

Loser Pays

How To Avoid Frivolous Lawsuits

By Robert J. Mintz

The outline of a new health care plan is taking shape but the issue of litigation and tort reform hasn't yet surfaced in the legislation. While there's not much debate among health care providers that the direct and indirect costs of litigation and the threat of lawsuits are major contributors to spiraling health care costs, proposals to remedy the problem haven't reached the table.

How Lawyers Get Paid

Let's see if we can make some sense of the legal problems. In the U.S, almost all medical malpractice cases and personal injury litigation is handled on a contingent fee basis. The lawyer and the plaintiff enter into an agreement which sets the legal fee as a percentage of the amount of the ultimate recovery. The plaintiff and the defendant are each responsible for their own legal fees and costs. However, in practice it's the plaintiff's attorney who shoulders all of the costs with little or no contribution from the client himself.

This type of arrangement is generally prohibited in most other common law jurisdictions in the world. In Great Britain, for example, lawyers can only accept a case on an hourly fee basis, being paid for their actual time. They are permitted to charge "Success Fees" or "Conditional Fees" but these amounts are a bonus, calculated as a percentage of the normal hourly rate rather than as a percentage of the total damages recovered. Whatever the arrangement, the client pays a substantial amount in legal fees and must feel that his case is very solid before he agrees to commit a large sum of money to go forward.

In the U.S. the plaintiff's lawyer, rather than the client, is actually financing the cost of his time and the expenses of the case, such as court filing fees, expert witnesses, depositions etc., in exchange for a large percentage of the "action." An attorney who files a malpractice case is really involved in a business deal risking his costs against a potential dollar payoff. Successful attorneys are good at figuring these probabilities because a case without a recovery can produce a devastating financial loss.

Does Negligence Matter?

That doesn't mean that good attorneys don't take cases if the liability isn't clear. Clear liability is not the deciding factor. The real issue is the amount of the potential recovery and that usually depends more on the amount of damages or injury to the plaintiff than with the degree of negligence of the physician. The key issues from the attorney's

standpoint are the amount of the potential damages and whether an award will be collectible from either an insurance company or the personal assets of the physician.

An attorney can “win” a case with uncertain liability because jury awards are unpredictable and defense costs of litigation are high. If the injury to the plaintiff is serious there is always the risk of a large damage award and it is the ability to create uncertainty and a risk of loss which enables him to force a settlement. Actual liability is only a small factor because potentially enormous damage awards and defense costs create a financial threat which the defense is unable to reasonably withstand.

Why the Plaintiff Holds all the Cards

As a consequence there is a highly disproportionate degree of risk assumed by each side in a contingent fee case. The plaintiff’s lawyer is risking his time and his out of pocket costs which are largely within his control and that’s the key point. If it looks like the out of pocket costs might go beyond what he can afford or is willing to invest then he can essentially “dump” the case - settling for little or nothing but avoiding a big financial toll. The plaintiff’s attorney controls his own costs and can manage the case with a view to properly balancing the risk/reward equation.

The defendant in the malpractice lawsuit has no similar ability to limit his potential loss without settling the case. Unlike the plaintiff, the defense can’t simply decide to drop the case as the costs pile up. The defense can’t get out unless the plaintiff agrees and if he is well financed and a strong negotiator, the plaintiff holds the cards and will demand a high price for a settlement. The inherent economic advantage of the plaintiff (controlled versus uncontrolled costs) even in cases of marginal liability, produces the volume of frivolous malpractice litigation and much of the burden on the health care system.

Balancing the Scales-Loser Pays

What if we had a tort system where the loser pays? That is, the losing side pays all the legal fees and costs of the winner. Again, that’s the way Great Britain does it as well as almost every other country (you may not like their health care system but they seem to have figured out the legal system pretty well). Would that alone reduce the incentive to sue? Let’s consider it. Even with a contingent fee, a Loser Pays system moves the financial risk out of the plaintiff’s control, since, if he loses, he would be forced to pay both sides costs. It’s true that he doesn’t have the defense’s risk of a jury damage award but the other side’s legal fees and costs can be so substantial that the adverse financial impact and the high level of uncertainty creates almost the same effect. With Loser Pays, the two sides are more evenly matched. The defense is less likely to be forced into an unfavorable settlement because it can recover its costs if successful. The plaintiff can’t dump the case to avoid risk because the defense won’t give up the right to costs. As the financial risk to both sides is equalized and the plaintiff’s advantage is diminished, plaintiffs would be less likely to file cases for the settlement value without clear liability. Quite literally, with every filed case the plaintiff’s lawyer will be betting his house on a

successful outcome and those with poor skills or judgment will be weeded out of the profession in fairly short order.

A Loser Pays system would dramatically reduce the amount of frivolous litigation while those who are truly injured will be able to find an attorney to finance a legitimate case. The costs and the emotional impact of frivolous cases might be substantially reduced if these reasonable reforms were considered as a part of any new health care plans.

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