

Tort Reform - The Greatest Show On Earth

By Jeffrey A. Andrews, Esquire

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Now playing at a state capital near you --Medical Malpractice Tort Reform! Despite my somewhat cavalier introduction, this article is not intended to denigrate, or trivialize Tort Reform. On the contrary, I believe it to be a very serious subject which deserves full and honest public debate and legislative scrutiny.

Whenever the subject of Tort Reform is discussed in casual conversation, I cannot help but compare the maneuvering among interest groups to a three ring circus performance. In Ring One are the physicians, hospitals and medical societies--wild animal trainers moving fearlessly among ferocious lions and tigers.

Ring Two contains the attorneys and the American Bar Association-- those amazingly acrobatic and daring performers mesmerizing the audience while walking on a thin, high wire and operating without a net. In Ring Three is the insurance industry representatives--splendid and talented jugglers and dancers in bright costumes. Moving throughout the audience as circus vendors collecting money and "hawking" their circus merchandise and philosophies are the special interest groups, politicians and lobbyists.

Do not be fooled by the seemingly uncontroverted claims or scare tactics presented by each principal performer into thinking Tort Reform is simple or that only one of the circus performers simultaneously competing for the public attention has all the right answers. Arguments for and against numerous legislative proposals to remedy the high cost of medical malpractice liability insurance have been passionately and intelligently argued by advocates for the

medical profession, trial attorneys, consumer interest groups, and the general public. The issue of Medical Malpractice Tort Reform has reached such a priority position that it is being addressed simultaneously in the United States Congress, multiple State Legislatures, and it has become a major plank in the political platforms of both the Republican and Democratic national parties. No particular group has monopoly on truth, facts, or solutions to this very real problem.

Within the confines of the space constraints placed on this article, I offer the following opinions regarding each of the major performers in our hypothetical Tort Reform circus performance under the Big Top:

(1)Physicians. Must do a better job of policing their profession. Admittedly, poor outcomes can occur (especially in high risk medical specialties) that are not the fault of the physician. Not every unsatisfactory outcome is some ones “fault”. Nevertheless, substandard physicians or physicians temporarily impaired by drugs, alcohol, family problems, depression, etc. are allowed to move to freely among the states in order to escape disciplinary actions. Furthermore, there are still too many physicians with histories of multiple substandard outcomes directly linked to their substandard training or ability that are allowed to continue to practice within the States;

(2)Trial Attorneys. Must admit that a part of their resistance to Tort Reform and monetary caps on non economic damages is about money. Clearly, there are some egregious injuries to children who have never worked and will never have an opportunity to work. Since they have no “lost wages” from which to calculate economic damages, these individuals could be severely impacted by the monetary

caps on non economic damages. Trial lawyers should, however, also be forthright and admit that one consequence of award for non economic damages is to help pay an injured parties legal expenses without drastically diminishing the economic recovery portion of a successful malpractice action;

(3)The Insurance Companies. I will never be able to accept any arguments for Tort Reform proposed by the insurance industry until insurers admit that a significant component in the spiraling increases in medical malpractice insurance premiums is the economic downturn and the dramatic fall in interest rates and rates of return on traditional insurance company investments. For the years preceding this most recent spike in medical malpractice premiums, the cost of doing business by the insurers was subsidized by historically absorbent rates of return on investments. In order to compete for these investment dollars, insurance companies were willing to slash insurance rates to artificially low levels;

(4)The Public. America has become such a litigious society where citizens seemingly believe that every unfavorable outcome must be some ones “fault”. Also, it may be time to take steps designed to “rein in” runaway juries in medical malpractice cases willing to award unreasonable and unjustifiable windfall damages to injured plaintiffs.

In order to understand the factors at play and the difficulty in structuring Medical Malpractice Tort Reform, one must understand that these players have extraordinarily different points of view and even when they rely on the same or similar data, each constituency draws very

different conclusions. Readers should also be aware that each of our Tort Reform circus performers have been known to base certain conclusions upon what could happen in the future on certain established or presumed trends.

I can barely scratch the surface of the Tort Reform debate in this article. Perhaps the publishers will allow me to discuss proposed reforms and/or present my own solutions in a future edition of this magazine. In the meantime, if you would like to discuss this issue further or offer your own opinions, please feel free to contact me at my email address set forth below.

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