

2004

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Recommended Citation

Suzanne Blaz, *Getting to the Bottom of Tort Reform*, 9 Pub. Interest L. Rptr. 19 (2004).
Available at: <http://lawcommons.luc.edu/pilr/vol9/iss3/12>

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Getting to the Bottom of Tort Reform

By Suzanne Blaz

In the Paul Newman film, *The Verdict*, a jury in a medical malpractice suit, so moved by the evidence against a negligent doctor, returns to the courtroom finding for the injured party, and requests that they be able to issue a greater award than that requested. Whether the decision of a higher settlement is in the hands of juries or regulated by statutory caps on awards is central to the recent debate over tort reform, a controversial proposal to limit jury awards in medical malpractice suits.

In a political year dominated by divisive issues such as tax cuts and Iraq, the issue of tort-reform, while always an important part of political platforms, emerged as a major debate topic.

During his 2004 campaign, President Bush endorsed a television ad warning voters of a "crisis in women's access to health care in this country." Sen. John Kerry was asked by a Missouri resident to reconcile his concern for escalating health care costs with his choice of a "vice presidential candidate who has made millions of dollars successfully

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-Ted Frank, attorney

suing medical professionals." The recent presidential election turned the public's attention to tort reform and how it may or may not impact health care problems facing the United States.

Tort reform is being touted as a way to solve growing health care issues, such as the lack of specialists in certain areas and access to quality health care. Supporters of tort reform believe frivolous lawsuits and runaway juries are creating higher insurance premiums for doctors. Opponents of tort reform, however, believe that tort reform measures will not improve more Americans access to quality health care and see it as a cap on civil rights and a dangerous precedent that interferes with the legal

system in a way never done or sanctioned before.

The American Medical Association along with groups like the American Tort Reform Association are working together to promote tort reform as a way to fix what they term as the nation's "broken" medical liability system.¹

Gretchen Schaefer, the director of media relations for ATRA, said that high medical liability premiums are forcing physicians to retire early, move, and practice "defensive medicine," threatening Americans' access to quality health care. Defensive medicine means that doctors "avoid high-risk patients or procedures in order to reduce [their] exposure to malpractice liability" making patients travel further to receive the treatment they need, Schaefer said, and tort reform "would not impact an individual's right to trial by jury." She also added that tort reform would drive out frivolous claims and keep attorneys from pursuing claims against doctors that are unnecessary. ATRA, Schaeffer said, supports a \$250,000 limit on non-economic damages, which it believes would help lower insurance premiums, increase access to quality health care, and promote medical research and development. Schaeffer stated that the medical liability system is in a crisis and pointed to AMA reports that "there are only five or six states nationwide that are not in an access-to-health care crisis or showing signs of crisis." These proposals, however, are being blocked in the Senate.

Doctors and insurance companies are not the only ones supporting tort reform. Even some attorneys have joined their side in the tort reform debate. Ted Frank, an attorney and contributor to www.overlawyered.com, have backed the need for tort reform. Frank dismisses tort reform opponents' claims.

"No one can seriously question that lawsuits are directly responsible for the rise in liability insurance premiums ... premiums are directly related to the costs insurance companies incur defending lawsuits and paying claims," said Frank. While acknowledging that tort reform is not the only solution to the health care access problem, Frank argued that it is the simplest and easiest solution to implement. "[The] benefits of lawsuit reform are so easy to achieve at so little cost that it would seem

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foolish not to take that step regardless of what other measures are out there," he said.

On Sept. 25, 2004, Jennifer Ludden, the host of National Public Radio's *All Things Considered*, interviewed Walter Olson, a senior fellow at The Manhattan Institute and an editor of *www.overlawyered.com*, along with Frank Cross, a law professor at Northwestern University, and Michael McCann, a professor at the University of Washington, in an attempt to assess the actual impact of lawsuits on the American economy and health care.

Olson argued that the money spent on lawsuits in the United States is increasing and gives the world the impression that "the United States has a problem with its business climate because of its courts." Cross countered that the "United States does have more tort liability than other comparable countries, but what that loses sight of is that we have much less government regulation than those other countries." Cross denied the massive effect that Olson claims these lawsuits have on the U.S., and also stated that the business climate is not affected because, "if you look at the international surveys, you'll find the United States at the very top in terms of the rating for business climate, ahead of all the Western European nations, which have less tort actions but have much more regulations [on businesses such as insurance companies]."

Although Cross conceded that there is a lot of money being paid out in lawsuit damages, he indicated that these suits are "very justified" and stated that what is not being measured when looking at these amounts is the positive effects of the litigation on the public safety and health. As an example of the positive effects of litigation, Cross pointed to the improvements in anesthesia over the years as a result of lawsuits, which have made it safer. McCann said that the frivolous lawsuits introduced through the media are exaggerated, and that the media ignores the facts of the cases that persuaded the jury to find for the plaintiffs. Business litigation, he said, is the area in which lawsuits have increased and that the media's focus on sensational cases reduces tort cases to "little moralistic stories about greedy people rather than dealing with the larger

issues."

Many opponents to tort reform have argued that larger issues are at stake and that the highly debated tort reform proposals are not the only solution to the high liability premiums and health care access problems. Joanne Doroshow, executive director of the Center for Justice and Democracy,

said that the tort reform proposal for non-economic and punitive damages caps is a "devastating blow to seriously injured patients."

"The people who would be most deeply affected are those who

will not receive anything in the way of economic damages, such as children, the poor, the elderly, and women who work at home," said Doroshow. She further argued that doctors would go unchecked because the damages meant to deter and to punish negligent physicians would be not do what they are intended to do. Doroshow said that lawsuit filings have decreased 9 percent in the last 10 years, resulting in fewer and fewer tort plaintiffs actually getting their day in court.² From her standpoint, Doroshow said that what is increasing is the "fear-mongering" tactics of tort reform proponents who have been bombarding the media³ with the message that quality health care is going down because of lawsuits. "[We] do not have the money to combat these tactics and educate the general public on what is really going on," said Doroshow.

Those tactics are convincing Americans to give up their civil rights when there are other solutions, Doroshow said. "Telling local judges and juries what they can and cannot award in a case is a slippery slope [that]...set[s] up a stage for the pharmaceutical industry, chemical industry, and others to want to limit their liability through federal legislation as well allowing corporate America to take over the local judicial system in every single state," she said.

Doctors' insurance premiums are going up, Doroshow said, because of "an unregulated insurance industry [that] is trying to make up for their stock markets losses by raising insurance premiums." In response to questioning as to why doctors, HMOs and hospitals are then blaming the juries, Doroshow answered that tort reform is amenable to these entities because they "all want their liability

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- JoAnne Doroshow, Center for Justice and Democracy

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limited and the way to stop patients who have been injured from suing is to support tort reform."

Rather than punish injured patients, Doroshow believes that insurance reforms should be made rather than lawsuit caps because "lawsuits help bring about changes in companies and hospitals that make things safer for everyone." Doroshow argued that there is a crisis in insurance company regulation rather than in frivolous lawsuits, and stated that doctors are being "priced out" by insurance companies who rarely have any limitations on raising premiums. Citing past California insurance reforms, Doroshow proposed insurance legislation that would shake the "chokehold" insurance companies have on doctors. This would also force insurance companies to hold public hearings in order to justify raising their premium rates more than 15 percent.

Ultimately, tort reform will be left in the hands of voters who will sift through the many different statistics and opinions to select candidates who they

believe will properly address the growing health care concerns caused by increasing medical liability premiums.

1. American Medical Association, *Medical Liability Reform*, at www.ama-assn.org/ama/pub/category/7861.html (last accessed Dec. 13, 2004).
2. *Lawsuit Hell*, Newsweek, Dec. 15, 2003 (article reported that a recent study by the American Bar Association revealed that although the number of lawsuits filed in the federal system have increased since the 1960s, the number of trials has dramatically declined).
3. Stephanie Mencimer, *False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America's Lawsuit Crisis*, October 2004, available at <http://www.washingtonmonthly.com/features/2004/0410.mencimer.html> (last accessed Dec. 13, 2004).

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