Medical Malpractice: Myths and Realities

Two major goals of this website are to provide some transparency to medical costs and to dispel some of the many myths about these costs. In a way the second goal may be more important. If most people are misinformed about the cause of a problem then the solutions they propose are likely to be equally misguided. This brings me to the subject of medical malpractice and how much it really costs.

Whenever I ask anyone “how much do you think I pay for my malpractice insurance?” their answer never fails to amuse me. People often guess that I pay anywhere from $30,000 to $150,000 per year (as if I could afford that). When I tell them what I actually pay, they’re usually shocked and some people have even gone so far as to tell me I must be wrong. I write the check each quarter so I know how much it is. Well, seeing is believing, so here is my malpractice bill for all of 2015.

That’s right, $4,926.63 for the whole year! (It says $5025.63 because they want a voluntary $99.00 yearly PAC contribution that they add to the bill.) This is the fifth straight year that I’ve paid less than $5,000 for my malpractice and my premiums have been as low as $3,000 for the year.

So, why so little? If the cost of medical malpractice is breaking the back of healthcare in this Country, why is my bill so low? Is it because I’m such an outstanding doctor that my insurance provider long ago
recognized that I would never be sued? Well, I’d like to think that were true but, no. Here’s how much other doctors in my community pay for medical malpractice insurance in 2015:

The nephrologist who has an office one floor below me pays about $4,980 this year; $54 a year more than I pay and she runs a dialysis unit.

A pulmonologist I work with pays $6,342 this year, an ophthalmologist less than $7,000, emergency room physicians: $11,000-$12,000 this year, anesthesiologists: $12,000-$14,000 this year, surgeons (including orthopedics) $20,000-$22,000 this year and Ob/Gyn about $34,000 (obstetrics always has the highest malpractice premiums).

You can see from those amounts that medical malpractice premiums aren’t bankrupting me or any of my colleagues. But that just covers the area where I practice. What about the rest of the country? Is medical malpractice driving up medical costs elsewhere in the US? Lets examine the data.

A really good source for medical malpractice claims data is the National Practitioner Data Bank which posts data on all paid medical malpractice claims since 2003. A summary of the data for the US as well as for each individual state is here. As the following graphs show, both the number of paid medical malpractice claims as well as the total amount paid on these claims has been dropping steadily since 2003

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**Figure 1: Total number of Paid Medical Malpractice Claims for the United States from 2003-2014 for All Health Care Practitioners Combined as Well as for MD/DOs Only**
Figures 1 & 2 show that there were just over 15,000 paid malpractice claims against MDs and DOs in 2003. By 2014 that number had dropped by more than 40% to less than 8,900 paid claims. The total amount spent on those claims has also dropped by about 27%.

It’s important to note that the decline in the cost of medical malpractice hasn’t been even throughout the US. There are still several regions in the US where medical malpractice is relatively expensive. For example, one fifth of all paid medical malpractice claims occurred in New York each year since 2003 and nearly half of all paid claims in 2014 occurred in just six States. That said, even in states with the highest medical malpractice costs, the total number of paid claims and the amount paid on them has been dropping each year.

Now this should be good news for doctors everywhere. Fewer paid malpractice cases and lower overall malpractice costs have long been the AMA’s solution for rising health care costs in the US. It appears as though they’re winning this battle so, why aren’t we hearing more about this?

Possibly because health care costs in the US have risen considerably since 2003 in spite of the drop in medical malpractice costs. That would appear to deflate one of the main arguments that’s been used against medical malpractice: That it’s a major factor in why health care costs so much in the US.

In fact, the total amount spent in the US for medical malpractice (including the amount spent by hospitals as well as legal costs) was estimated to be about $10 billion in 2010. We can assume it’s less than that now. But even if it’s the same amount, $10 billion is only about 1/3rd of one percent of the $3 trillion total spent on health care in the US in 2013. That’s hardly a huge factor.
Defensive Medicine

Now, many doctors will tell you that medical malpractice is a problem even if it’s not about the money. Any doctor who has been sued for medical malpractice will tell you that it was a humiliating and degrading experience even if they won their case. This is why doctors will often recoil at even the mention of medical malpractice.

That brings us to the subject of defensive medicine. As I’ve shown, the direct cost of medical malpractice is a negligible fraction of overall health care costs in the US. Many have countered that fact by saying that doctors are so terrified of being sued they’ll often order batteries of unnecessary tests on patients and make unnecessary referrals in order to avoid lawsuits. It’s these unnecessary tests that drive up our health care costs, not the direct cost of medical malpractice.

This is an interesting argument, and one that’s hard to prove either way. After all, what do we really mean when we say a test was unnecessary and why do doctors order such tests? It’s safe to say that no doctor has ever been sued simply for not ordering a test that a patient wanted. Doctors can get sued for not ordering tests that would have detected a real problem, but that’s because that really is malpractice.

So, why are doctors ordering so many unnecessary tests and how much do these tests really cost? To try to address the second question, Jackson Healthcare; a medical staffing service, surveyed more than 3,000 physicians in 2009 and 2010 on the subject. They asked doctors how much they thought was spent on defensive medicine and these doctors guessed that it was about $650-$850 billion a year! Their breakdown of costly and unnecessary orders included unnecessary surgeries, diagnostic tests, hospitalizations and prescriptions.

I admit, $650-$850 billion a year is a lot of money to be wasted on such foolishness. To put this in perspective, the entire combined revenue for all hospitals in the US in 2010 (the year this study was published) was about $815 billion. It should be noted that much of the defensive medicine cited appears to have been done in hospitals (hospitalizations, surgeries and diagnostic tests). Even so, the doctors surveyed guessed that the amount spent on this defensive medicine somehow exceeded the total amount all hospitals in the US managed to collect for everything they did, defensive or otherwise. How is that possible?

This study serves to underscore a real problem in health care that I’ve mentioned elsewhere: Doctors really have no clue what anything in health care actually costs. We don’t have to pay for any of the tests or procedures we order, so any guess a doctor makes about the cost of these tests are likely to be wildly inaccurate.

Another more sober estimate on the cost of defensive medicine in the US was done by the Blue Cross Blue Shield association. Blue Cross and Blue Shield are health insurance providers so they actually do pay for some of this defensive medicine. They estimate that defensive medicine costs about $45.6 billion a year, which is still a lot of money, but only a small fraction of the amount doctors guessed that it cost.

The estimate by Blue Cross Blue Shield does sound more reasonable than the one made by doctors, but even this guess deserves of bit a scrutiny. After all, we still haven’t clearly defined an “unnecessary test” or provided a good explanation for why doctors are ordering them.
Doctors order medical tests in order to detect a disease that might not be detectable simply by examining a patient. Standard screening tests, like mammograms or colonoscopies, are routinely done on healthy people but most other medical tests are performed because a doctor is worried that the patient might have an illness that a test could detect. Early detection of a disease can make treating that disease much easier and might even save a patient’s life.

Here’s the problem: Doctors aren’t clairvoyant. We don’t have any special psychic powers that will tell us exactly who might benefit from which medical tests. Instead we rely on protocols and our protocols do provide reasonably good guidelines for when we should order certain diagnostic tests on a patient. Unfortunately, protocols aren’t always right because diseases don’t always take the time to read the textbooks we read.

Most practicing physicians have been faced at some point with a patient who’s disease defied the protocols. Such patients don’t show any of the classic signs or symptoms of their disease, causing doctors to miss important opportunities to diagnose and treat them as early as possible. Whenever this happens, the doctor will feel blindsided and a lot less certain when dealing with future patients. No doctor wants to miss an important diagnosis and this is true even if there were no malpractice attorneys.

It’s the uncertainty doctors feel when dealing with potentially life threatening conditions that probably makes them so defensive. If a doctor is worried that he might be missing something in a patient who “feels ill” for no clear reason, he’s likely to order another test just to be sure. If the extra test isn’t part of an established protocol, the doctor can just blame the lawyers. Everyone is used to hearing that excuse, so it works.

If defensive medicine really were exclusively about the fear of malpractice then it should be easy to show that, in the states with high malpractice costs, far more medical tests and procedures are done. Since no such association has ever been made, we can assume it doesn’t exist.

**Tort Reform**

As I’ve said throughout this section, medical malpractice costs have dropped precipitously over the last twelve years. The question is, why have they dropped so much in recent years. Is it because of all the tort reform laws passed in the last decade? By 2013, 33 states in the US had some form of active tort reform law aimed at limiting the cost of medical malpractice. How much of an impact have these laws really had?

One way to answer that question is to compare the difference in medical malpractice costs between the States that have tort reform laws aimed at limiting these costs and the States that don’t have such laws. If Tort reform laws are the main factor driving down medical malpractice costs, then the difference should be obvious; States with tort reform laws should have, on average, much lower malpractice costs than States that don’t have such laws.

To see if this were the case, I made two lists ranking each State by their per capita medical malpractice costs against physicians in 2013 and 2014. I calculated per capita malpractice costs by dividing the total in paid medical malpractice claims against doctors for each State in 2013 and 2014 by the State’s population for those years. I included on these lists what, if any, tort reform law aimed at reducing medical malpractice costs each State had those years.
The result was rather surprising. Of the 33 states that had any sort of active tort reform law in 2013, 16 had per capita malpractice costs that were above the median, 16 were below the median and Oregon had the median amount. It would be hard to have demonstrated less of an effect that year. The list for 2014 yielded similar results with 15 States that had active tort reform laws having above median medical malpractice costs and 18 States with below median costs.

More of a difference could be shown for States that had really strict tort reform laws, like a non economic or total damage cap of $500,000 or less. Non economic damage caps have long been seen as the most effective way to limit medical malpractice costs. These caps limit the amount plaintiffs can get compensated for the “pain and suffering” they endured as a result of medical malpractice, which is a far more subjective amount than, say, lost wages.

Since pain and suffering is very subjective, doctors have argued that juries will often inflate these awards any time they’re angry at a defendant. This encourages malpractice plaintiff attorneys to resort to a lot of unnecessary theatre in an attempt to get juries to really hate defendants.

If you just consider the States that have a $500,000 or less cap on total or non economic damages, nine out of 22 States with such caps had above median per capita medical malpractice cost in 2013. In 2014 eight of the 22 States with such caps had per capita malpractice costs that were above the median. That’s more of a difference than was shown with all States that had tort reform laws, but still more than one third of the States with these very strict caps had above average medical malpractice costs each year.

Looking at medical malpractice trends in individual States doesn’t make the case for tort reform much clearer. States like Texas, Florida and Ohio saw dramatic drops in their medical malpractice costs after passing laws that capped non economic damages. But Massachusetts and Louisiana have similar caps yet continue to have rather high medical malpractice costs.

The cases of Illinois and Missouri are even more confusing. Illinois passed a law in 2005 that capped non economic damages in medical malpractice cases at $500,000. After the law was passed, malpractice costs began to drop in that State. In 2010, the Illinois State Supreme Court declared the law unconstitutional. Ever since that law was overturned, medical malpractice costs in Illinois…have continued to drop. They dropped by more than 30% in Illinois after their tort reform law was overturned.

Missouri has a similar story to Illinois when it comes to medical malpractice costs and tort reform laws. Missouri also passed a law in 2005 capping non economic damages in medical malpractice cases at $500,000. This law was overturned by the Missouri Supreme Court in 2012. In 2011, the year before the law was overturned, Missouri had their highest medical malpractice costs in more than a decade. The year after the law was overturned, medical malpractice cost dropped significantly in Missouri.

Add to this the fact that there were dramatic drops in medical malpractice costs in Delaware and Iowa without any tort reform laws. Or that Minnesota and Vermont have among the lowest rates for Medical Malpractice per capita in the US (again without any need for tort reform) and the case for tort reform laws becomes very murky.

Tort reform laws did appear to have some effect on the amount medical malpractice costs dropped in States that have such laws. All 33 states that had active tort reform laws in 2013 saw the total paid in claims against their doctors drop by about 29% between 2003 and 2013. That’s somewhat more than the 24% drop in the cost of medical malpractice claims for States that didn’t have tort reform laws in 2013.
By 2014 the difference was somewhat more pronounced. The States that had active tort reform laws had dropped by 31% versus only a 20% overall change in medical malpractice costs from 2003-2014 seen in States that didn’t have tort reform laws. Again, the States with stricter tort reform laws like a $500,000 non economic damage cap saw bigger drops in medical malpractice costs over the twelve years.

So tort reform laws appear to have had some impact on the cost of medical malpractice in the US, but the effect is modest at best and they’re obviously not the only factor in reducing these costs. Also, even very strict laws aimed at reducing medical malpractice costs appear to be ineffective in certain States (e.g. Massachusetts, Louisiana). But most importantly, a 27% drop in medical malpractice costs in the US has coincided with a 64% rise in overall health care costs. Clearly, tort reform laws have done nothing to reduce overall health care costs and are only partly responsible for reducing medical malpractice costs in the US.

Sources


http://www.npdb.hrsa.gov/resources/npdbstats/npdbStatistics.jsp

http://truecostofhealthcare.org/medical-malpractice-malpractice_statistics


Tort Reform Tables


