

F I N A L   R E P O R T

of the

TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION

to the

65TH TEXAS LEGISLATURE

December, 1976

TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION

Members

BEZUCHA, Robert G.  
COTNER, William R.  
DAVIS, Dr. Milton V.  
DAVIS, Representative Robert E.  
HANCE, Senator Kent  
HITT, David  
HUBBARD, Harry, Jr.  
KEETON, Dean W. Page (Chairman)  
MARTIN, Mark  
MIZELL, W. A.  
MURPHY, Robert L.  
PLETCHER, George E.  
PRESNALL, James K.  
PURNELL, Charles G.  
STOWELL, Edward A.  
TUCKER, H. Hayes  
UHER, Representative D. R.  
WEBB, Dr. E. Don

Staff

LEBARRON, Barbara  
WADE, William  
WEISS, Sophie Carroll

Special thanks and gratitude are given to Mrs. Carolyn Seelig and Mrs. Donna Milian for their tireless efforts in preparing this manuscript and assisting the Commission in its activities. This report could not have been produced without their able efforts.

MEMBERS

Dean W. Page Keeton, Chairman  
 Robert Bezucha  
 William Cotner  
 Milton Davis, M.D.  
 Rep. R. E. (Bob) Davis  
 Sen. Kent Hance  
 David Hitt  
 Harry Hubbard, Jr.  
 Mark Martin  
 W. A. Mizell  
 Robert Murphy  
 George Pletcher  
 James Presnal  
 Charles Purnell  
 Edward Stowell  
 H. Hayes Tucker  
 Rep. D. R. (Tom) Uher  
 E. Don Webb, M. D.



STAFF

Barbara LeBarron  
 William Wade  
 Sophie Carroll Weiss

MEDICAL PROFESSIONAL LIABILITY  
 STUDY COMMISSION

Office of the Lieutenant Governor

Room G-38  
 State Capitol  
 Austin, Texas 78711  
 Phone 512-475-3106

December 22, 1976

Members of the 65th Texas Legislature  
 Texas State Capitol  
 Austin, Texas

Dear Sirs:

With this letter I officially transmit to you a copy of the Final Report of the Texas Medical Professional Liability Study Commission. The Commission has met eighteen (18) times since June of 1975 to deliberate the topic of medical professional liability insurance and arrive at effective solutions. Subcommittees of the Commission have met an additional twenty-two (22) times across the state to develop additional recommendations and policy statements.

The issue of medical malpractice is very complex and far-reaching in its ramifications. The Commission found it somewhat difficult to reach agreement on solutions to certain aspects of the problem, but the recommendations in the Final Report of the Commission were agreed upon in a spirit of cooperation with the interests of the citizenry of Texas foremost in mind. The Commission, on November 23, 1976, approved the Final Report in its entirety by a unanimous vote of those present.

I feel that the recommendations contained in this Report, if enacted into law, will go a long way in effecting a solution to the problem of medical professional liability insurance. I urge you to give our recommendations great weight in your deliberations in the months to come.

Respectfully yours,

A handwritten signature in cursive script that reads "Page Keeton".

W. Page Keeton  
 Chairman

TABLE OF CONTENTS

INTRODUCTION. . . . .	i
TRANSMITTAL LETTER. . . . .	ii
TABLE OF CONTENTS . . . . .	iii
 REPORT	
Overview . . . . .	1
Tort Law Recommendations . . . . .	11
Insurance. . . . .	23
Medical Care . . . . .	41
 MINORITY REPORTS	
1. Dean W. Page Keeton . . . . .	50
2. Charles G. Purnell. . . . .	63
3. George E. Pletcher. . . . .	65
4. Dr. Milton V. Davis . . . . .	69
5. Harry Hubbard, Jr.. . . . .	70
6. Robert G. Bezucha Chairman, Board of Director Texas Medical Liability Insurance Underwriting Association. . . . .	78
 LEGISLATION . . . . .	
1. Ad Damnum Clause Bill . . . . .	-1-
2. Arbitration Bill. . . . .	-3-
3. Collateral Source Bill. . . . .	-21-
4. Hospital Liability Bill . . . . .	-24-
5. Insurance Surcharge Bill. . . . .	-26-
6. Itemized Damages Bill . . . . .	-28-

7.	JUA Amendment Bill. . . . .	-30-
8.	Medical Examiners Bill. . . . .	-40-
9.	Medical Practices Act Bill. . . . .	-44-
10.	Notice-To-Sue Bill. . . . .	-53-
11.	Oral Warranty-To-Cure Bill. . . . .	-55-
12.	Pain and Suffering Bill . . . . .	-56-
13.	Periodic Payments Bill. . . . .	-58-
14.	Punitive Damages Bill . . . . .	-61-
15.	Screening Panel Bill. . . . .	-63-
16.	Self-Insurance Trust Bill . . . . .	-75-
17.	Standardized Policy Bill. . . . .	-77-
18.	Statute of Limitations Bill . . . . .	-79-
APPENDIX.	. . . . .	(1)
A.	Report of Subcommittee II . . . . .	(2)
B.	Informed Consent Bill (Sample). . . . .	(13)
C.	Membership List . . . . .	(19)
D.	Organization Scheme Subcommittees . . . . .	(21)
E.	Senate Bill 491 . . . . .	(24)
F.	Individuals Presenting Testimony Before the Texas Medical Professional Liability Study Commission. . . . .	(27)
G.	Bibliography. . . . .	(32)

## OVERVIEW

Shortly after its creation, the Study Commission organized to do its work by the creation of five Subcommittees. These Subcommittees were not created for the purpose of substituting for the Commission as a whole in making its ultimate findings and recommendations but rather as a means of dividing up the work, screening out irrelevant matters and gathering pertinent information for the making of informed recommendations to the Legislature.

These five Subcommittees were as follows:

### Subcommittee I

The scope of the medical professional liability problem.

- A. Claims and losses now as compared with a named previous time.
- B. Insurance premiums now as compared with a named previous time.
- C. Reasons for increases in losses and increases in premiums.

### Subcommittee II

The effect of the medical malpractice crisis on delivery of health services and changes in insurance costs.

- A. Magnitude of impairment in health care services as of now and magnitude of threatened impairment of those services.
- B. Increased costs to patients, including defensive medicine and medical fees and hospital charges.
- C. Problems related to the medical profession and delivery of hospital services, including licensing revocation procedures, that contribute to the number of mishaps in this area.

### Subcommittee III

Problems related to contracts of insurance, including terms of contract and methods for establishing rates. (Also to deal with proposals for any changes in the contract and techniques for establishing rates and to provide a discussion of the different techniques.)

#### Subcommittee IV

Substantive issues relating to the existing court compensation system and proposals for change with discussion of those problems.

#### Subcommittee V

Measure of recovery under existing tort system and proposal for change and legal professional problems related to the question, including the contingency fee system and matters of professional responsibilities.

#### LIABILITY INSURANCE - AVAILABILITY AND COSTS.

Every reasonable effort has been made to gather reasonably reliable data and statistical information that would reveal the magnitude of what has been commonly referred to as the "medical malpractice crisis." We do conclude that the facts justify remedial measures by the Legislature.

Satisfactory insurance coverage of up to a million dollars per occurrence is often not available to those engaged in high risk procedures and who need this coverage the most. Where it is available, the doctor engaged in such high risk procedures often must pay as much as \$20,000 to \$30,000. The most serious impact of the high costs of insurance relates to certain specialists who are engaged in high risk procedures, including anesthesiologists, neurosurgeons, orthopedists, plastic surgeons, obstetricians and gynecologists. These doctors are engaging in the very procedures that save many lives and prevent many disabling injuries. However, these same procedures involve risks of serious adverse consequences - mishaps that result in death, paralysis, and other permanently disabling injuries that give rise to claims of great severity - even when the highest skill and competence has been exercised. Many of these mishaps are inevitable in the course of saving lives. Some are of course attributable to negligence in the sense that there was a failure to conform to standard medical procedures.

The four basic components of any insurance rate are (1) a provision for losses and loss adjustment expenses, (2) a provision for underwriting and sales expenses, (3) a provision for an underwriting profit, and (4) general administration, sales expenses and taxes. The provision for losses and loss adjustment expenses in an insurance rate is commonly referred to as the pure premium, and it is the pure premium rate that has rather drastically changed over the last ten years. The pure premium is determined by two factors: (1) the claim frequency and (2) the claim severity. While the data are not conclusive as to whether volume of claims have levelled off during the past year or so, it is quite clear that the volume of

The Commission by a divided vote rejected the general approach of a Patients' Compensation Fund.

4. Self-Insurance Trusts.

The self-insurance trust is a mechanism designed to alleviate the insurance availability problem of the professional liability insurance situation. The trust provides its members with malpractice insurance coverage. It permits a designated group to consent voluntarily to joint and several liability with the trust. Funding of this liability is acquired through premiums and assessments paid by members. The agreement to be assessed is its guarantee of solvency, thereby avoiding the necessity for a \$300,000-\$500,000 capital surplus deposit required by other groups wishing to establish an insurance company in Texas.

Such a trust would be directed by a Board of Trustees. Their duties would consist of administering the trust and receiving and disbursing all monies. This would be accomplished through entering into an agreement with a servicing agent to collect, disburse, and account for all monies, to counsel with members as to claims handling and investigation, and to provide for excess insurance coverage if necessary. Such trusts have been introduced and formed in the State of Florida.

The Commission recommends that statutory authority be given to the self-insurance trust concept as an additional insurance mechanism. The Commission feels that the trust should be regulated by the State Board of Insurance as to solvency and policy form.

D. THE TEXAS JUA.

1. Joint Underwriting Association Two-Year Extension.

Texas S. B. 491 of 1975 provides that the Texas Medical Liability Insurance Underwriting Association (JUA) will issue no new policies after December 31, 1977.

The Commission recommends that the period of existence of the Joint Underwriting Association be extended from December 31, 1977 to December 31, 1979, with the State Board of Insurance reserving the power to disband the JUA before December 31, 1979, if there is no longer a need for it.



## LEGISLATION

The following pieces of legislation embody the major recommendations of the Texas Medical Professional Liability Study Commission. All policy decisions inherent in the proposed legislation have been agreed upon by the members of the Study Commission. The specific wording in all of the proposed bills was drafted by the Texas Legislative Council, with assistance from the staff of the Texas Medical Professional Liability Study Commission.

1. Ad Damnum Clause Bill
2. Arbitration Bill
3. Collateral Source Bill
4. Hospital Liability Bill
5. Insurance Surcharge Bill
6. Itemized Damages Bill
7. JUA Amendment Bill
8. Medical Examiners Bill
9. Medical Practices Act Bill
10. Notice-To-Sue Bill
11. Oral Warranty-To-Cure Bill
12. Pain and Suffering Bill
13. Periodic Payments Bill
14. Punitive Damages Bill
15. Screening Panel Bill
16. Self-Insurance Trust Bill
17. Standardized Policy Bill
18. Statute of Limitations Bill

## A BILL TO BE ENTITLED

## AN ACT

1  
2 relating to self-insurance against claims arising out of rendering  
3 or failure to render medical care or services by certain persons.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 Section 1. In this Act, "health care provider" means a  
6 person, partnership, or corporation lawfully engaged in the  
7 practice of medicine, dentistry, podiatry, optometry, chiropractic,  
8 professional nursing, psychology, physical therapy, or licensed  
9 vocational nursing or in the operation of a hospital, clinic, or  
10 health maintenance organization.

11 Sec. 2. On receiving approval of the State Board of  
12 Insurance and on complying with the conditions in Sections 3 and 4  
13 of this Act, a group or association of health care providers,  
14 composed of any number of members, may self-insure against claims  
15 arising out of the rendition of or failure to render medical care  
16 or services and may provide coverage for bodily injury including  
17 patient injuries arising out of the insured's activities.

18 Sec. 3. A group or association of health care providers that  
19 self-insures as provided in this Act shall establish a medical  
20 malpractice risk management trust fund to provide coverage against  
21 liability as provided in Section 2 of this Act.

22 Sec. 4. A group or association of health care providers that  
23 self-insures under this Act shall employ professional consultants  
24 for loss prevention and claims management coordination under a risk

1 management program.

2       Sec. 5. The State Board of Insurance shall approve a plan of  
3 self-insurance under this Act if it is satisfied that the group or  
4 association of health care providers possess and will continue to  
5 possess the ability to pay valid claims made against the  
6 self-insurance program.

7       Sec. 6. A plan of self-insurance approved under the  
8 provisions of this Act is subject to the continuing supervision of  
9 the State Board of Insurance relating to its solvency and to  
10 approval of its policy forms as provided by law.

11       Sec. 7. The importance of this legislation and the crowded  
12 condition of the calendars in both houses create an emergency and  
13 an imperative public necessity that the constitutional rule  
14 requiring bills to be read on three several days in each house be  
15 suspended, and this rule is hereby suspended, and that this Act  
16 take effect and be in force from and after its passage, and it is  
17 so enacted.