

THE FALLACIES OF MEDICAL MALPRACTICE “TORT REFORM”

by Alan H. Figman

Organizations representing the state’s doctors and their insurers have been hard at work trying to convince the public that medical malpractice insurance premiums have escalated beyond affordability due to medical malpractice lawsuits, resulting in increasing healthcare costs and in physicians leaving New York. Hospital associations claim their industry needs relief from the high cost of malpractice coverage. Legislators are constantly lobbied by these groups, being told that malpractice litigation results in “defensive medicine” and that “frivolous” lawsuits result in “soaring” liability payments that drive up the cost of healthcare.

The fact is – litigation is not a function of healthcare costs. The inconvenient truth is that they are a result of epidemic levels of medical error and the economics of the healthcare industry.

“Tort Reform” and other measures supposedly aimed at reducing the cost of medical malpractice coverage would deny victims of malpractice reasonable compensation for injuries caused by these errors. Moreover, the enactment of tort reform would merely shift responsibility for paying the victim’s expenses from the insurer to Medicare or Medicaid, without any change in malpractice policy premiums or healthcare costs.

The Fallacy of Blaming Lawsuits for Healthcare Costs

The Institute of Medicine of the National Academies reported in 2012 that one-third of hospitalized patients are harmed during their stay.¹ *To Err Is Human*, the Institute’s landmark study on hospital patient safety, found that nationwide up to 98,000 patients die from medical errors per year.²

New York was ranked as one of the ten worst states for patient safety in the 2010 and 2011 *Health Grades Patient Safety in American Hospitals* studies. In 2012, *Consumer Reports* started giving hospitals a patient safety score. The result: 27 of the nation’s 50 lowest scoring hospitals were in downstate New York.³ *The Journal of the American Medical Association*, in its 2010 survey of physicians, reported that 17% (nearly 1 out of 5) of respondents said that they had direct knowledge of an incompetent colleague over the last 3 years.⁴

The RAND Corporation, a leading public policy think tank, reviewed closed medical malpractice claims and adverse in-hospital events, and concluded that “a greater focus on improving patient safety in healthcare settings could benefit medical providers as well as patients”.⁵

New York Presbyterian Hospital implemented a comprehensive obstetrics safety program in 2002, incorporating interdisciplinary team training, emergency drills, having a full-time laborist, implementing electronic medical records and charting and clarifying chains of command. As a result, yearly obstetric-related malpractice claims payments were reduced by

99%, or \$25 million per year, as was reported by The American Journal of Obstetrics and Gynecology in February, 2011.

The Fallacies of “Defensive Medicine” and “Frivolous Lawsuits”

Medical lobbyists and groups funded by corporate interests such as the American Tort Reform Association and the American Legislative Exchange Council repeatedly claim that as a result of the fear of being sued, physicians order a tremendous amount of unnecessary tests and procedures. Eliminate the lawsuits and you remove the catalyst behind the rising costs of healthcare.

But the disingenuity of this claim has been exposed a decade ago. In 2003, the Government Accountability Office (GAO) found: “[T]he overall prevalence and costs of [defensive medicine] have not been reliably measured. Studies designed to measure physicians’ defensive medicine practices examined physician behavior in specific clinical situations, such as treating elderly Medicare patients with certain heart conditions. Given their limited scope, the study results cannot be generalized to estimate the extent and cost of defensive medicine practices across the health care system.”⁶

The Congressional Office of Technology Assessment (OTA) found that less than 8% of all diagnostic procedures were likely to be caused primarily by liability concerns.⁷ The OTA found that most physicians who “order aggressive diagnostic procedures . . . do so primarily because they believe such procedures are medically indicated, not primarily because of concerns about liability”.

Malpractice is defined as a departure from accepted standard of care. A doctor doing something that should not have been done, or not doing something that should have been done. Doctors are trained to know what tests need to be ordered and which ones do not under given circumstances.

If it is not a departure to not order a test, say, a carotid sonogram during a routine annual physical, and one is ordered, there may very well be other factors at play in the doctor’s mind other than liability concerns.

According to the Congressional Budget Office, “some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. On the basis of existing studies and its own research, CBO believes that savings from reducing defensive medicine would be very small”.⁸ (Emphasis supplied.) Particularly when self-referrals are made (*i.e.*, the doctor orders a specialized test that he then performs), should other motives for defensive medicine be considered.

The proponents of the argument that “Frivolous Lawsuits” plague the civil justice system ignore just how the contingency fee system weeds out weak cases.

As a graduate of the Class of 1982, Cardozo’s fourth graduating class, I and so many of

my classmates found work in firms that were compensated on a contingency fee basis. Contingency fees provide every citizen with access to the civil justice system who could otherwise not afford a lawyer, and are an essential and vital element in enabling victims of the negligence of others to receive compensation.

Since plaintiff trial lawyers receive no fee unless their client receives compensation, a lawyer would be insane to take on a project involving hundreds, if not thousands of hours of unpaid time, with the concomitant need to invest tens of thousands of dollars, if the case was a frivolous one. (A malpractice case can easily generate over \$50,000 in expenses, which must be laid out by counsel and will be lost if the case is lost.)

Malpractice lawsuits are by far the most hotly defended of negligence cases. The defense firms are the best of the defense bar, and it is universally known and accepted that they will not settle a case that lacks merit.

Furthermore, most malpractice insurance policies allow the defendant physician to determine whether a case gets settled. The doctor must give his consent before any settlement can be had. Since any settlement results in the doctor getting “data-banked”, physicians never consent to settling a frivolous case.

Insurance industry lobbyists point to the rate of 4 out of 5 verdicts in favor of the defense as being a sign of a proliferation of frivolous lawsuits. But 95% of cases settle prior to going to verdict. Thus the 4:5 defense verdict ratio is only applied to a distinct minority of suits. And even there, it cannot be said that it is an indication of the case having been frivolous. It merely reveals that the jury has sided with the defense expert.

Jurors have been tainted by the repeated, constant and persistent distortions of the civil justice system by the “Tort Reform” industry. Jurors start off their jury service by viewing their job to be a search for any holes in the plaintiff’s case, and then to throw her out of court. It is an uphill battle for a plaintiff’s lawyer to try a case in New York county, let alone Nassau, Suffolk, Richmond, Westchester and anything north of that.

The McDonald’s Hot Coffee case gave rise to attacks on “frivolous lawsuits” in the United States. In its aftermath, every plaintiff’s trial lawyer must spend great amounts of time during jury selection evaluating the jurors’ reactions to that particular case, and for what it means to the case being tried.

In 1992, a 79 year old woman in a car spilled a McDonald’s coffee cup onto her lap, sustaining horrific burns to her groin area. She was awarded \$2,700,000 in punitive damages by an Albuquerque jury! Typical reaction: McDonald’s didn’t spill it on her, she spilled it herself. And isn’t coffee supposed to be hot?

What jurors (and the public) don’t know are the real facts: (1) she wasn’t driving; she was sitting in the passenger seat of her car in the parking lot, opening the lid to add cream and sugar, when the cup tilted over; (2) the coffee wasn’t just hot, it was dangerously hot.

McDonald's corporate policy was to serve coffee at a temperature that would cause serious burns in a matter of seconds. To forward a specific business model calculated to control the consumption of refills, its Operations Manual dictated a temperature of 185° Fahrenheit, which causes 3rd degree burns in 3 seconds. McDonald's admitted that it knew about the risk of serious burns for over 10 years due to more than 700 claims and lawsuits involving hot coffee. The jury found that McDonald's had a "callous disregard for the safety of the public".

What people do not understand is that there are inherent checks and balances in our system to eliminate "frivolous" cases. In *McDonald's*, the plaintiff's injuries were extensive, and even there the trial judge reduced the verdict to \$640,000, and the parties settled before appeal for an undisclosed lower amount. Prior to trial, the plaintiff was willing to accept \$20,000 to settle her case.

The "frivolous" lawsuit myth was exposed for what it is by a 2006 Harvard School of Public Health study of more than 1,400 insurers' medical malpractice closed files across the country. According to the study, as reported in the *New England Journal of Medicine*, this review came to two conclusions: 1.) "portraits of a malpractice system that is stricken with frivolous litigation are overblown"; and 2.) "the malpractice system performs reasonably well in its function of separating claims without merit from those with merit and compensating the latter".⁹

The Fallacy of Physicians Leaving the State

Healthcare spokespersons are simply wrong when they tell the public and the Legislature that medical malpractice insurance premiums in New York have "soared". In fact, from 1995 to 2011, New York's Insurance Department approved average medical malpractice insurance rate increases for physicians totaling 45%, less than the 51% increase in the consumer price index and far below the 85% medical care inflation rate during this same period.¹⁰

In the 2008-2009 and 2009-2010 policy years, malpractice premium insurance rates were frozen for all medical malpractice insurers. For the 2011-12 year, the Department of Financial Services froze rates for Medical Liability Mutual Insurance Company (MLM), which is the largest of New York's malpractice insurance carriers, insuring the majority of doctors in the state. In addition, most physicians are benefitting from a 7.5 percent "claims free" premium discount that took effect in 2011.

One of the most frequently repeated myths about medical liability is that doctors are leaving New York in order to avoid paying high, unaffordable medical malpractice insurance premiums. That simply is not the case.

Indeed, New York has been gaining, not losing, physicians. 51,193 doctors practiced in New York State in 1995, 65,936 in 2010.¹¹ From 2000 to 2010, New York's physician-to-population ratio increased 7%. According to the American Medical Association, New York ranks fourth among the states in physicians-to-population.¹²

The Fallacy of Caps

The lack of any true medical liability crisis has not prevented doctor and hospital groups from vehemently demanding the implementation of “tort reform”. The principal reform they seek is a cap on the non-economic compensation that victims of malpractice can receive.

Healthcare lobbyists promise that caps will lower the cost of medical malpractice insurance and thereby encourage more doctors to practice in New York. They claim that caps will slow the growth in healthcare costs. The true reality: caps would not encourage doctors to practice in New York. Caps would have no impact on healthcare costs and would only serve to inflict further harm on patients already injured by medical negligence.

Arbitrary caps would have a tremendous, harmful impact on those with limited incomes, who would not be able to show significant economic damages. Caps would hurt minorities, who receive poor quality healthcare across the board. The U.S. Agency for Healthcare Research and Quality reported that healthcare for Hispanics and African Americans in New York is lower than in the nation as a whole. Another study by the Institute of Medicine of the National Academies found “U.S. racial and ethnic minorities are less likely to receive even routine medical procedures and experience a lower quality of health services”.

Arbitrary caps would have an enhanced negative impact on women. SUNY Buffalo Law Professor Linda Finley concluded in a widely-cited study: “[C]ertain injuries that happen primarily to women are compensated predominantly or almost exclusively through non-economic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries”.¹³ If non-economic damages were arbitrarily capped, these women would basically have no recourse in the courts.

A major study of the Texas civil justice system and its implementation of caps conclusively proves that caps do not lower healthcare costs by eliminating physician’s perceived need to practice “defensive medicine”.¹⁴

In 2003, Texas adopted “tort reform” through a one-size-fits-all cap on medical malpractice victim compensation. The June, 2012 study compared Medicare spending trends in Texas and the nation and found “no evidence of reduced spending in Texas post-reform, and some evidence that physician spending rose in Texas relative to control states”.

The study also compared spending in Texas counties that had relatively high rates of medical malpractice claims [“high risk counties”] and counties with low rates of claims [“low risk counties”]. The authors “found no evidence that spending levels or trends in high-risk counties declined relative to low-risk counties and some evidence of increased physician spending in high-risk counties” post-tort reform.

The study also found that caps did not increase the supply of doctors. From 2003-2010, Texas’ physician/population ratio increased 3.4%, compared to New York’s 4.2%. In 2003, Texas had the nation’s 42nd lowest physician-to-population ratio. In 2009, its ratio sank to the

44th lowest. In contrast, New York, a state without caps, had the nation's 4th highest physician-to-population ration in both 2003 and 2009.¹⁵

A 2011 study by Public Citizen on the impact of caps in Texas found that after Texas enacted caps, both Medicare expenditures and health insurance premiums in that state rose faster than the national average. Furthermore, the percentage of Texans who lacked health insurance increased.¹⁶ In 2010, a major study of Medicare spending and medical malpractice claim rates in Texas after the enactment of caps concluded: "In sum, we find no evidence that Texas' 2003 tort reforms 'bent the cost curve'" and, "We thus offer evidence that those interested in a magic bullet that will limit the growth of health care spending should look elsewhere".¹⁷

The Fallacy That New York State Is A "Hellhole" For Business And Industry Due To Liability Exposure

Medical malpractice "tort reform" is only the forefront for what business and insurance groups would like to see happen across the board, in all tort law litigation, as well as in any litigation involving the right to sue.

According to "tort reform" proponents, New York State has a "lawsuit industry". They argue that lawsuits in New York "discourage innovation due to liability concerns..." and New York is a "perfect storm of high tort-litigation risks...and a lopsided civil justice system".¹⁸ The American Tort Reform Association has called New York a "once-and-future judicial hellhole".

However, this view is not commonly shared by New York's leaders in commerce. Corporate attorneys and senior executives surveyed by the U.S. Chamber of Commerce's Institute for Legal Reform view New York quite differently. New York ranked 18th best in the Institute's, *Lawsuit Climate 2012: Ranking the States* survey, ahead of such ostensibly business-friendly states as Texas, Georgia and South Carolina, as well as other major states such as Ohio, Michigan, New Jersey, Pennsylvania, Florida, Illinois and California.¹⁹ The states that New York out-ranked comprise 86 percent of the nation's population.

The U.S. Chamber of Commerce survey asked about "elements of state liability systems" such as "damages", "juries' fairness", "treatment of class action suits and mass consolidation suits" and "judges' impartiality". According to the Institute, the survey was conducted in order "to explore how reasonable and balanced the states' tort liability systems are perceived to be by U.S. business". Clearly, New York's civil justice system is fair and balanced as it is.

The Fallacy That New York's Law Is Too Plaintiff-Friendly

Tort reformists claim that New York's laws are among the most favorable in the nation to claimants in medical malpractice actions. In fact, however, New York's laws are actually less favorable to plaintiffs in many ways.

New York's 2½ year Statute of Limitations in medical malpractice actions often results in an injured victim not being able to receive compensation because she did not discover the

negligence or injury until after this period expired. New York has no “date of discovery” law that would commence the running of the Statute of Limitations from the date the patient learns of the problem. The vast majority of states have a discovery rule, with the time limit running from the date the patient knew, or should have known, of the injury and its cause.

Victims of malpractice affected by this are often victims of a failure to timely diagnose and treat cancer. For patients over 50, colonoscopies are ordered every 3 years when pre-cancerous polyps are found. If a patient has a colonoscopy on June 1, 2010, where only 3 of 4 polyps are seen and removed, and he returns for a follow-up on June 1, 2013, when the 4th polyp is found, but is no longer a polyp but an advanced cancer, the time to sue has expired. Even if every gastroenterologist in the world says that it was a departure from accepted standards of care, *i.e.*, malpractice, to miss that polyp because it was plainly evident on the films taken during the first procedure, that doctor is insulated from any liability.

Tort reformists want to go even further. They want to limit the Statute of Limitations to only 1 year. Who will suffer? Women. Women get mammograms every year, but they cannot schedule their next mammogram less than 365 days after the first because of their health insurer’s guidelines. June 1, 2012 mammogram. Missed tumor, which would have been Stage 1, 95% chance of cure. June 15, 2013 mammogram. Tumor found, Stage 3B with lymph node involvement, 25% chance of cure. She cannot sue because the Statute of Limitations would have expired.

Another draconian element of New York law is that families grieving over the death of a loved one can only recover for loss of income. New York does not allow recovery for mental anguish and grief, unlike the 42 other states that do.

This archaic 1847 wrongful death law remains in place, ignoring the value of those who are killed who earn little or nothing.

A society is judged by its ability to compensate those who have lost something due to another’s fault. It has been this way from the time of Leviticus. Reforming our civil justice system on the basis of deceptive, misleading and false notions, shifting the costs of responsibility to the taxpayer, is manifestly unfair.

In 2007, the National Association of Insurance Commissions found that the costs of defending malpractice claims and compensating victims totaled a mere 0.3% of U.S. healthcare costs. Even if malpractice cases were completely abolished, the impact on healthcare spending would be negligible. The costs of lifelong care and compensation for lost earnings would still exist, and that burden would fall upon the government.

Endnotes

1 See the Institute of Medicine’s Infographic, accompanying their 2012 report, *Best Care at Lower Cost*, at <http://www.iom.edu/Reports/2012/Best-Care-at-Lower-Cost-The-Path-to->

Continuously-Learning-Health-Care-in-America/Infographic.aspx.

- 2 L.T. Kohn, J.M. Corrigan, and M.S. Donaldson, eds., *To Err Is Human: Building a Safer Health System, A Report of the Committee on Quality of Health Care in America*, Institute of Medicine, National Academy Press, 2000.
- 3 Accessed at <http://news.consumerreports.org/health/2012/03/new-york-city-area-hospitals-do-poorly-in-patient-safety-ratings.html>.
- 4 In addition, over one-third of responding doctors did not agree that physicians should always report colleagues who are incompetent or impaired by conditions such as substance abuse or mental health disorders. See: “*Many Physicians Do Not Accept Responsibility to Report Incompetent, Impaired Colleagues*, *Science Daily*, July 14, 2010, accessed at <http://www.sciencedaily.com/releases/2010/07/100713165001.htm>.
- 5 From the accompanying press release. Full report: Michael D. Greenberg, Amelia M. Haviland, J. Scott Ashwood, Regan Main, *Is Better Patient Safety Associated with Less Malpractice Activity? Evidence from California*, RAND Corporation, 2010.
- 6 Government Accounting Office (GAO), *Medical Malpractice: Implications of Rising Premiums to Health Care*, August, 2003.
- 7 Office of Technology Assessment (OTA) U.S. Congress, *Defensive Medicine and Medical Malpractice*, OTA-J-602 (1994), available at: <http://biotech.law.lsu.edu/policy/9405.pdf>.
- 8 Congressional Budget Office (CBO), *Limiting Tort Liability for Medical Malpractice*, January, 2004.
- 9 Studdert, David M., LL.B., Sc.D., M.P.H., et al. “Claims, Errors, and Compensation Payments in Medical Malpractice Litigation”, *New England Journal of Medicine*, May 11, 2006.
- 10 Northeast urban.
- 11 Source: annual *Summary of Board Actions*, Federation of State Medical Boards.
- 12 Source: *Physician Characteristics and Distribution in the U.S.*, 2012 edition, American Medical Association. New York was behind Massachusetts, Maryland and Vermont. In addition, the *Association of American Medical Colleges 2011 State Physician Workforce Data Book* reports that in 2010 New York ranked third among states in the number of “total active physicians” per 100,000 population.
- 13 Lucinda Finley, “The Hidden Victims of Tort Reform: Women, Children, and the Elderly”, *Emory Law Journal*, Summer, 2004. Emphasis added.
- 14 Paik, Myungho, Black, Bernard S., Hyman, David A. and Silver, Charles M., “Will Tort

Reform Bend the Cost Curve? Evidence from Texas”, *Journal of Empirical Legal Studies*, June, 2012. Control states were the states that did not adopt or repeal caps during the sample period.

15 State physician/population ratios are from the 2011 AMA *Physician Characteristics and Distribution in the U.S.*

16 Public Citizen. *A Failed Experiment: Healthcare in Texas Has Worsened in Key Respects Since State Instituted Liability Caps* in 2003, October, 2011.

17 Paik, Myungho, Black, Bernard S., Hyman, David A. And Silver, Charles M., *Will Tort Reform Bend the Cost Curve? Evidence from Texas*, July 16, 2010. Available at SSRN: <http://ssrn.com/abstract=1635882>. Paik and Black teach at Northwestern University School of Law, Hyman at the University of Illinois College of Law, and Silver at the University of Texas at Austin School of Law.

18 The first two quotes are from the website of the Manufacturers Association of Central New York. The third quote is from, *An Empire Disaster, Why New York’s Tort System is Broken and How to Fix It*, issued by the Pacific Research Institute and accessed from the website of the Business Council of New York State.

19 The ranking was based on a Harris Interactive survey of 1,125 in-house general counsels, senior litigators or attorneys, and other senior executives. They indicated they are knowledgeable about litigation matters and that they are familiar with the litigation environment in a given state they were asked to evaluate.

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