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# The Case Against Our Current Malpractice System

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Let me state this clearly from the start: Many – especially from a patient or a physician’s perspective, – see medical malpractice as not necessarily being about the patient or the doctor; but rather, as being about the lawyer. The stereotypical scenario is that a potential medical malpractice case comes walking into an attorney’s office and – “ka-ching!” – the cash register sound goes off in the attorney’s head

I don’t hold that view, though – the attorneys are really not to blame. If you think about it, they’re simply operating within the current legal system and maximizing profit. I think there are some unethical attorneys out there who abuse the system. But there also are good attorneys out there. Nearly every business operating within a free-market economy tries to manage its business under the same principles: maximize profit.

So attorneys will do that – maximize profit – even in cases that by many measures don’t have the merit to stand up in court; they will be settled out of court, often for tens of thousands of dollars or more, because the doctor or the hospital or whomever is being sued doesn’t want to go through the prolonged effort and expense of litigation. They would rather cut their losses and cut a check to make the problem go away. It’s cheaper, faster and easier to do that rather than take a chance on a verdict that could cost them ten times the settlement amount. The lawyers make their money, their clients are happy because they at least got some cash, and the doctor or hospital lives to practice another day. Everybody wins, right? Wrong. Everybody loses, really. It’s a systemic problem – the system has got to change.

Our current malpractice system doesn’t work. Why? Because [90 percent or more of malpractice cases don’t even go to court](https://books.google.com/books?id=MS3CVGQthekC&pg=PA44&lpg=PA44&dq=90+percent+or+more+of+malpractice+dollars&source=bl&ots=nktZLRglmP&sig=WcKjv1dj6VZV1Q4R0abMJFTXQZQ&hl=en&sa=X&ved=0ahUKEwjS1PHnttDXAhXIyVQKHbMdAUUQ6AEIWzAI#v=onepage&q=90%20percent%20or%20more%20of%20malpractice%20dollars&f=false). And the amount of money – and it is vast – that is attached to this “medical malpractice settlement industry,” if you will, is divvied up in such a way that much of it doesn’t reach the patient. It goes to lawyers, it goes to the courts, and it goes to so-called experts who testify on behalf of the defendant or the plaintiff.

Here are some relatively [recent sobering statistics](https://en.wikipedia.org/wiki/Medical_malpractice_in_the_United_States#cite_note-24):

* Sixty-three percent of medical malpractice claims filed were associated with medical errors; therefore, 37 percent were not associated with errors. However, of those, 28 percent still got compensation (at an average of $313,205).
* Of those medical malpractice claims associated with medical errors, 73 percent of them settled (with an average compensation $521,560).
* The majority of expenditures (54 percent) go toward litigation over these medical errors and compensation for them.

It’s safe to say, I think, that the overhead costs of malpractice litigation are exorbitant.

Why do we have such a malpractice system? Theoretically, it’s supposed to do two things for the good of the principals involved – i.e., the doctors and the patients:

1. To hold doctors accountable, ideally to force them to be more careful and not make mistakes. It also will even help identify bad doctors, weed them out and prevent them from doing further harm to patients.
2. To help patients harmed by medical error and compensate them financially for the harm that has been dealt to them because of medical error.

What’s wrong with that picture? Our current medical malpractice system does neither of these, or at least does neither of these to any great effect. Remember the statistic cited above – that 90 percent or more of medical malpractice cases don’t get to court; they are settled out of court. That deflates the purpose of holding doctors accountable and weeding out bad doctors; it also deflates the amount of compensation given to patients who have been victimized. Also, consider this: A [study by the American Medical Association](https://www.ama-assn.org/sites/default/files/media-browser/public/health-policy/prp-201001-claim-freq.pdf) found that, “An average of 95 [malpractice] claims were filed for every 100 physicians, almost one per physician, and more than 20 percent of physicians were sued two or more times.” We are a litigious society and we as a society have an expectation for being financially compensated under our current malpractice system.

Consider this bit of info from [a Forbes article last year](https://www.forbes.com/sites/amino/2016/04/19/does-your-doctor-have-malpractice-claims-how-to-find-out/#5ec17cb155a6):

“The U.S. is a notoriously litigious society. Simply put, anyone can sue anyone else for any reason—and there’s nothing you can do about it. Doctors are no different. While legitimate cases of medical malpractice are well documented, not every doctor who’s ever been sued committed a medical error. In fact, according to the National Center for Policy Analysis, some medical lawsuits aren’t for medical errors at all, but for things like administrative oversights (such as failing to renew their licenses on time) or defaulting on a student loan. And, according to the AMA report mentioned earlier, in cases where doctors are sued for medical malpractice, more than 65 percent of claims are dropped or dismissed.”

Actually, in reality, doctors caught up in a medical malpractice case do not really have their practices affected much. I challenge you to even find out if a doctor you’re going to or are considering going to has had a malpractice case brought against him or her and what the outcome was. Was there a settlement, a conviction? It’s not easy information to find. Most patients don’t even look for it. And if you found it and you have been a relatively long-time patient, would it affect you enough to cause you to change doctors?

A malpractice claim might hit a doctor’s wallet in the short term, primarily because of the increase in rates for medical malpractice insurance. Honestly, though, nobody is being kept from being a doctor because they’re bad doctors, according to Dr. Jerome “Jerry” Hoffman MD, an emergency medical doctor in Los Angeles who has been in practice for more than 20 years. He says that if you read medical board reports from state to state, the reason most doctors get their licenses to practice revoked are because of things like doing drugs, having sex with patients, committing murder, and other such infractions – but almost never for being a bad doctor.

As the National Institutes of Health spelled out in an article titled, “[An Introduction to Medical Malpractice in the United States](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/),” the US has “an adversarial system” of dealing with medical malpractice claims. “As technology and the demand for healthcare have increased,” the author wrote, “the complexity and incidence of healthcare delivery, injuries, and adverse outcomes require a system of patient redress that is equitable, fair, economical, and just.”

To win monetary compensation for injury related to medical negligence, a patient needs to prove that substandard medical care resulted in an injury. He or she must show that: (1) there was a professional duty owed to the patient – in other words the doctor was actively treating the patient; (2) that there was a breach of such duty – a deviation or departure from standards of care; (3) that there was an injury caused by this; and (4) that there subsequently were resulting damages.

The most critical phrase in that preceding paragraph is “deviation or departure from standards of care.” That means the pressure is on the doctor to adhere to a certain standard of care, which may not apply in all cases. It’s a bit of a scatter-shot approach to avoid potential malpractice by requesting tests or prescribing medications or following a course of treatment that a doctor knows is unnecessary. But they do it anyway. It’s a system that sometimes causes healthcare dollars to be spent unnecessarily because doctors now move into the mode of practicing defensive medicine, which is actually bad medicine. And it can be tremendously wasteful and potentially cause harm. So the practicing physician is really damned if he does and damned if he doesn’t. It’s not a good place to be.

And sometimes people get lots of money, particularly the lawyers, but sometimes the plaintiff as well, even though there was no medical error. It’s a scatter-shot, shotgun approach that doesn’t actually work. It doesn’t make sense, either.

So what’s to be done? Dr. Hoffman, who just published [a podcast on the medical malpractice subject](https://www.emrap.org/episode/ema2017november/reflectionsofa) advocates a no-fault system. He says there would be a lot more money available for claims because we wouldn’t be “spending it on lawyers and experts and courtrooms and administration. We’d have the money … to help people who have suffered medical harm and need our help. And secondly, separating out the doctors at fault – this whole rigmarole about was it or was it not standard care … If we want to look for bad apples who are doing the wrong things, there are much better ways to do it that have nothing to with this [current] system.

“There are very few doctors willingly going out deliberately hurting people,” he says. But if we want to identify bad doctors, our system is not the way to do it. … Not that we shouldn’t be looking for bad doctors; we should be. But the current system in most states is so counterproductive that it does more harm than good. I’d rather we got rid of it all and replace it with two things: 1) a system that provides help for people who have suffered medical harm, are financially in big trouble because of it, which is a huge problem in the United States; and 2) an independent system that says, let’s try to identify where there’s really bad care so we can be open about it and fix it as necessary. Our current system does neither of those things.”

I would concur with Dr. Hoffman. We really need to find out the circumstances of why a board-certified physician, with decades of experience, has a slip-up in treatment or procedure that causes harm to a patient. Why would a doctor, who sees hundreds of patients a year – thousands of patients over his career – suddenly miss something that he or she shouldn’t have missed. And should the medical community censure such a doctor, strip that physician of privileges to work at a hospital or hospitals, and essentially ostracize him or her as a result of that one instance? We need to find out what really was going on. Was the doctor ill and not at the top of his or her game? Was he or she in the middle of a personal or financial crises that served to distract? Was it burnout? Were the demands of his practice so profound that they finally caught up with him or her in this one instance and caused a loss of focus?

Another alternative idea has been in place for years and I think bears more consideration by physicians in general. It is known as the “3Rs” program developed by COPIC, an insurance company that offers medical professional liability coverage as well as other services in numerous states. The [3Rs program (Recognize, Respond and Resolve)](https://www.callcopic.com/copic-services/safety-and-risk/Pages/3rs.aspx) provides an interesting alternative to the current, standard medical malpractice litigation path. As far back as 2007, COPIC’s 3Rs program was recognized by The New England Journal of Medicine as part of the national transformation in how health care providers could communicate with patients about unexpected outcomes; the 3Rs program also was detailed in a Q&A in a [2007 edition of Physician Insurer](https://callcopic.com/who-we-are/news-room/articles/Documents/4q%2007%20Physician%20Insurer_COPIC%20Article.pdf). COPIC’s goals, as outlined in the Physician Insurer article, are to provide prompt and fair compensation to injured patients; reduce time, effort, money and other resources that are gobbled up by the current tort system; prevent medical errors, and maintain, preserve and nurture the physician-patient relationship.

While there are no simple answers to address the current state of medical malpractice, the hope, indeed, the aim of reform efforts around medical malpractice should be towards a system that, as the NIH article stated, adequately compensates patients harmed by medical errors, while eliminating frivolous claims and weeding out those who are seeking to abuse the system by pursuing opportunistic medical claims for as much money as they can possibly obtain.

<https://www.huffpost.com/entry/the-case-against-our-current-malpractice-system_b_5a1f4595e4b0dff40be0362f>