

In late 2003, 41-year-old Kimberly Nell Robinson died after surgery to fix a hernia. During the operation, doctors also confirmed uterine cancer, a condition that was suspected but went untreated for months despite continued internal bleeding.

Her mother, Linda Jo Robinson of Rison, Ark., wants to know why doctors failed to act on her daughter's cancer symptoms and why they did not adequately monitor the drugs given to prevent the bleeding and clotting that ultimately caused her daughter's death.

A licensed practical nurse for 25 years, Robinson has been trying to get redress through the courts for what she believes is a string of medical mistakes that killed her daughter. She contacted 62 lawyers, but none would take her case. Of her pending cases in three suits, she is representing herself in two of them and awaiting a court-appointed lawyer in the third.

Robinson has run smack into Arkansas' malpractice tort reform law, passed in 2003. Some lawyers told her, she says, that her case wouldn't result in a jury award large enough to make the suit worthwhile. Arkansas' law limits noneconomic damages—awards that compensate for pain and suffering—to \$250,000. And damages are awarded only if a lawyer can prove malicious intent or recklessness by the doctor, which is very difficult to do.

Malpractice reform is a hot-button issue, with more than 400 state bills introduced—and 63 passed—in 2005. According to the National Conference of State Legislatures, 32 states passed reforms, some limiting an injured person's ability to sue and some capping damage awards. This year, many states are considering limits on doctors' malpractice premiums and alternatives to malpractice litigation.

President Bush has also called on Congress to tackle tort reform. The House has passed legislation capping damages at \$250,000 three times since 2002, but the Senate has failed to enact it.

Despite the calls for reform, malprac-



Righting Wrongs

The truth about medical malpractice and the law By Trudy Lieberman

tice lawsuits filed have increased only slightly over the years. A survey of 17 states conducted from 1998 to 2002 found the number rose from 12,321 to 13,091, according to the National Center of State Courts. Another study published in the journal *Health Affairs* reported that from 1991 to 2003 payments in such suits grew 4 percent a year, consistent with increases in health care spending.

Even so, says AARP policy director John Rother, "what the country needs is a compensation system that is speedy, fair, inexpensive and promotes health care quality. The current sys-

tem fails on all those counts. Caps on awards just make it worse."

Malpractice reform—and caps in particular—is highly contentious. On the one hand, doctors, insurance companies and other business interests want reforms to shield them from the high cost of lawsuits. They say high jury awards are leading to big increases in malpractice premiums that are forcing doctors to curtail services or move to other states.

On the other side, trial lawyers and patient advocate groups say going to court is the only recourse for people

harmed by the health system. They claim that caps on jury awards penalize people with serious injuries, who may not be adequately compensated, and retirees and others with low incomes like Linda Jo Robinson, who may not get to court because lawyers think their cases won't pay off. Without access to courts, injured patients or their families often have nowhere to turn, since doctors usually don't come forward with their mistakes, and state medical boards typically protect them.

"The vast majority of people who suffer never get compensated for their injuries," says David Studdert, an associate professor at the Harvard School of Public Health.

For those who do manage to enter the legal system, the process can be slow, unpleasant and costly. It can take five years or longer for a case to wind through the courts, and in the end most cases are decided in favor of providers, not patients. One Harvard study of 30,000 hospital discharges in New York state found that only 3 percent of some 300 patients injured because of medical negligence were compensated.

Many people file cases simply to learn what happened to their loved ones. California resident Michelle Geyer wanted to know why her 7-year-old daughter, Jessie, died in 2004 after a hospital near San Francisco failed to do a blood culture that would have revealed a bacterial infection treatable with antibiotics. Because of the state's cap on payouts, it was hard for Geyer to find a lawyer. "Money was not even in my mind," she says. "The only way I could get information was through a lawsuit." The trial is set for summer.

Patients need accountability and candor from health professionals, but those goals can get lost in the debate between lawyers and doctors. "Both sides are partly right and partly wrong," says Randall Bovbjerg, a researcher at the Urban Institute, a nonprofit organization in Washington. "Both sides exaggerate."

Where does the truth lie? Here are some myths and facts:



WHAT THE DOCTORS SAY

MYTH: Jackpot verdicts are raising malpractice premiums, forcing physicians to flee to states with caps. "We are being sued at a rate that's unimaginable," an obstetrician told a gathering at the Manhattan Institute, a research group in New York and proponent of malpractice reform.

FACT: There's no evidence of widespread flight of doctors to other states. The U.S. Government Accountability Office (GAO) examined five states claiming a malpractice "crisis" and found just localized decreases in hospital services, often in rural areas that have trouble keeping such services. Harvard's Studdert adds that studies show that caps on awards do not lower frequency of lawsuits and may reduce premiums just slightly.

MYTH: Frivolous lawsuits jam the courts and result in excessive jury awards.

FACT: Most suits are withdrawn before they get to court. Eighty percent of the cases with a jury verdict result in no payment for those injured or their families.

MYTH: Malpractice lawsuits cause doctors' premiums to go up, making health care unaffordable for many people.

FACT: The real reason for health care inflation is costly new technology. New treatments and tests may be used before there is evidence that they are necessary, resulting in wasted health care dollars. Since premiums account for only about 2 percent of total health care spending, the GAO says, national health costs in general would drop by only 0.4 to 0.5 percent if caps and other proposed federal reforms were passed. Even though doctors claim that lawsuits cause them to do extra tests and practice defensive medicine, Timothy Jost, a professor at Washington and Lee University School of Law, says he has not seen any evidence of defensive medicine as a huge problem. "The incentives are to do

more. Doctors are paid to do more."

WHAT THE LAWYERS SAY

MYTH: The rise in malpractice premiums is largely the result of what's called the insurance cycle: Premiums go down when the stock market and investment earnings go up; when the stock market and earnings drop, premiums rise. "What's causing the rate hikes has nothing to do with the legal system," says Joanne Doroshov, executive director of the Center for Justice and Democracy, a consumer advocacy group based in New York.

FACT: That's not entirely true. One GAO study found that other factors, such as how aggressive lawyers are in a particular region, may also affect the cost of premiums. The GAO said that in Miami, for example, one insurer quoted a malpractice premium rate of \$174,300 for general surgeons, 17 times higher than the \$10,140 rate the insurer quoted in Minnesota.

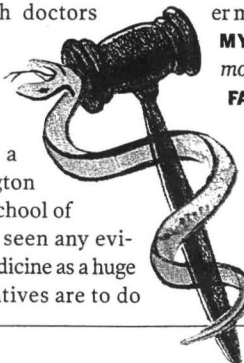
One health policy expert says certain cultural traits—such as income inequality and lack of community support—probably affect the volume of medical errors and malpractice lawsuits in a given area.

MYTH: A legal system that penalizes doctors for negligence fosters safer medical care.

FACT: The system does little to make health care safer. In the 1980s, anesthesiologists, once the target of frequent negligence suits, did adopt national safety standards that have reduced deaths and injuries and resulted in fewer lawsuits. But the threat of litigation has failed to prompt a similar response among other medical specialty groups.

MYTH: A few bad doctors cause most malpractice suits.

FACT: While a few doctors attract more than their share of lawsuits, they do not account for most of the suits or most of the injuries, say patient safety experts. In 1999 the Institute of Medicine reported that medical mistakes in hospi-



What You Can Do

If you or a family member is injured in the health care system, here are steps you can take:

- Collect your medical records as quickly as possible. Once a medical error occurs, record alteration can become a problem.
- Make an appointment with the doctors, the hospital CEO or nursing home administrator to discuss what happened and why. They may be cooperative, especially if they are participating in "apology" programs in which providers are candid about what went wrong.
- If you don't get a satisfactory response or the promise of compensation, you may want to contact a lawyer who specializes in malpractice. Be aware that you may be turned down unless the lawyer believes the case could be financially worthwhile. This is especially true if you are older or disabled, have little or no economic loss or live in

a state that has capped non-economic damages.

Or you can file a complaint with the appropriate regulatory agencies.

- For doctors, contact the state licensing board.
- For hospitals, the state health department and the Joint Commission on Accreditation of Health Care Organizations (JCAHO) may investigate your complaint. Go online at www.jcaho.org and click on "Report a Complaint About a Health Care Organization."
- For nursing homes, contact the state health department's agency that licenses nursing homes and conducts state inspection surveys.
- For Medicare, contact the quality improvement organization for your state. Go online to www.medqic.org and click on "QIO Listings."

tals cause as many as 98,000 deaths a year, and most are caused by health system failures, not the occasional bad doctor. There's no evidence that stopping bad doctors from practicing will substantially reduce malpractice premiums or, for that matter, make medical care safer.

THE REAL PROBLEM

Many neutral experts who have studied malpractice reform say caps on awards are a Band-Aid on deeper wounds: an inherently unsafe health system, where too many preventable deaths and injuries occur, and a flawed compensation program for its victims. But there are other ways to help make the system safer and more workable for patients.

They range from more attention to

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medical discipline and "apology" or "sorry works" programs where doctors admit their mistakes and patients receive compensation, to special courts devoted entirely to medical cases, to automatic payment programs for avoidable events in which disputes are resolved via mediation and arbitration.

But these proposals—which may result in more equitable and faster compensation—are stuck in the rhetorical stalemate perpetuated by doctors and lawyers. "They have been discussed in the law journals for years," says Robert Berenson, M.D., a senior fellow at the Urban Institute. "What we need is a raising of consciousness for these ideas." ■

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