

Curing Texas' Lawsuit Headache

By the Honorable Joe Nixon

"Our purpose was to establish an equitable and efficient system of justice in Texas that provides meaningful remedies for those who have been wronged and protects the rights of those who have done no wrong."

This statement was my guiding principle during the effort to pass historic tort reform in Texas during the 2003 legislative session. I believe we achieved this objective with the passage of House Bill 4 (HB4) and that all Texas citizens — as consumers and patients—are the beneficiaries. Having practiced law for over 20 years, I deeply appreciate the importance of access to the courthouse for redress when another is at fault. Nevertheless, access to the courthouse need not be equated with unfettered access to a money vault.

While many viewed tort reform efforts as anti-lawyer and as a direct attack aimed at “greedy” trial lawyers, I did not. I believe most trial lawyers zealously and steadfastly represent their clients to obtain the maximum recovery under the law. Indeed, this is *their job* and it is what state law requires. But, when the “law”—both legislatively enacted and court-created—becomes stacked in favor of plaintiffs, and litigation begins to take a destructive toll on our society, we as legislators and policy-makers for the citizens of Texas must act. I have spoken often that the essence of tort reform is about “how we choose to live together,” and I think that sums up my other guiding principle: restoring litigation to its *proper* role in our society.

The Scope of the Problem in Texas

Texas has been referred to by different commentators and organizations as a “lawsuit mecca,” a “judicial hellhole,” and consistently ranks in the bottom handful of states on evaluations used by companies, medical providers, and insurers to determine in which states to do business or locate. Further, the taxpayers of this state pay for a court system that handles a tremendous amount of what is essentially nationwide and non-Texas litigation.

In medical malpractice liability, the problem has reached dire proportions due to the squeeze faced by doctors who are caught between rising liability insurance costs on one side and constrained by employer-provided benefit contracts and low medicare / medicaid reimbursement levels on the other. Faced with increasing hassles and demands to appear in court and at depositions combined with diminishing income levels, they are choosing to retire early or leave Texas. What I heard from doctors over and over was that the practice of medicine is “no longer worth it.” That is frightening.

Dramatic increases in litigation costs and awards have fueled the rising malpractice premiums. Consider the following:

- 85% of claims fail, but cost anywhere from \$10,000 to \$40,000 per defendant to defend.
- In 1989, the average non economic award was \$318,666. By 1999, the average non economic award in medical malpractice cases was \$1,379,203.
- The percentage of awards attributable to non economic damages rose from 35.7% in 1989 to 65.6% in 1999.
- The number of medical liability companies in Texas has dropped from 17 to 4 just since 2000. [*Companies don't leave if business is at all profitable*].
- Over 150 counties in Texas have no obstetrician. Many counties also have no neurosurgeon and no orthopedic surgeon. People are literally dying because there aren't enough emergency personnel to provide care in the critical hours after an accident.

Clearly a serious problem exists, and we need to ensure that our best doctors remain in the practice of medicine, and that they stay in Texas.

Fair and Balanced Legislation

The full scope of House Bill 4 is too wide and varied to address in a short article, but all of the general civil justice reforms encompass basic principles of common sense and fairness that most Texans overwhelmingly support, including the following: those at fault should only pay for their portion of the blame; juries should be privy to more information surrounding cases they hear; good Samaritans, non-profits, and volunteers should be protected from lawsuits; and lawyers should not be

the main beneficiaries in class actions.

As an example, in class actions, if the class members are paid in coupons, that same percentage of the lawyers' fees should also be paid with coupons. In general litigation, a party who refuses to accept a reasonable settlement offer will have to pay the additional litigation costs to the other side if the trial outcome is not at least 80% as good as the offer. Often costs of trial and delay tactics are used in extortion-like ways to force settlements in frivolous cases or to force inflated settlement amounts. In civil cases where a property owner is sued for failure to prevent a *crime*, current law allowed the owner to be tagged with full responsibility if the criminal was never caught. The new laws will end this injustice and other similar anomalies.

The Medical Malpractice Damage Caps

In the end, the most controversial provision in HB4 was the medical malpractice non-economic damage caps, which ended up at \$250,000 for any and all doctors sued in a case, and \$250,000 per institution, up to two institutions. Since it will be a rare case that will involve two institutions, the cap effectively will be \$500,000 in most cases. The critical point is this cap only covers non-economic damages: pain and suffering, loss of consortium, disfigurement, and other extremely subjective damages that seek to compensate injuries with money. All actual medical expenses, lost past and future income, and any other expense that can be translated into dollars - such as a driving service or a maid service - are still recoverable. Twenty other states have similar caps on non-economic damages, and a \$250,000 cap (regardless of the type or number of defendants) has been in place in California since the 1970's.

The key criticisms of this cap attempt to supplant reason with emotion. First, that it "devalues" non-working mothers or low-income folks. This cap does not affect any portion of the *economic* award—which currently varies between lower and higher income persons when lost wages are awarded—so any disparity remains unchanged. Rather, to the extent money can compensate for pain and suffering, everyone is treated the same.

Second, it is argued that access to courts is cut off and the caps are "arbitrary." No one is precluded from filing a lawsuit. Access to the courts cannot be equated with unlimited damages for pain and suffering. Non-economic damages are highly subjective and difficult; all awards are arbitrary. A recent medical malpractice juror stated the following: "My thinking was he's a doctor, he's got money, and he should pay." Asking jurors to quantify pain and suffering into arbitrary dollar terms with no limit is quite different than asking them to make yes/no or alternative factual determinations. Even in criminal law, jurors determine guilt and then the punishment is *within allowable guidelines* set by law. When consumer products are at issue, high dollar awards and legal costs are simply passed on to consumers. However, in the medical malpractice arena, we have an important public policy objective to balance on the other side: access to affordable healthcare. Ultimately, those open-ended jury awards for pain and suffering are paid by other consumers of healthcare. In short, the doctor's bill goes up. It is the legislature's role to balance competing interests and establish policy.

Third, some argue that damage caps of any kind are simply unconstitutional. Interestingly, the Texas constitution with its "open courts" provision was adopted in 1876, while pain and suffering damages were not awarded by Texas courts (and thereby added into Texas law) until almost a decade later. Disfigurement damages were not added until around 1950, and the various loss of consortium damages were not awarded until the 1970's and 1980's. Based on this, it is difficult to argue that unlimited awards for noneconomic damages are somehow enshrined in the Texas constitution's open courts provision.

Some Thoughts on the Legislative Process

What the Wall Street Journal refers to as "Ten-Gallon Tort Reform" took a monumental effort to pass. I can say without hesitation that passing HB4 was the most difficult accomplishment of my professional career. The opposition to this bill was intense, organized, and well-funded.

Opposing legislators adopted delay tactics, used personal attacks, and fought this legislation on every possible front. As an example, there were 622 pages of amendments which I had to prepare to argue against even if not all were ultimately heard on the house floor. I was accused of holding

“backroom” meetings under a contrived open meetings violation, and was the target of a subpoena for possible criminal violations. Interestingly, a similar open meetings allegation, while so deserving of front-page news and a subpoena when levied against me was quickly ignored by the press and dismissed within one day when levied against the defecting Ardmore Democrats. My law firm’s computers were hacked into, and my garbage was routinely searched. Other legislators and their family members were subjected to similar pressure and harassment. My every step and action was under the utmost scrutiny. In the end, of course, no legal violation or indiscretion ever took place or was found.

On a broader level, as a member of the legal profession, I had to put my own profession’s and my own firm’s self-interest second to what I consider to be the best policy for the people of this State. Many tend to think that defense lawyers are all pro-tort reform; that is not the case. Any reforms that lead to less litigation also lead to less defense work. Furthermore, many conservative Republicans (lawyers in particular) misapply concepts of limited government and free-markets to an attempt by the legislature to reign in an activist judiciary. When a plaintiff uses the law and judicial system to force another into court, under the prospect of astronomical jury awards or huge legal costs, that’s not a market, it is what it is – a court of law. The legislature must ensure that the laws provide for a fair system.

The tort reform bill is a fair and balanced bill, as demonstrated by the tremendous bipartisan support. The final conference report was adopted in the House with 110 of 150 votes and in the Senate with 27 of 31 votes.

Next? On the Horizon

The constitutional amendment for Proposition 12 is the next hurdle to ensure the effects of the medical malpractice reforms are felt in the near-term and not years from now. Those opposing Prop. 12 are already engaging in a campaign of distortion and misleading information calling it an “HMO-backed” amendment. HMO’s are not protected in HB4 at all—only health care providers are covered. I can only hope that the citizens of Texas, who in numerous polls strongly support caps on non-economic damages, do not fall prey to this campaign of misinformation and deception.

Prop. 12 simply affirms that the legislature is the policy-making body of this state, and that caps on subjective, non-economic damages-ultimately paid for by all Texans-clearly fall within this policymaking role. Without this constitutional amendment, the full beneficial effects of HB4 could be five to ten years away.

A Headache Cured?

I am honored to have played a role in this historic tort reform legislation, but must admit I am happy it is over. I no longer take two Tylenol the first thing each morning to rid myself of an incessant, nagging headache. After several rounds of tort reform, I hope we have finally helped truly rid Texas of its incessant, nagging headache as one of the “lawsuit meccas” in the country.

Joe Nixon, R-Houston, is Chairman of the House Committee on Civil Practices.