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Tort reform: the pathologists' perspective

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Physicians who become ensnarled in malpractice litigation often feel that the tort system has treated them unfairly. This negative perception has fueled physician efforts to enact "reforms" intended to mitigate the damage that allegations of medical negligence currently have on both individual physicians and on the practice of medicine itself. Although physicians are generally enthusiastic about "reform," there is currently no definition that allows tort "reform" to be separated from related initiatives. Some physicians largely restrict the term to defendant-friendly changes in the rules and procedures governing the workings of the tort system, whereas others take a somewhat broader view. In the present paper, we have favored the broader approach to the topic, leading to a discussion of 30 measures that have been presented in the context of tort "reform." Although most of these measures involve changes in the complex rules governing the malpractice tort system itself (eg, capping jury awarded damages), our broader view of "reform" also includes attempts to exert influence on the tort system from the outside (eg, peer review of expert testimony) and measures designed to keep patient dissatisfaction out of the tort system (eg, apology for error). Some would argue for an even broader view of tort "reform" that would including measures for reducing the pool of dissatisfied patients. For example, trial lawyers have claimed that physicians have put far too much effort into "reforms" that reduce the legal consequences of committing medical errors, and not enough effort into "reforms" that would reduce the errors themselves. The latter point may or may not have some validity, but there is a natural demarcation between measures designed to align medical outcomes with patient expectations (eg, error reduction, better diagnostic technology) and others designed to improve the processes that resolve patient dissatisfaction. Only the latter meet our definition of tort "reform."

"Recurrent (malpractice) crises have exposed the rawness of physician antipathy toward attorneys and the legal system."
From 2005 JAMA article discussing the relations between attorneys and physicians.[1]

". . .we. . .have this awful, awful system. This is a terrible system."
William Plested III, MD, president of the American Medical Association, describing the tort system in a 2006 press interview.[2]

". . .the current system of medical malpractice litigation is expensive as a social policy and irrational as a compensatory mechanism."
Medical historian James C. Mohr, PhD[3]

"It appears that supporters of "tort reform" are rearing their ugly heads again, pumping volumes of rhetoric across the airwaves. Don't fall for the rhetoric."
From a template letter addressed to "Dear Legislator" appearing on the Web site of a Florida plaintiff attorney firm to respond to a legislative battle over capping noneconomic damages.[4]

"Tort "reforms" (or tort "deforms") are cruel laws that reduce the protections and rights our country provides to those who are injured by defective products, toxic chemicals, medical malpractice, and other wrongdoings."
Center for Justice and Democracy (CJ&D): Glossary of "tort reforms"[5]

"Reform" from the Latin *reforme* (re –'back' + forme –'to form') is one of the most common labels applied by advocates of any hoped-for administrative change. Whether it be tort reform, social security reform, tax reform, or some

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other type of "reform," opponents of "reform" can be positioned as being against the "amendment of what is defective, vicious, corrupt, or depraved."[6] Of course, for "reform" to be achieved without major conflict, the involved parties must share the view that the "reforms" are beneficial, or, alternatively, opponents must be too weak to prevent change. With regard to malpractice litigation, it is probably safe to assert that all parties would agree that an ideal tort system would quickly and fairly compensate harm due to medical negligence; that "frivolous" cases would be quickly and inexpensively dismissed; and that the same system would be an effective partner in the effort to reduce medical error. Unfortunately, beyond these few platitudes, powerful interest groups have such different and opposing views that even such limited shared goals are presently unattainable.

The lack of middle ground with regard to "reform" of malpractice litigation contrasts with other areas of the law (eg, patent infringement), where a consensus approach to change is possible. In patent cases, many of the litigants know that, although they will sometimes be in court as plaintiffs, in other actions they will be the defendants.[7,8] Therefore, participants are not locked into any particular posture. In contrast, in malpractice litigation, plaintiffs' lawyers will virtually never represent physicians, and physicians rarely are plaintiffs. As a result, trial attorneys consistently and strongly oppose any rule changes that might favor the defense, and they strongly support those that may weaken their opponents. Physicians are just as strong in their support of changes that make it harder to file a suit or collect a settlement or judgment.

If the rules governing the tort system were immutable, then legal rules would not be a source of conflict between physicians and attorneys. However, none of the rules has the absolute quality of a law of nature such as the speed of light, and none is the result of a scientific discovery, such as the relationship between the structure of a segment of DNA and the structure of a corresponding protein. For example, there are certain arbitrary restrictions on the time frame in which a patient can file a malpractice suit, just as there are certain arbitrary restrictions on the size of a golf ball. The malleability of legal rules creates an opportunity for conflict, and because the tort system is structured as a zero-sum game, any rule change automatically favors one side or the other.

Over the last four decades, as the tort "reform" movement has gained momentum, certain key initiatives such as caps on damages awarded by juries have come to symbolize "reform." However, it is important for physicians to recognize that even that "reform" has many different variations and different impacts on the functions of the tort system. Furthermore, the effectiveness of any given "reform" or package of "reforms" will be affected by details of the legal and economic context in which the "reform" is enacted.

Methods

Because of the huge size and somewhat unconventional nature of the topic of tort "reform," the authors based this presentation on their own experience, supplemented by articles from the scientific literature, newspapers, and magazines, as well as court decisions, state and federal statutes, and textbook chapters. To give the reader an idea of the scope of the topic, we would refer them to the results of searching the following data bases for "tort reform": PubMed, 288 articles; The New York Times, 448 articles between 1981 and the present; The Wall Street Journal, 505 articles between 1996 and the present; and Amazon.com, 1300 books and articles. In addition, the numerous groups that favor or oppose tort "reform" self-publish their own studies and position papers, providing another source of information. We make no claim to have reviewed all of this material.

In addition to these potential sources of information, there are relevant decisions from state and federal courts, as well as legislation at both state and federal levels that have a direct impact on malpractice litigation. The laws that govern the activities of each state's medical board can also be important. However, these various opinions and statutes are seldom the final word on any issue. Court opinions are challenged and sometimes overturned at a higher level; they may apply only in a certain jurisdiction; or they are narrowly tailored to a certain set of circumstances. Statutes can pass in one legislative body and be defeated in another; they can be vetoed at the executive level or overturned by the courts; and they are subject to modification by appropriate legislatures.

Tort "reform" initiatives

Physicians advocating tort "reform" have supported a broad spectrum of measures designed to change how patient perceptions of negligence are resolved. One way of classifying "reforms" is to divide them into three categories based on their major objectives. Although there is certainly some overlap, most can be assigned as follows: 1) those that lower the cost of dealing with a claim or a potential claim, ie, lower claim severity; 2) those that decrease the number of cases that result in a demand for compensation (lower claim frequency); and 3) those that bring final decisions regarding negligence closer to the scientific mainstream, making the decisions of the tort system more rational and therefore more predictable.

Category #1 reforms: lowering the cost of malpractice defense by decreasing claim severity (Table 1)

Claim severity is on a continuum that begins at zero, rises to "nuisance value," and then extends upward to the