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SYMPOSIUM
MEDICAL MALPRACTICE:
EMERGING ISSUES & THE EFFECTS OF TORT REFORM

ARTICLES

Doctors, Duties, Death and Data: A Critical Review of the Empirical Literature on Medical Malpractice and Tort Reform

Geoffrey Christopher Rapp..... 439

Much of the debate on medical malpractice and tort reform ignores the recent emergence of a fairly substantial volume of empirical research on the subject. There have been a large number of empirical (i.e., statistical) papers put out from law professors, economists, and others, on a number of medical malpractice and tort reform topics. This article consists of critical literature review covering selected empirical papers on these topics. The paper asks what malpractice practitioners, state legislatures, and legal academics learn from the data work that's been done. Rather than report the results of any original data analysis, the article evaluates selected papers for considerations such as (1) significance of the topic; (2) integrity of the statistical methodology; and (3) robustness of the results.

Things to do (or Not) to Address the Medical Malpractice Insurance Problem

Edward J. Kionka.....469

The article begins with an overview of the tort reform problem; federal vs. state level reform; a history of tort reform in Illinois; current Illinois law (prior to P.A. 94-677) specific to medical malpractice cases or that particularly impacts those cases; discussion of prior caps and the cases holding them unconstitutional; discussion of P.A. 89-7, which was held unconstitutional in the Best *case; discussion of the 2005 legislation (P.A. 94-677) and whether it is constitutional; and finally, "where do we go from here," which includes my ideas for reform that build on the reforms already in place. An appendix includes citations to some of the many recent articles (and a few books) relevant to this topic.*

The Fleecing of Seriously Injured Medical Malpractice Victims in Illinois

Frank A. Perrecone and Lisa Fabiano 527

The Supreme Court of Illinois has twice held that caps on damages are unconstitutional. In 1976, the court held in Wright v. Central DuPage Hospital Association *that a cap on damages in medical malpractice cases constitutes special legislation in violation of the 1970 Illinois Constitution. Twenty-one years later, in* Best v. Taylor Machine Works, *the court held that a cap on non-economic damages in bodily injury and death cases is special legislation as well as a violation of the separation of powers clause. Despite these clear precedents, last year Governor Rod Blagojevich capitulated to public pressure manipulated by the powerful insurance and medical industries and signed into law Public Act 94-677, which limits non-economic damages in medical malpractice cases to $500,000 against physicians and $1,000,000 against hospitals. But if caps are unconstitutional, why were they enacted yet again? Because the medical liability insurance industry and medical trade associations have conspired in a campaign of misinformation to deceive the public, physicians and lawmakers into believing that there is a medical malpractice crisis caused by non-economic damage awards rather than insurance industry mismanagement and a temporary decline in investments. This article will examine the major claims made by the insurance and medical lobbies to manipulate public and legislative support for caps and show that they are misleading or simply false. It also demonstrates that non-economic damage awards are not fueling the rapid rise in malpractice insurance rates, caps do not reduce physicians' premiums, and caps unconscionably place the burden of loss on a small number of innocent victims. Illinois' most recent cap legislation is a windfall for the profiteering insurance industry subsidized by seriously injured medical malpractice victims who are left with profound disabilities and shattered lives.*

Why Medical Malpractice Caps are Wrong

Patrick A. Salvi..... 553

In recent years, many states have passed legislation limiting the amount of recovery in medical malpractice cases. One primary purpose behind these caps is to lower medical malpractice insurance premiums. Unfortunately, damage caps neither reduce malpractice premiums nor prevent premium increases. In addition, damage caps neither lower consumer health care costs nor prevent frivolous litigation. Even worse, damage caps prevent victims of malpractice from being fully compensated for damages they received as a result of another's negligence. Not only are damage caps incapable of effecting tort reform, but they have a catastrophic effect on those victims, who receive unfair and inadequate compensation for life-changing losses. This article demonstrates that a more effective means to reduce medical malpractice insurance premiums is through insurance reform.

Medical Negligence Litigation is Not the Problem
Kenneth C. Chessick, M.D., J.D. and
Matthew D. Robinson 563
The medical malpractice insurance "crisis" results not from out-of-control juries or overly-litigious plaintiffs and their attorneys, but rather is simply the result of epidemic levels of negligence among physicians. The myth that the liability system is to blame for high premiums facing doctors creates opportunities for insurance companies to restrict plaintiffs' access to courtrooms and to limit the amount of compensation they may receive after proving negligence. This article examines and debunks the leading myths regarding the so-called "crisis" and presents several suggestions that may improve the healthcare provided to patients nationwide.

COMMENTS

People v. Caballes: An Analysis of *Caballes*, the History of Sniff Search Jurisprudence, and its Future Impact
Brett Geiger 595
This article begins by attempting to understand sniff search jurisprudence through the earliest Supreme Court precedent and the application of those cases by the various circuits. Then after a brief discussion of the Caballes *case itself, it attempts to discern the various arguments made by the parties in the suit, scholars, and practitioners, examining each for its relative merit. Finally, the article attempts to predict what impact* Caballes *will have on both the use of canines in law enforcement and other technologies that serve similar purposes.*

Criminal Discovery and the Costs of Reproduction: A Burden Taxpayers Should Not Have to Bear
Gary C. Pinter 623
This comment asserts that a prosecutor's office may charge privately-retained defense counsel for the costs the prosecutor's office may incur as a result of reproducing material that may be requested via discovery. Although the evolution of discovery has resulted in rules or statutes that differ with respect to a particular jurisdiction's scope of discovery or its adopted approach, the overwhelming majority of discovery provisions regarding the prosecutor's duty of disclosure are very similar. The duty essentially requires that the prosecutor make the particular material available and permit its inspection and reproduction. Consequently, to forbid a prosecutor from seeking reimbursement for the costs of reproduction is not only

contrary to the plain language of the discovery provisions, but it would also be reading an exception or limitation into the provisions because it would be implicitly requiring the prosecutor to make the copies of the material. Such an action violates the rule of statutory construction - an undertaking courts should avoid. Furthermore, public policy supports the contention that taxpayers should not have to bear the costs of reproducing material for a defendant's criminal defense when the defendant can afford the costs of that defense, even if the defendant has a statutory or constitutional right to the material. This policy is reflected in statutes that govern access to public records, the imposition of costs of criminal proceedings upon defendants, and reimbursement of the costs of court-appointed counsel. However, because discovery is almost exclusively promulgated by statute or court rule, this comment recommends that legislators amend their current discovery provisions to provide for the reimbursement of discovery reproduction costs. Such a measure will help alleviate the present and future burden placed on the public revenue.