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Pain and Profit: The Politics of Malpractice

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BOOK REVIEW

PAIN AND PROFIT: THE POLITICS OF MALPRACTICE. By Sylvia Law¹ and Steven Polan.² New York: Harper & Row, Publishers. 1978. Pp. xiv, 305. \$12.95.

Reviewed by Ruth L. Gokel³

This is an excellent book. The authors have succeeded in bringing logical order, thoughtful analysis, and lucid prose to bear on the extremely complex issue of medical malpractice. *Pain and Profit* should be required reading for lawyers, doctors, patients, and particularly for legislators.

The stress on this book's value to legislators results from this reviewer's present close observation of the legislative process. Most, if not all, state legislators are part-time. They are inundated with bills each time they convene and cannot hope to master all the intricacies of the subjects requiring their vote.⁴ The same is true of the members of the United States Congress and they are full-time.

While a cursory look at the insurance industry might lead the unwary to believe that the process of premium and reserve determination is a scientific matter that merely requires plugging in the numbers, this is not so.⁵ Insurance is political, just like everything else. As such, it behooves those who make the political decisions on behalf of the rest of us to know what they are doing. In *Pain and Profit*, Law and Polan have done the job the various state legislators should have done in the mid-1970's. Instead, the legislators reacted to "crisis" and took the easy way out.

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2. B.A. 1973, Tufts University; J.D. 1976, New York University Law School. Former legislative assistant to New York City Council Committee on Health. Presently health specialist with Carol Bellamy, President of the New York City Council.

3. B.A. 1965, Tulane University; M.A. 1967, Columbia University; J.D. 1978, Florida State University College of Law. Member, Florida Bar. Legislative Analyst, Florida House Committee on Insurance.

4. Over 3,500 bills were filed during the 1978 session of the Florida Legislature. FLA. H.R. JOUR. 1310 (Reg. Sess. 1978); FLA. S. JOUR. 993 (Reg. Sess. 1978).

5. This determination is made by company actuaries on the basis of historical data and in conformity with statutes in the jurisdiction. These are predictions of the future and, to the extent that the future is not radically different from the past, the predictions will be reasonable. Since premium charges are the funds from which losses will be paid, to the extent there is underestimation in determining premiums or in determining the amount to be reserved for claims which may be incurred, the company will sustain a loss. As a consequence, the actuaries and the companies which employ them are very conservative in estimating future claims to be paid. M. GREENE, *RISK AND INSURANCE* 641-42 (3d ed. 1973).

Pain and Profit begins with a short description of the adoption of a fault-based system of liability and the special rules applicable to determination of fault on the part of professionals. "[I]n most areas of the law, courts make an independent judgment as to whether customary practice is reasonable. In evaluating the conduct of professional people, the customary practices of the profession are presumed to be reasonable."⁶ The inevitable consequence is that an expert witness "is demanded as a matter of law."⁷

With this introduction, the authors proceed to examine the medical system and demonstrate statistically what should be intuitively obvious—that malpractice claims are not randomly distributed over the general doctor population. Rather they are predictable by geographic area and by specialty. Thus, "in 1972 the risk of a malpractice claim against a surgeon practicing in California was fourteen times as great as the risk of a claim against a general physician practicing in New Hampshire."⁸ In Florida in 1977, there were over 700 claims against surgeons and 189 against general physicians. There were 240 claims filed in Dade County, 195 in Broward County, 2 in Bay County and 1 in Gadsden County.⁹

The question is whether that small group of doctors who regularly practice substandard medicine has an impact on malpractice premiums. The answer is yes. A report by the National Association of Insurance Commissioners "found that in 1975 claims of over \$50,000 against individual physicians constituted only 3 percent of the claims made, but consumed 63 percent of the premium dollars paid out."¹⁰

That there are bad doctors is incontestable; that they are ever "delicensed" is very rare. A recent series of articles in *The Miami Herald* makes this appallingly clear.¹¹

Dr. William Henry Harrison stuck a scalpel in a patient without giving local anesthesia. When the patient screamed in pain, Dr. Harrison laughed, according to another surgeon and two nurses. Another time, nurses said, he was so drunk in the emergency room that he started treating another doctor's patient by mistake. Dr. Harrison is practicing medicine in Ormond Beach.¹²

6. S. LAW & S. POLAN, *PAIN AND PROFIT: THE POLITICS OF MALPRACTICE* 7 (1978).

7. *Id.* at 8.

8. *Id.* at 11.

9. Medical Malpractice Liability Closed Claims Survey 1977. (Available from the Office of the Actuary, Florida Department of Insurance, The Capitol, Tallahassee, Florida 32304).

10. S. LAW & S. POLAN, *supra* note 5, at 34.

11. Miller, Hiaasen & Malone, *Dangerous Doctors: A Medical Dilemma*, *The Miami Herald*, Feb. 25-Mar. 4, 1979.

12. *Id.* Feb. 25, 1979, § A, at 1, col. 1.

The *Herald* reporters reached the same conclusions as Law and Polan. Bad doctors are rarely disciplined and if disciplined, their names are rarely made public. "The Florida Board of Medical Examiners received 1,561 complaints during the five-year period ending in June 1978. It revoked 10 licenses."¹³ In January 1979, the Florida Medical Association began publishing the names of disciplined doctors in its journal. However, "[t]he journal's subscribers are doctors—patients seldom see the magazine."¹⁴

And so it goes, doctors protect doctors, as lawyers protect lawyers, out of sympathy, out of friendship, out of reluctance to "tattle," out of fear of a slander suit. The doctors know who the "bad apples" are; the nurses know; the hospital administrators know. Only the patients do not know.

The authors next examine the legal system. The two major issues are who should pay the attorney's fees and what the rules of the game should be. Patients' lawyers operate on the contingent fee system; doctors' lawyers are paid by the insurance companies. The companies get their money from premiums paid by all doctors, the cost of which is passed on to all doctors' patients. Thus all patients pay the doctors' lawyers and injured patients pay their own lawyers as well. The authors find no "legitimate reason for the present arrangement."¹⁵ They find that the "reasons for [this situation] are tradition, the powerlessness of patients as a class, and the fact that if a law were now adopted providing for the payment of patients' lawyers out of malpractice insurance funds, there would necessarily be an increase in medical malpractice premiums."¹⁶ From a legislative point of view, this is anathema. Equity often has little role in legislative decision making.

Another part of the malpractice problem is the misinformation on the part of doctors of the legal standards by which their professional activities are judged. The chapter on "The Rules of the Malpractice Game" shows clearly that the deck is stacked in favor of the doctor.¹⁷

The chapter on "Techniques of Dispute-Resolution" should be read most carefully.¹⁸ State legislators all across the country responded to the "malpractice crisis" of 1975 by doing the easy thing.¹⁹ And the easy thing was to restrict the right of the injured

13. *Id.* § A, at 24, col. 1; see ch. 458, FLA. STAT. (1977) for the constitution and powers of the Florida Board of Medical Examiners.

14. Miller, Hiaasen & Malone, *supra* note 11, Feb. 25, 1979, § A, at 24, col. 3.

15. S. LAW & S. POLAN, *supra* note 5, at 95.

16. *Id.* at 95-96.

17. *Id.* at 97-119.

18. *Id.* at 120-48.

19. See TEXAS STATE LEGISLATURE, HOUSE-SENATE HEALTH CARE STUDY, REACTION TO CRISIS: A STATE BY STATE REVIEW OF MEDICAL MALPRACTICE LEGISLATION ENACTED IN 1975 (1975).

patient to recover. This was accomplished in a number of ways. Statutes of limitations were shortened. Screening panels were established as a voluntary method of encouraging settlement.²⁰ A number of states permitted voluntary arbitration, but this mechanism was not widely used.²¹ Perhaps the most egregious response by the legislatures was to limit the amount of recovery. The range was from a low of \$150,000 in Idaho to a high of \$750,000 in Virginia.²² "Never before in American legal history has a legislature abolished the right of the most seriously injured to receive full compensation for personal injuries caused by the unreasonable action of another, without providing any substitute remedy."²³ As the authors remark, this is "outrageous."²⁴

Part III is devoted to the mystery that is the insurance industry. The basics are quite simple but the introduction of formulae seems to evoke an almost universal response. The eyes glaze over; the attention wanders; the mind idles.

With the aid of surveys conducted post-1975, it appears that the industry overreacted to a few large awards. That is, however, not the way it is supposed to work. Instead, company actuaries are supposed to gather the available data, analyze it over a statistically significant period of time, and then make an educated guess about the range of possible claims in the future. Computer people have an acronym for what appears to have happened—GIGO—"garbage in, garbage out." The authors pinpoint the two major failures: "most state regulators have pursued a policy of benign neglect, and the industry has not voluntarily pooled data in any intelligible manner."²⁵ In fairness to insurance departments, their woefully inadequate staffs are primarily concerned with the solvency of the insurers in their states, not with whether they are *too* solvent. And as the Florida House Insurance Committee has recently discovered in its investigation of workers' compensation insurance, insurance companies do not generally volunteer information.

Rather than make the effort to investigate the private carriers,

20. Florida's medical mediation panel, FLA. STAT. § 768.44 (Supp. 1978), was found constitutional "as constructively construed." *Carter v. Sparkman*, 335 So. 2d 802, 806 (Fla. 1976). On reading the opinion, however, one gets the distinct impression that had the legislature not specifically recognized the existence of a "crisis," the court might well have gone the other way. "Even though the pre-litigation burden cast upon the claimant reaches *the outer limits of constitutional tolerance*, we do not deem it sufficient to void the medical malpractice law." *Id.* (emphasis added).

21. S. LAW & S. POLAN, *supra* note 5, at 128-39.

22. *Id.* at 139.

23. *Id.* at 140.

24. *Id.* at 139.

25. *Id.* at 163.

many states, including Florida, established a Joint Underwriting Association. This is "a consortium of private insurance companies that could, if necessary, be forced to write medical malpractice insurance without risk of loss or opportunity for profit."²⁶

The experience of the Florida Medical Malpractice Joint Underwriting Association (FMMJUA) is instructive. The annual report for the fiscal year ending June 30, 1978, showed that for the three years 1976, 1977, and 1978, the FMMJUA had taken in over \$36,500,000 in premiums, had paid out \$3,361,000 for losses and loss expenses (one-tenth the amount of premiums), had accumulated reserves of \$16,000,000 and had received investment income of over \$3,000,000.²⁷ But notwithstanding a two-year statute of limitations,²⁸ Mr. E. Allen Shiver, manager of FMMJUA, plans to ask for an increase in premiums because the FMMJUA's actuary tells them that \$16,000,000 in reserves (busy earning twelve percent a year) is not enough.²⁹

The lesson to legislators is clear. Reacting to "crisis" in an informational void is irresponsible. Stopgap measures such as the formation of temporary JUA's are the best way to preclude an irrational response. While there are some frivolous claims, most people bring malpractice suits because they were injured by a doctor. Given the odds against winning, it takes a firm conviction in the rightness of one's cause to pursue a malpractice claim. The first legislative response should hardly be to restrict a patient's right to recover. Rather that should be the last response.

The first step should be to accumulate the data to see if the industry's claim of "crisis" is justified. The second step should be to ascertain how many doctors are really bad and why they are still practicing. If the industry is correct and if all the bad doctors are weeded out, then, and only then, may a legislature decide that patients are bringing frivolous claims. This kind of analysis is applicable to any situation in which insurance is involved. Scrutinize the industry data. Then isolate the actors in the drama and ascertain their roles. Pay attention to who is hurt and who inflicts the injury. Define the role of the supporting players and assess their contributions. Then make the laws.

26. *Id.* at 195. Authorization for Florida's JUA may be found at FLA. STAT. § 627.351(7) (Supp. 1978).

27. Florida Medical Malpractice Joint Underwriting Association Financial Statement—Fiscal Year Ending June 30, 1978 (available from the FMMJUA, 325 John Knox Road, Building L—Suite 206, Tallahassee, Florida 32303).

28. FLA. STAT. § 95.11(4)(b) (1977).

29. Meeting of the House Insurance Committee, March 7, 1979 (tape on file at the committee office, 310 House Office Building, Tallahassee, Florida 32304).

