



Pennsylvania Trial Lawyers Association

## *Talking Points on: Health Courts Scheme*

**Introduction.** Proposals for so-called “Health Courts” would remove cases of medical negligence from the courts and place them in an administrative program that’s set up and run by hospitals, insurance companies, and so-called neutral experts. Judges and juries would no longer have decision-making authority in critical cases where someone has been harmed by preventable medical error.

The big insurance corporations and medical special interests who argue in favor of health courts say that judges and juries do not have the expertise to rule on matters relating to medical malpractice. This is contrary to both the 7th amendment of the U.S. Constitution and the Pennsylvania Constitution, which, for more than two centuries, has put its faith in juries to deal with matters ranging from the life and death of a criminal defendant, to a products liability case, to a sophisticated case involved corporate fraud.

The Health Courts scheme is an anti-democratic measure designed to cure a “crisis” that doesn’t exist and to increase the profits of insurance companies who are gouging our doctors.

### **Talking Points**

- **Health courts mean less rights for injured patients.** Those in favor of health courts like to compare it to similar administrative programs like workers’ compensation. An important difference, however, is that Workers’ Compensation is a no-fault system--an injured employee does not have to show negligence on the part of an employer to receive a monetary award--only that the accident occurred in connection with their job. Under the health court scheme, injured patients waive their right to go to court and agree to a set schedule of compensation that’s set not by the courts or the legislature, but by hospital special interests. Patients still must go before an “adjudicatory

### **Top Stats**

1. Recently released data by the Pennsylvania Supreme Court reports a 38% decline in med mal filings statewide from the base years 2000-2002.
2. In Philadelphia, the state’s largest judicial district, the decline has been over 50 percent. 2006 also saw the fewest number of jury verdicts resulting in plaintiff awards.
3. Medical malpractice cases currently constitute only about four percent of all tort cases in state civil courts (in thirteen states reporting), so removing them would provide only minuscule savings.
4. More than 90 percent of cases are settled without a jury trial.
5. Just 5.3 percent of doctors are responsible for 56 percent of medical malpractice payouts nationally. Of these, only 7.6% have ever been disciplined by state medical boards.

panel” and prove negligence.

- **Waivers will be controversial and contested.** A key element is the waiver by the patient, their acceptance of health courts as the alternative to litigation. But, so often, waivers will need to be obtained from patients who are very sick, and either under severe stress and anxiety and/or pressure from family members and medical professionals.
  - Will more litigation result from questions about the validity of emergency room waivers?
  - Will doctors and hospitals refuse medical care from patients who refuse to sign health courts waiver?
- **Health courts are unconstitutional.** The Pennsylvania state constitution gives citizens the right to a jury trial, and health courts would take away this long-standing right. Art I, Section 6. Courts around the nation have held that it is only a fair trade for someone to waive their civil justice rights in favor of a health court when they no longer have to prove fault. In addition, just like with the legislation which established Workers Compensation, health courts would require a constitutional amendment. Proposals for health courts step over these constitutional procedures. They aim to take away the rights of injured patients without a referendum, or a say by voters.

### Top Talking Points

1. So called “health courts” are unconstitutional and stack the deck against injured victims.
2. Removes consideration of human tragedy of wrongdoing and negligence.
3. Court studies say there is no med-mal crisis.
4. Whole system is unproven and hugely expensive.
5. Keep decision making in critical cases in the trustworthy hands of judges and juries – not special interests.

At least 11 states have found other, less radical medical liability tort restrictions violate their state constitution’s right to jury.<sup>1</sup> At least 12 states that have upheld less invasive tort restrictions have indicated in their decisions that removing a medical claim entirely from jury deliberation would be unconstitutional.<sup>2</sup> Even more states have found less radical medical liability

<sup>1</sup> *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)(damage caps); *Smith v. Dep’t of Ins.*, 507 So.2d 1080 (Fl. 1987)(damage caps); *Lucas v. U.S.*, 757 S.W. 2d 687 (Texas 1988)(damage caps); *Knowles v. U.S.*, 544 N.W.2d 183 (S.D. 1995)(damage caps); *Lakin v. Senco Products*, 987 P.2d 463 (Ore. 1999)(damage caps); *Moore v. Mobile Infirmary Assoc.*, 592 So.2d 156 (Ala. 1992)(damage caps); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989)(damage caps); *Lloyd Noland Hosp. v. Durham*, 2005 WL 32404 (Ala. 2005)(periodic payment schedules); *Condemarin v. University Hosp.*, 775 P.2d 348, 357-60 (Utah 1989) (liability limit for state hospitals); *Wright v. Central DuPage Hospital Assoc.*, 347 N.E. 2d 736 (Ill. 1976)(medical review panels); *Boucher v. Sayeed*, 459 A.2d 87, (R.I. 1983)(striking down Reform Act under EPC, but in dicta doubting it would pass muster under jury trial challenge); *Duren v. Suburban Comm. Hosp.*, 495 N.E.2d 51 (Ohio 1985)(damage caps).

<sup>2</sup> *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525 (Va. 1989); see also *Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Lacy v. Green*, 428 A.2d 1171 (Del. 1981)(“The parties remain free to call, examine and cross-examine witnesses as if the pretrial panel opinion had not been made . . . [the statute in question] cuts off no defenses, interposes no obstacle to full consideration of all the issues, and takes no question of fact from the jury.”); *Adams v. Children’s Mercy*

tort restrictions unconstitutional under due process review.<sup>3</sup>

- **The health court system would remove consideration of the human tragedy of wrongdoing and negligence.** The proposed compensation scheme would never take into account the number of factors and extreme variability of pain and suffering, physical impairment, mental anguish, loss of society and companionship, and other elements of damages suffered by patients. That is why these matters have been entrusted to juries. Health courts are just a step away from automated adjudication by computer.<sup>4</sup>

Like other administrative schemes, benefits will inevitably be reduced in future years as politicians try to appease insurers and hospitals, which in the case of workers' compensation has left many permanently injured individuals barely able to survive. [See Center for Justice & Democracy – Workers' Compensation – A Cautionary Tale](#)

- **This scheme would overthrow control of the MCare Fund.** The state operated Medical Care Availability and Reduction of Error Fund, or MCare Fund, which provides excess limits of coverage to hospitals, would have to accept any panel's decisions and pay its assigned share of damages up to its statutory limits. But MCare would have no control over the claim or a say in the adjudicative process. [See MCare web site for intent and administrative purpose of the fund.](#)
- **Study by our state courts says there is no med mal crisis.** Recently released data by the Pennsylvania Supreme Court reports a 38% decline in med mal filings statewide from the base years 2000-2002. In Philadelphia, the state's largest judicial district, the decline has been over 50 percent. 2006 also saw the fewest number of jury verdicts resulting in plaintiff awards. The State Supreme Court has been successful in cutting down the number of medical malpractice cases with procedural rules requiring a certification of merit before filing a lawsuit and stricter standards on where lawsuits can be filed. Health courts would create an inhuman process to fix a system that isn't broken. [See the Pennsylvania Supreme Court's latest data](#)

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*Hospital*, 832 S.W.2d 898 (Mo. 1992); *Kirkland v. Blaine Cty. Med. Ctr.*, 134 Idaho 464 (2000); *Murphy v. Edmonds*, 325 Md. 342 (1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991)(noting that even some damage caps may go to far by eliminating the remedy altogether); *English v. New. England Med. Ctr.*, 405 Mass. 423 (1989); *Wright v. Colleton Cty. Sch. Dist.*, 301 S.C. 282 (1990); *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W.Va. 720 (1991); *Evans ex. Rel. Kutch v. State*, 56 P.3d 1046 (2002); *Barret v. Baird*, 908 P.2d 689 (Nev. 1995); *Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402 (Mich. 2003).

<sup>3</sup> *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Carson et al v. Hitchcock Clinic, Inc.*, 424 A.2d 825 (N.H. 1980); *Kenyon v. Hammer*, 688 P.2d 961, 975 (Ariz. 1984)(finding right to access the court for a negligence claim is a fundamental right and therefore three-year statute of limitations was unconstitutional)

<sup>4</sup> See Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 18 (citations omitted).

- **Health courts are both costly and inefficient.** Given that medical malpractice cases currently constitute only about four percent of all tort cases in state civil courts (in thirteen states reporting),<sup>5</sup> removing them would provide only minuscule savings and thus health courts will not be cost effective for states.

Whether it's a judge, a court and a jury, or a wholly new adjudicatory bureaucracy, any process to determine medical negligence will be an involved, time-consuming one.

In 2006, Duke University professor Neil Vidmar testified before the the U.S. Senate that no matter the size of the claim, "medical malpractice cases involve complex issues that can only be sorted out after considerable investigation and discovery. When patients make claims of negligence the process of discovering whether negligence occurred requires investigating medical records, interviewing the involved parties (through sworn depositions), finding experts, sorting out conflicts between the opinions of experts, reinvestigating the records and testimony as new insights are uncovered and then reaching some kind of consensus, if possible, about what actually occurred and whether those facts meet the definition of legal negligence. To be fair to both sides, health courts will have to do the same thing. Health courts will also have to bear these transaction costs."<sup>6</sup>

- **Health courts would disrupt careful and balanced negotiation that takes place outside the courtroom to successfully resolve the vast majority of legitimate medical malpractice claims today.**
  - More than 90 percent of cases are settled without jury trial.<sup>7</sup>
  - As Professor Neil Vidmar recently testified in the U.S. Senate, "Research on why insurers actually settle cases indicates that the driving force in most instances is whether the insurance company and their lawyers conclude, on the basis of their own internal review, that the medical provider was negligent.....An earlier study by Rosenblatt and Hurst examined 54 obstetric malpractice claims for negligence. [\[Link to abstract of this article\]](#) For cases in which settlement payments were made there was general consensus among insurance company staff, medical experts and defense attorneys that some lapse in the standard of care had occurred. No payments were made in the cases in which these various reviewers decided there was no lapse in the standard of care."<sup>8</sup>

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<sup>5</sup> Examining the Work of State Courts, 2005, A National Perspective from the Court Statistics Project (2006) at 29.

<sup>6</sup> Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 27 (citations omitted).

<sup>7</sup> *Ibid.* at 17 (citations omitted).

<sup>8</sup> *Ibid.* at 17-18, 22.

- Vidmar further testified, “Without question the threat of a jury trial is what forces parties to settle cases. The presence of the jury as an ultimate arbiter provides the incentive to settle but the effects are more subtle than just negotiating around a figure. The threat causes defense lawyers and the liability insurers to focus on the acts that led to the claims of negligence. Thus, the practical effect of the health court scheme will be to remove all incentives for viable cases to settle and go forward with costly adjudicatory proceedings.
  
- **Far from being “broken,” the current medical malpractice system works well.** This is true even according to the Harvard School of Public Health, which advocates Health Courts. They recently found that despite its costs, the current system works: legitimate claims are being paid, non-legitimate claims are generally not being paid, and “portraits of a malpractice system that is stricken with frivolous litigation are overblown.”<sup>9</sup> The authors found:
  - Sixty-three percent of the injuries were judged to be the result of error and most of those claims received compensation; on the other hand, most individuals whose claims did not involve errors or injuries received nothing.
  - Eighty percent of claims involved injuries that caused significant or major disability or death.
  - “The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win are high. Rather, our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers.”
  - “Previous research has established that the great majority of patients who sustain a medical injury as a result of negligence do not sue. ... [F]ailure to pay claims involving error adds to a larger phenomenon of underpayment generated by the vast number of negligent injuries that never surface as claims.”
  - Patients “rarely won damages at trial, prevailing in only 21 percent of verdicts as compared with 61 percent of claims resolved out of court.”
  
- **Repeat offenders must be held accountable.** Most of our doctors are skilled, decent, diligent and rarely, if ever, have contact with the civil justice system. But there are repeat offenders in the medical industry who are rarely sanctioned by medical authorities or their own profession. Just 5.3 percent of doctors are responsible for 56 percent of medical malpractice payouts nationally. [[See Public Citizen’s Web site – Facts about Medical](#)

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<sup>9</sup> David M. Studdert, Michelle Mello, et al., “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation,” *New England Journal of Medicine*, May 11, 2006.

**Malpractice in Pa.]** Of these, only 7.6% have ever been disciplined by state medical boards. Four out of five doctors say they have seen a colleague take a dangerous “shortcut” in medical procedures. Fifty percent of nurses say they saw colleagues make a mistake. According to Governor Rendell, \$6.2 billion of the \$7.6 billion wasted in health care in our state is for costs attributable to bad medicine such as infections acquired in the hospital. [**See “Gov. Rendell unveils historic ‘prescription for Pennsylvania’ to provide access to affordable, quality health care for all Pennsylvanians.”**]

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