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# Conflating Health Care Reform with Tort Reform

**Keywords**

Health care reform, Tort reform, Patient Protection and Affordable Care Act, Tort system

## CONFLATING HEALTH CARE REFORM WITH TORT REFORM

By: Steven M. Pavsner<sup>1</sup>

*The recent health care reform act encourages the States to develop alternatives to the traditional tort system for health claims to control health costs. Many alternatives have already been tried in the States, but none have succeeded, except in impairing access to the courts to redress medical negligence, particularly among disadvantaged groups.*

On March 23, 2010, President Obama signed the “Patient Protection and Affordable Care Act” into law.<sup>2</sup> Turning aside years of effort to blame rising health care costs on “lawsuit abuse” and to impose federal restrictions on state-law tort claims as the solution, the Act instead calls on the States to seek alternatives to the traditional tort system for health care claims. This commentary looks at alternatives the States already have tried. It finds that none these alternatives have achieved their stated objectives, and all of them have had a disparate impact on the most vulnerable among us.

Specifically, the Act encourages the States to “develop and test alternatives to the existing civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, *while preserving an individual’s right to seek redress in court....*”<sup>3</sup> Toward that end, the Act authorizes the Secretary of the Department of Health and Human Services to award “demonstration grants” to States “for the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations.”<sup>4</sup>

The nexus between health care and tort reform is the alleged relationship between health care costs and a supposed increase in the incidence or size of health claim verdicts. The presumed mechanism for health care cost reduction (thus limiting medical negligence lawsuits) is the lowering medical liability damage payments. This would supposedly allow insurers to lower medical liability insurance premiums, which would reduce physicians’ costs of doing business, and allow them to reduce their service fees.

Unfortunately overlooked is the fact that no convincing evidence exists to support the alleged relationship between health care costs and health care claims. Studies can be found to support the relationship, but the better-reasoned and methodologically superior studies are to the contrary. In the “crisis” atmosphere created by tort reform proponents, it is easier to decry outsize verdicts than to review the studies. But anecdotal reports of outsize verdicts are irrelevant, in part because they are so rare and in part because they are rarely paid. The traditional tort system has numerous safeguards against outlying verdicts,

including *remittitur*, new trial, and appeal, which are commonly invoked to reduce outsize awards to appropriate levels. It is therefore not surprising that numerous studies have shown that neither the incidence of medical negligence suits, nor the size of plaintiffs’ verdicts, has significantly increased during the “insurance crisis,” much less at the pace with which liability premiums have risen.

Nor have premiums decreased in States that have adopted “tort reform,” as compared to States that have not. To the contrary, insurers in States with tort reform have raised rates higher and faster than insurers in States without tort reform. The simple reason is that factors other than medical negligence verdicts drive premiums. Numerous studies demonstrate that liability insurance premiums are driven by insurers’ returns on the premium dollars they invest in the market, not by losses on the premium dollars they pay in claims. But it’s easier for insurers to blame “litigious plaintiffs” and “greedy lawyers” than their own portfolio managers. And why not take the easy path? If some members of the public believe that their doctors are being driven out of business by “lawsuit abuse,” they will carry that bias into the jury room and return defendants’ verdicts. If some legislators rely on the misinformation and enact limits on medical negligence claims, the insurance industry wins again.

More than half the States have experimented with a wide variety of alternatives to the traditional tort system, relying on the presumed relationship between health costs and health claims. Existing alternatives include changes to when claimants may sue, hoops they must jump through before they may sue, what they may recover when they sue, from whom they may recover if they win their suit, and what they pay for the chance to sue.

Restrictions on when health claims may be brought include shortening limitations in general, limiting the “discovery rule,” or requiring minors’ claims to be brought before they reach majority. Hurdles to filing in court include requiring prior notice to the defendant, submission of the claim to mediation or arbitration before filing, or preparation of certificates and reports from doctors willing to testify against their peers as a precondition to filing in court.

Once in court, some States restrict the amount of forensic work expert witnesses may perform, but the most popular alternatives to traditional tort law are limits on the amount or type of damages that the injured party can recover. These include a cap on all damages, or a cap on non-economic damages (sometimes indexed to inflation or time and sometimes not), a bar to punitive damages (usually by raising the standard of proof to “actual malice”), requiring that amounts awarded

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for future damages be paid out over time as the future damages are incurred, and precluding proof of economic losses paid by a collateral source, such as a health insurance policy. Juries generally are not told of these limits, which are imposed in post-trial proceedings and can decimate the amount the jury intended the victim to receive. States also have experimented with abolition of the common law concept of joint and several liability, and have instead required juries to apportion damages according to fault. In such States, when substantial fault is assigned to an impecunious or under-insured defendant, the injured party recovers less than the full jury-awarded damages.

Other changes have been made to the traditional tort system that affect an injured party's ability to bring a lawsuit in the first place, such as the reduction of the contingent fee claimants' counsel may charge for their services or the requirement that the injured party to pay defense fees if the suit is lost. Reducing plaintiff's counsel's fees reduces access to the courts because as the reward for winning decreases, willingness to incur the risk of loss also decreases, especially in health claims cases, which are particularly expensive and time-consuming to pursue. The abrogation of the "American Rule," which does not require losing plaintiffs to pay defendants' attorneys' fees, in favor of "offer of judgment" rules, which impose the winner's attorneys' fees on the loser, deter plaintiffs from filing meritorious claims and raise the stakes much higher for prospective plaintiffs. Insurers are far more able to bear this risk than individual plaintiffs, for whom loss of the claim can mean financial ruin.

Of course, many States employ different combinations of these individual strategies to create their own unique variety of "tort reform," so there is no shortage of "alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations." What is lacking, and what the demonstration projects authorized by the Act should focus on finding, is any alternative to the traditional tort system that reduces liability insurance premiums while preserving an individual's access to the courts and spreading the burden of tort reform equally among all litigants.

None of the many changes enacted in the States have reduced liability insurance premiums, except at the cost of *also* impairing the individual's right to seek redress in court. This is particularly true of children, seniors, racial and ethnic minorities, the economically underprivileged, and women. These already disadvantaged groups are disproportionately impacted by tort reform for a number of reasons, including their lower earnings and the nature of the injuries they suffer.

Lost earnings can be a significant component of a claimant's economic damages, and under virtually all of the existing changes they are fully compensated. Victims whose losses do not include earnings, or include them at a lesser level, may be equally compensated by juries, but their awards will have a greater non-economic component, which will then be

reduced to the cap level. As a result, groups with no earnings, such as seniors, or historically lower earnings, such as racial and ethnic minorities and women, receive less of their jury awards than others. The disparity is only exacerbated by reliance on historical race- and gender-based statistics to measure the loss.

The nature of the injuries suffered by these same groups also contributes to the disproportionate impact of tort reform upon them. Injuries resulting from obstetric or gynecologic care are common in medical negligence litigation, but the resulting verdicts for undiagnosed breast cancer or infertility or other peculiarly "female" damages are often expressed in larger non-economic than economic awards, and thus are not fully recovered in "cap" States. The same is true of a child who has to go through life scarred or maimed or of a senior who is abused in a nursing home. Infertility, disfigurement, scarring, blindness, burns, loss of a limb and chronic pain are some of the many devastating injuries that cause enormous pain and suffering are properly recognized by an award of non-economic damages, and thus are not fully compensated under most tort reform regimes. Indeed, in many such

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cases, the prospect of receiving a lower percentage of a reduced award obtained in a more expensive process has led victims and their attorneys to conclude that otherwise meritorious claims are not economically viable. Wherever the economic component of the loss is relatively small, but the non-economic component is great, current tort reform measures heap injustice on top of injury.

When victims are not fairly compensated, and vulnerable groups are disproportionately impacted, the whole system of justice suffers. A vibrant tort system is a founding principle of our democracy, a deterrent to negligence, and an early warning of recurring problems in our society. The traditional tort system has its flaws, but, to paraphrase Winston Churchill, it's far better than any of the alternatives yet devised.

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## Endnotes

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<sup>2</sup> Sheryl Gay Stolberg and Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 23, 2010.

<sup>3</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6801 (emphasis added).

<sup>4</sup> *Id.* at § 10607.