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Countering stereotypes

by Samuel Gross

Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards, by Neil Vidmar. University of Michigan Press. 839 Greene Street, Ann Arbor, Mich. 48106. (313) 764-4388. 1995. 336 pages. \$37.50. \$19.95, paper.

The story of The Medical Malpractice Trial has a place in popular American legal culture, somewhere on the shelf with Killers Who Got Off on Technicalities. The plot is simple and tragic. The protagonist is the Doctor, a good man with a flaw: He tries too hard. In the process, he makes an innocent mistake or believes he can prevent the unpreventable. In any event, he fails and the Patient dies or is permanently injured. For this unintentional error the Doctor is crucified, by the vengeful anger of the Patient or her survivors, the avarice of the plaintiffs' lawyer, the smooth deceit of the plaintiffs' experts, and the ignorance of the jury.

The jury is central to this tragedy. It is the audience to whom the other furies play, so its vices are critical. A full account of its failings would read something like this: The jurors enter the case blinded by emotion—sympathy for the injured plaintiff, antipathy to the elitist professional defendant; they are too dumb to make heads or tails of the medical issues at stake; they are easily manipulated by the machiavellian plaintiffs' lawyer and his quack witnesses; they find the defendant liable on flimsy if not fraudulent evidence that no knowledgeable expert would believe; they

assume the defendant Doctor is rich so they award excessive, outrageous damages, primarily for will-o-the-wisp "pain and suffering;" and then add vast, unjustified punitive damages.

This is not our only image of medical malpractice trials. In the movie *The Verdict*, for example, the hero (Paul Newman) is a down-at-the-heels malpractice plaintiffs' attorney who is aided by an itinerant good-Samaritan expert witness, and the villains are the chief defense attorney and the doctor defendant. Still, the vision of medical malpractice litigation as the persecution of innocent doctors by greedy lawyers and incompetent jurors has gained a great deal of currency. But, as Neil Vidmar convincingly argues in *Medical Malpractice and the American Jury*, almost every element of this story is false.

Vidmar, a professor of social science at Duke Law School and a professor of psychology at Duke University, is a prolific student of jury behavior and a long-time defender of the jury as an institution. In this work, his expertise in social scientific research serves his argument well. Based on his own studies of medical malpractice litigation in North Carolina, and on an extensive body of research by others, Vidmar counters common stereotypes with facts:

- Juries in medical malpractice cases are not biased in favor of plaintiffs in any obvious way. The great majority of malpractice trials—two-thirds to three-quarters, by most estimates—end with defense verdicts, and jurors often express sympathy and concern for the defendants even in cases in which they find for the plaintiffs.

- Jurors do not simply accept the claims of the expert witnesses. They do their best to understand, interpret and evaluate expert testimony and are quite sensitive to motivations and possible biases.

- Medical malpractice juries are not irrational, arbitrary, or lawless. Studies have found that malpractice jury verdicts are generally consistent with the judgments of judges and of non-partisan medical experts.

- Malpractice juries do not award vast unjustified damages. Most medical malpractice verdicts are comparatively modest, and the occasional mega-verdicts are usually understandable. There is a great deal of unexplained variation in the size of jury awards, but the variation parallels that in settlements and judgments by judges.

- Most of the damages in medical malpractice verdicts are for out-of-pocket costs—primarily expensive long-term medical care—and for economic losses. Non-economic pain and suffering damages seem to be a minor component. There is no systematic evidence that juries give higher damages for the same injuries in medical malpractice cases than in other tort cases, or that they penalize doctors because they believe that doctors are rich.

- Finally, punitive damages are essentially a non-issue. They are rarely awarded in medical malpractice trials—1 percent of all cases is a plausible estimate of the frequency of punitive damages—and usually in comparatively small amounts.

Many of these findings are not new to scholars in the field. But they are new to most people, including many lawyers and judges, and they are frequently ignored by writers and scholars. As Vidmar points out, medical malpractice law has been controversial for a long time. Cases discussing the "conspiracy of silence" among physicians to protect their own go back 50 years or more, and Vidmar cites articles from the 1840s and 1850s charging that litigation was forcing doctors to abandon their calling. But in the past 20 years, the public debate over medical malpractice

has become particularly shrill.

Vidmar does not assume that the reader has any particular background in medicine, law, social science, or statistics. Instead, he explains issues in interesting and simple terms and includes a selection of readable and illuminating stories. Vidmar has succeeded in producing a general treatment of the role of the malpractice jury that is accessible to any interested reader—not an easy task.

Praising juries

Vidmar is a self-proclaimed fan of juries, and his praise of the accuracy of jury trials may go too far. For example, in discussing the use and evaluation of expert witnesses, he sometimes seems to be attacking straw men:

[T]he case studies help make the point that we must seriously question the claim that plaintiffs always use 'hired gun' experts who will testify to anything for a fee and that jurors will uncritically accept that testimony. (p. 157)

Granted. And granted that experts who "get caught up in the adversary process and go out on a limb" sometimes find that that "the limb gets sawed off in cross examination," and also that defendants and their experts occasionally show some disingenuousness. But at the end of the day, does that mean the process is accurate? Even if all the witnesses who testify are as honest as they know how to be, our system of selecting and preparing expert witnesses is likely to produce as polar a display of opinions as possible. And the same adversarial buzz saw that lops off implausible limbs can and does destroy competent well-rooted trees.

Vidmar points to research that shows a positive correlation between jury verdicts and expert evaluations of malpractice cases, but this is only equivocal evidence of jury accuracy. The decision on liability in a medical malpractice case has two components: (1) Did the defendant doctor violate the standard of care in treating the plaintiff patient? (2) If so, did that violation cause the defendant's injuries? The first question is normative. The norms that are encom-

passed by the standard of care only apply to physicians, but even so it might make sense to let juries be the final arbiters of what type of practice is expected of doctors. One way or the other, the statement that a particular type of conduct is required by the standard of care is true only because it is supported by some group's consensus—doctors, lawyers, judges, or jurors.

Causation, however, is a factual question, and often a very difficult one. If a baby is born with cerebral palsy, the only issue at a malpractice trial may be: Was that condition caused by the obstetrician's failure to perform an emergency cesarian section despite signs of fetal distress, or would it have occurred anyway? In the usual case, there is no way to know for sure—and no way to tell, after the fact, if the jury (or any other decision maker) was right or wrong. On the other hand, on a similar issue—whether a mother's use of the drug Bendectin caused her baby's birth defect—we know quite a bit, and the evidence overwhelmingly shows that Bendectin does not cause birth defects. And yet in the some 22 jury trials of Bendectin cases, the juries got it wrong 36 percent of the time, and that despite much clearer and more one-sided scientific evidence than they would ever have seen in a birth-trauma malpractice case. The result of the Bendectin cases are consistent with a positive correlation between jury verdicts and actual liability—the juries *were* right 64 percent of the time—but this is hardly an encouraging result.

I agree with Vidmar that there is no reason to believe that judges would do any better than juries. But comparative claims—that malpractice juries are no worse than judges, that they are often in agreement with doctors—are weak praise. They refute some strong and misplaced criticisms of malpractice jury trials but do not amount to an affirmative argument that jury decision making is better because it's more accurate.

The legal context

Vidmar is careful to point out that his

book "is about medical malpractice juries, not about the whole tort litigation system for medical malpractice." Nonetheless, he does address this broader question because, as he recognizes, "jury outcomes cannot be understood independently of the dynamics of the litigation process and the mass of cases from which the jury trials arise." This part of the book, however, suffers from significant omissions. For example, one of the major studies in the area is the Harvard Medical Malpractice Study. Vidmar refers to this study repeatedly, but he does not mention its finding that actual negligence by the physician bore little relation to the patient's decision to file a law suit. That finding—like the recently published finding from the same source that damage payments to malpractice plaintiffs were unrelated to negligence—does not speak directly to jury decision making. But it does say a great deal about the context of filed, dismissed, and settled cases in which jury trials occur.

Vidmar discusses the literature on the process by which litigated disputes are selected for trial, but he does not entirely do it justice. For example, in trying to explain the fact that plaintiffs lose 65 percent to 80 percent of malpractice trials, Vidmar pooh-poohs the "portfolio" theory: that plaintiff attorneys are willing to absorb 3 or 4 loses for every win, since the payoffs in the winning cases greatly exceed their costs in the losers. In the next paragraph he offers his own theory:

Sometimes plaintiff attorneys may realize late in the game that the case is weak, but so much time, money and effort have already been expended that they decide to go to trial anyway...to 'roll the dice,' that is take a chance that the jury will see things their way.

I think it's fair to assume that a lawyer's decision to roll the dice on a long shot is based on an assessment that the possible gain is much greater than the likely additional costs. If so, Vidmar's theory is simply a variant of the portfolio theory that he rejected directly above it.

Of all the defects of our system of

litigating medical malpractice claims, perhaps the worst is the high cost of the process. Vidmar points out that most malpractice lawyers he spoke to in North Carolina said that because of high costs they will rarely, if ever, take a case in which the expected damage award is under \$100,000; others report similar practices elsewhere. Vidmar recognizes that "malpractice trials are painful and expensive" and best avoided, if possible. I think he underestimates the problem. Nationally, about 7 to 10 percent of medical malpractice law suits go to

jury trial. By contrast, as best we can tell, fewer than 1 percent of filed automobile accident law suits go to trial, and a higher proportion of claims are settled without a complaint ever being filed in the first place. It's not just the trials themselves; in medical malpractice litigation, almost every case is investigated and prepared and defended as if it might go to trial, and that drives up costs heavily. Whatever the causes, the outcome is shocking: a system in which potentially compensable injuries are ignored because the damages

are a mere \$99,000.

This book should be read by every student of medical malpractice. Professor Vidmar does a good job of defending malpractice juries against the charge that they provide cheap, debased justice. In the process, however, he adds evidence to what may be a more serious indictment: that medical malpractice jury trials are a luxury that we cannot afford. ☹️

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