Prescribing Change: Exploring the Efficacy and Implications of Medical Malpractice Tort Reform

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I. INTRODUCTION

A. Medical Malpractice and Tort Reform Defined

In modern society, civil lawsuits have become an increasingly common means of seeking justice and compensation for harm suffered. While the legal system serves a vital role in holding individuals and corporations accountable for their actions, it is not immune to criticism. Tort law is especially susceptible to these criticisms; one of its most common loopholes being with patient-plaintiffs commonly losing the legal right to full recovery in a medical malpractice lawsuit, and the systemic favoritism toward defendant-physicians.

The legal process pertaining to medical malpractice can be extremely demanding, both for the plaintiff and the defendant. Medical malpractice occurs when a healthcare provider exhibits negligence in care, resulting in patient injury or death. In such instances, the harmed patient (or their survivors) may pursue legal action seeking monetary compensation for their harm. The types of harm are designated as either economic or non-economic damages. Non-economic damages are difficult to quantify, because they concern categories such as pain, emotional anguish, humiliation, reputational damage, loss of enjoyment of activities, and other non-economic matters. It can be difficult to convey the magnitude of these struggles to a jury. From an ethical standpoint, it is disputed whether it is possible to put monetary value on emotional distress. (Justia)

Tort reform seeks to address perceived flaws in the civil justice system, aiming to strike a balance between ensuring access to justice for victims and preventing excessive litigation that may hinder economic growth. Proponents of tort reform argue for measures designed to curtail perceived abuses within the legal system. These measures often target two key areas: limiting damage awards and capping attorney fees. By imposing limits on non-economic damages, tort reform seeks to address the issue of jury awards that may be disproportionate to the harm suffered. Additionally, tort reform proponents argue that by reducing attorney fees, particularly in contingency fee arrangements, the incentive for lawyers to pursue baseless claims diminishes, discouraging frivolous litigation.

Opponents of tort reform argue that these measures may infringe upon individuals' access to justice and restrict their ability to seek redress for genuine grievances. They assert that limiting damage awards may disproportionately harm victims with severe injuries or suffering, as it fails to account for the subjective nature of non-economic losses. Critics also claim that imposing restrictions on attorney fees could dissuade competent lawyers from representing those with valid claims, leaving the most vulnerable at a disadvantage. Furthermore, opponents argue that stringent procedural requirements may deter victims from pursuing legitimate cases, as they face additional hurdles to their day in court. (Andrus Wagstaff) (Bryston Gallegos)

B. Thesis

From the perspective of a young adult analyzing tort reform with new eyes, the purpose of this paper is to consider the objectives of tort-reform policy, to assess the efficacy of non-economic damages caps in effectuating intended outcomes, and to provide alternative solutions that respect plaintiff-patients' individual rights while acknowledging the societal need

for physicians. This paper has been written to offer clarity into the competing interests and arguments, looking into cases of patients who have filed claims of malpractice, and the constitutionality of tort statutes. Society has an interest in preserving individual rights, including those of patients to litigate claims of negligent harm, while also keeping society's need for physicians at a manageable level.

II. DEFINITION AND TERMS OVERVIEW

Medical malpractice is a type of personal injury case that arises when a healthcare or medical professional's negligent care inflicts injury or causes death to a patient. In legal terms, the party bringing the case to legal action is called the plaintiff, and the party trying to defend themself is called the defendant. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in the fact that an individual suffers; both of these are relevant to malpractice. (Cornell Law School LII)

A tort is an act or omission that gives rise to injury or harm to another, and amounts to a civil wrong for which courts impose liability. Torts can result from negligence, and can also be intentional. In the case of medical malpractice, negligence means improper care from a physician/health provider; and although it is rare, physicians can also harm a patient intentionally, perhaps with a motive of the patient requiring continued and costly care. While tort laws in each state are mostly similar, their technicalities are defined by the state's government. In some states, these laws are partial to the physician-defendants. This is at the heart of the tort reform conversation. (Cornell Law School LII) For several decades, the topic of tort reform has ignited passionate debates, pitting proponents of stricter regulations, such as monetary caps on what a plaintiff may be awarded, against those advocating for a more lenient approach, giving more empathy to plaintiffs for their suffering through abundant monetary awards.

A tort has four elements: duty, breach, injury, and causation. These terms follow as is: The defendant had a duty to the plaintiff, the defendant breached the duty, the plaintiff suffered an injury, and the defendant's breach was the cause of the injury. In evaluation of cases, these four elements are required to establish liability. Where a cause of action is established, damages may be awarded to the party who brought forth the case. Compensatory damages are awarded to the plaintiff, for any suffering or losses to "make them whole." These types of compensatory damages include economic and non-economic damages. As said before, economic and non-economic damages are awarded when physical ailments or detriments prevent one from living their life and when someone is emotionally or mentally distressed, respectively. There is also a special type of non-economic damage which a spouse may be able to recover, called loss of consortium. (Cornell Law School LII) (Miller and Zois)

Tort reform affects plaintiffs and defendants differently. A result of tort reform is the continued pursuit of trying to make it more difficult for victims of personal injury cases to receive damage awards. Supporters of tort reform argue that it helps reduce frivolous lawsuits, lowers medical malpractice insurance premiums, and encourages economic growth by limiting the financial risks associated with litigation. On the other hand, critics of tort reform argue that it can restrict access to justice for injured individuals, limit their ability to seek fair compensation, and undermine the deterrence of negligent behavior by defendants.

In many states, there are limits on how much can be awarded in damages in medical malpractice cases. These limits are called damage caps, and the legislature determines these limits. For example, the cap in Massachusetts for non-economic damages for medical malpractice is limited to $500,000. It is important to note that in most states, there is no cap on

non-economic damages in general personal injury cases, but there is a cap on non-economic damages in medical malpractice cases. (Percy Law Group, PC)

III. A BACKGROUND ON TORT REFORM

Tort reform is ever changing, as its basis rests on the changing of laws. But its history is important to understand in order to comprehend its position today. Tort reform goes back as early as 1910, and since then, there have been a couple substantive reforms. This brief overview will cover two of the reforms pertaining to medical malpractice; worker's compensation and comparative negligence (G. Edward White). Towards the beginning of tort law reform, plaintiffs were favored; but, more recent trends have shifted the benefits towards defendants.

A. Worker's Compensation

Back in 1910, New York State passed the state's first worker's compensation statute. This statute shed light on the hardworking individuals undertaking dangerous jobs in the industrial economy. Railroads were an example of one of those booming industries. Railroads were the first mode of transportation of such efficiency and speed, and required intensive labor. When workers were involved in wrecks and injured, this affected more than just the workers–it included passengers, operators, and fellow employees.

With current laws in place, as well as the frequency of these accidents, they seemed to be inevitable. The workers themselves were actually least likely to receive any compensation for their injuries. The only way in which they would be compensated was if they presented proof of their employer's negligence, and only if the worker himself had not been negligent in his own job. The worker could not recover if the injury was caused by a fellow employee, which was unfortunate, given that this was the most common mode of injury. With this, the incentive to work these dangerous jobs was decreased, and to keep the demand high, oftentimes employers would instate private contracts with employees which assured compensation for them in the event of work-related injuries.

However, there were some significant changes to tort law with the worker's compensation statute. The statutes no longer included fault as a basis of recovery. Previous to when workers could only receive compensation with proof of negligence, they could now receive compensation for injuries regardless of who had been negligent. The second change, and possibly even more substantial, the statute removed "causation as a prerequisite for liability." It did not matter how a worker had been injured in employment; if a worker was "'within the scope of employment'" (White), they were eligible for recovery.

In improved worker's compensation, the fault principle stated that liability is not just liability without fault, but also without defenses. This meant that it was not very easy for the employer to escape liability, as the act of being involved in employment was enough[1]. However, this legal doctrine was not accepted by all. In 1914, Jeremiah Smith expressed his opinions in an article in the Harvard Law Review, arguing that the rule of liability adopted in worker's compensation (liability for damage irrespective of fault) contradicted the fundamental common law and the requisites of a tort itself. Smith argued that the fundamental common law includes that there must be fault on the part of the defendant. (G. Edward White)

[1] This type of reasoning, strict liability, is also seen in product manufacturers. It is difficult to find proof of negligence in cases like these. The *res ipsa loquitor* doctrine, meaning "the thing speaks for itself", had already amounted to the strict liability principle. Also, the manufacturer was "in the best position to minimize the risk of harm and loss due to product related injuries" partly because the manufacturer is responsible for product design and the integrity of actual manufacturing.

A year earlier, two judges adopted arguments similar to Smith's in the *Ives v. South Buffalo Railway* case. Earl Ives was injured during the course of employment, and sued his employer South Buffalo Railway Co. The case was filed in state court, and appealed once. Both judges agreed that the employer should have some responsibility in accidents occurring during employment, in order for the injured employee to be awarded damages. However, the more pressing concern in the Ives court was that worker's compensation took property from employers without "just compensation." Plaintiffs were receiving recoveries and taking money out of employers pockets with no true evidence of negligence. The *Ives* decision regarded this as unconstitutional—"the taking of property from person A and giving it to B"—and that it could not be done at the state or at the federal level.

At the start of worker's compensation legislation, tort law was not defined clearly, and many court decisions were made by precedent, meaning they were decided not based on any statute but by facts and reasoning and reference to earlier case law. Prior to the *Ives* decision, fault for liability was not required, but after this case, the system was reoriented to prevent assets being taken from innocent employers. The bottom line for the change in the fault principle was the injured party having "no means of accountability," and so any fault of the worker was taken into further consideration.

B. Comparative Negligence

Comparative negligence is a tort principle used in court to reduce the amount of damages that a plaintiff can recover in a negligence-based claim. Damages are awarded to the plaintiff based on the degree of fault in a case. Comparative negligence systems first came into the conversation through means of literature in the 1920s and 30s, and started to receive vocal support in the 1950s. But the concept of comparative negligence was not actually reflected in law until the 1970s, which is also the time recognized today as when tort reforms took off and each state started to make their own laws. There were responses of annoyance that the tort law system had been reformed again. Some doubts of the system from a law? student note included "'its lack of definiteness, the difficulty of the jury in apportioning damages, the impossibility of enforcement in the courts, the openings for fraud, etc.'" (G. Edward White)

Comparative negligence was so different from past reforms in the way that it quantified the degree of negligence. Courts began this in 1932 by using the terms "slight," "ordinary," and "gross" in a sense of legal terms to assess damage, and then attempted to make mathematical assessments to the degree of negligence displayed by one party as well as the other (in a scenario such as a workplace environment). However, responses to this approach from opponents of the reform called it absurd, needing no exposition. (G. Edward White)

C. MICRA

In the 1970s, medical malpractice tort reform began to surface in states, when each state instituted their own damage caps. Concerns about plaintiffs receiving exorbitant jury awards, even after fault was no longer included as a basis of recovery, gave rise to efforts to help the defendant-physicians, enacted into California law as the 1975 "Medical Injury Compensation Reform Act" (MICRA). This act aimed to lower malpractice insurance premiums for healthcare providers by decreasing their potential tort liability. By lowering the malpractice premium cost for healthcare providers, insurance coverage became accessible to them.

The constitutionality of MICRA was challenged in the 1970s and 80s, but passed as constitutional under rational basis review.[2] It is still mostly in place in California but has undergone updates in 2022. (Wikipedia) (Institute for Legal Reform)

IV. OPPOSING PERSPECTIVES

A. Tort Reform Disincentivizes Improvements in Safety

Opponents of tort reform argue that tort reform does not allow for healthcare to improve safety or assure patients that they are being properly cared for. Hospitals, doctors, and medical malpractice insurance companies can continue questionable practices without consequences. For example, in the case *Condon v. St Alexius Medical Center*, Condon suffered a stroke caused by negligence from the physician-defendant, cutting the main artery supplying blood to her brain. The judge awarded Condon $3.5 million total in damages, $2 million in economic and $1.5 million in non-economic. However, the defendants brought to the court's attention North Dakota's statutory limit of non-economic damages of $500,000.

Condon's attorney argued against the cap, arguing that it discriminated against plaintiffs who were "unable to establish large economic loss—particularly children and stay-at-home parents" (Gallegos 19). Her attorney argued that this cap indeed benefited physicians the most: "The greater the harm caused by the negligent doctor, the greater the discount" (Gallegos 20).

The judge denied the defendants' motion to reduce the award, stating that it did not pass the rational basis test as there was no evidence of a cost crisis for medical malpractice insurance in North Dakota (which may have constituted a legitimate state interest). The judge found no convincing reason as to how a $500,000 cap would improve the legislature's goals of increasing healthcare access, improving the quality of care, and maintaining insurance premium prices at a reasonable level.

Under tort reform law, physicians can continue to give negligent care in the case of malpractice, because the law is on their side, and one could even go as far to say that it is cheaper to kill the plaintiff instead of just injure them. Laws in favor of physicians and other healthcare providers limit plaintiffs' ability to receive quality representation. This fear is especially present due to the payment terms under which most malpractice and personal injury attorneys work: a contingency fee basis. A contingency fee means that a lawyer only receives compensation if and when a plaintiff wins a case, and their fees are also a percentage taken from the awards (Andrus Wagstaff). Without assurance of good legal support from an attorney, then there is not much hope for those suffering as a result of medical malpractice negligence.

B. Pro-Business Efforts Influence Jury Attitudes

As mentioned above, trends that favor tort law have had a massive shift. From the plaintiff liberation in worker's compensation, to the opposite treatment in comparative negligence; as the economy has grown, interests have shifted to corporations. In 1970-1980, there was a large increase in medical malpractice insurance premiums. Physicians-defendants use this occurrence as a call to action for tort reform. However, this argument persists, whether or not there is actually a 'crisis' at hand of premiums rising, continuing to restrain plaintiffs' ability to fully recover financially in their legal cases.

Defendant lawyers believe that jurors are uninformed of the contents of a corporation. They believe that jurors have "naive and unrealistic expectations of business people, their lack

[2] The rational basis test is a level of review that determines how a court will approach analyzing the constitutionality of a law. Rational basis is the lowest level and under rational basis, the person challenging must prove that the government has no legitimate state interest in the law, or that there is no reasonable link between the interest of the individual and the challenged law. (FindLaw)

of experience and understanding about corporate affairs, and the American tradition of sympathizing with the underdog all place the corporate defendant at a disadvantage in the courtroom." (Hans) A wealthy corporation and an injured plaintiff are not in the same financial position. Some critics believe that jurors have awarded substantial recovery to plaintiffs simply out of spite for booming enterprises; for their insurance companies have "deep pockets."

However, as a whole, commentators that have overseen the broader conversation of business treatment in courts have actually been benefiting towards business; "societal desires to stimulate the economy [have led] to generous treatment of business corporations in the evolving tort system." Corporates are what are referred to as "repeat players" in civil litigation. They are often involved in legal processes, and they have the knowledge and skills to play to their advantages. As much as Americans like to support the underdog, they are also partial to "cultural values underlying a capitalist economy, such as the Protestant work ethic, personal ambition, and competition". From a *Business Week* national survey, many are much more confident in the way that major corporations are functioning rather than Congress. (Hans)

In regards to tort reform, these trends do not help plaintiffs. Businesses continue to gain a higher standing from consumers needing services, and insurance premiums rising give them a credible reason to argue so. Plaintiffs' safety in economic and non-economic damages are not assured, and furthermore, constitutionality is in jeopardy.

V. LEGAL BASES AND RATIONALES

Constitutionality differs based on who is being discriminated against, but the topic has been raised concerning plaintiffs especially. Some plaintiffs believe that non-economic damage caps are unconstitutional. The states with damage caps set them at a value much lower than what plaintiffs who suffered a catastrophic injury should receive. Some plaintiffs believe that they should recover a substantial amount corresponding to the amount of trauma and pain they sustained; due to the fact that some injuries have altered patients' lives forever, and even money cannot bring back a cognitive ability or bodily function.

A. Non-Economic Damage Caps Discriminate Against Plaintiffs Who Cannot Establish Loss

1. Nestlehutt v. Atlanta Oculoplastic Surgery

To put this into perspective, the Georgia Supreme Court affirmed a Georgia trial court that had struck down a 2005 cap on non-economic damages in a case put forth by Beth Nestlehutt. Beth Nestlehutt worked in real estate with her husband. Noticing that her clients were moving towards younger agents, she wanted to get some surgical cosmetic work to make herself look younger. She met with Dr. Harvey P. Cole of Atlanta Oculoplastic surgery, and he recommended that she get a full face lift, although she was 71 at the time. (Georgia Watch)

Due to her age and the risks of the surgery, the blood flow in Nestlehutt's face was compromised. Her skin began to fall off and die. Her face was extremely disfigured, and due to her appearance, her career in real estate was also in jeopardy. Her case was first heard by the Georgia trial court, and the verdict was in favor of Nestlehutt. With recovery for past and future medical expenses and Nestlehutt's affected quality of life, the judge awarded $900,000 in non-economic damages. This surpassed the $350,000 cap instituted in 2005.

In the lower court, the cap was ruled unconstitutional. This was because a statute capping a jury's verdict violated the plaintiff's constitutional right to a trial by jury. The decision was appealed by the defendants to the Georgia Supreme Court. In 2009, the Supreme Court agreed with the lower court judge's ruling that the cap was unconstitutional. Originally, the cap instituted in 2005 did not assure patient-plaintiffs their rights and safety, and it was not a priority

for the legislation at all. Nestlehutt lost much more than her physical appearance. She was the face of her business, and she lost her way of making money due to her ailment, an economic loss. But beyond that, Nestlehutt lost her identity, self-confidence, and ability to communicate with others; all non-economic losses. By striking down the cap, “the promise of justice for all and the rights of all Georgians—young and old, rich and poor—to access the courts” was restored. (Georgia Watch)

2. Condon v. Alexius Medical Center

Non-economic damage caps “discriminate against plaintiffs who cannot establish large economic loss.” After suffering malpractice and being denied redress, plaintiffs cannot continue with their way of life as it was before, and therefore cannot properly cover any future medical expenses. For example, in *Condon v.s. Alexius Medical Center*; Chenille Condon, a 35 year old woman, suffered a stroke from negligently performed surgery. The physician, Dr. Allen Booth, had cut the main artery supplying blood to Condon’s brain, leading to a stroke and paralysis. Condon’s brain condition was also expected to deteriorate over time. (Bryston Gallegos)

The judge awarded $3.5 million total in damages, $2 million in economic and $1.5 million in non-economic. However, Dr. Booth tried to reduce the verdict pursuant of current non-economic damages to North Dakota’s statutory cap on non-economic damages, which was $500,000. Condon argued against the cap, arguing that the cap violated the state’s constitutional guarantee of equal protection, as it discriminated against citizens who could not establish large economic loss, such as children and stay-at-home moms. She also argued that the cap protected physicians from having to pay rising insurance premiums: “The greater the harm caused by the negligent doctor, the greater the discount.” (Bryston Gallegos)

Constitutionality is not acknowledged without concerns of it initially raised. Condon believed that she was not rightfully compensated in her case, which is why she brought legal action questioning constitutionality. But, unfortunately for Condon, the North Dakota Supreme Court held that the cap was not unconstitutional and remanded the case back to the district court for a reduction in non-economic damages consistent with the state statute. There was no “fundamental or important substantive interest” to a legitimate government concern. (Google Scholar)

3. Gourley vs. Nebraska Methodist Health System

Lastly, in 2003, the Gourley family brought action against the Nebraska Methodist Health System and Nebraska Methodist Hospital (collectively Methodist Hospital). Lisa Gourley, a resident of Nebraska, was receiving prenatal care from Nebraska Methodist Hospital. Lisa was unknowingly suffering from bradycardia, a decrease in heart rate and lack of amniotic fluid. However, the doctors had failed to detect this, resulting in one of her twin boys being born with cerebral palsy and many other health complications.

Lisa and her husband filed a suit against Methodist Hospital. From the suit, the jury awarded the family $5,625,000. However, the Gourleys moved for a new trial, arguing that the court had made an error of entering a direct verdict. The district court reduced the award to $1,250,000, on account of Nebraska’s cap on damages. The final decision by the Supreme Court upheld the reduction of the award.

The Gourleys argued that the cap affected fundamental rights. They could not have rights to a proper jury trial, property, and medical care. The Gourleys argued that the cap affects a “suspect class”: due to the fact that “plaintiffs with damages awards over the cap are ‘saddled with disabilities.’” (Google Scholar) Although Lisa Gourley still had a child that was healthy, her other son was suffering the consequences of negligence. The Gourleys would still have to pay

thousands of dollars in treatment for Colin, as well as other concerns. The extent of the negligence should not be the only factor weighing in when awarding damages: the consequences from a lack of necessary damages should have equal, if not more, significance.

VI. CONCLUSION

Throughout this paper, we have explored the various views of medical malpractice, history and trends of tort reform, and the potential benefits and drawbacks of its measures. It is clear that medical malpractice cases play a crucial role in holding healthcare professionals accountable for their actions and ensuring the quality and safety of patient care. However, the system has been criticized by defendants for its high costs and lengthy legal proceedings; implementing reform that does not support the needs of all involved.

Tort reform initiatives have been proposed as a means to address some of these concerns, aiming to strike a balance between providing fair compensation to injured patients while minimizing the negative impacts on healthcare providers and overall healthcare costs. By implementing caps on non-economic damages, proponents of tort reform argue that these measures could lead to more efficient and equitable resolution of medical malpractice claims.

On the other hand, critics of tort reform caution against potential limitations on patients' rights and access to justice. They stress the importance of preserving the ability of injured patients to seek appropriate compensation and hold negligent healthcare providers accountable, thus maintaining the integrity of the healthcare system.

As we navigate this complex landscape, it is essential to consider the diverse perspectives of stakeholders, including patients, healthcare professionals, legal experts, and policymakers. Striking the right balance between ensuring patient safety, fair compensation, and maintaining the healthcare system's functionality is a challenging task that requires thoughtful deliberation and evidence-based decision-making.

In the end, the pursuit of effective and just solutions for medical malpractice and tort reform requires a collaborative effort, drawing upon the expertise of various fields and a commitment to continuously improve the healthcare system for the benefit of both patients and providers.

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