



Medical Malpractice: The Prognosis

Attorneys Talk About Tort Reform, Jury Attitudes and Change

BY KAY M. COOPER

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Few topics can raise the hackles like medical malpractice. Like many controversial matters, it often is discussed as a backdrop to larger issues, like insurance premiums, doctors fleeing from practice, and the value of and need for what is commonly called tort reform.

In this article, litigator Kay Cooper decided to ask lawyers what they think about a specific topic: the decline in the number of Arizona filings of medical malpractice cases. She asked those on both the plaintiff and defense side, and many attorneys graciously and candidly provided their thoughts.

All opinions are those of the individual speaker or the author and do not necessarily reflect the views of other contributors or the speaker's law firm.

What's Going On?

The number of medical malpractice cases filed in Maricopa County declined from 446 in 2005 to 323 in 2006—a 27.6 percent drop.¹

In Pima County, plaintiffs filed 110 cases in 2005. In 2006, only 67—a 39 percent drop.²

In the past five years, 135 medical malpractice cases went to a jury in Maricopa County. Of that total, 110 were defense verdicts.³

Why? High cost, hostile juries and new restrictions have made many otherwise meritorious cases impractical to file. Some blame the Bush Administration for this situation. Some blame insurance companies. Some say it's just a natural cycle.



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No one says there are fewer lawsuits because our medical care is better.

In this article, attorneys share their thoughts about medical malpractice litigation in Arizona. The decline in lawsuits dominates discussions.

Attorneys are concerned about far more than their workload. The real issues, they say, are access to good medical care, affordable health insurance and reimbursements to doctors and hospitals. Plaintiff attorneys point to the insurance industry as the cause, but both sides agree so-called tort reform will not solve these problems. As 2007 begins, attorneys also anticipate changes in the practice of medicine that may affect litigation.

The Numbers

First, a look at the numbers. Not only has the raw number of med-mal suits dropped, but so has the percentage of the total number of civil cases filed. Statewide, medical negligence cases comprised 0.85 percent of all civil cases filed in Superior Courts in FY 2006, as compared to 1.32 percent in FY 2000.

The Arizona Supreme Court collects this data from each county. Here are the changes in Maricopa and Pima counties:

MARICOPA COUNTY			
FISCAL YEAR	MED-MAL FILINGS	TOTAL CIVIL FILINGS	% TOTAL CIVIL CASES
1999-2000	387	31,181	1.24
2000-2001	446	28,005	1.59
2001-2002	460	31,123	1.48
2002-2003	507	34,860	1.45
2003-2004	449	36,164	1.24
2004-2005	446	36,013	1.24
2005-2006	323	34,946	0.92

PIMA COUNTY			
FISCAL YEAR	MED-MAL FILINGS	TOTAL CIVIL FILINGS	% TOTAL CIVIL CASES
1999-2000	144	6,749	2.13
2000-2001	132	6,039	2.19
2001-2002	136	6,172	2.20
2002-2003	93	6,929	1.34
2003-2004	80	6,963	1.15
2004-2005	110	7,204	1.53
2005-2006	67	7,063	0.95

Yavapai County is next, with the third-highest number of med-mal suits each year. Cases there fell 55 percent in FY 2006 from FY 2002.

In FY 2006, there were 53 lawsuits total for all counties outside Maricopa and Pima. Apache, Greenlee and Santa Cruz coun-

ties have not seen a med-mal complaint in two years.

What do the lawyers say?

A survey of attorneys found some who see the decline as part of a natural cycle.

Attorney Fred Cummings, at Jennings, Strouss & Salmon, calls it "a statistical quirk." He believes the number of lawsuits will increase as Arizona's population expands. More people typically means more litigation of all varieties.

There is support for this view. In November 2006, the *Arizona Republic* reported that, according to an ASU study, the number of doctors in Arizona increased 10 percent each year in 2004 and 2005, but still did not keep up with demand. The study calculated 27,000 doctors needed by 2020 to keep up with population growth.⁴

In addition, filings have fluctuated before. In Maricopa County, med-mal cases declined between 2003 and 2006 but rose between 2000 and 2003.⁵ In Pima County, where a 20-year history was available, filings varied several times: 39 cases in FY 1985, up to 188 in 1990, down to 131 in 1995, and up again to 144 in 2000.

MEDICAL MALPRACTICE FILINGS IN PIMA COUNTY	
1984-1985	39
1989-1990	188
1994-1995	131
1999-2000	144
2004-2005	110
2005-2006	67

However, a majority of attorneys surveyed believe that the current decline is not temporary. Med-mal cases are more expensive to litigate, precluding all but those with significant damages. Statutes designed to restrain plaintiffs have achieved their goal. Ultimately, the public's anti-plaintiff bias fueled by the publicity surrounding tort reform has made plaintiff verdicts few and far between. As a result, experienced plaintiff attorneys are (and have been for some time) turning away cases they would have filed 10 years ago.

What has led to that result?

COST. Attorney John Curtin, of Robbins and Curtin, pegs the cost to prepare a case at \$50,000 to \$100,000, *not* including trial. Add another \$25,000 minimum to try it.

Defense attorney Judith Berman, at Doyle, Berman, Gallenstein PC, puts it another way. "Cost-of-defense used to be \$50,000. Now, it's \$75,000."

Why the increase?

Expert witnesses, depositions, videographers and trial consultants take a big bite. Also, the litigation itself has become more protracted. As attorney Barry MacBan, of MacBan Law Offices, writes, "Physicians and their respective liability insurers have taken a much more aggressive defense posture."

For example, plaintiff attorney John Micheaels, of Beale Micheaels & Slack, sees defendants taking depositions that "I would have been shot for taking," referring to his prior defense practice.

And where settlement requires a physician's consent, cases rarely settle early. As Jim Broening, at Broening, Oberg, Woods



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& Wilson, puts it, “Between the malpractice premium and reporting requirements, doctors will not consent when they are no worse off going to trial than settling.”

Even the court is concerned about costs. Judges Anna Baca and Tim Ryan co-chair a Civil Studies Committee, which examines the court’s role in medical cases. Setting realistic trial dates is a frequent topic as both sides spend a lot of money preparing themselves and their experts every time a trial is bumped. As one solution, judges are encouraged not to set trial dates until enough discovery has been done to determine a trial date.

Despite the effort of courts, costs remain a decisive factor in an attorney’s decision to take a case. The damages must justify the expense and risk involved. “No one wants to lose with that kind of investment,” observes Treon Aguirre & Newman’s Dick Treon.

LEGISLATION. Attorneys say laws enacted to limit lawsuits are achieving their goal. The latest—the “Affidavit of Merit” and Expert Qualification statutes (A.R.S. §§ 12-2603 and 2604)—target medical malpractice cases.⁶

Plaintiffs must now disclose standard-of-care experts and opinions with their initial Rule 26.1 disclosure. Medical experts also must meet certain criteria, such as recent experience practicing or teaching medicine.

Supporters argued this legislation would eliminate “frivolous” lawsuits. No such thing, say plaintiff attorneys. The cases are just too expensive to file a lousy one.

A recent study published in May 2006 by the *New England Journal of Medicine* examined closed malpractice suits for merit and outcome. It found the vast majority of claims are not frivolous and concluded the amounts spent by insurance companies fighting meritorious cases had the greatest effect on the cost of litigation.⁷

The real impact of these statutes has been to further reduce meritorious claims. Defense attorneys report successful motions to dismiss claims based on inadequate affidavits. In cases involving multiple providers (a doctor, hospital, nurse, etc.), the rules have precluded some plaintiffs who could not locate experts in time from naming all potentially liable parties. The legislation appears to be a factor in the number of cases filed.

JURY ATTITUDES. By far, jurors’ bias against plaintiffs is the most widely discussed reason for the decline in cases. These discussions invariably lead to the topic of tort reform.

Tucson attorney Ted Schmidt, at Kinerk Beal Schmidt Dyer & Sethi, writes, “Juror attitudes have been visibly impacted by the publicity tort reform has received and its claimed connection with doctors leaving the practice and health care costs and malpractice insurance premiums rising.”

Before most jurors even walk into the courtroom, they dislike plaintiffs in medical cases. They think lawsuits make their own medical care cost more and force doctors out of work. A cap on damages, they have been told, is the only way to cure what ails our health care system.

In a poll conducted by the Kaiser Family Foundation in November 2004:

- 63 percent favored caps on non-economic damages in medical malpractice cases.
- 69 percent said limiting pain and suffering damages would help reduce overall health care costs.
- 82 percent felt too many lawyers filing malpractice suits increased the cost of malpractice insurance for doctors.⁸

Yet, another Kaiser poll in August 2005 showed less than half of the population (3 to 5 out of 100) claimed to even “some-what” follow the news concerning the medical practice debate.⁹

Voir dire should level the playing field by allowing plaintiffs to ferret out the worst of these jurors. However, attorneys seldom get the chance to conduct a meaningful voir dire. As attorney Howard Snyder wrote recently in *Arizona Attorney*,¹⁰ judges increasingly impose time limits, making it impossible to find out what people really think and address it.

Informed or not, our juries are “more demanding of evidence establishing fault,” according to Barry MacBan. As one attorney says bluntly, “To get a verdict as a plaintiff right now, you better give the jury a drunk doctor, an altered chart or someone lying. The jury has to get angry.”

Truth or Fiction?

Over and over in interviews for this article, plaintiff attorneys made the same observation: Our juries have been misled. The insurance industry “has done a good job manufacturing a ‘law-suit’ crisis when there is none,” says Yuma attorney Jim Clark.

These attorneys present a compelling argument. *Trial*, published by the American Trial Lawyers Association (ATLA), reports the following¹¹:

- According to the Congressional Budget Office, malpractice costs (including malpractice insurance) account for less than two percent of all health care spending in the United States.



Kay M. Cooper



Barry MacBan



Fred Cummings



John Micheals



JoJene Mills

**A few of the
medical
malpractice panel
participants**



Bill Sandweg



Ted Schmidt



Dan Miller



Tony Palumbo



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If caps on damages reduced that cost by 25 percent to 30 percent, the savings would be a tiny 0.4 percent to 0.5 percent—assuming 100 percent of the savings was passed along to consumers.

- A 2003 study by a financial rating company, Weiss Ratings, Inc., looked at median medical malpractice premiums over 12 years (1991 to 2002). States with caps had premiums that were slightly *higher* (\$30,246) than states without caps (\$30,056).¹²
- In Texas, some insurers asked for rate hikes as high as 35 percent for doctors and 65 percent for hospitals *after* their legislature capped damages in 2003 for medical malpractice cases.¹³
- In 2004, the American Insurance Association admitted that insurers “never promised that tort reform will achieve specific savings,” and there are “other state-specific factors that affect premium levels, such as taxes, fees and the degree of market competition.”¹⁴

Locally, between 2000 and 2005, Arizona’s largest malpractice insurer experienced a modest 3.98 percent per year increase (about the rate of inflation) in payouts. It paid indemnity on only 28 percent of all claims. Seventy-two percent closed with no payment. Finally, despite an increase in the number of physician policyholders, claims and suits fell approximately 35 percent.¹⁵

Also, Arizona’s rural counties have never had many cases in their Superior Courts. As noted by attorney Tom Ryan, with Treon Aguirre & Newman PA, the low numbers do not support the “common belief that medical negligence claims are chasing doctors away from the rural areas in Arizona.” Isolation, the lack of hospitals and medical technology, and income-earning potential make it difficult to recruit talented physicians to rural areas nationwide.

So, if not plaintiffs, who are the real culprits behind high malpractice premiums and health care costs? Many attorneys blame insurers for controlling premiums to make up for lost investment income in a down market, the lack of competition among carriers, and inflation. Their argument for insurance industry reform is the subject of another article for another day.

The Practice Today

So, what’s next for the future of this practice? Things will level out, attorneys say.

“Balance” will return, says Tony Palumbo, of Palumbo Wolfe Sahlman & Palumbo. Population growth will have an impact. Plaintiffs again will see a better reception at trial, predicts Bill Sandweg of Sandweg & Ager PC.

However, the volume will not be what it was before. The decline in lawsuits appears to be the product of a self-regulating system. High costs, conservative juries and discriminating plaintiff attorneys are holding down the number of cases filed.

There will be changes in the practice of medicine that may affect litigation. Doctors are expected to see more patients per day to make up for low reimbursements (i.e., income). Attorneys agree “treadmill medicine”—the practice of moving patients

through without taking the time to listen to them and to follow up—is a set-up for mistakes in patient care.

Attorney Kari Zangerle, of Campbell Yost Clare & Norell PC, predicts the cost of doing business may ultimately encourage more physicians to leave private practice for employment with hospitals or medical services corporations. This shift may affect hospitals’ exposure for their physicians’ negligence. We can expect more nursing home litigation and bariatric and plastic surgery cases, says Tucson attorney JoJene Mills.

Finally, Ted Schmidt envisions that the problems with health care we all face as patients may lead to a salutary result:

Doctors, hospitals and lawyers working together to reform both the medical negligence liability insurance industry and the health care insurance industry so that doctors are fairly paid for their services, malpractice premiums bear some reasonable relationship to the quality of the practice, and patients retain the right to fair compensation for their injuries. **■**

endnotes

1. Superior Court Medical Malpractice Case Filings for FY 2005-06 (7/1/06 to 6/30/06), Arizona Supreme Court, Court Services Division, Caseflow Management Unit.
2. *Id.*
3. Compiled by Hon. Anna M. Baca, Civil Presiding Judge, based on jury verdicts from 7/1/01 to 4/1/05.
4. Jodie Snyder, *Arizona Sees Increase in Physicians*, ARIZ. REP., Nov. 2, 2006.
5. Based on data from Maricopa County Superior Court for fiscal years 2001, 2003 and 2006. The fiscal year is July 1 to June 30.
6. Enacted in 2004.
7. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024-33 (May 11, 2006).
8. Kaiser Family Foundation/Harvard School of Public Health Survey, Health Care Agenda for the New Congress (conducted Nov. 4-28, 2004), available at www.kff.org/kaiserpolls/7231.cfm, “Survey Toplines.”
9. Kaiser Public Opinion Spotlight (undated Dec. 2005), available at www.kff.org/spotlight/malpractice/index.cfm.
10. *Time Warp: How Arbitrary Voir Dire Limits Harm the Jury System*, ARIZ. ATT’Y, Oct. 2006, at 12.
11. See Patrick A. Salvi, *Why Medical Malpractice Caps are Wrong*, TRIAL, May 2005, at 38.
12. Weiss Rating, Inc., *The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and the Availability of Coverage*, at 7-8 (June 2, 2003, rev. June 3, 2003), available at www.weissratings.com/MedicalMalpractice.pdf.
13. Darrin Schlegel, *Some Malpractice Rates To Rise Despite Prop. 12*, HOUSTON CHRON., Nov. 19, 2003, at A1. See also Terry Carter, *Tort Reform Texas Style*, ABA J., Oct. 2006, at 28.
14. American Insurance Association, *AIA Cites Fatal Flaws in Critic’s Report on Tort Reform* (Mar. 13, 2002), available with password at www.aiadc.org.
15. Information presented by Mutual Insurance Co. of Arizona (MICA) before the Emergency Medical Services Access Task Force, Oct. 25, 2006.