



MEMO

To: MMA Policy Council
From: Teresa Knoedler
Re: Medical Malpractice Tort Reform Open Issue (2014)
Date: October 7, 2015

The Policy Council requested an informational memo on medical malpractice in Minnesota, to better aid its examination of a 2014 Open Issues Forum submission that called for the MMA to lead tort reform measures consistent with policy developed by the American Medical Association. This memorandum will address each pillar of the tort reform requests for action articulated in the open issue submission, and provide information about what relevant law or practice exists in Minnesota. Torts are state-based claims, meaning Minnesota law exclusively governs the process by which medical malpractice claims are adjudicated in Minnesota.

The requests for action in the 2014 open issue submission are:

(1) Medical Expert Witness Testimony: Courts should admit into evidence only expert medical testimony that is shown through a proper legal foundation to be based on (a) widely accepted theories of medical science or (b) theories that are supported by a respectable minority of experts in the field at issue.

(2) Implementation of the "Loser Pays" Rule in Medical Liability Litigation: Responsibility for a prevailing party's legal expenses, including attorney fees, should not be shifted to a losing party in medical liability litigation unless (a) some provision is made for retrieving fees owed to a prevailing party from the losing party's attorney in the event the losing party has no available assets;(b) some provision is made to calculate fees owed to a plaintiff's attorney on the basis of the reasonable value of time expended, regardless of the existence of a contingency fee arrangement;(c) the rule is adopted that no losing party will be required to pay expenses including legal fees that exceed his or her own bill for such goods or services; and (d) other efforts are made as necessary to insure that the "loser pays" disincentive to pursue litigation applies equally to all parties.

(3) Punitive Damages Awards: Punitive damages in medical liability cases should not be awarded unless the party alleging such damages meets the burden of producing clear and convincing evidence of the opposing party's intent to do harm.

Request for action #1: Medical Expert Witness Testimony

This first request addresses the standards applicable to expert witnesses who provide testimony in medical malpractice actions. The request for action states:

Courts should admit into evidence only expert medical testimony that is shown through a proper legal foundation to be based on (a) widely accepted theories of medical science or (b) theories that are supported by a respectable minority of experts in the field at issue.

The Minnesota Rules of Evidence govern generally what evidence may be admitted in a civil trial. The Rules specifically address expert testimony as well as novel scientific theory:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.

In addition, if the opinion involves novel scientific theory, the Minnesota Supreme Court requires that the proponent also establish that the evidence is generally accepted in the relevant scientific community. The rule does not define what is novel, leaving this for resolution by the courts. See, e.g., State v. Klawitter, 518 N.W.2d 577, 578-86 (Minn. 1994) (addressing whether 12-step drug recognition protocol involves novel scientific theory); State v. Hodgson, 512 N.W.2d 95, 98 (Minn. 1994) (ruling that bite-mark analysis does not involve novel scientific theory).¹

Expert testimony is required in order to establish a claim for medical malpractice in Minnesota. Any expert testimony given must be in conformity with the rule of evidence. Also, Minnesota Courts have given extensive guidance on what it means for a medical expert to be “qualified”. In order for a medical witness to be competent to testify as an expert, the witness must have both sufficient scientific knowledge of and practical experience with the subject matter of the offered testimony.² An expert witness in a malpractice case must make a substantial showing of qualification in the particular area necessary to support the claims at issue in the suit, and can’t rest on non-specific or inapplicable credentials.³ This means that a psychiatrist must testify as an expert against a psychiatrist defendant, not a psychologist or an APRN specializing in

¹ Minn. R. Evid. 702

² [Cornfeldt v. Tongen, 262 N.W.2d 684, 692 \(Minn.1977\).](#)

³ [Swanson v. Chatterton, 281 Minn. 129, 140, 160 N.W.2d 662, 669 \(Minn.1968\)](#)

mental health. Similarly, a neuroradiologist whose practice includes (or included) coil embolization must testify against a neuroradiologist who allegedly performed a substandard embolization, not a body radiologist or a neurologist.

Moreover, the qualified expert must establish not only that the care at issue was deficient, but that the care at issue directly caused the alleged injury. This may not be accomplished via broad conclusory statements, but rather through a detailed chain of causation between the care at issue and the claimed injury. ⁴ For example, it would not be sufficient for an expert to testify merely that a delayed diagnosis leads to diminished prognosis, or that a surgical complication caused more pain, for example; the connections must be explicit, direct, and supported by medical evidence. These standards are high and it is common for cases to be dismissed because plaintiffs fail to meet these standards. This high Minnesota standard is functionally equivalent to the standard articulated in the request for action.

Request for Action #2: "Loser Pays" Rule

This action request addresses the issue of which party pays for the fees of the losing party. Some proponents of tort reform argue that if the "loser" pays for the attorney's fees of the prevailing party, litigation would be decreased. Under current law in every state except Alaska, each party is responsible for its own fees. This request for action also addresses "loopholes" in the "loser pays" rule, in particular the common outcome in which the "loser" has few or no assets, and therefore the prevailing party is not able to meaningfully collect.

The "Loser Pays" request for action states:

Responsibility for a prevailing party's legal expenses, including attorney fees, should not be shifted to a losing party in medical liability litigation unless

- (a) some provision is made for retrieving fees owed to a prevailing party from the losing party's attorney in the event the losing party has no available assets;
- (b) some provision is made to calculate fees owed to a plaintiff's attorney on the basis of the reasonable value of time expended, regardless of the existence of a contingency fee arrangement;
- (c) the rule is adopted that no losing party will be required to pay expenses including legal fees that exceed his or her own bill for such goods or services; and
- (d) other efforts are made as necessary to insure that the "loser pays" disincentive to pursue litigation applies equally to all parties.

The American legal system uses the "American Rule" regarding attorney's fees, except in very unusual circumstances. Under this rule, each party is responsible for its own fees, regardless of outcome. This is in contrast to, for example, the British system, in which the loser generally

⁴ [Stroud v. Hennepin County Med. Ctr., 556 N.W.2d 552, 556 \(Minn.1996\)](#)

pays the fees of the prevailing party. The American Rule is the law in Minnesota, and applies to medical malpractice actions. Minnesota's Supreme Court has affirmed that unless there is specific authority in contract or statute, it is improper for Minnesota courts to deviate from the American Rule.⁵

The American Rule reflects a bedrock principle of American jurisprudence, which is that every citizen should have an equal right to and fair access to the legal system. This reflects a uniquely American respect for individual rights, and belief that litigation should take place on an equal playing field. Further, that there should not be undue disincentives or burdens placed on people who want to avail themselves of litigation.⁶ The American Rule is therefore deeply cherished, and traditionally state legislatures are unwilling to alter this paradigm via statute. Furthermore, courts are ill-equipped and loath to get into the business of accounting for attorney's fees, especially given that plaintiff's attorneys generally operate on a contingent fee basis, rather than straight hourly billing. The U.S. Supreme Court has repeatedly expressed its bias against a "loser pays" rule:

Since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing including the fees of their opponents' counsel....Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.⁷

Because of the long history and principles behind the American Rule, it is nearly impossible to get "loser pays" legislation past state legislatures.

Notwithstanding these barriers, Florida was able to pass a "loser pays" law in 1980, with the strong support of its physician community. The results were not as expected, however. While the volume of medical malpractice cases did drop somewhat, the average amount of each medical malpractice verdict rose precipitously. The law did not have the effect physicians hoped it would. In 1985 Florida repealed the law after a massive legislative push by physicians to revert to a traditional American Rule fee system, which has been in place in Florida ever since.⁸

⁵ *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn.1983); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271, 95 S.Ct. 1612, 1628, 44 L.Ed.2d 141 (1975) (declining to invade the legislature's province and award attorney fees without statutory authorization); *Kallok v. Medtronic*, 576 N.W.2d 356 (Minn. 1998).

⁶ 718 Vargo, John F., *The American Rule on Attorney's Fees Allocation: The Injured Person's Access to Justice*, American University Law Review, 1993.

⁷ *Fleishman Distilling Co v. Meyer Brewing Co.*, 386 U.S. 714 (1967).

⁸ <http://www.economist.com/node/21541423>

Request for action #3 Punitive Damages Awards

This request for action addresses the concern that in some states physicians are being subject to punitive damage (which are designed to punish, and are awarded on top of compensatory damages) as opposed to merely compensatory damages (which are intended to compensate the plaintiff for actual harm sustained, generally economic, physical, and emotional harm). The request for action states:

Punitive damages in medical liability cases should not be awarded unless the party alleging such damages meets the burden of producing clear and convincing evidence of the opposing party's intent to do harm.

Minnesota has a punitive damages statute that articulates a high standard for an award of punitive damages, much like the standard in the request for action:

Punitive Damages

(a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.⁹

(emphasis added.) The statute also requires that if punitive damages are sought, they must be examined in a hearing separate from and following a hearing on compensatory damages, so as to avoid muddying a jury's perspective. Finally, the statute allows for a judge to review and modify any punitive damage award, in an effort to place a check on an impassioned or rogue jury. This punitive damage framework is stringent and meaningfully meets the standards articulated in the request for action.

Existing safeguards and other considerations

There are three other commonly-recommended pillars of medical malpractice tort reform that are not mentioned in the open issue, but affect the malpractice climate in Minnesota. These three reforms do not exist in every state.

⁹ Minn. Stat. § 549.20

The first existing safeguard is the affidavit of expert review, also known as a “certificate of merit”. This is a pre-filing screening process that applies only to medical malpractice cases; there is no similar filter for general negligence cases including non-medical personal injury cases (such as car accidents). This statute requires that, before a medical malpractice case may be commenced, the plaintiff’s attorney sign an affidavit attesting that “the facts of the case have been reviewed by the plaintiff’s attorney with an expert whose qualifications provide a reasonable expectation that the expert’s opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff.”¹⁰ This is a high bar to reach, because the only experts who are eligible to provide opinions on the medical care rendered by a physician are similarly-qualified physicians with experience treating the same or similar condition at issue in the lawsuit. That means that in a medical malpractice case alleging negligence as to a cardiologist, radiologist, and pathologist, before the case could be commenced the plaintiff’s attorney must have obtained the review of a similarly-qualified expert in each specialty, each of whom agrees that their peer provided deficient care and that that care was a cause of injury to the plaintiff.

The statute further requires that within 180 days of commencing an action, the plaintiff’s attorney must produce an affidavit containing “the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.”¹¹ The penalty for failing to comply with this statute can be dismissal of the case. It is not uncommon for cases to be dismissed mid-stream because the court discovered that the affidavit of expert review was untimely or procedurally insufficient. This is a very effective control on the volume of medical malpractice cases commenced in Minnesota each year.

The second existing safeguard is a shortened statute of limitations. In Minnesota, general tort claims for negligence may be commenced up until 6 years after the date of the injury. Medical malpractice cases must be filed within 4 years of the date of the allegedly deficient care.¹² This shortened timeline reflects tort reform efforts to keep the window of exposure narrow, and at core is a recognition of the unique professional, underwriting and risk management considerations that attach to an insured professional (in contrast to an insured vehicle, insured company, or insured building, for example). Similarly, wrongful death actions must be commenced within 3 years of death.

The third existing safeguard is the “collateral source rule”, which allows for money a plaintiff has received from other sources (such as worker’s compensation, other insurance, or other

¹⁰ Minn. Stat. § 145.692 (subd.2).

¹¹ Minn. Stat. § 145.682 (subd.3).

¹² Minn. Stat. § 541.076(b).

negligent parties) to be included in the calculation of damages.¹³ This rule prevents the collection of duplicative damages for one injury, and helps to keep total damages down. Minnesota’s version of this rule is applied to all medical malpractice actions. This helps to keep medical malpractice damage awards lower than they otherwise might be, and also disincentivizes plaintiffs from pursuing a claim against a physician where there are other, easier avenues of recovery. This also can help keep premiums down. Collateral source rules are known to help modulate all tort environments, not just medical malpractice, and are a key component of tort reform nationally.

Conclusion

For two of the three requests for action, Minnesota has in place law that meets or exceeds the threshold set by the requests. There is no meaningful room for improvement of Minnesota’s medical malpractice expert witness law or of Minnesota’s punitive damages law. The third request, for a “loser pays” law for medical malpractice, seeks action that is extremely unpopular among legislators and the legal community, not to mention anyone who may ever be a plaintiff in a lawsuit. Further, Florida’s five-year experiment with “loser pays” laws is persuasive evidence that it’s not an effective tort reform mechanism.

Moreover, three key aspects of medical malpractice tort reform already exist in Minnesota: the affidavit of expert review, a shortened statute of limitations, and the collateral source rule. These three safeguards reflect the generally favorable climate in Minnesota. In addition, Minnesota has been recognized second in the nation for its “fair and reasonable litigation environment”.¹⁴ Minnesota premiums are amongst the lowest in the nation¹⁵, and in Minnesota, medical malpractice trials end in a defense verdict over 90% of the time. Within the realm of what is possible and legal, Minnesota already does much of what is right and necessary to protect physicians from meritless litigation. This in turn has created a welcoming environment in which premiums are low, litigation volume is low, and doctors almost always win.

¹³ Minn. Stat. § 548.251.

¹⁴ <http://archive.leg.state.mn.us/docs/2010/mandated/100188.pdf>

¹⁵ <http://epmonthly.com/article/the-medical-malpractice-rundown-a-state-by-state-report-card/>