Brigham Young University Prelaw Review

Volume 38 Article 6

4-2024

Ensuring Equity in Medical Malpractice Cases for Low-Income Plaintiffs

Hassan El-Cheikh
Brigham Young University, helcheik@byu.edu

Ensuring Equity in Medical Malpractice Cases for Low-Income Plaintiffs

Hassan El-Cheikh[1]

I. Introduction

Across the United States, about 85,000 lawsuits are filed against medical providers every year.[2] This represents an unfortunate trend for both medical providers seeking to care for patients as well as for patients seeking care for the myriad of ailments they may be facing. For the plaintiff, suing a doctor is a grueling and complicated process. For a plaintiff to prove medical malpractice and receive compensation, they must demonstrate that the medical provider fell below the standard of care. The process of bringing a lawsuit against a doctor is laborious, highly emotional, and time-consuming.

A. Ryan and Malyia Jeffers

In 2010, a Sacramento man named Ryan Jeffers took his two-year-old daughter, Malyia, to the doctor. Malyia was a perfectly healthy baby who loved to dance, sing, and entertain. One Sunday in November, Jeffers noticed Malyia had an unusually high fever, and

---

1 Hassan El-Cheikh is a fifth-year student studying Communications at Brigham Young University. He plans to attend law school after graduating. Hassan has also worked as a writer for BYU's Daily Universe and as executive producer of BYU's Universe Live. Hassan would like to thank his editor, Stetler Tanner. Stetler is a fourth-year student studying Family Life: Human Development at BYU. He plans to attend medical school in Fall 2024.

2 *US Medical Malpractice Case Statistics*, Justpoint (Jan. 2024), https://justpoint.com/knowledge-base/us-medical-malpractice-case-statistics.

unusual bruises appeared on her cheek. Alarmed by this, he rushed Malyia to the emergency room at Sacramento's Methodist Hospital, where the situation took a turn for the worse.

The family claims they could not get a physician to examine their daughter and that the five-hour wait in the emergency room nearly killed her. As Malyia waited to be seen, her septic infection deteriorated. Ultimately, this perfectly healthy baby girl had to have several amputations, which the family feels could have been avoided. "If any of my other kids get sick, I'm terrified of taking them to the ER," said Jeffers.[3] This quote illustrates the fear that individuals throughout the nation can develop because of medical negligence.

Three months later, (once Malyia's condition had stabilized) the Jefferses filed a lawsuit against Sacramento Methodist Hospital. The claims filed included medical malpractice, negligent infliction of shock, and emotional distress. "The day this happened, I knew I wanted to sue," said Jeffers. "No one's child should have to suffer the way Malyia did in that ER."[4] In the end, Sacramento Methodist Hospital and the Jefferses reached a settlement of $9 million according to California court records.[5]

It is difficult to imagine what type of pain Malyia and her father endured. For plaintiffs, the main issue is holding doctors accountable, let alone the financial setbacks, and hoping the compensation received is enough for future medical treatment. While it is evident the impact lawsuits can have on patients, one argument of this paper is that the ramifications equally impact treating physicians.

B. Effects on Physicians

A researcher at the University of Illinois Department of Psychiatry found that upon learning of a lawsuit against them, doctors are often encompassed by initial feelings of surprise, shock, outrage,

3 Sabriya Rice, *Harmed in the Hospital? Should You Sue?* CNN (Mar. 24, 2011), http://www.cnn.com/2011/HEALTH/03/24/ep.malpractice.sue.or.not/index.html.

4 Id.

5 *Jeffers v. Methodist Hospital of Sacramento* CCP §877.6(a)(2)

anxiety, or dread. The researchers also found that when doctors begin consulting with their attorneys, the reactions include anger, denial, concern, reassurance, and panic. Naturally, these emotions depend on the initial assessment of the case.[6]

This is followed by lengthy periods of denial and intrusions, with active attempts to erase thoughts about the case. However, doctors become preoccupied by ruminating excessively; this is exacerbated whenever case-related activity increases, such as before the deposition, when experts testify, and before and during the trial. Overall, the researchers' findings show that sued physicians often experience a "see-saw effect": up one week and down another, with alternating feelings of confidence and low self-esteem, assurance, and doubt.[7]

The overall goal of this paper is to offer a proposal that will benefit both plaintiffs and doctors. In a medical malpractice lawsuit, a plaintiff is typically accompanied by a medical expert witness. Low-income individuals should be guaranteed a right to a medical expert witness that is willing to testify on the plaintiff's behalf due to the high expenses associated with obtaining the medical expert witness. By doing so, doctors will be more focused on building a physician-patient relationship, while victims of medical negligence will have a fair and equal chance at receiving just compensation. This will be done via taxpayer dollars to a "Medical Expert Witness Fund" that will pay out appropriate funds to lawyers who have low-income clients seeking a medical expert witness.

II. Background

A. Civil Lawsuits and Medical Malpractice

This section offers a discussion of what a medical malpractice lawsuit looks like and considers the difficulties involved. The first medical malpractice lawsuit in the United States dates to 1794, just four years after George Washington's inauguration, when a

6 Sara Charles, *Coping with a Medical Malpractice Suit*, 174(1) West. J. Med. 55-58 (2001).

7 Id.

Connecticut man claimed a doctor promised to skillfully perform an operation on his wife, but she later died from surgical complications. The court ruled in favor of the plaintiff and awarded him 40 English pounds (roughly $20,900 in 2023). While a medical malpractice lawsuit shares much of the same characteristics of any other civil lawsuit, it is important to note that medical malpractice also differs in many ways, most notably in the characters involved in the lawsuit. As with any civil lawsuit, the case begins with a plaintiff. In this specific discussion, the plaintiff is the victim of medical negligence who shares their story with an attorney specializing in medical malpractice. From there, the attorney determines whether they will take the case.

One extremely important method through which an attorney determines the validity of the victim's claim is consulting a medical expert witness. According to another peer-reviewed study, the expert witness may be asked to evaluate the merits of a claim before legal action is filed. To do this, they may be tasked to review the medical records and then provide a written opinion regarding the standard of care and any deviation from it.[8]

While at first glance, medical malpractice may seem to not deviate far from any other kind of civil lawsuit, there are important specifics that make medical malpractice unique:

1. In the United States, medical malpractice law has traditionally been under the authority of individual states rather than the federal government. This contrasts with many other countries.

2. State laws governing medical malpractice can vary across different jurisdictions, although the principles are similar.

3. These laws have been heavily influenced by state legislatures in the past 30 years.

4. Allegations of medical negligence must be filed in a timely manner (see Statute of Limitations section). These vary from state to state.

8 Yasmyne Ronquillo et al., *Expert Witness* (2023).

5. Damages account for both actual economic losses, such as lost income and cost of future medical care, as well as noneconomic losses, such as pain and suffering.

6. Physicians practicing in the United States generally carry medical malpractice insurance to protect themselves in case of medical negligence or unintentional injury. In some instances, such insurance is required as a condition of hospital privileges, or employment with a medical group.

7. If an act of malpractice occurred in a federally funded clinic, then the action is filed in a federal district court rather than a state court.

8. To successfully prove malpractice, four elements or legal requirements must be met: 1) the existence of a legal duty on the part of the doctor to provide care or treatment to the patient; 2) a breach of this duty by a failure of the treating doctor to adhere to the standards of the profession; 3) a causal relationship between such breach of duty and injury to the patient; 4) the existence of damages that flow from the injury such that the legal system can provide redress.[9]

The standard of care, or the standards of the profession, refer to the benchmark that determines whether professional obligations to patients have been met. Failure to meet the standard of care is considered negligence, which can carry significant consequences for clinicians.[10]

The deposition is also an important element of the system. Those who will be deposed in a medical malpractice case include the plaintiff or injured person, the treating physician(s), family members, individual defendants, nurses and other healthcare providers who may have been present during the particular medical event, expert witnesses retained on behalf of the plaintiff, and the defendant. As

9 B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467(2) Clin. Orthop. Relat. Res. 339-347 (2008).

10 Donna Vanderpool, *The Standard of Care*, 18(7-9) Innov. Clin. Neurosci. 50-51 (2021).

with any civil lawsuit, prosecuting attorneys will record statements or events that transpired in the deposition to prove negligence.[11]

In court, medical malpractice attorneys will conduct opening statements, and the plaintiff's attorney will present the victim of negligence's case in chief. This involves calling upon the medical expert witness who offers testimony designed to establish (a) the appropriate medical standard of care that applied under the circumstances (what the doctor should have done); (b) that the defendant doctor breached the medical standard of care (what the doctor did wrong); and (c) how the plaintiff suffered harm (damages) as a result (this will be detailed proof of everything from additional medical treatment and lost income to pain and suffering, loss of employment, etc.).

A trial in court can take hours, days, or even weeks depending on the complexity of the case and the witnesses involved. Both plaintiff and defense attorneys are given the opportunity to question all the witnesses, including the victim of negligence. After both parties plead their case, closing arguments are given. Upon closing arguments, the judge instructs the jury to deliberate, and a verdict is given. If damages are awarded, it is based upon what the law allocates.

B. Payment

This section provides an overview of the potential issues of medical malpractice law. Specifically, the different methods of payment lawyers require and the laws that advantage medical providers in malpractice lawsuits are noted.

As in many lawsuits, the cost of filing a medical malpractice claim is quite costly. Yet, the challenge arises in how payment is allocated. Upon a simple Google search of "How much does it cost to file a medical malpractice lawsuit?" A plethora of advertisements for medical malpractice attorneys appears touting, "You pay us

11 *See* Julie Clements, *The Medical Malpractice Deposition Process—an Overview*, MOS Medical Record Reviews (Sept. 8, 2023), https://www.mosmedicalrecordreview.com/blog/the-medical-malpractice-deposition-process-an-overview.

nothing… until we win," as seen in Utah-based law firm Creekside Injury Law.[12]

Medical malpractice attorneys generally follow the "you pay us nothing… until we win" business model because attorneys working in the field of medical malpractice do not usually work on billable hours as is customary in other areas of law. Instead, medical malpractice attorneys work on contingency fees. This means that instead of charging a plaintiff by the hour, they will instead be given a percentage of either the settlement or award damages by the jury. According to Gilman and Bedigian Trial Attorneys, "Contingency fee arrangements allow lawsuit accessibility to even those who cannot afford it—they will not be charged a fee if they do not win the case, in which case the fee comes out of the damage award."[13] While contingency fees are generally standard when it comes to attorney fees, paying the medical expert witness complicates the protocol.

The complexity arises from the fact that various law firms throughout the country handle the payment of a medical expert witness differently. Many law firms, such as Gerry Oginski, Esq. in New York, will pay for the expert's time, and if they are successful, are reimbursed for those expenses at the end.[14] Other law firms, such as Ganson Co. in Ohio, require payment from the client up-front due to the tremendous expense to prosecute medical malpractice cases ever since Republicans in that state's legislature enacted laws that protect medical professionals and their insurance companies.[15] Listed below are examples of laws that protect medical providers.

12 Matt Schmoldt, *Utah Medical Malpractice Lawyer*, Creekside Injury Law (Apr. 19, 2021), https://www.creeksidelegal.com/utah-medical-malpractice-lawyer.

13 *Costs in Medical Malpractice Cases*, Gilman & Bedigian, LLC, https://www.gilmanbedigian.com/costs-in-medical-malpractice-cases/ (last visited Feb. 6, 2024).

14 E-mail from Gerry Oginski, Founding Partner, Oginski Law, to Hassan El-Cheikh, Undergraduate Student, BYU (Nov. 25, 2023, 06:34 PM EST) (on file with author).

15 E-mail from Michael B. Ganson, Founding Partner, Ganson Law Office, to Hassan El-Cheikh, Undergraduate Student, BYU (Nov. 16, 2023, 07:25 AM CST) (on file with author).

C. Apology Statutes

One of these laws protecting medical providers are apology statutes. The Ohio apology statute can be found in Section 2317.43 under the medical liability action-admissibility of certain communications. This is commonly referred to by Ohioan medical malpractice attorneys as the Ohio Apology Statute.[16] It reads:

> In a civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, error, fault, or general sense of benevolence that are made by a health care provider, an employee of a health care provider, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.[17]

In short, this means that a doctor's apology cannot be used as de facto evidence of medical malpractice. "If an apology can't be used against a doctor in court, then how sorry are they really?" points out the founding partner at Ganson, Michael B. Ganson.[18] However, the law was upheld by the Ohio Supreme Court in a 5-2 decision in *Stewart vs. Vivian*. In the majority response, Justice Kennedy stated Ohio's apology statute indeed provides exemption of liability for

16 *Ohio apology statute covers admissions of fault*, Bricker Graydon (Sept. 15, 2017), https://www.brickergraydon.com/insights/publications/Ohio-apology-statute-covers-admissions-of-fault.

17 Medical Liability Action—Admissibility of Certain Communications, Ohio Rev. Code Ann. § 2317.43 (West 2019).

18 Telephone Interview with Michael B. Ganson, Founding Partner, Ganson Law Office (July 15, 2022).

statements made by a health care provider who acknowledges the patient's medical care fell below the standard of care.[19]

Section 2317.43 was passed after extensive lobbying efforts while the law was a bill, titled H.B. 7, in 2018 during the 132nd Ohio General Assembly. This influence is evident by examining the record of the bill's main sponsor, Representative Bob Cupp (R-OH). After seeing the record of some of the individuals and organizations that contributed to him while he was in office in 2018, it is not too difficult to see why Rep. Cupp introduced this bill. Donors include Dr. Michael Heaphy, M.D. ($1,000); the Ohio Optometry Association ($700); the Physical Medicine Association of NW ($600); the Ohio Dental Association ($500); the Ohio Association of Nurse Anesthetists ($350); the Ohio State Medical Association ($350); Ultrasound Special Events ($250); the Gastro-Intestinal Association ($200); Dr. Gary R. Beasler, M.D. ($125); Dr. Carl S. Wher, M.D. ($100); Bradd Pots (psychologist; $50); and St. Rita's Hospital ($50), which brings the combined donations to $4,275.[20]

Ohio is not the only state to have such legislation. Republican states like Utah also have a similar law protecting physicians. In Utah, this law is commonly referred to as the Utah Apology Rule.[21] It is titled in Utah law as Utah Code 78B-3-422 "Evidence of disclosures—civil proceedings—Unanticipated outcomes—Medical Care." This code reads:

> In any civil action or arbitration proceeding relating to an unanticipated outcome of medical care, any unsworn statement, affirmation, gesture, or conduct made to the patient by the defendant shall be inadmissible as evidence of an admission against interest or of liability.[22]

19 *Stewart v. Vivian*, 151 Ohio St. 3d 574, 2017-Ohio-7526.

20 *Donor Lookup*, Open Secrets, https://www.opensecrets.org/donor-lookup/results?cand=Robert+Cupp&cycle=2018/ (last visited Feb. 6, 2024).

21 Alex Stein, *The Apology Rule*, Harvard Law: Bill of Health (Mar. 5, 2014), https://blog.petrieflom.law.harvard.edu/2014/03/05/the-apology-rule-2.

22 Utah Code Ann. § 78B-3-422 (West 2008).

Like Rep. Bob Cupp, Utah legislators can also fall prey to medical lobbying. Legislation for this law was introduced in 2009 as S.B. 79 by Senator Peter C. Knudson (R-UT), and looking at Sen. Knudson's donor list from 2008, a pattern is noted between this list and Rep. Cupp's. Donors include Medco Health Solutions ($1,000); Regence Group of Salt Lake City ($800); Pharmaceutical Research and Manufacturers Association of America ($500); Wyeth Pharmaceutical ($300); Johnson & Johnson ($250); and the Walgreens Utah Retail Merchants Association ($250), which brings the combined donations to $3,100.[23]

By not allowing a doctor's apology, even if the health care provider acknowledges that the patient's medical care fell below the standard of care, the doctors are heavily advantaged, and the client is left without what could be a form of evidence to prove ipso facto that the treating physician was indeed negligent. In another study, researchers identified 39 states that currently have apology laws.[24]

D. Statute of Limitation

Another law that advantages doctors in certain states is the statute of limitation on medical malpractice claims. These laws disadvantage those trying to sue their doctors by reducing the amount of time victims of negligence must sue their providers. Most states have their statute of limitation set at 3 years or more.[25] However, 18 states, including Utah, have a two-year statute of limitation. Kentucky, Tennessee, and Louisiana have a one-year limit. In Utah, the statute can be found under Utah Code 78B-3-404, which reads:

23 *Donor Lookup*, Open Secrets, https://www.opensecrets.org/donor-lookup/results?name=&cycle=2008&cand=Peter+Knudson/ (last visited Feb. 6, 2024).

24 Nina E. Ross & William J. Newman, *The Role of Apology Laws in Medical Malpractice*, 49(3) J. Am. Acad. Psychiatry Law. (2021).

25 *See Medical Malpractice Statute of Limitations by State*, Rocket Lawyer, https://www.rocketlawyer.com/family-and-personal/health-and-medical/personal-injury/legal-guide/medical-malpractice-statute-of-limitations-by-state/ (last visited Feb. 6, 2024).

> A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence.[26]

This bill to codify Utah Code 78B-3-404 was introduced by State Senator John L. Valentine (R-UT). As with other legislators previously mentioned who introduced the apology statutes, the State Senator's donor list provides some elucidation for the motives behind his interest in this bill. Donors include Select Health ($5,000), the Utah Medical Association ($2,200), Bluecross and Blueshield Utah ($750), the Utah Hospitals and Health Systems Association ($600), the Utah Dental Association ($300), USANA Health Sciences ($300), the Utah Association of Health Underwriters ($300), which brings the combined donations to $9,450.[27]

E. Payment (cont.)

These codes are causing medical malpractice attorneys to adapt how they take payment for their medical expert witnesses. The previously cited medical malpractice attorney Michael B. Ganson explains, "In other words, there is no steadfast rule on when a client pays for medical expert witness fees. It depends on the facts of the case, the likelihood of proving liability and the amount of compensation likely to be recovered."[28]

This echoes much of the sentiment of Randy Sorrels, a medical malpractice attorney based at Sorrels Law Firm in Texas, who says, "It depends on the case. Most of the time, the expenses are paid out of the client's share of the recovery. But a questionable case where the client really wants to pursue the case, but the outcome is not

26 Utah Code Ann. § 78B-3-404 (West 2012).

27 *Donor Lookup*, Open Secrets, https://www.opensecrets.org/donor-lookup/results?cand=John+Valentine&jurisdiction=UT/ (last visited Feb. 13, 2024).

28 Ganson, *supra* note 15.

likely favorable would require the plaintiff to pay the medical expert witness fee up-front."[29]

If lawyers are following the payment standard of Ganson Co. (where clients must pay the fees of the medical expert witness up-front regardless of favorability) or the payment standard of Sorrels (where payment of the medical expert witness is up-front only if case deemed unfavorable), the high expense of obtaining a medical expert witness can cause a tremendous, or even insurmountable, burden to a plaintiff who is low-income. According to the Gilman and Bedigian Trial Attorneys, the indispensable cost of having a medical expert witness does not come cheaply, with witnesses charging roughly $582 per hour for deposition testimony and $622 per hour for courtroom testimony.[30] (It should be noted that there can be an enormous deviation from these average figures, depending on the medical field.)

Many times, those who are low-income simply cannot afford the high fees for a medical expert witness. According to the U.S. Department of Health and Human Services' Poverty Guidelines, the federal poverty level of "low-income" for a single-person household is $14,580, or roughly $1,215 per month.[31] With the average rental price in the United States being $1,978 per month alone,[32] the price of having a medical expert witness is simply an unrealistic expense for a low-income individual.

As described earlier, different attorneys throughout the country have different methods of payment for attaining a medical expert witness. However, only two will be focused on for this proposal. The first is Ganson's up-front payment method, and the second is Sorrell's

29 E-mail from Randall Sorrels, Founding Partner, Sorrels Law, to Hassan El-Cheikh, Undergraduate Student, BYU (Nov. 25, 2023, 07:08 PM CST) (on file with author).

30 GILMAN & BEDIGIAN, *supra* note 13.

31 *Poverty Guidelines*, OFFICE OF ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, (Jan. 17, 2024), https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines.

32 Jon Leckie, *Rent Report*, RENT.RESEARCH, (Dec. 7, 2023), https://www.rent.com/research/average-rent-price-report.

unfavorable odds payment method. In states like Ohio where the up-front method is used, the burden to pay the medical expert witness is prohibitively costly. There is not much debate as to the financial burden that having to pay for a medical expert witness up-front will be for a low-income individual.

Sorrell's unfavorable odds payment method is even more controversial. Critics of providing funds for a low-income individual to attain a medical expert witness that has an unfavorable case may feel that such funds would be a waste. However, the criticism runs into a major problem. What makes a case "favorable" or "unfavorable"? Legal records show serious variability in this criterion. A viable medical malpractice claim requires presenting evidence and having considerably favorable odds.

Even with strong evidence, 50% of malpractice claims are in favor of the doctor.[33] By that definition, all cases are "unfavorable" as there is lower than a 50.1% chance of winning a trial verdict. That said, paradoxically 95% of medical malpractice claims end in settlement. Even if the case is "unfavorable" in court, it is likely to be favorable in settlement negotiations, as now the plaintiff has a medical expert witness testifying on their behalf. This strengthens their case and increases their likelihood of receiving compensation via settlement.

For these reasons, this paper argues that there should be an option at the state level to provide payment to a plaintiff's attorney for a medical expert witness. Through this model, the cost of the medical expert witness would not fall immediately upon the shoulders of the victim of negligence, regardless of if they are using the up-front model or unfavorable model. In addition, if the case is ruled in favor of the plaintiff, the government may reimburse itself for the expenses paid to attain the medical expert witness. In the following

33 *See* Gabriel Levin, *What Are the Odds of Winning a Medical Malpractice Suit?*, The Levin Firm, (July 18, 2023), https://www.levininjuryfirm.com/what-are-the-odds-of-winning-a-medical-malpractice-suit; *See* Jeffrey Goldberg, *What Are the Odds of Winning a Medical Malpractice Suit*, Jeffrey M. Goldberg Law Offices, (Mar. 21, 2022), https://goldberglaw.com/what-are-the-odds-of-winning-a-medical-malpractice-suit.

proof of claim, there is further discussion on the importance of having a medical expert witness.

III. PROOF OF CLAIM

In Charles Dickens' classic, *Great Expectations*, the prominent and enigmatic London lawyer named Mr. Jagger says, "Take nothing on its looks; take everything on evidence. There's no better rule."[34] To satisfy the rigorous demand of Mr. Jagger, this paper will discuss the proof of claim showing how it is possible for U.S. taxpayer dollars to provide monetary payment to low-income individuals seeking a medical expert witness. This will be done in three focuses: 1) the importance of having a medical expert witness, 2) evidence of precedents of taxpayer money being used for similar reasons, and 3) an explanation of how low-income plaintiffs may practically receive funding for a medical expert witness.

The idea of the government acting as parens patriae by funding opportunities and resources for the poor is nothing new. Advocates for such a system include John Rawls, an American political philosopher who advocated for a social minimum that would protect the interests of the poor;[35] John Keynes, a British economist who introduced Keynesian Economics during the Great Depression to argue government intervention in the economy to address poverty;[36] and Franklin D. Roosevelt, the 32nd president of the United States, who introduced the New Deal, which lifted thousands of Americans out of economic hardship through government-funded work opportunities.[37]

---

34 Charles Dickens, GREAT EXPECTATIONS 373 (1861).

35 John Rawls, JUSTICE AS FAIRNESS 47-48 (Erin Kelly ed., 2001); *See John Rawls*, STANF. ENCYC. PHIL. (Apr. 12, 2001), https://plato.stanford.edu/entries/rawls/#Bib.

36 *See* Sarwat Jahan et al., *What Is Keynesian Economics?*, 51(3) FIN. & DEV. (2014). Nina E. Ross & William J. Newman, *The Role of Apology Laws in Medical Malpractice*, 49(3) J. AM. ACAD. PSYCHIATRY L. (2021).

37 *See* David M. Kennedy, *What the New Deal Did*, 124(2) Political Science Quarterly, 251-268 (2009).

Yet, such a belief in this system is not without its critics. Fredrich Hayek, an Austrian-British economist, said, "new welfare activities of the government [cunningly disguised as 'mere service activities'] are a threat to freedom."[38] Robert Nozick, a 20th century American philosopher at Harvard, also argued against such systems of economic prowess and was reported in a *New York Times* article as claiming, "the trouble with government regulation of the market is that it prohibits 'capitalistic acts between consenting adults.'"[39]

While the role that the government has in providing welfare to its citizens in all aspects of life is beyond the scope of this paper, the examples above illustrate the divide in this nation's economic thought behind a potential increase in government-sponsored welfare programs. Understanding these economic principles are crucial to the subject of the medical malpractice tort system, which is commonly understood and governed by well-established principles of common law. Four principles of this must be addressed and are found in *A Measure of Malpractice*:

> 1. If a patient is injured as a result of the wrongful behavior of another (a physician or other medical care provider), then the victim is entitled to recover for all losses—both financial and non-pecuniary—caused by such fault.
>
> 2. In the absence of negligent behavior, a doctor is not legally responsible for injuries suffered by his or her patients; instead, such losses must be borne by the victims personally or by the broader community through its various programs of public and private loss insurance.
>
> 3. Disputes over whether an instance of medical treatment was careless and over what injuries the victim suffered as a result are ultimately resolvable in a civil trial before a jury;

38 Andrew Farrant & Edward McPhail, *Supporters Are Wrong: Hayek Did Not Favor a Welfare State*, 55(5) Challenge 6 (2012).

39 Jonathan Lieberson, *Harvard's Nozick: Philosopher of the New Right*, N.Y. Times (Dec. 17, 1978), https://www.nytimes.com/1978/12/17/archives/harvards-nozick-philosopher-of-the-new-right-nozick.html/; Robert Nozick, Anarchy, State, and Utopia 163 (1974).

(although in practice some 90% of such claims are settled by the parties and their lawyers through voluntary negotiation before a trial).

4. If some legal fault and liability are established through this process, compensation will almost invariably be paid to the victim. This may not be by the individual guilty of the careless act, but rather by another entity, such as the liability insurer in the case of an independently practicing doctor, or by the institution (or its insurer) that employed the doctor or other provider in question.[40]

Government involvement in economic practices is not a novel, unconstitutional practice that ought to be criticized, but rather it is a fundamental aspect of the well-being of Americans. Listed below are the benefits of such a proposal to both American victims of negligence and American doctors:

1. Benefits for Victims of Negligence

a. Such a proposal shall increase the victim's probability of an even and fair trial.
b. Such a proposal shall increase the probability of patients receiving higher rates of compensation for negligence.
c. Such a proposal shall bridge the inequality gap between America's most vulnerable, specifically low-income individuals, and the wealthy.

2. Benefits for Treating Physicians

a. Such a proposal shall mitigate the amount of medical malpractice cases physicians will face.
b. Such a proposal shall cause physicians to take more precaution in how patients are treated, if they know there will be someone readily enlisted to testify in court.
c. Such a proposal shall remove negligent doctors from practice, thus preserving the high standard quality of medical care.

40 Paul C. Weiler et al., A Measure of Malpractice 14 (1993).

A. Importance of Having a Medical Expert Witness

Here, a brief definition of what a medical expert witness is in the context of medical malpractice is helpful:

> A medical expert witness is a physician, nurse, surgeon, or other licensed practitioner whose skills and experience qualify them to testify on a particular medical area. In personal injury and medical malpractice lawsuits, attorneys often utilize medical expert witnesses during both the discovery and trial stages.[41]

Medical professionals—as members of the medical community, patient advocates, and private citizens—have a professional and ethical responsibility to assist with the civil and criminal judicial processes.[42] A medical expert opinion ensures that there is a non-bias actor who can testify and level the playing field against the team of doctors that the defense generally has.

In a medical malpractice lawsuit, the laws and regulations heavily favor doctors, nurses, specialists, and hospitals. This is evident through legislation like the aforementioned apology statutes and the statute of limitation in Ohio and Utah. "Professionals don't like to get sued. So, there's a lot of extra legislation and law around these kinds of cases," according to Laura M. Shamp, a medical malpractice attorney with Shamp Silk.[43] By ensuring those who are low-income can receive fair and equal access to a medical expert witness that would otherwise be a financial burden, low-income individuals can be assured that there will be no unfair advantage for the defense.

To further show the unfair advantage that doctors have, let us point out another study in which researchers showed that physicians

41 *What Is a Medical Expert Witness?*, American Medical Forensic Specialists, https://www.amfs.com/resources/what-is-a-medical-expert-witness/ (Last accessed Mar. 11, 2024).

42 Ibid.

43 Seth Bader, *Medical Malpractice Attorney Speaks Out - 8 Figure Attorney Podcast*, YouTube (Mar. 11, 2022), https://www.youtube.com/watch?v=WIxm4F_F-tU.

win 70% of cases with borderline evidence of medical negligence. Conversely, only 50% of cases that show strong evidence of medical negligence are ruled in favor of the plaintiff.[44] This latter figure is particularly alarming. Not only do these rulings decrease the chance of the victims receiving just and fair compensation for damage caused, but they also almost completely dismiss the concept of *res ipsa loquitir* in medical care and put other patients at risk by allowing a negligent doctor to continue working with minimal to no repercussions.

By absolving the need of low-income individuals to afford a medical expert witness, these plaintiffs can be assured fair and equal representation by a doctor, nurse, or specialist that can testify on their behalf and provide evidence of medical negligence on the part of the treating doctor, nurse, specialist, or hospital. According to Prince Benowitz Accident Injury Lawyers, LLP, "It is rare for a malpractice plaintiff to achieve a successful case result without input from at least one medical expert witness, especially in states that generally require [an] affidavit of merit to be filed alongside initial complaints."[45]

B. Evidence of Taxpayer Money Being Used for Similar Reasons

There is enough evidence from previous court rulings setting a precedent that would allow for government funding to pay for a low-income plaintiff to receive a medical expert witness. This discussion begins with the supreme law of the land, the U.S. Constitution, which would allow for such a ruling to be constitutional.

44 Philip G. Peters, *Twenty Years of Evidence on the Outcomes of Malpractice Claims*, 467(2) Clin. Orthop. Relat. Res. 352-357 (2009).

45 *Who Serves as an Expert Witness in Medical Malpractice Cases?*, Price Benowitz Accent Injury Lawyers, LLP, https://pricebenowitz.com/blog/who-serves-as-an-expert-witness-in-medical-malpractice-cases/ (Last accessed Feb. 6, 2024).

1. U.S. Constitution Article 1 Section 8

In Article 1 Section 8, the document reads, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States:"[46]

The foundation of the presented argument that the government paying for a medical expert witness for a plaintiff rests on the idea that it would, in fact, provide for the general welfare of the United States. For one, the government subsidizing a medical expert witness for a low-income plaintiff would ensure that less negligent doctors would be practicing medicine. If, conversely, a government allows negligent doctors to continue practicing, more people may be harmed by that doctor, thus harming the general public. This, along with revoking the licenses of negligent doctors to practice, is in the general welfare of citizens of the United States to receive justice and compensation when any wrong is committed against them. If people are not afforded a fair chance at justice, then how can we truly be a nation touting "liberty and justice for all?"

2. Civil Gideon

A civil right to counsel, also referred to as "Civil Gideon" refers to the idea that people who are unable to afford lawyers in legal matters involving basic human needs should have access to a lawyer at no charge. The idea of Civil Gideon law came about after a 1994 study by the American Bar Association (ABA) revealed that about four of every five families with civil legal needs were not being met.[47] While this right exists in criminal matters due to the sixth amendment[48] and Supreme Court case *Gideon vs Wainwright*, it also exists at present in some civil matters.[49] The American Bar Resolution 112A and the

46 U.S. Const. art. 1, § 8.

47 Robert J. Derocher, *Access to Justice: Is Civil Gideon A Piece of the Puzzle?*, ABA, 32(6), (2008).

48 U.S. Const. amend. VI.

49 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Utah Civil Case Pro Bono Program (described below) are practical examples of Civil Gideon law in action.[50,51]

3. American Bar Resolution 112A

In August 2006, the House Delegates of the ABA took a historic step forward by adopting a resolution urging "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, safety, health or child custody."[52] This resolution was sponsored by thirteen state and local bar associations, and the principles were adopted by an additional six state bar associations and five Access to Justice Commissions.

This resolution by the ABA details health as a matter of right. When medical malpractice occurs, the victim of negligence loses their right to health and should have the opportunity to receive compensation. Notably in 2018, the ABA also adopted Resolution 114, which calls for a right to counsel whenever physical liberty is at stake, regardless of whether the case is civil or criminal.[53]

4. The Utah Civil Case Pro Bono Program

In the state of Utah, the District Court offers a program called the Civil Case Pro Bono Program. The purpose of this program is "to provide access to justice for those who are unable to afford representation in civil cases."[54] This program appoints qualified attorneys

50 Res. 112A, ABA (Aug. 7, 2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

51 D. Utah Civ. R. *Civil Case Pro Bono Program*, https://www.utd.uscourts.gov/civil-case-pro-bono-program/ (Last accessed Feb. 13, 2024).

52 ABA, *supra* note 50.

53 Albert S. Dandrige III, *ABA Resolution 114: An Important Right to Counsel Measure*, Law.com (June 28, 2018), https://www.law.com/thelegalintelligencer/2018/06/28/aba-resolution-114-an-important-right-to-counsel-measure.

54 D. Utah Civ. R., *supra* note 51.

for general and limited purposes; it also provides opportunities for attorneys to gain valuable litigation experience in a variety of cases from employment discrimination matters to violation of civil rights claims.

The court uses the attorney admission fund to reimburse pro bono counsel for out-of-pocket expenses, payment for pro bono counsel, witness fees, and other expenses for pro se civil litigants, thus providing counsel to those who cannot afford it in civil matters. A medical expert witness is included in that counsel.

Theoretically, a low-income individual could have the right to a medical expert witness if the plaintiff is suing in federal court. It is unjust that this program should be offered in federal courts but not at the state level. A Civil Case Pro Bono Program should be offered in the state to allow victims of medical negligence to receive the necessary funds of obtaining a medical expert witness.

When someone becomes a victim of medical negligence, there is no question that the individual has lost a right to physical liberty. From 2013 to 2017, 33% of all filed medical malpractice claims were related to missed or delayed diagnosis, which have life-altering consequences. Others include prescription drug errors and surgical errors that cause similar results. Gary N. Stern, owner of Stern Law office, explains,

> Loss of enjoyment of life can and should be honored, emphasized, and argued because it is right there in our nation's Declaration of Independence. There is a symbiotic relationship between 'loss of life' and 'pursuit of happiness.' The phrase loss of enjoyment of life should be considered as a loss of one's natural right to pursue happiness.[55]

By providing funding to low-income individuals to attain a medical expert witness, the government can fulfill its duty of promoting the general welfare of the United States as this will ensure low-income victims of negligence may receive a fair and just opportunity at

55 Gary N. Stern, *"Loss of Enjoyment of Life" and the Declaration of Independence*, Advocate (Jan. 2022), https://www.advocatemagazine.com/article/2022-january/loss-of-enjoyment-of-life-and-the-declaration-of-independence.

compensation as well as keep repeatedly negligent doctors away from patients, thus preserving the standard of excellence for America's medical institutions.

C. Explanation of How This Would Be Done

Of course, the idea of promoting social welfare is nothing new. However, one of the primary challenges stems from disagreements about the implementation of such welfare. While ideas of a utopia where everyone can partake of the bountiful plenty may seem appealing, the reality is that very few times in history have such systems worked.[56] Still, if a strong plan is present, there is no reason to dismiss it.

The first step of understanding this paper's proposal is a description of what this would look like at the fiscal level for taxpayers; the example of Utah can illustrate how the system would work. This paper proposes that a portion of the state's available Medicaid budget that is not fully used be directed into a separate budget henceforth referred to as "the expert witness fund." The expert witness fund will be created using a portion of the state's sales tax of hospitals. Utah has a sales tax of a little over 6%.[57] Because the budget is coming from already mandated sales taxes, there would be no need to increase taxes on Utahns.

As the cost of medical malpractice varies widely depending on factors such as attorney fees, rates per testimony, rates for discovery and research, rates for depositions, etc., the present example will use the Seak Expert Witness Directory average rate of $500 per hour for the malpractice witness, with an assumption of an average of 24 hours for the amount of work that the witness must put in for a single case. This equates to an average total cost of $12,000 for the medical expert witness. Utah had 175 cases of medical malpractice in 2022

56 Ewan Morrison, *Why Utopian Communities Fail*, Areo (Aug. 3, 2018), https://areomagazine.com/2018/03/08/why-utopian-communities-fail.

57 *Taxes in Utah*, Tax Foundation, https://taxfoundation.org/location/utah/ (Last accessed Feb. 13, 2024).

according to Becker's ASC Review.[58] Of Utahns with medical insurance, 11% have state government-funded Medicaid insurance.[59] The conclusion, then, is that of the medical malpractice claims filed, 17% were filed by Medicaid, making 30 of the 175 individuals who filed a medical malpractice lawsuit a Medicaid carrier.

If the $12,000 per case is multiplied by the 30 individuals filing a lawsuit, then the overall cost would be $360,000. To account for the fact that some years may contain more lawsuits than others, we will round this number up to $500,000. According to the 2022 Utah Tax Commission Report, Utah generated $9,434,850 in tax revenue from rural hospitals alone.[60] This means roughly only 5% of the revenue generated from rural hospitals will go into the expert witness fund. We once again propose that the government may reimburse itself, thus making the 5% needed for the expert witness fund much smaller, as not every single case will lose or fail to settle.

IV. Conclusion

The area of medicine is a complex and daunting one. However, individuals have a right to physical liberty. While it is understandable that representation should only be allowed for criminal prosecution as guaranteed under the Sixth Amendment, the premise of the Amendment is to allow someone who was wronged to be returned their freedom. While victims of medical negligence may not have their freedom taken in the sense that they are incarcerated, they have lost their freedom to the basic enjoyment of life and their bodily autonomy. Thomas Jefferson believed in life, liberty, and the pursuit of happiness; victims of medical negligence may lose all three. It is not too far to say that victims of malpractice not receiving representation is an un-American idea.

58 Claire Wallace, *Medical Malpractice Reports by State in 2022*, ASC Review (Nov. 21, 2022), https://www.beckersasc.com/asc-news/medical-malpractice-reports-by-state-in-2022.html.

59 Kaiser Family Foundation, 2022 Medicaid in Utah Report, (June 2023), https://files.kff.org/attachment/fact-sheet-medicaid-state-UT.

60 Utah State Tax Commission, Annual Report (2021-2022).

Some may think that this proposed system will cause prospective health providers to no longer want to be a part of the field of medicine. This is more alarming than ever as the U.S. will have an estimated shortage of 17,800-48,000 primary care physicians by 2034.[61]

While it is easy to understand protecting doctors and encouraging individuals to join the profession, what is unacceptable is a failure to hold negligent doctors accountable. It is unfair that someone seeking compensation has only 10% odds of winning in trial and that those odds rise to only 50% if strong evidence is presented. The current system is heavily skewed towards negligent doctors, but the creation of an expert witness fund would be a productive primary step to helping victims of negligence receive just compensation for the future treatments they will need and for receiving the much-deserved compensation for pain and affliction.

The goal is that the research conducted and the analysis provided here is at least a step in the right direction of both helping victims of negligence receive just and deserving compensation from a system that is unfavorable as well as clear the name of doctors throughout the U.S., building upon the patient-doctor relationship that many Americans cherish.

61 Annalia Merelli, *A New Paper Suggests a Simple Fix to the Primary Care Physician Shortage*, STAT+ (Sept. 1, 2023), https://www.statnews.com/2023/09/01/primary-care-physician-shortage.