



## POLICY PERSPECTIVE

WEAKNESSES IN THE CURRENT MEDICAL TORT SYSTEM HAVE GENERATED WIDESPREAD INTEREST IN REFORM. SOME EXPERTS ARE PARTICULARLY INTERESTED IN DEVELOPING ADMINISTRATIVE COMPENSATION SYSTEMS TO PROCESS MEDICAL INJURY CLAIMS, A MODEL THAT HAS CAUGHT THE ATTENTION OF STATE AND FEDERAL POLICY-MAKERS. TRADITIONAL SELLING POINTS FOR SUCH SYSTEMS INCLUDE INCREASED SPEED, ACCURACY AND EFFICIENCY. A NEWLY RECOGNIZED ADVANTAGE OF SUCH MODELS IS THE POTENTIAL TO IMPROVE PATIENT SAFETY BOTH BY PROMOTING A CULTURE IN WHICH SAFETY IS PRIORITIZED AND BY INCREASING THE USE OF CLAIMS DATA IN SAFETY RESEARCH.

## The Problem

The shortcomings of the medical tort system are widely acknowledged. First, only a handful of those who sustain medical injuries receive compensation. Second, malpractice cases often take years to resolve and when damages are awarded, compensation amounts are inconsistent. The inefficiency of the tort system is also costly to society—only about 40 cents of every dollar spent on malpractice insurance goes to compensate injured patients (the rest goes to legal fees, court costs, insurance company administration and other costs).<sup>1</sup> Finally, the tort system does not seem to effectively promote patient safety and may actually discourage accurate medical error reporting among health care providers.

These drawbacks have prompted substantial interest in medical liability reform. New research conducted by Mello, Studdert, Kachalia, et al. describes a model for an alternative administrative compensation system featuring health courts and explains its advantages over the tort system. The study, “Health Courts’ and Accountability for Patient Safety,” was funded by the Robert Wood Johnson Foundation’s Pioneer portfolio.<sup>2</sup>

## What is a health court?

The authors define a health court as a system of administrative compensation for medical injuries with five main features:

1. Specially trained judges with expertise in health court adjudication make injury compensation decisions and operate outside of the regular court system.
2. Unlike the tort system, which requires that claimants prove negligence, health courts use a broader definition of substandard care with “avoidability” of the injury as the criterion. An injury is compensable if it would not have occurred had best practices been followed.
3. Where possible, decisions are guided by experts’ *ex ante* determinations about the avoidability of medical injuries. Their opinions would be informed by the leading scientific literature.
4. Decision aids based on both precedent and the *ex ante* determinations of injury avoidability allow for fast-track compensation decisions for certain types of injury.
5. *Ex ante* guidelines also direct decisions about noneconomic damages awards.

## What are the advantages of health courts?

The authors describe several advantages of moving from a tort system to a health court system in terms of efficiency and patient safety:

- The speed, consistency and reliability of compensation decisions would improve. With the help of explicit decision aids, judges would be able to make more consistent decisions across similar cases. The tort system, in contrast, does not incorporate presumptions or precedent, nor does it provide juries with guidelines for calculating damages.
- A much broader group of injured patients would be eligible for compensation under health courts because of the avoidability standard. In addition, the relative ease of filing and processing claims (which normally would not require legal counsel) would encourage more of the eligible population to pursue compensation. The authors argue that “improving the capacity of the compensation system to serve the group it is intended to serve” is a compelling reason for moving to the administrative health courts model.
- Health courts would allow for greater cost control because the guidelines that inform compensation decisions could be adjusted to ensure that the socially optimal amount is spent on injury compensation. Controlling costs in the tort system, on the other hand, is hampered by the system’s decentralization and lack of guidelines. Modeling also suggests that health courts could award compensation to a wider range of injured patients (at a more modest level) without raising costs, due in part to savings from administrative expenses.
- Patient safety would improve because the more explicit avoidability criterion would give health care providers clearer signals regarding areas where improvement is needed. Provision of substandard care is not effectively deterred in a tort system in part because the negligence standard is ambiguous. By reducing the stigma associated with claims for injury compensation, health courts would also promote a culture of safety and disclosure. Because more claims would be filed in this system, hospitals would gain more information about medical injuries that would allow them to conduct better safety tracking and analyses. Experts believe this shift in institutional norms has the potential to generate significant gains in patient safety. Indeed, administrative compensation systems in countries like New Zealand, Denmark and Sweden have promoted improved research on patient safety, and offer important lessons for how such a model may work in the United States.

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1 Mello MM. Understanding medical malpractice insurance: a primer. Research Synthesis Report No. 8 (Princeton, NJ: the Robert Wood Johnson Foundation, 2006). Available at [http://www.rwjf.org/publications/synthesis/reports\\_and\\_briefs/pdf/no8\\_primer.pdf](http://www.rwjf.org/publications/synthesis/reports_and_briefs/pdf/no8_primer.pdf).

2 Mello MM, Studdert DM, Kachalia AB and TA Brennan. “Health Courts’ and Accountability for Patient Safety.” *The Milbank Quarterly*. 84(3): 459–492, 2006.