Malpractice Reform: the Developing Consensus

In August, the Department of Health and Human Services issued a report that analyzed the problems of medical liability and malpractice. As a member of the Task Force on Medical Liability and Malpractice, I believe our report represents a growing consensus on the direction needed to address this problem.

The facts are sobering. Consider the following:

- Before 1981, there were 3.2 malpractice claims made for every 100 physicians. In 1985, that figure had grown to 10.1 claims per 100 physicians.
- Total compensation paid by insurers for medical malpractice claims has increased at an average annual rate of 25 percent since 1979.
- The average compensation paid per malpractice claim increased approximately 54 percent between 1982 and 1985. This contrasts with the Consumer Price Index, which increased 11 percent during the same period.
- The average liability insurance costs for physicians increased from $5,800 in 1982 to $10,500 in 1985.
- In 1986, the medical malpractice component of the property-casualty insurance market accounted for about 2 percent of its premiums but 8.8 percent of its losses.

These facts show us why a significant number of physicians are changing the way they practice medicine. Those changes fall into two categories: (*a*) raising charges for services and (*b*) restructuring medical practices to avoid medical services that historically have high litigation rates.

For the welfare of those needing health care today, it is essential that we get beyond finger pointing and that we find solutions. There are many interests represented in the proposed reforms of the current medical malpractice system, but the most important interests are those of the patient. They are not served by charges volleyed back and forth that the current crisis is because of "careless" doctors, "greedy" lawyers, or "profit-mongering" insurance companies. These tactics alienate the American public and the organizations that are needed to move us toward constructive dialogue.

Instead, the task force, which was chaired jointly by a lawyer and physician, carefully analyzed the problem and then made recommendations. The 30 recommendations are directed primarily toward State legislatures and fall into four areas: health care, the medical liability system, alternatives to tort litigation, and the insurance industry.

From watching the debate in State legislatures over the past 2 years, it is obvious that it is the recommended reforms of the rules by which medical malpractice cases are litigated that is most controversial. Interestingly enough, it is within this area that a consensus seems to be evolving.

Our task force made seven significant recommendations on how States could change their laws to favorably affect the litigation process.

- States should review and—where appropriate—shorten their statutes of limitations, the period during which malpractice claims may be filed.
- States should consider instituting pretrial screening panels in medical malpractice suits. The decisions of these panels should be admissible as evidence in court.
- States should consider setting limits on attorneys' fees in malpractice claims.
- States should eliminate joint and several liability, except when defendants have actually acted in concert to cause injury.
- States should place limits on damage awards for noneconomic losses.
- States should limit the amount of punitive damages that can be awarded in medical malpractice cases.
- States should provide that future economic damages may be paid on a periodic basis rather than in a lump sum.

There is no doubt that these recommendations will be controversial and may be opposed by some. However, it is interesting to note that other Federal reports, as well as the actions of State legislatures, parallel many of these recommendations.

In 1986 and 1987 the Department of Justice chaired an interagency group—the Tort Policy Working Group on the Causes, Extent, and Policy

Implications of the Current Crisis in Insurance Availability and Affordability. Their report focused on issues broader than just medical malpractice litigation. Nevertheless, the Tort Policy Working Group's recommended tort reforms similar to five of the seven HHS recommendations listed previously.

At the State level, many State legislatures have passed some form of tort reform affecting medical malpractice litigation in their last sessions. While creative and individual in their approaches, the new laws still seem to fall within the framework of the recommendations made by HHS's task force. For example, six States adopted measures to limit attorneys' fees in 1986.

I think this growing consensus is a positive sign for both patients and any person who pays for medical insurance. There is no doubt that we pay the bills for out-of-control insurance rates, the withdrawal of doctors from certain critical specialties, and defensive medical practices like unnecessary tests. Now, with a clear direction forming and reform moving through the States, we will all be the beneficiaries. That is important for our pocketbooks and important in ensuring the quality of the health care that we have access to and receive.

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NOTE: Single copies of "Report of the Task Force on Medical Liability and Malpractice" are available free from the Office of the Counselor to the Under Secretary, U.S. Department of Health and Human Services, Rm. 639-H, Hubert Humphrey Bldg., 200 Independence Ave., SW, Washington, DC, 20201.

Injury Prevention and Control Comes of Age

I have drunk from wells I did not dig, and I have warmed by fires I did not build.—Proverb

This is an extremely important time in injury control and public health. While we talk of new opportunities for solving old problems, we simply must pay tribute to those who have come before us. I think of the proverb cited. In injury control today, we are building on the methodologies—epidemiology, surveillance, evaluation—that have been honed through the decades.

Injury control interrelates with all of society: politics, law enforcement, mental health, pediatrics, business, mining, transportation. And it relates to all of history because the one consistent plague throughout history, year in and year out, from one culture to another, from one country to another, has been the plague of violence. Our work to control injury will affect the course of that plague for future history.

Many in public health talk about the world as becoming a global village where nations and continents are interdependent. They speak about this interdependence as if it were a new phenomenon. But Polybius, over 2,000 years ago, wrote, "Now, in earlier times, the world's history has consisted of a series of unrelated episodes, but from this point forward, history becomes an organic whole." So, by our efforts to curb intentional and unintentional injuries, we are sowing seeds of immortality in relation to future prevention, future treatment, future rehabilitation, and even in relation to war and its avoidance.

The recent history of injury control provides us with the names of some innovators to be thanked. To them, what is new is not the approach, but the recent and widespread interest in injury control. We thank those in academic public health: Susan Baker, Leon Robertson, Julian Waller, and others. We thank those in public health practice, particularly Robert Saunders of Tennessee, who was instrumental in getting child restraint laws passed, and William Haddon and Brian O'Neill. We thank those in the Public Health Service, from Jim Goddard, who 30 years ago directed an injury control program that was ahead of its time, to the present Surgeon General, Dr. C. Everett Koop, who has been promoting violence control. We thank workers with the Department of Defense, the Department of Transportation, and the National Traffic Safety Administration—especially Michael Finkelstein for his work over the past years.

Yet, despite all of these people, the response has not been commensurate with the problem. Society has simply accepted injury as being inevitable—that, despite the lessons of history, this is a cause-and-effect world; despite the fact that we are a scientific culture, we have remained fatalistic when dealing with injuries. This belief is a throwback to the Middle Ages.