

The Quality Colloquium at Harvard University
Legal Issues in Patient Safety

*Patient Safety and Litigation Dynamics:
The New Malpractice Crisis*

T.A. Brennan
Harvard Medical School
Harvard School of Public Health

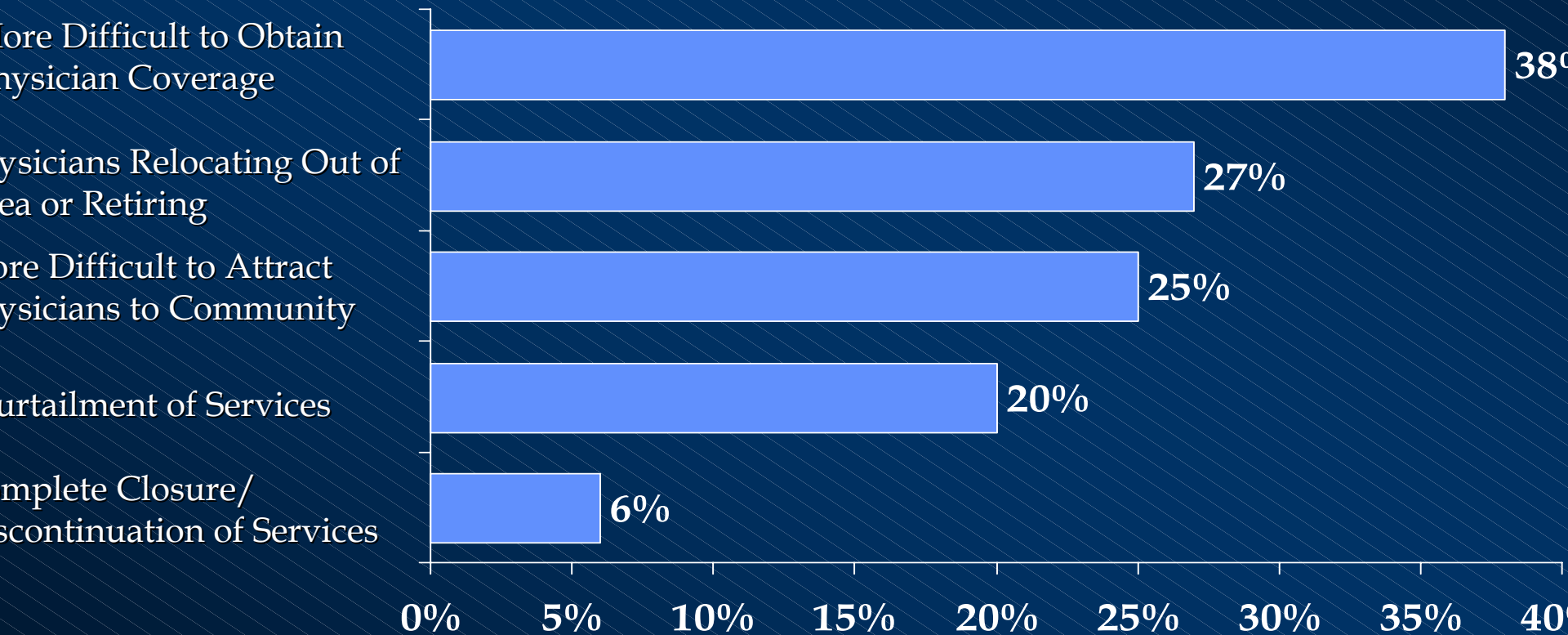
Malpractice Crisis Now Widely Recognized

- St. Paul Companies left the market in December, 2001
- “Breathtaking” rate increases in Oregon
- Nevada OB-Gyn shortage due to rate increases
- West Virginia Doctors’ strike

Situation in Pennsylvania Is Focus of the Nation

- More difficult to obtain physician coverage
- Physicians relocating out of area or retiring
- More difficult to attract physicians to community
- Curtailment of services
- Complete closure/discontinuation of services

Percentage of Hospitals Reporting Impacts of Current Professional Liability Market on Health Care Delivery, 2002¹



Average Combined Highest Premium Increases for Specialty Providers in States Experiencing a Litigation Crisis

State	Premium Increase from 2001 - 2002
Florida	61%
Iowa	29%
Mississippi	66%
Nebraska	31%
New Hampshire	42%
North Carolina	50%
South Carolina	38%
Tennessee	30%
Virginia	22%

Source: Medical Liability Monitor, October 2002. Data represent the average of the highest premiums reported for internal medicine, general surgery and obstetrics-gynecology specialists.

Crisis in Perspective

- Take a step back
- Understand malpractice system
- Evaluate empirical evidence

Theory of Malpractice

Proof of:

Duty

Injury

Negligence

Causation

Perform Role of: Compensation

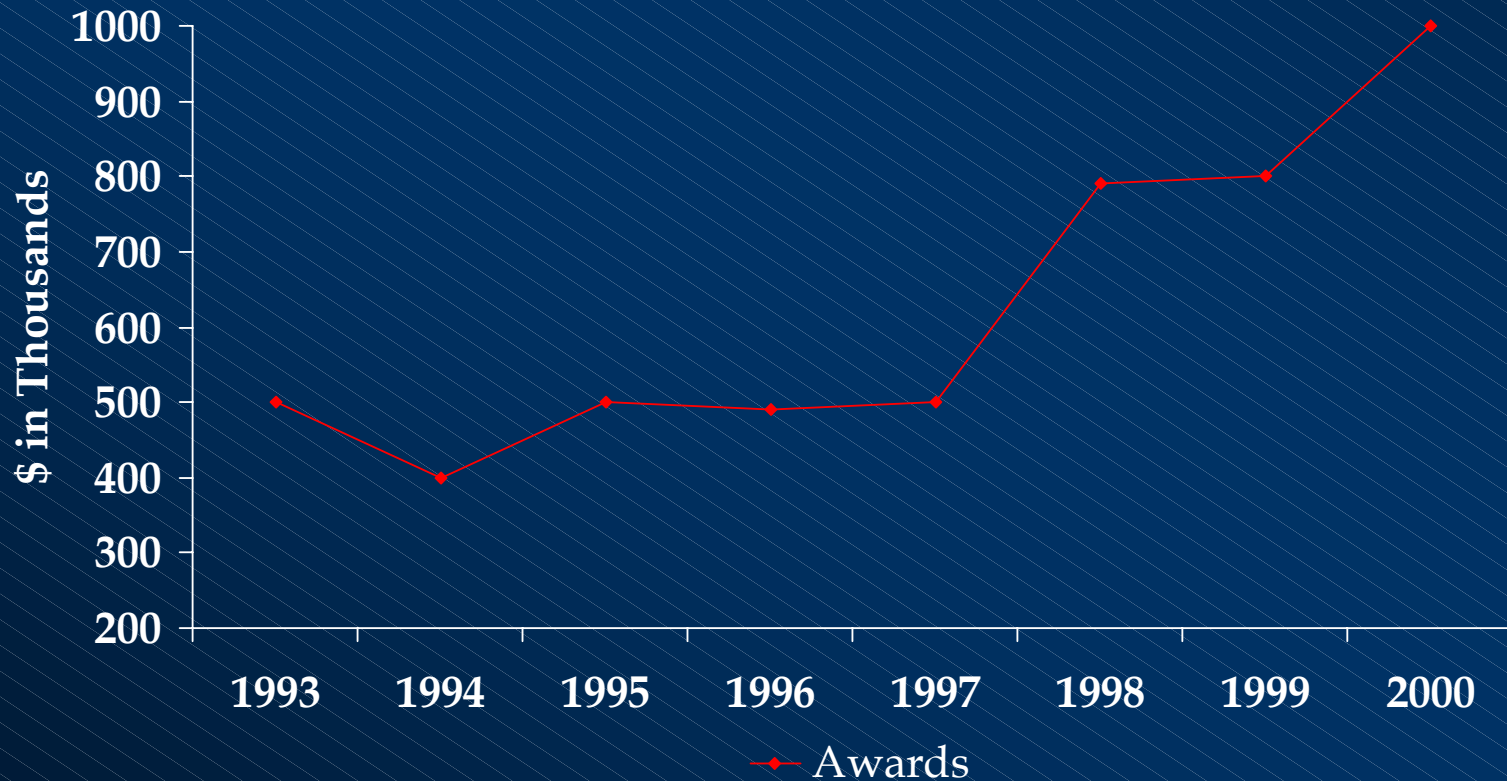
Deterrence

Economic Analysis of Tort Law

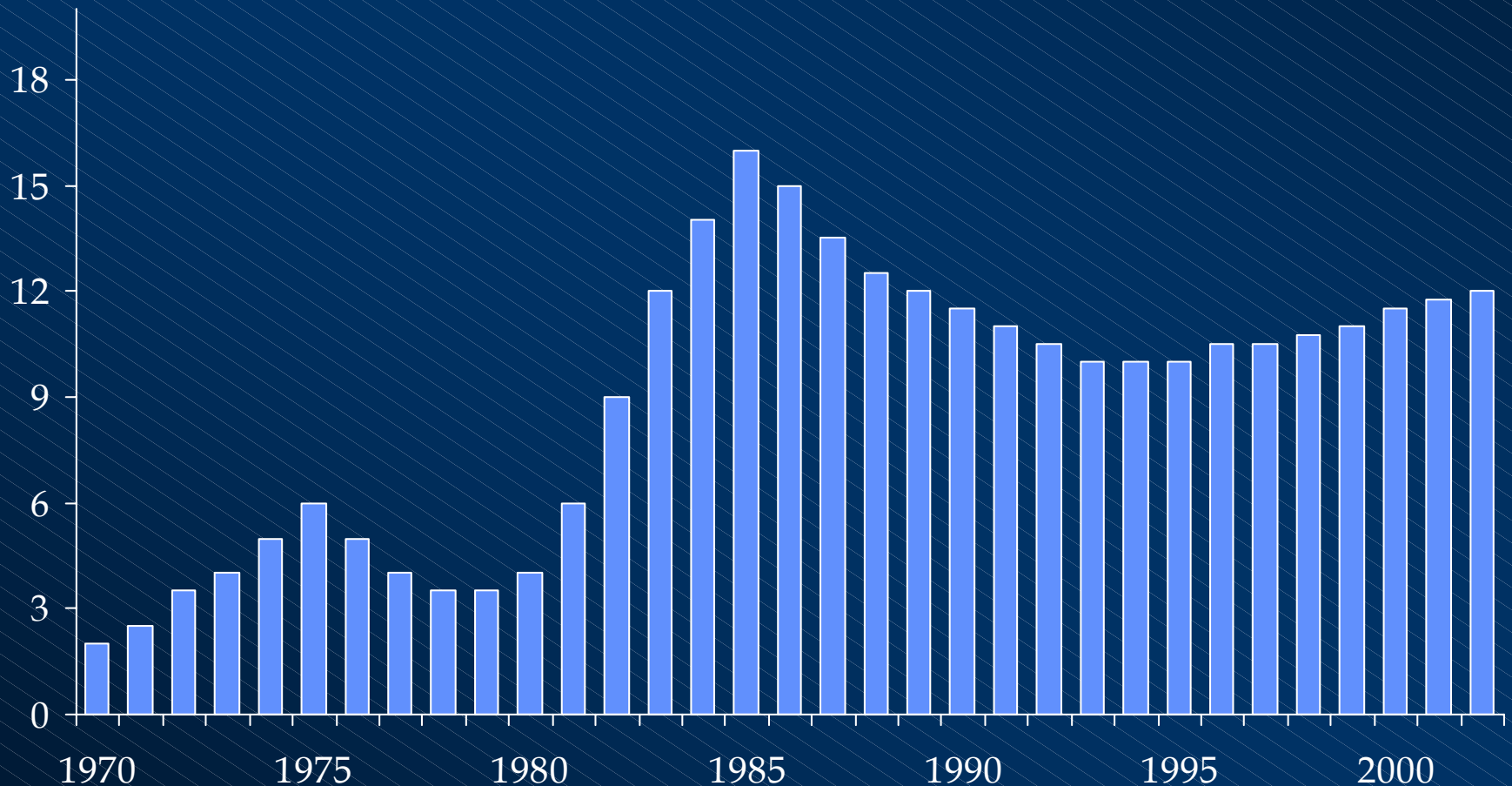
- Key decision maker is plaintiff attorney
- Must evaluate: size of potential award
probability of victory
cost of bringing case
- Appears rational, but what does empirical evidence show

Premiums Are Driven by Increases in Awards

U.S. Median Medical Liability Awards and Settlements



But Claims Per 100 Physicians Per Year Are Slowly Rising



Standardized Adverse Event Rates and Percentage of Adverse Events Due to Negligence

	California 1976	New York ¹ 1984	Utah/Colorado ² 1992
Adverse Event Rate	4.65	3.7	3.3
Negligent Adverse Event Rate	0.79	1.0	1.1

¹NEJM 1991

²Medical Care 2000

Population Estimates of Disability

	New York	Colorado	Utah
Number of Hospitalization	2,517,000	384,024	211,347
Adverse Events (AE's)	96,610 (3.7%)	11,578 (2.9%)	5,614 (2.9%)
Negligent AE's	27,177 (1.1%)	3,179 (0.8%)	1,828 (0.9%)
Deaths Due to AE's	13,451 (.54%)	495 (0.1%)	492 (0.2%)
Deaths Due to Negligent AE's	6,988 (.28%)	191 (0.04%)	235 (0.1%)
Extrapolated Figures (IOM)	98,000 deaths		44,000 deaths

Ratio of Negligent Adverse Events to Malpractice Claims

	Negligent Adverse Events	Claims	Ratio
New York - 1984 ¹	27,177	3,675	1:7.39
Colorado - 1992 ²	3,179	558	1:5.70
Utah - 1992	1,828	438	1:4.17

¹NEJM 1991

²Medical Care 2000

Comparison of Medical Care and Malpractice Claims¹

Record Review
31,429 Records

Litigation File Review
67,000 Claims 1975-89

Computer and Manual Matching
51 Cases with Claims Filed

No AE
31 (61%)

AE
12 (24%)

NAE
8 (16%)

Estimate of Adverse Events, Negligent Adverse Events and Claims – New York – 1984: The Big Reservoir of Potential Claims

	Hospitalized Patients	Claims
No Adverse Events	2,573,253	2,267
Adverse Events	71,433	783
Negligent Adverse Events	27,177	625
TOTAL	2,671,863	3,675

Bottom Line

1. Malpractice litigation often bears little relationship to medical injury and error
2. Most medical errors that cause injury do not result in claims: a very large reservoir of potential claims exists
3. Quite difficult to believe that deterrence or compensation functions actually occur

Crisis Brings the Return of Tort Reform

- Aimed at key economic player: the plaintiff's attorney
- Reduces the value of claim to attorney
- Follows Hand rule:

$$\text{Prob (lawsuit)} = \text{Prob (victory)} \times \text{Recovery}$$

Tort Reform Choices

Reduce Recovery

- Damage caps
- Periodic payment
- Collateral source offsets
- Reduce joint/several liability
- Attorney fee controls

Obstacles to Suits

- Pretrial hearings
- Screening panels
- Mandatory arbitration
- Certificate of merit

Doctrine Shift

- Expert witness restrictions
- Professional standard of care
- Change in informed consent standard
- Res ipsa* changes

Federal Tort Reform

HR 4600: Help Efficient, Accessible, Low-Cost, Timely
Healthcare (HEALTH) Act of 2003 (Greenwood)

- Preempt state law
- Reduce statute of limitations
- Pain and suffering limited to \$250K
- Periodic payment
- Reduce punitive damages
- Eliminate joint and several liability

States With High Premiums in 2002 by Specialty, Compared to California

State	OB/GYNs	Surgeons	Internists
Florida	\$211-\$78K	\$164-\$55K	\$56-\$15K
Nevada	\$142-\$59K	\$85-\$38K	\$23-\$11K
Michigan	\$141-\$51K	\$107-\$43K	\$46-\$14K
New York	\$115-\$33K	\$66-\$19K	\$17-\$6K
Illinois	\$110-\$47K	\$76-\$29K	\$32-\$9K
Texas	\$117-\$43K	\$88-\$33K	\$34-\$11K
Maryland	\$96-\$29K	\$38-\$24K	\$11-\$6K
West Virginia	\$95-\$69K	\$64-\$40K	\$18-\$9K
Connecticut	\$95-\$69K	\$43-\$37K	\$14-\$7K
District of Columbia	\$90-\$84K	\$43-\$38K	\$13-\$11K
California	\$75-\$28K	\$49-\$18K	\$21-\$5K

Source: Medical Liability Monitor, October 2002 Report. Highest and lowest premiums reported for internal medicine, general surgery and ob-gyn physicians.

Will Tort Reform Stem the Tide?

- Little empirical support behind the rhetoric of support for caps
- Is the 00's tort crisis different?
- Critical is the plaintiff's attorney greater certainty of a large award
- How much of that is related to focus on medical injury?

The Visibility of Medical Injury

- More money available for research
- Much lower threshold for publication
- Much more rapid public cycle time
- Has to lead to new presumptions in the jury box

The NEW ENGLAND JOURNAL of MEDICINE

SPECIAL ARTICLE

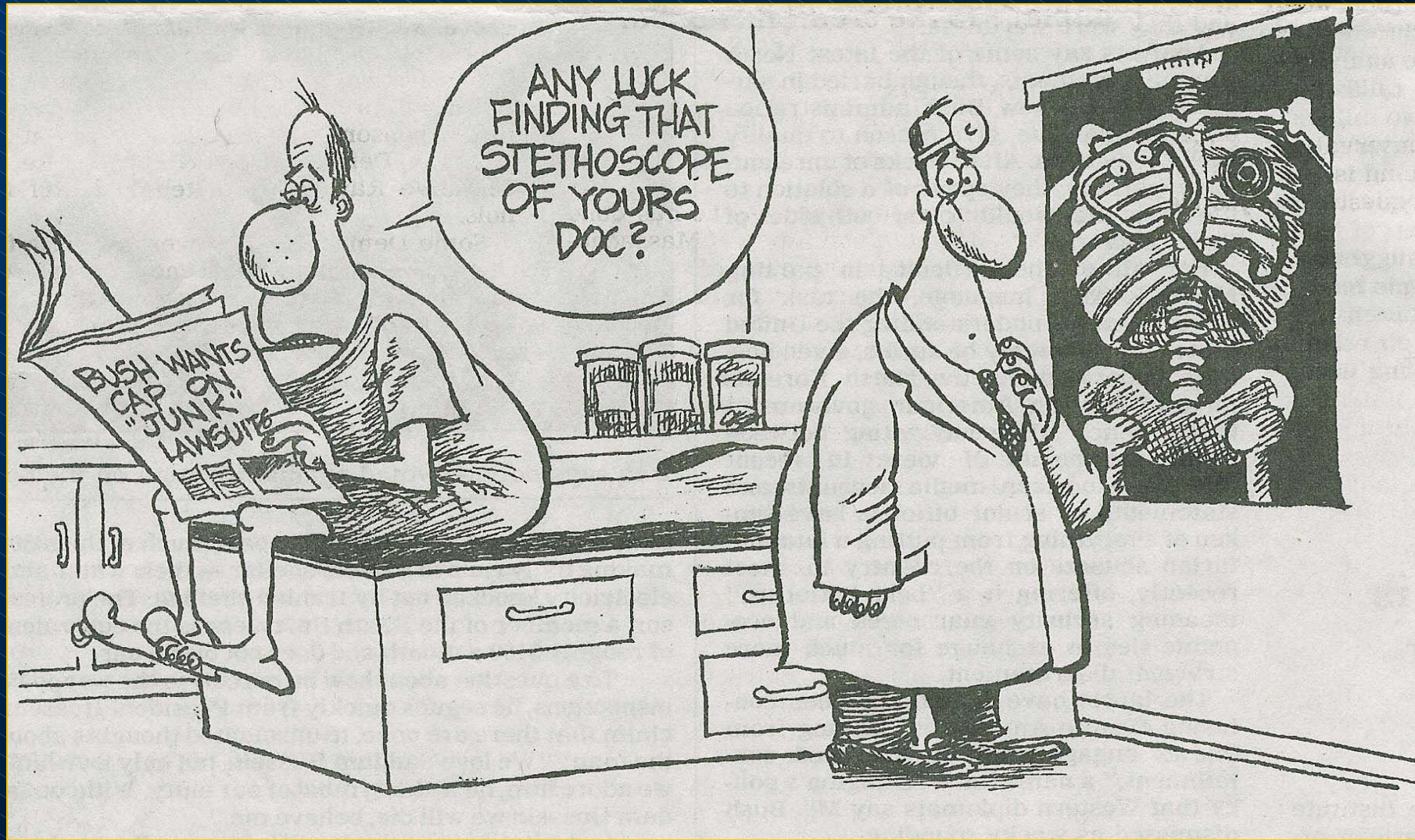
PATIENT SAFETY

Risk Factors for Retained Instruments
and Sponges after Surgery

Atul A. Gawande, M.D., M.P.H., David M. Studdert, LL.B., Sc.D., M.P.H.,
E. John Orav, Ph.D., Troyen A. Brennan, M.D., J.D., M.P.H.,
and Michael J. Zinner, M.D.

ABSTRACT

Published January 15, 2003



Printed January 17, 2003