

# Untoward Outcomes of Health Care—Who Is Liable?

THEODORE COOPER, MD, PhD

WE WHO ARE CONCERNED with the functioning of the health care system are very much concerned with specific problems and instances of liability—the liability of physicians, institutions, and suppliers of *materia medica*. However, as I see it, we need to take a longer view of the societal factors that are contributing heavily to our present situation.

We are involved not simply in a subject of equity—not simply with insuring that the aggrieved are fairly compensated and the guilty are made to pay for their misdeeds—but rather with a growing conviction on the part of the public that health care can be, and therefore ought to be, fully satisfactory in every instance, and that if the outcome is not satisfactory, someone is at fault. Many people may not support such a characterization of the art and science of medical care and the certainty of its outcome. Yet, is this not an attitude that is widely condoned? And, even more to the point, is it not an attitude that the medical and other health professions, the legal profession, the

courts, and the drug and device industries have collectively helped to foster?

It has been said, perhaps too often, that we live in a period of rising expectations. In fact, however, our aspirations clearly exceed our resources. Despite the frustration of failure, we still cling to the idea that poverty can be eliminated, ignorance overcome, discrimination eradicated, and hunger assuaged. We see all of these human and societal ills as remediable, and we willingly pledge ourselves to remedy them once and for all. We say this over and over again.

The same aspirations hold for illness and infirmities of the human body and mind. Knowing as we do that medicine and health care are limited in what they can accomplish—somewhat less limited perhaps with each passing year, as our investments in research “pay off” but limited nonetheless—we continue to fuel the engine of rising expectations, passively if not actively, in countless ways. And, we adamantly refuse to recognize that we not only cannot do what we promise

but also that we could not afford it if indeed we could do it.

The medical and legal professions and the health care industry convey the impression that high-quality health care administered by competent practitioners in exemplary institutions is virtually guaranteed to produce the desired result—complete cure, full recovery, or freedom from disability. And if it does not, then something or someone went wrong. Is this concept realistic? As a physician, I can only say that it is hopelessly unrealistic. In fact, I believe that the greater fault of negligence lies not in the incompetence or carelessness of providers

---

□ *Dr. Cooper is Assistant Secretary for Health, U.S. Department of Health, Education, and Welfare. This paper is based on his presentation to the American Society of Law and Medicine in Boston, June 22, 1976. Tearsheet requests to Office of Public Affairs, Public Health Service, Rm. 17-22, Parklawn Bldg., 5600 Fishers Lane, Rockville, Md. 20852.*

and manufacturers but in our neglecting to counter the rising tide of unrealistic expectations, and, as I have suggested, even in actively and passively contributing to it.

I think the reasons for our unintended neglect of social responsibility are clear and in some ways commendable. After all, if health care were represented to the American people as faulty, unreliable, and hazardous, the people would certainly tend to make less and less use of the services that the health care system is able to properly provide, and they would, I have no doubt, pay heavily in unnecessary suffering from preventable or treatable illness. Because we in the health field recognize that, to some undefined degree, health care is better than no health care, we encourage people to avail themselves of it. And we do this by extolling its virtues and accomplishments.

The phrase, "see your doctor" is obviously part of the American idiom, and for good reason. But we must consider whether we have gone too far, and whether we might, in the process, have given rise to our present liability and tort questions by fostering the notion that "more is better."

I see this as a dilemma, but not I hope an inescapable one. Clearly, our society cannot continue to escalate the size and frequency of judgments of liability. Clearly, we cannot eliminate every possibility of mishap by passing regulatory laws, even though such laws as the new medical device amendments to the Food, Drug, and Cosmetics Act are warranted in the public interest. And it is just as clear that no useful purpose would be served by a campaign to convince the American people that health care is sometimes faulty.

Some people may find it therapeutic to offer society the solution of Federal licensure of physicians as the means to remedy incompetence or to recommend Federal standards for all health encounters and interventions. But such approaches will not solve the problems. The path of

escape from our dilemma is more difficult to follow because obviously there is liability when negligence occurs, and every person must have access to compensation through our legal system.

In my view, the medical and legal professions and the public and private sectors of the American health care system have a critical responsibility to themselves and to the public to help society gain a more balanced, realistic sense of what health care can and cannot accomplish. Society must understand that even the most trivial procedure is not without some risk at the hands of the most thorough and experienced practitioner, that a hospital is not an extraordinarily safe environment just because it exists to serve the sick, and that a drug or device can cause harm—even when it is used precisely as intended with all due care and when it meets all the standards applicable to it.

The medical schools and the law schools of this country need to concern themselves with the impact of rising expectations on the one hand and of increasing regulation on the other. In our society, we have adopted the notion that increasingly stringent and pervasive regulation of the health care system can make health care more available and more effective. Certainly there is a need for responsible regulatory action. But we have to examine very carefully, from both medical and legal standpoints, the extent to which regulation may promise more than the art and science of medicine can deliver—more than is really possible in the way of uniformity of outcome and freedom from risk. And this, I think, is a major task for the medical and legal academic communities.

I believe we also need to make it known to the public at large that a tremendous judgment against a physician, a hospital, a drug company, or anyone else found liable represents an economic penalty on society. I would be the last to suggest that a person should not have

the right to recover for injury sustained because of the negligence of another. But we need to understand that, ultimately, this price is paid by the whole of society through increased costs for health services and supplies, for malpractice insurance, liability insurance, taxes, and the like.

If, in the name of compassion, we want everyone to be compensated for any injury resulting from negligence, preventable or nonpreventable, we should look to revising laws, to setting limits in the process, to putting teeth into our State laws, and to infusing courage into our professional accrediting bodies.

We in medicine are often criticized for doing things just because they are technically possible. Do we often not convince ourselves that we should try to recover "damages" just because there is insurance? I am talking here about pervasive, ingrained social attitudes, perhaps even cultural attitudes. And they do not change quickly or easily. Perhaps they should not, because sudden change may be more disruptive than gradual change. But in any case, I feel strongly that the problem of liability in the health field is ultimately symptomatic of a problem that is manifest throughout society—a problem rooted in our fundamental optimism about the perfectibility of institutions and of society itself.

I do not see liability as government's problem, or medicine's problem, or a problem for the courts or the legal profession. We all contribute to it. Who is liable? Society is! If we can recognize that, then perhaps we can work to solve this problem.

The concern of the legal and medical professions must be shared by a much larger group. Unless the technological advancement of medicine and health care is accompanied by greater understanding of the paradoxical limits of advancing technology, the critical problem of liability can only become more complex, more costly, and more difficult to untangle.