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Neil Vidmar

*Duke University Law School, vidmar@law.duke.edu*

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**MILLION DOLLAR MEDICAL MALPRACTICE CASES IN FLORIDA:  
POST-VERDICT AND PRE-SUIT SETTLEMENTS\***

**Neil Vidmar<sup>a</sup>, Kara MacKillop<sup>b</sup>, and Paul Lee<sup>c</sup>**

Beginning about 2000, medical malpractice litigation has occupied a center stage in public controversy about tort reform.<sup>1</sup> The cost of medical liability insurance for doctors sharply increased, allegedly doubling in some specialties. Large jury verdicts especially are castigated as unwarranted and corruptive of the system because they set the bargaining rate around which plaintiff and defense lawyers negotiate settlements. One of the most commonly proposed remedies is a cap on the amount that can be awarded for general damages, often called “non-economic damages or just simply “pain and suffering,” following trial by jury.<sup>2</sup>

Trial lawyers and consumer groups oppose these reforms. They say one problem is a too- high incidence of malpractice and the consequent enormous economic losses of injured patients. They also assert that the increase in the costs of malpractice insurance lies with poor decisions made by liability insurance companies and problems associated with recurrent down turns in the insurance industry business cycle.

Systematic empirical data is needed about the many facets of the controversy if public policy choices are to be made wisely. Obtaining such information has been difficult because much of the process of medical malpractice litigation has remained beyond scrutiny. Typically, settlements are confidential and thus legislators, the general public and researchers have been unable to obtain data about crucial questions related to the controversy. However, a closed claim database compiled by the Florida Department of Insurance provides an opportunity to shed important light on these hidden processes. The data are available to the public and contain important information about many variables bearing on the litigation process including settlements as well as jury verdicts. In a first article arising out of our research on the closed claims we developed profiles of

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<sup>a</sup> Neil Vidmar, Ph.D., Russell M. Robinson II Professor of Law, Duke University School of Law.

<sup>b</sup> Kara MacKillop, B.S. (J.D. expected 2006).

<sup>c</sup> Paul D. Lee, M.D., J.D., James Pitzer Gills, III, M.D. and Joy Gills Professor of Ophthalmology, Duke University Medical School.

<sup>1</sup> For a review of this controversy, see Tom Baker, *The Medical Malpractice Myth* (2005); or David M. Studdert et al. *Medical Malpractice*, 350 *New England Journal of Medicine* 283 (2004); Dean Starkman, *Calculating Malpractice Claims*, *Washington Post*, December 29, 2005, page D01.

<sup>2</sup> See, e.g. Pinnacle Actuarial Resources, Inc., *The Potential Impact of Caps on Non-Economic Damages in Medical Malpractice Insurance in Wisconsin*, September 2005 at <http://www.pinnacleactuarial.com/pages/publications/files/Pinnacle-WHAFinalReport.pdf>.

the incidence of settlements at various stages of the litigation process, including claims settled without payments; changes in the seriousness of injuries associated with claims; the amounts of settlements; and the insurer's legal costs.<sup>3</sup> The data involved cases settled from 1990 through 2003.

The present article extends that research much further by comparing two sets of cases in which the payment to the claimant equaled or exceeded \$1 million. The first group involves cases that were tried to juries. We systematically compare the verdict with the amount the insurer actually paid. We also go a step further and examine the nature of the injury, including the medical treatment sought and the alleged cause of the injury.

The second part of the article examines a group of cases that were settled without a lawsuit. . One of the most interesting findings from our earlier article is that, of claims resulting in payments of \$1 million or more, fully 10.1 percent were paid without pleadings of any kind. In contrast only 7.5% of paid claims over \$1 million followed a jury trial<sup>4</sup> Thus, while jury trials loom large in the public debate, the truly invisible cases—invisible in the sense that they evade the formal court system—constitute an even larger source of payments.<sup>5</sup> We ask about the nature of pre-suit cases and compare them to the cases that went to trial and resulted in a plaintiff verdict.

Our approach to malpractice litigation issues in this paper involves qualitative as well as quantitative analyses. The qualitative analyses place a concrete face on the nature of the issues and the injuries experienced by patients involved in malpractice claims.

## I. Million Dollar Verdicts

Jury trials constitute only a very small part of medical malpractice payments. In 2005 the President of The Physician Insurers Association of America presented data indicating that jury verdicts for plaintiffs constituted only about 3 percent of malpractice payments.<sup>6</sup> As noted above, our prior research in Florida showed that for cases involving \$1 million payments or more just 7.5% followed a jury trial verdict<sup>7</sup> During the fourteen-year period, 34 cases out of the total of 801 million dollar payments, or slightly over 4 percent, involved payments of \$5 million or more. Of these 34, only two followed a jury trial to verdict.<sup>8</sup>

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<sup>3</sup> Neil Vidmar *et al.*, *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DePaul Law Review 315, 348 (2005).

<sup>4</sup> Vidmar *et al.*, *supra* note 2 at 348-350.

<sup>5</sup> In a future article we will examine in more detail the roughly 82 percent of cases falling between these two extremes, that is those settled after a lawsuit but before trial. For now, however, comparison of the two ends of the claims process--pre-suit cases and trial cases allows interesting comparisons that bear directly on the medical malpractice controversy.

<sup>6</sup> Lawrence E. Smarr, Testimony before the Illinois General Assembly, House Judiciary—Civil Law Committee Hearing , April 7, 2005 at <http://www.ihatoday.org/issues/liability/talk/smarrtest.pdf>. This interpretation of Smarr's data is taken from Exhibit B of his testimony. The exhibit shows that paid claims constituted 25.2% of all claims and that plaintiff verdicts constituted .8 % of this total.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

## Verdicts and Settlement Payments

Although litigators are aware that cases often settle for less than verdicts, documenting the differences between the two has proved largely elusive because of the confidentiality of post-trial settlements. Nevertheless, there have been some prior studies. Broeder,<sup>9</sup> researchers at the RAND Corporation,<sup>10</sup> and The National Center for State Courts<sup>11</sup> were able to document reductions in awards involving a mix of tort cases. Merritt and Barry conducted a detailed examination of jury awards in Franklin County (Columbus) Ohio.<sup>12</sup> They also documented 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.

Four studies have specifically looked at reductions in medical malpractice verdicts. One study of malpractice verdicts in New York, Florida and California examined reductions in “outlier” awards.<sup>13</sup> Some of the largest malpractice awards in New York ultimately resulted in settlements between 5 and 10 percent of the original jury verdict.<sup>14</sup> Similar findings were documented in a Pennsylvania study.<sup>15</sup> Recent research on jury verdicts in Cook and DuPage counties in Illinois produced similar findings.<sup>16</sup> On average, final payments to the Illinois plaintiffs were 42% lower than the jury verdict. In many cases the prevailing plaintiff settled for the policy amounts of the health provider’s liability insurance. In the present symposium Silver and Hyman present data from Texas closed claims that show substantial differences between verdicts and ultimate payments showing that, on average, the larger the verdict the smaller the percentage that the plaintiff recovered from the verdict.<sup>17</sup>

With the exception of the Silver and Hyman research previous studies have been selected samples that are not necessarily representative of the universe of cases. In many instances multiple health care providers are named in a lawsuit. Some of the defendants may have settled with a payment in advance of trial. The studies could not systematically account for such payments and thus may have underestimated

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<sup>9</sup> Ivy Broeder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 *The Justice System Journal* 349 (1986).

<sup>10</sup> Michael Shanley and Mark Peterson, *POST TRIAL ADJUSTMENTS TO JURY AWARDS* (1987).

<sup>11</sup> Brian Ostrom et al., *So the Verdict Is In?—What Happens Next?*, 16 *Justice System Journal* 97 (1993).

<sup>12</sup> Deborah Merritt and Kathryn Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 *Ohio State Law Journal* 315, 353-355.

<sup>13</sup> Neil Vidmar, Felicia Gross and Mary Rose, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 *De Paul Law Review* 265,287 (1998).

<sup>14</sup> *Id.*

<sup>15</sup> 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 author.)

<sup>16</sup> Neil Vidmar, *Medical Malpractice and the Tort System in Illinois, A Report to the Illinois State Bar Association* (May, 2005).

<sup>17</sup> David Hyman and Charles Silver, *Medical Malpractice Litigation and Tort Refor; It’s the Incentives Stupid*, *Vanderbilt Law Review* (in press).

eventual payments by some unknown degree.<sup>18</sup> The prior studies, including the Hyman and Silver research, lacked information about the alleged cause of the injury and specifics of the injury itself, including the financial consequences for the injured person. In many cases the Florida closed claim data provide important insights about these other aspects of claims.

## **The Florida Data**

In the previous research with the Florida closed claim database the present authors relied on electronic files obtained from the Florida Department of Insurance. The present research is based upon the hard copies of more than 800 cases involving payments equal to or more than \$1 million from which the electronic files were constructed, including a few cases that had not been recorded in our original data base and a few that extended into the first quarter of 2004.

We discovered that the hard files contained information that was more detailed than was recorded in the electronic files, including information about other defendants in the case. This allowed us to search for additional payments by these other defendants. Information about payments from excess insurance policies was in some reports. In addition there was usually a prose description of the medical treatment sought by the defendant, the alleged nature of the malpractice and the injury sustained by the patient. In some important instances the reports also contained detailed information about structured settlements. The hard files contained 54 cases involving jury trials with subsequent payments of \$1 million or more. A few of the older cases had copies of the actual jury verdict attached to the file.

With the exception of the few reports with copies of the verdict sheet, the closed claim data do not report verdicts. Although the name of the patient is redacted from the file the name of the health care provider on whose behalf payment was made is reported. Westlaw contains a database of jury verdict reports based primarily on the Florida Jury Verdict Reporter, and there are sometimes supplemental verdicts reports from other sources. Using the defendant's name we searched the Westlaw databases to identify the case. The verdict reports were checked for correspondence with the data in the closed claim files. Verdict reports also contain information about other defendants, how liability was apportioned between them, and the amount of the judgment, which sometimes differs from the verdict.

We discovered, however, that some of the closed claim cases were not in the verdict reports. Verdict reporters are commercial enterprises and despite claims to be comprehensive there are often omissions. Some trials outside of major cities may be missed. Even in metropolitan areas there are sometimes missing cases, especially when the verdict was appealed. When cases are appealed the complete file is usually sent to the appeals court. If the verdict reporter employee searches the court files while the

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<sup>18</sup> Vidmar's Illinois study, *id.*, did manage to capture additional payments in some cases, but the information was missing in many others.

case is on appeal the documents, including the verdict, will be missing. It appears that verdict reporters do not engage in systematic follow-up. This required additional effort to obtain information on the verdict.

In some instances a search of Westlaw's courts of appeals cases produced the sought-after information about the verdict. The next strategy for the remaining missing-verdict cases was to search the archives of the major newspapers in the county in which the trial took place. Through these procedures we were able to identify verdicts in 50 of the 54 cases with million dollar payments.

In order to account for the total payments in each case we identified the other doctors named in the lawsuit and searched the electronic files to determine if a payment had also been made on their behalf. We did find additional payments and added those into the sum of the settlement amounts.<sup>19</sup>

Despite our diligence in attempting to provide a complete picture of each case there are three limitations on the set of data. First, by choosing million dollar settlements at their face value we did not adjust for inflation. It was not practical to adjust for inflation in gathering the hard copies of closed claims. As a consequence, it is not appropriate to compare changes in the number of million dollar settlements over time. In 1990 a settlement for \$692,000 would be equal to \$1 million in today's dollars. A 1995 settlement for \$807,000 would be equivalent to a million dollars today. The fact that there may be fewer million dollar settlements in the first half of the years covered in the data being used in this analysis does not mean that there were fewer cases, only that a number of cases that would be million dollar cases today are likely missing.

Second, despite our efforts searching cases we did not manage to match all cases and verdicts. Thus, of 55 million-dollar verdicts only 50 cases have both verdicts and settlements.

Third, there are possibly some settlements that were not reported in the closed claim files. Reporting is dependent on the care and integrity of the insurer. The Department of Insurance does not monitor reporting and thus some cases may not have been reported by insurers, particularly if their corporate offices were off shore rather than in Florida. In other instances, health care providers may have been self-insured and paid money to a plaintiff, but not reported it to the Department of Insurance. In still other instances an insurer of excess liability, especially if an offshore corporation, may not have reported a payment. The primary insurer is supposed to report excess insurance payments as well as any deductible paid by the provider and in some instances these payments are contained in the closed claims data. We believe we have accounted for most excess insurer payments, but the data do not allow a statement of absolute confidence that we have captured every payment.

Both the closed claim files and the Westlaw verdict reports are publicly available information. However, as reported above, the closed claim reports omit the name of the patient to protect patient privacy, but the Westlaw reports have patient names as well as those of defendants. To accommodate the patient privacy concerns we have assigned arbitrary code names to the cases reported in the tables.

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<sup>19</sup> Some cases involved hospital residents as defendants. The files show that the hospital assumed liability for these doctors.

In most previous research in the literature on the medical malpractice litigation process the patient's injury has been reported only as a category code on what is called the NAIC scale. The scale ranges from 1, classified as a minor or emotional injury, graduated up to 8, denoting a grave injury and 9 being death.<sup>20</sup> This code system, while useful for certain purposes, does not allow scrutiny of the actual injury for which the jury decided damages. Our analysis of the claims went further. Malpractice injuries occur after a person seeks treatment for a pre-existing illness or injury. The alleged malpractice results during treatment. As a consequence, we report a short prose summary of the original medical treatment sought by the plaintiff, the alleged malpractice, and the injury sustained by the plaintiff. These prose summaries were derived from the closed claims and the Westlaw summaries. The two sources were consistent in the description of the case. The Westlaw files had more information about such matters as apportionment of liability between multiple defendants, remittitur, and apportionment of responsibility to the plaintiff, as well as breakdowns of the elements of the damages.

For some cases our data allowed further exploration of the extent of injuries and the financial consequences of those injuries. The closed claim files also report when parties agree to a structured settlement that involves part or all of the money being put into an annuity. When structured settlements do occur the closed claims data report the amount of cash settlement, the amount the insurer paid for the annuity and the total expected payments to the plaintiff from the annuity. This allows an estimate of the financial losses of the injured patient. In cases involving death, the annuity information often contains reports of how the structured settlement provides for a patient's minor children. Structured settlements were reported more often in the pre-suit claims reported in the next section but those in the verdict cases also help to explain the economic basis of settlements.

## **Verdicts and Settlements**

What are the claim issues in million dollar verdicts? How do final settlements compare with the verdicts? Table 1 reports the treatment sought, the alleged basis of malpractice, the injury, as well as the severity according to a NAIC code scheme. It also reports the verdict, the final settlement amount, and the percent that the settlement represents of the jury damages verdict.

**(Table 1 appears on next page)**

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<sup>20</sup> The NAIC Scale was created by the International Standards Organization for statistical reporting on the closed claims studies they conduct for the National Association of Insurance Commissioners. The scale is as follows:  
1: Emotional Only - Fright, no physical damage.  
2: Temporary: Slight - Lacerations, contusions, minor scars, rash. No delay.  
3: Temporary: Minor - Infections, mis-set fracture, fall in hospital. Recovery delayed.  
4: Temporary: Major - Burns, surgical material left, drug side effect, brain damage. Recovery delayed.  
5: Permanent: Minor - Loss of fingers, loss or damage to organs; includes non-disabling injuries.  
6: Permanent: Significant - Deafness, loss of limb, loss of eye, loss of one kidney or lung.  
7: Permanent: Major - Paraplegia, blindness, loss of two limbs, brain damage.  
8: Permanent: Grave - Quadriplegia, severe brain damage, lifelong care or fatal prognosis.  
9: Permanent: Death.

**Table 1**

**Years of Settlements and Verdicts, Patient Gender and Age, Treatment Sought, Alleged Malpractice, Injury, Verdict Amount, Judgment, Final Settlement and Amount of Settlement as a Percentage of Verdict**

Settlement Year	Verdict Year	Case	Sex	Age	Treatment Sought	Claim Cause/Type	Injury	NAIC Code	Verdict/Judgment	Total Settlement	%	
1990	1989	B v J	M	60	Complaint of back pain	Misdiagnosis of epidural abscess as cervical strain and failure to refer to specialist	D	Quadriplegia	8	\$3,100,000	\$2,400,000	77
1990	1990	L v M	M	64	Herniated lumbar disc	Failure to diagnose and repair punctured dura resulting in meningitis	D	Brain damage and hearing loss	8	\$2,488,300	\$2,250,000	90
1990	1998	H v HR	F	54	Barium enema	Perforation of colon	T	Peritonitis with permanent colostomy	6	\$1,140,000	\$1,443,659	127 <sup>a</sup>
1991	1990	C v D&H	F	60	Headache/chest pain	Subarachnoid hemorrhage undetected	D	Stroke-hemiplegia, no bladder/ bowel control/wheel chair bound	7	\$2,900.00	\$3,250,000	112
1991	1991	C v G	F	21	Full term pregnancy	Hemorrhage following live birth; hysterectomy /retention of lap pad	T	Massive sepsis and death 5 months following delivery	9	\$167,384 \$142,384	\$1,029,416	615
1992	1992	P v I	F	23	Congenital malformation of pulmonary sequestration	Advice that surgery not needed	D	Death from rupture causing hemorrhage	9	\$3,733,000	\$2,900,000	78
1992	1991	S v S&.M	F	46	Routine gynecological exam	Failure to timely diagnose cancerous breast tumor	D	Infiltrating ductal adenocarcinoma; metastatic cancer of hip bones and ribs	8	\$2,055,000 judgment \$2,029,825	\$2,310,000	112 <sup>a</sup>
1992	1991	R v BR	F	38	Asthma; presented at emergency with severe reaction and intubated	Inadequate monitoring of patient; lack of bronchio-dilator overdose of highly potent IV sedative, Versed.	M,T	Death within 45 minutes	9	\$2,740,000 judgment \$1,946,017		71
1992	1992	N v F	F	59	Neck pain	Spinal fusion surgery; failure to reduce subluxation with proper traction and align spine	T	Quadriplegia	8	\$1,950,000	\$1,900,000	71
1993	1992	SB v.I	F	25	Menstrual irregularity	Failure to diagnose bulimia as cause of menstrual disorder	D	Anoxic encephalophy and cardiac arrest; permanent vegetative state	9	\$6,800,271	\$2,000,000	29
1995	1994	S v.W	M	62	Treatment for throat cancer	CT scan of head and neck diagnosed as normal, but subsequent scan showed tumor of piriform sinus	D	Radical resection of throat, including voice box , feeding tube, loss of 70 pounds, needs electro-larynx to speak and cancer had recurred at time of trial; then death	9	\$1,000,000	\$1,127,864	113 <sup>a</sup>
1995	1995	R v. MCR	F	56	Patient presented for screening mammogram	Doctors failed to recognize microcalcifications; 6.5 month delay in diagnosis of breast cancer	D	Grave cancer prognosis	8	\$3,350,000	\$3,250,000	97
1995	1994	A v. M	F	41	Several consultations on epigastric pain and blood in stool	Diagnosis of irritable bowel syndrome vs. actual carcinoma of colon	D	Death following cancer	9	\$3,000,000 judgment \$1,164,000	\$1,340,000	45

Settle- ment Year	Verdict Year	Case	Sex	Age	Treatment Sought	Claim Cause/Type	Injury	NAIC Code	Verdict/ Judgment	Total Settlement	%
1996	1995	K v. W	F	71	Minor stroke; right carotid endarterectomy	Delay in response to post-op neurological changes <b>D,T</b>	Paralysis on left side; bladder catheterization and required assisted living facility	7	\$1,724,102	\$1,076,761	62
1996	1993?	Z v.H	M	12	Corrective knee surgery following motorcycle accident	Laceration of femoral artery <b>T</b>	Below knee amputation	6	\$9,600,000	\$1,000,000	10
1996	1995	A v. M	M	18	Bacterial endocarditis	Stroke 24 hours after patient admitted to hospital <b>D</b>	Neurological deficits and left-sided hemiparesis	7	\$2,000,000	\$1,000,000	50
1996	1993	B.v HLS	M	72	Chronic back pain	Lumbar decompressive surgery <b>T</b>	Death	9	\$1,600,000	\$1,091,467	68
1997	1997	L v.C	M	52	Severe abdominal pain	Misdiagnosis of renal cell carcinoma as kidney stone <b>D</b>	Death 3 years following failure to diagnose	9	\$3,525,554; judgment \$1,545,500	\$1,440,000	41
1998	1994	B v SM	F	1	Surgical correction for ptosis of right eyelid	Overdose of Halothane after defendant informed that anesthetic vaporizer was out of calibration <b>T</b>	Bradycardia and brain death	9	\$9,000,000	\$2,495,922	28
1998	1997	K v C	F	23	Former cancer patient with pain in leg	Misdiagnosis as fibroma: reoccurrence of a tumor <b>T</b>	Amputation of leg	7	\$4,690,000	\$1,450,000	31
1999	1997	C v .M et al.	M	0	Birth	Newborn male, age 7 at trial, suffered a crushed skull during induced labor when doctor used solid-bladed vs open forceps that were mislabeled <b>T</b>	Partial paralysis, seizure disorders, inability to speak and visual impairment	8	\$6,700,000	\$6,500,000	97
2000	1998	B v O	F	0	Pregnancy	IV left in mother 11days; infection indicators ignored—infection transmitted to infant <b>T</b>	Spastic quadriplegia	8	\$8,638,380	\$3,299,241	38
2000	1998	F v. S	M	36	Abdominal pain with diarrhea	Anaphylactoid reaction to prescribed Cipro and no leukocyte tests performed <b>T</b>	Death	9	\$4,766,900	\$2,750,000	48
2000	1999	B v H	M	3	Child with Morquito's syndrome fell from swing	Failure to diagnose and immobilize a spinal cord contusion and subluxation <b>D,T</b>	Neurological deficits	7	\$5,865,000; judgment \$3,055,631	\$1,109,369	19
2000	2000	L v OD	M	51	Patient with history of heart disease presented to emergency room complaining of chest pain	Discharged with diagnosis of stable angina and prescription of Isordil, a long-acting nitrate; returned same day to emergency; no further tests and discharged again <b>D</b>	Acute heart attack and death	9	\$2,265,567	\$1,000,000	44
2000	2000	W v CF	F	84	Lower back pain	Following epidural injection patient fell and buckled knee; nurses at fault <b>M</b>	Deformity of right knee and severe bone fractures, resulting in above knee amputation	6	\$1,830,000; judgment \$1,654,038	\$1,240,000	68
2000	1999	A v B&B	F	20	Full term pregnancy	Epidural with failure to monitor vital signs <b>M</b>	Death	9	\$2,351,005	\$1,350,759	27
2000	2000	P v P	F	47	Liposuction	Removal of excess amount of fat and inappropriate documentation of procedure <b>T</b>	Pain, scar tissue, hardened abdomen	5	\$1,000,000	\$1,000,000	100
2000	2000	K v D	F	59	Coronary artery disease	Perforation of artery during angioplasty <b>T</b>	Death	9	\$1,216,000	\$1,216,000	100

Settle- ment Year	Verdict Year	Case	Sex	Age	Treatment Sought	Claim Cause/Type	Injury	NAIC Code	Verdict/ Judgment	Total Settlement	%
2001	2000	O v D	M	39	Herniated disc	Surgery on wrong level of spine	T	7	\$3,800,000	\$2,500,000	66
2001	2000	C v R	F	30	Weakness in leg from childhood surgery	Replacement of subarachnoid morphine pump; malpositioning of puncture sites and failure to use anesthesia and diagnose spinal cord contusion.	T	6	\$1,949,535	\$1,250,000	64
2001		C v K	M	12	Pregnancy, 28 weeks gestation	Failure to arrest labor to prevent premature delivery	T	7	\$10,000,000	\$10,075,831	100
2001	1999	A v BM	F		Leg pain	Failure to take aggressive care and consult a vascular surgeon for a blood clot	D,T	6	\$2,700,000	\$2,579,939	96
2001	2001	D v OWK	F	58	Breast Lift	Failure to relieve venous congestion to areola of nipples	T	5	\$2,030,500	\$1,775,000	87%
2002	2000	D v M	F	29	Patient with family history of heart disease complaining of chest pain	EKG but no other workup and discharged	D	9	\$1,756,906	\$1,000,000	57
2002	2002	M v. M	M	30	Presented to doctors with a breast lump	Failure to inform claimant that ultra-sound showed a solid mass consist-ent with cancer. Biopsy and 2d ultrasound 3d doctor did minimized	D	9	\$2,781,533	\$1,250,000	45
2002	2002	N v L	M	34	Shin bruise to professional athlete	Surgical opening of bruise; would not heal.	T	6	\$5,350,000//?J NOV	\$0	0
2002	2002	B v. GG	M	23	Repair of complex fractures to foot of professional athlete following car accident	Delayed diagnosis of compartment syndrome to left foot	D	7	\$1,800,000	\$1,450,000	81
2003	2002	S v.L	M	36	Incarcerated male with Hodgkin's disease has subsequent swollen lymph nodes in neck	Lack of timely diagnosis of a secondary cancer	D	8	\$6,007,000	\$2,600,000	43
2003	2003	N v. M	F		Lung mass	Retained foreign body during thoractomy, failure to timely perform MRI	T	7	\$4,992,452	\$2,500,000	50
2003	2001	P v G	M	65	Acute heart attack	Thrombolytic therapy (blood thinners) caused a cerebral hematoma	T	7	\$3,500,000	\$1,504,666	42
2003	2003	N v M&M	F		Lung surgery: lobectomy and chest wall resection	Gelfoam to stop bleeding pushed into nerve root foramen, compressing spinal cord; 28 hour delay in diagnosis of problem	T	7	\$4,992,452	\$1,350,000	27
2003	1999	C v L&A	M	53	Peripheral vascular disease	Delay in performing distal bypass surgery	D,T	7	\$1,820,400	\$1,373,133	58
2003	2003	P v C&E	M	42	Blood and protein in urine	Failure to refer patient to nephrologists delay in diagnosis of chronic glomerulonephritis	D	7	\$5,750,000	\$1,676,814	29

Settle- ment Year	Verdict Year	Case	Sex	Age	Treatment Sought	Claim Cause/Type	Injury	NAIC Code	Verdict/ Judgment	Total Settlement	%
2003	2001	D v O	F	38	Breast lift surgery	Venous congestion of nipples within 24 hours of surgery; bilateral necrosis of both nipple areas of breast	<b>T</b> Damage to breasts' nipple areolar complex that cannot be reconstructed	6	\$2,030,500	\$1,775,000	87
2003	2001	C v E	M	6	Four punctures from tree thorn	Continued swelling and referral to orthopedic surgeon who recommended warm soaks, despite elevated blood tests for sepsis.	<b>D</b> Significant damage to knee, surrounding bones and growth plates	5	\$1,016,306	\$1,735,000	170 <sup>b</sup>
2003	1997	M v M	M	10	Asthma attack	Delay in treatment	<b>T</b> Death after 3 months in vegetative state	9	\$4,500,000	\$5,073,480	112
2004	2002	S v W&M	F	0	Full term pregnancy	Monitor fetal distress delay c-section	<b>M</b> Permanent brain damage	8	\$6,260,416	\$5,000,000	80
2004	2003	W v R	M	46	Spinal surgery for lumbar disc herniation	Failure to diagnose and treat deep vein thrombosis	<b>D</b> Death at home 2 days later	9	\$16,131,381	\$8,750,000	54

Table 1 shows that the number of male and female plaintiffs is roughly equal, twenty-six females versus 24 males. Ages of plaintiffs are missing in a few instances but they range from birth (coded as 0) to 71. There are only three verdicts involving an alleged birth injury, although an additional three cases involve children less than seven years of age.

The original basis for seeking medical treatment varied from complaints of pain or other abnormalities in function through surgery to correct an existing illness to life-threatening events such as a car accident or a heart attack. The seventh column in Table 1 describes the alleged cause of the injury. Reading those descriptions gives an important picture of the alleged acts of malpractice. Each description is accompanied by a letter or letters in bold. We classified each alleged cause as falling primarily into one of three categories: failure to diagnose or misdiagnose = D; treatment error = T; or failure to monitor = M.<sup>21</sup> Four claims involved both failure to diagnose and treatment error and one involved treatment and failure to monitor. Thus in the fifty cases there were a total of fifty-five errors. Using fifty-five as the base we can conclude that 42 percent of the claims in Table 1 involved diagnostic error claims, 51 percent involved treatment claims and 7 percent involved failure to monitor the patient following treatment.

Table 1 shows that the injuries incurred by defendants in these trial cases had very serious resultant medical problems or died. Using the NAIC Scale we find that 34 percent of cases involved death, 18 percent involved grave injuries like quadriplegia or severe brain damage, 26 percent involved major permanent injuries such as paraplegia or blindness, 16 percent involved permanent major injuries like deafness, loss of an eye, kidney or lung, 16 percent involved permanent damage to major organs and 6 percent involved permanent “minor” damage such as loss of fingers or organs. While useful as a quick quantitative measure, the NAIC Scale obscures the actual details regarding the nature of the physical injuries.

The summary prose descriptions of the injuries reported in Table 1 provides a more useful look at what was involved. The 17 deaths reported in Table 1 indicate that in some instances the patient did not die immediately. For example case C v. G (1991) involved the death of a woman from sepsis five months after delivery of her baby. Not shown in the table is the information that the woman was survived by her infant. Case SB v. I (1993) involved a patient in a vegetative state for many weeks before death. Case S v. W (1995) shows a slow death over many months. The nine NAIC category 8 cases involve grave injuries and speak for themselves. Some injuries categorized by the insurer as seven (permanent major) leave questions about whether the injury should have been categorized as an eight. Consider Case K v. W (1996). The patient was paralyzed on her left side, required bladder catheterization and assisted living. Case C v. D & H (1991) involved a stroke, loss of bladder and bowel control with confinement to a wheel

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<sup>21</sup> Dr. Lee, the physician co-author of this article, made the classifications; the first author, Vidmar, served as a reliability check on the classifications.

chair. Injuries categorized as a six or a five according to the NAIC scale may have had serious economic consequences for the patient. Amputation of a leg or a damaged organ or limb can affect employment and other factors associated with living. While most of the defendants in these cases contested liability,<sup>22</sup> the descriptions of the actual injuries are very arguably consistent with million dollar verdicts.

The last three columns of Table 1 report the verdict and judgment, the final settlement and the percentage of the verdict represented by the final settlement. In seven of the fifty cases the settlement exceeded the verdict. There are two related explanations for the payments in excess of verdicts. All of these cases were appealed. The plaintiff is entitled to post-judgment interest if the case is settled or affirmed on appeal and six of the seven reflect that interest. The 1991 case of C v. G is an anomalous case that resulted in the settlement being over six times the verdict. The mother died while delivering her child. The original jury verdict was \$167,384 and the judge reduced the payment to \$142,384 with a \$25,000 setoff from a pre-trial settlement by one of the defendants. The case was appealed and the higher court ruled that the facts of the case showed that the jury verdict was “grossly inadequate” to the surviving child and her grandparents. In addition the court ruled that the trial judge had erred in excluding certain evidence. The case was sent back for retrial but the defendants settled for slightly over \$1 million.

An important question is, what percentage of the verdict is represented by the settlement? For purposes of calculation the seven cases in which the ultimate payment was greater than the verdict were treated as equal to one hundred percent since post-judgment interest explains the difference for all but case C. v. G. Table 1 thus yields the conclusion that the defendants paid the full amount of the verdict in only ten of the fifty cases. In the remaining cases the final settlement amounts ranged from zero in N. v. L (2002), where the judge rejected the award notwithstanding the jury verdict, through 19 percent to 97 percent. On average the final settlement was just 63 percent of the verdict. By and large, consistent with previous research, the largest verdicts had the greatest reductions. Although the largest verdict, \$10 million, was paid in full there were twelve additional verdicts that exceeded \$4 million. Their average payout was 37 percent of the original verdict. Considering all cases there was a statistically significant negative correlation (-.39) between the size of jury verdict and the amount actually recovered in post-trial negotiations immediately after the verdict or during or following an appeal.<sup>23</sup>

One lesson from Table 1 confirms earlier research indicating that jury verdicts do not represent the end point in litigation but rather the continuation or beginning of a negotiation process on the settlement. Unlike previous research, the strength of the present data are that we believe that we have accounted for the sum of all payments made by defendants for a claim by a patient.

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<sup>22</sup> Some cases may be contested on the amount of damages rather than liability.

<sup>23</sup> Pearson  $r = -.39$ ,  $t = 2.87$  ( $df = 1,49$ ),  $p < .05$ .

The final payments in all of these cases equaled or exceeded a million dollars, sometimes several times over. A qualitative look at the actual injuries suffered by plaintiffs suggests that the final payments may have been reasonable given the injuries suffered. Two cases involved structured settlements but details of the agreement were not provided in the closed claims. In contrast many pre-suit settlements provide detailed information about annuities that allow a perspective on projected losses and the reasons for them.

## II. Pre-suit Settlements

One of the most intriguing findings from our previous research on Florida closed claims was that fully 10.1 percent settlements involving payments of one million dollars or more were made closed without a lawsuit being filed.<sup>24</sup> Presumably the health care provider did not contest liability. What was the nature of the treatment sought? What were the grounds of the malpractice claims? What kinds of injuries were suffered and how serious were they? Finally, how did these pre-suit settlements claims differ from cases tried to juries?

Our methodological approach to gathering these data was similar to our approach to the jury trial cases. The closed claim files listed other defendants named in the claim. We first attempted to match those names with names in the hard copies of the files. If no match was found we searched the electronic database, which contains all payments, including those less than \$1 million. If no matches were found in either of these sources we assume that no other payment was made. As mentioned in the beginning of this article the weakness in this assumption is that some payments may not be recorded in the database if the insurer or self-insured health care provider did not submit a report to the Department of Insurance. We believe these instances to be infrequent.

The hard copies of the files also included many instances in which a claim against a hospital included the names of doctors, nurses, pharmacists or technicians. Often there was a notation that the claim was closed on behalf of those providers as well as the hospital. Many doctors, especially those completing their residencies, are considered employees of the hospital and thus were covered under the same insurance umbrella.

Table 2 reports the results of the 115 claims from 1990 through the first quarter of 2004 in which million dollar claims were paid without a lawsuit being filed.

**(Table 2 appears on next page)**

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<sup>24</sup> An additional 4.6 percent of cases were settled through pre-suit arbitration. These claims are not considered in this article.

**Table 2**  
**Pre-Suit Paid Claims: Year of Settlement, Gender and Age of Patient, Treatment,**  
**Alleged Negligence, Injury, and Settlement Amount**

<i>Settle- ment Year</i>	<i>Case</i>	<i>Sex</i>	<i>Age</i>	<i>Dr/H</i>	<i>Treatment Sought</i>	<i>Claim Cause/Type</i>	<i>Injury</i>	<i>Code</i>	<i>Settlement</i>
1990	LB	F	7	1	Sub-aortic stenosis	Surgery to descending correct aorta ; suture problem	T Paraplegia	7	\$1,000,000
1991	KA	F	0	3	Early labor with ruptured membrane	Diagnosed as UTI; precipitous delivery of footling breech birth	D Severe neurological deficit	8	\$1,000,000
1991	BMH	M	0	2	Labor/delivery	Non-diagnosis of fetal distress	D Spastic quad; cerebral palsy/riplegia	8	\$1,887,044
1992	WCD	M	1	1	Fall with peripheral injuries to head	Failure to diagnose bacterial meningitis; gastrointestinal symptoms and 105.6 temperature and sent home without tests; return to emergency and again sent home	D Severe brain damage, blind, deaf, immobile	8	\$1,000,000
1992	BRC	M	34	3	Lumpectomy -breast augmentation	Medication error; cardiac arrest	T Death	9	\$1,600,000
1992	BHM	M	40	2	Double vessel coronary artery disease	Heart arrest during angioplasty	T Death	9	\$1,900,000
1992	FHC	F	0	2	Pregnancy	Failure to diagnose neural tube defect	D Spina bifida, hydrocephalus blind, Arnold-Chiari disorder	8	\$1,800,000
1992	UMS	F	0	1	Congenital ventricular septal defect	Progressive seizure five days after surgery; being weaned off sedatives	T Severe mental, emotional impairment	8	\$3,000,000
1993	CRH	F	2	3	Acute asthma attack	Failure to aggressively treat asthma attack; respiratory arrest	T Severe cerebral palsy secondary to hypoxia	8	\$6,000,000
1993	TGP	M	43	1	Left flank pain	Misdiagnosis of renal cell carcinoma	D Renal cell carcinoma	9	\$2,000,000
1993	AHP	F	0	3	28- week neonate delivery	Improper placement of umbilical monitor for 16 hours	T Paraplegia	8	\$3,750,000
1994	AR	M	0	3	Twin birth with one having bacterial meningitis	Failure to diagnose meningitis	D Profound brain damage	8	\$1,000,000
1994	HAS	F	46	3	Cancer of breast	Inadequate and inaccurate interpretation of mamogram studies;Delay in diagnosis	D Advanced breast cancer	7	\$1,200,000
1994	GBP	F	39	2	Induction labor with Pitocin unsuccessful; C-section	Hypotensive Bradycardia during C section (abnormal slowness of heart)	T Vegetative state, non-reversible	8	\$3,000,000
1995	GI	M	50	1	Auto accident;post accident parathesia and pain	Cervical laminectomy; anterior cord syndrome and uncontrolled bleeding	T Quadriplegia 8	8	\$2,000,000
1995	LRC	F	23	2	Motor vehicle accident	Repairing multiple fractures, tracheostomy with ventilator support but vents settings changed due to misdocumentation; pulmonary edema and acute respiratory distress syndrome	T,M Brain damage	8	\$4,450,000
1995	SG	M	39	1	Viral syndrome	Developed transverse myelitis;delay in diagnosis and treatment	D Paraplegia	7	\$1,000,000
1995	LDC	M	56	1	Spinal cord compression	During cervical laminectomy spinal cord dura cut and used wrong oscillating saw	T Quadriparesis with secondary impairment mobility	8	\$1,000,000
1995	GLA	F	22	3	Unknown in emergency room	Intracerebral hematoma	D Death	9	\$1,000,000
1995	FHH	M	25	3	Stage 24 nodular sclerosing Hodgkins Disease	Miscalculation of radiation dosage affecting spinal cord	T Spinal cord injury	6	\$2,562,500
1995	ACI	F	0	2	Birth	Vaginal delivery with vacuum assistance unsuccessful leading to c-section but umbilical prolapse	T "significant brain damage"	8	\$2,250,000
1995	CHM	M	0	2	Birth	Misdiagnosis of negative test result of Canavan's disease	D Canavan's Disease (degenerative disorder of CNS)	8	\$2,383,900

<i>Settle- ment Year</i>	<i>Case</i>	<i>Sex</i>	<i>Age</i>	<i>Dr/H</i>	<i>Treatment Sought</i>	<i>Claim Cause/Type</i>	<i>Injury</i>	<i>Code</i>	<i>Settlement</i>
1995	MHS	F	41	2	Rehab post possible herpes simplex encephalitis	Bacteremia from catheter tip. T,M	Convulsions, pulmonary emboli status epilepticus; Permanent vegetative state	8	\$2,150,000
1995	HBM	F	32	3	Pancreatic cyst	Post-op overdose of anesthetic; 83cc/hr vs. 3cc/hr T	Coma	8	\$7,250,000
1995	MHS	M	36	3	Post gunshot wound	Spinal anesthesia attempted several times but last anesthesiologist unaware of last PT and PTT values far out of normal range T	Bleeding spinal canal causing paralysis; required surgical procedure for removal and subdural hematomas	7	\$3,000,000
1996	FRD	F	44	1	Gallstones	Post-op full gram sepsis with multiple system failure: DIC, renal, abdomen hematoma D	Death	9	\$1,000,000
1996	RLC	UK	UK	2	Chest pain	Premature discharge from ER D	Death	9	\$1,500,000
1996	HSL	M	53	3	Herniated nucleus pulposus	Compression laminectomy with bilateral foraminotomies with neurolysis of nerve roots; discectomy and spinal fusion D,M	Paraplegia and loss of consortium	7	\$1,750,000
1996	CPC	M	0	2	Birth	Delay in C-section after fetal monitor showed distress D	Required resuscitation; neurological damage	7	\$2,500,000
1996	ORH	F	0	3	Coarction of aorta	During cardiac catheterization left ventricle punctured resulting in cardiac tamponade and full cardiac arrest T	Brain damage	7	\$7,300,000
1996	GMI	F	0	2	Birth	Failure to properly monitor and assess and properly perform CPR T,M	Severe brain damage	8	\$6,379,322
1996	DCH	M	0	2	Birth	Delivery via c-section with low apgars. Infant developed seizures and transferred to another facility T	Cerebral palsy	8	\$3,000,000
1996	CKR	F	30	3	TB meningitis	Failure to timely perform MRI and lumbar puncture test D	Brain herniation	7	\$3,000,000
1996	FHA	M	0	2	Post birth, home follow-up	Visiting nurse failed to diagnose Group B sepsis and infant re-admitted to hospital 28 hours late D	Cerebral vasculitis and bilateral thalamic infarcts	8	\$6,500,000
1996	MMM	M	7	2	Cholestoma of left middle ear and mastoid	Surgery. Child was to have topical dose to control bleeding and epinephrine but topical dose was used as injected amount. T	Death	9	\$1,250,000
1996	RJS	F	54	3	Angina	Extensive laceration of femoral vein T	Death	9	\$1,000,000
1996	RAL	F	0	1	Birth	Adverse reaction to digital exam T	Cerebral palsy	8	\$1,000,000
1996	HM	F	33	1	Cervical pain	Deep surgical plexis block; immediate cardiac arrest but resuscitation delayed due to incomplete crash cart T	Cardiac arrest	8	\$1,000,000
1996	RPA	F	24	1	Angina	Pulmonary angiogram interpreted as non diagnostic of pulmonary embolus D	Patient died from complications of pulmonary hypertension during pregnancy		\$1,000,000
1997	SVC	M	52	1	Depression	Prescribed drugs led to comatose state T	Brain damage	7	\$1,000,000
1997	CNP	M	14	2	Left tibia fracture	Cast too tight and cut off blood supply to leg and foot T	Below knee amputation	6	\$1,000,000
1997	BPR	F	40	3	Urinary tract infection	Failure to timely diagnose sepsis and initial failure to admit to hospital despite severe pain. Once in hospital failure to hydrate and prescribe proper antibiotic D,T	Death	9	\$1,000,000
1997	CMD	F	43	1	Cerebral spinal fluid leak	During surgical repair Fluorescein inappropriately administered T	Bowel and bladder dysfunction, paraparesis and memory dysfunction	7	\$1,000,000
1997	DLC	M	4	1	Unknown	Misdiagnosis: not early puberty; instead pineal tumor D	Non-correctible vision in right eye ; subsequent surgeries	7	\$1,000,000
1997	BRC	UK	UK	1	Cardiac valve replacement	Failure to follow IV protocol M,T	Endocarditis, infection of cardiac valve	8	\$1,500,000
1997	ORO	M	43	2	Motor vehicle accident with flat chest bilateral pneumothorax	Failure to diagnose subclavian artery which caused massive right hemothorax D	Death	9	\$2,500,000

<i>Settle- ment Year</i>	<i>Case</i>	<i>Sex</i>	<i>Age</i>	<i>Dr/H</i>	<i>Treatment Sought</i>	<i>Claim Cause/Type</i>	<i>Injury</i>	<i>Code</i>	<i>Settlement</i>
1997	HCP	M	49	3	Microscopic laser lumbar laminectomy for herniated disc	During post op 48 hours after surgery non-timely diagnosis of congestive heart failure and pulmonary edema by nurses. PCA morphine may have masked symptoms of myocardial infarction and decreased respiratory function	D,M Death	9	\$5,000,000
1997	KCM	F	37	2	Pregnancy- induced hypertension	Induced labor with IV Pitocin. When eoidural catheter removed patient had no sensation in legs but back pain and weakness	T Paraplegia and cauda equina syndrome (spinal cord ends)	7	\$65,333,164
1997	CNM	F	0	3	Birth delivery	Neurological damage during delivery	T Grave neurological damage	8	\$3,250,000
1998	HMS	F	40	1	Bowel pain	Failure to timely respond to lab values and order diagnostic tests. Bowel obstruction	D Cardiac arrest resulting in vegetative coma and death	9	\$2,000,000
1998	GJL	F	52	3	Angiogram	Instructions to radiologist not provided by hospital employees and problem with angioplasty with stent and sepsis	T Paraplegia	7	\$1,000,000
1998	COR	M	56	2	Tendon laceration - right index finger	Following the administration of a bolus of Propofal, patient was monitored by 2 nurses not certified for IV conscious sedation protocol. When drapes removed, nurses discovered patient was cyanotic.	T Death	9	1,000,000
1997	LMG	M	39	1	Shortness of breath and coughing blood after fall on back.	Failure to diagnose pulmonary embolism.	D Death	9	\$1,250,000
1998	UM	F	56	2	Neck, shoulder pain radiating to lumbar spine and left leg.	Cervical discectomy, developed respiratory distress, left vein deep venous thrombosis, gangrene of feet.	T Right ankle, left below knee amputation.	7	\$1,625,000
1997	FH	M	0	2	Labor & delivery, 39 week gestation.	Failure to recognize fetal distress, convey to OB. Delay in delivery.	D Neurological injury.	7	\$1,450,000
1998	GAB	F	50	1	Knee surgery	Failure to diagnose cervical disc herniation, spinal cord traumatized during surgery.	D Quadriplegia.	8	\$1,500,000
1998	GSHI	M	62	2	Decompression laminectomy.	Failure to appropriately monitor neurological checks post-laminectomy.	M Quadriparesis, neurogenic bladder.	8	\$1,449,032
1997	CH	F	60	2	Neck and central back pain.	Following administration of 100 mg of Demerol, patient suffered acute respiratory arrest and cardiopulmonary arrest.	T Severe hypoxia, vegetative state.	8	\$2,575,000
1998	UCH	M	2	2	Labor & delivery.	Delay in C-section, failure to recognize fetal distress.	D Profound brain damage	8	\$5,000,000
1998	GEO	M	55	1	Inverting papilloma of left nasopharynx.	No prophylactic antibiotics, failure to recognize complication.	D Post-operative bacterial meningitis	6	\$1,000,000
1998	JRR	M	51	1	Pain management for disc disease.	Improper prescription, drugs contraindicated.	T Seizures and death.	9	\$1,300,000
1999	SPGH	F	0	3	Post-birth monitoring.	Failure to diagnose group B streptococcal meningitis prior to discharge.	D Severe cognitive delays, requires occupational, physical, and speech therapy.	7	\$5,500,000
1999	PRMC	F	21	2	Intrauterine pregnancy at 33 weeks, HELLP syndrome.	Eclamptic seizure when BP escalated, second seizure within ten minutes. Intracerebral bleed. Patient taken to surgery to remove hematoma, but remained comatose. EEG revealed brain death.	D,T Death	9	\$2,250,000
1999	SJH	F	0	2	Labor & delivery	Cardiopulmonary arrest of baby when mother fell asleep with baby in her bed.	M Brain damage.	8	\$1,761,000
1999	BMC	M	53	2	Congenital oral deformity; surgery.	Cardiac arrest in surgery, became less responsive following surgery.	M Vegetative state.	8	\$4,000,000
1999	PRMC	F	1	3	Severe preeclampsia and HELLP syndrome in 32 week gestation.	Untreated for 10 hours.	D Hemorrhagic periventricular leukomalacia, hypoxic ischemic injury resulting in motor development delay, cognitive defects.	7	\$3,300,000

<i>Settle- ment Year</i>	<i>Case</i>	<i>Sex</i>	<i>Age</i>	<i>Dr/H</i>	<i>Treatment Sought</i>	<i>Claim Cause/Type</i>	<i>Injury</i>	<i>Code</i>	<i>Settlement</i>
1999	UM2	F	0	3	C-section for twins in breech position.	Delay in c-section for twin A, depressed fetal heart rate and prolapsed cord noted following epidural grid.	D,T Prenatal asphyxia, respiratory failure, hypoxic ischemic encephalopathy, gastroesophageal reflux.	7	\$6,120,000
1999	CCMC	F		3	Multicentric and multifocal ductal carcinoma in SITU of right breast.	Malfunction of sequential compression devices led to compartment syndrome requiring fasciotomy.	T Compartment syndrome of left leg, neurological deficits in left leg, foot drop, significant scar.	5	\$1,000,000
1999	UPP	F		1	Mononucleosis	Spleen rupture associated with mononucleosis.	D Death	9	\$1,000,000
1999	JTC	M		1	Ultrasound for unspecified reasons.	Missed Chiari malformation on ultrasound.	D Spina bifida.	6	\$1,000,000
1999	ORMC	M		2	Headache and fever.	Attempted spinal tap without sedation.	T Death	9	\$1,647,500
1999	RB	M		3	Biliary disease.	Laparoscopic cholecystectomy. Failure to prevent, diagnose, treat perforation of the small intestine. Septic shock.	T Death	9	(\$2,000,000)
2000	JNA	F		3	Ovarian carcinoma. Lower abdominal pain, nausea and vomiting.	Benign pelvic mass and gall stones removed. Failure to read X-rays prior to surgery resulting in missed cancerous mass in lungs.	D Death from lung cancer.	9	\$2,500,000
1999	BSC	M		1	Ischemic heart disease with critical coronary atherosclerosis.	Unspecified.	D Death due to cardiac arrhythmia.	9	\$7,000,000
1999	MAK	F		1	Septicemia.	Misdiagnosis of infection.	D Death.	9	\$5,000,000
2000	SMH	M		3	Prenatal ultrasound.	Misdiagnosis of multiple genetic anomalies and deformities eliminated parental option to abort.	D Wrongful birth. Multiple genetic anomalies and deformities.	8	\$3,000,000
2001	SMF	F		1	Pulmonary embolus.	Failure to timely diagnose and treat pulmonary embolus.	D Death	9	\$1,000,000
2001	KMC	F		3	Induction of labor with irregular contractions.	Failure to provide appropriate monitoring, failure to aggressively treat hemorrhage, failure to give clotting factors.	M Death.	9	\$1,625,000
2001	AHMC	M		3	Acute myocardial infarction.	Failure to diagnose and adequately treat MI, failure to perform serial cardiac enzymes, failure to recognize abnormal EKG.	D Death.	9	\$1,000,000
2001	WHB	M		1	Right-side femoral tibial bypass.	Negligent administration of epidural anesthesia. Failure to follow post-operative epidural monitoring roles.	T Rectal, scrotal, perineal, and perianal numbness; incontinence, bowel and bladder dysfunction.	6	\$1,000,000
2001	MR	M		3	Pneumothorax.	Medication overdose. Pleurodesis.	T Death	9	\$2,000,000
2001	CEK	M		3	Spinal abscess.	Failure to diagnose abscess on CT scan. Paraplegia with complications.	D Death.	9	\$1,000,000
2002	JIC	M		3	Pectus excavatum (sunken sternum).	Nuss procedure; place rod to push out sunken sternum.	T Death.	9	\$2,500,000
2002	JFK	F		2	Diabetic ketoacidosis.	Nurse flushed triple lumen catheter with Lidocaine causing cardiac arrest.	T Severe, irreversible brain damage with seizure activity.	8	(\$5,803,120)
2002	RR	M		3	Bone scan.	Failure to diagnose lytic lesion.	D Development of multiple myeloma.	8	\$1,600,000
2002	PRMC	F		2	Laparotomy.	FT count during procedure, retained foreign body.	T Retained foreign body.	4	\$1,275,000
2002	RWS	F		1	Ultrasound revealed fibrocystic changes without malignancy.	Failure to diagnose breast cancer.	T Metastatic breast cancer.	8	\$1,000,000
2002	PGH	F		3	Infection	Infection	? Amputation of 4 extremities.	8	\$1,000,000
2002	OHH	M		2	Unspecified	Incorrect weight documentation led to overdose of Heparin causing massive pulmonary thromboembolism.	T Death.	9	\$1,000,000
2002	DW	M		1	Hypertrophic cardiomyopathy.	EKG revealed left bundle block branch. Failure to request proper cardiac workup. Later suffered massive heart attack.	D,T Death	9	\$2,000,000
2002	GR	M	46	1	ER visit for unspecified complaint.	Failure to diagnose intracranial hemorrhage.	D Brain damage.	7	\$1,000,000
2002	DWG	M	42	3	ER visit for unspecified complaint.	Failure to diagnose spinal cord injury.	D Paralysis.	7	\$1,000,000

<i>Settle- ment Year</i>	<i>Case</i>	<i>Sex</i>	<i>Age</i>	<i>Dr/H</i>	<i>Treatment Sought</i>	<i>Claim Cause/Type</i>	<i>Injury</i>	<i>Code</i>	<i>Settlement</i>
2002	CB	M		1	Pectus excavatum (sunken chest).	Nuss procedure; place rod to push out sunken sternum. Perforated heart.	T Death.	9	\$1,000,000
2002	GMB	M		3		Failure to diagnose purpura fulminans secondary to meningococcus.	D Extremity amputation.	7	\$1,000,000
2003	CIS	F		1	Dislocated posterior chamber interocular lens, right eye.	Implanted and anterior chamber intraocular lens without removing the prior lens.	T Loss of vision in right eye.	5	\$2,250,000
2003	DSP	M		1	Prescribed antacids for chest pain, referred patient to ER if pain continued or worsened.	Failure to diagnose myocardial infarction. ER discovered heart disease.	D,T Death due to complications of MI.	9	\$10,000,000
2003	ASR	F		3	Right upper quadrant pain.	Laparoscopic cholecystectomy, failure to treat properly.	T Transection of common bile duct.	6	\$3,500,000
2003	BH	M	0	3	Labor & delivery.	Aggressive use of pitocin, failure to monitor, failure to carry out M, T C-section in timely manner once fetal bradycardia was announced.	T Death.	9	\$1,325,000
2003	EAA	M	0	1	Obstetric ultrasound routine.	Failure to diagnose spina bifida.	D Spina bifida.	7	\$1,000,000
2003	TJF	M	53	1	Renal cancer.	Robot assisted laposcopic nephrectomy.	T Death.	9	\$2,000,000
2003	CBS	F	43	1		Failure to diagnose pelvic inflammatory disease.	D Death.	9	\$1,000,000
2003	HRMC	F		2	Labor & delivery.	C-section, patient developed bradycardia progressing to code blue.	T Death	9	\$1,000,000
2003	JP	M		3	Chest pain.	Misdiagnosis of possible bronchopneumonia, failure to diagnose dissecting aortic aneurysm.	D Death.	9	\$1,000,000
2003	JWB	M		3	Shoulder strain, bulging disc.	Prescribed Clinoril. Patient suffered cardiac arrest.	T Death.	9	\$1,000,000
2003	MMMC	F		3	Chicken pox, varicella and labial cellulitis.	Delay in diagnosis of necrotizing faciitis.	D Extensive tissue damage and residual scarring from necrotizing faciitis.	6	\$1,000,000
2003	BHSF2	F		2	Anoxic encephalopathy.	Pulmonary embolus.	D,T Death.	9	\$8,080,000
2003	CHF	M	34	2		Failure to diagnose streptococcus infection.	D Death.	9	\$1,000,000
2004	ORH	M		3	Impingement syndrome.	Arthroscopy of left shoulder subcromial. Chest pain not reported timely, cardiologist never consulted.	D Death.	9	\$1,300,000
2004	LAF	F		3	Pregnancy.	Abruptio placenta leading to a vaginal delivery of stillborn.	D Stillborn infant.	9	\$1,240,000
2004	ALW	M		1	Leg weakness, numbness, gait problems, was diagnosed with a large herniated disc, surgery.	Post-operative infection, septic shock and total organ failure, vascular collapse, gangrene of both lower extremities.	D,T Amputation of legs and paraplegic.	7	\$1,000,000
2004	GB	F		1	Pregnancy.	Failure to diagnose placenta previa, failure to properly interpret ultrasound.	D Death.	9	\$1,000,000
2004	BHSF	M		2	Acls	Lacerated liver sustained during resuscitation, 90% occlusion of lad.	T Death.	9	\$1,000,000
2004	ERP	F		3	Unspecified.	Third ventricle cystercicosis, which likely led to herniation and death.	D Death.	9	\$1,000,000
2004	JK	M		3	Chest x-ray.	Failure to diagnose cardiomegaly.	D Death.	9	\$1,875,000
2004	MCH2	M		2		Hypoxic brain damage.	? Hypoxic brain damage.	7	\$8,200,000

Table 2 shows that 47 percent of the patients were female. Ages varied from birth to the seventies decade. For 46 percent of the claims the primary allegation was diagnostic error with 48 percent being treatment error and 6 percent involving failure to monitor. Forty-eight percent were female patients.

The patients often sustained severe injuries. The NAIC scale calculations from Table 2 show that 42 percent of the cases resulted in deaths, 30 percent resulted in grave injuries, 20 percent resulted in major permanent injuries and 8 percent involved lesser permanent injuries.

Once again, however, it is important to read the summaries of the injuries and the alleged causes of the injury as described in Table 2 to appreciate the full gravity of the injuries suffered. Of course, neither the qualitative nor the quantitative data in Table 2 tell about the economic consequences to the patient or the patient's heirs.

Before 1999 insurers were required to report whether a structured settlement was involved in the agreement and provide information about the nature of that settlement. It is not clear if all insurers complied with this requirement. In addition details varied considerably for cases in which the data were reported. Of the 115 settlements in Table 2 thirty-one, or 27 percent, reported structured settlements. These cases are described in Table 3. The last column in that table reports the details of the settlement. In all of the cases there was a cash settlement and an annuity. In most instances the insurer reported the amount paid for the annuity and the projected amount that the patient would receive over the period of the annuity.

**Table 3**  
**Year, Case Name, Injury and Details of Settlement**

Settle Year	Case	Sex	Age	Injury	Settlement	Structured
1991	BMH	M	0	Spastic quad; cerebral palsyriplegia	\$1,887,044	\$1million cash plus\$887,044 annuity yielding an expected total payment to child of \$13,855,826
1992	WCD	M	1	Severe brain damage, blind, deaf, immobile	\$1,000,000	\$640,000 cash plus \$540,000 annuity yielding \$2,557/month for child plaintiff.
1992	UMS	F	0	Severe mental, emotional impairment	\$3,000,000	No details except an estimate that the annuity would yield \$5,914,774
1993	CRH	F	2	Severe cerebral palsy secondary to hypoxia	\$6,000,000	\$4,922,115 cash; plus \$1,077,885 present value for structured trust expected to yield \$3,179,273 (Note medical expenses incurred to date of the settlement = \$989,164)
1993	TGP	M	43	Renal cell carcinoma	\$2,000,000	\$1,389,542 cash plus \$610,459 for structured settlement for 3 surviving minor children
1993	AHP	F	0	paraplegia	\$3,750,000	\$2,300,000 plus \$1,450,000 present value for annuity
1994	AR	M	0	Profound brain damage	\$1,000,000	\$440,178 cash plus \$559,822 annuity yielding a total of \$2,912,000
1994	GBP	F	39	Vegetative state, non-reversible	\$3,000,000	\$1,500,000 cash plus \$1,500,000 annuity expected to yield an expected payment to the plaintiff of \$8,783,183 for plaintiff and four minor dependants.
1995	FHH	M	25	spinal cord injury	\$2,647,617	\$1,156,000 cash plus \$1,491,000 for structured annuity expected to yield \$5,291,937.
1995	CHM	M	0	Canavan's Disease (degenerartive	\$2,383,900	\$1,092,209 cash + \$1,291,691for annuity yielding lump

Settle Year	Case	Sex	Age	Injury	Settlement	Structured
				disorder of central nervous system		sum payments at five and ten years totalling \$2,000,000
1995	HBM	F	32	Coma	\$7,250,000	Cash and annuity cost unknown but annuity estimated to yield \$16,129,528
1996	RLC	UK	UK	Death	\$1,500,000	\$1,429,808 cash plus \$70,192 for annuity yielding atotal payment to plaintiff's family of \$1,422, 239
1996	CPC	M	0	Required resuscitation ;neurological damage	\$2,500,000	\$1,187,940 cash plus \$1,312,060 for annuity, yielding \$3,307,824 for the child
1996	ORH	F	0	Brain damage	\$7,300,000	\$5,100,000 cash paid on behalf of four defendants plus \$2,200,000 for an annuity. Total yield of annuity unknown.
1996	GMI	F	0	Severe brain damage	\$6,379,322	\$5,529,332 cash plus \$850,000 annuity yielding 8,066/mo for life of the child.
1996	DCH	M	0	Cerebral palsy	\$3,000,000	\$2,600,000 cash plus \$800,000 annuity expected to yield \$13,783,483 over the child's life.
1996	CKR	F	30	Brain herniation	\$3,000,000	\$1,800,000 cash plus \$1,200,000 from three insurance carriers for an annuity expected to yield atotal of \$7,816,824
1996	FHA	M	0	Cerebral vasculitis and bilateral thalamic infarcts	\$6,500,000	\$4,500,359 cash plus \$1,999,641for an annuity yielding \$7,855/mo for life plus periodic cash payments graduating from\$50,000/yr to balloon at \$25 yearsto \$250,000.
1997	SVC	M	52	Brain damage	\$1,000,000	\$582,935 cash plus \$417,065 for annuity, yielding expected total of \$1,572,935.
1997	HCP	M	49	Death	\$5,000,000	\$4,000,000 cash plus \$1,000,000 annuity yielding projected \$3,976,503 for decedent's minor daughter.
1997	KCM	F	37	Paraplegia and cauda equina syndrome (spinal cord ends)	\$3,520,160	\$1,845,160 cash plus \$1,675,000 to two annuity companies yielding an expected total of \$8,157,597
1998	GJL	F	52	Paraplegia	\$1,000,000	\$500,000 cash plus \$500,000 annuity starting at \$2,500 per month and then adjusted for inflation .
1998	COR	M	56	Death	1,000,000	Payout of approximately \$2,000 per month over 35 years.
1997	LMG	M	39	Death	\$1,250,000	553,359.60 cash plus annuities purchased at \$354,4560, \$111,048.20 and 111,048.20 yielding at total of \$1,129,9120
1998	UM	F	56	Right ankle, left below knee amputation.	\$1,625,000	\$700,000 cash and annuity providing \$4000 per month for 5 years and \$1000 per month for 7 years.
1998	GSHI	M	62	Quadriparesis, neurogenic bladder.	\$1,449,032	\$675,000 cash and annuity providing \$9750 per month for 5 years or life.
1998	UCH	M	2	Profound brain damage	\$5,000,000	\$2500 per month, increase 3% per year. 20 years guaranteed, plus life.
1997	CKMC	F	37	Paraplegia and cauda equina syndrome (spinal cord ends)	\$3,520,000	Cash payment of \$1,845,1600 and two annuities purchased with present value of \$1,675,000: total payments estimated at \$8,157,597
1999	SPGH	F	0	Severe cognitive delays, requires occupational therapy, physical therapy, speech therapy.	\$5,500,000	total annuities yielding \$12,754.31 per month.
1999	PRMC	F	21	Death	\$2,250,000	Cash of \$1,809,709 plus annuity for surviving child purchased at \$440,291.
1999	PRMC	F	1	Hemorrhagic periventricular leukomalacia, hypoxic ischemic injury resulting in motor development delay, cognitive defects.	\$3,300,000	Cash of \$907,829 plus annuity purchased for \$2,392,171 for life care of child.

In some instances the estimated payments are staggering, reflecting medical costs to the patient, income losses, and /or financial support for surviving minor children. Case BMH (1991) was estimated at over \$13 million; Case GBP (1994) was estimated at almost \$9 million; case DCH (1996) was estimated at almost \$14 million. In case CKR (1996), which the insurer rated only a 7 in level of injury seriousness, the estimated cost was almost \$8 million, suggesting that the medical injury was more serious than reported, that the claimant had a large income loss or a combination of both of these factors. Case HBM (1995) was estimated at over \$16 million; and Case KCM (1997) was estimated at over \$8 million.

It is noteworthy that during the same time period there were only two structured settlements reported in the jury trial cases contained in Table 1. In the 1991 case, C v. D & H \$1,500,000 of the \$3,250,000 settlement was put into an annuity expected to yield a total payment of \$2,954,347. In the 1996 case of Z v H the \$1 million settlement involved a cash payment of \$725,649 plus \$482,351 for an annuity. However, it is likely that annuities were eventually purchased in other cases, although without the direct input of the insurer. For instance, the 1992 case of R v. BR involved a deceased patient who left eight surviving children. Florida law, like many other state laws, requires the oversight and approval of a judge when money is awarded to minor children.<sup>25</sup> Trial cases reflect an inability for the parties to agree on liability or amounts of damages and the adversary nature of trial probably, in most instances, just excludes the insurer from participating in decisions about how the money is to be used.

The other potentially interesting finding from Table 3 is that it provides a rough guess as to how much plaintiff lawyers make from million dollar settlements. In discussing these figures with several plaintiff lawyers their opinion was that the lawyers working on contingency fee basis would take their fee percentage only from the cash portion of the settlement. Thus, for example, if a \$3 million settlement resulted in purchase of a \$2 million annuity plan, a lawyer working on a one-third contingency fee would receive her cut only from the cash portion of the remaining \$1 million balance. This assumption, if correct, provides an important correction to claims about plaintiff lawyers always getting huge profits from these large cases. In this hypothetical example, rather than receiving \$1 million from the \$3 million settlement, the lawyer would receive only \$333,000. The present research cannot confirm this assumption but the data do raise an issue for additional research since windfall plaintiff lawyer fees often play an important role in claims about the need for tort reform.<sup>26</sup>

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<sup>25</sup> Fla. Stat. § 768.25 (2005)

<sup>26</sup> See “Medical Liability Reform – NOW!”, American Medical Association, June 2005. <http://www.ama-assn.org/ama1/pub/upload/mm/-1/mlrnowjune142005.pdf> or “The Med-Mal Divide: As the AMA Talks Up Damage Caps and Specialty Courts, Solving the Medical Malpractice Clash May Require Bridging the Lawyer-Doctor Culture Gap” ABA Journal, March 2005.

### III. Jury Cases and Pre-suit Cases Compared

Aside from the fact that pre-suit cases appear to have more structured settlements than trial cases, are there other characteristics that distinguish the two types of claim settlements?

In examining the claims we classified them according to whether they involved a claim against doctors, against hospitals or against both hospitals and doctors. Among jury trials 64 percent of cases involved doctors alone, 4 percent involved hospitals alone and 33 percent involved doctors and hospitals. Among pre-suit claims, only 38 percent involved doctors alone, 35 percent involved hospitals alone and 28 percent involved both doctors and hospitals. These differences were statistically significant.<sup>27</sup> Thus, jury trials were more likely to involve doctors alone whereas pre-suit settlements were more likely to involve a hospital alone. The data do not allow an explanation as to why there are differences in these proportions. Noteworthy, however, in many of the pre-suit cases involving doctors and hospitals the hospital assumed liability for the doctors. This suggests that the doctors were engaged in medical residencies or were otherwise direct employees of the hospital.

A more important comparison involves the distribution of injury seriousness. For this comparison we add those five jury trial cases for which we could not find verdict data. The closed claim reports for these cases include the injury seriousness as well as the amounts actually paid in the post-verdict settlements. In addition we can also ask if the amounts paid in settlements differed.

Table 4 reports the levels of injury seriousness according to the NAIC scale, the percent of cases falling within each category and the mean amounts paid according to seriousness level.

**Table 4**  
**Jury Cases and Pre-suit Claims: Percent of Cases and Mean Amounts Paid by Level of Injury Seriousness**

Injury Seriousness Level (NAIC)	Percent of Jury Cases	Percent of Pre-suit Settlement Claims	Jury Cases Mean Amount Paid	Pre-suit Claims: Mean Amount Paid
5	5%	2%	\$1,367,500	\$1,508,333
6	15%	6%	\$1,326,956	\$1,837,750
7	31%	20%	\$1,510,948	\$2,499,126
8	16%	30%	\$3,688,655	\$2,269,205
9	33%	42%	\$2,221,230	\$1,808,385
Total Percent/ Mean Overall Amount	100%	100%	\$2,052,804	\$2,124,264

Table 4 shows that the pre-suit cases involved a greater number of the most serious injuries compared to jury cases. A Chi-square comparison of the two distributions indicated the difference is

<sup>27</sup> Chi-square =20.4,df =2 , p< .01.

statistically significant.<sup>28</sup> Specifically, while 33 percent of jury cases involved death 42 percent of pre-suit claims involved death; 16 percent of jury cases involved grave injuries whereas 30 percent of pre-suit claims involved grave injuries. Put another way, 72 percent of paid pre-suit claims involved grave injuries or death compared to 49 percent for jury trial cases.

Are there any differences in the amounts paid in relation to the level of injury seriousness? The last two columns of Table 4 show the amounts paid by level of seriousness and the mean amount over all levels of seriousness. There is no statistically significant difference between the overall mean amounts paid by insurers for jury cases and for pre-suit cases.<sup>29</sup> Although the table shows some differences between levels 7 and 8, the differences are not statistically significant across levels of seriousness.<sup>30</sup>

#### **IV. Summary and Conclusions**

Discussion about problems with medical malpractice litigation tends to focus on jury verdicts, particularly large jury verdicts even though jury verdicts represent only a small fraction of the total payouts by medical liability insurers. Previous research on a comprehensive set of closed medical malpractice claims submitted by Florida insurers showed that among cases involving payouts of a million dollars or more the number of million dollar cases settled without a lawsuit were more than double the number of cases resulting in payouts following jury trial. In the present article we analyzed and then compared these two sets of closed claims.

Consistent with previous research jury trial cases tended to settle for substantially less than the original verdict. On average the settlement in the million dollar cases was 67 percent of the verdict. However, with one exception, cases with verdicts over \$4 million settled, on average, for 37 percent less than the verdict. Both the quantitative ratings and the qualitative data provided in the liability insurers' reports show that the injuries suffered by plaintiffs in jury trial cases were very serious. The injuries in claims settled without a lawsuit were comparable to jury trial cases. Presumably there was no serious dispute about liability in these pre-suit claims. A number of the pre-suit claim files also had information about structured settlements for the plaintiffs that supported a picture of major medical or income losses resulting from the injuries, either for the patients themselves or for their heirs.

The data analyses support a view that tort reform efforts focused on jury verdicts are misdirected, at least with respect to million dollar verdicts in Florida. Not only do jury trials constitute only a small portion of million dollar payments, the settlements following verdicts tended to be substantially less than the jury awards.

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<sup>28</sup> Chi-square = 16.85, .df 4, p<.01.

<sup>29</sup> Analysis of variance: F = .542., df 1,166, p = n.s.

<sup>30</sup> Analysis of variance: F = 1.56, .df 5,166, p = n.s.

On their own and in comparison to million dollar claims settled without a lawsuit, the settlements following verdicts reflect payments for very serious economic losses. Recent claims that million dollar claims have increased, perhaps even doubled,<sup>31</sup> may or may not be true, but that does not necessarily mean that the awards were unwarranted. Rather than suggesting that the claims are unwarranted the present data suggest two possible alternative hypotheses. The first is that the cost of injuries due to medical errors may have increased in recent years. The second is that more patients are seeking redress for very serious negligent injuries.<sup>32</sup> The findings in this article present a prima facie argument that these alternative hypotheses may have validity. The million dollar settlement claims without a lawsuit further suggest that the focus in the medical malpractice reform debate should be on the basis and dynamics of settlement rather than trial.

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<sup>31</sup> See Dean Starkman, *Calculating Malpractice Claims*, Washington Post December 29, 2005 at D01referencing uncited sources asserting that \$1 million plus claims as a percentage of all claims has doubled to 8 percent over the past five years..

<sup>32</sup> Support for this second hypothesis is found in our earlier article, Vidmar *supra* note 3 at 338-345. More claims involving very serious injuries or death were paid in Florida after the year 2000 than at the beginning of the 1990s decade.