

LAW AND CONTEMPORARY PROBLEMS

Volume 54

Winter 1991

Number 1

FOREWORD

RANDALL R. BOVBJERG* AND THOMAS B. METZLOFF**

For the second time in five years, *Law and Contemporary Problems* is devoting its attention to the topic of medical malpractice.¹ Malpractice concerns remain timely, and considerable new information merits the continued discussion. The mid-1980s saw a resurgence of increases in malpractice claims and insurance premiums, prompting comparisons to the “malpractice crisis” of the 1970s. Policymakers accordingly revisited “tort reform” and addressed again the legal system’s ability to resolve malpractice claims fairly and efficiently. Political interest and legislative activity remain high as we enter the 1990s, despite the recent return to relative normality in insurance markets. For the moment at least, the crisis mentality has abated—insurance is readily available and prices are now falling, although many see this as a mere lull before the inevitable next storm.

Beyond immediate legislative interest, there remains strong residual dissatisfaction with the legal system. Many question its ability to establish appropriate levels of compensation and deterrence, quite apart from any cyclical insurance crisis. This dissatisfaction has prompted innovative policy approaches that deserve continuing analysis and discussion. Another major justification is the relative wealth of newly available empirical information. A central note sounded in the earlier symposium was the paucity of reliable, systematic, and unbiased evidence.² Today, important new sources of information have become accessible to policymakers. Many of the articles presented here contribute significantly to this welcome development. While

Copyright © 1991 by Law and Contemporary Problems

* Senior Research Associate, Health Policy Center, The Urban Institute, Washington, D.C.

** Associate Professor of Law, Duke University School of Law.

1. See *Medical Malpractice: Can the Private Sector Find Relief?*, 49 L. & Contemp. Probs. (Spring 1986) (Clark C. Havighurst and Randall R. Bovbjerg, special editors).

2. See, for example, Stephen Zuckerman, Christopher F. Koller & Randall R. Bovbjerg, *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, 49 L. & Contemp. Probs. 85, 111 (Spring 1986) (“Quantitative analysts and scholars have thus far contributed far less to malpractice debates than have interest groups and professionals applying expert opinion.”).

much is still only imperfectly understood, no longer should policymakers have to leap before they look; they can now understand better the problems and likely impact of any response.

In considering the nature of the works presented, it is useful to place malpractice issues within a framework of analysis. Legal and political discourse often uses terms like "malpractice crisis" and "tort reform" as a convenient shorthand for particular agendas. In fact, complex developments in and among the three systems of medicine, law, and insurance are involved. Crafting solutions calls for understanding each system and, more importantly, their interrelationship. For each system, the fundamental question is, "How bad (or good) is it?" Until recently, the truthful answer was, "We do not really know."

Certainly, each system has long had its share of critics. Modern medicine causes some avoidable injuries in achieving its enormous successes. But some insist that the medical system unnecessarily injures too many people and thus requires stringent controls, including more, rather than fewer, malpractice suits. Tort law purports both to compensate those negligently injured and to deter substandard practice. Its critics claim that the process is too expensive, too slow, and too unpredictable. The insurance system is supposed to mediate between law and medicine by financing compensation, spreading the risk of such losses, and, ideally, preserving the deterrent function intended by tort law. Some critics object that the insurance system overcharges policyholders, manufactures crises to justify rate hikes, and does little to encourage quality medical care. Better information has been needed to sort out all these assertions as well as to clarify the effects of reforms, past and proposed.

This symposium provides a wide-ranging discussion touching upon problems and proposals within medicine, law, and insurance. The articles vary considerably in focus—from detailed analyses of particular experiences to broad reviews on an international level. The symposium is divided into two parts. The first part, entitled *The Medical Malpractice System and Existing Reforms*, includes articles that present innovative empirical analyses of the existing litigation system. Collectively, these articles provide a more rational basis for considering future reform by illuminating the workings of the current malpractice system, particularly the litigation process³ and existing reform efforts.⁴ The final article in the first part of this double issue sets

3. See Randall R. Bovbjerg, et al, *Juries and Justice: Are Malpractice and Other Injuries Created Equal?*, 54 L & Contemp Probs 5 (Winter 1991) (analysis of comparative levels of compensation as between malpractice awards and other tort awards); Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 L & Contemp Probs 43 (Winter 1991) (discussion of jury outcomes, their impact on the settlement process, and related procedural reforms); Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 L & Contemp Probs 131 (Winter 1991) (analysis of appropriateness of malpractice compensation levels).

4. See Eleanor D. Kinney & William P. Gronfein, *Indiana's Malpractice System: No Fault by Accident?*, 54 L & Contemp Probs 169 (Winter 1991) (analysis of comprehensive tort reform efforts in Indiana); Catherine S. Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and*

developments in the United States in an international perspective, arguing that social changes have also increased the level of legal activity elsewhere.⁵

The second part of the symposium, entitled *The Medical Malpractice System and Emerging Reforms*, focuses on promising reform efforts that for the most part are largely untested. Medical-legal and medical-insurance interactions receive particular attention. In the past, malpractice issues have often focused on the legal or insurance systems. It is increasingly clear, however, that trends in the practice of medicine have important impacts as well. For example, a potentially critical question is whether hospitals or insurers could do more to identify high-risk physicians or procedures in advance of litigation. Well-focused risk management⁶ or insurance reforms⁷ might well reduce the extent of injury and, hence, decrease malpractice exposure. In addition, the development of medical practice guidelines—prompted initially by quality of care considerations—also will affect malpractice liability.⁸ There also remains considerable interest in defining outcomes in variations on no-fault proposals that would permit more efficient means of providing compensation.⁹ The variety of reform initiatives provide fertile ground for legislative restructuring of the malpractice system.¹⁰

Although these diverse articles understandably offer no unified explanation and no single approach to reform, they raise common themes. Several articles suggest that thoughtful reforms should in fact be pursued. Operating within the current tort environment, authors propose innovations in litigation procedures, risk management, insurance rating, and practice

Implementation, 54 L & Contemp Probs 195 (Winter 1991) (study of mandatory mediation program in Wisconsin).

5. See Donald N. Dewees, Michael J. Trebilcock & Peter C. Coyte, *The Medical Malpractice Crisis: A Comparative Empirical Perspective*, 54 L & Contemp Probs 217 (Winter 1991) (similarity and causation of trends in claims frequency and severity in United States, Canada, and the United Kingdom).

6. See Laura L. Morlock & Faye E. Malitz, *Do Hospital Risk Management Programs Make a Difference?: Relationships Between Risk Management Program Activities and Hospital Malpractice Claims Experience*, 54 L & Contemp Probs 1 (Spring 1991) (finding based upon Maryland experience that certain attributes of risk management programs are effective); Orley H. Lindgren, Ronald Christensen & Don Harper Mills, *Medical Malpractice Risk Management Early Warning Systems*, 54 L & Contemp Probs 23 (Spring 1991) (discussing risk management performance in selected California hospitals); Harold S. Luft, Patricia P. Katz & Douglas G. Pinney, *Risk Factors for Hospital Malpractice Exposure: Implications for Managers and Insurers*, 54 L & Contemp Probs 43 (Spring 1991) (reporting on factors that affect hospital malpractice experience in California attempting to link measures of medical quality with malpractice experience).

7. John E. Rolph, *Merit Rating for Physicians' Malpractice Premiums: Only a Modest Deterrent*, 54 L & Contemp Probs 65 (Spring 1991) (raising questions about the predictability of claims and accordingly the appropriateness of use of "merit rating" to maintain deterrent incentives).

8. See Clark C. Havighurst, *Practice Guidelines as Legal Standards Governing Physician Liability*, 54 L & Contemp Probs 87 (Spring 1991) (arguing for the flexible use of such guidelines through private contract); Mark A. Hall, *The Defensive Effect of Medical Practice Policies in Malpractice Litigation*, 54 L & Contemp Probs 119 (Spring 1991) (analyzing legal impacts of implementing practice guidelines).

9. See Laurence R. Tancredi & Randall R. Bovbjerg, *Rethinking Responsibility for Patient Injury: Accelerated-Compensation Events, A Malpractice and Quality Reform Ripe for a Test*, 54 L & Contemp Probs 147 (Spring 1991) (analysis of potential utility of accelerated compensation events).

10. Recently, for example, there has been a spate of federal legislative proposals addressing perceived malpractice problems, the most recent effort of which, and one of the most innovative, is described here in Clark C. Havighurst & Thomas B. Metzloff, *S. 1232—A Late Entry in the Race for Malpractice Reform*, 54 L & Contemp Probs 179 (Spring 1991).

guidelines. Other authors suggest broader reforms. These recommendations are offered even though many articles conclude that the litigation process works better than its critics contend. Another point made repeatedly is that reform efforts can have unexpected results. Careful design, implementation, and evaluation of effects are thus critical. The final article serves as an epilogue by providing both an overview of current knowledge and an agenda for reform.¹¹

In preparing this symposium, we have received the valued assistance of many colleagues and friends. Special thanks must go to Melvin Shimm, without whose assistance we could not have proceeded. We also thank the editorial staff of *Law and Contemporary Problems*, who worked diligently on this issue, with Theresa Glover, general editor, deserving a special commendation. Many nonlawyer authors and much nonlegal information was involved; conforming disparate styles required hard work, patience, and creativity. We also wish to acknowledge the support for this issue provided by the Robert Wood Johnson Foundation.

11. Walter J. Wadlington, *Legal Responses to Patient Injury: A Future Agenda for Research and Reform*, 54 L & Contemp Probs 199 (1991).