

**MEDICAL MALPRACTICE
AND ITS REFORM**

Course No. 2323-AD

Fall 2007

Marc A. Rodwin, J.D., Ph.D.

Class Time: Wednesday: 2:00 PM - 3:50 PM

Classroom: Room 245

Office Hours: M 11:15 to 12:15; W: 3:50 to 4:30 and by appointment

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This course examines the way our current system of medical malpractice law functions based on empirical, economic, and philosophical studies. The course examines how effectively and efficiently the current system compensates those injured, the degree and kind of errors in finding liability when none exists and errors in not finding liability when negligence occurred. It also examines the extent to which tort liability deters negligence and improves quality of care, the cost of medical malpractice on patients, physicians and society. The course focuses on proposals to change malpractice law and on the effect of state law reforms since 1970s. These reforms and proposals range from changes in rules for screening cases, altering the role of the jury, changing the process of trials, limiting testimony, capping damage awards or attorneys fees, instituting a system of no-fault or social insurance in place of tort, and a wide range of other proposals.

Course Requirements

Grades will be based on the student's paper (due at the end of the semester), class presentation, and participation. The paper may, but need not, fulfill the law school legal writing requirement.

Students should come to class prepared to contribute to discussion. I will award additional credit for students who distinguish themselves in classroom participation.

Students should regularly read a national newspaper (such as *The New York Times*, *Washington Post* or *Wall Street Journal*) and think about how class relates to current health news. Students who do not subscribe to a hard copy of such newspapers can read them on the web, or on Lexis or Westlaw. An excellent daily listing of links to health news articles is available at: <http://www.kaisernetwork.org/dailyreports/healthpolicy>. You can receive these links as an email each day from the Kaiser Family Foundation if you sign up at <http://www.kff.org/profile/subscriptions.cfm>.

Writing a Paper to Fulfill the School Legal Writing Requirement

You may elect to write a paper for this course to meet the school legal writing requirement. If you want to do so, let me know early in the semester, meet with me to get your topic approved, and fill out the registrar forms. *A draft paper needs to be submitted by the ninth week of class and revised based on my comments.*

Texts

Course Reader

Baker, Tom. 2005. *The Medical Malpractice Myth*. Chicago: The University of Chicago Press.

Werth, Barry. 1988. *Damages: One Family's Legal Struggles in the World of Medicine*. New York: Berkeley Books.

Media reports on medical malpractice and health policy.

A library of electronic documents posted on blackboard and library electronic reserves.

Academic Honesty

Your paper must be written by you alone and must respect law school rules on academic honesty. When turning in your exam and paper, include a separate page paper clipped to the back with the following statement and your signature.

"I have reviewed the Suffolk University Law School policy on academic honesty and plagiarism. My essay and take home exam are my own written work and conform to these rules."

Format and Style for Papers

- Number pages.
- Use 12 pt. font with 1 inch margins on all sides.
- Double space.
- Put your paper title on a title page.
- Include a bibliography with your sources as well as citations. You may use any citation and bibliographic style that you choose.

TOPICS

Tentative Topics and Schedule. Readings will be revised.

Week 1: August 22. Introduction

Berenson, Robert A. Malpractice Makes Perfect. *The New Republic* Oct. 10, 2005, 17-21.

Mohr, James C. 2000. American Medical Malpractice Litigation in Historical Perspective. *The Journal of the American Medical Association* 283: 1731.

Studdert, David M. and Troyen A. Brennan. 2004. Medical Malpractice. *New England Journal of Medicine* 350: 283-292.

Baker, Tom. 2005. *The Medical Malpractice Myth*, Ch. 1.

Bovbjerg and Berenson. 2005. Surmounting Myths and Mindsets in Medical Malpractice. *Urban Institute*.

Week 2: August 29. Malpractice Evidence and Myths: Relation of Malpractice Claims to Negligence, Compensation, and Law Suits

Baker, Tom. 2005. *The Medical Malpractice Myth*. Ch. 2, An Epidemic of Medical Malpractice, Not Malpractice Suits

Baker, Tom. 2005. *The Medical Malpractice Myth*. Ch. 4, The Malpractice Insurance Companies' Secret.

Studdert et al, 2006. Claims, errors, and compensation payments in medical malpractice litigation. *New England Journal of Medicine* 354:2024-2033.

Supplemental/ Optional

Brennan, Troyen A., Lucian L. Leape, and N.M. Laird, et al. 1991. Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I. *New England Journal of Medicine* 324:370-6.

Localio, A. Russell, Ann G. Lawthers and Troyen A. Brennan, et al. 1991. Relation between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III. *New England Journal of Medicine* 325:245-51.

Brennan, Troyen A., Colin M. Sox and Helen R. Burstin. 1996. Relation between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation. *New England Journal of Medicine* 335: 1963-7.

Week 3. September 5. Malpractice Evidence and Myths: *Relation of Premiums to Malpractice and Access*

Baker, Tom. *The Medical Malpractice Myth*. Ch. 3, An Insurance Crisis Not a Tort Crisis.

Rodwin, Marc A., Hak Chang, and Jeffrey Clausen. 2005. Malpractice Premiums and Physician Income: Perceptions of Crisis Conflict with Empirical Evidence. *Health Affairs* 25(3): 750-758.

Baker, Tom. *The Medical Malpractice Myth*, Ch 7, Dr. Bill May be Gone But Dr. Jane is Here to See You.

GAO. 2003. *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*. Washington, DC: GAO-030836.

Supplemental/ Optional

Mello, Michelle. 2006. *Understanding Medical Malpractice Insurance: A Primer*. Robert Wood Johnson Foundation.

Physician Insurers Association of America. 2003. *Statement of the Physician Insurers Association of America Regarding Patient Access Crisis: The Role of Litigation*. Judiciary Committee and Health, Education, Labor and Pensions Committee. Washington, DC.

Week 4. September 12. Quality, Patient Safety and Liability

Baker, Tom. *The Medical Malpractice Myth*. Ch. 5, Why We Need Malpractice Law Suits

Sage, William M. 2003. Medical Liability and Patient Safety. *Health Affairs* 22 (4):26-6.

Hyman, David A. and Charles M. Silver. 2005. The Poor State of Health Quality in the U.S.: Is Malpractice Part of the Problem or Part of the Solution? *Cornell Law Review* 4:893.

Leape, Lucian, and Donald Berwick. 2007. Five Years After *To Err is Human*: What Have We Learned. *Journal of the American Medical Association*. 293(19): 2384-2390

Supplemental/ Optional

Bovbjerg, Randall R., R.H. Miller and D.W. Shapiro. 2001. Paths to Reducing Medical Injury: Professional Liability and Discipline vs. Patient Safety — and the Need for a Third Way. *Journal of Law, Medicine, and Ethics* 29: 369-80.

Week 5. September 19. Critiques of Malpractice—The Litigation Process-1

Werth, Barry. *Damages: One Family's Legal Struggles in the World of Medicine*.

The Physician's Perspective

Lantos, John. *The Lazarus Case: Life-and-Death Issues in Neonatal Intensive Care (Excerpts)*

Gawande, Atul. "When Doctors Make Mistakes" *Complications: A Surgeon's Notes on an Imperfect Science*

Week 6. September 26. Critiques of Malpractice-The Litigation Process-2

Werth, Barry. *Damages: One Family's Legal Struggles in the World of Medicine*.

Excerpt from, O'Connell, Jeffrey. 1979. *The Lawsuit Lottery: Only the Lawyers Win*. New York: Free Press.

Week 7. October 3. Critiques of Malpractice—Contracts over Standard of Care and Defensive Medicine

Contracts, Consent, Rationing and the Standard of Care

Epstein, Richard Allen. 1976. Medical Malpractice: Its Cause and Cure. In Simon Ruttenberg (ed.), *The Economics of Malpractice*. Washington, D.C.: American Enterprise Institute for Public Policy Research.

Morreim, E. Haavi. 1987. Cost Containment and the Standard of Medical Care. *California Law Review* 75(5): 1719-1763.

Hall, Mark A. The Malpractice Standard under Health Care Cost Containment. *Journal of Law, Medicine & Ethics* 17(4): 347–355.

Defensive Medicine

Baker, Tom. *The Medical Malpractice Myth*. Ch. 6. The Goods on Defensive Medicine. (Additional articles on defensive medicine will be assigned.)

Defensive Medicine and Medical Malpractice. 1994. OTA-H-602. Washington, D.C: U.S. Congress, Office of Technology Assessment.

Bovbjerg, Randall, Lisa C. Dubay, Genvieve M. Kenney and Stephen A. Norton. 1996. “Defensive Medicine and Tort Reform: New Evidence in an Old Bottle.” *Journal of Health Politics, Policy and Law* 21 (2):267-288.

Baldwin, Laura-Mae, Gary Hart, Michael Lloyd, Meredith Fordyce and Roger A. Rosenblatt. 1995. Defensive Medicine and Obstetrics. *The Journal of the American Medical Association* 274:1606-10.

Week 8. October 10. Reform Proposals

Baker, Tom. *The Medical Malpractice Myth*. Ch. 8. Evidence-Based Medical Liability Reform

Malpractice Reform 1970s-1980s: An Assessment: Materials from Furrow et al.

AMA proposals and testimony on reform.

Palmisano, D.J. 2003. Statement of the AMA to the Committee on Energy and Commerce, Subcommittee on Health, U.S. House of Representatives. Assessing the Need to Enact Medical Liability Reform.

Week 9. October 17. Reform Proposals—Promoting Settlement

O’Connell, Jeffrey. 1982. Offers That Can’t Be Refused: Foreclosure of Personal Injury Claims by Defendants’ Prompt Tender of Claimants’ Net Economic Losses. *Northwestern University Law Review* 77: 589-632.

[Article on Alternative Dispute Resolution to be added]

Week 10. October 24. Reform Proposals: No Fault

Weiler Paul C. 1993. The Case for No-Fault Medical Liability. *Maryland Law Review* 52: 908-50.

Studdert, David M. and Troyen A. Brennan. 2001. Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States. *American Journal of Law and Medicine* 27: 225-52.

Bovbjerg, Randall R. and Frank A. Sloan. 1998. No-Fault for Medical Injury: Theory and Evidence. *University of Cincinnati Law Review* 67: 53-123.

Week 11. October 31. Reform Proposals: Enterprise Liability

Abraham, Kenneth and Paul C. Weiler. 1994. Enterprise Medical Liability and the Evolution of the American Health Care System. *Harvard Law Review* 108:381-436.

Sage, William M., K.E. Hastings and Robert A. Berenson. 1994. Enterprise Liability for Medical Malpractice and Health Care Quality Improvement. *American Journal of Law & Medicine* 20: 1-28.

Sage, William M. 1997. Enterprise Liability and the Emerging Managed Health Care System. *Law and Contemporary Problems* 60:159-210.

Week 12. November 7. Medical Malpractice, Tort and Social Theory

Readings to be assigned

Week 13. November 14.

Student Presentations

November 21. Thanksgiving Break

Week 14. November 28.

Student Presentations