

**NOWHERE TO TURN:
A GLANCE AT THE FACTS BEHIND THE
SUPPOSED NEED FOR TORT “REFORM”**

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I. INTRODUCTION

Linda McDougal's pain was unbearable. This was no surprise given the fact that this young mother and wife just had both of her breasts completely amputated. As she was being prepared for discharge from the hospital, her surgeon walked into her room. The surgeon said: "You do not have any cancer." Although a bit puzzled by the comment, Linda had hoped that the double mastectomy would do just that; rid her of the terrible disease. Linda responded: "That's good." The surgeon replied: "No. You don't understand. You never had cancer." It was only through litigation that Linda learned the pathologists who examined her needle biopsy tissue had carelessly mixed up Linda's pathology slides with another woman's. In an effort to market their business, the pathology company had instituted "rapid processing" of breast tissue slides. This "One Hour Martinizing" of pathology pushed the pathologists to get the results out fast - so fast that two pathologists chose not to verify whether the patient names and numbers on the paperwork accompanying the two women's sets of slides did not match the names and patient numbers on the slides themselves. This choice led to Linda hearing the three words that no person ever wants to hear: "You have cancer."

Linda McDougal has become a lightning rod for the tort reform debate. She said nothing to anyone for months following her unnecessary double mastectomy. What brought her out of her darkened, rural Wisconsin home was President Bush's proclamation that Linda, and other casualties of preventable malpractice, should receive nothing more than \$250,000 for their pain, disability, disfigurement, and for those like Linda, loss of her sexuality. As a Navy veteran, Linda believed it was her duty as an American citizen to speak out. Without ever receiving a cent for her advocacy, she embarked on a campaign to tell the world just how unfair tort "reform" is to Americans.

We've all heard about it - the so-called urgent need for tort "reform." President Bush lists enacting a federal tort reform bill among his top

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priorities for his second term in office. In a nearly infamous video clip, President Bush condemns trial lawyers, insisting that frivolous lawsuits that result in “lottery-like” jury awards against well-meaning, hard-working doctors have made it so “[o]b/gyns aren’t allowed to practice their, their love with the women all across this country.”³ President Bush’s indictment of trial lawyers is indicative of the cultural phenomenon of smash-mouth politics where “spin” is all important and underlying facts frequently go ignored.

How can President Bush expect anyone to look in to the eyes of a retired Veteran who avoided bullets defending our country, but now, as the result of a *preventable* medical error, is facing a certain sentence to early death, and tell her that the cost of taking her case to court will almost certainly exceed the value that Congress has placed on her life? It seems hard to believe, but it is undeniably true: the current administration is attempting to radically change America’s long-standing civil justice system, imposing in its place a universal, one-size-fits-all approach to catastrophic injuries rather than continuing to trust the very people who elected them to office to determine what is fair.

So what is really going on in this country? Are courts actually backed up because of a backlog of frivolous cases filed by individuals? Are doctors actually leaving so-called “crisis states” as a result of malpractice premium increases, or worse, are they actually leaving the practice of medicine altogether, forced out of a profession they can no longer afford to participate in? How high are these premiums? What is actually being reported by the various newspapers and media organizations? Is the information accurate? What impact do the few high profile cases have on would-be jurors around the country? Doctors and trial lawyers seemingly share the similar, all important goal: to protect individual patients/clients, ensuring they have the best, safest medical care available. So why is there such a chasm between the two groups? This article will attempt to at least consider each of these questions as our country begins to face what might be a new chapter – a retreat from fundamental institutions like the civil justice system in exchange for a one-size-fits-all approach to compensating individuals for preventable, but incomprehensible losses.

II. WHAT IS REALLY GOING ON IN THIS COUNTRY?

A. Political Background, or Thanks Again, Karl Rove

As part of his well-known (and apparently highly successful) strategy to secure election and re-election for George W. Bush, Karl Rove identified three main contributors to democratic opponents and incorporated

³ Associated Press, *Bush Mixes Words while Speaking about Health Care*, BOSTON HERALD, Sept. 7, 2004, available at <http://news.bostonherald.com/election/view.bg?articleid=43150> (last visited Apr. 15, 2005).

in his general strategy a plan to deny each of these groups power and in turn, deny financial backing to these opponents.⁴ One of these identified groups was the various trial lawyers associations around the country.⁵ Thus, one of the main tenants of both President George W. Bush's bids for election has been an attempt to link the ever increasing costs of medical care to trial lawyers and "runaway jury awards." It was hoped tort reform legislation would be disastrous to plaintiff's attorneys, who in turn would be unable to fund democrats in need of financial support during the most expensive election in American history. To that effect, speeches are and have been filled with mischaracterizations about the state of medical malpractice suits across the nation.⁶

In the 2004 presidential election, corporate special interests and political strategists came together on common ground to defeat democratic opponents. Once again, tort "reform" has found its way back to center stage. So what is the state of medical malpractice litigation in courts around the country? A very brief look at three states might help shed some much needed light on the purported "crisis" our nation is now suffering from.

⁴ See, e.g., JAMES MOORE & WAYNE SLATER, *BUSH'S BRAIN: HOW KARL ROVE MADE GEORGE W. BUSH PRESIDENTIAL* (2003). The three main groups were labor unions, trial lawyers, and the entertainment industry (Hollywood). According to one source

The "tort reform" movement is comprised of two main advocate groups: (1) Organizations [such as the American Tort Reform Association and the American Insurance Association], which are backed by industries that are frequently named as defendants in civil actions, such as insurance, chemical, and tobacco companies; and (2) Right-wing multi-issue organizations (such as the Manhattan Institute) and individuals backed by ultra-conservative funders. They seek to limit legal awards as a means of defunding trial lawyers, who are major backers of their political opponents.

LEWIS L. LASKA & KATHERINE FORREST, *FAULTY DATA AND FALSE CONCLUSIONS: THE MYTH OF SKYROCKETING MEDICAL MALPRACTICE VERDICTS 3-4* (2004), available at <http://www.commonwealinstitute.org/reports/CI-MedMalpracticeReport-Oct20041.pdf> (last visited Apr. 15, 2005).

⁵ See LASKA & FORREST, *supra* note 4.

⁶ In one speech, Bush said that "[i]n 2003, almost half of all American hospitals lost physicians or reduced services because of medical liability concerns. Think about that, one half of all American hospitals lost physicians." President George W. Bush, Speech at Collinsville, Ill. (Jan. 5, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050105-4.html> (last visited Apr. 15, 2005). Actually, according to the American Medical Association, "the number of physicians has risen in every state every year over the last 3 years (of available data – 2000-2002), and the numbers of physicians are higher in every state than they were in 1996." AMERICAN MEDICAL ASSOCIATION, *PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S.* (2003-04).

**B. California – The So-Called “Gold Standard” for
Tort “Reform” Proponents**

Supporters of tort “reform” frequently suggest that states such as California, which have imposed legislative restrictions on the ability of injured people to seek redress in courtrooms, have been immune to the dramatic increases in medical malpractice premiums.⁷ Even a cursory look at California’s experience cannot support the argument that tort reform solved any problems in The Golden State. As a general matter, states that have imposed caps on damages actually have insurance premiums 9.8 percent higher than the same premiums in states without caps,⁸ but California in particular receives a great deal of attention for its supposed reduction in insurance premiums following the imposition of damage caps.

Admittedly, while California has enjoyed a stable rate of increase following the enactment of tort “reform” measures as compared to certain states across the nation, the stabilization did not happen until California adopted Proposition 103 – insurance reform.⁹ During the first twelve years following California’s adoption of the \$250,000 cap on non-economic damages, physicians were subject to no less than 190 percent increase in their premiums.¹⁰ Proposition 103 mandated that insurance companies immediately decrease rates by 20 percent and prohibited any insurance company from imposing rate increases of greater than 15 percent without first holding a public hearing to explain the need for the substantial increase.¹¹ Understandably, most insurance carriers prefer to avoid the hassles involved with such a public forum and seem content to keep increases under the statutory maximum of 15 percent per year.¹² After the adoption of Proposition 103, premium increases in California leveled off as compared to the experiences of physicians in other states. The cause of the

⁷ See Tanya Albert, California Tort Reform Shaken by Abuse Laws as Court Creates Inpatient Loophole: States with Proven Tort Reforms Routinely Fight Lawsuits Designed to Erode Physician Protections, AM. MED. NEWS, (Am. Med. Ass’n Chicago, Ill.), May 17, 2004, available at <http://www.ama-assn.org/amednews/2004/05/17/prl20517.html> (last visited Apr. 15, 2005).

⁸ See MEDICAL LIABILITY MONITOR, Oct. 2004. In fact, physicians practicing medicine in the five states that recently adopted caps actually saw their premiums rise at nearly twice the rate of the states that do not have a cap on damages. *Id.* Those states that recently enacted tort “reform” are Mississippi, Nevada, Ohio, Oklahoma, and Texas. *Id.*

⁹ See generally MICRA: *The Impact on Health Care Costs of California’s Experiment with Restrictions on Medical Malpractice Lawsuits*, Report of the Proposition 103 Enforcement Project Study (1995).

¹⁰ See *id.*

¹¹ http://www.insurance.ca.gov/docs/Factsheet/Prop_103_Fact_Sheet.html (last visited Apr. 30, 2005).

¹² Increases of just 15 percent per year certainly cannot be considered trivial, particularly considering the relative rates of inflation over the past few years.

premium leveling was legislative reform of the insurance industry, not the \$250,000 cap on non-economic damages.¹³

C. Texas – Truth in Advertising?

Injured patients and physicians alike are now learning firsthand what many people working on behalf of insurance companies have known for years: enacting tort reform does not reduce medical malpractice insurance premiums.¹⁴ In 2003, presumably in response to the long barrage of advertisements claiming doctors could no longer afford to practice medicine as a result of large jury verdicts, Texas voters narrowly approved legislation limiting non-economic damages to no more than \$250,000, no matter how severe or permanent the injury.¹⁵ Undoubtedly, physicians associations relished their success at the ballot box and doctors sat back waiting for their insurance companies to notify them that their premiums would soon be a shadow of their former selves. The physicians in Texas are still waiting. Despite much campaigning and fanfare concerning the immediate need for tort "reform," insurance companies selling medical malpractice policies to physicians in Texas never actually promised a reduction in premiums. The companies merely implied a connection between non-economic damages awarded by "runaway juries" and dramatic increases in premiums. The reality, according to the insurance companies, is that non-economic damages make up such a small fraction of the amounts actually paid to injured individuals that no premium reduction would be appropriate.¹⁶ Perhaps the lesson learned the hard way by both doctors and victims of medical malpractice in Texas can be recognized nationally before it is too late.

D. Minnesota – A Model State?

Preventable medical errors are not limited to one area of the country, and Minnesota residents are, unfortunately, not immune from suffering such injuries. Yet Minnesota is hardly experiencing the kind of crisis in access to healthcare conservative pundits claim is gripping the nation. Thanks to the stringent statutory requirement that attorneys secure support from a medical expert prior to filing a malpractice law suit,¹⁷ the number of medical

¹³ See generally *MICRA Did Not Lower Insurance Premiums in California*, The Foundation for Taxpayer and Consumer Rights, Aug. 22, 2002, available at <http://www.consumerwatchdog.org/insurance/fs/fs002695.php3> (last visited Apr. 16, 2005).

¹⁴ See *supra* note 33.

¹⁵ Janet Elliot, *Texas Pass Prop. 12 in Statewide Election*, HOUST. CHRON., Sept. 19, 2003 (Texans narrowly approved Proposition 12, which limits non-economic damages to less than \$250,000).

¹⁶ See *supra* note 33.

¹⁷ MINN. STAT. § 145.682 (2005).

malpractice suits initiated in Minnesota is miniscule.¹⁸ Due also in some part to the relatively small number of cases filed and the conservative juries in the upper Midwest, Minnesota is second only to South Dakota in a national survey of lowest medical malpractice premiums across the nation.¹⁹ In 2002, Minnesota courts received merely 127 complaints alleging medical negligence.²⁰ Compare that number to the estimated number of deaths of patients in hospitals caused by preventable medical errors on a national level: 195,000 each year.²¹ The number of lawsuits filed in Minnesota does not even approach Minnesota's pro rata share of the number of preventable deaths that occurred in hospitals, not to mention patients who suffered injuries as a result of medical negligence but who have survived.²² In Minnesota, it can hardly be argued that the vast number of lawsuits is driving up the cost of medical malpractice insurance and forcing doctors away from the practice of medicine.

E. Are Courts Actually Backed Up Because of Frivolous Cases Filed By Individuals?

The number of medical malpractice lawsuits from 1992 to 2001 has only fluctuated minimally, most recently with a decrease in cases filed per capita.²³ This is particularly true in the states the AMA has labeled "crisis" states, as 70 percent of those states are experiencing a decrease in the number of cases filed.²⁴ Considering the recent statistics reflecting the number of preventable deaths occurring in hospitals every year, not including "just injuries" suffered as well, it is clear that most patients either do not or cannot pursue legal remedies for the damages they have suffered.²⁵

For attorneys who represent victims of medical negligence, one of the most frustrating parts of the lash-out against the tort system is the failure to provide any perspective on how many cases are really governed by the

¹⁸ See Paul Demko, *Doctors Little Helper: Minnesota Courts are Making it Tougher to Pursue Medical Malpractice Suits*, CITYPAGES, Dec. 18, 2002, available at <http://www.citypages.com/databank/23/1150/article10950.asp> (last visited Apr. 15, 2005).

¹⁹ See generally UNITED STATES GENERAL ACCOUNTING OFFICE, *MEDICAL MALPRACTICE INSURANCE* (June 2003).

²⁰ *Id.*

²¹ See *infra* note 53.

²² See THE MMIC GROUP, 2002 ANNUAL REPORT (2003) (reporting the loss frequency in 2002 to be 6 claims per 100 physicians and/or clinics insured).

²³ See National Center for State Courts ("NCSC") website at <http://www.ncsconline.org/> (last visited Apr. 30, 2005).

²⁴ Missouri, New York, Connecticut, New Jersey, and Oregon were all identified as 'crisis states' by the AMA, and each have experienced a reduction in the number of cases filed between 2-37 percent. *Id.*

²⁵ In fact, a new approach some doctors are advocating as a means of avoiding lawsuits is to apologize when they make a mistake. See, e.g., *Doctors Apologizing to Avoid Lawsuits*, Nov. 15, 2004, at www.cnn.com (last visited Apr. 15, 2005) (explaining how "some malpractice-reform advocates say an apology can help doctors avoid getting sued, especially when combined with an upfront settlement offer").

proposed changes. Medical negligence lawsuits constitute a tiny fraction of one percent of the two million matters handled in Minnesota courts,²⁶ and because so few of these cases go all the way to trial, medical malpractice cases as a group have virtually no impact on court dockets.

Disputes between corporations, on the other hand, make up a much larger percentage of lawsuits in Minnesota courts, yet there is no demand on the nightly news that the ability of corporations to pursue legal remedies be curtailed. Would physicians or insurance companies be receptive to a suggestion that their ability to protect their rights in a court of law be substantially reduced or eliminated altogether? The clear and indisputable answer to this question is *not a chance*.²⁷ In fact, the AMA devotes an entire section of its website to explaining the various cases it and its affiliate organizations have pursued in courts across the country on behalf of its physician members.²⁸ Thus, it is apparently entirely appropriate to seek redress of perceived wrongdoings through the court system if you are a physician or a corporation – but not an individual. Tort “reform” proponents seemingly suggest that the public only be outraged by injured individuals asserting their rights in court.

²⁶ See MINNESOTA JUDICIAL BRANCH, 2003 ANNUAL REPORT (2003), available at <http://www.courts.state.mn.us/documents/CIO/annualreports/2003/default.asp?IncPage=casefilings> (last visited Apr. 15, 2005).

²⁷ Doctors are not afraid to seek redress in courts around the country when they feel they have been treated unfairly by health insurance companies or HMOs. See generally Emily Gottlieb, *Hypocrites of "Tort Reform: Doctors and Organized Medicine*, CENT. FOR JUSTICE & DEMOCRACY WHITE PAPER 10, Oct. 2003.

²⁸ See AMERICAN MEDICAL ASSOCIATION, LITIGATION CENTER HIGHLIGHTS, at <http://www.ama-assn.org/ama/pub/category/13409.html> (last visited Apr. 30, 2005). The AMA website goes on to detail several class actions currently pending in state and federal courts around the country. The class actions, made up of several hundred thousand physicians, allege that the physicians are owed hundreds of millions of dollars as a result of various alleged breaches of contract. See, e.g., *In re Managed Care Litigation*, 298 F. Supp. 2d 1259 (S.D. Fla. 2003). Following a \$540 million settlement, Michael E. Greene, President of the Medical Association of Georgia, explained that “[o]ur purpose was not primarily monetary damages. We’ve got to fix the way the system works now and in the future.” Tayna Albert, *CIGNA Settles Class Action Suit on Pay Issues*, AMEDNEWS.COM, Sept. 22-29, 2003, available at http://www.ama-assn.org/sci-pubs/amnews/pick_03/prl20922.html (last visited Apr. 15, 2005). The irony of this quote will not be lost on any trial attorney reading this article, as those identical words are professed by every single client and would-be client to a parent who has lost a child due to medical negligence. The lawsuit is rarely about the money, but rather a deep, heartfelt need to do whatever possible to ensure no other parent endures the same unnecessary, preventable loss.

F. Are Doctors Actually Leaving Particular States as a Result of Malpractice Premiums, or Worse, Are They Actually Leaving the Practice of Medicine Altogether, Forced Out of a Profession They Can No Longer Afford to Participate In?

Because the standard explanation for the need for tort “reform” legislation is the ever increasing premium rates for medical malpractice insurance policies, it is interesting to consider: exactly how high are these premiums as a percentage of a physician’s yearly income? In Minnesota, the base rate of insurance for an internal medicine physician was \$3,803 per year in 2002.²⁹ An obstetrician/gynecologist – generally considered among the highest risk specialties in medicine from an insurance standpoint - paid a base rate of \$17,431 in Minnesota during the same time.³⁰ In order to gain perspective as to whether rates like these might drive a physician out of the profession, it is imperative to consider average base salaries for physicians practicing in Minnesota in these specialties as well. In the Twin Cities, the average salary for an internal medicine physician is \$149,430.³¹ An obstetrician/gynecologist makes, on national average, \$223,584,³² and a casual glance through employment positions seeking physicians reveals that the vast majority of employers provide malpractice insurance as a benefit of employment.³³ Thus, physicians that support imposing limits on the amount of money a patient can recover for permanent, lifelong injuries such as disfigurement or loss of a limb believe an amount equivalent to less than two years of their own salaries equates to full and complete compensation when it comes to their patients.³⁴

²⁹ THE MMIC GROUP, 2002 ANNUAL REPORT (2003).

³⁰ *Id.*

³¹ See Minnesota Department of Employment and Economic Development website, <http://www.deed.state.mn.us/lmi/tools/salary/display.asp?geog=TC0000&zipcode=&strAreaName=SevenCountyMpls-StPaul%2CMN&strOccName=HealthcarePractitionersandTechnicalOccupations&occ=29&occ2=291063&search=+++search+++> (last visited Apr. 17, 2005).

³² Shawn D. Schwartz, M.B.A., *Working Harder for the Same Pay*, 49 GROUP PRAC. J. 8, p. 13 (2000), available at http://www.amga.org/Publications/GPJ/Articles/CoverStories/coverStorySept00_gpj.pdf (last visited Apr. 17, 2005).

³³ Searches for physicians with an internal medicine specialty were conducted on <http://www.physicianrecruiting.com>; <http://www.healthjobsusa.com> (last visited Apr. 17, 2005).

³⁴ Gottlieb, *supra* note 27, at 1 (discussing a proposed \$250,000 cap on pain and suffering damages). In fact, both the American College of Obstetrics and Gynecology (“ACOG”) and the AMA have asserted that even the proposed \$250,000 cap on non-economic damages is “too high.” Sharon Worcester, *Doctor Groups Call on Senate to Pass Medical Liability Reform; Cap on Non-economic Damages*, OB. GYN. NEWS, June 1, 2003, available at <http://wwwz.eobgynnews.com/scripts/om.dll/serve> (last visited Apr. 17, 2005).

Another logical question is much more general: are the expenses associated with lawsuits³⁵ truly what is driving up the cost of medical care in this country? Just by way of example, it is interesting to compare some readily accessible numbers. In Minnesota, statutory reporting requirements should make it fairly easy to determine how much money was paid out as a result of medical malpractice settlements or jury verdicts in a given year.³⁶ In 2002, that number equaled \$19 million.³⁷ Just for sake of comparison, another readily available and frequently reported number is the 2004 annual salary awarded to Dr. William McGuire, the CEO of United Health Care: \$94.2 million.³⁸ Looking at those two numbers nearly side by side it seems almost laughable to suggest that health care costs are rising as a direct result of malpractice cases. CEOs are routinely awarded more each year than the total amount paid to an entire state's medical negligence victims.

III. WHAT IS ACTUALLY BEING REPORTED BY THE VARIOUS NEWSPAPERS AND MEDIA ORGANIZATIONS – IS THE INFORMATION ACCURATE?

A. Culture Where "Spin" Is All Important and Facts Are Not

To hear the President talk about the dramatic increases in the cost of medical care, one might believe that "[m]any of the costs we're talking about don't start in the examining room or an operating room, they start in a courtroom."³⁹ However, according to the Congressional Budget Office, "malpractice costs . . . represent less than two percent of overall healthcare spending."⁴⁰ In fact, the insurance industry admits that imposing caps on

³⁵ Moreover, who is truly responsible for the high costs associated with taking a case all the way to trial? A famous memo uncovered during the tobacco litigation is insightful: "[t]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiff's lawyers, To paraphrase General Patton, the way we won these cases was not by spending all of [the defendant's] money, but by making the other son of a bitch spend all of his." *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (quoting Memorandum from J. Michael Jordan, counsel for R. J. Reynolds to unspecified smoking and health attorneys (Apr. 29, 1988)).

³⁶ MINN. STAT. § 147.111 (2004).

³⁷ See generally MINNESOTA CONSUMER ALLIANCE, CAPS ON MEDICAL MALPRACTICE AWARDS, available at http://www.mnconsumeralliance.org/issues_caps.html (last visited Apr. 15, 2005).

³⁸ See David Phelps & Patrick Kennedy, *UnitedHealth CEO is State's Highest Paid*, STAR TRIB., Apr. 13, 2004, available at <http://www.startribune.com/stories/535/4718831.html> (last visited Apr. 15, 2005).

³⁹ See President George W. Bush, Speech at Collinsville, Ill., *supra* note 6.

⁴⁰ CONG. BUDGET OFFICE, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE (2004), available at <http://www.cbo.gov/showdoc.cfm?index=49688&sequence=0> (last visited Apr. 15, 2004). In fact, "a reduction of 25 percent to 30 percent in malpractice costs would lower health care costs by only about .4 percent to .5 percent, and the likely effect on health insurance premiums would be comparatively small." *Id.*

damages won't keep premiums down.⁴¹ Rather, insurance companies are once again attempting to influence legislation in the ways most financially beneficial to the corporations, with complete disregard for the impact on Americans, and the media has consistently served as an amplifier to the pro-business messages.⁴²

What sells newspapers or stops someone sitting on the couch from flipping past a news program? The answer to this question may help explain why so many Americans believe the hype about the need for tort "reform." Big jury verdicts sell newspapers. Stories about doctors being driven out of the practice of medicine "in communities across the country" sell newspapers. Accurate reporting concerning the risky nature of medicine and the high probability that even supposedly routine visits to the hospital aren't as safe as everyone depends on them to be might be factually correct, but if those stories sold newspapers, it is likely we would be reading them everywhere we look. We aren't, so that must say something about what sells newspapers.

B. Small Minority of Cases Over-Reported

Perhaps the public has succumbed to the idea that tort "reform" is somehow necessary because newspapers and television programs rarely follow up an initial report of a 'shocking' dollar figure with a detailed account of what kind of damages a plaintiff actually suffered. Further, there is a complete absence of reports on what all attorneys familiar with medical malpractice cases know to be indisputable: many of the largest jury awards are subsequently substantially reduced by the judge presiding over the case or on appeal.⁴³ It is easier to grab a consumer's attention with one line sound bites. Take the infamous McDonald's coffee case.⁴⁴ During voir dire, any would be juror is quick to cite this case as an example of "what is wrong with the system," but few people are aware of the terrible and painful extent

⁴¹ "We have not promised price reductions with tort reform." Mark Silva, *Bush's Tort Reform Efforts to Start in Madison County, Illinois*, CHI. TRIB., Jan. 3, 2005 (quoting Dennis Kelly, American Insurance Association spokesman). "There is no question that it is very rare that frivolous suits are brought against doctors. They are too expensive to bring." Nick Anderson & Edwin Chen, *The Race for the White House; Bush Pushes Stance Against 'Junk Lawsuits'*, L.A. TIMES, Oct. 22, 2004 (quoting Victor Schwartz, General Counsel of the American Tort Reform Association). "Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1 percent." GE Medical Protective regulatory filing with Department of Insurance (TDI), Oct. 30, 2003. This revelation was made in response to questions about the insurer's plan to raise physician's premiums by 19 percent only six months after Texas enacted caps on damages.

⁴² See generally Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality and the Media*, 11 KAN. J. OF LAW & PUB. POL. 523 (2002).

⁴³ See generally LASKA & FORREST, *supra* note 4.

⁴⁴ *Liebeck v. McDonald's Rest.*, No. CV-93-02419, 1995 (D.N.M. Aug. 18, 1994).

of the injuries suffered,⁴⁵ the disregard that McDonald's had shown despite hundreds of similar reports of burns in the past,⁴⁶ or of the fact that the jury's initial award of \$3 million was ultimately reduced to \$480,000.⁴⁷

People have unrealistic fears all the time: fear of flying in an airplane, but not a second thought is given to hopping in the car despite the fact that statistically the car ride is far more likely to result in disaster. Perhaps this same irrational kind of fear is in play when it comes to misconceptions about individuals pursuing lawsuits for medical malpractice: no one wants to believe that a very severe injury can befall someone just by visiting their doctor's office because doctors are supposed to be perfect. In reality, people frequently forget something all physicians know with certainty: doctors are actually human.

The scariest part about the press concerning tort "reform" is felt by trial attorneys every time they try to pick a jury. The notion that rich and greedy trial lawyers are bringing frivolous lawsuits to the detriment of American small-businesses seems axiomatic. Injured people with legitimate claims are shouldered with frequently insurmountable burdens of proof as many juries expect the plaintiff to prove that the physician actually intended to do the plaintiff harm despite the fact that negligence has no intent requirement. Clearly the stereotypes about lawyers and their clients come from repetitive exposure to the same old lies.

C. Facts Impacting Premium Increases are Either Not Investigated or Not Reported

Instead of 'lottery-like' jury verdicts causing an increase in medical malpractice premiums, the reality is that the hike in insurance premium costs is a direct result of the various insurance companies hedging bad Wall Street bets.⁴⁸ One undeniable but widely unreported fact is that, in many states,

⁴⁵ See generally http://www.centerjd.org/free/mythbusters-free/MB_mcdonalds.htm (last visited Apr. 15, 2005). A vascular surgeon determined that the injured customer suffered third-degree burns over six percent of her body including her inner thighs, perineum, buttocks, and genital and groin areas. *Id.* She was hospitalized for eight days during which time she underwent skin grafting. *Id.*

⁴⁶ *Id.* During trial, McDonald's admitted that it had known about the risk of serious burns from its coffee for more than ten years. *Id.* From 1982 to 1992, McDonald's received more than 700 reports of burns from scalding coffee; some of which involved injured children and infants. *Id.* Many customers received severe burns to the genital area, perineum, inner thighs, and buttocks. See generally http://www.centerjd.org/free/mythbusters-free/MB_mcdonalds.htm (last visited Apr. 15, 2005).

⁴⁷ In fact, the jury initially found \$2.7 million was an appropriate amount for punitive damages, in light of the fact that McDonald's earned well over \$1.3 million each day from coffee sales alone. *Id.* The punitive damages were reduced by the judge to a mere \$480,000, despite the fact that McDonald's freely admitted that it had no plans to reduce the temperature of coffee sold. *Id.*

⁴⁸ "Insurance was cheaper in the 1990's because insurance companies knew they could take a doctor's premium and invest it, and \$50,000 would be worth \$200,000 five years later when the claim came in. An insurance company today can't do that." Victor Schwartz,

companies issuing policies for medical malpractice liability are enjoying “unanticipated profits.”⁴⁹ According to the nonpartisan General Accounting Office, there is absolutely no support for the proposition that jury awards in medical malpractice cases are responsible for increases in premiums.⁵⁰ Rather, recent increases are attributable to lower investment income enjoyed by insurance companies, a general lack of competition in the insurance market, and the rapid increase in rates for reinsurance policies in the wake of September 11th.⁵¹ References explaining the fundamental disconnect between the increasing costs of medical malpractice verdicts and insurance premiums would be simple to come by for a journalist with even cursory investigative skills, yet these facts are rarely, if ever, found in the daily newspaper. It is easy to understand why so many Americans seemingly believe in the necessity of legislative reforms of the civil justice system: busy people are not motivated to seek out alternative explanations when one seemingly plausible explanation is so readily accessible.

IV. WHAT IS REALLY WRONG WITH THE SYSTEM?

A. Preventable Medical Errors

Most medical errors are preventable. Following a review of over a thousand patient charts, at least one landmark study concluded that 70 percent of adverse events were preventable.⁵² Instead of focusing on what is really going on in the hospitals and clinics across America, attention is focused on how much money physicians have to pay for insurance policies protecting them from personal liability for their mistakes. Rather than being outraged at the dollar figure of premium increases, public outcry should be focused on what needs to be done to ensure Americans do not continue to die from preventable medical errors while they are *in the hospital*. Depending

general counsel to the American Tort Reform Association, *Dose of Legality*, HONOLULU STAR-BULLETIN, Apr. 20, 2003. See also DR. ANDREW J.K. SMITH, LETTER TO SHAREHOLDERS IN THE MMIC GROUP 2002 ANNUAL REPORT (1996) (“An interesting phenomenon . . . the rush of commercial insurance companies returning to the malpractice business. In an effort to buy into the market, these companies often offer premiums well below the true cost of the coverage. MMIC, by contrast, has maintained its long-term commitment to offering fair and sustainable rates, quality products and superior customer service, allowing us to consistently outperform our commercial counterparts.”).

⁴⁹ In 2002 alone, MMIC returned over \$4 million to policyholders through its policyholder dividend program. THE MMIC GROUP, 2002 ANNUAL REPORT (2002). The program’s main purpose “is to share unanticipated profits with all policy holders.” *Id.* According to the 2002 Annual Report, MMIC was able to return over \$44 million through this program “in past years.” *Id.*

⁵⁰ GOA, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (2003).

⁵¹ *Id.*

⁵² *Trends: A Periodic Report from Blue Cross and Blue Shield of Minnesota*, (2003) (citing Agency for Healthcare Research and Quality).

on where you look, research shows that medical errors kill between 80,000 and 195,000 people in America *every year* and cost as much as \$29 billion.⁵³ Medical care organizations have recognized the continuing problem with surgery being performed on the *wrong site*, yet it remains "a significant national problem."⁵⁴ When it comes to prescription drug errors, we are not making medications safer, but actually much, much more dangerous. In no more than ten years, the number of yearly deaths directly attributable to prescription drug errors doubled to nearly 7,400.⁵⁵ In New York, for the ten year period ending in 1998, fifteen healthcare providers were responsible for 412 medical malpractice claims, yet only two of these providers lost their license to practice medicine.⁵⁶

By way of example, Dr. Donald Hofreuter, a well-known and public advocate of the various proposed caps on damages available to injured patients, claimed that three neurosurgeons left the Wheeling Hospital as a result of insurance problems.⁵⁷ To hear Dr. Hofreuter tell the story, the healthcare system was doomed to ruin, losing quality physicians unless the legislature acted immediately and impose damage caps. However, Dr. Hofreuter's claims eventually became the subject of a newspaper investigation which uncovered the fact that one of the three doctors he alleged was driven out of business had in fact been named in nine malpractice suits in seven years, each of which resulted in payments to patients.⁵⁸ The second physician had been named in ten lawsuits in eight years, all but one of which merited payments to patients. In one case, the physician used a new surgical clamp without his patient's consent and during the course of surgery, the clamp slipped and rendered the patient paralyzed from the neck down.⁵⁹ The third and final of Dr. Hofreuter's purported 'casualties' of the increases in insurance premiums had been involved in at least three malpractice suits, one of which followed a surgery where the

⁵³ Compare *To Err is Human: Building a Safer Health System*, INST. OF MED. (2000), with *Patient Safety in American Hospitals*, HEALTHGRADES, July 2004, available at www.healthgrades.com (last visited Apr. 15, 2005). See also *supra* note 32 (noting that "in spite of the dedication and caring of health care professionals, as many as 98,000 people die in hospitals each year as a result of medical errors, making it the fifth leading cause of death in America") (citing *To Err is Human: Building a Safer Health System*, INST. OF MED. (2000) and estimates from the Centers for Disease Control and Prevention); National Committee for Quality Assurance ("NCQA") website, at www.ncqa.org (containing recent study).

⁵⁴ Joint Commission on Accreditation of Health Care Organizations (Dec. 2001).

⁵⁵ INST. OF MED. (1999). In fact, "more than one of five Americans report that they or a family member had experienced a medical or prescription drug error." The Commonwealth Fund (April 15, 2002).

⁵⁶ New York Daily News Investigative Series (March 2000).

⁵⁷ See David O. Weber, *Malpractice Insurance Rates Reach Boiling Point: Physicians Burned by Lawyers, Lawsuits and Jury Awards*, PHY. EXEC., Mar. 2002, available at http://www.findarticles.com/p/articles/mi_m0843/is_2_28/ai_84236557 (last visited Apr. 15, 2005).

⁵⁸ See Roger Mezger, *Insurance Stories May Sound Good, But Are They True?*, CLEV. PLAIN DEALER, Sept. 15, 2003.

⁵⁹ *Id.*

doctor mistakenly drilled a hole into the wrong side of the patient's head.⁶⁰ Perhaps a better solution to Dr. Hofreuter's claimed insurance premium crisis would be to ensure those doctors who continue to harm patients with their failure to comply with accepted standards of medical practice be denied the privilege to continue to practice medicine.

B. What Do These Verdicts Include, and What Impact Do the Few High Profile Cases Have on Would-Be Jurors Around the Country?

"Runaway" juries are frequently blamed for supposedly excessive awards, so it is likely surprising to most people to learn that juries only actually decide four percent of malpractice claims.⁶¹ In California, the number of verdicts and settlements in excess of \$1 million has steadily decreased in recent years, down to merely 24 in 2001.⁶² Likewise, reviewing insurance company information concerning Massachusetts, only four percent of cases resulted in payments of over \$1 million. The majority of cases in Massachusetts resulted in no payment at all, and of the cases where payments were made – a very small fraction of cases – the average amount was just \$396,535.⁶³ Further, as many attorneys actively representing individuals injured as a result of medical negligence can attest, many large awards are never collected as a result of insufficient insurance coverage.⁶⁴ Again, to use Minnesota as an example, as of 2002 the average amount paid with respect to a claim for medical negligence is down to \$211,654.⁶⁵ While this is not a trivial amount by any means, it is certainly not a "Powerball" recovery.

Not surprisingly, cases with the largest settlement agreements or verdicts attract the most attention from newspapers and politicians alike, but rarely, if ever, do these reports explain what the amount is based on. Take the case of a newborn baby who suffers a severe and preventable brain injury during birth. Many children who suffer these types of injuries will never eat, talk, walk or otherwise be able to take care of themselves, but some still have near normal life expectancies. No trial attorney would ever attempt to argue that such injuries are always preventable. There is certainly a difference between a bad result and negligence, but there are systems in place to help

⁶⁰ *Id.*

⁶¹ LASKA & FORREST, *supra* note 4 (citing Jackson Williams, *Medical Misdiagnosis: Challenging the Malpractice Claims of the Doctors' Lobby*, WASH., D.C. PUB. CITIZEN 15 (2003)).

⁶² *See, California Experiences "Sharp Decline" in Claims Closed with \$1 Million of More Payouts*, MED. LIAB. MONITOR 8, May 14, 2002.

⁶³ LASKA & FORREST, *supra* note 4 (citing, *Mass. Reports Far More Claims Activity in 2000*, MED. LIAB. MONITOR 2, May 18, 2001 (noting insurance companies won over 96 percent of cases tried to conclusion)).

⁶⁴ *See, e.g., Henry Gottlieb, Aftermath of Large Jury Verdicts Shows Much-Diminished Victories*, N.J.L.J. (2004).

⁶⁵ THE MMIC GROUP, 2002 ANNUAL REPORT (2002). In fact, the average amount paid per claim varied up and down between \$175,095 and \$252,905 from 1998 through 2002. *Id.*

families deal with either scenario. In the case of a child born with severe disabilities not attributable to anything more than so-called bad luck, there are state and federal programs established to help these families meet what would otherwise be an extreme financial burden. However, in those cases where such injuries are a direct result of a preventable medical error, it is grossly unfair to expect hardworking taxpayers to foot the bill while allowing the insurance companies - entities which have regularly accepted premium payments from doctors - to shirk their responsibilities.⁶⁶ Juries who evaluate these cases are presented with concrete bills from all kinds of medical care providers, and are then charged with the task of calculating how much money will be required to provide the minimum basic care necessary to keep the child alive for the remainder of their lifetime. Any parent who has seen a bill for a routine stop in the emergency room when their child needs stitches or a cast after a hockey game might be able to imagine how intensive, specialized care for the duration of many decades quickly adds up to a large amount of money.⁶⁷ Considering that damages suffered by the patients in medical malpractice claims are always severe and usually permanent, it seems anyone arguing that "awards" are akin to winning the lottery is disingenuous at best.⁶⁸

C. Doctors vs. Trial Lawyers: A Failure to Communicate Despite Seemingly Similar Goals

Physicians and lawyers presumably share the same goal: of ensuring that patients have the best, safest medical care available. Doctors and lawyers both take oaths when they are granted licenses to practice in their respective fields. Prior to being sworn in, lawyers promise to uphold the Constitution, and in many states, to provide assistance to those in need.⁶⁹

⁶⁶ Societal costs of medical malpractice are three to five times greater than the total amount spent on medical malpractice insurance. See LASKA & FORREST, *supra* note 4 (citing Williams, *supra* note 61).

⁶⁷ Jury verdicts and the rising cost of medical care in the United States are curiously linked. In order to determine what amount of money will adequately compensate a patient injured by malpractice, juries are presented with information about what kind of future medical care will be required. As the groups lobbying for tort "reform" are frequently pointing out, the cost of medical care in this country is rising at a very high rate. It would seem to follow logically that any jury faced with the facts reflecting these fast rising costs will award larger sums of money than juries considering similar injuries in years past: medical care simply costs more now than it did ten years ago, and that trend is predicted to continue.

⁶⁸ See generally LASKA & FORREST, *supra* note 4. This is particularly true because many jury verdicts that initially appear large do not "translate into large final settlements, due to post-trial reductions, appeals, etc." *Id.*

⁶⁹ Prior to being admitted to the United States Supreme Court, an applicant must take the following oath: "I do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States." SUP. CT. R. 5. Many states also require attorneys to pledge service to those in need. See generally Dennis Archer, *The power of Attorneys*, 60 BENCH & BAR OF MINN. 8 (2003).

Likewise, upon graduation, most physicians also take an oath, promising to protect their patients and do whatever they can to ensure the profession is achieving its potential.⁷⁰ The inability of healthcare providers across the country to deliver consistent, high-quality care to all patients is a result of outdated systems of work, not a lack of care on the part of healthcare providers.⁷¹ If attorneys and physicians both care about patients, why don't the groups cooperate for the better of everyone?

There have been times when groups of attorneys and physicians worked together in the hopes of advancing a common goal. In recent years, the two groups jointly campaigned for a federal law that would have allowed patients to sue HMOs for injuries or death that resulted from HMO decisions about what care was appropriate, or more importantly, covered by the health insurance plan.⁷² In spite of ethical guidelines touting the responsibility a

⁷⁰ Despite common belief that all doctors pledge to "first, do no harm" as preface to what is known as the Hippocratic Oath, there is no one oath ascribed to by all medical schools or the American Medical Association. For reference purposes, the following AMA Principle of Ethics are included:

Principles of medical ethics: I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights. II. A physician shall uphold the standards of professionalism, be honest in all professional interactions, and strive to report physicians deficient in character or competence, or engaging in fraud or deception, to appropriate entities. III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient. IV. A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law. V. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated. VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care. VII. A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health. VIII. A physician shall, while caring for a patient, regard responsibility to the patient as paramount. IX. A physician shall support access to medical care for all people.

PRINCIPLES OF MEDICAL ETHICS, AMERICAN MEDICAL ASSOCIATION (2001), available at <http://www.ama-assn.org/ama/pub/category/2512.html> (last visited Jan. 9, 2005).

⁷¹ National Academy of Sciences, *Crossing the Quality Chasm: A New Health System for the 21st Century* (2000).

⁷² See Amy Goldstein, *For Patients' Rights, a Quiet Fadeaway; Hill Partisanship and HMO Changes Cooled a Crusade*, WASH. POST, Sept. 12, 2003. Additionally, there is a possibility that physicians are susceptible to believing inaccurate reporting as well. By way of example, the following headlines have appeared in news reports directed at physicians in recent years: Tanya Albert, *Plaintiffs Win Birth Lawsuits Most Often*, 9 AM. MED. NEWS, Apr. 14, 2003 (meaning that based on the most recently available numbers, plaintiffs were successful in one percent more cases in 2001 than they were in 2000, still only winning 39

physician has to his or her patients, the American Medical Association has abandoned the proposed legislation in favor of the Bush administration platform on tort "reform" measures, making no secret of the fact that its "top legislative priority" is limiting liability for physicians.⁷³

Sometimes, for no particular reason, groups of people will have a thought pattern or belief ingrained in them for so long that they are uncertain where they learned to think that particular way. Perhaps this explains why it is so many doctors and lawyers are so distrustful of one another. This way of thinking goes all the way back to medical school for many physicians, as many medical schools play host to lectures aimed at indoctrinating medical students with pro-insurance company views.⁷⁴ Perhaps the change reflects the fact that a majority of insurance companies issuing medical malpractice insurance policies are owned by physicians.⁷⁵ Whatever the reason, there is no question that the lack of cooperation between the two groups seems to be a dominant characteristic of their relationship. Why is the same not true of doctors and insurance companies? After all, insurance companies make no attempt at disguising the fact that they are in fact companies incorporated for one purpose: profit.⁷⁶

percent of the time); J. Edward Hill, *In the Liability Lottery, It's Our Patients Who Really Lose*, 33 AM. MED. NEWS, Sept. 2, 2002.

⁷³ See, e.g., *AMA Joins with President Bush in Call for Medical Liability Reform*, PR NEWswire, July 25, 2002.

⁷⁴ For example, on February 26, 2004, the University of Minnesota Medical School hosted the Deinar Memorial Lecture, given by T.A. Brennan of the Harvard Medical School and Harvard School of Public Health and titled "The Crisis in Patient Safety and Malpractice: Fixing Medicine and Law." The focus of the lecture, however, was rising liability insurance rates for physicians. Dr. Brennan argued, among other things, that the American tort system is poorly designed because it is inefficient and there is no correlation between higher levels of medical malpractice lawsuits and a reduction in the number of injuries/deaths suffered by patients. Thus, the system is de facto flawed. No suggestions for actually improving patient safety were ever offered.

⁷⁵ See UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTERS, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 5-6 (2003).

⁷⁶ Certainly trial attorneys are generally compensated for the representation they provide to injured individuals as well. Contingent fees are often criticized by the media and other opponents of the civil justice system as some attorneys' fees may appear at the outset to be disproportionate. However, the fact that all trial attorneys frequently receive no payment at all on legitimate cases taken on a contingent fee basis and lost at trial is a fact frequently lost in the shuffle of name calling and statistic spinning. At the very least, it is instructive to compare mission statements of insurance companies with those set forth by trial lawyer organizations. MMIC has a vision "[t]o become the most trusted business partner of healthcare providers," and explains its mission as "[t]o provide high quality, professional liability insurance and other services to enhance the strength and security of the healthcare community." THE MMIC GROUP. 2002 ANNUAL REPORT (2002). The Association of Trial Lawyers of America ("ATLA"), in contrast, lists their goals in the following order:

Seek justice for all . . . Preserve the constitutional right to trial by jury . . .
Prevent injury from occurring . . . Champion the cause of those who
deserve redress for injury to person or property . . . Promote the public
good through concerted efforts to secure safe products, a safe workplace, a

Perhaps the mutual distrust stems from the fact that many of the insurance companies issuing medical malpractice policies these days are in fact owned by the physicians themselves.⁷⁷ Upon even a cursory examination of the various efforts at legal reform supported by doctors/insurance companies and trial attorneys, it doesn't take long for a person to wonder whether physicians truly have their patient's best interests at heart. In spite of the fact that presumably all physicians intend to provide their patients with the best care possible, physicians will frequently have economic interests diametrically opposed to those of their patients.⁷⁸ In its 2002 Annual Report, MMIC boasts:

Our leadership in tort reform efforts is well recognized in the insurance industry. We work very closely with the state medical associations on tort reform efforts. In Minnesota, we were instrumental in defeating an attempt to change the Statute of Limitations to a discovery statute. In South Dakota the "loss of chance doctrine," favorable to the plaintiffs' bar, was abrogated. On the national level, as a member of the Health Care Liability Alliance, we

clean environment, and quality health care . . . Further the rule of law and the civil justice system, and protect the rights of the accused . . . Inspire excellence in advocacy through training and education . . . Encourage cooperation among members . . . Advance the common law and finest traditions of jurisprudence. . . Uphold the honor and dignity of the legal profession and the highest standards of ethical conduct and integrity.

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, MISSION STATEMENT, *available at* www.atla.org (last visited Jan. 3, 2005). In order to effectuate these goals, ATLA has established a number of agencies dedicated to serving the public interest, including Trial Lawyers Care, a group of hundreds of trial attorneys across the country who volunteered to represent families of the victims of September 11th for free. *See generally* Stephen Breyer & Kenneth Feinberg, *When the Call Comes, We Answer*, 40 TRIAL 66 (2004). The trial lawyers volunteered the equivalent of over one hundred years of time, representing over \$200 million in donated time. *Id.* at 67.

⁷⁷ For example, the insurance company with the largest percentage of medical malpractice policies in the upper Midwest is Midwest Medical Insurance Company Group – or MMIC as it is commonly known. MMIC has policy holders in Minnesota, North Dakota, South Dakota, Nebraska and Iowa, and is physician owned. DR. G. RICHARD, THE MMIC GROUP, 2002 ANNUAL REPORT, LETTER TO SHAREHOLDERS (2002). *See also* GAO, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (2003) (noting the number of physician owned insurance companies has rapidly increased to 60 percent).

⁷⁸ Certainly there can be no question that the interests of trial attorneys are more closely aligned with their clients than physicians ever will be; trial attorneys come in many shapes and sizes, from trial attorneys representing the largest corporations in the world, Cargill or Microsoft, in disputes about business contracts or intellectual property, down to the trial attorneys who represent the smallest babies who suffer injury as a result of medical negligence or a defective product. If medical malpractice were no longer viable as a segment of the trial attorney profession, either due to tort "reform" efforts or, idealistically, as a result of a complete eradication of preventable medical errors, trial attorneys have the ability to shift their focus and adapt to the needs of the new system. Injured people who are deprived of their rights by statute will remain permanently injured with no recourse at all.

contributed to the 2002 passage of HR 4600, a tort reform package, in the House of Representative⁷⁹

What does this really mean? It means that a physician-owned corporation is actively lobbying to curtail the patients' rights.⁸⁰ A typical discovery statute simply protects a patient's right to pursue remedies for injuries they had no reason to know they had suffered at the time: a run of the mill "discovery statute" case involves a situation where a physician misses a cancer diagnosis and the patient is unaware until some much later date that they in fact have cancer, and most importantly, that the cancer appeared on previous tests but their physician failed to provide them any treatment. Likewise, the "loss of chance doctrine," a legal right recognized by a majority of jurisdictions across the country, simply recognizes the obvious fact that there is a substantial difference between a zero percent chance or recovery and 49 percent chance of recovery. If a person is denied that chance as a result of medical negligence, it is a real and substantial harm to individual and their family.⁸¹

Is it ethical for physicians to lobby for laws that hurt their patients?⁸² These types of laws are never in the best interests of the patients, yet physician groups such as state medical associations and physician owned insurance companies seem to pride themselves on their successes in this arena. Rather than acknowledging these initiatives hurt patients, physician owned insurance companies frame the issue as if the only adversary or group impacted by these laws is the dreaded trial attorneys. The AMA has shamelessly papered waiting rooms in doctor's offices around the country with brochures urging patients to "Join America's Patient Action Network" and "Tell Congress You Don't Want to Lose Your Doctor" without even a passing disclosure of the fact that "making a difference" in they way the AMA suggests would result in a limitation of the patient's own individual

⁷⁹ DAVID P. BOUNK & JACK L. KLEVEN, THE MMIC GROUP, 2002 ANNUAL REPORT, PRESIDENTS' LETTER TO SHAREHOLDERS (2002).

⁸⁰ In many states around the country, doctors are refusing to treat patients until and unless their patients sign binding, mandatory arbitration agreements whereby the patient waives his or her right to sue a doctor in the event they are injured or killed as a result of medical malpractice. Less than five years ago, although the AMA and the American Bar Association had an agreement that such waivers should not be used, many physicians elected to ignore this professional understanding. See COMM'N ON HEALTH CARE DISPUTE RESOLUTION, AM. ARBITRATION ASS'N. & AM. MED. ASS'N, FINAL REPORT, A DUE PROCESS PROTOCOL FOR RESOLUTION OF HEALTH CARE DISPUTES (1998), available at <http://www.adr.org/upload%5CLIVESITE%5CfocusArea%5CHealthcare%5Chealthcare.pdf> (last visited Apr. 15, 2005).

⁸¹ Minnesota, like South Dakota, has thus far failed to recognize the loss of chance doctrine. In application, the effect of the law is essentially that for those patients who have a less than 50 percent chance of surviving a disease, their next of kin will not be allowed to proceed with a lawsuit even if the medical care providers made a clear mistake resulting in death.

⁸² See generally Jay Angoff, *The Truth About Med-Mal Premiums*, 40 TRIAL 36 (2004) (explaining that insurance companies frequently court doctors, getting the physicians to align themselves against lawyers and patients).

rights.⁸³ Similarly, the President of the AMA characterizes as “myth that bad doctors, a bad economy or bad insurance companies are behind the liability crisis. It is instead a system that has turned courtrooms into casinos for jackpot justice.”⁸⁴ Perhaps if physicians and insurance companies approached the true problem, preventable medical errors, with the same vigor, the quality of medical care would improve and the true cause of the problem would be eliminated. There is no question that everyone would be better off if that were in fact the case.

For now, the approach taken by many physicians when faced with the fact that they made a mistake, however unintentionally, is to keep the information away from their patients. This failure to inform the patient has the very strong potential to increase the harm suffered. Without the proper and necessary information, many patients will fail to get requisite care or follow up for conditions that can worsen if not appropriately and timely addressed. Despite this potential for increasing harm to their patients, physicians’ groups routinely refuse to support legislation that would require a physician to notify patients of mistakes or errors in diagnosis and/or treatment.

D. Scare Tactics

One interesting, and no doubt frightening, aspect of the increasingly visible attempt by doctors to publicize their grievance with the rising costs of insurance has been the seeming disregard for patients. Physicians in Maryland, New Jersey, and West Virginia have attempted to bring their cause to the forefront of people’s minds by refusing to treat “non-emergency” patients for anywhere from a day to a week, or in an extreme example, actually canceling surgery and walking off the job altogether.⁸⁵ While antitrust liability might potentially attach to such actions if physicians were seen to be colluding in these actions, as of yet, doctors have been successful in alleging that any actions they took were made on an individual basis.⁸⁶

Additionally, professional associations of physicians are also retaliating against doctors who testify on behalf of injured patients.⁸⁷ The American College of Obstetricians and Gynecologists (“ACOG”) has requested its members to consent to have any testimony they give reviewed by their colleagues.⁸⁸ The American Association of Neurological Surgeons

⁸³ AM. MED. ASS’N, WILL YOUR DOCTOR BE THERE? (2003).

⁸⁴ Yale B. Coble, Jr., M.D., *Today’s Fight for Tort Reform will Ensure Care in Future*, AM. MED. NEWS, May 19, 2003, at 23-24.

⁸⁵ *Doctors Try Labor Tactics in Bid to Cut Insurance Cost*, N.Y. TIMES, Dec. 27, 2004, available at <http://www.nytimes.com/2004/12/27/national/27docs.html> (last visited Apr. 15, 2005).

⁸⁶ *Id.*

⁸⁷ See DiPaola, *supra* note 87.

⁸⁸ *Id.*

("AANS") reportedly suspended the memberships of two neurosurgeons following testimony that was critical of other member neurosurgeons.⁸⁹ Websites aimed at doctors collect personal information about victims of medical malpractice who pursue legal remedies so physicians can make decisions about whether it is in their own personal interest to continue with a doctor/patient relationship.⁹⁰ At the 2004 AMA meeting, one member offered a proposed addition to the Ethics rules, recognizing as "ethical" a decision by any physician to refuse treatment to attorneys who represent injured individuals in claims against physicians.⁹¹ These are but a few examples of the increasingly hostile environment facing individuals injured as a result of medical malpractice.

E. "Healthy Mother and Healthy Babies Access to Care Act" – a Misnomer at Best

During the 2003 Congressional session, the "Healthy Mother and Healthy Babies Access to Care Act of 2003" was introduced to the Senate. Just reading the title most anyone would get the distinct sense that such a law would have been good for both mothers and babies. However, the bill contained a provision limiting the maximum amount of damages to \$250,000, no matter how severe and permanent the injuries suffered, and had it been passed, it would have preempted all state laws that would otherwise govern such claims.⁹² Under the proposed law, if a jury were to determine, on the basis of the evidence introduced, that a larger number would be necessary in order to compensate the victim for his or her injuries, the judge presiding over the case was simply directed to disregard the jury's careful determination and reduce the amount to no more than \$250,000.⁹³

⁸⁹ One of the neurosurgeons fought back. See *Austin v. Am. Ass'n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001); see also DiPaola, *supra* note 87.

⁹⁰ See, e.g., Mark Gorney, *Expert Witnesses Caught in a Moral and Ethical Dilemma*, 88 BULL. AM. C. SURGEONS 11, 12 (2003).

⁹¹ Laura Parker, *Medical-malpractice battle gets personal*, U.S.A. TODAY, June 13, 2004, available at, http://www.usatoday.com/news/nation/2004-06-13-med-malpractice_x.htm (last visited Apr. 15, 2005). While the proposal, offered by J. Chris Hawk, M.D., of Charleston, S.C., was ultimately withdrawn, it signifies an alarming trend in the medical profession to employ scare tactics against both patients and their legal representatives. See S. 2061, 108th Cong. (2003).

⁹² The proposed bill also included limitations on attorneys' fees. Nearly all medical malpractice cases are governed by contingency fee agreements, wherein the attorney agrees to pay all costs associated with proceeding with the case in exchange for a percentage of the total recovery. In the case the jury finds in favor of the health care provider, the attorney representing the injured individual recovers nothing and is out of pocket all the money expended in bringing the case to trial. The most likely effect of statutory limitations on attorneys' fees is that the most talented attorneys will no longer represent injured individuals, opting instead to handle business disputes and the like, at a substantially reduced risk of financial loss. In short, limiting attorneys fees will limit the quality of representation available to injured individuals, who clearly need all the help they can find.

⁹³ Proposed bill, *supra* note 91, at sec. 3(b-c).

Additionally, the proposed bill included a so-called “Fair Share Rule,” wherein no medical care provider would be responsible for paying any more than that party’s share of the damages and would not be responsible “for the share of any other person.”⁹⁴ This provision flies directly in the face of longstanding American tort principles: because the injured person was usually the least able to protect themselves against the harm suffered,⁹⁵ the tortfeasors, who generally have some ability to protect others from their actions, properly bear the burden of potential damages for injuries suffered, even if not all damages are completely or solely assignable to them. Finally, the proposed legislation would have effectively eliminated⁹⁶ punitive damages for an injured patient, placing unnecessary⁹⁷ obstacles and increased burdens of proof in front of a patient who suffered once as a result of errors in the medical system, only to suffer again, this time because the hands of the legal system are tied, preventing justice from being done.

F. *The True Victims*

Caps on non-economic damages are discriminatory in nature. Under most proposed tort “reform” schemes, people injured as a result of medical negligence or a defective product will remain able to recover any *economic* damages the jury finds they sustained. In other words, concrete losses like lost wages or medical expenses that can be calculated from tax returns or medical bills will not be affected by the new proposals.⁹⁸ What will be

⁹⁴ *Id.* at sec. 3(d).

⁹⁵ This is particularly true in the medical negligence setting where a patient generally finds themselves completely at the mercy of the medical care provider.

⁹⁶ Punitive damages under the proposed bill would have been limited to twice the economic damages or \$250,000, whichever is greater. This provision fails to recognize the purpose behind punitive damages – to punish willfully or grossly negligent conduct. What amount of money would convince a large corporation to remedy known, dangerous policies? These authors submit that, in the context of the large corporate nature of medical care providers in modern times, doubling even the largest jury awards would rarely amount to even a slap on the wrist.

⁹⁷ Very few medical malpractice cases allege punitive damages are appropriate, and even fewer patients are successful in collecting such damages despite frequent displays of egregious and willful refusals to ensure patient safety is a primary concern. *See generally* Punitive Damages in California: A Review and Comparison of the Evidence, (1996), *available at* <http://www.pacificresearch.org/pub/sab/entrep/punitive2/punitive3.html> (last visited Apr. 30, 2005) (noting that the number of jury verdicts containing punitive damages in California, Texas, Illinois and New York combined was 104 in 1991).

⁹⁸ However, this is not universally true. During the 2005 legislative session, Minnesota lawmakers are considering tort “reform” proposals which would limit the total amount of potential recovery to \$300,000 – making no distinction between economic and non-economic damages – for any and all lawsuits arising out of negligence by an ambulance service or a nursing home. *See generally* <http://www.minnesotavotes.org/2005-HF-2> (last visited Apr. 30, 2005).

affected is the ability of injured people to be compensated for what is commonly called non-economic damages.⁹⁹

Non-economic damages is the catch-all way the legal system thinks about and attempts to compensate an injured person for things that do not have an easily identifiable value, like the inability to walk after losing a limb, the loss of fertility, or pain and disfigurement suffered as a result of a severe burn. There is no question that these types of damages are very real, and up until this point, the American legal system has trusted juries with the responsibility of determining what amount of money might equate to the damage endured. Now there are many special interest groups and politicians that favor abandoning this age old institution in favor of a one-size-fits-all approach to law. These new proposals will impact women and children disproportionately, as they typically either work inside the home or do not earn high wages. Presumably, most parents would think it grossly unfair to say that their child who died as a result of medical negligence or a defective product was worth no more than \$250,000. Likewise, there can be no doubt that a child who loses a parent suffers an immeasurable loss whether their parent was a physician earning over two hundred thousand dollars a year or "merely" staying home to take care of them and not earning a wage outside the household. The new proposals suggest the loss of one parent is worth more to the child than the loss of the other.

VII. CONCLUSION

Some trial attorneys might agree that there are such things as frivolous lawsuits, and that in certain regions of the country, perhaps statutory restrictions on when lawsuits can appropriately be commenced may solve perceived problems. There must also be other ways to address the growing costs of medical malpractice premiums. Increased regulation on the insurance industry might help. At the very least, enacting state or federal reporting requirements could ensure accurate facts are available on which to base future actions. How many claims are made in a year? How many merit settlement prior to the initiation of a lawsuit? What are the settlement ranges and average payment? How many lawsuits go all the way to trial? What percentage of cases result in a win for the insurance companies versus those won by the patient? What are the range of awards of these cases, and what is the average? And most importantly, what, if anything, is taken from these claims and lawsuits that might ensure future problems are reduced or

⁹⁹ For example, "if one loses one's eye, the surgeon's bill is economic, while blindness is noneconomic." David Stowman, *Frivolous Lawsuits*, LXI BENCH & BAR OF MINN. 5 (2004). The largest portion of the so-called lottery verdicts are made up of economic damages, which are not capped by most current tort "reform" proposals. Thus, while Congress is willing to ensure that some portion of an injured person's medical expenses are recoverable, Congress seems unwilling to recognize the substantial impact of loss of sight or ability to walk.

eliminated altogether? Certainly there are many more questions to answer, but these authors suggest more information is absolutely imperative before a longstanding, fundamental component of the American Justice System is discarded in favor of a one-size-fits-all approach.