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Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy

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I. Introduction

Medical insurance liability premiums rose substantially in many states during 2001 and 2002.[1] Mississippi is included in these states.[2] The cost and availability of professional liability insurance for doctors is a serious matter, having potentially important consequences for Mississippi's health care system. In response the Governor of Mississippi called an Extraordinary Session of the Legislature that after much debate and conflicting evidence passed an Act to Amend Section 11-11-3 of the Mississippi Code of 1972. The Act was signed by the Governor and went into force on January 1, 2003.

The Act provides a number of prescriptions for the medical malpractice crisis. One is that any civil actions must be commenced in the county in which the defendant(s) are found or in the county where the cause of action occurred.[3] Another section[4] of the act incorporates a wide number of health care providers who are employed by the University of Mississippi Health Care Center or its affiliated practice sites under the Mississippi Torts Claims Act.[5] The Act also addresses and modifies the joint

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[1] See 2002 Medical Malpractice Rate Survey at http://www.medicalliabilitymonitor.com/highlights.html; see Americans for Insurance Reform , Consumer Group Says Evidence Mounting That Skyrocketing Insurance Rates Not Tied to Jury Verdicts, News Release, October 31, 2002 for additional references.

[2] See, e.g. Julie Goodman, Premiums Rise BY 45%: Insurance Group's Hike Comes as Doctors Seek Relief, CLARION LEDGER, September 22, 2002.

[3] Section11-11-3 (1).

[4] Section 11-46-1

[5] Tort Claims Act.

and several liability rule,[6] sets statutory limits on the filing of claims [7] and requires plaintiffs' attorneys to certify that they have consulted with at least one qualified expert regarding the likelihood of negligence alleged in the claim.[8] The Act also caps non-economic damages.[9] Claims filed before July 1, 2011 are capped at $500,000;[10] after July 1, 2011 the cap is set at $750,000;[11] and after July1, 2017 the cap is set at $1 million.[12] Finally, The Act makes provisions for a joint underwriting medical malpractice association for medical personnel who are unable to obtain liability insurance.[13]

This article does not propose to deal with the elements of the Act per se. Rather, it examines data used to support the claim that the tort system is primarily responsible for the insurance liability crisis in Mississippi. The article *does not* address claims of a general litigious climate in Mississippi or concerns about mass tort actions in product liability cases.[14] It does, however, take especial note of the fact that in newspaper coverage and legislative debate the movement for medical malpractice tort reform has been intimately linked to what is perceived as a broader tort problem affecting the business

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[6] Section 4: Under the previous statute, physicians were held joint and several liable only to the extent to allow the plaintiff to recover 50% of the award. Under the amendment the trier of fact shall assign percentages of fault to all defendants, regardless of immunity. For non economic damages, a defendants liability is several only. For economic damages, if a defendant is found to be less than 30% at fault, such defendant liability is several only. If a defendant is found to be 30% at fault or more, such defendants liability is joint and several only to the extent to allow the plaintiff to recover 50% of his recoverable damages.

[7] Section 5

[8] Section6

[9] Section 7

[10] (i)

[11] (ii)

[12] (iii)

[13] Section 8 other aspects: The Act also prevents certain medical providers from being sued for prescribing FDA approved drugs, reduces the time for commencing a medical malpractice action against an institution for the aged or infirm, and requires a 60 day notice for medical malpractice cases. The Act also requires that medical records remain the property of the institutions for the aged or infirm and provides immunity for medical personnel providing volunteer services to school programs.

[14] See e.g. Mark Ballard, Mississippi Becomes Mecca for Tort Suits, THE NATIONAL LAW JOURNAL, April 30, 2000. The authors take no position on whether these claims are valid.

climate.[15]

II. Potential Causes of the Crisis: Public Debate

Strikingly, in Mississippi almost all of the attention in the public arena focused on the tort system as the cause of the current crisis.[16] Physicians and medical insurers blamed the tort system as

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[15] See e.g. Jimmie E. Gates, Lawyers Willing To Talk About Tort Compromise, CLARION LEDGER, June 26, 2002 ("Some doctors say skyrocketing Medical malpractice insurance premiums brought on by the state's legal climate are making it difficult to continue to practice, especially in rural areas. Also, business leaders say large jury verdicts are driving up the cost of doing business in the state."

Patricia Sawyer, Lobbies Hold Up Civil Tort Fixes, CLARION LEDGER, September 23,2002 ("Doctors and Business Owners have said they are exposed to frivolous claims and large jury verdicts and want pain and suffering damages limited .")

Editorial, State Keeps Its Title As Tort Capital, CLARION LEDGER, February 17, 2002 ("But other states , such as Texas and Alabama, have found a way to balance the legal rights of citizens with the economic concerns of businesses , medical practitioners and insurance companies.")

Editorial, Tort Reform II, CLARION LEDGER October 9,2002:

"With the Legislature's approval of medical malpractice insurance tort reform, the debate shifts to general tort reform relating to business and industry in Mississippi.

For most Mississippians , the cost and availability of health care ...is the most apparent and dramatic effect of 'jackpot' justice that tort reform expects to solve.

But the need of reform for business is just as real and has far-reaching effects, regarding the state's ability to attract and retain industry and jobs and what types of businesses locate here."

Tom Pittman, Tort Reform Advocates , Opponents Need to Ask the Right Questions, {YAZOO DAILY HERALD 06/22/02} "Business and medical representatives contended that making lawsuits less costly would be the answer."

Theresa Agovino, Soaring Insurance Costs Force Doctors Out, CLARION LEDGER, July 7,2002,: "Mississippi is one of 12 states where rising premiums, tied to awards by state juries in malpractice cases, are creating a crisis, according to the American Medical Association."

Robert Lee Long, DeSoto Members of Tort Reform Committee Unsure of Outcome, DES TIMES, {date///} "On the table are efforts by some pro-business lobbysists to curtail huge jury awards which they say are hurting the health care industry and business sector."

See, Julie Goodman and Patricia Sawyer, Session Agenda Expanded, CLARION LEDGER, October 9,2002: "Dr. John Cook , head of the Mississippi State Medical Association , lauded [Governor] Musgrove and lawmakers for creating legislation he said would stabilize insurance rates for doctors. Cook said he planned to continue monitoring the negotiations on general reform issues impacting the business community."

[16] See, e.g. Coast Physician Says Litigious Climate Cost Him His Insurance, CLARION LEDGER, May 30, 2002 " The doctors said Mississippi laws encourage lawsuits , and tort reform isn't happening." Nikki Davis Maute, Doctors : Absence of Tort Reform May Be Prescription for Trouble. ??? May 19,2002 : "A reform will reduce our

the cause and asserted that the solution is medical malpractice tort reform.[17] An important source of this focus appears to have been the doctors' insurers. As reported in the *Clarion Ledger*[18] in testimony before a joint legislative committee on tort reform Gerald Wages of Reciprocal of America, a medical liability insurance company, is quoted as saying: "Our ability to continue to writing insurance in Mississippi is seriously threatened at this point." He is paraphrased as claiming that " the number of claims are rising higher than premiums collected, causing severe losses for the company and affecting the cost of insurance for hospitals and doctors." The article continued that in response to a question by a Senator about a solution to the crisis, Wages said, " I think what it's going to take is meaningful changes to our civil justice system to get insurance companies to return to the state and start writing insurance."[19] Another newspaper article reported that "Doctors said they were told by many companies that the skyrocketing premiums were the result of large jury verdicts being handed down against physicians in Mississippi."[20] Still another article reported that "The Medical Assurance Co. of Mississippi, a doctor- owned insurance group, has notified doctors that it will raise its rates by 45 percent due, *in part*, to the state's legal climate, according to a letter sent to policy holders."[21]

Largely lost in the public debate were alternative hypotheses about the cause of the crisis. One

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malpractice rates , [Dr. Dean] Cromartie said." Jimmie E. Gates, Lawyers Willing to Talk About Tort Compromise, CLARION LEDGER, June 26,2002: Some doctors say skyrocketing medical malpractice insurance premiums brought on by the satae's legal climate are making it difficult to continue to practice , especially in rural communities." Peter Wodall, Tort Reform for Everyone?, THE SUN HERALD, { Date June 6 or thereabouts} " Doctors say the state's legal climate is making it difficult for them to find medical malpractice insurance because companies will no longer write policies in the state ."

[17] Michael Freedman, The Tort Mess: It's Even Worse than You Think. FORBES MAGAZINE, May 13 2002,page 91 (The article begins with a reference to a Mississippi case and then extends the discussion to allegations of a nationwide problem.)

[18] Patricie Sawyer, Insurers: Claims Causing Losses, CLARION LEDGER, June 6,2002

[19] *Id.*

[20] Pamela Berry, Doctors Turning to Last Resort, CLARION LEDGER, July 7,2002.

[21] Julie Goodman, Premiums Rise by 45%: Insurance Group's Hike Comes As Doctors Seek Relief, CLARION LEDGER, September 22, 2002. Italics on "In part" are added by the authors to draw attention to the fact that the policy letter does appear to concede that other factors may be at least partly responsible for the rate hike.

of these is that the fault lies in whole or in part with insurers themselves. This view argues that during the 1990s insurance companies underpriced their policies in competition with one another and also made major actuarial miscalculation of the expected indemnities that would have to be paid. In addition, experts have drawn attention to the fact that insurers invest their reserves in financial markets and these investments provide income that produces profitability. When the financial markets turned steeply downward in 2001 this income disappeared. As a consequence of the underpricing, the actuarial miscalculations and the market downturn, the cash reserves of insurers are too low, forcing them to drastically raise rates in order to maintain solvency and produce profits for their shareholders.

The most recent proponents of an alternative explanation is a nationwide alliance of consumer groups, Americans for Insurance Reform.[22] The Alliance asserts that its data show that the amounts that medical insurers have paid out over the last 30 years is directly correlated with rates of medical inflation, but the amounts of the premiums charged doctors have fluctuated with an insurer's economic cycle. The Alliance argues that the current crisis, as well as insurance crises in the mid-1970s and mid-1980s are the sole cause of the current crisis.

A third explanation accepts that insurer business cycle is implicated in the liability crisis,[23] but asserts that the dynamics are more complex than the Americans for Insurance Reform explanation,

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[22] Americans for Insurance Reform, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES (undated report 2002); see also Rachel Zimmerman and Christopher Oster, Insurers' Price Wars Contributed to Doctors Facing Savings Costs, WALL STREET JOURNAL June 24, 2002.This organization is not the first to claim that insurers rather than the tort system is the cause of sudden rises in medical liability insurance rates, see, e.g. Randall Bovbjerg,, Legislation on Medical Malpractice: Further Developments and A Report Card, 22 U. CALIFORNIA, DAVIS LAW REVIEW, 449, 504-506 (1989); J. ROBERT HUNTER, MEDICAL MALPRACTICE INSURANCE: A REPORT OF THE INSURANCE GROUP OF THE CONSUMER FEDERATION OF AMERICA (March, 1999); Vasanthakumar Bhat, MEDICAL MALPRACTICE: A COMPREHENSIVE ANALYSIS (2001) at Chapter 10, page 221; GOVERNMENT ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISING DESPITE REFORMS (December, 1986).

[23] See e.g. Stephen Zuckerman et al., Effects of Tort Reform and Other Factors on Medical Malpractice Premiums, 27 INQUIRY 167 (1990)("..interest rates, a factor outside the insurers' control, affect the premiums required to insure against a given future loss." at 181); Chad Karls, "Medical Malpractice: A Market in Transition," Talk presented to the Fall 2002 Midwestern Actuarial Forum Meeting, Madison Wisconsin, September 26, 2002, <http://www.casact.org/affiliates/maf/0902/agenda.htm>. Additional discussion of these various matters is contained in the transcript of the November 4, 2002 symposium of the [Florida] Governor's Select Task Force on Health Care Professional Liability Insurance, University of Miami Medical Center, Miami Florida, particularly the presentation of James Hurley from the firm of Tillinghast-Towers Perrin beginning at page 5 of the transcript.

particularly the assertion that the cause is just bad business judgment. There are a number of factors to consider beyond aggressive insurer competition in the 1990s that resulted in premiums that were too low, although this cannot be dismissed as contributing to the crisis. Insurers have been faced with increasing costs of payments, partly due to increasing costs of medical care that affect economic losses of injured patients but perhaps the tort system as well. Some for-profit liability insurers are having difficulty competing with specialty insurers and "insurance at cost" insurers. It is possible that increased claims result from more injuries, regardless of whether those injuries are ultimately a result of negligence. The long tail between injury and payout and the additional fact that experience- ratings of physicians are not feasible makes it difficult to predict the amounts needed for reserves.[24] These and other factors, such as eroded profits from invested reserves in the financial markets, have simply made the cost of doing business as insurers either clearly unprofitable or extremely risky.

Indeed it is possible that all three of these theories can be correct. The curious fact, however, is that, as mentioned above, the latter two explanations appear to have been given only minimal attention or actually dismissed as false.[25] The public debate, as reflected in Mississippi newspaper coverage, has instead focused entirely on the tort system. Critics of the tort system claim that large and undeserved jury awards have increased exponentially, resulting in a financial drain on the insurer reserves.[26] Equally important, it is alleged, the large awards have an immediate secondary effect fostering frivolous litigation by plaintiff contingency fee lawyers hoping to hit a "jackpot" case and also frightening defendants and insurers into unwarranted settlements out of fear of "runaway" juries.[27]

A first observation is that the medical malpractice tort reform movement in Mississippi has

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[24] For discussion see, Michelle Mello and Troyen Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform,80 TEXAS LAW REVIEW 1595, 1616-1623 (2002). Both for profit and non-profit insurers need to develop reserves to meet statutory obligations and, for the latter, profits.

[25] See e.g. Patrice Sawyer, *supra* note _

[26] See citations in notes 14 through 16; also see Neil Vidmar, Medical Malpractice and the American Jury, Chapter 1 (1995)for a review of similar claims made before the current crisis.

[27] See, Is "Due Process" Afforded to Business Defendants in Mississippi–an Analysis @ http://www.litigationfairness.org/pdf/DueProcessSummary.pdf; and generally, Neil Vidmar, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at Chapter 1.

been tied to concerns about other areas of tort litigation that allegedly affects the business environment. A recent article in the *National Law Journal* was headlined " Mississippi becomes mecca for tort suits."[28] In February 2002 an editorial in the *Clarion Ledger* asserted that tort reform efforts were dead, and as a consequence "... Mississippi will retain its title as the 'Tort Capital of the United States.'"[29] There does appear to be anecdotal evidence that a substantial number of claims have been filed in Mississippi involving multiple plaintiffs against defendants that are corporations headquartered in other states, such as drug companies. Some substantial awards have been rendered in these cases.[30] We do not take a position on whether there is validity to this claim. We do, however, raise a legitimate question about whether, even if that general claim about the Mississippi tort system is proven to be true, it applies to medical malpractice cases. In most medical malpractice cases in state courts both plaintiffs and defendants are citizens of the same state, often residing in the same community.[31] One not infrequent problem for plaintiffs in rural communities is finding jurors who themselves or members of their families are not patients of the medical provider.[32] This is quite a different matter than lawsuits against large corporations headquartered outside of Mississippi.

Next, consider several of the empirical claims about medical malpractice as examples. One

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[28] Mark Ballard, Mississippi Becomes a Mecca for Tort Suits, THE NATIONAL LAW JOURNAL April 30,2001 page A1.

[29] Our Views, State Keeps Its Title as Tort Capital, CLARION LEDGER, February 17, 2002.

[30] Mississipians for Economic Progress, infra note –describing 52 jury awards over $1 million.

[31] See Thomas Eaton and Susette Talarico, A Profile of Tort Litigation in Georgia and Reflections on Tort Reform,30 GEORGIA LAW REVIEW 627 at 686 (1996) have made a similar observation. We recognize that the increasing tendency of medical practices to consolidate or otherwise become part of a corporate entity can mean that one or more of the named defendants may be a health care provider with headquarters that are not in the local community. If the corporate headquarters reside in the state it is possible that the lawsuit may be filed in a venue that is not the venue in which either plaintiff or defendant reside.

[32] Plaintiff lawyer conversations with the first author during preparation of Medical Malpractice , *supra* note _. See also *Herrington v. Spell*, 92-CA-00947-SCT (Mississippi) [cited in NLJ August 19,1996]. In this case the Mississippi Supreme Court ruled that the trial court in a medical malpractice case did not commit reversible error when it refused to excuse for cause a juror who had been a patient of the defendant physician and another had been the patient of a party witness. The Supreme Court ruled that the plaintiff should have exercised her peremptory challenges to eliminate the two jurors. A bench conference was held on the issue, but was not retained as part of the record. Since the appellant has the duty to preserve the record the Court refused to rule on the issue.

Mississippi newspaper article on the insurance crisis quoted an official of Medical Assurance Company of Mississippi (MACM), the physician-owned medical liability insurer that insures about 2500 doctors, or between 65 and 70 percent of Mississippi doctors,[33] as follows: "More than 1000 lawsuits against physicians are pending in Mississippi state courts"...[34] This assertion tells us very little. Is this number more or less than in previous years, and, if so, to what extent does it correlate with population growth or the number of practicing doctors, or the number of doctors covered by the medical liability insurer? Are the lawsuits warranted because malpractice has increased in recent years? Are the majority of the claims frivolous suits or non-meritorious suits or are the claims valid? How do we separate non-meritorious lawsuits from meritorious ones?[35] In short, this assertion about the number of claims lacks foundation without comparative data bearing on the incidence of malpractice today and in the past and about the merits of the claims.

In fact there are some data bearing on the possibility that the increase in the number of claims may be associated, at least to some degree, with the number of insured doctors. An official of The Medical Assurance Corporation of Mississippi (MACM) is reported as stating in September, 2002 that MACM has "insured over 559 new doctors since St..Paul announced its decision to abandon the Mississippi market,"[36] and "'We've processed a total of 608 new applications and over the past two years we've turned down 208."[37] This last statement indicates an increase of at least 400 insured doctors in two years, or an approximate increase of 19% in the total number of doctors insured by

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[33] See Sid Salter, MACM: "The 800-lb. Gorilla" THE CLARION-LEDGER, September 1, 2002, <http://www.clarionledger.com/news/0209/01/lperse.html>.

[34] Bob Pittman, Malpractice Insurance Requests Flood Company, Tort Reform Urged, THE PETAL NEWS, [undated] quoting Mike Hope, President of Medical Assurance Company of Mississippi.

[35] See generally, Michael Saks, Medical Malpractice: Facing Real Problems and Finding Real Solutions, 35 WILLIAM AND MARY LAW REVIEW 693 (1994); Michael Saks, Do We Really Know Anything About the Behavior of the Tort System __ And Why Not? 140 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1147 (1992); 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).

[36] Salter, *supra* note--

[37] *Id.*

MACM.[38] MACM's *2001 Annual Report* states that in 2001 the increase in the number of insured doctors was 7.5%, "the largest net growth since 1997.'[39] These sets of figures appear somewhat discrepant, but all are consistent with a hypothesis that an increase in claims is at least partially associated with an increase in the number of insured physicians.[40] In fairness, the *2001 Annual Report* also reported that the paid indemnity in 2001 increased by 64% over 2000 and over the five-year period from 1997 through 2001 the costs to defend law suits increased by 31%.[41] On the other hand, the 2001 Annual Report also indicates small increases in the amounts of member equity from 1998 through 2001 and a net profit each of these years, although net income in 2001 was only $1,443,113, down from $7,076,908 in 2000.[42] The importance of these various figures for purposes in this article are only to indicate that deeper investigation of claims by the medical insurers is required. They should not be accepted uncritically.

Another newspaper article, referring to an American Medical Association report, stated that "the average jury award doubled to $1 million in the six years ending in 2000, according to Jury Verdict Research, a private data base used by lawyers, insurers and doctors"[43] The article went on to state that "In the first six months of this year, there were five jury awards in Mississippi and the average verdict was $5.6 million, according to the state's medical association."[44]

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[38] The Salter interview, *id*., reports this official as saying that the total number of currently insured doctors is approximately 2500, indicating that two years previously MACM insured approximately 2100 doctors. If correct, these figures indicate that the 400 new doctors represent a 19% (400/2100) increase in liability policies.

[39] see MEDICAL ASSURANCE COMPANY OF MISSISSIPPI , 2001 ANNUAL REPORT at 11.

[40] Correlations do not prove causality, but the figures are consistent with what we would expect from the hypothesis.

[41] *Id*. at 8.

[42] *Id.* at 4.

[43] Theresa Agovino, Soaring Insurance Costs Force Doctors Out: Doctors Expected to Leave States With Rising Premiums, CLARION LEDGER, July 20, 2002; .Freedman, FORBES *supra* note _ at 91 reports Jury Verdict Research as concluding that the average jury award in medical malpractice cases has tripled since 1994.

[44]Agavino *supra* note_.

With regard to the first claim, social scientists have shown that the data provided by Jury Verdict Research is far from representative of the universe of cases that are decided by juries, tending to report only the larger awards to the exclusion of lesser awards and cases in which the defendant prevails.[45] Moreover, its methods of data collection do not take into account the possibility that changes in litigation rates affect the types of cases that go to trial, so we cannot tell if juries are deciding cases differently today than they were some years ago or whether they are deciding different cases.[46] One consequence of these facts is that the AMA's claim of doubling of jury awards cannot be trusted on its own merits. Moreover, the data on which the doubling claim is made is based upon a mix of cases, not just malpractice cases,[47] raising the issue already discussed above, as to whether medical malpractice should be lumped togther with product liability, contract disputes and a host of other lawsuits. In this context the second claim of five Mississippi jury awards with an average verdict of $5.6 million does not indicate if these awards were medical malpractice awards or awards in some other type of case or a combination of both. Indeed, MACM's *2000 Annual Report* stated that, [e]leven lawsuits reached trial in the year 2000,[48] and "[t]here was one jury verdict for the plaintiff, which is now on appeal."[49] The 2001 Annual Report stated only that there were "several multi-million dollar verdicts where the jury

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[45] See A. Russell Localio, Variations on $962,258: The Misuse of Data on Medical Malpractice ,13 LAW, MEDICINE AND HEALTH CARE 126 (1985);Stephen Daniels and Joanne Martin, Jury Verdicts and the "Crisis" in Civil Justice 11 JUSTICE SYSTEM JOURNAL 321,328 (1986). Zimmerman and Oster , *supra* note _ report a spokesperson for Jury Verdict Research as recently admitting that its malpractice data base "has large gaps", that it collects award information unsystematically and cannot estimate how many cases it misses. Moreover, its data base excludes trial victories by doctors and hospitals. Despite these very major flaws in data collection that JVR admits, the spokesperson claimed that the data base accurately reflects trends.

[46] See Vidmar, Pap and Circumstance, *supra* note_

[47] Dr. Richard Anderson, representing the Doctor's Company from California, and who has spoken around the country during the present crisis, committed the same error in his presentation at the November 4, 2002 symposium of the [Florida] Governor's Select Task Force on Health Care Professional Liability Insurance, University of Miami Medical Center, Miami Florida, see transcript of that proceeding at pages 39-41.

[48] MEDICAL ASSURANCE COMPANY OF MISSISSIPPI, 2000 ANNUAL REPORT, at 6.

[49] *Id.* at 6.

seemed to be swayed more by sympathy than by the medical facts."[50] However, the 2001 *MACM Monitor* reported that in 2001 there were a total of 17 trials, with the plaintiff prevailing in three of them resulting in the following damage awards: $2.6 million, $1.5 million and $65,000.[51] Doctors prevailed in the other 14 trials, a defense win rate of 82 percent. Of course, these figures may under-represent the total of trials and verdicts since it is not clear from the report if the statistics represent all Mississippi trials or just defendants insured by MACM.

In short, the claims that have been used to help justify medical malpractice tort reform in Mississippi leave some very serious unanswered questions. The claims may be correct, but it is important to take a closer look at the data used by advocates of medical malpractice tort reform and other sources of data.

III. A Partial Map of Mississippi Medical Malpractice Litigation

Toward the end of ascertaining some perspective on medical malpractice litigation in Mississippi we relied on three sources of data: a report by Mississippians for Economic Progress; our own commissioned research by Jury Verdict Research; and our personal search of Lexis and Westlaw for appellate cases involving medical malpractice. In addition a fourth source was a confidential memo provided to us by a trial lawyer that was a survey of trial lawyers regarding medical malpractice cases.[52] It was used to provide additional insight regarding cases reported in the other sources, but proved to be of only minimal assistance.

A. Report of Mississippians for Economic Progress

The Mississippians for Economic Progress provided us with a copy of their list of 52 jury verdicts over $1 million that have been rendered by Mississippi juries since 1995 through the first part

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[50] MEDICAL ASSURANCE COMPANY OF MISSISSIPPI, 2001 ANNUAL REPORT, at 8.

[51] THE MACM MONITOR, July 2002, at pages 4 and 5.

[52] A copy of this list is on file with the authors.

of 2002.[53] That list was compiled by the Perryman group. It includes just seven medical malpractice verdicts. The rest are other tort cases, contract disputes or other non-medical malpractice cases.[54] Thus, in fact the list shows that Mississippi has had an average of just under one "million dollar" medical malpractice award per year. The cases on that list, the year of the verdict and the reported amount of the verdict are as follows:

Gibbs v. King's Daughter Hospital (1996): $2 million

Gibson v. Rush Medical Center (2000): $3.6 million[55]

Miller v. McHenry (2001): $2.6 million

Marshall v. Methodist Healthcare (2001): $6.2 million[56]

Mckenzie v. McComb Orthopedic Clinic (2001):$1.5 million

Johnson v. Jackson HMA, Inc. (2001): $23 million

Moore v. No. Mississippi Medical Center (2002): $5 million[57]

Missing from these data are specifics about the nature of the injury and the alleged economic and non-economic losses against which the verdict can be compared. We searched Westlaw and Lexis for additional information about these cases, but none of them were in those data bases. However, we found information about *Gibbs v. King's Daughter* in our own commissioned search through Jury Verdict Research. In Gibbs the plaintiff alleged that she suffered a bleeding arterial venous malformation, resulting in partial paralysis after the physician and hospital defendants failed to properly examine and diagnose her condition. In 1991 the plaintiff had presented to the hospital emergency

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[53] A copy of this list is on file with the authors. The data were compiled by the Perryman group.

[54] The two largest verdicts were breach of contract cases and involved punitive damages awards. *O'Keefe v. Loewen Group* (1995) involved an award for $100 million in compensatory damages and $400 million in punitive damages. Ironically, the prevailing plaintiff in the second case was the State of Mississippi: in *State Tax Commission v. American Management Systems* (2000) the jury awarded $474.5 million for a breach of contract.

[55] Foot injury

[56] The statement indicates damages for a burn and nurse negligence.

[57] For "wrongful death."

room on two occasions with complaints of severe back pain and leg numbness, whereupon she was given pain killers. Later she went to a different emergency clinic, but she was told to go back to the hospital. Several days later she awoke with paralyzed legs. The consequence was "incomplete paraplegia." A settlement was reached with the second emergency room and attending physician for failure to treat her as a patient and for delaying the eventual surgery that was required. However, the allegations against the remaining defendants do not allow us to independently determine if either the appropriate negligence decision or award was reached. Nevertheless, the Jury Verdict Research synopsis makes both decisions plausible.

The *National Law Journal* reported the basic outline of *Johnson v. Jackson HMA, Inc.*[58] Central Mississippi Medical Center was sued by the parents of an infant and were awarded $23 million in compensatory damages on October 5, 2001. According to the allegation the Hospital and a nurse failed to deliver the child immediately despite a dramatic deceleration in her heart rate prior to birth, resulting in a substantial loss of oxygen to the infant's brain. The child, three at the time of the verdict, cannot walk, talk or feed herself. The plaintiffs also alleged that certain medical records were altered or destroyed in order to conceal the amount of time between the heart rate drop and the caesarean delivery and asked for punitive damages, but the trial court ruled that punitives were not warranted.[59] The case was eventually settled for an unreported fraction of the $23 million.[60]

B. The JVR Research

The Jury Verdict Research search, commissioned by the first author of this article, yielded only 13 medical malpractice cases from 1995 through July 1, 2002.[61] Seven of the 13 involved defense verdicts. There were four jury verdicts in favor of the plaintiff, one "judgment for the plaintiff," and one

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[58] Family Awarded $23 million for Birth Injuries, THE NATIONAL LAW JOURNAL, November 5, 2001 , page B3.

[59] *Johnson v. Jackson*, Cir.Ct.1st Judicial District of Hinds County, No. 251-99-1113 CIV,Judgment entered October 12, 2001.

[60] Reported at the Conference where this article was first presented on November 15 by a lawyer associated with the case.

[61] This certainly raises additional questions about the data collection methods and reliability of Jury Verdict Reports as discussed in note _ *supra*.

non-trial settlement. The only new discovery in this limited data set is a case in Federal court. In *Tanner, pro ami v. Westbrook* in the Northern District of Mississippi in 1996 a jury awarded $3.2 million in the case of a female infant who suffered acute severe metabolic acidosis during birth. The plaintiff alleged that the defendants delayed diagnosing and treating the child's condition resulting in cerebral palsy. Although a federal case, the jury was chosen from citizens of Mississippi and bears on the propensity of its jurors to render million dollar awards. In *Glover v. Todd* (1996) a plaintiff received a $200,000 jury verdict after suffering a severed bile duct while undergoing laparoscopic surgery. In *McDonald v. Gordon* (1997) a female suffered severe sinus problems and permanent pain of the face and nose. She received a $225,000 award. In *Crow v. United States* (1998) (in federal court with a bench trial)[62] the plaintiff received $538,698 after sustaining mild brain injury, kidney dysfunction, and vertigo after the jury found substandard care. The other verdict was in *Gibbs v. King's Daughter,* discussed above The settlement came in *Wilson v. U.S.A.* A man undergoing oral surgery for a benign lesion in his jaw suffered hypoxia and ended up in a vegetative state. The federal court settlement was for of $4,650,000.

The allegations of injuries suffered in the seven defense verdicts involved severe nerve damage to the mouth; permanent pain and weakness to the shoulder; the death of a minor child; breast cancer that had spread to the lymph nodes and spine; a burn to a leg; a fractured humereus and wrongful death of an 18-year-old-female from a pulmonary embolism.

C. The Lexis/Westlaw Searches

Lexis and Westlaw files in the libraries for Mississippi cases was searched the term "medical malpractice " from January 1,1995 through September 30, 2002. The libraries do not contain trial court outcomes so the cases uncovered involve only trial court decisions that were appealed. The search yielded 109 hits that are summarized in Table 1. A complete summary of the cases is attached to this article as Appendix A.

Table 1

[62] The JVR synopsis states only a "judgment."

Summary of Medical Malpractice Appeals 1995- September 2002

Jury Verdicts for the Plaintiff Affirmed:	**4**
Jury Verdicts for the Plaintiff Reversed:	**2**
Bench Trial in Favor of Defendant Affirmed:	**1**
Jury Verdicts for the Defendant Affirmed:	**16**
Jury Verdicts for the Defendant Reversed:	**7**
Summary Judgement for the Defendant Affirmed:	**32**
Summary Judgement for the Defendant Reversed:	**22**
Directed Verdict for the Defendant Reversed:	**2**
Motion to Dismiss Affirmed:	**5**
Motion to Dismiss Reversed:	**6**
Interlocutory Appeal in Favor of the Plaintiff:	**8**
Interlocutory Appeal in Favor of the Defendant:	**2**
Appeal Dismissed:	**2**
Total Number of Appeals in Favor of Plaintiff:	**49**
Total Number of Appeals in Favor of Defendant:	**60**

* some cases were counted twice due to the fact that defendants in the same case were treated differently.

Table 1 shows that 49 of the appeals were decided in favor of the plaintiff and 60 were decided for the defendant. As is clear from Table 1 these actions by appeals courts involve matters relating to the disposition of cases other than jury verdicts per se, but they do provide a profile of important matters related to the litigation of medical malpractice cases in Mississippi.

The data reported in Appendix A indicate four jury awards, only one of which was reported in our other sources. All were were affirmed by the Supreme Court of Mississippi or an appeals court. The judgment of $225,000 in *McDonald v. Gordon*[63] for sinus and facial pain was upheld by the Supreme Court. The data also indicate a $1.5 million jury awardto the plaintiff in a wrongful death

[63] *Supra* note_

claim. A $9 million jury award was upheld in *Bradshaw v. Brandon HMA, Inc*.(1-31-2000) in a claim based on a patient suffering severe brain damage. In the final case, *Locke v. Purdon* ((July 6, 1999) a $650,000 award was upheld in for a patient suffering an injury caused by a broken wire during a percutaneous coronary atherectomy, but we could find no details about the specific injury.

Appendix A also indicates that the Supreme Court of Mississippi reversed a $1 million verdict on statute of limitation grounds in *Jones v. Rawson* and a $1.7 million verdict in *Washington v. Sullivan* of May 21, 1998 on the grounds that the physicians were employees of the state. The plaintiff had suffered complications from tubual ligation surgery.

The remainder of the data in Appendix A need not be reviewed in detail here. However, as summarized in Table 1, there were 7 jury verdicts for the defendant that were reversed. Whether these cases will be retried or settled cannot be known at this time. However, these data are useful in suggesting that Mississippi juries do not automatically decide in favor of plaintiffs even when some alleged injuries result in death. *Adkins v. Sanders* [64] involved the death of a woman allegedly due to complications from caesarian surgery. *Bickham ex rel. Estate Bickham v. Grant*[65] also involved the death of woman due to a physicians' alleged failure to diagnosis her with endometriosis. In *McCaffrey v. Puckett* [66] the plaintiff was suffering from a herniated disc that he claimed was caused during a spinal manipulation. *Davis v. Powell* [67] was a wrongful death action brought by the mother of a deceased baby. *Thornton v. Sanders* [68] involved the amputation of a diabetics' leg due to alleged negligent surgical procedures. *Coltharp v. Carnesale* [69] involved a shoulder injury that the plaintiff

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[64] 823 So.2d 550 (Miss.App., Mar 19, 2002)

[65] 2001 WL 570018 (Miss.App., May 29, 2001) (NO. 97-CA-01639-COA)

[66] 784 So.2d 197 (Miss., May 03, 2001) (NO. 1999-CA-00667-SCT).

[67] 781 So.2d 912 (Miss.App., Dec 12, 2000) (NO. 97-CA-00646-COA)

[68] 756 So.2d 15 (Miss.App., May 04, 1999) (NO. 97-CA-00788-COA)

[69] 733 So.2d 780 (Miss., Feb 25, 1999) (NO. 97-CA-00890-SCT)

claimed was not timely diagnosed. Finally, in *Day v. Morrison* [70] the plaintiff alleged injuries arising from complications of a penile implant procedure.

Table 1 and Appendix A also show that both trial courts and appeals courts in Mississippi are serving as active gate keepers in deciding which medical malpractice claims are factually or legally meritorious. They upheld more summary judgments for the defendant than for the plaintiff (32 versus 22). A summary judgment for the defendant that is upheld means, of course that the defendant prevailed while a summary judgment against the plaintiff that is reversed usually means only that plaintiff may have an opportunity to present his or her case to a jury and a chance to prevail.

D. Implications of this Incomplete Profile

These data provide no information on claims, settlements, and post-trial adjustments. Little information is given about defense wins at trial. The data under-represent, possibly by a substantial amount, the total number of cases won by plaintiffs at trial since, with a couple of exceptions, they tell us nothing about plaintiff awards below $1 million. It is an incomplete profile.

Nevertheless, the proponents of tort reform based their claims on large jury awards and the profile allows us to draw a number of tentative conclusions on that issue. The first is that no evidence has been produced to show that there are large numbers of Mississippi medical malpractice suits involving million dollar awards. In fact million dollar awards averaged slightly more than one per year since 1995, or if we consider cases decided from January, 2000 through June, 2002 the average is 2.4 per year (6 cases/2.5 years).[71] What these data do not tell us is whether these awards were justified or whether they will stand up through the appeals process or will be settled for a lesser amount than the verdict. In a few of the cases we learned that some large awards were viewed as reasonable after Supreme Court review. In one case, *Bradshaw v. Brandon HMA, Inc*., the Mississippi Supreme

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[70] 657 So.2d 808 (Miss., Jun 15, 1995) (NO. 91-CA-00978-SCT)

[71] In searching newspaper coverage the authors also found mention of a $12 million judgment obtained "recently" by an out-of-state lawyer "in favor of the parents of the parents of a child who was crippled by the effects of a doctor's surgery." However, this assertion was reportedly made in an interview of a Tennessee lawyer who was not involved in the case. The account did not indicate the title of the case, when it occurred , or whether the judgment was a result of a jury trial, see Robert Lee Long, Tennessee Attorneys Keenly Watching Tort Reform Debate in Magnolia State, DESOTO TIMES TODAY, June 28, 2002.

Court sustained a $9 million award , suggesting that it was a reasonable amount for a patient suffering severe brain damage.[72] In another case, *Wilson v. U.S.A.*, involving a patient in a vegetative state, the parties seemed to agree that $4.65 million was an acceptable settlement.[73]

In short on the face of the available data, there is no evidence that Mississippi juries are out of control in medical malpractice cases or, as we will suggest below, that they are different from juries in other parts of the country. Of course jury awards reflect only those cases that get to trial. They do not reflect settlements that may driven by fear of large and unreasonable jury awards, a claim that is often made by physicians and their liability insurers.[74] To shed light on these various issues we review what has been learned in studies of medical malpractice litigation over the past several decades.

IV. General Research Findings About Medical Malpractice Litigation

A. The Incidence and Costs of Medical Negligence

Sometimes explicitly, but more often tacitly, debates about medical malpractice contain the arguments that medical negligence is relatively infrequent and that injuries and the consequent financial losses of patients are exaggerated. Strikingly, in the current discussion about the rise in medical liability insurance premiums in Mississippi and elsewhere pro-tort-reform advocates do not address the question of seriously injured patients. The incidence of injuries and their costs to patients have implications for both jury awards and claims about frivolous litigation. Thus, these matters need to be addressed before turning to a discussion of jury behavior and the litigation process.

1. Medical Injury Due to Negligence Is Not Infrequent. A Harvard study of medical negligence examined hospital records of 31,000 patients and concluded that one out of every 100

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[72] *Supra* at _

[73] *Supra* at _

[74] See e.g. Vidmar, Medical Malpractice , *supra* note _

patients admitted to hospital had an actionable legal claim based on negligence.[75] Some of these patients' injuries were minor or transient, but 14 percent of the time the adverse event resulted in death and 10 percent of the time the incident resulted in hospitalization for more than six months, with seven of those ten persons suffering a permanent disability. Subsequent research involving the states of Utah and Colorado found rates of negligent adverse events that were similar to the New York findings.[76] The Institute of Medicine produced a report that relies on these data and cites other data consistent with the above findings.[77] These findings are consistent with earlier research reported by Danzon who estimated that on average one in twenty hospital patients incurred an injury due to medical error.[78] A still earlier study in California estimated that compensable injuries due to negligence occurred in one in 125 hospitalizations.[79]

There are good reasons to believe that the Harvard study may have underestimated the incidence on medical negligence. For example, Lori Andrews conducted a study in a large Chicago area hospital.[80] The Harvard data were based on hospital records. Andrews, however, studied actual incidence of negligent events in hospital wards and discovered that many injuries were not recorded on the records as required, especially when the main person responsible for the error was

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[75] Paul Weiler et al., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993).

[76] E.J. Thomas et al. Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado, 38 MEDICAL CARE 261 (2000).

[77] 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>. But also see Rodney Hayward, and Timothy Hofer, Estimating Hospital Deaths Due to Medical Errors, 286 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 415 (2001);Clement McDonald et al., Deaths Due to Medical Error Are Exaggerated in Institute of Medicine Report, 284 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 93 (2000); Lucian Leape, Institute of Medicine Medical Error Figures Are Not Exaggerated, 284 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 95 (2000).

[78] Patricia Danzon, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY (1985) at 20.

[79] California Medical Association, Donald Mills, ed., MEDICAL INSURANCE FEASIBILITY STUDY (1977).

[80] Lori Andrews, MEDICAL ERROR AND PATIENT CLAIMING IN A HOSPITAL SETTING (1993).

a senior physician. Other research is consistent with the Andrews findings. For example, Dr. Thomas Julian had a panel of obstetricians review obstetric malpractice claims and concluded that "common obstetrical risks were often not recognized or not recorded in medical records."[81]

Thus, research findings from highly regarded sources show that medical negligence not only occurs, but it occurs at a substantial rate. Patients are injured as a result: substantial numbers of patients die and others are seriously injured. It is noteworthy to observe one other finding from the Harvard study which also interviewed a sample of physicians. The authors of the report concluded that while many of the doctors conceded that patients are injured by medical accidents, they would not readily concede that negligence was the cause.[82]

2. Injuries Have High Costs. One only needs to consider an example or two in order to appreciate the cost of a serious injury. A woman in her forties, divorced, with two dependent children, enters a hospital with a high fever. A feeding tube was improperly inserted into her lung, necessitating partial removal of the lung. In the recovery room bleeding from the surgery was discovered and she was rushed back to the operating room where another tube was improperly inserted in her other lung. The woman is paralyzed from the chest down and will have to spend the rest of her life in a nursing home. What will be the cost of her medical care and lost income for the next three or more decades? As a second example, what is the cost associated with a child born blind, deaf, retarded and requiring constant attention to avoid bed sores and other illnesses, especially when experts predict that she could live for decades?[83] In a country without universal health care the medical costs must often be born by the plaintiff's family. And in the case of a patient who was the major wage earner, who is to replace that lost income?

More than a dozen years ago Sloan and van Wert, two economists, conducted systematic

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[81] Thomas Julian, Investigation of Obstetric Malpractice Closed Claims: Profile of the Event, 2 AMERICAN JOURNAL OF PERINATOLOGY 320 (1985).

[82] Paul Weiler et al., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993).

[83] Both of these examples are based on cases that formed part of the data set analyzed in Vidmar, Medical Malpractice , *supra* note__

assessments of economic losses in a sample of Florida cases involving claims of medical negligence occurring asa result of birth-related and emergency room incidents.[84] Even though they offered the caution that their assessment procedures probably underestimated losses,[85] severely injured parties was between $1.4 and $1.6 million in 1989 dollars. If we adjust for inflation using the consumer price index[86] these figures in 2001 dollars translate to $2.0 million and $2.3 million, respectively. The losses of persons who survived an emergency room incident were estimated at $1.3 million[87] or $1.86 million in 2001 dollars. For persons who died in an emergency room incident the loss to their survivors was estimated at $0.5 million,[88] or $0.7 in today's dollars.

Sloan and van Wert cautioned that a major share of past losses was covered by collateral sources.[89] However, even if future medical expenses, including nursing care, are covered by collateral sources, and this is not guaranteed by any means, loss of income and other expenses, such as care giving by family members resulting in diminished income from those family members, will not be covered. Sloan and van Wert's estimates, moreover, did not consider non-economic losses, such as pain and suffering or loss of consortium. Very significantly their estimates of loss also did not consider the transaction costs that plaintiffs incurred to receive any trial award or settlement before trial, a topic that will be discussed in more detail below.

The Harvard study of medical malpractice in New York also documented the high costs of

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[84] Frank Sloan and Stephen van Wert,. Costs of Injuries , Chapter 7 in FRANK SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993) at 139, 140.

[85] *Id.* at 145.

[86] http://www.orst.edu/Dept/pol_sci/fac/sahr/cv2001.pdf. Inflation in medical costs is generally higher than the consumer price index, see http://rehphome.tripod.com/infbond.html. Thus, conversion by the CPI underestimates economic losses by some unknown degree.

[87] *Id.* at 140.

[88] Id at 140.

[89] *Id.* at 145.

negligent injuries.[90]

B. The Incidence of Claims Is Much Lower Than the Incidence of Injuries

One of the most striking findings of the Harvard medical malpractice project is that eight times as many patients suffered from a medical negligence injury as filed a claim.[91] Put in different words, for every seven patients who suffered a negligent injury, one claim was filed".[92] Claims were also filed in cases in which the research team of health care providers concluded that there was no negligence. However, the ratio of invalid claims to valid claims that went unfiled was approximately one to seven. That is, for every doctor or hospital charged with an invalid claim there were seven valid claims that were not filed.[93] Danzon's earlier research, using a data base from California, concluded that "at most one in 10 negligent injuries resulted in a claim."[94] Similarly, Andrews study of errors in the hospital that she studied found that of 1047 patients experiencing a medical error only 13 patients made a claim.[95]

Sloan and Hsieh studied medical malpractice claims in Florida involving injuries during childbirth that resulted in death or permanent injury.[96] The families of the child were interviewed and the data were supplemented by an independent medical review of the records by physicians. Cases in which the

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[90] Weiler et al. *supra* note __ at Chapter 5.See also Vidmar, Medical Malpractice at 249-254; Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 JUDICATURE 118 (1992) at 122; see also Mello and Brennan at note _ *supra* at 1620-1623.

[91] Paul Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation and Patient Compensation (1993) at 69-76. This book is based on Report of the Harvard Medical Practice Study to the State of New York, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1990).

[92] *Id.* at 70.

[93] Michael Saks, Medical Malpractice: Facing Real Problems and Finding Real Solutions, 35 WILLIAM AND MARY LAW REVIEW 693, 702, 703 (1994) presents one of the clearest expositions of these findings in a review of the Weiler *et al.* book. In further calculations from the Weiler *et al.* data Saks points out at 715 that the probability of a health care provider being sued for a negligent injury is .029 whereas the lprobability of being sued for a non-negligent injury is .0013.

[94] Danzon, *supra* note 67 at 24.

[95] Andrews, *supra* note 50 at 12.

[96] Frank Sloan and Chee Hsieh, Injury, Liability, and the Decision to File a Medical Malpractice Claim, 29 LAW & SOCIETY REVIEW 413 (1995).

physicians concluded that negligence was involved were much more likely to become claims. More serious injuries were more likely to become claims than less serious injuries. Those authors concluded that of 963 women giving birth in Florida in 1987 who were surveyed 220 had experienced a negative birth outcome. The high incidence rate was a result of intentional over-sampling for purposes of the study. Of the 220 cases 23 persons sought legal advice but not a single suit was filed in any of the 220 cases. The researchers observed that injuries associated with greater severity were more likely to cause the parties to make a claim, but:

> The lack of claimants among the 220 women whose babies had serious birth injuries and the failure of the 23 women to obtain [legal] representation runs counter to the "conventional wisdom" that patients sue when they obtain less than a "perfect result."In fact, lawyers filter out many potential claims that injury victims might lose.[97]

C. Juries Typically Tend to Be Competent and Conservative.

1. Jurors Tend to View Plaintiff Claims With Skepticism. The assertion that jurors decide cases out of sympathy for injured plaintiffs rather than the legal merits of the case is one of the most persistent claims of opponents of civil jury trial.[98] Such claims have been made about malpractice juries in the United States since at least the nineteenth century.[99] Yet, research finds no support for these claims.

In interviews with jurors who decided medical malpractice cases Vidmar found that jurors viewed the plaintiffs' claims with great skepticism.[100] Their attitudes were expressed in two main themes: first, too many people want to get something for nothing and second, that, most doctors try to do a good job and should not be blamed for a simple human misjudgment. Indeed, these attitudes were even expressed in some cases in which jurors decided for the plaintiff. Jurors who decided against the doctor sometimes expressed concern that the verdict might have an adverse effect on the doctor's

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[97] *Id.* at 430.

[98] See generally, NEIL VIDMAR, MEDICAL MALPRACTICE, *supra* note_

[99] See KENNETH DEVILLE, MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA: ORIGINS AND LEGACY (1990).

[100] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995)at 169-171

practice. This does not mean that in every case jurors held these views. Sometimes, evidence of the doctor's behavior caused jurors to be angry about the negligence. However, even in these latter cases the interviews indicated that the jurors had initially approached the case with open-minds.

Professor Valerie Hans interviewed jurors who decided tort cases, including medical malpractice, as part of a larger study of corporate defendants and obtained similar findings.[101] She concluded that

> Jurors often penalized plaintiffs who did not meet high standards of credibility and behavior, including those who did not act or appear as injured as they claimed, those who did not appear deserving due to their already high standard of living, those with pre-existing medical conditions, and those who did not do enough to help themselves recover from their injuries.[102]

2. Jury Verdicts Tend to Be Consistent With Judgments of Neutral Medical Experts. An important study of malpractice litigation compared jury verdicts with the judgments of doctors hired by an insurance company to review the medical records and provide a neutral assessment of whether they believed medical personnel had acted negligently.[103] These decisions were not discoverable by the plaintiff. The research team compared these neutral ratings with jury verdicts for those cases that went to trial. Jury verdicts tended to be consistent with these neutral assessments. Moreover, the study also found that judgments for the plaintiff were not correlated with the severity of the plaintiff's injury. These results, therefore, also contradict the "plaintiff sympathy" claim.

3. Judges Agree With Jury Verdicts. Several studies have asked trial judges to make independent assessments of who should have prevailed in civil cases over which they have presided.[104]

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[101] VALERIE HANS, BUSINESS ON TRIAL (2001) at .

[102] Valerie Hans and William Lofquist, Jurors' Judgments of Business Liability in Tort Cases : Implications for the Litigation Explosion Debate, 26 LAW AND SOCIETY REVIEW 85 (1992).

[103] 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 780 (1992); Henry Farber and Michelle White, A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice, 23 JOURNAL OF LEGAL STUDIES 77 (1997); FRANK SLOAN *ET AL*. SUING FOR MEDICAL MALPRACTICE (1993) at Chapter 6

[104] HARRY KALVEN AND HANS ZEISEL, THE AMERICAN JURY (1966); Larry Heuer and Steven Penrod, Trial Complexity : A Field Investigation of Its Meaning and Effects, 18 LAW AND HUMAN BEHAVIOR 29 (1994).

These judge assessments have been compared to the jury verdict in that case. Although the research has not specifically focused on malpractice juries, the findings indicate that there was high agreement between the judge and the jury. Moreover, in instances when the judge would have decided differently than the jury, the judges usually indicated that nevertheless, the jury could reasonably have come to a different conclusion from the trial evidence.

Other studies have asked judges to draw on their professional experience with juries and give a general opinion about jury decisions.[105] The overwhelming number of these judges from around the country give the civil jury high marks for competence, diligence and seriousness even for complex cases. These studies are thus consistent with the other studies that compared the judge's opinion with specific jury verdicts.

4. There Is No Evidence of a "Deep Pockets" Effect. Closely related to the claim of jury sympathy is a claim that juries are more likely to render verdicts against doctors, hospitals and corporations not because they are seen as negligent but only because the jurors perceive them as having the ability to pay large awards–a so-called "deep pockets"effect. A number of research studies have assessed this hypothesis and find no support for it.[106] This general finding includes experiments that specifically tested for a deep pockets effect in medical malpractice cases.[107]

5. There is Little Evidence To Support a Claim that Juries Are "Overwhelmed" By Plaintiff's Experts. An often-repeated charge is that jurors are overwhelmed by experts, particularly the plaintiff experts, in medical malpractice cases.[108] This confusion and deference to experts, it is alleged, plays to the advantage of plaintiffs because the jury then simply defers to the plaintiff's experts

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[105] These surveys are reviewed in Neil Vidmar et al., Amicus Brief: *Kumho Tire v.Carmichael* filed in The Supreme Court of the United States, October Term 1998 (reprinted in 24 LAW AND HUMAN BEHAVIOR 387 (2000).

[106] For a review of this research see VALERIE HANS, BUSINESS ON TRIAL (2001).

[107] Neil Vidmar, Empirical Evidence on the "Deep Pockets" Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases, 43 DUKE LAW JOURNAL 885 (1994).

[108] See Neil Vidmar, Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data From Medical Malpractice, 43 EMORY LAW JOURNAL 885,885-891 (1994); VIDMAR (1995) *supra* note _at 3-8.

and allows juror sympathies for the plaintiff to be the basis of their verdict. There is some fuzzy logic in this claim because it ignores the fact that defendants also call experts who offer opinions contrary to the plaintiff's experts. Moreover, the defendants typically call more experts than the plaintiff. However, more important is the fact that research into civil jury behavior refutes these allegations.

Diamond and Vidmar recently reviewed studies of jury responses to experts.[109] The findings indicate that (a) jurors do not "automatically defer to experts" and (b) have a basic understanding of the evidence in malpractice and other cases.[110] They understand the adversary system through opening statements and judicial instructions. Moreover, they carefully scrutinize and compare the testimony of opposing experts.

Through a series of case studies reported in *Medical Malpractice and the American Jury* Vidmar documented the processes by which jurors reached their verdicts. Interviews with jurors indicated that, in general, through collective discussions about the evidence they came to have an essential understanding of the case and the issues in the dispute.[111] While jurors may not have backgrounds in medicine they become educated about the basic issues during the trial through the processes of expert testimony from both sides and from cross-examination. Deliberation and collective wisdom produces an understanding that results in a justifiable verdict.

6. Jury Damage Awards Tend to Correlate With Severity of Injury. The claim that jury damage awards frequently go excessively beyond those losses must be addressed, especially when general damages that are frequently, but inappropriately,[112] called "pain and suffering" are included in the award. Various research studies have also examined these claims.

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[109] Neil Vidmar and Shari Diamond, Juries and Expert Evidence, 66 BROOKLYN LAW REVIEW 1123 (2001).

[110] In addition see Neil Vidmar, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995); Neil Vidmar *et al.* Amicus Brief: *Kumho Tire v.Carmichael*, filed in The Supreme Court of the United States , October Term 1998 (reprinted in 24 LAW AND HUMAN BEHAVIOR 387 (2000)).

[111] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at 127-182.

[112] 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).

In 1992 and again in 1996 the Office of Justice Programs of the U.S. Department of Justice undertook a systematic survey of verdicts in state courts in the 75 largest counties in the nation.[113] Of the 10,596 tort, contract and real property rights cases in the 1996 sample, there were 1112 medical malpractice cases and plaintiffs prevailed in 23 percent, or slightly more than in one of five.[114] The median final award when plaintiffs prevailed was $254,000; but 22.1 percent of cases equaled or exceeded $1 million.[115] Punitive damages were awarded in only three cases, 1.1% , when plaintiffs prevailed.[116]

The plaintiff win rates in the BJS study are generally consistent with 14 earlier studies of win rates in medical malpractice jury trials, although there was some variation between jurisdictions.[117]

Bovbjerg, Sloan and Blumstein found that the magnitude of jury awards in a sample of medical malpractice tort cases was positively correlated with the severity of the plaintiffs' injuries, except that injuries resulting in death tended to result in awards substantially lower than injuries resulting in severe permanent injury, such as quadriplegia.[118] While Blumberg et al. concluded that there was considerable variability within categories of injury severity, later research by Sloan and van Wert,[119] discussed earlier, provides a plausible explanation for this variability, namely that economic losses vary considerably within each level of injury severity. For instance, the economic loss for a quadriplegic who is 40 years old with a yearly income of $200,000 and a family three young children would ordinarily be

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[113] Carol DeFrances and Marika Litras, Civil Trial Cases and Verdicts in Large Counties,1996, BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ 173426 September 1999. No county in Mississsippi was large enough to be included in the study.

[114] *Id.* at 6, Table5.

[115] *Id.* at 8, Table 7.

[116] *Id.* at 11, Table 10.

[117] See VIDMAR, MEDICAL MALPRACTICE , *supra* _ at 39.

[118] Randall Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 NORTHWESTERN LAW REVIEW 908 (1989).

[119] *Supra* at ___

much greater than an identical quadriplegic who is retired, widowed, 75 years old, has no dependents, and whose annual income never exceeded $35,000.

In a study of medical malpractice verdicts in New York, Florida and California Vidmar , Gross and Rose also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury.[120] Daniels and Martin found a similar pattern.[121]

7. The "Pain and Suffering" Component of Awards Is Mis-characterized and Mis-understood. The general damages portion of damage awards is often labeled "pain and suffering," but this is an inappropriate label, because some of these elements of damages involve injuries that are not strictly "pain and suffering." Rather, they include such injuries as severe disfigurement, emotional distress, mental anguish, loss of parental guidance or parental companionship, loss of enjoyment of life and loss of consortium.[122] These damages share with strict "pain and suffering" the characteristic that precise dollar figures cannot be attached to them, but they nonetheless have potential economic consequences. In medical malpractice cases, for example, negligent administration of a drug that makes the patient permanently psychotic would be a severe trauma, that aside from medication and health care can have many other economic consequences, including diminished job performance. A sexual assault by a doctor while undergoing medical care could result in severe emotional stress that would prevent the injured person from performing her job at the same level as before or cause her to be unable to work at all.

Vidmar's interviews with jurors who decided medical malpractice cases indicated that jurors considered the effects of disfigurement and emotional trauma on chances for promotion, the likelihood of a marriage dissolving as a result of the injury and the economic consequences as well as strict pain

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[120] 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).

[121] STEPHEN DANIELS AND JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM,127-129 (1995).

[122] *Id.* at 275.

and suffering.[123] Jury instructions usually caution jurors that they should not award compensation for general damages when the same element is included in special damages but these lines of demarcation are often indistinct.[124] In research comparing juror decisions with those that would have been rendered by judges and senior lawyers Vidmar found that juror reasoning on damages was similar to that of the professionals.[125]

The important point to be made about these findings is that using the label "pain and suffering" as a generic term for general damages greatly oversimplifies the complex human judgments that case law and statutory law ask juries to make. Moreover, aside from the policy issue of whether and how much plaintiffs should be awarded for their pain and suffering the label obscures real economic injuries contained in general damages.

Vidmar, Gross and Rose's examination of medical malpractice verdicts in New York, Florida and California[126] found that the general damages portion of awards was generally positively related to severity of plaintiff injury. That is, the more serious the injury the higher the mean and median levels of general damages. The exception to this trend was that in cases involving death the mean and median awards tended to be substantially lower than in cases of very serious permanent disabilities. While these verdict statistics provide no information on the actual basis of the jury's decisions, there is no evidence that they result from caprice or unwarranted sympathy.

D. Outlier Awards Do Not Withstand Post-Verdict Adjustments

Despite the substantial evidence indicating that ordinarily juries are conservative in deciding damages in malpractice cases, there are clearly exceptions resulting in what are commonly labeled

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[123] *Id.* at 275; NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY at 241; see also Neil Vidmar *et al.*, Damage Awards and Juror's Responsibility Ascriptions in Medical Versus Automobile Negligence Cases, 12 BEHAVIORAL SCIENCE AND LAW 149 (1994).

[124] See, *e.g.*, RONALD EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS (3rd ed., 1993) at 321.

[125] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY at Chapter 19.

[126] 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).

"outlier awards."[127]

There are a number of reasons for outlier awards.[128] One is that in some instances doctors contest the case solely on liability and do not call experts on damages or contest damages at all. The plaintiff, on the other hand, presents the losses through experts who give a "Cadillac" version of the plaintiff's losses. The jury is instructed by the judge to decide damages solely on the evidence, and the jurors have only the plaintiff's figures to work with. Despite reservations the jurors follow the judge's instructions and accept the plaintiff's suggested award because that is the only evidence that they have. In other instances, the defense may call an economist who offers an alternative to the plaintiff's damages evidence; the floor may be quite high due to the seriousness of the injury; and the jury uses this as a floor from which damages are estimated. Additionally, in some jurisdictions juries are presented with the gross amount of a loss or of a life care plan that is not reduced to present value.

The final explanation casts the jury in a less favorable light. Specifically, because of the evidence brought out at trial the jurors become so outraged at the negligence of the defendant that they essentially violate the judge's instructions and appear to add a punitive component into their compensatory award.[129] These outlier awards are not as frequent as portrayed in the mass media,[130] but they unquestionably do occur. Nevertheless, research evidence indicates that these verdicts seldom withstand post-verdict proceedings.

In their study of malpractice verdicts in New York, Florida and California Vidmar, Gross and

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[127] *Id.* Also see Steve Cohen, Malpractice: Behind a $26 million Award to a Boy Injured in Surgery , reprinted in VIDMAR, MEDICAL MALPRACTICE at 95.

[128] See NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at.

[129] A case study of one such award and its eventual reduction by the trial judge is reported in VIDMAR, MEDICAL MALPRACTICE at Chapters 9 and 10. Some other probable cases of jury outrage are reported in 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).

[130] See Carol DeFrances and Marika Litras, Civil Trial Cases and Verdicts in Large Counties, 1996, BUREAU OF JUSTICE STATISTICS BULLETIN (September 1999, NCJ 173426); Daniel Bailis and Robert MacCoun. Estimating Liability Risks With the Media As Your Guide: A Content Analysis of Media Coverage of Tort Litigation, 20 LAW AND HUMAN BEHAVIOR 419 (1999); Michael McCann, William Halton and Anne Bloom, Java Jive: Geneaology of a Juridical Icon, 56 UNIVERSITY OF MIAMI LAW REVIEW 114 (2001).

Rose asked what happened to the outlier awards.[131] There are four main processes by which awards are reduced: the judge reduces the award verdict through the legal mechanism of *remittitur* or *j.n.o.v.*; the case is appealed and a higher court reduces the award; the parties set a high-low agreement,[132] and, most common of all, the plaintiff and the defendant negotiate a post-trial settlement that is less than the jury verdict.

Merritt and Barry conducted a detailed examination of jury awards in Franklin County (Columbus) Ohio.[133] They documented a number of post-trial reductions in jury awards. For example a $12 million award was reduced by the trial judge to $8.5 million and a $3 million award was reduced by an appeals court to $1.5 million. Other large awards settled for lesser amounts as well.

Plaintiffs are willing to negotiate lesser amounts for three main reasons. First, many plaintiffs need or want the money immediately rather than wait for the years it will take to get the money if the case is appealed. Second, there is always a risk that an appeals court will reduce the award or even overturn the verdict. Third, most of these outlier awards greatly exceed the medical provider's insurance coverage. While plaintiffs and their lawyers could attempt to foreclose on the defendant's assets, they are extremely reluctant to do so.[134] Therefore, the plaintiff negotiates a settlement around

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[131] 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).

[132] High-low agreements are not uncommon. These occur in some cases in which the plaintiff and defendant cannot close the gap on the amount of a negotiated settlement. They agree to submit the case to the jury under the condition that if the jury verdict falls below a certain amount, or even if there is a defense verdict, the plaintiff will receive a specified amount of money anyway and if the verdict is above a specified amount the defendant will pay no more than the figure agreed to before trial. In this way both parties are protected against "outlier" verdicts that are either give the plaintiff little or nothing or, alternatively, expose the defendant to an award that could severely injure finances. The public and even the court may be unaware of the agreement but such arrangements are legal and serve both parties well. See Neil Vidmar, JURIES AND JURY VERDICTS IN MEDICAL MALPRACTICE CASES:IMPLICATIONS FOR TORT REFORM IN PENNSYLVANIA, unpublished report, January 28,2002 (on file with the first author.)

[133] Deborah Merritt and Kathryn Barry, Is the Tort System in Crisis? New Empirical Evidence, 60 OHIO STATE LAW JOURNAL 315, 353-355.

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

the defendant's insurance coverage. High-low agreements, too, usually take cognizance of the upper limits of insurance coverage.[135]

Vidmar et al. were able to empirically explore the fate of many of the outlier awards. They found that some of the largest malpractice awards in New York that made national headlines ultimately resulted in settlements between 5 and 10 percent of the original jury verdict. In Pennsylvania between 1999 and 2001 there were 22 verdicts that exceeded $5 million that were settled.[136] In the end the plaintiffs received final settlements that ranged between 6% and 46% of the verdict, but averaged to 22% of the verdict. In general, the higher the verdict the smaller percentage that the plaintiff ultimately received. The findings about these reductions are consistent with earlier research by Broeder,[137] by researchers at the RAND Corporation,[138] and by researchers at The National Center for State Courts.[139]

E. Injured Claimants Often Receive Less Than Actual Economic Losses

Debates about medical malpractice reform often ignore the lives and financial effects of injuries suffered by plaintiffs. In the study of birth and emergency room injury awards, Sloan and his colleagues compared the plaintiffs' economic losses to the amount actually received.[140] On average, including cases that were settled as well as cases that went to trial, plaintiffs received only 52 percent of their losses. Plaintiffs in cases that went to trial did better than plaintiffs in settled cases, ultimately receiving 22 percent more than their estimated economic losses.[141]

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[135] VIDMAR, TORT REFORM IN PENNSYLVANIA, *supra* note _

[136] *Id.* at 18.

[137] Ivy Broeder Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements , 11 THE JUSTICE SYSTEM JOURNAL 349(1986);

[138] MICHAEL SHANLEY AND MARK PETERSON, POST TRIAL ADJUSTMENTS TO JURY AWARDS (1987).

[139] Brian Ostrom et al., So the Verdict Is In?-- What Happens Next?, 16 JUSTICE SYSTEM JOURNAL 97 (1993).

[140] FRANK SLOAN *ET AL*., SUING FOR MEDICAL MALPRACTICE (1993)

[141] *Id.* at

A focus on awards does not take into consideration the fact that expert fees and related litigation expenses involved in medical malpractice litigation often run into tens of thousands of dollars, sometimes into several hundreds of thousands. In addition the lawyer typically receives between 30 to 40 percent of the award for litigating and assuming the risks of litigating the case.[142] In addition the awards are often subject to liens or subrogation by Medicare or a state medicaid provider.[143] These various expenses are deducted from the gross amount received.

After conducting their detailed analyses Sloan et al. concluded that

> "...few claimants received payments far above the mean for their stage of resolution categories. The fact that even plaintiffs who were successful at verdict received payments only moderately higher than economic loss contradicts the notion that courts make very excessive awards in medical malpractice cases."[144]

F. Frivolous Litigation

Claims about frivolous litigation are based, in part, on findings that in medical malpractice cases doctors prevail in approximately 70 percent of cases that go to trial and that as many as 50 percent of cases filed against health care providers ultimately result in no payment to the plaintiff.[145] Additionally, opponents of medical malpractice litigation argue that jury verdicts, especially those involving larger awards, encourage lawyers to file lawsuits in cases that are not meritorious because doctors and liability insurers will settle claims, not out of merit, but rather out of fear of a large and unjustified award if the case goes before a jury. These claims are not supported by research evidence.

1. Most Injured Patients Do Not Sue. The Harvard study, discussed earlier, found that of

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[142] See SLOAN ET AL. *supra* note__ at 77, 189

[143] See E.G. Erik Larsen, Successfully Discharging Medical Liens in Personal Injury Cases, 32 CUMBERLAND LAW REVIEW (2001-2002);Mark Bower and Joseph Lichtenstein, How to Vacate a Medicaid Lien in an Infant's Case,30 TRIAL LAWYER'S QUARTERLY , issue 2-3, 80-84 (2000); Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 JUDICATURE 118 (1992) at

[144] SLOAN ET AL. *supra* _at 195.

[145] VIDMAR , MEDICAL MALPRACTICE *supra* note _ at 40-41 reviewing statistics from several studies on settlement rates.

every eight injured patients only one claim was filed.[146] After carefully examining the Harvard statistics Professor Michael Saks drew attention to the fact that for every claim filed that eventually turned out to be without legal merit, seven valid claims were *not* filed.[147]

One reason that claims are not made is that the patient does not discover that the injury was negligent. Another is that many patients are forgiving of the doctor, especially if attempts are made to apologize and rectify the problem; many patients just accept their injury as part of the fate that befell them in seeking medical help in the first place.[148]

Another important reason for failure to sue that is often overlooked in medical malpractice debates is that injured patients cannot find a lawyer to take their case. Sloan and his colleagues interviewed patients who prevailed in their law suits against doctors.[149] One of the findings was that a number of these eventually-successful plaintiffs had contacted a number of lawyers before they found one who would take their case.[150] Contrary to the view that plaintiff lawyers will take any claim that "walks in the door," research on the intake practices of plaintiff lawyers indicates that in fact the lawyers carefully screen their cases and tend to err on the side of not taking cases.[151] Indeed, plaintiff lawyers screen out as many as nine of ten alleged tort claims without further discussion with the claimant.[152] The simple reason behind this behavior is that, because they are working on a contingency fee basis,

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[146] PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993).

[147] Michael Saks, Medical Malpractice: Facing Real Problems and Finding Real Solutions, 35 WILLIAM AND MARY LAW REVIEW 693 (1994).

[148] For a discussion of these dynamics see Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 MARYLAND LAW REVIEW 1093, 1099-1109 (1996); Marlynn May and David Stengle, Who Sues Their Doctors? How Patients Handle Medical Grievances, 24 LAW & SOCIETY REVIEW 105 (1990); Daniels and Martin *supra* note - at 114-136.

[149] SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993) at.

[150] *Id.* at 73-76.

[151] Herbert Kritzer, "The Wages of Risk" The Returns of Contingency Fee Legal Practice, 25 DEPAUL LAW REVIEW 267 (1997).

[152] *Id.*

lawyers cannot afford to waste their time on cases that have no chance of success. The problems are even greater in medical malpractice cases because of the extremely high cost of hiring experts as well as the large amount of time that must be devoted to litigating the case. In Vidmar's research on medical malpractice most plaintiff lawyers that were interviewed indicated that they could not consider taking a medical malpractice case unless the potential damages exceeded $100,000 and unless they estimate that the chances of proving negligence are substantial. Some cases require many thousands of dollars of up-front money by the lawyer.[153]

There are two important implications to these findings about plaintiff lawyers' screening of potential cases. The first is, of course, that some injured persons with legally valid claims do not obtain redress simply because they cannot obtain legal counsel. The second is that medical malpractice cases that do get into the courts tend to be the ones with very serious injuries involving potentially large damage awards that have a reasonable chance of persuading a jury that medical negligence caused the injury.

2. Liability Insurers Do Not Settle Frivolous Cases. In interviews with liability insurers that Vidmar undertook, the most consistent theme from them was: "We do not settle frivolous cases!"[154] The insurers indicated that there are minor exceptions, but their policy on frivolous cases is based on the belief that if they ever begin to settle cases just to make them go away, their credibility will be destroyed and this will encourage more litigation.

3. Cases Dropped by Claimants Before Trial Are Not Necessarily Frivolous. As discussed in greater detail in *Medical Malpractice and the American Jury*[155] and in Sloan et al.,[156] despite up-front screening by plaintiff lawyers, there is still a lot of uncertainty about whether negligence has occurred. This can usually only be determined after a law suit is filed, depositions are taken and

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[153] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at 40-45; 59-67.

[154] *Id.* at Chapters 7 and 8.

[155] *Id.*

[156] FRANK SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993) at 164-185.

expert opinions are obtained. As documented in that book, research into the files of liability insurers showed that this is as true of the defense side as it is of the plaintiff side: lawyers for the defendants and their insurers get conflicting opinions as to whether negligence has occurred. Sometimes, after an extensive process of consulting with experts and the taking of depositions, it becomes reasonably apparent that no legal negligence has occurred, or that, in any event, the case is "not winable" because of the costs that would be entailed in pursuing it. At this juncture plaintiff lawyers tend to drop the case. In North Carolina nearly 40 percent of filed cases were dropped on these grounds. Again, the point to be made is that it makes little economic sense for a plaintiff lawyer to continue to invest time and money in a case that he or she is unlikely to win. It is true that occasionally lawyers misjudge the merits of cases and continue to pursue them, but far more often they are dropped.

Thus, given the fact that both plaintiff and defendant are faced with uncertainty, it is inappropriate to call the vast majority of dropped cases "frivolous." Rather, they should be labeled "non-meritorious" cases in recognition of the fact that both sides took them very seriously at the beginning of the lawsuit.

4. Doctor's High "Win Rates"at Trial Do Not Mean the Lawsuit Was Frivolous. As discussed earlier, statistics indicate that doctors prevail in about 70 percent of cases that go to trial. Nevertheless, a plaintiff loss at trial is not grounds for concluding that the litigation was "frivolous."[157] Cases that go to trial are ones where negligence is uncertain. As discussed above, when pretrial investigation shows that the case is clearly not winnable, lawsuits tend to be dropped before trial. On the other hand cases with clear negligence tend to be settled, particularly if the parties can negotiate the amount of damages. Thus, only "close cases" tend to go to trial.

There are a number of explanations, other than non-merit, as to why doctor win rates at trial are so high.[158] One reason is that jurors generally tend to be skeptical of plaintiff claims and essentially place a burden on the plaintiff that is greater than the legally appropriate "balance of probabilities" standard. Another is that plaintiffs often have a more difficult time obtaining and hiring the experts,

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[157] See VIDMAR, MEDICAL MALPRACTICE *supra* .

[158] See *id*.

relative to the defense. It is also important to observe that Vidmar's research showed that in many instances, plaintiffs who lost at trial against one doctor nevertheless obtained settlements from other doctors who had been named in the lawsuit.[159] This suggests that medical negligence had occurred in the case, albeit at trial the jury did not think that the evidence against the remaining defendant or defendants was sufficient to find liability.

V. Diagnosis and Remedy: Implications of the Analyses

We must again caution that the data that we have analyzed present an incomplete picture of the medical malpractice tort system in Mississippi. The data are primarily about jury awards over $1 million, although they also provide us with additional information on the gate-keeping and policing actions of Mississippi appellate courts. Jury verdicts are only the tip of the litigation iceberg and cannot tell us much about the mass of claims and settled or dismissed cases.[160]

Nevertheless, because the public debate about the current liability insurance crisis has centered primarily around claims of million dollar jury awards, the data raise important questions.
In particular the data from Mississipians for Economic Progress show only slightly more than one million dollar plus award per year in medical malpractice cases. Combining the seven medical malpractice awards with 44 million dollar awards involving breach of contract, product liability and other cases presents a very distorted image of the medical malpractice tort system in Mississippi. Our review of more general research findings about the medical malpractice litigation process suggests that the ramifications of these awards over a million dollars probably have only a minor effect on claiming behavior in Mississippi. To the extent that the passage of the Act depended on the claim of runaway juries in medical malpractice cases, it would seem to be an improper diagnosis of the medical liability insurance problem.

The problem of a mis-perception of problems in tort reform is not new. Sanders and Joyce

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[159] VIDMAR, MEDICAL MALPRACTICE *supra* note _ at 33-34.

[160] See Vidmar, Pap and Circumstance, *supra*, note _.

have written about 1980s tort reform in Texas, and documented how legislative decisions were made without an adequate empirical underpinning.[161] Daniels and Martin[162] and Galanter[163] have documented how anecdotes and misuses of data have led to mis-perceptions of a tort crisis. Indeed, there is a growing body of research findings demonstrating the extent to which mass media and tort reform groups have presented an image of an "out of control" tort system that is often at great variance with empirical reality.[164]

The important point to be made here is that if the diagnosis is wrong, a serious question can be raised as to the Act will serve to remedy the problem, particularly since so little attention has been given to the other explanations for the crisis. To what extent will a $500,000 cap on pain and suffering have an effect on medical negligence litigation if there are so few awards over $1 million?[165] To what extent

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[161] Joseph Sanders and Craig Joyce, " Off to the Races": The 1980s Crisis and the Law Reform Process,27 HOUSTON LAW REVIEW 207 (1990).

[162] STEPHEN DANIELS AND JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995).

[163] Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 MARYLAND LAW REVIEW 1093 (1996; Marc Galanter, An Oil Strike in Hell: Contemporary Legends About the Civil Justice System 40 ARIZONA LAW REVIEW 717 (1998).

[164] See, e.g. Deborah Merritt and Kathryn Barry, Is the Tort System in Crisis? New Empirical Evidence, 60 OHIO STATE LAW JOURNAL 315 (1999); Thomas Eaton and Susette Talarico, A Profile of Tort Litigation in Georgia and Reflections on Tort Reform, 30 GEORGIA LAW REVIEW 627 (1996); Theodore Eisenberg and Martin Wells, Trial Outcomes and Demographics: Is There A Bronx Effect? 80 TEXAS LAW REVIEW 1839 (2002); Mary R. Rose and Neil Vidmar, The Bronx "Bronx" Jury: A Profile of Civil Jury Awards in New York Counties, 80 TEXAS LAW REVIEW 1889 (2002); Erik Moller, Nicholas Pace and Stephen Carroll, Punitive Damages in Financial Injury Jury Verdicts, 28 JOURNAL OF LEGAL STUDIES 283,237 (1999); Michael Rustad, In Defense of Punitive Damages in Products Liablility: Testing Tort Anecdotes with Empirical Data 78 IOWA LAW REVIEW 12 (1992); Neil Vidmar and Mary Rose, Punitive Damages; In *Terrorem* and in Reality, Harvard Journal on Legislation, 38, 489-511(2001); Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages); [hereinafter "Eisenberg et al., Predictability"]; Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743, 745 (2002) [hereinafter "Eisenberg et al., Juries & Judges"]; Thomas Koenig & Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 JUSTICE SYSTEM JOURNAL 21 (1993); Michael McCann et al., Java Jive: Geneaology of a Juridical Icon 56 UNIVERSITY OF MIAMI LAW REVIEW 113 (2001)..

[165] Research on the effects of caps on non-economic damages has at best produced conflicting findings about their utility in affecting payments to plaintiffs, see e.g. Vasanthakumar Bhat, MEDICAL MALPRACTICE: A COMPREHENSIVE ANALYSIS at (2001) (reduce payment rates , but reduce the probability of settlement raising overall malpractice costs at 68-69); William Gronfein and Elanor Kinney, Controlling Large Malpractice Claims: The Unexpected Impact of Damage Caps , 16 JOURNAL OF HEALTH POLITICS, POLICY AND LAW 441 (1991) (Indiana cap on

will the requirement that trials be held in the venue where the incident allegedly occurred affect the overall rate of litigation or the size of awards if most trials occur in those venues anyway? To what extent will requiring plaintiff lawyers to certify that they have consulted with a qualified expert if that has already been their practice? To be sure, incorporating more health care providers under the Mississippi Tort Claims Act may reduce the size of some awards to a limited number of plaintiffs and the provision for a joint underwriting medical malpractice association should relieve pressure on doctors who cannot otherwise obtain insurance. The central problem however, is that these are probably not sufficient to cause much of a ripple in the tort system.

To be sure, beliefs matter, even unfounded beliefs. To the extent that the passage of the Act and perhaps more general tort reform measures in Mississippi sends a symbolic message that an attempt has been made to change tort law and thereby improve the perceived business climate, medical liability insurers might be encouraged to reenter the Mississippi market place. However, if the cause of the present crisis is not the tort system–and our analysis suggests there is no evidence to show it is a primary cause– then this mis-diagnosis and the legislated remedies set forth in the Act will have little effect on the availability of health providers' liability premiums.

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total damages resulted in higher claim payment amounts than comparison states without caps); Sloan et al., Effects of Tort Reform on the Value of Closed Medical Malpractice Claims: A Microanalysis, 14 JOURNAL OF HEALTH , POLITICS, POLICY AND LAW 663 (1989) (limits on non-economic damages reduced indemnity payments, at 678); ROBERT HUNTER AND JOANNE DOROSHOW, PREMIUM DECEIT: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES (Citizens for Corporate Accountability and Individual Rights, 1999) ("tort reforms did not reduce insurance prices; GOVERNMENT ACCOUNTING OFFICE, MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE STILL RISE DESPITE REFORMS, Report to Congressional Requesters, GAO/HRD 87-21 (December , 1986); BRIMMER ET AL. REPORT ON MEDICAL MALPRACTICE LIABILITY, REPORT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY (March 18, 1998).