

## Damage Caps and Access to Justice: Lessons from Texas

|   |     |
|---|-----|
| Introduction .....  | 636 |
| A. Why Texas?.....  | 636 |
| B. Texas—Because Access Depends on the Contingency<br>Fee .....                                   | 638 |
| I. So, What Do We Know About Texas?.....  | 639 |
| II. Reform, Damage Caps, and Texas .....  | 641 |
| III. Gatekeeping and the Business Model.....  | 646 |
| A. Gatekeeping.....   | 646 |
| B. The Business Model and the Plaintiffs’ Bar.....  | 649 |
| IV. Case Screening and Damage Caps: The Challenge for<br>Plaintiffs’ Lawyers in Their Words ..... | 655 |
| V. Are the Courthouse Doors Closing?.....   | 660 |
| A. Once Again in the Lawyers’ Words .....   | 660 |
| B. Evidence Beyond the Words of Lawyers .....   | 665 |
| Conclusion.....   | 671 |

*“We are removing the incentive that personal injury trial lawyers have to file frivolous lawsuits and run health care professionals out of business.”<sup>1</sup>*

---

\* Research Professor, American Bar Foundation.

† Executive Director, American Bar Endowment; Research Professor Emerita, American Bar Foundation.

The American Bar Endowment provides an annual, unrestricted grant to support American Bar Foundation research. The views expressed here are the authors’ alone.

<sup>1</sup> James Richard “Rick” Perry, Governor, Tex., Gov. Perry Speaks at Med Mal Bill Signing (July 11, 2003), <http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2003/speech071103.pdf>.

## INTRODUCTION

*A. Why Texas?*

The words above are those of Texas governor Rick Perry at the 2003 signing ceremony for a tort reform measure that placed a damage cap on noneconomic damages in health care cases (i.e., medical malpractice and nursing home cases).<sup>2</sup> Why open an article for a symposium on the Oregon Supreme Court's decision in *Horton v. Oregon Health Science University*<sup>3</sup> with Perry's statement? That decision, like Perry's statement, deals with damage caps. If we look past the political rhetoric about frivolous lawsuits and running health care professionals out of business, Perry's statement alludes to a very important issue relevant to the discussion in Oregon about damage caps—one not directly addressed in *Horton*. That issue is access to justice—or we should say, meaningful access to the rights and remedies the law provides.

In overruling two earlier decisions on state constitutional grounds in *Horton*, the Oregon Supreme Court opened the door for damage caps in the state. The court's decision dealt specifically with a damage cap in a case involving a state employee and a state entity. However, the breadth of the ruling's reach, it is fair to say, was left open with respect to caps generally. The court expressed no opinion about the constitutionality of damage caps in a situation unlike the one in *Horton*. In his opinion, Justice Kistler said, with regard to caps and the Oregon Constitution's remedy clause, “[t]hose cases are not before us, and we leave their resolution to the customary process of case-by-case adjudication.”<sup>4</sup> The discussion, in other words, will continue.

Governor Perry, in contrast, signed a piece of legislation duly passed by the Texas Legislature in 2003. The law imposed a hard damage cap (one not periodically adjusting for inflation) on noneconomic damages awards in a specific type of case.<sup>5</sup> Perry and the Texas Legislature had no state constitutional issues to worry about. Any such issues were efficiently swept away later that year by a controversial statewide referendum amending the Texas

---

<sup>2</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a)–(c) (West 2017). As shorthand, we will use the term “medical malpractice” as including both medical malpractice and nursing home cases.

<sup>3</sup> *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 376 P.3d 998 (2016).

<sup>4</sup> *Id.* at 225, 376 P.3d at 1030.

<sup>5</sup> § 74.301(a)–(c).

Constitution.<sup>6</sup> The amendment specifically allows damage caps, and importantly, it allows them “[n]otwithstanding any other provision of this constitution.”<sup>7</sup>

On its face, the legislation Perry praised does not bar medical malpractice suits, nor does it thwart formal access. However, the essence of his message is found in the reference to plaintiffs’ lawyers and their “incentives,” and what that message implies with regard to meaningful, worthwhile access to a legal remedy. Perry’s targeting of plaintiffs’ lawyers is significant because they are the civil justice system’s gatekeepers. They open the doors to the courthouse—or not. The doors will remain closed to many plaintiffs if the gatekeepers cannot play the role profitably. Changing the incentive structure is intended to ensure they cannot play that role profitably.<sup>8</sup>

Meaningful access, as opposed to formal access, requires a lawyer. In complex cases, such as malpractice matters, it is important to have a lawyer who has experience with this type of matter and the resources to handle it.<sup>9</sup> Such lawyers hold the key to the courthouse door because they provide meaningful access. Without lawyers willing and able to take on costly, complex cases, many plaintiffs are left without viable access to a real remedy. A layperson has no chance for success in a *pro se* proceeding. As one Texas trial court judge stated with regard to medical malpractice cases, “they won’t be able to come to the courthouse because they can’t litigate them

---

<sup>6</sup> See H.J. Res. 3, 78th Leg. Reg. Sess. (Tex. 2003); see also TEX. CONST. art. III, § 66(b); Bill Kidd, *Proposition 12 Appears to be Most Controversial Amendment*, TEMPLE DAILY TEL. (July 27, 2003), [http://www.tdtnews.com/archive/article\\_d1d015c9-8f71-5b3c-b79c-6c07d2d2e6da.html](http://www.tdtnews.com/archive/article_d1d015c9-8f71-5b3c-b79c-6c07d2d2e6da.html).

<sup>7</sup> TEX. CONST. art. III, § 66.

<sup>8</sup> On the idea of lawyers as gatekeepers, see HERBERT JACOB, *LAW AND POLITICS IN THE UNITED STATES*, 118 (2d ed. 1986); see also Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997); Joanne Martin & Stephen Daniels, *Access Denied*, TRIAL, July 1997, at 26. For a practitioner’s perspective, see Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, 2 LITIG. 27 (1976).

<sup>9</sup> Even in simpler cases representation is a necessity. A recent *Denver Post* article reported on an examination of legal representation—or the lack thereof—in housing court. It shows in such cases a party’s chance of any success without representation is virtually nil. See Jennifer Brown, *Denver Landlords Tried to Evict Nearly 8,000 Households Last Year. The Success Rate Largely Depended on One Factor: Attorneys*, DENV. POST (Sept. 15, 2017, 5:20 PM), <http://www.denverpost.com/2017/09/13/eviction-denver-renters-tenants-landlords-more-success-with-attorney/>. On the importance of representation in medical malpractice cases, see also Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1055–60 (2006).

themselves, that's impossible. I've seen a few *pro se* litigants; it just can't be done."<sup>10</sup>

*B. Texas—Because Access Depends on the Contingency Fee*

Perry's statement reflects a sophisticated understanding of the connection between the business side of plaintiffs' practice and access. It recognizes the importance of meaningful access and that it is not free. It is not free because lawyers—the gatekeepers—need to be paid; they need to pay their operating costs and make a living. Perry's statement also recognizes the fact that many, if not most, injury victims—especially where medical malpractice is involved—cannot pay a lawyer on an hourly basis while also paying the litigation costs. The only option available for most injured people to afford meaningful representation is to find a lawyer who will handle the case on a contingency fee basis.

In short, Perry's statement illustrates that the contingency fee—in practice—is about access to the full range of rights and remedies the law provides for those without the means to pay a lawyer to represent them. Professor Herbert Kritzer notes that, “from the perspective of the average citizen, contingency fees *are* about ‘access to justice’ through the mechanism of civil litigation, or the threat of civil litigation.”<sup>11</sup> What Perry is celebrating, in pointing to the demise of incentives, is that damage caps will make medical malpractice cases so financially unattractive that plaintiffs' lawyers—particularly the specialists who have built their practices on these cases—will not handle them.

Perry's statement recognizes the fact that lawyers working on a contingency fee basis must balance cost, risk, and reward across a practice's portfolio of cases if they are to stay in business.<sup>12</sup> They must choose cases carefully because if they lose, they receive nothing for their time and no reimbursement for the costs of the case. Adding damage caps changes that balancing, perhaps fundamentally if the cap

---

<sup>10</sup> See discussion *infra* Part I for an overview of our Texas research. Stephen Daniels & Joanne Martin, American Bar Foundation Texas Plaintiffs' Lawyers Project (2006) (materials on file with the authors). Unless otherwise specifically footnoted with a citation, all quotations in our article come from lawyers or judges we interviewed as a part of our research. Human subjects regulations and promises of confidentiality prevent us from identifying them or presenting them in way that would allow them to be identified.

<sup>11</sup> HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 254 (2004).

<sup>12</sup> See *id.* at 9–19. We rely heavily on Kritzer's insight throughout our discussion.

is set low. It does so because caps, in limiting damages, are functionally a limit on the contingency fee. Lawyers must factor this into their choice of cases, and limiting fees can limit meaningful access as lawyers decide what cases to take. Limiting damages in risky, expensive to prepare cases like medical malpractice is also a good way to curtail legal scrutiny.

In changing the incentive structure, the gatekeepers are clearly the immediate targets. However, we must keep in mind that they are not the ones who will really feel the pain. A plaintiffs' lawyer, interviewed as a part of our research in Texas, told us, "I wanna make sure that I'm clear about one thing, and that is the real victim in all of this is the consumer, the individual. It's not the lawyers . . . we're all fairly well educated and we're resourceful enough to come up with other ways to pay our bills and feed our families. And although our lifestyles may have taken a hit, we're not the victims in this."<sup>13</sup>

It is the effect of damage caps on meaningful access we will discuss here. We have been doing research in Texas on tort reform—including medical malpractice—and the idea of lawyers as gatekeepers, and our article draws from that work. Our research and its lessons offer a cautionary tale about damage caps, and those lessons can inform the discussion on damage caps in Oregon.

This Article is divided into five parts. Part I provides a short outline of our Texas research. Part II offers a brief overview of tort reform—including medical malpractice—with an emphasis on Texas. It provides a bit of needed context. Part III, a more substantive section, discusses the idea of plaintiffs' lawyers as gatekeepers and describes their business model, which is necessary for understanding the relationship between damage caps and access. This is followed by Part IV, a discussion of the case screening process. It is here, in how plaintiff's lawyers decide what cases to take and why, we see the practical connection between damage caps and meaningful access. Lastly, Part V addresses the question of whether the gates to the courthouse are narrowing, or even closing altogether for some injured people in the wake of damage caps.

## I

### SO, WHAT DO WE KNOW ABOUT TEXAS?

So, what do we—the authors—know about Texas, and how do we know it? The lessons from Texas offering a cautionary tale for

---

<sup>13</sup> See generally Daniels & Martin, *supra* note 10.

Oregon arise out of our research on plaintiffs' lawyers, their roles, the effects of tort reform on them, and ultimately the effects on access. Our research is an amalgam of a multifaceted series of research projects begun in the mid-1990s and that continue today. This research allowed us to systematically examine the Texas plaintiffs' bar and lawyers' practices along with changes in those practices as tort reform unfolded and progressed.<sup>14</sup> In saying "as tort reform unfolded," we mean to say that our research was framed by the politics of tort reform in Texas. Tort reform has been a key part of the rise of the Republican Party in Texas and its eventual capture of all branches of state government in the early 2000s.<sup>15</sup>

Anchoring our research are two key sources of information. The first comes from in-depth interviews with Texas plaintiffs' lawyers—100 completed between 1995 and 2000, 51 undertaken in 2005–06, and 5 done in 2012–13. These interviews captured comments and insights from plaintiffs' lawyers across the state. The interviews focused on lawyers' practices and their views on tort reform and the changing environment in which they work. A number of these lawyers were interviewed more than once at different points in time over the course of our research.

The second key source of information comes from two detailed surveys of Texas plaintiffs' lawyers. One was fielded in 2000 and the other in 2006. Each survey was sent to a statewide sample of plaintiffs' lawyers (lawyers with at least twenty-five percent of their business in contingency fee cases) and each involved a different sample of respondents. Like the interviews, the surveys focused on eliciting information about lawyers' practices and their views on tort reform and its effects. Because we wanted to explore changes in lawyers' practices generally, the surveys included a number of questions in common. But even though different samples were used, there were a number of lawyers who appeared in both samples and completed both surveys—the "repeaters." For this unique set of lawyers we can actually look at changes in individual practices.

We will draw from these sources in our discussion here, with special attention to the interviews. Sometimes the best approach is to

---

<sup>14</sup> We have written widely on the subjects of tort reform, plaintiffs' lawyers, and access to the courts. Most recently, Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445 (2016); STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE (2015).

<sup>15</sup> See DANIELS & MARTIN, *supra* note 14, at 31–69.

simply let the research subjects speak for themselves, and given the ways in which damage caps affect access, this is one of those times. Too much is lost in trying to merely summarize the balancing of the multifaceted factors that may open the courthouse door—or not.<sup>16</sup>

## II

### REFORM, DAMAGE CAPS, AND TEXAS

Concerns over medical malpractice litigation are a mainstay in the contemporary tort reform movement, but general concerns around medical malpractice have a very long history in the United States. The title of a 1990 book by historian Kenneth Allen DeVille—*Medical Malpractice in Nineteenth Century America*—itself illustrates this.<sup>17</sup> The contemporary concerns related to litigation, however, date to the 1970s, and those concerns brought the first of a series of state legislative efforts to change the rules surrounding medical malpractice. These efforts eventually became a part of a larger political movement for tort reform.

It is important in examining the various aspects of tort reform, like damage caps, to keep in mind that the movement is and has always been deeply political in nature. One of the most cogent definitions of politics is “who gets what, when, how.”<sup>18</sup> Tort reform has always been about whose interests the law will serve.<sup>19</sup> Writing over thirty years ago, Kenneth Jost, then the editor of the *Los Angeles Daily Journal* (a legal newspaper), stated the following, “[t]he current tort reform movement seeks not neutral efficiency-enhancing procedural

---

<sup>16</sup> See *id.* at 241–45 for the technical details of our research methodology. In brief, we chose Texas as a research site because Texas has a substantial, long-standing, and differentiated plaintiffs’ bar. It has experienced a forty-year history of increasingly intense tort reform activity that includes legislative actions and court decisions as well as lobbying efforts and public relations campaigns on the part of interest groups with national ties. Finally, Texas became the poster child for tort reform “success.” See *id.* at 31–69.

<sup>17</sup> Many of the major themes found in today’s debates over medical malpractice appear in his book—the fear and aggravation of malpractice suits, seen as frivolous; the idea of over litigiousness in this area; the idea that things are so bad that nearly every physician has been the victim of such suits brought by unsavory lawyers; and even the idea that the situation is driving doctors out of business and thereby threatening the availability and adequacy of health care services. KENNETH ALLEN DEVILLE, *MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA* 25 (1990). Turning to Governor Perry, “Because of the [2003] medical malpractice reforms . . . our hospitals and clinics will remain open to the patients who need them.” Perry, *supra* note 1.

<sup>18</sup> HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1st ed. 1936).

<sup>19</sup> On the politics, see DANIELS & MARTIN, *supra* note 14, at 2–30; see also WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

changes, but substantive legal revision to rewrite rules more in their [the reformers'] favor."<sup>20</sup>

The politics surrounding tort reform have become increasingly partisan. Writing in 2002, political scientist Thomas Burke noted the politics of tort reform are relatively straightforward. He said, "Groups aligned with plaintiffs fight groups aligned with the defendants . . . . [The] battles are thus highly partisan, with most Republicans on the antilitigation side and most Democrats lined up with the plaintiffs."<sup>21</sup> This polarization along party lines is clearly observed in Texas, and Perry's statement at the opening of our Article is simply one illustration. Other influential factors include the role of trade groups and lobbying organizations like the American Tort Reform Association and the U.S. Chamber of Commerce's Institute for Legal Reform along with their state and local affiliates. Such groups have been, and continue to be, active in Texas.

Burke identified three waves, or rounds, of tort reform—in the 1970s, 1980s, and 1990s. A fourth round subsequently occurred in the early to mid-2000s, after Burke's initial observations.<sup>22</sup> The impetus for the first round in the 1970s, Burke notes, was medical malpractice itself—and damage caps were a key aspect of this early effort. He found that "[b]etween 1975 and 1978, fourteen states . . . put monetary caps on damages," among other changes.<sup>23</sup> Most measures placed limits on noneconomic damages in medical malpractice cases ranging from \$250,000 to \$1,000,000. The State of Indiana took a different approach during this first wave and placed a cap on *all* damages in medical malpractice cases. In the estimation of one commentator reviewing these early activities, damage caps were among the most significant changes.<sup>24</sup>

Texas was among those states placing caps on noneconomic damages in medical malpractice cases.<sup>25</sup> The Texas cap, however, was struck down by the Texas Supreme Court on state constitutional grounds in 1988. Specifically, the Texas court decided the cap

---

<sup>20</sup> Kenneth Jost, *Polemics Won't Solve Insurance Crisis*, L.A. DAILY J., Dec. 9, 1985, at 2.

<sup>21</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 27 (2002).

<sup>22</sup> *Id.* at 31–32.

<sup>23</sup> *Id.*

<sup>24</sup> See Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 525 (1989).

<sup>25</sup> See Michael D. Morrison, *Texas Tort Law—2003: It Was a Very \_\_\_ Year*, 56 BAYLOR L. REV. 423, 453–55 (2004).

violates article 1, section 13, of the Texas Constitution. “All courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have a remedy by due course of law.”<sup>26</sup> This decision, in turn, was later rendered moot by the 2003 voter-approved constitutional amendment. As we noted earlier, the amendment specifically allows damage caps, and importantly, it allows them “[n]otwithstanding any other provision of this constitution.”<sup>27</sup>

The second nation-wide wave of “tort reform” began in the mid-1980s, and Burke notes this round covered more than just medical malpractice claims.<sup>28</sup> Damage caps were featured yet again, and not just for medical malpractice cases. “Between 1985 and 1988 sixteen [states] capped ‘pain and suffering’ damages. . . . In 1986 alone, forty-one of the forty-six legislatures that met passed some type of tort reform.”<sup>29</sup> Oregon was among those sixteen states and passed legislation limiting noneconomic damages. The Oregon Supreme Court subsequently declared the cap unconstitutional on state constitutional grounds.<sup>30</sup> However, the court later overruled these cases in *Horton*, apparently allowing caps again.<sup>31</sup>

The third wave of tort reform on a national level arrived in the mid-1990s, again involving a broad range of issues and not just medical malpractice. As recorded by Burke, “In 1995 eighteen states passed tort reforms, including extensive reform packages in Oklahoma, Illinois, Indiana, and Texas. Between 1995 and 1997 fourteen states limited punitive damages, thirteen modified their joint and several liability rules, and eight made significant changes in products liability law.”<sup>32</sup> In Texas, medical malpractice was again included, imposing strict filing requirements, including a \$5000 bond for each defendant named, along with new qualifications for experts.<sup>33</sup>

The fourth wave of tort reform came in the early 2000s, this time with more emphasis on medical malpractice. Among the states

---

<sup>26</sup> *Lucas v. United States*, 757 S.W. 2d 687, 696 (Tex. 1988).

<sup>27</sup> TEX. CONST. art. III, § 66(b).

<sup>28</sup> BURKE, *supra* note 21, at 32.

<sup>29</sup> *Id.*

<sup>30</sup> See *Smothers v. Gresham Transfer, Inc.*, 332 Or. 83, 86, 23 P.3d 333, 336 (2001), *overruled by Horton v. Or. Health & Sci. Univ.*, 359 Or 168, 376 P.3d 998 (2016); *Lakin v. Senco Prods., Inc.*, 329 Or. 62, 67, 987 P.2d 463, 467, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by Horton*, 359 Or. 168, 376 P.3d 998.

<sup>31</sup> *Horton*, 359 Or. at 254, 376 P.3d at 1046.

<sup>32</sup> BURKE, *supra* note 21, at 32.

<sup>33</sup> See Frank L. Branson, *Personal Torts*, 49 SMU L. REV. 1221, 1241 (1996).

implementing major medical malpractice reforms, were Texas (the 2003 legislation), Illinois, and Florida.<sup>34</sup> A key provision of the reforms in each of the aforementioned states was a stringent cap on damages. The damage caps in Florida and Illinois were subsequently struck down on state constitutional grounds.<sup>35</sup> As previously mentioned, as a result of the 2003 voter-approved amendment, constitutional issues in Texas were no longer relevant.

In Texas, Governor Perry made medical malpractice reform—and targeting plaintiffs’ lawyers—a major policy goal for Republicans during the 2003 legislative session. According to a *Texas Lawyer* overview of his agenda, a Perry spokesman said, “[t]he Governor believes med-mal reform is the key to reducing skyrocketing insurance rates for medical doctors . . . [and] also says that frivolous litigation is the reason for the premium increases.”<sup>36</sup> The overview also noted the focus on plaintiffs’ lawyers, stating the Governor’s agenda “takes aim at the plaintiffs’ lawyers—a group that will assuredly take plenty of hits from the Republican-controlled, tort-reform minded Texas Legislature.”<sup>37</sup> The key provision of the governor’s reform agenda was a \$250,000 cap on noneconomic damages in medical malpractice cases.<sup>38</sup>

That 2003 amendment referendum was a blunt, but very effective, mechanism for clearing away any state constitutional barriers to damage caps, and it was quite controversial.<sup>39</sup> Perhaps the most important opponent of the amendment was Deborah Hankinson, a Republican and former Texas Supreme Court Justice originally appointed to the court by then-Governor George W. Bush. Although an earlier supporter of tort reform, she became a key fundraiser,

---

<sup>34</sup> See Joseph Falk, Comment, *Resuscitating Noneconomic Medical Malpractice Damage Caps in Illinois*, 64 DEPAUL L. REV. 185, 185–86 (2014); R. Jason Richards, *Capping Non-Economic Medical Malpractice Damages: How the Florida Supreme Court Should Decide the Issue*, 42 STETSON L. REV. 113, 115–16 (2012); see also Morrison, *supra* note 25.

<sup>35</sup> See *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014); *Lebron v. Gottlieb Mem’l Hosp.*, 930 N.E.2d 895 (Ill. 2010).

<sup>36</sup> Lisa Whitley, *2003 Legislative Wish List*, TEX. LAW., <http://www.texaslawyer.com/id=900005379491> (last visited Dec. 19, 2017).

<sup>37</sup> See *id.* It is worth noting that plaintiffs’ lawyers were not among Perry’s or the Republican’s supporters.

<sup>38</sup> See Justice Nathan L. Hecht, *Foreword*, 46 S. TEX. L. REV. 729, 729 (2005) (Foreword to House Bill 4 Symposium Issue of *Texas Law Review*) for a basic overview of the 2003 legislation. He described the legislation as “among the most sweeping statutes the legislature has ever enacted.” *Id.*

<sup>39</sup> See Kidd, *supra* note 6.

spokesperson, and the treasurer for the major opposition group, Save Texas Courts. She was joined in her work with this group by another former Texas Supreme Court justice and Bush appointee—Republican James A. Baker.<sup>40</sup>

Given the significant issues at stake, Hankinson was troubled by the entire process. For her, the tort reform package and the authorization for the amendment's special election "went through the Texas Legislature with very little comment."<sup>41</sup> Most important for Hankinson, however, was the amendment's substance and what it would mean in practice.<sup>42</sup> Her concern was about the effects on access to the courts (the purpose of article 1, section 13, of the Texas Constitution).<sup>43</sup> According to Hankinson, the proposed amendment and any subsequent legislation "would be closing the doors to a great many citizens."<sup>44</sup>

In 2005, Hankinson told a journalist, "this amendment . . . wasn't designed to cut off bad—that is, frivolous—lawsuits; it was designed to cut off lawsuits by people with legitimate claims, by restricting access to the courthouse . . . [t]his tort reform went too far . . . I view this as something that deprives people of their constitutional rights."<sup>45</sup> Former Justice Baker agreed, arguing that the reformers had gone too far in allowing the legislature to limit damages. It would, in his view,

---

<sup>40</sup> See Mary Alice Robbins, *Big Names, Big Change: First Shot Fired Over Proposed Constitutional Amendment to Cap Damages*, TEX. LAW., July 7, 2003, at 1.

<sup>41</sup> Am. Bar Found., *The Fellows CLE Seminar: The Juice Isn't Worth the Squeeze: The Impact of Tort Reform on Plaintiffs' Lawyers and Access to Justice*, 24 RESEARCHING LAW, Spring 2013, at 7 (2013). The *Fellows CLE Seminar* article reported at length on a Fellows of the American Bar Foundation CLE Research Seminar, which was held on February 9, 2013 in Dallas, TX, during the 2013 American Bar Association Midyear Meeting. Drawing from a verbatim transcript of the CLE, it included details on the panelists' respective presentations and comments (see American Bar Foundation, *Fellows CLE Research Seminar*, February 9, 2013, on file with the authors). The panelists were Professor Stephen Daniels, former Texas Supreme Court Justice Deborah Hankinson, Professor Ellen Pryor, Professor Charles Silver, and attorney Carmen Mitchell. Legal journalist Mark Curriden was the panel moderator.

<sup>42</sup> *Id.* at 7–8.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 8. Hankinson found the date for the election especially troubling—"the first Saturday after Labor Day." *Id.* at 7. As a special election, she noted, turnout was likely to be low compared to the already scheduled November election in which "there were going to be some significant local elections in places like Houston that would've very much affected voter turnout." *Id.*

<sup>45</sup> Mimi Swartz, *Hurt? Injured? Need a Lawyer? Too Bad!*, TEX. MONTHLY (Nov. 2005), [www.texasmonthly.com/content/hurt-injured-need-lawyer-too-bad](http://www.texasmonthly.com/content/hurt-injured-need-lawyer-too-bad).

undermine the rights the framers of the Texas Constitution provided to citizens to have their disputes fully heard by the courts.<sup>46</sup>

### III

#### GATEKEEPING AND THE BUSINESS MODEL

##### *A. Gatekeeping*

What motivated two tort reform-supporting Republicans, such as Justices Hankinson and Baker, to express their opposition in the face of a measure deeply rooted in a major issue at the heart of the Republican agenda in Texas and one heavily touted by the Republican governor? Their concern should tell us something deeply important is at stake here beyond the partisan debates that have surrounded tort reform.

What motivates them is preserving the role of the gatekeepers and protecting against the loss of meaningful access. As experienced litigators who also served for years on the bench, they understand the practical importance of representation. In our view, this is an issue often lost in the political debates over the advisability and efficacy of reform measures, like damage caps. The rhetorical claims in the political debate favoring caps focus on keeping doctors in the state, lowering their insurance premiums, and improving health care.

These are precisely the issues to which Perry pointed in his 2003 signing statement for the Texas legislation enacting the cap. Because of malpractice reforms, he said, “our hospitals and clinics will remain open to the patients who need them . . . . By capping non-economic damages . . . we are taking strong action to lower malpractice insurance rates and keep doctors, nurses, and hospitals doing what they do best: providing health care to Texans in need.”<sup>47</sup> These are the kinds of matters—ones tied to availability of health care—Justice Kistler might see as the *quid pro quo*, or trade-offs, justifying caps—lower awards for some people that in turn benefit the people of Oregon generally.<sup>48</sup> For Hankinson and Baker, lower awards for some people are not the issue. It is the practical inability to get any award.

---

<sup>46</sup> See Robbins, *supra* note 40.

<sup>47</sup> Perry, *supra* note 1.

<sup>48</sup> Said Justice Kistler,

[T]he court has recognized that the reasons for the legislature’s actions can matter. For example, when the legislature has sought to adjust a person’s rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others, we have considered that *quid pro quo* in

As noted at the outset, the Texas legislation does not bar medical malpractice suits, nor does it thwart formal access to the courthouse. It is meaningful access that is at stake, and this requires not just any lawyer, but one who has the experience and the resources to pursue a matter like medical malpractice. Without lawyers willing and able to take on these cases, plaintiffs are left with the window dressing of rights with no real world worth. As one Texas lawyer bluntly told us in one of our research interviews, “Unless there’s a way to make money practicing law, rights don’t make any difference.”<sup>49</sup>

A study by law professors Charles Silver and David Hyman provides a simple Texas illustration. Using publicly available data on closed Texas insurance claims for bodily injury, Silver and Hyman found that across all lines of commercial liability insurance, claimants with lawyers received higher payments.<sup>50</sup> This finding is consistent with those we reported in an earlier article about medical malpractice matters in Wisconsin.<sup>51</sup> Parties without legal representation almost never received an award regardless of the merits of their case, while those with representation were more likely to receive an award. Those represented by the best lawyers—the medical malpractice specialists—were the most likely to receive an award (and receive the highest awards).<sup>52</sup> A recent article on plaintiffs’ lawyers and medical malpractice litigation in Illinois came to the same conclusions.<sup>53</sup>

Again, the only way for most people to afford representation, especially in a complex matter such as medical malpractice, is to hire a lawyer who will handle that matter on a contingency fee basis. The

---

determining whether the reduced benefit that the legislature has provided an individual plaintiff is “substantial” in light of the overall statutory scheme.

*Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 219, 376 P.3d 998, 1027 (2016). Interestingly, the Wisconsin Supreme Court explicitly rejected this kind of justification for a cap. *See Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 491 (Wis. 2005). A Wisconsin appellate court recently reiterated the *Ferdon* reasoning in striking a subsequent cap passed by the state legislature. *See also Mayo v. Wis. Injured Patients & Families Comp. Fund*, 901 N.W. 2d 782, 794 (Wis. Ct. App. 2017).

<sup>49</sup> *See generally* Daniels & Martin, *supra* note 10 on our research interviews and citation.

<sup>50</sup> Charles Silver & David A. Hyman, *Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims*, 37 *FORDHAM URB. L.J.* 357, 364 (2010).

<sup>51</sup> Daniels & Martin, *supra* note 9.

<sup>52</sup> *Id.*; *see also* Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* (Am. B. Found., Working Paper No. 9210) (1992).

<sup>53</sup> David A. Hyman et al., *Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois*, 13 *J. EMPIRICAL LEGAL STUD.* 603 (2016).

costs of handling these types of cases are far too great, often six figures to cover investigation, experts, depositions, and the other costs of litigation. Even the cost of the required bond for each named defendant would be an insurmountable barrier for most plaintiffs to face alone. To illustrate, one experienced medical malpractice litigator told us, “I think the most I’ve had [invested in a medical malpractice case] was around \$600,000 or \$700,000. We prevailed on that one, thank goodness.”<sup>54</sup>

In summarizing the importance of the contingency fee arrangement for access, a different Texas lawyer we interviewed explained,

ninety percent of the people out there make their living, they pay for their kids to go to school, they pay to take care of their kids, they pay for their mortgage, they pay for their one or two cars, and at the end of the month, they may have \$100 left over if they’re the lucky ones. . . . And so, for someone to have the ability to go hire a lawyer on anything other than a *contingency*, you know, I think it’s a fiction.<sup>55</sup>

Another lawyer said, it “is a shame for most of the people out there who just—they just can’t hire a lawyer on an hourly basis and you’ve got no ability to get anybody to represent you because you have no money . . . You know, it closes the door to a lotta people out there.”<sup>56</sup>

What if there were no lawyers willing and able to work on a contingency fee basis? The lawyer just quoted about closing the door provided a stark illustration regarding damage caps and access in the city in which he practiced at the time.

You won’t find any nursing home lawyers anymore [post-2003 cap]. If they claim to be a nursing home specialist or malpractice specialists and do only malpractice, it’s because they have the ability to practice in a different state . . . Because there’s no money to be made in Texas in those areas. One of the biggest in town . . . who did a ton of nursing home, and now he’s working for a defense firm because he had no ability to continue making money in that practice area. And that’s what I think that you can see happening in the future. They will leave the area, they will leave the practice area, or they’ll just slowly suffocate because they have no money, there’s no money coming in, if they stay in that practice area.<sup>57</sup>

This lawyer ultimately left the practice area.

---

<sup>54</sup> See generally Daniels & Martin, *supra* note 10.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

As Silver and Hyman note, “[t]ort reforms can cause the supply of legal services to contract by capping fees, reducing claim values, or making litigation riskier or more expensive for claimants.”<sup>58</sup> Hankinson and Baker understand this as well, and it is why they were so concerned about meaningful access in the wake of tort reform in Texas.

### *B. The Business Model and the Plaintiffs’ Bar*

The contingency fee is a mechanism designed to enable access to legal remedies for people without substantial means, but it is not a perfect answer to the problem of access. A key reason it is a less than perfect answer is the business model for plaintiffs’ lawyers who build most—if not all—of their practice around the representation of people injured in some way. A business model based on contingency fees is unlike the traditional hourly fee model. As noted earlier, the lawyer receives no fee unless there is a monetary settlement or award for the client, nor will the lawyer receive reimbursement for the costs incurred in handling the case. These are the inherent, baseline risks for many plaintiffs’ lawyers.

The contingency fee business model shapes a lawyer’s practice and the plaintiffs’ bar in important ways—ways that affect how, and even if, they can play the gatekeeping role we have emphasized in the discussion so far. The lawyer must, to a substantial degree, be a rational business actor.<sup>59</sup> Given the inherent risks, the lawyer needs to pay close attention to costs and overhead. Because a practice based on contingency fees is often characterized by a series of one-time clients,

---

<sup>58</sup> Silver & Hyman, *supra* note 50, at 380.

<sup>59</sup> While the lawyer needs to be a rational actor to a substantial degree, in Texas we found that this was not sufficient to fully understand the plaintiffs’ bar. We found more involved than just making a living. One Texas plaintiffs’ lawyer told us:

You have true believers . . . I put myself in that category. What has appealed to me is a family with kids whose life gets turned upside down because someone in the family gets seriously hurt or killed, and they’re facing a greater than David and Goliath battle, and they need someone to fight for them . . . I’ll be in this business until the bitter end. And I hope that the bitter end is not five years from now.

DANIELS & MARTIN, *supra* note 14, at xvii. For many plaintiffs’ lawyers there is a very particular professional identity or sense of what it means to be this kind of lawyer, their own set of norms, and their own professional organizations. If these lawyers were purely rational actors, we might legitimately wonder why they ever decided to enter this practice area and why—in the face of tort reform in Texas—anyone would stay in it. See *id.* at 106–39 for a discussion of their professional identity and norms, and at 71–105 for a discussion of the development of the Texas plaintiffs’ bar and organizations.

the lawyer also needs a steady stream of clients with injuries or losses the civil justice system will compensate adequately. This means sufficient to compensate the client, cover the lawyer's costs, and provide a fee. Accordingly, a damage cap, depending on the additional risk and cost involved, may cause lawyers to be leery of cases covered by the cap. One can see, as we noted earlier, why Hankinson and Baker would be concerned about access.

Governor Perry's remarks that opened this Article presume that there is, in fact, a particular set of lawyers at fault for serious harms threatening the people of Texas. Leaving aside his rhetorical claims about those harms, he was right. In Texas, we found that there is a coherent, robust plaintiffs' bar with its own history, professional organizations, and a clear hierarchy. It is made up of lawyers whose practices consist almost exclusively of plaintiffs' work done on a contingency fee basis.<sup>60</sup> Across the pool of the respondents to the second of our two surveys (conducted in 2006), the median percentage of caseload representing cases taken on a contingency fee basis was seventy-five percent and the mean was ninety-five percent.<sup>61</sup>

Plaintiffs' practices in Texas are small in terms of the size of their firms; eighty-five percent of our survey respondents worked as solos or in firms of two to five lawyers.<sup>62</sup> With the exception of the few, but very visible, lawyers with high-volume television advertising-based practices or mass tort lawyers, Texas plaintiffs' lawyers also tend to have small support staffs. One would expect small size, as those firms must keep overhead as low as possible due to the risks

---

<sup>60</sup> Over one-third of our respondents are board certified in personal injury, in civil trial law, or both. The Texas Board of Legal Specialization enforces substantial requirements for certification. See STATE BAR OF TEX., STATE BAR OF TEXAS MEMBERSHIP: ATTORNEY STATISTICAL PROFILE (2005-2006) 4 (2006), <https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=11457>. At the time of our survey the State Bar of Texas reported that only ten percent of all Texas attorneys were formally certified in one or more of twenty different practice areas. *Id.* Less than six percent of all Texas lawyers at the time were certified in personal injury trial law or civil trial law (these figures include lawyers working in the defense side). *Id.*

<sup>61</sup> In contrast, the comparable figures for all lawyers in private practice in Texas were two percent and nineteen percent. The statistics for all private practice lawyers in Texas were taken from the authors' analysis of data from the State Bar of Texas, Texas Referral Practices Survey Report. STATE BAR OF TEX., TEXAS REFERRAL PRACTICES SURVEY (2004), <https://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=11493>.

<sup>62</sup> According to the State Bar of Texas, the comparable figure for all Texas private practitioners in 2005-2006 was fifty-nine percent. See STATE BAR OF TEX., *supra* note 60 at 2.

involved and the concomitant cash-flow concerns that come with needing to fund cases.

For most plaintiffs' lawyers, caseloads are generally small and are dominated by lower-value automobile accident cases.<sup>63</sup> For thirty-eight percent of the survey respondents, automobile accident cases made up fifty percent or more of their business, and only twenty-five percent said they handled no automobile accident cases.<sup>64</sup> These cases represent frequently occurring events that typically do not involve a large upfront investment to handle. And a larger caseload of even less costly matters would mean higher overhead to handle the cases.

In contrast, medical malpractice and nursing home cases, on average, make up just twelve percent of the caseloads of the survey respondents.<sup>65</sup> Fifty-nine percent of them, however, reported handling none of these specialized types of cases and only nine percent reported that medical malpractice or nursing home cases made up fifty percent or more of their business.<sup>66</sup> These lawyers, in effect, are "super specialists." They are the ones with the expertise and resources to handle medical malpractice cases and the ones for whom the damage cap poses the greatest threat, but the cap also affects other plaintiffs' lawyers as we will see below.

In line with the dominance of lower-value automobile cases, the median value of cases handled by the surveyed plaintiffs' lawyers was modest—\$45,500 in 2016 dollars.<sup>67</sup> For those lawyers with half or more of their business in automobile accident cases, the median award in 2016 dollars was just \$24,000.<sup>68</sup> In contrast, for those with half or more of their business in medical malpractice and nursing home cases the median award in 2016 dollars was \$359,000.<sup>69</sup>

These differences highlight specialization within the plaintiffs' bar itself, as does the fact that there is a clear hierarchy within this group based on the value and nature of cases handled. At the top are those who specialize in complex, high-cost, and high-risk cases, like medical malpractice. At the other end are the plaintiffs' lawyers who

---

<sup>63</sup> For our survey respondents, the mean number of open cases was seventy-one and the median was twenty-five. See generally Daniels & Martin, *supra* note 10. On average, just over one-third of their caseloads were lower-value automobile accident cases. *Id.*

<sup>64</sup> See generally Daniels & Martin, *supra* note 10.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

specialize in low-complexity, lower-value, lower-cost, and lower-risk cases.<sup>70</sup> This hierarchy is important for how the high-end specialists acquire their cases.

The predominant source of clients for all of our survey respondents was some form of referral—just under three-quarters of their clients.<sup>71</sup> Referrals from other lawyers were the most important (referrals from former clients were next); this reflects their status as specialists and their willingness to pay referral fees (in the form allowed) to the lawyers who refer cases to them. One younger, solo practitioner said, “as a solo, . . . most of my PI cases are referrals from other lawyers and referrals from friends, you know, like, lawyers that don’t do PI.”<sup>72</sup> Personal injury cases generally dominate the referral market among Texas private practice lawyers, with medical malpractice cases being the most referred type of case.

There has long been a robust referral system in Texas, and it is based on professional reputation. For lawyers in our 2006 survey, reputation is by far the most important reason for choosing a lawyer to whom to refer a case.<sup>73</sup> This is especially important for those lawyers whose practices focus on complex, high-cost, and high-stakes cases like medical malpractice. This kind of specialization and referrals go hand in hand. For the lawyers in the survey with half or more of their business in medical malpractice—the super specialists—fifty-eight percent of cases came from lawyer referrals.<sup>74</sup>

To be successful as a high-end specialist, there must be a way for cases of a certain kind to get to that lawyer. The typical client will likely not know who the appropriate specialists are, but other lawyers will. As one sole practitioner put it, “there’s the handful of kind of heavy hitter guys, that, you know . . . that live on the referrals . . . the smaller fish will get a case that’s over their head and kick it to those

---

<sup>70</sup> See DANIELS & MARTIN, *supra* note 14, at 141–75.

<sup>71</sup> In contrast, advertising—despite its apparent ubiquitous nature—was not a substantial source of business for the lawyers in our survey. Only fifteen percent of the caseload for those lawyers came from advertising. See *id.* at 152–53. Any larger scale advertising, such as television, is relatively rare. Most plaintiffs’ lawyers do not advertise on television if for no other reason than the expense for a practice built on the contingency fee.

<sup>72</sup> See generally Daniels & Martin, *supra* note 10.

<sup>73</sup> Data from the Texas Referral Practices Survey shows professional reputation is also the most important factor for all private practitioners in Texas when it comes to referring a case. See STATE BAR OF TEX., *supra* note 61. See also DANIELS & MARTIN, *supra* note 14, at 190.

<sup>74</sup> See generally Daniels & Martin, *supra* note 10.

guys . . . they don't really have significant advertising to speak of. It's more their reputation."<sup>75</sup> Importantly, those smaller fish will receive a fee if the heavy hitter is successful, and this can be an important addition to their income from a more modest practice. The damage cap, then, can have a trickle-down effect on referring lawyers if specialists are handling fewer cases.

At the time of the interview, that solo practitioner just quoted said with regard to a medical malpractice case, "I've got one that we're looking at, that if there's something there, then of course, I'll refer it to . . . one of the bigger boys in town."<sup>76</sup> From a lawyer who receives referral from other lawyers, "a referral basis that's grounded in something that you earned—the right to be one of the go-to lawyers."<sup>77</sup> These complimentary comments tell us that specialization and referrals among lawyers are both important for meaningful access. It is about getting cases to the lawyers best able to handle them.<sup>78</sup>

For plaintiffs' lawyers, a referral system makes sense. The referring lawyer has a way of balancing risk, cost, and return, while better serving the client's needs. In referring a case, this lawyer carries little or no risk for a case in which he or she does not have the expertise or resources to handle. If the specialist is successful, the referring lawyer will receive a percentage of the fee. The specialist carries the ultimate risk but is better able to ultimately handle it because of his or her expertise and resources. In addition, the referring lawyer who sees the case in the first instance will have done some initial screening. This saves the specialist both time and cost.

A damage cap, especially a low one, disrupts this process of getting clients to the lawyers best able to handle their cases for the simple reason that the referred-to lawyer has less of a fee to share. It is one more key cost to take into consideration in deciding whether to take a particular case in light of possible award or settlement. This assumes, of course, the specialist is still taking cases. Access, in other words, is another trickle down effect of damage caps.

---

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Although we will not discuss it here, it is important to note that there was a concerted effort by the Texas Supreme Court to fundamentally alter the referral system in the early 2000s, but that effort fell short. Some changes were made in 2005 that still left the system intact. See DANIELS & MARTIN, *supra* note 14, at 55–65.

Regardless of how a case gets to a lawyer, case screening is everything and goes to the heart of the business model and the incentives in Governor Perry's statement. A lawyer would likely go out of business if he or she blindly took on every, or even most, cases without consideration of risk, cost, and reward, regardless of how the cases came to the lawyer.<sup>79</sup> And screening is not cheap if done right. It is all the more important in complex, high-cost cases like medical malpractice and all the more costly. To illustrate, one medical malpractice specialist told us, "last year we spent in excess of \$100,000 in cases that we didn't take."<sup>80</sup>

Even without damage caps, lawyers like this one take very few cases—the costs and risks are too great. Taking few cases can mean turning away cases in which liability is quite clear. With caps, especially if the limits are low in light of the costs, this is more likely. This could also mean turning away certain *clients* in cases with clear liability if the possible award is too small. Ultimately, damage caps will not allow for adequate compensation—enough to compensate the client, cover the lawyer's costs, perhaps a referral fee, and the lawyer's fee.

For critics of caps like Professor Lucinda Finley, the concern is that lawyers will simply screen out certain types of people. She calls them the "hidden victims" of tort reform—injured people for whom noneconomic damages make up the bulk of the potential damages.<sup>81</sup> Finley, like Governor Perry, is interested in incentives and sees plaintiffs' lawyers as rational actors focused on their own bottom line. Even if some lawyers continue to handle medical malpractice cases, those lawyers may decide to completely avoid these potential clients because of the limited reward.

Finley's worry adds another dimension to Hankinson and Baker's more general concern about access. The logical consequence of caps will leave such people—those with little in the way of economic damages—"shut off from seeking redress and recognition through the

---

<sup>79</sup> On average the respondents to our 2006 survey reported signing twenty-five percent of the calls they received to a contingency fee contract. Even those with half or more of their business being automobile accident cases reported, on average, signing one-third of the calls. Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337, 369 (2011).

<sup>80</sup> See generally Daniels & Martin, *supra* note 10.

<sup>81</sup> Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004). This same concern was a part of the reason the Wisconsin Supreme Court struck down a damage cap in medical malpractice cases in *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

tort system.”<sup>82</sup> For Finley, limited access to redress is perhaps the most profound consequence of caps because it undermines “fairness and equality of our civil justice system.”<sup>83</sup>

Finley’s worry also reinforces the importance of understanding the impact of damage caps on the business incentives underlying a plaintiffs’ contingency fee practice. Making decisions on what clients to take or not is where we see the connection between damage caps and meaningful access. To return to the comments of a lawyer quoted in this article’s introduction, “I wanna make sure that I’m clear about one thing, and that is the real victim in all of this (damage caps and tort reform generally) is the consumer, the individual . . . It’s not the lawyers . . . we’re all fairly well educated and we’re resourceful enough to come up with other ways to pay our bills and feed our families. And although our styles may have taken a hit, we’re not the victims in this.”<sup>84</sup>

#### IV

##### CASE SCREENING AND DAMAGE CAPS: THE CHALLENGE FOR PLAINTIFFS’ LAWYERS IN THEIR WORDS

The challenge of maintaining a steady stream of clients that the civil justice system will compensate adequately is substantial for all plaintiffs’ lawyers, but it is acute for lawyers handling medical malpractice cases where damage caps are imposed. Caps, as Governor Perry said (and Finley agrees), are clearly about changing the incentive structure for lawyers handling medical malpractice cases on a contingency fee basis. The best way to show what this means in practice is to simply let the research subjects speak for themselves. This is exactly what we will do here in exploring the screening process for capped cases. The lawyers’ comments about screening illustrate, in a very practical sense what is important, how the incentive structure underlying their business model works, and what some of the consequences of caps may be.

Through our research, we learned that risk and cost are paramount in medical malpractice cases, even though the return on investment can be substantial. As one lawyer told us, “We all know that the hardest case to win is a med mal case at a trial because the juries just

---

<sup>82</sup> Finley, *supra* note 81, at 1313.

<sup>83</sup> *Id.*

<sup>84</sup> *See generally* Daniels & Martin, *supra* note 10.

don't want to believe that doctors can make mistakes.”<sup>85</sup> Another lawyer said, “Juries rarely award money on good medical malpractice cases, you know. They certainly don't on frivolous ones. And on frivolous ones, you don't even get to a jury. They get dismissed by summary judgment.”<sup>86</sup> Put simply, plaintiffs are likely to lose medical malpractice cases that go to trial in Texas.<sup>87</sup> This kind of risk illustrates why lawyerly expertise is so important, and it is the most skilled lawyers who are more likely to prevail for their clients.<sup>88</sup>

These cases are especially expensive. A Houston medical malpractice specialist said, “there's no other case in the system as expensive as malpractice.”<sup>89</sup> The high costs involved in actually prosecuting a case enhance a lawyer's risk since it is his or her money funding the case. One can deal with this risk, in the first instance, by rigorously screening the case. This screening is itself a substantial cost, which means the costs of screening must ultimately be covered by the cases taken, cases that are hopefully successful. In short, everything—not just profitability, but survival itself—is riding on the screening process.

Accordingly, lawyers screen medical malpractice cases quite stringently. Our 2006 survey findings show that lawyers regularly handling medical malpractice cases (those for whom these cases comprise at least fifty percent of their business) take on average fewer than eight percent of the cases that come to them, and three-quarters reported taking ten percent or less.<sup>90</sup> One-third reported taking as few as one percent or two percent. The figures are no different if we look at the lawyers for whom medical malpractice cases made up twenty-five percent or more of their business.<sup>91</sup> One specialist told us (in a precap interview) “[w]e've . . . always had statistics that go back

---

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Even in the years before Texas imposed the damage cap in medical malpractice cases in 2003, plaintiff win rates in medical malpractice cases tried to a jury were very low. For instance, for the years 1988 to 1990 the plaintiff win rate (defined as winning at least one dollar) was twenty-five percent or lower in Texas' three largest jurisdictions: Harris County (Houston), Dallas County, and Bexar County (San Antonio). In comparison, the win rates for auto accidents cases during the same time period were no lower than forty-eight. See STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 80, tbl. 3.3, cont'd (1995).

<sup>88</sup> See Daniels & Martin, *supra* note 9, at 1057; Daniels et al., *supra* note 52; Hyman et al., *supra* note 53.

<sup>89</sup> See generally Daniels & Martin, *supra* note 10.

<sup>90</sup> DANIELS & MARTIN, *supra* note 14, at 212.

<sup>91</sup> See generally Daniels & Martin, *supra* note 10.

many, many years, maybe 10 or 15 years, that show that we look at 300 cases for every one we take. I think recently, within the last two years or at least year, that number has now gone to 400.”<sup>92</sup>

While screening in this practice area is done in different ways, all approaches emphasize the importance of the medical issues and then, if necessary, the costs of prosecuting the case. Reflecting the importance of the medical issues, some firms will have more specialized staff members that are important for screening purposes and eventually for case preparation. This specialized staff may include nurse-paralegals or nurse-lawyers or even a physician-lawyer. A medical malpractice specialist we interviewed in the 1990s (pre-damage cap) outlined the composition of his staff: “we have nine lawyers that do almost nothing but medical malpractice. Two of our lawyers are doctor-lawyers; one is a nurse-lawyer; we have three nurse-paralegals.”<sup>93</sup>

The specialist went on to explain the multiple steps in his firm’s screening process used in deciding whether to take the case that involved different levels of expertise within the firm, each examining the medical records. Some in the firm are responsible for consulting experts and the medical literature. Others conduct a thorough consideration of damages, venue, and the cost of moving forward. A regular firm meeting will eventually discuss potential cases—both the medical and legal aspects. He said, “Only if we agree on all of that and basically . . . everybody in the room reaches agreement, do we then decide we’re going to then get the client in and sign the client up.”<sup>94</sup>

Another specialist, the one quoted above from a precap interview and who said “we look at 300 cases for every one we take,”<sup>95</sup> handled things without a large, specialized staff and is somewhat more typical.

There’s three full-time lawyers . . . we have a lot of contract folks who we’ve developed relationships [with] over the years who have enabled us to keep the overhead very low . . . we have a nurse and a doctor on staff. Then we have other doctors that consult with us, almost on staff but technically not.<sup>96</sup>

---

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

As to screening, priority is given to the medical side.

When we get a person who is a potential candidate, they talk to a receptionist. From there they go to an investigator. From there, if the answer is still yes or maybe, they go to a nurse, and from there, if it's yes or maybe they go to a doctor. Only when the case is accepted . . . and if there are any issues on damages or things like that then I do get involved. But typically I only get involved in the cases that are actually signed up.<sup>97</sup>

Medical issues always predominate and if the medical issues pass muster, the process turns to assessing the likely costs of handling the case. The possible return from the case must be sufficient to cover the costs of appropriately preparing the case and screening medical issues. For instance, one lawyer who specializes in brain injury cases said, "we always escrow \$300,000 for each case."<sup>98</sup>

Another specialist, interviewed in the mid-1990s (and quoted earlier), provides an idea of how high the costs can get when you actually go to trial: "I think the most I've had was around \$600,000 or \$700,000. We prevailed on that one, thank goodness."<sup>99</sup> More typical is the lawyer who said, "you're talking about \$100,000 that you're gonna [sic] spend on technical expertise to write reports, to give depositions, you know, to explain the standard of care and how it's been breached."<sup>100</sup>

A lawyer interviewed in 2006 (postcap) described the process for nursing home cases at his firm before the Texas damage cap went into effect. His description gives a breakdown of the kinds of costs involved:

In the old days, what I was looking for, my ideal case was a very longstanding nursing home stay, a protracted stay with multiple instances of neglect and possibly abuse—physical, sexual, emotional abuse. But what I was looking for were long periods of neglect. Because of the long periods of neglect, the neglect was crossing various medical specialties. And so I might have malnutrition, dehydration, decubitus ulcers, falls. And so I would need an expert witness then on each of those areas. And then I would also do a very extensive staffing analysis because poor staffing is highly correlated with poor care. And so I would have a staffing expert evaluate the staffing. I would then have a nursing home administrator expert to talk about the overall business aspect of the nursing home and how they're emphasizing profits over

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

people. So all totaled, in the old days, I would routinely have eight to ten experts per case, would take 20 or 30 depositions, both liability depositions and corporate business type depositions, spending, you know, total investment in these nursing home cases, anywhere between \$85,000 and \$125,000 before they went to trial, all to achieve, though, multi-million dollar settlements. Okay? Those were the old days.<sup>101</sup>

At that time—the old, precap days—the firm had a substantial nursing home and medical malpractice business. His staff included “another lawyer who was helping me with the docket. We each had secretaries. We each had paralegals and we then shared a nurse in addition to contract nurses that we employed.”<sup>102</sup>

These examples above show that, even in the years before the damage cap went into effect, costs were substantial and the need for rigorous screening was great. Without exception, the lawyers we interviewed after 2003 (postcap) said the challenge of balancing risk, cost, and reward became even more daunting in these cases with the imposition of the cap.

As one medical malpractice specialist put it, “The cost of prosecuting the case didn’t change when caps were instituted . . . . The only thing that changed was, now they’re capped at \$250,000 with regard to what frequently was the biggest element of damages, and it just made it where it was economically not feasible to take the cases.”<sup>103</sup> He simply screens out cases in which noneconomic damages are the biggest element because the system will no longer compensate people in these cases adequately.

Yet another lawyer emphasized that some cases passing muster on the medical issues would still be screened out. He said it is “no longer viable from a practical and business standpoint to be able to pursue so many of these cases that were still meritorious . . . given the anticipated expense and risk involved . . . given the caps and procedural and legal burdens imposed by tort reform.”<sup>104</sup> In other words, the damage cap alters the incentive structure in a way that limits the availability of meaningful access even when it is warranted. The reason is simple: by limiting awards, damage caps function as a

---

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

limitation on the contingency fee, which is at the heart of the plaintiffs' lawyers' business model.

One lawyer summarized the postcap challenge quite succinctly. "You're talking about a lot of money, and—in other words—it makes the juice not worth the squeeze."<sup>105</sup> This raises the question of whether the courthouse door is closing medical malpractice cases generally, and especially for people like Finley's hidden victims.

## V

### ARE THE COURTHOUSE DOORS CLOSING?

#### *A. Once Again in the Lawyers' Words*

For most lawyers, the only way to escape the challenge created by damage caps in trying to successfully balance cost, risk, and potential return is to make changes in their practices by avoiding the cases at the heart of that challenge—capped cases. Avoiding capped cases is, of course, precisely the response hoped for by the proponents of damage caps—especially if it's the most skilled lawyers changing their practices. This would mean the courthouse doors would close, at least to some degree. In certain situations, as we will see in what lawyers told us about their practices in the postcap era, it could mean closing the doors all together in certain situations.

One specialist told us about a major change in his practice in the face of the cap, one the proponents of caps would likely endorse.

We are using cases out of the state to fit in with my desire to work on medical malpractice and nursing home cases, which is what our focus had been on in the past. And we got licensed in the State of Tennessee and handled a number of cases over there. We're going to trial on a significant case in July in New Mexico.<sup>106</sup>

Others, we discovered, are doing the same. "Out of state? Yes, I've got a case in the Bronx . . . I've got a malpractice case that I may file in California, I've got one . . . I'm looking at that may be filed in Oklahoma. So yeah, there are some cases, some of the cases that I normally would've filed in Texas. I'm filing outta state."<sup>107</sup> Another lawyer said, "I've got cases going on in two different states right now [South Dakota and Minnesota] . . . medical malpractice cases."<sup>108</sup> He is also considering getting licensed in another state. "I've seen

---

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

lawyers get—in fact, I can think of, just off the top of my head, I mean, right off the bat, three or four lawyers . . . that have gotten licensed in other states already.”<sup>109</sup>

An interesting and somewhat similar practice change comes not from our interviews or surveys, but from the websites of some specialists. It is a business strategy of still handling some Texas cases subject to the damage cap along with medical malpractice cases elsewhere in the country. One firm, for instance, prominently notes on its website that it handles Federal Torts Claims Act (FTCA) cases. The website explains further:

Under United States tort law, federal employees are not personally liable for most torts they commit in the course of their work. Instead, the federal government provides an exclusive remedy for such tort claims called the Federal Tort Claims Act . . . The Federal Tort Claims Act (FTCA) removes the federal government’s immunity from certain types of tort claims and gives the government responsibilities much like those of a private citizen. This system allows citizens to file civil suits against the government.<sup>110</sup>

The FTCA provides that the applicable law—for a matter like medical malpractice—is the law in the state in question (a damage cap applies only if the state has one). The FTCA also provides for the payment of litigation expenses and attorney’s fees of twenty percent or twenty-five percent (depending on whether a trial is involved or not) in successful medical malpractice cases.<sup>111</sup>

These examples show that even if plaintiffs’ lawyers in Texas continue to work in this practice area, they are looking for market niches elsewhere in which they can take advantage of their skills and expertise. In doing so, they diminish the availability of top-notch legal representation in Texas.

Other lawyers are substantially cutting down the amount of medical malpractice and nursing home cases and reorienting their

---

<sup>109</sup> *Id.*

<sup>110</sup> *National Federal Tort Claims Act (FTCA) Cases*, WHITEHURST, HARKNESS, BREES, CHENG, ALSAFFAR & HIGGINBOTHAM, PLLC, <https://nationaltriallaw.com/federal-tort-claim-attorney/> (last visited Dec. 21, 2017). This firm is by no means alone in Texas in practicing in this market niche. See ARCHULETA LAW FIRM, <http://www.veteransmedicalmalpractice.net> (last visited Dec. 21, 2017); THE LAW OFFS. OF TYLER & PEERY, <http://www.tylerandpeery.com/Contact.shtml> (last visited Dec. 21, 2017), among many others. Texas lawyers are not unique in focusing on this market niche. See, e.g., CHALAT LAW, <http://www.chalatlaw.com/> (last visited Dec. 21, 2017); *About Us*, THE MCMILLEN LAW FIRM, <https://federal-tort-claims.com/about-us/> (last visited Dec. 21, 2017).

<sup>111</sup> 28 U.S.C. § 2678 (2017).

practices. One lawyer told us his postcap practice is “probably half now commercial litigation and half brain damage in medical malpractice . . . used to be the percentage was much, much higher in medical malpractice and all of our medical malpractice business has been concentrated on brain damage cases.”<sup>112</sup>

When we interviewed this lawyer in the 1990s (precap), he said his practice was almost exclusively medical malpractice. As to why his practice changed: “I would say its 100% as a result of HB4”<sup>113</sup> (the cap legislation). All of the commercial litigation is done on a contingency basis.

A key part of our interviews was asking lawyers what type of medical malpractice case, if any, might still be viable from a business perspective. Without prompting, one thing we heard over and over in response to this question was about the people like Finley’s hidden victims and how the changed incentive system affected them. One lawyer said the 2003 damage cap “has the effect of eliminating an entire couple of subgroups of patients . . . those being individuals without any type of income and . . . children.”<sup>114</sup>

The lawyer quoted in the previous section who spoke about his practice in the “old days”<sup>115</sup>—the precap days—gave us a more detailed illustration of what is a viable case from a business perspective and why.

Those were the old days (precap). The new days . . . if a case comes in the door to me that is a protracted nursing home stay, which is a lot of things that went wrong, I know right off the bat that I can’t handle that case. It’s too expensive. If there is a . . . if \$250,000 is the worst day in court for a nursing home, they’ll never settle for \$250,000. But even if they did settle for or I did obtain a verdict for \$250,000, the forty percent attorney’s fees would be \$100,000 and in the old days, my expenses would be another \$100,000. And then the Medicare and Medicaid lien reimbursements would easily be \$50,000 on a very protracted course of negligence. And so now there’s nothing left. So what’s it been about? It’s been about me and the government reimbursement. And that’s not justice.<sup>116</sup>

After the caps went into effect his firm closed the medical malpractice part of its business. The lawyer now works as a solo

---

<sup>112</sup> See generally Daniels & Martin, *supra* note 10.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

practitioner still doing medical malpractice and nursing home cases, but not like the old days. As he described it:

Now, I am a solo practitioner . . . I can't tell you how sharp my pencil is in running this practice. And the only way that I'm able to make this work is I really, really, really pay attention to the number . . . so today what I'm looking for in terms of a case that comes in the door is a very clear-cut instance of negligence. Someone who chokes on a hot dog at dinner time who is supposed to be on a pureed diet but they've given him a hot dog and he chokes on the hot dog. They mess up the Heimlich maneuver and he dies right then and there from choking in the nursing home. I actually have that case, a clear-cut case.<sup>117</sup>

He now simply avoids the more serious cases that defined his practice in the old days.

Like this lawyer, others also made comparisons to the past in responding to our question about what kinds of cases may still be viable. One mentioned the example of a precap case he had successfully handled that he would turn away postcap. It involved a woman who had a breast removed that turned out not be cancerous. He stated the following:

Before tort reform, I had a case of a woman that had a lump in her breast. She went to the surgeon . . . the surgeon decides he's going to do a frozen section. He's going to do a frozen section before he goes any further . . . Patient's asleep. He forgets to do the frozen section and removes her breast . . . Now, the pathologist comes and says, "Guess what? That was benign tissue." So you've got a case. Now, I settled that case for a \$1.2 or a \$1.3 million before tort reform. I had no economic damages at all. Zero. That case now . . . that case now is worth a maximum of \$250,000. But, you know, there is no way you're going to get 100 cents on the dollar.<sup>118</sup>

Again, the central idea conveyed in this statement is that adequate compensation is not possible.

The elderly, as the "old days/new days" lawyer's comments show, have become especially unattractive. On the viability of cases involving an elderly person, one lawyer simply said, "you know, if you're an old person and you've been a victim of medical malpractice . . . . You can't bring the case, because you don't have any lost earnings and your pain and suffering is capped."<sup>119</sup> The same

---

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

is true for children and anyone else without substantial economic damages.

In telling us about the viability of cases involving a child, one lawyer drew from a case he did not take saying:

But you know, that case was worth nothing, because that child is worth nothing. I mean, that's the clearest cut example that we've experienced. This family comes in . . . [and] we can't even hire an expert for you to tell you that this was negligent or not. Certainly sounds like negligence; I mean, you went in and had a surgery and something horrifically wrong happens. And we can't even take it as a case, because your child didn't have any earning capacity.<sup>120</sup>

The question of earning capacity more generally took on special importance for the lawyers we interviewed, and this adds still another dimension to the concerns of Hankinson, Baker, Finley about meaningful access. Typical was the lawyer who said, "the medical malpractice cases . . . we've done a fair amount of that here, and the caps on the damages have just about made it impossible to find a very good case that you know would justify the expense of pursuing. You know, unless they're a high wage earner and that sort of thing."<sup>121</sup> Another lawyer shared a common sentiment:

If you take the average working class guy . . . say they're thirty-five years old and they make \$10 an hour, which is, I'm sure, probably an average wage in Texas for working folks, blue collar folks . . . And if you're capped on your emotional anguish damages, you know, you have extraordinary expenses related to litigation, catastrophic litigation, then you really hafta weigh whether or not, you know, you're gonna take that case.<sup>122</sup>

Another specialist, whose precap practice was dominated by medical malpractice and nursing home cases (ninety percent), shared his perspective on the viability of such cases:

You've got to really be able to create some loss of earning capacity model to justify potential recovery outside of simply, you know, the intangible damages . . . the CEO of a Fortune 500 company who gets hurt in a medical malpractice case, well, you're gonna be able to take his case. But it's the hard worker . . . you can't take their cases . . . they essentially closed the courthouse door to the negligence that would kill a child, a housewife or an elderly person . . . and unless it's drop-dead clear negligence that you can

---

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

prosecute with one or two experts, that's just not a case that I think in Texas right now is a viable case.<sup>123</sup>

### *B. Evidence Beyond the Words of Lawyers*

Having let our research subjects speak for themselves, how can we address the practical question of whether the courthouse doors may actually be closing? One way is to look at filings in Texas trial courts. While annual data on the number of medical malpractice filings for the entire State of Texas are unavailable prior to 2011, they are available from a number of sources for Harris County, which includes Houston. Houston is the most populous county in Texas, as well as the third most populous county in the United States.<sup>124</sup> These figures can at least give us a sense of any changes in filings.

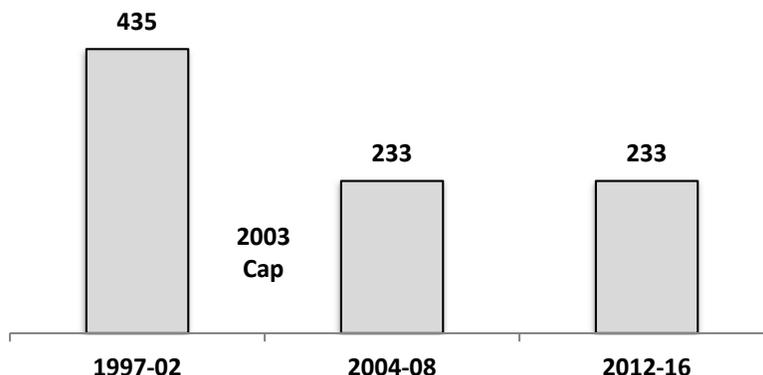
Figure 1 presents data from those sources on medical malpractice filings in Harris County over time. The pattern in Figure 1 indicates that filings for medical malpractice lawsuits clearly and substantially declined in Harris County after the implementation of the 2003 cap. For the five years after the cap was put into place—2004 to 2008—the average number of medical malpractice filings per year was 233, representing a forty-six percent drop from the annual average of 435 filings that took place between 1997 and 2002.

---

<sup>123</sup> *Id.*

<sup>124</sup> The Texas Office of Court Administration collects annual data on court filings. It only breaks tort cases down into two categories: auto cases and non auto cases. However, data are available for Harris County's trial courts of general jurisdiction from the Harris County District Clerk and the Harris County Justice Information Management System. See Terry Carter, *Tort Reform, Texas Style: New Laws and Med-Mal Damage Caps Devastate Plaintiff and Defense Firms Alike*, 92 A.B.A. J. 30 (2006).

**Figure 1.**  
**Harris County, TX: Average Annual Number of**  
**Medical Malpractice Filings per Time Period**



Raw filing figures show fewer matters coming into the courts, but do they mean the courthouse doors are actually closing? One might presume the answer lies with the raw material—medical errors. However, there is no reason to think that medical errors suddenly and substantially declined. There is reason, as our discussion illustrates, to think the gatekeepers are a key part of the explanation. We designed part of our 2006 survey to discern whether the doors are closing because lawyers were actually avoiding these cases generally, or avoiding certain kinds of clients. To do so, we included an experiment of sorts.

We asked respondents to the survey to indicate whether they would take cases with certain kinds of clients five years prior to the survey (precap), and whether they would take the same types of clients at the time of the survey (postcap). Rather than simply ask the survey respondents generally about clients and cases, greater analytic value was gained by presenting them with a series of questions based on hypothetical situations that would allow for controlled comparisons involving different combinations of cases and clients.<sup>125</sup>

---

<sup>125</sup> The hypotheticals follow the logic of a difference-in-differences design and were constructed with the assistance of ten experienced and successful Texas plaintiffs' lawyers practicing in different parts of the state, chosen because of their reputations. Like all lawyers we interviewed, we promised complete confidentiality as required by regulations governing human subjects research. *See generally* Daniels & Martin, *supra* note 10. *See also* DANIELS & MARTIN, *supra* note 14, at 216–20.

The hypothetical situations posed in the survey involved the following:

1. Three kinds of potential plaintiffs: (1) a seventy-year-old retired male for whom economic damages would be minimal; (2) a forty-five-year-old employed, married male for whom there could be significant economic damages (the ideal client representing medical malpractice cases generally); and (3) a forty-five-year-old married “stay-at-home mom” for whom economic damages would be present but low.
2. The same injury unquestionably caused in one of two ways: (1) by a physician in a medical malpractice case; (2) or by an eighteen-wheeler in a car wreck case—that involved substantial noneconomic injury (cases involving eighteen-wheelers are highly sought after);<sup>126</sup> and
3. Two time periods: (1) five years prior to the 2006 survey (precap); and (2) at the time of the survey (postcap).

For each client-case situation (e.g., seventy-year old male in a medical malpractice case) at each point in time (e.g., the same client-case situation precap and postcap), respondents were asked the following: whether they would take the case, take it but refer it to another lawyer, or not take the case at all. The possibility of referring the case was included in order to present the respondents with a realistic set of choices.<sup>127</sup> We wanted to know if the attractiveness of certain clients in medical malpractice cases—or malpractice cases generally—became diminished in the wake of the Texas damage cap. The underlying explanation for the disparity is the change in lawyers’ incentive structure—a direct result of the damage cap.

Figure 2 summarizes the salient results from these questions in the 2006 survey; the bars represent the percentage of lawyers who found the client type “attractive” in each situation. The “attractiveness”

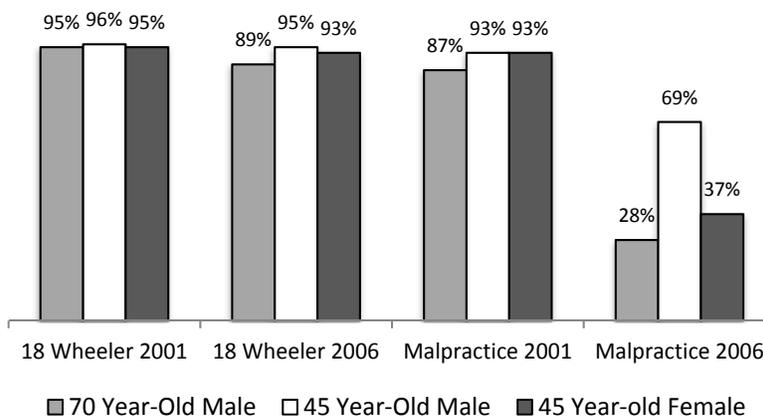
---

<sup>126</sup> Such cases have the potential for substantial settlements and awards. More importantly, juries seem more amenable towards them compared to medical malpractice cases. “Everybody seems to be able to connect with an 18-wheeler that’s out of control. You know, we hit one for \$20 million that we got paid on, and you know, even Republicans were voting for us on that one,” said a Houston lawyer. *See generally* Daniels & Martin, *supra* note 10.

<sup>127</sup> Much more detailed and technical descriptions of this part of our 2006 survey can be found in two of our earlier pieces, Stephen Daniels & Joanne Martin, *It is No Longer Viable from a Practical and Business Standpoint: Damage Caps, ‘Hidden Victims,’ and the Declining Interest in Medical Malpractice Cases*, 17 INT’L J. LEGAL PROF. 59 (2010); DANIELS & MARTIN, *supra* note 14, at 216–28.

measure includes the percentage of responding lawyers who would have taken or referred clients in each of the case types. We combined the two possibilities because we know medical malpractice cases are frequently referred and because many specialists rely on referrals for cases. Before referring a case, a lawyer must do some initial screening knowing there would be specialists out there looking for referred cases.

**Figure 2**  
**Attractiveness of Client by Case Type in Light of**  
**Texas \$250,000 Noneconomic Damage Cap**



With regard to the question of attractiveness, Figure 2 shows the following from all respondents to the 2006 survey:

1. Medical malpractice cases were generally attractive before the cap as shown by the high percentages of attractiveness for each type of client on bar Malpractice 2001 in Figure 2;
2. Clients with limited economic damage potential—the 70 Year-Old Male and the 45 Year-Old Female—were quite attractive at both points in time in 18-wheeler cases as shown on bars 18-Wheeler 2001 and 18-Wheeler 2006;
3. Those same clients with limited economic damage potential were attractive in medical malpractice cases before the cap as shown on bar Malpractice 2001;
4. But those clients became significantly less attractive in medical malpractice cases after the cap as seen by comparing bars Malpractice 2001 and Malpractice 2006;

5. However, there is no comparable change for the limited damage clients in the 18-wheeler cases as seen by comparing bars 18-Wheeler 2001 and 18-Wheeler 2006; and
6. Importantly, even the “best” client became less attractive in medical malpractice cases postcap, but not to the same degree as the other client types as seen by comparing the percentages for 45 Year-Old Male (representing medical malpractice cases in general) in bars Malpractice 2001 and Malpractice 2006.

The lawyers’ responses summarized in Figure 2 reflect a fundamental change in the attractiveness of medical malpractice matters generally, but especially those involving hidden victims. The changes give credence to the comments of the lawyers we interviewed and discussed earlier. Still, it is possible to read the results from the survey’s hypotheticals with a skeptical eye and assume that plaintiffs’ lawyers’ responses were guided more by their political opposition to caps than by actual changes in their approach to certain kinds of clients and to medical malpractice cases.

However, responses to other questions from the 2006 survey were unlikely to be guided by political views, and they reinforce the findings drawn from the hypotheticals. The survey asked lawyers to indicate the distribution of their caseload by percentage across twenty substantive areas relevant to plaintiffs’ practice. When asked about their caseload mix in the 2006 survey, just over one-half of the 460 respondents (250, or fifty-four percent) reported handling the same amount of medical malpractice as five years earlier (before the 2003 cap). Most of these 250 respondents, however, (211) handled no malpractice at either point in time. If we remove from our analysis the 211 respondents who reported not being in the medical malpractice market at either point in time, sixteen percent of the remaining 249 respondents reported doing the same amount of medical malpractice, twenty-four percent reported doing more, and sixty-one percent reported doing less.

Perhaps illustrating the point even more clearly, are the responses from the 163 lawyers who completed both of our surveys—the 2000 survey and the 2006 survey (we noted these “repeaters” earlier in the article in outlining our Texas research). Like the 2006 survey, the 2000 survey asked lawyers to indicate the distribution of their caseload by percentage across those twenty substantive areas. Because the surveys were done six years apart and each used the same list of substantive areas, we can compare the responses of those 163

lawyers regarding their caseload mix at the time of each survey and look for changes in mix of business. Doing so greatly minimizes the possibility that responses are driven by political opposition to damage caps in medical malpractice cases or other particular tort reform measures.

A comparison of individual responses for these 163 repeaters in each survey regarding the percentage of caseload comprised of medical malpractice revealed that 57 reported handling no medical malpractice at the time of either survey. For the 106 lawyers who included some medical malpractice matters in their caseloads, twelve percent of them reported no change in the percentage of business made up by medical malpractice, twenty-seven percent reported an increase, and sixty percent reported a decrease. In short, medical malpractice itself became less attractive to this set of plaintiffs' lawyers after the implementation of damage caps.

The additional evidence from our surveys coincides with the responses to the hypotheticals showed about the attractiveness of medical malpractice cases after the implementation of the 2003 cap. The survey's findings are also consistent with the information presented above in Figure 1, which shows the decline of filings for medical malpractice cases in Harris County, Texas, trial courts.

Finally, our survey findings are also consistent with the findings of a study of closed medical malpractice insurance claims in light of the 2003 damage caps. Using publicly available data from the Texas Department of Insurance, the study found that closed medical malpractice claims and payouts per claim for Texas declined after the 2003 cap went into effect. The declines, according to this study, affected medical malpractice claims generally but were especially acute for the elderly.<sup>128</sup> More specifically,

The 2003 tort reforms had a dramatic impact on claim rates and payouts per claim. We expected the impact to be larger for elderly plaintiffs, because a higher proportion of their damages are non-economic. We find evidence consistent with that expectation. There is evidence of a steeper drop in claim rates for the elderly, especially the very elderly. We also find a larger drop in per-claim payouts for the elderly . . . .<sup>129</sup>

---

<sup>128</sup> Myungho Paik et al., *How Do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence from Texas*, 14 AM. L. & ECON. REV. 561, 580 (2012).

<sup>129</sup> *Id.* at 595.

## CONCLUSION

We opened our discussion with a quote from former Texas governor Rick Perry that came from his signing statement for the 2003 legislation that imposed a damage cap on noneconomic damages in medical malpractice and nursing home cases. In his statement, he boasted about changing the incentive structure for plaintiffs' lawyers handling these matters. Our research indicates—in light of the contingency fee business model—the legislation did just that, with very real implications for meaningful access to the rights and remedies the law provides.

As we emphasized, meaningful access requires an experienced lawyer able to handle and finance a case. This is especially true for a complex, expensive, high-risk case such as medical malpractice. Meaningful access is not free. For most plaintiffs, an opportunity to pursue a remedy requires a lawyer who will handle the case on a contingency fee basis. What Governor Perry was celebrating in pointing to a change in incentives is that damage caps dramatically reduce the viability of legitimate medical malpractice and nursing home cases. Especially problematic in all of this are the hidden victims—those without substantial economic damages—for whom access is curtailed the most. Their situation makes any claimed quid pro quo justified by the claimed benefits of damage caps to society generally—as alluded to in *Horton*—quite troubling.<sup>130</sup>

Without lawyers willing and able to take these cases, all that is left is formal access with little hope for an actual remedy. And while we have focused on medical malpractice and the effects of damage caps in Texas, the general idea regarding the relationship between damage caps and incentives applies more generally to other contingency fee situations. Meaningful access for plaintiffs will depend on whether lawyers can successfully find a steady stream of clients the civil justice system will compensate adequately by compensating the client, covering the lawyer's costs, and providing a reasonable fee for the lawyer.

In sum, it is the detrimental effect of damage caps on meaningful access that is most important for Oregon to consider moving forward. The lesson from Texas—"it's the incentives, stupid."<sup>131</sup>

---

<sup>130</sup> See cases cited *supra* note 48.

<sup>131</sup> David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085 (2006).

