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# Regulating Doctors

by Carl E. Schneider

A lawyer today can hardly speak to a doctor—or even be treated by one—without being assailed by lawyer jokes. These jokes go well beyond good-humored badinage and pass the line into venom and gall. They reflect, I think, the sense many doctors today have that they are embattled and endangered, cruelly subject to pervasive and perverse controls.

This is puzzling, almost to the point of mystery. Doctors have long been the American profession with the greatest social prestige, the greatest wealth, and the greatest control over its work. Indeed, what other profession has been as all-conquering? One may need to go back to the seventeenth-century clergy, and before them perhaps to that gloriously predominant profession—knight-hood. This mystery is worth exploring because ultimately regulating the profession is crucial to many of bioethicists' hopes. So let us explore it.

## The Physicians' Lament

When you press doctors to explain their distress, you hear that the law regulates medicine too closely. And you hear most about the law of malpractice. Yet though our malpractice regime is far from admirable, doctors are wrong in much of their indictment of it.

Physicians' first charge against the law of malpractice is that it imports external criteria to evaluate doctors. This is baffling. The law sedulously uses the standard of care established by medical practice. It does so even though much tort law is moving toward strict (that is, no-fault) liability for injuries and even though the arguments for strict liability—including consumer ignorance,

plaintiffs' difficulty in proving fault, the desirability of spreading the costs of injuries, and strict liability's deterrent effect—apply to medical services.

Second, doctors say juries are pro-plaintiff, anti-doctor, incompetent, and prodigal. Sometimes, perhaps, but plaintiffs appear to win malpractice suits only one-fifth to one-third of the time.<sup>1</sup> Furthermore, one study of 117 malpractice cases in North Carolina found that while the average award was \$367,737, the median award was only \$36,500. The average was inflated by four cases with awards ranging from \$2.9 million to \$750,000. Three of those cases involved serious injuries, including (in each case) brain damage; in the fourth the patient died. (The largest element of most awards tends to be the cost of medical services incurred because of the malpractice.) According to the study, jurors "often were suspicious of the plaintiff's decision to bring suit and frequently mentioned their concerns about the effects of verdicts on insurance rates and other social costs of large damage awards." They said things like, "We all go through hardships in life, . . . and we won't always be able to blame or get what we think we deserve" (p. 121).

Doctors' third charge against malpractice law is that it necessitates "defensive medicine." Physicians do faithfully report to the American Medical Association that they practice defensive medicine. Doctors may indeed overtreat some patients. But why? Because of malpractice law? Out of an abundance of caution? Because the fee-for-service system doctors have historically used creates a financial incentive to do so?

Some defensive medicine is probably due to the remarkable fact that doctors

overestimate the annual rate of suit by a factor of three, overestimate the risk of suit from an incident of negligence by a factor of almost five, and overestimate the risk of suit from an adverse event by a factor of eleven.<sup>2</sup> But we can fairly ask that doctors not respond irrationally to malpractice law, that doctors have a realistic sense of the chances of being sued.

Paul Weiler, one of the ablest students of medical malpractice, observes that evidence of "defensive medicine" would in other contexts "be viewed as a positive compliment to the law," since it looks like evidence that the law deters negligence. He concludes that "[m]alpractice law has played a valuable role in stimulating broad-based improvements in the institutional environment and procedures through which medical care is provided. . . ."<sup>3</sup>

In sum, the standard elements of doctors' attacks on the law of malpractice seem strangely insubstantial. And the profession's animus toward that law is yet more striking when one grasps how responsive the law has been to doctors' discontents. For example, when doctors complained (with scant reason) that they risked being sued by accident victims they had stopped to assist, legislatures obligingly passed "Good Samaritan" statutes. (Happily, studies suggest that these laws do not affect doctors' willingness to help the injured in emergencies.)

Similarly, the malpractice "crisis" of recent years illustrated just how eagerly the law can defer to medicine. State legislatures alertly responded to doctors' indignation with a deluge of soothing statutes that attempted to narrow the standard of liability, to cap damage awards, and to constrain access to courts with devices like limitation periods, screening procedures, and limitations on attorney fees.

The medical profession's reaction to the law of malpractice would be more understandable if the profession had demonstrated a livelier interest in finding ways of dealing with incompetent doctors and of protecting patients injured by malpractice. But doctors have no more to boast of than lawyers in this respect. As Weiler observes,

[T]here is notorious underreporting of incompetent practice by the doctor's professional peers. Even if the physicians in charge of a hospital or clinic observe or learn of the danger posed by one of their colleagues, their natural inclination is simply to ease the offending doctor out of the institution rather than go public with complaints to the authorities. (p. 108)

Weiler adds that state medical boards "appear disinclined to judge their colleagues sufficiently incompetent to lose the right to practice entirely" (p. 109). And where medicine has shown some interest in deterring incompetent care—for example, in creating risk-management and quality-assurance programs—the profession has not infrequently seemed driven by fears of malpractice liability.

### Still There Are Problems

Despite all I have said, the medical-malpractice system is surely unsatisfactory. Its fault, however, is not so much that it harasses doctors, but that it disserves plaintiffs. First, the system is a painfully expensive method of compensating injured patients. Again, Weiler: "[T]he malpractice litigation and liability insurance system forces doctors and hospitals to collect \$7 billion from their patients to deliver \$3 billion into the hands of a selection of injured patients" (p. 91).

Second, far from there being too many plaintiffs, there are too few: One of the best studies found that only one-eighth of all potential claims are actually filed. And "even when we narrowed our focus to the more serious and 'valuable' tort claims—iatrogenic injuries to patients under seventy that produced

disabilities (including death) lasting six months or more—we still found that for every 3 such events there was only 1 tort payment" (p. 13).

The mystery, then, is how so successful a profession can feel so enfeebled by so misunderstood a threat. Like all large-scale social mysteries, this one has many causes. For example, doctors sometimes seem to abandon the scientific method when it comes to nonmedical reasoning. In the small and insular world of medicine, horror stories proliferate. In each story may lurk a kernel of truth. But soon the story circulates, unaccompanied by the facts that might dilute its force, like news of settlements or appellate court reversals. It gains strength with the retelling and soon loses contact with its origin. Since the rumor confirms sub-cultural views, it is widely credited.

But there are also weightier forces at work. Physicians, like most professionals (not least lawyers), see the good they can do with power and appreciate the prerogatives that come with it. As Robert Zussman concludes, "Physicians are not concerned about specific and limited legal obligations. Instead, they are concerned with the basis of medical discretion. From this perspective, the point is not what the law says but the simple fact that it says anything at all."<sup>4</sup>

Furthermore, while they misdiagnose the reasons for it, doctors are indeed losing the professional authority and autonomy they have come to expect and enjoy. We live in the age of distrust, and like most American social institutions, medicine has experienced declining cultural power. But this declining cultural power is not just a product of the times or even of the market. It is also a product of the belief that medicine has, like all professions, like all institutions, sometimes abused the power it has had. This is the lesson of

Tuskegee, of Willowbrook, of the law of informed consent. This is the lesson the patients I have interviewed draw from their dealings with physicians they too often found unskilled and unkind.<sup>5</sup>

But this is not the greatest source of doctors' loss of power. Medicine is changing from a profession of solo practitioners to a profession of bureaucrats. More and more doctors work for hospitals, HMOs, or urgent care centers, and those who do not are often driven to joining preferred provider organizations. More and more of their work is invigilated by ever-more inquisitive third-party payers, like insurance companies, Medicare, and Medicaid. Utilization management organizations require second opinions, discharge planning, high-cost case management, preservice certification, and concurrent review. The professional autonomy of the individual doctor now seems at risk. It may be partly to this development that doctors are reacting. And not without reasons. But it may be more profitable to address those reasons directly without being diverted by misplaced indignation about the law of malpractice.

### References

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