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Commentary

Appellate Court Offers Best Reason for Tort Reform

By Steven I. Kern

The Appellate Division's repeated refusal to moderate jackpot jury awards makes immediate legislative action to radically reform the medical liability system essential.

The court's June 2 decision in *Estate of David Williams v. St. Joseph's Hospital & Medical Center*, A-2683-01T5, is the latest poster child for the proposition that the medical liability system is broken and the need for dramatic tort reform urgent. In its ruling, the Appellate Division upheld a \$5 million jury award to the plaintiffs after the death of Dr. Williams, an oral surgery resident.

The death resulted from Williams' self-administration of the drug, Fentanyl. While there was some dispute as to whether the death resulted from suicide, recreational use of the drug or illegal self-treatment by Williams for anginal pain, there was no dispute that he, alone was responsible for taking the medication that resulted in his death.

However, where there's a deep pocket, there's always another defendant. Here, at the time of his death, Williams was a resident at St. Joseph's Hospital and Dr. Hillel Ephros was his department chairman. Two deep pockets — two defendants — and ultimately a jury that found Williams was only 45

percent liable for his self-inflicted death while St. Joseph's and Ephros were 55 percent liable.

In upholding the award, the Appellate Division speculated that "a reasonable jury might conclude that Dr. Williams would not have misused Fentanyl at all if defendants had not been negligent in making the Fentanyl so readily available to him, without proper security controls, and without any ability to trace a misappropriation of the drug."

How absurd! Fentanyl is a staple in any dental or anesthesia practice. It's about as hard for a dentist or oral surgeon to obtain Fentanyl as it is for a fish to breathe water. To even suggest that 55 percent of the blame for Williams' death rests with others, simply because some Fentanyl was available in an unlocked desk drawer, rather than a locked cabinet, defies credulity. Williams would have had the key to the cabinet!

Is there any wonder why physicians are leaving the state as malpractice premiums double and triple? Look no further than this decision for the answer. As long as the courts continue to find any excuse to uphold any ridiculous jury verdict, the problem will not go away. And the problem is enormous. Here are some facts, according to a just-released report on Medical Malpractice Liability by The Joint Economics Committee of the United States Congress:

- In 2001, premiums for medical malpractice insurance topped \$21 billion — double the amount spent 10 years earli-

er.

- Between 1994 and 2001, the typical medical malpractice award increased 176 percent to \$1 million.

- In 2001, medical malpractice insurers paid \$1.34 in claims and costs for every \$1 they received in revenue (including investment income).

- The medical malpractice insurance market's premium capacity has dropped 15 percent.

- Injuries caused by negligence occur in nearly 1 percent of all hospitalizations.

- Only about 3 percent of injuries due to negligence result in a claim.

- Eighty percent of malpractice claims show no signs of a negligent injury.

- In 2001, the costs of malpractice premiums, apportioned among the population, averaged close to \$350 for every family of four.

- Medical liability reforms could have reduced the cost of defensive medicine by \$69 billion to \$124 billion in 2001, without reducing health benefits.

- If medical malpractice reforms were implemented now, by 2006 gross savings on health care expenditures are estimated at \$99 billion to \$178 billion a year.

In New Jersey, according to the National Practitioner Data Bank, \$457 million was paid out on medical malpractice claims in the three-year period beginning in 1998. According to insurance company data, the plaintiffs' bar received roughly 30 percent of this amount, or \$137 million, with the vast majority of this \$137 million going to 20 law firms, and to five firms in particular.

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In June, medical malpractice insurance renewals were mailed to nearly half the state's physicians. Princeton Insurance Co., the state's largest carrier, increased premiums by a minimum of 44 percent. At the same time, its Best rating was reduced to B- and was placed under state supervision as it struggles to survive.

New Jersey physicians are threatening to strike beginning on Oct. 6, claiming the cost of insurance is driving them out of business. They say they will stay out until meaningful tort reform is achieved. In the meantime they are

engaging in rolling job actions.

At the same time, the Board of Medical Examiners is considering reducing the mandatory minimum amount of malpractice insurance necessary to practice in New Jersey from \$1 million/\$3 million to \$15,000, the amount required to drive a car.

These facts cannot be ignored. As amply demonstrated by *Estate of David Williams*, the tort system no longer works as an effective and affordable adjudicator of claims. Our society can no longer bear the huge costs of the existing system, regardless of its intrinsic

merits, and certainly where, as in that case, there simply was no merit. Our desire to "cure" every injury with a monetary award can no longer be sustained.

Our society cannot do without physicians. Physicians need insurance for their protection and the protection of their patients. Since the Appellate Division has failed to address this reality, the Legislature must act, and act dramatically, or our healthcare system will come to a screeching halt as physicians spend their days on picket lines rather than in examining and operating rooms. ■