



Your Local Lawyer

*by Guy O. Kornblum, Certified Civil Trial Advocate,
National Board of Trial Advocacy and
Member Million Dollar Advocates Forum*

Published in *The New Fillmore* August 2005

Tort Reform Part III: What Lies Ahead for the Reformers

The current Administration has two primary targets for tort reform in the coming months. Medical malpractice reform was first adopted in California in 1975. I could fill this paper with documentation about the misleading statistics that have been circulated in virtually every state claiming supposed impact that these proposed reforms *really* have on the cost of health care and malpractice insurance and costs of settlements in such cases. These are the primary areas of focus by interests advocating a national program of medical malpractice reform.

Target number 1 involves “caps” on non-economic damages (e.g. pain and suffering). California has the oldest medical malpractice reform measures of any state, albeit the least friendly. For example, as I have noted in previous articles, the maximum anyone can recover in a medical malpractice suit for non-economic losses (i.e. pain and suffering or the death of a loved one) is \$250,000:

- This is the original sum initially allowed in 1975.
- It has never been changed despite the fact that housing, medical care, and groceries now cost many multiples of what they did 30 years ago.
- \$250,000 is worth today in the range between \$40,000 and \$60,000.
- For a current day equivalent, a patient/plaintiff would need to be awarded in excess of \$1 Million (calculations are up to \$1.5 Million). The result is enormous under compensation for victims of medical negligence.

Consider a parent, husband, wife or partner who dies as a result of below-standard medical care. The family recovers, at most, \$60,000 for the loss.. The current system of a “cap,” particularly at these ridiculously low numbers, is simply unfair to victims. Family members are deprived of love, affection, support and comfort of the loved one. In all fairness, this cap for

“non-economic” losses should be increased to at least \$1 Million, with annual increases based on cost of living adjustments.

Consider, also, these facts:

- Medical malpractice insurance is most profitable in the State of California when compared with other states.
- The cost to maintain medical malpractice insurance is only 3.5% of the average physician’s gross revenues from his or her practice.
- Caps on malpractice recoveries do not affect whether physicians practice in a state. The number of physicians per 100,000 of the general population is about the same in “cap” versus “non-cap” states.
- Despite adoption in California of the Medical Injury Compensation Reform Act (“MICRA”) in 1975, which provided for various reform measures including the \$250,000 “cap,” medical malpractice premiums continued to increase; they increased by 190% during the first 12 years after MICRA. Those premium increases were not reduced until California passed stricter regulations of insurance companies in 1988.
- According to the National Academy of Sciences, up to 98,000 people die each year by preventable medical errors in hospitals – more than those who die from car accidents, breast cancer or AIDS!
- Premium increases for medical malpractice coverage relate to the state of the economy and are not significantly impacted by increases or decreases in profits. This is because insurance companies make their money investing – not strictly through the claims process.

These are all documented facts. So if medical practitioners think that proposed reform measures lead to lower premiums, that is a false statement.

The second area of proposed reform is to limit attorneys’ fees, possibly even abolish, the contingency fee system. Many of the cases in my practice are handled on a contingency basis. I do not charge the client directly for my services. I also usually advance the costs on the case. Once the case is concluded, I am compensated out of the recovery in the case after the costs are deducted (costs are advanced without any interest charge). I share in the recovery by procuring anywhere from 25 to 40 % of the “net.”

If there is little or no recovery, my fee is either nil or a modest one. I may not even get my costs back. I am at financial risk for every such case I take. Thus, I have to “screen” my cases to make sure that I not only take meritorious ones. As can be seen, the contingency fee system does not encourage the filing of non-meritorious claims. No competent lawyer can risk his or her funds on cases that are not likely to yield a positive result for the client and a reasonable fee for the lawyer.

This is the typical contingency arrangement which allows those who cannot afford a lawyer to obtain legal representation by a qualified litigator, trained and experienced in civil litigation. The types of cases in which the contingency fee is used include personal injury, medical or legal malpractice, insurance coverage, “bad faith” and other “tort” actions involving victims of these civil wrongs. If contingency representation were to be disallowed, many people would be unable to bring a case to obtain compensation from serious personal or economic injury.

Currently, this system is being threatened by corporate self-interests, as they are the targets of the lawsuits made possible by our legal system which (appropriately) allows the contingency fee.

Proposals to eliminate these lawsuits are against the just interests of the public and victims who are injured by wrongdoers. As I understand these proposals, they apply to drunk drivers who kill or maim victims, drug companies which prematurely release improperly tested drugs and insurance bad faith claims (i.e. tort claims) against insurance companies which employ heavy-handed tactics to deprive their insureds of benefits of the policy to which they are entitled.

The public must take a stand against these “reforms.” Clearly, they are not in the best interests of Americans and pose a major threat to our legal system.

**Guy and his wife, Victoria, are long-time residents of our neighborhood. Guy’s firm, Guy Kornblum & Associates, specializes in personal injury cases, insurance matters, including insurance bad faith and coverage matters of all kinds, and other civil actions on behalf of plaintiffs who are injured or who are policyholders. He also is a mediator, specializing in early resolution of cases. His office is located at 1388 Sutter Street, Suite 820, tel: 415-440-7800. He can be reached at gkornblum@kornblumlaw.com and welcomes your comments.*