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## A SICK TORT SYSTEM ENDANGERS U.S. HEALTH CARE

### INTRODUCTION<sup>1</sup>

The liability insurance crisis is hitting the American health care system very hard. Malpractice claims and average damage awards are soaring, with devastating effects on the medical malpractice insurance industry. The result: many insurers have pulled out of the malpractice business altogether and those remaining are dramatically increasing premiums--meaning even higher doctor bills for Americans.

The staggering cost of these premiums is in turn seriously harming medical care in the U.S. Those doctors who cannot raise their fees sufficiently to cover insurance costs are cutting services or dropping out of practice, particularly in such high risk specialties as obstetrics and surgery. This means reduced access to care. Many pregnant women are finding that they must travel long distances just to deliver their babies. And doctors are performing more "defensive medicine," ordering increased tests and other procedures primarily to cover themselves against potential suits.

This malpractice crisis is just another painful example of the nation's acute liability problem, stemming from huge awards for highly subjective assessments of pain and suffering damages. In the case of medical malpractice suits, fewer than 3 percent of all claims win awards for pain and suffering in excess of \$100,000. Yet the pain and suffering damages alone in these cases account for about 40 percent of all paid medical malpractice damages.

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1. This is the third in a series of studies examining the liability insurance crisis. It was preceded by Background 498, "The Liability Insurance Crisis: What Washington Can Do To Help" (March 27, 1986) and Background Update 10, "The Liability Insurance Crisis" (May 14, 1986). Future studies will look at other aspects of the problem, including the burden imposed on consumers.

The increase in liability costs is not an attempt by insurance companies to raise excessive profits. Nor is it due to growing incompetence of doctors. The blame lies, rather, with the judges and lawyers who have allowed liability to be imposed in cases where the doctor is not really at fault. And where doctors are at fault, judges and lawyers have failed to restrain outrageous runaway jury awards.

The result is a perverted tort system. No longer does it impose the responsibility for damages solely on the wrongdoer. Instead, the system has become a lottery with huge payouts to the lucky few--and their attorneys.

The solution to the medical malpractice crisis requires measures to be taken to impose liability only where doctors are clearly at fault, to cap runaway purely subjective pain and suffering awards, and to allow greater freedom of contract between doctors and consumers to determine the standards of liability and damages that should apply.

## THE MEDICAL MALPRACTICE CRISIS

### Soaring Claims and Awards

More and more doctors are finding themselves facing judges rather than patients. Malpractice lawsuits per 100 physicians doubled between 1979 and 1983, and tripled during that period for obstetricians and gynecologists. In 1983, about 40,000 claims were brought against physicians overall; this year there will probably be over 50,000.

The American Medical Association reports that 16 percent of all doctors were sued in 1984, compared with 3 percent in 1978.<sup>2</sup> About 25 percent of all obstetricians were sued in 1985, and about 75 percent of such specialists have been sued at some point in their careers. The Washington Post reports that in Maryland, a state with better than average medical malpractice experience, about 20 percent of all practicing doctors are currently involved in malpractice litigation.<sup>3</sup>

2. American Medical Association, Special Task Force on Professional Liability and Insurance, Professional Liability in the 80's, Report 1, October 1984, p. 10; "Stopping the Bloodbath in Medical Malpractice," Business Week, April 22, 1985, p. 93; Patricia Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, January 1986, p. 1.

3. Victor Cohn, "The Price of Malpractice: How the Crisis Harms the Relationship Between Doctors and Patients," The Washington Post, March 12, 1986, p. 14.

Aggravating the problem has been the soaring cost of each claim. The average medical malpractice jury award jumped from \$220,018 in 1975 to \$1,017,716 last year, a 363 percent increase.<sup>4</sup> While there were only 3 medical malpractice jury awards of more than \$1 million in 1975 1984 there were 71 of them.<sup>5</sup> In 1983, total liability losses for physicians reached nearly \$2 billion. In 1985, final figures are likely to show that losses topped \$3 billion.

Added to this is the cost of defending against each claim--which must be paid even in the 80 percent of cases which end in dismissal or in no liability judged against the doctor. Doctors also bear a heavy cost in time lost preparing for their legal defense. This means a further loss in available medical resources for society.

### Large Pain and Suffering Awards Are the Key

Fewer than 3 percent of all medical malpractice claimants win awards through settlements or verdicts for pain and suffering in excess of \$100,000.<sup>6</sup> Yet, these cases account for as much as 72 percent of total medical malpractice damages paid to all claimants, with the average total award close to \$1 million. In these cases, 80 percent of the total award is for pain and suffering. Thus actual, tangible damages are only a small part of the total award.<sup>7</sup> The pain and suffering component alone in these cases accounts for about 40 percent of all paid medical malpractice damages, although only a few plaintiffs are involved.<sup>8</sup> These awards account for almost all of the soaring increase in average medical malpractice award amounts in recent years. Indeed, if medical malpractice awards in excess of \$1 million were not counted, then the increase in average awards from 1975 to 1985 would fall from 363 percent to just 26 percent.<sup>9</sup>

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4. Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, February 1986, pp. 35-36.

5. Report of the Tort Policy Working Group, pp. 36-37.

6. Report of the Tort Policy Working Group, p. 67; Henry Manne, ed., Medical Malpractice Policy Guidebook, Manuscript p. 134.

7. Report of the Tort Policy Working Group, p. 67; Medical Malpractice Policy Guidebook, pp. 10, 135.

8. Medical Malpractice Policy Guidebook, p. 136.

9. Report of the Tort Policy Working Group, pp. 36-39.

The malpractice system operates like a lottery, with the big payoffs going to the lucky few. Yet even they are not the biggest winners. Plaintiffs generally receive only about 30 percent of the damages. The jackpot goes to the lawyers.<sup>10</sup> Indeed insurance companies pay more to lawyers than to injured persons.

Emory University Law and Economics Center Director Henry Manne and leading health economists Patricia Danzon and Clark Havighurst, argue that these huge pain and suffering awards are inefficient and contrary to consumer preferences.<sup>11</sup> They point out that the tort system can be viewed as a form of compulsory insurance cost for consumers, since they are forced to buy this insurance through higher fees paid to doctors to cover malpractice premiums. Over the long run, of course, consumers bear the entire cost of providing the insurance.

Do Americans actually want pain and suffering insurance? The record indicates that they do not. While consumers buy private insurance to cover many eventualities, they generally buy little or no private insurance for pain and suffering. And while the public supports government programs for health and disability insurance to cover health and lost income expenses, there has been no support for programs to pay benefits for pain and suffering. Evidently Americans do not think insurance for pain and suffering is worthwhile. If they thought so, they could get a better deal by paying for such insurance directly through the market rather than indirectly through the tort system, with its very expensive overhead of attorney costs. By granting huge pain and suffering awards, the courts force consumers to buy an extremely inefficient form of insurance they do not want.

### Insurers Retreating

The soaring claims and awards are devastating the medical malpractice insurance industry. In 1985, medical malpractice insurers charged \$2.6 billion in premiums and paid total claims and expenses of \$3.9 billion. The result: an underwriting loss of \$1.3 billion--or 50 percent of total premiums. Since 1981, these insurers have paid total claims and expenses of \$13.3 billion, but received premium income of only \$8.8 billion, for an underwriting loss of \$4.5 billion.<sup>12</sup>

While insurers have had some income from investments to offset these losses, it was not enough to break even. That would require a

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10. Ibid., pp. 2, 31 fn. 24; James S. Todd, Statement of the American Medical Association, House Subcommittee on Health, March 18, 1986.

11. Medical Malpractice Policy Guidebook, pp 11, 13, 142-144, 170-173; Report of the Tort Policy Working Group, pp. 31, 42-45.

12. Report of the Tort Policy Liability Working Group, p. 21.

total "loss ratio" (ratio of total expenses to premium income) of 110 to 115 percent. But for each of the last 4 years, the loss ratios have been 150 percent or more.<sup>13</sup>

Faced by this cold financial reality, many insurers simply have surrendered and retreated from the medical malpractice market. And the largest remaining commercial carrier, St. Paul's Insurance Company, which covers 20 percent of all doctors, has slapped a moratorium on new policies.<sup>14</sup> Making matters much worse, even Lloyd's of London, the legendary insurer of last resort, has stopped providing reinsurance for American malpractice insurers. Overall, only 2 percent<sup>15</sup> of commercial insurers still offer medical malpractice insurance.

Lack of insurance may doom certain medical services. Most of the nation's midwives, for instance, have had their coverage provided under a blanket policy to the American College of Nurse Midwives. But last year the Association's insurer cancelled its policy. The group has been unable to find a replacement. If alternative coverage does not become available--and the prospects look bleak--the American midwife professional may soon become extinct, driving up the cost of having babies for millions of young couples.

#### Premiums Soar and Services Disappear

The insurance companies remaining in the market are dramatically increasing their premiums to cover soaring costs. For all physicians, medical malpractice premiums rose by 45 percent from 1982 to 1984, while physician income rose just 9 percent.<sup>16</sup> Even doctors in the relatively low risk specialties of general practice and internal medicine saw increases of 31 percent and 32 percent in 1984.<sup>17</sup>

Doctors nationwide already pay an average of more than \$10,000 per year for medical malpractice insurance. But the cost is far higher for some specialties. From 1982 to 1984, for instance, the average premium increase for obstetricians nationwide was

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13. Ibid.; Professional Liability in the 80's, Report 1, pp. 22-23; Report 2, p. 5.

14. Report of the Tort Policy Working Group, p. 7.

15. "The Price of Malpractice," The Washington Post, p. 14; Response of the American Medical Association to the Association of Trial Lawyers of America Statements Regarding the Professional Liability Crisis, August 1985, p. 9.

16. Response of the American Medical Association, p. 3; Todd, op. cit., p. 4.

17. Response of the American Medical Association, p. 3.

approximately \$10,000, bringing the average obstetricians premium to about \$27,000 in 1985.<sup>18</sup> In New York state, the average premium was over \$51,000--or about one-fourth of total obstetrician fees.<sup>19</sup> Obstetricians in Los Angeles were paying annual premiums in 1985 of between \$36,000 and \$61,000, amounting to between \$685 to \$1,175 for each baby delivered.<sup>20</sup>

In Washington, D.C. and New York state, neurosurgeons pay annual premiums over \$100,000 per year.

The sharp increase in medical malpractice premiums forces most doctors to increase their fees and others to quit the profession. This problem is particularly acute in the high risk specialties which have experienced the most dramatic premium increases. A recent survey, for instance, finds that 12 percent of qualified obstetricians have quit because of soaring malpractice premiums. Another 14 percent have decreased the number of births they are willing to handle. Among practicing obstetricians, 23 percent have begun turning away high risk cases.<sup>21</sup>

Another recent survey reveals that 21 percent of family physicians nationwide have reduced their obstetric services because of malpractice costs.<sup>22</sup> In two rural areas of Hawaii, for instance, all the family physicians have stopped delivering babies because of malpractice costs, leaving only one midwife to care for low-risk pregnancies in one area.<sup>23</sup> Similar problems are developing in many other states.

Medicaid patients particularly have been hit, since doctors generally are unable to pass on higher costs to the state. A study of West Virginia doctors, for instance, finds that 41 percent of obstetricians, 25 percent of surgeons and 20 percent of general

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18. California Medical Association, "Professional Liability Issues in Obstetrical Practice," Socioeconomic Report, Vol. XXV, No. 5, July/August 1985, p. 3.

19. Medical Society of the State of New York, "An Analysis of Medical Malpractice Insurance Expenses and Physician Income in New York and Selected States," September 1985, p. 6, Exhibit 6.

20. "The Other Side of Medical Malpractice," California Lawyer, p. 40.

21. "Professional Liability Insurance and Its Effects," p. 23; Todd, op. cit., p. 5

22. Response of the American Medical Association, p. 3.

23. "Family Physicians Stopping OB in Hawaii," American College of Obstetricians and Gynecologists, November 12, 1985.

practitioners would not take Medicaid patients.<sup>24</sup> In the Washington, D.C. area, 84 percent of obstetricians will not accept Medicaid patients.<sup>25</sup>

### Defensive Medicine

Not surprisingly, the increased threat of lawsuits is causing doctors to order increased tests and perform procedures which they do not really feel are medically necessary. They do so, they are frank to admit, just to defend themselves against potential claims. Known as defensive medicine, this adds substantial unnecessary costs to health care. A 1983 study, for instance, discovered that 41 percent of physicians surveyed ordered additional diagnostic tests, 27 percent provided additional treatment procedures, 36 percent spent more time with patients explaining medical details, and 57 percent maintained more detailed records--all primarily as a defense against a potential claim. They were not necessary in medical terms.<sup>26</sup> Overall, the American Medical Association estimates that needless defensive medicine costs \$15 billion per year.<sup>27</sup>

Typical of defensive medicine is increased use of Caesarean section to deliver babies, which requires major abdominal surgery. Plaintiffs have been suing doctors by claiming that various birth defects could have been avoided if Caesarean delivery had been used. Consequently, doctors now deliver more than 20 percent of all babies by this very costly and more dangerous method, compared with 5 percent in 1970.

Another example of defensive medicine is the routine use of x-rays for all head injuries. Because this procedure seems so logical to laymen, doctors feel they have to order it to avoid liability on any potential claim. But medical research establishes that the treatment would be the same in virtually all cases regardless of what the x-ray might show, and that in the few cases where special treatment is warranted the need for such treatment could generally be determined by routine examinations. Such x-rays are deemed medically necessary in only a small minority of cases.<sup>28</sup>

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25. Statement of the Medical Society of the District of Columbia, October 22, 1985, p. 3.

26. American Medical Association, "Study of Professional Liability Costs," 1984, pp. 97, 100-101, Table 3.

27. "Study of Professional Liability Costs," pp. 100-101; Professional Liability in the 80's, Report 1, pp. 3, 16.

28. Robert L. Dickman, "The Practice of Defensive Medicine: Ramifications and Solutions," Malpractice Digest, September/October 1980, pp. 1-2; "The Other Side of Medical Malpractice," California Lawyer, pp. 39-40.

## CAUSE OF THE CRISIS

Some so-called "consumer advocates" maintain that the malpractice insurance explosion has two causes. First, they say, doctors who at one time could hide their mistakes are now being forced to pay proper restitution. And second, they insist, the insurance industry is exploiting the American people by inventing a crisis to justify higher premium charges. Both arguments collapse under scrutiny.

### The Doctors

The malpractice problem is not the result of more doctors being found guilty of more malpractice. It is caused by the dramatic increase in awards, primarily for pain and suffering, and by the enormous increase in claims filed--the overwhelming majority of which ultimately prove to be without merit.

It is not just incompetent doctors who are sued. A high percentage of all doctors have been taken to court, including over half of those in some specialties. Nor is the problem the existence of repeat offenders. To the contrary. A New Jersey study reveals that of the state's 7,079 doctors, only 19 had more than two awards against them for over \$100,000, and only two doctors had three such awards against them.<sup>29</sup>

Medical malpractice, of course, exists. But doctors have not suddenly become more incompetent than in the past, creating a malpractice crisis. In fact, quality has improved. Emory's Manne reports a number of indicators showing improved quality and high consumer satisfaction.<sup>30</sup>

### The Insurance Companies

Rather than reaping profits from medical malpractice coverage, the insurance companies have lost money on it for years. The premium increases are merely an attempt to make the business viable again. The commercial carriers, moreover, are leaving the market in droves, hardly what one would expect if the business were profitable. Over

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29. Response of the AMA, pp. 15-16. It is also wrong to suggest that just a few doctors are responsible for most of the damages. The fact is that just a few cases predominantly involving huge awards for pain and suffering are responsible for most of the damage. It is generally different doctors who are held liable for such cases each year.

30. Medical Malpractice Policy Guidebook, p. 23.

half of all doctors, meanwhile, are covered by cooperative, doctor-owned companies, and the premiums these doctors are charging themselves are just as high, if not higher, than those charged by commercial carriers. There is no reason for doctors to exploit themselves. Strict and often unsympathetic state regulators, moreover, have been allowing the premium increases, because they recognize that insurance company losses have to be staunched if the U.S. insurance industry is to survive.

### Judges and Lawyers

The cause of the medical malpractice crisis is a breakdown in America's legal system, due primarily to the actions of judges and lawyers. Lawyers seek, and judges allow, findings of liability in cases where any reasonable standard of medical malpractice would rule out actual liability.

To prevail on a medical malpractice claim, the plaintiff must show that the doctor negligently failed to provide treatment in accordance with the prevailing standard of care provided by other doctors, and that the failure caused the plaintiff's injury. Yet the courts too often find liability where there is neither a clear showing of negligence by the doctor nor any failure to provide treatment in accordance with the normal standard of care--nor even evidence that the injury was caused by anything the doctor did or failed to do. Rather, liability often is allowed out of sympathy for an obviously sick or injured person, and a desire to award him or her some compensation, regardless of the actual culpability of the doctor for the plaintiff's condition. Liability is often found in such cases on the basis of mere speculation that had the doctor followed a different course of treatment, the patient would have fared better.

Allowing courts to find liability and grant awards where no real fault by the doctor exists amounts to a court-operated welfare system, where benefits are distributed on the basis of perceived need, and the costs of such benefits are borne by patients through higher fees for medical care.

The purpose of the time-tested, Anglo-American tort system, of course, is not to distribute compensation to anyone who has an injury, but to distribute justice. Absent any wrongdoing, compensation should be provided by those who have contracted for that responsibility, such as private health and disability insurers, or by federal, state and local programs. The tort system is designed to make a wrongdoer bear the costs of injury and negligence, when the injury is caused by a wrongful act. It is only such wrongdoing or fault which justifies imposing a burden on a defendant.

Unfortunately the nation's courts have become the arena for an ideological crusade by lawyers and judges to turn the tort system into an income redistribution scheme, based on the notion that any injury

should be compensated handsomely out of the surely-undeserved wealth of the nearest "deep pocket." It is this principle that now pervades the tort system, leading to the general liability insurance crisis.

## SOLVING THE PROBLEM

The solution to the malpractice problem is primarily at the state level. It is state law that governs most tort actions. The federal government, however, can provide essential advice, guidance and data. Washington should urge states to make reforms in such a way that a national pattern of tort enforcement emerges. Washington, of course, also should amend federal law where appropriate. The elements of a sound tort approach to medical malpractice claims would include, among other things:

1) Require the plaintiff to show that the doctor was at fault before liability is found.

Mere speculation that the patient would have fared better if the doctor had done something different, or second-guessing of a doctor's judgment in choosing between medically-acceptable alternative courses, should not be enough to find liability. The plaintiff should be required to prove that the doctor failed to provide the treatment or care that any reasonable doctor would have provided under the circumstance, and that this failure caused the injury.

States should codify this common law standard into statutory form, with language making its application unavoidable, perhaps requiring certain, specified jury instruction as well.

2) Place a cap on damages for pain and suffering.

Since judges no longer can be counted on to perform their traditional role of limiting runaway jury awards, statutes, regrettably, may be needed to put a reasonable cap on pain and suffering awards. Pain and suffering damages are purely subjective in any event and money cannot actually compensate for the harm. Consumers show little willingness to insure against pain and suffering in the marketplace, and they should not be forced to do so through the tort system. A cap of, say, \$100,000 would go far to alleviate the medical malpractice problem because of the high proportion of total damages represented by large pain and suffering awards. Yet the cap would still allow reasonable compensation for pain and suffering.

States also should enhance by statute the power of judges to reduce or reject excessive or unjustifiable jury awards. And juries should be required by statute to itemize the components of their damage awards, indicating exactly for what the awards are meant to compensate.

3) Abolish punitive damages.

There never was a sound basis for granting punitive damages in tort cases. The purpose of the tort system is to make the wrongdoer pay for the damage he has caused. Where punishment is justified, it should be imposed through criminal, regulatory or professional disciplinary proceedings set up for that purpose, with proper procedural safeguards for the accused.

4) Allow the winning party to recover its attorney's fees and litigation expenses from the losing party.

This would discourage unmeritorious claims and the tendency for plaintiff's attorneys to try to run up the opponent's expenses in the hope of exacting a favorable out-of-court settlement. Litigation expenses needed to recover a just claim are part of the damages caused to a plaintiff--they should be paid by a defendant found at fault. Attorney and defense expenses for a party not at fault, on the other hand, are a harm caused by nonmeritorious claims. There should be compensation for them.

5) Allow defendants to pay damages in annual payments covering actual damages as they occur, rather than in a lump sum.

This would make damage payments less expensive for insurers to finance. There is no reason why the plaintiff should receive compensation before damage is incurred. This would allow payments to stop if the plaintiff recovers, or died earlier than expected and damages incurred were thereby reduced.

6) Adopt standards for expert witnesses.

A party should be required to show that a proposed expert witness is knowledgeable and qualified and will accurately represent scientific opinion on the subject he or she is addressing. Judges should be granted authority to refuse to allow testimony by putative experts who do not meet these standards. "Experts" which do not accurately represent scientific opinion on the subject at issue should be subject to suit themselves for damages caused the opposing party.

7) Allow consumers and doctors greater freedom of contract to set their own standards for liability.

States should pass legislation requiring courts to allow more scope for limited contractual waivers of liability or limitations of damages under appropriate circumstances. This would include situations where a sophisticated economically substantial agent, such as a union, employer or insurance company, had negotiated the deal for the consumer. It would also include situations where the consumer had a valid choice of care with full potential tort liability, or care

with limited liability and a lower price accurately reflecting the reduced costs of such an arrangement. For instance, a patient might sign an agreement with a doctor or hospital accepting that a certain procedure does involve risk, and limiting his right to sue if the outcome is not ideal. Leading economists have argued that this would allow the system to adapt consistently to actual consumer and public preferences.<sup>31</sup>

8) Do not restrict contingency fees.

While limiting contingency fees would be applauded by some critics of the tort system, it would limit the ability of plaintiffs with valid claims but limited resources to obtain legitimate damages. There is no reason for believing that contingency fees contribute to the medical malpractice crisis. The fees are a product of high awards, and not the other way around.

9) Retain the collateral source rule.

This rule states that amounts awarded to a plaintiff for damages should not be reduced by compensation that the plaintiff receives from collateral sources, such as insurance. Some have suggested that the recovery of any compensation from collateral resources should reduce the damages of medical malpractice plaintiff receives, so that he does not recover for the same injury twice. But a wrongdoer should have to pay the full costs of the actual damages he causes. He should not benefit through a reduced payment for damages simply because of the foresight of the injured plaintiff in arranging for insurance or other collateral support. If anything, the amount that collateral sources have to pay should be reduced by the amount of the tort recovery, shifting the burden of compensation on the wrongdoer.

10) Reject Patient Compensation Funds.

Some states are establishing so-called patient compensation funds, while putting a limit on total damages which can be collected from a doctor in each case. The fund would cover damage awards above the limit. These funds are financed by premiums paid by the doctors themselves. This system simply forces doctors to purchase a major portion of their insurance coverage from new government insurance monopoly. This would do nothing to solve the medical malpractice crisis.

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31. Medical Malpractice Policy Guidebook, pp. 11, 13, 142-144, 170-173, 199-207.

## CONCLUSION

Many states already have begun adopting reforms to address the medical malpractice crisis. The states should reject fingerpointing at insurance companies and doctors; so far they have. Instead, reforms need to be addressed to the real problem--the departure from a fault-based standard of liability, leading to runaway, unjustified awards for pain and suffering. The medical malpractice crisis is an example of what can happen when judges ignore one of the basic principles of law--only those at fault are liable for damages.

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