



Jon Kyl, Chairman

Lawrence Willcox, Staff Director
347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
<http://rpc.senate.gov>

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Meaningful Health Care Reform Begins with Health Courts

Executive Summary

- Meaningful reform of the country's medical liability system continues to be a priority, both for lawmakers and the public. Poll results indicate that nearly 75 percent of respondents want their elected representatives in Washington to support comprehensive medical liability reform.
- One proposal that presents what may be the most effective means of reform is creation of special health courts. These would provide a forum where medical liability actions could be heard by judges who are specially trained in medical liability matters and who hear only health court cases.
- One prominent proposal centers on creating a network of health courts at the state level. In the state-based system, medical liability claims would first be filed with an administrative board, in a manner similar to the current workers' compensation system. Claims that cannot easily be resolved by the administrative board (and appeals) would then be heard in the health court.
- Health courts would resemble other civil trial courts in many ways, but the differences between the two are important. In health courts, expert witnesses would be hired by the court, not by the parties to the case, in an effort to remove any bias that might exist. Also, most proposals would eliminate the jury in medical liability cases, instead relying on the expertise of the specially trained judge.
- Compensation for an injury caused by a provider's negligence would be determined by a fixed schedule of benefits, developed by medical experts, that would be annually updated and refined. Although the schedule of benefits might result in smaller payments for some claimants, the administrative nature of the claim-filing process would allow easier access to compensation for a greater number of injured patients, including those who cannot afford a good attorney.
- Because the courts would be created at the state level, details regarding their structure and operation may vary, though all would operate on the same basic framework. And a corresponding system of federal courts would be available to reconcile inconsistencies that may arise in state laws.

Introduction

Recent proposals for reform of the medical liability system in the United States have been laudable but have not targeted the root of the problem. The current system for compensating injured patients operates somewhat like a lottery: jury verdicts are characterized more by their random nature than by good medicine. And, unlike most legal proceedings, medical liability cases are largely decided without precedents to guide the decisions – juries have little ability to look to appropriate medical treatments as a basis to determine whether the care received by patients was inappropriate. Instead, they must rely on testimony from expert witnesses hired by the parties to the action. Such a deeply flawed system also provides no legal guidance to practitioners as to what constitutes a good standard of care and, in turn, does nothing to help stem the occurrence of injuries in other patients. Worse yet, most liability actions take years to come to trial.

There is a viable alternative: a system of specialized health courts would provide consistent, reliable, and timely awards for injured plaintiffs, differentiating between individual negligence by a health care provider and a negative outcome not associated with fault. Such a system would ensure that all patients injured by a provider’s negligence, not just those with the financial resources to hire a good attorney, have access to justice and fair compensation. In addition, it would shield non-negligent providers from costly litigation; instead, it would focus attention and resources on those practitioners who are delivering substandard care. Such a change in focus would deter future mistakes and improve overall quality of care.

Background

Over the past 30 years, groups from various industries have advocated reform of the nation’s tort system. A number of bills, including the so-called “Cheeseburger Bill,” have been introduced with the common goal of reducing lawsuit abuse and making recovery of damages more prompt and more fair.¹ As part of this focus on tort reform, at least one medical liability reform proposal has been introduced in each of the last dozen Congresses, with many of those proposals focusing on capping a claimant’s non-economic damages (generally, those damages commonly referred to as “pain and suffering”).

These proposals acknowledge that the medical liability system in this country is inherently flawed. What these proposals fail to recognize, however, is that while damage caps, if enacted, would greatly improve the current system, they don’t get at the heart of the issue – they do nothing to eliminate the greater systemic problems related to medical errors and fair compensation.² Caps do not deter mistakes. Nor do they ensure that patients injured by negligence are compensated promptly and consistently or that non-negligent providers are protected against unwarranted legal action.³ Until

¹In the 109th Congress, the “Cheeseburger Bill” is H.R. 554, the Personal Responsibility in Food Consumption Act of 2005. The bill prohibits new and pending actions brought against any manufacturer, distributor, marketer, advertiser or retailer of food for any alleged injury related to weight gain or obesity.

²Stuart Taylor, Jr. and Evan Thomas, “Civil Wars,” *Newsweek*, December 15, 2003.

³A. Russell Localio, et al. “Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Malpractice Study III.” *New Eng. J. Med.* Vol. 325 No. 4 (1991): 250.

these underlying problems are addressed, preventable errors will persist and compensation for medically related injuries will continue to be random and unreliable. There must be predictability for patients and health care providers alike.⁴

Achieving reliable justice reform is also a necessary foundation for other health care reforms. Fear of litigation often leads to practice of “defensive medicine.”⁵ This overutilization of medical resources has become a sort of faux standard of care that does nothing to improve the quality of care, but does serve to drive prices higher. A recent PricewaterhouseCoopers study of factors fueling the high cost of health care found that approximately 10 percent of the costs of medical services are attributed to the cost of litigation and defensive medicine.⁶ These higher costs of care inflate the cost of health insurance and, in turn, contribute to higher numbers of uninsured.⁷ Frivolous lawsuits also drive up the costs of liability insurance, forcing many physicians out of practice (particularly those in high-risk specialties like obstetrics and neurology) and limiting access to care even for those who do have insurance. Meaningful reform is the first step toward creating a professional culture of quality care, avoiding waste, and encouraging affirmative cost-containment choices.

The Current System Fails Both Patients and Providers

Several studies of medical errors indicate that at least 44,000 patients (and as many as 98,000) die each year as a result of medical errors; hundreds of thousands more are injured.⁸ Yet research shows that most medical errors are actually unavoidable and not the result of neglect.⁹ A recent study of medical liability estimates that only about 1 percent of all adverse events are deemed to have been caused by a provider’s negligence.¹⁰ Yet, surprisingly, only 2 percent of those who are injured by negligent care actually file malpractice claims. Although there may be many reasons why this is so, a prevailing theory is that plaintiff’s attorneys won’t take cases unless the potential payout will be lucrative; and in many cases of true negligence, the actual injury may be relatively insignificant.¹¹ Meanwhile, many others who do file claims either are not injured as a result of negligence or actually suffer no injury at all – some are simply unhappy with their provider or the outcome of their treatment.¹² It is estimated that as many as 80 percent of the liability claims filed in the United States target doctors who made no medical error.¹³

⁴Comments on “The Malpractice Mess” and “Bad Medicine,” Common Good, November 2005, available at <http://cgood.org/healthcare-newscommentary-watch-813.html?print=1>.

⁵Harris Interactive Poll, “Doctors and Other Health Professionals Report that Fear of Malpractice Has a Big, and Mostly Negative, Impact on Medical Practice, Unnecessary Defensive Medicine and Openness in Discussing Medical Errors,” February 2003. A full 79 percent of those polled said they order more tests than are medically needed.

⁶PricewaterhouseCoopers, “The Factors Fueling Rising Healthcare Costs 2006,” January 2006.

⁷*Newsweek*.

⁸Institute of Medicine (IOM). To Err is Human: Building a Safer Health System. DC: National Academy Press, 2000.

⁹IOM.

¹⁰New Eng. J. Med., 246-247.

¹¹New Eng. J. Med., 249.

¹²*The Economist*, “Scalpel, scissors, lawyer,” December 17, 2005, and New Eng. J. Med., 249.

¹³New Eng. J. Med., 246-247.

When patients do file claims, the outcome is uncertain – both for the patient and the provider. Like cases are not decided alike.¹⁴ Not every patient receiving negligent care will recover monetary damages, and many non-negligent providers will be forced to pay large settlements to avoid even costlier defenses in court. This is due in large measure to the structure of the current system of medical liability. In the current system, expert witnesses are hired by the parties to represent their individual interests, and juries are expected to sort out the facts provided in a “battle of the experts.”¹⁵ Juries return verdicts without having any legal standard of care or precedent on which to rely in making their decisions. In many instances, juries seem to let their sympathies guide them – a phenomenon that sometimes may result from their inability to understand the scientific complexities of the cases and that may contribute to widely disparate damage awards.¹⁶ More than half of all jury awards in medical liability cases exceed \$1 million, with the average award topping \$3.5 million.¹⁷ When damages are awarded, it often takes five to ten years for the patient to be compensated, and nearly 40 percent of the award goes to pay attorneys’ fees and other costs of litigation.¹⁸

Cost, however, is not the only inefficiency in the system. As mentioned previously, many doctors admittedly resort to defensive medicine to protect themselves against liability suits, and few providers say they are comfortable admitting medical errors in the current litigious climate, knowing that such admissions could be used against them in court.¹⁹ Polling confirms this concern is widespread: in a Harris Interactive poll of health care providers and hospital administrators, 94 percent responded that fear of liability discourages open discussion of medical errors, with 59 percent of the respondents indicating that the impact was substantial.²⁰ Without open discussion, patient-provider relationships in the current system have become characterized by distrust, and providers are reluctant to coordinate with one another. Inevitably, quality of care is compromised. Given the effects that fear of unwarranted litigation have on the practice of medicine, reform of the medical liability system should improve protocols of practice so as to reduce the incidence of error and improve dispute resolution.

¹⁴*The Philadelphia Inquirer*, “A Case for Medical Justice,” Philip Howard, May 16, 2004.

¹⁵*The Boston Globe*, “Malpractice Fix,” Kristin Eliasberg, August 21, 2005.

¹⁶*Newsweek* described the current litigation climate in this way: “Many of these cases do not belong in court. But clients and lawyers sue anyway, because they hope they will get lucky and win a jackpot from a system that allows sympathetic juries to award plaintiffs not just real damages – say, the cost of doctor’s fees or wages lost – but millions more for impossible-to-measure ‘pain and suffering’ and highly arbitrary ‘punitive damages.’” *The Wall Street Journal* discussed jurors in an August 22, 2005, article titled, “Merck Loss Jolts Drug Giant, Industry.” The article noted that “Jurors who voted against [pharmaceutical company] Merck [in a recent Texas case on drug safety] said much of the science sailed right over their heads.” One juror told reporters, “We didn’t know what the heck they were talking about.”

¹⁷“The Case for a Reliable Health Court: Making Malpractice Resolutions Part of the Cure,” PowerPoint presentation by Nancy Udell, Director of Policy at Common Good, available at <http://cgood.org/assets/attachments/97.ppt>.

¹⁸*The Boston Globe* and Troyen A. Brennan and Philip K. Howard, “Heal the Law, Then Health Care,” editorial, *The Washington Post*, January 25, 2004.

¹⁹*Newsweek*.

²⁰Harris Interactive Poll, “The Fear of Litigation Study - The Impact on Medicine,” April 11, 2002.

How Health Courts Can Help Save Health Care

Ideally, a reliable system of medical justice should provide consistent judgments on the standard of care, make resolution of claims less adversarial, eliminate the emotional influence on jury awards, make negligent and reckless providers accountable for their actions, provide powerful incentives for quality improvement, lower costs, and improve administrative efficiency. And, ideally, providers should be held accountable for the extent of their fault, not the extent of the injury to the patient. Providers who make sensible judgments should not be penalized unfairly.²¹ This is the concept behind health courts. Such a system would compensate a greater percentage of those injured by negligent care (albeit, perhaps, with smaller awards) because the system would be more accessible. In addition, compensation would be prompt and would be fair to both the injured patient and the provider. Moreover, providers would have a body of legal notice defining appropriate guidelines regarding what behaviors constitute a good standard of care.

Creating a Framework

One of the most prominent health court proposals is one jointly advocated by the bipartisan organization Common Good, whose self-proclaimed mission is to restore common sense to American law, and the Progressive Policy Institute (PPI), once referred to as President Clinton's "idea mill." Common Good and PPI propose creating a network of health courts at the state level. Under this proposal, medical liability claims would first be filed with an administrative body, in a manner similar to the current workers' compensation system.²² Injured patients would obtain claim forms from their health care providers and would submit them to the local health court review board. These boards would be responsible for investigating the claims to determine whether the alleged malpractice does, in fact, constitute negligent behavior on the part of the provider. If the board determines that the case for negligence is clear, the board will order the patient's provider to pay damages to the patient according to a standing schedule of benefits, which allows for both economic and non-economic damages. This schedule of benefits would compensate any number of negligence events compiled by medical experts. These "avoidable classes of events" or "accelerated compensation events" (ACEs) would be immediately compensable because their occurrence would be a "clear indication" of wrongdoing by the provider.²³

In cases where an injury is clearly not the result of medical negligence, or where there is negligence but the injury is too minor to merit an award, the board would dismiss the case. Both

²¹Jeffrey D. Pariser, "Specialized Health Care Courts: Could They Create Clear Standards and Greater Reliability?," *Medical Malpractice Law and Strategy*, August 22, 2004.

²²Progressive Policy Institute (PPI), "Health Courts: Fair and Reliable Justice for Injured Patients," February 17, 2005, available at <http://www.ppionline.org>. This PPI Policy Report describes workers' compensation systems in this way: "Workers injured on the job could simply submit a claim form through their employer to an administrative law judge or board. If the judge determines that the injury occurred on the job, a worker receives compensation according to a schedule of benefits that takes into account the severity of the injury, the degree of disability, and the worker's age and pay. Injured workers cannot sue employers in a traditional court because workers' compensation provides an alternative system of justice, which the Supreme Court has upheld as constitutional."

²³PPI.

patients and providers would have the right to appeal the case to a health court for further review. Where the board cannot make a clear determination one way or the other, the board can refer the case to the state's health courts for a full trial.

There is currently no functioning model for health court trials. It is important to recognize that health courts would be part of each state's own court system, and so their procedures would vary. In general, Common Good and PPI see their proposal operating like other civil trials with a few notable exceptions. Like civil trials, both the patient and the provider would be represented by attorneys. Expert witnesses would provide testimony on scientific evidence; however, unlike civil trials, the expert witnesses would be hired by the court, not the individual parties. Health court cases would be decided solely by judges, without the use of a jury. These judges would be required to receive specific training about medically related matters and would hear only medical liability cases. This singular focus would ensure that medical liability trials are decided objectively on the merits of the evidence, rather than on subjective determinations about which party's experts were more convincing or how deserving the plaintiff was of compensation, regardless of whether the provider was to blame.

If a judge finds that the facts of the case before him do constitute negligence, the patient would be awarded damages based on the same ACE schedule of benefits used by the administrative review boards, also taking into account both economic and non-economic damages.²⁴ The ACE schedule would be reviewed annually by medical experts and would be updated or refined as needed to reflect changing medical technology and practice trends.

Finally, Common Good and PPI suggest that a corresponding system of federal health courts also be created. These federal health courts would resolve differences between contradictory decisions at the state level.

Building Support and Answering Critics

The health courts concept enjoys broad bipartisan support, as well as support from leaders in the fields of health care and law and from the public. Senate Majority Leader Bill Frist has included health courts among his proposals for reform of the nation's health care system.²⁵ The Democratic Leadership Council has said that "health courts offer a true cure: fair and reliable compensation for patients injured by medical mistakes and clear legal signals for doctors and hospitals to help them prevent mistakes."²⁶ Former Speaker of the House Newt Gingrich and former Deputy Attorney General Eric Holder are among the supporters, and support for the idea is building in over a dozen states, with several having considered health courts legislation.²⁷

²⁴Economic damages include lost wages, medical bills, and damage to property.

²⁵Remarks by Senate Majority Leader Bill Frist in a speech before the National Press Club, July 12, 2004.

²⁶"Health Courts for Fair and Reliable Justice," Democratic Leadership Council website, July 15, 2005, available at <http://www.dlc.org>.

²⁷See, American Health Line, National Journal Group, August 13, 2002. See also, Lindsay Fortado, "States Weigh Med-Mal Courts," *National Law Journal*, December 16, 2004. See also, Paul Barringer, "Let's Create Health Courts," *National Law Journal*, May 2, 2005. States considering health courts include Wyoming, Rhode Island, Colorado, Washington, Michigan, Connecticut, Pennsylvania, and New York, and legislation has been introduced in Maryland, Illinois, New Jersey, and Virginia. Two

With regard to public support, a 2005 Harris Interactive poll found that, “By a huge margin, the American people want their elected representatives in Washington to support comprehensive medical liability reform.”²⁸ Harris indicated that three-quarters of respondents said they wanted their Senators and Representatives to support reform legislation.²⁹ Moreover, there is public support for creation of special health courts. A 2004 Harris Interactive poll found 62 percent of Americans favor having medical liability cases decided by health courts.³⁰ A full 63 percent of those polled believe that claims are very often or somewhat often brought against doctors and hospitals when there is no negligence, and 31 percent believe that liability actions against providers and doctors’ fear of being sued harm the quality of patient care “a lot.”³¹

Although the Health Law Section of the American Bar Association (ABA) has recommended that the ABA endorse the creation of health courts, the organization has declined to do so at this time.³² One of the aspects of the Common Good/PPI health court proposal the ABA opposes is the idea that health court cases are decided solely by judges without the use of a jury. While some proponents of non-jury trials argue that jurors cannot be trusted to sift through complex information, this is not part of the Common Good/PPI rationale.³³ Common Good and PPI assert that, since juries decide disputes on a case-by-case basis, there is no precedent, no legal standard of care, by which providers can be guided.

Those who oppose removing the jury from the courtroom cite constitutional concerns, claiming that such a system would undermine the guarantees of the Seventh Amendment.³⁴ The Supreme Court has not extended the Seventh Amendment right to a jury trial to state courts. A majority of states, however, have similarly guaranteed their citizens a constitutional right to a jury trial in civil actions. A federal law authorizing resolution of liability actions in a non-jury health court at the state level can be written to pre-empt existing state guarantees to a civil jury trial under the Supremacy Clause of the U.S. Constitution.³⁵

Massachusetts state Senators have indicated that they will introduce legislation in the near future.

²⁸Harris Interactive Poll, March 2005, available at <http://www.hcla.org/polls.html>.

²⁹Harris 2005.

³⁰Harris Interactive Poll, June 14, 2004, available at <http://www.cgood.org>.

³¹Harris 2004.

³²American Bar Association (ABA), Report to the House of Delegates on Recommendation 103, February 2006. It is important to note that the ABA represents all lawyers, including trial lawyers. In a February 15, 2006, press release responding to the ABA resolution, Common Good states that it is not surprising that the ABA would oppose the creation of a system of health courts “since 60 percent of the cost of the current medical malpractice system goes to lawyers and court costs. More money now goes to lawyers’ fees than to patients who have been harmed by medical malpractice.”

³³See *Wall Street Journal*.

³⁴The Seventh Amendment to the U.S. Constitution reads, “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

³⁵The Supremacy Clause is Article VI, Paragraph 2, of the United States Constitution. This clause states, “the Laws of the United States . . . shall be Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The treatment of state jury trials is a difficult one. Juries often play an important role in dispute resolution, but Congress has determined that fairness can sometimes be better achieved through alternate means.³⁶ On the other hand, state policy choices deserve serious consideration. Recall that the Common Good/PPI proposal is only one of several that Congress may look to as it considers legislation. As this paper earlier noted, the health courts will be a part of each state's own court system, and so some may find it advisable to integrate the new health courts with any existing preferences for juries – thereby preserving some sort of role for jurors, but ensuring that the specialized expertise of health court judges is given full effect so that the failures of the current system are corrected.

The Association of Trial Lawyers of America (ATLA) also vigorously opposes health courts, calling support of non-jury administrative courts “an outrageous antidemocratic position.”³⁷ But the concept of using single-issue, non-jury administrative courts to resolve cases more expeditiously and more fairly is not unprecedented. As Philip Howard, Chair of Common Good, points out, America has a “long tradition of special courts, which began in 1789 with separate admiralty courts.”³⁸ In this country, separate courts already exist at the federal level for tax, bankruptcy, workers' compensation, and vaccine liability.

In ATLA's member magazine *Trial*, Joanne Doroshow, Executive Director of the Center for Justice & Democracy, also argues that “requiring patients to prove causation and other issues before an administrative tribunal – even one that did not rely on health care and insurance professionals as decision-makers – is very unfair in medical liability actions because of the wide disparity in power and resources between the parties.”³⁹ But this would not be the case. The problems cited by Doroshow exist in the current system and are exactly those that a system of health courts would attempt to solve; a greater number of injured patients would be able to obtain compensation, regardless of their ability to pay an attorney.

Other criticisms of the health court proposal are equally unfounded. Doroshow claims that health courts would operate “without a public record” and would “have no legally-binding effect.”⁴⁰ Again, these are exactly the problems in the current medical liability system that proponents of health courts seek to solve.

Pursuing Real Reform

Congress has heeded the call for health courts. Legislation proposing creation of health courts has been introduced in both the Senate and the House of Representatives. Senators Enzi and Baucus introduced a bipartisan bill, S. 1337, the *Fair and Reliable Medical Justice Act*, on June 29, 2005, and the bill is currently pending before the Committee on Health, Education, Labor and Pensions (HELP).

³⁶Congress' recent consideration of the asbestos reform legislation, which includes a trust fund as an alternative compensation regime that lacks a jury trial, is a recent example.

³⁷Mark A. Hofmann, “Health Courts' Touted as Malpractice Claim Option; Setup Would Resemble Workers Comp System,” *Business Insurance*, June 13, 2005.

³⁸Philip K. Howard, Letter to the Editor, *New Yorker*, December 26, 2005.

³⁹Joanne Doroshow, “The Health Courts Facade,” *Trial*, January 1, 2006.

⁴⁰Doroshow.

This legislation would authorize the Secretary of Health and Human Services (HHS) to award up to 10 demonstration grants to the states for five years for the development, implementation, and evaluation of alternatives to the current medical liability system. Among the three demonstration types contemplated by S. 1337 is the health court.⁴¹ According to the sponsors, “the state would ensure that the presiding judges have expertise in and understanding of health care,” and “such judges would make binding rulings on causation, compensation, standards of care, and related issues.”⁴² In the House, Congressman Mac Thornberry has introduced a similar bill, H.R. 1546, the *Medical Liability Procedural Reform Act*, which is currently pending before the House Judiciary Committee.

Separately, Senator Cornyn is working on a bill to authorize health court pilot projects at the federal level. The bill would allow shifting of dispute resolution for medical injuries from state courts into administrative courts maintained by the U.S. Department of Health and Human Services, and would allow a select group of hospitals to serve as a model for this approach. The pilots could be established expeditiously, and numerous major hospital systems around the country, including New York Presbyterian, Duke, and Johns Hopkins have expressed interest in participating in such a project.⁴³

Conclusion

Given the failure of other proposed reforms, developing and implementing a system of dedicated health courts may be the most effective means of achieving real health care reform in this country. The health court proposal is not about reducing costs overall (since many more people may be compensated at smaller amounts). It is about targeting the root causes of medical errors, making compensation more fair for both patient and provider, and laying the necessary foundation for other reforms, which rely on having standards of care in place to guide providers in their practice.

⁴¹The health court model in the Enzi bill is similar to the court portion of the Common Good/PPI proposal. The Enzi bill would also allow grants to states for two alternative model programs. The first involves early disclosure and compensation, whereby a state would grant legal immunity to health care providers who first disclose medical errors that result in injury and then make a timely offer of compensation to the injured patient. The second model would feature an administrative compensation board, similar to the one contemplated by the Common Good/PPI proposal.

⁴²Fact sheet on the *Fair and Reliable Medical Justice Act*, issued by Senator Enzi’s office.

⁴³Interview of Senator Cornyn’s staff.