

Journal of Law & Commerce

Vol. 37, No. 2 (2019) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2019.161 • <http://jlc.law.pitt.edu>

NOTES

MEDICAL LIABILITY ERASED: HOW THE PROTECTING ACCESS
TO CARE ACT OF 2017 LIMITS PATIENTS' ACCESS
TO PROPER CARE

Ben Cohen



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

NOTES

MEDICAL LIABILITY ERASED: HOW THE PROTECTING ACCESS TO CARE ACT OF 2017 LIMITS PATIENTS' ACCESS TO PROPER CARE

*Ben Cohen**

I. INTRODUCTION

The United States House of Representatives passed bill H.R. 1215 on June 28, 2017, titled the Protecting Access to Care Act of 2017.¹ This bill dismantles the rights of injured patients who seek justice against health care providers that should be held liable for their medical negligence.² This bill stems from the limitations placed on certain types of damages under several states' laws. The Protecting Access to Care Act of 2017 goes farther than those state laws, by severely limiting injured patients' ability to bring a lawsuit against a health care provider.³ Ironically named, the Protecting Access to Care Act prescribes a limit of \$250,000 for noneconomic damages.⁴ The bill also features a harsh statute of limitations for medical malpractice lawsuits, limiting the period to either three years after the injury, three years after the treatment that resulted in the injury, or one year after the patient discovers or should have discovered the injury.⁵ The first option

* Ben Cohen is a 2019 candidate for J.D. at the University of Pittsburgh School of Law.

¹ Billy Corriher, *The Other Terrible Health Care Bill Pending in Congress*, CTR. FOR AM. PROGRESS (July 20, 2017, 2:54 PM), <https://www.americanprogress.org/issues/courts/reports/2017/07/20/436343/terrible-health-care-bill-pending-congress/>.

² *Id.*

³ *Id.*

⁴ Protecting Access to Care Act of 2017, H.R. 1215, 115th Cong. § 3(b) (2017).

⁵ *Id.* at § 2(a)(1).

becomes the governing statute of limitations, which, in most cases, would result in a patient needing to file a lawsuit within one year of discovering the injury.⁶ This threshold, which is more severe than almost any state statute, would severely limit patients' abilities to bring a civil action.⁷ Additionally, the bill requires those subject to the one-year statute of limitations period to meet difficult requirements before they can even file a lawsuit.⁸

This Paper outlines the severe impact that this bill would have on victims of malpractice who have suffered grave injuries, and also explains how the bill would nearly eliminate patients' ability to recover damages when doctors or hospitals provide negligent care. Part II of this Paper examines some of the limits that this bill would impose and the effect it would have on injured patients' ability to recover damages. Part III describes those entities that are truly driving this bill and what their motives are for doing so. Part IV clarifies some of the misconceptions about tort reform and caps on damages and why the enactment of this bill would ultimately do more harm than good. Finally, Part V examines the benefits of medical malpractice litigation and why it is imperative to ensure that patients have the ability to find redress in a court of law.

II. H.R. 1215 LIMITS AND THE IMPACT ON INJURED PATIENTS

A. Background

The Protecting Access to Care Act of 2017 follows the trend in about half of states in the United States in initiating some type of cap on non-economic damages in medical malpractice cases.⁹ A limit is imposed in a medical malpractice case by first allowing the jury to calculate damages while unaware of the limitations; if they are aware of the limitations, jury

⁶ *Id.*

⁷ Corriher, *supra* note 1.

⁸ *Id.*

⁹ David Goguen, *Award (And Settlement) Limits in a Medical Malpractice Case*, ALLLAW, <http://www.alllaw.com/articles/nolo/medical-malpractice/award-settlement-limits.html> (last visited Mar. 2, 2019).

members are instructed to ignore them.¹⁰ Any jury awards that surpass the outer limit of the cap are reduced to the amount permitted by law.¹¹

There are three types of damages permitted in medical malpractice cases: economic damages, non-economic damages, and punitive damages.¹² Non-economic damages compensate the plaintiff for harm caused by the malpractice that cannot be given an exact monetary figure, such as pain and suffering, inconvenience, loss of marital companionship, and decreased quality of life.¹³ Initiatives to place a cap on the amount of damages a victim of malpractice can collect primarily target non-economic damages because it is both politically unwise and morally wrong to suggest that an injured person should not be compensated for economic losses incurred.¹⁴ Non-economic damages also become a target of cap initiatives because of their indefinable nature and the difficulty placing a value on them.¹⁵ Proponents of caps on non-economic damages often point to their strong influence on jurors' emotions.¹⁶

While the main focus of legislative action has focused on non-economic damages, states have looked to other methods to limit damages as well.¹⁷ Approaches taken by other states include limiting punitive damages only, limiting a plaintiff's total damages (including economic losses), limiting the liability of each defendant named in a case, and imposing a cap on all elements of damages except medical expenses and related expenses.¹⁸ Advocates for caps on damages argue based on their supposed success in other states, but the data used to prove this point is "grossly inflated and misleading."¹⁹ Caps on damages tend to punish some victims more severely than others, particularly women, the elderly, and children.²⁰

¹⁰ Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 516 (2005).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 516–17.

¹⁶ *Id.* at 517.

¹⁷ *Id.*

¹⁸ *Id.* at 517–18.

¹⁹ Eric Lindenfeld, *Moving Beyond the Quick Fix: Medical Malpractice Non-Economic Damage Caps a Poor Solution to the Growing Healthcare Crisis*, 41 T. MARSHALL L. REV. 105, 106 (2016).

²⁰ *Id.*

B. The People Affected

Those who support placing limitations on non-economic damages often claim that the caps are “facially neutral.”²¹ However, these caps are actually discriminatory due to their strong “reliance upon gender and age based generalizations in calculating damage awards.”²² These discriminatory generalizations include relying on women in the workforce generally earning a lower income than men for the same job, and the notion that women are more likely to accept a domestic role in their household; together these are used to place limitations on non-economic damages and prevent women from recovering equal amounts to men for the same injury.²³ There are also injuries that disproportionately affect women but cannot be accounted for in primarily economic terms, such as sexual assault, pregnancy loss, infertility, and gynecological medical malpractice.²⁴ These women-specific injuries are compensated more through non-economic damages, such as emotional distress and grief, an altered sense of self and social adjustment, impaired relationships, or impaired physical capacities that are not directly involved in market-based wage earning.²⁵ Women’s ability to recover for these types of damages would be severely limited with the enactment of H.R. 1215 due to the bill’s harsh reduction of non-economic damages.

Elderly patients who have retired from the workforce or are no longer physically able to work, have no way of recovering significant damages without being able to utilize non-economic damages.²⁶ The elderly also have a lower life expectancy, which further reduces future medical costs and limits the economic damages that can be recovered.²⁷ It is also difficult to prove future earning capacity with any exact calculations when it comes to children, leaving them with lower economic damage awards when injured by medical negligence.²⁸

²¹ *Id.* at 114.

²² *Id.*

²³ *Id.*

²⁴ Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1281 (2004).

²⁵ Lindenfeld, *supra* note 19, at 115.

²⁶ *Id.* at 114.

²⁷ Finley, *supra* note 24.

²⁸ Lindenfeld, *supra* note 19, at 114.

In May 2011, a doctor and a physician's assistant treated Ascaris Mayo for a high fever and abdominal pain in a Milwaukee, Wisconsin emergency room.²⁹ The physician's assistant recorded the potential diagnosis as an infection, but no one relayed this information to Mayo.³⁰ It would have been vital for Mayo to be aware of this, but rather than providing the information to her, she was told to follow up with her personal gynecologist concerning a previous diagnosis.³¹ Mayo's condition worsened the next day and she sought a second opinion at another emergency room, at which point she was diagnosed with an untreated septic infection caused by the original untreated infection.³² Mayo became comatose and eventually fell unresponsive before being transferred to a different medical facility.³³ Ultimately, the infection caused nearly all of her organs to fail and resulted in dry gangrene in Mayo's arms and legs, requiring the amputation of all of Mayo's extremities.³⁴

Mayo and her family sued her health care providers for medical malpractice and a failure to provide proper informed consent.³⁵ Following an intensive jury trial, the jury awarded Mayo \$15 million in non-economic damages for the health care providers' failure to provide informed consent regarding her diagnosis and treatment options.³⁶ Under the Protecting Access to Care Act, Mayo could only collect \$250,000 in non-economic damages, a small portion of the \$15 million originally awarded by the jury.³⁷ The Wisconsin Court of Appeals upheld the verdict in Mayo's case, overturning the state's \$750,000 cap on non-economic damages.³⁸ The court held that the cap placed on non-economic damages "violated the equal protection rights of severely injured patients" because the "cap always reduces non-economic damages only for the class of the most severely injured victims."³⁹ Limits on non-economic damages present a number of constitutional issues and have

²⁹ Mayo v. Wis. Injured Patients & Families Comp. Fund, 901 N.W.2d 782, 785 (Wis. Ct. App. 2017).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 785–86.

³³ *Id.* at 786.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Corriher, *supra* note 1.

³⁸ *Id.*

³⁹ *Id.*

been struck down on multiple occasions following state constitutional challenges.⁴⁰ “Equal protection, separation of powers, and the right to trial by jury” have all been subjects of successful constitutional challenges regarding non-economic damage caps.⁴¹

Texas has a law that caps non-economic damages at \$250,000, similar to H.R. 1215.⁴² The Texas law also states that lawsuits involving wrongful death claims are limited to \$500,000 in “nonmedical” damages.⁴³ The Texas law mandates similar requirements to those of H.R. 1215 concerning expert evidence.⁴⁴ H.R. 1215 requires a lawsuit to be filed with an affidavit from an expert witness who meets strict requirements.⁴⁵ The bill states that only a doctor practicing or teaching in the same field and in the same state or a neighboring state can testify to a defendant’s malpractice.⁴⁶ In an interview with the Center for American Progress, a Texas resident claimed that she could not find an attorney following a misdiagnosed heart attack by an emergency room despite strong evidence that doctors missed this obvious diagnosis.⁴⁷ If H.R. 1215 passes Congress, patients all across the country will find themselves in a similar situation as those in Texas, and they will be left without representation in the judicial system.

C. Who Will Represent the Injured?

One section of the Protecting Access to Care Act entitled “Maximizing Patient Recovery,” has the polar opposite effect in practice.⁴⁸ This section of the bill provides limits on fees that attorneys can collect for representing victims of malpractice.⁴⁹ These limits, in addition to the strict expert witness requirements, make it economically impractical for attorneys to warrant

⁴⁰ Jared R. Love, *The “Soft Cap” Approach: An Alternative for Controlling Noneconomic Damages Awards*, 52 WASHBURN L.J. 119, 130 (2012).

⁴¹ *Id.*

⁴² TEX. CIV. PRAC. & REM. CODE § 74.301.

⁴³ *Id.* § 74.303.

⁴⁴ *Id.*

⁴⁵ Protecting Access to Care Act of 2017, H.R. 1215, 115th Cong. §§ 11, 13 (2017).

⁴⁶ *Id.*

⁴⁷ Corriher, *supra* note 1.

⁴⁸ *Id.*

⁴⁹ Protecting Access to Care Act of 2017, H.R. 1215, 115th Cong. § 4 (2017).

accepting medical malpractice cases.⁵⁰ While the title of this section indicates that it will offer patients a greater opportunity to recover damages in a medical malpractice case, this bill would make it significantly more challenging for victims of malpractice to find attorneys to represent them.⁵¹

In addition to the limit set on attorneys' fees that can be collected in medical malpractice cases, "any reduction in the amount of damages allowable threatens to make it more difficult for a plaintiff to file an otherwise meritorious claim."⁵² Plaintiffs' attorneys handle cases on a contingency fee basis and they advance expenses throughout a case.⁵³ Therefore, these attorneys are already selective based on the strength of cases they are willing to take on.⁵⁴ They are not able to recover costs when they lose a case and, thus, have little incentive to take on cases on which they do not strongly believe they can make significant earnings.⁵⁵ Medical malpractice plaintiffs' attorneys regularly turn down at least 80% of the solicitations for representation that they receive.⁵⁶ With damages caps in place as strict as those in H.R. 1215, attorneys' ability to afford to take on legitimate cases will significantly decrease.⁵⁷ Not only would the potential award from which a lawyer could extract his contingency fee be drastically reduced, but considering the high cost of litigation, economic damages alone will not be "high enough to exceed the expected value of the case."⁵⁸

A study analyzing the effects of tort reform on the filing of cases in court found that when a state adopts medical malpractice damages caps, there is a statistically significant drop of 23% in medical malpractice filings.⁵⁹ The study also found that in the aftermath of a damages cap's removal, case filings increased by 29%.⁶⁰ These limitations placed on attorneys affect all

⁵⁰ Corriher, *supra* note 1.

⁵¹ *Id.*

⁵² Lindenfeld, *supra* note 19, at 114.

⁵³ Carol J. Miller, *Medical Malpractice Noneconomic Caps Unconstitutional*, 69 J. Mo. B. 344, 349 (2013).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Scott DeVito & Andrew W. Jurs, "Doubling-Down" for Defendants: *The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 546 (2014).

⁶⁰ *Id.*

injured patients, as an otherwise meritorious claim may not be accepted from a purely financial standpoint. If a lawyer does not believe that he or she can make a profit from accepting a case, there is no incentive to do so; therefore, placing an extremely harsh burden on patients who are severely injured. If enacted, the so-called Protecting Access to Care Act will place this burden on severely injured patients, as attorneys will be forced to reject meritorious claims when they know that the cost of accepting the case will exceed the rewards from winning it.

III. WHO IS PUSHING MEDICAL MALPRACTICE REFORM?

“The United States has the most expensive healthcare system in the world, spending billions more dollars than any other industrialized nation.”⁶¹ In recent decades, health care providers and state law-makers have increasingly looked to address the rising costs of healthcare by placing limitations on the amount of damages allowable in medical malpractice lawsuits.⁶² State legislatures around the United States continue to pass laws that curtail injured patients’ ability “to hold negligent actors accountable.”⁶³ A constitutional amendment in Arkansas has been offered that would reverse rulings by the state supreme court that uphold a plaintiff’s right to a jury trial.⁶⁴ Kentucky has imposed a new law that compels a plaintiff to seek approval by a panel of health care providers before filing a medical malpractice action.⁶⁵ Large corporations that are frequently the target of these lawsuits, such as healthcare providers and insurance companies, have spent millions of dollars lobbying in favor of these laws.⁶⁶

As the bills specifically limiting non-economic damages in medical malpractice cases became increasingly more prevalent, a number of state supreme courts struck them down as unconstitutional on the grounds that they are broader than the Seventh Amendment right to a trial by jury.⁶⁷ For example, the Ohio Supreme Court reversed multiple tort reform bills in the

⁶¹ Lindenfeld, *supra* note 19, at 105.

⁶² *Id.* at 106.

⁶³ Corriher, *supra* note 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

1990s, but the state then saw a severe increase in corporate campaign funds shortly thereafter.⁶⁸ The Ohio Supreme Court later upheld a tort reform bill in 2007 that was comparable to the one it had struck down less than a decade before.⁶⁹ Ohio Justice Paul Pfeifer said in his dissent in the case, “Today is a day of fulfilled expectations for insurance companies and manufacturers of defective, dangerous, or toxic products that cause injury to someone in Ohio. But . . . this is a tragic day for Ohioans, who no longer have any assurance that their Constitution protects the rights they cherish.”⁷⁰ Patients all across the United States who have been victimized by negligent care from their healthcare providers can expect even greater uncertainty of whether their constitutional rights will be protected if the Protecting Access to Care Act passes Congress and becomes law.

The Protecting Access to Care Act of 2017 is not a completely new idea drafted by its creators. Conservative politicians typically favor shielding physicians who commit medical malpractice from liability.⁷¹ Physicians, therefore, support those conservative lawmakers with the hope that medical malpractice reform will result.⁷² The tort reform movement consumed state legislatures and public opinion as the twentieth century came to a close.⁷³ Large corporations that were frequently the targets of lawsuits contributed sizeable donations to “tort-reform groups and corporate advocates such as the U.S. Chamber of Commerce,” and in turn, those groups financed the campaigns of judges, “who then voted to uphold statutory caps on damages” and laws that limited citizens’ right to sue and right to a jury trial.⁷⁴ Before the onslaught of corporate campaign funding, judicial elections were not large productions and it was exceptionally rare to come across a campaign that would raise millions of dollars.⁷⁵ “In 1990 candidates for all state

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (citing *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 466 (Ohio 2007)).

⁷¹ Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice “Crisis,”* 23 STAN. L. & POL’Y REV. 477, 489 (2012).

⁷² *Id.*

⁷³ Billy Corriher, *No Justice for the Injured: Big Business Is Funneling Campaign Cash to Judges Who Allow Corporate Wrongdoers to Escape Accountability*, CTR. FOR AM. PROGRESS (May 2013), <https://www.americanprogress.org/wp-content/uploads/2013/05/NoJusticeforInjured.pdf>.

⁷⁴ *Id.*

⁷⁵ *Id.*

supreme courts raised around \$3 million in campaign contributions.”⁷⁶ “By the mid-1990s, candidates were raking in more than five times that amount.”⁷⁷ State Supreme Court candidates raised \$211 million from 2000 to 2009, more than two times the amount in the previous decade.⁷⁸ “Spending on television ads reached a record \$29.7 million in the 2012 election” and in 2012, the largest donor in Texas was a group that advocates for limiting accountability for negligence.⁷⁹ Large corporations are a major influence when it comes to legislation and that is no different when it comes to the Protecting Access to Care Act of 2017.

Medical malpractice reform has typically been a staple in the Republican legislator policy arsenal. As an illustration, Iowa Republican Congressman Steve King introduced H.R. 1215.⁸⁰ King defends the bill as an essential move for lowering spending on healthcare, and claims that healthcare spending is increasing in part due to doctors conducting unnecessary tests in fear of patients bringing lawsuits against them and further practicing defensive medicine.⁸¹ While King claims that his reasoning behind the bill is to decrease healthcare spending, the fact that major healthcare corporations could finance his future campaigns is an unavoidable truth and something that must be considered. If this bill is able to gain momentum and receive support from major health care providers and insurance companies, it could become a serious issue for those that have fought hard to keep tort reform at bay.

IV. MEDICAL MALPRACTICE REFORM MYTH

Proponents of H.R. 1215, and medical malpractice reform in general, claim that the benefits include a decrease in healthcare spending and physicians moving away from practicing defensive medicine.⁸² However, they tend to ignore one simple fact: when doctors and health care providers

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Kimberly Leonard, *House Passes Medical Malpractice Bill*, WASH. EXAMINER (June 28, 2017, 5:26 PM), <http://www.washingtonexaminer.com/house-passes-medical-malpractice-bill/article/2627374>.

⁸¹ *Id.*

⁸² Corriher, *supra* note 1.

are not held accountable for their malpractice, patients' safety becomes significantly more at risk.⁸³ A study conducted by Northwestern University examined different states that have imposed damages caps similar to the one in H.R. 1215, and found that the adoption of these caps "is followed by a broad increase in adverse patient safety events," an increase that averages between 10 and 15%.⁸⁴ The study's results are consistent with "classic tort law deterrence theory," which states that holding healthcare providers liable for medical malpractice forces those providers to pay closer attention to the quality of care issued to patients.⁸⁵ When the risk of liability for health care providers disappears, adverse events will increase severely.⁸⁶ Policies should reflect incentives for hospitals and physicians to prevent adverse events rather than the other way around.⁸⁷

The Congressional Budget Office estimated that H.R. 1215 would reduce government deficits, but the Office failed to consider the immense cost incurred by the victims of malpractice.⁸⁸ "Studies have shown that limits on damages have little effect on the cost of health care or the cost of medical malpractice insurance."⁸⁹ In 2003, Texas approved a tort reform law that limited medical malpractice awards and hampered injured patients' ability to bring lawsuits against health care providers.⁹⁰ Republican politicians maintained that physicians were providing fewer services to patients for fear of being sued and they promised that this law would lower health care costs as well as bring more doctors to the state.⁹¹ Since the enactment of this law in 2003, Republicans around the country use Texas as a model for tort reform.⁹² However, a study by University of Texas law professor Charles Silver and colleagues from Northwestern University and the University of

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform 3* (Nw. U. Inst. for Pol'y Res., Working Paper No. 13-xx, 2014), <https://business.illinois.edu/nmiller/mhec/Zabinski.pdf>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Corriher, *supra* note 1.

⁸⁹ *Id.*

⁹⁰ Ben Sherman, *STUDY: Texas Tort Reform Did Not Reduce Health Care Costs*, THINKPROGRESS (June 26, 2012, 5:10 PM), <https://thinkprogress.org/study-texas-tort-reform-did-not-reduce-health-care-costs-92b4d3e957de/>.

⁹¹ *Id.*

⁹² *Id.*

Illinois examined Medicare spending in Texas between 2002 and 2009 and found no evidence that capping medical malpractice payouts led to lower health care costs.⁹³ The researchers actually found a slight increase in medical tests performed.⁹⁴ A group funded by the healthcare industry, the Texas Alliance for Patient Access, asserted that tort reform resulted in 5,000 additional doctors in Texas following the enactment of this law.⁹⁵ However, “an unpublished study by the same group of researchers rejects that claim,” and affirms that the number does not reflect physicians who left Texas or retired, physicians who are not actively practicing and perform research or administrative work, and ignores physician growth statistically compared with other states.⁹⁶ After considering all these factors, the study found that “doctor growth has actually declined” in Texas since 2003.⁹⁷

A separate study published in *The New England Journal of Medicine* found similar results.⁹⁸ In that study, researchers studied how emergency-room care changed for beneficiaries in Texas, Georgia, and South Carolina; states that all passed similar laws regarding medical malpractice reform, compared with nearby states that did not enact such laws.⁹⁹ That study concluded that malpractice reform did not significantly change cost indicators such as “how often imaging was used to rule out problems, how much was spent on average and how many patients were admitted to the hospital.”¹⁰⁰

Tort reform is often labeled as an answer to frivolous medical malpractice lawsuits.¹⁰¹ Republican lawmakers continue to push this issue despite evidence that defensive medicine practiced by physicians accounts for, at most, 2 or 3% of U.S. healthcare costs.¹⁰² A study led by Michael B.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Aaron E. Carroll, *Malpractice Reform Won't Do Much to Reduce Health Spending*, N.Y. TIMES (Nov. 3, 2014), <https://www.nytimes.com/2014/11/04/upshot/malpractice-reform-wont-do-much-to-reduce-health-spending.html>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Michael Hiltzik, *New Study Shows That the Savings From 'Tort Reform' are Mythical*, L.A. TIMES (Sept. 20, 2014), <http://www.latimes.com/business/hiltzik/la-fi-mh-another-study-shows-why-tort-reform--20140919-column.html>.

¹⁰² *Id.*

Rothberg of the Cleveland Clinic and published in the *Journal of the American Medical Association* set out to discover the true impact of defensive medicine in the healthcare field.¹⁰³ The study found that out of the estimated \$2.7 trillion spent on healthcare in the United States, defensive medicine accounts for approximately \$78 billion, which comes to about 2.9%.¹⁰⁴ While \$78 billion is a significant amount of money, it constitutes a small portion of the overall health care spending.¹⁰⁵ Even if there was a tort reform bill effective enough to make that 2.9% go away, it would still likely create costs in other areas, such as a potential increase in malpractice “generated from the elimination of oversight exercised by the court system.”¹⁰⁶ However, speculation on the impact of a perfectly crafted tort reform bill is irrelevant at this point because the Protecting Access to Care Act of 2017 is far from claiming that title.

Frivolous lawsuits are not nearly as large an issue as Republicans and tort reform advocates make it seem.¹⁰⁷ Studies have shown that most of these “frivolous lawsuits” fail to produce any awards to the plaintiff, and in fact, the converse is the larger issue at hand.¹⁰⁸ Injured patients who are in need of compensation have a difficult time recovering any damages since it has become such a daunting task bringing a medical malpractice lawsuit.¹⁰⁹

Several studies have been conducted in the past twenty years that suggest injured persons are hesitant to initiate a lawsuit concerning medical claims.¹¹⁰ Tom Baker’s book, *The Medical Malpractice Myth*, “deconstructs a number of the assumptions made about medical malpractice plaintiffs.”¹¹¹ Baker estimates that there are anywhere between seven and twenty-five “serious medical malpractice injuries for every one medical malpractice lawsuit.”¹¹² Some researchers have claimed that the volume of tort litigation

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind “Tort Reform,”* 86 OR. L. REV. 533, 549 (2007).

¹¹¹ *Id.*

¹¹² *Id.*

is actually lower than it should be, contrary to the perception that there is too much litigation.¹¹³

A Harvard-based study of medical malpractice litigation found that only “eight out of 306 patients who experienced adverse events as a result of medical negligence ultimately filed suit.”¹¹⁴ Medical malpractice reform does not provide lower spending, more efficient doctoring, or anything else that advocates tend to promise. Bills such as the Protecting Access to Care Act of 2017 only detract from health care providers having to pay out to patients who have been severely injured, and they take away the rights of patients to find redress in a court of law.

V. BENEFITS OF MEDICAL MALPRACTICE LITIGATION

Proponents of medical malpractice reform have completely ignored the interests of those that laws such as H.R. 1215 impact the most, the injured patients.¹¹⁵ As law professor Jeffrey O’Connell has stated, concerning tort reform, “a ‘solution’ that merely further limits the amount or availability of compensation to injured persons is a questionable solution indeed. The *least* appealing way to reform the tort system is to make it even harder for injured parties to be paid.”¹¹⁶ Medical malpractice reform laws favor defendants and insurance companies, in addition to ignoring the resulting risks to patient safety.¹¹⁷ Most of the reforms that are enacted lessen the amount of litigation required to “police dangerous medicine.”¹¹⁸ Tort reforms have mostly been found to be unsuccessful due their focus on liability costs as opposed to “care related measures,” therefore, they do not prevent actual injuries from occurring.¹¹⁹

Medical liability litigation is a necessary component to keep patients’ safety amidst the highest concern of the health care system, as there continues to be a high level of adverse medical events across the country. Litigation

¹¹³ *Id.* at 550.

¹¹⁴ *Id.*

¹¹⁵ Barry R. Furrow, *The Patient Injury Epidemic: Medical Malpractice Litigation as a Curative Tool*, 4 DREXEL L. REV. 41, 44 (2011).

¹¹⁶ *Id.* at 44–45.

¹¹⁷ *Id.* at 49.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

can be effective towards deterrence when they are able to ensure the maximum number of meritorious claims possible.¹²⁰ Lawsuits affect both provider behavior, as the threat of liability will impact the behavior of health care providers, and patient choices, as consumers can better choose a provider using the public information concerning a physician's legal history.¹²¹ Medical negligence actions often result in hospital discipline, and multiple claims against a hospital "are useful evidence for discovering problematic physicians."¹²²

Lawsuits can be useful to optimize patient safety if utilized properly.¹²³ The functions of holding health care providers liable can be summarized in four values that exemplify its significance.¹²⁴ "Tort liability (1) reinforces good medical practice; (2) articulates new duties of care; (3) gives voice to mistreated patients; and (4) exposes obtuse organizations."¹²⁵ Medical malpractice litigation should be reinforced as a device for maximizing patient safety, and there should be greater incentives for providers to improve patient safety, unlike H.R. 1215, which offers health care providers no reason to focus on the safety of patients or provide a system of recourse for those patients that have already been severely injured.¹²⁶

The benefits of litigation are significant as lawsuits provide an added basis of pressure "toward institutional change," they provide a database for adverse events, and they allow for a process of shedding light on medical failures and "articulating new and necessary duties of care."¹²⁷ The Protecting Access to Care Act of 2017 would lead to a significant decline in medical liability litigation because there would be little incentive for attorneys to accept cases in which they would either likely lose or simply lose money. This decrease in litigation would further constrain injured patients' ability to hold healthcare providers that are responsible for those injuries accountable. Judicial decisions have imposed new duties on providers that H.R. 1215 would erase, but it is the responsibility of physicians to treat

¹²⁰ *Id.* at 54.

¹²¹ *Id.*

¹²² *Id.* at 55.

¹²³ *Id.* at 56.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 66.

¹²⁷ *Id.*

patients with respect, to fully disclose possible risks of treatment, and to generally place the patient's interests higher than their own.¹²⁸ The Protecting Access to Care Act competes with that responsibility and healthcare providers will be able to hide behind the curtain of this legislation to avoid accountability and further injure those individuals who have already been harmed enough.

VI. CONCLUSION

H.R. 1215, or the Protecting Access to Care Act of 2017, far from protects patients' access to care, but rather has the reverse effect. This bill, which was passed by the U.S. House of Representatives and is now awaiting a vote in the Senate, puts severe limits on injured patients' ability to bring a lawsuit.¹²⁹ If this bill is enacted, evidence shows that neither insurance premiums nor healthcare spending will decrease.¹³⁰ This bill is another example of lobbyists' involvement in pushing an agenda that does more damage to patient care than it does to protect it. The only parties benefiting from this bill would be healthcare providers who will now have no fear of liability, as medical malpractice lawsuits will significantly decrease. Medical malpractice litigation ensures that patients have a voice when they have been wronged, and the enactment of this bill would silence those voices.¹³¹ The Senate should make the right decision and prevent this bill from becoming law and further ensure that injured patients are not left behind while doctors and hospitals run rampant without fear of being held accountable for negligent and reckless behavior.

¹²⁸ *Id.* at 63.

¹²⁹ Corriher, *supra* note 1.

¹³⁰ *Id.*

¹³¹ Furrow, *supra* note 115.