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Any malpractice reforms should put patients first

By Kevin Pho

Whenever the issue of medical malpractice comes up, my fellow physicians and I agree that changes are necessary. Where we disagree is on how to fix the problem. So we all took note when President Obama acknowledged that [medical malpractice reform](#) must be considered. In fact, he proposed [pilot projects](#) to study how to improve patient safety and change the way we compensate injured patients.

Reforming medical liability has historically been a source of major contention. Many physicians argue that the system is expensive, promotes multimillion-dollar awards disproportionate to the injuries and encourages "defensive medicine." Lawyers say suing doctors is the only way patients harmed by medical errors can seek financial redress. They dismiss the notion that malpractice costs and defensive medicine contribute substantially to [health care spending](#).

This argument overlooks the fact that the liability system often does injured patients a disservice. A [2006 study](#) from *The New England Journal of Medicine* should give health care reformers something to think about.

Lengthy battles

Researchers found that the impact of frivolous lawsuits was limited. More concerning was that in one in six cases, patients injured from errors received no payment. Patients who did receive compensation waited an average of five years before their case was decided, with one-third of claims requiring six years or more to resolve. To make matters worse, 54 cents of every dollar that injured patients received were then used to pay legal and administrative fees. These costs do not justify this level of inefficiency.

Furthermore, medical malpractice cases do little to promote patient safety. Although medical errors account for close to 100,000 patient deaths annually, according to the Institute of Medicine, the majority [are caused by failed systems or procedures](#) — not physician negligence. Doctors and hospitals ideally should learn from mistakes in order to improve patient care, but that's difficult to do when liability cases are resolved in an adversarial manner.

Problem with caps

Many physicians advocate caps on malpractice awards, but this does little to ensure that patients are compensated fairly or expeditiously, nor will it improve safety. In Texas, for instance, a \$250,000 cap on non-economic damages has made it more difficult for injured patients to seek compensation because lawyers find most claims too unprofitable to pursue.

Perhaps we should look abroad for other ideas. The U.S. is one of the few countries that uses a jury to decide medical malpractice cases. Liability cases in Great Britain, Germany and most of Canada use judges who can decide cases more quickly and in a manner more reliable and

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consistent than a jury. These "health courts" would speed up payment of compensation for injured patients. Additionally, according to [Philip Howard](#), chairman of the legal reform coalition Common Good, by using health courts, "information about each (malpractice) incident ... would be compiled and disseminated so that doctors and hospitals could learn from their errors."

Another consideration is a "no-fault" approach used in countries such as Sweden and New Zealand. Under such a system, legitimately injured patients are [quickly compensated](#) using payments based on the severity of injury without assigning blame to doctors.

Medical malpractice certainly needs a second look, but any reforms should put the patients — and no one else — first.

Kevin Pho, a primary care physician in Nashua, N.H., blogs at [KevinMD.com](#) and also is a member of USA TODAY's board of contributors.

Posted at 12:15 AM/ET, October 26, 2009 in Forum commentary, Health care/Insurance - Forum, Medical Issues - Forum, Pho | Permalink

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John786 (0 friends, [send message](#)) wrote: 11h 46m ago
Malpractice reform in states does have the patient in mind.
Some states have a \$250,000 maximum for pain and suffering unless there is major negligence, as determined by a neutral panel. The biggest costs are the pain and suffering awards. There is no limit on the actual loss of income or remedial medical expenses. In this country, a jury that has no medical expertise, prodded on by a tort attorney, makes the awards. It is ridiculous.

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Mickey Rat (0 friends, [send message](#)) wrote: 10h 25m ago
The main profession of the congressfolk is lawyer. The Trial Lawyers donate huge to their campaigns. What do you really think the chances are they will do anything? Lip service, a slow walk, then change the topic for a while, then "that's a dead issue, time to move on". No change unless you melt their phone lines and flood their letterboxes.

Understand: The total profits of ALL of the publicly traded health insurance companies did not exceed \$15 Billion last year. The lowest estimates of the costs of defensive medicine was \$60 Billion last year, and that is the low one. Other estimates were upwards of \$200 Billion.

Medicare fraud is another \$80 Billion a year.

So what does our lawyer-led congress focus on? The two elephants in the room? Nope. The health insurance companies, 2/3 of one percent of the costs. Even if they wasted another \$10 Billion in high salaries and fraud, it still doesn't scratch the surface of the costs of medical care.

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Mickey Rat (0 friends, [send message](#)) wrote: 10h 19m ago

Lawyers are trained to hand-pick facts that win their argument. Engineers and businesspeople are trained to figure out the real story, then figure out what can be done to improve things.

Doctors know a thing or two about health care costs. You even have a few in congress. They want to meet with the President. Perhaps he should meet with them to hear their side of things.

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AlsoNewman (0 friends, [send message](#)) wrote: 8h 13m ago

I'd put more value on this discussion after hearing from people who lost the wrong leg, had the healthy kidney removed, survived a double mastectomy "by mistake" ... or had a "whoops" that severed their manhood.

Easier to pontificate when you haven't had your life changed by a doctor who admitted (do they ever?) that mistakes were made....

Discussing your real medical malpractice experience or just the general philosophy from a safe distance... ???

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HTN007 (0 friends, [send message](#)) wrote: 7h 44m ago

Caps have worked since 1973 in California and patients have been adequately compensated. That system needs to be implemented nationwide.

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Robert Oshel (0 friends, [send message](#)) wrote: 6h 26m ago

This author says he is writing about malpractice reform. He's not. He's writing about legal liability reform when someone brings a malpractice claim.

What we actually need is true malpractice reform to reduce malpractice in the first place. National Practitioner Data Bank data shows that in most states only about two percent of physicians have been responsible for over half of all the money paid out for malpractice since 1990. NPDB data also shows that quite often these two percent have multiple payments in their records but no action by state licensing boards to revoke their licenses or restrict their practices. Similarly, most often no action has been taken by hospital peer reviewers to revoke or restrict their clinical privileges. So the "repeat offenders" continue commit more malpractice.

To have true malpractice reform the licensing boards and peer reviewers need to get serious about protecting the public from physicians with a pattern of malpractice.

It is also worth noting that there are fewer than 20,000 malpractice payments each year for all causes although the Institute of Medicine estimates that there are about 100,000 deaths each year from malpractice. Other sources double that number. Only about 28 percent of malpractice payments involve patient death. Thus we can estimate that at most only about 3 to 6 percent of all malpractice victims receive any malpractice payment.

The real problem isn't malpractice payments. To save money -- and more importantly, to save lives and

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prevent injury -- we need true malpractice reform that reduces malpractice itself. We need to stop treating the symptoms -- malpractice payments -- and instead treat the disease -- malpractice.

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knaug60 (5 friends, [send message](#)) wrote: 5h 19m ago
On this one I agree with Mickey Rat:

"Lawyers are trained to hand-pick facts that win their argument. Engineers and businesspeople are trained to figure out the real story, then figure out what can be done to improve things. "

=====

The legal system in this country places great emphasis on winning arguments, and much less emphasis on what is really going on. and even less emphasis on such arcane issues like continual improvement. Sometimes the legal system even makes things worse when the threat of a lawsuit inhibits the free exchange of information. No issue can show improvement when the parties involved are forced to defend themselves through secrecy.

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knaug60 (5 friends, [send message](#)) wrote: 5h 16m ago
On second thought, I am not so sure I would elevate business people to the level of Engineers and Scientists. Business in general has its own inherent conflict in that the need to protect profits can also inhibit the free flow of information. One example that comes to mind is Celebrex, where deleterious information was withheld in order to protect the huge revenue stream.

It's one reason why I do not see unfettered capitalism as a panacea for what ails us.

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knaug60 (5 friends, [send message](#)) wrote: 5h 2m ago
To reform malpractice may require reforming more than just the actions taken in the event of a bad outcome. One reason I say this is that our entire medical system is focused upon delivery of care, procedures performed, and has less focus upon achieving the best possible outcome, and maintaining the health of the patient.

Although there are many in the medical industry who take offense to and have tried to discredit Jack Wennberg's study of the delivery of healthcare in Maine. His conclusions tend to bear this out.

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kckn4fun (6 friends, [send message](#)) wrote: 5h 1m ago
Mickey Rat: there you go posting that drivel about profits again. While true, you fail to point out the GROSS REVENUE numbers for those same organizations. Remember: before the companies post their so-called profits, they can reduce all that money coming in with "expenses" such as corporate jet leases, refueling, corporate cars (think Lexus here), salaries (think 7 figures many times over), bonuses and other egregious wastes of health care dollars. Why don't you post the combined revenues there buddy and let us see how much money is actually being soaked by these bureaucracies?

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