

# CONTRAST

June 2003

A publication of Endurance Speciality Insurance

Welcome to our first edition of *Contrast*. Published quarterly for healthcare professionals, *Contrast* is just one way Endurance demonstrates its commitment to providing insight and analysis to our valued clients and associates.

### About Us

Endurance's Healthcare Liability division, led by Judy Hart, focuses on Excess Medical Professional Liability for multi-hospital systems, integrated delivery networks, university teaching hospitals and large specialty hospitals. Our clients are typically sophisticated purchasers who practice strong clinical risk and claims management.

### Contact Us

Contrast welcomes your comments and suggestions. Please email us at [jhart@endurance.bm](mailto:jhart@endurance.bm), or contact our editor directly at 441-278-0441.

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## Letter from the Editor

Welcome to Endurance Specialty Insurance's inaugural edition of *Contrast*, a quarterly publication designed especially for healthcare professionals. Important updates on risk trends, claim developments, regulatory changes, and other matters that are important to you are our focus. As litigation issues remain a top agenda item for healthcare organizations worldwide, we have also chosen to make this a recurring theme in this edition and future ones. We welcome your insight and encourage feedback and suggestions for helping *Contrast* become an invaluable source of industry information.



attitudes towards hospital and healthcare defendants. The responses we received were illuminating, and Dennis also shares his thoughts on defense techniques that can help ensure positive jury perception. Going forward, we will continue to discuss what is going on in the world of medical negligence litigation and, more importantly, investigate what is driving these trends. The primary editorial objective at *Contrast* is to remain ahead of the matters that impact you. There are many challenges facing the healthcare area, and Endurance understands that with insight and analysis, these obstacles can be overcome.

We look forward to hearing from you and hope you enjoy this first edition!

Sincerely,



Judy Hart  
 Executive Vice President,  
 Healthcare Liability  
 Endurance Specialty Insurance Ltd.

In this issue, we will discuss the alarming advent of billion dollar verdicts and their impact on defense strategies and new cases. We have also sat down with leading trial consultant, Dennis Donoghue, to discuss jury

# Billion Dollar Awards

By Scott Crockett

What amount of money can a jury award that will really shock you? Surely not hundreds of millions of dollars. During the last few years we have even seen a few instances of billion dollar awards in individual cases, not just class actions.

In the eyes of most consumers, healthcare is a business that is just as susceptible to mismanagement as Fortune 500 companies.

While there have been individual medical negligence verdicts of \$100 million or more (in California, Texas, New York, Pennsylvania), never have we seen a billion dollars awarded on an individual medical professional liability case...yet. The angry jury is a fearsome thing indeed to healthcare organizations seeking to protect against risk.

The billion dollar awards in other types of cases reveal significant information on juror sensitivities, or lack thereof when it comes to the "value" of money. Monetary desensitization has been extensively written about and is an unfortunate attribute of many modern juries. Yet, if jury consultant Dennis Donoghue's comments in the accompanying "20 Questions" article are right, and access to affordable healthcare is in fact threatened, the size of jury awards becomes more tangible to juries. The correlation between verdicts and individual healthcare costs becomes apparent, thus offering hope for bloated monetary verdicts.

There is no simple explanation for the onset of billion dollar verdicts, but there is an obvious crisis of confidence in business and other institutions. In the eyes of most consumers, healthcare is a business that is just as susceptible to mismanagement as Fortune 500 companies. In a surprising twist, juries really don't want healthcare organizations run like a business. Published focus group results and other surveys clearly show this sentiment. So while at the mercy of public scrutiny and current corporate suspicion, healthcare organizations are also expected to bring more compassion and less financially driven strategies to the table.

The inescapable fact is that jurors in catastrophic injury cases seem inclined to put the burden of proof on the defendants to show they acted appropriately or in good faith. Defense weaknesses and the issues described by Dennis in this installment of "20 Questions" reflect this.

One of the things Dennis and other trial consultants stress is the proper development of defense themes. One of the lead trial attorneys for a



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## Billion Dollar Awards

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major auto maker revealed recently that he would prepared an opening statement – as you would for a real jury – very early in the lawsuit. He would then test his defense themes in front of the client’s board and other groups within the company. This practice forced him to develop a trial theme first. Then he would look for testimony from experts and fact witnesses that would support that theme

in some way. In other words,

the defense was built from the top down - but the top was something he knew would sell. This lawyer and his client have been very successful in choosing which cases to try and in lowering the settlement value of the ones they can or choose to settle.

In future issues of *Contrast* we will discuss strategies to combat the “runaway” jury as well as the work and tools used by trial consultants.

## 20 Questions

### Litigation Insights From Leading Trial Scientists

In the first five installments of *Contrast* we will pose four questions (20 total) to selected trial consultants. For our inaugural installment, we are pleased to present answers from Dennis Donoghue, principal of Donoghue and Associates. Dennis Donoghue is a Chicago-based trial consultant with over 15 years experience in the field. In that time, he has worked on over 150 high risk personal injury/ medical malpractice cases in venues throughout the United States. He holds a B.A. from Georgetown University, and graduate degrees from The London School of Economics and The University of Chicago.

someone close to them were the patient. This results in jurors being more open to the plaintiff’s contentions. It also makes them more normative in their desire not to ratify perceived negligence on the part of a healthcare provider, even when the plaintiff’s evidence on causation is weak.

*The following are some other attitudes we see over and over, regardless of the venue.*

#### High Expectations

Jurors have high expectations as to what healthcare providers can do. They have come to expect only positive outcomes and many believe a negative outcome must have been someone’s fault. Overall, they have a low tolerance for mistakes.

#### Critical Role

Jurors also believe that the healthcare system is critical to the well-being of them and their families. They feel highly dependent upon healthcare

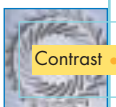
*Dennis Donoghue, the principal of Donoghue & Associates, Inc., is a Chicago-based trial consultant with over 15 years experience in the field. In that time, he has worked on over 150 high risk personal injury/ medical malpractice cases in venues throughout the United States. He holds a B.A. from Georgetown University, and graduate degrees from The London School of Economics and The University of Chicago.*

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**Question:** How would you describe current juror attitudes toward hospital or other healthcare defendants?

**Answer:** More than ever, jurors are viewing cases from a “patient perspective.” By this I mean they are viewing the case as if they or



providers and out of control and vulnerable when they place themselves in their care.

### Suspicious

While jurors recognize that trust is at the heart of the relationship between patient and healthcare provider, they also increasingly express concern that financial considerations are negatively impacting the quality of care being provided. In many malpractice cases, jurors suspect under-staffing, inadequate training and/or poor performing employees are the reasons for a bad outcome. Plaintiff contentions in these areas tend to fall on fertile ground. Guarantors Jurors want hospitals to be the overseers and guarantors of all healthcare provided there, regardless of whether or not the provider is an employee of the hospital.

### Caring & Concerned

The most common complaint we hear jurors express about the current healthcare system is that it is "too corporate," "too impersonal," and "rushed." The healthcare providers



who are seen as "caring and concerned" are the ones most positively perceived by jurors.

### Awards & Access Linked?

One promising trend is that more jurors in more places are starting to see a link between large damage awards and the quality of healthcare available to them and their families. As healthcare providers limit or leave their practices because of economic pressures and litigation concerns, jurors are seeing, in a very tangible way, that huge damage awards aren't free. While many people may not actually have lost their doctor, the fear of losing access to or choice of healthcare providers in the future, particularly in smaller communities, is real to them. Such concern is causing more jurors to evaluate damage claims by plaintiffs by the criteria of "fair" and "reasonable" as the law requires.



**Question:** Have the war in Iraq, terrorism and related international events affected jurors psychology or trial outcomes?

**Answer:** The impact of 9/11 has been much discussed, but there is no consensus among risk professionals, trial lawyers, judges and consultants as to what impact it has had. My sense is that 9/11 has accentuated jurors' feelings of dependence on the healthcare system. Beyond that, I have seen little discernible impact, other than enhanced perceptions of firefighters, police officers, and military personnel. One additional observation is that fewer prospective jurors are trying to get out of jury

service. My impression is that more people are taking civic obligations, such as jury service, more seriously since 9/11.

While the impact of the events of 9/11 is unclear, I believe two events that have taken place since 9/11 have had an impact on jurors. The first is the drop in the stock market and the generally sluggish economy. These have made jurors more uneasy, uncertain about the future and risk adverse.

This in turn has made them much more open to plaintiff arguments that jurors should use very conservative assumptions when calculating the present value of future needs. Two years ago, many jurors would accept a "low risk" discount rate of 8-10%. Nowadays, they are much more willing to accept the plaintiff's claim that short-term Treasury yields should be used because anything else is too risky.

Secondly, the well publicized problems and scandals of Enron, WorldCom, Tyco, RiteAid, Adelphia and Arthur Andersen have raised juror suspicion and cynicism of large institutions. While none of these had anything to do with healthcare, they are regularly brought up in jury research exercises on medical malpractice cases when the discussion turns to betrayal of trust. Because of these corporate scandals, more jurors are more willing to believe that institutions lie, cover-up and destroy documents.

**Question:** What new themes or techniques have you seen plaintiff attorneys effectively use in medical malpractice cases?

**Answer:** Here are some strategies and tactics we are seeing plaintiff attorneys use to their advantage.

### **Juror Questionnaires**

More and more plaintiff attorneys are trying to use supplemental written jury questionnaires to pre-sell their case and shape the panel of prospective jurors. They do this by asking lots of leading questions, for example, about excessive jury awards. Their hope is that conservative jurors will rise to the bait and say enough in the questionnaire to get them disqualified for cause.

### **Trying the Institution**

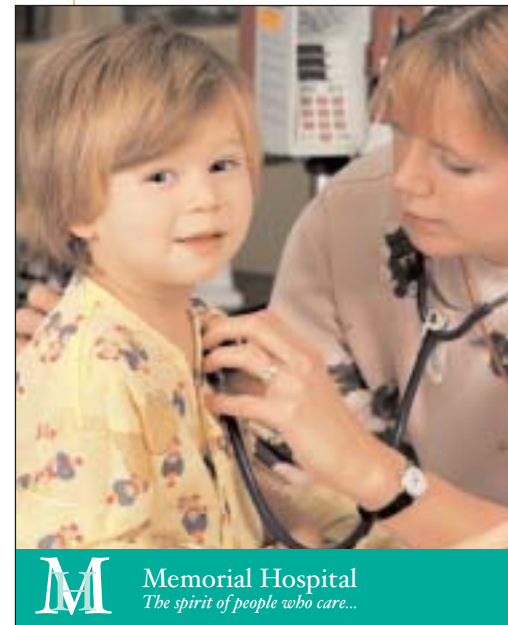
Lawyers are trying to tap into the increased suspicion of institutions by emphasizing institutional shortcomings (e.g., inadequate staffing, insufficient training, improper or no policies and procedures) rather than individual actions.

### **Advertising**

Using advertising/promotional materials to tap into pro-patient/pro-consumer sentiment is another strategy used by plaintiff attorneys. They try to juxtapose what the healthcare provider tells the public to attract patients with the treatment received by the plaintiff and make the defendant explain any alleged discrepancy.

### **Guardian ad litem**

Particularly in cases where the parents or guardian have some flaws, more plaintiff attorneys are bringing in a guardian ad litem and telling the jury that any award they give will be overseen by a court-appointed officer who reports to the judge.



**Question:** What two things can hospitals do to improve their trial outcomes going forward?

**Answer:** Despite the negative trends and attitudes described earlier, I believe jurors truly want to feel good about their healthcare providers. Many also want to find a way to conclude that what happened to this plaintiff couldn't happen to them or someone close to them.

Should you have any questions or require additional information, Dennis Donoghue he can be reached at:

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Two strategic implications of this for healthcare defendants in a given case are the following:

1) Emphasize caring and concern by the healthcare providers towards the plaintiff. Show all the actions and effort put forth on behalf of the patient, especially actions that go above and beyond the standard of care.

2) Develop a competing story to explain the outcome. Defendant counter punching and relying on the burden of proof, especially in catastrophic cases, are rarely effective. Presenting a competing story for the defense that includes an alternative cause enables jurors to conclude that this could not happen to them. It especially strengthens the resolve of defense-oriented jurors and gives them points to argue for the defense during deliberations

