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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 malpractice claims losses. Senators KENNEDY and INOUYE 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 ROTH, 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 had 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.

THE MEDICAL MALPRACTICE CRISIS

Mr. MANSFIELD. Mr. President, another matter which is of concern to me has to do with the medical malpractice crisis. We all are aware of the fact that slowdowns have occurred in various parts of the country because of the exorbitant rates which doctors have to pay, in all too many cases, and because of the exorbitant legal fees which all too

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 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.

II. 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 1970), 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 rapid compensation for their injuries and frequently must wait long periods of time, during which medical and legal costs are likely to be substantial, without relief. In those cases which are not settled out of court, the average time of settlement is five years; and it has been estimated that it takes ten 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 an increase, however, as the average settlement by 1973 had risen to $8,000. Of all claims made, about 45 percent result in payment to the plaintiffs. This corresponds with the findings of insurers that 46 percent of all medical malpractice claims are meritorious. Despite a significant increase in the amount spent on malpractice insurance (from $61,100,000 in 1960 to $370,600,000 in 1970), only a small amount 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.

III. THE LEGAL SYSTEM

There is evidence that the legal community is well served by the current medical malpractice system. Patients 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 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, of course, no guarantee that compensation 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 to insurance companies of malpractice suits and claims goes to the legal community."

IV. DOCTORS AND HEALTH CARE PROVIDERS

The recent doctors' strike in California dramatized the concern of health care professionals with the existing malpractice situation. Premiums for hospital medical malpractice increased by more than four times in the period from 1960 to 1972. The most dramatic increase has been for surgeons whose rates are up approximately 950 percent, as compared with 540 percent for physicians, and 115 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 claims experience of that physician; and the geographic area in which he practices. A physician who frequently performs complex surgery, who has a record of malpractice, and who, for example, chooses to practice in California, rather than in Wyoming (where rates are 8 times higher), will pay the highest insurance premiums. Obtaining malpractice insurance has posed a problem for some doctors. Recent trends have indicated a concentration of companies insuring individuals (10 companies had between 47.8 percent

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and 86.2 percent of the market) and a growth of group insurance. Continuation of these tendencies pose future problems for doctors, as reported by the Secretary's Commission:

"Evolution of the market towards total reliance on group plans vests sponsoring organizations with an undesirable high degree of monopoly power over hospitals or physicians. . . . In the market for individual insurance, any single company can be notoriously capricious about whom it declines to underwrite. So long as the individual market place is truly competitive, this capriciousness is of no great concern because qualified buyer who is turned down by one insurer can always find another willing seller without great difficulty. In a restricted market, however, a capricious refusal to sell can become a significant barrier to limit or restrict the practice of medicine by qualified individuals."

The increasing threat of being sued for malpractice (in 1966, 1.7 per 100, and in 1970 3 per 100 physicians were sued) has caused doctors to practice what has been called "defensive medicine." According to a Medical Economics Malpractice Survey of 1973 many physicians increase the use of services, or substitute more expensive for less expensive services as a means of protection against malpractice claims. While in some cases the quality of medical care is improved by this practice, it is also reasonable to assume that not only are the increased costs of malpractice insurance passed on to patients, but also additional expenses result from what, in many cases, are unnecessary medical procedures.

V. APPROACHES

Approaches to the medical malpractice crisis must be directed toward: A) elimination of iatrogenic injuries; and B) reduced administrative costs (a comparison of total dollars required to settle claims and the actual amount received by claimants reveals the present method to be exceptionally wasteful) and speedier resolution of malpractice claims.

A. There has been an increase in educational programs to reduce injuries, and these programs should be encouraged. The Medical Malpractice Commission concluded that injury prevention programs should focus initially on hospitals where 74 percent of alleged malpractice events occur. PSRO's represent one means of improving health standards. I might add here that the PSRO program in Montana has been highly sucessful. It was one of the first in the country to be fully operational and serves as a model for the rest of the nation. Aproximately two dollars have been saved in reduced health costs for every one dollar spent on the program. Medicaid expenses have been significantly lowered. Statistics have not been compiled, but indications are that the potential is great for reduced costs to patients through elimination of unnecessary treatment and for a reduction in malpractice claims. The Commission also recommended review of licensure and certification standards for health personnel and special attention to monitoring drug prescribing; increasing the numbers of nurses and expanding their clinical training; granting qualified immunity from suits to hospital committees who appropriately suspend, revoke, or curtail privileges of physicians to practice in the hospital in question; and empowering all state licensing boards to suspend, revoke, or curtail medical licenses based on professional incompetence.

B. One way of improving the present mechanism is to encourage out-of-court settlements. Encouragement should be given to organizing screening panels composed of both lawyers and phsicians who can look at the facts of a case for both parties involved and decide on the merits of the claim. The cost of resolving disputes has been lessened approximately 49-60 percent through this approach. But in states which have utilized physician/lawyer panels, there have been only minimal reductions of court actions. Another potential method of settling malpractice claims is through arbitration. Patients and health care providers agreed to arbitration of any malpractice claims by an impartial party prior to performance of health services. Little data is available on arbitration; however, preliminary indications are that court dockets 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, these alternatives to litigation have settled in the claimants' favor in the same ratio as do actions at law. The time saved has not been substantial, with the average time of settlement being: for arbitration—36 months, for screening panels—35 months, for actions at law—40 months, and for actions at law with verdicts by jury—60 months.

VI. NO-FAULT INSURANCE

Serious consideration should be given to encouraging no-fault medical injury compensation systems. Such a program would eliminate medical malpractice as it is currently understood. The concept of strict liability is substituted for negligence. Compensation would be contingent upon demonstration of injury only, not of injury through negligence. Compensation would be made for medical expenses, immediate or future loss of earnings and rehabilitation. Such a program would go into effect only after all other forms of coverage have been exhausted. Such a program would likely include:

1. All medical claims handled within the system.

2. Claim initiation is the responsibility of the patient with the assistance of an impartial review process.

3. Informal claim screening could eliminate non-meritorious claims, but findings would not be binding.

4. Compensability determination performed by panel of referees.

5. Appeals would be limited to the mechanism of the system.

A no-fault mechanism would likely result in increased claims, and therefore, greater costs in payment for meritorious claims. It has also been argued, however, that on "total social accounting, there may be no net increase in real costs at all, and moreover, that the quality gains to be anticipated would justify some increased cost in any event." Another area of difficulty with such a proposal is, with the absence of negligence as a basis for settling malpractice claims, how can compensable injuries be identified? Determining cause of injury may prove to be a significant problem with the no-fault approach.

VII. LEGISLATION

A number of bills have been introduced concerning the medical malpractice problem, several simply calling for further study of the issue. However, the proposed approaches have been sufficiently varied so as to generate an examination of medical malpractice from many perspectives, and hopefully to produce a consensus as to how the situation might be improved. Senator Nelson has proposed a medical malpractice insurance program to protect insurance companies from catastrophic malpractice claims losses. Senators Kennedy and Inouye have suggested consideration of several means of protecting physicians against the threat of malpractice 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 Roth, 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.

I. INTRODUCTION

The problem of malpractice in the legal profession has not reached the crisis point which exists in the area of health care. Law is the fastest growing profession in the country. There are currently 375,000 lawyers, up from the 221,000 of 1950, and a figure which could double by 1985. The earnings of lawyers have increased from $2 billion in 1955, to $4 billion in 1966, and to $9.7 billion in 1972 (of which $5.2 billion was kept by lawyers as net profit). Growth and prosperity have not always been accompanied by corresponding increases in the quality of service provided. Malpractice suits are increasing. As was the case in health care, the fundamental issue is the provision of adequate service at reasonable cost. If this need can be met in the area of legal services, a malpractice crisis can be avoided.

II. CLIENTS

Evidence indicates that the general public is not benefiting from the current system of legal service delivery. Addressing this problem before a Senate Subcommittee, Orville H. Schell, president of the New York City Bar, remarked: "The delivery of legal services—Is it adequate? The answer is definitely No! . . . a high percentage of people in this country are not receiving adequate legal services. The estimated percentages run from 60 to 90 percent of the population. Whatever the estimate you take the numbers are staggering." Prohibitive cost is the most frequently cited factor putting legal services out of the reach of many Americans. Only 10 percent of the population can afford legal counsel. Perhaps one in five can qualify for government-subsidized legal aid. The *New York Times* quotes American Bar Association president Chesterfield Smith, "I have to represent only wealthy people. . . . This is capitalism. Our standard of living is high. We're selling time just like a store sells a shirt. If you don't like the shirt, you buy another."

The merchandise offered by the legal profession is often faulty, and can result in substantial loss to the buyer. Settlements are lost because claims have not been filed correctly or on time; children are left unprotected through errors in wills; defendants are convicted because of poor trial performance. Chief Justice Burger has estimated that anywhere from one-third to one-half of all lawyers engaged in serious litigation are unqualified to do so, which may only be the tip of the iceberg. Trial lawyers are highly visible; the abuses of lawyers who are not involved in litigation are likely to go unnoticed. A poll of judges in the Second Circuit revealed estimates of from one- to four-fifths of lawyers as being unfit to practice.

III. LAWYERS

Indications are that lawyers have not satisfactorily maintained professional standards. Of 3,000 claims filed against lawyers in Manhattan and the Bronx in 1974, only 50 resulted in formal disciplinary action of any kind. The existing mechanism for grievance review is monitored solely by bar associations themselves. Despite the contention of several ABA presidents that, "The bar is guided by a desire to serve the country and not itself," the public has little evidence of this altruism.

In 1967 a committee under Justice Tom C. Clark found pervasive evidence of lawyers

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continuing practice after disbarment, of the reluctance of lawyers to report breaches of ethics or malpractice by fellow lawyers, of a hesitancy on the part of bar associations to take action against prominent attorneys, and of serious undermanning and insufficient financing of disciplinary agencies. The response of the legal community to these findings was summarized by Mr. Schell: ". . . the organized bar has recognized the existence of a problem and has taken an important step in the direction of its solution. This step, however, deals only 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 service. 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 estimate 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, 90 percent of urban attorneys and 60 percent of those in smaller communities now carry some type of insurance. Premiums are rapidly increasing. One of the largest legal malpractice underwriters increased rates 50 percent last year and expects to have similar increases this year. Insurance rates in Wisconsin increased an average of 300 percent last year. Clearly, more effective methods of insuring quality legal services and stronger 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.

A. An important means of increasing the availability of legal services to those of limited income 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 service plans being tried by some unions and organizations. Under these plans a 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 legal malpractice can pose a number of difficulties. To date malpractice suits have been successful primarily 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 view processes is one means of preventing malpractice. In a recent sequence of articles in the *ABA Journal*, Paul 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 of 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.

VI. LEGISLATION

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. 3025) 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 employers 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 even greater increase in insurance premiums, and probably the same 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 unthinkable 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.

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