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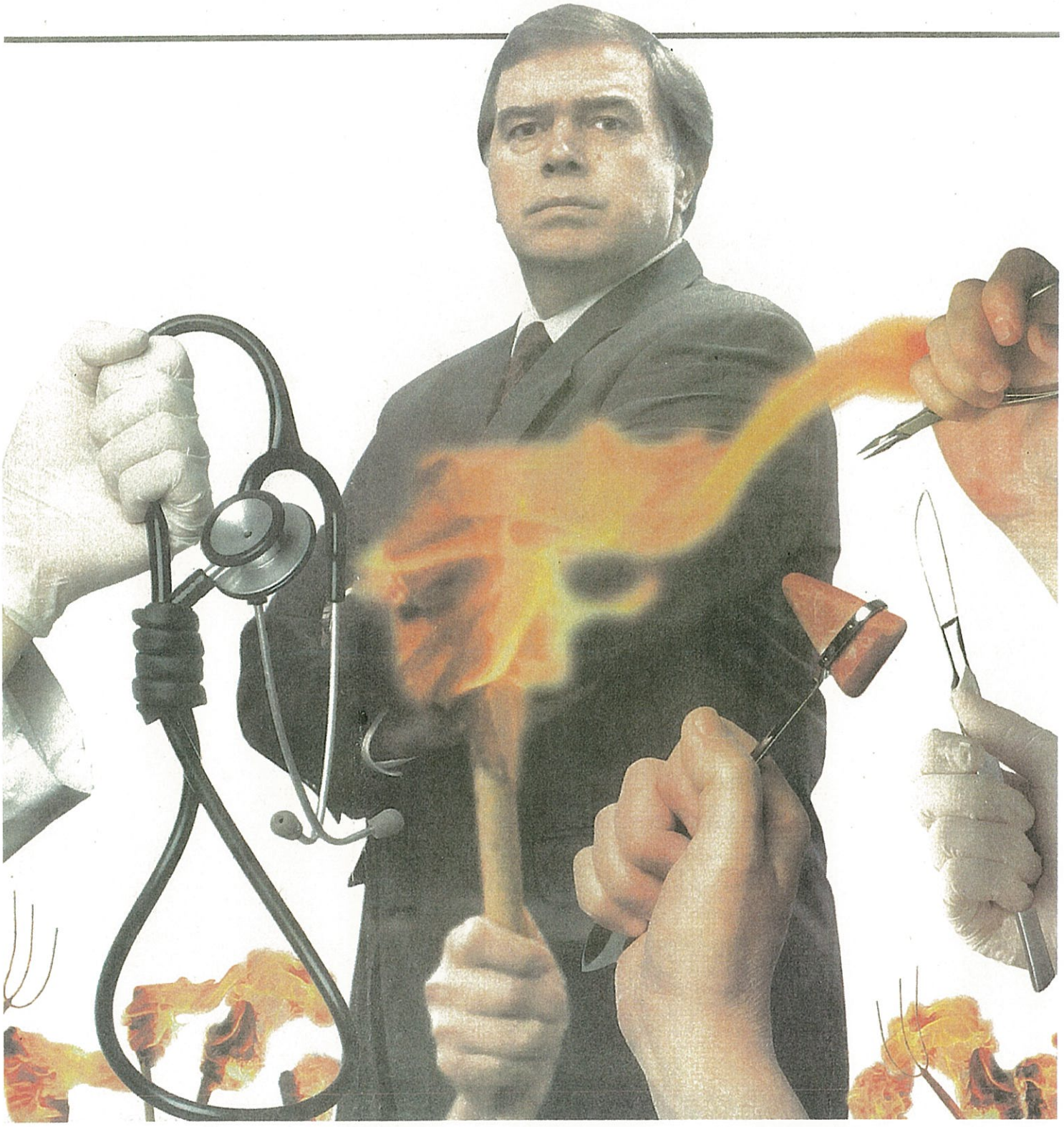


Bush's Next Target: Malpractice Lawyers

A Focus on Capping Awards May Ignore Other Problems

BY STEVE LOHR

A Focus on Capping Awards May Ignore Other Problems

TODD A. SMITH is one of the nation's leading medical malpractice lawyers, renowned and feared in the courtroom, having extracted a lengthy string of multi million-dollar settlements and verdicts from doctors, hospitals and insurers over the years. Though wealthy even by the standards of his profession, Mr. Smith, 55, seems to have lost none of the intensity and passion that fuel his 12-14 hour workdays and make him a persuasive trial lawyer.

Seated in his law firm's conference room, with an Olympian view high above Lake Michigan, Mr. Smith recited the details of his first courtroom victory in the summer of 1977, when he was a $12,000-a-year assistant public defender in the Cook County criminal courts. The defendant, he recalled, was an American Indian who was accused of armed robbery in a case that was based mainly on his race. The man was identified as the robber, for example, in a lineup that included him and a collection of off-duty, white police officers. "It was terribly unfair," Mr. Smith said.

What drives Mr. Smith now, he says, is what drove him then: a desire to seek justice for people who need it, whether criminal defendants too poor to hire lawyers or victims in medical lapses whose lives have been ruined and face huge bills for care. "You can make a significant contribution to someone's life, someone who might be in desperate straits," he explained. "That's as rewarding as it gets for me. It's not really, or mostly, about money."

The Bush administration wants to make Mr. Smith's profession far less financially rewarding. Medical malpractice lawyers are cast as the marquee villains in the administration's war against what it regards as a litigious culture run amok. If there were a face in the bull's-eye in this political battle, it would be Mr. Smith's. He is not only a big-name medical malpractice lawyer, but he is also serving this year as the president of the Association of Trial Lawyers of America, the principal advocacy and lobbying group for trial lawyers. And within conservative circles and inside the White House, the term "trial lawyer" is an epithet.

This month, the administration won the first round in its fight to curb litigation, as Congress passed legislation to sharply restrict class-action lawsuits against companies. Next up is medical malpractice. In his re-election campaign, Mr. Bush repeatedly decried "junk lawsuits" as the bane of the nation's doctors. The issue was deftly framed, and the subtext was clear: greedy lawyers were attacking the Marcus Welbys of America, good doctors doing their best.

In a speech last month in Illinois, Mr. Bush again called for strict limits on medical malpractice suits, including "a hard cap of $250,000" on what patients could recover for non-economic damages like physical and emotional pain and suffering. Returning to his election-year themes, Mr. Bush said doctors "should be focused on fighting illnesses , not fighting lawsuits."

"We need to fix a broken medical liability system," he said, and he called on Congress to act this year. This month, a medical litigation overhaul bill, mirroring the administration's proposals, was introduced in the Senate by two Republican senators, John Ensign of Nevada and Judd Gregg of New Hampshire.

The medical liability system, health care analysts agree, is deeply flawed. But they also generally agree that the solution offered by the administration and the Republican Congress - putting a ceiling on damages - addresses only one aspect of the problem.

Medical liability policy, said Dr. William M. Sage, a physician and a law professor at Columbia University, should seek three goals: restraining overall costs, compensating the victims of medical mistakes and providing incentives for doctors and hospitals to reduce medical errors.

"There is a strong consensus among people who have really studied the issue that caps on damages would tend to keep costs down and make liability insurance more affordable for doctors," Dr. Sage said. "And there is a universal consensus that caps would do absolutely nothing to reduce medical errors to compensate injured patients. If anything, caps on damages would make those problems worse."

Medical malpractice laws vary state by state. But California offers a glimpse of a future preferred by the administration and many Republicans in Congress. In 1975, California passed the Medical Injury Compensation Reform Act, which included a cap of $250,000 for damages like pain and suffering in malpractice cases. It did not limit economic damages for things like the cost of continuing care for a person disabled or wages lost because of medical errors. The law also curbed attorneys' fees on a sliding scale that prohibited them from collecting more than 15 percent on award amounts over $600,000, with higher percentages for the amounts below that sum. (In states without limits on fees, contingency payments to malpractice lawyers are typically about one-third of awards.)

Research varies on the likely impact of curbs on awards and fees, but a RAND Corporation study last year concluded that the California law had reduced the net recoveries for plaintiffs by 15 percent and had cut attorneys' fees by far more, an estimated 60 percent. Defendant liabilities, it calculated, were trimmed 30 percent because of the law.

California malpractice lawyers say the law also discourages them from taking wrongful-death cases if the victims are children or retirees. Those groups have no economic value by the cold logic of the courtroom because they are not earning salaries, so the maximum award would be $250,000. Complex cases, which often require many expert witnesses and years of research , can cost that much to bring to trial.

Linda Fermoyle Rice, a medical malpractice lawyer in Woodland Hills, Calif., said she recently told the family of a 14 year old boy who died unexpectedly in a hospital - apparently from medical negligence, Ms. Rice said - that she could not afford to pursue the case. "The law has made it impossible for many victims to get access to the court," she said.

Even plaintiffs who get to court often come away empty handed. Nationally, defendants prevail in nearly 80 percent of the medical malpractice cases that go to trial. Many malpractice suits, legal analysts say, are filed by personal-injury lawyers, accustomed to handling simpler cases like those involving auto accidents, but not as experienced in medical negligence work. In a 2002 survey by the trial lawyers association, only 11 percent of its 60,000 members said medical malpractice was their primary area of practice; 40 percent replied that medical negligence cases were some part of their practice.

Mr. Smith, a partner at Power, Rogers & Smith in Chicago, resides at the top of the medical malpractice mountain. He does some aviation litigation, but medical negligence claims account for 70 percent of his cases; in the last 17 years, he has won more than $300 million in verdicts and settlements for clients . Contingency fees collected by his firm would typically be 20 percent of the total, a limit set by Illinois state law on all awards over $1 million.

So how much does he earn? "Far less than you might expect," Mr. Smith replied. His firm employs 11 lawyers - six working on medical malpractice cases, the remainder focusing on other personal-injury claims. It also employs four nurses as full-time researchers. Complex cases can require reams of expert testimony, years of investigation and hundreds of thousands of dollars to prepare. Medical malpractice lawsuits are custom work, focusing on one victim at a time, as opposed to large class actions against an entire industry, like the $246 billion tobacco settlement that trial lawyers helped 46 states win in 1998.

There are no hourly fees and no well-heeled corporate clients paying for expenses. Trial lawyers are the venture capitalists of the legal system, putting their money on the line and taking up front risk. The occasional big paydays cover the daily expenses.

For all the costs, there is still plenty left over for Mr. Smith. He won't say precisely, but he concedes that his yearly income is routinely in the high six figures, and seven figures in good years , which appear to have been plentiful recently. That would put him on par with partners at leading corporate law firms.

At one time, corporate law would have seemed the natural choice for Mr. Smith. In 1973, he was a freshly minted M.B.A from Northwestern University's graduate school of business, now called the Kellogg School of Management, and most of his job offers were from banks in the Chicago area. But he says he balked at what struck him as an anonymous career within the crowded managerial ranks of a big bank. He became intrigued by the law and enrolled at Loyola University law school; while there, he started working for the public defender's office.

In that office, Mr. Smith got his first taste of trial work, and he vividly described the thrill of standing in the huge courtrooms of the Cook County criminal court and the exhilaration of presenting cases. "It was real life, and the outcome really mattered to peoples lives," he said.

The most skilled trial lawyers, legal professionals agree, truly savor the theatre of

the courtroom, the adrenaline rush of verbal combat, the on-the-fly decisions made in cross examination and the challenge of winning over an audience. "In the end, it all depends on the judgement of 12 people," Mr. Smith noted.

But medical malpractice work requires more than a deft touch in court. According to colleagues and courtroom adversaries, Mr. Smith combines a relentless work ethic - needed to absorb the arcane details of medical science - and an underlying belief that his clients are victims who have suffered grave injustices.

"The best plaintiffs lawyers in this field, like Todd Smith, almost have a crusader mentality," said Brian C. Fetzer, a leading malpractice defense lawyer in Chicago, who has represented physicians, hospitals and insurers in cases against Mr. Smith for more than 20 years. "They are true believers."

Joseph W. Balesteri, a lawyer who joined Power, Rogers & Smith in 2000, after five years working the defense side of medical negligence cases, said of his colleague: "Todd gets into the medicine. He wears his emotions on his sleeve, and listening to him you really see that he believes what he says. It's a credibility that is felt by the jury."

Mr. Smith says his success rate is higher than 80 percent - including jury verdicts and settlements - far higher than the national average for medical malpractice plaintiffs' lawyers. Being picky in his selection of cases helps explain the high winning percentage. He says he decides to take fewer than 3 in 100 cases that are brought to his firm. "We say to people right off that a bad outcome does not mean you have a medical negligence case," he said.

The plaintiffs' lawyer must argue that a doctor or hospital failed to meet the profession's acknowledged standard of care for a certain operation, test or treatment, and, more important, must be able to prove it.

Cases worth pursuing, Mr. Smith said, are typically ones in which the victim has suffered a major injury that results in continuing pain, suffering and disability. Brain damage, loss of a limb and facial disfigurement, he noted, are good candidates.

At his firm, potential cases go through rigorous screening that can take months and costs tens of thousands of dollars. The victim's medical records are collected after receiving the authorization of the patient or family. Those records are reviewed, and one of the firm's nurse-researchers assesses the care that the patient received.

Next, the case is sent to a consulting specialist - often more than one. If the case still seems promising, the accumulated information is sent to a physician who determines whether the care was negligent enough to write a certificate of merit, required in Illinois and some other states, to be presented to the court.

"In his speeches, Bush makes it sound as if every lawsuit that is brought is junk or frivolous," Mr. Smith said. "But we do everything we can to weed out cases that are without merit. We have to. Our own money is at risk."

The work, time, risk and potential rewards in complex malpractice suits are illustrated by a $20 million settlement Mr. Smith won last June. The origins of the case go back to 1997, when Huong Nguyen, then a 19 year old sophomore at the University of Illinois at Chicago, was experiencing shortness of breath doing ordinary things like climbing stairs. She was diagnosed as having a faulty mitral valve, a pair of triangular flaps that regulate blood flow between two of the heart's chambers. The valve had to be repaired or replaced.

The surgery lasted more than eight hours, though the procedure usually takes about half that long, Mr. Smith said. The next morning, Ms, Nguyen could squeeze her right hand, but she was otherwise paralyzed and could not speak. She had suffered severe brain damage.

A lawyer referred the family to Mr. Smith, who began investigating. After an initial screening by Mr. Smith's firm, the family filed suit against the surgeon, Dr. Bradley S. Allen. Over the next several years, in preparation for trial, the law firm spent $375,000, much of it for the work of specialists like a cardiothoracic surgeon, neurologists, economists and a forensic videographer.

Mr. Smith contended that Dr. Allen did not properly remove air from the patient's heart during the procedure and that the resulting air embolus caused brain damage. Dr. Allen's lawyer, Kevin T. Martin, said Ms. Nguyen's resulting disability was a risk in this kind of surgery and "very unfortunate, but not a medical error."

The surgery had been videotaped, but when a court ordered Dr. Allen to produce the tape, there was a lengthy gap that included brief segments of television commercials. Had the case gone to trial, Mr. Smith would have contended that the defendant tampered with evidence, an assertion denied by Mr. Martin, who said the gap in the tape had resulted from a mechanical malfunction.

Ms. Nguyen is unable to move her arms or legs and cannot sit up or speak on her own. She communicates by tapping her right finger on a special keyboard. She suffers from depression and seizures but is cognitively intact. "She is totally aware of her desperate straits," Mr. Smith said, "This is as bad as it gets and she knows it."

Mr. Smith's economists estimated that lifetime care for her would cost up to $20 million. The settlement talks, Mr. Smith said, began a few months before the trial was scheduled to start, with the defense offers starting at $5 million and the Nguyen family deciding to settle at $20 million. "It was entirely the family's decision," Mr. Smith said. "I think we could have gotten more in trial."

Indeed, the risk for the defense, legal analysts say, is that the pain and suffering of damages in such a heart wrenching case, handled by a skillful medical malpractice lawyer like Mr. Smith, could lift the total award far higher. "There wouldn't have been a dry eye in the house" if Ms. Nguyen's case went to trial, said Mr. Martin, the surgeon's lawyer, who estimated that a jury award could have gone up to $100 million.

In settlements, defendants make no admission of guilt and typically try to add confidentiality agreements to the deal. Mr. Smith's firm, as a matter of policy, does not sign such agreements.

Limiting Lawyers

A bill introduced in the Senate this month would place limits on attorneys' fees and the damages that plaintiffs collect in medical malpractice suits. The proposed law would be similar to one enacted by California in 1975.

Highlights of the Senate bill

NON-ECONOMIC DAMAGES

Physical and emotional pain and suffering

- Pre-empts state law to require a "hard cap of $250,000"

LIMITS ON ATTORNEYS' FEES

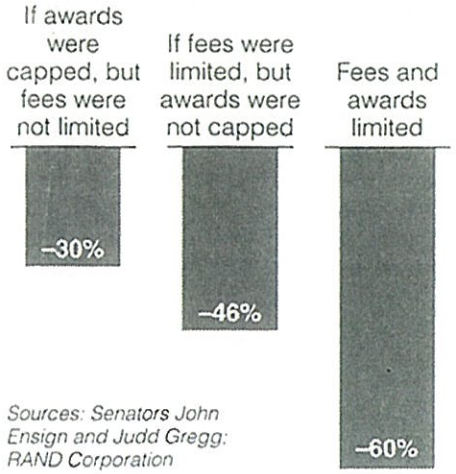
According to a sliding award scale:

- 40% of the first $50,000
- 33.3% of the next $50,000
- 25% of the next $500,000
- 15% of any amount over $600,000

Lawyers' fees: a case study

CALIFORNIA LAW'S EFFECT ON ATTORNEYS' FEES

Based on a 2004 RAND Corporation study of 257 plaintiff verdicts in California malpractice trials, 1995-1999.



Sources: Senators John Ensign and Judd Gregg; RAND Corporation

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In big malpractice cases, the administration's proposed cap of $250,000 for pain and suffering would change the terms of trade in settlement talks. In the case of Ms. Nguyen, for example, there were sizable economic costs - for the care of the disabled patient - though the defense would surely have argued that they were less than $20 million. But it is the prospect of unknown, and potentially astronomic, damages in a trial that can give plaintiffs a powerful hand in settlement negotiations.

To Mr. Smith, the administration's battle against medical malpractice lawyers is simple to explain. "It's about politics and money; it's not really about health care," he said. "If you want to address the medical malpractice crisis in this country, do something about the medical errors. That's the real problem

The quality of medicine across the country is uneven , analysts agree, and that represents a huge problem. Medical errors are estimated to be responsible for 45,000 to 98,000 deaths a year - more than those caused by breast cancer, AIDS or motor vehicle accidents, according to the Institute of Medicine of the National Academy of Sciences.

So Mr. Smith has a point. But improving the quality of health care raises a separate set of complex issues about incentives for improvement, investment in information technology and changes in the culture of medicine.

Pointing the finger elsewhere will not get Mr. Smith and his fellow lawyers off the political hook. There have been calls to overhaul medical malpractice before. But this time the White House, doctors, insurers and other business interests, who see curbs on malpractice suits as one step in reducing their health costs, are pushing hard together.

The champions of tort reform are spending heavily. Last year, the Institute for Legal Reform, an affiliate of the Chamber Of Commerce, and the American Medical Association, the physicians' advocacy group, spent a total of $33.8 million on lobbying. The trial lawyers' association spent $2.9 million on federal lobbying , PolitcalMoneyLine reported.

"We're outgunned financially, and we're being targeted because we have supported candidates who support Americans' rights to access to a jury trial," Mr. Smith said.

He has done his part. In the 2003 - 2004 campaign cycle, he contributed just under $100,000, nearly all of it to Democrats and Democratic political action committees, according to the center for Responsive Politics, a nonpartisan group.

Yet even if the Bush administration prevails and malpractice awards are curbed, the impact on Mr. Smith will probably be limited. It may crimp his style but not change his game. "There will always be plenty of work for people like him, the best litigators on the plaintiffs side," said Dr. Sage, the Columbia law school professor.

Kevin Lamarque/Reuters

In Collinsville, Ill., last month, President Bush met with doctors after speaking about legislation that would cap medical malpractice awards.