Louisiana Advocates

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Louisiana Association for Justice

AAJ: New analysis rejects myth equating medical liability and fleeing doctors

Number of physicians rises nationwide; states with caps have fewer doctors

An analysis of new American Medical Association (AMA) data rejects the myth that tort reform attracts more doctors, adding to a growing body of research that proves physicians are not fleeing the profession because of medical liability, according to the American Association for Justice (AAJ).

The AMA statistics show the number of doctors continues to rise nationwide and in every state. There are now twice as many doctors per capita than when the AMA began tracking physician numbers in the 1960s, AAJ said.

The number of doctors rose over the last five years in all states. Only in Alaska, Georgia, Montana and Utah—all with medical malpractice caps—did the growth not outpace population growth.

AAJ says the analysis also found the number of physicians per capita (100,000 population) was 13 percent higher in states without caps. This finding echoes research from the Commonwealth Fund and the American College of Emergency Physicians, which found health-care quality and patient safety are far worse in states that have eliminated accountability through tort reform measures.

Additionally, specialties saw significant increases in the number of doctors. Neurosurgeons, OB/GYNS and emergency room doctors all increased over the last five years nationally.

To view AAJ's materials on the Web, go to *http://www.justice.org/resources/docstats.pdf.*

In the past, the AMA argued that medical liability premiums were reducing the number of doctors in the nation.

"Our medical liability system is broken. Skyrocketing medical liability premiums—$200,000 year or more in some high-risk specialties—are forcing physicians to limit services, retire early or move to a state with reforms where premiums are more stable. The crisis is threatening access to care for patients," William G. Plested III said in September 2005 when he was AMA president-elect.

In February 2003, then AMA President Yank Coble said, "Because of the sky-high cost of liability insurance, physicians throughout the country have been forced to limit their practices, stop delivering babies and some are even leaving the practice of medicine completely."

"This data proves that doctors can practice medicine while patients are protected by a strong civil justice system," American Association for Justice President Les Weisbrod said. "Tort reform does nothing to keep patients safe or provide health care for millions of uninsured Americans."

Louisiana Supreme Court moves effective date of new advertising rules to Oct. 1

Chief Justice Catherine D. Kimball announced on Feb. 18 that the court's recently-adopted amendments to the Rules of Professional Conduct pertaining to lawyer advertising will become effective on October 1, 2009, rather than April 1, 2009, as previously announced.

The court adopted the new rules following a lengthy study conducted by the Louisiana State Bar Association, recommendations of the LSBA House of Delegates and further study by a court committee chaired by Kimball.

A 2006 Louisiana Senate concurrent resolution triggered the process.

The court has decided to defer implementation of the new rules until October 1, 2009, in order to allow the LSBA and the court to further study certain rules in light of the constitutional challenges that have been raised.

Bipartisan Arbitration Fairness Act introduced in U.S. House

Consumer groups like Public Citizen and the American Association for Justice (AAJ) quickly voiced their support for the reintroduction of the Arbitration Fairness Act into the U.S. House of Representatives in February.

The act, sponsored by Rep. Hank Johnson (D-Ga.), would end the practice of forcing consumers, employees and franchise owners to sign away their rights to take disputes to court.

Mandatory binding arbitration clauses are included in everything from cellular phone, credit card, franchise and employment agreements to nursing home care contracts. The clauses require all disputes to go to secretive, private forums chosen by the company.

Under the bipartisan legislation, all parties in a dispute would be allowed to choose whether to go into arbitration or into court.

"There is little wonder why big business and the U.S. Chamber of Commerce oppose this bill," said David Arkush, director of Public Citizen's Congress Watch Division. "In many cases mandatory arbitration is akin to a rubber stamp for oppressive practices."

Arkush added, "Arbitration firms have a strong incentive to rule in favor of their clients—the corporations that choose them. Consumers in arbitration are stuck with costs far higher than those in court, and they must abide by the decision of the arbitrators whose rulings are usually unreviewable by a judge, no matter how unfair they might be."

AAJ President Les Weisbrod said, "The Arbitration Fairness Act will prevent negligent corporations from stacking the deck against consumers who unknowingly sign away their access to justice. Arbitration can only be an effective means to resolve disputes when both parties agree voluntarily, not when it is forced upon consumers in secret to limit their rights."

AAJ explained that the Arbitration Fairness Act will help people like Jamie Leigh Jones, who was raped, drugged, beaten and then confined to a shipping container by KBR/Halliburton employees while working in Iraq. Because of a clause in her 18-page employment contract, KBR tried to force Jones to submit to binding, secret, non-appealable arbitration.

Americans overwhelmingly disprove of mandatory binding arbitration agreements, AAJ said. When consumers learn that the company picks the arbitrator, they give up their right to take the case to court and binding arbitration applies even if they are seriously injured, 81 percent disapprove.

The legislation has wide support across party lines with no statistical difference between Democrats (+38) and Republicans (+37).

AAJ's polling information can be found at *http://www.justice.org/cps/rde/xchg/justice/hs.xsl/4350.htm.*

Public Citizen's Arkush called on Congress to "stand up for consumers and pass the arbitration bill. No company should be able to place itself above the law by stripping others of access to the courts. Consumers, employees and others who sign contracts deserve a choice on how they settle their disputes."

The U.S. House's Judiciary Committee, on which Rep. Johnson serves, held hearings on the bill in 2007 and 2008. Sen. Russ Feingold (D-Wisc.) introduced similar legislation in the U.S. Senate in 2007.

"This is not an anti-business bill, but a pro-consumer bill," Rep. Johnson said. "One of our indelible rights is the right to a jury trial."

Securing payment for road-hazard tort judgments against state

If you obtained a road-hazard tort judgment against the state for a client, the only way to get that judgment paid is through legislative appropriation. This includes consent judgments.

Attorneys who have a client with one of these judgments should start working now to ensure that the Legislature considers that judgment during the 2009 Regular Session, which convenes at noon on Monday, April 27. The first thing to do is find a legislative sponsor and contact Sharon Perez, public finance specialist, House Fiscal Division, at (225) 342-2441, fax (225) 387-8848, P.O. Box 44486, Baton Rouge, LA 70804, *perezs@legis.state.la.us*.

Any legislator can assist you and your client; however, Art. III Sect. 16 of the Louisiana Constitution specifies that "[a]ll bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills."

Your legislative sponsor does not have to be from your or your client's district.

The prefiling deadline for session is Thursday, April 16. After that date, legislators may file only a limited number of additional bills.

Perez says that attorneys seeking an appropriation will need:

- Confirmation of the final judgment or settlement of the case. If it is a consent judgment, a certified copy of the consent judgment is needed from plaintiff's counsel.
- If interest is awarded and the date of demand is not specified, a certified copy of the petition in order to show the date of demand.
- If costs or expert fees were awarded but not enumerated in the judgment, an order to fix costs should be obtained to facilitate payment.

Plaintiff attorneys with road-hazard tort judgments against the state are

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Brain injuries from high voltage power line; $4.35 million settlement

A 40-year-old policeman sustained serious injuries while investigating a vehicle wreck involving a truck that went out of control before striking and breaking an electrical pole. During the course of the investigation, an electrical power line came into contact with the officer's head.

The electricity fragmented the officer's skull and exited through both of his feet. The officer, who was earning $1,850 per month at the time of the incident, sustained brain and other injuries.

Plaintiff claimed the power company failed to properly and timely respond to the police call informing it that one of its power poles had been broken during a wreck. The officer's injury occurred about one hour after the power company was notified.

Case settled at mediation for $4.35 million. Settlement was subject to a confidentiality agreement.

Doe v. Doe, No. ____, 14th JDC, Calcasieu Parish, 10/23/2008
Plaintiff's counsel: Steven Broussard and Randall E. Hart of Broussard & Hart, LLC, Lake Charles
Plaintiff's expert: John St. Clair, electrical engineering, Johnson City, Tenn.

Medical malpractice; death of baby; $800,000 jury award

Plaintiff-mother repeatedly complained to her OB/GYN during the late stages of her pregnancy that her baby was too large and that something was wrong. Radiologist read and reported the wrong ultrasound to plaintiff's OB/GYN, who maintained that the baby was not too large.

Plaintiff, believing her baby was in distress, went to the hospital. The examining OB/GYN discharged plaintiff with instructions to see her treating OB/GYN the next day. At the time of discharge, the baby was alive.

The next day, plaintiff's treating OB/GYN could find no heartbeat because the baby had died. The baby, which was delivered by C-section, weighed 14 pounds.

Medical review panel found no malpractice. Jury awarded plaintiffs $805,326, which included $10,326 for medical expenses and $397,500 in general damages to each parent.

Robinson v. Caplan, et al., No. 558-996, 24th JDC, Jefferson Parish, 12/17/2008
Plaintiffs' counsel: Van Robichaux, Robichaux Law Firm, Chalmette; Daniel Nodurft, Fred L. Herman, APLC, New Orleans

Whiplash

Continued from page 14

cervical collar or brace to immobilize the neck temporarily, usually only when pain is intolerable and not controlled by medication (analgesics, non-steroidal anti-inflammatory drugs, antidepressants, muscle relaxants) and usually for one or two weeks.

Ice and/or heat may alleviate the pain, swelling, spasm and inflammation. Spinal manipulation may help restore normal positioning. Acupuncture may assist with pain and healing. Physical therapy may help increase circulation and range of motion.

Obviously, if symptoms do not improve, referral to specialists in the fields of orthopedics, neurology, pain management and/or physiatry may be in order.

The guidelines for treatment vary significantly in the literature. The SAAQ guidelines that evolved from the Quebec Task Force have been criticized both for their "consensus-based" evaluation and for the selection basis—using only those subjects with a particular medical code report and a police report.

A guide that does not focus on whiplash but may be useful is Reed, *The Medical Disability Advisor: Workplace Guidelines for Disability* (3rd ed. 1997), with sections on whiplash at pages 1448 and 1981 (hereafter Reed).

Defendants often claim that the plaintiff over treats. Acute whiplash is generally treated conservatively and many people have symptoms that will resolve within three to six months. Chronic whiplash is harder to diagnose and treat and often means poor outcome. (See Reed, *supra*, at p. 1981.)

Currently, there is a premise that chronic pain may be more treatable than previously believed. It is shown that often chronic pain results from nociceptive innervation of structures in the cervical spine. In severe cases, a doctor may prescribe trigger point and other injections both for diagnosis and for treatment.

For example, medial branch blocks of the dorsal rami of the spinal nerves that supply the particular facet joint or joints that may be causing pain can help to determine if that is indeed the source. If significant relief results from two blocks, then radiofrequency neurotomy may provide more sustained relief—for as long as 12 months. This procedure can be repeated indefinitely.

Surgery (discectomy and/or fusion), however, may be indicated where facet joints or discs suffer injury and where conservative non-surgical measures have proven ineffective. (See Foreman and Croft, *Whiplash Injuries, supra*.)

Finally, defense doctors often opine that all pain results from pre-existing degenerative changes. Thus, it is important to note that injury of the type associated with WAD can lead to accelerated degeneration of the spine, resulting in chronic pain and the loss of pain-free years that the victim might have otherwise enjoyed.

Translate knowledge into fair recovery for your client

Many people are injured from these kinds of acceleration/deceleration events, and at times the injury can be severe. Yet the defense continues to deny or minimize claims.

When the defense insinuates that the plaintiff is not really injured and that the litigation fuels her complaints of pain, the plaintiff lawyer must tap into the foundation of knowledge to advocate otherwise. The careful plaintiff's counsel must harness the sources that currently exist to demonstrate that scientific and medical evidence supports the victim's claim and must provide the jury with the best information and supporting data available.

Thus, counsel must understand both the mechanism of injury and the individual factors that particularly support that plaintiff's claim.

*Dee Yarnall has achieved numerous multi-million-dollar verdicts and settlements and handles appeals for her own practice in Los Angeles, Calif., and for others. As an adjunct professor for more than 15 years, she has taught constitutional law, criminal procedure, criminal law and evidence. She currently teaches civil procedure and appellate advocacy.

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