

1970

The Silent Doctors- The Conspiracy of Silence

Joseph Kelner

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Health Law and Policy Commons](#)

Recommended Citation

Joseph Kelner, *The Silent Doctors- The Conspiracy of Silence*, 5 U. Rich. L. Rev. 119 (1970).

Available at: <http://scholarship.richmond.edu/lawreview/vol5/iss1/8>

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE SILENT DOCTORS—THE CONSPIRACY OF SILENCE

*Joseph Kelner**

MEDICAL malpractice and malpractice lawsuits are on the rise. Perhaps the main reason is that less than 300,000 active doctors are caring for over 200 million Americans—about one doctor for every 700 citizens. This is a dangerous shortage of doctors—a pressure cooker of overworked physicians, high caseloads, short-cut precautions, and substandard treatment.

Medical journals are reporting the mounting wave of protests and alarm of doctors over their increasing malpractice insurance rates. The doctors are offering suggestions for new legislation that would set up a workmen's compensation type of system of awards to injured patients, under which patients would be surcharged for their own coverage.

The patient would have to pay for a schedule award for his own injury caused by the doctor's negligence. He would receive nothing for his pain, suffering, humiliation or inconvenience. The system thus treats the symptoms of the serious malady of malpractice rather than its cause.

Silence is golden—for the doctor, not the patient. The sick, sore, lame or disabled patient wants to know his medical care is careful care, but his right to know conflicts with an unwritten code of the medical brotherhood—to see, hear, and speak no evil against each other, whether they know each other or not.

This is a mass "cop-out" of doctors in medical malpractice litigation—the silent treatment, even in the clearest cases of carelessness. Patients injured by negligent doctors must crack this "conspiracy of silence" before they can win malpractice damages.

A few years ago Boston University Law Medical Research Institute surveyed 214 doctors. They were asked bluntly: Would you be willing to appear in court for the patient where a surgeon, operating on a diseased kidney, removed the wrong one? Only 31% of the specialists and 27% of the general practitioners said they would be willing.

*Member of the New York Bar; Former President, American Trial Lawyers' Association.

The Hippocratic Oath, still taken by medical graduates, is a perfect philosophic rationale for the conspiracy of silence. The doctors' Hippocratic Oath reads:

Whatsoever house I enter, there will I go for the benefit of the sick, refraining from all wrongdoing or corruption, and especially from any act of seduction, of male or female, of bond or free. Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which *ought not to be noised abroad*, I will keep silence therefrom, counting such things to be as sacred secrets. (Emphasis added).

The oath binds the fledgling doctor not to divulge confidential information. This edict of silence was intended to protect the patient's privacy, but somehow has been turned around to give negligent doctors a sanctuary of immunity never intended for the privileged doctor-patient relationship. It works not only to protect the patients' secrets, but also to hide secrets from patients. Doctors' mistakes seem to be among those secrets which "ought not to be noised abroad."

In some states the doctors have lobbied for "Good Samaritan" laws which grant immunity to doctors for negligence in treating first-aid cases. No other profession has asked for or received such special favors. But the AMA felt that doctors need and deserve to be absolved in advance in these cases from responsibility for negligence.

In fact, the Good Samaritan laws are unnecessary. No one can seem to find any record of any doctor who ever stopped his car to give emergency care to a traffic victim and then got sued for being the "good samaritan." It was enough to get the Good Samaritan laws passed for the doctors to say they needed them—a kind of therapeutic salve for the paranoia of those "uptight" doctors who feel threatened by the legal concept that they should be held liable for running through medical red lights.

The negligent doctor or hospital would "shape up" for safer care if they knew shoddy standards and careless acts were not easily covered up. Malpractice lawsuits spotlight the skeletons in the closet, which take familiar shapes. One example is the itinerant surgeon who, according to the American College of Surgeons, "travels from hospital to hospital, merely 'cutting and sewing' and not staying around long enough to supervise each patient's vital post-surgical period of recovery." These patients don't even know the ghost surgeons who operated on them.

If complications arise after surgery, untrained doctors or nurses can't cope with the problems. Another example is the doctor sued for "abandonment" of the patient for failing to follow his condition carefully, failing to watch the patient after surgery, or delegating care to nurses or interns. Often, X-rays are taken and interpreted while wet. If the doctor fails to study them again when they are dry, he may miss important findings, like fractures.

Other common medical "flubs" are: failure to take X-rays to discover fractures or other conditions; failure to inform patients adequately of the hazards of certain treatment, or surgery before getting the patient's consent; failure to keep proper written records of all significant steps in treating the patient; failure to write orders for medication and treatment so that nurses and attendants can handle the patient properly when the doctor is not present.

Frequent mistakes are burns from excessive X-ray treatment, heat lamps or hot water bottles; injection of wrong drugs, or injections into improper areas of the body, causing damage to nerves with resulting paralysis; using defective equipment; failure to study the side effects and contraindications of drugs before prescribing them; performance of unnecessary surgery, such as hysterectomies; failure to tie off arteries during surgery, causing internal hemorrhages; and a variety of unskillful acts or omissions of careless treatment and surgery.

The lawyer often encounters "tight cast" cases in which fractured legs or arms are enclosed in casts so tight they cut off blood circulation and result in amputations. Occasionally, the doctor removes wrong organs or leaves sponges, catheters, clamps or other hardware within the body during surgery. He may transfuse wrong blood types into the patient, causing a kidney blockage and death.

Childbirths are maltreated by obstetricians who try to juggle several births at a time and don't watch each case carefully. Doctors arrive late while nurses or interns try to delay the birth until his arrival. The results can be disastrous.

Doctors and hospitals may administer excessive oxygen, improper or excessive drugs to premature infants or expectant mothers, causing blindness, brain damage or death of the infant or mother. Some doctors may induce births prematurely or use excessive drugs to induce births, causing dangerous hemorrhages.

A high public medical official has candidly stated that in New York

City alone a weekly average of two deaths occur from incompatible blood transfusions—the wrong blood type—which causes kidney shut-down, uremia and nephrosis of the kidneys. The patient dies a miserable death after fits and convulsions resulting from uremic poisoning of his brain and other organs. The kidneys become blocked by clots formed by mixing his blood with the incompatible blood.

The Medical Examiner in New York and elsewhere who performs coroner's autopsies is not required by law to inform the family of the cause of the uremia and nephrosis discovered upon autopsy. The mistake is buried with the deceased.

In the case of David M, his young widow was told by the doctor that "complications" and cancer caused her young husband to die. Since no one told her he had cancer when he entered the hospital for minor surgery to remove polyps of the colon—small benign growths—his widow gagged at the doctor's explanation. Investigation showed that David M really died from a transfusion of mislabelled blood. He had no cancer. The insurance company covering the hospital settled the case.

To reduce carelessness, there should be a law to make coroners and medical examiners supply more than bare medical terms such as "uremia," "toxicity," "cardiac arrest" or "natural causes" as the cause of death on death certificates. Full disclosure and an impartial opinion of the cause of death should be stated. Grieving relatives often lack the sophistication to understand medical double talk, and thus get no clue of the true cause of death.

The law of malpractice is very fair to the doctor. It requires him to possess and use only average reasonable skill and care prevailing in his community. He is not required to guarantee results, and the law allows him to make mistakes. He can guess wrong in diagnosis and treatment as long as he uses reasonably fair judgment and has some basis for doing what he does.

The doctor also has jury sympathy in malpractice trials. Juries are reluctant to brand him as negligent even though the patient's lawyer may be careful to point out on summation and on voir dire that the only consequence of their verdict for the patient is a money award, that there will be no criminal penalties and no suspension of the doctor's license to practice medicine.

Thus, to prove a doctor's careless departure from prevailing standards of care usually requires that another doctor testify against the defending

doctor. It takes one to know one. But recruiting a doctor ready, able and willing to testify against the negligent doctor is like looking for the proverbial needle in a haystack. The doctor willing to testify is inviting social and professional ostracism in his county medical society—and worse.

The curtain of silence is parted here and there by a few “renegade” doctors with enough courage to brave the taunts and penalties. Their testimony is needed to make out a “prima facie” case in court, but in a few cases the facts speak for themselves: the clamp left in the abdomen during surgery is a “*res ipsa loquitur*” case.

Even so, it is risky for the patient to go to trial without an expert medical witness because the malpractice insurance lawyer will have no shortage of doctors to explain away on trial any act of carelessness. The negligent doctor can be expected to get from three to ten doctors to testify for him; the patient is lucky to get one.

A CASE IN POINT

Susan is a beautiful eight-year-old mentally retarded girl whose brain was damaged at birth by sheer negligence. She was a premature baby, born in the eighth month of gestation. Her mother was given injections of demerol within an hour before birth.

Demerol is a powerful synthetic narcotic, a morphine substitute administered to reduce labor pains. But demerol depresses the respiration of the mother and reduces the vitally needed oxygen carried to the brain of the baby about to be born.

Although full term babies in gestation for nine months can tolerate the depressive effects of demerol, the best obstetrical authorities say demerol should be reduced in dosage or eliminated completely in premature births because the premature baby’s brain is too underdeveloped to withstand the reduction of oxygen, which can create a narcotized brain. The hospitals, however, had no standards to limit dosages of demerol in premature births.

Susan was also short-changed within the first hour of her life by hospital personnel who failed to resuscitate her promptly with necessary oxygen, medication and incubation, causing permanent brain damage. Her intelligence level will never rise over the level of a three-year-old. She will never walk, talk, or function like other people—an unspeakable but avoidable lifetime tragedy.

A world-renowned obstetrician consented to review the case with her counsel before trial. He indicated that the hospital record showed Susan's brain was damaged by negligence, but he could not get "involved" as a witness because he had "connections" with the doctor and hospital in the case. However, he referred the case to doctor D, a famous and respected obstetrician who had written extensively in a book about the hazards of demerol—especially in prematurity cases—and "might consent" to come into the case.

Dr. D was a dream witness; chapter and verse of his own book supported plaintiff's contentions. Dr. D concluded that Susan had a good case, but he would decide later if his schedule would enable him to appear in court.

A week later he politely excused himself because of an inability to arrange his schedule to testify, and suggested six other doctors to be consulted, with the hope that "some of these gentlemen will agree to accept the responsibility" to testify.

All six prestigious doctors were contacted. Four of the doctors refused to see plaintiff's counsel, even upon recommendation of their famous colleague, Dr. D.

The fifth specialist granted an interview, apparently curious to know what another doctor had done wrong. He shook his head sadly and observed that these cases "are, after all, matters of the doctor's individual judgment at the time of delivery." He added that he too administered demerol in prematurity cases but was not familiar with its dangers to premature infants. He could not recall if any of the "preemies" he had delivered were narcotized or brain damaged from demerol because he never saw any baby after its birth.

The sixth doctor was a top authority and author of an outstanding textbook, almost the "bible" in obstetrics. He said that the "whole obstetrical world is watching this case." He offered to appear only if he were to be called as an "impartial witness" by the court and not by either side. This offer was declined in view of his feeling that plaintiff did not appear to have a case. He later abandoned his pose of impartiality and testified for the defendant in an all-out support of the propriety of injecting demerol into mothers of premature babies.

When confronted on the witness stand with his own book which prohibited the use of demerol in prematurity cases, he blandly told the jury he was rewriting this part of the book which had been published

only two years earlier. In the new edition he said he would advise his readers that the use of demerol in prematurity cases must be left to the judgment of each individual doctor!

Plaintiff's chief medical witness was to be Dr. M, a fine obstetrician who had courageously agreed to testify long before the case reached trial. Dr. M had testified several years earlier in a case involving a 24-year-old mother who had hemorrhaged to death when her doctor failed to watch her carefully after he delivered her first baby. He was the cornerstone of Susan's case.

The trial started Friday; on Saturday, plaintiff's counsel arranged with Dr. M to review the testimony he would be giving on the following Monday. At his office, however, he said sheepishly: "I have bad news for you, but I did not want to tell you on the telephone. I can't testify."

When pressed to explain, he frankly stated that he had been "paid a visit" by representatives of the defending doctor's malpractice insurance company. They ran a tape of their "interview" with Dr. M, in which they persuaded him not to testify because he would be opening a "Pandora's box" of malpractice cases that would cause malpractice insurance rates of the whole obstetrical profession to be raised—or so they said. Susan's ghastly injury and her right to a fair trial were not discussed.

Eventually several doctors, aroused by the lurid background of the case, agreed to testify. One was Dr. G, a pediatrician who never had testified in any court and was ill-fitted for the brutal treatment he received from fellow doctors during the trial.

He was awakened repeatedly by startling phone calls in the night from seven doctors, some of whom he knew. They demanded to know why he was testifying against a doctor, what was in it for him, and how could he do such a thing? They threatened to bring the matter up at his medical society. None of these nightriders deigned to ask him about the medical details of Susan's case or if it had merit. His hospital superior quizzed him on how he became "involved" in the case.

Dr. B, an obstetrician recruited after the case started, got a similar hazing from several doctors.

Doctor K, a highly rated pediatrician who had treated Susan for the first several years of her life, and who had often told her parents that her mental retardation had been caused by carelessness at birth, testified that he was unqualified to answer questions about the cause of her injury, and that his medical society had instructed him that he need not do so at trial.

Despite these hurdles, the jury rendered a handsome verdict for Susan against the hospital but not against the doctor. The quietus had run the gamut from callous "thank you, but no thank you" refusals to testify, to overt acts of abuse, threats and even illegal suppression of vital medical testimony.

It is a penal offense in New York and in most states to persuade any person not to testify in any case. Section 215.10 of New York's Penal Law provides:

A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person. Tampering with a witness is a class A misdemeanor.¹

Here and there the courts openly recognize the conspiracy exists and are pecking away at it. In New York the Court of Appeals has decided that a plaintiff in a malpractice case may require the defendant doctor himself to answer opinion questions put to him by the plaintiff's lawyer where no doctor is available to testify for the patient.² In Massachusetts and several other states the plaintiff may use standard medical textbooks as evidence where no doctor will come forward to testify.

Doctors and lawyers of Pima County, Tucson, Arizona, have taken a giant step forward to change. Several years ago they set up a medico-legal panel to which outstanding doctors and lawyers are appointed by the county bar association and medical society.

The joint panel hears evidence presented by both sides and makes a decision by majority vote on the merit of the case. If the panel finds that malpractice was committed, the decision goes to the malpractice insurance company which usually settles the case. If it does not, the patient is free to litigate the case in court and the panel cooperates to supply a doctor who will testify for the patient in court. If the panel decides the case has no merit, the patient's lawyer undertakes in advance of the

¹ N.Y. PENAL LAW § 215.10 (McKinney 1967).

² *McDermott v. Manhattan Eye, Ear & Throat Hospital*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

hearing to refrain from a lawsuit unless he feels there are strong reasons which require that he take further action.

This plan is being tried in other states. Although not perfect, it is a good nonaggression pact which reduces the intensity of the fratricidal war between doctors and lawyers and—more important—gives an injury-ridden public a better chance for justice.

Lawyers who are frustrated in their search for doctors to testify often become trigger-happy and sue with or without a doctor and with or without a good case. Some lawyers, out of sheer ignorance of the medical aspects of the case or in the hope of finding a doctor to testify just before trial, will sue on a hope and prayer. Later, they must drop or lose the case when no doctor will agree to testify—a fiasco which adds to calendar congestion in our courts.

Most doctors are sincere and hardworking, often to the point of exhaustion. Many who overwork are candidates for “coronaries.” But the portrait they paint with their eloquent silence is that they are careless and couldn’t care less about their patients.

Deep down doctors must know that the public will not wait forever for change. Their silence is deafening.