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The Malpractice Wrangle

Attorney Marvin Ellin

by Arthur M. Frank

On Wednesday, October 1, 1975, Mr. Marvin Ellin, Esq. delivered an excellent speech on medical malpractice. Mr. Ellin, specializing in medico-legal work, graduated from the University of Baltimore School of Law in 1953. The speech was the first of a two-part series on The Malpractice Wrangle, sponsored by the Student Bar Association and arranged by the Speakers' Committee Chairman, Michael P. Kenney.

Mr. Ellin begins with the fact that many, not all, spokespersons for those with medical and insurance interests start with the premise that doctors, surgeons, and hospitals should not be able to be sued. These interest groups feel most suits the "unscrupulous lawyers" bring are unwarranted. The solution proposed by the Medical and Chirurgical Faculty of the State of Maryland is that if a medical malpractice suit is alleged, the parties must first submit to an arbitration panel (composed of doctors?). This, Mr. Ellin notes, is the first obstacle to an injured patient's right to free access to the courts, because Med-Chi would like the arbitration result to be final with no right of appeal. Last year, when the Legislature revised House Bill 8-29 allowing appellate review to the courts, Med-Chi spokespersons withdrew their support of the bill. This year, Med-Chi is again supporting a similar bill allowing no appellate review. Mr. Ellin suggests that decreasing the amount of frivolous suits could be accomplished by changing court rules of procedure to make it mandatory for very specific allegations of negligence to be alleged.

Many physicians have relayed the view to Mr. Ellin that physicians should not be "subject to suits, after all, mistakes will happen." Mr. Ellin questions: how about lawyers being given immunity from malpractice suits, or negligent architects not being subject to suit if a building collapses resulting from negligence? Should separate compensation boards be set up for all of these interest groups? Why should medical interests be singled out?

Doctors can afford the high rates of insurance. The average physician, as reported by the American Medical Association two years ago, is grossing two hundred thousand dollars a year. This places the physician in the fifty per cent tax bracket giving him one hundred thousand dollars a year. Surely that physician can afford to pay eighteen thousand dollars a year (and often, it isn't that high) for one million dollars' coverage, which is tax deductible, with the result that he pays only nine thousand dollars a year for insurance. But the physicians "being unable to survive" these high rates of insurance, say they must pass the cost onto the patients. Mr. Ellin feels that this threat of passing the costs onto patients is merely a method of causing people to mandate the legislature to change the law to what the medical interests would like.

Further, the medical and insurance interests would like, at minimum, to restrict the testifying of expert physicians, allowing only experts from the same locality. So that a doctor testifying in a Maryland medical malpractice case must be from the Maryland area. Again Mr. Ellin quares: "where will an injured plaintiff get another doctor in the same community to testify against a fellow physician?" Mr. Ellin feels the Court of Appeals is not interested in whether a particular expert is from the same locality, but rather in whether he is competent in the area and familiar with the locality; most doctors are certified by National Medical Boards where there are uniform standards of practice.

Mr. Ellin's comments in response to the locality question are well taken. Almost a week after Mr. Ellin's speech, in *Shilkret v. Annapolis Emergency Hospi-*

tal Ass'n., No. 7, Term 1975, the Court of Appeals of Maryland repudiated the strict locality rule in medical negligence actions. The Court held that "a physician is under a duty to use the degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances. Under this standard, advances in the profession, availability of facilities, specialization or general practice, proximity of specialists and special facilities, together with all other relevant considerations are to be taken into account." The Court reasoned that "since the medical profession itself recognizes national standards for specialists that are not determined by geography, the law should follow suit." The case involved an infant who had been institutionalized since birth because of brain damage attributable to intra-cranial bleeding. This damage allegedly occurred from negligence at delivery and was complicated by subsequent treatment.

In Mr. Ellin's presentation, he recognized that medical and insurance interests find fault with lawyers' contingency fees. Lawyers receive twenty-five per cent or one-third of the total award or settlement. Mr. Ellin notes that a case may take him months and years of work, with settlements also taking a substantial amount of time. Further, many clients are poor people and couldn't afford to pay the lawyer by the hour; if one were to talk of hours spent on a case, the fee might be more than if it were on a contingent fee basis. Additionally, there is always the possibility the victim may lose in court where there is no payment for work done. As far as the amount of work involved in these suits, Mr. Ellin notes, "I ain't skinny for nothing."

Physicians do not want to be subject to the same law as everyone else; Mr. Ellin thinks they should be. Juries are competent to determine medical malpractice suits; indeed, they have done so adequately in the past. The present system is a good one, as Mr. Ellin suggested by citing a widely read publication, *Medical Economics*, September 1, 1975 issue, quoting a doctor, "[t]hose lawyers are forcing us to be better doctors."



Surgeon Raymond Donovan

by James J. Nolan, Jr.

In the second installment of the Wednesday Speakers' Program's "Malpractice Wrangle", Dr. Raymond J. Donovan, a surgeon at St. Agnes Hospital, presented the physician's viewpoint.

Noting that lawyers now realize the malpractice crisis goes beyond the mere unwillingness of physicians to pay higher insurance premiums, Dr. Donovan stated that physicians, as well as attorneys, have a special interest in medical malpractice, a contention confirmed by Marvin Ellin's remarks to University of Baltimore Law School students last week.

As a point of reference, Dr. Donovan presented an example from his own practice of the difficult milieu in which doctors work, and he contended that the highly-trained, more fully-educated physicians, not the "bad doctors," are being sued. As proof of this contention, Dr. Donovan noted that all eight professors of neurosurgery in New York City are currently being sued, for a total of sixty-seven million dollars. Dr. Donovan went on to characterize medicine and surgery as a prospective, rather than an exact, science, notwithstanding the unrealistic expectations of many patients.

Dr. Donovan proceeded to examine the present inadequacies of the system and to suggest areas needing reform. He encouraged the elimination of the *ad damnum* cost estimate and lump sum payments, a statutory time limitation for infant tort liability, as well as informed consent requirements more easily trans-

latable into actual medical practice.

Much to the disappointment of students who brought guns loaded with six hundred years of common law tradition, Dr. Donovan did not express dissatisfaction with the jury system. Instead, Dr. Donovan suggested putting some teeth into the findings of screening panels by allowing those findings to be admitted at the inevitable trial.

Dr. Donovan suggested other areas that should be looked at, including contingency fees, the use of collateral sources of payment, pain and suffering and loss of consortium.

There were sympathetic ears in the large audience, but no tears; the students, questions were sharp and, at times, emotional. The debate among and between the members of the legal and medical professions continues. In Dr. Donovan's view, at least, the present system needs corrective surgery.