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Private Responses to the Crisis

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SESSION 2: PRIVATE RESPONSES TO THE CRISIS

PROF. BLUM: Our next speaker is Susan Schwartz from Corboy & Demetrio.

MS. SCHWARTZ: Good morning. I am the pariah. I am Dickie Scruggs. Actually, it's refreshing to participate in this environment in a discussion like we are having today, because so often when I speak on the topics I am going to talk about, it's very hostile, especially when I am with healthcare providers. I want there to be a proper perspective. I don't want anybody to be misled. I am a tort trial lawyer. I don't do anything else. My firm is retained daily on a contingent fee basis to represent injured people, often catastrophically injured people, or the surviving spouse and children of a dead person. The tort system in which I practice requires all people in all walks of life to adhere to a standard of care, a standard of conduct. If, as a result of a deviation from that standard of conduct, a person is injured, those actors who are negligent are asked to respond in money damages.

At this time in Illinois, the state in which I practice, victims, deceased or injured, have the right to full, fair, and reasonable compensation for the nature, extent, and duration of their injuries, whether that injury stems from the inattention of a Greyhound bus driver who ran a red light, or from the manufacturer of an SUV whose defective tire exploded, or, as in less than ten percent of the cases in our office, in the case against a hospital or a physician for medical negligence. Yet whenever we talk about this concept of tort, more often than not when you are talking to a doctor particularly, their backs bristle. How does this happen? How have we gotten to this point?

I have a letter that was sent by the President of the American Association of Neurological Surgeons and the President of the Congress of Neurological Surgeons to each and every member of their organization addressed, "Dear Colleague, Neurosurgery is in a state of crisis. The out of control litigation system is threatening each and every one of us and professional liability reform is the single most important issue facing American neurosurgery today." They go on to request all of their members to contribute a minimum of a thousand dollars to fight the tort reform battle for patient education purposes. This is what the doctors believe—that the only

solution for the crisis is caps. Usually I am the only person in the room that is saying that there is any other solution but caps and that caps are not the answer. That's why I was pleasantly surprised today to not have to be the only person standing here saying to you, all of the studies that we have on the subject matter show caps are not the answer. Caps are not the panacea to healthcare problems that they are purported to be.

As often happens when you are sitting in a room and you hear other people talking, you change your speech because you want to talk about different things that arose as a result of what happened. That's a little bit where I want to go because in getting ready to come today I looked at ninety days of newspaper articles using my Lexis research tool. There were 1200 articles about caps and insurance premiums—1200 articles in ninety days. I just used a really simple search. I read quite a few of them to see if they were following the usual trend that we absolutely have to have caps. Most of those articles talked about frivolous lawsuits. Since I am the lawyer that represents these people who supposedly file these frivolous lawsuits, I would like to talk about that a little bit.

One of my partners just settled a case, but he settled it after being on trial for over two and a half weeks. In that lawsuit were the parents of a five-year-old girl, who today has respiratory therapy, physical therapy, and occupational therapy five days a week. Her problem is that she has bilateral phrenic nerve palsy and bilateral brachial plexus injuries. Her arms are partially paralyzed and she can't breathe without the use of a ventilator every night because she is too exhausted at the end of the day from using her accessory muscles to breathe.

At the time her case went to trial, her medical expenses to date were $2.7 million. Her father had exhausted his insurance coverage. She is on public aid. The healthcare plan which was introduced into [evidence at] trial [and] was verified by her treating physicians as being the minimum of what she would need to live the rest of her life, at present cash value was $27 million. [T]he healthcare plan went in uncontradicted. There was not a defense expert that was called to contest the plan either on the numbers or on the need for the treatment. The injury was verified by her treating physicians, who were the national and world-renowned experts in the treatment of brachial plexus palsy. [The assessment] was that there had been excessive traction [at birth].

The nature of the case was that she [the mother and patient] had a breech delivery where an elective induced vaginal delivery was performed at thirty-four weeks. I am not going to get into all the legal things because the case settled for $20 million. But I ask you, is that a frivolous case? Is that a case in which a jury would not have been warranted in awarding far more than the economics involved for this lifetime of suffering, for this lifetime

of disability, for this lifetime of loss of enjoyment of life? By the way, every doctor that testified said that with the proper care she would live a normal life expectancy. Was it frivolous? Would a jury be unjustified in awarding a multi-million dollar verdict in that case? I would respectfully suggest that most of you would agree they would not have been.

But I want to look at the flipside. Assume a forty-five-year-old vivacious, active, tennis playing wife and mother of four comes out of the hospital two admissions and two and a half months after surgery for a ruptured appendix with brain damage. Her husband elects to reject the million-dollar offer that is given to him before trial because he knows what his wife's round-the-clock care will cost for the rest of her life. The case is tried.[1] It's one of those strange animals.

Nationally, less than five percent of the malpractice cases which are filed are actually tried. The jury only gets to hear a very small number of the cases that are filed. What happened in that case is what usually happens—the doctors win seventy to eighty percent of the time, depending on which jurisdiction they practice in. Guess what? In that case the doctors won.[2] An appellate court reviewed the verdict and the case was reversed on evidentiary grounds;[3] again, settled before it went to trial. But what if it hadn't? Was that man acting on behalf of his wife frivolous in pursuing his day in court? I suggest that he was not.

I also suggest to you that the only people we represent are not just lay people. I have represented many physicians, and I categorically tell you when a physician is injured in an automobile accident, he hires a lawyer. When he hires that lawyer, he wants full, fair and reasonable compensation, and he is not even remotely interested in caps. [Likewise] when the son or daughter [of a physician] or a physician himself is injured as a result of what they believe is malpractice, they don't sit by and say, "Oh, that's the system. It's okay." They hire a lawyer. Again when they hire that lawyer at that point in time, they are not remotely interested in caps.

That's the concern I have. If a cap is enacted in the medical negligence arena, what does that mean about caps being enacted in other cases? If physicians are granted this immunity, why isn't that immunity available to other actors as well? I am fortunate. I live in a state where there is a strong supreme court which has upheld the notion that special legislation can't be passed to treat people injured by similar means differently.

In this state we have full, fair and reasonable compensation, but what would happen if there were a cap? That's again what I want to focus on –

1. Karsten v. McCray, 509 N.E.2d 1376 (Ill. App. Ct. 1987).
2. *Id.* at 1379.
3. *Id.* at 1384.

how a cap is not going to affect a frivolous lawsuit. Number one: I don't think they [frivolous lawsuits] are filed. Number two: if they are filed, they are not going to approach $250,000 of non-economic damages. The caps are going to affect those patients who are the most severely injured –the blind, the paralyzed, the brain damaged. Think again.

We represented a nurse. She was near retirement. She went into the hospital for a bowel resection. The good news is she doesn't have cancer. The bad news is the day before she was scheduled to be discharged, she developed pain and a loss of a pulse in her right foot. She was seen by four residents throughout the course of the night, one of whom did call his attending physician. She was not taken for an arteriogram for over twelve hours. It took an additional six hours before she was brought to the operating room with an ischemic, pulseless, cold, paralyzed right foot, and [by that time] her left foot didn't have any pulse either. She lost both of her legs.

The $250,000 cap applies whether you lose one leg or two. She is going to spend her retirement [in a wheelchair], instead of grabbing the keys and going to drive to see her eighty-seven year old mother in Alabama. She is too old and has too much difficulty using a prosthesis. What you find out with amputees frequently is that their economic damages are limited. Why? Once the limb is cut off, they [the amputees] don't necessarily need a lot of continuing care. If they get a good prosthesis and are young and able enough, which most of them are, and they want to, they go back to work. Their economic damages from loss of wages are small. Their future medical expenses are limited. But is $250,000 adequate compensation for loss of enjoyment of life, the disability and disfigurement they have suffered? I respectfully suggest that each and every one of you would answer no to that question.

I could talk a lot about more studies that are out there about how caps don't help, but I am not going to do that. I am going to talk about one other thing. We receive approximately 1000 phone calls per year from people who claim they have a potential medical negligence cause of action. I know this because I did the research for my senior partner, Phil Corboy, for an article that was published during the last [medical malpractice] crisis in the late 1980s. I did it the last two years to again verify [the number of phone calls per year]. The average has been pretty consistent.

Most of those people who call want to know what happened. The biggest problem is communication. They maintain that they went to the hospital because they had been lured there by the ads that drew them in, telling them "we are the best," "you have a choice," "choose wisely." Then the iatrogenic injury or death occurred, which they had no reason to suspect would ever occur, and whenever they asked, they got nothing. They got the

resident that looked away. They never again saw the attending physician. Now to add insult to injury, they have been trying to get the medical records, and they can't—they [the physicians/hospitals] won't give them to us.

They [these patients] are coming to a lawyer to find an answer. The good news for most of you is that over half of those people are summarily rejected within minutes of the first phone call. Why? The case wouldn't warrant the cost of conducting a medical investigation. It's just that simple. It's a cost-benefit analysis.

Of the remaining fifty percent, there are probably only about 100 to 125 [complaints] every year that we go through the process of obtaining the medical records and x-rays and forwarding them to an expert for review. Our statistics have been pretty steady. Last year we filed twenty new medical negligence cases. This year we filed sixteen. We have another month. We will probably come pretty close to twenty [new medical negligence cases out of 1000 phone calls received]. So twenty out of 1000. I think the lawyers who are working on the contingent fee basis are the best break that we have in the medical liability system, because we know what's involved in these types of cases.

We do our best to find experts who are credible, to find experts who have published; [however], there will be aberrancies like what happened with Dr. Austin.[4] But there are also other fallouts from that. One of the most difficult experts to obtain in the United States today—and I have talked to plaintiff lawyers all over the country—is a neurosurgeon. [M]any of them [the neurosurgeons] cite the *Austin* case and pressure from their faculty that they cannot get involved in these kinds of cases on behalf of the plaintiff as the reasons for their not wanting to review a case. I suggest to you that that is not the publicity that the medical profession wants either, a conspiracy of silence. That does not comport with safety systems and wanting to promote patient care.

Most of the studies say that the cost of malpractice in the medical legal system is less than one percent of the total cost of all our healthcare expenses in the United States. I respectfully suggest to you that savings of one dollar out of every hundred is not going to improve access to healthcare for anyone.

I thank you for allowing me the opportunity to speak to you and to share with you some of the concerns that I as a trial lawyer have about preserving this tort system, because it's there. It's there not only for me and for the people whom I have had the privilege to represent to date, but it's there for each and every one of you and the members of your family if you are one of

4. Austin v. Am. Ass'n of Neurological Surgeons, 253 F.3d 967 (7th Cir. 2001).

those persons in the Institute of Medicine study who are injured by iatrogenic healthcare-induced negligence. Thank you.