

# America needs a new system of MEDICAL JUSTICE

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Common Good is a bipartisan coalition dedicated to restoring common sense to American law. Advisory groups of experts research, establish, and promulgate public policy guidelines that can bring reliability and balance to the legal system. In health care, these visionaries have concluded that special health courts are the answer.

Philip K. Howard, founder and chair of Common Good, has participated in past years on panels at ACS Clinical Congresses. Since then, much progress has been made, and policymakers and government agencies are increasingly interested in health courts. The ACS Patient Safety and Professional Liability Committee has solicited the following article to bring Fellows up-to-date on Common Good's efforts to improve the quality of surgical care and the environment in which we work.

As potential advocates for health courts, you should visit [www.cgood.org](http://www.cgood.org) for additional insight.

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**T**he American Bar Association (ABA) recently adopted—without addressing serious concerns raised by members of its Health Law Committee—a resolution opposing the creation of special health courts. In doing so, the ABA put itself in direct conflict with a broad coalition of medical associations, patient advocates, consumer groups, and think tanks that are calling for pilot projects of special health courts as a way to begin to restore reliability to medical justice.

It's disappointing that the ABA would oppose this consumer-oriented reform but not surprising, given that 60 percent of the cost of the medical liability system goes to lawyers and court costs. More money now goes to lawyers' fees and administrative costs than to patients who have been harmed by medical malpractice.

### ***How health courts work***

The hallmark of health courts would be judges dedicated full-time to resolving health care disputes. They would make written rulings in every case to provide guidance on proper standards of care. Their rulings would set precedents on which both physicians and patients could rely. As with similar administrative courts that exist in other areas of law—for tax disputes, workers' compensation, and vaccine liability, among others—there would be no juries. To ensure uniformity and predictability, each ruling could be appealed to a new medical appellate court.

The fundamental concept behind health courts is that restoring trust in medical justice requires creating a system that no longer tolerates wildly inconsistent verdicts. According to the landmark Harvard Medical Practice Study and subsequent major studies, most people don't sue under the current system when there has been a medical mistake, but a substantial percentage (as much as 80%) of claims are made against physicians who were not negligent.

### ***Health cases in today's courts***

Under the current system, most patients who are harmed by medical errors get no compensation at all, yet the nearly universal distrust of justice drives up costs—billions of dollars are spent in defensive medicine alone—and drives down quality, killing the open professional interaction needed for effective care.

The current system is unpredictable, emotionally wrenching, and staggeringly inefficient. The lawyers are compensated to a greater extent than injured patients and the lawsuits go on for years.

There is virtual unanimity among organizations concerned with health care that the current system is a failure, as evidenced by the following quotes:

- The Institute of Medicine: “The legal liability system does not adequately fulfill either of its two main objectives—to encourage enhanced safety and quality and to provide timely and fair compensation to injured patients.”<sup>1</sup>
- The Progressive Policy Institute: “It does not give most injured patients access to justice, and it does not send clear signals about standards of care that would help healthcare providers avoid medical mistakes.”<sup>2</sup>
- The Joint Commission on Accreditation of Healthcare Organizations: The current system is “...not a ‘real system,’ but rather a patchwork of disjointed and inconsistent decisions with a limited ability to inform the development of improved healthcare practices.”<sup>3</sup>

The current system pits physicians and patients against each other, when the two are not, of course, natural enemies. Both groups need what justice today is not providing: reliability. Patients need a system that will reliably hold physicians accountable when there's a mistake, and physicians need a system that will reliably protect them when unfairly charged.

Restoring reliability to health care justice, however, requires questioning the one assumption that, until recently, no one dared even discuss: the role of the jury.

The core flaw with justice today is that no one's in charge—all-important decisions are made by juries that come and go with each case. Juries can't set precedent; every jury is different, and decisions are often inconsistent. One jury may grant a huge award in a particular case, and another, in a similar case, may grant no award at all.

### ***The jury***

In American law, the role of juries in civil cases is to decide disputed issues of fact, and the role of judges is to rule on the law. Decisions on proper standards of care should fall with the judges as matters of the law, not with juries.

Popular confusion over the jury's role probably

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stems from the distinction between civil and criminal cases. Under the Sixth Amendment, only a jury has the power to convict. Juries in a criminal case are our protection against abuses of state power. But a private lawsuit is a use of state power against another private citizen. A lawsuit is just like indicting someone—it's just an indictment for money. That's why the jury has the more limited role of deciding disputed facts.

The role of the jury in a particular lawsuit depends not on constitutional rights but on whether the case turns on a question of law. Does the case hinge on a factual dispute specific to the parties—say, who ran the red light? Or does the issue implicate the functioning of society—say, the standard of care appropriate in a particular medical case?

Questions of broader impact are ones that the judge has the authority to decide as a matter of law. That, in turn, provides the consistency that physicians, for instance, need in order to know what's expected of them.

The point is not that the judge is necessarily wiser than a jury, but that the jury can't make a ruling with binding effect. Trial lawyers typically argue that the jury system is the way our society regulates wrongful behavior. If that's the case, where's the regulation where we can find the guidelines of right and wrong? It doesn't exist, because the "regulation" varies from jury to jury.

Today, partly as a result of the increasing complexity of medical science, no one working on behalf of society is making binding rulings about what is good care and what is not. No one is deciding when a test is needed and when it is not. Established standards of care are missing. It's difficult to improve the current system when no one has the authority to make the choices needed to bring health care under control. The way to create reliability, and to make the deliberate choices needed to improve care, is to create specialized health courts, with trained judges relying on neutral experts to make decisions about the standard of care in medical injury cases.

### ***Benefits of a health court***

Common Good, the bipartisan legal reform coalition, is currently developing a prototype for a health court pilot project, in partnership with the Harvard School of Public Health and with funding

from The Robert Wood Johnson Foundation. The outlines of a health court could vary, but the basic components are very straightforward: Health courts would be staffed by judges with medical training. The judges would have the authority to hire neutral experts, instead of experts-for-hire who now confuse and prolong liability cases. To reduce legal fees and the emotional toil, proceedings would be expedited so that injured patients would keep more of any award.

Along with reliable decisions about standards of care, which would set precedent from one case to another, health court judges could award non-economic damages (over and above medical costs and lost wages) in accordance with a schedule of benefits that would provide predetermined amounts for specific types of injuries.

With special health courts, recovery for patients is expedited for injuries out of range of expected results. Patients would still have their own lawyers, but the fees would be a fraction of what they are today, because the cases would take months, not years.

A primary goal of a specialized health court should be patient safety. This requires reviving or inducing a culture of open communication. With an expert health court, doctors could have the confidence that they would not be penalized for admitting uncertainty or error in the candid back-and-forth in hospital corridors and examining rooms. Rulings from a health court could also provide affirmative incentives for doctors and hospitals to improve the quality of care.

As Margaret O'Kane, president of the National Committee for Quality Assurance, has said: "The current legal system presents real barriers to improving the quality of American health care. A special health court could provide powerful incentives for honest reporting and analysis of errors, and to elevate standards of care."<sup>4</sup>

Reliable accountability is critical to overcoming the distrust that infects daily choices and the physician-patient relationship. Patients injured by medical mistakes should be compensated fairly. Physicians who are unjustly charged should be protected. Physicians who are not competent should lose their licenses. An expert court can make these types of decisions reliably and consistently.

Creating a new health court may seem like a

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radical proposal. But health care in America is in meltdown, and the benefits of health courts are clear:

- Quicker, more reliable justice
- Improved patient safety
- Lower costs
- An open, trusting relationship with physicians
- Liberalized compensation to cover avoidable injuries without the requirement of proving negligence

As noted, specialized courts are common in other areas of law, and expert courts or tribunals have long been recognized as the sensible solution in situations where there is a crisis of distrust.

The concept of health courts has been endorsed by U.S. Senate Majority Leader Bill Frist (R-TN) and by the Progressive Policy Institute, a major Democratic think tank. A bipartisan bill is pending in the U.S. Senate to authorize pilot projects for special health courts. The bill was introduced by Sens. Mike Enzi (R-WY) and Max Baucus (D-MT), and hearings are expected shortly. A similar bill has been introduced in the House by U.S. Rep. Mac Thornberry (R-TX). In addition, several of America's most prominent hospitals, including Johns Hopkins and New York-Presbyterian, have indicated an interest in participating in a pilot project.

Support for the health court concept is broad and growing. Scores of the nation's most prominent leaders in health care and the law have called for the creation of special health courts, including university presidents, medical school deans, former high-ranking government officials from both political parties, and current or former heads of health care policy, health care quality, or patient safety organizations.

Joining Common Good in advocating the creation of pilot projects for health courts are leading organizations such as the AARP, the Joint Commission on Accreditation of Healthcare Organizations, the American College of Obstetricians and Gynecologists, the American Association of Family Practitioners, and the American College of Emergency Physicians, among others, as well as the state medical societies in Maryland, Mississippi, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia.

Support from major news publications includes

an editorial in *USA Today* stating, "Health courts could show the way for quicker and fairer compensation to the deserving."

The time for a new approach is now. William Sage, a health care expert at Columbia Law School, recently observed that it would be a shame to waste the current crisis. American health care finds itself in a "perfect storm"—of needless errors, unaffordable cost increases, declining access, inadequate accountability, and fearful and frustrated professionals.<sup>5</sup> Those who care passionately about improving health care must seize this moment to do what's needed—create a solid foundation of law, reliable for patients and providers alike, upon which we can begin to make the deliberate choices needed to improve quality and access of health care for all Americans.

Creating special health courts is an ambitious undertaking, but it's essential to strengthen one of the oldest and most basic principles of the American system of justice: that like cases be decided alike. There isn't really a choice: the distrust that is eating away like a cancer at American health care cannot be cured until justice in health care is made reliable.

The time has come to move ahead with special health courts and put the public interest ahead of special interests. □

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**Philip K. Howard**, a lawyer, is chair of Common Good, the bipartisan legal reform coalition, and the author of *The Death of Common Sense* and *The Collapse of the Common Good*.



## MEDICAL JUSTICE, from page 15

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