

More Healthcare Recovery Hurdles

The future of the United States healthcare system may be in limbo. Legislators are debating, and in at least one house have passed, significant changes to federal law which would totally usurp state rights. The proposal would limit the right to recover so-called noneconomic damages to \$250,000. Lawmakers should think long and hard before eliminating the right to recover legitimate damages in medical and hospital liability claims.

People simply do not realize how many preventable medical errors there are in the United States. We learned in 1999, when the advance edition of *To Err Is Human: Building a Better Healthcare System* was first released, that as many people die in U.S. hospitals as would die if, every month, two 747s fully loaded crashed, killing all aboard. There is absolutely a catastrophe of preventable medical errors in the United States. It is one of the leading causes of death in this country. One in 10 patients who go into a hospital wind up with a terrible infection. The cost of curing those infections is one of the largest components of the medical healthcare bill in the United States.

The only way to bring down healthcare costs in a reasonable way is to lessen the absolute avalanche of preventable medical errors in the United States, including infections.

What do lawmakers want to do? They want to take the cop off the beat. It is accountability and responsibility that keep the healthcare system safe. Many states have attempted full disclosure of medical errors, providing information about the background of doctors, and still the problem persists. The reason for this is the artificial barriers preventing recovery in medical liability cases.

It is extremely difficult to bring or succeed in an infection case, for example. It is not enough simply that an infection has occurred. In a medical liability case, it must be proven that the sterile field was broken, or they did not properly treat a developing infection. The very fact that the infection occurred at all is not necessarily a matter of medical liability. Many patients who have implants, prostheses and other care in the surgical setting wind up with infections and nobody knows why. It is these types of cases that deserve the attention of the legal accountability system.

Another problem with medical accountability in the United States is secret peer review. Hospitals frequently do know why doctors and nurses and other staff have made inexcusable mistakes leading to preventable medical harm. In most states there is immunity or secrecy so that information about what happens in hospital peer review is locked away forever. This is wrong. There should be statewide and even national peer review which is open to the public. There should be fair, honest, and real peer review.

Physician specialty organizations sometimes punish doctors who testify truthfully in medical liability cases. It is well known, for example, that the neurosurgery board will actually sanction doctors or remove their certification for testifying legitimately in medical liability claims. This is a kind of blackmail.

Unfortunately, it is very difficult to bring a medical malpractice case in the United States. For example, the Pennsylvania Patient Safety Authority has reported almost a third of one million incidents and serious events per year. In the last reporting period, there were approximately 1,400 cases of medical malpractice actually filed. Just think of it. A third of one million incidents and serious events, and only 1,400 cases filed. The reason for this, aside from the fact that it is expensive and takes great expertise to bring liability claims, is the unbelievably difficult obstacles in bringing a claim.

On one occasion, a professor at a well-respected school of public health was speaking at the University of Pennsylvania. The speaker said there will never be patient safety in this country without "the carrot and the stick." The physician was speaking to other physicians. Everybody knew what he said was true. We are never going to have a safer healthcare system without real accountability.

The idea of creating more barriers and hurdles to bringing medical liability claims, such as caps on damages, is a blatant violation of states' rights and the U.S. Constitution. We do not cap salaries. We do not cap what people can make from stocks or bonds. We do not, in this country, say that a person who is legitimately entitled to something should not get it. Rarely is it true that the amount of money people recover in medical liability claims is unfair. It is sometimes, infrequently, a significant amount of damages because of the unique harm caused by the medical profession when they are negligent. Why should a person not be fully compensated when they are horribly maimed or their lives or the lives of their loved ones are ruined?

The 2018 federal budget proposal would place a cap on noneconomic damage awards of \$250,000. It is said this would create a "safe harbor" for clinicians following evidence-based clinical practice guidelines. What are noneconomic damages? Those are the damages which are the most serious for most people. Noneconomic damages are the loss of life's pleasures and the ability to function as a normal human being when a person suffers unimaginable harm. I once achieved a major verdict where a woman had a permanently opened hole in her back. She had earlier had surgery to remove a cancerous nodule. The doctor put a hole in her diaphragm. For over a week, there was evidence that the woman was suffering herniation of her internal organs through that hole in her diaphragm. Eventually, the woman almost died and had her whole lung removed. She had to live with a permanent open wound that completely dominated her life every single day. In that situation, was a \$250,000 noneconomic award reasonable? Of course, the answer is "no." The literature shows that there are very few unduly harsh noneconomic awards when looking at the entire population and the amount of medical liability which occurs in the United States. Physicians already are supposed to follow "evidence-based" clinical practice guidelines. It is because many physicians do not adhere to the standard of care that medical liability claims are brought.

Legislators should encourage and smoothe the path for legitimate legal claims where patients can be fully compensated. Lawmakers should provide for the possibility of obtaining injunctive relief. In addition to being able to obtain full measure of damages, courts should be able to order that doctors and hospitals do something to change unsafe practices.

Electronic medical errors are causing significant problems in the healthcare system in the United States. Congress has appropriated millions, and perhaps billions, of dollars to encourage the electronic producers of medical records further to complicate the system. These systems cannot even be used by some doctors and hospitals. Frequently they do not work properly and they do not work well.

What is needed in the United States is a robust and serious medical liability system with well-trained lawyers and competent physician practitioners. We need more accountability, more responsibility, and we need to eliminate artificial hurdles to bringing legitimate claims not only in infection cases, but in all other kinds of litigation. Secrecy and the inability of patients to know what happened to them or why it happened is the biggest obstacle to building a safer healthcare system.

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders, who practices law in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.