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THE DEFENSIVE MEDICINE MYTH

A June 1, 2009, *New Yorker* magazine article by Dr. Atul Gawande, “The Cost Conundrum; What a Texas town can teach us about health care,” explored why the town of McAllen, Texas, “was the country’s most expensive place for health care.” The following exchange took place with a group of doctors and Dr. Gawande:

“It’s malpractice,” a family physician who had practiced here for thirty-three years said. “McAllen is legal hell,” the cardiologist agreed. Doctors order unnecessary tests just to protect themselves, he said. Everyone thought the lawyers here were worse than elsewhere.

That explanation puzzled me. Several years ago, Texas passed a tough malpractice law that capped pain-and-suffering awards at two hundred and fifty thousand dollars. Didn’t lawsuits go down? “Practically to zero,” the cardiologist admitted.

“Come on,” the general surgeon finally said. “We all know these arguments are bullshit. There is overutilization here, pure and simple.” Doctors, he said, were racking up charges with extra tests, services, and procedures.

Here’s what the studies say:

Annenberg Center. In 2005, the Annenberg Center’s reputable “Factcheck.org” challenged the insurance industry’s use of bogus statistics and argument that medical malpractice limits would save health care costs based on considerations like defensive medicine. “Insurance Industry Ad Makes Fishy Claim About Lawyers; Lobby groups fight like animals over health care costs - implausible statistics vs. fact-free stereotypes,” April 19, 2005.

Congressional Budget Office. Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* 1, 6 (Jan. 8, 2004).

- “Malpractice costs account for less than 2 percent of [health care] spending,” and “savings from reducing defensive medicine would be very small.” Limiting tort liability would have no significant impact on health care spending.
- “[S]ome so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients....

National Bureau of Economic Research: Katherine Baicker, Amitabh Chandra, “The Effect Of Malpractice Liability On The Delivery Of Health Care,” Working Paper 10709, (August 2004.)

- “The fact that we see very little evidence of widespread physician exodus or dramatic increases in the use of defensive medicine in response to increases in state malpractice premiums places the more dire predictions of malpractice alarmists in doubt. The arguments that state tort reforms will avert local physician shortages or lead to greater efficiencies in care are not supported by our findings.”

General Accountability Office: *Analysis of Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, General Accounting Office, GAO-03-836, Released August 29, 2003

- Noting everything from low response rates to surveys (10 and 15 percent) and the general failure of surveys to indicate whether physicians engaged in “defensive behaviors on a daily basis or only rarely, or whether they practice them with every patient or only with certain types of patients,” the GAO found both AMA and American Academy of Orthopedic Surgeons surveys on defensive medicine highly unreliable.
- “Officials from AMA and several medical, hospital, and nursing home associations in the nine states we reviewed . . . cited surveys and published research but could not provide additional data demonstrating the extent and costs associated with defensive medicine.

“Some officials pointed out that factors besides defensive medicine concerns also explain differing utilization rates of diagnostic and other procedures. For example, a Montana hospital association official said that revenue-enhancing motives can encourage the utilization of certain types of diagnostic tests, while officials from Minnesota and California medical associations identified managed care as a factor that can mitigate defensive practices.

“According to some research, managed care provides a financial incentive not to offer treatments that are unlikely to have medical benefit.”

Office of Technology Assessment (OTA) U.S. Congress, Office of Technology Assessment, *Defensive Medicine and Medical Malpractice*, OTA-H--602 (1994):

- Even before the widespread onset of managed care, the congressional Office of Technology Assessment (OTA) found that less than 8 percent of all diagnostic procedures were likely to be caused primarily by liability concerns.
- OTA found that most physicians who “order aggressive diagnostic procedures . . . do so primarily because they believe such procedures are medically indicated, not primarily because of concerns about liability.” The effects of “tort reform” on defensive medicine “are likely to be small.”