# HERE A CRISIS, THERE A CRISIS

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N.B.: This fractional is about the "medical malpractice crisis" as it has been used to hype "tort reform." In editing this I note that I made several statements about what "the law" is. Most of these are general statements for this is not a place for the explanation of the nuances of medical malpractice litigation. Moreover, these general statements are reflections of Pennsylvania law as this is the law that I practice and know best. The specifics of Pennsylvania law, like the law of any state, can be idiosyncratic or markedly different from the law in another specific jurisdiction. This is less true for sweeping principals such as a definition of "negligence" than it is for specific cases or the nuts and bolts of how courts work. But be aware that these differences do exist and do not be too surprised if, for example, your read here that a defendant was found 25% negligent and one of your local attorneys tells you that the law does not permit such a finding. Pennsylvania does; your state may not.

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One of the ironies of the celebration of the 200th anniversary of the Constitution is that it comes at a time when a large segment of the population is hysterically clamoring for a surrender of a basic right guaranteed in that document. Brandishing a sheaf of yellowed newspaper clippings and endlessly citing misleading statistics, people have convinced the American public that the medical system is in a crisis and, unless they give up the right to have innocent victims compensated for injuries inflicted upon them, Dire Things Will Happen. For a while you could not turn on a television set without someone moaning about the Big Bucks the insurance companies pay out in frivolous medical malpractice cases.

I do not believe that to be the case. It is my belief that the "malpractice crisis" is an event created by the insurance companies who are financially less profitable than before for reasons unrelated to litigation and that segment of the medical profession that does not believe that its judgment should be questioned under any circumstance. You may believe differently. Certainly it is true that the number of medical malpractice cases (and, incidentally, product liability cases) is increasing while most other litigation is stable. It is also true that insurance companies are scrambling financially due to a drop in interest rates. These factors, to you, may represent a "crisis." Be that as it may, you should realize that the arguments presented to show that the problem is more significant than an

increase in the number of claims made simply lack credibility. In scientific inquiry the study design -- the means of gathering statistics and the use to which they are to be put -- is vital to the credibility of any study. The data used to buttress the arguments of the insurance industry is so misleading when used in support of "tort reform" as to be deliberately dishonest and inherently uncredible.

The statistic used by the insurance companies and the other proponents of "tort reform" is the "average verdict." I have never heard another one used. The average verdict, however, is not a measure of what the insurance company must pay out. It measures "exposure" or what their maximum liability might be. It is reached by taking an average of all verdicts in cases where there is a recovery by a plaintiff. That sounds good. It ain't. It is designed to measure the maximum risk to which the insurance company may be exposed in an individual claim. It therefore disregards three factors very relevant to this discussion. First, it considers only cases that the insurance company loses. Second, it does not consider any post-trial changes in the verdict. Third, it does not reflect the actual amount paid by the insurance company.

To understand this statistic you must understand how an insurance company works when a claim is made against it. To protect an insured against whom a claim is made from default by the carrier, an insurance company is required by law to place on "reserve" an amount of money equal to the potential "exposure" they have as result of a claim when the claim is first made. Since a verdict is not limited to the amount of coverage a physician has (in fact, it is even improper to tell a jury that there is insurance) and the insurance company, under certain conditions, can be compelled to pay an amount in excess of the limit of policy coverage, the amount on reserve must reflect the total possible exposure. Exposure must be considered on an individual basis not an aggregate one. Insurance companies, therefore, cannot establish a reserve fund based on average payout.

It may come as a surprise to some of you but defense verdicts (i.e. the doctor wins) are common in medical malpractice cases. In practice the cases that go to trial are, for the most part, ones where there is a real question of fact that can be seriously disputed. One one recent study it was found that approximately one third of all medical malpractice trials result in a defense verdict. An insurance company does not know in advance whether they will win or lose and must set up a reserve fund for every claim. Thus cases which the insurance company wins are ignored in verdict averages but the number of claims for which reserve funds are established are not.

Let me give you an example with real numbers. I work as an independent contractor for a firm that litigates medical malpractice cases for an insurance company. In 1987 they have tried seven cases to verdict. Six resulted in defense verdicts; one resulted in a plaintiff's verdict of $6,000,000.00. What is the average verdict obtained against this firm as cited by the insurance company to change the tort system? The average verdict in the seven cases is $6,000,000.00. If that statistic is presented

without an explanation most people will think that in those seven cases the insurance company has paid out $42,000,000.00 even though the payout is a fraction of that sum.

Let us even go a step further. The case lost by my neighbors was actually a case against three defendants only one of which was represented by the insurance company. The actual verdict found their defendant 25% negligent and they are legally responsible for only 25% of the claim or $1,500,000.00. Does this affect the average? No, it doesn't. Exposure is measured by the total verdict which could have gone against that single insured. The average verdict for the seven cases remains $6,000,000.00. Although this is an exagerated example, the overstatement of the size of verdicts by this statistic is quite large. It gets even worse.

The second reflected inaccuracy in these figures is that they do not take into account anything that happens after trial. For a lawyer the verdict, especially a large one, is not the end of a case but the middle. After the trial the trial judge himself may consider evaluate the verdict and, while he cannot increase it, he can cut it down in size or throw it out entirely. So can an appeal court. Moreover post-trial motions and appeals take time and money. Cases can be and are settled at this point for a sum far less than the verdict. That is what they are trying to do in the Texaco-Pennzoil case right now.

Let us return to the $6,000,000.00 verdict I referred to above. The case was fought because it was felt that the other defendants were negligent and that their negligence was unforseeable by the original doctor. A jury can, if it finds that there was intervening, superceding negligence that could not be foreseen, find in favor of a defendant even if he is negligent. Unfortunately the Pennsylvania pattern jury instructions forbid a judge from explaining this to a jury. The jury which brought in the verdict that the doctor was 25% negligent never knew they had this option. The case has been appealed on several grounds, including this. If the appelate courts rectify this obvious analomy and rule that the jury must be told of this defense where facts are available to establish it, the verdict against the doctor will be thrown out. Does this affect the verdict statistic? No, it doesn't. An appeal does not affect possible exposure. Even though no valid verdict will have been brought in against a defendant of theirs, the average verdict in the seven cases they tried remains $6,000,000.00.

Let us even take this a step further. The actual insurance policy was for $1,000,000.00. An excess verdict can be recovered against the insurance company only where it is shown that the company acted in bad faith. They cannot be held to have acted in bad faith where they believed there was a valid defense. There was one in this case. Whatever the appeals court decides the it is probable that the plaintiff will get no more than $1,000,000.00 from this insurance company. Tactically this is a good time to settle. In effect the insurance company will go to the plaintiff and say something like "Look, we have a good chance of winning the appeal and even if we don't this is so important it's going to the Supreme Court. Even if you win it's a couple of years down the road and there is no bad faith so

you won't get excess or delay damages. The big bucks are against the other defendants who don't have a strong appeal. Our auditors will be happy if we clip a bit off the policy limits. How about taking $900,000.00 right now for our share." A lot of cases on appeal are settled in exactly this way. Does this affect the verdict average? Have you been reading this? Such a settlement does not affect the general possiblity of a large verdict in the next claim. The average verdict in the seven cases is still $6,000,000.00.

The real question how much do these two possible scenarios distort the statistics; are these scenarios academic hairsplitting or do they reflect the real world. There are no studies of which I am aware that deal with cases settled while appeals are pending. It happens and it is not rare; more than that I cannot say. This first scenario is a different matter. There is an excellent recent study by the Rand Corporation on changes after verdict by courts. It examined about 800 verdicts in Chicago and San Francisco. The gross findings of the study were that the average payout rate was 71% of the jury verdict.

This is not the whole story revealed by the study, however. The study divided verdicts into those below $100,000.00, those between $100,000.00 and $1,000,000.00, and those over $1,000,000.00. The higher the verdict, the study found, the more likely it is to be reduced. Verdicts under $100,000.00 were paid off at 93% of the verdict; verdicts of over $1,000,000.00 were paid off at a rate of 68%. This is still not the entire story. The reduction in payout of medical malpractice verdicts was higher than of products liability verdicts (67% payout vs. 91% payout). Go a bit further: malpractice verdicts and products liability verdicts are, by their nature, going to be larger than other cases (malpractice cases require expert witnesses and have more expensive trials. While a lawyer can make a good living from $5,000.00 automobile accident cases, it is economically unfeasible to take small malpractice cases. At Krimsky, et al., it was not considered economically sound to take either a medical malpractice or products liability case where the expected recovery is less than $50,000.00) and, hence, more likely to be reduced. Finally the study took place in two jurisdictions where the courts can increase a verdict; in fact, they did in 5% of the cases studied. This is possible, however, in only a minority of jurisdictions so the final figure found by the study is a bit biased in favor of higher verdicts. The bottom line of the study is that in large medical malpractice award by the jury the chances are that less than 60% will ever be paid to the plaintiff.

The final inaccuracy is that verdict averages do not reflect the amount of money actually paid by insurance companies from their own funds. The big factor here is time and the reserve fund. When money is placed in the reserve fund it is not buried under the rock of Gibralter; it is invested. Investments yield returns. The $6,000,000.00 verdict listed above had a fund of $5,000,000.00 attached to reserve when the case was initially evaluated. That was three years ago. It will be two more years before the appeals run their course. If the verdict is reversed that will add additional years to the course of the case. It is readily apparent that the return on the investment will cover even a maximum recovery of the verdict

rendered against the defendant in this case without touching the funds put on reserve. While this is not true in all cases, this return on investment reduces the actual payout from company funds in a substantial proportion of medical malpractice cases. The more likely a case is to go to litigation or appeal the longer the fund wl1 be in existance and the greater the portion paid by the return. Medical malpractice cases are more likely to go to litigation and appeal than other types of cases.

A portion of any recovery is, therefore, not paid by the insurance company's actual funds but from a return on the investment of their funds. When interest rates are high -- as they were ten years ago -- an insurance company can actually be very profitable while taking in less in premiums then paying out in claims. This is especially true with medical malpractice insurance where most claims are not resolved until after litigation is commenced. (It is also obvious that when interest rates drop, less of the claims are paid from investments and it's time to start jacking up rates and screaming "tort reform") This reduction is not reflected in verdict averages even though it can represent a substantial portion of the claims actually paid.

Obviously verdict averages are very useful in setting up reserve funds. Just as obviously they are absolutely worthless when used for other purposes. Yet proponents of "tort reform" cite them with a straight face and defend them vigorously. And as soon as these misleading statistics are attested to as a valid measure of what is going on a sheaf of newspaper clippings is trotted out to demonstrate how silly the courts really are. I have seen some silly things in courtrooms. Indeed I have seen some very silly things in courtrooms. I have seen sillier things in newspapers.

Take one example that was publicized nationally. Supposedly a jury in Philadelphia awarded a plaintiff $1,000,000.00 because a myelogram ruined her psychic powers. This story was widely reported, cited in support of tort reform on national television, and the subject of a scathing editorial in The Wall Street Journal. Did it ever happen? Well, something like it happened.

A women did indeed sue a hospital in Philadelphia for medical malpractice in giving her a myelogram. The fact situation was that before the myelogram was given she told the doctors that she was allergic to the material injected during such a study. There is, in fact, a rate varying between 1:5000 and 1:25,000 for such allergic reactions depending on the medium used. There are also a lot of hysterical kooks who claim such a reaction because they have heard horror stories about myelograms (my father, who has done more myelograms than anyone else in the world, tells me that this claim is made to him weekly). The proper medical practice is test for allergy and, when the results are known, either use another medium or tell the patient that he/she is a kook. The hospital did not test for allergy and the patient was not just a kook. She had a classic histamine reaction during which she stopped breathing for a short time. In short there was a cause of action for medical malpractice substantial enough to go to a jury.

In her claims for damages (which, otherwise, were quite modest) the plaintiff did claim she had lost her psychic powers. After hearing the evidence the trial judge ruled that this claim was frivolous and instructed to jury to ignore it. They didn't. They brought in a verdict of $1,000,000.00. The astonished trial judge heard post trial motions and threw out the verdict shortly after it was rendered.

Clearly what happened here is hardly an argument for "tort reform" just as the improper methodology used by the hospital is not an argument for discontinuing the use of myelograms. Indeed it provides an effective argument against "tort reform." An error was made: a jury disregarded their instructions. The system, noting an error had been made, promptly corrected that error on its own. There is little more that can be asked of any system than what occured in that case; I wish I could say it works that well in all cases. Yet the proponents of "tort reform" distorted this case past recognition and hyped it into a national "scandal." In so doing they disregarded the fact that there was an underlying meritorious claim, ignored the system's corrective action, and deceptively allowed people to believe that the courts approved of the travesty. There are probably some of you who even believe that that verdict was paid.

An irony of the debate is that these arguments have been made in part by a profession which lays claim to a scientific methodology. If a competent physician were confronted with a stack of newspaper clippings proporting to establish that a diet of yogurt and eggplant is a sure cure for cancer, he would sneer at it. And rightly so. If he was presented with "proof" that blacks are less intelligent than whites in the form of a statistic that fewer blacks than whites obtain Ph.D.s, he would lecture that person about the proper use of statistics. He would be correct. But given fast-talking insurance executives using the same techniques to fabricate a crisis they ask no questions but join instantly in the clamor for restrictions.

The current proposed "reforms," stripped of their rhetorical pretensions, eliminate the right of victims of medical malpractice to sue for compensation for their injuries. There may be, in fact, arguments in favor of such drastic action. If so, they have yet to be made. The arguments that have been made are based on verdict averages aand are so duplicitious that they can be credbile only to the uninformed. Before you take them seriously you should consider this. There are four medical malpractice firms now doing business in Pennsylvania. Right now they are engaged in cut-throat competition to get more business. Do you really think they would be doing so if the business was, as they claim, a losing proposition? Do you believe in the Easter Bunny, too?

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