February 2015
Chicago Lawyer®
Volume 38 Number 02 • chicagolawyermagazine.com

Difficult to argue with

Detailed study shoots holes in defensive medicine theory

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.

Defensive medicine. It is an article of faith among physicians and "tort-deformers" that fear of medical-negligence lawsuits drives physicians to order otherwise unnecessary tests and procedures and that tort "reform" will reduce these wasteful expenses.

But doctors are data-driven professionals and demand empirical evidence of causality. They scoff at "anecdotal" evidence and demand randomized, double-blind, case-controlled studies before they'll agree under oath that a treatment universally prescribed for a condition would likely have cured that condition in a particular patient.

So if only a peer-reviewed study examining the prescribing habits of physicians before and after tort reform in states that enacted tort reform existed, it would be the gold standard in finally proving that health-care costs are so high because doctors are afraid of lawsuits. As luck would have it, the *New England Journal of Medicine* (*NEJM*) recently published such a study, and it proves just the opposite.

A "special article" in the *NEJM*'s October 2014 issue concludes that legislation in three states that radically altered the malpractice standard for emergency physicians had little effect on the "intensity of practice." Rather, imaging rates, average charges and hospital admission rates remained virtually unchanged.

The study, titled "The Effect of Malpractice Reform on Emergency Department Care," randomly examined the records of 5 percent of Medicare-beneficiary emergency room visits in three so-called reform states and in neighboring "control" states from 1997 to 2011. The reform states are Texas, Georgia and South Carolina.

Between 2003 and 2005, each of these states passed legislation requiring proof of willful and wanton conduct or gross negligence before a patient can prevail against an emergency room physician. In short, in those states, ER doctors became immune from liability for ordinary medical negligence and could only lose a malpractice case if the plaintiff proved reckless conduct, bordering on intentional. In Texas, claims dropped by about 70 percent and payouts by almost as much.

According to Dr. David H. Newman, commenting on the study in the medical news website MedPage Today, physicians and policymakers were convinced that dramatic drops in the rate of claims like those seen in Texas would lead inexorably to significant reductions in ER costs. Anecdotally, everyone had heard that the reasons ER physicians order so many advanced imaging studies and admit so many patients to the hospital was the fear of a lawsuit.

The *NEJM* study's authors used a "quasi-experimental" design to compare patient outcomes before and after legislation in reform states and in control states with no tort reform. Measured outcomes included "policy-attributable" changes in the use of CT or MRI scanning, per-visit emergency department charges and the rate of hospital admissions.

The results were dramatic. For eight of the nine state and outcome combinations tested, the study found zero — yes, zero — reform-related reductions in the amount or cost of care. There was no reduction in the use of CT or MRI scans, no reduction in the percentage of ER patients admitted to the hospital, and, in Texas and South Carolina, there was no reduction in the amount of ER bills. In Georgia, the authors attributed a 3.6 percent reduction in ER charges to reforms. Even assuming the latter attribution is accurate, the study showed that essentially immunizing ER physicians from responsibility for the harm they cause through carelessness has little effect on the cost of ER services.

The results were dramatic. For eight of the nine state and outcome combinations tested, the study found zero — yes, zero — reform-related reductions in the amount or cost of care.

Newman's reaction was that the results were "a little disappointing" and "a kick in the butt" for ER physicians. The fact that the study's results were "disappointing" was a little Freudian ("surprising" might have been a better description), but Newman deserves credit for acknowledging that the study proved that tort reform did not change practice patterns and cannot be counted on to provide cost savings.

Newman attributes this lack of correlation to several possibilities, including a culture of "never miss" or the fear of criticism by administrators. As the study's authors point out, however, the ER is an "information-poor, resource-rich setting." In that type of setting, might "defensive medicine" be similar to "defensive driving"?

The standard "Safe Practices for Motor Vehicle Operations," published by the National Safety Council, defines defensive driving as "driving to save lives, time and money, in spite of the conditions around you and the actions of others." That sounds exactly like the way most patients would hope their doctor practices medicine, whether in the ER, OR or office. ■

TAD@corboydemetrio.com • KTL@corboydemetrio.com