

The law and healthcare: *We the patients*

One of the most recognizable icons of the legal system is the statue of 'Lady Justice.' It dates back to Egypt and Greece. The Egyptians called her 'Má at' and the Greeks, Themis and Dice. She symbolized fairness, harmony, law and order and balance. The statue is blindfolded and holds the scales of justice and a sword. The blindfold stands for impartiality; the scales for the weight of evidence and the sword for the sense of authority and power.

Each of those symbols relies on the other, and we rely on their efficacy and their consistent application by our courts and the judges who preside over them. We also depend on the ability and willingness of our juries to come to verdicts based on evidence. Moreover, we rely on attorneys to faithfully follow procedures and protocols that protect the rights of both the prosecution and the defense to make their cases and to reach decisions based on the merits of each and every case.

That's the idea, anyway, but the sword of justice cuts both ways.

Those of us who've ever been in a court of law or served on a jury have seen how skilled lawyers can sway a judge or a jury with emotional pleas. To be fair, it's hard to subordinate emotion when personal injury cases are heard. Looking at 'Exhibit A', an x-ray of a forceps left behind in a patient's body after surgery, is something any jury can relate to, and that goes for most medical malpractice cases where patients have been subjected to excruciating pain and sometimes death. Depending on which source you choose to cite, the annual costs associated with medical malpractice or medical liability range from \$45 billion (on the part of physicians and hospitals for liability insurance) to \$250 billion for performing unnecessary (read: defensive) tests on patients. The American Medical Association stated, several years ago, that it estimated that the pressures related to liability increased health system costs by between \$84 and \$151 billion each year. The two costs are staggering on their own but when combined can infuriate most hard-working people in the industry. Unfortunately, they have not angered *we the patients* sufficiently to demand meaningful tort reform on the size and extent of personal injury claims.

An interesting article penned three years ago in 'Policy and Medicine' (a Rockpointe publication) by Thomas Sullivan serves to further clarify the problem. He states: "Accordingly, with 2.4% of America's total health-care spending being directed toward defensive medicine it is clear that Congress needs to address this issue, and failed to do so in the health care legislation passed last March (2018). Some believe that the way to address defensive medicine is to target physician behavior. Other proposals have suggested *health courts* specializing in medical malpractice, and an *apology program*. While some of these ideas are new, some have been around for several years, and were given little attention by Congress during health care reform negotiations. It seems like this 2.4% of health care spending (which is 17% of our GDP) is worth revisiting, especially considering doctors in many states believe tort reform has no effect on rising medical costs."

Attorney at law magazine lays out the factors that influence a medical malpractice suit. They are: 1. The doctor had a duty to the patient; 2. The doctor breached his or her duty; 3. The negligence caused the patient's injury and 4. The patient suffered losses, which can be compensated. They go on to say that we must be aware of the fact that doctors are more likely to win these cases (up to 80% of the overall cases) than the patients that bring them. And in cases where plaintiffs presented "strong evidence" doctors still won 50% of them.

Despite the win/loss ratio, the settlement amounts have been increasing by leaps and bounds. A five-year study done several years back revealed a 23% increase in payouts. The average amount won by going the distance in court instead of settling out-of-court is in excess of \$1 million. That begs the question, "If you can sue why NOT sue?" And if the personal injury attorneys are not on the clock but instead only charge a contingency fee what does a patient have to lose? The answer is, while the individual patient may have little to lose ALL patients lose when the costs of healthcare increase BECAUSE of these awards.

We must not ignore the pressing need for tort reform when we're contemplating changing our healthcare system. If we do, we might as well add one more symbol to her statue, that of handcuffs...behind her back.

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