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The Malpractice Malady

Eric W. Robinson*

Rapidly rising insurance costs and increased malpractice litigation are causing a crisis in the American medical industry: doctors are leaving their practices and prospective doctors are being driven away from the field. National reform, modeled after California's MICRA legislation, can reverse the crisis.

On July 3, 2002, the doors closed on the University of Nevada Medical Center in Las Vegas, not because of an evacuation, not for annual cleaning, not even for lack of patients. The Medical Center closed because the highly trained surgeons and specialists resigned as a result of rapidly increasing insurance costs and the risk of being sued for malpractice. This left the city of Las Vegas and people in parts of Utah, California, and Arizona without access to a Level 1 Trauma Center—the top qualification given to trauma centers in the United States. This closure and many like it are the direct results of the increase of malpractice lawsuits. Because of the effects of these lawsuits, doctors are being forced to relocate, retire, or restrict their practice. The U.S. government needs to adopt a national plan in order to control this crisis, and this plan should be modeled after the Medical Injury Compensation Reform Act (MICRA) that California adopted more than twenty-five years ago. This study will begin by providing background that is necessary for the discussion at hand. Secondly, it will describe the crisis that we are facing as a nation and the potential it has for disrupting quality health care. Thirdly, it will focus on the few states that have begun to take the necessary steps to avert this crisis. Finally, it will show that there is a way to solve this dilemma at the national level.

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Background

It is important to establish the definitions of malpractice, defensive medicine, and economic damages versus non-economic damages awarded in lawsuits in order to understand the discussion at hand. The *Attorneys' Dictionary of Medicine* defines malpractice as "the handling of a case by a physician or surgeon in a manner not agreeing with accepted methods, and resulting in injury to the patient." Because the science of these methods is not exact, the outcome of a lawsuit is often based on the unfortunate result and not whether the best practices were followed. Sen. Orrin Hatch (R-UT), a former medical malpractice defense attorney and current member of the Senate Judiciary Committee, defined defensive medicine as "medical care that is primarily or solely motivated by fear of malpractice claims and not by the patient's medical condition." Sen. Hatch estimated that defensive medicine costs upwards of $300 billion annually. Economic damages include costs of past and future medical expenses, lost wages, and the cost of in-home care if necessary. Non-economic damages cover pain and suffering, something which is impossible to quantify and has resulted in numerous multimillion dollar settlements. These terms will be important to understand as solutions are offered for fixing the malpractice crisis.

American Medical Association

The American Medical Association (AMA) speaks out on issues important to the health of both the patient and the health care industry. Their stance regarding malpractice is as follows:

The AMA recognizes that injuries due to negligence do occur in a small percentage of health care interactions, and that they can be as devastating for patients and

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their families as injury due to natural illness or unpreventable accident. When injuries occur and are caused by a breach in the standard of care, the AMA believes that patients are entitled to prompt and fair compensation.

It is not the motive of the AMA to stop these kinds of lawsuits from happening; they understand as well as anyone the risks involved in medical care. The main goal of the AMA is to ensure the safety of the American people by providing regulations to establish a “standard of care” for medical professionals. The ability to follow this standard of care is put in jeopardy when doctors are overworked and fearful of litigation that could end their careers. The AMA is a driving force in pursuing legislation to improve the future of the medical profession.

Medical Students

In 1997 the Pennsylvania State University College of Medicine paid $4.4 million in insurance premiums to cover the hospital and all of its clinical faculty. That number, which is a reflection of the increase in premiums of the doctors themselves, had skyrocketed to $24 million by 2002. This increase is due to the excessive costs of litigation and increased unavailability of malpractice insurance. Gov. Jeb Bush (R-FL) commissioned a task force to examine the effects of the malpractice malady. In their findings they stated, “If society wishes to have unlimited judgments, then insurance companies will be required to charge unlimited premiums.” Medical residents are seeing this increase and adjusting their career plans accordingly. A 2004 survey of medical students, conducted by a national physician recruiting firm, found that one in four graduating residents would choose a new career if given the opportunity to start over and that their main concern was malpractice. Also, four times as many residents stated in 2004 that malpractice


was a more significant source of concern than in 2001. Something needs to be done to help encourage these students that there is a change coming to limit these high insurance premiums and excessive costs of litigation.

Insurance Companies

Perhaps the main reason for the increase in these lawsuits is the increase in amounts awarded to patients by juries. In the six-year period from 1995 to 2001, median jury awards doubled to $1 million. During the same period of time the mean jury award rose to $3.9 million—an increase of 95 percent since 1995. This increase in compensatory awards led to a corresponding increase in premiums given by insurance companies. As of yet, there are no caps on the amount of money that is awarded to lawyers who prosecute malpractice cases. This leads to lawyers selecting only those cases that have the clients with the potential to be the most appealing to the juries, regardless of whether or not the case is meritorious. Robert Keeton, a former U.S. District judge and professor emeritus at Harvard Law School, in an article on litigation quoted one personal injury lawyer who explained his secret to success:

The appearance of the plaintiff [is] number one in attempting to evaluate a lawsuit because I think that a good healthy-looking type, one who would be likeable and one that the jury is going to want to do something for, can make your case worth double at least for what it would be otherwise and a bad-looking plaintiff could make the case worth perhaps half."

This puts everyone at an immediate disadvantage when it comes to seeking recompense for their injuries, especially those who do not fit the "profile" that would appeal to a judge and jury.

A direct result of these lawsuits is an increase in the premiums that doctors are paying in order to stay in practice. Insurance companies are being forced to pay out more and more annually to patients and need to cover

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themselves financially. This is obviously hurting the doctors, but they are not the only ones being forced out of business; the insurance companies themselves are losing money. In 2002, insurance companies nationwide spent $1.65 on claims and lawsuits for every $1 they collected in premiums. The St. Paul Companies (SPC) used to be the largest medical malpractice provider in the country; this was until 2001 when they sustained great losses and were forced to leave the market. SPC provided insurance to 40,000 physicians, over 70,000 other health care professionals, and 750 hospitals. In order to keep afloat, providers are increasing premiums at a drastic rate—136 percent over the last seven years. This is a major concern to both doctors already in practice and medical students about to embark on their careers.

The Crisis

The American Medical Association has identified seventeen states that have reached a crisis level concerning liability in malpractice cases and twenty-seven states that have reached near-crisis level. One of the crisis states, Pennsylvania, lost 1,738 “actively practicing” physicians from 2001 to 2002. Of these 1,738 doctors, 941 relocated to other states where malpractice premiums are lower. California is not one of these seventeen states, due to reforms passed almost thirty years ago. The other noncrisis states, including Wisconsin, New Mexico, and Colorado, are all states where measures of MICRA (California’s law) have been passed. In each of these states, a cap has been placed on the amount of money that can be awarded as non-economic damages. This cap has been set anywhere from $250,000 to $300,000. Meanwhile in the near-crisis states the cap reaches upwards of half a million dollars. The states with the most severe crises are those without caps on non-economic damages. Nationwide, 54 percent of all plaintiffs who received compensation were awarded over $1 million. With the risk of such high

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12 Committee on the Judiciary at 10.
jury awards, could doctors be blamed for moving away from states without preventative measures in place?

Another alternative to paying high insurance premiums is for the doctor to retire from practicing medicine. Dr. Charles Rich, a prominent Utah neurosurgeon, was the head of the medical staff for the 2002 Winter Olympics in Salt Lake City. At the close of the Olympics, he was sixty-six years old and still wanted to practice medicine, but at a reduced level. Although he would be working fewer hours and with fewer patients, he would still be forced to pay a premium of $82,000, and this is without ever having a payout from his insurance company to a patient. Financially, it was clearly not profitable for him to continue offering his services, so he retired early. Now there are only twenty-seven neurosurgeons performing surgery in Utah, or about 1 for every 75,000 residents—not enough to meet demand. Malpractice lawsuits and insurance premiums are already driving away new doctors from fields of specialization. If those already established in these highly trained specialties begin to leave their practices with no one to replace them, we will be facing an even bigger crisis.

Another possible option for doctors to overcome extremely high insurance premiums is to restrict practices from high-risk procedures to those of lower level of risk. For example, two of the specializations with the highest insurance premiums—OB/GYNs and neurosurgeons—also have the highest percentage of doctors restricting their practices. A recent study by a University of Nevada Medical School professor noted that 42 percent of obstetricians plan to move their practices out of southern Nevada. This area which experiences 23,000 births a year includes Las Vegas. If these doctors move away and none move in, there would only be seventy-eight obstetricians left who are still delivering babies, for an average of 294 babies per year per OB/GYN. The American College of Obstetrics and Gynecology has not set a limit on allowable deliveries per doctor but does show concern when that number reaches 225 annually. Many obstetricians are limiting themselves to performing pre-delivery care, which reduces their premiums substantially. In

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15 Rovito at 17 n. 1.
In the United States, a neurosurgeon is sued on average every eighteen to twenty-four months, causing many to stop performing surgery and instead provide only presurgical care. In the area outside of metro Boston, there are only twenty-three neurosurgeons to serve thirty-nine hospitals, and the average time needed to recruit a neurosurgeon has reached thirty months. With such a high percentage of doctors limiting their care, the amount of options left to ordinary citizens is getting dangerously low. These crisis states are beginning to look like California did some thirty years ago.

Successful Legislation

In 1975, California was experiencing major inflation in the amounts its doctors were paying in malpractice insurance. At the worst time, some doctors' insurance rates were being raised over 400 percent annually. In addition to raising the premiums some doctors paid, the insurers were refusing to renew the plans of thousands of doctors. Worried that this could end medical care as they then knew it, Gov. Jerry Brown (D-CA) pulled the legislature together to try to find a solution. They created the Medical Injury Compensation Reform Act, now commonly referred to as MICRA.

MICRA

The following are the major statutes of MICRA: (1) A $250,000 cap on non-economic damages. This still gives the patient unlimited access to lost wages, past and future medical expenses, as well as lost income. (2) Collateral Sources Judgment Reduction. This avoids a double payment from insurance companies by taking the money paid by the company out of the court-awarded judgment. (3) Limits on Attorney Contingency Fees. Attorney fees are adjusted on a sliding scale to assure that more of the money goes to the plaintiff. (4) Periodic Payment of Large Sums. Before MICRA, a large verdict had to be paid all at once. Now, patients are paid regularly throughout


Statement for the Record of the American Medical Association to the Committee on Energy.

their lives to ensure that they have the money whenever they need it. This has also kept some insurance carriers from declaring bankruptcy as they are able to better budget for payments made to patients in these settlements.

Opponents of MICRA say that it limits access to courts and judgments in order to control rising insurance rates; that during the ten years following the enactment of MICRA, insurance premiums continued to increase; and that MICRA hasn't actually benefited patients directly since its enactment. Despite its critics, MICRA has proven to be effective in reducing the time needed for patients to receive their compensation, and it has also paved the way for them to receive more money than pre-MICRA. In California, patients receive their money on average seven months earlier than patients in other states. There is also a significant disparity in the amounts awarded to patients in non-MICRA states and those in California, with Californians receiving an average of $200,000 more per $1,000,000 judgment.

MICRA has withstood numerous legal challenges, including many questioning the constitutionality of the caps. In fact, it wasn't until 1985 that insurance companies felt comfortable lowering their premiums. In the case of Lawrence Fein v. Permanente Medical Group, the California Supreme Court ruled that

in enacting MICRA, the Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing serious problems for the healthcare system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments. In attempting to reduce the cost of medical malpractice insurance in MICRA, the Legislature enacted a variety of provisions affecting doctors, insurance companies and malpractice plaintiffs. [The limitation on recoverable non-economic damages] is, of course, one of the provisions which made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums. It appears obvious that this section—by placing a ceiling of $250,000 on the recovery of non-economic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers.31

31 Lawrence Fein v. Permanente Medical Group, 38 cal. 3d 137 (Cal. Sup. Ct., 1985).
By finding that the caps that had been set were in fact constitutional, the Supreme Court of California established MICRA as a bona fide solution to the malpractice malady. Since then, premiums have fallen 12 percent in California. During the same time period, premiums have risen 55 percent nationally and 809 percent in Florida. MICRA works in California, and it is time for the nation as a whole to follow California's lead and adopt malpractice reform.

A National Solution

U.S. Sen. Orrin Hatch (R-UT) worked with Senate Majority leader Bill Frist (R-TN) to cosponsor a law patterned after MICRA but which had been adjusted to work better across the country. This proposal included a $500,000 general cap on non-economic damages while still providing for a significantly higher cap in cases of disfigurement or death. Their proposal also allowed for individual state laws to supersede the federal legislation with respect to the caps. This would allow each state to tailor the law to its own needs, while providing a standard to follow. The AMA worked to obtain forty-nine votes in the affirmative for passing this legislation. While this was still eleven short of the required sixty needed to pass, it was a record number and a great sign of progress. This legislation has one very powerful ally who has promised a change—Pres. George W. Bush. In an October 2004 speech in Pennsylvania, Pres. Bush said that "the quality of life is deteriorating because of these lawsuits" and that "in a new term we'll pass real caps on non-economic damages." Not only does he support caps on damages, the President also supports legislation containing the following reforms:

- Provide for payment of a judgment over time rather than in one lump sum.

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• Ensure that old cases cannot be brought years after an event when medical standards may have changed or witnesses' memories have faded. Accomplishing this with a three-year statute of limitations.

• Provide that defendants pay any judgment in proportion to their fault, not on the basis of how deep their pockets are.

• Reserve punitive damages for cases that justify them—where there is clear and convincing proof that the defendant deliberately failed to avoid unnecessary injury to the patient.

Pretrial screening panels that sift through all lawsuits and allow only those which are legitimate to proceed have been shown to decrease insurance premiums by as much as 20 percent.36

It is now the "new term" of which Pres. Bush spoke. Now is the time for his administration and our elected representatives to come together and consider a solution to this crisis that is spinning out of control. This is a crisis which threatens Americans as a whole and as such transcends political barriers. Lawyers are not a dying breed, but because of the profitability of malpractice litigation, doctors are. The solution for this problem should be modeled after MICRA, which California passed more than twenty-five years ago. MICRA has been proven a viable solution and has worked with each state that has applied its principles and it would work on a national level. Passage of a MICRA-type law would provide a basis for solving this problem across the country.