

GUEST EDITORIAL

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Malpractice—A Defendant's Perspective

Probably too much has already been written about the liability crisis. Health care providers have known of the problem for 15 to 16 years, and now other professionals and the general public are increasingly aware of the problem and its ramifications. So far, physicians have blamed lawyers and soft-hearted juries, trial lawyers have blamed physicians and insurance companies, and a few enlightened souls are blaming the society within which we live. For my part, I often quote that sage of contemporary America, Pogo, "We have met the enemy and they is us." Unfortunately, to date, most of the conversation on this subject has been confrontational and self-serving, with everyone trying to lay the blame on someone else. Having been a defendant in 2 liability cases (at the same time) approximately 5 years ago, I believe I have some insight into the overall problem, and would like to share some thoughts with you.

Just so you will know from whence I am coming, let me give you a few more facts about my unpleasant experience. I felt that one case had some merit (the one-million dollar suit) and that the other was quite without justification (the six-million dollar suit). One case was heard by an arbitration panel, and the other case went straight into the circuit court system. Both cases took five years to bring to culmination. In one case there was a \$60 000 judgment against me. In the other case I was completely exonerated by the arbitration panel, but my insurance company settled the case for \$25 000 when the plaintiff appealed the case to circuit court. They felt we had a good case, but that it would cost more than \$25 000 to take the case to court. While these two cases were crawling along with depositions and long phone calls, I was threatened with legal action in two other cases in which I had hardly any involvement at all. One of these involved a situation in which a trauma surgeon had left a gauze sponge in a surgical wound and the patient's lawyer felt I had not found this out soon enough. Actually, I believe the surgeon had very little insurance and the plaintiff's attorney just wanted to get a shot at my insurance company. Fortunately, neither of these two cases ever amounted to anything, except gastric hyperacidity for me. Just as a crowning measure, the one case that went to court, after crawling along for five years, was finally heard during the same week my oldest daughter was married. It has been five years, and I still have some difficulty in discussing this issue in an objective manner. Let me enumerate for you what I see as the problems with our "system," my concept of the causes, and necessary corrective action.

A malpractice action is a horrendous event for most health care providers. It is an affront to the ego. The practitioner's basic competence is called into question. He or she begins to question his or her ability. Nearly every physician I know tends to blame himself if something

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goes wrong. Each of us realizes we are imperfect and will continue to be imperfect. To salve our consciences concerning our fallibility, we talk about our problem cases with our peers. However, when someone is suing you for six million dollars, you do not even have the luxury of discussing or "confessing" some of your inadequacies. The ability to practice medicine suffers greatly. Depression sets in. The first thought every morning and the last thought every evening is about "the case." An overriding determination arises to never let this sort of thing happen to you again. Every headache must have a C-T scan. Every sprained finger or ankle must be X-rayed. If the patient is a little slow getting better, get a consultation. If the patient is over 35 and has an occasional lower abdominal pain, get an upper G.I. series, barium enema, and sigmoidoscopy. The patient suffers an inordinate number of studies (some of which are dangerous), the physician begins to think like a machine rather than using his skill, experience, and intuition, and the insurance companies raise their rates to cover all this unnecessary testing. Additionally, many skilled physicians stop doing procedures and giving the kind of intensive care that they are quite capable of giving because the risk of liability claims is so high. Those who continue to do the procedures charge more and more to help pay their escalating insurance premiums.

I believe there are at least three basic causes for malpractice: man's imperfection, high tech medicine, and the increasing complexity of medical practice. As noted previously, there will always be cases of medical malpractice because physicians are imperfect and make mistakes. As we are given newer and stronger drugs, and more potent diagnostic and treatment modalities, we increase the risks to the patient as well as the benefits. As medicine becomes more and more impersonal, with multitudes of clerks and technicians having contact with the patient, the probabilities of stupid errors increase. How else explain the incorrectly marked C-T scan, resulting in surgery on the wrong side of the patient's brain?

I have a small list of corrections that I believe will have to be made before this crisis improves. Much as I dislike legislated limitations on society's actions, it seems obvious some cap will have to be put on awards. Any award, in any case, of over a million dollars is probably a rip off. Eliminate punitive damages, limit awards for pain and suffering, make all awards relevant to documented losses, and refer any defendant found guilty of negligence to his licensing board for review. These licensing boards should not reprimand a practitioner for every mistake, but should take action only if there is evidence of culpable ignorance or repeated infractions of the standard of care. Secondly, there must be more attention paid to risk reduction programs, not only in hospitals, but in each individual's medical practice. For a fee, an insurance company should be prepared to evaluate a practitioner and his practice, and make recommendations for risk reduction. Third, I believe every practitioner must become a friend and an advocate of each of his patients. Nothing minimizes the threat of a lawsuit more than having a patient who is convinced that his physician genuinely is concerned for his well-being and is doing everything of which he is capable to protect the patient. All of us are aware of mistakes, oversights, or inappropriate actions which could have resulted in a malpractice suit, except for an understanding patient or family. Fourth, I believe we must continue to practice defensive medicine, especially for those patients whom we do not know well, or with whom we have great difficulty communicating. If the patient is hostile or noncomplying, the practitioner is in danger, and must take defensive action.

Last, and most difficult, we must try to change the perspective of our society. As long as we live in an acquisitive society, with a price tag on everything and everybody, it is doubtful the picture will change. Society must become more sophisticated in its understanding of life, death, and medical care. People must become more realistic in their expectations of medical outcomes. At one time I thought some form of no-fault insurance set up much like Workmen's Compensation could solve the problem, but I have some difficulty with the concept that everyone should expect to be compensated for everything that goes wrong in their life. Not always is a poor result someone's fault. No-fault, taken to its ultimate degree, sounds rather socialistic to me.