Medicolegal Sidebar

Medicolegal Sidebar: Blowback: The Unintended Consequences of Medical Liability Reform

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A Note from the Column Editor, *The Medicolegal Sidebar* column addresses issues that orthopaedic surgeons may face at the intersection of law and medicine. One of the goals of

the column is to assist orthopaedic surgeons in making legally sound clinical and business decisions. In doing so, the column focuses on legal issues, avoiding the public debate on whether our current malpractice system favors providers or patients.

Accordingly, our column will periodically publish articles by distinguished guest commentators to express their personal opinions on the current status of our malpractice system. The goal of these commentaries is to stimulate discussion among our readers and others who have an interest in malpractice litigation. Our first distinguished commentator is attorney Christopher Stombaugh. Mr. Stombaugh is an accomplished trial attorney, a faculty member of The Gerry Spence Trial Lawyers College and Past President of The Wisconsin Association of Justice.

—B. Sonny Bal MD, JD, MBA,
Lawrence H. Brenner JD

Note from the Editor-in-Chief: We are pleased to publish the next installment of “Medicolegal Sidebar” in Clinical Orthopaedics and Related Research®. The goal of this quarterly column is to encourage thoughtful debate about how the law and medicine interact, and how this interaction affects the practice of orthopaedic surgery. We welcome reader feedback on all of our columns and articles; please send your comments to eic@clinorthop.org.

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While physicians and trial lawyers in the medical liability system may speak the same language, they really misunderstand each other. Physicians and lawyers, like the United States and Great Britain, are “[t]wo nations divided by a common language” [5].

A clear example of this disconnect is when we discuss medical negligence claims and medical liability reform. The common impression among many physicians is that a claim for medical negligence is, in essence, a claim that a physician is a “bad doctor.” Worse yet, verdicts against physicians can result in those physicians being reported to the national databank, and even unsuccessful claims have to be reported to future hospitals when one seeks employment. Litigation, therefore, can adversely affect a physician’s reputation and livelihood. Trial lawyers in the medical liability system, however, would submit that the issue should not be the fear of litigation, rather the fear of carelessly injuring patients. The latest statistics (August 2015) from the New York Law School’s Center for Justice and Democracy reveals that medical negligence cases made up

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less than half of one percent of civil case filings in 2013. Only a small portion of these claims ever reached trial [1].

Despite the emotional and physiological effects of being sued for professional negligence, the fact remains that upwards of 5% of physicians have made at least two malpractice payments and make up more than 50% of all malpractice payments. Even more astonishing, about 2.3% of doctors have made three or more payments, accounting for 32.8% of all malpractice awards [4]. Like the inflated proverbial 50% divorce rate, the total rate of malpractice per physician is skewed because of the repeated actions of a few. While this is cold comfort to a physician who feels maligned by a claim, having a claim is not a universal danger.

While few medical negligence cases go to trial and verdicts against physicians are rare, strong medical liability reforms have been enacted in many states. These reforms, depending on the state, may raise the threshold of proof for malpractice or limit the noneconomic damages for affected patients. Regardless of one's position on the necessity of medical liability reforms, the reform laws have now been in place long enough to examine their patient safety effects. Wisconsin (my home state) is a poster child for

the simultaneous success and failure of medical liability reform.

The Wisconsin Example

The Badger State is the epitome of a medium-sized state in the upper-Midwest, with nearly 6 million residents. In 2013, the *Journal of Patient Safety* reported that as many as 210,000 to 440,000 people die from preventable medical errors a year in the United States [3]. If we extrapolate those numbers based upon Wisconsin's 1.8% of the national population, we would yield a figure of 3789 to 7920. That means anywhere from 3800 to 7900 Wisconsinites could be dying in hospitals each year due to preventable medical errors. Even though such an extrapolation will be far from exact, it does provide a "ballpark" expectation from which to compare actual filings.

Despite the prevalence of preventable medical errors, in 1999 there were only 294 medical negligence suits filed in Wisconsin [6]. In 2013, there were 140 filed, and only 84 such cases were filed in 2014 [6]. Combine these statistics with Wisconsin's perennial ranking as one of the 10 jurisdictions (often in the bottom five) with the least per capita physician

discipline and you have a recipe for declining patient safety [11].

There are two possibilities here to explain the minimal physician discipline and sharply declining case filings. The first, is that the quality of medicine has soared in the Badger state. This view is actually espoused by the Wisconsin Medical Society. The Medical Society's representative claimed doctors and hospitals should get much credit for the sharp decrease in case filings. "Some of the decline in cases is due to doctors' getting it right, doing the right kinds of things" [7]. Of course, a normal distribution or bell curve shows us with compelling logic that in a group of lawyers, plumbers, or physicians, the number of superstars and the truly dangerous will be approximately equal; in every state, city, and specialty area.

The second, and perhaps most plausible explanation for the reduction is that many cases cannot be realistically brought by lawyers as medical liability reform makes them cost prohibitive. While an objective of medical liability reform was to eliminate marginal claims, the numbers suggest that something more extreme has happened. On a per capita basis, Wisconsin physicians paid fewer medical malpractice claims last year than physicians in any other state. A *Milwaukee Journal Sentinel* analysis

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of federal data revealed that this has become a common occurrence. “Only six of every 1 million Wisconsin residents collected a medical malpractice claim last year, compared with a national rate of 27 per 1 million, according to the National Practitioner Data Bank. That amounts to 37 total payouts in Wisconsin last year” [8].

Defense attorneys have suggested that the tort reform laws have “created an atmosphere where plaintiffs’ counsel are very likely to lose” [8]. Tort reform brings caps on damages, changes in standards of proof, and shortened statutes of limitation, depending on the state. Expenses incurred to bring a case to verdict can run in the six figures, and attorneys generally recover expenses and collect a fee only if the case is won. This results in meritorious medical malpractice cases subject to new damage caps or in the low-to-middle range of damages becoming too expensive to bring.

Weak Medical Boards

Fewer case filings has a second harsh impact on patient safety when payouts are linked to mandatory reporting. In Wisconsin, as in most other states, an insurance payment for medical negligence will result in a detailed report being issued to the medical examining

board describing the circumstances of the payment [10]. Fewer claims yield fewer lawsuits, which, in turn, yield fewer mandatory reports. Not only does medical liability reform effect what happens in the courtroom, it necessarily affects proceedings in the examining board by removing incidents from consideration altogether where, previously, they would come to the attention of the board through mandatory reporting.

Without a strong medical liability system, medical licensing and examining boards have failed to take on a larger role in disciplinary action. For example, recently the *Wisconsin State Journal* reviewed 218 cases leading to medical board discipline from 2010 to 2012, along with dozens of other cases where the board took no action. What the *State Journal* found was that more than 50% “of the doctors disciplined received reprimands, [which are] warnings that go on the doctors’ records but do not limit their practices. In at least 50 of the cases involving reprimands, patients died or were harmed” [9].

Moreover, medical boards by definition only oversee physicians, but the most serious in-hospital errors are often caused by systems failures, which remain beyond the disciplinary reach of medical boards. This means that hospitals usually go unrebuked

when their policies and procedures, or lack thereof, contribute to a medical error causing serious, preventable injury. In many states, hospitals now also enjoy extra protection on the medical liability side as well.

In the past, the medical liability system has shown that it can assist in bringing about positive change. For example, in anesthesiology, an article in *Forbes* suggested that transformative changes in training, procedures, monitoring, and equipment design came about in the 1980s after many large malpractice verdicts against anesthesiologists [2]. The end result? Dramatically improved patient safety and lowered malpractice insurance rates for anesthesiologists: “Within 10 years, the mortality rate from anesthesia dropped from one in 6000 administrations to one in 200,000. Anesthesiologists’ malpractice insurance rates fell to among the lowest of any specialty” [2].

Without a strong medical liability system supporting a strong physician discipline system, the only option left is whether doctors will bridge the widening gap to effectively police themselves. Physicians, like lawyers, feel uncomfortable advocating on behalf of other people’s patients against a peer. As you read this now, pause for a moment and think about it; you already know who these problem doctors are within your city, your

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region and your specialty. You would not refer a patient, let alone a loved one, to these physicians, board certified or not, because you question their competence, their ethics, or both. These are the inconvenient truths of the medical profession and we lawyers have our own. As George Bernard Shaw wrote in his 1906 play, *The Doctor's Dilemma*: "All professions are conspiracies against the laity."

Decision Point: Ignore or Engage?

Even after learning the scope of this problem you may not be convinced that this is a problem worth fighting. This is precisely why while medicine should be able to clean up its careless practitioners, it will not do so in any meaningful way. I agree with others who point out that physician discipline works poorly, but I would add that it works even worse when it works alone.

So, what is to be done? Is this a call to undo the "progress" of tort reform? I believe that the answer is "yes," or at least "to some degree." Strong evidence suggests that reversing course on medical liability will save lives, reduce harm, and improve quality of life for many patients. If that isn't the mission of medicine, what is? Yes, trial lawyers will profit. But, more importantly, so will patients.

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