

A PUBLICATION OF THE AMERICAN HEALTH LAWYERS ASSOCIATION

# HEALTH LAWYERS NEWS

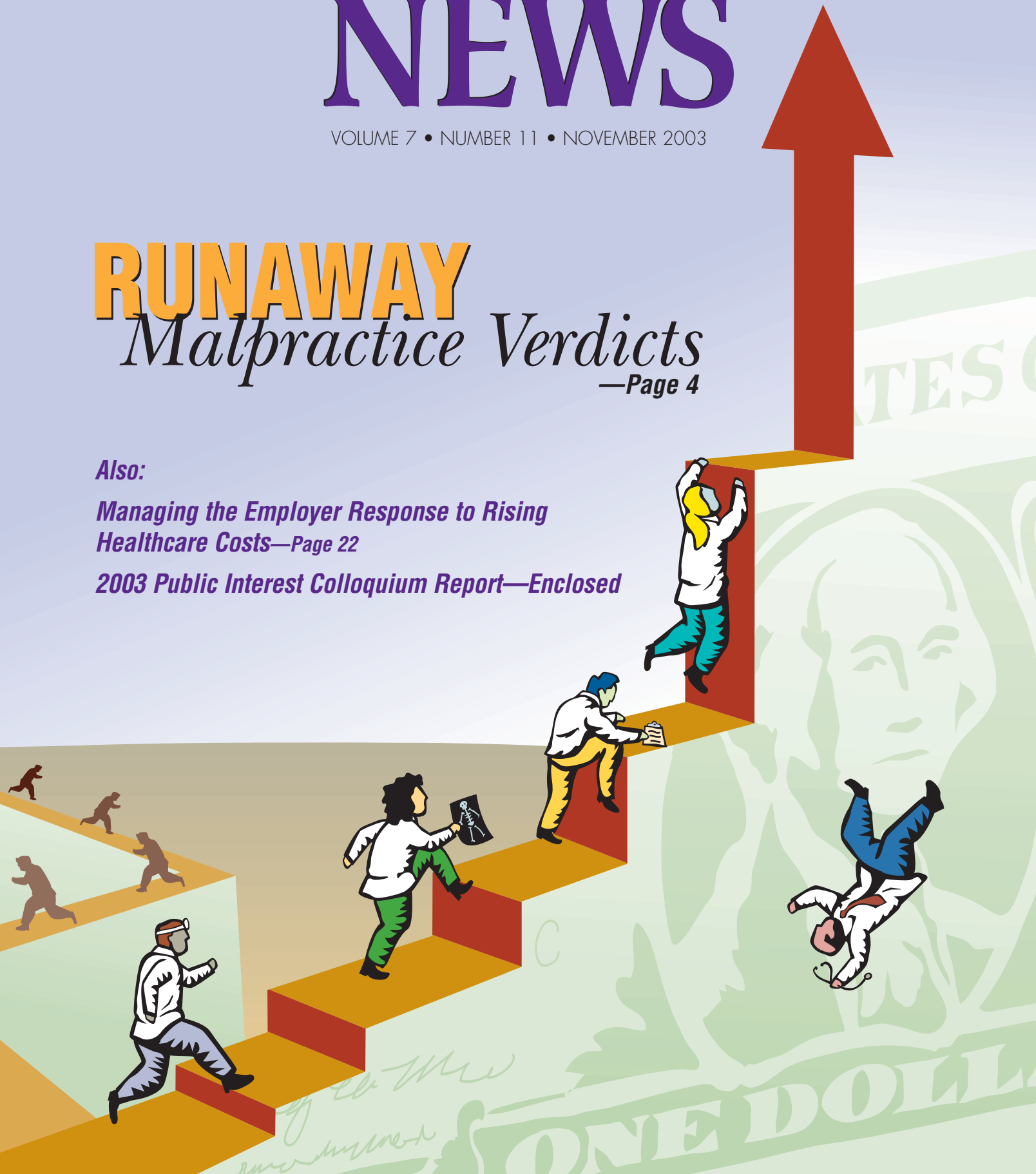
VOLUME 7 • NUMBER 11 • NOVEMBER 2003

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**Also:**

***Managing the Employer Response to Rising  
Healthcare Costs—Page 22***

***2003 Public Interest Colloquium Report—Enclosed***



A PUBLICATION OF THE AMERICAN HEALTH LAWYERS ASSOCIATION  
**HEALTH LAWYERS**  
**NEWS**

VOLUME 7 • NUMBER 11 • NOVEMBER 2003



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Jury awards in medical malpractice cases in the United States have skyrocketed over the last ten years. The article will examine the recent trends in medical malpractice jury awards, and will analyze the effect they have had on the quality and availability of healthcare.

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# RUNAWAY

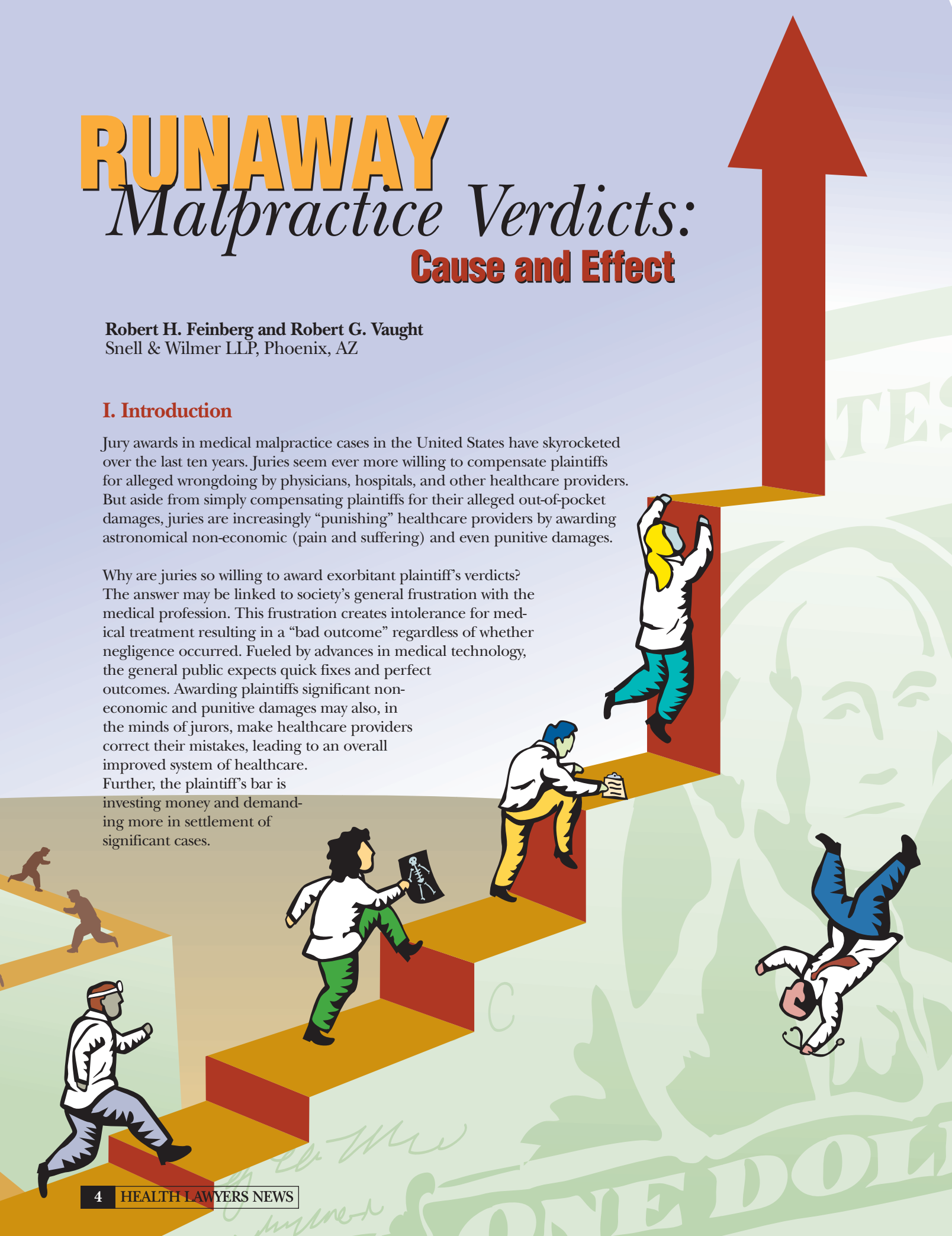
## *Malpractice Verdicts:* Cause and Effect

Robert H. Feinberg and Robert G. Vaught  
Snell & Wilmer LLP, Phoenix, AZ

### I. Introduction

Jury awards in medical malpractice cases in the United States have skyrocketed over the last ten years. Juries seem ever more willing to compensate plaintiffs for alleged wrongdoing by physicians, hospitals, and other healthcare providers. But aside from simply compensating plaintiffs for their alleged out-of-pocket damages, juries are increasingly “punishing” healthcare providers by awarding astronomical non-economic (pain and suffering) and even punitive damages.

Why are juries so willing to award exorbitant plaintiff’s verdicts? The answer may be linked to society’s general frustration with the medical profession. This frustration creates intolerance for medical treatment resulting in a “bad outcome” regardless of whether negligence occurred. Fueled by advances in medical technology, the general public expects quick fixes and perfect outcomes. Awarding plaintiffs significant non-economic and punitive damages may also, in the minds of jurors, make healthcare providers correct their mistakes, leading to an overall improved system of healthcare. Further, the plaintiff’s bar is investing money and demanding more in settlement of significant cases.



Escalating jury awards have had an alarming and ironic effect on the quality and availability of healthcare. Increasing awards have made quality healthcare more difficult, and in some cases, impossible to obtain. Increasing jury awards lead to increased insurance premiums for healthcare providers. Increased premiums have made practicing medicine financially prohibitive for many physicians, especially in “high-risk” specialties like emergency medicine and obstetrics. When physicians close their doors, quality healthcare becomes harder to obtain. This scenario has played out in communities of all sizes across the country.

This trend has prompted several state legislatures to create statutory caps on non-economic and punitive damages available in medical malpractice cases. The federal government has also weighed in on the issue. President Bush has pledged the full support of the White House in efforts to develop federal legislation that would similarly limit recovery in medical malpractice cases.

This article will examine the recent trends in medical malpractice jury awards, and will analyze the effect they have had on the quality and availability of healthcare. The article will also present several possible explanations for this trend, and will outline the federal government’s response.

## II. General Trends

Thousands of lawsuits are filed in the United States every year. Very few actually make it to trial. For the last ten years, the number of cases reaching a verdict has steadily fallen. However, the outcome of the cases that are tried to verdict have had a pronounced impact on those that settle.

Generally, jury verdicts can influence future trials and settlements in two ways. First they establish guidelines that will be used to value future disputes. Second, they can create precedents binding on future lawsuits.<sup>1</sup>

A recent study conducted by the Rand Institute for Civil Justice examined jury verdicts since 1985 and uncovered some interesting trends.

- Across all cases, claimants won 56.6% of the verdicts.
- Claimants were most successful in automobile personal injury and business cases, winning approximately 66% of both.
- Medical malpractice (33%) and product liability (44%) cases were won least often by claimants.
- Urban areas show higher per capita verdict rates than rural areas.

- Among the case types, the highest awards and increases in awards generally occur in business and product liability cases.
- Expected values in medical malpractice verdicts are quite similar to those in automobile personal injury verdicts.
- Punitive damages are awarded very rarely, ranging between 2% and 7% among the jurisdictions studied nationwide.
- Trial rates are generally flat, or decreasing.
- During the past ten years, case mix has not changed significantly, and is relatively similar among jurisdictions.
- In general, award amounts are increasing.
- Greater uncertainty about award amounts could fuel litigation.<sup>2</sup>

Although medical malpractice cases are won least often by claimants, the awards for successful claimants have risen dramatically.

## III. Trends in Medical Malpractice Litigation

The latest statistics seem to confirm what many physicians and insurance companies have already suspected: Jury awards in medical malpractice cases have soared over the last ten years. In one year, between 1999 and 2000, jury awards in medical malpractice cases jumped over 40%. According to Jury Verdict Research, a Pennsylvania-based company that gathers information on verdicts and awards from cases involving physicians, hospitals, and other healthcare entities nationwide, the trend has been pronounced:

<u>Year</u>	<u>Award Median</u>
2000	\$1,000,000
1999	\$700,000
1998	\$733,900
1997	\$503,000
1996	\$474,536
1995	\$500,000 <sup>3</sup>

Settlement medians have not increased as dramatically, but appear to be on the rise as well.

<u>Year</u>	<u>Settlement Median</u>
2000	\$500,000
1999	\$592,074
1998	\$500,000
1997	\$400,000
1996	\$375,000
1995	\$350,000 <sup>4</sup>

Interestingly, compensatory award medians for the most commonly claimed liability situations between 1994 and 2000 were significantly higher than the settlement medians for the same time period:

	<u>Compensatory Award Median</u>	<u>Settlement Median</u>
Childbirth	\$2,050,000	\$750,000
Cancer diagnosis	\$1,000,000	\$500,000
Delayed treatment	\$1,000,000	\$665,000
Diagnosis	\$750,000	\$462,500
Medication	\$668,000	\$235,000
Lack of informed consent	\$500,000	n/a
Nonsurgical treatment	\$400,000	\$250,000
Negligent surgery	\$355,000	\$325,000
Negligent supervision	\$147,750	\$200,000 <sup>5</sup>

These awards have led to a pronounced increase in medical liability insurance rates. In 2001, more than twenty states saw at least one medical insurer increase rates by more than 25%, and that trend is expected to continue.<sup>6</sup> This trend translates into higher liability insurance rates or an inability to find coverage at all.<sup>7</sup>

#### IV. Why Have Jury Awards Increased in Medical Malpractice Cases?

The bleak statistics outlined above illustrate a problematic trend. Medical malpractice verdicts and settlements are out of control. In order to devise a practical, workable solution we must evaluate why.

The analysis should begin and end with the people who have the ultimate say in deciding what a case is worth—the jurors. Jurors are everyday people. They are mothers, fathers, grandparents and friends. They are ordinary folks from all walks of life. Jurors are a reflection of the world in which we live. When jurors return mind-boggling plaintiffs’ verdicts, they do so as hand-selected representatives of society.

Bruce Boyd, a Senior Jury Trial Consultant with Tsongas Litigation Consulting, Inc., explains that, “damages are the jury’s barometer of outrage.” Jurors in medical malpractice cases are pushing this barometer’s redline. The cause of this outrage is multi-factorial.

People are frustrated with healthcare today. The doctor-patient relationship seems to have lost the intimacy of years past. Many feel as if they are given short shrift during visits with their own doctors. Often patients are seeing physician assistants and nurse practitioners rather than their doctors. In addition, many physicians are beginning

to view patients as potential courtroom adversaries, as opposed to simply people in need of care.

A generalized perception of suspicion surrounds health maintenance organizations and managed care groups. People seem to believe that the financial bottom line is prioritized at the expense of patient care. This suspicion gets splashed on all healthcare professionals. For example, during trial, whenever *hindsight* suggests that a particular diagnostic test or treatment modality may have been useful, jurors are inclined to conclude that it was negligent not to order the test or modality. This is generally true even though a prospective analysis demonstrates the test or treatment modality was neither indicated nor required by the standard of care. Jurors expect that absolutely everything should be done for patients—regardless of indication or expense, yet they are perplexed by and want to control healthcare costs. A schism between juror expectations and healthcare costs has developed, contributing to awards that are intended to declare: “shut up and listen to us.”

Patient care is better than ever, but expectations continue to increase. People expect a quick fix for just about everything, including medical problems. We are living on high speed. Information exchange is rapid, overwhelming, and often misleading. Bad results in medicine are simply not tolerated. The doctor must have made a mistake. People are not supposed to suffer catastrophic injuries or die unless it is someone’s fault—right?

According to Mr. Boyd, “anger about health care is a fact of life for many, many Americans—some jurors feel more like victims of the system than patients of its doctors.” Big dollar verdicts are certainly a projection of this anger. Often in the courtroom the verdict can be a reflection of how the jury is angry about how patients are treated.

Plaintiffs’ attorneys are having a field day with the prevailing attitudes and misconceptions of jurors. In fact, some prominent plaintiffs medical malpractice lawyers routinely seeks to admit



into evidence general articles on medical mistakes. These articles have absolutely nothing to do with the case being tried. Most judges will, of course, prevent the admission of this type of evidence because it is irrelevant and unfairly prejudicial. But we are able to glimpse here into the mind-set of the plaintiffs' bar. They know that juries are angry about the healthcare system—and clever lawyers will figure out a way to exploit the anger and parlay it into big awards.

In many parts of the country, Plaintiff's attorneys seem to be demanding a raise. They will invest a large amount of money in a substantial case and will not settle the case at traditional levels. In states where there are no caps, this puts the defendants in a difficult position. Many of these cases end up in the courtroom with resulting large verdicts, which then goes on to feed the fire. Plaintiffs will hire numerous experts, technology consultants, jury consultants, set up large movie screens in the courtroom for a virtual show. If it is a case that the defense thought "would settle" you can end up with a mismatch.

## V. Effect of Increased Awards

Increased insurance premiums resulting from excessive malpractice awards have had a profound effect on the healthcare system. Medical specialists such as obstetricians and surgeons are facing monumental (sometimes prohibitive) insurance premium increases. Some experienced physicians are questioning whether to retire early to avoid the high cost of insurance premiums and being sued.

Perhaps the most significant result of this phenomena, and the most potentially devastating one, deals with patient care and access to medicine. Rising insurance costs have already directly affected patient care across the country in some alarming ways:

- In Nevada, patients are facing unprecedented problems in assuring quick access to urgently needed care. The University of Nevada Medical Center closed its trauma center in Las Vegas for ten days earlier this month. Its surgeons essentially went on "strike" because they could no longer afford malpractice insurance; some facing premium increases from \$40,000 to \$200,000. The trauma center re-opened after some surgeons agreed to become county government employees for a limited time, which capped their liability for non-economic damages if they were sued.
- Dr. Cheryl Edwards closed her decade-old obstetrics and gynecology practice in Las Vegas because her malpractice insurance premium jumped from \$37,000 to \$150,000 a year. She moved her practice to West Los Angeles, leaving 30 pregnant women to find new doctors.

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- In Delaware County, Pennsylvania, approximately 40 physicians left the state, or quit practicing, in 2001 because of high malpractice insurance costs.
- In Chester County, Pennsylvania, 65% of physicians polled in January, 2001, said they were seriously considering moving their practice to another state. Many specialists (such as neurosurgeons) have already moved to states with less hostile medical-legal environments.
- At Frankford Hospital's three facilities in Northeast Philadelphia and Bucks County, all twelve active orthopedic surgeons decided to quit practicing after their malpractice rates nearly doubled to \$106,000 each for 2001.
- In areas of rural West Virginia such as Putnam County and Jackson County, the sole community provider hospitals have closed their OB units because the obstetricians in those areas cannot afford malpractice insurance.
- In rural Mississippi, many physicians who specialize in family medicine and obstetrics/gynecology have stopped delivering babies due to skyrocketing insurance costs. Most of the cities with populations under 20,000 in Mississippi no longer have physicians who deliver babies.
- In Georgia, the 80-bed Bacon County Hospital in Alma had to secure a loan to cover a premium that more than tripled. Another Georgia Hospital, Memorial Hospital and Manor in Bainbridge, that operates a hospital and nursing home, was faced with a 600% increase.
- In New Jersey, 65% of hospitals surveyed report that physicians are leaving because of increased premiums.
- In Tacoma, Washington, rapidly increasing premiums (some tripling over a one-year period) may force many physicians in the state to leave.

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- Health Link Medical Center opened in March 2001 in Southampton, Pennsylvania, to provide free healthcare to the working poor. Some physicians, who volunteer their services on the board of directors, are unable to volunteer to provide medical care because of the fear of lawsuits.<sup>8</sup>

In states that have not adopted malpractice reform legislation (i.e. caps on non-economic damage awards), malpractice insurance premiums have increased dramatically; in some cases as much as 75%:

<u>State</u>	<u>Premium Increase</u>
Nevada	30%
Mississippi	30-40%
North Carolina	50%
Pennsylvania	40%
Virginia	75%
Florida	30%
Ohio	30%
Illinois	Over 30% <sup>9</sup>

In Illinois, the state's largest medical liability insurance writer for physicians increased annual base rates by 35.2% on July 1, 2003.<sup>10</sup> In Kentucky, the insurance commissioner approved a 29% premium increase for OHIC Insurance Co. in July of 2003, and ProAssurance took a 40% increase on August 1, 2003.<sup>11</sup> In Missouri, the largest insurance writer, Intermed Insurance Co., had an 82% across-the-board increase take effect on August 1, 2003.<sup>12</sup>

In addition, several major insurance carriers have stopped selling medical malpractice insurance as a result of rising costs:

- St. Paul Companies, which was the largest malpractice carrier in the United States, covering approximately 9% of doctors, announced in December 2001, that it would no longer offer coverage to any doctor in the country.
- MIXX pulled out of every state; it will recognize and sell only in New Jersey.
- PHICO and Frontier Insurance Group have also left the medical malpractice market.
- Doctors Insurance Reciprocal stopped writing group specialty coverage at the beginning of 2002.<sup>13</sup>

Many physicians who have remained in practice and have been able to receive and afford malpractice insurance, have adjusted their behavior in an attempt to avoid being sued. A recent survey of physicians revealed that one-third shied away from going into a particular specialty because they feared it would subject them to greater liability exposure.<sup>14</sup> Seventy-six percent of those surveyed are "concerned" that malpractice litigation has inhibited their ability to

provide quality care to patients.<sup>15</sup> Because of that concern, physicians have more frequently engaged in so-called “defensive medicine”:

- 79% said that they had ordered more tests than they would, based only on professional judgment of what is medically needed, and 91% have noticed other physicians ordering more tests.
- 74% have referred patients to specialists more often than they believed was medically necessary.
- 51% have recommended invasive procedures such as biopsies to confirm diagnoses more often than they believed was medically necessary.
- 41% said that they had prescribed more medications, such as antibiotics, than they would based only on their professional judgment, and 73% have noticed other physicians similarly prescribing excessive medications.<sup>16</sup>

Patient care may also be affected in a couple of additional ways. First, many physicians, particularly those who have been sued and are familiar with the legal system, spend an inordinate amount of time dictating progress notes. A physician will have difficulty proving what is not documented in the medical chart. The patient’s subjective comments along with the physician’s objective findings, assessment, and plan must be documented in sufficient detail; otherwise, proving what occurred later in a lawsuit is an uphill battle. Many physicians are spending thousands of dollars a month on transcription fees. Unfortunately, time spent dictating notes is time away from treating patients.

Second, after experiencing a bitter lawsuit, physicians may “sniff out” other patients who they perceive may be the personality type to sue them down the road. Patients can be perceived as potential enemies; patients’ family members and friends can be thought of as future hostile witnesses to every utterance made. Meaningful communication can atrophy. The physician patient relationship can suffer. This is an unfortunate reality.

Ironically, a physician’s obsession with documentation at the expense of free and fluid face-to-face communication may be the very impetus for additional lawsuits. Patients are generally less inclined to sue a physician if they have a close, meaningful relationship. Furthermore, where a good relationship exists between physician and patient, even if a lawsuit is brought, a runaway verdict is much less likely. Jurors are unlikely to get angry if they sense that the patient liked the physician and was treated fairly, even if they believe a medical error occurred. Communication is always the key.

The recent litigation trend has also affected patient care in another way. In a recent report by the Institute of Medicine, it was noted, “reporting systems are an important part of improving patient safety and should be encouraged. These voluntary reporting systems [should] periodically assess whether additional efforts are needed to address gaps in information to improve patient safety and to encourage health care organizations to participate in...reporting, and track the development of new reporting systems as they form.”<sup>17</sup>

However, the fear that information from these reporting systems will be used to prepare a lawsuit against them, even if they are not negligent, deters physicians and hospitals from making reports. This fear impedes quality improvement efforts. According to some experts, the most significant barrier to more effective quality improvement systems in healthcare organizations is the fear of creating new avenues of liability by conducting earnest analyses of how healthcare can be improved.<sup>18</sup>



The financial consequences have become all too clear. The money spent on malpractice premiums raises the cost of healthcare. According to one study, in 2001, physicians spent over six billion dollars to obtain liability coverage. Hospitals and nursing homes spent additional billions of dollars.<sup>19</sup>

Some suggest that the litigation system also imposes significant “indirect costs” on the healthcare system as well. Defensive medicine not only leads to increased costs, but also can increase patient risk. Ultimately, the costs of medical litigation are borne by all Americans, through higher premiums for health insurance (which reduces workers’ take home pay if the insurance is provided by an employer), higher out-of-pocket payments when they obtain care, and higher taxes.<sup>20</sup>

The federal government (and thus every taxpayer who pays federal income and payroll taxes) also pays for increased healthcare costs. The federal government provides direct healthcare to a number of individuals: members of the armed forces, veterans, and patients served by the Indian Health Service. It also funds Medicare and Medicaid programs, and supports Community Health Centers. It also provides assistance, through the federal tax system, for workers who obtain insurance through their employment. The Department of Health and Human Services suggests that the “direct cost of malpractice coverage and the indirect cost of defensive medicine increases the amount the federal government must pay through these various channels, it is estimated, by \$28.6–47.5 billion per year.”<sup>21</sup>



## VI. Dealing with Increasing Awards

Medical malpractice defense lawyers must provide physicians and their insurers with honest, realistic case assessments. Physicians who find themselves in a lawsuit for the first time need to understand that they are in for a long and bumpy ride. Their care and treatment will be questioned. Huge sums of money will be demanded. Their personal wealth and assets will be exposed to a jury award over the insurance policy limits.

Physicians typically have difficulty when their professional judgment is questioned. Physicians are scared of getting hit with a personal judgment against their own assets. Defense attorneys should be mindful that this experience will be very difficult for their clients. Listening carefully to the client's concerns and fears is important.

Jury trial consultants can be helpful under certain circumstances. Mock trial research can provide invaluable insight into the minds of typical jurors. Issues that lay people may choose to focus on can be surprising—and mock trial research can better expose such issues.

Clues for what to look for when selecting your real jury are also provided by mock trial research. People of a differing background, age, and socioeconomic status may be more or less favorable to your case. The research will better enable selection of jurors who are likely to be more aligned with your position.

Mock trial research may also provide a reasonable verdict range, which may alleviate some of the anxiety associated with significant risk exposure. Determining a realistic verdict range through mock trial research may also tend to encourage settlement, especially if the research shows higher awards than previously anticipated.

Around the country, many are questioning some of the underlying approaches to the defense of these claims. More attention needs to be paid to “event management,” fast track on claims and then to the type of defense one asserts on those large claims.

## VII. How to Fix the Problem

A recent report published by the United States Department of Health and Human Services has concluded that a “critical element” for enabling necessary healthcare reform is “curbing excessive litigation.”<sup>22</sup> The Report suggests:

As multimillion-dollar jury awards have become more commonplace in recent years, these problems have

reached crisis proportions. Insurance premiums for malpractice are increasing at a rapid rate, particularly in states that have not taken steps to make their legal systems function more predictably and effectively. Doctors are facing much higher costs of insurance, and some cannot obtain insurance despite having never lost a single malpractice judgment or even faced a claim.<sup>23</sup>

One study estimates that limiting unreasonable awards for non-economic damages could reduce healthcare costs by 5%–9% without adversely affecting quality of care.<sup>24</sup> “If reasonable limits were placed on non-economic damages to reduce defensive medicine, it would reduce the amount of taxpayers’ money the federal government spends by \$25.3–44.3 billion per year.”<sup>25</sup> Experts suggest that these savings could lower the cost of health insurance and permit an additional 2.4–4.3 million Americans to obtain insurance.<sup>26</sup>

Some states have already taken steps to curb excessive jury awards. California, which has had a \$250,000 cap on non-economic damages since 1975, is one of a handful of states where malpractice rates are somewhat stable because losses are more predictable.

The federal government has pledged to do what it can to curb out-of-control jury awards. In a speech last year at High Point University in Greensboro, North Carolina, President Bush recognized that too many meritless lawsuits are driving physicians out of practice. The President said that tort reforms, like those implemented by California in 1975, the same ones physicians across the country have been lobbying for, should be implemented nationwide.<sup>27</sup> He proposed a framework for federal legislation that would:

- Cap non-economic damages at \$250,000, but set no limit on economic damages;
- Limit punitive damages to whichever is less: \$250,000 or twice the economic damages;
- Include a statute of limitations on medical malpractice cases; and
- Allow physicians to pay awards to plaintiffs over time, instead of in one lump sum.<sup>28</sup>

The proposed plan attempts to strike a balance between an injured plaintiff's right to sue, and society's interest in quality, affordable healthcare.

The President's plan has drawn support from several interest groups, including the American Medical Association. Last summer, the AMA identified 19 “crisis states” in which

high liability insurance premiums are driving physicians away or forcing them to give up high-risk specialties.<sup>29</sup> Donald Palmisano, M.D., president of the American Medical Association notes: "The AMA always has held that patients who have been injured through negligence should be compensated fairly. Unfortunately, the current liability system has failed patients."<sup>30</sup>

To date, the future of federal medical malpractice liability reform remains uncertain. Earlier this year, the House of Representatives passed a measure imposing a strict \$250,000 cap on non-economic and punitive damage awards. In July of 2003, the Senate refused to take up the bill.<sup>31</sup> Republican Senator Bill Frist (a heart surgeon who has put medical malpractice tort reform high on his agenda) has promised to bring the bill up again "This is a national emergency that is hurting people," he said. "It's a crisis that is increasing."<sup>32</sup> Democrats, and the trial lawyers and consumer groups who support them, suggest that a \$250,000 cap is too restrictive and would inhibit malpractice victims' right to sue. As an alternative to the Republican bill, some Senate Democrats favor a measure that would offer tax credits to doctors to offset the increasingly high cost of malpractice insurance and would strip insurance companies of their exemption to federal antitrust lawsuits.<sup>33</sup>

## END NOTES

- 1 Rand Institute for Civil Justice, *Jury Verdict Trends: Why Are They Important?*, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 (Aug. 1, 2002).
- 2 *Id.*
- 3 Gary Bagin, *Medical Malpractice Verdict and Settlement Study Released*, Jury Verdict Research News Release (Mar. 22, 2002).
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## VIII. Conclusion

Regardless of whether a federally-mandated cap on damages will resolve the very real problems outlined in this article, an undeniable and alarming fact remains: skyrocketing medical malpractice awards have had a direct, and in some cases devastating, effect on the quality and availability of healthcare in the United States. Look for this issue to play a sure role in the 2004 election campaign and beyond.

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