**WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS**

# 2005-06
(session year)

# Assembly
(Assembly, Senate or Joint)

# Task Force on Medical Malpractice (ATF-MM)

Sample:

Record of Comm. Proceedings ... RCP
- 05hr_AC-Ed_RCP_pt01a
- 05hr_AC-Ed_RCP_pt01b
- 05hr_AC-Ed_RCP_pt02

- *Appointments ... Appt*
- **

- *Clearinghouse Rules ... CRule*
- **

- *Committee Hearings ... CH*
- **

- *Committee Reports ... CR*
- **

- *Executive Sessions ... ES*
- **

- *Hearing Records ... HR*
- **

- *Miscellaneous ... Misc*
- **05hr_ATF-MM_Misc_pt47b**

- *Record of Comm. Proceedings ... RCP*
- **

*Foley v. Lutheran General Hospital*[76] involved a third trial in a case in a wrongful death lawsuit. The other two trials involved deadlocked juries in which a majority of jurors (11:1 in the first trial and 9:3 in the second trial) favored the plaintiff. The plaintiff's estate claimed that in 1993 her bowel was perforated during a tubal ligation and she subsequently became physically distressed and died from sepsis. Although the hospital's policy was that their laboratory call a panic button when lab results showed a panic situation, the log book that would document a panic call was missing. The defense argued that the most likely cause of death was a pulmonary embolism. The plaintiff was survived by her husband and two daughters, ages 4 and 7months. The jury sided with the defense in this third trial. However, the parties entered into a high-low agreement during deliberations of $1 million versus $5 million. The plaintiff's estate thus received $1,000,000 from the hospital and $900,000 from another original defendant who settled with the estate before trial.

*Marcial v. Michael and St. Anthony's Hospital*[77] involved a wrongful death claim from the estate of a 65-year old female who fell down stairs and was admitted to the hospital. The plaintiff's estate asserted that the treating physician made a misdiagnosis of a pulmonary embolism and administered the blood thinner Heparin.The patient developed sepsis and died after approximately four weeks. The defense argued that the diagnosis was proper as was the treatment. Although the jury sided with the defendants, the parties had a high-low agreement of $50,000 -$1 million. The woman's estate received $50,000 from the defendant plus a pretrial settlement with the hospital for $30,000.

*Jones v. Jordan*[78] involved a claim that the defendant was negligent in failing to diagnose meningitis in an 86 day-old child resulting in quadraplegia and severe mental retardation ( an IQ of about 30). The plaintiff claimed that the doctor recommended giving the child castor oil rather than examine the

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[76] 95L-5339 (Tried January 5, 2001).
[77] 96L-50363 (Tried March 14, 2001).
[78] 96L-13425 (Tried September 10, 2001).

child. Two persons corroborated the mother's version of events. The doctor denied that he recommended castor oil for a child under two and that even if a phone call of some kind had taken place the standard of care would not require that the child be seen immediately. The jury sided with the defense. In earlier proceedings the HMO that employed the treating doctor was dismissed from the lawsuit by the judge, but the summary judgment was reversed by the Illinois Appellate Court with an order for a new trial. Prior to the trial the HMO settled with the defendant for $1,700,000.

*Gamboa v. Christ Hospital and Sternquist* [79] was a lawsuit alleging that a premature baby fell out of an isolet in the intermediate care nursery and suffered a skull fracture. The child now has cognitive, speech and language deficits. The defense argued that its nurse complied with the standard of care, that the child suffered only superficial bleeding from the fall, and that the deficits were associated with his prematurity. The jury supported the claims of the defendants. Just before the jury rendered its verdict the parties entered into a high-low agreement of $1 million versus $3 million, resulting in the plaintiff receiving $1 million.

*Thomas v. Habid and University of Chicago Hospital* [80] was filed after a patient presented to the treating physician with a distended stomach and was treated for megacolon with several medications in 1994. The patient improved, but in 1995 was hospitalized with respiratory distress and other symptoms and was later found dead in the hospital's commode. His estate claimed the cause of death was respiratory failure caused by pressure on his diaphragm and lungs from a megacolon. The defense countered that the patient died of an unrelated cardiac problem. The defendant physician was found not liable. However, the hospital was dismissed from the lawsuit after it settled for $1 million at the start of trial.

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[79] 96L- 2442 (Tried September 17, 2001).
[80] 96L-6604 (Tried August 20, 2001).

*Allen v. Kirby and Harvey & Associates* [81] involved a malpractice claim by a lawyer who alleged that he became blind after negligent treatment. In 1995 she entered the emergency room of Columbus Hospital with complaints of severe headache and blurry vision. She was diagnosed with sinusitis, her personal physician was contacted and the physician prescribed an antibiotic and Tylenol #3 by phone. The patient became worse, the doctor advised her to discontinue the Tylenol and make an office visit the next day. Instead the patient went two days later to the emergency room at Nowrthwestern Memorial Hospital and was diagnosed with a blood clot that resulted in strangulation of the optic nerves. Plaintiff is now totally blind and needs a seeing eye dog. The physicians who subsequently treated the patient and other experts testified that had she been diagnosed earlier, vision would have been saved. The jury found both defendants not liable, but there was a high-low agreement of $200,000 - $1,950,000 and thus the plaintiff received $200,000.

*Brandonisio v. Kahan and Ob-Gyne Specialists* [82]involved a case in which an iliac artery was cut during a laproscopy. When bleeding occurred, open surgery was conducted to repair the injury. The plaintiff claimed ongoing numbness and weakness in her left leg as a result of the surgery. The defense argued that the injury was immediately recognized and they took proper corrective action. Although the jury sided with the defendants, a high-low agreement of $200,000-$1 million just prior to closing arguments resulted in a payment of $200,000.

*Hanson v. Kanuri and Hinsdale Anesthesia Associates* [83] concerned a claim that an anesthesiologist failed to take proper cautions involving a 63-year–old man who had recently been taking Coumadin, a blood thinner prior to undergoing surgery on his spine. The man died. The defendant anesthesiologist contended that the surgeon was responsible because he had cleared the patient for surgery and in addition had failed to alert him of the need to

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[81] 96L-9932, (Tried November 13, 2001).
[82] 97L-16429 (Tried June 15, 2001).
[83] 98L-1361 (Tried August 13, 2001);

terminate the anesthesia sooner because of excessive bleeding. The DuPage County jury found for the defendants. However, while the jury was deliberating, the parties reached a high-low agreement of $1 million versus $3 million, subject to a setoff for a pretrial settlement by Hinsdale Hospital. In short the plaintiff received $1 million despite losing at trial.

*Goodman v. University of Illinois Hospital* [84] is a case that ended in a hung jury with nine of the twelve jurors favoring the defendant. A baby born with a congenital heart defect underwent corrective surgery in 1995, but a subsequent infection developed and he died in 1996. The defense argued that the surgical treatment was appropriate. During the jury selection for a second trial the case settled for $600,000.

*Fleming v. Murphy* [85] Involved a plaintiff who was admitted to Northwest Community Hospital for repair of an abdominal aortic aneurysm. Following the surgery the man became paraplegic, dependent on a wheelchair and leg braces. The defendant surgeon asserted that he met the standard of care and said that the paralysis is a known, though rare, complication of the surgery. The jury was deadlocked 10 to 2 and the case subsequently settled for $300,000.

Several other defense verdicts against doctors had pre- or mid-trial settlements of $25,000 by hospitals that had been named as co-defendants.

In *Egenou v. Elahi and Weiss Memorial Hospital* [86] the jury rendered a defense verdict in a case involving a claim that intubation left a woman in a vegetative state. The judge ordered a new trial. No other information about the case could be found.

**A Multi-Million Dollar Settlement in 2001**

In addition to the above jury verdicts, there was a multi-million dollar settlement in 2001 that was reported for Cook County. Settlements are important because they reflect upon the costs incurred by medical providers

[84] 97L-16429 (Tried June 15, 2001).
[84] 97L-3636 (Tried Feb 1, 2001).
[85] 98L-11451 (Tried June 11, 2001).
[86] 96L-12640 ( Tried Jan 2, 2001).

and their insurers. The case is probably an exceptional case, but it gives a glimpse of the less visible side of medical malpractice litigation in Illinois.

*American National Bank and Trust v. Advocate Health and Hospitals, Corp.*[87] involved a settlement of $12,000,000 following the birth of triplets in 1993. Two of the children were born with spastic cerebral palsy and brain damage; the third child, also suffering with cerebral palsy and brain damage, died in 1997. Of the $12 million total, $5.5 million was awarded for one child, $3 million for the second child, $2 million to the estate of the third child for wrongful death and $1.5 million to the parents of the children under the Family Expense Act. The claim was based on the assertion that the health care providers were negligent in not informing the parents of the risks of triplet pregnancies, failing to examine the mother on a timely basis when premature labor began and failure to provide appropriate medicines on a timely basis after delivery by Caesarian section. Lutheran General Hospital was self-insured and paid $2 million while St. Paul Insurance Company paid $10 million for the other two defendants.

**Cook and DuPage Jury Verdicts: 2002-2004**

I also obtained data on jury verdicts in Cook and DuPage counties for 2002, 2003 and 2004. The problem with these data for this report is that post-verdict adjustments often take many months and are often not available in initial verdict reports. As demonstrated with the 2001 data, without these adjustments the verdicts can be quite misleading. As a consequence, I report only the frequency of jury trials and plaintiff win rates for the combined counties.

Table 3.6 reports the frequency of jury trials and plaintiff win rates for Cook and DuPage counties for 2001 through 2004.

[87] 2001 WL 34030866, 96L-05765 ( 2001).

**Table 3.6: Jury Trial Frequency and Plaintiff Win Rates in Cook and DuPage Counties (Combined): 2001-2004**

| Year | Trial | Win rate |
|---|---|---|
| 2001 | 99 | 30% |
| 2002 | 110 | 37% |
| 2003 | 99 | 36% |
| 2004 | 97 | 30% |

The table shows that in 2002 trial frequency changed from 99 trials in 2001 to 110 trials, an increase of 10 percent. The table also indicates that the plaintiff win rate jumped 7%. However, in 2003 frequency of trials returned to 99 although plaintiffs win rate was 36%. In 2004 there were two fewer trials than in 2001 and the win rate returned to 30%. In short, there is no evidence of increasing jury trials or increased win rates over the four-year period. Remember also that the trials in all of these years were based on lawsuits that on average were filed between three and six years earlier than the trial date.

**Summary and Conclusion**

The statistics and case summaries presented in this section are compilations and case summaries collected by others and checked, where possible, against other sources. The summaries of the issues in the case may contain details or omissions that parties to the actual cases may contest. Nevertheless, the *Cook County Jury Verdict Reporter* data appear to be generally accurate. With the one exception of *National Bank and Trust,* they speak only to outcomes of jury trials, which may constitute only ten percent or fewer of all malpractice claims during 2001 since the overwhelming majority of claims are settled without jury trials.[88]

But since Cook and DuPage counties contain approximately one half of the population of Illinois and approximately two-thirds of its non-federal treating physicians and much of the debate about problems with the tort

[88] See Vidmar et al, *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida,* 54 DEPAUL LAW REVIEW 315(2005); NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at pages 24-25.

system focus on jury decisions, some important findings emerge from the analyses. There was a modest increase in medical malpractice case filings between 1996 and 2004, but when adjusted for the growth in physicians who treat patients there is no evidence of a medical malpractice claims increase. The data from the federal Bureau of Statistics study raise questions about comprehensiveness but they do show no increase in jury trials between 1996 and 2001.

Jury verdict reports from the *Cook County Jury Verdict Reporter* appear to be a comprehensive survey and provide more details about jury trials than other sources. These data show no increases in jury trials or in plaintiff win rates between 2001 and 2004.

Trial outcomes are a matter of judgment. The claims in many of the trials that are summarized involve very serious injuries or death. Trials occur when the plaintiff and the defendants cannot agree on legal liability or the amount of damages. Different readers could undoubtedly draw different opinions about the verdicts if they heard the same evidence that the jury heard.

What we can draw from the findings is that in cases where plaintiffs prevailed, twelve citizens of the State of Illinois, some who voted Republican and some who voted Democrat, heard the evidence and unanimously agreed on a verdict. In the vast majority of the cases a trial judge agreed with the verdict and entered judgment. We can also draw a conclusion that the judgment was not always the final word. Sometimes a trial judge or an appellate court overturned the verdict. In other instances the parties settled for much less than the verdict. Some very large verdicts actually settled for the limits of the insurance coverage. In other instances the parties entered into high-low agreements before the verdict. Although the final settlements of some cases could not be determined, the post trial adjustments that were available indicate that the mean adjusted verdict was much less than the original verdict—in one instance, from $30 million to $2 million. The data also show that some plaintiffs who lost at trial against one or more defendants still ended up with large settlements from other defendants.

The findings from Cook and DuPage counties account for high percentages of Illinois' population and Illinois doctors. Can they be generalized to the rest of the state, especially if, as some have claimed, there are "judicial hellholes" in certain smaller Illinois counties? Chapter 4 turns to an examination of Madison and St. Clair counties.

# Chapter 4

## A Close Look at Madison and St. Clair Counties and the Southern District of Illinois Federal Court

Madison and St. Clair counties have been a center of controversy in the debate about medical malpractice and doctors' liability insurance premiums. When President Bush visited Collinsville in January 2005, he blamed the problem on outsized jury awards. News reports suggest that doctors have left the area because of high malpractice insurance premiums, blaming the problem on jury awards. The American Tort Reform Association has labeled Madison County as a "judicial hellhole." Much of the controversy involves large awards in class action asbestos cases. However, by inference, claims are made that there are also large awards in medical malpractice cases.

As a consequence of the controversy, Madison and St. Clair counties and the U.S. District Court for the Southern District of Illinois were singled out for particular attention. The *Westlaw* and *Lexis* databases (which incorporate the *Southwest Illinois Jury Verdict Reporter*) were searched from 1992 through 2005 for all medical malpractice verdicts in those venues. To supplement the summary descriptions contained in the verdict reporter I personally traveled to Edwardsville, Illinois and examined the actual court files for each of the identified cases. My goal was to check them for accuracy and to discover any other relevant facts.

### Madison County

Table 4.1 presents a summary of jury verdicts involving claims of medical malpractice from 1992 through 2005.

**Table 4.1**
**Jury Verdicts in Medical Malpractice Cases:**
**Madison County Court, 1992-2004**

| Year | Case Name | Verdict | Verdict Amount |
|---|---|---|---|
| 1992 | Buie v. St. Elizabeth Medical Center | Defense | $0 |
| 1992 | Hungate v. Allendorph | Defense | $0 |
| 1992 | Brown v. Afuwape | Defense | $0 |
| 1992 | Marshall v. Harley | Defense | $0 |
| 1993 | Garcia v. Tulyasthien | Plaintiff | $600,000 |
| 1993 | Beets v. Mucci | Plaintiff | $332,000 |
| 1993 | Krause v. Greaves | Defense | $0 |
| 1994 | Fisher v. Friedman | Plaintiff | $350,000 |
| 1994 | Rives v. Hamilton | Defense | $0 |
| 1995 | Pruett v. Mucci | Plaintiff | $900,000 |
| 1995 | Holbert v. Malench | Defense | $0 |
| 1996 | Barnes v. St. Elizabeth's Medical Center | Plaintiff | ~~$402,000~~ $174,000* |
| 1996 | Grant v. Petroff | Defense | $0 |
| 1997 | Finazzo v. Hill | Defense | $0 |
| 1998 | Lanz v. Chen | Defense | $0 |
| 1999 | Arnold v. Gittersonki | Defense | $0 |
| 1999 | Roberts v. Fernandez | Defense | $0 |
| 2000 | Adams v. Marrese | Plaintiff | $1,784,000 |
| 2000 | Knight v. Miller | Defense | $0 |
| 2001 | Lemons v. Dave | Plaintiff | $470,000 |
| 2002 | Wagoner v. Gingrich | Plaintiff | $75,000 |
| 2002 | Moffitt v. Skirball | Defense | $0 |
| 2002 | Jenkins v. Dai | Defense | $0 |
| 2002 | Terry v. Hamilton | Defense | $0 |
| 2003 | Budwell v. Freeman | Plaintiff | $25,000 |
| 2005 | Grant v. Petroff | Defense | $0 |

* Settled for $174,000 versus verdict of $400,000

Table 4.1 indicates there were 26 reported jury trials involving medical malpractice in Madison County from 1992 through 1995, an average of 1.7 trials per year. Nine of the 26 trials ended with an award for the plaintiff, a win rate of 35 percent. The average award in those plaintiff wins was $523,333. One award (*Adams*) exceeded $1 million and another (*Pruett*) approached $1 million. The awards in the table are not adjusted for inflation.

**Plaintiff Verdicts Summarized**

Details about each of the plaintiff verdicts provide insights about the nature of the claim and its eventual settlement. These details do not speak to the issue of whether the case was decided properly. Additionally, in most instances I could not independently verify pre-trial settlement offers reported in the database. Further, in most instances, there were some exceptions; neither the verdict reporter nor the court file provided data on whether the case was finally settled for less than the jury verdict.[89]

*Garcia v. Tulyasthien* (1993)[90] involved a claim of negligent surgery. The plaintiff, age 33, claimed that a surgeon negligently inserted a metal rod in his leg that was unnecessary, resulting in osteomyletitis, inflammation of the bone and marrow. His past medical costs were $2500 and his wage loss was $15,000.

*Beets v. Mucci* (1993)[91] concerned the wrongful death of a 34 year old mother of two children, ages 4 and 16. The patient had been treated for cervical cancer and her estate claimed that Dr. Mucci had failed to remove all the cancer during surgery. The jury verdict was $332,000.

*Fisher v. Friedman* (1994)[92] involved a claim that the physician failed to detect a detached retina and or refer the patient to a specialist. The claimed result was the loss of one eye; five separate surgeries to reattach the retina were not successful. The plaintiff claimed he was legally blind as a result. The defendant physician admitted liability. Presumably the jury trial was about the amount of damages. The plaintiff had demanded $750,000 before and during trial and the defendant offered $600,000. The jury verdict was for $350,000, about 58 % of the defendant's offer. The parties settled following the plaintiff's post-trial motion for a new trial on damages.

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[89] The cases are identified in footnotes by the Madison County Court's docket number.
[90] 91-L-1026
[91] 91-L-433
[92] 91-L-1646

*Pruett v. Mucci and St. Anthony's Hospital* (1995)[93] involved permanent neurological damage to the brain and spinal cord of a child during her mother's labor. The plaintiff's guardian alleged failure to monitor during delivery and inappropriate use of forceps. The jury concluded that Dr. Mucci was an agent of the hospital. During trial the plaintiff demanded $750,000 to settle and the defendant offered $250,000. The jury verdict of $900,000 involved the following breakdown: past and future medical expenses, $200,000; past and future disability, $250,000; past and future disfigurement, $250,000; past and future pain and suffering, $200,000. The case settled for $875,000. Because the case involved a minor the court record contains a formal settlement distribution approved by a judge. $500,000 of the award was invested in an annuity to provide the plaintiff with a guaranteed annual income with graduated income amounts that would eventually provide $5600 per month for life (expected total lifetime yield from the annuity would be over $4 million) over the plaintiff's lifetime. From the balance of $375,000, a lien (unspecified but likely Medicaid or a private insurer) of $28,000 for medical expenses was deducted. Expert fees and other litigation expenses amounted to slightly over $22,000. Under Illinois fee structure the plaintiff's lawyers received $281,000. The plaintiff received the net balance of $43,437.

*Barnes v. St. Elizabeth's Medical Center* (1996)[94] involved a claim that the medical staff of the hospital had failed to provide antiseptic conditions following wrist surgery, had failed to monitor the infection, and negligence in transporting him in the hospital during which the patient's arm was "rammed" into an elevator door, thereby pushing placement pins into a bone graft. As a consequence, the plaintiff contended, an infection developed and additional surgery was required. The treating physician was listed in the claim as having knowledge of the facts but was not listed as a defendant. The plaintiff claimed lost wages as well as medical expenses. The defense was based on the alleged failure to show a proximate cause for the injuries. After the jury verdict of

[93] 91-L-823
[94] 92-L-994

$402,000 the plaintiff requested the judge to increase the judgment because the defense counsel had improperly mentioned in closing arguments that the plaintiff's $96,000 in medical costs were paid by insurance, thereby causing the jury to deduct those expenses from the award. Approximately six weeks after the verdict the trial judge entered a judgment, reducing the final award to $228,000 on the grounds that the plaintiff's claims of wage loss were "too speculative." Shortly thereafter the parties settled the case for $174,000.

*Adams v. Mareese* (2000)[95] involved a claim by a 29-year-old man that in 1992 the defendant performed three unnecessary fusion surgeries to the man's neck requiring a fourth corrective surgery with an internal fixation. The alleged result was a complete loss of range of neck motion, chronic pain, permanent disability and inability to work for the remainder of his life. The claim involved $91,000 in past medical expenses, approximately $140,000 in past wage loss and approximately $400,000 in future wage loss. The defendant denied the claims of negligence, stating that the original surgeries were necessary. The jury awarded the plaintiff $1,784,000 divided as follows: $140,000 for past wage loss; $400,000 for future wage loss; $90,000 for past medical expenses, and $1,154,000 for disability, disfigurement and pain and suffering. The trial judge affirmed the verdict and in the judgment commented on judicial restraint "in response to defendant's evasive answers, unsolicited elaborations, and assorted courtroom shenanigans." (judgment, page 26). The judgment further noted that the defendant was chastised out of the presence of the jury but threatened with chastisement in front of the jury for this behavior (judgment, page 25). The defendant appealed to the 5th District Appellate Court and then to the Illinois Supreme Court, but the appeals were denied (204 Ill.2d 655, 792 N.E.2d 305, 275 Ill. Dec. 74, June 4, 2003).

[95] 98-L-858

*Lemons v. Dave* (2001)[96] involved a claim of wrongful death for failure to diagnose and treat bladder cancer in a timely manner; the delay of 25 months allegedly resulted in a premature death. The mother of four children was 58 years old at the time of her death. The jury verdict was as follows: medical expenses medical $70,000; pain and suffering, $250,000; husband of the deceased, $50,000 for loss of money,services, society, and sexual relations; the estate value of wife's services, $50,000; reasonable society and loss of companionship and sex, $50,000. Judgment affirming the jury verdict was made on Dec 7, 2001. The verdict reporter notes that the plaintiff's estate reached a confidential settlement with another defendant named in the lawsuit, suggesting that more money was recovered than reflected in the verdict.

*Wagoner v. Gingrich* (2002)[97] involved a claim of a birth injury to the shoulder and arm resulting in Erb's palsy (nerve damage) and partial loss of use of right arm. Medical specials were $5000. The defendant denied negligence. Testimony indicated that, otherwise, the child was developing normally. The jury awarded $75,000.

*Budwell v. Freeman* (2003)[98] involved a claim by a woman in her late thirties that the defendant performed a scheduled tubal ligation after child birth, but the incision for the tubal ligation was made too close to an existing umbilical hernia, causing post-operative complications resulting in an infection in her abdomen for about 18 months, multiple corrective surgeries, permanent abdominal scarring and pain and suffering. Medical expenses were claimed to be approximately $12,000 and wage losses between $6,000 to $7,000. The jury verdict was for $25,000.

**Three Other Cases That Were Not Medical Negligence Verdicts**

It is important to draw attention to the fact that three other awards were identified that involved medical malpractice plaintiffs. In 1992 a Madison

[96] 99-LM-651
[97] 98-L-780
[98] 00-L-960

County case, *Bloome v. Wiseman* [99]involved a legal malpractice award of $3,238,000. The case concerned a lawyer who failed to properly represent a patient involved in a malpractice lawsuit. The trial judge reduced the award to $2.6 million, reflecting an assessment that the plaintiff had potential medical damages of that amount. *Robeen v. Walgreens*[100] involved a pharmacy error that resulted in a person having seizures resulting in a jury verdict of $50,840. In *Hess v. Madison County Nursing Home*[101] in 2001 the estate of an eighty-seven-year old patient sued for burns resulting from hot tea and received an award of $14,000. A doctor was originally named in the suit but was dismissed as a defendant before trial.

**A Settlement Case**

*Resser v. Chand* (1997)[102] involved a claim that the defendant attempted but failed to complete a colposcopy examination and subsequently ordered surgery and performed an extensive conization which virtually amputated the cervix. Plaintiff had significant abdominal pain after the procedure and upon a return visit was first told of the type of surgery performed, attributing the pain to the internal sutures. Plaintiff underwent a laparoscopic examination and dilation of the cervical canal but continued to experience uterine bleeding. Subsequently, plaintiff sought another opinion from a different doctor who recommended a total hysterectomy and performed such. The plaintiff claimed defendant breached the standard of care by performing a conization, which was inappropriate for the abnormal PAP test and contended that defendant misdiagnosed her condition as severe dysplasia when the post-operative pathology report indicated no dysplasia was present. Plaintiff claimed defendant also failed to type the HPV virus to determine whether it was a specific species, which is a precursor of cancer and that the defendant failed to obtain her informed consent for the conization procedure.

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[99] 91-L-189
[100] 93-L-1211
[101] 98-L-931
[102] 98-L-1279

The plaintiff further contended that the defendant falsified and/or negligently altered medical records to reflect plaintiff's informed consent. The case settled for $275,000.

**St Clair County**

St. Clair County jury verdicts are contained in Table 4.2.

**Table 4.2: St. Clair Jury Verdicts 1993-2003**

| Year | Case name | Verdict | Verdict Amount |
|---|---|---|---|
| 1993 | Holten v. Memorial Hospital | Plaintiff | ~~$8,816,500~~ Retrial[a] |
| 1993 | Taylor v. Murphy | Defense | $0 |
| 1994 | Smith | Defense | $0 |
| 1995 | Karr v. Tschoe | Defense | $0 |
| 1995 | Eggemeyer v. Metropolitan Ref Labs and Simons | Plaintiff | $0 [b] |
| 1996 | Earle v. Diehl | Defense | $0 |
| 1996 | Abbitt v. Price | Defense | $0 |
| 1997 | McClure v. Ramon | Defense | $0 |
| 1997 | Restoff v. S.Ill. Surgical Consultants | Defense | $0 |
| 1998 | Eck v. Prosser | Defense | $0 |
| 1999 | Trentman v. Associated Orthopedic Surgeons | Defense | $0 |
| 2002 | Sherrod v. Ramaswami | Plaintiff | $250,000 [c] |
| 2003 | Mcginnis | Defense | $0 |
| 2003 | Cretton v. Protestant Memorial Medical Center | Plaintiff | $0 [d] |

Notes: a. Reversed and remanded by Ill. S. Ct but another defendant settled pre-trial $2,950,000; b. Doctor not liable but $550,000 against hospital for "slip and fall;" c. Also a civil rights claim with $150,000 in compensatory and punitive damages; d. Not medical negligence but $950,000 against hospital for "slip and fall."

The table shows one very large verdict of over $8 million that was reversed by an appeals court, but the note draws attention to the fact that another defendant in the case settled before trial for $2,950,000. Details are reported in the next section. There was one other medical malpractice verdict for $250,000. The notes to the table indicate that in two other cases doctors were sued along with other parties but were found not liable for medical

negligence but co-defendants were found liable on other grounds and substantial damages were awarded. Details are provided in the next section. It is noteworthy that the juries in these latter cases were clearly capable of making distinctions between malpractice versus other claims.

Similar to Madison County, there is no evidence of runaway juries in medical malpractice cases, especially over the last decade.

**Plaintiff Verdicts Summarized**

*Holten v. Memorial Hospital* (1993)[103] claimed a hospital failed to properly diagnose her condition She alleged that in 1990, she was admitted to Memorial Hospital emergency room with complaints of numbness and tingling in her lower extremities. She alleged that on the following day, the numbness and tingling progressed to paralysis which was not noticed by the nurses on the ward who took care of her. Plaintiff contended that two days after admission, she was paralyzed in her lower extremities; the defendant had failed to properly diagnose her condition and administer treatment before her condition worsened. Memorial hospital asserted that her condition was properly diagnosed at that time as being the result of a blood clot or circulation failure in the spine. Further, in a cross claim Memorial alleged that the treating physician had incorrectly diagnosed her condition to be caused by cancer, had treated her for cancer and failed to properly treat an infection in her spine which lead to the worsening of her condition. The jury awarded $8,706,500 to the plaintiff and her spouse received $110,000. The trial judge agreed with the verdict on liability but reduced the award by $1,500,000. Next the appellate court afirmed the judgment on liability but reduced the award to $4,366,500. The Illinois Supreme Court reviewed the case and ruled that the evidence supported the jury's determination that the failure of the hospital staff to report the progression of the patient's paralysis was a proximate cause of her paralysis. However, the Court further concluded that the trial court's stated belief that a defense witness had been led by defense counsel to testify falsely

[103] 91-L-900

and the plaintiff counsel's prejudicial remarks during closing arguments charging attorney misconduct denied the hospital a fair trial. In addition the Court ruled that a jury instruction on aggravation of an injury caused by another tortfeasor's (the surgeon) negligence should not have been given and that another instruction on proximate cause should not have been given. The case was reversed and remanded back to the original trial court. No further information could be found about the case, possibly indicating it settled. However, it is noteworthy that a co-defendant, the plaintiff's treating neurosurgeon, settled with plaintiff before trial for $2,950,000. Additional on-line research uncovered no evidence of a retrial or a settlement involving Memorial Hospital.

*Cretton v. Protestant Memorial Center* (1993)[104] involved a wrongful death claim by the estate of a security guard, age 63, suffering from chronic obstructive pulmonary disease and emphysema. The plaintiff's estate claimed that Cretton told her daughter after the transfer from one hospital unit to another that, while she was being put in her bed, nurses had her stand on her own, and she fell. She subsequently died and the coroner concluded that death was caused by an injury to her brain. The defense contested the coroner's finding, claiming that the patient died of respiratory failure. The jury found that Cretton's death was not caused by medical negligence on the part of the hospital, but that the fall was, and awarded $950,000. The plaintiffs sought noneconomic damages for the three days between Cretton's transfer and her death, and for the loss of society, guidance, and support to her heirs.

**Medical Malpractice and a Civil Rights Violation**

*Sherrod v. Ramaswami and Shroff* (2002)[105] is an unusual case. The plaintiff was a convicted rapist who complained of abdominal pain and was diagnosed with suspected appendicitis but the doctors did not take timely additional action for over two weeks despite many complaints of severe pain by

[104] 00-L-64
[105] 97-63-GBC

the man. Eventually a surgeon operated and found a ruptured appendix with gangreen having spread to the intestines. The surgeon had to remove the appendix, four inches of small intestine, three inches of large intestine and the cecum, leaving the patient with a large scar and a risk of future intestinal blockage. In addition to medical malpractice the plaintiff claimed a civil rights violation. The jury awarded $250,000 for medical malpractice, $100,000 compensatory damages and $50,000 against Dr. Ramaswami , but found defendant Shroff not liable.

**A Settled Case**

*Eggemeyer v. Metropolitan Reference Laboratories and Simmons* (1995)[106] alleged an unnecessary mastectomy, pain and suffering by the laboratory defendant and a physician. The patient was about 50 years old sought treatment for a suspicious lump in her breast. A biopsy was performed but a courier for the laboratory failed to deliver the specimen or the laboratory misplaced it. Plaintiff alleged the doctor reviewed her options, which ranged from monitoring her condition to a prophylactic mastectomy. A second biopsy was not an option because virtually all suspicious tissue was removed. At some point, the doctor relocated his practice and plaintiff sought another opinion. Since plaintiff had a family history of breast cancer, the second doctor was very concerned about an undiagnosed cancer and plaintiff decided to undergo a modified radical mastectomy. However, after the procedure it was found that there was no cancer present. Before trial the laboratory settled for $500,000 and the physician settled for $50,000.

**Federal Cases In the Southern District of Illinois**

Medical malpractice cases end up in federal rather than state courts under two main circumstances. One circumstance is when one of the parties to a lawsuit resides in another state; the case may be moved to a federal court under "diversity" jurisdiction. The second circumstance is when the defendant

[106] 93-L-362

is a federal agency, such as a VA hospital or a military hospital. However, under this second circumstance the Federal Tort Claims Act requires that the case be decided by a judge rather than by a jury.

Table 4.3 presents medical malpractice verdicts reported for federal court of the Southern District of Illinois (located in East St. Louis).

**Table 4.3 Federal Court Jury Medical Malpractice Verdicts, Southern District of Illinois: 1992- 2003**

| Year | Case Name | Verdict | Amount |
|---|---|---|---|
| 1993 | Taylor | Defense | $0 |
| 1994 | Ridenour v. Muller | Defense | $0 |
| 1995 | Cripps v. Union Pacific and Heshmatpour | Plaintiff | $375,000 |
| 1995 | Haas v. Group Health Plan | Plaintiff | $100,000 |
| 1996 | Kaufman v. Cserny | Defense | $0 |
| 1997 | Mandrell | Defense | $0 |
| 2001 | Treadway | Defense | $0 |
| 2003 | Mize | Defense | $0 |

Table 4.3 shows that since 1992 there have been two plaintiff verdicts from federal court juries involving claims related to medical malpractice. There was an additional verdict involving a brain-injured child that resulted in a verdict of $19,253,549. It was major news, but as explained below, it did not involve a jury verdict.

**Plaintiff Verdicts Summarized**

*Cripps v. Union Pacific and Heshmatpour*(1995)[107] involved a railroad worker who was injured on the job and alleged permanent nerve damage to his left elbow and inability to return to his job.. He alleged that the physician had been negligent in performing surgery after a work injury. The defendant contended that he had met the standard of care. Union Pacific was a defendant as part of a "loan receipt agreement" called a "Mary Carter" agreement after a 1967 case

[107] 93-318

involving a defendant , Mary Carter Paint Company. The verdict was for $1,500,000 for the plaintiff against Union pacific and $175,000 against the physician. From the $375,000 Union Pacific received $225,000 and the plaintiff received an additional $155,000. Under the agreement Union Pacific paid nothing to the plaintiff.

*Haas v. Group Health Plan* (1995) [108] involved a 45–year-old female plaintiff who went for an ear cleaning. Her eardrum was perforated resulting in temporary hearing loss and permanent high frequency loss. The plaintiff's case was based on the legal theory of *res ipsa loquitur*, that is, the injury speaks for itself. The award was $100,000.

**Trial by Judge Alone**

*Coleman v. United States of America and Touchette Regional Hospital* (2003) [109] involved a claim against a physician considered a federal employee of the United States. The plaintiff's mother alleged that during the birthing process the physician attempted to apply a vacuum extractor to the baby's head about 15 times rather than the manufacturer's recommendation of no more than three times. The result was severe brain injury to the plaintiff. The plaintiff further alleged that although a Caesarian Section was eventually performed it should have been performed much earlier. The physician denied that fifteen attempts were made with the vacuum extractor and claimed the injury was due to an arrest of labor and the injury was attributed to an infection contracted by the mother. Defendant Touchette Regional Hospital was dismissed from the suit before trial. Under the Federal Tort Claims Act the trial was by judge alone and resulted in a verdict of $19,253,549. The plaintiff reportedly had offered to settle for $8 million before trial and the defendant's last offer was reported as $3.1 million. After a search of federal court cases in *Westlaw* no appeal of the verdict could be found.

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[108] 94-231
[109] 01-CV-314

**Conclusion**

Over a 14-year period only 11 jury verdicts favoring the plaintiff were uncovered in Madison and St. Clair county courts involving medical malpractice. Only two verdicts exceeded one million dollars although a third for $900,000 approached one million. As with cases summarized in Chapter 3, different persons can draw opposing conclusions about whether even the relatively few plaintiff awards were justified, but in any event there is no evidence to support the perception that medical malpractice jury trials in these counties are frequent and outrageous in their generosity to plaintiffs.

The data reported in this chapter do not speak to settlements resulting in payments without resort to jury trial. Research in other jurisdictions indicates that settlements outnumber jury trials by about nine settlements to one trial. The public debate has been about jury verdicts, however.

The reputation of these two counties has been affected by the linking controversy over asbestos litigation and medical malpractice litigation in mass media reports and the claims of tort-reform proponents. The reputation may have been further enhanced by media accounts of the very large award in the *Coleman* case in the Federal Court. The case was decided by a federal judge, not a jury.

The central conclusion to be drawn from this chapter is this: Insofar as medical malpractice litigation is concerned, the reputation of Madison and St. Clair counties as "judicial hellholes" is not supported by hard data.

# Chapter 5

## Caps on Pain and Suffering

One of the central proposals for tort reform in medical malpractice involves a cap of $500,000 on the pain and suffering component of awards. One source, without documentation, reported that non-economic damages "...now make up more than 90 percent of the money awarded by Illinois juries."[110]

This chapter returns to the jury awards from Cook and DuPage counties presented in Chapter 3 to examine issues related to "pain and suffering." Its intent is to provoke deeper thought about the pain and suffering component of awards. Fundamental changes in tort law should not be taken lightly and without such consideration.

The data in Chapters 3 and 4 have challenged some widely held assumptions about jury awards, and the data in Chapter 6 will offer an additional challenge, namely that the evidence of doctors fleeing Illinois is not supported by any reliable data and in fact is contradicted by statistics collected by the American Medical Association.

## Re-Examining Cook-DuPage Jury Awards in 2001

Table 5.1 describes all 30 plaintiff verdicts from Cook and DuPage counties in 2001. In most cases, although not all, the summary from the *Cook County Jury Verdict Reporter* described the various elements that made up the damage award, including the pain and suffering component. The summaries allow us to make a rough estimate of what the verdict would have been if the judge had been required to reduce the pain and suffering component of the award to $500,000. Recall also, that in a number of cases the settlement was less than the verdict due to high-low agreements, settlements for the amount of the liability insurer's coverage, or for other reasons.

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[110] Steve Stanek, *Doctors Flee Illinois*, HEALTH CARE NEWS, April 1, 2004.

The first column reports the case. The second column is the jury verdict. The third column reports any adjustment to the verdict that the judge would have applied if the pain and suffering component of the award exceeded $500,000. The fourth column reports any known settlement amount that differed from the verdict. The remaining columns report the itemized verdict elements. The pain and suffering component of the award is in the fourth column, allowing the reader to see how much the jury award differed from the $500,000 cap.

**Table 5.1: Estimating Effects of a $500,000 Cap on Pain and Suffering**

| Case | Verdict | Cap Adjust | Settlement | Pain & Suffering | Medical and income loss | Disfigurement | Loss of Normal Life | Loss Society/ Wrongful Death/ Loss Consortium |
|---|---|---|---|---|---|---|---|---|
| Bryant | $30,000,000 | $26,500,000 | $1,100,000 | $4,000,000 | $ 16, 476,000 | $4,000,000 | | |
| Lawler | $3,800,000 | $1,800,000 | | $2,500,000 | | $100,000 | $1,200,000 | |
| Brewster | $170,000 | | | $150,000 | $20,000 | | | |
| Asceves | $467,000 | | | | $32,900 | | | |
| E. Munoz | $2,495,893 | $1,870,000 | | $1,000,000 | $887,300 | $500,000 | | |
| D. Munoz | $150,000 | | $0 | $100,000 | | $50,000 | | |
| McNamara | $317,000 | | | $280,000 | $37,000 | | | |
| Matthews | $3,781,393 | | | | $31,393 | | | $3,750,000 |
| Genovese | $494,906 | | | ?? | ?? | | | |
| Willis | $120,608 | | | ?? | ?? | | | |
| Bales | $2,812,553 | | | $500,000 | $715,723 | $750,000 | $800,000 | |
| Washington | $200,000 | | | $100,000 | | $100,000 | $0 | |
| Gonzales | $1,191,256 | $1,091,256 | $950,000 | $600,000 | $141,256 | | $450,000 | |
| Walisczek | $6,500,000 | | $800,000 | ?? | ?? | | | |
| Stajsczyk | $801,643 | | | | $1,643 | | | $800,000 |
| Thomas | $835,000 | | | | $835,000 | | | |
| Matei | $525,000 | | | ?? | ?? | | | |
| Skonieczny | $13,298,052 | | $2,000,000 | | $298,052 | | | |
| Christy | $2,500,000 | $2,000,000 | | $1,000,000 | | | $1,000,000 | $500,000 |
| Cork | $5,300,000 | | $0 | | | | | |
| Simpson | $2,563,492 | $1,963,492 | $1,900,000 | $1,100,000 | $263,492 | $550,000 | $650,000 | |
| Cummings | $1,250,000 | | | $500,000 | $500,000 | $250,000 | | |
| Salas | $2,750,000 | | | | | | | |
| Guerin | $7,622,040 | $7,122,040 | $7,000,000 | $1,000,000 | $1,622,040 | | | $5,000,000 |
| Banis | $1,710,000 | $1,640,000 | | $570,000 | $570,000 | $570,000 | | |
| Perrier | $218,626 | | | $100,000 | $68,626 | $50,000 | $0 | |
| Schlindler | $1,262,748 | | | $200,000 | $462,748 | | | $600,000 |
| Macias | $1,500,000 | $1,000,000 | | $1,000,000 | $42,705 | | | $457,295 |
| Carroll | $7,962,024 | $7,462,024 | $2,000,000 | $1,000,000 | $5,962,024 | $1,000,000 | | |

Column 3 in the table shows that the cap would have reduced the jury's verdict in ten of the 30 cases: *Bryant, Lawler, E. Munoz, Gonzales, Christy, Simpson, Guerin, Banis, Macias,* and *Carroll.* But wait. Look at column 4. *Bryant* settled for $1,100,000, far less than jury's award for economic damages. The cap made no difference in the settlement outcome. Similarly, *Gonzales* settled for less than the cap adjustment. So did *Simpson, Guerin* and *Carroll.*

Thus, five cases of the 30 would have been affected by the caps: *Lawler, E. Munoz, Christy, Banis,* and *Macias.* The verdicts in *Munoz, Christy,* and *Macias* would have been $500,000 less. In *Banis* the cap would have reduced the jury's award by $70,000. *Lawler* resulted in the biggest reduction, namely $2 million.

In some cases, the breakdown of the elements of the verdict was not reported and these are noted with question marks, but the total verdicts of these cases were, in any event, below the $500,000 limit of the proposed cap.

Readers may note that in addition to medical and income losses, jury verdicts described in Table 5.1 also included damages for disfigurement, loss of a normal life, loss of society, wrongful death, and loss of consortium. Under Illinois law these elements of damages have important economic consequences bearing on claims even though there is no fixed metric by which the amounts can be assessed. The determination of amounts is left to the jury under the supervision of the judge.[111]

Recognition of the economic component to so-called "non- economic damages" is a common source of confusion about "pain and suffering."[112] Pain and suffering is only one component of "non-economic" damages. In some states and textbooks, alternative terms of "special" and "general" damages are

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[111] See generally, Ill. Pattern Jury Instr.-Civ. 30.04.03 (2005 ed.); Ill. Pattern Jury Instr.-Civ. 34.02 (2005 ed.); WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED and cases cited in the annotations.
CHAPTER 740. CIVIL LIABILITIES, ACT 180. WRONGFUL DEATH ACT, 180/1. Action for damages

[112] For more discussion see, 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 (1998).

used. This partially avoids the problem of conflation of pain and suffering with other kinds of damages, such as described above. In short, the claim in one mass media report that more than 90 percent of Illinois jury awards are for "non-economic" damages [113] might be true—better data would be needed—but this does not mean that 90 percent of jury awards in medical malpractice cases are for pain and suffering.

Indeed, although data are missing for breakdowns of damages in some cases, a very rough estimate of the proportion of the total awards that pain and suffering represented in the cases reported in Table 5.1 can be obtained dividing the total of the pain and suffering (column 5) by the total of the jury verdicts (column 2). By this rough calculation "pain and suffering" constitutes only 15% of verdicts. Perhaps if the missing data were known and added in, the percentage would be higher. But even if the missing information doubled the figure - an unlikely projection - the percentage would be a far cry from 90%.

Recall that, as discussed in Chapter 2, jury verdicts constitute ten percent or less of all payments to claimants. Recall also that Cook and DuPage counties contain half of Illinois' population and two-thirds of its doctors and that the data show that Madison and St. Clair counties yield jury verdicts less or equal to Cook and DuPage counties, so it is reasonable to assume that these findings can be generalized to all of Illinois. One conclusion to be drawn from the above discussion is that a $500,000 cap on pain and suffering, while significantly decreasing awards to some individual plaintiffs, would have minimal impact on overall payments to claimants in medical malpractice in Illinois.

Some might argue that the above conclusion does not consider the "shadow effect" of jury verdicts. No direct answer can be given to this claim. However, given the likely minimal impact that a $500,000 cap would have on jury verdicts, this claim would not appear to have much logical substance.[114]

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[113] Steve Stanek, *Doctors Flee Illinois*, HEALTH CARE NEWS, April 1, 2004

[114] Research on malpractice liability insurer files from North Carolina led researchers to conclude that insurers and defense lawyers settle cases primarily on the basis of their own

It is important to note here that a study conducted by the U.S. Government Accounting Office in 2003 studied four states with pain and suffering caps of $250,000, four states with caps of $500,000 and 11 states without such caps.[115] The study found that while medical liability insurance premiums increased in all states, they were lower in states with caps, as were claims payments. On the other hand the GAO also qualified the findings: "Moreover, differences in both premiums and claims payments are also affected by multiple factors in addition to damage caps, and we could not determine the extent to which differences among states were attributable to the damage caps or to additional factors."

As the GAO report properly recognized, there are multiple factors that influence premiums and claim payments, and it is often impossible to separate causes or the contribution of separate factors to outcomes, such as claims and premiums.

A report by Weiss Ratings, a respected insurance analyst, found that caps on pain and suffering reduced the amounts recovered by plaintiffs but did not result in insurers reducing doctors' insurance premiums.[116]

In 2003 GE Medical Protective Company, the nation's largest medical malpractice insurer, reported to the Texas Department of Insurance as follows:

> "Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0%."[117]

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internal assessments of whether the standard of care was violated, Ralph Peeples, et al., *The Process of Managing Medical Malpractice Cases: The Role of Standard of Care*, 37, WAKE FOREST LAW REVIEW 877 (2002). Research by 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) on medical malpractice cases in New Jersey is also consistent with this view. SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993) at 89-113, conducted research on closed claims in Florida that also is supportive of such a conclusion.

[115] GOVERNMENT ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE , GAO-03-836 (2003)

[116] See MARTIN D. WEISS, WEISS RATINGS, INC., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NONECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS AND AVAILABILITY OF COVERAGE 7-8 (2003) available at http://www.weissratings.com/malpracticecap.asp.

[117] See http://www.consumerwatchdog.org/insurance/rp/rp004689.pdf.

The company also said that a provision in the Texas law allowing for periodic payments of awards would provide a savings of only 1.1%. Medical Protective eventually raised the rates on its physician policyholders.

Table 5.1 and the discussion associated with it cannot provide a definite answer as to whether a $500,000 cap on pain and suffering would have an effect on claim payments and ultimately a secondary effect on doctors' liability insurance premiums, but it raises important questions about whether a cap would be effective. It also begs questions of fairness.

**Fairness Considerations: Two Studies on the Effects of Caps**

It is important to consider two additional studies. They address the issue of the fairness of caps and raise questions about justice for claimants. In the medical malpractice tort reform debate, most of the rhetoric on both sides has addressed the plight of doctors and liability insurers and the potential implications for availability of health care. Little of the discussion has addressed the plight of persons who are injured by medical negligence and make claims.[118]

Research by Lucinda Finley has examined the consequences of caps on the allocation of plaintiff recoveries in California, Florida, and Maryland by looking at jury verdicts and calculating the discrepancy between what the jury awarded and the amount the plaintiff would recover under caps.[119] She found that the major effects would fall most heavily on children, women, and elderly people because their losses are more likely to be non-economic losses, albeit often devastating and tragic.

David Studdert and his colleagues conducted a study of California jury verdicts to assess the impact of California's $250,000 cap on non-economic damages and concluded as follows:

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[118] See Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries and Social Policy*, LOYOLA LOS ANGELES LAW REVIEW (2005, in Press).

[119] Lucinda Finley, *The Hidden Victims of Tort Reform*, 53 EMORY LAW JOURNAL 1263, 1281, 1286, 1308-1312 (2004).

> Plaintiffs with the most severe injuries appear to be at highest risk for inadequate compensation. Hence, the worst-off may suffer a kind of "double jeopardy."
>
> Analysis of proportional reductions shows that the burden of caps tends to fall on injuries that cause chronic pain and disfigurement but do not lead to declines in physical functioning that would generate lost work time or high health care costs.... Notwithstanding their limited economic impact, the injuries involved are by no means trivial.[120]

The findings from these two studies raise questions about the fairness of caps on negligently injured persons. Perhaps some readers will conclude that these are less important considerations in overall health care policy, but it seems important to raise them.

To consider these fairness issues further, readers may wish to turn back to the summaries of some of the cases reported in Chapter 3. In *Carroll v. Barrows* a child in his first year of life had undiagnosed eye cancer. Despite radiation and chemotherapy treatments he eventually lost sight in both eyes. The jury awarded him $1 million for pain and suffering. In *Simpson v. Allswede* improper intubation of an eight-year-old boy resulted in a tracheostomy followed by 30 surgical procedures. The traceostomy was in place for five years, preventing him from speaking and at 16 has permanent throat damage, although he can now speak. The jury awarded $1.1 million for pain and suffering. In *Gonzales v. Pla* a doctor failed to diagnose kidney disease in a man, age 44. He was required to undergo dialysis when his kidneys failed and then received a kidney transplant. The jury awarded $600,000 for pain and suffering. In *Lawler v. Lomont* a female special education assistant, age 33, suffered delayed diagnosis of cancer when a physician misread her pap smears over a two-year period. The defendant admitted liability. The cancer spread and a radical hysterectomy was required. The woman obviously cannot have

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[120] David Studdert et al, *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFFAIRS 54 (2004). A footnote omitted in the above quotation references Frank Sloan and C.R. Hsieh, *Variabilty in Medical Malpractice Payments: Is the Compensation Fair?* 24 LAW & SOCIETY REVIEW 601 (1990) which also pointed out a similar inequity in pre-1990 cases.

children and suffers from fear that the cancer will recur. The jury awarded $2.5 million for pain and suffering.

Are the amounts awarded for these injuries too much? That is a matter on which reasonable people can disagree. It is important to consider cases like the one described above. Fairness issues for patients injured from medical negligence are all too often neglected in public debate about caps on pain and suffering.

**Summary**

Serious issues can be raised about whether a cap on pain and suffering will reduce doctors' insurance premiums. The chapter also discusses the proportion of jury awards that are for "pain and suffering" and discusses justice issues related to the patients who might be affected by caps.

# Chapter 6[121]

## Doctors in Illinois: 1993-2003

One of the concerns about jury verdicts and the tort system is that as a result of jury verdicts and their impact on settlements doctors may be leaving the State of Illinois for other states.[122]

To examine these claims, I researched the American Medical Association's *Physician Characteristics and Distribution in the US*, an annual publication that provides a number of important statistics about doctors, including county breakdowns by state, some information on certain specialties and state-by-state comparisons of physician-to-population ratios.

## Qualifiers to the Statistics

There is a two–year time lag between the date of the publication and the statistics. Thus, for example, the 2005 edition presents data on doctors as of December 31, 2003.[123] Consequently, the data reported in this chapter begin with 1993 and end at 2003. The data cannot speak to changes in Illinois doctors after that period. Some of the statistics were used in Chapter 3 to assess numbers of claims in relation to treating physicians, but this chapter examines doctors as a primary variable.

There are additional qualifications to these data. The first is that I have limited the analyses to non-federal "Total Patient Care Physicians," as reported in the statistics. Some physicians are federal employees, such as those associated with military bases, Veterans Administration Hospitals, and the Public Health Service. These physicians are not affected by the liability

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[121] I want to thank my Duke colleague and co-author, Dr. Paul Lee, who offered comments and suggestions on a draft of this chapter.

[122] Illinois Chamber of Commerce as of April 24, 2005 at < http://www.ilchamber.org>, 2005 State Interactive Systems Ranking Study, Harris Interactive, Inc. Fact Sheet: "Illinois' abusive legal climate is forcing doctors to leave the state," Press release of March 8, 2005; Editorial, Illinois Supreme Court, Buying Justice, ST. LOUIS POST DISPATCH, November 5, 2004 at B6; Patrick Powers, Doctors Flee Hospitals in the Area, BELLEVILLE NEWS DEMOCRAT, Wed March 23,2005; Georgina Gustin and Phil Dine, Lax Insurance Regulation Is Core of Malpractice Crisis, SAINT LOUIS POST DISPATCH, January 1, 2005.

[123] American Medical Association, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE US. The editions used in this chapter begin in 1995 and end in 2005.

insurance crisis since the United States Government assumes tort liability for these providers, and malpractice claims are adjudicated under the Federal Tort Claims Act that provides for trial by judge alone. Other physicians are employed by insurance carriers or pharmaceutical companies.

Some physicians list themselves as inactive and a few remain unclassified in the AMA statistics.[124] Thus in 2003 Illinois had a total of 37,608 physicians, of whom 30,264 classified themselves as non-federal physicians focused on patient care, although of this number 3,147 classified themselves as "inactive."[125] Some physicians may only be working part-time and others may have limited their practices, e.g., abandoned surgery, certain types of surgery, or stopped delivering babies.

**Illinois Physicians: 1993-2003**

Of the 37,608 private physicians in Illinois in 2003, fully 30,264 were classified as patient care physicians. The remainder were designated as "other professional activity" (1,772), "inactive" (3,147) and "not classified" (2,425). The "not classified" physicians may or may not be treating physicians and "inactive" physicians might still carry liability insurance. However, for purposes of the analyses, I chose the AMA's definition of "Total Patient Care Physicians"

The statistics provide some general breakdowns as to how physicians classify their practice, but these are self-designations and do not provide estimates of types of actual patient care. Thus, an obstetrician/gynecologist may not deliver babies as part of his or her practice or may refer difficult cases to another obstetrician. A surgical specialist may conduct only low-risk surgery and avoid high-risk operations. A physician whose classification is "Family Medicine/General Practitioner" may conduct surgery or deliver babies.

[124] AMERICAN MEDICAL ASSOCIATION, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE US, 2005 Edition, at xix-xxiii.
[125] Id at page 222, Table 3.11

Table 6.1 allows examination of trends in the total number of patient care physicians with separate breakdowns for Obstetric-gynecologists and Neurological surgeons. The two specialty groups are alleged to have been most affected by the liability insurance problem.

**Table 6.1: Patient Care Physicians in Illinois: 1993-2003**

| Year | Total Patient Care Doctors | Obstetrics-Gynecology | Neurological Surgery |
|---|---|---|---|
| 2003 | 30264 | 1814 | 212 |
| 2002 | 29,135 | 1774 | 205 |
| 2001 | 29,116 | 1769 | 199 |
| 2000 | 28,730 | 1796 | 209 |
| 1999 | 27,779 | 1715 | 207 |
| 1998 | 27,630 | 1800 | 205 |
| 1997 | 27,733 | 1785 | 208 |
| 1996 | 26,758 | 1734 | 204 |
| 1995 | 26,054 | 1669 | 213 |
| 1994 | 25,020 | 1547 | 192 |
| 1993 | 24,514 | 1596 | 191 |

Table 6.1 shows a steady increase in the absolute number of Illinois' total patient care physicians. With some year-to-year variations the trend is upward or steady for Ob-Gyns and neurological surgeons.

But how do these trends track against changes in Illinois' population? The AMA's data also provide information on the total number of physicians per 100,000 population and physician-population ratios ranked by state. These data are reported in Table 6.2 and are based on total non-federal doctors versus patient care doctors.

**Table 6.2: Patient Care Physicians Per 100,000 Persons and Relative State Ranking: 1993-2003**

| Year | Patient Care Physicians /100,000 persons | Rank Among States |
|---|---|---|
| 2003 | 239 | 17 |
| 2002 | 235 | 15 |
| 2001 | 237 | 13 |
| 2000 | 231 | 11 |
| 1999 | 229 | 12 |
| 1998 | 233 | 11 |
| 1997 | 235 | 11 |
| 1996 | 226 | 11 |
| 1995 | 221 | 11 |
| 1994 | 213 | 13 |
| 1993 | 211 | 13 |

Table 6.1 shows that the total number of patient care physicians and physicians in obstetrics-gynecology and neurological surgery have steadily increased in Illinois since 1993. Table 6.2 shows that adjusted for Illinois population growth the ratio of patient care physicians has also increased.

Table 6.2 does show that Illinois' ranking in patient care population to physician ratios has slipped relative to other states. It is not clear what should be made of this last finding. It could be interpreted as Illinois losing out to other states. An alternative way of looking at the data in the table is that Illinois' increase in the population to physician ratio is just slower relative to other states.

The other problem with rankings is that rankings they tend to exaggerate small differences. Consider that in 2002 New Hampshire was ranked 16$^{th}$ with a 240 ratio; Oregon was ranked 22$^{nd}$ with a 235 ratio; Virginia was ranked 12$^{th}$ with a 244 ratio; and Washington was ranked 16$^{th}$ with a 237 ratio. In 2003 the rankings and ratios had changed: New Hampshire was ranked 14$^{th}$ with a 240 ratio; Oregon was ranked 18$^{th}$ with a 235 ratio; Virginia was ranked 12$^{th}$

with a 244 ratio; and Washington was ranked 16th with a 303 ratio. Thus, New Hampshire increased in its ranking even though it dropped four figures in the ratio of patients to physicians. Oregon maintained the same ratio but jumped from 22nd up to 18th. A state with a small population can gain or lose a relatively small number of doctors and that will substantially alter the ratio. If a state with a large population gains or loses the same number of doctors as the small state, the ratio will hardly be affected.

In short, the rankings were included in Table 6.2 because it was proper to do so as well as to avoid any appearance that the data are not fully presented. However, as explained immediately, above rankings can be very misleading. The bottom line is that the number of patient-treating physicians in Illinois has increased, not decreased.

**Patient Care Physicians: Madison and St. Clair Counties 1993-2003**

Madison and St Clair counties have received special attention. A November 2003 Article in the *Belleville News Democrat* quoted a Memorial Hospital spokesman as saying "the hospital has lost 59 doctors since the beginning of the year."[126] One report in 2004 stated: "[a]t least 60 doctors in the past two years have left or announced plans to leave Madison and St. Clair counties." [127] In March 2005 the *Belleville News Democrat* put the figure at 136.[128] The Springfield *Journal Register*, the *St. Louis Post Dispatch*, and the *Wall Street Journal* have reported that the two counties' hospitals have lost 161 physicians.[129] The figure of 136 is based on a study by Navin and Sullivan on

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[126] Patrick Powers, Doctor Exodus Continues, Belleville NEWS DEMOCRAT, Nov 9, 2003 at <,http:/www.Belleville.com/mld/newsdemocrat/7218042.htm>.
[127] Steve Stanek, Doctors Flee Illinois, HEALTH CARE NEWS, April 2004 <http:/www.heartlend.org/Article.cfm?artId=14633>.
[128] Patrick Powers, Doctors Flee Area Hospitals, March 23, 2005 at < http:/www.jobsillinois.us/news/contentview.asp?c=150575>.
[129] Dean Olson, Shimkus: Chance for Malpractice Caps Getting Better, JOURNAL REGISTER February 24, 2005; William Lamb, Illinois Trauma Cases Surge at SLU, POST DISPATCH , Monday January 10, 2005; Sherman Joyce, Judicial Hellholes, WALL STREET JOURNAL, December 15, 2004 at A 20 .

the health Care Sector in Madison and St. Clair counties and will be discussed below.[130] It is not clear where or how the other figures originated.

Unfortunately, the AMA data do not extend into 2004 and 2005 to directly address all of these claims. Nevertheless, data up to 2003 may give insights that can prompt additional discussion.

Tables 6.3 and 6.4 provide statistics on doctors in Madison and St. Clair counties, respectively, from 1993 through 2003. These statistics deal only with non-federal physicians. They are disaggregated by the self-described practices of the physicians.

**Table 6.3: Non-federal Physicians in Madison County with Breakdowns for Practice Areas: 1993-2003**

| Year | Total Physicians | Total Patient Care | Family/ General Practice | Medical Specialties | Surgical Specialties | Other Specialties | Hospital Based Practice | Other | Inactive | Not Classified |
|---|---|---|---|---|---|---|---|---|---|---|
| 2003 | 338 | 280 | 39 | 94 | 72 | 50 | 25 | 5 | 44 | 9 |
| 2002 | 341 | 286 | 37 | 99 | 72 | 53 | 25 | 6 | 39 | 10 |
| 2001 | 341 | 292 | 38 | 100 | 75 | 58 | 21 | 7 | 33 | 9 |
| 2000 | 328 | 282 | 37 | 98 | 73 | 58 | 16 | 7 | 28 | 11 |
| 1999 | 334 | 279 | 34 | 94 | 77 | 60 | 14 | 8 | 28 | 19 |
| 1998 | 332 | 277 | 34 | 90 | 78 | 59 | 16 | 8 | 28 | 2 |
| 1997 | 329 | 277 | 30 | 83 | 74 | 58 | 32 | 8 | 32 | 12 |
| 1996 | 328 | 281 | 32 | 87 | 78 | 59 | 25 | 8 | 28 | 11 |
| 1995 | 318 | 266 | 35 | 78 | 73 | 57 | 23 | 8 | 32 | 12 |
| 1994 | 316 | 275 | 37 | 73 | 74 | 64 | 27 | 8 | 29 | 4 |
| 1993 | 317 | 274 | 36 | 75 | 74 | 61 | 28 | 6 | 29 | 8 |

[130] John Navin and Timothy Sullivan, Recommended for a Healthy Economy: The Importance of the Health Care Sector in Madison and St. Clair Counties, SIU , Edwardsville, March 2005.

**Table 6.4: Non-federal Physicians in St. Clair County with Breakdowns for Practice Areas: 1993-2003**

| Year | Total Physicians | Total Patient Care | Family/ General Practice | Medical Specialties | Surgical Specialties | Other Specialties | Hospital Based Practice | Other | Inactive | Not Classified |
|---|---|---|---|---|---|---|---|---|---|---|
| 2003 | 526 | 431 | 72 | 112 | 85 | 78 | 84 | 15 | 60 | 20 |
| 2002 | 503 | 402 | 67 | 112 | 81 | 84 | 58 | 19 | 60 | 22 |
| 2001 | 494 | 402 | 57 | 116 | 82 | 87 | 60 | 19 | 60 | 13 |
| 2000 | 493 | 396 | 56 | 117 | 78 | 86 | 59 | 17 | 59 | 21 |
| 1999 | 456 | 356 | 48 | 102 | 82 | 80 | 44 | 19 | 60 | 21 |
| 1998 | 432 | 348 | 48 | 100 | 81 | 72 | 47 | 16 | 52 | 16 |
| 1997 | 386 | 320 | 33 | 95 | 78 | 72 | 42 | 15 | 48 | 3 |
| 1996 | 376 | 312 | 38 | 88 | 74 | 73 | 39 | 15 | 43 | 6 |
| 1995 | 354 | 292 | 37 | 87 | 72 | 65 | 31 | 13 | 43 | 6 |
| 1994 | 351 | 298 | 40 | 86 | 71 | 65 | 36 | 15 | 34 | 4 |
| 1993 | 345 | 297 | 45 | 79 | 74 | 60 | 39 | 11 | 33 | 4 |

Table 6.3 shows a slight drop in total patient care physicians in 2002 and 2003 in Madison County compared to 2001. But 2001 appears to be an anomalous year with respect to total number of treating physicians in the sense that instead of a slow rise in the number of physicians by one or two annually the number jumped by 10. On the other hand the number of "inactive" physicians increased steadily so that in 2003 fully 40 physicians stated they were inactive.

In contrast to Madison, St. Clair County shows a steady increase in both total number of physicians and the total number of patient care physicians and a big jump in the number of physicians describing themselves as having a hospital-based practice.

One could ascribe the drop in total patient care physicians and increase in inactive physicians in 2003 to increased liability insurance premiums, but the problem with this interpretation is that it is contradicted by the increase in treating doctors and the stable rate of inactive doctors in St. Clair County. Doctors in St. Clair County were presumably exposed to the same rates of liability insurance premiums as those in Madison County. Perhaps the explanation lies in shifting demographics, even including the possibility that

some doctors have shifted their offices from Madison County to St. Clair County. Perhaps another clue lies in the big jump in hospital-based practice in St. Clair in 2003.

The data do not allow conclusions on these hypotheses, but they do invite closer examination and research on issues that may arise. However, taken as a whole, the data for the combined two counties are not consistent with a sudden decrease in the availability of physicians overall. A simple calculation from data in Tables 6.3 and 6.4 shows that in 2003 there were 711 private patient care physicians in the two counties compared to 678 in the year 2000, a year just before the liability insurance premiums began to increase. Put in percentage terms in 2003 the number of patient care physicians had actually *increased* by four percent.

The data in Tables 6.3 and 6.4 do not address the claim that 56 or 60 or 161 physicians have left the Madison-St. Clair county area as of 2005 since the data extend only to 2003. But they do pose a serious need to document the claim. Does the claim include federal doctors who are transferred or otherwise move from one federal facility to another? Is the figure of 60-161 doctors a net loss or gross loss? Doctors retire or move away from areas, medical residents finish their residencies and move to different locations, but often other doctors replace them. The central issue is *net* loss not gross loss.

The data are also inconsistent with the Navin and Sullivan report on Madison and St. Clair counties[131] that apparently gave rise to the claims of the loss of 136 to 161 doctors in the area. Their report was concerned with employment in the health sector, including support staff, and used two sources of data. One source was the number of physicians' offices in the counties through 2002.[132] They concluded that the number of physician offices dropped by about 2.5% between 1998 and 2002.

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[131] John Navin and Timothy Sullivan, Recommended for a Healthy Economy: The Importance of the Health Care Sector in Madison and St. Clair Counties, SIU , Edwardsville, March 2005.
[132] Id at 10.

These figures do not correspond with calculations we can make with the AMA's figures that can be calculated from Tables 6.3 and 6.4. Combining total physicians for the two counties yields the following finding: In 1998 there were 764 total physicians and in 2002 there were 844 physicians, a *gain* of 10 percent. If we limit the calculations to treating physicians, the figures for 1998 and 2002 are, respectively, 673 and 688, a gain of two percent. By either measure *the AMA figures show a gain, not a loss of physicians.*

The second measure used by Navin and Sullivan was hospital staff listings from six area hospitals for the years 2002 through 2004. After culling for duplicate names those authors identified 798 physicians listed in 2004 compared to 934 physicians, a difference of 136, or 15 percent. Their figures for 2002 again appear different from the AMA data indicating a total of 844 physicians (688 treating physicians) in 2002. One plausible hypothesis for the discrepancy probably lies in the fact that this measure from the Navin and Sullivan report is based on physicians with hospital privileges. These listings could include physicians from out of the area or even from out of the state, e.g., Missouri. Federal as opposed to non-federal physicians may also be listed in their data. The difference could also be due to changes in the way that doctors practiced medicine or how hospitals classified physicians.

There are possibly other plausible explanations, but the Navin and Sullivan data based on hospital staff listings are clearly not a good source of data for estimating the number of physicians or changes in the number of physicians.

The American Medical Association statistics are clearly the official and superior source of data. Their statistics data for 2004 will eventually allow a further comparison with the Navin and Sullivan findings and might, in the end, support their conclusions by showing a loss of physicians. Nevertheless, it should be clear that their research should not be relied on for a source of support for estimating losses or gains of physicians in Madison and St. Clair counties.

The AMA statistics for 2003 also are inconsistent with the Memorial Hospital spokesperson's claim that that hospital alone lost 59 doctors. Perhaps the statement was accurate but omitted replacement doctors. If many of the 59 doctors were medical residents finishing their period of residency, they would have been expected to leave but would be replaced by new doctors working on their residency.

In short, the AMA statistics through 2003 do not support claims of a loss of doctors in Madison and St.Clair counties.

**Conclusion**

As of the year 2003, the American Medical Association's statistics do not provide support for a claim that doctors are leaving the State of Illinois or that the number of non-Federal physicians has decreased in the Madison-St.Clair county area. Changes may have indeed occurred since 2003, but proponents of the claim of major losses of doctors have not substantiated their claims in any sources that I could find.

# Chapter 7

## Conclusions

This report opened with the assumption that the medical insurance liability premiums for Illinois' doctors have increased dramatically in recent years. Nothing in this report challenges that assumption. The findings of the research in the report, however, strongly challenge widely made claims about the role of the Illinois tort system as a cause of the increase in these premiums.

## Data

Claims have been made that the number of lawsuits has increased dramatically in recent years. Data on medical malpractice lawsuit filings in Cook and DuPage counties give no support to this claim. Claims have been made that there has been an increase in jury trials. Data from the United States Bureau of Statistics study of civil litigation indicate that the number of jury trials in 2001 in Cook County and DuPage counties actually decreased when compared to 1996. Data from the Cook County Jury Verdict Reporter showed that combined data from Cook and DuPage counties showed that, with the exception of a modest fluctuation in 2002, the number of trials remained steady between 2001 and 2004. Data also showed that the actual payouts were often much smaller than the jury verdicts.

Claims have been made that Madison and St. Clair counties are "judicial hell holes" for doctors. Data showed that from 1992 through the first quarter of 2005 there was a total of 26 medical malpractice jury trials—1.7 trials per year--and that plaintiffs prevailed only 11 times in this 14-year period. Only two awards exceeded $1 million. Claims have been made that a cap on pain and suffering will alleviate some of the large awards and lead to reduced premiums. The data suggest that the effects of caps would likely be minimal and possibly result in unfairness to negligently injured patients.

Claims have been made that doctors were leaving the state of Illinois for states with more benign litigation climates. Data from the American Medical

Association show that from 1993 through 2003 the actual number of patient care physicians has increased steadily in absolute numbers and in the ratios of population to physicians. Claims have been made that large numbers of doctors in the Madison and St. Clair counties have been fleeing or retiring from practice as a result of its litigation climate. Not according to the American Medical Association statistics through 2003. Compared to the year 2000 the number of patient care doctors actually increased by four percent.

**Missing Data**

The publicly available data did not allow an assessment of actual payouts from settlements, the litigation costs from claims in which no payments were made, or costs for paid cases in which payments were made. These and many other variables that could have shed additional light on the current debate exist in closed claim files of the Illinois Department of Insurance.

Clearly these data should be made available to the public as they are in Florida and Texas. Doctors and patients and interest groups on both sides of the controversy, indeed the citizens who pay taxes to have these important data collected, should have a right to know. The controversy regarding health care should be resolved with data rather than by anecdote and questionable statistics.

**If Not the Tort System...?**

Think of a crude analogy. A patient goes to the doctor with a sore throat and other symptoms. The doctor suspects a bacterial infection, takes a throat swab, and sends it to a laboratory. The report comes back negative. That cause eliminated, the doctor then begins to look for other causes of the ailment.

For more than a quarter century the American civil jury system and the citizens who serve on it have been defamed by variations on the claim that juries too often "act like Santa Claus handing out millions of dollars in cases

involving comparably minor injuries."[133] The best data for Illinois that were available for this report indicate that juries are not to blame for the problems involving the increases in doctor's liability premiums. It is time to look for other causes of the ailment. Some have been suggested but that is beyond the scope of this report. [134]

[133] James D. Griffith, *What Will It Take to Resolve the Malpractice Crisis?* 27 MEDICAL ECONOMICS , 195 (1982).
[134] Dean Olsen, Doctors, *Lawyers seek Common Ground on Malpractice Reform*, THE STATE JOURNAL REGISTER, January 27, 2005; Sarah Klein, *Doc Insurer Payouts Dip*, CHICAGO BUSINESS, March 14, 2005; Daniel C. Vock, *Speaker's Counsel Blasts Med-Mal Carrier Over Reasons for Premium Hikes*, CHICAGO DAILY LAW BULLETIN, March 1, 2005, page1;Daniel C,Vock, *Legislators Take Med-mal Deadlock Head On*, CHICAGO DAILY LAW BULLETIN, February 23,2005; Joseph Treaster and Joel Brinkly, *Behind Those Medical Malpractice Rate Hikes*, 151 CHICAGO DAILY LAW BULLETIN, February 22, 2005.