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## Malpractice Crisis Update Troubles Ease but Cap Push Continues

By Anniken Davenport

There's good news for Pennsylvanians who for the last three years have been bombarded with media coverage of the medical malpractice crisis. So-called frivolous malpractice lawsuits are down - way down. Central Pennsylvania saw 29% fewer medical malpractice cases filed in 2003 than in 2002. Doctors have gotten significant relief from high malpractice insurance premiums. And if you don't live in rural areas, you may even have noticed an increase in the number of specialists available. Still, doctors, their professional organizations and some legislators continue to push for caps on what juries can award in a medical malpractice case.

It wasn't long ago doctors shut down their offices and staged the first ever white-flu strike in Pennsylvania. They demanded a \$250,000 cap on jury awards in medical malpractice lawsuits, to stem the rise in malpractice insurance premiums. To dramatize their plight, they read a long list of names of doctors who have left Pennsylvania, retired early or stopped practicing high-risk specialties. Joining them was Senate majority Whip Jeff Piccola (R Dauphin), who announced the introduction of a bill to limit contingent fees in medical malpractice and personal injury lawsuits as well as his continued support for jury award caps. Senator Piccola told the crowd of doctors, "If we don't act quickly, we will have no health care in Pennsylvania because we will have no physicians."

The week-long protest in May 2003 got wide press coverage and marked a new tactic in the Pennsylvania malpractice crisis. But while angry doctors took to the streets, trial lawyers pushed hard to get their side of the story out. They staged a March 2004 protest of their own in the Capitol Rotunda. This one featured Pennsylvanians injured by medical malpractice, poor employer safety practices and defective products. To trial lawyers, the rise in medical malpractice premiums is the function of too much medical malpractice and inadequate oversight of insurance companies who raised rates to make up for investment losses elsewhere.

Neither party seems ready for a truce and their public battle rages on even as the number of medical malpractice lawsuits have dropped dramatically statewide. (See graph.) Throughout Pennsylvania, a dueling billboard campaign demonizes trial lawyers as opportunists who see every patient as a victim and doctors as liars who fudged the numbers about white coat flight from the state. Caught in the middle are ordinary Pennsylvania citizens who expect quality healthcare and instead find their family doctor eyeing them with suspicion. According to a recent study conducted by the Project on Medical Liability in Pennsylvania, nearly 75% of doctors agreed with the statement, "Because of concerns about malpractice liability, I view every patient as a potential malpractice lawsuit." That's hardly the recipe for a good doctor-patient relationship.

While the public focus is on caps and what George Bush calls "frivolous and junk lawsuits" that drive good doctors out of medicine, little attention has been paid to the substantial reforms the Pennsylvania Legislature and the Pennsylvania Supreme Court have put into place. Smokers fund large rebates on the assessments doctors paid in 2003 and this year for malpractice coverage through a 25 cent per pack cigarette tax and unscrupulous lawyers who file frivolous malpractice lawsuits have been forced out of court early on. Despite these and other reforms, the focus remains on caps.

### Caps

Pennsylvania doctors and their professional associations, the Pennsylvania Medical Society (PMS), the Pennsylvania Osteopathic Medical Association (POMA) and the Politically Active Physicians Association (PAPA) have made a \$250,000 cap on pain and suffering awards the centerpiece of their reform plan. They reason caps will cause malpractice insurance premiums to fall or at least stabilize and that large jury awards drive the cost up, while lower jury awards will drive it down.

Trial lawyers call caps unfair for victims of medical mistakes who have been hurt the most or who haven't lost wages or have no future medical bills (because, for example, they died.) They often cite as examples patients who were retired, low wage earners or homemakers or whose injuries are painful or disfiguring but don't require future medical care. They ask whether \$250,000 is fair compensation for lifelong pain, disfigurement or the loss of a loved one.

Pennsylvania physicians have been vocal in their call for caps. They've even gone as far as buying billboard space featuring a smiling baby wearing a satin sash with the word "Lawsuit" and the tag line, "What Trial Lawyers See." Their efforts began in earnest in late 2002, when doctors received notice that their mandatory payments into a state-sponsored insurance program would skyrocket. Some doctors went public with their plight, claiming they would either leave Pennsylvania or quit work on January 1, 2003 rather than pay the assessment. Governor-elect Ed Rendell promised that the malpractice insurance crisis would top his administration's agenda.

The push for caps in Pennsylvania is an uphill battle. That's because an earlier effort at malpractice reform ended in the



Pennsylvania Supreme Court, where the justices concluded that limiting what juries can award violated the Pennsylvania Constitution. To get caps in Pennsylvania, doctors will have to get the legislature to change the Pennsylvania Constitution, no easy task. To accomplish that, both legislative houses will have to approve the Constitutional change in two successive sessions of the Legislature. Attempts to pass malpractice caps in the last session failed.

If the Legislature passes a Constitutional amendment, the change must be approved by the Pennsylvania electorate in a general election. Knowing that getting pain and suffering caps is a long range project, medical associations are adamant about keeping the crisis hot. While doctors may not make the office shut-down of spring 2003 an annual event, patients can expect their doctors to continue pushing malpractice insurance relief. Unless the federal government acts first, (possible under a second Bush administration but dubious under a Kerry/Edwards administration given that Mr. Edwards is a trial lawyer who made a fortune representing plaintiffs in products liability and malpractice lawsuits) it is patients who will ultimately decide whether other patients will be limited to \$250,000.

### **Patient Harm**

Some consumer groups and trial lawyers argue the most effective way to reduce malpractice insurance premiums is to reduce the number of medical errors. In an open letter to Pennsylvania Bar Association members, PBA President Michael Reed told his membership, "The real cost driver of medical malpractice is inadequate patient safety." Not everyone agrees that there's a patient safety problem. Senator Piccola, for one, believes "allegations about patient safety are overblown."

However, according to Governor Rendell's Office of Health Care Reform, over 5000 hospitalized Pennsylvanians experienced an adverse medical event such as a medication error, laceration or foreign object left in the body after surgery in 2001. Another 88,000 had avoidable medical complications due to equipment failure, infections or obstetrical trauma.

One advocacy group, Public Citizen, recently analyzed National Practitioner Data Bank information and concluded most doctors who commit medical malpractice are never punished by the medical boards that control their ability to practice. The NPDB tracks medical malpractice payouts. Of those doctors who had two or more malpractice payouts, only 7.6 percent were disciplined. Shockingly, only a third of doctors with ten or more payouts were punished.

To address patient safety, the Legislature passed the 2002 Medical Care Availability and Reduction of Errors Act. It requires medical professionals report to their licensing board if sued for malpractice, convicted of a drug offense or arrested for a serious criminal offense. The law also requires that the boards review every accusation of negligence for possible disciplinary action. The boards can then begin to identify those doctors who are most frequently sued, track the cases and decide whether restricting or revoking the license of repeat offenders would protect patients and reduce malpractice premiums.

### **Pennsylvania Reforms**

Although doctors haven't gotten the number one wish on their list, there has been progress. Pennsylvania Trial Lawyers' Association spokesperson Mark Phenicie doesn't think there's a crisis because "Just about everything they (the Legislature) can do short of caps has been done." Pennsylvania doctors have received substantial rebates or reductions in the amount they're required to pay to insure against a malpractice lawsuit, funded by an increase in the state's cigarette tax. In exchange for the annual reduction, doctors have to promise to stay in Pennsylvania. Doctors in the highest risk specialties (and therefore with the highest insurance costs) received a 100% reduction, while all other doctors received a 50% reduction. The Legislature also reduced the amount of primary insurance doctors must buy to \$500,000. (See sidebar)

There are also new limits on when and how much patients can receive in punitive damages. In most Pennsylvania medical malpractice cases, patients are limited to punitive damages equal to or less than twice the actual damages the jury awards. For example, if the jury awards \$100,000 in lost wages, medical expenses and pain and suffering, the jury cannot award more than an additional \$200,000 in punitive damages. And 25% of the punitive damages will be paid not to the patient, but to the MCARE Fund where it presumably can be used to compensate other malpractice victims or further subsidize the assessments doctors pay.

The Legislature and the Supreme Court also ordered that malpractice cases against doctors must be filed in the county where the alleged malpractice happened. Before the change, lawyers could file cases in counties considered "friendly" to plaintiffs, a practice known in the legal profession as forum shopping. Since the change, Philadelphia filings have decreased considerably. There has, however, been an increase in the number of cases filed in Philadelphia suburbs.

### **Certificates of Merit**

The Pennsylvania Supreme Court also took action to cut down on the number of frivolous malpractice lawsuits. Until recently, all an attorney needed to do to start a malpractice lawsuit was to file a complaint or notice of suit. The attorney was then free to demand medical records, take depositions and look for evidence to support the case. If the case didn't pan out, it could be dismissed before trial, but after the defendant doctor and her insurance carrier expended time and money on a defense. To weed out cases without merit earlier, the Pennsylvania Supreme Court told lawyers that no malpractice case can be filed unless a medical professional has given the lawyer a written opinion that there is a reasonable probability that the medical care rendered by the defendant didn't meet professional standards and caused harm. Lawyers must provide the certificate of merit within 60 days.

The new rules were put into effect in early 2003 (before the doctors' week-long shut-down) and may already be having an impact. Filings fell from 2,957 in 2002 to just 1,989 in 2003, a 33 percent decrease. While Mark Phenicie believes certificates of merit have helped reduce filings, Senator Piccola points to a sharp increase in cases filed in 2002, which would make the 2003 decrease less

dramatic.

### **Unfinished Business**

Despite the reforms already in place, Pennsylvania doctors remain convinced there's a continuing crisis. The Project on Medical Liability in Pennsylvania survey found nearly 40 percent of Pennsylvania high-risk specialists were dissatisfied with the practice of medicine and only 15 percent were willing to recommend practicing in Pennsylvania. Adding to physician discomfort is the timing of insurance policy renewals. According to Nora Truscello, spokesperson for PAPA, doctors won't know what their 2005 premiums will be until late December. PAPA is also pushing for national reform.

Caps are likely to be a continued focus. Senator Piccola plans to reintroduce cap legislation and is considering additional limits on punitive damages, perhaps using the money to fund public interest projects such as adult education.

But caps aren't the only weapons in their arsenal. PMS spokesperson Chuck Moran says his association is having some success with a man-bites-dog approach - suing lawyers who lose malpractice cases. According to Moran, a Delaware County gynecological oncologist got an attorney to admit she filed a frivolous lawsuit and settled for an undisclosed sum of money. PMS is also looking at the creation of special malpractice courts and the use of alternative dispute resolution as creative alternatives to litigation.