COMMENTARY

The Legal Sting of Pain and Suffering

By Stephen D. Sugarman

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President Bush and Senate Majority Leader Bill Frist want the federal government to impose a limit of $250,000 on what victims of medical malpractice can be awarded for pain and suffering.

They have looked to places such as California, where such a cap has been in place for 30 years, and they have concluded that its doctors and hospitals don't face the same medical malpractice insurance crisis said to exist in states without caps.

But if they were to look a bit further afield — to Europe — they might have second thoughts about their proposal.

Imagine a young woman the age of the president's daughters who suffers from blindness or quadriplegia as a result of a doctor's malpractice. If her case went to trial in the U.S. (in a state with no cap), jurors would be told that in addition to compensation for medical costs, attendant care and lost income, they should add on a further sum for her anticipated lifetime of pain and suffering.

Predicting precisely how much the jury would award for this pain and suffering is impossible because there are no guidelines. Nor are jurors told how much other juries have awarded for similar injuries. The trial judge simply instructs the jurors to provide what they believe is the proper amount, guided by the closing arguments made by the lawyers on both sides, by evidence of what a "day in the life" of this victim is like, and by what they've seen of the victim's condition in the courtroom.

Often the plaintiff's lawyer will emphasize lost pleasures and the negatives associated with incapacity, disfigurement, constant pain and the like. Some lawyers try to have jurors consider how much money *they* would require in order to accept being in the condition of the victim. Studies suggest that the amounts ultimately awarded often turn on the talents of the lawyers, the composition of the jury and such inappropriate factors as the appearance, gender and race of the victim.

Given all the imponderables, it is not surprising that jury verdicts for pain and suffering vary dramatically. On average, studies suggest, an American jury today is likely to award between $3 million and $4 million for pain and suffering to a victim who has become blind or a quadriplegic.

Now consider what would happen in Europe. There, such a sum would be viewed as

dazzlingly large. Not because Europeans believe that a malpractice victim suffering blindness or quadriplegia is "made whole" with a pain-and-suffering award of much less than $3 million. It is rather that they do not see that making a victim "whole" is the proper function of tort law. Instead, they believe that the award should suitably acknowledge the seriousness of the doctor's misconduct and the consequent harm to the victim.

How much is that? European countries vary. In Britain, Italy and Ireland, our young woman would likely receive between $250,000 and $375,000 for pain and suffering. In Denmark, Greece, Portugal and Sweden, she'd more likely get something in the $20,000 to $75,000 range.

Within each of these countries, the amount awarded would be far more predictable than in the U.S. This is because juries are rarely used and because judges in most European countries base their awards on past awards for roughly similar injuries. That makes a lot more sense than our system.

At first, it may look like the Bush-Frist proposal would award victims less than the most generous European countries, but more than the least generous. But here's another difference between our system and theirs: In Europe, malpractice victims not only win pain-and-suffering awards, but the defendant, if he or she loses, also has to pay the victim's legal fees. This is not true in the U.S., where the victim has to pay his or her own legal expenses, which often come to as much as 40% of the victim's total award — not just the pain and suffering portion, but the whole thing. Under the Bush-Frist plan, our quadriplegic or blind young woman would almost always use up not only her full $250,000, but also a whole lot more, to cover her legal bills.

A more sensible reform than what Bush and Frist have proposed would be to set a limit on pain-and-suffering awards of, say, $400,000 (adjusting that number annually for inflation, as they do in Canada) and combine it with a rule that defendants also have to pay victims' legal expenses.

This would make U.S. awards far more predictable and keep them at the high end of wealthy nations, but they would no longer be off the charts. Under the Bush-Frist plan, by contrast, the reductions would be so significant that they would move the U.S. off the charts on the low end.

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