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## Health Courts: Panacea or Palliative?

Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)

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# ESSAY

## HEALTH COURTS: PANACEA OR PALLIATIVE?

*Carl W. Tobias \**

Numerous observers have expressed growing concerns regarding health care delivery, medical malpractice, and litigation against health care providers, although, for years, all fifty of the states have instituted and applied a broad spectrum of medical malpractice reforms while experimenting with various other measures. Some commentators believe that the health care delivery system is now experiencing a crisis in which medical expenses are dramatically rising, even as the number of citizens without medical insurance approaches fifty million; physicians are leaving medicine or particular specialties because of extremely high medical malpractice insurance premiums and too much litigation; and health care professionals practice defensive medicine, essentially by conducting unnecessary tests.

Observers assert that primary responsibility for the crisis should be assigned to the unreliability of the medical justice system. For example, most individuals whom medical negligence harms file no claims because expensive proceedings consume years to resolve and typically last from a half decade to ten years. In those suits which patients do bring, only twenty percent are said to implicate wrongdoing by health care professionals. Moreover, jury awards can vary significantly. The existing system may

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\* Williams Professor, University of Richmond School of Law. B.A., 1968, Duke University; LL.B., 1972, University of Virginia.

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also fail to promote improvements in the quality of health care which patients actually receive. Concerns about being sued make health care professionals reluctant to admit errors. Although systemic breakdown, rather than individual provider error, is responsible for negligence in most cases, liability's assignment to specific doctors impairs the open communications required to detect mistakes and realize improvements.

These concerns have prompted numerous observers to suggest the establishment of special health courts as a potentially efficacious response to the allegedly unreliable medical justice system. Central to this idea are judges, who possess specialized training in the medical malpractice issues which they would confront and who exclusively adjudicate health care suits. The jurists would ascertain law and fact without juries. The judges would define and construe the relevant standards of care in malpractice litigation by hearing the testimony of neutral experts whom the court would hire and reimburse and whom the judges would examine in individual cases, thus eliminating the purportedly unreliable and costly phenomenon of "dueling experts."

Proponents assert that the development and articulation of relevant standards of care would concomitantly increase the common law standards' predictability to which doctors in turn could conform. The judges' special expertise would ostensibly permit them to enhance consistency in deciding malpractice lawsuits partly because they would be superior factfinders to lay juries, who lack any medical background. Advocates claim the tribunals could also guarantee that more injured patients receive compensation while securing a higher percentage of awards and insure that non-economic damages are awarded through a benefits schedule which furnishes predetermined amounts tailored to specific injuries. Moreover, the courts' supporters contend that the tribunals will decrease litigation expenses because the judges will resolve cases more promptly. Many of these advantages, should they materialize, will apparently encourage physicians to practice "defensive medicine" less frequently.

Lawmakers in Illinois and Pennsylvania have introduced proposed legislation to effectuate special health courts, and United States Senators recently sponsored a bill that would authorize federal funding for ten states to experiment with the tribunals, although neither state legislatures nor Congress has adopted any of these proposals. However, numerous health care providers in

Virginia and some legislators have suggested that a measure which would implement those courts will be introduced in the 2006 Virginia General Assembly.

The notion of instituting health courts is a provocative idea and may prove effective. Nevertheless, when these courts' advocates develop proposed legislation that would authorize the tribunals and when the General Assembly and the Governor consider the bills which are introduced, they should evaluate numerous relevant factors. First and foremost, none of the fifty jurisdictions in the United States has ever prescribed health courts. Thus, the nation and Virginia have no practical experience with the courts and lack any empirical data which suggest how the tribunals will actually function in practice.

The federal government and the overwhelming majority of the states do have considerable experience with somewhat analogous "specialized" courts. For instance, the United States Tax Court has worked rather efficaciously at the federal level, while virtually all of the fifty states have long depended on specialized tribunals in the area of workers compensation. Notwithstanding the relative success of these courts, they do impose disadvantages. For example, critics express concern that the judges may experience "capture" by certain "repeat players" who appear in the tribunals, while this difficulty seems equally applicable to health courts. Some observers correspondingly find that the workers' compensation system is outmoded, partly because the compensation awarded is deficient. This concern might well apply with similar force to health courts.

The proposed health courts may be vulnerable to additional criticisms. For instance, the elimination of lay juries, which have served the nation reasonably well in the medical malpractice area, may be unwise as a policy matter, even should the idea pass constitutional muster. Juries might also be as accurate at fact-finding as judges, while juries would be less vulnerable to "capture." There as well may be readily-available measures which legislators and judges can apply to the present medical justice system that would improve this regime. For example, having judges closely scrutinize the evidence proposed to be submitted, as they now do in the federal system under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, could prove more effective in preventing the introduction of unreliable evidence.

The ideas explored above suggest that health courts are a provocative, but controversial, solution to the perceived complications in the medical justice system, which may impose disadvantages and yield relatively few benefits. However, my evaluation is rather speculative because there is essentially no practical experience with the tribunals contemplated. Accordingly, the General Assembly and the Governor should proceed cautiously when they consider the proposed legislation that would institute health courts. The present lack of experience with the tribunals and the potential criticisms which can be articulated suggest that legislators and the Governor might want to study this untested approach or perhaps authorize experimentation with the concept and the systematic collection, analysis, and synthesis of empirical data on the idea's actual operation before implementing health courts.