

The Litigation Threat to Surgical Practice: Legal Reform and Risk Management

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Abstract

There exists a considerable body of literature, across jurisdictions in the common law world, and including a wide variety of sources – from academic articles to presidential speeches – asserting the existence of a “medical litigation crisis”. Surgery, in particular, is on the “front line” of this crisis, making it also a “surgical litigation crisis”.

The research aims to first understand the nature and the extent of the threat that litigation poses to surgical practice. A critique of tort law in relation to surgical practice will be undertaken. A synthesis of the literature on the reform of tort law and medical malpractice law will be given including: no-fault medical injury claim systems; limitation of remuneration for non-economic loss and the establishment of special health courts and Alternative Dispute Resolution methods.

The research work and its publications will propose potential solutions to these litigation problems; investigate impediments to their realisation and examine practical strategies for the motivation of governments to engage in legislative reform, as well as examining the limitations of law for solving social problems. Changes to medical practice, such as strategies of eliminating medical error and risk management are also discussed.

Declaration

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution, without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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The Litigation Threat to Surgical Practice: Legal Reform and Risk Management

Contextual Statement

Aims Underpinning the Publications

There is a considerable body of literature that has appeared for some time¹ and across jurisdictions,² claiming that there is a “medical malpractice crisis” or a “medical liability crisis.”³ The literature ranges from academic articles in leading medical and law journals to US Presidential speeches and essays. Thus former US President George W. Bush in January 2005 stated his belief that the rise in US medical indemnity insurance premiums was a product of “litigation excess,”⁴ a view supported by papers published in 2002 and 2003 by the US Department of Health and Human Services.⁵ Interestingly enough in 2006,

¹ C. Wood (ed.), *The Influence of Litigation on Medical Practice*, (Academic Press, London, 1977); P. Danzon, *Medical Malpractice: Theory, Evidence and Public Policy*, (Harvard University Press, Cambridge, MA, 1985); I. Hay, *Money, Medicine and Malpractice in American Society*, (Praeger Publishers, Westport, 1992); K. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11*, (Harvard University Press, Cambridge, MA, 2008).

² See for example, E. Dantas, “A Bridge Over Troubled Waters: The Development of Medical Malpractice Litigation in Brazil”, *Chicago-Kent Law Review*, vol. 87, no 1, 2012, pp. 3-20; Z. Wang and K. Oliphant, “Yangge Dance: The Rhythm of Liability for Medical Malpractice in the People’s Republic of China,” *Chicago-Kent Law Review*, vol. 87, no 1, 2012, pp. 21-52; R. B. Leflar, “The Law of Medical Misadventure in Japan,” *Chicago-Kent Law Review*, vol. 87, no 1, 2012, pp. 79-110.

³ M. M. Mello (et. al.), “The New Medical Malpractice Crisis,” *New England Journal of Medicine*, vol. 348, 2003, pp. 2281-2284.

⁴ President George W. Bush, “President Discusses Medical Liability Reform and Health Care in Pennsylvania,” January 5, 2005, at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/10/20041021-15.html>

⁵ US Department of Health and Human Services, *Update on the Medical Litigation Crisis*, September 25, 2002 at, <http://aspe.hhs.gov/daltcp/reports/mlupd2.htm>; US Department of Health and Human Services, *Addressing the New Health Care Crisis*, March 3, 2003, at <http://aspe.hhs.gov/daltcp/reports/medliab.htm>.

Hillary Rodham Clinton and then Senator Barack Obama, now US President, wrote in the leading medical journal, *New England Journal of Medicine*, that “ever-escalating insurance costs” mean that for some medical specialities, “high premiums are forcing physicians to give up performing certain high-risk procedures leaving patients without access to a full range of medical services.”⁶

The “medical malpractice crisis” has been defined as “a period of volatility in the malpractice insurance market characterized by above-average increases in premiums, contractions in the supply of insurance and deterioration in the financial health of insurance carriers.”⁷ In the United States the term “crisis” has been applied to the early to mid-1970s period, involving major malpractice insurers leaving the market, creating a condition of scarcity of insurance availability.⁸ This “crisis” was allegedly solved by the formation in many US states of insurance companies which were owned and operated by physicians, or alternatively, by joint underwriting associations, backed by the states.⁹ The US crisis from the early to mid-1980s was a crisis of affordability produced by rapidly rising premiums and the crisis in the 2000s, and perhaps today, is one of both availability and affordability.¹⁰ In the US context this crisis is often illustrated by a litany of “horror” statistics more than by robust theoretical argument. For example, 86 percent of US interventional specialist doctors have been named in a malpractice suit at least once¹¹; the average US payment in

⁶ H. R. Clinton and B. Obama, “Making Patient Safety the Centerpiece of Medical Liability Reform,” *New England Journal of Medicine*, vol. 354, 2006, pp. 2205-2208, cited p. 2205.

⁷ C. H. Williams and M. M. Mello, “Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms,” Robert Wood Johnson Foundation, The Synthesis project, Policy Brief, No. 10. May, 2006, p. 1, at <http://www.rwjf.org/en/research-publications/find-rwf-research/2006/05/medical-malpractice.html>.

⁸ Mello (et. al.), cited note 3, p. 2281.

⁹ As above.

¹⁰ As above, p. 2282.

¹¹ M. M. Mello (et. al.), “Caring for Patients in a Malpractice Crisis: Physician Satisfaction and Quality of Care,” *Health Affairs*, vol. 23, 2004, pp. 42-53.

malpractice claims increased by 52 percent between 1991 and 2003¹²; 76 percent of US obstetricians in 2003 reported a “litigation event” in their careers, usually for allegedly causing cerebral palsy¹³; almost 8 out of 10 US obstetricians-gynaecologists have been sued at least once in their career and almost half have been sued three or more times¹⁴; over 94 percent of cardiovascular or thoracic surgeons have been sued in Dale, Broward and Palm Beach counties, Florida¹⁵, and every neurosurgeon in southern Florida (in 2004) had been sued on average five times.¹⁶

The medical liability crisis debate has also occurred in Australia. Dr Fiona Stanley, Professor of Paediatrics at the University of Western Australia and Australian of the Year for 2003, wrote in 1995 in the *University of Western Australia Law Review*, that litigation and fear of litigation has had an “extraordinary negative effect...on the practice of medicine and public health.”¹⁷ Professor Stanley claimed that “Courtroom trials are quintessentially singular, framing facts in isolation and demanding that scientific truths be rediscovered anew every time. They are often influenced by biased expert witnesses, who present an extreme and outrageous view which is not the general consensus of knowledge.”¹⁸

¹² A. Chandra (et. al.), “The Growth of Physician Medical Malpractice Payments: Evidence from the National Practitioner Data Bank,” *Health Affairs*, January –June, 2005 (supp. Web exclusive), W5-240 – W5-249, cited p. W5-240.

¹³ A. MacLennan (et. al.), “Who Will Deliver Our Grandchildren? Implications of Cerebral Palsy Litigation,” *JAMA*, vol. 294, 2005, pp. 1688-1690, cited p.1688; G. D. V. Hankins (et. al.), “Obstetric Litigation is Asphyxiating our Maternity Services,” *Obstetrics and Gynecology*, vol. 107, 2006, pp. 1382-1385.

¹⁴ American College of Obstetrics and Gynecology, *Professional Liability Survey 2006*, (American College of Obstetrics and Gynecology, Washington DC, 2006).

¹⁵ D. J. Palmisano, “The Hidden Cost of Medical Liability Litigation,” *Annals of Thoracic Surgery*, vol. 78, 2004, pp. 9-13, cited p. 10.

¹⁶ As above.

¹⁷ F. Stanley, “Litigation Versus Science: What’s Driving Decision-Making in Medicine?” *University of Western Australia Law Review*, vol. 25, 1995, pp. 265-282, cited p. 266.

¹⁸ As above.

Professor Stanley discussed a number of examples to support her position, including cerebral palsy and obstetric care, where there was, and still is, concern about the magnitude of cerebral palsy litigation. The problem, as stated in a more recent paper by Johnson (et. al.), is that medical care advances have improved the life expectancy of persons with severe cerebral palsy, which has increased long-term care costs and increased the need for seeking legal action for financial support and compensation.¹⁹ As Johnson (et. al.) note: “Medical indemnity costs for insurance have soared, particularly in obstetrics. In Australia, obstetricians pay some of the highest premiums for medical indemnity insurance since they are associated with about 18 % of the cost of claims, despite forming only 2 % of the physician group. Some USA insurers declined to renew policies for doctors who had prior claims against them.”²⁰ As an example of these difficulties, a small maternity hospital in South Australia, the Le Fevre Hospital, closed because its insurance was not sufficient to cover an AUS \$ 5 million payout in a cerebral palsy case.²¹

The aim of this thesis by publication is to examine whether or not there is a litigation threat to surgical practice, as a subset of a more general medical litigation threat, and if so, to explore what can and should be done about it, to secure both justice for injured patients and the sustainability of the medical/surgical system. The methodology for undertaking this examination was a review of existing literature and available data from authoritative sources. Two books are submitted for publication: *The Surgical Litigation Crisis*²² and the forthcoming *Medical Malpractice, Mistakes and*

¹⁹ S. L. Johnson (et. al.), “Obstetric Malpractice Litigation and Cerebral Palsy in Term Infants,” *Journal of Forensic and Legal Medicine*, vol. 18, 2011, pp. 97-100, cited p. 97.

²⁰ As above.

²¹ J. W. Smith and G. Maddern, *The Surgical Litigation Crisis: Medical Practice and Legal Reform*, (Edwin Mellen Press, Lewiston, New York, 2010), p. 3.

²² As above.

Mishaps,²³ both published by the Edwin Mellen Press in the United States. Although the thesis title is “The Litigation Threat to Surgical Practice,” the works are concerned with alleged litigation threats to surgical practice in the context of the wider issue of medical malpractice and litigation and any solutions to a “surgical litigation crisis” are likely to be relevant to aiding the more general “medical litigation crisis.”

To keep this project to a manageable length, the candidate in the two submitted books has considered primarily the Australian and United States jurisdictions. These jurisdictions are the ones which the candidate knows best and much of the academic discussion of the problems of this thesis have been discussed in the United States context. The books have discussed similarities and differences between the two jurisdictions in these matters. In the foreword to *The Surgical Litigation Crisis*, the distinguished Australian jurist Hon. Geoffrey Davies AO (former Inaugural Judge of the Court of Appeal, Supreme Court of Queensland), after making a number of positive remarks about the candidate’s book, says that the work’s reliance upon American materials and arguments may have “Misled [the authors] into painting a bleaker picture of the civil justice system in Australia than the reality warrants.”²⁴ On the contrary, *The Surgical Litigation Crisis* did not present a bleak enough picture, and *Medical Malpractice, Mistakes and Mishaps* attempts to provide this, as well as presenting a general jurisprudential argument for legal scepticism. Latter in this Contextual Statement the candidate will discuss a recent argument from Professor Davies’ judicial peer, former Chief Justice of the Supreme Court of

²³ J. W. Smith and G. Maddern, *Medical Malpractice, Mistakes and Mishaps: Essays on Medical Litigation, The Mandatory Reporting of Health Professionals and the Limits of Law*, (Edwin Mellen Press, Lewiston, New York, forthcoming 2013).

²⁴ As above, p. iv.

South Australia, John Doyle, who also expresses legal scepticism about the sustainability of the Australian civil justice system.²⁵

²⁵ J. Doyle, "Imagining the Past, Remembering the Future: The Demise of Civil Litigation," *Australian Law Journal*, vol. 86, no. 4, 2012, pp. 240-248.