North Carolina Medical Malpractice Reform Bill: A Lethal Dose for Constituents

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On February 2, 2011, Senate Bill 33, short-titled "Medical Liability Reforms," was filed in the North Carolina State Senate. The Bill (hereinafter "SB 33") proposes to reform aspects of the state's medical malpractice law in an attempt to "bring down healthcare costs and attract the best doctors," according to Senator Bob Rucho, co-sponsor of the Bill. [1] Despite these purported goals, SB 33 has justifiably garnered a host of resistance from both individual citizens and entities alike, all focused on preventing the state legislature's erosion of critical patient rights.

Sen. Rucho has stated that SB 33 will prevent doctors from "fleeing North Carolina to other states, where they can practice without the threat of excessive lawsuits."[2] However, a recent study that compiled data from the North Carolina Administrative Office of the Courts revealed the futility of this threat. Over the last decade, medical malpractice suits in the state have actually declined, while the physician population has grown by 18.3%.[3] In fact, medical malpractice filings only constituted 0.25% of all civil case filings in North Carolina from 1998 to 2009.[4] While these figures appear to be encouraging news for patients in North Carolina, it is important to point out that the number of malpractice suits filed does not accurately reflect the number of patients injured by negligent medical care.

A study on patient harms occurring in North Carolina hospitals revealed that an astonishing 18.1% of all patients were harmed while receiving medical care, and, of that number, 63.1% of the harms were determined to be preventable.[5] Moreover, a total of 13.8% of these reported harms were severe, resulting in permanent and life-threatening injuries or death.[6] Despite these startling numbers, only 1 in 20 patients who are severely harmed by medical negligence actually files suit.[7] Nevertheless, the misconception still exists that medical malpractice lawsuits are the target at which health care reform must be aimed.[8]

Sen. Rucho cites medical malpractice as "one of the hidden—but highest—costs in our country's medical system."[9] However this statement is inconsistent with the

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[1] Bob Rucho, *Is Malpractice Reform Good for Patients?*, The Charlotte Observer, p. 9A (Feb. 22, 2011).
[2] *Id*. Rucho at p. 9A.
[3] NC Advocates for Justice, *Bound Material on SB 33*, http://www.ncaj.com/file_depot/0-10000000/0 -10000/9208/folder/100846/SB+33+bound+material.pdf, (accessed Feb. 24, 2011).
[4] *Id*.
[5] Christopher P. Landrigan, M.D., *The New England Journal of Medicine, Temporal Trends in Rates of Patient Harm Resulting from Medical Care*, http://www.nejm.org/doi/ full/10.1056/NEJMsa100 4404, (Nov. 25, 2010).
[6] *Id*.
[7] NC Advocates for Justice, *Safeguarding Patient Safety and Legal Rights*, http://www.ncaj.com/page/171859/, (accessed Feb. 27, 2011).
[8] Dan Margolies, *JournalStar.com*, *Would Tort Reform Make a Difference in Health Care?*, http://journalstar.com/article_9420b16e-9d94-11de-a51e-001cc4c002e0.html, (Sept. 9, 2009).
[9] Rucho, *supra* n. 1, at 9A.

realities of healthcare spending in the U.S. Data gathered by the Congressional Budget Office pinpoints medical malpractice costs at less than 2% of national health care spending.[10] The savings that will be recognized if SB 33 is implemented are equally as insignificant. For example, the CEO of Medical Mutual estimated that if the North Carolina legislature passed all of its proposed liability reforms, it would only result in a 5% reduction in future premium increases for physicians and health care providers.[11] GE Medical Protective, the fourth largest malpractice insurer in North Carolina, has stated that the proposed non-economic damages cap would create loss savings of only 1%.[12] Still, medical malpractice has been used as a convenient scapegoat on which to place the burden of healthcare reform because, as attorney Gene Graham explained, "[e]veryone likes to have villains . . [and] trial lawyers have become convenient targets for people who want to say they're responsible."[13] As Raleigh attorney and patient advocate Burton Craige aptly stated, "[f]ear of lawsuits is a convenient boogeyman to avoid accountability for people who are actually making these [treatment] decisions."[14]

Attorney Clifford Britt, of Winston-Salem, NC, has observed that there exists an unfair characterization of medical malpractice lawsuits as "potential lottery jackpots."[15] Mr. Britt recently won a $10.4 million verdict in the case of his client, Kaleb Davis, who is now 17 years old. In 2003, Kaleb was being treated for an injury at Wake Forest Baptist when one of the screws in a halo device was tightened too far, causing it to penetrate through his skull and into his brain. Kaleb suffered bleeding, stroke, and permanent injuries due to negligent medical care. Not only will Kaleb require future medical treatment, including surgery and therapy, but it is also highly probable that he will never be able to live independently. "Kaleb does not feel like he won the lottery," Mr. Britt stated.[16] After four years of litigation leading up to trial and $360,000 in expert fees and other expenses, the award was certainly no boon for Kaleb and his family.[17]

Litigating a malpractice case is a both costly and time consuming, and involves great risk on the part of the plaintiff.[18] Yet one of the key features of SB 33 is a $250,000 cap on the amount of non-economic damages available to plaintiffs, which are defined by SB 33 as "damages to compensate for pain, suffering, emotional distress, loss of

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[10] Margolies, *supra* n. 8.
[11] *North Carolina Academy of Trial Lawyers, A "Litigation Explosion" In North Carolina? Hardly.*, http://www.ncaj.com/file_depot/0-10000000/0-100000/9208/folder/40584/2004-11-Civil+Justice +Factsheet.pdf, (accessed Feb. 27, 2011).
[12] *Id*. at http://www.ncaj.com/file_depot/0-10000000/0-100000/9208/folder/40584/2004-11-Civil +Justice+Factsheet.pdf.
[13] Margolies, *supra* n. 8.
[14] Sarah Avery, *Newsobserver.com, Lawsuits and Health Costs*, http://www.newsobserver.com/2009/09/27/116620/lawsuits-and-health-costs.html, (accessed Feb. 24, 2011).
[15] *Id*. at http://www.newsobserver.com/2009/09/27/116620/lawsuits-and-health-costs.html.
[16] *Id*.
[17] *Id*.
[18] *North Carolina Advocates for Justice, Medical Malpractice Lawsuits in North Carolina 1998-2009*, http://ncaj.com/file_depot/0-10000000/0-10000 /9208/folder/18824/2010MedMalReport1.pdf, (accessed Feb. 27, 2011) (stating that "[o]f the 245 cases that went to verdict [in North Carolina], the plaintiff won 54 times—a 22.3% success rate").

consortium, inconvenience, physical impairment, disfigurement, and any other non-pecuniary, compensatory damage."[19,20] Creating a ceiling for non-economic damages with no inquiry into the degree or scope of a plaintiff's injuries would drastically abate compensation for those whose value cannot be monetized, including children, homemakers, students, and the elderly. If the expense of litigation is not justified, potential plaintiffs will have no means of redress for the serious injuries they have suffered due to negligent medical care. Dr. Martin Brooks, a member of the Board of Trustees of the Southeastern Regional Medical Center in Lumberton, NC, voiced his disagreement with the proposed cap, stating, "[e]very person's injuries are different . . . [t]he amount of compensation they should receive as a result of medical mistakes should be based on the particular facts of each case and decided by a jury, not arbitrarily set by the legislature."[21]

In addition to its flaws, there is also a debate that SB 33 is unnecessary given the current safeguards already in place, if not unconstitutional. North Carolina statutory law ensures that frivolous claims are culled at their onset, thereby eliminating the need for the legislature to infringe upon the role of juries in the legal system. Rule 9(j) of the NC Rules of Civil Procedure imposes exacting pleading requirements on plaintiffs who bring medical malpractice actions.[22] The rule requires that complaints alleging medical malpractice assert that a qualified expert is willing to testify that the medical care did not meet the applicable standard of care.[23] Rule 702 of the NC Rules of Evidence further places restrictions on those who may be qualified as an expert in medical malpractice actions.[24]

In a letter to North Carolina Sen. Peter S. Brunstetter, former Chief Justice of the North Carolina Supreme Court, I. Beverly Lake, Jr. stated that the cap on noneconomic damages is "unnecessary as well as unconstitutional."[25] The North Carolina Constitution provides that, "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."[26] Chief Justice Lake pointed out that trial judges have "the well-established power and duty" to prevent excessive verdicts by offering plaintiffs to choose either a remittitur or a new trial. According to Chief Justice Lake, the trial judge, after hearing all of the evidence, is best-suited to determine whether the verdict is excessive.[27] A hard cap on non-economic damages would certainly contradict this principle.

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[19] N.C. Sen. 33, 2 (Feb. 3, 2011).
[20] *But see Assoc. Press, NC Senate Panel Confronts Medical Malpractice Bill*, http://finance.yahoo.com/news/NC-Senate-panel-confronts-apf-3290621791.html?x=0&.v=1, (Feb. 25, 2011) (stating that the Senate Finance Committee has recently amended the proposed cap on non-economic damages to $500,000 per victim).
[21] *PR Web*, *Honored Doctor Says NC Malpractice Bill "Just Plain Wrong…Will Reduce Quality of Care"*, http://www.prweb.com/releases/2011/02/prweb5091704.htm, (accessed Feb. 23, 2011).
[22] N.C. Gen. Stat. § 1A-1 R. 9(j) (2001).
[23] *Id*. at § 1A-1 R. 9 (j) (unless the facts establish negligence under the doctrine of res ipsa loquitur).
[24] N.C. Gen. Stat. § 8C-1 R. 702 (2007).
[25] *NC Advocates for Justice*, *Bound Material on SB 33*, http://www.ncaj.com/file_depot/0 -10000000/0-10000/9208/folder/100846/SB+33+bound+material.pdf, (accessed Feb. 24, 2011).
[26] N.C. Const. Art. I, § 25.
[27] NC Advocates for Justice, *supra* n. 25.

The North Carolina Legislature's proposed ceiling on non-economic damages for those seriously injured or even killed by medical malpractice runs afoul of the public policy considerations for which tort law was created. Accountability and responsibility are important deterrents for negligent conduct, and these safeguards will certainly be eviscerated if the legislature is permitted to enact its proposed reforms. The efforts behind SB 33 chip away at the policies put in place to rectify the injuries caused by medical negligence in North Carolina, making the term "medical malpractice reform" a misnomer. It does not stand to reason that the legislature should insulate from liability those in whom the public trusts with their lives and the lives of their loved ones. Reforming North Carolina's healthcare system should not be achieved through the insubordination of crucial patient rights. There is simply no place for policy such as SB 33 that prioritizes frivolous savings over patient care.