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Introduction

The statistics are well-known: about 90% of medical malpractice cases tried in Massachusetts result in a jury verdict for the defense.[1] Without taking a position on whether these results are justified, this essay examines some of the differences between bringing a garden-variety lawsuit for negligence, and bringing a claim for negligent medical care that may, at least in part, explain the results reflected in these statistics.

I. Two Hypothetical Plaintiffs

Imagine two patients are admitted to neighboring rooms in a Boston, Massachusetts teaching hospital. The first patient, Mal, is asleep in her bed at 2:00 a.m. A nurse, on physician's orders, injects a medication into Mal's intravenous line. The medication immediately interacts with another medication Mal is taking. This causes a severe reaction, resulting in Mal becoming permanently paralyzed. The interaction between the two medications was well-known, and should have been known, to the hospital pharmacy, the physician in charge of Mal's care, and the nurse that delivered the drug.

At the same time, a second patient, Gary, is lying in his own hospital bed in the next room over. A night-shift worker for an outside maintenance company, on orders

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[1] David E. Frank, *Odds Against Tort Plaintiffs in Massachusetts*, MASS. LAWYERS WEEKLY, June 14, 2010, at 1, *available at* http://www.dolanmedia.com/view.cfm?recID=602147.

from his supervisor, comes into Gary's room to repair a light fixture above Gary's bed. In the process, the worker drops the entire fixture on Gary, resulting in Gary's permanent paralysis. The dangerousness of attempting to change the fixture with Gary underneath it was, or should have been, known to the worker and the worker's supervisor.

Before the injury, both Mal and Gary were happily married adults of the same age, each raising two children, working full-time jobs and earning identical salaries. The medical treatment and associated costs, and the suffering Gary and Mal each encounter as a result of their injuries, are the same.

Both Mal and Gary obviously have rights to bring claims for the negligence that paralyzed them. Mal's case, involving the negligence of medical providers, must be framed as a medical malpractice case. Gary's case will be a garden-variety negligence claim. This essay examines some of the ways that, under the procedural and substantive laws of Massachusetts, the litigation and trial of their respective cases will differ.[2] It then asks what that might mean for the results of their cases.

II. Two Hypothetical Lawsuits

One unfamiliar with the law might assume that because medical malpractice is just a negligence case in which the defendant is a medical professional, Mal's case would proceed like any other negligence case. After all, the elements are no different, and the goal of the tort system – regardless of the defendant's vocation – remains to allow people injured by the carelessness of others to be "made whole" for their injuries.[3] The reality, though, is that Massachusetts law, whether by design or as it has evolved, poses significant obstacles to Mal recovering damages that simply do not exist in Gary's case. This essay looks at some of those obstacles.

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[2] We set this hypothetical in Massachusetts because both authors work and have practiced in Massachusetts, which allows us to give state-specific insight. However, Massachusetts is not atypical when it comes to adding challenges for plaintiffs who bring malpractice claims. In some respects, Massachusetts is more pro-plaintiff than other states, and in other respects, less.

[3] Smith v. Mass. Bay Transp. Auth., 968 N.E.2d 884, 889 (Mass. 2012) ("[A]t the time of an accident, an injured party accrues a right . . . 'to be made whole and compensated for' injuries wrongfully inflicted by a tortfeasor." (quoting G.E. Lothrop Theatres Co. v. Edison Elec. Illuminating Co., 195 N.E. 305, 307 (Mass. 1935))).

A. Presentment and Tribunal

Long before Mal gets her day in court, extra procedural hurdles must be cleared that do not exist in Gary's case. The first hurdle is newly imposed as of the fall of 2012. Before Mal can even file a lawsuit, she must present her case – including her theories of negligence and her damages – to her health care providers, and then wait six months for them to determine whether to settle (or more likely, how to defend) her case.[4] By contrast, Gary's case would begin with his attorney filing a lawsuit for negligence with the ability to immediately and aggressively pursue his claims. This could be done at any time within the statute of limitations for a negligence claim, which, in this scenario, is three years.[5] Gary's attorney's ability to file at will prevents the defense from having the head-start on every aspect that they would in Mal's case.

Once Mal has presented her case, waited the statutory period and filed suit, she faces another hurdle. Before she can complete the discovery phase (and probably before she can get any information from the defendant medical providers), Mal's attorneys will be obligated to establish that her case has merit by making presentations before a medical malpractice "tribunal."[6] Every medical malpractice case in Massachusetts must first be cleared by one of these tribunals, which consists of a judge, an attorney, and a health care provider practicing in the same area as the defendant.[7]

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[4] An Act Improving the Quality of Health Care and Reducing Costs Through Increased Transparency, Efficiency and Innovation, ch. 224, § 221, 2012 Mass. Legis. Serv. 885 (West) (to be codified at MASS. GEN. LAWS ch. 231, § 60L(a)). "[A] person shall not commence an action against a provider of health care as defined in the seventh paragraph of section 60B unless the person has given the health care provider 182 days written notice before the action is commenced." When 182-day notice has been given to another medical provider involved in the same claim or when the claimant has already commenced a medical malpractice action against any provider involved in the claim, the notice period is shortened to 90 days. *Id.* (to be codified at MASS. GEN. LAWS ch. 231, § 60L(c),(d)).

[5] MASS. GEN. LAWS ch. 260, § 2A (2010).

[6] MASS. GEN. LAWS ch. 231, § 60B (2010).

[7] *Id.* Mal must go through this process regardless of whether her defendant is a hospital, physician, nurse, or a combination of the three. *See id.* The tribunal requires the hearing if the defendant is a provider of healthcare, defined as

> a person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, social worker, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment.

Although the statute requires the tribunal to take place within fifteen days of the defendant's answer to the complaint, in practice the rule is never followed and waiting for the hearing could delay Mal's case for a year or more.[8] In the interim, many medical malpractice defendants, and judges, take the position that no discovery is to be allowed until the tribunal is completed.[9]

Beyond mere delay, the tribunal represents another opportunity for the defense to get a jump on the plaintiff. At the tribunal, Mal will have the burden of establishing that her case meets a standard akin to that needed to overcome a directed verdict.[10] That means, with the aid of no discovery, no interrogatory answers, and no depositions, Mal's attorney must in effect prove, before the case is litigated, that her case is worthy of going to a jury. Gary's attorney would not have to meet this standard until all the evidence was collected during discovery and presented to the jury at trial.[11]

Presenting Mal's case to the tribunal will also involve significant added expense, because Mal cannot merely rely on her complaint or the medical records to support her argument about the defendants' liability. Instead, her attorneys must craft an "offer of proof," which is a written submission summarizing the evidence and explaining why her claim meets or exceeds the directed verdict standard.[12] The offer of proof must include

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Id.

[8] 14C HOWARD J. ALPERIN, SUMMARY OF BASIC LAW §17.157, at 953 (4th ed. 2009).

[9] *See id.* at 953 n.19 (citing Gugino v. Harvard Cmty. Health Plan, 403 N.E.2d 1166, 1168 (Mass. 1980)). In *Gugino*, the court noted that, in reviewing offers of proof presented to a medical malpractice tribunal, the tribunal should "allow[] for the fact that the hearing before the tribunal ordinarily precedes discovery." 403 N.E.2d at 1168.

[10] St. Germain v. Pfeifer, 637 N.E.2d 848, 851 (Mass. 1994) (citing Little v. Rosenthal, 382 N.E.2d 1037, 1041 (Mass. 1978)).

[11] MASS. R. CIV. P. 50; King v. G & M Realty Corp., 370 N.E.2d 413, 414 n.3 (Mass. 1977) (indicating motion for directed verdict decided at close of plaintiff's case will not survive unless followed up by motion for directed verdict at close of all evidence); *see also* 10C MARC G. PERLIN & STEVEN H. BLUM, PROCEDURAL FORMS ANNOTATED § 93.10, at 200-02 (2009) (detailing Rule 50 motion for directed verdict).

[12] MASS. GEN. LAWS ch. 231, § 60B (2010). A tribunal consisting of a superior court justice, a Massachusetts-licensed physician, and a Massachusetts-licensed attorney must review the offer of proof to determine whether the medical malpractice case has merit for judicial inquiry. *Id.*; *see supra* notes 6-7 and accompanying text (detailing tribunal); *see also* Kapp v. Ballantine, 402 N.E.2d 463, 467 (Mass. 1980) (holding written reports and opinions of qualified medical professionals warrant evidentiary consideration by medical tribunal); Saunders v. Ready, 862 N.E.2d 422, 424 (Mass. App. Ct. 2007) (holding "necessary elements can be proved only by reasonable inferences drawn from the offer of proof"); Booth v. Silva, 626 N.E.2d 903, 906 (Mass. App. Ct. 1994) (requiring acceptable offer of proof to "comprise more than mere conclusory allegations or statements of counsel").

supporting affidavits from experts. Obtaining these affidavits is neither simple nor cheap.

Here, it is likely that Mal's attorneys would have to locate and hire as many as *four* separate medical experts to present to the tribunal: one to offer an opinion that the physician-defendant breached the standard of care by ordering the medication; a second to establish that the nurse-defendant breached the standard of care by giving it; a third to establish that the pharmacist should not have filled the order; and a fourth to offer an opinion as to whether these breaches were the cause of Mal's injuries. Because of the culture of medical practice, it is likely that the only experts willing to offer an opinion as to the negligence of a medical colleague would be retired and/or from a different region of the country.[13] In any event, obtaining expert opinions is enormously expensive and time consuming because a proper expert review requires a review of Mal's entire medical record and many hours of time to formulate and draft an opinion.[14] Some experts require weeks or months of lead-time before doing so, with expenses potentially reaching many thousands of dollars per expert for the plaintiff.[15]

Moreover, Mal's attorneys would likely have to complete the process *three* separate times: once in a tribunal hearing her claims against the physician, a second against the nurse, and a third in a tribunal hearing against the pharmacist.[16]

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[13] *See* Howard L. Oleck, *A Cure for Doctor-Lawyer Frictions*, 7 CLEV.-MARSHALL L. REV. 473, 476-79 (1958) (discussing use of retired physicians to ease tension of testifying against practicing physicians); *see also* Juan Carlos B. Gomez, *Silencing the Hired Guns: Ensuring Honesty in Medical Expert Testimony Through State Litigation*, 26 J. LEGAL MED. 385, 392-93 (2005) (discussing ability to use out-of-state medical experts).

[14] *See generally* C. Paul Sinkhorn, *Gaining Credibility in Word and Deed*, *in* THE ROLE OF EXPERT WITNESSES IN MEDICAL MALPRACTICE CASES: LEADING EXPERTS ON UTILIZING EXPERT WITNESS TESTIMONY, UNDERSTANDING TECHNICAL AND SCIENTIFIC EVIDENCE, AND PREPARING FOR TRIAL 77-99 (2009) (detailing medical experts' steps and procedures in preparation for trial).

[15] Typically, litigation costs are borne by the plaintiff's attorney, with the expectation that counsel will be compensated based on a contingent fee and stipend for costs in the event the plaintiff recovers money. If, however, the plaintiff does not recover money, typically the plaintiff's counsel bears the expense. *See* Michael L. Rustad, *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Toward Nursing Home Practices, Tort Reform, and Non-Economic Damages*, 35 N.M. L. REV. 337, 358 (2005). For instance, in nursing home neglect cases, the costs of medical experts and other discovery are borne by law firms and can reach up to $100,000. *Id.*

[16] MASS. GEN. LAWS ch. 231, § 60B (2010). Although a licensed physician is usually appointed to the tribunal,

> [w]here the action of malpractice is brought against a provider of health care [who is] not a physician, the physician's position on the tribunal shall be

Perhaps more important than the delay and expense of the tribunal(s) is the fact that the tribunal process puts Mal at a distinct and significant strategic disadvantage. At a time in the case where the defense possesses nearly all of the facts and evidence that make up the case, Mal has had to disclose the opinions of all of her experts. If any of those opinions end up not being supported by the facts found during discovery, those incorrect opinions or assumptions would subject Mal's experts, through no fault of their own (they did not have all the facts at the time they gave the opinions), to serious and potentially fatal impeachment at trial.[17]

In effect, the tribunal forces the plaintiff to commit to a set of facts and a theory of the case and to disclose it to the defendants, giving the defendants added opportunity to craft their own defense – including the testimony of their witnesses and experts – around and against that theory. It will likely be months or years, after all discovery is done and the case is being set down for trial, before plaintiff will get to know both the identity of defendant's experts and their opinions about why they believe the defendants are not liable.[18] The disadvantage for Mal and her attorney of flying blind during discovery against unknown defense experts with unknown opinions and theories cannot be overstated. To state the obvious, if Mal's attorney knew the defense's theories going into the deposition phase of discovery, she would be better able to explore and test those theories in her questioning. Without this information, she is left to guess at the defense's theories, and if she guesses wrong, she goes to trial with little or no idea what the experts and witnesses will say about them.

> replaced by a representative of that field of medicine in which the alleged tort or breach of contract occurred, as selected by the superior court justice in a manner he determines fair and equitable.

Id. Thus, Mal's case would require a separate tribunal hearing for each different type of health care provider.

[17] *See, e.g.*, FED. R. EVID. 613(b) (permitting admissibility of extrinsic evidence of witness's prior inconsistent statement); MASS. GUIDE TO EVID. § 613(a) (noting general admissibility of extrinsic evidence of witness's prior inconsistent statement).

[18] *See* MASS. SUPER. CT. THIRD AMENDED STANDING ORDER 1-88 (Time Standards), *available at* http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/standing-order-1-88.pdf. Tracking order designations for both negligence and medical malpractice cases in Massachusetts are provided in the Superior Court's Standing Order on time standards. *Id.* Under the order, negligence claims appear on the "Fast Track," with a 22-month deadline from filing the claim to entering the judgment. *Id.* at 9. By comparison, medical malpractice claims appear on the "Average Track," which permits a 24-month period for completion of discovery alone, with the exception of expert depositions. *Id.* at 10. *See also* Ralph D. Gants, *The Revised Superior Court Standing Order 1-88*, BOSTON B.J., Sept./Oct. 2007, at 3 (discussing changes in tracking designations and differences between factual and expert discovery).

Finally, if the tribunal does not find that the claim has merit, Mal must post a \$6,000 bond.[19] Without the bond, her case will be over.[20]

Contrast the tribunal system to Gary's case. For Gary, filing suit will be on his timetable, which will be followed by an answer from the defendant and then discovery that Gary's attorney can commence immediately. There will be no delay, and there will be no risk of having to post a bond. Absent a successful motion for summary judgment (which would be unlikely under our facts) or settlement, the next step after discovery would be to schedule and hold a jury trial.[21] If Gary calls experts, he likely will not have to disclose them until the pretrial conference (after the facts are developed during discovery), at the same time the defendants must disclose theirs.[22] The exchange would

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[19] MASS. GEN. LAWS ch. 231, § 60B (2010). The bond must be filed "with the clerk of the court in which the case is pending, payable to the defendant or defendants in the case for costs assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment." *Id.* The tribunal's superior court justice has discretion to increase the amount of the required bond. *Id.* The justice may also decrease the bond upon a showing of indigency by the plaintiff, but the bond amount may not be eliminated entirely. *Id.* The cost for this bond was once \$2,000, but the figure was tripled at the request of the Massachusetts Medical Society in 1986. Marylou Foley, *Tribunal System Works in Massachusetts*, AAOS NOW, May 2010, at 34.

[20] MASS. GEN. LAWS ch. 231, § 60B (2010) (requiring dismissal of case if bond not posted within 30 days of tribunal's finding; permitting decrease but not elimination of bond amount); Farese v. Connolly, 664 N.E.2d 450, 450 (Mass. 1996) (interpreting § 60B to require dismissal with prejudice if bond not seasonably posted). The bond is designed to prevent/discourage lawsuits from going forward after the tribunal has ruled in favor of the defendant. *See* Foley, *supra* note 19 (indicating Massachusetts Medical Society successfully sought to increase statutory bond amount "to discourage frivolous lawsuits"). The case is not permitted to move forward without this bond because it would force the defense to spend additional money on a lawsuit where the tribunal found for the defendant. *See* MASS. GEN. LAWS ch. 231, § 60B (requiring bond be payable to defendant for costs if "plaintiff does not prevail in the final judgment"). The plaintiff may seek appellate review of the tribunal's finding without first posting a bond, but, having not posted the requisite bond within the time allotted, the plaintiff must recognize "that he thereby runs the risk of being out of court entirely if his claim of error by the tribunal is decided adversely to him." McMahon v. Glixman, 393 N.E.2d 875, 878 (Mass. 1979).

[21] *See* MASS. SUPER. CT. THIRD AMENDED STANDING ORDER 1-88 (Time Standards), *supra* note 18, at 3-5, 9 (outlining general timeline for "fast track" cases, including negligence cases); *see also* MASS. R. CIV. P. 12, 38, 56.

[22] *See* MASS. SUPER. CT. THIRD AMENDED STANDING ORDER 1-88 (Time Standards), *supra* note 18, at 5 (requiring submission of joint pre-trial memorandum, set forth in Appendix A, prior to pre-trial conference). The Pre-Trial Memorandum submitted to the court must disclose information on expert witnesses and their likely testimony:

> The name, address and qualifications of each expert witness the parties intend to call, together with the subject matter on which the expert is expected to

be simultaneous, or near-simultaneou,s with defense counsel.[23]

While the configuration of the tribunal system is unique to Massachusetts, adding procedural hurdles for victims of medical malpractice is not. [24] States have

> testify, the substance of all facts and opinions to which the expert is expected to testify and a detailed summary of the grounds of each expert's opinion. If an expert witness's identity and expected testimony has previously been disclosed in response to expert interrogatories, this item may be satisfied by appending to the pre-trial memorandum a copy of the expert interrogatory responses. Otherwise, the substance of the expert opinion shall be contained within the pre-trial memorandum and shall be as detailed as would be expected in an answer to an expert interrogatory.

MASS. SUPER. CT. THIRD AMENDED STANDING ORDER 1-88, APPENDIX A (Notice to Appear for Final Pre-Trial Conference), *available at* http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/final-pre-trial-conference-order.pdf. However, some or all of each party's experts may have already been disclosed through interrogatories during the discovery process. MASS. R. CIV. P. 26(4)(A)(i) (permitting a party to seek "facts known and opinions held by experts" through interrogatories).

[23] *See* MASS. SUPER. CT. THIRD AMENDED STANDING ORDER 1-88, APPENDIX A (Notice to Appear for Final Pre-Trial Conference), *supra* note 22 (requiring jointly prepared pre-trial memorandum disclosing specified information for each expert witness intended to be called at trial). The plaintiff is generally responsible for preparing and circulating the first draft of the pre-trial memorandum and, thus, must acquire expert witness information from the defendant to include in the memorandum. *Id.*

[24] Jona Goldschmidt, *Where Have All The Panels Gone? A History of the Arizona Medical Liability Review Panel*, 23 ARIZ. ST. L.J. 1013, 1084 (1991) (asserting uniqueness of, e.g., Massachusetts requirement for plaintiff to make offer of proof to tribunal); ALPERIN, *supra* note 8, § 17.157, at 951 (noting "Massachusetts, like many other states, has adopted a procedure for the screening of all medical malpractice actions by a medical malpractice tribunal" (footnote omitted)); *see also* 70 C.J.S. *Physicians, Surgeons, and Other Health-Care Providers* § 143, at 658-60 (2005) (synthesizing and comparing statutes and case law for medical malpractice panels and mediation across several states). As previously noted, medical malpractice tribunals in Massachusetts consist of a superior court justice, a physician, and an attorney. MASS. GEN. LAWS ch. 231, § 60B. The plaintiff presents an offer of proof to the tribunal who then "determine[s] if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." *Id.*; *see also* ALPERIN, *supra* note 8, § 17.157, at 951-53 (detailing statutory requirements including interpretations by courts). The composition of the tribunal in Massachusetts is similar to requirements for medical malpractice screening panels that have been enacted in other jurisdictions. *See* Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 189-90 (1990) (citing multiple jurisdictions in which medical malpractice screening panels have contained at least one judge, one attorney, and one healthcare provider). As of 2004, "[t]wenty states ha[d] screening panels[, but] panel provisions ha[d] been repealed or invalidated in eleven others." Catherine T. Struve, *Improving the*

enacted various forms of legislation in an alleged attempt to combat the cost of medical malpractice insurance.[25] Examples are statutes that shorten the time period for filing litigation, require the involvement of a pretrial screening panel, similar to Massachusetts' tribunal system, or require the use of arbitration, which extinguishes the plaintiff's opportunity to bring the case before a jury.[26]

B. Peer Review Privilege

While the tribunals will delay, add expense, and put Mal at a strategic disadvantage, once that hurdle is cleared Mal's case will not be treated like Gary's case when it comes to obtaining information during discovery. A vast amount of potentially vital, case-proving information will simply be unavailable to Mal under Massachusetts' "peer review" privilege.[27]

Medical Malpractice Litigation Process, HEALTH AFF., July/Aug. 2004, at 33, 35, *available at* http://content.healthaffairs.org/content/23/4/33.full.pdf. For a national survey of medical liability and medical malpractice laws as of 2011, *see Medical Liability/Medical Malpractice Laws*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/banking/medical-liability-medical-malpractice-laws.aspx (last updated Aug. 15, 2011).

[25] *See, e.g.*, CONG. BUDGET OFF., ECONOMIC AND BUDGET ISSUE BRIEF: LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE (2004), *available at* http://www.cbo.gov/ftpdocs/49xx/doc4968/01-08-MedicalMalpractice.pdf; Kenneth E. Thorpe, *The Medical Malpractice 'Crisis': Recent Trends and the Impact of State Tort Reforms,* HEALTH AFF., Jan. 21, 2004, at W4-20, *available at* http://content.healthaffairs.org/content/early/2004/01/21/hlthaff.w4.20.full.pdf; U.S. GEN. ACCT. OFF., MEDICAL MALPRACTICE, IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE, GAO-03-836 (2003). The Massachusetts Legislature developed the medical malpractice tribunal system "as part of a comprehensive package designed to ensure the continued availability of medical malpractice insurance at a reasonable cost." Paro v. Longwood Hospital, 369 N.E.2d 985, 987 (Mass. 1977) (noting legislative intent in analyzing and upholding statute under constitutional challenge). Whether medical malpractice premiums have actually increased steadily, consistent with popular belief, is a matter of debate, as is the issue of whether attempts to contain premium increases via statutory limits on medical malpractice claims have been successful. *See* Marc A. Rodwin et al., *Malpractice Premiums and Physicians' Income: Perceptions of a Crisis Conflict with Empirical Evidence*, 25 HEALTH AFF. 750 (2006), *available at* http://content.healthaffairs.org/content/25/3/750.full.pdf.

[26] FRANK A. SLOAN & LINDSEY M. CHEPKE, MEDICAL MALPRACTICE 85-94 (2008); George L. Blum, Annotation, *Medical Malpractice: Who Are "Health Care Providers," or the Like, Whose Actions Fall Within Statutes Specifically Governing Actions and Damages for Medical Malpractice*, 12 A.L.R. 5th 1, 17-18 (1993); *see also supra* notes 6-20 and accompanying text (detailing Massachusetts tribunal system).

[27] *See* MASS. GEN. LAWS ch. 111, § 204(a) (2010).

> [T]he proceedings, reports and records of a medical peer review committee shall be confidential and shall be exempt from the disclosure of public records

Imagine that following Mal's injury, the hospital had a "morbidity and mortality" meeting to discuss the events, and that, following Gary's injury, the maintenance company did the same. In the maintenance company's meeting, the worker that injured Gary tells his supervisor and co-workers that the accident was entirely his fault. The worker admits that he was distracted by his cell phone and that is why he dropped the light fixture on Gary. He admits that he knew that, in any event, he should not have done the work with Gary there in the first place. All of this information is noted in the post-incident report that the company, by policy, creates after any accident.

At the hospital's meeting, the nurse who injected Mal tells his colleagues that he did not know what medicine he was giving Mal at the time of the incident; it was just handed to him and he now recognized that giving it to Mal was careless and violated hospital rules. The physician and the pharmacist admit that they were tired from working double shifts and did not look for potential drug interactions before ordering and dispensing the medications. This information is noted in the post-incident report that the hospital, by policy, creates after any accident.

Gary's case would be governed by the typical rules of discovery in the United States: his attorneys would likely have access to all of the reports created at the post-incident meeting, as well as being able to discover what was said during the meeting itself.[28] For obvious reasons, if the defendants in Gary's case admitted to being careless,

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> . . . but shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding . . . and no person who was in attendance at a meeting of a medical peer review committee shall be permitted or required to testify in any such judicial or administrative proceeding . . . .

Id. That is, due to the confidential nature of a medical peer review committee's records and findings, information that would normally be discoverable by a plaintiff is precluded from being obtained or presented at trial. *Id.*; Vranos v. Franklin Med. Ctr., 862 N.E.2d 11, 19-20 (Mass. 2007); Grande v. Lahey Clinic Hosp., Inc., 725 N.E.2d 1083, 1086 (Mass. 2000). *See generally* 49 HON. PETER M. LAURIAT ET AL., DISCOVERY § 4.13, at 383-86 (2008 & Supp. 2012) (detailing medical peer review privilege); Kenneth R. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 MASS. L. REV. 157 (2002) (discussing history and necessity of medical per review privilege); David L. Fine, Note, *The Medical Peer Review Privilege in Massachusetts: A Necessary Quality Control Measure or an Ineffective Obstruction of Equitable Redress?*, 38 SUFFOLK U. L. REV. 811 (2005) (discussing history of peer review privilege in Massachusetts and its efficacy as a quality control measure).

[28] In Massachusetts,

> [p]arties may obtain discovery regarding any matter, not privileged, which is

or even if they discussed their actions leading up to the incident, having access to this information could be quite valuable to Gary's claim. It would, in effect, prove the case.[29]

By contrast, in Mal's case, she would never be able to see internal reports of the morbidity and mortality meeting, or even learn what the defendants said. Massachusetts law makes secret everything medical providers say or write in the context of "peer review" meetings.[30] As long as the meeting can be claimed to be for the purpose of critiquing the care provided, the contents of the meeting are strictly protected under the state's peer review statute.[31] By keeping their conversations about Mal's injuries secret, the logic goes, the medical providers will be honest with each other and share experiences that prevent future accidents.[32]

What this means, ultimately, is that as long as Mal's medical providers frame their discussions as being for "peer review," they could openly admit that they acted negligently, but neither Mal, nor her attorney, could ever learn of these statements. In theory, despite their admissions of negligent care made at the meeting, the defendants could deny liability and fully litigate the case up to and including trial. In Gary's case,

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> relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

MASS. R. CIV. P. 26(b)(1).

[29] That is, a defendant's admission to carelessness could be used to prove breach of an owed duty of care.

[30] MASS. GEN. LAWS ch. 111, § 204(a) (2010); *see supra* note 27 (quoting § 204(a)).

[31] MASS. GEN. LAWS ch. 111, § 204(a); Beth Israel Hosp. Assoc. v. Bd. of Registration in Med., 515 N.E.2d 574, 575-76 (Mass. 1987) (citing statutory confidentiality protections afforded to medical peer review committees and providing historical overview of statute); *see also* Fine, *supra* note 27, at 812-13 (discussing statute's history).

[32] *See* Grande v. Lahey Clinic Hosp., Inc., 725 N.E.2d 1083, 1085 (Mass. App. Ct. 2000) (reiterating purpose of peer review). The purpose of peer review is to encourage frank examination and representation of professional opinion. *Id.*; *see also* Fine, *supra* note 27, at 812 (stating "the medical peer review process consists of institutional employees meeting internally to debate recent mishaps in the hopes that such roundtable-type discussions will lead to an uninhibited expression of professional opinion, thereby improving the quality of future care"). *But see* Susan O. Scheutzow, *State Medical Peer Review: High Cost but No Benefit – Is It Time for a Change?*, 25 AM. J.L. & MED. 7, 9-12 (1999) (noting scholars have questioned whether medical peer review actually promotes increased communication or patient safety).

once the admissions were discovered, it is unlikely that the case would proceed to trial, and if it did, the admissions would be extremely problematic, to say the least, for the defense.

C. Charitable Immunity & the Empty Chair Problem

Before the lawsuit, and throughout trial, Massachusetts' charitable immunity law will pose serious challenges in Mal's case that do not exist in Gary's. Almost all hospitals in Massachusetts are designated as charities.[33] Under Massachusetts law, those charities have a maximum liability of $100,000 (recently raised from $20,000).[34] This absolute limit of liability creates several hurdles and pitfalls for Mal and her lawyer, and is arguably the largest obstacle to Mal receiving a fair trial and a fair recovery.

One of the first questions the attorneys for both Gary and Mal will have to answer is who to sue. For Gary, the answer is simple. A lawsuit can be brought against the worker who dropped the light and his employer. The employer is liable for the

[33] *See generally* MASS. GEN. LAWS ch. 180 (providing laws applicable to "Corporations for Charitable and Certain Other Purposes); *see also id.* § 4(b) (permitting formation of charitable corporation "for the prosecution of any . . . medical . . . purpose"). Major hospitals in Massachusetts organized under chapter 180 include, e.g., Beth Israel Deaconess Medical Center, Boston Medical Center, Brigham and Women's Hospital, and Massachusetts General Hospital. *Beth Israel Deaconess Medical Center, Inc.*, SEC'Y OF THE COMMONWEALTH OF MASS., http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp (enter "666000763" to Search by Identification No.; then review filings); *Boston Medical Center Corp.*, SEC'Y OF THE COMMONWEALTH OF MASS., *supra* (enter "000536669" to Search by Identification No.; then review filings); *Brigham and Women's Health Care, Inc.*, SEC'Y OF THE COMMONWEALTH OF MASS., *supra* (enter "042921338" to Search by Identification No.; then review filings); and *The Massachusetts General Hospital*, SEC'Y OF THE COMMONWEALTH OF MASS., *supra* (enter "041564655" to Search by Identification No.; then review filings); *see also* Conners v. Ne. Hosp. Corp., 789 N.E.2d 129 (Mass. 2003) (finding appropriate designation of hospital as charity, reiterating connection between charitable immunity and charitable purpose of institution).

[34] An Act Improving the Quality of Health Care and Reducing Costs Through Increased Transparency, Efficiency and Innovation, ch. 224, § 222, 2012 Mass. Legis. Serv. 886 (West) (amending MASS. GEN. LAWS ch. 231, § 85K). Before the 2012 amendment, a non-profit charity, including any hospital classified as such, was subject to an absolute liability cap of $20,000 – no matter how serious the negligence or the harm. MASS. GEN. LAWS ch. 231, §85K (2010). The amendment increased that liability cap to $100,000, exclusive of interest and costs. 2012 Mass. Legis. Serv. 886 (West) (amending MASS. GEN. LAWS. ch. 231, § 85K). Although a defendant may waive the statutory damage cap, a judge may not strike the damage cap, even in the case of an unfair or inequitable result. Keene v. Brigham & Women's Hosp., 786 N.E.2d 824, 837-38 (Mass. 2003).

negligence of its worker.[35] In Gary's case, the insurer for the employer will defend and cover both the worker and the employer, and pay any judgment against the worker and his employer.[36]

Because the employer can be sued and held liable in Gary's case, it is likely that Gary's case will only be tried against the employer and not the worker himself. The employee would likely be dismissed to avoid the possibility of jury sympathy for the worker.[37] Moreover, the jury would be told that the employer is responsible for the worker's negligence.[38] Thus, the case would be litigated and tried against the company that is ultimately responsible for the negligence, and the employee would be protected from any personal liability. Whether the jury blames the worker, or his boss, or the company itself, Gary will be able to recover fully.

For Mal, the question of who to sue and try the case against is much more

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[35] Dias v. Brigham Med. Assocs., Inc., 780 N.E.2d 447, 449 (Mass. 2002) (noting "respondeat superior is the proposition that an employer, or master, should be held vicariously liable for the torts of its employee, or servant, committed within the scope of employment"); Douglas v. Holyoke Mach. Co., 124 N.E. 478, 479 (Mass. 1919) ("If the act of the servant is performed in the course of doing his master's work, in carrying out the master's directions, or in accomplishing his master's business, then the latter will be answerable whether the wrong be merely negligent, or wanton and reckless.").

[36] *See generally* JOHN T. HARDING & CARYN L. ANLAGE, *Triggering the Duty to Defend*, *in* INSURER'S DUTY TO DEFEND: A COMPENDIUM OF STATE LAW 1 (2005).

[37] *See* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 19-23 (1997) (providing overview of studies addressing extent of juror sympathy).

[38] Paul R. Sugarman & Valerie A. Yarashus, *Personal Injury*, *in* 1 STEPHEN D. ANDERSON ET AL., MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS § 2.1.7 (Hon. Patrick F. Brady & Joseph D. Lipchitz eds., 2d ed. 2008 & Supp. 2011). A Massachusetts jury instruction for respondeat superior states:

> An employer is responsible for the negligence of [his/her] employee if the employee was negligent while acting within the scope of [his/her] employment. In determining whether the conduct was within the scope of a person's employment, you may take into account whether it was the type of conduct that [he/she] was employed to perform, whether the conduct occurred substantially within the authorized time and space limits, and whether it was motivated, at least in part, by a purpose to serve the employer.

Id. No court-approved pattern jury instructions exist in Massachusetts civil cases, and trial court judges have "considerable discretion [in] framing jury instructions." Bouley v. Reisman, 645 N.E.2d 708, 711 (Mass. App. Ct. 1995) (citation omitted) (alteration in original). However, use of the cited instruction is generally approved by the court, unless circumstances warrant otherwise.

complicated because of the immunity enjoyed by the hospital.[39] While the hospital can technically be sued, even if the jury found that the hospital was responsible for $10 million dollars in damages to Mal, the hospital will only have to pay $100,000.[40] This means that the pharmacist, the physician who gave the order, and the nurse who administered the medication *must* all be sued individually.[41]

The fact that the individual medical providers, rather than the hospital, need to be sued will affect the case, and the trial of the case, significantly. Even if the hospital is sued, the hospital will likely be dismissed before trial (or a $100,000 settlement reached), because Mal's attorney cannot risk the jury issuing a large verdict against the hospital alone and letting the individual defendants off. Whether the hospital is dismissed or not, the lawyers for the pharmacist, the physician, and the nurse have a huge advantage: they can blame the hospital. They can say it was not the fault of the individuals, but the failure of the hospital to have adequate protocols and procedures, that caused the injury.[42]

In almost every state other than Massachusetts, the tactic of blaming the hospital would result in a huge award against the hospital, which the hospital's insurer would be responsible to pay.[43] In Massachusetts, however, the tactic of blaming the

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[39] An Act Improving the Quality of Health Care and Reducing Costs Through Increased Transparency, Efficiency and Innovation, ch. 224, § 222, 2012 Mass. Legis. Serv. 886 (West) (amending MASS. GEN. LAWS ch. 231, § 85K (2010)). Previously, a hospital in Massachusetts that was considered a non-profit charity under Chapter 180 was subject to an absolute liability cap of $20,000 – no matter how serious the negligence or the harm. MASS. GEN. LAWS ch. 231, § 85K (2010).

[40] 2012 Mass. Legis. Serv. 886 (West). "[I]n the context of medical malpractice claims against a nonprofit organization providing health care, such cause of action shall not exceed the sum of $100,000, exclusive of interest and costs." *Id.* (amending MASS. GEN. LAWS ch. 231, § 85K (2010)).

[41] That is, suing the hospital under the theory of respondeat superior will not be an appealing theory, given the damages cap. Thus, suing the health care providers individually is the only method to seek a recovery in excess of the cap.

[42] *See* Paul T. O'Neill, *Charitable Immunity: The Time to End Laissez-Faire Health Care in Massachusetts Has Come*, 82 MASS. L. REV. 223, 233 (1997) (noting general strategy for "[d]efendants' counsel [to] utilize the impleader or interpleader rules in an attempt to limit exposure . . . by making the institutional charitable defendant the target of the jury's blame").

[43] *See* 2 DAN B. DOBBS ET AL., THE LAW OF TORTS § 360 (2d ed. 2011) (noting general abolishment or modification of charitable immunity in most states). *But see* 3 DOBBS ET AL., *supra*, § 486 (noting some states have enacted damages limits through "tort reform" efforts that may nevertheless inhibit recovery against hospitals). *See also* Alicia Gallegos, *The Rise of Sky-High Jury Awards,* AMERICAN MEDICAL ASSOCIATION: AMERICAN MEDICAL NEWS (July 16, 2012), http://www.ama-assn.org/amednews/2012/07/16/prsa0716.htm (discussing recent significant

hospital works quite differently, and completely against Mal.

Mal's attorney is effectively trapped by charitable immunity.[44] If she keeps the hospital in the case at trial, every effort will be made to get the jury to find against the hospital, thereby absolving all of the individual defendants and reducing the exposure of the hospital's insurer to $100,000. If on the other hand, Mal's attorney dismisses the hospital from the case, the defense is left with an "empty chair" to blame. The jury will have no explanation for why the hospital is not a defendant at trial, and may leave the trial thinking, "If only we could have found the hospital liable, we would have." Throughout the entire proceeding, the jury would have no understanding of the charitable immunity issue because, in practice, judges rarely instruct them on this issue.[45] And because the jury is not told about the available insurance, the jury may believe that the individual defendants are financially exposed to a large verdict, when in fact they are not.[46]

There is almost no way to collect data on how big of an obstacle charitable immunity poses for medical malpractice claimants like Mal, particularly because

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medical malpractice damages awards, accordant award reductions in states with damages caps, and impact of large awards on insurers).

[44] *See, e.g.*, O'Neill, *supra* note 42 (denoting reasons to repeal charitable immunity cap); Lisa Wangsness, *Limitation on Child Sexual Abuse Complaints May Be Extended; Victims Could Get Two-Year Window*, BOSTON GLOBE, May 31, 2012, at A1 (discussing proposed legislation to eliminate the $20,000 charitable immunity cap in cases relating to child sexual abuse). "[T]he proposal to eliminate the charitable immunity cap also alarmed nonprofit hospitals, which fear eliminating the cap in sexual abuse cases could become a pathway to eliminating it for other kinds of civil claims, including medical malpractice." *Id.*

[45] 51 GEORGE JACOBS & KENNETH LAURENCE, PROFESSIONAL MALPRACTICE § 8.13, at 122-23 (2007). "The question of whether a jury should be informed of the $20,000 limitation on damages is generally treated by trial judges as a matter of judicial discretion." *Id.* at 123. No court-approved pattern jury instructions exist in Massachusetts civil cases. JACOBS & LAURENCE, *supra*, § 10.13, at 163-64. Thus, in theory, it is optional for judges to inform juries about the liability cap. *See* Bouley v. Reisman, 645 N.E.2d 708, 711 (Mass. App. Ct. 1995) (noting that trial court judges have "considerable discretion [in] framing jury instructions" (alteration in original)). In practice, however, such an instruction is rarely, if ever, included in the instructions to the jury. In fact, the recommended jury instructions for medical malpractice cases do not include an explanation of charitable immunity. JACOBS & LAURENCE, *supra*, § 10.14, at 164 (providing recommended medical malpractice jury instructions).

[46] *See* Roselle L. Wissler et al., *Instructing Jurors on General Damages in Personal Injury Cases: Problems and Possibilities*, 6 PSYCHOL. PUB. POL'Y & L. 712, 721 (2000) (discussing and citing research into juror beliefs regarding liability limits and defendant's ability to pay); *see also* MASS. GUIDE TO EVID. § 411(a) (referencing general inadmissibility of insurance on issue of negligence).

Massachusetts has strict limits on contact with jurors following a trial.[47] However, in practice, charitable immunity may stand alone as the largest obstacle to recovery for even the most legitimate cases. It is much easier, and often more proper, for a jury to blame an institution for systemic deficiencies that hurt people than it is to blame individual, well-intentioned medical providers.[48] And, in point of fact, it is often such systemic deficiencies that lead to medical errors and disastrous results like those suffered by Mal.[49]

D. Jury Instructions

For a jury of laypeople deciding a case, the instructions they receive from judges

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[47] *See* MASS. RULES OF PROF'L CONDUCT R. 3.5(d) (2013), *available at* http://www.mass.gov/obcbbo/RPC.pdf.

> A lawyer shall not . . . after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation processes.

Id.; *see also* Commonwealth v. Fidler, 385 N.E.2d 513, 520 (Mass. 1979) ("[C]ounsel, litigants, and those acting for them may not independently contact jurors after a verdict is rendered. Counsel may investigate unsolicited information only to see if it is a matter worth bringing to the judge's attention.").

[48] *See* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 404 (1994) (discussing possibility of jury willingness to award more damages than they otherwise would in cases against individual physicians when institutions with deeper pockets are liable).

[49] Bryan A. Liang & LiLan Ren, *Medical Liability Insurance and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Health Care,* 30 AM. J.L. & MED. 501, 503 (2004). Medical errors are caused not by bad physicians but instead as a result of the structure of a defective healthcare system. *Id.* Good intentioned individual providers cannot outperform the healthcare institution's management of which they are a part. *Id.* Errors stem from two major sources. *Id.* at 522. First, individual providers take "unintentional actions in the performance of routinized tasks and [make] mistakes in judgment." *Id.* Second, medical institution management derive insufficient plans of action. *Id.* The faulted design and structure of such complex systems lead to human error and accidents. Liang & Ren, *supra*, at 522-23. Latent defects go unnoticed, upholding the system's failed disposition. *Id.* The individual practitioner, then, is "set up to fail." *Id.* at 523; *see also* Joan H. Krause, *Medical Error as False Claim,* 27 AM. J.L. & MED. 181, 191-92 (2001).

are their sole lifeline to properly applying the legal standards to the facts before them. However, a series of differences in the model instructions appear to make what should be the exact same legal standard – negligence – higher to reach in a malpractice case.

At Gary's trial, the jury will be instructed on the definition of negligence. The jury will be told, among other things, that "negligence [is] the failure of a person to exercise that degree of care which a reasonable person would exercise in the circumstances."[50] They will be told that the company fixing the light was required to do so with "reasonable care."[51] They will be told that, in order to recover, Gary must establish that the company failed to exercise the required amount of care, and that the amount of care to be exercised varies with the circumstances.[52]

The instructions in Mal's case will be quite different. For reasons that are unclear, the model instructions, either intentionally or unintentionally, set the bar much higher for finding a medical provider negligent.[53] The jury will be told that the medical

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[50] Sugarman & Yarashus, *supra* note 38, § 2.1.2. The typical jury instruction then continues by addressing the element of breach: "The second element which the plaintiff must prove by a preponderance of the evidence is that the defendant did not exercise the required amount of care under the circumstances, that the defendant breached [his/her] duty of care, or, in other words, was negligent." *Id.* § 2.1.3.

[51] The typical jury instruction states that "[t]he standard is not established by the most prudent person conceivable, nor by the least prudent, but by the person who is thought to be ordinarily prudent. The same standard is frequently expressed in terms of 'reasonable care.'" *Id.* § 2.1.2.

[52] The typical jury instruction states:

> Since there is a duty to exercise [reasonable] care, the plaintiff must prove by a preponderance of the evidence that the defendant failed to exercise the required amount of care. The standard of care in negligence cases is how a person of reasonable prudence would act in similar circumstances.
>
> . . . .
>
> The amount of care that the prudent person would exercise varies with the circumstances, the care increasing with the likelihood and severity of the harm threatened. Therefore, based on the facts you find from the evidence submitted in this case, you are to determine how a person of reasonable prudence would act in these circumstances.

Id. §§ 2.1.3, 2.1.4 (alteration in original) (footnotes omitted).

[53] *See* George S. Mahaffey Jr., *Cause-In-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 408 (2004) (indicating confusion exists regarding jury instructions in medical malpractice cases); Development in the Law, *The Civil Jury: V. The Jury's Capacity to Decide Complex Civil Cases*, 110 HARV. L. REV. 1489, 1490-92 (1997) (acknowledging issues with jury instructions and jury's ability to analyze complex litigation cases).

providers' conduct is not tested by excellence or perfection, or even current standards.[54] The jury will be told that the medical provider has the right to exercise professional judgment, and that even if that judgment ends up being wrong it is not negligence.[55] The jury will be told that the fact that another medical provider might undertake a different course of treatment is not evidence of negligence.[56] The jury will be told that a medical provider does not guarantee results or cure or improvement.[57] The jury will be

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[54] The typical jury instruction states:

> A physician is bound to conform to the accepted standards of reasonable skill and care. The defendant physician's conduct is not tested by standards of perfection or excellence, or even by current standards, but by the standards of care and skill and advancement of the profession in [the specific year(s) of the alleged negligence] among average qualified physicians practicing in the defendant physician's area of practice or specialty.

Elizabeth L. B. Greene et al., *Medical Malpractice*, *in* 1 STEPHEN D. ANDERSON ET AL., MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE JURY INSTRUCTIONS, *supra* note 38, § 4.3.2.

[55] The typical jury instruction states:

> Physicians exercise judgment in the care and treatment of their patients, and the fact that in retrospect the physician's judgment was incorrect is not, in and of itself, enough to prove medical malpractice or negligence. A physician is permitted a range in the exercise of [his/her] professional judgment so long as the exercise of that professional judgment is in accordance with the duty of care owed to the plaintiff as I have described it to you. The issue is whether in exercising [his/her] professional judgment the physician complied with the standard of care which I have just explained.

Id.

[56] *Id.* The typical jury instruction states:

> That another doctor might undertake a different course of treatment from that of the defendant physician is not evidence that the defendant physician's treatment was negligent unless you, the jury, as the finders of fact, also find that the defendant physician's treatment was not in accordance with accepted medical practice in [his/her] area of practice or specialty. You, the jury, must determine whether the conduct of the defendant physician in this case violated the standard of medical care that [he/she] owed to the plaintiff based upon the expert medical testimony presented at trial.

Id.

[57] *Id.* The typical jury instruction states:

> A physician does not guarantee the results of a course of treatment, a cure of a patient's condition, or even an improvement of it, but he or she must act in accordance with the standard of care as I have described it to you. The fact

told that the fact that Mal had an unfortunate medical result of bad conduct does not mean that the providers were negligent.[58] These "negative" instructions simply tend not to be given in Gary's negligence case.[59]

While it is again difficult, if not impossible, to track how these instructions – particularly the instructions instilling medical providers with a wide range of judgment – affect a jury,[60] there is a fair inference that the instructions are not helpful to Mal. By the time a jury hears how the defendants need not be excellent or perfect, are entitled to exercise a wide range of judgment (even if wrong), and that the defendants are not responsible for what may be an unfortunate medical result, the simple and basic question of whether the providers were careless and injured Mal becomes quite murky.

Put in more concrete terms, in Gary's case, it would be difficult for the maintenance company to argue that a worker dropping a light fixture on a man's head was not negligent under the instructions given to the jury. Giving a person the wrong medicine that one knows or should know might kill him would seem to be at least equally negligent. But the jury instructions in Mal's case leave ample room for a jury to conclude, for example, that the nurse – while perhaps he could have been a little more careful – was exercising his judgment in relying on the pharmacist and the physician. Every defendant in Mal's case could make this argument, i.e., that they erroneously exercised the judgment afforded to them by the law, an argument that would be essentially unavailable under the law given to the jury in Gary's case.

E. Limitations on Damages

Under traditional tort principles, a jury is empowered to award such economic and non-economic damages as to make the injured plaintiff whole.[61] However, the

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> that the plaintiff may have had an unfortunate medical result or bad outcome following the defendant physician's treatment does not, in and of itself, mean that the defendant physician was negligent.

Greene et al., *supra* note 54, § 4.3.2.

[58] *Id.*

[59] *Compare* Sugarman & Yarashus, *supra* note 38, § 2 (providing typical jury instructions for negligence cases), *with* Greene et al., *supra* note 54, § 4 (providing typical jury instructions for medical malpractice cases).

[60] *See supra* note 47 and accompanying text (detailing severe restrictions on post-verdict communications between lawyers and jurors).

[61] Smith v. Mass. Bay Transp. Auth., 968 N.E.2d 884, 889 (Mass. 2012) ("[A]t the time of an accident, an injured party accrues a right . . . 'to be made whole and compensated for' injuries wrongfully inflicted by a tortfeasor." (quoting G.E. Lothrop Theatres Co. v. Edison Elec.

calculation of damages in malpractice claims have significantly curtailed the jury's ability to do so.

When Gary's case is presented to a jury, the jury and the jury alone will determine the amount of damages to award him. The jury may award damages for medical bills, lost wages, future medical care, and pain and suffering.[62] These concepts will be explained to the jury, and there will be no upper or lower limit on the damage amounts.[63] Any amounts awarded will be solely in the jury's discretion.[64] The

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Illuminating Co., 195 N.E. 305, 307 (Mass. 1935))).

62 *See, e.g.*, Cuddy v. L&M Equip. Co., 225 N.E.2d 904, 907 (Mass. 1967) (reiterating appropriateness of compensating injured person for both past and future physical pain and mental suffering); Stella v. Curtis, 204 N.E.2d 457, 461 (Mass. 1965) (asserting usual damages in personal injury cases are "pain and suffering, impairment of earning capacity, and disbursements for hospitalization and medical attendance"); Lewis v. Springfield, 158 N.E. 656 (Mass. 1927) (accepting proper elements of damages for personal injury to include loss of time at work, impairment of earning capacity, medical expenses, and mental suffering connected with a bodily injury).

63 Sugarman & Yarashus, *supra* note 38, § 2.1.13. The typical jury instruction for damages states:

> There is no special formula under the law to assess the plaintiff's damage. It is your obligation to assess what is fair, adequate, and just. You must use your wisdom and judgment and your sense of basic justice to translate into dollars the amount which will fairly and reasonably compensate the plaintiff for [his/her] injuries. You must be guided by your common sense and your conscience.

Id. *Cf.* David A. Hyman et al., *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. OF LEGAL ANALYSIS 355, 361 (2009) (distinguishing initial jury awards from verdict reductions applied after jury awards damages, such as remittitur and judgment notwithstanding the verdict, the death cap, and the punitive damages cap).

64 MASS. GEN. LAWS ch. 231, § 60F(a) (2010).

> In every action for malpractice, negligence, . . . which is tried to a jury, the court shall instruct the jury that if the jury awards damages to the plaintiff or plaintiffs it shall specify the total amount of damages, as well as the applicable elements of special and general damages upon which the award of damages is based and the amount of the total damages assigned to each element, including, but not limited to: (1) Amounts intended to compensate the plaintiff for reasonable expenses which have been incurred . . . . Each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future.

Id.; *see also* Sugarman & Yarashus, *supra* note 38, § 2.1.13; *supra* note 63 (quoting § 2.1.13, providing typical jury instruction).

defendant company's insurer will be responsible for payment of the award plus interest accrued while the lawsuit was pending.[65]

In Mal's case, damages will be treated differently. First, Mal's damages will be limited to $500,000 unless the jury finds that she has suffered a serious, permanent injury.[66] In Mal's case, her serious personal injury is obvious, but it is relevant to know

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[65] Allan D. Windt, Annotation, *Existence of a Duty in General*, 2 INSURANCE CLAIMS AND DISPUTES § 6:1 (5th ed. 2007).

> The most fundamental of an insurer's obligations under an insurance contract is its duty to indemnify—its duty, depending on the type of policy, either to reimburse the insured for losses incurred directly by the insured or to pay sums that the insured becomes legally obligated to pay to others.

Id.; *see also* Smith v. Mass. Bay Transp. Auth., 968 N.E.2d 884, 889 (Mass. 2012)

> Under the common law of torts, . . . an injured party accrues a right . . . 'to be made whole and compensated for' injuries wrongfully inflicted by a tortfeasor. . . . However, such compensation is rarely forthcoming. . . . As a result . . . , the plaintiff incurs additional injury. . . . The award of interest compensates the plaintiff for this additional injury.

Smith, 968 N.E.2d at 889 (footnote and citations omitted) (quoting G.E. Lothrop Theatres Co. v. Edison Elec. Illuminating Co., 195 N.E. 305, 307 (Mass. 1935)).

[66] *See* MASS. GEN. LAWS ch. 231, § 60H (2010).

> In any action for malpractice . . . against a provider of health care, the court shall instruct the jury that in the event they find the defendant liable, they shall not award the plaintiff more than five hundred thousand dollars for pain and suffering, loss of companionship, embarrassment and other items of general damages unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained

Id. Additionally, if Mal does receive an award, the pre-judgment interest will be significantly lower than it will be if Gary receives an award. The default interest rate rule – and the one that would apply to Gary – is that plaintiffs in Massachusetts recover pre-judgment interest at a rate of 12%. *Id.* § 6B. However, in medical malpractice cases *only*, the rule has been changed so that Mal's pre-judgment interest will be 2% above the current U.S. Treasury rate. An Act Improving the Quality of Health Care and Reducing Costs Through Increased Transparency, Efficiency and Innovation, ch. 224, § 220, 2012 Mass. Legis. Serv. 885 (West) (amending MASS. GEN. LAWS ch. 231, § 60K by lowering rate from 4% to 2%). Interest is allowed on malpractice verdicts at "a rate equal to the weekly average 1-year constant maturity Treasury yield plus 2 per cent, as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of judgment." *Id.* Weekly average 1-year constant maturity Treasury yields that this cap on damages has existed in Massachusetts for over 25 years.[67]

Further, under the Massachusetts medical malpractice statute, any amounts awarded to Mal for medical expenses will be deducted from the jury's verdict to the extent that they were covered by private health insurance.[68] To the extent medical expenses are awarded that were covered by Medicare or Medicaid, those amounts must be reimbursed directly to Medicare and Medicaid.[69]

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have hovered around zero in recent years, effectively meaning that Mal's pre-judgment interest rate will be closer to 2% than 12%. *Historical Treasury Rates*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/Historic-LongTerm-Rate-Data-Visualization.aspx (last visited Mar. 29, 2013) (enter date range; then click "Go"). There is no upside to this law for Mal because the statute specifically states that, regardless of how high Treasury rates go, a malpractice plaintiff's interest rate can never exceed the 12% available to all other plaintiffs. MASS. GEN. LAWS ch. 231, § 60K.

[67] An Act Relative to Medical Malpractice, § 26, 1986 Mass. Acts 689 (limiting damages for "malpractice, negligence, error, omission, mistake or the unauthorized rendering of professional services"), *available at* http://archives.lib.state.ma.us/actsResolves/1986/1986acts0351.pdf.

[68] MASS. GEN. LAWS ch. 231, § 60G(b) (2010). The statute states in relevant part:

> If the court finds that any such cost or expense was replaced, compensated, or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums or other amounts paid by the plaintiff for such benefits for the one-year period immediately preceding the accrual of such action.

Id.

[69] *See id.* § 60G(c); Harlow v. Chin, 545 N.E.2d 602 (Mass. 1989) (interpreting § 60G as matter of first impression). Section 60G "is designed to prevent double recovery by the plaintiff through litigation [and to] protect[] the plaintiff from double loss of benefits by cancelling the rights of subrogation and perfections of lien previously held by the entities which provided . . . collateral benefits." *Harlow*, 545 N.E.2d at 610. With the exception of gratuitous payments or gifts, "collateral benefits" refer to amounts contained within the damages award that were previously paid to the plaintiff by a "collateral source," i.e., not the defendant. *Id.* at 609-10 (discussing § 60G(a),(b)).

> [W]hen the judge deducts [collateral] benefits from the damage award, the entity which provided the benefit cannot collect that amount from the plaintiff. There is an exception, however, for benefits provided by an entity "whose right of subrogation is based in any federal law." In those cases, the right of subrogation survives, and the court may not deduct those amounts from the damage award.

Id. at 610 (quoting MASS. GEN. LAWS ch. 231, § 60G(c)). Benefits provided by Medicare and Medicaid are considered to have been provided by entities with rights of subrogation based in federal law. *Id.* at 610-11. Thus, pursuant to federal law, a plaintiff's medical expenses covered by Medicare or Medicaid will be subject to the rights of reimbursement enjoyed by those entities

Mal's damages cap in Massachusetts is not as big of an obstacle as caps are in many other jurisdictions. Indeed, it is standard practice in malpractice trials in Massachusetts for defense attorneys to waive the cap entirely.[70] The thinking is that the defense does not want the concept of "serious, permanent injury" or the number "$500,000" to go back to the jury room.[71] Jurisdictions such as Virginia, Nebraska and Indiana impose an absolute cap on damages no matter how serious they are.[72] That is, even if economic damages for expenses like outstanding medical bills or anticipated future medical costs exceed the cap, the jury award will still be reduced to the cap limit. Regardless of what the jury decides and regardless of their amount of damages, this reduction to the damages cap limit means that plaintiffs are stuck going without or that public assistance will have to pay their damages instead of the cost being placed on the party that caused the injury. Further, many jurisdictions, like California, Texas and Florida, impose a cap on pain and suffering (so-called non-economic damages), which are often the most meaningful damages to those who must live with the consequences of an injury for the rest of their lives.[73]

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as secondary payers, and the plaintiff will be required to reimburse those entities to the extent that the plaintiff's damages award includes damages for Medicare- or Medicaid-covered medical expenses. *See id.* (acknowledging subrogation rights of Medicare under federal law and interpreting subrogation rights of Medicaid under state and federal law as based in federal law).

[70] Primus v. Galgano, 329 F.3d. 236, 247 (1st Cir. 2003).

> Defense counsel's avoidance of the instructions appears to reflect a strategic decision on the defendant's part *not* to request the instructions. As affidavits by malpractice lawyers and the district court's own experience attest, judges in malpractice cases under Massachusetts law habitually allow counsel to decide whether to request the § 60H instruction, and defense counsel often opt not to request it, for fear that juries will misinterpret it as a $500,000 floor rather than as a ceiling.

Id.

[71] *Id.*

[72] VA. CODE ANN. § 8.01-581.15 (2007 & Supp. 2012) (placing $2.05 million cap on damages for malpractice occurring between July 1, 2012 and June 30, 2013); NEB. REV. STAT. § 44-2825(1) (2010) (capping damages at $1.75 million); IND. CODE ANN. § 34-18-14-3(a), (b) (West 2011) (limiting health care provider's liability to not more than $250,000 and limiting total damages to $1.25 million).

[73] CAL. CIV. CODE § 3333.2(b) (West 1997) ($250,000 cap on non-economic damages); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(b) (West 2011) ($250,000 cap on non-economic damages); FLA. STAT. ANN. § 766.118(2)(a) (West 2011 & Supp. 2013) ($500,000 cap on non-economic damages); *see also* Amanda Edwards, Recent Development, *Medical Malpractice Non-Econonmic Damages Caps*, 43 HARV. J. ON LEGIS. 213 (2006). "Determining non-economic damages in a medical malpractice case entails subjectively deriving just compensation based on less-than-concrete notions of fairness and magnitude of pain and suffering." *Id.* at 229.

The cap on damages and the treatment of medical expenses in Massachusetts do, however, affect the strategy of how these two cases get tried. Gary's attorney will estimate medical expenses, which will all be collectible if they are awarded. If those amounts are awarded for medical expenses, the idea, although lacking empirical evidence, is that the jury will use the medical expense award as a starting point, or a multiplier, when calculating pain and suffering damages.[74] For example, if the jury awards Gary $1 million in damages for his medical expenses, the hope for him is that they will award at least that amount in pain and suffering damages.

Mal's attorney must find another approach. If Mal convinces the jury to award $1 million in medical expenses, assuming those expenses were paid by health insurance, none of it will be collectible by Mal, and it may even be completely removed from the jury's verdict.[75] The jury, in all likelihood, will not be told this fact before their verdict and, thus, will think that the $1 million in medical expenses is going to compensate Mal.[76] In other words, Mal's attorney must focus on convincing the jury to award Mal non-economic damages, or else risk receiving what will be a meaningless award of medical expenses.[77]

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[74] *See* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal For Change*, 100 Nw. U. L. Rev. 87, 113-14 (2006) (arguing for use of medical expenses as normative basis for pain-and-suffering calculation). Despite a lack of empirical evidence for jury calculation methods in awarding pain-and-suffering damages, a positive correlation between the severity of injury – compensated by pain-and-suffering damages – and medical expenses suggests that juries may already use medical expenses as a multiplier for pain-and-suffering damages, although data to support this correlation is also limited. *Id.* at 114; *see also* Jeffery O'Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims Under a Variant of the Business Judgment Rule*, 77 NOTRE DAME L. REV. 373, 379 (2002) (asserting that medical expenses are often used as a multiplier for pain-and-suffering awards). *But see* Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain and Suffering Damages*, 42 U. MICH. J. L. REFORM 431, 474-80 (2009) (discussing drawbacks to use of medical expenses as multiplier for pain-and-suffering damages).

[75] *See supra* note 68 and accompanying text (discussing plaintiff's inability to collect medical expenses to the extent that amount was already compensated by plaintiff's private insurance plan).

[76] MASS. GEN. LAWS ch. 231, § 60G(b) (2010) (requiring post-verdict damages award reduction for "any such cost or expense . . . replaced, compensated, or indemnified from any collateral source"). Generally, prior to the jury's verdict, the defendant is precluded from introducing evidence of the plaintiff's receipt of compensation from a collateral source. JACOBS & LAURENCE, *supra* note 45, § 11.6, at 185-86.

[77] That is, the entire award would be reduced to zero after the previously compensated medical expenses are removed pursuant to statute. MASS. GEN. LAWS ch. 231, § 60G(b) (2010); *see also supra* notes 68-69, 76 and accompanying text (discussing deduction of medical expenses from jury award).

F. Reporting Pressures Affecting Settlement

The great majority of cases in which plaintiffs receive compensation are resolved by settlement.[78] One would like to imagine that a defendant's decision to offer a settlement would result from an honest evaluation of their liability and a reasonable calculation of damages. While there is some evidence that for non-medical defendants this is true,[79] for defendants in medical malpractice cases, a separate set of reporting requirements ratchet up the perceived "cost" of settlement. This phenomenon results in plaintiffs like Mal being far less likely to be offered compensation for injuries than for non-malpractice plaintiffs.

In Massachusetts, and many other states, a malpractice payment made on behalf of a physician is public information.[80] Massachusetts consumers – or anyone with

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[78] *See e.g.*, Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J. LEGAL STUD. S183, S187 (2007) (indicating that "more than 90 percent of the medical malpractice cases are settled" and analyzing implications of tort reform on settlements); Mirya Holman et al., *Most Claims Settle: Implications for Alternative Dispute Resolution from a Profile of Medical-Malpractice Claims in Florida*, LAW & CONTEMP. PROBS., Summer 2011, at 103 (citing past research to suggest that "a very high number of [medical-malpractice] cases are resolved before trial" in Florida); Ann Pfau, *Med Mal Litigation in New York: Time to Change the Status Quo*, N.Y. L.J., June 14, 2012 (noting high instance of settlement in New York's medical malpractice cases).

[79] *See generally* Bruce L. Hay & Kathryn E. Spier, *Litigation and Settlement*, *in* 2 PETER NEWMAN, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (1998).

[80] *See* MASS. GEN. LAWS ch. 112, § 5C (2010).

> Every insurer or risk management organization which provides professional liability insurance to a registered physician shall report to the board any claim or action for damages for personal injuries alleged to have been caused by error, omission, or negligence in the performance of such physician's professional services where such claim resulted in:
>
> (a) A final judgment in any amount,
>
> (b) A settlement in any amount, or
>
> (c) A final disposition not resulting in payment on behalf of the insured.

Id. Many states, including Massachusetts, have online portals where residents can search a physician's medical malpractice history. *See, e.g.*, *Physician Profiles*, MASS. BD. OF REGISTRATION IN MEDICINE, http://profiles.ehs.state.ma.us/Profiles/Pages/FindAPhysician.aspx (last visited Mar. 29, 2013); *Indiana Patient's Compensation Fund*, IND. DEP'T OF INSURANCE, http://www.indianapcf.com/Public/index.aspx (last visited Mar. 29, 2013); *License Search*, OHIO ELICENSE CENTER, https://license.ohio.gov/lookup/default.asp?division=78 (last visited Mar. 29, 2013); *Physician License Lookup*, MEDICAL BD. OF CAL., http://www.mbc.ca.gov/lookup.html (last visited Mar. 29, 2013); *Physician Profile*, N.Y. STATE, http://www.nydoctorprofile.com/ (last internet access – can simply look up a physician's name and determine if he or she has made malpractice payments.[81] There is also a federal databank, called the National Practitioner Data Bank ("NPDB"), which has tracked this information on a national level since 1990.[82] Although the NPDB data for individual medical providers is not publicly available, such data is available to their potential employers.[83] As a result, all medical practitioners are tracked – by their home state, the federal government or both.[84] This has resulted in a fear that having a payment history will result in a physician being unemployable or uninsurable.[85] Scholars have labeled the medical community's response to settling cases under the threat of having such a payment history as a "fight to the death."[86]

While it is unclear how the specific nurse, physician and pharmacist that appear to be liable to Mal would respond to the risk of being reported as a result of paying a claim, the statistics indicate that the reporting of the payment will make it significantly less likely that Mal will be offered compensation through a settlement. For example, a 2003 study established that after the NPDB came into effect, the likelihood of an injured

visited Mar. 29, 2013).

[81] MASS. BD. OF REGISTRATION IN MEDICINE, *supra* note 80.

[82] *About Us*, NATIONAL PRACTITIONER DATA BANK, http://www.npdb-hipdb.hrsa.gov/topNavigation/aboutUs.jsp (last visited Mar. 29, 2013). The Health Care Quality Improvement Act of 1986 (HCQIA) established the National Practitioner Data Bank. Pub. L. No. 99-660, Title IV, 100 Stat. 3784 (codified at 42 U.S.C. §§ 11101-11152 (2006)). During the 1980s, the health profession endeavored to improve its restrictions on incompetent physicians by implementing a peer review system – the effectiveness of which was hindered by threats of litigation. Scott M. Smith, Annotation, *Construction and Application of Health Care Quality Improvement Act of 1986,* 121 A.L.R. FED. 255, 263 (1994). Congress passed the HCQIA as an incentive for vigorous peer review by providing limited immunity for those engaged in physician peer review that satisfies certain standards. *Id.* at 264. In its findings for the HCQIA, Congress noted "a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." 42 U.S.C. § 11101(2).

[83] 45 C.F.R. §§ 60.13, 60.15 (2012) (limiting disclosure to specified entities and noting confidential nature of database).

[84] 45 C.F.R. §§ 60.5, 60.7-60.9 (2012).

[85] *See* Elisabeth Ryzen, *The National Practitioner Data Bank: Problems and Proposed Reforms*, 13 J. LEGAL MED. 409, 434, 441(noting physician reluctance to settle in light of NPDB reporting requirements); Guillermo A. Montero, Note, *If Roth Were a Doctor: Physician Reputation Under the HCQIA*, 30 AM. J.L. & MED. 85, 85-86 (2004) (arguing that "'listing' in the NPDB can, and is in fact designed to, 'stigmatize the practitioner'" – making hospitals "reluctant to hire [the listed] physician").

[86] Ryzen, *supra* note 85, at 434; *see also* Philip G. Peters, Jr., *What We Know About Malpractice Settlements*, 92 IOWA L. REV. 1783, 1819-24 (noting physician consideration of NPDB reporting requirements as factor in unwillingness to settle cases).

patient's claim receiving payment fell to 59 percent of pre-NPDB levels.[87] A national insurance organization reported that "97 percent of [its member] companies reported that physicians [were] less willing to settle claims as a result of the NPDB."[88] This means that for plaintiffs like Mal, attorneys will have to anticipate the added expense, and added risk, of having a much higher likelihood of trial.

By contrast, the defendant-worker or corporation in Gary's case will likely have no objection to resolving the case. While there is potentially an increase in insurance rates for the maintenance company if multiple claims are paid on its behalf, there is no public labeling of the worker or the company as tortfeasors.[89] Thus, there would not be a similar fear that paying this claim could harm their reputation or risk future business. In fact, for Gary's defendants, settling the case may be in their benefit if it can be done within the limits of their insurance policy because it prevents the potential for corporate liability if the jury were to assess damages that exceed the insurance coverage.

Conclusion

That malpractice cases so rarely lead to plaintiffs recovering is no doubt multifactorial, and cannot be fully explained by the issues raised in this essay. However, it is clear that the current state of the law, and the application of it, make it harder for a medical malpractice plaintiff like Mal to succeed than a garden-variety plaintiff like Gary. At every step of the process, Mal is faced with procedural, economic, and tactical obstacles that do not exist in other cases. These obstacles and the advantage they provide to the defense are then coupled at trial with a known tendency for juries to side with the physician when the facts allow them to do so.[90]

Whether the obstacles to Mal's recovery should exist – and whether so-called tort reform is necessary in light of these already existing obstacles – is not addressed here. Additionally, not addressed at length in this article are those "soft" issues that

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[87] Teresa M. Waters et al., *Impact of the National Practitioner Data Bank on Resolution of Malpractice Claims*, 40 INQUIRY 283, 290 (2003).

[88] James S. Todd, *Just Numbers or Knowledge?*, 110 PUB. HEALTH REP. 377, 378 (1995).

[89] That is, as opposed to information on a medical malpractice payment that becomes publicly available in Massachusetts, no comparable database or reporting requirements exist for non-medical defendants who settle negligence claims. *See supra* notes 80-81 and accompanying text (discussing medical malpractice payment reporting in Massachusetts).

[90] Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1475-76 (2007); *see also* Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 JUDICATURE 118, 120-21 (1992) (noting juror sympathy expressed for physicians but also suggesting that a juror bias against plaintiffs may stem from belief of unwarranted increase in medical malpractice claims).

distinguish malpractice litigation from other forms of negligence. For example, one must wonder whether the absence of attorney-led voir dire is especially harmful in malpractice cases, given the negative perceptions many members of the public have about malpractice litigation that may not exist for victims of other types of torts.[91]

What cannot be denied, however, is that Mal and Gary suffered the same injury in the same place as a result of negligence, yet their ability and chances of recovery differ markedly. With that in mind, it is worth asking whether the law is intended to make all injured people who prove their cases whole, or whether this principle applies differently when it is a medical provider's negligence at issue. Beyond the possibility of legislative changes, it also bears asking what else can be done, consistent with the current procedural and substantive law, to ensure all meritorious negligence claims, including those for medical negligence, stand on the same footing in the development and presentation of facts to a jury.

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[91] *See, e.g., Kaiser Public Opinion Spotlight: Public Opinion on Medical Malpractice Debate*, THE HENRY J. KAISER FAMILY FOUNDATION 1 (Dec. 2005), http://www.kff.org/spotlight/malpractice/upload/Spotlight_Dec05_malpractice-2.pdf (indicating 61% of those polled said "patients bring 'too many' malpractice lawsuits against doctors," while only 18% said "patients bring the 'right amount'").