

# The Reality of the Deterrence Effect: How Malpractice Lawsuits Promote Patient Safety

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Joanna C. Schwartz, *A Dose of Reality for Medical Malpractice Reform*, **N.Y.U. Law Rev.** (forthcoming), available at [SSRN](#).

Discussions of patient safety often begin with the depressing statistic that 98,000 Americans die every year due to hospital medical error. From there, they may veer toward a conversation about the culture of silence that hinders efforts to identify and address medical errors. The reasons for the culture of silence? There are many, but the law usually features prominently among them. Fearful that any discussion of errors may find its way into malpractice litigation, the providers best suited to preventing medical error are often reluctant to share the information necessary to do so. Thus, rather than deterring error, tort law ends up deterring its prevention.

But this gloomy story is often told alongside a more hopeful one. Thirty years ago, prompted at least in part by high malpractice insurance premiums, anesthesiologists made a concerted effort to improve anesthesia safety – and they succeeded. So tort law can sometimes fulfill its deterrence function. And it does not always chill communication about errors, either. In institutions such as the Veterans Administration Hospital in Lexington, Kentucky, and the University of Michigan Health System, errors are not just discussed internally, but also disclosed to patients.

One way to reconcile these two very different perspectives on patient safety and medical malpractice is to say that these more hopeful anecdotes are just that, anecdotes. In a fascinating article forthcoming in the *N.Y.U. Law Review*, however, UCLA law professor Joanna Schwartz shows that they are more than just anecdotes: medical malpractice claims regularly play an important part in patient safety improvement efforts, and not just at a few prominent institutions.

Schwartz documents the relationship between malpractice law and patient safety through semi-structured interviews with individuals performing risk and safety functions in hospital settings and through a survey sent to members of the American Society of Healthcare Risk Managers. Using the results of 35 interviews and more than 400 survey responses from hospitals across the country, she confirms that the patient safety culture in hospitals has been changing and illustrates the many functions that malpractice claims perform in patient safety improvement initiatives.

Schwartz's results reveal that hospital risk managers traditionally responsible for limiting financial losses have become increasingly focused on patient safety issues. While they once might have sought to curtail discussion of medical errors, risk managers now often promote increased transparency, both internally and in communication with patients. In addition, they frequently work alongside patient safety officers in efforts to enhance hospital safety.

Schwartz also examines ways in which malpractice litigation supports patient safety. More than 85% of survey respondents reported often or sometimes using “notices of claim and legal complaints for performance and safety lessons.” Individual claims prompt internal investigations that can point toward safety problems, while claims trends highlight areas in need of further investigation. Respondents also frequently reviewed information generated during discovery; examples of this practice included

gleaning information from depositions or from regular conversations with defense attorneys. And the majority of respondents reported using closed claims files. Files were used for education and training purposes, and, in some cases, to identify areas of safety concern.

While the survey results suggested that none of these malpractice-related sources of information were as useful as adverse incident reports or reports to risk management, many respondents still found them quite useful in responding to safety and quality concerns. More than 80% of survey respondents characterized claims trend information, for example, as “very useful” or “somewhat useful.” Most respondents also found complaints and legal notices of claim useful. These documents revealed new allegations of medical errors with surprising frequency, especially in larger hospitals, and especially with regard to diagnosis and treatment errors.

Schwartz also presents evidence suggesting that the malpractice system’s chilling effects linger. Some risk managers acknowledged a reluctance to discuss cases being litigated, for example, and some reported that limits on legal protections for peer review had shaped their patient safety efforts. These findings do not detract from the central conclusions of the article, however, which are that hospitals are increasingly open about medical errors and have been able to make systematic use of malpractice-related data in patient safety efforts.

This study’s central results might not come as a big surprise to scholars of health law and policy. But even so, the study makes a major contribution to the academic literature. The article’s reliance on systematically-collected data and a richly detailed, concrete discussion of how risk managers go about their work set it apart from much other work in this area. In addition to survey data, the article makes extensive use of interviewee quotes that vividly illustrate and support its conclusions. Readers more accustomed to bland and brief discussions of hospital risk managers’ tasks will likely find this approach both engaging and informative. Moreover, Schwartz’s thoughtful and careful discussion of the implications of the study’s results for medical liability reform is worthwhile reading.

Like any empirical study, this one has limitations. While the inclusion of hospitals with varying characteristics helps to establish that the trend toward openness extends beyond just a few hospitals, the survey response rate raises questions about the representativeness of the sample, an issue that Schwartz acknowledges. And Schwartz did not study malpractice claims’ implications for patient safety outcomes, just their usefulness in patient safety improvement processes, as perceived by a survey sample consisting mainly (but not exclusively) of risk managers.

Nevertheless, the article provides ample evidence for a phenomenon that Schwartz has labeled “introspection through litigation.” The article should prompt not only a fuller acknowledgement of the role malpractice claims can play in reducing medical error, but also more systematic use of the medical liability system in promoting patient safety.

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