

Statistics Show Medical Malpractice Cases Are Not an Easy Windfall for Plaintiffs

The Advocate, newsletter of the Trial Lawyers Section of The Florida Bar, recently printed an article on medical malpractice information for physicians, "The Law: Trial Lawyers Tell All" (Vol. XXXVIII, No. 4 – Spring 2009).

The author, Shirley Grace, is a senior writer for *Physicians Practice*. An excerpt from her excellent article is reprinted here.

A Picky Profession

Believe it or not, reputable trial lawyers who specialize in litigating malpractice cases do not relish taking every case to court. Why? Because "we're likely to lose," says (Jeff) Kimmel (partner in the law firm of Salenger, Sack, Schwartz & Kimmel). He estimates that 80 percent of medical malpractice cases that go to trial rule for the defendant – much worse odds than most other personal injury cases.

The U. S. Department of Justice numbers differ only slightly. According to government data from 2003 (the latest available), medical malpractice is the second-toughest type of tort case for plaintiffs to win at trial, with defendant physicians prevailing in 63.3 percent of verdicts.

The Justice Department's data reflect trials in federal court; most malpractice claims are heard in state court, and states vary widely in terms of verdicts for plaintiffs. Still, the majority of cases don't even get that far: According to a 2006 Harvard School of Public Health report, 61 percent of medical malpractice suits are settled out of the courtroom. And it takes a sizeable chunk of change for lawyers to prepare for such cases – \$50,000 would

be a "normal" outlay, says Kimmel. Meanwhile, with many states passing laws capping damages for pain and suffering (often at \$250,000), and the amount of any judgment that attorneys can take home, the potential payout for plaintiffs' lawyers is greatly reduced, without any reduction in their risk.

According to a 2001 study conducted by the Bureau of Justice Statistics, medical malpractice plaintiffs win only 27% of trial cases – compared to 52% for all other plaintiff-won tort trials.

"It's nowhere near what the public thinks," says Kimmel. "In New York there's no huge payout (for attorneys). Statutorily, it's less than a third (of the award). It goes down to 10 percent . . . on a sliding scale once you collect over \$1 million."

According to a 2001 study of the 75 largest U. S. counties, conducted by the Bureau of Justice Statistics, medical malpractice plaintiffs win only 27 percent of trial cases – compared to 52 percent for all other plaintiff-won tort trials. Even winning a case is no guarantee the plaintiff will see any real cash forthcoming.

Another Justice Department study, using data collected on 43,000 closed cases between 2000 and 2004 from Florida, Illinois, Maine, Massachusetts, Missouri, Nevada, and Texas (all of which are required by state law to submit information on closed medical malpractice claims), found that most plaintiff-won claims closed with no compensation to a claimant at all. ■

When Cases Go To Trial, How Often Do Plaintiffs Win?

| Type of Tort Case | Number of Jury and Bench Trials | Percent found for Plaintiff |
|------------------------------|---------------------------------|-----------------------------|
| Federal employers' liability | 68 | 69.1% |
| Motor vehicles | 311 | 56.9% |
| Marine | 128 | 53.9% |
| Other personal injury | 419 | 46.3% |
| Airplane | 16 | 43.8% |
| Assault/libel/slander | 34 | 38.2% |
| Medical malpractice | 147 | 36.7% |
| Product liability | 194 | 33.5% |

Source: Federal Judicial Center, Integrated Data Base (Civil), Fiscal Years 2002-03

When Plaintiffs Win, How Much Are They Awarded?

| Type of Tort Case | Number of Trials With Awards to Plaintiff | Median Amount Awarded for Plaintiff |
|------------------------------|---|-------------------------------------|
| Federal employers' liability | 43 | \$124,000 |
| Motor vehicles | 152 | \$164,000 |
| Marine | 55 | \$203,000 |
| Other personal injury | 156 | \$ 90,000 |
| Airplane | 7 | Insufficient data |
| Assault/libel/slander | 10 | \$115,000 |
| Medical malpractice | 49 | \$600,000 |
| Product liability | 55 | \$350,000 |

Source: Federal Judicial Center, Integrated Data Base (Civil), Fiscal Years 2002-03

The entire article can be found in the newsletters at the Florida Bar Trial Lawyers Section website, www.flatls.org.