Georgia Board for Physician Workforce
Spotlight on National Tort Reform & Reform in the Surrounding States
August 2010

Tort reform continues to be a highly debated issue at both the state and national level. In March 2010, the Georgia Supreme Court ruled the state's $350,000 cap on non-economic damages was unconstitutional in medical liability cases. The cap on non-economic damages was just one component of a comprehensive tort reform package that was passed and took effect July 1, 2005. The long-term impact of Georgia's Supreme Court ruling is unknown.

For informational and comparative purposes, there is value in looking at what is happening at the national level and in surrounding states. There are states which have taken effective steps to improve the medical marketplace environment (e.g., California). The variations between Georgia and the surrounding states illustrate the complexity of the issue.

Note: Physicians in Georgia and the surrounding states are not required to have medical liability insurance as a condition of licensure. Two states, Florida and South Carolina, have State Patient Compensation Funds, which provide additional coverage for participating physicians. Participation is optional.

This fact sheet examines the following questions:
1. Are there national models of tort reform that have proven to be effective?
2. What reforms have been enacted in Georgia and the surrounding states?

1. Are there national models of tort reform that have proven to be effective?

The most widely recognized model for tort reform is the California Medical Injury Compensation Reform Act of 1975, which is described in the box below.

California Medical Injury Compensation Reform Act (MICRA)

The MICRA has been deemed effective because it includes provisions to:

- Secure the ability of injured patients to receive quick, unlimited compensation for their economic losses
- Ensure that recoveries for non-economic damages do not exceed a reasonable amount (e.g., $250,000)
- Reserve punitive damages for cases in which they are truly justified
- Provide for periodic payment of judgments over time
- Ensure that old cases cannot be brought years after an event occurs (statute of limitations)
- Reduce the amount that doctors must pay if a plaintiff has received other payments from an insurer to compensate for their losses (collateral source rules)
- Provide that defendants must pay judgments only in proportion to their degree of fault (joint and several liability reform)

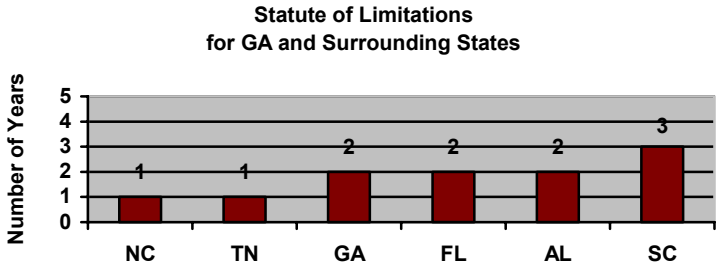
At the national level, the Department of Health and Human Services' (HHS) Agency for Healthcare Research and Quality (AHRQ) has undertaken an initiative to address patient safety and medical liability. Approximately $25 million in federal funding has been allocated to help states and health care systems develop detailed plans and test models to improve patient safety and promote medical liability reform. Efforts at the national level are being led by the Patient Safety and Medical Liability Reform National Advisory Council.

New York State will receive funding totaling $2.9 million for a three year pilot program/demonstration project based on a model developed by a Bronx Supreme Court judge. Additionally, 13 planning grants totaling $3.5 million have been awarded as of June 2010. The HHS initiative should provide useful information and experience to aid other states in enhancing patient safety and improving the medical liability environment.

2. What reforms have been enacted in Georgia and the surrounding states? [1, 2]

Statute of Limitations **-** *The maximum number of years a claimant has to file a liability suit.*

The statute of limitations for Georgia and the surrounding states ranges from one year to three years as shown in the graph. Tennessee and North Carolina have a limit of one year. Georgia, Florida, and Alabama adhere to two years. South Carolina has the longest time period at three years.



Contributory or Comparative Negligence *- Contributory negligence disallows any recovery by a plaintiff whose negligence contributed to causing the damages (even minimally). Comparative negligence reduces the amount of damages that a plaintiff can recover based upon the degree to which the plaintiff's own negligence contributed to the harm suffered.*

Contributory versus Comparative Negligence Laws in GA and Surrounding States	
North Carolina **Alabama**	Pure doctrine of contributory negligence. A claimant's contributory negligence bars recover completely.
Florida	Pure form of comparative negligence. A claimant's award is diminished in proportion to the claimant's fault, but the claimant's fault, no matter how great, will not act as a bar to recovery.
South Carolina **Tennessee** **Georgia**	Modified doctrine of comparative negligence. In **South Carolina**, a plaintiff may recover damages if his negligence is **less than or equal to** that of all the defendants. In **Tennessee**, a plaintiff may recover only if his negligence is **less than** the defendant's. In **Georgia**, for claims after 2/15/05, a plaintiff **cannot recover damages if he is more than 50% responsible**. In all three of these states, the plaintiff's damages are reduced in proportion to his percentage of fault.

Joint and Several Liability *- Under joint liability, each party is responsible for up to the full amount. With several liability, defendants are only liable for their respective share. Under joint and several liability, a plaintiff may recover all the damages from any of the defendants regardless of their individual share of liability.*

Joint Liability, Several Liability, & Joint and Several Liability Laws in GA and Surrounding States	
Tennesee **Florida** **Georgia**	Tennessee, Florida, and Georgia adhere to several liability. Each defendant is liable only for the percentage of the plaintiff's damages caused by the defendant's negligence. In Georgia and Florida, the fault of non-defendant's must also be considered in making the determination of a defendant's percentage of fault. In Florida, there is one important exception. A defendant whose liability exceeds that of the claimant is jointly and severally liable for the claimant's *economic damages*.
North Carolina **South Carolina** **Alabama**	The states of North Carolina, South Carolina, and Alabama impose joint and several liability. Any defendant is liable to the claimant for the entire amount of judgment, regardless of the defendant's share of fault.

Vicarious Liability *– In medical malpractice cases, vicarious liability refers to whether a hospital or hospital system can be held liable for the actions or inactions of a physician who is not directly employed by the hospital. Liability is dependent on the limits of their association. Typically, when an employee causes a loss to a patient in the normal course of his/her duty, then the employer will be responsible for such loss.*

- Florida statute holds hospitals liable for actions of physicians who are not directly employed by the hospital. In South Carolina, a hospital can be held liable if the hospital consciously implied that the doctor was its agent and the plaintiff relied upon that representation.
- Georgia statute stipulates a hospital will not be held liable if the hospital posts a notice in prescribed form or obtains an acknowledgment from the patient that some of the healthcare professionals are independent contractors.
- North Carolina and Alabama do not impose vicarious liability on hospitals. In Tennessee, no court case has addressed the issue.

Vicarious Liability of Hospitals Laws in GA and Surrounding States

	Imposed	Not Imposed	Not Addressed
Florida	X		
South Carolina	X		
Georgia		X	
North Carolina		X	
Alabama		X	
Tennessee			X

Expert Affidavits and Testimony *– Some states require that an affidavit from an expert, also referred to as a Certificate of Merit, be submitted when filing a malpractice claim (25 states require Certificate of Merit in medical liability cases).*[3] *Expert testimony refers to the sworn statements of a person who by virtue of education, training, skill or experience is believed to have expertise and specialized knowledge about a subject beyond that of the average person.*

Expert Affidavits and Testimony Requirements in GA and Surrounding States

	Affidavit Required with Complaint	Expert Testimony Required
Georgia	X	
Alabama		X
South Carolina		X
North Carolina	X	X
Florida	X	X
Tennessee	X*	

- In Georgia, an expert affidavit must be included when filing a medical malpractice complaint. Expert testimony during the court proceedings is recommended, but optional.
- Alabama requires the plaintiff to prove negligence through the use of expert testimony, unless only common knowledge or experience is needed to understand allegations against the doctor.
- South Carolina requires the introduction of expert testimony in medical malpractice actions to prove that the defendant failed to conform to the applicable standard of care.
- In North Carolina, the complaint must indicate that a qualified healthcare provider is willing to testify that the medical care did not meet the applicable standard of care. Medical malpractice claimants must prove a breach of the standard of care by expert testimony, unless the negligence is obvious to a layman.
- Florida requires a claimant to include a verified written medical expert opinion to support that there are reasonable grounds to believe each named defendant was negligent. Unless the alleged negligence is obvious to a layman, expert testimony is necessary to establish a claim for medical malpractice.
- Tennessee has a Certificate of Good Faith requirement. Plaintiffs must consult with an expert witness within 90 days after the complaint. A written statement should be obtained by the plaintiff saying that the expert believes in good faith that the action has merit. At the present time, Tennessee law does not require the plaintiff to provide the court with the Certificate.

Damage Caps *– Limits on the amount a plaintiff is able to receive for non-economic damages. Examples of non-economic damages include, but are not limited to: physical and emotional pain, inconvenience, physical impairment, mental anguish, loss of enjoyment of life, injury to reputation, etc. In 2006, there were 26 states that had some type of cap on non-economic damages or total damages.*[3]

- North Carolina – No cap on non-economic damages.
- Florida – Florida's voluntary arbitration program provides a cap on non-economic damages under certain circumstances.
- South Carolina – Does not impose a cap on the amount of damages that a claimant can recover
- Tennessee – No cap on the amount of damages recoverable in a medical malpractice action
- Georgia – Caps on non-economic damages of $350,000 per defendant were enacted in 2005, but the Georgia Supreme Court ruled the caps to be unconstitutional in March 2010.
- Alabama – Caps on non-economic damages were enacted in 1987, but were held to be unconstitutional by the Alabama Supreme Court in 1991.

Statutory Cap on Attorneys' Fees *– This term refers to limitations placed on an attorney's contingency fee in a medical malpractice case. There are cases under which an attorney may petition the court for additional compensation (e.g., extra services that required more than the customary time and effort). There are 16 states with laws that limit attorney fees.* [3]

- The Florida Supreme Court has identified thresholds and criteria under which attorney fees are deemed excessive or unreasonable.
- In Tennessee, the compensation of the plaintiff's attorney may not exceed 33.3% of all damages awarded.
- Attorney fees are not capped in Georgia, Alabama, South Carolina, or North Carolina.

Statutory Cap on Attorney's Fees GA and Surrounding States

	Yes	No
Florida	X	
Tennessee	X	
Georgia		X
Alabama		X
South Carolina		X
North Carolina		X

Collateral Source Rule *– States that adhere to the collateral source rule prohibit the introduction of evidence that a plaintiff's damages were or will be compensated by a third party (e.g., medical bills paid by the plaintiff's insurance company). There are 11 states that have laws limiting the collateral source rule.* [3]

- North Carolina and South Carolina – Both states adhere to the collateral source rule. Payments from third parties are not admissible as a means of reducing the plaintiff's damages.
- Georgia – Currently adheres to the collateral source rule. Although the statute allows tort defendants to introduce evidence of third party payments, the courts have held the statute to be unconstitutional.
- Alabama – Does not adhere to the collateral source rule. The Medical Liability Act of 1987 partially abolished the collateral source rule in medical malpractice cases by allowing the introduction of evidence that the claimant's medical or hospital expenses had been or would be paid.
- Tennessee – Does not adhere to the collateral source rule. Economic losses suffered by a medical malpractice claimant are recoverable only to the extent that such costs are paid or payable out of the claimant's family assets or insurance benefits for which the claimant or family paid.
- Florida – Does not adhere to the collateral source rule. Florida law requires the court to reduce a plaintiff's damages by the amounts paid to the plaintiff from collateral sources.

Periodic Payments *– A structured settlement whereby payments are made to an injured person or survivor for a specified number of years or for life. Structured settlements are often created through the purchase of one or more annuities, which guarantee the future payments. There are 31 states that have a rule that addresses periodic interim payments.* [3]

- North Carolina, South Carolina, and Tennessee - Do not require the periodic payment of damage awards/malpractice judgments.
- Georgia and Florida – Both mandate that the court must order periodic payments upon the request of any party. Both states define a threshold for which periodic payments are an option.
- Alabama – Now has three periodic payment statutes based on the type of case and circumstances.

Arbitration *- A legal technique for settling disputes outside the courts. A third party reviews the case and imposes a decision that is legally binding for both sides.*

Utilization of Arbitration GA and Surrounding States
• Georgia, Alabama, Tennessee, Florida, and South Carolina – In these states, ***arbitration is offered as an option, but is not required***. Arbitration must be agreed to by both the plaintiff and defendant. Alabama requires the agreement between the parties to be in writing. Florida's system of binding arbitration allows the defendants the option to limit non-economic damages in return for admitting liability. In all five of these states, ***arbitration findings are final and legally binding***.
• North Carolina – In North Carolina, ***mediation is required***. Mediation is another alternative dispute resolution technique. ***The outcome of mediation is not legally binding***. The intent is to try to find middle ground between the parties before the matter goes to court. Rules have been drawn up by the North Carolina Supreme Court and parties may select their own mediator.

Additional Types of Reforms [3]

Pre-judgment Interest - prejudgment interest is interest awarded on a claim for some period of time before the judgment in a lawsuit is entered.

Patient Compensation Funds and Physician Insurance - a medical malpractice insurance mechanism, created by state law, designed to increase professional liability coverage availability and/or affordability primarily by providing coverage for a specific type of injury or an excess layer of coverage.

Screening Panels – pre-trial panels staffed by medical experts to review potential liability cases before they proceed to court (utilized by 20 states). [3]

Health Courts – compensation decisions are based on an "avoidability" standard rather than a negligence standard and compensation is determined by specially trained judges (rare – only done in Florida and Virginia). [3]

Full Disclosure / Early Offer Programs – primary focus is to disclose information to the patient about the occurrence of an error. Often includes an apology and an offer of compensation (29 states have laws that prohibit the presentation of an apology in a state court following the occurrence of an unanticipated outcome). 21 states have passed legislation that mandates reporting of some medical errors and adverse events. [3]

1 Source: McCullough, Campbell & Lane, LLP. Summary of Medical Malpractice Law for GA, NC, SC, FL, AL, and TN.
2 Source: Wikipedia.com for definition of terms.
3 Source: U.S. Department of Health & Human Services, Agency for Healthcare Research and Quality (AHRQ), "Review of Reforms to Our Medical Liability System" January 4, 2010.