An Alternative to Malpractice

By John Goodman – NCPA
May 03, 2011

About three decades ago, University of Chicago law professor Richard Epstein proposed a radical alternative [gated, but first page available] to our system of malpractice liability. He called it "liability by contract." The idea: let patients and doctors voluntarily agree in advance how to resolve things if something goes wrong.

In nonmedical fields, Epstein's idea is actually quite commonplace. Contracts for performance often have provisions detailing what the parties will do if something goes awry. If the parties disagree, contracts often spell out dispute resolution procedures (such as binding arbitration).

One version of this idea in medicine has already been tried. For years, hospitals asked admitting patients to sign a form agreeing not to sue the hospital or the doctors, no matter how negligent they were. When these forms showed up at the courthouse, however, judges routinely dismissed them on the grounds that the patients were too sick, too scared and too uninformed for there to have been a true meeting of the minds.

My colleagues and I at the National Center for Policy Analysis believe we have found here and here. Let the state legislature decide on the minimum elements (including the amount of monetary compensation) that must be in such contracts in order to make sure patients are fairly protected. Then widely publicize these elements so that people generally understand (before they get sick) what will happen if they opt out of the malpractice system. Courts would be required to accept these contracts as binding.

Recently we have added a new element to the proposal, as a result of our work on hospital safety. Whereas the current system is absorbed with finding fault, for reasons explained below, we propose a system of voluntary, no-fault contracts under which patients and their families are compensated for deaths and injuries that arise from any cause other than the medical condition which caused them to seek care.

By voluntary, we really mean voluntary. If doctors and hospitals choose not to opt out of the tort system, they can practice under the rules of existing law.

In my last Alert, I reported on the general results of the hospital safety literature. Judging by the comments I received you would have thought I had joined an anti-medicine, left-wing conspiracy. Yet hospital safety is not a left/right issue. Betsy McCaughey, for example, is a valiant crusader for lower hospital infection rates and most people would put her well to the right side of the political spectrum. In fact there are very few people — regardless of politics — who have looked at this issue and concluded that the current system is satisfactory.

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.

As explained in our Health Affairs study and at a previous blog post, the malpractice system distorts the incentives of doctors and hospitals by encouraging them to make the malpractice events as rare as possible, even if they increase the number of other adverse events. For example, doctors may order more blood tests and other procedures in order to reduce the risk of a malpractice lawsuit, even though these procedures may put patients at additional risk.

Fortunately, there is a better way. 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 for some reason other than the medical condition for which they seek care, 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 nonjudicial parameters.

Note that the minimum compensation for adverse events really is a minimum. Hospitals would be free to offer much better terms and no doubt many would. Geisinger Health System, for example, offers a "warranty" on its heart surgeries. Patients don't pay for readmissions, regardless of whether there is an adverse event.

In addition to Epstein, Emory University economist Paul Rubin has proposed nonjudicial mechanisms for creating a market for resolving liability issues. Our proposal builds on the pathbreaking work of these scholars, and we believe it can make liability by contract a reality. It is an idea whose time has come.