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Clifford's Notes

Clifford's Corner

A majority of Illinois legislators voted to cap non-economic damages for victims of medical malpractice despite study after study that clearly demonstrates that medical malpractice settlements and verdicts do not impact doctors' premiums. In fact, the largest malpractice carrier in Illinois has consistently paid out roughly the same amount since 1997, and in 2004 the Illinois State Medical Insurance Exchange (ISMIE) paid 10 percent less than it did the year before. Furthermore, in the last five years in this state, the number of medical malpractice lawsuits filed each year has been about the same. Legislation with the identical purpose has been found unconstitutional by the Illinois Supreme Court twice, thereby setting a precedent in this state.

Patient's Plea to Stop Caps Legislation Fell on Deaf Ears

By: Robert A. Clifford
Reprinted from July, 2005 *Chicago Lawyer*

After spending weeks in Springfield telling Illinois legislators about the unfairness of caps on damages, encouraging them to trust juries to make the right decisions and about how the legislators should not allow insurers and health-care providers to write bills to escape liability, the facts seemed to be falling on deaf ears.

Then a 33-year-old woman came to my office in tears, telling me the horrific story of how a doctor had removed her healthy breast and dozens of lymph nodes. In conducting a biopsy of her breasts, the pathology lab had switched her specimen with another woman's. It turns out the wife and mother of two actually didn't have cancer at all.

Because of inexcusable carelessness, Molly Akers of New Lenox, a stay-at-home mom, is forever scarred. She suffers pain and swelling down her arm and is unsure if she will ever be able to return to her personal training job.

But Molly also was upset that, had the incident occurred just months later, her damages might be capped for this egregious error on the part of the hospital.

Certainly, her rather modest hospital and medical bills would be paid as economic damages in a lawsuit. But is a cap fair that prevents compensating her for the nightmares that wake her up in the middle of the night? How about for her living the rest of life with a disfigured body? Shouldn't that be left to a jury?

By now you know a majority of lawmakers have voted as if they are wiser than the juries. But before their vote, Molly wanted to tell them they were wrong if they thought the pending legislation would help the public. She thought she needed to speak out for those who were yet to be injured as terribly as she.

So she traveled to Springfield as legislators were working on the bill. Molly bravely walked to the front of a high-ceilinged room, sat behind one of the microphones and quietly told her story. Molly pleaded with the legislators to see the unfairness in what they were contemplating doing.

But she was disappointed weeks later to find that a large number of legislators, including a few in that room, had voted in favor of caps on damages. Molly's words had fallen on deaf ears. She felt her trip had been in vain.

The caps on damages in S.B. 475 have been widely publicized. Less well known are the other onerous provisions in the legislation. The unnecessarily strict new standards for expert witnesses (Amended 735 ILCS 5/8-2501), grafted onto the initial lawsuit-screening procedures under Section 2-622 (735 ILCS 5/2-622), will simply deny access to the courts for many patients with meritorious cases. Both of these changes assume, incorrectly, that the judiciary does not do its job of being the "gatekeeper" for the admission of competent evidence.

Also, the sardonically entitled "Guaranteed Payment of Future Medical Expenses and Costs of Life Care" (735 ILCS 5/2-1704.5) requires profoundly injured plaintiffs to accept an annuity for payment of their future medical and caretaking expenses. The plaintiffs must assume the risk that the annuity company will be around 20, or maybe 70, years from now to pay those expenses.

Finally, doctors and hospitals can confess their errors within 72 hours of an adverse incident without the apology being admitted into evidence (Amended 735 ILCS 5/8-1901).

Make no mistake, the war over this law will be waged on a different battleground, as it was 30 years ago and again 10 years ago. No matter how one tries to characterize it, the cap on damages in S.B. 475 is identical in legislative purpose and substance to previous legislation that has been held unconstitutional as special legislation and in violation of the doctrine of the separation of powers.

We should note a few of the economic realities that provide background for this legislation. First, the "economic damages," which were not capped, are largely returned to the doctors and hospitals in the way of medical bills, rehabilitation and other health care needs. Economic damages are not really the patient's money.

The "non-economic" damages, which the legislation does cap, often ends up being used for health care purposes, too, because the economic damages simply aren't enough. With rising health care costs, those injured by medical negligence are lucky if they can find the resources to finance the medical treatment they require over their lifetimes.

Second, the predominant malpractice insurer in Illinois, ISMIE, has been blaming lawsuits because it doesn't want its "free ride" to come to an end. It has been allowed to charge whatever premiums it sees fit, without interference by regulation, for more than 30 years. It refuses to release pertinent information to other insurers, which would enhance competition and drive down premium rates, according to experts in the field.

The fact that there are far too many medical mistakes and extremely lax insurance regulation are not legitimate reasons to cap damages. Wouldn't it be better to police the medical profession more closely to get rid of recidivists? Wouldn't that also be a reason to look more closely into insurers' books?

All of the anecdotes and tall tales of the insurance companies and the health care world are nothing but spin. They just don't add up. Molly Akers, though, is for real.

Caps on damages protect insurers at the expense of those injured or killed by medical malpractice.

By: Keith A. Hebeisen
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The Patient's Perspective

THE ISSUE A patient's neurosurgeon operates on the wrong side of his head, a young man is a quadriplegic because a neurosurgeon puts a screw in his spinal cord during surgery to remove a disc, a woman's husband dies because a retractor is left in his abdomen during surgery, a young woman has a breast removed unnecessarily because someone writes the wrong name on the pathology slides in the lab, a man dies because he was sent a heart instead of a kidney for a transplant operation, and a baby is born severely brain damaged after being delivered too late after an anesthesiologist ignored pages while he was having sex with a nurse.

Insurers and other interest groups have used anecdotes, myths, and spin to argue that the rights of those harmed or killed by medical malpractice should be taken away. The claim is that the frequency and severity of medical malpractice lawsuits in recent years has increased, thereby causing high malpractice insurance premiums, which in turn has reduced access to healthcare. The claim is that if we take away the most important constitutional right of those harmed by medical malpractice, the right to full compensation, by setting an arbitrary cap on what a jury can award an injured patient, these problems will disappear. The facts do not support these claims.

In the last five years in Illinois, the number of medical malpractice lawsuits filed each year has been about the same.

In 2004, the total amount that ISMIE, the predominant malpractice insurer for doctors, paid to settle claims was 10 percent less than it paid in 2003. The average amount ISMIE paid on a claim in 2004 was 20 percent less than in 2003 and even less than in 2002.

While claims have been decreasing, the total amount of premiums collected by ISMIE has been increasing rapidly. ISMIE raised its premiums about 35 percent in July, 2003, and another 7 percent in July, 2004. In 2004, the difference between the amount of premium dollars taken in and the amount paid out in claims, including defense costs, was almost $200 million.

ISMIE insures about 14,000 doctors. At $150 million per year in total claims, it is paying approximately $10,000 per doctor it insures. But high risk specialists are paying as much as $250,000 for a year's insurance. Does that make sense?

Illinois does not require insurers to make public the database of all closed malpractice claims, and ISMIE won't voluntarily turn over its data. But in Texas, where such information is public, just before Texas took away the rights of its patients by passing caps, the data showed:

- Large claims were roughly constant in frequency.
- The percentage of claims with payments of more than $1 million remained steady at about 6 percent of all large claims.
- The number of total paid claims per 100 practicing physicians per year fell to fewer than five in 2002 from greater than six in 1990-92.
- Mean and median payouts per large paid claim were roughly constant.
- Jury verdicts in favor of plaintiffs showed no trend over time.
- The total cost of large malpractice claims was both stable and a small fraction (less than 1 percent) of total health care expenditures.

Various hospital organizations and their representatives have also been trying to create hysteria about their financial situation. In an op-ed in the *Chicago Tribune* on February 17, 2005, one hospital representative asserted that in 2004 there were two $30 million verdicts in Cook County involving only "non-economic" damages. In fact, one of those cases involved a baby who sustained serious brain damage requiring life-long care in which the jury awarded 60 percent of the total verdict for economic damages. The second verdict cited in that op-ed will never be paid because there was no insurance.

In the same op-ed, the author compared the hospitals' insurance problems to an auto driver having a $50,000 deductible for his auto insurance. But if you got in an accident almost every day due to your own negligence, would you be surprised if you had a really big insurance problem?

Medical malpractice is one of the leading causes of death and injury in this state. Until someone is hurt or killed by malpractice, there can be no malpractice lawsuit.

According to Tommy G. Thompson, former Secretary of the U.S. Department of Health and Human Services, the Institute

Medical malpractice is one of the leading causes of death and injury in this state.

of Medicine's (IOM) landmark 1999 report, To Err is Human, alerted the nation to the patient safety challenge in ways that prior studies had not. The IOM estimated that between 44,000 and 98,000 Americans die each year as a result of medical errors, making them the eighth leading cause of death in the United States. More people die from medical errors than from automobile accidents, breast cancer, or AIDS. While there has been subsequent debate about the actual number of deaths, it is clear that the rate of medical errors is unacceptably high.

And recently the Journal of the American Medical Association (JAMA) stated that a truly national response to the IOM's call to reduce preventable patient injuries by 90% requires that every health care board, executive, physician, and nurse make improving safety an absolutely top strategic priority—fully equal to the corporate priority of financial health. And JAMA said that at a national level, such a commitment has yet to emerge; indeed, it is not in sight. "Five Years After To Err Is Human What Have we Learned?" JAMA Vol. 293, May, 18, 2005, pp. 2388- 2389.

And according to Newt Gingrich, "Healthcare is the only industry in America that can give you a disease and then charge you to cure the disease it gave you. Clearly this is an outrageously wrong principle . . . . . The enormous number of needless deaths from medical errors (44,000), hospital-induced infections (88,000), and medication errors (7,000) is not only unacceptable, it is un-American".

Recently, the *Chicago Tribune*, citing the National Practitioners Databank, reported that 5 percent of the doctors who have made malpractice payments over the last 15 years are responsible for almost one-third of the costs.

The same insurance companies and interest groups who want to take away patients' rights have no suggestions about how to prevent medical malpractice. What is going to be done about the malpractice that understandably leads to lawsuits? Maybe someone could ask Jane Jackman, M.D., a member of the ISMIE Board of Directors who also serves on the State of Illinois Medical Licensing Board or Sandra F. Olson, M.D., another ISMIE Director who serves on the State of Illinois Medical Disciplinary Board.

The insurers claim that caps will lower malpractice premiums. But this claim holds no water. Malpractice premiums continued to rise in every state after caps were enacted. And many of those states are listed as in "crisis" by the American Medical Association. And some states without caps (like Iowa and Minnesota) have some of the lowest malpractice premiums in the country.

Missouri *(the state all the Metro East doctors are supposedly fleeing to)*

Cap passed in 1986, which was recently lowered. Between 2000 and 2003, premiums rose by 121%. This was despite the fact that new claims dropped by 14% in 2003 to a record low and payouts dropped by about 21%.

Keith Hebeisen is pictured here at a press conference in June at Clifford Law Offices representing victims of medical malpractice. The firm filed two separate lawsuits on behalf of two different patients who were negligently operated on the wrong sides of their brains. The patients wore "left" and "right" buttons on their lapels indicating the gross negligence that occurred. "These kinds of preventable mistakes should not be occurring if physicians and hospital personnel are doing their jobs and putting the patient first," Hebeisen said.

> “Healthcare is the only industry in America that can give you a disease and then charge you to cure the disease it gave you.”

California

Since caps passed in 1975, insurers have continually asked for rate increases but some have been denied or reduced thanks to a tough law (Proposition 103) passed by the voters in 1988. In 2003, numerous companies requested rate increases, some asking for up to a 96% rate increase.

Texas

Cap passed in 2003. The next year rate increases of 35% were denied by the Insurance commissioner. One insurer, after having its request turned down, used a legal loophole to raise rates by 10% without approval. Overall, since caps passed, there has been less than a 1.5% reduction in premiums and GE Medical Protective, the largest malpractice insurer in the U.S., stated in its filings that the total savings expected from the cap are only estimated at 1%.

Florida

Cap passed in 2002. The next year insurers requested rate increases for 2004 of 45%, 17.3%, and 8%.

Have you noticed that almost every day there is at least one large advertisement in a Chicago metropolitan newspaper by some hospital advertising its services? It is typical to see four different hospitals run large ads in the Sunday newspapers. At least two hospitals are regularly running TV commercials in Chicago.

Advertising costs a lot of money, as does a plasma screen TV in each patient’s room at a new children’s hospital in Chicago. Hospitals can afford all this advertising and expansion, but they can’t afford to fully compensate people who are harmed by their malpractice? And imagine how much less medical malpractice we would have if the hospitals channeled their advertising budgets into preventing medical malpractice?

It is claimed that Illinois is unique in having shortages of doctors, particularly specialists, and that somehow caps on damages are the “silver bullet” solution. But in 2001, the California Medical Association conducted a survey of 19,000 physicians who had had the protection of caps for 26 years. The Association found that many physicians were leaving the practice. Lower reimbursement, managed care hassles, and government regulation were the greatest sources of dissatisfaction. 43 percent of surveyed physicians planned to leave medical practice in the next three years. 58 percent of physicians had experienced difficulty attracting other physicians to join a practice. More than 25 percent of physicians had difficulty in recruiting doctors in various counties in California. Primary care, neurology, orthopedic surgery, and neurosurgery led in specialty shortages. More than one-fourth of physicians would no longer choose medicine as a career if starting over today, and more than one-third of those who would still choose medicine would not choose to practice in California. The study includes letters from specialists, including OBs and neurosurgeons, predicting that there will be no specialists in many areas of California in the near future. So much for caps solving healthcare access problems in California.

Caps on damages are also unconstitutional. The Illinois Supreme Court has said “even assuming that a systemwide savings in costs were achieved by the cap, the prohibition against special legislation does not permit the entire burden of the anticipated cost savings to rest on one class of injured plaintiffs.”

The real problem with insurance premiums lies with the insurance industry. ISMIE gave a multimillion dollar golden parachute to a former executive who pleaded guilty to crimes of dishonesty in 2002, the year before the rate increase of 35 percent. And ISMIE has a neat plan to compensate at least one high level executive. Loan him hundreds of thousands of dollars, pay him a bonus to pay off the loan, and pay him a second bonus to pay the taxes on the first bonus. How many doctors’ malpractice premiums could have been paid with all those millions of dollars?

Illinois regulators have no authority to reject a rate increase in medical malpractice insurance. Therefore, in 30 years, no rate increase by a medical malpractice insurer has ever been rejected. Those laws need to change.

So does it make sense to pass a cap on the recovery of the most severely injured patients when it won’t solve the malpractice premium problem, and wait until after the cap is again declared unconstitutional to start looking at real solutions? Or does it make sense to pass laws now to reduce medical malpractice so there are less malpractice cases and to reduce doctors’ malpractice premiums by toughening insurance regulation and creating competition in the marketplace? The answer is obvious if you look at the facts.

The medical malpractice dilemma.

Thadeus & Weez
by Charles Pugsley Fincher

Clifford Law Offices is intensely active in the preservation of rights of victims of medical malpractice.

This advertisement appeared in the *Chicago Life* supplement of the *New York Times* in March, 2005. Each of these people, and thousands more like them, support the need for diligence and close monitoring of physicians as well as the public reporting of settlements and cases tried to verdict in Illinois and around the country. Patients need to be informed in order to make intelligent decisions.

THE FACES OF MEDICAL MALPRACTICE

For the past 25 years, Robert A. Clifford and Clifford Law Offices represented hundreds of people in Illinois who have been victims of negligence. Doctors who have made a mistake. Here are just some of their stories:

Sharon Lindsay was pregnant with triplets in 1993. At 27 weeks she complained of pelvic pressure and pain on a Sunday morning. Her doctor did not tell her to come to the hospital until later that evening when it was too late to stop the premature delivery. All three infants were diagnosed with varying degrees of cerebral palsy from the premature delivery. Justin died three years later. Jordan remains wheelchair bound.

Mercy Hospital and Medical Center in Chicago negligently and incorrectly prepared, mislabeled and administered an intravenous glucose solution to two-day-old Samuel Gist. He suffers seizures and permanent brain damage.

Rosemary Simone went to Dr. Joshua Salvador as an outpatient for the routine removal of a fibroid tumor. During the procedure, he severed her bladder yet sutured her up with minimal stitching. She was sent home and suffered severe bleeding. Despite Dr. Salvador strongly recommending she stay home, her daughter rushed her to the emergency room that night where she was in critical condition. Her kidneys and other internal organs have failed, and she remains on dialysis and requires numerous surgeries.

Dr. James York, an orthopedic surgeon, required knee surgery. An anesthesiologist negligently punctured his spinal cord and injected anesthesia fluid in it, leaving his right leg partially paralyzed. Dr. York is unable to continue practicing medicine which included frequent travel to Africa to help the poor with his surgical skills.

Kalifa Smith was born brain damaged after physicians at Mt. Sinai Hospital delayed for days giving her mom a cesarean section, despite fetal distress signs and being deprived oxygen for a prolonged time. Kalifa also suffered from inadequate post-delivery care. She has cerebral palsy, speech problems, fine motor problems and cognitive deficits requiring life-long assistance.

A 42-year-old Chicago police officer, James Mithen was admitted to Northwestern Memorial Hospital with palpitations, fatigue and dizziness. He was treated and released for work without restrictions, and medication was discontinued three days later. Three months later, he collapsed and died from cardiac arrest despite resuscitation efforts.

Each of these cases was filed with a certificate of merit signed by a qualified physician in the state stating that a deviation from the standard practice of medicine had occurred. Each of these cases attempted to hold those who were negligent accountable for their wrongful behavior but could not return the patient and the families to the way they were before the negligence occurred. These are not frivolous cases. These people represent why physicians need to be more closely monitored in the state. These people represent the need for public reporting of lawsuits settled or tried to verdict in the state. These people deserve what their injuries are worth, not a $250,000 cap. These people could be you.

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In the Public Eye

Below: **Keith A. Hebeisen** was inducted as the 2005-06 President of the Illinois Trial Lawyers Association, a group of thousands of lawyers dedicated to protecting consumer rights. He was wearing an orange bracelet imprinted with ITLA's slogan, "Protect Rights, Not Wrongs." To obtain a bracelet, please contact ITLA at 1-800-252-8501.

Above: Dozens of lawyers gathered to hear an intense discussion on the pending legislation in Illinois that caps patients' damages in civil lawsuits. Moderated by Joel Weisman of WTTW/Channel 11, Robert A. Clifford was among the panelists invited by the Law Bulletin Publishing Company on May 17 at the Renaissance Chicago Hotel.

The debate, which ran for nearly two hours, aired all sides of the issue and allowed audience members to question panelists. Illinois Channel, an independent public access television station based in Springfield, recorded the event and aired it live throughout the state. A streaming video of the debate can be viewed by clicking on www.CliffordLaw.com. The event was free to the public.

Below: **Robert A. Clifford, panelist** Robert Clifford represented the patient's perspective in a heated debate sponsored by the Law Bulletin Publishing Company in Chicago. The discussion included Cook County Commissioner Larry Suffredin who, along with Mr. Clifford, explained the legislative aspects of what is occurring in Springfield on the issue.

NBC The Today Show
May 11, 2005

Robert Clifford appeared on the Today Show on NBC in May with his client, Molly Akers of New Lenox, Illinois. Doctors at a major Chicago hospital negligently removed a healthy breast of the 33-year-old mother because a radiologist mixed up her pathology slide with that of another woman's. Clifford traveled to Springfield, Illinois, to explain to state legislators the unfairness and unconstitutionality of legislation that caps non-economic damages.

CNN American Morning
May 12, 2005

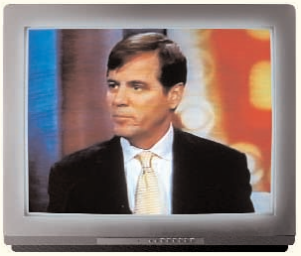
Robert Clifford also was invited to appear with Molly Akers on CNN American Morning, a national cable news show that reaches millions of viewers. They discussed how legislation that caps non-economic damages, such as pain, suffering and disfigurement, discriminates against people like Molly who is a stay-at-home mom who does not have an income-bearing job at this point in her career.

WTTW Chicago Tonight
May 26, 2005

Robert Clifford was invited to speak on Chicago Tonight, WTTW, Chicago's public television station, to discuss the legislation that had been approved by the Illinois state legislature in late May. The bill arbitrarily capped non-economic damages, thereby disallowing a jury to decide damages for a victim of negligent medical treatment. Phil Ponce moderated the lively discussion on Channel 11.

WBBM Eye on Chicago
June 6, 2005

Keith Hebeisen was invited to speak in June on "Eye on Chicago," a Sunday morning news talk show that airs on Channel 2, WBBM-TV. He faced off against the President of the Illinois Hospital Association on the issues surrounding the legislation that would cap non-economic damages in Illinois. For Mr. Hebeisen's viewpoint, turn to the inside of this newsletter.



Very Sincerely Yours,

Thomas K. Prindable

Thomas K. Prindable, Managing Partner, Clifford Law Offices, P.C.