For The Defense™

dri™

The magazine for defense, insurance and corporate counsel

October 2020

COVID-19

MULTIDISTRICT LITIGATION

An Examination of the Lack of Uniformity in a Post-MDL Remand, COVID-19 World

Also in this Issue

AVIATION LAW

WORKERS' COMPENSATION

Five Common Myths of Trials and Why We Should Not Be Afraid to Try Cases

And More

Debunking Trial Fiction

Five Common Myths of Trials and Why We Should Not Be Afraid to Try Cases

By: John E. Hall, Jr., Lauren Spears Gresh, and Jonathan Arndt

Studies show that medical malpractice defense attorneys needn't fear jury trials and may be rushing to settle to their detriment.

It is risky. It is volatile. It is expensive. They are unpredictable. They are sympathetic. They are unsophisticated. These are just some of the descriptors you hear in conversations and articles discussing medical malpractice trials and juries.

■ John E. Hall, Jr. is one of the founding partners of Hall Booth Smith, located in the firm's Atlanta office. He specializes in the defense of high exposure cases, including medical malpractice, batch claims, construction, commercial litigation, mass torts, transportation, and product liability. During his legal career, he has tried more than 125 cases to resolution. Lauren Spears Gresh is a partner in the Charleston, South Carolina, office of Hall Booth Smith in the medical malpractice and professional negligence practice groups. Ms. Spears Gresh defends cases throughout the southeast including Georgia, Florida, Tennessee, and South Carolina in areas of medical malpractice, wrongful death, birth trauma litigation, and insurance defense. Jonathan S. Arndt is an associate in the Charleston, South Carolina, office of Hall Booth Smith, focusing his practice on professional negligence, medical malpractice, and general liability.

© 2020 DRI. All rights reserved.

Few things strike more fear into medical liability insurers than the prospect of taking a malpractice claim to trial. After all, it seems that a day rarely goes by without media coverage of another multi-million-dollar jury award to a plaintiff/patient. But is the perception really all that it seems? We believe that it is not. In fact, according to the Physician Insurers Association of America (PIAA), insurers prevail in 91 percent of the medical negligence claims that received a verdict between 2003 and 2012. Yet, still, only 8 percent of claims make it to the verdict stage of trial.

Why? Because almost all cases that are not dropped, withdrawn, or dismissed end in a plaintiff settlement. While there are certainly cases where settlement is appropriate for defendants—those cases where liability is indisputable—there are also cases where liability is more uncertain and settlement is sought nonetheless, which brings us back to fear.

The fear of trial stems from fear of uncertainty. Uncertainty lies with concerns regarding jurors and experts, awards and costs, which create voids that are filled with perceptions of worst-case scenarios. Most common is the perception that jurors are sympathetic to plaintiffs, that they do not understand the science or medicine, and that they are downright unpredictable. There is also the perception that it costs too much to try a case and the result, if for the plaintiff, will likely be an astronomical award. But these perceptions are built upon myths that can be dispelled by data, and we argue that once they are put to bed, insurers can take advantage of the 91 percent success rate of trials and reduce overall indemnity at the same time.

Myth #1: Juries are sympathetic to plaintiffs

Insurers and defendant/physicians may be hesitant to take a medical malpractice case to trial because of the fear that jurors will be swayed by a sympathetic, injured plaintiff and perceive the physician or hospital as an evildoer with deep pockets. However, empirical research data contradicts this idea.

In a 2005 study, the latest available, from the U.S. Bureau of Justice Statistics, there were an estimated 2,449 medical malpractice cases tried before juries across the United States. *See* Bureau of Jus-

tice Statistics, https://www.bjs.gov/index.cfm?ty=tp&tid=4511. Of these jury trials, plaintiffs prevailed in less than a quarter. *Id*. Research also suggests that physicians win 80 to 90 percent of jury trials with weak evidence of negligence, about 70 percent of cases with moderate evidence of negligence, and about 50 percent of cases where there is strong evidence of medical negligence. Philip G. Peters, Jr., *Twenty Years of Evidence on the Outcomes of Malpractice Claims*, 467 Clin. Ortho. Relat. Res. 352–57 (2009). So, even when it is fairly evident that the physician was negligent in some way, juries still side with physicians approximately half of the time.

> **Likewise,** evidence does not support the idea that jurors render verdicts for plaintiffs and against doctors or hospitals simply because they perceive the doctor or hospital as having the "deep pockets" to pay awards.

These figures show that juries do not make their decisions based solely on their emotional attachment to an injured plaintiff. In fact, a series of interviews with jurors from North Carolina revealed that jurors "describe their attitudes along two main themes: too many people want to get something for nothing; and most doctors try to help people and should not be blamed for simple human misjudgment or a momentary lapse of concentration." Neil Vidmar, *Juries and Medical Malpractice Claims*, 369 (2009). Furthermore, other interviews of jurors conducted by Hans and Lofquist revealed that "jurors often penalize plaintiffs who [do] not meet high standards of credibility and behavior, including those who [do] not appear as injured as they claimed, those with preexisting medical conditions, and those who [do] not do enough to help themselves recover from their injuries." *Id*. Our own experience backs these sentiments, as well. In our post-trial discussions with jurors, we often hear complaints that the plaintiffs' attorneys spent too much time emphasizing the emotional elements of the case rather than focusing on the medicine.

Likewise, evidence does not support the idea that jurors render verdicts for plaintiffs and against doctors or hospitals simply because they perceive the doctor or hospital as having the "deep pockets" to pay awards. In a study conducted by Neil Vidmar, 147 people called for jury duty were asked to award damages for pain and suffering in a case where the plaintiff suffered a broken leg as a result of complications. *Id*. at 371. For one set of jurors, the cause was described as medical negligence, but for the other jurors, the cause was described as a car accident. *Id*. When comparing the awards from each set of jurors, there was no statistically significant difference. *Id*.

Based on the foregoing research, it is clear that jurors are generally skeptical of personal injury claims and are not likely to be influenced simply because a plaintiff appears sympathetic. Furthermore, juries are not likely to grant a plaintiff a large award simply because they believe that the hospital or doctor can afford to pay the damages.

Myth #2: Juries do not understand the science, so they side with plaintiffs and the guidance of their likeable experts

One common criticism of juries is that the members, presumed to be laymen, are not always sophisticated enough to understand the science presented by medical experts in medical malpractice cases. In fact, a phrase ubiquitously heard in the industry is "juries are made up of folks who are not creative or smart enough to get out of jury duty." This "lack of sophistication" supposedly leads jurors to side with the party with the most likeable expert, rather than scrutinizing and analyzing the information presented to them. This, in turn, leads to fear of taking a case to trial, particularly cases involving very complex medicine. However, multiple studies have revealed data that contradicts this view.

One study by Taragin et al. used data from closed claim files of a medical liability insurer. *Id*. Medical doctors examined these files and developed opinions on whether negligence had occurred. These opinions were then compared to jury verdicts when the case went to trial. In these cases, jury verdicts were very consistent with medical judgments and were not related to the severity of the injury suffered by the plaintiff. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 Emory L. J. 885, 904 (1994). This suggests that, even if a medical malpractice case involves complex medical terminology or concepts, juries can comprehend the issues, and even draw the same conclusions medical doctors would make on liability.

Further, research suggests that juries do not simply listen to expert witnesses and blindly follow their guidance. A study by the Arizona Jury Study Project involved the study of fifty civil juries in Arizona, including examination of questions jurors asked of experts and videotapes of jury room deliberations. *Juries and Medical Malpractice Claims* at 370. Results of this study revealed that, when given the opportunity, jurors ask incredibly thoughtful and intelligent questions of expert witnesses and are vigorous in their deliberations. Overall, "juries are anything but passive participants who simply defer to experts or just superficially gloss over the standard of care." *Id*. Another study by Schuman et al. required interviews of jurors following expert testimony in medical malpractice trials. These researchers concluded that there was no "white coat syndrome" in which "jurors mechanistically deferred to certain experts because of their field of expertise. Instead, [they] found jurors far more skeptical and demanding in their assessments." *Id*. at 371.

These studies tend to disprove the myth that jurors will blindly follow whatever an expert witness says at trial, or that jurors are incapable of understanding complex and technical information presented during the course of medical malpractice trials.

Myth #3: Jury awards are unpredictable

Another reason insurers and defendant physicians may choose to settle a case,

rather than take it to trial, is because juries are perceived as unpredictable. When entering into a settlement, defendants likely take comfort in the fact that they know exactly how much they will have to pay, rather than rolling the dice and risking the possibility that the verdict exceeds the settlement amount. However, research suggests that jury awards are actually quite predictable, and that defense attorneys are the best at predicting what those awards will be.

Just as jury verdicts tend to be consistent with medical judgment, jury verdicts are also very consistent with the opinion of judges. Certain studies have asked judges to make independent decisions on liability prior to finding out how the jury decided. *Id*. at 369. The findings from these studies revealed that there is a high degree of agreement between judges and juries on liability and, even when the judge disagreed with the jury decision, the judge usually noted that there was evidence such that a reasonable jury could decide for the other party. *Id*.

Research also suggests that defense counsel are able to predict whether any payment will be paid to the plaintiff by a physician, whether through settlement or as a result of a jury trial, better than plaintiffs' counsel or medical experts.

Furthermore, damage awards tend to correlate with the severity of the injury. A study by Bovbjert et al. found that the magnitude of jury awards in medical malpractice cases positively corresponds to the severity of plaintiffs' injuries, with the exception that injuries resulting in death were usually lower than awards for plaintiffs with severe and permanent injuries. *Id*. at 371. Several other studies have found similar results, and there is no evidence that these jury verdicts were the result of anything other than the evidence presented at trial, such as jury sympathy. *Id*.

Research also suggests that defense counsel are able to predict whether any payment will be paid to the plaintiff by a physician, whether through settlement or as a result of a jury trial, better than plaintiffs' counsel or medical experts. Ralph Peeples, Catherine Harris & Thomas Metzloff, *Settlement Has Many Faces: Physicians, Attorneys and Medical Malpractice*, 41 J. Health & Soc. Behavior 333–346 (2000).

As this research shows, jury awards are not as unpredictable as many believe, and when ascertaining the potential range for the verdict, defense attorneys tend to be the most capable at making these predictions.

Myth #4: Taking a claim to trial costs more than settling

The myths of medical malpractice trials are not just limited to issues with juries. When it comes down to the dollars and cents of taking a claim to trial versus settling with a plaintiff, a common perception is that it will always cost more to take a 50-50 claim to trial than to settle on the front end. This, too, is a myth.

Looking back to the data from PIAA's data sharing project (DSP) of claims closed between 2008 and 2012, it is true that the average allocated loss adjustment expense (ALAE) was higher for claims that went to a verdict instead of settling. Aaron E. Carroll, Parul Divya Parikh, & Jennifer L. Buddenbaum, *The Impact of Defense Expenses in Medical Malpractice Claims*, 40 J. of Law, Med., & Ethics 135, 138 (2012). Insurers on average paid $67,242 to settle a claim and $136,396 when a claim resulted in a defense verdict. *Id*. But while these raw ALAE figures seem to suggest that it costs twice as much to close a claim through trial than through settlement, this conclusion is misleading; it fails to take into account the indemnity that is paid in a settlement but not in a defense verdict. Average indemnity for the same period, according to DSP data, was $321,101, a figure that did not include the associated ALAE. *Id*. at 137. Adding in average ALAE for settlement brings the average total cost of settling a claim to $786,056. The cost of achieving a defense verdict is far less than the average settlement cost. (While the average indemnity figure from the DSP is likely skewed upward slightly by outlier plaintiff verdicts (and, thus, inflating the average settlement cost used here), it is not likely that the bias is large enough to dissolve, or even seriously decrease, the cost advantage of achieving a defense verdict.) Combine this with the fact, as discussed before, that the defense wins 70 percent of 50-50 cases that go to a verdict, and the significant cost-savings remain even if the plaintiff wins 30 percent of verdicts and the insurer pays indemnity and higher ALAE in those cases. Philip G. Peters, Jr., *Twenty Years of Evidence on the Outcomes of Malpractice Claims*, 352 (2008). See Figure 1.

Myth #5: Plaintiffs' verdicts result in bigger awards than settlements

Of course, the primary attack on the reasoning above, that going to trial is cheaper even with 30 percent plaintiffs' verdicts, is that the argument is turned on its head by jury awards that far exceed settlement value. And while large jury awards make

Figure 1: Analysis of Cost to Close Claims, Settlement vs. Verdict

				In 100 50-50 Claims…		
	Indemnity	**ALAE**	**Total Cost**	**Chance of Result**	**Cost**	**Overall Cost**
Settlement	$282,843	$38,867	**$321,710**	100 percent	$32,171,000	**$32,171,000**
Defense Verdict	$ -	$81,590	**81,590**	70 percent	$5,711,300	**$17,419,280**
Plaintiff Verdict	$282,843	$107,423	**$390,266**	30 percent	$11,707,980	

Data: Philip G. Peters, Jr., T*wenty Years of Evidence on the Outcomes of Malpractice Claims*, 352 (2008), Aaron E. Carroll, Parul Divya Parikh, & Jennifer L. Buddenbaum, *The Impact of Defense Expenses in Medical Malpractice Claims*, 40 J. of Law, Med., & Ethics 135, 137–38 (2012).

for flashy headlines, when actual settlements and verdicts are examined in the aggregate, the idea that jury awards are bigger on average turns out to be a myth, as well.

While the data is somewhat segmented, at least two studies suggest that plaintiffs' verdicts produce awards that are on par with settlement value and rarely the blockbuster amounts that attract popular attention. In one study, researchers examined 465 claims from a single hospital, 242 of which resulted in lawsuits. Henry S. Farber & Michelle J. White, *A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice*, 23 J. of Legal Studies 777, 786 (1994). In assessing the claims, they coded incidents based on characteristics, like severity of injury and quality of care, and cataloged final dispositions, including settlement or verdict awards. *Id.* at 787. Although the sample produced only a few plaintiffs' verdicts, the awards in those cases were generally comparable to the settlements in other cases with similar characteristics. *Id.* at 802–03.

Not only does data suggest that the settlement and verdict values have little variance, but other data suggest that big awards often attributed (incorrectly) to jury verdicts are more a product of settlement. In a study of all Florida closed medical malpractice claims between 1990 and 2004, researchers found that the vast majority of payments over $1 million were the product of settlement, not jury verdict. Neil Vidmar, *Juries and Medical Malpractice Claims*, 368 (2009). Of 801 cases with payments over $1 million, 747 cases were resolved before jury verdict. *Id.* Even more notable, of the 801 cases over $1 million, only 34 involved "mega-awards" exceeding $5 million. *Id.* And of those thirty-four cases, only two were decided by a jury. *Id.* Although large payments are often thought of as a unique product of jury verdict, the Florida data indicates otherwise. In fact, a more comprehensive study from the National Practitioner Database supports this theory. According to the published report, approximately $4,031,987,700 was paid to plaintiffs in medical malpractice lawsuits in 2018. *See* Leveragerx, **https://www.leveragerx.com/malpractice-insurance/2019-medical-malpractice-report/**. Over the course of the fourteen-year span that the report covers, the total payout amount has varied, sometimes significantly. The total payout for medical malpractice claims in 2004 was the highest year recorded, totaling approximately $4.6 billion. *Id.* The number steadily decreased over the next eight years, reaching a low in 2012 of approximately $3.5 billion. *Id.* It increased consistently over the next six years, experiencing jumps by nearly $200 million each year from 2012 to 2014. *Id.* However, one thing did not change—the payouts were the result of settlements 96.5 percent of the time, with only 3.5 percent (and $142,569,750 in total payments) resulting from a court judgment. *Id.* In other words, large payments come from high-value claims, and such payments are not the result a risk exclusively inherent to trials.

Even when verdicts lead to large judgments for plaintiffs, evidence suggests that the judgments rarely stick in the long run, either succumbing to post-verdict review or settlement. *Id.* at 373. Faced with the potential that an award will be overturned by increasingly active appellate courts or an inability to collect all the award immediately, even winning plaintiffs often settle for less. *Id.* Studies show that some large cases eventually settle for between 5 percent and 10 percent of the jury award, and generally, the higher the jury award, the greater the reduction in post-trial proceedings and settlement. *Id.* So, even if a jury returns an outlier award, there is reason to believe that the award will ultimately be mitigated after the gavel falls.

Caveats

Of course, there are some caveats to the suggestion that these myths should be dispelled, and more medical malpractice cases should be taken to trial. First among these is the fact that it takes longer to resolve a claim when it is taken to trial. While the average resolution time for all claims between 2002 and 2005 was nineteen months, the time required to resolve a claim through trial ranged between thirty-nine and forty-three and one half months. Anupam B. Jena, Amitabh Chandra, Darius Lakdawalla & Seth Seabury, *Outcomes of Medical Malpractice Litigation Against US Physicians*, 172 Arch Internal Med. 892, 892–93 (2012). In our own experience, these numbers remain mostly true in today's world. Time is money, and the monetary (and intangible) costs of resolution certainly grow when the resolution time of a claim is almost doubled by taking it to trial. However, it would seem that the monetary cost is already taken into account in the foregoing analysis, which recognizes significant increases in ALAE for claims resolved at trial. Still, there are certainly

And while large jury awards make for flashy headlines, when actual settlements and verdicts are examined in the aggregate, the idea that jury awards are bigger on average turns out to be a myth, as well.

intangible and business costs associated with maintaining ongoing litigation without certainty of exposure for the insurer.

Worth more attention, however, is the premise that the percentage of success in these cases will remain the same when more cases are taken to trial. This proposition is shaky, particularly since the additional claims that would be taken to trial are likely less favorable cases for the insurer with higher likelihoods of an adverse verdict. But even if this is the case, it is unlikely that a change in the rate of success in jury trials will be significant enough to change the overall conclusion.

Conclusion

The empirical data exists, and it shows that the fear of taking a case to trial based on common myths is not supported by the results of the data. It is impossible to know how many defense verdicts could have been achieved had these matters not been settled. What we do know is that these fears are myths, and trial should not be avoided simply because of a fear created out of fiction.