

Patient Compensation for Medical Injuries: International Approaches

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This is New Directions in Healthcare, the Commonwealth Fund's podcast, and today we look at how the nation deals with medical malpractice. The American Medical Association says lawsuits and efforts to avoid them add 5 percent to 10 percent to the cost of healthcare in this country, and critics say a no-fault system might be better for everyone.

The process of seeking compensation is so complex and drawn out that it becomes very difficult for patients to receive compensation in cases of malpractices.

Tony Shih is executive vice president for programs at The Commonwealth Fund:

Most evidence suggests that less than 5 percent of victims even file malpractice claims, and then even among those who file, not all are awarded compensation. Some patients who are victims of malpractice and file get compensation. Others file and don't get compensation, and as to whether or not that compensation is always fair + we know that many payments vary widely for very similar injuries, so not all of these payments can be considered fair.

And because injured patients must pursue their claims in court, our system can make physicians feel like criminals:

We do this in a way that's highly adversarial and stigmatizing to the doctor, so the process itself destroys the physician-patient relationship.

Michelle Mello is a professor of law and public health at Harvard University:

It also contributes to the phenomenon of defensive medicine. Doctors are so fearful of being caught up in this system that they order more healthcare than is medically necessary, and that contributes to our growing national healthcare bill.

What's more, Mello and Shih agree, the fear of lawsuits causes doctors to cover up mistakes rather than learning from them:

The fear of malpractice is preventing some providers in health systems from proactively identifying their medical errors and working to prevent them in the future, and this of course leads to a more dangerous health system for all of us.

Learning from medical mistakes is further complicated by a system of compensation that's highly fragmented.

There are hundreds if not thousands of different insurance companies in the United States that provide liability insurance for doctors and hospitals. They each develop a treasure trove of

information when a doctor is sued or when a notice of claim is presented about an incident of care and what went wrong, + but they don't share these data, and there's really no national repository of information about what went wrong in these cases. We collect data at the national level about who got paid and how much they got paid, but not about the patient safety lessons.

That's not the case in Sweden, Denmark or New Zealand – countries that separate patient compensation from issues of medical malpractice. Marie Bismark is a physician and an attorney who served on the board of New Zealand's Accident Compensation Corporation or ACC for five years:

In the late 60's, dissatisfaction with workers compensation led to a royal commission chaired by Sir Owen Woodhouse, and he recommended replacing the entire fragmented and capricious tort system with a system of no fault compensation. Woodhouse believed very strongly that regardless of the cause of injury, the community should not leave injured people to struggle alone. + And he felt that compensation and rehabilitation from injuries should be separated from consideration of fault or negligence.

Patients who suffer a medical injury in New Zealand simply fill out a form and send it, along with medical records, to the ACC, where independent panels of experts decide whether there has, in fact, been an injury.

All treatment injuries are eligible for compensation. + You don't need to show fault or error in order to be eligible for compensation. You only need to show you were harmed by health care and that that healthcare was provided by a registered health practitioner. + The kinds of treatment injuries that are covered by the scheme are everything from minor wound infections right through to lifetime care for a child with severe cerebral palsy. Most claims are decided within a matter of days or weeks, and the more complex claims can take months to decide. It's very different from a medical malpractice system where you can often be waiting for years before you have a decision on a claim.

About two thirds of those who file claims receive payments, and unlike U.S. courts, which award very different amounts of money to people with similar injuries, New Zealand's ACC pays equitable sums:

One of the strengths of the NZ system is that it's very transparent as to what people are entitled to – so anybody can log on to www.acc.co.nz + and you can see exactly what you're entitled to + and people who have similar injuries and similar needs will receive similar entitlements. The kinds of things that are covered are the costs of your medical treatment, the costs of any rehabilitation. The scheme can provide child care, home help, other personal care at home, it can provide treatment, transport to and from your treatment. If you're unable to work, the scheme will replace 80% of your lost wages. If you're unable to return to your job,

the scheme will support vocational rehabilitation to help you train at a new job. + So there's a broad range of entitlements, and they're tailored toward the patient's needs.

Rather than awarding a lump sum, the system provides periodic payments, and case workers continually reassess patients' needs.

Dr. Bismark says information from each of about 10,000 claims is studied for possible lessons on how to make medical care safer:

Each year the large hospitals receive a report from ACC telling them what injury claims have been received, and if there are any potential areas for improvement within their hospital. + If anybody working for ACC receives a claim which seems to indicate there's a risk of harm to future patients, they can notify the medical board or another responsible authority of that risk of harm so that action can be taken to protect future patients.

For example, reports of allergic or adverse reactions to medications contributed to creation of a new chart to better protect patients. But if those patients can't sue their doctors, how does New Zealand assure high quality care?

The fact that there's no fault compensation doesn't mean that there's no professional accountability. We have a code of patients' rights in New Zealand, + and patients can complain if they feel their right to quality care has been breached. + We also have other systems of professional accountability through the medical board, so if there are concerns that a doctor is unsafe, the medical board can undertake a competence review and establish an educational program to help the doctor back into safe practice, and then finally we have disciplinary tribunals.

Critics of the New Zealand system, and similar programs in Sweden and Denmark, note that payouts to patients are far lower than what American patients might collect in court, but those countries have universal healthcare coverage, so claimants don't have to worry about big medical bills.

And what about the costs of these programs? Who pays to compensate injured patients? In Sweden, doctors buy insurance to cover the costs of any injuries. In Denmark, regional hospital authorities pay claims, and they're usually self-insured. In New Zealand, taxpayers pick up the tab – about \$20 apiece per year, and because there are no legal costs, most of the money goes to injured patients:

For every dollar that goes into the scheme, more than 90 cents goes + into the pockets of the patients who need care and support, whereas under a medical malpractice scheme, probably close to 40 cents of every dollar ends up going to lawyers and other administrative costs.

Which brings us to the question of whether such a system could be implemented here. Marie Bismark figures there are too many people who profit from a system of legal liability to make change easy:

I mean there's not very much work for health lawyers in New Zealand is the one effect of our system.

Michelle Mello adds that some state constitutions guarantee citizens access to courts if they've been injured, so going to a *no fault* system would be difficult – but not impossible:

To impose this kind of solution legislatively involves a lot of political and legal challenges, but there could be voluntary experimentation by accountable care organizations or other forms of health care systems, to see if they like the administrative, collaborative approach to injury resolution.

You've been listening to New Directions in Healthcare, the Commonwealth Fund's podcast – with Harvard University Professor Michelle Mello, New Zealand attorney and physician Marie Bismark and the Commonwealth Fund's Vice President for Programs, Tony Shih. I'm Sandy Hausman.