

# THE CASE FOR PREDICTABILITY AND OBJECTIVITY IN LIFE CARE PLANNING

## THE PROBLEMS

*Maryland's hospital medical malpractice damages climate is hurtling out of control.*

- A recent survey found that in 2018, Maryland's annual hospital payouts (closed claims) were nearly 140 percent higher than in 2008 – \$176 million vs. \$73.5 million, despite the frequency of claims remaining relatively stable.<sup>1</sup>
- Maryland's claim frequency (number of claims) is about half the national average in most years, and yet the claim severity (payout) is approximately double the national average most years.<sup>2</sup>
- While hospitals struggle with access and affordability of liability coverage, attorneys typically take 40 percent of each verdict, plus expenses, which in 2018 diverted more than \$70 million from patients' health care.<sup>3</sup>

## CURRENT LIFE CARE PLANS ADD UNPREDICTABLE COSTS

*Outlays for birth injuries and surgical injuries are higher because they require life care plans that cover patients' future medical costs.*

- In 2018, the average Maryland hospital medical malpractice case cost \$477,711; the average obstetrics case cost \$1.13 million, and the average surgical case cost \$737,143.<sup>4</sup>

*Contributing to these higher outlays is a lack of objective criteria to determine the needs and total costs of a life care plan.*

- Life care plans are offered at trial by expert witnesses (life care planners), and are based on their opinion about the future medical care needs of an injured person.
- Life care planners are not certified in the State of Maryland. They are held to the *Frye/Reed* standard, which allows far too much leeway by requiring only that the plan not be novel and MD Rule 5-702(3), which only requires a "sufficient factual basis" for a life care plan.<sup>5</sup>

## THE FIX

*Adopt the Daubert standard for medical malpractice cases.*

- The *Daubert* standard requires strict adherence to the scientific method in medical malpractice testimony.<sup>6</sup>
- Federal courts currently require the *Daubert* standard, and 31 states and the District of Columbia utilize a pure or modified *Daubert* standard.<sup>7</sup>

*Tie the cost of future medical services to rates that are used in Maryland, adjusted for inflation.*

- Life care plans are not based on standard rates or formulas; establishing objective criteria and benchmarks will ensure that medical liability payouts are predictable, benefiting plaintiffs and defendants.

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<sup>1</sup> MHA Medical Liability Survey (2018), includes medical liability claims by service type representing about 90 percent of Maryland's hospitals and includes claims from 2004 – 2018.

<sup>2</sup> AON/ASHRM Hospital and Physician Liability Benchmark Analysis, October 2018. Available at <https://www.aon.com/risk-services/thought-leadership/2018-report-hospital-professional-liability-overview.jsp>

<sup>3</sup> *These Three Trends Could Dramatically Drive Up Healthcare Liability Rates.* (2018) Ironshore. Available at <https://www.brmsinc.com/m/blog/these-three-trends-could-dramatically-drive-up-healthcare-liability-rates.aspx>

<sup>4</sup> MHA Medical Liability Survey (2018), includes medical liability claims by service type representing about 90 percent of Maryland's hospitals and includes claims from 2004 – 2018.

<sup>5</sup> MD Rules, Rule 5-702

<sup>6</sup> Testimony to be based on 1) sufficient facts or data; 2) is the product of reliable principles and methods; and 3) the principles and methods have been applied reliably to the facts of the case.

<sup>7</sup> *Daubert Verses Frye: A National Look at Expert Evidentiary Standards* (2018), Available at:

<https://www.theexpertinstitute.com/daubert-versus-frye-a-national-look-at-expert-evidentiary-standards/>