Chapter 24
Could Patient Engagement Promote a Health System Free From Malpractice Litigation Risk?

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ABSTRACT

In recent decades, medical malpractice litigation experienced a large-scale expansion in the United States as well as in Europe, involving both medical and surgical specialties. Previous studies have investigated the reasons why patients decide to sue doctors for malpractice and highlighted that adverse outcome, negative communication with doctors and seeking compensation are among the major reasons for malpractice litigation. In this chapter, patient engagement is discussed as a possible method for reducing the risks of doctors being sued for medical malpractice. The results of a first qualitative study underline how an active role for patients and their engagement in the treatment definition and execution could be a way to limit the occurrence of malpractice litigations. However, a second study noted that in Italy, many patients are still struggling to become involved in the process of their care. The authors discuss the role of professional education in promoting patient engagement in Italy.

INTRODUCTION

The first document presenting a case of medical malpractice litigation dates back to the second half of the 14th century. In 1374, Chief Justice John Cavendish on the Court of King Bench in England ruled on a civil liberty action against a London surgeon for the treatment of the crushed and mangled hand

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of a woman (Spiegel & Kavaler, 1997). However, it is during the nineteenth century that the number of malpractice suits first substantially increased. In the United States, between 1835 and 1865, the first "malpractice crisis" is documented. At that time, most cases were associated with poorly repaired fractures or were obstetrics problems (Badri, 2014). Some authors attribute the increase in malpractice litigations to the hostility between the law and professional medical practices because medicine is a prospective profession, whereas law is a retrospective one. In this regard, Ficarra (1976) wrote: "When a physician does anything to any patient, he is experimenting or medically speculating. However, if the patient suffers adverse results and sues, then the court applies what is by definition a retrospective judgement of a particular course of treatment" (p. 23). This point of view, used to explain that first increase in malpractice suits, is still valid. However, despite the increased interest in medical malpractice during the second half of the 20th century, updated data on the proportion of physicians who faced malpractice claims are lacking, at least until the last decade of the 1900s. Jena, Seabury, Lakdawalla and Chandra (2011) state that in the United States, from 1991 to 2005, 7.4% of all physicians had a malpractice claim, with many differences between the various medical specialties. Indeed, the proportion of physicians facing a claim each year ranged from 19.1% in neurosurgery to 2.6% in psychiatry.

In the same period, even in Europe, medical malpractice litigation has rapidly expanded (Di Nunno, Vimercati, Viola, & Vimercati, 2005). In Italy, hospitals, doctors and health professionals in general are increasingly subject to patients' complaints and are at risk of facing legal proceedings. As a consequence, current legal actions against physicians number approximately 15,000 per year, and hospitals spend over €10 billion to compensate patients injured by therapeutic and diagnostic errors. (Traina, 2009). Some clinical areas are historically more at risk of legal challenges, as is the case for orthopaedics, obstetrics and gynaecology; however, in recent years, even less traditional areas – such as emergency, radiology, surgery, oncology, etc. – have been subjected to malpractice litigation (Traina, 2009; National Association of Insurance Companies [ANIA], 2014). As an example, for Italian radiologists the risk of incurring a malpractice lawsuit has progressively increased and is now estimated at 44 per 1000. For these professionals, this corresponds to one malpractice claim for every 231 years of activity (Magnavita et al., 2013). The data provided by ANIA (2014) demonstrate that disputes in the medical field in Italy have increased by over 255% from 1994 to 2011 and further increased by 15% in 2011 compared to 2010, while in 2012 they decreased by 5% compared to 2011. This reduction does not necessarily mean a real decrease of malpractice litigations; rather, it can be considered the consequence of a different way of coping with the problem by local health organizations. Indeed, these organizations try increasingly to directly manage the vast majority of claims without giving notice to the insurance system, given the growth of insurance premiums and, often, the refusal of an insurer to willing assume the risk (Norelli, De Luca, Focardi, Giardiello, & Pinchi, 2015; ANIA, 2014). For a more reliable assessment of the extent of medical malpractice suits in Italy, a system able to acquire accurate information on medical litigation and to classify it would be useful. However, to date, a complete and comprehensive database on medical malpractice litigation is not available.

Among the main reasons that cause the suing of health professionals are diagnostic and therapeutic errors committed in their professional activities. Medicine is certainly not free from errors (Kohn, Corrigan, & Donaldson, 2000). Despite the great efforts made during the last decades to avoid medical errors and their consequences for patients, the number of adverse events caused by medical practice has not been reduced nor have hospitals become safer. Previous studies have highlighted a mutual influence between physicians' errors, adverse events and malpractice litigation risk (Renkema, Broekhius, &