

## Can we ensure “justice for all” in medical injury cases?

New findings prove adversarial litigation is unfair to both sides

**N**ational leaders in medicine and government are actively seeking new systems for handling medical injury compensation. The current adversarial litigation system is slow, costly, and unfair to both physicians and patients. The best approach is unclear, and there is surprisingly little scientific literature on the ecology of professional liability litigation.

Although each case involves a unique set of circumstances, much can be learned by examining large series of closed liability claims. Recently, Studdert and colleagues reported on a review of more than 1,400 such claims.<sup>1</sup> Their observations point the way to a new approach to resolving medical injury cases: administrative health courts. One of their most important observations is that the vast majority of medical liability claims (97%) are associated with a clearly identified adverse outcome (injury), and many of these outcomes result in death or disability. Clearly, there is a problem that needs to be addressed by a rational compensation system.

### ■ “Systems approach” to reducing injuries

From a medical viewpoint, one response is to try to reduce the rate of the injuries that commonly result in litigation.

**Consistent with patient safety movement.** On the positive side, this approach is consistent with the growing “patient safety” movement. The patient safety movement is predicated on the idea that we can use a

“systems approach,” much like that used in industrial processes, to redesign health care so that fewer injuries occur.

**Unintended side effects.** On the negative side, trying to reduce uncommon but frequently litigated injuries is likely to have unintended side effects, including accelerating the momentum for defensive medical practices.

In obstetrics, for example, the increasing cesarean section rate is associated with a reduced rate of severe newborn injuries, a frequent cause of litigation. Unfortunately, increasing the cesarean section rate may also increase maternal morbidity. But maternal morbidity associated with cesarean section seldom results in litigation. By increasing safety for the newborn, we may marginally decrease safety for the mother.

### ■ Is independent expert opinion reliable?

The Studdert study is strong evidence for adoption of an administrative court system to handle medical injury lawsuits. Multiple physician experts were asked to review each record and determine if physician error contributed to the adverse outcome (medical error).

According to the expert reviewers, physician error contributed to the injury in 60% of the cases and did not contribute to the injury in the remaining cases.

**Jury judgments** tended to be consistent with the experts’ findings.

- In the cases in which the experts con-



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### **FAST TRACK**

#### **ACOG: Benefits of administrative health courts**

- Faster adjudication
- Clear standards
- Judges guided by court-employed experts in cases where medical error contributed to injury
- Damages more consistent, fair to both patients and physicians

cluded that physician error did *not* contribute to the adverse outcome, the jury agreed 72% of the time. In these cases, the jury returned a judgment in favor of the defendant.

- In the cases in which the experts concluded that physician error *did* contribute to the adverse outcome, the jury agreed 73% of the time. In these cases, the jury returned a judgment in favor of the plaintiff.

**This study supports the premise** that independent physician experts can review cases of alleged medical malpractice and “reliably” determine if an injury was due to physician error.

### ■ Cheaper, faster resolution

Adjudication by administrative health courts where independent experts assess the merits of a case would markedly reduce the costs of the current system and likely speed up resolution of cases and payments to injured patients. Administrative courts have been successfully used to adjudicate worker injuries in the United States and to resolve medical injury cases in many European countries. Senators Michael Enzi (R-WY) and Max Baucus (D-MT) have filed legislation (S. 1337) that would authorize and fund pilot proj-

ects to examine the benefits and risks of administrative health courts.

#### 4 key benefits

ACOG supports this legislation and has identified at least 4 benefits of administrative health courts:

1. Adjudication of cases would speed up.
2. Clear and consistent standards could be created.
3. Administrative health judges would be guided by neutral, court-employed medical experts in cases where medical error contributed to injury.
4. Damage awards would be more consistent, predictable, and fair to both patients and physicians.

We may be at the beginning of a long process that will move us from adversarial litigation to administrative health courts for adjudication of adverse medical outcomes.



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#### REFERENCE

1. Studdert DM, Mello MM, Gawande AA, et al. Claims, errors and compensation payments in medical malpractice litigation. *N Engl J Med.* 2006;354:2024-2033.

## What do **you** think?

For a case of Erb palsy associated with shoulder dystocia in which standard obstetrical interventions were used, how would you prefer that the medical liability claim be resolved?

- Adversarial litigation
- Administrative health court
- Not sure



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