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Using tort reform as an excuse: Why health care cannot be reformed

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The health care industry, upon which we are all dependent, promotes the need for tort reform as an excuse for not being able to improve patient safety. As a result, the victims of medical negligence are subject to double discrimination, first by being victims, and second by being denied due process. This is a terrible price that the American public must face for an industry that cannot find a way to sufficiently improve safety.

For more than a decade, we have all known the terrible statistics about the personal cost of medical malpractice. According to a National Institute of Medicine Report, almost 100,000 people die each year as a result of medical errors in the U.S. Since that first report, there have been several well-publicized efforts to make medical care safer, including instituting electronic medical records and increasing the number of hospital based physicians. But none of these efforts have been able to confront the real issues that would improve safety in hospitals to the point of a significant reduction in death and injury. As a result, all hospitals in the U.S. can be considered inherently dangerous and all patients who need hospital care face a small, but significant, risk of death or injuries from preventable medical errors.

Some proponents of improved hospital safety have compared modern health care to airline travel, where risks have been significantly reduced as a result of a highly regimented system of interaction between pilot and airplane, complete with detailed checklists and simulation programs. Others suggest that electronic medical records, with the capability to crosscheck and prevent medication errors, will reduce the incidence of medical errors. While these methods have improved safety in the airline industry, medical care in hospitals is far more complex — most aspects cannot be reduced to written standards and checklists. Even the use of required time-outs and multiple crosschecks for all surgical procedures has not completely eliminated wrong-site surgery or retained foreign bodies.

However, the real catastrophes in medicine, where a young healthy patient dies, or a patient suffers a hypoxic brain injury that requires lifetime medical and attendant care, usually occur as a result of hospital system errors. These errors occur when multiple health care providers fail to properly communicate with each other. It is often difficult to conduct a root cause analysis of such problems, and even more difficult to actually eliminate the causes.

With the increased use of complex computer technology in medicine for everything from monitoring devices to robotic surgery, nurses and physicians must utilize and interact with computer systems that they rarely understand. While most businesses can wait for their information technology personnel

to fix computer problems, health care involves decisions based on data that have a very short information to decision time span. Add the number of different physicians that may be involved in the care of a patient, multiply that by the number of different nurses who have to provide both information to physicians and carry out orders for treatment and medications, and then factor in the often complex physiology of an individual patient, and it is possible to understand why patients who actually walk out of a hospital, better off than when they entered, can be considered lucky.

The industry knows that it is unable to significantly reduce the incidence of medical errors. That is why it promotes tort reform, specifically, a \$250,000 limitation on the amount of recoverable non-economic damages for victims of medical negligence regardless of the circumstances of injury or death. As a result, it is possible to calculate the maximum potential jury award in any medical malpractice case in California. Most wrongful death cases come down to the net lost income to the family plus a maximum of \$250,000. For the elderly or minor children who provide no income to the heirs, the value of such cases has been arbitrarily set at \$250,000. Based on 1975 dollars, that has a value today of less than \$75,000, since there is not any cost of living increase.

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California has had tort reform in medical malpractice cases for more than 35 years, with the enactment of MICRA by the California Legislature in 1975. This was based on a perceived crisis in the cost and availability of malpractice insurance. That crisis was, in fact, triggered by the decision of insurance companies to drastically increase the cost of insurance or cease business in California. Advocates claim evidence that without tort reform, the cost of insurance would increase and force many physicians to order otherwise unnecessary tests to further protect themselves from malpractice litigation. The real reason the industry needs tort reform is due to the fear of juries who, in response to concerns about patient safety, might then award reasonable damages for the kinds of catastrophic injuries and needless deaths that occur as a result of preventable medical errors in hospitals.

For those who are severely injured and face a lifetime of medical expenses, lost earnings, and pain and suffering, the value of such a case comes down to the loss of earnings and the cost of purchasing an annuity to pay for medical care over a reduced life expectancy. Insurance companies for doctors and hospitals in California, most of which are doctor-owned companies formed in 1975, or insurance companies that have come back into California now that the market is so profitable, have been able to provide liability insurance at affordable rates and still make a record profit.

When MICRA was enacted, the proponents claimed that the victims would get all of the economic damages (loss of earnings and medical expenses), and the \$250,000 limit on non-economic damages would pay for the attorney

fees in most cases. Yet today, the injured victims of medical negligence barely get their future medical care expenses paid, since the maximum recovery for non-economic damages will cover only a portion of attorney fees, even at MICRA's 15 percent cap. The only reason that liability insurance companies for health care providers must pay ever-increasing amounts for negligence cases is that the cost of medical care has increased over 700 percent in the last 36 years since MICRA was enacted.

In 1984, when the state Supreme Court ruled by a 4-3 vote that the MICRA limitation on non-economic damages was constitutional, it did so by finding that the law bore a "rational relationship" to the legislative finding that there was a medical malpractice insurance crisis in 1975. That any such crisis has long since disappeared has not registered with the Court since they have yet to decide to review any case from the appellate court that have upheld the MICRA limitation on non-economic damages. It is generally accepted that on the law, MICRA can no longer be considered as having a rational relation to a now non-existent crisis in the availability or cost of liability insurance. The Court seems content to wait for the state Legislature to change the law, but it knows that the current priorities in Sacramento are not focused on the victims of medical negligence.

What worries the California Medical Association (CMA), California Hospital Association (CHA), and liability insurance carriers is that without the cap on non-economic damages juries would award substantial sums for a lifetime of unendurable pain and suffering, caused by a preventable medical error. Currently there is little incentive for hospitals to enact the kind of changes that might actually reduce the number of patients who die or who are severely injured as a result of medical negligence. The CMA has over \$5 million in a reserve fund to be used to defend MICRA. Both the CMA and CHA could probably live with a cost of living increase on the \$250,000 cap, since that would still prevent a jury in any one case from awarding the potentially large awards seen in other states. If a cost of living increase had been added by the state Legislature, even 10 years ago, it would have increased the cap closer to \$500,000 today, and ensured that the economic value of such an award would not continually decrease as it does now.

Ultimately, all of us in California must recognize the fact that medical care is becoming increasingly complex and less available. If the public is willing to accept the discrimination that victims of health care face when they decide to sue for compensation because the system cannot be fixed to prevent such errors, then we must all be willing to accept the consequences.



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