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October 26, 2007

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Ralph Peeples
Catherine Harris, *Wake Forest University*
Thomas Metzloff

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Does Being a Repeat Player Make a Difference? The Impact of Attorney Experience and "Case Picking" on the Outcome of Medical Malpractice Lawsuits

Catherine T. Harris

Ralph Peeples

Thomas B. Metzloff

Running head: "Repeat Player" Attorneys and the Outcome of Medical Malpractice Lawsuits

Key words: medical malpractice litigation settlement

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Abstract

We begin with Galanter's suggestion that attorneys who are "repeat players" in a specific area of litigation have an advantage over those who are not. Using a combination of data sources we analyze the impact of attorney experience and case characteristics on case outcome of 348 North Carolina medical malpractice lawsuits. We add the insurers' evaluation of liability to the analysis in a limited number of cases (n=72). While plaintiffs' attorney's medical malpractice case experience had an impact, we argue that this must be understood in the context of the plaintiffs' attorney's ability to pick cases in which the insurers' assessment of liability is either probable or uncertain. We find that the insurer's evaluation of liability as either uncertain or probable was predictive of money being paid to the plaintiff. The presence of a trial in the case was also tied to the case picking process, and was predictive of money not being paid. Other observers have described the system of compensation for medical malpractice as essentially rational in operation. In this paper, we identify the plaintiff's attorney's experience and the plaintiff's attorney's "case picking ability" as the keys to understanding the rationality of that system.

Does being a "Repeat Player" Make a Difference? The Impact of Attorney Experience and "Case Picking" on the Outcome of Medical Malpractice Lawsuits

I. INTRODUCTION

Empirical analyses of important and basic questions, such as how particular litigation outcomes can be explained, are not often attempted either in legal scholarship or in the sociology of law.[1] There is little theory that addresses this issue in legal scholarship.[2] Looking at the literature from an interdisciplinary perspective there are few theories in the sociology of law at all, other than that of Donald Black,[3] that could address the litigation process. In addition there is a dearth of micro-level studies in the sociology of law, especially those that look at the dynamics of the legal process. Although studies focusing on conversation analysis in mediation can be found,[4] empirical analyses of how particular litigation outcomes (such as involuntary dismissal, settlement and trial) can be explained are rarely attempted.

There are, of course, several reasons for this. Determining outcomes of actual, filed civil cases is difficult, tedious and time consuming. There are few databases from which samples may be drawn in a systematic way. Cases must be identified. Court records must be found, read and abstracted. Even when court records are successfully reviewed, critical information about the

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[1] There are a few exceptions, notably the work of Herbert Kritzer. However, Kritzer himself noted that there are very few such studies. HERBERT KRITZER, LET'S MAKE A DEAL 131 (1991).

[2] Marc Galanter is an example of one of the few legal scholars who have offered a theoretical frame for understanding case outcomes from a socio-legal perspective. Galanter has pointed out that there is an awareness that little is known about how the tort liability system actually operates. Marc Galanter, *Real World Torts: An Antidote to Anecdote,* 55 MD. L.REV. 1093, 1098 (1996); Galanter et al., *How To Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994). *See also* Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System- And Why Not,?* 140 U. PENN. L.REV. 1147, 1154-55(1992).

[3] M.P. Baumgartner, *The Sociology of Law in the United States,* 32 AMER. SOCIOLOGIST 99-113 (2001).

[4] David Greatbatch and Robert Dingwell, *Argumentative Talk in Divorce Mediation Sessions*, 62 AMER. SOCIOLOGY REV. 151-170 (1997); Angela Garcia, *Moral Reasoning in Interactional Contexts:*

cases is often not a part of the court file. For example, whether a monetary settlement was reached, and, if so, the terms of that settlement are seldom contained in the official court records. Instead, the court records merely indicate either that a judgment was rendered by the court, or that the case was "dismissed." Why the case was dismissed, or on what terms the case was dismissed, is seldom disclosed. Nonetheless, insights gained from studies based on court records, utilizing additional sources, such as archival data, questionnaires and interviews are needed. Such studies could lead to a richer understanding of the conflict resolution process, as it is conducted in the civil court system. The work of Miller and Sarat provides an example.[5] More than twenty-five years ago, Miller and Sarat described the litigation process in the larger context of what they called the "dispute pyramid," with layers- grievances, claims disputes, filings (involving lawyers), court filings, trials, and appeals. They discussed the process of case attrition, and noted that it may be very pronounced.[6] The result resembles a pyramid, with the most durable cases at or near the top. Dispute pyramids vary by type of case, but what they all have in common is that very few cases survive to the apex- a pattern supported by considerable empirical evidence.[7] The pyramidal shape suggests the importance of the ability of the plaintiff's lawyer to select cases that are likely to settle or, if a trial occurs, cases that are likely to result in a plaintiff's verdict.[8]

A further impediment to interdisciplinary scholarship dealing with the litigation process exists, as well. Knowledge about the meaning of the different stages of the legal process is not common among sociologists or social scientists in general. Further, expertise in empirical

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Care and Justice Arguments in Mediation Hearings, 66 SOCIOLOGICAL INQ. 197-214 (1996).

[5] Richard Miller and Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture,* 15 LAW & SOCIETY REV. 525 (1981).

[6] Id. at 544-46.

[7] Id.; Herbert Kritzer, *Contingent Fee Lawyers as Gatekeepers in the Civil Justice System,* 81 JUDICATURE 22 (1997); Kritzer, *supra* n.1.

[8] *See also* the discussion of dispute pyramids in Galanter, *Real World Torts, supra* n.2 at 1099-1102.

research methodologies has historically not been common among legal scholars – although there are signs that this is changing.

One of the few theories that address the dynamics of the litigation process is Galanter's seminal discussion of "repeat players"[9]. Galanter argues that attorneys acting as "repeat players" have advantages in the legal system that others do not. These advantages include an understanding of legal rules, ready access to specialists who can provide expert testimony, more readily available information about cases and less start-up costs. Daniels and Martin have recently argued, on the basis of data from Wisconsin and Texas, that "repeat players" within the medical malpractice plaintiffs' bar do exist, and that these repeat players tend to do better than non-repeat players.[10]

This article is the result of an interdisciplinary effort in which data were collected from court records and other archival sources, supplemented by a limited number of questionnaires and interviews with attorneys. Building on the work of Galanter, we explore the question of whether the experience of opposing counsel affects medical malpractice case outcomes. We look at this question in the context of the case, including severity of alleged injury, whether there was a trial and, for a limited number of cases, insurers' and plaintiffs' counsels' assessment of liability.

II. PREDICTORS OF OUTCOME IN MEDICAL MALPRACTICE CASES: PREVIOUS LITERATURE

Does the identity of counsel makes a difference for medical malpractice case outcomes? More to the point, does it matters who the plaintiff's lawyer is and who the defendant's lawyer is?

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[9] Marc Galanter, *Why The 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOCIETY 95, 97-102 (1974).

[10] Stephen Daniels and Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L.REV. 1051, 1059-60 (2006).

Not every observer thinks so. Some earlier work in the area of medical malpractice litigation suggests that the identity of the lawyers does not really matter. For example, Taragin et al.[11] concluded that compensation for medical malpractice claims is closely associated with probable liability, as determined by peer (i.e., fellow-physician) review. In similar fashion, Sloan & Hsieh[12] and Farber & White [13] found a connection between negligence, as determined by physicians, and compensation. It then follows that the central event in a rational system of compensation should be a determination of medical fault by a panel of experts, based upon a review of the relevant records.[14] In making such a determination, the relative competence and skill of the lawyers for the plaintiff and defendant would not matter greatly, particularly if a schedule of compensation for specified injuries is used.[15] Instead, the key determination of medical fault would be made by members of the medical, not the legal profession.[16]

Using a different model, Brennan et al.[17] have argued that compensation is connected to severity of injury, defined in terms of temporary or permanent disability- but not much else. Again, if severity of injury is the crucial variable, the role of lawyers would not be critical to the outcome of the case. Thus, if liability or severity of injury or some combination of the two adequately predicts payment, then the dynamics of lawyer confrontation may not matter. Using liability to predict payment suffers from serious logical problems, however. First of all, to the extent that compensation is based on a determination of negligence, as determined by non-

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[11] M.I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims,* 117 ANNALS OF INTERNAL MED. 780 (1992).

[12] Frank Sloan and Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?* 24 LAW & SOC. REV. 997 (1990).

[13] Henry S. Farber and Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process,* 22 RAND J. ECON. 199 (1991).

[14] Taragin et al.,*supra* n. 11.

[15] See Catherine T. Harris et al., *Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs' Attorneys,* 58 SMU L.REV. 225, 227 (2005).

[16] To a substantial extent, this has long been the case. Most medical malpractice claims rely on the testimony of experts, who are invariably physicians, and who typically practice in the same field. See DAN B. DOBBS, THE LAW OF TORTS §246, 639 (2000).

[17] T.A. Brennan, C.M. Sox and H.R. Burstin, *Relation Between Negligent Adverse Events and the*

physicians, the role of lawyers in the process becomes more significant. Second, a system that bases prediction of payment on a determination of liability is constrained by one simple consideration: liability, however defined, is not always reducible to a simple yes/no question. Sometimes the key medical facts are subject to interpretation. Sometimes the appropriate course of treatment is a matter of professional debate. Sometimes reviewers will reach different conclusions, even when presented with identical information -whether the reviewers are physicians, insurers, lawyers or laypersons. Finally, there is usually an informational disparity with respect to "liability": the insurer will know more about potential liability than the plaintiff's attorney will. Thus, for any given claim for compensation, the predictive value of a model based on liability is quite limited. This is especially true for claims where fault is neither clearly present nor unquestionably absent. Unlike liability, which represents a reasoned conclusion based on the facts presented, severity of injury is merely an objective attribute of a case.[18] As a result, severity needs to be understood in context, considered in connection with other case attributes, taking into account the experience of opposing counsel.[19]

Over the past several years, a consensus has emerged (at least among academic observers) that the medical malpractice system operates, overall, in a rational and predictable way.[20] There is a clear connection between the quality of the case (expressed in terms of likely liability) and compensation. However, some questions remain. The fit between quality and outcome is less than perfect. Other factors, such as the expertise of counsel, need to be examined more closely. The scholarly literature on the effect the relative skills and competence of lawyers have on case

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Outcomes of Medical Malpractice Litigation, 335 NEW ENGL.J.MED. 1963 (1996).

[18] Frank Sloan et al., SUING FOR MEDICAL MALPRACTICE (1993).

[19] Several recent reviews of the published studies of medical malpractice have concluded that the Brennan et al. findings are inconsistent with virtually every other empirical study on the subject. *See* Philip G. Peters, Jr., *What We Know About Malpractice Settlements,* 92 IOWA L.REV. 1783, 1803 (2007); David Hyman and Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid,* 59 VAND. L.REV. 1085, 1094-1100 (2006). *See also* Tom Baker, *Reconsidering the Harvard Medical Practice Study Conclusions about the Validity of Medical Malpractice Claims,* 33 J.L.MED. & ETHICS 501, 502-506 (2005).

outcomes is scanty at best. As Heinz and Laumann observed almost thirty years ago, the profession of law is less studied, and less understood, than the profession of medicine.[21] This pattern has not changed over time. While studies occasionally address issues of professional stratification[22] and specialization,[23] the relative importance of competence and skill in determining case outcomes has not often been considered. Given the obvious difficulties in measuring competence and skill, and in determining case outcomes with precision, this is not surprising. What evidence exists on the subject suggests that case evaluation and negotiation skills make a large difference in case outcomes.[24] One of the few empirical studies focusing on the impact of relevant experience is that of Harris et al.[25] They report that "seasoned plaintiff's attorneys", (those who had handled at least four medical malpractice cases during the study period, who had conducted at least one malpractice trial during this period and who had attended law school in-state) were more successful than other plaintiffs' attorneys in obtaining money for their clients.[26]

On the surface, the conclusions of Taragin et al.,[27] who see the crucial variable as assessment of liability, and Brennan et al.,[28] who argue that the crucial variable is severity of injury, seem inconsistent. Severity of injury, as identified by Brennan et al., bears no necessary connection to

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[20] *See, e.g.,* Peters, *supra* n. 19, at 1831-32; Hyman and Silver, *supra* n. 19, at 1087.

[21] John P. Heinz and Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies,* 76 MICH. L.REV. 1111 (1978).

[22] Rebecca Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers' Labor,* 66 AM. SOCIOLOGICAL REV. 382 (2001); JEROME CARLIN, LAWYERS ON THEIR OWN (1994); John P. Heinz and Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies,* 76 MICH. L. REV. 1111 (1978); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT, 73-76 (1970); ERWIN SMIGEL, THE WALL STREET LAWYER (1969); Jack Ladinsky, *Careers of Lawyers, Law Practice and Legal Institutions,* 27 AM. SOCIOLOGICAL REV. 47 (1963).

[23] Edward O. Laumann et al., *Washington Lawyers and Others: The Structure of Washington Representation,* 37 STANF. L. REV. 465 (1985); ROSS, *supra* n.22.

[24] GERALD WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT at 5-7 (1983). *See also* Kritzer, *supra* n.1, at 54-55.

[25] Harris et al., *supra* n.15.

[26] Harris et al., *supra* n. 15, at 244-47. *See also* Daniels and Martin, *supra* n.10.

[27] Taragin et al., *supra* n.11.

[28] Brennan et al., *supra* n.17.

liability, as described by Taragin et al. We argue that both conclusions present an incomplete picture of the process of medical malpractice litigation, especially since there is evidence that physicians who have been sued don't necessarily agree that they were liable.[29]

In their study of medical malpractice lawsuits in Florida, Sloan et al. suggested that the skill and competence of the lawyer for the plaintiff might be a factor in determining the outcome of specific cases.[30] Sloan et al. concluded that in terms of monetary recovery, claimants represented by "specialist" attorneys fared better than did claimants represented by non-specialist attorneys.[31] They further observed that the relative importance of who the lawyers are in a particular medical malpractice case had never been the subject of empirical study.[32] Sloan et al.'s measurement of the impact of specialist attorneys on case outcomes represented a pioneering effort. However, the study considered only the influence of plaintiffs' counsel on case outcomes and payment. The impact of defense counsel was discussed very little. In addition, the study used a number of different criteria, both objective and subjective, for determining specialist status. Sloan et al. defined "specialist" to include attorneys who handled four or more medical malpractice cases, whether in or out of their sample, as well as their partners and associate attorneys; lawyers listed as experts in tort law in "The Best Lawyers in America"; members of the Inner Circle of Advocates; and attorneys who identified themselves as medical malpractice specialists in the Martindale-Hubbell National Directory of Lawyers.[33] Thus, while perhaps more widely studied than most other areas of law, even in the field of medical malpractice one finds relatively little on the topic of lawyer competence and skill.

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[29] Ralph Peeples et al., *Settlement Has Many Faces: Physicians, Attorneys and Medical Malpractice,* 41 J. HEALTH & SOC. BEHAVIOR 333 (2000).

[30] SLOAN ET AL., *supra* n.18.

[31] SLOAN ET AL., *supra* n.18 at 196.

[32] SLOAN ET AL., *supra* n.18, at 164.

[33] SLOAN ET AL., *supra* n.18, at 170.

Our approach adds attorney experience to those variables that have traditionally been argued to predict payment in medical malpractice cases, such as the severity of the alleged injury[34] and assessment of liability.[35] We also look at the relationship among attorney experience, the ability to pick cases and case outcome.

III. APPROACH TO ANALYSIS

We begin with a bivariate analysis, looking at whether money was paid to the plaintiff by relevant experience variables (malpractice case experience, general experience), case context variables (severity of the alleged injury and whether a trial occurred) and the insurer's assessment of liability. Utilizing binary logistic regression, we look at the question of what variables predict case outcome, in terms of whether money is paid. For these analyses we enter three clusters of variables discussed above into the model. First, we enter experience variables, including general experience and medical malpractice case experience- "repeat playing." Second, we add case context characteristics: severity of injury and whether there was a trial. Third, for a limited number of cases for which the data were available (n= 72), we add the insurers' assessment of liability (probable, uncertain, unlikely) to the model.

In order to take an in-depth look at the circumstances under which money is paid or not, in the number of cases in which data for both defense and plaintiffs' counsel were available (n=52), we look at the extent to which plaintiffs' counsels' assessment agreed with that of the insurer. We introduce a variable that measures effectiveness of plaintiffs' counsel. Are effective plaintiffs' counsel more likely to agree with the insurers' assessment of liability? How does this agreement, or lack of it, affect case outcome? How does this agreement, or lack of it, affect whether there was a trial? After all, there is evidence that insurers act rationally, settling cases

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[34] Brennan et al., *supra* n.17.

when they evaluate liability as probable and not settling when liability is seen as unlikely.[36] Finally we look at the extent to which a combination of agreement with the insurer assessment of liability and medical malpractice case experience affects the payment of money to the plaintiff.

IV. METHODS

In our first analyses our dependent variable is case outcome (whether money was paid in a given medical malpractice case). Our independent variables include time since admitted to practice (general experience), the number of medical malpractice cases handled during the study period (case experience), whether the case went to trial, severity of the alleged injury and assessment of liability by defense and plaintiff's counsel (the latter in a limited number of cases). In our next analyses we add the variable counsel effectiveness as an independent variable looking at the impact of this variable on assessment of liability and the presence of a trial in the case.

A. Sample

Our study is based on the collected data from 348 medical malpractice lawsuits filed in the North Carolina courts between 1992 and 1995. The final outcomes of these cases were determined through a combination of techniques, including a review of the court files for each case and the use of archival data on attorneys. For each case we identified the counsel for the plaintiff and the counsel for the defendant, all of whom were licensed in North Carolina. Archival sources provided information about the number of years since the attorney was admitted to practice. Court files provided information about the number of medical malpractice cases handled during the study period as well as the outcomes of these cases. Matching our data sources resulted in an upper limit of 306 usable cases. For a limited number of cases (72) we

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[35] Taragin et al., *supra n.*11.

[36] Ralph Peeples et al., *The Process of Managing Medical Malpractice Cases: The Role of Standard*

have a combination of interview and questionnaire data that utilize the defense attorney's evaluation of liability as a proxy for insurers' assessment of liability.[37] In all our analyses we used data where they were available. As a result the numbers in different analyses varied.

Given that there is no malpractice case database in North Carolina from which a sample could be randomly selected, we focused on durable cases. Following the notion of the dispute pyramid, [38] durable cases, or those that had progressed at least beyond the initial stages of complaint by the plaintiff and answer by the defendant, seemed the most appropriate for looking at litigation as a process. Our sample consists of closed cases that had progressed far enough to be ordered to mediation by the trial court, under the auspices of a pilot program mandated by the North Carolina General Assembly in 1991. Thus a type of control for case durability is provided. On the other hand, we recognize that this is not a random sample and that these cases may have characteristics that differ from cases not ordered to mediation. It should be noted that although only eighteen of the state's 100 counties were a part of the pilot program, the pilot counties included five of the six most populous cities in the state (Charlotte, Raleigh, Greensboro, Winston-Salem, and High Point). It should also be noted that today, virtually all medical malpractice cases filed in North Carolina are ordered to mediation.

B. Dependent Variable

Case Outcome

As a result of our examination of court records, attorney questionnaires and attorney interviews, we were able to determine for most cases (296/348, 85.1%) if money had actually been paid, whether in settlement of the case or as a result of a favorable jury verdict. Overall,

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of Care, 37 WAKE FOR. L.REV. 877 (2002).

[37] The defense attorney's evaluation is based on tht of the insurer, which is in turn based on that of the outside physician reviewers. Peeples, *supra* n.36.

[38] Miller and Sarat, *supra* notes 5-6.

payment occurred in 50.4% of cases. However, it should be kept in mind that these were durable cases.[39] Although it was possible to determine whether money was paid, it was seldom possible to determine the actual amount paid. The settlement terms of medical malpractice lawsuits typically take the form of a private contract between the parties, and thus are not subject to public scrutiny. A common condition of settlement is a pledge extracted from the plaintiff and the plaintiff's counsel not to disclose the amount paid in settlement of the lawsuit. Thus, although we were able to obtain actual settlement amounts for some cases, an insufficient number of such cases precluded utilizing settlement amounts as a dependent variable. Instead, we created a binary variable in which "money paid" was coded as "1" and money not paid was coded as "0'. The binary approach to whether money was paid serves to put the payment rate of 50.7% in context. The payment of several thousand dollars in a case might be considered a statistical "win" for the plaintiff, but it is unlikely that either the plaintiff or the plaintiff's counsel would see it that way.

C. Independent variables

In our first analyses there were three categories of independent variables: attorney experience variables, which included time since admitted to practice (general experience) and number of medical malpractice cases handled; case context variables (severity of alleged injury and was there a trial?); and insurers' assessment of liability (probable, uncertain and unlikely). In the second set of analyses effectiveness of plaintiff's counsel was the independent variable. The variables and their coding are presented in Table 1.

1. <u>Attorney Experience Variables</u>

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[39] Imposing a filter on medical malpractice cases, such as a requirement that an order to mediate the case has been issued, has the effect of reducing the number of cases in the study that were abandoned early in the process by plaintiffs, for whatever reason.

a. Time since First Admitted to Practice: General Experience

Data are available from attorney directories on the year attorneys were first admitted to practice and the law school from which they graduated. We utilized these directories to compute the years of general experience of the attorneys. For our bivariate analysis we recoded years of experience into greater or less than ten years, mindful of the time it traditionally takes to become a partner in a law firm.

b. Number of Medical Malpractice Cases Handled by Defense and Plaintiffs' Counsel: Case Experience

We calculated the number of medical malpractice cases each attorney handled during the study period. For cases with more than one defense counsel (due to the involvement of more than one defendant) we determined, based on a review of the court file, the identity of the primary defendant and thus the identity of the primary defense counsel.

Reliance on experience, particularly specific experience in medical malpractice cases, serves as a useful indicator of competence and skill for several reasons. First, medical malpractice litigation is largely a specialty practice for lawyers, especially on the defense side. Second, simple market principles seem to be at work in this area. Defense counsel for physicians, and often for hospitals, are chosen by the malpractice insurance carrier. Insurers understandably use (and continue to use) attorneys who have demonstrated a certain level of skill in defending medical malpractice cases. On the plaintiff's side, market principles also seem to be at work. Plaintiffs' attorneys are compensated on a contingent fee basis. Thus, plaintiff's counsel receives compensation only if the case results in a payment to the plaintiff. Plaintiffs' attorneys who have handled a substantial number of medical malpractice cases have likely demonstrated their skill in

this complex and technical field.[40] The costs of preparing a medical malpractice case are high enough, both in terms of time and money, to deter casual or occasional players.

We measured malpractice case experience in terms of the number of medical malpractice cases handled, apart from the general experience as a practicing lawyer. The principal reason for this approach is the fact that medical malpractice litigation is a specialty practice. Attorneys for both plaintiffs and defendants tend to specialize in medical malpractice, and to devote a substantial portion of their practice to that area. We defined malpractice case experience in terms of the actual number of cases handled during the study period. For our bivariate analysis we recoded this variable into at least four cases and less than four, as an indicator of the attorney handling at least one case a year during the study period.

2. Case Context Variables

a. Severity of alleged Injury

Not every malpractice case is the same. Some cases involve very serious injuries, while others involve less significant harm. It is quite possible that the dynamics of resolution for cases involving a very severe injury will differ from those cases involving only a modest or temporary injury. Indeed, previous work in this field has suggested as much.[41]

We identified nine different levels of severity of injury, ranging from emotional injury only to death. This is consistent with the approach of Sloan & Hsieh[42] who obtained these categories from the National Association of Insurance Commissioners and the General Accounting Office.. A binary variable was created in which "1" indicated more severe injuries and "0" less severe injuries. More severe injuries included minor permanent partial disability, major permanent partial disability, major permanent total disability, grave permanent total

[40] Harris et al., *supra* n.15, at 247-48.

disability and death. Less severe injury included emotional injury only, insignificant injury, minor temporary disability and major temporary disability.

b. Was there a trial?

Whether counsel for the plaintiff or the defendant had medical malpractice trial experience in a given case was determined by the court records. A binary variable for each case was created, indicating whether or not a trial occurred. The presence of a trial was coded as "1" and the absence of a trial was coded as "0". Trial experience could be argued to be an indicator of a willingness not to back down, in the face of an uncertain outcome.[43] This willingness seems particularly relevant to plaintiffs' counsel, who will often be risking a modest monetary compensation when a final settlement offer from defense counsel is rejected, in the hope that a larger amount will be recovered at trial. Further, since plaintiff's counsel receives nothing from his or her client unless money is paid by the defendant, a decision to proceed to trial represents a risk of even greater financial loss to plaintiff's counsel. On the other hand, the fact that a trial occurred could indicate either efficiency or lack of efficiency in settling cases, depending on the nature of the case and the skill of the attorney. After all, there is evidence that if the insurer thinks liability is probable settlement will occur.[44] The consequences of going to trial differ for defense and plaintiff's counsel. Plaintiffs' counsel risk everything since they are compensated on a contingency fee basis. Defense counsel will receive their fee regardless of case outcome.

3. Assessment of Liability

Using questionnaire and interview data collected from counsel to the defendant and to the plaintiff, we were able to collect data on assessment of liability in a limited number of cases.

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[41] Brennan et al., *supra* n.17; Sloan and Hsieh, *supra* n.12 at 1007.

[42] Sloan and Hsieh, *supra* n.12 at 1004.

[43] Galanter, *supra* n.9, at 99; Harris et al., *supra* n.15 at 246.

[44] Peeples et al., *supra* n.36 at 886-87.

Attorneys were asked to evaluate liability in terms of three categories: probable, uncertain and unlikely. Defense counsel's evaluations were used as proxies for the insurers' evaluations, since, as noted above, defense counsel work for the insurer and evaluations of liability are ultimately determined by the insurer with the help of physician reviewers. These reviewers are usually paid consultants in a given malpractice case.[45] We created a design variable with "unlikely liability" as the reference category since we focus on the case outcome of money being paid to the plaintiff.

4. Performance Measure: more versus less effective plaintiff's counsel

Our measure of effectiveness required experienced counsel to have handled on the average at least one medical malpractice case a year, as discussed above and have obtained money (either in settlement or by trial) in at least half of those cases. If a plaintiff's counsel had at least four cases and had been paid money in at least half of them, his/her record was categorized as "more effective (coded 1). If counsel either did not have four cases or was not paid money in at least half the cases, counsel was categorized as less effective.

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Table 1 about here

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V. FINDINGS

The median number of years in practice for all defense attorneys for which data were available (n=323) was 20 years. The median for plaintiffs' counsel for which these data were available (n=307) was 18 years. Data on both number of medical malpractice cases handled and whether money was paid were available for most cases (n=348). The median number of cases

[45] Peeples et al., *supra* n.36 at 884-85.

handled by defense counsel was seven and two for plaintiffs' counsel. In terms of level of effectiveness, 37.7% of defense counsel were more effective compared to 17.5% of plaintiffs' counsel. Over 19 % (19.3) of effective defense counsel had been involved in a trial compared to 22.2% of effective plaintiffs' counsel.

Over 71% (71.3) of the cases involved more severe injuries, with 21.6% of all cases being death cases. Over 16% (16.7) of all cases eventually went to trial. Cases that went to trial did not differ significantly from those that did not by severity of alleged injury.

A. What Predicts Whether Money Will Be Paid to the Plaintiff?

Bivariate analyses of the impact of relevant experience variables, case context variables and assessment of liability on the payment of money to the plaintiff are presented in Table 2. In terms of recoded relevant experience variables, general experience does not matter for either plaintiffs' or defense counsel. Medical malpractice case experience matters for plaintiffs' counsel, but not for defense counsel, keeping in mind that defense counsel are selected by the insurer and are almost always experienced.[46] In terms of specific medical malpractice experience for plaintiff's counsel, if counsel had handled four or more cases during the study period, money was paid in 57.1% of cases compared to 46.3% of cases in which counsel had handled less than four cases (p=.07, Phi=.106).

In terms of case characteristics, the severity of the alleged injury mattered. Money was paid more frequently in cases with more severe injuries, 53.6% compared to 44% (p=.1, Phi=.084). Money was significantly less likely to be paid if a trial occurred. Money was paid in 26.8% of cases in which there was a trial compared to 56.4% of cases in which no trial occurred (p<.001, Phi=-.236).

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[46] Id. at 880.

What about the insurers' assessment of liability? Money was paid in 78% of cases that were evaluated as having probable liability, in 73.7% of cases in which liability was assessed as uncertain and 33.3% of cases in which liability was viewed at unlikely ($p<.001$, Phi=.423).

Table 2 about here

Logistic analysis for money paid to the plaintiff is presented in Table 3. In Model 1, with experience variables, defense counsel's general experience had an impact on money not being paid ($p=.14$). Plaintiff's counsel's malpractice case experience predicted payment of money ($p=.06$). When case context variables are added to the model (model 2), the negative coefficient indicates that if a trial occurred, this event was a significant predictor of money *not* being paid to the plaintiff ($p<.001$). The general experience of the defense counsel continues to be influential, with respect to money not being paid ($p=.14$). Severity of the alleged injury was not predictive of money being paid to the plaintiff.

In Model 3, the full model, for a limited number of cases for which the data were available (n=72), the insurer's assessment of liability was added. The fact of a trial in the case continued to be a significant predictor of money not being paid ($p<.01$). An assessment of liability as either probable or uncertain was predictive of money being paid to the plaintiff ($p<.001$ and $p<.01$ respectively), as shown by the positive coefficients. The -2 log likelihood steadily diminished from Model 1 to Model 3.

Table 3 about here

Our multivariate analysis indicates that, while plaintiff's counsel's malpractice experience has an impact on the payment of money at some level, a more in-depth analysis of the process is

needed. In order to do this, we look at the impact of being represented by a more effective compared to being represented by a less effective attorney. Are more effective attorneys better at "case picking?" In other words, are they better at evaluating liability in a given case in a way that agrees with the insurer's private assessment? If so, the attorney for the plaintiff would be in a better position to settle, and avoid a trial.

Our findings are presented below. Some of these analyses utilize percentages only.

B. The Effectiveness of Plaintiffs' Counsel and 'Case Picking'

Since the evaluations of the insurer drive case outcome [47] we compare assessments of plaintiffs' counsel with those of defense counsel, whose evaluations are a proxy for that of the insurer. While data on assessment of liability are limited to 52 cases, nonetheless these cases allow us to a detailed look at the dynamics of case settlement involving those variables that are shown to be important in both bivariate and multivariate analyses.

Even after the case was closed it is interesting to note that plaintiffs' and defense counsel didn't always agree on the assessment of liability (see Table 4). Of the 26 cases that were evaluated as having probable liability, 19 (73.1%) of these cases were so evaluated by plaintiffs' counsel (Table 4). In six (23.1%) of these cases plaintiffs' counsel evaluated liability as uncertain and one (3.8%) was seen as having unlikely liability. There were 12 cases assessed by defense counsel as having uncertain liability but only two (16.7%) of plaintiffs' counsel agreed. However, nine (75%) of plaintiffs' counsel saw these cases as having probable liability and one (8.3%) evaluated liability as unlikely. Finally there were 14 cases evaluated by defense counsel as having unlikely liability. Plaintiffs' counsel evaluated eight (57.1%) of these cases as having probable liability, three (21.4%) as having uncertain liability and agreed with defense counsel

[47] Peeples et al., *supra* n.36 at 880, 887.

that liability was unlikely in only three (21.4%) of cases.

_____
Table 4 about here
_____

Table 5 examines agreement between defense and plaintiffs' counsels' assessment of liability, controlling for attorney effectiveness. This analysis reveals that in the nine cases handled by more effective plaintiffs' counsel, there was 100% agreement with the assessment of defense counsel. However this was not the pattern with less effective plaintiffs' counsel. While 13 (65%) of less effective counsel agreed with defense counsel about cases with probable liability, six (30%) saw liability as uncertain and one (5%) viewed liability as unlikely. In the 10 cases that defense counsel evaluated as uncertain, 7 (70%) of the less effective plaintiffs' counsel saw liability as probable. There was agreement that liability was uncertain in only two (20%) of the cases. One case (10%) was evaluated as unlikely liability. There were 13 cases defense counsel saw as having unlikely liability. It is interesting to note that seven (53.8%) of less effective plaintiffs' counsel evaluated these same cases as having probable liability. Less effective plaintiffs' counsel saw three (23.1%) of these cases as having uncertain liability and agreed with defense counsel that liability was unlikely in three (23.1%) of cases.

_____
Table 5 about here
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Table 6 looks at case picking and level of liability and whether a trial occurred, once again controlling for attorney effectiveness. More effective attorneys went to trial in 4/16 (25%) of their cases. One of these cases was evaluated by the insurer as having probably liability. It should be noted that the other cases so evaluated (eight, 88.9%) did not go to trial. There were five cases evaluated by the insurer as having uncertain liability. More effective attorneys went to trial in

two of these cases. Of the two cases that the defense counsel evaluated as having unlikely liability, more effective attorneys went to trial in one (50%).

In comparison less effective attorneys went to trial in 20 of 73 cases (27.4%), nine (34.6%) of which were evaluated as having unlikely liability by the insurer. Only six (18.2%) were evaluated as having probable liability by the insurer and five (35.7%) as being of uncertain liability.

Table 6 about here

Tables 7 and 8 further clarify the findings in the bivariate and multivariate analyses. Although the results of Fisher's exact test are reported here, caution must be taken in drawing conclusions since the numbers are very small.

There were 24 cases in which plaintiffs' and defense counsel agreed about liability (table 7). In the 19 cases in which there was agreement that liability was probable money was paid to the plaintiff in 18 (94.7%) of the cases. Money was paid in two (100%) of the cases in which there was agreement that liability was uncertain. In the three cases in which there was agreement that liability was unlikely no money was paid to the plaintiff.

When there was disagreement about probable liability, money was paid to the plaintiff in four of seven cases (57.1%). Disagreement about uncertain liability resulted in money being paid to the plaintiff in seven of nine cases (77.8%) and in four of 11 (36.4%) cases in which there was disagreement about unlikely liability ($p<.01$, $V=.846$).

Table 7 about here

In Table 8, combinations of agreement on liability and malpractice case experience (less than four cases handled during the study period compared to more than four cases) are examined. This is intended to sort out the impact of agreement on liability, compared to medical malpractice case experience. Again, because the numbers are small the results should be viewed cautiously. Nonetheless, of the 10 cases in which there was agreement that liability was probable or uncertain in combination with counsel having handled four or more medical malpractice cases money was paid to the plaintiff 100% of the time. Plaintiffs' counsel who had handled four or more cases simply did not select cases which were evaluated as having unlikely liability.

In those cases in which there was agreement about probable liability but plaintiffs' counsel had handled less that four cases, money was paid in eight of nine (88.9%) cases. Money was also paid in the one case in which there was agreement that liability was uncertain. Those plaintiffs' counsel with less experience handled three cases in which there was agreement that liability was unlikely and in these cases, no money was paid to the plaintiff. The results of Fisher's exact test are reported ($p<.001$, $V=.856$).

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Table 8 about here
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VI. DISCUSSION

We have looked at the variables that previous literature reported as having an impact on whether money was paid in medical malpractice cases. In our analyses we have considered the impact of three categories of independent variables: relevant experience variables (years in practice and medical malpractice case experience), case context variables (severity of alleged injury and the presence of a trial) and finally, the insurer's assessment of liability.

Our analysis has proceeded in several stages. First we conducted bivariate analyses of the

impact of these three categories of variables on whether money was paid to the plaintiff using chi-square and appropriate measures of association. We found some evidence that malpractice case experience for the plaintiff's attorney had an impact on the payment of money to the plaintiff. In our bivariate analyses, the variables that were clear predictors of money being paid to the plaintiff were the insurers' assessment of liability and whether there was a trial. There was also some evidence that plaintiffs' counsel's malpractice case experience had an impact on money being paid. If insurers evaluate the liability of a case as probable or uncertain the pattern was that money was paid. If the case went to trial it was unlikely that money would be paid.

Second, we utilized binary logistic regression to evaluate the impact of these three categories of variables, relevant experience variables, case context variables and insurers' assessment of liability, entering them in three separate models. Consistent with the bivariate analyses, the presence of a trial and assessment of liability emerged in the multivariate analysis as significant predictors, again, along with some evidence that plaintiffs' malpractice case experience was having some impact. It should be noted that severity of the plaintiff's alleged injury was not a significant predictor of money being paid to the plaintiff.

Finally we took an in-depth look at the relationships among plaintiffs' counsel's effectiveness, medical malpractice experience, agreement with insurers' evaluations of liability and case outcome. The numbers are very small and conclusions must be cautiously suggested. Recalling that the insurers' evaluations drive the process, our analyses indicate that the ability of plaintiffs' counsel to pick cases- that is, to evaluate liability as the insurer does- is crucial. Effective plaintiffs' counsel clearly do better at "case picking" than less effective counsel. It also seems that just picking the cases is not enough. Plaintiffs' counsel who had handled more than four cases were more likely to obtain money for the plaintiff, regardless of whether their assessments

agreed with that of the defense, than those plaintiffs' counsel who had not handled at least that many cases during the study period. We suggest that the ability to evaluate cases as the insurer does is a necessary but not sufficient condition for money being paid to the plaintiff. In short, we find evidence that being a repeat player matters if plaintiffs' counsel is good at evaluating cases.

VII. CONCLUSION

The medical malpractice compensation system may be inefficient, but in practice it is rational. Meritorious claims are more likely to be paid than non-meritorious claims. The status of plaintiff's counsel as a repeat player, skilled at evaluating cases, is the basis for the system's rationality.

A larger, random sample, including both quantitative and qualitative data is needed for a continuing analysis of the important variables that have an impact on case outcomes, as well as the litigation process itself.

TABLE 1.
Variables and Coding for Attorney Experience and Case Characteristics in Medical Malpractice Cases

Variables	Definition	Coding
Dependent Variables		
Money paid	Case in which money was paid to the plaintiff.	0 = Money not paid 1 = Money paid
Performance: Attorney Effectiveness Plaintiff's Counsel	Plaintiff's counsel handled at least four cases and won at least half of them.	0=Less Effective 1=More Effective
Independent Variables		
Experience Variables		
Years since admitted to Practice	Archival sources were used to determine the number of years in practice. These interval level data were utilized.	Defense Counsel: range=1-46, median=20 Plaintiffs' Counsel: range=1-47, median=18
Malpractice Case Experience	Number of medical malpractice cases handled as collected from the court files during the study period.	Defense counsel: Range 1-29, median=9 Plaintiffs' Counsel: Range=1-19, median=2
Case Context Variables		
Trial Experience: Defense and Plaintiff's Counsel	If the court records indicated that the attorney had tried a medical malpractice case.	1=Yes 0=No
Severity of alleged injury	Less severe injuries included emotional only, insignificant injury, minor temporary disability and major temporary disability.	1=More severe 0=Less Severe
Assessment of Liability	Defense counsel's assessment	Two dummy variables 1=liability probable 1=liability uncertain 0=liability unlikely, reference category

Table 2. Money Paid to the Plaintiff and Relevant Attorney Experience, Case Context Variables and Insurers' Assessment of Liability

Relevant Experience Variables	*Was Money Paid to the Plaintiff?*				
	No			*Yes*	
Years in Practice	N	%		N	%
Defense Counsel					
>10 years	126	50.0		126	50.0
<10 years	11	45.8		13	54.2
			ns		
Plaintiff's Counsel					
>10 years	105	49.5		107	50.5
<10 years	25	47.2		28	52.8
			ns		
Medical Malpractice Case Experience Defense Counsel					
>four cases	115	50.7		112	49.3
<four cases	31	44.9		38	55.1
			ns		
Plaintiff's Counsel					
>four cases	51	42.9		68	57.1
<four case	95	53.7		82	46.3
			ns		
Case Context Variables					
More Severe	98	46.4		113	53.6
Less Severe	42	56.0		33	44.0
			ns		

Was there a trial?					
Yes	41	73.2		15	26.8
No	99	43.6		128	56.4
			$\chi 2$=15.746, df=1, p<.001, phi=-.236		
Insurers' Assessment of Liability					
Probable	9	22.0		32	78.0
Uncertain	5	26.3		14	73.7
Unlikely	20	66.7		10	33.3
			$\chi 2$=16.082, df=2, p<.001, V=.423		

ns=not significant
N=number (frequency)

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.

Table 3. Logistic Analysis for Money Paid to the Plaintiff

	Model 1			*Model 2*			*Model 3*		
	Coefficient	SE	Odds Ratio	Coefficient	SE	Odds Ratio	Coefficient	SE	Odds Ratio
Experience Variables									
General Experience, Defense Counsel	-.012	.015	.988+	-.023	.016	.977+	-.022	.043	.978
Plaintiff Counsel	-.009	.014	.991	-.008	.015	.992	-.056	.030	.946+
Malpractice Case Experience Defense Counsel	-.012	.015	.988	-.020	.016	.980	-.009	.031	.992
Plaintiff Counsel	.048	.025	1.049+	.032	.027	1.032	.104	.080	1.110
Case Context Variables									
Severity of Injury	---	---	---	.411	.324	1.509	.718	.777	2.051
Trial?	---	---	---	-1.463	.390	.232***	-2.036	.756	.131**
Liability Assessment									
Probable	---	---	---	---	---	---	2.466	.725	11.769***
Uncertain	---	---	---	---	---	---	2.247	.859	9.458**
Constant	.524	.427	1.689	.694	.518	.180	.019	1.127	1.024
-2 Log Likelihood	334.832	---	---	289.636	---	---	68.449	---	---
N	246			225			72		

+p<.1, *p<.05; ** p<.01; ***p<.001

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.

Table 4. Defense and Plaintiffs' Counsel Assessment of Liability: Percentage of Agreement

Plaintiffs' Counsels' Assessment	Defense Counsels' Assessment N=52					
	Probable		Uncertain		Unlikely	
	N	%	*N*	%	*N*	%
Probable	19	73.1	9	75.0	8	57.1
Uncertain	6	23.1	2	16.7	3	21.4
Unlikely	1	3.8	1	8.3	3	21.4

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.

Table 5. Defense and Plaintiffs' Counsels' Assessment of Liability: Percentage of Agreement for More and Less Effective Plaintiffs' Counsel

Plaintiff's Counsels' Assessment	*More Effective Plaintiffs' Counsel Defense Counsels' Assessment N=9*						*Less Effective Plaintiffs' Counsel Defense Counsels' Assessment N=43*					
	Probable		*Uncertain*		*Unlikely*		*Probable*		*Uncertain*		*Unlikely*	
	N	*%*	*N*	*%*	*N*	*%*	*N*	*%*	*N*	*%*	*N*	*%*
Probable	6	100	2	100	1	100	13	65.0	7	70.0	7	53.8
Uncertain	--	--	--	--	--	--	6	30.0	2	20.0	3	23.1
Unlikely	--	--	--	--	--	--	1	5.0	1	10.0	3	23.1

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.

Table 6. Case Picking in Terms of Level of Liability and Presence of a Trial by Attorney Effectiveness

Insurers' Assessment of Liability	***Less Effective Attorneys***				***More Effective Attorneys***			
	Trial? N=73				*Trial? N= 16*			
	Yes		*No*		*Yes*		*No*	
	N	*%*	*N*	*%*	*N*	*%*	*N*	*%*
Probable	6	18.2	27	81.8	1	11.1	8	88.9
Uncertain	5	35.7	9	64.3	2	40	3	60
Unlikely	9	34.6	17	65.4	1	50	1	50

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.

Table 7. Money paid to the Plaintiff by Whether there was agreement between Defense and Plaintiffs' Counsel on Assessment of Liability

	Money Not Paid (N=16)		***Money Paid (N=35)***	
Agreement on Liability	*N*	%	*N*	%
Probable	1	5.3	18	94.7
Uncertain	-	-	2	100.0
Unlikely	3	100.0	-	-
Disagreement on Liability				
Probable	3	42.9	4	57.1
Uncertain	2	22.2	7	77.8
Unlikely	7	63.6	4	36.4

Fisher's Exact Test = 18.582, df=5, p<.01, V=.846

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.

Table 8. Money paid to the Plaintiff by Agreement between Defense and Plaintiffs' Counsel on Assessment of Liability and Medical Malpractice Case Experience

	Money Not Paid (N=4)		***MoneyPaid (N=20)***	
Agreement on Liability: Those with > four cases	*N*	%	*N*	%
Probable	-	-	10	100.00
Uncertain	-	-	1	100.00
Unlikely	-	-	-	-
Agreement on Liability: Those with <four cases				
Probable	1	11.1	8	88.9
Uncertain	-	-	1	100.00
Unlikely	3	100.0	-	-

Fisher's Exact Test + 12.272, df = 1, p<.001, V = .856

NOTE: Cases consist of North Carolina state court medical malpractice cases filed between 1991 and 1995, inclusive, in which data are available from court files, interviews and the risk management office of a major teaching hospital and from one of the principal liability insurers of physicians in North Carolina.