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Op-Ed

The Malpractice Crisis

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The most serious current problem with professional liability is the steady increase in malpractice premiums, which have more than doubled over the last 3 years. This is principally due to the escalating size of jury awards, not to an increase in the frequency of malpractice events. This large increase in premiums has at least 2 major harmful effects: increased cost and decreased availability of health care.

An increase in cost of premiums inevitably results in higher cost of medical care for *all* patients. What is generally not understood by the public is that the monies used to pay malpractice awards are recouped principally by increasing charges to future patients.

The increased costs also reduce availability of medical care for complex conditions, despite the fact that patients with these problems need care most. Many such illnesses can be helped but not cured, and less-than-perfect outcomes after treatment may result in litigation if it is uncertain whether the residual problems are due to the quality of care or the progression of the disease. As malpractice insurance premiums skyrocket, many physicians can no longer afford to accept high risk cases.

A Cap on Noneconomic Damages

The most effective short-term method for stopping the steady rise in premiums is to place a cap on non-economic damages. "Non-economic" damages are subjective claims—compensation for pain, suffering, and mental anguish, for example, as opposed to economically based considerations such as medical costs and loss of income from missed work.

The concept of payment for pain and suffering is a legal invention that has become popular over the past few decades. When these payments first began, \$25 000 was considered liberal, but now, with the absence of caps on awards, juries periodically grant several million dollars to plaintiffs in medical malpractice suits. The jurors' decisions would suggest that they don't realize that these expenses must ultimately be paid for by future patients like themselves.

In 1975, California was one of the first states to institute caps on noneconomic damages. Since that time its rate of rise in medical liability premiums has been only about one-third of the rate in states without caps. The imposition of caps has been strongly resisted, however, by the legal profession. As a result, only a handful of states has followed the California example and successfully enacted caps. Texas initiated a

cap approximately 3 years ago and since that time premiums have decreased 17 percent [1].

The Malpractice System and Jury Trials

Caps on noneconomic damages will help greatly to decrease the recent rises in malpractice premiums, but it will do nothing to correct the serious defects in our overall malpractice system. Malpractice is, by definition, medical care that is grossly inferior to what is normally provided by other physicians in the community. Using this legal definition, and based on local standards of care, less than 10 percent of cases filed for litigation are instances of malpractice. A high percentage of suits, probably 30 to 40 percent, are simply “frivolous” suits, not gross malpractice; these often originate from personality conflicts between the doctor and the patient. These findings have been repeatedly validated by members of the Professional Liability Committee of the American College of Surgeons. Three of the committee members direct Physician Insurance Programs in Chicago, New York, and Massachusetts, respectively. Data from other sources have described similar findings [2, 3].

The United States is recognized as providing the best medical care in the world, even though there are serious problems with its cost and availability for the average citizen. It is somewhat paradoxical, therefore, that malpractice expenses are the highest of any nation in the world. This is due primarily to the expensive inefficiencies of the jury system, not to a high incidence of incompetent physicians. The United States is the only nation in the world that uses a jury system to adjudicate patient malpractice claims.

In the current jury system less than 50 percent of premium dollars goes to the injured patient. Most of the monies are spent on the expenses of litigation. What is needed is a prompt, efficient form of insurance—much like automobile insurance or house insurance—that provides the majority of the monies to the injured patient. Most suggested changes, however, have been strongly, and effectively, resisted for decades by the legal profession. So, while caps on noneconomic damages prevent the steep rise in premiums, the most serious defects are related to court costs and attorneys fees and will require many major reforms.

Two Major Myths

Two major myths which have circulated for decades without any sound supporting data have contributed greatly to the absence of liability reform. The first is the “bad doctor” myth. As stated earlier, mediocre medical care is found in less than 10 percent of cases litigated. Bad doctors are rare for many reasons. For one, the educational training in this country is longer and more intense than almost anywhere in the world. Medical regulations are also numerous and strict, with required licensure, reporting of adverse events, and oversight by state medical boards.

Furthermore, malpractice premiums for a physician are usually increased if he or she is frequently involved in suits. Such physicians tend to be unable to get malpractice insurance or hospital admitting privileges.

A second major myth is that insurance companies make large profits from malpractice premiums. Insurance revenues have varied with economic cycles for decades, but in the past 3 years professional liability insurance has steadily lost money to such a degree that several major insurers have abandoned the market. St Paul's of Minnesota, formerly a national leader in medical malpractice insurance, completely withdrew from the medical liability market over 2 years ago after losing more than \$1 billion.

Conclusion

The rapidly increasing cost of malpractice insurance is making medical care not only more expensive but also less available—especially for those with complex illnesses. The ultimate goal is legal reform that delivers the majority of the award money to the patient as opposed to the less-than-50 percent the patient currently receives. The most effective short-term solution is a cap on non-economic damages.

References

1. Smarr L. Blame cost of claims for medical liability crisis. *St Louis Post-Dispatch*. January 16, 2005;B3.
2. Confidential Minutes of the Professional Liability Committee of the American College of Surgeons (1986-present).
3. Spencer FC. The urgent need for major reform of the professional liability system. *Ann Thorac Surg*. 1987;44:335-337.

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