

Tort Reform

By now there probably isn't a physician in the United States who isn't aware of the current medical malpractice crisis. According to a recent report by the American Medical Association, 18 states are listed as being in crisis and 26 at risk. Only six states—California, Colorado, Indiana, Louisiana, New Mexico, and Wisconsin are at low or little risk. The reason that these states are not in crisis, according to the report, is a set of legal reforms that were established during the first "malpractice crisis" in the late 1970s and early 1980s. Those legal reforms place a cap on awards for non-economic damages and allow periodic payouts of the award instead of lump sum payments that can bankrupt the defendant or insurance company. Two of the states limit legal fees, and most have pretrial expert panels that screen cases. Some have collateral source reform disclosure, which means that the jury is advised, prior to making their award, if the plaintiff has already received compensation from another source. Some have a patient compensation fund from which awards can be paid if the plaintiff is insolvent.

While these reforms are all worthwhile, they do not adequately address the following basic problems:

- (1) The legal system in the United States is so burdensome in terms of time and expense that it is simply impractical to defend many, if not most cases in both the civil and criminal system. That is why so many cases settle or plead to lesser offenses even if the defendant is "innocent."
- (2) Because legal fees are so high (usually 25–50% of the award), there is enormous financial incentive for lawyers to seek out cases with sufficient economic damages regardless of the merits of the case. The breast implant fiasco is a case in point. It is now widely accepted by the scientific community

(peer review, an FDA panel) that there is no cause and effect between breast implants and damages; yet settlements have been well in excess of 5 billion dollars.

- (3) Many experts are not experts, they are "hired guns;" and hired guns perjure themselves (euphemism, for lie under oath). Even real experts perjure themselves sometimes.

In such an economic climate, the Tort system is nothing more than a big lottery looking for big payoffs. No matter what the damages, if the defendant does not have the ability to pay, there will be no case. No matter what the merits of the case, if the defendant is a "deep pocket," the case will proceed and, all too often settle because of the time, expense and risks of the legal battle.

The solution?—Do away with the concept of Tort in its current form and replace it with two kinds of statutes, one that compensates victims and one that punishes wrongdoers. If, as a society, we believe that victims should be compensated, why not compensate them all from a fund derived from all that money that will be saved in legal fees. This is how the victims of the World Trade Center terrorist catastrophe are being compensated. And if we believe that wrongdoers should be punished (or rehabilitated) why not just punish them? In the current system, the overwhelming majority of victims do not get compensated at all and the overwhelming majority of defendants who lose malpractice cases suffer no ill consequences at all. This is how things are in the United States. For the rest of the world, beware.

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