



Better Than Death Panels

By John C. Goodman

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Previously, I wrote about a [dangerous development](#): a proposal by former Obama administration officials to give doctors immunity against malpractice lawsuits if they practice medicine according to government sanctioned guidelines. That would give the guideline writers enormous power to ration care.

Doctors would be able to escape the pain, agony, humiliation and costs of lawsuits, but only at a very heavy price: They would have to deny you the care their training and judgment tells them you need. They literally would be choosing between saving lives and curing diseases and the comfort of being able to avoid all the unpleasantness of litigation.

Fortunately there is a much better solution to the problem of malpractice and to the much wider problem of patient safety. I think of it as "medicine without lawyers." Further, Florida may be the first state to try it out. More on that below.

As things now stand, the only way a victim of an adverse medical event can get compensation is by filing a lawsuit, enduring its trauma and discomfort, and trying to prove malpractice. Yet [only 2 percent](#) of victims of malpractice ever file a lawsuit. Fewer still ever receive any compensation. On the other hand, [37 percent](#) of lawsuits filed involve no real malpractice. To add insult to injury, [more than half the money](#) spent on malpractice litigation goes to someone other than the victims and their families.

Despite this poor track record, the system imposes a heavy social cost—[as much as \\$2,500](#) per household per year, including defensive medicine, at today's prices. And it may be making hospitals less safe than they otherwise would be.

The malpractice system distorts the incentives of doctors and hospitals by encouraging them to make malpractice events as rare as possible, even if they increase the number of other adverse events. As explained in our [Health Affairs study](#), the system encourages doctors to order more blood tests and other procedures in order to reduce the risk of malpractice litigation, even though these procedures may put patients at additional risk.

Fortunately, there is an alternative. For the money we are now spending on a wasteful, dysfunctional malpractice system, we could afford to give the families \$200,000 for every hospital-caused death. We could give every injury victim an [average of \\$20,000](#)—with the actual amount varying, depending on the severity of the harm.

How exactly could this work? We propose to allow patients, doctors and hospitals a voluntary, contractual, no-fault alternative to the malpractice system. In return for forgoing their common law rights to litigate, at the time of entry into the health care system patients would be assured

that if they experience an adverse outcome, the provider institution will write them a check—without lawyers, without depositions, without judges and juries—no questions asked.

This proposal would take quality-of-care issues out of the hands of the legal system and put it in the hands of people who are best able to do something about it. Providers would soon realize that every time they avoid an adverse death, they will save, say, \$200,000. They would come to view every life as equally valuable—regardless of whether the cause of harm is negligence, preventive steps not taken or an "act of God."

To pay off the claims, hospitals would probably purchase insurance just as they purchase malpractice insurance today. Insurers would become outside monitors of hospital quality and their premiums would reflect doctor and hospital experience. Those with higher adverse event rates would pay more. Those with lower rates would pay less. Further, if patients desired to pay an additional premium and top up their potential compensation—doubling or quadrupling the amount—they would have that option as well.

Under this proposal, state legislators would establish a commission to set the minimum compensation patients must receive for various adverse events. An independent commission (with patients, doctors and hospitals all represented) would regularly review hospital records and determine whether an adverse event has occurred in marginal cases. The decision to opt out of the malpractice system is a decision to accept these non-judicial parameters.

As radical as it may seem, the idea may be catching on. In Florida, a bill proposed by Senators Alan Hayes and Jimmy Patronis and backed by an advocacy group called Patients for Fair Compensation would replace Florida's highly litigious medical tort system with a new approach, modeled after the workers' compensation system. In this manner, Florida would implement a "no-fault" system that would compensate patients for certain types of injuries deemed as medical errors.

An independent review panel would evaluate claims based on their merits, and an administrative law judge would be on hand to ensure fairness in the process. It is estimated that this reform would save the state billions of dollars in defensive medicine costs (those unnecessary tests doctors administer out of fear of being sued), as well as court costs. By the way, Florida has one of the most medically litigious counties in the country, Miami-Dade, so almost any system that keeps medical cases out of the courts will benefit them and reduce the malpractice premiums doctors must pay.

The true test will be if a no-fault system will align the incentives of doctors and patients to reduce medical errors and adverse events in the first place. The only way that will happen is if, first, physicians are rewarded for speaking up about adverse events rather than hiding them. Since doctors are reluctant to talk for fear of litigation, a system that for the most part bypasses litigation may encourage freer communication with the patient. And since patients primarily sue to find out information about their case, they would be less inclined to do so anyway.

Second, doctors will most likely improve quality if they are rewarded monetarily. If patient compensation is directly tied to an individual physician's insurance premiums (this means no community rating) or a hospital's cost of self-insuring, the monetary savings would incentivize health care providers to initiate best practices and improve overall quality.

Florida's malpractice solution is a good start.