

Medical liability reform and the states

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Editor's note: *StateStats* is a new bi-monthly column focused on state legislative issues. Written by the State Affairs staff of the College, this column will examine those issues in which the College and chapters have a major stake. It will provide basic briefing information to help surgeons become more effective advocates, as well as state-based data snapshots, discussion of issue trends, and available informational resources.

Questions/comments or suggestions for future column topics are welcome and may be sent to state_affairs@facs.org.

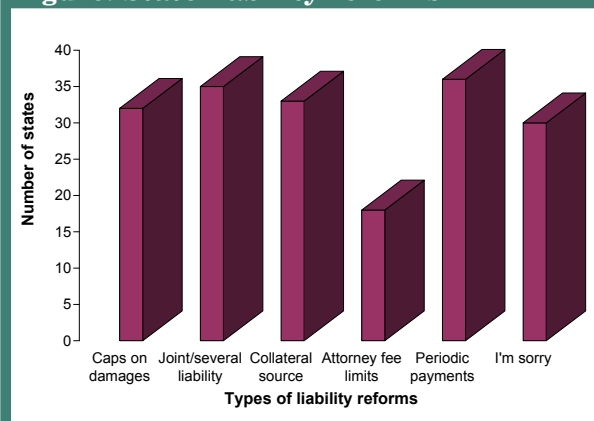
Less than a decade ago, states began facing a full-blown health care workforce crisis. Due to the skyrocketing costs of professional liability insurance premiums, nearly one out of 11 obstetricians nationwide had stopped delivering babies. In Wheeling, WV, all of the neurosurgeons had left town, forcing trauma patients to be airlifted to Pittsburgh, PA, to receive care.¹ Across the country, physicians were ordering additional tests due to fear of litigation. State governments, physicians, and patients were in trouble due to a lack of comprehensive medical liability reform (MLR). Without MLR in place, patients could not access health care services, medical liability premiums were on the rise, litigation was out of control, and many physicians were abandoning high-risk procedures.

In response to this crisis, many states have since taken action to defend physicians and their practices through comprehensive medical liability reform. These traditional reforms have been included as caps on noneconomic damages, joint and several liability reform, periodic payments, limits on attorney fees, and revisions in collateral source rules. More recently, attention had been given to passage of "I'm sorry" laws.

Caps on noneconomic awards

Medical liability reform saw its first great success when California enacted landmark legislation in 1975. The Medical Injury Compensation Reform

Figure. State liability reforms



Act (MICRA) entitled patients to recover unlimited economic damages, limited noneconomic damage awards to \$250,000, and placed limits on attorney fees.² MICRA is a model for reform because it has produced a stable, competitive medical liability insurance market, while ensuring that patients have full access to the courts.

In the 35 years since MICRA was enacted, medical liability premiums increased by more than 1,029 percent across the country—except in California, where premiums grew by less than one-third of that amount, largely due to limits on noneconomic damages.³ A 2003 survey showed that MICRA lowers health care costs by an estimated 6 percent—saving Californians \$6 billion every year on health care.⁴

As of last year, 32 states have placed caps of various dollar levels on the amount of noneconomic damages that a plaintiff can collect from a physician. Caps can be solely on noneconomic damages, but may also be applied just in cases involving wrongful death or severe permanent physical impairment, or even on total damages. States with caps of some type include Alaska, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Mis-

souri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin.

Numerous independent research articles show that over the long term, patients have greater access to physicians in areas with reforms, such as caps on noneconomic damages, than in areas without reforms.⁵ For example, since enacting major reform in 2003, Texas has seen liability rates cut by an average of 27 percent, as well as a statewide increase in the number of physicians, particularly specialists.³

“I’m sorry” laws

One of the criticisms of the current litigation system is that it prevents a provider from expressing any sort of apology for an unanticipated outcome, due to the fear of having such statement used against the physician in a subsequent lawsuit. To address this concern, over the past few years 30 states have passed “I’m sorry” laws—including Arizona, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.⁶

The type of expressions covered by the law and their level of protection vary among the states. The majority of the states with “I’m sorry” laws protect any statements, gestures, or expressions of apology, benevolence, sympathy, or commiseration regarding pain or discomfort, suffering, injury, or death made to a patient, or the family of a patient, who experienced an unanticipated outcome.

A growing body of evidence in the peer-reviewed medical literature shows that patients and families file lawsuits against physicians because of anger, not greed.¹ In response to this data, several hospitals and insurance companies have adopted disclosure and apology programs, often called “Sorry Works!” The Sorry Works! program teaches doctors and nurses to be empathetic and caring, and to stay connected with patients and families when a medical error occurs.

Many successes have been credited to the Sorry Works! programs. For example, in 37 cases at the University of Illinois Medical Center in which

the hospital acknowledged a preventable error and apologized for it, only one patient filed suit. In the eight years since adopting Sorry Works!, the University of Michigan, Ann Arbor, has cut lawsuits in half, reduced litigation expenses by two-thirds, and reduced their reserves from \$72 million to less than \$20 million.⁷

Future of liability reform

Due to political and constitutional barriers that exist in the many states where caps on noneconomic damages have not been enacted, it will be very difficult for caps to pass. To pass legislation in those situations expensive, multiyear efforts would be required to revise state constitutions. □

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