An analysis of the liability insurance crisis

The problem of the growing liability insurance crisis is examined from historical, economic, policy, and legislative perspectives. Specifics of arguments presented by physicians, nurses, lawyers, and insurers are provided to illustrate the conflict inherent in the situation. Reports of policy actions accomplished by these groups are presented with a discussion of related bills proposed in past years. Specific nurse populations directly affected by the insurance crisis are presented and actions to be taken by nurses and legislators to deal with the problem are suggested.

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DURING THE past year, much activity has centered around the growing liability insurance crisis. Nurses have already directly felt the impact of what has been, in the past, a physician problem. Health care expenditures have markedly increased since the 1960s with the advent of the Medicare and Medicaid acts. Today, health care costs account for 11% of the current US gross national product.[1] These two acts over the years have created an attitude within this country that health care is a right for all citizens.

Physicians, a major part of the health care system, are currently having difficulties meeting the financial demands of malpractice insurance. As a result of this problem they have had to make adjustments in their services. This has subsequently affected the other parts of the system, namely nurses, patient care, and health care delivery. Specifically, nurse midwives were originally denied continued coverage by their primary insurers in 1985.[2] At that time, the American Nurses' Asso-

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ciation (ANA) offered to cover them, but once hit by the immensities of legal and economic risks of insurance, ANA too was forced to let liability coverage of nurse midwives expire. Since then, these nurses have scrambled to obtain insurance from other sources before current policies elapse.

Not only have midwives been affected but, because of the strain placed on insurance resources by growing malpractice awards, all RNs have realized a 150% increase in premium costs just since 1985.[3] Most recently, psychiatric clinical nurse specialists in the South are hearing threats of insurance policy cancellations in the near future. Even several day care centers received notice that their liability coverage had been cancelled prior to the policy's actual date, threatening a shutdown of their services.[4]

HISTORY

The issue of medical malpractice insurance is one of affordability and availability. It is only one aspect of a nonfunctioning system stemming from a much larger core: a crisis in liability insurance. The cluster of separate, distinct events leading to the liability insurance crisis culminated in 1985, creating a crisis in medical malpractice.[5] The initial insidious event triggering the crisis was the insurance industry's investment of the cash collected from physicians' premiums in short-term, high-interest accounts. The returns (the interest income) derived from these short-term accounts created two opportunities for the insurance industry: (1) enough money to provide a cushion to adequately cover policies in the event of a malpractice case or a large award and (2) the ability to offer liability coverage at much lower rates than would have otherwise been assessed.

Insurance industry crunch

As the national economy improved, prime interest rates declined and interest income rapidly decreased, concurrently causing insolvency of many insurance companies. The findings of one state's liability insurance task force revealed record losses incurred by the private insurance industry.[4] The task force's final report states, "In 1984, for example, total underwriting losses for the industry topped $21.3 billion. Losses from underwriting for the 6-year period from 1979 through 1984 totalled a reported $55 billion."[4] Many have questioned the validity of the liability insurance crisis, purporting that it has been contrived by insurance companies. But the task force report continues, "While the 'experts' debate the reasons for the losses, and who is at 'fault,' and the would-be culprits range from pricing practices by the insurance industry to the American tort system the task force generally agrees that the losses, for the most part, are real."[4(pp3-4)]

Faced with a sudden crunch, insurance companies, over a short period of time, either got out of the market or started to dramatically increase liability premiums for physicians and nurses. One state insurance commissioner was quoted as saying, "There are companies out there losing their shirts on medical liability policies, and if you can't make a profit, you are going to get out of that line of business, or start charging a premium to compensate for the losses."[6(pC-3)] The only alternative left to insurers, with respect to health care profes-

sionals, was to sharply increase premiums and stop reinsurance.

The emergence of the medical insurance crisis

Although this crisis peaked in 1985, for the past ten years the health care industry has witnessed a steady rise in malpractice premiums.[2] Dr Donald T. Lewers, president-elect of the Maryland State Medical Association, stated, "The same (legislative) bills they are deciding on today, we've been submitting over the years."[7(p 2)]

Problems arose for one state when St Paul Fire and Marine Insurance Company of Minnesota requested a 48% increase in liability premiums. The insurance commissioner denied this request, causing St Paul, the primary insurer at the time, to withdraw from the market, creating a shortage of available insurance coverage.[8(p 2)] It was the physicians who responded immediately to counteract this problem; as the initiators of legislative agendas, they influenced state legislatures to respond by creating the Medical Mutual Liability Insurance Society, a physician-owned mutual insurance company that assessed physicians a one-time tax of $300, creating a policy-holder surplus.[8(p2)]

Nursing reaction to the crisis

Nurses remained oblivious to the problem (or at least characteristically uninvolved) until much later, when a private physician lobbying group requested that nurses formulate a position statement on provider malpractice. Since then several resolutions have been introduced by legislators to state legislative committees but have failed to gain passage.[8(pp3-4)] In 1985, the only legislation to aid this growing problem empowered medical liability insurers to include other health professionals by underwriting policies and establishing subsidiaries for those who were just beginning to have difficulties obtaining insurance.[8] In 1986, liability insurance companies notified physicians of a 250% increase in premiums[9] and also notified nurses of the previous 150% increase.[3]

This final event, precipitated by the insurance underwriters as an attempt to salvage their ailing industry, caused a strong reaction within the medical community. Physicians waged a comprehensive campaign designed to gain and maintain legislative attention while most nurses still remained relatively politically inactive.

Nurse midwives, however, attempted to become an integral part of the policy process. They participated in hearings before task force committees in several states as well as the US House Subcommittee on Commerce, Transportation, and Tourism and delivered testimony documenting the impact the crisis was having and would continue to have on the delivery of health services across the nation. The appointment of nurse midwives as task force members guaranteed a stable position for nursing in the decision-making process on the insurance issue, but as soon as the task forces finished conducting hearings and finalized recommendations to legislators, these nurses, too, became silent. State nursing association lobbyists also testified repeatedly, indicating the professional organizations' position on the liability issue, and typically when the hearings concluded this segment retreated as well.[3]

Physicians announce crisis is a threat to public health care

The second and most significant triggering event that transformed the malpractice issue into a crisis was the medical profession's statement that the high—and unaffordable—liability insurance rates would jeopardize public health care. The opening statement from one state medical journal announced, "Local doctors say rising malpractice premiums are forcing them to cut services for the poor."[10] This threat to health care quickly obtained media exposure. Daily accounts throughout the 1986 state legislative season recounted the devastation the malpractice crisis had on the health care system and the bleak outlook for the health care of the poor and near poor.

The *New York Times*, reporting from Boston, stated, "Hundreds of doctors around Massachusetts say that malpractice insurance rates have risen so high that they cannot continue in practice without changes in the system. In New York, New Jersey, Florida and other states, doctors have begun major legislative campaigns, held demonstrations, or even temporarily refused to see nonemergency patients to press for malpractice reform."[p(p7)] Baltimore obstetrician Dr Barry Wolk told *The Montgomery Journal*, "In 15% of the states more than 450 obstetricians have quit their practices last year, and another 30% could quit this year."[11(pB-4)]

Nurse midwives have been forced to follow the same route as their physician counterparts in terms of their care of the poor. Consequently, state task force reports on malpractice noted the availability of health care services for the poor and near poor as one of their major concerns.[7]

LAWYER–HEALTH CARE PROVIDER CONFLICT

While the crisis was occurring, another conflict was developing. "They're fighting like cats and dogs, and granted, both sides have a point. Much is at stake for the public and Senate President Steinberg is right to call for calm and compromise."[12(pC-10)] This anonymous reporter was commenting on the legal profession joining the battle over liability rates. The *Washington Post* reporting on the behavior of the involved groups wrote, "Charges and countercharges from doctors to lawyers to insurance companies and back again, were flying fast and furious."[13(pB-12)]

Health care providers blamed lawyers for creating the malpractice insurance problem, claiming that lawyers have been instrumental in causing the increase in the number of malpractice cases and the size of awards. Citing greedy lawyers, who receive 30% to 40% of the recovery, one physician wrote, "Everyone loses in medical malpractice actions except the legal fraternity."[14(pA-3)]

The medical community argues for tort reform

Nurses and physicians argue for the necessity of tort reform (legal changes) to preserve the quality of health care. Dr. Willie Blair, a hospital physician, angrily testified at a task force hearing that "doctors are becoming the victims of a strike-it-rich or 'lotto' malpractice, an attitude

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lawyers are encouraging."[7(p2)] For nursing, although not experiencing as many malpractice suits, the situation is as bad. Just the threat of malpractice suits severely damages the nurse-physician-patient relationship, increases medical costs, and decreases the quality of health care. Dr Margaret Snow, physician, testified, "Rampant malpractice encourages an adversary role for the patient and without reforms, medical costs will continue to increase. We are so worried about suits that we practice defensive medicine, ordering needless tests and procedures to be safe, rather than sorry."[7(p2)] It is estimated that the cost of this defensive health care is $15.1 billion annually.[15]

Shifting alliances

To further complicate the situation, insurance professionals joined ranks with medical professionals in an attempt to save their ailing industry. One state insurance commissioner noted, "The public is under the impression that entitlement [to payment for damages] is a right whether negligence has occurred or not. Society has to recognize the acuity of this situation and reconcile the need for reforms before everyone loses."[16]

Trial lawyers in turn accused physicians of failing to police their own profession. "Stupid mistakes [by doctors] are responsible for the payout of large amounts of money and the necessity for raising premiums," stated one successful malpractice lawyer.[12] Lawyers argued that solutions favor health care providers and have little regard for the consumer: "The courtroom is the only place where victims of malpractice can seek recourse and why are we punishing the true victims of this situation?"[13(pB-12)]

The final actors to enter the stage, the consumers, allied with attorneys by organizing their own groups. Jenelle Cousino, executive director of one citizen action group announced, "Our effort is for the victim"[17(pA-4)]; individuals came prepared to committee hearings relaying personal experiences complete with color photographs of their injuries.

POLICY ACTION

Health professionals and the insurance industry pitted against lawyers and consumers left legislators as the arbitrators centering around tort reform. The malpractice issue became a public fight among professionals who have displaced their frustrations, publicized policy-level disagreement and conflict, and in defining malpractice a "crisis" created a sense of urgency for resolution. Nelson states, "When a new issue achieves a governmental agenda it sets a precedent, indeed paves the way, for governmental consideration of similar issues. Government agenda are approached, if not set, by clusters of issues."[18(p35)] Malpractice, although a structural breakdown of liability insurance, has caused the government to recognize the attendant problems and to begin to address the current health care insurance

situation, the threat to health care delivery, and the need to change the American tort system. As yet, it is difficult to assess the long-term ramifications of the crisis and of the solutions.

In 1986, health care providers appealed to state governors for help. In response, joint executive/legislative task forces consisting of physicians, nurse midwives, lawyers, insurance professionals, legislators, and consumers were commissioned to study malpractice insurance.[19] Many legislative packages were developed as a result, containing a combination of the reforms recommended by task force committees. Tort reforms proposed include:

- changes in the collateral source rule (allowing as evidence in court cases other sources of compensation, such as the hospital insurance payment being subtracted from the award);
- periodic payments;
- regulation of lawyer contingency fees;
- caps on noneconomic losses;
- statute of limitation changes;
- abolition of punitive damages;
- countersuit;
- certificates of merit (requiring attorneys to affirm that cases have been reviewed by health care experts to support a claim);
- defense of the Health Claims Arbitration Mechanism (giving this board more authority to arbitrate the validity of alleged malpractice cases before court action is taken);
- strengthening of peer review procedures; and
- the use of expert witnesses (confirmation of expert health care witnesses as truly experts).[19]

The most controversial bills introduced relate to the proposed caps (dollar limits) on awards for noneconomic (pain and suffering) losses. This particular aspect of any malpractice case is the most difficult to assess and is where awards are the most unpredictable. Some lawyers argue that cap proposals are unconstitutional, noting that only an individual and his or her attorney can determine this aspect of malpractice.[20] However, capping malpractice awards, according to one state senator, "will create a provision that will help lower the size of court judgements, make the insurance risks more predictable and possibly make malpractice coverage more affordable."[14(pA-3)] To date, a few states (approximately 17) have enacted some tort reforms, but these have been limited to placing caps (usually around $350,000) on noneconomic awards.[17]

The hope is that tort reforms will decrease the cost of insurance and increase the availability of liability insurance. Lawyers, particularly trial lawyers, adamantly oppose all proposed tort reforms. They continue to come armed to committee hearings with clients in wheelchairs and with severe burns who have been victims of alleged negligence. These people tell their horror stories to committee members and warn of the dangers of proposed changes.[7]

NURSING ACTION

Nurse midwives are the primary segment of the nursing profession to have felt the impact of the liability crisis up to this point. Like obstetricians, they present the same unpredictable risks in the eyes of the insurance industry. As mentioned earlier,

as of 1987 nurse midwives will be unable to obtain reinsurance through the ANA.

Efforts to negotiate insurance coverage with other companies met with success in early March 1986; several medical liability insurance companies have announced the expansion of coverage to include other health care professionals, beginning with nurse midwives.[16] According to Maryland Nurses Association lobbyist Rob Hendrickson, "The cost will be approximately $3,000 to each nurse midwife."[3] This is significantly lower than was originally estimated; initially insurance companies wanted to assess nurse midwives at the same rates as obstetricians, which was approximately $40,000 to $60,000.

An alternative developed by the nurse midwives to alleviate their insurance problem has been to form a self-insurance group through the American College of Nurse Midwives (ACNM), which established a program that went into effect as of April 1, 1986. The benefit of the program (as stated by Susan Yates, RN, president of the ACNM) is "that it guarantees continued nurse midwife services without compromise in any way."[21(p10)]

Nurse midwives' insurance rates are still much higher than other RN's because of the 18-year statute of limitation placed on midwifery policies. However, insurance professionals predicted that the rest of the nursing population can expect the cost of their liability coverage to increase; rates in 1986 were already 150% of what they were in 1985.[3]

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The continued rise in malpractice premiums reflects a situation of many abuses. Consumers who desire to take advantage of the system have an opportunity through litigation to unjustly benefit from the affluent physician; suits are instituted at the slightest provocation. Furthermore, lawyers have abused the purpose of court action and have used it as a means to increase their practice by bringing all disagreements, whether founded or not, to court. Health professionals have, in the past, benefited from the shortsightedness of the insurance industry by paying underassessed premiums. Insurance professionals have overextended themselves, creating their own massive losses. The situation has become what Insurance Commissioner Edward Muhl calls "a free for all."[16]

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At the policy level, tort reforms are necessary to preserve the quality of health care not only for the poor and the near poor but also for society as a whole. Reforms are necessary to retain support for health care practitioners presently in practice and to maintain current standards of health care. Reforms also have the potential to contain unrealistic costs of malpractice and to provide a more adequate means to support true malpractice victims. Reforms will also allow the insurance industry to regain its stability. Ignoring the current situation will only precipitate higher health care costs, create greater disparities in health care delivery, and eventually lead to the collapse of the insurance industry.

Such activities as strengthening the

Health Claims Arbitration Board and allowing only true malpractice cases to reach the courts would have a dramatic impact on premium costs. Another suggestion is to permit as evidence other sources of compensation paid to malpractice victims, thus stopping the double and triple payments some plaintiffs are currently receiving for the same loss. Also, any other prior payments should be subtracted from the final award amount. This method better estimates the actual out-of-pocket losses of claimants and reduces costs to insurance companies.

Structured payment schedules to victims would eliminate the large lump sums needed by insurance companies for large awards. Also, monies awarded would be allocated only when actual medical or other costs are incurred by the victim. This would help to reduce the up-front amounts necessary for insurance companies to operate, would create a more predictable assessment of malpractice risks, and would thus reduce premiums to policyholders.

Consumers are entitled to receive fair compensation when malpractice has truly occurred, but award activity must not be used as a punitive measure against professional negligence. Health professionals should be reasonably penalized when conclusive evidence exists for negligence, but only through better enforcement of existing punitory channels.

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