

MALPRACTICE LAWS BENEFIT DOCTORS



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COLUMNIST CHARLES Krauthammer recently wrote that runaway medical malpractice verdicts are a root cause of high health care costs.

He was wrong. There was a health care affordability crisis in the 1930s, 1940s and 1950s which was addressed by enactment of Medicare and Medicaid. No one attributed the health care crisis then to lawyers. Changes in malpractice law since then have benefited doctors and hospitals far more than patients.

The law holds health care providers responsible for injuries they negligently cause to patients, just like it holds everyone else liable for their negligence. That law comes from the English common law, not any recent liberalization of U.S. law. To the contrary, the legal innovations of the last half century largely provide legal shields to health care providers that are denied the rest of us.

From a patient's perspective, the courtroom is a very, very uneven playing field when it comes to medical malpractice. Consider the following:

- In Virginia, as a typical example, there is an absolute limit of \$2 million on court awards in medical malpractice cases. Hence, if your future expected earnings are \$5 million and you are disabled or killed by medical negligence, your family can still recover only \$2 million from the doctor's insurance company. There is no such cap on court recoveries for any other class of professionals in America.

- It is illegal to file a medical malpractice case without an advance expert opinion that the health care provider was negligent. Getting that opinion costs money, sometimes lots of it. No other professionals enjoy that pre-suit legal protection.

- You must have a medical expert to testify in your case; otherwise, it's automatically dismissed. Such expert testimony costs between \$5,000 and \$25,000 each. Expert out-of-pocket expenses in a malpractice case can exceed \$100,000.

- Medical professionals circle the wagons in these cases, so, even if you can afford to hire the expert, you may not find one willing to go on the record. Doctors testifying against doctors are not popular in

medical societies. Remember, doctors live on referrals from other doctors.

- Judges are overly deferential to medical defendants because they lack the technical expertise of doctors. Consequently, the defense tends to get the benefit of the doubt at trial.

- Doctors do not have to disclose information like the rest of us. Their so-called peer review malpractice investigations on allegations of malpractice cannot be subpoenaed because doctors' lobbyists have changed the law to put a standing gag order on medical negligence investigations. Thus, the patient is denied information about his own case.

Independent studies reveal nearly 200,000 patients die each year because of medical negligence. That's about 400 percent higher than the death rate from automobile accidents and many times the American casualty rate in any 20th century war. Given these facts, it is hard to see how so-called tort reform (making it more difficult for patients to recover in court for negligence) is needed.

Further, it is a myth that patients' legal fees for frivolous cases drive up health care costs. The patient's lawyer is almost always paid on a contingency fee basis, meaning he gets paid only if he wins. He has no incentive to bring a frivolous claim because frivolous claims almost always lose.

By contrast, the doctor's lawyers, bought and paid for by insurance companies, have a direct financial incentive to throw up frivolous defenses. They are paid by the hour whether they win or lose, no matter how frivolous the defense. The system encourages the doctor's lawyer to engage in frivolous litigation.

Thus the perversity of Mr. Krauthammer's logic that frivolous suits by trial lawyers are a significant factor in the cost of health care. More likely, they are a significant factor in putting a cap on the shamelessly horrendous rate of medical malpractice in this country.

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