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Health care reform should include malpractice process

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In a conflict between two parties, an exemplary legal process would base a resolution on truth and justice; discovering the truth in the contested matter and finding a way to provide justice for both parties.

However, the process in the United States for adjudicating malpractice cases is unconcerned with determining the truth and is unable to deliver justice. Instead, both sides are primarily motivated by money. The plaintiff and his or her attorneys strive to maximize what they might gain, while the defendant and his or her advocates attempt to minimize what they might lose. These goals color the entire legal process, with truth and justice often its victim.

Medical negligence indicates that an error has occurred in the treatment of a patient because the standard of care was breached. Negligence is deemed malpractice when trial lawyers enter the picture. Unfortunately, medical negligence is a major problem confounding the delivery of health care, ruining people's lives and resulting in unnecessary suffering. No one would argue against addressing this problem aggressively. But it needs to be done in an equitable fashion, as physicians may suffer emotionally and financially from these actions even if they have done anything wrong.

Malpractice suits raise health care costs in various ways, including physicians' payments for professional liability coverage. (The total cost of medical professional liability insurance in 2002 was calculated to be $25.6 billion and is certainly much higher since then.) The economic difficulties faced by many physicians because of the price of liability insurance can not be overestimated, with the cost often in the tens to hundreds of thousands of dollars. These exorbitant premiums have resulted in some physicians "going bare" (practicing without insurance) or closing their practices.

Defensive medicine, related to the fear of malpractice suits, is another factor that increases health care costs- physicians ordering unnecessary tests to exclude every unlikely cause for problems to protect against the risk of future suits.

A CBS News report in 2007 noted that the cost of defensive medicine to the health care system was estimated at more than $100 billion annually. Another study calculated the costs in 2001 at between $69 billion and $124 billion.

As an example of defensive medicine, when patients come into emergency rooms with relatively minor head injuries, CT scans are invariably ordered. This is to protect doctors from malpractice actions in the rare instance that a problem develops subsequently. (In addition to raising costs, this also exposes patients to unnecessary radiation.)

The proper (cost-effective) way to manage these patients would be to follow them clinically and order scans only if the symptoms warranted it. A survey of physicians several years ago showed that 79 percent ordered more tests and procedures than they deemed medically necessary in order to defend against malpractice suits.

Does the current system only need small adjustments to improve it or is it so flawed that it should be completely overhauled? Any program designed to address medical negligence and malpractice should have five objectives.

1) Decreasing the incidence of negligence and improving quality of care.

2) Properly and rationally compensating individuals who have been significantly injured as a result of negligence.

3) Removing incompetent physicians from patient care.

4) Punishing physicians guilty of negligence.

5) Having a process both patients and physicians believe is equitable.

The current method of handling malpractice through legal redress fails to meet any of the above objectives. A report in the New England Journal of Medicine assessing patients who had sued for malpractice, found no correlation between adverse events caused by negligence and payment to patients. Another study revealed that only 1.53 percent of patients injured by negligence ever filed a claim and only 8-13 percent of these cases went to trial. In addition, only 1.2-1.9 percent were decided for the plaintiffs. Yet almost $25,000 was spent on average by insurance companies and defendants to defend each claim, no matter how minor they may have been. The present system also does not address the issue of improving the quality of care. As the lawyer Winston Hubert Smith noted in writing about malpractice- "The civil action for damages enforces only incidentally the standards of medical practice."

Malpractice actions currently do not decrease the incidence of medical negligence, do not adequately compensate injured patients, do not remove incompetent physicians, and usually do not punish those guilty of negligence. Advertising by trial lawyers who want to attract personal injury cases persuades individuals who are angry at physicians or hospitals, or dissatisfied with the outcome of their care, to use the lawyer's services. A study in 1994 showed that the most frequent reason patients initiated a suit was television advertising, noted by 73 percent.

Physicians believe the malpractice process is inequitable and that they are unable to achieve justice, even if they win their cases, with no compensation from the plaintiffs after years of emotional stress and lost time defending themselves. Frustrated physicians view the process as flawed, knowing that only chance (and not good medical practice) keeps them from its clutches.

These actions are opportunities for plaintiffs and trial lawyers to obtain large payouts in cases where the treatment was unsuccessful or the results failed to meet expectations, whether or not there was actual malpractice. The skill of the attorneys and the experts on both sides may determine how a jury votes, rather than the true merits of the case. And there is an industry of expert witnesses who charge $500 to $1,000 an hour and are willing to testify on any aspect of a case, with no attempt at impartiality or seeking the truth.

Noted trail lawyer Melvin Belli once said, "If I got myself an impartial witness, I'd think I was wasting my money."

Trial lawyers have been obstructing all attempts at malpractice reform, contributing large sums to the campaign funds of politicians. The Trial Lawyers Association also has lobbyists actively working with Congress and state legislatures to prevent any critical statutes affecting malpractice from being passed. (The Association of Trial Lawyers changed its name to the American Association for Justice after a number of its most prominent members went to jail for subverting the legal process in various ways.)

The current method of handling presumed malpractice is a waste of time and resources, in addition to being ineffective. It is unfair to patients, physicians, and society as a whole. There are far better ways to deal with the issue of medical negligence from the standpoints of trying to lessen negligence, improve health care quality, and compensating victims who have been injured. Transforming the malpractice system now in place should be an integral part of comprehensive health care reform.

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