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COMMENTARY: FINDING FAULT WITH "NO FAULT"

Miles J. Zaremski & David J. Schwartz***

INTRODUCTION

PROFESSOR GRAD INTRODUCES his article with his oft-repeated thesis that "the so-called medical malpractice crisis [is] in reality a crisis of insurance availability." This insurance availability crisis, Professor Grad asserts, has led to a series of public policy problems in health care, including rising health care costs and the practice of defensive medicine. While the precise nature of the crisis is subject to dispute, there is no doubt that liability insurance is becoming increasingly difficult to obtain in necessary amounts at a reasonable cost. Contributors to the problem of insurance availability include members of the legal and medical professions, the insurance companies, and the public itself. While none accept credit for the crisis, each participant has its favorite villain.

There are the "greedy" lawyers, who by sheer volume of malpractice suits hope to stumble on one or two cases with recoveries comparable to lottery jackpots—the type of case which can put a lawyer on financial easy street. While awaiting the enormous judgment, the lawyer is able to pass the time collecting numerous small awards in the hope of striking it rich. The legal profession counters that only a small percentage of valid medical negligence claims are ever filed, and only a small percentage of those result in verdicts of over one million dollars.¹ Moreover, only the threat of a lawsuit

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1. Only 10 percent of negligent malpractice injuries result in a claim and only 40 percent of claims result in payment. Danzon, *An Economic Analysis of the Medical Malpractice System*, 1 BEHAVIORAL SCI. & L. 39, 42 (1983). In 1984 only 401 suits nationwide resulted in verdicts of over one million dollars, and those suits were not limited to the medical negligence arena. Rosenbaum, *The Liability Crisis and How to Cool It*, N.Y. Times, May 27, 1986, at 23; Wermiel, *The Costs of Lawsuits, Growing Ever Larger, Disrupt the Economy*, Wall St. J., May 16, 1986, at 1; *Myths About Million-Dollar Settlements*, N.Y. Times, May 25, 1986, at 18E. While 400 million-dollar verdicts is no small number, in light of the number of suits nationwide and the premium dollar amount insurance companies collect, those verdicts could hardly be the pivotal factor causing physician insurance premiums to triple and quadruple.

provides any present deterrent to shoddy medical practice.

There are also the "greedy" doctors whose average income far exceeds the average income of lawyers but who plead poverty. Rather than address such issues as how to provide better care or how to better police their peers,² some physicians focus on cost concerns, claiming that malpractice premiums are putting them in the poor house and causing the cost of health care to skyrocket. In reality, premiums for physician malpractice insurance have had a very small effect on doctors' income or their standard of living.³

Then there supposedly are the "greedy" insurance companies which often have the luxury of sitting back and watching the doctors and lawyers point accusingly at each other.⁴ The insurance companies claim they cannot afford to continue insuring health care practitioners due to the vast increase in the frequency and severity of claims, lawsuits, and judgments. Of course, the insurance companies do not disclose the profits they are earning as they are ostensibly being driven out of the market.⁵ Nor do they emphasize their

2. See, e.g., Cowan, *MDs, Juries and Peer Review*, Chicago Tribune, Jan. 24, 1986, at 17; Strasser, *Malpractice: A Crisis of Doctor's Making?*, Nat'l L.J., Sept. 16, 1985, at 8.

3. On the average only one to two percent of a physician's salary (six percent for high risk specialties) is absorbed by the cost of procuring malpractice insurance. See *supra* note 1; Kleinfeld, *The Malpractice Crunch at St. Paul*, N.Y. Times, Feb. 24, 1985, at 4F; Tybor, *AMA's Malpractice Stand Ripped by Lawyers*, Chicago Tribune, Feb. 10, 1986, at 1, col. 5.

4. A good example of this may be found in Mathewson, *The Law: What the Doctors Ordered*, Reader, July 26, 1985, at 10. In that article, the author stated that it is tempting to view the insurance crisis as a "battle of the titans"—referring to doctors and lawyers but completely excluding the insurance companies. In Mathewson's words, "You have rich lawyers versus even richer doctors, and regardless of how they divy up their share of the pie the rest of us end up with the same sliver." Of course, the insurance companies take a large piece of the pie also, but on the whole the insurance companies have been successful in their efforts to keep the public focused on a "lawsuit crisis" rather than an insurance crisis. For discussions of the role of insurance companies in the latest crisis, see Hunter, *Taming the Latest Insurance "Crisis"*, N.Y. Times, April 13, 1986, at 3C; *The Manufactured Crisis: Liability-Insurance Companies Have Created A Crisis and Dumped It on You*, CONSUMER REPORTS, Aug. 1986, at 544 [hereinafter cited as *The Manufactured Crisis*]; Strasser, *Tort Crisis Focus Shifts to Insurers*, Nat'l L.J., June 9, 1986, at 1; Levin, *The Insurance Crisis: Is Blame With Industry?*, Chicago Tribune, June 16, 1986, at 9A.

5. The Insurance Information Institute originally claimed the insurance industry suffered a \$5.5 billion loss in 1985. The National Insurance Consumer Organization claimed its actuarial analysis indicated a \$6.6 billion gain for the insurance industry in 1985. In reply, the Insurance Information Institute reiterated its claim of a 1985 \$5.5 billion operating loss, but conceded the industry expected to have close to two billion dollars in after-tax income in 1985. See INSURANCE INFORMATION INSTITUTE, *NADER-HUNTER CHALLENGE ON 1985 PROFIT/LOSS IN P/C INDUSTRY* (1986); Decker, *Insurance Industry Has Transformed Its Problems Into Tort System Crisis*, Chicago Daily L. Bull., April 26, 1986, at 5. It is interesting to note further that casualty insurance stocks soared in 1985 to levels more than twice the Dow Jones Industrial Average. See Decker, *supra*. Obviously, many investment analysts believe the insurance industry is a good place to make a profit.

poor investment returns due to falling interest rates as contributing to their reduced profits. Since insurance companies in the past earned most of their money through premium investments, the recent poor performance of insurance company portfolios plays a significant role in the financial position insurance companies have recently confronted.

Finally, there is the "greedy" public. The structure of our legal system allows those injured by negligent health care practitioners to recover damages. Our legal system inherently rewards those who take greatest advantage of the system by suing for ever larger awards, using the most skilled attorneys. This, in fact, is the bottom line of the crisis. More people are increasingly willing to sue and claim ever larger amounts.⁶ Moreover, these same people comprise the juries which award ever greater recoveries. Thus, the crisis is really not one of mere insurance availability; it is a system-wide crisis of burgeoning litigation which has manifested itself partially in the health care field.

While insurance availability is certainly a problem, the cause of this problem is rooted in both the litigious nature of American soci-

6. There has been substantial, recent debate over the question whether a crisis in litigiousness actually exists. Robert Roper of the National Center for State Courts conducted a study of court filings in 25 states covering the years 1978 to 1984 and concluded that "a careful examination of the available data provides no evidence to support the often cited existence of a 'litigation explosion.'" See Lauter, *Report Says Litigation Explosion is a "Myth"*, Nat'l L.J., April 28, 1986, at 46; Brill & Lyons, *The Not-So-Simple Crisis*, THE AM. LAW., May 1986, at 1; cf. Marvell, *There is a Litigation Explosion*, Nat'l L.J., May 19, 1986, at 13.

In a recent advertisement in the New York Times (May 21, 1986, at 10) the Medical Society of New York stated that the "crisis in New York is *not* due to a tremendous increase in the number of suits, but is the result of skyrocketing increases in the amounts being awarded." Actually, the median jury award over the past 25 years has remained a remarkably constant 20-25 thousand dollars in 1984 dollars. See Hunter, *supra* note 4.

Whether a litigation crisis actually exists is unclear. Nonetheless, it is quite clear that the number of million dollar-plus verdicts is increasing at an alarming rate. The first award of over one million dollars occurred in 1962 and by 1985 there were over 400. See Rosenbaum, *supra* note 1; Wermiel, *supra* note 1. That first million dollar-plus verdict in 1962 was reduced by the court to \$450,000. In fact, a high proportion of jury awards, particularly those over one million dollars, are reduced substantially by the courts. See *The Manufactured Crisis*, *supra* note 4, at 545.

While these awards might not threaten insurance company liquidity, the increasing rate of multi-million dollar verdicts makes actuarial predictions more and more difficult. See Nash, *Are Insurers Caught in a Squeeze or Putting It On?—Calculating Risk is Riskier Business Now*, N.Y. Times, May 25, 1986, at 18E.

Insurance companies have a difficult time projecting what their future losses may be in the present litigious climate. If they have no rational way of determining costs, how can they determine what premiums to charge? Insurance carriers must adjust their rates to reflect this uncertainty. See *supra* text at part IV.

ety and a tort system which rewards those who push the system to its limits. What is the solution to a problem rooted in the foundations of our culture and our free democratic society? Should partial solutions to particular symptoms, such as the symptom of rising insurance rates, be undertaken, or should system-wide reform be considered? Professor Grad's proposition for the development of a no-fault compensation plan evinces the former approach.

In evaluating Professor Grad's proposed solution to the symptomatic crisis of insurance availability, several questions must be considered. Most important, it must be determined whether a no-fault plan also provides a solution to the system-wide problem of litigiousness or the social ills it has spawned. At minimum, his plan must reduce the cost of medical malpractice insurance. It fails in all respects. Not only does his no-fault system fail to address the basic nature of the systemic problem, it also fails to reduce total costs or to remedy the particular social ills he criticizes as products of the present "fault-based" insurance system.

I. DETERRENCE

One social ill Professor Grad asserts has resulted from the easy availability of malpractice insurance is the failure of the tort system to pose a threat to physicians, thereby abrogating the deterrent value of the legal system. According to Professor Grad, insurance protects the physician's assets and therefore does not deter or discipline negligent conduct. He argues that since "the threat of litigation has not resulted in . . . fewer lawsuits," the threat of litigation must not fulfill an adequate disciplinary function. Contrary to this reasoning, a reduction in the number of malpractice claims is not necessarily an indication of increased medical competence. There are a number of reasons why the rate of filing of malpractice claims may fluctuate without reflecting a change in the level of physician competence. For example, an increase in filings may be due to an increased awareness of consumer rights, an increase in the public's willingness to sue, or an increase in the incentive to file (higher awards). As Professor Grad himself recognizes, "[T]he increase of the number of medical malpractice claims does not apparently bear a necessary relationship to negligent medical care."

Contrary to Professor Grad's assertion, despite the presence of insurance, the threat of a lawsuit does have a deterrent effect. A malpractice suit affects a physician's reputation, self-esteem, and the future of his practice. The fact that a physician's home is not at risk

does not mean that insurance negates the deterrence or disciplinary value of malpractice suits.

Professor Grad also argues that the present insurance system induces the practice of costly and wasteful defensive medicine by health care providers. He defines defensive medicine as "subjecting patients to diagnostic and therapeutic procedures, not because they are necessary for the benefit of the patient, but in order to establish a litigation-proof chart." Professor Grad is opposed to the practice of defensive medicine because of the added cost it apparently imposes upon the health care industry. However, there is no precise agreement as to what constitutes defensive medicine. A defensive procedure by one practitioner may be regarded by another as essential for the protection of the patient. Thus, defensive medicine really appears to mean that a doctor keeps more and better records, orders more diagnostic tests, and makes certain the patient is fully informed when making treatment decisions. If defensive medicine means raising the standard of care, regardless of the reasons prompting it, the threat of litigation apparently does serve as an inducement to better health care.

Even if the threat of litigation posed no deterrence to poor medical practice, a point certainly arguable, a no-fault compensation plan entirely abrogates any notion of deterrence. Under a no-fault system, the physician would no longer need to fear the glare of public scrutiny, the only deterrent in the present system. While it may be true that there is no empirical evidence equating defensive medicine with a higher standard of care, a no-fault system which removes the sole incentive to perform medical services with a greater degree of diligence is not advisable.

II. STANDARD OF CARE

Perhaps the single greatest flaw with a no-fault compensation system is the difficulty in determining what constitutes a compensable injury. If a negligence standard is abandoned, what standard replaces it? While automobile accidents and work-related injuries have been the subject of no-fault laws, an injury during the course of medical treatment is much more difficult to quantify. How does one know whether an injury is due to the medical treatment (or lack thereof) or due to the underlying disease? What will be the new standard of care? What elements will be necessary to establish that the standard has been met?

Professor Grad articulates alternative solutions. First, he sug-

gests that a finite list of compensable events may be established. It has been estimated, however, that "the number of potentially compensable events would be between 75 and 150 times the number of injuries currently compensated through tort. [However,] because of the difficulty of distinguishing [a medically caused] injury from anything less than perfect health outcome, the number of claimants could be much higher."⁷ Aside from the obvious expense of compensating the much greater number of claimants, what happens to those persons injured during the course of medical treatment whose injuries are not on the list?

Professor Grad's alternate suggestion is to define compensable events in very general terms and leave the question whether the injury is treatment-connected to the hearing officer. Once again, the lack of a defined standard is a problem. How will the hearing officer determine what is compensable without a uniform standard? Will the negligence standard creep back in? After all, demonstrating negligence may become the most practical means of establishing that an injury is due to medical intervention rather than due to the underlying illness. Professor Grad has no solution to these questions. Instead, he concedes the "problem needs to be studied and worked on."

III. COST SAVINGS

Professor Grad further advocates the use of a no-fault compensation system as a method of saving the substantial cost of litigation. While it is true that a percentage of the cost of insurance is used to pay for the litigation process, there is no evidence that a no-fault compensation scheme will save money. In fact, the contrary is true. A study conducted by Dr. Don Harper Mills in California several years ago indicated a no-fault system would cost \$800 million more than the present system.⁸ The failure to effect a savings over the cost of the present system is due to the increased number of claimants and the consequent cost of administration. Currently, the system requires that a claimant establish a physician's negligence prior to obtaining any recovery. Since only an adverse result, rather than negligence, need be established under a no-fault system, many more claims would likely be filed.

7. P. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY* 216 (1985).

8. See Zaremski & Weibel, *There Is No Answer to the Medical Malpractice Crisis* 6 J. LEGAL MED. 265 (1985).

Although Professor Grad asserts that a no-fault system will save the "friction" cost of proving negligence, even he ultimately recognizes that replacing fault-based insurance will not really achieve any savings. Rather, it will use cost savings to compensate a greater number of people. He states, "the primary objective of a compensation system would be to make payments to as many injured persons as possible in as substantial amounts as available, by saving the 'transaction' or 'friction' costs." Moreover, the supposed savings of friction costs could be expended simply through administrative requirements. Thus, the amount presently available for distribution to injured claimants would be available to pay the many more claimants under a no-fault plan. In effect, a no-fault system would act like a cap on awards to injured persons (the same dollars spread thinner) but without any savings to the health care system. In Professor Grad's words, although "assured of some benefits, the injured person would be compensated under a system of strictly limited recoveries."

The question of funding is another problem with the no-fault plan. Various candidates for paying the insurance premiums exist, such as the health care provider, the consumer, or the state government. While the final alternative is, of course, an individual state decision, it is difficult to envision any savings over the present fault-based system regardless of how the new system is funded.

IV. THE TRUE CRISIS

In sum, a no-fault system for providers of health care would not achieve savings over the present cost of health insurance. Neither would it address the primary problem of an excessively litigious society and ever increasing jury verdicts. *The present malpractice crisis is really a crisis of the tort law system.* Our legal system has no safeguards against a culture which becomes accustomed to suing for enormous damages on grounds which years ago would not have led to suit. The "crisis of insurance availability," as Professor Grad labels it, is no more than an effect of the crisis of litigiousness in American culture.

While insurance companies may not yet be going bankrupt paying very high judgments, insurance carriers are finding it increasingly difficult and sometimes impossible to predict costs, and hence what premiums to charge. For example, in late March of 1986, a Chicago woman was awarded \$39 million due to the loss of her two

legs,⁹ and a jury awarded a Philadelphia woman nearly one million dollars for injuries following a negligently performed CAT scan. The injuries included intense headaches, breathing difficulties, incontinence, and the alleged loss of psychic abilities.¹⁰ Anecdotal evidence may be questionable, and the foregoing examples may be extreme, but enough anecdotes very likely indicate a trend: multi-million dollar verdicts are becoming more commonplace. However, predicting them, together with the number of lawsuits and attendant costs, becomes an actuarial nightmare.

The problem with actuarial predictions is a problem affecting the entire American tort system, not simply a problem impacting on doctors. While health care providers may be at the forefront of the crisis, everyone in our society is confronted with the problem. Professionals, such as architects, accountants, and lawyers, are facing burgeoning insurance premiums due in part to both the increasing frequency of suits and severity of judgments. Manufacturers, automobile owners, and even insurance carriers are finding their premiums rising, or, in many instances, their policies being cancelled. The piecemeal approach to the crisis as advocated by Professor Grad, which proposes to create special protection for health care practitioners, is simply not the solution. There is no justification to afford physicians special treatment for a problem affecting everyone. If a solution does exist, it must be found in reducing the incentive, not the right, to sue.

If the outcome of a tort suit were not as potentially lucrative as it is today, many people would initially refrain from suing. Those that do sue would settle their claims without being influenced by the possibility of winning the big verdict. If our society becomes less litigious and an equilibrium is established for jury verdicts, insurers will be able to develop rational actuarial projections, thereby bringing the accelerating cost of premiums under control.

Some of the suggestions designed to ensure actuarial soundness and insurance availability currently before many state legislatures include ceilings on awards for noneconomic damages (e.g., pain and suffering), abrogation of the collateral source rule, and abolition of joint and several liability. By reducing the amount of potential recovery, these proposals also reduce the incentive to sue.

In a Rand Corporation study of the post-1975 tort reforms,¹¹ it

9. Cook County Jury Verdict Reporter, Vol. BB, No. 23, March 28, 1986.

10. See THE MANUFACTURED CRISIS, *supra* note 4, at 546.

11. P. DANZON, THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS (1982).

was found that ceilings on awards and mandatory offset of collateral compensation had a substantial effect on frequency and severity of claims and judgments. States enacting a cap were estimated to have had a nineteen percent lower average severity within two years.¹² Mandatory collateral source offset effective for two years was estimated to result in a fifty percent reduction in severity.¹³

Despite these statistics, Professor Grad has several objections to tort law changes designed to ensure actuarial soundness and insurance availability. First, he asserts that the "unpredictable character of malpractice claims raises doubts" whether tort law changes would be effective. While the character of malpractice claims may be unpredictable, that is a problem which exists regardless of how the insurance crisis is approached. Moreover, the unpredictable nature of malpractice claims seems particularly problematic in developing a no-fault compensation scheme. With reference to no-fault, however, Professor Grad asserts that "the number of adverse medical outcomes or medical injuries [may be] finite and . . . capable of specification." If medical injuries are predictable in a no-fault system, why are they unpredictable in a fault-based system?

Second, Professor Grad asserts that to reduce the cost of insurance, tort law changes would have to make it more difficult for patients to recover from physicians, perhaps requiring a patient to prove gross negligence rather than simple negligence. This is simply not true. To assure competent actuarial projections, it may be necessary to make it more difficult for patients (and all tort plaintiffs) to recover excessively large judgments, but not necessarily to recover any judgment. While it is true that award caps for noneconomic damages are objectionable to some, a no-fault system would necessitate an even lower cap on awards (including economic damages) in order to pay all claimants suffering adverse outcomes not necessarily due to negligence.

V. CONCLUSION

While there is certainly a problem in insurance availability, that problem is really a part of the greater crisis—the litigious nature of our society. Consequently, any proposed solution, if it is to have a hope of success, must address the basic issue of decreasing the incentive to sue. A no-fault compensation scheme available only to physicians fails to accomplish this. Moreover, it fails even in its

12. *Id.* at vi.

13. *Id.*

primary endeavor to reduce the cost of health care. Concomitantly, a no-fault system removes the disciplinary threat of litigation and fails to replace it with an incentive to perform at the highest level of medical competence. The proposed no-fault system fails to identify a standard of care to which physicians will be held accountable, and it fails to delineate how to determine compensable outcomes.

In short, a no-fault system of medical insurance is not a viable solution. Any solution which is to be successful must address the correct issue. The problem in insurance availability is an effect, not a cause, of a greater ill in our society. That ill is the eagerness to sue, as is said in the vernacular, "for everything you've got."