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Joseph E. Owens. Admitted to the Maryland Bar in 1964. Member of the Maryland House of Delegates since 1971. Chairman of the Judiciary Committee since 1973. Served as Vice-Chairman of the Medical Malpractice Committee.

Walter Tahler. Admitted to the Maryland Bar in 1949. Director of the Health Claims Arbitration Office, since 1979.

Marvin Ellen. Admitted to the Maryland Bar in 1953. Well-known City Attorney specializing in Plaintiff's Medical Malpractice Claims.

Introduction:

The ever increasing surge of medical malpractice claims initiated by injured parties has generated a drastic legislative change in Maryland's procedure of adjudicating such claims. The catalyst prompting this change is typically referred to as the "Medical Malpractice Crisis." This "crisis" started in 1974. It consisted of the soaring cost of medical malpractice insurance which triggered great concern within the legal and medical professions, as well as within the insurance industry. The Maryland General Assembly began investigating the "crisis" and set forth to enact remedial action to aid the medical profession and to maintain the quality of health care provided.

One of the first steps implemented by the Maryland legislature to ease the "crisis" was to shorten the statute of limitations for bringing malpractice claims. Under the new statute, a medical malpractice suit must be filed within five years of the injury or within three years from the discovery of the injury, whichever time is shorter. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1980 rep. vol.). By instituting this change, the General Assembly attempted to reduce the insurers' burden of predicting losses in the distant future.

In response to continued pressure for a more efficient method of resolving medical malpractice disputes, the Maryland General Assembly adopted the Health Care Maintenance Claims Statute in 1976. MD. CTS. & JUD. PROC. CODE ANN. §3-2A-01 to 3-2A-09 (1980 rep. vol.). The new statute modified the former resolution process in three ways. First, it implemented an exclusive procedure for all medical malpractice claims for damages in excess of $5,000. This procedure involves the reviewing of claims by an arbitration panel prior to the filing of a court action. Second, it provides that the panel's award is not binding and any party to the action may reject the decision of the arbitration panel and take the claim to court. MD. CTS. & JUD. PROC. CODE ANN. (1980 rep. vol.). The panel's decision is admissible into evidence in a subsequent judicial proceeding and carries with it a presumption of correctnes. MD. CTS. & JUD. PROC. CODE ANN. §3-2A-06 (d) (1980 rep. vol.). Third, the statute created the Health claims Arbitration Office to manage the resolution malpractice claims. MD. CTS. & JUD. PROC. CODE ANN. §3-2A-03 (1980 rep. vol.).

The Health Care Malpractice Claims Statute has been highly controversial since its inception on July 1, 1976. Many commentators have criticized the act and have encouraged a return to the traditional court system for resolving malpractice disputes. Others are of the opinion that such a system is necessary considering the specialized problems of resolving malpractice disputes. This article is a survey of various views regarding the feasibility and long-range success of Maryland's arbitration system. Interviews were taken of Delegate Joseph E. Owens, a major proponent of the act in the House of Delegates; Walter R. Tabler, the Director of the Health Claims Arbitration Office; and Marvin Ellin, Esquire, a plaintiff's medical malpractice attorney in Baltimore City and opponent of the Act.

Interview with Delegate Joseph E. Owens:

U: Who were the proponents of the Medical Arbitration Bill?

O: Certain insurance and medical people. Of course, the opponents were trial lawyers.

U: Why was the Medical Arbitration Bill enacted?

O: We felt that something had to be done because of the feeling that there was an absolute "crisis." I personally do not think there was a crisis; however, many professionals did.

U: Have there been proposals to repeal or change the arbitration procedure statute?

O: There have been stronger proposals in the Senate than in the House. My own feeling is that it will take a couple of years to find out whether we should make any radical changes to the basic approach of the law. The big problem is that many people are not convinced that the law is constitutional. It has not been accepted by the Bar wholeheartedly, and we need good attorneys to sit on the panel.

U: Some commentators say that one of the major reasons for instituting the panel was to decrease awards and to decrease suits that weren't merited.

O: No, I don't think that the members of the legislature felt there would be great reduction in the awards. I think we thought that an arbitration panel would eliminate a good number of suits. I don't think we could have

sold an arbitration board if the emphasis was on "we'll reduce the awards." I think insurance companies who supported the arbitration panel felt it would eliminate cases that have little or no merit. There were some proposals to put limits on awards which we were not about to do.

U: When the opponents of the act wanted a repeal, was the alternative suggestion to return to the traditional tort system?

O: I think basically that was it. There was no other alternative that they would prefer. It was to some extent, all or nothing.

U: What is your opinion of the medical malpractice arbitration system now employed, discussing its strengths and weaknesses?

O: Of course one of our biggest weaknesses is that we still don't have enough of a track record. Next is the problem of real support. Lack of financial support by the government is another weakness. There is also a lack of acceptance by a good part of the bar and the reluctance on the part of attorneys to serve on the panel which of course also goes to the lack of financial support. The strengths have not shown themselves yet, but I think it does eliminate some of the filing of meritless cases.

U: What feedback have you received from the medical and legal professions as to the popularity of the arbitration system?

O: The legal profession is more vehemently opposed to it; although, I don't think the Bar as a whole is uptight about the system. However, a good percentage of the Bar, and I think a good percentage of the legislature, think that the medical malpractice "crisis" was manufactured. We feel that the crisis was real.

U: Manufactured?

O: Manufactured in that the insurance companies played up what they anticipated was going to happen but which never happened.

U: What future changes do you foresee in Maryland's arbitration procedure?

O: I think, frankly, more money has to be put into it. One thing that must be done is to increase the willingness of both doctors and lawyers to sit on the panel. I think that doctors do it more willingly because they want the system to work. The lawyers are not that interested in the system so they feel they should be well compensated if they sit on the panel. They are not well compensated. The problem is no money. Perhaps they should levy something on the various insurance companies including mainly the medical insurance companies: their own medical mutual. Maybe we should hit them for more money in that area. We have what is called an executive budget. The Governor prepares a budget. We can cut it, but we can't add to it. We cannot shift it. I am not criticizing the Governor for this. He has to decide priorities and he has decided this isn't the biggest priority as far as money goes.

U: You mentioned before that the bill was originally written by the Governor's people, how can you explain this lack of funding?

O: That was a different governor, and there was a "crisis."

U: Do you feel it's necessary to retain the arbitration system the way it is now?

O: Yes. For right now I think that we have to keep it, at least for the present. Right now I'd say there's no justification for doing away with it. I think that as time goes on it'll start working better. There will always have to be minor adjustments.

Interview with Walter R. Tabler, The Director of the Health Claims Arbitration Office

U: Recently in February of 1980, a class action, *Walker v. Hughes* was brought against the state alleging certain inadequacies in the Health Claims Arbitration Office. Could you capsulize these allegations and lend your views as to the veracity of these allegations?

T: It was contended that even if the theory of the act was constitutional, the poor administration of the act rendered it in effect unconstitutional. Some of the complaints were justified at the time the suit was filed but were not justified by the time the case was tried. I am reluctant to comment too widely because the case is presently being held *sub curia* in Judge Beall's court. I don't want to say anything that might preempt his decision.

U: Could you enumerate on the inadequacies that you felt were justified at that time?

T: Yes. The office was not staffed properly. It had a non-attorney running it. She had one secretary. The director had never been physically present in the office as far as I know. When I walked into this office, it was obviously one that had been in total disuse. The desk was bare with only a pencil and a telephone. There was no chair. There was no record keeping. The only diary system was in the assistant Director's mind. I was able to install a number of different types of procedures. Some of the basic ones were a diary system, a docket system and maintaining dockets with indexes and cross-indexes. When the Arbitration Office was first set up, it was estimated that approximately 50 to 75 cases a year would be solved. Now we're over the 365 bracket so far this year. Last year we had 326. The year before that, we had 269 or 279.

U: Of the claims that have been filed, how many have been settled?

T: Not settled as such but resolved without formal panel determination: in 1977 none; in 1978—33; in 1979—106; in 1980—86; and in 1981 through November 12—17.

U: Since the effective date of the Act, how many claimants have rejected an award and proceeded to appeal?

T: In 43 of the cases, the award has been rejected. I think that is a very telling figure, when you consider that since July 1, 1976 only 43 malpractice cases went to our nisi prius courts.

U: When an award is appealed, how strong is the presumption of correctness of the arbitration award?

T: Interesting enough, it imposes no greater burden upon the plaintiff than the plaintiff would have had if he had gone in that court initially. All that is required to overcome the presumption of correctness is a tipping of the scale, ever so slightly, in favor of rejection. From a practical standpoint, however, I think it is a considerable burden. Jurors seem to be a little bit reluctant to decide differently than in the way the case was decided originally. The burden of proof does shift if it is the defendant who has entered an appeal. The presumption of correctness imposes upon the defendant the burden of going forward with evidence to overcome the presumption that he or she was negligent. So if anybody should be complaining, it should be the defendant who is forced to carry a burden of proof to the jury that otherwise would not be his obligation.

U: What is typically the time frame between the original filing of the claim until the claim is arbitrated?

T: It can vary. I think that the statistics that we got together for the trial of *Walker v. Hughes,* suggested that the time frame is considerably shorter now than it was back in 1974 and 1975 when the cases were brought in the nisi prius courts.

U: Considering the fact that there is not a jury but a panel consisting of a layman, a health care provider and an attorney, does this composition tend to decrease damage awards?

T: I have seen no indication that it has. Several panel chairmen have reported to me that once the negligence of the health care provider has been established to the satisfaction of the health care member on that panel, he is frequently the highest one in assessing the damages of the three.

U: And as far as the finding of negligence, how does the health care provider member on the panel generally decide?

T: It's a little bit misleading, the facts show that of every four cases about three are decided in favor of the health care provider on liability.

U: Has the minimal fee paid to the panelists affected the quality of panel chairmen participating in the arbitration procedure?

T: I think so, basically on the theory that you get what you pay for. I think many more of our panel chairmen serve as a professional responsibility rather than a means of earning a living. Now to some of our younger lawyers, $150 per day isn't bad when the time was not filled with other productive work. It isn't at all necessary that anybody have any experience in the field of malpractice to serve as a good panel chairman. He is just there as one vote as to whether there is or is not negligence. That is not to be determined by experience in other malpractice cases, but by what the evidence shows in that particular case by the factual testimony of the parties and by the testimony of the expert witnesses. It is a misapprehension that I'd love to dispel.

U: What current operating problems does the Health Claims arbitration office have?

T: Our biggest problem in getting through expeditiously, comes from our having no place to go when one defendant remains unserved. Another problem, it's a terrible misnomer, but the word "backlog" is frequently used to describe our operation here. I am at a loss to say what constitutes "backlog" and I have never had anybody be able to explain it to me. I am recording all cases that came in after July 1, 1981 for an eight month period. Now all cases will come to my attention eight months after they have been in the office. At that point I will send a notice to the chairman and to counsel stating that all discovery must be completed within the next thirty days. Likewise, when a case becomes eleven months old, I will send out a notice stating that the case must be completed within thirty days from this date. However, there are no sanctions imposed if the case is not completed in that time. This office is currently working together with the Attorney General's Office, and we are attempting to draft certain supplementing legislation.

Interview with Marvin Ellin

U: Mr. Ellin, do you feel the traditional tort system of handling medical malpractice cases is preferable to the present arbitration system?

E: I think most anything is preferable to the present arbitration system. The present system is a non-system. There are something like 700 cases that are backlogged which gives one an idea of the efficiency and practicality of this system. Let me add that there is no system that can improve on the prior system, which is the judicial system. This is because in the judicial system there are supporting administrative staffs to help administer the cases coming into the court. The cases are handled in a routine fashion. There is some order to what is going on. The present arbitration system doesn't work which is exactly why in September of 1981, the Supreme Court of Pennsylvania, in the case of *Mattos vs. Thompson,* threw their arbitration system out and declared it unconstitutional. Pennsylvania, at that time, had reached a backlog of 2,600 cases. When you consider that Maryland has a population of 4 million and Pennsylvania has a population of around 12 million, you can see that the present Maryland backlog approximates the backlog in the *Mattos* case.

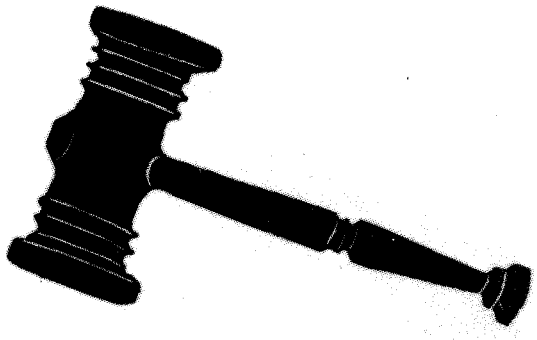
U: In terms of time and cost effectiveness, do you think the arbitration system has any beneficial value?

E: It benefits the insurance companies becaue insurance companies invest funds. The longer the insurance companies can hold onto the

funds that would normally be paid to claimants, that money is earning interest for them. In a substantial case, tying that money up for an extra 2 or 3 years is really reducing the ultimate amount.

U: In February of 1980, you were involved in the *Walker v. Hughes* case. Could you capsulize the allegations involved in that case?

E: An arbitration panel is supposed to approximate a cross-section of the population the same as a jury. But unfortunately this isn't so, because an overwhelming number of people that are volunteering to serve as health-care panel members, and lay panel members are elderly. I received one particular list where the average age was something like 73 years old. Now there is nothing wrong insofar as having somebody who is 73 years old as a panel member. There is something dreadfully wrong when all three members are 73, 76 and 80 years old. Not that old age per se is bad, but deprivation of the litigants of a cross-section of population of both young, middle age and old is the desirable combination which should prevail. Also our studies indicate that you're tacking 2-1/2 to 3 years before you can start the judicial route. I tried a case called *Bateman v. Kim.* The *Bateman* case is an example of the destructive effect of the system which is simply delaying resolution of claims to such a degree that it's tantamount to an infringement of constitutional rights. It was a case of a young mother who we contend was submitted to an unnecessary appendectomy and then the operation was enlarged to remove what they thought was a tumor but turned out to be an ovarian vein and the woman died on the operating table at 21 years of age leaving 2 children. The *Bateman* case was filed on October 16, 1978. It was tried on April 13th of 1981. So it took from October of 1978 until April of 1981 just to reach the panel. It was a plaintiff's verdict. The two children, ages 3 and 2 were awarded $80,000 each in damages. So it's sort of an empty victory as far as the plaintiffs are concerned. The plaintiff immediately filed an appeal from the damages aspect and every one of the defendants filed an appeal on liability. The earliest date that I could get where all counsel agreed to try this case on appeal is April 1982. You certainly recognize the fact that if the plaintiff is successful or if the plaintiff isn't successful, the probability exists of an appeal to the Court of Special Appeals. That certainly would take another 10 months to a year. You are thus talking about a wrongful death case involving 2 minor children who are dependent on public assistance to live while funds to which they have a right have been blocked by a system that has tacked on time that I've just discussed with you. And this is typical! Now I know that Mr. Tabler has probably told you about all these cases that have been settled. Mr. Tabler's approach to this system is similar to the man who lives in the Sahara Desert and promises you it's going to rain tomorrow. It just never does. He's not dealing with it very realistically. But then again, he's the director of the system. As a practical matter, the *Bateman* case is typical of the delay and typical of the frustration, and typical of the duplication of effort and expense which should not exist.



U: Mr. Tabler said the complaints were justified in the *Walker* case at the time the suit was filed but were not justified by the time the case was tried. Did you notice any changes?

E: I would say that the Health Claims Arbitration Office is not an efficient operation. Mr. Tabler recently sent me panel sheets giving data which the proposed panel member is to fill in. There was a question which one panel member filled in. The question was: "Do you believe that you can participate as a panel member in this case and arrive at a decision based solely on evidence of this case?" The answer was "No." Yet, that system is so efficient that they submitted a panel member who replied in the negative. I then asked Mr. Tabler to please substitute another name giving me a strike. He refused to do that. He wanted me to deal with a panel member who already indicated bias.

U: Mr. Ellin, was there a personal motivation for bringing the *Walker* case? I ask this because Mr. Tabler said the action was primarily motivated by your total dissatisfaction of having another step to go through before getting to a jury.

E: That, of course, is nonsense and completely overlooks the fact that I represent people who have been seriously injured and the survivors of individuals who have died as a result of medical negligence. Some of the people who are totally disabled can't afford the extra 2 or 3 years to satisfy the lobbyists who sold this defective package initially. I believe the legislature is beginning to realize the prob-

lem which exists with this system. I believe I have a duty to attack the system which has created the hardship. It isn't a matter of an extra step. I just explained the *Bateman* case. Those children are entitled to funds. These funds are blocked. That is wrong and the system is wrong. It's unfair and it's unconstitutional.

U: On appeal there is a presumption of correctness of a panel award. Do you believe it's an unjustified burden for an appellant to have to overcome this presumption of correctness without the assistance of a written opinion of the panel explaining their rationale in deciding the case?

E: This is precisely why in certain appeals, I intend to subpoena the chairman of the panel and have him explain to the jury exactly why he ruled the way he did. Inthe absence of a written opinion, I believe it's entirely proper for a jury to know why a ruling was made.

U: What is typically the time frame between the original filing of the claim until the time the claim is arbitrated?

E: Usually 2-1/2 years.

U: Do you believe the arbitration system has tended to decrease damage awards to plaintiffs?

E: Yes. Look at the Bateman children who were awarded $80,000 as damages for the death of their mother.

U: Do you find the reduction can be attributed to the health provider member of the panel?

E: Yes.

U: What would you like to see in the way of future changes in the system?

E: I would like to see the system that prevailed prior to July 1 of 1976, where in Baltimore City, after a suit was filed and a plea was filed, any suit could be tried within 12 months from the time it was filed. You can't beat that system. Maryland has an excellent judicial system. A system that is efficient, that moves the cases along to completion. There's no reason in the world why one should attempt to improve on a system that has already been established and perfected and worked in Maryland for many years.