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## Medical Malpractice Insurance Crisis: The Boys Who Cry "Wolf."

The Joint Judiciary Interim Committee of the Wyoming legislature is currently wrestling with how to resolve an alleged medical malpractice insurance crisis. Two powerful interest groups are professing the existence of this crisis: the insurance industry and Wyoming physicians who have been notified that they must pay greatly increased malpractice insurance premiums or face losing their liability coverage. Both groups demand changes in the tort system to relieve the alleged crisis. They assert that reform is necessary to assure availability of medical malpractice insurance and that tort reform will result in lower malpractice premiums, reducing health care costs to the public.

Unfortunately, doctors are not questioning the practices of the insurance industry. Many are being duped into blaming the legal system for creating their insurance woes by other doctors who have a direct economic interest in asserting that there is a crisis and in keeping the examination of its roots and possible reforms away from the insurance industry. Doctor-owned insurance companies emerged in response to an earlier round of crisis assertions in the mid 1970's.<sup>1</sup> The doctors involved in these companies are influential in shaping other doctors' perceptions about the alleged crisis.<sup>2</sup> That physicians have a stake in advocating tort

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1. Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional Quid Pro Quo Analysis to Safeguard Individual Liberties*, 18 HAR. J. ON LEGIS. 143, 146 (1981).

In examining the recent history of malpractice insurance in Wyoming, and indeed nationally, there is a striking similarity between today's situation and that of about ten years ago. In the 1976 minutes of the Wyoming State Bar, Paul Godfrey reported from the Liaison Committee with the Wyoming Medical Association on Medical Malpractice. The Wyoming Medical Association had a draft of proposed changes to then existing legislation. Then, as now, the Association believed that the answer to its problems lay in curtailing victims' rights. However, the list was interesting in that the doctors put demands on the insurance industry as well as the legal system. Hence, the list included a requirement "that insurance companies be required to report all claims and pay outs [; and] . . . that all insurance companies be required to join an underwriting pool and be required to underwrite doctors even if the particular company does not normally underwrite medical malpractice policies [; and] . . . that a patient's compensation fund be established." 11 LAND & WATER L. REV. 310-311 (1976). In contrast, the list of reforms proposed by the Wyoming Medical Society in 1985 uniformly recommends changes in the legal system.

Typical of doctors' efforts to arouse the public is the letter enclosed in patients' billing statements, sent by a Cheyenne anaesthesiologist. Alarmist in tone and unsigned, the letter reads:

To My Patients:

Many of you have heard about the crisis that our Wyoming doctors are currently facing, being without malpractice insurance when their policies expire in the near future.

This will not only affect the physicians, but the whole economy of our entire state.

If you feel you would like to help, please contact your legislators, requesting them to become involved in seeking a fair and rapid resolution of this problem, in particular, giving careful consideration to the tort reform suggested by the Wyoming Medical Society.

Thank you for any help that you may give in resolving this urgent problem. (emphasis added).

2. Londigran, *The Medical Malpractice 'Crisis'*, TRIAL, May 1985, at 25.

reform is demonstrated by the AMA urging its members "to make speeches, write letters to newspapers and [to] persuade their patients that limiting the size of awards in malpractice suits [will] lower health-care costs for everyone."<sup>3</sup>

In the face of this well-orchestrated crisis message from the medical profession and the insurance industry, the Wyoming legislature is searching for solutions where it has been told they lie, with tort reform. The Joint Judiciary Interim Committee is considering several proposals to be presented at a special legislative session.<sup>4</sup> Two alternative proposals seek to amend Article 10 Section 4 of the Wyoming Constitution.<sup>5</sup> Although the two proposals achieve the same result, they differ in the means chosen to eliminate the existing constitutional guarantee that no law may be passed which limits the damages recoverable for injury or death caused by any person.<sup>6</sup> Of course, this would pave the way for legislation limiting malpractice awards.<sup>7</sup> In addition, a bill has been drafted to establish pretrial screening as an initial hurdle to overcome in bringing a malpractice action.<sup>8</sup> The ostensible purpose of the bill is to lower litigation costs by preventing spurious filings and encouraging settlement in meritorious cases. Finally, the Legislative Services Office is drafting a bill that would repeal joint liability.<sup>9</sup> Thus, one tortfeasor could not be made responsible for a full award in the event that a joint tortfeasor was judgment proof.

Sadly, the legislature's best intentions and zealous efforts may result in a net loss for Wyoming citizens, for its solutions are likely to be carved out of the existing rights of malpractice victims. Our legislature should not hurriedly change the tort system through a special session in which many legislators will not have had the opportunity to fully consider the

3. Wall St. J., Feb. 15, 1985, at 54, col. 3.

4. Whether a special session will be called to consider the many legislative proposals that are being discussed currently is an open question at the time of this writing. Medical malpractice insurance concerns are only one segment of problems perceived in the larger context of liability insurance which affects the State of Wyoming, municipalities, other professions, and businesses. Nancy Freudenthal, Attorney for Intergovernmental Affairs for the Governor's Office, noted that special sessions are very costly and should be used only where problems rise to the level of emergencies that cannot wait until the regular session. Speaking for the Governor, Ms. Freudenthal stated that he currently views the Joint Judiciary Interim Committee's efforts as too unfocused, and attempting change on too many fronts to yield productive results in a special session. The time pressures of a special session would not be conducive to giving these complex issues proper consideration. The Governor will meet with the Committee November 8 and 9, 1985, and make a decision on whether to call a special session after hearing the Committee's proposals for an agenda. Telephone interview with Nancy Freudenthal (October 29, 1985).

5. JOINT JUDICIARY INTERIM COMMITTEE, 1986 TENTATIVE DRAFT NOS. 86LSO-0096.C1, -0096.C2, 49th Wyo. Legis. (1985).

6. See *infra* text accompanying note 55.

7. Joint Judiciary Interim Committee, Recap of Action Taken by the Joint Judiciary Interim Committee October 11 and 12, 1985 (unpublished notes) [hereinafter cited as Recap] (compiling the changes discussed during those two days) was distributed to all Committee members. Tellingly, point 7 was labelled, "Cap on Awards—Constitutional Amendment." This clearly indicates that amending the Constitution is merely a preparatory step to passing award-limiting legislation.

8. 1986 Tentative Draft No. 86LSO-0095.C2, *supra* note 5.

9. JOINT JUDICIARY INTERIM COMMITTEE, "PURE" COMPARATIVE NEGLIGENCE/REPEAL JOINT & SEVERAL LIABILITY, WORKING DRAFT NO. 1, 49th Wyo. Legis. (1985).

issues. Further, the legislature should not pass reforms solely on the basis of charges made by powerful lobbies with special interests, especially when they have not proved the existence of a crisis nor demonstrated a correlation between their proposed reforms and the supposed crisis.

This comment will consider briefly general principles of tort law and show how imposition of liability on malpractioners conforms to those principles. It will then look at the present condition in Wyoming. Wyoming has a tradition of protecting injured individuals against powerful entities. The current medical malpractice "crisis" may result in replacing traditional loss allocation on the word of special interest groups that change is imperative. This comment will demonstrate that the current challenge for the Wyoming legislature is to pierce the crisis assertions. It needs to evaluate current circumstances to decide for itself whether there is a problem, rather than to accept and react to the discourse of physicians and insurers.

#### WHERE LOSS SHOULD LIE

As a general rule, loss lies where it falls, unless there is a good reason to shift it.<sup>10</sup> Tort law has developed around determining when loss should be shifted from the victim, that is, when he should be compensated.<sup>11</sup>

One factor that has led courts in recent years to shift loss is the nature of defendants in many tort cases. Defendants are often public utilities, corporations, or commercial enterprises, large entities which can distribute their risks and losses by building those costs into the prices they charge their customers.<sup>12</sup> Generally, courts have been willing to shift loss to entities which are in a position to protect themselves, "[r]ather than leave the loss on the shoulders of the individual plaintiff, who may be ruined by it."<sup>13</sup> A second factor which has been influential in shaping tort law has been the desire to sanction wrongdoers.<sup>14</sup> Sanctioning has the dual functions of punishing past acts but, more importantly, deterring future injuries.

Consistent with these general principles of tort law, doctors' potential tort liability works as a compensating and quality-control mechanism for each doctor-patient interaction.<sup>15</sup> Enforcement is provided by the judicial system. An injured plaintiff is entitled to make his case to a jury. He must prove that his injuries resulted directly from physician conduct which fell below the accepted standard of due care. If a jury is persuaded of this causal relation, it may award damages to the full extent that it is possible to make a physically impaired plaintiff whole by giving him money.

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10. W. PROSSER & W. KEETON, *THE LAW OF TORTS* 20 (5th ed. 1984).

11. *Id.*

12. *Id.* at 24.

13. *Id.*

14. *Id.* at 26.

15. *Defensive Medicine and Medical Malpractice: Hearing Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 12 (1984) [hereinafter cited as *Hearing*] (Statement of Patricia Danzon, Center for Health Policy, Duke University).

Doctors carry insurance in order to protect themselves from personally having to compensate patients injured as a result of their negligence. Insurance spreads the cost of compensating victims and deterring future injuries.

### THE ALLEGED CRISIS IN MEDICAL MALPRACTICE

#### *Insurance Availability*

In an attempt to separate fact from inflammatory assertion, the Wyoming Insurance Commissioner subpoenaed insurance companies presently doing business in Wyoming to appear and answer questions.<sup>16</sup> Companies presently writing medical malpractice insurance in Wyoming answered questions related to the availability of malpractice insurance for Wyoming physicians.<sup>17</sup> Testimony presented by insurance company spokesmen did not support the contention that passage of tort reform in Wyoming is a necessary prerequisite to continued medical malpractice insurance underwriting. Company spokesmen indicated that coverage would be written in any case. Tort reform appeared to be something that they would like to see, but not something upon which their continued viability was dependent.

Special urgency had appeared in the malpractice area after the announced withdrawal of New Mexico Physicians Mutual from Wyoming, expected to occur in December, 1985.<sup>18</sup> Though news stories in Wyoming papers during the summer laid the blame for the crisis at the door of the legal system which granted "huge"<sup>19</sup> and "excessive"<sup>20</sup> awards, and drove insurance premiums to prohibitively high levels, those assertions were not corroborated by insurance company spokesmen.

St. Paul Fire and Marine is the largest medical malpractice insurer in the United States. Spokesman Bob Trunzo testified that St. Paul is willing to insure those Wyoming doctors who are affected by the New Mexico Physicians' pull out and who can meet St. Paul's underwriting guidelines.<sup>21</sup> Though Mr. Trunzo forcefully argued for the passage of tort

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16. *Examination of Insurers, Hearing Before the Insurance Commissioner*, Wyo. Dept. of Insurance (Sept. 24-25, 1985). Hearings were held before the Insurance Commissioner and a panel of examiners in Cheyenne, Wyoming on September 24-25, 1985. The panel included, in addition to Insurance Commissioner Robert Schrader; Glenn Smith, Deputy Insurance Commissioner; Kelly Davis, Director of Investigation, Dept. of Insurance; and Tom Power, Certified Financial Examiner for the State of Wyoming.

17. Companies presently writing individual physician and surgeon medical malpractice liability policies in Wyoming are: The Doctors Management Co., St. Paul Fire and Marine Insurance Co., Insurance Corporation of America, and New Mexico Physicians Mutual (which has announced its withdrawal from Wyoming, effective in December, 1985).

18. New Mexico Physicians Mutual insures 225 Wyoming physicians currently, roughly forty percent of those practicing in Wyoming.

19. *Laramie Daily Boomerang*, August 16, 1985, at 9, col. 1.

20. *Wyoming State Tribune*, June 20, 1985 at 1, col. 1.

21. Factors mentioned by Mr. Trunzo which are examined on a physician by physician basis include, among others, educational background, a doctor's previous loss history including the number and severity of claims filed against him, the type of practice he is engaged in, and the context in which he practices, e.g., clinic or solo practitioner.

reform in Wyoming, he did so only after stating that St. Paul "is open for business" and ready to accept applications from Wyoming doctors. Mr. Trunzo conceded that Wyoming is in much better shape than many other states in that there are three or four companies willing to write medical malpractice policies here.<sup>22</sup> Mr. Trunzo was not convincing that tort reform is necessary to get malpractice coverage for Wyoming's physicians.

James Hurley testified for the Insurance Corporation of America, which currently insures 165 physicians in Wyoming and which could underwrite an additional twenty to twenty-five.<sup>23</sup> ICA classifies physicians into twenty-five categories. Though Mr. Hurley had a list of reforms when asked what ICA would like to see passed,<sup>24</sup> he admitted that loss payments made by ICA to date have been favorable; there have been no "serious" loss payments in Wyoming since 1980.<sup>25</sup> Significantly, ICA admitted that even if all of its favored reforms were passed, it would not improve the position of doctors who performed obstetrical procedures, which the company refuses to underwrite in any case. Thus, reforming the tort system would not result in ICA writing any more policies than it is currently prepared to write.

The Doctors Management Company has been insuring in Wyoming since 1979 and currently insures around 100 Wyoming doctors. Larger than New Mexico Physicians Mutual, it is otherwise similar to that company. Like NMPM, it is doctor-owned and was formed in response to the insurance crisis of the mid 1970's.<sup>26</sup> President and Chief Executive Howard Lamb said that DMC would be willing to expand in Wyoming<sup>27</sup> and would accept physicians who met their underwriting standards.

This suggests that the New Mexico Physicians Mutual did not pull out because of the alleged crisis. Other medical malpractice insurers would be pulling out just as quickly if the climate for profit-making was hopeless given Wyoming's tort law. Any company writing medical malpractice in-

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22. Mr. Trunzo said that having three companies willing to write medical malpractice insurance meant that Wyoming is "in good shape." To illustrate Wyoming's position in relative terms, Mr. Trunzo indicated that Kansas, a more populous state, has three carriers and Minnesota only two.

23. ICA spokesman James Hurley reported that while ICA could cover an additional ten to fifteen percent over the number of doctors currently insured, ICA's capacity to take more doctors is limited.

24. The list included a narrowed statute of limitations for physician liability, reform of the contingency fee system, decrease of awards to reflect availability of collateral sources of compensation, ceilings on non-economic damages, and the use of pre-trial screening panels.

25. Mr. Hurley was unable to say for sure how many claims over \$500,000 ICA had paid, but guessed that there had not been more than ten or fifteen out of a total of two or three hundred.

26. Formed in 1976 in California as a physician owned reciprocal exchange, the Doctors Management Company is currently insuring doctors in four states: Nevada, Montana, Wyoming, and California.

27. The Doctors Management Company's willingness to expand in Wyoming is tied to "favorable conditions," chiefly, that they not have to compete against Joint Underwriting Associations or Patient Compensation Funds.

surance in Wyoming believes there is money to be made doing so. “[T]he competent, knowledgeable underwriter understands that the acceptance of risks at a profit is the aim of the insurance enterprise.”<sup>28</sup>

Looking broadly, and considering the Doctors Company’s viability, NMPM’s experience appears to be a function of the free market’s weeding-out process. NMPM is not big enough to compete in Wyoming’s open competition<sup>29</sup> market. It had insufficient reserves to buffer it against its own premium rate pricing decisions which turned out to be too low. The number of physicians that NMPM wrote was not great enough, by its spokesman’s reckoning, to effectively spread risk. The competition among malpractice writers prevented NMPM from either increasing its rates or gaining a sufficient physician population over which to spread risk.<sup>30</sup>

Because NMPM is a physician-owned company, the doctors involved in the corporate decision to leave Wyoming, as well as the doctors facing loss of coverage, add their clout to the crisis/tort reform litany. The physicians point to the higher premiums that they are being asked to pay and insist that they bear a direct relation to the jury system.<sup>31</sup> Perhaps they are unaware of what physicians in other states are paying. All of Wyoming’s medical malpractice insurers agree that the sharp rate increases this year were due in part to the fact that insurance has been underpriced in Wyoming for the last five years.<sup>32</sup> And despite the media attention that big awards and settlements inevitably receive, perhaps doctors here are unaware of the reasonable awards that Wyoming juries return, even by insurance company spokesmen’s admission.

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28. J. LONG & D. GREGG, PROPERTY AND LIABILITY INSURANCE HANDBOOK 713 (1965).

29. In 1983, WYO. STAT. §§ 26-14-101 to -118 (1983) were enacted, removing all of the rate setting authority of the Insurance Commissioner on the theory that appropriate rates would be arrived at through the functioning of “open competition” among insurers. See especially *id.* § 26-14-101.

30. Insurance Commissioner Robert Schrader points out that rate oversight by a regulatory agency is necessary to assure that rates are *high enough* in addition to assuring that they are not excessive. Rates were pushed to unreasonably low levels in the recent past because of the insurance companies’ emphasis on generating premium income. During a period of high interest rates, investment dollars are especially productive and insurance companies vie with one another to underwrite more doctors in an effort to raise more capital to invest at the favorable rates. Premium rates as well as standards for deciding which doctors to accept fall as a result of this competition. Over time, poor risk underwriting and low rates compound, so that when claims by injured patients start coming in, the push to increase the number of insureds and volume of premium dollars is exacerbated. In the absence of a regulatory mechanism or of a company with a large enough market share to pull rates back to where they need to be to meet claims, the spiral of depressed prices continues. This pricing strategy ceases to work when interest levels fall and investment income can no longer offset losses. We are now witnessing “radical” increases as companies seek to find the rate levels they require to continue business in a period of lower interest rates. The Insurance Commissioner believes that if rates paid over the last five years had been ten percent higher across the board, premiums and investment income would have covered losses, and premium rates would be at about the levels they are now rising to, without the extremes that have engendered a feeling of crisis. Conversation with Robert Schrader, Insurance Department, Cheyenne, Wyoming (October 22, 1985).

31. See *supra* text accompanying notes 19-20.

32. *Examination of Insurers, Hearing Before the Insurance Commissioner, supra* note 16.

Vice President of NMPM, K. D. Dickson appeared before the panel of examiners<sup>33</sup> having submitted written answers to questions posed by Joint Judiciary Interim Committee Chair, Ellen Crowley, a month earlier.<sup>34</sup> In his appearance before the Insurance Commissioner, Mr. Dickson stated that tort reform would make no difference to NMPM. Contrary to physicians' statements, Mr. Dickson said that Wyoming jury awards are not extravagant. Indeed, exhibit 5c(iv) of Mr. Dickson's written responses showed that only five cases against NMPM doctors have been heard by juries to date. In four of them verdicts were returned for the doctors, and in one the plaintiff was awarded \$325,000. NMPM has not paid out anything on jury awards to date, however, as the latter case is on appeal. Regardless of the final outcome, NMPM has had the continuing benefit of the income generated by that sum.

At the end of two days of insurance companies' testimony, the Wyoming Insurance Commissioner concluded that there is no crisis of access to malpractice insurance in Wyoming. Further, though physicians can expect to pay higher prices in the future, Wyoming is in better shape than surrounding states, even those that have made reforms in their tort law.<sup>35</sup> Clearly, insurance companies believe that there is money to be made by insuring Wyoming doctors given our present tort system.

### *Insurance Cost*

Even though there is not a crisis in availability of medical malpractice insurance in Wyoming, doctors and insurance companies nonetheless claim that a crisis exists with respect to the cost of insurance. Reform is ultimately advocated on the grounds that it will lower the cost of medical services to the consuming public.<sup>36</sup> Lower malpractice premiums are not likely to lower health care costs, however. According to a widely quoted statistic, 1983 malpractice premiums accounted for about one percent of

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33. Mr. Dickson testified on the second day of the hearings, September 25, 1985, after each of the other medical malpractice liability insurance companies' spokesmen had testified the day before.

34. Letter from K.D. Dickson to Dan Pauli (August 20, 1985) (written at the request of Ellen Crowley, Chairman, Joint Judiciary Interim Committee, in her letter to Mr. Dickson of August 19, 1985).

35. Utah has passed the Malpractice Actions Against Health Care Providers Act, UTAH CODE ANN. §§ 78-14-4 to -16 (Supp. 1985). Section 78-14-4.5 reduces the amount of an award against a doctor by the amount of collateral sources available to a plaintiff. Section 78-14-7.5 limits attorney's contingency fees. Sections 78-14-12 through -15 provide for a pretrial panel to screen malpractice cases.

Montana has passed the Montana Medical Legal Panel Act, MONTANA CODE ANN. §§ 27-6-101 to -704 (1977). It is an extensive act the purpose of which "is to prevent . . . filing in court of actions . . . where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims as . . . may be well founded."

New Mexico has passed the Malpractice Act, N.M. STAT. ANN. §§ 41-5-1 to -28 (1978). It includes many provisions, among them section 41-5-4, which forbids ad damnum clauses, section 41-5-6, which places a limitation on recovery, and sections 41-5-14 to -21 which create a medical review commission.

36. Wall St. J., *supra* note 3, at 54, col. 3.



total health care costs of \$355.4 billion nationwide.<sup>37</sup> Any change in premium rates is not likely to have much impact on the cost of health care.

Further, Wyoming malpractice premiums are among the lowest in the nation, as attested to by insurance company spokesmen. Mr. Trunzo of St. Paul Fire and Marine indicated that affordable health care in Wyoming was dependent on the passage of tort reform. Yet when he compared premium rates for Obstetrician/Gynecologists<sup>38</sup> from Wyoming and other states, the Wyoming rate was significantly less than California's, a state which has adopted the tort reforms that Mr. Trunzo advocated for Wyoming.<sup>39</sup> Mr. Hurley of ICA said that rates paid by Wyoming doctors in all its categories were low as compared with rates paid by doctors in the sixteen other states in which ICA writes medical malpractice liability insurance.<sup>40</sup> The premiums paid to The Doctors Company in Wyoming echo the experience of the other medical malpractice insurers. Wyoming's Ob/Gyns pay \$15,012 yearly as compared to Nevada's Ob/Gyns, who pay \$29,368 and Southern California's, who pay \$42,928.<sup>41</sup>

Physicians argue that costs are inflated by the pressure that they feel from the prospect that litigation may arise out of their treatment of any given patient. This pressure results in extra tests and procedures being ordered solely to have a better defensive position should litigation arise. There are at least two arguments against these assertions. First, there are other pressures that have far more to do with extra procedures and resulting costs. As economist Patricia Danzon observed in a Senate hearing, "[I]ncentives for over-utilization [are] built into our traditional fee-for-service system of health insurance."<sup>42</sup> Simply put, the more procedures and tests that are itemized on a statement of services rendered, the larger the fee charged. This tendency is heightened where itemizations are

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37. *Hearing, supra* note 15, at 10; *Wyoming Medical Society Testimony to the Joint Interim Judiciary Committee* [sic], *Hearing Before the Joint Judiciary Interim Committee*, 49th Wyo. Legis. 1 (Sept. 6, 1985).

38. The premiums charged Ob/Gyns are frequently quoted for their shock value. Doctors practicing in that specialty are at the highest risk of liability for very large awards because of the potential for devastating injury should they err. Rates paid by them are the highest of all specialties, and are not representative of the premiums paid by doctors in other specialties.

39. Mr. Trunzo rejected the argument that this was empirical proof of the ineffectiveness of tort reforms, however. He cited other factors that distinguish the two states, especially California's more litigious climate, and the greater frequency and severity of claims made there.

40. ICA divides doctors into eight classes, with family and general practitioners, dermatologists, psychiatrists, ophthalmologists, and pathologists at the lowest risk of being hit with a large award. Specialties become more costly to insure when more surgical procedures or complex organs are involved. The spread of premium rates charged by ICA in Wyoming, from the lowest to the highest risk category is from \$1861.00 to \$24,947.00 This compares with a spread of from \$3,014.00 to \$41,636.00 in Washington, and a spread for Montana of from \$2021.00 to \$27,112.00. Letter to Insurance Commissioner Schrader from James Hurley, Senior Vice President of ICA (September 20, 1985) (attachment of ICA rate table with comparisons of rates charged ICA's eight classes of doctors for Wyoming, Washington, Montana, Idaho, Utah, and Harris County, Texas).

41. Letter to Deputy Commissioner Smith from Howard Lamb, President of The Doctors Management Co. (Sept. 18, 1985) (comparative figures attached, copy available at Wyoming Dept. of Insurance).

42. *Hearing, supra* note 15, at 10.

prepared for payment by government or private insurance programs, where no one protests charges for superfluous procedures. Reform of payment methods, to a per visit basis, for example, would reverse the financial incentives to tack on extra tests and procedures. Second, physician behavior that is correctly ascribed to the liability threat is not pure waste. "Spending more time with patients, referring difficult cases—these are precisely the types of increased care which the malpractice system is intended to encourage."<sup>43</sup> Increased care deters the incidence of malpractice, a specific objective of the present system.

### *The Victim's Right to Full Recovery*

Even if malpractice premiums are too high and even if the proposed reforms would lower malpractice premiums and health care costs, the legislature still should not change the tort laws of Wyoming. Adoption of the suggested tort reforms would narrow victims' rights against physicians' negligence.

Potential medical malpractice victims are a class that has not been heard from during the series of meetings which have been held in the last several months.<sup>44</sup> The danger that appears currently, and which is likely to result from hastily considered legislation aimed at providing lower health costs, is that the rights of individuals are going to be withdrawn in the name of collective expediency.<sup>45</sup>

Virtually everyone in society is a consumer of medical services at one time or another. We all stand a more or less equal chance of becoming a victim of medical malpractice. But because no one knows today whether he will be a victim in the future, there is nothing to further interest group cohesiveness or political organization in opposition to legislation directed at limiting malpractice recovery.<sup>46</sup> In the absence of a group to advocate on behalf of victims, politically powerful groups such as the medical and insurance establishments can manipulate the political process, persuading the legislature to shift the burden of liability to the medical malpractice victim.

Big jury awards and out of court settlements, reported in the media and pointed to by physicians, are cited as root causes of the increasing cost of malpractice insurance with such frequency that one loses sensitivity to what underlies them. A climate of animosity toward them is fostered, and the public is encouraged to seek changes in a system that makes large settlements and jury awards possible. They take on an independent existence that together with "smooth plaintiff's lawyers" are pointed to as

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43. *Id.*

44. There have been meetings of well organized special interest groups, however. There was a meeting in Casper, July 11 and 12, 1985, attended by professionals, especially doctors and lawyers; in Lander on September 6th and 7th, at which professional associations and societies spoke; and in Cheyenne on September 24th and 25th, of insurance companies' spokesmen.

45. Learner, *supra* note 1, at 167.

46. *Id.* at 186.

the causes of the present crisis.<sup>47</sup> What underlies the largest judgments, however, is generally paraplegia or brain damage, injuries which require years of medical and maintenance expenses, and involve a denial of the human potential that existed before a doctor's negligent acts or omissions.

Mathew Erdman is a victim behind a "big jury award." In *Erdman v. Bass, Hinkle, and the Board of Trustees of the Memorial Hospital of Laramie County*,<sup>48</sup> a jury awarded approximately 1.1 million dollars to the Erdmans. The judge granted a motion for additur for lost future earnings and the insurance company ultimately settled with the Erdmans for \$1.6 million.

That award is allowing the Erdmans to care for a child who, the jury found, was so negligently delivered that he is cortically blind, and perhaps deaf, has a minimal I.Q. and will never be able to communicate, who suffers frequent epileptic seizures, lacks any muscle control, and requires a shunt to drain fluid from his brain. Matthew Erdman sustained these massive injuries when doctors failed to react to indications of abruptio placenta and/or placenta previa.<sup>49</sup> Had they properly reacted, Matthew would have been delivered by immediate caesarian section on the night that his mother entered the hospital. Matthew was not delivered until after 10:00 a.m. the following day, however, and not before lack of oxygen had taken a devastating toll on his brain.<sup>50</sup>

Matthew has a normal life expectancy, and he will attain the size of a full-grown adult. With frequent seizures and lack of any muscle control, the energy and efforts that will be required to care for him are enormous. In the face of such profound injury it is difficult to maintain that the jury was taken in by smooth talking lawyers. It appears instead that the jury seriously attempted to give Matthew Erdman compensation in proportion with the harm done him.

Irene Clay is a victim behind a "big settlement."<sup>51</sup> She entered a hospital for surgery to remove spinal disc material. Cutting too deeply, however, her doctor severed an artery. In the absence of a thoracic surgeon, the immediate repair to her artery had to be redone the following day. Since then Mrs. Clay has undergone a dozen surgeries in an effort to put her back to where she was before the original error. These have left her scarred and crippled.<sup>52</sup>

Big settlements lose their negative buzzword quality when one considers them in the context of someone's daily pain and the inevitable ero-

47. Of the insurance company spokesmen who testified, Bob Trunzo was especially adamant on this point.

48. No. 93-405 (1st Jud. Dist. Wyo. 1982).

49. 1 S. PEGALIS & H. WACHSMAN, *AMERICAN LAW OF MEDICAL MALPRACTICE*, § 4:35 (1980).

50. Telephone interview with Sharon and Jim Fitzgerald (Oct. 1, 1985). Mr. Fitzgerald and Bill Trine represented the Erdmans. Mrs. Fitzgerald is an attorney and a friend of the Erdmans.

51. Telephone interview with Richard Johnson, Director of the Wyoming Medical Society (October 25, 1985). Although Mr. Johnson could not remember precisely, he said settlement in that case approached \$825,000.

52. Telephone interview with Bob Schuster, counsel for Irene Clay (October 3, 1985).

sion in their quality of life. It becomes much more difficult to look at limiting plaintiff recoveries as a relatively cost free way of curing the crisis. Further, in this context it is difficult to embrace removal of the deterrent aspect of our current system. Present forces work to encourage doctors to conform to high standards of care. By limiting victims' prospects for recovery against negligent doctors, insurance companies and doctors promise lower health costs. But one may ask if they are not at the same time offering the prospect of a lower standard of health care. Perhaps Wyoming citizens are willing to pay for the current system's protections against lapses in doctors' attention. Attacks on large recoveries in the abstract, as if they were the result of feigning plaintiffs' get-rich-quick schemes, should not numb us to the point that we are willing to do away with them. It must not be forgotten that severely debilitating injuries are the most usual conditions precedent to big awards.

If the Wyoming legislature decides that lowered health care costs for the public at large are a greater good than full recoveries to those who are catastrophically injured, an awareness that this is their choice should be articulated. The legislature should recognize that it is re-making public policy in contradiction to the risk allocation scheme that has been recognized and accepted in this state for many decades.<sup>53</sup> Returning to a scheme that leaves loss as it lies, on malpractice victims, should not be chosen by capitulation to the messages emanating from the self-serving medical and insurance lobbies.

#### LEGISLATIVE PROPOSALS UNDER CONSIDERATION

Tort reform was placed on the Joint Judiciary Interim Committee's agenda for study in March of 1985.<sup>54</sup> By beginning its inquiry with "which reforms," the Committee is unquestioningly subscribing to the premises that there is a crisis and that it will be resolved by altering the legal system. Legislators who go to work on those assumptions will make changes without an appreciation that problems in the legal system are only a part of larger problems relating to the delivery of health care and the medical malpractice insurance industry. Further, by enacting the proposed bills the legislators would perhaps unknowingly alter Wyoming's tort system at the expense of victims.

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53. The first sentence of Art. 10 Section 4 of the Wyoming Constitution, written in 1889 reads, "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." Fully compensating injured victims has been favored since Wyoming gained statehood.

54. Interestingly, the source of this study topic was the Wyoming Medical Society. Its members had first organized their concerns in June 1984, and approached the Health Care Cost Containment Committee. That Committee asked WMS for recommendations, which it worked on and presented to the Committee in November, 1984. The Committee found that medical malpractice insurance issues were beyond its expertise. These issues were, therefore, presented to the Management Council, which then assigned them to the Joint Judiciary Interim Committee for study in March, 1985. Thus, from the very beginning these proposals have been presented to the legislature from the perspective of doctors, who have a vested interest in the outcome, and who have gotten an advantage from the outset by casting the study in terms of the necessity of tort reform. Johnson, *supra* note 51.

Ceilings cannot be imposed on the recoveries available to victims of malpractice because of Article 10 Section 4 of the Wyoming Constitution which states that “[n]o law shall be enacted limiting the amount of damages to be recovered by any person.”<sup>55</sup> Legislation to cap recoveries could be introduced, however, if either of the alternatives proposed to amend this section is passed. One alternative would simply delete the quoted language which forbids the limiting of damages. The problem with this proposal is that it runs contrary to Wyoming’s tradition of allowing victims full compensation by arbitrarily limiting their awards. The other alternative would insert into the full recovery of damages section an exception for injury or death caused during the rendering of services by doctors. This obviously invites an equal protection challenge where doctors are being treated as an elite group receiving preferential treatment under the law. These proposals would effect an incredible reversal in the constitutional protection now accorded Wyoming citizens. It is a mark of the success with which the “crisis” rhetoric has been advocated that even constitutional guarantees are no barrier to a reduction of rights.

Another current proposal would erect a hurdle to bringing suit. The Pre-Trial Screening Panel bill under consideration<sup>56</sup> would make review by a medical review panel a mandatory prerequisite to filing a medical malpractice claim. The focus of the proposed bill is on protecting doctors from frivolous lawsuits by placing an additional burden on plaintiffs to demonstrate that their case is meritorious before their claim can even be filed. There is no indication that the legislature intends this review to function equally as a quality-control mechanism vis-a-vis the medical profession or to reduce the incidence of medical malpractice. It appears to be aimed strictly at giving doctors a financial benefit by making it more difficult to sue them.<sup>57</sup>

The cost reduction benefit of screening panels, so the theory goes, is achieved by exposing spurious claims. The number of claims tried is therefore minimized, resulting in a savings of the premium dollars that would otherwise have been spent defending claims.<sup>58</sup> A threshold question is whether the number of malpractice suits filed annually in Wyoming is so great as to need to be minimized by the creation of this additional step.

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55. WYO. CONST. art. X, § 4.

56. 1986 Tentative Bill Draft No. 86LSO-0095.C2, *supra* note 5.

57. The “purpose” section of the proposed statute states that the Act’s purpose is to prevent filings against health care providers where facts do not permit a reasonable inference of malpractice. There is no language in the section to indicate that the panel will function equally to identify negligent acts or review doctors’ performances with an eye to reducing the incidence of medical malpractice. The “purpose” section clearly defines the Act as doctor-protecting legislation.

One provision near the end of the bill, section 9-2-1510, provides that the information gathered from the panel’s proceedings could be used to facilitate “ongoing studies” of medical malpractice in Wyoming. It is not clear that there are any ongoing studies for data to be channelled into, however. Thus, this section merely pays lip service to the idea that the collected data will be used to decrease the future incidence of medical malpractice.

58. Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 679 (1976).

It is hard to see how the imposition of an additional procedural tier, with its attendant burdens of delay and expense, can be justified as a means to achieve cost reduction. The discovery required to produce good documentary records for panel review may actually increase costs;<sup>59</sup> it certainly will for cases that go to trial after screening. In addition, the panelists will require payment, creating further costs not present in the current system. Though it is unclear how many panelists will be decided upon in the final version, three doctors and three lawyers were proposed initially. This was changed to two doctors and two lawyers with a fifth member chosen by those four.<sup>60</sup> Additionally, a salaried director, appointed by the governor, would preside; a plaintiff could bring his doctor, and the physician could bring a lawyer. Panelists would be paid a per diem and travel expenses, and forty dollars per hour "while engaged in business of the board,"<sup>61</sup> including activities preparatory to sitting formally as a panel. Thus, the cost of this extra step is substantial. Two hundred thousand dollars are being appropriated from the general fund to finance the review panel's first year. After that, the appropriation would be repaid and funding would be provided by fees levied on physicians based on the director's estimate of expenses. This extra cost to physicians will no doubt be passed on to consumers of medical services, just as premium rates are currently.

The effect of making suits harder to bring will fall equally on all injured patients. It follows that some deserving victims who can just afford to pursue their claims under the present system will be discouraged by the expense of an extra tier. The general perception that many malpractice suits are spurious is distorted. If anything, the present number of suits is underrepresentative of the incidence of medical malpractice. An economist's testimony before the Senate Committee on Labor and Human Resources cited a California study which showed that injury due to medical negligence resulted in one out of every 126 hospital admissions. Estimates based on that study's figures suggested that only ten percent of those injured patients filed a claim, "and at most one in twenty-five received compensation."<sup>62</sup> Thus, a very small fraction of people who are hurt by doctors' negligent acts bring suit, and of those who do, very few get awards.<sup>63</sup> Still fewer injured patients, we may posit, get awards that could be called huge or excessive. In spite of these facts we see the legislature considering proposals to insulate doctors from the relatively few suits that are filed.

In addition to their discussion of these bills, the Committee has also requested that the Legislative Services Office draft a letter to the Permanent Rules Advisory Committee, asking it "to consider [among other things] the propriety of creating a percentage limitation on attorney

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59. *Id.* at 681.

60. 1986 Tentative Bill Draft No. 86LSO-0095.C2, *supra* note 5, at § 9-2-1507; Recap, *supra* note 7, at 3.

61. 1986 Tentative Draft Bill No. 86LSO-0095.C2, *supra* note 5, at § 9-2-1504(c).

62. *Hearing, supra* note 15, at 11.

63. *Id.*

fees."<sup>64</sup> Because plaintiffs' lawyers work on contingency fees, it is safe to assume that the effect of this change would be to constrain plaintiffs' attorney fee arrangements, while leaving the status quo for insurance company defense lawyers. The effect of these limits, like the effect of pre-screening panels, would result in a reduction of suits brought on valid claims because they had become economically infeasible to prosecute.

On another front, the Joint Judiciary Interim Committee is considering a proposal to repeal joint and several liability for the payment of damages.<sup>65</sup> Under present law, if payment of a judgment is to be shared by more than one defendant, the share of one who cannot pay must be borne by those who can pay.<sup>66</sup> This furthers the policy of fully compensating victims. The proposed alteration would change this result, thereby favoring tortfeasors who would only have to pay for their proportionate share of the harm, regardless that a plaintiff was uncompensated to the extent that a share of the judgment was unpaid.

Doctors and insurance companies would like to see the repeal of the joint and several liability law. They are exploiting the Wyoming Supreme Court's recent decision in *Kirby Building Systems v. Mineral Explorations*,<sup>67</sup> in which Justice Brown, specially concurring, exhorted the legislature to reconcile the conflict between the comparative negligence statute and the joint and several liability law.<sup>68</sup> The conflict involved in that case arises when, after weighing the relative amounts of negligence of the plaintiff and the defendants, the court forces one defendant to pay, irrespective of the negligence-weighting process, because that defendant has the ability to pay. This conflict rarely arises in medical malpractice cases, however. Plaintiffs are often unconscious when their injuries are sustained and seldom contribute to their own injuries. Consideration of the conflict between joint and several liability and comparative negligence is inappropriate in the context of medical malpractice problems and does not justify the repeal of joint and several liability as a response to Justice Brown in *Kirby*.

#### CONCLUSION

The Joint Judiciary Interim Committee and the Wyoming legislature are determined to resolve the medical malpractice insurance crisis. Media

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64. Letter from Representative Ellen Crowley, Chairman, Joint Judiciary Committee, to Chief Justice Richard Thomas, Wyoming Supreme Court and Judge Joseph F. Maier, Chairman, Permanent Rules Advisory Committee (Oct. 23, 1985).

The Rules Committee was also previously asked to consider changes that would limit the use of ad damnum clauses, authorize affidavits of non-involvement, and amend Wyo. Rule 11 to conform with Rule 11 in the Federal Rules of Civil Procedure. Letter from Representative Ellen Crowley to Governor Herschler (October 16, 1985).

Affidavits of non-involvement are clearly meant to give doctors a procedural device in addition to those already generally available, i.e., demurrer or motion for summary judgment. Amendment of Rule 11 would obviate the need for an elaborate pre-trial screening mechanism.

65. "Pure" Comparative Negligence/Repeal Joint and Several Liability Working Draft No. 1, *supra* note 9.

66. WYO. STAT. § 1-1-110 to -113 (1977).

67. 704 P.2d 1266 (Wyo. 1985).

68. *Id.* at 1278 (J. Brown, concurring).

attention to big jury awards and settlements distorts public perceptions of malpractice suits and contributes to the unpopularity of plaintiffs' lawyers. The media is used by well organized lobbies to define the crisis, and to manipulate the political process at the expense of potential victims of medical malpractice.

Perhaps we are at the end of an era, watching a retreat from the high water mark of consumer protectionism, with courts now more interested in protecting the financial interests of any given defendant, than in assuring that individual plaintiffs will be fully redressed for injuries sustained due to another's negligent acts. If we are at the beginning of a new period, the legislature may choose to leave loss where it falls.

If this choice is made in response to self-serving crisis assertions levelled by powerful and interested lobbies, however, we are witnessing a travesty of the political process. It will be left for future writers to recount egregious cases in which victims of devastating injury are left without compensation. They can comment on the next round of reformist zeal. It is likely to be advocated by the public which will find itself appealing for a restoration of the balance which will be taken away by passage of the proposals that the legislature is now considering.

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