

MEDICOLEGAL HELL IN TEXAS

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In Brief • En bref

In the "war zones" of Texas, lawyers use billboards, television commercials and Yellow Page advertisements to announce their availability to help the "unjustly injured," and medicolegal lawsuits are as common as the rain that sweeps in from the nearby Gulf of Mexico. Almost 75% of the suits are dismissed without award or settlement, since many are plainly frivolous. However, even these can mean torment for physicians, who have to hire lawyers, answer charges, collect paperwork, take time off work for depositions and consultations, and then worry about how insurers will react the next time premiums are due — even if they are cleared. Texas estimates that defensive medicine practised because of legal fears costs the state at least \$702 million annually, spending that is bound to continue as long as one lawsuit is filed annually for every 5.3 doctors in the state.

Dans les «zones de guerre» du Texas, des avocats utilisent des panneaux-réclame, des messages télévisés et des

annonces dans les pages jaunes pour annoncer qu'ils sont prêts à aider les «personnes qui ont subi des préjudices injustes». Les poursuites en justice pour raisons médico-légales sont aussi fréquentes que la pluie qui provient du golfe du Mexique voisin. Presque 75 % des poursuites sont rejetées sans adjudication ou règlement puisque beaucoup sont manifestement non pertinentes. Or, même ces poursuites peuvent être une cause de tourment pour les médecins qui doivent retenir les services d'avocats, répondre à des accusations, réunir de la paperasse, prendre congé pour témoigner et consulter et se demander ensuite comment les assureurs réagiront au moment du renouvellement de leurs primes, même s'ils sont lavés de toute accusation. Le Texas estime que la médecine défensive pratiquée à cause des craintes de poursuite en justice coûte au moins 702 millions de dollars par année à l'État et que ces dépenses demeureront inévitables aussi longtemps qu'on déposera une poursuite en justice par année par 5,3 médecins dans l'État.

In this area, where lawyers use billboards, television commercials and Yellow Page advertisements to announce their availability to help the "unjustly injured," lawsuits are as common as the rain that sweeps in from the nearby Gulf of Mexico. Almost 75% of them are dismissed without award or settlement, since many are plainly frivolous. However, even these can mean torment for physicians, who have to hire lawyers, answer charges, collect paperwork, take time off work for depositions and consultations, and then worry about how insurers will react the next time premiums are due even if they are cleared.

As a general orthopedic surgeon, Iceton's current malpractice insurance costs \$60 000 (US) a year and covers him for up to \$1 million per occasion — to a maximum of three events. "And that," he adds, "is with an 18-year history of no losses."

The city of Port Arthur, located in Jefferson County, is a breeding ground for medical-liability actions. It is a blue-collar area and many of the nation's costly asbestos-related lawsuits are filed in the county's main city, Beaumont. One lawyer in this area has bankrupted three corporations.

Kent Adams, a personal-injury defence attorney in the county, says that on a given day, one-third of the jury members he faces (or members of their families) will have had their own personal-injury cases before the courts.

Jefferson County is listed by the Texas Medical Association (TMA) as

When orthopedic surgeon John Iceton left Barrie, Ont., 5 years ago for southeast Texas, he didn't think he would be practising in a war zone. Today he is, as doctors and lawyers fire invective at one another and "ambulance chasers" clog the courts with malpractice lawsuits that eventually limit the availability of health services.

It's not what Iceton expected of Port Arthur, a quiet town with about 70 000 residents close to the Louisiana border. And although he soon realized that there was a deep litigious streak in the community, it wasn't until this year that the reality of a lawsuit hit him. For the first time in 18 years of practice, Iceton was being sued — for more than \$1 million. The plaintiff was a man pursuing his "third or fourth personal injury case."

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1 of the state's 11 "war zone" counties because of its number of medical-liability lawsuits — almost one in seven physicians in the county had to deal with at least one malpractice claim in 1992. But as bad as that is, the situation is worse in several other parts of Texas. In Hidalgo, an area near Mexico, almost 30% of physicians were sued at least once in 1992. The situation was almost as bad in Montgomery County, just north of Houston, where 29.3% of the doctors were sued. Even in Harris County, which encompasses Houston and has some of the world's most richly endowed medical services, 14.7% of doctors had at least one claim filed against them in 1992, up 50% from 1988.

Houston has another distinction. According to a national data collec-

tion service, Jury Verdict Research, Houston has seen more million-dollar personal-injury verdicts since 1990 than any other part of the US except Los Angeles and New York City.

In May 1994, when the TMA announced it was listing 11 Texas counties as liability war zones, Dr. Robert Tenery Jr., the president, said "the likelihood of a physician being sued now depends more on where he or she lives and practises than on the quality of care provided." And that, he warned, "is driving many physicians out of certain areas of practice . . . and is taking a tremendous toll on access to health care for many Texans."

Texas is not the only state encountering huge problems — it is not even the leader in terms of the

size of awards and the cost of malpractice insurance. The average premiums for general surgeons in Houston was \$42 000 to \$53 000 in 1994, well below the rate of \$76 000 to \$78 000 in Detroit. For obstetricians-gynecologists, the difference was even greater.

However, the situation has seldom been as volatile as in Texas, where the acrimony is intense and has become a driving force behind tort reform — something that is high on the priority list of the new governor, George W. Bush, son of the former president. "Junk lawsuits drive up the cost of litigation and increase the time it takes for people with real grievances to get justice because their case must compete with frivolous cases for space on crowded

PATIENT ADVOCATES REACT TO MEDICAL MISTAKES

As medical lawsuits rage on in Texas, a group of Florida patient advocates has focused national attention on the need to protect patients from wayward hospitals and doctors.

The Tampa-based Association for Responsible Medicine went into action in the wake of several highly publicized medical "mistakes." In only a few weeks the group generated statewide patient-protection legislation that some experts believe may serve as a national model.

The law would require hospitals to disclose when staff injure or kill patients, and it allows for criminal prosecution. The legislation arrived as courts here were becoming more receptive to penalizing health care providers who cause injury or death.

The situation wasn't helped by some high-profile cases. First came the amputation of the wrong foot of a diabetic patient at the University Community Hospital in Tampa. The patient's diseased foot had to be amputated a few weeks later at another hospital. The patient, Willie King, settled for \$250 000 from the doctor and was negotiating with the hospital.

At the same hospital, one patient died after being mistakenly disconnected from a ventilator and another had arthroscopic surgery on the wrong knee. Florida legislators responded with the Willie King Hospital Safety Act, which calls for criminal prosecution of health care providers who injure a patient during surgery. It also requires hospitals to report publicly their injury rates and risk managers to certify the accuracy of investigations and adverse-incident reports.

The bill is working its way through the legislature. In the meantime, federal regulators have threatened the beleaguered hospital by threatening to pull its Medicare and Medicaid funding unless deficiencies are corrected immediately. For its part, the state has ordered all 326 of the hospital's surgeons and surgical staff to be retrained in safety procedures.

"We know that laws that should have been written to help protect patients are in fact written to protect doctors and hospitals," said Ray McEachern, who founded the Association for Responsible Medicine. "Until Willie King, no one was interested."

As the Florida legislation was being drafted, several other high-profile medical mistakes gained national attention, including the botched breast-cancer chemotherapy given a prominent Boston newspaper medical writer at New York's Sloan-Kettering Memorial Hospital. The writer died.

In New York, a doctor was sent to jail after he mistook a patient's dialysis catheter for a feeding tube. The patient, who had food pumped into her abdomen, died. The physician was charged with reckless endangerment and willful violation of health laws when he left the patient in her nursing home for 10 hours after the incident instead of sending her to hospital, as other doctors had advised. He was sentenced to spend 52 weekends in jail.

The physician's lawyer said his client's life "has been destroyed. This case criminalized the exercise of medical judgement in a way never done before."

Might the Willie King law add momentum to this trend?

FAIRNESS...YES GREED...NO!

Stop Lawsuit Abuse!

Bumperstickers like this are part of the push for tort reform in Texas

court dockets," he wrote prior to his election.

The TMA is seeking a sharp reduction in the number of frivolous or meritless claims, tougher laws against flagrant solicitation of cases by lawyers, filing of affidavits from experts certifying that cases have medical merit and assurance that patients who have valid claims, and not their lawyers, receive most of the money from court awards. Because most lawyers take personal-injury cases on a contingency basis, plaintiffs often end up with the smallest share of awards. The TMA says that two-thirds of all dollars in liability cases go to lawyers.

Although cities like Port Arthur and Houston are listed among the TMA's war zones, the association says the worst lawsuit abuse is found in the southern counties, particularly in the Rio Grande Valley in the towns of McAllen, Harlingen, Brownsville and Rio Grande City. Unfortunately, these are the areas that can least afford to see another practice close or another obstetrician or orthopedic surgeon leave town because of legal fears.

The *Houston Chronicle* reports that in Brownsville, across the river from Mexico, there are 12 general surgeons, and eight of them refuse to take emergency calls. There are two full-time orthopedic surgeons, and one refuses to see any children, including during an emergency, because of the threat of litigation. (The statute of limitations on minors lasts until they are 21.)

The valley is distinguished by its poverty and unemployment, but it is here that large law firms from Houston, San Antonio and even Dallas file their cases. The town of Weslaco, which borders Mexico, is a perfect example of how a community can be held hostage to medical liability. Last year, the family of a woman who underwent knee surgery that resulted in an undiagnosed and lethal blood clot, sued the Knapp Medical Center in Weslaco and won a \$10.1-million award from a sympathetic judge. The hospital, the only one in the mid-Rio Grande Valley, was faced with bankruptcy and closure because it was only self-insured for up to \$2 million. Furthermore, closure of the 200-bed hospital would throw 700 people out of work and deprive the town of 39 000 of a \$15-million payroll.

At this point an advocacy group, Citizens Against Lawsuit Abuse (CALA), stepped in to help mobilize public opinion and fight the hospital's closure. Thanks to the civic outcry, the hospital and plaintiffs came to a \$2-million settlement that allowed the hospital to stay open.

CALA itself has become a prominent force in fighting the litigation fever rampant in many parts of Texas. Jon Opelt, the executive director, likens the cost of lawsuits in Texas to a "hidden tax" that costs each household an average of \$2600, more than twice the national average. He says that 70% of the retail cost of a diphtheria-pertussis-tetanus vaccination (\$11.50) is for liability insurance, as is 33% of the cost of a

doctor's fee for a tonsillectomy.

Travel through the Rio Grande Valley and you will see signs of the war being fought against these costs. CALA has erected billboard after billboard. "Lawsuit Abuse!" says one. "We All Pay, We All Lose." CALA's different messages make an interesting counterpoint to the billboards placed by lawyers. "Justice Comes Only To Those Who Demand It" says one. Another reads: "Accidents Don't Happen. They're Caused."

Kim Ross, director of public affairs for the TMA and its chief lobbyist on tort reform, says it is no secret among many Texas doctors that lawyers pay clerks, orderlies, emergency-room staff and others for "leads." One creative lawyer sends pizzas to hospital personnel, accompanied by his business card.

Dr. Antonio Falcon, a family physician, works in a federally funded health centre in Starr County that provides virtually all obstetrics in the county. Before working there, he and five other FPs were in private practice, delivering about 1000 babies a year.

After 11 years of unchallenged practice, Falcon was sued eight times in 2 years. Seven cases have been resolved with no money paid out, and Falcon has never gone to court. However, he says the experience of being sued is "agonizing." He told CMAJ that "all of us were being driven crazy by the [litigation] madness," and even though the cases were being dismissed he estimates it cost at least \$7000 just to fight each case.

He then announced that he and

his partners would stop practising obstetrics. They gave 10 months' notice to the community to allow patients to make other arrangements. Alarmed by the prospect that this large area would soon be without any obstetric services, the TMA and the Texas Department of Health arranged a contract that allowed Falcon and his partners to practise obstetrics at a federally funded community-health centre. Under this arrangement they could continue doing their deliveries at Starr County Memorial Hospital, but the federal contract would shield them from malpractice liability.

Falcon is pleased with the arrangement, but still hopes tort reform arrives soon. He knows it is going to take more than legislation to change the public attitudes toward lawsuit abuse that are rampant in the area today.

Many patients are indigent and do not hesitate to sue if something goes wrong or doesn't turn out quite the way they hoped. Falcon says some even continue to seek treatment from him during litigation, assuring him the lawsuit is "nothing personal."

Ice-ton, the Canadian expatriate, says law in Texas is a very political affair, as most judges are elected. That is one reason the TMA's Political Action Committee is very active in endorsing candidates and soliciting contributions. One judicial race for the state Supreme Court last year cost \$5 million, mostly contributed by doctors supporting one candidate and trial lawyers supporting another. The candidate supported by the doctors won.

Tommy Jacks, a prominent attorney based in Austin, Tex., does not believe the medical-malpractice situation is necessarily worse in Texas than in other high-profile states, but agrees that interprofessional tensions run high in Texas. He thinks the TMA's decision to designate "war zones" is fair game because the filing of frivolous suits must be discour-

aged. He supports the posting of at least a \$5000 bond by the plaintiff's attorney and the presentation of qualified medical opinion about the validity of the case when a suit is filed. The money would be used to cover the defendant's costs should the suit be dropped or dismissed.

Jacks also favours tighter action against barratry, the persistent incitement of litigation, although there are laws against it, they are rarely enforced. "Prosecutors have their hands full," says Jacks. "They say barratry is not a priority — they see it as a victimless crime."

Yet how victimless is it? A study commissioned by the TMA shows that a doctor can be sued and win his case, but will still pay an average of \$8393 in legal fees while winning. And this does not include income lost while working on the case.

The American Medical Association (AMA) estimates that 17.6% of all medical bills are attributable to liability costs, mostly because of "defensive medicine." The AMA also estimates that for every \$1 spent on insurance premiums, doctors and hospitals spend \$2.70 performing unnecessary tests in an attempt to ward off lawsuits. Texas estimates that defensive medicine costs the state at least \$702 million annually. Of course, such spending is bound to occur when one lawsuit is filed annually for every 5.3 doctors in the state, as was the case in 1992.

Dr. Walter Bobechko, a former chair of orthopedic surgery at the Hospital for Sick Children in Toronto who now practises in Dallas, attributes much of the litigation fever to a breakdown in the doctor-patient relationship. Fortunately, Dallas is not one of the "war zones."

Bobechko, who pays \$28 000 for liability insurance, would pay double that amount if he practised in Houston. He has never been sued, although he has been in Texas more than 8 years, and has served as expert witness for other doctors.

He said many physicians do not want to treat Medicaid (low-income) patients because they fear they will sue, but he has treated many of them. "You have to treat people like people," he says. "I'm paid well enough that I can sit and talk to people as if they were my own relatives. I take time to do that, and I have never been sued."

Falcon agrees patients will rarely sue physicians they know well, but he thinks it is becoming more difficult to develop this type of doctor-patient relationship. And when there are so many incentives to capitalize on the growing isolation between doctor and patient by using a quick-fix court-based "lottery," it becomes tougher still. ■

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