

## POLICY NOTE

# The cost of medical malpractice lawsuits in Washington state – Lessons from Texas reform

By Roger Stark, MD, FACS, WPC Health Care Policy Analyst

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### Key Findings

- 1. The experience in Texas shows that reasonable reform is effective in reducing the number of frivolous medical malpractice lawsuits, decreasing the dollar amount of jury awards and increasing the number of physicians in the state.*
- 2. A coalition of businesses, doctors, hospitals and concerned citizens in Texas overcame the money and narrow interests of the trial attorney association to enact meaningful medical malpractice lawsuit reform.*
- 3. The number of physicians in Texas is increasing at twice the rate of population growth thereby increasing health care access for the state's citizens.*
- 4. The number of medical malpractice lawsuits has occurred in unpredictable waves in the past 50 years. To preserve health care access and quality, Washington state should move now to effect meaningful medical lawsuit reform.*
- 5. Meaningful caps on non-economic damages would encourage more doctors to stay in practice in Washington, would promote greater expertise in key medical specialties, and would make the state a more attractive place for doctors to open their practices.*
- 6. Washington state officials, businesses, providers and concerned citizens should support a plan similar to Texas' to pass reform legislation and amend the state constitution.*

### Introduction

Unlike other western countries, the United States has a very active legal system, and hospitals, doctors and other health care providers must constantly manage the impending threat of costly medical lawsuits.

In many states, health care lawsuit reform, that is, reasonable limits placed on the cost of a medical lawsuit, has helped hold costs down and provided a stable physician pool, while still allowing injured patients to have their day in court. Medical malpractice reform was the top health care reform recommendation of Washington state small business owners attending Washington Policy Center's Small Business Conference in 2011.<sup>1</sup>

This study describes how frivolous lawsuits and high jury awards have increased the cost of health care and contributed to the rise of malpractice insurance premiums, and it reviews the history of medical malpractice reform efforts in Washington state. In addition, the state of Texas successfully amended its constitution in 2003 to allow for meaningful medical tort reform. This study looks at the lessons Washington state policymakers can learn from Texas, and how reasonable reforms would reduce health care costs and increase access for all Washington residents.

### Background

The number of medical malpractice lawsuits has occurred in waves over the past 50 years. Three periods of crisis in soaring medical malpractice costs occurred in the 1970s, the mid-1980s and the late 1990s into the mid-2000s. Malpractice insurance premiums for doctors fluctuate over time, but they predictably increase dramatically during these times of crisis.<sup>2</sup>

1 "7 Steps on the Road to Economic Recovery, Key Recommendations to Improve Washington Small Business Climate," by Paul Guppy and Caitlin Kincaid, Policy Brief, Washington Policy Center, January 2012, at [www.washingtonpolicy.org/publications/brief/7-steps-road-economic-recovery](http://www.washingtonpolicy.org/publications/brief/7-steps-road-economic-recovery).

2 "Health care lawsuit reform in Washington state," by Dr. Roger Stark, Policy Brief, Washington Policy Center, August, 2012 at <http://www.washingtonpolicy.org/library/docLib/health-care-lawsuit-reform-washington-state-pb.pdf>.

For example, in 2006, 21 states experienced a medical malpractice crisis and malpractice insurance premiums rose, on average, by 80 percent that year.<sup>3</sup> Unfortunately, in times of crisis malpractice insurance premiums tend to increase for all doctors, regardless of their individual litigation history. In addition, malpractice insurance companies reassess their viability in the market and often leave a state that is experiencing a high rate of malpractice claims, leaving less competition to help hold rates down.<sup>4</sup>

The great majority of injured patients do not sue their doctor, and only one in six of those who do sue receives compensation. In 40 percent of medical malpractice cases there is no evidence of medical error or even that an injury has occurred. Yet these unquestionably frivolous lawsuits account for fully 16 percent of medical liability costs.<sup>5</sup>

Jury awards also trend upward at these times. During the last severe crisis, the national average jury award increased almost 60 percent, from \$3.9 million in 2001 to \$6.2 million in 2002.<sup>6</sup> Unfortunately, the patient is not the biggest winner in the dispersal of the award. Patients, on average, receive only 46 percent of the money they are awarded by juries. The remainder goes to lawyers, expert witnesses and court fees. The average time an injured patient waits to receive compensation is five years.<sup>7</sup>

Insurance premium rates vary depending on the medical specialty covered and claims experience of individual doctors. Physicians in high-risk specialties, such as obstetrics and neurosurgery, pay more for malpractice insurance than do family doctors or pediatricians. A physician with multiple legal claims filed against him or her will pay more for malpractice insurance than a doctor in the same specialty with no claims history.

Although gross negligence does occur in health care, just as often doctors get sued merely for bad patient outcomes. Patient expectations can often be unreasonably high, or the physician has not spent enough time discussing the severity of the patient's condition and the chances of recovery. When dealing with the human body, a less than ideal outcome often results, despite the best care modern medicine can provide.

Unfortunately, the Washington State Supreme Court has ruled that "loss of a chance of a better outcome" confirms medical negligence. Doctors and medical malpractice insurance companies currently must live with this "bad outcome" ruling, although it is often unknown whether a better outcome was possible.

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3 "Another state added to liability crisis list," American Medical Association, March 6, 2006, at [www.ama-assn.org/amednews/2006/03/06/prca0306.htm](http://www.ama-assn.org/amednews/2006/03/06/prca0306.htm).

4 "The New Medical Malpractice Crisis," by Michelle M. Mello, David M. Studdert and Troyen A. Brennan, *New England Journal of Medicine*, 2003; 348 (23): 2281–2284.

5 "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," by David M. Studdert, et. al., *New England Journal of Medicine*, 2006; 354(19): 2024–2033.

6 "Medical Liability Reform Crisis 2008," by Stuart L. Weinstein, *Clinical Orthopaedics and Related Research*, 2009; 467: 392–401.

7 Ibid. See Note 3.

Court cases are usually determined by the testimony of expert witnesses. An entire industry of professional experts has grown up, although qualifications for experts continue to evolve. Today, experts can be hired to argue virtually any side in a pending lawsuit.

Ideally, irresponsible doctors are sanctioned with practice limitations imposed by their medical peers. Ironically, it is lawyers, working on behalf of and protecting bad doctors, who make it difficult for state medical associations to police chronically bad physicians. Hospital and community medical review committees continually face the threat of civil lawsuits over defamation of character or restraint of trade when they try to weed out bad doctors.

Critics of medical lawsuit reform claim that without the potential of punitive lawsuits, doctors would become sloppy and careless in their practices.<sup>8</sup> However, there is no objective evidence that the threat of malpractice lawsuits improves the quality of health care. It is clear, though, that increasing malpractice insurance prices and the fear of being sued are causing many skilled physicians to retire early, leave Washington state, or reduce patient access to care by limiting their practices to less risky procedures.

### **History of medical lawsuit reform in Washington state**

The first national spike in medical malpractice claims occurred in the 1970s. Traditional commercial insurance companies left the marketplace because of overwhelming losses. Nearly 100 physician-owned insurance companies started up during this period to fill the void. Doctors in Washington state, along with the Washington State Medical Association, formed a company, Physicians Insurance, in 1982.

The Washington state legislature responded to the malpractice crisis and in the late 1970s passed several important pieces of legislation. Lawmakers passed laws to:

- Legally define medical negligence and informed consent (what a physician must explain to a patient before a procedure);
- Adopt an eight-year statute of limitation (which was later overturned by the courts);
- Allow providers to pay the medical bills of injured patients without admitting fault or liability;
- Prohibit the dollar amount of damages to be publicized;
- Allow evidence of other source payments (money paid to injured patients by other parties being sued) to be reported in court.<sup>9</sup>

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8 “Could Mandatory Caps on Medical Malpractice Damages Harm Consumers?,” by Shirley Svorney, Policy Analysis number 685, Cato Institute, October 20, 2011, at [www.cato.org/publications/policy-analysis/could-mandatory-caps-medical-malpractice-damages-harm-consumers](http://www.cato.org/publications/policy-analysis/could-mandatory-caps-medical-malpractice-damages-harm-consumers).

9 “Defense Costs of Medical Malpractice Claims,” by Seth Seabury, et. al., *New England Journal of Medicine*, 2012; 366:1354–1356.

The second malpractice crisis in Washington state occurred in the mid-1980s. Not only did the number of claims sharply increase, so did the size of jury awards. Insurance premiums increased 15–60 percent in 1985 and rose an additional 35–60 percent in 1986.

In response to this second malpractice crisis, Washington’s legislature passed The Liability Reform Act of 1986. The provisions of this law were:

- A sliding scale cap on non-economic damages or “pain and suffering” (based on average wages and life expectancy of the patient);
- A new statute of limitations;
- Modified joint and several liability, protecting doctors with minor responsibility for a patient’s injury from having to pay the entire jury award;
- Payment-over-time on settlements;
- Stronger requirements for patients to prove doctor negligence.

However, in 1989 the Washington State Supreme Court ruled the cap on non-economic damages unconstitutional and other courts subsequently ruled against the statute of limitation.<sup>10</sup>

During the 1990s, malpractice claims increased at an annual compounded rate of 7 percent, compared with general inflation of only 2.6 percent. From 2001 to 2002, however, the average claim paid by Physicians Insurance rose 48.5 percent. In response, malpractice insurance premiums rates increased 8.6 percent in 2002, 16.7 percent in 2003 and 19.0 percent in 2004.<sup>11</sup>

The most recent major effort at medical lawsuit reform in Washington state was an initiative campaign in 2005. Initiative 330 was sponsored by the Washington State Medical Association and proposed the following changes:

- Imposing a cap on non-economic damages of \$350,000 to \$1,050,000;
- Changing of the statute of limitation for filing a claim on a child from 21 years of age to eight years of age;
- Imposing a limit on attorneys’ fees;
- Modified joint and several liabilities.

In response, the Washington State Trial Lawyers Association sponsored a competing initiative (Initiative 336) the same year. Its proposed provisions included:

- Imposing a “three strikes, you’re out” rule on providers, preventing them from practicing medicine after losing three malpractice lawsuits;

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

- Creating a government-run malpractice insurance program;
- Adding patient advocates to the state Medical Quality Assurance Commission;
- Reporting any verdict or settlement over \$100,000 to the state Department of Health;
- Requiring doctors to disclose their expenses;
- Allowing patients and families access to all medical records;
- Requiring insurance companies to explain rate increases;
- Limiting the number of expert witnesses in a court case to two;
- Expanding the legal definition of an adverse medical incident that results in patient injury.<sup>12</sup>

A bitter and confusing public campaign resulted, and both initiatives were defeated by voters. Throughout the campaign, though, voters were polled and stated they understood the connection between the current medical tort system and their ability to access needed medical services.

In 2006, at the urging of Governor Christine Gregoire, the legislature passed HB 2292, entitled “Addressing health care reform.” The Bill Digest states “(the bill) declares an intent to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those for whom settlement negotiations do not work. Declares an intent to provide the insurance commissioner with the tools and information necessary to regulate medical malpractice insurance rates and policies so that they are fair to both the insurers and the insured.”<sup>13</sup>

Since passage of the medical malpractice reform law in 2006, the Washington State Supreme Court has ruled on multiple occasions that parts of the law are unconstitutional.<sup>14</sup>

### **Medical malpractice reform in Texas**

The history of medical malpractice in Texas is similar to the experience in Washington state, with the important difference that in Texas reform succeeded and improved the state’s health care system.

Texas was affected by the wave of malpractice lawsuits in the early 1970s. After studying the problem, a state-based commission in 1975 recommended placing

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12 “Medical Liability Reform: A Three State Comparison,” by Amy Johnson, Policy Brief, Washington Policy Center, April 2005, at [www.washingtonpolicy.org/publications/brief/medical-liability-reform-three-state-comparison](http://www.washingtonpolicy.org/publications/brief/medical-liability-reform-three-state-comparison).

13 Washington State Legislature, 2005-2006, HB 2292, “Addressing health care reform at <http://apps.leg.wa.gov/BillInfo/summary.aspx?bill=2292&year=2006>.

14 “Washington Supreme Court rules another medical malpractice reform law unconstitutional,” by B. Nivison, January, 2014 at <http://www.helsell.com/health-care/washington-supreme-court-rules-another-medical-malpractice-reform-law-unconstitutional/>.

caps on medical malpractice jury awards. The Texas legislature passed a law in 1977 that established caps on all medical malpractice damage awards except payments to cover medical expenses.<sup>15</sup>

Just as the Washington State Supreme Court did, the Texas Supreme Court ruled the law unconstitutional. As Joseph Nixon reported for the Heritage Foundation, by 2002 the Texas judicial system was in disarray:

- One out of every four doctors in Texas had a malpractice claim filed against him or her each year.
- 85 percent of all medical malpractice claims failed but still cost more than \$50,000 to defend.
- The number of medical malpractice insurers in Texas dropped from 17 in 2000 to only four in 2003. One of the four was the State of Texas as the insurer of last resort.
- Plaintiffs were given too much latitude in choosing the county in which to bring suit. Forum shopping was prevalent. Counties with no connection to the parties or the case were chosen because the patient's lawyers thought the judge or the jury pool in that county was likely to favor them.

The out-of-control judicial system created a doctor shortage, which was worse among specialists, across the state. Patient access to health care was compromised by one of the lowest doctor-to-citizen ratios in the country.

In 2003, elected officials in Texas confronted the judicial crisis. A large coalition of businesses, doctors, hospitals and concerned citizens backed reform. Multiple policy reforms were combined in one bill, HB4, that proposed:

- Juries should hear more evidence about who may really be at fault.
- Only those individuals who cause harm should pay, and then only to the extent of their own fault.
- Damages should be limited to what the amount the injured patient paid or incurred or what someone, like an insurance company, paid or incurred on their behalf, thereby eliminating "phantom damages."

In a malpractice case:

- A medical report written by a physician in the same or similar field as the physician being sued should be submitted within 120 days of the filing of a lawsuit, clearly identifying the appropriate standard of care, how the standard of care was violated, and the damages that resulted from the violation of the standard of care.

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15 "Ten years of tort reform in Texas: A review," by J. Nixon, Heritage Foundation, Backgrounder #2830 On Legal Issues, July, 2013 at [http://www.heritage.org/research/reports/2013/07/ten-years-of-tort-reform-in-texas-a-review#\\_ftn1](http://www.heritage.org/research/reports/2013/07/ten-years-of-tort-reform-in-texas-a-review#_ftn1).

- Non-economic damages should be capped at \$250,000 for any and all doctors sued with an additional cap of \$250,000 for each of up to two medical care institutions.
- Other procedural and substantive devices, such as forum shopping, used to tilt the scales of justice would be eliminated.

After extensive debate, HB4 was enacted into law. The legislature, with bipartisan support, also passed Texas Constitutional Amendment Proposition 12 to overturn the supreme court's previous ruling and make HB4 constitutional in the state. Voters approved Proposition 12 in September, 2003, and thereby amended the state constitution.

### **Effects of Texas reform**

Texas has now had 13 years of experience with medical malpractice reform. So what have the effects been?

First, access to quality health care for patients has improved dramatically. The number of physicians in the state is increasing at twice the rate of population growth.<sup>16</sup>

Second, the frequency of medical malpractice claims and the amount of each claim have decreased. Almost 50 percent of jury verdicts awarded to the plaintiff have been affected. By 2009, mean allowed non-economic damages were reduced by 73 percent and the mean total pay-out was reduced by 27 percent.<sup>17</sup>

Third, the American Medical Association (AMA) intermittently published a list of states in medical malpractice crisis. Both Texas and Washington were on the AMA's last list. The organization removed Texas, but not Washington, from that list after the results of the Texas's medical malpractice reform became obvious.

### **Conclusion**

The experience of Texas shows that reasonable medical malpractice reform works. A meaningful legal cap on non-economic damages is the most effective element of successful lawsuit reform legislation. To a lesser extent, a statute of limitations on lawsuits and pre-trial screening are often effective in reducing the cost of specific medical malpractice lawsuits.

The barriers to enacting non-economic caps are provisions in some state constitutions, the active political opposition of powerful state trial lawyer associations, and the states-rights question of whether the states or the federal government should pass such legislation. To control the rise in medical lawsuit costs, Washington state would need to amend its constitution. This would require a supermajority of legislative votes in both houses, a strong coalition of supporters as in Texas, and a simple majority support of voters.

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16 Ibid

17 "Estimating the effect of damage caps in medical malpractice cases: Evidence from Texas," by D. Hyman, et. al., *The Journal of Legal Analysis*, Vol.1, No.1, 2009 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1349829](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349829).



**Dr. Roger Stark** is a health care policy analyst at WPC and a retired physician. He is the author of two books including *The Patient-Centered Solution: Our Health Care Crisis, How It Happened, and How We Can Fix It*. He has also authored numerous in-depth studies on health care policy for WPC, including *Health care reform: lowering costs by putting patients in charge*. Over a 12-month period in 2013 and 2014, Dr. Stark testified before three different Congressional committees in Washington DC regarding the Affordable Care Act. He completed his general surgery residency in Seattle and his cardiothoracic residency at the University of Utah. After practicing in Tacoma he moved to Bellevue and was one of the co-founders of the open heart surgery program at Overlake Hospital. He has served on the hospital's governing board.

In Washington state, lawmakers can most effectively reduce the cost of health care lawsuits, slow the rise in overall health care costs and increase patient access to high-quality affordable care by adopting reasonable limits on the non-economic costs of malpractice awards.

In addition, meaningful caps on non-economic damages would encourage more doctors to stay in practice in Washington, would promote greater expertise in key medical specialties like delivering healthy babies and treating severe neurological injuries, and would make the state a more attractive place for University of Washington Medical School graduates and doctors from other states to open their practices. This reform would improve the affordability and quality of health care for all Washington state residents.

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