

Restore Reliability to Medical Justice

The Legal System Is Undermining Healthcare

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Healthcare in America is suffering a nervous breakdown, and neurosurgeons and other high-risk specialists are at the center of the crisis. Doctors are striking, specialists are abandoning their practices, healthcare premiums are rising at unsustainable rates, and over 43 million Americans are uninsured.

But the underlying problem is our legal system. Justice today is a free-for-all. The crippling rise in professional liability insurance premiums is caused by an uncontrolled rise in jury verdicts, which have more than doubled in the last 10 years. But the total costs of our unreliable system are far greater. Some economists estimate that over \$100 billion is now wasted annually on unnecessary tests and procedures, ordered by doctors to build a record just in case there is a lawsuit.

Distrust of justice has adversely affected healthcare quality as well. Legal fear has replaced the honesty and candor that are vital both to humane care and to improved care. A culture of secrecy and blame keeps intelligence about mistakes and near misses underground.

Law is undermining healthcare because it is no longer reliable. Medical justice today is random. Many victims of error get nothing, while others win lottery-like awards when the doctor did nothing wrong. The resulting fear and distrust makes it impossible to make common-sense judgments.

The American Association of Neurological Surgeons (AANS) has taken an important step toward improving the quality of medical justice by raising the bar on the quality of expert testimony by AANS members. The testimony of expert witnesses underpins the reliability of judicial procedures, and the AANS is right to urge impartial, balanced testimony, rather than advocacy. If the testimony is substandard or worse—fraudulent—justice cannot be reliable.

But broader reform is needed—broader even than the proposed limits on noneconomic damages that have been so futilely debated in Congress. Merely putting caps on pain and suffering will not restore reliability or trust; in exchange for providing a lifetime of care, a neurosurgeon who did nothing wrong could still suffer a ruinous verdict.

Seventy prominent leaders of healthcare recently came together to demand an entirely new system of medical justice. The goal

of this new system is not to protect any one group but to be reliable—“reliable to protect patients against bad practices, reliable to protect caregivers who act reasonably and reliable to interpret standards of care so that all participants know where they stand and where they must improve.”

A reliable system of medical justice could take many forms, but because the critical issue in virtually all cases is whether the doctor complied with appropriate standards of care, the key element must be expert judges ruling on standards of care—with the benefit of impartial expert testimony they can rely on.

Judges must do that, rather than juries, because juries can only make judgments in individual cases—even with the benefit of reliable expert testimony. Juries can't make consistent rulings of what is reasonable care and what is not. In fact, juries have no authority to make rulings at all. Their role in civil cases is to decide disputed facts, like whether someone is telling the truth. It is not to declare standards of care

that affect society as a whole.

Judges in special medical courts should have sufficient medical training to be able to define and interpret standards of care. They should be able to consider knowledgeably the testimony of expert witnesses and be influenced by their expertise more than their presentation skills.

Specialized courts are common in such areas as taxes, workers compensation, labor issues and vaccine liability, and a bill to fund pilot projects for special medical courts in individual states will be considered by the U.S. Senate shortly.

Creating a special medical court, an ambitious undertaking, will be opposed by the trial lawyers at every step because it is precisely the unreliability of the current system that gives them their leverage. But creating such a court will actually help to strengthen one of the oldest and most basic principles of the American system of justice: that like cases be decided alike.

The victim of unreliable justice is society as a whole, not just the medical profession. That's why reform must focus on achieving a reliable foundation of law for all. ■

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