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INSURANCE EXCHANGE RISK RETENTION GROUP
1250 Broadway, Suite 3401
New York, NY 10001

www.academicins.com

AHPIA Solutions, Inc.
Attorney-in-Fact

Tel: 646 808 0600
Fax: 646 808 0601

Medical Malpractice: Tort Reform is A Myth and What Happens When Doctors Apologize

By Dava Castillo, Ann Arbor, MI, USA | May 07, 2011

Tort reform is being discussed as a method to cut the cost of health care. Some educators question the validity of tort reform in reducing costs and compromising physician credibility. While Congress discusses this issue in committees with disagreements tending along party lines, The University of Michigan presents a unique approach. Their research might surprise you and offers an alternative to some legislative reforms proposed that address medical malpractice and the myths surrounding tort reform in reducing health care costs.

Myth: Tort Reform Is the Solution (http://www.allvoices.com/people/Final_Solution) Information from the University of Louisiana Law Center Unilateral Tort Reform.

There are two types of tort reform. The more common variety is unilateral tort reform. These reforms make it harder for all persons to sue physicians and to recover adequate compensation when they win a lawsuit. While unilateral tort reform benefits physicians, it does so at the expense of injured persons with meritorious claims.

In many cases, it shifts the cost of medical malpractice to society by making the injured person a ward of the state.

Unilateral tort reform is the process of putting obstacles in the way of persons seeking compensation for an iatrogenic injury (something that results in injury of a patient by a doctor). It is referred to as unilateral reform because the defendants do not give up any of their traditional protections.

Substantive reforms may limit certain causes of actions such as lawsuits for failure of informed consent, or they may cap the damages that a successful plaintiff can recover.

Procedural reforms include shortened statutes of limitations, special restrictions on the qualifications of expert witnesses, and the required use of pretrial screening panels or affidavits to establish that the claim has merit.

Most unilateral tort reform has been enacted without empiric evidence of the magnitude of the problem being addressed. For example, many statutes limit a plaintiff's recovery for pain and suffering to a fixed amount, such as \$250,000. This is based on the unsubstantiated belief that large awards for pain and suffering make a substantial contribution to malpractice insurance rates.

The lack of proper baseline data also makes studies that purport to evaluate the effectiveness of tort reform methodologically unsound. A drop in insurance rates may be due to tort reform, but it may also be due to the cyclic nature of the insurance business.

Bilateral Tort Reform

Bilateral tort reform attempts to make the tort system more equitable and affordable for both parties. Bilateral reforms are usually based on alternative dispute resolution techniques. These can make it both cheaper to defend an unfounded claim and easier to prevail on a meritorious claim.



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Bilateral reforms best serve society's interest in justice. They can be devastating to malpractice insurance costs, however, because they reduce the opportunity cost of presenting a valid claim.

The malpractice insurance carriers have been skillful in persuading general medical societies and specialty societies to lobby for tort reform. These physician organizations have viewed lobbying for tort reform as a no-cost (other than the cost of the lobbyists) benefit. While it is true that unilateral tort reform will reduce certain of the costs of medical malpractice litigation, this is at a political cost to physicians.

However necessary and beneficial tort reform may be, lobbying for it puts physicians in the position of asking for a special exemption from the laws that govern other businesses. Moreover, unilateral tort reform clearly benefits the physician at the expense of the injured patient.

The cost of tort reform is that it convinces legislators that physicians are no different from other businesspersons. This reduces the credibility of physicians when they lobby for measures, such as increasing the availability of prenatal care, that benefit the public's health.

It also increases the likelihood that legislators will see tort reform as a trade for other special favors that physicians enjoy. As physicians lobby for their own parochial interests, they should not be surprised to find themselves treated as just another trade group.

Alternatives to Medical Malpractice Lawsuits

Since 2004, The University of Michigan Health System has been in the national spotlight for its innovative approach to medical errors, mishaps and near-misses and their potential legal consequences including malpractice suits.

Claims involving serious injury, the only category for which litigation is a realistic option, often take five or more years to resolve and have consequences. Information about the cause of injury is denied patients and families for prolonged periods, compensation is unavailable when it is most needed and quality, timely feedback to providers is diluted and rendered useless.

Saying "I'm sorry" Works

Ann Arbor, Mich. - The University of Michigan's program of full disclosure and compensation for medical errors resulted in a decrease in new claims for compensation (including lawsuits), time to claim resolution and lower liability costs, according to a study published last year in the *Annals of Internal Medicine*.

<http://www.allvoices.com/s/event-9005220/aHR0cDovL3d3dy5tZWQudW1pY2guZWR1L25ld3MvbmV3c3Jvb20vbW0uaHRt>

"The need for full disclosure of harmful medical errors is driven by both ethics and patient safety concerns," said lead study author, Allen Kachalia, M.D., J.D., Medical Director of Quality and Safety at Brigham and Women's Hospital. "However, because of fears that disclosing every medical error may lead to more malpractice claims and costs, disclosure may not happen as often and consistently as we would hope."

American Medical News reports, when you hurt someone, saying "sorry" may seem like the least you can do. But when the hurt occurs in the medical arena, offering an apology is not so easy.



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Thirty-five states have laws offering some kind of legal protection for physicians who express regret or empathy to patients who experience an adverse event. But laws vary in what they protect from admissibility in court. Most insurers discourage doctors from apologizing for fear it could hurt them in court, and lawyers often advise against it.

Hospitals are required to tell patients about serious mistakes. But it is unclear to what extent disclosure policies are followed, and these disclosures may not be accompanied by apologies.

The University of Michigan Experience

The root causes of medical malpractice claims are deeper and closer to home than most in the medical community care to admit. The University of Michigan Health System's experience suggests that a response by the medical community more directly aimed at what drives patients to call lawyers would more effectively reduce claims, without compromising meritorious defenses.

More importantly, honest assessments of medical care give rise to clinical improvements that reduce patient injuries. Using a true case example, this article compares the traditional approach to claims with what is being done at the University of Michigan. The case example illustrates how an honest, principle-driven approach to claims is better for all those involved—the patient,

the healthcare providers, the institution, future patients, and even the lawyers.

Patient's Reasoning

Studies that have examined patients' reasons for seeking legal help following unanticipated medical outcomes suggest that caregivers' reluctance to disclose actually may drive patients to lawyers' offices. A common societal misconception is that plaintiffs who sue are primarily

opportunists trying to squeeze every dime they can from the system (e.g., the McDonald's coffee case). Although compensation is clearly one factor in the decision to sue, "patients and relatives are hoping for more than compensation when they embark on a legal action.

Professional Community Fears

Over the years, a myriad of fears have fueled physicians' and hospital administrators' reluctance to speak openly with patients about not only medical mistakes, but even complications that occurred in the absence of negligence.

These fears include:

- A natural aversion to confronting angry people;
- Concerns that disclosure might invite a claim that otherwise would not be asserted;
- Anxiety that the discussion will compromise courtroom defenses later; and
- Fear that the conversation may lead to loss of malpractice insurance or higher premiums.



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University of Michigan Findings of Research

The University of Michigan Health System adopted a process of full disclosure of medical errors that involves multiple components, including an online incident reporting system and outreach to plaintiffs' attorneys to facilitate early identification of potential claims; a formal process for investigating claims and potential claims; a multidisciplinary claims review committee; open and honest communication with patients and families, with an apology offered when warranted; and quality improvement initiatives guided by reported errors. The program increased error reporting, significantly reduced malpractice claims and costs per claim, hastened the claims resolution process, and reduced insurance reserve requirements. Although specific savings are difficult to calculate, health system administrators believe that savings are significant. Feedback from both physicians and malpractice attorneys has been quite positive.

Conclusions

Tort reform shifts the cost of medical malpractice to society by making patients the ward of the state. Many statutes limit a plaintiff's monetary recovery to a fixed amount, and insurance rates tend to fluctuate with business cycles of the insurance business, rather than the cost of malpractice suits.

Lobbying for tort reform puts physicians in the precarious position of lobbying for exemptions defining them as business people rather than patient oriented individuals, which mitigates their credibility as physicians when seeking legislation for medical care issues.

The University of Michigan research reveals that transparency, designing protocols and procedures for multidiscipline review within their institution and keeping the lines of communication open between patients and physicians reduces claims.

Sometimes just saying "I'm sorry" to a patient can be sufficient and hastens the resolution process.