



WITH “HEALTH COURTS” 90 PERCENT OF VICTIMS GET NOTHING

Harvard study shows “Health Courts” model would compensate fewer victims and provide less money

There is no need for a pilot program to determine whether the “health courts” compensation model offers an adequate substitute for medical malpractice suits. An intensive study was already done by the same researchers now advocating for a “health courts” alternative.

From 1995 to 1998, Harvard researchers Studdert, Brennan and Thomas conducted the Utah-Colorado Medical Practice study (UCMP study) – a detailed study of medical errors in Utah and Colorado to determine “the economic feasibility of a no-fault alternative for medical injury compensation.”¹ They examined hospital records from 1992 to determine how much an administrative compensation system would cost, how many patients injured by medical errors could be compensated, and the level of compensation that would be available for the injured.² In determining economic feasibility, they relied on the total annual cost for medical malpractice liability in Utah and Colorado, respectively, as the amount of monies available (the “budget”) for compensation under the administrative scheme in each state.³

The results of the UCMP study, which were widely reported in the academic literature, showed that most victims of medical errors would be uncompensated and the few who could overcome the system’s obstacles

would receive much less money to remedy their injury than under a traditional court system.⁴ The UCMP study revealed the points made below.

Most victims would be uncompensated

The “health courts” model is not a “no-fault” plan. The UCMP study showed that the model drastically narrows the pool of patients injured by medical errors that would be eligible for compensation. It is not a “no-fault” plan, as only patients who *prove* that their injury was an “avoidable” error would be eligible for a limited form of compensation.

Only half of all medical errors met the “avoidable” error standard. “Avoidable” error was adopted from the Swedish model of compensating for medical errors.⁵ Applying this arbitrary standard, the researchers showed that the universe of compensable medical injury would be reduced by half if an “avoidable” error standard was applied. The researchers examined hospital records from 1992, which indicated that the total number of patients injured by medical errors in 1992 was 17,192. However, only 8,859 of those injuries were deemed to result from “avoidable” error.⁶ Thus, only 51 percent of identified medical errors would have qualified as compensable under the researchers’ “health courts” model. See diagram: Most Medical Injuries Would Not Be Compensated.

Not all “avoidable” medical errors would be compensated. If a patient’s injury was deemed “avoidable,” an “injury threshold” must be overcome. The UCMP study showed that applying this threshold would greatly reduce the number of eligible patients. A four-week disability threshold reduced the number of patients with eligible injuries from 8,859 to 3,069, covering only 18 percent of all patients injured by medical error. When an eight-week disability threshold was applied, as proposed in Colorado, the number of eligible patients dropped to 1,862, or 10 percent of the patients injured by medical error.⁷ Fully 90 percent of injured patients would be forced to bear the economic and personal suffering caused by medical error.

The few who might receive compensation would receive less than under a traditional civil justice system

In the UCMP study, the researchers recognized that to maintain economic feasibility, the amount of compensation for the few eligible patients (*i.e.*, the 10-18 percent who are able to overcome all of the aforementioned obstacles) would need to be rationed substantially and costs shifted to public and private health insurers. To stay within the annual budget (*i.e.*, the total annual cost of medical liability in Utah and Colorado, respectively) compensation would be severely curtailed:

Less than two-thirds of lost wages would be compensated. The researchers proposed to limit wage loss compensation to 66 percent of lost wages, and would reduce that amount further by subtracting any sick pay or wage continuation benefits available to the patient.⁸

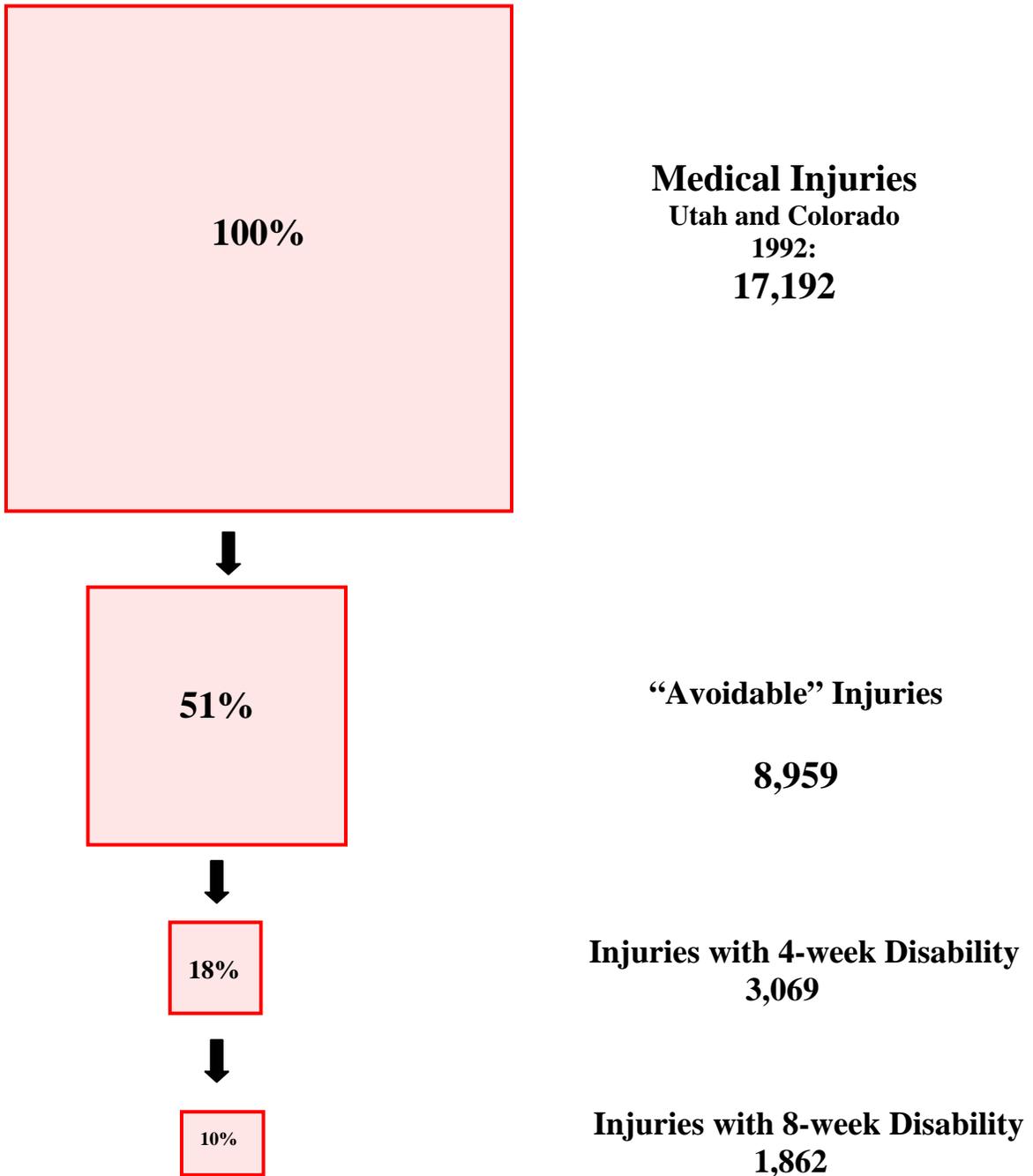
Only out-of-pocket medical expenses would be paid. These expenses would be paid out periodically, not in a lump sum, and

only to the extent not paid for by the patient’s insurer.⁹

Loss of household production would be capped at \$20 per day. “Household production” is a term describing compensation for those whose injury prevents their performance of domestic tasks. This element of compensation is especially critical for seniors, and important to others who are injured in a way that prevents them from performing routine household work.¹⁰

Pain and suffering compensation would be capped. Damages for the pain and suffering of the patient would be determined from a rigid schedule based on an injury’s severity and the patient’s age, and would be capped at \$100,000 regardless of the patient’s need or circumstances.

Most Medical Injuries Would Not Be Compensated



¹ Studdert, David M., Brennan, Troyen A., Thomas, Eric J. “Beyond Dead Reckoning: Measures Of Medical Injury Burden, Malpractice Litigation, And Alternative Compensation Models From Utah And Colorado.” 33 Ind. L. Rev. 1643;1657 (2000). (“Beyond Reckoning”).

² This “health court” model is described most recently in a November 3, 2006 article, and is essentially the same model the researchers relied on in the UCMP Study. Mello, Michelle M., Studdert, David, Kachalia, Allen B. and Brennan, Troyen A. “Health Courts and Accountability for Patient Safety.” *The Milbank Quarterly*. Vol. 84, No.3. November 3, 2006. (“Nov. 2006 Harvard Health Proposal”).

³ The annual cost of medical malpractice liability in each state was represented by the total annual cost of medical malpractice premiums paid in that state. “Beyond Reckoning” at 1673.

⁴ Studdert, David M., et al. “Negligent Care and Malpractice Claiming Behavior in Utah and Colorado.” 38 Med. Care 250 (2000); Thomas, Eric J., et al. “Costs of Medical Injuries in Utah and Colorado.” *Inquiry*. Volume 36. Fall 1999; Studdert, Brennan et al., *No-Fault Compensation for Medical Injuries, the Prospect for Error Prevention*, JAMA; Jul 11, 2001; 286, 221; Beyond Reckoning 33 Ind. L. Rev. 1643; Studdert, David, Thomas, Eric, Zbar, Brett, et al. “Can the United States afford a “no-fault” system of compensation for medical injury?” 60 Law & Contemp. Prob. (Spring 1997). 1-34.

⁵ The concept of “avoidable” error is based on the Swedish compensation model, which operates in the context of a comprehensive social insurance system with nationalized health care. The Swedish model requires that: (1) the medical management was the cause of the injury (as distinguished from the underlying disease or medical condition); and either (2) the treatment was inappropriate or unacceptable according to medical standards; or (3) the injury was avoidable. The claimant must establish (1) and (2) or (3) to receive compensation. “Beyond Reckoning.” 33 Ind. L. Rev. 1643;1673.

⁶ “Beyond Reckoning.” 33 Ind. L. Rev. 1643;1659, 1670.

⁷ “Beyond Reckoning.” 33 Ind. L. Rev. 1643;1674-1675.

⁸ In Utah, the administrative plan initially proposed by the authors had a total cost exceeding the total cost of medical malpractice premiums in Utah (which represent the total cost of medial malpractice liability in Utah) in that year by 30 percent. Hence, that plan had to be abandoned. “Beyond Reckoning.” 33 Ind. L. Rev. 1643;1673.

⁹ To stay within budget, these researchers have since advocated abolishing the subrogation rights of health care insurers, which would require amending existing laws because statutes protect the secondary payor status of Medicare, Medicaid, and employer health insurance plans covered by the provisions of the Employee Retirement Income Security Act. Studdert, Mello, et al. and Common Good draft Health Court Proposal Skeleton presented October 17, 2005, at 7 (“Harvard Skeleton Proposal”).

¹⁰ “Beyond Reckoning.” 33 Ind. L. Rev. 1643;1669.