Testimony of

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August 20, 2004

Testimony before U.S. Congressional Hearing on Tort Reform

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Salt Lake City, Utah
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Senator Hatch, thank you for the invitation to participate on this panel discussing Utah's professional liability crisis and the need for federal tort reform legislation.

According to an extensive survey by the American Association of Neurological Surgeons (AANS), Utah and twenty-three other states are "severe crisis" professional liability insurance (PLI) states. The criteria: either, a fifty percent increase in PLI premiums between 2000 and 2002 or average neurosurgery PLI premiums over $100,000. That is a truly dubious honor - for Utah citizens.

As one who practiced in Salt Lake City for over thirty years and decided to stop doing so two years ago, my principal concern regarding Utah's "severe" professional liability insurance (PLI) crisis for neurosurgeons is that, as a consequence, patients in this state are losing access to neurosurgical care.

The neurosurgeons, nationally and locally, for whom I have the most admiration and whose surgical services I would insist upon for my own care have been sued, multiple times. An American neurosurgeon can expect, on average, to be sued every eighteen months. The surgical treatment of certain types of brain tumors, cerebrovascular anomalies and spinal disorders is associated with an inherent risk such that everything can be done correctly, proceed optimally during the surgical procedure and, nevertheless, result in an unfavorable outcome. Lawsuits alleging medical negligence are intensely unpleasant, drawn out and vividly remembered. Neurosurgeons will justifiably go to great lengths to avoid medical practice areas associated with demonstrable legal jeopardy. Their behavior is perfectly appropriate considering the harsh disincentives provided by the present litigious medical practice environment.

There are only twenty-seven neurosurgeons practicing in Utah - a smaller number than were present five years ago. Some cover busy, more liability "risk-associated," Level 1 Trauma Center and large Regional Referral Center emergency room hospitals and others cover considerably less busy emergency rooms with the always present option of sending a case to a larger referral center hospital at their discretion. In present circumstances, for obvious reasons, it is increasingly difficult to find neurosurgeons willing to affiliate with the former.

Although few in number, neurosurgeons are absolutely essential if there are to be available to the Utah public the following: emergency rooms, tertiary and quaternary intensive care units,

medical air transport systems, Level 1 Trauma Services or, for that matter, a Utah State Bureau of Emergency Medical Services (EMS). Without easy access to neurological surgeons, not one of the above is a viable, functional entity. A remarkably small number of willing neurosurgeons maintain that vital functional link.

Does the average Utah citizen take for granted that if their son is seriously head-injured in a car rollover that a neurosurgeon will be immediately available to him? Does that citizen just assume that if their mother has experienced a cerebral hemorrhage that, within the brief time-frame essential for intervention, a neurosurgeon will be immediately available to her? As a consequence of Utah's present litigious medical practice milieu and PLI crisis, it is less and less realistic to be comfortable with that assumption. In fact, without the passage of national tort reform legislation that assumption is not warranted at all. Considering the blatant disincentives present in our current litigiously threatening neurosurgical practice environment, there may too few left in practice willing to be available on emergency room coverage rosters.

For neurosurgeons and their patients in Utah, it is a "severe crisis." It has already tangibly affected Utah citizens' access to neurosurgical care in three ways: by neurosurgeons being provided incentives to leave practice; by altering their practice pattern to one less risk-associated; and by diminishing the prospects of attracting neurosurgeons.

Early retirement

After time off to serve as Chief Medical Officer for the 2002 Olympic Games, I was a perfectly healthy sixty-six year old and considered continuing my neurosurgical practice at a reduced level of patient volume and frequency of surgical procedures. I believe that I could have made a valuable contribution. My 2003 Utah Medical Insurance Association (UMIA) annual PLI premium, however, was estimated to be about $82,000. Understand, the UMIA is not making money from anyone. It is non-profit and physician owned.

I could either practice full tilt in order to afford the increasingly high practice overhead or not practice at all. There was no feasible way to slow down. I stopped medical practice altogether. If I were in practice this year, based on close parallels with practice partners, my annual PLI premium would be $93,000 - despite a practice profile such that my insurance carrier never had to make a pay out. The premium is projected to increase again for 2005. That apparent fiscal necessity demonstrates the failure of the extant PLI system.

Last year another Salt Lake neurosurgeon, a medical school classmate and two years younger than I, also abruptly left the practice of neurosurgery. He was scheduled in the regular rotation covering the major referral center, LDS Hospital emergency room. Notified that his annual PLI premium had been doubled (his PLI carrier was one of two companies that decided last year to no longer do business in Utah), he immediately and unexpectedly "retired" leaving a conspicuous void on the rotating coverage roster of that absolutely essential, major referral center emergency room. His place on the roster has yet to be filled. No one is willing to replace him.

Repeated entreaties have been made to three neurosurgeons at Salt Lake suburban hospitals to join our large referral and trauma center emergency room call rotation. How strong is the emergency room coverage aversion? Despite the attraction of access to Intermountain Health

Care health plans plus a daily coverage stipend, none are willing to provide that emergency room coverage.

Altering practice patterns

Some neurosurgeons, well trained in cranial surgery, are giving up hospital privileges for cranial surgery and limiting their practice to spine surgery in order to avoid increased risk-associated emergency room coverage. As illustrated in the paragraph above, the number of neurological surgeons willing to provide this emergency coverage under any remunerative arrangements is dwindling with each "crisis" and increase in PLI premiums. One cannot overstate the seriousness of that problem or its implications for the public.

Some higher risk cranial and spine cases previously cared for at suburban hospitals convenient to those population areas are no longer being done locally. They are being sent to a distant referral center.

Trends in the Neurosurgical Workforce in the United States, a recent well-researched paper, one of the authors of which is our own, Bill Couldwell, MD, PhD, Chairman of the Department of Neurological Surgery at the University of Utah Health Sciences Center, comments on the decreasing availability of neurosurgeons.

"One significant contributing factor is the current malpractice crisis in the U.S., which has exerted strain on practitioners of neurosurgery, particularly those in private practice who do not have the benefit of working in a self-insured health delivery system or hospital. Rising malpractice premiums, combined with decreasing reimbursement, have made continued practice in many regions of the country fiscally untenable. In a survey of 563 neurosurgeons nationwide in 2002, 29% responded that they were considering retirement, 43% were considering restricting their practices to low-risk surgeries and 19% were considering moving in response to the liability insurance crisis."

The self-evidently necessary, constructive remedy is to provide relief from the litigiously threatening medical practice environment to which neurosurgeons have appropriately adapted and which ill-serves the general public interest. That requires federal tort reform legislation.

Attracting neurosurgeons

What does the future hold? Responding to these often discussed and well-understood disincentives, U.S. medical student applicants for the neurosurgery residency match began declining in 1991 and have more so since 1995. From a public interest standpoint, that represents a significant problem. Neurosurgery has always been known as an exacting, demanding specialty with a post-medical school residency lasting six to seven years. Since about 1991 it has been increasingly identified as the subspecialty "most sued" and for which it is most difficult to find professional liability insurance. People respond to incentives - these are persuasive, cautionary and demonstrably effective disincentives.

Had you finished your residency in neurosurgery elsewhere and were looking for a favorable location in which to practice for the long term, would you choose Utah with a "severe" PLI crisis practice environment?

If you are a young neurosurgeon already in Utah and note that the fees paid for given surgical procedures are significantly higher in Idaho and the PLI premiums are significantly lower, would it not be appropriate to move there? About three years ago, one of our most respected, able and well-trained neurosurgeons left Salt Lake for Idaho.

In good part a reflection of a litigious practice atmosphere, the number of practicing neurological surgeons in the U.S. has declined since 1998. By 2002 there were fewer in practice than in 1991. During 2001, three-hundred twenty-seven board certified neurosurgeons, comprising ten percent of our national workforce, left their practices.

Considering the availability of essential services to the public, of even more concern is that a large proportion of those remaining are in the fifty to sixty-five year old age group and have already altered how and where they practice in response to this PLI crisis. Their only remaining option is to cease practice altogether.

Do our Utah neurosurgeons, facing a "severe" PLI crisis, have any reason whatsoever to be optimistic about an improvement in their practice environment? No. Are they going to insist on national tort reform legislation? Yes. Is the Utah public sufficiently aware of how vulnerable they are if that does not occur? No.

Conclusion

Considering access of patients to critically important neurosurgical care in a highly litigious environment, consider the following. The Emergency Medical Treatment and Active Labor Law (EMTALA) legislation requires that one accept a patient in transfer when on-call for the hospital emergency room. In my more than thirty-year practice experience, fielding telephone calls during the middle of the night from emergency rooms spanning three states was common. The last year of practice I was served with subpoenas for two depositions by opposing attorneys concerning two lawsuits that had been instituted alleging malpractice in cases I had apparently discussed on the phone with emergency room physicians.

Our UMIA legal counsel asked a reasonable question. In our litigious environment, was it prudent behavior for me to answer phone calls from emergency rooms all over Utah, Wyoming and Idaho, giving expert neurosurgical advice regarding diagnosis and treatment? My behavior was judged not to have been medico-legally prudent. It was too "risk-associated." Presently, the neurosurgeons in my practice environment do not accept any calls from outside hospital emergency rooms, on advice of legal counsel. Does the current "severe" PLI crisis interfere with the average Utah citizens' access to excellent and timely neurosurgical care? The answer is yes, directly, in many ways and every single day.

We are fortunate to have John Nelson, MD as a local colleague and American Medical Association (AMA) president. Succinctly, the AMA case is that if there are inflationary considerations regarding so-called economic damages to injured patients, fine. Where some

vestige of reason has to prevail and reform has to occur is with the apparently limitless non-economic damages - concerning which, arguments about inflation are not cogent. No one feels worse than neurosurgeons who have been involved with bad outcomes. It puts some right out of business emotionally. Frankly, some are never the same. There is a bottom line, however. Unless there is prompt national legislative reform of the present system, some neurosurgical services in Utah will become increasingly and noticeably difficult to access.

Senator Hatch, in April 1995 you graciously gave me the opportunity to sit with you in your Washington, D.C. office and discuss tort reform. I was the soon-to-become president of the spokes-organization for America's neurological surgeons, the American Association of Neurological Surgeons (AANS). We agreed that if that issue were not then addressed in the U. S. Senate there would be inevitable patient access consequences. To your credit, you worked for tort reform legislation in the mid-nineties. Here we are nine years later with a much worse PLI crisis in Utah and twenty-three other states. Nationally, neurosurgery continues to lose far more board-certified surgeons each year than would be expected from normal attrition. We all understand why.

Neurosurgeons have been coerced into a high-stakes, prohibitively risky game. The ante necessary to just stay in that game continues to soar higher and higher. All over the country, they are making this reply, colloquially, "The stakes are too high and risky for me. I'm no longer in. I fold. I'll leave whatever I have on the table, but ... I'm done. You all go on without me."

Each year more neurosurgeons walk away from the present counter-productive, contrary-to-the-public-interest and failed medical-legal-insurance system. That represents the irretrievable loss of a national workforce crucially important if we are to have functioning ERs, ICUs, medical air transports and trauma services. Without neurosurgeons, those services are non-functional.

I repeat for emphasis, every Utah citizen can only hope that a superbly trained neurosurgeon will always be immediately accessible through the emergency room when their own son is seriously head-injured in an auto accident and when their own mother has a hemorrhagic stroke and needs surgical intervention promptly, within two hours. Unless there is meaningful federal tort reform, that immediate neurosurgical access will likely not be available. Under the present glaring disincentives in Utah, there won't be enough willing neurosurgeons around to provide it.

We appreciate your concern and willingness to act as a facilitator on this issue. The general public needs your help in achieving federal tort reform legislation - and the sooner the better.

Thank you.