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Article

***9** TORT REFORM AND THE MEDICAL LIABILITY INSURANCE CRISIS IN MISSISSIPPI: DIAGNOSING THE DISEASE AND PRESCRIBING A REMEDY

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Medical insurance liability premiums have risen substantially in many states during the past year [FN1] and Mississippi is included in these states. [FN2] The matter is a serious one, having potentially important consequences for Mississippi's health care system. In response, the Governor of Mississippi called an Extraordinary Session of the Legislature that after much debate and conflicting evidence passed an Act to Amend Section 11-11-3 of the MISSISSIPPI CODE OF 1972. The Act was signed by the Governor and went into effect on January 1, 2003.

The Act provides a number of prescriptions for the medical malpractice crisis. One is that any civil actions must be commenced in the county in which the defendant(s) are found or in the county where the cause of action occurred. [FN3] Another section [FN4] of the Act incorporates a wide number of health care providers who are employed by the University of Mississippi Health Care Center or its affiliated practice sites under the Mississippi Torts Claims Act. [FN5] The Act also addresses and modifies the joint and several liability rule, [FN6] sets statutory limits on the filing of claims [FN7] and requires plaintiffs' attorneys to certify that they have consulted with at least one qualified expert regarding the likelihood of negligence alleged in the claim. [FN8] The Act also caps non-economic damages. [FN9] Claims filed before July 1, 2011, are capped at $500,000; [FN10] after July 1, 2011, the cap is set at $750,000; [FN11] and after July 1, 2017, the cap is set at $1 million. [FN12] Finally, the Act makes provisions for a joint underwriting medical malpractice association for medical personnel who are unable to obtain liability insurance. [FN13]

***10** This article does not propose to deal with the elements of the Act per se. Rather, it examines data used to support the claim that the tort system is primarily responsible for the insurance liability crisis in Mississippi. This article does not address claims of a general litigious climate in Mississippi or concerns about mass tort actions in product liability cases. [FN14] It does, however, take especial note of the fact that in newspaper coverage and legislative debate the movement for medical malpractice tort reform has been intimately linked to what is perceived as a broader tort problem affecting the business climate. [FN15]

I. POTENTIAL CAUSES OF THE CRISIS: PUBLIC DEBATE

Strikingly, in Mississippi almost all of the attention in the public arena has focused on the tort system as the cause of the current crisis. [FN16] Physicians and medical insurers have blamed the tort system as the cause and asserted that the solution is medical malpractice tort reform. [FN17] An important source of this focus appears to have been the doctors' insurers. As reported in the Clarion Ledger, [FN18] in testimony before a joint legislative committee on tort reform, Gerald Wages of Reciprocal of America, a medical liability insurance company, is quoted as saying: "Our ability to continue writing insurance in Mississippi is seriously threatened at this point." He is paraphrased as claiming that "the number of claims are rising higher than premiums collected, causing severe losses for the company and ***11** affecting the cost of insurance for hospitals and doctors." The article continued that in response to a question by a senator about a solution to the crisis, Wages said, "I think what it's going to take is meaningful changes to our civil justice system to get insurance companies to return to the state and start writing insurance." [FN19] Another newspaper article reported that "[d]octors said they were told by many companies that the skyrocketing premiums were the result of large jury verdicts being handed down against physicians in Mississippi." [FN20] Still another article reported that "[t]he Medical Assurance Company of Mississippi, a doctor-owned insurance group,

has notified doctors that it will raise its rates by forty-five percent due, in part, to the state's legal climate, according to a letter sent to policy holders." [FN21]

Largely lost in the public debate are alternative hypotheses about the cause of the crisis. One of these is that the fault lies in whole or in part with insurers themselves. This view argues that during the 1990s insurance companies underpriced their policies in competition with one another and also made major actuarial miscalculation of the expected indemnities that would have to be paid. In addition, experts have drawn attention to the fact that insurers invest their reserves in financial markets, and these investments provide income that produces profitability. When the financial markets turned steeply downward in 2001 this income disappeared. As a consequence of the underpricing, the actuarial miscalculations and the market downturn, the cash reserves of insurers are too low, forcing them to drastically raise rates in order to maintain solvency and produce profits for their shareholders.

The most recent proponents of an alternative explanation is a nationwide alliance of consumer groups, Americans for Insurance Reform. [FN22] The Alliance asserts that its data show that the amounts that medical insurers have paid out over the last thirty years is directly correlated with rates of medical inflation, but the amounts of the premiums charged to doctors have fluctuated with an insurer's economic cycle. The Alliance argues that the current crisis, as well as insurance crises in the mid-1970s and mid-1980s, are the sole causes of the current crisis.

***12** A third explanation accepts that the insurer business cycle is implicated in the liability crisis, [FN23] but asserts that the dynamics are more complex than the Americans for Insurance Reform explanation, particularly the assertion that the cause is just bad business judgment. There are a number of factors to consider beyond aggressive insurer competition in the 1990s that resulted in premiums that were too low, although this cannot be dismissed as contributing to the crisis. Insurers have been faced with increasing costs of payments, partly due to increasing costs of medical care that affect economic losses of injured patients and perhaps the tort system as well. Some for-profit liability insurers are having difficulty competing with specialty insurers and "insurance at cost" insurers. It is possible that increased claims result from more injuries, regardless of whether those injuries are ultimately a result of negligence. The long tail between injury and payout and the additional fact that experience-ratings of physicians are not feasible makes it difficult to predict the amounts needed for reserves. [FN24] These and other factors, such as eroded profits from invested reserves in the stock market, have simply made the cost of doing business as insurers either clearly unprofitable or extremely risky.

Indeed, it is possible that all three of these theories can be correct. The curious fact, however, is that, as mentioned above, the latter two explanations appear to have been given only minimal attention or actually dismissed as false. [FN25] The public debate, as reflected in Mississippi newspaper coverage, has instead focused entirely on the tort system. Critics of the tort system claim that large and undeserved jury awards have increased exponentially, resulting in a financial drain on the insurer reserves. [FN26] Equally important, it is alleged, the large awards have an immediate secondary effect fostering frivolous litigation by plaintiff contingency fee lawyers hoping to hit a "jackpot" case, and also frightening defendants and insurers into unwarranted settlements out of fear of "runaway" juries. [FN27]

A first observation is that the medical malpractice tort reform movement in Mississippi has been tied to concerns about other areas of tort litigation that allegedly affects the business environment. A recent article in the National Law Journal was headlined "Mississippi becomes Mecca for tort suits." [FN28] There does ***13** appear to be anecdotal evidence that a substantial number of claims have been filed in Mississippi involving multiple plaintiffs against defendants that are corporations headquartered in other states, such as drug companies. Some substantial awards have been rendered in these cases. We do not take a position on whether there is validity to this claim. We do, however, raise a legitimate question about whether, even if that general claim about the Mississippi tort system is proven to be true, it applies to medical malpractice cases. [FN29] In most medical malpractice cases in state courts both plaintiffs and defendants are citizens of the same state, often residing in the same community. [FN30] One not infrequent problem for plaintiffs in rural communities is finding jurors who are themselves or whose family members are not patients of the medical provider. [FN31] This is quite a different matter than lawsuits against large corporations headquartered outside of Mississippi.

Next, consider several of the empirical claims about medical malpractice as examples. One Mississippi newspaper article on the insurance crisis quoted an official of Medical Assurance Company of Mississippi (MACM), the physician-owned medical liability insurer that insures about 2500 doctors, or between 65 and 70 percent of Mississippi doctors, [FN32] "More than

1000 lawsuits against physicians are pending in Mississippi state courts ...." [FN33] This assertion tells us very little. Is this number more or less than in previous years, and, if so, to what extent does it correlate with population growth or the number of practicing doctors, or the number of doctors covered by the medical liability insurer? Are the lawsuits warranted because malpractice has increased in recent years? Are the majority of the claims frivolous suits, or non-meritorious suits, or are the claims valid? How do we separate non- meritorious lawsuits from meritorious ones? [FN34] In short, this assertion about the number of claims lacks foundation without comparative data bearing on the incidence of malpractice today and in the past, and about the merits of the claims.

***14** In fact there are some data bearing on the possibility that the increase in the number of claims may be associated, at least to some degree, with the number of insured doctors. An official of The Medical Assurance Corporation of Mississippi (MACM) is reported as stating in September, 2002, that MACM has "insured 559 new doctors since St. Paul announced its decision to abandon the Mississippi market," [FN35] and "We've processed a total of some 608 new applications and over the last two years we've turned down 208." [FN36] This last statement indicates an increase of at least 400 insured doctors in two years, or an approximate increase of 19 percent in the total number of doctors insured by MACM. [FN37] MACM's 2001 Annual Report states that in 2001 the increase in the number of insured doctors was 7.5 percent, "the largest net growth since 1997." [FN38] These sets of figures appear somewhat discrepant, but all are consistent with a hypothesis that an increase in claims is at least partially associated with an increase in the number of insured physicians. [FN39] In fairness, the 2001 Annual Report also reported that the paid indemnity in 2001 increased by 64 percent over 2000, and over the five-year period from 1997 through 2001 the costs to defend law suits increased by 31 percent. [FN40] On the other hand, the 2001 Annual Report also indicates small increases in the amount of member equity from 1998 through 2001 and a net profit each of these years, although net income in 2001 was only $1,443,113, down from $7,076,908 in 2000. [FN41] The importance of these various figures for purposes of this article are only to indicate that deeper investigation of claims by the medical insurers is required. They should not be accepted uncritically.

Another newspaper article, referring to an American Medical Association report, stated that "the average jury award doubled to $1 million in the six years ending in 2000, according to Jury Verdict Research, a private database used by lawyers, insurers and doctors." [FN42] The article went on to state that "[i]n the first six months of this year, there were five jury awards in Mississippi and the average verdict was $5.6 million, according to the state's medical association." [FN43]

With regard to the first claim, social scientists have shown that the data provided by Jury Verdict Research is far from representative of the universe of cases that are decided by juries, tending to report only the larger awards to the exclusion ***15** of lesser awards and cases in which the defendant prevails. [FN44] Moreover, its methods of data collection do not take into account the possibility that changes in litigation rates affect the types of cases that go to trial, so we cannot tell if juries are deciding cases differently today than they were some years ago or whether they are deciding different cases. [FN45] One consequence of these facts is that the AMA's claim of doubling of jury awards cannot be trusted on its own merits. Moreover, the data on which the doubling claim is made is based upon a mix of cases, not just malpractice cases, [FN46] raising the issue already discussed above as to whether medical malpractice should be lumped together with product liability, contract disputes and a host of other lawsuits. In this context, the second claim of five Mississippi jury awards with an average verdict of $5.6 million does not indicate if these awards were medical malpractice awards or awards in some other type of case, or a combination of both. Indeed, MACM's 2000 Annual Report stated that, "[e]leven lawsuits reached trial in the year 2000," and "[t]here was one jury verdict for the plaintiff, which is now on appeal." The 2001 Annual Report stated only that there were "several multi- million dollar verdicts where the jury seemed to be swayed more by sympathy than by the medical facts." [FN49] However, the 2001 MACM Monitor reported that in 2001 there were a total of 17 trials, with the plaintiff prevailing in three of them resulting in the following damage awards: $2.6 million, $1.5 million and $65,000. [FN50] Doctors prevailed in the other 14 trials, a defense win rate of 82 percent. Of course, these figures may under-represent the total of trials and verdicts since it is not clear from the report if the statistics represent all Mississippi trials or just defendants insured by MACM.

In short, the claims that have been used to help justify medical malpractice tort reform in Mississippi leave some very serious unanswered questions. The claims may be correct, but it is important to take a closer look at data used by advocates of medical malpractice tort reform and other sources of data.

II. A PARTIAL MAP OF MISSISSIPPI MEDICAL MALPRACTICE LITIGATION

Toward the end of ascertaining some perspective on medical malpractice litigation in Mississippi we relied on three sources of data: a report by ***16** Mississippians for Economic Progress; our own commissioned research by Jury Verdict Research; and our personal search of Lexis and Westlaw for appellate cases involving medical malpractice. In addition, a fourth source was a confidential memo provided to us by a trial lawyer that was a survey of trial lawyers regarding medical malpractice cases. [FN51] It was used to provide additional insight regarding cases reported in the other sources, but proved to be of only minimal assistance.

A. Report of Mississippians for Economic Progress

The Mississippians for Economic Progress provided us with a copy of their list of fifty-two jury verdicts over $1 million that have been rendered by Mississippi juries between 1995 and the first part of 2002. [FN52] That list was compiled by the Perryman Group. That list includes seven medical malpractice verdicts, or an average of just under one case per year. The cases on that list, the year of the verdict and the reported amount of the verdict are as follows:
Gibbs v. King's Daughter Hospital: $2 million [FN53]
Gibson v. Medical Foundation Inc.: $3.6 million [FN54]
Miller v. McHenry: $2.6 million [FN55]
Marshall v. Methodist Healthcare: $6.2 million [FN56]
Mckenzie v. McComb Orthopedic Clinic: $1.5 million [FN57]
Johnston v. Jackson HMA, Inc.: $23 million [FN58]
Moore v. N. Mississippi Medical Center: $5 million [FN59]

Missing from these data are specifics about the nature of the injury and the alleged economic and non-economic losses against which the verdict can be compared. We searched Westlaw and Lexis for additional information about these cases, but none of them were in those databases. However, we found information about Gibbs v. King's Daughter Hospital in our own commissioned search through Jury Verdict Research. In Gibbs the plaintiff alleged that she suffered a bleeding arterial venous malformation, resulting in partial paralysis after the physician and hospital defendants failed to properly examine and diagnose her condition. [FN60] In 1991, the plaintiff had presented to the hospital emergency room on two occasions with complaints of severe back pain and leg numbness, whereupon she was given pain killers. [FN61] Later she went to a different emergency clinic, but she was told to go back to the hospital. [FN62] Several days later she awoke ***17** with paralyzed legs. [FN63] The consequence was "incomplete paraplegia." [FN64] A settlement was reached with the second emergency room and attending physician for failure to treat her as a patient and for delaying the eventual surgery that was required. [FN65] However, the allegations against the remaining defendants do not allow us to independently determine if either the appropriate negligence decision or award was reached. Nevertheless, the Jury Verdict Research synopsis makes both decisions plausible.

The National Law Journal reported the basic outline of Johnston v. Jackson HMA, Inc. [FN66] Central Mississippi Medical Center was sued by the parents of an infant and were awarded $23 million in compensatory damages on October 5, 2001. According to the allegation, the hospital and a nurse failed to deliver the child immediately, despite a dramatic deceleration in her heart rate prior to birth, resulting in a substantial loss of oxygen to the infant's brain. The child, three at the time of the verdict, cannot walk, talk or feed herself. The plaintiffs also alleged that certain medical records were altered or destroyed in order to conceal the amount of time between the heart rate drop and the caesarean delivery. They asked for punitive damages, but the trial court ruled that punitives were not warranted. The case was eventually settled for an unreported fraction of the $23 million. [FN67]

B. The JVR Research

The Jury Verdict Research search, commissioned by the first author of this article, yielded only thirteen medical malpractice cases from 1995 through July 1, 2002. [FN68] Seven of the thirteen involved defense verdicts. There were four jury verdicts in favor of the plaintiff, one "judgment for the plaintiff," and one non-trial settlement. The only new discovery in this limited dataset is a case in federal court. In Tanner, pro ami v. Westbrook [FN69] the Northern District of Mississippi in 1996 a jury awarded $3.2 million in the case of a female infant who suffered acute severe metabolic acidosis during birth. The plaintiff alleged that the defendants delayed diagnosing and treating the child's condition resulting in cerebral palsy. Although a federal case, the jury was chosen from citizens of Mississippi and bears on the propensity of its jurors to render million dollar

awards. In Glover v. Todd [FN70] (1996) a plaintiff received a $200,000 jury verdict after suffering a severed bile duct while undergoing aparoscopic surgery. In McDonald v. Gordon [FN71] (1997) a female suffered severe sinus problems and permanent pain of the face and nose. She received a $225,000 award. In Crow v. United States [FN72] ***18** (1998) (in federal court with a bench trial) the plaintiff received $538,698 after sustaining mild brain injury, kidney dysfunction and vertigo after the jury found substandard care. The other verdict was in Gibbs v. Kings Daughter Hospital, [FN73] discussed above. The settlement came in Wilson v. United States. [FN74] A man undergoing oral surgery for a benign lesion in his jaw suffered hypoxia and ended up in a vegetative state. The federal court settlement was for $4,650,000.

The allegations of injuries suffered in the seven defense verdicts involved severe nerve damage to the mouth; permanent pain and weakness to the shoulder; the death of a minor child; breast cancer that had spread to the lymph nodes and spine; a burn to a leg; a fractured humereus and wrongful death of an 18- year-old-female from a pulmonary embolism.

C. The Lexis/Westlaw Searches

Lexis and Westlaw files in the libraries for Mississippi cases was searched for the term "medical malpractice" from January 1, 1995, through September 30, 2002. The databases do not contain trial court outcomes so the cases uncovered involve only trial court decisions that were appealed. The search yielded 109 hits that are summarized in Table 1. A complete summary of the cases is attached to this article as Appendix A.

Table 1

Summary of Medical Malpractice Appeals 1995- September 2002

Jury Verdicts for the Plaintiff Affirmed	4	Jury Verdicts for the Defendant Affirmed	16
Jury Verdicts for the Plaintiff Reversed	2	Jury Verdicts for the Defendant Reversed	7
Summary Judgements for the Defendant Reversed	22	Summary Judgement for the Defendant Affirmed	32
Directed Verdicts for the Defendant Reversed	2	Bench Trial in Favor of Defendant Affirmed	1
Motions to Dismiss Affirmed	5	Motions to Dismiss Reversed	6
Interlocutory Appeals in Favor of the Plaintiff	8	Interlocutory Appeals in Favor of the Defendant	2
Number of Appeals in Favor of	49	Number of Appeals in Favor of	60

Plaintiff	Defendant
Appeals Dismissed	2

some cases were counted twice due to the fact that defendants in the same case were treated differently.

***19** Table 1 shows that forty-nine of the appeals were decided in favor of the plaintiff and sixty were decided for the defendant. As is clear from Table 1 these actions by appeals courts involve matters relating to the disposition of cases other than jury verdicts per se, but they do provide a profile of important matters related to the litigation of medical malpractice cases in Mississippi.

The data reported in Appendix A indicate four jury awards, only one of which was reported in our other sources. All were affirmed by the Supreme Court of Mississippi or an appeals court. The judgment of $225,000 in McDonald v. Gordon [FN75] for sinus and facial pain was upheld by the Supreme Court. The data also indicated a $1.5 million jury award to the plaintiff in a wrongful death claim. A $9 million jury award was upheld in Bradshaw v. Brandon HMA, Inc. [FN76] in a claim based on a patient suffering severe brain damage. In the final case, Locke v. Purdon [FN77] (July 6, 1999), a $650,000 award was upheld for a patient suffering an injury caused by a broken wire during a percutaneous coronary atherectomy, but we could find no details about the specific injury.

Appendix A also indicates that the Supreme Court of Mississippi reversed a $1 million verdict on statute of limitation grounds in Jones v. Rawson [FN78] and a $1.7 million verdict in Washington v. Sullivan [FN79] of May 21, 1998, on the grounds that the physicians were employees of the state. The plaintiffs had suffered complications from tubual ligation surgery.

The remainder of the data in Appendix A need not be reviewed in detail here. However, as summarized in Table 1, there were seven jury verdicts for the defendant that were reversed. Whether these cases will be retried or settled cannot be known at this time. However, these data are useful in suggesting that Mississippi juries do not automatically decide in favor of plaintiffs even when some alleged injuries result in death. Adkins v. Sanders [FN80] involved the death of a woman allegedly due to complications from caesarian surgery. Bickham ex rel. Estate Bickham v. Grant [FN81] also involved the death of woman due to a physician's alleged failure to diagnosis her with endometriosis. In McCaffrey v. Puckett [FN82] the plaintiff was suffering from a herniated disc that he claimed was caused during a spinal manipulation. Davis v. Powell [FN83] was a wrongful death action brought by the mother of a deceased baby. Thornton v. Sanders [FN84] involved the amputation of a diabetics' leg due to alleged negligent surgical procedures. Coltharp v. Carnesale [FN85] involved a shoulder injury that the plaintiff claimed was not timely diagnosed. Finally, in Day v. Morrison, [FN86] the plaintiff alleged injuries arising from complications of a penile implant procedure.

***20** Table 1 and Appendix A also show that both trial courts and appeals courts in Mississippi are serving as active gate keepers in deciding which medical malpractice claims are factually or legally meritorious. They upheld more summary judgments for the defendant than for the plaintiff (32 versus 22). A summary judgment for the defendant that is upheld means, of course that the defendant prevailed; while a summary judgment against the plaintiff that is reversed usually means only that plaintiff may have an opportunity to present his or her case to a jury and a chance to prevail.

D. Implications of this Incomplete Profile

These data provide no information on claims, settlements and post-trial adjustments. Little information is given about defense wins at trial. The data under-represent, possibly by a substantial amount, the total number of cases won by plaintiffs at trial since, with a couple of exceptions, they tell us nothing about plaintiff awards below $1 million. It is an incomplete profile.

Nevertheless, the proponents of tort reform based their claims on large jury awards, and the profile allows us to draw a

number of tentative conclusions on that issue. The first is that no evidence has been produced to show that there are large numbers of Mississippi medical malpractice suits involving million dollar awards. In fact million dollar awards averaged slightly more than one per year since 1995, or if we consider cases decided from January, 2000, through June, 2002, the average is 2.4 per year (6 cases/2.5 years). [FN87] What these data do not tell us is whether these awards were justified or whether they will stand up through the appeals process or will be settled for a lesser amount than the verdict. In a few of the cases we learned that some large awards were viewed as reasonable after Supreme Court review. In one case, Brandon HMA, Inc. v. Bradshaw, [FN88] the Mississippi Supreme Court sustained a $9 million award, suggesting that it was a reasonable amount for a patient suffering severe brain damage. In another case, Wilson v. United States [FN89] involving a patient in a vegetative state, the parties seemed to agree that $4.65 million was an acceptable settlement.

In short, on the face of the available data, there is no evidence that Mississippi juries are out of control in medical malpractice cases or, as we will suggest below, that they are different from juries in other parts of the country. Of course jury awards reflect only those cases that get to trial. They do not reflect settlements that may be driven by fear of large and unreasonable jury awards, a claim that is often made by physicians and their liability insurers. [FN90] To shed light on these various issues, we review what has been learned in studies of medical malpractice litigation over the past several decades.

***21** III. GENERAL RESEARCH FINDINGS ABOUT MEDICAL MALPRACTICE LITIGATION

A. The Incidence and Costs of Medical Negligence

Sometimes explicitly, but more often tacitly, debates about medical malpractice contain the arguments that medical negligence is relatively infrequent and that injuries and the consequent financial losses of patients are exaggerated. Strikingly, in the current discussion about the rise in medical liability insurance premiums in Mississippi and elsewhere, pro-tort- reform advocates do not address the question of seriously injured patients. The incidence of injuries and their costs to patients have implications for both jury awards and claims about frivolous litigation. Thus, these matters need to be addressed before turning to a discussion of jury behavior and the litigation process.

1. Medical Injury Due to Negligence Is Not Infrequent.

A Harvard study of medical negligence examined hospital records of 31,000 patients and concluded that one out of every one hundred patients admitted to a hospital had an actionable legal claim based on negligence. [FN91] Some of these patients' injuries were minor or transient, but fourteen percent of the time the adverse event resulted in death and ten percent of the time the incident resulted in hospitalization for more than six months, with seven of those ten persons suffering a permanent disability. Subsequent research involving the states of Utah and Colorado found rates of negligent adverse events that were similar to the New York findings. [FN92] The Institute of Medicine produced a report that relies on these data and cites other data consistent with the above findings. [FN93] These findings are consistent with earlier research reported by Danzon who estimated that on average one in twenty hospital patients incurred an injury due to medical error. [FN94] A still earlier study in California estimated that compensable injuries due to negligence occurred in one in 125 hospitalizations. [FN95]

Lori Andrews conducted another study in a large Chicago area hospital that strongly suggests that the Harvard study may have seriously underestimated the incidence of injuries. [FN96] While the Harvard data were based on hospital records, Andrews studied actual incidence of negligent events in hospital wards and discovered that many injuries were not recorded on the records as required, especially when the main person responsible for the error was a senior physician.

***22** Thus, research findings from highly regarded sources show that medical negligence not only occurs, but it occurs at a substantial rate. As a result of the medical negligence a substantial number of patients die, while others are seriously injured. It is noteworthy to observe one other finding from the Harvard study which also interviewed a sample of physicians. The authors of the report concluded that while many of the doctors conceded that patients are injured by medical accidents, they would not readily concede that negligence was the cause. [FN97]

2. Injuries Have High Costs.

One only needs to consider an example or two in order to appreciate the cost of a serious injury. A woman in her forties, divorced, with two dependent children, enters a hospital with a high fever. A feeding tube was improperly inserted into her

lung, necessitating partial removal of the lung. In the recovery room bleeding from the surgery was discovered and she was rushed back to the operating room where another tube was improperly inserted in her other lung. The woman is paralyzed from the chest down and will have to spend the rest of her life in a nursing home. What will be the cost of her medical care and lost income for the next three or more decades? [FN98] As a second example, what is the cost associated with a child born blind, deaf, retarded and requiring constant attention to avoid bed sores and other illnesses, especially when experts predict that she could live for decades? In a country without universal health care the medical costs must often be born by the plaintiff's family. And in the case of a patient who was the major wage earner, who is to replace that lost income?

More than a dozen years ago Sloan and van Wert, two economists, conducted systematic assessments of economic losses in a sample of Florida cases involving claims of medical negligence occurring as result of birth-related and emergency room incidents. [FN99] Even though they offered the caution that their assessment procedures probably underestimated losses, [FN100] severely injured parties' losses ranged between $1.4 and $1.6 million dollars in 1989. If we adjust for inflation using the consumer price index, [FN101] these figures in 2001 dollars translate to $2.0 million and $2.3 million, respectively. The losses of persons who survived an emergency room incident were estimated at $1.3 million, [FN102] or $1.86 million in 2001 dollars. For persons who died in an emergency room incident, the loss to their survivors was estimated at $0.5 million, [FN103] or $0.7 million in today's dollars.

***23** Sloan and van Wert cautioned that a major share of past losses was covered by collateral sources. [FN104] However, even if future medical expenses, including nursing care, are covered by collateral sources, and this is not guaranteed by any means, loss of income and other expenses, such as care giving by family members resulting in diminished income from those family members, will not be covered. Sloan and van Wert's estimates, moreover, did not consider non-economic losses, such as pain and suffering or loss of consortium. Very significantly their estimates of loss also did not consider the transaction costs that plaintiffs incurred to receive any trial award or settlement before trial, a topic that will be discussed in more detail below.

The Harvard study of medical malpractice in New York also documented the high costs of negligent injuries. [FN105]

B. The Incidence of Claims Is Much Lower Than the Incidence of Injuries

One of the most striking findings of the Harvard medical malpractice project is that eight times as many patients suffered from a medical negligence injury as filed a claim. [FN106] Put in different words, for every eight patients who suffered a negligent injury, one claim was filed. [FN107] Claims were also filed in cases in which the research team of health care providers concluded that there was no negligence. However, the ratio of invalid claims to valid claims that went unfiled was approximately one to seven. [FN108] That is, for every doctor or hospital charged with an invalid claim there were seven valid claims that were not filed. [FN109] Danzon's earlier research, using a data base from California, concluded that "at most one in 10 negligent injuries resulted in a claim." [FN110] Similarly, Andrews study of errors in the hospital that she studied found that of 1047 patients experiencing a medical error only 13 patients made a claim. [FN111]

Sloan and Hsieh studied medical malpractice claims in Florida involving injuries during childbirth that resulted in death or permanent injury. [FN112] The families of the child were interviewed and the data were supplemented by an independent medical review of the records by physicians. Cases in which the physicians concluded that negligence was involved were much more likely to become ***24** claims. More serious injuries were more likely to become claims than less serious injuries. Those authors concluded that of 963 women giving birth in Florida in 1987 who were surveyed 220 had experienced a negative birth outcome. The high incidence rate was a result of intentional over-sampling for purposes of the study. Of the 220 cases 23 persons sought legal advice but not a single suit was filed in any of the 220 cases. The researchers observed that injuries associated with greater severity were more likely to cause the parties to make a claim, but:
The lack of claimants among the 220 women whose babies had serious birth injuries and the failure of the 23 women to obtain [legal] representation runs counter to the "conventional wisdom" that patients sue when they obtain less than a "perfect result." In fact, lawyers filter out many potential claims that injury victims might lose. [FN113]

C. Juries Typically Tend to Be Competent and Conservative.

1. Jurors Tend to View Plaintiff Claims With Skepticism.

The assertion that jurors decide cases out of sympathy for injured plaintiffs rather than the legal merits of the case is one of the most persistent claims of opponents of civil jury trial. Such claims have been made about malpractice juries in the United States since at least the nineteenth century. [FN115] Yet, research finds no support for these claims.

In interviews with jurors who decided medical malpractice cases, Vidmar found that jurors viewed the plaintiffs' claims with great skepticism. [FN116] Their attitudes were expressed in two main themes: first, too many people want to get something for nothing; and second, most doctors try to do a good job and should not be blamed for a simple human misjudgment. Indeed, these attitudes were even expressed in some cases in which jurors decided for the plaintiff. Jurors who decided against the doctor sometimes expressed concern that the verdict might have an adverse effect on the doctor's practice. This does not mean that in every case jurors held these views. Sometimes, evidence of the doctor's behavior caused jurors to be angry about the negligence. However, even in these latter cases, the interviews indicated that the jurors had initially approached the case with open-minds.

Professor Valerie Hans interviewed jurors who decided tort cases, including medical malpractice, as part of a larger study of corporate defendants and obtained similar findings. [FN117] She concluded that
[j]urors often penalized plaintiffs who did not meet high standards of credibility and behavior, including those who did not act or appear as injured as they claimed, those who did not appear deserving due to their already high standard ***25** of living, those with pre-existing medical conditions, and those who did not do enough to help themselves recover from their injuries. [FN118]

2. Jury Verdicts Tend to Be Consistent With Judgments of Neutral Medical Experts.

An important study of malpractice litigation compared jury verdicts with the judgments of doctors hired by an insurance company to review the medical records and provide a neutral assessment of whether they believed medical personnel had acted negligently. [FN119] These decisions were not discoverable by the plaintiff. The research team compared these neutral ratings with jury verdicts for those cases that went to trial. Jury verdicts tended to be consistent with these neutral assessments. Moreover, the study also found that judgments for the plaintiff were not correlated with the severity of the plaintiff's injury. These results, therefore, also contradict the "plaintiff sympathy" claim.

3. Judges Agree With Jury Verdicts.

Several studies have asked trial judges to make independent assessments of who should have prevailed in civil cases over which they have presided. [FN120] These judge's assessments have been compared to the jury verdict in that case. Although the research has not specifically focused on malpractice juries, the findings indicate that there was high agreement between the judge and the jury. Moreover, in instances when the judges would have decided differently than the jury, the judges usually indicated that nevertheless, the jury could reasonably have come to a different conclusion from the trial evidence.

Other studies have asked judges to draw on their professional experience with juries and give a general opinion about jury decisions. [FN121] The overwhelming number of these judges from around the country give the civil jury high marks for competence, diligence and seriousness even for complex cases. These studies are thus consistent with the other studies that compared the judge's opinion with specific jury verdicts.

4. There Is No Evidence of a "Deep Pockets" Effect.

Closely related to the claim of jury sympathy is a claim that juries are more likely to render verdicts against doctors, hospitals and corporations, not because they are seen as negligent, but only because the jurors perceive them as having the ability to pay large awards-- a so-called "deep pockets" effect. A number of ***26** research studies have assessed this hypothesis and find no support for it. This general finding includes experiments that specifically tested for a "deep pockets" effect in medical malpractice cases. [FN123]

5. There is Little Evidence To Support a Claim that Juries Are "Overwhelmed" By Plaintiff's Experts.

An often repeated charge is that jurors are overwhelmed by experts, particularly the plaintiff experts, in medical malpractice cases. [FN124] This confusion and deference to experts, it is alleged, plays to the advantage of plaintiffs, because the jury

then simply defers to the plaintiffs' experts and allows juror sympathies for the plaintiffs to be the basis of their verdict. There is some fuzzy logic in this claim because it ignores the fact that defendants also call experts who offer opinions contrary to the plaintiffs' experts. Moreover, the defendants typically call more experts than the plaintiffs. However, more important is the fact that research into civil jury behavior refutes these allegations.

Diamond and Vidmar recently reviewed studies of jury responses to experts. [FN125] The findings indicate that (a) jurors do not "automatically defer to experts," and (b) jurors have a basic understanding of the evidence in malpractice and other cases. [FN126] They understand the adversary system through opening statements and judicial instructions. Moreover, they carefully scrutinize and compare the testimony of opposing experts.

Through a series of case studies reported in Medical Malpractice and the American Jury, Vidmar documented the processes by which jurors reached their verdicts. Interviews with jurors indicated that, in general, through collective discussions about the evidence, they came to have an essential understanding of the case and the issues in the dispute. [FN127] While jurors may not have backgrounds in medicine, they become educated about the basic issues during the trial through the processes of expert testimony from both sides and from cross- examination. Deliberation and collective wisdom produces an understanding that results in a justifiable verdict.

6. Jury Damage Awards Tend to Correlate With Severity of Injury.

The claim that jury damage awards frequently go excessively beyond those losses must be addressed, especially when general damages that are frequently, but inappropriately, called "pain and suffering" are included in the award. Various research studies have also examined these claims. [FN128]

***27** In 1992 and in 1996, the Office of Justice Programs of the U.S. Department of Justice undertook a systematic survey of verdicts in state courts in the seventy-five largest counties in the nation. [FN129] Of the 10,596 tort, contract and real property rights cases tried before a jury in the 1996 sample, there were 1,112 medical malpractice cases, and plaintiffs prevailed in twenty-three percent, or slightly more than in one of five. The median final award when plaintiffs prevailed was $254,000; but 22.1 percent of cases equaled or exceeded $1 million. [FN131] Punitive damages were awarded in only three cases, 1.1 percent, when plaintiffs prevailed. [FN132]

The plaintiff win rates in the BJS study are generally consistent with fourteen earlier studies of win rates in medical malpractice jury trials, although there was some variation between jurisdictions. [FN133]

Bovbjerg, Sloan and Blumstein found that the magnitude of jury awards in a sample of medical malpractice tort cases was positively correlated with the severity of the plaintiffs' injuries, except that injuries resulting in death tended to result in awards substantially lower than injuries resulting in severe permanent injury, such as quadriplegia. [FN134] Blumberg, et al., concluded that there was considerable variability within categories of injury severity. Later research by Sloan and van Wert, [FN135] discussed earlier, provides a plausible explanation for this variability, namely that economic losses vary considerably within each level of injury severity. For instance, the economic loss for a quadriplegic, who is forty years old with a yearly income of $200,000 and a family of three young children, would ordinarily be much greater than an identical quadriplegic who is retired, widowed, seventy- five years old, without dependents, and whose annual income never exceeded $35,000.

In a study of medical malpractice verdicts in New York, Florida and California, Vidmar, Gross and Rose also found that jury awards of prevailing plaintiffs in malpractice cases were correlated with the severity of the injury. [FN136] Daniels and Martin found a similar pattern. [FN137]

7. The "Pain and Suffering" Component of Awards Is Mis-characterized and Mis- understood.

The general damages portion of damage awards is often labeled "pain and suffering," but this is an inappropriate label, because some of these elements of damages involve injuries that are not strictly "pain and suffering." Rather, they ***28** include such injuries as severe disfigurement, emotional distress, mental anguish, loss of parental guidance or parental companionship, loss of enjoyment of life and loss of consortium. [FN138]

These damages share with strict "pain and suffering" the characteristic that precise dollar figures cannot be attached to them, but they nonetheless have potential economic consequences. In medical malpractice cases, for example, negligent administration of a drug that makes the patient permanently psychotic would be a severe trauma, that aside from medication and health care can have many other economic consequences, including diminished job performance. A sexual assault by a doctor while undergoing medical care could result in severe emotional stress that would prevent the injured person from performing her job at the same level as before or cause her to be unable to work at all.

Vidmar's interviews with jurors who decided medical malpractice cases indicated that jurors considered the effects of disfigurement and emotional trauma on chances for promotion, the likelihood of a marriage dissolving as a result of the injury, and the economic consequences as well as strict pain and suffering. [FN139] Jury instructions usually caution jurors that they should not award compensation for general damages when the same element is included in special damages, but these lines of demarcation are often indistinct. In research comparing juror decisions with those that would have been rendered by judges and senior lawyers, Vidmar found that juror reasoning on damages was similar to that of the professionals. [FN141]

The important point to be made about these findings is that using the label "pain and suffering" as a generic term for general damages greatly oversimplifies the complex human judgments that case law and statutory law ask juries to make. Moreover, aside from the policy issue of whether and how much plaintiffs should be awarded for their pain and suffering, the label obscures real economic injuries contained in general damages.

Vidmar, Gross and Rose's examination of medical malpractice verdicts in New York, Florida and California found that the general damages portion of awards was generally positively related to the severity of the plaintiff's injury. That is, the more serious the injury the higher the mean and median levels of general damages. The exception to this trend was that in cases involving death the mean and median awards tended to be substantially lower than in cases of very serious permanent disabilities. While these verdict statistics provide no information on the actual basis of the jury's decisions, there is no evidence that they result from caprice or unwarranted sympathy. [FN142]

***29** D. Outlier Awards Do Not Withstand Post-Verdict Adjustments

Despite the substantial evidence indicating that ordinarily juries are conservative in deciding damages in malpractice cases, there are clearly exceptions resulting in what are commonly labeled "outlier awards." [FN143]

There are a number of reasons for outlier awards. [FN144] One is that in some instances doctors contest the case solely on liability and do not call experts on damages or contest damages at all. The plaintiff, on the other hand, presents the losses through experts who give a "Cadillac" version of the plaintiff's losses. The jury is instructed by the judge to decide damages solely on the evidence, and the jurors have only the plaintiff's figures with which to work. Despite reservations, the jurors follow the judge's instructions and accept the plaintiff's suggested award because that is the only evidence that they have. In other instances, the defense may call an economist who offers an alternative to the plaintiff's damages evidence; the floor may be quite high due to the seriousness of the injury; and the jury uses this as a floor from which damages are estimated. Additionally, in some jurisdictions, juries are presented with the gross amount of a loss or of a life care plan that is not reduced to present value.

The final explanation casts the jury in a less favorable light. Specifically, because of the evidence brought out at trial, the jurors become so outraged at the negligence of the defendant that they essentially violate the judge's instructions and appear to add a punitive component into their compensatory award. [FN145] These outlier awards are not as frequent as portrayed in the mass media, but they unquestionably do occur. Nevertheless, research evidence indicates that these verdicts seldom withstand post-verdict proceedings.

In their study of malpractice verdicts in New York, Florida and California, Vidmar, Gross and Rose asked what happened to the outlier awards. [FN147] There are four main processes by which awards are reduced: the judge reduces the award verdict through the legal mechanism of remittitur or j.n.o.v.; the case is appealed and a higher court reduces the award; the parties set a high- low agreement; [FN148] ***30** and, most common of all, the plaintiff and the defendant negotiate a post-trial settlement that is less than the jury verdict.

Merritt and Barry conducted a detailed examination of jury awards in Franklin County (Columbus) Ohio. [FN149] They documented a number of post-trial reductions in jury awards. For example, a $12 million award was reduced by the trial judge to $8.5 million, and a $3 million award was reduced by an appeals court to $1.5 million. Other large awards settled for lesser amounts as well.

Plaintiffs are willing to negotiate lesser amounts for three main reasons. First, many plaintiffs need or want the money immediately rather than waiting for the years it will take to get the money if the case is appealed. Second, there is always a risk that an appeals court will reduce the award or even overturn the verdict. Third, most of these outlier awards greatly exceed the medical provider's insurance coverage. While plaintiffs and their lawyers could attempt to foreclose on the defendant's assets, they are extremely reluctant to do so. [FN150] Therefore, the plaintiff negotiates a settlement around the defendant's insurance coverage. High-low agreements, too, usually take cognizance of the upper limits of insurance coverage. [FN151]

Vidmar, et al., were able to empirically explore the fate of many of the outlier awards. They found that some of the largest malpractice awards in New York that made national headlines ultimately resulted in settlements between five and ten percent of the original jury verdict. In Pennsylvania between 1999 and 2001 there were 22 verdicts that exceeded $5 million that were settled. [FN152] In the end the plaintiffs received final settlements that ranged between 6% and 46 percent of the verdict, but averaged to 22 percent of the verdict. In general, the higher the verdict the smaller percentage that the plaintiff ultimately received. The findings about these reductions are consistent with earlier research by Broder, [FN153] by researchers at the RAND Corporation, [FN154] and by researchers at the National Center for State Courts. [FN155]

E. Injured Claimants Often Receive Less Than Actual Economic Losses

Debates about medical malpractice reform often ignore the lives and financial effects of injuries suffered by plaintiffs. In the study of birth and emergency room injury awards, Sloan and his colleagues compared the plaintiffs' economic losses to the amount actually received. [FN156] On average, in cases that were settled, as well as cases that went to trial, plaintiffs received only fifty-two percent of their losses. Plaintiffs that went to trial did better than plaintiffs in settled cases, ***31** ultimately receiving twenty-two percent more than their estimated economic losses. [FN157]

A focus on awards does not take into consideration the fact that expert fees and related litigation expenses involved in medical malpractice litigation often run into tens of thousands of dollars, sometimes into several hundreds of thousands. In addition the lawyer typically receives between thirty to forty percent of the award for litigating and assuming the risks of litigating the case. [FN158] Additionally, the awards are often subject to liens or subrogation by Medicare or a state Medicaid provider. [FN159] These various expenses are deducted from the gross amount received.

After conducting their detailed analyses, Sloan, et al., concluded that
few claimants received payments far above the mean for their stage of resolution categories. The fact that even plaintiffs who were successful at verdict received payments only moderately higher than economic loss contradicts the notion that courts make very excessive awards in medical malpractice cases. [FN160]

F. Frivolous Litigation

Claims about frivolous litigation are based in part on findings that, in medical malpractice cases, doctors prevail in approximately seventy percent of the cases that go to trial and that as many as fifty percent of cases filed against health care providers ultimately result in no payment to the plaintiff. [FN161] Additionally, opponents of medical malpractice litigation argue that jury verdicts, especially those involving larger awards, encourage lawyers to file lawsuits in cases that are not meritorious because doctors and liability insurers will settle claims, not out of merit, but rather out of fear of a large and unjustified award if the case goes before a jury. These claims are not supported by research evidence.

1. Most Injured Patients Do Not Sue.

The Harvard study, discussed earlier, found that of every eight injured patients only one claim was filed. [FN162] After carefully examining the Harvard statistics, Professor Michael Saks drew attention to the fact that for every claim filed that eventually turned out to be without legal merit, seven valid claims were not filed. [FN163]

One reason that claims are not made is that the patient does not discover that the injury was negligent. Another is that many patients are forgiving of the doctor, ***32** especially if attempts are made to apologize and rectify the problem; many patients just accept their injury as part of the fate that befell them in seeking medical help in the first place. [FN164]

Another important reason for failure to sue that is often overlooked in medical malpractice debates is that injured patients cannot find a lawyer to take their case. Sloan and his colleagues interviewed patients who prevailed in their lawsuits against doctors. [FN165] One of the most striking findings was that a number of these eventually successful plaintiffs had contacted a number of lawyers before they found one who would take their case. [FN166] Contrary to the view that plaintiff lawyers will take any claim that "walks in the door," research on the intake practices of plaintiff lawyers indicates that, in fact, the lawyers carefully screen their cases and tend to err on the side of not taking cases. [FN167] Indeed, plaintiff lawyers screen out as many as nine of ten alleged tort claims without further discussion with the claimant. The simple reason behind this behavior is that, because they are working on a contingency fee basis, lawyers cannot afford to waste their time on cases that have no chance of success. The problems are even greater in medical malpractice cases because of the extremely high cost of hiring experts as well as the large amount of time that must be devoted to litigating the case. In Vidmar's research on medical malpractice, most plaintiff lawyers that were interviewed indicated that they could not consider taking a medical malpractice case unless the potential damages exceeded $100,000, and unless they estimate that the chances of proving negligence are substantial. Some cases require many thousands of dollars of up-front money by the lawyer. [FN168]

There are two important implications to these findings about plaintiff lawyers' screening of potential cases. The first is, of course, that some injured persons with legally valid claims do not obtain redress simply because they cannot obtain legal counsel. The second is that medical malpractice cases that do get into the courts tend to be the ones with very serious injuries, involving potentially large damage awards that have a reasonable chance of persuading a jury that medical negligence caused the injury.

2. Liability Insurers Do Not Settle Frivolous Cases.

In interviews with liability insurers that Vidmar undertook, the most consistent theme from them was: "We do not settle frivolous cases!" [FN169] The insurers indicated that there are minor exceptions, but their policy on frivolous cases is based on the belief that if they ever begin to settle cases just to make them go away, their credibility will be destroyed and this will encourage more litigation.

***33** 3. Cases Dropped by Claimants Before Trial are not Necessarily Frivolous.

As discussed in greater detail in Medical Malpractice and the American Jury [FN170] and in Sloan et al., [FN171] despite up-front screening by plaintiff lawyers, there is still a lot of uncertainty about whether negligence has occurred. This can usually only be determined after a law suit is filed, depositions are taken and expert opinions are obtained. As documented in that book, research into the files of liability insurers showed that this is as true of the defense side as it is of the plaintiff side: lawyers for the defendants and their insurers get conflicting opinions as to whether negligence has occurred. Sometimes, after an extensive process of consulting with experts and the taking of depositions, it becomes reasonably apparent that no legal negligence has occurred, or that, in any event, the case is "not winnable" because of the costs that would be entailed in pursuing it. At this juncture, plaintiff lawyers tend to drop the case. In North Carolina nearly forty percent of filed cases were dropped on these grounds. Again, the point to be made is that it makes little economic sense for a plaintiff lawyer to continue to invest time and money in a case that he or she is unlikely to win. It is true that occasionally lawyers misjudge the merits of cases and continue to pursue them, but far more often they are dropped.

Thus, given the fact that both plaintiff and defendant are faced with uncertainty, it is inappropriate to call the vast majority of dropped cases "frivolous." Rather, they should be labeled "non-meritorious" cases in recognition of the fact that both sides took them very seriously at the beginning of the lawsuit.

4. Doctor's High "Win Rates" at Trial Do Not Mean the Lawsuit Was Frivolous.

As discussed earlier, statistics indicate that doctors prevail in about seventy percent of cases that go to trial. Nevertheless, a plaintiff loss at trial is not grounds for concluding that the litigation was "frivolous." [FN172] Cases that go to trial are ones where negligence is uncertain. As discussed above, when pretrial investigation shows that the case is clearly not winnable,

lawsuits tend to be dropped before trial. On the other hand, cases with clear negligence tend to be settled, particularly if the parties can negotiate the amount of damages. Thus, only "close cases" tend to go to trial.

There are a number of explanations, other than non-merit, as to why doctor win rates at trial are so high. [FN173] One reason is that jurors generally tend to be skeptical of plaintiff claims and essentially place a burden on the plaintiff that is greater than the legally appropriate "balance of probabilities" standard. Another is that plaintiffs often have a more difficult time obtaining and hiring the experts, relative to the defense. It is also important to observe that Vidmar's research showed that in many instances, plaintiffs who lost at trial against one doctor, nevertheless obtained settlements from other doctors who had been named in the ***34** lawsuit. [FN174] This suggests that medical negligence had occurred in the case, albeit at trial, the jury did not think that the evidence against the remaining defendant or defendants was sufficient to find liability.

IV. DIAGNOSIS AND REMEDY: IMPLICATIONS OF THE ANALYSES

We must again caution that the data that we have analyzed present an incomplete picture of the medical malpractice tort system in Mississippi. The data are primarily about jury awards over $1 million, although they also provide us with additional information on the gate-keeping and policing actions of Mississippi appellate courts. Jury verdicts are only the tip of the litigation iceberg and cannot tell us much about the mass of claims and settled or dismissed cases. [FN175]

Nevertheless, because the public debate about the current liability insurance crisis has centered primarily around claims of million-dollar jury awards, the data raise important questions. In particular, the data from Mississippians for Economic Progress show only slightly more than one million-dollar-plus-award per year in medical malpractice cases. Combining the seven medical malpractice awards with 44 million-dollar-awards involving breach of contract, product liability and other cases presents a very distorted image of the medical malpractice tort system in Mississippi. Our review of more general research findings about the medical malpractice litigation process suggests that the ramifications of these awards over a million dollars probably have only a minor effect on claiming behavior in Mississippi. To the extent that the passage of the Act depended on the claim of runaway juries in medical malpractice cases, it would seem to be an improper diagnosis of the medical liability insurance problem.

The problem of a misperception of problems in tort reform is not new. Sanders and Joyce have written about 1980s tort reform in Texas, and documented how legislative decisions were made without an adequate empirical underpinning. [FN176] Daniels and Martin [FN177] and Galanter [FN178] have documented how anecdotes and misuses of data have led to misperceptions of a tort crisis. Indeed, there is a growing body of research findings demonstrating the extent to which mass ***35** media and tort reform groups have presented an image of an "out of control" tort system that is often at great variance with empirical reality. [FN179]

The important point to be made here is that if the diagnosis is wrong, a serious question can be raised as to whether the Act will serve to remedy the problem, particularly since so little attention has been given to the other explanations for the crisis. To what extent will a $500,000 cap on pain and suffering affect medical negligence litigation if there are so few awards over $1 million? [FN180] To what extent will the requirement that trials be held in the venue where the incident allegedly occurred affect the overall rate of litigation or the size of awards if most trials occur in those venues anyway? To what extent will requiring plaintiff lawyers to certify that they have consulted with a qualified expert if that has already been their practice? To be sure, incorporating more health care providers under the Mississippi Tort Claims Act may reduce the size of some awards to a limited number of plaintiffs and the provision for a joint underwriting medical malpractice association should relieve pressure on doctors who cannot otherwise obtain insurance. The central problem, however, is that these are probably not sufficient to cause much of a ripple in the tort system.

To be sure, beliefs matter, even unfounded beliefs. To the extent that the passage of the Act, and perhaps more general tort reform measures in Mississippi, sends a symbolic message that an attempt has been made to change tort law, thereby improving the perceived business climate, medical liability insurers might be encouraged to reenter the Mississippi market place. However, if the cause of the present crisis is not the tort system, and our analysis suggests there is no evidence to show it is a primary cause, then this mis- diagnosis and the legislated remedies set forth in the Act will have little effect on the availability of affordable health providers' liability premiums.

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[FN1]. See 2002 Medical Malpractice Rate Survey at http:// www.medicalliabilitymonitor.com/highlights.html.

[FN2]. See, e.g., Julie Goodman, Premiums Rise By 45%: Insurance Group's Hike Comes as Doctors Seek Relief, CLARION LEDGER, September 22, 2002, at 1A.

[FN3]. Medical Malpractice Tort Reform Act, ch. 2, sec. 2, § 11-11-3 (2002) (to be codified at Miss. Code § 11-11-3).

[FN4]. Medical Malpractice Tort Reform Act, ch. 2, sec. 2, § 11-46- 1(c) (2002) (to be codified at Miss. Code § 11-46-1 (c)).

[FN5]. Medical Malpractice Tort Reform Act, ch.2, sec. 2, 2002 Miss. Laws 3rd Ex. Sess. § 13 (2002).

[FN6]. Id. § 4. Under the previous statute, physicians were held joint and severally liable only to the extent to allow the plaintiff to recover 50% of the award. Under the amendment the trier of fact shall assign percentages of fault to all defendants, regardless of immunity. For non economic damages, a defendant's liability is several only. For economic damages, if a defendant is found to be less than 30% at fault, such defendant's liability is several only. If a defendant is found to be 30% at fault or more, such defendant's liability is joint and several only to the extent to allow the plaintiff to recover 50% of his recoverable damages.

[FN7]. Id. § 5.

[FN8]. Id. § 6.

[FN9]. Id. § 7.

[FN10]. Id. § 7(2)(a)(i).

[FN11]. Id. § 7(2)(a)(ii).

[FN12]. Id. § 7(2)(a)(iii).

[FN13]. Id. § 8 (Act also prevents certain medical providers from being sued for prescribing FDA approved drugs, reduces the time for commencing a medical malpractice action against an institution for the aged or infirm, and requires a 60 day notice for medical malpractice cases. The Act also requires that medical records remain the property of the institutions for the aged or infirm and provides immunity for medical personnel providing volunteer services to school programs.)

[FN14]. See, e.g., Mark Ballard, Mississippi Becomes Mecca for Tort Suits, THE NAT'L L. J., April 30, 2001, at A1. The authors take no position on whether these claims are valid.

[FN15]. See, e.g., Jimmie E. Gates, Lawyers Willing To Talk About Tort Compromise, CLARION LEDGER, June 26, 2002, A1 ("Some doctors say skyrocketing Medical malpractice insurance premiums brought on by the states legal climate are making it difficult to continue to practice, especially in rural areas. Also, business leaders say large jury verdicts are driving up the cost of doing business in the state.").
Patrice Sawyer, Lobbies Hold Up Civil Tort Fixes, CLARION LEDGER, September 23, 2002, at 6B ("Doctors and Business Owners have said they are exposed to frivolous claims and large jury verdicts and want pain and suffering damages limited.").
Editorial, Tort Reform II, CLARION LEDGER, October 9, 2002, at 6A ("With the Legislature's approval of medical malpractice insurance tort reform, the debate shifts to general tort reform relating to business and industry in Mississippi. For most Mississippians, the cost and availability of health care ... is the most apparent and dramatic effect of 'jackpot' justice that tort reform expects to solve. But the need of reform for business is just as real and has far-reaching effects, regarding the state's ability to attract and retain industry and jobs and what types of businesses locate here.").
Tom Pittman, Tort Reform Advocates, Opponents Need to Ask the Right Questions, YAZOO HERALD, June 22, 2002, at

10a1 ("Business and medical representatives contended that making lawsuits less costly would be the answer.").
Theresa Agovino, Soaring Insurance Costs Force Doctors Out, CLARION LEDGER, July 20, 2002, at 3C ("Mississippi is one of twelve states where rising premiums, tied to awards by state juries in malpractice cases, are creating a crisis, according to the American Medical Association.").
See Julie Goodman and Patrice Sawyer, Session Agenda Expanded, CLARION LEDGER, October 9, 2002, at 1A ("Dr. John Cook, head of the Mississippi State Medical Association, lauded [Governor] Musgrove and lawmakers for creating legislation he said would stabilize insurance rates for doctors. Cook said he planned to continue monitoring the negotiations on general reform issues impacting the business community.").

[FN16]. See, e.g., Coast Physician Says Litigious Climate Cost Him His Insurance, CLARION LEDGER, May 30, 2002, 8B ("The doctors said Mississippi laws encourage lawsuits, and tort reform isn't happening.").

[FN17]. Michael Freedman, The Tort Mess: It's Even Worse than You Think, FORBES MAGAZINE, May 13, 2002, at 91 (article begins with a reference to a Mississippi case and then extends the discussion to allegations of a nationwide problem).

[FN18]. Patrice Sawyer, Insurers: Claims Causing Losses, CLARION LEDGER, June 22, 2002, at 1B.

[FN19]. Id.

[FN20]. Pamela Berry, Doctors Turning to Last Resort, CLARION LEDGER, July 21, 2002, at 10A.

[FN21]. Julie Goodman, Premiums Rise by 45%: Insurance Group's Hike Comes As Doctors Seek Relief, CLARION LEDGER, September 22, 2002, 1A (italics on "in part" are added by the authors to draw attention to the fact that the policy letter does appear to concede that other factors may be at least partly responsible for the rate hike).

[FN22]. AMERICANS FOR INSURANCE REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES (undated report 2002); see also Rachel Zimmerman and Christopher Oster, Insurers' Price Wars Contributed to Doctors Facing Savings Costs, WALL STREET JOURNAL, June 24, 2002 (organization is not the first to claim that insurers rather than the tort system is the cause of sudden rises in medical liability insurance rates). See, e.g., Randall Bovbjerg, Legislation on Medical Malpractice: Further Developments and A Report Card, 22 U.C. DAVIS L. REV., 499, 504-06 (1989); J. Robert Hunter, MEDICAL MALPRACTICE INSURANCE: A REPORT OF THE INSURANCE GROUP OF THE CONSUMER FEDERATION OF AMERICA (March, 1999); Vasanthakumar Bhat, MEDICAL MALPRACTICE: A COMPREHENSIVE ANALYSIS (2001), at Chapter 10, page 221; GOVERNMENT ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: MEDICAL MALPRACTICE: SIX STATE CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISING DESPITE REFORMS (December, 1986).

[FN23]. See, e.g., Stephen Zuckerman et al., Effects of Tort Reform and Other Factors on Medical Malpractice Premiums, 27 INQUIRY 167 (1990) ("interest rates, a factor outside the insurers' control, affect the premiums required to insure against a given future loss." at 181); Chad Karls, "Medical Malpractice: A Market in Transition," Address at the Fall 2002 Midwestern Actuarial Forum Meeting, Madison, Wisconsin (September 26, 2002). Additional discussion of these various matters is contained in the transcript of the November 4, 2002, symposium of the [Florida] Governor's Select Task Force on Health Care Professional Liability Insurance, University of Miami Medical Center, Miami, Florida, particularly the presentation of James Hurley from the firm of Tillinghast-Towers Perrin beginning at page 5 of the transcript.

[FN24]. See Michelle Mello and Troyen Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform, 80 TEX. L. REV. 1595, 1616- 23 (2002). Both for-profit and non-profit insurers need to develop reserves to meet statutory obligations and, for the latter, profits.

[FN25]. See, e.g., Patrice Sawyer, supra note 18.

[FN26]. See citations in notes 14 through 16; see also NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY, Chapter 1 (1995) (review of similar claims made before the current crisis).

[FN27]. See Is "Due Process" Afforded to Business Defendants in Mississippi- an Analysis at

http://www.litigationfairness.org/pdf/DueProcessSummary.pdf, and generally, NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY (1995) at Chapter 1.

[FN28]. Mark Ballard, Mississippi Becomes a Mecca for Tort Suits, THE NATIONAL LAW JOURNAL, April 30, 2001, at A1.

[FN29]. MISSISSIPPIANS FOR ECONOMIC PROGRESS, infra note 53 (describing 52 jury awards over $1 million).

[FN30]. See Thomas A. Eaton and Susette M. Talarico, A Profile of Tort Litigation in Georgia and Reflections on Tort Reform, 30 GA. L. REV. 627, 686 (1996) (made a similar observation) (We recognize that the increasing tendency of medical practices to consolidate or otherwise become part of a corporate entity can mean that one or more of the named defendants may be a health care provider with headquarters that are not in the local community. If the corporate headquarters reside in the state it is possible that the lawsuit may be filed in a venue that is not the venue in which either plaintiff or defendant reside.).

[FN31]. See Herrington v. Spell, 692 So.2d 93 (Miss. 1997) (Mississippi Supreme Court ruled that the trial court in a medical malpractice case did not commit reversible error when it refused to excuse for cause a juror who had been a patient of the defendant physician and another had been the patient of a party witness. The Supreme Court ruled that the plaintiff should have exercised her peremptory challenges to eliminate the two jurors. A bench conference was held on the issue, but was not retained as part of the record. Since the appellant has the duty to preserve the record, the Court refused to rule on the issue.).

[FN32]. See Sid Salter, MACM: "The 800-lb. Gorilla," CLARION LEDGER, September 1, 2002, http://www.clarionledger.com/news/0209/01/lperse.html.

[FN33]. Bob Pittman, Malpractice Insurance Requests Flood Company, Tort Reform Urged, THE PETAL NEWS, [undated] quoting Mike Hope, President of Medical Assurance Company of Mississippi.

[FN34]. See generally Michael Saks, Medical Malpractice: Facing Real Problems and Finding Real Solutions, 35 WM. MARY L. REV. 693 (1994); Michael Saks, Do We Really Know Anything About the Behavior of the Tort System And Why Not?, 140 U. OF PA. L. REV. 1147 (1992); Neil Vidmar, Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System, 28 SUFFOLK U. L. REV. 1205 (1994).

[FN35]. Salter, supra note 32.

[FN36]. Salter, supra note 32.

[FN37]. The Salter interview, id., reports this official as saying that the total number of currently insured doctors is approximately 2500, indicating that two years previously MACM insured approximately 2100 doctors. If correct, these figures indicate that the 400 new doctors represent a 19% (400/2100) increase in liability policies.

[FN38]. See MEDICAL ASSURANCE COMPANY OF MISSISSIPPI, 2001 ANNUAL REPORT at 11.

[FN39]. While correlations do not prove causality, the figures are consistent with what we would expect from the hypothesis.

[FN40]. MEDICAL ASSURANCE COMPANY OF MISSISSIPPI, 2001 ANNUAL REPORT at 8.

[FN41]. Id. at 4.

[FN42]. Theresa Agovino, Soaring Insurance Costs Force Doctors Out: Doctors Expected to Leave States With Rising Premiums, CLARION LEDGER, July 20, 2002; Freedman, FORBES supra note 17, at 91; report, Jury Verdict Research (concluding that the average jury award in medical malpractice cases has tripled since 1994).

[FN43]. Agovino, supra note 42.

[FN44]. See A. Russell Localio, Variations on $962,258: The Misuse of Data on Medical Malpractice, 13 LAW, MED. AND HEALTH CARE 126 (1985); Stephen Daniels and Joanne Martin, Jury Verdicts and the "Crisis" in Civil Justice, 11 JUST. SYS. J. 321, 328 (1986). Zimmerman and Oster, supra note 22, reports a spokesperson for Jury Verdict Research as recently admitting that its malpractice data base "has large gaps", that it collects award information unsystematically and cannot estimate how many cases it misses. Moreover, its database excludes trial victories by doctors and hospitals. Despite these very major flaws in data collection that JVR admits, the spokesperson claimed that the database accurately reflects trends.

[FN45]. See Vidmar, Pap and Circumstance, supra note 34.

[FN46]. Dr. Richard Anderson, representing the Doctor's Company from California, and who has spoken around the country during the present crisis, committed the same error in his presentation at the November 4, 2002, symposium of the [Florida] Governor's Select Task Force on Health Care Professional Liability Insurance, University of Miami Medical Center, Miami, Florida, see transcript of that proceeding at pages 39-41.

[FN47]. MEDICAL ASSURANCE COMPANY OF MISSISSIPPI, 2000 ANNUAL REPORT at 6.

[FN48]. Id. at 6.

[FN49]. Id. at 8.

[FN50]. The MACM Monitor, July 2002, at 3-4.

[FN51]. A copy of this list is on file with the authors.

[FN52]. A copy of this list is on file with the authors. The data was compiled by the Perryman group.

[FN53]. Gibbs, 93-CV-12967 (Miss. Cir. Ct. Washington County 1996).

[FN54]. Gibson, 99-CV-0608 (Miss. Cir. Ct. Lauderdale County 2001).

[FN55]. Miller, 98-000449-CIV (Miss. Cir. Ct. Hinds County 2001).

[FN56]. Marshall, 99-000984-CIV (Miss. Cir. Ct. Hinds County 2001).

[FN57]. McKenzie, 96-0050-A-B (Miss. Cir. Ct. Pike County 2001).

[FN58]. Johnston, 99-001113-CIV (Miss. Cir. Ct. Hinds County 2001).

[FN59]. Moore, CV00-074(f)1 (Miss. Cir. Ct. Lee County 2002).

[FN60]. Gibbs, 93-CV-12967.

[FN61]. Id.

[FN62]. Id.

[FN63]. Id.

[FN64]. Id.

[FN65]. Id.

[FN66]. Family Awarded $23 million for Birth Injuries, THE NAT'L L. J., November 5, 2001, at B3.

[FN67]. Reported at the Symposium where this article was first presented on November 15, 2002, by a lawyer associated

with the case.

[FN68]. This certainly raises questions about the data collection methods and reliability of Jury Verdict Reports.

[FN69]. See Tanner v. Westbrook, 174 F.3d 542 (5th Cir. 1999).

[FN70]. See Glover v. Todd, 96-7020-S (Miss. Cir. Ct. Adams County 1996).

[FN71]. See Gordon v. McDonald, 743 So. 2d 1029 (Miss. Ct. App. 1999).

[FN72]. See Crow v. United States, 3:96CV731 (S.D. Miss. 1998). The JVR synopsis states only a "judgment."

[FN73]. See Gibbs, 93-CV-12967.

[FN74]. See Wilson v. United States, 3:96CV858 (S.D. Miss.).

[FN75]. See Gordon, 743 So. 2d 1029.

[FN76]. See Brandon HMA, Inc. v. Bradshaw, 809 So. 2d 611 (Miss. 2001).

[FN77]. See Purdon v. Locke, 807 So. 2d 373 (Miss. 2001).

[FN78]. See Rawson v. Jones, 816 So. 2d 367 (Miss. 2001).

[FN79]. See Sullivan v. Washington, 768 So. 2d 881 (Miss. 2000).

[FN80]. 823 So. 2d 550 (Miss. Ct. App. 2002).

[FN81]. 2001 WL 570018 (Miss. Ct. App. May 29, 2001).

[FN82]. 784 So. 2d 197 (Miss. 2001).

[FN83]. 781 So. 2d 912 (Miss. Ct. App. 2000).

[FN84]. 756 So. 2d 15 (Miss. Ct. App. 1999).

[FN85]. 733 So. 2d 780 (Miss. 1999).

[FN86]. 657 So. 2d 808 (Miss. 1995).

[FN87]. In searching newspaper coverage, the authors also found mention of a $12 million judgment obtained "recently" by an out-of-state lawyer "in favor of the parents of a child who was crippled by the effects of a doctor's surgery." However, this assertion was reportedly made in an interview of a Tennessee lawyer who was not involved in the case. The account did not indicate the title of the case, when it occurred, or whether the judgment was a result of a jury trial.

[FN88]. Brandon HMA, Inc., 809 So. 2d 611.

[FN89]. Wilson, 3:96CV858.

[FN90]. See, e.g., VIDMAR, MEDICAL MALPRACTICE, supra note 26.

[FN91]. PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993).

[FN92]. E.J. Thomas et al., Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado, 38 MEDICAL

CARE 261 (2000).

[FN93]. Linda Kohn, Janet Corrigan and Molla Donaldson, eds., To Err Is Human: Building a Safer Health Care System, Institute of Medicine (2000) at http://books.nap.edu/catalog/9728.html?onpi_newsdoc112999. But also see Rodney Hayward, and Timothy Hofer, Estimating Hospital Deaths Due to Medical Errors, 286 JAMA 415 (2001); Clement McDonald et al., Deaths Due to Medical Error Are Exaggerated in Institute of Medicine Report, 284 JAMA 93 (2000); Lucian Leape, Institute of Medicine Medical Error Figures Are Not Exaggerated, 284 JAMA 95 (2000).

[FN94]. PATRICIA DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY (1985) at 20.

[FN95]. CALIFORNIA MEDICAL ASSOCIATION, DONALD MILLS, ED., MEDICAL INSURANCE FEASIBILITY STUDY (1977).

[FN96]. LORI ANDREWS, MEDICAL ERROR AND PATIENT CLAIMING IN A HOSPITAL SETTING (1993).

[FN97]. PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION (1993).

[FN98]. Both of these examples are based on cases that formed part of the data set analyzed in VIDMAR, MEDICAL MALPRACTICE, supra note 26.

[FN99]. Frank Sloan and Stephen van Wert, Costs of Injuries, Chapter 7 in FRANK SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993) at 139, 140.

[FN100]. Id. at 145.

[FN101]. http://www.orst.edu/Dept/pol_sci/fac/sahr/cv2001.pdf. Inflation in medical costs is generally higher than the consumer price index, see http:// rehphome.tripod.com/infbond.html. Thus, conversion by the CPI underestimates economic losses by some unknown degree.

[FN102]. SLOAN, supra note 99, at 140.

[FN103]. SLOAN, supra note 99, at 140.

[FN104]. SLOAN, supra note 99, at 145.

[FN105]. WEILER et al., supra note 91, at ch 5. See also VIDMAR, MEDICAL MALPRACTICE supra note 26, at 249-254; Neil Vidmar, The Unfair Criticism of Medical Malpractice Juries, 76 JUDICATURE 118, 122 (1992); see also Mello & Brennan, supra note 24, at 1620-1623.

[FN106]. Paul Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation and Patient Compensation (1993) at 69-76. This book is based on Report of the Harvard Medical Practice Study to the State of New York, Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation and Patient Compensation (1990).

[FN107]. Weiler, supra note 106, at 70.

[FN108]. Weiler, supra note 106, at 70.

[FN109]. Michael J. Saks, Medical Malpractice: Facing Real Problems and Finding Real Solutions, 35 WM & MARY L. REV. 693, 702-03 (1994) presents one of the clearest expositions of these findings in a review of the Weiler et al. book. In further calculations from the Weiler et al. data Saks points out at 715 that the probability of a health care provider being sued for a negligent injury is .029 whereas the probability of being sued for a non-negligent injury is .0013.

[FN110]. Danzon, supra note 94, at 24.

[FN111]. Andrews, supra note 96, at 12.

[FN112]. Frank Sloan and Chee Hsieh, Injury, Liability, and the Decision to File a Medical Malpractice Claim, 29 LAW & SOCIETY REVIEW 413 (1995).

[FN113]. Id. at 430.

[FN114]. See generally VIDMAR, MEDICAL MALPRACTICE, supra note 26.

[FN115]. See generally KENNETH DEVILLE, MEDICAL MALPRACTICE IN NINETEENTH- CENTURY AMERICA: ORIGINS AND LEGACY (1990).

[FN116]. NEIL VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 169-171.

[FN117]. VALERIE P. HANS, BUSINESS ON TRIAL: the Civl Jury & Corporate Responsibility 79-111 (2000).

[FN118]. Valerie Hans & William Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 LAW AND SOC. REV. 85, 95 (1992).

[FN119]. Taragin et al, The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims, 117 ANNALS OF INTERNAL MED. 780 (1992); Henry Farber & Michelle White, A Comparison of Formal and Informal Dispute Resolution in Medical Malpractice, 23 J. LEGAL STUD. 777 (1994); SLOAN, supra note 99, at Ch 6.

[FN120]. HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY (1966); Larry Heuer & Steven Penrod, Trial Complexity: A Field Investigation of Its Meaning and Effects, 18 LAW & HUM. BEHAV. 29 (1994).

[FN121]. These surveys are reviewed in Amicus Briefs, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (reprinted in 24 LAW & HUM. BEHAV. 387 (2000)).

[FN123]. Neil Vidmar, Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases, 43 DUKE L.J. 217, 224-27 (1993).

[FN124]. See Neil Vidmar, Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data From Medical Malpractice, 43 EMORY L.J. 885, 885-891 (1994); VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 3-8.

[FN125]. Neil Vidmar & Shari Diamond, Juries and Expert Evidence, 66 BROOKLYN L. REV. 1121 (2001).

[FN126]. Id. at 1143, 1140. In addition, see VIDMAR, MEDICAL MALPRACTICE, supra note 26; Amicus Brief, Kumho Tire, supra note 121.

[FN127]. NEIL VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 127-182.

[FN128]. Neil Vidmar, et al, Jury Awards For Medical Malpractice and Post-Verdict Adjustments of Those Awards, 48 DEPAUL L. REV. 265 (1998).

[FN129]. Carol J. DeFrances & Marika F.X. Litras, Civil Trial Cases and Verdicts in Large Counties, 1996, BUREAU OF JUSTICE STATISTICS BULLETIN, NCJ 173426, September 1999 (county in Mississippi was large enough to be included in the study).

[FN130]. Id. at 6, tbl. 5.

[FN131]. Id. at 8, tbl. 7.

[FN132]. Id. at 11, tbl. 10.

[FN133]. See VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 39.

[FN134]. Randall Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering," 83 NW. U. L. REV. 908, 920-23 (1989).

[FN135]. SLOAN, supra note 99.

[FN136]. Vidmar, supra note 128, at 296.

[FN137]. STEPHEN DANIELS AND JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM, 127-129 (1995).

[FN138]. Id. at 275.

[FN139]. Id. at 275; NEIL VIDMAR, MEDICAL MALPRACTICE supra note 26, at 243; see also Neil Vidmar et al., Damage Awards and Juror's Responsibility Ascriptions in Medical Versus Automobile Negiligence Cases, 12 BEHAV. SCI. & L. 149 (1994).

[FN140]. See, e.g., RONALD W. EADES, JURY INSTRUCTIONS ON DAMAGES IN TORT ACTIONS 314 (4th ed. 1993).

[FN141]. VIDMAR, MEDICAL MALPRACTICE, supra note 26, at Ch. 19.

[FN142]. Vidmar, supra note 128, at 296.

[FN143]. Id.; see also Steve Cohen, Malpractice: Behind a $26 -Million Award to a Boy Injured in Surgery, reprinted in VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 95-110.

[FN144]. See VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 260-61.

[FN145]. A case study of one such award and its eventual reduction by the trial judge is reported in VIDMAR, MEDICAL MALPRACTICE supra note 26, at Chs. 9 & 10. Some other probable cases of jury outrage are reported in supra note 128, at 287.

[FN146]. See DeFrances supra note 129; Bailis and Robert MacCoun, Estimating Liability Risks With the Media As Your Guide: A Content Analysis of Media Coverage of Tort Litigation, 20 LAW & HUM. BEHAV. 419 (1999); Michael McCann, et al., Java Jive: Geneaology of a Juridical Icon, 56 U. MIAMI L. REV. 113, 114 (2001).

[FN147]. Vidmar, supra note 128, at 278.

[FN148]. High-low agreements are not uncommon. These occur in some cases in which the plaintiff and defendant cannot close the gap on the amount of a negotiated settlement. They agree to submit the case to the jury under the condition that if the jury verdict falls below a certain amount, or even if there is a defense verdict, the plaintiff will receive a specified amount of money anyway and if the verdict is above a specified amount the defendant will pay no more than the figure agreed to before trial. In this way both parties are protected against "outlier" verdicts that are either give the plaintiff little or nothing or, alternatively, expose the defendant to an award that could severely injure finances. The public and even the court may be unaware of the agreement but such arrangements are legal and serve both parties well. See Neil Vidmar, Juries and Jury Verdicts in Medical Malpractice Cases:Implications for Tort Reform in Pennsylvania, unpublished report, January 28, 2002 (on file with the first author) [hereinafter Vidmar, Juries & Jurt Verdicts].

[FN149]. Deborah Merritt and Kathryn Barry, Is the Tort System in Crisis? New Empirical Evidence, 60 OHIO ST. L.J. 315, 351-55 (1999).

[FN150]. Tom Baker, Blood Money, New Money and the Moral Economy of Tort Law in Actions, 35 LAW & SOC.'Y REV. 275, 284-85 (2001).

[FN151]. Vidmar, Juries & Jury Verdicts, supra note 151.

[FN152]. Vidmar, Juries & Jury Verdicts, supra note 151, at 18.

[FN153]. Ivy Broder, Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements, 11 JUST. SYS. J. 349 (1986).

[FN154]. MICHAEL SHANLEY & MARK PETERSON, POST TRIAL ADJUSTMENTS TO JURY AWARDS (1987).

[FN155]. Brian Ostrom ET AL., So the Verdict Is In?-- What Happens Next?, 16:2 JUST. SYS. J. 97 (1993).

[FN156]. SLOAN, supra note 99.

[FN157]. SLOAN, supra note 99.

[FN158]. SLOAN, supra note 99 at 77, 189.

[FN159]. See, e.g., Erik Larsen, Successfully Discharging Medical Liens in Personal Injury Cases, 32 CUMB. L. REV. (2001-2002); Mark Bower & Joseph Lichtenstein, How to Vacate a Medicaid Lien in an Infant's Case, 30 TRIAL LAW. Q., issue 2-3, 80 (2000); Vidmar, supra note 105, at 122.

[FN160]. SLOAN, supra note 99, at 195.

[FN161]. VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 40-43, reviewing statistics from several studies on settlement rates.

[FN162]. WEILER, supra note 91.

[FN163]. Saks, supra note 34, at 702.

[FN164]. For a discussion of these dynamics see Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 MD. L. REV. 1093, 1099-1103 (1996) [hereinafter Galanter, Real World Torts]; Marlynn May & David Stengel, Who Sues Their Doctors? How Patients Handle Medical Grievances, 24 LAW & SOC'Y REV. 105 (1990); Daniels, supra note 137 at 114-136.

[FN165]. SLOAN, supra note 99.

[FN166]. SLOAN, supra note 99.

[FN167]. Herbert Kritzer, "The Wages of Risk" The Returns of Contingency Fee Legal Practice, 25 DEPAUL L. REV. 267 (1997).

[FN168]. VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 40-45, 59-67.

[FN169]. VIDMAR, MEDICAL MALPRACTICE, supra note 26, at chs. 7 & 8.

[FN170]. VIDMAR, MEDICAL MALPRACTICE, supra note 26, at chs. 7 & 8.

[FN171]. SLOAN, supra note 99.

[FN172]. See VIDMAR, MEDICAL MALPRACTICE, supra note 26.

[FN173]. See VIDMAR, MEDICAL MALPRACTICE, supra note 26.

[FN174]. VIDMAR, MEDICAL MALPRACTICE, supra note 26, at 33-34.

[FN175]. See Vidmar, Pap and Circumstance, supra note 34, at 12.

[FN176]. Joseph Sanders & Craig Joyce, "Off to the Races": The 1980s Tort Crisis and the Law Reform Process, 27 HOUS. L. REV. 207 (1990).

[FN177]. DANIELS, supra note 137.

[FN178]. Galanter, Real World Torts, supra note 164; Marc Galanter, An Oil Strike in Hell: Contemporary Legends About the Civil Justice System, 40 ARIZ. L. REV 717 (1998) [hereinafter Galalter, An Oil Strike in Hell].

[FN179]. See, e.g., Thomas Eaton & Susette Talarico, A Profile of Tort Litigation in Georgia and Reflections on Tort Reform, 30 GA. L. REV. 627 (1996); Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 CORNELL L. REV. 743, 745 (2002) [hereinafter "Eisenberg et al., Juries & Judges"]; Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. LEGAL STUD. 623, 633-37 (1997) (summarizing studies on the decision to award punitive damages) [hereinafter "Eisenberg et al., Predictability"]; Theodore Eisenberg & Martin Wells, Trial Outcomes and Demographics: Is There A Bronx Effect?, 80 TEX. L. REV. 1839 (2002); Thomas Koenig & Michael Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 JUST. SYS. J. 21 (1993); McCann, supra note 146; Merritt supra note 149; Erik Moller, Nicholas Pace and Stephen Carroll, Punitive Damages in Financial Injury Jury Verdicts, 28 J.LEGAL STUD. 283, 293 (1999); Mary R. Rose & Neil Vidmar, The Bronx "Bronx Jury": A Profile of Civil Jury Awards in New York Counties, 80 TEX. L. REV. 1889 (2002); Michael Rustad, In Defense of Punitive Damages in Products Liablility: Testing Tort Anecdotes with Empirical Data, 78 IOWA L. REV. 1, 15 (1992); Neil Vidmar and Mary Rose, Punitive Damages by Juries in Florida; In Terrorem and in Reality, 38 HARV. J. ON LEGIS., 487, 489-511 (2001).

[FN180]. Research on the effects of caps on non-economic damages has at best produced conflicting findings about their utility in affecting payments to plaintiffs, see, e.g., BHAT, MEDICAL MALPRACTICE, supra note 22 (reduce payment rates, but reduce the probability of settlement raising overall malpractice costs at 68-69); William Gronfein & Elanor Kinney, Controlling Large Malpractice Claims: The Unexpected Impact of Damage Caps, 16 J. OF HEALTH POL., POL'Y & L. 441 (1991) (Indiana cap on total damages resulted in higher claim payment amounts than comparison states without caps); Sloan et al., Effects of Tort Reform on the Value of Closed Medical Malpractice Claims: A Microanalysis, 14 J. OF HEALTH POL., POL'Y & L. 663 (1989) (limits on non-economic damages reduced indemnity payments, at 678); Robert Hunter and Joanne Doroshow, PREMIUM DECEIT: THE FAILURE OF "TORT REFORM" TO CUT INSURANCE PRICES (Citizens for Corporate Accountability and Individual Rights, 1999) ("tort reforms did not reduce insurance prices".; Government Accounting Office, supra note 22; Brimmer et al. Report on Medical malpractice Liability, Report of Columbia Financial Responsibility and Management Assistance Authority (March 18, 1998).

***36** APPENDIX A

Mississippi Medical Malpractice Cases in Appellate Courts: January 1, 1995-September 30, 2002

Jury Verdicts for the Plaintiff Affirmed: 4

Dorrough v. Wilkes, 817 So. 2d 567 (Miss. 2002).

OVERVIEW: Judgment in wrongful death medical malpractice action was affirmed where jury decision was supported by record and not against overwhelming weight of evidence, and verdict was not so excessive as to shock conscience of appellate court. Awarded $1,5000,000.

Purdon v. Locke, 807 So. 2d 373 (Miss. 2001).

OVERVIEW: Trial court did not abuse its discretion in letting the verdict against the doctor stand as the doctor did not overcome the burden of proof before him on his arguments that the jury award was excessive and unsupported by the evidence. Awarded $650,000.

Brandon HMA, Inc. v. Bradshaw, 809 So. 2d 611 (Miss. 2001).

OVERVIEW: Nine million dollar damage award to brain/motor functions damaged patient against medical center was affirmed. Given evidence from patient's experts, jnov for center was not warranted. Medicaid payments were subject to collateral source rule. Awarded $9,000,000.

Gordon v. McDonald, 743 So. 2d 1029 (Miss. Ct. App. 1999).

OVERVIEW: Defendant was not entitled to a new trial because plaintiff did not give her informed consent to the disputed medical procedure performed by defendant. Awarded $225,000.

Jury Verdicts for the Plaintiff Reversed: 2

Rawson v. Jones, 816 So. 2d 367 (Miss. 2001).

OVERVIEW: $ 1 million verdict for mother in malpractice case against doctor and group originally named as John Does in her complaint, was reversed on statute of limitations grounds. She had had all facts needed to name them initially, even without expert. Award of $1,000,000 reversed.

Sullivan v. Washington, 768 So. 2d 881 (Miss. 2000).

OVERVIEW: Physicians were employees of state for purposes of Sovereign Immunity Act, such that they were immune from personal liability in medical malpractice action based on procedure occurring within course and scope of employment. Award of $1,700,000 reversed.

Bench Trial in Favor of Defendant Affirmed: 1

Mississippi State Hosp. v. Wood, 823 So. 2d 598 (Miss. Ct. App. 2002).

OVERVIEW: There was substantial evidence to support factual determination establishing standard of care for treatment of psychiatric in-patient and its violation by state hospital, proximate contributing cause of daughter's suicide.

Jury Verdicts for the Defendant Affirmed: 16

Warren v. Sandoz Pharms. Corp., 783 So. 2d 735 (Miss. Ct. App. 2000).

OVERVIEW: Because appellant failed to seek relief prior to trial for appellee's evasive answer to appellant's expert interrogatory, trial court did not abuse discretion in allowing expert who was not named to testify for appellee.

Simpkins v. Forrest Gen. Hosp., 1998 Miss. App. LEXIS 562 (Miss. Ct. App. June 30, 1998) NOT DESIGNATED FOR PUBLICATION

OVERVIEW: Patient was not prejudiced when hospital designated its expert witnesses more than a month before trial began and when she was permitted liberal cross-examination of a doctor with alleged bias in favor of the hospital in medical malpractice case.

***37** Bridges v. Kitchings, 820 So. 2d 42 (Miss. Ct. App. 2002).

OVERVIEW: On appeal, the patient argued that the lower court erred in allowing the doctors to cross-examine her using medical records from her prior physicians, failing to apply the reasonably prudent patient standard, not allowing her

calculated medical damages into evidence, in allowing the defense to discuss her health insurance, limiting the photographs she wished to enter into evidence, allowing the defense to introduce evidence regarding ovarian cancer, and not permitting her discuss the issue of money damages in the second half of her closing argument; the verdict was against the overwhelming weight of the evidence; and she did not receive a fair trial. The appellate court held that the patient was properly cross-examined; although Mississippi followed the objective standard, the court submitted the patient's instructions on the issue; the patient was allowed to testify as to medical costs; health insurance testimony was more probative than prejudicial; the photographs would have been cumulative; ovarian cancer testimony was relevant; the patient waived the closing argument issue; the evidence supported the verdict; and the fair trial issue was moot.

Ekornes-Duncan v. Rankin Med. Ctr., 808 So. 2d 955 (Miss. 2002).

OVERVIEW: The mother alleged the trial court erred in granting summary judgment to the medical center and also found error with the trial court's decisions to deny her motions for continuance, prohibit introduction of demonstrative evidence, allow the introduction of undisclosed business records, limit cross-examination of a medical expert, and permit improper closing arguments. The appellate court found that the mother failed to show any negligence on part of the medical center. Even if the affidavits were allowed, the negligence assigned had already been provisionally diagnosed. There was nothing to substantiate the mother's claim that she suffered injustice or prejudice from the denial of her motions for continuance. The mother's claims that she was prejudiced by the trial court's allowing the physician to use a log book were not properly before the appellate court. Defendants' closing argument was not improper as an objection was made and sustained, the statement was rephrased, and counsel took the opportunity to further address the statement during his closing. Short jury deliberations did not automatically evidence bias or prejudice.

Ortman v. Cain, 811 So. 2d 457 (Miss. Ct. App. 2002).

OVERVIEW: Juror's familiarity with expert would not affect decision on the verdict. Trial court did not err in excluding sworn statement of decedent witness, as opposing counsel were not present and were prevented from developing testimony from decedent.

Bickham v. Grant, 2001 Miss. App. LEXIS 223 (Miss. Ct. App. May 29, 2001).

OVERVIEW: Granting of jury instruction was reversible error where parties' experts gave opposite views on proper standard of care and jury was instructed to exonerate if doctors used their best judgement in choosing one of the two courses of action.

Morgan v. Greenwaldt, 786 So. 2d 1037 (Miss. 2001).

OVERVIEW: Trial court did not err in denying mental patient's motion for new trial where patient failed to prove that hospital assaulted and battered her, falsely imprisoned her, treated her negligently, intentionally inflicted emotional distress and medical malpractice negligence.

Trustmark Nat'l Bank v. Jeff Anderson Reg'l Med. Ctr., 792 So. 2d 267 (Miss. Ct. App. 2000).

OVERVIEW: Judgment for doctor affirmed; a reviewing court would not set aside the jury's verdict unless it was so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice.

Toche v. Killebrew, 734 So. 2d 276 (Miss. Ct. App. 1999).

OVERVIEW: In a medical malpractice case, the court did not err in granting the doctor's requested jury instruction, an incident of alleged jury impropriety did not warrant excusing the juror for cause, and evidence of liability insurance was not admissible.

Brown by & Through Webb v. Blackwood, 697 So. 2d 763 (Miss. 1997).

OVERVIEW: Because a mother failed to timely object to a doctor's peremptory challenges to jurors, the mother was unable to obtain a new trial based on those challenges in her malpractice action against the doctor.

Herrington v. Spell, 692 So. 2d 93 (Miss. 1997).

OVERVIEW: In medical malpractice case where the testimony of the surgeon and patient conflicted on the issue of informed consent, it was proper to submit it to the jury. Because there was substantial evidence to support the verdict, JNOV was properly denied.

***38** Starcher v. Byrne, 687 So. 2d 737 (Miss. 1997).

OVERVIEW: In an action against a physician for injury caused by induction of anesthesia by a nurse, the fact that the physician was in the operating suite and resuscitated the patient was evidence by which a reasonable juror could find for the physician.

Ducker v. Moore, 680 So. 2d 808 (Miss. 1996).

OVERVIEW: The trial court properly denied the patient's parents' motion for a new trial following a judgment in favor of the physician's estate in the parents' medical malpractice action because the parents failed to preserve certain issues for appeal.

Tighe v. Crosthwait, 665 So. 2d 1337 (Miss. 1995).

OVERVIEW: The error in precluding a line of questioning was harmless as the advertisements in the case were geared toward reducing the amount of damages and at no point was it suggested that jurors should have found the doctor and heart clinic not liable.

McCarty v. Kellum, 667 So. 2d 1277 (Miss. 1995).

OVERVIEW: A motion to amend the pleadings was properly denied, where the timing of the motion was desperately late and potentially prejudicial to the defendant.

West v. Sanders Clinic for Women, P.A., 661 So. 2d 714 (Miss. 1995).

OVERVIEW: Patient's experts were permitted to give opinions as to what general practitioner would have done under similar circumstances, and where one issue was not presented in discovery as theory of patient's case it was properly excluded from instructions.

Knotts by Knotts v. Hassell, 659 So. 2d 886 (Miss. 1995).

OVERVIEW: Judgment was proper in medical malpractice case because injury victim had not exhausted his preemptory challenges when trial judge refused to dismiss jurors, limit on cumulative expert testimony was proper, and drug administration was jury question.

Jury Verdicts for the Defendant Reversed: 7

Adkins v. Sanders, 823 So. 2d 550 (Miss. Ct. App. 2002).

OVERVIEW: Requested instruction should have been given for jury to determine if evidence of doctor's negligence was sufficient to find that doctor told his patient he could achieve a good result and assumed duties of a specialty other than his own..

Bickham v. Grant, 2001 Miss. App. LEXIS 223 (Miss. Ct. App. May 29, 2001).

OVERVIEW: Granting of jury instruction was reversible error where parties' experts gave opposite views on proper standard of care and jury was instructed to exonerate if doctors used their best judgement in choosing one of the two courses of action.

McCaffrey v. Puckett, 784 So. 2d 197 (Miss. 2001).

OVERVIEW: In a medical malpractice case, the trial court committed reversible error by excluding a chiropractor's testimony as to the cause of patient's injuries and by admitting testimony about defendant chiropractor's disciplinary record.

Davis v. Powell, 781 So. 2d 912; (Miss. Ct. App. 2000).

OVERVIEW: In a medical malpractice suit, the trial judge abused his discretion by failing to sustain appellant's challenges for cause to biased jurors who were patients of appellee physician.

Thornton v. Sanders, 756 So. 2d 15 (Miss. Ct. App. 1999).

OVERVIEW: It was reversible error for the trial court to admit impeachment testimony as an exception to the collateral source rule when the state supreme court had never recognized such an exception.

Coltharp v. Carnesale, 733 So. 2d 780 (Miss. 1999).

OVERVIEW: Doctor engaged in trial by ambush by failing to provide name of one expert until seven days before trial and term for alternative diagnosis that expert would testify to; evidence raised issue of doctor's admission sufficient for jury instruction.

***39** Day v. Morrison, 657 So. 2d 808 (Miss. 1995).

OVERVIEW: The words "mere error of judgment" and "good faith error" could not be used in jury instructions in a medical malpractice action because they had the potential for confusing the jury.

Summary Judgement for the Defendant Affirmed: 32

Byrd v. Biloxi Reg. Med. Ctr., 722 So. 2d 166 (Miss. Ct. App. 1998).

OVERVIEW: A hearing on the summary judgment motion was held and the trial court entered its order granting summary judgment. Neither party received notice that the trial court had entered its order granting summary judgment until almost four months later. The medical center agreed that it would not contest the timeliness of the injured party's appeal if the notice of appeal was filed within 30 days. Instead, the injured party filed a motion for reconsideration apparently pursuant to Miss. R. Civ. P. 59(e), but did not give notice of its motion for reconsideration to the medical center until two months after the order had been filed. The medical center then promptly filed its response and alleged that the motion was time barred. Thereafter, the trial court denied the injured party's motion without comment. The injured party's notice of appeal was subsequently filed some 189 days after the trial court's ruling in which it granted summary judgment to the medical center. The appellate court held the injured party's notice of appeal was untimely filed in violation of the appellate rules.

Clayton v. Harkey, 2002 Miss. LEXIS 295 (Miss. Sept. 26, 2002).

OVERVIEW: A physician was immune from liability in a malpractice action, as he was a state employee and not an independent legal contractor, given that the state exercised significant control over the physician as a state medical center employee..

Moore v. Mem'l Hosp., 2002 Miss. LEXIS 279 (Miss. Sept. 5, 2002).

OVERVIEW: Summary judgment in favor of the pharmacy was appropriate as the learned intermediary doctrine was extended to pharmacists. The parents did not fail to file their complaint against the hospital within the one-year statute of limitations.

Cole v. Methodist Med. Ctr., 820 So. 2d 739 (Miss. Ct. App. 2002).

OVERVIEW: The patient alleged that the hospital failed to monitor his needs while in the hospital. He alleged that the lock on a bathroom door in the hospital was defective. He claimed that because the door was not secure and he did not receive the

assistance of hospital personnel, he fell injuring the right side of his chest and right shoulder. On appeal, the patient contended that summary judgment should not have been granted on the sole basis of his failure to respond to the summary judgment motion. The patient maintained that the trial court should have, but failed to consider the factual basis for the motion. He argued that a genuine issue of fact existed as to whether or not the hospital provided adequate assistance and monitoring while he was a patient at the hospital. The appeals court disagreed. It concluded that the patient failed to provide evidence to establish negligence as a genuine issue of material fact in response to the motion for summary judgment. Thus, the trial court properly granted a summary judgment to the hospital.

Cole v. Buckner, 819 So. 2d 527 (Miss. 2002).

OVERVIEW: The husband argued that the requests for admission violated Miss. R. Civ. P. 36 because they did not contain a preamble of fact, but merely stated conclusions of law. The requests both addressed the doctor's standard of care in treating the deceased. The appellate court found that the term "standard of care" was sufficient to serve as a preamble of fact. The record clearly showed that notice of service was filed, but the actual document was left out of the record. The husband was aware that the doctor had made discovery requests. The husband did not raise the issue before the trial court, therefore, it could not be raised for the first time on appeal. There was no authority cited by the husband that stated that the doctor had to attach a copy of the requests for admission as exhibits to her motion to strike. Miss. R. Civ. P. 36 was to be enforced according to its terms. There was no sufficient cause for the husband's delay in answering discovery. The husband's responses did not set forth the question preceding each response; therefore, the responses were deemed to have not been served under Miss. Unif. Cir. & County Ct. Prac. R. 4.04B.

Richardson v. Methodist Hosp. of Hattiesburg, Inc., 807 So. 2d 1244 (Miss. 2002).

OVERVIEW: Nurse was qualified as expert to testify regarding standard of care for pain and suffering damages, but she was not qualified to testify regarding causal link of death, in daughter's wrongful death action against health center.

***40** Ekhornes-Duncan v. Rankin Med. Ctr., 808 So. 2d 955 (Miss. 2002).

OVERVIEW: The mother alleged the trial court erred in granting summary judgment to the medical center and also found error with the trial court's decisions to deny her motions for continuance, prohibit introduction of demonstrative evidence, allow the introduction of undisclosed business records, limit cross-examination of a medical expert, and permit improper closing arguments. The appellate court found that the mother failed to show any negligence on part of the medical center. Even if the affidavits were allowed, the negligence assigned had already been provisionally diagnosed. There was nothing to substantiate the mother's claim that she suffered injustice or prejudice from the denial of her motions for continuance. The mother's claims that she was prejudiced by the trial court's allowing the physician to use a log book were not properly before the appellate court. Defendants' closing argument was not improper as an objection was made and sustained, the statement was rephrased, and counsel took the opportunity to further address the statement during his closing. Short jury deliberations did not automatically evidence bias or prejudice.

Gilchrist v. Veach, 807 So. 2d 485 (Miss. Ct. App. 2002).

OVERVIEW: Doctor, as an employee of a state hospital, was entitled to sovereign immunity protection afforded under statute, and patient commenced her medical malpractice suit after the statute of limitations had expired.

Brown v. Baptist Mem'l Hosp.-DeSoto, Inc., 806 So. 2d 1131 (Miss. 2002).

OVERVIEW: Guardian's failure to show that doctor deviated from the requisite standard of care during a birthing process, and the underlying facts, did not permit an application of the doctrine of res ipsa loquitur to provide proof of negligence.

Mallery v. Taylor, 805 So. 2d 613 (Miss. Ct. App. 2002).

OVERVIEW: State officials were immune from liability following death of 15- year-old who was incarcerated at training school, as nurse's misdiagnosis of meningitis did not establish "deliberate indifference" or give rise to cause of action.

Mallet v. Carter, 803 So. 2d 504 (Miss. Ct. App. 2002).

OVERVIEW: Summary judgment was proper as mother was delinquent in designating expert witness and disregarded court-ordered deadlines in attempt to find local doctor. Affidavit did not provide proper standard of care and appropriate treatment.

Hill v. Warden, 796 So. 2d 276 (Miss. Ct. App. 2001).

OVERVIEW: On summary judgment, trial court did not err in denying plaintiff's request to conduct further discovery or in ruling for doctor on plaintiff's medical malpractice claims when the plaintiff failed to disclose an expert witness in discovery.

Barry v. Thaggard, 785 So. 2d 1107 (Miss. Ct. App. 2001).

OVERVIEW: Summary judgment in doctor and hospital's favor proper where accrual of malpractice claim began when patient first became aware of injury, cause, and malpractice. Limitations issue was question of law; thus no material fact issue present.

Knight v. McKee, 781 So. 2d 121 (Miss. 2001).

OVERVIEW: Doctors who were employed exclusively by state teaching hospital did not waive their immunity under the tort claims act by personally acquiring professional liability insurance.

Durr v. University Hosp., 773 So. 2d 403 (Miss. Ct. App. 2000).

OVERVIEW: Appellant's cause of action accrued prior to the enactment of the Tort Claims Act, therefore the court was directed by statute to apply common law, and as a result, the doctrine of sovereign immunity barred the claim.

Henderson v. Un-Named Emergency Room, 758 So. 2d 422 (Miss. 2000).

OVERVIEW: Plaintiff's claim against a county medical center and its physician for the negligent diagnosis and treatment of his eye was time barred where plaintiff waited over two years after the treatment before he filed his claim.

Goleman v. Orgler, 771 So. 2d 374 (Miss. Ct. App. 2000).

OVERVIEW: Patient failed to establish a claim for lack of informed consent because she failed to establish the particular problem with appendectomy that doctor failed to inform her about that would have caused her to refuse to consent.

***41** Austin v. Baptist Mem'l Hosp.-N. Miss., 768 So. 2d 929 (Miss. Ct. App. 2000).

OVERVIEW: Knee-surgery patient's muscle atrophy in area remote from surgery required expert testimony as to physician causation to survive summary judgment; negligence per se theory was not considered without citation to authority.

Cook v. Children's Med. Group, 756 So. 2d 734 (Miss. 1999).

OVERVIEW: Plaintiff parents could sue defendants for fraudulent misrepresentation for concealing vaccine-related injuries to their child, because their suit was beyond the scope of the National Childhood Injury Compensation Act.

Pickens v. Donaldson, 748 So. 2d 684 (Miss. 1999).

OVERVIEW: The court held that the statute of limitations under the Mississippi Tort Claims Act applied to bar claims against university hospital physicians who were obviously state employees but not to independent contractors.

Owens v. Thomae, 759 So. 2d 1117 (Miss. 1999).

OVERVIEW: Given unclear employment status of defendant, senior doctor, summary judgment in medical malpractice

action was inappropriate and trial court should have granted plaintiff's continuance motion for further discovery on issue.

Brumfield v. Lowe, 744 So. 2d 383 (Miss. Ct. App. 1999).

OVERVIEW: Summary judgment to doctor and police officer was proper in medical negligence suit after police officer shot claimant because police officer was protected by sovereign and qualified immunity and statute of limitations barred claim against doctor.

Sheffield v. Goodwin, 740 So. 2d 854 (Miss. 1999).

OVERVIEW: Lack of a qualified expert to testify as to a dentist's malpractice was fatal to negligence case, where alleged malpractice in diagnosing symptoms and prescribing antibiotics was not within the common knowledge "layman" exception.

Robinson v. Singing River Hosp. Sys., 732 So. 2d 204 (Miss. 1999).

OVERVIEW: Patient's suit against hospital that was a political subdivision and its employee was governed by the statute of limitations for the Tort Claims Act, rather than the general malpractice statute; thus, the action was untimely filed.

Creed v. Bloom,724 So. 2d 357 (Miss. 1998).

OVERVIEW: The order affirming grant of summary judgment to physician in malpractice action was proper where, despite the existence of a tax record bearing the physician's name, both patient and physician acknowledged that physician had never treated patient.

Doe v. Mississippi Blood Servs, 704 So. 2d 1016 (Miss. 1997).

OVERVIEW: Daughter did not exercise due diligence in identifying second company prior to running of statute of limitations. Thus, relation back doctrine did not apply to substitution of second company for first company and action was properly dismissed.

Travis v. Stewart, 680 So. 2d 214 (Miss. 1996).

OVERVIEW: In medical malpractice action, expert's affidavit that defendant doctor complied with standard of care was sufficient basis to grant summary judgment to doctor because plaintiffs failed to present contradictory expert testimony.

Thompson v. Love, 661 So. 2d 1131 (Miss. 1995).

OVERVIEW: The issue of whether Mississippi courts would recognize a claim for loss of parental consortium was a matter best left to the legislature.

Thompson v. Love, 1998 Miss. App. LEXIS 186 (Miss. Ct. App. April 21, 1998).

OVERVIEW: The circuit court properly granted summary judgment for the medical center and doctor in wrongful death action brought by the son the deceased because a release or recovery by the injured party in his lifetime barred the action by the next of kin.

***42** McCalop v. Marascalco, 1998 Miss. LEXIS 518 (Miss. Oct. 8, 1998).

OVERVIEW: Summary judgment for doctor was proper where widow did not present expert testimony to rebut expert testimony that widow's husband's injuries were not the result of a lack of informed consent.

Taylor v. Singing River Hosp. Sys., 704 So. 2d 75 (Miss. 1997).

OVERVIEW: In a negligence case, the court determined that summary judgment was properly granted to the hospital because there was no genuine issue of material fact that precluded summary judgment.

Summary Judgement for the Defendant Reversed: 22

Moore v. Mem'l Hosp., 2002 Miss. LEXIS 279 (Miss. Sept. 5, 2002).

OVERVIEW: Summary judgment in favor of the pharmacy was appropriate as the learned intermediary doctrine was extended to pharmacists. The parents did not fail to file their complaint against the hospital within the one-year statute of limitations.

Bennett v. Madakasira, 820 So. 2d 794 (Miss. 2002).

OVERVIEW: Existence of factual issues precluded granting summary judgment to psychiatrists and prescription drug manufacturers in suits for negligently prescribing drugs, failing to adequately warn of drug's side effects, and breaching a product warranty.

Richardson v. Methodist Hosp. of Hattiesburg, Inc., 807 So. 2d 1244 (Miss. 2002).

OVERVIEW: Nurse was qualified as expert to testify regarding standard of care for pain and suffering damages, but she was not qualified to testify regarding causal link of death, in daughter's wrongful death action against health center.

Bailey v. Almefty, 807 So. 2d 1203 (Miss. 2001).

OVERVIEW: Trial court erred in granting summary judgment based on one-year statute of limitations, which was inapplicable to claims arising from events occurring before its passage; therefore patient's lawsuit was timely.

Dailey v. Methodist Med. Ctr., 790 So. 2d 903 (Miss. Ct. App. 2001).

OVERVIEW: Trial court erred in granting summary judgment to health care providers in medical malpractice case because patient's widow showed by affidavits, depositions, interrogatories, and common lay knowledge that genuine issues of material fact existed.

Thompson v. Patino, 784 So. 2d 220 (Miss. 2001).

OVERVIEW: Although discovery sanctions were appropriate, dismissal of plaintiff's medical malpractice action was reversed because plaintiff pursued her case fairly diligently from filing until dismissal, and there were triable issues of fact regarding negligence.

Sarris v. Smith, 782 So. 2d 721 (Miss. 2001).

OVERVIEW: Trial court erred in dismissing appellant's medical malpractice cause of action as applicable statute of limitations was tolled while she diligently sought decedent's medical records which contained the only indication of appellees' negligence.

Conley v. Warren, 797 So. 2d 881 (Miss. 2001).

OVERVIEW: In medical malpractice action, because trial court failed to apply five-part test to determine whether state university hospital's faculty physician was state employee or independent contractor, summary judgment for physician reversed.

Carter v. Harkey, 774 So. 2d 392 (Miss. 2000).

OVERVIEW: Medical malpractice judgment was reversed and remanded to determine whether appellee doctor was acting as an employee or an independent contractor at the time of the alleged malpractice based upon the Miller factors.

***43** Smith v. Braden, 765 So. 2d 546 (Miss. 2000).

OVERVIEW: Plaintiffs' minor child died after a medical procedure performed by defendant doctor at a state university medical center. The trial court limited discovery by plaintiffs as to defendant's employment status, and granted defendant's summary judgment motion after finding defendant was a state university employee, and that plaintiffs' action was time-barred. The court reversed and remanded for further discovery on the issue of defendant's employment status, with directions to the trial court to apply the Miller five- part test to determine defendant's status. Because there were questions of fact, specifically with regard to defendant's medical partnerships, coupled with plaintiffs' previous attempt to conduct discovery, the trial court's grant of summary judgment was premature. Further, there was a question of fact as to when the limitations period began to run. Although plaintiffs did not file a motion to compel in response to motions to quash discovery, they did file a response pleading and requested at the hearing on the motion to dismiss that the trial judge require compliance with the subpoenas; thus, plaintiffs were not dilatory in attempting discovery on the issue.

Miller v. Meeks, 762 So. 2d 302 (Miss. 2000).

OVERVIEW: Application of new five factor test for whether doctor was state university hospital employee or independent contractor when treating decedent at university clinic was not possible on the existing record; summary judgement was reversed.

Cook v. Children's Med. Group, 756 So. 2d 734 (Miss. 1999).

OVERVIEW: Plaintiff parents could sue defendants for fraudulent misrepresentation for concealing vaccine-related injuries to their child, because their suit was beyond the scope of the National Childhood Injury Compensation Act.

Pickens v. Donaldson, 748 So. 2d 684 (Miss. 1999).

OVERVIEW: The court held that the statute of limitations under the Mississippi Tort Claims Act applied to bar claims against university hospital physicians who were obviously state employees but not to independent contractors.

Owens v. Thomae, 759 So. 2d 1117 (Miss. 1999).

OVERVIEW: Given unclear employment status of defendant, senior doctor, summary judgment in medical malpractice action was inappropriate and trial court should have granted plaintiff's continuance motion for further discovery on issue.

Barnes v. Singing River Hosp. Sys., 733 So. 2d 199 (Miss. 1999).

OVERVIEW: Because the applicable statute of limitations did not begin to run until plaintiffs' discovery of hospital's alleged negligence, the trial court erred in awarding hospital summary judgment based upon expiration of the statute

Paepke v. N. Miss. Med. Ctr., 744 So. 2d 809 (Miss. Ct. App. 1999).

OVERVIEW: In a medical malpractice action where plaintiff produced evidence in the form of a physician's statement in opposition to a motion for summary judgment that described the requisite standard of care, plaintiff met his burden to defeat the motion.

Coleman v. Rice, 706 So. 2d 696 (Miss. 1997).

OVERVIEW: In a medical malpractice action, an expert witness was not required where the negligence which gave rise to the action was patently obvious to a layperson.

Russell v. Orr, 700 So. 2d 619 (Miss. 1997).

OVERVIEW: Where an employee, injured in the course of her employment, sought treatment from a co-employee, who aggravated the injury, a question of fact arose whether a sufficient nexus existed between the employee's status as employee and the treatment.

Fortenberry v. Mem'l Hosp., 676 So. 2d 252 (Miss. 1996).

OVERVIEW: The patient's action was not time barred because his complaint was timely filed, the filing tolled the statute of limitations for the 120-day period during which process had to be served, and process was served within that period.

Erby v. Cox, 654 So. 2d 503 (Miss. 1995).

OVERVIEW: The two-year statute of limitations in a medical negligence action was tolled when the complaint was timely filed. Service of process was timely made thereafter within the prescribed 120-day time limit.

***44** Erby v. N. Miss. Med. Ctr., 654 So. 2d 495 (Miss. 1995).

OVERVIEW: The patient was admitted to the hospital for evaluation of chronic renal failure. After a surgical procedure, he died after becoming disoriented and comatose. The daughter filed a medical negligence suit against certain physicians, unknown nurses, and the hospital. The hospital was granted summary judgment pursuant to Miss. R. Civ. P. 56(c). On appeal, the court reversed the grant of summary judgment and remanded the suit. The court held that the daughter's proof was sufficiently significant and probative with respect to a deviation by the nursing staff from the usual and accepted standard of nursing care which may have proximately caused or contributed to her father's death. A genuine issue of material fact was created by the expert witness report, the affidavits of a registered nurse and the daughter, and the depositions of certain physicians. The court also held that fairness dictated that the daughter be allowed to take two additional depositions, which would not have unnecessarily prolonged the record requiring the closure by the trial court. The trial court, under the facts of this case, abused its discretion in denying the additional discovery.

Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790 (Miss. 1995).

OVERVIEW: Lay witnesses were competent to testify to facts or things of common knowledge but expert testimony was needed to establish that the hospital's breach of regulations that required two surgeons in the operating room proximately caused the injury.

Directed Verdict for the Defendant Reversed: 2

Fennell v. Stewart, 807 So. 2d 1262 (Miss. Ct. App. 2001).

OVERVIEW: A biopsy showed a benign throat lesion. The lesion developed into cancer and the husband sued the doctor. The husband died before the suit came to trial and the wife was substituted as plaintiff. The husband stated in a deposition and the wife testified that the doctor had never told them that cancer could still develop and the husband should have a follow-up examination within six months or sent a card reminding the husband to schedule an appointment. The doctor testified he told the husband to return and the doctor's records showed the same. The records also showed a card had been sent. The wife's medical expert testified that if the husband had been adequately informed of the seriousness of the condition and a follow-up examination had been informed, the cancer could have been treated. The expert did however agree that the doctor's records showed the husband had been told to return. The trial court granted the directed verdict on the basis that the expert admitted that the doctor had appropriately cautioned the husband. The appellate court held that what the doctor actually told the husband was still in dispute and the directed verdict was improper.

Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023 (Miss. 2000).

OVERVIEW: Trial court erred in granting hospital and doctor's motion for directed verdict in wrongful death action as plaintiff presented sufficient evidence as to hospital's vicarious liability and damages for loss of companionship.

Motion to Dismiss Affirmed: 5

Bang v. Pittman, 749 So. 2d 47 (Miss. 1999).

OVERVIEW: Plaintiff's medical malpractice action was dismissed because he served process on defendant 122 days after

complaint was filed, and no excusable neglect was shown to justify granting additional time.

Jones v. Baptist Mem'l Hosp.-Golden Triangle, Inc., 735 So. 2d 993 (Miss.1999).

OVERVIEW: Defendants, nurses and county hospital, were properly dismissed in a medical negligence case where the acts of defendants were shielded by immunity statutes and by sovereign immunity.

Chamberlin v. City of Hernando, 716 So. 2d 596 (Miss. 1998).

OVERVIEW: Survivors' wrongful death action against a city after CPR was stopped on decedent was time-barred where sovereign immunity protected the city and the survivors failed to comply with applicable notice of claim and statute of limitations provisions.

Sparks v. Kim, 701 So. 2d 1113 (Miss. 1997).

OVERVIEW: Motion to dismiss that was granted based on sovereign immunity in a wrongful death action against prison doctors and superintendent was proper when they neither exceeded their authority nor committed willful wrongs or malicious acts.

***45** Watters v. Stripling, 675 So. 2d 1242 (Miss. 1996).

OVERVIEW: A complaint for medical malpractice was quashed when the plaintiff failed to serve the defendant within 120 days after the complaint was filed and failed to show good cause for not perfecting service.

Motion to Dismiss Reversed: 6

Wilner v. White, 788 So. 2d 822 (Miss. Ct. App. 2001).

OVERVIEW: Appellant was admitted to appellee hospital to undergo a diagnostic laparoscopy to relieve symptoms associated with endometriosis. Following the procedure, appellant complained of pain, weakness, and numbness in her lower left extremity. She filed an original personal injury complaint against appellee hospital and appellee nurse, but not the physicians. Both appellees answered and filed motions to dismiss. Appellant then filed a motion to amend and an amended complaint naming the physicians as additional defendants, and appellees filed motions to dismiss for failure to state a claim. The trial court granted appellees' motions and denied appellant's motion. On appeal, the court held under Miss. R. Civ. P. 15(a) leave to amend should have been freely given when justice so required, and if the underlying facts or circumstances relied upon were a proper subject of relief, a plaintiff should have been afforded an opportunity to test the merits of her claim. The court reversed, holding appellant's amended complaint appeared to present a proper subject for relief and she should have been allowed to amend her complaint.

Hoffman v. Paracelsus Health Care Corp., 752 So. 2d 1030 (Miss. 1999).

OVERVIEW: The dismissal of plaintiff's suit for lack of prosecution was improper because there was no evidence of deliberate carelessness on plaintiff's part to require such drastic action and there was no prejudice or harm to defendants.

Humphrey v. Ocean Springs Hosp., 749 So. 2d 1044 (Miss. 1999).

OVERVIEW: Plaintiff's notice of claim that was delivered to an administrator of a subsidiary hospital constituted a valid notice upon defendant, the subsidiary's parent hospital chain.

Robert v. Colson, 729 So. 2d 1243 (Miss. 1999).

OVERVIEW: Appellant patient's initial negative answer to a discovery request was appropriate when given and was seasonably supplemental with new information to allow appellee doctor enough time to prepare before trial.

Tinnon v. Martin, 716 So. 2d 604 (Miss. 1998).

OVERVIEW: The lower court should not have imposed the ultimate sanction of dismissal because of a letter from a patient's attorney to a doctor in a medical malpractice case because it was not a violation of the lower court's order involving ex parte contact.

Fortenberry v. Mem'l Hosp., 676 So. 2d 252 (Miss. 1996).

OVERVIEW: The patient's action was not time barred because his complaint was timely filed, the filing tolled the statute of limitations for the 120-day period during which process had to be served, and process was served within that period.

Interlocutory Appeal in Favor of the Plaintiff: 8

Baptist Mem'l Hosp.-Union County v. Johnson, 754 So. 2d 1165 (Miss. 2000).

OVERVIEW: Appellee mother, whose child was taken by appellant hospital to another woman who breast fed the child, was entitled to in camera review of other woman's medical files to determine if child's health was at risk.

Colson v. Johnson, 764 So. 2d 438 (Miss. 2000).

OVERVIEW: Order denying disqualification of opposing counsel affirmed; if appellant had basis for disqualification, he waived it by failing to move in timely manner. The trial court was justified, its action was not an abuse of discretion.

Johnson v. Mem'l Hosp., 732 So. 2d 864 (Miss. 1998).

OVERVIEW: Without direction as to what part of decedent's treating doctors testimony came from ex parte contact with defense counsel, court could not exclude entire testimony of treating doctors.

***46** Claypool v. Mladineo, 724 So. 2d 373 (Miss. 1998).

OVERVIEW: Statutes prohibiting discovery of peer review committee documents only covered the records and transcripts of committee proceedings, not documents pertaining to the results of those proceedings.

Burgess v. Lucky, 674 So. 2d 506 (Miss. 1996).

OVERVIEW: In an action for wrongful death based upon medical malpractice, venue was proper in either the county where the decedent died or in the county where the alleged negligence occurred, and the choice of venue belonged to the widow.

McMillan v.Puckett, 678 So. 2d 652 (Miss. 1996).

OVERVIEW: While the negligent acts complained of occurred in another county, plaintiffs brought the instant action in the county where their daughter died. The court held that venue in the county where the daughter died was proper. In so ruling, the court analyzed the phrase "where the cause of action may occur or accrue" contained in the general venue statute, under Miss. Code Ann. ' 11- 11-3. The court stated that the term "occur" was not synonymous with the term "accrue," as suggested by the disjunctive connector "or." Whereas "occur" referred to the place where the negligent acts took place, "accrue" referred to the place where the wrongful death action arose. Because the wrongful death action did not arise until the infant daughter died, the county where the infant died was the place where the action accrued. The court also noted that venue would have also been proper in the county where the negligent acts took place, but deference was given to the parents' choice of venue.

Scott by & Through Scott v. Flynt, 704 So. 2d 998 (Miss. 1996).

OVERVIEW: A medical malpractice claimant was not required to unconditionally waive her medical privilege to allow ex parte contact with her medical providers where the scope of such waiver was limited to medical information relevant to the

subject injury.

S. Cent. Reg'l Med. Ctr. v. Pickering, 749 So. 2d 95 (Miss. 1999).

OVERVIEW: Plaintiff wife, a diabetic, was a patient at defendant, medical center. Plaintiff wife contended that the lancets stored in defendant's blood testing machine had been used before by some other unknown patient and/or patients. Defendant disposed of the lancets before they could be tested. Plaintiff wife and plaintiff husband brought suit against defendant seeking damages for negligent infliction of emotional distress since plaintiff wife was possibly exposed to HIV and other communicable diseases. The trial court denied defendant's motion for summary judgment. On appeal, the court affirmed the judgment. The court held that since defendant allowed or caused the best evidence to be destroyed, despite the fact that defendant had notice that a material, factual issue existed regarding that evidence, thereby resulting in plaintiffs' being denied an opportunity to test it, a rebuttable presumption arose in favor of plaintiffs regarding actual exposure.

Interlocutory Appeal in Favor of the Defendant: 2

Pruett v. Malone, 767 So. 2d 983 (Miss. 2000).

OVERVIEW: The trial court lacked authority to grant plaintiff's second motion for reconsideration because said motion was filed eight months after the expiration of the time set for appeal.

Forrest County Gen. Hosp. v. Conway, 700 So. 2d 324 (Miss. 1997).

OVERVIEW: In medical malpractice suit, a hospital's motion for change of venue was granted because plaintiff parents chose a venue where the cause of action of medical malpractice neither occurred nor accrued, and none of the parties resided in that venue.

Appeal Dismissed: 2

Gilchrist v. Veach, 754 So. 2d 1172 (Miss. 2000).

OVERVIEW: Patient was not entitled to appeal summary judgment granted for anesthesiologist as the order did not also adjudicate patient's claims against surgeon; thus it did not constitute a final judgment.

Williams v. Delta Reg'l Med. Ctr., 740 So. 2d 284 (Miss. 1999).

OVERVIEW: The appellate court refused to make a decision on the appeal because plaintiff sought review of a lower court's order that did not terminate plaintiff's complaint and the appeal was not certified by the appellate court as a final judgment.

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