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**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES**
**February 13, 2006**

**RECOMMENDATION**

RESOLVED, That the American Bar Association reaffirms its opposition to legislation that places a dollar limit on recoverable damages that operates to deny full compensation to a plaintiff in a medical malpractice action.

RESOLVED, That the American Bar Association recognizes that the nature and extent of damages in a medical malpractice case are triable issues of fact (that may be decided by a jury) and should not be subject to formulas or standardized schedules.

FURTHER RESOLVED, That the ABA opposes the creation of health care tribunals that would deny patients injured by medical negligence the right to request a trial by jury or the right to receive full compensation for their injuries.

REPORT

As part of an ongoing effort to "reform" that portion of the civil system of justice that deals with the liability of health care providers, proposals are being discussed that would, through the implementation of so-called "Health Courts," remove medical negligence litigation from the court system where cases are heard by judges and/or juries in favor of an administrative procedure where malpractice cases would be heard by health care tribunals who have expertise in health care. The concept of having a specialized court hear medical malpractice cases along the lines of what is being proposed by groups such as the Progressive Policy Institute and Common Good is highly problematic.

The effort to create a separate administrative Health Court system runs counter to a number of established principles of the American Bar Association (ABA). These policies will be discussed below. As a result, the Standing Committee on Medical Professional Liability urges the ABA House of Delegates to adopt a resolution that would urge Congress to oppose enactment of any legislation that would lead to the creation of such Health Courts.

The central feature of any Health Court procedure is the requirement that any medical negligence case be tried before a tribunal that is separate from the civil system of justice. Most often, these proposals suggest that such cases be tried before one or more persons who have specialized knowledge in medicine. For example, Common Good has a widely-disseminated proposal that would create a system that has features that are found both in "No Fault" or Workers' Compensation systems.[1] As of the writing of this report, the Common Good proposal is apparently still evolving and must be viewed as a work in progress. The most recent evolution is the suggestion that patients could "opt in" to the systems and waive their right to a jury trial. This development would be particularly troubling should the "opt in" actually prove to be a mandatory part of health care agreements that HMO's, insurers, hospitals and health care providers might require their patients to sign before allowing treatment. It has long been ABA policy to endorse the use of alternatives to litigation, such as arbitration, for resolution of medical malpractice disputes under circumstances whereby the agreement to arbitrate is entered into only after a dispute has arisen and is entered into on a voluntary basis. Thus, any "opt in" provision would necessarily have to be transparently voluntary in order to pass muster by this organization.

In addition the Progressive Policy Institute (PPI), in a February 2005 Policy Report, which was co-authored by Nancy Udell, the Director of Policy and General Counsel of Common Good, proposed that "[m]alpractice cases should no longer be heard in civil courts. Instead they could be handled in administrative processes overseen by the states. The system would be similar to the one that handles workers' compensation claims."[2] However, unlike under workers' compensation systems, an injured patient under the Health Courts being proposed would need to prove negligence on the part of the health care provider.

Using the Workers' Compensation model for medical malpractice cases is inappropriate. In these programs, there is a trade-off of loss of a right to bring an action in court that is counterbalanced by a "guaranteed" award. With Health Courts, the plaintiff gives up the right to bring an action in court for no guarantee of an award.

The PPI/Common Good approach would also dictate that the "specialized judge" retain an expert in order to determine the standard of care, a procedure that is currently left to the parties in malpractice litigation, with the testimony of opposing experts to be weighed by a jury. It also would mandate a schedule of limits on non-economic damages, to be set by an "independent" commission created by Congress. This is directly contrary to existing ABA policies against any limit on pain and suffering damages in tort actions, including medical negligence actions.[3] A schedule would not be appropriate in medical malpractice cases. Would it be fair to award a pre-fixed award for negligence which resulted in a paralyzed hand for a surgeon, or lost or impaired vision for an artist, or lost or impaired hearing for a musician?

Significantly, no proposal for the establishment of Health Courts would require that a plaintiff be permitted a jury trial on his/her claim of medical negligence. This is contrary to the Seventh Amendment of the Constitution of the United States, which preserves the right to trial by jury.[4] It is also against the ABA policy related to juries which was adopted by the ABA House of Delegates in February 2005, which states that "parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with the law."[5] There is also substantial doubt as to whether such a procedure would violate the due process clause of the United States Constitution.[6]

Empirical studies have demonstrated that juries are competent in handling medical malpractice cases. Duke University School of Law Professor Neil Vidmar's 1995 extensive study of juries found that:

> [o]n balance, there is no empirical support for the propositions that juries are biased against doctors or that they are prone to ignore legal and medical standards in order to decide in favor of plaintiffs with severe injuries. This evidence in fact indicates that there is reasonable concordance between jury verdicts and doctors' ratings of negligence. On balance, juries may have a slight bias in favor of doctors.[7]

In addition, he concludes at page 259 of his 1995 publication that research "does not support the widely made claims that jury damage awards are based on the depth of the defendants' pockets, sympathies for plaintiffs, caprice, or excessive generosity." A survey of studies in the area by University of Missouri-Columbia Law Professor Philip Peters, Jr. published in March 2002 likewise found that:

> [t]here is simply no evidence that juries are prejudiced against physician defendants or that their verdicts are distorted by their sympathy for injured plaintiffs. Instead, the existing evidence strongly indicates that jurors begin their task harboring sympathy for the defendant physician and skepticism about the plaintiff.[8]

A July 2005 Illinois study conducted by Professor Vidmar also concluded that there was no basis for the argument that runaway verdicts were responsible for increases in malpractice premiums.[9]

Janice Mulligan
Chair, Standing Committee on Medical Professional Liability

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[1] Philip K. Howard, *A Case for Medical Justice* (May 16, 2004), http://www.cgood.org/healthcare.html (last visited Dec. 7, 2005).
[2] Nancy Udell and David B. Kendall, *Health Courts: Fair and Reliable Justice for Injured Patients* (2005), http://www.ppionline.org (last visited Dec. 7, 2005).
[3] See, e.g., ABA Resolution opposing "ceilings on awards" in malpractice actions, ABA House of Delegates, February 1978; and the ABA Resolution opposing any "ceilings on pain and suffering" damages, ABA House of Delegates, February 1987.
[4] The Seventh Amendment reads: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." U.S. CONST. amend. VII.
[5] ABA Policy, Principle 1, "The right to jury trial shall be preserved," adopted by the House of Delegates, February 2005.
[6] U.S. CONST. amend. XIV; See also, *Medical Professional Liability Reform for the 21st Century: A Review of Policy Options*, Committee Report, General Assembly of Pennsylvania, www.legis.state.pa.us (last visited Aug. 25, 2005).
[7] NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS 182 (Univ. of Michigan Press 1998) (1995).
[8] Philip G. Peters, Jr., *The Role of the Jury in Modern Malpractice Law*, 87 IOWA L. REV. 934 (2002).
[9] Neil Vidmar, *Medical Malpractice and the Tort System in Illinois*, 93 ILLINOIS BAR JOURNAL 340 (2005).