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Why Defensive Medicine Won't Go Away...and Might Become Worse

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Individual states have been addressing the problem of medical malpractice lawsuits in different ways with varying degrees of success. Because medical malpractice premiums are skyrocketing, doctors have put pressure on lawmakers for help.

However, not much help has been forthcoming, and the problem goes far beyond high premiums: up to \$204,000 annually for obstetricians in some Long Island counties in New York. The whole system is broken.

First of all, defensive medicine is real. Every doctor will readily admit to doing tests to placate their patients. It is faster to say yes, and patients are happy that they got everything "to be safe." Two things constitute a lawsuit: bad outcome and angry patients. Doing extra tests can help both parts of the equation.

It's not necessarily good medicine to do so many tests, especially when they are CT scans that can cause high doses of radiation. However, for every test deemed "unnecessary" there is an anecdotal story of how it caught that small tumor and saved that patient's life.

It comes down to acceptable risk. When a physician examines a patient with a head injury and clinically clears that person without doing a CT scan, that physician is practicing good medicine. However, if one of those patients has an epidural hematoma and dies there is a high likelihood of a lawsuit, *especially* if that patient asked for a scan and you refused. Although that physician might win the case if the jury can be convinced of the veracity of a clinical rule-out, that was still years of stress and anxiety for the physician.

Doctors Need to Be Protected

In other words, if the government wants to follow clinical guidelines that don't require tests for every diagnosis, the government also needs to protect physicians from the threat of a lawsuit if indeed a statistical certainty occurs with a bad outcome.

Currently, the Obama administration is trying to cut down on what are deemed unnecessary tests. If a patient has a headache and gets a head CT scan and it is positive, all is well. However, if the CT scan is normal the government wants to enact rules that refuse payment -- all in the name of preventing excessive testing. However, the government doesn't want to assume the increased medical malpractice liability risk that is certain with those kinds of policies.

Unfortunately, a new phenomenon is contributing to an increase in defensive medicine: overreliance on unscientific patient satisfaction surveys such as the Press Ganey Ratings. Because physicians are forced to pay closer attention to patient impressions of their visits, they will do their best to placate their patients - and that will increase costs.

Why Doctors Need to Be Concerned

Many legislators, policy experts, and attorneys think that physicians' concerns are overblown. They claim that the current system is necessary to protect patients. I dispute this for 2 reasons.

First, defensive medicine is real. Every doctor knows it. Although the number is difficult to quantify, Price Waterhouse did so in [their 2008 study](#) that estimated defensive medicine costs \$210 billion a year. A Congressional Budget Office study from December 2008 backs up that number.

Although this study is touted as verifying that defensive medicine is not a significant factor in healthcare costs because tort reform will only reduce costs by 0.5%, the fine print showed that number to be based on insurance premium reductions. It added that when defensive medicine is figured in, the total percentage could be as high as 7%. When multiplied by the \$2.4 trillion in overall healthcare costs, that comes to \$168 billion per year. Even in the healthcare world this is not an insignificant number.

Second, the current system doesn't give real justice for patients who have been truly harmed in medical malpractice. It takes years for a lawsuit to garner any money for patients. Much of the settlement/judgment goes to the plaintiff's attorney. Plus, it's rare that there will be a change in the physician's medical practice. There's no current mechanism to have the lessons learned from this trial be carried out for the specialty as a whole.

The Obama administration has taken medical malpractice caps on noneconomic damages off the table, but has many other reforms that they plan to try to get passed as law. Personally, I don't think caps do anything to fix the problem, although it can temporarily lower or control skyrocketing medical malpractice rates.

What Would Make You Stop?

Before I go into the specifics of the new proposal, first answer this yourself: What do you think would cause you to discontinue your practice of defensive medicine?

Did you say: Complete protection from lawsuits? This is not realistic. We all know that there are bad doctors out there, and there needs to be a system in place to find them and educate them if possible -- or discontinue their practices if necessary. How to Improve the Malpractice Situation

President Obama's budget includes money for grants to states to try out alternatives to the current medical tort system. Reforms that would be able to use grant money include the following.

Health Courts

This involves having specially trained judges who would decide verdicts instead of juries.

Benefits are that judges would be less likely to rule for astronomical verdicts, and a smoother trial process would mean faster turnover.

However, there are potential problems. Doctors win an estimated 80% of cases at trial. Healthcare courts could become a "be careful of what you wish for" situation that could lower that percentage. There are so many unknowns. Does each case get heard? Is there a process for health courts to screen out frivolous cases?

How is the standard of care determined? No matter how educated the judges are, they are not board-certified physicians practicing in the defendant's field. Thus, experts will still be needed, and if so, will there be strict rules as to who can serve this purpose?

Creation of a Legal Defense Fund for Doctors

To qualify for these funds, you would have to follow guidelines for best clinical practices and use electronic medical records. How much money would be available to you? How would it be funded? These are some questions that would need to be answered. However, I could write a whole article on the problems of "best clinical practice" and electronic medical records. Although an intriguing idea on the surface, I foresee many issues with qualification and implementation.

Require that physicians and hospitals disclose errors and make apology and compensation to mitigate a lawsuit. The apology is protected, so if the patient does sue, it can't be used as an admission of guilt. These programs are well documented to reduce litigation, and as long as the apology is truly not admissible in court it is an idea worth expanding beyond the 20 or so states that have them.

Change legal rules that result in higher malpractice awards. Because so few details are given, it is difficult to comment.

When a physician is sued, he or she has already lost regardless of outcome. It is this loss, or threat of it, that creates the need for defensive medicine. I'm not convinced that President Obama's plan does enough to weed out frivolous claims before they become lawsuits. If something like that is enacted, it could alter physician behavior.

Perhaps Obama's suggestions could theoretically help improve defensive medicine from a medical malpractice standpoint. However, physicians can't be expected to lower costs with best practices *and* give their patients whatever they want. New rules make it very clear that in the near future patient satisfaction and physician reimbursement will be linked. If that occurs, any potential gains from medical malpractice reform will be lost.

do you craft a system that protects doctors from frivolous lawsuits and defends the right of a patient to sue for medical malpractice?

There's no easy answer to this, although President Obama's proposal to explore several options does attempt to address many facets of the problem.