Myth Versus Facts In Malpractice Cases

“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.” - Andrew Jackson

When the facts are separated from the myths, damage caps and other forms of tort restrictions are never about limiting frivolous lawsuits. To be blunt, tort restrictions are about reducing the contributions trial lawyers can make to elect legislators and judges who support the right to a jury trial. Damage caps, which limit and suppress legitimate medical malpractice lawsuits, benefit insurers. One size fits all damage caps disproportionately impacts women and families with infants, because stay at home mothers’ and children’s economic damages are frequently limited or difficult to estimate. This article will examine whether tort reform curbs frivolous lawsuits and reduces health care costs. The answer is no. We will examine recent medical journal articles regarding defensive medicine and a Florida Supreme Court decision which separated myth from fact in holding the Florida damage cap unconstitutional.

Michael B. Rothberg of the Cleveland Clinic and published a recent study in the Journal of the American Medical Association aimed to measure how much defensive medicine there is, really, and how much it costs. The researchers’ conclusion is that defensive medicine accounts for about 2.9% of healthcare spending. In other words, out of the estimated $2.7-trillion U.S. healthcare bill, defensive medicine accounts for $78 billion. While $78 billion dollars is a considerable sum, tort reform severe enough to
make that disappear would be offset by a rise in the costs of providing healthcare to those injured by an increase in medical mistakes which would invariably result from the elimination of the oversight lawsuits provide. *JAMA Intern Med*. Published online September 15, 2014. doi:10.1001/jamainternmed.2014.4649.

A recent study in the prestigious New England Journal of Medicine (N Engl J Med 2014; 371:1518-1525, [October 16, 2014](#) DOI: 10.1056/NEJMsa1313308) examined whether tort restrictions in states which had implemented them reduce the cost of defensive medicine in emergency rooms. Georgia, South Carolina and Texas have implemented tort restrictions which make it more difficult for an injured patient to sue an emergency room doctor by changing the burden of proof to gross negligence. The authors of this study found these results:

For eight of the nine state–outcome combinations tested, no policy-attributable reduction in the intensity of care was detected. We found no reduction in the rates of CT or MRI utilization or hospital admission in any of the three reform states and no reduction in charges in Texas or South Carolina. In Georgia, reform was associated with a 3.6% reduction (95% confidence interval, 0.9 to 6.2) in per-visit emergency department charges.

In examining the myth that fear of lawsuits drives doctors to perform unnecessary test, and the study authors reached this conclusion: Legislation that substantially changed the malpractice standard for emergency physicians in three states had little
effect on the intensity of practice, as measured by imaging rates, average charges, or hospital admission rates.

Appellate courts serve a vital role in protecting the rights of victims of medical negligence. An independent judiciary protects the citizens of a state from irrational laws passed by the legislature and insures equal protection under the law for everyone. A 2014 Florida Supreme Court decision sets a good example for other appellate courts to follow in separating myth from fact in medical malpractice cases. On March 13, 2014, the Florida Supreme Court held unconstitutional a legislative cap on noneconomic damages as violating equal protection. Florida capped noneconomic damages at $500,000.00 regardless of the number of claimants. Thus, a family of 10 was subject to the same cap for the mental anguish from losing a loved one as an individual claimant. The Court said:

“...we conclude that section 766.118 violates the Equal Protection Clause of the Florida Constitution under the rational basis test. The statutory cap on wrongful death noneconomic damages fails because it imposes unfair and illogical burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants do not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the statutory cap on wrongful death noneconomic damages does not bear a rational relationship to the stated purpose that the cap is purported to address, the alleged medical malpractice insurance crisis in Florida.”
The Florida legislature attempted to justify a cap on non-economic damages by claiming that Florida was undergoing a medical malpractice insurance crisis which was increasing liability insurance premiums, resulting in physicians leaving Florida or retiring early from practice, refusing to perform high-risk procedures, and limiting the availability of health care. In analyzing whether the Florida legislature’s cap on non-economic damages served a legitimate governmental purpose, the Florida Supreme Court said this about the legislature’s fact finding:

While courts may defer to legislative statements of policy and fact, courts may do so only when those statements are based on actual findings of fact, and even then courts must conduct their own inquiry.

The general rule is that findings of fact made by the legislature are presumptively correct. However, it is well-recognized that the findings of fact made by the legislature must actually be findings of fact. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry. (emphasis added)

The Florida Supreme Court then went on to examine whether the legislature’s finding of a medical malpractice crisis was based on fact or myth. The court determined that the Florida legislature’s conclusion that a medical malpractice crisis existed was not supported by fact.
One claim often made in support of damage caps is that the number of physicians in the state is decreasing because of a medical malpractice crisis. The Florida Supreme Court looked at government reports which found that in fact the number of physicians in both metropolitan and nonmetropolitan areas have increased. In other words during the purported medical malpractice crisis, the number of physicians in Florida were actually increasing and not decreasing.

Arguments in favor of damages caps is often based on an assertion that the medical malpractice crisis has been created by runaway juries awarding excessive amounts of non-economic damages. The Florida Supreme Court found that of payments of 1 million or more over a 14 year, only 7.5% involved a jury trial verdict. The court pointed to one study which found that jury trial verdicts were only a very small portion of medical malpractice payments. The court concluded that the Florida legislature’s finding that noneconomic damage awards by juries are a cause of the medical malpractice crisis is questionable.

The court was critical of conclusory findings by the legislature which made ominous predictions for the future. The legislature stated in its findings that the crisis could get worse. The Legislature concluded, without factual support, that insurance premiums may become unaffordable, or that coverage may become unavailable at any price to physicians and hospitals. The legislature made these conclusions despite a report from JoAnn Doroshow, Executive Director of the Center for Justice and Democracy, wherein she explained that the malpractice crisis was nonexistent and that
increases in premiums are cyclical depending on the economy. Ms. Doroshow demonstrated through facts that:

Medical malpractice insurance has been subject to sudden jolts, both in availability of coverage and cost. An entire cycle has been defined as the period of years in which insurer underwriting profits cycle from above average to below average. These cycles have always occurred in the insurance industry, particularly in medical malpractice insurance.

Frivolous lawsuits are often blamed for creating a medical malpractice crisis. The Florida Supreme Court found no evidence or facts to support this. In fact, the director of the Florida Office of Insurance Regulation testified that he found no evidence to suggest that there had been a large increase in the number of frivolous lawsuits filed in Florida, nor was there evidence of excessive jury verdicts in the prior three years. Frivolous lawsuits are simply another myth used to promote the claim that there is a medical malpractice crisis.

Another myth often used to support damage caps is that a medical malpractice crisis is forcing doctors to leave the state, or to stop performing high-risk procedures. The Florida Supreme Court found the legislature's determination that an increase in medical malpractice liability insurance rates was forcing physicians to practice medicine
without insurance, to leave Florida, to not perform high-risk procedures, or to retire early from the practice of medicine was unsupported by fact.

An argument is frequently made that imposing noneconomic damage caps will reduce medical malpractice insurance premiums. The Florida Supreme Court found this unsupported by fact:

Reports have failed to establish a direct correlation between damages caps and reduced malpractice premiums. Weiss Ratings, which evaluates the performance of the malpractice insurance industry, has detailed two particularly salient findings. First, based upon data acquired from 1991 until 2002, the median medical malpractice premiums paid by physicians in three high-risk specialties—internal medicine, general surgery, and obstetrics/gynecology—rose by 48.2 percent in states that have damages caps, but in states without caps, the median annual premium increased at a slower rate—by 35.9 percent. Martin D. Weiss, Melissa Gannon & Stephanie Eakins, Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage, at 7-8 (rev. ed. June 3, 2003), available at http://www.weissratings.com/pdf/malpractice.pdf. Second, the study noted that among states with caps on damages, only 10.5 percent (two of nineteen states with caps) experienced static or declining medical malpractice premium rates following the imposition of caps. In contrast, among states without damages caps, 18.7 percent (six of thirty-two states without caps) experienced static or declining medical malpractice premiums. Id. at 8.
The Florida Supreme Court also took notice of the fact that the president of the largest medical malpractice insurance provider in Florida testified to the Florida legislature that a $500,000 cap on noneconomic damages would not stabilize or reduce medical malpractice insurance rates. The court also noted that the cap on damages, even if it reduced the amount of payouts to injured victims of medical malpractice, does not require insurance companies to pass on those acquired savings to lower malpractice premiums for physicians. The Florida Supreme Court also looked at the profitability of the leading companies selling malpractice insurance and found that they were doing well financially. In 2012 the leading insurer had a surplus of 14%. 2012 was the ninth consecutive year profitability for this insurance company. In fact, four insurance companies that offered medical malpractice insurance between the years 2003 in 2010 reported an increase in net income of more than 4300%.

The Florida Supreme Court concluded its opinion in this manner:

Thus, even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. No rational basis currently exists (if it ever existed) between the cap imposed by section 766.118 and any legitimate state purpose. See generally Fla. Nurses Ass’n, 508 So. 2d at 319. At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members. Moreover, it has never been demonstrated that there was a proper predicate for
imposing the burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence. Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications.

The Florida Supreme Court stood up for its citizens and separated myth from fact. One can only hope that other state supreme courts maintain this same level of independence and uphold the tradition of separation of powers.

Healthcare policy should be based on facts and not myths. Healthcare policy should be about improving patient safety. Healthcare policy should not punish the most defenseless in our society - the elderly, stay-at-home mothers and children. Caps on damages and other tort restrictions use myths to advance the interest of the corporate immunity crowd. Although it seems we live in a post-fact world, let us strive to keep facts in front of the public. Let us seek the truth through facts and not myths.