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A Healthy Debate

Ideas for Addressing the Medical Malpractice Crisis

Summary: North Carolina has now joined many other states and the federal government in debating solutions to the problem of rising costs in medical malpractice insurance. Evidence suggests that flaws in our tort laws and procedures are a major part of the problem. Proposed state legislation to cap "pain and suffering" awards and implement other reforms represents a good starting point, but lawmakers should also look at a "loser pays" rule and judicial oversight of expert testimony.

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The litigation crisis…has made insurance premiums unaffordable or even unavailable for many doctors, through no fault of their own. This is currently making it more difficult for many Americans to find care, and threatening access for many more. This crisis affects patients, physicians, hospitals, and nursing homes all across the United States."

—The US Department of Health and Human Services[1]

Should the way in which medical malpractice suits are handled in North Carolina and elsewhere be reformed? A number of interest groups, legislators, and citizen groups are convinced that the answer to that question is yes, with legislation being introduced at both the federal and state levels. Physician associations, including the AMA, and insurers have taken the lead in claiming that jury awards, particularly for non-economic pain and suffering, are arbitrary, inconsistent from case to case, and usually reflect jury sympathies; not hard evidence. The result, allegedly, is that exorbitantly high jury verdicts are driving up costs to insurance companies, doctors, and patients.

Between 1994 and 2000 average jury awards more than tripled, going from $1.14 million to $3.48 million. Except for 1994 and 1995, insurers have paid out more in claims than they have received in premiums every year since 1991. The ratio of claims to premiums has risen consistently from 1994 to the present and it is estimated that in 2002 insurers paid out $1.65 for every premium dollar received.[2] According to doctors' representatives and insurance industry groups this trend is translating into higher insurance rates for doctors and health care costs for patients. According to Robert Hartwig, Chief Economist for the Insurance Information Institute, "these awards…are the principal factors responsible for today's chaotic market conditions and higher

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rates."[3] This trend is also cited as a reason why some insurers have left the medical malpractice market and why some doctors have left certain specialties such as obstetrics/gynecology where awards have been very high and premiums have skyrocketed.

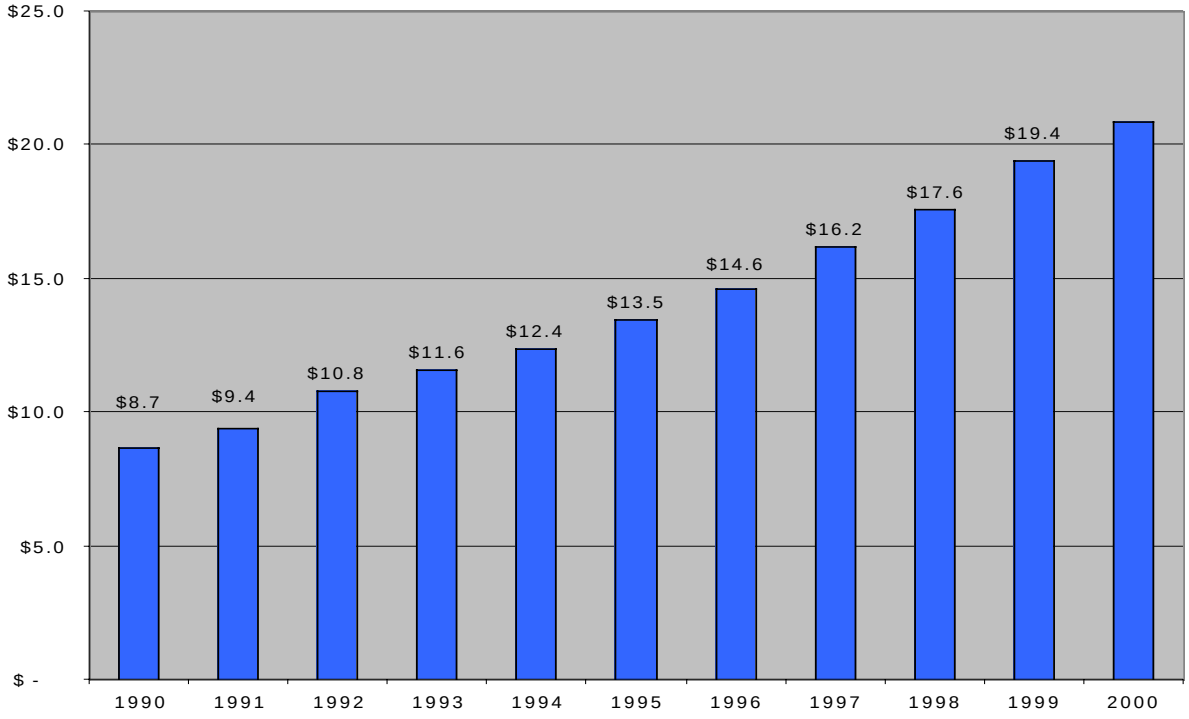
North Carolina seems to be tracking or possibly leading the national trend. Based on a study by the US Department of Health and Human Services,[4] the American Medical Association has categorized the state as one of 18 that is in a "state of crisis." According the HHS study, from 2001 to 2002 North Carolina had a 50 percent increase in premiums for medical specialists. This was the eighth highest increase in the country. The AMA cites statistics from the N.C. Medical Society showing that insurance premiums for hospitals in the state have risen by more than 400 percent over the last three years and that rates for rural hospitals went up by 180 percent during 2002 alone. In addition they note that the top five jury awards ranged from $4.5 to $15 million in 2001, up from $3.35 to $10.7 million in 2000.[5] In addition the American Association of Neurological Surgeons have designated North Carolina as one of 25 states in "severe crises" with respect to medical malpractice insurance for neurosurgeons. Their definition of a "severe crisis state" is one that has had either a "50 percent increase in premiums from 2000 to 2002, or average premiums near or over $100,000."[6] Reportedly, only four malpractice insurers are still truly active in the North Carolina market, down from 10 a year ago, and their rates are expected to shoot up by between 10 percent and 30 percent for 2003, depending on the specialty.[7]

Alternatives for Reforming the System

The primary approach to reform legislation has been to impose a cap on jury awards for pain and suffering. These are damages that are not directly quantifiable, such as psychological trauma and stress. Legislative proposals that attempt to cap these awards do not apply to what are known as economic damages, which relate to medical costs, lost wages and other income, home care, transportation, etc. In North Carolina legislation has been proposed by Senator Robert Pittenger[8] from Charlotte to cap pain and suffering awards at $250,000. This is the cap that is in effect in California and is being proposed in other states and at the federal level. The Pittenger legislation also includes a cap on lawyers' fees and a provision to allow payouts over a court-determined period of time rather than in a lump sum. This last provision is meant to time the award payout to cover expenses as they occur. It also prevents the recipients of the awards from spending the payout all at once, leaving themselves with nothing for future expenses.

Growth of U.S. Malpractice Tort Costs, 1990 to 2000 (in billions)

While medical costs rose by 60%, malpractice tort costs grew by 140%



Source: Hartwig, at note 2, based on data from "U.S. Tort Costs 2002 Update" Tallinghast-Towers Perrin, 2003 at www.tillinghast.com/tillinghast/home/spotlight/Tort_dosts_update.htm

Except for the caps on lawyers' fees, these reforms make sense, at least in principle. The fee caps are inconsistent with principles of freedom of contract and, since they are a form of price controls, will distort the competitive process among lawyers and lead to fewer choices for potential clients. The fees that a lawyer receives should be a matter of private agreement between lawyer and client.

With respect to capping pain and suffering awards, some analysts have suggested that the approach should be different. The goal of these awards should be to accurately reflect the harm that is inflicted. The real problem is that there are no standards to guide juries, who are often influenced by the personal appeal of the plaintiff or the extent to which the defendant can afford to pay the damages, i.e., "deep pockets." Rather than placing an arbitrary cap of $250,000 or any other amount, some have suggested that legislation be passed establishing objective "pain and suffering" standards, with dollar amounts attached for different categories of injuries. Harvard Professors Joseph Newhouse and Paul Weiler argue for implementing "a scale for pain and suffering damages running from a floor to a ceiling containing standardized injury profiles and specific damage amounts that will govern the parties' and the juries' appraisal of particular claims."[9] This would make pain and suffering awards more predictable, more rigorously determined, and more consistent from case to case.

There are also reforms not included in the proposed legislation that should also be considered. First of all, there is an inherent bias in the system in favor of reaching a settlement even if the defendant would otherwise be found not to be negligent by a jury. This is because of the high cost of defending a case. For example, if it would cost a doctor, hospital, or insurance company $75,000 to $100,000 to defend against a suit in court, it makes sense to settle out of court for any amount less than that, even if it is certain that the plaintiff would lose. Because of this it often makes sense for a suit to be brought even if the odds of winning are relatively low. A legal reform that would address this problem is to adopt a "loser pays" rule. In other words, if the plaintiff loses the case he or she must pay the legal fees of the defendant. This would go a long way toward discouraging frivolous suits and protecting doctors from false accusations.

A second reform that should be considered by North Carolina legislators relates to the introduction and evaluation of expert testimony. This is a reform that applies primarily to economic damage awards and actual findings of guilt or innocence. Because juries do not typically have medical or scientific backgrounds they have no way of evaluating the legitimacy of expert testimony. Because of this they are easily swayed by junk science and quack medicine. A memorable example of this is the legal attack on silicone breast implants, which was shown to have no foundation in sound science but ended up in large jury awards to plaintiffs. As noted by legal scholar Walter Olson, "caps on pain and suffering awards are of…limited help if doctors lose all confidence that the legal system will get medical facts right in the first place." To help remedy this problem Olson suggests "empowering judges to exclude more scientifically doubtful testimony," and implementing "juror selection reforms to keep citizens with medical expertise from being systematically excluded from jury service."[10]

Conclusion

It is clear that medical malpractice reform legislation should be a high priority for the North Carolina General Assembly. Sen. Pittenger's legislation represents a good starting point. Its primary drawback is that it does not address some of the root causes of the problems that the current system is facing. As the legislative process proceeds, some of the additional issues that are addressed here should be brought to light. A sound legal system that fairly redresses grievances is a right of both potential plaintiffs and defendants. Ultimately it will lead to better health care at lower costs.

— Dr. Roy Cordato, Vice President for Research and Resident Scholar

Notes

1. "Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care," The US Department of Health and Human Services, March 3, 2003. Found at http://aspe.hhs.gov/daltcp/reports/medliab.htm.
2. From data compiled by Robert P. Hartwig, Senior Vice President and Chief Economist, Insurance Information Institute, from AM Best and the Conning Corporation. Found in "Trends in Medical Malpractice Insurance," at www.iii.org/media/presentations/medmal/.
3. Ibid.
4. Op. cit. at note 1.
5. www.ama-assn.org/ama/pub/article/1616-7340.html
6. "Neurosurgery in a State of Crises," published jointly by the American Association of Neurological Surgeons, Congress of Neurological Surgeons, and the Council of State Neurosurgical Societies, September 25, 2002. Found at www.neurosurgery.org/csns/csnssurveyreport092502.pdf .
7. Doug Campbell, "N.C. doctors, lawyers square off on malpractice issue," *Charlotte Business Journal*, March 28, 2003, p. 7.
8. "Medical Malpractice Damages/Attorney's Fees" Senate DRS75006-LD-3A, General Assembly of NC, Session 2003.
9. Joseph P. Newhouse and Paul C. Weiler, "Reforming Medical Malpractice and Insurance," *Regulation*, Vol. 14, No. 4, 1991. Found at www.cato.org/pubs/regulation/regv14n4/reg14n4-newhouse.html.
10. Walter Olson, "Delivering Justice," *The Wall Street Journal*, February 27, 2003.