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Don’t Forget Who Got Hurt

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BY KATIE WATSON

A new Illinois law that limits to $500,000 the amount of money patients can receive for non-economic damages in medical malpractice suits has physicians celebrating and lawyers complaining.

As a lawyer who teaches in a medical school, I'm sympathetic to both professions. But as a medical ethicist, I'm disappointed that the frenzy over caps has given us a thin vision of "malpractice reform" that overlooks the needs of most patients.

It's fine with me if Illinois wants to cap awards for pain and suffering, but let's be clear about who benefits. Capping awards will lead to a drop in malpractice awards, which would increase profits for insurers, which might lead to lower insurance premiums for physicians. In the best case scenario, physicians might take home more money.

That's not a bad thing. Practicing medicine is an extremely difficult, socially valuable job that requires many years of training that often saddles students with five- or six-figure debt. Physicians deserve to be well-compensated.

But the fact that neurosurgeons pull in a median income of about $490,000 makes the word "crisis" seem a little strong. It's also the case that the high-risk, high-premium, high-salary specialties the debate has focused on -- neurosurgery, orthopedic surgery and obstetrics -- represent a combined total of only 9 percent of physicians involved in patient care in Illinois (2,875 individuals).

Medicine isn't as lucrative a profession as it was before managed care and high liability premiums -- most docs work in low-risk, low- premium specialties that earn about a third of what neurosurgeons make. But the average physician still makes about seven times more than the average American worker. So rather than say a few physicians "can't afford" to continue working in Illinois, it would show more respect for patients to say, "I moved to Wisconsin because I could make more money there."

True reform puts patient health first

A medical ethics analysis of any problem starts with the patient, because that's who this endeavor is for. So I'm interested in asking what patient goals for malpractice reform might look like. To start from square one, why are patients suing physicians?

The obvious reason is because they're hurt. Preventable medical error kills up to 98,000 people a year in the United States, according to a 1999 Institute of Medicine report. That's like an airplane crash every day. If the Centers for Disease Control were to include it in their morbidity rankings, medical error would be the eighth leading cause of death in the U.S. Not everyone agrees on how to categorize or quantify medical error, but no one doubts it's an enormous problem.

So a patient perspective might reframe the issue from "malpractice crisis" to "safety crisis," and shift the legislative focus to aggressive, generously funded efforts to reduce the number of medical errors.

In reality, malpractice doesn't account for most medical harm. Rather, the majority of injured patients are victims of errors that don't rise to the legal standard for negligence. The culprit might be a confusing system for prescribing drugs and treatment, perhaps, or an overwhelmed medical team that suffers a communication lapse -- chains of ordinary actions that don't include "negligence" but result in preventable error.

Nonetheless, malpractice litigation spends a lot of time and money identifying the "deserving injured" and the "incompetent to blame." About 70 percent of Illinois malpractice suits end without any payment to the patient, but that doesn't mean 70 percent of plaintiffs weren't injured. It just means those who were injured were harmed by non-negligent error.

Wouldn't the money we spend sorting types of error be better spent compensating those injured by non-negligent error too? (The fact that jury awards sometimes seem more keyed to degree of disability than negligence suggests they're on the same wavelength.) When a patient who comes in for a routine medical procedure ends up with a life-altering injury, it really doesn't matter to him whether the injury was the fault of an incompetent individual or a complex hospital system. Either way, he's still injured. And either way, he may be facing expensive future care or a loss of income.

It's common to note that fears of being sued can undermine efforts to create a "culture of safety" -- a blame-free hospital environment in which errors are openly discussed to prevent recurrences. But error prevention programs can only benefit patients. Until they also help the injured person who flagged the safety problem in the first place, they'll never escape the shadow of the malpractice system and live up to their full potential.

Therefore, the second element of any malpractice reform that truly benefits the patient is linking safety and compensation -- making it possible for patients to be justly compensated when injured (filling the gaps between health, unemployment, and/or disability insurance) -- without having to sue. Think of it as no- fault insurance against both negligent and non-negligent medical error.

Docs clam up, patients sue

Another reason patients sue is anger. Everyone expects an explanation and an apology when they're harmed. But lawyers often advise physicians to not discuss even non-negligent error. So just when a patient needs his doctor most, she clams up.

The frustrated patient or a relative might then sue because it's the only way to find out what went wrong or why a loved one died, or because they feel like their health care providers simply don't care. So another patient perspective would call the problem a "communication crisis," which is only made worse by the short visits and frequent doctor switching required by managed care.

The new "Sorry Works" law, signed by Gov. Blagojevich on Aug. 25, tackles one aspect of this issue by allowing doctors to apologize to patients without the apology being used against them in court. Research in other states suggests this simple step might improve communication between doctors and patients, defusing difficult moments and decreasing the number of lawsuits.

Docs have feelings, too

As a medical ethicist, I am also concerned with the quality of life of the human being on the other side of the medical exchange, the physician. So what is it about malpractice that harms physicians?

From what physicians tell me, the main problem isn't the money exactly -- most will never be hit with a big jury award, and insurance will cover it if they do. And it isn't just the hassle of the occasional lawsuit. The majority of docs practice in low-risk specialties like internal medicine,

which get sued about once every ten years.

The biggest problem, physicians tell me, is a climate of fear that makes it less rewarding to be a doctor. Practicing defensive medicine and feeling mistrustful of patients can make any physician cynical, even if he goes his whole career without being sued.

When they are sued, physicians feel betrayed. How could my patient turn on me? Every lawyer's inquiry is upsetting, though the vast majority come to nothing.

Improving the health care climate for physicians means reducing the number of cases filed, not just the amount awarded in the small percent of high-verdict cases that make it through. It is here that physicians' and patients' interests converge, because vigorous reduction in medical errors, just compensation and full disclosure serve both groups' needs.

Finally, it would be disrespectful for me to discuss malpractice insurance without mentioning that the 1 in 7 of Americans who don't have health insurance would like to be protected from economic catastrophe, too.
It's unfair to ask patients who are on their own in their effort to pay for health care to suddenly abandon individualism and become team players in keeping health care costs down after they're injured.

Physician calls for lower malpractice premiums inspired the legislature in Springfield to make significant reform. Now it's time to give equal attention to the needs of insured patients, who are also struggling with premium increases, and to the needs of those who don't have health insurance at all.

Let's not stop at caps. Organized medicine and the trial bar need to collaborate, dialing down the rhetoric and combining clout to advocate for a robust vision of malpractice reform premised on the needs of the patient.

I'm an idealist, not an idiot. I know that's a big request. But when the malpractice debate is reduced to "doctors vs. lawyers," patients aren't even in the game. Law and medicine are human systems, and if they aren't working for us, it's time for some ambitious re-imagining.

Teaching medical students has reinforced my faith that most people become lawyers and doctors because they want to improve the lives of those they serve. Both professions contribute mightily to that endeavor, and herein lies yet one more opportunity to do so.

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