

THE CASE FOR MANDATORY MEDICAL MALPRACTICE INSURANCE*

Believe it or not, New York State does not mandate that physicians and hospitals carry medical malpractice insurance coverage (hereinafter referred to as MPL meaning medical professional liability). However, the overwhelming number of physicians and hospitals have MPL coverage. Typically, hospitals as part of their credentialing process require physicians to have MPL coverage in order for them to obtain hospital privileges. Nevertheless, there are several major hospitals in the greater metropolitan area that are self-insured and do not have adequate reserves set aside to pay malpractice claims. Witness for example Jamaica Hospital, Wykoff Heights and Kingsbrook Jewish where malpractice settlements were often made below case value and paid out over years. Further, many medical practitioners who are not affiliated with any hospitals do not have any MPL coverage imperiling their patients ability to recover any compensation for serious injuries and damages caused by their negligence.

On the positive side New York State does require that those physicians who were disciplined by the Medical Board of Professional Misconduct and are being monitored carry a minimum of \$2 million coverage per claim and \$6 million aggregate coverage per year. These physicians who are in the minority are often each responsible for multiple malpractice claims. For example, in 2019 New York State had 75,000 licensed doctors and in 2017 approximately 1400 (or about 2%) were on probation but not required to disclose this information to patients. The vast majority of physicians have MPL coverage as a required condition of granting their hospital privileges. The MPL policies covered by insurance companies provide coverage of either \$1 million or \$1.3 million per occurrence and \$3 million or \$3.9 million aggregate for any given policy year. A physician in good standing with hospital privileges may be entitled to receive an additional premium free layer of \$1 million excess coverage through the Hospital and insurer if the physician has taken qualified risk management training.

The big problem in New York State is that the MPL coverage limits provided through hospitals and insurers has basically remained the same since the beginning of medical malpractice insurance in 1975. This has

significantly impaired the ability of seriously injured patients and their families in the event of patient's wrongful death to receive full and fair compensation for their damages. The Institutes of Medicine in a leading study published over 20 years ago entitled "To ERR Is Human" estimated that between 44,000 to 98,000 patients are killed in hospitals each year due to preventable medical errors. More recent studies and data by credible institutions including John Hopkins have estimated preventable medical errors including misdiagnosis of patients causing injury or death to number up to 444,000 per year. According to data available from The National Practitioner Data Bank (NPDB) which receives notice of all claims and payments on behalf of physicians in the United States these errors predominately involved diagnosis 31.8%, surgery 29.6% and medications 24.5%. It is estimated that preventable medical errors have cost the nation \$17-29 billion dollars each year in costs and lost productivity. According to the Department of Labor (DOL) over the past 45 years the cost of health care in the United States has shot up from representing 6.9% of Gross Domestic Product (GDP) in the 1970's to 17.7% of GDP in 2019 totaling \$3.8 trillion dollars. The cost of private health insurance alone represents 31.5% of health care spending. Public spending on health care costs including Medicare and Medicaid comprises 45% or \$1.7 trillion dollars.

The cost of health care is also compounded by medical inflation which according to DOL statistics has averaged around 2.9% per year over the past 45 years. The past year has seen a dramatic increase in inflation of about 5%. In fact, you would need \$1.59 today to purchase what a \$1 purchased in 2000. This means that a seriously injured patient today will typically incur huge hospital and medical costs which may continue over a lifetime. . Even assuming such costs are substantially covered by private and public health insurance including Medicare and Medicaid these plans assert claims / liens for monies paid out against a patient's lawsuit settlement or recovery which amounts must be satisfied and paid back from the patient's recovery. These health insurance plans ride on the coattails of their insureds and without incurring any of the substantial risks and expenses of litigation. The costs of medical care and treatment past and future over a lifetime often well exceeds \$1 million dollars for a permanently injured adult or child. Reimbursement of third-party health care claims / liens often impede a patient's malpractice recovery as the MPL coverage is not

adequate to compensate the permanently injured patient for all damages caused by the malpractice including pain and suffering. In the case of wrongful death of a working adult or spouse with young dependent children the \$1.3 million primary MPL coverage may be inadequate to fairly compensate for the economic losses suffered by survivors. Moreover, practically speaking there is usually no recovery against a physician's personal assets beyond the MPL insurance coverage. Attorneys most often choose not to pursue chasing after a physician's personal assets as this course is expensive and usually not fruitful. In reality this means that the malpractice insurance coverage acts as a ceiling beyond which the patient or survivors will not recover any compensation for their damages.

Will New York State mandating increased medical malpractice coverage limits cause a financial burden on insurers? The simple answer is no. The medical malpractice insurance industry has been very profitable over the past 10 years. In 2018 Politico reports that New York State has a brisk market of over \$1 billion in premium dollars. This was the largest market in the Country as New York State has more licensed doctors than any other State. As of 2016 there were 6 admitted New York companies and 63 Risk Retention Groups (RRG) with 12 more entering the market. The RRGs typically charge lower premiums to physicians as they are not subject to New York State Insurance regulations and do not have to participate in the State Guaranty Fund which protects doctors and patients in the event a licensed company were to go out of business. As of 2018, Medical Liability Mutual Insurance Company (MLMIC), the State's largest insurer insuring over 13,000 physicians and a subsidiary of Berkshire Hathaway reported assets exceeding \$5.8 billion with \$3.3 billion in liabilities leaving a policy surplus of \$2.5 billion. In 2014 alone MLMIC investment of premiums yielded over \$279 million in income. In 2015 MLMIC collected \$411 million in premiums. In fact, MLMIC is proud to report on its website that during its 44-year history it has paid out over \$500 million in dividends to its physicians. In 2021 The Doctors Company, which recently acquired the Hospital Insurance Company, the Country's largest physician owned malpractice insurer in the United States with over 80,000 members and licensed in New York State reports over \$6.2 billion in assets and a \$2.3 billion surplus. It has reported collecting over \$1.1 billion in premiums and \$936 million earnings on investments. Both MLMIC and The Doctors Company are rated A or better in financial strength by AM Best.

New York's leading medical malpractice insurers have done very well with their investments of premium dollars in the equity markets earning \$100's of millions of dollars each year. Moreover, their profitability is also enhanced by a steady decline in the number of medical malpractice payouts to injured patients and their families over the past 16 years. This is supported by data published by the National Practitioner Data Bank (NPDB) which reports nationally and by state all medical malpractice claims and payouts against physicians for patient's injuries and deaths. The data for New York State shows that in 2004 there were 2,413 payouts totaling \$835 million. The annual number of payouts and total amounts paid have for the most part have steadily declined over the ensuing 16 years. Most recently in 2019, 2020 and 2021 (through June 30th this year) there were 1,722, 1,423 and 368 payouts respectively. This has corresponded to total amounts paid out of \$676 million, \$602 million and \$148 million respectively. Obviously, part of the recent decline is due to the slowdown in court proceedings caused by the COVID pandemic. However, the overall decline in physician medical malpractice payouts in New York coupled with a favorable stock market over the past 16 years has made MPL insurance companies very rich.

Unfortunately for physicians the high profits earned by New York's medical malpractice insurers has not translated into significant reductions in malpractice premiums. MPL insurers keep raising premiums which amounts to price gouging their physicians who pay the highest premiums in the country. Physicians should lobby their carriers to reduce premiums and not be misled into making false claims of a medical malpractice insurance crises which simply does not exist. New York's physicians should be entitled to reductions or credit toward their premiums based in part on the profitability of investment income on premiums. Further, physicians' incomes have gradually increased over time. This should not be used by insurers as an excuse to increase premiums. Moreover, insurers and physicians should place the most focus on implementing a culture of patient safety to help improve medicine and reduce the huge number of preventable medical errors. In actuality, by implementing and enforcing patient safety measures, thereby reducing the incidence of malpractice, is the most effective way of lowering malpractice payouts, costs and premiums over time.

When preventable medical errors occur, patients and their families need to be fully and fairly compensated for their injuries and damages.

The damages often include a lifetime of pain and suffering and economic losses including past and future lost earnings and medical costs. For seriously injured adults and children a lifetime of pain and suffering and economic losses often add up to many millions of dollars. The death of a loved one often results in substantial financial losses to spouse and minor children. The simple truth is that the existing medical malpractice insurance coverage limits per claim have been in existence for the past 45 years and are inadequate to cover the substantial losses and damages suffered by the most seriously injured patients and their survivors. The coverage limits have been eroded over time due to large increases in the cost of medical care and inflation reducing the dollar value of goods and services. Most of us have experienced this first hand when we examine our hospital bills and explanation of benefits provided by health insurance companies as well as Medicare and Medicaid. Many private health insurers as well as Medicare and Medicaid are entitled to be paid back from a patient's net recovery. This imposes a heavy burden on injured patients and their attorneys who are responsible for satisfying medical claims / liens against their recovery. All the risk and financial burden is wrongly shifted to the patient. When a preventable medical error injures a patient by a doctor who has no malpractice insurance this usually leaves the patient with no recovery as attorneys cannot successfully prosecute a case with no likelihood of recovery against a doctor's personal assets. It's time for the legislature to act and mandate adequate medical malpractice coverage limits for all New York doctors and hospitals.

If you have experienced a serious injury at the hands of medical providers call our experienced team at Duffy & Duffy, PLLC 516-394-4200 for a free initial consultation with one of our attorneys or staff. We are dedicated to protecting your rights and holding wrongdoers accountable for injuries, harms and losses suffered by negligent or substandard medical care and treatment.

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