MEDICAL NEGLIGENCE: HEALTH CARE COSTS

The United States spent $3.2 trillion on health care in 2015 and the costs continue to rise. While many people blame lawsuits for driving up the cost of health care, the costs associated with the medical negligence system account for only 0.2 percent of all health care spending. Reducing medical errors would be a far more effective way to lower costs and improve health care quality than eliminating the right of injured patients to seek justice.

Caps on damages result in higher health care costs. In 2016, researchers at Northwestern University and the University of Illinois looked at the effect of caps on damages on health care spending. They found that instead of reducing costs by eliminating defensive medicine, caps actually **caused a 4-5 percent increase in physician service spending**:

"*Overall, we estimate a 4-5% post-cap rise in Medicare Part B spending. Our estimates for the effect of damage caps on Part A spending are small and not statistically significant. Total Medicare spending appears to rise as well – our point estimates are 2-3% and are sometimes statistically significant. There is, at the least, no evidence that caps reduce healthcare spending.*"[1]

Evidence from Texas supports these conclusions. A comprehensive analysis conducted by a panel of professors from Northwestern University, the University of Illinois and the University of Texas, found that, despite predictions, doctors actually ordered tests at a higher rate after a cap was implemented than they had before. The study also found that Texas health care spending increased at a higher rate than across the country as a whole.[3]

A 2014 Cato Institute publication echoed these conclusions:

"*This emerging evidence on the relationship between med mal reform and healthcare quality suggests that* ***med mal reform could have an unfortunate double effect –higher spending and lower quality****. The two effects could be related – lower care quality could cause spending to rise.*"[2]

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Medical negligence litigation has no bearing on health care costs.

A 2014 study from the Rand Institute for Civil Justice found no difference in physicians' behavior in states that had switched from an ordinary negligence standard to a higher gross negligence standard. These findings, published in the *New England Journal of Medicine (NEJM)*, led the researchers to conclude that "*malpractice reform may have less effect on costs than has been projected*." The researchers also suggested that:

"Physicians are less motivated by legal risk than they believe themselves to be. Although a practice culture of abundant caution clearly exists, it seems likely that an aversion to legal risk exists in parallel with a more general risk aversion and with other behavioral, cultural, and economic motivations that might affect decision making. When legal risk decreases, the 'path of least resistance' may still favor resource-intensive care."[3]

Writing for Oxford University Press, researchers from the University of Texas at Austin and Northwestern University came to similar conclusions:

"*limitations on liability did not, and likely cannot, significantly reduce healthcare costs… Damage limitations are highly unlikely to affect healthcare costs significantly, and they have potential offsetting effects that may outweigh any savings. Our conclusion from various studies using different approaches is that there is no clear answer to whether caps and other damage limitations are detrimental or improving to social welfare. What clearly emerges from the studies, however, is the conclusion that damage limitations will have small impacts on outcomes such as provider behavior, costs, and patient welfare, even if the signs on these impacts are uncertain or vary by practice area.*"[4]

Medical malpractice dollars are a red herring for the system's failings.

According to Harvard University economist Amitabh Chandra, *"medical malpractice dollars are a red herring for the system's failings. No serious economist thinks that saving money in med mal is the way to improve productivity in the system. There's so many other sources of inefficiency.*"[5] In 2010, Chandra echoed this finding in a *Health Affairs* article co-authored with Atul Gawande and Michelle Mello, saying, *"the amount of defensive medicine is not trivial, but it's unlikely to be a source of significant savings.*" [6]

Litigation is declining while health care costs are rising.

Researchers at Public Citizen found that declines in litigation did not translate into lower health care costs. Between 2003 and 2012, the value of medical malpractice payments fell 28.8 percent while national health care spending rose 58.3 percent. The researchers concluded:

"The fallacy of the defensive medicine theory is perhaps most plainly exposed when one examines developments in Texas, which in 2003 enacted one of the most restrictive litigation laws in the country. Between 2003 and 2010, malpractice payments in Texas fell by nearly 65 percent, but health care costs in the state (especially concerning Medicare diagnostic testing expenditures) rose far faster than the national average." [7]

Defensive medicine is not a true driver of health care costs.

A 2014 study in the *Journal of Patient Safety* concluded that defensive medicine was not a driver of rising health care costs. The study explained, *"comparing Medicare reimbursements, premedical and postmedical tort reform, we found no consistent effect on health-care expenditures. Together, these data indicate that medical tort reform seems to have little to no effect on overall Medicare cost savings.*" [8]

Similarly, the Cato Institute surmised:

"*Unfortunately, the defensive medicine story now*

appears to be incorrect. We find no evidence that second-wave damage caps lead to lower spending, and evidence that third-wave caps leads to higher Part B Medicare spending, with no appreciable change in Part A spending. Apparently, for every defensive procedure avoided through reform, another takes its place."[9]

A 2012 study by experts at the Center for Progressive Reform also found no relationship between defensive medicine and health care costs:

"The evidence reveals that 'defensive medicine' is largely a myth, proffered by interests intent on limiting citizen access to the courts for deserving cases, leaving severely injured patients with no other recourse for obtaining the corrective justice they deserve. These changes would limit the deterrent effect of civil litigation and diminish the regulatory backstop that the civil justice system provides to the professional licensing system, leading to more medical errors."[10]

Defensive medicine has little to do with true liability risk.

A 2014 study in *JAMA Internal Medicine* measured the costs of defensive medicine by comparing physicians' testing practices with their perceptions about their liability risk. They found that only 2.9 percent of costs were associated with purely defensive behavior. These findings led the researchers to conclude that *"only a small portion of medical costs might be reduced by tort system changes."* [11]

Costs associated with medical negligence are only a very small portion of health care spending.

Medical malpractice payouts *plus* the cost of defending claims comprises approximately 0.2 percent of health care costs. [12]

There are very few high dollar malpractice claims.

A study of catastrophic claims by Johns Hopkins University researchers found that such cases were not frivolous—as they tended to involve quadriplegia, brain damage or the need for lifelong care—and accounted for only 0.05 percent of health care costs. According to study leader Marty Makary, M.D., M.P.H., *"The notion that frivolous claims are routinely resulting in $100 million payouts is not true."* [13]

Medical errors add billions to the cost of health care each year.

A 2013 study in the *Journal of Patient Safety* found that as many as 440,000 Americans die from preventable medical errors every year. At that rate, preventable medical errors would be the third leading cause of death in the U.S. behind heart disease and cancer. [14]

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[10] The Truth About Torts: Defensive Medicine and the Unsupported Case for Medical Malpractice 'Reform,' Center for Progressive Reform, 2012, http://www.progressivereform.org/articles/medmal_myths_1203.pdf.

[11] Rothberg et al., *The Cost of Defensive Medicine on 3 Hospital Medicine Services*, JAMA Internal Medicine, September 15, 2014, http://archinte.jamanetwork.com/article.aspx?articleid=1904758.

[12] Personal Health Care Expenditures taken from the Centers of Medicare and Medicaid Services and is $3.2 trillion (https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf). Total spent on paying and defending medical malpractice claim from National Association of Insurance Commissioners (*Countrywide Summary of Medical Professional Liability 2015, http://www.naic.org/documents/research_stats_medical_malpractice.pdf*), and is $6 Billion. Percentages may not round up due to both rounding and the fact that CMS does not regard medical negligence costs as health care costs.

[13] Makary et al., *Catastrophic Medical Malpractice Payouts in the United States*, Journal for Healthcare Quality, March 29, 2013, http://onlinelibrary.wiley.com/doi/10.1111/jhq.12011/abstract; *'Catastrophic' malpractice payouts add little to health care's rising costs*, Science Daily, April 30, 2013, http://www.sciencedaily.com/releases/2013/04/130430142008.htm.

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