"Whoa! Watch where that thing lands—we'll probably need it."

[Cartoon image of a surgical procedure with a patient in the middle, a doctor is saying, "BOING!"]
Introduction

• Problems: What kind of a crisis is this?
  • Frequency
  • Severity
  • Cost: the real numbers

• Patient safety
  • Of course, but…
  • There should be a natural alliance between advocates for patient safety and malpractice reform.
• Randomness
  Fallacy of the bad doctor
Introduction

• Professional Liability and the Practice of Surgery
• Tort Reform: Is this really a solution?
  • Theory and practice
    • *The importance of caps*
Frequency by Specialty 1996-2002

Frequency

Specialty

NSU01  PLA01  ORT01  GES01  OBG01  OTO01  FGP02  INT01  PAT01

0% 10% 20% 30% 40% 50% 60%
Meaning

• On any given day there are more than 125,000 malpractice suits in progress against America’s doctors.
Specialty Relativity Nationwide

- Neurosurgery: 6.51
- Obstetrics & Gynecology: 4.37
- Plastic Surgery (With Breast Implants): 2.32
- General Surgery: 3.90
- Orthopedic Surgery: 2.97
- Family/General Practice (Minor Surgery/No Obstetrics): 1.08
- Internal Medicine: 1.00
- Anesthesiology: 1.07
- Pathology: 1.00
Top Jury Awards of 2002

- Philip Morris: $28,000
- Medication Dilution: $4,000
- Gas Explosion
- Truck Roll
- Headon Collision
- Investment Firms
- Cerebral Palsy
- Cerebral Palsy
- Cerebral Palsy
- Cerebral Palsy
- Car Accident

Millions

$0 $4,000 $8,000 $12,000 $16,000 $20,000 $24,000 $28,000
Severity: National Medians

National Jury Award and Settlement Medians for Medical Malpractice Cases

Source: Jury Verdict Research
Average Jury Award in Medical Malpractice Cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Award (Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>94</td>
<td>$1.14</td>
</tr>
<tr>
<td>95</td>
<td>$2.04</td>
</tr>
<tr>
<td>96</td>
<td>$1.90</td>
</tr>
<tr>
<td>97</td>
<td>$1.97</td>
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<tr>
<td>98</td>
<td>$2.98</td>
</tr>
<tr>
<td>99</td>
<td>$3.43</td>
</tr>
<tr>
<td>00</td>
<td>$3.48</td>
</tr>
</tbody>
</table>

Source: Jury Verdict Research; Insurance Information Institute.
Impact of Noneconomic Damages

Mean (Average) Total Jury Award
Mean (Average) Compensatory Jury Award

Source: Jury Verdict Research
Trends in Million Dollar Verdicts - Medical Malpractice

Verdicts of $1 million or more

Source: Jury Verdict Research; Insurance Information Institute
Large Claims Analysis

• Total number of claims 1998-2002: 16,398
  • 0.8% (140) paid $1 million or more, 28.5% of paid indemnity
  • 2.3% (378) paid $500,000 or more, 55.4% of paid indemnity

• Total *paid* claims 1998-2002: 3,307
  • 4.2% (140) paid $1 million or more, 28.5% of paid indemnity
  • 11.4% (378) paid $500,000 or more, 55.4% of paid indemnity
Large Claims Analysis

Claims Paid $500K or More: 2.3%
Paid Indemnity: 55.4%
The Most Expensive Claims

- Texas: $268,000,000
- Many states: $100,000,000
- Philadelphia: Jury verdicts exceed the entire state of CA over past 3 years.
- Verdicts drive settlement value.
Medical Malpractice: Tort Cost Growth is Skyrocketing

Paid Loss Ratio

Source: Brown Brothers Harriman
Medical Malpractice: Cumulative Underwriting Losses

The cumulative underwriting loss in med mal from 1990-2001 totals nearly $10 billion!

Source: Insurance Information Institute calculations based on data from A.M. Best.
Medical Malpractice: Losses & Expenses Paid vs. Premiums Earned

Over the period from 1996 through 2001, premium earned rose 16.8% while losses and expenses rose 68.9%.

Source: Computed from A.M. Best data by the Insurance Information Institute
Inflation and Per Doctor Premiums and Losses

Source: Brown Brothers Harriman
Harvard, IOM, and Patient Safety
Institute of Medicine Study

- 44,000 to 98,000 deaths annually due to malpractice
- Goal: 50% reduction over 5 years
Harvard Study

- NYS 1984
- More than half of cases met screening criteria
- Concordance rate of medical reviewers on existence of an adverse event: **10%**
- Failed to replicate their own data
  - 318 records, different events, similar rates
  - *It doesn’t matter whether we convict the guilty or the innocent, as long as the rate of incarceration matches the crime rate.*
Harvard Study: Observations

- More than half of cases met screening criteria
- Physician reviewers were not specialists
- Did not distinguish between major and minor events
- Did not distinguish events under physician control
- Based exclusively on in-patient population
- 40-fold variation among hospitals
  - Academic hospitals had the highest adverse event rate
- 10-fold variation among specialties
Harvard Study: The Actual Claims

- 51 claims
- 8 involved “negligent adverse event”
- 26 involved no medical injury at all
- 7.6 times as many negligent adverse events as malpractice claims.
- Likelihood of a negligent adverse event resulting in litigation 1 in 65 (1.53%)
Harvard Study

- Extrapolation: 180 inadequately classified deaths became 98,000 Americans dying every year due to malpractice.
Harvard Medical Practice Study (1996):

No correlation whatever between the presence or absence of medical negligence and outcome of malpractice litigation
Randomness and the Fallacy of the Bad Doctor

• 2% of the doctors cause 50% of the losses.
  • Mirror image of causation
  • Harvard: Degree of injury, not medical negligence, predicts outcome.

• Fewer than 1% of physicians have 2 paid claims over a 10-year period of time.
  • Only one in five doctors with a single paid claim gets a second within 10 years.
Surgical Claims
Laparoscopic Claims Worldwide

• 50% involve bile duct injury.
• Complication rate is 0.3% worldwide.
  • Delayed recognition 62-76% (surgeon finished operation without recognizing the error.
  • i.e., majority of injuries unrecognized.
General Surgery Claims

<table>
<thead>
<tr>
<th></th>
<th>% of Claim Count</th>
<th>% of Indemnity Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Laparoscopic</td>
<td>80%</td>
<td>67%</td>
</tr>
<tr>
<td>Laparoscopic</td>
<td>20%</td>
<td>33%</td>
</tr>
</tbody>
</table>
General Surgery Claims

% of Claims With Indemnity Payments

- Non-Laparoscopic: 23%
- Laparoscopic: 37%

Non-Laparoscopic  Laparoscopic
General Surgery Claims

Average Paid Indemnity

- Non-Laparoscopic: $120,896
- Laparoscopic: $145,859
Claim Distribution by Allegation

- Pre-Operative/Non-Operative: 82%
- Intra-Operative/Peri-Operative: 18%
Claim Distribution by Allegation

Pre-Operative/Non-Operative

- Consultation: 34%
- Inadequate Preoperative Evaluation: 26%
- Biopsy: 8%
- Failure to Diagnose Fracture: 8%
- Failure to Diagnose Appendicitis: 8%
- Lack of Informed Consent: 8%
- Delay in Surgery: 4%
- Inadequate Patient Follow-up: 4%
- Negligent Nonsurgical Treatment: 4%
Claim Distribution by Allegation

**Intra-Operative/Peri-Operative**

- Overly-Aggressive Surgery: 32%
- Unnecessary Surgery: 24%
- Incomplete Surgery: 7%
- Retained Foreign Body: 4%
- Improper Treatment-FDA Issue: 4%
- Intra-operative Complication Diagnosed Postoperatively: 3%
- Failure in Management Postop Complication: 4%

**Claim Distribution by Allegation**
Costs of Coverage
• September 11
• Effect is inversely proportional to the size of the insurance company
Average Rate Increases

Medical Liability Monitor

Int Med | Gen Surg | OBGYN

2000 | 2001 | 2002

0% | 5% | 10% | 15% | 20% | 25%

Int Med | Gen Surg | OBGYN

2000 | 2001 | 2002

0% | 5% | 10% | 15% | 20% | 25%
Recent General Surgery Rates

San Francisco  FL (Dade, Broward)  NV (Clark)  Philadelphia  West VA

2000  2001  2002  2003
Tort Reform
"A unique and stirring plea, counsellor"
Goals and Benefits

- **Sustainable** insurance system providing full indemnification of actual loss.
- **More** money for injured patients.
- **Faster** settlements.
- Preserves **access** to medical care without impeding access to courts for truly injured patients.
- Society does not incur **double** costs.
- Assures **money** is available at the time it is needed.
MICRA: Context

- California’s Litigation Fairness (U.S. Chamber 2003): 44th among the 50 states.
  - Bottom 5 in:
    - Jury predictability
    - Punitive damages
    - Class action lawsuits
Where the Premium Goes

- Awards for Economic Loss: 22%
- Administration: 21%
- Claimants’ Attorney Fees: 19%
- Awards for Noneconomic Loss: 24%
- Defense Costs: 14%

Source: Tillinghast-Towers Perrin
MICRA

• 1. Mandates a $250,000 cap on noneconomic damages ONLY.
• 2. Allows introduction into evidence of collateral sources of payment.
• 3. Allows periodic payments of future damages.
• 4. Provides for a sliding scale limit on attorneys’ contingency fees.
5. Provides for a shorter *statute of limitations*.

6. Requires a *90-day “Notice of Intent to Sue.”*

7. Encourage and facilitate *arbitration*. 
MICRA Helps Reduce California Medical Liability Premium Rates by 40%

The Doctors’ Company 1976-2001

Average Premium 1976*  Average Premium 2001

$23,698  $14,107
adjusted to 2001 dollars

$7,614
actual premium in 1976

* $7,614 average premium adjusted to 2001 dollars on the Annual Urban CPI Index for a $1 Million/ $3 Million Claims-Made Policy Premium
Tort Reform Helps Reduce Colorado Medical Liability Premium Rates by 61%

<table>
<thead>
<tr>
<th></th>
<th>Average Premium 1986**</th>
<th>Average Premium 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Doctors’ Company</td>
<td>$30,214 Adjusted** to 2002 dollars</td>
<td>$11,758 Adjusted** to 1986 dollars</td>
</tr>
<tr>
<td>1986-2002</td>
<td>$18,535 actual premium in 1986</td>
<td>$7,213</td>
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</table>

*The Doctors Company’s average of all specialties including dividends for a $1 Million/$3 Million Mature Claims-Made Policy.

**Premium adjustments are made using the Annual Urban Price Index published by the Bureau of Labor Statistics.
MICRA Reduces Verdict Cost and Frequency

$1 Million+ Verdicts Per 1,000 Doctors

NY: 3.71
NJ: 3.10
OH: 2.40
FL: 2.14
Nat’l Avg ex CA: 1.93
CA: 1.31

Sources: Jury Verdict Research, AMA

Source: Jury Verdict Research

FL (1996-2001) - $806,750
NY - $1,000,000
PA - $840,000
TX - $725,000
CA (1997-2002) - $402,500
MICRA Reduces Average Time to Settlement

California: 1.8 years

States with No Noneconomic Caps: 2.4 years

33% Longer

*Indemnity payments only
The Doctors’ Company, 1997-2001
“You have a pretty good case, Mr. Pitkin. How much justice can you afford?”
Injured Patients Benefit Directly

Proceeds of a $1 Million Judgment

<table>
<thead>
<tr>
<th>MICRA</th>
<th>Without MICRA</th>
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<tbody>
<tr>
<td>$800,000</td>
<td>$0</td>
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<tr>
<td>$600,000</td>
<td>$0</td>
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<tr>
<td>$400,000</td>
<td>$0</td>
</tr>
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<td>$200,000</td>
<td>$0</td>
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Average Medical Liability Claim in CA vs. Average Claim Adjusted for Inflation 1976-2001

- **Actual average physician medical liability claim paid in CA 1976-2001.**
- **Average medical liability claim in CA beginning 1976, adjusted for rate of inflation (CPI) 1976-2001.**
MICRA Does Not Limit Access to Courts

TDC PHYSICIAN CLAIM FREQUENCY

Report Year

Annual Claims Per Mature Internal Med. Equivalent Doctor


- California
- Rest of Nation
Oregon: Loss of Tort Reform

Paid Claims

Millions

1998 1999 Lost Tort Reform 2000

1998

1999 Lost Tort Reform

2000

$0 $10 $20 $30 $40 $50 $60 $70
Total Plaintiff’s Demand in Settled Cases

- Oregon: Loss of Tort Reform

1998
1999
2000
2001

- Total Demand

$0
$50,000,000
$100,000,000
$150,000,000
$200,000,000
$250,000,000

$0
$50,000,000
$100,000,000
$150,000,000
$200,000,000
$250,000,000

1998
1999
2000
2001
California vs. Florida Average Rate by Specialty (2002)
Stanford Study: The Cost of Defensive Medicine

- States with effective tort reform lower health care costs 5-9%.
- Savings nationally would be $50 billion.
- HHS estimates savings as high as $110 billion.
Plaintiff Bar Trial Balloons and Myths
Trial Lawyer Trial Balloons

- It’s just about the few bad doctors.
- It’s about insurance companies’ bad investments.
- It’s about insurance companies not charging enough (sic).
- It’s not about MICRA, it’s about Prop. 103.
- Claims losses don’t matter.
Insurance Company Investments

- Commendably, used to **subsidize** premium levels in relation to **claims losses**.
- No malpractice insurer has ever had **negative** investment income.
- Malpractice insurers average less than 10% of assets in equities.
The Proposition 103 Myth

- **Prop. 103** approved 1989, final court challenge 1993.
- Med mal hearings 1991
- TDC had been paying dividends for 11 years prior to its 103 dividend.
- TDC dividends were higher in the 5 years prior to 103 than they were in the 5 years after.
The Proposition 103 Myth

- The med mal insurers were specifically **exempted** from rate rollbacks.
- There has **not** been a single med mal rate increase denied under 103 until this year, when one company’s rate increase was reduced from 16% to 10%.
Savings from MICRA Reforms


Source: NAIC Profitability By Line By State
Underwriting Results 1991-2000 NAIC

Source: 2000 NAIC Profitability Report
Impact of Caps on Premiums

Ave Highest Premium Increase Over Two Years

- $\leq$250,000 States with Caps: 26%
- $<350,000$: 18%
- No Caps: 45%

Source: Medical Liability Monitor
MICRA Works

- Congressional Budget Office (2002)
- American Academy of Actuaries
- Standard and Poor’s (2003)
• Florida Governor’s Select Task Force
  • “The primary cause of increased medical malpractice premiums has been the substantial increase in loss payments…”
  • $250,000 cap
    • “…will bring relief to this current crisis”
    • “Without the inclusion of a cap on potential awards of non-economic damages in a legislative package, no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs, and thereby promoting improved access to healthcare”
MICRA Works

• “...there is no other alternative remedy that will immediately alleviate Florida’s crisis...”
• “…a cap of $250,000 per incident will lead to significantly lower malpractice premiums.”
• “If society wishes to have unlimited judgments, then insurance companies will be required to charge unlimited premiums. Unlimited medical malpractice premiums mean unlimited increases in the cost of healthcare. Unlimited increases in the cost of healthcare mean decreased access to healthcare. Limitations of access inevitably affect the most vulnerable members of our society.”
Summary

- Exposure is greater.
- Financial market subsidies have ended.
- Capacity is shrinking and reinsurance is more expensive.
- Laparoscopic surgery is a genuine advance, but has increased the risk profile of the specialty.
- We know, we do not speculate, real tort reforms work.