Pathologists and Liability

An Old Medical Story Needing a New Ending

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Pathologic diagnosis of breast disease is increasingly in the public's eye[1] and as such may be increasingly perceived as a high-risk area in pathology for a medical malpractice suit. In this issue of the *American Journal of Clinical Pathology*, Reisch and colleagues[2] surveyed 252 breast pathologists regarding the extent to which their concerns over being sued for medical malpractice influenced their assurance behaviors in breast tissue diagnosis.

Reisch and colleagues' study[2] provides information that pathologists are like other physicians: they have great concerns over medical malpractice. The high percentage of pathologists matches general physician surveys on concerns regarding liability suits.

Of interest here is that pathologists, as the authors note, are low-frequency, high-severity defendants compared with other specialties traditionally associated with concerns of tort liability, such as neurosurgeons. So an important question is, do pathologists exhibit assurance behaviors that lead to defensive medicine?

It appears that they do. However, this would be expected if using standard risk assessment. Traditional economic models focusing on expected loss, which have been used by courts, are useful[3]: B = PL, or the burden or cost to an entity or an individual (B) equals the P, the probability of event, times L, the total loss if it occurs. So, of course, low-probability, high-loss events can equal the loss from high-probability, low-loss events. Pathologists are in the former group. Hence, pathologists appear to act or perceive like other physicians and engage in defensive practices when faced with the same expected loss.

The implications on behavior are important. Earlier work involving pathologists[4] shows considerable agreement as to clinical care but significant disagreement with malpractice outcomes. Consequently, this study shows in a slightly different light the concerns pathologists have with the tort system: it does not match the standard of care, does not provide an appropriate signal as to the standard of care, or, regardless, requires defensive practice to avoid a poor legal outcome. Together, these results demonstrate less than robust confidence in the medical malpractice legal system.

Behavior, of course, is also dependent on one's practice environment. Although the authors did provide limited information on the location of the physician sample, it would have been informative or at least intriguing to assess the relative state of malpractice reform and environment of each respondent. For example, were responding pathologists located in states such as California—with caps on noneconomic damages—or in states with "unfriendly" litigation environments such as Missouri, which overturned medical malpractice caps? Significant differences in assurance behavior discerned by this characteristic might identify areas of focus and education. An international comparison might also be instructive.

Solutions are elusive. Of course, a focus on patient safety is paramount, since that itself can potentially stop error from affecting the patient and the source of litigation. Other quality assurance measures similarly are key. By reducing injury, one reduces the impact of the tort system and its potential distortions on medical practice.

But to change the attitude of physicians will be challenging. Indeed, as more and more assurance behaviors become taught to the next generation of physicians, they will simply be absorbed into the standard of care, as much as may have been already. A paradigm shift to cooperative systems

that promote the injured patient's needs, as well as physician participation in system improvement, is needed. This could be accomplished by direct contact between pathologist and patient, with the pathologist given the opportunity to provide patient information directly, including the limits and expectations of each test. Professional societies should garner their resources and assess how specialties such as pathology, as well as others with challenging litigation environments and limited patient contact, such as anesthesiology and radiology, can more effectively engage the patient, providing an opportunity for risk management.

Hence, Reisch and colleagues' study[2] provides us with insight as to pathologists' behavior and defensive assurance responses to malpractice perception, indicating they are much like other physicians. As reform efforts stumble their way in each state, professional societies must assume leadership roles. Cooperatively, each should assess means to provide potentially closer patient-physician relationships while focusing on avoiding the litigation environment entirely by investing in patient safety measures. Using both better patient relationships and better safety tools, the influence of the tort system may fade as a stronger, more coordinated health care system addresses the needs of all future patients. In that evolution, the work by Reisch et al[2] will be seen as a watershed.

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