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Strong Medicine

Skyrocketing health-care costs are a looming national tragedy, but cannot be contained without restoring reliability to the justice system. America spends over \$6,300 per person on health care each year, almost twice that of other Western countries; the overall expenditures on health care, \$1.9 trillion, are rising annually at 8%. But the care here is on average no better than in countries that spend half as much.

There are a number of forces contributing to this higher cost—including government mandates and lack of market discipline. One of the largest drivers of excess costs, however, is American justice—or more accurately distrust of American justice. Fear of erratic jury decisions in medical malpractice cases has spawned a culture of fear, causing inefficiencies that infect every level of medicine.

Any sick person who gets sicker can drag a doctor through years of litigation—an average of five years to resolve a claim. A jury can render a verdict that bears no relation to accepted medical standards or, indeed, the results of prior cases. It is not that most juries are unwise: Overall, according to a recent Harvard study, the error rate in this system is about 25%. But playing Russian roulette with one bullet in four chambers is not a source of comfort to most doctors. Meanwhile, payment to patients who deserve it may take years, with the attorney taking up to 40% of the award.

The direct costs of the malpractice system, about \$28 billion a year, are only the tip of the iceberg. Defensive medicine—the practice of ordering the procedures and tests that are not clinically indicated—is ubiquitous, according to a recent study in Pennsylvania, practiced by over 90% of physicians. It's hard to calculate the total cost of defensive medicine, but estimates start at the tens of billions and go up from there.

Extra tests are not the worst inefficiency. Hospitals often operate like slow motion zones: No choice can occur without stacks of forms and disclosures with multiple witnesses—all designed to “build a record” in case there's a bad outcome. End-of-life care is often as inhumane as it is costly, as nursing homes send the aged to die in intensive care units, poked with needles and strapped to machines sounding alarms instead of holding the hands of loved ones in quiet comfort.

Restoring trust in American justice can't be accomplished by tweaking this system. A functioning system of justice must aspire to deliberate choices, binding from one case to the next. Reliability is critical. Providers must know what's expected of them and must trust the system to distinguish good care from bad care. What's needed is something entirely new: specialized health-care courts.

This country has a long history of expert courts in areas that require technical knowledge or special expertise. At the time of the Constitution there were admiralty courts; today we have bankruptcy courts, tax courts, patent courts and a wide range of specialized tribunals in areas ranging from workers compensation to vaccine liability.

A proposal for expert health courts has been developed in a joint venture of Common Good (a

nonprofit organization) and the Harvard School of Public Health. It promises to restore reliability and foster confidence by incorporating the following features:

There would be no juries. Instead, specially trained administrative judges, advised by neutral experts paid for by the court—not by lawyers for either side—would make decisions and write opinions on standards of care.

A liberalized standard of recovery would provide compensation to injured patients based on whether the injury should have been avoidable.

Someone who comes into the hospital with pneumonia and comes out with a staph infection, for example, should be able to recover without having to prove how it happened.

An individual injured by malpractice would receive 100% of his or her *actual* monetary losses, including future lost income—but damages for *pain and suffering* would be paid according to a preset schedule depending on the injury. This is how people are compensated in other countries. And expedited procedures, including mandatory disclosure by defendants, would ensure quick resolution or disputes, avoiding the monetary and psychological costs of drawn-out proceedings.

The advantages of a specialized health court are enormous. A court that writes opinions based on accepted medical standards can provide affirmative guidelines for improving care. The incentives for defensive medicine will be sharply reduced, and a culture of trust will restore the candor needed to avoid tragic errors. Patients will receive settlements much sooner, paying only a fraction of what they now pay in legal fees. Most importantly, reliability will provide a foundation to restore order to health care, including defending reasonable choices to contain costs.

A broad coalition of safety experts, health-care providers and consumer groups such as AARP have come together to call for pilot projects of special health courts. Six major hospitals, including New York Presbyterian and Johns Hopkins, have volunteered to participate in the pilot. Several states are considering sponsoring an experiment, and a bipartisan bill to fund them, co-sponsored by Sens. Mike Enzi (R., Wyo.) and Max Baucus (D., Mt.) has been introduced.

The sticking point is the opposition of the trial lawyers, who insist that juries, and only juries, must make the final decision. But the civil jury was never supposed to decide standards of care as a matter of law; it is intended to resolve disputed facts. In any case, as noted, this country has a long history of special courts and tribunals without juries where the purpose, as here, is to improve the reliability and effectiveness of justice.

None of our aspirations for American health-care—better safety, affordability, even empathy—can be realized as long as providers go through the day looking over their shoulders instead of doing what they think is right. The only way to overcome this distrust, and all its debilitating errors and waste, is to create a special health court that is trustworthy.

Mr. Howard, a lawyer and author, is chair of Common Good. More information on health courts can be found at www.cgood.org.

Health courts can eliminate billions in waste.