First, Do No Harm

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First, do no harm. It is an adage that has been associated with medicine for centuries. As a physician takes a patient's life into their hands, their skills providing the best hope of recovery, this saying guides their moves: "First, do no harm". Yet for a physician, such high stakes makes infallibility simply impossible. No matter the scale, mistakes can happen; the consequence of having physicians is that we have to live with the all too real shortcomings of humanity's imperfection. Ultimately, doctors must be held accountable for their mistakes, just as they are responsible for ensuring exemplary standards of care for their patients. However, medical malpractice litigation as it exists today is deeply flawed: failing to protect doctors and physicians appropriately; hindering the way medical care is provided; and poorly outlining the guidelines for the adjudication of the cases which do arise. In order to create a more balanced system of patient and physician protection, a clearer system of standards and fair malpractice litigation must be adopted in order to evolve health care into a more transparent and effective system.

Malpractice occurs when a professional breaks a standard of care or conduct, resulting in client injury or damage.[1] Particularly, medical malpractice is "improper, unskilled, or negligent treatment of a patient."[2] In civil litigation, these proceedings typically fall under the subset of TORT law, which deals with damages resulting from the wrongful acts of others.[3] Under this law, there are four criteria for determining whether a physician is truly negligent, and whether they are truly culpable: Did the physician provide the care he or she was supposed to? Was the expected care standard met?; Did the patient sustain any compensable injuries?; and Were the injuries caused by substandard care?[4] These questions lack simple answers, especially when situations vary so wildly and when proving fault is so difficult in actuality.

It is not as if these questions are just starting to be considered; malpractice suits have been a matter of debate for centuries. The first malpractice case is recorded as *Stratton vs. Swanlond*, in 1374, and was handled by a local "Court of Common Pleas."[5, 6] Yet this local battle over malpractice did not extend into a national debate over patient and physician protection until around the nineteenth century. In 1852 *The Boston Medical and Surgical Journal* noted that "one case after another shows that the best operators in New England expose themselves to the hazard of a vexatious lawsuit... [to the end of] the ruin of the defendant's professional influence . . . even if his last dollar is not tak-

en."[7] This debate gained further hold in the 1960s and 1970s, as it became clear how medical practices and standards of care were being affected.[8] Over time, it has become more evident that medicine is entrenched in a world increasingly focused on technology, economics, and law, and that these forces will only have a larger influence on the bureaucracy and policy behind medicine.[9] The debate has not been resolved, but has instead only escalated.

Today there are some measures in place to govern malpractice suits, but they remain vague. A standard of conduct attempts to regulate the expected level of care from physicians across the nation, yet such standards are exceptionally difficult to judge across areas with such dramatically different resources.[10] A "respectable minority rule" in theory protects physicians who are performing riskier surgeries and techniques which only a small number of respected doctors use, preventing their liability should something go wrong.[11] Yet again, it is extremely difficult to establish what that vague parameter of exclusivity includes. An "error in judgment" rule is effective by mandating that medical professionals are not at risk of malpractice if they err in judgment when choosing a treatment or diagnosis from a set of feasible conditions or tactics.[12] Nevertheless, it is difficult to apply these laws, and such provisions do little to project physicians in court.

As a result, *liability* is less of a question; rather, litigation is used more frequently to determine the *amount* of compensation a patient will receive.[13] This goes beyond physical or emotional injury to punitive damages—extra-monetary compensation won in court cases that serves more as revenge on the physician than payment for pain and suffering.[14] In 1975, the California Medical Injury Compensation Reform Act limited noneconomic damages to $250,000, and also limited lawyer fees to eliminate some punitive damages.[15] Yet there is still an unsettling potential for unnecessarily enormous settlements. Patients must be compensated, but the terms of such compensation must be regulated on more than a case-by-case basis.

This lack of protection has caused many physicians to distrust the legal system, and a fear of litigation along with a desire to maintain their careers and good standing has led to dishonesty with regard to medical errors. In a recent study by the Archives of Internal Medicine, 98% of doctors acknowledged the need to disclose serious issues to patients, particularly after a physician's mistake, but that statistic fell to 33 percent when it was described as full disclosure, with a full, explicit apology.[16] Furthermore, physicians admitted they would be far less likely to report errors if they were sure the patient would never find out.[17] This distrust for the handling of malpractice and mistakes and the wariness it imposes have created a new layer of distrust between doctor and patient, and a wholly undesirable lack of transparency. These lies by omission create a horrific barrier to care—one that is completely unnecessary and potentially avoidable without such a fear of litigation.

This fear of failure imposed by the courts has led to a costly and impractical era of defensive medicine. Defensive medicine terms the unnecessary measures doctors often take to avoid the chance of making mistakes or missing something, and being sued as a result. As President Obama stated in his June 2009 speech to the American Medical Association, "too many doctors order unnecessary tests and treatments only because they believe it will protect them from a lawsuit."[18] One study said that 79% of doctors acknowledge ordering more medical tests than they think

are needed; 74% refer patients to specialists more often than needed; 61% are reluctant to make humane choices for terminally ill patients; and 83% of physicians and 72% of hospital administrators do not trust that the justice system will be reasonable in lawsuit results.[19] This could be beneficial, an extra safety net might prevent any overlooked issues. These tests were *beyond* what the physicians believed necessary, consuming unnecessary time and resources. Such tests purposelessly funnel away tens of billions of dollars every year.[20] With a continued culture of corrupted malpractice, defensive medicine has become expected, the new standard of care, ingrained into the routines of physicians for decades.[21, 22] This standardization is clear in the reluctance of medical professionals to change their ways after minimal malpractice reform; changes in Texas, South Carolina, and Georgia, for example, did not produce significant change in the number of MRI or CT scans ordered.[23]

Beyond the cost of defensive medicine, corruption in the legal system is further using malpractice as a means to increase the cost of health care and insurance. A 2010 statement by the president of the American Medical Association clearly highlights the dysfunction with which the system impedes the true wishes of doctors and patients: "The litigation lottery invites abuse, inefficiency and persecution of the blameless … Unfortunately, the liability system has failed patients, but it is extremely lucrative for trial lawyers…"[24] With huge premiums, physicians are forced to pay exorbitant amounts for insurance, especially in New York and Florida where they pay $100,000 annually for one million in coverage.[25] Newt Gingrich explains, "the system subsidizes lawyers instead of improving health care."[26] As George W. Bush said in his 2003 speech before the American Medical Association, "There are too many frivolous lawsuits against good doctors, and the patients are paying the price."[27] They pay this price through higher defensive medicine bills, lack of doctor transparency, and falling confidence of medical professionals. The entangled, ineffective system must change.

Effective reform has been negligible so far. While there are plenty of policies condemning doctor mistakes, there are few endorsing or incentivizing desirable practices. As President Obama explained in his June 2009 speech to the American Medical Association, "We need to explore a range of ideas about how to put patient safety first, let doctors focus on practicing medicine and encourage broader use of evidence-based guidelines."[28] Establishing such protocols will help to eliminate some malpractice risk. The reform that has been passed by Congress is largely in the form of small pilot projects that do little in terms of enforcement; Congress has failed to provide the proper funding required for implementation and development of better tactics.[29] Only with more large-scale, broad-based reform will there be real change that does not impede the work of doctors or the safety of patients.

A possible remedy to some of the aggravation within the system could occur through technocratization and separation of the medical malpractice suits from the larger court of civil litigation. Oftentimes, the jury handling a malpractice suit is not a panel of experts, unable to appropriately judge the situations at hand, even with an expert testimony. Two-thirds of such cases end in settlement because of the expectation that physicians will "accept liability even in cases of inevitable deterioration following due and proper treatment."[30] With biased, uninformed juries, physicians rarely have a chance. Newt Gingrich—with the group "Common Good, " a reform-minded group of politicians—suggested a special court in order to eliminate such poorly informed

decisions.[31] It is challenging to have litigation without any bias, yet this new system may eliminate some of the distrust that obscures clear reason in determining fault. Perhaps the delegation of malpractice suits to a separate court will begin a new era of more informed, fair decisions for all parties, such that truth and accountability are both upheld.

Beyond all of the legal reforms and the technical aspects that must be implemented to solve this issue, a larger emphasis must be placed on maintaining the human connections between physicians and patients as a reminder of why we do not simply use robots for care and diagnostics. Malcolm Gladwell explains that "the overwhelming number of people who suffer an injury due to negligence from a physician never file a malpractice suit at all. Patients don't file lawsuits because they've been harmed by shoddy medical care. Patients file lawsuits because they've been harmed by shoddy medical care and ... they were rushed or ignored or treated poorly."[32] Take Dr. Wendy Levinson, MD, from the University of Toronto, who found that doctors who had never been sued had spent on average an extra three minutes with patients, compared to those who had been sued.[33] This basic level of communication and humanization establishes patient-physician trust and connects the patient and doctor, leading to more understanding, open communication, and less animosity should something go wrong. It is a shame that more physicians still adhere to the stereotype of being cold and distant. Simply increasing this basic communication correlates to better outcomes, better patient behavior, and fewer malpractice cases. Perhaps the remedy to this issue of lawsuits is simply a change in the way of approaching these relationships.

Ultimately, physicians are not Gods, not infallible, yet with each life they take into their hands they are inspired to try to solve a new problem and to save a life. It is their job, their duty undertaken from the moment they swear the Hippocratic Oath. The empathy and care for human beings to which they swear—drawing on humanity, vulnerability and imperfection—create better caretakers. "There is art to medicine as well as science… warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug."[34] Giving up that empathy, the ability to understand a patient, is not a cost that should be paid for ultimate perfection. Thus, physicians cannot avoid these mistakes, but must learn how to handle them.

Transparency is the key. The debate is far from over, the balance not yet achieved; systematic reform must include some elimination of tension and fear. This ultimately requires a more universal understanding of the grounds for malpractice suits, a standardized system of care and justice. It requires a restructuring of court procedures to eliminate bias. Beyond this, humanity has to be brought back into health care. Patient-provider communication must reestablish that physicians are fallible and patients deserve full disclosure. Only then can trust be reestablished. Only then can physicians perform at their highest standard. Only then will patients feel that their needs will be fully met. Communication is the future of health care, and lack of reform will only serve to entrench the system in bureaucracy and litigation.

A system such as that will heal no one.

ENDNOTES

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