

## No greener grass:

A comparative analysis of no-fault compensation in NZ  
and medical malpractice litigation in the US



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## New Zealand



- “New Zealand continues to be one of the most hostile medico-legal environments in any of the places in which MPS operates ...”

– Medical Protection Society

## New South Wales, Australia



Image:  
[www.worldcountries.info](http://www.worldcountries.info)

“[Doctors] now work in an increasingly hostile medico-legal environment. New South Wales is reputed to have one of the highest rates of medical negligence litigation in the world.”

- Editorial, Critical Care and Resuscitation

## United Kingdom



Image:  
[www.worldcountries.info](http://www.worldcountries.info)

The tidal wave of litigation crashing against the shores of the NHS threatens a crisis. ... Dr Panting [of MPS] maintains that the situation is dire. "We are looking at a looming crisis of proportions that will make the flu epidemic seem like a drop in the ocean," he said.

- BBC News, Litigation Next NHS Crisis, 2000

## Florida, United States



Image:  
[www.worldcountries.info](http://www.worldcountries.info)

“[Florida’s medical malpractice legislation has] crippled the health care system and left patients, payers, and providers considerably worse off than before. These conditions have, undoubtedly, created the most hostile professional and clinical conditions observed in the US, while fomenting a major social and political crisis.”

- Paul Barach, AHRQ

## Overview: 7 measures of quality

- Patient-centred
- Effective
- Equitable
- Timely
- Efficient
- Co-ordinated
- Safe

- Institute of Medicine,  
Crossing the Quality chasm



## Patient-centeredness: Few negligently injured patients sue in US

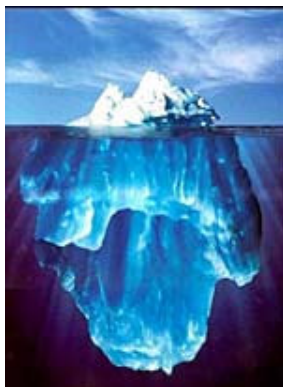
- Medical-malpractice litigation infrequently compensates patients injured by medical negligence

Localio et al, NEJM, 1991

- Of the patients who suffered negligent injury in our study sample, 97% did not sue.

Studdert et al, Medical Care, 2000

## Patient-centeredness: Claims & complaints tip of iceberg in NZ



- Fewer than 5% of eligible patients claimed ACC compensation (medical misadventure scheme)
- Among patients who suffered serious preventable injuries only 1 in 25 complained to HDC

Bismark et al, 2006  
Quality and Safety in Healthcare

## Why do patients sue in the US?

### What could provider have done to prevent claim?

Pay me compensation	13%
Be willing to correct the error	25%
Explain what happened/apologise	>50%

### What motivated you to bring a lawsuit?

Physician not completely honest	24%
Needed compensation	24%
Only way to find out what happened	20%
Punish doctor / assure it won't happen again	19%

Hickson, JAMA, 1992

## “We want honesty”



- “My father rang the hospital all the time but we were never given any constructive information. We asked the specialist if we could speak to him after he examined her. He left without speaking to us at all.”

(sister of 39 year old woman who died following kidney surgery)

## “I want fair compensation”

"I feel I should be recompensed for the cost of household help and hanging out the washing as I'll never be able to look after myself again."

(previously independent 89 year old woman who fell in hospital, resulting in a compression fracture of her spine)



## “I want lessons to be learnt”

"Surgeons should not be overworked to the point of mistakes. I hope those involved have been able to learn from this and can thus prevent a mistake which could result in loss of life."



(breast cancer survivor whose breast prosthesis was punctured by surgeon who mistook it for a fluid collection)

## What do injured patients want? (NZ data)

Correction	50%
Lessons learned / competence review	
Communication	40%
Explanation / apology / expression of responsibility	
Restoration	22%
Compensation / intervention with care	
Sanction	12%
Professional discipline / other punitive measure	

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## Effectiveness: Unpredictable jury awards in US



President Bush renews his call for caps on damages  
Image: CNN

- “Our medical liability system is broken ... Jury awards in medical liability cases have skyrocketed in recent years ... In my mind, there is no doubt that we won't solve these problems, because this is the greatest nation on the face of the Earth.”

George W. Bush, 2005

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## Effectiveness: Modest, predictable comp. in NZ



- ACC Treatment Injury reforms removed any consideration of fault, error, rarity or severity
- A fixed award structure ensures that patients with similar needs receive similar compensation.

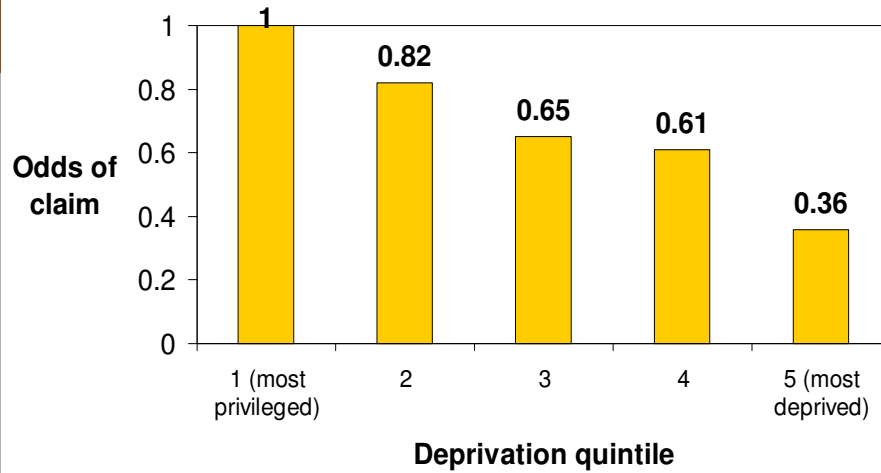
## Equity: Worrying disparities exist in NZ and US

	New Zealand Odds of claim	United States Odds of lawsuit
Maori	0.4 *	
Most deprived/poorest	0.4 *	0.2*
Elderly (ref: 18 to 44)	0.2 *	0.3 *

Multivariate analysis controlled for disability and eligibility for compensation  
\* =  $P < 0.05$



## Equity: Socio-economically deprived patients are less likely to claim ACC (or complain)

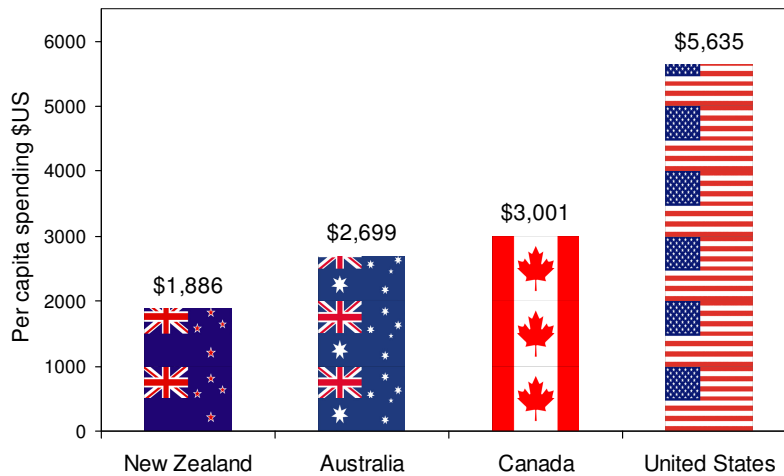


Bismark et al, 2005, unpublished data

## Timeliness

	New Zealand ACC	United States Malpractice litigation
Average time between claim & compensation decision	Weeks to months	>5 years

## Efficiency: per capita spending on healthcare (OECD data 2005)



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## Efficiency: does the money reach the patient?



“For every dollar spent on compensation, 54 cents went to administrative expenses (including those involving lawyers, experts, and courts). The overhead costs of malpractice litigation are exorbitant.”

Claims, errors, and compensation payments  
in medical malpractice litigation  
Studdert, Mello et al, NEJM, 2006

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## Efficiency: does the money reach the patient?

	<b>New Zealand</b> ACC	<b>United States</b> Malpractice litigation
Proportion of expenditure spent on administration	10%	50-60%

## Co-ordination: 14 avenues for investigation



“Currently, there are multiple systems that deal with adverse medical events. Approximately 14 organisations (including external state agencies as well as private agencies) potentially can each undertake their own investigation or hearing.”

Helen Cull QC

## Co-ordination: New Zealand

1. Professional indemnity association
2. Employer
3. Mortality review committee
4. Coroner
5. Police
6. Professional College
7. Civil proceedings
8. Accident Compensation Corporation
9. Health and Disability Commissioner
10. Director of Proceedings
11. Health Practitioners Disciplinary Tribunal
12. New Zealand Medical Council
13. Complaints Assessment Committee
14. Human Rights Review Tribunal

## Co-ordination: New South Wales, Australia

1. Professional indemnity association
2. Employer
3. Mortality review committee
4. Coroner
5. Police
6. Professional College
7. Civil proceedings “unfathomable & unsustainable” (Ipp)
8. Incident Information Management System
9. Healthcare Complaints Commission
10. Healthcare Complaints Commission Prosecutor
11. Administrative Decisions Tribunal
12. Medical Board
13. Medical Board Professional Standards Committee
14. Medical Tribunal

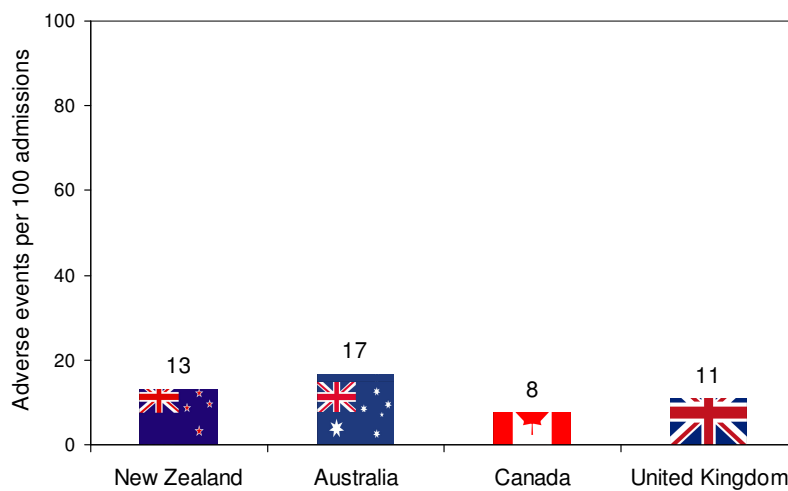
## Co-ordination: United States

1. Professional indemnity association
2. Employer
3. Mortality review committee
4. Coroner
5. Police
6. Professional College
7. Civil proceedings
8. Medicare
9. National Practitioners Databank
10. Public Citizen (private watchdog organisation)
11. State Board of Medical Examiners
12. State Board of Medical Examiners disciplinary committee
13. American Board of Surgeons etc
14. American Medical Association

“With some exception the watch dogs of healthcare quality in America all are autonomous agencies that work on their own agendas.”

Dr T.R. McLean

## Safety: adverse events per 100 admissions



## Safety: litigation & safety are on a collision course

“Unfortunately, because access to compensation for medical injury in our health system hinges on blame and individual provider fault, patient safety reforms are on a collision course with the medical malpractice system.”



David Studdert and Troy Brennan  
JAMA, 2001

## Safety: defensive medicine in volatile malpractice environment

Survey of 824 physicians in Pennsylvania:

93% reported practising defensive medicine

43% reported using imaging technology in clinically unnecessary circumstances.

42% reported that they had taken steps to restrict their practice, avoiding patients who had complex medical problems or were perceived as litigious.

Studdert et al, JAMA, 2005

## Efficiency: “Nervous docs dodge the complainers”

“I would say it’s the same here.

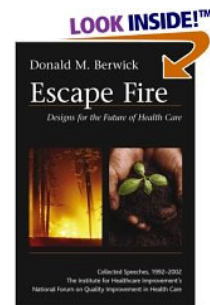
As a society, we believe that by making complaints we’re going to improve the delivery of health care. In fact, there is an increasing wealth of evidence to show doctors practise worse.”

Wayne Cunningham,  
NZ Sunday Star Times, April 30 2006

## Safety: patient concerns represent opportunity, not a burden

“I have seen [medication errors] firsthand, at the sharp end, sitting by Ann’s bedside for week after week of acute care ... A patient with a question represents an opportunity, not a burden.”

Don Berwick, IHI



## Safety: patient voice offers “window” on serious, preventable adverse events

“Complaints offer a valuable portal for observing serious threats to patient safety and may facilitate efforts to improve quality.”

2/3 complainants had suffered an adverse event

Injury severity and preventability are strong predictors of complaints – patient death is 18 times more likely to result in complaint than temporary injury

Bismark et al, QSHC, 2006

## Safety: recognition of shared interests

### Patient

Prevent further harm  
Communication  
Fair compensation  
Timely resolution  
Preserve relationship  
Avoid adverse publicity?  
Sanction?

### Doctor

Prevent future harm  
Protect reputation  
Avoid adverse publicity  
Timely resolution  
Communication  
Preserve relationship  
Fair compensation?



## Safety: allies, not adversaries



Image:  
[www.mcnz.org.nz](http://www.mcnz.org.nz)

“Doctors and patients share a similar concern about avoiding similar incidents in the future.”

Medical Council of New Zealand  
 2004

	<b>New Zealand</b>	<b>United States</b>
Patient-centred	<5% eligible pts claim	<5% eligible pts claim
Equitable	Disparities for Maori, elderly, & disadvantaged	Disparities for poor & elderly
Effective	Modest, predictable ACC	Unpredictable jury awards
Timely	Weeks to months	Several years
Efficient	90c in \$1 to patient	40c in \$1 to patient
Co-ordinated	Improvements since Cull	Poorly co-ordinated
Safe	No safer and no more dangerous; no-fault system offers promise of culture of safety	No evidence of “tort deterrent”; compensation requires proof of error and individual blame

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## Final thoughts: Medical perspective

“Anyone who honestly believes that New Zealand has the most hostile medico-legal environment in the world needs to get out more.”

Chris Johnston, MD JD  
New Zealand / United States

## Final thoughts: Academic perspective



“From my perspective, the New Zealand medico-legal system for addressing medical injury is the most sophisticated in the world.”

Professor Ed Dauer  
HDC Mediation Symposium  
May 2006

## Warm thanks to:



- Tom McLean
- Mike Heron
- Ron Paterson
- Peter Davis
- David Studdert
- Troy Brennan
- HDC and ACC
- Commonwealth Fund
- Auckland medico-legal society