

Cure for the Health Care Crisis

Specialized courts could create clear standards and greater reliability. **By Jeffrey D. Pariser**

America is in a health care crisis—a “perfect storm” of needless errors, unaffordable cost increases, declining access, inadequate accountability, and fearful and frustrated professionals. Some of the problems are unavoidable. No one can change, for instance, the fact that the baby boom population needs more health care as it ages.

But our legal system is part of the problem, too: It imposes needless costs, deters safety improvements, and fosters widespread distrust among medical professionals. Changing the way medical malpractice lawsuits are decided would go a long way to improving health care for patients and providers alike.

TOO MANY MISTAKES

Medical justice today, studies show, is worse than random. Most errors go uncompensated. At the same time, according to a Harvard medical practice study, 80 percent of claims are made against doctors who made no medical error at all. The irony is that juries often let a doctor who made a mistake off the hook, but one out of four cases in which experts believe the doctor did nothing wrong results in payments. Lawsuits go on for years, with the truth obscured by technical jargon and experts-for-hire. It's a nightmare both for those injured by malpractice and for physicians unfairly charged.

At present, juries are making the major decisions in medical liability cases. But juries can't set precedent; they can only make judgments in individual cases. They can't establish standards of care that affect society as a whole, and their decisions are often inconsistent. One jury may make a huge award in a particular case, and another, in a similar case, may make no award at all.

Patients and doctors are left wondering where the fairness is and what the standards are. Jurors, after all, typically have no medical or scientific training, and the medical issues that are at the core of many lawsuits are highly complex and technical.

Our nation needs a reliable system of medical justice—one that protects patients against bad practices, compensates victims of malpractice adequately, protects caregivers who act reasonably, and interprets standards of care so that all participants know where they stand and where they must improve. It should also provide incentives for health care providers to modernize their systems.

FOCUS THE COURTS

Such a system could take many forms, but because the critical issue in virtually all cases is whether the doctor complied with appropriate standards of care, the key element must be expert judges ruling on standards of care.

Today, partly because of the growing complexity of medical science, no one working on behalf of society is making binding rulings about what is good care and what is not. No one is deciding when a test is needed and when it is not. What is missing are established standards of care.

The work of special health courts should be to define and interpret such standards of care. The courts should have dedicated judges with the authority to hire neutral experts, instead of the experts-for-hire who now populate, confuse, and prolong malpractice cases. To reduce legal fees, the legal proceedings should be expedited, so that injured patients keep more of any award.

Creating a special health court is an ambitious undertaking, but specialized courts already exist in such areas as taxes, workers' compensation, labor issues, and vaccine liability. If they can be created to address those issues, why not for health care?

The creation of special health courts will presumably be opposed by the trial lawyers, who take home as much as 40 percent of any award to a patient, because it is precisely the unreliability of the current system that gives them their leverage. But creating such a court will help to strengthen one of the oldest and most basic principles of the American system of justice: that like cases be decided alike.

And the American people already support the idea. A Harris Interactive survey, commissioned by Common Good and

released on June 14, revealed that 62 percent of American adults support the creation of special health courts. Interestingly, 63 percent also think that medical malpractice claims are often brought against doctors and hospitals when there has been no malpractice.

JUSTICE YOU CAN RELY ON

It's clear that the American people want reliability. What should we expect from a reliable system of medical justice?

Patient safety should be the first goal. And that requires reviving or inducing a culture of open communication. As the Institute of Medicine (a division of the National Academies) has found, people who distrust the system of justice are reluctant to be open about their mistakes and uncertainties. Tragic human errors—in prescription dosage, for example—occur because health care professionals are reluctant to speak up for fear of legal consequences. The legal system today provides no incentives for doctors and hospitals to develop systems to help catch errors and to make improvements.

Access to health care must also be a goal. That requires health care professionals to make wise choices on how they use resources. That's not happening in the current system, in which billions of dollars are squandered annually as doctors order tests and procedures of little or no utility—designed to protect themselves from lawsuits rather than to help their patients. And funds spent on unnecessary or marginal tests are funds not available to care for other people who are sick.

Forty-three million Americans lack health insurance. A reliable legal system would enable health care resources to be allocated more efficiently and to a broader public.

Accountability is also a critical goal. Patients injured by medical mistakes should be compensated fairly. Doctors should be held accountable for the quality of their judgments and actions. Doctors who perform below acceptable standards should be punished; doctors who are not competent should lose their licenses.

But there is a need to distinguish, in a field with inherent risks and uncertainties, between developments that the doctor could have foreseen or addressed and those outcomes that could not have been controlled. Not all bad medical outcomes should be the basis for a suit—only those that could reasonably have been anticipated and prevented.

The role of law, after all, is not only to condemn what's unreasonable but also to protect what is reasonable. We've forgotten that second half, contributing to the crisis in health care.

The question is: How will we fix it? If we do nothing, we are accepting a continuation of unreliable justice. And the victim of unreliable justice is society as a whole—not just the medical profession.

Only by establishing reliable justice in health care can we make progress toward a cure.

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