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In Malpractice Trials, Juries Rarely Have the Last Word

Large Awards Grab Attention But Often Aren't Paid Out

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Earlier this year, a New York state jury awarded Elizabeth and John Reden $112 million in a medical-malpractice case filed on behalf of their brain-damaged daughter.

But the Redens didn't get $112 million. They got $6 million.

In the debate over medical-malpractice lawsuits, multimillion-dollar verdicts have become an important rallying cry for advocates of legislation to curtail jury awards. From emergency rooms to state houses to the White House, the advocates point to the heavy cost of large malpractice awards.

Behind the big dollar numbers, the reality is more complex. Many plaintiffs settle for less than a jury's verdict, to eliminate delays and the uncertainty of appeal. Sometimes, even before a jury rules, a plaintiff has signed an agreement that limits how much money actually changes hands.

The Redens, for example, hedged the outcome of their case through a common device known as a "high low" agreement. No matter what the jury ruled, the two sides agreed to settle for between $2 million and $6 million. Such agreements protect plaintiffs from a lengthy appeals process and typically set the top end of any potential award close to the limit on the physician's insurance policy.

Proponents of tort reform acknowledge that verdicts for plaintiffs are often reduced to amounts that are kept confidential. But even if the headline-grabbing numbers are never paid out, proponents of limits say, big jury awards create benchmarks that raise the costs of future settlements.

"The verdict amount for a given case sets the bar for the value of that type of case during future settlement negotiations on similar cases," says Lawrence E. Smarr, president of the Physician Insurers Association of America, which represents physician-owned or operated companies that insure an estimated 60% of the nation's doctors.

The debate over big awards focuses on a small minority of malpractice cases. The insurance industry wins most cases that go to trial. By far, the majority of lawsuits settle long before they reach a jury. Jury verdicts account for just 4% of payouts.

More than $4 billion a year is paid out to settle malpractice claims against doctors, and plaintiffs lawyers receive a portion of that. The contingent fees charged by the lawyers vary widely and are often limited by law, but a common charge is 33% of any payment.

Across the country, advocates of tort reform have made large verdicts Exhibit A in their case for stronger curbs on malpractice awards. Often these curbs come in the form of caps on so-called noneconomic damages -- the amount a jury can pay out for things like pain and suffering. Earlier this year, Mississippi 's Republican governor, Haley Barbour, signed a law that limits large jury awards, proclaiming it a big step forward in eliminating "outrageous" verdicts in his state.

In 2000, Pennsylvania reported three of the largest medical-malpractice verdicts in its history, all of them rendered in Philadelphia : one for $100 million, another for $55 million and a third for $49.6 million.

News of the verdicts riled many in the state's medical and insurance communities. Doctors protested high malpractice rates on the steps of the state capitol. The then-president of the state's largest malpractice insurer was quoted at the time as saying " Philadelphia has gone haywire."

Many in the public agreed. A 2002 poll of 1,100 Pennsylvanians funded by the Pew Charitable Trusts found that 65% identified excessive jury awards as a "major reason" for the rising cost of malpractice insurance; 62% said these awards were a "bad thing because they increase everyone's health-care costs."

In a major address on the subject of malpractice delivered in Scranton , Pa. , last year, President Bush cited reports of "startling" malpractice awards from Philadelphia juries -- so big they exceeded all malpractice payments in the state of California for the previous three years. "You've got a problem in Pennsylvania ," the president said.

But each of the three biggest Philadelphia verdicts was settled for much smaller sums, according to plaintiffs lawyers and court records. The $55 million case settled for $7.5 million, according to the lawyer for the plaintiff. The $49.6 million case settled for $8.4 million, according to court documents. And the $100 million case settled for an undisclosed sum. Andrew J. Stern, the lawyer representing the plaintiff in that case, says the amount of the settlement was significantly less than $100 million.

White House spokesman Trent Duffy says those reductions wouldn't have caused the president to alter his remarks. "There are instances across the country ... where the insurance costs that go with malpractice insurance premiums are really driving caregivers out of business and out of states," says Mr. Duffy. "And that's why the president feels it's very critical for the improvement of our health-care system and our economy that we address medical liability reform."

It is unknown how many malpractice verdicts in favor of plaintiffs are ultimately settled, or for how many cents on the dollar -- in large part because of the confidentiality pacts insisted upon by insurers.

But Neil Vidmar, a Duke University law professor, and colleagues of his there and elsewhere have come up with estimates based on studies in several states. After examining a pool of 105 malpractice verdicts from 1985 to 1997 in the New York City area, they found that 44% of jury awards were reduced after the verdict. The eventual payments to plaintiffs were, on average, 62% of the awards. Prof. Vidmar says this estimate is "very conservative" because the data he looked at covered only a short time after the verdict. Had the time been longer, he says, the study would have likely found that more of the awards had been reduced.

Prof. Vidmar also found that the larger the award, the steeper the discount. Large malpractice verdicts in New York were typically reduced to between 5% and 10% of the original verdict amount. One case with a total award of $90.3 million settled for $7 million. Another award, for $65.1 million, was reduced to $3.2 million.

"The whopping big ones really get knocked down and they get knocked down incredibly," says Prof. Vidmar, who has worked as a consultant for both plaintiffs and defendants in medical-malpractice suits.

One of the most common ways this happens is through high-low agreements like the one used by the Redens. Under such bargains, plaintiffs are guaranteed a minimum amount of money (the "low") no matter what the jury decides. But if the jury comes back with a large award, the amount of money the plaintiff receives is capped by the high end of the high-low.

In 1997, the Redens' daughter, Danielle, was born and soon developed severe neurological problems that have rendered her a quadriplegic. The family alleged that the doctors involved in the case failed to deliver Danielle in a timely fashion after her mother reported an absence of fetal movement.

The Redens reached the high-low agreement of $2 million to $6 million just before the jury began its deliberations, says their attorney, Steven E. Pegalis. "My thinking on our side was 'OK, we won't have to wait to be paid and we won't have to worry about appeals,' " says Mr. Pegalis. The Redens, through Mr. Pegalis, declined to comment.

Clifford A. Bartlett Jr., the attorney for the physicians involved, says there are many things that enter into such a decision. But bottom line, the rationale for the high-low is this: "It protects the one person from getting a runaway verdict, and it protects the other from getting nothing."

About that $269 Million Verdict

Last month, the Coalition for Affordable and Reliable Health Care, a Washington-based group that advocates for tort reform on behalf of hospitals, doctors and others, cited in a news release a $269 million verdict in Texas .

Although the release didn't say so, the case involved Rachael Martin, a 15-year-old Texas girl who died in 1998. Rachael had cerebral palsy, and in 1998 she was taken to Medical City Dallas Hospital for surgery to fix a narrowed trachea. There, she was allegedly given 10 times the recommended dose of the sedative propofol. Her muscle cells began disintegrating, and the content of those cells was secreted through her kidneys. Her urine changed color and eventually turned black. A short while later, Rachael went into cardiac arrest and died.

Rachael's parents sued the hospital and three physicians who treated their daughter, accusing them in Dallas County court of being grossly negligent -- charges the defendants denied.

In 2000, a jury awarded the Martins nearly $269 million. That is the largest medical-malpractice verdict in Texas ever recorded by VerdictSearch, a division of American Lawyer Media that compiles verdict information from cases around the country.

The Martins got a fraction of that amount. The jury assigned 25% of the liability in the case -- or $67 million -- to the doctors. But before the trial had even begun the doctors and their professional group had agreed with the Martins to settle the case for just $3 million, says Charla Aldous, the Martins' attorney. That sum was just under the total policy limits of the three physicians involved and their practice group, each of which was insured for $1 million.

The hospital also reached a settlement with the Martins, according to attorney David G. Moore, who represented the hospital. But the settlement amount, he says, is confidential.

Mr. Moore says the settlement was reached just before the jury returned its verdict, making the jury's award moot. "It was meaningless," he says.

Nonetheless, CARH cited the verdict as evidence that such awards are "driving medical liability insurance premiums up over 500%."

Asked whether the settling of the Martin case affected CARH's assertion about verdicts, Jan May, the organization's executive director, says "absolutely not." She says the case, even though it was subsequently settled, prompted local hospitals to set aside larger litigation reserves. It also prompted the formation of CARH, she says.

Rolling the Dice

Defendants in malpractice cases usually win most of their cases before a jury. Earlier this year, for instance, the U.S. Department of Justice published a study of medical-malpractice trials and verdicts rendered in 2001 in the nation's 75 largest counties. Plaintiffs, it found, won only 27% of the time. That win rate, it noted, has changed little in the previous decade and is consistent with other studies that have examined the same issue.

Emboldened by this success, insurance companies are often willing to roll the dice with a jury. This happened two years ago during a trial in Lenoir County Superior Court, in eastern North Carolina . In that case, the family of John Waters, a 66-year-old retired manufacturing worker, sued Kinston surgeon Wayne T. Jarman and others. Dr. Jarman allegedly misdiagnosed Mr. Waters's ruptured appendix, then went on vacation without making arrangements to monitor the man's condition. Seven weeks later Mr. Waters died, and his family filed suit.

Dr. Jarman denied the allegations, and the Waters family offered to settle the case for as little as $250,000, says Bill Faison, the Waters' attorney. But Dr. Jarman's insurance carrier, Atlanta-based MAG Mutual Insurance Co., refused.

MAG is one of the largest physician-owned malpractice insurers in the Southeast, and a leading proponent of tort reform. One piece of legislation it successfully opposed earlier this year was the Georgia Sunshine in Litigation Act, which would have made it difficult for insurers like MAG and others to keep medical-malpractice settlements confidential.

MAG is also highly successful in the courtroom. Last year, says the company, it won 84% of its trials. In court filings, the company acknowledged that its highest offer to Mr. Faison on Dr. Jarman's behalf was $75,000.

Mr. Faison rejected that offer and the case went to trial. After three weeks of testimony and two hours of deliberation the jury awarded Mr. Waters's family $4.5 million. This was the largest medical-malpractice verdict involving a physician in North Carolina in 2002, according to North Carolina Lawyers Weekly, a legal publication based in Raleigh.

Such missteps by insurers -- or by plaintiffs lawyers -- rarely become public. That is because settlement discussions are typically secret. But Dr. Jarman was so troubled that the insurer hadn't reached a settlement before the trial's end that he sued his own insurance carrier in Wake County Superior Court, making the issue public.

The case was dismissed last year, after the court ordered a mediated settlement conference. Dr. Jarman didn't respond to requests for comment. A spokeswoman for MAG Mutual says the company declines to comment on litigation involving Dr. Jarman.

Mr. Faison says MAG Mutual eventually agreed to settle the Waters case for less than the jury award. The amount of the settlement is confidential.