Neurosurgical forum
Letters to the editor

Professional Liability: Statement to the Subcommittee on Health, Committee of Labor and Public Welfare, Washington, D.C., on behalf of the AANS

There is no need to persuade this committee that a crisis which threatens the public health exists in the field of medical malpractice. Both Senator Kennedy and Senator Inouye have made eloquent and perceptive statements to that effect.

The system of adversary-oriented civil procedures in the court-jury system has broken down under pressures related for the most part to the expensive, cumbersome, and capricious system, and to its heavy exploitation by a small segment of the legal profession. Medicine, law, the insurance industry, and government watch helplessly as insurance premiums rise almost exponentially, insurance companies withdraw from the field, and the very real danger that physicians may be forced out of practice in large numbers appears. Other symptoms of the crisis include:

1. The premature retirement of older physicians.
2. The inability of young physicians in the high insurance risk specialties to obtain coverage in several states.
3. The inability of medical schools to retain clinical teachers and investigators whose clinical practice is not large enough to pay their insurance costs.
4. The increasing unwillingness of physicians to attempt high-risk procedures or to care for indigent patients in public hospitals, where an unduly high proportion of malpractice claims originate.
5. The increasing use of “defensive medicine,” the cost of which has been estimated at between three and seven billion dollars annually.
6. Large sums are awarded by juries out of sympathy, and contingency fees of 30% to 50% have created a “legal lottery” in which a few become rich and many are passed over.
7. The costs of preparing a defense against even the most capricious suit are large. An attorney writes, “We have been recommending settlement and the doctors have been concurring where the amount being paid was economically sound and where it was not such as to be indicating a feeling of probable fault.” By this he means that the settlement is “less than the likely cost of further defense.”
8. Our best physicians and best institutions have proved most vulnerable. Their high standards and detailed records make it possible to document the smallest event which deviates from the optimal, and the optimal, ironically, has been established by these very physicians.
9. Most tragically, the distortion of the decision-making process in medicine, which is more and more influenced by possible legal liability rather than the physician’s judgment. He may be reluctant to attempt a difficult procedure that might offer the best chance to a desperately sick patient, or to a patient who is still apparently well but who harbors a life-threatening disease. High-risk procedures and new or unusual methods of treatment are therefore withheld because an unsatisfactory outcome too often means an attack on the physician.

It is easy to misperceive the crisis as an insurance crisis, but the exorbitant, even prohibitive, insurance rates are only a symptom of the bankruptcy of the present court-jury system, in which the costs are perhaps 84% of the premium dollar, and awards are often based on the severity of the injury rather than the degree to which the physician has been negligent. We have now proven by social experiment that the adversary-jury system...
cannot handle malpractice litigation at acceptable costs to the public and, secondarily, to the health professions.

Lastly, and probably least in dollars spent, there is indeed malpractice. Competent physicians err. There are incompetent, careless, and callous physicians. Institutions fail to provide adequate safeguards or are slow to recognize hazards.

PROPOSALS

The American Association of Neurological Surgeons, which is the spokesman for the specialty, believes that government must, in consultation with the health professions, the insurance industry, and the Bar, make major changes in the system. Immediate temporary measures are needed to avert the impending crisis in health care. Major long-range changes must be made with all deliberate speed. We believe most of this would be better accomplished at the state level.

We respectfully submit the following comments and recommendations:

Medicine’s Responsibility

Quality Control. The profession’s level of internal criticism is extremely high in our best institutions. There are many places, however, in which quality of care and physician behavior are inadequately monitored. We must strengthen the State Boards of Medical Licensure, or Medical Regulatory Boards must be established with adequate staffs of investigators, examiners, attorneys, and a rotating panel of volunteer physicians. The increased expenses of such a board might be borne by increasing reregistration fees.

Physicians bringing charges against their colleagues to these boards must be protected against harassment by countersuit, and the decisions of the board should have the finality of disarmament procedures. The sanctions of such a board, however, should be graded so that there are options other than complete acquittal or exclusion of a physician from his practice and his livelihood. These sanctions might consist of limiting his practice to those procedures for which he is qualified or requiring that he work under supervision. A blanket requirement of consultation prior to any major procedure would be prohibitively expensive and time-consuming, in our opinion. There also might be limitation of the kind of major procedures permissible by an institution, based on available staff and facilities, rather than solely upon the qualification of the physician.

Informational Services. A systematic statewide loss control and education program should be instituted so that hospital accidents which repeatedly form the basis of malpractice suits can be identified and eliminated. At present, the insurance companies are not required to divulge this information and do not engage in any form of loss control or educational process. There is no central collection point for such malpractice data which could be distributed to hospital administrators and staffs.

Complaints. There should be, perhaps at county or state level, a well-publicized agency to handle patient complaints before they reach proportions of a malpractice suit. A system whereby grievances can be aired without taking them to court might well eliminate many suits which are filed out of misunderstanding, poor communication, anxiety, or resentment.

Public Education. Health care providers must provide an antidote to the unreasonably high expectations engendered by favorable publicity. In spite of much talk of “medical miracles,” the public must be educated to realize that medicine is a difficult, complex, and imperfect art. Appropriate publications would do much to aid and reinforce the kind of “informed consent” which the good physician attempts to provide to his patients.

The Insurance System

More and/or different insurance is not the answer to the problem of insurance costs. The availability of more money is, at least in part, responsible for the escalating demands and unreasonable expense of the present system. We should: 1) restructure the laws, such as those applying to the statute of limitations and methods of arriving at appropriate awards, to permit the insurance companies to make valid actuarial predictions; 2) require that insurance companies open their books on malpractice coverage to determine where the malpractice premium dollars are going, and why; 3) reduce the cost of litigation, which consumes by far the largest portion of the premium dollar.

It must be emphasized that the present cost of malpractice premiums (as well as defensive