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Medical Malpractice Reform: A Societal Crisis or Fear Marketing?

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Abstract

This paper explores the primary issues surrounding the malpractice crisis currently facing the healthcare system and asks the question 'is it truly a crisis or is it an effective marketing campaign waged by interested parties?' The authors discuss the primary issues presented by both the supporters of tort reform and the opposition to tort reform. As is true for many issues in healthcare, final analysis suggests that whether tort reform is needed or not needed depends on the analysts' role in the system. The authors argue that the evidence suggests malpractice reform will produce desired results if the goal is to reduce the physician's cost of doing business and/or enhance the profit margin of insurance companies. If it is society's goal to reduce overall healthcare costs, the evidence at best is, however, unclear. The authors speculate that providers and others are employing fear marketing in an effort to reduce their cost of doing business.

INTRODUCTION

The continuing controversy over tort reform, in general, and medical malpractice, specifically, have produced a wealth of data in the literature but little valuable information. Each viewpoint presents its agenda in an alleged 'objective' format leading the reader to a predetermined conclusion solidifying the wisdom of the communicator's position and the error of the opposition's viewpoint. If one internalized all the criticisms of the American Tort Reform Association, he/she would be convinced that the current system was developed by the evil Darth Vader, while the American Bar Association is convinced that medical malpractice litigation enhances the quality of healthcare delivery.[1] A rational decision maker should probably take both viewpoints, add them up, and divide by two, with the end result approximating reality!

Malpractice may be, generally, defined as a gross departure from an accepted standard of practice. In other words, the courts should look at the performance of the defendant physician compared to what a reasonably prudent professional would do in a similar circumstance. Gray[2] and others argue that with the evolution of medicine, the patient's definition of malpractice has become 'anything a doctor does that is less than perfect!'. It is an interesting phenomenon, the better we have become in delivering quality medical interventions, the higher consumer expectations have risen. The more expectations have risen, the more willing the consumer is to

sue when performance deviates from expectations. Hence, improvement in the quality of medicine has resulted in increased lawsuits!

The US Chamber of Commerce estimates that product liability costs in the United States are 20 times higher than in Europe and 15 times higher than in Japan.[3] One might, therefore, speculate that the population of the United States is more litigious than most other industrialized nations; and this phenomena spills over into the medical industry. Perhaps, medical malpractice liability does not represent a unique problem for the healthcare industry, but rather is a subset of an overall problem with tort liability. Further, while greater in the United States the problem is not unique to this nation. Australia, the United Kingdom and many other European countries have also experienced significant increases in malpractice premiums in recent years. In some cases it has truly reached the crisis level. For example, obstetricians in Ireland are literally uninsurable and depend on government for protection from lawsuits.[4]

Brennan et al.,[5] contend that assessment and compensation for medical malpractice case injuries are most often based on the extent of the injury incurred rather than the degree of negligence demonstrated by the practitioner. If their assessment is accurate, one might speculate that a fundamental problem with malpractice litigation is that settlements tend to reflect an emotional identification between the jury and the plaintiff rather than based on the application of objective criteria. This observation further suggests that perhaps society should be focusing on jury behaviour modification as a component of tort reform.

MALPRACTICE LITIGATION DEBATE

In a continuing multi-year study, Tillingbast-Towers Perrin [6] concluded that current tort costs are the equivalent of a 5 per cent tax on wages for the typical employee and this 'tax' is growing at an increasing rate. In 2002, tort costs grew at a rate of 13.3 per cent, while overall inflation grew at 3.6 per cent.

Medical malpractice, a subset of total tort costs, has demonstrated a parallel trend. A study by Price Waterhouse Coopers in 2002, however, demonstrated that malpractice costs accounted for about 1/14th of the increase in health insurance premiums for the period of 2000–2002.[7] There is an obvious conclusion to be drawn from these two studies — while the overall cost of tort litigation is rising at an increasing rate, medical malpractice costs represent a rather small component of overall healthcare spending. Assuming that this is correct, one might ask why the issue has received extensive mass media coverage. It appears that there may be a lack of understanding in the media concerning the malpractice crisis. Those who are reporting on the 'malpractice crisis' are quite possibly collapsing two problems into one — rising malpractice premiums; and, rising healthcare costs. Those who are marketing a particular viewpoint do not seem to be clarifying this point and in fact may be purposefully obfuscating the issue. As a result, the general public may be arriving at some erroneous conclusions about tort reform— at

least in the medical industry. If public relations can be viewed as free advertising, creating a national crisis might be viewed as the ultimate public relations strategy.

Rising malpractice premiums certainly represent a microeconomic problem for physicians, but from society's perspective the macroeconomic problem of rising healthcare costs are of considerably greater concern. If in fact malpractice premiums represent a small portion of the overall cost of healthcare, strategies to reduce premiums may be beneficial to the medical profession but will do little to relieve the 'crisis' of exploding healthcare costs. Fear marketing, however, certainly works — just ask those folks selling storm shutters in Florida! Imagine the level of fear that can be imposed on a society already financially stretched paying for their healthcare needs when they hear that malpractice is driving physicians out of practice and the cost of medicine soaring.

There appears to be little agreement among analysts concerning the rising cost of malpractice insurance. Mencimer[8] found that malpractice insurance premiums increased 30–40 per cent annually between 1999 and 2002. The Congressional Budget Office, however, places the increases at approximately 15 per cent annually for the period 2000–2002.[9] Price Waterhouse Cooper on the other hand suggest that increases from 20 to 100 per cent in malpractice premiums were commonly seen across the country during this time-frame.[7] They cannot all be correct; or, can they? It appears that for all physician categories, premiums increased 15 per cent annually during this period, but for some specialties (eg obstetrics) the increases ranged from 60 to 100 per cent. In addition, there have been significant geographic variations in rate changes (during the time-frame when most of the country's malpractice premiums were increasing 15 per cent annually, West Virginia experienced average increases of 35 per cent across the board). Therefore, depending on the specialty focus and geographic areas analysed, estimates could vary significantly. These differences are certainly understandable but also can be quite misleading. A 2002 paper written in the Las Vegas Review Journal online edition was headlined: 'Medical Malpractice Crisis: Insurance costs driving doctors away: Skyrocketing premiums as high as $200,000 per year'.[10] When reviewing the paper one quickly discovers that its focus is not on physicians, in general, but rather on obstetrics/gynaecology; which, as stated above has experienced significant premium increases. The typical reader, however, will most likely look at the headlines, read the paper and assume that the 'crisis' is endemic throughout medicine. Malpractice in the state of Nevada has certainly been a contentious issue (in an 18-month period, 240 papers addressing malpractice were published in the Las Vegas Review) but the vast majority of controversy has involved high-risk physician practices and not the practice of medicine in general. Numerous articles have appeared in quality publications like USA Today focusing on the malpractice crisis. Examples of physicians establishing 'office user charges' to help offset premium increases are cited. References are made to physician protests in Wyoming, Kentucky, Virginia and Maryland. While the information is basically correct it tends to project a global medical crisis when in fact a close examination of the data demonstrates that the 'crisis' is limited to a few high-risk disciplines and a few high-cost or small- market locations. Once again the reader will probably conclude that the problem is pervasive among all physician disciplines

rather than among high-risk specialties. This is not a criticism of the media, but rather an example of the insufficient information and/or misinformation currently bombarding the general population; and, the potential effectiveness of fear marketing.

The media may be inadvertently but never the less significantly contributing to the misinformation and misinterpretations surrounding malpractice litigation. As an example, there have been numerous references to the rise in million dollar settlements in recent years — a crisis is upon us! In one year (1999–2000) the number of million dollar settlements doubled! That is a true statement but in actuality the number of million dollar settlements went from 27 in 1999 to 54 in 2000, increasing the cost of healthcare somewhere in the neighbourhood of $27m. When compared to the $2tn we spend on healthcare, this is an insignificant amount. But, such media coverage has wide market appeal, promotes the perception that we are experiencing a 'malpractice lottery,' may contribute to frivolous suits; and, certainly contributes to the perception that malpractice settlements are the root cause of escalating healthcare costs.

The evidence suggests that OB/GYN physicians are either avoiding high-risk patients or eliminating the OB component from their practice because of extensive litigation and exploding malpractice premiums. This is certainly a crisis for those who are interested in making babies; however, this experience should not be projected to physicians in general. Several salary surveys demonstrate that the typical neurologist's taxable income is approximately $250,000 annually. A reasonable rule of thumb is that taxable income equals about one-half of total revenue. Therefore, the typical neurologist generates about $500,000 in total revenue. The average malpractice premium for neurologist is about $25,000 annually. This suggests that malpractice premiums account for about 5 per cent of the cost of doing business. A 15 per cent increase in malpractice premiums increases the neurologists cost of doing business from 4 to 4.75 per cent. Does it seem logical that someone would give up $250,000 in income because their costs went up 0.75 per cent? The issue of rising malpractice premiums is critical for some medical specialties but for many it is merely an unpleasant cost escalation that has to be dealt with. Regardless of the figures used, the reality is that malpractice premiums have been increasing at three or more times the rate of general inflation. These increases may not be morally or economically justifiable but they are neither driving physicians out of business nor are they significantly contributing to our exploding national healthcare bill.

Critics of the health insurance industry contend that malpractice premiums have risen rapidly because of poor investment strategies and not because of litigation. If one analyses insurance income trends from 1995 to 2002 (Table 1), it appears that there is some credibility to this observation. In 1995, the broad combined ratio for the insurance industry was 126 (awards, settlements, legal costs, dividends, taxes, etc) with a net income of 23 per cent, while in 2002 the broad combined ratio was 129 and net income was −11 per cent. In 2001, there was a significant spike in the ratio and a significant decline in net income; however, over the 8-year period the broad combined ratio went up 3 per cent while net income went down 34 per cent. While the evidence may not be conclusive, it does suggest that the financial plight of the insurance industry was influenced by investment losses as well as increases in malpractice costs.[11]

Table 1: Malpractice trends 1995–2002

Year	Broad combined ratio	Net income (%)
1995	126	23
1996	124	20
1997	124	21
1998	126	17
1999	122	12
2000	129	4
2001	141	-10
2002	129	-11

According to the Congressional Budget Office, malpractice settlements increased from an average of $95,000 per claim in 1986 to $320,000 per claim in 2002. The number of claims, however, remained fairly constant at 15 per 100 physicians.[9] Overall insurance costs (both claims and administrative) rose about 8 per cent annually during this same period. One might conclude from this that the explosion in premiums (15 per cent annually) beginning with the new millennium was either a strategy designed to overcome historical 'low-ball' premiums or to cover 'current' investment losses. Most likely, the increases were a combination of the two factors.

The insurance industry, however, argues that the primary reason for rising premium rates is rapidly increasing malpractice costs. It contends that between 1995 and 2001 the average jury award for malpractice cases doubled from $500,000 to $1,000,000, and the maximum annual claim award nationwide jumped from $5.3 to $20.7m.[12] Once again, there appears to be a contradiction between two primary sources of information. In reality, the information is not contradictory but the inferences are. The Congressional Budget Office cites settlements 'per claim' which incorporates out of court settlements, while the insurance industry is limiting its presentation to only 'jury awards'.

Research has demonstrated that 70 per cent of the malpractice suits are either won by physicians, are dismissed or are dropped. When cases do go to trial, 80 per cent are won by physicians.[13] Even in a straightforward tort case, the transaction costs may, however, exceed one-third of total expenditures and typically 60 percent of the award is absorbed by legal fees.[14,15] The insurance industry claims that the average cost of defending a physician found not guilty of malpractice was $66,767 in 2000 — a substantial amount by any measure. Whether it is

the result of historically maintaining artificially low rates to compete in the marketplace, low investment earnings, miscalculation of payouts, high malpractice costs or pure price gouging, the result is the same — rapidly growing premium rates.

Perhaps the expenses stated above are merely the 'tip of the iceberg'. The true cost of malpractice litigation may be found in a practice called 'defensive medicine.' Defensive medicine is when physicians order tests, interventions or referrals not because they are medically justified, but rather to protect themselves in case of future litigation — the logic being 'a reasonably prudent physician would have ordered X test, but I went the extra mile and ordered X plus tests just to be sure'.[16] As is the case for all of the data surrounding malpractice litigation, the calculations concerning the cost of defensive medicine varies significantly from one study to the other. The most common estimation is that defensive medicine costs society $10bn annually.[3] The CBO, however, found that there was no evidence indicating that limits on tort liability reduces overall medical spending.[9] Interestingly, malpractice premium rates in California range from $23,000 to $72,000 per physician, while the rates in Florida range from $143,000 to $203,000 per physician.[12] Since California is a model of tort reform, there seems to be some evidence that tort reform results in lower malpractice premiums. These lower premiums are, however, not manifesting into lower costs to society. Either the physicians are pocketing the difference, the cost of malpractice insurance does not influence defensive medicine, or the analysis is faulty.

Defensive medicine is a difficult issue to address because it is primarily based on anecdotal information. Surveys are conducted asking physicians if they practice defensive medicine and conclusions are drawn. Obviously, the respondents have a vested interest in the outcomes and may tailor their responses to promote a particular agenda. When comparing physician interventions between geographic locations, one might speculate that, where additional interventions are common, the physicians are practicing defensive medicine. On the other hand, the additional services provided may be the result of a profit motive and have little to do with defensive medicine. The medical profession may call it 'defensive medicine', while critics of organised medicine may call it 'physician induced demand'. In either case the outcome is the same — excess services provided to society. As one can readily conclude, the economic consequences of malpractice litigation are blurred to say the least and are certainly subject to significant manipulation.

AN ETHICAL ISSUE?

As stated earlier, malpractice awards seem to be based on the extent of injury incurred and not on the degrees of negligence. Claims are frequent even when no negligent injury appears to have occurred, and juries often compensate the plaintiff even when the standard of care has been met by the physician. As a society, we must ask ourselves if juries are trying to protect the economic wellbeing of a plaintiff at a cost to society as a whole. In other words, regardless of negligence, do juries conclude that they have a responsibility to ensure that the injured party has

sufficient money to live on? When one considers the huge variation in malpractice settlements per physician by state ($250,000 in Illinois versus $55,000 in California), one can seriously question the objectivity of jury awards.[17]

The 'litigation lottery' may be fast approaching a major industry in the United States. It seems that large segments of society may believe that individual responsibility has been replaced by a victim mentality and accountability is being replaced by adversarial thinking. As a result, the outrage over malpractice costs may be a response by society to a perceived morality crisis, and money (claim settlements) is merely the tangible manifestation of this crisis. Should this be the case, marketing fear and negativism to promote a viewpoint — an issue — is a powerful strategy. Just think of the phrase 'socialised medicine'. What does socialised medicine really mean? It means a medical system that is paid for through tax dollars and a system of providers that work for taxed-based organisations. If this is 'socialised', then we have inappropriately named our education system. It should not be 'public education' it should be 'socialised education'. If we objectively labeled taxed-based medicine we would call it 'public medicine' but 'socialised' suggests a 'commie behind every bush', a threat to our freedom and a challenge to the 'American way'! This is not an endorsement of taxed-based medicine, but rather a demonstration that marketing fear works!

CONCLUSION

The evidence is not clear on the economic impact of malpractice litigation but suggests it is a microeconomic problem for physicians and not a macroeconomic problem for society. Malpractice litigation is not driving physicians out of practice although it has resulted in some physicians relocating their practices. And, while malpractice litigation is very expensive, malpractice reform is not likely to drive down the cost of healthcare significantly. The authors contend that regardless of the misinformation endemic in the literature and the absence of conclusive financial data, society through its political system will initiate change. It is interesting that medical malpractice may have less economic impact on the healthcare industry than tort liability has on other industries but it will very possibly be the 'tail that wags the dog'! Lessons can be learned from the medical industry. Perhaps, if high-risk product industries were more effective at marketing fear among consumers they too could create a 'crisis'.

The above analysis is not intended to suggest that professional negligence is not a real problem in the healthcare industry. Nor is it intended to suggest that the economic implications are not significant; but rather, it is intended to suggest that given the weight of evidence from all sources, the degree of concern is disproportionate to the cost involved and perhaps there is an underlying motivator. Perhaps, the 'crisis creators' should focus on moral/ethical issues surrounding excessive malpractice litigation; but then again, it probably would not sell like fear.

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