Medical Liability and the Emergency Physician: A State by State Comparison — Part 4

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When it comes to medical malpractice law, there is immense interstate variability. Some states have passed sweeping reforms that have decreased litigation and provided increased access to medical care. Other states have been reluctant to change, and as a result malpractice insurance premiums have skyrocketed and physicians have left in droves.

This is the fourth installment of this state by state review. The initial installment, in the July-August 2013 issue of *Common Sense*, analyzed the first ten states and included a "methods" section detailing how the ratings were calculated. The second and the third installments appeared in the January-February 2014 and March-April 2014 issues, respectively.

I welcome any and all feedback. Please direct your comments or questions to the editor of Common Sense, Andy Walker, at cseditor@aaem.org. Now, let's look at the next five states, Ohio through Rhode Island.

Ohio ★★★★☆

Caps: $350,000 cap on non-economic damages per plaintiff, but up to $500,000 if multiple plaintiffs are involved (soft cap).[3]

Average 2013 premiums: $33,600 (estimated) for EM, $7,000-25,600 for IM, $23,800-78,000 for GS.[31]

Liability environment for emergency physicians: Still the seventh most populous state, this once prosperous industrial bellwether has fallen on hard times over the past decade as the majority of its manufacturing cities (Cleveland, Cincinnati, Akron, Toledo, Dayton) have continued a decline that began 50 years ago.[60] But not everything in the Buckeye State has deteriorated over the past ten years. The Cavaliers flourished under Lebron James (up until The Decision),[64] Ohio State University dominated college football (up until Tattoogate),[65] and the state's medical liability environment resurged after Ohio passed one of the country's most powerful and comprehensive tort reform packages in 2004.[66] Once designated as a crisis state by the AMA,[35] with physicians leaving in droves due to skyrocketing premiums, Ohio is now considered a welcoming safe harbor for EPs — thanks to the enactment of extensive reforms ten years ago.[66] Litigation has dropped 41% state-wide over the years following the enactment of these reforms.[66] The 2004 across-the-board package included:

- A $350,000 cap on non-economic damages.[3]
- A four-year statute of limitations — upheld by the Ohio Supreme Court in Dec 2012.[67]
- Proportionate liability reform (damages are apportioned based on the plaintiff's share of the negligence).[66]
- A required case certification signed by an expert witness actively practicing the same specialty as the defendant.[8]
- Ohio State Medical Board jurisdiction over out-of-state physician expert witnesses — which gives the board the ability to discipline any physician who provides false or baseless medical testimony.[66]
- An "apology law" making physician apologies inadmissible in court — upheld by the Ohio Supreme Court in April 2013.[46]
- Peer-review protection ensuring that any information disclosed in peer review is protected from discovery in a subsequent medical liability claim.[66]
- Prejudgment interest reform that limits calculations to when the defendant first received notice of a claim and rather than when the injury first occurred (and now prejudgment interest cannot be applied to future damages).[66]
- A Good Samaritan Law that extends liability protection to any physician who cares for indigent patients in his office.[66]
- A requirement that malpractice insurance companies both explain the reasons behind nonrenewals or premium increases and provide physicians a warning period of 60 rather than 30 days before nonrenewals or significant premium increases.[66]

The state's impressive $350,000 cap on non-economic damages does come with a few exceptions. The cap can be increased to a total of $500,000 if the case involves multiple plaintiffs, and for cases involving "catastrophic injuries" the maximum may increase to $500,000 per plaintiff or $1 million for multiple plaintiffs.[3] In addition to the broad reforms passed in 2004, the state has enacted joint and several liability reform, collateral source reform, and periodic payment reform.[3] Unfortunately for Ohio EPs, this exhaustive assortment of reforms has not included specific laws protecting physicians practicing in the emergency setting. Also, while premiums have been reduced substantially over the years (down 26%),[66] EP premiums still remain in the mid to high range when compared to EPs practicing in other parts of the country.[31] Physicians in Cuyahoga county (Cleveland) pay substantially more than their colleagues in other parts of the state.[31]

Assessment: Ohio's medical liability environment has experienced a renaissance since the state passed sweeping reforms ten years ago. Sadly, this comprehensive package did not include laws protecting docs in the emergency setting, and premiums for EPs remain relatively high.
Grade: 4.0 stars out of 5.

Oklahoma ★★★☆☆

Caps: $350,000 cap on non-economic damages (soft cap).[3]

Average 2013 premiums: $29,175 (estimated) for EM, $11,700-14,700 for IM, $39,300-51,000 for GS.[31]

Liability environment for emergency physicians: Thanks to a booming oil and gas economy, the Sooner State has recently experienced unprecedented growth and prosperity.[59] Thanks to HB 2128, passed in April 2011, the state's medical liability environment has flourished in like

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fashion.[35] This bill solidified a formidable cap of $350,000 on non-economic damages — regardless of the number of parties against whom the action is brought or the number of actions brought.[35] Unfortunately, a few loopholes still persist. The cap does not apply to cases involving wrongful death or cases involving "bodily injury resulting from negligence if a judge and jury find that the defendant's acts were in reckless disregard or grossly negligent or fraudulent or intentional."[35] Additional favorable Oklahoma laws include: collateral source reform,[3] partial joint and several liability reform (joint and several liability still apply if the defendant's responsibility is greater than 50%),[3] a two-year statute of limitations,[8] and a certificate of merit requirement.[8] Attorney fees are limited, but rather than the customary 30% or sliding scale, they are limited to an alarming and exceedingly attorney-friendly 50% of the plaintiff's recovery![3] Laws do exist regarding expert witnesses, but they contain notable escape clauses: "Experts must be licensed to practice medicine or have other substantial training or experience in any area of health care relevant to the claim, and must be actively practicing or retired from health care in any area of health care services relevant to the claim. The judge may allow experts who do not meet these qualifications to testify if the judge finds there is good reason to admit the expert's testimony."[8] EP premiums remain unexpectedly high in the Sooner State, with Okie EPs paying twice as much as their Kansas neighbors and substantially more than their colleagues in Texas and Arkansas.[31]

Assessment: A robust cap on non-economic damages has been upheld, but exceptions exist. Expert witness laws are dubious at best. EPs pay significantly higher premiums than their colleagues in neighboring states.
Grade: 3.0 stars out of 5.

Oregon ★★½☆☆

Caps: $500,000 cap on non-economic damages in wrongful death actions (hard cap).[3]

Average 2013 premiums: $20,200 (estimated) for EM, $6,700-10,250 for IM, $26,400-37,500 for GS.[31]

Liability environment for emergency physicians: Unfortunately for Oregon EPs, the state's medical liability environment is not as stunning as it's windswept Pacific coastline. The Beaver State is known for breathtaking waterfalls, majestic forests, and volcano-studded mountains. It is not known for tort reform, which is barely perceptible in this otherwise beautiful state. In fact, Oregon was identified as a crisis state by the AMA in 2003.[35] In keeping with this designation, the state lacks a certificate of merit requirement and there are no laws of any kind in regard to expert witnesses.[8] The statute of limitations is generally two years, but can be extended up to five years in certain cases.[8] There are no significant limits on attorney fees, but attorney fees recovered from an award for punitive damages are limited to 20% of the punitive damages.[3] The state's constitution specifically prohibits caps on non-economic damages in personal injury actions, but a $500,000 cap is applied to wrongful death cases.[3] The state has enacted joint and several liability reform and collateral source reform.[3] EP premiums are inexplicably reasonable (low to mid-range), despite the state's lack of meaningful reform.[31] In keeping with its cutting-edge image, the state recently adopted an early arbitration initiative.[22] Senate Bill 683 (2013) is similar to the Michigan Model and Massachusetts' Disclosure, Apology, and Offering Initiative.[58] This innovative process emphasizes early discussion and mediation, including early settlement offers, under the authority of the Oregon Patient Safety Commission.[22] This bill was supported by both the Oregon Medical Association and the Oregon Trial Lawyers Association, as a way to improve patient safety and reduce costly litigation while still offering fair compensation.[22] While this bill has received overwhelming support, its ultimate impact remains uncertain. As it stands, these "adverse outcomes" will be reported confidentially to the Oregon Patient Safety Commission rather than the National Practitioner Databank (compensation negotiated through mediation does not have to be reported to the NPDB).[61] Patient advocacy groups are concerned that this lack of transparency will have a negative impact on patient safety.[61]

Assessment: A gorgeous state with reasonably fine looking premiums and unsightly tort reform. Its early arbitration initiative is promising.
Grade: 2.5 stars out of 5.

Pennsylvania ★½☆☆☆

Caps: Punitive damages are capped at twice the actual damages (hard cap).[3]

Average 2013 premiums: $48,175 (estimated) for EM, $13,600-30,700 for IM, $45,400-103,000 for GS.[31]

Liability environment for emergency physicians: As the U.S. was gearing up for its bicentennial celebration in 1976, Elton John sang "Cause I live and breathe this Philadelphia Freedom. From the day that I was

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born I waved the flag." This song, originally about tennis, became an anthem for the Keystone State and its City of Brotherly Love. Philadelphia will always be synonymous with flag-waving patriotism, liberty, and the signing of the Declaration of independence. To this end, the state's constitution contains specific language protecting the people's right to sue and prohibiting caps on damages of any kind.[62] While this degree of "liberty" may be advantageous to some, for well-meaning EPs taking care of patients in the trenches, the situation is an absolute nightmare. For many years Pennsylvania undoubtedly had the worst medical liability environment in the country. It was an AMA-designated crisis state,[35] with Philadelphia **ATRA's top-ranked Judicial Hellhole**.[63] At the peak of the state's catastrophe, from 2000 to 2004, general surgery premiums increased from $33,600 to $128,500 per year and OB-GYN premiums increased from $37,500 to $161,000 per year.[35] In 2002, medical malpractice plaintiffs whose cases were heard in Philadelphia courts were more than twice as likely to win jury trials as the national average, and more than half the awards were for $1 million or more.[63] Reforms were passed in 2003, including a case certification requirement and venue reform — a law mandating that liability legal proceedings take place in the county where the alleged negligence took place, to prevent "venue shopping" for sympathetic juries.[63] Over the past ten years medical malpractice case filings have decreased 44% in the state, and they're down 65% in Philadelphia.[63] So times have changed — or have they? Let's just say things have gone from "horrendous" to "barely tolerable." Keystone State EPs still pay some of the highest premiums in the country.[31] Furthermore, surgeons and OB-GYNs can expect to pay over $100,000 per year in Philadelphia — almost double the premiums paid by their colleagues in the remainder of the state.[31] Pennsylvania's per capita malpractice payout of $24.77 per year is the second highest of any state in the nation.[36] Also, the state has failed to enact significant caps. Punitive damages are capped at two times actual damages, but this is rarely relevant since there are no limits on attorney fees,[3] and the statute of limitations can be extended up to seven years from the date of the incident.[8] Expert witnesses must be in the same specialty and "actively engaged in clinical practice or teaching," but two loopholes exist: 1)"Expert testimony is required to establish the requisite standard of care, unless negligence is obvious to a lay person" and 2) "The court can waive this requirement if the expert has sufficient training, experience, or knowledge as a result of active practice or teaching within five years prior to the incident." On a positive note, the state has enacted collateral source reform and partial joint liability reform, and the defendant may be fully responsible for damages if it is proved that he is at least 60% at fault.[8] Finally, the state's recent enactment of "Apology Legislation" has received significant attention — after the bill required eight years to get through the legislature![61] Similar to "apology laws" that have been established in 35 other states, SB 379 makes physician apologies inadmissible in court.[61] While "I'm sorry laws" are well meaning, their overall impact on litigation remains unclear. The disclosure process remains a challenge for physicians, and laws such as this one undoubtedly lend added support. After all, according to the legendary Elton John, "Sorry seems to be the hardest word."

Assessment: This highly litigious state has made some progress over the years, but with sky high premiums and a state constitution specifically prohibiting caps, this medical liability environment remains a mine field for EPs. **Grade:** 0.5 stars out of 5.

Rhode Island ★☆☆☆☆

Caps: None.[3]

Average 2013 premiums: $32,375 (estimated) for EM, $12,300-16,000 for IM, $44,200-57,000 for GS.[31]

Liability environment for emergency physicians: Measuring just 1,212 square miles, the Ocean State is the smallest in the union. And unfortunately for Rhode Island EPs, the state's negligible medical liability reforms are commensurate with its minuscule size. Following in

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the footsteps of its New England neighbors, this tiny island state in the Northeast has failed to enact meaningful reform of any kind. Rhode Island has no caps on damages,[3] no joint liability reform,[3] no periodic payment reform,[3] no case certification requirement,[8] and no limits on attorney fees.[3] While "expert witness testimony is required", thanks to ambiguous legalese trial attorneys can essentially call upon any hired gun with "health care experience" to serve in this capacity.[8] The state's statute of limitations is three years[8] and its per capita malpractice payout of $17.35 per year is the eighth highest in the nation.[36] With a paucity of laws protecting physicians, it is no surprise that the AMA identified Rhode Island as a crisis state.[35] However, the state's mid-range malpractice premiums are a pleasant surprise.[31] Despite the negativity surrounding the state's liability environment, Rhode Island EPs actually pay substantially less for malpractice coverage than their colleagues in neighboring states.[31]

Assessment: An undersized state with undersized medical liability reforms. Premiums are slightly lower than expected. **Grade:** 1.0 star out of 5.

Look for this series to continue in future issues!

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