

Juror Attitudes and Perceptions in Medical Malpractice Cases



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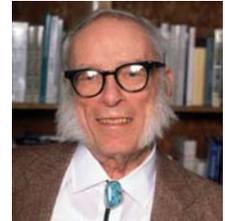
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“Jurors generally want to believe that doctors, hospitals, and other health-care providers will provide them with safety and comfort in their time of need. They do not want to believe that doctors and hospitals make mistakes that injure or kill patients.”

“If the doctor told me I had six minutes to live, I'd type a little faster.”



Isaac Asimov (1920-1992)

Jurors are often maligned because of their decisions in medical malpractice cases. Some people believe that of all of the problems in the American civil justice system, the extent of adverse jury verdicts in this area is the most pervasive.

A task force for the American Medical Association declared in 1988, that:

“In the medical liability context, a source of at least some of the problem for physicians and other health care providers...appears to many to be the jury...[Problems with the jury] include decisions that are not based on a thorough understanding of the medical facts and awards that increase at an alarming rate and in a fashion that seems uniquely to disadvantage positions as compared with other individuals who have acted negligently.”¹

Newspaper columns, journal articles, and books have been written containing the

¹ American Medical Association Specialty Society Medical Liability Project (1988) *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based Administrative System*, 7-8 .

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opinions of those who believe that medical malpractice jury verdicts are generally unjustifiable and need regulation. As one author stated,

“...judges and juries were, for the most part, committed to running a generous sort of charity. If the new tort system cannot find a careless defendant after an accident, it will often settle for a merely wealthy one.”²

Even legal authors have taken up the mantra that juries try to play Santa Claus in medical malpractice cases and, thereby wreak havoc in the civil justice system. One such author wrote:

“...juries have become accustomed to huge award requests and they are more willing to reach into the deep pocket of malpractice insurers to compensate the victims generously – more willing than when they encounter the victims of automobile accidents, for in these cases the insurance premiums at risk are paid directly by the jurors themselves.”³

The insurance brokerage firm, Johnson and Higgins, even took out an advertisement in the Wall Street Journal declaring that a litigation crisis existed because juries “tripled their awards in just one decade.” The advertisement further stated that the average medical malpractice award in 1984 was \$950,000.⁴ The factual or statistical basis for these statements remains unclear.

² Huber, Peter (1988) *Liability: The Legal Revolution and Its Consequences*, at p.12.

³ Weiler, Paul (1991) *Medical Malpractice on Trial*, Cambridge, MA: Harvard University Press, at p. 48.

⁴ See Daniels, Stephen (1986) *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 *Law & Contemp. Probs.* 269-310.

The accusations leveled against juries in medical malpractice cases might be summarized as follows.⁵

- Over time, juries have increasingly favored plaintiffs over physicians and hospital defendants.
- Jury damage awards seem to be increasing at an alarming rate.
- The amounts of unjustifiable awards also seem to be increasing at an alarming rate.
- Juries are biased against doctors, hospitals and other health-care providers.
- Juries often award damages out of sympathy despite the lack of evidence.
- Juries award larger amounts of damages against doctors and health-care providers because they have deeper pockets.
- Punitive damages are awarded too frequently without proper foundation.
- Juries are not competent to decide technical issues in medical malpractice cases.
- Juries are easily confused by experts and they evaluate evidence in irrational ways.
- Juries are not reliable and are arbitrary in their decisions about both liability and damages.
- Doctors, judges and arbitrators make better decisions in medical malpractice cases than juries.

In 1991, a comprehensive review of these charges against juries was published by Professor Neil Vidmar, Professor of Social Science and Law, Duke University School of Law, and Professor of Psychology, Duke University.⁶ In his book, Professor Vidmar takes a careful look at the allegations about juries and compares them to the results of extensive scientific research. The results of

⁵ Vidmar, Neil (1997) *Medical Malpractice and the American Jury*, Ann Arbor, MI: The University of Michigan Press, at p. 7.

⁶ *Id.*

his work reveals astonishing differences between the published opinions against juries and the actual statistics which the authors of those written opinions did not discuss.

For example, Professor Vidmar lists the results of 22 different published studies of jury verdicts in jurisdictions all over America which revealed the plaintiff "win" rates over various 2-4 year periods. When averaged together, the actual "win" rate for plaintiffs was 29.86 percent. Whether such a "win" rate amounts to a crisis in civil justice depends upon one's point of view.

A closer look at medical malpractice cases which go to a jury trial reveals that they are composed primarily of cases in which evidence of defendant liability is weak.⁷ Most cases where defendant liability appears to be strong (based on the facts) tend to settle prior to trial. Most defendants and insurance companies tend to fight cases in which they have a better chance of winning, and then, settling the rest. The fact that less than 30 percent of medical malpractice cases are won by plaintiffs is an indication that juries tend to view the circumstances of the case in ways which are similar to those of attorneys and other professionals who evaluate such cases prior to trial.

The allegation that jurors do not always "get it right" assumes that there is a "right" answer. We must remember that in most medical malpractice trials, there is a divergence of medical opinions about the treatment that was given to the plaintiff. In other words, even the medical professionals cannot agree on the "right" answer.

Perhaps the closest we can come to arriving at a clear and agreed answer to a medical malpractice question is to look at those instances where medical panels and doctors are in agreement and compare their decisions with those of juries. A review of medical panel decisions and jury verdicts in

New Jersey and Florida has indicated that there is a *"high concordance between doctors' assessments of negligence and jury verdicts."*⁸

Jurors tend to believe that doctors, hospitals, and other health-care providers should be held to a high standard for a number of reasons. They believe that in a typical health-care scenario, the health-care provider has more power, control, and knowledge than the patient. They believe that the patient in most instances is vulnerable and that in some instances the patient's life is in the health-care provider's hands. They believe that the nature of health-care service has a large effect on an individual patient's life. They believe that health-care providers have special education, skills, and resources that patients and other individuals do not have.

However, jurors are generally hesitant to find liability against health-care providers. Jurors generally want to believe that doctors, hospitals, and other health-care providers will provide them with safety and comfort in their time of need. They do not want to believe that doctors and hospitals make mistakes that injure or kill patients.

For these reasons, we often hear jurors say positive things about health-care providers in jury selection. In those instances where jurors do not like a particular health-care provider, such as a large hospital chain, their views are often colored by a mixture of negative media images and personal experiences. When jurors express their views about a particular health-care provider in jury selection, their feelings often run deep. The sometimes feel that the health-care provider has betrayed the trust that's patients have placed in it.

Jurors scrutinize medical malpractice plaintiffs closely. Even jurors who might lean toward the plaintiff will ask themselves if the

⁷ Id at 83.

⁸ Id at 176.

plaintiff is a malingerer. They will also want to know if the plaintiff followed the instructions of health-care providers. Although jurors will not tolerate an unwarranted attack against a medical malpractice plaintiff, they will be willing to listen to evidence that the plaintiff shares some of the blame or that the plaintiff's claim is wrong.

As in most types of lawsuits, jurors are more persuaded by what happens in the courtroom than what happened outside the courtroom. For example, jurors will watch the plaintiff to see how injured he or she appears to be. Plaintiffs who appear to be normal but who are suffering from mental or unobvious injuries as a result of medical malpractice are sometimes at a disadvantage. In such cases like this, the trial team would be well advised to study ways to convey such injuries in a persuasive manner.

Defendants and their representatives in the courtroom are also scrutinized carefully. Jurors will want to know how caring and comforting the health-care provider would be if the jurors themselves were under the provider's care.

Substantial jury research which has been conducted in medical malpractice cases indicates that the likelihood of natural jury bias against doctors and health-care providers is extremely remote. There is more likely a tendency to believe that doctors and health-care providers should not be liable without clear proof.

One of the most celebrated legal doctrines in medical malpractice is the "*captain of the ship*" doctrine. Under this principle, a doctor is deemed to supervise and be responsible for a team of health-care people who perform surgery or provide other treatment to a patient. Conversely, a hospital is not supervised by a physician and is not responsible for the behavior of people who are under the doctor's supervision. A hospital would only be liable for its own behavior or that of its employees while under its supervision.

Jurors do not understand the complex arrangements and legal boundaries that have been put into place to govern the interactions between health-care providers. In the experience of most jurors, everyone who provides them with health-care has a joint responsibility in carrying out the necessary treatment. In other words, all health-care providers are "lumped in" together. Therefore, efforts to distance health-care providers from each other in trial are often unsuccessful.

In exceptional cases, a medical malpractice defendant may have behaved in a way that was contrary to the behavior of the remaining health-care providers, either in a positive or negative way. In those cases, it may be possible for one health-care provider to be singled out as having behaved in a particularly good or bad way.

The technical aspects of medical malpractice cases often present challenges to trial teams for plaintiffs and defendants. Even though jurors will most likely decide the outcome of the case based upon the totality of the situation, rather than the technical explanations, the use of expert witnesses and persuasive demonstrative exhibits is important to help the jury understand the facts.

Jurors understand the trial advocacy system well enough to have ideas about who they can trust and who they cannot trust. They realize that each of the opposing parties has retained the best and most persuasive expert possible. They often judge experts by their apparent motivation and their behavior. However, jurors will listen closely to expert witnesses to glean information that will be helpful to them in understanding the circumstances and the meaning of the case.

Perhaps the most underutilized persuasive tools in medical malpractice cases are effective demonstrative aids. Even though a trial lawyer and an expert witness may be skilled at explaining medical procedures and their effect on the mind and

body, there are often visual aids that can transform vague ideas into clear images. For example, the effect of an oral explanation that the plaintiff lost five liters of blood pales in comparison to showing the jury five liter-sized bottles containing a red liquid. Another example might be an animation showing the progressive steps of an operation that is alleged to have been conducted by a negligent doctor.

Since most of the trial attorneys and expert witnesses in medical malpractice cases tend to specialize in this field, their tactics and persuasive tools also tend to be specialized and somewhat sophisticated. However, the technical sophistication of health-care continues to increase rapidly and the necessity for new and inventive ways to study jury perceptions in these cases and the necessity for more creative ways to persuade juries increases also.



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The Advocates' clients include major law firms and corporations all over the United States (www.theadvocates.com).

The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [***Courtroom Psychology and Trial Advocacy***](#), published by American Lawyer Media.

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