

Understanding the US Medical Malpractice Crisis

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Introduction

Medical malpractice occurs when a physician or hospital fails to properly treat a medical condition and the negligent act or omission is the cause of a new or aggravated injury to the patient. Medical malpractice insurance covers doctors and other professionals or entities in the medical field for liability claims arising from their treatment of patients.

While everyone agrees that a patient who has been injured through negligence should be compensated fairly, the authors feel that the US system has turned into a “lawsuit lottery” where many patients have received astronomical settlements, tens of millions of dollars. This in turn has caused malpractice insurers to restrict coverage, drop physicians and continue to hike rates.

Our nation is in a full-blown crisis in at least a dozen states. Obstetricians have been forced to stop delivering babies, trauma centers have closed, and physicians will no longer staff emergency rooms. Patients are suffering access-to-care problems as a result (American Medical Association, 2003). We absolutely need reform in this area of healthcare. The consequences generated by spiraling liability costs are borne by everyone.

Ramifications for Hospitals

According to the Midwest Medical Insurance Company, hospitals have even more problems with availability and affordability than do physicians. Sharp increases of 20 to 25

percent in the size of awards against hospitals have elevated their rates, and in some cases make them unable to get coverage at all. This effectively closes the hospital (Medical Economics, 2003).

Hospitals are already being hit with other financial pressures such as shrinking reimbursement, increased wages, shortage of nurses, higher drug costs, providing care to a higher number of uninsured patients and loss of specialists due to their own malpractice woes.

In response to rising premiums and fear of litigation, some hospitals have reduced access to services such as emergency surgery and newborn deliveries. For example, the only hospital in a rural Pennsylvania county no longer has Orthopedic on-call surgery coverage in its emergency room because their Orthopedic Surgeons left due to the high cost of malpractice insurance. Similarly, women in rural Mississippi must now travel 65 miles to the nearest hospital that still has an obstetrics unit, because the local hospital stopped providing maternity services (Medical Benefits, 2003).

When physicians can no longer, or are unwilling to, provide services due to the medical liability crisis, it affects both hospitals and patients. Some examples provided by the AMA include (American Medical Association, 2003):

- ❑ More than 50 percent of Arkansas physicians reported in a recent survey that they have been forced to reduce or discontinue one or more medical services in the last two years due to rapidly increasing medical liability premiums.
- ❑ Because of our legal climate making \$1 million-plus jury verdicts and settlements more common, an increasing number of Connecticut obstetricians are no longer delivering babies. Premiums for neurosurgeons and other high-risk specialists are more than \$100,000 annually.
- ❑ In Illinois, where the state supreme court has overturned medical liability reforms on three separate occasions, health clinics, hospitals, and small towns are in jeopardy because physicians no longer perform certain procedures such as neurosurgery and maternity.

- ❑ High-risk specialists in Kentucky, including emergency room physicians and general surgeons, saw increases in their liability premiums last year between 87 and 200 percent. Nearly one-quarter of the state's physicians say medical liability concerns make them consider leaving the state.
- ❑ Women with gynecological cancers in three rural Missouri towns now have to drive more than 100 miles because the only gynecological oncologist was forced to eliminate his rural outreach clinic due to increasing insurance premiums. Physicians saw their premiums increase more than 60 percent on average last year.
- ❑ North Carolina hospitals have experienced professional liability insurance premium increases of 400 to 500 percent over the past three years, with small, rural hospitals experiencing the greatest increases. Jury awards are increasing at an alarming rate, with top awards ranging from \$4.5 million to \$15 million in 2001.

Causes of Skyrocketing Liability Insurance Rates

Many believe that medical liability premiums have skyrocketed due to increasing awards. However, other drivers include insurers who kept premiums artificially low to gain market share and major insurance carriers which are leaving the market.

The strong economy and stock market of the 1990s enabled insurers to keep medical malpractice premiums low, and in some cases even below market value since profits from investment income helped offset low premiums and underwriting losses (NGA Center for Best Practices, 2002). A decrease in investment income meant that income from insurance premiums had to cover a larger share of insurer's costs. Due to the high investment returns in the 1980s, companies could offer prices that in hindsight did not completely cover their ultimate losses. As a result, they become insolvent or left the market in the late 1990s.

At the same time, jury awards for medical malpractice lawsuits have risen over the years. Jury awards in medical malpractice claims jumped 43 percent in one year – from \$700,000 in 1999 to \$1 million in 2000, and continue to rise (NGA Center for Best Practices, 2002).

Finally, one of the largest medical malpractice insurers left the market. The St. Paul Companies stopped writing medical liability policies at the end of 2002. St. Paul was one of the largest insurers in some states and the only insurer in other regions and is leaving the market due to the fact they can no longer afford to offer medical malpractice coverage. The effect of a major carrier leaving the market was significantly less incentive for others to keep rates competitive.

Fallout on Patient Care

An important consideration is how the cost and availability of professional liability insurance can alter physician treatment decisions and affect patient care. Many physicians try to avoid malpractice claims by practicing defensive medicine such as ordering excessive tests and services, declining elective referrals, and giving up certain high-risk practices. Physicians are also referring more patients to emergency departments and refusing to provide on-call emergency department coverage (Center for Studying Health System Change, 2003). As physicians stop performing procedures, close portions of their practice and refer more patients to other care settings, health care access, continuity of care and patient choices are being affected. Physicians also fear low-income patients who have inadequate or no insurance and who are known for not following through on treatments. This increases the likelihood of adverse outcomes, and thus malpractice claims. Physicians are also reluctant to refer to, or receive referrals from, physicians with little liability coverage. This relates to increased exposure under joint and several liability (Center for Studying Health System Change, 2003).

Options for Reform

Many argue for tort reform as a means of lowering certain awards in medical malpractice lawsuits and advocate legislative changes at the state level designed to place a cap on such awards. The authors concur that meaningful tort reform is an essential aspect of any long-term solution to the problem. A study conducted by the AMA revealed that 78% of Americans are concerned that skyrocketing medical liability costs could limit their access to care, and 73% favor a law that would guarantee insured patients full payment for lost wages and medical costs and place reasonable limits on awards for “pain and suffering” in medical liability cases (American Medical Association, 2003).

Others argue for medical reforms as a means for reducing the incidence of medical malpractice, and for insurance reforms as a way to moderate premium rate increases (Biomedical Market Newsletter, 2003). There are dramatic differences in rates, specific to state and specialty. In Florida, premium rates for general surgeons rose 75% in three years as opposed to a 2% rise over the same interval in Minnesota.

Recently, an increasing number of large hospitals and physicians have had to become creative by insuring themselves. While self-insuring can save money, entities insured through these arrangements face a greater risk of insolvency, and some states simply will not permit self-insurance as an option.

Physicians have also chosen to join together to form physician-owned insurance companies. Initially, much more capital is required, but due to the time factor for a claim to be resolved, much of that money is used as capital contribution to surplus. This avenue also offers a cost advantage because the company does not need to provide shareholders with profits. In

addition, the physician-owned company may have some underwriting advantages over the for-profit entity, such as intimate knowledge of local doctors and hospitals and the legal customs and climate. Finally, physician-owned companies have different management philosophies than for-profit companies, one that places greater emphasis on risk management and thus lowering the incidence of claims. This philosophy may also extend to defending claims more aggressively than traditional insurers (Biomedical Market Newsletter, 2003).

A “consumer-choice” system has been discussed. This option involves the patient actively selecting his or her individual level of malpractice protection, based upon personal preference and economic circumstances. When an individual buys a used car, he or she has the option of purchasing an extended warranty. He or she may either take the risk of not purchasing the warranty and paying for repairs themselves, or buying the warranty and transferring that risk to a third party. By allowing physicians to set fees based upon their level of liability protection, medical care would be more affordable for low-income and uninsured patients. In this system, insurance companies could offer dramatically lower premiums for patients willing to accept low-limit malpractice providers. These reductions would make employers more willing to continue benefits to their employees. The extent of medical litigation would be reduced, easing the strain on our judicial system, and with doctor visits more affordable, the number of non-emergency visits to the emergency rooms would be reduced. It is felt that such a system would enhance doctor-patient relationships as well. Doctors would have less incentive to treat patients as potential adversaries, and therefore would have less reason to perform unnecessary diagnostic procedures to protect themselves from lawsuits (NPRI Issue Brief, 2003). Yes, the logistics of implementing such a plan are huge, and state statutes permitting lower levels of coverage would need to be in place before any moves in this direction could proceed.

Lastly, some physicians are going “bare”. Physicians are practicing medicine without any medical liability coverage. Dr. Mark Macumber of Chicago has opened his office without medical liability insurance and relying on trust. He hopes his patients trust him to provide quality care, and in return trusting his patients not to rush to a lawyer at the first sign of trouble. He has his patients sign an informed consent so they realize that there is no million-dollar policy should they decide to sue. This course of action has had its consequences. Dr. Macumber had to take out a home equity loan to furnish and equip his office. He cannot sign billing agreements with health insurers, so his patients must pay him and then seek reimbursement from their health plans. He no longer has hospital admitting privileges and must rely on colleagues to admit and treat his patients requiring hospitalization. Dr. Macumber has made arrangements with an outpatient surgery center to utilize the x-ray facilities, and is seeking similar arrangements for other diagnostic tests his patients may need. The advantages of Dr. Macumber’s decision are that because he has no administrative costs in processing paperwork and saves \$40,000 a year for the liability bill, he can charge his patients less for office visits. He charges about one-third the going rate. This makes his service affordable to poor and uninsured patients, who are the ones he most wants to serve. As a group, his physician colleagues have been very supportive of Dr. Macumber’s decision, and all are watching his practice very closely to see how this really works (Family Practice News, 2003).

Conclusion

There are clear signs that malpractice insurance pressures are altering physician treatment decisions and affecting patient care in unexpected ways and places. The time for action on our nation’s liability crisis is well past due. We must act now to fix our broken medical liability

system. We need to utilize common sense in our courtrooms so that every patient can have access to physician care in emergency rooms, operating rooms and delivery rooms. Creative solutions such as those presented in this paper must be pursued. Most urgently, there must be meaningful tort reform legislation which limits jury awards to sane levels when a true case of medical malpractice occurs.

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