

Chapter V

How Malpractice Lawsuits Improve Medical Care

While physicians and insurers see malpractice litigation as a threat, malpractice lawsuits have proved to be an important force for improved medical care. Especially in the absence of other consumer protections, malpractice cases help identify serious deficiencies in medical treatment and exert strong pressure for change. Here are some illustrations of this simple yet often-overlooked fact.

Death by Infection Makes Infection Control a Nationwide Priority

Julius F. Barowski, a 72-year-old man, received a knee replacement at the Paoli Memorial Hospital in Paoli, Pennsylvania, in 1983. After the surgery, he was given a room with a man suffering from a bacterial infection called Klebsiella. Even though he was discharged from the hospital with a clean bill of health shortly after his surgery, Barowski had to be re-admitted to the hospital within the week because of a severe knee infection caused by staph and Klebsiella bacteria. The infections eventually required 11 additional hospitalizations and nine excruciating surgical procedures, all to no avail. His knee joint ultimately fused and Barowski's leg was completely rigid. The infection became systemic, and Barowski experienced great agony and a clinical depression that eventually required institutionalization for psychiatric care. He died a year later.

How the tort system improved medical care: On behalf of Barowski's estate, Constance Widmann brought a lawsuit that led to a jury verdict in 1989 holding the Paoli Memorial Hospital responsible for Barowski's infection. The hospital, the jury ruled, had failed to adhere to its own infection control standards, increasing the likelihood of harm. The

Widmann ruling and similar cases have had a catalytic impact in health care facilities around the country. Facilities are much more attentive to the clinical importance of cleanliness in all its dimensions — hand-washing, routine monitoring of infection risks, and more vigorous reviews of hospital infection control protocols. Widmann played a critical role in this important improvement.¹⁵¹

Why Arizona Has More Rigorous Anesthesia Standards

While Marilyn Hathaway of Arizona was undergoing surgery, her anesthesiologist failed to properly monitor her cardiopulmonary status, despite the high risk of cardiac arrest. The anesthesiologist apparently believed that he was good enough that he didn't need to use the stethoscope required under standard medical procedures. As a result of his inattention, Hathaway slipped into a coma and suffered brain damage.

How the tort system improved medical care: After having to pay repeated malpractice claims arising from faulty anesthesia practices — a jury awarded Hathaway \$5 million — Arizona's malpractice insurance companies took action. For example, the Mutual Insurance Company of Arizona, which insures over 75 percent of the state's physicians, began levying a \$25,000 surcharge on insurance premiums for anesthesiologists against whom claims had been made because constant monitoring of the patient was not performed during general anesthesia. As a result of litigation, adequate anesthesia monitoring during surgery has become a standard medical practice in Arizona.¹⁵²

Better Diagnostic Testing for Heart Disorders in the Military

On at least three separate occasions, servicemen at Tyndall Air Force Base in Florida were discharged from the base hospital's emergency room despite complaints of symptomatic chest pain, nausea and seating, with pain radiating into the neck, back and left arm. Even though the men had classic histories of angina caused by coronary artery disease, and even though these symptoms are recognized signs of heart disorder, they were not sent to cardiologists for further examination nor were they hospitalized for tests. Rather, they were diagnosed with indigestion, given

antacids, and sent home. Shortly thereafter, the servicemen suffered fatal heart attacks.

How the tort system improved medical care: As a result of malpractice litigation, the Air Force investigated the deaths and instituted stringent new requirements for diagnostic testing in cases of potential unstable angina pectoris, which is a precursor of myocardial infarction. These new procedures are now standard practice at Air Force medical facilities throughout the world.¹⁵³

Now Nurses in North Carolina Can Speak Up for Patients' Medical Needs Without Risking Their Jobs

While Margaret Campbell was in labor at the Pitt County Memorial Hospital in Greenville, North Carolina, a fetal monitor warned that the baby was becoming severely asphyxiated. The labor and delivery nurse warned the obstetrician of the danger but when he took no steps to respond to the problem, the nurse took no further action. Unfortunately, in medical circumstances, nurses are too often considered the subordinates of physicians. The failure of both the doctor and nurse to take action resulted in permanent brain damage to the infant.

How the tort system improved medical care: In the lawsuit that was brought against the hospital, the jury apparently found the testimony of the nursing supervisor convincing — that an employee could be “fired on the spot” for questioning a physician’s judgment. The jury held the hospital responsible. Because of this verdict and its subsequent publicity, hospitals throughout North Carolina have adopted a new protocol that allows nurses to use their specialized training and judgment on behalf of patients, without risking their jobs. Tragic accidents of the sort experienced by Ms. Campbell are now less likely to occur.¹⁵⁴

With Full Staffing in the Hospital Nursery, Babies' Lives Are Saved

It is not uncommon for newborn babies and young infants to die of unknown causes while in their cribs, or suffer irreversible brain damage.

“Crib death” is one explanation for such deaths, but in truth the precise causes of these tragedies are not really understood. Perhaps the best approach, however, is prevention. In the hospital setting, at least, this means making sure that enough nurses are always present in the nursery. This procedure probably would have prevented permanent brain damage in a newborn baby boy born in September, 1982, at Doctors Hospital in Little Rock, Arkansas. While left wholly unattended for 35 minutes, the baby turned blue and he stopped breathing. Once a nurse finally discovered his condition, he was resuscitated, but had suffered permanent brain damage.

How the tort system improved medical care: The absence of a nurse in the hospital nursery was not entirely accidental or circumstantial. The hospital had maintained a policy that no newborn was to be left alone in the nursery. However, after the Hospital Corporation of America bought the hospital, hospital staff began to complain to administrators that there were not enough nurses to ensure that no newborns would go unattended. No action was taken on these complaints. The original lawsuit brought on behalf of the infant proved that the hospital consistently hired two nurses less than necessary on its night shift, which the lawyers for the child contended was the result of a decision by hospital authorities to save money. The 1986 verdict for the plaintiffs was subsequently reversed on a technicality. A second trial ended in a verdict in favor of the hospital when the judge refused to allow the victim to introduce evidence of discussions held among hospital staff, ruling that such conversations were “privileged” under a state law that prevents such critical information from being presented to the jury. But despite the defeat, the lawsuit motivated new hospital procedures to ensure that all newborns at the hospital would be overseen by a sufficient number of nurses.¹⁵⁵

Protecting the Rights of Emergency Room Patients

On May 22, 1981, Brett Jackson, a 16-year-old boy, was hiking with friends when he fell off a cliff near Fairbanks, Alaska. He was airlifted to the Fairbanks Memorial Hospital, where John Power, M.D., one of the two emergency room physicians on duty at the time, found multiple lacerations and abrasions on his face and scalp, multiple contusions in the lumbar area and several broken vertebrae. These findings should

have been highly suggestive of serious internal injuries as well, but Power did not order the standard procedures that could have ascertained whether his kidneys had been injured. As a result, damage to Jackson's kidneys went undetected for about ten hours after his arrival at the hospital — and he lost both of his kidneys.

How the tort system improved medical care: When Jackson brought suit against the hospital, the hospital claimed that the attending doctor, as an employee of Emergency Room, Inc., was an independent contractor who should be held responsible for any harm. But Jackson's attorneys successfully argued that the hospital had a statutory duty to provide 24-hour emergency care, as outlined by the state accreditation committee and the hospital's own bylaws. In the end, the Alaska Supreme Court agreed that, as a matter of public policy, hospitals — not independent contractors — must be held responsible for what goes on in their emergency rooms. Even though the case settled out of court, it has helped establish the principle that hospitals must closely supervise all of its employees, and cannot look toward loopholes such as "independent contractor" clauses to evade its responsibilities.¹⁵⁶

A Drugged Patient Cannot Make Sound Judgments — As Doctors Now Realize

Helen Medina, a 46-year-old woman who suffered from excruciating migraine headaches, went to Dr. Michael Straight's office in Taos, New Mexico, in August, 1985, to seek help. He injected her with Demerol — and then, when she complained of nausea — with a second drug, either Vistaril or Tigan. Both drugs are known to cloud a person's judgment and produce a euphoric effect; it was not surprising, therefore, that Ms. Medina, under the influence of the drugs, ignored the doctor's warning not to drive herself home and proceeded to try. Within 70 minutes of receiving her injections, she ran off the road, pinned a man against a parked car and crushed his leg so severely it had to be amputated.

How the tort system improved medical care: The injured man filed a lawsuit against Dr. Straight, charging him with failing to verify whether another person could and would drive her home. Neither the doctor nor his staff tried to keep Ms. Medina's keys or ensure that she or the

public would be protected if she tried to drive. The case was eventually settled, but physicians in New Mexico are now vigilant in making sure that patients who are given narcotic drugs are driven home by responsible family members or friends.¹⁵⁷

* * *

Case after case, buttressed by the overwhelming weight of independent scientific research, demonstrates that the civil justice system performs several essential functions: first, it forces negligent doctors and hospitals to fully compensate those most seriously injured by medical mistake and incompetence. Second, by making sure that those responsible for a person's medical injuries pay all the costs of their negligence, incompetence or criminal behavior, the legal system saves the public the cost of picking up the tab through taxpayer-subsidized programs. Finally, it forces medical providers to practice careful medicine, preventing malpractice.

Both the medical profession and the insurance industry proclaim that the prevention of deaths and injuries is among their most important missions. It is all the more astonishing, therefore, that these same forces have joined to press for the passage of laws whose purpose is to undermine the legal system and discourage citizens from exercising their legal rights. To understand why these industries so deliberately and cruelly ignore the health and welfare of consumers, we must closely examine the insurance industry itself.