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INSURANCE PROTECTION AND DAMAGE AWARDS IN MEDICAL MALPRACTICE

OLIVER CHARLES SCHROEDER, JR. *

INSURANCE PROTECTION

Some Conceptual Differences

Doctors suspect law. Their suspicions are based on many and complex causes. No causes, however, are more irritating than the malpractice insurance policy which does not protect, and the damage awards which appear grossly excessive or completely unfounded. Somehow, medical practitioners find these two facets of the malpractice area intimately related. On the other hand, the legal practitioner views the elements as independent phases of the law. Perhaps this legal approach has resulted from the fact that two traditional law school courses are involved: insurance and damages; and to the average law student nothing is more unrelated than a second year course and a third year course. Or, even if the two courses are studied simultaneously, the final examinations are given on different days. Hence, the courses remain unconnected. In law schools which are developing law-medicine programs, the intimate relevance of several law courses to the practice of medicine is underscored. The law of insurance and damages is not affecting medicine in separate vacuums. Instead, the law, with all its ramifications, affects the medical profession. Thus, educating the lawyer and the lawyer-to-be in the wisdom and skill essential to interpret the law for a professional colleague in medicine is legal education at its best. This is not the law departmentalized—rather, it is the law unified. This purpose guides the thoughts of the instant article.

Introduction to Insurance

Prior to a discussion of damages in the modern medical malpractice action, it is pertinent to discuss insurance, its coverage,

* Acting Dean for Administrative Affairs, Professor of Law, School of Law, and Director, Law-Medicine Center, Western Reserve University.

and exclusions. There is no extensive legal writing which fully and adequately covers the many diverse problems which potentially lurk in the average professional liability policy for medicine. Nevertheless, some case law as well as limited law review investigations of this complicated and puzzling area exist.[1] The paucity of legal literature stands in contradistinction to the almost continuous preoccupation of medical literature with the problem of malpractice generally, and insurance in particular.[2] In addition to professional medical journals, the law department of the American Medical Association has also been active in the study and consideration of malpractice insurance.[3]

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[1] See, *e.g.*, Hirsch, "Insuring Against Medical Professional Liability." 12 Vand. L. Rev. 667 (1960). This article contains discussions of malpractice insurance cases existent in 1959. Since 1959, several courts have dealt with medical malpractice insurance cases, but no startling developments have occurred. The purpose of the first portion of the instant article is to analyze all the significant malpractice insurance cases in the hope of providing the reader with a current guide to this subject. See also Annot., 35 A.L.R.2d 452 (1954), which contains an interesting discussion of insurance coverage of liability or indemnity policies for physicians, surgeons, dentists, and the like. This annotation, and the cases therein, replaced the annotation in 104 A.L.R. 1089 (1939), 100 A.L.R. 1450 (1936), and 63 A.L.R. 766 (1929).

[2] See, *e.g.*, Committee Report, "Professional Liability & the Physician", 183 A.M.A.J. 695 (1963); Nash, "A Statistical Study of Malpractice Liability Insurance Claims", 61 A.D.A.J. 315 (1960); Rees & Whelan, "Professional Liability in Dermatology", 86 Arch. of Dermatology 788 (1962); Wyckoff, "Effects of a Malpractice Suit Upon Physicians in Connecticut", 176 A.M.A.J. 1096 (1961). The substance of these particular articles is discussed in depth at notes 4, 6, 20 and 29 *infra*. See also Hassard, "Your Malpractice Insurance Contract," 168 A.M.A.J. 2117 (1958); "Review of Medical Claims and Suits," 167 A.M.A.J. 227 (1958); "Analysis of Professional Liability Claims and Suits," 165 A.M.A.J. 608 (1957); Sandor, "The History of Professional Liability Suits in the United States," 163 A.M.A.J. 459 (1957); "Study of Medical Professional Liability," 163 A.M.A.J. 364 (1957).

[3] See the recent Committee Report, "Professional Liability & The Physician", 183 A.M.A.J. 695 (1963). This report notes that medical malpractice claims rose tenfold between 1930-40, and another tenfold between 1940-50. Furthermore, at least 1/7 of all physicians become defendants in malpractice lawsuits.

The report also listed several factors contributing to the increased incidence of lawsuits against doctors. Included among these factors are (1) public attitude (2) effect of juries (3) inflation (4) court extension of doctrines such as *res ipsa loquitur* (5) attitudes of plaintiffs' attorneys, and (6) increased hazards of medicine and surgery.

The 1963 report listed eleven criteria which should govern the individual doctor's choice of malpractice insurance. The doctor should (1) consider the stability of the carrier and its reserve capital, (2) where the insurer's reserve capital is on deposit, (3) the doctor's own philosophy and experience in regard to defending suits, (4) the sufficiency of the coverage offered, (5) the extent of the cancellation clause, (6) the extent of the exclusion clause, (7) the extent of the liability coverage, (8) the insurance company's policy toward annual renewals, (9) the extent of hidden additional charges in the insurance contract, (10) the insurance company's willingness

The typical medical liability policy is a surprisingly short and apparently simple document. This is especially true when it is compared with the average automobile liability policy or life insurance contract.[4] The average medical liability policy contains, in varying lengths and degrees of prolixity, the following elements: insuring agreement, defense and settlement provisions, conditions, exclusions, and the other usual impediments of the insurance world.[5] To the aggravation of physicians and lawyers, many difficult legal issues arise within the confines of such simply worded documents.

The Insuring Agreement

Most standard medical insurance policies state that the coverage includes "malpractice, error or mistake of the insured" or "acts or omissions of the insured as a member of a professional board or committee."[6] Resultant litigation centers about the definition of "malpractice, error or mistake."[7] In *De Mandre v. Liberty Mut. Ins. Co.*,[8] an insured hospital's policy expressly excluded liability for injuries resulting from malpractice, error, or mistake in rendering professional service or treatment. The hospital failed to provide sideboards for a patient's bed, and injury resulted when the patient fell off the bed. On appeal, defendant insurer's motion for summary

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to engage in public professional liability preventive programs, and (11) the cost of the premium.

[4] See Rees & Whelan, "Professional Liability in Dermatology", 86 Arch. of Dermatology 788 (1962), where it is noted that only 256,000 physicians are presently insured, while 62,000,000 automobile drivers are insured.

[5] Hirsch, *supra* note 1. See also Law Department, "Your Professional Liability", 183 A.M.A.J. 750 (1963).

[6] Rees & Whelan, *supra* note 4. This article is not confined to malpractice insurance for dermatologists. Instead, the statements of the authors also apply to the general topic of malpractice insurance.

Noting that 6.8% of all physicians are uninsured, the authors naturally made a strong recommendation for complete coverage. Depending on the circumstances, it was recommended that doctors should carry at least $100,000 coverage for singular liability and $300,000 for multiple insurance claims. In light of the increased incidence of malpractice lawsuits and other factors contributing to higher awards to claimants, it seems that the recommendations of these authors are quite conservative.

[7] See, *e.g.*, American Policyholders Ins. Co. v. Michota, 156 Ohio St. 578, 103 N.E.2d 817 (1917). There, claimant alleged malpractice because the doctor failed to lock a treatment chair, causing injury when claimant fell to the floor. The court held such an incident an accident arising out of the malpractice of insured's profession. The same result occurred when a safety catch on a treatment table collapsed. See Harris v. Firemen's Fund Indem. Co., 42 Wash. 2d 655, 257 P.2d 221 (1953).

[8] 264 F.2d 70 (5th Cir. 1959). Actually, the key issue on appeal in this case involved distinguishing a motion for summary judgment under rule 56 and a motion for judgment on the pleadings under rule 12 (c) of the Federal Rules of Civil Procedure.

judgment was denied, and the cause was remanded for a new trial. The reasoning of the court, although obscure, seems in keeping with the holdings of *American Policyholders Ins. Co. v. Michota* and *Harris v. Fireman's Fund Indem. Co.*[9]

Another physician marked a death certificate with the notation that decedent died of "criminal negligence at X Sanatorium." Three years later, a newspaper published a photostatic copy of the certificate. When the physician sued his insurance company for damages he sustained as a result of the sanatorium suing the physician, the court held that the newspaper publication was not related to professional services, so the doctor could not recover his loss from the insurer.[10]

The far-reaching scope of the terms "error or mistake" in a statement of coverage was revealed in at least one jurisdiction. A California court held that they covered liability *not* based on malpractice exclusively, but also included liability for injuries resulting from the condition of the physician's property.[11]

If the magic words "error and mistake" include a physician's property, will they include a medical practitioner's acts beyond the scope of his practice? An Ohio optometrist injured a patient while attempting to remove foreign matter from his patient's eye. His policy provided indemnification due to "malpractice, error or mistake committed in the practice of optometry." The policy was held not to indemnify the loss. The restrictive clause limiting the coverage to the practice of optometry established the outer limits of "error and mistake." [12]

A most abrasive medico-legal issue is generated when a physician warrants a cure. One court stated that the words "malpractice, error or mistake" refer not only to common-law tort liability, but to all liability including a contract relationship which the warranty established. Hence, the warranty of cure when breached was held to be within terms of the policy.[13] This de-

[9] See note 7 *supra.*

[10] Maier v. U.S. Fidelity & Guar. Co., 133 Colo. 571, 298 P.2d 391 (1956). The court further indicated the insurer would have been liable for an action arising out of the statement included in the death certificate, had the doctor not given the defense to lawyers not approved by the insurer.

[11] Burns v. American Cas. Co., 127 Cal. App. 2d 198, 273 P.2d 605 (1954).

[12] Kime v. Aetna Cas. & Sur. Co., 66 Ohio App. 277, 22 N.E.2d 1008 (1940).

[13] Sutherland v. Fidelity & Cas. Co., 103 Wash. 583, 175 Pac. 187 (1913). Whether a malpractice action sounds in tort or contract usually involves the issue of which statute of limitations should apply, because most state statutes of limitations provide a longer period of time for contracts than for torts. Thus, it is often to the claimant's advantage to allege and prove a contract action, in addition to a tort action, especially when the time period allowed for torts has almost terminated. See, *e.g.*, Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961).

cision might have been different if the terms had not included "mistake or error." Even though the physician did make a special contract, the policy operated because the warranty was made in the practice of a profession and was an understanding which the doctor clearly had a right to make. Most active practitioners, both in law and medicine, identify this rule as wise. Some judicial decisions, however, hold that the special contract warranting cure which is breached is not within the terms "malpractice, error or mistake." [14] An important contribution to the effective meshing of law and medicine could be accomplished by the insurance coverage of such warranties which are common and fundamental to medical practice.

Most courts draw narrowly the insurer's liability for acts of the physician's assistants or employees.[15] A patient operated upon and injured by an unregistered, unlicensed assistant acting in violation of a dentist's instructions created an uninsured incident, even though violation of the dentist's instructions was the direct cause of the injury.[16] A policy covering loss against liability for "error or mistake or malpractice by any assistant in the employ of the assured while acting under the assured's instructions" did not cover a loss from treatment by an assistant without the supervision or instruction of the assured. The assistant was acting in the line of his employment according to previous general instructions and prevailing custom under the employment contract. The court said that, under the contract, the insurer did not undertake to answer for the mistake or malpractice of a doctor's helper acting on his own responsibility, without advice or directions, because the subordinate was unknown to the insurer.[17]

Once again the medico-legal relationship suffers difficulty, for modern medical practice demands extensive use of assistants and employees who operate under general instructions. More understandable is the situation where the physician uses an unqualified, unlicensed assistant. The insurer's contract responsibility requires greater care from the doctor. Insurance coverage in such situations should be and is denied.[18] However, the needs of medical education were not enhanced by one court which denied coverage to a coroner who permitted members of a medical school pathological department to perform an autopsy on the plaintiff's deceased husband. The liability of the physician was held not to be within

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[14] See 70 C.J.S., *Physicians & Surgeons* § 57 (1951).

[15] See Annot. 35 A.L.R.2d 452, 455-57 (1954).

[16] Betts v. Massachusetts Bonding & Ins. Co., 90 N.J.L. 632, 101 Atl. 257 (1917).

[17] Seay v. Georgia Life Ins., 132 Tenn. 673, 179 S.W. 312 (1951).

[18] Glesby v. Hartford Acc. & Indem. Co., 6 Cal. App. 2d 89, 44 P.2d 365 (1935).

the scope of a policy indemnifying him against suiits based on "malpractice, error, negligence or mistake." Though the policy referred specifically to autopsies, the action was against him in his capacity as a coroner, not as physician, and so he was not protected.[19]

The importance of insurance coverage in medical practices covering several phases of medicine must be resolved by proper contract arrangements to prevent what appears to physicians as obsessive, picayune detail. Court decisions after such misfortunes irritate the law-medicine relationship. Adequate contractual arrangements should prevent these occurrences.[20]

Some policies include within their insuring agreement coverage against accidental injuries. One policy insured a physician against liability for injuries "accidentally suffered" from treatment by use of a hair removal machine and injury caused by the constant application of X-rays. Thus, even though the patient "intentionally" submitted to, and the doctor "intentionally" applied the treatment the court held for the plaintiff physician because an accident had occurred.[21]

Defense and Settlement Issues

Perhaps the most important consideration from the physician's point of view is the right to demand that the insurance company procure his assent to any proposed settlement. A physician insured with otherwise adequate protection may find that his policy gives

[19] Crenshaw v. U.S. Fed. & Guar. Co., 193 S.W.2d 343 (Mo. Ct. App. 1946).

[20] See, *e.g.*, Wyckoff, "The Effects of a Malpractice Suit Upon Physicians in Connecticut", 176 A.M.A.J. 1096 (1961). The author of this article, which was based on a thorough survey of physicians in Connecticut, pointed out that most physicians have a great fear of malpractice claims because such lawsuits directly affect the individual's business, even if the claimant loses. Thus, doctors are now looking to malpractice insurance, in addition to "public education" programs to recoup possible losses. The provisions of the contract can be extremely important. For example, in American Mut. Liab. Ins. Co. v. Goff, 281 F.2d 689 (9th Cir. 1960), the policy provided that no coverage would result if the insured had previous claims of malpractice or loss of previous insurance. A party had threatened suit, but never pressed his claim. The court found for the insured doctor because of the ambiguity in the term "claim." At least in this case, the doctor won. However, it is apparent that when recovery from the insurer is finally based on the interpretation of one word, the situation is not the most desirable. Thus, the physician would be wise to know the terms of the insurance contract beforehand. In regard to ambiguities in malpractice and hospital insurance contracts, see, *e.g.*, Douglas v. American Cas. Co., 106 Ga. App. 744, 128 S.E.2d 364 (1962); Cottrill v. Michigan Hosp. Serv., 359 Mich. 472, 102 N.W.2d 179 (1960); Tenney v. American Life & Acc. Ins. Co., 338 S.W.2d 370 (Mo. Ct. App. 1960); Interstate Life & Acc. Ins. Co. v. Houston, 360 S.W.2d 71 (Tenn. Ct. App. 1962); Street v. Continental Cas. Co., 339 S.W.2d 680 (Tex. Ct. App. 1960).

[21] Shaw v. U.S. Fid. & Guar. Co., 101 F.2d 92 (3d Cir. 1938).

him no voice in cases where his professional reputation is at stake. Case law involving these provisions is non-existent. At least one authority, however, recommends that adequate coverage include the physician's written consent to any settlement.[22]

While most policies provide only for the defense of claims which are within the policy's protection, some insurance policies will provide defense of any claim as far as legal services are concerned.[23] Typical is the policy which will defend but not pay any judgment based on a verdict arising out of the performance of a criminal act. If an insurer agrees to pay all legal expenses and to defend all suits, but refuses to pay the legal counsel employed, the physician may pay the legal fees. He does not thereby become a volunteer. He acquires an assignment of the attorney's claim against the insurer and can recover his expenditure.[24]

Conditions of the Contract

The term "condition" embraces those terms of the contract distinctly labeled as such.[25] It also includes terms embracing representations, understandings, and the like, which relate not only to what the physician says he is and does, but also to what he must do once a claim is asserted against him. If a practitioner represents that he is a member in good standing in a state dental society when he secures his policy, his acceptance of a renewal of his policy represents the same effect. If he failed to pay his dues and was not in good standing, the insurer is entitled to cancel.[26]

The condition of cooperation requires prompt notice as well as a full and frank disclosure of all elements of the claim. When a physician is sued, he is entitled as a matter of right to his expenses for travel arising from the litigation. But he has no claim for professional services as a witness in his own case.[27] Other conditions concern direct action against the company. Such clauses usually establish certain conditions precedent, as well as apportionment among any other insurance companies which may be involved.[28] Usually, this part of the policy also states the policy limits, often

22 See Hirsch, *supra* note 1. Naturally, the medical profession is very interested in the settlement of malpractice claims. It has been estimated that 10% of all settlement cases have been in favor of the plaintiff. See Rees & Whelan, *supra* note 4, at 789.

23 See, *e.g.*, Todd v. Fid. & Cas. Co., 48 Ohio App. 459, 194 N.E. 431 (1934).

24 Seay v. Georgia Life Ins., *supra* note 17.

25 See Hirsch, *supra* note 1.

26 U.S. Fid. & Guar. Co. v. Fridrich, 23 N.J. Eq. 437, 198 Atl. 378 (1938).

27 Medical Protective Co. v. Light, 48 Ohio App. 508, 194 N.E. 446 (1934).

28 See, *e.g.*, American Mut. Liab. Ins. Co. v. Goff, 281 F.2d 689 (9th Cir. 1960).

a matter of deep concern to the physician. Should he assume only a minimum dollar protection to discourage litigation as some insurance companies suggest?[29] Litigation will occur despite dollar limits, for the economic reputation of physicians is that of high income. It is therefore better to obtain the protection of maximum dollar limits. Indeed, many physicians now carry one hundred thousand to three hundred thousand dollars coverage.[30]

Exclusions from the Contract

The most common exclusion provision which creates issues in malpractice insurance litigation is the so-called "criminal acts" exclusion. While certain acts are obviously criminal (abortion), other acts are not so obvious (assault and battery from lack of consent).

One court has held that the failure to obtain consent to therapy did not constitute criminal assault and battery as that term was intended under the policy which excluded acts involving assault and battery from policy coverage. But if the patient's injuries were caused by the unlicensed and therefore criminal practice of the physician's assistant, the insured's liability was not within the coverage.[31] Where the unlawful act was not the direct cause of injury, one court suggested that the policy should protect the doctor.[32] But the court held that no legal obstacle exists to the parties agreeing to the basis of liability.

Other exclusions typically involve X-ray apparatus, partnership liability, and the acts of unlicensed assistants. A recent case denied recovery from an insurer by a physician who settled a malpractice claim arising from the wrongful act of an assistant physician who handled calls for the insured physician. The policy had limited coverage to the insured doctor "acting professionally or by assistant in the practice of his profession." Assistant was further defined *not* to include:

> a physician, surgeon, dentist or x-ray technician employed by the insured except while acting under the insured's instructions

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[29] It has been estimated that payments of malpractice claims have increased 23% in between 1950-60, while the number of claims have increased by only 9.8% in the same period. Thus, the suggestion that only minimum dollar protection would be adequate does not seem reasonable. On the contrary, it would seem that *maximum* dollar protection should be the rule. See Nash, "A Statistical Study of Malpractice & Liability Insurance Claims," 61 A.M.A.J. 315 (1960).

[30] *Supra* note 6.

[31] Glesby v. Hartford Acc. & Indem. Co., *supra* note 18.

[32] Betts v. Mass. Bonding & Ins. Co., *supra* note 16.

(a) in the care and treatment of a patient personally attended by the insured or (b) in the performance of an autopsy.[33]

Time Limits of Contract Coverage

The calendar also plays an important role in insurance coverage. Annual premiums must be based on actuarial risks for sound insurance economics. If a patient receives a series of treatments, the first portion may have been given when no insurance coverage existed for no policy had been written. The final portion of treatments may result when a policy is in effect. If the injury to the patient by malpractice standards resulted from the therapy during the final portion of treatment, or if the final treatments alone did no injury but did cause harm when added to the first treatments, then the insurer is liable and the insured is covered.[34] This sophisticated law is bottomed on the simple rule that the insurer is liable only for such malpractice which occurs during the effective dates of the policy's operation.[35] An insurer who declines to defend a physician when the treatment series extends over periods of both no coverage and coverage must reimburse the physician for the amount he expends as the result of the malpractice litigation.[36]

A most serious pitfall for the practitioner can result if the policy is limited to actions brought within two months after the expiration of the policy.[37] Courts will say the contract is binding, the provision is not ambiguous and consequently the insurer is not required to defend.[38] Doctors, who often purchase insurance with naiveté, will not have anticipated this result.

Notice to the Insurer

Most malpractice insurance contracts establish a method by which the insured physician must notify his insurer as to claims against him and the like. Rigid as some of these requirements may seem in print, courts have generally favored the insured, stating that reasonable notice under the circumstances is adequate. A recent case stated that the question of adequate notice, although

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33 O'Neil v. Glen Falls Indem. Co., 310 F.2d 165, 166 (8th Cir. 1962).

34 Shaw v. U.S. Fidelity & Guar. Co., *supra* note 21.

35 Aetna Life Ins. Co. v. Maxwell, 89 F.2d 988 (4th Cir. 1937).

36 Waterman v. Fidelity & Cas. Co., 209 Ill. App. 284 (1917).

37 See Annot., 91 A.L.R.2d 547 (1963). This annotation covers the general law of insurance involving the renewal of insurance policies.

38 Lehr v. Professional Underwriters, 296 Mich. 693, 296 N.W. 843 (1941). *Cf.* Heins, "Insured and Discovered Losses in Malpractice Insurance," 24 Ins. L.J. 399 (1955).

a condition precedent to the insurer's liability, is nevertheless a mixed question of law and fact.[39] Thus, such an issue is to be determined by the jury.

Contractual Conclusions

The doctor seeking insurance protection from malpractice litigation must exercise preventive law. Before purchase, the need to understand what he is purchasing is paramount. The comprehension of what he lacks in insurance coverage is mandatory. The piecemeal interpretation of contractual rights and duties provided by judicial decisions is not conducive to satisfactory medical practice. Legal issues arising from patients' claims which set forth breach of warranties, misrepresentations, criminal acts, concealments, and the multitude of legal technicalities only confuse malpractice insurance, depreciate professional services, and destroy a healthy law-medicine relationship. Insurance carriers and medical societies should be able to construct that degree of medico-legal understanding which permits malpractice insurance to better fulfill its role in the health science practice.

Damage Awards

General Trends

Much like the malpractice insurance law, there have been few recent malpractice cases involving the amount of damages awarded as a key issue before the appellate courts. Nevertheless, the opinions are illustrative of the various courts' policies toward damages in such cases. The holdings are generally divisible into three categories: (1) where the jury award was reduced by the judge under his authority to remit,[40] (2) where the jury award was affirmed,[41] and (3) where no recovery was allowed.[42] Moreover,

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[39] United States Fid. & Guar. Co. v. Dittoro, 206 F. Supp. 528 (M.D. Pa. 1962).

[40] See, *e.g.*, Lates v. Health Ins. Plan of Greater New York, 241 N.Y.S.2d 17 (Sup. Ct. 1963); Farrell v. Lavine, 236 N.Y.S.2d 323 (Sup. Ct. 1962); Ribando v. American Cyanamid Co., 235 N.Y.S.2d 110 (Sup. Ct. 1962); McCrain v. Health Ins. Plan of Greater New York, 207 N.Y.S.2d 685 (Sup. Ct. 1960).

[41] See, *e.g.*, Dietz v. King, 184 F. Supp. 944 (E.D. Va. 1960); Moore v. Webb, 345 S.W.2d 239 (Ct. App. Kan. 1961); Ehrlichman v. Feldman, 231 N.Y.S.2d 390 (Sup. Ct. 1962); Gonzales v. Peterson, 57 Wash. 2d 676, 359 P.2d 307 (1961); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W. 2d 255 (1963), *rehearing denied*, 20 Wis. 2d 1, 122 N.W.2d 439 (1963).

[42] See, *e.g.*, Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (Ct. App. 1963); Deutsch v. Doctors Hosp., Inc., 240 N.Y.S.2d 576 (Sup. Ct. 1963); Kraus v. Spielberg, 236 N.Y.S.2d 143 (Sup. Ct. 1962).

most of the cases arose in the State of New York.[43] A substantial number of the recent cases involved remittiturs imposed either by the appellate court, or by the appellate court's affirming a trial judge's remittitur.

Remittiturs

Basically, remittiturs occur when either the trial judge or appellate court substantially disagrees with the jury award. The disagreement may be due to various reasons, although it is usually stated that the remittitur is necessary because the facts of the case do not justify the amount of the verdict.[44] Most courts apply a "shock the conscience" test on the appellate level,[45] but leave great discretion to the trial judge because of his close proximity to the facts of the case.[46] At the same time, courts which impose remittiturs will often use particular circumstances of the fact situation to enunciate a policy which favors the concept.[47]

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[43] Of 14 cases involving the issue of damages on appeal, 7 were from New York. It is also interesting to note that not one of the New York cases reached that state's court of appeals. Thus, it may be concluded that the plaintiffs were satisfied with the remittiturs imposed and also felt that the no recovery decisions were acceptable, however disagreeable the results may have seemed.

[44] See, *e.g.*, Barnes V. Bovenmyer, 122 N.W.2d 312 (Iowa Sup. Ct. 1963). This case succinctly states the damages rules generally applicable in malpractice cases. Furthermore, it contains a good statement on how to build a malpractice case, including the elements of proof necessary and the causation factors. See generally, Morris, "Malpractice: Medical—The Important Events of the Last Two Years," 30 Ins. Counsel J. 44 (1963); Note, "Theory of a Medical Malpractice Action—Time Limitation and Damages", 64 W. Va. L. Rev. 413 (1962).

[45] See *e.g.*, Leonardo v. Sloan, 23 Pa. D. & C.2d 201 (C.P. 1959). In this case, plaintiff alleged improper X-ray treatments which caused serious third degree burns, in addition to the high probability that cancer would result. The jury awarded plaintiff $18,500 and this verdict was upheld on appeal. The court stated at page 215 that damages in such a case would not be reduced on appeal unless they were "so grossly excessive as to shock the court's sense of justice."

[46] See, *e.g.*, French v. Fischer, 362 S.W.2d 926 (Tenn. Ct. App. 1962). Here, the classic sponge left in the patient situation occurred in an operation on a two week old child. The court reduced the father's recovery for loss of services, giving no reason other than the fact that such a remittitur is within the trial judge's discretion.

[47] *Compare* McCrain v. Health Ins. Plan of Greater New York, 207 N.Y.S.2d 685 (Sup. Ct. 1960) (conduct of plaintiff justified remittitur), *with* Farrell v. Lavine, 236 N.Y.S.2d 323 (Sup. Ct. 1962) (loss of services of three year old child can be only nominal). These two cases in particular illustrate the necessity of reading between the lines of the remittitur opinion. Close reading indicates both courts "felt" the jury awards were simply too great. But neither court would reach a decision without attaching some importance to the fact situation. This, at least, is encouraging because some cases refuse to even discuss the facts of the situation at all. See note 59 *infra*.

Examples

In *Ribando v. American Cyanamid Co.*,[48] plaintiff was awarded 10,000 dollars for injuries which resulted from a broken hypodermic needle which was lodged in the claimant's rectal area. On appeal, the court recognized that malpractice was proved, but reduced the award to 7,500 dollars. The court pointed to the fact that plaintiff had suffered rectal pain *before* the negligent insertion of the needle. Thus, it was reasoned that most of the pain and suffering was *not* due to the negligent act and "therefore" the remittitur was imposed.

It is submitted that the court's logic was not perfect. Instead, it seems likely that the *Ribando* case exemplifies a policy of reducing malpractice awards.[49] This policy is doubtlessly grounded on the well-known fact that juries generally assume doctors have wealth and should reimburse the suffering injured patient.[50]

The policy which apparently favors remittitur in malpractice cases often results in rather odd statements by a court. *Farrell v. Lavine* [51] involved a father's recovery for loss of services of his three-year old child due to a negligently formed spica cast. The son and father were each awarded 2,500 dollars, but the trial judge reduced the father's amount to 1,500 dollars.[52] Naturally, the father ap-

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[48] 235 N.Y.S.2d 110 (Sup. Ct. 1962). Another important issue in this case involved the matter of submitting the issue of improper care of the hypodermic needle in the absence of any expert testimony. The court cited the well-known general principle that expert testimony is not necessary if the matter at hand is within a lay jury's comprehension. In *Ribando,* it was apparent that the surgical needle was not properly tested. In fact, defendant admitted his unfamiliarity with the particular needle used. See generally 70 C.J.S., *Physicians and Surgeons* § 62 (1951), and cases cited therein.

[49] The 1962 Belli Seminar indicates that damage awards for torts in certain states, such as New York, have been lower. Included in this category of cases, naturally, are the recoveries for malpractice. Since most of the recent malpractice cases involving damages occurred in New York, this article's analysis substantiates Mr. Belli's thesis. This is especially true in the remittitur cases. See 12 Belli, Trial and Tort Trends 9 (1963).

[50] See Committee Report, "Professional Liability & The Physician," 183 A.M.A.J. 695 (1963).

[51] 236 N.Y.S.2d 323 (Sup. Ct. 1962).

[52] It is interesting to note that the *Farrell* case involved a good deal of expert testimony regarding the use of the spica cast on the child. According to the expert testimony, the spica cast is not generally used in cases of broken femurs. However, the community standard of care did permit such usage. Thus, the court approved the use of the spica cast, and therefore, negligence could not be proved by the use of that cast alone. On community standard of care, see George v. Travelers Ins. Co., 215 F. Supp. 340 (E.D. La. 1963); Gault v. Sideman, 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963); Johnson v. Vaughn, 370 S.W.2d 591 (Ky. Ct. App. 1963).

pealed. However, the trial judge's decision was affirmed not only because the jury award exceeded the claim stated on the petition, but also because the loss of services of a three year old child could only be "nominal." A literal interpretation of the court's reasoning would indicate that the father would have better profited if his son had been killed by the defendant's negligence. Needless to say, the language of the court makes sense only if read in the context of a policy favoring remittiturs in malpractice cases.

Appellate courts often base a remittitur on the conduct of the plaintiff. As noted previously, plaintiff can be guilty of contributory negligence in a tort action for malpractice.[53] In *McCrain v. Health Ins. Plan of Greater New York*,[54] plaintiff pleaded and proved that defendant had negligently treated a fractured arm, in addition to not discovering a fractured hip. The jury award was 114,600 dollars, even though the plaintiff was a most difficult patient, often leaving the hospital without permission, constantly ignoring medical advice as to proper care, and generally wreaking havoc with the hospital staff.[55] On appeal, the award was reduced to 60,000 dollars. Noting the plaintiff's recalcitrant behavior, the court reasoned that much of the pain and suffering was actually caused by the plaintiff. Also tempering the court's decision was the fact that expert testimony proved there was little chance for complete cure at any stage of the convalescence.

Perhaps one of the more interesting points of the *McCrain* case involved the appellate court's statement that plaintiff obtained a sympathy verdict. In light of the "passion and prejudice" principle [56] followed by many courts in remittitur situations, it is

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[53] See text at note 14 *supra* and 70 C.J.S. *Physicians and Surgeons* § 51 (1951).

[54] 207 N.Y.S.2d 685 (Sup. Ct. 1960). In all remittitur cases, the plaintiff is given an option of either accepting the reduced figure or of having a new trial. As stated previously, research disclosed that all the plaintiffs involved in the instant cases accepted the remittiturs imposed upon them. Perhaps such results indicate that the remittiturs were still of a greater sum than that for which the defendant was willing to settle. And naturally, most litigants are not unmindful of the high costs of appeal, in addition to the amount of time ordinarily consumed by the appellate process.

[55] The plaintiff proved to the jury that his conduct did not actually contribute to his pain and suffering. Nevertheless, the appellate court heavily relied on such behavior in reducing the damages awarded. Thus, in *McCrain*, the court actually delved into the fact situation, impliedly concluding that the jury was incorrect in its conclusion regarding plaintiff's conduct. Query, is an offshoot of the "substantial error" rule normally used by court's to reverse a verdict? Or, on the other hand, does it indicate a modern trend of appellate courts often delving into the fact situations—a province once wholly thought of as the jury's?

[56] *Supra* note 45.

probably correct to assume a remittitur would have been awarded solely on the basis of the sympathy verdict.[57]

As is true in many areas of law, a court's purported reasoning in a malpractice case will often have little to do with the true rationale behind the decision. Instead, a well-known and long standing policy such as charitable immunity will truly govern the case.[58] Students of law quickly grasp the meaning of such decisions, and are able to maintain a reasonable amount of predictability for future cases. However, some of the malpractice cases which involve the issue of damages fall victim to a remittitur opinion totally lacking in explanation. *Lates v. Health Ins. Plan*[59] involved such a situation. There the court simply reduced a pain and suffering award from 22,000 to 5,000 dollars. The decision was purportedly based on the "law and facts," although no law was cited and no facts were given. The methodology is efficient, but it does present the lawyer with unanswerable questions.

The recent cases indicate that if at all possible, appellate courts will attempt to apply a remittitur in a malpractice case. Although such a policy may grate upon the soul of a plaintiff's attorney because his expectations of predictability are diminished, it does recognize the fact that juries often do not favor defendant doctors.[60]

Are remittiturs in malpractice cases increasing? [61] This problem is actually beyond the scope of the present article. However, if the recent cases are indicative, it would seem that remittiturs are increasing in favor if not money amounts.

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[57] This conclusion is especially in keeping with an analysis of the recent remittitur cases. The appellate courts are generally quite anxious to discover whether passion or prejudice influenced the jury's verdict. See Belli, 12 Trial and Tort Trends 362-79 (1963).

[58] Actually, charitable immunity is seemingly on the decline compared with the strict views held in most jurisdictions even one decade past. However, there still is strong impetus to continue the doctrine in the form of legislation. For example, the recent session of the Ohio General Assembly was quite involved with a hospital immunity proposal. Blending the concepts of charitable immunity and hospital immunity in general, the bill would have limited the actual liability for malpractice to the doctors and nurses in a case, excluding the hospital. The bill (S. B. 66) was passed in the Senate but was indefinitely postponed June 28, 1963, in the Elections and Federal Relations Committee of the House of Representatives.

[59] 241 N.Y.S.2d 17 (Sup. Ct. 1963).

[60] See the interesting discussion in Shartel & Plant, Law of Medical Practice 158-63 (1959).

[61] Of the 14 cases involved with this portion of the article, seven involved instances of remittiturs. Of the 14 recent cases, only 3 resulted in no recovery, either by reversing the trial verdict or by upholding a trial judge's dismissal. However, it is quite likely that unknown numbers of cases were dismissed at the trial stage and because no appeal was taken, no appellate record exists of such cases.

Award of Jury Completely Reversed — No Recovery

Recent instances of no recovery have not occurred as often as instances of remittitur. However, the same reasons given to substantiate remittiturs are often employed to justify no recovery in malpractice actions. The tried and true no facts, no law, no reasoning decisions appear, in addition to cases which hold that plaintiff's contributory negligence justifies no award. Finally, the law affords doctors a certain amount of leeway for honest errors of judgment or mistaken diagnosis. The latter category of cases, naturally, always absolves the defendant doctor from liability.

Examples

In *Deutsch v. Doctors' Hosp., Inc.*,[62] defendants hospital and the involved doctors were accused of malpractice causing brain damage to a newly-born child. The jury found for the plaintiff in the sum of 187,000 dollars. However, the appellate court reversed per curiam, stating that the verdict was against the weight of the evidence and that the damages were excessive.

Whether the evidence was slim and the award excessive in *Deutsch* will remain an unanswered question because no real reasons were given and no authority was cited.[63] This type of case drives a lawyer to distraction. An attorney should have a certain amount of reasonable expectations in most lawsuits. A case with no reason and no authority does not yield such a result. Surely the reversal of a jury award of 187,000 dollars is worthy of some comment.

True, the *Deutsch* case may have involved a passion and prejudice verdict. A child injured for life, with a jury of mothers, could raise a high probability of a high verdict. Nevertheless, the courts should not leave such imagined possibilities to the reader. Instead, the elements constituting passion and prejudice should be listed. Such a practice would benefit the legal and medical professions, as well as the individual parties to the case.

Gault v. Sideman[64] exemplifies how plaintiff's contributory negligence can result in no recovery. This case was originally

[62] 240 N.Y.S.2d (Sup. Ct. 1963).

[63] Naturally, there is conflict among various legal philosophers regarding the primacy of reasonable expectations. Some, such as Pound, say that certainty in law is more desirable than justice in a particular case. Others, like Llewellyn, disagree because of the feeling that *justice* in a particular case is the primary goal of law.

[64] 42 Ill. App. 2d 96, 191 N.E.2d 436 (1963). In a quite distinct opinion, the court carefully listed the elements necessary to prove malpractice in tort or contract. In malpractice actions based on tort, the court stated that plaintiff must carry the burden of proof in showing a lack of ordinary care to prove negligence. Furthermore, the court pointed out that in such tort actions, plaintiff could be guilty of

brought in tort, but amended pleadings made it a contract action. Plaintiff based his claim on alleged malpractice in the removal of a ruptured disc. The court took special pains to delineate the differences between tort and contract actions because contributory negligence is no defense to a contract action, while it is to a tort action.[65]

Influenced perhaps by the fact that the contract action was a seeming afterthought and that neither a writing nor the requisite contractual conduct of the parties existed, the court found no contract. Thus, the case was decided on the basis of tort law.[66]

The court found no breach of duty by defendants in that the community standard of care was met. Furthermore, it was stated that plaintiff's conduct "probably" caused most of the injury. Thus, the trial judge's directed verdict was affirmed.[67]

Cases of no recovery also are grounded on the fact that the doctor made an honest error of judgment or diagnosis.[68] The reasoning of such cases merely recognizes that physicians are human and therefore can err.

In *Kraus v. Spielburg*,[69] a rather weird fact situation occurred. The defendant physician falsely told plaintiff that tuberculosis germs had probably entered her stomach and immediate chemotherapy was needed. The doctor was not sure of this particular

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contributory negligence. On the other hand, in contract actions for malpractice, it was recognized that conflicting views existed. Some courts will apply the ordinary laws of contract applicable in commercial law cases. But the instant court recognized that its own public policy provided that the patient-physician relationship contract simply is not similar to a commercial contract. Thus, clear and convincing evidence would be necessary to prove the existence of a contract arising out of the physician-patient relationship.

[65] Distinguishing between the malpractice cause of action in tort and contract, the court stated that in the tort action plaintiff has the burden of proof, must show a lack of ordinary care, and could be guilty of contributory negligence. On the other hand, in the contract action, plaintiff must first prove the existence of a contract to establish consequent rights under it. The court recognized that some jurisdictions will apply mercantile contract rules in malpractice cases, but found such a view contrary to the jurisdiction's public policy.

[66] See generally 70 C.J.S. *Physicians and Surgeons* § 58 (1961) and cases cited therein.

[67] See Shartel & Plant, *op. cit., supra* note 60, at 152-58 (1959).

[68] See 70 C.J.S. *Physicians and Surgeons* § 58 (1951). Such conclusions, it is submitted, are just in nature. True, a doctor occupies a unique position in our society, in that his job often involves the maintenance of human life. Still, it would be gross to conclude that because of his position, a doctor is somehow exalted to a position higher than that of any ordinary human being. The law refuses to recognize such a belief and thus affords the medical profession the fact that doctors are human beings and are prone to error. Any differing belief would seem contrary to common sense.

[69] 236 N.Y.S.2d 143 (Sup. Ct. 1962).

diagnosis, but he knew the plaintiff was generally tubercular and needed immediate help. His thought was to frighten plaintiff into submitting to the treatment. Plaintiff, however, felt the frightening act was so convincing that she should be allowed recovery for the psychic injuries which resulted. Both the trial and appellate courts recognized that the doctor was wrong in his method.[70] It was stated that perhaps if nothing else were wrong with the plaintiff, the outcome of the case would have been different. However, the fact that plaintiff did have tuberculosis tempered the court's reasoning process. Although defendant's method was not considered the best advisable, the courts excused it in light of the circumstances.

This particular decision appears just. Often, recalcitrant patients refuse to submit to treatment because of a basic distrust of medical men, even though the circumstances might be quite dire indeed. Furthermore, many jurisdictions find it difficult to associate mental pain and suffering without a physical chain of causation. This latter factor may also have influenced the court's verdict.[71]

The small number of recent "no recovery" cases makes it impossible to ascertain a recent trend. Thus, the reader is left to his own conclusions. However, it should be noted once more that the no reasons, no authority cases are not palatable professionally to either lawyers or doctors.

Adequate Damages

Several cases have upheld the damages awarded, and for various reasons. Naturally, an example of the "no reason" cases exists. Nevertheless, several other decisions list certain elements necessary in upholding the damages awarded by a jury.

In *Ehrlichman v. Feldheim*,[72] plaintiff alleged osteopathic malpractice in which the defendant negligently inserted a needle into a back muscle, causing the collapse of a lung. The jury awarded plaintiff 7,500 dollars and her husband 1,500 dollars for loss of services. The court, although giving no reasons, accepted the jury's

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[70] Obviously, the defendant was attempting to apply common sense psychology to convince a patient that treatment was an immediate necessity. If the patient is somewhat uneducated and is habitually distrustful of medical men, is there any other alternative available to persuade the patient that the situation is serious? The court gave no other alternative, which was unfortunate, because many physicians faced with similar circumstances would like to know the proper method to employ.

[71] See Prosser, Torts § 18 (2d ed. 1955).

[72] 231 N.Y.S.2d 390 (Sup. Ct. 1962). In this case, defendant admitted unfamiliarity with the needle used. He made a rather unique defense of coincidence, alleging that the injury and breaking of the needle were related events. Perhaps this defense was particularly indigestible to the court and influenced the outcome of the case.

verdict. It was stated that plaintiff met her burden of proof and the requisite causal connection existed.

Gonzales v. Peterson[73] involved a claim of malpractice by a high school athlete. Plaintiff broke an ankle while playing football and the cast was set by a doctor who then retired. The defendant took over the case and removed the cast. He failed to take any subsequent X-rays, but told plaintiff things would be all right. Plaintiff suffered further injury. The jury awarded 450 dollars for pain and suffering. Dissatisfied with the low award, plaintiff appealed, claiming he should have recovered for the lost opportunity of employment. The court rejected this contention, apparently relying on the fact that plaintiff's student status removed him from the usual category of recovery for lost employment. Furthermore, it was stated that the damages could only be related to the negligence of defendant. Thus, since plaintiff actually broke the ankle, defendant could not be responsible for that particular pain and suffering. However, there was a breach of duty, but 450 dollars was considered adequate damages.

Was not the court correct in its analysis? True, it is sometimes difficult to draw the line between suffering caused by malpractice and suffering caused by the injury itself and not due to malpractice. The fact of malpractice should not of itself make the defendant liable for absolutely everything related to the injury. Instead, most authorities consider justice is accomplished for both parties when damages are recovered only for injuries caused by the doctor's negligent act.[74]

The sponge left in the body after surgery is familiar to everyone.[75] Today, it is generally recognized that liability will result. However, *Dietz v. King*[76] is indicative of how the courts may meticulously analyze such a situation, instead of indiscriminately giving the plaintiff an award. In *Dietz*, an operation for breast cancer was performed. Plaintiff slipped into a state of shock, and the surgery was hastily completed. As a result, a sponge was left in plaintiff's body and was not discovered until a subsequent trip to England. The jury awarded 6,000 dollars plus costs. On appeal, the case was affirmed. The interesting portion of the case, however, is the reasoning used to ascertain the limits of damages. The

[73] 57 Wash. 2d 676, 359 P.2d 307 (1961).

[74] See, *e.g.*, Bockman v. Butler, 226 Ark. 159, 288 S.W.2d 597 (1956); Beauchamp v. Davis, 309 Ky. 397, 217 S.W.2d 822 (1948); Olsen v. McAtee, 181 Ore. 503, 182 P.2d 979 (1947).

[75] 70 C.J.S. *Physicians & Surgeons* § 66 (1951) lists several cases on the subject. In fact, the sponge left in the body has become a classic illustration of medical negligence.

[76] 184 F. Supp. 944 (E.D. Va. 1960).

court stated that the operation could not be considered malpractice because of the emergency situation which developed. Instead, the malpractice occurred when defendant failed to take X-rays after the operation to determine whether the surgery had been effective.

Dentists often are involved in malpractice cases because it is alleged that the wrong teeth were removed.[77] In *Moore v. Webb*,[78] plaintiff complained of *all* her teeth being removed while she was under anesthetic. Defendants claimed estoppel because authority for such removal was granted by plaintiff when she signed a "referral" card. Plaintiff was awarded 5,500 dollars, and this was affirmed on appeal. The court pointed out that commercial contract law is *not* followed in malpractice cases because the physician-patient relationship does not arise from any such contract, but rather from the trust, confidence, and special nature of the relationship. Thus, estoppel would not apply because plaintiff believed that certain teeth were to be removed, not all of them.

Analysis of this case is quite illuminating to both potential plaintiffs and defendants. Obviously, any doctor should realize that a mere written form will not always limit liability or grant him authority. Indeed, it would seem likely that serious explanation of such a card's contents is necessary, otherwise it might be a nullity.[79] On the other hand, plaintiffs should not assume that they have no worries as far as written forms are concerned. Instead, it is suggested that the facts of the *Moore* case prejudiced the court into such one-sided inclinations. For generally speaking, there can be contracts which alter the normal patient-physician relationship.[80]

Perhaps the most interesting of the recent malpractice cases involving damages is *Fehrman v. Smirl*.[81] There, the Wisconsin court finally recognized *res ipsa loquitur*, which subject is beyond the scope of this article. For purposes of this analysis, however, other considerations are important. Plaintiff claimed malpractice in a prostate gland operation which caused impotency and loss of control over urinary activities. Amidst conflicting expert testimony, erroneous instructions, and the like, the appellate court granted defendant's motion for new trial. The Wisconsin special verdict had resulted in 115,000 dollars damages for plaintiff, although the defendants were found not liable. Thus, the court upheld the damages awarded, but granted a new trial on liability.

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[77] See Annot., 80 A.L.R.2d 320 (1961); Annot., 13 A.L.R.2d 1, 61-76 (1950).

[78] 345 S.W.2d 239 (Kan. Ct. App. 1961).

[79] *Supra* note 64.

[80] See 70 C.J.S. *Physicians & Surgeons* § 66 (1951).

[81] 20 Wis. 2d 1, 121 N.W.2d 255, *rehearing denied*, 122 N.W.2d 439 (1963).

Relation Between Insurance Coverage and Amount of Verdict

An important problem exists when a malpractice judgment rendered against a physician exceeds the coverage limits of the insurance policy. True, the insurer usually agrees to defend the physician, but generally only to the limits of the policy. As a consequence, the insured often pays the amount of the judgment which is beyond those limits. Here is where the laws of damages and insurance squarely meet.

The traditional law of insurance and damages has favored, as a matter of policy, the rule that the insurer is liable only for the amount of coverage stated in the policy.[82] There are indications, however, that this law is changing.[83] Some cases have recently held that the insurer is liable for the total amount of the judgment, even in excess of the coverage, because the insurer controlled the entire lawsuit and because of a changing public policy.[84]

Will this recent trend grow? Will it apply to physicians and their malpractice insurers? These questions form the basis of the great uncertainty in the area of malpractice insurance. As important as this matter is, not one case has risen involving physicians and liability of the malpractice insurer beyond policy limits. In fact, the 1963 American Medical Association Report has noted the absence of law in this area and cautions physicians to be aware of possible personal liability if courts apply the traditional insurance rule.[85]

Conclusion

Thus, the intricacies of damages awards and the complications involved in malpractice insurance still exist. The words of caution promulgated by the A.M.A. only recognize the fact that the meshing of damages law and insurance law in regard to physicians has neither been harmonious nor certain. And in some situations, legal precedent has not even existed. The doctor, lawyer, and insurer still face certain obstacles for which there is no legal solution. These parties must rely on their own abilities until courts or legislatures decide who is to pay the amount of judgment beyond the policy limits, establish a consistent policy in regard to the definition of the terms "malpractice, error or mistake," and realize that although physicians sometimes are negligent, the increasingly higher awards are not helping doctors, insurers, or the public in general.

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82 See generally Annot., 76 A.L.R.2d 983 (1961).

83 *Id.* at 985.

84 See, *e.g.*, River Valley Cartage Co. v. Johnston, 104 So. 2d 734 (Fla. 1958). See also 29A Am. Jur., *Insurance* §§ 1591-94 (1953).

85 Committee Report, "Professional Liability & The Physician", 183 A.M.A.J. 695 (1963). The discussion in note 3 *supra* is also pertinent to this portion of the article.