

RESOLVING MALPRACTICE DISPUTES: IMAGING THE JURY'S SHADOW

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The trial went very poorly from the beginning. The jury was comprised of about an even split of men/women and black/whites—five jurors did not have a high school education and three slept through goodly portions of the trial. The plaintiff's lawyer was very aggressive It was a fiasco from beginning to end. The judge was clearly angry at our failure to settle and talked with us three times during the trial [about settling]. The jury was out 14 minutes and came back with a \$750,000 verdict [in a case that we could have settled for \$150,000 two weeks ago].¹

I

INTRODUCTION

Horror stories about jury results can instill a strong distrust of the litigation system's abilities. While troublesome results such as that noted in the opening quotation may be infrequent, even a few such outcomes would almost certainly impact how the participants approached other cases. The potential for such "jackpot" recoveries awarded by half-awake or half-interested jurors in malpractice cases has prompted numerous reform proposals including the suggested elimination of the jury in favor of a more qualified decisionmaker.²

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1. Quote from an insurance company claims manager reporting on the results in a malpractice trial. This quote and the detailed case descriptions contained in the Appendix are taken from closed claims files made available by malpractice insurers. See notes 14-16 and accompanying text.

2. Am Med Ass'n, *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based, Administrative System* (AMA/Specialty Society Medical Liability Project Report, 1988) ("*A Proposed Alternative*"); Physician Insurers Ass'n Am, *A Comprehensive Review of Alternatives to the Present System of Resolving Medical Liability Claims* 49-50 (PIAA, 1989). Nor is there anything unique about malpractice; while an important context for considering the issues presented, other areas raise the same concerns. For example, virtually identical criticisms have been made concerning the jury's role in corporate litigation, see Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 L & Contemp Probs 177 (Autumn 1989).

Yet before expelling the jury from the adjudicatory process, detailed information regarding the jury's performance and the impact its decisions have on other cases is necessary. The jury's primary function is to make factual determinations and apply the law to the facts in those cases in which the parties cannot reach a negotiated settlement. In theory, clearly non-meritorious claims are resolved short of trial, either because plaintiffs' attorneys refuse to take such cases or drop them during the pendency of the litigation, or because existing procedural mechanisms—most notably the motion for summary judgment—terminate them short of trial.³

Four central criticisms of the jury's role in malpractice cases have been expressed. First, commentators have regularly questioned whether lay juries can comprehend the complex medical testimony submitted on the issues of liability and causation.⁴ Second, there is concern that juries may overlook the legal standards for imposing tort liability because of sympathy toward a severely injured plaintiff.⁵ Third, even if juries understand the expert testimony and do not act out of sympathy, critics have charged that juries are unable to value damages consistently, given the flexibility that exists with amorphous concepts such as pain and suffering.⁶ Finally, regardless of its

3. See Thomas B. Metzloff, *Researching Litigation: The Medical Malpractice Example*, 51 L & Contemp Probs 199 (Autumn 1988).

4. See, for example, Duncan Yaggy & Patricia Hodgson, *Medical Malpractice* 17 (Duke U Press, 1987) (statement of participant that the "complexity of modern medical care makes it increasingly difficult for a jury" to distinguish between physician negligence and the inherent risks of interventionist techniques); Elliott M. Abramson, *The Medical Malpractice Imbroglia: A Non-Adversarial Suggestion*, 78 Kentucky L J 293, 295 (1989-90) ("Juries frequently cannot understand the technical, confusing, and often conflicting testimony of medical experts, or the distinctions between injuries attributable to a physician's negligence and injuries that fall within normal statistical probabilities of occurrence."); Kirk B. Johnson, et al, *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 Vand L Rev 1365, 1370 (1989) ("Juries cannot evaluate independently the expert testimony almost always introduced in malpractice cases."). While there have been suggestions that juries are constitutionally suspect in complex cases, see, for example *Zenith Radio Corp. v Matsushita Elec. Indus.*, 478 F Supp 889 (ED Pa 1979), vacated, 631 F2d 1069 (3d Cir 1980), this argument has never apparently been raised in a malpractice case.

5. See, for example, M. Roy Schwarz, *Liability Crisis: The Physician's Viewpoint*, in James Hammer & B. R. Jennings, eds, *Medical Malpractice—Tort Reform* 24 (U Tenn, 1987) (Juries are "seemingly incapable of separating their personal feelings from the evidence in the cases and instinctively wish to help the plaintiffs as they would want others to help them if they were in a similar situation.") This sentiment has been echoed by representatives of North Carolina malpractice insurers. See, for example, US Gen Acct'g Office, *Medical Malpractice: Case Study on North Carolina* 21-22 (1986) (statement attributed to insurer that "juries often make awards regardless of the 'fault' of anyone out of sympathy for an injured person") ("*GAO North Carolina Report*").

6. See generally Randall R. Bovbjerg, Frank A. Sloan, & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw U L Rev 908 (1989); Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 L & Contemp Probs 225 (Autumn 1989). There is also some evidence that juries tend to fuse liability and damage issues, possibly awarding less in damages in cases of contested liability, or finding liability where damage needs are compelling. See id at 232-34; Dale W. Broeder, *The University of Chicago Jury Project*, 38 Neb L Rev 744, 754 (1959) (in simulation with identical injuries, mock juries awarded an average of \$41,000 when liability was clear; \$34,000 when contested). See generally Molly Selvin & Larry Picus, *The Debate Over Jury Performance: Observations from a Recent Asbestos Case* 36-40 (RAND, 1987) (jury awarded compensation for impermissible expenses) ("*Debate over Jury Performance*"). Some commentators have argued, however, that jury discretion in determining pain and suffering awards is fully consistent with the jury's primary role of bringing societal values to bear in resolving complex disputes. See Harry Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St L J 158 (1958). A related concern is that

decisionmaking competence, the jury process, which requires a slow-paced trial, is thought to be a primary contributor to the high cost and protracted nature of malpractice litigation.⁷ In combination, these criticisms have led some to conclude that the jury trial system is an expensive lottery in which large pay-outs are sometimes awarded without regard to the merits.⁸

These criticisms raise issues that could be profitably addressed through empirical study. This article—drawing upon an examination of all medical malpractice cases litigated in North Carolina over a three-year period—permits an in-depth analysis of the jury's role in light of its critics' contentions, and thus provides an informed basis for consideration of procedural strategies for improving the litigation process. Part II focuses on jury outcomes, the costs of trial, and post-trial adjustments to jury decisions. A significant finding is that malpractice plaintiffs were notably unsuccessful at trial. Indeed, if one focuses solely on cases in which (1) liability was contested and (2) the plaintiff was awarded an amount within the range of the damages estimated prior to trial, the observed plaintiff win rate was only slightly over 10 percent.

It has long been assumed that trial cases do not represent a random sample of the larger population of litigated claims. Several predictive models have suggested that contested liability cases with high potential damages are likely trial candidates. Part III of the article, after briefly describing these models, discusses the trial selection process observed in the study. Objective factors such as the severity of injury or area of practice yield few statistically significant predictors of trial. An analysis of insurers' closed claims files—a primary research source used throughout the article—demonstrates that a large percentage of trial cases are, contrary to expectations, low-quality disputes involving minor injuries, mediocre lawyers, or weak liability claims. Collectively, these factors reveal the insurers' skills as "repeat players"⁹ in the

juries may tend to award more to malpractice plaintiffs than to other types of plaintiffs for similar injuries. See Randall R. Bovbjerg, et al, *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 L & Contemp Probs 5 (Winter 1991).

7. See, for example, Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 33 U Chi Legal F 33, 39 (1990) ("The civil jury has not . . . lacked for critics to decry it as clumsy, and therefore expensive, and as a result of its expense, unjust."); George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U Chi Legal F 161, 164-65 (noting that the right to jury trial together with the court's limited capacity to try cases constitutes a major determinant of the endemic delay prevailing in many urban trial courts). The length of malpractice trials per se has not to date been shown to be a significant issue. See *On Trial: The Length of Civil and Criminal Trials* 9-10 (Nat'l Ctr State Cts, 1988) (average length of fifty-eight professional malpractice trials in three different jurisdictions was seventeen hours as opposed to thirteen hours for average length of civil trials) ("*On Trial*").

8. Am Med Ass'n, *A Proposed Alternative* at 4 (cited in note 2) (statement of Jeffrey O'Connell that results of jury system "are often fortuitous, yet society pays high costs for operating this unsatisfactory lottery"); Stephen D. Sugarman, *Serious Tort Law Reform*, 24 San Diego L Rev 795 (1987). For an overview of the medical profession's criticisms of the litigation system, see F. Patrick Hubbard, *The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform"*, 23 Ga L Rev 295 (1989).

9. See Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L & Soc'y Rev 95, 98-103 (1974) (discussing the litigation advantages enjoyed by institutional litigants who are termed "repeat players").

litigation process in selecting cases for trial, which explains in large part the insurers' success.

Part IV addresses the potential impact of the observed jury outcomes on the larger litigation process. It is widely believed that jury decisions, although relatively few in number, provide important signals used by the participants in the litigation process.¹⁰ This signalling process is not well understood—some have suggested that jury awards establish a “going rate” for resolution of other malpractice claims; others question how so few decisions under a regime that permits juries such wide discretion in awarding damages can offer any useful signal at all.¹¹

The study suggests that a key point in properly imaging the jury's shadow is to distinguish between issues of liability and damages. A comparison of the insurers' pretrial assessments of the merits of the case with the actual jury outcomes demonstrated that insurers fared well before juries, winning virtually all the cases that the insurers believed on the merits to present strong defense positions. Accordingly, the jury determinations of liability—at least from the viewpoint of the insurer—were reasonably predictable. In contrast, however, jury determinations of damages were surprisingly unpredictable. In part, this was a function of how infrequently malpractice juries value damages. But even in those few cases requiring the jury to make an award, insurers' estimates were seriously off the mark and failed to establish anything like a going rate.

Finally, Part V explores possible procedural strategies for addressing the problems associated with the jury. While a host of reforms might draw support from the information presented, the article focuses on two areas. First, it details a possible revitalization of the offer of settlement rules. The current approach¹² is generally recognized as having little impact on the settlement process. The article suggests a revised approach in which a defendant first agrees to “accept responsibility” for paying for the plaintiff's injuries, which in turn triggers a series of litigation impacts creating incentives for settlement. Second, Part V explores the ramifications of the evidence presented on the jury's role with respect to the development of alternative dispute resolution methods.

10. See, for example, Marc Galanter, *The Civil Jury as Regulator of The Litigation Process*, 1990 U Chi Legal F 201.

11. Compare Stephen Daniels & Lori Andrews, *The Shadow of the Law: Jury Decisions in Obstetrics and Gynecology Cases* 167, 169, in Victoria P. Rostow & Roger J. Bulger, eds, 2 *Medical Professional Liability and the Delivery of Obstetrical Care* (Nat'l Acad Press, 1989) (importance of jury verdicts lie in their symbolic value as transmitters of signals, as they “play a crucial role in setting the ‘going rates’ for different types of cases”) (“*Jury Decisions*”) with Albert Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 Harv L Rev 1808, 1825-28 (1986) (describing impact of uncertainty in damage awards as forcing settlements “out of fear” which suggests a need to adopt strategies to determine damages more precisely to encourage better quality settlements). See generally Galanter, 1990 U Chi Legal F 201 (cited in note 10); Harry Kalven & Hans Zeisel, *The American Jury* (Little, Brown, 1966); H. Laurance Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Aldine, 2d ed 1980).

12. See Fed R Civ Pro 68.

The picture that emerges of the jury's role in malpractice cases is a complex one. While there is no evidence that juries are biased against doctors, it does appear that the jury contributes to instability in the litigation process, which tends to undermine the settlement process and contributes significantly to the high cost of litigation, thus justifying continued scrutiny of procedural reforms.

II

DESCRIBING THE JURY'S ROLE IN RESOLVING MALPRACTICE CASES

A. Research Methodology

The study reviewed all medical malpractice cases filed in North Carolina courts, both state and federal, between July 1, 1984 and June 30, 1987. After adjusting for cases that had multiple case files owing to such procedural events as court-ordered change of venue, 895 distinct malpractice disputes were identified.¹³ Based upon an examination of court records, detailed information concerning both the nature of the claim as well as a wide variety of procedural events was collected for each case.

While a review of court files was sufficient to obtain an accounting of jury outcomes, understanding the nature of the cases being tried required additional information, such as the parties' bargaining positions and pretrial assessments of the merits of the cases. The most reliable source for this information is the insurers' claim files. Malpractice insurers have the contractual responsibility of defending the litigation, which typically includes the power whether to settle or try the case. As repeat players in the process, it is in the insurers' best interest to gather all relevant information and to make an objective assessment of its significance; an insurer's performance in the marketplace depends upon its ability to value cases and assess litigation risk effectively over time. The insurers' files also serve as repositories of key documents that provide a reliable record of litigation strategies.¹⁴

13. All cases filed in the North Carolina superior courts are coded according to one of seven case classifications. Through the cooperation of the North Carolina State Administrative Office of the Courts, lists of court file numbers were obtained in each of the state's 100 counties of all "other negligence" cases, a total of over 6,500 case files. "Other negligence" cases included product liability, slip and fall, dog bite, alienation of affection, and malpractice disputes. Review of these files resulted in the identification of more than 1,000 medical malpractice case files. A suit was sometimes transferred to another county pursuant to a change of venue motion. A new file would be established in the new county, resulting in two case files for a single dispute. Similarly, a plaintiff could dismiss a case and subsequently refile it in the same or a different county. Since our identification procedure identified both files, it was necessary to combine the relevant information to avoid double-counting.

Since identifying cases depended upon court clerks coding malpractice cases correctly as "other negligence" cases, the possibility of error existed. Extensive efforts were made to review other identification sources—such as insurers' files—to uncover improperly coded malpractice cases. Approximately twenty incorrectly coded malpractice cases were discovered through these other means.

14. No other source offers such reliability. While plaintiffs' attorneys must advise their clients on the merits of the case, such assessments may be given orally. To obtain a pretrial assessment of the merits would thus require plaintiffs' attorneys to recall their views *after* having been through the trial. Given a trial's intensity and the potentially biasing impact of the result in terms of post-hoc justifications, any post-trial recollection would be open to question. Also, the existence of

Each of the three major insurers in the state permitted access to their files.¹⁵ Detailed reviews were made in fifty-five trial cases representing approximately half of all trial cases in the study.¹⁶ The typical file numbered in the hundreds of pages, and included medical records, defense counsel's summaries of relevant events, relevant communications from the plaintiff's attorneys, and the insurer's assessment of the case, including estimates of chances for winning at trial and likely verdict ranges should the case be lost. Summaries of nine case histories drawn from this review—including five of the six largest plaintiff awards among the trial cases in the study—are provided in the Appendix.

It is important to understand that the empirical information referenced here is based upon the results from a single state; generalizing from data drawn from one state is always an issue. North Carolina has both advantages and disadvantages for research purposes. As the tenth most populous state, it has a high level of medical activity,¹⁷ which generates a significant, though not overwhelming, number of cases. In addition, unlike many other states, North Carolina had not enacted any major procedural reforms specifically applicable to malpractice disputes that would predictably have impacted the litigation process.¹⁸ Moreover, evaluation was greatly assisted by the absence of court

contingency fees may serve to skew the objectivity of the assessments. See Melvin W. Reder, *Contingent Fees in Litigation with Special Reference to Medical Malpractice*, in Simon Rottenberg, ed, *The Economics of Medical Malpractice* 211 (Am Enterprise Inst for Public Pol'y Res, 1978) ("Contingency Fees"). Moreover, since many plaintiffs' attorneys have been involved in handling only a few other malpractice cases, their judgments as to the likely outcome of the case could also be skewed by lack of experience. Another approach would be to seek an independent third-party assessment of the merits of the case, which could include obtaining the views of the judge who presided at trial, or seeking a neutral review of the case by retained experts. See generally Robert MacCoun, *Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior* (RAND, 1987). Third-party reviews are problematic for several reasons. The expense for evaluating a significant number of cases would be considerable. Moreover, simply amassing the relevant documentary evidence necessary to perform an adequate review presents significant problems.

15. The insurers were Medical Mutual Insurance Company of North Carolina, St. Paul's Insurance Company, and North Carolina Hospital Reciprocal Insurance Exchange.

16. The results in the reviewed cases included: (1) thirty-five defense verdicts; (2) eleven plaintiff verdicts (accounting for 92% of the dollars awarded by juries in the study); (3) six cases settled during trial; (4) two mistrials; and (5) one case dismissed during trial. The number of files reviewed was limited by several factors. First, although working relationships were obtained with each of the three largest insurers, there were a number of smaller insurers (many located out of state) or self-insured hospitals that were involved in trials. Second, the document retention policies of the insurers varied. In some cases, files from earlier trial cases in our study had been discarded. Third, some files were incomplete and did not contain sufficient information to permit the desired level of analysis. It is not clear whether the above factors affected the nature of the sample.

Perhaps due to problems of obtaining access, malpractice closed claims files have not been regularly used as a research source. One of the few studies using that resource is Frederick W. Cheney, et al, *Standard of Care and Anesthesia Liability*, 261 J Am Med Ass'n 1599 (March 17, 1989) (detailed review of over 1,000 closed claims files involving claims against anesthesiologists performed by volunteer experts). The study found that indemnity payments were made in 82% of claims determined to have involved substandard care, and in 42% of claims determined to have involved "appropriate" care. Id at 1601. The study did not separately focus on jury outcomes.

17. See *GAO North Carolina Report* at 6 (cited in note 5).

18. As part of a larger "tort reform" package, the North Carolina legislature enacted a few minor procedural reforms in 1976, including an adjustment in the statute of limitations for malpractice claims based upon the so-called "discovery rule" and the elimination of the *ad damnum* clause in professional malpractice complaints. Id at 9-10. According to the GAO report, none of the

delays in most North Carolina counties, resulting in prompt resolution of malpractice disputes. As of early 1991, all but eight cases included in the study had been terminated.¹⁹ On the other hand, North Carolina has one of the lowest malpractice insurance rates in the country, perhaps suggesting that the results here may not be typical of other, high-risk jurisdictions.²⁰

B. A Statistical Profile of Trial Outcomes

Trial was commenced in 118 of the 895 malpractice disputes filed over the three-year period of the study (13.2 percent of the total cases).²¹ Most of the trial cases were resolved promptly. The average length of time from filing of the complaint to trial was approximately twenty-six months; the median time was twenty-four months. A total of 86 percent of the trial cases (102 of 118 cases) were tried within three years of the filing of the case. In the eighty-seven trial cases in which the jury reached a verdict and for which the length of the trial is known, the median trial length was five days; the average was 5.5 days. Table 1 presents a summary of trial lengths.

interest groups surveyed "believed the tort reforms enacted by the state had any major effect" on the disposition of malpractice claims. *Id.* at 10.

19. One complicating factor deserves mention. Unlike the federal courts, North Carolina permits a plaintiff to file a dismissal *without* prejudice at any point up to the close of the presentation of the plaintiff's evidence at trial. The case may then be refiled within a year, with the plaintiff able to take advantage of the initial filing date for purposes of the statute of limitations. See NC Gen Stat § 1A-1, Rule 41(a)(1) (1990). See *Cooter & Gell v Hartmarx Corp.*, 110 S Ct 2447, 2456-57 (1990) (discussing the federal approach to voluntary dismissals distinguishing it from rules employed in some state courts, including North Carolina). This means that some of the cases that were dismissed without prejudice may have been refiled outside the time limits of our study, and may in fact still be pending or have been settled. Efforts have been made to track refileing in the larger counties, and many refileings were identified.

20. Despite the relatively low malpractice insurance rates, North Carolina has experienced the same upward trend in insurance rates observed elsewhere. See *GAO North Carolina Report* at 10 (cited in note 5) (noting increase in insurance rates from 1980 to 1986 of between 173% and 547% depending upon the specialty involved). The average paid claim in North Carolina in 1984, for example, was \$62,043, which exceeded the national average for a large insurer (\$56,739), and the averages for two of five other states included in a government survey. US Gen Acct'g Office, *Medical Malpractice: Six State Case Studies Show Claims and Insurance Costs Still Rise Despite Reforms* 20, Table 2.9 (1986).

21. This rate is higher than the rate observed elsewhere. See, for example, Patricia M. Danzon, *Medical Malpractice: Theory, Evidence and Public Policy* 31-32 (Harv U Press, 1985) (approximately 7% of a sample of 6000 claims closed in 1974 and 1976 were tried to verdict). US Gen Acct'g Office, *Medical Malpractice: Characteristics of Claims Closed in 1984*, 37 (1987) (indicating that of claims closed in 1984, only about 5% were tried) ("*GAO Closed Claims Study*"). Both of these studies were based upon the total universe of asserted claims and not just the smaller number of cases in which lawsuits were filed, so these figures are not directly comparable.

TABLE 1
LENGTH OF TRIALS²²
(N=87)

<u>Length of Trial</u>	<u># of Cases</u>	<u>% of Total</u>
1 to 2 Days	9	10.3%
3 to 4 Days	31	35.6%
5 to 6 Days	17	19.5%
7 to 10 Days	23	26.4%
Over 10 Days	7	8.0%
Total:	87	99.8%

Twelve cases (10.2 percent of the trial cases) were settled during trial. Eight cases (6.8 percent of the trial cases) were dismissed without prejudice by the plaintiff's attorney after the start of the trial.²³ Mistrials were declared in two cases (both of which were subsequently settled). The remaining ninety-six cases (81.4 percent of the trial cases) proceeded to verdict. While criticisms of juries might lead one to believe that plaintiffs usually prevail, our results—which are consistent with other studies²⁴—indicate that plaintiffs were notably unsuccessful. Plaintiffs won—that is, received a verdict for at least \$1—in only eighteen of these ninety-six cases (18.8 percent). Defendants won the remaining seventy-eight cases (81.3 percent). The median verdict was \$33,000, while the average verdict was \$176,163, which shows the preponderance of small awards with the average skewed by a few relatively large awards.

The proportion of plaintiff victories at trial increased somewhat if one counted as wins the twelve settlements reached during trial²⁵ and the two settlements occurring following mistrials. Given the lack of a verdict, jury studies exclude any consideration of these types of cases. To be sure, settlements during trial could indicate nothing more than the parties taking a few additional paces beyond the proverbial court house steps before consummating an agreement. It is also possible, however, that these settlements are based upon some trial event—such as concern with the quality of a specific jury's decisionmaking ability—which draws into question the

22. This table excludes cases (1) dismissed by the plaintiff during trial; (2) settled during trial; (3) dismissed by the court pursuant to a directed verdict; or (4) in which the trial length was unknown. Trial length was recorded in days without any adjustment for partial days of trial since that information was not included in the court records. The longest known trial length was eighteen days. The total does not equal 100% due to rounding.

23. The dismissals appear to have been in cases in which the plaintiff's attorney was either unprepared or otherwise did not want to proceed owing to weak experts or the unavailability of witnesses.

24. Comparative studies across jurisdictions reveal that plaintiffs' success rates in malpractice cases are typically *lower* than in other litigation contexts. See Daniels & Andrews, *The Shadow of the Law* at 174-75, Table 3 (cited in note 11) (in forty-four of forty-six counties studied, the plaintiffs' success rate for malpractice cases was below the plaintiffs' overall success rate).

25. The twelve cases settled during trial constituted 1.3% of the total cases in the study, which is consistent with results reported elsewhere. See *GAO Closed Claims Study* at 82, Table V.14 (cited in note 21) (noting that 585 cases, representing 1.7% of litigated cases, were settled during trial).

jury's competence.²⁶ Counting these trial-related settlements as plaintiff wins, the plaintiff's victory rate rises from 18.6 percent to 29.1 percent (representing 32 of 110 total trial and settlement cases). Including the settlement amounts, where known, the median award in all trials cases is unchanged, but the average award decreases somewhat to \$167,670.

Thus, the initial emerging picture is of a trial system that clearly favors the defendant, albeit by not such a wide margin if trial related settlements are considered. Upon closer examination, however, the results are in fact even more favorable to the defense. Without any insight into the issues presented at trial, most researchers are forced to define outcomes according to an artificial measure. In judging jury outcomes, victory is usually defined in terms of whether the plaintiff received any award, even as low as \$1.²⁷ In fact, some plaintiff victories under this standard represent functional losses as the awards made by the jury constitute nominal damages in the context of the specific dispute. If full information on the claim were known, many of the low awards observed in malpractice trials should be treated as the equivalent of a plaintiff loss. The point is potentially quite important in assessing the jury's performance; the percentage of plaintiff wins is likely to be significantly lower once this case-by-case assessment is made.²⁸ Based upon our case reviews, at least three plaintiffs' verdicts and three trial settlements constituted functional defendant victories.²⁹ Taking this into account, the percentage of true

26. In analyzing the possible significance of trial settlements, the timing and amount of the payment are relevant. Seven of the twelve settlements were reached on the first day of trial or during jury selections, three occurred during the presentation of the evidence, and two were consummated while the jury was deliberating. Settlement amounts are known in seven of the twelve cases. Three settlements were for \$10,000 or less. Review of the insurers' files confirm that in these minor cases, the plaintiffs agreed to a significant reduction from their pretrial demand, and that the insurers were willing to pay a "nuisance value" settlement; there is no indication that the parties' perceptions of the jury's abilities played a role. For example, in one case, a young man hurt in an automobile accident claimed that an emergency room physician failed to x-ray his neck. The resulting delay in diagnosing a fracture allegedly caused a permanent disability. While the court granted plaintiff's motion for summary judgment, the question of damages remained. Prior to trial, defense counsel determined that the plaintiff was teaching aerobics and lifting weights. Following the presentation of this evidence during cross-examination, plaintiff agreed to accept \$10,000 in settlement—the amount offered by the defendant prior to trial.

The remaining four settlements were in greater amounts, including settlements of \$50,000, \$110,000, \$138,000, and \$750,000. The \$750,000 settlement represented the second largest plaintiff recovery in a case going to trial in the study. In that case, attached as *Case 1* in the Appendix, the settlement was strongly influenced by the attorneys' concerns with the jury's inability to assess the case on the merits.

27. See Daniels & Andrews, *Jury Decisions* at 173 (cited in note 11). In our study, three of the cases were non-jury trials, one of which resulted in an award to the plaintiff.

28. See Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J Legal Stud 337, 355 (1990) ("A nominally successful trial is sometimes in fact a loss for the nominal winner. Without observing amounts recovered and expended on litigation, more sophisticated measures of success must await future research.").

29. See Appendix, *Case 2*. In that case, a plaintiff seeking \$150,000 received a verdict of only \$20,000 following a seven day trial in which the defendant's actual trial preparation and trial expenses were over \$18,000. In another case, the plaintiff, complaining of heart pain, went to the hospital and was seen by a physician's assistant and was discharged. She died several hours later. Following a lengthy trial, the jury awarded plaintiff \$18,000, an amount which, according to the plaintiff's attorney, did not even cover the costs of their experts. See John Stevenson, *Lawyers refuse to suffer malpractice blame quietly*, Durham Morning Herald A1 (May 7, 1990). In fact, the plaintiff did not

plaintiff wins drops from 29.1 percent of the total trial cases (including cases settled at or after trial), to no more than 23.6 percent (26 of 110 cases).

Another adjustment that should be factored into any statistical summary of jury performance is the number of trials in which liability was not seriously contested. These cases demonstrate nothing about the juries' proclivities with respect to determining liability.³⁰ The mere fact that the jury made an award in favor of the plaintiff in these cases is basically irrelevant; the issue is whether the amount of damages awarded was appropriate based upon the facts of the case. Trying a significant number of damages-only cases inflates the percentage of plaintiff wins, which may be misinterpreted as suggesting that juries are increasingly likely to find doctors liable. A more appropriate approach would be to separate out damages-only cases, and report a plaintiff win rate only when liability was contested. Based upon a review of the insurers' files, at least four plaintiff victories occurred in cases in which liability was uncontested.³¹ These disputes included three of the five largest verdicts observed and accounted more than half of the total damages awarded by juries.³²

The detail provided by our review of the insurers' claims files permits a critical refinement of the observed jury outcomes to exclude nominal plaintiff victories and damages-only cases. Focusing solely on *contested liability* jury cases (thus *excluding* nominal victories, damages-only cases, and disputes tried by a judge without a jury), the observed plaintiff win rate was extraordinarily low. The adjusted results show that, at best, plaintiffs prevailed in 10 of 89 contested liability cases that went to verdict (11.2 percent). Obviously, a

obtain any recovery at all since the verdict was reduced as a result of a prior settlement with another defendant. Total defense expenditures in the case exceeded \$100,000.

Arguably, a presumption could be used that any plaintiff recovery under a certain amount, such as \$15,000, should be treated as a nominal plaintiff victory given the high costs of litigation. By the same token, however, our study includes a number of small plaintiff verdicts which in context represented recoveries consistent with or even above the parties' pretrial estimates or settlement offers.

30. See Eisenberg, 19 J Legal Stud at 338 (cited in note 28); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J Legal Stud 215, 228-29 (1985) (presence of damages-only disputes "confuse the empirical evaluation of the selection hypothesis which, to date, has been limited to counting the proportion of plaintiff verdicts" (footnote omitted)).

31. For present purposes, "uncontested" does not require that a defendant stipulate liability per se; rather it refers to the insurer's belief that the finding of liability by the jury was very likely. Priest, 14 J Legal Stud at 228 (cited in note 30). Even in such circumstances, defense counsel may prefer to present evidence as to liability based upon a belief that juries are less likely to award large damages if they at least believe the defendant doctor, even if negligent, was acting in good faith. See note 6. In the seven plaintiff victories in which the insurer's files were not reviewed, the information obtained from the court files suggests that possibly three other cases may have involved cases of clear liability, including claims against (1) a podiatrist for illegally administering medication; (2) a doctor for failing to treat gangrene that had been previously diagnosed; and (3) a surgeon for damaging an organ during surgery. While these descriptions suggest clear liability, hesitation is advisable. Many similar-sounding claims upon close examination by the insurer revealed a potentially meritorious defense.

32. The total amount awarded in the four damages-only cases was \$1.75 million, representing 55% of the total jury awards of \$3.17 million. Descriptions of the three largest of these cases are included in the Appendix as Cases 3, 4, and 5.

major question to address in considering the trial selection process is what factors might explain so low a level of plaintiff success before juries.³³

C. The Cost of Trial

A major criticism of the malpractice system is its expense;³⁴ indeed, it has been estimated that the costs of litigating malpractice cases exceed the amount paid in compensation to injured patients.³⁵ While the high costs are partially a function of the complexity of many malpractice actions, the use of juries is almost certainly a contributing factor since jury trials proceed at a slow pace given the need to select a jury and educate lay jurors on medical issues. Other dispute resolution models employing more knowledgeable decisionmakers could resolve issues in stages based upon a more efficient exchange of information.³⁶

Aggregate statistics indicating high transaction costs do not contribute to our understanding of the jury's responsibility for the system's high costs, however, nor do they provide any insights into strategies for reducing expenses. Our research involving insurers' files provided an opportunity to examine defense expenditures in specific trial cases,³⁷ which, in turn, permits

33. See notes 61-115 and accompanying text. It is possible to make an informed judgment whether the jury awards in the damages-only cases constituted plaintiffs' victories as a result of our review of insurers' files. See Priest, 14 J Legal Stud at 228 (cited in note 30). It would appear that in each of the four confirmed damages-only cases, the plaintiff prevailed as in no case was the jury's award less than the defendant's pretrial offer. In three of the four cases, the award either exceeded or essentially equalled the plaintiff's pretrial settlement offer; in one case, the award fell between the parties' positions but still exceeded the defendant's pretrial settlement offer by \$80,000 and the insurer expressed disappointment at the verdict amount. Counting these four cases as "plaintiff wins" and adding them to the contested liability cases results in plaintiffs winning fourteen of ninety-three cases in which a verdict was rendered (15.1%).

34. See Yaggy & Hodgson, *Medical Malpractice* at 21 (cited in note 4) (statement of participant William Ginsburg that "[w]e are plagued with the high cost of the system: the cost of handling claims and attorneys' fees and the burden applied"). See generally *Report of a Task Force, Justice for All: Reducing Costs and Delay in Civil Litigation* (Brookings Inst, 1989).

35. See, for example, *Report of the Task Force on Medical Liability and Malpractice* 19 (Dep't of Health and Human Serv, 1987) (While estimates vary, percentage of insurance premiums actually paid in compensation to victims is "very likely less than half", and this fact does not take into account the non-monetary costs of "time lost and emotional stress for both patient and physician, and of burdens on judicial and other decision-making processes.") ("*Task Force Report*"). See generally Orley H. Lindgren, Ronald Christensen & Don Harper Mills, *Medical Malpractice Risk Management Early Warning Systems*, 54 L & Contemp Probs 23, Tables 7, 8 (Spring 1991); Danzon, *Medical Malpractice* at 176-78 (cited in note 21). The high costs are in part the function of the means by which attorneys are compensated: the use of contingency fees by plaintiffs' attorneys provides a set percentage of recovery regardless of effort, while the hourly billing rates typically used by defense attorneys create incentives to prolong rather than resolve disputes. See James S. Kakalik & Nicholas M. Pace, *Cost and Compensation Paid in Tort Litigation* 41, 55 (RAND, 1986) (Costs and expenses incurred by plaintiffs in malpractice cases constituted approximately 36% of the amount recovered, while aggregate defense costs were approximately 30% of the amount awarded in compensation.) ("*Cost and Compensation*").

36. See, for example, Carrington, 1990 U Chi Legal F at 39 (cited in note 7); Priest, 1990 U Chi Legal F at 199 (cited in note 7).

37. The common unit for measuring defense costs is known as "allocated loss adjustment expense" ("ALAE"), which represents all direct expenses associated with the defense of a particular claim. Each insurer also has indirect expenses relating to the operation of its claims department, such as the salary of claims adjusters and office overhead, which are not typically allocated to specific cases. These indirect expenses are known as "unallocated loss adjustment expense" ("ULAE"). It is estimated that ALAE exceeds ULAE by a factor of about four to one. Kakalik & Pace, *Cost and*

an analysis of several important issues that bear more directly on the relationship between the jury and litigation expense.

1. *Defense Expenditures in Malpractice Cases.* Information on defense costs was obtained in forty-five trial cases.³⁸ Total defense expenditures in these trial cases were \$1.55 million for a per case average of \$34,500. The median expenditure was \$24,800, which was well below the mean figure, indicating that there were a small number of cases with high expenditures. As detailed in Table 2, defense expenditures per case varied greatly, ranging from a low of \$4,100 in a case against a dentist for an alleged failure to obtain a patient's informed consent prior to the removal of his teeth, to \$112,100 in a case against a hospital for the alleged failure of its emergency room personnel to diagnose a heart attack which resulted in the subsequent death of the patient.

TABLE 2
TOTAL DEFENSE COST IN TRIAL CASES³⁹
(N = 45)

<u>Total Defense Costs</u>	<u># Cases</u>	<u>Percent</u>
Over \$100,000	4	8.9%
\$50,100 to \$99,900	7	15.6%
\$25,100 to \$50,000	11	24.4%
\$10,100 to \$25,000	14	31.1%
Under \$10,000	9	20.0%
Total:	45	100.0%

Indeed, the observed variation strongly implies that any notion of an identifiable paradigm malpractice case that accurately describes the level of litigation activity is open to serious question.⁴⁰ Rather, the variation strongly

Compensation at 151 (Table D.11), 157 (Table D.16) (cited in note 35). For a more complete description of the elements typically included in these expense categories, see *id.* at 148-149, 151. The information presented here relates to ALAE.

38. The sample excluded cases settled during trial or in which the insurers' files did not contain complete information on defense expenditures. As previously noted, these cases were not randomly selected, see note 16.

39. This table includes only those trial cases in which the jury reached a verdict and in which information is known with respect to total direct expenses incurred (ALAE) in defense of the claim. It thus excludes trial cases that were dismissed by the plaintiff during trial, settled during trial, or dismissed by the court pursuant to a directed verdict. Information was obtained from summary statistics for ALAE maintained by insurers and was recorded to the nearest \$100.

40. It is useful to investigate whether there are any patterns that may explain the observed variations. By using the insurers' internal predictions of probable outcomes, the observed cases were divided into one of three categories, consisting of cases in which the insurers estimated that their chances of prevailing were: (1) significantly better than even (greater than 60%); (2) approximately even or in the "toss-up" range; and (3) significantly less than even (less than 40%). On average, the least expensive category was the "likely to lose" cases; attorneys' fees in this group averaged \$24,220 (ten cases). In comparison, the average attorney's fee in "likely to win" cases was \$29,770 (seventeen cases), and \$45,520 in the "toss-up" cases (eighteen cases). The observed differences were not statistically significant, owing to the relatively small number of observations. The observed difference is somewhat obscured by the presence of several low-cost "toss-up" trials where minimal defense effort was expended in light of the small stakes at issue. Thus, on average, the cost of litigating a closely contested liability issue was approximately twice that of litigating disputes in which

suggests that there are major differences in the types of issues presented and in the level of effort required to adjudicate different types of malpractice cases. Recognizing this point has profound consequences for considering procedural strategies to refine or improve the litigation process.

An important question is what insights this cost analysis provides for assessing the relative efficiency of the trial process. While absolute expense levels as provided in Table 2 are useful, an additional perspective would relate expenditures to the amount at stake in the litigation. It matters a great deal whether it costs \$50,000 in defense fees to resolve a \$50,000 dispute or a \$500,000 one. To date, no such relative comparison has been made; defense expenditures have been related only to overall levels of patient compensation. This is a particularly inept measure for considering the efficiency of jury trials. The large number of defendant wins and nominal plaintiff victories obscure the significance of the relationship between total defense costs and the amount awarded to plaintiffs in the few cases in which they prevail.⁴¹

The challenge is to find a measure of the amount in controversy or the stakes of the litigation⁴² against which to compare expenditures. A useful proxy is provided by the insurers' estimates of likely damages assuming that the plaintiff prevailed. As noted above, insurers typically estimate a range of damages assuming the plaintiff prevails as part of the process of determining whether to seek a negotiated settlement. Accordingly, an analysis was done comparing defense expenditures with the midpoint of insurers' estimated range of damages. Complete information on both expenditures and damage estimates was available in thirty-six cases. The total cumulative amount in controversy was \$7.7 million, with defense expenses totalling slightly more than \$1.3 million, or 17 percent of the amount estimated by insurers to be paid if plaintiffs had been universally victorious. Wide variations were observed, however; the percentages ranged from defense costs of under 5 percent of the stakes in a large case in which liability was not seriously

the liability question strongly favored the plaintiff. This may well be a function of the fact that in strong plaintiff cases, the defendants essentially conceded liability, thus obviating the need for extensive expert testimony with its attendant costs.

41. See Kakalik & Pace, *Costs and Compensation* at 55, Table 5.1 (cited in note 35) (showing that the average defense costs constituted 64.1% of the compensation awarded by juries in cases tried to verdict). The point can be illustrated by focusing on those cases in the cost sample in which the plaintiff prevailed. In the ten plaintiff win cases analyzed, defense expenditures equalled 14% of the amount awarded by the juries (defense costs of \$397,600 as compared to verdict awards of \$2,866,000). Taken at face value, this percentage might seem reasonable. However, it represents a misleading composite of three different categories of trial results. In four cases, liability was not seriously contested. In those cases—which account for the majority of dollars awarded—defense costs represented only 5% of the verdict amounts (defense costs of \$88,200 as compared to verdict awards of \$1,745,000). In two cases, the plaintiffs obtained nominal victories. Defense expenses in those cases constituted 390% of the verdict amounts (defense costs of \$148,400 as compared to jury awards of only \$38,000). In the remaining four cases in which liability was contested and the plaintiffs won an award within the expected range, defense fees constituted 15% of the recovery (defense costs of \$161,000 as compared to verdict awards of \$1,083,000).

42. Given the high initial demands typically made by plaintiffs' attorneys, there was no objective indication of plaintiff's position that could be used. Moreover, in North Carolina, plaintiffs are not permitted to include a request for a specific recovery in their complaint, but instead may only state that they are requesting damages of "more than \$10,000." See N Car Rule Civ Pro 8(a)(2).

contested, to 355 percent of the insurer-estimated amount in controversy in a small case in which the assessed damages of \$10,000 were dwarfed by expenditures of over \$35,000.

An important distinction lies in the size of the case. In large cases, defined here as cases in which the amount in controversy exceeded \$250,000, the average level of defense expenditure was 8 percent. In medium-sized cases, where the midpoint of the estimated damages ranged from over \$75,000 to \$250,000, the average expenditure was 33 percent of the estimated amount in controversy. In small cases, defined here as where the midpoint of estimated damages was \$75,000 or less, defense expenditures constituted 57 percent of the estimated damages; indeed, this group included seven cases in which defense expenditures exceeded the midpoint of the estimated damages.⁴³

This high relative level of expenditures in the low-damage cases strongly suggests that trial by jury is an expensive proposition. Assuming that defense costs are even a rough approximation of the value of plaintiff expenditures, total expenditures in these cases predictably exceed the insurer's valuation of the likely damages even assuming a plaintiff's victory. The observed level of effort in litigating small stakes through trial was sufficiently high to make pursuit of such claims more likely a function of spite, poor judgment, or other factors unrelated to reasoned decisionmaking.

2. *Defense Costs by Litigation Function.* Aggregate data on expenditures provides only general insights into understanding what aspects of litigation expenses are driven by the system's reliance on the jury. Any fault-based system will entail transaction costs; the expense critique being analyzed here seeks to explore what costs are fairly attributable to the use of a jury.⁴⁴ The level of detail provided by some of the insurers' files permitted a further analysis of expenditure patterns according to the different stages of the litigation process. In each case analyzed,⁴⁵ attorneys' fees and associated

43. The precise totals for these subgroupings are as follows: in the seven cases in which the midpoint of damages exceeded \$250,000, the total stakes were \$5.5 million. Defense expenditures totalled \$452,200, representing 8.2% of the total. Defense expenditures ranged from 4.5% to 20.6% of the midpoint of the estimated damages. In the thirteen cases in which the midpoint of damages was between \$75,000 and \$250,000, the total estimated damages were \$1,732,500. Defense expenditures totalled \$575,000, representing 33.2% of the total. The individual observations in this category ranged from 10.6% to 59.8% of the midpoint of the estimated damages. In the sixteen cases in which the midpoint was \$75,000 or less, the total stakes were \$488,750, with defense expenditures of \$279,800 representing 57.2% of the total. The range ran from 12.6% to 355% of the midpoint of the estimated damages.

44. The jury system's requirement of a concentrated trial—as opposed to a discontinuous approach that would resolve specific issues piecemeal—probably tends to increase discovery costs somewhat as well. See Galanter, 1990 U Chi Legal F at 228 (cited in note 10). Nonetheless, it is clear that the costs attributable to trial preparation and the trial itself are those functions most directly affected by the possibly unique demands of the jury.

45. A detailed examination was made of all defense expenditures in seventeen trial cases. Given the possibility of variations in case management styles among insurers, cases were reviewed from each of the three major insurers in the state. The selected cases were not randomly sampled from the universe of reviewed insurer cases; case selection depended in the first instance upon the completeness of the file. Since the inquiry turns not upon the absolute level of defense expenditures but rather on an allocation of expenses by litigation function, complete billing records and

litigation expenses (most notably expenditures on experts) were allocated to one of three distinct litigation functions: discovery, trial preparation, and trial.⁴⁶ Expenses related to investigating the cases, such as interviewing the defendants or obtaining preliminary reviews of the merits by medical experts, responding to discovery requests, taking or defending depositions, and similar activities, were assigned to the discovery category. Efforts to organize and prepare for trial (such as pretrial conferences, preparation of trial exhibits, meeting with witnesses immediately prior to trial, and related actions) were assigned to the trial preparation category.⁴⁷ All expenditures from when the trial began through to the conclusion of the case were assigned to the trial category.⁴⁸

Interestingly, *more than half* of all defense expenditures were incurred in preparing for trial and the trial itself. Total defense expenditures in the cases studied were \$790,795. Trial preparation expenses totalled \$171,595, or 22 percent of the total, while direct expenses associated with trial were \$247,105, or approximately 31 percent of total expenditures. The combined preparation and trial expenditures—which equal the marginal cost of proceeding to trial—were 53 percent. In contrast, discovery-related costs were \$372,095, or 47 percent of the total.⁴⁹ In other words, it cost insurers more to resolve the case through the jury process than it did to collect and analyze the information relating to the merits of the case for purposes of

descriptions were required. While insurers frequently maintain total expenditures as a summary statistic, in several cases, individual monthly billing statements from attorneys or experts were missing or had been removed from the files pursuant to the insurers' document retention policies. This fact tended to exclude trial cases decided earlier in the study period.

Defense expenditures in the seventeen studied cases totalled \$790,795, and ranged from a low of \$12,220 to a high of \$112,080. The mean expenditure was \$46,515, with a median of \$36,500. The sample mean exceeded the mean observed for all the case files reviewed, suggesting that this sample perhaps tended to overselect more complex cases.

46. Differentiating among these categories did not prove to be a significant problem; each insurer required that its defense counsel supply detailed billing statements describing activities on a daily basis. While a series of minor categorization problems arose, the amounts involved and the conceptual issues were not significant. Accordingly, the methodology for dealing with these minor issues is not detailed here.

47. Contrary to initial concerns, the attorneys' billing sheets were usually clear in distinguishing trial preparation from discovery efforts. Virtually all the attorney expense allocated to trial preparation occurred within three weeks of the scheduled trial.

48. Costs were allocated to the trial category if they occurred on or after the first day of trial. In addition, costs associated with various post-trial activities, such as preparing post-trial motions or responses, or arranging for the filing of the judgment, were included. Arguably, some of the expenses could be included in a new category, but they were typically minor and indeed in most instances were fairly described as trivial. Also, since they would not have been incurred but for the trial, they are fairly included as trial expenses. If an appeal was filed and pursued, however, costs associated with the appeal were separated out and not included as trial expenses. Appeals were filed in three of the cases analyzed, and those expenses (which totalled \$10,320, \$9,220, and \$4,370 respectively) were excluded from these calculations.

49. This pattern held true in various sub-groupings of cases, although the number of cases in any subgrouping are few. For example, in "large" cases (where total defense costs exceeded \$50,000), the observed cost pattern was discovery at 45%, trial preparation at 24%, and trial at 31%. The pattern was similar in cases with defense costs under \$50,000, with discovery expenses totalling 49%, pretrial preparation 19%, and trial expenses 32% of total defense expenditures.

determining whether to settle the dispute or proceed to trial.⁵⁰ This finding is surprising given the general assumption that the high costs of litigation are often thought to be a function of the liberal discovery permitted under modern rules of procedure,⁵¹ and strongly suggests that, at least in the malpractice context, the high costs of litigation are indeed partly attributable to the use of juries.⁵²

Several significant observations can be made relevant to the high marginal cost of trial. First, the trial itself is an expensive process given its requisite marshalling of legal and expert talent. The cases studied generated a total of 101 trial days, or an average trial length of slightly under six days per case. The average cost per day of trial was \$2,395. Substantial variations were observed, owing in part to the varying use of experts. Thus, the expense per day of trial ranged from a low of \$870 in a short, damages-only trial, to a high of \$5,445 in a lengthy, contested liability case. Nine of the seventeen trials had average per-day expenditures of approximately \$2,000 (plus or minus \$300).⁵³ At this level of daily expenditure, the length of malpractice trials presents an important issue in considering reforms addressed to controlling transaction costs.

Another noteworthy factor was the relatively high level of trial preparation, which averaged about 20 percent of all defense expenditures. One factor that partially accounts for the high preparation expense was that there were several cases in which the defense prepared but the trial was postponed; the postponement resulted in a second preparation once the trial was rescheduled. Moreover, there appeared to be only marginal value to the

50. Consideration should also be given to the high marginal costs of trial from the public perspective. From the *court's* perspective, trial is by far the most significant event in terms of the use of public resources, since a judge, jury, and attendant court personnel are provided at the public's expense. See Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation*, 34 *Cath U L Rev* 267, 268-71 (1985) (noting that public expenses have been estimated at \$400-\$600 per hour for courtroom time and that this public subsidy serves as a deterrent to the development of alternative dispute resolution efforts).

51. On the problems associated with modern discovery practice, see, for example, William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 *U Pitt L Rev* 703, 705 (1989); Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand L Rev* 1295 (1978); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 *Yale L J* 352 (1982).

52. In identifying other factors that contribute to litigation expense, several observations can be made about the cost of expert witnesses. Most malpractice cases, with the exception of those cases in which liability is uncontested or which involve the doctrine of *res ipsa loquitur*, require the parties to present expert evidence. One of many issues raised by this heavy reliance on expert testimony is its expense. In the sample of seventeen cases, the amount paid to experts totalled \$109,190, or 14% of the total defense costs. Expenditures for experts represented 56% of all non-lawyer expenses, with the balance being spent on miscellaneous items such as travel, copying, postage, transcript fees, and telephone. Indeed, many of these other litigation expenses, such as travel and court reporter fees for transcripts of depositions, relate to the development of expert testimony. Thus, the actual "expense" associated with experts is probably closer to 20% of total defense expenditures. As noted with respect to overall litigation expenses, the majority of expert-related expenses were incurred at trial. Overall, 55% of expert expenditures were incurred in connection with trial preparation or the trial itself as opposed to 45% incurred during the discovery process.

53. Looking only at attorney expense (thus removing the widely variable trial expense for experts), the average legal expense per day of trial was \$1,670. While some variations existed, it related primarily to whether the defense had one or two attorneys present during the trial.

initial preparation. The level of activity undertaken in connection with each preparation was typical of the effort in cases in which only a single preparation was required. This suggests that calendaring practices—such as the routine availability of special or preemptory settings in which the parties are assigned a firm date for the trial of the case—could have an impact on reducing this category of expense.

The high cost of pretrial preparation also raises a clear concern with respect to the timing of settlement. If it is true that malpractice cases often settle “on the courthouse steps”—a suggestion borne out by our research⁵⁴—then there exists a notable waste of effort in trial preparation activities incurred in the period immediately preceding the scheduled trial. While it is possible that the process of preparing for trial serves to change an attorney’s assessment of the settlement value of the case, there is little evidence from the reviews we performed that this is true, at least from insurers’ perspectives. The opportunity to minimize major trial preparation expenses suggests that settlement efforts should occur well before the scheduled trial. Thus, for example, court-initiated efforts to encourage settlement during pretrial conferences held immediately before trial obviously do not offer the same potential cost savings which could occur if the same settlement efforts were undertaken earlier.⁵⁵

54. There is little empirical evidence as to the relative number of pretrial settlements occurring immediately before trial. Typically, closed claims studies are content to lump into a single category all settlements occurring before trial, be it the day after the complaint is filed or the day before trial commenced. See *GAO Closed Claims Study* at 82, App 5 (cited in note 21). While we were unable to identify the exact settlement point for all settled cases in our study, we were able to estimate the general point in most instances. Determining whether they occurred “on the courthouse” steps was fairly easy as the court files would often indicate a scheduled trial date. Approximately 25% of all settlements took place on the court house steps (representing 106 settlements out of 418 cases in which settlement points were given).

55. Although the focus of the above analyses has been on defense expenditures, the information presented does permit some observations to be made concerning the use of contingency fees by plaintiffs’ attorneys. The precise relationship between defense and plaintiff costs has not been examined in depth, but it is generally assumed that they are comparable. While activity patterns probably vary somewhat, there is no reason to believe that the basic profile of litigation activities varies significantly between the defense and plaintiff functions. Many litigation events, such as depositions as well as the trial itself, require the participation of both attorneys, suggesting that defense expenditures provide a useful proxy for valuing plaintiff expenditures.

At least for malpractice cases going to trial, contingency fees in the range of 30% to 40% are appropriate. In cases in which liability is contested and the damages are under \$200,000, the high level of defense expenditures strongly suggests that the percentage levels of 33% to 40% currently in use in contingency fee agreements are commensurate with the level of litigation activity required. See note 43.

It also seems fully appropriate for plaintiff’s attorneys to negotiate a higher contingency percentage for cases that are tried as compared to those that are settled prior to trial. The high marginal cost of trial justifies a trial premium, regardless of any inherently greater risk associated with going to trial. The cost information also reveals, however, a significant distortion in this respect. Given the high marginal rate of trial, plaintiff’s lawyers are relatively *overcompensated* for settling cases since the typical contingency fee agreement does not sharply differentiate between awards won at trial and those achieved by pretrial settlement. Plaintiff’s attorneys do far less work in settling a case, but receive close to full compensation. The legal system appears quite willing to tolerate this relative overpayment in settlement cases rather than requiring plaintiffs’ attorneys to differentiate between settlements and trial awards to avoid a predictable shift to trial. Arguably, fee regulations should insist upon a more marked difference between trial and settlement contingency fee rates.

D. The Post-Trial Adjustment Process

A complete description of the trial process profitably includes consideration of post-trial modifications of jury outcomes. The litigation system provides numerous means by which jury outcomes can be changed, ranging from informal negotiations between the parties to formal processes such as appeal and the trial court's power to modify jury verdicts. Recent studies of post-trial adjustments in malpractice and other categories of cases suggest that significant reductions do occur in some cases; these reductions can be sizable, especially in cases involving large verdicts.⁵⁶

Our study included forty-four jury trials in which any post-trial modifications could be confirmed. Thirty-four of these cases involved defense verdicts. An important initial observation relates not to the prospects for post-trial *reductions* limiting supposed jury excesses, but to the contrary possibility of post-trial *increases* in cases in which the jury either found for the defendant or plaintiffs received a smaller than expected award. If the process of post-trial adjustment is to serve an ameliorative role in mitigating inappropriate jury outcomes, it should operate both in terms of reducing excessive awards as well as in providing recoveries in cases in which no award was made or increasing insufficient awards. The results provide little evidence of this function. There was but a single case in which the post-trial adjustment process resulted in either a payment to a losing plaintiff or an increase in an arguably inadequate award. This low level of adjustment was observed despite the fact that there were several cases in which the insurer believed prior to trial that there was a significant risk of plaintiff prevailing.⁵⁷

56. One study of cases in which juries awarded over \$1.0 million in damages reported that the average malpractice verdict was reduced by 27% during the post-trial process. Ivey E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 Just Sys J 349, 355, Table 4 (1986). In a study involving a larger sample of cases and a wider variety of awards, Shanley and Peterson found that the average amount actually paid to malpractice plaintiffs constituted only 67% of the original verdict. Michael G. Shanley & Mark A. Peterson, *Posttrial Adjustments to Jury Awards* 27, 45 (RAND, 1987) ("*Posttrial Adjustments*"). The level of reductions, however, varied substantially according to the size of the original verdict; for verdicts under \$100,000, the average reduction was insignificant. *Id.* at 45, Table 4.7. For cases in which the verdict fell between \$100,000 and \$1.0 million, the average reduction was 20%. For the few cases with an initial award over \$1.0 million, the average reduction was 39%, although the sample size in this category was small. *Id.* See also Mark Peterson, Syam Sarma & Michael Shanley, *Punitive Damages: Empirical Findings* 26-30 (RAND, 1987) (review of post-trial adjustment process in sixty-eight cases in which punitive damages were awarded showing overall reduction of approximately 50%) ("*Punitive Damages*"); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J Legal Stud 535, 564-66 (1985) (discussing the role of the appellate process in controlling the award of punitive damages); US Gen Acct'g Office, *Product Liability: Verdicts and Case Resolution in Five States* 89-99 (1989) (noting major post-trial reduction in large award and punitive damages cases in product liability disputes). Marc Galanter has recently suggested that judicial review of verdicts may be decreasing over time even as it is focused on larger awards. Galanter, 1990 U Chi Legal F at 227 (cited in note 10).

57. Shanley and Peterson found that plaintiffs benefitted from the adjustment process in only 5% of all cases studied. Shanley & Peterson, *Posttrial Adjustments* at 27-28, Table 4.1 (cited in note 56). The one case in which an adjustment in favor of the plaintiff was observed occurred only after a successful appeal by the plaintiff. As opposed to post-trial reductions favoring defendants, which largely occur as a result of negotiation, see *id.* at 46, it appears that pro-plaintiff adjustments occur, if at all, following more formal appellate review. While a complete analysis of the appellate process is not yet complete, the preliminary data show that plaintiffs filed thirty-five appeals from adverse trial

With respect to post-trial reductions in plaintiffs' awards, our findings, given the small size of our sample, do not directly challenge the prior studies with respect to the frequency or amount of post-trial adjustments. In the smaller cases (defined here as cases in which the award was under \$100,000), there was virtually no post-trial activity.⁵⁸ In part, this reflects the fact that some of these cases, while ostensibly plaintiff victories, involved an award of damages far below the plaintiff's expectations or the insurer's estimates. In those cases, insurers were quite content to pay the small award.

Any significance to post-trial reductions is to be found in large cases. In the five large plaintiff-verdict cases, juries awarded a total of \$2,780,000, which accounts for over 85 percent of the total amount awarded by juries in the study. Under state law, pre-judgment interest was added, increasing the total awards to \$3,255,000.⁵⁹ Post-trial adjustments were made in four of the five cases in a total amount of \$485,000, representing an overall reduction of approximately 15 percent of the total awards (including pre-judgment interest). Most of the adjustment was observed in a single case in which the final settlement was approximately \$350,000 below the combined amount of the verdict and the pre-judgment interest.

The reductions that were observed were of three types: (1) negotiated reductions in the amount of the original jury verdict (occurring in one case in the amount of \$200,000); (2) negotiated reductions in the amount of pre-judgment interest (occurring in three cases for a total reduction of \$245,000); and (3) offsets based upon prior settlements with other defendants (occurring in two cases for a total reduction of \$40,000).⁶⁰ Thus, in only a single case did the adjustment reduce the total award below that awarded by the jury exclusive of any pre-judgment interest.

decisions. The majority were not pursued. In the eleven appeals filed by plaintiffs that were heard, the result was affirmed in six cases. Plaintiffs prevailed in five cases for reasons ranging from unfair discovery tactics by defense counsel to incorrect jury instructions and evidentiary rulings made during trial.

58. In the five smaller cases, the total amount awarded directly by the jury was \$90,000. After considering pre-judgment interest, the total amount was \$104,000. Insurers paid a total of \$85,000 (81.7%) with reductions occurring in two cases. Virtually the entire observed reduction occurred in one case where an \$18,000 verdict resulted in a \$0 payment owing to a set-off from a prior settlement with another defendant.

59. In the RAND study, it was noted that pre-judgment interest was not a major factor. Shanley & Peterson, *Posttrial Adjustments* at 10 (cited in note 56) (noting that state law in the jurisdictions studied made it unlikely that pre-judgment interest would be awarded). In North Carolina, pre-judgment interest is routinely awarded as an element of damages. NC Gen Stat § 24-25 (Cum Supp 1983) (allowing pre-judgment interest on compensatory damages for tort, if covered by insurance).

60. Set-offs for prior settlements are typically known in advance of trial and are accordingly factored into the parties' analysis of the case. It is questionable whether these adjustments should be considered at all given that they represent pretrial events the effect of which is known. It is unclear how earlier studies treated these set-offs.

III

UNDERSTANDING TRIAL SELECTION PROCESS

Recent scholarship has resulted in a rich collection of theoretical as well as empirical studies on the dynamics of the litigation process.⁶¹ Collectively, this work provides a basis for understanding the trial selection process against which our observed results can be compared.

It is useful to provide a brief overview of existing litigation models. Litigated cases are drawn from a pool of potential claims arising from incidents that possibly caused injuries. In the malpractice setting, the pool of potential claims is thought to be much greater than the number of claims actually asserted.⁶² Comparatively little is known about the process by which certain potential claims are asserted.⁶³ Obviously, plaintiffs' attorneys play a major screening function in determining which claims ripen into lawsuits. Once a claim is pursued, the key issue is modeling the parties' determination whether to settle, drop, or try a particular lawsuit. Existing models describe a bargaining game:⁶⁴ the competing parties consider the expected economic impact to them at every stage. Claimants and their lawyers maximize their net return (settlement or jury award less litigation expenses), while defendants, insurers, and their lawyers minimize their total loss (settlement or jury award plus litigation expenses). Estimates of the plaintiff's probability of winning and the probable level of damages are based on knowledge of the applicable legal rules of liability and damages, investigation of the circumstances and nature of the alleged injury, and informed judgment about likely jury behavior. It follows that most claims will be settled whenever the difference between the two sides' respective valuations of the case (perceived likelihood of liability times likely damages) is less than the expense of pursuing the case to trial. The precise settlement amount is determined by the parties' relative bargaining power, which varies with factors such as legal talent and resources available to finance the litigation.⁶⁵

These models are based upon a number of simplifying assumptions. For example, they assume that plaintiffs and defendants are risk neutral. A risk-

61. See, for example, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1 (1984); Eisenberg, 19 J Legal Stud 337 (cited in note 28); William M. Landes, *An Economic Analysis of the Courts*, 14 J L & Econ 61 (1971); John P. Gould, *The Economics of Legal Conflicts*, 2 J Legal Stud 279 (1973); Richard A. Posner, *Economic Analysis of Law* 434-53 (Little, Brown, 2d ed 1977); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J Legal Stud 55 (1982); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Georgetown L J 1567 (1989).

62. See Don Harper Mills, John S. Boyden, Jr. & David S. Rubsamen, *Report on the Medical Insurance Feasibility Study* 97-101 (Sutter, 1977) (estimating approximately 1% rate of negligent injury in hospital setting); Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* 3, 6-1 (Harvard U Press, February 1990) (1.0% rate for New York hospitals in 1984).

63. For available information, see Marylynn May & Daniel B. Satengel, *Who Sues their Doctors? How Patients Handle Medical Grievances*, 24 L. & Soc'y Rev 105 (1990).

64. For a review of the literature, see Robert D. Cooter and Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J Econ Lit 1067 (1989).

65. See id at 1078.

neutral party would be indifferent as between a \$5,000 settlement offer and going to trial in a case in which that party estimated a 50 percent chance of obtaining a \$10,000 award. A risk-averse party would prefer settlement; a risk-taker would prefer trial. For malpractice cases, it is generally believed that plaintiffs, who have but a single claim, tend to be more risk-averse than insurers who have a large number of claims and are thus more able to run the risk of losing.⁶⁶ The models also assume that the litigants have the same stakes in the dispute, usually meaning that their only interest is in obtaining or not losing money. In reality, litigants may be motivated by a variety of other factors such as a plaintiff's interest in vengeance, a defendant doctor's interest in vindicating his or her reputation, or an insurer's refusal to pay what it perceives to be "nuisance value" settlements even if in its short-term economic interest.⁶⁷ Other possible distortions may be caused by differences in interests between clients and lawyers, particularly plaintiffs' attorneys retained on a contingency fee basis.⁶⁸

Commentators have set forth two distinct predictions dealing respectively with (1) the selection process for determining which cases are tried and (2) expected plaintiff success rates. The so-called "selection effect" predicts that the selection of cases for trial does not result in a random sample of cases from the larger universe of litigated claims. Rather, clear cases in which liability is either certain or unlikely will be settled or dropped, leaving more closely contested liability or difficult to value cases overrepresented in the trial sample.⁶⁹ The above model is consistent with the conventional wisdom offered in the malpractice context, which provides that malpractice cases are:

"self selected" to [trial] precisely because the outcome was unpredictable to the litigants, the potential award was large, and the evidence for the plaintiff was weak. Thus we get a very biased impression of the operation of the malpractice system from observing the minority of more visible cases that are litigated to verdict rather than the great majority of cases that are settled out of court.⁷⁰

If, as predicted, the subset of trial cases do not constitute a random sample, trying to gauge trends or policy shifts solely from jury results is particularly risky—the fact that plaintiffs lose more often than they win at trial does not mean that the existing legal regime is pro-defendant.⁷¹

66. Id at 1075.

67. See, for example, Priest & Klein, 13 J Legal Stud at 24-29 (cited in note 61) (discussion of impact on settlement of different litigation stakes); Cooter & Rubinfeld, 27 J Econ Lit at 1074 (cited in note 64) (same).

68. For an overview of the impact of contingency fees on settlement dynamics, see, for example, Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 L & Contemp Probs 139 (Winter 1984).

69. See, for example, Priest & Klein, 13 J Legal Stud at 7-17 (cited in note 61).

70. Danzon, *Medical Malpractice* at 51 (cited in note 21).

71. See, for example, Eisenberg, 19 J Legal Stud at 337 (cited in note 28) ("The observation of hotly contested trials is therefore wholly consistent with the underlying rules that are skewed toward the plaintiff, toward the defendant, or toward neither side."). For further discussion of the trial selection process, see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L Rev 4 (1983).

A second prediction, known as the "50 percent hypothesis," is that the case selection dynamic will tend to produce an approximately equal number of victories for plaintiff and defendant in contested liability cases.⁷² Since "easy" cases favoring either party will be readily identified, the cases remaining for trial will be those cases that are more difficult to analyze. Since the model assumes that each party is equally talented in analyzing disputes, possibilities of evaluation errors will be equally distributed among plaintiffs and defendants.⁷³ Assuming further that both parties are risk neutral and that the stakes of the litigation are symmetrical (meaning that no party is more or less prone to litigate by factors such as protecting reputation or insisting upon their day in court), plaintiffs and defendants should win with equal frequency.

Like any economic model, the trial selection theory and the 50 percent hypothesis are not necessarily accurate in describing reality, but rather provide an analytic tool to conceptualize the nature of the process being described. Obviously, the plaintiff's success rate in our study is well below 50 percent; in fact, in contested liability cases, the observed success rate, excluding nominal victories, was only about 11 percent.⁷⁴ The fact that our study, with results from a limited period and a single jurisdiction, shows a low plaintiff success rate does not disprove the 50 percent hypothesis; some variance would be expected among jurisdictions simply as a result of random variations.⁷⁵ Nonetheless, several empirical studies have shown that the 50 percent hypothesis does not adequately describe trial outcomes in several litigation contexts,⁷⁶ perhaps most notably medical malpractice. Our results then serve to confirm—indeed emphatically confirm—what others have observed.⁷⁷ It has been suggested that the low success rate may be the

72. See Priest & Klein, 13 J Legal Stud at 17-24 (cited in note 61); Eisenberg, 19 J Legal Stud 337 (cited in note 28). The 50% hypothesis is not limited to contested liability cases, as the same principle would apply to damages-only disputes, in that the theory's proponents contend that difficult damages cases will be tried more frequently, with the results tending over time toward plaintiffs' achieving a 50% "win rate," although determining what constitutes a victory is more difficult in the damages context. See Priest, 14 J Legal Stud at 226-29 (cited in note 30). See note 33.

73. See Priest & Klein, 13 J Legal Stud at 17-19 (cited in note 61).

74. See notes 27-33 and accompanying text.

75. See Eisenberg, 19 J Legal Stud at 340-47 (cited in note 28).

76. For an overview of existing evidence, see generally *id.* See Eisenberg, 77 Georgetown L J 1567 (cited in note 61) (analyzing success rates in various civil rights contexts); Jeffrey M. Perloff & Daniel L. Rubinfeld, *Settlements in Private Antitrust Litigation*, in Lawrence J. White, ed, *Private Antitrust Litigation* 149 (MIT Press, 1988) (antitrust actions).

77. See Priest & Klein, 13 J Legal Stud at 37-42, Table 7 (cited in note 61) (malpractice cases had lowest success rate in categories of cases analyzed with a plaintiff success rate of 39.6% based upon a sample of 202 cases in the Illinois state courts); F. Patrick Hubbard, "Patterns" in *Civil Jury Verdicts in the State Circuit Courts of South Carolina: 1976-1985*, 38 SC L Rev 699, 730-32, Table 9 (1987) (for 1983-85, total of sixty-three malpractice trials with twenty-four plaintiff victories or 38% success rate); Eisenberg, 19 J Legal Stud at 357 (cited in note 28) (sample of 697 federal court malpractice trials during 1978-85 with plaintiff success rate of 38%); Lindgren, Christensen & Mills, 54 L & Contemp Probs at 38 (cited in note 35) (plaintiffs prevailed in only 16% of claims brought to trial against group of California hospitals, and won more than the defendant's final settlement offer in only 6%). Thus, while plaintiffs' win rates are variable across jurisdictions, they tend to be lower than for other types of cases. See Daniels & Andrew, *The Shadow of the Law* at 173-75, Table 3 (cited

function of differential “stakes” in the litigation process exhibited by malpractice plaintiffs and defendants.⁷⁸

The above discussion suggests that further investigation into the trial selection process in a focused setting (such as malpractice) would be worthwhile to improve our understanding of litigation dynamics.⁷⁹ As a result of the detailed profiles of the trial cases and the overall sample of litigated disputes, we can provide insights into the trial selection process in an effort to explain the deviations.

A. Preliminary Empirical Observations on the Trial Selection Process

In searching for insights into the trial selection process, one approach would be to determine if cases with particular types of injuries are more likely to be tried. Based upon the trial selection models detailed above, for example, one might expect a higher trial rate with cases involving serious permanent injuries or death. Table 3 presents information on trial rates based upon severity of injury.⁸⁰

TABLE 3
TRIAL RATES BY SEVERITY OF INJURY⁸¹

<u>Injury Class</u>	<u># Cases</u>	<u>Trials</u>	<u>Trial Rate</u>
Total Sample	895*	118	13.2%
Emotional/Insignificant	44	5	11.4%
Temporary—Minor/Major	230	27	11.7%
Permanent—Partial Minor/Major	333	47	14.1%
Permanent—Total Major/Grave	69	11	15.9%
Death	182	28	15.4%

* Other, Pending, Unknown—37 Cases

in note 11) (plaintiff success rate exceeded the overall rate in only two of forty-six counties, both of which had few malpractice verdicts).

78. See, for example, Priest & Klein, 13 J Legal Stud at 40 (cited in note 61).

79. See, for example, Eisenberg, 19 J Legal Studies at 355 (cited in note 28) (A “fruitful line of analysis may be to dig deeply within subject matter areas before trying to generate a broad, testable litigation model. Each subject matter area will have its own set of factors that potentially influence the outcome of trials.”).

80. Classification of injury severity is a subjective process, especially when acting upon imperfect information such as the allegations of a complaint. Moreover, injuries within specific categories can vary significantly. Even death is ambiguous given the considerable variation in the relationship of the injury to the alleged malpractice. Some cases represent situations in which a totally healthy plaintiff died allegedly as a result of a medical procedure. Other cases involve situations in which an already seriously ill patient died sooner as a result of some alleged negligence.

81. Information on severity was collected on each case according to the nine-point scale used in various closed claims studies. See *GAO Closed Claims Study* at 24 (cited in note 21). Since the number of observations in some categories was small, certain severity codes were combined. The category “other and unknown” consists of cases that are still pending or in which the severity of injury could not be determined.

While the trial rates for the more severe injuries are slightly higher than for less severe injuries, there are no statistically significant correlations; the observed results could result from random selection.⁸²

A second approach would be to analyze trial rates according to the area of medical practice involved in the suit. Claims involving certain practitioners—such as obstetricians or emergency room physicians—may consistently raise more difficult damages or liability issues resulting in higher trial rates. A summary of trial rates according to area of practice for those areas in which significant number of claims were observed is presented in Table 4.

TABLE 4
TRIAL RATES BY AREA OF PRACTICE⁸³

<u>Specialty Area</u>	<u># of Cases</u>	<u>Trials</u>	<u>Trial Rate</u>
Total Sample	895*	118	13.2%
Anesthesiology	32	3	9.4%
Emergency Medicine	70	12	16.9%
Family/General	77	6	7.8%
Internal	38	9	23.7%
OB/GYB	107	16	15.0%
Surgery—OB/GYN	39	11	28.2%
Surgery-General	88	13	14.8%
Surgery—Orthopedic	60	4	6.7%
Dentistry	73	9	12.3%

* Other Specialties Pending, Other or Unknown: 311 Cases

As a result of the smaller number of observations in each category, some variations were noted in the trial rates with respect to area of practice. None of the variations, with the exception of "Surgery-OB/GYN," however, are statistically significant.⁸⁴ The surgical obstetrics claims involved a number of injuries in which a woman's ability to bear children was lost, which raises a difficult damages question perhaps requiring trial.

82. Use of a simple chi-square test, which measures the likelihood that the observed distribution occurred by chance, provides a chi-square score of approximately .7. This means that there was about a 70% chance that the observations could have resulted from a random selection of cases, well above the .050 score used as a minimum level for determining significance. For a similar finding, see Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process* 14, 16 (Nat'l Bureau of Econ Res, 1990) (suggesting that with respect to severity of injury, trial cases were similar to cases that had been dropped by the plaintiff or dismissed) (*'Examining Malpractice Litigation'*).

83. Each case was coded to indicate the primary area of medical specialization or practice involved. As all cases do not involve a single area of medical practice, researchers coded up to three areas of practice, indicating the primary, secondary, and tertiary areas of practice. This table analyzes only the primary area of practice. These areas presented here do not equal the total number of cases in the study, since there are additional categories in which the number of cases was too small to warrant presentation; presented here are practice areas with more than thirty cases.

84. The chi-square score for the "surgery-OB/GYN" area was .004, meaning that there was only a four in 1,000 probability that the observed trial rate occurred as a result of chance. If combined with the general OB-GYN category, however, the trial rate was not significantly different from the total population.

A search for other objective measures of the dynamics of trial selection suggests that the county where the case is filed may be of some significance. Table 5 presents trial rates for those North Carolina counties in which more than 30 cases were filed.

TABLE 5
VARIATION IN TRIAL RATES BY COUNTY⁸⁵
(minimum of 30 cases per county)

<u>County</u>	<u># Cases</u>	<u>Trials</u>	<u>Trial Rate</u>
Total Sample	895*	118	13.2%
Mecklenburg	92	23	25.0%
Forsythe	58	6	10.3%
Wake	53	3	5.7%
Guilford	48	7	14.6%
Durham	43	8	18.6%
Cumberland	40	3	7.5%
Buncombe	35	8	22.9%
Gaston	33	5	15.2%

* Other Counties or Federal Court—493 Cases

Although a number of variations from the overall trial rate can be noted, most counties had relatively few trials so that with one exception, none of the variations are statistically significant.⁸⁶ The high trial rate in Mecklenburg County, which is almost double the overall rate, *was* statistically significant.⁸⁷ Since Mecklenburg is a large urban county,⁸⁸ several factors may account for its high trial rate. First, Mecklenburg's courts have longer delays than are typical in other counties. Delay may result in the parties being less willing to enter into early settlement negotiations, which perhaps tends to harden the parties' negotiating positions. Second, individual litigation styles among attorneys or insurers may promote a higher trial rate. Another possibility is that variations in practice and approach among defense counsel, whose recommendations often play a major role in forming the insurer's decision to settle, are a significant factor in determining whether a case is tried.⁸⁹

85. The county in which the case was adjudicated or resolved, as opposed to the county in which it was initially filed, was considered for purposes of this analysis.

86. In order to increase the number of observations necessary to test for statistical significance, adjacent counties were combined to see if regional as opposed to county specific patterns existed, but no significant patterns were noted.

87. Excluding Mecklenburg County, there were ninety-five trial cases out of 803 total cases for a trial rate of 11.8%, as compared to Mecklenburg's trial rate of 25.0% (twenty-three trials out of ninety-two cases). The chi-square score was under .001 indicating that the chance of this difference occurring randomly less than one in a 1,000.

88. On the possible significance of urbanization as a relevant factor in explaining observed levels of malpractice litigation, see Danzon, *Medical Malpractice* at 74-75 (cited in note 21).

89. In reviewing court files, we obtained the identity of plaintiff and defense counsel in each litigated case. This permits a direct means of testing various theories as to the specific impact of individual attorney action. With respect to defense counsel, twelve different defense firms were involved in fifty or more malpractice cases, indicating a high degree of concentration on the defense side. The trial rates for the two most active defense firms in Mecklenburg County were 23% (twenty-one trials out of ninety cases) and 22% (ten trials out of forty-five cases). The high trial rate of the

Reviews of the insurers' closed claims files provide some evidence that the insurers and their defense counsel view Mecklenburg juries as being particularly competent, thus suggesting that they are more willing to submit complex liability issues or damages questions to the jury than in other counties.⁹⁰

Taken collectively, the search for objective case characteristics that explain the trial selection process is largely unenlightening. Trial selection does not appear to be a function of either the type of injury or the area of medical practice involved. Rather, the search for explanations must go deeper into a case-by-case search for explanatory factors. Given problems of access to information and the detailed examination of particular cases necessary to scrutinize the trial selection process, no systematic search has been conducted in the past in the malpractice context. Our study permits a more searching inquiry, including an analysis of the nature of the liability issue presented and the estimated level of damages involved.

Excluding cases settled during trial, there were forty-eight cases (representing half of all trial cases in this category) in which the insurer made a probabilistic estimate of their chances of prevailing with respect to liability. For purposes of analysis, the cases were divided into one of three categories, consisting of cases in which the insurers estimated that their chances of prevailing were: (1) significantly better than even (greater than 60 percent); (2) were approximately even or in the "toss-up" range; and (3) significantly less than even (less than 40 percent).⁹¹ The trial selection model referenced above would suggest that closely contested liability cases would be overselected, and thus one would expect to see a predominant representation in the middle category. The results, presented in Table 6, are contrary to this expectation, and indicate that the clear majority of trial cases fell in the

first firm was statistically significant with a chi-square score of .002; the chi-square for the second firm was .063, which, while suggesting a relationship, is not considered statistically significant. Combining the two primary Mecklenburg defense firms, the chi-square is .001, indicating that there is only a one in 1,000 chance that the trial rate of these two firms would be this high as a result of random selection. Of course, the statistical significance of the observed result does not indicate that the choice of defense counsel is causally related to the trial rate.

90. For example, the review of the insurers' closed claim files revealed a number of comments about juries in Mecklenburg being "sophisticated." Thus, one defense counsel noted that "Mecklenburg County juries are predictably well-educated and conservative/skeptical toward radical malpractice claims."

91. The estimates upon which these labels have been assigned were derived in part from defense counsel who may have an interest in overestimating the odds of plaintiff prevailing in order to protect or enhance their reputations. By overestimating the possibility of a plaintiff victory, defense counsel guard against a "surprise" loss while at the same time making defense victories appear to be earned. By the same token, however, there is a limit to how grim a picture the defense counsel can paint and still proceed to trial or retain the confidence of the insurer. Over time, an insurer would become aware of major discrepancies. Also, the insurer has sufficient institutional capabilities to formulate its own assessments of the potential likelihood of liability apart from defense counsel's input. Indeed, there were several cases in which the insurers discounted defense counsel's odds based upon their own estimates of the likely odds of winning at trial. The likely impact of this potential biasing factor is probably for defense counsel to report more cases to be in the "toss-up" range when in fact their objective view is that the odds of a defense verdict were more likely than a finding for the plaintiff.

probable win or probable loss categories, with only about one-third falling in the close liability category.

TABLE 6
INSURERS' PROBABILITY ASSESSMENTS ON LIABILITY⁹²
(N = 48)

<u>Category</u>	<u>Number of Cases</u>	<u>Percentage</u>
Probable Win (>60%)	20	41.7%
Toss-up Cases (≈50%)	17	35.4%
Probable Loss (<40%)	11	22.9%
Total	48	100.0%

Another important factor in the trial selection process is the amount of potential damages at stake in the case. Malpractice cases can run the gamut from disputes involving insignificant injuries and modest recoveries to claims involving permanent disability or death and potentially millions of dollars. As noted above, it is widely predicted that high-stakes cases are more likely to be tried, especially in light of high litigation costs that make trial of small-stakes disputes problematic. Table 7 depicts the trial sample in terms of the insurers' estimates of damages assuming the plaintiff were to prevail. Since most insurers predict a range of damages, the information is presented both in terms of the highest predicted damage award made by the insurer as well as the midpoint of the estimated range.

92. The information reported here relates to forty-eight trial cases in which a probabilistic estimate on the likely trial outcome on liability was manifested by the insurer. In most cases, a precise prediction, such as 20%, or narrow range, 15-20%, was given. In other cases, more general statements were made. For the eleven probable loss cases, three cases were listed as 0% chance of prevailing; three between 15% and 25%; one at 40%, and the remainder were listed as "less than 50%" with other indications in the file that the insurer clearly expected to lose on the liability issue. For the probable win cases, eleven of the twenty cases expressly listed the odds as being 75% or higher; four were listed as being in the 60-75% range; and the balance did not present a specific figure but there were indications in the file that the insurer clearly expected to prevail, such as reserve rates set at \$0 or affirmative statements that the physician was not liable and therefore the case should be tried.

TABLE 7
INSURERS' ESTIMATES OF DAMAGES AWARDS IN TRIAL CASES⁹³
(N = 40)

Dollar Category	Number of Cases Using Midpoint of Insurers' Estimates (%)	Number of Cases Using Highest Insurer Estimates (%)
\$0 to 50,000	15 (38%)	12 (30%)
50,001 to 100,000	9 (23%)	9 (23%)
100,001 to 250,000	6 (15%)	7 (18%)
250,001 to 500,000	7 (18%)	8 (20%)
Over 500,000	3 (8%)	4 (10%)
Total	40	40

The results tabulated in Table 7 are striking. The clear majority of trial cases involved disputes in which the insurer's assessment of the damages, *even if liability were found by the jury*, was less than \$100,000. Particularly notable is the large cohort of small-stakes cases in which the amount in controversy was less than \$50,000.⁹⁴ The information presented in the above two tables has been combined in Table 8 to show a cross-tabulation based upon the insurers' estimates of damages (based upon the midpoint of the ranges expressed) and liability. Existing litigation models would suggest that the trial population is composed largely of high damages, contested liability cases. Table 8 indicates otherwise, as there were only three close liability cases involving estimated damages over \$500,000.

93. The estimates were obtained from forty trial cases that proceeded to verdict in which the insurer made explicit estimates of damage ranges should the case be lost on liability. The high estimate refers to the highest damages mentioned by the insurer in the estimate made directly preceding trial. The midpoint estimate was obtained from the same range. The eight cases included in Table 6 in which no verdict range was given (and thus not included in this table) do not for the most part involve potentially large damages. In four of these cases, the plaintiff had offered \$75,000 or less to settle prior to trial. In several cases, no estimate was made, in part because the estimated odds of the defense prevailing were so high or the facts of the case suggested that the damages were insignificant. The total percentages in each column vary from 100% due to rounding.

94. Tables 6 and 7 also permit a preliminary assessment of whether insurers tend to pay "nuisance" value settlements to avoid the high cost of litigation. See, for example, Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J Legal Stud 437 (1988). The presence of so many low-stakes cases suggests insurers in North Carolina during the period of the study were generally unwilling to pay nuisance value settlements. Indeed, there were several cases in which plaintiffs dropped their demands to nuisance value levels but the insurers insisted upon trial even though the decision, at least when considered in light of the defense costs associated with trial, was arguably contrary to the insurer's short-term economic interests. Three hypotheses may account for this behavior. First, the insurers may believe that the many plaintiffs will in fact dismiss their case rather than proceed to trial. Second, the insurers may perceive an interest in deterring other plaintiffs' attorneys from pursuing weak cases. A nuisance value settlement may be sufficient to repay the attorney any costs forwarded on behalf of the client. By denying such payments, the insurer may be able to impose economic costs on plaintiffs' attorneys. Third, there may be non-economic considerations involved relating to the defendant doctor's preference to seek full vindication, although there was no direct evidence of this phenomena in the reviewed files. See notes 108-15 and accompanying text.

TABLE 8
TRIAL CASES TABULATED BY INSURERS' LIABILITY ASSESSMENTS AND ESTIMATES OF DAMAGES AWARDS
(N = 40)

Liability Category	Estimated Damages			Total
	\$100,000 or Less	\$100,001 to \$500,000	Over \$500,000	
Probable Win (>60%)	10 (25%)	5 (13%)	0 (0%)	15 (38%)
Toss-Up Cases (≈50%)	8 (20%)	4 (10%)	3 (8%)	15 (38%)
Probable Loss (<40%)	6 (15%)	4 (10%)	0 (0%)	10 (25%)
Total	24 (60%)	13 (33%)	3 (8%)	40 (100%)

B. Subjective Case Selection Factors

The detailed case reviews provide an excellent source for documenting any explanations that may account for variations from the trial selection and 50 percent hypothesis, such as examples of the parties' different stakes.

1. *Trial and Non-Medical Factual Issues.* A review of the trial cases indicates that many disputes were selected for trial as a result of the presence of factual issues. The factual elements encountered were of two types: (1) lay factual questions upon which liability turned and (2) unusual factual elements that allegedly justified an award of punitive damages. These categories are considered separately.

a. *Lay factual issues and liability.* Despite common perceptions, many malpractice trials do not require juries to sort through conflicting and complex expert testimony on the applicable standard of care. Instead, these cases present factual questions requiring an assessment of the credibility of non-expert witnesses; trial is required in large part because of the parties' differing versions as to what happened. The potential importance of lay factual issues is illustrated by the following case.⁹⁵ The plaintiff's husband claimed he had made two calls to the doctor on Saturday reporting that his wife had a raging fever following surgery and was told by the doctor or his receptionist to come to the office on Monday. The doctor claimed he received a single call indicating only a slight fever. When the plaintiff came to the office as allegedly instructed, she was suffering from a serious infection that required extensive treatment. As the case progressed, defense counsel noted that the case was a "swearing match" between the husband and doctor; whoever the jury believed would win.

The above illustration is not an isolated example, although few cases turn so completely upon lay factual issues. Of the reviews made in contested

95. For a more complete description, see Appendix, *Case 6*.

liability cases, one quarter presented important non-medical factual issues.⁹⁶ In many of these cases, the defense attorneys believed that their theory of the case was supported by the better evidence, but noted that, given the nature of the testimony, plaintiffs would have an even chance of being believed by the jury.⁹⁷ These cases may be selected for trial because the parties mutually prefer trial by jury; the jury's ability to make the necessary credibility judgments may make it the decisionmaker of choice. Since the need for expert testimony is less important in such cases, it is also possible that the jury process represents a relatively inexpensive means for resolving such disputes.

b. Jury trials, punitive damages, and "bad" facts. A second category of "factual" cases involve allegations that the defendant was involved in some sort of impropriety, thus injecting a punitive quality to the dispute. Such unusual facts are often claimed by plaintiffs to justify an award of punitive damages. Critics of punitive damages have raised two primary concerns: (1) that malpractice juries regularly and unjustifiably award punitive damages and (2) that the mere assertion of a punitive damages claim coerces insurers to enter into "in terrorem" settlements to avoid risking adverse jury results or adverse publicity to the defendant. The observed results from the study suggest that neither of these assertions is valid. In fact, malpractice juries rarely award punitive damages. Of the twenty-four trial cases in which an entitlement to punitive damages was claimed, only a single award was made.⁹⁸ Other malpractice studies have also shown that punitive damages awards are similarly rare.⁹⁹

96. We reviewed insurers' files in forty contested-liability cases that were tried to verdict. Of these, ten cases presented significant "lay" factual issues. A few other examples illustrate the type of issues presented. In one case, a young child was admitted to the emergency room with abdominal pain. The doctor ordered a series of x-rays, which required that she stand up. During the process, she stated that she was not feeling well, and subsequently fainted and fractured her right arm as she fell. She sued the hospital claiming that the x-ray technician was negligent in not stopping the treatment. The key issue in the case was determining precisely what the child said before falling. The technician recalled her saying that "she was not able to stand much longer." The child and her mother claimed that she said "I'm dizzy—I'm going to fall." In another case, an emergency room physician removing wax from a child's ear inadvertently removed a tube previously placed there to prevent ear infections. The primary question at trial was whether the child's grandmother had informed the physician that the child had tubes in his ear.

97. For example, in one case, even though there were glaring inconsistencies in the plaintiff's version of the events, defense counsel noted that the plaintiff's story had been consistent over time and the discrepancies were not "killers." As a result, counsel rated the case a toss-up because a jury might think that the plaintiff would not just make up the story.

98. The single case in which punitive damages were awarded involved a claim that a doctor performed a tubal ligation on the plaintiff, who was Catholic, without her consent during another surgical procedure. The jury awarded \$1 in compensatory damages and \$6,000 in punitive damages.

99. See, for example, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn L Rev 1, 38, Table V (1990) (eighteen punitive damages awards out of 1,917 malpractice verdicts); Peterson, Sarma, & Shanley, *Punitive Damages* at 13-14, Tables 2.5 and 2.6 (cited in note 56) (showing that punitive damages were awarded in only 2% of the malpractice cases tried in San Francisco and Cook County during 1980-84); Florida Academic Task Force for Review of the Insurance and Tort Systems, *Final Fact-Finding Report on Insurance and Tort Systems* 248-57 (March 1, 1988) (punitive damages awarded in 4.8% of the tried malpractice cases; 6.7% in other cases); Hubbard, 38 SC L Rev at 739 (cited in note 77) (in total sample of 118 malpractice jury verdicts over ten-year period, only two awards of punitive damages found in amounts of \$10,000 and \$15,000).

Rather than being more likely to settle, punitive damages cases are in fact *more* likely to be tried than are cases in which punitive damages are not asserted. Twenty-four of 118 trial cases involved claims for punitive damages (20.3 percent), as compared to 86 punitive damages claims in 777 non-trial cases (11.1 percent), a statistically significant difference.¹⁰⁰ As opposed to forcing settlement, the assertion of a punitive damages claim instead appears in the malpractice context to create an obstacle to the voluntary resolution of the dispute.

In understanding why a disproportionately high number of punitive damages claims are tried, it is useful to illustrate the types of issues that commonly arise. A customary allegation was that the defendant modified the plaintiff's medical records *after* the event in question. While, if true, such a modification may indicate some type of cover-up that would serve as a possible justification for punitive damages, the explanation can be far less sinister. In one case, it was determined during discovery that an emergency room physician had made additions to the plaintiff's medical chart. At his deposition, the physician noted that making supplemental notations was standard emergency room practice; it permitted doctors to "catch up" on their record-keeping during "quiet times." Defense counsel reported that, despite the explanation, the alteration of the medical records would complicate the case, noting that the plaintiff's attorney "who has probably seen the movie 'The Verdict' too many times, is convinced there is a conspiracy to cover up this man's case and treatment." Other types of unusual factual elements include allegations relating to callous or indifferent statements made by the defendant about the plaintiff,¹⁰¹ or evidence that the defendant had been subject to disciplinary activities either relating to the specific event or to other matters.¹⁰²

One possible explanation for the high trial rate is that the allegations of wrongful conduct causes the defendant doctor to insist upon full vindication of the defendant's actions, thus suggesting that the stakes of the litigation are transformed. While possible, this is not a likely explanation in our sample; no cases were observed in which this dynamic occurred. More likely explanations relate to the plaintiff's side of the equation. The facts underlying the assertion of the punitive damages claim may predispose the plaintiff to vindictiveness. Alternatively, the factual elements may inflate a plaintiff

There are, however, reports of individual malpractice trials involving large punitive damages awards. See Peterson, Sarma & Shanley, *Punitive Damages* at 22 (cited in note 56).

100. The chi-square score comparing the trial rates of punitive damages claims was .004 indicating that there are only 4 chances in 1,000 that the difference was a function of chance alone.

101. In one case, the mother claimed during her deposition that she overheard the technician tell a nurse that her daughter had fallen and broken her arm, at which time the nurse repeated it and started laughing. In another, a plaintiff stated that she overheard an emergency room physician say that "this is the kind of shit they get me out of bed for!"

102. In one case, plaintiff alleged that the defendant ophthalmologist was negligent in not personally performing a pre-operative examination prior to cataract surgery on an elderly patient. Defendant had been admonished by the Board of Medical Examiners for not doing so in other cases. Plaintiff's attorney sought \$500,000 in compensatory damages and \$3.0 million in punitive damages, although was ultimately willing to settle for \$75,000 before trial. Defendant prevailed at trial.

attorney's valuation of the case, so that the attorney seeks a premium which the insurer, perhaps as a result of its superior knowledge of the jury's tendency not to award punitive damages, has no interest in paying. That approximately 20 percent of trial cases involved punitive damage allegations, but only a single case resulted in an award, strongly suggests a serious gap exists between plaintiff perceptions and jury reality—a gap that appears to create an obstacle to settlement.¹⁰³

2. *The Unworthy Plaintiff and Trial Selection.* In many trial cases, the plaintiff was in some respect personally unappealing or unsavory. Typically, these personal attributes—consisting of such conditions as drug addiction, obesity, or psychiatric problems—did not directly relate to the legal question of liability. As a practical matter, however, the insurer or defense counsel believed that these attributes served to mitigate any litigation risk by making it either less likely that the jury would in fact find liability or causation, or, even if liability were found, it would serve to limit any damages that would be awarded. Thus, even in a case in which the insurer believed liability was probable—and therefore might otherwise be willing to consider settlement—the fact that the plaintiff was in some sense undesirable, unattractive, or unworthy, limited the insurer's offer.¹⁰⁴

Of course, if both the insurer and plaintiff's counsel similarly viewed the impact of a plaintiff's personal condition, then this would not serve to interfere with settlement. The fact that several of these cases were tried

103. Given the few punitive damages awards and what appears to be significant overclaiming behavior of plaintiffs, a strong argument could be made that, at least in the malpractice context, simply abolishing punitive damages would be a useful response. As a practical matter, few cases would be affected and the overall efficiency of the system would be increased. A more restrained policy response would be to consider changes in the manner in which such damages are decided. While reform efforts to date have often focused on redefining the legal standard for the award of damages, it is doubtful that such semantics will change the plaintiffs' attorneys' perceptions.

104. These observations are well illustrated in one of few high-stakes cases that was tried in the sample. See Appendix, *Case 7*. In that case, the plaintiff arguably suffered serious injuries as a result of the defendants' negligent treatment in administering emergency aid following his attempted suicide. Despite potential liability, the parties disagreed strongly on the likely level of damages. The insurer believed that the jury, even if it found liability, would significantly discount any damages award based upon the circumstances of the case, given that the plaintiff—an "unemployed drifter"—had brought the condition on himself by trying to commit suicide.

In another case, the insurer had concluded that the defendant would probably lose on the merits, but refused to authorize more than \$120,000 in settlement, despite defense counsel's recommendation to go higher, owing in large part to the fact that the plaintiff was seriously overweight, and thus the burn she had suffered should not be compensated at the same level as if she were a non-obese person. In another case, the plaintiff was a drug addict who had been arrested and placed in the county jail. He became seriously ill suffering from drug withdrawal symptoms, and was taken to the emergency room at the local county hospital where he was treated by the defendant. He was discharged from the emergency room and returned to the jail where he was found dead within a few hours. Medical reviews indicated that the case was defensible but that arguably the doctor erred by not immediately admitting the patient for treatment of a severe infection. Nonetheless, the insurer never considered making a settlement offer. As stated by defense counsel in a pretrial report recommending that no settlement be made: "What we have here is essentially a worthless human being who most likely died as a direct consequence of a disease which he gave himself—infected endocarditis caused by his use of dirty needles. He had abandoned his wife and child, his job and essentially his place as a productive member of society to pursue his drug addiction."

suggests that plaintiff's counsel tend not to discount or interpret the information in the same way as the insurer. This difference may reflect an example of some of the considerations discussed in the next section relating to variations in the quality of plaintiffs' attorneys.

3. *The Plaintiff's Attorney and Trial Selection.* A significant percentage of malpractice cases are handled by plaintiffs' attorneys with little or no prior experience in malpractice cases—almost 40 percent of the malpractice cases were handled by plaintiff's attorneys with only one or two malpractice cases during the three-year period covered. Certainly, the experience and skill levels of plaintiff's counsel is a significant factor considered by insurers in assessing whether to make a settlement offer or to proceed to trial.

A plaintiff's attorney can inhibit the successful handling of a case in many ways. The most obvious is lack of preparation generally, such as in failing to locate a competent expert witness. Counsel can also improperly assess the merits or value of a case, thereby refusing to drop or settle appropriate cases, or may appear to the insurer as being unable to present the case effectively. For example, in one case in which the plaintiff appeared to have a strong case on liability, a series of errors attributable to the plaintiff's attorney resulted in the insurer refusing to make a settlement offer, and the court eventually ordered a directed verdict in favor of the defendant.¹⁰⁵

In some cases, plaintiffs' counsel simply refuse to consider settlement. For example, the insurers in several cases believed that the plaintiff's claim was potentially meritorious, and their internal reports suggest a willingness to consider settlement but for the lack of any meaningful expression of interest on the part of the plaintiffs' counsel. Sometimes this lack of interest was reported by counsel to be a function of the plaintiff's personal insistence on trial.¹⁰⁶

In other cases, however, plaintiff's counsel either refused to negotiate, or made an outlandish demand in light of the insurer's analysis of the merits and

105. See Appendix, *Case 8*. In another case, the plaintiff's attorney was described as "inexperienced," leading the insurer to conclude that "he won't be able to handle the big boys [defense counsel] at trial." In one case, following a key deposition, the defense attorney reported that the plaintiff's attorney "appeared weak in medical knowledge"; the insurer later justified the decision to try the case in part owing to "incompetent counsel." In another case, the insurer obtained six different medical reviews, which were evenly split on the issue of liability, leading the insurer to conclude that at best their odds of prevailing were even. As a result of the uncertainty on the liability issue, the insurer was seriously considering making a settlement offer. At this point, the plaintiff's counsel called defense counsel and admitted that the deposition of his expert had gone poorly. The plaintiff's family was "pushing him" hard, and he wanted the defense counsel to file a summary judgment motion apparently so that if the case were lost, they could not blame him. The decision was made to proceed to trial.

106. In one case in which the insurer was willing to pay a small amount to settle, plaintiff's counsel, who was representing the family of an elderly man who had died from cancer that arguably was not promptly diagnosed, indicated that he would be interested but that the "bull headed children expected a big recovery." In another case, defense counsel pointed out that the plaintiff was apparently not interested in settlement and instead "wants to make his retirement bundle." Given that the defense counsel and insurers are prohibited by ethical rules from talking directly with the plaintiff, there is no way to confirm if this is in fact the dynamic or simply the plaintiffs' attorneys' negotiating strategy.

likely damages. Some of the plaintiff's demands in the cases that were ultimately tried defy explanation. In one case, plaintiff had shown direct medical expenses of \$68,345 and lost wages of \$11,875. At the end of discovery, defense counsel recommended no settlement, and estimated a 50 percent chance of prevailing with a likely verdict range, if defendant lost, between \$75,000 and \$100,000. The only pretrial settlement demand received from plaintiff's counsel was for over \$2.5 million. Following a five-day trial, the jury deliberated for fifteen minutes before returning a verdict for the defendant. In another case, the attorney's initial demand was for \$7.4 million, an amount that forced the insurer to notify the defendant doctor that the demand was in excess of his policy coverage and to consider retaining personal counsel, even though the insurer's valuation of the case was nowhere near this level. During trial, plaintiff's attorney was willing to settle for \$180,000. The jury found for the plaintiffs and awarded \$20,000 in damages.

Depending on how unreasonable the plaintiff's demand or how late it is made in the litigation process, an insurer's decision to proceed to trial sometimes hardened to the point where the insurer was simply no longer interested in settlement.¹⁰⁷ In one case, an elderly man allegedly died as a result of the physician's failure to diagnose a recurrence of Hodgkins Disease, a pre-existing condition that clearly contributed to plaintiff's death. Nonetheless, plaintiff counsel's initial demand was \$2.5 million. In the words of the insurer's claims supervisor, "[w]ith a \$2.5 million demand, we'll probably end up in court even if we find we owe." Sixteen months later, following a number of pro-plaintiff developments suggesting that the defendant doctor probably was negligent, plaintiff's counsel offered to settle for \$325,000 on the eve of trial. Even though the insurer by that point had determined that liability was probable and that likely damages could be as high as \$350,000, the insurer refused at that late date to make a settlement offer and proceeded to trial (which resulted in a \$300,000 verdict for the plaintiff). It is probable that an earlier settlement offer by the plaintiff in the range in which the subsequent offers were made would have resulted in at least a counter-offer, and most likely a settlement.

C. Evaluating the Trial Selection Process

The above account of the composition of the trial subset and the observed results at trial is clearly at odds with the predictions arising from both the trial selection theory and the 50 percent hypothesis. Rather than representing a distillation of high-stakes, close liability cases, the observed trial subset is comprised of a solid core of marginal claims in which the insurers routinely

107. In part, this may reflect a defendant's case management philosophy. Some defendants actively attempt to settle cases, if at all, early in the process in order to avoid litigation expenses. See, for example, Catherine Cronin-Harris, ed, *Mainstreaming: Corporate Strategies for Systematic ADR Use* E110 (Ctr Pub Resources, 1989) (discussion of General Mills' litigation policy of settling "early or not at all").

prevail.¹⁰⁸ The results invite consideration of any asymmetrical stakes or other aspects of the negotiation dynamic that might explain the observed outcomes.¹⁰⁹

In assessing the possible impact of asymmetrical stakes, commentators have focused on malpractice defendants' interest in maintaining their reputations. Concern with reputation could be manifested in one of two ways, either of which could account for the meager plaintiff success rates. First, as most commonly suggested by commentators, physicians might strongly prefer to settle close liability cases in order to avoid the publicity of trial as well as the possibility of an adverse judgment and its negative impact on their reputations.¹¹⁰ Under this theory, doctors would tend to pressure insurers to make relatively attractive settlement offers resulting in fewer trials and skewing the cases being tried to include more low-quality liability cases thereby causing a correspondingly low plaintiff success rate. A second theory is that doctors would regularly insist upon trial in order to vindicate their actions. This dynamic would tend to result in a higher number of trials and a higher proportion of defendant victories since the insurer, rather than offering small settlements in certain cases, would offer nothing in deference to the doctor's interest in vindication.

While both theories predict a low rate of plaintiff success, they suggest different impacts on trial rates and the nature of cases being tried. Under the first approach, one would expect fewer trials with most cases consisting of low-quality disputes. Under the second approach, one would expect more trials with a greater mix of case types with many instances in which the insurer made no settlement offer. The study's empirical evidence provides more support for the latter view in that the observed trial rate (13.2%) was high relative to other litigation contexts and the sample included a majority of trial cases in which the insurer made no settlement offer.¹¹¹

108. See generally Priest, 1990 U Chi Legal F at 191 (cited in note 7) (jurors spent approximately 63% of their time deciding automobile accident cases, many of them involving minor injuries, leading to the conclusion that civil juries are "saddled with an extraordinary burden of resolving the routine").

109. The skewed results could also be accounted for if the costs of settling malpractice cases were low in relation to the cost of trial so that plaintiffs faced no disincentive to try even weak cases. See Priest & Klein, 13 J Legal Stud at 39 (cited in note 61) (suggesting that low trial costs could not be ruled out as a factor in explaining the low plaintiff success rates in malpractice litigation). See generally Eisenberg, 77 Georgetown L J at 1579, 1581 (cited in note 61) (noting high trial rates and corresponding low rates of plaintiff success in the pro se civil rights context). The cost data presented in Part II refutes this explanation—the marginal cost of going to trial exceeds the costs of discovery and as an absolute matter is high. Also, the incidence of pro se representation in malpractice is negligible with less than 3% of the plaintiffs in our sample appearing pro se.

110. See Priest & Klein, 13 J Legal Stud at 40 (cited in note 61) ("An adverse judgment may harm the reputation of the doctor, which would mean that the doctor would have more to lose from a defeat at trial than the dollar judgment the plaintiff gains. If so, doctors, like manufacturers, may settle cases selectively, conceding those in which there is a greater likelihood of defeat and litigating those in which there is a greater likelihood of victory.")

111. In forty-eight reviewed trial cases that went to verdict, the insurer made no settlement offer in twenty-eight cases (58.3%). Plaintiffs prevailed in three of the twenty-eight "no offer" cases. Breaking down the cases according to the insurers' liability predictions, no settlement offers were made in only one of eleven cases in which the insurer expected to lose, sixteen of twenty cases in

In fact, however, based upon a direct review of the insurers' files, neither theory finds much support. Malpractice defendants rarely attempted to impact the settlement process; there were only a few scattered instances in which a doctor's preference for or against settlement was even noted, much less any indication that the preference was given any significant weight. In only two cases were the defendants' position on settlement vociferously expressed; in both instances, the defendant made a demand on the insurer to settle. Significantly, in neither case was the demand justified in terms of protecting a physician's reputation; rather, the demands were based on a concern that an adverse jury verdict might exceed the amount of the defendant's insurance coverage thus placing the physician or hospital at risk of paying the excess.¹¹² Malpractice defendants were not regularly consulted as to their views on settlement, nor was there any indication in the claims files that insurers expressly considered the impact of trial or settlement on defendants' reputations. This lack of evidence of any direct involvement by malpractice defendants in the settlement process is perhaps partially explained by the fact that each of the insurers possessed the contractual right to settle claims without the physicians' express consent.¹¹³

If malpractice defendants' reputational interests do not account for the observed variations, what other factors may be implicated? Particularly challenging is the need to explain the high incidence of zero offers by insurers even in the absence of any indication that defendants insisted upon this posture. Given the high cost of litigation, as well as the admitted potential for liability in most cases, why would insurers refuse to make any settlement offer in over half of the cases that went to trial?

Many insurers' files reveal a strong sentiment against making what are perceived to be "nuisance value" offers in cases in which liability was not clear. In understanding why an insurer might adopt such a bargaining

which the insurers estimated they had a significantly better than even chance of prevailing, and eleven of seventeen "toss-up" cases. Thus, excluding those cases in which the insurer expected to lose, no settlement offers were made in twenty-seven of thirty-seven cases (73%).

112. See Appendix, *Cases 1 and 7*. A complete analysis of this issue would require review of settled cases to determine whether defendant pressures contributed significantly to the decision to settle.

113. Insurer control over settlement in malpractice cases, once rare, has become increasingly common. See, for example, *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust*, 570 So 2d 1362 (Fla App 1990) (upholding right of insurer to settle malpractice claim opposed by doctor pursuant to contractual "expedience clause" relating to settlement). While some insurers may still afford physicians a contractual right to veto settlements, there is no evidence as to how frequently doctors utilize this right. Even apart from contract, insurers may be constrained by existing ethical rules or tort duties to consider physician preferences concerning settlement. See generally *Gardner v. Aetna Casualty & Surety*, 841 F 2d 82 (4th Cir 1988) (malpractice insurer has duty of good faith to consider physician's interests in evaluating settlement offer).

An alternative explanation is that while malpractice defendants do not individually insist upon either settlement or trial, malpractice defendants collectively have an interest in having insurers investigate all claims vigorously prior to making a settlement offer. Thus, insurers may feel compelled not to make small settlement offers without investigation even if in the insurers' short-term economic self-interest. This generalized, non-case specific sentiment might result in fewer offers in low-quality cases and thus accomplish some of the same effect as the theory that doctors affirmatively seek vindication.

position, certain characteristics of the claims dynamic are noteworthy. First, the universe of potential plaintiffs' attorneys is large and includes many inexperienced malpractice attorneys. Second, insurers are probably well aware that only a small proportion of potential malpractice claims are asserted, so that the possible number of claims greatly exceeds those claims that are actually filed. Existing negotiating theory suggests that when a repeat litigant (the insurer) regularly deals with non-repeat litigants (here inexperienced plaintiffs' attorneys), the repeat litigant is likely to adopt a "hard bargaining" settlement strategy in order to deter future litigation.¹¹⁴ By adopting such a strategy, insurers seek to deter plaintiffs' attorneys from regularly undertaking to represent other malpractice plaintiffs. By insisting upon proof of clear liability prior to making a settlement offer, insurers trap the attorneys into either dropping the case or going to trial in many small or modest stakes cases that arguably should have been settled. While a few attorneys may prevail and receive an award more than they might otherwise obtain through settlement, many will obtain no recovery and if they are forwarding cost of litigation actually be forced to pay certain litigation expenses. The prospect of making malpractice litigation a losing prospect—a threat made very real by the insurers' bargaining position—clearly will deter attorneys from taking malpractice cases in general, but particularly small-stakes disputes.

Another factor noted in the files relates to the existence of instances in which the plaintiff manifested an interest in proceeding to trial despite the low prospects for success. Thus, in approximately 10 percent of the trial cases there is some indication that the plaintiff did not want to pursue settlement (even if the attorney would have preferred settlement), either because of an interest in obtaining a large recovery or in seeking retribution against the physician. While, as noted, it is not possible to verify these assertions (which may simply represent a plaintiff's attorney's own negotiating strategy), such a dynamic is certainly plausible. Malpractice plaintiffs may well view trial as the culmination of their efforts to hold a physician accountable. Especially if the attorney is forwarding any litigation expenses, individual plaintiffs do not bear any costs in proceeding to trial given the widespread use of the contingency fee.

The fact that plaintiffs may not always be motivated by purely economic factors and may be interested in trial even if they are unlikely to prevail is not surprising given the highly emotional issues often involved in the underlying events that typically give rise to malpractice claims. What is surprising, however, is why their attorneys are unable to provide an effective screen in terms of either refusing the low-merit cases in the first instances or in

114. See Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J Legal Stud 225, 241-42 (1982) ("our model predicts that a repeat player whose opponents are not repeat players will adopt a hard bargaining strategy"). If a litigant adopts a hard bargaining posture, higher rates of trial are likely because of the increased possibility of breakdowns in the negotiating process. *Id.*

convincing their clients to drop the case or to pursue settlement. The fact that this dynamic occurs perhaps reflects the fact that contingency fee attorneys have a limited ability to drop the case once accepted; rather than trying to dissuade an angry client to drop a claim (or risk a malpractice suit if the claim is dropped against the client's desires), it may be easier to go forward with a trial while exerting the minimum in terms of additional effort.

The possible impact of individual plaintiff's asymmetrical stakes illustrates a third consideration already explored in some depth relating to the importance of plaintiffs' attorneys in understanding the dynamics of the trial process. A central assumption supporting the 50 percent hypothesis is that valuation errors will be equal between plaintiffs and defendants.¹¹⁵ Observations drawn from the case studies suggest that the skills of plaintiffs' attorneys in estimating the value of malpractice cases are in the aggregate less well refined than insurers' and defense counsels' skills. Choice of defense counsel is controlled largely by the insurer and can be limited to a relatively select group. There is no similar limit on access to plaintiffs' counsel. Errors of judgment by plaintiffs' counsel—a function of either inexperience or incompetence—is certainly a factor informing the insurer's decision to proceed to trial and serves to partially explain the observed variations in both the trial selection process and the 50 percent hypothesis.

While differences in aggregate attorney abilities may well account for the observed variations, the question remains why the effect is more notable in the malpractice context and not as apparent in other litigation areas where departures from the 50 percent hypothesis are not so great. There are indeed many reasons to expect differences in lawyer abilities to have a more pronounced impact in the malpractice setting. For example, plaintiffs' attorneys must be able to locate able expert witnesses from what is admittedly a limited market. Plaintiff's lawyers must also possess substantive knowledge on the particular medical issues involved in the case.

IV

IMAGING THE JURY'S SHADOW

It is generally assumed that the relatively few jury decisions have a disproportionate—if not an overwhelming—impact in shaping non-trial outcomes.¹¹⁶ Understanding the nature of the relationship between jury

115. Thus, it is assumed that "plaintiffs' errors to overestimate success is the same as the distribution of defendants' errors to underestimate plaintiffs' success (that is, approximately half of those disputes litigated will be attributable to plaintiffs' overestimates and half attributable to defendants' underestimates." Priest & Klein, 13 *J Legal Stud* at 19 n42 (cited in note 61). See generally Eisenberg, 77 *Georgetown L J* at 1582 (cited in note 61) (analyzing low success rates in certain civil rights contexts in terms of possible differences in attorney quality).

116. See, for example, Priest, 1990 *U Chi Legal F* at 161 (cited in note 7) ("The civil jury defines the substance of liability for all civil disputes: directly, for cases litigated to judgment; and through potential recourse, for cases settled out of court."); Galanter, 1990 *U Chi Legal F* at 228 (cited in note 10) (noting the "invisible but massive influence of the jury on the shape of the whole system of litigation").

outcomes and non-trial results is central in assessing the critique of the jury. Critics assume that jury errors with respect to liability and the juries' lack of consistency in awarding damages combine to create unpredictability, which forces malpractice insurers to settle non-meritorious cases and to pay more in settlement in meritorious cases than would be necessary or justified in the absence of a jury system.

Commentators analyzing the relationship between jury outcomes and non-trial cases have frequently invoked the image of the jury casting a shadow¹¹⁷ or of jury decisions forming the top of a litigation pyramid.¹¹⁸ This imagery assumes that jury decisions exercise some type of control over the resolution of non-jury cases.¹¹⁹ Despite the allure of the imagery, it remains unclear how jury decisions are in fact internalized by litigation participants and applied to non-trial cases. For example, it is unknown to what extent participants in the litigation process possess accurate and complete information about jury decisions.¹²⁰ Thus, while the imagery admits of distortion in the shadows cast by juries,¹²¹ the possible sources of distortion are largely matters of conjecture.

Perhaps the most important use of the evidence presented in this study is in developing a more refined image of the relationship between jury decisions and the larger litigation process. The detailed and complete description of actual jury involvement in the litigation process—doubtlessly more complete than possessed by the individual participants¹²²—permits an improved

117. See, for example, Galanter, 1990 U Chi Legal F at 241-42 (cited in note 10); Daniels & Andrews, *The Shadow of the Law* at 171 (cited in note 11). See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J (1979).

118. The pyramid image suggests a large number of potential claims at the base with correspondingly fewer cases as one moves upward, with the pyramid's top formed by the few cases that proceed through the procedural gauntlet to trial. See generally Marc Galanter, Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L & Soc'y Rev 525, 545-46 (1980-81). A similar image used to describe jury outcomes is that of an iceberg with jury decisions forming the visible tip. See Kalven & Zeisel, *The American Jury* at 31-32 (cited in note 11) (the informal resolution of non-trial cases is controlled by expectations of what the jury will do so that "the jury, like the visible cap of an iceberg, exposes but a fraction of its true volume").

119. See Galanter, 1990 U Chi Legal F at 241 (cited in note 10) ("the construction of cases and negotiation of settlements throughout the pyramid or realm of shadows are guided by the visible stratum of authoritative decisions, including those of juries").

120. On types of information available about jury decisions and difficulties that exist in interpreting them, see *id.* at 231-41. Because fewer attorneys have extensive trial experience because of both the increasing size of the legal profession and decreasing percentage of cases being tried, Galanter suggests that the "shadow of the jury is viewed less through the lenses of personal experience and more through other media." *Id.* at 232. Indeed, there is evidence suggesting that legal decisions, even those obtaining significant press coverage, are, at best, imperfectly understood. See Hans, 53 L & Contemp Probs at 199-200 (cited in note 2) (noting that few individuals who knew about a well-publicized verdict against a tobacco company could remember the precise amount of the award); Daniel J. Givelber, William J. Bowers & Carolyn L. Blich, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in America*, 1984 Wis L Rev 443, 483 (noting that medical practitioners misperceived significance of widely publicized legal ruling).

121. See Galanter, 1990 U Chi Legal F at 241-42 (cited in note 10).

122. Interpretations of jury results vary depending upon the participants' experience and position, see *id.* at 247 ("Using jury knowledge is a complex interpretive undertaking, involving assessments of the comparability of earlier and later cases, of the location of specific verdicts along the range of expectable jury responses, and of the scope, slope and speed of trends in jury behavior.

understanding of the messages and signals emitted by malpractice juries. Once the jury's role is better understood, it is then possible to reassess its culpability for current litigation problems. In examining the relationship, it is useful to focus separately on the predictability of jury outcomes with respect to liability and damages.

A. Predictability of the Jury's Liability Determinations

Our review of insurers' files permitted an assessment of the insurers' pretrial estimates of the probability of prevailing on liability. This assessment in turn permits an analysis of jury predictability, which is central in determining whether juries find in favor of plaintiffs regardless of the merits of the individual cases.¹²³ It matters a great deal, of course, whether an insurers' estimates constitute true odds based on the insurers' assessments of the merits according to the controlling legal definition of negligence as opposed to predictions based upon its view that, regardless of the merits, a jury was likely to find for or against a malpractice defendant as a result of either bias or incompetence. In the bulk of the trial cases reviewed, there is no indication that the insurers' predictions on liability were influenced by fear of jury incompetence, sympathy, or bias. Quite to the contrary, the predicted odds in virtually every case were directly supported by expert medical assessments relating to the applicable medical standard of care. For example, in every case in which the insurers expected to lose, the insurer had received at least one and usually several reviews from medical experts indicating the defendant's care fell below the applicable standard. The results of this analysis are presented in Table 9.

It is an undertaking ideally suited for the appearance of the kinds of flawed 'intuitive' judgment described in the cognitive-psychology literature. Even those in possession of a great deal of accurate information may make spurious inferences about the patterns of jury response.'').

123. This article does not directly assess the jury's decisionmaking process or its competence per se. A jury could reach a defensible result, but one could still be critical of the process by which the jurors considered the issues presented. As a result, jury competence is not easily defined; it could refer either to the substantive correctness of the result or a normative assessment of the jury's deliberative process. See generally Selvin & Picus, *Jury Performance* (cited in note 6) (focused analysis of jury's performance in asbestos case). Efforts have been made in other contexts to study jury competence by comparing jury outcomes with the presiding judge's views of the merits of the case. See Kalven & Zeisel, *The American Jury* (cited in note 11). See generally MacCoun, *Getting Inside the Black Box* (cited in note 14). Of course, even if one were to identify jury errors in a particular case, that finding might not implicate the jury system. A particular error may be a function of the manner in which the attorneys chose to present the evidence, and thus not fairly attributable to a jury's lack of ability. See Hans, 52 L. & Contemp. Probs. at 188 (cited in note 2). While our research has included observing malpractice trials and interviewing jurors about their deliberative process, this article does not address individual jury's decisionmaking abilities.

TABLE 9
 PREDICTABILITY OF LIABILITY DETERMINATIONS¹²⁴
 (N = 47)

Category	# Cases	P Wins	D Wins
Probable Win (>60%)	19	1	18
Toss-up Cases (≈50%)	17	4	13
Probable Loss (<40%)	11	6	5
Total	47	12	35

The results displayed in Table 9 are reassuring, at least from the perspective of malpractice insurers. In virtually all cases in which the insurers believed they were likely to win on liability, they did so.¹²⁵ With respect to the group of "toss-up" cases, malpractice defendants did significantly better than one would have expected, with outright victories in thirteen of the seventeen cases. Indeed, two of the four plaintiff wins in this category constituted only nominal victories making the results even more lopsided. Insurers also did surprisingly well in those cases in which they expected to lose. Whether the insurers' success reflects their trial selection talents or possible jury bias in favor of defendants is unclear.¹²⁶ Bias in jury decisions is particularly difficult to isolate.¹²⁷ The important point to garner from Table 8 is that malpractice defendants do not often lose cases on the merits where their insurers expected to win, and they win at least as much as expected (indeed more than expected) of those cases they expected to lose or viewed as presenting close liability questions.

124. All plaintiff verdicts, regardless of whether they constituted "nominal" victories, are included as "plaintiff wins."

125. The only plaintiff victory in a jury trial in which the insurer expected to win—of which a quote from the file appears at the beginning of this article—was a case in which the insurer believed it had an 80% chance of prevailing, but the jury found for the plaintiff and awarded \$750,000 in damages. In another case in which the insurer estimated a 90% chance of prevailing, a judge ruled in favor of the plaintiff in a bench trial.

126. The number of cases are too few to conclude that a pro-defendant bias is operating, especially in light of the fact that as detailed in Part III, many of these cases were selected for trial due to the insurer's assessment that various factors were present—such as a weak plaintiff's attorney or an "undesirable" plaintiff—that minimized the risk of a finding of liability. Insurers are, after all, in the business of making informed decisions as to which "close" cases to settle and which to try. The determination that a case is a toss-up may not incorporate fully the insurer's assessment of the various subjective factors noted in Part III, but may rather reflect an objective analysis informed solely by expert opinion on the liability issue. Thus, an insurer may proceed to trial in a case in which internal expert reviews suggest a close liability issue because the case exhibits other attributes—such as the plaintiff being unsavory or the plaintiff's attorney being not well qualified—which suggests that the litigation risk associated with the case is minimal.

127. See Hans, 52 L & Contemp Probs at 191-201 (cited in note 2) (while bias in corporate litigation is widely presumed, the direction of the bias is not clear, and many different factors—such as the type of business and the jury's sense of the individual's own responsibilities for the injuries—impact any jury predisposition). In the malpractice context, for example, any existing bias may vary according to whether the defendant is an individual physician or a corporate entity such as a hospital.

B. Predictability of the Jury's Damages Awards

Commentators have expressed apprehension that the signals provided by jury damages awards fail to provide clear guidance for the settlement of other claims in part due to the inconsistency in the amount of damages awarded.¹²⁸ This fear is confirmed and its causes partially explained by our study which reveals the difficulties litigants would have in applying jury damages decisions to non-trial cases. First, even if each jury decision were known and its significance well understood, the simple fact is that there are not very many jury awards available for consideration. In the three years covered by our study, malpractice juries were required to assess damages in only seventeen cases, representing a mere 2 percent of the total cases in the study.¹²⁹

Second, the damages questions put to malpractice juries often turn on unique facts that are not readily generalizable to other disputes. Unlike injuries in other litigation contexts, malpractice injuries frequently interact with other causes, since plaintiffs are often suffering from medical ailments at the time of the doctor's alleged negligence.¹³⁰ This lack of comparability may well serve to differentiate the malpractice context from other categories of litigation in which claims tend to cluster around identifiable types of injuries and in which causation issues are not as significant.

Third, and most significantly, the juries' damages awards—quite unlike the evidence with respect to liability—appear not to be predictable to insurers. Table 10 presents a comparison of the insurers' pretrial estimates of likely damages with the actual amount awarded by the jury.

128. See Gerald R. Williams, *Legal Negotiations and Settlement* 6 (West, 1983) (experiment with pairs of attorneys negotiating a personal injury case showing tremendous variation in range of settlement offers and final settlements). See also Philip J. Hermann, *Predicting Verdicts in Personal Injury Cases*, 475 *Insur L J* 505 (1962) (noting infrequency with which attorneys' settlement offers were close to actual jury verdict). Some commentators have suggested that jury instability or inconsistency may be a function of the shift toward smaller juries in which individual juror preferences are afforded greater impact. See sources cited in Galanter, 1990 *U Chi Legal F* at 245-46 (cited in note 10).

129. The paucity of decisions may partially explain why there is little empirical work exploring the juries' role in determining damages, and why that which does exist is often based upon jury simulations. See Greene, *Juries and Damage Awards* at 231-32 (cited in note 6).

130. For example, in one case, the jury was required to determine whether a plaintiff's psychological problems were caused by the doctor's negligence which had resulted in the death of her baby, or by the death of her husband a few months later. See Appendix, *Case 3*. In another case, the damages question required an assessment of the degree to which a medical condition was a function of a drug overdose or the result of plaintiff's pre-existing cancer. See Appendix, *Case 4*.

TABLE 10
 COMPARING JURY DAMAGE AWARDS WITH INSURERS' PRETRIAL PREDICTIONS¹³¹
 (N = 10)

Case	Predicated Range (in dollar amounts)	Jury Verdict (in dollar amounts)
1	350-500,000	1,200,000
2	150-250,000	750,000
3	150-400,000	335,000
4	No Range	300,000
5	100-750,000	195,000
6	24-40,000	41,000
7	40-60,000	25,000
8	50-300,000	20,000
9	75-300,000	18,000
10	5,000	15,200

The results illustrated in Table 10 show that the majority of awards fell *outside* the range of damages estimated by the insurers, even though the estimated ranges were wide. Four of the awards exceeded the highest amount estimated by the insurer (albeit two by relatively modest sums);¹³² three awards were less than the lowest expected award. To be sure, the number of observations is small, but the paucity of damages cases is not a function of limits on our research, but rather the limits of the litigation process. As paltry as it may seem, the results in Table 10 account for the vast majority of dollars awarded by malpractice juries over the three-year period of the study.

Another observation—undoubtedly related to the apparent lack of predictability illustrated in Table 10—is that insurers' damages estimates range widely. Table 11 provides a summary of the range of damages estimates in those trial cases in which the insurers' highest estimate of potential damages exceeded \$100,000.

131. The predicted ranges represented the damages estimates made by insurers closest to trial. The reviewed cases accounted for 92% of the dollars awarded by the juries. The jury awards in the unreviewed cases (which were not reviewed because they involved defendants insured by other insurers or where the files were no longer present) were: (1) \$4,000; (2) \$6,001; (3) \$7,000; (4) \$12,787; (5) \$33,000; (6) \$75,000, and (7) \$125,000 (in a case in which the defendant had no insurance and appeared pro se). In the other plaintiff-win case, a judge in a bench trial awarded \$8,946 where the insurer estimated damages at between \$5,000 and \$10,000. The figures do not reflect any post-trial adjustments. In *Case 4*, the insurer did not estimate damages prior to trial. Early in the case, the insurer noted that the likely damages would be \$100-120,000, but the insurer's assessment of the case evolved over time. Prior to trial, plaintiff's counsel estimated damages at \$250,000 to \$750,000. The insurer refused to settle for plaintiff's pretrial demand of \$325,000 owing to a possible defense on liability and its belief that the jury's award would not exceed \$350,000.

132. In the most extreme case, liability was not seriously contested, but the parties were more than \$500,000 apart prior to trial. See Appendix, *Case 5*. Nonetheless, the jury subsequently awarded \$300,000 *more* than the plaintiff had demanded. It is no wonder that the insurers' files are replete with grumbings about the difficulty of predicting jury awards. In commenting upon an unexpectedly large jury award, one defense counsel noted that "[o]nce again, a jury has proven that attempts to predict verdicts are unsuccessful about as often as they are successful." In another case that ultimately settled, another defense counsel reported as follows: "I do not want to appear facetious, but I guess the verdict could be anywhere between \$5,000 and \$5,000,000."

TABLE 11
 RANGE OF DAMAGE ESTIMATES IN LARGE CASES¹³³
 (N = 18)

Case Type	# Cases	Sum Low Estimates	Sum High Estimates	Difference	(% Difference)
High Damages (estimate over \$500,000)	4	\$1,900,000	\$ 7,000,000	\$5,100,000	73%
Large Damages (estimate \$250-\$500,000)	6	\$1,225,000	\$ 2,550,000	\$1,325,000	52%
Modest Damages (estimate \$100-250,000)	8	\$ 645,000	\$ 1,470,000	\$ 825,000	56%
Total	18	\$3,770,000	\$11,020,000	\$7,250,000	66%
Mean		(\$209,000)	(\$612,000)	(\$403,000)	

For each category of cases (defined in terms of the estimated level of damages), the low point and high points of the damage estimates have been separately summed. The difference between the sums of the high and low estimates reflects the aggregated ranges of the damages estimates. Thus, for the four cases in the highest category—those cases in which the estimated damages possibly exceeded \$500,000—the total of the insurers' low end estimates was \$1.9 million whereas the sum of the high estimates was \$7.0 million, a remarkably wide variation. In the average large case reviewed, the estimated damages ranged from about \$200,000 to \$600,000. The clear message expressed by the information presented in Table 11 is that insurers were not able to predict even the range of likely damages with any precision.

The problems of using juries to resolve malpractice disputes is usually conceptualized in terms of difficulties with assessing liability—the difficulties of both determining and applying the standard of care. The evidence suggests otherwise. At least for the trial cases analyzed here, insurers were generally able to assess liability with a fair degree of confidence as to the jury's ultimate result. The major uncertainty or unpredictability was estimating what damages a jury might award. Unpredictability in jury calculation of damages obviously has serious consequences for the settlement process. The mere fact that liability is disputed is not a bar to settlement so long as both sides share a similar opinion of the likelihood of a finding of liability; if they agree on the damages, the parties can simply discount the damages according to their shared assessment of the probability of finding liability. If, however, the valuation of damages is itself problematical, settlement will be difficult, even assuming consensus on how to assess liability.¹³⁴

133. The information presented in this table was derived from a review of malpractice insurers' closed claim files in cases in which the estimated potential damages exceeded \$100,000, and in which the insurers included an explicit range of damages.

134. See, for example, Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 L. & Contemp Probs 131, 132 (Winter 1991) (noting impact of variability of compensation awards in malpractice cases on the settlement process).

C. Predictability and the Impact of the Post-Trial Adjustment Process

It is possible that the post-trial adjustment process—by decreasing high damages awards or increasing inadequate awards resulting from jury indiscretion—provides an enhanced measure of predictability to the jury's determination of damages. Indeed, prior studies of post-trial adjustments have implied that such adjustments can serve this ameliorative role.¹³⁵ In fact, however, based upon the admittedly limited evidence on post-trial adjustments from our study, defendants would find little solace from the observed results. While a few individual awards were modified (some marginally), the modifications did not lend any greater predictability to the system.

An adjustment in the amount of the verdict (as opposed to reductions in the amount of pre-judgment interest plaintiff was willing to accept), was observed in but a single case. There, the insurer anticipated a defense verdict, but the jury found instead for the plaintiff in the amount of \$750,000. A post-trial settlement reduced the award to \$550,000, an amount still three times the plaintiff's pretrial settlement offer and more than twice the highest amount expected by the insurer to have been awarded. In other large cases, no reductions in the verdicts were observed even though some of the awards were higher than the insurers' expectations.¹³⁶

As reflected in the insurers' files, the post-trial discussions that did occur in which the defense counsel or the insurer sought to lower a jury's award lacked substance. The litigants were not seeking reductions of the awards based upon any objective assessment of the likelihood of the merits of their appeals; for the most part, defense counsel were openly skeptical of prevailing on appeal. Plaintiffs were essentially being asked to forfeit part of their award to avoid the delay and expense of appeal. The appellate process was thus little more than a thinly veiled bargaining chip representing the power of one side to delay what was essentially seen as a foregone conclusion. Rather than operating to mitigate jury indiscretion, the post-trial process as observed here reflected yet another indication of the obfuscating impact of the system's inherent expense and potential for delay.

135. See, for example, Broder, 11 Just Sys J at 358-59 (cited in note 56) (Despite "large variations in the pattern of original jury awards," the post-trial adjustment process tends to "provide a more consistent pattern of disbursements among all categories of cases" so that one ignoring this aspect of the process would be "seriously misinformed."). See Robert L. Nelson, *Ideology, Scholarship, and Sociological Change: Lessons From Galanter and the "Litigation Crisis,"* 21 L & Soc'y Rev 677, 688 (1988) (suggesting that post-trial reductions may blunt some of the criticism of the litigation process). As discussed above, see notes 56-60 and accompanying text, the post-trial adjustment process has virtually no impact on small-stakes cases; this is probably not important to insurers anyway, given the low stakes involved and the few cases that are lost. Nor does the process have any major impact in cases in which the defendant prevailed. *Id.*

136. In the case involving the largest verdict in the study, the jury's \$1.2 million verdict remained unchanged despite the fact that it exceeded the insurers' highest damage estimate and the plaintiff attorney's settlement offer by almost \$400,000. See Appendix, *Case 5*. Another telling example is reflected in a comment from a judge in a case in which liability was uncontested. During trial, the judge indicated that he would let stand any verdict between \$1 and \$1.0 million because the parties had "taken calculated risks to have the case decided by a 'roll of the dice.'" See Appendix, *Case 3*.

Perhaps this lack of connection between post-trial adjustments and the likelihood of success on appeal should not be surprising. Appellate review of trial-related errors, such as those that are likely to influence a jury's decision, is limited. Appellate courts are not empowered to review the quantum of damages awarded except in extreme cases, making it unlikely that the post-trial review process can add much to the overall predictability of determining damages. Without prospects for meaningful appellate review of jury damages awards, the post-trial adjustments that was observed was unconstrained and unfocused.

D. Interpreting Jury Outcomes

What messages or signals are in fact being sent by the jury in the malpractice context?¹³⁷ Based upon the information presented here, two opposing characterizations of the jury relationship to non-trial cases would appear to be demonstrably wrong. One suggestion is that the growing scarcity of litigated results risks making any relationship between trial outcomes and settlements chimerical.¹³⁸ This is not the case here. Unlike other tort contexts where settlements in non-litigated cases are common, the vast majority of dollars paid to claimants in malpractice disputes occur only after the filing of a lawsuit.¹³⁹ While the number of litigated outcomes is modest, the jury is a real and present influence. Approximately one in eight malpractice cases in our study went to trial, and there were a number of other formal judicial interventions, such as grants of motions for summary judgment, that provided additional instances of direct involvement.¹⁴⁰

The second expression of the potential relationship between jury outcomes and the settlement process—and perhaps the more widely

137. Of course, different participants may interpret the results in diverse ways. As noted by Marc Galanter:

The reality of juries includes the images of them held by lawyers, judges, insurers, litigants, and wider audiences. Juries are present as a threat and as a supply of markers, both variously interpreted. Hence, what gives rise to these interpretations is part of the jury process; what changes these interpretations is as crucial as changes in jury behavior.

Galanter, 1990 U Chi Legal F at 211 (cited in note 10).

138. Alschuler, 99 Harv L Rev at 1823 n64 (cited in note 11) ("Frequently . . . Americans bargain in the shadow of unavailable law."). See generally Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L Rev 833 (1990).

139. See Kakalik & Pace, *Costs and Compensation* at 31 & Table 3.3 (cited in note 35) (90% of all compensation received by malpractice claimants is paid in disputes in which a lawsuit was filed as compared to only 33% of compensation paid in litigated cases for automobile claims and 77% for general compensation claims). While there may well be a large reservoir of unasserted, potentially meritorious claims, see Harvard Medical Practice Study, *Patients, Doctors, and Lawyers* (cited in note 62), those malpractice claims that are pursued successfully usually do so in the context of formal litigation.

140. See Herbert Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *Judicature* 161 (1986) (noting that while trial rates are low, use of arbitration, summary judgment, and court dismissals significantly increases the amount of "formal" adjudication thus supporting a closer link between the adjudicatory process and settlement). For example, in our study, summary judgment motions were filed in one third of the cases (297 of 895 cases). While many of these motions related to only one defendant in a multi-defendant case, they did result in the dismissal of forty-seven cases (or 5% of the total cases in the study).

believed—is that jury decisions are so important that they serve to establish a “going rate” for resolution of other cases; the settlement process is to a significant degree driven by jury outcomes as participants compare claims with similar disputes resolved by juries.¹⁴¹ Regardless of whether this dynamic exists in other litigation contexts,¹⁴² the going rate theory for malpractice cases seems an improbable, if, indeed, not an impossible dynamic. First, the small number of jury decisions actually awarding damages inhibits the calculation of a going rate.¹⁴³ The small number by itself is probably not dispositive—many markets operate with signals from relatively few transactions. But the paucity of awards is only part of the problem. As noted above, the variability in types of injuries and factual circumstances presented in the malpractice context presents another difficulty. Malpractice cases involve a large number of substantive areas of medical practice and a variety of injuries ranging from emotional injuries and temporary disabilities to severe permanent injuries and death. The presence of case specific factors—such as the county in which the case is being tried, the quality of opposing counsel, the personal traits associated with the plaintiff, and the other factors related to the trial selection process—serves to obfuscate the significance of any individual damages award.¹⁴⁴ Perhaps the most important point in assessing the going rate argument is the lack of predictability of the few jury damages awards that are made. While an individual award might serve a

141. See, for example, Daniels & Andrews, *The Shadow of the Law* at 167, 169 (cited in note 11) (Malpractice jury verdicts “play a crucial role in setting the ‘going rates’ for different types of cases, and these going rates in turn are used in the process of negotiation and settlement that disposes of the bulk of claims.”).

142. See, for example, Ross, *Settled Out of Court* at 114-15 (cited in note 11) (explaining that in automobile cases “both sides come to [the settlement amount] estimate by comparing a given case in its many dimensions against other, similar, cases that have gone to trial”). But see Priest, 1990 U Chi Legal F at 196 (cited in note 7) (noting that the trial of so many routine cases reflects “the difficulty of predicting how Chicago juries will decide these cases,” thus making “it impossible for the parties to agree on a settlement amount to save litigation costs”).

143. In comparison, an informed observer would prefer information on court-approved settlements, which are more numerous than jury awards and thus a more likely source for establishing a going rate. Under North Carolina law, court approval is required for settlements involving minors, resulting in a large number of settlements being noted in the court files; in other cases, the parties, for a variety of reasons, sought approval or filed their settlement agreements with the court. In total, eighty cases (or 9% of the cases in the study) were resolved pursuant to a court-approved settlement, a figure approximately five times more than the number of jury damages awards. Moreover, many of these are among the largest settlements observed. See generally Marygold S. Melli, et al, *The Process of Negotiation: An Exploratory Investigation in the Divorce Court* 34-35 (Inst Legal Stud, 1985) (suggesting that the shadow of the law was “cast by the agreements of the parties” so that “rather than a system of bargaining in the shadow of the law, divorce may well be one of adjudication in the shadow of bargaining”). Nonetheless, information on these settlements is not widely available, in part because defendants often insist upon a confidentiality agreement: the settlement agreement containing the amount of the settlement was sealed in twenty-eight cases.

144. Indeed, in the entire sample of fifty-six reviews of insurers’ files in trial cases, there was only one reference to the dollar value of another jury verdict in North Carolina. Conceivably, jury decisions from other litigation contexts such as automobile accidents or product liability suits, or jury decisions from other malpractice cases in other states, could provide additional input to assist in formulating a going rate. Nonetheless, there is little indication in the insurers’ files that these sources were regularly used. In part, this may reflect the inconsistency of jury awards for similar injuries across litigation contexts. See Bovbjerg, et al, 54 L. & Contemp Probs at 15-18 (cited in note 6).

useful signalling role,¹⁴⁵ the quality of information from some cases is virtually impossible to interpret given that the results were well above or well below the parties' pretrial estimates. Different parties will come away with widely different interpretations of the significance of these outlying awards.

Rather than fixing a going rate, the observed jury awards on damages in the malpractice context accomplish just the opposite. The few awards and their unpredictability promote the plausible assertion by both parties of a wide range of possible damages; malpractice jury awards both cause and reinforce the open-ended nature of the parties' settlement positions. The problem is not simply a function of improving the participants' understanding of the results; even with complete information about the limited number of awards, one cannot glean sufficient information to calculate anything approaching a going rate. The problem is not one requiring the bolstering of a faint signal so that it can be understood; with respect to damages, the signal is inherently garbled.¹⁴⁶

Thus, an informed observer of trial outcomes would likely note three messages being emitted from the trial process. The first is that the jury—contrary to popular belief—is a relatively trustworthy decisionmaker on questions of liability, at least from the defendant's perspective. This has important ramifications for the claims review process. Insurers can confidently determine settlement positions by focusing on the merits of the case; there is little need, especially in small and modest stakes cases, for insurers to approach the prospects of a jury trial with trepidation.

A second, less distinct message is suggested by the low level of plaintiffs' victories at trial, even in contested liability cases deemed as "toss-up" cases by insurers. Although there is insufficient information available to prove the point, one possible interpretation for this observed result is the presence of a pro-defendant bias. Plaintiffs' attorneys observing these results—especially inexperienced attorneys operating with imperfect information—might rationally interpret the signal as indicating a pro-defendant bias, and as a result, discount their assessment of a claim's value. Insurers are thus in a position to take advantage of this possible interpretation, revealing a potential benefit to insurers of their status as "repeat players" and their abilities in selecting cases for trial.¹⁴⁷

The third message, arguably a very strong one heard by both parties, is that jury decisions on damages are unpredictable. This has particular ramifications for high-stakes cases and may well explain their surprisingly low

145. See, for example, Appendix, *Case 3*.

146. See Galanter, 1990 U Chi Legal F at 257 (cited in note 10) (discussion of strategies for improving the quality of signals emanating from jury decisions). This observation may explain why limits on damages—thought to be one of the most effective tort reform measures—are useful. Even though few cases ultimately result in awards that would exceed the cap, the presence of the limit would have an impact in narrowing the range of damages asserted in the settlement process in a far greater number of cases.

147. This observation may explain in part why malpractice insurers and defense counsel have not been particularly exuberant in their support of the American Medical Association's proposal to substitute an administrative system for the jury. See note 2.

trial incidence.¹⁴⁸ Insurers have substantial resources and are able to run the risk in low-stakes cases, especially given the jury's basic trustworthiness with respect to liability. But the risk of jury unpredictability in large damages cases is severe and raises a critical point for further developing our understanding of the settlement dynamic in those cases.¹⁴⁹ It is widely assumed that institutional defendants such as insurers in malpractice cases are generally less risk averse than plaintiffs, because of their ability to spread risk over a greater number of cases. This would suggest a willingness to try large stakes cases in which liability is contested unless the plaintiff offers what the insurer believed to be a fair approximation of the expected value of the case. While the relatively few high-stakes cases may indicate that plaintiffs' attorneys, perhaps sobered by the low win rates in malpractice cases, are willing to make reasonable settlement offers, it is also possible that insurers are more risk averse than previously anticipated. The fact that most juries are trustworthy on liability provides only limited solace; a single aberrant result runs the risk of serious losses in the malpractice context, where the total number of claims and suits are small—but potential losses in some cases great—in comparison to litigation contexts such as automobile suits.¹⁵⁰ Single losses in high-stakes

148. See Alschuler, 99 Harv L Rev at 1825-27 (cited in note 11) (noting that "the lawlessness of our jury system—especially the largely unguided discretion that juries exercise in assessing damages—exerts pressure on risk-averse litigants on both sides). It is possible, of course, that there are in fact few high-stakes cases being filed. Due to ambiguity in injury classifications, our data cannot directly address how many cases in the study involved potentially high damages. For example, the death of an elderly patient already suffering from a serious illness may involve far less in likely damages than a partial disability suffered by a child. Nonetheless, it is clear that there were a large number of high-stakes cases that were settled without trial. Our results show at least twenty-eight cases in which settlements were reached for more than \$250,000, with eleven cases involving settlements of over \$1 million.

149. Determining how the participants' perceptions of the jury color settlement negotiations cannot be directly determined from the few high-stakes trial cases observed in the study. One case clearly evidenced concern with jury competence in support of a decision to settle. See Appendix, *Case 1*. Additional research into the settlement process in large-stakes cases should focus on any expression of insurers' fear of jury bias or unpredictability. Assessing the parties' subjective assessment of juries as a factor in settlement of large-stakes cases may prove difficult. Based upon a preliminary review of insurers' files in large settlement cases, there are indeed several references to how a jury might react to the facts of the case cited in support of a recommendation to settle. Such references may or may not suggest fear of jury bias or incompetence. The jury is after all the decisionmaker in the dispute; referencing how it is likely to resolve the case is to be expected. This is especially true if the defense counsel or insurer actually believed on the merits that the doctor was negligent; it would be natural for the attorney's assessment to be depersonalized in terms of what "the jury"—an amorphous third party—would do (knowing full well that this result is precisely what the defense attorney believes to be appropriate). What is difficult then is separating what portion of a settlement reflects a reasonable accommodation of the merits of the dispute from an exaction above a "fair" value of the case owing to the possibility of perceived *inappropriate* jury behavior—evidence that a party believed that a jury would be likely to reject a meritorious argument or would be unable to assess it fairly.

150. For example, the largest malpractice insurer in North Carolina had paid claims of approximately \$17.5 million in 1989. Medical Mutual of North Carolina, *Annual Report* 16 (1989). In one trial case (filed outside of the study period covered here), the insurer viewed the case as one involving probable negligence, but with a potentially meritorious causation argument. Settlement negotiations stalled with the parties several hundred thousand dollars apart. The trial resulted in a verdict over \$3.0 million, an amount approximately four times the plaintiff's pretrial settlement offer. The plaintiff's counsel subsequently agreed to a downward revision. While malpractice insurers can spread their risk of such large payments through the purchase of reinsurance, the resulting payment

cases also have the predictable effect of increasing the plausible range of damages claimed by plaintiffs' attorneys in other cases.

The description of the relationship of jury outcomes to the settlement process thus presents a decidedly mixed picture. While jury results generally seem to foster a welcome focus by insurers on the merits of the case especially in disputes involving small or modest damages, the observed outcomes also raise serious potential problems. The lack of success exhibited by plaintiffs, even if largely a function of insurers' adeptness at the trial selection process, may lead some plaintiffs to discount their assessments of the merits of their case unnecessarily, resulting in a settlement for less than what some observers may consider the "fair value" of the case. Perhaps of most concern, the unpredictability of the jury's role in calculating damages may well be a major factor in the surprising absence of high-stakes cases from the trial process.

The evidence presented suggests a rather sharp paradox. On the one hand, there are a sizable number of jury decisions relative to the larger universe of litigated malpractice claims; contrary to those bemoaning the lack of jury input, it was no means the rare malpractice case that went to trial. The threat to take the case to the jury—be it from the insurer or the plaintiff—was credible. The relatively high number of jury outcomes in relationship to litigated cases would initially suggest that jury decisions could well exercise a type of hierarchial control.

On the other hand, however, the nature of the cases being tried indicate that most trial cases were simply not very important. For example, during the three years studied, juries awarded only a small fraction of the compensation obtained by malpractice plaintiffs.¹⁵¹ Thus, while there is a regular supply of jury outcomes that could provide source material for guiding the resolution of other cases, many of the trial cases were low-quality disputes brought by inexperienced attorneys and were characterized by small potential damages, fact specific disputes, and weak liability claims—cases that are unlikely to exercise direct control over the resolution of other disputes. Taken collectively, these cases send only a general signal that defendants tend to win most of the time. Any individual case simply confirms what should have been an already well internalized message. While providing reason for confidence in the jury's abilities, these cases, in terms of lighting the way for resolving other claims, provide at best a background radiance.

For malpractice cases at least, the common analogy to a pyramid, with its assumption of hierarchial control with jury decisions at the top, is open to

in this one case represented more than 10% of the entire amount paid in indemnity by that insurer for the year.

151. But see Galanter, 1990 U Chi Legal F at 230 (cited in note 10) (assuming that juries distribute a sizable fraction of compensation paid to plaintiffs). In our three-year sample, juries awarded a total of approximately \$3.2 million (much of which was awarded in cases in which liability was uncontested and the insurers understood that large amounts were owed). While we do not have settlement figures for all cases, the total dollar value of settlements in our study clearly exceeded \$20 million.

serious question.¹⁵² To be sure, there are perhaps a few trial cases that serve an important signalling role in establishing damages or assessing new theories of liability, but they are rare. The pyramid image ultimately fails in part by not illustrating the variety of case being tried, or the different strength and types of signals that are sent. Jury trial decisions are assigned to the top of the pyramid primarily because of their visibility, not because of a sense that those decisions are somehow more important or noteworthy than non-jury decisions. Existing trial selection models predicted that cases proceeded to trial primarily because they were difficult to value or involved high-stakes. These predictions supported the imagery of jury decisions being located at the top of the dispute resolution pyramid. The reality of the description here, however, is that if malpractice cases were ranked according to complexity, amount of stakes, or importance, trial cases would certainly be scattered throughout the ranks, with many located at the bottom ends of these scales.

The existing shadow image of the jury process also does not adequately capture the lurking danger associated with jury determinations of damages. Given jury unpredictability on damages, single results risk serious losses. Anecdotal evidence of outrageous results may well have direct impacts on settlements in other cases. For the malpractice setting, perhaps a better imagery to describe the relationship of jury to settlement is that of a volcano, which, while usually inactive, has the potential for a major eruption that can cause great harm. Another appealing aspect of the volcano imagery is the notion that the danger—the aberrant jury result—is not predictable. Moreover, once the volcano has erupted, it is difficult to provide immediate or sufficient disaster relief (in the jury context in the form of post-trial adjustments) and nearby residents may be unwilling to return to the scene for quite some time.

V

PROCEDURAL STRATEGIES FOR MALPRACTICE LITIGATION

This article has noted a number of potential problems in litigating malpractice cases as revealed through the trial process, most notably the unpredictability of jury awards of damages and the high marginal cost associated with the use of juries. Although further analysis of the settlement process is needed to shed additional light on many of areas of concern, the question necessarily arises as to what procedural reforms are suggested by the insights developed earlier in the article. A complete overview of possibly useful reforms is not attempted here.¹⁵³ Instead, this section analyzes two

152. See Galanter, 1990 U Chi Legal F at 251 (cited in note 10) (questioning whether the juries' role is adequately captured by the pyramid or iceberg images "with their connotation of orderly bonds of rational calculation by which the 'visible cap' of jury verdicts 'controls' the larger settlement arena"). Galanter's focus is on how jury decisions are distorted through the process of interpretation. The suggestion here is that even with full information, there is no interpretation that would permit the type of hierarchical control postulated.

153. For example, a number of specific reforms are designed to improve the jury's ability to function as a decisionmaker, such as permitting jurors to take notes or ask questions in complex

specific reforms drawn from the study results: the redesign of formal offers of settlement and the development of alternative dispute resolution ("ADR") methods particularly suited to the malpractice cases currently being tried.

A. Toward Rationalizing the Determination of Damages: Redesigning an Offer of Settlement Rule

One litigation dysfunction noted in Part IV is the apparent inability of the jury to provide useful input in the calculation of damages. A clear manifestation of this problem is the trial of cases that the insurers believed to be meritorious and in which settlement might ordinarily be expected, but in which the parties were unable to reach an agreement as to damages. These cases—as well as numerous other trial cases in which liability was contested—were not settled because of the wide variation in potential damages that could plausibly be claimed as a result of the lack of predictability of jury awards of damages. A possible procedural response is the design of formal settlement offers that create incentives to settle. Similarly, if, as previously suggested, some of the trial selection is a function of insurer's tough bargaining postures adopted to deal with non-repeat players, then an offer of settlement rule would assist by encouraging insurers to soften their positions by placing a tax on too low offers (or on plaintiff's high demands).¹⁵⁴

Although formal offers of judgment are permitted under Federal Rule of Civil Procedure 68¹⁵⁵ and its state counterparts,¹⁵⁶ it is widely believed that these rules are inadequate. The most frequent explanation for their inadequacy is that the sanction imposed on the non-settling plaintiff—the

cases such as medical malpractice trials. See Larry Heur & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 Nw U L Rev 226 (1990). See generally Mark Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 Nw U L Rev 221, 224 (1990) (noting questions jurors asked in an obstetrical malpractice case); Stephen I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw U L Rev 190 (1990) (arguing in favor of permitting jurors to become more active in questioning and notetaking). Our study, while involving direct observation of jurors in several malpractice cases, does not bear directly on this level of reform. For a discussion suggesting that the various tort reform impacts are either anticipated or thwarted by jury behavior, see James K. Hammitt, Stephen J. Carroll & Daniel A. Relles, *Tort Standards and Jury Decisions*, 14 J Legal Stud 751 (1985).

154. See Cooter, Marks & Mnookin, 11 J Legal Stud at 247 (cited in note 114) ("Offers to compromise in effect tax hard strategies and subsidize soft strategies; that is, a slightly more generous offer will be subsidized by one's opponent in the event of trial. Both players will want to revise their strategies to make more generous offers.")

155. Fed R Civ P 68. Rule 68 permits a defendant to serve the plaintiff with an "offer of judgment" at virtually any point in the litigation process. If the plaintiff accepts the offer, the judgment is filed with the court. If not accepted, the offer is deemed withdrawn and no evidence relating to it is admissible at trial. A rejected offer has no impact unless the judgment "finally obtained" by the plaintiff is less favorable to the plaintiff than the rejected offer. If that trigger condition is met, the plaintiff must pay the defendant's "costs" incurred from the date of the offer forward; that trigger condition also serves to cut off the plaintiff's entitlement to recover post-offer costs. See *Delta Air Lines, Inc. v August*, 450 US 346, 352 (1981) (purpose of Rule 68 is to "encourage the settlement of litigation"); *Marek v Chesny*, 473 US 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation.").

156. As relevant to this article, North Carolina's version of Rule 68 is in all material respects the same as the federal rule. See NC R Civ P 68; G. Gray Wilson, 2 *North Carolina Civil Procedure* 453-58 (Michie, 1989); *Purdav v Brown*, 307 NC 93, 296 SE2d 459 (1982).

shifting of litigation costs not including attorneys' fees—is too insignificant to affect the settlement dynamic.¹⁵⁷ As a result, the rule is only seldom invoked.¹⁵⁸

Our study clearly supports the current rule's lack of use in the malpractice context. Rule 68 offers were filed in only twelve of the 895 cases (1.3 percent).¹⁵⁹ Only two of these offers were accepted by plaintiffs. Those few offers that were made usually occurred in low-stakes cases; in fact, in eight of the twelve cases, the offer was for \$10,000 or less. The filing of a Rule 68 offer resulted in the shifting of costs in only a single case.¹⁶⁰ The rare Rule 68 offer was filed in the vague hope that it might somehow serve to force the action with respect to settlement.¹⁶¹ Moreover, Rule 68 was not often

157. See Proposed Fed R Civ P 68, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 FRD 337, 361-67 (1983) (noting that the "costs" shifted under existing Rule 68 are "too small a factor to motivate parties to use the rule") ("*Preliminary Draft*"); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 Geo Wash L Rev 1, 7 (1985) (same); Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs By Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 Am U L Rev 813, 819 (1984) ("If Rule 68 is to fulfill its goals of encouraging settlement and avoiding protracted litigation, a party's rejection of an offer of judgment must result in more meaningful penalties."). See generally Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J Legal Stud 93, 103-04, 108-10 (1986).

158. See Note, *The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions*, 70 Iowa L Rev 237, 245 (1984) (authored by Julie M. Cheslick) (describing Rule 68 as a "little used threat" in part because post-offer costs were not significant).

159. Since the information was obtained from court records, the validity of the observed results depends on whether all Rule 68 offers were actually filed in court; if offers were not regularly filed, the use of Rule 68 could be greater. Federal courts have held that it is *not* proper to file a Rule 68 offer with the court unless it has been accepted. See, for example, *Scheriff v. Beck*, 452 F Supp 1254, 1259 (D Colo 1978). There are no North Carolina state court decisions as to whether such offers can be filed prior to acceptance. The fact that several "unaccepted" Rule 68 offers were filed in court indicates that the practice is at a minimum not prohibited. In addition, our review of over 150 insurer closed claim files did not reveal any cases in which Rule 68 offers were made but not filed in court, further suggesting that state practice is to file offers with the court when made.

160. In that case, the defendant served an offer of judgment for \$25,010, but prevailed at trial. Under the federal rule as interpreted in *Delta Air Lines, Inc.*, 450 US 346, defendant would not have been entitled to any costs. In this case, however, defendant moved for the imposition of costs, including the deposition transcript expenses and witness fees for five expert witnesses, citing in support the state version of Rule 68. The court awarded reduced costs of approximately \$4,500, but did not specify whether the award was pursuant to Rule 68 or the usual award of costs to the prevailing party.

In three cases, plaintiff prevailed at trial, and the award exceeded the Rule 68 offer. In five other cases, the lawsuit was settled after the offer was filed. Settlement amounts are unknown in four of the cases; in the fifth case, the parties settled for \$15,000 fourteen months after the defendant made a \$7,500 offer of judgment. Without further information, it is not possible to speculate as to any relationship between the offer and the final settlement amount. The timing of the settlements casts some doubt as to whether any causal relationship existed; while three settlements occurred within four months of the offer, in the other two cases, the settlement was not consummated until more than a year after the Rule 68 offer.

161. In two of the closed claim files reviewed, insurers made a Rule 68 offer. The first file contained no explanation why the defendant made a \$1,500 offer; the insurer was willing to settle for more than that amount. In the second case, see Appendix, *Case 3*, the insurer instructed counsel to file a Rule 68 offer for \$75,000; in fact, the formal offer was made a month *after* the attorney informally communicated an offer in the same amount. Settlement negotiations continued for several months and the insurer eventually increased its settlement offer prior to trial. No revised Rule 68 offer was made, which is surprising since an increased offer would have been in the insurers' interest in that it would have increased the likelihood that the plaintiff would obtain a less favorable judgment thus triggering the Rule's sanction provision.

threatened apart from its marginal actual use; there is little indication in the insurers' files that defendants even considered making Rule 68 offers.¹⁶²

Criticisms of Rule 68 have prompted the federal Advisory Committee on Civil Rules to promulgate two proposed amendments. The first proposal provided for either party to serve an offer of settlement on their opponent which, if rejected and then not improved upon at trial, triggered a sanction that included an award of attorneys' fees.¹⁶³ This proposal generated significant controversy, especially from supporters of civil rights litigation, who argued that it would adversely affect civil rights plaintiffs by placing them at risk of having to pay defendants' attorneys' fees.¹⁶⁴ The second proposal also provided for either party to make formal offers of settlement, but did not define the sanction to be imposed, leaving it to the trial court's discretion to determine on a case-by-case basis whether the rejection of the offer was "unreasonable" and if so to determine an "appropriate" sanction.¹⁶⁵ Concerns were voiced again as to the proposed rule's potential impact on certain plaintiffs, most notably civil rights plaintiffs, and new concerns were raised regarding the court's ability to apply the rule consistently.¹⁶⁶ These criticisms, together with strong concerns that either rule would unfairly benefit defendants,¹⁶⁷ led to the abandonment of the reform efforts.

During the debate on the proposed revisions to Rule 68, there was some discussion about the proposed rule's impact in litigation contexts—such as malpractice—in which contingency fee agreements are regularly employed. The general assumption was that either version of the proposed rule would work to plaintiffs' detriment as they would be placed at risk of paying defendants' attorneys' fees.¹⁶⁸ The information presented here demonstrates that these concerns are potentially well founded. Mandatory shifting of attorneys' fees under the first proposal could have a significant impact on plaintiffs, given the high defense costs associated with trial as well as the serious risk that juries may find for defendants even in cases in which plaintiffs have strong claims. A party contemplating an offer of settlement under a

162. See Galanter, 9 L & Soc'y Rev at 103 (cited in note 9) (discussing how certain rules tend to "penetrate" the negotiation process apart from their formal use).

163. *Preliminary Draft*, 98 FRD at 361-65 (cited in note 157).

164. See Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 Harv L Rev 828 (1985); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 Colum L Rev 719 (1984) (authored by Victoria C. Choy). See generally Dale A. Oesterle, *Proposed Rule 68 on Offers of Settlement*, Cornell L F 11, 13 (February 1984) (the fact that a party makes a settlement offer is an "insignificant reason for such a dramatic change" of the current approach to cost shifting in American courts); Owen M. Fiss, *Against Settlement*, 93 Yale L J 1073 (1984).

165. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 102 FRD 407, 432-37 (1984).

166. See, for example, Simon, 54 Geo Wash L Rev at 40-47 (cited in note 157).

167. See Miller, 15 J Legal Stud at 121-22 (cited in note 157); George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 Sup Ct Econ Rev 163 (1982). See generally Thomas D. Rowe with Neil J. Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 L & Contemp Probs 13, 15 (Autumn 1988).

168. See Simon, 54 Geo Wash L Rev at 13 (cited in note 157). See generally Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L J 651, 673-76.

mandatory fee shifting rule would be faced with a severe penalty for even a good faith insistence upon a jury resolution. The second proposal's approach—awarding sanctions for unreasonable refusals—would in most cases be difficult to apply; the wide settlement ranges projected in insurers' closed claims files exemplifies the difficulty in establishing what constitutes a reasonable settlement—a prerequisite for deeming a refusal unreasonable. The lack of available information on comparable verdicts would render the reasonableness inquiry meaningless in most malpractice cases.

Despite the rule's lack of use or any consensus on reform directions, there remains substantial interest in restructuring the offer rules for medical malpractice cases given the high costs of litigation and the potential benefit of reigning in outlandish settlement demands. For example, the American Medical Association's proposed administrative system for resolving malpractice claims recommends a series of mandatory settlement offers culminating in pre-hearing offers that serve as triggers to mandatory cost-shifting of attorneys' fees.¹⁶⁹ A more radical proposal would allow health care providers to force patients to forfeit their rights to bring suit in return for the provider's offer to pay all economic damages associated with a treatment-related injury.¹⁷⁰ Such a proposal would provide strong incentives for providers to pay compensation in high-quality cases voluntarily, albeit in amounts that would be significantly lower in some cases than the amounts currently provided.¹⁷¹

1. *The Proposed Acceptance of Responsibility Rule.* As an alternative reform approach, Rule 68 could be profitably restructured to focus on strong plaintiff cases in which the difficulty of determining damages has created a barrier to settlement. Under the current rule, an offer once refused has no impact; the dispute proceeds to trial and the defendant is free to contest liability without prejudice. As a result, there is little reason for a defendant to admit liability

169. See *Tort Reform Codification, Model Medical Liability and Patient Protection Act*, 1 Courts, Health Science & the Law 87, 97-98 (1989). As another example, Florida recently adopted a revision to its offer of judgment rule, allowing either party in a malpractice case to make an offer of settlement which, if unreasonably rejected, results in the imposition of attorneys' fees. See F. Townsend Hawkes, *The Second Reformation: Florida's Medical Malpractice Law*, 13 Fla St U L Rev 747, 765-69 (1985) (criticizing the provision for establishing an arbitrary and inflexible approach to the awarding of sanctions and for failing to discourage "sham" settlement offers). Prior Florida law provided for the prevailing party in malpractice cases to be awarded its attorneys' fees as part of the costs of litigation. A defendant could avoid paying the plaintiff's fees by making an offer that proved more favorable than a later judgment. See Fla Stat § 768.56 (1983) (repealed by ch 85-175, § 43, 1985 Fla Laws 1180, 1225).

170. See W. Henson Moore & John S. Hoff, *H.R. 3084: A More Rational Compensation System for Medical Malpractice*, 49 L & Contemp Probs 117 (Spring 1986); Henson Moore & Jeffrey O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 La L Rev 1267 (1984); Jeffrey O'Connell, *Offers that Can't be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 Nw U L Rev 589 (1982).

171. See Moore & Hoff, 49 L & Contemp Probs at 118 (cited in note 170) ("The desire to avoid the tort lottery and its potentially very high payouts—not to mention the cost, distraction, and unpleasantness of litigation—should motivate providers to make reasonable offers to settle on the basis of fairer, more controlled, payments."). Admittedly, the recovery would be less in cases where the legitimate non-economic damages exceeded economic damages. Id.

even in cases in which the plaintiff's claim is strong. A different approach would require a defendant as a necessary condition to making a formal offer under a revised Rule 68 to acknowledge the strength of the claim by "accepting responsibility" for the plaintiff's injuries. Accepting responsibility would then trigger appropriate procedural consequences to assist the parties in reaching a principled resolution on the remaining issue of damages.

This alternative vision of Rule 68, focusing on high-quality cases in which a defendant would consider removing the liability issue from the dispute, is premised on the assumption that the current problems with the rule stem not only from its weak sanction, but also from its failure to: (1) impact the litigation process and (2) concentrate its reach on those cases in which damages are the primary issue.¹⁷²

The proposed approach does not require the defendants to stipulate liability *per se*.¹⁷³ While the difference between stipulating liability and accepting responsibility may at first seem an unimportant semantic ploy, the difference in terminology could prove consequential. While only a few malpractice disputes present cases of undisputable liability and causation, numerous cases allow defendants to argue for non-liability, albeit weakly. The suggested rule would provide incentives for defendants to focus these cases on the question of damages in light of the expense and complexity of determining liability and causation. To require the defendant to stipulate liability in such cases overstates the nature of the defendants' concession. Moreover, a stipulation of liability seems to invite jury speculation—perhaps inflamed by plaintiff attorneys—on the physician's negligence, an inappropriate focus once the liability issue has been removed. The more neutral acceptance of responsibility formulation, on the other hand, would permit a judge to exclude any evidence relating to the underlying event claimed to be malpractice.¹⁷⁴

172. Focusing on probable liability cases is consistent with the Supreme Court's earliest discussion of Rule 68's intended use. As noted by the Court, while the possibility of losing always provides an incentive to consider settlement, "Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain." *Delta*, 450 US at 352 (emphasis added).

173. The prevailing view is that filing a Rule 68 offer does not constitute a stipulation of liability because if so construed, Rule 68 would discourage defendants from making offers. Varon, 33 Am U L Rev at 840-41 (cited in note 157). It is also assumed that defendants do not want their offers construed as admissions, as evidenced by the fact that many Rule 68 offers expressly deny liability. Note, *The Offer of Judgment Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 Golden Gate U L Rev 963, 1001 (1980) (authored by Maureen Malvern).

174. The choice of terminology is also important in controlling how attorneys are permitted to structure their arguments at the subsequent trial on damages as well as how the jury is instructed. It is necessary to be concerned with the character of the plaintiff's argument in order to avoid the jury possibly increasing its award of damages based upon the clarity of the defendant's negligence. See Greene, 52 L & Contemp Probs at 232-34 (cited in note 6) (noting possible spillover impact of jury's assessment of liability on the issue of damages). The significance of terminology was suggested by two malpractice trials that the author observed in which the question of damages was supposedly the sole issue. In the first case, the parties had agreed that "liability would not be an issue." This curious phrasing proved difficult. The plaintiff's attorney repeatedly argued that liability had been conceded and proceeded to discuss the impropriety of the doctor's treatment. The defense attorneys argued at length that the treatment was proper, leaving the jury understandably confused as to what

Thus, the attitude reflected in filing a statement of responsibility is one of generosity—not of confession—which is more consistent with the medical profession's sociological approach to dispute resolution.¹⁷⁵ Using the more neutral responsibility formulation would almost certainly increase the likelihood that defendants would invoke the procedure. Requiring a stipulation of liability, on the other hand, would cause a negative emotional reaction and could well have legal ramifications in terms of reporting the outcome to disciplinary authorities.¹⁷⁶ In low-stakes cases, an insurer might utilize the proposed approach even if liability were contested simply in order to reduce litigation expenses. In these situations, the acceptance of responsibility language would in fact be a more apt description of the defendant's strategic initiative.

Once focused on cases in which the defendant is willing to abandon the liability issue, a revised Rule 68 could be used to trigger a variety of procedural consequences to enrich the negotiating environment. Three possible litigation triggers are described below.

a. The use of mutual formal settlement offers with meaningful sanctions. First, a defendant's acceptance of responsibility could serve as a precondition for the use of *mutual* settlement offers along the lines set forth in the proposed revisions to Rule 68 discussed above. In particular, following the defendant's acceptance of responsibility, it would be fair to permit either side to make a formal settlement offer which if not accepted and then not improved upon at trial would result in the imposition of sanctions including the shifting of attorneys' fees. Criticism of the earlier proposals was premised upon the fear that plaintiffs would unfairly be put at risk of paying defendants' attorneys' fees, which in contested liability cases could be substantial.¹⁷⁷ This risk would be almost entirely eliminated if the defendant were first required to accept

"not an issue" meant. In the second case, an agreement was reached that the defendant had "accepted responsibility" for the injury and that neither party could discuss the doctor's treatment. While the jury indicated a certain curiosity as to what had happened, the case focused entirely on the plaintiff's damages. In other cases, some issue may arise as to the impact of the acceptance language with respect to proximate cause. In this regard, the acceptance of responsibility language may be broader than a stipulation of liability that would be unrelated to any question of proximate cause.

175. See Moore & Hoff, 49 L & Contemp Probs at 120-21 (cited in note 170) (noting that early tenders of settlement offers to pay an injured patient's economic damages will be more appealing to the medical profession's non-adversarial "healing spirit" and "caring mission" than litigating liability). See generally Hubbard, 23 Ga L Rev at 348 (cited in note 8) ("The combative, adversarial approach of tort litigation conflicts with the medical profession's system of treating problems; and perhaps more importantly, the approach personally offends many physicians.").

176. For example, the federal government recently instituted a national data bank which collects information on all malpractice settlements and verdicts. See Ilene D. Johnson, *Reports to the National Practitioner Data Bank*, 265 J Am Med Ass'n 407 (January 16, 1991). The information collected in the data bank will be made available primarily to hospitals in the hiring and review of physicians. The more neutral responsibility statement may be important in permitting a physician to argue that the offer does not necessarily equate with an admission of negligence. *Id.* at 410 (noting that the reporting form requires the insurer to designate whether the indemnity payment resulted from a judgment or from a settlement).

177. See, for example, *Marek v Chesny*, 473 US 1, 7 (1985) (attorneys' fees and expenses following a Rule 68 offer totalled approximately \$140,000 where final judgment for the plaintiff was \$60,000).

responsibility for the plaintiff's injuries. The acceptance serves to guarantee that (1) the plaintiff will obtain a recovery and (2) the defendant's post-offer attorneys' fees will be predictably modest, given the lack of any need to prove liability.¹⁷⁸ It is unlikely this scenario would chill a malpractice plaintiff's *initial* decision whether to pursue the claim; the marginal impact of the rule would be limited to the plaintiff's consideration of a settlement offer at the point when some recovery is assured.

Permitting mutual Rule 68 offers following a defendant's acceptance of responsibility would provide both parties with a potentially useful settlement tool. In several cases in the study, the plaintiff attorneys had made offers beyond the insurers' assessments of likely damages. Insurers would have a strong incentive to invoke a settlement rule to pressure the plaintiffs to reconsider their bargaining position; the fact that plaintiffs can also make offers following the defendants' acceptance of responsibility mitigates any pro-defendant impact.¹⁷⁹

b. Limiting plaintiff's contingency fees. The acceptance of responsibility could also allow the imposition of mandatory limits on plaintiff attorneys' contingency fees. To date, several states have limited contingency fees based upon the belief that a constant contingency rate regardless of the amount of recovery overcompensates attorneys in large cases.¹⁸⁰ The cost information set forth here generally supports this assumption; the total defense expenditures in large cases on average are well below the one-third level typically found in plaintiff's contingency fee agreements.¹⁸¹ While this disparity makes existing efforts to limit contingency fees rational, it does not make them precise. In some large damages cases, a reduced contingency fee could undercompensate a plaintiff's attorney as measured against the expenditures incurred by the defense. This is especially possible in those cases in which liability is contested and there may be a need to provide the plaintiff's attorney with a premium to compensate for the risk of a non-

178. As suggested by the cost data presented in Part II, attorneys' fees in damages-only cases typically represent only a small percentage of the amount in controversy, and in absolute terms are modest. See note 40 (average litigation expenses, including pretrial discovery which at least partially would not be shifted since occurring prior to an offer, averaged only \$24,220 in cases in which the insurers expected to lose); note 41 (defense costs were only 5% of the verdict amounts in damages-only cases).

179. See Miller, 15 J Legal Stud at 123 (cited in note 157).

180. State reforms have included both case-by-case reviews of plaintiffs' fees as well as a sliding scale approach in which the contingency rates decrease with the size of the recovery. See, for example, Reder, *Contingency Fees* at 211 (cited in note 14); Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L Rev 949, 950-51 (1990) (reviewing types of contingency fee limitations). This particular variety of "tort reform" was intended to reduce the number of malpractice claims filed, based upon the belief that high contingency rates inspired attorneys to file unwarranted lawsuits, to seek exaggerated damages, and to refuse reasonable settlement offers in search of "jackpot" recoveries at trial. See Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 L & Contemp Probs 5, 22 (Spring 1986). A case-by-case approach adds an additional procedural step (thereby further increasing cost) and requires active judicial involvement. Also, without standards as to what an appropriate fee would be, it is unclear whether the discretion would result in a consistent policy approach.

181. See notes 42-43 and accompanying text; note 55.

recovery. In other cases, however, such as in cases in which liability is not seriously disputed, even a reduced contingency fee may still provide significant overcompensation.¹⁸²

The more valid conceptual difference is not between large and small recovery cases, but between contested liability and damages-only disputes. The average defense cost in damages-only cases in our study averaged well under 10 percent of the amount in controversy;¹⁸³ a contingency fee agreement awarding 33 percent or more of the total recovery would, in most instances, be grossly out of proportion to the effort required and the costs incurred. This point has prompted the argument that the contingency fee should be disallowed in cases in which there is in fact no contingency.¹⁸⁴ Efforts to limit contingency fees on this basis, however, are difficult to implement because there is currently no method for routinely identifying cases that turn primarily on the issue of damages; as shown by our study, juries sometimes rule in favor of defendants even in cases in which the insurer fully expected to lose. The proposed acceptance of responsibility rule provides a principled basis for identifying "low risk" cases in which the plaintiff's attorney is assured of a recovery, thus justifying a reduction in the contingency fee rate.

c. Triggering the use of ADR. A defendant's acceptance of responsibility under the proposed rule could also trigger the mandatory use of an appropriate ADR procedure.¹⁸⁵ If the parties had not voluntarily settled after a certain period following the defendant's filing of the acceptance of responsibility, the damages issues could be submitted to non-binding arbitration or some other ADR method to obtain an assessment by a neutral decisionmaker to assist the parties in refining their negotiating positions.¹⁸⁶

182. For example, *Case 4* in the Appendix resulted in a jury award in a damages-only case of \$335,000. Total defense expenditures for the lawsuit were only \$12,220. Assuming a one-third contingency fee, the plaintiff's attorney would have received an award of \$111,667—almost ten times the level of actual defense expenditures. Even under the sliding scale approach used in some states, the plaintiff's attorney's award would have exceeded defense expenditures by about five to one. See Robinson, 49 L & Contemp Probs at 22 & n. 92 (cited in note 180) (noting that Delaware's statute would permit 35% of first \$100,000, 25% of next \$100,000, and 10% thereafter, which in this case would result in an attorney's fee of \$73,500).

183. See note 41.

184. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L Rev 29 (1989). See generally Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 Cornell L Rev 529 (1978).

185. The potential relationship between ADR and Rule 68 offers has been recognized. See Simon, 54 Geo Wash L Rev at 78-79 (cited in note 157) (noting that ADR programs could increase the frequency of use as well as the utility of Rule 68 offers by helping the parties narrow their disagreement as to the value of the case). Simon's point assumes that an ADR program would operate independently of Rule 68 and usually before the parties would consider making Rule 68 offers. The proposal espoused here views ADR as a post-offer response.

186. Perhaps the most suitable ADR method would be based upon the court-ordered arbitration programs now in use in many state and federal courts. See Paul Nejelski & Andrew S. Zeldin, *Court Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 Md L Rev 787, 787-800 (1983); E. Allan Lind & John E. Shepard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (Fed Judicial Ctr, 1983); Barbara S. Meierhofer, *Court-Annexed Arbitration in Ten District Courts* (Fed Judicial Ctr, 1990). Court-ordered arbitration programs vary substantially, see D. Marie Provine, *Settlement*

Using ADR would be appropriate for several reasons. First, the defendant's acceptance of responsibility insures that only a single issue is presented—the issue of damages. Second, evidence relating to that issue could be submitted to a neutral decisionmaker after a brief hearing. An ADR evaluation would seem especially beneficial to those plaintiffs' attorneys who may not be experienced in malpractice litigation.¹⁸⁷

2. *The Utility of the Acceptance of Responsibility Rule.* In assessing the potential utility of the acceptance of responsibility rule, an important issue is whether its incentives would be sufficient to entice defendants to use it. Why would a defendant agree to accept responsibility, thereby forfeiting all liability defenses, if the current Rule 68—which requires no form of confession or surrender—is hardly ever used? The defense would seem better off maintaining even a weak liability defense as a bargaining chip during negotiations, even if it were ultimately jettisoned at trial.

Yet, there are several reasons why insurers would consider invoking the acceptance of responsibility rule as outlined above. The rule would create incentives, now lacking in the system, for insurers to simplify disputes in strong plaintiff cases. Even if no settlement were achieved, using the rule would result in significant cost savings by obviating the need for expensive discovery on the liability issue and by shortening trial lengths. The proposed triggers—permitting mutual settlement offers, limiting contingency fees, and obtaining a neutral evaluation through an ADR process—would create specific methods for both parties to focus the settlement process, as well as to reduce the plaintiff attorneys' willingness to pursue, and ability to profit from, a jackpot recovery.

3. *Assessing the Fairness of a Responsibility Rule.* A second issue is whether the proposed rule would be fair to plaintiffs. Clearly, plaintiffs are benefitted by defendants' acceptance of responsibility, which focuses the case solely on plaintiffs' damages award, thus negating the risk of zero recovery and

Strategies for Federal District Judges 44-51 (Fed Judicial Ctr, 1986) ("*Settlement Strategies*"). In general, this ADR method has been recognized as particularly useful in assessing damages. *Id.* at 51 ("Relatively straightforward compensation cases that could benefit from a valuation in dollar terms would seem better suited to this procedure" than those involving complex or novel legal issues.).

Despite the recent growth in court-ordered arbitration programs, see Susan Kelitz, Geoff Gallas & Roger Hanson, *State Adoption of Alternative Dispute Resolution*, 12 St Ct J 4 (Spring 1988), its use in malpractice and other high-stakes cases has been negligible owing to jurisdictional definitions establishing dollar caps on cases subject to the process. See E. Allan Lind, *Arbitrating High-Stakes Cases: An Evaluation of Court-Annexed Arbitration in a United States District Court* (RAND, 1990). Thus, while conceptually well suited to the task, existing court-ordered arbitration programs may need to be restructured to maximize the potential utility of ADR for these high-stakes cases. Possible changes could include new methods for selecting neutrals with expertise in malpractice as well as possible variations of the rules controlling the length and nature of the hearing.

Another possible ADR method is the use of the summary jury trial. For discussion of this procedure, see notes 199-224 and accompanying text.

187. See, for example, Reder, *Contingency Fees* at 227 & n48 (cited in note 14) (suggesting that a neutral evaluation be performed in malpractice cases to overcome the likely fact that plaintiffs' attorneys tend to overstate the likely outcome given their client's tendency to be risk averse).

reducing plaintiffs' legal expenses. Plaintiffs are potentially harmed, however, by the litigation impacts triggered by the defendants' acceptance of responsibility. Two major potential problems are noteworthy.

The first concern arises in applying the responsibility rule to cases involving claims for punitive damages. Since plaintiffs sought punitive damages in slightly more than 10 percent of malpractice cases observed (and approximately 20 percent of the cases going to trial),¹⁸⁸ the issue is of some moment. At one level, the high trial rate of punitive damages cases confirms the potential utility of a settlement rule; plaintiffs' attorneys may well be making unreasonable settlement demands. On the other hand, meritorious punitive damages claims, even if few and far between, are potentially important in serving the tort system's deterrent function.

Under the proposed rule, a defendant's willingness to accept responsibility cannot be read to include a willingness to agree to an award of punitive damages. Moreover, the proposed rule cannot co-exist with the plaintiff's continuing right to seek punitive damages. Proving punitive damages entails a detailed analysis of the underlying facts of the case. Such an inquiry would be inconsistent with the theory of the responsibility proposal—to simplify the dispute by focusing it on the plaintiff's damages.

One approach would be to exempt punitive damages cases from the rule. This is likely to be counterproductive, however, as plaintiffs' attorneys would assert punitive damages claims whenever ethically possible—perhaps even more often than they do now—to avoid the rule's impact. A second option would be to provide that a defendant's acceptance of responsibility extinguishes a punitive damages claim. While seemingly harsh,¹⁸⁹ such an approach could have the effect of encouraging the rule's use even in contested liability cases in which plausible punitive damages claims are asserted. Thus, the plaintiff would be assured of a recovery without the rancor and expense associated with trying the punitive damages issue. Alternatively, the plaintiff could be given the choice of either accepting the defendant's offer or refusing it and going forward to trial with the punitive damages claim intact but with the defendant free to contest liability.

A second fairness consideration is whether the rule would foster undesirable strategic behavior by defendants. For example, since the filing of the acceptance of responsibility decreases the plaintiff attorney's contingency fee percentage, an insurer might threaten to file the acceptance to pressure the attorney to accept a low settlement in order to maintain the high contingency rate. The plaintiff would be harmed by having obtained a settlement possibly lower than what could have been obtained if the acceptance had been filed with the attorney being paid at the higher contingency fee rate.

188. See notes 98-103 and accompanying text.

189. Considering how infrequently punitive damages are actually awarded, permitting defendants to cut off plaintiffs' entitlement to seek punitive damages would in fact negatively impact plaintiffs' rights in only a few cases.

This worry may not prove to be a serious one, however. The tension created by the insurer's offer is similar to that which already exists; plaintiffs with lawyers operating pursuant to a contingency fee agreement always face the hard choice of whether to accept a given settlement or to proceed with the uncertainties of trial.¹⁹⁰ While it is usually thought to be the client that favors a low settlement (to insure at least some recovery),¹⁹¹ the proposed rule places the tension more squarely on the attorney. Moreover, ethics rules—backed by potential malpractice liability—require attorneys to communicate with their clients to explain all offers of settlement as well as their fee arrangement. These rules would almost certainly include a duty to disclose the possibility of an insurer's filing under the proposed rule and its impact on the client's potential recovery and the attorney's fee.¹⁹² Certainly, the insurer's threat serves the beneficial purpose of commencing settlement negotiations earlier in the litigation process. The plaintiff's attorney may make a higher counteroffer; the question is not whether the rule will create pressures to settle, but whether those pressures are unfair. Indeed, in cases involving uncertain liability, for example, the plaintiff's attorney may elect to call the insurer's bluff by encouraging the filing of the acceptance as the plaintiff, as well as the attorney, may be better off with the lower contingency rate but the certainty of recovery.

B. Alternative Dispute Resolution, the Jury, and Medical Malpractice

There is considerable interest in developing ADR methods for malpractice cases.¹⁹³ The presentation here is intended to provide only a preliminary appraisal of possible ADR strategies as revealed through the trial process. An initial question is whether the evidence is sufficient to warrant the total replacement of the jury system in favor of an alternative approach such as

190. See generally *Evans v Jeff D.*, 471 US 1098 (1986) (affirming judicial approval of settlement offer that did not include any amount for attorneys' fees despite statutory authorization for such fees).

191. Plaintiffs, likely to be more risk averse because the claim represents their only case, are predictably more willing to accept an insurer's settlement offer even if it falls below the case's expected value, whereas attorneys, who are less risk averse given that they possess a portfolio of cases, are in a better position to insist upon settlements at least at the expected value. This may result in attorneys overestimating likely recoveries in order to discourage risk-averse clients from rejecting too low settlement offers. Reder, *Contingency Fees* at 228 (cited in note 14).

192. See ABA Model Rule of Professional Conduct 1.4 ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). Model Rule 1.5(c) requires a contingent fee agreement to be in writing and to state the method by which the fee is determined "including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal." Id 1.5(c). The Comment to the rule notes that "[a]pplicable law may impose limitations on contingent fees, such as a ceiling on the percentage." Id Comment [3].

193. See generally US Gen Acct'g Office, *Medical Malpractice: A Framework for Action* 30-31 (1987) (noting desirability of evaluating ADR mechanisms for malpractice); *Task Force Report* at 46-47 (cited in note 35); Note, *Health Care Providers and Alternative Dispute Resolution: Needed Medicine to Combat Medical Malpractice Claims*, 4 Ohio St J Dispute Res 65 (1988) (authored by Neil D. Schor); *Medical Quality and the Law* 96-103 (The Roscoe Pound Foundation, 1990).

proposed, for example, by the AMA.¹⁹⁴ While the answer depends in part upon the burden of proof required to justify such a change,¹⁹⁵ it is fair to say that the case against the jury is not compelling. Indeed, several subsets of malpractice cases currently are being tried in which use of a lay jury is either appropriate or indeed even preferable. For example, a significant percentage of trial cases involve non-medical factual issues or simple medical issues that appear well suited to lay resolution.¹⁹⁶ A malpractice ADR strategy must anticipate the need to resolve factual disputes or damages issues which may well benefit from lay—or at least non-medical—input.

Reforms seeking to eliminate the jury are often justified in part on the assumption that they would generate major cost savings in resolving claims. This assumption may not be accurate, however. In our study, a significant number of cases, constituting the slight majority of trial cases reviewed, were resolved with total defense expenditures of less than \$25,000.¹⁹⁷ In these cases, the jury served as a reliable, not terribly expensive, and apparently preferred decisionmaker. Because ADR methods require additional expenditures, such as compensation to arbitrators or neutral experts, to replace or supplement processes that are currently publicly funded, it may be that any cost savings in these cases may prove insignificant, and indeed, ADR costs may in some cases exceed current costs.¹⁹⁸ Another assumption underlying proposals to replace juries in the malpractice context is that juries are biased against doctors. The expectation that award levels would drop dramatically if biased or sympathetic juries were replaced by neutral arbitrators—inherent in several ADR suggestions—is open to serious question given the study's findings that juries tend to find regularly in favor of doctors even in close cases.

While the results may not demand excluding juries altogether, particular ADR methods may still offer important contributions to the fair and efficient resolution of categories of malpractice claims, for example, small disputes

194. See Am Med Ass'n, *A Proposed Alternative* (cited in note 2). See generally Priest, 1990 U Chi Legal F at 198-200 (cited in note 7) (suggesting that the use of juries inevitably serves to increase unpredictability and delay, thus justifying the utilization of professional decisionmakers in civil litigation).

195. See, for example, Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U Chi L Rev 440, 453 n74 (1986) (suggesting that ADR applications should be justified under a "clear and convincing" standard).

196. See notes 95-96 and accompanying text. Thus, a partial response to the AMA's jury critique is that it wrongly assumes that the large majority of malpractice trials include a difficult medical issue. See Johnson, et al, 42 Vand L Rev at 1370 (cited in note 4) ("Furthermore, juries cannot evaluate independently the expert testimony almost always introduced in malpractice cases to explain the two major elements of liability: failure to meet the appropriate standard of care and causation." (footnotes omitted)). This observation supports a flexible approach to ADR that seeks to utilize a variety of procedural strategies. See Clark C. Havighurst & Thomas B. Metzloff, *S. 1232—A Late Entry in the Race for Malpractice Reform*, 54 L & Contemp Probs 179, 186-88 (Spring 1991) (discussing benefits of flexible approach to ADR).

197. See Table 2.

198. See generally US Gen Acct'g Office, *Medical Malpractice: Few Claims Resolved Through Michigan's Voluntary Arbitration Program* 27, Table V.3 (1990) (average defense costs for arbitrated claims was \$23,509 as compared to average defense costs of \$20,202 for litigated claims).

which currently are thought to be excluded from the litigation system. Realizing the potential benefits, however, as discussed below, may prove difficult.

1. *The Summary Jury Trial and Medical Malpractice Cases.* This article's descriptions of the jury's role especially permits an in-depth evaluation of the summary jury trial ("SJT")—an ADR method particularly focused on trial cases. The theory of the SJT is simple: in cases destined for lengthy trials, prospects for settlement are improved if the parties conduct a brief non-binding trial to obtain a prediction of how a jury will react.¹⁹⁹ While the parties maintain their constitutional right to insist upon a traditional jury trial, receiving the advisory verdict may serve as a catalyst for further settlement negotiations. Proponents contend that among ADR methods, the SJT is preferable because it maintains the central role of the jury.²⁰⁰

The summary jury trial was first used in federal court in 1980, and remains predominantly a federal court phenomenon.²⁰¹ Despite lingering uncertainty over the federal courts' power to mandate their use,²⁰² SJTs have become

199. A typical summary jury trial has been described as follows:

The summary jury trial is a half-day proceeding in which attorneys for opposing parties are each given one hour to summarize their cases before a six-member jury. Basically, introduction of evidence is limited, and witnesses are excluded from the proceeding. After the evidence has been presented and the judge provides a short explanation of the law, the jury retires and either presents a consensus verdict or, if no consensus can be reached, reveals anonymous individual juror views. The jury's verdict is purely advisory, unless the parties agree to be bound by the verdict. The main purpose of the procedure is to provide parties with an insight into the way a trial jury would view the case without the expenditure of time and money required for a full trial.

Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 Cleve St L Rev 43, 43 (1980). See Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 FRD 461 (January 1984). Significant variations in the format described above have been employed, including differing trial lengths, methods for selecting the jury, the types of evidence permitted to be presented, and the type of verdict to be rendered. See Provine, *Settlement Strategies* at 68-76 (cited in note 186).

200. See, for example, Celeste F. Bremer & W. Scott Simmer, *One Day in Court: Suggestions for Implementing Summary Jury Trials in Iowa*, 36 Drake L Rev 297, 301 (1986-87) (SJT is "one of the most promising of the alternatives available" in part because it allows the parties to have their "day in court."); Glenn Newman, *The Summary Jury Trial as a Method of Dispute Resolution in the Federal Courts*, 1990 U Ill L Rev 177, 182 (SJT is "unique among settlement techniques in its use of a jury and the community involvement that juries bring to dispute resolution."); S. Arthur Spiegel, *Summary Jury Trials*, 54 U Cin L Rev 829, 834 (1986) (SJT may be "a better reflection of community attitudes" than other ADR methods such as arbitration.).

201. See Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U Pitt L Rev 789, 798-804 (1989).

202. Compare *Strandell v Jackson County*, 838 F2d 884 (7th Cir 1988) (holding that federal courts do not have the authority to mandate the use of SJTs) with *Arabian American Oil Co. v Scarfone*, 119 FRD 448 (MD Fla 1988) (courts may mandate the use of SJTs); *McKay v Ashland Oil, Inc.*, 120 FRD 43 (ED Ky 1988) (same); *Federal Reserve Bank of Minneapolis v Carey-Canada, Inc.*, 123 FRD 603, 604 (D Minn 1988) (same). Indeed, another recent decision held that the federal courts have no authority to conduct SJTs even if the parties consent. *Hume v M & C Management*, 129 FRD 506 (ND Ohio 1990).

Commentators are divided as to the desirability of mandatory SJTs. Compare Gerald L. Maatman, Jr., *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 John Marshall L Rev 455, 486 (1988) (making the process mandatory "will only reduce the reliability of the advisory verdict and destroy the procedure's perceived theoretical efficacy to promote settlement"); Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 Ore L Rev 87, 90 (1990) (SJT "is not an effective means of resolving disputes,

commonplace in certain federal district courts.²⁰³ Since malpractice cases are typically filed in state courts, summary juries have to date been used in malpractice cases only infrequently.²⁰⁴ Little research on the utility or desirability of the SJT has been conducted, raising questions as to whether it in fact benefits either the courts or the parties.²⁰⁵ The most important issue for assessing the utility of the SJT—with its insistence upon short summaries of evidence—is whether it is a fair predictor of conventional trial results, an issue upon which there is little proof and considerable disagreement.²⁰⁶

As SJTs are increasingly employed in state courts,²⁰⁷ a question arises as to the utility of routine assignment of malpractice cases to this ADR process. The profile of malpractice trials presented in this article suggests that the process would be only marginally useful. Proponents make clear that SJT

... [and] has no basis in either the statutory or common law”) with Richard L. Marcus, *Completing Equity's Conquest? Reflections on The Future of Trials Under the Federal Rules of Civil Procedure*, 50 U Pitt L Rev 725, 750 (1989) (“Making litigants go through [a SJT] is qualitatively different from clubbing them into accepting a specific compromise.”); Glenn Newman, 1990 U Ill L Rev at 199 (cited in note 200) (arguing that if *Strandell* prevails, “the result will be the destruction of the summary jury trial, not merely its modification”).

203. See Lambros, 50 U Pitt L Rev at 802 (cited in note 201) (estimating that a total of 1,000 SJTs have been conducted in federal and state courts).

204. In our study, only 2.6% of the cases had been filed in federal court (23 of 895 total malpractice cases). There is apparently only a single official reference to the use of a SJT in a federal court malpractice case, see *Lockhart v Patel*, 115 FRD 44 (ED Ky 1987). Even in those few states that are now using summary juries, there is no evidence of extensive use in malpractice cases. See James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 J Disp Res 213, 221 (1989) (no medical malpractice cases among forty-three SJTs studied in Florida state court system). None of the existing literature specifically identifies malpractice cases as particularly suited or ill-suited to the process, although SJT proponents tend not to be very specific about the types of cases thought to be well suited to the process. See Lambros, 50 U Pitt L Rev at 799 (cited in note 201) (SJT is useful for “all kinds of cases”); Bremer & Simmer, 36 Drake L Rev at 313 (cited in note 200) (noting that “it now appears that the pool of possible cases may be much broader than had been expected”).

205. See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U Chi L Rev 366 (1986); Maatman, 21 John Marshall L Rev at 482 (cited in note 202). See generally M. Daniel Jacobovitch & Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio* (Fed Judicial Ctr, 1982) (indicating the process was generally favored by participating attorneys but that a sizeable dissenting faction existed) (“*Summary Jury Trials in Ohio*”); Alfini, 4 J Disp Res at 233-34 (cited in note 204) (concluding that state court program where participation was voluntary had been better received by attorneys than mandatory federal program). See generally *United States v Exum*, 744 F Supp 803, 808 n1 (ND Ohio 1990) (“The summary jury trial exists as an ‘experiment’, commenced without controls, carried on without standards, evaluated without criteria, and developing without direction.”).

206. For a useful overview of existing evidence, see Wiegand, 69 Ore L Rev at 99-103 (cited in note 202) (noting several cases in which summary juries reached inconsistent decisions in comparison either to other summary juries hearing the same case or to subsequent regular juries). See generally *Muehler v Land O'Lakes, Inc*, 617 F Supp 1370 (D Minn 1985) (use of two juries in summary jury trial in which first jury found for defendant and second for plaintiff in the amount of \$2,292,000); *Caldwell v. Ohio Power Co.*, 710 F Supp 194, 202 (ND Ohio 1989) (refusing to set aside \$2.2 million verdict in part because a SJT had resulted in a similar verdict since the court was “not inclined to conclude that two separate panels evaluating the same case would return verdicts based on passion or prejudice”).

207. See, for example, Alfini, 4 J Disp Res at 215-18 (cited in note 204) (describing use of summary juries in Florida state courts); Thomas B. Metzloff, et al, *Summary Juries in the North Carolina State Court System* (Private Adjudication Ctr, 1991) (“*Summary Juries In North Carolina*”). A few states have recently enacted specific rules or statutes authorizing SJTs. See, for example, Va Code Ann § 8.01-576.1 to 576.3 (1990); Neb Rev Stat § 25-1154 to 1157 (1989).

targets those cases currently being tried, and not those that are likely to settle without ADR intervention—the process focuses on those seemingly intractable cases that threaten to use a disproportionate amount of the trial court's scarce resources.²⁰⁸ The characteristics of the malpractice trials observed in the study reveal several categories of disputes that appear ill-suited to the SJT process. First, disputes expected to result in short trials are thought inappropriate for SJTs. Most SJT adherents suggest that, given the costs of preparation and the possibility that a full trial will subsequently be required, SJTs are fitting only for those disputes that would take a week or more to try.²⁰⁹ Yet, most malpractice cases in our study were tried in less than a week, many in only a few days.²¹⁰ Requiring a summary jury trial in these cases would offer only marginal cost savings to the courts or the parties.

Second, disputes that turn on factual issues, which necessarily require the jury to resolve issues of witness credibility, are also thought to be unsuited to the SJT process. As a result of reliance on attorney summaries of evidence in lieu of live testimony from witnesses, SJTs are admittedly an imperfect replication of a traditional trial.²¹¹ As noted previously, several malpractice trials involve factual issues that require a jury to consider credibility issues.²¹² Similarly, cases involving punitive damages would seem ill-suited to the process. The jury's need to consider the moral quality of a defendant's actions would be inappropriately addressed through abbreviated summaries.

Third, malpractice cases involving unprepared plaintiffs' attorneys—of which several were noted²¹³—further argue against the indiscriminate use of SJTs. In these cases, requiring a defendant to present its evidence and strategy in a non-binding setting provides an arguably unfair advantage to the plaintiff, who may well benefit from such disclosure should the case be subsequently resolved in a traditional trial setting.²¹⁴

208. Lambros & Shunk, 29 Cleve St L Rev at 63 n18 (cited in note 199); Lambros, 103 FRD at 471-72 (cited in note 199). Judges vary in their views as to the type of case best suited to the SJT. See Bobby Marzine Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 Temple L Rev 799, 811-13 (1990).

209. See, for example, Provine, *Settlement Strategies* at 70-71 (cited in note 186).

210. See Table 1, at page 50 (noting that approximately half of the malpractice cases in the study period were tried in five days or less); *On Trial* at 10 (cited in note 7) (median length for fifty-eight professional malpractice trials was seventeen hours and twenty minutes).

211. See Maatman, 21 John Marshall L Rev at 483 (cited in note 202) (summary jury process prevents jury "from being able to reach an accurate and just assessment of credibility"); Jacobovitch & Moore, *Summary Jury Trials in Ohio* at 32 (cited in note 205) (recommending against use of SJTs in cases in which truthfulness is a major issue). But see Bremer & Simmer, 36 Drake L Rev at 313 (cited in note 200) (noting that parties' "cathartic experience of [having] their day in court" makes SJTs useful even in "swearing match" cases).

212. See notes 95-97 and accompanying text.

213. See notes 105-07 and accompanying text.

214. See Provine, *Settlement Strategies* at 70 (cited in note 186) (noting reports from experienced judges that "the procedure does not work well when lawyers are inexperienced or unprepared"); Maatman, 21 John Marshall L Rev at 486 (cited in note 202) (Use of the SJT process "by ill-prepared counsel motivated by a desire to gain a strategical advantage at the subsequent full trial on the merits will only reduce the reliability of the advisory verdict and destroy the procedure's perceived theoretical efficacy to promote settlement."). But see *Arabian American Oil*, 119 FRD at 449 (noting that many attorneys are ill-prepared for trial, and that the "reality is that too many will not get ready until the day of a trial; a summary trial forces that day and that preparation!" (emphasis in original)).

Based upon the above analysis, the large majority of malpractice cases currently being tried would appear unsuited to the SJT process as currently conceived. Yet, there are some malpractice cases that SJT proponents probably would identify as good candidates. For example, the SJT is thought to be well suited to those cases in which the primary issue is damages,²¹⁵ a category in which several important malpractice trials fall. Nonetheless, while these cases may be appropriate in that they typically do not include credibility issues, calculating damages is the area in which jury predictability is most suspect;²¹⁶ it is hard to see why the input from a summary jury—relying on admittedly incomplete information—would lead to greater predictability or confidence in the result. Nor would a summary jury offer any significant cost savings as damages-only disputes tend to be relatively inexpensive to try.

Another suggestion is that SJTs are fitting in weak cases to help the plaintiff recognize the lack of merit.²¹⁷ However, as our study revealed, many of these cases appear to involve short trials with modest expenses, raising the question whether insurers would prefer simply to go forward with the binding trial. Moreover, other ADR methods, such as court-ordered arbitration,²¹⁸ arguably offer cheaper, earlier, and equally effective ADR interventions in these cases.

Based on the above analysis, it is unlikely that the summary jury method in its present form offers much to improve the litigation process in the malpractice context.²¹⁹ Rather than focusing an ADR method for the already small percentage of trial cases, many of which are low-quality disputes or present factual issues for which the existing jury process appears to be working acceptably, the more important challenge may be to develop ADR methods targeted at cases that are currently being settled, but in which the quality of the settlement is open to question.²²⁰

The point is demonstrated by the fact that our study has noted the surprising paucity of high-stakes, contested liability cases going to trial. Several factors may explain this observation. Without some means of defining or controlling litigation risks in these disputes, a jury determination practically insures a major loss to one party or the other. The jury will either find for the defendant (at which time the plaintiff receives nothing and the plaintiff's attorney is out of pocket the substantial litigation expenses incurred in the litigation) or for the plaintiff in an amount that potentially exceeds—

215. See, for example, Provine, *Settlement Strategies* at 69 (cited at note 186) (noting that the "most obvious application is the original one, the relatively simple personal injury action where liability is likely but the amount of damages a jury might award is difficult to predict").

216. See notes 128-34 and accompanying text.

217. Provine, *Settlement Strategies* at 68 (cited in note 186) (a SJT "may encourage the plaintiff to take stock of the legal strength of the claim and reduce the demand for damages accordingly, making eventual settlement more likely").

218. See note 186.

219. This observation is confirmed by our experiences as an ADR provider for malpractice cases; to date, no malpractice insurer, defense counsel, or plaintiff's attorney has expressed an interest in conducting a non-binding SJT.

220. See Marc Galanter, *The Quality of Settlements*, 1988 Mo J Dispute Res 55.

sometimes by a great deal—the expected value of the case prior to trial. Because of this risk of loss, fear of jury incompetence or bias (while not manifested in the cases actually being tried) may pressure parties in high-stakes cases to settle.

The court system may be indifferent to these litigation risks since they create strong settlement incentives, thereby reducing crowded dockets. SJT advocates, who are often federal judges faced with long trial calendars,²²¹ tend not to be interested in “unsettling” cases, especially the more complex and potentially burdensome ones. The point, however, is that the litigation risks faced by litigants in high-stakes cases presents a major opportunity for ADR proponents in devising methods that define and limit this risk.

High-stakes cases that are currently being settled thus present a fertile opportunity to reconceptualize the SJT. As part of our research, we have developed a process—the “jury-determined settlement”—targeted at high-stakes cases that utilizes some of the techniques of the summary jury trial,²²² but which differs fundamentally in several critical respects. First, a jury-determined settlement is binding. The parties agree to submit the case to a jury pursuant to an agreement that establishes a minimum recovery for plaintiff’s benefit as well as a maximum award protecting the insurer, regardless of the summary jury’s verdict. Ideally, an agreement to use the process is reached early in the litigation process so that discovery costs can be minimized by such means as agreements to limit the number of expert witnesses. The case is then tried in an abbreviated fashion in which various procedural shortcuts—some borrowed from the SJT format—are employed. Unlike the SJT, however, the jury-determined settlement anticipates the use of live or videotaped testimony on critical issues. Since the jury’s decision is binding, it is critical that the process be a fair, albeit abbreviated, replication of a conventional trial. The jury-determined settlement thus permits the parties to obtain a binding adjudication at a reasonable cost without the risks

221. See Spiegel, 54 U Cin L Rev at 832 (cited in note 200) (use of ADR methods such as the SJT are necessary since “[t]here simply is not enough time to do justice to the cases which must be tried in the ordinary course”).

222. In the past two years, four high-stakes malpractice cases in North Carolina have been resolved pursuant to this innovative process. Three of the cases are described in detail in Metzloff, et al, *Summary Juries in North Carolina* at 19-28 (cited in note 207). In each case, the plaintiff ultimately was awarded over \$500,000 in damages (two of the cases were damages-only cases). By comparison, the traditional trial process in North Carolina in the three years covered by the study involved only two jury awards in an amount of this magnitude.

inherent in the current jury system,²²³ while at the same time maintaining or increasing the role of the jury.²²⁴

2. *Perspectives on Other ADR Options in the Malpractice Context.* The summary jury example demonstrates the difficulties in assessing ADR methods given the different case characteristics and dynamics found in malpractice litigation. Perhaps in recognition of the conceptual difficulties, recent initiatives have tended to promote an ad hoc approach to the use of ADR in which court personnel assign particular cases to “appropriate” alternative procedures based upon the exercise of their discretion.²²⁵ Such an unprincipled approach is problematic and raises concerns as to whether our understanding of the benefits and appropriateness of the differing ADR approaches is sufficient to permit a meaningful exercise of this discretion. This article’s identification of particular litigation problems and concerns provides a basis for developing specially focused ADR strategies for malpractice cases in lieu of the current ad hoc approach.

An appropriate initial inquiry is to identify specific litigation problems that occur with sufficient regularity to justify the effort to design malpractice-specific ADR methods. For example, while mediation may be potentially useful by affording a forum for malpractice claims that are currently not being pursued due to the expense of litigation, mandating mediation for all cases currently being litigated would be nonsensical if only a small portion contain issues of the type thought suitable to that process.²²⁶ Based upon the analysis presented in this article, there appear to be two litigation problems that arise with sufficient regularity in the malpractice context to warrant serious consideration as to what ADR approaches might offer significant benefits.

First, this article has noted a recurring and serious problem with valuing damages. While calculating a precise percentage of cases exhibiting this

223. The binding nature of the jury-determined settlement serves to avoid much of the criticism levelled against the SJT. For example, since the jury’s decision is binding, the ethical criticisms levelled against the SJT for not informing jurors that their decision is advisory is avoided. See Posner, 53 U Chi L Rev at 386 (cited in note 205). Similarly, since the jury-determined settlement encourages the use of live testimony, it averts the criticism against the SJT’s typical prohibition against live evidence. Also, since parties must voluntarily agree to jury-determined settlement, the continuing debate over judicial authority to mandate its use, see note 202, is not an issue. It does raise some additional questions, such as a court’s willingness to approve the parties’ specific plan for conducting the jury-determined settlement. See Metzloff, et al, *Summary Juries in North Carolina* (cited in note 207) (recommending procedural rule permitting flexible use of summary jury processes).

224. See Galanter, 1990 U Chi Legal F at 257 (cited in note 10) (suggesting that existing evidence on the quality of jury performance “invites us to improve the litigation system by refining and enlarging the use of the civil jury, not by eliminating it”).

225. Several states have recently enacted legislation empowering trial court judges to mandate the use of mediation or non-binding arbitration in a large variety of civil disputes including malpractice cases. See, for example, Fla Stat § 44.301-306 (1987). Typically, these authorizations provide little guidance as to when application of a particular procedure is warranted. To date, there is little evidence as to the effectiveness of these free-form ADR initiatives. See generally, Steven Lubet, *Some Early Observations on an Experiment with Mandatory Mediation*, 4 J Disp Res 235 (1989).

226. See Catherine S. Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and Implementation*, 54 L & Contemp Probs 195, 210-13 (Winter 1991) (noting several problems relating to a mandatory hybrid mediation process in Wisconsin).

problem is not possible based upon current evidence, the percentage certainly appears to be sufficiently high to justify consideration of ADR options. Obviously, this problem could optimally be addressed through substantive law changes such as scheduling of damages or limitations on non-economical damages.²²⁷ But assuming political realities prevent such modifications, what ADR strategies could be profitably pursued?

Routine use of non-binding arbitration focusing solely on damages could be usefully employed in a large number of malpractice cases. A determination of damages following a brief hearing, at which evidence of liability would not be permitted,²²⁸ would assist the parties in valuing the cases by providing a view of how an informed decisionmaker might assess damages. A non-binding determination on damages only should serve to narrow the observed gap between the litigants' expectations. In some respects, this approach is the antithesis of the screening panel process still used in several states which focuses primarily, if not exclusively, on liability.²²⁹

The most useful expertise for performing this early valuation of damages would be that of experienced legal practitioners, such as arbitrators, former judges, or experienced attorneys. As noted above, if the current difficulties in establishing damages is at least partially a function of jury unpredictability, it makes little sense to replicate the jury process through an ADR method using lay decisionmakers as employed by the SJT. Similarly, medical expertise will not often be directly relevant to valuing damages suggesting that there would be no need to include medical professionals as decisionmakers.

A "damages assessment" ADR process would likely be cost effective and could be conducted relatively early in the litigation process as it need not await the development of expert testimony on the liability issue. Nor would the process itself be particularly expensive. The determination could in many instances be made on a written record; even if a hearing were required, it could usually be conducted in a day or less.²³⁰

227. See Bovbjerg, Sloan & Blumstein, 83 *Nw U L Rev* 908 (cited in note 6); Alschuler, 99 *Harv L Rev* at 1825-27 n79 (cited in note 11) (discussion of utility of damages guidelines and other reforms).

228. Although it is not directly focused on the utility of ADR methods to assist in determining damages, one study provides some interesting evidence on the use of non-binding arbitration based upon claims against a single hospital. Farber & White, *Examining Malpractice Litigation* (cited in note 82). The authors found that non-binding arbitration panels comprised of three attorneys tended to find for plaintiffs more often than did juries, probably owing to the fact that they were assessing "the expected trial outcome, which is the product of the probability of liability and expected damages given liability." *Id.* at 18. The authors further found that in sixty-seven settled cases in which the ADR result were known, the ADR awards were accepted in seventeen cases, but that overall, the settlements were lower than the ADR awards in thirty-seven of the remaining fifty cases, with more defendants rejecting the awards than plaintiffs. *Id.* at 18-20, Table 5.

229. The theory of the screening panel is that an early focus on liability will identify non-meritorious cases leading plaintiff's attorneys to dismiss those claims, as well as identify meritorious claims that will lead to settlement. Some screening panels do not even address damages. Even for those panels that do assess damages, there is little evidence of their particular competence. See Metzloff, 51 *L & Contemp Probs* at 222-25 (cited in note 3) (describing study of the Hawaii malpractice screening panel noting that evidence of its abilities in establishing damages was inconclusive).

230. To date, we have conducted or observed binding arbitrations in seven malpractice cases in which only the issue of damages was at issue. Four of the cases were resolved in four hours or less. A

A second problem with sufficient volume of cases to justify focused ADR consideration relates to potentially non-meritorious claims. The medical profession has long complained that too many malpractice cases lacked merit.²³¹ This complaint has potential empirical support from our study: in about 40 percent of the cases, the plaintiff recovered nothing either as a result of the case being withdrawn or dismissed following adjudication.²³² Obviously, litigating these claims entails considerable expense, at least in the aggregate. Unlike the problem of uncertain damages valuation, the concern with non-meritorious litigation relates primarily to liability. These cases are ultimately dropped or dismissed based primarily upon a decision by someone—be it a plaintiff's attorney, judge, or jury—that the plaintiff cannot prove a case or the potential award is too small to justify continuing. Providing an earlier assessment of the merits of the case thus potentially increases litigation efficiency.²³³

There are several difficulties with implementing an ADR strategy based upon the early evaluation of low-merit cases. First, it is not clear how only potentially low-merit claims would be identified. Compelling all cases to submit to a liability review clearly would be overinclusive. A second problem is whether an ADR intervention will actually prove more efficient than the current system. A substantial portion of the pool of non-meritorious cases under the current system are dropped or dismissed relatively quickly.²³⁴ It would appear, for example, that plaintiff attorneys reassess the merits of their claim after conducting some discovery and sometimes drop claims shown to be lacking in merit. In other cases, defendants successfully move for summary

non-binding process could probably employ additional procedural shortcuts to shorten the length even further.

231. For a discussion of the problems of non-meritorious litigation in the malpractice context, see Metzloff, 51 L & Contemp Probs at 203-16 (cited in note 3).

232. In our study, out of a total of 895 cases, 268 cases were dismissed by the plaintiff without the plaintiff receiving any compensation. Forty-seven more cases were dismissed by the court pursuant to a defendant's motion for summary judgment. With respect to trial, approximately 40% of the trial cases were deemed low-merit cases by the insurers. See Table 5. Applying this estimate to the total trial sample results in another forty-seven cases (.4 times 118 trials) in which plaintiffs received no award and in which the merits strongly favored the defendant. Combining these three categories, there were approximately 360 cases out of the total sample of 895 cases (or almost exactly 40%) in which the plaintiff did not obtain any recovery. Other recent empirical studies reflect a similar pattern. See generally Farber & White, *Examining Malpractice Litigation* at 11 (cited in note 82) (noting that in sample of 252 claims against a single hospital, 36.5% of claims were either dropped by plaintiffs or dismissed by the court, while an additional 5.2% of the claims went to trial resulting in verdicts in favor of the hospital); Cheney, et al, 261 J Am Med Ass'n at 1600 (cited in note 16) (noting that 46% of claims reviewed involved what in the opinion of the expert reviewers was appropriate care).

233. See generally Alschuler, 99 Harv L Rev at 1845-49 (cited in note 11) (proposing general use of a preliminary adjudication conducted by a judicial officer).

234. See Farber & White, *Examining Malpractice Litigation* at 11, Table 1 (cited in note 82) (noting that of fifty-one cases dropped or dismissed in a local court, forty-four were dropped prior to a non-binding, mandatory ADR process); id at 32, Table 11 (60% of cases with "good quality" care were resolved prior to ADR hearing).

judgment²³⁵ and are likely to prefer the finality of a summary judgment dismissal over a non-binding ADR proceeding. Even of those cases proceeding to trial, several are arguably better left alone as they are often inexpensive to try and the jury appears quite able to identify low merit cases by ruling in favor of the defendant. Third, the timing of an ADR liability assessment is problematic. A general goal of most ADR programs is to intervene early in the litigation process to save discovery expenses and promote quick settlements.²³⁶ In the malpractice context, however, it may well be that early intervention raises problem in that the required ADR process is used before the parties have had a meaningful opportunity to conduct possibly essential discovery, so that the ADR intervention simply occurs too early to be useful. Reforms that severely limit discovery may be unnecessarily sacrificing the potential benefits of the process.²³⁷ As a result of the above difficulties, mandatory ADR focusing on an assessment of liability may not be advisable. Rather, it would be preferable to invoke the procedure only after one of the parties has affirmatively requested that it be employed. A party-initiated approach would permit defendants the choice of pursuing summary judgment, awaiting voluntarily dismissal of the case by the plaintiff, relying on the jury at trial, or invoking the ADR evaluation.

VI

CONCLUSION

The picture that emerges from this overview of the trial process is a rich and varied one. Describing the jury's role does not lend itself well to simple labels that critics or proponents can use in the continuing political battle over malpractice reform; the jury is neither all good nor all bad. Any meaningful efforts to seek solutions to the litigation problems that exist must take cognizance of the jury's abilities as well as its limitations.

235. In our study, forty-seven cases were dismissed on defendant's motion for summary judgment. In addition, a number of other cases were dropped by plaintiffs prior to the summary judgment hearing as a result of the filing of the motion.

236. A common alternative adopted by many states is the screening panel which reviews malpractice claims often as a prerequisite to the filing of suit. See US Gen Acct'g Office, *Medical Malpractice: No Agreement on the Problems or Solutions* 133-39 (1986) (describing screening panels). The structure of the panels and the procedures used vary significantly. See Peter Carlin, *Medical Malpractice Pre-Trial Screening Panels: A Review of the Evidence* 15-41 (Geo Wash U Intergov't Health Pol'y Project, 1980). Recently, some states have abolished their screening panel programs amid criticism that the process was costly and unproductive. See, for example, Note, *Screening Panels: Corrective Surgery or Amputation*, 4 J Disp Res 255, 259-62 (1989) (authored by Debra L. Fortenberry) (discussing repeal of Ohio screening panel). Evidence as to whether these early interventions have been effective in either settling disputes or identifying non-meritorious claims is ambiguous. See Metzloff, 51 L & Contemp Probs at 214-16; 222-25 (cited in note 3).

237. For example, some statutes establishing screening panels expressly disallow discovery. See Alaska Stat § 09.55.536. Others permit discovery, but the time limits may be restrictive. See, for example, Arizona Stat § 12-567(D). See generally Meschievitz, 54 L & Contemp Probs at 210 (cited in note 226) (noting problems with conducting a mediation process prior to discovery). Determining liability requires development of expert testimony, which typically occurs only after factual witnesses are deposed and medical records reviewed.

The results described here give little support to the popular image of the jury system in malpractice cases as being some sort of lottery; there is no evidence suggesting that the jury's liability determinations are random. Perhaps this is not surprising given the political context in which many of the statements have been made. Most of the time, jury outcomes represent a fair resolution of the claim, but the risk that the result will not be fair is real and troubling. Indeed, resolving cases through the institution of the jury appears at times both appropriate and desirable; the jury is a useful decisionmaker for those cases raising factual issues, and appears to be a trusted and predictable method for resolving low-quality disputes.

Yet, there are concerns. The jury system is expensive; its skills in determining damages is open to serious question. While this may be a function of the inherent flexibility in the law of damages, the consequences of jury unpredictability are significant. Insurers—despite their talents as repeat players in the litigation process—appear unable to predict jury damage awards accurately. Especially given the lack of any meaningful post-trial adjustment process, litigants in contested cases involving high-stakes are presented with a serious dilemma when faced with the prospect of having a jury resolve their disputes. Given the current political climate, replacing the jury system is unlikely. Nonetheless, once better informed of the jury's role, meaningful procedural reforms within the context of the current system are both possible and desirable.

APPENDIX: CASE HISTORIES

THE INCOMPETENT JURY

Case 1. Plaintiff was a pregnant woman near term who was admitted to the hospital for delivery. A nurse noted a high fetal heart rate and telephoned the obstetrician for instructions. The labor progressed slowly; no fetal monitor was used despite constant elevated heart beats. Several hours later, the obstetrician, who had subsequently arrived at the hospital, ordered the administration of oxytocin. The child was born with the umbilical cord wrapped around its neck suffering from oxygen deprivation. Suit was filed both against the obstetrician (who settled before trial for well over \$1.0 million) and the hospital. The basic claim against the hospital was that the nursing staff failed to question the obstetrician's handling of the patient by "going up the chain of command" within the hospital.

Throughout the analysis of the case, the insurer compared the issues presented to another dispute in which the plaintiff had obtained a \$6.0 million verdict following a jury trial. Although in the other case the verdict was reduced by the trial judge and reduced further on appeal (see *Campbell v. Pitt County Memorial Hospital*, 321 N.C. 260, 362 S.E.2d 273 (1987)), the case had been a traumatic one for the malpractice defense industry. As stated by the insurer, "[b]oth cases have minor plaintiffs with considerable appeal, and for whom the jury will no doubt have enormous sympathy and admiration." Numerous other comparisons were made throughout the handling of the case given the involvement of the same plaintiff's counsel, experts, and theory of liability.

Defense counsel believed that the case was defensible despite some risk created by inadequacies in the patient's records, especially during the early course of her labor. A number of favorable medical reviews were obtained, although other reviews were critical of the hospital staff's handling of the case. Defense counsel's opinion was that the hospital had a 50 percent chance of prevailing on the merits, but that potential damages if the case were lost were in the \$1.5 to \$3.0 million range. During discovery, plaintiff's counsel offered to settle for approximately \$1.5 million. The offer was refused, and extensive discovery and pretrial preparation efforts—totalling approximately \$100,000—were undertaken.

The insurer's assessment of the case was complicated when the hospital retained separate counsel to evaluate whether to proceed to trial or settle. This independent review resulted in the hospital requesting that the insurer settle the case within the hospital's policy limits. Special counsel concluded that while the case was defensible and had been well prepared, the odds were approximately three to one in favor of the plaintiff on the liability issues. The nursing staff's failure to use a fetal monitor after the administration of oxytocin violated the hospital's written policy, a fact admissible under North Carolina law. While special counsel acknowledged there was a potentially viable causation argument, he noted that it was based upon a "rather

sophisticated debate taking place in the medical journals and will be difficult to communicate to the jury.”

Special counsel was also concerned that the judge who would try the case had limited experience in complex civil litigation; he had a reputation for giving attorneys substantial leeway with evidence which would favor the plaintiff. This suggested that he would probably be unwilling to set aside a large verdict if one were awarded. While the county in which the case was being tried had a “reputation for having conservative jurors,” special counsel believed that “no county is immune from the big verdict if the blackboard supports such a verdict based on economic losses.” The most significant concern was that the potential damages were extraordinary: “from a damage perspective,” special counsel believed this case was “the most dangerous obstetrical malpractice case [he had] seen.” In his view, the probabilities were that the case would result in “the first eight figure jury verdict in a contested personal injury case in North Carolina.”

Despite the risks, the insurer determined to try the case based upon the defense counsel’s assessment of the merits. This decision changed during the jury selection process. As noted by defense counsel, “[i]n our judgment, the jury in this case would not have been capable of understanding the evidence to the extent of presenting any realistic possibility of this defense being accepted.” The insurer authorized a significant increase in settlement authority and the case was subsequently settled on the fifth day of trial near the completion of jury selection.

In reporting on the jury selection process and its impact on the decision to settle, defense counsel noted that juries in that area of North Carolina usually provide a rural/urban mix with similar blue/white collar mix of backgrounds. “Such jurors are generally conservative and respectful of the medical community and are not usually regarded as plaintiff-biased jurors.” The jury venire drawn for this case, however, was a “substantial deviation from the norm.”

By the end of the week, twelve jurors had been selected with each side having essentially exhausted their allotted peremptory challenges. Defense counsel later described some of the jurors that had been selected. The first juror was a mail clerk in a factory, who worked nights during the trial. By the third day, he told the judge that he was exhausted. The judge advised him to sleep through the rest of jury selection, “but [that he] would have to do the best he could during the course of the trial.” Another juror, an employee in a clothes factory, had asked to be excused because she was not going to be paid by her employer. The judge tried to intervene with the employer but without success. This “did not predispose her to be entirely happy about her enforced servitude.” Another juror was an unmarried female who had recently had a hysterectomy. Yet another female juror had recently had a child delivered by the obstetrician involved in the case. She stated that she had received oxytocin and been monitored, but the hospital record did not so indicate. A young white female asked to be excused since she was planning a

vacation for the following week, but the judge, owing to the lack of potential jurors remaining in the pool, refused the request. A male juror, described as a "throwback to the 60's," was not "the kind of juror that we would typically have selected in a case such as this (or in any case)." The last juror selected was a 19-year-old male farmer who, in the opinion of counsel, was mildly retarded and "did not appear to have any understanding of what was taking place."

On a scale of 1 to 10, defense counsel rated this jury a "2" and was "*without question the worst jury*" in his experience; the hospital's general counsel confirmed the assessment, noting that "the jury being drawn for the subject case was absolutely the worst quality he had seen to try a complicated case." Prior to trial, defense counsel had assessed that the defense had a 50 percent chance of prevailing. Those odds decreased to 30 percent or less as a result of the particular composition of the jury.

THE NOMINAL PLAINTIFF VICTORY

Case 2. The plaintiff, a 62-year-old minister, underwent a biopsy procedure to analyze tissue in the prostate. The pathology report indicated that the examined cells were abnormal and that there were three "foci" or cancerous areas present. The defendant doctor interpreted the results to be an A-2 carcinoma, which would indicate a serious problem. While there was a factual dispute as to what the doctor said to the plaintiff in discussing the results of the test, the doctor performed a radical prostatectomy on plaintiff. As a result of complications with the surgery, the plaintiff suffered urinary incontinence.

Subsequently, the plaintiff's new treating physician informed him that he had not needed the radical prostatectomy "because the lab report showed no cancer cells," and that the defendant should have waited before performing the surgery. There was evidence that the complications had caused significant personality changes in the plaintiff "resulting in impatience, irritability, lack of enthusiasm, and lack of affection."

After obtaining a medical review, the insurer determined that the case was defensible. The insurer subsequently obtained a second expert review which was more critical of the defendant. In the second expert's opinion, the cancer was a "low grade" type that could have been treated conservatively. Assuming that the plaintiff's version of the statements made by the defendant were true, this expert believed that the plaintiff had a valid claim at least with respect to the informed consent issue.

Prior to trial, defense counsel recommended that no settlement offer be made given that there was a slightly better than even chance of prevailing on the liability issue. If lost, the probable verdict would be between \$50,000 and \$300,000. During the middle of trial, defense counsel reported to the insurer that the case was going well. The judge had made an effort to have the parties settle, and plaintiff made an offer of \$175,000 (which was subsequently lowered to \$150,000). After a seven-day trial, the jury found for plaintiff in the amount of \$20,000. While ostensibly a plaintiff "victory," the insurer was

pleased with the result. The amount awarded was only 40 percent of the low end of the range estimated by defense counsel assuming that plaintiff prevailed, and was less than 15 percent of the lowest offer the plaintiff had made in the middle of trial while being pressured by the judge to settle. Given the length and expense of the trial, it is doubtful whether the award even covered the plaintiff's litigation expenses. Defense costs incurred for the trial exceeded \$18,000, including approximately \$5,000 paid to experts who testified at trial.

THE JURY AND THE CALCULATION OF DAMAGES

Case 3. Plaintiff, a 37-year-old woman pregnant with her first child, was seen by her obstetrician and given a non-stress test which the physician interpreted as normal. Later, when she did not feel any movement from the fetus, she returned to the obstetrician who determined that the baby was dead. She filed suit claiming that the doctor negligently interpreted the non-stress test. The trial court initially dismissed the case, holding that under existing North Carolina law (*DiDonato v. Wortman*, 80 N.C. App. 117, 341 S.E.2d 58 (1986)), absent physical injury, the mother could not collect for her own injuries from the doctor's negligence. Subsequently the North Carolina Supreme Court held otherwise. (See *DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987).)

Following this change in the law, the parties were unable to agree upon the valuation of the mother's injuries, which were in large part psychological. Liability was never seriously contested. A psychiatrist's report described the plaintiff's continuing problems from the incident, which included nightmares, depression, and loss of sexual drive. The insurer noted that obstetrical claims involving stillborns typically settled for less than claims in which the child lived. The claims adjuster thought that \$150,000 would be a reasonable settlement figure, but defense counsel believed this amount was too high, especially given that part of plaintiff's problems arose from the fact that her husband died within a year of the child's death.

In response to an initial offer of \$35,000, plaintiff's counsel counteroffered at \$500,000, noting that the case was not a "million dollar case but that \$35,000 is out of line." Subsequently, a second round of offers narrowed the difference to \$75,000 and \$250,000. In describing the dynamic of the settlement discussions with the insurer, defense counsel noted that while this was "not a big verdict case, it is the first of its kind in North Carolina." Since plaintiff's counsel was a leader of the plaintiff's bar in the state, he apparently felt a responsibility to be a "groundbreaker," which might require that he try the case. During a pretrial conference, the judge mentioned a \$250,000 verdict in another emotional distress dispute that he had recently tried, but also noted that the doctor in this case, who died subsequent to the filing of the suit, had been well respected in the community and that the jury was unlikely to "clobber his widow."

In an effort to break the impasse, plaintiff's counsel provided two references to supposedly similar cases reported in an issue of *Medical Malpractice Verdicts* which settled for \$180,000 and \$200,000 respectively. As trial approached, defense counsel expressed some concern that "the jury will probably identify with plaintiff as one of their own and this compounded by the fact that the doctor's chair will be empty may make them more sympathetic to the plaintiff." The case was difficult to analyze since there was no real yardstick on what to expect from a jury given the nature of the plaintiff's psychological injuries. A few weeks before trial, the insurer increased its settlement authorization somewhat, but plaintiff's counsel would not lower its demand below \$200,000. Accordingly, the decision was made to proceed to trial.

In reporting on the subsequent trial in which the jury awarded \$195,000, defense counsel noted that "[a]s you know, probably the most uncertain factor in trying a case like this is the selection of the jury." Defense counsel had wanted middle-aged white males because he thought that they would be more conservative. Due to the luck of the draw, however, the jury had a number of young black jurors. A perceived key to the defendant's case was to convince the jury that part of plaintiff's grief related to the death of her husband. Defense counsel believed that he had succeeded on this point; one juror was quoted in the newspaper as saying "[w]e wanted to get her on her feet, not take care of her for life." Nonetheless, the defense counsel was upset that even accepting his key argument, they would still award what he viewed as a high amount.

The insurer continued to believe that the case was worth only \$150,000 and actively sought a negotiated reduction in the award. With respect to an appeal, an issue could be raised as to whether plaintiff had suffered a legal "injury," but the argument was "tenuous at best." Another potential issue was whether the plaintiff expert's testimony should have been excluded. "We can certainly cloud the issue on that, but in all candor, I am not terribly optimistic that we can get this turned around given our stipulation on negligence." As a result, the insurer reluctantly concluded that it would pay \$195,000, the amount awarded by the jury but not including any pre-judgment interest, to settle the case.

Plaintiff's counsel was initially unwilling to accept the forfeiture of its right to pre-judgment interest. Given the insurer's refusal to accept the settlement, plaintiff had been content to submit the case to the jury's discretion. During the trial, the judge had indicated that he would let stand any verdict between \$1 and \$1.0 million "because he viewed the situation as both [parties] having taken calculated risks to have the case decided by a 'roll of the dice.'" Having now invested more time and money in the case, as well as a legal right to three year's of interest, plaintiff's counsel offered to settle for \$225,000. After additional discussions, he eventually accepted the insurer's \$195,000 offer.

Case 4. Plaintiff was a 66-year-old minister who was suffering from lung cancer which required regular chemotherapy treatments. During a hospital stay, his

treating physician phoned in a drug order for 1.0 milligrams of a potent chemotherapy drug. The nurse recorded the information on a scratch piece of paper, and then transferred the entire drug order onto a "physician's order" sheet. In the process, the dosage was inadvertently recorded as 10 milligrams, not 1.0 milligrams as ordered by the doctor, which resulted in the plaintiff receiving a serious overdose. The error was quickly recognized, and while plaintiff was in the intensive care unit for several days, his condition gradually improved, although it was clear that he had suffered a significant loss of mobility. There was no question as to the defendant hospital's liability for the error; the treating physician termed the incident "an inexcusable error" that indicated a "total lack of understanding of the drug." Plaintiff filed suit seeking damages caused by the overdose; plaintiff's wife asserted a derivative claim for loss of consortium.

Plaintiff counsel's initial settlement demand was \$2.0 million, which was subsequently lowered during discovery to \$1.2 million. In support of the claim, the attorney presented an economist's report calculating that the plaintiff would have earned \$121,500 in the period from the date of the overdose until his hypothetical retirement at age sixty-five. Assuming he had worked past this hypothetical retirement to age seventy, the projected loss of earnings would have been increased to \$267,442. The insurer gave little credence to this analysis since it ignored the fact that the plaintiff's work habits would have been severely curtailed by the cancer regardless of the drug overdose; the report assumed that an elderly man with incurable cancer could work full-time for seven more years.

In valuing the case, defense counsel sought an expert opinion as to whether a portion of the plaintiff's injuries were attributable to his cancer and its treatment as opposed to the overdose. The expert's analysis proved to be unenlightening as he was "unable to delineate with any degree of certainty the problems which plaintiff has experienced as a result of his cancer on the one hand and the overdose on the other." Defense counsel desired to pursue this point further by discussing the question with plaintiff's treating physician, but was restricted by a recent court decision limiting such interviews. (See *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990).) Another difficulty in valuing the case was determining how much progress the plaintiff had made in overcoming the neurological problems, even if it were assumed that they were caused by the overdose.

Immediately prior to trial, defense counsel reported that he had discussed the case with his law partners, and that their range of likely damages varied from \$150,000 to \$300,000, with \$400,000 as the highest outside possibility. The plaintiff was elderly, in obviously declining health from an incurable disease, and had been having increasingly severe problems with his health before the drug overdose. The damages included \$23,000 in documented medical expenses and three years of pain and suffering. Of concern was the fact that the case involved a clear error that hospital employees should have discovered. "Although we would not anticipate any type of punitive quality to

the verdict, there also appears to be no factor that would make a jury particularly reluctant to award the Plaintiff full damages for whatever injuries and losses are demonstrated.”

Based upon the difficulty in separating out the damages, defense counsel recommended that the insurer pursue settlement up to \$250,000 given an anticipated verdict range of between \$150,000 and \$300,000. Immediately before trial, plaintiff’s counsel dropped his demand from \$1.2 million to \$650,000. The insurer elected to go forward with trial without making a settlement offer, given the plaintiff’s unwillingness to make an offer in the range which the insurer viewed as reasonable.

Following a four-day trial, the jury awarded plaintiff \$275,000 and his wife \$60,000 for her loss of consortium claim. In analyzing the jury’s result, defense counsel noted that the plaintiff’s treating physician had hurt the defendant’s case as he refused to acknowledge that the plaintiff had made progress in his recovery efforts. Also, the trial judge permitted the showing of a 35-minute videotape of a sermon that plaintiff had given a few months prior to the drug overdose while on a trip overseas, which demonstrated his pre-overdose stamina. On the other hand, the defense was able to obtain some valuable admissions concerning his weakened physical condition even prior to the overdose. With respect to his wife’s consortium claim, there was evidence introduced “concerning a brief idyll that they had on an island on the way back to the United States [from the evangelism tour a few months prior to the overdose], which was the last occasion on which [the plaintiffs] had engaged in sexual intercourse.”

In sum, defense counsel thought that the verdict for plaintiff was within the contemplated range, while the verdict for the wife was higher than anticipated, probably as a result of a significant portion of the jury—especially the women on the jury—having awarded her damages “for having to suffer through and put up with the difficulties her husband has had such as the distasteful details of the nursing care she has provided.”

Case 5. The plaintiff, a 37-year-old sanitation worker, underwent elective surgery on his knee which he had sprained on the job. Approximately twenty minutes into the surgery, the anesthesiologist noted that the plaintiff was wheezing. It was determined that he was experiencing bronchospasms, and an attempt was made to ventilate him by using an air bag. During these efforts, a nurse summoned another doctor for additional assistance. That doctor arrived quickly and immediately concluded that the anesthetic tube was not placed properly. The anesthesiologist removed the tube, but the plaintiff went into cardiac arrest and died shortly thereafter. Plaintiff was survived by a wife and five children.

The deceased was a steady, 17-year veteran worker with the city. The insurer and defense counsel recognized the emotionally charged nature of the case. Basically, “a patient with a sprained knee went in for arthroscopic surgery, which turned out not to be necessary, and ended up brain dead from

an alleged anesthesia error.” The insurer’s initial assessment of the case based upon preliminary medical reviews was that a “defense appears to be non-existent,” with less than 15 percent chance of winning, suggesting the desirability of an early settlement. Defense counsel met with the plaintiff’s attorney soon after the suit was filed. Plaintiff’s initial demand was \$875,000, which was based upon an expected jury verdict of slightly over \$1.0 million. The defense attorney responded that this claim was “totally out of line.”

The deposition of the anesthesiologist confirmed the insurer’s initial assessment of the case. Defense counsel reported that the defendant came across as “very defensive” and lacked confidence in his testimony. Soon after the deposition, defense counsel made an offer of approximately \$200,000 to settle the case, which was promptly rejected. Defense counsel noted that they had dealt with this attorney before and found him “difficult to negotiate with, and generally will not get realistic until he gets before a Judge. We continue to feel that it is possible to settle the case, but probably not before beginning trial.” Furthermore, “based on the historic side of wrongful death verdicts in this county, we did not consider the case to be worth anything in the range of \$875,000.”

Defense counsel retained an economist to counteract the plaintiff’s economist, but ultimately decided not to use him at trial since on cross-examination “he would have to concede some substantial economic loss based upon [the deceased’s] capacity, even though his figures would have been considerably lower than [the plaintiff’s economist].” Rather, the decision was made to base the defense on a detailed cross-examination of the plaintiff’s economist. In terms of the jury’s likely verdict, defense counsel estimated that there was an 80 percent chance that the jury would award less than \$875,000 (the amount of the plaintiff attorney’s settlement offer), noting that there were “generally good juries in this county.”

Following a nine-day trial, the jury awarded \$1.2 million. In reflecting on the trial, defense counsel noted that there were no serious settlement negotiations during the trial, although plaintiff’s counsel would probably have accepted around \$775,000. According to defense counsel, “[e]ven that amount was beyond [their] evaluation of what was reasonable, and beyond [their] settlement authority, so it was not pursued. Even the Judge felt at that stage that the plaintiff’s demand was unreasonably high for purposes of settlement.”

From the beginning of the trial, plaintiff’s counsel argued to the jury that the case was worth \$1.5 million. “Initial reaction from the jury appeared to be skepticism that the case could be worth anything in that range.” The evidence at trial showed that plaintiff was a good man who was earning just under \$20,000 per year. An important point in the trial was the defense counsel’s cross-examination of the plaintiff’s economist. On cross, the defense established that the economist earned approximately 20 percent of his income from serving as an expert in personal injury cases and had been paid \$2,500

for his work in this case, which probably entailed no more than two hours of his time.

Jury selection was important; defense counsel reported that they "intentionally selected two jurors with computer training so that [they] would have jurors who could understand the games that had been played with [the economist's] computer." Defense' counsel reported that he was pleased during the trial with its progress and was confident that the verdict would be less than the plaintiff's prior offer. "When the jury returned with their verdict," however, defense counsel "was more shocked than [he had] been in 24 years of trial practice. The amount was totally unexpected from this particular jury, as it appeared to be a typically conservative" jury for that county. According to the insurer's notes, "[s]upposedly a computer programmer convinced the jurors that \$1.2 million was the right figure."

Although shocked by the verdict, defense counsel indicated that "the trial was virtually error-free, and that [their] chances of showing prejudicial error on appeal are extremely remote." The judge stated that while the verdict was high, he felt that it was supported by the evidence. Accordingly, despite the fact that the verdict exceeded the plaintiff's pretrial settlement offer by more than \$300,000, the defense counsel recommended simply settling the case for the amount of the verdict. Under the contingency fee agreement, plaintiff's counsel was entitled to 40 percent of any recovery if the case were decided after an appeal as opposed to 35 percent if decided after trial. To eliminate the appeal and thereby reduce costs and the risks involved, the plaintiff's attorney agreed to a \$50,000 reduction in prejudgment interest.

THE FACTUAL CASE

Case 6. Plaintiff, a 61-year-old female with a history of mental problems, had a lesion on her leg which the defendant doctor recommended be removed surgically. Out-patient surgery was performed on a Friday. The next day, plaintiff's husband called the doctor complaining that the plaintiff was running a fever. The parties disagreed sharply on what specific information was given to the doctor about (1) the extent of the fever; (2) the description of the wound; and (3) what actions the husband should take if the situation worsened. The doctor claimed that he inquired as to the condition of the wound, advised the plaintiff to take aspirin, and told the husband to call again if the fever increased. Plaintiff's husband alleged that the fever in fact increased to 104 degrees, and that he called back and spoke with the doctor's nurse who informed him simply to bring plaintiff to the doctor's office on Monday as planned. The doctor denies this conversation occurred (in part because he did not have a nurse answering calls on Saturday since his office was closed). In any event, plaintiff was admitted to the hospital on Monday with a serious infection that ultimately required several treatments including a skin graft.

Following routine discovery, the defense attorney indicated in numerous confidential reports to the insurer that this case was simply a "swearing

match.” Various witnesses who visited or talked with the husband on Saturday and Sunday gave conflicting stories about the plaintiff’s condition and what was done. While it was difficult to explain such a sharp conflict over whether a second phone call was made, two theories were presented, although neither scenario could be confirmed. First, there was a possibility that the husband called his wife’s psychiatrist’s office and not the defendant’s office. Another possibility was that the husband called the doctor’s *home* and spoke to his wife who then did not relay the information to the doctor.

The insurer believed that the defense had a good chance of prevailing so long as the doctor made a decent witness; it seemed implausible that he would have ignored a 104 degree temperature if told of that fact. An interesting issue in the case was whether the defense should present any expert testimony at all. The plaintiff’s expert, a reputable doctor from a major teaching hospital, based his opinion of negligence on the facts as stated by the plaintiff. When asked his opinion assuming the defendant’s version of the facts, he stated that there was no negligence. Accordingly, defense counsel advised that no expert was required since the best strategy was to keep the case clearly focused on the factual events of the weekend and not on conflicting expert evidence. The doctor, upset in the first place by the filing of the suit, ultimately insisted that the defense counsel retain an “ivory tower” expert from an academic institution to counter the plaintiff’s expert.

The insurer decided to proceed to trial without making any settlement offer despite defense counsel’s opinion that the case was essentially a toss-up given the factual issue. If lost, defense counsel estimated that the verdict would probably range between \$60,000 and \$100,000. Plaintiff had initially demanded \$350,000 to settle, but two months before trial this offer was lowered to \$60,000. After a four-day trial in which the bulk of the evidence consisted of lay testimony as to what transpired over the weekend, the jury found for the defendant.

THE UNWORTHY PLAINTIFF

Case 7. Plaintiff was a 26-year-old male who was seen in the emergency room late one evening after having consumed over 100 Darvon pills and several beers. The emergency room physician administered Ipecac to induce vomiting, which arguably is not the recommended treatment since plaintiff was unconscious at the time. Plaintiff went into respiratory arrest, but was resuscitated and transferred to the intensive care unit where he was closely watched. During this time, the doctor’s orders were to administer Narcan, a stimulant, “as needed to keep the patient awake.” Additional respiratory arrests occurred, but plaintiff was resuscitated each time. The next day, he suffered a cardiac arrest which resulted in permanent brain damage, allegedly as a result of the hospital staff’s failure to administer sufficient amounts of Narcan in a timely manner.

Plaintiff’s brain damage resulted in a number of functional disabilities. He was later transferred to a hospital in another state near where his parents

lived, and he underwent extensive rehabilitation training. After deposing plaintiff's rehabilitation doctors, defense counsel noted that while plaintiff had made a "remarkable recovery," it was clear that the potential damages were substantial; plaintiff's experts would testify that the cost of a life care plan would exceed \$3.5 million.

During discovery, defense counsel interviewed the plaintiff's former girlfriend who had lived with the plaintiff prior to the suicide attempts. During this time, plaintiff had been unemployed and quite depressed about his job situation. He occasionally drank to excess, and had one conviction for driving under the influence of alcohol. He was loud and destructive when drunk, and this prompted their landlord to consider evicting them. After one of plaintiff's "binges," the girlfriend made him move out. He still visited regularly and many of these turned into overnight stays. The landlord would not tolerate this situation, and the girlfriend asked the plaintiff to leave for good. This is the event that prompted a first suicide attempt when plaintiff tried to slit his wrists. At this point, the girlfriend insisted that he return to his parent's home to try and straighten out his life. He returned in two weeks, and shortly thereafter attempted suicide the second time, giving rise to the alleged malpractice claim.

Defense counsel believed that the hospital faced a significant risk of being found liable. Both with respect to the alleged inadequate monitoring of the plaintiff in the emergency room and the failure to treat the patient properly in the intensive care unit, the hospital's position was vulnerable, albeit defensible. The liability issue was a close one, with both sides having quality expert witnesses. Three factors worked in defendant's favor: (1) plaintiff had the burden of proof and there was uncertainty as to what had actually caused plaintiff's cardiac arrest and subsequent brain damage; (2) plaintiff's own conduct could result in a finding of contributory negligence, which under North Carolina law would constitute a complete bar to any recovery; and (3) the "combination of the first two factors and the plaintiff's obvious antecedent problems should act as a mitigating factor on the damages question." Thus, even if liability were found, defense counsel believed that "[r]ealistically, I think our maximum exposure is for the special damages as I simply do not believe that a jury will give this plaintiff everything he wants in view of the circumstances which led to his admission at the hospital in the first place." The insurer took the same position and was willing to consider a settlement in the \$400,000 to \$600,000 range. Given the quality of the plaintiff's attorney, the odds of prevailing at trial were no greater than 50 percent and the potential damages were very high. Nonetheless, there was a significant "mitigating factor" in that "the jury will certainly consider that it was the patient's own ingestion of 150 Darvon tablets which originally placed his life in jeopardy. Also, . . . it will be evident to the jury that this patient was essentially an underemployed drifter."

Given the risk of a high award, the hospital ultimately made a demand on the insurer to settle the case within the policy limits. The insurer refused the

request, noting that defense counsel had estimated a 50-60 percent chance of winning the case, and given the circumstances of the injury, there was “no substantial risk of an award in excess of [the hospital’s multi-million dollar] policy limits.” No serious settlement discussions took place. At one point, plaintiff’s counsel indicated that he would recommend that his clients accept a \$2.0 million settlement. The insurer believed that this amount did not fairly reflect either the uncertain merits of the case or the special circumstances relating to the plaintiff’s condition. Following a lengthy trial, the jury returned a verdict for the defendant.

THE WEAK PLAINTIFF’S ATTORNEY

Case 8. Plaintiff was an elderly patient with possible colon cancer. The defendant doctor performed a flexible sigmoidoscopy. During the procedure, the plaintiff felt pain and the procedure was stopped. The pain subsided, and he went home only to return a few hours later with greater pain. It was discovered that plaintiff had suffered a perforated colon requiring several subsequent surgeries to correct. The doctor reported the potential claim to the insurer the day after the incident, and offered to pay the plaintiff’s subsequent hospital bills.

After the suit was filed, the insurer’s internal investigation showed that the plaintiff had incurred \$16,000 in medical expenses. Plaintiff’s attorney elected not to retain an expert, believing that the case fell under the *res ipsa loquitur* doctrine. The insurer obtained an additional expert review, noting that it was not yet time to “throw in the towel” and settle even though the complication that occurred in this case could prove difficult to defend. The insurer established a loss reserve of \$50,000.

During a conference with the local judge during a calendar call, the judge informed the plaintiff’s counsel that an expert would likely be required, and that counsel was in trouble on this case and “had better get his shop in order.” The judge strongly suggested that the plaintiff’s counsel have his client acknowledge the need for paying for an expert “in writing” to avoid a legal malpractice suit.

The insurer initially received a favorable medical review indicating that perforation was a known risk, and the fact that the defendant waited to determine if the pain would subside without intervention was appropriate. Additional reviews were less favorable. Defense counsel viewed the case essentially as a toss-up, and recommended an effort to settle in part because the doctor wanted the case settled and in part because the injury involved was in fact an unusual complication that ordinarily would not have occurred absent negligence; defense counsel reported that “this is going to be a very difficult case to win before a jury, even though we do have a very sloppy plaintiff’s lawyer” since the case involved a “healthy man who ended up unhealthy” as a result of the doctor’s actions.

Prior to trial, plaintiff’s counsel was indicted for conspiracy to commit perjury; defense counsel noted that he would likely be “distracted.” On the

second day of trial, the judge ruled that plaintiff's out-of-state expert, who was testifying as to a national standard of care, could not testify because of lack of knowledge of local conditions in the "same or similar communities" as required by state law—a result that was probably the function of lack of preparation by the plaintiff's attorney. Without the expert evidence, plaintiff had no case and the judge ordered a directed verdict.

The plaintiff filed an appeal. Prior to the hearing, defense counsel recommended to the insurer a nuisance settlement in order to avoid the risk of an adverse decision that could come back to "haunt" them in the future, especially given the appellate court's general hostility to directed verdicts. Two events suggested that a settlement might be accepted. First, the plaintiff had died, which made a second trial unappealing since plaintiff's counsel would have to rely on deposition evidence instead of live testimony. Second, plaintiff's counsel was likely to go to trial on perjury charges in the next several months. The insurer elected to proceed with the appeal, which ultimately resulted in the affirmance of the directed verdict.

THE POST-TRIAL ADJUSTMENT PROCESS

Case 9. Plaintiff was a 71-year-old female suffering from Parkinson's disease. She was admitted to the hospital for treatment of a fever of unknown origin and malnutrition. An intern negligently placed a feeding tube in her lung and injected a food substance, which resulted in emergency surgery to remove a portion of the lung. Two weeks later, a similar incident allegedly happened in which food substances were injected into her lung. As a result of both events, plaintiff was required to live in a nursing home until her death approximately a year later.

There was no question that the initial incident was the intern's fault, as evidenced by the fact that the intern's insurer agreed to a \$150,000 settlement of the claim against him. The facts relating to the alleged second incident were unclear, and the insurer for the hospital believed the case was defensible. Given the magnitude of the injuries involved and the insurer's concern with the inadequacy of the documentation as to what had happened and what was done, the parties explored settlement at some length. Immediately prior to trial, the parties were approximately \$75,000 apart with the plaintiff willing to accept under \$200,000 to settle the case. After a lengthy trial, the jury found liability and awarded \$750,000 in damages, an amount obviously well beyond the negotiating range defined by the parties' previous dealings.

The insurer was understandably disturbed by the verdict, and asked defense counsel to file an appeal. Appellate counsel was less optimistic about success on appeal and reported that the "chances are not good for prevailing." A meeting was scheduled with plaintiff's counsel to discuss the record on appeal, and defense counsel intended to "gauge the temperature of the water" for a possible settlement. Defense counsel indicated that they were "shooting for any reduction, perhaps \$150,000 set-off plus an interest

reduction.” Settlement negotiations were postponed as a result of problems in preparing the record on appeal that could have resulted in the appeal being dismissed as untimely. Eventually, the problems were resolved.

The post-trial negotiations were unfocused. An issue arose as to the precise amount of pre-judgment interest owed to the plaintiff based upon an ambiguity in the law. After researching the issue, defense counsel informed the insurer that the amount owed was probably close to \$900,000. Plaintiff’s counsel indicated a willingness to accept \$675,000, noting that “[i]n all candor, I do not see any errors in the record that are substantial enough that would place us at much risk of a new trial. However, it does seem that all cases should eventually come to an end and that is why we are making this attempt, at this time, to resolve the matter.” In response, the insurer authorized a settlement up to \$600,000. Following additional negotiations, the case was settled for \$550,000. There is no indication in the file as to any substantive reason why the plaintiff’s counsel was willing to agree to such a significant reduction other than avoiding the delay associated with continuing the appeal.

