

**An excerpt from
The Medical Malpractice Myth
Tom Baker**

Medical malpractice premiums are skyrocketing. “Closed” signs are sprouting on health clinic doors. Doctors are leaving the field of medicine, and those who remain are practicing in fear and silence. Pregnant women cannot find obstetricians. Billions of dollars are wasted on defensive medicine. And angry doctors are marching on state capitols across the country.

All this is because medical malpractice litigation is exploding. Egged on by greedy lawyers, plaintiffs sue at the drop of a hat. Juries award eye-popping sums to undeserving claimants, leaving doctors, hospitals, and their insurance companies no choice but to pay huge ransoms for release from the clutches of the so-called “civil justice” system. Medical malpractice litigation is a sick joke, a roulette game rigged so that plaintiffs and their lawyers’ numbers come up all too often, and doctors and the honest people who pay in the end always lose.

This is the medical malpractice myth.

Built on a foundation of urban legend mixed with the occasional true story, supported by selective references to academic studies, and repeated so often that even the mythmakers forget the exaggeration, half truth, and outright misinformation employed in the service of their greater good, the medical malpractice myth has filled doctors, patients, legislators, and voters with the kind of fear that short circuits critical thinking.

This fear has inspired legislative action on a nationwide scale three times in my lifetime. The first time was back in the mid-1970s. I remember sitting at the dinner table listening to my father report what he’d heard at his medical society meeting: “Medical malpractice insurance premiums are going through the roof. Frivolous litigation and runaway juries will drive doctors out of the profession.” The answer, the medical societies and their insurance companies said, was medical malpractice tort reform—to make it harder for misguided patients and their lawyers to sue.

What the medical societies did not tell my father, or almost anyone else, was that their own research showed that the real problem was too much medical malpractice, not too much litigation. In the mid-1970s the California Hospital and Medical Associations sponsored a study on medical malpractice that they expected would support their tort reform efforts. But, to their surprise and dismay, the study showed that medical malpractice injured tens of thousands of people every year—more than automobile and workplace accidents. The study also showed that, despite the rhetoric, most of the victims did not sue. But almost nobody heard about the study because the associations decided that these facts conflicted with their tort reform message.

Two years after they achieved their goal of enacting restrictive medical malpractice tort reform in California, the associations printed the results of the study, but only as an association report. All that was published for outside consumption was a technical summary, which did not feature the dramatic findings. The report was not widely distributed, and it was written in exceptionally dry and technical language.

The next time I heard about frivolous litigation and runaway juries driving doctors out of practice was while I was in law school in the mid-1980s. Medical malpractice premiums were back through the roof. And, once again, the answer from the medical societies and their insurance companies was tort reform: raise the bar on getting into the courthouse and, in many states, limit what juries could do once victims got inside.

That time, more people were skeptical about the claims of the medical societies. But this was the 1980s, and organized medicine still knew best. Nobody had pulled together enough facts about medical malpractice litigation. And hardly anyone knew about, or could have easily understood, that buried California report. The result was a virtual avalanche of restrictive tort reform legislation proposed—and often enacted—in legislatures across the country.

The third time began in 2002 and continues today. This time around we have a lot more information. But you would not know it from the tort reform remedies that the medical societies, the hospitals, and their insurance companies are pushing.

What do we know?

First, we know from the California study, as confirmed by more recent, better publicized studies, that the real problem is too much medical malpractice, not too much litigation. Most people do not sue, which means that victims—not doctors, hospitals, or liability insurance companies—bear the lion's share of the costs of medical malpractice.

Second, because of those same studies, we know that the real costs of medical malpractice have little to do with litigation. The real costs of medical malpractice are the lost lives, extra medical expenses, time out of work, and pain and suffering of tens of thousands of people every year, the vast majority of whom do not sue. There is lots of talk about the heavy burden that “defensive medicine” imposes on health costs, but the research shows this is not true.

Third, we know that medical malpractice insurance premiums are cyclical, and that it is not frivolous litigation or runaway juries that drive that cycle. The sharp spikes in malpractice premiums in the 1970s, the 1980s, and the early 2000s are the result of financial trends and competitive behavior in the insurance industry, not sudden changes in the litigation environment.

Fourth, we know that “undeserving” people sometimes bring medical malpractice claims because they do not know that the claims lack merit and because they cannot find out what happened to them (or their loved ones) without making a claim. Most undeserving claims disappear before trial; most trials end in a verdict for the doctor; doctors almost never pay claims out of their own pockets; and hospitals and insurance companies refuse to pay claims unless there is good evidence of malpractice. If a hospital or insurance company does settle a questionable claim to avoid a huge risk, there is a very large discount. This means that big payments to undeserving claimants are the very rare exception, not the rule.

Finally, we know that there is one sure thing—and only one thing—that the proposed remedies can be counted on to do. They can be counted on to distract attention long enough for the inevitable turn in the insurance cycle to take the edge off the doctors' pain. That way,

people can keep ignoring the real, public health problem. Injured patients and their lawyers are the messengers here, not the cause of the medical malpractice problem.

Jesica and Jeanella

No one who follows the medical news is likely to forget Jesica Santillan, who died after a receiving a heart and lung transplant at Duke University Hospital in February 2003. Brought to the United States from a poor Mexican town in search of better medical care, she inspired her new North Carolina community to raise money for a heart and lung transplant, and she inspired people to care about the problem of the medically uninsured.

When she received the transplant, it turned out to be the wrong blood type—a basic, easily avoidable, and tragic mistake. Her body began rejecting the new organs even before the transplant surgery was over. Her supporters launched a national public relations effort to find a second, compatible, set of heart and lungs, while accusing Duke of trying to stifle their efforts to avoid publicizing the mistake. She died shortly after receiving a second transplant, less than two weeks after the first, while the whole world watched.

At the same time, doctors, hospitals, medical liability insurance companies, and their trade and professional organizations were mounting a fierce campaign for tort reform all over the United States. Beginning in about June 2002 and reaching a peak in early 2003, the medical malpractice crisis dominated the medical news. This, too, contributed to the attention on Jesica: a public and almost impossible to understand mistake at a leading medical center, at a time when doctors claimed that frivolous medical malpractice lawsuits and outrageous jury verdicts were the problem.

Fewer people know that Jesica Santillan was actually the second girl in seven months to die after receiving a transplant with the wrong blood type at a prominent medical center. Jeanella Aranda was the first. She received a transplant of part of her father's liver at Children's Medical Center in Dallas in July 2002, allegedly after a surgical mistake in an earlier operation had destroyed her own liver.

Due to a "laboratory mix-up," according to the New York Times, doctors thought that her father's blood type was a good match, when it was actually her mother's who matched. "The blood type mismatch was not detected until Aug. 5, 19 days after the surgery, when Mrs. Aranda, who was aware that her husband had type A blood, noticed that Jeanella's transfusions were Type O, and asked whether the transplant had been a mismatch." Jeanella died on August 6, 2002.

Shortly after Jesica died in February 2003, the Los Angeles Times linked her story to Jeanella's while criticizing medical liability reform proposals in Congress. "Communication errors of the sort that doomed Jesica and Jeanella are all too common in medicine," the Times reported. The Times quoted Carolyn M. Clancy, director of the federal Agency for Healthcare Research and Quality, who said, "There's more double-checking and systematic avoidance of mistakes at Starbucks than at most health-care institutions." And the Times cited a survey published in the New England Journal of Medicine, reporting, "Only 30% of patients harmed by a medical error were told of the problem by the professional responsible for the mistake."

Jesica's and Jeanella's stories became even more tightly linked to the medical malpractice debate when the families of both girls brought medical malpractice claims. As far as I have been able to tell, no one called those claims frivolous. Quite the reverse. Duke Hospital publicly apologized to Jesica's family, offered to fund a new program in her name, and announced that it had changed its organ transplant procedures. Children's Medical Center appointed a new medical chief for its organ transplant program and announced that it had adopted new policies and procedures "designed to improve every link of the quality control chain." Both cases settled.

Throughout the medical malpractice crisis, leading newspapers carried accounts of other obvious medical mistakes. Like the L.A. Times piece on Jesica and Jeanella, the accounts often linked the particular mistakes to the larger story about the extent of medical malpractice in U.S. health care. The report by the Institute of Medicine of the National Academy of Science, *To Err Is Human*, was a common source. That report summarized research showing that nearly 100,000 people die in the United States each year from medical mistakes—more than die from automobile and workplace accidents combined.

Because of that research and reporting, public opinion is coming around to the view that, distressingly, Jesica's and Jeanella's problems are not unique; our health care system has a serious medical-injury problem. But at the same time, public opinion remains firmly anchored to the view that we have an explosion of what President George W. Bush calls "junk lawsuits" and that medical malpractice lawsuits contribute significantly to the high cost of health care in the United States.

Stories like Jesica's and Jeanella's helped shift public opinion about medical malpractice only because they were linked to research and reporting that reframed medical malpractice as a public health problem. But their stories did not shift public opinion about medical malpractice lawsuits, because they were not linked to research and reporting that reframed malpractice lawsuits as a public good.

Like any durable and effective myth, the medical malpractice myth can accommodate almost any number of real-life examples that conflict with the myth—by classifying those examples as exceptions. Nobody but a researcher has the time or inclination to go out and take a systematic look at medical malpractice lawsuits in order to evaluate what is the rule and what is the exception. Everyone else has to take individual examples as they come.

As a result, lawsuits like Jesica's and Jeanella's do not pose a serious challenge to the myth. No one says that all the lawsuits are frivolous. But everyone "knows" that most of them are. Even a regular drumbeat of contrary examples does not call the myth into question, because the myth provides the context in which we understand the examples, not the reverse. It is time to change that context.

The Power of the Tort Litigation Myth

The medical malpractice myth is part of a larger story about the litigation explosion, the litigiousness of Americans, and the debilitating effect that lawsuits have on the U.S. economy. I have often encountered this larger story in my work directing the Insurance Law Center at the University of Connecticut School of Law in Hartford, Connecticut. We try very hard to get university and insurance industry people to talk to each other. People in

universities call on me to find out what is happening in the insurance industry, and people in the insurance industry call on me to find out about the university research.

One good example came in the summer of 2003 when I was invited to speak to a meeting of insurance company CEOs in London. My assignment was to provide an overview of the academic research on how the U.S. tort system really works and, in particular, to report on the substantial research debunking many of the claims about the litigation explosion.

My host invited me to come to the whole meeting, even though my session was near the end. I had never met a CEO from any significant company, let alone an insurance company. For me, the chance to spend two days with dozens of insurance company CEOs was quite an opportunity.

I used the time to meet and talk with quite a few of the CEOs, to see what they were like and also to get a sense of what they were expecting to hear from me. They were smart, hard-working people. They were at least as well read and informed about current events as most of my university colleagues, and on the whole they were more informed about what was happening in countries other than their own.

I was surprised and a bit concerned, however, to find that almost everyone assumed I was there to provide them with the latest research on the extent of the litigation explosion and the particular ways in which the U.S. tort system was out of control. At first I worried that they thought I had been paid to tell them whatever they wanted to hear. (I had not been paid and, even if I had, I would not have done that.) So I checked with my host to make sure he knew what they were in for. He did. In fact, he was rather looking forward to the fireworks.

My concerns addressed, I put on my participant observation research hat and resolved to find out why the CEOs expected that from me. What I learned was that they assumed I was there to talk about the out-of-control tort system not because they thought I was paid to tell them what they wanted to hear, but rather because they believed, intensely, that chaos was the real situation.

That was interesting. I had always harbored a suspicion that insurance industry leaders promoted the tort litigation myth despite what they really knew to the contrary. Maybe some do, but not these people.

The CEOs were well informed about political and economic matters generally. They were especially well informed about things that affect their business. And the U.S. liability situation affects their business. So, as far as they were concerned, if they thought that there was a tort litigation explosion in the United States and if they thought that the U.S. tort system was out of control, then that was how it was.

Whatever else anyone might think, their support for tort reform was not a cynical effort to make money at the public's expense. While the CEOs did in fact think that tort reform was in their industry's interest, the emotion that fired them up came from belief—a belief that is not rooted entirely in self-interest. The debate over the other major issue for which they brought outside experts to their meeting (new international accounting standards) was pale by comparison. Yet, in financial terms that other issue would have a much bigger immediate

impact on their business than liability reform, especially for the life insurance CEOs, who are not even in the liability insurance business. The CEOs tried to get fired up about it, but they could not. Accounting rules simply do not plug into beliefs about right and wrong in remotely the same way as tort liability.

They were concerned about the litigation explosion, not just because it affected their business, but also because of the impact they expected it to have on the larger economy and society. They were concerned about the United States, where they saw the explosion originating, and Europe, where they saw signs that it was spreading. They were looking forward to hearing from me so they could better understand and treat this American disease.

In this regard at least, I am sure that I disappointed my audience. As I reported to them, except for auto accidents and the occasional “mass tort” situation like asbestos, Agent Orange, or breast implants, Americans actually do not bring tort claims all that often, especially compared to the number of accidents and injuries there are. We now have two decades of solid research documenting this fact. What is more, the rate of auto lawsuits—the most frequent kind of tort lawsuit—is going down. And, despite the media focus on mass torts, products liability, and medical malpractice, those kinds of cases are far less important in dollar terms than either auto accidents or workers’ compensation.

In 2003 U.S. businesses paid \$27 billion for auto liability insurance premiums, \$57 billion for workers’ compensation insurance premiums, and less than \$5 billion for products liability insurance premiums. Doctors, hospitals, and other health professionals paid only about \$11 billion in medical malpractice insurance premiums. This means that the real insurance money and the real claiming action for U.S. business does not lie in high-profile areas like products liability and medical malpractice. The real action lies in routine, below-the-radar areas like workers’ compensation and automobile lawsuits. U.S. businesses paid less than half as much for products liability and medical malpractice insurance, combined, as they paid for auto insurance, alone, and only a quarter of what they paid for workers’ compensation insurance.

Products liability and medical malpractice insurance look even less significant compared to what ordinary Americans paid for personal auto liability and no-fault auto insurance: \$115.5 billion in 2003. That is more than U.S. business paid for auto, workers’ compensation, products liability, and medical malpractice insurance combined. Adding all the premiums of all the different kinds of liability insurance together results in a big number—about \$215 billion in 2003—but that number is hardly exploding, and the medical malpractice insurance share—\$11 billion—looks pretty small by comparison. It looks even smaller next to the \$1.5 trillion plus (that is more than 1,500 billion dollars) we spent on health care that year. Something that amounts to less than 1 percent of health-care costs simply cannot have the impact on health care that the medical malpractice myth would have us believe.

Even on a per doctor basis, that medical malpractice insurance number is not as high as many people think. There were nearly 900,000 doctors in the United States in 2003. That means that medical malpractice insurance premiums were about \$12,000 per doctor, and of course hospitals, dentists, and other health-care professionals buy malpractice insurance, too. So the average premium doctors paid was less. Some kinds of doctors have to pay much more. Obstetricians are the best-known example. But there is a simple insurance reform that will solve that problem, as I will explain in chapter 8.

Where Americans do excel in litigation is in the area of business lawsuits. If you read the business section of the newspaper, you know that B2B—business-to-business—sales are hot. So is B2B litigation. Some of the business executives who complain about the litigation explosion must be thinking about their own behavior. In one indication, the proportion of lawyers who bring personal-injury lawsuits has remained steady since 1975, while the share of lawyers involved in business litigation has more than tripled.

I enjoyed the London presentation, and, as predicted, we had some vigorous debate. Did I persuade the CEOs that the tort litigation explosion is a myth? They did not get to be CEOs by lacking confidence, so they were not shy about telling me what they thought. Some argued with me then. Some continue to argue with me. But we are still talking. And their people are reading the research.

I also told them, and I continue to repeat every chance I get, that they should be careful what they wish for. What other industry asks the government to reduce the demand for its product? Tame the tort system, and hospitals and other big businesses will decide that they do not need liability insurance. Take away the risk of a really big lawsuit, and a line of credit is nearly as good as an insurance policy, and, with a line of credit, you pay only for the credit you use. Once businesses can predict their liability losses with enough certainty, a monthly savings plan is even better, and it costs even less.

Who knows how long it will take me to convince them, if I ever will. But I have already noticed a change in the rhetoric, from complaints about the number of lawsuits to complaints about the size of the lawsuits. Complaints about the size of lawsuits represent a real improvement, because at least they have some basis in reality. Medical malpractice claims are getting bigger. So are auto claims and workers' compensation claims. Of course, the fact that claims are getting bigger does not mean that the tort system is out of control. Tort claims are getting larger mostly because health care costs more than ever before.

Putting the Medical Malpractice Myth in a Political Context

My interest in the medical malpractice myth grows out of a variety of experiences that have nothing to do with politics. My father and father-in-law are both doctors. I regularly teach tort law, the branch of law that includes medical malpractice law. My field research on personal-injury litigation introduced me to many lawyers on both sides of medical malpractice lawsuits. And my role as the director of an insurance education and research program virtually guaranteed that I would want to understand the medical malpractice insurance crisis that broke out in 2002.

Despite the fact that my interest in medical malpractice is not political, there is no avoiding the fact that medical liability reform has become a very partisan issue. With some exceptions, Republican legislators favor cutting back on tort liability and Democratic legislators do not. And over the course of the last thirty years, tort reform has become one of the top political objectives of groups like the Chamber of Commerce, the American Manufacturers Association and other traditionally business-oriented trade associations. These groups support medical liability reform as part of their effort to limit tort law more broadly.

The effort currently underway in Washington to include pharmaceutical companies and medical device manufacturers under the umbrella of national medical liability reform shows how medical malpractice reform can pave the way for broader efforts to limit liability. Pharmaceutical companies and medical device manufacturers are not the target of medical malpractice lawsuits. Instead they face the same kinds of product liability claims as any other manufacturer. But their products are used in the medical field, and therefore the medical liability reform tent may be big enough to hold them, too—or so their Washington, D.C., lobbyists contend. From there, it is a small step to limit liability in other areas, so that all defendants receive equal treatment.

Doctors have conflicting interests in the larger political struggle over access to the courts. On the one hand, efforts to limit medical liability serve their long-term interest in self-regulation and professional autonomy. As researchers from Harvard Medical School have explained, “Physicians and their societies are actively resisting the legitimacy of the law as a means of controlling and regulating the practice of medicine. . . . The profession’s organizations have invested extensive financial, cultural and political resources to resist what both rank-and-file practitioners and the professional collective regard as infringements on medical work.”

On the other hand, doctors are consumers and, increasingly, employees and independent contractors who work for large organizations. In these roles they have a strong interest in maintaining access to courts.

These conflicting interests are playing out right now in my state of Connecticut. On the one hand, our state medical society has been lobbying the Connecticut legislature, hard, in favor of medical liability reform. On the other hand, the society has filed lawsuits against several big health insurance companies that doctors believe are not playing fair. After the medical society achieved a favorable result in one of the lawsuits, I spoke to their executive director, suggesting that there might be some irony in their using the courts to advance doctors’ interests—while at the same time trying to limit what patients could do in court.

He explained that there is no conflict in the two positions: the medical society’s lawsuits involve different issues and different fields of law than medical malpractice. I had to agree that he was correct in technical, legal terms. But to my mind, the society is walking a tightrope. The skilled artisans and craftsmen who formed the American Federation of Labor used to think that they had more in common with businessmen than with the industrial trade unions. They changed their view in the early part of the twentieth century, when the expansion in the scope of manufacturing and construction restricted their independence and control over the workplace. Will doctors follow a similar path in the twenty-first century, when large health plans place greater pressure on health-care providers to control costs and take a more businesslike approach to health care?

Part of the art of politics is keeping supporters focused on the things they agree upon so they don’t break up the coalition by fighting about other things. Tort reform is one issue on which doctors, health insurers, and most businesses clearly agree. The medical malpractice myth helps to maintain that alliance, by keeping rank-and-file doctors and the medical societies completely committed to tort reform and grateful to the (mostly Republican) politicians who deliver it.

President Bush's January 2005 speech on medical liability reform in Collinsville, Illinois, shows just how strongly his administration is promoting the medical malpractice myth. As with any major political address by a politician from either party, the visual images, alone, tell a significant story. The White House video of the speech opens with a wide-angle shot of the president walking toward a podium stationed in front of a bleacher full of cheering doctors in white coats, beneath a large banner on which the words "Affordable Healthcare" are framed between two large images of the caduceus—the twined snake and wing symbol of the American medical profession. When the camera pulls in tight for the speech, we see a striking image: President Bush, the presidential seal on the podium below, and doctors in white coats all around.

In advance of the Collinsville address, the White House had announced that the president would be discussing medical liability reform. By linking "affordable health care" with medical liability reform and surrounding the president with cheering doctors, the image conveyed a clear message. Medical malpractice lawsuits are a big reason health care is so expensive. The president supports doctors' efforts to eliminate that cost. And doctors support the president.

The speech itself delivered the same message. "I'm here to talk about how we need to fix a broken medical liability system," the president announced to a roar of applause. He mentioned by name the Illinois Republican politicians attending the speech, explained how they are supporting the cause, and offered special thanks to the Republican legislator who was "leading the medical liability reform effort" in the Illinois state legislature. After running through the top agenda items for his administration and a few other health-care reform ideas designed to control health-care costs, he arrived at his main topic:

What's happening all across this country is that lawyers are filing baseless suits against hospitals and doctors. That's just a plain fact. And they're doing it for a simple reason. They know the medical liability system is tilted in their favor. Jury awards in medical liability cases have skyrocketed in recent years. That means every claim filed by a personal-injury lawyer brings the chance of a huge payoff or a profitable settlement out of court. That's what that means. Doctors and hospitals realize this. They know it's expensive to fight a lawsuit, even if it doesn't have any merit. And because the system is so unpredictable, there is a constant risk of being hit by a massive jury award. So doctors end up paying tens of thousands, or even hundreds of thousands of dollars to settle claims out of court, even when they know they have done nothing wrong.

From there, the speech proceeded point by point through the medical malpractice myth: the frivolous lawsuits, the courts' bias against doctors, the skyrocketing jury awards, the huge settlements in cases in which doctors did nothing wrong, the direct link between lawsuits and insurance premiums, the doctors leaving the practice of medicine, the patients who cannot find doctors, and the huge waste of money on defensive medicine. "This liability system of ours is," the president said, "what I'm telling you, is out of control." It was an effective, succinct, and powerful statement of the medical malpractice myth.

It would take a book—this book I hope—to set the record straight after a speech like that.

Order today at www.trialguides.com