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Malpractice in Surgery: Is Defensive Medicine a Solution?

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1. Editorial

Error is an inherent possibility of all human activities. The term malpractice associated with medical errors originates in “Mala Praxis”, since 1794, which is defined as 'neglect or unskillful management of a physician or surgeon' [1]. Since then, "the first recorded medical malpractice lawsuit in the US takes place in Connecticut where a patient died of a surgical complication" [2]. The problem evolved during the 19th Century through lawyers who acted aggressively, with most lawsuits related to errors in treating fractures, dislocations, and amputations [3]. Most lawsuits were for alleged medical errors during the first half of the 20th Century. That is, errors related to the doctor's action: the doctor made something wrong, so-called errors of commission, "such as complications of surgical treatment, and diagnostic failures"[1]. From the 1950s onwards, there was a transition from errors of action to errors of omission. The doctor failed to do what was correct for that particular case. As stated by Berlin [1], "a 1991 study disclosed that 75% of all adverse events due to negligence committed in New York hospitals in the late 1980s involved diagnostic mishaps, usually the result of a physician's failure to do something". In summary, the nature of allegations of negligence against physicians suffered a transformation: early they were sued for doing something wrong; now, they began being sued for failing to do something right. Thus, the physicians began to use conduct called "defensive medicine" (DM), which has been defined as the practice of ordering tests, procedures, and visits or the method of avoiding treatments for patients considered at high-risk to prevent malpractice claims." [5]. In the last decades, the culture of practice of DM spread worldwide due to an increasing number of lawsuits against physicians in all medical specialties, in many countries [6]. The physicians used DM "to lessen their exposure to medical malpractice litigation" or "by fear of malpractice litigation." [5,7].

In the US, the specialties most affected by claims were plastic Surgery, General Surgery, gynecology, and dermatology [8]. In Brazil, we can include orthopedics [9, 10] on the list. Frati et al. [5] pointed out that "several studies have highlighted how lawsuits negatively impact physicians, causing them stress, thereby jeopardizing their future performance." In addition, it creates a "significant pressure on health professionals, particularly in some specialized branches more exposed to this risk. The authors emphasize that "there is no evidence in the literature that a fear of being sued is useful for reducing the rate of medical error." As far we know, DM has two primary forms. An active form, also called "positive", is when the physician orders extra tests and procedures. The other is "passive or negative" when high-risk patients and procedures are avoided. [7] In this perspective, the increase of exposure to lawsuits has made physicians more careful in their actions and procedures to prevent medical claims, "rather than to promote the patient's best interest", disregarding medical ethics. We have to point out that DM is not innocuous or harmless. The request for unnecessary tests (preoperative, for example) enhances the entire process. In the field of a universal public health system, as in England or Brazil, this means a considerable expenditure of resources, burdening the whole system and harming many other patients, who may be left without care. Furthermore, "the broad impact of defensive medicine" includes indirect costs induced by physician's stress, time, and reputation loss [11]. From our point of view, DM is unethical since it disregards actions for the benefit

of the patients, adds avoidable risks to patients, and increases costs to society and public health. Besides, the practice of DM does not have the strength to prevent a lawsuit because from the time that defensive medicine became part of medical malpractice 45 years ago, medical errors have increased [1]. In other words: DM is not a solution for medical litigation. The only possible solution (if it exists) due to differences in legislation between different countries is a good and ethical medical practice with the proper use of technology, based on knowledge of scientific evidence and ethical principles of medicine - for the benefit of patients. Also, encourage a physician-patient relationship, with better communication and respect on both sides, "with physicians listening to their patients before trying to convince them" [11]. After all, the places are different, but the patients are the same everywhere.

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