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Time for a New Medical Liability Debate

Joel Port, BA, MHSA, CHE, CMPE*
Richard Wells, BA, MBA*

* Main Line Health

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Time for a New Medical Liability Debate

After almost two full years of media coverage, political lobbying, and protest, the medical liability issue has generated plenty of heat. But where is the light?

Some significant reforms have come from Harrisburg, such as venue control, which states that medical liability cases can be brought only in the county where the actions leading to the lawsuit occurred, and limitation of joint and several liability, which requires a defendant to pay monetary damages only to the degree of responsibility assigned by a judge or jury. These reforms won't have any real impact for several years. Meanwhile, doctors and hospitals continue to struggle, with doctors at least having the unpalatable option of leaving the state. Hospitals have nowhere to go.

The doctors scream "caps." The trial lawyers scream "unfair." Hospital administrators cut here and there so they can pay their insurance bill. The public is confused and anxious. And, nobody knows what the insurance industry thinks because it has remained essentially silent.

We suggest refocusing the debate on two issues on which all sides can agree. First, what can doctors, hospitals, lawyers, and insurers do to support the reduction or elimination of medical errors? And second, what improvements can be made to compensate legitimately injured patients fairly and quickly? Refocusing the debate on these issues puts patients at the center of concern -- where they should be.

Here are some ideas that deserve analysis and debate from the perspective of putting patients first.

Expert Panels

The typical physician trains for four years of college, four years of medical school, and three to six years of residency. Once in practice, a doctor usually obtains board certification, with recertification every six to 10 years, depending on the specialty, and must receive one to two weeks of continuing education credits annually. The qualifications of a potential juror who might sit on a medical liability case often do not include a high school diploma. Proposing a panel of experts to judge malpractice claims "whether as part of a specialized jury pool, or as part of an arbitration board" acknowledges that "malpractice" and "maloccurrence" are not the same and that determining which is which requires careful, unemotional analysis. Trial attorneys like to cite that at least half of all liability cases are found in favor of the physician or hospital. Physicians counter that many settlements and awards are not negligence but simply bad luck. This would suggest that lay jurors sometimes get it wrong. Expert panels could do a better job of finding real negligence and could speed getting appropriate compensation to patients.

Baby Fund

Some of the most gut-wrenching malpractice claims are those involving babies injured during pregnancy or childbirth. The current tort system places many obstacles in front of parents and babies in need. Will a lawyer take their case? How many years will it take to adjudicate? And, even if they "win," how much of the

award will go to the attorney and not to the child's care? If the goal is to get help quickly to those in need (whether or not because of medical negligence), then a better solution would be to provide a state regulated fund, supported by taxes or by a portion of each medical liability award, to serve as a "no fault" fund that could help parents and babies immediately.

"Good Samaritan" ED Protections

When one considers the remuneration and risk for emergency medical care, it is truly one of the most charitable acts offered by physicians and hospitals. It is also one of the most expensive forms of medicine for carriers to insure. The lack of the traditional patient-doctor relationship contributes to the potential for legal action when the patient is unhappy with the clinical outcome. As a result, hospital emergency departments have been particularly impacted by the loss of physicians, such as neurosurgeons and orthopedists, who can no longer afford to risk possible claims arising from emergency treatment. The loss of these specialists to perform emergency medicine is a direct and present danger to patient safety. Current state law protects civilians when acting as "good Samaritans" coming to the aid of those in need. It may be time to consider some type of similar protection for those physicians and hospitals providing emergency care to the community.

Patient Safety Fund

The medical liability system is awash in cash: hundreds of millions of dollars each year in insurance premiums, awards and settlements, and attorneys' fees. Yet none of that money is directed toward what should be the ultimate goal: the reduction of medical errors. Why couldn't the stakeholders in the liability system -- doctors and hospitals, lawyers, and insurers -- each contribute to a state-managed fund that would make money available to doctors and hospitals to implement new patient safety processes and technologies? A large, urban hospital may well be able to afford bar-coding technology, but what about the small, rural hospital? Its patients also deserve the latest in patient safety technology. A Patient Safety Fund could provide grants or no-interest loans to help doctors and hospitals make care safer and more effective. Such a fund could be supported by a percentage of every insurance premium and of every attorney's fee (both plaintiff and defense), along with an allocation from hospitals and doctors.

These ideas are just a few that could refocus the medical liability issue away from the confrontational point-counterpoint that has thus far characterized the debate. We believe current advocacy efforts for medical liability reform should continue and propose these suggestions to expand the dialogue to include the ultimate goal of safe and effective care for patients.

About the Authors

Joel Port, BA, MHSA, CHE, CMPE, is Vice President for Business Development and Planning; Richard Well, BA, MBA, is Vice President for Public Affairs, both at Main Line Health. Please address comments to Joel Port at portj@mlhs.org or Richard Wells at wells@mlhs.org.