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The Impact of SB 33—Four Years of "Malpractice Reform"

by Burton Craige

October 1, 2015 marks the four-year anniversary of SB 33, North Carolina's radical experiment with "malpractice reform." The anniversary is a fitting moment to assess the impact of the legislation.

Decrease in Number of Malpractice Lawsuits

As October 1, 2011 approached, patients' attorneys rushed to file suit before the effective date of SB 33. The dramatic spike in malpractice case filings in September 2011 drained the inventory of cases under evaluation, artificially depressing the number of suits filed in the ensuing months. In 2012 and 2013, it was difficult to determine whether the decrease was a temporary artifact of the September 2011 surge or a permanent readjustment to the post-SB 33 regime. Now, four years after the effective date, the effect is clear: SB 33 has reduced the number of malpractice lawsuits by 35 to 40 percent.

Based on data compiled by the Administrative Office of the Courts, in the five years from 2006 through 2010, the average annual number of malpractice suits filed in North Carolina was 477, or about 40 per month. After the volatile period surrounding the effective date of SB 33, the rate of malpractice filings stabilized in 2013. From January 2013 through June 2015, the rate has remained steady at about 25 malpractice filings per month, or 300 per year. That figure is 62.5 percent of the average from 2006 to 2010.

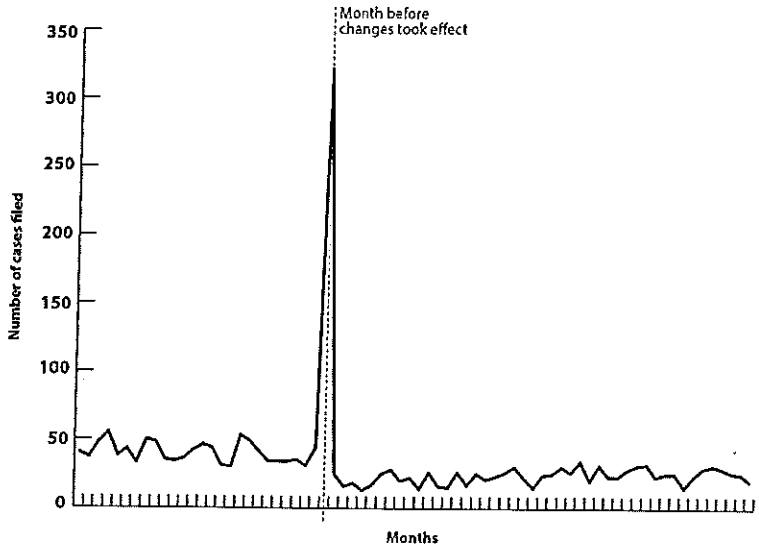
The 300 malpractice suits filed annually represent a tiny fraction of patients harmed by medical negligence in North Carolina. A 2010 report by the New England Journal of Medicine indicates that 4,000 patients die and 5,700 patients are permanently injured every year in North Carolina hospitals because of preventable medical errors.[1] After SB 33, only one out of every 30 malpractice victims files a lawsuit.

The most obvious explanation for the sharp drop in case filings since 2011 is the $500,000 cap on "noneconomic damages"—the legislative euphemism for pain, suffering, and disfigurement. The impact of the cap falls disproportionately on patients with minimal wage losses, including children, homemakers, the disabled, and the elderly. When the cap is added to the expense and risk of pursuing any malpractice case, lawyers are compelled to reject many meritorious claims with low economic damages.

The drop in malpractice filings post-SB 33 continues a trend that preceded the advent of "malpractice reform" in 2011. From 1998 through 2005, 611 malpractice lawsuits were filed annually in North Carolina. From 2006 through 2010, the annual average dropped 22 percent, without any legislative intervention. The costly wars of attrition waged by liability insurers caused plaintiff's attorneys to become more selective about cases they could afford to pursue.

The combined impact of the sharp decreases in filings that

Medical malpractice lawsuits filed between July 2009 and June 2015 (Chart 1)



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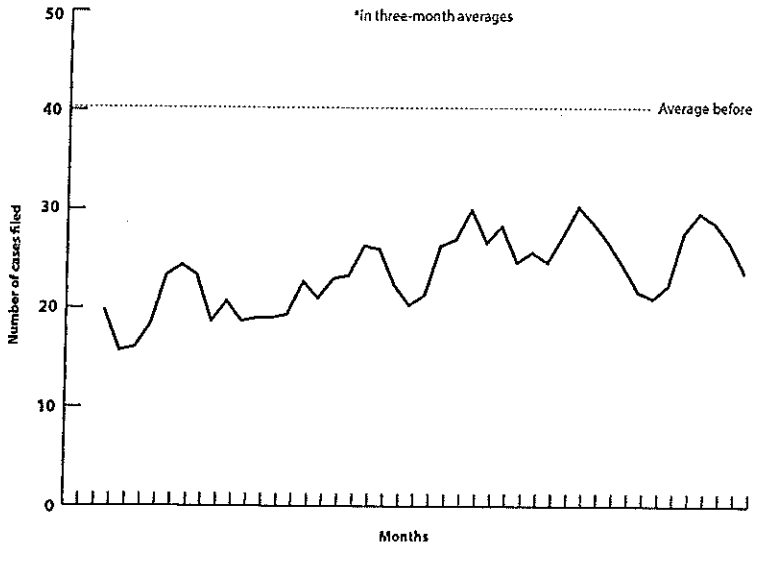
Lawsuits filed since December 2011 (Chart 2)



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occurred before SB 33 and after SB 33 has dramatically reduced access to courts for patients injured by medical negligence. In the 11 years from 2004 to 2014, while the population of North Carolina grew by 16 percent, the rate of malpractice filings fell by more than 50 percent.

The Changing of the Guard

Several malpractice lawyers expressed surprise to me that the AOC data show "only" a 35 to 40 percent drop in case filings since 2011. For many experienced malpractice attorneys, the decrease has been much more pronounced. A malpractice lawyer with a statewide reputation filed 11 malpractice suits in September 2011, but only three in the ensuing four years. A major plaintiffs' firm that filed 20 malpractice cases in September 2011 has filed only three since then. Another prominent firm reported 12 filings in September 2011 and four during the next four years. A firm in the Triangle with decades of success in medical negligence cases reported filing only one malpractice suit since 2011. A veteran leader in the plaintiffs' bar reported filing one malpractice case since 2011, and told me "We are essentially out of the med mal business since the bill passed."

The pattern is not universal. Two eminent malpractice lawyers, each with more than 30 years of experience, reported filing suits at about the same rate pre- and post-SB 33, and obtaining favorable verdicts and settlements.

As some traditional leaders wind down their malpractice work, others are stepping up to fill the gap. Several lawyers in mid-career told me that, since 2011, they are receiving far more inquiries from potential malpractice clients, many of whom were turned away by more established firms, and have a bigger caseload than before. The accelerated emergence of a new generation of malpractice lawyers is an unintended consequence of SB 33.

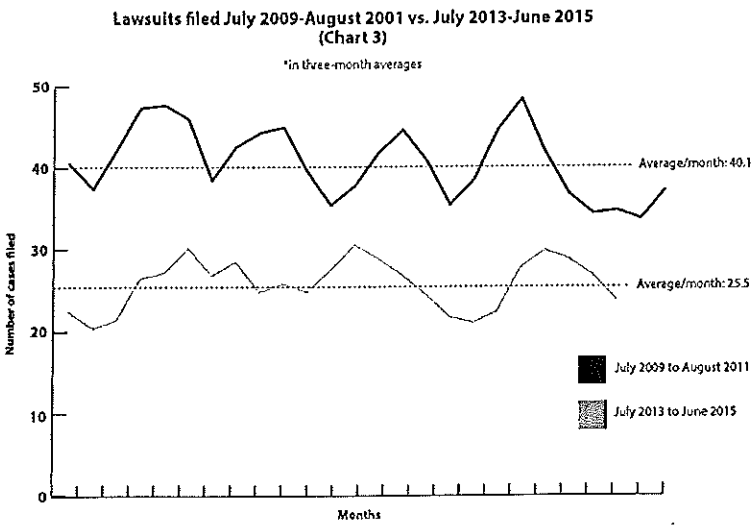
The learning curve for malpractice litigation is steep, and poor case selection can ruin a small firm. But young lawyers who seek guidance from their colleagues, exercise good judgment in choosing their cases, and fight passionately for each client will be able to survive in the post-SB 33 environment.

Reducing the Impact of "Malpractice Reform"

Lawyers who represent malpractice victims should take three steps to minimize the impact of "malpractice reform." First, do not reject a case simply because it arises in a hospital Emergency Department. Second, in settlement negotiations obtain full value for your constitutional challenge to the cap on noneconomic damages. Third, challenge the constitutionality of Rule 414 ("bill v. paid"), and seek an early ruling on the constitutional issue by a three-judge panel.

"Emergency Medical Condition," not "Emergency Department"

Four years after the effective date of SB 33, many lawyers do not understand the "emergency medical condition" provision



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of SB 33, mistakenly believing that the statute establishes a heightened burden of proof for all claims arising in the Emergency Department. As a result, they tell me: "I have stopped taking ER cases." In fact, *the location of the care is irrelevant.*

N.C. Gen. Stat. § 90-21.12 provides:

> (b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term "emergency medical condition" is defined in 42 U.S.C. § 1395dd(e)(1)(A), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence.

In *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387-88 (2006), the North Carolina Supreme Court interpreted the identical definition in a federal Medicaid statute:

> [W]hen determining whether a condition is an emergency medical condition, the key words are "emergency," "acute," "manifest," and "immediate." . . . "[T]he statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe and short-lived physical injuries or illnesses that require immediate treatment to prevent further harm." . . . The word "immediate" is commonly defined as: "occurring, acting, or accomplished without loss of time: made or done at once: INSTANT." *Webster's Third New International Dictionary* 1129 (16th ed. 1971).

Following *Diaz*, our courts must confine the heightened burden of proof to those rare situations in which "*instant*" action was required to prevent serious harm. The statute applies to few claims that arise in an ER, a place where four-hour waits are routine and the need for "instant" action is the rare exception.

Properly interpreted, the "emergency medical condition" provision should have a minimal impact on case selection. Even before the enactment of SB 33, experienced malpractice lawyers avoided taking cases that hinged on erroneous judgments made in true emergencies under acute time pressure. If the window of decision is measured in seconds rather than minutes, the plaintiff was bound to lose, regardless of the judge's instruction about the burden of proof.

Constitutional Challenge to the Cap – Do Not Undervalue Your Case

In early 2011, former Chief Justice Lake warned the legislature that a cap on noneconomic damages would violate the right to trial by jury, guaranteed by Article I, Section 25 of the North Carolina Constitution. After reviewing the controlling precedents, Justice Lake concluded:

> North Carolina citizens have a "sacred and inviolable" right to have a jury determine the amount of compensatory damages, including noneconomic damages, under our Constitution. The right to have a jury make that decision cannot be eliminated or restricted by the General Assembly.

Former Justice Edward Thomas Brady submitted a letter supporting Chief Justice Lake's analysis. Justice Brady's letter commands particular attention because he authored the unanimous Supreme Court opinion in *Rhyne v. K-Mart*, 358 N.C. 160, 594 S.E.2d 1 (2004). The *Rhyne* Court explicitly recognized that a jury's award of compensatory damages is a vested property right, protected by the North Carolina Constitution.

Ignoring the views of Chief Justice Lake and Justice Brady, the General Assembly enacted a cap on damages that is plainly unconstitutional, and imposed the cap on all cases filed on or after October 1, 2011, even if the case arose before the effective date of SB 33.

Since October 1, 2011, most NCAJ members have included in their malpractice complaints a paragraph challenging the constitutionality of the cap. So far, no trial or appellate court has ruled on the constitutional issue. Three factors delay judicial review:

1. The issue only becomes ripe when the plaintiff obtains a verdict for noneconomic damages in excess of $500,000. Few malpractice cases go to trial, and most trials result in defense verdicts.
2. Following the "tort reform" playbook, the architects of SB 33 amended Rule 42(b) to provide for separate trials of liability and damages. But bifurcation has risks and

consequences for both parties. A verdict for the plaintiff on liability creates strong leverage to obtain a favorable settlement before the jury considers the issue of damages.

3. The plaintiff's leverage in settlement negotiations after a favorable liability verdict is fortified by the vulnerability of the cap to a constitutional challenge. While they will never admit it, defense counsel and insurance carriers know that Chief Justice Lake is right. They do not want to have their name attached to the case that strikes down the cap. To avoid that distinction, most will pay close to full value in settlement after the plaintiff prevails on liability.

When an insurance carrier finally chooses to roll the dice, the jury returns a verdict for noneconomic damages in excess of the cap, and the trial judge reduces the verdict to $500,000, the constitutional issue will be squarely presented. The path to the Supreme Court will depend on when the case was filed.

Cases filed before September 1, 2014 will follow the traditional appellate route: entry of judgment by the trial court followed by cross notices of appeal to the Court of Appeals. Given the importance of the constitutional issue, the Supreme Court may grant a petition to bypass the Court of Appeals.

In 2014, the General Assembly enacted a statute providing that all facial challenges to the validity of a statute must be heard by a three-judge panel appointed by the Chief Justice of the Supreme Court. N.C. Gen. Stat. 1-267.1(b2). The statute applies to any claim filed on or after September 1, 2014.[2]

New Rule 42(b)(4) of the Rules of Civil Procedure prescribes the procedure at the trial court level. If a facial challenge is raised,

> the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case.

If the three-judge court determines that the statute is facially invalid, the party seeking to uphold the statute has an appeal of right to the Supreme Court. N.C. Gen. Stat. 7A-27(a1). If the three-judge court upholds the validity of the challenged statute, the trial court will reduce the verdict for noneconomic damages to $500,000 and enter judgment for that amount. At that point, either or both parties would file notice of appeal to the Court of Appeals.

It will be years before the Supreme Court rules on the cap's constitutionality. In the meantime, plaintiffs' lawyers should not give the cap more weight than it deserves. When considering whether to take a strong malpractice case with low economic damages, or to accept a settlement offer that undervalues the client's losses, the lawyer should keep two things in mind: 1) the cap is unconstitutional; 2) the other side wants to avoid a judicial ruling. Heed the advice of Chuck Monnett: "until an appellate court says the cap is valid, there is no cap."

Constitutional Challenge to Rule 414 – Full Steam Ahead

In 2011, as part of its comprehensive "tort reform" bill, the legislature imposed new restrictions on evidence of medical expenses, adversely affecting malpractice plaintiffs with serious injuries. New Rule 414 limits evidence of past medical expenses to "the amounts actually paid to satisfy the bills" and "the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied."

The legislation violates the North Carolina Constitution. While Article IV, § 13(2) gives the General Assembly the power to make rules for the trial courts, it also sets limits on that power: "*No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury.*" As discussed in the previous section, the "sacred and inviolable" right to trial by jury encompasses the jury's determination of the amount of compensatory damages.

The amount of reasonable medical expenses is a key element of compensatory damages that must be determined by the jury. By limiting the evidence of medical expenses to the amount paid, the legislature has adopted a "rule of procedure" that unconstitutionally "abridge[s] substantive rights" and "limit[s] the right of trial by jury," in violation of Article IV, § 13(2) and Article I, § 25.

In all personal injury cases filed since the effective date, we have encouraged NCAJ members to include a constitutional challenge to Rule 414 in the complaint. For cases filed after September 1, 2014, Rule 414 is primed for expedited review by a three-judge panel. Because the rule directly affects the evidence that can be presented to the jury, a determination of the validity of Rule 414 must be made before trial. To avoid a delay of the trial, the issue should be raised early in the litigation, soon after the court has considered and rejected any motions to dismiss. No purpose would be served by waiting until the eve of trial to send the constitutional issue to the three-judge panel.

When the issue of Rule 414's validity is transferred to the three-judge court, the originating court is free to proceed with other matters in the case that do not hinge on the outcome of the constitutional challenge. Rule 42(b)(4) provides:

> The court in which an action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity and shall *stay all matters that are contingent upon the outcome of the challenge to the act's validity* pending a ruling on that challenge and until all appeal rights are exhausted.

The most efficient procedure, consistent with Rule 42(b)(4), would be for the trial court to transfer the constitutional challenge to Rule 414 to the three-judge panel at the earliest opportunity, and permit the parties to pursue discovery and otherwise prepare for trial. If the court follows that procedure, the case should be ready for trial as soon as the constitutional challenge is resolved.

The new statutory provisions provide a roadmap for the plaintiff's attorney who seeks to challenge the constitutionality of Rule 414. Early in the litigation, file a motion asking the trial court to transfer the constitutional issue to a three-judge court without staying the remainder of the case. If the three-judge panel rules in plaintiff's favor, defend the ruling in the Supreme Court. If the three-judge panel rejects the constitutional challenge, preserve the issue at trial for appellate review.

Of course most plaintiffs want an early resolution of their claim. Most will be daunted by the prospect of a "detour" to a three-judge panel and an appeal to the Supreme Court on a novel issue of constitutional law.

Despite these reservations, some plaintiffs will understand that the benefits of pursuing the constitutional challenge may outweigh the costs. Most significantly, *a well-litigated challenge to the validity of Rule 414 will increase the settlement value of the case.* No insurance company—and no insurance defense lawyer—wants to be responsible for a ruling that Rule 414 is unconstitutional. When the amount billed is far greater than the amount paid, a vigorous constitutional challenge provides leverage for a settlement based on the full amount of the bill.

Most lawyers have never litigated a constitutional issue, many have never filed an appeal, and few have argued in the North Carolina Supreme Court. No NCAJ member has ever appeared before a three-judge panel under new G.S. 1-267.1(b2). Almost all are fully occupied with their current practice. For these reasons, NCAJ will provide members with free legal assistance in carefully selected cases to challenge the constitutionality of Rule 414, all the way from the trial level to the three-judge panel to the Supreme Court.

Conclusion

Every year, thousands of North Carolina patients are seriously injured because of medical negligence. The anti-patient legislation enacted in 2011 has made it more difficult for victims of malpractice to obtain access to the courts. Despite the obstacles created by misguided "malpractice reform," lawyers who adapt to the new environment will be able to provide injured patients the excellent representation they deserve. ♦

1. Landrigan, Temporal Trends in Rates of Patient Harm Resulting from Medical Care, N Engl J Med 2010; 363:2124-34; Bryan and Craige, Harmed in the Hospital, *Raleigh News & Observer* (January 20, 2011).
2. Session Law 2014-100, Section 18B.16(f).