

Health Courts: System Overview and Current Research

Michelle M. Mello, J.D., Ph.D., M.Phil.

David M. Studdert, LL.B., Sc.D., M.P.H.

Troyen A. Brennan, M.D., J.D., M.P.H.



Harvard School of Public Health

*This work is supported by
The Robert Wood Johnson Foundation and The Commonwealth Fund*

Core Principles



1. Compensation decisions are made outside the regular court system by trained adjudicators.
2. Compensability is based on a standard of care that is broader than negligence, but does not approach strict liability.
3. Criteria are “evidence-based” and some decisions are guided by *ex ante* determinations of preventability for common adverse events.
4. Decisions on damages are aided by guidelines for compensating both economic and noneconomic losses.
5. Deidentified information is provided to caregivers and others for purposes of analysis and safety improvement.

Key Design Choices

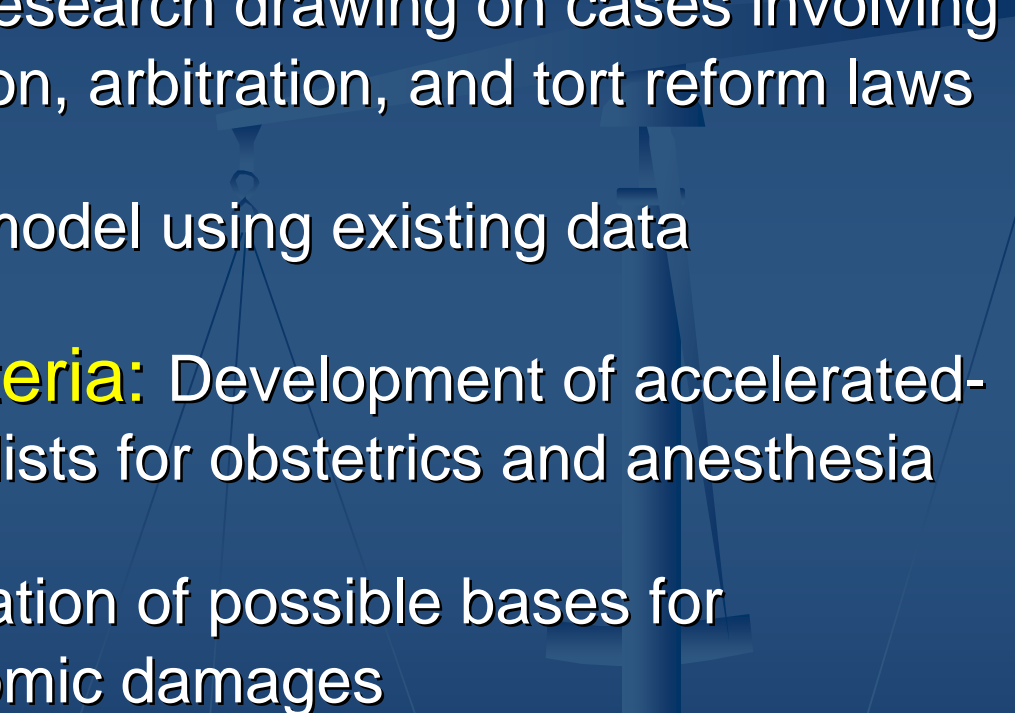


- Jurisdiction
- Decision makers and the role of experts
- Claims process
- Compensation standard
- Damages
- Appeal
- Financing
- Relationship to other patient safety structures

Research Undertaken

- **Key informant interview study of existing patient compensation schemes:**
 - Nordic systems: Sweden, Denmark
 - New Zealand Accident Compensation Corporation
 - Florida and Virginia birth injury schemes
- **Study questions:**
 - What compensation criteria are used and how are they operationalized?
 - What has been the experience with these criteria?
 - What kinds of decisions are straightforward or challenging to make?

Research Undertaken

- **Constitutionality:** research drawing on cases involving worker's compensation, arbitration, and tort reform laws
 - **Costs:** Preliminary model using existing data
 - **Compensation criteria:** Development of accelerated-compensation event lists for obstetrics and anesthesia
 - **Damages:** Investigation of possible bases for scheduling noneconomic damages
- 



Design Alternatives and Current Recommendations

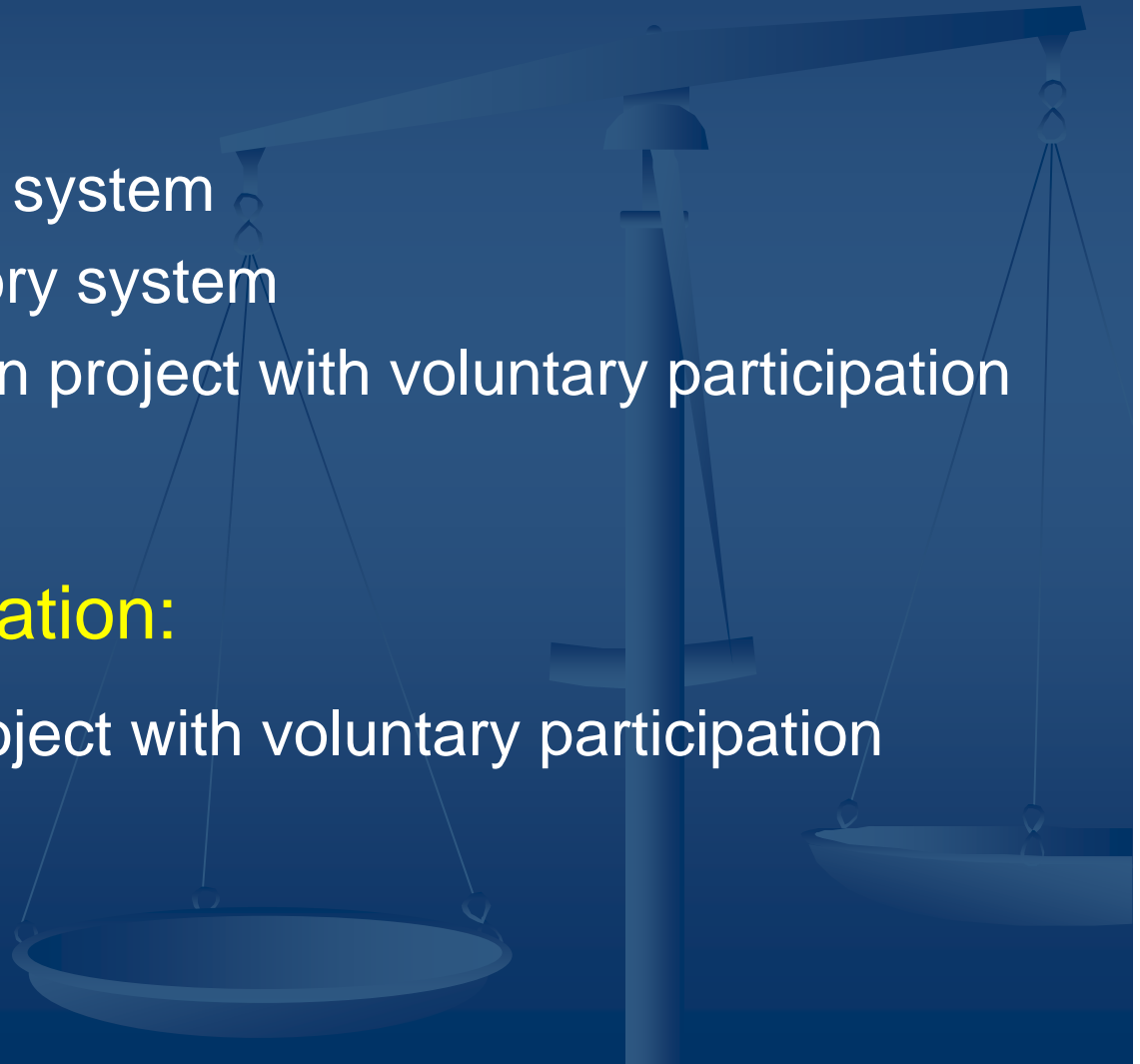
Jurisdiction: Administration

Alternatives:

1. Federal mandatory system
2. Statewide mandatory system
3. State demonstration project with voluntary participation

Current recommendation:

State demonstration project with voluntary participation



Jurisdiction: Covered Disputes

Excluded claims:

- Intentional torts, product liability, coverage disputes

Alternatives for covered clinical areas:

1. All clinical areas
2. Select areas such as OB/GYN and surgical/anesthesia

Current recommendation:

- Start demonstrations in select clinical areas in which
 - (1) types, range, and causes of adverse events are relatively well understood, and
 - (2) prospective patient consent is feasible to obtain.

Decision Makers and the Role of Experts

Alternatives:

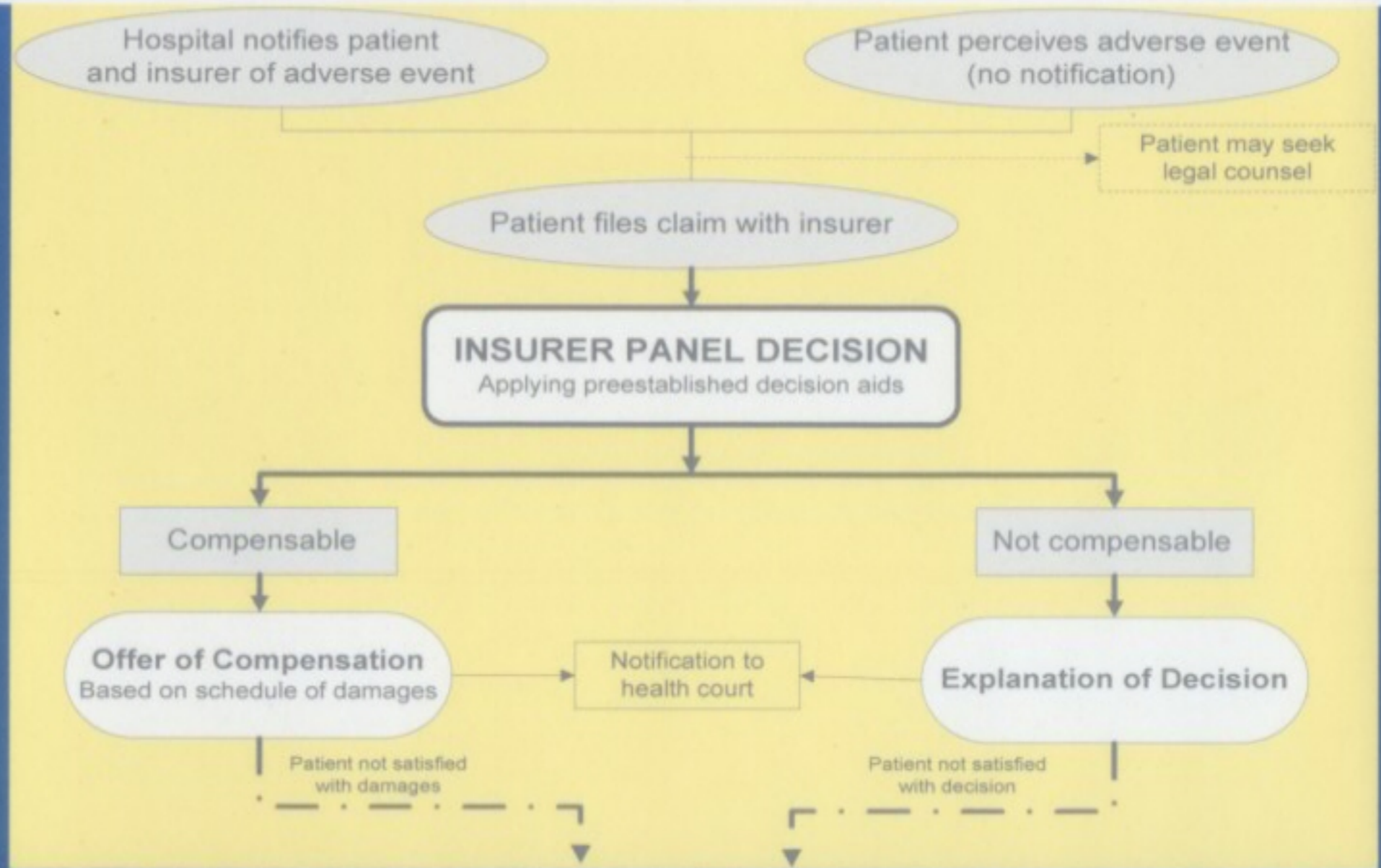
1. Internal clinical review at the involved hospital or insurer
2. Administrative law judge specializing in medical injury claims adjudication who has no medical training but is advised by medical experts
3. State-appointed judge with medical expertise

Current recommendation:

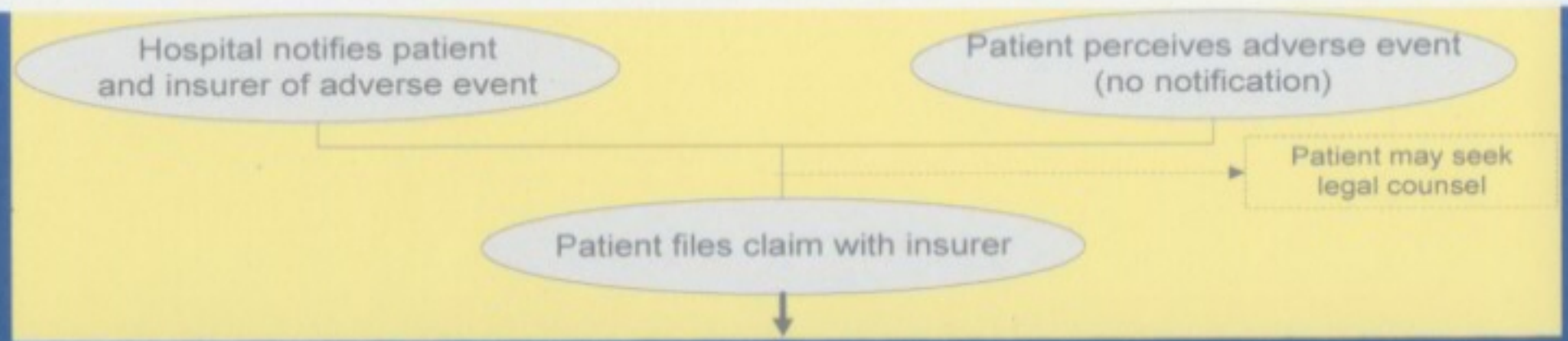
Combination of 1 & 2.

- Internal clinical review at the involved hospital or insurer, which may lead to an offer.
- If no resolution is found, health court hearing is held, presided over by a specialized ALJ aided by court-appointed experts.

Claims Process



Claims Process



Compensation Standard: Liability Rule

Alternatives:

1. “Treatment injury”
2. Avoidability: injuries that should not often happen when optimal care is given

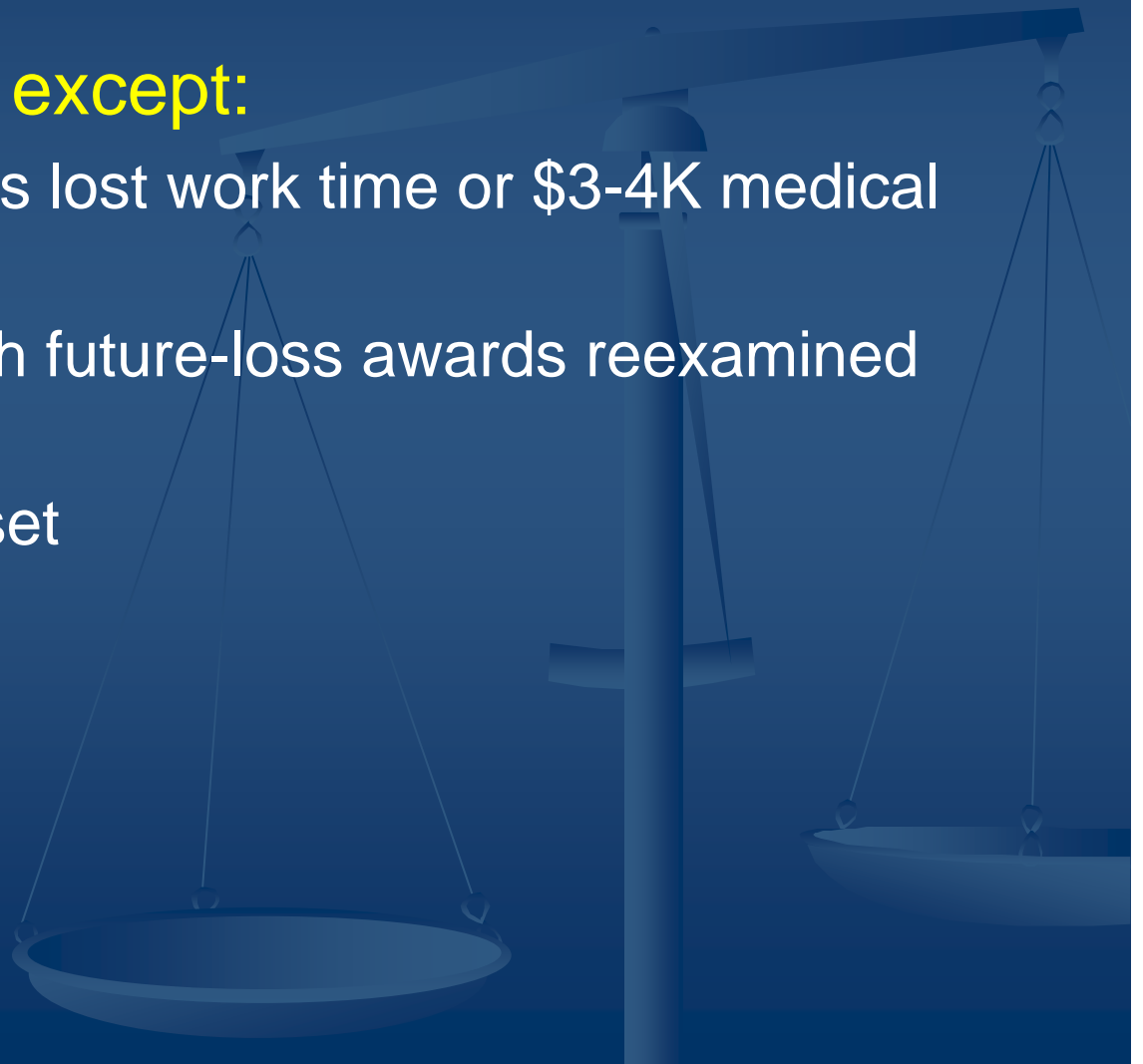
Current recommendation:

- Avoidability, possibly modified by additional criteria based on injury severity, rarity, or particular types of outcomes (e.g. birth injuries).
- Incorporate decision guidelines by
 - (1) Compiling compensability determinations into database.
 - (2) Creating lists of accelerated-compensation events using expert review of injury causation, frequency, and preventability.

Damages: Economic Losses

Compensated in full except:

- Deductible: 4-6 weeks lost work time or \$3-4K medical expenses
- Periodic payment with future-loss awards reexamined every few years.
- Collateral-source offset



Damages: Noneconomic Losses

Limited, scheduled compensation for noneconomic losses

Damages schedule:

- Injury severity matrix based on NAIC scale or similar
- Damages may also vary based on plaintiff age
- Dollar range assigned to each cell based decision-science research about utility losses and public deliberation
- Adjudicator chooses a value within the dollar range

Appeal



Alternatives:

1. Judicial review based on “arbitrary and capricious” standard.
2. Judicial review based on “substantial evidence” standard.

Current recommendation:

- “Arbitrary and capricious” standard

Financing

Alternatives:

1. Social-insurance model financed through tax revenue from individual and/or corporate taxes. (*For mandatory model*)
2. Privately-financed model utilizing existing insurance arrangements plus an annual state surcharge. Initial public appropriation for start-up costs.

Current recommendation:

- Privately-financed model
- Stop-loss guarantee from government or reinsurance entity

Relationship to Other Patient Safety Structures

Alternatives:

1. Vest the health court (state agency) with responsibility for both claims processing and safety improvement.
2. Share deidentified claims data with other patient safety, research, and purchasing/QI organizations.
3. Share identifiable claims data with organizations responsible for physician discipline, licensure, and certification.
4. Feed claims data back to hospital patient safety offices.
5. Share drug and device related information with FDA.

Current recommendation:

- All except #3

Ongoing Research

- Operationalizing avoidability and further work on ACEs
 - Optimal sites for demonstration projects
 - More extensive cost analysis
 - Empirical model of the damages schedule
- 