

Sam argues against tort reform, because the proponents of the reform have been using it to do away with consumer protectionism.

A CASE AGAINST TORT REFORM

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Upon his reelection to the office for a second term, as well as the victory of a larger majority of conservatives to congress, President Bush has put implementation of tort reform as a priority on his agenda for the next four years. Even though the supporters of tort reform claim that its main purpose is to prevent the filing of excessive amount of lawsuits against physicians and consequently decrease what the proponents of reform call “defensive medicine,” a more thorough investigation of the current situation of tort law as well as the interests behind tort reform demonstrate that the parties that are likely to benefit most from the reform are multibillion dollar corporations and insurance companies that insure physicians. In order to understand the main purpose and future effects of tort reform, it is first important review the concept and justifications behind the idea of tort reform.

The main concept behind the idea of tort reform is to place a cap on the number of lawsuits which can be filed by the victims of wrongful injuries, or the relatives of victims of wrongful deaths, to obtain economic compensation for non-economic damages. These non-economic damages include those such as pain and suffering, or mental disorder caused by a tragedy. A cap is also placed on the amount of economic compensation which could be obtained. President Bush has supported this cap at \$250,000. Tort reform is also going to limit the amount of compensation that individuals who have lost relatives and family members due to wrongful death could obtain from the damagers, including corporations and physicians.

One of the central justifications for the proposition of tort reform has been a supposed crisis, which the reform’s proponents refer to as the crisis of “defensive medicine.” This concept explains that “if fear of liability drives healthcare providers to administer treatments that do not have worthwhile medical benefits, then the current liability system may generate inefficiencies many times greater than the costs of compensating malpractice claimants” (McClellan 1996 p. 353). McClellan, who was appointed by president Bush to head the Food and Drug Administration and the Center for Medicare and Medicaid Services, believes that the current liability rules have caused physicians to prescribe many medical tests which are supposedly unnecessary, and the doctors only prescribe those tests to reassure themselves that their medical decisions are not going to harm the patients. Physicians see their correctly made medical decisions a factor which would eliminate malpractice lawsuits filed against them. McClellan supports his argument by stating, “The previous empirical literature is consistent with the hypothesis that providers practice of defensive medicine, although it does not provide direct evidence on the existence or magnitude of the problem” (McClellan 1996 p.357).

Another one of the arguments of the proponents of tort reform is the idea that the current liability system and excessive lawsuits are driving up the costs of healthcare. When physicians, supposedly under the pressure of tort liability system and possibility of future lawsuits, advise patients to take additional medical tests that supposedly are not

worthwhile, that would cause the medical costs for each patient to increase. This increase in costs of healthcare would consequently result in individuals in the society not being able to afford healthcare. Hence, the supporters of tort reform claim to support the reform because it would consequently result in bringing cheaper healthcare to the society.

The last major argument made by the proponents of tort reform is the claim that excessive lawsuits are driving doctors and healthcare providers out of business. They claim that many lawsuits which are being filed and won in courts of law have cost doctors millions of dollars. In addition, the tort reformers have pointed out that these lawsuits have also caused a drastic increase in the cost of malpractice insurance.

Speaking before hundreds of doctors and medical workers in a St. Louis suburb in January of this year, "President Bush called attention to a neurosurgeon on stage with him in the small auditorium. The doctor, the president said, was paying \$265,000 a year in premiums for insurance against malpractice claims." President Bush, who has been one of the major supporters of tort reform, has repeatedly confirmed his belief that costs of lawsuits have gotten out of hand. Furthermore, supporters of reform explain that those costs have gotten to levels, which have resulted in costs to doctors to exceed their benefit, hence causing them to be operating at a loss. This phenomenon, proponents assert, has been forcing many doctors to leave their professions due to high costs, causing lack of enough physicians in the healthcare system, which would consequently hurt healthcare users and society as a whole.

The advocates of tort reform in Washington have repeatedly attempted to present the reform in a manner that would make them appear as champions of the public and middle class. They have claimed that the sole purpose of tort reform is to bring better and cheaper healthcare to public while simultaneously protect physicians from what reformers consider "frivolous lawsuits." However, as one examines the evidence closely, it becomes apparent that research and data from various sources do not support the claims and theories made by the supporters of reform. In order to examine the claims of tort reform proponents, it is imperative to analyze them in light of existing relevant research, which is to be discussed.

Even though the proponents of tort reform have spoken about a so-called "crisis of defensive medicine," available researches which have been done indicate that the existence of such crisis is a myth. This fact is demonstrated by a report that was issued in 2003 by the General Accounting Office, which is an independent and non-partisan agency. This report found that there was no evidence that would support the idea that the threat of malpractice lawsuits contributes to the practice of "defensive medicine" (GAO 2003 p.12). In fact, contrary to the argument of the reformers, the GAO report explains that doctors financially benefit from additional medical tests. Hence the reason for excessive medical tests could be explained by physicians' own desire to maximize financial profit, rather than them being pressured by the tort liability system to advise additional tests.

Another major argument that is made by the supporters of tort reform is the presumption that malpractice litigations and lawsuits are driving up the cost of healthcare. The Congressional Budget office released a report in 2004 in which it recognized that legislation to cap damages in medical malpractice lawsuits would "do little to hold down health care spending" or eliminate the supposed practice of "defensive medicine" (The Committee for Justice for All). Additionally, evidence indicates that it is the insurance companies, HMOs, and pharmaceutical companies which are responsible for increases in

the cost of U.S. healthcare. In an article published by Jacksonville Business Journal, a report indicates that in the year 2003, top American HMOs reported doubling their profits (Jacksonville Business Journal 2003). However, despite the drastic increase in their profit, since the year 2000, health insurers have raised health insurance premiums in America by 59 percent.

Despite the assumption made by the reformers of tort liability system that implementation of tort reform would result in a decrease in physicians' malpractice insurance premiums, relevant data seems to indicate otherwise. In an article titled "Premium Deceit: The Failure of "Tort Reform" To Cut Insurance Rates," Robert Hunter and Joanne Doroshov criticize "tort reform" for not having any element that would force malpractice insurance companies to lower their rates upon the implementation of tort reform. Hence, the authors believe that caps will not have any meaningful effect in terms of lowering insurance premiums (Hunter 2002 p.2). This notion is more apparent in data gathered by the agency of Medical Liability Monitor, which demonstrate that on the contrary to the assumption of reformers, average premiums are 16 percent higher in states that have caps in their tort liability system (The Committee for Justice for All). In fact, many corporate associates and insurance executives have repeatedly expressed the idea that caps proposed by tort reform will not lower caps (Center for Economic Justice for All 2005).

Supporters of the idea that tort reform would result in lower premiums ignore two very important facts. The first one is that increases in malpractice insurance premiums are not the fault of greedy victims or their lawyers, but rather the insurance companies that pass along their investment losses to their policyholders. Historically, at the times when investment incomes have dropped, insurance premiums have risen. Not surprisingly, similar malpractice "crises" have also been brought up by firms and politicians during the same economic downturns as well (Americans for Insurance Reform 2002 p.4). The second fact is that as opposed to other brands of insurance, malpractice insurance companies do not have experience-based coverage. Therefore they do not take into account the qualifications and experience of specific physicians. Hence, many good doctors pay higher insurance rates because of a few negligent doctors that cause injury through malpractice. Therefore based on these two facts, the assumption that caps will lower insurance premiums has no substance or support.

Having established the lack of any connections between caps and increase of insurance premiums, it is important to investigate the real effects which tort reform would have on physicians. In October 2004, two journalists for the Wall Street Journal, Rachel Zimmerman and Joseph Hallinan, wrote a report titled "As Malpractice Caps Spread, Lawyers Turn Away Some Cases," in which they explored the real benefits of caps to physicians. In this article, authors assert that caps are not intended to give doctors financial relief from such factors as high insurance premiums, but they are rather intended to immunize physicians from lawsuits (Zimmerman 2004). The reason that physicians want a \$250,000 cap on pain and suffering is that in cases where there is no economic loss, it would be very difficult for patients to find lawyers to take their cases. The reason for that happening is that malpractice cases can cost lawyers hundreds of thousands of dollars out of pocket to prosecute, with no guarantee of obtaining enough economic compensation to recoup incurred expenses. Hence by supporting tort reform, physicians are attempting to decrease incentives for lawyers to take cases where there has been no economic loss.

The assertion of the advocates of tort reform that costs of lawsuits are driving physicians out of business does not have support. According to Medical Economics Magazine, “on average, doctors spend 1 to 5 percent of their gross revenues on medical malpractice insurance premiums” (The Committee for Economic Justice). Furthermore, doctors earn hundreds of thousands of dollars a year just by charging attorneys fees for providing “independent medical evaluations.” These facts indicate that premium increases do not seem to have imposed any major financial hardship on physicians. In addition, it is appropriate to note that most of the doctors who are affected by high premiums are high-risk specialists – the ones who also have the highest incomes. Hence premiums are not likely to create much of a financial burden for them.

One argument made by the proponents of the reform which is worth analyzing is the assertion that the number of frivolous lawsuits as well as the amounts paid out in malpractice cases have drastically increased over the past few years. Even though those amounts have in fact increased, if we adjust for high rate of healthcare inflation, total compensations in malpractice cases remained the same until the year 2001 (Americans for Insurance Reform 2002 p.1). In fact, data released by the Pennsylvania state Supreme Court indicate that filings for malpractice cases decreased by nearly thirty percent across Pennsylvania (Nepa News 2004). As far as the number of cases that could be categorized as “frivolous” is concerned, it is important to note that many states have taken variety of legal measures, eliminating most lawsuits which could be categorized as such. For example Pennsylvania now requires victims to obtain what is called a “certificate of merit” from a physician of same field as that of the physician who has caused injury. In fact it is also important to note that according to a study by Harvard University, 4 out of five victims of medical negligence never file a lawsuit. Hence the notion that frivolous lawsuits have overwhelmed the physicians is simply unfounded.

One aspect of the tort reform which one needs to keep in mind is that its advocates base their beliefs on very few “frivolous” lawsuits, while completely ignoring a much larger number which represents real cases of individuals being hurt as a result of real negligence. A report indicates that as a result of preventable medical errors, 195,000 patients die per year in the United States alone (CNN 2004). That dramatically large number of wrongful death makes medical error the third leading cause of death in the U.S. following heart disease and cancer (Center for Disease Control). Hence, one is likely wonder what the total number of wrongful deaths and injuries per year caused by malpractice, faulty products, etc would add up to be. Despite the fact that proponents of tort reform have repeatedly undermined the importance of juries and lawyers in helping the victims of wrongful deaths and injuries receive fair compensation for their pain and sufferings, the real numbers such as the one reported here demonstrate how crucial is the role of juries and lawyers to hold responsible physicians and producers that cause these wrongful injuries and deaths.

Another major number which also appears to be shocking, but for being tragically low, is the cap of \$250,000 that tort reform places on non-economic damages. The reason that this number is much lower than it should be is that non-economic damages could be extremely painful and cause extensive suffering for its victims. For instance, one of such victims may have undergone extensive surgery and had parts of his organs removed, simply because his physician mixed up the MRI test result of two of his patients. Economic damages would be negligible because he can still work and earn a living,

therefore causing him to become eligible to receive only \$250,000 of compensation for such lifetime pain and suffering caused by negligence.

Following the analysis of the arguments of the proponents of tort reform, it is necessary to proceed to examine the main reasons and interests behind tort reform.

The nature of caps such as those proposed by the advocates of tort reform is in conflict with the constitution. The U.S. constitution reserves individuals' right to jury. The cap elements of tort reform however take away the constitutional right to have a jury to decide what is fair. One important criticism to make against the supporters of tort reform is that they have repeatedly underestimated the importance of legal system to assist victims of malpractice and negligence get the compensation they deserve. However one can't help wondering what reasons proponents of tort reform have to think that while juries are well qualified to sentence to death individuals they consider guilty, they cannot be trusted to decide on damages which they would find fair in malpractice cases. The most likely response to that observation is that in cases of death sentences, there are no HMOs and multibillion dollar insurance companies incurring losses. Hence it seems that the main reason which reform advocates are supporting tort reform is not because juries will not be fair in estimating damages, but rather because they usually will be.

Another important aspect of tort reform could be understood by looking at it as a part of a larger pro-business, anti-consumer pattern of behavior which has been shaping the decisions of many legislators. In an article published by Washington Monthly, titled "false alarm," Stephanie Mencimer has examined two important factors which have been promoting the myth of America's "lawsuit crisis": the media, and the GOP. Mencimer explains that the tort reform campaign by insurance industries and other multibillion dollar corporations is just the latest of such campaigns which started in the early 1950's. She explains that since that time, when the victims' lawyers succeeded in breaking some legal barriers that had previously protected the industry from responsibility for injuries caused by negligence, and opened jury polls to make them more representative of the general public, insurance industry has consistently supported any limitations to be put on victims and lawyers (Washington Monthly 2004). Hence it is critical to realize that the current tort reform movement which is shaping the policies of many legislators is not a new notion or one that HMOs and insurance companies have been neutral toward, but rather the reform campaign has been largely financed and supported by big business for the past fifty years.

Tort reform has resurfaced once again in the political arena and its campaign is being waged by HMOs, coalition of insurers and pharmaceutical companies, big business, rightwing political parties, and the president (Washington Post 2003). Chamber of commerce has also contributed its share to help this anti-consumer, anti-jury, and anti-lawyer campaign by stating in August of 2005 that it will help for advertisements suggesting "dangers" associated with having trial lawyers aligned with the White House (Bloomberg 2005).

Although many arguments have been offered to justify the necessity of tort reform, thorough investigation of existing evidence and research indicate that most of those arguments are statistically unsupported. As advocates of tort reform shape current policies of legislators, the most important point to keep in mind is that this reform is not designed to save the middle class from a "lawsuit crisis," provide the public with cheap and better quality healthcare, or help small businesses grow. But rather, this campaign is a

continuation of assault on consumers, victims, juries and trial lawyers, led by HMOs, multibillion dollar corporations, and insurance industry to weaken the tort liability system, in order to serve their economic and political interests.

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