

Medical Errors Subcommittee

Report

May 23, 2005

This is a summary of the presentation made by Michelle Mello, JD, Phd, MPhil at the Brookings Institute on May 5, 2005, in Washington, DC.

I. Evaluating an injury compensation system

1 Two Models for Compensating Medical Injury

	Tort System	Health Court
Compensation Standard	Negligence	Broader than Negligence
Process	Judicial	Administrative
Adjudicators	Jury	Expert Panel and/or judge
Damages	Jury Discretion; Flat Cap or No Limit	Scheduled

2. Core functions

1. Compensation
2. Deterrence
3. Corrective Justice
4. Efficiency
5. Collateral Effects

II. Performance of the tort system

Compensation

- a. From all episodes of medical care (3-4% result in injuries)
- b. 1% of injuries are due to negligent care
- c. Only 2-5% of the 1% file claims
- d. This represents only 44% of all claims filed with only 79% receiving compensation
- e. 26% of the claims are of uncertain merit with 53% receiving compensation
- f. 30% of the claims are deemed frivolous with 24% receiving compensation

2. Deterrence

Theory: Tort liability prevents accidents by creating incentives to engage in optimal levels of precaution taking.

Problems: Uncertainty and Cost Externalization. There is a poor fit between negligence and claims

3. Corrective Justice

Tort System often meets claimants' psychological needs

- Information about what happened
- "Day in court" to show impact of defendant's behavior
- Receiving restitution

But often fails to secure:

- Admission of responsibility and apology
 - Public judgment of wrongdoing (confidential settlements)
- And only a few of the injured come claimants

4. Efficiency

Tort system has very high transaction costs
 Where Malpractice Insurance Premiums Go
 40% Injured Patients
 40% Legal Fees
 20% Insurance Overhead

5. Collateral Effects

Defensive Medicine
 Effects on physician/patient relationship
 Effects on patient safety initiatives
 Nonreporting of adverse events
 Reluctance to disclose errors to patients

Dr. Mello's Report Card

Compensation	D
Deterrence	C
Corrective Justice	B
Efficiency	F
Collateral Effects	D

III. Promise of the health courts model

Compensation

More claimants accessing the system
 Broader eligibility
 Easier Access
 More reliable compensation decisions
 Use of ex ante compensation criteria & precedents
 Expert adjudicators
 Compensation is more modest but more equitable
 Use of damages schedules

Deterrence

Hard to do worse than tort
 Opportunities to create economic incentives
 Experience-rated contributions
 Discounts for taking safety-improving measures
 Penalties for not reporting adverse events

3. Corrective Justice

Loss of opportunity for a "day in court"
 A less public process

Could make payouts public
More likely to be “made whole”
Can preserve opportunity to discover what happened

4. Efficiency

Administrative costs – U.S. systems:

Tort: 40-60%

Workers’ Compensation: 20-30%

Social Security Disability Insurance 5%

Savings from not having to prove negligence?

More certain compensation standard

Less reliance on partisan experts

5. Collateral Effects

Less defensive medicine?

In an experience-rated system, still some incentive

Healthier physician-patient relationships?

Less punitive environment for patient safety initiatives?

Overall Assessment

Offers more reliable but more modest compensation

To many more injured patients

At lower overhead cost

With potential benefits for patient safety

While avoiding negative collateral effects