

Victims of medical negligence pay for reforms

By Shanin Specter

There is a silent crisis today in the tort field: the uncompensated victims of medical negligence.

Much has been said about the waning of medical-malpractice litigation in Pennsylvania. There has been a 43.4 percent decrease in medical-malpractice filings in the past 10 years, down from 2,733 per year on average from 2000-02 to 1,546 in 2013. In Philadelphia, there's been a 68.3 percent decrease in that same time period, from 1,204 to 382. Pay-outs by MCARE, the excess insurer for Pennsylvania physicians and hospitals, have decreased by 48.8 percent, from \$378.7 million in 2003 to \$193.9 million in 2013.

Strikingly, all states have experienced large drops in paid claims per physician. From 1992 to 2012, those claims dropped by 57 percent nationally, including 51 percent in those states, such as Pennsylvania, that do not impose a cap on pain-and-suffering awards. The number of paid claims per physician career has dropped from 1.05 in 1992 to 0.45 in 2012. Thus, the average physician will never be involved in

a medical-malpractice claim that results in the payment of money. Medical-malpractice payments have dropped to 0.1 percent of total health-care costs. Malpractice insurance rates have fallen nationally roughly 20 percent since 2006.

What explains the decrease in medical-malpractice claims, payments, and insurance rates? Unfortunately, it's not due to better health care. Although there have been improvements in some areas - for example, a decline in central-line infections in intensive care units - studies continue to show very high error rates, with no evidence of improvement.

Medical-malpractice claims, payments, and insurance rates are down due to changes to the tort system. Presently, 31 states, covering roughly 68 percent of the U.S. population, have damage caps in medical-malpractice cases. Pennsylvania doesn't have caps, but statutory and court rule changes in 2002 and 2003 have combined to sharply reduce claims and payments. These changes include a reduction in the amount of coverage required by physicians, from \$1.2 to \$1 million, an abrogation of joint liability, a reduction to present worth for future earnings

losses, periodic payments of future medical and personal care expenses, certificates of merit, and strictures on the plaintiff's choice of venue. The cumulative effect of these changes is to deter roughly half of lawsuits and prevent roughly half of the payments for claims.

But every action has an equal and opposite reaction.

The decrease in claims and payouts results in fewer fairly compensated victims of medical negligence. Importantly, the wholesale transfer of cases previously brought in Philadelphia to the suburban counties has resulted in justice being denied to malpractice victims.

It is extremely difficult to win a medical-malpractice trial in the suburban counties. Between 2009 and 2013, plaintiffs only won 16 out of 146 jury trials in Bucks, Chester, Delaware, and Montgomery Counties, a .109 batting average. Philadelphia is not a haven for medical-malpractice victims, as only 33.8 percent of malpractice plaintiffs won their cases between 2009 and 2013. But at least plaintiffs have a decent chance in Philadelphia.

Given these odds and the reduced value of the claims, it's no wonder

that law firms report that they accept only about 1 percent of medical-malpractice inquiries for representation.

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What should be done?

First, the Pennsylvania Supreme Court should amend the venue rules that were enacted in 2003. Malpractice victims and defendants should play by the same rules as other tort victims and defendants. Medical-malpractice cases should be permitted to be filed in a county in which one or more of the defendants regularly conducts business. That's the rule for motor vehicle accident cases, premises liability cases, contractual disputes, and nearly all other civil matters. We needn't fear abuse of the rules, as our Supreme Court has made clear that the Common Pleas Courts and Superior Court are vested with the authority to transfer cases away from an inconvenient forum.

Second, there is a significant issue about whether it is fair to pay less to victims of medical malpractice than to victims of other torts. Only the medical profession enjoys special rules with respect to reduction to present worth of lost earning capacity and periodic payments of future medical and personal care expenses. This may violate the constitutional guarantee of equal protection. The special-venue rules may also violate equal protection. These and related questions could be raised in the Pennsylvania trial and appellate courts.

The pendulum has swung too far in favor of health-care providers and their insurers and against medical-malpractice victims. It's time to move toward the center.