

THE TRUTH ABOUT MEDICAL MALPRACTICE

No issue in recent years has created as much controversy as much as the “medical malpractice crisis”. As you can imagine, we follow the issue with interest, and are particularly concerned about what we see as the unfair vilification of trial attorneys, even by our own President. Although the issue has been cast as doctors vs. trial attorneys, we see it more as doctors vs. their own insurance companies. The marked increase in many physician’s malpractice insurance premiums has rightfully upset physicians, particularly those who have never had a malpractice claim, and caused many to speak out in the public forum as they never have before. We feel their angry outbursts against trial attorneys should be directed instead to the insurance industry which has their practices caught in an economic vise.

The increase in medical malpractice insurance is due to a number of factors having nothing to do with jury verdicts in malpractice cases. The truth is that the liability insurance industry as a whole has been hit hard by two factors affecting their underwriting of liability insurance: the declines in the stock market which have caused tremendous losses for everyone, and the payout of claims following the terrorist attack on September 11th. Professional liability rates for attorneys are expected to increase between 35% and 75%. If you check your own liability insurance, you will likely find similar increases. That is because insurance companies have the ability to pass their losses onto their insureds by way of higher premiums. Physicians are unable to do that because health insurance companies also set limits on the fees physicians can charge. This has put a squeeze on the business of practicing medicine. This effect is being felt throughout the country, but particularly in Pennsylvania. That’s because the leading liability insurance company in the state went insolvent, due to mismanagement and undercutting of other carriers. This led to a bailout by the state and a limited supply of available carriers. This enabled the remaining carriers to take advantage of the situation by markedly increasing their premium charges to physicians.

What does all this have to do with medical malpractice cases? Nothing, really. Nothing has changed as far as the payout of malpractice settlements or jury verdicts. According to the National Association of Insurance Commissioners, the number of medical malpractice claims filed has actually declined by 4%, nationally, as well as in Pennsylvania and even Philadelphia. Studies have shown that payments for medical malpractice in Pennsylvania have increased but at a rate lower than the national average and at a slower rate than the cost of health insurance. And according to the Medicare Payment Advisory Commission, malpractice insurance costs amount to only 3.2% of the average physician’s annual revenues.

Our firm does handle medical malpractice cases, on a very selective basis. Any trial attorney will tell you that medical malpractice cases are very expensive to pursue and very difficult to win, largely because of the tendency of our juries to sympathize with the physician, even in cases of clear liability. You should know that every malpractice plaintiff is a former patient of the physician they are choosing to sue. They are being represented by the very best trial attorneys in the state. The physicians are ably defended by trained defense malpractice attorneys and a stable of qualified expert witnesses. Any settlement is authorized by the defendant physician. Any verdict is decided by an impartial jury selected by both sides from the physician’s own community. And any award is paid not by the physician, but by his or her

insurance company. In Pennsylvania, regardless of the size of the verdict, the Plaintiff only receives a maximum of \$500,000 from the physician's insurance and \$700,000 from the Pennsylvania Contingency fund, or a total of \$1,200,000.

Medical malpractice occurs, all too often. In a study by the Institute of Medicine, medical errors cause nearly 100,000 deaths per year, moving it from the 8th to the 5th leading cause of death. We are against any legislative limits or caps on the claims of future victims of malpractice. Attempts to impose caps in the past have been found to be a violation of the right to trial by jury under the Pennsylvania constitution. They also have been found not to reduce insurance premiums for doctors. We feel that doctors should be permitted to increase their charges to make up for their increased expenses. The increased premium charges will lead more insurance companies to want to do business in Pennsylvania. Doctors who have clean records should pay less in insurance and doctors who repeatedly commit malpractice should pay more. They should also be exposed by other physicians, rather than protected.

Have there been some high jury verdicts in medical malpractice cases in Philadelphia in the last year? **Yes.** But, statewide, claims payouts for medical malpractice actually dropped from \$341 million in 1990 to \$323 million in 1991. The average victim of medical malpractice was paid only \$42,607, up only slightly from the figure a decade ago. And the increase in verdicts is largely due to the fact that the Philadelphia court system is catching up on its backlog and pushing major cases into the courtroom. In the three previous years, the number of medical malpractice cases that came to verdict in Philadelphia dropped from 152 in 1998, to 146 in 1999 to 104 in 2000.

Have doctors insurance premiums in Pennsylvania significantly increased? **Yes.** But it's not because of the verdicts alone. In a 2000 study, Pennsylvania ranked 25th in mean payments of claims to victims of medical malpractice

Are doctors upset about that? **Yes.** Upset enough that they have incurred even more expense by mounting an aggressive advertising and public relations campaign designed to change your opinion about our legal system.

The campaign has seized on a theme which troubles us and seems to us like a scare tactic. The scare tactic is that as a result of increased insurance premiums, you may not be able to get medical treatment when you need it. We don't think that scaring patients is good medical practice. Nor is it a good idea for doctors to threaten to leave their practice just so they can make more money in another state.

Are doctors fleeing Pennsylvania? **No.** The Philadelphia Inquirer on October 2, 2001 published an article entitled "Recent Census of Doctors Shows No Flight From Pa." The article reported on a census of Pennsylvania doctors done by the Pennsylvania Medical Professional Liability Catastrophic Loss Fund (CAT Fund - which pays out on settlements over \$200,000) which revealed that the number of doctors in Pennsylvania actually grew from 30,451 in 1990 to 34,565 in 2000. In 1996 Pennsylvania ranked 9th highest in the country in physicians per capita. In payment rates, Pennsylvania doctors ranked 41st in the country. John H. Reed, head of the CAT Fund, was quoted as stating that there was no evidence of a decline in doctors this year as a result of the recent surcharge. Susan Aspey, a spokesperson for former Governor Ridge, stated that despite the lobbying efforts of some doctors, "We don't have concrete evidence that there is a physician flight from Pennsylvania due to rising medical malpractice rates". The article did note that malpractice premiums in Southeastern Pennsylvania are now significantly higher than in New Jersey and Delaware but are similar to those of other metropolitan areas such as New York and Chicago.

Lauren Townsend of the advocacy group Citizens for Consumer Justice, was highly critical of the "scare tactics" being employed by the lobbying groups. She was quoted as saying that doctors should be working at eliminating the causes of malpractice, not a patient's ability to sue in the future if they are injured due to a medical mistake. We agree with Ms. Townsend. The problem here is not the jury verdicts. Each of those juries heard a case that was presented to

them fairly and ably defended by the treating physician and his trained defense malpractice attorney. And no doubt each of the Plaintiffs presented a compelling story of the effect a medical mistake had on their lives. And each of those Plaintiffs will be compensated, not by the negligent doctor, but by a system of insurance that each physician pays into. In a study by the Institute of Medicine, medical errors cause nearly 100,000 deaths per year in the United States, moving it from the 8th to the 5th leading cause of death. Only 2% of those injured by medical malpractice sue their doctors. Perhaps doctors should seek changes to that system, and to doctors who do harm to their patients, rather than to the jury system that deals with the mistakes after they happen.