

Philadelphia Medicine



Volume 99, No. 7

September 2003

The sorry state of justice in American healthcare

By Philip K. Howard

Lose-lose is perhaps the best way of describing the sorry state of justice in American health care. Doctors are going on strike and even quitting because of ruinous increases in liability premiums. Patients aren't doing so

every victim should fear: justice is random. Most doctors who make mistakes don't get sued. But most lawsuits are against doctors who did nothing wrong; the cases involve human tragedy but not medical negligence.

Code Blue Still Active

The Philadelphia County and Pennsylvania Medical Societies, other medical societies and interested parties plan an intense effort in the fall 2003 to effect satisfactory and comprehensive tort reform. In the near future we will announce the details of the fall campaign. This will include efforts for a cap on noneconomic damages, alternative funding for insurance coverage and other required judicial and legislative actions. For continuous updates, we encourage you to visit the websites at www.philamedsoc.org and www.pamedsoc.org.

well, either: thousands die annually because of simple slip-ups, and no one seems to be able to revoke the licenses of inept physicians.

Congress failed in its recent attempt at reform, which would have capped jury awards for pain and suffering at \$250,000. In truth, the bill offered only limited relief to beleaguered doctors, and was easy to attack as anti-consumer. Why protect doctors at the expense of victims of malpractice?

The demise of the bill capping damages is not necessarily a setback for the cause of legal reform. Instead, it is an opportunity to break free from the partisan stalemate and address the underlying flaws of a legal system that is out of control.

Doctors and patients aren't natural enemies. They've been driven apart by an unreliable system of justice that tolerates both abusive claims and bad care, breeding distrust on both sides. Studies about jury awards in healthcare confirm what every doctor fears—and

The common ground here is the need for reliable justice. For doctors, reliability would offer protection against baseless claims. For patients, it would provide victims with quicker compensation without the legal costs that consume almost half the awards. A system of reliable justice could also remove from practice incompetent doctors who often escape accountability now by threatening to sue their hospital or state licensing board.

Creating a reliable system of medical justice, however, requires changing one aspect of the system that is so ingrained it is hardly even part of the debate: the jury. Expert judges, not juries, must decide what is a valid claim.

Even modest legislative reform is routinely resisted as trespassing on the hallowed right to take every issue to a jury. But this right is generally misunderstood. In criminal prosecutions, juries play a critical role as our protec-

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PCMS News

Mcare Assessment

We remind you that the 2003 Mcare assessment has been deferred until September 15, 2003, for policies written or renewing after January 1, 2003, and on or before September 15, 2003.

If you have already received, or if, prior to September 15, you receive a bill from your carrier which includes the Mcare assessment, the best course of action is to call your carrier or your insurance agent to clarify your individual payment obligations.

PAMPAC Endorsement

PAMPAC has endorsed Judge Joan Orié Melvin for the Pennsylvania Supreme Court. PAMPAC believes that her election will assist efforts to protect and insure patient access to care.

Cardiac update meeting

The latest information from the study on congestive heart failure will be presented at PCMS, Pfahler Auditorium on Wednesday, October 1, 2003, at 6 PM. This important educational dinner meeting is sponsored by GlaxoSmithKline Pharmaceuticals. If you would like more information, please phone 215-563-5343 Ext. 113.

By action of the Board of Directors, the PMSA Golf Tournament will be known as The Barber/Bartuska Memorial Golf Tournament in recognition of two PMSA presidents who were ardent golfers and charter members of the Tournament:

Letha Barber, MD, 2000 President (April 27, 2002)

Anthony Bartuska, 2001-02 President (November 21, 2002)

Change of address?

Phone 215-563-5343, Ext. 102 with any change of address, phone, fax number or e-mail address.

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ISSN 0031-7306

Philadelphia Medicine is an editorial project management service of Healthcare Media International, Inc. (HMI).

HMI publishes periodicals on medical communications, management, and managed care, and provides contract publishing and medical communication consulting services.

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Highlights from incoming PCMS president's inaugural

Working in unison with patients, medical associations

By Sheila Moriber Katz, MD



For over a decade, I've served on the Board. So I have in mind a vision which is—in *unison*. It's about *we*, not *me*. And it's about the patient. I intend to fix the Society's gaze

on the patient, including fitness and exercise, including access, including tort reform, including the health insurance marketplace. I intend to continue active collaboration with the Pennsylvania Medical Society and our regional friends. Recently, we've held effective demonstrations with PMS, our neighbors and PAPA. I intend to pursue and extend these efforts in unison.

We advance politically. But these are tricky times for the patient and the doctor—the changing rules and the changing regulations, the changing doctor-patient relationships, the new adversarial ways. No wonder we wax nostalgic and look back to times of reasonable malpractice premiums and to times when purpose number one was to treat people, not push paper.

During troubled times, we tend to overlook the pluses of medicine, such as the thrill of keeping and making people well or our ability to move miracles of today's science to the bedside.

We doctors actually practice biomedical science. We are scientists. Our mastery of tables, graphs, equations, and other scientific data enables us to pick the most salubrious routes for patients. Commencing at the pre-medical level, we undergo years and years of taxing basic science preparation. During residency we use and do biomedical research. And to reach where we are today, we pass midterms, finals, specialty boards, and the alphabet soup of SAT's, EPSAT's, MCAT's, GRE's, CME's, and USLME's—hundreds and hundreds of tests that credential us in math, science, and medicine. Nowadays, in our fights with third party payers and with the trial lawyers, the pluses of who we are and what we do get swept under the rug.

Ours is the molecular and biotechnologic century. Each day we transfer amazing breakthroughs from the cutting edge of medicine to the patient—gene replacement treats immunodeficiency; protease inhibitors abate the progression of AIDS; robotic surgery strikes precise coordinates dead-on. And there is more ahead. I have hopes that, some day, we will come to control critical medical switches—those of repair, organ regeneration and neoplasia. I have hopes that, some day, we will be able to flick the switches to the “on” position or to shut them off. I have hopes that, some day, we will come to transfer the miracles of cellular regulation to the patient. After all, isn't this what medicine is?

In my term, we will work in unison to correct the medical liability issue and the lack of competition in the insurance marketplace. Mindful of the biomedical presence in this city ... and mindful of the doctor as the compassionate scientist. In my term, I will also explore ways for us to interact with our remarkable life science neighbors.

Recently, *The New York Times* said of Philadelphia, “Just as chips do it for...[San Francisco] and Boeing, does it for...[the Pacific Northwest], biomedical science drives the Philadelphia economy...” In Philadelphia, we have the second highest concentration of biopharmaceutical scientists in the US. We have science-support systems including research parks, business schools, incubators and venture capitalists. We have five medical schools, eight nursing schools and more than ten health professional schools. In recent years, our region has received \$3 billion from the NIH, and the number of biotechnology patents has risen fast.

True, medicine has become a vast
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Sorry state *from page 1*

tion against abuses of government power. Juries are our defense. But in a civil case, where citizens can use the justice system as an offensive weapon, the most important social value is predictability.

Law is the foundation of freedom in part because it provides guideposts of right and wrong. But those legal guideposts don't exist unless judges make rulings on who can sue for what. Juries can't make consistent rulings of what is reasonable care and what is not. Juries have no authority to make rulings at all. Every case is a blank slate. It's yea or nay, and on to the next jury.

The Constitution's right to a jury trial does not require judges to abjure their traditional role of defining the

The victim of unreliable justice is society as a whole, not just doctors. That's why reform must focus not only on protecting one group with caps on damages, but also on achieving a reliable foundation of law for all.

boundaries of reasonable dispute. The role of juries in civil cases is to decide disputed facts, like whether someone is telling the truth. It is not to declare standards of care that affect society as a whole. That's why the Seventh Amendment qualifies the jury right as applying to "suits at common law" and ends by saying that "no fact tried by jury shall be otherwise re-examined . . . than according to the rules of the common law." Judges declare the standards of law that affect all of society; juries decide disputed facts in a particular case.

Today, however, juries are being asked to decide not only disputed facts but standards of medical care. How does a jury know how to do that? More important, how does a doctor know what standards to abide by? Every time a sick person gets sicker, it's easy to come up with a theory of what a doctor might have done differently. Chemotherapy didn't work, but maybe radiation would have.

Since the earliest days of the common law, there has always been a ten-

sion between what's a legal standard and what's a disputed fact. Until recent decades, however, this distinction didn't matter much to society. Social mores kept people from suing except in egregious cases. No longer. Now lawsuits are limited only by the imaginations of self-appointed victims and their lawyers. Drawing the line can be difficult for a judge, but not drawing the line transforms justice into a free-for-all.

Unreliable justice harms patients more than it does doctors. Pervasive distrust is causing a meltdown in American health care. Quality suffers as fear of lawsuits chills the professional interaction necessary for informed and humane care. Costs spiral out of control in part because doctors squander resources with unnecessary tests in order to build a record just in case they get sued.

A reliable system of medical justice could take many forms, but because the critical issue in virtually all cases is whether the doctor complied with appropriate standards of care, the key element must be expert judges ruling on standards of care. Specialized tribunals are common, in areas ranging from taxes to vaccine liability. A bill to finance pilot projects for special medical courts is scheduled to be introduced in the Senate later this week.

Defenders of the current system take pride in the fact that each case goes to the vote of the people. But that's not the rule of law; law that changes from case to case is the opposite of law. Shifting decisions about standards of care to judges from juries seems radical, but doing so is essential to restore a critical precept of American justice: that like cases be decided alike.

The victim of unreliable justice is society as a whole, not just doctors. That's why reform must focus not only on protecting one group with caps on damages, but also on achieving a reliable foundation of law for all.

Philip K. Howard is a lawyer and author, most recently, of The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom.

Reprinted with permission from The New York Times, July 21, 2003

Working in unison *from page 2*

profit-based business of pro formas, liability suits and the bottom line. True, these trends endanger our patients. But I submit that Philadelphia can again become a great place to practice medicine. For the good of the patient. This is just the time to do it. And we are just the ones.

In my term, we will work in unison to correct the medical liability issue and the lack of competition in the insurance marketplace. Mindful of the biomedical presence in this city . . . and mindful of the doctor as the compassionate scientist. In my term, I will also explore ways for us to interact with our remarkable life science neighbors.

—Dr. Katz is President of PCMS

QUOTE

"Doctors and patients aren't natural enemies. They've been driven apart by an unreliable system of justice that tolerates both abusive claims and bad care, breeding distrust on both sides."

—Philip K. Howard
in The New York Times

Immediate access to tort-reform information

We encourage you to visit these web sites for instant updates on tort reform efforts:

- Philadelphia County Medical Society at www.philamedsoc.org
- Pennsylvania Medical Society at www.pamedsoc.org
- Politically Active Physicians Association at www.fightingdocs.org

In addition, PCMS sends out e-mails regularly. Do we have your e-mail address? If you have not been receiving the PCMS e-newsletter, e-mail us at stat@philamedsoc.org.

pcms people



Philadelphia Medicine publisher **David Woods**, PhD, has been appointed adjunct assistant professor in the Department of English and Philosophy at

Drexel University. He will continue to serve as CEO of HMI Publishing, the company he formed ten years ago.

Want to attend the PMS Annual Meeting? Here's how.

PCMS may need additional physician members to represent Philadelphia physicians and patients at the Annual Meeting of the Pennsylvania Medical Society in Hershey, PA at the Hershey Lodge and Convention Center on Saturday, October 18, and Sunday, October 19, 2003. Expenses will be reimbursed.

This is an opportunity to have a voice in setting your medical society policy. All physician members are welcome. Call 215-563-5343, Ext. 102.

Joan E. Hurlock, MD, a family practice practitioner at Roxborough Memorial Hospital, has been named Physician of the Year by Samaritan Care Hospice of Pennsylvania, where she serves as medical director. A member of Roxborough Memorial's medical staff for more than 30 years and the current Chief of Family Practice, Dr. Hurlock has also served as a member of the hospital's Board of Trustees for the past 15 years.



PCMS Past Presidents **Lila Stein Kroser, MD**, and **Doris Bartuska, MD**, during the latter's induction into the American Women's Association International Medical Hall of Fame.

PA AMA Delegation in Chicago at a reception in honor of Rep. Jim Greenwood

Charles Cutler, MD, Stephen Clay, MD, Lila Stein Kroser, MD, Judy Pryblich, MD, Congressman Greenwood, Richard Schott, MD, Joyann Kroser, MD, William Lander, MD, Anthony Padula, MD, and Marilyn Heine, MD.



John Domzalski, Philadelphia Health Commissioner, recently addressed the Philadelphia Block Captain Health Care Advisory Council during a

luncheon sponsored by PCMS. PCMS and the Philadelphia Department of Public Health coordinate the Block Captain Health Care Program. Mr. Domzalski praised the work of the PCMS Public Health Committee for their continued service to the community in addressing the needs of citizens to access healthcare. In cooperation with the Philadelphia Department of Public Health, PCMS publishes the booklet, "Where To Turn: A Community Guide to Health Care Resources" distributed citywide. If your office would like copies of this booklet, phone PCMS 215-563-5343, ext. 113.

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