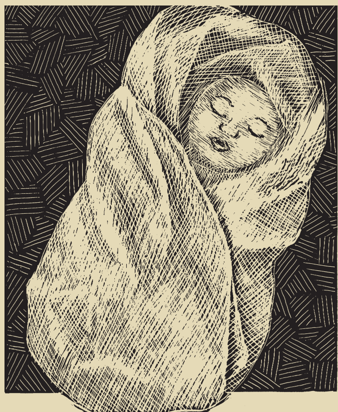
Serving society

By Oglesby H. Young, M.D.



The care of pregnant women and their newborn babies is being threatened nationwide by the obstetrical liability crisis.

Earlier this year, U.S. Senator Judd Gregg of New Hampshire introduced federal legislation to put a $250,000 cap on jury awards for noneconomic damages (pain and suffering) in obstetrical malpractice cases. Unfortunately, the Senate defeated the bill, 48 to 45. With no relief in sight from the obstetrical liability crisis, the care of pregnant women and their newborn babies is being threatened nationwide. There must be some reform if our medical liability system is to continue to serve society well.

Unhappy outcomes: Less-than-optimal medical outcomes seldom result from malpractice but often result in litigation. The majority of medical lawsuits stem merely from unhappy outcomes and do not distinguish between good care and bad care. But obstetricians are sued an average of three times during their career, and this number is climbing. Paradoxically, the best-trained obstetricians are the most likely to be sued because they care for the highest-risk patients—those most likely to have a less-than-perfect baby.

Then, once a case is in litigation, our system asks lay jurors to comprehend highly technical matters and to be impassive while watching a severely disabled child and distraught family in the courtroom throughout the trial. For this reason, many lawsuits are settled out of court—sometimes because the insurance company is afraid a jury might return a multimillion-dollar verdict, and sometimes because a settlement costs the insurance company less than defending even a case in which there is no evidence of malpractice. Yet obstetricians are successfully defended in more than 65 percent of the cases that are resolved by a jury or court verdict.

Tort system: Another problem of our tort system is its cost; billions of dollars are spent each year on litigation—a cost that is indirectly borne by patients. I would be pleased to contribute my malpractice premiums to a fund supporting the needs of families with disabled children. A no-fault system would direct the money to affected families instead of the legal system. Now, less than 40 cents of every dollar awarded in malpractice cases goes to injured patients. The rest of the money goes to lawyers (including 30- to 50-percent contingency fees for plaintiffs' attorneys), expert witnesses, and court costs. A no-fault system would also eliminate the few unjustly huge awards for pain and suffering—amounts that are excessive even in cases of malpractice. For example, a Philadelphia jury recently awarded $100 million to the plaintiffs in an alleged birth-injury case.

These are only the costs of our current process that can be easily measured. There are many others. For example, all physicians today admit to practicing defensive medicine—ordering unnecessary or marginally useful lab tests and imaging studies to forestall liability claims. The country's rising cesarean-section rate, for example, is clearly a reflection of defensive medicine. Defensive medicine is seldom better medical care, and it is expensive—in part fueling the rising cost of health care.

The liability crisis is also limiting patients' access to care, especially in obstetrics. With rising premiums and decreasing reimbursements, many obstetricians no longer deliver enough babies to even cover their malpractice premiums. As a result, some regions of the country have few or no obstetrical services. In Pennsylvania, for example, where malpractice premiums average $150,000 a year, more than a third of obstetricians have retired, moved, or stopped delivering babies. My own premium increased 35 percent this year, even though I am in a group practice that has not been sued in more than 18 years.

Furthermore, the liability crisis in obstetrics is compromising the future care of women and newborn babies in this country. Because of fear of litigation, fewer and fewer medical-school graduates are entering ob-gyn residencies. It is not just the financial cost of practicing obstetrics that deters them, but their fear of being sued if a less-than-perfect baby is born after excellent obstetrical care.

Greatest cost: Herein lies the greatest cost of this crisis. The system is undermining the trust between physicians and patients that is fundamental to good care. A malpractice suit, no matter how unfounded, affects how we doctors feel about our work and our patients. I know two well-trained young ob-gyns who stopped practicing medicine after being *successfully* defended in malpractice cases. "I will no longer give my blood, sweat, and tears to be subjected to another malpractice suit," one remarked. These words signify to me that the social contract between physicians and society is being threatened by our medical malpractice system. All of us—patients, health-care providers, and legislators—must work to craft a new professional liability system. These changes could include simple tort reform, a pre-trial litigation process, or a no-fault insurance plan.

Whatever the reform, something must happen if we are to have a system that improves the quality of care, ensures appropriate compensation to patients who are wrongfully injured, reduces medical costs, enhances rather than limits access to health care, and protects the sacred covenant between physicians and patients.

After many years of training and many more of practice, I still cherish the birth of every baby—perhaps now more than ever. My hope is that our present medical liability system is fixed soon, ensuring women and babies full access to health care long into the future. ■

"Point of View" provides a personal perspective on some issue in medicine. Young is a 1975 graduate of DMS. He practices obstetrics and gynecology in Concord, N.H. This essay is adapted from an op-ed piece that he wrote originally for the Concord Monitor.