



September 8, 2011

Contact Josh Archambault, 617-723-2277 ext. 209 or [jarchambault@pioneerinstitute.org](mailto:jarchambault@pioneerinstitute.org) or  
Micaela Dawson, 617-723-2277, ext. 203 or [mdawson@pioneerinstitute.org](mailto:mdawson@pioneerinstitute.org)

## **A Fair and Cost-Effective Tort System for Health Care**

*New study calls for comprehensive tort reform to address rise in number and average cost of malpractice payouts, and increase in insurance premiums, up by 63% in 2009 since 2001*

BOSTON - Medical malpractice is a branch of tort law meant to compensate patients for injuries resulting when physicians deviate from general standards of care. With the Massachusetts tort system becoming too expensive for health care providers and patients, and a legislative effort likely this fall to control state health care costs, a new Pioneer Institute report, [\*Innovative Medical Liability Reform: Traditional and Non-Traditional Methods\*](#), provides options for comprehensive medical malpractice reform.

*Innovative Medical Liability Reform* is authored by John Biebelhausen, MD/MBA, resident physician, University of Colorado, and Amy Lischko, Pioneer Senior Fellow and Associate Professor, Tufts University School of Medicine. In the report, they describe the pros and cons of a variety of options available to policymakers who are serious about facing this challenge.

“The current tort system is not only putting at risk our ability to retain medical talent, but also cost containment across the health system—a major goal of the 2006 health reform,” says Jim Stergios, Pioneer’s executive director. “Any reform this fall aimed at furthering cost containment cannot exclude meaningful tort reform.”

Nationally it is estimated that only 2% of malpractice victims file suit, 37% of cases involve no error, and victims receive less than half of every dollar recovered through settlements or a jury verdict. In 2010, Massachusetts ranked 7<sup>th</sup> highest in the nation for medical malpractice claim payments, averaging over \$484,000.

The American Medical Association considers the Commonwealth a “crisis state,” as it takes six years for cases to make it through the legal system. Medical malpractice insurance premiums have risen by 63 percent in Massachusetts, from \$198 million in 2001 to \$322 million in 2009.

Even more expensive is defensive medicine, in which medical providers order extra tests or procedures, or avoid high-risk patients primarily due to concerns about malpractice liability. A 2008 Massachusetts Medical Society (MMS) survey reported that 83 percent of physicians practice defensive medicine, at a cost of \$1.4 billion annually, in 2006 dollars – nearly 3 percent of total Massachusetts health expenditures that year.

However, this estimate represents only the costs associated with eight physician subspecialties, constituting 46 percent of Massachusetts physicians. The estimates did not include the cost of tests and diagnostic procedures ordered by physicians in other specialties, observation admissions to hospitals, specialty referrals and consultations, or unnecessary prescriptions. Thus, the total cost of defensive medicine in Massachusetts is likely to be significantly more.

“The current medical liability system fails both patients and physicians,” says co-author, John Biebelhausen. “Going forward, we need medical liability reform that assuages physicians’ fear of litigation and imparts timelier, more efficient reimbursement to those truly affected by medical error and negligent care.”

The Pioneer report anticipates legislation that Beacon Hill will take up this fall to control state health care costs, with two provisions on medical liability reform. Governor Patrick has proposed protection for providers who apologize for a mistake, and a cooling off period to identify inappropriate care. But there are serious limitations to the Governor's provisions, and they are unlikely to reduce the direct cost of malpractice insurance in the short term.

The paper outlines four main objectives for meaningful medical malpractice reform:

- Provide a quick resolution to meritorious claims
- Fully and fairly compensate victims
- Require offenders to pay the full cost of their harmful acts; and
- Improve the quality of care for future patients.

The report calls for traditional and non-traditional changes in the medical liability system to promote increased patient safety and improved quality. The authors urge legislators to review current law and consider the 14 options outlined in the report such as imposing caps or damage schedules in cases of ordinary malpractice; and to implement a safe harbor law to provide increased protection for physicians who comply with established practice guidelines.

Another, less traditional option, is "contract liability," a progressive market-effective method for patients to contract directly with doctors or health systems to establish pre-determined rules for compensation in the case of injury due to physician negligence.

"Five years after the passage of state health care reform legislation, Massachusetts has achieved the goal of near-universal health insurance coverage," says Josh Archambault, who directs Pioneer's health care research and programs. "But those gains will not be sustained over time unless policymakers address cost containment. True medical malpractice reform will serve that goal, while providing fair and just compensation for victims, and needed assurance to health care providers."

Pioneer's recent health care research includes: [\*Business Solutions to the Health Care Cost Crunch\*](#), [\*Fixing the Massachusetts Health Exchange\*](#) (March 2011), 2010: Interim Report Cards on Massachusetts Health Care Reform: [\*Increasing Access\*](#), [\*Equitable and Sustainable Financing\*](#), [\*Administrative Efficiency\*](#), [\*Cost-Effective Quality\*](#).

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