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From Waiting Room to Courtroom

How Doctors can Avoid Getting Sued



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Foreword
Jeffrey P Bates

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CHAPTER

3

Law School 101

In order to navigate the legal system, you have to know something about how it works. It is just like healthcare. You can treat a disease much more effectively if you know something about the cause. If you were to visit a law library and look through some of the books, you'd notice that everything is written in legalese. It is written in such a manner that we need lawyers to merely explain what it means. I will try to break down much of the gobbledygook so that you will understand the important points and not fall asleep.

There are certain areas of law that are more likely to affect the healthcare provider.

Tort law is the first and foremost area of law you have to understand.[1] Tort law is concerned with a **breach of duty**—other than under contract—leading to liability for damages. Tort law includes general liability: **slip and falls**, **automobile accidents**, **libel** (writing bad things about another), **slander** (saying bad things about others) and the one most important to us: **malpractice claims**.

This is the short list, because anything possible that can be considered a breach of duty is a tort. If you have a swimming pool and someone drowns because you did not have a tall enough, locked fence, you are responsible—someone drowned while trespassing on your property because your fence was not high enough to keep them out—your fault. It is called the **attractive nuisance** doctrine. That is right, your swimming pool attracted this person, and it is your fault that he/she drowned.

Keep in mind: it appears legislators/lawyers construct laws to protect irresponsible people, incompetents, the impaired and criminals. They forever come up with doctrines used to shift the blame from the

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negligent to those with money (cash, property and insurance dollars). If the party to blame has no money, "the law" often tries to find someone with some responsibility, no matter how little, and shift the burden to him/her. Hey, not fair! Too bad! They make the rules. They are constantly trying to shift the blame for a recoverable injury from those at fault to those with money. This is a big part of the problem. If only responsible, well-behaved people could sue, there would likely not be enough suits to support all the lawyers involved in personal injury law.

Tort law that affects healthcare providers the most is **malpractice** and these cases have the potential to ruin you.[2] While many injuries related to malpractice may be minor, there is always the potential for catastrophe. The patient could die; he/she could have a stroke or heart attack or any type of injury that renders him/her paralyzed. This is the main area of law you have to understand and learn to prevent serious consequences by practicing defensively.

Contract law is another type of legal entanglement you may find yourself fighting.[3] It involves **breach of an agreement**. The risks are usually much less than seen with tort cases. You may have landlord issues regarding a rental contract. You may have signed a vendor agreement stating that you would purchase a certain quantity of supplies and you renege. These cases are aggravating, but not likely to see you lose your home.

While the risks of damages of a breach of an agreement are generally less than in a tort case, the problem for healthcare providers is that these damages are not covered by insurance for the most part. As such, these damages come directly from your pocket.

You should be aware that any business activities that you engage in bound by contracts are enforceable and could put you at risk for the remedies stated in the contracts. At least contracts generally define the risks.

Another tort most practitioners do not know about is the charge of **battery** for not obtaining an informed consent, and it is considered a *civil* charge. This is not to be confused with *criminal* battery which involves unlawful touching or beating of a person.

Insurance companies do not cover battery in the informed consent arena (incidentally, this is really only in Pennsylvania—check your state law) because civil battery is an *intentional act*. Insurance companies do not cover intentional acts such as battery or any acts considered so egregious by the court as to give rise to punitive damages. All punitive damages claims are deemed to be intentional and therefore not covered by your insurance.

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Do not be surprised if your malpractice carrier sends you a letter telling you to consider hiring an *additional attorney* to protect your interests in the battery portion of the case or in any cases involving punitive damages. That letter will scare you, but it is a formality. The insurance company wants to be protected from you suing them. At some time, an insurance company was probably sued by a doctor who lost a civil battery case and felt the insurance company did not do enough to defend them because they were not at risk for paying the claim. You may get this type of letter in any case where the insurance company will defend you from charges, but not pay for the penalty if found guilty.

Criminal law involves **protecting society by** establishing and **punishing those who break the law.**[4] While we do not expect healthcare providers to end up defending themselves against criminal proceedings, it happens to those who commit insurance fraud, sexually molest their patients or touch patients inappropriately (criminal battery) or are accused of involuntary manslaughter.

If you keep your nose clean and practice the defensive techniques found in this book, the chance of being charged in criminal court is slim, unless someone is willing to perjure themselves to get you in trouble. And why would anyone do that? It could be to get even with you for a perceived injustice or to receive a cash award in the process by then filing civil charges against you once you are found guilty of the criminal matter.

Administrative law is the law which governs disciplinary or licensure actions.[5] Practitioners can find themselves victims of complaints to the state board with regard to their treatment of patients. This will result in appearing before the state board to defend themselves and their licensure. Most practitioners may not be aware, but they generally have some insurance coverage for this as well. They should know that they need to contact their insurance carrier immediately once there has been notification of a disciplinary claim.

Employment law affects everyone in any type of business and certainly healthcare professionals are not immune.[6] If you own the practice there are a host of rules and regulations you must follow. If you work for someone, various rules apply to you even if you are not involved in hiring and firing. There are still many areas of employment law that affect you regarding your interactions with patients and staff.

The **Equal Employment Opportunity Commission (EEOC)** is the government entity charged with caring for every protected group from any and all discrimination. It has the manpower and money to come after you relentlessly, and as such, it wields great power in convincing all of us to behave. For the most part we do behave. However, even with

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the best behavior, you can end up in court with an employee looking to get even with you, or someone who lost their job *for cause*—like incompetency—and knows how to use the system for profit (often because they have been fired before). If you have not followed the rules precisely, they could prevail.

Healthcare law involves and is governed by The Occupational Health and Safety Act (OSHA) and Health Insurance Portability and Accountability Act (HIPAA). Like the Equal Employment Opportunity Commission (EEOC), they have the full faith and backing of the United States Government get you to abide by a myriad of rules and regulations and to come after you if you do not.[7]

Divorce law may also affect you as a professional healthcare provider and change your life in many unforeseen ways.[8] The good news: unlike tort law that can see you lose everything, divorce law will, at most, only be able to take half of everything you own.

Paranoia 101

Who is out to get you? Your patients, your employees, your visitors or anyone who steps upon your property (home or office), the government, special interest groups that oppose anything you may use or do that is controversial (risky procedures, off label prescribing, X-rays, fluoridation, contaminated waste disposal) and your spouse. Just about everyone could be out to get you!

Motivation of Lawsuits

In a word, the motivation behind most lawsuits is money. In three words: money, money and money. If there were no monetary rewards involved in litigation, how many lawsuits would be filed?

Cause of Lawsuits

Injury, loss of money, wages, pain and suffering, failed treatment, humiliation, and perception of value are some of the things that result in patients suing their providers.

Culture of Lawsuits

The board game, **The Game of Life,** is part of Americana.[9] You may have played this game as a child or you may have played it with your children. It looks innocent enough until you land on one square that says, **Lawsuit—sue another player for $100,000.** I do not remember

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that square being there when I was a child, but it is there now, and it says much about our culture. It says a lot about what we are teaching our children—lawsuits represent a windfall of unearned cash. The first response by many aggrieved people has often become, "I will sue you!"

Lawsuits have become a sort of lottery. You do not even have to buy a ticket. They are free. While in England and most of the industrialized world the loser of a lawsuit pays the other's legal fees, not here. Our system motivates many cases being brought with the attitude, "What do I have to lose?" This clogs the courts and worse, it takes time, money and limited resources to defend against a lawsuit, so many people just cave in and settle the case to avoid the exorbitant costs. It is American, and it is destroying our culture, commerce and spirit.

Ridiculous, Absurd and Excessive

Attorneys who argue against tort reform would like us to think the sensational cases that get reported in the news are oddities. When we hear about a woman who goes to a McDonalds takeout window, orders a cup of hot coffee, places it between her legs and drives off, and then gets burned by the hot coffee is rewarded with a $2.9 million judgment for inappropriate, unreasonable behavior, they want us to think that is the exception. Compensatory damages $100,000, punitive damages (to punish McDonalds for making its coffee so hot) $2.8 million. The attorneys will be the first to point out that the award was reduced to a mere $650,000, like that is okay for this kind of case.[10] Well, it is not okay, even if these cases are exceptions.

A Texas couple got a barbeque grill for Christmas and could not wait for summer. They had a barbeque in their living room. The grill blew up and they claimed the instructions were not clear about not having a barbeque indoors. The grill was not defective; there were at least six warnings in the instructions, but the size of the lettering on the propane tank warning not to use it indoors was smaller than recommended, so Sears settled the case. It seems it did not want to take a chance with a jury trial so it gave the couple $4.8 million.[11] Somewhere along the way we are all paying for these cases in higher prices, higher insurance premiums and fewer services and innovations.

Are these cases aberrations? It is surely debatable; however, these cases happen every day in America—home of the *anything goes* when it comes to suing. Are they isolated and have no chance of affecting healthcare providers? Later, we will look at the $4 million dental injection case and you decide.

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There is a bright side. The defense wins in most cases which results in a large number of cases going to trial with no benefit to the plaintiff. This, however, is little comfort to you, the defendant, who has to go through the expense, worry and blight of the process.

Your Legal Dictionary

Plaintiff: This is the person suing someone. Why could not they just call this person the "sewer" to make the legal process easy to understand? Perhaps that term would prejudice the jury: sewer/cesspool, you get the point.

Besides standing for **plaintiff**, **"P"** stands for the **patient** who is suing you. Yes, from now on, your patient will be referred to as the plaintiff. That should help you remember who is who.

Defendant: This is the person being sued, which, to your chagrin will be your new name during the course of the trial. It is very possible that a jury with a 10th grade average education may have, sometime in history, declared a verdict for the wrong person as they may have not understood *who was who* in a case that uses these confusing terms to designate each party.

Besides standing for **defendant**, **"D"** stands for the **doctor** who is being sued. Yes, you are now known as the defendant.

Discovery: This is the legal process whereby all parties to a suit are allowed to *discover* the facts of the case. It includes obtaining copies of all documents and records, taking sworn testimony to learn about the facts of the case in a process known as a deposition, and having the case reviewed by expert witnesses.

Deposition: This is the taking of *sworn* testimony in front of the lawyers from both sides of the case. The defendant and the plaintiff may be in attendance if they so desire, but of course, they have to attend their own deposition so they can testify on their own behalf.

The deposition takes place *before* any courtroom appearances where sworn testimony is given before a judge and/or jury. It usually takes place in a lawyer's office and there is a stenographer recording all that is stated for the record to produce a word-for-word written copy of the deposition.

Be careful not to keep saying "uh," because every "uh" will be written into the deposition making you look like a poor witness and moreover, you will look like a dolt when the plaintiff's attorney reads part of your deposition in front of the jury. It sounds even worse when they ask you to read from your own deposition at the spot where you kept going, "uh."

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Contingency is a type of fee payment to lawyers for their services. It means the lawyer will not get paid unless he/she wins, i.e. the plaintiff does not have to pay any fee unless he/she wins the case, and then the plaintiff gives the lawyer about one-third to one-half of the award. The other way lawyers usually get paid is by an hourly rate.

Deep Pockets: This is the term often used to designate an individual or company that has a good amount of money and/or insurance coverage thus making a lawsuit worth pursuing. If a lawyer takes a case on contingency and wins a large award, it means nothing unless there is a "deep pocket" to pay the award. If there is no deep pocket to sue, the lawyers will often get creative and bring anyone they can into the lawsuit. Lawyers will not usually take a case on contingency if there are no deep pockets.

Malpractice: Aka Medical Mistakes, Medical Errors – Malpractice essentially means the healthcare provider did not follow the standard of care. It is really much more complicated than this simple definition states, but the actual determination as to whether or not you committed an act of malpractice will be debated and decided by lawyers, the judge and the jury. Your job is not to worry about the definition; your job is to practice excellent medicine defensively to stay out of court.

There are both **acts of commission** (things you did to the patient) and **acts of omission** (things you did not do but should have) over which you can commit malpractice and be sued.

Standard of care is defined as the level of practice/care the average, prudent practitioner in a given community would provide to his/her patient.[12] You are required to practice prudently. If you are performing specialty care and are not a specialist, you are held to the higher standard of care that applies to the specialist. The definition is actually much more complex, but those complexities are left to your attorney assigned to defend you.

A **Jury** is a group of twelve persons chosen to decide who has the better lawyer! Actually, a jury usually consists of six, eight, or twelve citizens sworn to render a verdict, i.e. picked to decide a case in a courtroom.

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Salient Features

- From Waiting Room to Courtroom is a warning about, a blueprint for and a guide to avoiding potentially catastrophic malpractice suits.
- The author provides insight into what could be the most important lesson in your career.
- For the first time, a practical book is available that teaches healthcare providers how to stay out of the courtroom, and what to do if they end up there in spite of doing everything right.
- The chance that a healthcare provider will be sued during his/her lifetime is higher now than at any time in history.
- Once the legal profession was no longer prohibited from advertising, there has been a constant onslaught of commercials convincing everyone that they must get what they deserve from doctors who committed malpractice against them. They have convinced people that they can, and should, blame bad outcomes on their doctors.
- We have gone from a trusting nation that held healthcare providers in high esteem to a jaded population expecting to be rewarded at every turn, always looking to blame anyone with money or insurance for our injuries.
- The time has come for healthcare providers to fight back. If you don't learn the techniques and strategies that can keep you safe, you will fall prey to the personal injury attorneys who devised the game and know how to play it better than anyone else.
- There are a multitude of books that teach lawyers how to do everything from finding the right expert witness to how to destroy an adversary's testimony in front of the jury. Yes, they take the game very seriously, and maybe you should too.
- Written by a doctor, with advice from attorneys, this book is filled with practical clinical and legal insights to help you swim in the shark-infested waters of medical litigation. Everything from obtaining a well-designed informed consent to protecting your assets before you get sued is addressed to help keep you safe. You can't practice sensibly without knowing your risk.



Robert M Fleisher did his DMD and Bachelor of Arts in Psychology at Temple University, Philadelphia, USA. He attended the University of Pennsylvania where he received his specialty training in endodontics. He taught at Temple University, the University of Pennsylvania, and currently teaches at the Albert Einstein Medical Center in Philadelphia. After twenty-five years of teaching his winning formulas to many generations of practitioners at this hospital-based endodontic program, he was inducted into the Maimonides Society.

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By developing and instituting practice management systems that go beyond the typical financial instructions and ways to get more patients, he teaches office design, employee and doctor scripts, interpersonal techniques, and compassion to build a practice and to make sure patients remain loyal, are kept happy and love you.

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