

## Malpractice Matters. We Can Do Better (9/17/09)

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*Washington Post: How significant is the malpractice problem? What can be done to reduce defensive medicine and still protect patient rights?*

Depending on whom you ask, a broken medical liability system unnecessarily raises America's health-care bill by somewhere between 2 and 10 percent. It's not what's pushing costs through the roof. (Technology, bad lifestyle choices and an aging population are better culprits.) But medical liability adds an extra blob of costs on top: 5 percent would equal \$130 billion a year.

Patients injured by physician negligence should have recourse, but too often our system punishes doctors who've done nothing wrong and fails to compensate patients who really have been wronged. Defensive medicine and doctor-patient mistrust are side effects.

An oft-cited example: a large percentage of obstetricians are sued in relation to cerebral-palsy births. Some research suggests that the result is lots more Caesareans being performed and relatively little change in cerebral palsy rates. C-sections raise the average cost of childbirth and make health insurance more expensive. Higher cost induces some decline in coverage. In addition, malpractice insurance costs and litigation fears drive some OB-GYNs to close their practices. Some places have been left with no practicing obstetricians, creating hardships for patients.

Generally, neither jurors nor judges are medical experts, so there's wide variation in the quality of rulings. Lawyers receive contingency pay, so bigger settlements mean bigger income. There's no penalty for filing frivolous lawsuits. Together, these factors generate strong incentives for plaintiffs to bring suit and for innocent defendants to pay settlements to avoid litigation and increased risk.

Some proposed solutions include: caps on non-economic damages, protections for doctors who self-report errors, mandatory arbitration before initiating litigation, and expert-run health courts (similar to bankruptcy, patent, and drug courts). Other countries offer intriguing possibilities: Some prohibit contingency fees. In the United Kingdom and Canada, losers have to pay the winner's legal bills, so bringing nonsense suits is risky. New Zealand replaced its tort system with no-fault insurance.

Medical liability reform is mostly absent from the current health-care reform debate. That needs to change. We can do better.