



December 8, 2011

No system is entirely rational

BY IGORODETSKI

Shirley Svorny

I do not believe, as Mr. Frank summarizes my view, that the system is entirely rational. No system is entirely rational. As Mr. Frank points out, researchers have looked at the tort system. Using the numbers in Mr. Frank's original post, if there is no negligence in 40 percent of claims and, of those, 28 percent result in awards, then 11 percent of claims are both bogus and result in damages.

It is hard to say whether that incidence is too high--we wouldn't expect any system to be error free-- but perhaps the focus should be on getting that number down. Proposals to change how the courts work, such as substituting medical experts for lay jurors have been touted as a way to improve outcomes, but Neil Vidmar cites several reputable studies that find jury verdicts on negligence are similar to assessments made by medical experts. [[Vidmar](#), p. 369]

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.

Mr. Frank mentions New Zealand as an example of a country that has no-fault insurance and people there don't seem to be dying left and right. Perhaps they have other protections in place, but it is hard to imagine what protections could be as efficient as private liability. It may be, as it was with anesthesia and hospital infections, that a level of injury is thought reasonable when, in fact, at fairly low cost, there could be significant improvements. In a [2006 paper](#), Linda Gorman ([see](#) p. 17) cited a study published in the Canadian Medical Association Journal that found adverse events more common in New Zealand than in the U.S. ([see](#) p. 17). Of course

other factors, such as income, might explain the difference in outcomes across countries; it may not be malpractice liability.

As Mr. Frank notes, the costs of a system may outweigh the benefits. Right now we don't have much to go on to make this determination. My research on the medical professional liability insurance industry identified a benefit previously missed by analysts. Would going to a no-fault insurance system (the extreme case of caps) save enough money to offset the benefits forgone from the loss of oversight by the medical professional liability insurance industry?

The right question to ask is whether we can improve the current system in a way that reduces costs more than benefits.

Join the debate! Please send your questions and commentary via [Twitter](#), #PoLdiscussion.