CLE ON MEDICAL MALPRACTICE

Wisconsin Legislative Council

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MYTH:

Medical malpractice costs are a substantial factor in driving up health costs.

REALITY:

Medical malpractice expenses are a tiny part of total health care spending.

EVIDENCE

Overall tort expenditures are less than the cost of medical injuries. Total national costs (lost income, lost household production, disability and health care costs) of negligence in hospitals are estimated to be between $17 billion and $29 billion each year.[1] Awards, legal costs and insurance cost an estimated $6.5 billion, or 0.46 percent of total health care spending in 2001.[2] This is at least three to four times less than the cost of medical negligence to society.

Malpractice insurance costs amount to only 3.2 percent of the average physician's revenues. According to experts at the Medicare Payment Advisory Commission (MedPAC), liability insurance premiums make up just a tiny part of a physician's expenses and have increased by only 4.4 percent over the past year.[3] The increase in this expense is noticeable primarily because of the decreases in reimbursements that doctors are receiving from HMOs and government health programs.

Malpractice insurance costs have risen at half the rate of medical inflation, debunking the myth of "out-of-control juries." While medical costs have increased by 113 percent since 1987, the total amount spent on medical malpractice insurance has increased by just 52 percent over that time—less than half of medical services inflation.[4]

Government data show that medical malpractice awards have increased at a slower pace than either malpractice premiums for doctors or health insurance premiums for consumers. According to the federal government's National Practitioner Data Bank, the median medical malpractice payment by a physician to a patient rose 35 percent from 1997 to 2000, from $100,000 to $135,000.[5] But during the same time, the average premium for single health insurance coverage has increased by 39 percent.[6] Malpractice claim payout increases have actually slowed to 1.6% a year from 2000 to 2003 — below the rate of inflation.[7]

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[1] *To Err is Human; Building a Safer Health System,* Institute of Medicine, National Academy of Science 1999.
[2] Gerald F. Anderson, et al., "Health Spending In The United States And The Rest Of The Industrialized World," *Health Affairs,* Vol. 24, Issue 4, 903-914, July-August 2005.
[3] Official Transcript, Medicare Payment Advisory Commission, Public Meeting, December 12, 2002.
[4] Office of the West Virginia Insurance Commission, *Medical Malpractice: Report on Insurers with over 5% Market Share* (November 2002)
[5] National Practitioner Data Bank Annual Reports, 1997 through 2001.
[6] Kaiser Family Foundation and Health Research and Educational Trust, Employer Health Benefits Surveys, 1998-2002; National Practitioner Data Bank Annual Reports, 1997 through 2001.
[7] Chandra, Amitabh, "The Growth of Physician Medical Malpractice Payments: Evidence From The National Practitioner Data Bank," *Health Affairs,* Vol. 24, Issue 3, W5-240-249, May-June 2005.

So-called "defensive medicine" is a red herring. Only a small percentage of diagnostic procedures — "certainly less than 8 percent" — are performed because of a concern about malpractice liability.[8] The General Accounting Office (GAO) found that (1) some defensive medicine is good medicine, (2) managed care discourages bad defensive medicine, and (3) doctors do defensive medicine because they make money from defensive medicine.[9]

Ferdon Decision

¶126 One reason that the cap does not have the expected impact on medical malpractice insurance premiums may be that a very small number of claims are ever filed for medical injuries, and even fewer of any eventual awards are for an amount above the cap. (Footnotes omitted)

¶127 Articles and studies, including a General Accounting Office study, indicated that in 1984, 57% to 70% of all claims resulted in no payment to the patient. Wisconsin statistics are similar. According to information derived from the Office of Medical Mediation Panels, from 1989 through 2004 a little more than 10% of the claims filed resulted in verdicts, with only about 30% of those favorable to the plaintiffs. In 2004, out of the 23 medical malpractice verdicts in Wisconsin, only four were in favor of the plaintiffs. (Footnotes omitted)

¶128 Victims of medical malpractice with valid and substantial claims do not seem to be the source of increased premiums for medical malpractice insurance, yet the $350,000 cap on noneconomic damages requires that they bear the burden by being deprived of full tort compensation. (Footnote omitted)

¶129 Based on the available evidence from nearly 10 years of experience with caps on noneconomic damages in medical malpractice cases in Wisconsin and other states, it is not reasonable to conclude that the $350,000 cap has its intended effect of reducing medical malpractice insurance premiums. We therefore conclude that the $350,000 cap on noneconomic damages in medical malpractice cases is not rationally related to the legislative objective of lowering medical malpractice insurance premiums. (Footnote omitted)

¶174 Three independent, non-partisan governmental agencies have found that defensive medicine cannot be measured accurately and does not contribute significantly to the cost of health care. (Footnote omitted.)

¶175 The evidence does not suggest that a $350,000 cap on noneconomic damages is rationally related to the objective of ensuring quality health care by preventing doctors from practicing defensive medicine. We agree with the non-partisan Congressional Budget Office's finding that evidence of the effects of defensive medicine was "weak or inconclusive." (Footnote omitted.)

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[8] Office of Technology Assessment, *Defensive Medicine and Medical Malpractice,* OTA-H602 pg. 74 (July 1994).
[9] GAO-03-836, "Medical Malpractice and Access to Health Care," pgs. 26-27, August 2003.

MYTH:

Wisconsin's high health costs are caused by numerous medical malpractice claims.

REALITY:

There is no medical malpractice crisis in Wisconsin.

EVIDENCE

***Expansion Magazine* has rated Wisconsin's malpractice costs as the lowest in the nation, *just 39 cents out of each $100 spent on health care*.**[10] The national average is 46 cents for every $100. Meanwhile, Wisconsin health insurance premiums are rated second highest in the nation. There is no correlation between malpractice costs and health care costs.

In Wisconsin, a state with 5.5 million people, only 240 medical negligence claims were filed in 2004 with the Medical Mediation Panels. **That is one claim for every 22,916 Wisconsin citizen.**[11]

Between 1995-2005, when the cap was in effect, there were only nine verdicts in which the jury awarded more than the cap amount to an injured patient.[12] The total amount of money that was denied to the nine people because of the cap was just over $10 million, about $1 million per year. **That comes to 18 cents per person in Wisconsin per year.**

If you compare the actual dollars, in 2003 Wisconsin doctors were spending ***less money*** on medical malpractice insurance than they did in 1989 — $118 to $112.5 million.[13]

49th in US

The frequency of awards in Wisconsin rank 49th lowest out of the 50 states on a per-capita basis, with only the state of Alabama lower.

Source: National Practitioners Databank Reports 1992-2002.

According to the National Practitioners Data Bank, in 2003 Wisconsin was the third lowest state in the number of doctors, per 1,000 doctors, for whom claims were paid to injured patients.[14] This demonstrates that many people injured by medical negligence in Wisconsin go uncompensated. Nor was that ranking due to the cap. Wisconsin was the third lowest state for the number of payments per 1,000 doctors in both 1994 and 1995, before the cap took effect.[15]

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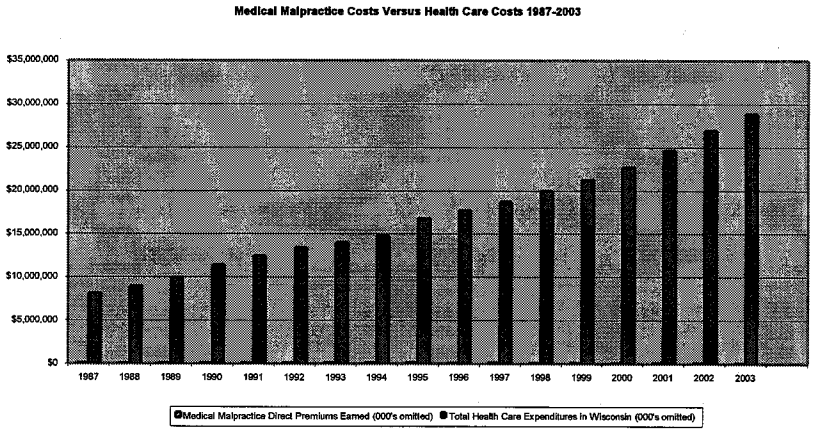
[10] From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1987-2002.
[11] Randy Sproule, Medical Mediation Panels.
[12] Information obtained from Randy Sproule, Medical Mediation Panels.
[13] From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, Years 1989 & 2003.
[14] 2004 National Practitioner Data Bank Annual Report.
[15] 1999 National Practitioner Data Bank Annual Report.

Medical malpractice costs are a drop in the bucket compared to health care costs in Wisconsin. In 2003, Wisconsinites spent an estimated $28.8 *billion* on health care costs compared with $112.5 *million* for medical malpractice costs.[16]



Insurers of health care providers thrive in Wisconsin. Wisconsin medical malpractice insurers had the lowest loss ratios (the percentage of each premium dollar spent in paying claims and claim expenses) in the country in 2002.[17] Physicians Insurance Company of Wisconsin, Wisconsin's largest malpractice insurer, has seen its assets increase by $92 million from 2001 to 2004.[18] It paid dividends to its stockholders averaging over $833,000 per year from 1999 through 2002.[19] Its 2003 report to the Office of the Commissioner of Insurance showed that it earned premiums of over $37 million and expected its direct losses to be a negative number, giving it a pure loss ratio of 0.0%. That profitability was not due to the cap. Wisconsin malpractice insurers had a pure loss ratio in 1994, the year before the cap was enacted, of 42.4%. That means out of every dollar collected for premiums, only 42 cents were paid out in claims. In that year, the Wisconsin insurers had premiums written in the amount of $79.4 million and paid claims of $30.1 million.[20]

Ferdon Decision

¶ 162 [M]edical malpractice insurance premiums are an exceedingly small portion of overall health care costs. (Footnote omitted.)

¶165 ... even if the $350,000 cap on noneconomic damages would reduce medical malpractice insurance premiums, this reduction would have no effect on consumer's health care costs. Accordingly, there is no objectively reasonable basis to conclude that the $350,000 cap justifies placing such a harsh burden on the most severely injured medical malpractice victims, many of whom are children.

¶166 We agree with those courts that have determined that the correlation between caps on noneconomic damages and the reduction of medical malpractice premiums on overall health care costs is at best indirect, weak, and remote. (Footnote omitted.)

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[16] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-05, pages 92, 93 & 96. Years 1999-2003 are also estimated based on annual percent changes of 6.3% in 1999, 7.1% in 2000, 8.5% in 2001, 9.3% in 2002. Year 2003 is estimated based on a projected rate increase of 7.2%.

[17] Eric Nordman, et al., "Medical Malpractice Insurance Report: A study of Market Conditions and Potential Solutions to the Recent Crisis," National Association of Insurance Commissioners, page 78, September 2004.

[18] Physicians Insurance Company of Wisconsin, Inc.
https://ociaccess.oci.wi.gov/CmpInfo/GetFinancialData.oci?cmpId=0

[19] Physicians Insurance Company of Wisconsin, Inc. 2003 Annual Report, page 24.

[20] Wisconsin Insurance Report Business of 2003, page 104.

MYTH:

Rising medical malpractice costs are forcing good doctors to quit practicing or leave their states.

REALITY:

Doctors are not fleeing states in droves, despite increasingly frantic and unsupported claims from the American Medical Association, the insurance industry and their allies.

EVIDENCE

Doctors not Leaving. In 2003 the *Washington Post* reported at least 1,000 doctors had left Pennsylvania in recent years because of rising malpractice premiums caused by lawsuits. That was not true. This past April, the head of the state medical society said Pennsylvania had gained 800 more doctors the past two years. In addition, the insurance commissioner's office reported that malpractice payouts had fallen for the second year in a row and lawsuit filings were declining.[21]

Independent assessments by state officials and the media have found that the number of doctors in many states including Florida, Ohio, Pennsylvania and Washington, has remained stable and in most, has actually increased.[22]

Doctors wildly overstating claims. In 2003, the Government Accounting Office (GAO) reviewed claims by physicians that high medical malpractice premiums were causing doctors to flee states with high malpractice fees. Its review of five states concluded that the doctors have wildly overstated their case. "We also determined that many of the reported physician actions and hospital-based service reductions were not substantiated or did not widely affect access to health care" (p. 12). "Although some reports have received extensive media coverage, in each of the five states we found that actual numbers of physician departures were sometimes inaccurate or involved relatively few physicians" (p. 17). "Contrary to reports of reductions in mammograms in Florida and Pennsylvania, our analysis showed that utilization of these services among Medicare beneficiaries is higher than the national average in both [states]." (p. 21)[23]

Effect on OB/GYNs. UW Law School Professor Marc Galanter reviewed two Office of Technology Assessment studies that also fail to confirm the existence of a linkage between high malpractice premiums and doctors leaving the profession. The first study examined whether New York obstetrician/gynecologists (OB/GYNs) and family practitioners (FPs) who experienced high absolute increases in malpractice insurance premiums were more likely than physicians with lower premium increases to withdraw from obstetrics practice. The researchers found that "[m]edical malpractice insurance premium increases were not associated with physician withdrawal from obstetrics practice for either OB/GYNs of FPs." The second study

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[21] Stephanie Mencimer, "Trial and Error," Mother Jones, September/October 2004.

[22] FL, *Palm Beach Post* Editorial, 7/16/03; OH, *Toledo Blade*, 7/17/04; PA, *Allentown Morning Call*, 4/24/04; WA, *Seattle Times*, 2/23/04

[23] GAO-03-836 "Medical Malpractice and Access to Health Care," pgs. 26-27, August 2003.

looked at whether state premium levels and personal malpractice claims history accounted for whether OB/GYNs were practicing obstetrics at all. "The study found that OB/GYNs in states with greater liability threats and who reported higher personal malpractice exposure were more likely to be practicing obstetrics and had higher volumes of obstetric care than their counterparts."[24]

Effect on Rural Areas. A 1995 article reviewed a trend of worsening access to obstetrical care in some rural areas. The study concluded, "Contrary to what family physicians often claim, we found malpractice premium costs and Medicaid reimbursement rates were not associated with family physicians' likelihood of providing maternity care."[25]

REAL CAUSES OF PREMIUM HIKES

Rather than looking at medical malpractice lawsuits, perhaps the AMA should re-focus its scrutiny to the practices of insurance companies. The GAO confirms that one cause of the malpractice premium spike is that malpractice insurance firms artificially held down premiums while the stock and bond markets boomed in the late 1990s, and then got caught short when the market went sour in 2001. To make up for the shortfall, the industry jacked up rates severely in many states.[26]

The highly-conservative *Wall St. Journal* confirmed this analysis in its investigation of the malpractice premium crisis. It concluded in a front-page June 24, 2002 article:
"A price war that began in the early 1990's led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims...An accounting practice widely used in the industry made the area seem more profitable in the early 1990's than it really was. A decade of short-sighted price slashing led to industry losses of $3 billion last year."[27]

Ferdon Decision

¶168 Studies indicate that caps on noneconomic damages do not affect doctors' migration. The non-partisan U.S. General Accounting Office concluded that doctors do not appear to leave or enter states to practice based on caps on noneconomic damages in medical malpractice actions. (Footnote omitted.)

¶170 The Wisconsin Office of the Commissioner of Insurance's biennial reports on the impact of 1995 Wis. Act 10 examine the Act's impact on the number of health care providers in Wisconsin. The Commissioner's 2003 report shows a slight decrease in the number of providers. The Commissioner's 2005, 2001, and 1999 reports show a slight increase in the number of health care providers. The Commissioner's reports do not attribute either the increases or decreases in the number of health care providers to 1995 Wis. Act 10, much less to the $350,000 noneconomic damages cap. (Footnotes omitted.)

¶171 The available evidence indicates that health care providers do not decide to practice in a particular state based on the state's cap on noneconomic damages.

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[24] Galanter, *Real World Torts: An Antidote to Anecdote,* 55 MD. L. REV. 1093, 1144-45 (1996).
[25] D. Pathman & S. Tropman, *Obstetrical Practice Among New Rural Family Physicians,* 40 JOURNAL OF FAMILY PRACTICE, No. 5, pp. 457, 463 (May 1995).
[26] GAO-03-702, "Medical Malpractice Insurance: Multiple Factors Have Contributed to Premium Increases," June 2003.
[27] Rachel Zimmerman & Christopher Oster, "Insurers Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, p. 1, June 24, 2002.

MYTH:

"Tort reform" and caps on damages have succeeded in holding down health care costs and medical malpractice premiums in states that have adopted them.

REALITY:

Caps on damages discriminate against the most severely injured and have not lowered health care costs.

EVIDENCE

Medical Malpractice Insurance Rates Not Reduced with Caps. The 2003 Weiss Report found that despite caps on economic damages in 19 states, "most insurers continued to increase premiums (for doctors) at a rapid pace, regardless of caps." The report found that insurers failed to pass along any savings to physicians in states with caps by refusing to lower their insurance premiums, and that caps only slowed the increase in the amount of damages insurers were required to pay out.[28]

Ironically, the Weiss study also found premiums are actually higher in states with caps than in those without. The average malpractice premium in states without caps was $35,016 in 2003. The average premium in states with caps was $40,381.[29] But despite this well-documented differential, many doctors have been stampeded into clamoring for caps as a "solution" to their sharply-rising premiums.

In recent years, at least 40 states have enacted some sort of "tort reform"; since 2002 alone, Florida, Mississippi, Nevada, Ohio, Oklahoma, and Texas have done so. Interestingly, in each state, immediately after the legislation passed, insurers sought rate increases — ranging from a minimum of 20 percent all the way up to 93 percent.

Capping Noneconomic Damages No Panacea. A recent insurance company memo explains how little noneconomic damages have to do with medical malpractice insurance. The insurer was asking for a rate increase of 27% per occurrence or 41% claims made coverage in Texas after the passage of Proposition 12, capping noneconomic damages in medical malpractice cases. The memo states:

"Noneconomic damages are a small percentage of total losses paid. Capping noneconomic damages will show loss savings of 1.0%."[30]

Instead of a frantic, ill-considered rush toward more restrictions on citizen's legal rights like caps, all the major players must seriously examine the roots of the recent epidemic of rate increases in many states. Most recently, a doctor in Connecticut signed a letter along with the state trial lawyer association and two patient groups challenging a recent rate increase of a

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[28] Martin D. Weiss, Ph.D., et al., *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage,* Weiss Ratings, Inc., June 2003.
[29] *Medical Liability Monitor*, October 2003.
[30] The Medical Protective Company, Texas Physician and Surgeons Actuarial Tort Reform Memorandum, found at www.aisrc.com/caps.pdf.

medical malpractice insurer. The letter prompted the Commissioner to hire an outside actuary to review the rate hike.[31]

A One-Sized Cap is Unfair. A study from the Harvard School of Public Health indicates that caps on non-economic damages result in inequitable payouts across different types of injuries and limits patients' ability to be fairly compensated for their pain and suffering.[32]

The study analyzed a sample of jury verdicts in California that were subjected to the state's $250,000 cap on non-economic damages. They found that reductions imposed on grave injuries were seven times larger than those for minor injuries. People suffering from pain and disfigurement had particularly large reductions in their awards.

Ferdon Decision

¶82: The $350,000 cap limits the claims of those who can least afford it; that is, the claims of those, including children such as Matthew Ferdon, who have suffered the greatest injuries. Thus, the cap's greatest impact falls on the most severely injured victims. (Footnote omitted.)

¶99 According to a 1992 report by the Wisconsin Office of the Commissioner of Insurance, children from ages 0 to 2 with medical malpractice injuries comprise less than 10% of malpractice claims, yet their claims comprise a large portion of the paid claims and expenses of insurers and the Fund. That is, "[p]laintiffs with the most severe injuries appear to be at the highest risk for inadequate compensation. Hence, the worst off may suffer a kind of 'double jeopardy' under caps." (Footnotes omitted.)

¶100 Furthermore, because an injured patient shares the cap with family members, the cap has a disparate effect on patients with families.

¶101 The legislature enjoys wide latitude in economic regulation. But when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational. Limiting a patient's recovery on the basis of youth or how many family members he or she has does not appear to be germane to any objective of the law.

¶102 If the legislature's objective was to ensure that Wisconsin people injured as a result of medical malpractice are compensated fairly, no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured. No rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers. (Footnote omitted.)

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[31] Tanya Albert, AMNews staff. Oct. 18, 2004.

[32] David Studdert, Michelle Mello and Y. Tony Yang, *Journal Health Affairs*, July/August 2004, http://www.insurancejournal.com/news/national/2004/07/08/43841.htm.