

Medical malpractice and health reform's unfinished business

Reno Gazette-Journal / RGJ.COM

Tuesday, November 2, 2010

Medical malpractice reform easily tops the long list of unfinished business facing the nation's health system in the wake of Affordable Care Act signed into law earlier this year.

For nearly four decades, political battles over malpractice reform have pitted Republicans who typically back tort reforms aimed at capping economic damages in malpractice lawsuits, limiting payouts for pain and suffering, and otherwise reducing the overall costs of malpractice litigation against Democrats and their contributors in the trial lawyer community who have typically opposed such efforts.

As enacted, the ACA contains two limited provisions authorizing demonstration projects by the states and an extension of federal malpractice protections to free clinics' nonmedical personnel. These measures will do little to alter the entrenched, acrimonious positions of the major political parties or to address the underlying problems of the malpractice system which include additional health system spending resulting from rising malpractice insurance premiums and the practice of defensive medicine.

More importantly, law professor and malpractice expert William Sage argues that "caps on damages [are] tangential to the real problems with the malpractice system, which involve excessive numbers of medical errors, inaccessible compensation for most avoidable injuries, and a slow, expensive process of dispute resolution that is inhumane to both plaintiffs and defendants."

Many states have enacted caps on awards and other tort reforms amid the cyclical malpractice crises since the mid-1970s. However, malpractice limits sought by Republicans at the federal level have been unsuccessful. In Nevada, proposed tort reforms in the next legislative session are likely to remain focused on efforts by plaintiffs lawyers to have lawmakers place caps on noneconomic damage awards in liability cases.

Tort reform proponents have argued that a volatile malpractice environment and rising insurance costs have led physicians to reduce service by retiring early, relocating practice to other states with lower insurance costs, and restricting their scope of practice to exclude or reduce high-risk procedures or avoid high-risk patients. While these claims have been supported more by anecdote than hard evidence, concerns about slowing the rate of growth of health expenditures have reignited interest in national level liability reforms and the potentials system savings accruing from reducing defensive medicine.

An analysis of the costs of the US medical liability system recently published in the health policy journal Health Affairs provide an estimate the potential savings that would be yielded by proposed national level malpractice reforms.

The largest component of liability system costs are defensive medicine – that is to say, when physicians and hospitals order or provide ostensibly unnecessary tests, procedures or care primarily because of

concern about malpractice liability. Estimated defensive medicine costs total \$45.6 billion or nearly 82 percent of total liability system expenditures. Actual payouts for economic, noneconomic and punitive damages total \$5.7 billion or about 10 percent of system costs.

### Estimated of the Costs of the National Liability System in 2008

Components of the Medical Liability System	Estimated Cost (billions of 2008 dollars)
<b>Indemnity Payments</b> Economic, noneconomic and punitive damage awards	\$5.72 (10.3%)
<b>Administrative Expenses</b> Plaintiff & defendant legal expenses, overhead expenses	\$4.13 (7.4%)
<b>Defensive Medicine Costs</b> Hospital services, physician & clinical services	\$45.59 (81.9%)
<b>Other Costs</b> Lost clinician work time, price effects, reputation/emotional harm	\$0.20 (0.4%)
<b>Total</b>	<b>\$55.64</b>

Source: M. Mello, et al. *Health Affairs* (September 2010).

Overall, the medical liability system costs the nation more than \$55 billion annually or a modest 2.4 percent of total health care spending in the US.

The report's authors conclude that the total liability price tag "is less than some of the imaginative estimates put forward in the health reform debate and it represents a small fraction of total health care spending. Yet in absolute dollars the amount is not trivial."

At the national level, then, expect tort reform to remain a key component of the Republican health care platform, despite the limited contribution those efforts would make toward bending the health care cost curve. At the state level, expect the entrenched positions of the major parties and their patrons to yield little if anything resembling meaningful malpractice reform and nothing that measurably improves the quality of care or patient safety.

There is the added, delicious irony of Republican lawmakers in Nevada and other states, not to mention recuperating Governors, who will nonetheless continue to rally to the call of national malpractice reform but are unlikely to be receptive to another damn health reform mandate from the federal government.

John Packham, PhD is Director of Health Policy Research at the University of Nevada School of Medicine and Past President of the Nevada Public Health Association.