Law and Emergency Medicine

Medical Liability and the Emergency Physician: A State by State Comparison — Part 1

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"I don't want to miss badness when it presents in an unusual way." I recently read this quote on an emergency medicine discussion forum, and it got me thinking about the vulnerability of our specialty and the need for comprehensive tort reform. Working with limited information is what emergency medicine is all about, and when our initial information is limited and our ability to obtain additional information is restricted, the door to legal action opens wide. Unfortunately, with mounting regulation and increased scrutiny of our resource utilization on the horizon, our ability to "find badness when it's less than obvious" will be challenged. We will be forced to limit our work-ups based on evidence-based protocols and cost-benefit ratios. If our ability to diagnose and treat is restricted beyond our control by the government, we deserve to be shielded from litigation when bad outcomes occur. Simply put, the current medical liability system is not compatible with government-run health care rationing. We need tort reform. That being said, we won't see tort reform at the federal level anytime in the foreseeable future. For now, it will remain an issue for each state. As we examine tort reform at the state level, there is immense interstate variability. As we all know, some states have passed laws limiting plaintiff awards and attorney fees, and other states have developed laws regarding pretrial physician panels and patient compensation funds. As one would expect, these laws have directly affected health care costs and lawsuit frequency, and indirectly affected resource utilization, physician retention, and physician practice style. I've seen this on a personal level throughout my career, as I've now practiced in three states with drastically different liability environments: Illinois, Indiana, and Texas.

Which states have good medical liability environments, and why? Are any states particularly favorable for emergency physicians? Which states have passed EMTALA-related tort reform? Which states have established a gross negligence standard? State by state information on medical liability has been compiled many times, but data specifically on emergency medicine has been hard to come by — until now. I have constructed a medical liability state by state comparison — hopefully the most accurate and comprehensive medical liability database yet for emergency physicians.

Methods

Each state's medical liability environment was carefully scrutinized and given a rating (one to five stars). These ratings were based primarily on (1) the presence of damage caps and their stability over time (weighted 30%), and (2) the approximate malpractice premium costs for emergency physicians (weighted 30%). States with meaningful laws specifically protecting emergency physicians received additional one or two stars.

Additional factors that received consideration included: limits on attorney fees (7.5%), expert witness reform (7.5%), statute of limitations (5%), joint and several liability reform (2.5%), collateral source reform (2.5%), whether periodic payments are allowed (2.5%), lawsuit frequency (5%), lawyers per capita (5%), pretrial panels (7.5%), patient compensation funds (7.5%), and average malpractice awards (5%).

I attempted to list the average 2012 annual premium (approximate) for emergency physicians. For states in which this information could not be obtained, I listed average 2012 annual premiums for Internal Medicine (IM) and General Surgery (GS) (approximate numbers representative of full time physicians with standard policy limits). This information was obtained from "The Medical Liability Monitor."[1] As a general rule, emergency medicine premiums are typically somewhere between IM on the low end and GS on the high end.

Primary sources for this state by state comparison included: The Medical Liability Monitor, The American Medical Association, Protect Patients Now, The American Tort Reform Association, The Kaiser Foundation and its statehealthfacts.org, discussion forums at sermo.com and studentdoctor.net, and countless conversations involving helpful emergency medicine colleagues all over the country.

I welcome questions, comments, and additions. Hopefully, this will stimulate increased cooperation and communication among emergency physicians practicing in different states. I'm curious, for those of you who practice in tort reform states, what's it like? Better for patients? Physicians? Can a state have a good climate despite the absence of tort reform?

I welcome any and all feedback. Please direct your comments or questions to the editor of *Common Sense*, Andy Walker at cseditor@aaem.org.

Before we scrutinize each state, I'd like to define a few terms that will be mentioned repeatedly in this paper.[2]

- **Tort:** in common law, compensating someone for the wrongdoing of another.
- **Tort reform:** proposed changes that would reduce tort litigation or damages.
- **Hard caps:** don't change over time, hold no exceptions, and are the same regardless of the number of defendants or plaintiffs.
- **Soft caps:** are individualized per defendant or plaintiff, change over time, and allow for exceptions.
- **Non-economic damages:** are paid to compensate an individual for physical and emotional pain, not monetary losses.
- **Punitive damages:** should be awarded only if there is clear and convincing evidence that the defendant acted with malicious intent.

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- **Collateral source rule:** says that juries need to be aware of payments to plaintiffs from other sources, such as health insurance, disability insurance, etc.
- **Joint and several liability:** a rule that allows any defendant in a lawsuit to be held liable for the entire amount of damages, regardless of that defendant's proportion of fault. Ideally, this rule is reformed/abolished so that defendants are held liable only for their own portion of the damages awarded to a plaintiff, in direct proportion to their percentage of fault.
- **Expert witness reform:** experts must have, "An appropriate level of knowledge about the specific matter in question and a sufficient level of expertise in the applicable field of medicine." Some states have passed laws requiring experts to be currently in practice, from the same specialty, and living in the same state in which the incident occurred.

Now, let's look closely at the first 10 states arranged alphabetically:

Alabama ★★★½☆ 3.25 stars out of 5
Caps: None.[3]
Average 2012 premiums: ~ $22,000 for EM (personal communication, 2012).
Liability environment for emergency physicians: Alabama is not a particularly risky state for EPs (personal communication, 2012). Strengths include relatively low premiums (info obtained from helpful colleague), a low number of award payments,[7] a two year statute of limitations,[3] and a strong contributory negligence clause: "a claimant's proximate contributory negligence will bar recovery completely."[6] Weaknesses include the absence of caps,[3] no expert witness case certification requirement,[8] no limits on attorney fees,[3] and no joint and several liability reform.[3] A $400,000 cap on non-economic damages and a $1 million cap on wrongful death damages were both overturned in the 1990s.[4]
Assessment: Premiums remain low despite the absence of meaningful tort reform. Grade: 3.25 stars out of 5.

Alaska ★★★★½ 4.5 stars out of 5
Caps: $250,000 on non-economic damages, $400,000 cap on non-economic damages for wrongful death or severe permanent physical impairment that is more than 70% disabling.[3]
Average 2012 premiums: ~$8,000 to $10,000 for IM, ~ $29,000 to $33,000 for GS.[1]
Liability environment for emergency physicians: With excellent liability reforms that have so far stood the test of time, Alaska is a fantastic state for emergency physicians. Strengths include caps on non-economic damages,[3] expert witness reform,[8] a two year statute of limitations,[3] and joint and several liability reform.[3] Unique among the states, Alaska has had a "loser pays" rule throughout its civil courts for many years — the "English Rule" that the entire world outside the U.S. follows. Unfortunately, in Alaska the rule is applied to no more than 20% of the winner's legal fees and is actually collected in only a minority of cases. Thus it has not had an obvious effect on medical liability in the state.[27] Minor criticisms include the absence of limits on attorney fees[3] and no specific protection for emergency physicians and other physicians providing EMTALA-mandated emergency care.
Assessment: Formidable reforms have been upheld. Grade: 4.5 stars out of 5.

Arizona ★★☆☆☆ 2 stars out of 5
Caps: None.[3]
Average 2012 premiums: $30,000 to $50,000 for EM.[5]
Liability environment for emergency physicians: Despite specific legislation designed to protect emergency physicians and those providing EMTALA-mandated emergency care,[9] Arizona is still a dangerous state for EPs. There are several negatives: high premiums,[1] caps are prohibited by the state constitution,[3] and there are no limits on attorney fees.[3] On the positive side, Arizona does have a two year statute of limitations,[8] joint and several liability reform,[3] and this year the Supreme Court upheld expert witness reform requiring the plaintiff's experts to be physicians practicing in the same specialty as the defendant.[10] Most notably, in 2009 Senate Bill 1018 added a new section to Arizona Statutes section 12-572, that increased the burden of proof on plaintiffs in cases involving emergency physicians and others providing EMTALA-mandated emergency care. Plaintiffs must present "clear and convincing evidence" rather than a "preponderance of evidence" that the provider committed malpractice.[9]
Assessment: Legislation providing additional protection for EMTALA-mandated emergency care is promising, but has yet to make an impact. Grade: 2 stars out of 5.

Arkansas ★★★½☆ 3.25 stars out of 5
Caps: None.[3]
Average 2012 premiums: $7,000 to $10,000 for IM, $21,000 to $31,000 for GS.[1]
Liability environment for emergency physicians: Arkansas is known as relatively non-litigious (personal communication, 2012) — the state is a safe bet for an emergency physician. Physicians enjoy some of the lowest annual premiums in the country.[1] The state has enacted a two year statute of limitations and expert witnesses are required to practice in the same specialty as the defendant.[3,8] Despite these strengths, tort reform is nonexistent,[3] opening the door for lawsuit abuse and increased costs down the road. Arkansas has no caps, no joint and several liability reform, no collateral source reform, and no limits on attorney fees.[3,8] However, the state's political climate is slowly changing and tort reform in Arkansas may soon become a reality. In 2013 Senate Joint Resolution[2] was filed, introducing a "loser pays" penalty for those who file lawsuits determined to be frivolous, as well as additional expert witness reforms — further expert restrictions and a "certificate of good faith" requirement.[11]
Assessment: Premiums remain low despite the absence of meaningful tort reform. Grade: 3.25 stars out of 5.

California ★★★★★ 5 stars out of 5
Caps: $250,000 cap on non-economic damages (hard cap).[3]
Average 2012 premiums: $4,000 to $18,000 for IM, $15,000 to $64,000 for GS.[1]
Liability environment for emergency physicians: In 1975, California passed MICRA, the Medical Injury Compensation Reform Act, and it has since become the gold standard for state-based medical liability reform.[12] Components of MICRA include a hard $250,000 cap on non-economic damages — one of the only caps out there that is not indexed

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for inflation, limits on attorney fees, and a short statute of limitations.[3,8] Despite having it's constitutionality repeatedly challenged, this landmark reform package has stood the test of time and has served as a model for reform at the federal level.[12] MICRA is credited for reigning in healthcare costs.[13] Premiums in California are relatively low[1] and the state has one of the lowest average malpractice award payments in the nation.[7]
Assessment: CA is top dog when it comes to pertinacious reform. Low premiums, hard caps — thank you MICRA! Grade: 5 stars out of 5.

Colorado ★★★★★ 5 stars out of 5
Caps: $300,000 cap on non-economic damages, $1,000,000 cap on total damages (hard caps).[3]
Average 2012 premiums: $11,000 to $14,000 for IM, $43,000 to $60,000 for GS.[1]
Liability environment for emergency physicians: In my opinion, Colorado is one of the top states in the union regarding medical liability. Despite lacking EMTALA-specific reforms, it is considered a safe haven for EM physicians. It is one of the only states to have upheld a hard cap on non-economic damages and a hard cap on total damages.[3] Additional strengths include expert witness reforms such as a case certification requirement, experts must be in the same specialty as the defendant, and experts must be licensed in Colorado;[8] joint and several liability reform;[3] and a two year statute of limitations.[8] Colorado has no limits on attorney fees.[3]
Assessment: A hard cap on total damages, low premiums, and superior expert witness reform make the centennial state an easy sell. Grade: 5 stars out of 5.

Connecticut ★☆☆☆☆ 1 star out of 5
Caps: None.3
Average 2012 premiums: $15,000 to $35,000 for IM, $66,000 to $93,000 for GS.[1]
Liability environment for emergency physicians: Connecticut's medical liability environment is not particularly favorable towards EPs. Annual premiums are high,[1] average malpractice awards are high (over $495,000 in 2011),[7] damage caps are nonexistent,[3] and last year trial attorneys came very close to passing a bill which would have weakened Connecticut's certificate of merit law passed in 2005.[14] Strengths include some expert witness reform, joint and several liability reform, a limit on attorney fees, and a two year statute of limitations.[3,8]
Assessment: Sky high premiums and the absence of caps make CT a no-go. Grade: 1 star out of 5.

Delaware ½☆☆☆☆ 0.5 stars out of 5
Caps: None.[3]
Average 2012 premiums: $40,000 to $60,000 for EM (3 million/5 million policy) (personal communication, 2012).
Liability environment for emergency physicians: Unfortunately, Delaware's medical liability environment is one of the nation's worst. You've been warned. Damage caps are nonexistent,[3] premiums are high,[1] average malpractice awards are high ($600,000 in 2011),[7] the state lacks expert witness reform,[8] and there is no joint and several liability reform.[3] The state does limit attorney fees[3] and Delaware enforces a two year statute of limitations.[8] Apparently, pretrial screening panels are a voluntary option.[8]
Assessment: No caps, no expert witness reform, high premiums, and no hope on the horizon. Grade: 0.5 stars out of 5.

District of Columbia ☆☆☆☆☆ 0 stars out of 5
Caps: None.[3]
Average 2012 premiums: $24,000 for IM, $73,000 for GS.[1]
Liability environment for emergency physicians: Stay away, stay away! EM physicians who love DC and want to call it home are advised to commute to Maryland or Virginia to find work. No damage caps,[3] no expert witness reform,[8] no joint and several liability reform,[3] a three year statute of limitations,[8] no limits on attorney fees,[3] premiums that are through the roof,[1] a high average malpractice award payment ($575,000 in 2011), and the highest number of attorneys per capita (276 per 10,000 residents) in the country.[15]
Assessment: The highest number of attorneys per capita. Need I say more? High premiums, high awards, no caps, and no reform whatsoever. Grade: 0 stars out of 5.

Florida ★½☆☆☆ 1.5 stars out of 5
Caps: $500,000 cap on non-economic damages for physicians, $750,000 cap on non-economic damages for hospitals (soft caps).[3]
Average 2012 premiums: $20,000 to $48,000 for IM, $57,000 to $190,000 for GS.[1]
Liability environment for emergency physicians: Despite comprehensive reform in 2003 that included legislation geared towards emergency physicians,[16] Florida will probably always be a relatively dangerous state for EPs. There is immense variation throughout the state regarding risk, with Dade and Broward counties being two of the most litigious counties in the country.[17] General surgeons, OB-GYNs, and other specialists can expect to pay close to $200,000 in annual premiums.[1] A soft $500,000 cap on non-economic damages was instituted in 2003, but the cap can be raised to $1 million if negligence resulted in wrongful death, a permanent vegetative state, or any type of "catastrophic injury."[16] For emergency physicians and others providing care in the emergency setting, these caps are lowered to $150,000, and $300,000 in the case of catastrophic injury.[16] On the negative side, South Florida has a lot of lawyers[15] and a lot of ATRA-reported "judicial hellholes."[17] On the bright side, Florida does have joint and several liability reform,[3] limits on attorney fees,[3] a two year statute of limitations,[8] expert witness reform,[8] and two patient compensation funds.[8] In March 2013, legislation (Senate Bill 1134/House Bill 897) was introduced to transform the Florida medical malpractice system into something similar to a no-fault workers compensation model, in an attempt to reduce healthcare costs and decrease defensive medicine. Not surprisingly, surveys reveal that 93% of physicians support the bill while trial attorneys remain intensely opposed.[21]
Assessment: Special caps on non-economic damages for emergency providers have failed to significantly improve this high risk environment. Grade: 1.5 stars out of 5.

Look for this series to continue in future issues!

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