Evolving Medicolegal Concepts

Editorial Comment

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Tort law has always been controversial. There are three distinct schools of tort theory. The first school can be described as economists. The economists note, of the \$10 million to \$20 million spent in medical malpractice premiums annually, less than 25% goes to compensating patients. This school of thought promotes a tort system that is based on either a no-fault system or what is known as “enterprise liability,” which is a complicated system designed to hold accountable the party who is capable of spreading the losses among the largest number of patients. A second tort theory is advocated by those who believe the purpose of the tort system is social utility. In a context of medical malpractice, the social utilitarian views the purpose of tort law as a means to improve community standards of medicine. Plaintiffs argue this social utility is achieved by verdicts that send signals to physicians and surgeons that result in improved safety and quality. Defendants advocate fewer and/or lower verdicts as a means of improving community standards, arguing frequent and large verdicts lead to depletion of resources

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Fig. 1 Dr. B. Sonny Bal is shown.

Fig. 2 Lawrence H. Brenner is shown.

through defensive medicine and adversarial relationships with patients, all of which reduce quality and safety. Finally, there are the philosophers who believe the sole purpose of tort law is to reach a just and fair verdict between private parties in a lawsuit.

Despite these different perspectives, tort law has withstood the test of time and continues to be the means by which our democracy has selected to resolve civil conflicts that allege acts of negligence. Most physicians readily understand the basic structure of law and legal principles as they apply to medical errors, standard of care, and damages. Beyond that understanding, this symposium addresses more sophisticated legal concepts that impact and shape clinical practice. Like medicine, the law is not static; it changes and evolves over time and with advancement in technologies and human experience.

As one example, the traditional informed consent doctrine has required discussion of the risks, benefits, and alternatives attendant to planned surgery. Recent court decisions have modified and expanded informed consent, as the internet age has eroded traditional veils of secrecy and discretion associated with the medical profession. As a result, patients want to know more about their doctor, including personal characteristics that have not been part of the traditional informed consent doctrine. This symposium addresses the evolving law of informed consent, so readers can understand the scope and extent of the required disclosures.

Courts have struggled to formulate standards of care that apply to the professional conduct of physicians in training (ie, resident staff); judicial thinking reveals the complex, contradictory policy matters that must be considered. This symposium will be of relevance to residents and attending staff in academic medical centers, since it addresses the standard of care by which resident professional conduct is judged and how resident liability extends to attending and institutional liability.

The standard of care is a time-honored concept, but it may not be sufficient or fair in judging medical conduct. When necessary, the standard of care should be assessed by legal concepts such as justification and excuse. Sometimes, the unique circumstances attendant to an adverse outcome

may require that we excuse the conduct of the physician, thereby denying compensation to the injured patient. This symposium presents a provocative discussion of these subjects that is timely and relevant, as our society continues its heated debate on malpractice litigation.

Alternatives to traditional tort litigation in resolving medical negligence are of interest as society seeks legal mechanisms that harmonize principals of law and medicine such that compensation is awarded or denied consistent with principals of fairness and justice. The role of sovereign immunity in medical malpractice is likewise timely and relevant, as the public sector expands its role in health care and as more physicians work as employees rather than own their medical practices.

Physician participation in social media evokes concerns related to physician liability, patient privacy, and the security of online information. Very little is known yet about this subject, and legal cases remain sparse. In this symposium, experienced authors share their perspective and offer valuable pointers that can guide physician online social activity. Without doubt, there will be more literature on this subject in both the legal and medical literature in the coming years.

This symposium also addresses the role of cultural competence in tackling subconscious biases that can lead to differential treatment of various population groups. Not all readers will agree with the perspectives offered here, and it is not our goal to present concrete answers. Intelligent readers will know neither medicine nor the law lend themselves to simple rules. Both professions demand the exercise of careful thought, analysis, and reasoning. Our goal is to raise questions and provoke thought such that shared discourse can advance our common goal of improved medical outcomes, better physician professional satisfaction, reduced medical errors, and just compensation to injured patients. Your comments and insights are most welcome.