The Antidote

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A Newsletter about Truth and Integrity in Medicine and Medical Malpractice

Why Does Healthcare Delay the Meaningful Implementation of Comprehensive Patient Safety Measures to Protect Patients from Foreseeable Harm?

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One answer to the above question is that there has been a flawed approach to implementing the recognized need for change. In the past, many respected healthcare leaders have decried the effort of the law in holding negligent healthcare providers responsible and legally accountable for their wrongful actions. The belief is that good doctors and nurses continually display the highest examples of dedication and competence in a profession that involves delivery of potential care that is inherently dangerous. It is only human to make mistakes and holding such dedicated people responsible and accountable for unintentional mistakes is unfair. Law suits are frivolous and the law is unfair.

So the single most effective social engineering tool for change - civil liability for harm done - is eliminated as a means for change.

Instead of embracing a rule of law, the country has adopted a brand of “professional narcissism” and “willful blindness”. Hospitals and their healthcare providers are thought to be above the law. The concept is that healthcare providers should not be subject to the rule of law that applies to all other activities in society.

It is argued that medicine is an art. It is not a science. Doctors practice medicine based upon experience and judgment. Treatment plans work, and sometimes, they don’t. Patients are all different – there are no hard and fast rules.

Doctors are at war with disease and with war there are always casualties.

When a doctor’s good intentions result in avoidable injury to a patient, he should never be held accountable in the court of law. Such proceedings are frivolous and counterproductive in the war on disease.

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The concept of good intentions of healthcare providers justifies and excuses those rare instances when, because of complexity of disease or the difficulty of treatment, there is an unintended but foreseeable and avoidable injury.

It was Sir Edward Coke who said, "The known certainty of the law is the safety of all." That principle has bred social stability and improvement of conditions for all members of society and in almost every field of endeavor, save the field of healthcare. Persons who dislike the tort system denounce the need for a rule of law and preference for a need for autonomy and professional freedom. These individuals denounce the law applicable to the healthcare system that requires the performance of medicine to be done with "due care" and paramount regard for patient safety.

The tort system does provide for accountability from unintended injury. Negligence is based upon the concept that anyone who engages in an activity that exposes another person to an unreasonable risk of harm is obligated to protect the patient from that risk. If this is not done, that person is held accountable for any unintended injury from that activity. The "standard of conduct" established by the law determines when the risk of an activity is unreasonable. If it is foreseeable and avoidable by exercising due care or using reasonable means that are available but not used, there is liability. Unfortunately the medical community has assumed incorrectly that their standard of care is, and should be, the same as the legal standard of care.

The medical standard is focused on diagnosis and treatment of illnesses. Multiple approaches are recognized even though the risk of injury is often different in the multiple approaches that are recognized in the practice of medicine. The principle that assuring the safest approach in any activity is a legal requirement is not taught in medical school and is not understood as a requirement of the lawful practice of medicine.

When a lawsuit results in accountability of a doctor who is following a "legitimate, recognized approach" to diagnose or treat a patient that is shown in a lawsuit to have contained more risk of injury than another available approach…the doctor who is found accountable under the legal standard of conduct feels threatened and betrayed by the law. The tort system, therefore, is a source of shame, guilt and fear, all of which are unpleasant feelings and are easily thought to have to be "wrong" when the acts performed by members of a healthcare profession are performed with original good intention and belief.

The argument then arises among healthcare providers that the law has to be wrong and the answer is to change it with any available means. Arguments of reason and logic are replaced with arguments based upon half-truths and emotionalism. Scapegoating is common and effective. The cry is that there are too many frivolous lawsuits. The tort system is unfair. It is driven by greedy lawyers that drive up costs of healthcare so that doctors cannot get insurance and need to move to rural areas where patients are more grateful.

One example of the problem surrounding healthcare is revealed by the title of the report released in 2000 by The Institute of Medicine: <u>To Err is Human</u>. The concept that to err is human is an example of the misunderstanding of the civil justice system. Is it fair to say that being negligent is human and therefore excusable? The premise of the exposé of The Institute of Medicine clearly points

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out the need for change in the way healthcare is delivered. But the continued emphasis on the need to not penalize persons who have been negligent is counterproductive. To err negligently is not "human" behavior. To err when it is done in violation of the standards created by the law to prevent and avoid injury is negligence. To assume that to be negligent is to be human is a flawed concept. Human beings can be negligent. However, this is not the kind of conduct that should be excused by providing immunity to the negligent person because of good intentions.

While it is true that the practice of medicine involves the exercise of judgment and skill, calling it an "art" and not a "science" is also misleading. The safe practice of medicine is or should be a scientific discipline. There are basic rules of patient safety that are easily forgotten when medicine is practiced as an "art." For example, in diagnosing the cause of a patient's symptoms that could be caused by several conditions, one of which could severely harm or kill the patient, that condition should be ruled out first, even if it is not a likely cause.

When a 14 year old boy presents with chest pain, a runny nose, and congestion, scientific discipline would require an EKG to rule out heart problems, even though the chance of a 14 year old child having a heart attack is extremely rare. A 54 year old woman who complains of back pain and has congestion in her lungs who has had surgery on her leg ten days earlier should have blood clots in the lungs ruled out. One final example involves labor and delivery of children. During labor, if the unborn child produces meconium, (stool in the amniotic fluid), fetal distress should be ruled out by fetal scalp monitoring or other means.

However, all of these examples will be met with cries of needless defensive medicine. The demand for the establishment of rules of diagnosis will be decried as solely the province of the diagnostician. The claim will be that there should not be any hard and fast mandatory rules and they will not work to improve healthcare. It will only make a doctor more vulnerable to liability claims. Such objections are based upon a willful blindness to the concept that competence must always include patient safety as an essential component to the delivery of healthcare.

The result of such objections is a continual stream of "unexpected" but avoidable conditions that kill or injure patients. What happens when the safety requirements are not met? If medicine is changed from an art to a discipline which establishes rules of safe practice, how will they ever be enforced? The establishment of the concept of enforceability of patient safety rules and regulations needs to be freely adopted by the medical profession. The whip of tort liability is the only answer to successfully enforcing the rules of patient safety.

The following explanation of safety engineering principles as it applies to healthcare has been written to establish a way to reach the goal of eliminating unintended harm to the patient while confined in the hospital. It is time to give up the process of using the civil justice system as a scapegoat and to concentrate rather on fixing problems. The problem does not lie with the legal system. The problems rather lie with the manner in which healthcare is delivered.

The legal system is the safety engineer's best friend. It is the legal way that responsibility is established and safety is enforced. It is the only way that dramatic change can occur.

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In our next newsletter, we will provide suggestions on how the enforcement of civil law can make a difference.

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