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Congressional Record S. 1571 - A Program for Compensation of Crime Victims

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many lawyers receive because of their participation in suits of this nature.

It is understanding that a number of bills have been introduced to face up to this matter. The Senator from Wisconsin (Mr. Nelson), for example, has proposed a medical malpractice insurance program to protect insurance companies from catastrophic medical malpractice claims losses. Senator Mansfield and others have suggested consideration of several means of protecting physicians against the threat of malpractice suits, and assuring the public of quality health care standards.

S. 215 proposes a voluntary program of medical injury compensation insurance, under which injured patients would receive automatic compensation without having to demonstrate negligence. Patients would still have recourse to the courts should they wish to pursue a malpractice claim. There is also legislation to establish a plan for the arbitration of medical malpractice claims.

The problem of excessive legal expenses has been addressed by Senator Reno, who has proposed specific limitations on the fees which may be charged by an attorney who brings a medical malpractice action before a Federal court. It is my understanding that similar legislation to that discussed here has also been introduced in the House.

This is a matter which, I think, calls for national attention, so that some degree of stability and continuity can be achieved in this crisis situation. I had intended to introduce legislation covering this matter, but because of the number of bills already introduced, which will in time be heard before the committees to which they have been referred, I have decided not to do so; but I ask unanimous consent to have printed in the Record at this point a statement which I have intended to make, and which will guide my consideration, in large part, of any bill covering medical malpractice which may be reported out of committee.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

STATEMENT BY SENATOR MANSFIELD ON THE MEDICAL MALPRACTICE CRISIS

I. INTRODUCTION

The sensational aspects of the medical malpractice crisis, the huge settlements and skyrocketing insurance premiums, tend to obscure the basic problem—thousands of patients each year receive medical injury through the incompetence and/or negligence of health care providers. Efforts must be directed toward one, upgrading health services; two, providing patients with an equitable means of compensation for iatrogenic injury; and three, protecting physicians from exorbitant medical malpractice insurance rates and capricious malpractice claims. It has become increasingly obvious that existing malpractice protection mechanisms work toward the benefit of neither doctors nor their patients.

A. PATIENTS

Patients, who receive medical injuries because of negligence and whose only redress is through a costly and time-consuming legal process, are often discouraged from ever filing a malpractice claim. While it is true that the number of claims has increased (from 18,200 in 1966 to 32,900 in 1976), it is also the case that only a fraction of medical injuries result in malpractice claims. It is also to be noted that despite increasing claims the number of settlements has remained relatively constant (20,300 in 1966, and 22,100 in 1970). Patients have little hope of any compensation from an injunction litigant that may extend for years. In those cases which are not settled out of court, the average time of settlement is five years; and it takes four to five years to settle the malpractice claims made in any one year.

Despite the publicity given large settlements (there were seven for $1,000,000 or more in 1970), the average of claims settlements in this year was $5,000—one-half of all payments were for less than $2,000; three-fifths for less than $3,000. Trends do indicate that the average settlement by 1973 had risen to $8,000. Of all claims made, about 45 percent result in sues for medical malpractice. It is estimated that 10 companies handled 42 percent of all malpractice claims made in 1970, and only 8 percent of this sum ever reaches the injured patient or his legal representatives. Only 16-17 cents out of every insurance premium dollar is being paid out in compensation.

There is evidence that the legal community is well served by the current medical malpractice system. Physicians do not often pursue claims because of the prohibitive cost of doing so. The HEW Commission Report on Medical Malpractice revealed that of all claims rejected by lawyers who specialize in malpractice litigation, 23 percent were turned down for economic reasons. A significant portion of medical malpractice insurance premiums goes toward payment of court costs and legal fees.

If a case is accepted on a basis of hourly cost, claimants can expect to pay, on the average, $63 per hour for legal services. As was indicated, claims take a great deal of time to reach settlement. There is no limit on the time which the case might take and, in some cases, over a decade. There will be forthcoming. If legal services are rendered on the basis of contingent fees, plaintiffs can expect to pay one-third of their settlement to lawyers. Lawyers frequently will not accept a case if small claims are involved. In hearings before the Congress, it was reported: "The lion's share of the total cost of insurance companies of medical malpractice suits and claim goes to the legal community."

IV. DOCTORS AND HEALTH CARE PROVIDERS

The recent strikes in California dramatized the concern of health care professionals with the existing malpractice attitude. Premiums for hospital medical malpractice increased by more than four times in the period from 1965 to 1972. The most dramatic increase has been for surgeons whose rates are up approximately 950 percent, as compared with 460 percent for physicians, and 118 percent for dentists. In some states, for some specialists, malpractice insurance can cost $45,000. Factors which affect the determination of rates are: the type of practice engaged in by the physician; the number of years in practice and the geographic area in which he practices. A physician who frequently performs complex surgery has a higher rate than one who has a routine practice, and who, for example, chooses to practice in California, rather than in Wyoming (where rates are 6-7 times higher) with the highest insurance premiums. Obtaining malpractice insurance has gone beyond the reach of many doctors. Recent trends have indicated a concentration of companies insuring individuals (10 companies had between 7.8 percent
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and 82 percent of the market) and a growth of group insurance. Continuation of these tendencies pose future problems for the industry. The Senate Select Committee on Aging has characterized the malpractice problem as "one of the major issues confronting the nation today."

Another potential method of settling medical malpractice claims is through arbitration. Patient and health care providers agreed to arbitrate any malpractice claims against an insurance company after partial payment of health services. Little data is available on arbitration; however, preliminary indications are that court costs can be reduced. Many cases are settled before reaching arbitration; however, the arbitration proceedings are lengthy and cost between 55 and 85 percent of the mid-range of an action at law. To date, a formal claim has been filed in the claims favor in the same ratio as to actions at law. The time saved has not been an additional factor.

VI. NO-FAULT INSURANCE

Serious consideration should be given to encouraging no-fault medical injury compensation. This program would provide a more direct way of settling malpractice claims. The current system of injury awards is fragmented, and the costs involved in pursuing medical malpractice claims can be lengthy and expensive. Such a program would also encourage out-of-court settlements, reduce the burden on the courts, and reduce the potential for malpractice claims.

There is no question that the medical malpractice problem is a significant one. However, it is important to recognize that the problem is complex and requires a comprehensive approach to its solution. A number of approaches have been proposed, and many have been successful. The key to the problem is to ensure that patients are properly compensated for their injuries and that the medical profession is held accountable for its actions.

II. APPROACHES

A. Approaches to the medical malpractice crisis

1. Mediation

Mediation is a process in which a neutral third party assists the parties in reaching a mutually acceptable agreement. Mediation can be a cost-effective and efficient way of resolving medical malpractice claims. However, it is important to ensure that the mediator is impartial and knowledgeable in the area of medical malpractice.

2. Arbitration

Arbitration is a process in which an impartial third party decides the merits of a claim. While arbitration can be a cost-effective way of resolving medical malpractice claims, it is important to ensure that the arbitrator is impartial and knowledgeable in the area of medical malpractice.

3. No-Fault Insurance

No-fault insurance is a system in which patients are compensated for their injuries through a no-fault insurance program. No-fault insurance can provide a more efficient and cost-effective way of resolving medical malpractice claims. It is important to ensure that no-fault insurance programs are fair and cost-effective.

B. Approaches to the medical malpractice crisis

1. Legislation

Legislation can be an effective way of addressing the medical malpractice crisis. Congressional action is necessary to ensure that patients are properly compensated for their injuries and that the medical profession is held accountable for its actions. It is important to ensure that legislation is comprehensive and cost-effective.

II. CLIENTS

Evidence indicates that the general public is not benefiting from the current system of legal services. Addressing this issue is critical to ensuring that the medical malpractice crisis is resolved.

VII. LEGISLATION

A. Number of bills have been introduced to address the medical malpractice problem

Several bills have been introduced to address the medical malpractice problem. These bills have been introduced by members of Congress who are concerned about the cost of medical malpractice and the need to ensure that patients are properly compensated for their injuries.
continuing practice after disbarment, of the refusal to report breaches of ethics or malpractice by fellow lawyers occurs on the part of the bar associations to prevent prominent attorneys and of serious undermanning and insufficient financing of disciplinary agencies. The recommendation of legal committees and the findings was summarized by Mr. Schell: '... the organized bar has recognized the extent of the problem and has taken an important step in the direction of its solution. This step, however, does little towards dealing with the procedural problems, the mechanics of grievances, and does not offer solutions to the many substantive criticisms of the handling of lawyer discipline.' Thomas Erlich, former dean of the Stanford University Law School and now head of the new Legal Services Corporation, has not expressed "any hesitancy in saying that enforcement mechanisms throughout the country are not nearly tough enough."

IV. THE MALPRACTICE PROBLEM

The evolution of the malpractice problem in the legal profession has not reached the crisis stage which exists in the health services. However, there are indications of a growing problem. Companies insuring lawyers report that the number of malpractice claims has doubled in the past five years and estimates that as many as 7 percent of all insured lawyers may face a malpractice claim this year.

Although most lawyers did not carry malpractice insurance until recently, 50 percent of urban and 60 percent of those in smaller communities now carry some type of insurance. Premiums are rapidly increasing. The average premium for a malpractice policy in Wisconsin increased an average of 300 percent last year. Clearly, more effective methods of insuring quality and strong enforcement by bar associations and judges must be developed if a malpractice crisis is to be averted.

V. APPROACHES

The approach to the situation which exists in the legal profession must be directed toward: A) increasing the availability of legal services to those of all incomes; B) identifying and preventing legal incompetence; and C) improving mechanisms for settling malpractice claims. An important means of increasing the availability of legal services to those of limited incomes is adequate funding of the Legal Services Corporation. Moderate income families will benefit greatly from the expansion of legal insurance plans. Such plans could be modeled upon the prepaid legal services being tried by some unions and expanded with moderate yearly fee entitles participants to legal counsel services—in closed plans from any of a group of lawyers included in the program, in open plans from an attorney of the participant's choice. According to the New York Times, "bar associations have fought legal insurance only slightly less vigorously than medical associations fought health insurance as 'socialistic.'" The ABA has only recently modified its stance against prepaid plans. The costs of these services could be reduced by utilizing paralegal personnel to perform routine work. The concept of legal clinics, which has also been opposed by the ABA, can be expanded to make expertise in a number of areas available to the public.

B. Identifying malpractice problems can pose a number of difficulties. To date malpractice actions have not significantly increased in the area of omission by lawyers; i.e., failing to do something which should have been done. However, consideration must also be given toward developing criteria for assessment of malpractice in which, through lack of skill or knowledge, cases are mishandled to a client's detriment.

Establishment of stricter peer review procedures is one method of preventing malpractice. In a recent sequence of articles in the ABA Journal, Dr. Wolkin has urged adoption of a monitoring system to investigate complaints of incompetence, to determine whether there was a basis for them, to determine the extent and character of the lack of competence, and to prescribe and require fulfillment of remedial measures. A system of this sort would benefit from the membership of non-lawyers. Laymen would cause the legal profession to be more alert to public concerns and would aid in enforcement of proceedings which are in the public interest—for example, the disciplining of legal incompetence. It is frequently charged that existing grievance review mechanisms of bar associations have little motivation for actively investigating claims. (This charge of self-interest has been leveled at most committees of the ABA. For example, in 1972 a Special Committee on Automobile Insurance Legislation was formed and strongly opposed no-fault insurance. Accident litigation produces one-fourth of the gross legal income and all ten committee members had been involved with and collected fees from auto accident litigation.) The Chief Justice has also recommended pre-practice training and recertification requirements for lawyers. Several states have implemented programs of continuing legal education which should be expanded. Furthermore, law school curricula can be modified to improve the practical performance of law.

C. Lack of data on the malpractice problem and the complexities involved make any recommendations on improving malpractice settlement procedures tenuous at best. The use of ombudsmen, arbitrators, and other methods of solving disputes outside the courts should be explored. It is possible that the no-fault concept could be expanded to client compensation in cases of legal malpractice; however, this raises a number of questions, including cost. If sufficiently clear malpractice guidelines could be developed, a no-fault program similar to that discussed in conjunction with medical injuries could be implemented.

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There has been little legislation directly addressing the problem of legal malpractice, and there is need for further study of the problem. Some action has been taken to facilitate the growth of prepaid legal service plans. The Taft-Hartley Act was amended to allow the inclusion of such benefits in union contracts. Legislation is pending in the House to encourage individual participation in group plans. With this proposal (H.R. 3058) an employee's gross income under the Internal Revenue Code would not include: the amounts received as reimbursement for legal services under a group plan; the value of legal services rendered under such a plan; or the contributions of employees to such a plan.

The ACTING PRESIDENT pro tempore. Does the Senator from Pennsylvania wish to be recognized?

Mr. HUGH SCOTT. Mr. President, I think Congress ought to address itself to the malpractice situation, where there has been a most enormous increase in malpractice actions, occasioning an ever greater increase in insurance premiums, and probably the one thing can be said about the very heavy legal charges which are involved. Medical colleges, universities with medical schools, and hospitals are paying premiums, some of them, actually in the millions of dollars—the premiums alone in the millions of dollars. I have some firsthand knowledge of a part of this problem as a member of the board of visitors of a university.

Individual physicians practicing alone either have to become self-insured or contribute a very large part of their income to malpractice premiums.

There ought to be some kind of protection against catastrophic recoveries, because juries nowadays think nothing in the world of awarding six and seven figures. I think, however, there should be in all of these cases the requisite showing of negligence; otherwise, we have simply moved into socialized medicine, which would in my view be untrammable for this country. But I do think we ought to approach this, and we ought to do it in this session of Congress if we can.