

# The Medical Malpractice Myth?

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# The good and the bad

- Debunking important
- Good look at insurance market
  - Honest argument that doctors should pay more
- But evaluation of litigation studies selective
  - Pro-reform studies get tremendous scrutiny or ignored
  - Anti-reform studies taken at face value

# Type I and Type II

- Type I: failure to act (negligence?)
- Type II: too many procedures (defensive med.)
- Baker: defensive medicine concerns overstated
  - E.g., C-sections vary widely
  - But Harvard study shows even greater 40:1 variance of malpractice incidence within same jurisdiction
    - Why discount one, but not the other?
    - Why look for alternative explanations for defensive medicine, but not consider good-faith reasons for improvement?

# Type I and Type II

- Only evidence of Type I improvements is anecdotal
  - Book eager to explain away defensive med. evidence, but equally eager to attribute improvements to litigation fears, even when lawsuits came after reform
- We can't be at an inflection point: if incentives aren't increasing defensive medicine, they're also not solving Type I errors, and vice versa
- If incentives matter, they matter across the board

# No consideration of second-order costs

- >\$10 billion/year to attorneys
- Time spent in depositions and trial not spent with patients
- Baker proposals increase these administrative costs dramatically
  - Many more lawsuits
  - Many more administrative hearings
  - Two new layers of bureaucracy for adverse event disclosure
- But not “evidence-based reform”: will benefits justify these costs

# Are courts good decisionmakers?

- Lawyers don't think so
  - Harvard study litig'n files (Brennan NEJM '96)
  - Forum shopping pointless if juries are equal
  - Lottery litigation wouldn't happen if no outliers
- Outcome bias
  - Affects even experts: Caplan/Posner ASA
- ASA reform: 95% reduction in death; 40% reduction in insurance costs
- Merenstein (JAMA 2004)
- Book's counter-evidence weak
  - Federal juries aren't state juries
  - No consideration of outlier problem

# Legitimate arguments for caps

- Ex ante preferences of patients
- Unmoored damages encourages lottery litigation
- In terrorem effect on insurers
  - Possibility of bad-faith litigation if policy-limit settlement available and jury returns giant verdict
- Limits expense of cases to those with real economic damages

# Other

- Average malpractice insurance
  - Baker: \$12,000
  - ATLA: \$44,000
- Have malpractice suits increased?
  - No, relative to 1990
  - Yes, relative to mid-1950s
    - 1-in-7 lifetime chance of being sued
    - That's an annual rate for some specialties now

# Incentives

- Dr. Thomas Hurley of Illinois
  - 1000 risky spinal surgeries, 1 paralysis
  - Jury: \$2.3 million in damages
  - \$2,500/surgery surcharge: how many surgeries deterred?
    - Bigger damages easily imaginable, as is higher adverse event rate
- Is the proper incentive to stop performing the spinal surgery?
- If not, perhaps re-evaluate compensation goals.