

A Conversation with Ronen Avraham

Tort Reform in Texas Changed Delivery of Medical Services

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Q. What is medical malpractice law and why is it so important to the health care system?

Medical malpractice is a branch of tort law, a body of law that assigns civil liability to parties for committing acts that cause some harm to others. Medical malpractice law is a subarea of this field and deals with medical accidents stemming from health care providers' negligent behavior. Specifically, it deals with wrongdoing to patients in various health care settings—for example, in hospitals and clinics.

Medical malpractice law serves as the stick with which the legal “market” disciplines health care providers. These laws should be promulgated with the goal of achieving optimal deterrence in the hope that providers will avoid negligent delivery of care. Other desired goals motivating policymakers include ensuring that victims are compensated for any tortuous injuries.

Operating in the backdrop of this policy discussion is the persistent myth that medical malpractice has a big impact on total health care costs. However, decades of empirical evidence suggests the impact is miniscule at best—likely less than 3 percent.

Q. What did Texas do to address growing medical malpractice lawsuits and settlements? Why?

In 2003, Texas amended its tort laws, making it more difficult for victims of medical malpractice to file lawsuits for

negligent delivery of care. The changes to Texas tort law happened because a coalition of interested parties—doctors, hospitals and insurers—convinced lawmakers that tort reform would have wide-ranging benefits, including lowering health care costs and increasing access to doctors. Many people claimed that doctors, fearing liability, were electing to either move their practices out of Texas or overtreating patients as a means to protect themselves from future liability, a phenomenon called “defensive medicine.”

Q. Has medical malpractice reform/tort reform in Texas succeeded in lowering health care costs and increasing access to doctors?

The empirical studies of which I am aware have failed to show such an effect. It is important to note that there are at least two principal reasons why medical malpractice reform cannot even in theory make more than a dent in total health care costs.

First, tort reform does not eliminate all litigation. Rather, it only reduces it. Moreover, litigation costs reflect only a small percentage of total health care costs. So, even eliminating all medical malpractice litigation in the U.S will not reduce these high costs burdening the system. Second, proponents of limiting liability for doctors argue that protecting doctors from liability may reduce costs by removing doctors' incentives to perform defensive medicine.

What proponents overlook, however, is that limitation of liability might at the same time increase costs by creating incentives to overtreat patients in order to maximize doctors' reimbursements. Why? Because by reducing the risk of liability, doctors have incentives to perform costly procedures that they might not have performed before for fear of liability—some bypass surgeries, for example. We call this phenomenon “offensive medicine.” In practice, both effects are at work and, therefore, one should not be surprised that reforms did not reduce overall costs by much.

Q. So what benefits have there been as a result of the medical malpractice reform? Did health insurance premiums go down?

Studies have repeatedly shown that tort reform, especially caps on noneconomic damages, reduce litigation significantly, likely in the area of 30 percent. But that in and of itself is not a benefit to society, as money that hospitals save from reduced litigation comes from uncompensated, innocent injured victims. The research has also shown, however, that some tort reform—primarily the caps on noneconomic damages—reduce health insurance premiums by up to 2 percent, with the reduction concentrated among health insurance plans that are not managed-care plans. The reduction in price leads to a small increase in health insurance coverage, primarily among price-sensitive groups.

Q. The legislative process took decades. Why was tort reform so contentious?

Tort reform morphed into a partisan issue with the main political parties taking opposite sides. Also, for many years, no good empirical evidence regarding the impact of the law on the delivery of care existed. Therefore, people could make all sorts of arguments without being able to support them or have them disproven. Luckily, over the past decade or two, empirical evidence on the real impact of tort reform has started accumulating. As a result, it is easier for legislatures to engage in evidence-based legal reform.



Q. Has the quality of medical care changed? Is the supply of doctors in traditionally underserved areas affected?

No solid evidence of which I am aware suggests much has changed. In Texas, the best studies—done by my colleague [University of Texas Law School professor] Charles Silver and his coauthors—have shown that the supply of doctors to rural areas did not increase appreciably after 2003. The state as a whole also gained doctors at the same rate it did before lawsuits against doctors were restricted in 2003. When one controls for the historical rate of growth in physician supply, there does not appear to have been any effect of the 2003 tort reform on the number of doctors attracted to the state. Nor have I seen evidence that costs declined. A Texas-focused study found no evidence of reduced spending in Texas post-reform and some evidence that physician spending rose in Texas relative to control states.

Q. What have other states done to help doctors and curb costs? How have their choices played out?

Some states have experimented with “apology laws”—doctors approach their patient and assume some level of responsibility for an accident and offer to work with patients on fixing what has been broken. Empirical evidence suggests that such an approach, indeed, was successful in reducing litigation. But in my view, this approach misses the point. The best way to reduce medical malpractice litigation—and to protect both doctors’ and patients’ interests—is to reduce medical malpractice. Period.

If negligence does not happen, there should be no suits filed. Therefore, efforts should be geared toward improving the

▶ *“Improving patient safety just a little can help significantly reduce malpractice lawsuits.”*

health care delivery and not to artificially reducing litigation. One of the biggest problems of the health care system is that care is not delivered at satisfactory levels across the nation. Successfully addressing this issue will simultaneously reduce litigation by eliminating bad care, as opposed to the current approach of simply erecting legal barriers to keep patients from filing suit against negligent health care providers. Indeed, a recent study found the hospitals that fare badly in various patient safety indicators developed by the government were subject to more malpractice lawsuits. Improving patient safety just a little can help significantly reduce malpractice lawsuits.

Q. How did the Affordable Care Act (ACA) include medical malpractice reform? Has it worked to limit rising health care costs?

The ACA primarily enabled various pilot projects, which is a great thing in and of itself. To properly overhaul the legal landscape, we need more evidence on what actually works. To my knowledge, there are no existing studies showing any significant and conclusive results [regarding the impact of the ACA]. The Center for Medicare & Medicaid Innovation hasn’t run any pilot projects on medical malpractice reform.

The ACA did not reduce the rate at which health care spending grew. It increased it. The primary driver was Medicaid expansion, which added hundreds of billions of dollars in health care spending and would have required hundreds of billions more to continue.

The extension of private insurance coverage to more than 10 million people who were previously uninsured drove up spending, too. Both results were predictable. The more people who are covered by government programs and private insurance, the more that is spent on medical services. The conclusion from all this is that one needs to look not only at costs but also at benefits. The ACA provided basic health care to millions of disadvantaged fellow Americans.

Q. Where might the Legislature look to further change laws regarding medical practices in Texas?

I believe technology should be better integrated into health care delivery, and laws should facilitate (or at least enable) such progress. One way to do that is to shield doctors from medical malpractice liability, provided they utilize modern decision-aids-based components, such as artificial intelligence and deep learning [an advanced use of artificial intelligence for decision-making]. Eliminating liability from doctors in such a way, I think, would strongly incentivize them to leave the 20th century and join others delivering health care in line with advances made in the 21st century. By incentivizing doctors to deliver better care, I am sure medical accidents will decrease, and litigation will decrease naturally as well.

Q. Are there other industries, where state lawmakers might want to similarly consider a wide-ranging review of laws governing them?

Of course, there are. Such a review can occur basically everywhere—from increasing competition in the health care system, to introducing competition among automobile dealerships markets from online sellers, to rethinking our privacy rights in an era where everything is online, to shaping our banking and bankruptcy laws to prevent another meltdown, to conceptualizing antidiscrimination laws in the big-data era, to rethinking employment and welfare laws in a world where robots can do so much. Ask any law professor in this country, and he or she will tell you what is wrong with the law in his or her area. Beyond teaching, faculty members in top law schools study existing legal regimes and imagine ways to improve them and make the world a better place.