

Defensive medicine. Preventable?

Medicina defensiva. ¿Evitable?

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ABSTRACT

In recent years, the practice of both private and institutional medicine has changed, not only because of scientific and technological breakthroughs, but also because of the increase in complaints and medical malpractice suits, which has resulted in a broken doctor-patient relationship, generating suspicion, dissatisfaction, complaints and, thus, the practice of defensive medicine, which is defined as “the use of diagnostic-therapeutic procedures with the explicit purpose of avoiding malpractice lawsuits”, where health professionals adopt criteria to modify their daily medical practice when they identify patients as potential plaintiffs.

RESUMEN

En los últimos años, la práctica de la medicina tanto privada como institucional ha cambiado, no sólo por los avances científicos y tecnológicos, sino también por el incremento en las quejas, demandas y denuncias por mala praxis, lo que ha dado como resultado que la relación médico-paciente se encuentre fracturada y genera recelo, insatisfacción, reclamo y, por ende, la práctica del fenómeno de medicina defensiva, la cual se define como “el empleo de procedimientos diagnóstico-terapéuticos con el propósito explícito de evitar demandas por mala práctica”, en donde los profesionales de la salud adoptan criterios para modificar su práctica médica diaria al identificar a los pacientes como potenciales demandantes.

INTRODUCTION

In the last thirty years, the practice of medicine worldwide has taken a turn at the private level as well as in public institutions due to several factors, such as population growth, the development and use of technology for diagnosis and treatment, access to information by both parties—physician and patient—and a change in the set of values at all levels of society. All these have broken the physician-patient relationship, which used to be solid and strong, generating suspicion, dissatisfaction, and grievances that have resulted in increased complaints, claims and lawsuits related to medical care received. All the above has led to a type of practice called “defensive medicine”, which can be defined as the “changes made by health care professionals to defend themselves and prevent possible complaints, lawsuits and accusations in the future due to professional actions.”

Overview

Formerly, the physicians’ paternalistic figure gave rise to a unique physician-

patient relationship, where the physician’s authoritarian behavior prevailed, and it was for him to say what to do and how to do it, without the least intervention from the patient, who was receptive, obedient and uncritical. This relationship was comfortable because it was generally not monitored, nor did it lead to criticism or dissatisfaction, much less to a lawsuit.¹

However, today we face defensive medicine. Although its existence was noted as early as the sixties, it was originally recognized as a problem for health services in the early nineties by the Congress of the United States of America, which through its Technology Assurance Administration conducted a study to identify the problem, its dimensions and costs, as well as proposals to prevent or modify it. The results yielded data that led the US to review the functioning of its health system. According to findings by the American Medical Association, obstetrics and neurology are specialties no longer offered in several states of the US for two reasons: first, the overly high cost of medical indemnity insurance premiums, and second, the large number of

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lawsuits against physicians. This has increased the cost of medical care, since patients who require attention from such specialists have to be transferred to the nearest hospitals in neighboring states. Another situation reported in 1994 highlighted that requests for unwarranted laboratory and imaging studies had an impact of several million dollars in patient care, reaching up to 20% of total health care cost in the state of Texas for that year. Based on this report, several countries have recognized that the problem is not exclusive to the United States and not even to developed countries, whose litigious culture is greater than in developing countries. The findings in this study show a trend similar to another study published in England in 1995, reporting a first survey aimed at identifying defensive practices among general practitioners. In it, 80.6% of respondents mentioned they were sometimes or frequently concerned about being sued, and 98% stated that they made changes in their professional practice in response to possible dissatisfaction in patients. What these figures clearly show is a symptom, and it represents an alarming amount in those countries. Such data should encourage us to take action and prevent the growth of this phenomenon in Mexico, since it is unethical and increases the costs of medical care, a luxury that we cannot afford, given the low budget that goes to medical care and how it affects a large part of the Mexican society.

Consequently, it is advisable to strengthen the physician-patient relationship with interpersonal and written communication throughout the process of medical care, remembering that the roots of medicine are totally humanitarian and the vocation to serve and maintain the patient's health is the essence of this science. And although it is true that the physician-patient relationship has been affected by a number of circumstances and factors, it is time to retake its humanistic bases and to use technology as the tool that allows health professionals to better interact with patients, adequately proposing and informing on the procedures, alternatives, and risks they will be facing, taking into account the patients' needs and experiences and empathizing with them, in order to choose the best in each case,

together with the patients, in order to recover this humanistic approach, where human communication is privileged.

Being involved in a lawsuit, whether against the physician or one of his close colleagues, promotes a defensive behavior. It distorts the physician's actions to such an extent that it can increase the possibility of further legal actions against him.

Physicians who have been sued are less willing to discuss their mistakes and prefer to keep them secret or covert. There is an explanation for this: human behavior, being intra- and inter-systemic, affects men as a whole. Thus, we are facing a problem whose solution is deeply rooted in education as its main component, but we also face the need to confer greater depth and identity to Mexican medicine, by ensuring that external influences are not so intense due to the transculturation of two serious problems of American medicine: defensive medicine and medical malpractice lawsuits.

This phenomenon may be initially seen among residents, who are already afraid of exercising their profession for fear of being involved in lawsuits. It is necessary to make it clear to residents, since the training years, that multiple factors lead patients to sue their physician, particularly those related to poor communication between them. Therefore, it is important to emphasize, since the physician is in training, that there should be empathy with the patient, which will bring along confidence in the physician and, in the event that there is a problem with medical care, the patient will think twice before suing the health professional. The topic of communication is of the utmost importance in the physician-patient relationship; however, we cannot overlook other elements equally important in the relationship, such as the proper information that should be provided to the patient regarding his condition and its implications; the treatments and the risks and consequences of failing to comply with them; as well as explaining in detail any surgical procedures and the various circumstances that may arise during them. All this intends to make the patient feel properly informed, so, later on, he will not feel that he was deceived or argue that he was not told about a certain risk

or consequence of his condition, surgery or treatment. Therefore, it is the physician's job to devote some time to communication, which may eventually spare him unnecessary trouble. On the other hand, an essential element of the physician-patient relationship that helps avoid legal medical issues or makes a better defense possible, given the case, is for professionals to comply with protocols and clinical guidelines that apply the standard of care (*lex artis*), since once they are involved in a legal procedure, these elements will provide peace of mind, being totally certain that they did what was technically and scientifically appropriate.

The phenomenon of defensive medicine is a serious problem with many ramifications, whose roots infiltrate deeply in the behavior of physicians; therefore, it is urgent to confront it, before it becomes a problem with unpayable costs for a developing country like ours.

If the cost of defensive medicine in Mexico were similar to that in developed countries, it would have a 20% impact on the budget allocated to health, endangering the stability of the health sector. Consequently, it is essential to develop training courses for undergraduate medical students and post-graduate physicians without a defensive approach, in which the head of the Teaching Department and the attending physicians must preach by example, emphasizing the basic points mentioned above that must be addressed during medical care. First of all, the physician should provide patients with detailed information about their condition, treatment or surgery, as well as the risks and implications of each. Second, the physician must comply duly with the established protocols for any treatment, surgery or medical intervention, as minimal as it may be. And third, and no less important, the patient should be made co-responsible for the risks and implications of every action in which medical practice is involved, and aware of his responsibility in case of non-compliance with the health professional's instructions.

Having an option that allows for the analysis of nonconformities by experts on medical action is an alternative that helps —when carried out among peers— to the best reasoning on the causes that led to the conflict and breakdown of the physician-patient relationship, appearing

as the best option to rebuild the social fabric, since it leads to correct the causes that affected a health care system that should be primarily based on a humanistic approach.²

Consequences of defensive medicine

Some of the consequences of health care professionals adopting a defensive behavior in medicine to protect themselves from a possible legal medical issue are the following:

- The physician orders more laboratory tests with no clinical purpose, only to protect himself from a potential complaint, lawsuit or accusation and to have supporting evidence (which, in many cases, is superfluous).
- The physician offers medical treatments or clinical procedures that are not consistent with the medical “*ad hoc lex artis*” (standards of care) and, consequently, should not have been prescribed.
- The physician feels insecure and, therefore, asks the patient to come more often to the office or increases referral to other specialists.
- The physician picks his patients, trying to care for those that present with less complex conditions, and avoids those who require emergency attention or who appear as potentially troublesome.
- Hospitals avoid offering high-risk specialties due to lawsuits.

Thus, the cost of defensive medicine is catastrophic, and it has been assessed in different studies. In the United States, it has been estimated that defensive medicine accounts for 20% of the final cost of medical care, and that the unnecessary request for laboratory and imaging tests in itself amounts to 8% of the national health budget, adding up to 10 billion dollars; the final costs of defensive medicine may reach 50 billion dollars per year.

As mentioned above, the physician-patient relationship has weakened in recent years; it has radically shifted from good to bad, since it is no longer based on trust from either party, as before. Nowadays, there is more distrust, and the health professional is fearful of claims. However, the physician is often to blame for

building a poor relationship with his patient by not establishing good communication, explaining the risks of a procedure, clarifying the patient's doubts or counseling him or her properly. A considerable number of grievances against health professionals stem from the lack of information for patients about their conditions, treatments, risks, and prognosis.

Another important point of this phenomenon is the access to medical information that the general population has in a fast and updated way through the mass media. Educational level has increased with access to these media, whereby people get to know about state-of-the-art surgical or therapeutic procedures or even are aware of complaints, claims or lawsuits for medical negligence or malpractice. As a result of this, when the patient requests any kind of medical care, he wants to uphold his rights before the physician, and the latter is afraid of any action against him, since, as mentioned, the physician-patient relationship has changed dramatically. The patient is no longer submissive before the physician's diagnosis and care, and now questions the physician as to the reasons for this or that procedure, and agrees with the physician as to whether or not to undergo a certain procedure or to take certain medication prescribed. And in case of doubt, whether justified or not, the patient discusses his doubts with the physician.

Certain factors contribute to the appearance of defensive medicine, such as the existence of stricter laws against health professionals, the immediate dissemination of any negative event in which a physician or a health institution is involved, as well as the timely demand for humanistic and high-quality medical care.³

On September 1, 2011, the General Health Law in Mexico was amended, stating that physicians who perform medical and surgical practices have to be certified by a particular Board called the National Ruling Committee of Specialties Councils (CONACEM). The medical community ignores both its origin and the end use of the resources that it obtains through these certifications. Furthermore, this places the medical community in a unique situation, since they are the only professionals that must have an additional certification, besides having demonstrated the required abilities for the free practice of their

profession, which leads to the phenomenon that we are writing about. Nowadays, the patient can ask for proof of certification; if the physician is not certified, the physician has the well-founded fear that it may lead to a report before an administrative authority, both in the public and private sectors. Consequently, given this set of factors, the health professional works under a different kind of pressure.

In our country, during the last decade, society has become increasingly demanding, especially regarding services such as health care that the government has an obligation to provide in an appropriate, immediate and humanitarian manner. That is why society has constantly monitored cases of alleged medical malpractice, leading to a true "witch hunt" against health professionals who are involved in legal problems due to their professional activity.

The media have influenced the immediate and massive dissemination of legal processes that health care professionals face. Consequently, medical action is more restrained, even fearful, as practitioners watch how physicians involved in this type of news are discredited. Furthermore, the media spread this kind of news in a sensationalistic way, in most cases without precise information on the matter, since they are interested in selling, with no concern for the damage they can cause to a healthcare professional, always to the detriment of the physician.

This new attitude that physicians have adopted when offering health care services has been a consequence of the increase in lawsuits for actions involving physicians who do not meet their patients' expectations. Such change in attitude is also due to the socio-cultural environment which affects both members of the physician-patient relationship, since patients are now more informed and active and also more interested in everything that concerns their health. Sometimes, they even obtain information from sources other than their physician, which causes them to make their own independent judgment and confront the healthcare professional.

To reverse in our country the harmful effects that contaminate the professional practice of medicine and break up the physician-patient relationship, leading to

defensive medicine, this relationship must be renewed, making it more informative on the part of the health professional. Obviously, the physician has to adhere to protocols and make the patient co-responsible for the consequences and risks arising from the practice of medicine, letting him know that a favorable health outcome depends on the patient's cooperation and full compliance with the physician's indications.

What should physicians do to avoid defensive medicine?

The answer to this question is very wide. It is necessary that, throughout their professional practice, physicians keep in mind that they must always be fully updated both in general knowledge and regarding their specialty, so as to comply with the standard of care (*lex artis*), pursuing a continuous medical education. Besides, they should also be familiar with all new communication tools, so that they have the information that they received during their academic education as well as updated information, in order to increase patient visits to their office and apply such information in their professional practice. Physicians should help their patients and make them aware of their rights, but primarily they should be familiar with their own rights, so that at no time a physician is reported or sued by a patient.

Defensive medicine and the ethics of health care

Given this situation that modifies medical practice, we should ask ourselves: is defensive medicine ethical? The answer is no.

Defensive medicine damages the physician-patient relationship, promoting a lack of trust between both parties. If a complaint, lawsuit or accusation does occur, it leads to a loss of self-confidence by the physician, who may then adopt a defensive attitude in his professional practice.

Defensive medicine is not ethical, nor is the physician solely responsible for it. If we consider that the physician protects himself by requesting tests, prescribing medications or performing surgical procedures in order to avoid trouble, we conclude that this is an inappropriate way

of acting and a consequence of his personal history, both of his poor or outdated preparation as well as his inadequate ethical and moral formation in the family, the social environment and the school.

If the physician requests excessive, invasive or costly laboratory tests during the diagnostic workout to avoid complaints or lawsuits, he is adopting defensive attitudes that damage the individual and his economy.

The physician is not the only guilty party; if we consider that medical schools, their curriculum, teachers and healthcare institutions are the first ones involved in the physician's education, encompassing basic as well as postgraduate training, we can point out the first co-responsible parties for the physician's way of acting.

Complaints are uncommon in the outpatient setting, both in public and private institutions; if anything, the patient complains about the lack of effectiveness of the prescribed medications or some undesirable effect. In these cases, the physician is failing to fulfill the principles of what could be called "prescribing ethics" by not knowing the immediate or long-term undesirable effects of the drugs he is prescribing. If he is aware of such effects, and if there is no alternative, he should inform his patient about them and, based on risk/benefit considerations, they should decide together if the drug is prescribed or not. In these cases, rather than defensive medicine, there is a lack of preparation and, therefore, of ethical principles. Prescribing new drugs to treat a certain condition based solely on the information from the pharmaceutical company, without knowing the pharmacology of the drug and doing it only for the novelty, is irresponsible and unethical, and demonstrates a lack of knowledge.

The physician adopts defensive attitudes and breaches medical ethics when he conceals information about laboratory tests or surgical procedures that he requested or performed and whose results make it clear that he was wrong when requesting them, or if the preoperative diagnosis is not confirmed by surgical findings, all the more if he does it to avoid claims or lawsuits.

In some circumstances, especially when working for a public health care institution, and for fear of criticism or complaints from

patients or their family, the physician hides information. As for the prognosis, he states it objectively; sometimes the information is harsh and cruel but true, and if it is grim or contrary to what the patient expected, it causes a serious affective impact. In this situation, the physician must inform his patient frequently and in the kindest and least aggressive way possible, without failing to tell the truth and complying with medical ethics. In situations such as the above, it is important to always bear in mind that patients do not usually sue when things go wrong, but when they are angry about mistreatment or inadequate information.

Regarding the care and treatment of people with low economic resources and little education, so common in our country, this should not be a relevant factor when making medical decisions. Although poor people are less likely to sue their physician, according to literature on the topic, medical care provided to the poor, as well as to any other person, should be responsible and of the highest quality.⁴

Alternatives

The physician's primary interest should focus on demonstrating his knowledge, skills and attitudes, in order to win respect from the patient and his family, even in case of a poor outcome. This is the best protection against defensive attitudes and lawsuits.

Expert management, with updated knowledge and skills complying with the standards and guidelines of medical practice, is the best way to handle the risks implied in the practice of the profession.

A responsible physician is committed to his training and to making decisions that are fair both for his patients and for himself.

When patients and their families are upset about the result, but satisfied with the physician's personal attention, they are unable to even think of appearing before an administrative or judicial authority, the district attorney or a lawyer's office.

Acting with fear and excessive worry to the detriment of the patient degrades the practice (exercise) of medicine. The physician must act honestly to avoid harming the patient and therefore being subject to a lawsuit.

Defensive medicine is completely avoidable, as long as the health professional complies with the following points:

1. Continuous training and updating.
2. An improved physician-patient relationship, promoting communication to achieve empathy.
3. Greater communication with the patient, that includes providing information in a detailed manner and as often as necessary regarding the indications, risks, and cost/benefit relation of therapeutic or diagnostic procedures.
4. Complying with laws, regulations, official standards, and protocols established for each of the specialties that exist in the medical practice.
5. Making patients co-responsible for the risks and implications arising from lack of adherence to a medical order or contraindication.

The physician must learn to realistically assess the legal risk of his professional performance and consider the emotional, physical and financial cost to the patient before using defensive measures.

The best way to act ethically and to avoid the risks involved in professional performance is to practice a patient-centered medicine.

The ethical action of a health care professional demands honesty and seriousness, with himself and with his patient. In order to act honestly, it is necessary to have a solid basic preparation, to update, to train continuously, and to put the rights and welfare of the patient before economic profit and, often, personal well-being. Acting truthfully always, even if this means acknowledging errors and the risks thereof. Maintaining high standards for performance, whether at the level of general practitioners or qualified specialists, and complying with guidelines or procedure manuals.⁴

Finally, when making judgments about a physician's actions, it is important to see him as a human being and to consider that his work is largely carried out in an uncertain context and that the possibility of making mistakes is not always avoidable.

A physician who is knowledgeable, a physician who communicates assertively, respects patients and makes them respect his rights as a physician is a professional who should not fear medical lawsuits, who should not fear accusations; a physician who does not have to act defensively with his patient, but always keeps busy striving for the maximum possible benefit for that same patient. This is a physician who, above all, is satisfied with his professional practice; a physician who understands that his work and studies are intended to offer a high quality service to another human being undergoing a situation that confronts him with his physical body and, indirectly, with the possibility of death, which puts him at a disadvantage, so that the physician's attitude, with the support from the health team, should be to help and not to confront.⁵

CONCLUSION

The problem of defensive medicine in our country, although not yet as serious as that reported in other countries, should be avoided as much as possible by creating culture and awareness in physicians from medical school. The duty of health professionals is to recover the former image of this profession, based on trust and humanism, by establishing an adequate relationship with the patient and making him see that the purpose of the physician is to help preserve health. Although it is true that there will always be certain kind of complaints regarding

medical care received by a patient, it is also true that most of them can be prevented by experiencing empathy, by informing properly and by complying with current standards, all of these key elements that will lead us to avoid the phenomenon of defensive medicine, which is unethical, because it encumbers the genuine action of the physician for fear of a possible legal procedure, and leads the physician to carry out defensive procedures in his own favor, thus contradicting the true meaning and object of medicine.

REFERENCES

1. Ortega-González M, Méndez-Rodríguez JM, López-López FH. Medicina defensiva, su impacto en las instituciones de salud. *Revista CONAMED*. 2009; 14: 4-10.
2. Sánchez-González JM, Tena-Tamayo C, Campos-Castolo EM, Hernández-Gamboa LE, Rivera-Cisneros AE. Medicina defensiva en México: una encuesta exploratoria para su caracterización. *Cir Cir*. 2005; 73 (3): 199-206.
3. Paredes-Sierra R. Medicina defensiva. Artículo UNAM. Available in: www.facmed.unam.mx.
4. Paredes-Sierra R. Ética y medicina defensiva. Seminario: El ejercicio actual de la medicina. Artículo UNAM. Available in: http://www.facmed.unam.mx/sms/seam2k1/2003/ponencia_sep_2k3.htm
5. Guzmán-Mejía JI, Shalkow-Klincovstein J, Palacios-Acosta JM, Zelonka-Valdez R, Zurita-Navarrete R. ¿Medicina defensiva o medicina asertiva? *Cir Gen*. 2011; 33: S151-S156.

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