Health Care in Crisis
Donald J. Palmisano, MD, JD

There is a crisis in American medicine brewing up a perfect storm that could capsize our healthcare system as we know it. The culprits are a health insurance system that leaves more than 41 million Americans without coverage; a fatally flawed payment system that threatens the foundation of Medicare; onerous rules and regulations that are forcing physicians to spend more time on paperwork than with patients; unreasonable (and unfunded) government mandates; and the ongoing attempts by some insurers to delay, deny, or “downcode” the legitimate claims physicians submit for the care and healing they provide.

The most threatening component of the healthcare storm, however, is a broken medical liability system that defies common sense and reason. This danger is picking up speed like a tornado sweeping through states, leaving patient access problems in its wake. This broken liability system is forcing talented and gifted physicians out of high-risk specialties, leaving some communities without access to critical healthcare services.

An American Medical Association (AMA) analysis shows that medical liability has reached crisis proportions in 19 states, with another 35 states on the brink of crisis. What is a crisis? The AMA considers it a crisis when a pregnant woman is in labor and distress and no obstetrician is available, or when a 9-year-old boy has a head injury but there is no neurosurgeon remaining in his region. This is happening to the patients we care for and care about across the country.

Last summer, the only maternity ward in South Philadelphia shut its doors because of medical liability costs. Today, not one hospital in South Philadelphia delivers babies, and 7 of 39 maternity wards have closed or are about to close. An exodus of physicians out of Pennsylvania is also taking place, especially among high-risk specialists and new MDs. One of the physicians who fled the Keystone state compared his decision with fleeing a burning building. Pennsylvania physicians are not alone. Other physicians around the country are pulling up stakes, dropping or reducing high-risk services, or even taking early retirement.

In South Texas, a pregnant woman arrived in a physician’s office just 10 minutes from delivery. She was trying to drive 80 miles to her doctor in San Antonio because her long-time physician had stopped delivering babies.

In Las Vegas, a man seriously injured in an automobile accident died because the city’s only Level I trauma center had to shut down for 10 days in July 2002—the surgeons who worked there couldn’t afford their liability premiums. For those 10 days, Las Vegas was the only city of its size in the country without such a life-saving medical facility. The nearest similar trauma center was 5 hours away.

In New York State, 16% of obstetricians have stopped practicing obstetrics because of the state’s medical liability crisis. Forty percent of the state’s counties have fewer than 5 practicing obstetricians. Seven counties in New York State, with as many as 300 births per year, currently have no obstetrician.

In Ohio, rising liability insurance costs had an oncologist eyeing retirement, but his patients raised more than $40 000 to pay the premium and keep him in practice. If liability reform legislation is passed, the oncologist said, maybe other patients won’t have to step in to keep their physician’s practice from closing.

Twenty-seven of Mississippi’s 80 counties have fewer physicians today than they did in 1990, and 21 of those 27 counties have 10 or fewer physicians. This loss of physicians is devastating to rural and underserved communities, as pediatric specialist Kurt Kooyer, MD, can attest. He left the

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small town of Rolling Fork in the Mississippi Delta. He was fed up with a legal system that allowed lawyers to file suit against him—without his patients even knowing it. Dr Kooyer had been the only pediatrician among Rolling Fork’s 3 physicians. He had arrived in 1994 and was responsible for the infant mortality rate falling from an average of 10 deaths per 1000 live births to 3.4. Today, Rolling Fork no longer enjoys his services. Today, Dr Kooyer lives in North Dakota, a state with a better liability climate.

So, how did the current liability system become so dysfunctional? Trial lawyers will tell you that it’s the “greedy liability insurers,” but the facts show that insurers pay out more in claims than they receive in payments. A.M. Best (a leading insurance industry analyst) has determined that investment returns for liability insurers—mostly from bonds—have been stable and positive for the past 5 years. No, it’s not poor insurance company investments fueling the current crisis; rather, it’s the outrageous awards for noneconomic damages that are driving insurance rates up.

Another contributing factor to the current crisis is the sheer volume of lawsuits. On any given day, more than 125 000 cases against physicians clog our nation’s courts. Seventy percent of those filed, however, are closed without payment, and physicians win 80% of the cases that do go to trial. If 70% of the appendices I removed were normal, I wouldn’t be allowed to operate! How about instituting peer review for the lawyers who file these claims?

America’s patients deserve reform because they are the ones who ultimately bear the real cost. Our broken medical liability system adds $70 to $126 billion dollars to healthcare costs each year, according to the US Department of Health and Human Services. These resources could be better used to help provide health care to the uninsured, improve access to medical care in underserved areas, or spur innovation in medical technologies.

To stop the jackpot justice mentality that is jeopardizing our healthcare system, we must take the same approach that physicians have used to bring us so many wondrous medical advances: the scientific method. By making careful observations, gathering evidence, testing hypotheses, and validating findings, we can prepare a successful argument for reform. Furthermore, we can use the scientific method to debunk the unfounded and ever-changing arguments offered by the opponents of liability reform.

Here’s what use of the scientific method has revealed thus far: Today, 6 states, including my home state, Louisiana, enjoy a stable liability climate. The common denominator these states share is strong, sensible medical liability reforms, including caps on noneconomic damages (pain and suffering).

One of these stable states is California, which passed the Medical Injury Compensation Reform Act (MICRA) in 1975. Since MICRA was enacted 29 years ago, liability premiums in California have risen 182%. If that sounds like a lot, note that the average rate of increase for the nation during that same time period has been nearly 570%—almost a 6-fold increase. To give that statistic some added context, an obstetrician in Los Angeles (where reforms are in place) pays about $69 000 a year for insurance. That same obstetrician in Miami, Fla (a state without meaningful reforms) pays about $249 000 or more for liability insurance.

All told, MICRA saves California about $1 billion per year in liability premiums. Best of all, patients can still find physicians to deliver their babies, read their mammograms, and perform emergency surgery.

Of course, preserving and protecting our patients’ access to care are really what our fight for reform is all about. President George W. Bush has repeatedly highlighted how America’s “culture of lawsuits” is severely jeopardizing patients’ access to care. Speaking recently to physicians and patients in Arkansas, the president said, “These senators have got to understand no one has ever been healed by a frivolous lawsuit.”

In March 2003, the US House of Representatives passed bipartisan medical liability reform known as the HEALTH (Help Efficient, Accessible, Low-Cost, Timely Health Care) Act (H.R. 5). Modeled after California’s proven reforms, the HEALTH Act would:

- Ensure that patients receive 100% compensation for their economic losses, including medical expenses, rehabilitation costs, child care, lost wages, and other quantifiable costs, if harmed by a physician’s negligence;
- Establish periodic payments of future damages;
- Maximize the amount of money that juries award to patients, not trial lawyers; and
- Place a $250 000 cap on noneconomic damages (eg, pain and suffering, mental anguish, physical impairment) and allow states the flexibility to establish different caps, whether higher or lower than those provided for in H.R. 5.

H.R. 5 would safeguard patients’ access to care by enacting common-sense reforms that provide a $250 000 cap on noneconomic damages, thus reasonably limiting damages without preempting existing state law.

The Supremacy Clause, principles of preemption, and the language of H.R. 5 would protect states with existing caps and provide a federal standard for a noneconomic cap, even if such caps are barred by a state constitution.

A 2003 Congressional Budget Office study on H.R. 5 (108th Congress) indicates that certain tort limitations, primarily caps on awards and rules governing offsets from collateral-source benefits, effectively reduce average premiums for medical liability insurance. Consequently, the Congressional Budget Office estimates that, in states that currently do not have controls on medical liability torts, H.R. 5 would significantly lower premiums for medical liability insurance from what they would otherwise be under current law.

The HEALTH Act would bring common sense back to our courtrooms and provide a national solution to a national
problem. The US Senate, however, remains the final hurdle to accomplishing this goal. The AMA is currently working with the Senate leadership to press for more votes on this bill in 2004.

President Bush and Senate Majority Leader Bill Frist understand we have to fight now and fight hard, because America can no longer tolerate a broken liability system that threatens patients’ access to care and doctors’ existence.

We’ve seen that common-sense medical liability reform can work. Now it’s time to take the proven treatments and apply them to the rest of our country. The AMA will not relent on this. We will not abandon our patients. No matter how long it takes, the AMA will continue to push Congress to institute meaningful tort reform. The practice and the promise of medicine depend on it. At stake is nothing less than the health of our patients.
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