Boston College International and Comparative Law Review

Volume 1 | Issue 1 Article 4

1-1-1977

Streamlining Medical Malpractice Jury Use: The Approach Used by Common Law Countries

Steven P. Ross

Follow this and additional works at: http://lawdigitalcommons.bc.edu/iclr

Part of the Common Law Commons, and the Health Law Commons

Recommended Citation

Steven P. Ross, *Streamlining Medical Malpractice Jury Use: The Approach Used by Common Law Countries*, 1 B.C. Int'l & Comp. L. Rev. 47 (1977), http://lawdigitalcommons.bc.edu/iclr/vol1/iss1/4

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.

NOTES AND COMMENTS

Streamlining Medical Malpractice Jury Use: The Approach Pursued By Common Law Countries.

INTRODUCTION

The medical profession's global aegis of mystery and awe has fallen.[1] Patients are no longer acquiescing to unforeseen deleterious results: they are asking for explanations whenever inferior treatment is suspected. If the answers fail to convince, patients increasingly seek legal remedies.

This worldwide trend[2] is most pronounced in the United States. In 1970, 1280 malpractice claims were filed in the United States while only 80 were filed in Canada;[3] over a period of twenty-five years (1947-1971) England reported 2809 claims.[4] In 1975, United States' medical malpractice insurance rates increased as much as 750% for physicians with an equal or higher

---

[1] Sharpe & Weisstub, *Medical/Legal Concerns In a Canadian Context*, 3 J. LEGAL MED. 40-44 (1975); Addison, *Medical Malpractice in Great Britain*, APPENDIX, H.E.W. SECRETARY'S COMMISSION REPORT ON MEDICAL MALPRACTICE, U.S. GOV. Print. Office, Jan., 1973, H.E.W. Pub. No. 17-00114 (OS)B-89, at 859 [hereinafter cited as APPENDIX, COMMISSION REPORT].

[2] *See generally* Gilder, *The World Medical Association and Medical Care*, in INTERNATIONAL MEDICAL CARE 316-25 (J. Fry & W. Farnsdale eds. 1972) (This rising trend demonstrates a "worrying phenomenon" of international importance.)

[3] A. LINDEN, CANADIAN NEGLIGENCE LAW 51 (1974); Welch, *Medical Malpractice in Canada*, in APPENDIX, COMMISSION REPORT 850.

[4] Addison, *Medical Malpractice in Great Britain*, APPENDIX COMMISSION REPORT 857; Curran, *The British Experience in Medical Malpractice: An Upward Trend*, 288 NEW ENG. J. MED. 249 (1973) (The rate at which damages and costs have been increasing during the most recent years, may be identical in England and the United States.)

rate increase for hospitals.[5] In some states, this trend threatens to erect an insurmountable barrier of entry into the profession and, in many more states, is forcing practicing physicians to alter or prematurely abandon their work.

Many creative extra-judicial solutions have been proposed[6] to wrestle with the problem of finding a just method for remedying the causes and results of medical grievances, but they are not to be favored.[7] It is submitted that application of the law of malpractice can best be achieved by a court of law adept at the discovery of relative truths and expert in legal matters. Furthermore, this particular area of our law is notably sound in its substance. At the common sense level of human experience the present tort law of negligence rings true:[8] physicians must be held to meet their obligations in such a manner as would be typical of their fellow physicians in similar situations; that is, doctors must answer to the "community standards doctrine." If a doctor fails to meet this responsibility to his patient, and money can recompense that injured patient, then it is just to hold the doctor legally liable for this financial reparation. In addition to awarding damages, the approbation of legal liability keeps the general medical profession in check,[9] serving to increase the common level of health-care quality.

This paper advances from the assumption that a viable solution to the medical malpractice problem must be one which preserves the role of the courts and their application of the theories of civil negligence. It is submitted that the ill-advised

---

[5] Curran, *Malpractice Insurance: A Genuine National Crisis*, 292 NEW ENG. J. MED. 1223-24 (1975) (Mr. Curran does not supply a specific cause for the insurance rate increases.)

[6] A. HOLDER, MEDICAL MALPRACTICE 416-37 (1975) (arbitration boards, screening panels, no-fault insurance); G. ANNAS, THE RIGHTS OF HOSPITAL PATIENTS 198-207 (1975).

[7] L. CHARFOOS, THE MEDICAL MALPRACTICE CASE 138-40 (1974). Additional reasons are discussed in footnote 70, *infra*.

[8] A. LINDEN, CANADIAN NEGLIGENCE LAW 50-51 (1974).

[9] Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330, 338 (1970). *See also* Haines, *Lecture X*, in JURY TRIALS: SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 170 (1969) [hereinafter cited as JURY TRIALS]; *Cf.* A. LINDEN, CANADIAN NEGLIGENCE LAW at 483 (1974).

use of the jury institution in the United States is the factor which is most responsible for crippling the judicial resolution of the increasing number of medical malpractice complaints.

The jury's function has dramatically metamorphosed from its birthright in Ninth Century France, when it merely supplied the facts of a local mishap to a royally appointed judge. From this very basic role, the jury's responsibilities slowly grew more active; in Seventeenth Century England, for example, the jury had become a champion of the commoner.[10] Today, the jury not only discerns facts, but also applies law; standards of behavior have thus become creatures of everyday sensibility, rather than of sovereign edict. This increasingly active posture of the jury has operated to assure that modern concepts of justice are grounded in a truly participatory democracy. It is questionable, however, whether the benefits of the active jury always outweigh the detriments.[11] This doubt is perhaps most strongly felt in medical malpractice suits.[12]

A medical malpractice suit requires the objective balancing of unusually esoteric expert testimony. At the same time, however, the subject matter of a medical malpractice suit will likely evoke lay juror prejudices and sympathies which will interfere with that delicate balancing process. It would seem that discreetly restricting the right to a jury in the United States would strengthen the institution. As the late Judge Charles E. Clark said: "[I]t is not showing care for the jury to force it into classes of claims where the right is dubious and the use inconvenient and burdensome. . ."[13] This viewpoint has been praised as a wise middle course,[14] and demonstrates that a tool is effective only insofar as it is appropriately applied. The indiscriminate use of the jury will only effect its gradual demise

---

[10] See discussion in text at 50-54.

[11] See discussion in text at 54-62.

[12] Space constraints require limiting discussion to medical malpractice suits.

[13] Damsky v. Zavatt, 289 F.2d 46, 59 (2nd Cir. 1961) (dissent). *See also* Bercouici v. Chaplin, 56 F. Supp. 417 (D.C. N.Y. 1944).

[14] WRIGHT & MILLER, 9 MODERN FEDERAL PRACTICE 10.

through avoidance and disuse, as exemplified by the history of the jury in England,[15] Canada,[16] and Australia.[17]

This article will attempt an analysis of the jury. It will begin with a study of the history of the jury, and proceed to a functional examination of the use of a jury. It will then be suggested that the use of a jury in medical malpractice suits does not necessarily result in the best justice, but instead may effect needless complexity and delay. Finally, a legislative scheme will be detailed, proposing a minimum jurisdictional prerequisite to the use of the jury in medical malpractice cases.[17a]

HISTORY

The history of the jury in common law countries began in Ninth Century France. Juries (assizes) were formed when courts bid their sheriffs to assemble twelve good and lawful men of the neighborhood. These jurors (recognitors) reported the facts on oath concerning local community events which they had heard about and in which certain of the King's rights had allegedly been violated. Judges, appointed by the Crown, decided the cases after being told the facts by these witness-jurors. The judgments were made as consistently with the King's view as the facts would permit.[18]

In 1066, the Normans brought this jury system to England.[19]

---

15 Haines, *Lecture X*, JURY TRIALS: SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA iii (1969); *See generally*, R. SIMON, THE JURY SYSTEM IN AMERICA 16 (1975).

16 *Idem.*

17 Note, *Juries: The Western Australian Experience*, 11 U. WESTERN AUSTRALIA L. REV. 99, 100 (1973).

17a The proposal is patterned upon the jury system used in Canada where each province fashions its own civil trial practices. The provinces have frequently opted for the statutorily limited right to a jury trial similar to Quebec Province's, from which this article draws its model. The underlying belief is that restricting access to a jury in this manner makes the jury institution more enduring.

18 J. FRANK, COURTS ON TRIAL 108 (1963).

19 Other species of trial introduced into England by William the Conqueror included compurgation and ordeal. Compurgation required the civil or criminal defendant to take an oath to his innocence in open court with 11 of his neighbors (compurgators) present to avow the belief in their consciences that what the de-

Then, states Maitland, "the germ of trial by jury, having once been introduced . . . in these formal assizes . . . began to spread outside their limits to take a new shape and become susceptible of free development."[20] In the Thirteenth Century the custom arose of allowing juries to make the decisions. However, "the jury remained for some centuries a body of men who gave their decision, not upon the evidence placed before them, but upon their knowledge of the persons, the circumstances or the locality."[21] As the communities expanded, thereby preventing jurors from gaining knowledge of alleged crimes through personal contact, juries evolved into courtroom finders of fact.

During the Seventeenth Century, the English jury gained formidable strength and respect. This rise to high regard was due in large part to the common folk who stood up, as jurors, against the royal judges who had customarily browbeat the jury into revealing the facts to the Crown's best advantage. The juries now gave a verdict where once the King had spoken through his judge. This evolution of the jury, however, was unique to the common law, for while the English jury underwent these developments, Roman law had spread across Europe, eroding lay participation in the trial process. Ultimately, the Roman law caused the civil jury to "fall into oblivion on the European Continent where it had been originally created."[22]

Colonization brought the jury system to England's numerous and distant territorial acquisitions.[23] In the colonies, and

---

fendant swore to was the truth. Ordeal demanded great physical tests of torture by fire or water from which supernatural intervention would rescue the innocent person. These means of obtaining evidence of guilt and innocence were abolished in the 13th Century.

Baeck, *The Legal Systems of Continental Europe*, in AMERICAN FOREIGN LAW ASSOC., JURY TRIAL PRACTICE IN CIVIL CASES IN FOREIGN COUNTRIES at *Appendix I* (1955) (unpublished report in Harvard Law School Library) (hereinafter cited as JURY TRIAL PRACTICE).

[20] Maitland, THE FORMS OF ACTION AT COMMON LAW 34 (Chaytor & Whittaker eds. 1958).

[21] 18 HALSBURY'S STATUTES OF ENGLAND (3rd Edn.) 31 (1970).

[22] Baeck, JURY TRIAL PRACTICE at 3.

[23] Cheang, *Jury Trial: The Singapore Experience*, 11 U. WESTERN AUSTRALIA L. REV. 99, 120 n.1 (1973).

throughout the formative era of United States' history, the jury continued its self-assumed role as champion of the common citizen.[24] In the United States today the right to a jury trial is firmly secured in the federal courts by the 7th Amendment to the federal constitution and in the state courts by 48 state constitutions.[25] Thus, in the United States, the jury has assumed a position of greater importance than it had occupied in Great Britain. Prior to World War II, England had ceased using civil juries for most of the purposes she had created them for. Today, the jury has been completely abolished from personal injury trials in England.[26] The evolution of the jury system in the United States was also quite different from its modern history in other former colonies. In most common law countries, upon reaching its zenith, use of the civil jury rapidly declined. In Canada, for example, provincial judiciaries are now characterized by an almost complete absence of juries from civil actions.[27] In Australia, similarly, the civil jury which had been employed in all common law actions triable in the Queen's Bench was, by 1971, excluded from Australian courts, unless ordered by a judge.[28]

---

[24] J. FRANK, COURTS ON TRIAL 108 (the Jeffersonian commonfolk, as jurors, came near to fisticuffs with their Federalist judges); Kaplan, *Trial By Jury*, in PRACTICING LAW INSTITUTE OF NEW YORK, MEDICAL AND DENTAL MALPRACTICE — 2d 27 (1972).

[25] The right to a jury in federal cases has not been incorporated through the 14th Amendment to impose civil jury regulations upon the state courts. State legislatures have been held the forums most suited to choosing the remedy best adapted to protect the interests concerned. *See, Hardware Dealers Mutual Life Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1951). In developing these standards the states have adapted civil jury procedures similar to the federal requirements.

E.g., CALIF. CONST. art. 1, § 7; IND. CONST. art. 1, § 20; MASS. CONST. pt. 1, art. 15; N.Y. CONST. art. 1, § 7.

[26] Green, *Juries and Justice — The Jury's Role in Personal Injury Cases*, 62 U. ILLINOIS L. FORUM 152, 167 n.72 (1962); Lenhoff, JURY TRIAL PRACTICE at *Appendix V*, p.1.

[27] Haines, *Lecture X*, JURY TRIALS: SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA iii (1969). Even on the criminal side, where guaranteed by the Canadian Criminal Code, the jury right is actually exercised only in those serious cases where it is obligatory. Between 92% and 95% of all Canadian criminal cases are tried before a judge alone.

[28] Note, *Juries: The Western Australian Experience*, 11 U. WESTERN AUSTRALIA L. REV. 99, 100-101 (1973).

In the 1930's-1940's Jerome Frank and other leading American jurists began advocating dismissal of civil juries.[29] Encouraged by the pressing medical malpractice emergency and by the Supreme Court's recent decisions upholding the use of non-unanimous verdicts and six-person juries, it seems a propitious moment in United States' history to give some effect to these suggestions.

There is historical justification for the United States to be mindful of its brother and sister common law nations' reevaluation and subsequent abatement of civil jury use. History, as shown above, reveals that the jury was never the perfect embodiment of lofty democratic ideals. Rather, it has laudibly served more practical purposes and has maintained a flexibility which enables growth and change in response to the peculiar needs of the times. Today, the historical jury function of bringing the facts of an offense to a judge's attention has no place:

> Like the 'town hall' meetings of the New England colony days, the jury is . . . part of an earlier era: It was important and should be revered for the role it played in developing our sense of democracy; but by the 20th Century it has outgrown its usefulness.[30]

Nor is its past function as a check against pro-government judges appropriate.[31] Today, jury history instructs us to adapt our malleable jury structure to solve the current medical malpractice crisis as it has historically been molded to meet pertinent demands in the past. It should be noted that what is advocated is an adaptation of the uses of a jury, rather than the complete rejection of that institution. This is because the

---

[29] *See* J. FRANK, COURTS ON TRIAL (1963); *cf.* Justice Cardozo: "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without (juries)." Palko v. Connecticut, 302 U.S. 319, 325 (1937) (majority opinion).

[30] R. SIMON, THE JURY SYSTEM IN AMERICA 15 (1975).

[31] Although the risks of a judge's corruption and personal bias must be boldly resisted, it is questionable whether this should be a function of the jury's, and if so, one requiring a jury in every trial of every legal claim. If it does, then litigants should never be permitted to consent to a non-jury trial nor should juries be omitted from trials at equity. *cf.*, R. KEETON, VENTURING TO DO JUSTICE 76 (1969).

jury can still perform a useful function, even in medical malpractice cases, where it seems that the usefulness of the jury is most limited.

FUNCTION

It is believed that the task for the juries which do sit in civil cases in common law countries today is to (1) ferret out the pertinent facts, (2) apply the given law, and (3) promote democratic justice. Despite this worthy constellation of functions, the low degree of their fulfillment and the great time and financial costs militate in favor of reforming wide usage of medical malpractice juries.

(1) *Fact Finding*

Evidentiary rules are applied to the admission of all information to remedy the fact that lay jurors lack specialized training in the law and that each case may be the juror's first exposure to the courts. The fear is that the jurors would otherwise attribute incorrect significance to certain factors by allowing their personal emotions to skew their weighing of the evidence. These complex rules, however, tend to distort the retelling of the story by eliminating evidence which is prejudicial although admissible as material and relevant to the portrayal. Despite these rules, the successful play on jury emotions is commonly attested to.[32] "Mr. Prejudice and Miss Sympathy are witnesses whose testimony is never recorded but which nonetheless must be reckoned with in trials by jury."[33]

The distortion effects caused by both the imperfect exclusionary rules of evidence and the jury's emotional bias may be heightened by the jurors' lack of a scientific background. Responsible factual determinations in medical malpractice cases

---

[32] No definite conclusions can be drawn, however, due to the numerous conflicting opinions and empirical studies. *See* L. CHARFOOS, THE MEDICAL MALPRACTICE CASE 138 (1974); KALVEN & H. ZEISEL, THE AMERICAN JURY, 149-162, 275-394 (1966) (regarding criminal juries). *See also*, Town v. Archer, 4 Ont. L. R. 383, 388 (1902).

[33] J. FRANK, COURTS ON TRIAL 121-122 (1963) (Balsac is attributed with defining "jury" as "twelve men who decide who has the better lawyer.")

are especially difficult by lay jurors as they do not possess the requisite medical base upon which to gauge the expert testimony of conflicting medical witnesses. Owing to these inherent trial and jury traits, jurors are at a great disadvantage in finding the facts with which to judge a doctor's conduct:

> Trial by jury, as a method of determining facts, is antiquated . . . and inherently absurd — so much so that no [doctor,] lawyer, judge, scholar, prescription-clerk, cook, or mechanic in a garage would ever think for a moment of employing that method for determining the facts in any situation that concerned him.[34]

These factors wear upon the jury's patience and attention span such that twelve wandering minds could be said to characterize that silent group.[35] It therefore seems overly optimistic to expect a jury in a medical malpractice suit or, indeed, in any complex, protected litigation, to deliver a reasoned verdict.[36]

(2) *Application of Law*

The lack of confidence in jurors' fact finding abilities, as illustrated by the prolix evidentiary rules, is incompatible with the treatment jurors receive regarding the law which they are given to apply to those facts.

> Juries have the disadvantage . . . of being treated like children while the testimony is being given, [i.e. enforcement of evidentiary guidelines] but then are doused with a kettlefull of law, during the charge, that would make a third year law student blanch.[37]

---

[34] *Id.* at 124.

[35] *Id.* at 124-25 ("There is probably more woolgathering in jury boxes than in any other place on earth" — Osborn quoted.)

[36] *See* DU BOIS, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster,*" 43 INS. COUNSEL J. 344, 353 (1976) (concludes that the power to punish should be shifted from the jury to the less emotional trial judge).

[37] *Id.* at 117 (quoting J. Bok). "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Cf.* Krulewitch v. U.S., 336 U.S. 440, 453 (1949) (Jackson concurring).

The jury's response may well be to avoid the complicated instruction by applying its own homespun sense of justice rather than the law given it. This phenomenon of deciding cases upon self-styled *ad hoc* law is customarily termed, "jury lawlessness."[38]

Jury lawlessness is exemplified by the jury which chooses not to follow its jurisdiction's doctrine of contributory negligence.[39] Rather than obeying the court's charge by refusing to grant an award to the plaintiff who is partly responsible for bringing on the mishap, this jury finds the defendant liable. The jury reduces the damages they would have otherwise levied against the defendant by their monetary equivalent to the plaintiff's contribution. In so refusing to recognize the plaintiff's contribution in the manner required by the judge, the jury has substituted its own rule of comparative negligence for the law of the court. Such a jury has become an uncontrollable force in lawmaking.

Jury lawlessness is defended as a "quiet distortion that presently adapts (the law) to the needs of a rough justice."[40] The price in caprice and duplicity is too dear to pay for this creative law reform.[41] There is little force to the alternative argument that, despite its faults, the lawlessness provides a valuable function as a safety valve for potential victims of the unfeeling letter of law. Advocating additional procedural safeguards is appropriate when dealing with accused parties in a criminal proceeding, but not with these civil litigants whose stakes are significantly smaller.

---

[38] *Id.* at 130-135.

[39] Sedler, Weinstein, *Routine Bifurcation of Jury Negligence Trials*, 14 VAND. L. QUARTERLY 831, 833 (1961).

[40] Traynor, *Fact Skepticism and the Judicial Process*, 106 U. PA. L. REV. 635, 640 (1958); R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 68 (1954) ("Jury lawlessness is an agency of justice chiefly in connection with the moral quality of conduct where the special circumstances exclude that 'intelligence without passion' which, according to Aristotle, characterizes the law.") Similar expressions collected at Fleming, *Sufficiency of the Evidence and Jury-Control Devices Avoidable Before Verdict*, 47 VA. L. REV. 218, 247-248 (1961).

[41] R. KEETON, VENTURING TO DO JUSTICE 76 (1969).

The inability of lay people to learn and apply substantive law with such a short exposure to the legal doctrine frustrates the jurors and encourages them to fashion and implement laws of their own design.[42] The cumulative result is a verdict resting upon a shaky factual determination to which a handicapped understanding of the law is then applied.

(3) *Promoting Democratic Justice*

Civil jury use is irreconcilable with the democratic principle that a government must be "of laws and not of men." The companion watchword: "supremacy of law," does not prevail where different juries will give different verdicts in factually similar cases. A partial cause of this lack of uniformity among verdicts, and concomitant loss of predictability in the law, lies with juries applying their own aberrant understanding of the given law or their varying species of homemade law. Although a democracy should make an allowance from legal certainty and uniformity to gain individualized justice in unique fact situations, this should always be "accomplished openly, and not furtively by such a surreptitious technique as 'jury lawlessness' ".[43]

It is a fallacy to think of juries as being comprised of a democratic cross-section of society.[44] From the start, selection of citizens to comprise the master potential juror list, being

---

[42] A partial legislative cure has been proposed which would require the jury commissioner to send to each juror, before trial, a copy of a juror's handbook. "The juror's handbook shall inform prospective jurors in lay terminology of the nature and extent of their forthcoming duties as grand or trial jurors. The handbook may introduce and orient prospective jurors to basic trial procedures and legal terminology. . . Each prospective grand or trial juror shall read the juror's handbook before he reports for service as a juror." Mass. Senate Bill No. 1338, Sec. 39 (1976; refiled as House Bill No. 2021, 1977).

[43] J. FRANK, COURTS ON TRIAL 132, 130-35 (1963).

[44] There is no federal constitutional obligation that juries be constituted of a fair cross-section of society in our state or federal courts. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

In the federal courts it is merely a "declared policy" for those courts to select jurors from a fair cross-section of the community in which the court sits; whether those people ultimately chosen to be jurors represent that cross-section seems to be irrelevant. 28 U.S.C. 1861.

limited to registered voters in most instances, eliminates many fine people who are simply unable or without desire to register to vote.[45] Later, in voir dire, the attorneys' "peremptory" and "for cause" dismissal of jurors commonly includes removal of those very jurors who have the preparatory knowledge or experience in medicine.[46] The need for aloof objectivity is self-defeating in medical malpractice cases where expert witnesses testify and only jurors who do *not* know what the experts are talking about will be weighing their testimony.[47]

Contrary to the democratic virtue of a decision-maker's accountability to those affected by his determinations, the jury remains anonymous. The jury does not supply supportive reasoning for its verdicts and the method by which it arrives at that verdict is never revealed even when misconduct is suspected.[48] If the trial judge performed his duties correctly the jury verdict would be very difficult and often impossible to upset on appeal.[49] This is especially true in medical malpractice cases where there is a wide margin of discretion left to the jurors.[50]

A compelling argument is provided, however, when it is urged that the democratic principles mentioned above must be sacrificed, with the use of jury trials, in order to preserve yet more highly cherished ones. In contrast, it is inappropriate to join

---

45 A recent statutory attempt to assure that jurors are drawn from lists which "adequately represent a cross-section of the population" draws attention to this need for reform. *See*, Mass. House Bill No. 2021 (unenacted, 1977).

46 That is, doctors, nurses, etc. who are removed from the jury panel.

47 Maloney, *The Challenge to the Retention of Civil Juries*, 8 LAW SOCIETY GAZETTE 166, 67 (1974).

48 *See generally*, Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958) (verdict by majority vote, by quotients of the individual juror's awards, by chance methods).

49 W. MEREDITH, MALPRACTICE LIABILITY OF DOCTORS AND HOSPITALS: COMMON LAW AND QUEBEC LAW 190 (1956).

50 In negligence cases the jurors are instructed to apply a "reasonable man standard" which, being so nebulous, appellate courts are reluctant to overturn. *Cf.*, R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 69 (1954); Weinstein, *A Routine Bifurcation of Jury Negligence Trials*, 14 VAND. L. QUARTERLY 831, 833 (1961).

those proclaiming that the abolition of this institution irreparably violates the most basic tenets of democracy.[51] One ideal which is strengthened by using juries is the latter's ability to provide the masses with an opportunity to participate in the making of their law and in their self-rule. Being a juror educates the layman as to the workings of his democracy while fostering an added respect for it. The jury also serves as a mouthpiece for public outcry or approval, thereby preventing elitist abuses of power[52] which result when doctors,[53] judges, and lawyers[54] are taken too far away from the realities of their patients and clients. This noble and spirited reasoning persuades this writer to recommend that medical malpractice jury use be restricted rather than be entirely forsaken.

Thus, in medical malpractice suits, the jury system fails to fulfill its three functions. Moreover, the jury affirmatively exacts a demanding toll in the expenses and efficiency of litigation. In medical malpractice suits, these costs yield injustices which far outstrip the potential benefits of the civil jury. The greatest costs to civil litigation, which are due in whole or in part to the jury, are those of delay — both an overcrowding of the dockets and a protraction of the trial stage — and financial expense.[55] In medical malpractice litigation these factors are magnified to such an extent that they cause general demoralization among doctors and lawyers alike.[56] Doctors are forced to work in the shadow of a lengthy and foreign process before an outcome is reached on a matter which will directly

---

51 Kaplan, *Trial By Jury*, in PRACTISING LAW INSTITUTE, MEDICAL AND DENTAL MALPRACTICE-2d 32-34 (1972).

52 Shapo, *Changing Frontiers in Torts*, 22 STAN. L. REV. 330, 336 (1970); L. CHARFOOS, THE MEDICAL MALPRACTICE CASE 138-9 (1974).

53 Sharpe & Weisstub, *Medical/Legal Concerns In a Canadian Context*, 3 J. LEGAL MED. 40, 43 (1975).

54 Cheang, *Jury Trial: The Singapore Experience*, 11 U. WESTERN AUSTRALIA L. REV. 99, 122-24 (1973); Baeck, *The Legal Systems of Continental Europe*, in JURY TRIAL PRACTICE, *supra* note 19, at viii.

55 *See generally* JURY TRIAL PRACTICE, *supra* note 21, at 1.

56 J. FRANK, COURTS ON TRIAL 124 (1963); COMMISSION REPORT, *supra* note 1, at 18.

touch their livelihood. By the time this cloud has passed over, another claim may be threatening — one to which even the best of doctors could see no validity — yet to which he must submit until exoneration. The doctor well appreciates the increase in his insurance premiums due to legal fees inflated by protracted jury litigation; the venom thus increases between the doctor and the legal system. Yet, the conscientious lawyer too is distressed by the burdens created by these unnecessaries. Attenuated trials, overcrowded dockets and the additional concerns to which the lawyer must adjust his trial technique so as to elicit the desired reactions from the jury and to best influence the choosing and charging of the jury all contribute to weary the lawyer as well as the doctor. The cross is harder to bear for the attorney who understands that a better brand of justice is not being achieved in return for this increased burden. The attorney should actively study this problem rather than join passively in the doctor's dismay.

The medical malpractice case is often subject to a delay of one and one-half years before the filed suit is called to trial, totalling three or more years from the time the alleged tort occurred.[57] As compared to other types of personal injury actions, medical malpractice suits require approximately four times the lawyer's time to handle, and double to triple the time to try.[58] A recent survey demonstrates that the trial stage of a medical malpractice case frequently takes as long as 19 to 28 months.[59] Factors significantly contributing to this delay might include: juror selection, implementation of difficult rules of evidence, jury charges, and jury deliberation time. Juries also increase the risk that even once the trial has run its course it may encounter a de novo ruling. For, unique to juries, is the problem that the proceeding may be completely invalidated due to incorrect instructions to them or to a miscarriage on evidentiary grounds.

---

[57] A. HOLDER, MEDICAL MALPRACTICE 412 (1975).

[58] Dietz, Baird & Berul, APPENDIX, COMMISSION REPORT, *supra* note 1, at 153.

[59] Dietz, Baird & Berul, APPENDIX, COMMISSION REPORT, *supra* note 1, at 153.

Thus, medical malpractice suits necessitate a disproportionate amount of court congestion[60] and impairment of the speedy disposition of other suits.[61] Patients who suffer injuries resulting in continuing hardships may be forced to endure needless discomfort until the damage award is made. The longer the patient-client must wait for the money to be awarded him, the longer he will suffer.

Complementing the financial burden on the court system, owing to the lengthier jury trials, is the onus of greater lawyer and expert witness fees which is borne by the litigants. That this increased financial expense to litigants effectively reduces their jury award is counterproductive. Added to these court and litigant complaints are those from the jurors themselves who resent their sacrifice of time and money from work. It has been argued that these anticipated costs and delays save the time and cost of litigation by enhancing the chances of pre-trial settlement.[62] Granted, juries are an unwitting and potent factor in the settlement of personal injury claims,[63] but query whether their presence is not just as likely to encourage suits. Hopes for high jury awards, whether realistic or not, entice many medical victims to seek out legal remedies.[64]

---

[60] Court congestion impelled Professor Carrington to design and urge a dramatic restructuring of the federal appellate system to relieve the severe hardships resulting from the congestion in the federal Courts of Appeals. He too saw the need to reform a traditional element of the judiciary which, by remaining an unquestioned bulwark of the judiciary had escaped urgently needed reform. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

[61] COMMISSION REPORT, *supra* note 1, at 18.

[62] The American practice of encouraging medical malpractice settlements runs contra the English and Canadian approach. The attempt in those countries may be to discourage *any* complaints by making every patient victory the result of a tortuous journey. *See* COMMISSION REPORT, *supra* note 1, at 851, 860, 869-70.

[63] Martin, *The Role of a Jury in a Civil Case*, in JURY TRIALS *supra* note 9, at 168-69: Green, *Juries and Justice — The Jury's Role in Personal Injury Cases*, 62 U. ILLINOIS L. REV. 152, 158-59 (162); Haines, *Lecture X*, in JURY TRIALS, *supra* note 9, at iii-iv (where the differences between civil and criminal trials is urged in *support* of jury usage in civil trials).

[64] *See generally*, JURY TRIAL PRACTICE, *supra* note 22, at 1.

In summation, the jury's modern functions of finding fact, applying law and promoting a democratic form of justice have not been fulfilled. The attempt has not only failed to meet its objectives but has worked detrimentally, most particularly in the medical malpractice area, where onerous burdens of time and money have aggravated the sufferings of our patient-clients. The omnipresent medical malpractice jury has also precluded a potential legal balm for our national health-care delivery system. As reported in the prior section, most other common law countries have carefully tightened their historically permissive civil jury procedures, especially in personal injury actions. The immediate concern for the rising medical malpractice trend, coupled with the possibility of a plan which utilizes the medical malpractice jury's benefits while minimizing its debilitating burdens, makes this a propitious time for the United States to consider revamping its medical malpractice jury system.

PROPOSAL

A sensible revision of jury use in United States' medical malpractice trials would shift the emphasis of responsibility from juries to judges. The extent to which we have already deemed our judges the proper source of judicial responsibility is frequently overlooked. The trial judge determines the admission and exclusion of evidence prior to its presentation to the jury and later decides whether the sum of the evidence admitted should go to the jury as sufficient to support a verdict.[65] If he allows the jury to deliberate, he will limit the jury's use of their factual determinations by charging them with what a lawful verdict may contain.[66] After the verdict has been given, the trial judge can still render a judgment notwithstanding the verdict. Ultimately, with or without the trial judge's approval, reviewing appellate judges may adjust the damage award (additor and remittitur) or even require a new trial de novo.

---

[65] W. PROSSER, LAW OF TORTS 205-208 (1971).

[66] *Cf.*, Fleming, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

Judges should be accorded greater responsibility in this area since they can significantly remedy the jury's shortcomings. First: judges, no less than jurors, are equipped with the human capacity to discern true facts from biased witnesses. Supplementing this ability is the judge's familiarity with lawyers and the courtroom environment which insulates the judge from numerous outside influences.[67] Additionally, it can be argued that a judge would not become as emotionally enmeshed in a medical malpractice suit as would a jury. This lack of emotional involvement could very possibly result in fewer claims being brought by patients.[68] Second: judges have the necessary legal expertise, completely lacking to juries, with which to understand and apply the law. Third: this specialized knowledge would enable judges to provide judgments more consistent with the law, and with greater internal uniformity among factually similar cases. The democratic goal of seeking predictability in the law would seem to be more nearly realized by judge-made law. Furthermore, greater control exists over lower court decisions since appellate court powers of review are wider for setting aside the decisions made by judges than the verdicts of juries'.[69] Finally, it seems possible to avoid the unnecessary time and money costs which grow out of the use of juries in medical malpractice suits.

Despite these advantages, this writer nonetheless urges that juries be provided a significant role. The public's direct participation in formulating particular standards to which conduct in their society is to be measured is a basic attribute of democracy which must be preserved. The judge, jury, and attorney form an interrelating judicial trinity similar to that of our tripartite system of government.

The writer's model, entailing the shift of responsibility from jury to judge in medical malpractice trials, should be initiated

---

[67] JURY TRIAL PRACTICE, *supra* note 22, at vii.

[68] It is believed in Canada, for example, that their juryless medical malpractice trials result in fewer claims being brought by patients due to less emotional judges.

[69] *See* Note, *Juries: The Western Australian Experience,* 11 U. WESTERN AUSTRALIA L. REV. 99 (1973).

with legislative reform at the state level.[70] The states have generally shown a willingness to experiment with juries and a change through legislative enactment would provide for a free and candid expression of all views.[71]

The proposed model's state-by-state statutory approach is presently employed by Canada's provinces. Canada's federal "constitution," The British North America Act, provides that the determination of trial procedures in civil matters be made by each province's own legislature.[72] The Constitution of the United States, similarly, does not impose standards upon the states for jury use in civil cases.[73] The enacted provincial schemes sharply limit the use of a civil jury in Canada to the extent that a civil jury trial is generally unavailable in Canada today.[74] Whereas the 7th Amendment to the federal constitution in the United States requires its federal courts to make juries available in civil actions at common law where the sum in controversy exceeds $20, the Canadian Federal Court is expressly prohibited from hearing any causes or matters before a jury.[75] In Canada, all medical malpractice disputes are resolved by the Canadian courts applying their law's negligence

---

[70] Each state's constitution must be examined to determine how its amendment may be required.

The basic premise upon which this paper proceeded was that the litigation of medical malpractice suits should be reformed at the court level. (See text at footnote 7.) Any extra judicial solution would require an unnecessary diminution of judicial power, eliminate any possibility of a jury at the initial fact-finding stage, be more lax in its adjudication and would require needless administrative costs.

[71] Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367, 370 (1972).

[72] THE BRITISH NORTH AMERICA ACT, 1867, 30 & 31 Vict., c. 3, § 91 (U.K.) provides that the federal Parliament may make laws regarding "all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. . ." Section 92 ¶ 14 provides that "In each Province the Legislature may exclusively make Laws in relation to . . . [t]he Administration of Justice in the Province . . . including Procedure in Civil Matters in [the Provincial] Courts.

[73] "[T]he Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same." Minneapolis Ry. v. Bombolis, 241 U.S. 211, 217 (1916) (Chief Justice White).

[74] A. LINDEN, CANADIAN NEGLIGENCE LAW at 51 (1972).

[75] The Federal Court Act, R.S., ch. 10 § 49 (2nd Supp.)

principles. Some Canadian commentators have opined that Canada's limited usage of civil juries is a primary reason why Canada has not had to re-examine its judicial approach to resolving medical malpractice questions as the United States has had to begin doing.[76]

The Canadian province of Quebec has made an explicit statutory provision for trial by jury in personal injury actions.[77] The use of civil juries in Quebec is nevertheless very carefully restricted. There will be no civil jury unless the amount claimed exceeds $5,000.[78] The jury must be requested by a party on motion within 15 days after the filing and the motion "must be accompanied by the deposit of the amount (which equals) . . . the indemnity to which the jurors are entitled and other disbursements necessitated by this mode of trial."[79] This motion may be refused by the court "because of the technical nature of the evidence . . . or for any other compelling reason."[80] English law does not provide for a jury in personal injury cases and in those limited areas where it does, the jury may be denied, as in Quebec, if "the court or judge is of the opinion that the trial requires a prolonged examination of documents or accounts or *any scientific* or local investigation which cannot *conveniently* be made with a jury." (emphasis added).[81]

This writer's proposed statutory reform will be limited exclusively to medical malpractice claims. If the amount claimed

---

[76] A. LINDEN, CANADIAN NEGLIGENCE LAW at 51 (1972); *see* Welch, *Medical Malpractice in Canada*, in APPENDIX, COMMISSION REPORT 850.

[77] Statutes of Quebec, 13 & 14 Eliz. II, c. 80, arts. 332-381 (1965).

[78] *Id.* at art. 332.

[79] *Id.* at arts. 333, 334.

[80] *Id.* at art. 337. In full:

> The court may refuse a trial by jury if, because of the technical nature of the evidence to be made, or of the multiplicity of parties, or for any other compelling reason, it considers that it is preferable that the case be heard by a judge alone.
>
> The judge presiding at a jury trial may, for the same reasons, dismiss the jury and hear the case himself.
>
> No appeal lies from any judgment under this article except in cases where trial by jury is refused.

[81] Administration of Justice (Miscellaneous Provisions) Act of 1933, 23 & 24 Geo. 5, c. 36, s. 6; *See* 18 HALSBURY'S STATUTES OF ENGLAND (3rd Edn.) 31 (1970).

exceeds $200,000 there will be an absolute right to trial by jury if demanded by any party within ten days of the filing of the complaint. If the amount claimed is not in excess of $200,000 no jury will be permitted unless a pre-trial motion for a jury is granted by the trial judge. Subsequent to the entering of a judgment any party may motion the judge for a new trial with a jury. The judge will grant a motion for a new trial or a pre-trial jury motion only if the facts demonstrate the necessity for a new formulation of the objective standard of community conduct. The trial judge's denial of a pre-trial jury motion will be reviewable for abuse of discretion. The grant or denial of a motion for a new trial, however, is never subject to review. In addition to the limited right to appeal pre-trial jury motions there is an absolute right of first appeal, subsequent to the entry of the trial court's judgment, on grounds that that judgment was against the clear weight of the evidence. The result is that the propriety of a trial without a jury will only be squarely faced by an appellate court upon appeal from the denial of a pre-trial jury motion. The appellate court will either affirm the judgment below or order a new trial. All new trials granted on these jury or factual grounds will be tried before a jury. (See Appendix.)

The $200,000 cut-off is designed to remove approximately three-quarters of the juries from medical malpractice trials. Although 78.6% of the victims who recover receive awards less than $10,000 [82] it is estimated that they claim twenty times that amount. The setting of a specific monetary sum is analogous to the federal jurisdictional amount: it separates the major cases, where new law should be allowed to form, from those less legally significant.[83]

---

[82] COMMISSION REPORT, *supra* note 1, at 11.

[83] Although spurious claims in excess of $200,000 might arise, it is anticipated that this jurisdictional amount can be adequately policed by state courts in a manner similar to that employed by the federal courts. Upon a motion to dismiss for lack of jurisdiction in federal question and diversity cases federal courts will examine the sufficiency of a plaintiff's asserted satisfaction of the $10,000 jurisdictional requirement. It is plaintiff's burden to convince the court, through pleadings and affidavits, that the requisite amount is in controversy. C.A. WRIGHT, LAW OF FEDERAL COURTS 110-117 (1972).

The arbitrary $200,000 cut-off and the judicial discretion to grant or deny motions for a jury trial limit access to a jury trial and in this respect are of untested constitutionality. The constitution in question is that of the individual state's since the federal constitution only imposes jury restraints upon the federal courts.

Federal court juries will usually be unavailable to parties who fail to satisfy the state jurisdictional amount since diversity of citizenship is prerequisite. In those limited numbers of cases which involve out-of-state defendants it is likely that a specialist was involved for a major malady — from which the largest malpractice claims often generate — thereby overcoming the state courts' jurisdictional barrier to a jury trial.

Support for this incursion into jury rights can be garnered from recent United States Supreme Court decisions upholding nonunanimous jury verdicts and six person juries.[84] Furthermore, other Supreme Court cases allow a cause of action which is "cognizable at law," to be maintained as an equitable action, without any jury rights, if the remedy at law is inadequate.[85] Legal remedies are inadequate due to, among other factors, "the practical abilities and limitations of juries."[86] Medical malpractice suits may readily be determined too complex. In Ontario, Canada, for example, it has been legislatively determined that medical malpractice suits are so technical and complicated that they must be decided by a judge alone.[87] Numerous other Canadian provinces and England have provided the court with wide discretionary power to prevent any civil case from coming before a jury if the court deems the facts reasonably complicated.[88] That the judge's discretion is

---

84 *See* footnote 30, *supra*.

85 Dairy Queen v. Wood, 369 U.S. 469, 478 (1962).

86 Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). The other two factors are: remedy sought and pre-merger custom. There is also a breach of the fiduciary duty between the doctor and patient in medical malpractice suits: an additional "equity" characteristic, *Ross*, 396 U.S. at 542.

87 W. MEREDITH, MALPRACTICE LIABILITY OF DOCTORS AND HOSPITALS: COMMON LAW AND QUEBEC LAW 191 (1956).

88 *Id. See* footnotes 78 and 79, *supra*.

carefully limited in the proposed model, to a clear and specific standard and that there are ample opportunities for the litigants of smaller claims to move for a new trial and then to appeal if denied, supports the likely constitutionality of this model.

The pre-trial jury motion is expedient in its providing for a jury trial from the start of court proceedings when it is inevitable that one will ultimately be granted. If the motion is denied, the party would realize that it is unlikely, barring a clearly improper judgment upon the facts, that an appeal would succeed. The trial will proceed with all the seriousness attendant upon such a proceeding whose outcome is unlikely to be reversed on appeal.[89]

The motion for a new trial provides the trial court judge with a retrospective glance over the trial. In the unlikely event that he believes a jury trial would have been more proper he may initiate one by granting the motion. His ruling is not reviewable. If the trial judge grants a new trial, it will always be before a jury and will not be denied. If the judge denies the motion, the appellant can bring an appeal on grounds that (1) the pre-trial jury motion was improperly denied or (2) that the judgment was against the clear weight of the evidence. The latter ground insures against a judge's temptation to prejudice or a gross misunderstanding of his case.

Yet the question remains whether juries should be completely unavailable in medical malpractice cases. It is true that whenever a jury trial is allowed, even in those malpractice suits where there is a claim of $200,000 or more, prohibitively high costs in time, money, and effectiveness are perpetuated. Yet, it is believed that providing for a jury in just such significant court cases allows the jury to perform its essential function: that of articulating the community's sense of reasonable conduct where negligent conduct is alleged. Today's crisis in the medical malpractice area mandates that a new balance be

---

[89] Under the present system about 25% of the medical malpractice trials are appealed. APPENDIX, COMMISSION REPORT, *supra* note 1, at 154.

struck, reintroducing the pressing element of expeditious disposal of claims. Yet, this need does not entirely offset the value of some input from a jury. The proposed model preserves the jury's essence yet strips off some of the fat; it is believed that such limited use of the jury will improve a judicial system beset by more problems than it either deserves or need suffer.

CONCLUSION

Current methods for resolving medical malpractice disputes in the United States are inadequate due to the dramatically increasing load of claims requiring resolution. Other common law countries generally solve these disputes in their courts by applying negligence law. Their trials of medical malpractice suits differ, however, from those in the United States in that these countries have drastically reduced the availability of juries. In light of the historically varied and flexible purposes which juries have served and the special difficulties presented to a jury in its attempt to fulfill its functions when faced with the typically complex medical malpractice case, reform is urged for United States' trial procedure. By carefully restricting medical malpractice jury use to the most significant cases, it is proposed that the more expeditious handling of the suits will help remedy the medical malpractice crises without sacrificing the jury's essential functions. Adapting the jury system to the demands of the times will make the jury institution stronger and more enduring for the future.

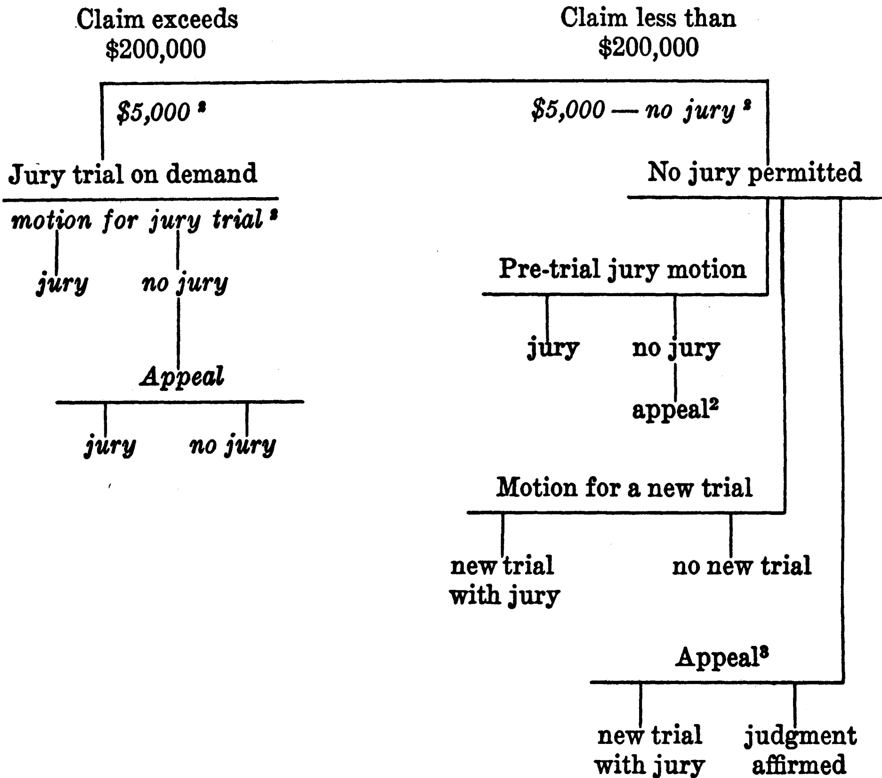
STEVEN PAUL ROSS

APPENDIX

Proposed Model of Statutory Reform

MEDICAL MALPRACTICE CLAIM

Civil Claim[1]



---

[1] *Statutes of Quebec*, 13 & 14 Eliz. II., c. 80, arts. 332-381 (1965).
[2] Standard of review: Abuse of discretion. (post-judgment appeal).
[3] Standard of review: Judgment against clear weight of the evidence.