

Introduction

“First, do no harm.”

— Hippocrates, the “Father of Modern Medicine”

Malpractice and Other Killers: 1992 Fatalities¹

Highway crashes	41,710
Crime	26,570
AIDS	22,660
Medical malpractice	80,000-150,000

Unlike a grisly homicide or a vivid train wreck, you won't find reports of medical malpractice displayed on the nightly television news shows. There are no reporters or TV crews to be found in the antiseptic shadows of a surgical theater or within the pleasantly hued walls of the local medical clinic. Indeed, to most people, “medical malpractice” is at most a vague worry, yet another pseudo-scientific term absorbed into the general lexicon.

However, for the estimated 80,000 to 150,000 Americans killed each year by negligent, incompetent or even criminal physicians, and for the hundreds of thousands more who are injured, and for their loved ones, medical malpractice is a profound horror, a costly nightmare, an inexplicable betrayal.

It involves entirely preventable deaths, grotesque and lifelong injuries, fraud, and even criminal behavior, such as murder and rape. It is aided and abetted by a conspiracy of silence within the medical profession; by insurance companies that don't want to pay the claims of malpractice victims, seeking only to enrich their coffers; and by the bureaucratic neglect of government authorities whose job it is to protect the public.

For many years, malpractice has been a silent epidemic that has never received the attention paid to other life-threatening events. Now, with the nation's attention riveted on health care reform — attention long overdue — one would expect this dereliction to end. After all, the President has promised that 37 million presently-uninsured Americans will receive adequate health care coverage for the first time. How will the system maintain even the present inadequate and dangerous standard of care, much less a better one, when so many new customers suddenly show up at the doorsteps of America's medical facilities? None of the politicians and policy-makers leading the debate over health care reform are even asking this question!

Instead, the victims of medical malpractice have become not the reason for reform, but the *target of attack* — the bull's eye of a campaign by the medical and insurance lobbies to generically relieve themselves from responsibility for the deaths and injuries caused by physicians and hospitals.

According to the medical lobby and a surprising number of political officials, the problem is not, *how are we going to reduce deaths and injuries caused by negligent or incompetent doctors and hospitals?* but *how are we going to stop or impede victims of malpractice from suing the perpetrators of their injuries?*

Led by large insurance companies and the powerful American Medical Association (AMA),² the medical-insurance industry has proposed to degrade the legal rights of victims of medical incompetence, negligence and crime. Malpractice victims are to be *victimised again* by preventing them from seeking justice in the courts, by cutting the amount of compensation to which they are entitled.

It is one of the perversities of our modern political culture that the documented violence of medical malpractice can reach epidemic levels, yet responsibility for it is so easily and disdainfully transferred by those most responsible — physicians, hospitals and insurers — to their *victims*.

This cruel, cynical strategy is best understood in the context of the larger corporate attack on the rights of injured victims. In the mid-1970s, the insurance industry unleashed a crusade, in collaboration with manufacturers and other corporate interests, to place drastic limits on the legal rights of consumers. By stringing together lurid anecdotes, half-truths and phony statistics, these industries launched a massive cam-

paign that continues to this day to overturn principles of the common law — the “tort system” — that protect Americans against damaging corporate and individual misbehavior.

In the legal system, a “tort” is a “wrong” or an “injury.” For two centuries, judges and juries have developed a set of rules that punish misbehavior and force those who harm others to pay compensation. The corporate attack on the tort system is simply a means for defendants to avoid accountability for the damage they cause to others. The specific goals of this campaign are, first, to make it harder and more expensive for victims to file lawsuits in the first place, and, second, to make it more difficult for them to prevail and win full compensation once their lawsuits reach the courts.

In 1986 alone, the corporate crusade against consumer rights achieved one or both of these goals in 41 state legislatures.³ In many of those states, victims of medical malpractice were specifically targeted by lobbyists and trade associations representing physicians, hospitals and other providers of medical care, along with drug companies and other suppliers. In these lengthy legislative battles, often involving generous campaign contributions from doctors and insurance companies, malpractice victims had few allies: consumer advocacy groups with limited resources, and attorney organizations with larger resources but with an obvious self-interest that unfortunately limited their credibility.⁴ In many cases, malpractice victims were isolated and easily defeated by the overwhelming power of the so-called “tort reformers.”

As a result, innocent victims of medical negligence and incompetence presently face one or more legal hurdles in dozens of states, a collection of anti-consumer barriers to justice which the AMA now advocates become the centerpiece of federal health care “reform”:

- The amount of compensation (medical bills, lost wages, pain and suffering) a jury or judge may order a doctor or hospital to pay malpractice victims is arbitrarily capped.
- The amount of money that a victim’s own insurance has paid to cover the victim’s expenses for medical care or lost wages caused by malpractice is *subtracted* from what the negligent physician or hospital must pay to the injured victim. In other words, the persons responsible for the inju-

ries do not pay the full cost of their malpractice. The victim is required to pay and provide a windfall to the defendant.

- Those found liable for malpractice can pay the compensation they owe victims on an installment plan basis, instead of in one lump sum. This unfairly allows the person who caused the malpractice to reap free interest on the remaining sum of money for years. In some cases, if the victim dies in the meantime, the defendants may keep the remaining money, depriving the next of kin.
- Health care providers are allowed to require patients to waive their right to a jury trial in the event of malpractice.
- The amount of time a victim has in which to bring suit is limited, making it more difficult for malpractice victims to sue those responsible.
- A sliding scale for attorneys fees is established to discourage lawyers from accepting serious or complicated malpractice cases.

As President Clinton's campaign for health care reform takes center stage in Washington, D.C., the legal rights of malpractice victims *in every state* are under attack. Determined to defend their privileged roles in the health care system, the medical establishment and insurance industry are demanding that Congress override state laws and provide more legal insulation from their negligent and careless practice of medicine throughout the nation.

What makes this new campaign so outrageous is its perceived respectability — conveyed largely through rhetorical flim-flam and inaccurate, anecdotal information in the popular media — despite a singular lack of solid empirical evidence. The “malpractice lawsuit crisis” is, as *Consumer Reports* concluded in July, 1992, “the ‘crisis’ that isn’t” — a “straw man.”⁵ The Harvard Medical Practice Study Group came to a similar, if more diplomatically stated, conclusion in its comprehensive 1990 empirical review of medical malpractice in New York State.⁶ One of its authors later concluded: “Our data make clear, then, that the focus

of legislative concern should be that the malpractice system is too *inaccessible*, rather than too accessible, to the victims of negligent medical treatment.”⁷

While the public justification for this attack has been a wholly illusory “lawsuit crisis,” the real motive is far simpler: profits and escape from responsibility.

Insurance companies are pressing their case because they believe it is politically feasible to shift costs, burdens and risks onto defenseless patients. By making it more arduous, expensive and problematic for victims to recover damages from those who harmed them, malpractice insurers seek to reduce the claims to be paid, hence increasing their own profits and mitigating the losses wrought by their own investment and underwriting miscalculations. (See Chapter VI.)

As for physicians, hospitals and medical providers, limiting their legal liability for malpractice would enable them to escape public scrutiny and accountability for their professional performance. While physicians and hospital executives no doubt support legal restrictions in order to lower the liability insurance premiums that they must pay, the issue is not only a matter of economics. It is fundamentally a matter of personal responsibility.

The malpractice scapegoat has taken on a life of its own. The ginned-up propaganda about the “malpractice crisis” continues to maintain its political currency because so much money and political influence have been mobilized on its behalf. Insurers have pooled tens of millions of dollars to wage a massive public relations campaign for weakening tort laws, an effort that has reached judges, juries, news media and even academia.⁸ Indentured law professors and think tanks churn out ideologically motivated treatises bolstering the premise. And with more than \$23.8 million in campaign contributions to federal legislators from the medical/insurance complex in the 1992 election cycle — up 290 percent over contributions during the 1980 cycle⁹— politicians dare question the reality of the “malpractice crisis” at their own peril.

The Clinton Administration is convinced that it must negotiate with this entrenched power if it is to achieve any meaningful health care reform. The Administration appears to believe that physicians, hospitals and insurance companies will accede to a health care reform package if it contains a *quid pro quo* for them. Limiting liability for malpractice harms has emerged to serve this purpose.

Hillary Clinton's health care reform task force, comprised of physicians, insurance industry executives and a few consumer advocates, was pressed to make restrictions on the legal rights of victims of malpractice the centerpiece of its plan. It was prepared to endorse some restrictions, but the White House, anxious to curry favor with the medical lobby, scrapped the more modest approach favored by the task force and adopted, with few changes, the pernicious restrictions advocated by the AMA.¹⁰

As a result, the legal rights of consumers are "on the table," in Washington parlance, to be used as a bargaining chip played by the politicians in closed-door negotiations. Shielding negligent or crooked physicians has become a political "bone" thrown to the special interests in order to assuage their irritation and help neutralize their opposition to health care reform.

This callous strategy can succeed only as long as the basic facts and human realities surrounding medical malpractice deaths and injuries are disguised or overwhelmed with distractions. Once consumers read the fine print, they are not likely to support a health care "reform" that ignores the malpractice epidemic and lets doctors and hospitals escape individual and financial responsibility for their actions — leading to even more malpractice.

Questions about the quality of care consumers will receive under the new health care system are now at the forefront of the health care debate. However, voters must recognize that medical malpractice and the quality of care they receive as health care consumers are the same issue. Once the breadth and impact of medically-induced deaths and injuries is understood, the ability of politicians to treat the issue in a cavalier fashion will evaporate.

The purpose of this volume, therefore, is to provide consumers with an accurate and practical look at medical malpractice.

Accuracy means exposing the avalanche of statistical tricks, slick public relations materials and false impressions that have been skillfully circulated about malpractice and the tort system by the medical and insurance lobbies. Debunking the myths which surround medical malpractice is essential, as it is too easy to see this issue through a lens of anecdotes and phony ideological abstractions. Too little attention has been paid to the empirical and scientific evidence that demonstrate the scope of the malpractice epidemic and refute the superficial premises of the medical and insurance industries. However, technical and legal analy-

sis alone cannot fully illuminate the matter. Most people, especially policymakers, do not ordinarily witness the poignant human anguish, fractured lives and grave injustice that is the essence of medical malpractice. Thus, we devote considerable space to describing, sometimes in gruesome detail, the human face of medical mayhem.

Health care consumers also need a practical guide on how to protect themselves as they navigate the corridors of the medical establishment. Until America has a health care system in place that guarantees the highest quality health care for every individual, every patient is at risk. Understanding your rights and responsibilities as a patient can be a matter of life and death. This book provides potential health care consumers important precautions and suggestions on how to avoid becoming a victim of medical malpractice.

Finally, a section of the book considers the national health care reform controversy. It explains how the quality of medical care in the nation will be affected by the health care reform plans proposed by many different interest groups. And it will discuss how the consumer, taxpayer, worker, shareholder and voter can make sure that the public interest prevails in this extraordinarily important debate.

