# QUESTIONS AND ANSWERS ON CAPS

*As PaTLA members deal with members of the Legislature and editorial boards around the state, it is important that you be prepared for any and all topics that may come up. Many of the topics you will be asked are based on a faulty understanding of the caps issue and defined by the rhetoric of the caps proponents who argue that something – anything – must be done to help struggling doctors. If we are able to fully explain the issue and deflate the claims of the caps proponents, it is possible to change the minds of these key opinion makers. If you have questions or need additional information, please do not hesitate to contact PaTLA.*

***Question:*** *There is a crisis going on and it's high insurance rates and jackpot juries that are driving it. Don't we need caps to help doctors?*

**Answer:** There is no doubt that some doctors have had their insurance rates climb beyond reason or rationale. But there are two important things to keep in mind: not all doctors have seen their rates jump dramatically and there's no evidence that caps will lower rates doctors actually pay.

The "crisis" you are talking about is really only affecting high risk specialists. Family doctors pay an average of $4,500 a year in medical malpractice premiums. If they can't afford that, then there's something else troubling their practice.

But just as importantly, for you to believe that caps will work to lower rates, you'd have to believe that the size and number of non-economic damage payments is increasing as quickly as doctors' insurance rates are.

But there is no evidence there's been an increase in the number or size of lawsuits or awards here in Pennsylvania, much less a climb that would warrant the 75% increases some doctors have seen. Because the state does not keep track of the number of medical malpractice suits or their outcome, it is very difficult to make any generalizations about the causes of these hikes.

In fact, there are numerous reports that prove that the rate of insurance hikes is roughly equivalent to the rise in the medical costs over the last decade. And there isn't any evidence that payouts are connected in any realistic way to the rates insurance companies charge doctors.

There are a number of things that are wrong with the argument that caps are the answer to the problems some doctors face. The first is that there's plenty of proof that caps won't even work to lower doctors rates – they haven't worked in other states.

That's something even insurance execs admit. Frank B. O'Neil, a Senior Vice President of ProAssurance, a medical malpractice insurer, was quoted in the *Scranton Times* as saying, "Nobody is saying tort reform is going to reduce rates." [October 20, 2002]

The second is that they're inherently unfair to people who've been injured. These caps aren't based on the injury received, the amount of suffering involved or the

value of the injured parties' life to their family or their community. It's a "one-size" fits all approach that values the loss of a limb the same as the loss of a life. Does that make any sense?

Moreover, given that there are other options to the problem then just imposing an arbitrary flat-cap on damages – including insurance reform – why limit full and fair compensation for an innocent victim? It's an irony of this debate that we're all talking about high insurance rates and no one is talking about the insurance industry's role in this mess.

*Question:* *But isn't there an exodus of doctors in Pennsylvania?*

**Answer:** It's important to note that not all doctors are having problems -- just some of the high risk specialties. Most doctors have not seen their rates go up appreciatively.

But to answer your question, no, there hasn't been an "exodus". There is only one true tracker of how many doctors are in this state – the Mcare fund which every doctor is required to participate in -- and the numbers they have show that there has been a new INCREASE in the number of doctors in the state. And the Pew Foundation found that Pennsylvania continues to have a higher per capita rate than the nation as a whole.

The Agency for Healthcare Research and Quality, a branch of the U.S. Department of Health and Human Services, reported that the number of physicians in Pennsylvania grew by more than 100 percent from 1970 to 2000, even though there have been periodic insurance crises.

Now, there's certainly been some anecdotal evidence that some doctors are leaving because of high rates, but when you dig a little deeper, many of the claims fall apart. For example, the Medical Society claims some doctors have "retired" because of high rates. But they refuse to reveal how old the doctors are. We have no idea if the "retiree" was 36, 46 or even 86. It's highly questionable that an 86 year old is retiring or "cutting back" because of high rates. Moreover, in an investigation of which doctors who claimed they were leaving actually left Pennsylvania, the *Scranton Times* found just about all those doctors were still practicing – and some had even added staff.

But even if you are to believe the number of doctors PAPA and the PMS claim have left because of this "crisis" it is only about 2 percent – or roughly the same as the annual attrition rate of any other profession.

And don't forget the role of reimbursements in all of this, too. How much does the lower reimbursement rates doctors are getting play in their decisions about what services to provide? In some cases, they can't pay for their time and this is especially true of ob/gyns. How many stories have you seen where they get paid less than $1,500 per delivery? In Philadelphia recently there was a story about how yet another cardiac care center was opening and that experts were worried about a problem of overcapacity. Yes, there's risk, but is balanced by the financial reward.

*Question:* *But won't caps lower insurance companies' costs?*

**Answer:** Of course they will – somewhat, but it's impossible to tell how much because no one keeps track of how much is paid out in non-economic damages at all, much less in awards over $250,000. But that's not really the question. The question is, will caps lower the rates doctors pay? And the answer seems pretty clear: no, they won't. There are no provisions in any of the "reforms" being debated that will in any way affect how much the profit spread should be for insurance companies.

Frank B. O'Neil, a Senior Vice President of ProAssurance, a medical malpractice insurer, was quoted in the *Scranton Times Tribune* on October 20, 2002 as saying, "Nobody is saying tort reform is going to reduce rates."

It's kind of odd. The caps proponents keep saying we need to limit the income lawyers can receive, but no one can limit the amount that insurance companies can receive.

*Question:* *Is there really a problem of too many medical errors?*

**Answer:** There is no question that preventable medical errors occur in Pennsylvania hospitals. But the exact number of them is unknown because doctors and hospitals have been dragging their feet about getting a real reporting system up and running.

Unfortunately, it's not only the number of medical errors that are unknown. So are the names of the doctors who commit them. The doctors lobby in Pennsylvania has been fighting tooth and nail any disclosure of actions against doctors. So now patients have no idea if they are going to a good doctor or a bad doctor. The Medical Society's fight against disclosure protects bad doctors and hurts patients.

Moreover, the state doesn't track the number of doctors by specialty, the number of medical malpractice lawsuits filed or even the amount of non-economic damages paid out. How can you say caps will work when no one knows how much they would reduce actual payouts? Decision makers need to have access to reliable, credible information. Right now they don't have it.

*Question:* *With insurance rates growing so quickly, don't the doctors need some help to pay their premiums?*

**Answer:** Absolutely. Some doctors have seen their rates double and triple over the last few years, even if they haven't been sued or found negligent. That's not right and those doctors should be subsidized.

That's why the doctors have received unprecedented support from the taxpayers over the last few years. They have received $750 million at a time when the state is struggling to increase education and economic development funding. No other group has received that much taxpayer subsidy. But at some point, the doctors have to give something in return too – like disciplining bad doctors and reducing preventable medical errors.

*Question:* *But didn't doctors in Texas see rate reductions after that state passed caps this fall?*

**Answer:** Actually, most doctors saw a substantial rate increase. One insurance company did cut their rates, but the majority saw increases from their carrier and from the state run JUA.

*Question:* *No amount of money can bring back a lost limb or a lost loved one. So why are you arguing about more money when money won't change things or make them better?*

**Answer:** It's true that no amount of money can bring back a loved one or console the survivors. Not $100,000, not $100 million. But the only group putting a price tag on this pain is the doctors and other caps proponents. They argue that the pain and suffering – including life-long, daily pain – is worth $250,000. Everyone else says juries should decide compensation based on the facts and merits of the case. It may be difficult at times, but we trust juries with all kinds of decisions in this country. Medical malpractice cases should be no different.

There's also an element of justice that is involved here as well.

It is unheard of for a doctor to be held criminally liable for any harm that comes to a patient. If they were driving a truck and were negligent, they'd go to jail. But if they are negligent holding a scalpel, there's only civil penalties. In Pennsylvania, bad doctors are rarely even disciplined.

So the non-economic damages, in addition to making the victim financially "whole", also represents some level of "justice" for the victims.

*Question:* *Aren't there too many frivolous lawsuits?*

**Answer:** There are actually very few "frivolous" lawsuits. Not only is the cost too high for lawyers – if they lose, they are out the money they put up front for costs – but there are new protections in place. Now, not only do judges have the option of dismissing a case they find frivolous, but to file a medical malpractice case you have to have an independent medical expert certify that this is not a "bad outcome", but that there was negligence or malpractice involved. There are currently five (5) rules and regulations on the books that penalize lawyers for filing a frivolous lawsuit.

Because of these changes, Senate leader Robert Jubelier even said that "there is no such thing as a frivolous lawsuit anymore."

To believe that "frivolous" lawsuits are the cause of the higher rates, you'd have to believe two things: one, that judges and juries make awards in cases that are merit-less and two, that insurance companies, which are supposedly losing money, settle merit-less claims. Does anyone believe that?

*Question:* *Isn't the problem a "jackpot jury" system that rewards lawyers and provides an incentive to sue?*

**Answer:** No one – but no one – is going to wish to be crippled so they can get a higher payout than they would if they had a minor injury.

There are protections in place to make it hard to file a meritless case that's based more on a potential payout than on the facts. You have to have an independent expert certify that malpractice was involved. You have judges with the options of throwing out the cases if they find them baseless.

And in med mal cases, there is a special remititur that allows judges to lower or even vacate awards they believe are too high. No other type of civil case has they special provision.

There are now 5 laws on the books that would penalize an attorney who brings a meritlesss cases. If anyone thinks there are too many "frivolous" suits, they should be clamoring for the full enforcement of <u>current</u> law.

*Question:* *Why should lawyers receive between 30% and 50% of damage awards?*

**Answer:** There is no set percentage that a lawyer receives for taking a case. Any and all agreements about payments to the lawyer are between that lawyer and their client.

But don't forget how a contingency fee system works. A lawyer who takes a case has to advance all costs for the case – they pay for any and all tests, expert testimony and any other necessary costs. And if they lose, they are out that money. So this limits the likelihood that they are going to take a questionable or "frivolous" case in the first place. But it also allows them to take difficult cases – because they will get fairly compensated in the end.

Providing an incentive to take tough cases is exactly why we have a contingency fee system in the United States: it allows poor people to participate in the legal system. If a poor person was harmed and had to pay all legal costs up front – including medical tests, expert testimony and legal fees – few could afford it and they'd be shut out of the judicial system. And no one should be arguing that the poor shouldn't have access to the courts.

*Question:* *But doesn't the insurance industry need some sort of stability to properly price the market – the sort that a cap will provide?*

**Answer:** By definition, any cap that was imposed will provide some sort of stability – whether it's $1, $250,000 or $2 million.

But the reason that the doctors want a $250,000 cap is that they know it will make them virtually immune from civil suits because the out-of-pocket costs of putting the case on may not be recoverable. Since those costs come out of a lawyers pocket up front, there's no way they'll take a case if they can't even make back out-of-pocket costs, much less a fee for their time.

Here's why a $250,000 cap is "immunity" for doctors: In Pennsylvania, if an injured party is compensated for their economic losses and medical costs by

another insurer (health insurance, workers compensation, etc.) those payments are non-recoverable. That means if there is a $250,000 cap, $250,000 is the ONLY money that can be sought in a suit. $250,000 may sound like a lot, but when you have cases that can cost several hundred thousands of dollars to put on – as many med mal cases do because expert testimony and medical tests are very expensive – there's nothing left over for the injured party or the lawyer. What lawyer is going to take a case they are likely to lose money on or be paid a pittance for more than 2 years worth of work?

A low cap means that suits won't be brought – no matter how severe the injury or gross the negligence. And that's what doctors really want.

*Question:* *But isn't $250,000 a lot of money on top of full economic losses and health costs?/ But someone is hurt already gets full payment for lost earnings and medical costs – what else do they need?*

**Answer:** Whatever noneconomic damages someone who is injured receives will be the ONLY compensation they receive for their injuries. Payment of their economic losses and funds to cover medical expenses merely mean that someone who is injured is held harmless for the injury someone else caused – i.e. they aren't harmed financially by someone else's mistake. It would be different if they injured themselves, but this is about someone else hurting them. For people at the lower end of the economic scale, that means that they won't have to go on welfare.

But ask yourself: is $250,000 enough compensation for you to spend the rest of your life unable to care for yourself or walk again or anything else? If you're hurt when you're 25, that means you will spend the next 50 years living with your injury. 50 years at $250,000 is just over $13 a day. $13 a day to be a cripple.

*Question:* *If everyone gets the same noneconomic damages, isn't that by definition fair?*

**Answer:** No. The noneconomic damages are what makes compensation awards fair.

By limiting noneconomic damages, you are tipping compensation for legitimate injuries to their economic losses (you have to presume that medical costs are close, if not identical). That means that how much an injured party receives is based on their income, not their injury, their value to their family or their community. If individuals receive the same exact injury and the same pain, shouldn't they receive similar, if not exactly the same, compensation? Why is one person's life or injury more than another's?

*Question:* *Didn't caps work in California?*

**Answer:** Not according to an executive for the second largest med mal insurer in California.

This year, James Robertson, Assistant Vice President and Associate Actuary of SCPIE Indemnity Company, said, "While MICRA was the legislature's attempt at remedying the medical malpractice crisis in California in 1975, it did not substantially reduce the relative risk of medical malpractice insurance in

California." He believes that economic damages are driving rates in that state, which NO ONE is talking about capping -- nor should they be.

We can't tell if it's economic losses that are driving rates here because no one collects good enough data to evaluate it.

But if it's economic damages and health care costs that are driving rates in California, how will capping non-economic damages here help, except marginally? Are people really looking for "marginal" help?

*Question:* *But isn't the legislation that was passed really just about helping docs?*

**Answer:** No. In fact, the last minute switch from a med mal specific constitutional amendment to the broader "all-tort" amendment was an almost classic bait-and-switch. The doctors were presented as the public face of the debate and were used to get this broader bill passed.

There's no reason to pass this broad a bill unless it's about helping other groups besides the doctor. And even if you agree that there should be allowed to be caps in other matters, you can't be anything other than disappointed by the fact that there was no debate on this big a change. What the House did was a disgrace.

*Question:* *But isn't it unlikely that the Legislature would ever act to immunize the tobacco companies/environmental polluters/makers or unsafe products?*

**Answer:** Unfortunately, no. Don't forget that this is a Legislature that passed a budget this year without a single day of hearings or debate and has routinely slipped into legislation specific favors and protections for certain industries.

Just think: if there was not much chance of them using this change to immunize certain favored industries, would they have pulled this bait-and-switch? Would there be so much money being put into the effort by groups like big tobacco? Not likely.

*Question:* *Why will insurance reform work?*

**Answer:** It will work because it's something that can be done and done immediately and because the resources are already available.

There has already been legislation introduced that will create a state insurance fund that collapses the insurance "pyramid" (right now, the high risk specialties basically insure each other and the low risk doctors insure each other that way) and will lead to an immediate 30-40% reduction for some high risk specialties.

It doesn't need to be permanent state run program, but there needs to be some sort of bridge for the short-term because no one thinks that insurance carriers will return to the state in enough time to help the docs.

*Question:* *What about insurance companies that lost money last year? They lost $18 million?*

**Answer:** It is very difficult, if not impossible to tell what the earnings or expenditures for these insurance companies actually are because the Insurance Department collects such inadequate information.

For example, the insurance companies said they lost $18 million, but that they put almost $210 million away to plan for future losses. There's no indication of how much they were supposed to put away, if the $210 million is more than they needed to or anything else. I find it hard to argue that the companies "lost" $18 million if they're putting $210 million away, but there's no way to definitively tell with such poor data. It's like a family saying that the money they have put away for savings is actually a "loss."

And there is a precedent for insurance companies "over" saving. In the 1980s – during the last insurance/tort crisis -- this was a real problem in Pennsylvania. The insurance companies were putting more money away then they needed to and when future losses were lower than the monies they had away, the squirreled away funds were distributed as profits. How do we know that they aren't doing that again? We don't.