A New Approach to Medical Malpractice Reform

Our Approach to Medical Errors is Failing

**Dangerous:** Preventable medical errors kill more people in the United States each year than automobile accidents or guns. This is the equivalent of a jumbo jet crashing every day with no survivors.

**Expensive:** Billions of dollars are wasted each year on “defensive” medicine – unnecessary procedures and tests ordered to protect health care providers in case of a lawsuit.

**Ineffective:** There is “scant evidence that tort liability has a positive deterrent effect” on poor-quality care. Despite the high cost of the current tort system, patient safety has not improved. You are just as likely to be a victim of a medical error today as you were three decades ago.

**Unfair:** If you are injured by a medical error, your chances are less than 3-in-100 of receiving compensation for your injuries. If you are poor or elderly, your chances are even lower.

**Slow:** Injured patients must wait, on average, 4-5 years to receive compensation – time that could have been used for rehabilitation.

**Inefficient:** Even if victims receive compensation, more than half the award is lost to legal and administrative costs.

**Compromises Victims’ Access to Justice:** A recent national survey of attorneys published by the Emory University School of Law found:

- Most attorneys reject over 90% of the cases they screen.
- The cost of prosecuting a single case of medical malpractice ranges from a low of $50,000 to a high of $500,000.
  - “Every case requires hundreds of hours of work and a huge outlay of money to pay for the investigation, evaluation by experts, deposition testimony, travel, etc.”
  - An attorney with 33% contingency fee, for example, who has expected litigation costs of $100,000 would only break even if damages are $300,000 or more.
- In a random sample of 63 Georgia malpractice attorneys:
  - Two-thirds of the attorneys wouldn’t accept a case unless expected damages were at least $250,000
  - Almost half of the attorneys wouldn’t accept a case unless expected damages were at least $500,000
- Because some groups (females, children, the elderly, demographic minorities and the poor) tend to have disproportionately lower economic damages, they find it even more difficult to find legal representation.
Patients, Doctors, Lawyers, Liberals and Conservatives Agree We Have A Problem:

Dr. John Goodman, President of the National Center for Policy Analysis:

“As things now stand, the only way a victim of an adverse medical event can get compensation is by filing a lawsuit, enduring its trauma and discomfort, and trying to prove malpractice. Yet only 2 percent of victims of malpractice ever file a lawsuit. Fewer still ever receive any compensation. On the other hand, 37 percent of lawsuits filed involve no real malpractice. To add insult to injury, more than half the money spent on malpractice litigation goes to someone other than the victims and their families.”

Dr. Joanna Shepherd-Bailey, Emory University School of Law:

“Many legitimate victims of medical malpractice are unable to obtain legal representation and have no meaningful access to the civil justice system. Without legal representation, most of these victims will not be compensated for the harm they suffer as a result of medical negligence. In turn, the medical malpractice system will fail to provide adequate precautionary incentives for healthcare providers. Without dramatic change, the access to justice problem will continue to hinder the medical malpractice liability system’s ability to achieve its compensatory and deterrent functions.”

Hillary Rodham Clinton and Barack Obama:

“We have visited doctors and hospitals throughout the country and heard firsthand from those who face ever-escalating insurance costs. Indeed, in some specialties, high premiums are forcing physicians to give up performing certain high-risk procedures, leaving patients without access to a full range of medical services. But we have also talked with families who have experienced errors in their care, and it has become clear to us that if we are to find a fair and equitable solution to this complex problem, all parties — physicians, hospitals, insurers, and patients — must work together. Instead of focusing on the few areas of intense disagreement, such as the possibility of mandating caps on the financial damages awarded to patients, we believe that the discussion should center on a more fundamental issue: the need to improve patient safety.

“We all know the statistic from the landmark 1999 Institute of Medicine (IOM) report that as many as 98,000 deaths in the United States each year result from medical errors. But the IOM also found that more than 90 percent of these deaths are the result of failed systems and procedures, not the negligence of physicians. Given this finding, we need to shift our response from placing blame on individual providers or health care organizations to developing systems for improving the quality of our patient-safety practices.

“To improve both patient safety and the medical liability climate, the tort system must achieve four goals: reduce the rates of preventable patient injuries, promote open communication between physicians and patients, ensure patients access to fair compensation for legitimate medical injuries, and reduce liability insurance premiums for health care providers. Addressing just one of these issues is not sufficient. Capping malpractice payments may ameliorate rising premium rates, but it would do nothing to prevent unsafe practices or ensure the provision of fair compensation to patients.

“The current tort system does not promote open communication to improve patient safety. On the contrary, it jeopardizes patient safety by creating an intimidating liability environment. Studies consistently show that health care providers are understandably reticent about discussing errors, because they believe that they have no appropriate assurance of legal protection. This reticence, in turn, impedes systemic and programmatic efforts to prevent medical errors.”

Tom Baker, professor of law and health sciences at the University of Pennsylvania School of Law:

“Imagine you go to the emergency room with appendicitis. For whatever reason, they fail to diagnose it. Your appendix bursts, and you spend a couple weeks in the hospital. I’ve had lawyers tell me they would not take a case like that, even if it’s a slam-dunk. The damages wouldn’t be enough — medical expenses,
maybe a month of lost salary, although the patient might have short-term disability insurance that would cover a large part of that. It’s not enough to justify going to court.

“The medical malpractice system only works for serious injuries. What it doesn’t work for is more moderate ones. Lawyers discourage people from bringing suits if their injuries are not serious in monetary terms — a poor person or an older person who can’t claim a lot in lost wages. That’s why obstetrician-gynecologists pay such high premiums. If you injure a baby, you’re talking about a lifetime-care injury. Gerontologists’ premiums are exceedingly low.

“That’s the reason I say if people are serious about tort reform, they should improve compensation for moderate injuries. Nobody likes that idea, by the way. They say it would make the system more expensive, not less expensive. More people would bring claims. That says to me that the critics are not serious about tort reform.”

Listen to the tragic stories of Jennifer Shiver and Ron Bachman as told at the 2012 Georgia Legislative Policy Forum here: http://tinyurl.com/ahkt8zl

Georgians Deserve Better

- From a social justice perspective, it is unacceptable that most victims, especially the poor and elderly, are not compensated for their injuries.
- From a patient safety perspective, it is unacceptable that patients today are no safer than they were in the 1970s.
- From a cost perspective, it is unacceptable that medically unnecessary costs are dramatically increasing the cost of health care.

A Better Solution: The Patients’ Compensation System
Quick and Fair Compensation, Fewer Errors and Lower Cost

For over a decade, the Georgia Public Policy Foundation has called for significant medical malpractice reform with an emphasis on reducing litigation and improving patient safety. We have finally found a proposal that meets these goals.

The Patients’ Compensation System (PCS) is an alternative to adversarial medical malpractice litigation. It is designed to provide patients with fair and timely compensation for avoidable medical injuries without the expense and delay of the court system. PCS focuses on improving the overall quality of patient care by encouraging reporting and analysis of medical errors so the medical community can learn from its mistakes.

Patients’ Compensation System Q & A:

Will access to justice and compensation for victims of medical negligence be reduced?

It is important to remember that under the current system, patients receive less than half of awards after legal and administrative costs are taken out. Under PCS, patients will receive the entire amount.

The Patient Injury Act, which authorizes PCS, sets a floor on compensation payments based on a national database that includes both economic and non-economic damages. The Act states, “Damage payments for each type of injury shall be no less than the average indemnity payment reported by the Physician Insurers Association of America or its successor organization for like injuries with like severity for the prior fiscal year.” This means patients are protected in two ways: Payments will not be less than the current average and they will get to keep far more of their payments than under the current system.

For the remaining 97 percent of victims of medical negligence who receive zero compensation in the current system, PCS provides a low-cost, expedited process for compensation. In addition, the threshold to qualify for compensation is lowered from “negligence” to “avoidable harm.” This means that if the
medical injury would not have occurred in an optimal situation, the Mayo Clinic, for example, then the patient is eligible for compensation. This is a middle ground between a negligence standard and a true “no fault” standard where all medical injuries are compensated.

Will total costs increase since more victims will be compensated and compensation amounts will be linked to national averages by injury type and severity?

The Patient Injury Act caps the overall cost of the system. The Act states, "...A compensation schedule...shall not exceed the prior fiscal year aggregate cost of medical malpractice as determined by an independent actuary..." This is achievable since multiple studies have projected compensation plans based on “avoidable harm” can successfully compensate more victims at less cost.12 Based on an actuarial study, Aon Global Risk Consulting found that PCS “provides the unique opportunity to more than double the amount of money going to patients while reducing the total cost of the medical malpractice system.”13

The table below provided in the Aon analysis shows how savings from lower payments to attorneys and lower insurance company profits (due to the lower risks of a more predictable system) more than offset the increased payments to patients. In fact, Aon projects that in this case malpractice premiums would decline by 8 percent.

Where Does the Money Come From?
Georgia-Based Medical Malpractice Carrier Cost Comparison

<table>
<thead>
<tr>
<th>Categories (Cents per Dollar)</th>
<th>Current System</th>
<th>PCS</th>
<th>Percentage Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collected Premium</td>
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<td>0.92</td>
<td>-8%</td>
</tr>
<tr>
<td>Paid to Patients</td>
<td>0.23</td>
<td>0.51</td>
<td>122%</td>
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<tr>
<td>Paid to Attorneys</td>
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<tr>
<td>Administration Costs</td>
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<td>0%</td>
</tr>
<tr>
<td>Insurance Company Profit</td>
<td>0.30</td>
<td>0.15</td>
<td>-50%</td>
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It is also important to note that experts almost uniformly agree that a system like PCS will result in a reduction in medical errors. If this occurs, it will further reduce the cost of the system.

Will the Georgia Composite Medical Board remain in charge of investigating medical malpractice claims and disciplining health care providers?

It is important to separate compensation and patient safety. The current tort system requires injured patients to prove medical negligence, but the ultimate purpose of litigation is compensation for patients. The court has no power over the doctor’s ability to practice medicine. Only the Georgia Composite Medical Board is authorized to license health care providers, investigate negligence claims and administer disciplinary actions. That will not change.

The Patient Compensation System does nothing to restrict the Medical Board; in fact, it actually should enhance its effectiveness. Health care providers who constitute an imminent danger to the public will be reported by PCS to the Medical Board, which will investigate and can require additional training or revoke the doctor’s license to practice medicine. Assuming the doctor’s behavior is egregious, a criminal investigation will also likely occur on a parallel track. (The Patient Compensation System does not prevent criminal lawsuits alleging gross negligence.) A patient could also report the health care provider to the Medical Board, as is currently the case.

One problem with the current system is that many lawsuits are settled before trial and the records are sealed. Under PCS, more claims will mean that more doctors will be scrutinized, increasing the odds of catching bad doctors and having them investigated and ultimately face disciplinary action. For example,
the Medical Board investigated 159 cases in 2012. Under PCS, in comparison, medical experts would be scrutinizing several thousand cases each year.

It is even better to prevent the errors from occurring in the first place. Doctors now are incentivized to avoid fully disclosing errors to avoid being hauled into court. When doctors don’t have to worry about the risk of losing their personal wealth in a lawsuit, they will be more open to disclosing errors and discussing best practices. In addition, the Office of Quality Improvement established under PCS will be communicating to the medical community frequently on areas to improve patient safety based upon the large amount of data they will be accumulating.

**Will compensation payments from PCS be reportable to the National Practitioner Data Base?**

Physicians are concerned that the larger number of applications by patients under PCS could impact their reputations if reported, especially since the applications may not reflect cases of medical negligence. The Patient Injury Act clearly states that actions on applications submitted to PCS are not subject to reporting to the National Practitioner Data Base (NPDB).

An opinion from Tom Barker, the former General Counsel of the U.S. Department of Health and Human Services, concurs. The opinion states, "We believe the overall spirit of the PCS is fully consistent with the goals of the NPDB, establishing a system that puts patients at the forefront of the process and realigning incentives toward patient safety and a reduction in medical errors. ... A payment made to a patient under the PCS is not a ‘medical malpractice payment,’ but rather a no-fault claim resulting from an application and paid through a highly regulated administrative review process. Unlike payments reported to the NPDB, which result from a claim or judgment against a physician, a claim under the PCS is made after a patient files an application with the PCS and there is a no-fault finding of an avoidable medical injury.”

**Does implementation require a constitutional amendment?**

There is a constitutional basis for exchanging the right to trial by jury for another benefit: the creation of the state workers’ compensation system. Under that system, workers waived their right to sue their employer for predictable compensation when injured on the job. Because of this precedent, it is likely the Patients’ Compensation System would survive a constitutional challenge.

The Georgia Supreme Court’s recent disapproval of a damages cap was based on the limitation of an existing right (the right to have a jury decide on damages for a claim of medical negligence), while under the Patients’ Compensation System, victims of medical injuries who now find it very difficult to pursue their tort claims will be gaining a new right. The new right provides the injured patient with a more generous evidentiary standard for compensation (“avoidability”) than the current standard (“negligence”) and successful claimants are virtually assured of receiving more net compensation than under the current system. This “quid pro quo” would be the critical factor in any constitutional determination.

**Is this a case of the “fox guarding the henhouse” since only physicians will sit on the panel making the determination of negligence?**

Just as attorneys sit in judgment of ethics cases brought before the bar, experts of a particular profession are best suited to understand what happens in that field. We wouldn’t expect a teacher to know how to roof a house, a police officer to create an architectural drawing or a plumber to perform surgery. The experts serving on the independent medical panel will not know the identity of the provider(s) they are reviewing because the names of the medical provider(s) and the patient in question will be redacted from the records.

Again, it is important to remember the Patients’ Compensation System is about compensation, not blame or punishment. The Georgia Composite Medical Board remains the only entity with the authority to license health care providers, investigate negligence claims and administer disciplinary actions. The ultimate deterrent effect for doctors is the risk of losing their license and their ability to earn a living
practicing medicine. The Patients’ Compensation System enhances the effectiveness of the Medical Board by ensuring that more cases are scrutinized each year and providers who are a threat to public safety are reported.

Has this idea been tested anywhere else?

The U.S. National Vaccine Injury Compensation Program is a no-fault alternative to the traditional tort system created in 1988 to provide compensation to people injured by certain vaccines. Florida and Virginia created no fault administrative systems in the late 1980s to cover certain birth-related neurological injuries. New Zealand and Sweden have had no-fault systems in place since the 1970s.

Who will make money off this system?

PCS will be a nonprofit, quasi-governmental entity reporting to the Georgia Department of Community Health. PCS will only be allowed to charge fees to cover its operating costs.

1 To Err Is Human: Building a Safer Health System, Institute of Medicine (IOM), http://www.nap.edu/books/0309068371/html/.
3 Repeated studies over time and across several states show a consistent rate of adverse medical events due to negligence. In 1974, a California study reported that 1 percent of all hospitalized patients have significant injury due to physician negligence. The Harvard Medical Practice Study of 1984 in New York State reported a 1 percent injury rate due to physician negligence. A study in Colorado and Utah in 1992 again found a 1 percent physician negligence rate. The most recent study in North Carolina in 2010 found similar results: “Temporal Trends in Rates of Patient Harm Resulting from Medical Care,” The New England Journal of Medicine, November 24, 2010, http://www.nejm.org/doi/full/10.1056/NEJMsa1004404.
5 Highlighted slides from a presentation by Dr. Joanna Shepherd-Bailey, Emory University School of Law, on the findings of the first national survey of attorneys that explores medical malpractice victims’ access to the civil justice system: Video of presentation: http://www.youtube.com/watch?v=RQcM4C_8D-U&list=UU4uOlfbFbDlh6WclQEDxQ&index=24, Slideshow: https://georgiapolicy.org/wp-content/uploads/2012/09/Dr.-Joanna-Bailey.pdf