

## From the Massachusetts Medical Law Report

# The time has come for liability reform

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Medical liability in Massachusetts has become an extraordinary burden on our health care system. It produces years of litigation, financial inefficiencies, a culture of secrecy and a “blame game” mentality, plus unaffordable premiums for physicians. It is dysfunctional for physicians and patients.

Harvard School of Public Health Professor Michelle Mello has described it aptly: “For compensation, deterrence, corrective justice, efficiency and collateral effects, the system gets low or failing grades.”

The latest indication of the system’s failings comes from a survey of Massachusetts physicians about the practice of defensive medicine: tests, imaging, referrals, consultations and hospitalizations ordered by physicians out of the fear of being sued.

The survey is the first of its kind to quantify defensive practices across a wide spectrum and among a number of specialties, as well as the first to link such data directly with Medicare cost data.

The study, conducted by the Massachusetts Medical Society, found that 83 percent of physicians reported practicing defensive medicine and that an average of 18-28 percent of tests, procedures, referrals and consultations and 13 percent of hospitalizations were ordered for defensive reasons. The costs of these practices, in part, were conservatively estimated at \$1.4 billion.

But that number falls short of the real costs: the survey queried physicians in just eight specialties, accounting for only 46 percent of the physicians in the state.

The estimate doesn’t include tests and procedures ordered by physicians in other specialties and it doesn’t account for observation admissions to hospitals, specialty referrals and consultations or unnecessary prescriptions.

Reduced access to care, through the avoidance of high-risk procedures and high-risk patients, is another concern. The survey found that 38 percent of physicians reduced the number of high-risk services they perform and that 28 percent reduced the number of high-risk patients they serve. These findings are similar to previous studies. Over a five-year period, MMS workforce studies have found an average of 44-48 percent of physicians saying they alter or limit services due to the fear of litigation.

Defensive medicine also raises safety issues: Patients exposed to unnecessary imaging face the risks of radiation exposure, and many surgical procedures, such as Caesarean sections (now estimated to be one in three births), have increased as a result of liability concerns.

### **Threatening landscape**

Clearly, defensive medicine carries huge costs, reduces access to care, and poses unnecessary risks. Yet it remains widespread because the fear of being sued, with its potentially dire economic, personal and professional consequences, is so pervasive.

Recent decisions from the Massachusetts Supreme Judicial Court create an even more threatening landscape. The case of *Coombes v. Florio*, extending the possibility of physician liability to a third party outside of the doctor-patient relationship, and *Matsuyama v. Birnbaum* and *Renzi v. Paredes*, permitting recovery for a “loss of chance” for a better medical outcome, may signal more lawsuits and create more defensive medicine.

The irony is that at the same time the Commonwealth has become a model for health care reform, it has widened the liability of all physicians.

As the state struggles with exploding costs – which experts agree is the biggest threat to the success of reform – it is seeing billions spent on defensive medicine.

Reform is long overdue. A new model is needed that enhances patient safety; encourages open communication, full disclosure and transparency; offers sincere apologies for avoidable injuries with a proposal for timely and fair compensation; and resolves disputes with mediation and arbitration. Lawsuits should be a last resort.

Such a model – like the one proposed by The Joint Commission – compensates more patients more quickly and equitably, while dramatically reducing litigation and restoring trust among all parties.

This approach fundamentally transforms the system from reactive to proactive, from adversarial to advocacy-based, from a culture that isolates patients and providers to one that supports them, from a system that thwarts safety to one that embraces it, and from one that encourages defensive medicine to one that promotes evidence-based medicine.

Progress has occurred. Harvard University’s 2005 Consensus Statement of “When Things Go Wrong: Responding to Adverse Events” was a giant first step toward sound policies and practices in this state. Apology legislation, already passed in many other states, is gaining interest in the Commonwealth.

With spiraling costs, reduced access, and the threat to our state’s health care reform, how much longer can we afford to wait?

Physicians, lawyers, insurers, legislators, policymakers and patients must come together to start the dialogue and process of reform.

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