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The effect of care quality on medical malpractice litigation

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Abstract

This paper analyzes the effect on medical malpractice litigation of the quality of the medical care provided by the defendant. Our data set includes measures of the quality of the defendant's medical care. We explore the extent to which information about care quality or negligence is incorporated in three evaluations of the plaintiff's claim, each based on a different amount of information: (1) the initial reserve, chosen by the risk manager when he first learns of the existence of the claim; (2) the mediation award, made after a hearing, and after pretrial discovery is under way or completed; and (3) the settlement payment, made after the parties have acquired all the information they think it is worthwhile to acquire. We develop a simple model of the correlation between estimates (1) and (2) and the settlement payment.

We find that the initial reserve provides no information about care quality. Several alternative measures indicate that the mediation award includes substantial information about the quality of care, but less than that reflected in the settlement payment. Given the recent growth in the use of methods of alternative dispute resolution such as mediation, it is important to learn how well these methods determine whether the care at issue meets the legal standard. Thus our finding that the mediation award includes substantial information about care quality may be our most interesting result.

1. Introduction

The purpose of this paper is to analyze the role of negligence in medical malpractice litigation. It is hardly necessary to stress the importance of knowing how malpractice

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litigation is affected by evidence on the quality of care. The primary justification for the current system is its deterrent effect on negligence. Clearly the incentive to provide care that meets professional standards is diluted to the extent that the link between negligence and liability is believed to be erratic. A view that courts frequently err in determining negligence has prompted proposals to adopt no-fault schemes, like a Virginia statute that provided automatic compensation for severe neurological birth injuries.[1] The current concern about the cost of "defensive medicine," that is, medical procedures and practices that are not cost-effective, but are done with a view toward possible future litigation, is based on the premise that health care professionals do not believe that the courts can identify negligence accurately.

The first part of the paper explores the effect of care quality on the outcome of the case, that is, whether the case is settled or dropped. We investigate whether there is a tradeoff between damages and liability, that is whether a defendant will settle when potential damages are large even if the evidence of negligence is weak. We use several different specifications in order to exploit all the information in the data, namely, data on trial awards, and on the characteristics of claims that are dropped or settled, including the quality of care involved.

The other issue considered in this paper concerns the trend toward increasing use of various methods of alternative dispute resolution (ADR). In recent years there has been a movement in the courts, legislatures, the legal profession and the academic community promoting the adoption and use of methods of ADR such as arbitration, mediation, abbreviated trial procedures, and even rent-a-judge programs. Advocates of ADR claim that ADR methods are less costly, and involve less delay, than traditional litigation; sometimes they also suggest that these methods do a better job of resolving claims in accordance with the law. In the area of medical malpractice, some methods of ADR, such as arbitration and pretrial screening panels, have been promoted with the claim that they would do better than the courts in weeding out frivolous cases. Clearly, before we decide the extent to which the court system should be replaced by ADR methods, we should learn how well these methods do the task of conventional litigation, that is, ascertaining whether the care in question met the legal standard and, if it did not, determining the damages that resulted from it.

2. The literature on ADR

There is a literature that examines the social costs and benefits of ADR. It turns out that the effects, and therefore the social value, of ADR depend on how well ADR predicts the outcome of a trial. For example, Shavell (1995) found that if there is mandatory nonbinding ADR that perfectly predicts trial outcomes, there are two consequences: the parties will never go to trial, since they know what the outcome of a trial will be, and more lawsuits will be filed by plaintiffs, since mandatory ADR provides a forum for the plaintiff that is less costly than trial.

Bernstein (1993) examines the effects of mandatory nonbinding ADR on the incentives of plaintiffs to file suits whose expected value is negative, either because the chances of winning at trial are small (i.e., the suit is "frivolous"), or because the expected recovery is small