

# THE price OF error

## Malpractice cap is still waiting for a court test

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malpractice had cost the patient part of his leg.

"The fact is there is an unjust and untested law out there," Shapiro said.

Not so, replied Alice T. Lorenz, a constitutional law specialist and appellate attorney among whose clients is the New Mexico Medical Society. The law is tested, just and constitutional, she said.

The law was a collaborative effort of lawyers and doctors responding to the collapse of New Mexico's medical malpractice insurance market in 1975, said Randy Marshall, the society's executive director.

"Travelers (Insurance) was the major liability carrier in the state of New Mexico. In 1975 they announced they would leave the market entirely," Marshall said.

Claims had become more frequent and pay-outs to injured patients more expensive, Marshall said. "New Mexico was a small

market and not worth it to them to stay."

Even worse, he said, no other company wanted to fill the void. Physicians "were very frightened," he said. "A lot of them were contemplating pulling out of New Mexico. It was a very challenging time."

### The solution

A New Mexico Bar Association blue-ribbon committee met with doctors all that summer and developed the medical malpractice legislation. Doctors formed their own insurance company and paid money into a state fund that would help compensate injured patients.

Among the law's provisions was guaranteed payment of all patients' medical expenses resulting from medical malpractice. However, awards for other expenses, including pain and suffering, were capped. Today the cap is \$600,000.

"This is social legislation," Lorenz said. "All the Legislature had to have was a

rational basis."

While the caps in the law have never been specifically challenged before the Supreme Court, other provisions of the law have been. "They've looked at what the legislative purpose was and found the legislative purpose was a legitimate one," Lorenz said.

Far from discriminating against plaintiffs, the law is designed to ensure that malpractice victims are cared for, she argued.

"In this state, given our economic situation, I think medical malpractice plaintiffs are much better off than any other plaintiff because there is a guarantee you'll collect something," she said.

In other types of cases, the larger the award, the lower the likelihood the plaintiff will collect it, she added. Since the medical malpractice caps and patients' access to funds for a lifetime of medical expenses are linked, the law is fair to everyone, she said.

In other injury cases, a

plaintiff has to decide today what sort of medical problems might require payment in the future and then argue for a lump sum to be paid now, Lorenz added. Medical payments under the malpractice act will continue as long as they are required, she said.

### The doubts

Still, Word said, "I think it's clearly unconstitutional." The law "favors doctors as a class of human beings over everyone else," he said.

"The cap does not substantially relate to keeping malpractice premiums down," Shapiro added. "It can't be shown that it does." Even if caps keep insurance premiums lower, he said, "they do so by depriving the most seriously injured victims of adequate compensation for their injuries. That seems grossly unfair."

Instead of a guaranteed payment today for injuries incurred, the law promises only that a patient will be paid in the future, Word and

Shapiro said. What if malpractice underwriters withdraw from the state, leaving behind inadequate reserves to handle the medical expenses, they asked.

"Patients shouldn't have to be exposed to the risk of uncertainty about the funding, especially if the malpractice act is unconstitutional," Shapiro said.

The act "interferes with the right of a jury to decide what the damages are in the case," he said.

Whether the Supreme Court will overturn the law, assuming it ever gets the chance to consider it, will depend on who the justices are at the time, Word said.

Word said he once thought the court would overturn the act. "The makeup of the court has changed, so now I'll say I don't know."

The court's makeup is changing again soon. Justices Joseph Baca and Gene Franchini have both announced they will leave the court this year.

## The state cap on malpractice awards waits for a legal test

KATHY HAGEDORN ILLUSTRATION/KNIGHT RIDDER

BY WINTHROP QUIGLEY  
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**A** long-expected showdown over the constitutionality of a state law limiting medical malpractice awards is on hold again.

A district court judge in Colfax County produced the most recent decision on the subject, that a \$600,000 limit on damages other than medical costs violates the state constitution. His

decision eventually became academic when an Albuquerque surgeon and his Capulin patient settled their lawsuit out of court. The settlement forbids either party to discuss the agreement.

"That's what's happened over and over again," said Terry Word, an Albuquerque attorney who represents plaintiffs in medical malpractice cases. "Every time there's been a case where you think the issue is

going to go up (to the State Supreme Court), they somehow settle it."

Sooner or later the Supreme Court has to rule on the constitutionality of this law, which has been in effect since 1976, said Dan Shapiro, an Albuquerque attorney who represented the Capulin man.

The jury in the Colfax County case last summer found the surgeon

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