

Life and Disability Insurance

A No-Fault Method for Addressing Structural Flaws In the Med-Mal System

By Jeffrey J. Segal and Michael Sacopulos

The tort system is designed to determine negligent actions and to make harmed individuals whole. A fair system would be predictable and would compensate every injured patient in an equitable way for lost earnings, medical expenses, and suffering. It would also impact all negligent health care providers in a similar way, in spite of the identity of the injured patient. Unfortunately, our current system is an inadequate means for achieving these goals.

The answer may lie in a no-fault med-mal payment system that treats all patients and health care providers alike. Are we talking about a universal no-fault liability coverage system? Yes, that is part of the equation. But that kind of program is a long way off in this country, if it ever comes to pass. What we do advocate, in the meantime, is a greater public and private emphasis on a patient's only true assurance of fair treatment: life and disability insurance.

THE PROBLEMS IN OUR CURRENT SYSTEM

Low Value, High Value Claims

An effective system should address the entire range of individuals who access it, but because of the expense of litigation, it is unrealistic to believe that those with low-value legitimate claims will find redress. An attorney is almost always needed to prosecute a case effectively, and counsel must hire expert witnesses, file motions, and take time to advance a case. If the claim has low perceived value, the typical contingency fee nets little revenue. Accordingly, the rational attorney will tell the potential client, "I am sorry. You have a bona-fide claim, but from a practical standpoint, the cost of my assisting you is too great for the work that will need to be done." Hence, the legitimate low-value claim goes without a practical remedy.

At the other end of the spectrum of unfairness is the example of a 42-year-old investment banker with an annual income of \$10 million. This hypothetical patient has a cumulative earnings capacity in nine figures, while the defendant physician will likely carry only a \$1-3 million limit on his professional liability policy. If this patient is negligently injured, is it realistic to believe that the physician who caused the harm should be responsible for all damages? Should the tort system look to the doctor's individual finances (above and beyond policy limits) to make the injured party whole?

The Location of the Defendant

Who the defendant is matters. The first variable in the analysis is geography, as many states have enacted caps on recovery. Some states, such as California, mandate a cap on non-economic damages, such as pain and suffering. In California, that cap is \$250,000. Other states have a cap on total damages. In Indiana, that cap is currently \$1,250,000. Still other states have a blend of these, such as Louisiana, which has a cap of \$500,000, with an exception for future care. Most patients are unaware of such caps when they seek medical care and only learn of the issue after receiving negligent treatment.

But familiarity with one's home-state's medical malpractice laws is not sufficient. Many patients seek care at institutions of excellence far away and are only too willing to make the trip. Further, some patients are transferred while unconscious to trauma centers in another state. These are individuals who did not knowingly bargain for limits to a tort recovery, their primary motivation undoubtedly being to seek the benefit of better treatment in another location. Nonetheless, their legal rights are affected by geography.

The Defendant's Employer

Beyond the defendant's residence, the public or private characterization of his or her employer affects the equation. If the physician works for the state or the federal government, either directly or indirectly, sovereignty issues might impact the ability of an individual to sue and/or to recover damages. Thus, the patient who is injured by a physician in a state university hospital might have a different remedy than the same person might have for the same injury in a for-profit facility in that same state.

For example, in Florida, the law limits the state's liability to \$100,000 per claimant and \$200,000 per occurrence. It is also well established that a physician employed by a sovereignly immune entity is entitled to the benefit of sovereign immunity. See *Pub. Health Trust v. Valcin*, 507 So.2d 596, 601 (Fla.1987); *White v. Hillsborough County Hosp. Auth.*, 448 So.2d 2, 2 (Fla. App. 1983).

The system in Kentucky is very different from that in Florida. Medical malpractice lawsuits against the University of Kentucky are barred, period. The Board of Claims procedure (an administrative process) is the exclusive method of asserting such claims. However, an injured patient can still sue the physician (with no apparent limit), even if he or she is employed by the state university. See *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997).

Finally, a claim against the federal government is governed by the terms of the Federal Tort Claims Act ("FTCA") 28 U.S.C. § 2675. The Act waives the government's sovereign immunity with a number of exceptions, including a claim by an active duty soldier or a claim arising in a foreign country.

Hence, the amount of a plaintiff's recovery, if any, may be influenced the nature of the physician's employer/principal. This is not the road to appropriate recovery and predictability.

The Uninsured Provider

Some plaintiffs may win a judgment but be able to collect little, or nothing. Not all states mandate that physicians carry liability insurance for the privilege of practicing medicine. In addition, in one state, Florida, to avoid losing one's medical license, the law mandates that physicians be responsible only for a maximum of \$250,000 in damages. So, if a Florida physician has legally protected his or her personal assets through trusts or other means, a high judgment might net a patient a maximum of only \$250,000.

The Speed of Recovery Through the Court System

When patients are injured, they are concerned about their financial viability. Many of our country's bankruptcies are precipitated by medical conditions that make individuals unemployable for some period of time. The injured patient is scared of losing his home and car, and he needs assistance sooner rather than later. Litigation is an adversarial system and serves this need poorly. Many cases

take years to resolve and generate considerable costs. Even if the case goes as far as a court hearing, the physician defendant prevails most of the time. Physician Insurers Association of America, PIAA claim trend analysis: 2004 ed. at exhibits 1, 6a; 2005. For the few who win large judgments, the process is time consuming and capricious. The plaintiff must prove breach in standard of care, causation, and damages. Many more patients will lose their personal and family assets than will become wealthy. It is difficult to plan around such uncertainty.

REMEDIES TO ADDRESS MOST PATIENT'S NEEDS

Disability and life insurance are better risk-mitigating vehicles than is the current fault-based adversarial system. The injured party or his survivors receive a predictable sum, which can be accessed when needed most. These funds can help prevent catastrophic financial loss by paying the bills while the patient recovers.

Disability and life insurance are indifferent to what causes the problem; be it negligence, progression of a disease or just bad luck. Further, such insurance is specific to the individual who owns the policy so that, in order to be made whole, the patient is not dependant upon the unknown circumstances of a potential defendant. In the disability or life insurance model, one has properly planned for a range of bad events.

Sometimes, disability and life insurance coverage will not be enough, such as when long-term, expensive, future medical needs must be met. Examples of such cases are severely birth-injured infants, patients who sustain brain injuries or those who are left paralyzed by medical negligence. Most of these patients' needs are related to medical care. Guaranteed continued health insurance could serve the goal of providing needed care for these patients. A viable model would need to make sure that there were adequate funds to cover all the patients who need such a program. One variation of such a system is found in the Florida Birth-Related Neurological Injury Compensation Program. A similar program operates in Virginia.

SHIFTING COSTS

It is obvious that a seismic change in perspective would be required for Americans to change the current system and begin relying on self-insurance and new public programs. Certainly, disability and life insurance coverage cost money. That money must come from the patient. Universal continuing health coverage would also cost money, most likely from taxpayers (although such a program might be funded, at least in part, by a fee on health care providers). This may seem unfair to the general public, who see the current malpractice system as properly placing the onus on negligent health care providers to pay for medical mistakes.

But our present medical malpractice system comes at enormous cost. These costs manifest themselves in many ways, from the existence of unscrupulous "ambulance-chasers" to a medical community practicing defensive medicine, with its concurrent inefficiencies and excessive expenditures.

Of more immediate concern to the individual is the fact that the current system does not meet its goal of compensating individuals who are negligently injured. In order to recover, the injured patient must have the right size potential claim. He must be patient and persistent. He must have sufficient funds to keep his head above water while his case progresses. He must have as good an attorney, or better, than the opposing side. He must get a jury that understands the medical evidence and deals with it fairly. The defendant must have assets that are not sheltered. If the defendant is insured, the carrier must remain solvent. The state must not impose any limits on damages.

Patients would be better protected and served by disability and life insurance coverage than by a defective medical tort system. A system that requires the determination of fault consumes vast resources that could be better employed to assist injured patients. The challenge is in converting from the present medical malpractice system to a no-fault system.

Editor's Note: The authors are affiliated with Medical Justice Services Inc., a company that seeks to protect medical providers against frivolous medical malpractice lawsuits by providing legal services to fight and deter meritless claims.

Jeffrey J. Segal, M.D., is the Chief Executive Officer and founder of Medical Justice Inc. **Michael Sacopulos, Esq.**, is the firm's lead counsel.