AAOS American Academy of Orthopaedic Surgeons
American Association of Orthopaedic Surgeons

Position Statement

Medical Liability Reform

This Position Statement was developed as an educational tool based on the opinion of the authors. It is not a product of a systematic review. Readers are encouraged to consider the information presented and reach their own conclusions.

The AAOS is committed to safe, accessible, cost effective and quality patient care. The AAOS believes that the structure of the current medical liability system limits the ability of physicians to provide the highest quality patient care. Systematic medical liability reform is necessary to improve the overall health care system.

Challenges of the Current Medical Liability System

Fails to Fairly Compensate Injured Patients in a Timely Manner

The medical liability system fails to fairly compensate those injured through medical negligence.[1,2] Only a small percentage of injured patients receive any payment.[3] The majority of the medical liability premiums go towards administrative expenses and legal fees.[4] Medical liability lawsuits average three to five years and are costly.[5] A large percentage of lawsuits do not involve a negligent injury.[2,6] Just 6 percent of lawsuits go to trial,[4] and in less than 10 percent of all closed claims is the verdict in favor of the plaintiff.[5] Compensation amounts are unpredictable and inconsistent from case to case and not necessarily related to negligence or adverse events.[6]

Interferes with the Patient-Physician Relationship

The adversarial nature of the medical liability system disrupts the empathic patient-physician relationship and communication at a time when patients need it most after an injury.[10-18]

Prevents Analysis of Medical Errors and Impedes Lessons Learned

Improved patient safety and continuous improvement of the medical care system should be a main focus of reform efforts. The issue of patient safety should be about system improvement.[19] Analyzing errors, unexpected outcomes, and near misses are seminal tools to improving patient safety. A culture of continuous quality improvement and maintenance of open communication between patient and physician is critical.

Under the current system, medical errors and negative outcomes are frequently underreported due to fear of punitive action or exploitation without explanation. There is no incentive to report medical errors. Failure to report medical errors prevents physicians from learning from mistakes, thus endangering future patients.[19] Self-reporting and process improvement should be encouraged when a mal-outcome occurs. Quality improvement is essential to improving patient care and an absolute necessity in educating future physicians.

Compromises Quality by Encouraging Defensive Medicine

Evidence indicates that areas with greater medical liability pressure experience greater practice of defensive medicine.[20-25] It is estimated that 40% of physicians have chosen to limit their practice due to liability concerns. Defensive medicine is driven by the intensity of conflict, the duration of tort action, the emotional drain on the physician, and the threat of a large jury award.[26]

Defensive medicine includes the practice of ordering excessive or unnecessary tests, procedures, visits, or consultations solely for reducing liability risk to the physician, and/or the practice of avoiding high-risk patients or procedures.[24] The threat of frivolous lawsuits places significant pressure on physicians to request or perform unnecessary tests including invasive ones.[27,29]

Quality of care is reflected by appropriate tests and treatments,[30,32] efficient use of resources,[29] and treatment that is consistent with current medical knowledge.[30] Defensive medicine detracts from quality of care.[34-37] Avoidance behavior limits access to care, especially for high risk patients.[27]

Escalates the Cost of Health Care

Ten percent of health care spending in the United States can be attributed to the cost of litigation and defensive medicine.[38] Liability reform could reduce defensive medicine practices and result in an estimated 5 to 9 percent savings in overall health care expenditures.[36]

Reduces Patient Access to Care by Decreasing Physician Supply

Critical specialists are becoming less available to provide emergency trauma care as specialists face higher medical liability exposure.[41] Patients in need of high-risk services, uninsured patients, and patients whose insurance minimally reimburses specialists are most affected.[40]

One sixth of the approximately 650,000 practicing physicians report a medical liability claim annually.[28] Fifty (50) percent of America's neurosurgeons and more than 30 percent of orthopaedists, obstetricians, trauma surgeons, emergency department physicians, and plastic and reconstructive surgeons are sued each year.[28] In 86 percent of cases, the jury finds the doctor not negligent, yet the cost of defense can range from $24,000 to $90,000.[8]

Principles for Medical Liability Reform

The AAOS believes that broad reforms are necessary to compensate negligently injured patients promptly and equitably, enhance patient-physician communication, facilitate improvement of patient safety and quality of care, reduce defensive medicine and wasteful spending, decrease liability costs, and improve patient access to care.

The AAOS believes that efforts for comprehensive medical liability reform should include the following core principles:

- ***Compensation***
  - *Compensate patients for injury caused by negligent care promptly, fairly, equitably, and reliably.[42-46]*
- ***Communication***
  - *Encourage early and free dialogue and advance the primacy of empathic patient-physician relationship[1,11-18,44-46]*
- ***Dispute Resolution***
  - *Develop more equitable and less adversarial mechanisms for dispute resolution while minimizing costs[26,44-46]*

- ***Encourage a Culture of Safety and Quality***
  - *Encourage voluntary reporting of unanticipated occurrences and open dialogue through confidentiality laws*[19]
  - *Establish firewalls between discipline and voluntary reporting systems*
  - *Enhance data collection and analysis efforts to enable effective system-wide and individual improvement*[2,19,44-48]
  - *Enhance peer review to prevent abuse, ensure due process, and focus on learning in order to improve patient safety and quality of care*[48,49]
  - *Encourage system-wide responsibility for clinical safety and improvement* [47,48,50]
- ***Reduce Defensive Medicine and Excess Health care Costs***
  - *Eliminate and/or minimize factors that promote the practice of defensive medicine*
  - *Reduce assurance behavior to avoid the expense of unnecessary tests and treatment* [20-,27,38,39,52]
- ***Increase Patient Access***
  - *Eliminate and/or minimize factors which promote the practice of defensive medicine (avoidance behavior) in order to increase availability of care*[22-27,38,39,43-46,51]

Components of Successful Medical Liability Reform

The AAOS believes that the following programmatic components of reform should be among those considered to achieve these principles.

- *Early tender to compensate for economic losses*
- *Alternative dispute resolution*
- *Arbitration; mediation; pre-arranged patient-physician agreement*
- *Enterprise (the organization, e.g. hospital, and the professionals as an accountable unit) liability to encourage shared responsibility and system-wide improvement; and eliminate blame and shame*[44]
- *Safe harbor from liability for following established and approved clinical practice guidelines*[46]
- *Medical courts with specially trained judges to allow a case to be evaluated by experienced professionals in the medical and legal arena*
- *Scheduled payments for certain typical injuries*
- *Administrative compensation system using an evidence-based and expert-developed predetermined list of compensable injuries resulting from negligent care and compensation amount*
- *Modify punitive and National Practitioner Data Bank reporting requirements to provide incentive for open communication, prompt resolution and compensation, and the improvement of patient safety through confidential data collection*

The AAOS believes that no federal legislation pertaining to liability reform should include provisions that would undermine effective state tort reform provisions or the ability of states to enact tort reform tailored to local needs. In recognizing that broad reform requires pilots and time before widespread application, it is critical to provide interim relief within the current system through proven measures by state and/or federal legislation, including:

- *A specific per claimant cap on non-economic damages*
- *Make juries aware of collateral source payments and allow offsets for these payments*
- *Allow defendants to make periodic payments for losses projected to occur in the future resulting from the injury at issue, rather than immediate payment*
- *Establishment of basic requirements to qualify an expert witness in medical liability cases and accountability to license board/medical specialty board*

- *Expansion of the Good Samaritan laws to allow volunteers and charitable organizations to serve the public without the threat of litigation*
- *Shorter duration for the statute of limitations for minors and/or a statute of repose*
- *Implementation of a uniform system of several, and not joint liability that holds physicians liable only to the extent he or she is responsible*
- *Safe harbor from liability for following best practice guidelines*[46]

The AAOS believes that there is an urgent need to improve patient safety and access to care, decrease defensive medicine and reduce the cost of health care through medical liability reform.

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