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Root: Medical Malpractice Litigation: Suggested Improvements and a Poss

MEDICAL MALPRACTICE LITIGATION: SOME SUGGESTED IMPROVEMENTS AND A POSSIBLE ALTERNATIVE

Medical malpractice is one of the fastest growing areas of tort law, both in litigation and in literature.[1] Because of the substantial amount of material relating to the substantive law of malpractice,[2] the increase in malpractice litigation,[3] and suggestions for avoiding malpractice suits,[4] these subjects will receive only cursory treatment in this note. Primary emphasis will be placed on the drawbacks of current methods of adjudicating medical malpractice claims and on possible improvements and alternatives to the methods.

History and Development

The first known case of medical professional liability at common law arose in England less than one hundred years after Magna Carta.[5] The first reported case in the United States occurred in 1794.[6] Until the 1930's this area remained relatively dormant, but since that time medical malpractice claims have been increasing at a marked rate.[7] The increment has been attributed to a number of developments,[8] including the following:

1. increase in medical specialization with the corresponding decline in the number of general practitioners, resulting in fewer personal relationships between doctors and patients,
2. expansion of liability insurance,
3. improved medical technique and "miracle drugs" creating a feeling that medicine is an exact science and recovery assured,
4. increase in personal injury claims generally.

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1. The term "medical professional liability" is usually preferred to "medical malpractice," which has a quasi-criminal or disreputable connotation. Stetler & Moritz, Doctor, Patient, and the Law 305 (4th ed. 1962). Nevertheless, because of its widespread use and general acceptance, the term "medical malpractice" is used throughout this note to describe medical negligence.

2. *E.g.*, Kramer, Medical Malpractice (1965); Louisell & Williams, Trial of Medical Malpractice (1960); Stetler & Moritz, Doctor, Patient, and the Law 305 (4th ed. 1962).

3. See Stewart, Bradford & Kelly, *Why the Increase in Malpractice Litigation*, 27 Ins. Counsel J. 621 (1960).

4. See Martin, *Some Practical Considerations*, in Medical Malpractice 11 (Defense Research Institute Monograph 1962).

5. See Stetler, *The History of Reported Medical Professional Liability Cases*, 30 Temp. L.Q. 366, 367 (1957).

6. Cross v. Guthrey, 2 Root 90 (Conn. 1794).

7. Stetler & Moritz, *op. cit. supra* note 2, at 305.

8. See Stewart, Bradford & Kelly, *Why the Increase in Malpractice Litigation*, 27 Ins. Counsel J. 621 (1960).

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SUBSTANTIVE LAW

Although the number of cases has increased rapidly, the substantive law of malpractice has experienced little change in recent years. A medical malpractice claim is typically a tort action based on a physician's alleged negligence with the traditional elements of duty, breach, and proximate cause. The duty or standard of care has been almost uniformly stated as follows:[9]

> The physician is required to possess that degree of knowledge and skill, and to exercise that degree of care, judgment, and skill, which other physicians of good standing of the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances.

The only portion of this duty that has varied significantly has been that of "same or similar localities." With modern advancements in communications, the distinctions between large and small communities and between different areas of the country have lost most of their importance.[10] Today practically all doctors within a particular specialty are held to the same standard.[11]

PROCEDURE

The procedural form followed in litigating medical malpractice claims does not differ from other negligence actions. Due to the highly technical nature of medicine, however, expert testimony plays a more dominant role in malpractice proceedings.[12] Expert medical witnesses are needed in determining not only the degree of knowledge skill, judgment, and care that a physician is required to possess and exercise, but also whether the defendant did in fact fulfill these standard of care requirements.

Possibly as a relief from the strict requirements for expert testimony, there has emerged in this area the use of the doctrine of *res ipsa loquitur*.[13] This doctrine allows the factfinder to determine negligence without expert testimony when the evidence shows that (1) an injury has occurred, which is of a nature that it ordinarily would not occur except for negligence; (2) the instrumentality or conduct causing the injury was, at the time of injury, under the exclusive control of the defendant; and (3) the plaintiff was not guilty of con-

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9. STETLER & MORITZ, *op. cit. supra* note 2, at 307.
10. PROSSER, TORTS §32, at 167 (3d ed. 1964).
11. LOUISELL & WILLIAMS, *op. cit. supra* note 2, ¶8.06.
12. Note, *The Malpractice Dilemma*, 9 W. RES. L. REV. 471, 474 (1958).
13. LOUISELL & WILLIAMS, *op. cit. supra* note 2, ¶14.02.

tributory negligence.[14] The usual effect of the doctrine is to shift the burden to the defendant for presentation of evidence to rebut the inference of negligence.[15]

THE CONFLICT

From these features of medical malpractice litigation a heated controversy has arisen between the medical profession and plaintiffs' lawyers. The medical profession contends that the recent trends in malpractice litigation result in increasing numbers of baseless claims against doctors.[16] In general, physicians resent the judging of their medical conduct by a panel of laymen who are inherently sympathetic toward plaintiffs of their own social and economic standing and unappreciative of the uncertainty and risk involved in medical practice. They distrust the adversary system as a means of arriving at objective fact.[17] Doctors generally hold in disdain the practices of attorneys in manipulating facts; attempting to thwart the admission of evidence; and invoking the sympathy, prejudice, and emotions of juries. Viewed with particular contempt is the emerging doctrine of *res ipsa loquitur*, which is vigorously criticized as an artificial means of proof subject to misapplication and abuse.[18] In addition to the financial effects of adverse judgments and increased insurance rates, the medical profession points to the damage to doctors' reputations[19] and the influence on medical practices[20] as unjustified and dangerous consequences of the current trends.

Plaintiff's attorneys reject the contention that the number of spurious claims and unwarranted recoveries are out of proportion, maintaining instead that too often malpractice victims go uncompensated.[21] They feel that because of a special status accorded the medical practitioner the law of malpractice traditionally favors physicians and consequently makes the plaintiff's case too difficult to

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14. PROSSER, TORTS §39, at 218 (3d ed. 1964).

15. *Id.* at §40.

16. Gallagher, *A Lawyer Looks at the News*, in MEDICAL MALPRACTICE 4 (Defense Research Institute Monograph 1962). Caswell, *A Surgeon's Thoughts on Malpractice*, 30 TEMPLE L.Q. 391 (1957); Stetler, *Medical-Legal Relations — The Brighter Side*, 2 VILL. L. REV. 487, 489 (1957).

17. See Hall, *Let's Understand Each Other*, 42 ILL. B.J. 690 (1954).

18. Morris, *Res Ipsa Loquitur or Rule-of-Sympathy*, in MEDICAL MALPRACTICE 23 (Defense Research Institute Monograph 1962).

19. See Stetler, *Medical-Legal Relations — The Brighter Side*, 2 VILL. L. REV. 487 (1957).

20. See Mitty, *How Surgical Practice is Influenced by the Legal Profession*, 10 MED. TRIAL TECH. Q. 29 (1964).

21. See NIZER, MY LIFE IN COURT 348 (1961).

prove.[22] It is further contended that physicians' reluctance to testify is tantamount to a "conspiracy of silence,"[23] making the plaintiff's burden of proving negligence through expert testimony unduly heavy. As a partial remedy to this situation, it is urged that the application of *res ipsa loquitur* be expanded,[24] forcing the defendant to come forward with the expert testimony to relieve himself of liability.

Because of the impossibility of assessing the accuracy of any malpractice determination, the controversy remains moot. Adoption of proposals solely for the purpose of protecting either physicians or their patients would be unjustifiable. Yet, the general dissatisfaction displayed by both sides to the controversy calls for objective reexamination of the system.

CRITICISMS OF CURRENT MALPRACTICE ADJUDICATION

Under the present system of liability based upon negligence, the goal of litigation is to determine the factual elements of the tort to the highest possible degree of accuracy. The examination should therefore be directed at an analysis of the system's efficacy in achieving this goal.

Adversary Method

As a means of objective fact determination, the adversary method has been criticized extensively. The value of cross-examination in exposing fraud or honest error in a witness and in eliciting facts to make a witness's testimony complete is generally acknowledged.[25] But because of the premium placed on glibness and fast thinking under the fire of piercing questions, some doubt is raised whether it is not the weak or timid witness who actually suffers.[26] When dispassionate presentation of technical data through expert testimony is involved, serious doubt is cast upon the value of the adversary method.[27] Obscuring facts on direct testimony and impeaching or discrediting testimony on cross-examination is directly contrary to the

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22. See NIZER, MY LIFE IN COURT 348 (1961); Scott & Herring, *Medical Malpractice in Florida*, 12 U. FLA. L. REV. 121, 145 (1959).

23. See generally Belli, *An Ancient Therapy Still Applied: The Silent Medical Treatment*, 1 VILL. L. REV. 250 (1956).

24. *Id.* at 268. Other suggested escapes from the "Tyranny of the Expert" have been the use of medical texts as substantive proof, extension of the area of common knowledge, and use of the defendant's testimony. Scott & Herring, *Medical Malpractice in Florida*, 12 U. FLA. L. REV. 121, 138 (1959).

25. MCCORMICK, EVIDENCE §31 (1954).

26. *Ibid.*

27. *Id.* §17.

accepted scientific means employed by doctors and hospitals to determine the causation and justification of untoward medical results.[28]

Jury System

The jury system, deeply rooted in our legal traditions and constitutions,[29] has also been the subject of recent criticism. Although revolved primarily around the time and expense involved in jury trials, such criticism questions the indispensibility of the civil jury. A common argument for retaining the system, to "temper harsh and rigid law,"[30] seems to concede the fallibility of the jury as a factfinder. Other cited advantages,[31] such as the jury's general acceptance by the public, its providing citizen participation in government, and its acting as a check against expanding bureaucracy and judicial control add no support to its factfinding capabilities. Although the collective action of a jury panel reduces the chances of a single juror influencing verdicts because of his background prejudices,[32] occupational exclusions and exceptions in venire selection may often result in a panel of jurors having similar economic and social backgrounds. The charges that juries too often yield to persuasion and emotion are impossible to substantiate except through observation of lawyers' courtroom tactics in jury trials. Perhaps additional studies of jury trials will shed more light on this controversy.

The jury system's factfinding capabilities are especially questionable in malpractice cases, it being generally admitted that lay juries are often incapable of comprehending and solving such highly complicated factual issues.[33] Furthermore, factors that may arouse a jury's sympathy or prejudice are prevalent in medical malpractice cases. These factors do not necessarily work in favor of a plaintiff. The plaintiff's exaggerated injuries coupled with the high economic and social position of a doctor may often be offset by a desire to protect the physician's reputation. Whatever their effect on the morale of the jury, it is obvious that they partially obscure the factual issues to be decided.

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28. See Hall, *Let's Understand Each Other*, 42 ILL. B.J. 690, 691 (1954); Stetler, *Medical-Legal Relations — The Brighter Side*, 2 VILL. L. REV. 484, 495-96 (1957).

29. *E.g.*, U.S. CONST. amend. VII; FLA. CONST., Bill of Rights §3.

30. See JOINER, CIVIL JUSTICE AND THE JURY 18 (1962).

31. *Id.* at 9.

32. *Ibid.*

33. Edelstein, *A Kind Word for the Civil Jury*, 17 NACCA L.J. 302 (1956) in JOINER, CIVIL JUSTICE AND THE JURY 134, 140 (1962). Other areas suggested as being beyond the comprehension of the average juror are commerce, mechanics, and science. *Ibid.*

Expert Witnesses

Special problems are involved in presenting expert testimony in medical malpractice proceedings. There is little doubt that a general reluctance to testify in malpractice actions exists among members of the medical profession.[34] Although such unwillingness is hardly exemplary of civic responsibility and seems to be contrary to the medical profession's ethical standards,[35] it cannot be entirely attributed to a desire for mutual protection from liability. The same aversion to testifying is displayed in other personal injury actions involving medical issues.[36] This may stem from a physician's understandable distrust of a system in which he is asked to appear on behalf of one party to a dispute, induced to testify directly only to events favorable to that party's case, and then subjected to cross-examination designed to discredit his character, his qualifications, and his testimony. A portion of the so-called "conspiracy of silence" can reasonably be attributed to the difficulty encountered by a plaintiff's lawyer in securing an expert who (1) agrees that there has been negligence on the part of the defendant and (2) is willing to offer such one-sided testimony.[37]

The effects of medical malpractice litigation on the parties and the public are patently unsatisfactory. If the claimant's suit is successful his award will be substantially reduced by a contingent attorney's fee. In the absence of improper jury consideration of these fees in determining damages, a plaintiff is never fully recompensed for his injuries. Contingent fees further operate to the detriment of a victim whose injuries are not substantial and whose claim involves complicated issues. This is because of the practical inability of some attorneys to devote the necessary time and energy to a case in which their potential return is meager. Yet without contingent fees impoverished victims would be denied recovery altogether.

The damage inflicted by malpractice suits upon doctors' reputations is impossible to assess. Nevertheless, it is not difficult to conceive of the adverse effects of a well publicized claim, irrespective of its outcome. Of greater concern is the effect of malpractice claims on the actual practice of medicine. It is manifest that a doctor should be able to practice with his mind free of the possible legal entanglements, devoting his full efforts to the welfare of his patients. In situa-

34. See Stetler, *Medical-Legal Relations — The Brighter Side*, 2 VILL. L. REV. 487, 495 (1957). *But see* Hall, *Let's Understand Each Other*, 42 ILL. B.J. 690 (1954).

35. "The medical profession should safeguard the public and itself against physicians deficient in moral character or professional competence." 1 LAWYER'S MEDICAL CYCLOPEDIA 24 (1958).

36. Stetler, *supra* note 34, at 495.

37. See *id.* at 503.

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tions involving the use of drugs and treatment that yield highly satisfactory results but involve a calculated risk untested by the courts, physicians may choose a means of therapy that is less effective but has been given approval in malpractice suits. When the advancement of medicine is thus retarded, the law of medical malpractice causes its greatest and most unwarranted injury to society.

Malpractice suits cause the public to incur higher medical expenses, for malpractice insurance costs are reflected in physicians' fees. The public also must pay through taxes for the cost of such protracted litigation. Indeed, the legal profession and the insurance industry are the only elements of society that derive any benefit from medical malpractice litigation.

Conclusions

This discussion leads to conclusions that question the value of the present system of malpractice litigation as a means of arriving at objective, factual, and legal determinations of professional negligence. With the objective of providing a method whereby victims of medical negligence are justly compensated without unduly interferring with sound medical advancement and practice, there follows a discussion of possible improvements or alternatives to the present system.

PROPOSALS FOR IMPROVEMENT

Impartial Expert Testimony

The most crucial problems in present malpractice litigation are the unavailability and partiality of expert medical witnesses. A number of proposals have been advanced to remedy this, but no significant change has taken place. Movements toward a better understanding between the medical and legal professions[38] are positive steps aimed at a source of the problem but, as a practical matter, do not remove the defects. This must be accomplished by more specific changes in the system itself, changes that will evolve only through better mutual understanding.

The most reasonable answer to the problem of biased expert testimony is to have impartial witnesses appointed by the courts. In support of this proposal, provisions in the Model Expert Testimony Act[39] and the Uniform Rules of Evidence[40] empower judges to appoint expert witnesses in civil actions. Although there is some

38. See Powers, *After All, Doctors Are Human*, 15 U. FLA. L. REV. 463 (1963). Examples of these movements are courses on law and medicine in the professional schools, medico-legal conferences, and interprofessional codes.

39. MODEL EXPERT TESTIMONY ACT §1 (1957).

40. UNIFORM RULE OF EVIDENCE 59.

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authority at common law that judges have this power,[41] the point is unsettled. In either case, this power seems to have been infrequently employed by the bench.[42] The primary criticism against the use of court-appointed experts is that the weight of judicial appointment places the expert in a position of factfinder rather than witness.[43] Provisions in the acts and rules that either party may cross-examine the court's expert or call his own experts[44] minimize this contention. Such impartial testimony deserves greater weight than that of a party's expert,[45] a consideration that has been recognized in the Uniform Rules of Evidence by authorizing the judge to instruct the jury to give greater consideration to the neutral expert's testimony.[46]

Greater use of court-appointed experts would remove many of the reasons for doctors' reluctance to testify in malpractice actions. They would be relieved of having to present one-sided testimony and, to some extent, freed from being subjected to scientifically objectionable cross-examination.

There remains the question whether a court appointed medical expert would be truly neutral when asked to testify in a case involving a fellow member of his profession. A semantic problem is presented in this discussion of neutrality. A court appointed expert would be neutral in the sense of being nonpartisan. The question then raised is whether identification with his profession would taint the neutrality of his testimony. For the moment this question must go unanswered, but with the added confidence of doctors in the legal system that should result, failure to render impartial testimony would expose the bad faith behind the alleged "conspiracy of silence" and justify steps to counteract it.

To effectuate this means of obtaining impartial testimony, more is needed than a statutory amendment or a rule of evidence. Such provisions only authorize courts to appoint experts; achievement of their purpose necessitates the courts' adopting the practice of appointing them. Also required is the cooperation of the medical profession in making such experts available and of the legal profession in

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41. *Ex parte* Peterson, 253 U.S. 300 (1920). *But see* Henkel v. Chicago, St. P. M. & O. Ry., 284 U.S. 444 (1932) (taxing costs of party experts to losing party). See also Sink, *The Unused Power of a Federal Judge To Call His Own Expert Witness*, 29 So. CAL. L. REV. 195 (1956).

42. See Sink, note 41 *supra*.

43. Levy, *Impartial Medical Testimony — Revisited*, 34 TEMP. L.Q. 416, 424 (1961).

44. MODEL EXPERT TESTIMONY ACT §§8, 9 (1957); UNIFORM RULE OF EVIDENCE 59.

45. See Griffin, *Impartial Medical Testimony: A Trial Lawyer in Favor*, 34 TEMP. L.Q. 402, 411-15 (1961).

46. UNIFORM RULE OF EVIDENCE 61.

realizing the need for objective scientific inquiry. Through such cooperation, a positive step can be taken toward solving the conflict and achieving more accurate factual determinations. In this respect, this proposal is far more desirable than extending the artificial tool of *res ipsa loquitur* to remedy the expert testimony problems.

Factfinding Reforms

Another area of concern in malpractice litigation is the factfinding problem arising from difficulties encountered by lay juries in understanding the intricate medical issues. Although the neutral presentation of evidence through impartial expert witnesses proposed above would alleviate this by partially eliminating the fact obscuring issues of bias and interest on the part of witnesses, additional ways to facilitate the jury's duty should be explored.

Abolition of Civil Juries. The jury's shortcomings provoke the question whether juries should be abolished in medical malpractice suits. Civil actions in European countries are tried without juries,[47] and in England, the source of our civil jury system, less than five per cent of the civil cases are decided by juries.[48] Before civil juries are abolished, however, a satisfactory substitute must be found.

Abolition of the jury without more would leave the judge to find the facts. Although a trial judge, by virtue of his education and experience, may be able to comprehend certain complicated issues more readily than the average juror, his competency to solve highly technical medical issues is not necessarily superior to that of a jury.[49] Furthermore, judges are not immune from prejudice, and a judge's prejudice would have more serious consequences than a juror's, which is tempered by the collective decision of the panel.

The most qualified finder of medical fact would undoubtedly be a medical practitioner. Because of the possible background prejudice of a single physician in a malpractice case against a fellow practitioner and because of the benefits of collective knowledge, a panel of doctors would be an even more competent factfinder. The impracticalities of calling six or twelve doctors from their practices to try a malpractice case, which may extend over several days, are apparent. At a time of doctor shortage few would argue that the accuracy of a legal decision should override the medical needs of a community. This is recognized in statutes exempting practicing physicians, surgeons, and dentists from ordinary jury duty.[50] Any other substitute, however,

47. JOINER, CIVIL JUSTICE AND THE JURY 59 (1962).
48. DEVLIN, TRIAL BY JURY 132 (1956).
49. Edelstein, *A Kind Word for the Civil Jury*, 17 NACCA L.J. 302 (1956) in JOINER, CIVIL JUSTICE AND THE JURY 134, 140 (1962).
50. *E.g.*, FLA. STAT. §40.08 (2) (1965).

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would result in a sacrifice to some degree of the accuracy of the determination of medical issues. For example, an attempt to achieve a middle ground between lay and medical juries by using a form of "blue-ribbon" jury[51] selected from the most highly educated members of the community would encounter objections from both sides. Their medical factfinding competency would not be significantly higher than a lay jury's or a judge's, and it would be impractical to pull such persons from important jobs.

The above-mentioned problems, the established tradition and acceptance of civil juries, and the state and federal constitutional guarantees of civil jury trials would make abolition of the jury in malpractice actions highly difficult and impractical. Efforts at improving the system should therefore be directed more toward aiding a lay jury in achieving more accurate findings of fact.

Panels. Several localities, with the cooperation of the bar and medical societies, have devised panel systems with various jury aiding functions. In Tucson, Arizona a panel composed of eight doctors and eight attorneys hears both sides of a potential malpractice case and votes secretly on whether there is substantial evidence of negligence and whether harm has been done.[52] The results of their decisions are not binding on the parties but serve to give both sides an idea of their chances before becoming involved in expensive litigation.[53] The system has apparent advantages in discouraging baseless suits and encouraging settlement. Because of their extra judicial nature these panels can be effective without fear of prior restraint or usurpation of court or jury functions.[54] Without judicial sanction, such a plan requires a large degree of cooperation between the legal and medical professions. Here, at least, is a definite objective toward which the two professions can direct their efforts and perhaps alleviate the unfortunate impasse.

Special Masters. Under Rule 53 of the Federal Rules of Civil Procedure,[55] district court judges may refer certain issues to masters or special masters. In nonjury trials the use of masters is severely limited to cases in which "some exceptional condition requires it."[56] In jury trials, although reference should be the "exception and not

51. *Cf.* N.Y. JUDICIARY LAW §749.

52. *Medical Malpractice Suits — The Arizona Experiment,* 6 J. FORENSIC MEDICINE 41 (1959).

53. *Ibid.*

54. A plan whereby an attorney would be censored by the bar for filing an action after an impartial medico-legal panel has decided against the merits of his case has been criticized as imposing a prior restraint. Note, *The Malpractice Dilemma,* 9 W. RES. L. REV. 471, 483-84 (1958).

55. FED. R. CIV. P. 53 (a).

56. FED. R. CIV. P. 53 (b).

the rule,"[57] the limitation to cases in which "the issues are complicated"[58] is less restrictive. The highly technical issues of a malpractice action are particularly suited for such reference.[59] A special master, especially one who is a medical expert,[60] could clarify the medical issues and "then present to the jury with precision and succinctness the questions to be resolved."[61] The master's findings in a jury action are admissible as evidence of the matters found[62] and may be rebutted by additional testimony before the jury. This differs from nonjury trials in which the master's findings must be accepted by the court unless clearly erroneous.[63] Thus, in jury trials the chance of violating the seventh amendment by unduly interfering with the jury's function is avoided by leaving the ultimate questions to the jury.

At common law, courts are authorized to refer issues to masters with the consent of both parties.[64] Compulsory references, however, are generally limited to equity proceedings in absence of statute.[65] When only certain issues, such as medical issues, are referred and when the findings of the master can be adequately refuted in open court, the constitutional objections to compulsory reference are seemingly overcome.[66] Thus, even in states where no referral rule or statute exists, the power to refer medical issues to special masters should nevertheless be available.

Because a malpractice case may involve medical issues exclusively, compulsory reference without a statute is likely to encounter serious objection. Legislation authorizing judicial reference of such highly technical issues is therefore recommended to allow juries to make more enlightened factual determinations.

Other Procedural Reforms. Two other rules that can be effectively used in malpractice actions are Federal Rules 42 and 49. Rule 42 permits the court to order a separate trial of any separate issue "in furtherance of convenience or to avoid prejudice."[67] By having

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57. *Ibid.*

58. *Ibid.*

59. See Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 460 (1958).

60. See Report of the Judicial Conference of the United States, *Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62, 80 (1953).

61. Kaufman, *supra* note 59, at 460.

62. FED. R. CIV. P. 53 (e) (III).

63. FED. R. CIV. P. 53 (e) (II).

64. 76 C.J.S. *References* §7.

65. 76 C.J.S. *References* §12.

66. See *Ex parte* Peterson, 253 U.S. 300 (1920). See also Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 465 (1958).

67. FED. R. CIV. P. 42 (b).

separate trials of the issues of liability and damages, the chance of sympathetic prejudice resulting from testimony relating to the extent of a plaintiff's injuries can be reduced.[68]

Rule 49, authorizing special verdicts or interrogratories accompanying general verdicts,[69] can serve several purposes in malpractice actions. It can reduce prejudicial decisions by limiting to some extent the jury's knowledge whether its decision will favor one side or another.[70] It can ease the jury's burden of applying complicated law to complicated fact situations by leaving only the factual issues to be determined.[71] Finally, by forcing attorneys to concentrate on specific factual issues, less appeal will presumably be made to the jury's emotions.

Still another means of facilitating the jury's duty is the use of the pretrial conference.[72] Such conferences can be beneficial in defining and narrowing the complicated issues, especially if the medical experts participate.

A Proposed Alternative: Loss Insurance

Even if the suggested steps are taken to improve the present methods, the issues would remain complicated and jury verdicts, to some degree, speculative. It is this uncertainty of result, plus the time and expense involved in such litigation that has provoked suggestions that negligence and fault theories in certain areas be replaced with loss insurance. Similar displacement has already been accomplished in the area of workmen's compensation and has been advocated for traffic[73] and "hospital-accident"[74] victims.

The area of medical malpractice is ripe for consideration of such reform. Since virtually all doctors carry medical liability insurance,[75] the cost of which is reflected in their fees, the risk of medical negligence is spread among the patients. This ineffectiveness of the law in requiring doctors to pay for the consequences of their negligent

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68. See Joiner. *op. cit. supra* note 47, at 90.

69. Fed. R. Civ. P. 49.

70. Ruddy v. New York Cent. R.R., 124 F. Supp. 470 (N.D.N.Y. 1954), *aff'd in part and rev'd in part on other grounds,* 224 F.2d 96 (2d Cir.), *cert. denied,* 350 U.S. 884 (1955).

71. See Flusk v. Erie R.R., 110 F. Supp. 118 (1956).

72. Fed. R. Civ. P. 16.

73. See Ehrenzweig, "Full Aid" Insurance for the Traffic Victim (1954); Green, Traffic Victims (1958).

74. See Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First Step Toward the Displacement of Liability for "Medical Malpractice,"* 31 U. Chi. L. Rev. 279 (1964) [hereinafter cited as Ehrenzweig, *Compulsory "Hospital-Accident" Insurance*].

75. See Stetler & Moritz, *op. cit. supra* note 2, at 433.

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acts leads to inquiry into the purposes served by medical malpractice suits. No one has suggested that the law is qualified or should set standards for medical practice. In its dubious role of inflicting punishment for fault the law has served only to embarrass the reputation of defendant physicians. The apparent function of medical malpractice law as evidenced by trends such as the expansion of *res ipsa loquitur*, is to compensate the victims of medical results. If this be its role, there is no reason why the law's protection should extend only to those victims who can prove medical fault.[76]

A loss insurance scheme replacing malpractice liability would operate by requiring doctors to show adequate loss insurance coverage as a condition to the issuance of a license to practice medicine.[77] The insurance would indemnify patients for injuries, or provide benefits for death, resulting from untoward medical results or "medical accidents."[78] Provisions for uncompensated losses, intentional torts and criminal negligence, administration of claims, and other details would also be included but are not considered here in detail. Special consideration would have to be given to whether the scheme should provide for scheduled benefits or for actual damages[79] and to a method of allocating a patient's injuries between the original malady and the medical failure.

The effects of a loss insurance scheme would be widespread. Among those that could be expected are the following:

1. Victims of medical accidents would be assured of recovery without undergoing the difficult burden of proving negligence and without their recoveries being diminished by contingent attorneys' fees.

2. Medical practitioners would be relieved of the threat and stigma of malpractice claims and free to engage in sound progressive diagnosis and therapy.

3. Court congestion would be reduced by the elimination of medical negligence trials. Although some issues, such as source of injuries and extent of damages, would remain these could often be settled out of court or administratively.

4. Insurance costs, despite the increase in the number of claims paid, should be smaller because of the reduction of legal fees and costs.[80]

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76. See Ehrenzweig, *Compulsory "Hospital-Accident" Insurance* 281.

77. See GREEN, *op. cit. supra* note 73, at 87; Ehrenzweig, *Compulsory "Hospital-Accident" Insurance* 284.

78. See GREEN, *supra* note 73, at 88; Ehrenzweig, *supra* note 77, at 284-85.

79. For arguments in favor of actual damages see GREEN, *op. cit. supra* note 73, at 98-99 and for a scheduled compensation scheme see Ehrenzweig, Book Review, 11 STAN. L. REV. 400, 402-03 (1959).

80. See Ehrenzweig, *Compulsory "Hospital-Accident" Insurance* 289. It is also

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5. Medical fees would reflect the expected reduction in insurance premiums.

6. The legal profession would be deprived of the often lucrative contingent and defense fees, but it is presumed that a larger number of smaller cases would result.[81]

Establishment of a system of medical loss insurance is not without objection.[82] Whatever inducement the threat of malpractice action provides toward the exercise of professional care would be eliminated. The validity of this function of tort law, however, is questionable, and it is submitted that medical societies and criminal law are better qualified to provide such incentives through their sanctions.[83] Other objections are that displacement of tort liability by loss insurance is too great a break with tradition, that it is contrary to accepted theories of liability based upon fault, and that there is no way of limiting such a scheme. These objections lose much of their force when it is considered that the traditional methods have not met the problems of modern medical technology, that the public seems to demand recovery rather than retribution, and that a scheme administered through private competitive insurance carriers should provide its own limits.

The adoption of a loss insurance plan would meet with formidable obstacles requiring comprehensive legislation and satisfactory actuarial and insurance plans. Nevertheless, continued dissatisfaction with the present system and failure to take steps to improve it lead to more serious consideration of displacing medical malpractice with loss insurance.

CONCLUSIONS

By threatening the practice of medicine and by making recovery difficult the present system of adjudicating medical malpractice claims provides no social benefits. If the cooperation of doctors, lawyers, judges, and insurers is directed toward adopting improvements such as those suggested, the conflict may be resolved and the system's shortcomings reduced to a tolerable level. If not, malpractice litigation should be replaced by loss insurance or some similar alternative.

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suggested that recovery for pain and suffering be eliminated from such a plan, which would further reduce the costs. See GREEN, *op. cit. supra* note 73, at 88.

81. See GREEN, *op. cit. supra* note 73, at 102.

82. See Schlotthauer, *Compensation Without Fault — A Defense Counsel's Views* in SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW OF THE ABA, PROCEEDINGS 55 (1958).

83. See Ehrenzweig, *Compulsory "Hospital-Accident" Insurance* 290.