

PATIENT SAFETY BLOG

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Rick Santorum's (and the GOP's) Damage Cap Problem

February 1, 2012 by **Patrick A. Malone**

Rick Santorum is not the first politician to be caught in a "Do as I say, not as I did" moment. So when it came out this weekend that Santorum had asked for more damages in his wife's medical malpractice lawsuit than the legal limit he would like to impose on all malpractice victims, it would be easy to shrug off the story as the usual politicians behaving badly. But that would miss the bigger and more interesting story.

All the Republican presidential candidates, this year and stretching back for many campaigns, propose damage caps and other rollbacks to the public's right to sue when injured by medical mistakes.

The idea of imposing a uniform national limit on the amount that victims could sue for -- no matter how bad their injury -- has always been a head scratcher to anyone looking for some minimal level of consistency in their politicians. After all, Republicans are often the first to decry "big government Washington solutions" to local issues best handled by each of the 50 states in their own ways. And with medical malpractice, there has been no shortage of state experiments with damage caps and other ideas that are supposed to make medical care more affordable and accessible, despite the lack of evidence that they do either.

But the Santorum story is interesting for another reason that exposes the Achilles heel in the damage cap idea. Every state already has a mechanism for cutting back on high jury awards when plaintiffs like Santorum's wife overreach, and it worked very nicely in the Santorum case.

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Karen Santorum sued a Virginia chiropractor in 1999, asking for \$500,000 for a back injury she claimed his manipulation caused, with allegedly permanent restrictions on her ability to move. After a jury gave her \$350,000, the presiding trial judge, Arthur Vierreg, noted that she only had \$18,000 in actual medical bills. Most of the award was for the kind of general damages that Santorum would like to cap for other victims.

Judge Vierreg said the jury's award was "excessive" and a product of "undue sympathy." He cut the verdict by half to \$175,000. That's a power he shares with every trial judge in America. It's called "remittitur," and it's an ancient common law power of judges, who see the actual evidence unfold at trial, to curb the occasional over-enthusiastic jury.

It's one of those small-government, local-control ideas that the GOP is supposed to champion.

Those states that have imposed the kind of cap that Santorum advocated -- a \$250,000 limit on all "non-economic damages", other than lost wages and medical bills -- have not seen their medical costs go down. Texas, the most recent state to follow a path first walked by California in 1975, has the **same medical cost problem as the rest of the country**, and its small towns are just as under-served by doctors as they were before the "reforms" were implemented in 2003. Texas actually added doctors to its population faster before the 2003 law than after, as **PolitiFact pointed out recently when it rated as "false" the claim of then GOP candidate Rick Perry that tort reform** had boosted its number of doctors dramatically.

There's another problem with damage caps besides that they don't work. They hit hardest at the malpractice victims with the worst injuries, like brain damage and paralysis, that can justify high verdicts. Caps do little to curb middling claims like Mrs. Santorum's; she and her husband testified that she had some numbness in a leg and persistent back pain because of the chiropractor's manipulation.

A **White House memo on possible medical malpractice reforms** was made public last Friday (courtesy of the **New Yorker's Ryan Lizza**), making the same point. According to the memo sent to President Obama in July 2009 by two top aides on health care policy, "Evidence shows that caps reduce average damage awards by 20 to 30 percent but do not reduce the frequency of medical malpractice claims. Although some argue that caps may reduce the growth of malpractice premiums, there is no evidence that they improve quality of care or reduce health care costs. Finally (and not surprisingly), caps appear to adversely affect the most severely injured patients."

The Santorums are not alone in thinking that damage caps may be a good idea for other people, but not so much at home. Saddled with a bad injury, most people would rather take their shot with a jury and judge, and not have big brother impose a one-size-fits-all limit on their case.

There are plenty of other reasonable ideas to speed up the malpractice system, improve patient safety and cut health care costs. This just isn't one of them. So isn't it time to inter damage caps into the policy grave that they deserve? Somebody give Rick Santorum a shovel.

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