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Defensive medicine or 'defensive' medicine?

Excess testing may have nothing to do with lawsuit fears

Med-Mal Matters

Thomas A. Demetrio is a founding partner of Corboy & Demetrio, representing victims of medical malpractice and personal injury.

Kenneth T. Lumb is a medical-malpractice attorney at Corboy & Demetrio.

In our last column, we discussed a recent study which compared "defensive medicine" practices in states with tort reform and in states without tort reform.

That study, published in the *New England Journal of Medicine* and called "The Effect of Malpractice Reform on Emergency Department Care," examined doctors' actual prescribing habits and not just their attitudes or perceptions as expressed in response to surveys. The study proved that even draconian tort reform has virtually no effect on the cost of emergency room care.

A recent *New York Times* article illustrates another explanation for the rising cost of health care, particularly among Medicare beneficiaries: Doctors, like everyone else, like to make money.

The article, written by Elisabeth Rosenthal, discusses the experience of retirees who, while wintering in Florida, see local doctors for routine ailments and end up with prescriptions for expensive tests, which the patients' longtime doctors back home tell them are unnecessary.

Indeed, according to the *Times*, this has become a trend, resulting in some doctors north of the Mason-Dixon Line warning their patients to check in with them before agreeing to any tests or procedures.

As the *Times* points out, medical testing is a huge industry in the United States. Though Medicare limits the price of tests and procedures, some doctors who see Medicare patients have figured out that they can increase revenues not by charging more for a specific test or procedure but by simply ordering more of them. As the *Times* puts it, doctors skirt lowered reimbursement rates "by simply expanding the volume of such services and ordering tests of questionable utility."

As Medicare reduced its reimbursement rates for a number of cardiology services from 1999 to 2008, for example, the number of claims for those services soared. According to the *Times*, claims for echocardiograms increased by 90 percent and claims for ultrasounds and nuclear stress tests tripled.

The *Times* also cites a study from Dr. Elliott Fisher, a Dartmouth researcher who demonstrated that the number of tests and imaging studies performed on Florida Medicare patients in the last two years of life was "far above the national average."

These numbers are not related to a sicker patient population, better outcomes or any demand by Florida patients for more treatment. According to Fisher, they are related to a system "where you make more by doing more. Financial incentives and more entrepreneurial doctors are very important to what we're seeing."

Thus, there is compelling evidence that high health-care costs are largely caused simply by capitalism. Indeed, Adam Smith would be surprised that there is even a debate. "Rational self-interest" shapes the medical profession as much as any other. Physicians, like everyone else, will adjust to a changing economic environment to maintain or increase their incomes.

But another feature of human nature is that actual evidence is no match for firmly held beliefs, and doctors just know that high health-care costs are the fault of injured patients who have the audacity to exercise their Seventh Amendment rights.

An article published in the February issue of *Neurosurgery*, titled "Defensive Medicine in Neurosurgery: Does State-Level Liability Risk Matter?" illustrates this disconnect. Unlike the *NEJM* study, which analyzed data on what doctors actually do, the *Neurosurgery* study's method was to ask doctors what they think. The authors simply e-mailed a 51-question survey to neurosurgeons in the U.S.

When the study's "background" section states that "[d]efensive medicine is prevalent among U.S. neurosurgeons due to the high risk of malpractice claims," it is not surprising that the article concludes that defensive medicine is "prevalent" among American neurosurgeons and is related to malpractice liability risk.

The authors do acknowledge, in somewhat of an understatement, that "a cross-sectional survey of practitioner perceptions is susceptible to bias." Add to that the uncontrolled nature of an anonymous survey and you have data no more objective than Yelp reviews on restaurants. Indeed, 48 percent of Illinois neurosurgeons paying the highest malpractice premiums responded to the survey compared with only 15 percent of Texas neurosurgeons. Texas, of course, has all but immunized physicians from liability for their negligence, and Illinois has not. That's a pretty significant bias.

The authors do not address the data from the *NEJM* study and, to be fair, it may not have been available to them. But, if giving ER doctors in Texas virtual immunity did not change ER prescribing habits and reduce costs, perhaps doctors' subjective beliefs are not what is driving those costs.

In a comment to the *Neurosurgery* study, neurosurgeon James Bean from Lexington, Ky., aptly states:

"[T]he distinction between testing for thoroughness and testing for self-protection may become blurred, as over time testing that might once have been deemed self-protective may become standard as usage proves it prudent and patient protective."

In other words, one man's defensive medicine is another man's reasonable care. ■

TAD@corboydemetrio.com • KTL@corboydemetrio.com