

PREFACE: THE CRISIS THAT WAS CREATED

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I. THE MANUFACTURED CRISIS ELIMINATED PROTECTIONS AGAINST BAD DOCTORS	622
II. THE MANUFACTURED CRISIS LEFT LITTLE ACCOUNTABILITY IN EMERGENCY ROOMS	623
III. THE MANUFACTURED CRISIS EXPANDED DEFINITIONS OF HEALTH CARE (AND LIABILITY PROTECTIONS) FAR BEYOND REASON	623
IV. THE MANUFACTURED CRISIS MISREPRESENTED THE EFFECT OF CAPS ON NONECONOMIC DAMAGES.....	624
V. CONCLUSION	625

More than fifteen years ago Texans were told there was a medical liability “crisis.” Special interests pointed to data they said showed a lack of doctors and specialists in certain underserved areas of the state; they alleged that liability insurance premiums for doctors were skyrocketing; and they argued that the cost of health care was rising as a result.

Their proposed solution: slashing constitutional protections that were designed to hold dangerous doctors and careless medical facilities accountable and, more importantly, deter bad conduct. What resulted was legislation that, among other things, severely limited the recovery for victims of medical negligence.¹ The bill, House Bill 4 (H.B. 4), set an arbitrary cap on the recovery of noneconomic damages, which disproportionately affected individuals with little or no income, specifically children, people with disabilities, senior citizens, and stay-at-home parents.²

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1. *See generally* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

2. *Id.*

The problem is that the supposed crisis was one of their own making. When crafting their message, proponents cherry-picked and spun data to meet their own interests; ignored broader trends in the insurance marketplace; and made promises about improving the access, quality, and cost of health care for patients that have never materialized.³

This Book will explore the effect of H.B. 4 and subsequent legal rulings on access to justice and accountability for victims of medical negligence and their loved ones. We will review the failed promises of the special interests who proposed the legislation, provide detailed analyses of the bill's real world legal ramifications, and illustrate how the legislation has affected frontline practitioners and their clients.

Texas experienced a political sea change in 2002, setting the table for sweeping and radical tort "reform" in the 78th legislative session. Republicans gained total power over all levels of state government for the first time since Reconstruction, enjoying a large class of freshmen legislators, supermajorities in both chambers of the legislature, and all nine seats on the state's highest court.⁴ Rick Perry was elected to his first full term as governor, David Dewhurst was elected to his first term as lieutenant governor, and Tom Craddick, a hardliner, assumed power after many decades, presiding as speaker over the Texas House.⁵ The corporate lobby tilled fertile ground that session.

The tort reform tsunami that was H.B. 4 in 2003 swept through with little but anecdotes and hysteria. An interim study committee on prompt payment for doctors swiftly morphed into a push for medical malpractice changes and created an opportunity for the insurance industry to hide their agenda behind the guise of protecting doctors.⁶ The governor's office quickly added their support—listing this as an "emergency" issue⁷—and the legislative leadership followed suit. Led by the Texans for Lawsuit Reform (TLR) and the newly created Texas Alliance for Patient Access (TAPA)—and with the support of the 85,000 Texas doctors, hospitals, and nursing homes, as well as their respective trade associations⁸—a perceived crisis in health care became an opportunity for the insurance industry and the tort

3. *See id.*

4. *See* OFFICE OF THE SEC'Y OF STATE, RACE SUMMARY REPORT: 2002 GENERAL ELECTION (2002), https://elections.sos.state.tx.us/elchist95_state.htm.

5. *See id.*

6. TEX. SENATE SPECIAL COMM. ON PROMPT PAYMENT OF HEALTH CARE PROVIDERS, INTERIM REPORT TO THE 78TH LEGISLATURE 2.5 (2002), https://senate.texas.gov/cmtes/77/c950/rpt_PromptPay_2002.pdf.

7. *Texas Governor Rick Perry: 2003-05-08.mp3*, TEX. ST. LIBR. & ARCHIVES COMMISSION (May 8, 2003), https://tsl.access.preservica.com/uncategorized/digitalFile_642d85fd-ea4a-45e5-9e64-7fe0d07a39ca/.

8. Texas Medical Association (TMA), Texas Hospital Association (THA), and Texas Health Care Association (THCA).

reform groups. After all, a doctor in a white coat is a more compelling and sympathetic witness than an insurance executive in a thousand-dollar suit.

Having successfully whipped lawmakers, health care practitioners, and the public into believing there was a crisis, the 78th legislature convened in January 2003. A house bill that began solely as a medical malpractice bill was expanded to encompass twenty other corporate- and insurance-friendly civil justice changes.⁹ After weeks of contentious testimony, the legislature passed H.B. 4, and the governor signed the bill into law. A special constitutional election was called during an atypical time to adopt the caps on noneconomic damages in medical malpractice cases, an attempt to stave off a constitutional challenge.¹⁰ On September 13, 2003, by a narrow margin, the public approved restricting their rights, essentially immunizing their doctors.¹¹

Following the passage of H.B. 4 and the constitutional amendment, the proponents of the bill sought further fortifications for their victory through publication of a scholarly book on all aspects of the bill to serve as a legislative history.¹² Putting aside the presumption of lobbyists creating a legislative history, there was little data in the analysis.¹³ Now, a more thorough retrospective is timely because the data and caselaw are available on the changes made by H.B. 4. Questions can now be answered with more than anecdote and hyperbole.

Two important preliminary questions are: does the data show a crisis and did the changes found in H.B. 4 alleviate the crisis? The answer to both of those questions is no. In an Article that follows, Professor Charles Silver and his co-authors clearly show that the crisis was manufactured and not supported by the data.¹⁴ The assertions made in support of H.B. 4—that there was a “litigation crisis” that led to malpractice insurance premium spikes; that H.B. 4 would attract new doctors to the state, particularly in underserved areas; and that health care costs would be lowered—have all been shown false by the data.¹⁵

Rural areas remain underserved—63 counties have no hospital, 27 counties have no primary care physicians, and 16 counties have only one

9. See generally Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

10. See *Ballot Language for the September 13, 2003 Constitutional Amendment Election*, TEX. SECRETARY STATE, <https://www.sos.state.tx.us/elections/voter/2003sepconsamend.shtml> (last visited Apr. 17, 2019).

11. OFFICE OF THE SEC’Y OF STATE, RACE SUMMARY REPORT: 2003 CONSTITUTIONAL AMENDMENT ELECTION (2003), https://elections.sos.state.tx.us/elchist103_state.htm.

12. See generally Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169 (2005).

13. See *id.*

14. Charles Silver et al., *Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After H.B. 4*, 51 TEX. TECH L. REV. 627 (2019).

15. *Id.* at 627.

primary care doctor.¹⁶ In Texas, 35 counties have no physicians at all, 80 counties have five or fewer doctors, 185 counties have no general psychiatrists, 158 counties have no general surgeons, and 147 counties have no obstetricians/gynecologists.¹⁷ Texas has fewer physicians per 100,000 working-age people than other large states, like New York, California, Florida, and Illinois.¹⁸ Patients have not gained greater access as Texas remains first in the country in the percentage of the population lacking health insurance.¹⁹

In sum, the crisis was manufactured and the promised results were not delivered. In addition, this manufactured crisis has led to many other bad health care outcomes for Texans.

I. THE MANUFACTURED CRISIS ELIMINATED PROTECTIONS AGAINST BAD DOCTORS

In response to concerns raised about losing negligence lawsuits as a protection against bad doctors, the legislature promised to beef up investigations and regulations at the licensing authority, the Texas Medical Board.²⁰ However, these promises were short lived. A newly created Office for Patient Protection was defunded two years later, and an underfunded Texas Medical Board quickly became overwhelmed.²¹ In fact, as is evidenced by the press and the podcasts about Dr. Christopher Duntsch, the North Texas neurosurgeon called “Dr. Death,” no remedy was available for injured patients or concerned colleagues at the medical board.²² Turned away by the medical board, Dr. Death’s colleagues instead appealed to local law enforcement. The manufactured crisis stripped injured patients of effective civil remedies, the promises to increase regulatory investigations and enforcement were never realized, and Texans were left with few avenues to justice.

16. See Emily Ramshaw, *No Country for Health Care, Part 1: Far from Care*, TEX. TRIB. (Jan. 4, 2010, 5:00 AM), <https://www.texastribune.org/2010/01/04/health-care-sparse-in-rural-texas/>.

17. See PHILLIP MILLER ET AL., N. TEX. REG’L EXTENSION CTR., *THE PHYSICIAN WORKFORCE IN TEXAS* (2015), <https://dfwhcfoundation.org/wp-content/uploads/2015/04/mhaNTREC2015studyfinal.pdf>; John Commins, *35 Texas Counties Have Zero Physicians*, HEALTHLEADERS (May 6, 2015), <https://www.healthleadersmedia.com/strategy/35-texas-counties-have-zero-physicians>.

18. See *The U.S. Health Workforce: State Profiles*, HEALTH RESOURCES & SERVICES ADMIN., <https://bhwh.hrsa.gov/health-workforce-analysis/state-profiles> (last visited Apr. 17, 2019).

19. See *Health Insurance Coverage of the Total Population*, KFF, <https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Apr. 17, 2019).

20. TEX. MED. BOARD, www.tmb.state.tx.us (last visited Apr. 17, 2019).

21. See Robert A. Kraft, *Winslow: Texas Must Stop Protecting Public Safety on the Cheap*, PERS. INJ. & SOC. SECURITY BLOG (Mar. 15, 2010, 5:51 AM), <https://www.injury-and-disability.com/2010/03/winslow-texas-must-stop-protecting-public-safety-on-the-cheap.html>; Jason Roberson, *Texas Medical Board Falling Behind on Complaints as Workload Grows*, DALL. MORNING NEWS, Dec. 26, 2008, 2008 WLNR 24740679.

22. *Dr. Death*, WONDERY, <https://wonderly.com/shows/dr-death/> (last visited Apr. 17, 2019).

II. THE MANUFACTURED CRISIS LEFT LITTLE ACCOUNTABILITY IN EMERGENCY ROOMS

Another Article in this Book highlights the heightened standard of care for emergency care created in H.B. 4. For an injured Texan to hold a doctor or hospital accountable for negligent emergency care, a plaintiff must prove “wilful and wanton” conduct, which was subsequently construed in caselaw to mean “gross negligence,” i.e., that the harm was all but intentional.²³ As one Texas court concluded: “In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn’t care.”²⁴ Victims of medical negligence have had difficulty holding medical providers accountable because of the heightened standard.²⁵ With such lowered accountability, incentives for safety in the emergency room have decreased as well. In fact, Texas was the first state in the country to permit free-standing emergency rooms and now has a proliferation of standalone emergency room centers.²⁶ The manufactured crisis made the emergency room a more dangerous place for Texas patients.

III. THE MANUFACTURED CRISIS EXPANDED DEFINITIONS OF HEALTH CARE (AND LIABILITY PROTECTIONS) FAR BEYOND REASON

In H.B. 4, health care providers and liability claims were defined to delineate who and what received the liability protections of Chapter 74.²⁷ As Paula Sweeney explains in *Definitions Under Chapter 74* later in this Book, a disturbing trend emerged in the courts where almost anything associated with a doctor, hospital, or nursing home constituted health care.²⁸ Sweeney lists several cases in which courts have extended the definitions to shield outrageous situations:²⁹ multiple rapes at a nursing home, masturbating employees, defective bed maintenance, and improper floor

23. TEX. CIV. PRAC. & REM. CODE ANN. § 74.153 (West 2017).

24. *Turner v. Franklin*, 325 S.W.3d 771, 782 (Tex. App.—Dallas 2010, pet. denied) (quoting *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981)).

25. See Emily Ramshaw, *Struggling to Sue*, TEX. TRIB. (Dec. 19, 2010, 5:00 AM), <https://www.texas-tribune.org/2010/12/19/injured-er-patients-struggle-find-attorneys/>.

26. See Edgar Walters & Jeremy Lin, *Freestanding ERs Find a Home in Wealthy Areas*, TEX. TRIB. (Aug. 21, 2015, 6:00 AM), <https://www.texas-tribune.org/2015/08/21/freestanding-emergency-rooms-rise-texas/>.

27. CIV. PRAC. & REM. § 74.001(12)–(13).

28. Paula Sweeney, *Definitions Under Chapter 74*, 51 TEX. TECH L. REV. 745 (2019).

29. See generally *Harris Methodist Fort Worth v. Ollie*, 342 S.W.3d 525 (Tex. 2011) (per curiam) (extending definition of health care liability claim to improper floor mopping); *Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658 (Tex. 2010) (extending definition to defective bed maintenance); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005) (extending definition to multiple rapes at a nursing home); *In re Seton Nw. Hosp.*, No. 03-15-00269-CV, 2015 WL 4196546 (Tex. App.—Austin July 10, 2015, no pet.) (extending definition to masturbating employees).

mopping.³⁰ Hopefully, as Sweeney notes, “the high-water mark” for such claims has been reached after the now-infamous “cow-in-the-road” case, where a retired physician-rancher sought to be shielded from liability for his collision-causing bovine.³¹ While there is hope that the expansive Chapter 74 protections afforded by the definition of “health care” will be curtailed, there can be no doubt that the manufactured crisis protected some egregious non-health care cases from liability.

IV. THE MANUFACTURED CRISIS MISREPRESENTED THE EFFECT OF CAPS ON NONECONOMIC DAMAGES

Back in the '80s, the Texas Supreme Court struck down a law that capped damages for victims who were injured, but did not die, from medical negligence as “unreasonable and arbitrary.”³² They called the law “a speculative experiment to determine whether liability insurance rates will decrease.”³³ Hartley Hampton and Bob Peck note that this decision gave the Texas Legislature “good reason to believe its handiwork was unconstitutional”³⁴ and took the precaution of proposing an amendment to the Texas Constitution in Proposition 12. This Article details the subsequent legal challenge to the caps and suggests that the timing may not have been ripe for such a challenge.

What emerged shortly after the passage of H.B. 4 and Proposition 12 was confusion from the public about what the caps meant for each individual case.³⁵ There is an attitude frequently encountered by plaintiffs’ lawyers that a client’s only “nonfrivolous” litigation is their own.³⁶ Many victims of malpractice discovered that their case was now deemed frivolous, or at least nonactionable, by H.B. 4 and Proposition 12.³⁷ A client interviewed in a *Texas Monthly* article, Alvin Berry, voted for the cap thinking that \$750,000 was a reasonable figure.³⁸ What he and so many others like him did not understand was that the cap was overpromised.³⁹ In reality, in a case with one defendant and no economic damages, \$250,000 was the most that a health

30. See generally *Ollie*, 342 S.W.3d 525; *Marks*, 319 S.W.3d 658; *Rubio*, 185 S.W.3d 842; *In re Seton Nw. Hosp.*, 2015 WL 4196546.

31. See generally *Archer v. Tunnell*, No. 05-15-00459-CV, 2016 WL 519632 (Tex. App.—Dallas Feb. 9, 2016, no pet.); Sweeney, *supra* note 28.

32. *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

33. *Id.*

34. Robert S. Peck & Hartley Hampton, *A Challenge Too Early: The Lawsuit to Invalidate Texas Damage Caps Ten Years Ago and Its Likely Future Vindication*, 51 TEX. TECH L. REV. 667 (2019).

35. See Mimi Swartz, *Hurt? Injured? Need a Lawyer? Too Bad!*, TEX. MONTHLY (Nov. 2005), <https://www.texasmonthly.com/politics/hurt-injured-need-a-lawyer-too-bad/>.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

care defendant was liable.⁴⁰ After subtracting fees and costs for experts, substantially less would be available for plaintiffs like Alvin. Diminishing the value of a claim like Alvin's further, the cap, for which he voted, would not be adjusted for inflation.⁴¹ Another Article in this Book, *The Damages Caps: 'The Most Important Part' of House Bill 4*, by Luke Metzler and Lawrence Lassiter, discusses the caps in further detail and notes that the \$250,000 cap in 2003 is only worth about \$180,000 today.⁴² The manufactured crisis oversold the value of the cap to plaintiffs like Alvin Berry. If \$250,000 was supposedly "fair" compensation in 2003, how is \$180,000 for the same injury "fair" today?

V. CONCLUSION

The Articles in this Book highlight a number of concerns in the fifteen years since passage of H.B. 4. Some show that the premise behind H.B. 4 was faulty to begin with and that the crisis it was meant to address was manufactured.⁴³ Other Articles expose the expansion of the statutes into areas not contemplated by the legislature (or at least not understood by the public) and the often-tortured analysis performed by the courts to interpret many provisions.

One result is clear: Malpractice claim payouts have decreased and insurance company profits have increased.⁴⁴ However, Texans' quality of care and access to care have not increased.⁴⁵ Texas still has some unfortunate health care distinctions: one of the highest rates of uninsured citizens, a high maternal and infant mortality, and a multitude of underserved counties.⁴⁶ What we do not have is more physicians, better access to health care, and improved health care costs and outcomes.⁴⁷ The Articles contained in this Book contain a detailed analysis of the data and the caselaw in the fifteen years since the passage of H.B. 4 and Proposition 12. What cannot be captured are the stories of clients and potential clients that TTLA members encounter every day in their offices across the state and the effect that H.B. 4 has had on their individual cases.

40. *Id.*

41. See Luke Metzler & Lawrence Lassiter, *The Damages Caps: "The Most Important Part" of House Bill 4*, 51 TEX. TECH L. REV. 833 (2019); see also *CPI Inflation Calculator*, BUREAU LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 17, 2019) (calculating that \$250,000 in 2003 is worth \$180,000 today).

42. *Id.*

43. See Silver et al., *supra* note 14, at 627.

44. See *Health Insurance Coverage of the Total Population*, *supra* note 19.

45. See *id.*

46. See Commins, *supra* note 17; Ramshaw, *supra* note 16.

47. See Commins, *supra* note 17; Ramshaw, *supra* note 16.