

MEditorial December 2011

“A Few Thoughts about Medical Liability”

First, let me take this moment to wish all the readers of this website and all my patients a wonderful Holiday Season, including a Merry Christmas and Happy New Year. May 2012 be free of any major health issues for you and your loved ones.

We all know about health care reform, the exploding cost of health care, and the stresses which will be placed by the new legislation, if/when implemented, on the system including for doctors, other practitioners and hospitals by more entrants (patients) into the healthcare arena. The higher burden placed on physicians and lower reimbursement from an under-capitalized system could lead to shorter patient encounters; longer waits; too much reliance on lab tests, x-rays and other diagnostic tests; as well as inaccurate diagnoses made by less-than-experienced practitioners. Specialists could be overwhelmed with patients previously diagnosed by their primary cares in a culture that seeks more and more expertise. This in turn could make, for example, urologists, less available to do what they do best, e.g., complex diagnosis and surgery. Complications of care could multiply.

I am not going to get into the whole topic of tort (and specifically medical malpractice) reform and the politics thereof. Let's just say that, based on my 25 years of experience, changes in malpractice legislation (even something as simple as “loser pays”) will definitely cut health care costs, keep many physicians from early retirement (and encourage more bright young minds to enter the profession), and allow for “smarter” medicine. Patients need to, if not actually face more of the costs of the medical care they seek, at least be aware of what these are. They need to be given an honest assessment, using the available tools of “evidence based medicine” as to what works and what does not. We need to quote patients the percentages involved in our joint decision making. Once understood (“informed consent”), patients should “live within” the boundaries of their medical choices. For example, what is the chance that a

surgery to remove a post-fracture fixation device will really eradicate chronic pain in the leg? In a patient with blood in the urine, what is the chance that adding a CT or CT urogram on top of an already normal kidney ultrasound will show something of significance to the patient's health; and let's say there is a 1-2% chance of finding something, is that worth \$500 of cost? What are the odds that chemotherapy for lung cancer in an 80 year old patient will truly add significant/quality longevity—or is this just being done to avoid the perception of “giving up on grandpa”?

When patients experience a bad outcome from their medical care, it is easy to look for blame, especially in a society like ours. Most health care interventions derive from perception of illness and a patient seeking help from a doctor. Could it be that a less-than-optimal outcome or a downright complication ensue from the patient's illness itself; the limitations of medicine/surgery; or mere randomness? Is it permissible to say that any system is imperfect and on rare occasions, accidents will happen?

Besides tort reform, I'd like to see a system where--if compensation for a bad outcomes is needed--it comes more from a “no-fault” logic--except in the most egregious cases of poor medical care [where the case should 1st go to a panel of experts before being referred for legal arbitration, not to a lay jury for judgment].

Some patients are more stoic than others about outcomes of their health problems. To those less so inclined, I have a few suggestions. To those of you old enough to remember, one used to be able to buy a personal liability insurance policy at the airport in the very unlikely event of accidental death or injury resulting from a flight. Most elected not to buy it, and of those who did, very few claims were in need of payment. Why not have patients who are “worried” purchase an inexpensive case-by-case “no-fault” policy before undergoing surgery (or before being diagnosed/treated by their Internist) that will compensate them appropriately, without blaming anyone, should they suffer serious injury/prolonged disability/income loss attributable to the procedure? I do not proclaim to know how much this “policy” should cost as

related to the potential award, but somewhere in the realm of \$100-\$500 before a surgery and \$50 to \$100 before an illness is diagnosed/treated non-surgically seems reasonable.

Another thought. Most patients are happy with their medical outcomes. I often hear patients tell me, after they see the insurance company's "explanation of benefits"; that the doctor was clearly underpaid for the benefit derived. Why not try out a pilot program for "voluntary gratuities" i.e., "tips" from happy patients to defray the cost of compensating those rightfully unhappy. Let' say someone is quite pleased with the outcome of prostate surgery, and they "tip" \$250. This can go into an earmarked insurance fund (preferably run privately and not governmentally) to cover awards needed to those truly "damaged". It could even be arranged that a certain percentage of such gratuity (e.g., 33-50%) could be paid via the fund directly to the treating physician, as an incentive to keep doing a fine job.

I know these types of suggestions may seem whimsical to some--but we (healthcare providers, patients, and politicians alike) all need the courage to be creative and sway from the usual paradigms to help fix what is becoming a woeful system.