

# More Facts Needed On Doctors' Insurance

## To the Editor:

The problem of growing medical malpractice premiums is a complicated topic that needs to be studied fully prior to enacting any measures on caps or other significant restrictions on a patient's right to sue. There are many reasons for this.

There is strong evidence that rising malpractice premiums are related to investment losses by insurance carriers. Just last year, Donald J. Zuk, CEO of a major malpractice insurer, discussing rising malpractice premiums, told *The Wall Street Journal*, "I don't like to hear insurance executives say it's the tort system — it's self-inflicted."

We are in a broad economic downturn. Many of us are seeing minimal (or negative) returns on our investments and our retirement portfolios. It is no different for insurance companies. During the '80s and '90s they could invest the premium dollars they collected and use the high returns to pay claims, business expenses, salaries, bonuses and stock options to their highly compensated executives. Now, with the economic downturn, the reasonably-priced premiums doctors paid in prior decades are no longer supported by investment returns.

There is insufficient evidence that the crisis in New Jersey is in any way related to more legal claims or excessive verdicts. A comprehensive study tried to determine the relationship between the doctors' standard of care, the severity of injury and the resolution of medical malpractice claims. Called the Taragin study, it tried to determine how often doctors lose malpractice cases despite having complied with the standard of care, and to assess whether the severity of patient injury influenced the amount or frequency of payments to plaintiffs. The study reviewed 8,231 closed malpractice cases handled by one of the largest medical malpractice insurance companies in New Jersey from 1977 to 1992.

This study found that "contrary to many perceptions, physicians usually win cases" in which their care is deemed to meet community standards. Furthermore, the "severity of patient injury had little influence on the probability of plaintiff payment" but "the amount of payment correlated closely with the severity of injury." In short, "unjustified payments" are rare.

More recently, the Administrative Office of the Courts (AOC), which regulates our court system, did its own study. It found there has actually been an 18% reduction in the number of medical malpractice lawsuits filed in the last four years, and that doctors prevail in a vast majority of cases. The number of malpractice cases filed dropped to 1,656 from 1,776 last year. The proportion of cases settled out of court fell to 44% from 47%. The percentage of malpractice complaints dismissed fell to 39% from 44%.

The AOC also reviewed malpractice cases that went to trial last year. Of 205 verdicts, juries found for doctors and against plaintiffs 74% of the time. Of the 54 cases where juries found malpractice, 12 verdicts were for \$100,000 or less, and about half the awards were for less than \$300,000.

In a memo outlining the findings, Jane Castner, assistant director of the AOC's civil practice division, said "considering New Jersey's population of 8 million and the tens of thousands of diagnostic tests, medical procedures, and surgeries performed, the number of cases filed does not appear excessive."

There is no proof that caps would significantly reduce insurance premiums. A Medical Society of New Jersey study found that caps would reduce premiums by just 7%. The Medical Society frequently cites California to show how caps on damages will solve our problems. But in

California, malpractice premiums are 19% higher than the U.S. average. Since 1998, premiums in California have risen 37% compared to the 5.7% national average.

Getting as far as a jury usually takes years of litigation and significant expense. When they begin the case, attorneys must present an Affidavit of Merit from a board certified doctor in the same specialty area as the doctor being sued. This means that another doctor must swear under oath that a colleague has committed malpractice. This measure very effectively reduces the fear of frivolous suits.

When there is a verdict in favor of the injured party, it is because a jury, made up of members of the public, has decided that malpractice was committed. It is only after a careful review of the facts, listening to witnesses, examining the evidence and applying the judge's legal instructions, that a jury renders its verdict. Jurors, like you and I, are not perfect. They can make mistakes. When that occurs the trial judge decides whether the verdict "shocks his or her conscience" and, if it does, the trial judge will set it aside. If either side is unhappy with the trial judge's decision an appeal can be taken to three Appellate Division judges and, then, to seven Supreme Court justices. These built-in checks and balances work to eliminate "runaway verdicts" and assure justice to all parties.

To say there must be a cap on pain and suffering damages is really to say that juries can't be trusted to decide what are fair, just and reasonable damages under the circumstances. We are not prepared to take that leap, especially when the evidence appears to point the other way. If we say juries cannot be trusted to decide what money should be awarded to compensate a victim of medical malpractice, how can they be trusted to say if criminal defendants should live or die?

One claim we hear is that excessive defense costs drive up malpractice premiums. While we know of no definitive study linking malpractice litigation costs to increased premiums, we agree that the cost of litigation — especially malpractice litigation — is excessive. Neither patients nor physicians are served by an inefficient and costly legal process which results in delayed payments to truly injured persons and casts a dark cloud over physicians. We do not believe, however, that limiting a patient's rights or capping damages in meritorious cases is the answer. We think more support and consideration should be given to the pending bills which require mandatory pre-suit screening, mediation and

early resolution of malpractice claims.

The Legislature should keep an open mind about how to solve malpractice problems. It should not commit this state to caps or lawsuit restrictions without fully understanding the problem. The doctors seem to know exactly how much they need as a cap, so perhaps they (or their insurance companies) can substantiate the numbers that led them to this conclusion. So far, insurance companies have been unwilling to disclose the nature of their losses to justify the need for a cap on lawsuits; significant evidence points to a decrease in medical malpractice suits and a decrease in the size of awards in New Jersey. Even if carriers get caps, we don't know if this will assure a premium decrease for any period of time. In the long run, both doctors and patients could stand to lose.

We believe the Legislature should act quickly on measures that provide immediate relief for doctors faced with substantial malpractice premium increases. But they should not move on caps or lawsuit restrictions based on the information known to date. A commission should be impanelled to consider regulating the malpractice insurance industry, and to recommend measures to reduce the incidence of malpractice, and improve the quality of health care.

To do anything less is bad medicine for New Jersey patients.

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