

# **The Facts About Medical Malpractice in Pennsylvania**



**Congress Watch  
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## Executive Summary

### Section I: Lawsuits Are Not Responsible for Rising Medical Malpractice Insurance Premiums in Pennsylvania

- **The annual number of medical malpractice awards in Pennsylvania declined at least 6.3 percent and as much as 13.1 percent from 1995 to 2002.** According to the federal National Practitioner Data Bank (NPDB), there were 957 medical malpractice awards made in Pennsylvania in 1995, and 832 awards made in 2002 – a decrease of 125, or 13.1 percent. (If this number is adjusted by adding certain payments by the state supplemental fund (Mcare) to the total, the number of awards was 996 in 1995 and 933 in 2002 – still a decrease of 63 awards, or 6.3 percent.)
- **The rate of medical malpractice awards per Pennsylvania physician dropped at least 9.2 percent and as much as 16 percent from 1995 to 2002.** Based on the total number of awards reported by the NPDB, the number of malpractice awards per 100 Pennsylvania doctors was 2.81 in 1995 and dropped to 2.36 in 2002 – a decline of 16 percent. (If this ratio is based on the adjusted number of total awards, the rate of awards per 100 doctors dropped from 2.92 in 1995 to 2.65 in 2002 – a decrease of 9.2 percent.)
- **Mcare/CAT claims, cases and payouts have declined or been stable the past five years.** The number of claims on whose behalf Mcare/CAT, Pennsylvania's supplemental insurance fund, has made payouts declined from 706 in 1999 to 699 in 2003, according to the Pennsylvania Department of Insurance. The number of cases that Mcare has made payouts on has dropped from 580 in 1999 to 542 in 2003 over the same period – a decrease of 6.5 percent. The total amount of payouts for all claims rose by only 1 percent a year from 1999 to 2003, from \$300.8 million to \$314.0 million, after adjusting for medical care services inflation.
- **The number of million-dollar jury verdicts fell by 50 percent from 2000 to 2002.** The number of jury verdicts of \$1 million or more declined from 44 in 2000 to 22 in 2002, according to the Pennsylvania Department of Insurance. And the overall amount of these awards decreased by over 75 percent, from \$415 million to \$93 million.
- **The number of medical malpractice cases filed in Philadelphia dropped 58 percent in 2003, as a result of procedural rules changes regarding venues mandated by the State Supreme Court.** In 2003, 572 medical malpractice cases were filed in Philadelphia, compared with 1,352 in 2002 – a 58 percent drop – according to the Common Pleas Court in Philadelphia. Moreover, by the end of 2003, at least 298 medical malpractice cases had been transferred out of Philadelphia to other counties – a 15.9 percent reduction of the court's medical malpractice inventory. The city is regularly used as the poster child by those claiming a constitutional amendment must be passed to limit damage awards. Given the dramatic decrease in the city's case filings the pressure surely should be off for further restrictions to patients' legal rights:

- **The number of Pennsylvania doctors rose 5.6 percent from 1994 to 2002.** In 1994, 33,321 physicians paid into the state's Mcare Fund, run by the insurance department. In 2002, the last year for which data is available, the number of participating physicians had risen to 35,180 – an increase of 1,859, or 5.6 percent. In comparison, the state's overall population grew just 3.3 percent from 1990 to 2000.
- **The ratio of physicians per 1,000 Pennsylvania residents grew 37.2 percent from 1985 to 2001.** In comparison, during the same period this measurement increased at a slower rate in five neighboring states (Maryland, New Jersey, New York, Ohio, and Virginia), two of which had caps on malpractice damage awards in place.
- **Vital information about medical malpractice in Pennsylvania is lacking, which is reason enough for not proceeding with amending the state's constitution.** For example, there is no reliable data on the number of medical malpractice cases filed annually in the state, which is why the state Supreme Court recently ordered local courts to begin tracking such information. The only reliable information that exists about the number of Pennsylvania doctors in any given specialty is maintained by the American Medical Association, but it has refused to release this data during the debates on malpractice policy, choosing instead to rely on unsubstantiated anecdotes. Moreover, there is no reliable data on the portion of medical malpractice payouts that comprise economic and non-economic damages, and how each category has trended over time.
- **The General Accounting Office essentially found that the AMA and allied groups manufactured a "crisis" to push their agenda of changing medical malpractice laws.** The GAO compared conditions in five AMA-designated "crisis states," including Pennsylvania, and found that the AMA's claims that medical services were unavailable in particular areas because of malpractice costs were not reliable; and claims that the overall number of doctors in the "crisis" states had declined were based on questionable surveys.
- **Medical liability premium spikes are caused by the insurance cycle and mismanagement, not the legal system.** In December, 2003, 17 new entities were approved to offer medical malpractice insurance in Pennsylvania, according to the state insurance department's, illustrating the temporary nature of the "hard" market that drove some insurers to drastically raise rates or discontinue writing policies. The Congressional Budget Office recently noted that the country's 15 biggest medical malpractice insurers saw their investment returns drop by 1.6 percent from 2000 through 2002 – a figure that corresponds to almost half of the 15 percent increase in medical malpractice premium rates estimated by the U.S. government. Medical inflation, which is running at about 5 percent a year probably accounts for the rest of the increase.
- **Reduced fees – not insurance rates – are the biggest financial burden on doctors.** Doctors across the country have seen their fees slashed in recent years as managed care companies tried to increase profits, and government programs, such as Medicare and Medicaid, tried to cut costs. The AMA estimates that since 1991 physician practice costs have risen by 35 percent, but Medicare payments have risen only 10 percent. That means

practice costs have risen two-and-a-half times the rate of Medicare payments. The tort system is a convenient whipping boy for doctors who will continue to chafe from cost containment measures, but victims of medical negligence should not be made to compensate for declining reimbursement rates.

- **Medical malpractice premiums account for a very small share of a physician's practice revenue – ranging from 2.2 percent to 7.6 percent, according to *Medical Economics* magazine.**
- **A landmark Harvard Medical Practice study found that only a small percentage of medical errors result in lawsuits, letting doctors benefit from a claims gap.** Harvard researchers using a sample of hospitalizations in New York State compared medical records to claims files. They found that only one in 7.6 instances of medical negligence committed in hospitals results in a malpractice claim. Researchers replicating this study made similar findings in Colorado and Utah.
- **Expenditures on medical liability comprise less than 1 percent of overall health care costs.** As the Congressional Budget Office reported, “Malpractice costs account for a very small fraction of total health care spending; even a very large reduction in malpractice costs would have a relatively small effect on total health plan premiums. In addition, some of the savings leading to lower medical malpractice premiums – those savings arising from changes in the treatment of collateral-source benefits – would represent a shift in costs from medical malpractice insurance to health insurance.”
- **The Congressional Budget Office has rejected the defensive medicine theory.** The Congressional Budget Office was asked to quantify the savings from reduced “defensive medicine” under draconian federal legislation that included a \$250,000 non-economic damages cap. CBO declined, saying: “Estimating the amount of health care spending attributable to defensive medicine is difficult. Most estimates are speculative in nature, relying, for the most part, on surveys of physicians’ responses to hypothetical clinical situations, and clinical studies of the effectiveness of certain intensive treatments. Compounding the uncertainty about the magnitude of spending for defensive medicine, there is little empirical evidence on the effect of medical malpractice tort controls on spending for defensive medicine and, more generally, on overall health care spending.”

## **Section II: The Real Medical Malpractice Crisis Is Inadequate Patient Safety**

- **The real impact of medical malpractice in Pennsylvania should be measured by the cost to patients and consumers, not the premiums paid by health care providers.** Extrapolating from Institute of Medicine findings, we estimate that there are 1,920 to 4,277 hospital deaths in Pennsylvania each year due to preventable medical errors. The costs resulting from preventable medical errors to Pennsylvania’s residents, families and communities are estimated at \$742 million to \$1.3 billion each year. But the cost of medical malpractice insurance to Pennsylvania’s health care providers is about \$683 million a year.

- **5.3 percent of doctors nationally are responsible for 56 percent of medical malpractice payouts, according to the National Practitioner Data Bank.** Each of these doctors has made at least two medical malpractice payouts. Even more surprising, just 2 percent of all doctors, each of whom has paid three or more malpractice claims, were responsible for 30.9 percent of all payouts. Moreover, 83.2 percent of the nation's doctors have never made a malpractice payout.
- **Doctors with repeated malpractice claims against them suffer few consequences.** According to the NPDB, only 11.1 percent of the nation's doctors who made three or more malpractice payouts were disciplined by their state boards. Only 14.4 percent of the nation's doctors who made four or more malpractice payouts were disciplined by their state boards. Only 17.2 percent of the nation's doctors who made five or more malpractice payouts were disciplined by their state boards.
- **13 physicians in Pennsylvania have made between 4 and 15 malpractice payouts totaling more than \$5 million per doctor, but have not been disciplined, according to the NPDB.** Collectively, these 18 physicians have been responsible for 94 medical malpractice payments to patients totaling \$86 million.
- **Anesthesiologists' experience shows patient safety efforts do more than caps to reduce lawsuits and insurance premiums.** In 1985, the American Society of Anesthesiologists studied malpractice files from 35 different insurers and issued standards and procedures to avoid injuries. The resulting savings exceeded the dreams of any "tort reformer." In 1972, anesthesiologists were the target of 7.9 percent of all medical malpractice claims, double their proportion among physicians. But from 1985 to 2001, they were targets of only 3.8 percent of claims. From the 1970s to the 1990s, anesthesiology claims involving permanent disability or death dropped from 64 percent to 41 percent, and claims resulting in payments to plaintiffs dropped from 64 percent to 45 percent. The increased patient safety measures paid off in savings to doctors – remarkably, the average anesthesiologist's liability premium remained unchanged from 1985 to 2002 at about \$18,000 (and, if adjusted for inflation, it would be a dramatic decline). And the safety effort dramatically reduced awards. For example, during the 1990s, the median malpractice award in California, which has a stringent \$250,000 cap on non-economic damages, increased by 103 percent, but the median anesthesiology malpractice award remained constant.

### **Section III: Caps on Damages Are Unjust and Offer No Solution to Rising Premiums**

- **A cap on non-economic damages effects only the most seriously injured patients.** A cap on non-economic damages is cruel and unusual punishment, because it affects only those who are most catastrophically harmed. According to Physician Insurers Association of America (PIAA), the average total payment between 1985 and 2001 for a "grave injury," which encompasses paralysis, was only \$454,454. This includes both economic damages (health care costs and lost wages) and non-economic damages. Since

about one-third to one-half of a total award comprises non-economic damages, a \$250,000 cap affects only patients with “grave injuries.”

- **Capping awards hurts children, women, seniors and minorities in particular.** Limiting medical malpractice awards for non-economic injury has a disproportionate impact on children, women, seniors and minorities. Children have no employment income, which is the basis for calculating most economic awards. One of the more significant medical injuries inflicted on women is harm to reproductive capacity, but that does not impact a woman’s earning capacity, and thus does not entitle her to economic damages despite the devastating emotional impact of such a loss. Retired seniors who suffer often deplorable neglect and abuse in nursing homes and other long-term care facilities have no employment income. Capping awards also discriminates against minorities since they have lower incomes on average than whites. In some cases, low wage earners are denied the opportunity to earn more in the future due to injuries caused by medical negligence.
- **California’s lower malpractice insurance premiums are due to insurance reforms, not damage caps.** In 1975 California passed MICRA (Medical Injury Compensation Reform Act), the centerpiece of which is a \$250,000 cap on non-economic damages. Ever since, this has been the model law for efforts to restrict patients’ legal rights in other states. Ironically, the California experience exemplifies the success of insurance reforms, not the imposition of damage caps, at keeping malpractice rates lower. In a revolt against skyrocketing auto and homeowners insurance rates, voters passed Proposition 103 in 1988. This strong pro-consumer measure, which also applied to lines of medical malpractice insurance, instituted a 20 percent rate rollback and made it much more difficult for companies to get future rate increases. The effect on medical-malpractice insurance premiums was staggering. In the first 12 years of MICRA (1976-1988) premiums paid *increased* 190 percent, but under Proposition 103 premiums paid *declined* 2 percent from 1988-2001.
- **Damage caps don’t guarantee lower malpractice insurance premiums.** A comparison of 2003 rates contained in the Medical Liability Monitor shows that internists, general surgeons and ob/gyns generally pay less in Philadelphia than their counterparts do in Detroit when insured by the same carrier or when comparing rates between the largest insurers in the marketplace. Pennsylvania has no cap and Detroit limits non-economic damages to \$366,000 for non-catastrophic injuries and \$635,500 for catastrophic injuries.