The US Medical Liability System—A System in Crisis

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The United States health care system has been a role model for the rest of the world, but an unparalleled rise in health care costs has threatened the availability of affordable health care to a large segment of US society. Many reasons exist as to why this crisis has come to pass: an aging population, an outdated Medicare program, Medicare cuts, lack of affordable health insurance, and a sluggish domestic economy have all had an effect on health care costs. But one of the most important factors in the spiraling cost of health care has been excessive medical litigation.

In general, Americans probably spend more per person for litigation costs than people of any other country. This has carried over into the field of medicine with excessive awards in medical litigation. Those of us actually delivering care are very well aware that fear of potential litigation has, in many circumstances, been the determining factor in ordering costly medical tests and interventions. Fear of potential legal liability—not patient history, not physical findings, not experience or diagnostic impression, but fear of being sued—has fostered the practice of “defensive medicine.” This fact is so patently obvious that probably only the trial lawyer’s bar would deny that increases in multimillion-dollar jury awards have contributed to defensive medicine. Every test, every intervention, every procedure has a cost, and someone has to pay that cost.

In many instances, defensive medicine by physicians is being practiced to avoid being sued, not to improve patient care. Moreover, the fear of being hounded by lawyers has caused some physicians to give up their practices, others to move to states with a more fair legal system, and others to limit their practices to patients without high-risk conditions that increase the peril of litigation. This trend has serious implications. Many patients are now at risk for not being able to see a physician, most poignantly, when they urgently need one.

Major cities are without a Level I trauma program, and entire states have severely limited obstetric or surgical resources, or both.1 Ability to obtain health care is affected by many factors, not the least of which is the patient’s economic status. But a frightening prospect is the possibility of health care not being obtainable at any cost. As physicians, in particular surgeons, are forced out of practice or out of a geographic area, replacing them has been difficult. No one wants to practice in an area where physicians are in exodus. Doctors are acutely aware of the malpractice climate in a particular geographic area. It seems bad news travels fast. Consider also the length of time it takes to train a specialist. After 4 years of medical school, an additional 4 years are required to train an obstetrician/gynecologist, and 5 years to train a general surgeon. It probably takes another 5 to 10 years of clinical practice before that specialist attains the peak of his or her clinical prowess. Physicians, surgeons, and other specialists are precious resources that once lost are not easily replaced in the short term.

The potential of not having medical, surgical, emergency, or obstetrical services affects all of us. Imagine being told that no neurosurgeon is available to care for a family member who has an acute head injury after a car crash, or a mother in need of natal care being told that no obstetrician is available because none can afford the malpractice premium in that area or state. What was unthinkable a few short years ago is now a reality in some areas.

The medical litigation crisis in this country is multifactorial in origin. However, a major determinant of the crisis in malpractice litigation is the very expensive litigation system itself. Insurer’s costs increased in the late 1990s, driven largely by increases in the cost of defending a lawsuit and the size and frequency of large claims. Although most cases of alleged malpractice do not go to trial, it is expensive to defend a claim—on average, almost $25 000 per case.2 More to the point, the size of the median jury award has progressively increased. In 1998, the median jury award was $750 000, and in 1999 it was $800 000. Between 1994 and 1996, only 34% of verdicts that specified damages assessed awards of $1 million dollars or more. By 1999,
52% of all awards were in excess of $1 million dollars. The entire system as currently practiced promotes a "winning the lottery" attitude. Although money as a remedy does not replace a hurt, from the patients' perspective, a verdict in their favor represents a large economic windfall, perhaps more than a lifetime of gainful employment could provide. On the legal side, a plaintiff's lawyer can expect to garner 30% to 40% of the total amount awarded to an injured person by a jury verdict. A large "win" can result in a good payday for both the plaintiff and for the plaintiff's attorney.

Malpractice premiums have become unaffordable for some doctors, and some major carriers have been driven entirely out of the malpractice insurance market because of cost. The St. Paul Companies, which was one of the largest malpractice carriers in the United States covering many physicians, announced in 2001 that it would no longer offer coverage to any physician.

Reform of the litigation system is imperative and needs to be implemented now. Far too many patients are underserved. Far too many dislocations of medical personnel and practices have occurred. The number of states "in crisis" has steadily increased. Each state has different needs, and certainly one solution will not fit all. But most persons agree that for the medical liability system to function in a satisfactory manner, it must be predictable and rational. It cannot function as a lottery, as it exists today. To improve the litigation process, incentives for filing frivolous lawsuits must be eliminated, the "win the lottery" mentality of patients and patient lawyers must be diminished, and the medical liability system should be reasonably predictable.

The President of the United States has supported medical liability reform that seems reasonable and fair. He has suggested:

- Improve the ability of patients injured by negligence to obtain unlimited compensation for their "economic losses."
- Ensure that recoveries for noneconomic damage do not exceed a reasonable amount.
- Reserve punitive damages for cases that truly merit them and avoid unreasonable awards.
- Provide for payment of a judgment over time.
- Ensure that ancient cases are not brought to trial years after the event.
- Inform the jury if a patient has another source of payment, ie, health insurance.
- Provide that defendants pay judgments in proportion to their fault, not based on "deep pockets."

All of the above are rational principles upon which to base a dialogue for initiating nationwide medical liability reform. Continued delay will result in potentially irreparable harm to our patients and to the medical community.

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