



The Facts about Medical Malpractice and Tort Reform

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It's helpful to look at the actual facts, not supposition, about so-called "tort reform" and medical malpractice, because so many medical leaders persist in arguing that curbing victims' rights to accountability for medical injuries would make the health care system better.

The following discussion is courtesy of Joanne Doroshow, the head of Center for Justice & Democracy, and based on a submission she made to the Medicare payment review board.

No serious economist believes that medical malpractice litigation is a major driver of [health care costs](#). In over 30 years, medical malpractice premiums and claims have never been greater than 1% of our nation's health care costs.

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Senator Orrin Hatch asked the Congressional Budget Office to look into the cost issue. CBO responded in an October 9, 2009 letter, trying to determine health care cost savings if Congress enacted a menu of extreme tort restrictions advocated by the medical lobbies, the insurance industry and a lot misinformed doctors. CBO could go no further than to find an extremely small percentage - about 0.5% - of health care savings by wiping out most litigation, legitimate and otherwise (which is what these measures would do – see the Texas example, below). This is far lower than the highly exaggerated numbers thrown around by those who would like to restrict patients' rights. Alexander C. Hart, "Medical malpractice reform savings would be small, report says," [Los Angeles Times](#), October 10, 2009;

To reach the 0.5% savings figure, CBO determined that 0.3% was specifically due to defensive medicine. That's it. Moreover, CBO found little evidence of this "defensive medicine" phenomenon except in studies of Medicare, not studies of private managed care systems. Obviously doctors operate under the same liability rules no matter the system of payment or the age of the patient, so the explanation for this disparity cannot lie with the legal system. Rather, according to CBO, the problem is Medicare's emphasis on "fee-for-service" spending, whereas private managed care "limit[s] the use of services that have marginal or no benefit to patients (some of which might otherwise be provided as 'defensive medicine')." In other words, CBO suggests that to the extent defensive medicine exists at all, it can be controlled through simply managing care correctly as opposed to taking away patients' rights and possibly killing and injuring more people.

As far as medical malpractice premiums, CBO attributed 0.2% to this cost. This insurance industry continuously fights its own figures on this, but I think they speak for themselves. (See, e.g, a [New York Times](#) article.) And here's what the figures say:

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- Medical malpractice premiums, inflation-adjusted, are nearly the lowest they have been in over 30 years. The periodic premium spikes that doctors experience, as they did from 2002 until 2005, are not related to claims, which have been steady or dropping for many years, but to the economic cycle of insurers and to drops in investment income. In fact, medical malpractice claims, inflation-adjusted, are down 45 percent since 2000.
- Medical malpractice insurer profits are higher than the rest of the property casualty industry, which has been remarkably profitable over the last five years.
- Many states that have resisted enacting severe restrictions on injured patients' legal rights experienced rate changes (i.e., premium increases or decreases for doctors) similar to those states that enacted severe restrictions on patients' rights, i.e., there is no correlation between "tort reform" and insurance rates for doctors.

All the data backing up these statistics can be found [here](#): For more information, contact the study's main author, actuary J. Robert Hunter, former Federal Insurance Administrator under Presidents Carter and Ford, former Texas Insurance Commissioner, and now Director of Insurance for the Consumer Federation of America.

Finally, you may be familiar with the widely-read and cited June 1, 2009, New Yorker magazine article by Dr. Atul Gawande, "The Cost Conundrum; What a Texas town can teach us about health care," which explored why the town of McAllen, Texas, "was the country's most expensive place for health care." The following exchange took place with a group of doctors and Dr. Gawande:

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“It’s malpractice,” a family physician who had practiced here for thirty-three years said. “McAllen is legal hell,” the cardiologist agreed. Doctors order unnecessary tests just to protect themselves, he said. Everyone thought the lawyers here were worse than elsewhere.

That explanation puzzled me. Several years ago, Texas passed a tough malpractice law that capped pain-and-suffering awards at two hundred and fifty thousand dollars. Didn’t lawsuits go down?

“Practically to zero,” the cardiologist admitted.

“Come on,” the general surgeon finally said. “We all know these arguments are bullshit. There is overutilization here, pure and simple.” Doctors, he said, were racking up charges with extra tests, services, and procedures.

This is true for all states that have enacted "caps" and other restrictions on patients' rights. Moreover, CBO noted that “imposing limits on [the right to sue for damages] might be expected to have a negative impact on health outcomes” and cites one study finding such tort restrictions would lead to a 0.2 % increase in the nation’s overall death rate. If true, that would be an additional 4,853 Americans killed every year by medical malpractice, or 48,250 Americans over the ten-year period CBO examines. This should be unacceptable to us as a nation.

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