CENTER FOR JUSTICE & DEMOCRACY
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IMPACT

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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friend,

On the day following the election, President Bush said that one of his first priorities would be to pass legislation that severely limits the rights of patients who are injured by medical malpractice.

If we thought we'd already seen the worst attacks on the civil justice system, it now seems we've hardly seen anything yet.

It is telling that the senior vice president of federal affairs for the National Association of Mutual Insurance Cos. called the election a "great day" for the insurance industry. Indeed, the main impact of this legislation likely would be to make insurance companies richer while the impact on many families would be catastrophic, causing untold suffering, economic devastation, and for some, the destruction of family life. I don't know anyone who knowingly voted for that.

In any event, CJ&D is gearing up for the fight of our life. We could use your help! Please visit our web site today, and take a moment to make a tax-deductible donation to CJ&D. Now more than ever.

Thanks,

Joanne Doroshow
Executive Director

IN THIS ISSUE: FOCUS ON MEDICAL INJURIES

Loss Prevention and the Insurance Function

One would expect, and hope, that the insurance industry -- responsible for paying for injuries and harm caused by policyholders -- would seek to prevent those injuries as much as possible: that makes good business sense and would be good public policy.

In fact, historically insurance companies often used their power and resources to control and minimize hazards, known as "loss prevention." By preventing injuries, the insurance industry reduces claims and payouts.

Yet today most insurers are indifferent to loss prevention. Insurance companies have generally moved away from their original loss prevention functions, and are now acting as large financial institutions, focused on increasing income through investments of premium dollars they collect.

More often than not, insurance carriers tolerate repeated litigation over identical hazards rather than conducting hazard analyses and refusing to continue coverage until the problem is eliminated.

Instead, the insurance industry is spending tremendous resources trying to restrict the rights of injured consumers to sue over the very hazards it could be preventing. This campaign, known as "tort reform," has done nothing but cost lives.

Just look at insurers' approach to medical malpractice. Rather than seek to reduce medical errors and improve quality of care, medical malpractice insurers have waged an aggressive lobbying and public relations effort to take away the legal rights of injured patients and their families.

Attacking victims while failing to minimize the risk of

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Caps Hurt the Most Severely Injured Patients

Ten-year-old Colin Gourley suffered terrible complications at birth after a doctor failed to administer vital ultrasound scans days before his mother went into labor. The tests would have revealed that there was a restriction of blood flowing to Colin, who has cerebral palsy and cannot walk. He could not speak until he was five. Irregular brain waves and the amount of time he has spent in a wheelchair have affected his bone growth. He has been through five surgeries and needs to sleep in a cast every night to prevent further orthopedic problems. His twin brother, Connor, survived their birth without injury.

A jury ruled that Colin was a victim of medical negligence, finding that $5.625 million was needed to compensate him for his medical care and a lifetime of suffering. In 2003, the Nebraska Supreme Court upheld a cruel state law that severely cut this jury verdict to one-quarter of what Colin will need. As a result, he will have to rely on the state for assistance for the rest of his life.

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Loss Prevention and the Insurance Function continued . . .

future harm is particularly troublesome since insurance companies are on notice about unsafe physicians, medical products and institutions that repeatedly cause avoidable death or injury. Moreover, medical malpractice carriers are in a unique position to disclose information about known medical dangers to regulatory agencies, the media and the public.

Yet time and again, insurers allow or require confidentiality agreements that shield the identities of problem doctors, hospitals and nursing homes or keep defective medical devices on the market. But some judges are saying no.

For example, in November 2002, South Carolina's federal trial judges banned secret settlements in their courts. A newspaper investigation about secret settlements by South Carolina doctors repeatedly accused of malpractice had sparked the interest of Chief Judge Joseph Anderson Jr., who worried that such agreements made the courts complicit in hiding known dangers. "Here is a rare opportunity for our court to do the right thing," Judge Anderson wrote to his colleagues.

Forced silence not only endangers innocent patients but also creates terrible pressure on victims -- who may be in need of medical care, disabled or perhaps in pain and unable to work -- to accept a monetary settlement on the insurer's terms.

Forced silence not only endangers innocent patients but also creates terrible pressure on victims...

And while insurers declare war on injured patients, medical errors continue to be a grave problem. According to a July 2004 study by HealthGrades Inc., a health-quality ratings company, an average of 195,000 patients in the United States die annually from preventable hospital errors. That's nearly double the estimate reported by the Institute of Medicine (IOM) in 1999.

In addition, demands for confidentiality drive up the transaction costs of litigation by making victims injured by the same medical product or physician build their case from scratch.

"The HealthGrades study shows that the IOM report may have underestimated the number of deaths due to medical errors, and, moreover, that there is little evidence that patient safety has improved in the last five years," said Dr. Samantha Collier, vice president of medical affairs at HealthGrades.

"The equivalent of 390 jumbo jets full of people are dying each year due to likely preventable, in-hospital medical errors, making this one of the leading killers in the US." Collier added, "If the Centers for Disease Control and Prevention's annual list of leading causes of death included medical errors, it would show up as number six, ahead of diabetes, pneumonia, Alzheimer's disease and renal disease."

There are many ways insurers can work to reduce medical mistakes. Insurance should use their own rating function to penalize doctors, hospitals and other insureds who do not improve safety and require the implementation of hazard prevention measures as part of the insurance contract.

Insurers should advocate safety improvements before health agencies and seek enforcement of existing health and safety standards through judicial proceedings. Carriers should also work to prevent medical injuries by focusing on risk management and education and devote more resources toward research and development in the areas of hazard and disease prevention.

Until insurers take these and other steps, patients will continue to be at risk, leaving the threat of liability as the only way to protect their health and safety.

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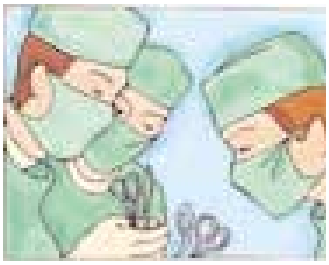
Caps Hurt the Most Severely Injured Patients continued . . .

Sadly, stories like Colin's have become all too familiar. Bowing to pressure from the insurance and medical lobbies, many states have enacted severe damages caps on patients, making it more difficult or impossible for medical malpractice victims to seek compensation and hold accountable those who have injured them.



This is especially true where an arbitrary cap limits the amount an injured patient can receive in non-economic damages. Non-economic damages compensate for intangible but real injuries like infertility, permanent disability, disfigurement, blindness, pain and suffering, loss of a limb or other physical impairment.

As catastrophically injured patients and their families have long-known, a "one-size-fits-all" approach to non-economic damages disproportionately penalizes the most severely hurt malpractice victims.

Take the impact of California's 29-year-old cap, hailed by insurers, medical societies and the Bush administration as a model for the nation. Under this law, patients can recover no more than $250,000 in non-economic compensation, no matter how devastating the injury or egregious the malpractice.

The consequences of the cap for Californians most gravely injured or killed as a result of medical negligence have been, quite simply, unfathomable. According to a 2004 report by the conservative Rand Corporation, "[P]laintiffs with the most serious injuries, such as brain damage, a variety of catastrophic injuries, and paralysis, have their [non-economic damage] awards capped most frequently, and when they do, they incur median reductions of more than a million dollars." In addition, "[c]ases with the greatest percentage losses in total awards are those with small economic losses but great damage to the plaintiff's quality of life."

Rand also found that in cases involving death from medical negligence, California's cap reduced jury verdicts by nearly half over 50 percent of the time. Moreover, most cases in which the verdict was cut by more than $2.5 million involved critical injuries to infants and young children, such as permanent coma, quadriplegia or severe retardation.

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Reducing the Amount of Malpractice

Today a small number of doctors commit most of the malpractice. According to Public Citizen's examination of the National Practitioner Data Bank (NPDB), from September 1990 through 2003, only 5.4 percent of doctors (1 out of 18) were responsible for 56.2 percent of malpractice payouts. Eighty-three percent of doctors have never made a medical malpractice payout since the NPDB was created in 1990.

Yet only 8 percent of doctors (1 out of 12), who have made 2 or more malpractice payouts have been disciplined by their state medical board and only 14.4 percent of doctors (1 out of 7) who have made 4 or more malpractice payouts have been disciplined by their state medical board.

Given the number of medical errors, too few bad doctors are disciplined. As Public Citizen's Health Research Group found, there were only 2,992 serious disciplinary actions taken by state medical boards in 2003, an indefensible number given the recent estimate that 195,000 patients die from preventable medical errors in hospitals every year.

What's the answer?

States should crack down on the small number of doctors responsible for most of the malpractice.

State medical boards need adequate funding and staffing, strong leadership, independence from state medical societies and the power to undertake significant investigations.

Hospitals should adopt available technology to provide better care with greater consistency.

A handful of hospitals are starting to use technology to make prenatal care and delivery safer. These hospitals are using computer software that improves monitoring and treatment.

Safe RN staffing ratios should be established to reduce the occurrence of medical errors and patient deaths.

A 2002 study in the Journal of the American Medical Association found that patients on surgical units with patient-to-nurse ratios of 8:1 were 30 percent more likely to die than those on surgical units with 4:1 ratios.

Medical societies should devote significant resources to improving patient safety.

In 1985, the American Society of Anesthesiologists (ASA) funded a Closed Claims Project that examined claims from 35 different insurers. Analysis of the data led to the issuance of standards and procedures to avoid injuries. As a result, the number and severity of claims against anesthesiologists has decreased dramatically over the past three decades.

Additional improvements are needed.

For example, the Joint Commission on Accreditation of Healthcare Organizations recently unveiled a "Protocol for Preventing Wrong Site, Wrong Procedure, Wrong Person Surgery," effective July 1, 2004. "The protocol includes verifying who the patient is, guidelines to mark the site and making sure the entire surgical team takes a 'time out' just before the operation to discuss possible errors."

Caps Hurt the Most Severely Injured Patients continued . . .

"The study sheds a light on how far from the mainstream the medical and insurance lobby finds itself as it pushes to place limits on the rights of infants disfigured by shoddy medicine and patients killed due to negligence," said Douglas Heller, executive director of the nonprofit Foundation for Taxpayer and Consumer Rights. "The Rand study illustrates the obvious injustice of arbitrary caps by providing data showing that the law hurts most those who have lost the most."

A 2004 Harvard School of Public Health report confirms Rand's findings, namely that victims with the most severe injuries feel the impact of California's $250,000 ceiling on non-economic damages most often. As the researchers concluded: "We found strong evidence that the cap's fiscal impact was distributed inequitably across different types of injuries. In absolute dollar terms, the reductions imposed on grave injury were seven times larger than those for minor injury."

14-year-old Steven Olsen is one of countless California patients further victimized by the cap. Steven is blind and brain-damaged after an HMO refused to give him an $800 CAT scan when he was two years old. He had fallen on a stick in the woods while hiking.

In 2001, Steven had 74 doctor visits, 164 physical and speech therapy appointments and three trips to the emergency room. His mother, Kathy, had to leave her job to care for him. He must be watched constantly.

A California jury awarded Steven $7.1 million in non-economic compensation for his doomed life of darkness, loneliness, pain, physical retardation and around-the-clock supervision. However, the judge was forced to reduce the amount to $250,000 because of a law capping non-economic damages in the state.

Such cases demonstrate the fundamental unfairness of damages caps, which not only force taxpayers to pick up the tab for injuries caused by others but also unjustly hurt the most severely injured even more.

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