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No-Fault Compensation for Medical Malpractice

In the 1970s, as a result of increasing medical malpractice suits and unstable insurance premiums, several reforms were made within both the insurance industry and the legal arena in an attempt to stabilize the market. These included the introduction of statutory caps, the creation of screening panels to prevent frivolous suits, and limiting contingency fees.¹ These reforms met with varying levels of success however and insurance premiums continued to rise, threatening access to quality health care. So, some experts and governments considered no-fault compensation as an alternative to the rising costs of tort claims on both the court system and individual providers.

No-fault compensation is a system that focuses on preventable injuries, rather than on the negligence of providers. Supporters of no-fault insurance claim that by removing the need to prove fault or negligence and instead compensating based on loss, no-fault compensation can help to ensure fair and timely payments for more accident victims while reducing costs. In the United States, no-fault compensation has been implemented in some jurisdictions, such as compulsory self-insurance for automotive accidents.

With regards to medical malpractice, in a no-fault compensation system a patient is compensated for a proven injury incurred unnecessarily through treatment. Patients simply must prove unnecessary injury, file a claim, and if accepted, wait for compensation. This system has been implemented in several countries around the world, beginning in New Zealand.²

Malpractice Law in the United States

Federal Malpractice Law

In the United States, the federal government has exercised limited control over most medical malpractice claims, leaving each state to set its own boundaries on tort law. In the past decade, Congress has made several proposals to create uniform federal guidelines for malpractice

¹ Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?" *Arizona Journal of International and Comparative Law* 649.22 (2005).

² Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

claims brought in the United States, including a \$250,000 cap on noneconomic damages and a \$500,000 cap on punitive damages, have been made.³ According to the Congressional Budget Office (CBO), if implemented, these changes could result in a ten percent reduction in malpractice insurance, as well as savings of \$13.5 billion over the next four years and \$54 billion over the next ten years from the decreased use of services for “defensive medicine” by physicians attempting to avoid a lawsuit.⁴

Although the United States government does not limit most malpractice claims, it does limit the action that may be taken against its own agencies. Enacted in 1946, the Federal Tort Claims Act governs torts filed against the federal government and its employees.⁵ To file a suit against a federal agency, the party must first file a claim with the relevant agency within two years of the incident. If the claim is denied or no action is taken by the federal agency within six months, the party may then file suit against the agency in federal district court. If a party files suit against a federal employee, the defendant will be changed to the United States government. Suits filed against the federal government are tried without a jury, and the Attorney General or a designee on his behalf must approve all settlements made above \$25,000. These regulations govern both Veterans Administration (VA) Hospitals and Federally Qualified Health Centers (FQHCs).

Vermont Malpractice Law

In 2004 the Vermont Legislature established a committee to explore the need for medical malpractice reform in order to address rising insurance costs.⁶ The market for medical malpractice insurance in Vermont is highly concentrated: 63% is controlled by two companies.⁷ The strong market concentration puts the state in a dangerous situation should it face coverage availability shortages or price fluctuations. One of the most common approaches in medical malpractice reform is the institution of statutory caps. Twenty-five states have placed caps on malpractice claims, but Vermont has yet to institute limits on malpractice awards.⁸

³ Douglas W. Elmendorf, Director of the Congressional Budget Office, “Letter to Honorable Orrin G. Hatch, 9 Oct. 2009,” http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf, accessed 23 Feb. 2010.

⁴ Elmendorf, “Letter to Honorable Orrin G. Hatch.”

⁵ Vivian S. Chu “Federal Tort Claims Act.” *Congressional Research Service*. 29 Jan. 2010.

⁶ The Vermont Medical Malpractice Study Committee, “Medical Malpractice Liability Insurance in Vermont,” Dec 2005, p. 15, http://74.125.47.132/search?q=cache%3AR8u6wsxbRioJ%3Awww.bishca.statevt.us%2FinsurDiv%2Fmedmal_stud_ygroup%2FMedMal_final-report_Nov172005.pdf+Medical+Malpractice+Liability+Insurance+In+Vermont&hl=en&gl=us, accessed 5 March 2010.

⁷ The Vermont Medical Malpractice Study Committee, “Medical Malpractice Liability Insurance in Vermont” p. 21.

⁸ National Conference of State Legislatures, “Medical Liability/Malpractice Laws,” 4 Sept. 2009, <http://www.ncsl.org/default.aspx?tabid=18516#VT>, accessed 5 March 2010.

No Fault Compensation Systems Currently in Use

New Zealand

In 1974, New Zealand eliminated medical malpractice litigation in favor of no-fault compensation. In 2005, New Zealand removed its distinction between medical mishap and medical error, instead favoring a new concept of treatment injury. Treatment injury covers all adverse medical incidents, regardless of whether or not negligence occurred during treatment, creating a comprehensive no-fault program.⁹

No-fault compensation in New Zealand is funded through a Treatment Injuries Account that is funded by an earner levy and the non-Earner's Account. The earner levy is a flat tax specifically collected for the ACC; in 2009 this was set at 1.7%.¹⁰ All employed citizens in New Zealand will pay this tax and be covered by this for any treatment injury incurred. The non-Earner's Account is a government account funded through general taxation to cover people who do not work such as children or the elderly. The Treatment Injuries Account covers any treatment injury.¹²

Under the no-fault compensation system, patients who have suffered from an injury under the care of a doctor file a claim with the ACC. The ACC is government-run; its stated mission is to provide monetary assistance to an injured party and provide injury prevention consultation.¹¹ The ACC differs from the United States' current medical malpractice tort system—in New Zealand, a patient must prove only injury, not a doctor's fault or negligence.¹²

Patient claims to the ACC take several weeks to approve, and payment is made within 9 months. When a claim is accepted, the ACC can provide assistance ranging from monetary compensation for lost wages to the coverage of transportation to and from treatment, equipment such as crutches, and home changes such as a wheel chair ramp.¹³ The ACC processed 1,398 people for treatment claims during the 2007/2008 fiscal year, costing 73.7 million NZD, 2.3% of their total expenditures for that year.¹⁴

⁹ Marie Bismark and Ron Paterson, "No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety," *Health Affairs* 25, no. 1 (2006), pp. 278-283, <http://content.healthaffairs.org/cgi/content/full/25/1/278?ijkey=E13G6melb5wfU&keytype=ref&siteid=healthaff>, accessed 5 March 2010.

¹⁰ New Zealand Inland Revenue, "Income tax rates for individuals (Find out about)," 24 Mar. 2009, <http://www.ird.govt.nz/how-to/taxrates-codes/itaxsalaryandwage-incometaxrates.html>, accessed 8 February 2010.

¹² "How we're funded." ACC Homepage. N.p., n.d. http://www.acc.co.nz/about-acc/overview-of-acc/how-were-funded/index.htm#P24_2829, accessed 5 March 9, 2010.

¹² Bismark and Paterson, "No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety."

¹³ New Zealand Accident Compensation Corporation, "Getting Help with an Injury Caused by Treatment," April 2008, http://www.acc.co.nz/PRD_EXT_CSMP/groups/external_claims_care/documents/form/wcm2_020603.pdf, accessed 10 February 2010.

¹⁴ New Zealand Accident Compensation Corporation, "What do I pay?"

The New Zealand system offers some benefits over the U.S tort law system. The first benefit is cost. The New Zealand system has administration costs accounting for about 10% of their budget.¹⁵ Secondly, because eligibility for compensation is not based on negligence, more people are eligible to receive compensation without specifically faulting the licensed health services provider. The average payout for a claim is less than \$30,000, much less than the United States.

New Zealand has tried to address concerns about the lack of accountability for health service providers with the implementation the Health and Disability Commissioner Act of 1994. This act established a Health and Disability Commissioner whose job it is to advocate for patient's rights and to make sure health care is being provided with the proper amount of quality.¹⁶ New Zealand has yet to see an increase to patient safety with the implementation of this system with an adverse-event rate of 12.9%, which are similar to western countries with tort systems.¹⁷

Florida and Virginia Birth-Related Neurological Injury Programs

In 1988 and 1989, respectively, Virginia and Florida instituted no-fault compensation programs designed to stabilize insurance premiums in obstetrics by providing a no-fault option exclusively for brain injuries suffered by infants during delivery.¹⁸ Injuries or abnormalities resulting from congenital disorder, maternal substance abuse, disease, or other sources are not covered under these programs. Physicians and hospitals participate voluntarily in, and provide the sole funding for, these compensation programs, which are governed by organizations created by the state legislatures.¹⁹ No-fault compensation is the only option for legal recourse by the affected party unless intentional wrongdoing can be proven.

Following the implementation of the limited no-fault compensation programs in Florida and Virginia, insurance rates in obstetrics have stabilized. Additionally, administrative costs associated with medical malpractice have declined.²⁰ Over ninety percent of eligible physicians have chosen to participate in the voluntary program. According to separate studies published in the *American Journal of OB/GYN* and the *Arizona Journal of Comparative and International Law*,

¹⁵ Bismark and Paterson, "No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety."

¹⁶ Bismark and Paterson, "No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety."

¹⁷ Bismark and Paterson, "No-Fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety."

¹⁸ Frank A. Sloan, Kathryn Whetten-Goldstein, and Gerald B. Hickson, "The Influence of Obstetric No-Fault Compensation on Obstetricians' Practice Patterns," *American Journal of Obstetrics and Gynecology* 179.3 (1998). *Medline*.

¹⁹ Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

²⁰ Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

the limited scope of these no-fault programs has prevented them from having a significant impact on the incidence of these injuries.^{21,22}

Application of No-Fault Compensation to American System

No-fault compensation has been proposed as a reform mechanism to reduce malpractice costs and insurance rates in the United States. The application of no-fault compensation within the American healthcare system would face several complications: the massive scale of the American healthcare industry, the loss of revenue for lawyers and the reduction of award size for affected parties, the change in effective 'justice,' and the potential for decreased safety assurance.²³ In addition, the economic implications of such a systemic overhaul must be considered.

History of Tort Law

Due to a long history of tort law, the American malpractice system is associated with "ideas of corrective justice" meant to control wayward physicians and practices.²⁴ In a system of no-fault compensation, providers who cause fault-related injuries would not be punished, while 'do-gooders' would not be rewarded.²⁵ The loss of this system of justice, as well as the loss of pain and suffering awards, has been met with resistance from patient advocacy groups when wide-scale no-fault compensation programs have been considered in the United States.

The history of tort law has also resulted in an expectation of large punitive and noneconomic awards from plaintiffs in malpractice suits, an expectation that would not be met with the smaller awards provided with no-fault compensation.²⁶ Additionally, the American Trial Lawyers Association has opposed the systematic shift that would be required to implement no-fault compensation, a shift that would result in a reduction in litigation associated with medical malpractice incidents.

Safety

Some concern exists throughout the health care community with a shift away from the use of malpractice claims as deterrence for safety violations.²⁷ Some support for these fears is evident

²¹ Sloan, Whetten-Goldstein, and Hickson, "The Influence of Obstetric No-Fault Compensation on Obstetricians' Practice Patterns."

²² Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

²³ Sloan, Whetten-Goldstein, and Hickson, "The Influence of Obstetric No-Fault Compensation on Obstetricians' Practice Patterns."

²⁴ Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

²⁵ Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

²⁶ Matthew Hitzhusen. "Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?"

²⁷ David M. Studdert, and Troyen A. Brennan, "No-Fault Compensation for Medical Injuries," *Journal of the American Medical Association* 286.2 (2001): 217-23.

in the slight rise in automobile collisions following the introduction of no-fault compensation in vehicular insurance; however, effective modeling of the no-fault program within the medical field may eliminate safety problems.

Within the workers' compensation program and at some academic hospitals throughout the country, the use of an experience rating has allowed for the introduction of incentives for the maintenance of a safe, hazard free environment.²⁸ Hazard-prone institutions are forced to pay higher insurance premiums. The nature of malpractice coverage has limited the use of these ratings within health care; however, the adoption of no-fault compensation would allow experience ratings to be used on a larger scale. While an individual physician would not be liable for an adverse incident, the hospital or practice at which he is employed would see an increase in its premiums, providing an incentive to improve safety conditions.

Affordability/Cost

In a study released by the *Journal of the American Medical Association* in 2001, Studdert and Brennan used malpractice data from Colorado and Utah from 1992 to determine both the number of injuries eligible for coverage and associated compensation costs under tort law. These data were compared to results found using pilot versions of no-fault programs considered by Colorado and Utah during a medical malpractice study. The results indicate that these no-fault compensation programs could provide compensation for a larger group of patients than current tort law allows while remaining within the states' budgets. In Colorado, the no-fault program would serve 973 patients for \$82 million, compared to the tort system, which provided service to 270-300 patients for \$100-110 million. In Utah, 1,465 patients would be served under the no-fault program whereas only 210-240 benefitted from the tort system, at approximately the same cost: \$55 million.²⁹

A similar study was conducted in New York, where researchers studied 30,000 patient records at several hospitals to determine how many adverse events occurred and which were the result of doctor or provider fault.³⁰ The response of the tort system was evaluated and compared to the potential for coverage by a no-fault compensation program. Weiler concluded that a no-fault compensation program would provide broader coverage for adverse events, though compensation would be in smaller amounts than allocated through the tort system. Additionally, he estimated the administrative costs would be roughly one-third those experienced in the tort system, primarily as a result of the reduction in litigation associated with the no-fault system.

²⁸ David M. Studdert, and Troyen A. Brennan, "No-Fault Compensation for Medical Injuries."

²⁹ David M. Studdert, Eric J. Thomas, Brett I. Zbar, Joseph P. Newhouse, Paul C. Weiler, Johnathon Bayuk, and Troyen A. Brennan, "Can the United States Afford a 'No-Fault' System of Compensation for Medical Injury?" *Law and Contemporary Problems* 60 (1997): 1-34.

³⁰ Paul Weiler, *Measure of malpractice medical injury, malpractice litigation, and patient compensation* (Cambridge, MA: Harvard University Press, 1993).

Conclusions

Historically, efforts to fight rising costs of malpractice insurance have been focused on tort reform, including the creation of award caps, limitations on attorney fees, and councils to determine the legitimacy of claims. No-fault compensation could provide an alternative to this approach. Though concerns exist surrounding the assurance of patient safety in a no-fault compensation program, the creation of a carefully planned system could promote a safe environment. Additionally, studies of both the no-fault program in New Zealand and pilot programs within the United States have indicated that no-fault compensation has reduced costs and benefitted a larger body of patients than tort law, albeit with smaller compensation awards.

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