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Talk of the Nation

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Analysis: How fear of litigation has changed the way people work and live

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NEAL CONAN, host:

This is TALK OF THE NATION. I'm Neal Conan in Washington.

The news broke early this week. A former nurse named Charles Cullen told prosecutors he'd killed as many as 40 severely ill patients in Pennsylvania and New Jersey since 1987 by injecting them with drugs. Cullen portrays himself as an angel of mercy. He claims that he saves his victims from prolonged and difficult deaths. A strange and dramatic story, but with a twist that makes it even more compelling. Over the past 16 years, suspicion focused on Cullen several times. He was fired at least twice and was the subject of a murder investigation. Somehow he always managed to find another job. No one, it seems, gave him a bad reference. Several hospital authorities say they kept their suspicions to themselves for fear of a lawsuit. To be fair, there were other factors, including a severe shortage of nurses.

The questions about Charles Cullen are still to be resolved, but the fear of litigation is very real, and not just in medicine. You've probably heard stories: teachers who feel they can no longer console a child with a hug; disappearing playgrounds; the convoluted personnel process before an employee is hired or fired. But does the fear match the reality?

Later on the program, an update on today's federal appeals court ruling on the rights of one of the American citizens being held as an enemy combatant.

But first, fear of lawsuits. Does it affect your life? How? And is the fear justified? Our number here in Washington is (800) 989-8255; that's (800) 989-TALK. The e-mail address is totn@npr.org. We're going to talk first about medicine, then about education. Later in the program, we'll broaden the discussion.

And Michelle Mello joins us now. She's an assistant professor of health policy and law at the School of Public Health at Harvard University. She's conducted a series of studies ! on the impact of litigation on health care, and she joins us now from her office in Boston, Massachusetts.

And welcome to TALK OF THE NATION.

Professor MICHELLE MELLO (School of Public Health, Harvard University): Thanks,

Neal.

CONAN: What kind of environment are hospitals functioning in that would cause them to have this kind of response in the case of nursing, for example?

Prof. MELLO: Well, first recognizing that the Cullen case is a bit of an aberration...

CONAN: Sure.

Prof. MELLO: ...because we're not talking about garden-variety medical negligence, but rather an employee who's kind of run amok in a hospital. At the broader environment in which hospitals are functioning, as most people probably know, is being characterized today as a malpractice crisis. It is one in which the costs of malpractice claims, both for insurance companies and for hospitals, are increasing dramatically. And it is really creating for both hospitals and individual physicians a sort of siege mentality around the possibility of being sued.

CONAN: Well, what do they do differently? How is behavior affected?

Prof. MELLO: Well, there are a variety of things we think are going on in response to an elevated perceived risk of suit. One, of course, is the phenomenon of defensive medicine, of doctors rendering more services than they perhaps need to on medical grounds as a way of covering their bases in the event of a lawsuit. But perhaps more worrying is the tendency among health-care providers to be secretive about errors and other things that go wrong in the hospital because of a fear that it may lead to litigation.

CONAN: You talked about perceived, you know, fears. Does the fear match the reality statistically?

Prof. MELLO: Well, there are two ways to look at that question. One is: What is the absolute risk of being sued? And the other question is: If you are sued, what are the probable consequences? Now in terms of the absolute risk, it's probably fair to say that most health-care providers overestimate their risk of being sued, although for some high-risk specialists, almost all will be sued at some point during their lifetime.

CONAN: For example, what kinds of specialties?

Prof. MELLO: An obstetrician, for example, or an orthopedic surgeon. Upwards of 80 or 90 percent of them can expect to be sued sometime during their career. But from a provider's perspective, an equally important question is: If this, you know, relatively rare event does occur, what are the consequences for me? And for many providers, it can be disastrous, both because these jury verdicts can be in excess of their insurance policy limits and because their insurer may drop them as a result of a single bad claim, and they may have a very difficult time finding another insurer in today's market.

CONAN: And even if they do, presumably the premiums are going to be pretty steep.

Prof. MELLO: It may be, although for individual physicians there isn't a strong amount of experience rating in insurance.

CONAN: Now Harvard did a famous study on the perception of lawsuits and reality. What did you study, and what did you find?

Prof. MELLO: This was done about 10 years ago in New York. The investigators did a review of thousands of medical records, as well as thousands of malpractice claims, matched those up to see which instances of negligence turned into claims. They then went and surveyed many doctors in New York and asked them what their perceived risk of malpractice claims was, and what they found is that doctors thought that about 60 percent of all instances of negligence would become malpractice claims. But what they found on their record review was that the number was closer to 2 percent.

CONAN: Really?

Prof. MELLO: Yes. So today's doctors, I think, would give a slightly lower figure about their risk of being sued. They're beginning to understand some of these data about relatively weak relationship between negligence and malpractice claims. But still, the perception among providers is that the risk of being sued is very high.

CONAN: Again, that study was done 10 years ago, and...

Prof. MELLO: That's right.

CONAN: ...at least the perception is that this is, you know, increasing by orders of magnitude.

Prof. MELLO: That's right. And an important nuance is that although 2 percent of negligent injuries turn into malpractice claims, there are also lots of malpractice claims that are filed that don't actually involve negligence or a cognizable injury.

CONAN: And all those malpractice claims have to be defended one way or another.

Prof. MELLO: That's right.

CONAN: And that costs some money.

Prof. MELLO: That's right.

CONAN: Now you often hear about multimillion-dollar awards. How often do they actually happen?

Prof. MELLO: They're becoming more frequent, but they're still a small percentage of all claims. Data from one of the larger groups of physician insurers suggests that of all the

claims in which payments are made, around 8 or 9 percent in 2001 were over a million dollars.

CONAN: That's still a pretty substantial number.

Prof. MELLO: It is.

CONAN: Yeah. Michelle Mello, thanks very much.

Prof. MELLO: Thank you.

CONAN: Michelle Mello is assistant professor of health policy and law at the School of Public Health at Harvard University. She's been conducting a series of studies on the impact of litigation on health care. She was with us from her office in Boston. And Richard Arum joins us now. He's a professor of sociology at New York University, the author of "Judging School Discipline: The Crisis of Moral Authority." He's looked at the impact of lawsuits in education. And he's with us from his office in Greenwich Village in New York City.

And welcome to TALK OF THE NATION.

Professor RICHARD ARUM (New York University; Author, "Judging School Discipline"): Thanks for having me on, Neal.

CONAN: So what did you find in your studies?

Prof. ARUM: Well, we looked at the court cases from 1960 on where schools were sued for disciplining students. And what we found was that the matters that schools were being sued for have changed fundamentally since 1968 to 1975, when the law was first established.

CONAN: And what were they sued for in the old days, and what are they sued for when the study was done?

Prof. ARUM: Yeah. Originally case law developed in this area when students challenged schools for disciplining them over free speech issues, First Amendment right issues. And what we find today is that the case law that was established in that area is now being invoked much more broadly for when schools are disciplining kids for general misbehavior, for violence, for drugs and the like.

CONAN: In your research, did the actual number of successful suits match the perception of, you know, how much people's behavior was affected by it?

Prof. ARUM: Well, in the initial time period from '68! to '75, students won at the appellate level about half the time. From '75 onward, their rate of success has been much smaller; it hovers around 30 percent, 25 to 30 percent today. As your previous guest

noted, however, the probable consequences with these suits is still quite high.

CONAN: And what is that?

Prof. ARUM: Well, the consequences in terms of people's professional reputations are quite large. And in addition, there's a perception out there following *Wood v. Strickland*, a Supreme Court case in 1975 that held teachers and principals liable for knowingly violating student due process rights, that their personal property could also be subject to risk.

CONAN: And again, this study was in 1975, and presumably things have progressed since then.

Prof. ARUM: Well, yes. You know, and particularly in the last several years, we have seen an upsurge of cases around school discipline following the zero tolerance policies and also following changes in the technologies of search and seizure.

CONAN: Let's get some listeners involved. How are lawsuits and the perceived fear of lawsuits affecting how you work and live? Our phone number is (800) 989-8255. The e-mail address is totn@npr.org.

And Susan joins us on the line from Columbus, Georgia.

SUSAN (Caller): Hello?

CONAN: Hi, Susan. You're on the air.

SUSAN: Thank you. I have a rather unique problem. Maybe it isn't so unique. I live in Georgia. In 1999, I had to leave a social work job because of the excessive amounts of paperwork which I could no longer keep up with. I won't go into the circumstances. I left in good standing. I thought I would make a career switch out of social work after 29 years, and I've been a lifelong Braille user, and there's nobody in Columbus to teach Braille to newly blind or people who are going blind. So I offered my services and I qualified, but I had to take liability insurance in order for me to have the right to go to people's homes to teach them an alternative format for reading and writing. I had to take out legal insurance to the tune of--to cover up to \$1 million per incident, \$3 million aggregate.

CONAN: That seems excessive.

SUSAN: Yes. I think it's very excessive. I took out the insurance and I joined a professional organization that would give me a group rate.

CONAN: What were they concerned about? What could you possibly do to rack up a 3-million-dollar insurance bill?

SUSAN: Tell me. I'd like to know.

CONAN: Richard Arum, this may not be precisely up your alley, but...

Prof. ARUM: Well, I do think the caller raises an important issue here, and that is the general cost. She's speaking of the cost to an individual, but we should think more broadly about the cost to society.

SUSAN: Here I'm on disability. I didn't have an income at the time. I had to take out the insurance; I had to get on savings...

Prof. ARUM: Yeah.

SUSAN: ...when I didn't get referrals right--you know, within the first six months or so and it was time to renew, I didn't have the money to renew the insurance. Therefore, now I'm not qualified to sign another service agreement with the state.

Prof. ARUM: Yeah. Neal, let me add the following fact.

CONAN: Yeah.

Prof. ARUM: Prior to 1975, when the Goss v. Lopez case extended rudimentary due process rights for kids in school facing even minor discipline, and Wood v. Strickland that held teachers and administrators personally liable for violating due process rights, there were 250 attorneys in the country represented in the Council of School Attorneys, National School Board Association. Two years after Wood v. Strickland, there were 700 attorneys. Today there are 3,000 licensed attorneys working in the Council of School Attorneys of the National School Board Association across the country.

CONAN: And all of them presumably making a living at it.

Prof. ARUM: Making a living. And public schools increasingly today, this is! part of the operating budget, and not only, you know, the defense of practices in terms of paperwork, but also in addition nationally paying legal counsel.

CONAN: Susan, thank you...

SUSAN: And by the way...

CONAN: Yeah, go ahead, quickly.

SUSAN: ...let me just add one more comment. This is to teach adults. This has nothing to do with a school board in my instance. It's rehabilitation.

CONAN: Yeah. I think the principle probably is still the same. But, Susan, thank you very much for the call. We appreciate it.

SUSAN: Mm-hmm.

CONAN: Here's an e-mail we got. `I work in an institution of higher learning. It's my opinion that fear of litigation is the reason why we have many state employees working here that should have been fired. Instead of firing them, they're merely moved somewhere else on campus and the misdeeds continue, such as viewing pornography on state-owned equipment, sexual harassment, poor job performance, hostile behavior toward other employees.' So this presumably, Richard Arum, extends towards policies towards teachers as well.

Prof. ARUM: I think that's right. I mean, I think we have to think about where we want due process rights to exist and where we don't, and to acknowledge the cost of the due process rights, even when we realize they should be protected. In the case of schools, I believe firmly that students should have due process rights when they're invoking freedom of expression and when their First Amendment rights are at stake or when they're facing long-term exclusion. I also believe that employees should have such rights when they're being...

CONAN: Disciplined.

Prof. ARUM: ...threatened with termination. But do we want students to have due process rights when the matter is as simple as lowering their grade, keeping them after school, not playing in the football game on a Saturday? Should students have rudimentary due process rights in those matters?

CONAN: Richard Arum, thank you very much. All interesting questions.

Prof. ARUM: Thank you.

CONAN: Richard Arum is a professor of sociology at NYU, author of "Judging School Discipline: The Crisis of Moral Authority." More calls after a break. I'm Neal Conan. You're listening to TALK OF THE NATION from NPR News.

(Soundbite of music)

CONAN: This is TALK OF THE NATION. I'm Neal Conan in Washington. We're talking about the fear of litigation. Have you changed your behavior because of it? Our phone number is (800) 989-8255; that's (800) 989-TALK. And the e-mail address is totn@npr.org. Joining us now is Thomas Burke. He's an associate professor of political science at Wellesley College, the author of "Lawyers, Lawsuits and Legal Rights." And he's with us from his office in Cambridge, Massachusetts. Thank you for joining us.

Professor THOMAS BURKE (Wellesley College; Author, "Lawyers, Lawsuits and Legal Rights"): Thank you, Neal.

CONAN: Now! I understand you've looked at the profession overall. Broadly speaking, is our fear of lawsuits justified?

Prof. BURKE: It's exaggerated, Neal. And you know, I can't even convince my family of it, but I'll give you a few statistics and you can stop me when I bore you.

CONAN: OK.

Prof. BURKE: First, you cited the medical malpractice study. One out of eight times when there's serious injury from medical malpractice, someone sues. Another study shows that for a hundred people injured in an accident, about 10 file a liability claim and two end up filing in court. Give you another study. For every hundred people who feel that they've been injured by someone else's illegal conduct, about five end up filing in court.

CONAN: Now you're just talking about people filing. How often do they actually win?

Prof. BURKE: Well, that's another issue. The medical malpractice is classic where plaintiffs do very poorly if they get to trial; they win about 30 percent of the time, roughly 30, 40 percent of the time. Other kinds of tort litigation or personal injury litigation, the rates are higher. The median verdict in tort litigation today is \$30,000. So it's also not as high as people expect. And here's one more statistic. According to the best data that we know, tort litigation, personal injury litigation, when you adjust for population, is essentially flat from 1975 to today. So there has been no big increase in tort litigation, no big increase as far as we can tell, at least through 2001, in even medical malpractice litigation.

CONAN: Lawyers, though, don't come cheap. Even if you win your case, it's still going to cost you.

Prof. BURKE: Yeah. The costs of defensiveness are where a lot of the costs are. And so we should talk about defensiveness, where it arises from, and perceptions. It may not be so important what the actual numbers are; the perceptions might be more important.

CONAN: And that is all this in terms of the medicine that we heard about! , defensive medicine and ordering tests that might not strictly be necessary and that sort of thing?

Prof. BURKE: Yes. But we have to be careful with that, too, because people often explain themselves in terms of fear of litigation. But we don't know if their behavior comes about they fear litigation. There's lots of other plausible reasons for acting as they do. And it's often an easy out afterwards to say, 'Well, I was afraid.'

CONAN: The lawyer is the bogeyman.

Prof. BURKE: Yeah.

CONAN: Yeah. All right.

Prof. BURKE: Blame the lawyers.

CONAN: Let's get some callers in on this. Wendy joins us from Ft. Lauderdale. Hi, Wendy?

WENDY (Caller): Yes, this is her.

CONAN: Yes. You're on the air, Wendy.

WENDY: Oh, OK. Thank you. Yes, I'm a teacher in middle school, public school system. And I wanted to say that the psychological element of lawsuits is always there. You're working with children and you're working with their perception and how they might explain something while they're at home. You're always aware--are you still there?

CONAN: Yeah, sure. We're listening.

WENDY: OK. And...

CONAN: You're listening on delay. You gotta turn that radio off, or you'll be confused for the rest of your time on the radio.

WENDY: OK. I will do that.

CONAN: Anyway...

WENDY: Sure. Anyway, when you're there with a student alone, you definitely want to open up your door. You're always under a lot of stress psychologically, I think, because you are working with students. And there is the fear of litigation. And again, he did speak about the personal property that could be taken from the teacher.

CONAN: Right.

WENDY: And that's something that definitely will hit home with any teacher, any person that's working.

CONAN: We're also talking about perceptions, Wendy. And I'm just curious, do you know any teachers, any of your colleagues ever been sued?

WENDY: Not that I know of, no. Not that I work with or--you know, but I think that we've had different people brought up definitely at meetings, different events that have taken place nationwide that our principal or principals that I've worked for make us aware of and how we then need to handle ourselves. For example, just copyright issues. There's a host of different things that we have to have an awareness for, and it can be quite

overwhelming when you're working in the system and you have so many different angles to cover or to be aware of.

CONAN: Well, thank you very much for your call. We appreciate it.

WENDY: Thank you.

CONAN: OK. Bye-bye.

And, Thomas Burke, I guess her story is illustrative; no immediate examples that she knows of, yet it seems to be pervasive.

Prof. BURKE: Yes, and so she has meetings with groups. And we have to think about who has an interest in spreading the fear of these things, and how are those interests aligned? You know, Garrison Keillor has the "Fearmonger's Shop." Well, there certainly is a large group of people who might find it in their interest to spread the fear of litigation.

The other thing I should point out is, you know, a couple of really great stories make a huge difference. Stories have a lot more power than all the statistics I just told you. So if you hear about a story about someone--and it doesn't matter where they are, if they're in the adjoining school district or on the other corner of the country--it's going to have an impact.

CONAN: Let's go now to Robert, and Robert's with us from Sacramento, California.

ROBERT (Caller): Good morning. Morning, Neal. Thanks for saying 'harassment' the correct way. I'm an English teacher. I appreciate that. You'll notice my comment is I'm not afraid of a lawsuit, and let me tell you why. First of all, I'm a sworn officer of the state of California, just like the governor is, the judges, the police officers and so on. I have to sign an oath that says that I will defend the Constitution of the United States and of the state of California against all enemies, foreign, domestic, etc., etc., etc.

One of the things that I think is a big failing within the education of teachers is they don't teach teachers what their rights are. And I have four simple rules I put on the board in my classroom. Excuse me. One, teacher's in charge. Then I talk about food, gum and drink, not authorized, not allowed in the classroom. You can have all the water you want. Three, any questions about the rules, see rule one. And then number four, and always in response to students who say to me, 'You can't do that,' I can and I will. And in fact, I find that by doing it this way, students become immediately aware who's in charge in the classroom and we can get on with the process of learning, because I think one of the things that has been forgotten is not only do the other students have a right to learn, but the teacher has a right to do his or her job as a teacher.

And I think that there is a tremendous failing within the education establishment of this country in educating new teachers about what they can and can't do in the classroom. For example, can I touch a child? Yes, I can, under the law, if that child is a danger to himself or other students or to me, because remember, I am a sworn officer of the state.

CONAN: That's an interesting point, Robert. And thank you very much...

ROBERT: I'll take a comment off the air.

CONAN: OK, appreciate it.
Go ahead, Thomas Burke.

Prof. BURKE: Well, I think this comment points out that people maybe shouldn't be so fearful, and also the need for education. I think one of the things that policy-makers and judges do think about is how do we create a safe harbor for people; how do we create a system where they know exactly what they have to do to free themselves from this fear of litigation. The Supreme Court has tried to do that, I think, with sexual harassment law, and I think a little bit of education, not about the threat, but about your own rights and responsibilities, is helpful. So I agree with the caller.

CONAN: Michael McCann joins us now. He's a professor of political science and law at the University of Washington in Seattle. He has a book coming out next spring called "Distorting the Law: Politics, Media and the Litigation Crisis." He says, well, we, the media, are part of the problem. And he joins us now from his home in Seattle, Washington.

Welcome to TALK OF THE NATION.

Professor MICHAEL McCANN (University of Washington in Seattle): Thank you for having me join your discussion.

CONAN: And how much is media part of the problem?

Prof. McCANN: Well, we think it's part of a larger complex picture in which there's a number of different factors. But one thing that we did was we studied media coverage of civil litigation over the last 20 years and we found that, while Professor Burke, I think, is correct--most of the studies show that there hasn't been any dramatic increase in the incidence of litigation, although there has been some changes in patterns of litigation--that the amount of coverage of civil litigation has skyrocketed quite dramatically in the last 20 years. We saw that the amount of articles one would find in five major newspapers in the early 1980s would be about 15 to 20 articles a year, and that rose dramatically into the 1990s, where you'd read 3 and 400, 500 articles a year about civil litigation. And the kind of articles you'd read, it's really significant.

CONAN: In what way?

Prof. McCANN: Well, in most of those articles, we try and profile what are the characteristics of those articles. They're overwhelmingly about individuals who successfully sue corporations, or there's very few actually articles about medical malpractice, although there are some. They're mostly personal injury lawsuits, products liability lawsuits against corporations. They're about plaintiffs winning overwhelmingly; over 85 percent of the articles that we looked at involved an individual winning the case, which is far disproportionate to the actual number of victories in court.

CONAN: Well, is...

Prof. McCANN: They're almost always about huge awards, you know, multimillion-dollar, hundred-million-dollar awards.

CONAN: Well, that's kind of why it's news, isn't it?

Prof. McCANN: It is exactly what makes it news. And that's one of the--we suggest there's really two reasons for that. One is that there has been a very well-organized campaign by various groups to raise awareness about the so-called litigation crisis, primarily by promoting--telling stories, the anecdotes, again the sort that Professor Burke talked about, anecdotes about frivolous litigation, about crazy lawsuits, and that those parallel in many ways the kinds of things that are reported in the news. In fact, most of those come out of the mainstream media and then are recycled and re-spun by these various groups.

CONAN: Well, I have to say if somebody wins a quadrillion dollars because ! she spills a cup of hot coffee on her lap and gets it from a fast-food company, A, I think that does qualify as news. But to get back to Professor Burke's point and maybe yours, of those who profit from fear mongering, I guess you would include the media.

Mr. McCANN: Well, I mean, I think that there are reasons why this is news, especially with the amount of money. But it has to do with--if you read the newspaper regularly over a period of time, you're going to read about increasing amounts of litigation for large amounts of money. Partly--and that tends to correspond to claims by groups that are out there and what we read in other parts of, you know, mass media, entertainment media and so forth, that there is some sort of litigation crisis.

But it's also what we read about those stories. For example, we regularly read about claims that are being made and filings for multimillion dollars about awards, but we almost never read about the common practice of judges to whittle down those awards very dramatically. You mentioned the McDonald's coffee case. We have a whole chapter in our book about the McDonald's coffee case. And what we looked at was the five issues that mattered most to the jury who gave the 2.7-million-dollar punitive damages award. None of those points were raised in any of the newspaper articles that we looked at. In other words, what the jury heard in the courtroom was completely different than the story that was circulated in the mass media, which is to say that whether that was a proper outcome in that case or not is not our point; it is that the public is really not getting the information to make really reasonable judgments about whether those suits are, you know, reasonable, whether the outcomes are reasonable or not.

CONAN: Tell us about Charles Epp at the University of Kansas. Now I understand this was a survey of three different agencies.

Prof. McCANN: Well, he'd studied cities around the country, and I'm reluctant to report his research because it's s! till in progress and he hasn't written it all up. But he's a professor at the University of Kansas, and he did a study of three different areas of city

administration, and he sent surveys. And what he was interested in was the awareness of litigation, the concern about litigation, if you will. He didn't frame it as fear of litigation, but rather was the regulatory effect of litigation, and I think it involved police and playgrounds and human resources or personnel divisions within cities.

And what he found was that there was a tremendous amount of concern about litigation, and there was a lot of activity that was taken by these various divisions, too, in response to the fear of litigation that seemed to be far out of proportion to the actual likelihood of litigation and to the actual experience of litigation, which he found was relatively small in most of these places.

CONAN: We're speaking with Michael McCann of the University of Washington and with Thomas! Burke of Wellesley College about the perceived fear of lawsuits. You're listening to TALK OF THE NATION from NPR News.

And let's get another caller involved, and this is Tasha(ph), who's with us from Minneapolis.

TASHA (Caller): Hi.

CONAN: Hi.

TASHA: I am calling from Minneapolis, Minnesota, and I work for a volunteer center. And many of the issues we deal with in the non-profit world is the fears that come from the fear of lawsuits, including volunteers in the program, because they're not paid staff and they work with vulnerable populations and they may work with financial statements or information that's privy to only paid staff and how that has affected the non-profit world and the world of volunteerism.

CONAN: And how is it affecting your life in particular, Tasha?

TASHA: Well, I work in a volunteer center, so I don't work specifically with so many volunteers, but we train daily about--and try to help other non-profits decide, when can they accept a volunteer without doing a formal background check, state background check, national background check and all the expenses that come along with that? And there's a lot of waver room, and there's been no clear, concise answers to when volunteers can be included and when they can't. So...

CONAN: And again, in your experience, do you know of anybody who's been sued as a result of a volunteer? Do you think these fears might be exaggerated?

TASHA: I don't know anyone personally. I've heard of stories where perhaps they've brought a volunteer in that shouldn't have been into a system and some things did happen with vulnerable populations that shouldn't have. So some of it I think is warranted and some is not, but I think the point that is difficult for us in the volunteerism world is that there hasn't been any real clear, concise definitions or they aren't out there, and for the average person who doesn't study law to be able to make decisions about when they can accept volunteers and when they can't.!

CONAN: I think you've hit upon the solution, Tasha. We should all study law.
(Soundbite of laughter)

Prof. McCANN: I think that this point has come up over and over again, which is to say that we've lived in a climate where stories about litigiousness and about the threats of liability, litigation, are all around us. We read in the newspaper, we see it on TV, we read lawyer jokes in magazines. There are groups out there telling us that repeatedly, there are coffee table books about the sort of litigation, and it has become part of the common sense in our culture. But it not only is out of proportion to what we know about the actual incidence of litigation, but it also varies from activity to activity. But it has become a kind of the truth reality of the world in which we live, and that has great impact on our behavior. We all act as if we could be sued at any point, even though there's low likelihood of that.

CONAN: Thomas Burke, I wanted to bring you back in on this. It's not quite an urban legend. It's not, you know, my cousin's best friend heard the story about the woman who microwaved her cat. There are real lawsuits you do have to worry about.

Prof. BURKE: There are real lawsuits, but it's a question of risk perception. To me, it's very parallel to what's happened with criminal justice in this country, where the fear of crime has risen dramatically over, let's say, the last 30 years, but the fact is crime has either held steady or dropped during that same period. So, yes, it can happen, and if it happens, it's very bad, but we do have to take account of all the exaggerations, the whole culture which is kind of almost dedicated to a kind of exaggeration.

I should also say that Tasha, not being a lawyer, probably wouldn't be aware of it, but there was a law passed by Congress during the Clinton administration to try to immunize volunteers from lawsuits. Now I'm sure there's some end runs around that law and some ways that clever attorneys can find around it, but Congress has tried to address this, and I wonder if people are even aware of that.

CONAN: Michael McCann, we're going to have to let you go, but thanks very much for your time today. Michael McCann, a professor of political science and law at the University of Washington in Seattle. His book is "Distorting the Law: Politics, Media and the Litigation Crisis." It comes out this spring. He was with us from his home in Seattle, Washington.

This is TALK OF THE NATION. I'm Neal Conan in Washington.

Tomorrow join Ira Flatow on "Science Friday," and the talk turns to flight, to the moon and maybe elsewhere in the solar system. That's tomorrow on TALK OF THE NATION. Now we're wrapping up our discussion of the fear of litigation. Our guest is Thomas Burke, associate professor of political science at Wellesley College, the author of "Lawyers, Lawsuits and Legal Rights."

And let's get another caller on the line. And this is Jose, who joins us on the line from

Tucson, Arizona.

JOSE (Caller): Yes. I don't have the specifics that your colleagues have, but I can tell you that I know several physicians, including myself, who are giving up practice because of lawsuits. It's not just the financial implications. When we take care of patients, we are emotionally invested, and then to do our best and turn around and have a lawsuit filed against us, even if we are obviously covered and there's no personal financial loss, there's a tremendous loss of trust between the patients that you take care of and the physicians who provide that care.

CONAN: And what happened to you when you were sued?

JOSE: Well, there was a patient came to the emergency room with--the lawsuit's still going on, so I can't give you details, but the patient came to the emergency room with a life-threatening condition where, if nothing was done, her chances of death were 10 percent. I did a procedure that I do pretty much routinely. The patient had a very unusual complication of this procedure. I didn't recognize it immediately, and the patient died within 10 minutes. And I'm being sued for wrongful death. I've been in practice for 12 years. The area of specialty that I practice is in extreme demand right now. I get letters every day offering me \$500,000 to move to a new location, but I'm not going to practice medicine anymore, and people are going to die as a result of that. And another comment is that you said that practicing defensive medicine because of fear of lawsuit is a common excuse, but I know for certain, and I personally have patients that I admit to the hospital not because I think they need to be admitted to the hospital, but just because if they go home and something happens, there'd be no defense.

CONAN: Thomas Burke, we heard earlier from Michelle Mello, and in the statistics we've heard in this program, the medical ones, the fear of litigation seems to be the most justified.

Prof. BURKE: Well, it's justified in the sense that when something goes wrong and there is a malpractice claim, it's a pretty awful experience for the physician. Now the caller hasn't told us if he's going to win his lawsuit or not, but the mere fact that someone filed a claim is, obviously, devastating to him. And that leaves us with a puzzle, which is we have to weigh the benefits of these laws as well. We have to think through what reforms would be necessary. Can we find a way to get rid of the bad claims that come through without stopping the good claims? And that's always the question in this area.

CONAN: Jose...

JOSE: ...(Unintelligible) have an arbitration system.

CONAN: OK.

JOSE: ...so there's not a competitive--one lawyer trying to beat another lawyer and instead just having arbitration.

CONAN: Well, that's not the system that we have, is it, Thomas Burke?

Prof. BURKE: Well, there are plenty of states that ask you to go to arbitration before you can bring a lawsuit, and there are all kinds of reforms that different states are trying to get around these kinds of problems. And so I think there's a lot of experimentation at the state level in dealing with medical malpractice. But what I hear the caller saying is it's not so much just the pecuniary aspect, the fact that there might be a lot of money, it's really just the fact that his relationship to his patient has been legalized, and that is something that has changed in American society. We have more and more legalized relationships. There are whole areas of American life where you didn't have to worry at all about being sued. Today there is that threat, and for some people it happens. In my own world, academia, it used to be the case that you could deny tenure to people for any darn reason you wanted to. Nowadays it's at least possible for people to sue. They don't usually win, but they could. The threat hangs out there.

CONAN: Jose, I know also simply the emotional impact of making a decision and having it turn out so badly, but perhaps through no fault of your own, that's also got to be devastating.

JOSE: You know, I was much more devastated when the patient died than when the lawsuit was filed, but it's just not worth the emotional pain and the physical pain of having to go in at 2:00 in the morning to take care of a very ill patient and turn around and have this happen to us.

CONAN: We're losing your cell phone, but I wanted to thank you for the call and wish you the best of luck.

JOSE: Thank you. Bye-bye.

CONAN: Bye-bye.

And, Thomas Burke, before we let you go, there are all kinds of procedures that many of us now go through almost as a matter of routine in terms of signing waivers. That seems to be another aspect of this whole fear of litigation.

Prof. BURKE: It is, and then you also have the warning signs which you see all over the place, warning signs on mountain bikes and on baby bumper strollers and all kinds of things. They're almost like talismans because I'm not sure they actually have as great an effect as the people who put them into effect want. That is, they're not going to stop litigation entirely, but they're attempts to ward off this great danger that people perceive. I had to once sign a waiver to get my hair cut, and I asked--I went all the way up to the head of the organization that designed this waiver, I said, 'Do you know of anyone who's ever been sued because of a bad haircut or because, I don't know, clippers went awry and someone's ear got poked or something like that?' And they hadn't. But I'll bet there is one, and I'll bet it'll be in the newspaper somewhere.

CONAN: Well, maybe a lawyer listening right now can enterprise that lawsuit within the

next week or so.

Prof. BURKE: Absolutely. You know, it's the possibility. It's the possibility. And there are more possibilities out there today than there were 30 or 40 years ago. We hold people accountable much more in American society today than we did in the past. The story you're about to run to is kind of like that. I mean, the court is ! saying that Padilla and how he's being handled, that relationship has to be legalized. We're very uncomfortable with saying that certain kinds of decisions are completely outside the bounds of the law.

CONAN: Well, that decision, I think, is in another category, but we'll get to it in just a moment. Thomas Burke, thank you very much.

Prof. BURKE: Thank you.

CONAN: Thomas Burke, associate professor of political science at Wellesley College, the author of "Lawyers, Lawsuits and Legal Rights." He was with us from his office in Cambridge, Massachusetts.

Among the news stories we're watching here at NPR today, Israeli Prime Minister Ariel Sharon is warning Palestinians that they're running out of time. Sharon says if Palestinians do not make moves towards peace within a few months, Israel will greatly accelerate construction of a security fence which could cost the Palestinians land.

And the New York Stock Exchange named the president of the Goldman Sachs investment firm John Thain as its new chief executive today. You can hear details on those stories coming up on ALL THINGS CONSIDERED from NPR News.

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