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Editorial

"Evidence-Based" Medical Malpractice Research and Changing the Patient Safety Paradigm

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"We are told that our medical malpractice system is broken. Doctors are sloppy without punition; patients are injured without compensation; juries seek revenge without proof; and lawyers get rich without justification."[1]

The problem of medical errors is staggering[2] and efforts to address the medical liability crisis have provided at best "only symptomatic relief."[3] Medical malpractice lawsuits and the plaintiffs' lawyers that bring them are unpopular; but nonetheless the debate over changing health care liability remains centered on "tort reform"—capping of non-economic damages within the long-standing paradigm of negligence-based medical malpractice litigation. Serious alternatives to negligence-based medical malpractice liability have been proposed but not realistically considered.[2] Perhaps the best alternative to medical malpractice litigation, no-fault liability, remains academically but not politically popular and has only been broadly instituted successfully in Virginia and Florida for cases of severe newborn injury.[2]

The fundamental problem—medical error—requires a systems approach similar to approaches widely and routinely used in industry, with a focus on determining error epidemiology to correctly identify medical error (as opposed to bad outcomes unassociated with error) and utilize all available tools, including, but not limited to, risk management, error disclosure, continuing education, and apology in order to reduce medical error. The "shame and blame" approach of medical malpractice litigation not only fails to achieve medical error reduction; indeed, its adversarial structure is counterproductive in those goals.[3]

Anecdotal evidence of particularly outrageous medical malpractice cases are often touted to stress the existence of a medical malpractice crisis,[4] but anecdotes will not by themselves shift medical malpractice policy. If our medical malpractice system is broken we need rigorous empirical studies to provide data that will drive and substantiate appropriate policy remedies, overcome deep-rooted political stances entrenching the current system, and afford physician buy-in that will ultimately ensure policy success. But unfortunately, hard evidence of the effectiveness (or lack thereof) of medical malpractice litigation in meeting its two policy goals—patient compensation and patient safety—is scant.[4]

"Physician and Juror Assessment of Malpractice Case Scenarios: Does the Legal System Provide an Appropriate Signal to Promote Patient Safety?"[5] by Liang and Mackey provides just such an empirical, "evidence-based" evaluation of the effectiveness of negligence-based medical malpractice litigation in meeting its patient safety goals. Liang and Mackey empirically evaluate perhaps the largest cohort to date of physicians and jurors to assess their knowledge of, and the ultimate success of, negligence-based medical malpractice. Their findings regarding both jurors and physicians is extremely cogent and supports consideration of a paradigm shift in medical malpractice liability from negligence-based litigation to another system, such as a no-fault system, that will successfully and efficiently meet the policy goals of patient compensation and patient safety.

Negligence-based medical malpractice originated in the United States in the early 19th century, and was at that time the only (if

questionably effective, even then) method available to provide some degree of compensation for injured patients and education of physicians as to the standard of care they should hold themselves. But today other, more sophisticated and efficient methods of appropriately compensating patients, such as no-fault liability, are available; and other more sophisticated methods of providing patient safety—including but far from limited to only educating physicians regarding the standards of care to which they are held—are available, routinely used in industry and waiting to be instituted in medicine. It is time to recognize negligence-based medical malpractice litigation for the 19th century blunt instrument it is, and that its time has come and gone.

A successful remedy to the medical malpractice liability conundrum will require both political and physician acceptance.[6] Without political arguments based on solid empirical studies of medical malpractice litigation effectiveness, the various cottage industries surrounding medical malpractice litigation will continue to successfully lobby for the retention of the entrenched negligence-based litigation of medical malpractice cases, and happily continue to fight about the sole issue of damage caps. Without physician acceptance, physicians will thwart any new, untrusted system by continuing to practice defensive medicine.[6]

Liang and Mackey have provided substantial empirical evidence about medical malpractice litigation. Other investigators should follow their lead in establishing a robust empirical, "evidence-based" literature on medical malpractice. Without it, the much-needed paradigm shift in medical malpractice liability is unlikely to occur.

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