

Medical Malpractice: 10 Steps to Tort Reform

by John C. Goodman (from Chapter IX, *Handbook on State Health Care Reform*)

The malpractice system is supposed to compensate victims of medical errors for their injuries and discourage future errors by medical providers. It does both jobs poorly and it imposes large costs on doctors, employers and patients. The total cost of the medical tort system is an estimated \$129 billion to \$207 billion a year — or as much as \$2,000 per year for every household in America. The following proposals would remove perverse incentives in the current system.

Step No. 1: Fully compensate tort victims — no more, and no less.

The goal of rational tort law should be to make the victim whole. Perpetrators who pay less than their fair share for damages will commit more torts than they otherwise would. Also, victims who are overcompensated will exercise less care and fail to take precautions to avoid being victims.

Full compensation requires: First, reducing awards by the amount of any collateral source income, such as life insurance (in the case of wrongful death), disability insurance (for wrongful disability) or health insurance (for wrongful injury). However, the premiums the plaintiff or his employer paid in order to generate that income should be returned. Second, to avoid overcompensation, the victim should not be the recipient of punitive damages.

Step No. 2: Require defendants to pay the full cost of their harmful acts — no more, and no less.

Although the amount received by the plaintiff will be reduced by collateral income (insurance), defendants should be required to pay the full amount of the damages assessed. In addition, defendants should be required to pay for any social costs of their actions (Step No. 7), including punitive damages for the cost to society of any other victims of their malpractice who are not parties to the current legal action. When the plaintiff is not to receive the full amount of the damages assessed against the defendant, a possible way to dispose of such

funds is to give them to worthwhile charities chosen by the electorate.

Step No. 3: Allow the marketplace to determine damages, whenever possible.

One of the most difficult issues in malpractice cases is determining actual damages. In the typical case, the litigating parties call on expert witnesses who make educated guesses, at best. An alternative is to rely on the marketplace. In the case of injuries requiring continuing medical care, insurance companies could bid for the right to provide it. Their bids would consist of the dollar amount they would have to receive in order to assume responsibility for the care. In the case of wrongful death, when a widow loses the income her husband would have earned, the defendant could be ordered to purchase an annuity to provide the widow with a continuing income.

Step No. 4: Generally require structured awards rather than lump-sum awards.

Under the current system, awards often require a lump-sum payment. A better solution is a structured award — allowing payment of damages over time. Since the loss occurs over time, compensation for the loss should occur over the same time-period. A jury does not know whether or not a new drug will make continuing care unnecessary five years from now. With a structured award, the financial burdens of the defendant could be reduced, say, to the cost of the new drug if and when it is developed.

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Step No. 5: Allow parties to contractually alter court-determined awards.

Although structured awards constitute good public policy, the parties in a specific case may prefer a different arrangement. If so, they should be allowed (and even encouraged) to determine the particulars of the compensation by contract. (A structured award, for example, could be replaced by a lump-sum payment if both parties are willing.)

Step No. 6: Set reasonable limits on damages for pain and suffering, subject to rebuttable market evidence that victims place a higher value on such losses.

Pain and suffering are subjectively experienced, making it difficult to assess damages for them. Because of this difficulty, many states limit such damages; for example, a surviving spouse might be limited to an award for \$250,000. However, markets may be used to reveal differences in individual preferences. Suppose a husband has a \$1 million life insurance policy on his own life and his wife is the beneficiary. After his wrongful death, economists calculate the economic loss to the wife is \$600,000. In this case, the couple places an additional value of \$400,000 on the pain and suffering such a loss would create — as evidenced by the payment of life insurance premiums.

Step No. 7: Allow punitive damages only if there are social costs over and above the victim's private costs.

Why should there ever be punitive damages? Phrases such as “send them a message” or “teach them a lesson” should not be allowed as arguments before a jury. In assessing punitive damages, jurors should be encouraged to consider social harm, and only social harm. Suppose a doctor has committed malpractice and the course of discovery reveals the existence of other probable victims who never learned of the malpractice that led to their injuries. In this case, awarding full damages to the victim is not enough of a penalty because the total probable harm done by the doctor is much greater than the harm done to the defendant.

Step No. 8: Require plaintiff's attorney's contingency fees to be paid from the victim's award and in the same manner as the victim — with meritorious exceptions.

Plaintiff's attorneys should be paid the way their clients (victims) are paid. If instead of cash the victims in a class action lawsuit receive “dollar-off” coupons, so should their attorneys. If the victims receive a structured award — with periodic payments over time — so should the plaintiff's attorneys.

In especially meritorious suits, where an attorney invests considerable time and expense to uncover wrongdoing that would otherwise go undetected, the court could award a share of the punitive (social) damages to the attorney.

Step No. 9: Award attorney's fees to the opposing party in cases of bad faith.

The court should award attorney's fees to one of the parties when there is bad faith by the other party. Bad faith on the victim's side often consists of filing frivolous lawsuits. Bad faith on the defendant's side often consists of intentional delays — forcing victims to spend time, money and effort to collect on claims when fault is not really in question. Where bad faith is strongly suspected, judges should suspend the attorney-client privilege — as well as work product shields and other traditional privileges — in order to ferret it out.

Step No. 10: Settlements do not have to conform to the first nine steps.

The administration of justice is costly. For this reason, there is a social interest in encouraging settlements. If the first nine steps are followed at trial, there will be a substantial sum of money given to charity in many cases. That money does not have to be given to charitable institutions if there is an agreed-upon settlement. Thus, the first nine steps create a powerful incentive for the two parties to reach a middle ground and avoid a trial.

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