

# THE ANATOMY OF A MEDICAL MALPRACTICE VERDICT

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## I. INTRODUCTION

A commonly cited study conducted by the National Academy of Sciences Institute of Medicine in 1999 estimates that between 44,000 and 98,000 Americans die each year due to medical errors in hospitals.<sup>1</sup> The same study estimates that over 300,000 injuries are caused by medical errors each year.<sup>2</sup> A separate study conducted by HealthGrades, Inc., which rates hospitals for insurers and health plans, determined the figures proposed by the National Academy of Sciences Institute of Medicine were far too low, proposing instead that there are more likely around 195,000 annual deaths resulting from medical errors each year.<sup>3</sup> Despite frequent disputes regarding the accuracy of the figures, one can hardly question the fact that an impressive number of injuries and deaths are caused by medical errors in our country each year. Surprisingly, only a fraction of these errors result in claims against healthcare providers and, of those claims that make it to trial, less than one-third result in a plaintiff's verdict.<sup>4</sup>

In light of these statistics, why is there a need for an article focusing on the development of trial strategies for medical malpractice defendants? Despite the surprising success rate of defendants, defense attorneys still face

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1. Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson, *To Err is Human: Building a Safer Health System*, Natl. Acad. of Sci. Inst. of Med. Stud. 1, 1 (Natl. Acad. Press D.C., Nov. 2000).

2. *Id.*

3. Sen. Comm on Health, Educ., Lab. & Pens., *Medical Liability: New Ideas for Making the System Work Better for Patients*, 109th Cong. 5 (June 22, 2006). This 2004 study of Medicare records included all 50 states' records from years 2000-2002.

4. *Id.* at 6, 8.

an array of confounding factors that further complicate what are already emotional and opinion-laden issues.

First, medical malpractice litigation is a controversial issue, a frequent topic of public debate, involving strong opinions and emotions that can affect the strategies of both plaintiffs and defendants. Between constant media coverage and congressional initiatives aimed at tort reform, a significant portion of the population has formulated opinions on these issues, making it a very unique subset of tort claims.

Second, although the success rate of medical malpractice is half that of plaintiffs in other tort trials,<sup>5</sup> the median award in medical malpractice cases is nearly 16 times greater than that in other tort trials,<sup>6</sup> creating a total annual cost for defendant healthcare providers exceeding \$500,000,000.<sup>7</sup> Many of the psychological factors discussed in this article speak to the manner in which jurors award damages.

Third, the majority of medical malpractice claims that result in payments include cases of significant or permanent injury, or death.<sup>8</sup> Human perception of, and reaction to, traumatic injuries is unique. The unexpected and seemingly random nature of traumatic injuries resulting from medical error places the injuries outside the realm of one's perceived control of the events surrounding him or her. The field of psychology has consistently shown that a perceived lack of individual control often causes the individual to scramble to make sense of an otherwise senseless event, often resulting in the use of one of the many cognitive heuristics discussed in this article.<sup>9</sup> For example, victim-blaming by the trier-of-fact often occurs as a function of the need to differentiate oneself from the victim to attain the psychological satisfaction that such an event "would never happen to me." As a result of the overwhelming psychological need of the trier-of-fact to calm herself into believing such an event would not happen to her, victim-blaming can occur even when the victim deserves no such blame.

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5. Thomas H. Cohen, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, Bureau of J. Statistics, U.S. Dept. of J., NCJ 203098 1, 1 (Apr. 2004).

6. *Id.* at 1.

7. *Id.* at 2 (estimated cost in 2001: \$596,329,000).

8. Seth Oldmixon, *The Great Medical Malpractice Hoax: NPDB Data Continue to Show Medical Liability System Produces Rational Outcomes* 3, 3 (Laura MacCleery, Linda Andros & Barry Boughton eds., Pub. Citizen's Cong. Watch 2007).

9. See Elaine Walster, *Assignment of Responsibility for an Accident*, 14 J. Personality & Soc. Psychol. 73, 73 (1966); Kelly G. Shaver, *Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for an Accident*, 14 J. of Personality & Soc. Psychol. 101, 101 (1970); Neil Vidmar & Linda D. Crinklaw, *Attributing Responsibility for an Accident: A Methodological and Conceptual Critique* 6 Can. J. Behavioral Sci. 1112, 1112-1130 (1974); Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 Personality & Soc. Psychol. Bull. 563, 563 (1998); Claire Andre & Manuel Valesquez, *The Just World Theory*, Issues in Ethics (published by Markkula Ctr. for Applied Ethics) 2, 2-3 (Spring 1990).