The untenable defense of catastrophe

By Steven B. Stevens

No one is immune. It can strike anyone. It will strike most people. The results can range from harmless to catastrophic to lethal.

In 1999, a United States Institute of Medicine report estimated that it accounted for 44,000 to 98,000 preventable deaths each year. Later studies suggest that this estimate was low. In 2016, researchers analyzed data and reported that over 250,000 people die from it each year. That would make it the third leading cause of death in the United States.

Even those numbers are low. Those studies analyze and extrapolate *death* statistics. They do not include the number of catastrophic injuries – brain damage, organ failure, amputations – that it causes each year. Those studies do not calculate the devastating effect of deaths and injuries on the families of those who died or were injured.

"It" is preventable medical error.

A quarter of a million deaths is the equivalent of a passenger jumbo jetliner crashing more than once a day. If that horror were to occur, the public would rightly stop boarding airliners until the problems were identified and eliminated. legislators, governors, regulators, and the President would race to microphones and television cameras, clamoring for full and open investigations. They would vow to expose the causes and promise to enact legislation and regulations to restore the American traveler's confidence in the airline industry. The airline industry itself would ground the planes and unleash a public relations campaign, with pledges of complete and open cooperation with government investigators.

Not so for medical negligence. Nothing comparable for that daily catastrophe. No investigations. No vows of legislation to restore patient confidence in the health care system. No health care industry assurances of cooperation and transparency.

Quite the opposite, in fact. In the past 50 years there has been no widespread investigation by the California Legislature, or by Congress, to understand the scope of medical error and the devastating effects on patients and their families. Instead of protecting patients, the repeated hue and cry from legislators and the medical industry has been to proclaim the need to protect hospitals, physicians, and other health care providers from being accountable for the injuries that their errors inflict on patients and their families. It is exceptionally rare for those who are responsible for multiple catastrophic or lethal medical errors to be "grounded." Medical licenses are rarely revoked; hospitals are rarely shut down.

The medical industry – including physicians, hospitals, and their insurers – pushes legislatures to impose limits on recovery and to adopt procedural rules that make it more expensive and difficult for patients and their families to hold those responsible to account. What would be the public reaction if the airline industry, in response to a series of crashes, launched a public relations and lobbying campaign to protect them from liability for the catastrophes? Yet the medical industry does that every day.

In a 2002 survey of physicians, asked to name the two most important problems in medicine and health care, only 5% listed medical mistakes and injuries. Almost one-third said lawsuits and insurance. (Blendon, R.J., et al. *Views of Practicing Physicians and the Public on Medical Errors,* N.Eng.J.Med., Dec. 12, 2002, 347:19331940.) It would be as if pilots blamed families suing for wrongful death, instead of demanding action to eliminate pilot error.

And patients, of course, cannot refuse to "fly." Everyone eventually is a patient and must submit to care from physicians, nurses and technicians. When it comes to health care, there are no options "to drive or take the train."

Laws that protect wrongdoers undermine a fundamental purpose of the civil justice system. "[T]ort law is primarily designed to vindicate social policy." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683, 254 Cal.Rptr. 211, 227, internal quotations omitted.) "One of the purposes of tort law is to deter future harm." (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1081, 9 Cal.Rptr.2d 615, 624.) "The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 781, 122 Cal. Rptr.3d 313, 327.)

Medical negligence actions perform vital roles in society. They fulfill the basic goal of the civil justice system:

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Compensate those who have been injured by the negligence of others and, through that compensation, hold the wrongdoers to account for their errors. Through accountability, the community identifies dangers and encourages safety.

Laws that protect the negligent and impose the costs of negligence on the injured patients and their families distort social policy and make the health care system less safe. To the extent that health care providers are immunized, in whole or in part, from being held to account, the incentive to improve is diminished.

Civil litigation performs one more important role in our society: It satisfies the need for justice. "The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action." (Blackstone, W., *Commentaries on the Laws of England*, 1753, Vol. 2, Book III, Chap. 1, pp. 23 (J.B. Lippincott Co., 1893 ed.))

The lawyer representing the victim of medical negligence has an awesome responsibility: To be the champion of those who are unable to help themselves, to turn advocacy into accountability, and to turn accountability into justice.

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providing care to pregnant women. But the facts say otherwise.

States without caps have more doctors per capita than states with caps. Here on the West Coast, both Oregon and Washington have more doctors per capita than California, and neither has a cap on medical malpractice damages. The state of New York has no cap on damages and at least 30% more doctors per capita than California.

California's federally funded community health centers and free clinics are eligible for extensive free medical malpractice coverage from the federal government. Most Planned Parenthood clinics are self-insured, because the services they provide seldom lead to malpractice liability. The need for clinics or Planned Parenthood to purchase malpractice insurance is minimal. Even if malpractice premiums were to rise as the result of a change in the cap, the impact on clinics' budgets would be quite small. The Congressional Budget Office says that malpractice accounts for just a fraction of one percent of health care costs.

Of course, women aren't the only ones who take a disproportionate hit under MICRA. The law has its biggest impact on anyone who has little or low income, including children, the elderly, stay-at-home parents and working-class Californians. The late Congressman John Conyers (D-Michigan) observed in 2004 that this same math means malpractice caps discriminate against people of color.

As 2020 moves forward, California will very likely see another attempt at the ballot box to modernize MICRA. The executive board of CAOC is monitoring the progress of the ballot measure, which as I write has not yet qualified for the Nov. 3 election. It will face formidable, deep-pocketed opposition. Indeed, the medical industry spent nearly $60 million to defeat a similar measure in 2014, outspending proponents roughly 6 to 1.

Whatever the outcome, one thing is clear. For our organization, MICRA will not go away as a target for wholehearted opposition. Whether change comes via the ballot, the Legislature or the courts, this unjust, outdated and discriminatory law must be abolished. ■