The American Voice 2004: A Pocket Guide to Issues and Allegations

Issues and Allegations: Medical Malpractice

Background

Americans injured while receiving health care can sue providers for medical malpractice under governing state tort (injury) law. If the suit is successful, the victim can be compensated for the cost of medical treatments and lost wages. The victim can also be awarded financial compensation for pain and suffering, mental anguish and other less tangible but painful symptoms of distress. Punitive damages can also be awarded to punish the defendant for anti-social actions.

Health care providers buy medical malpractice insurance to protect themselves against potentially devastating claims. The insurer agrees to investigate claims, provide legal representation and accept financial responsibility for up to the amount stipulated in the policy. A typical policy provides $1 million of coverage per incident and $3 million in total coverage per year.**[1]**

Insurance rates (premiums) vary dramatically by medical specialty. High risk specialties, such as obstetrics, usually pay higher premiums. Rates also vary based on the amount of competition among insurers within a geographic and specialty market.

The problem

Medical malpractice premiums are rising rapidly with potentially negative effects on health care costs and doctor access.

The conservative perspective

Conservatives argue that soaring medical malpractice premiums are a principal reason for soaring overall health care costs. And proliferating and increasingly frivolous lawsuits and sky-high jury verdicts are the principal engines driving premium hikes. Jury "mega-awards" boost overall health care costs by encouraging doctors to practice "defensive medicine" by requesting unnecessary and costly procedures simply to defend themselves against possible lawsuits if anything goes wrong.

Christian Shalgian, Chair of the Health Coalition on Liability and Access, a coalition of health care providers, insurance associations, the U.S. Chamber of Commerce, the American Tort Reform Association, the Heritage Foundation and others sums up the argument, "More and more Americans aren't getting the care they need when they need it, because our medical liability system has turned into a lawsuit lottery where a few win and the rest of us lose. We strongly believe common sense federal reforms are urgently needs to preserve patients' legal rights and protect affordable patient care." **[2]**

President Bush agrees, "One of the major cost drivers in the delivery of health care are these junk and frivolous lawsuits."**[3]**

According to the President, savings resulting from reducing malpractice awards can lower "federal government costs by at least $28 billion per year or more, freeing up needed funds for making health care more affordable". Medical malpractice liability reform is a key piece of the President's health care agenda for 2004.**[4]**

The federal Department of Health and Human Services(HHS) estimates that capping malpractice awards will allow doctors to request fewer unnecessary and defensive medical procedures. That could lower health care costs for all Americans "by $60 billion or more, and(there will be) improve(d) access to quality health care as well."**[5]** Their estimate is based on a 1996 study by two Stanford economists who compared the costs of hospitalization of heart patients in states with and without malpractice award limits. They concluded, "We find that malpractice reforms that directly reduce provider liability pressure lead to

At a Glance…

The conservative view:

- Medical malpractice lawsuits are a major factor driving health care costs higher.
- The magnitude of malpractice awards is increasing rapidly.
- Excessive litigation is the key force behind soaring insurance premium rates.
- Rising insurance rates are driving doctors out of practice and reducing access to health care. Doctor walkouts are visible evidence of this.
- Fear of lawsuits encourages doctors to practice "defensive medicine" which increases health care costs.
- Capping jury awards is effective in lowering insurance premium rates as is most clearly verified by the California experience.
- Limiting the size of contingency fees trial lawyers may receive from jury awards reduces frivolous lawsuits.
- Medical malpractice suits hurt women most.

The liberal View:

- The recent surge in malpractice insurance rates is a direct result of the equally dramatic drop in investment income during the late 1990s.
- In the 1990s insurance companies under priced their policies to attract capital because investment returns were favorable.
- Several large insurance companies left the market, reducing competition and contributing to the run-up in rates. Their departure was not a result increased claims but rather financial and sometimes illegal mismanagement.
- Medical mistakes not medical lawsuits are the key problem.
- A small number of doctors makes the majority of the mistakes.
- State medical boards are reluctant to discipline incompetent doctors.
- The overall number of medical malpractice claims is not increasing.
- Only a small portion of medical mistakes result in a malpractice claim.
- Jury awards are reasonable and proportional to the severity of the injury.
- No significant evidence exists that doctors are driving up health

reductions of 5 to 9 percent in medical expenditures…We conclude that liability reforms can reduce defensive medical practices."**[6]**

Jury verdicts are soaring. According to Jury Verdict Research, a private research firm, awards rose 100 percent between 1997 to 2000, from $503,000 to $1 million.**[7]** In the last 15 years, the number of mega-verdicts, that is, those over $1 million rose 600 percent. **[8]**

Rising medical insurance rates are driving doctors out of practice thereby reducing access to high quality health care. "More and more Americans cannot get the health care they need when they need it", concludes the Health Coalition on Liability and Access (HCLA).**[9]** In testimony before Congress the American Medical Association maintained, "Unbridled lawsuits have turned some regions in our country—and in several cases entire states—into risky areas to practice medicine. As insurance becomes unaffordable or unavailable physicians are being forced to leave their practices, stop performing high-risk procedures, or drop vital services—all of which seriously impede patient access to care." As of mid 2002 it identified a "crisis situation" in 12 states.**[10]**

- costs by practicing defensive medicine.
- State jury award caps have not resulted in lower premium increases.
- Insurance company regulation not caps is a key solution as the California experience demonstrated.
- Reducing the workweek for medical residents and increasing nursing staff levels are key steps to reducing medical mistakes.

The BlueCross BlueShield Association maintains that rising insurance costs have led 56 percent of the doctors covered by their plans in 12 states to refuse some high-risk procedures. One-third of these doctors say they are moving their practices. Women needing obstetrical care will suffer most. **[11]** According to one recent survey, one in five Georgia doctors has stopped doing high risk procedures and hundreds of others are leaving the state or retiring because of soaring malpractice rates.**[12]** Another survey found that over half of doctors in southern California are planning to leave their practice.**[13]**

Using survey data from the federal Centers for Medicare and Medicaid Services (CMS) and from annual surveys conducted by Medical Liability Monitor newsletter, the authors of *Limiting Tort Liability for Medical Malpractice* calculated that premiums for all physicians nationwide rose by 15% between 2000 and 2002—nearly twice as fast as all total health care spending per person," in the CBO economic and budget issue brief released on January 8, 2004. "The increases during that period were even more dramatic for certain specialties… 22 percent for obstetricians/gynecologists and 33 percent for internists and general surgeons."**[14]**

Medical liability premium rises are driven by "excessive litigation and Powerball-sized jury awards. …An OB/GYN in Florida, for example, can expect to pay as much as $200,000 per year for medical liability coverage", observes the HCLA.**[15]**

Conservatives point to the recent spate of doctor walkouts as visible proof that rising malpractice awards and premiums are severely burdening the medical profession. In January 2003 more than two dozen West Virginia surgeons walked out resulting in the cancellation of surgeries at four hospitals. In February 2003 almost half of the 22,000 doctors in New Jersey participated in a walkout.

To reduce health care costs conservatives prescribe capping non-economic and punitive damages awards and limiting the size of contingency fees trial lawyers may receive from jury awards.

To the HCLA the twin strategies of capping awards and limiting attorney fees "are proven, common sense reforms that safeguard patients access to care while preserving their access to the courts." They point out that since California capped medical liability payments in 1975 its premiums have increased by 167 percent, less than one third the 505 percent nationwide increase. One result is that cases are settled 26 percent faster in California. Another is that health care costs in California are 6 percent lower than the national average. **[16]**

The leading liability-reform bill offered by the Republicans, Help Efficient, Accessible, Low-Cost, Timely Healthcare(**HEALTH Act H.R. 5**) caps non-economic damages, eliminates joint and several liability and reduces the amount of time a victim of malpractice is allowed.**[17]**

The Liberal Perspective

Liberals argue that the recent spurt in medical malpractice premiums is not the result of lawsuits and jury verdicts but rather reflects the boom and bust cycle of the recent investment climate and poor(and possibly illegal) financial decisions by insurance companies.

After analyzing the growth in medical liability premiums J. Robert Hunter, director of insurance for the Consumer Federation of America concluded that premium rates do not track the amount of claims paid but instead rise and fall with the state of the economy. This is true across insurance lines. In 2002, for example, the costs of many types of insurance rose in Florida, medical malpractice by 26 percent, health insurance by 20-28 percent, auto by 10.6 percent, homeowners by 15.7 percent.**[18]**

When investment income was high insurance companies low-balled premium rates to attract more customers and thus more investment capital. During the 1990s insurance companies used the hefty returns from stock market investments to reduce premiums by an average of 32 percent.**[19]** According to the Government Accounting Office (GAO), "during the 1990s, insurers competed vigorously for medical malpractice business and several factors, including high investment returns, permitted them to offer prices that, in hindsight for some insurers, did not completely cover their ultimate losses on that business. As a result of this, some companies became insolvent or voluntarily left the market, reducing the downward competitive pressure that had existed through the 1990s."**[20]**

When stock prices and bond interest rates fell, insurer income fell, prompting them to hike rates. The Government Accounting Office (GAO) reports, "from 1998 to 2001 medical malpractice insurers experienced decreases in their investment income as interest rates fell on the bonds that generally make up 80% of these insurers' investment portfolios…a decrease in investment income meant that income from insurance premiums meant that income from insurance premiums had to cover a larger share of insurers' costs."**[21]**

A January 2004 report by the Congressional Budget Office(CBO) concludes, "annual investment returns for the nation's 15

largest malpractice insurers dropped by an average of 1.6 percentage points from 2000 to 2002—enough to account for a 7.2 % increase in premium rates. That figure corresponds to almost half of the 15 % increase in rates estimated by the CMS."**[22]**

Premium hikes resulting from lower investment income were exacerbated by the decision of some large insurance companies to stop offering malpractice insurance. The Saint Paul Company, the second largest insurer in the country took that step in 2001. A year later Medical Inter-Insurance Exchange MIIX, one of New Jersey's biggest insurance carriers stopped renewing policies. Investigations by regulatory agencies and the business press found that insurance companies withdrew from medical malpractice not because of large jury verdicts but because of poor and possibly illegal financial management.**[23]**

When carriers holding large market shares in many states stopped offering coverage, thousands of physicians scrambled to find alternatives. The crises triggered in Mississippi, Nevada, Pennsylvania and West Virginia could be largely attributed to the Saint Paul Company's withdrawal. In some states, such as Pennsylvania, the remaining insurers either refused to take on new business or offered coverage only to doctors who enjoyed spotless claims records. Physicians turned to the joint underwriting association in their state as the "insurer of last resort." Although the statutory mission of these organizations is to ensure that all physicians can obtain coverage, these carriers can and often do impose high rates, particularly for those who have been sued.**[24]**

Liberals point to a study by the CBO that found that medical malpractice insurance accounts for less than 2 percent of health care spending. And this percentage may be falling since medical malpractice costs are increasing at half the rate of overall health care costs, 52 percent versus 113 percent since 1987.**[25]**

Medical Mistakes the Problem

Liberals reject the notion that a tidal wave of frivolous lawsuits is drowning the medical profession. They point out that the number of malpractice claims have been flat since 1996.**[26]** They maintain that the problem isn't lawsuits but a small proportion of incompetent doctors. "Medical mistakes, not lawsuits, are the problem", says Tom Baker, Director of the University of Connecticut School of Law's Insurance Law Center.**[27]**

In 1986 the New York State Legislature commissioned an interdisciplinary team of physicians, attorneys, economists, statisticians and social research experts to diagnose the problem of soaring liability insurance premiums. The task force concluded that "finding fault with the tort system is easy; what is difficult is identifying an alternative that, on balance will do better." They studied 31,000 randomly sampled records from 51 hospitals and reviewed insurance company files for almost 70,000 claims of medical negligence in New York over 14 years. They concluded that for every 7.5 patients who were injured due to negligence one malpractice claim was filed. "(W)hile the legal system does in fact operate erratically, it hardly operates excessively", they noted. "(W)e found several times as many seriously disabled patients who received no legal redress for their injury as innocent doctors who bore the burden of defending against unwarranted malpractice claims….the underlying assumption that too many groundless malpractice suits are initiated is unfounded."**[28]**

The task force also noted, "Physicians surveyed by the study team underestimated the incidence of medically caused morbidity and mortality by a factor of 10."

Two comprehensive reviews of inpatient records in New York and California found that 0.8 to 1 percent of hospitalization results in adverse events caused by negligence. About one third of these adverse events results in permanent total disability or death.**[29]**

1991 the Harvard Medical Malpractice Study reported that medical malpractice causes 300,000 injuries annually in hospitals alone.**[30]** In March 2000 the Institute of Medicine reported that between 44,000 and 98,000 people die each year as a result of medical mistakes. **[31]**

From 1996 to 1999 Florida hospitals reported 19,885 incidents but only 3,177 medical malpractice claims. Six medical errors for only l claim filed.**[32]** Incidents included surgery performed on the wrong patient, a wrong procedure performed, a procedure performed on the wrong side, a foreign object left in a patient after surgery.

The trial lawyers association argues that only a small number of doctors cause the majority of the problems and that because the medical profession refuses to police its own ranks, lawsuits are the patient's only recourse. The Saint Louis Post-Dispatch maintains, "If states' medical boards did a better job of disciplining doctors, there likely would be fewer malpractice cases."**[33]**

A Public Citizen analysis of National Practitioner Data Bank records from September 1990 to September 2002 found that the 5.1 percent of doctors who paid two or more malpractice awards were responsible for 54 percent of all payouts. Only 7.6 percent of these doctors had been disciplined by state medical boards. Only 1 out of 6 who had five or more malpractice payouts had been disciplined. **[34]**

As noted above, only 1 of 8 patients who suffered injury due to medical negligence ever file claims. A 1991 analysis of phone calls to six law offices in five states found that only 3.3 percent of the medical malpractice-related calls initially received were filed as lawsuits.**[35]** Half of all claims are abandoned by plaintiffs.**[36]** And a significant number of jury verdicts favor the health provider.According to New Jersey's Administrative Office of the Courts of the 205 cases that went to jury verdict in 2002, doctors won 151.**[37]**

Liberals note that the data of Jury Verdict Research, which shows awards rising 100 percent between 1997 and 2000 is misleading because the company collects only jury verdict information.**[38]** According to the PIAA 96 percent of malpractice awards are a result of out-of-court settlements. **[39]** A better database is contained at the National Practitioner Data Bank (NPDB), a government service that tracks malpractice claims, verdicts and settlements. The NPDB says the median payment for medical malpractice rose from $100,000 in 1997 to $135,000 in 2001.**[40]**

Liberals also note that level of award tracks the severity of the injury. The PIAA's Data Sharing Report found that the average indemnity paid for the least severe category of injury was $49,947. That increased to $454,454 for grave injuries

that include quadriplegia, severe brain damage, lifelong care or fatal prognosis.**[41]**

Liberals maintain that capping malpractice awards has little or no effect on malpractice premium rates. Premiums have not risen more slowly in states with caps on pain and suffering awards, according to Lorraine Woellert, *Business Week* Legal Affairs columnist.**[42]**

California Shows Effectiveness of Insurance Regulation

To liberals the moderation of insurance rates in California was not a result of capping jury awards but of regulating the industry.

In 1975 doctors in California protested rising malpractice insurance premiums by staging a sit-in at the statehouse. A landmark law was passed capping pain and suffering awards at $250,000. Similar measures were later copied in more than 20 states.

In the first 10 years after California's Medical Injury Compensation Reform Act of 1975 was passed, malpractice rate increases in that state were about the same as the national average.

Only after Proposition l03 passed in 1988 did malpractice insurance rates, and other insurance rates decline in California while they increased nationwide. Proposition 103 instituted insurance reforms not tort reform.**[43]** It immediately rolled back insurance rates and disallowed unnecessary costs like excessive expenses, bloated executive sales and bad faith lawsuit costs. Proposition 103 also required insurers to open their books to justify rate increases. For the first time insurers were provided with financial incentives for efficient performance rather than simply being able to pass on costs to consumers.

Between 1988 and 2000 malpractice premium rates fell 8 in California while the national average rose 25 percent.**[44]**

Those who oppose capping malpractice awards deny that lawsuits have had a demonstrable affect on the use of "defensive medicine". The study by Kessler and McClellan cited by the federal HHS and many others estimated a savings of about 7 percent of the $8 billion Medicare spends annually on cardiac disease if caps and other reforms were put in place. When the Congressional Budget Office tried to duplicate the two economists' methodology to other types of ailments they found "no evidence that restrictions on tort liability reduce medical spending. Moreover, using a different set of data, CBO found no statistically significant differences in per capita health care spending between states with and without limits on malpractice torts."**[45]** An Office of Technology Assessment study concluded, "it is impossible in the final analysis to draw any conclusions about the overall extent or cost of defensive medicine."**[46]**

Two investigations by independent government agencies have not supported the claim that rising malpractice premiums result in higher medical costs due to physicians practicing "defensive medicine". The CBO was asked by congress to quantify the savings from reduced "defensive medicine" if Congress passed HR4600. It declined, saying that any such "estimates are speculative in nature." It went on to say, "there is little empirical evidence on the effect of medical malpractice tort controls on spending for defensive medicine and more generally, on overall health care spending." Using broader measures of spending, the CBO's initial analysis could find no statistically significant connections between malpractice tort limits and overall health care spending.**[47]**

In August 2003 the GAO announced that it could not find any substantial confirmation of the practice of "defensive medicine". **[48]**

Liberal Remedies

Liberal solutions to the medical malpractice issue focus on improving the quality of medical care and regulating insurance companies.

One focus is on limiting the number of hours physicians work. The 100,000 interns and residents in teaching hospitals "work among the highest—if not the highest—number of hours in the professional world. They work up to 120 hours a week, including 36 hours shifts for several weeks at a time", notes the American Medical Student Association.**[49]** After 24 hours of wakefulness, cognitive function deteriorates to a level equivalent to having a 0.10 percent blood alcohol level. "In other words, doctors who would be considered too unsafe to drive may still treat patients…" Forty-five percent of residents who sleep less than four hours per night report committing medical errors. HR 3236 would limit resident's hours to 80 per week.

Researchers have also found that there is a higher risk of dying in hospitals where nurses have heavier workloads.**[50]** One report found that each additional patient per nurse corresponded to a seven percent increase in both patient mortality and deaths following complications.**[51]** The American Hospital Association reports that over 125,000 nursing jobs are vacant in US hospitals and 56 percent of hospitals are using temporary nurses who are likely to be less familiar with the staff and machinery.

Other reforms focus on better hospital management. Some of these have been suggested by the National Committee for Quality Assurance (NCQA): investment in technology and systems to support evidence-based care; increased collaboration between health care professionals; payment systems that reward excellence; more consumer engagement in provider selection and care decisions; and greater transparency on quality information.**[52]** Beginning in January 2003 the Joint Commission on the Accreditation of Healthcare Organizations(JCAHO), which inspects hospitals, began requiring that the hospitals meet six basic standards to reduce medical errors.

The Center for Justice and Democracy notes that hospitals that adopt technology that helps to avoid medical mistakes have been able to negotiate discounts of up to $300,000 on annual malpractice premiums. The Center for Disease Control(CDC) recently unveiled its new "hand hygiene" campaign. The CDC says that half of the 2 million infections picked up by patients in hospitals(resulting in 90,000 deaths) could be prevented by proper hand washing.

Liberals also advocate a more rigorous identification and weeding out of the small number of problem doctors. One way is to make publicly accessible the data in the National Practitioner Data Bank.

On the insurance side, liberals focus on regulation. They note that 8 of the 10 states with the lowest medical malpractice insurance rates have an approval process for premiums.**[53]** They also recommend that insurance companies broaden the risk pool by combining doctor specialties.

As for lawsuits, liberals note that even a minor reform can reduce the incidence of nuisance lawsuits. Rigorous prescreening of claims, as is done in Minnesota, has successfully weeded out junk lawsuits and resulted in very low malpractice premium rates.**[54]**

Notes and Sources

- **A note on internet citations**

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[14] ***Limiting Tort Liability for Medical Malpractice***. Economic and Budget Issue Brief. p. 1. January 8, 2004. *Congressional Budget Office*, Washington, D.C. PDF file.

[15] "Why America Needs Medical Liability Reform." HCLA Fact Sheet. p. 1-2. *Health Coalition on Liability and Access*

[16] Why America Needs Medical Liability Reform." HCLA Fact Sheet. p. 1. *Health Coalition on Liability and Access*

[17] The House passed the HEALTH Act on September 26, 2003, by a 217-203 vote. On July 9, 2003, the United States Senate failed to pass a motion to debate the companion bill, **S. 11** the "Patients First Act of 2003, " by a vote of 49 to 48. The legislation would limit non-economic damages, such as pain and suffering, to $250,000, and punitive damages to twice the amount of economic damages or $250,000, whichever is greater. Attorney fees would be restricted to 40 percent of the first $50,000 of the award, 33.3 percent of the next $50,000 of the award, 25 percent of the next $500,000, and 15 percent of that portion of the award in excess of $600,000. The caps on attorney fees would apply regardless of whether the award was determined in the courts or settled privately, and could be reduced further at the discretion of the court. (The court could not, however, increase attorney fees beyond the caps.) The bill would impose a statute of limitations requiring that lawsuits begin within three years after the injury occurred or one year after the claimant discovers, or should have discovered, the injury, whichever comes first.

On February 23, 2004, the Senate began consideration of S.2061, sponsored by Sen. John Ensign [R-NV]. The Healthy Mothers and Healthy Babies Access to Care Act of 2003 sets forth provisions regulating lawsuits for health care liability claims related to the provision of obstetrical or gynecological goods or services. While unlimited economic damages could be recovered, noneconomic damages would be limited to $250,000, and punitive damages, which would be allowed only under limited circumstances, would be capped at $250,00 or twice the economic damages, whichever is greatest. Each party would be liable only for the amount of damages directly proportional to such party's percentage of responsibility.

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Reform." October 10, 2002. PDF file.

[19] Editorial. St. Louis Post-Dispatch January 19, 2003

[20] Medical Malpractice: Implications of Rising Premiums on Access to Health Care. Report to Congressional Requesters. *Government Accounting Office* p. 10. Washington, DC. The International Risk Management Institute, one of the leading analysts of commercial insurance agrees, "What is happening to the market for medical malpractice insurance in 2001 is a direct result of trends and events present since the mid to late 1990s. Throughout the 1990s and reaching a peak around 1997 and 1998, insurers were on a quest for market share, that is, they were driven more by the amount of premium they could book rather than the adequacy of premiums to pay losses. In large part this emphasis on market share was driven by a desire to accommodate large amounts of capital with which to turn into investment income." Charles Klodkin, "Medical Malpractice Insurance Trends? Chaos!" *International Risk Management Institute.*

[21] "Medical Malpractice: Implications of Rising Premiums on Access to Health Care." Report to Congressional Requesters. *Government Accounting Office* pp. 9-10.

[22] *Limiting Tort Liability for Medical Malpractice*. p. 4.

[23] The Wall Street Journal discovered that the Saint Paul Company had generated large cash reserves by raising rates during the 1980s and then released $1.1 billion in reserves between 1992 and 1997 to artificially boost its bottom line. When revenue from premiums no long covered claims Saint Paul dropped its coverage. A lawsuit has been filed against the Saint Paul Company. Mantz v. St. Paul Fire and Marine Insurance Co., W. Va. Cir. Ct. Kanawa County, No. 02-C-770. When Medical Inter-Insurance Exchange MIIX announced it would stop renewing policies it was insuring 37 percent of all doctors in New Jersey. The state's Department of Banking and Insurance attributed the company's problems to its ill-fated decisions to expand into other states and to increase its stock market investments.

[24] "Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates." Report to Congressional Requesters. June 2003. *Government Accounting Office*. GAO-03-702. PDF file.

[25] "Medical Misdiagnosis: Challenging the Malpractice Claims of the Doctors' Lobby." *Public Citizen.* Washington, D.C. January 9, 2003.

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[31] "Mythbuster: New Studies on Medical Errors and Inadequate Care: Reducing Errors Will Save Lives, Decrease Costs, and Lower Insurance Premiums." *Center for Justice and Democracy*.p.1.

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[33] *Saint Louis Post-Dispatch*, Editorial. January 19, 2003

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