there are some yearly fluctuations. The second column in the table shows that filings per 100 treating physicians in Cook County remained steady at between approximately 8 and 8.5 from 1996 through 2003. DuPage County shows a similar trend although the filing rates are much lower, varying between 1.8 and 2.4 per one 100 physicians.

The much higher rate of filings per 100 physicians in Cook as opposed to DuPage County appears puzzling. However, an additional examination of physician statistics suggests a likely explanation for part of the difference. The AMA's physician database disaggregates treating physicians into a number of separate categories and one of those categories is "hospital based practice."[34]

[34] American Medical Association, PHYSICIAN CHARACTERISTICS AND DISTRIBUTIONS IN THE US, editions 1995 -2005.

In Cook County 35 percent of treating physicians in 2003 listed themselves as engaged in hospital-based practice whereas in DuPage County only 18 percent listed themselves in this category. To the extent that claims involving medical incidents are more likely to arise in hospital settings, hospital practice may explain part of the difference. The demographics of the patients seeking health care, the types of health services provided and other factors may also contribute to the higher rate, but the data do not help us further on these hypotheses.

Once again the reader is cautioned to keep firmly in mind two caveats. First, filings do not necessarily equate to payments to claimants. Second, unpaid claims incur defense costs by liability insurers.[35] Nevertheless, with these caveats in mind the principal finding from this analysis is that the data show no upward trends in filings or in filings per 100 treating physicians in either Cook or DuPage counties.

**Jury Verdicts Over Time: The Bureau of Justice Statistics Research, 1996 and 2001**

Much of the current controversy in Illinois involves claims about jury verdicts increasing in both frequency and magnitude of awarded damages. Cook and DuPage counties are the two Illinois counties represented in a survey of nationwide civil court statistics carried out by the U.S. Department of Justice's Bureau of Justice Statistics in collaboration with the National Center for State Courts. Called the Civil Justice Survey, the civil court records of forty-six of the nation's most populous counties, statistically representing the nations 75 most populous counties, were systematically surveyed in 1996 and 2001.[36] The data include identification of medical malpractice jury verdicts and

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[35] See Vidmar et al. at note 5.

[36] See, CAROL DEFRANCES AND MARIKA LITRAS, BUREAU OF JUSTICE STATISTICS BULLETIN, CIVIL JUSTICE SURVEY OF STATE COURTS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, available at < http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm.; Thomas Cohen , Tort Trials and Verdicts in Large Counties, 2001, Bureau of Justice Statistics Bulletin, Civil Justice Survey of State Courts, 2001 , November 2004, NCJ 206240, available at < http://www.ojp.usdoj.gov/bjs/abstract/ttvlc01.htm>.

their outcomes. The research has resulted in various reports that focus on nationwide statistics, including jury verdicts. The raw data are archived by the Inter-University Consortium for Political and Social Research that is headquartered at the University of Michigan. These surveys purport to provide a comprehensive listing of all civil jury trials, including disaggregation of medical malpractice cases in the chosen locations.[37]

Data supplied by John Kirkton from the *Cook County Jury Verdict Reporter* indicates that, at least in 2001, the BJS survey substantially under-reported the number of medical malpractice cases in Cook and DuPage counties. BJS reported 78 jury trials whereas the verdict reporter identified 99 jury trials.[38] The *Cook County Jury Verdict Reporter* data will be addressed in the next section of this chapter. However, working on an assumption that the Bureau of Justice's sampling techniques were the same in both years, the BJS data can be used to make comparisons of changes in jury verdicts between 1996 and 2001.[39] They also allow us to make comparisons with nationwide trends.

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[37] In our research attempting to identify more details about the cases identified in the survey we found several cases that involved product liability claims against medical manufacturers as well as health care providers. It was not always clear that the main defendant was the health care provider. In at least two cases the health care provider was either dropped from the lawsuit before trial or was found not liable. This finding raises the possibility that the BJS statistics may slightly overstate the number of medical malpractice trials in their sample. Another possibility is that while the Cook County Verdict Reporter includes cases in which hospitals are the sole or primary defendant, the BJS sampling excluded such cases. Since the BJS data do not identify plaintiffs or defendants, it is not possible to check this hypothesis against the data.

[38] There was also a $3,689,733 verdict against a chiropractic clinic (*Tews v. Stoxen Chiropractic Clinic*, Docket No. 99L-12631, involving allegations of fraud, and two dental malpractice trials, one of which resulted in an $11,250 plaintiff win and another resulting in a defense win. These trials were eliminated from the analysis.

[39] Despite proceeding with this comparison, the assumption is open to challenge. The BJS data are purported to be comprehensive of all verdicts. The Cook County Verdict Reporter data clearly show that in 2001 the BJS study under-reported jury verdicts by 21 percent (99 cases in CCVR versus 78 in the BJS research). Further problems arise with the BJS data. The first BJS survey was conducted in 1992, see DEFRANCES, C. ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES, U.S. Department of Justice, Bureau of Justice Statistics Special Report (July 1996, NCJ -154346.) Although medical malpractice cases were reported for other venues in 1992 our search of the raw data discovered that medical malpractice verdicts were not specifically distinguished from other personal injury torts in both Cook and DuPage Counties. Despite the problems that we have identified, many researchers treat the BJS data as an

**Changes in the Frequency of Jury Trials**

Table 3.2 reports the number of medical malpractice trials in Cook and DuPage counties over the two time periods along with adjustments for changes in the number of treating physicians. In 1996 Cook County had 15,673 non-federal treating physicians and in 2001 it had 16,339 treating physicians. DuPage County had 2735 physicians in 1996 and in 2001 there were 3319 physicians.

**Table 3.2: Frequency of Jury Trials by Year and in Proportion to 1000 Treating Physicians**

| Year | Cook County | | DuPage County | |
|---|---|---|---|---|
| | Number of Jury Trials | Trials/per 1000 Treating Physicians | Number of Jury Trials | Trials/1000 Treating Physicians |
| 1996 | 81 | 5 | 7 | 3 |
| 2001 | 78 | 5 | 8 | 2 |

The table shows no difference between 1996 and 2001. Note again that the data address trials, not lawsuits or settlements arising out of those lawsuits. As noted in Chapter 2, based on nationwide data, trials occur in less than ten percent of all medical malpractice lawsuits. The current debate in Illinois, however, has centered on jury trials and the effect of jury awards on settlements. Thus, it is reasonable to ask about jury trial frequency.

The data in Table 3.2 do not reflect the possibility that more than one physician or health care entity, such as a hospital or clinic, was named as a defendant in the lawsuit. The data provide some insight about the complexity of litigation and its potential effect on defendants. Table 3.3, therefore, was constructed to show these differences. For ease of presentation the data for Cook and DuPage counties were combined.

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authoritative source and a decision was made to report comparisons between 1996 and 2001as a separate section in this report.

**Table 3.3: Number of Defendants (and Percent of Total) Named in Jury Trials in Cook and DuPage Counties (Combined), By Year**

| Number of Defendants | 1996 Frequency | 2001 Frequency |
|---|---|---|
| 1 | 27 (31%) | 26 (33%) |
| 2 | 19 (22%) | 31 (40%) |
| 3 | 13 (15%) | 13 (17%) |
| 4 | 9 (10%) | 5 (6%) |
| 5 | 8 (9%) | 2 (3%) |
| 6 | 3 (3.%) | 1 (1%) |
| 7 | 3 (3%) | -- |
| 9 | 1 (1%) | -- |
| 10 | 1 (1%) | -- |
| 11 | 2 (2%) | -- |
| 12 | 1 (1%) | -- |
| Total | 87 | 78 |

Note: percentage of total trials is rounded to nearest whole number

Table 3.3 shows that approximately one third of trials involve more than one defendant in all three time periods, but the number of trials exceeding more than three defendants declined substantially by 2001, compared to 1996. These changes may reflect changes in the litigation strategies as discussed in more detail below.

## Rates at Which Plaintiffs Prevailed at Trial

How often do plaintiffs prevail when a jury decides their case? In addressing this question we again combined the data for Cook and DuPage counties. The findings are reported in Table 3.4.

**Table 3.4: Plaintiff Win-Rates By Year (Frequencies and Percentages)**

| Year | 1996 | 2001 |
|---|---|---|
| Plaintiff Verdicts | 15 (19%) | 28 (36%) |
| Defense Verdicts | 71 (81%) | 50 (64%) |
| Directed Verdict for defendant | 1 (1 %) | 0 |
| Other | 1 (1%) | 0 |
| Total | 88 (101%) | 78 (100%) |

Note: Percents rounded to nearest whole number

Table 3.4 shows that while the number of trials declined by 10 from 1996 to 2001, plaintiffs were more successful when they went to trial. The plaintiff's win rate trends are somewhat at variance with nationwide trends in plaintiff win rates.[40] In 1996 the national plaintiff win rate was 25.9% and in 2001 the plaintiff win rate was 27.1 %. Thus, in 1996 Cook and DuPage Counties were lower than the national average and in 2001 they were higher than the national average.[41]

It is not possible to ascertain the cause of these differences in plaintiff win rates, both over time and in comparison to nationwide data because there are different plausible, and not necessarily exclusive, explanations. One hypothesis is that jury attitudes toward plaintiffs and defendants changed (or are different from state to state) but there are equally plausible competing hypotheses. Laws may differ from state to state; laws may change over time within states; plaintiff lawyer strategies in the cases they choose to litigate may change; the development of alternative dispute resolution such as mediation or arbitration may affect rates of trial; both plaintiff and defense negotiation

[40] Carol DeFrances and Marika Litras, *Civil Trial Cases and Verdicts in Large Counties, 1996,* BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ 173426, September 1999; Thomas Cohen, Tort Trials and Verdicts in Large Counties, 2001, BUREAU OF JUSTICE STATISTICS BULLETIN, November 2004 NCJ 206240; Thomas Cohen, Medical Malpractice Trials and Verdicts in Large Counties , BUREAU OF JUSTICE STATISTICS BULLETIN , April 2004, No.NCJ 203098

[41] For comparison the COOK COUNTY VERDICT REPORTER data, discussed in more detail in the next section, shows a 2001 plaintiff win rate in Cook County and DuPage County combined for a win rate of 30 percent. The difference between the calculated BJS plaintiff win rate and the Cook-DuPage plaintiff win rate from the Cook County Verdict Reporter is thus about 4 percent.

strategies may change and thus affect whether cases are settled or go to trial; the way evidence is presented at trial may change. Posed simply, from these data *we cannot determine whether juries were deciding cases differently or whether they were deciding different cases.*[42]

**Jury Awards in Cook and DuPage Counties: 2001**

What do juries award when plaintiffs prevail? We assessed this question by examining mean awards for Cook and DuPage Counties combined for the year 2001.[43] For these analyses we use the more comprehensive set of data from the *Cook County Jury Verdict Reporter* supplemented by additional reports of cases contained in databases reported in *Westlaw.* The mean is the arithmetic average.

**A Reminder About Jury Verdicts**

Before this analysis is presented several caveats that were discussed in Chapter 2 need to be repeated. First, jury verdicts are not necessarily the amount that the plaintiff actually receives. In some cases the judge may reduce that amount in entering judgment. In other cases the parties may enter into a high-low agreement prior to the verdict. Often, cases with high-low agreements are not disputes about the health provider's liability but rather about the amount of the damages. In other instances high-low agreements may reflect the fact that the two sides recognize that the issue of liability is about a fifty-fifty probability and both become risk-averse. As a consequence, they enter into a mutual agreement that prevents an extreme outcome, such as the plaintiff

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[42] See Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us about Jury Behavior and the Tort System.* 27 SUFFOLK UNIVERSITY LAW REVIEW 1205 (1994/1996).

[43] The trials include medical malpractice lawsuits against medical doctors defined as having MD degrees and hospitals and their employees. Malpractice lawsuits against dentists, podiatrists chiropractors, physical therapists, pharmacies and nursing homes or other healthcare providers that did not include MDs or hospitals as defendants are not included in this research. A few cases classified as medical malpractice were actually slip and fall or contract disputes and were eliminated from consideration.

receiving nothing or the defendant being faced with a catastrophic damage award.[44]

Plaintiffs may settle for the limits of the defendant's medical liability insurance coverage rather than press for the full judgment.[45] In other cases the plaintiff may agree to settle for less than the judgment to avoid the defendant's appeal of the verdict, possibly losing everything if the judgment is overturned, but in any event suffering a long delay in receiving any money through the long delays as the case winds its way through the appeals courts. Additionally, an appeals court may overturn the verdict and the judgment or the amount of damages may be reduced.

A final reminder is that a plaintiff who loses at trial against one or more defendants may still receive substantial sums of money from other defendants in the lawsuit who settled prior to trial. The jury will not be aware of these agreements when they render their verdict. In some instances in which the plaintiff does prevail at trial, the amounts of prior settlements by other defendants will be deducted from the judgment, a deduction called a "set-off." The case summaries, reported below, find examples of these various settlement outcomes.

The final caution is that these data do not tell us if the jury verdict was correct on either the issue of liability or the amount of damages. There is no absolute truth about right or wrong. Cases come to trial because there is a dispute about either liability or damages or both. Under the law the resolution of the dispute is left to the jury and the trial judge who enters the judgment. In appealed cases, appellate courts review whether the decisions of the judge and jury were correct. They may overturn verdicts or awards.

The central lesson to keep in mind is that jury verdicts can be less or can be more than what is reported in the newspapers and portrayed by the parties on both sides of the dispute about tort reform. This chapter will report not only

[44] Importantly, the jury and, most likely the judge, will be totally unaware of this high-low agreement.
[45] See, Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOCIETY REVIEW, 275, 284-85 (2001).

damage verdicts but separately report some of these "hidden" outcomes. The year 2001 was chosen for detailed study for several reasons. It is the year studied by the Bureau of Justice Statistics. The year 2001 is a year when the problem with medical malpractice insurance began to be publicly recognized. Most important, the three-to-four-year time gap between 2001 and 2005 allows time for post-verdict settlements and for contested verdicts to be scrutinized by appellate courts, permitting insight into final outcomes of jury trials.

**Plaintiff Verdicts and Adjustments in 2001**

The *Cook County Jury Verdict Reporter* data indicate there were a total of 99 medical malpractice jury trials in Cook and DuPage counties in 2001.[46] Plaintiffs prevailed in 30 of these cases, a 30 percent win rate.[47] Table 3.5 reports the name of the case, a short description of the plaintiff's claim, the amount of the verdict, and any post-trial adjustments to the verdict. The footnotes in the table report the nature of the adjustment, but each of these cases is subsequently discussed in more detail in the paragraphs that follow.

[46] Again note that these data are more comprehensive than the Bureau of Justice Statistics data discussed in the previous section.
[47] In a small number of cases the jury was deadlocked. Deadlocked juries are treated as a defense win since the plaintiff bears the burden of proof. The plaintiff has a right to have the case retried.

**Table 3.5: Plaintiff Verdicts and Adjustments in Cook and DuPage Counties, 2001**

| Case | Claim | Amount of Award | Award after Adjustment |
|---|---|---|---|
| Bryant v. LaGrange Memorial Hospital , Kim & others | Birth injury-cerebral palsy | $30,000,000 | $1,100,000 [a] |
| Lawler v. Lamont | Delayed cancer diagnosis | $3,800,000 | $3,800,000 [b] |
| Brewster v. West & two others | Foot fracture misdiagnosed : subsequent surgery | $170,000 | $170,000 |
| Aceves v. Orihuela | Bile duct cut-reconstructive surgery | $467,900 | $467,900 |
| E. Munoz v. Clemis & others | Delayed cancer diagnosis: larynx surgery; chemotherapy | $2,495,893 | $2,495,893 |
| D. Munoz v. Herman & others | Mis-diagnosis: testicle removed | $150,000 | $0 [c] |
| McNamara v. Grimaldi | Informed consent re vasectomy: pain and suffering | $317,000 | $317,000 |
| Matthews v. Gottlieb Memorial Hospital | Stillborn birth | $3,781,393 | $3,781,393 |
| Genovese v. Caro | Cornea puncture: subsequent surgery | $494,906 | $494,906 |
| Willis v. Bracket & others | Hip surgery: corrective surgery | $120,608 | $120,608 |
| Bales v. Groya & others | Misdiagnosis: leg amputation | $2,812,553 | $2,812,553 |
| Washington v. Wilczynski & others | Diagnosis delay: loss of testicle | $200,000 | $200,000 |
| Gonzales v. Pla | Undiagnosed kidney disease requires transplant | $1,191,256 | $950,000 [d] |
| Waliczek v. Gutta | Other patient's blood thinner given: Death | $6,500,000 | $800,000 [e] |
| Stajsczyk v. MacNeal Memorial Hospital & others | Jugular vein puncture: death | $801,643 | $801,643 |
| Thomas v. Hosain & others | Antibiotic delay: death | $835,000 | $835,000 |
| Matei v. Patel & others | Premature discharge: infant dies | $525,000 | $525,000 |
| Skonieczny v. Gardner & others | Birth injury: nerve damage (Erb's palsy) | $13,298,052 | $2,000,000 [f] |
| Christy v. Cavanaugh | Misdiagnosis brain disease: pain and suffering | $2,500,000 | $2,500,000 |
| Cork v. Cook County Hospital | Improper management of injury: child dies | $5,300,000 | $0 [g] |
| Simpson v. Allswede & others | Tracheal tube damage to child burn victim | $2,563,492 | $1,900,000 [h] |
| Cummings v. Suprenant & others | Excessive radiation: severe burns | $1,250,000 | $1,250,000 |
| Salas v. Michael Reese Hospital & others | Unnecessary surgery: death of toddler | $2,750,000 | $2,750,000 |
| Guerin v. Yu & others | Death of mother following C-section | $7,622,040 | $7,000,000 [i] |
| Banis v. Loyola U Hospital& others | Surgery & misdiagnosis: amputation below elbow | $1,710,000 | $1,710,000 |
| Perrier v. Feinstein & others | Penile implant infection | $218,626 | $218,626 |
| Gonzalez v. St. Mary of Nazareth Hosp. & others | Misdiagnosis of stroke: death | $1,250,000 | $1,255,000 [j] |
| Schlindler v. Lipshitz | Prostatectomy & rectum puncture: eventual death | $1, 262,748 | $1, 262,748 |
| Macias v. St. Anthony Hosp | Absence of lab work: baby later dies | $1,500,000 | $1,400,000 |
| Carroll v. Barrows & others | Misdiagnosed eye cancer; toddler blind both eyes | $7,962, 024 | $2,000,000 [k] |

Notes: a: Loyola dismissed after settling for $100,000 before trial; plaintiff accepted Kim offer of policy limits during jury deliberations. b: Appealed, judgment affirmed. c: Two defendants settled before trial; setoff leaves on $4,000 judgment for costs. d: High-low ($150,000-$950,000); e. High-low ($350,000-$800,000 during jury deliberations. f. High-low agreement before verdict for policy limits of $1million for two defendants. g. Reversed on appeal; remanded for new trial. h: Post-trial settlement. i: High-low agreement ($500,000-$7,000,000) during deliberations. j: Case settled post-trial. k: Case settled for policy

From the data in Table 3.5 a quick calculation will indicate that the mean (average) verdict was $3,461,671. However, the last column in the table shows that at least seven of the verdicts were adjusted downward. The mean adjusted verdict when plaintiffs prevailed at trial was substantially lower, namely $1,465, 609, forty-two percent lower than the unadjusted figure.

The downward adjustment is very likely a conservative figure since post-trial settlements of awards may occur after the verdict reporter summaries are published. Additionally some settlements are kept confidential as a condition of settlement. Nevertheless, the central finding from Table 3.5 confirms a view that the amount that the jury awards the plaintiff is frequently not the end of the story. The amount actually paid may be substantially less.

**Further Exploration of the 2001 Plaintiff Awards Involving $1 Million or Over**

Table 3.5 does not give much detail about the case and its outcome. In this section short summaries of the cases over $1 million are presented. The summaries are from the *Cook County Jury Verdict Reporter*, supplemented by research on *Westlaw* and *Findlaw* databases and calls to lawyers who represented parties in the case.[48] Note again that the summaries do not allow an assessment of whether the jury verdict was correct or incorrect by some absolute standard as to either negligence or the amount of damages. In some instances the defense or plaintiff position regarding the claim is missing from the summaries. Some of the cases may still be on appeal and in others the case may have settled in the aftermath of the verdict. Nevertheless, the summaries provide a perspective on what was at issue in the case.

[48] In the footnotes below I report the court's docket number and beginning date of trial taken from the data supplied by the *Cook County Jury Verdict Reporter*. Unless otherwise noted the summary is taken from that source. In some instances the summary is supplemented from another source and this is noted as appropriate. In appealed cases the docket number of the appellate court is provided.

*Bryant v. La Grange Memorial Hospital, Kim, Nath and Loyola University Hospital*[49] involved a claim that in 1995 Dr. Kim was negligent in delaying a Caesarian section following signs of distress in the infant and that hospital employees also were negligent. The child suffered severe cerebral palsy and cannot walk or talk and is totally dependent but cognitively intact. The jury deliberated 7 hours and found only against Dr. Kim for $30 million. ($15 million disability; $4 million pain and suffering; $4 million disfigurement; $5.5 million for future medical expenses; $1.4 million for lost earnings and $116,700 for past medical expenses. Loyola University hospital and its employee, Dr. Nath, settled for $100,000 prior to trial and the plaintiff accepted Dr. Kim's offer of his $1 million policy limit during the jury's seven hours of deliberations. The plaintiff subsequently appealed the verdict in favor of LaGrange Memorial Hospital but a unanimous opinion of the Third Division Appeals Court affirmed the verdict favoring LaGrange.[50]

*Lawler v. Lomont*[51] involved a 1997 hysterectomy for cancer following a pathologist who misread Pap smears from 1994 through 1996, allowing stage 1 cancer to spread. The defense admitted liability but contested the likelihood of cancer reoccurrence and argued that the plaintiff had infertility problems before the surgery. The DuPage jury award of $3,800,000 ($2.5 million pain and suffering; $1.2 million loss of a normal life; $100,000 disfigurement) was appealed by the defendant, but the appellate court upheld the award.[52] The case settled for the full amount of the verdict.[53]

*Munoz v Clemis, Garcelon* and *Health Care Service Corp*[54] involved a 40-year-old woman who claimed that her HMO physician and a second physician failed to perform a timely biopsy following complaints of hoarseness. Due to delays the plaintiff lost confidence in her doctors and sought a new physician. The new physician diagnosed throat cancer. The plaintiff underwent surgery

[49] 96L-11679 (Tried July 16, 2001).
[50] Findlaw, Third Division, Illinois Court of Appeals, No.1-02-0518 (Dec 17,2003).
[51] 99L-555 (Tried June 11, 2001)
[52] Ill. App. Ct., 2nd District, No. 2-01-1307
[53] Telephone call to plaintiff lawyer on May 5, 2005.
[54] 2001 WL 34554111; JVR no. 412, 296.

that removed three-fourths of her voice box and required a tracheostomy. The jury returned a verdict of $2,495, 893 against all defendants , broken down as follows: $335,000 aggravation of pre-existing ailment or condition; $500,000 disfigurement resulting from the injury: $500,000 past and future disability: $1,000,000 past and future pain and suffering; $108,593 medicals; and $52,300 lost wages. The HMO was found liable under a claim of vicarious liability. (Prior to trial the plaintiff demanded $3,200,000 and the defense offered $41,000.) (The specialist physician to whom the plaintiff was referred by her primary physician was not mentioned in the trial summary and may have settled separately with the plaintiff prior to trial, but no further information could be obtained.)

*Matthews v. Gottlieb Memorial Hospital* [55] involved the estate of a stillborn girl at 42 weeks gestation. The hospital admitted liability and the trial involved only the matter of damages for the parent's "loss of society." Reportedly, a judge recommended a settlement of $600,000 to $700,000 and counsel agreed but the parents refused preferring to have a jury decide the case. The jury awarded $3,781,392 ($1,875,000 for each parent's loss of society plus $31,393 for funeral and medical expenses). The defendant appealed the verdict, but the three-judge appeals court unanimously affirmed the verdict.[56] Among other rulings, the appeals court ruled that the trial judge properly barred certain evidence because during discovery the defendant failed to disclose evidence requested by the plaintiff and ruled against a defense complaint about improper comments by the plaintiff's lawyer in closing arguments because the defense did not object in a timely manner. The court further rejected a defense argument that the trial judge inappropriately admitted certain medical expenses.

[55] 97L-12643 (Tried June 12, 2001)
[56] Appellate Division, 1st District, 4th Division No.1-02-0853, 6 ARD 36.

*Bales v. Groya, and Community Orthopedics* [57]concerned a 33-year-old-roofer who was injured in a fall and fractured his right lower leg. Surgery was performed but plaintiff claimed that a subsequent infection was improperly treated and the plaintiff was never hospitalized. A second surgery by another physician amputated the leg below the knee. The defense claimed the plaintiff had refused hospitalization after the infection developed. The jury awarded $2, 812,553 ($750,000 for disfigurement, $100,000 for past loss of normal life; $350,000 for past pain and suffering; $150,000 for future pain and suffering; $200,000 for future medical expenses, $52,553 for past medicals and $500,000 for future lost lifetime earnings.)

*Gonzales v. Pla* [58] involved a claim that a primary care physician's failure to diagnose kidney disease resulted in a 43-year-old male requiring a kidney transplant. The defendant argued at trial that his care was proper and that in any event the plaintiff would have required a kidney transplant and further that the plaintiff did not make a return visit to his office as instructed. The jury returned a verdict of $1,191,256 for the plaintiff. However, during jury deliberations the parties made a high-low agreement ($150,000-$950,000) on the doctor's $1 million liability policy. Thus the plaintiff received $950,000.

*Waliczek v. Ghandhigutta and Alexian Brothers Medical Center*[59] involved the death of a 47-year-old construction worker who was hospitalized following a construction accident. The man had multiple fractures in his arms, wrists and legs, bleeding in the stomach and a small amount of bleeding in the brain. The plaintiff's estate contended that the man was administered the blood thinning agent heparin intended for another patient. The defendants disputed both negligence and causation. On June 28, 2001 the jury rendered a verdict of $6,500,000. However, while the jury was deliberating the parties entered into a high-low agreement of $350,000-$800,000.

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[57] 97L-12643 (Tried June 12, 2001)
[58] 97L-9163 (Tried January 11, 2001).
[59] 2001 WL 34004686; ZARIN'S MEDICAL LIABILITY ALERT, Vol. 10, Issue 2. 97L-8110 (Tried June 15, 2001)

*Skonieczny v. Gardner, Northwest Professional Obstetrics and Gynecology, Levy and Northwest Community Hospital* [60] concerned a claim that a brachial plexus injury during delivery resulted in permanent loss of the use of the child's left arm and shoulder plus the likelihood of future arthritis and pain. The plaintiff claimed that the obstetrician applied excessive traction to the baby's head and that hospital nurses inappropriately pushed down on the mother's stomach during delivery. The jury awarded $13, 298,052, but defendant Levy was found not liable. Defendants Gardner and Northwest Professional entered into a high-low agreement of $1 million to $2 million with the plaintiff before the verdict. Each defendant had a $1 million policy limit.

*Christy v. Cavanaugh* [61] involved a claim brought by the family of a man who died in 1997 from complications associated with Huntington's Chorea, an incurable disease of the nervous system. The family contended that for seven years a psychiatrist had misdiagnosed the symptoms as due to depression, therefore preventing treatment that would have abated the man's symptoms and mitigated the pain and suffering by the man and his family. They contended that the worsening symptoms should have resulted in a referral to a neurologist who would have conducted proper testing. The defendant denied negligence and contended that the physical manifestations typically associated with this rare disease were not noticeable in the patient. In May 2001 the jury awarded $2,500,000.

*Cork v. Cook County Hospital*[62] concerned a 12-year-old female who was admitted to the hospital in 1991 with a severe windpipe injury following a suicide attempt. She was discharged in stable condition but subsequently readmitted. The lawsuit claimed that upon readmission following breathing difficulties, inexperienced hospital personnel attempted to intubate her at bedside rather than in an operating room. As a result, it was claimed, she was deprived of oxygen, suffered irreversible brain damage and died four days later.

[60] 98L-4578 (Tried May 7, 2001).
[61] 2001 WL 1855179; ZARIN'S MEDICAL LIABILITY ALERT, Vol. 10, Issue 6. 98L-4578 (Tried May 7, 2001).
[62] 99L-14351 (Tried May 2, 2001).

The defense claimed the child died from pneumonia and other symptoms. A favorable plaintiff verdict was overturned. This was the second trial and the jury rendered an award of $5,300,000. However, on appeal in 2003 the First District Appellate Court, Fourth Division, again reversed and remanded the case for a third trial. A rehearing was denied in 2004.[63]

*Simpson v. Allswede and Midwest Emergency Services, Ltd.*[64] involved a claim that an emergency room physician used a wrong sized tube to intubate an eight- year-boy who was admitted with severe burns to his face and torso following explosion of an aerosol can. The plaintiff also claimed that the intubation was unnecessary because, despite the burns, there was no indication of difficulty in breathing or hoarseness. The tube remained in place for approximately a week. Ultimately the boy had to undergo a tracheostomy that remained in place for five years plus undergo three additional surgical resections. As a teenager the boy had made a good recovery and could speak normally and breathe easily. On May 8, 2001 the jury returned a verdict of $2, 563,492 ($1.1 million for pain and suffering; $550,000 disfigurement; $650,000 for loss of a normal life; $263,492 for medical expenses). The case is reported elsewhere as settled post-verdict for $1,900,000.[65]

*Cummings v. Suprenant, Midwestern University, and Olympia Fields Osteopathic Hospital*[66] asserted that the plaintiff suffered excessive burns on his back from a fluoroscopy plus an increased risk of getting cancer. The defendant cardiologist contended that proper consent was obtained, that the exposure was limited, the radiation was in the appropriate amount and that the plaintiff was possibly unusually susceptible to radiation. The jury returned a verdict against the doctor for $1,250,000 ($500,000 medical expenses; $500,000 pain and suffering; $250,000 for disfigurement: $0 for disability). The

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[63] Appellate Court of Illinois First District, Fourth Division , No. 1-02-1009 (December 11, 2003); Appellate Court of Illinois First District, Fourth Division No. 1-02 1009 ( February 26, 2004).
[64] 2001 WL 1855179; 10 ZARIN'S MEDICAL LIABILITY ALERT 6:34 . 96-4608 consolidated with 96L-4770 ( Tried April 30, 2001).
[65] Westlaw WL 34395032, JVR No. 409, 786.
[66] 97L-7658 (Tried March 27, 2001).

hospital was dismissed mid-trial in a $75,000 settlement that was set off against the verdict.

*Salas v. Columbia Michael Reese Hospital, Organ, Podorovsky, Carranza and Leland* [67] involved a wrongful death claim involving a two-year-old girl. The girl was developmentally delayed, had congenital heart disease and chromosomal defects. In January 1997, she developed respiratory distress and was admitted to Michael Reese Hospital because X-rays showed a collapsed left lung; she could not breathe without supplemental oxygen. A CT scan of poor quality suggested a tumor but a second scan was negative. The plaintiff's family claimed that surgery was a high risk because of the collapsed lung and pneumonia. They also claimed there was no informed consent for the procedure because the mother only signed consent for a 'mini-thoracotomy,' while the doctor performed a standard thoracotomy. Also, plaintiff claimed that the anesthesiologist, should have used singular lung ventilation to protect against secretions. The defense claimed surgery was necessary even if the CT scan was negative because the source of the compression needed to be diagnosed and that single lung ventilation was impractical on a 2-year-old. Following a fifteen-day trial the jury awarded $2,750,000 for wrongful death against Michael Reese hospital, Organ and Podorovsky. Carranza was found not liable and Leland received a directed verdict. The plaintiff had asked the jury for $15 million. Post-trial motions were filed in this case but no additional information was available.

*Guerin v. Yu and Rush Prudential HMO* [68] is a case in which a mother gave birth by Caesarian section. The mother was discharged from the hospital but a post-partum examination showed excess bleeding. It was alleged that the defendant was negligent in failing to test the level of hemoglobin. She eventually was rushed to a hospital and underwent four surgeries to stop the bleeding but then developed Adult Respiratory Syndrome and died, survived by her husband and newborn child. The defense argued that the doctor's actions

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[67] 2001 WL 34030899; NATIONAL VERDICT REPORTER. 97L-1732 ( Tried Feb 20, 2001).

[68] 96L-15058 ( Tried March 19, 2001).

were not the proximate cause of death. The jury awarded $7,622,040 against both defendants for survival pain and suffering ($1 million), medical and funeral expenses ($92,940), funeral expenses ($4,100), lifetime earnings ($750,000) loss of household services ($275,000) loss of society to husband ($2.5 million) and loss of society for newborn child ($2.5 million). During deliberations the parties entered into a high-low agreement ($500,000-$7 million).

*Banis v. Loyola University Hospital and Dobozi* [69] involved a claim from a patient admitted to the hospital in a coma with several fractures, pulmonary contusion and a brain injury following an automobile accident . The plaintiff asserted that hospital staff did not check his forearm, which developed compartment syndrome and turned necrotic. All of the patient's left forearm muscles had to be removed and all subsequent physicians had recommended amputating the arm below the elbow. The defense argued that the compartment syndrome is an extremely rare complication in such cases and that the defendant's comatose state made diagnosis of compartment syndrome difficult. The jury awarded $1,700,000 against both defendants for disability ($570,000), disfigurement ($570,000) and pain and suffering (570,000). The case settled for the amount of the verdict.[70]

*Gonzalez v. St. Mary of Nazareth Hospital, Gonzalez, and Joshi* [71] involved a male patient, age 61, admitted to the hospital with symptoms consistent with a transient ischemic attack or stroke. Following treatment and tests the man died. The plaintiff's estate contended that the treatment deviated from the standard of care by administering a blood thinner and not conducting sufficient tests to determine if hemmoraging might be taking place. The hospital admitted that it failed to communicate the results of tests but denied negligence, liability or the proximate cause of the man's death.The physician's denied a duty to contact the hospital for lab results and asserted that it was

[69] 97L-3408 ( Tried March 2, 2001)
[70] Telephone call to plaintiff lawyer on May 5, 2005.
[71] 96L-14398 (Tried January 30, 2001).

reasonable to rely on the protocol of the hospital and its nursing staff. The jury found the two doctors not liable but awarded $1,250,000 against the hospital: $1,250,000 for loss of society , but nothing for pain and suffering and disability. The case settled for $1, 255,000.

*Schlindler v. Lipshitz*[72] involved a prostatectomy on a man, age 71 in 1995. During the procedure the man's rectum was perforated. The error was immediately recognized and repaired. The patient was discharged without further tests. The man returned to the doctor's office reporting that his stool was leaking into the incision. The doctor noted the man probably had a developing fistula and sent him home with instructions to take sitz baths and change back to a soft diet. At trial a plaintiff's surgeon said that the man should have had a colostomy at that time. A colostomy was eventually performed and then reversed. However, the fistula reopened and the man died from complications. The defendant doctor asserted that all decisions that were made were judgment calls and within the standard of care. Further, the defendant contended that the decision to reverse the colostomy was solely that of the surgeon who performed it and the decision was the sole proximate cause of the subsequent injuries and death. The defense made a high-low offer during jury deliberations of $15,000-$1,000,000 during jury deliberations (the summary is unclear as to whether the offer was accepted). The jury returned a verdict of $1, 262, 748 ( $600,000 for wrongful death , $462,748 for medical expenses; and $200,000 for survival pain).

*Macias v. St. Anthony's Hospital*[73] involved a child born in 1995. Blood samples were drawn as required by the Illinois Department of Public Health. The newborn child was not feeding well and developed jaundice. She was admitted to another hospital , transferred to the University of Chicago Hospital where she died. At trial the evidence indicated that the blood samples were not received by the Illinois Department of Health lab until 13 days after they were drawn. The results indicated that the baby had a congenital metabolic defect

[72] 97L4830 (Tried February 2, 2001).
[73] 97L-6675 (Tried January 30, 2001).

that , if detected, could have saved her life. The hospital argued that the samples were sent on a timely basis and that the child died from an unrelated influenza infection ( an opinion supported by the treating physician). The jury awarded $1,500,000 ($1 million for survival pain and suffering, $42,705 for medical expenses and $457, 295 for loss of society). The case was subsequently settled for $1,400,000.

*Carroll v. Barrows, Barrows and Brown* [74] was a lawsuit claiming that the defendants failed to properly diagnose abnormalities in the eyes of a child during seven visits during his first year of life. When the child was seen by the physician's partner the abnormalities were detected and the child was referred to a specialist who detected signs of cancer. The child subsequently had radiation and chemotherapy treatments but eventually lost both eyes. The plaintiff's experts testified that if the child's condition had been diagnosed earlier there was a greater than fifty percent chance that vision could have been saved. The defense maintained that a pediatrician could miss the diagnosis if a portion of the eye was normal, that the patient's form of cancer could not have been treated in any event and that an earlier diagnosis would not have changed the outcome. The jury awarded $7,962,024 against both defendants (1 million for disfigurement; $3.5 million for disability; 1 million for pain and suffering , $152, 224 for medical expenses and $2, 309,800 for lifetime earnings). The case settled for the $2 million policy limits of the defendants.[75]

**Selected Defense Verdicts Involving Payments to Plaintiffs**

In Chapter 2 attention was drawn to the fact that even when plaintiffs lose against some defendants at trial they may nevertheless recover money from other defendants. Of the 72 defense verdicts there are some examples to illustrate this fact.

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[74] 96L-13562 (Tried January 17, 2001).
[75] Confirmed by a phone message from the plaintiff's lawyer to Vidmar on April 28, 2005