



Medical Liability Reform = Health Care Reform

No serious health care reform is complete without reforms to America's litigation system. The current system for resolving claims against health care providers invites lawsuit abuse, is unacceptably costly and inefficient, and damages the quality of health care Americans receive. Lawsuit abuse contributes significantly to the cost of health care both directly and indirectly by increasing medical liability insurance rates and driving costly defensive medicine.

The American medical liability system is broken. According to one study, 40 percent of claims are meritless: either no injury or no error occurred. Attorneys' fees and administrative costs amount to 54% of the compensation paid to plaintiffs. The study found that completely meritless claims (which are nonetheless successful approximately one in four times) account for nearly a quarter of total administrative costs.¹ The American civil litigation system is the most expensive in the world, more than twice as expensive as nearly any other country.² In the medical liability context, the direct cost of lawsuits is more than \$30 billion a year.³ But the indirect costs are far greater.

"Defensive Medicine" is widely practiced – and costly. Skyrocketing medical liability insurance rates have distorted the practice of medicine. Costly, but unnecessary, tests have become routine as doctors try to protect themselves from lawsuits. According to a 2008 survey conducted by the Massachusetts Medical Society, 83 percent of physicians reported that they practice defensive medicine.⁴ Another study in Pennsylvania put the figure at 93 percent.⁵

While estimates vary, the Pacific Research Institute has put the cost of defensive medicine at \$124 billion;⁶ others have arrived at higher figures.⁷ In addition, defensive medicine can actually increase dangers to patients due to side effects of many procedures and tests.

Excessive litigation damages the doctor-client relationship and impairs care. Beyond the dollars and cents, when doctors begin to see their clients as potential litigants, the quality of care patients receive is seriously compromised. In a recent survey, 76 percent of doctors said that their concern about being sued has hurt their ability to provide quality patient care. Nearly half of nurses say they are prohibited or discouraged from providing needed care by rules set up to avoid lawsuits.⁸

Lawsuit abuse drives doctors out of practice. There is a well-documented record of doctors leaving the practice of medicine and hospitals shutting down particular practices that have high liability exposure. This problem has been particularly acute in the fields of ob-gyn and trauma care, as well as in rural areas.⁹ The absence of doctors in vital practice areas is at best an inconvenience; at worst it can have deadly consequences.¹⁰ Hundreds or even thousands of patients may die annually due to lack of doctors.¹¹

According to the Massachusetts study, 38 percent of physicians have reduced the number of higher-risk procedures they provide, and 28 percent have reduced the number of higher-risk patients they serve, out of fear of liability.¹² The American College of Obstetricians and Gynecologists has concluded that the

“current medico-legal environment continues to deprive women of all ages, especially pregnant women, of their most educated and experienced women’s health care providers.”¹³

The states have proven that legal reform works. While Democrats in Washington talk about the need to study the problem, states have acted to address it. Several states have limited noneconomic damages – such as those for “pain and suffering – and dramatically lessened the burden of lawsuits. In states with such limits, premiums are 17 percent lower than they are in states without them.¹⁴

After Texas adopted a new liability system in 2003, medical liability premiums fell dramatically, and thousands of new doctors flooded into the state.¹⁵ When Alabama adopted reform, the average judgment in medical liability cases fell sharply, only to double again when its courts reversed the reform.¹⁶

States also have had success with a variety of other reforms. A comprehensive study of these reforms suggests that attorney-fee limits, such as those in California, are particularly effective.¹⁷ The cumulative effect of all state reforms put together could be as much as a 74 percent reduction in premiums.¹⁸

The American people are demanding legal reform. A recent survey found that 83 percent of Americans believe that reforming the legal system needs to be a part of any health care reform plan.¹⁹

The time for legal reform is now. The Administration has acknowledged that our medical liability system is broken, but its tentative proposals will only delay a solution. The states have developed solutions that have worked. Unfortunately, Democrats on the Finance Committee voted in lock-step against these types of proven reforms. Whether Senate Democrats continue to oppose these reforms on the Senate floor will say a lot about whether they are serious about improving our health care system.

1 “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation,” David Studdert et al., *New England Journal of Medicine*, May 11, 2006.

2 “U.S. Tort Costs and Cross-Border Perspectives: 2005 Update,” Tillinghast-Towers Perrin.

3 “U.S. Tort Costs: 2008 Update, Trends and Findings on the Cost of the U.S. Tort System,” Tillinghast-Towers Perrin.

4 “Investigation of Defensive Medicine in Massachusetts,” Massachusetts Medical Society, November 2008.

5 “Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment,” David Studdert et al, *JAMA*, June 1, 2005, pp. 2609-2617

6 *Jackpot Justice: The True Cost of America’s Tort System*, LJ McQuillan et al, Pacific Research Institute, 2007.

7 “Wasted Medical Dollars,” Kevin Pho, *USA Today*, April 23, 2008.

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

9 For an extensive compilation of such instances see “Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Care,” U.S. Department of Health and Human Services, March 3, 2003.

10 See: Testimony of Leanne Dyess, “Patient Access Crisis: The Role of Medical Litigation,” Senate Judiciary Committee, February 11, 2003; Testimony of Dr. Thomas Gleason, “Medical Liability Reform: Stopping the Skyrocketing Price of Health care,” House Small Business Committee, February 17, 2005.

11 See: Testimony of Theodore Frank, “Protecting Main Street from Lawsuit Abuse,” Senate Republican Conference, March 16, 2009 (“The effect of the loss of productive doctors and the closing of emergency rooms ... is in the hundreds of lives a year, and perhaps as high as 1,000 deaths and many exacerbated injuries.”); “Tort Reform and Accidental Deaths,” Paul Rubin and Joanna Shepherd, *HEmory Law and Economics Research Paper No. 05-17H* (finding tort reforms saved approximately 2,000 lives in the year 2000 and 24,000 over a 20-year period).

12 “Defensive Medicine in Massachusetts,” pp. 4-5.

13 “Overview of the 2009 ACOG Survey on Professional Liability.”

14 “The Medical Malpractice ‘Crisis’: Trends and the Impact of State Tort Reforms,” Kenneth E. Thorpe, (January 21, 2004), pp. 20-30.

15 “Tort Reform: A Victory for Patient Access,” Texas Medical Association, July 5, 2006. Also, “Texas-Style Health Care Reform is Bigger and Better,” Sally Pipes, *San Francisco Examiner*, July 24, 2009.

16 “Damage Caps and Civil Litigation: an Empirical Study of Medical Malpractice in the South,” Albert Yoon, *American Law and Economics Review* 3, no. 2 (2001) pp. 199-227.

17 “Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums,” Nicole V. Crain, and W. Mark Crain, et al, Pacific Research Institute (2009).

18 “Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums,” Nicole V. Crain, and W. Mark Crain, et al, Pacific Research Institute (2009).

