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# Currents in Contemporary Bioethics

## Health Care Reform and Medical Malpractice Claims

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The seemingly interminable debates about health care reform in the last few years have focused mainly on health care access, quality, and cost. Debates on the medical malpractice component of the issue have focused almost entirely on cost.<sup>1</sup> The familiar arguments in favor of limiting liability include the financial and health costs of defensive medicine; decreased physician supply in certain specialties and geographic areas; excessive awards; and high transaction costs, including attorney and expert witness fees. The equally familiar arguments in favor of maintaining tort liability include the need to promote civil justice, deter substandard care, identify incompetent practitioners, and encourage systemic quality improvement.

Numerous studies have explored the possible effects of damage caps and other measures on malpractice premiums, health care costs, and other financial endpoints.<sup>2</sup> One relatively under-examined aspect of the issue is how federal legislation expanding access to health care might alter the number of medical malpractice claims. With the enactment of the Patient Protection and Affordable Care Act of 2010 (PPACA),<sup>3</sup> it is especially appropriate to consider what effect, if any, the new law will have on the rate of medical malpractice claims.

When fully implemented, PPACA will increase the number of individuals with health care coverage by approximately 32 million.<sup>4</sup> As a result, there will be many millions of additional patient encounters each year. If the rate of adverse events arguably attributable to medical malpractice remains constant, then it might be assumed that the

total number of medical malpractice claims will increase. In addition, with a physician work force of roughly the same size, there will be more patients per physician, and likely less time per patient visit. Thus, it might be assumed that more expedited medical care will increase the likelihood of medical errors and resulting medical malpractice claims.

Several counter-arguments are possible, and health care reform might actually reduce adverse events and medical malpractice claims because of superior care. It can be asserted that better coordination through continuity of care and “medical homes” will improve outcomes and decrease adverse events; electronic health records, including clinical decision support, will provide physicians with comprehensive and timely patient health information, as well as messages about potential drug interactions and other problems; expansion of outcomes research and greater emphasis on evidence-based medicine will improve health care quality; and lifelong assessment, recertification, remediation, and more intensive licensing review will improve physicians’ clinical knowledge and skills, and remove the licenses of physicians unfit to practice medicine.

There is a complicated and non-linear relationship between medical malpractice events, medical malpractice claims, and medical malpractice costs.<sup>5</sup> Changes in one of these measures will likely affect the others, but not necessarily in quantifiable or predictable ways. This article focuses exclusively on medical malpractice claims — and specifically the number of medical malpractice lawsuits initiated.<sup>6</sup> It concludes that one of

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the leading reasons why individuals bring medical malpractice claims is to ensure the availability of funds for future medical care. Because health care coverage at affordable rates will be accessible in the public or private sector without regard to preexisting conditions, and annual and lifetime caps will be prohibited, significant numbers of injured patients are likely to forego medical malpractice claims. Consequently, even with more patient visits, the total number of medical malpractice claims is unlikely to rise and might even decline.

**Motivation to Sue**

In trying to predict the behavior of injured patients and their legal representatives in this new health care environment, it is essential to understand why individuals bring medical malpractice claims. Studies beginning in the early 1990s clearly demonstrated that there are a variety of motivations. One of the leading studies, by Hickson et al. (1992), involved a survey of mothers of infants who had suffered death or permanent perinatal injuries and had closed medical malpractice claims in Florida.<sup>7</sup> A total of 127 families were interviewed by telephone using a questionnaire containing structured and open-ended questions. In response to the open-ended question “why did you sue?” respondents gave 179 reasons (1.4 per respondent). The leading reasons were as follows.

Advised to sue by someone outside of their immediate family (56% were members of the medical profession) **33%**

Needed money for long-term care **24%**

Realized physician was not completely honest with them or intentionally misled them **24%**

Realized their child would have no future **20%**

Sued to get more information about what happened **20%**

Sued to get revenge or deter future errors **19%**

The study has some limitations. It is a retrospective study, and there may be a problem with respondents precisely recalling their motivations at the time they initiated the lawsuit. In addition, the study measured self-reported motivation, and respondents sustained significant emotional harm. Therefore, their initial behavior, recall, and reporting could reflect denial, projection, rationalization, or other psychological reasons for their

**The Effect of Income**

The 32 million people newly eligible for health care coverage overwhelmingly will be low-income individuals qualifying under more generous Medicaid eligibility standards. Are these individuals more or less likely than other patients to bring medical malpractice claims? Based on the leading study on the issue, the answer is that low-income individuals are significantly less likely to sue.<sup>11</sup>

Burstin et al. (1993) conducted a case-control study involving 51 hospitals and 31,000 hospital records in New York State. Claimants were matched with non claimant controls, and the risk of medical malpractice claims was estimated by age, gender, race, insurance status, and income

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legal actions. The study, however, clearly demonstrates the range of reasons behind the plaintiffs’ decision to bring a medical malpractice claim.

Other studies indicate that a breakdown in the interpersonal aspects of patient care is also an important element in motivating injured patients and their families to file a medical malpractice lawsuit.<sup>8</sup> These studies provided insights that contributed to the growth of the “apology” movement and to greater disclosure by health care providers of the facts surrounding adverse events.<sup>9</sup> Nevertheless, even though financial compensation is not the only reason why injured patients sue, it is an important reason, and the need to pay for future medical bills is a key element of the financial motivation.<sup>10</sup>

(based on ZIP code). The results clearly demonstrated that low income and uninsured patients were significantly less likely to file claims. Similarly, elderly patients also were less likely to sue. There are several possible reasons for this finding, including lower potential damages based on lost income, difficulty in obtaining legal representation, lower expectations regarding their medical care, less likelihood of attributing adverse events to substandard medical care, and inability to take on additional challenges in their lives.

Before leaving this issue, it is important to consider whether the two principles developed thus far — the need to pay for future health care drives many medical malpractice lawsuits and low-income people are less likely to sue — are inconsistent. They are not. Relying on in-depth patient interviews

from an earlier study, Burstin et al. (1993) concluded that claimants generally were not indigent, at least not before the onset of their medical problems. "The typical injured claimant was a worker who was disabled by a medical injury and who faced large wage losses and relatively low costs of continuing medical care. The only instance of poverty among the injured claimants is one that occurred as a consequence of medical injury."<sup>12</sup> The magnitude of future medical expenses for serious injuries provides a financial incentive for a wide range of people, including even relatively wealthy people, to sue. This general financial background is not affected by the fact that low-income people tend to sue less often.

### Trends in Medical Malpractice Case Filings

There are no readily accessible national statistics on medical malpractice case filings, but there are several types of data from which national trends may be derived. All of the available data clearly suggest the number of cases filed has dropped significantly in the last decade. One source is data from certain states that maintain the number of state medical malpractice filings. For example, in Pennsylvania, case filings declined from 2,632 in 2000 to 1,533 in 2009.<sup>13</sup> Another source is the National Practitioner Data Bank, which compiles the number of medical malpractice payments made each year. From 2000 to 2009, the number of payments made on behalf of physicians declined from 15,447 to 10,772.<sup>14</sup> It is not disputed that case filings have declined sharply. Indeed, a leading insurance industry publication stated: "Overall, the most significant trend in [medical professional liability insurance] results over the five years through 2008 is the ongoing downward slope in the frequency of claims...."<sup>15</sup>

Many factors likely have contributed to this trend. State tort reform

laws, including limitations on non-economic damages; growth in risk management responses to adverse events, including growing use of apology and disclosure; difficulty in obtaining legal representation for smaller claims; and a variety of legal, social, and economic factors all probably are at work. For the purposes of this article, it is less important to identify the reasons for the trend than to observe that the trend exists. Thus, health care reform will be taking place in a climate of declining rates of medical malpractice case filings.

### Conclusion

Despite the increased number of patient encounters associated with expanded access to health care under PPACA, it is unlikely that the rate or number of medical malpractice claims will increase, and there is a reasonable chance they will actually decline. A substantial part of the downward pressure on the filing of medical malpractice claims will be improved access to health care, especially ongoing care for serious medical injuries. An unknown but likely substantial number of future injured patients and their families may believe access to affordable health care will eliminate the necessity of bringing a lawsuit.

Ideally, improved healthcare quality associated with health care reform will substantially reduce the number of adverse events.<sup>16</sup> Regardless of these efforts, however, the political pressure for medical malpractice reform will likely persist.<sup>17</sup> As the medical malpractice debate continues, it will be important to assess the effects of health care reform on medical malpractice events, claims, and costs.

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