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OP-ED CONTRIBUTOR

Just Medicine

By PHILIP K. HOWARD

WASTE in the health care system costs America upwards of \$1 trillion per year. Much of this waste is generated or justified by the fear of legal consequences that infects almost every health care encounter. The good news is that it would be relatively easy to create a new system of reliable justice, one that could support broader reforms to contain costs.

The legal system terrorizes doctors. Fear of possible claims leads medical professionals to squander billions in unnecessary tests and procedures. “Defensive medicine” is so prevalent that it has become part of standard protocol — for example, mandatory pre-operative exams even where the patient record is current, and even for minor procedures.

Like a cancer, this legal anxiety corrodes relationships with patients. Doctors and nurses don’t want to speak up for fear of assuming legal liability, and this causes unnecessary errors. Under instructions from lawyers, they don’t apologize or offer explanations when things go wrong. They sometimes conceal errors in an effort to avoid a legal ordeal. Even in ordinary daily encounters, an invisible wall separates doctors from their patients. As one pediatrician told me, “You wouldn’t want to say something off the cuff that might be used against you.”

As the culture of health care disintegrates, costs rise further. In hospitals, self-protective bureaucracy multiplies. Patient encounters require witnesses, wasting professional time. Patients, sensing distrust, demand second opinions even on minor ailments. There are psychological costs as well: doctors no longer find professional fulfillment and drop out in their prime. Forget productivity — sometimes doctors avoid using e-mail so they don’t have to put things in writing.

Restoring a foundation of trust requires a new system of medical justice. Medical cases are now decided jury by jury, without consistent application of medical standards. According to a 2006 study in the *New England Journal of Medicine*, around 25 percent of cases where there was no identifiable error resulted in malpractice payments. Nor is the system effective for injured patients — according to the same study, 54 cents of every dollar paid in malpractice cases goes to administrative expenses like lawyers, experts and courts.

America needs special health courts aimed not at stopping lawsuits but at delivering fair and reliable decisions. A special court would provide expedited proceedings with knowledgeable staff that would work to settle claims quickly. Trials would be conducted before a judge who is advised by a neutral expert, with written rulings on standards of care.

With a special health court, damages would consist of all lost income and medical costs, plus “pain and suffering” based on a set schedule depending on the severity of the injury. All information about each incident, including details learned in settlements, would be compiled and disseminated so that doctors and hospitals could learn from their errors. Proponents of special health courts have estimated that the total cost of such a new liability system would be about the same as the existing system — less than 2 percent of America’s total health care costs. One benefit would be that the quicker, streamlined system would compensate far more people, with drastically lower legal costs. Most important, it would restore faith in the reliability of medical justice.

A court that freed doctors from worries about unnecessary and unreasonable malpractice claims would transform the culture of health care. Doctors could finally emerge from their defensive cocoons and start focusing on the health of the patient. Hospitals would concentrate on productivity and safety. Doctors could be more candid about decisions for terminally ill patients, and offer more guidance about high-risk procedures.

This country has a long tradition of courts and tribunals to deal with issues like bankruptcy that require special expertise. Nowhere is that expertise, along with the stability and trust it would bring, more needed than in health care.

Several prominent hospitals, including New York Presbyterian, have said they are interested in being part of a health court pilot project. Some large consumer and patient safety groups support the idea. The fastest way to do this would be for Congress to authorize and finance pilot courts around the country. These ideas already have some bipartisan support: Bills for alternative medical justice systems have been introduced in Congress.

Cutting back on the notorious inefficiency of American health care is essential to achieve universal care, as well as make the American economy more competitive. Part of the solution — overhauling the reimbursement model so that doctors get paid only for what is needed — is unavoidably complex. But restoring trust in law, the other essential reform, can be accomplished with the creation of reliable courts.

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