# Show Me Tort Reform: the Missouri Experience

The changes in one state and their implications for the nation.

BY JOHN C. HAGAN III, MD; JOHN F. DOANE, MD; AND JIM DENNING

In 2003, medicine in Missouri was on life support. Physicians were leaving in droves to practice in states with affordable malpractice insurance and a less predatory tort bar. Despite seven medical schools in Missouri and Kansas City, Kansas, few residents and fellows could afford to set up a practice in Missouri or to join state medical groups. Huge areas of the Show-Me State were left without neurosurgical or high-risk obstetrics coverage. This article reviews the enactment and effect of tort reform in Missouri and our related thoughts on health care reform at the national level.

## KANSAS VERSUS MISSOURI

Many Missouri physicians headed west to Kansas in 2003. The contrast between the states is worth noting. Kansas politics are dominated by commercial and agricultural interests, and legislation is generally business friendly. The Kansas Trial Lawyers Association, the executive director/lobbyist of which from 1977 to 1986 was current Health and Human Services Secretary Kathleen Sebelius, does not have nearly the power or influence of its Missouri counterpart. The Sunflower State has created a stabilization fund that provides reinsurance against large adverse judgments. Consequently, Kansas physicians had malpractice premiums as much as 30% to 50% lower than their colleagues in Missouri (Discover Vision Centers, unpublished data).

Missouri trial lawyers are one of the major forces in the state's politics. They dominate the Democratic Party and, in areas, hold sway with the Republican Party as well. Their fundraising for politicians is legendary and prodigious. Inner-city juries in St. Louis and Kansas City are much more sympathetic to plaintiff's cases than out-of-state juries.[1] Quirky state law allowed tort lawyers from all over Missouri to move their trials to these two venues.[1] The US Chamber of Commerce declared 2003 Missouri one of the most hostile states in which to conduct business.[2]

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## ACTION

In full crisis mode, Missouri physicians mobilized as never before for the 2004 state elections. Previously somewhat parsimonious with their time and money, physicians became major contributors to the campaigns of Republican gubernatorial candidate Matt Blunt and numerous candidates for the State Senate and House, all of whom included in their platforms the enactment of tort reform. Physicians handed out campaign materials in their offices, let their patients know how runaway junk lawsuits imperiled their care, and identified which candidates were pledged to tort reform. Doctors advertised

## DEFENSIVE MEDICINE: A KEY DRIVER OF RISING MEDICAL COSTS AND AN ARGUMENT FOR TORT REFORM?

**Calculating the true costs of defensive medicine is difficult.**

BY CONNI BERGMANN KOURY, EXECUTIVE EDITOR

Defensive medicine is the practice of conducting diagnostic or therapeutic measures primarily as a safeguard against potential malpractice liability, rather than as a means of ensuring the health of the patient.

Studdert et al wrote in *The Journal of the American Medical Association* that the two main forms of defensive medicine are assurance behavior and avoidance behavior. Assurance behavior, or "positive" defensive medicine, involves supplying additional services of marginal or no medical value with the aim of reducing adverse outcomes, deterring patients from filing malpractice claims, or persuading the legal system that the standard of care was met. Avoidance behavior, or "negative" defensive medicine, reflects physicians' efforts to distance themselves from sources of legal risk.[1]

The prevalence and characteristics of defensive medicine are controversial.

"I think *defensive medicine* is a very difficult term to clearly define," said Kerry Assil, MD, in a telephone interview with *Cataract & Refractive Surgery Today*. "No two individuals' propensity toward pursuing risk are identical. Therefore, no two physicians draw the line in the sand the same as to what constitutes defensive medicine." Dr. Assil is a cataract and refractive surgeon who practices at the Assil Eye Institute in Beverly Hills and Santa Monica, California.

According to a recent article in *The Wall Street Journal*,[2] defensive medicine is a significant yet small portion of overall health care spending in America.

"Calculating how much defensive medicine actually costs is extremely difficult, because medical professionals often have many motivations for ordering tests and other procedures," wrote Dionne Searcey and Jacob Goldstein. "The [United States] spends a higher percentage of its gross domestic product on health care than any other nation in the industrialized world. Legal expenses contribute to the bill."[2]

The direct costs of medical malpractice—insurance premiums, claims paid, and legal fees—amount to a very small portion of overall health care spending.[2] In 2007, total spending on medical malpractice was more than $30 billion, an amount representing slightly more than 1% of total health care spending according to consulting firm Towers Perrin. That $30 billion includes legal defense costs and claim payments. The US federal government estimates that, in 2007, health care spending was $2.241 trillion.

Studdert et al[1] studied the prevalence and characteristics of defensive medicine among physicians practicing in high-liability specialties (emergency medicine, general surgery, orthopedic surgery, neurosurgery, obstetrics/gynecology, and radiology) in Pennsylvania. A mail survey with 824 respondents revealed that 93% of physicians were practicing defensive medicine. Ordering tests, performing diagnostic procedures, and referring patients for consultation were the most common behaviors and were reported by 92% of respondents. Forty-three percent said they used imaging technology in clinically unnecessary circumstances.

The survey found widespread negative behaviors such as avoidance of procedures and patients thought to increase the physician's chance of litigation. Forty-two percent of respondents said that, within the past 3 years, they had moved to restrict their practice by taking such steps as eliminating procedures prone to complications and avoiding patients who had complex medical problems or seemed litigious.[1]

"I think every physician would agree that, under certain circumstances, they should practice some degree of defensive medicine," Dr. Assil said. "If all physicians were to stop erring on the side of patient safety, then we would find that the results would be unpalatable to society. I think it's part of the Hippocratic Oath, which says, 'first do no harm,' … to practice some degree of defensive medicine. Where you draw the line becomes shades of gray."

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1. Studdert DM, Melo MM, Sage WM, et al. Defensive medicine among high-risk specialist physicians in a volatile malpractice environment. *JAMA*. 2005;293:2609–2617.
2. Searcey D, Goldstein J. Tangible and unseen health-care costs. *The Wall Street Journal*. http://online.wsj.com/article/SB125193312967181349.html?mod=googlenews_wsj; September 3, 2009. Accessed December 3, 2009.

the cause on radio and television and in newspapers. Ophthalmologists were especially engaged in the effort; our practice, Discover Vision Centers, donated more money than any other state physician group. The election handed Governor Blunt a victory and ushered in Senate and House majorities committed to changing the status quo.

> "Physicians should start raising opposition to health care bills that do not contain tort reform."

In 2005, physicians' political activism contributed to the passage of House Bill 393, a sweeping tort reform law. A $350,000 cap was set on non-economic damages, change of venue was abolished, and numerous other provisions had an immediate effect on Missouri's malpractice rates.[2] The exodus of physicians slowed. Our practice's malpractice premiums per Missouri ophthalmologist dropped from $22,718 in 2006 to $16,406 in 2009—a 28% reduction. (In 2009, however, the premiums for our Kansas-based ophthalmologists were only $8,937.) New physicians and new insurance carriers opened for business in Missouri. The number of malpractice lawsuits filed and judgments paid in the state plummeted to a 30-year low; the average payout is now about $50,000 below that of 2005.[2]

Not surprisingly, Missouri's trial lawyers have mounted an effort to overturn tort reform by the judicial process, as executed successfully in Wisconsin.[3] Their test case, carefully researched and lavishly financed, *Klotz v St. Anthony's*, is presently before the Missouri Supreme Court.

## IMPLICATIONS FOR NATIONAL REFORM

The unprecedented scope and speed of health care legislation at the national level is putatively driven by the costs and unavailability of medical care. The Manhattan Institute, a nonpartisan think tank, in addition to physicians and other thoughtful parties recognize that both the measurable cost of malpractice litigation and the much larger (but more difficult to compute) costs of defensive medicine are significant expenditures. Ultimately, the price of defensive medicine and unrestrained tort litigation will be paid by unsustainable inflationary monetary policies and confiscatory taxes on US citizens and businesses.[4]

We believe that the flagrant omission of tort reform in the health care bills before Congress at the time of this writing can be explained by the fact that the American Association of Justice (the refurbished name of the American Trial Lawyers Association) and wealthy individual trial lawyers are top political donors to the Democratic Party.[5]

Physicians should start raising opposition to health care bills that do not contain tort reform or that they find otherwise pernicious. The 2010 elections are important. Physicians should discuss the issues and candidates with their patients, who, in our experience, are mostly sympathetic and respect doctors' judgment. Physicians can distribute information in their office. Those in states with a US Senate race should find the best candidate and assist his or her campaign. Our practice has made a major commitment to US Representative Roy Blunt in his bid for a Senate seat.

We suggest meeting with state and national candidates, educating them, and—if they agree with tort reform—supporting them early in their campaigns. Based on the Missouri experience, we believe that motivated medical professionals can help shape positive health care legislation and enact tort reform. ■

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2. Blunt M. How Missouri cut junk lawsuits. *The Wall Street Journal*. September 22, 2009:A23.
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5. The Center for Responsive Politics. Heavy hitters: top all-time donors, 1989-2010. OpenSecrets.org. http://www.opensecrets.org/orgs/list.php. Accessed December 14, 2009.