

# Medical Malpractice Reform: Improving the Dispute Resolution System

The current system for resolving medical malpractice claims compensates individuals unevenly, often inaccurately, and typically after long delays. It is also unnecessarily expensive and diverts tremendous resources from the health care system. Improving the dispute resolution system will benefit patients, providers, and society. This issue of *Health Care News In-Depth* will explore one possible solution: courts dedicated to medical malpractice cases.

The current dispute resolution system falls short of its goals of deterring provider negligence and compensating those injured by it. It operates in direct conflict with safety experts' recommendations for improving the delivery of care. According to a 2004 *New England Journal of Medicine* article by Harvard medical malpractice experts David Studdert, Michelle Mello, and Troyen Brennan, "the punitive, individualistic, adversarial approach of tort law is antithetical to the nonpunitive, systems-oriented, cooperative strategies promoted by leaders of the patient-safety movement."<sup>1</sup> In fact, they wrote, "The clash between tort law and the patient-safety movement undermines efforts to improve quality."

With respect to its compensation goal, the system is often so lengthy, acrimonious, and

expensive that many individuals injured by negligence never enter the system. These same factors undermine the benefits intended for those who do enter the system, create inequities and unpredictability in compensation, and result in unreasonable costs for all involved.

## High Overhead

In a 2006 study, the aforementioned Harvard experts, Atul Gawande, and others studied closed malpractice claims from five insurers to determine the merits and outcomes of malpractice claims.<sup>2</sup> The primary goal was to examine the prevalence of frivolous lawsuits. Presumably for that reason, they applied the Institute of Medicine's (IOM) definition of error: "the failure of a planned action to be completed as intended...or the use of a wrong plan to achieve an aim," which

is broader than the tort system's term "negligence." Of the 1,452 claims reviewed, 3% had no adverse outcome from medical care. In cases that involved injuries, the researchers concluded that nearly 40% of the claims did not involve errors even though they applied the broader IOM definition.

Of the cases that involved injuries but no provider errors, 28% resulted in compensation. Of those cases that involved provider errors, 73% resulted in compensation. The authors concluded that the system's outcomes are reasonably in accordance with the merits of the claims when using the broad definition of error. Presumably, if the researchers had analyzed the claims applying the standard of "negligence," there would be more claims without "merit" and less correlation between merit and compensation.

However, the researchers expressed deep concerns about the system's costs. The average time between injury and resolution was five years, while one in three claims took at least six years to resolve. "These are long periods for plaintiffs to await decisions about compensation and for defendants to endure the uncertainty, acrimony, and time away from patient care that litigation entails," Studdert and his colleagues wrote. In terms of actual

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## DELAYS AND COSTS OF SYSTEM BENEFIT NO ONE

### In a study of 1,452 closed medical malpractice claims, researchers found:

- The total cost of litigating claims equaled 54% of compensation paid to plaintiffs
- The average time between injury and resolution was five years
- One in three claims took six years or more to resolve
- Streamlining the processing of claims would result in substantial system-wide savings

—Studdert, et al. (2006)

1. Studdert, David M., LL.B., Sc.D., M.P.H., Michelle Mello, J.D., Ph.D., Troyen Brennan, M.D., J.D., M.P.H. "Medical Malpractice." *The New England Journal of Medicine* 350 no. 3 (January 15, 2004): 283-292.

2. Studdert, David M., LL.B., Sc.D., M.P.H., Michelle Mello, J.D., Ph.D., M.Phil., Atul A. Gawande, M.D., M.P.H., et al. "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation." *The New England Journal of Medicine* 354 no. 19 (May 11, 2006): 2024-2033.

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financial costs, they labeled the system's overhead costs "exorbitant." They noted that the combination of defense costs and plaintiffs' attorney contingent fees "brought the total costs of litigating claims in our sample to 54 percent of the compensation paid to plaintiffs." They therefore believed that substantial savings could result from improving the system's efficiency and urged that efforts be made to streamline the processing of claims.

Studies that have examined claims from the standpoint of negligence have shown far less correlation with compensation. The oft-cited Harvard Medical Practice Study from 1990 found that only 17% of claims studied involved a negligent injury. In a 1996 follow-up study, Troyen Brennan, one of the Harvard Medical Practice Study authors, and others found that the severity of a plaintiff's disability, not the presence of negligence, was predictive of compensation.<sup>3</sup>

## Impact on Defensive Medicine

Improving the dispute resolution process would also reduce the high costs associated with defensive medicine. According to a study by Daniel Kessler and Mark McClellan, reductions in the time spent and the amount of conflict involved in defending against malpractice claims can also reduce defensive practices substantially.<sup>4</sup> "[E]ven a modest reduction in the hassle of resolving a claim... would lead to a large change in the intensity of treatment" of the diagnoses they studied.

## Improving Dispute Resolution

Over the years, malpractice system experts have recommended developing courts dedicated to resolving malpractice claims expeditiously, efficiently, and accurately. Those same experts believe such courts could quite adequately meet injured patients' needs and rights by increasing access, improving consistency in decision-making, and enhancing equity in payments.<sup>5</sup>

Establishing specialized courts for certain types of cases is not new. New York State has separate probate and family courts, along with a number of "problem-solving courts" aimed at addressing special issues surrounding specific types of cases involving domestic violence, mental health, sex offenses, and drug treatment. At the Federal level, patent and bankruptcy courts address the specialized issues that may arise in those areas.

Advocates of dedicated courts often recommend they be administrative in nature, similar to New York State's system for processing worker's compensation claims, given

### IMPROVING THE CURRENT RESOLUTION SYSTEM

**To improve access, equity, and consistency and to reduce unnecessary costs, the system needs:**

- Judges specially trained in handling medical cases and mediation
- Availability of neutral experts
- Clinical practice guidelines
- Compensation guidelines for certain injuries
- Patient safety data collection

that those systems often cost much less than judicial systems. However, a dedicated court could also be part of the judicial system as New York's existing specialized courts are.

Whether judicial or administrative, it is recommended that dedicated courts have certain features:

**Judges With Special Training** in mediation and adjudicating disputes about medical care. The practice of medicine and the operation of large health care providers are complex areas. It is important for plaintiffs and defendants that the judges overseeing such cases have special training and skills in this area.

**Neutral Experts** that could, when needed, assist the court by offering unbiased testimony regarding the appropriate standard of care. The current malpractice system is often criticized for being a battle of the experts, some of whom promote theories that do not

have a strong foundation in medicine.

**Clinical Practice Guidelines** that are evidence-based, which the court can use to make decisions regarding liability. Developing and relying on guidelines will help improve care, drive appropriate early offers of compensation, and instill more confidence in the process, thereby encouraging patient safety efforts. Using the guidelines would also streamline the process and reduce the system's costs.

**Compensation Guidelines** for certain injuries that would assist the courts in ensuring fairness and equity in decision making. Currently, there can be wide swings in com-

penetration, with some people winning huge awards while others are unable to enter the system due to its costs.

**Collection of Data** that can be used, without identifiers, for improving health care delivery systems and avoiding future errors.

## A Fairer, More Efficient System

The current malpractice system is unreasonably lengthy and expensive. Attorney fees, expert fees, and related costs sap resources equal to 54% of the compensation paid to plaintiffs, while delays and acrimony drive up the costs of defensive medicine. Many individuals with injuries caused by provider negligence never enter the system, and those who do must often wait years for compensation. Courts specifically designed to handle malpractice cases expeditiously, efficiently, and equitably will serve patients and providers alike by improving the fairness and consistency of the proceedings while reducing unnecessarily high overhead costs. ■

3. Brennan, Troyen A., M.D., J.D., M.P.H., Colin M. Sox, B.A., Helen R. Burstin, M.D., M.P.H. "Relation Between Negligent Adverse Events And The Outcomes Of Medical-Malpractice Litigation." *The New England Journal of Medicine* 335 no. 26 (1996): 1963-1967.

4. Kessler, Daniel P., Mark B. McClellan. "How liability law affects medical productivity?" *Journal of Health Economics* 21 (2002): 931-955.

5. Mello, Michelle M., David M. Studdert, Allen B. Kachalia, Troyen A. Brennan. "Health Courts and Accountability for Patient Safety." *Milbank Quarterly* 84, no. 3 (2006): 459-492.

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