Medical Liability Reform: A Three State Comparison

by Amy Johnson
Spokane Regional Chamber of Commerce

Introduction – The Medical Liability Crisis

Rising medical liability insurance rates for doctors and other health care professionals has prompted the American Medical Association to label Washington a state in medical liability crisis. The growing risk of high cost legal settlements and subsequent increases in malpractice insurance premiums is increasing the cost of, and limiting access to, quality health care for citizens. Since 1996, average jury verdicts in the state have increased 68% and average settlement costs have increased 53%.1 The number of settlements and verdicts of more than $1 million has increased almost ten fold, rising from four in 1994 to 39 in 2002.2

The Washington State Hospital Association estimates that, had a reasonable cap on non-economic damages been in place, $53.5 million in savings would have been realized in the 47 applicable cases settled in 2000, 2001 and the first half of 2002.3 The biggest contributor to rising malpractice insurance rates is increased losses for insurers on paid medical malpractice claims.4 Medical malpractice premiums increased an average of 8.1% every year from 1992-2001.5 The rising cost of malpractice insurance is three times greater than the general rate of inflation and double the rate of inflation for medical care.6

To help address the malpractice crisis, Washington policy leaders and the public can learn from the experiences of other states. Effective medical liability reform implemented in other states includes the following basic provisions:

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2 Ibid.
3 Ibid.
6 Ibid.
• change in the statute of limitations;
• changes the statutes governing negligence;
• joint and several liability reform;
• revising vicarious liability and;
• adopting a cap on non-economic damages.

The following study presents a comparison of the liability policies in three Northwest states, and summarizes two medical liability reform initiatives that will appear on the November ballot. The state comparisons cover five fundamental aspects of liability law - statute of limitations, negligence, joint and several liability, vicarious liability and non-economic damage caps.

**State Comparison**

Insurance companies base medical malpractice premiums in part on the costs associated with the rules and regulations in place in the states where they do business. A comparison of Washington, Idaho and Oregon shows measurable cost differences between statute of limitations, negligence, joint and several liability, vicarious liability and damage caps.

The cost of insurance is based on risk, and the difference in medical malpractice insurance premiums depends on differences in the level of liability created by each state’s legal system. The biggest contributor to rising malpractice premium rates is increased losses for insurers from medical malpractice claims. A state that imposes more liability on doctors and other health care professionals will have higher premium rates than a state with lower liability levels.

**Statute of Limitations**

Washington, Oregon and Idaho are similar in the amount of time after a medical injury in which a malpractice claim must be filed. Washington requires a medical malpractice suit to be filed within three years. Oregon and Idaho require medical malpractice suits to be filed within two years of the occurrence. The three states also allow suspension of the statute where fraud, intentional concealment or foreign objects are involved.

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7 A comparison of each state’s medical liability system is provided in Appendix A.
9 Suspension of the statute of limitations occurs when there are reasonable conditions in which the plaintiff did not or could not have known of the injury until after the expiration of the statute of limitation period. This causes the timing of the statute of limitations to begin at the time in which a person actually becomes aware of, or should have been aware of, the injury.
The greatest difference in each state’s statute of limitation law arises when physical disability is an issue. Disability in these cases includes status as a minor, or those under age 18. In Washington, the courts have interpreted the law on the statute of limitation and status of a minor as allowing a person to file a medical malpractice claim based on injury incurred as a minor (starting from birth) up to age 21. Oregon allows a person to file a medical malpractice claim up to age 19. Idaho allows a medical malpractice claim up to age eight, for an injury incurred at birth.

The difference in the statute of limitation laws between the states affects insurance premiums. Insurance premiums for malpractice must be sufficient to cover all potential claims made under any one policy. For physicians practicing in Washington, potential claims for a child are possible for a 21-year period. In Oregon the time period is 19 years. Idaho insurance premiums must only forecast the risk of claims for an eight-year period. Insurance premiums are higher the longer person has to file a claim.

Types of Legal Negligence

Washington, Idaho and Oregon address the issue of contributory negligence in three different ways.

1. Pure comparative negligence. Washington law is based on the doctrine of pure comparative negligence. The injured party’s award is reduced in proportion to the fault assigned the one who has been injured. This doctrine allows an injured person to receive a court-ordered award even if he is found to be in the majority at fault for causing his own injury. Nationally, only 13 states adhere to a pure comparative negligence doctrine.

2. Individual contributory negligence. Idaho uses the doctrine of individual contributory negligence. This doctrine does not bar recovery as long as the injured person’s fault is less than the fault of the person who caused the injury. Idaho courts assess the amount of fault on a case-by-case basis. This approach allows an injured person to collect money only from those defendants who have been found by a jury as contributing proportionately higher to the injury than the injured person did. In medical malpractice suits this rarely exists since it is usually the actions of a health care provider that cause the injury, although in some case a patient may contribute to his own injury by disregarding a physician’s orders or by not following after-care instructions.

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14 In a state, like Washington, that uses a comparative negligence doctrine, a jury may find that defendant #1 is 20% liable for negligence, defendant #2 is 50% liable for negligence, and the plaintiff is 30% liable for negligence. If the total jury award is $1 million, defendant number 1 is liable for $200,000 of the award and defendant number 2 is liable for $500,000 of the award.
3. Modified comparative negligence. Oregon follows a doctrine of modified comparative negligence. This doctrine provides for recovery by an injured person only if that person’s proportion of fault is less than the combined fault of the people he is suing. In other words, the injured person’s contribution to his own injury must be 49% or less before he can seek monetary damages from other people.

Washington law allows recovery regardless of the fault of the injured person and thus court rulings by the state’s judges result in many more costly awards than in either Oregon or Idaho. The doctrine of pure comparative negligence used in Washington allows an injured person to recover 100% in money damages from the people he sues, even if he is 99% at fault for his own injury. That difference strongly influences the cost of insurance premiums in Washington compared to neighboring states.

Individual contributory negligence, used in Idaho, bars recovery by an injured person only if his percentage of fault is less than the person he is suing. This doctrine does not bar total recovery, but it does minimize cost because the injured person may, for example, be found 30% liable, defendant number one 35% liable, defendant number two 20% liable, and defendant number three 15% liable. In this case, the injured person could collect money only from defendant number one, because only that person is more liable for causing the injury than the injured person himself.

A modified comparative negligence doctrine, like that used in Oregon, bars any recovery by an injured party if the injured party is found to be more at fault than the combined total of all defendants. This means in order to recover any damages the injured party must be no more than 49% at fault. This limits the cost of court rulings to an even greater extent than the pure comparative negligence doctrine and the individual contributory negligent doctrine.

Insurance premiums are affected by the varying doctrines because the cost of court decisions against some doctors contributes to the cost of malpractice insurance for all doctors. If more expensive claims are paid out, insurance premiums must be raised in order to offset the higher cost of the claims. In a state such as Washington the cost of court-ordered claims will be high because injured people are allowed to collect money regardless of how much they contributed to their own injuries.

Vicarious Liability

The vicarious liability doctrine provides that an employer may be liable for the wrong of an employee or agent if the act was committed within the scope of employment or agency. Within the doctrine of vicarious liability is the theory of “ostensible agency,” in which a company or non-profit entity (such as a hospital) may be held liable for the actions of a non-employee if the hospital fails to make it clear in

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some way that, to a reasonable person, the non-employee is in fact not an employee of the hospital.

Liability law in Washington and Oregon recognizes the theory of ostensible agency. 17 Idaho law does not. Instead, Idaho law is based on a strict vicarious liability theory, which says a hospital is liable only for the negligent acts or omissions of its own employees or agents, and not people who merely appear to be working for the hospital. 18

The legal principle of vicarious liability is illustrated by the case of Jimmie Lee Cobb. In April 1979, Ms. Cobb entered Tacoma General Hospital for surgery. During the procedure a problem with the anesthesia resulted in her suffering severe brain damage. The administration of anesthesia during the operation was the responsibility of Dr. Martha Cowgill, a resident at the University of Washington Hospital, and Dr. Phillip Backup, an employee of Tacoma Anesthesia Associates, Inc. Ms. Cobb’s family not only sued these doctors’ employers, they also sued Tacoma General Hospital, as allowed under Washington law, even though as non-employees Tacoma General was not responsible for the qualifications and training of these two doctors. 19

Had this accident occurred in Idaho, only employers actually responsible for the doctors who caused the harm could have been sued, resulting in much lower medical liability costs to the hospital. As it was, the cost of the court award had to be borne by all the other patients of Tacoma General, even though the two doctors at fault were not employees of the hospital.

Malpractice insurance premiums are impacted by ostensible agency because the level of liability is higher in states that recognize ostensible agency, like Washington, than in states with a stricter standard of liability.

**Joint and Several Liability**

Joint liability allows an injured person to file a claim against, and collect money from, a number of people within one lawsuit. Several liability means that several people in a lawsuit are liable for their portion of the claim based on the amount of liability or fault assigned to each person. 20 In practice, the legal doctrine of joint and several liability allows enforcement of an entire monetary judgment against any one of the people the court has found to be at fault. Joint and several liability statutes greatly

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20 A negligent person is someone who has committed a wrongful act other than a breach of contract that injures another person and for which the law imposes civil liability.
increase financial risk for malpractice insurers and add substantially to the overall cost of health care, particularly for doctors involved in a group practice.

In Washington a physician who belongs to a group practice is held financially liable not only for any medical mistakes he might make, but also for the errors of other members of his group. In Idaho a doctor who is a member of a group is only responsible for his own mistakes, or when his own actions combined with those of other doctors work together to cause harm to a patient.

Oregon’s individual liability law is similar to Idaho’s. In Oregon one negligent person may have to pay an entire financial judgment if after one year the injured person is unable to collect money from other guilty parties.

Washington’s system of joint and several liability greatly increases the risk of high-cost lawsuits, because doctors here are not only held legally responsible for their own decisions and actions, but for those of other doctors as well.

This point is illustrated by the case of Jimmie Lee Cobb described above. If for some reason she were unable to collect the court’s financial judgment from the employers of the doctors who harmed her, she would have been allowed under Washington law to collect the entire amount from Tacoma General Hospital, which, of all the parties involved, was the least responsible for causing her injuries.

**Caps on Non-Economic Damages**

Damage caps limit the monetary award for non-economic damages. The Washington Supreme Court has decided that non-economic damage caps are not permitted under the state constitution because they infringe on the right to a jury trial. Oregon has placed a $500,000 cap on non-economic damages for claims that do not customarily have a jury trial. Oregon has also imposed the cap in wrongful death cases because the wrongful death statute is a creation of the legislature, not the state constitution. However, in Oregon there are still cases in which a jury trial is customary and the cap does not apply. Idaho imposes a general $400,000 cap on all non-economic damages.

Damage caps reduce insurance premiums because the amount of money potentially paid out on claims is limited. Caps allow insurance companies to account for a definite number when including non-economic damages in the calculation of monthly premiums. The absence of a cap means the cost of potential non-economic damage awards is unlimited, and often reaches many millions of dollars in a single jury.

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verdict. The unknown factor must then be compensated for through higher insurance premiums charged to all doctors, clinics and hospitals.

Conclusion

In this three state comparison, doctors and insurers in Washington face the greatest risk of costly and often frivolous legal claims. Some of the key factors that make Washington a costly state include: a medical malpractice suit can be filed on behalf of a minor child until the child reaches the age of 21; an injured person can collect damages even if he is 99% responsible for his own injury; doctors can be held liable for medical mistakes made by other doctors; hospitals can be sued for the negligent behavior of non-employees, and there is no dollar limit on the amount of non-economic damages that can be awarded by a jury.

Oregon allows a reasonable cap on non-economic damages in most cases, and of the three states, Idaho offers the best balance between protecting the legal rights of injured patient protections and reasonable limits on unjust lawsuits and the size of jury awards.

The current medical malpractice system in Washington is contributing significantly to the steadily rising cost of health care and to the exodus of well-qualified physicians from the state. Untenable lawsuits and large non-economic damage awards by juries are causing steep increases in malpractice insurance premiums. Doctors and hospitals must then recoup the higher cost of premiums by charging higher prices for health care.

Medical malpractice reform in other states has helped control malpractice premiums without harming the quality of care or the safety of patients. Effective medical liability reform would include changing Washington’s statute of limitations, negligence laws, joint and several liability rules, vicarious liability statutes, and introducing a reasonable limit on non-economic damage. Legal reforms based on these policies would result in lower malpractice insurance costs and better-quality and more affordable health care for all Washington citizens.
2005 Ballot Initiatives on Medical Liability Reform

Initiative 330

This initiative is sponsored by the Washington State Medical Association (WSMA). If approved by voters, the initiative would change state law to:

1. Restrict non-economic damages to between $350,000 and $1,050,000;
2. Change the statute of limitations for filing claim on behalf of a minor child from age 21 to age eight.
3. Limit attorneys’ fees to 40% of the first $50,000 of a court award, 33 1/3% of the next $50,000, 25% of the next $500,000, 15% of any amount over $600,000;
4. Modify the joint and several liability laws so that defendants are held strictly accountable for their share of liability in contributing to their own injury;
5. Change the vicarious liability statute so that hospitals, doctors and other healthcare providers are responsible for only their own share, or their employees share, of liability.

This initiative is limited only to medical liability and does not effect general tort reform. The Washington State Medical Association has fully committed itself to passage of this measure, and has announced it will be the focus of their public policy efforts in 2005. The Association is also preparing to fight expected court challenges, including those filed on constitutional and equal protection grounds, against the initiative. The initiative’s severability clause provides that any parts of this initiative not challenged in court will go into effect upon passage. It also provides for a constitutional amendment to be introduced if the state supreme court rules that the cap on non-economic damages is unconstitutional.25

Initiative 336

This initiative is sponsored by the Washington State Trial Lawyers Association (WSTLA). If approved by voters, the initiative would change state law to:

1. impose a three-strikes-you’re-out provision on doctors and other health care providers which would require disciplinary action up to and including loss of

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25 In the November 2004, election Oregon proposed a constitutional amendment limiting non-economic damages. Initiative 106, Ballot Measure 35, was defeated by a narrow margin. 49.25% of the voters were in favor and 50.75% were against. Office of the Oregon Secretary of State, at www.sos.state.or.us/.
license for conviction for negligence in three medical malpractice suits within a ten year period;

2. create a government-run malpractice insurance program;

3. change the membership of the Medical Quality Assurance Commission to include two additional public members. Two of the Commission’s six public members would have to be representatives of patient advocacy groups;

4. require that any verdict or settlement over $100,000 must be reported to the state Department of Health;

5. require that a doctor fully disclose, upon patient request, a doctor’s experience;

6. allow a patient or family member access to information related to adverse medical incidents;

7. require insurance companies to disclose their rating factors and criteria when a rate change occurs which impacts medical malpractice rates;

8. limit the number of expert witnesses in a malpractice claim to two unless more experts are shown to be necessary;

9. expand the legal definition of an adverse medical incident.

The State Trial Lawyers Association has made passage of Initiative 336 its top legislative goal for 2005. Like Initiative 330, this initiative includes a severability clause that allows those provisions not challenged in court to go into effect upon passage.
### APPENDIX: STATE COMPARISON CHART

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<tr>
<th>STATUTE OF LIMITATIONS</th>
<th>WASHINGTON</th>
<th>IDAHO</th>
<th>OREGON</th>
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<tr>
<td><strong>WASHINGTON</strong></td>
<td>* A medical malpractice claim must be brought within three years of the act or omission alleged to have caused the injury or one year after the discovery of the alleged negligent act or omission, whichever period expires later. (RCW 4.16.350) * The limitations period is tolled upon proof of fraud, intentional concealment, or the presence of a foreign object in the injured party * The statute is tolled until the minor reaches age eighteen, at which time the knowledge of the parent or guardian is imputed to him.(RCW 4.16.190, 127 Wash. 2d 370) * In cases resulting in death the action must be brought within three years after the decedent’s death. (RCW 4.16.080(2))</td>
<td>* A medical malpractice claim must be brought no later than two years from the time the cause of action accrued. (Idaho code 5-219(4)) * If a injured party who is entitled to bring an action for personal injury or wrongful death is under the age of majority or insane, the disability tolls the running of the limitations period as long as the disability existed at the time of the cause of action. * The limitation may not be tolled due to one’s minority or in competency for more than six years.</td>
<td>* An action for injury caused by medical malpractice must be commenced within two years from the date the injury is discovered or in the exercise of reasonable care should have been discovered. (OR Rev. Stat. 12.110(4)) * Except in cases of fraud or misrepresentation, an action must also be commenced within five years from the date of the treatment or omission. * The statute of limitations is tolled during the time a injured party is within 18 years of age or insane. *However, the suspension provision cannot extend the statute for more than one year after the disability is lifted.</td>
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| NEGLIGENCE | Pure doctrine of comparative negligence. A injured party’s award is diminished in proportion to the injured party’s fault but not as a total bar to recovery (RCW 4.22.005) | Individual contributory negligence. This doctrine does not bar recovery as long as the injured party’s fault is less than the defendant’s fault. Evaluated on an individual injured party/defendant basis. (Idaho Code 6-801) | Modified comparative negligence. An Injured party’s action is barred if his fault exceeds the combined fault of all defendants and persons who have settled. Otherwise, an injured party’s recovery is diminished in proportion to his percentage of fault. (Or.Rev. Stat. 18.470) |

| VICARIOUS LIABILITY | The doctrine of ostensible agency is recognized. If a hospital acts or fails to act in some way which leads the patient to reasonably believe the physician is a hospital employee, the physician is deemed an ostensible agent of the hospital. This allows a injured party to seek damages from the hospital. (RCW 18.86.090) | A hospital is only liable for the negligent acts or omissions of its employees and agents. The theory of ostensible agency is not used. (Keyser v. St. Mary's Hospital, 662 F.Supp. 191, 1987) | * The doctrine of apparent agency is recognized. In order for a hospital to be held vicariously liable for the negligence of a physician who is not an employee the hospital must put forth the physician as its agent and the patient must have reasonably relied on this representation. (Jennison v. Providence St. Vincent Medical Center, 174 Or.App.219, 25 P.3d 358, 2001) |
| JOINT & SEVERAL LIABILITY | A right of contribution exists among two or more negligent parties who are jointly and severally liable for the same injury or death. (RCW 4.22.040) | Where negligent parties were acting in concert or as agents or servants of one another, liability is joint and several. In all other instances, liability among joint negligent parties is several only (Each party’s liability will equal his proportionate share of the total damages awarded. (Idaho Code 6-803) | * A hospital may be held liable for services that are integral to hospital operations and that the hospital puts forth as provided to the public (IE emergency services)  * Under certain circumstances physicians are protected from vicarious liability for the acts of subordinates. (O.R.S. § 677.492)  * In actions arising out of bodily injury or death, the jury apportions fault among the injured party, the defendants, and persons who have settled. (Or Rev. Stat. 18.480)  * The liability of each defendant is several only for an amount proportionate to that defendant’s share of fault.  * If within one year of judgment plaintiff brings a motion establishing that one of the defendants is uncollectable, then that defendant’s share of the judgment is reapportioned among the injured party and other defendants according to relative fault.  * A defendant whose share of fault is 25% or less, or whose fault is less than that of the injured party, is not affected by the reallocation. |
| DAMAGE CAPS | The Supreme Court of Washington has held that the statutory cap on non-economic damages is an unconstitutional infringement of the right to trial by jury. (Sofie v. Fireboard Corp, 112 Wash.2d 636, 771 P.2d 711, 1989) | * Non-economic damages for personal injury or wrongful death may not exceed $400,000 (Adjusted yearly by the rate of increase in average wages). (Idaho Code 6-1603)  * Limitation is inapplicable to causes of action arising out of acts constituting a felony under state or federal law. Also inapplicable to punitive damages | * $500,000 cap on non-economic damages provided the claim is one that does not customarily, under common law, have a jury trial.(OR Rev. Stat. 18.560)  * In wrongful death cases the cap may always be used since the wrongful death statute is a creation of the legislature. |
About the Author

Amy Johnson is a policy analyst for the Spokane Regional Chamber of Commerce. Prior to joining the Spokane Chamber Amy conducted policy analysis for the Health Care Personnel Shortage Task Force and the Washington State Senate Committee Services. In her capacity as intern with Senate Committee Services, Amy worked with the Health and Long Term Care Committee researching and analyzing health policy issues and legislation.

Amy is concurrently a candidate for the Master’s degree in Health Policy and Administration at Washington State University Spokane and the Juris Doctorate degree at Gonzaga University School of Law. Amy holds a B.A. in Philosophy from the University of Colorado and a B.A. in Government and History from California State University Sacramento.

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Spokane Regional Chamber of Commerce

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The goal of the Chamber’s public policy area is to promote and advocate for policies and laws that enhance the region’s business climate through economic and workforce development initiatives, facilities and infrastructure improvements, and capital and operating budget funding for regional programs and projects.

For more information on the programs, products and services, visit: www.spokanechamber.org, or contact 801 W. Riverside Avenue, Spokane, WA 99201, Tel. (509) 624-1393

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P.O. Box 3643
Seattle, WA, 98124
www.washingtonpolicy.org
E-mail wpc@washingtonpolicy.org
Tel. 1-888-972-9272