

# **THE CRISIS IN PROFESSIONAL LIABILITY: THERE IS A SOLUTION**

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**We have a flawed system of  
dealing with medical injury**

# **WE HAVE A FLAWED SYSTEM OF DEALING WITH MEDICAL INJURY:**

- **Fewer than one in sixteen patients who are negligently injured are compensated.**
- **Over 60% of premiums paid by physicians are consumed by legal fees, far more than any other form of insurance.**
- **Individuals who litigate may have to wait five to seven years before receiving compensation.**
- **A malpractice lawsuit frequently causes severe emotional damage to physicians and their families even when the physician is later acquitted by the courts.**
- **The current system promotes the practice of defensive medicine, the cost of which has been estimated to be as high as \$50 billion per year**
- **Our current system impedes the development of a patient safety system which requires self-reporting of errors.**

# **EFFECTS OUR FLAWED SYSTEM OF DEALING WITH MEDICAL INJURY IS HAVING ON PHYSICIANS:**

- **Limit their practice to less risky procedures**
- **Abandon specialty practices**
- **Move to other states**
- **“Go bare”**
- **Retire prematurely**

# **OUR FLAWED SYSTEM IS CAUSING ACCESS TO CARE PROBLEMS:**

- **Trauma surgery has been limited in Nevada, Mississippi, Maryland, and Pennsylvania.**
- **Obstetrical care is unavailable in many parts of the country. Maternity wards/hospitals closed in Pennsylvania, West Virginia, Florida, and Alabama.**
- **Neurosurgical care is limited in some areas.**
- **The wait for elective mammography can be as long as six months.**
- **Survey of hospitals by the American Hospital Association revealed that the current professional liability crisis has caused 20% of the associations 5,000 member hospitals to cut back services and 6% have eliminated some units**

# **PROFESSIONAL LIABILITY HAS REACHED CRISIS LEVELS IN:**

- Arkansas
- Connecticut
- Florida
- Georgia
- Illinois
- Kentucky
- Missouri
- Mississippi
- New Jersey
- New York
- Nevada
- North Carolina
- Ohio
- Oregon
- Pennsylvania
- Texas
- Washington
- West Virginia
- Wyoming

**Source: AMA**

# **STATES SHOWING PROBLEM SIGNS:**

- Alabama
- Alaska
- Arizona
- Delaware
- Idaho
- Iowa
- Kansas
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- New Hampshire
- North Dakota
- Oklahoma
- Rhode Island
- South Carolina
- South Dakota
- Tennessee
- Utah
- Vermont
- Virginia

**Source: AMA**

**Why is this  
occurring?**



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TRIAL LAWYERS

**BAD DOCTORS**

**BAD INSURANCE COMPANIES**

# **Oversight Hearing of the MA. Joint Committee on Insurance (10/1/02)**

**“There is simply no ‘cause and effect’ relationship  
between a paid claim and substandard care.”**

**Nancy Achin Sullivan, Executive Director  
MA. Board of Registration in Medicine**

# **U.S. General Accounting Office Study**

## **7/28/03**

**“While almost no medical malpractice insurers experienced net losses on their investment portfolios over this period (1998-2001), a decrease in investment meant that income from insurance premiums had to cover a larger share of insurers’ costs.”**

**Why is this  
occurring?**

# **U.S. General Accounting Office Study**

**7/28/03**

**“We found that the increased losses appear to be the greatest contributor to increased premium rates...”**

**Rapidly escalating,  
unlimited jury awards**

# **THE PAST FEW YEARS HAVE SEEN AN EXPLOSION IN THE COST OF INDIVIDUAL CLAIMS**

- **Texas has seen a \$268 million verdict.**
- **A number of states have witnessed verdicts in excess of \$100 million.**
- **The City of Philadelphia alone has recorded multiple verdicts in excess of \$50 million in just the past two years.**
- **Four claims in Arkansas totaled \$98 million in just the past year.**
- **Massachusetts just experienced a jury award of \$23 million for a “bad baby” case.**



- **From 1991 to 2001. The percentage of claims costing in excess of \$1 million increased nearly four-fold.**
- **From 1994 to 2000, the median compensatory award increased just under 300% to \$1 million.**
- **These types of jury awards make settling claims more difficult and more expensive.**

- **Approximately one of every ten practicing physicians faces a malpractice claim every year.**
- **In high risk specialties such as Obstetrics, Orthopedics, Trauma Surgery, and Neurosurgery the frequency is even greater.**
- **70% of the tens of thousands of claims are found to be without merit.**

# **AM Best (3/14/03)**

**In 2002, \$1.41 was paid for every dollar of premium collected.**

**In 2003, even with large rate increases, it is estimated that \$1.34 will be paid for every dollar of premium collected.**

**What is the answer?**

# What are we trying to accomplish?

- **Compensate patients who have been negligently injured in a timely fashion.**
- **Reduce overhead costs.**
- **Minimize the emotional damage to physicians and their families.**
- **Limit the practice of defensive medicine.**
- **Promote the self reporting of errors and facilitate the development of a patient safety system.**
- **Ensure affordability.**

# Solutions

- **“The first thing we do, let’s kill all the lawyers.”\***
- **Mediation**
- **Arbitration**
  - **Binding**
  - **Non-Binding**
- **Administrative Fault System**
- **Early Tender Offer (O’CONNELL)**
- **Accelerated- Compensation Events (Bovbjerg and Tancredi)**
- **Enterprise Liability**
- **Federal Health Court (Howard)**
- **MICRA**
- **Medical Injury Insurance**

\*W. Shakespeare, Henry VI, Act IV, Scene 2

# MICRA

- **Cap on pain and suffering (non-economic) damages of \$250,000**
- **Elimination of joint and several liability**
- **Collateral source offset**
- **Structured awards over \$50,000**
- **Reduction in statute of limitations**
- **Limitation of legal contingency fees**
- **90-day notice of intent to sue**

# **MICRA DOES NOT SOLVE THE FOLLOWING:**

- **Fewer than one in sixteen patients who are negligently injured are compensated.**
- **The majority of premiums paid by physicians are consumed by legal fees.**
- **Individuals who litigate may have to wait five to seven years before receiving compensation.**
- **A malpractice lawsuit frequently causes severe emotional damage to physicians and their families even when the physician is later acquitted by the courts.**
- **The current system promotes the practice of defensive medicine, the cost of which has been estimated to be as high as \$50 billion per year.**
- **The current system impedes the development of a patient safety system which requires self-reporting of errors.**



# Noneconomic Damages States With Caps on Awards

STATE	LIMIT	YEAR PASSED	STATE	LIMIT	YEAR PASSED
Alaska <b>P</b>	\$400,000	1986	Missouri <b>X</b>	\$350,000	1986
California	\$250,000	1975	Montana <b>P</b>	\$250,000	1995
Colorado	\$250,000	1990	Nebraska*	\$1.25 million	1976
Hawaii	\$375,000	1986	Nevada <b>X</b>	\$350,000	2002
Idaho <b>P</b>	\$250,000	1990	New Mexico*	\$600,000	1976
Indiana*	\$1.25 million	1975	North Dakota† <b>P</b>	\$500,000	1995
Kansas † <b>P</b>	\$250,000	1988	Ohio <b>X</b>	\$250,000	2002
Louisiana*	\$500,000	1975	South Dakota <b>P</b>	\$500,000	1986
Maryland <b>P</b>	\$500,000	1986	Utah <b>P</b>	\$250,000	1986
Massachusetts <b>P</b>	\$500,000	1986	Virginia* <b>P</b>	\$1.5 million	1976
Michigan <b>P</b>	\$280,000	1986	West Virginia <b>X</b>	\$250,000	1986
Mississippi <b>X</b>	\$500,000	2002	Wisconsin	\$350,000	1985

\*The cap is applied towards the total damages awarded.

**X** = Crisis

† Previous laws have been overturned.

**P** = Problems

# Noneconomic Damages

## States Without Caps on Awards

State	Notes	State	Notes
Alabama	<b>Overtured</b>	New Jersey	No cap
Arizona*	No cap	New York	No cap
Arkansas	No cap	North Carolina	No cap
Connecticut	No cap	Oklahoma	No cap
Delaware	No cap	Oregon	<b>Overtured</b>
Florida	<b>Overtured</b>	Pennsylvania*	No cap
Georgia	No cap	Rhode Island	No cap
Illinois	<b>Overtured twice</b>	South Carolina	No cap
Iowa	No cap	Tennessee	No cap
Kentucky*	No cap	Texas	<b>Overtured</b>
Maine	No cap	Vermont	No cap
Minnesota	No cap	Washington	<b>Overtured</b>
New Hampshire	<b>Overtured twice</b>	Wyoming*	No cap

\*Caps on damages are prohibited by the Constitution.

**Medical Liability Monitor 2003 Rate Survey of 3 Medical  
Specialties (as of 7/1/03)  
(\$1M/\$3M Mature Claims-Made Coverage)**

<b>LOCATION</b>	<b>COMPANY</b>	<b>SPECIALTY</b>	<b>RATE</b>
<b>California (L.A + Orange Counties)</b>	<b>NORCAL</b>	<b>IM</b>	<b>15,178</b>
		<b>GS</b>	<b>58,830</b>
		<b>OB/GYN</b>	<b>77,814</b>
<b>Massachusetts</b>	<b>ProMutual</b>	<b>IM</b>	<b>11,226</b>
		<b>GS</b>	<b>36,289</b>
		<b>OB/GYN</b>	<b>101,462</b>
<b>Connecticut</b>	<b>CIMIC</b>	<b>IM</b>	<b>21,240</b>
		<b>GS</b>	<b>42,385</b>
		<b>OB/GYN</b>	<b>123,470</b>

**Representation of increasing average indemnity payments for Connecticut, Massachusetts and New York for 1992 to 2002, sourced from James D. Hurley from data provided by Tillinghast**

**[graph not reproducible and otherwise unavailable]**

# **Large Loss Study conducted by Medical Underwriters of California**

**The yearly examination of settlements and awards over \$1 Million in 2002 tracked a record 40 such payouts, a 60% increase of 2000's 24. This is the highest number of \$1 Million or more cases ever reported.**

**The present value indemnity for big awards was \$144.4 Million, more than twice 2001's total of \$69.5 Million. Average indemnity jumped to \$3.5 Million from \$2.9 Million in 2001, and the median award was \$2.49 Million, 59% higher than 2001's median of \$1.57 Million.**

## **CA Jury Awards 9-Year-Old \$70.9 Million**

***The National Law Journal* reports that a California jury has awarded a 9-year-old boy that suffers from phenylketonuria \$70.9 million -- \$56.3 million for future medical and attendant services, and \$14.1 million for the loss of future earnings. The plaintiff accused Stanford Health Services and the Palo Alto Medical Clinic of failing to diagnose the metabolic disease in time for proper treatment. Due to MICRA reforms, only \$250,000 of the \$500,000 awarded to the boy for noneconomic damages can be collected.**

***(The National Law Journal, October 6)***

# Expansion of Liability (MA)

<u>Case</u>	<u>Decision Date</u>	<u>Decision Implication</u>
<b>Pinheiro v. Mass JUA</b>	<b>September 1989</b>	<b>Expanded limits beyond injured patient</b>
<b>“Stacking” (multiple cases)</b>	<b>N/A</b>	<b>Expanding limits to include multiple years</b>
<b>Dias v. BMA</b>	<b>December 2002</b>	<b>Exposes additional policy limits of corporate defendants</b>

# **Professional Liability Foundation, Ltd. ("PLF")**

**A non-profit Massachusetts corporation established in 1995. The purposes of PLF include improving the quality and affordability of patient health care by promoting reforms in the medical tort and professional liability insurance system, supporting legislation and/or administrative regulation consistent with its goals, and participating in litigation where necessary to express the views of its members.**

**Baystate Health System**

**Caritas Christi Health Care System**

**Massachusetts Hospital Association**

**Massachusetts Medical Society**

**ProMutual Group**

**Risk Management Foundation of the Harvard Medical Institutions Inc.**

**Tufts-New England Medical Center**



# **Amicus Briefs on Peer Review Confidentiality**

- **41 Mass.App.Ct 559, 671 N.E.2d 1004 (1996): Appeals Court ruled that peer review materials cannot be used in litigation and allowed convening organization to intervene to protect its peer review records.**
- **Mass 514, 689 N.E.2d 1304 (1998): SJC held that hospital incident reports are protected against disclosure in malpractice case by Peer Review Confidentiality Law (GL c. 111, § 204).**
- **49 Mass.App.Ct 77, 725 N.E.2d 1083 (2000): Appeals Court holds that Peer Review Privilege (GL c. 111, § 204) prohibits deposition of physician serving as expert for hospital peer review committee.**

**“Our fault based tort system will never provide a satisfactory long term solution to our professional liability problem, no matter how we attempt to reform it.”**

**B. Manuel**

# Solutions

- **“The first thing we do, let’s kill all the lawyers.”\***
- **Mediation**
- **Arbitration**
  - **Binding**
  - **Non-Binding**
- **Administrative Fault System**
- **Early Tender Offer (O’CONNELL)**
- **Accelerated- Compensation Events (Bovbjerg and Tancredi)**
- **Enterprise Liability**
- **Federal Health Court (Howard)**
- **MICRA**
- **Medical Injury Insurance**

\*W. Shakespeare, Henry VI, Act IV, Scene 2

# What are we trying to accomplish?

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- **Ensure affordability.**

# **Medical Injury Insurance (Non-Judicial Compensation)**

# **MEDICAL INJURY INSURANCE**

- **Change from a Fault Based System where few patients are compensated at a great cost to physicians, both financially and emotionally.**
- **To an Insurance Based System where more patients are compensated and the system is funded by those who receive the benefits,**

# Medical Injury Insurance

- **Would cover all out of pocket expenses and lost wages for compensable event.**
- **List of compensable events would be developed by expert panel composed of health care professionals and representatives of the public.**
- **Claim could be filed by a patient, physician, or hospital.**
- **All medical injury claims must first be submitted to medical injury insurance company. If injury not deemed compensable, then patient may bring suit in the usual manner.**
- **Consumer purchase as part of health and accident insurance policy.**
- **Cost would be 1.5% of typical comprehensive health and accident policy**

# Medical Injury Insurance

- **Fair**
- **Timely**
- **Efficient**
- **It would remove from physicians the omnipresent and pervasive fear of litigation allowing physicians to engage in “best practice” rather than “safe practice”**
- **Reduce the cost of defensive medicine**
- **It would promote self reporting of errors and “near misses” resulting in improved patient safety**



**New York Times, November 19, 2002**

**“The National Academy of Sciences said today that the United States health care system was in crisis and that the Bush administration should immediately test possible solutions, including . . . . . no-fault payment for medical malpractice, in a handful of states.”**

# National Academy of Science

- **States would establish and sponsor administrative systems to provide compensation to patients who suffer avoidable medical injuries. In exchange for mandatory participation in the state plan, all health care providers and facilities would in most circumstances receive immunity from tort liability.**

# National Academy of Science

- **Measures to increase patient safety would be built into the system.**
- **The current liability insurance crisis provides a compelling case for reform. However, approaches that focus narrowly on reducing the number and value of legal claims (e.g., limiting damage awards) may lower liability insurance premiums but do nothing to improve patient safety or produce prompt and fairer compensation for patients who are injured.**

# Examples of Non-Judicial Compensation

- **New Zealand**
- **Sweden**
- **Finland**
- **Virginia (Birth-related, Neurological Injury Com. Act)**
- **Florida (Birth-related, Neurological Injury Com. Act)**
- **U.S.A. (Vaccine Injury Com. Act)**

**National Childhood  
Vaccine Injury Act of 1986**

**The law established a Vaccine Injury Table, which lists the vaccines covered by the program and the injuries, disabilities, illnesses and conditions (including death) for which compensation may be paid.**

# **Covered Vaccines and Toxoids**

- **Diphtheria and tetanus toxoids and pertussis vaccine (DPT)**
- **Measles, mumps, and rubella (MMR)**
- **Oral poliovirus vaccine (OPV); and**
- **Inactivated poliovirus vaccine (IPV).**

**The maximum amount of compensation under the program is set by the law as follows:**

- **Vaccine-related death: \$250,000 for the estate of the deceased;**
- **Actual and projected pain and suffering and emotional distress: Up to \$250,00;**
- **Past and future unreimbursable medical, residential, custodial and rehabilitation expenses: No limit.**



# FUNDING

- **Federally mandated per dose excise tax to vaccine purchasers**

**Enactment**

# **ENACTMENT**

**Professional liability is a crisis impacting our entire health care system. Access to care and quality of care are being affected.**

**After 27 years of attempting to solve the problem by all 50 states and the Federal government, we still have 19 states in crisis and 23 states with problems.**

The Saturday Evening

# POST

April 11, 1959 - 15¢

## MALPRACTICE

Medicine's Legal Nightmare  
Costs Doctors and Patients  
**\$50,000,000 a Year**



# 314 P

DICK SARGENT

# **Legislative Response to the Malpractice Crisis of 1974-1975**

- 1. Establishment of joint underwriting associations with guaranteed availability (35 states did this);**
- 2. Establishment of screening or arbitration panels to eliminate non meritorious claims;**
- 3. Elimination of ad damnum clause;**
- 4. Reduction of statute of limitation;**
- 5. Limitation of physical liability (capping);**

# **Legislative Response to the Malpractice Crisis of 1974-1975**

- 6. Limitation of Lawyers' fees;**
- 7. Establishment of commissions to study medical liability problems;**
- 8. Improvement of tort laws;**
- 9. Development of self-insurance plan (physician mutuals) and state insurance fund;**
- 10. Establishment of collateral source rule.**

# Tort Reform Measures Adopted by States

<u>Tort Reform Proposal</u>	<u>Number of States Adopting</u>
Periodic payments for damages	31 states
Collateral source offsets	29 states
Penalties for non-meritorious suits	29 states
Pretrial screening panels	25 states
Contingency fee limits	25 states
Limits on recoverable amounts	25 states
Voluntary binding arbitration	15 states
Patient compensation funds	8 states

# **The General Accounting Office General Recommendations**

- I. Reduce the incidence of medical malpractice**
- II. Communicate more effectively the potential risks of medical treatment of patients**
- III. Improve the efficiency, predictability and equity in the way that malpractice claims are resolved**
- IV. Test and evaluate different ways of resolving and paying malpractice claims.**



# **The General Accounting Office Specific Recommendations**

- 1. Shortening of statute of limitation**
- 2. Changes in the rule of joint and several liability**
- 3. Limits on lawyer's contingency fees**
- 4. Elimination of collateral source rule**
- 5. Use of periodic payments for future damages**
- 6. Caps on non-economic damages**

# The Department of Health and Human Services

## Suggestions:

1. **Limit non-economic (including punitive) damages**
2. **Revise the statute of limitations for the purpose of shortening the time period in which malpractice claims can be filed**
3. **Eliminate the ad damnum clause**
4. **Institute alternative dispute resolution mechanisms, such as pretrial screening panels to reduce the number of claims taken to trial**
5. **Set limits on attorney's fees**
6. **Estimate joint and several liability**
7. **Allow for periodic payments of damages that exceed a predetermined figure**

# **White House Working Group on Tort Reform Recommendations:**

- 1. Elimination of joint and several liability**
- 2. Limitation of non-economic damages to \$100,000**
- 3. Limitations on attorney contingency fees**
- 4. Elimination of collateral source rules**
- 5. Structured awards**

# **White House Working Group on Tort Reform Recommendations:**

- 6. Greater use of arbitration and other methods for resolving disputes out of court**
- 7. Changes in tort law that would make it more difficult for plaintiffs to win in the absence of clear fault**
- 8. Clear connections between the complained-of activity and the injury**

**Should we still look to the  
government to solve this problem?**

# **108<sup>th</sup> U.S Congress**

**48 Senators (48%)**

**158 Representatives (36%)**

**Have been admitted to the bar**

# **CT. GENERAL ASSEMBLY (2003)**

**14 Senators (39%)**  
**32 Representatives (21%)**

**Hold Law Degrees**

# **POLL RESULTS**



# **The Wall Street Journal Online/Harris Interactive Healthcare Poll (3/6/03)**

**“Among the 75% who have an opinion regarding malpractice reform, better than a 3-to-1 majority favor reform.”**

**“59% of Americans feel that malpractice suits against doctors, and physicians’ fears of being sued, harm the quality of patient care.”**

# **Gallop Poll (1/20-22/2003)**

**72% of those polled would favor a plan which would set no limit on the amount of money patients can receive to pay for their medical costs and financial losses but would limit other payments.**

# **American Tort Reform Association Poll (2/27/03)**

**83% of those surveyed believe there are too many lawsuits filed in the United States.**

**76% believe “excessive lawsuits” are resulting in higher costs of goods and services for American consumers.**

# **The McCormack School at the University of Massachusetts/Boston Poll (9/17/03)**

- **83% think that the issue of medical malpractice insurance in healthcare today is either a “major problem” of a “crisis”.**
- **74% favor limits on the amount patients can be awarded for “pain and suffering” or non-economic damages in the lawsuits.**
- **68% think that physicians leaving the state because of the declining work environment for doctors is a serious problem.**
- **58% think that patients bring too many lawsuits against doctors.**

**Lou DiNatale, director of the Center for State and Local policy at the McCormack School stated that, “Massachusetts voters now recognize that medical malpractice costs are a threat to the health care system. Further, the issue now appears to have what we characterize as ‘voter penetration’. It has reached the stage of being a political issue and could become a major topic in the next campaign season.”**

# **Ballot Initiative**

# **Ballot Initiative**

**More and more of our society's complex issues and problems, which the legislature will not or cannot solve, are being dealt with by the public using ballot initiatives.**

# SUMMARY

- **We have a fundamentally flawed system of dealing with medical injury.**
- **This flawed system is having a profound effect on our health care system.**
- **We have recommended a change from a fault based system to an insurance based system to compensate medical injuries.**
- **We have suggested a method for implementation.**



# Reflections