December 13, 2011

Spirited med-mal debate complete!

Last week, PointofLaw launched a featured discussion with MI adjunct fellow and PoL editor, Ted Frank and Shirley Svorny, professor of economics at California State University, Northridge and adjunct scholar with the Cato Institute. Central to this discussion was a study authored by Professor Svorny claiming that existing empirical evidence suggests that "medical malpractice awards do track actual damages" and that noneconomic damage caps and other "policies that reduce liability or shield physicians from oversight by carriers may harm consumers."

Ted Frank articulated his dissent in the first comment of the discussion stating, "Shirley Svorny's paper for Cato arguing that caps on medical malpractice damages hurt consumers got a lot of attention. I found the paper very disappointing, however: it cherry-picked studies and ignored real-world practices by largely assuming away the problem. As such, it was not just contrarian, but counterproductive."

Throughout what manifested itself into a six-day debate, Ted made very compelling arguments to support his opposing viewpoint, for example:

Closer to home, Professor Svorny's students are not allowed to sue her for any alleged educational malpractice, another cap of zero. I trust that Svorny's lack of incentives created by liability do not reduce her efforts in teaching, even though she does not have an educational malpractice insurer charging her a quarter of her salary to work with her to minimize the risk of a student not being taught properly. How much more would Svorny demand in pay to keep teaching if she were exposed to potential liability, even if she believed the system was 100% rational and had no risk of haphazard false positives? (Even if the system never fails, Svorny would face real insurance costs, assuming she's not a perfect teacher. And note that even meritless claims properly dismissed by the courts would be costly to insure, because under the American system the winner of a lawsuit does not recover costs from the loser.) How many fewer students would take Svorny's classes because they couldn't afford to pay that marginal increase in cost?

Would that be a social cost militating against liability for educational malpractice or not? Why is it inappropriate to apply the same analysis to doctors?

Professor Svorny then responded:

There are real benefits to liability that cannot be swept under the rug by laws that limit liability. Just because my students cannot sue me for educational malpractice, it does not mean it does not exist and that students are not harmed. If students could sue their professors, the outcome would probably be a lot like that for medical malpractice, but even fewer cases would move forward as educational malpractice would likely be harder to prove than medical malpractice. But, in a liability regime, education would be more expensive, many professors would take greater care in preparing their courses, and the most egregious teachers would be out of a job.

This debate was one of the most lively featured discussions we've hosted on PoL and we are very interested in your feedback.

Who do you think had the better argument and why? Please send your feedback and commentary via Twitter, #PoLdiscussion.