



4-1-2011

## The Medical Malpractice Scapegoat: A Cyclical Call for Tort Reform in Utah

Bryan Mortensen

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

---

### BYU ScholarsArchive Citation

Mortensen, Bryan (2011) "The Medical Malpractice Scapegoat: A Cyclical Call for Tort Reform in Utah," *Brigham Young University Prelaw Review*. Vol. 25 , Article 8.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol25/iss1/8>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact [scholarsarchive@byu.edu](mailto:scholarsarchive@byu.edu), [ellen\\_amatangelo@byu.edu](mailto:ellen_amatangelo@byu.edu).

# THE MEDICAL MALPRACTICE SCAPEGOAT: A CYCLICAL CALL FOR TORT REFORM IN UTAH

by Bryan Mortensen\*

## I. BACKGROUND AND INTRODUCTION

In the heated climate that typifies today's discussions on health-care reform in the United States, many different proposals of systematic change to improve the system and eliminate waste have gained popularity. Of these changes, medical malpractice reform has become one of the more prevalent calls for reform from health-care professionals and prominent politicians.<sup>1</sup> Reforms on torts related to malpractice are promoted as a way to expand coverage to consumers and lower the costs of practicing medicine for doctors. On the other hand, proponents of the current system argue that malpractice law "serve[s] both as a compensation mechanism as well as a deterrent to medical injury. Clinicians are expected to be more likely to change their behavior if the odds that errors will be discovered and/or the financial consequences of negligence increase."<sup>2</sup>

The believed remedy for a broken medical malpractice system is legislative action limiting the power of patients to sue after medi-

---

\* Bryan Mortensen is studying advertising as a sophomore at BYU. He is serving in the BYU Prelaw Student Association presidency next year and applying to law school the following year.

1 See George W. Bush, *President Discusses Medical Liability Reform* (2004) THE WHITE HOUSE <http://georgewbush-whitehouse.archives.gov/news/releases/2005/01/20050105-4.html>.

2 Christopher J. Conover, *Healthcare regulation: a hidden 169 billion tax*, POLICY ANALYSIS (Cato Institute, D.C.), Oct. 2004, available at <http://www.cato.org/pubs/pas/pa527.pdf>

cal negligence. Utah recently implemented a version of tort reform in response to a supposed crisis in the insurance industry.<sup>3</sup> For example, in 2010, Utah's already comprehensive general damage cap was further capped at a lower rate.<sup>4</sup> Proponents of the reforms argue that it shoulders the rising costs of insurance premiums for doctors, costs that have allegedly driven doctors away from states without such reforms. Proposed and existing reforms impose a fiscal cap on payouts relating to patients' punitive damages, including wrongful death, pain and suffering, and other subjective grievances involving negligence.

The reality and factual relevance of Utah tort reform's consequences, underlying motives, and costs are misleading. The Utah Health Care and Malpractice Act<sup>5</sup> fails not only in its basic function of expanding coverage and reducing costs of premiums, but also in its misguided effort to shift the rights from victims of negligence to the rights of the actual wrongdoers.

The utility argument for reform suggests limiting the amount of excessive fiscal settlements or judgments that victims are awarded in the resolution of a tort stemming from medical negligence. As the Utah bill asserts, "the number of suits and claims for damages and the amount of judgments and settlements arising from healthcare has increased in recent years."<sup>6</sup> Utah's approach is similar to other state legislatures that believe tort reform "[i]s the legislative solution to a commercial insurance liability crisis which the legislature found existed"<sup>7</sup> within their respective states, with a Utah legislator attributing the problems with the United States' healthcare system to costs incurred from medical malpractice.<sup>8</sup> But after examining reforms in

---

3 Roger A. Reynolds et al., *The Cost of Medical Professional Liability*, 257 J. OF THE AM. MED. ASS'N 2776, 2776 (1987).

4 Utah Code Ann. § 78B-3-401.

5 *Id.*

6 *Id.*

7 *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1084 (Fla. 1988).

8 Senator Dave Thomas, "*Tort Reform*" (2005), <http://senatesite.com/blog/2005/09/tort-reform.html>.

Utah more closely, the reforms are revealed to be erroneous, ineffective, and cyclical in nature.

The problem in the insurance industry is said to be imbalance of cost. Reform proponents wish to use further reform to “deal comprehensively with . . . substantial increase[s] in insurance rates and related insurance problems.”<sup>9</sup> For example, Utah Senator Dave Thomas, contends reform is for the benefit of doctors and patients alike, saying in his open letter on tort reform, that medical malpractice “is killing our healthcare industry.”<sup>10</sup>

Rising premiums may be a reality, but this does not mean that the problem lies with the lawsuit-side of the healthcare crisis. Malpractice law actually increases the standard by which doctors practice, insuring better patient care by incentivizing doctors to act responsibly. These torts are supposed to provide “fair compensation to people who are harmed and to give physicians appropriate incentives for exercising a reasonable degree of caution within their practices”<sup>11</sup> through that compensation.

The arguments for tort reform are ultimately superficial, misguided, or deliberate fallacy. The grassroots support for interest in reform is often legitimate,<sup>12</sup> but these concerns are often overblown, motivated by self-interest, and translate into erroneous myths not rooted in empirical data.

This paper will confront four of the given reasons for tort reform in Utah: 1) The notion that there is a new crisis in medical malpractice law is untrue, as the system has been reformed several times before. 2) Arguments that doctors need protection from frivolous litigation misrepresents the actual problem that practitioners face—one of insurance premium increases related to the economic stresses in the insurance industry—not increased claims and higher verdicts.

---

9 *Smith*, 507 So. 2d 1080, 1084 (Fla. 1988).

10 Thomas, *supra* note 8, at 8.

11 David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 28 J. OF LEGAL STUD. 36, 36 (2007).

12 Kip Viscusi, *Damage Caps, Insurability, and the Performance of Medical Malpractice Insurance*, 72 J. RISK AND INS., 23, 23 (2005).

3) The notion that status quo is unchanged because reform continues to benefit the major parties involved. 4) Medical malpractice reforms alter people's rights to recourse and violate basic legal constitutional principles, essentially turning a blind eye to victims.

## II. FISCAL PROBLEMS

The notion that there is a crisis in healthcare insurance with respect to tort law is untrue, as the system has been reformed before, and the fiscal numbers show it to be a non-issue in overall costs.

The supposed fiscal crisis is a smokescreen to the actual data, which shows that medical malpractice claims have no correlation to premium increase. It is suggested that medical malpractice suits place an undue burden not only on doctors being sued—resulting in higher premiums to the doctor—but also on the system at large. As premiums go up for all doctors who are not the wrongdoers, these practitioners—and consequently their patients—are forced to shoulder the extra cost. Doctors also claim they are limited by what they can bill patients due to government and private insurance, thereby placing the entire burden for the premium increase on the doctor.

Insurance providers wish to discourage error and limit their payouts on damages and thus the price of a premium will rise after malpractice has occurred. Often times the premium rise is based upon any claim made, even if it is ultimately unsuccessful. This kind of rise is an insurance issue, not a legal system one.

Supposedly, this premium system is where practitioners are having financial troubles. The premiums are so high that doctors can no longer afford to pay them. Payments by malpractice insurers for negligent doctors are also reportedly giving malpractice insurers fiscal woes. However, delving deeper into the issue reveals that this simply is not true.

The statistical data indeed shows that premiums have increased. However, over the same period of time, the medical malpractice insurers financial records reveal no fiscal woes. For example, the Office of the Utah Senate estimated in 2005, "Health insurance premiums rose 11.2% in 2004; the year before, it was a 13.9% increase. These increases have occurred while the rate of inflation has been around

2.3%.”<sup>13</sup> In 2005, Utah’s largest medical malpractice insurance provider took in 205% more in premiums than it paid out in claims to injured patients in medical malpractice suits.<sup>14</sup> From 2000 to 2005—the period of the medical malpractice “crisis”—the Utah Medical Insurance value increased by 64.2% from a little over 100 million dollars to a little under 200 million dollars.<sup>15</sup> In that same period, net premiums increased 182.6% for medical practitioners. Despite such economic growth, during that same period of time, payouts to injured parties have increased at a level less than medical inflation.<sup>16</sup>

In the same year that a recent major medical malpractice reform passed, the largest provider of medical malpractice insurance in Utah admitted to its doctors that premiums have and will continue to rise, blaming an out of control legal system. Yet research shows that premiums continue to rise even after tort reform.<sup>17</sup> With the increasing value of premium payments and decreasing payouts, the medical malpractice insurers have the ability to lower premium rates. But insurers continue to insist that the tort system is ruining them fiscally.<sup>18</sup>

On the other hand, research shows premiums are rising and will continue to rise irrespective of tort reform. Medical malpractice insurance premiums account for less than 2% of total estimated national health spending.<sup>19</sup> Using medical malpractice premium hikes as a reason for reform is either misguided or intentionally misleading; thus pointing to premium increases is an ineffective method of

---

13 Thomas, *supra* note 8, at page 2.

14 Utah Med. Ins. Ass’n, *Annual Statement for the Year Ending December 31, 2005*, available at <http://naic.org/cis> (2005).

15 *Id.*

16 *Id.*

17 Melissa D. Weiss et al., *The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage*; (June 2003) WEISS RANKINGS INC, <http://www.thestretratings.com/malpractice.asp>.

18 Thomas, *supra* note 8, at 1.

19 J. William Thomas, *Low Costs of Defensive Medicine, Small Savings From Tort Reform*, 29 HEALTH AFF. 1578, 1578 (2010).

proving a malpractice crisis exists. Likewise using the actual cost of medical malpractice is just as ineffective a measurement, with less than 1% of the system's overall costs incurred by medical malpractice.<sup>20</sup> Reform in medical malpractice tort law is no deterrent to rises in healthcare costs.

The cause of rises in premiums is debated—with many claiming that medical malpractice is a large contributing factor. Studies and legislators assume that, “a reduction in losses to tort liability . . . should lead to lower level of premiums”<sup>21</sup> But in jurisdictions that have adopted reforms, studies indicate that relief from rising premiums is minimal, showing, “the average decrease in premiums is equivalent...to about one patient visit a week or about a 1 percent change in the fee charged for a typical office visit.”<sup>22</sup>

The likelihood of causation or even a “connection between damage caps and insurance rates remains especially murky,”<sup>23</sup> There is not a significant correlation between rising costs and medical malpractice. The number of medical malpractice cases in Utah, “does not appear to be increasing”<sup>24</sup> while medical malpractice premiums have risen by nearly double in the past five years.<sup>25</sup>

The connection between medical malpractice claims and rising premiums is a myth without grounds for influencing legislative action. After three waves of tort reform, the push to continue reform is more likely motivated by recession than by problems in the malpractice system.

---

20 Paul M. Simmons, *The Myth of the Runaway Medical Malpractice Verdict in Utah*, UAJ, 6, Fall (2002).

21 Stephen Daniels & Joanne Martin, *The Texas Two Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*. 55 DEPAUL L. REV. 636, 636 (2006).

22 Matsa, *supra* note 11, at 37.

23 Reynolds *supra* note 3, at 2780.

24 Simmons, *supra* note 20, at 3.

25 Martin J. Osowski, *Why Should I Stay With UMIA? THE EXCHANGE* (2010), <http://www.umia.com/exchange/win10/index.html>.

---

The reality of a crisis in regard to premium hikes and their affordability is obviously pressing enough to influence a push for malpractice reform. Doctors, insurance companies, legislators, and a former President of the United States contend that there is such a crisis.<sup>26</sup> But such a crisis is unlikely to have stemmed from the tort system in Utah, which has already undergone three separate waves of reform in the last thirty years. Why has the premium crisis not been resolved after the three separate waves of tort reform?

The history of tort reform in Utah is reflected in the history of the United States' actions toward medical malpractice. The United States has seen three major crisis periods of medical malpractice problems since the 1970s. The first period, 1974-1976, was a crisis of availability. In response to the likelihood that doctors could not find insurance to buy, several states (including Utah) enacted changes in malpractice tort law. The second crisis, running from 1984-1986, was characterized as a crisis of affordability. In response to this crisis legislation was enacted to give practitioners more affordable coverage. Finally, the crisis of 2001 to the present has come after years of stability, and malpractice premiums have risen substantially since 2001.

The cause of such reforms may not be indicative of the system as much as the economic times in which the reforms were passed. As one observer points out, the three malpractice crises in Utah in the 70s, 80s, and now in the 2000s are “not coincidentally [correlated] to major periods of recession in the last thirty years—in the mid 1970’s, the mid 1980’s, and currently.”<sup>27</sup>

Since the three waves of tort reform have not curbed the rise of premiums, the motivation and cause for reform may have been born out of tough economic times and revisited when the premium problem was exacerbated by recession.

The costs associated with malpractice claims are not rising, are not a burden that would cause a crisis, and are therefore a justified social cost. The cost burdens incurred by medical malpractice can be overwhelming, frightening, and most importantly: misleading. The

---

26 Thomas, *supra* note 8, at 1.

27 Simmons, *supra* note 20, at 3.



actual cost that medical malpractice incurs on the industry is, by itself, a staggering “\$113.7 billion.”<sup>28</sup> This number may be shocking on its own, but when examined in context the figure becomes less alarming. Out of that \$113.7 billion, the system “provides benefits amounting to \$33 billion (most of which is attributable to mortality/disability averted due to deterrence), but which also accounts for the compensation paid to injured patients.”<sup>29</sup> The healthcare system sees a lot of the money awarded come back in the form of payment for further treatment, meaning that injured parties use a substantial amount of their settlements to purchase care for their injuries, especially in the case of catastrophic injury when a patient needs long term care and remedial treatment.

Since figures indicate a steady rate of medical malpractice, and that that rate is a small cost to the healthcare industry overall, the rise in premiums is causative to the malpractice legal tort system. The \$113.7 billion cost became even less of an imposing figure when a U.S. Congressional Agency found that medical malpractice accounted for less than 1% of total health care costs.<sup>30</sup> Focusing a large amount of attention on the \$113.7 billion to cure out of control healthcare costs seems disingenuous. Curbing the proven rise in premium prices by concentrating on cost accounting for 1% of total health care costs is either misled or deceitful, especially when the number of medical malpractice cases in Utah, “does not appear to be increasing”<sup>31</sup> while premiums have nearly doubled in the past five years.<sup>32</sup>

Since the cost of malpractice is relatively small and largely speculative, the system of tort law seems justified in operating as it does. The costs of malpractice insurance are often given as a specific number based upon payouts. But estimates of actual costs of defensive medicine are highly speculative, and as examined before, settle-

---

28 Conover, *supra* note 2, at 4.

29 *Id.*

30 Simmons, *supra* note 20, at 3.

31 *Id.*

32 Osowski, *supra* note 25, at 1.

---

ments and fiscal rewards to victims often see a backchannel into the medical system. But in context, these costs are a justified social cost when the system operates as a recovery and redress tool. If the Utah patients' ability to recover damages is continually limited, insurers continue to increase in value and revenue, and doctors' premiums continue to rise, the conversation cannot focus on how to reform the tort system. The figures used to support a medical malpractice problem are absent, which leaves only the insinuation of a connection to the more tangible premium crisis. The conversation must turn to how to regulate the premium system.

### III. MEDICAL PROBLEMS

Arguments that doctors need protection from frivolous litigation misrepresent the actual problem that practitioners face—one of insurance imbalance. Rising premiums and the number of medical malpractice lawsuits are not directly correlated, but are tied by another confounding variable: insurance.

Doctors pay premiums to insurers and these resources address the awards given in a medical malpractice lawsuit. If the payout is reasonable then the premium should be as well. The median recovery in medical malpractice cases over the last thirty years was \$20,000.<sup>33</sup> In comparison, Utah drivers are required to carry \$25,000 of liability insurance to drive on Utah's roads. Existing caps have given insurers enough overhead to lower premiums as previously shown. If the recovery in most malpractice cases is not unreasonable then the premiums for covering doctors should not be increasing. But research indicates otherwise:

[O]n the surface, the theory behind caps on non-economic damages awards seems logical: caps would limit the payouts by insurers, and the lower payouts, in turn, would naturally enable the insurers to reduce [medical malpractice] premi-

ums. However, in the real world of the [medical malpractice] business, only the first half of this theory is working.<sup>34</sup>

The idea that medical malpractice torts actually harm treatment is untrue. Rather, tort suits help raise the standard of care and police the system for abuses. If reform is designed to shield doctors from lawsuits that impair their ability to practice good medicine, it will be another facet of a system designed to do so. Tort reform is motivated largely by a desire to protect doctors from outrageous and baseless lawsuits that restrict them from practicing medicine without a debilitating fear of being sued.

Lawsuits that have a reasonable chance of returning a payout must meet specific criteria beyond a bad outcome of medical treatment. In Utah and most other states, a victim of medical negligence has the “burden of proof” and it becomes his or her counsel’s responsibility to show how a medical practitioner acted against the standards agreed upon within the healthcare industry, a standard referred to as “the standard of care.” A victim’s counsel will show through expert witness and medical instructional materials that the standard of care was violated and that the violation caused the victim real and actual harm—an act called negligence. If the case cannot meet the burden of proof before trial, the judge throws out the case. Even if the plaintiff makes it past the judge’s scrutiny and the case goes to trial, then a jury is instructed to rule in the doctor’s favor if the plaintiff does not establish the medical negligence through its expert testimony.

Malpractice is not simply the result of medical treatment that has an undesired or dismal outcome. Malpractice occurs when this ‘standard of care’ is breached. This breach is not merely an unforeseen medical complication or error by the practitioner. Practitioners “are not expected to be perfect, and it is well recognized that less-than-ideal situations can occur even at the best of hands.”<sup>35</sup> Rather, a medical practitioner must violate a governing standard of care, acting in

---

34 Weiss, *supra* note 17, at 2.

35 Martin J. Osloski, *What if an injury occurs?* 2 THE EXCHANGE (2010).

negligence, thus causing unnecessary harm or injury to a patient for malpractice to occur.<sup>36</sup>

Those who wish to let doctors practice medicine without real threat of lawsuits due to negligence—even for altruistic reasons—play a dangerous game with unintended consequences that could harm not only patients but also the medical profession in general.

If premiums were more affordable, then malpractice litigation would become less of an issue. Reform hinges on creating a system where malpractice poses less of a threat to ruin doctors' careers; a system that will attract more doctors to the state. The fear of legal action against doctors has purportedly reached a level that has begun to discourage doctors from practicing in states that do not have strict tort reforms. The "purpose of act" in the Utah medical malpractice law that was passed in March 2010 states, "health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance."<sup>37</sup> Tort reform's stated aim is to lessen the ever-present threat of lawsuits aimed at doctors.

The aim of the reform is unneeded if only a small fraction of victims of negligence seek litigation. The tort system leaves the "individual patients to decide whether to sue in a given case, a[nd] a surprisingly high fraction (98%) of actual victims of negligence opt not to sue."<sup>38</sup> That is an overwhelming majority of actual wrongdoers, doctors who have acted in negligence, that do not face the financial liability of malpractice.

Insurance risk for medical practitioners is spread over a large base and thus should be able to afford the payouts to victims. The very idea of insurance is to minimize risk by spreading it over a

---

36 Utah Code Ann. Section 78B-3-402 (1). (In the 2010 legislative session, the Utah legislature gave additional protections to Emergency Room doctors, requiring the plaintiff to establish "by clear and convincing evidence" that the ER doctor violated the standard of care, effectively eliminating a sector of malpractice claimants who in 2009 had legitimate claims).

37 *Id.*

38 David M. Studdert et al., *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 350 *NEW ENG. J. MED.* 283, 283 (2004).

population of customers, and when someone acts in negligence, he or she has the “insurance” to minimize the damage fiscally and professionally. Medical malpractice insurers exist to provide coverage to the 2% of wrongdoers who are sued with the fiscal support from the 98% of doctors who pay premiums but never use the coverage.<sup>39</sup>

The actual number of medical malpractice lawsuits that result in payouts are minimal. Caricatures of a system run amuck with frivolous lawsuits are incorrect. If actual lawsuits occur in 2% of incidents where malpractice occurs, and these 2% of doctors still face a litigation process where opposing counsel must bear the standard of proof, then less than 2% of medical malpractice cases see an actual payout.<sup>40</sup> The New England Journal of Medicine concludes that, “portraits of a malpractice system that is stricken with frivolous litigation are overblown,”<sup>41</sup> supporting the U.S. Congressional agency finding that medical malpractice account for less than 1% of total health care costs.<sup>42</sup>

#### IV. INSURANCE PROBLEMS

The status quo of calling for reform every fifteen years is unchanged because reform continues to benefit the major parties involved. If insurers are not required to allocate the savings from tort reform to lowering premiums, then what incentive do they have not to pocket it?

Tort reform is only working to the benefit of the insurers, with doctors and patients not seeing positive effects. The money insurers have saved from such reforms should have lowered premiums or at least have been put towards helping doctors afford insurance. But research found the opposite occurred: again, only “half of this theory is working,”<sup>43</sup> and that half is the half cutting payouts while leaving

---

39 *Id.*

40 *Id.*

41 *Id.*

42 Simmons, *supra* note 20, at 3.

43 Weiss, *supra* note 17, at 2.

---

the premium rise untouched. If there is no legal obligation for insurers to use the savings to lower premiums, then the push for another wave of malpractice reform the next time the economy turns south is inevitable. “Most physicians’ net incomes [are] effectively insulated from the malpractice environment,”<sup>44</sup> which begs the question: is legislation capping the medical malpractice tort system simply designed to fail so that reforms can again be made at some future date?

Lowering doctors’ premiums is not the clandestine desire of insurers pushing for malpractice tort reform. For example, the savings from damage caps have not given physicians premium relief. Instead, the savings have been turned into a larger profit margin for insurers, with many insurance companies gaining in value while raising doctors’ premiums. Incentive for action in tort reform relies heavily on the benevolence of huge corporate insurance providers when the entities’ purpose is to make money. If they can cut costs by settling for less in court because of legislated caps, then what legal incentive do they have to lower premiums for doctors that they can basically hold hostage—all the while, pointing the finger at a tort system that likely has nothing to do with the premium problem in the first place.

Utah premiums may have actually seen a rise because of tort reform. In states that enacted non-economic damages caps, the burden was lessened on insurers. But in those same states the premiums prices actually grew more rapidly. Utah is one of these states. The likely cause of such a counterintuitive phenomenon lies with the fact that there is no motive for the insurance company not to merely pocket the savings.

As premiums continue to rise, doctors are led to believe the problem is trial attorneys; patients are led to believe tort reform will lower costs; and legislators are led to believe the system needs reform. Medical malpractice insurers direct unrest and fiscal problems of doctors and patients to lawyers and the system of law. The need to explain the rise in costs in premiums to both doctors and patients alike motivates insurance companies to make medical malpractice the proverbial scapegoat. Such tactics could direct disapproval away

from insurance company pockets by lobbying legislators to control the attorneys that they claim must be scamming the system.

The costs of premiums—unaffected by reform—are passed from the doctors who practice to the patients in healthcare costs. The popular argument for tort reform asserts that costs for insurers are too high and that reforming the tort system by limiting the amount of non-economic damages—for pain, suffering, loss of companionship, loss of a loved one or spouse (as opposed to economic losses such as loss of wages, medical costs, damage to property)—will alleviate the rising costs of practitioners. But the reverse is actually true, “given the magnitude of recent increases in health care costs, changes in malpractice insurance premium costs due to tort reform are unlikely to have a significant impact on most physicians”<sup>45</sup> and are consequently passed on to their patients.

Because insurers are not required to give the savings from medical malpractice caps to lower premiums, they will continue to pocket such savings and call for reform every time the pressure to relieve the costs of premiums is given by doctors and legislators.

## V. LEGAL PROBLEMS

The system of law that allows for torts is a sound process that, by its very nature, eliminates frivolous claims. Many view medical malpractice as a way of making unfair amounts of money from meritless cases; some believe lawyers and their clients are coming away from cases without an obscene amount of money from a case that was invalid or fraudulent. People may disagree as to the merits of the law, but that does not determine case validity.

The selection process within the legal system vets the merits of the case far before the jury awards a victim damages. First, an attorney examines the case and decides whether the facts will likely return a successful verdict or settlement. As most malpractice cases are handled on a contingency basis, it is in the attorney’s self-interest to take cases that have legality and validity, while not risking overhead costs and time on a case that can be lost. Plaintiff’s attorneys

argue that contingency fees and the prevalence of medical errors make the pursuit of meritless lawsuits fiscally unwise.

Second, a judge reviews the facts and merits of the case and claim after the filing. If the merits are “frivolous” as the judge interprets the law associated with the case, the judge has the power to throw it out. These first two steps come at little to no cost to the health care industry.

The third vetting step is when the law is explained to a jury and they evaluate the merits of the case and return a verdict. After researching the subject, the healthcare industry’s most notably journal acknowledged, “the malpractice system performs reasonable well in its function of separating claims without merit from those with merit and compensating the latter.”<sup>46</sup>

Distaste for attorneys taints the public idea of the vital role they play in helping victims recover damages. The red herring in the debate is distrust of the legal profession, which comes from a stereotype that lawyers are predatory. But in this area—medical malpractice—the plaintiff’s attorneys gain nothing unless they fight vigorously for the rights of the damaged party. A good attorney will gather the facts and fight for the victim’s rights and just compensation, but will also choose only cases that have merit. All qualms about practitioners of law aside, “plaintiffs’ lawyers function as the civil justice system’s gatekeepers, and the gates will widen or narrow depending on the profitability of the lawyers’ practices.”<sup>47</sup>

Under any tort system, the case selection process eventually pushes attorneys away from taking cases that will not return a payout. If medical malpractice cases become less profitable, than plaintiffs’ lawyers “will be less interested in handling such cases and move on to other, more profitable markets,”<sup>48</sup> much like doctors have begun flocking to tort reformed states.<sup>49</sup> When this occurs there will be fewer medical malpractice claims—not because there will be fewer

---

46 Studdert, *supra* note 38, at 12.

47 Daniels, *supra* note 21, at 638.

48 *Id.*

49 *Id.*



injury causing medical errors and therefore fewer potential cases of negligence—but because “there will be fewer lawyers interested in handling such cases.”<sup>50</sup> Should this kind of system be implemented permanently, “meaningful access to the civil justice system for some injured people may be diminished since meaningful access requires competent representation.”<sup>51</sup>

Tort reform deprives victims of negligence the basic right of legal redress to recover damages in an effort to cut costs. In the section of the Utah State constitution dealing with redress of injuries, it reads, “All courts shall be open, and every person, for an injury done to him in his person, property, or reputation, shall have remedy by due course of law, which shall be administered without denial.”<sup>52</sup> This right is denied by the Utah Supreme Court in the exception of tort reform, one of the few situations where redress is limited.

A system of law that allows for parties to threaten legal action allows for balance between doctor and patient. Tort claims help ensure people’s safety by holding practitioners accountable for mistakes or breaches of the standard of care and help correct and compensate shattered lives from those actions, again with much of the recovery going back into the medical system or preventing government from having to pay for catastrophic consequences.

Utah does not need malpractice reform, nor does it need to limit the basic legal rights to its citizens. But with the newly imposed cap, these are limited. Before the 2010 cap was established, “Utah was ranked number seven among the fifty states for its relatively low monetary tort losses, few litigation risks, and relatively strong tort rules on the books.”<sup>53</sup> Despite this, Utah passed the legislation and now has a \$450,000 hard cap. A jury is not told of this limit as the jury is allowed to “determine the facts in the first instance and then the court applie[s] the statutory cap to the jury’s award.”<sup>54</sup>

---

50 *Id.*

51 *Id.*

52 Utah Const. art I, § 12

53 *Defense of the Collateral Source Rule*, 1 UAJ Winter (2008).

54 *Judd v. Drezga*, 103, P.3d 135, 135 (Utah 2004).

The basic legal rights afforded to the citizens of Utah are restrained on this issue because of a perceived imbalance of cost. Even if the cost was caused directly by medical malpractice—which has been demonstrated not to be the case—this should not allow for legal principles to be ignored or suppressed.

## VI. CONCLUSION

This paper has attempted to demonstrate the fallacies in the calls for medical malpractice tort reform, problems with its implementation, and problems with its functionality. The evidence that tort reform does not meet its lofty promises or goals is strong. It does not protect doctors. It does not decrease premiums. It does not help patient care. The motives for the reform's stated purpose of reducing physicians' insurance premiums are suspect at the very least. It would be in the best interest of Utah to forego any further reforms and examine ways to address the increased insurance premium problem.