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Foreword

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FOREWORD

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> *. . . virtue must have the quality of aiming at the intermediate. I mean moral virtue; for it is this that is concerned with passions and actions, and in these there is excess, defect, and the intermediate. For instance, both fear and confidence and appetite and anger and pity and in general pleasure and pain may be felt both too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right motive and in the right way, is what is both intermediate and best, and this is characteristic of virtue.*

From Book II of Aristotle's Nicomachean Ethics.

My father, a veteran of many labor contract negotiations, tells of a union official who would often make references to certain abstract and generally obscure "principles" which prevented the union from compromising its bargaining position. Once, on the occasion of rejecting the company's latest offer for a wage increase, he liberally employed his familiar rhetorical device. When pressed to be more specific regarding the principle precluding union acquiescence, his response was, "What principle? I'd say about 15 cents an hour."

In many different contexts, not only labor negotiations, the dollar-and-cents-variety of principal overshadows the principles at issue, and the "bottom line" of a controversy is simply the bookkeeper's definition of that term. Concerns which are not so obvious, and therefore less compelling because less obtrusive, are discounted if not completely ignored. And, not surprisingly, it can then at least appear completely self-evident that the only analysis of real consequence is that which involves money. Needed moderation and a sense of balance are lost in the commotion.

Such is the case with professional malpractice litigation. Professionals exposed to expanding theories of liability battle those who promote generous recoveries to persons supposedly victimized by professionals' wrongdoing. Each marches to a steady and monotonous beat, bent on getting or retaining, as the case may be, a larger piece of the pie. A fixation on divvying up the spoils portends other prob-

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lems, however, because civil litigation can only divide, not enlarge, the pie. What follows, then, is a contentious and seemingly endless dispute, maybe not for individual litigants but certainly for the participants in the aggregate. So long as the discourse is dominated by such considerations, there will be a rather fundamental polarization of interests and an improbability of meaningful and lasting peace. Instead, perhaps the best to be hoped for is an ongoing cold war; more likely, the uneasy truce will not hold at all, and the combatants will continue to devote substantial amounts of time, energy and economic resources to waging and eventually escalating the war. In the process, one generation of professionals (especially doctors, and, to a lesser extent, virtually all other professionals) will perceive itself under siege and teach the next to revile attorneys and distrust the legal system. And, in like manner, self-interested segments of the legal community may never consider the option of beating certain of their swords into plowshares, even if that would be ultimately beneficial to the citizenry.

A fresh and maybe even daring way of looking at professional malpractice disputes must be constructed, beginning with a recognition of the warped outlook brought about by that singular focus on money which invariably reduces debate to the lowest common denominator of our values. Because of its undeniable significance, money will of necessity always play a prominent role in this type of litigation. But other vital factors are also involved, and they, too, need to be addressed and integrated into the formula for resolving professional malpractice cases. Taking these additional factors into account should elevate the debate and help to create a methodology which is sounder, if only because it produces a stronger consensus that justice is being rendered.

Given human nature, one might question whether it is realistic to expect the repudiation of a single-minded focus on the pecuniary aspects of these cases. We can at least change the tenor of malpractice litigation by actively exploring the non-monetary issues presented by the controversies. Even modest steps in this direction can avail much, because in addition to redefining the issues, shifting the focus more to non-pecuniary concerns will also necessarily contribute to a more humane perspective of the participants. When the primary considerations are financial, deep-pocketed professionals are obviously seen as attractive defendants. But lucre aside, they are also human beings who have much to lose from being sued. On the other hand, if pecuniary considerations do not dominate the controversy, professionals may more readily accept the fact that some injured patients, clients, parishioners, etc., have had their lives profoundly altered by the mistakes of their professional colleagues. Such insights should lead to the recognition that, for better or worse, our legal system is the only mechanism by which these injured parties can obtain redress.

Having said all this, and especially after having proclaimed the benefit of even "modest" efforts at redefining the issues, a thought or two on a possible reorientation of perspective and modification of the system's handling of professional malpractice cases is in order. In my mind, the discontent among participants in malpractice cases, especially the professionals, has a great deal to do with the fact

that non-lawyers tend to interpret determinations of civil liability as moral pronouncements. For many lay persons, the victor in a malpractice action has been adjudicated as good, deserving, virtuous, blameless, or upright; the loser as bad, undeserving, corrupt, defective, or iniquitous. The rhetoric of closing arguments notwithstanding, for most judges, lawyers and others sophisticated in the legal process, dispensing justice in civil actions no longer resonates with such moral overtones. Thus, litigants and lawyers view the proceedings from fundamentally different perspectives. Perhaps more significant is the fact that the decisions often do not correlate with the professional's own sense of right and wrong. We need to more closely analyze the ramifications of these disparate views.

Consider what is at stake for the defendant in a professional malpractice case aside from money. We all know of the tendency of people to model their behavior against the backdrop of a personal sense of what is honorable. While a professional may be a member of the general populace, to a greater or lesser extent, his or her primary frame of reference is the sub-culture of the profession. In this regard, numerous and varied influences—including one's education, formal and informal mentoring processes, hero worship, daily work activities, institutional norms, and associations with others engaged in a like calling—combine to shape an image of "the right stuff" for that particular profession. Only the staunchest of renegades, and perhaps not even them if they truly remain "in" the profession, are able to refrain from embracing certain fundamental aspects of the group's norms. The model citizen of a professional sub-culture, a conjectural embodiment of the ideal, provides a symbolic but nonetheless real standard by which members of the profession measure themselves and evaluate their actions.

Theoretically, the legal standards for imposing civil liability are not significantly divergent from the profession's own standards. In actuality, however, the standards are quite different. Perhaps the divergence has always existed; but certainly as the law of malpractice in past years has slipped from fault-based standards to stricter forms of liability, the gap between the professional sub-culture's standards and the standards by which liability is imposed has widened. When a professional who is of the opinion that he or she is performing in accordance with the norms of a relevant sub-culture is informed by the courts that such performance is unacceptable, an incongruity is created. Thus a dissonant chord is struck which, as with music, sounds harsh and incomplete until resolved to a harmonious chord.

In attempting to resolve such dissonance, the professional has rather limited options. He or she may become somewhat self-critical, even to the point of rejecting previously-held views regarding the acceptable norms of the profession. Alternatively, he or she may become disillusioned with the legal system and assume the role of either aggressive guerrilla or retiring exile. Whether active or passive in their resistance, such disenfranchised professionals would probably agree that the system has been taken over by an evil, competing sub-culture (the lawyers). To the extent that my personal acquaintances are valid indicators, most professionals are

indeed rather disillusioned by the perils of professional malpractice; few respond with self-criticism and rejection of the profession's norms.

One can empathize with professionals who perceive that activities acceptable within their own sub-culture are condemned by a legal system that plays by a different and somewhat bewildering set of rules. But such empathy on this point must not prevent an honest appraisal of the contributions professionals themselves make to the shortcomings of our method of compensating victims of malpractice. We have recognized the need to protect the professional's sense of honor, but it must also be said that honor or pride can be taken to excess, and that *hubris,* as the ancient Greeks called it, also produces rather unpalatable fruit. *Hubris* among professionals does indeed tend to manifest itself in a somewhat revolting manner, when there is a refusal to acknowledge the responsibility of the relevant profession for the mistakes of its practitioners.

Simply stated, a particular profession must accept the frailties of humanity, its own members included, and concede that reparations are warranted in some circumstances for those victimized by the profession's failings. Perhaps few professionals disagree with this statement in the abstract, but when it translates to the goring of one's own ox in the form of a lawsuit or increased malpractice insurance premiums, consensus soon fades. Because reparations cost money, where a member of the relevant profession is truly at fault, who should pay? Should the losses be absorbed by the victims themselves? Or, alternatively, should the victims be steered directly or indirectly to the public trough, and forced to become dependant upon government largesse for their maintenance and restoration? The obvious answer is that neither the victims nor the state should be responsible, but rather those who caused the harm, especially when one considers the fact that professionals are among the most highly compensated members of our society.

Where do these trails lead? Not only to the conclusion that change is needed, but also to the recognition that such change should include compromises and reflect a spirit of moderation. Ideally, reform should effectuate a change from the present emphasis on pecuniary concerns, which is nothing short of extraordinary. It should also be predicated on a recognition of a professional's pride and sense of honor in his or her professional status, but not allow such pride to operate unchecked, thereby insulating the professional from civil liability when justice demands otherwise. In other words, what is needed is more of a sense of balance, calling to mind certain of Aristotle's thoughts defining moral virtue.

To the extent that these reflections are indicative of beliefs held by many others, and not simply the idiosyncratic if not sentimental musings of the author, one might anticipate attempts at reform which address the concerns raised herein. Predicting the particulars of such reform is a precarious business, but I believe that some of the more general contours of future developments in this area of the law have already begun to emerge.

First, in years to come, professional malpractice disputes will move out of the court system, as resolution of these cases is handed over to administrative decisionmakers. Such adjudicatory agencies will almost certainly include representa-

tive members of the profession over which they sit in judgment, so as to promote convergence of the profession's norms with the standards by which liability is measured. Secondly, I would anticipate that where it is feasible, no-fault schemes will be implemented. For obvious reasons, such systems remove much of the stigma of liability for professionals. On the other hand, the profession remains responsible with such systems for shouldering the burden of making reparations for its mistakes. Finally, as a consequence of the first two developments, claimant recoveries will be increasingly uniform. This is the nature of an administrative body, to standardize its product, as does any mass producer. It is also the *quid pro quo* for no-fault, as typified by the worker's compensation model. In any event, the standardization of awards, which will also involve a minimization of the likelihood of outlandishly high recoveries and a probable reduction of the overall average of awards, will result in a de-emphasis of pecuniary concerns.

The somewhat quaint ring of the terms *honor* and *hubris* are enough to confirm that they are not in vogue. And, perhaps other thoughts herein, such as those relating to the need for virtue and balance, also appear a bit old-fashioned, or at least out of place in a modern analysis of legal decisionmaking. But consider the revolutionary changes in the law relating to professional malpractice that have occurred over the past 50 or even 25 years. Most have been brought on by tumultuous changes in numerous areas, including technology, consumerism, the delivery of legal services, and attitudes toward victim compensation. We can most certainly anticipate that none of these will stand still in the future. Consequently, as we contemplate repairs and alterations of the edifice, it is first necessary to excavate down to a stable substratum and ground ourselves on those things that do remain constant. Some of the more consequential attributes of human character, like honor and hubris, seem to qualify in this regard, as does the need for a legal system which dispenses a brand of justice more compatible with the views of justice embraced by those who come before it.