2018 SYMPOSIUM NOTE: ARE APOLOGY LAWS AND TORT REFORM HELPING OR HURTING?

I. PROFESSOR KIP VISCUSI: MEDICAL MALPRACTICE REFORM: WHAT WORKS AND WHAT DOESN'T

Addressing whether apology laws reduce medical malpractice liability risk, whether damages caps are effective, and whether other laws have an impact on medical malpractice, Professor Kip Viscusi began by stating that many years ago the debate about medical malpractice reform was much more ideological. Even though there have been more empirical studies, scholars still disagree about what to do with the results. This disagreement became apparent as the other panelists and audience members complicated the discussion.

Professor Viscusi discussed the viability of tort reforms by focusing on the stability of insurance markets and the mobility of physicians. For Professor Viscusi, predictable and stable insurance markets, deterrence of medical errors, and mobility of physicians to all regions, including rural areas, were indicators of successful tort reform. Professor Viscusi stated that noneconomic damages caps had been very successful. Specifically, Professor Viscusi used quantile regressions to show that insurance firms that previously suffered the largest losses in terms of profitability benefitted the most from tort reforms, especially noneconomic damages caps. Later in the panel, Professor Hyman expressed a similar belief that noneconomic caps were creating less cases and less payout per case, but that it was also important to consider other consequences of caps.

Professor Viscusi then discussed apology laws, which make apologies inadmissible in medical malpractice lawsuits and in some states, exclude statements of fault and liability. Of the thirty-eight states that have enacted some form of apology law, thirty-three exclude the actual apology, but not other statements of fault or liability. The first apology law was enacted in Massachusetts in 1986 and many more states adopted similar laws in the early 2000s. Professor Viscusi also discussed competing views on the psychological effects of apologies. First, it was posited that an apology would assuage patient anger and make them less likely to sue. However, others pointed out that such an apology could be counterproductive by signaling to patients the possibility of a claim. Professor Viscusi pointed to empirical data that suggested that apologies did not effect whether or not surgeons were sued, but that when a nonsurgeon apologized the effects were actually negative and there was a higher probability of a lawsuit. But, the data cannot answer all questions and Professor Viscusi suggested that maybe the most important thing was to teach physicians to not be jerks.

On the relationship between medical malpractice and patient safety, Professor Viscusi found that increased liability decreased complications in four specific obstetric and gynecological procedures. Professor Viscusi also noted that while punitive damages caps did not impact the mobility of physicians, noneconomic caps were correlated with the mobility of doctors. On the cost of medical malpractice litigation, Professor Viscusi pointed to data showing that every dollar paid for legal fees would lead to about a dollar in patient payout. Professor Viscusi also stated that defendants' costs of litigation were about half of plaintiffs' costs of litigation. Professor Viscusi stated that some may view these costs as inefficiencies or transaction costs, but to lawyers these are income opportunities.

Finally, Professor Viscusi presented an early offer plan, which would further limit the amount of medical malpractice litigation. Under this plan, a plaintiff would make a claim and the defendant would have an opportunity to make an offer. If the plaintiff accepted the offer, the case would settle. If, however, the plaintiff turned down the offer, they could pursue a tort claim, but would need to show gross negligence to win. Moreover, Professor Viscusi stated that his plan would further limit medical malpractice litigation costs and provide a stronger incentive to settle.

II. PROFESSOR HYMAN: MEDICAL MALPRACTICE: SOME NEW THINGS WE'RE STUDYING

Professor Hyman began his presentation by showing an x-ray of a human pelvis. The x-ray revealed a pair of scissors that had been left in the pelvis. Professor Hyman went on to explain that this was not a typical medical malpractice case. Rather, the paradigmatic case was described as a person who was already sick, had seen many doctors, and had been hospitalized many times. Typical cases are challenging because issues like causation are more difficult to prove.

In the context of medical malpractice suits, there is also a medical review panel of three doctors that evaluates a case before they go to court. Two of the three doctors on the panel practice in the same specialty as the doctor being sued. Both the plaintiff and the defendant know about this review and can present the results to the jury.

Relying on data from Indiana, Professor Hyman went on to discuss the effect of legal counsel on the outcome of a case. Professor Hyman found over 2,000 attorneys or firms that had represented a plaintiff in Indiana. Of those firms, the top 1% handle about 30% of the cases. Professor Hyman also found that good cases, those the medical review board recommended for settlement and that won in court, were more likely to end up at a first-tier firm. Professor Hyman also highlighted that *pro se* plaintiffs are less successful with the medical review board and in court.

Comparing plaintiff's attorneys with defense attorneys, Professor Hyman pointed out that defense firms are bigger and handle more cases.

There were only about 781 defense firms compared to over 2,000 firms that had represented a plaintiff. Again, the top 1% of defense firms handle about 40% of cases and 38% of payouts.

Professor Hyman then evaluated the differences between where plaintiff's attorneys and defense attorneys graduated law school. He found that 86% of the plaintiff's attorneys in Indiana went to a lower-ranked law school in Indiana. Contrarily, 50% of defense attorneys went to school out of state and attended higher ranked schools than the plaintiff's attorneys.

Professor Hyman also found that first tier firms have more cases where the panel finds malpractice, but suggested that this may be more about inherent attributes of the case and less about who is representing the client. While there is more variation in representation on the plaintiff side, Professor Hyman found that a first-tier firm faces another first-tier firm in 83% of cases. The audience was left wondering how much success is attributable to the lawyer and how much is attributable to the case.

Finally, Professor Hyman stated that unadjusted comparisons are problematic. He also recognized that his data is only based on two states and only medical malpractice cases, indicating reasons for skepticism. Finally, Professor Hyman pondered: "Are successful plaintiff's lawyers lucky or good?" Maybe they are both—lucky in getting good cases and good at winning.

III. FULL PANEL DISCUSSION

Moderator Bruce Braley introduced plaintiff attorney Scott Eldredge and defense attorney Jessie Fischer, and asked for their reactions to the first two panelists' presentations.

Ms. Fischer has represented physicians in hospitals sued for medical malpractice for fourteen years and thanked the presenters for their different perspectives.

Ms. Fischer then explained the law in Colorado: a doctor can apologize and accept total responsibility for an error or bad outcome and it is not admissible at trial. She also pointed out that she had only had to file a motion to keep this information out of evidence once. In this way, Ms. Fischer challenged Professor Viscusi's finding that apology laws had lead to more litigation and payouts; rather, Ms. Fischer suggested that maybe the doctors in the study were not apologizing or that they were in fact being sued less. Ms. Fischer also stated that she saw people sue doctors more frequently when they felt they were not getting answers and wanted to be heard. Ms. Fischer stated that apologies help patients feel heard. If anything, Ms. Fischer suggested that maybe apology laws that do not cover admissions of fault do not go far enough in protecting doctors from liability.

Ms. Fischer also addressed the proposed correlation between doctors who are sued for malpractice and those who find themselves subject to disciplinary actions. Ms. Fischer stated that every experienced defense attorney has "problem-child" clients. Ms. Fischer also stated that in her experience patients who file complaints with the disciplinary board are usually angrier because they cannot bring a legal claim.

Finally, Ms. Fischer pointed to Colorado's Certificate of Review Statute[1], which prohibits lawsuits against licensed professionals without a certificate stating that the suit does not lack substantial justification. This essentially means that you have to consult with an expert before you can sue a licensed professional. Admitting that this may hinder some lawsuits, Ms. Fischer approved of such a statute and stated that others could go to the disciplinary commission to be heard.

Mr. Eldredge introduced himself as both an ordained minister and plaintiff's attorney. While Mr. Eldredge did defense work for a short time, he has been a plaintiff's attorney for about thirty-six years. According to Mr. Eldredge, there was not a liability crisis, but rather a malpractice crisis. Mr. Eldredge bluntly stated that he was not interested in the statistics. Instead, he said: "I represent people who have been seriously injured in medical malpractice." Specifically, Mr. Eldredge highlighted cases involving cerebral palsy and other brain damage in infants.

Mr. Eldredge also pointed out that the societal costs of injured people are likely higher than either the litigation costs or damages costs. To follow up on this point, a member of the audience asked the panelists whether they had done any research on the amount of social resources used by those injured in medical malpractice. When the panelists admitted that they had not conducted such research, the audience member suggested that this was the research they ought to be doing.

Next, Mr. Eldredge stated that he wanted an even playing field. He expressed respect for and friendship with many defense attorneys, but wanted an equitable system without caps, where the jury could simply decide the issue of damages. Responding to the question about whether successful plaintiff's attorneys are lucky or good, Mr. Eldredge stated that great cases make great lawyers and that the vast majority of cases are extraordinarily difficult and time consuming.

As if to illustrate the complexity of medical malpractice cases, moderator Bruce Braley asked Ms. Fischer and Mr. Eldredge to comment on the largest amount of money they had sunk into a case, not including attorney fees. Both attorneys expressed numbers in the many thousands.

Mr. Eldredge stated that medical malpractice is the fourth leading cause of preventable death in the U.S. Mr. Eldredge also commented that if your doctor is practicing medicine in your state because of a damages

1. COLO. REV. STAT. § 13-20-602 (2018).

cap, you should find a new doctor, and that your doctor should find a new profession. Against this backdrop, Mr. Eldredge stated that the death of a child or infant is worth $300,000 in damages, but that this recovery could not touch the cost of bringing the case to trial.

Concluding the panel, Mr. Braley asked the panelists for their opinions on a newly proposed Colorado bill called the Candor Bill, which he described as promoting an open discussion between health care providers and patients. Ms. Fischer did not know about the bill, but added that some practitioners already have standard offers for certain injuries. Mr. Eldredge was more familiar with the bill because he serves on the legislative committee. He said that he liked the idea, but needed to consider it more thoroughly. Professor Viscusi compared this bill to his early offer plan.

After the panelists finished, the audience made two comments. The first was to correct Mr. Edlredge's statement that medical malpractice was the fourth leading cause of preventable death in the U.S. According to this audience member, medical malpractice is second only to tobacco use as the leading cause of preventable death in the U.S. At least one member of the audience appeared concerned about the need to study the cost shifted to society after a medical malpractice award runs out. The audience was also left considering the suggestion that the inadmissibility of apologies and admissions of fault in court may increase litigation unnecessarily by making liability an issue when it has in fact already been admitted.

Ultimately, the audience was left with the impression that plaintiff's attorneys and defense attorneys have deeply held, and often opposing, beliefs about the impact of apology laws, damages caps, and the cause of medical malpractice litigation.

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