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HEALTH LAW

The Jury Is Still Out on Health Courts

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In many physicians' minds, patient safety is closely linked to medical malpractice and the legal and financial consequences doctors confront when something goes wrong. Medical malpractice is a booming $55.6-billion business that accounts for 2.4 percent of annual health care expenditures [1]. The implications of a runaway medical malpractice system for the cost of health care generally has driven the call for reform and health courts have been proposed as one solution.

Health courts take malpractice claims out of regular courts and allow them to be handled by an administrative process, with a number of key differences from traditional malpractice. Proposals for health courts have been introduced by a number of organizations (including the American Medical Association), but the most recent model comes from Common Good, a bipartisan public interest group, and the Harvard School of Public Health [2, 3].

Health court hearings differ from malpractices procedures in many ways. Instead of juries, health courts rely on specially trained health care judges, and plaintiffs (those bringing the suits) need not necessarily have attorneys [4]. Second, a plaintiff has to prove only that his or her injury could have been avoided if best practices had been followed, rather than satisfying the more difficult standard that physician negligence contributed to the injury [4]. An unconscious emergency room patient, for example, who is allergic to latex and exposed to it during emergency surgery could still be compensated because the situation was avoidable, even though the surgeon wasn't negligent [4]. The surgeon, in following best practices, could have found a way to check the chart quickly without delaying surgery [4].

A third difference lies in the fact that compensation for injuries is based on expert evidence rather than a jury decision [4]. As Philip G. Peters [5] explains, compensation for pain and suffering, usually a big moneymaker in malpractice claims and varying widely from case to case, is capped and determined according to a formula based on the severity of the injury [6]. Fourth, compensation decisions establish precedence that judges can look to in making decisions about similar future cases. In traditional suits, damages are decided anew in each case [4]. Lastly, guidelines are in place to assist in assigning damages [4].

Health court proposals vary in some details. Some propose that a single court govern all patients and providers in a single geographic or clinical area, while the Harvard/Common Good proposal advocates that a court govern a single group of

insurers [4]. Some favor health experts over judges [7]. Additionally, some argue that a plaintiff who is unhappy with his award should only be able to appeal to an administrative judge within the health court system, while others support appeals through regular medical malpractice claims [7].

The concept of a health court as part of medical malpractice reform has been controversial. This article summarizes the pros and cons of health courts as a solution to climbing medical malpractice and health care costs.

A Need for Change

Some supporters of reform [8] allege that the current system allows frivolous claims and sky-high awards and that the time and cost of bringing a suit prevent many valid claims from getting off the ground [9].

Others, however, question the need for reform, citing the 90 percent of malpractice suits that are settled before going to trial [10]. This suggests that most of the cost of health care in this country is not linked to medical malpractice but to the high cost of care itself, and, because malpractice accounts for only 2.4 percent of all health expenditures, reform would not have a meaningful impact on overall cost [11].

Constitutionality of Health Courts

Another significant debate centers on the legality of health courts. Specialized administrative courts are not unique; similar types of courts have been formed to handle workers' compensation, vaccine injury, and tax claims. A key difference, one scholar [12] argues, is that each of these three courts adjudicates federally-created public rights, not state-created private rights [13]. The role of state law is important here. Almost every state guarantees a right to a jury trial for private civil matters, and the proposed health courts might butt heads with this protected right [14, 15]. Moreover, the right to a jury trial in federal courts is secured by the Seventh Amendment. Depending on their design, health courts could infringe this right [16].

Typically, legislatures must show that, when stripping citizens of a right, they provide a more or less equal trade-off, a concept called *quid pro quo* [17]. The three types of courts mentioned above are no-fault models, meaning that the plaintiff doesn't have to prove blame [13]. In contrast, the health courts plaintiff must prove that the injury was avoidable (even though he or she doesn't have to prove negligence). Hence, health courts may not satisfy *quid pro quo* because they strip the injured of a right to a jury trial without providing them an equal benefit—no burden to prove blame [17].

Legal challenges may also occur under state equal protection clauses, which require like treatment of like individuals or classes. If the health courts are introduced within particular medical centers or for specific types of injuries or events, injured parties within the health court system could argue they are receiving treatment unequal to that outside the system—their damages are capped, whereas damages for persons suing under other torts are not [18].

Claims that power is being abused are also possible. The legislative, executive, and judicial branches are meant to be independent and coequal [19]. If health courts amount to a misappropriation of power by the legislature or transfer of judicial power to the executive branch, they may be subject to legal challenge [19].

Capped, standardized damages are a trait of health courts that might pose a legal problem for health courts in states that have rejected caps. Some states (e.g., Illinois, Wisconsin) have struck down attempts to cap the amount of damages that a plaintiff can claim in a medical malpractice case [20].

Fairness

Is the health court model as fair as traditional medical malpractice suits? Supporters [21] argue that health courts make relief more accessible to everyone. Many individuals never bring suit for their medical injuries because of the high cost and length of malpractice claims (which may last 5-10 years) [22]. Health courts allow persons who had valid injuries but could not afford lawyers to make claims and would provide relief for those with injury claims that are valid, but too small to justify full-blown litigation [4]. While health courts enable wider access, they also entail less compensation per person, causing some to argue that they favor doctors and institutions over injured parties [23].

Critics of health courts point to studies suggesting that jury verdicts are often quite fair and studies have shown a "strong correlation between the merits of malpractice claims and the outcomes of litigation" when juries are in charge [24]. Conversely, judges may have more specialized expertise in the area of health care reform than juries and may therefore be superior fact finders, leading to better and more consistent verdicts [25].

Patient Safety

Whether or not health courts will lead to better patient safety is hotly contested. Supporters say that shifting the burden of proof from negligence to avoidability will encourage doctors to admit mistakes, allowing them and their institutions to more easily and openly address safety issues [25].

Others argue, however, that the health-court model of lumping together negligent acts and those that were merely avoidable creates less transparency, leading to "more brazen malpractice because of reduced fear of being shamed amongst medical peers and less fear of financial loss" [26].

Current Status

In 2010, President Obama called for "demonstrations of alternatives to resolving medical malpractice disputes, including health courts" [7, 27]. His 2012 budget allocated $250 million through 2016 for the Justice Department to "provide incentives for state medical malpractice reform," some of which will presumably involve study and potential piloting of health courts [28]. Similar models are

cropping up in actual practice around the country. A $3-million federal grant has funded a pilot "judge-directed negotiation" court system in parts of New York (including Bronx, Manhattan, and Brooklyn). This system is like health courts in that it favors judges over juries, but the model focuses more on settlement out of court than on an administrative court process.

With health care costs and budgeting center stage in the political arena, medical malpractice cost-reducing ideas will continue to be an important topic. The jury is still out on whether health courts will be the cure for rising health care costs, but much attention should be paid to these and other models as we continue to reshape health care provision in the future.

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