

PEER REVIEW HISTORY

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ARTICLE DETAILS

TITLE (PROVISIONAL)	Characteristics of paid malpractice claims settled in and out of court in the U.S.: A retrospective analysis
AUTHORS	Rubin, Jessica; Bishop, Tara

VERSION 1 - REVIEW

REVIEWER	Anupam B. Jena, MD, PhD Assistant Professor of Health Care Policy and Medicine Harvard Medical School, Boston, USA I have no competing interests to disclose.
REVIEW RETURNED	09-Apr-2013

GENERAL COMMENTS	<p>This article used data from the National Practioner Databank from 2005 to 2009 to study the characteristics of paid malpractice claims, specifically seeking to: 1) characterize trends over in time in the percent of paid claims that are settled out of court vs tried in court and 2) analyzing the limited physician and patient factors associated with the joint plaintiff-defendant decision to settle a case vs take it to trial. The paper is based on the premise that it is important to better understand the characteristics of malpractice cases that are tried in court since these are the cases that often influence public and physician opinion of malpractice.</p> <p>The paper is very well written and the methods, results, and conclusions are sound. I think the article will make a nice contribution to the medical malpractice literature.</p> <p>I have several comments which may further strengthen the manuscript. They are listed in order of appearance in the paper.</p> <ol style="list-style-type: none">1. Abstract. Minor point. Several of the p-values have 3 or 4 significant digits. I would limit to 2.2. Introduction. First paragraph. Minor point. The authors state that 'fear of malpractice is a commonly cited as a driver of overuse of health care services and high health care spending. This fear, known as defensive medicine, may cause physicians...' The fear of malpractice liability is distinct from the notion of defensive medicine, which is the actual ordering of extra tests, procedures, etc. because of fear of malpractice liability.3. Results. Page 10, line 20. Typo – 'Claims were more likely to be judged'4. Results. Page 10, line 32. The authors state that surgical and obstetric errors were more likely to be judged in court than settled out of court. This statement is not quite right. In both of these specialties, the majority of cases are settled out of court. The authors show that among judged cases, surgical/OB cases have a higher share than they do in settled cases. The remaining paragraph
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	<p>seems to phrase this issue correctly with respect to other factors they study.</p> <p>5. Discussion. I like the authors' hypothesis that because OB/surgical cases are disproportionately higher in judged cases, this may influence public perception about malpractice risk in these specialties. I might also specify that because judged cases take so much longer to resolve, the amount of time that these fields are exposed to 'malpractice concerns' is greater than other specialties.</p> <p>6. Discussion. Related to 5, I also appreciate the point that physicians may overestimate malpractice risks associated with the performance of procedures.</p> <p>7. Discussion. Page 12, line 8. Typo. 'Although we do not know exactly why cases that resulted in death were more likely to be judged in court,...' They are more likely to be judged out of court, correct?</p> <p>8. Discussion. Page 12, lines 18-25. The authors state that OB/surgical claims may be more likely to be judged in court because the potential damages are high. I would also note that in the analysis by Jena et al. that the authors cite, OB/GYN is among the lowest specialties in terms of case dismissal. In other words, cases that undergo litigation are more likely to be judged against the OB/GYN when compared to most other specialties. This greater 'generosity' to plaintiffs may push them to be more aggressive and go to trial.</p> <p>9. Discussion. Page 12. Regarding the payments for OB. Some have suggested that high indemnity payments may occur because children with catastrophic injuries provoke sympathy among attorneys, insurers, and juries, further increasing indemnity payments (Studdert DM, Mello MM. When Tort Resolutions Are "Wrong": Predictors of Discordant Outcomes in Medical Malpractice Litigation. <i>The Journal of Legal Studies</i>. 2007;36(S2):S47-S78.) Attorneys, insurers, and courts may also fail to objectively use clinical guidelines to determine the presence of malpractice and size of indemnity payments when children are involved. (Kesselheim AS, Studdert DM. Characteristics of physicians who frequently act as expert witnesses in neurologic birth injury litigation. <i>Obstet Gynecol</i>. Aug 2006;108(2):273-279.)</p> <p>10. Discussion. Page 12. The authors nicely hypothesize why claims involving death may be more likely to be settled. An economic theory of conflict resolution would argue that cases that go to trial are those where there are substantial asymmetric beliefs between plaintiffs and defendants on the probability of success and associated payouts. For example, a plaintiff who believes he/she will win will not settle. There may be less of this uncertainty when it comes to cases involving a death. It may also be interesting – though not required – to see how the variance in payments differs between judged and settled claims. The mean is higher in judged claims but I would also expect the variance to be higher if there is a lot of ex-ante uncertainty by both plaintiffs and defendants on how the trial will play out.</p>
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REVIEWER	Timothy Craig Allen, M.D., J.D. Department of Pathology The University of Texas Health Science Center Tyler, Texas
REVIEW RETURNED	18-Apr-2013

GENERAL COMMENTS	The manuscript is well written; however, it presents nothing new that
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	has not already been well observed in the literature regarding medical lawsuits. As such, unfortunately, it should be rejected.
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VERSION 1 – AUTHOR RESPONSE

Reviewer comments: Anupam Jena, MD, PhD
Professor of Health Care Policy and Medicine
Harvard Medical School

1. Abstract: several of the p-values have 3 or 4 significant digits. I would limit to 2.

We have changed all p-values in the abstract to 2 significant digits on Page 3.

2. Introduction, first paragraph: The authors state that ‘fear of malpractice is a commonly cited as a driver of overuse of health care services and high health care spending. This fear, known as defensive medicine, may cause physicians...’ The fear of malpractice liability is distinct from the notion of defensive medicine, which is the actual ordering of extra tests, procedures, etc. because of fear of malpractice liability.

We have changed the first sentence of the abstract on Page 6, Line 8 to read: "This fear may cause physicians to order unnecessary tests, procedures, and referrals in order to protect themselves from lawsuits, a practice known as defensive medicine."

3. Results: Typo – ‘Claims were more likely to be judged’

We have changed this line on Page 10, Line 20 to read: "Claims were more likely to be judged in court..."

4. Results: The authors state that surgical and obstetric errors were more likely to be judged in court than settled out of court. This statement is not quite right. In both of these specialties, the majority of cases are settled out of court. The authors show that among judged cases, surgical/OB cases have a higher share than they do in settled cases. The remaining paragraph seems to phrase this issue correctly with respect to other factors they study.

We have changed this statement on Page 10, Line 32 to read: "Similarly, claims were more likely to be judged in court if they were for surgical and obstetric errors compared to other types of errors..."

5. Discussion: I like the authors’ hypothesis that because OB/surgical cases are disproportionately higher in judged cases, this may influence public perception about malpractice risk in these specialties. I might also specify that because judged cases take so much longer to resolve, the amount of time that these fields are exposed to ‘malpractice concerns’ is greater than other specialties.

We agree with this hypothesis and have therefore changed Line 46 on Page 11 to read: "Moreover, because judged cases take significantly longer to resolve, surgeons and obstetricians are exposed to malpractice concerns for longer periods of time than physicians in other specialties, which may also influence their perception of malpractice risk."

6. Discussion: Related to 5, I also appreciate the point that physicians may overestimate malpractice risks associated with the performance of procedures.

We agree that this is a key point in the manuscript, relating to physician estimation of malpractice

risks.

7. Discussion: Typo. 'Although we do not know exactly why cases that resulted in death were more likely to be judged in court,...' They are more likely to be judged out of court, correct?

This statement in the discussion was in fact incorrect. Cases that resulted in death were more likely to be settled out of court. We have revised Page 12, Line 10 to correct this.

8. Discussion: The authors state that OB/surgical claims may be more likely to be judged in court because the potential damages are high. I would also note that in the analysis by Jena et al. that the authors cite, OB/GYN is among the lowest specialties in terms of case dismissal. In other words, cases that undergo litigation are more likely to be judged against the OB/GYN when compared to most other specialties. This greater 'generosity' to plaintiffs may push them to be more aggressive and go to trial.

We appreciate this additional information helping explain why obstetrics cases are likely to be judged in court. We have added a sentence to reflect this in Page 12, Line 32: "Moreover, as suggested by Jena et al. in a recent analysis, claims against OB/GYNs are more likely than claims against other physician specialties to be judged in favor of the plaintiff in court. This generosity shown toward plaintiffs in obstetrics cases may lead more of them to aggressively seek trial."

9. Discussion: Regarding the payments for OB. Some have suggested that high indemnity payments may occur because children with catastrophic injuries provoke sympathy among attorneys, insurers, and juries, further increasing indemnity payments (Studdert DM, Mello MM. When Tort Resolutions Are "Wrong": Predictors of Discordant Outcomes in Medical Malpractice Litigation. *The Journal of Legal Studies*. 2007;36(S2):S47-S78.) Attorneys, insurers, and courts may also fail to objectively use clinical guidelines to determine the presence of malpractice and size of indemnity payments when children are involved. (Kesselheim AS, Studdert DM. Characteristics of physicians who frequently act as expert witnesses in neurologic birth injury litigation. *Obstet Gynecol*. Aug 2006;108(2):273-279.)

We appreciate this additional information helping explain why obstetrics cases are likely to be judged in court. We have added two sentences to reflect this in Page 12, Line 39: "Previous research has also shown that catastrophic injuries to fetuses and children provoke sympathy among attorneys, insurers, and juries, and that clinical guidelines are not always utilized to analyze malpractice and determine indemnity payments when children are involved. Thus, there are several possible reasons for plaintiffs to push for trial in such cases."

10. Discussion: The authors nicely hypothesize why claims involving death may be more likely to be settled. An economic theory of conflict resolution would argue that cases that go to trial are those where there are substantial asymmetric beliefs between plaintiffs and defendants on the probability of success and associated payouts. For example, a plaintiff who believes he/she will win will not settle. There may be less of this uncertainty when it comes to cases involving a death. It may also be interesting – though not required – to see how the variance in payments differs between judged and settled claims. The mean is higher in judged claims but I would also expect the variance to be higher if there is a lot of ex-ante uncertainty by both plaintiffs and defendants on how the trial will play out.

We agree with this suggested hypothesis and while we have not provided a comparison of variance in judged versus settled claims, we have modified the discussion to read, Page 12, Line 18: Alternatively, claims that resulted in serious or major injury to the patient may have been more likely to be judged in court because of substantial asymmetric beliefs between plaintiffs and defendants about the most likely outcome.

VERSION 2 – REVIEW

REVIEWER	Anupam B. Jena, MD, PhD Assistant Professor of Health Care Policy and Medicine Harvard Medical School, Boston, MA, USA I have no competing interests to report.
REVIEW RETURNED	02-May-2013
GENERAL COMMENTS	Thank you for making the suggested revisions to the manuscript.