There is much policy debate currently about liability immunity, and medical liability has been a specific topic of debate for decades. This debate reflects concerns about increased health care spending related to undue fear of liability, commonly described as defensive medicine.

The Choosing Wisely movement is an attempt by numerous medical societies—led by the American Board of Internal Medicine Foundation—to curtail medical services that provide limited benefits relative to their costs. However, Choosing Wisely demonstrates the drawbacks of such a movement that does not account for liability considerations, which may help to explain why the uptake of Choosing Wisely recommendations has not been more robust.

In light of the increased interest in liability reform in general, the time may now be propitious to consider medical liability reforms that reduce provider incentives to practice defensive medicine by ordering unnecessary tests and procedures. One study found that when providers faced no threat of liability, inpatient spending was 5% lower while patient outcomes remained the same, suggesting the potential for substantial savings.

One goal of malpractice liability is deterring the provision of unsafe care. Providers are liable for monetary damages when they deviate from sound medical practice and harm patients as a result. Providers follow the customary standard of care, which, in theory, is knowable in advance, dictated by typical practice, and driven by science. However, 2 types of uncertainty undermine the current malpractice system and induce providers to deliver costly and unnecessary care to avoid liability.

First, clinical uncertainty calls into question what constitutes sound medical practice and challenges the very idea of a consensus-driven standard of care. While the standard of care may be clear in some instances, the appropriate course of action in each situation is often unclear, as evidenced by wide variations in treatment patterns across the country.

Courts rely on customary practice to decide the standard of care in individual cases. Customary practice is determined by a jury’s interpretation of often-conflicting expert opinion on how providers in a given area deliver care. It offers uncertain guidance to providers in specific circumstances and undermines a fundamental principle of medical malpractice law—that the standard of care should be scientifically determined by medical experts. Given clinical uncertainty, providers are incentivized to practice defensively, potentially ordering unnecessary tests or procedures.

Second, the post hoc evaluation of providers’ actions creates structural uncertainty. The standard of care is not determined until well after the actions giving rise to a malpractice claim have occurred. Providers often do not know what standard their actions must satisfy at the time of the clinical encounter. Clinical and structural uncertainty may leave providers unsure of what to do when delivering care.

Malpractice reform has generally taken a remedy-centric approach, focusing on the amount of damages awarded. Such reforms do little to provide clinicians with better information about the proper course of action in any given case. Recent research demonstrates that changes to the standard of care can induce clear changes in clinical practice. Focusing on the determination of liability, instead of remedies, may be better at reducing defensive medicine and its associated costs.

As a policy alternative, we advance the concept of Safe Harbors, which offer providers guidelines for delivering care in specific targeted situations and, if followed non-negligently, can immunize providers from liability. By providing clinicians with clear standards of care in carefully defined circumstances, Safe Harbors can address both clinical and structural uncertainty for common
conditions such as minor head injury, lower back pain, and uncomplicated headache. Such clinical scenarios occur routinely in an emergency department or urgent care setting, are targeted by Choosing Wisely, and can prompt physicians to order expensive and unnecessary defensive imaging tests.

Effective Safe Harbors require 3 critical characteristics. First, Safe Harbors must be announced in advance so providers can deliver care with the relevant standard in mind. Second, each Safe Harbor must provide clear, narrow, and targeted guidelines. Though not yet operationalized, such guidelines would reduce the use of discretion and thereby prevent courts and juries from second-guessing the appropriateness of a provider’s actions. Special guidelines of this type also return standard-setting to medical experts, diminishing the role of courts and lay juries.

Third, the guidelines must carry the force of law and constitute the standard of care, not merely provide evidence of the standard. If a guideline is not the standard, then providers will face uncertainty over how a court or a jury will apply a standard. Choosing Wisely has offered numerous recommendations, but those recommendations do not carry the force of law. Courts and juries can apply a different standard and hold liable a provider who complies with a Choosing Wisely recommendation. In contrast, a true Safe Harbor does not permit courts to apply a different standard of care. Absence of the force of law may explain why Choosing Wisely recommendations have not been widely implemented.

The institutional mechanism for implementing a Safe Harbor strategy has existed under federal law for decades, but it has been left unused. Specifically, Safe Harbors could be implemented by Quality Improvement Organizations (QIOs), which operate under federal law as self-regulatory organizations designed to monitor quality and cost in federal health care programs. The QIO legislation includes a provision that immunizes providers from malpractice liability when they practice nonnegligently in conformity with a standard approved by a QIO. Quality Improvement Organizations are authorized to engage in general quality-of-care review in which they can endorse Safe Harbors for narrowly defined areas of care.

The federal law authorizing QIOs may provide a useful model for considering liability immunity in health care. Quality Improvement Organizations would provide an effective mechanism to adopt and secure the benefits of Safe Harbors. Given the continued importance of containing health care spending and reducing unnecessary patient risk, encouraging QIOs to adopt Safe Harbors to reduce the costs of defensive medicine would be a useful avenue to pursue.

**ARTICLE INFORMATION**

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