Missing the mark

Caps hamstring victims, fail to slow rising costs of care, malpractice insurance

Caps on compensation for noneconomic injuries suffered by victims of negligent medical care are, at best, a proposed solution to rising healthcare costs that is based on ignorance of our justice system. At worst, caps are a mean-spirited attempt by the medical establishment and its insurers to gain economic advantage at the expense of those least able to bear that burden.

Under proposals recently considered by Congress, a 4-year-old girl, rendered blind by plainly negligent medical care, would be given a maximum of $250,000, before attorney's fees and expenses, to compensate her for more than 70 years of blindness. The same compensation would be given to the family of a 36-year-old stay-at-home mom killed by substandard care, leaving behind her husband and four children under the age of 12.

The Illinois Supreme Court determined in cases in 1976 and 1997 that limiting recovery in medical malpractice cases by imposing caps on noneconomic damages is "arbitrary" and denies those most seriously injured equal protection and due process of law under both the U.S. and Illinois constitutions, by placing "the entire burden … on one class of injured plaintiffs." The state Supreme Court also determined that caps "invade the power of the judiciary to limit excessive awards of damages."

There are compelling reasons, beyond the legalities, to reject caps:

- For the rule of law to work, all citizens must be accountable through a process that is accessible to all.
- It is long a tradition of our democracy to do justice with juries. The Seventh Amendment is not an afterthought.
- Noneconomic damages, under the law, are intended to compensate victims for years of physical pain, mental suffering and the loss of the quality of life they would have had absent the malpractice. It is the only form of compensation that does not just pass through the victim on its way to someone else, as is the case with damages for future medical costs or lost wages. Consequently, noneconomic damages are based on society's compassion for innocent victims and the belief that those who caused them injury owe it to them to make their lives as bearable as possible.

Proponents argue that caps will reduce "frivolous" lawsuits and avoid "jackpot" justice. These are very catchy terms, but they are horribly misleading.

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In Illinois, as in most states, medical negligence actions cannot even be filed unless the case has been reviewed and certified by a physician in the same school of medicine as the defendant. Most cases require multiple specialists to establish liability and proximate cause, so a plaintiff's costs often exceed $200,000 just to get a case to the point where it can be tried or settled. No right-thinking lawyer is going to invest that kind of money and time unless a reviewing physician can show that the case has merit. In our office, we accept for review about one of every 25 cases that come to us. Of those, we actually file lawsuits in only one of every eight. "Frivolous" malpractice cases have virtually disappeared in the past 25 years.

Large jury verdicts get the publicity, but the average award in malpractice cases has been flat for 15 years. Filings have decreased dramatically because lawyers have become increasingly selective of the cases they will accept. Large verdicts are usually the result of very high future-care costs for the victim, a product of the meteoric rise in the cost of healthcare. Those verdicts that are not supported by the evidence are reduced by the courts, but that process generates little or no publicity.

The rapidly increasing cost of care also means that caps on noneconomic damages do not have any significant effect on insurance premiums, because those are based on *all* potential damages, not just noneconomic damages.

Multiple studies published in the past two years have indicated that less than 10% of the victims of malpractice ever contact a lawyer. Yet, the medical profession claims that many physicians order unnecessary tests to protect against malpractice claims. If that is true, those practitioners ought to be ashamed. The law only imposes liability on doctors who fail to adhere to the standard of care. If a test is not medically indicated, there will be no liability for failure to order it. Ordering tests that are mandated by the standard of care is not defensive medicine.

Proponents of caps argue that by limiting accountability and access to the courts, they can save on overall healthcare costs and physicians' malpractice premiums. This is not unlike the present-day tension between fighting terrorism and preserving civil liberties. As Benjamin Franklin said, "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety."

Finally, de facto caps on damages against physicians have existed for many years. The cap is their limit of insurance coverage. I have practiced law in Illinois for 28 years and know of only one case where a plaintiff actually attempted to pursue the personal assets of a physician. There are anecdotal stories of physicians' assets being pursued in other jurisdictions, but they are incredibly rare and always involve extraordinary circumstances.

The bottom line is that caps don't provide any solutions and only impose additional hardship on the injured. «

Editor's note: The Illinois Supreme Court is expected to rule as early as this week on three cases challenging the state's 2005 law capping noneconomic damages. A lower court overturned the law and ruled it unconstitutional.

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