

## **Medical Malpractice Caps: Robbing the Wronged**

By: Carlos Méndez Pérez

232A Putnam Ave., Brooklyn, New York 11216

New York Law School – Law School

24 years old – carlos.mendezperez@law.nyls.edu

Supporters of the “tort reform” movement blame exorbitant medical costs on “greedy plaintiffs” and “greedy plaintiffs’ attorneys,” despite knowing that, in reality, the problem lies with greedy insurance companies, and not the seriously-injured parties who have exercised their constitutional right to a trial by jury to be compensated for their injuries. Tort reform advocates argue that caps on medical malpractice awards will: (1) discourage “frivolous” lawsuits; and (2) reduce the cost of health care. However, neither of these myths, promulgated by insurance companies, certain Republican lawmakers, and lobbying behemoths like the US Chamber of Commerce, pass the sniff test.

First, frivolous lawsuits do not cost the health care system any exorbitant amount of money. Research demonstrates that costs from medical liability make up only 2% to 2.5% of total healthcare spending.<sup>1</sup> Despite President Bush’s 2005 claim that “lawyers are filing baseless suits against hospitals and doctors, that’s just a plain fact,”<sup>2</sup> the actual facts paint a different picture. Only 10% of Americans ever seek compensation for their injuries and only 2% ever file lawsuits.<sup>3</sup> The number of tort litigation cases has declined steadily since the 1990s; and those plaintiffs who actually do proceed to trial, win fewer than half of the cases that juries hear.<sup>4</sup> Most importantly, the value of most jury awards is generally less than the actual losses suffered by victims.<sup>5</sup> People may sometimes file bogus claims. However, the vast majority of injuries are under-reported, the vast majority of those with legitimate claims are under-compensated, and the overall impact of all claims affects a very small percentage of overall healthcare spending.

Moreover, medical malpractice awards will not reduce the cost of healthcare by affecting premiums or forcing good doctors to flee the state. Research demonstrates that “neither jury verdicts nor payouts to patients [are] responsible for causing skyrocketing premiums for doctors” and that “the existence or non-existence of a non-economic damages cap has no demonstrably consistent effect on physician retention anywhere.”<sup>6</sup>

In reality, medical malpractice caps only affect the small percentage of plaintiffs who have been awarded damages exceeding the cap, and who tend to be the most severely and permanently injured. In 2011, a 53-year-old Milwaukee mother of four, Ascaris Mayo, lost both

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<sup>1</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3048809/>

<sup>2</sup> <http://www.cbsnews.com/news/bush-pushes-for-tort-reform/>

<sup>3</sup> <http://www.robinskaplan.com/resources/articles/tort-reform-perception-versus-reality>

<sup>4</sup> Press Release, *Citizens for Corporate Accountability & Individual Rights*, New Government Study Disputed Myths About “Out of Control Civil Juries,” (June 13, 2002)

<sup>5</sup> W. Kip Vicusi, *Towards a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Society*, 6 *Yale J. On Reg.*, 65, 95-97 (1989).

<sup>6</sup> <https://centerjd.org/content/center-justice-democracy-applauds-new-study-finding-no-medical-malpractice-litigation-crisis>

her legs and both her arms a result of medical malpractice.<sup>7</sup> Her doctors failed to detect her Strep A infection, which led her to go into septic shock, and eventually required all four of her limbs to be amputated. In 2014, a jury awarded her and her husband \$25.3 million, \$15 million of which was for pain and suffering and \$1.5 million for her husband's loss of companionship. However, Wisconsin's medical malpractice law caps non-economic damages at \$750,000 and her verdict was initially reduced. This past July, a Wisconsin appellate court found the medical malpractice law in question unconstitutional and it is currently being appealed.<sup>8</sup> Mayo's lawyer stated that if the Supreme Court reinstates the \$750,000 cap, the Mayos will not receive enough money in non-economic damages to cover the attorneys' fees and the \$400,000 in expenses that had already been incurred in bringing the case.<sup>9</sup> Therein lies the problem: "if you have a law that caps the ability of the attorney to recover from the judgment, they'll think twice before taking a case, [which] hurts the patient's ability to have a competent attorney or any attorney at all."<sup>10</sup>

The reason that medical costs are so outrageously high is because insurance companies are pocketing millions of dollars which they are not spending on plaintiffs' verdicts, and are furthermore not spending to make anyone safer. Medical malpractice insurance companies are making obscene amounts of money, "twice the profit of the entire property/ casualty insurance industry."<sup>11</sup> Yet, the use of caps have not made hospitals safer. In fact, after Texas enacted medical malpractice caps on damages "rates of preventable errors rose consistent with hospitals relaxing (or doing less to reinforce) patient safety standards."<sup>12</sup> In other words, hospitals know that they won't be on the hook for millions of dollars, so they are taking even less safety precautions.

Medical malpractice caps, such as Missouri's section 538.210 violate the separation of powers, since the legislature is subverting the will of the judiciary, violate equal protection, since certain personal injury plaintiffs are being treated differently than others, and violate the right to trial by jury. These draconian caps do not accomplish any of the supposed medical goals they purport to support, reinforce medical insurance companies' propaganda, and punish those most seriously injured. Hopefully, one day the United States Supreme Court will address this issue and definitively find these abhorrent caps unconstitutional.

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<sup>7</sup> <http://www.jsonline.com/story/news/investigations/2017/07/05/wisconsins-cap-medical-malpractice-awards-unconstitutional-courts-rules/451418001/>

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<sup>9</sup> <http://www.jsonline.com/story/news/investigations/2017/07/05/wisconsins-cap-medical-malpractice-awards-unconstitutional-courts-rules/451418001/>

<sup>10</sup> <http://www.npr.org/sections/health-shots/2017/06/28/534465478/this-gop-health-bill-proposes-new-limits-to-medical-malpractice-awards>

<sup>11</sup> <https://centerjd.org/content/center-justice-democracy-releases-new-briefing-book-medical-malpractice-numbers-0>

<sup>12</sup> <https://centerjd.org/content/center-justice-democracy-releases-new-briefing-book-medical-malpractice-numbers-0>