HEALTH PERSPECTIVES

A NON-PROFIT TAX EXEMPT ORGANIZATION

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Malpractice! A Consumer View

During the last year, there has *again* been a flurry of newspaper and magazine articles on the subject of medical malpractice insurance. These stories all focused on the rising cost to physicians of premiums charged by insurance companies for malpractice insurance.

In New York State, the Argonaut Insurance Co. asked for a 196.8% increase in doctor malpractice insurance rates and threatened to cancel coverage if the New York State Insurance Department denied its request.

Malpractice Rates High

Malpractice premiums currently in New York average about $4,000 a year for a general practitioner, $10,000 a year for surgeons, and as high as $15,000 a year for orthopedic surgeons. Physicians claim they cannot afford to pay any more for insurance, and are threatening to quit the business or relocate in other states where insurance is cheaper. Governor Carey appointed a "blue ribbon malpractice panel" to end a physician slowdown in New York State.

The insurance companies, for their part, say that they are losing money on malpractice insurance because so many suits are now being filed and juries are awarding unreasonable sums to plaintiffs. If rates are not raised, they say, they will be forced into bankruptcy.

Is There A Crisis?

Does all this constitute a crisis in health care? How will New Yorkers, for example, suffer if their doctors are forced out of practice? Will the quality of medical care in the state be poorer if malpractice insurance remains an overriding concern of practitioners? What should the attitude of health consumers be during this malpractice and malpractice insurance crisis?

What Is Malpractice?

Medical malpractice is a special term used to describe a *negligent* act by someone practicing medicine or by an institution providing medical services which causes *damage* to the patient.

Negligence is a section or part of the civil law known as the law of *torts*. A tort is a legal wrong by one party against another, where the wronged party can *bring* suit for damages.

Patients and their families *today* have the legal right to sue for monetary compensation if they believe medical malpractice has occurred.

Burden On Patients

During a negligence suit, the patient (or relative) must:

(1) prove that there have been damages,

(2) prove that those damages are the result of some act (or failure to act) of another party,

(3) prove that the act (or failure to act) was in violation of generally accepted standards of medical practice, and

(4) prove that the damages were not caused by an act of the wronged party.

In malpractice suits, the patient faces unique problems, not usually found in other negligence cases because:

(1) medical practice is still an art, as much as a science, and

(2) medical standards vary from community to community.

Experts Needed

These two special conditions require the patient to obtain *expert medical witnesses* to support the extent of damages, that the damages were the result of some act (or failure to act), that the act (or failure to act) did not meet accepted standards, and that the damages were not caused by the patient.

Expert medical witnesses are not easy to find, nor is their testimony conclusive. Medical standards are rarely written down in black and white, nor are accepted standards the same across the country.

What Is Malpractice Insurance?

Malpractice insurance is protection purchased by doctors, hospitals and other health providers against possible lawsuits brought by patients (or relatives) against the doctor or institution for alleged negligence in the way care was delivered. Malpractice insurance covers legal fees and payment for trial awards or negotiated settlements.

Malpractice Crisis Defined

The answer to the question "What is the malpractice crisis?", depends on whom you ask!

Doctors:

Doctors and patients cannot afford malpractice insurance. Doctors have to practice defensive medicine; it is no fun being a doctor knowing that any patient can sue the pants off you; greedy lawyers are pushing patients to sue without basis; doctors will restrict their practices; younger doctors cannot afford to go into practice—at least not in New York State; the courts keep redefining malpractice; doctors can be sued for something done as long as 18-20 years ago in the case of a child; doctors can be sued for what they did or didn't say to patients to obtain (informed) consent; if malpractice rates continue to spiral, doctors will not be able to make a living.

Lawyers:

Patients can't sue unless there is negligence by the doctors; most patients who could sue - don't; lawyers fees are fair; the legal suit is the best way to guarantee the (constitutional) rights of patients; patients don't sue doctors that readily—but the breakdown in the patient-physician relationship makes it easier for patients to sue, the patient just doesn't know what is going on; the contingency fee structure is needed to

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make legal services profitable.

Insurance Company Representatives:

The insurance industry is losing money on malpractice coverage; it was unwise for some companies to go into this field; the awards by jury trial and the number of malpractice suits is increasing so fast that the insurance industry cannot accurately compute premiums; malpractice insurance is a small part of any one company's business; the insurance industry can't make profits.

Patients:

Patients want the best care available at reasonable cost; easy access to care; and a doctor who will explain things in easy-to-understand terms; when something goes wrong—patients want just compensation, but even more, health care consumers want to know that everything possible has been done to protect them from negligence, preventable injury and accidental damage.

Wrong Emphasis

The current discussion on malpractice unfortunately centers on the cost to physicians of such insurance coverage, on the profitability of these policies to the insurance companies and on the size of fees paid to lawyers.

Bills have been introduced in State legislatures, New York, among others, which aim to help physicians and insurance companies in their "current crisis." One result of the emphasis of the current discussion is the frittering away of the rights of patients to seek legal redress for injury sustained as a result of medical negligence.

The relief that appeals to the medical profession is the reduction, if not complete elimination of the rights of patients and their relatives to sue their physicians. The profession prefers to substitute a system of compulsory arbitration to resolve medical negligence claims.

The plight of the insurance companies would seem even less reasonable for reducing the rights of patients (and their families) to seek redress through the courts. Although the companies are crying loudly, all that is known is that the biggest share of the malpractice premium dollar stays with the insurance industry.

Financial Picture Blackout

About fifty-five cents of every dollar paid in malpractice premiums by physicians and hospitals goes to pay the costs for claims settlements, for defensive legal fees and when the patient wins, for the fees for the patient's lawyers. *About forty-five cents of each malpractice dollar stays with the malpractice insurance company to pay marketing, and administrative costs and profits.*

The true financial situation of most malpractice insurance companies is simply not known by the public or providers today. The insurance industry is not sharing its data with anyone.

A special commission, set up in 1971 by the federal Department of Health, Education and Welfare, to study medical malpractice, was *unable* to obtain information about the financial condition of the malpractice insurance industry.

Argonaut Walks

In New York State recently, the Insurance Commissioner said that it would be necessary to look at the books of the Argonaut Insurance Company before approving the request to increase malpractice insurance rates 196.8%. The company decided to leave the State rather than open its books. On June 18, 1975, an Argonaut spokesperson said that it took in $35 million in malpractice premiums and paid out $24,000 in claims as of that date. Argonaut estimated that it might have to pay out $69 million eventually.

Is Wall Street Involved?

It is reasonable to speculate that malpractice insurance companies, like other major investors lost a lot of money in the stock market in the past year. General investment losses, combined with an increase in the number of malpractice claims and the growing amounts awarded by juries to claimants, may have placed insurance companies in financial difficulty. However, it would be a grave mistake to allow the setbacks suffered by malpractice insurance companies in the stock market to be used as a force to abolish the right of an injured patient to receive compensation for injuries caused by physician or hospital carelessness.

Scare Tactics Used

Scare tactics now being used by some spokespersons for organized medicine have attempted to force consumers to give up their primary means of redress when subjected to malpractice—the lawsuit.

Spokespersons for physicians predict that because of the malpractice situation residents of New York State will very likely find themselves receiving poorer quality medical care at extremely high costs. Henry I. Fineberg, M.D., President of the Medical Society of the State of New York, said in an interview with the *Journal of Commerce* that:

> "If the malpractice situation is not changed in New York, if we don't get legislative relief, then doctors will begin leaving the state and young doctors won't come here."

Consumers must not be stampeded by the most recent controversy about increases in malpractice insurance rates. While an increase in these rates will undoubtedly make medical care more expensive, as physicians charge higher fees to compensate for higher costs, there is little reason to fear that medical care will deteriorate or be unavailable, unless doctors allow that to happen.

The Real Issue

Should health consumers sacrifice one of their fundamental rights to resolve the present crisis, or are there alternatives?

Consumer Viewpoint

This issue of Health Perspectives provides a consumer's viewpoint on malpractice and indicates consumer rights and responsibilities in this area.

Medical Malpractice

To repeat, medical malpractice is the special name given, in law, to a negligent act by a doctor or other provider or institution which causes damage to the patient.

To win a malpractice case the patient must prove that the doctor did something no reasonable physician would have done, and that as a result of the doctor's unreasonable conduct the patient was injured. With rare exceptions, the legal system provides the only mechanism whereby patients who have suffered injury as a result of medical treatment can obtain redress (compensation for damages).

Malpractice: How Often

It is difficult to estimate a patient's chances of suffering from malpractice. Studies of patient experience show that many injuries do occur, but most of these are *not* due to negligence. It is also probable that often doctors are negligent

Malpractice: Recurrent Malady

1921-1935—Sixfold increase in medical malpractice suits. By 1937-4,000 suits in progress. Problem identified as suit consciousness among patients caused by breakdown in physician-patient relationship.

1930-1940—malpractice claims increased 1,000%.

1945-1955—metropolitan areas experience 250%-350% increase in malpractice claims.

1950—Almost one of three doctors covered by New York State Medical Society Group Malpractice Plan sued.

1955—Newsweek reports - 5,000 malpractice cases reach court, thousands settled out of court.

1955—Malpractice covered stopped for all doctors in Washington, D.C.

1950-1970—Various studies show quality of care, especially in surgery, can be questioned. More publicized reports include: *Trussell-Morehead* Study for Teamsters Joint Council No. 16—20% of hospital admissions unnecessary, 20% of patients received poor care, 33% of hysterectomies were unnecessary. *Dr. James C. Doyle* (University of California)—40% of 6248 complete or partial hysterectomies—unwarranted or unnecessary. Basis: pathology reports—no disease in removed organs, or only mild ovarian cysts or small fibroid tissues. *Dr. Walter C. Alvarey*—225 of 385 appendectomies mistaken diagnosis or no attack of acute appendecitis.

1958—One out of seven AMA members report being sued for malpractice once, better than one of eight sued more than once.

1959—One of five doctors in New York and Washington sued for malpractice. California sets pace with 25% of doctors sued at least once. Suits are against *experienced* doctors, doctors in practice ten plus years, not younger, less experienced doctors.

1959—Dr. Paul R. Hawley, Director, American College of Surgeons: "It is reliably estimated that one-half of the surgical operations in the United States are performed by doctors who are untrained or inadequately trained to undertake surgery."

1962—Patients ready to sue—80% of potential malpractice claims rejected by lawyers because money amounts not large enough, too risky, can't get expert testimony. 70% of remaining 20% of cases judged against patient.

1968—Reliable estimates confirm Dr. Hawley's statement made in 1959—that one-half of the surgical operations in the U.S. continue to be performed by untrained or inadequately trained physicians.

1968—Reports on unnecessary surgery reveal that 10-30% of surgical operations are unnecessary.

1970—Hawaii, Utah, Oregon, Nevada experience malpractice crisis.

1970—Insurance industry reports that only 4/10 of 1% (.004) of total insurance income or $200-$350 million of $75 billion was for malpractice insurance.

1972—DC 37 and United Storeworkers find that second opinion programs reduce elective surgery significantly. Quality of care up, costs down!

1973—United Mineworkers Union study finds that 75% of hysterectomies unnecessary.

1973—Special government commission reports that insurance industry believes that malpractice crisis will *not* occur in the future.

1975—Malpractice insurance coverages collapse across United States. California, New York, Michigan, New Jersey, Illinois and at least 17 other states all hit by crisis.

but there are no demonstrable ill-effects on the patient. Most calculations of how often malpractice occurs are based on how many suits are brought against physicians and hospitals.

Federal Study Findings

The HEW Commission on Malpractice found that a medical malpractice suit is still a relatively rare event, although the number has been increasing in recent years. The Commission's Report said:

"If the average person lives 70 years he will have, based on 1970 data, approximately 400 contacts as a patient with doctors and dentist. The chances that he will assert a medical malpractice claim are 1 in 39,500."

When to Sue

How do you know you are one of the few people who should start a claim? There are no simple rules, and most guidelines will tell you when you should not claim malpractice rather than when you should.

First of all, it is necessary to *prove* there is damage. Suppose you are in an automobile accident, and go to the emergency room of a hospital and x-rays are not taken. The next day your personal physician examines you and finds a slightly fractured rib. Although you will rightly be furious at the emergency room doctor for apparent negligence, you will not have a malpractice claim unless the failure to take an x-ray caused avoidable damage. Otherwise, no *legal* injury has occurred.

On the other hand, damages may be obvious but not due to negligence. Hemorrhage is a serious, even fatal, postoperative complication. But the courts have held that postoperative

hemorrhage can occur despite the highest degree of surgical skill and care. In itself, a death from postoperative hemorrhage is not evidence of malpractice, even though the injury is self-evident and the result of a medical procedure.

Local Custom Rule

In the past, *local* medical practices were accepted as a malpractice defense. Today, more courts allow *national* standards to be used to prove negligence. Local custom is no longer a sound malpractice defense. In one instance, a patient went into shock following surgery. The surgeon did not come to see the patient for twelve hours. Although the surgeon was able to show that it was local custom in his Ohio town to deal with this kind of problem by phone, he was found liable for the patient's death.

Treatment Varies

Rarely is there one system of treatment which all doctors agree on, and all a physician must do is show that a *respectable minority* of medical opinion would approve the method chosen. Standard practice also changes as medical knowledge develops. Physicians are expected to be aware of recent developments in diagnosis and therapy.

Malpractice Suits Difficult

Proving malpractice is never easy. In the case of medical malpractice it is particularly difficult. The law requires that patients get medical experts to testify that no reasonable doctor would have done what this doctor did. Medical malpractice is the *only* area of negligence where expert testimony is generally required. As a practical matter, even when a doctor's conduct has been obviously unreasonable and dangerous, (suturing a wound while under the influence of alcohol, for example), it is often very difficult for a patient to find one doctor who is willing to testify against another.

Until recently, the law said that the patient had to find a doctor in the same facility or hospital staff to testify that no reasonable doctor in that area would have done what this doctor did.

Courts in many states now recognize that there are national standards of medical care, and increasingly doctors from different parts of the country are permitted to testify about what a reasonable doctor should have done in a particular situation.

Res Ipsa Loquitor

In the malpractice debate in New York State the phrase "res ipsa loquitor" has been mentioned as a doctrine to be eliminated by legislation. "Res ipsa loquitor" is a Latin phrase which means "the thing speaks for itself." In the law it means that a person can prove negligence by proving that:

a. the person was injured by something,
b. the thing which injured the person was under the exclusive control of the person being sued, and
c. the injury is of a sort that does not happen unless the people in charge are unreasonably careless.

Experts Still Needed

Even under "res ipsa loquitor" the patient must generally still find an expert doctor to testify that the patient's injury is the sort of thing that does not happen unless a doctor is unreasonably careless. In a very small number of cases, a few courts have allowed patients to recover damages without expert testimony. For example, suppose a surgeon has left a sponge in a patient and the patient proves that the sponge caused injury and that the doctor had exclusive control over the surgical opening. Some courts would be willing to say, with no further testimony, that no reasonably prudent doctor leaves sponges in the patient. Other courts would still require expert testimony that reasonably prudent doctors in that locality do not leave sponges in their patients.

The Cure Can Hurt

Many modern medical procedures carry risks that unavoidably cause injuries to some patients, no matter how much care, skill and judgment is applied. No surgical procedure is absolutely safe and many therapeutic drugs have unpleasant or dangerous side-effects.

Informed Consent

Physicians are supposed to inform patients of these risks, with due regard to the fact that a person who is ill cannot be expected to function with the same intelligence, foresight, and comprehension as when well. It is incumbent upon the doctor to explain the hazards of therapy so that they are understood by the patient who can then decide whether or not to assume the risk of treatment. This is what is meant by "informed consent," another term that is often used in relation to malpractice.

Patient's Right to Decide

It is a fundamental principle of our legal system that all persons have the right to make major decisions involving their bodies. A patient subjected to medical treatment without giving consent has a cause of action against the physician or surgeon who performs that treatment. However, the consent is meaningless unless a patient is knowledgeable about what that treatment implies.

Provider's Duty to Warn

The doctrine of informed consent is defined as the duty of the medical practitioner to warn the patient of hazards, possible complications, and unfavorable results of standard treatment. In short, all patients have a right to know what they are letting themselves in for and to understand the general nature and inherent risks of any procedure. If this understanding is not obtained, any consent is in all probability legally *invalid*.

Obviously, if a patient is unconscious or otherwise prevented from giving informed consent then some member of the family must be informed and give consent for the patient.

Negligence or Failure to Inform

Let us assume that you suspect that the element necessary for a malpractice suit is present: (1) you have suffered an injury due to medical treatment, (2) or you believe that your physician or surgeon was negligent, (3) or you are sure that your physician did not explain the risks of therapy before beginning treatment. Negligence or failure to explain risks—either factor, may be sufficient cause for a malpractice claim.

How to Start a Malpractice Claim

The first thing to do is find a lawyer to represent you. This will probably *not* be easy. Although you should ask your

The Courts Speak

A 1951 court decision defined negligent treatment as:

(1) An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average members of the profession in the community in which he practices, and it is presumed that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment;

(2) The contract which the law implies from the employment of a physician or surgeon is that the doctor will treat his patient with the diligence and skill just mentioned;

(3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession;

(4) Before a physician or surgeon can be liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical malpractice in his community forbids in such cases or he must have neglected to do something required by those standards;

(5) It is not required that physicians and surgeons guarantee results, nor that the result be what is desired;

(6) The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendent or a disagreement of doctors of equal skill and learning as to what the treatment should have been does not establish negligence.

In New York State the highest court gave an opinion in 1971 which holds that:

"Where the case is one as to which a system of treatment has been followed for a long time, there should be no departure from it, unless the surgeon who does it is prepared to take the risk of establishing by his success the propriety and safety of his experiment."

family lawyer or telephone the local Bar Association to recommend an attorney who handles malpractice cases, be aware that you may not have much success. Very few lawyers are likely to take your case unless you have suffered such serious injury that a large judgment is probable.

Contingency Fee — Pro and Con

Most lawyers handle malpractice cases on a contingency fee basis. This means that the lawyer will agree to take the case without an initial charge to the patient, or for a small fee. Then, if the case is won, the lawyer is entitled to keep an agreed percentage of the amount that the patient wins. Contingency fees run between 33% and 40% of the amount of the award or settlement. The larger the award, the larger the total fee will be to the lawyer.

The availability of the contingency fee arrangement means that patients who do not have enough money to pay a lawyer can nonetheless find someone to represent them if they suffer serious injury as a result of provider negligence. Lawyers are not anxious to take a case unless there is a good chance of winning. A lawyer pursuing baseless claims will not be able to make a sizeable income.

Unfortunately, the contingency fee system discourages lawyers from accepting legally meritorious malpractice cases involving minor injury and a relatively small potential recovery in dollars. Thus, the advantages for poor patients may be cancelled out by the fact that many doctors can continue to practice poor medicine because there is no substantial remuneration potentially available to the lawyer.

Malpractice: Prevention Best Cure

While it is important to know how to seek redress in the courts, it is clear that no amount of money can compensate for irreparable, major physical or mental injury. Very few people would, if given the choice, opt to suffer the loss of an eye, arm or life in exchange for monetary compensation. Therefore, the prevention of the malpractice incident itself is of primary concern to consumers.

Whether or not legal malpractice is common, there is no doubt that bad medical practice does occur frequently.

The HEW Commission found that every study of patients produced to date showed that there are many times more medically caused injuries than there are malpractice claims. While most of these injuries may not be due to negligence, many of them could be prevented. Prevention at one level depends upon professional actions, at another level official or semi-official action is called for, and on still another level group action by consumers is necessary

As an individual you can protect yourself against bad medical practice by, taking responsibility for your health.

Choice of Doctor Key

After all, you choose your physician—you are not compelled by any law to go to one doctor rather than another. You should learn something about your doctor's qualifications: e.g., board certified?, residency training? professional associations? type of hospital

privileges?, privileges at teaching hospitals?, etc.

Second Opinion Before Surgery

When you need surgery, get a second opinion! Any reputable surgeon will be glad to send your records to a consultant if you ask that this be done. If the surgeon refuses or seems unhappy at the prospect of another doctor checking the diagnosis, get another opinion or better yet, get another doctor.

When your doctor wants to admit you to a hospital that you feel has a bad reputation, refuse to go. Your doctor may tell you that that hospital is *all right*, the nurses are great, it's the only hospital with empty beds, admitting privileges are difficult to get elsewhere, etc. These words should tip you off that something is wrong—go to the hospital of your choice by finding a physician on the staff of that hospital. Act like your life depended on it.

Question Your Doctor

Above all, you must take the responsibility of questioning your doctor about your health. Many physicians pride themselves on being so busy that they cannot take the time to talk to patients. If the waiting room is crowded and your doctor never takes the necessary time to explain your condition and treatment, be sure that bad medicine is being practiced. Doctors who are unable to explain things to patients leave themselves open to malpractice suits since you cannot give informed consent to a course of therapy that you do not understand.

Patient - Know Thyself

While it is your physician's obligation to be knowledgeable about all the diseases and conditions that bring patients to the office, it is your responsibility to be knowledgeable about your health status. Your physician can give you the information you need for this purpose. You will then be in a position to make informed decisions about your own body. Questioning your doctor will probably have the effect of protecting other patients, your doctor, as well as yourself against bad medical practice.

New Discovery Syndrome

Too often these days patients read or hear about a new treatment and rush to get it. Many new treatments require more testing before being made available to patients. Many doctors complain that they are forced to give the newest drug, treatment or therapy because patients demand it.

While it is the physician's responsibility to resist the temptation to compete with Marcus Welby, M.D. or other television heroes, it is your responsibility to avoid encouraging the doctor to assume an unrealistic role. When you ask questions your physician is motivated to read and study the latest medical techniques. Patient pressure is more likely to be an effective tool for continuing education than any peer regulation requiring post-graduate study or relicensing of professionals.

However, official action is still essential to eliminate whatever proportion of malpractice results from incompetent medical practice.

Malpractice Risk Varies

The risks of being sued for malpractice are not distributed equally among all physicians.

Certain specialists, such as orthopedic surgeons and anesthesiologists, are most subject to malpractice claims, probably because of the high risk procedures they undertake. Claims are also brought more readily in some sections of the country than in others. But even within a speciality and in same sections of the country some doctors are far more likely to have malpractice claims against them than others.

Most doctors never have a claim brought against them. While the relationship between incompetence and malpractice is far from one-to-one (competent practitioners are sometimes sued and incompetent ones often not), incompetence necessarily results in harm, whether or not claims result.

Failure to Police — More Suits

One reason that the right to sue for malpractice is so important to consumers is that there seems to be no adequate policing of bad practitioners either from within the medical profession or by official licensing agencies. Most often medical societies administer a "slap on the wrist" to doctors who exhibit manifestly incompetent practice, even when such bad practice is related to alcohol, drug addiction, or even senility on the part of the physician. State licensing boards' efforts may prove equally ineffective, if only because they are prolongued, often years, by court action, during which period the incompetent physician may continue to practice.

Horror Stories

The HEW Commission reported a number of what they called "horror stories." In Denver, for example, a physician whose license revocation was delayed by court action was found to be "definitely responsible" for two deaths during the period of delay. In New Mexico, the State Board found two doctors guilty of fraud and revoked their licenses. The courts delayed the revocations for nearly two years, during which time the doctors accumulated $1.5 million in malpractice suits.

The Commission stated that:

> "We agree that the rights of a doctor who may have been treated unfairly by a Board must be protected, but we are equally concerned about the rights of the patients whom he may irreparably injure while license revocation stay orders remain in effect."

Consumers Must Fend For Themselves

As long as organized medicine protects physicians' rights to practice so diligently that it is unwilling to control demonstrated and potential incompetents, consumers must lobby for their own protection with equally self-centered diligence.

It would probably be more equitable and efficient if the medical profession were willing to police its own performance strictly, with due regard for patient safety. After all, physicians do possess the knowledge necessary to evaluate their peers. However, in the past they have given no evidence that they are willing to do the job, but have understandably identified with their colleagues and, in effect, have been reluctant to expose incompetence and malpractice in their own ranks. [See Primum Non Nocere, page 8.]

PSRO — A Glimmer

It is obvious that new criteria to measure the competency of physicians will be necessary before any system can protect against bad practice. The Professional Standards Review Organizations (PSRO) may succeed in establishing and

enforcing such criteria. The active opposition of organized medicine to PSRO's only emphasizes the need for consumer vigilgence and governmental supervision of any protection mechanism. Consumers are concerned with the lack of public disclosure of PSRO standards and findings.

Alternative: Government Control

Unless and until doctors are able to fulfill this responsibility themselves, consumers have no alternative but to press for government action to revoke the licenses of incompetent physicians and to have this done expeditiously so that continued harm cannot be done to patients while the revocation is delayed by the legal process.

Institutional Malpractice

So far, malpractice has been discussed as a private practitioners problem. Actually, institutional malpractice is equally serious, since 74% of all alleged malpractice incidents occur in hospitals. Hospitals are held liable for the safety of all equipment, and the courts generally hold hospitals to a somewhat higher standard of care than they expect from an individual physician. Hospitals are expected to employ equipment maintenance personnel and to dismantle and inspect equipment at proper intervals.

As with physicians, hospital experiences with malpractice claims is not equally distributed among all hospitals. Fifteen percent of the hospitals accounted for more than fifty percent of the claims. This proneness to be sued is not necessarily an indication of the quality of care (hospitals performing more advanced and difficult procedures are more likely to have unfavorable results).

However, recent accounts of hospital conditions as revealed in HEW inspection reports show many unsafe and unhealthy conditions. Unless government health agencies exercise their powers to improve and maintain presently inadequate hospitals and nursing homes, malpractice suits should be considered a tool for consumers and concerned health providers to use in their efforts to assure adequate institutional care.

Consumers Viewpoint Stressed

So far this discussion of malpractice has focused entirely on the consumer's point of view and has ignored the valid complaints of physicians. This has been done to bring out the important issues of patient safety and patient protection.

Under National Health System . . .

In an ideal system, there would be no need for any malpractice insurance at all. A comprehensive national health system, for example, would obviate the need for patient compensation to pay for medical and hospital bills incurred as a result of medical malpractice. An adequate system of social services would supply the rehabilitation of financial support to enable a seriously injured patient to function. And adequate supervision of the profession and of facilities would probably tend to keep medical malpractice to a minimum!

Unfair Burden

The malpractice situation unfortunately affects the competent physician, as well as the less skilled practitioner. Although most physicians today earn enough money to pay these premiums and still have quite a comfortable income, the threat of skyrocketing costs and the likelihood of being sued can make any physician uncomfortable. It is also true that all doctors are not able to afford existing premiums. While a surgeon in mid-career, for example, may collect fees of $100,000 per year, the young surgeon, just out of residency may be performing far fewer operations and have a smaller income. That young surgeon is subject to real hardship.

It is unfortunate when physicians, affected by the threat of malpractice, begin to practice with insurance fees and legal suits in mind, rather than in the best interest of their patients. Improved communications between the profession and consumers might serve to allay physician fears, as it reduces the possibility of malpractice suits. A knowledgeable patient is the physicians' best protection against a malpractice suit.

Government Insurance

It is more difficult to have much sympathy for the insurance companies which are causing the "current crisis." There are proven methods by which government cooperation with insurance companies serves to protect both policy holders and insurance companies against disaster. Governmental co-insurance for the very large risk is now used to protect against floods and hurricanes where property damage is involved. The government should be prepared to place human life and safety in a medical situation above the value of beach property or industrial plants. The adjustments needed to control rising premium rates seem possible, if the commitment is made to help consumers and their doctors.

RECOMMENDATIONS

The Consumer Commission recommends the following:

1. All physicians or medical facilities with more than one malpractice suit against them should be subject to state review for purposes of license revocation, with peer review available to suggest intermediate actions or procedures where desirable.
2. Consideration should be given to establishing a group of physicians under governmental auspices to provide impartial medical testimony at malpractice hearings.
3. Malpractice premium rates should be related to the volume of practice and to malpractice experience, so that competent physicians are not penalized for the actions of less competent physicians, and younger physicians are not rated at the same level as physicians who have established practices and larger incomes.
4. Physicians and hospitals should be required to co-insure malpractice coverage.
5. Federal and state insurance funds should be established to co-insure the large-risk claim.
6. No adjustments in the system of malpractice insurance should abridge the rights of consumers to seek redress in the courts where they have suffered medical injury due to physician or institutional negligence.
7. Binding arbitration should be available to patients and professionals for small cases which are not large enough to require a jury trial.
8. All physicians should be required to participate in continuing educational programs, and periodically be retested on current standards of practice, new diagnostic procedures and patient-physician relationships and responsibilities.

Primum Non Nocere— First, No Harm to the Patient

Since doctors have lived with malpractice problems on a more intimate basis than lawyers, insurance companies and patients it would seem logical that as a group doctors would have come up with a plan that would show that:

"Medicine is, of all the Arts, the most noble . . ." and yet would contain elements to minimize injuries to patients ". . . owing to the ignorance of those who practice it . . . ." (Both quotes from the Hippocratic Oath.)

The plan would have to contain elements to minimize and correct the deficiencies of some practitioners.

A malpractice program advanced by Louis J. Regan, M.D., L.L.B. in his book Doctor and Patient and the Law, 3rd Edition, 1956 proposed to:

(1) raise medical standards,

(2) improve medical public relations,

(3) control (to a degree) physicians inclined to overchange,

(4) control physicians who needed special attention to keep them up to the mark (analogous we suspect to policing incompetent, negligent doctors and attempting to encourage them to meet minimum standards),

(5) promote the elimination of unprincipled and unethical practitioners.

The goals of the program were simply to reduce negligence suits against doctors-valid or not, protect doctors and enhance the profession. All of these goals he contended would contribute tremendously to the public welfare.

But the *real* goal he stated was: ". . . unless affirmative action is taken by the medical group. . . it appears to be just a question of time until the force of the pressure of public opinion will compel governmental interference for the protection of the public."

At most, only three of the 16 fundamentals of his program related to improving patient care, policing of doctors or handling of patient grievances. These three fundamentals provided for no penalties against incompetent, rude or greedy practitioners.

Oddly enough, the fundamentals addressed questions of ensuring "reasonable profits" for insurance carriers, making the coverage sound, calling for physicians to give the program loyal support and declaring that every physician is hurt when any physician is sued for malpractice.

Without the hindsight of Watergate the author asks the medical profession to close ranks, cover up and never admit guilt. The plan never addressed the issues of patients damaged by negligence; recourse for patients to recover for damages; and prevention of damages to patients where possible through educational programs for professionals and careful review of the competence of practitioners.

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