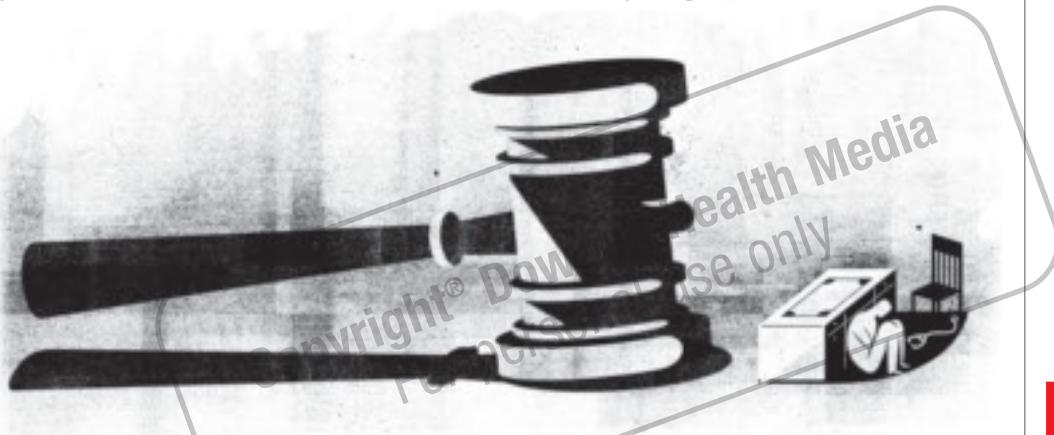




Stuff of nightmares: Criminal prosecution for malpractice

➡ Knowing how the law distinguishes criminal acts committed in practice from civil malpractice should ease your fears about the rare (but terrifying) prosecution

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Happily, criminal prosecutions for malpractice are rare in the United States—far, far less common than civil suits for malpractice. Nevertheless, criminal prosecutions do occur and seem to be increasingly frequent in recent years. Consider that, between 1809 and 1981, approximately 15 criminal cases involved the prosecution of a physician for medical malfeasance¹; by contrast, between 1985 and 2004, another 15 cases were heard in US courts—every one involving

the death of one or more patients.²

The two cases that I present in this article, both involving ObGyns, illustrate the distinguishing features of criminal and civil malpractice in the eyes of the law. My goal? To answer a question you may be considering: Am I safe from criminal prosecution for harm that comes to a patient at my hands?

CASE 1

Dr. Milos Klvana. The qualifications of Klvana to practice OB weren't reassuring. After he received his medical education in Czechoslovakia, he was dismissed from an ObGyn residency in New York for poor academic performance, then forced to resign

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Gary Steinman, MD, PhD >> Dr. Steinman is Assistant Clinical Professor, Department of Obstetrics and Gynecology, Albert Einstein School of Medicine, Bronx, NY, and Chair, Department of Obstetrics and Gynecology, International American University College of Medicine, St. Lucia. He is a member of the ObGyn attending staff at Long Island Jewish Medical Center, New Hyde Park, NY, and at St. John's Queens Hospital, Elmhurst, NY. Dr. Steinman is the coauthor of *Womb Mates: A Modern Guide to Fertility and Twinning* (2007).

The author reports no financial relationships relevant to this article.

This overview is not intended as advice on any legal matter. Consult a medicolegal expert for advice.

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Does the possibility of being charged with criminal malpractice trouble you? Explain, in an E-MAIL to obg@dowdenhealth.com or a FAX to 201-391-2778



How does the law distinguish criminal culpability from its civil counterpart?

- ▶ Depraved indifference to human life
- ▶ Lack of timely response
- ▶ Reckless endangerment
- ▶ Risky therapies

What do you call it? A glossary of criminal charges

- ▶ **First-degree murder** Many states require evidence of premeditation and intent to press this charge
- ▶ **Second-degree murder** Requires a reckless act and depraved indifference to human life
- ▶ **Manslaughter** Killing without malice aforethought
- ▶ **Negligent homicide** Killing because of carelessness, inattention, or indifference

from an anesthesiology residency in California when a hospital held him responsible for a patient's death. The California Medical Board put Klvana on license probation after he was convicted on 26 counts of inappropriately prescribing controlled substances and misrepresenting himself as "board-eligible" in ObGyn when he sought admitting privileges.

Klvana nevertheless continued practicing OB at his outpatient clinic after his convictions. There, over an 11-year period, nine babies whom he delivered died after grossly deficient management of labor.

Could Klvana have been prosecuted for causing these deaths?

What crimes can a physician commit?

Any action that violates the law—insurance fraud, illicit sexual contact, theft, illegal distribution of narcotics, and tax evasion, to name several—is a criminal offense, whether perpetrated in the course of medical practice or under other circumstances.³ But a physician, by the nature of his (her) work, is in a unique position in regard to the law: When a patient in his care suffers severe or lethal injury, he may face a charge of criminal negligence, manslaughter, or second-degree murder² (see the glossary of death-related charges on this page).

CASE 1 CONTINUED

Klvana was charged with second-degree murder—as well as with insurance fraud, perjury, grand theft, and practicing medicine without a license.¹⁻⁶ Expert witnesses testified that his conduct fell egregiously below the standard of proper obstetrical care. For example, Klvana repeatedly:

- failed to properly monitor oxytocin-stimulated labor
- disregarded signs of fetal and neonatal distress, including the presence of meconium
- was absent during delivery
- disregarded obvious signs of danger in newborns, including difficulty breathing
- failed to transfer high-risk patients to a hospital when labor became complicated.

Notably, Klvana continued these practices even after the Los Angeles County Department of Health Services issued a cease-and-desist order that prohibited him from performing outpatient deliveries.

A lengthy trial ensued. Klvana was convicted and sentenced to 53 years in prison.

Bad outcomes

The practice of medicine is full of uncertainties. There is never a guarantee that the outcome of a medical procedure or treatment will be curative or without risk.

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Physicians are in the unique position of having the threat of criminal prosecution hang over their heads for severe or lethal damage to one of their "clients"



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When an outcome is bad, nothing the physician could have done would, in most instances, have averted the catastrophe. On rare occasions, however, a bad outcome is the result of physician negligence; when the patient (or her survivors) believes that a bad outcome was caused by the physician's actions, they may institute a civil suit for malpractice. Very, very rarely does a prosecutor decide that the facts of a case warrant a charge of criminal malpractice.

What exactly puts a physician at risk of such a criminal charge?

The usual remedy is a civil suit

To understand why some medical actions constitute a crime, first let's analyze the far more usual redress for a bad outcome—the malpractice suit. To be successful in such a suit, a plaintiff must prove four elements (see “Civil malpractice carries 4 elements,” at right):

- duty
- breach
- damage
- causation.

The element of **duty** requires that a doctor-patient relationship existed when the injury occurred—such that the physician had a duty to render appropriate care to the plaintiff. The plaintiff must prove, usually by means of expert testimony, that the physician has **breached** that duty by acting in a way that does not meet prevailing standards of care. The plaintiff must show that he or she suffered **damage**, and that the damage was **caused** by the physician's acts or failure to act.

A civil suit for malpractice is brought by the injured party or by his or her representatives. The compensation sought by the plaintiff is monetary.

CASE 2

Dr. David Benjamin, repeat offender. Benjamin's license had been revoked for gross incompetence after the fifth occasion on which he perforated a patient's uterus during a gynecologic procedure. Unfortunately for his patients, Benjamin was given a **window of opportunity to do more harm while he appealed the revocation of the license.**

Civil malpractice carries 4 elements

- ▶ A relationship exists between physician and patient that establishes a duty on the physician's part to perform a medical service
- ▶ A breach in the performance of that duty occurs, measured by applicable standards of care
- ▶ Monetary or physical damages to the patient result from that breach
- ▶ A proximate cause-and-effect relationship (causation) can be identified between the performance and the damage⁷

During that time, Benjamin performed an in-office abortion on a patient at 20 weeks' gestation; state regulations at the time required that a second-trimester termination be performed in a hospital.

After the abortion, the patient bled excessively—the result of perforation of the uterus (a 1" x 4" wound) and cervical laceration. Benjamin was aware of the heavy bleeding but placed the patient in a clinic corridor while he performed an abortion on another patient. The first patient remained in the corridor for an hour, without adequate monitoring, until she went into shock and cardiac arrest. According to the testimony of witnesses, emergency medical services staff were misinformed about the patient's condition, further delaying timely intervention.

Benjamin was indicted for second-degree murder after a grand jury found “depraved indifference to human life.” He was tried, convicted, and sentenced to imprisonment for 25 years to life.⁶⁻¹⁰

What made his conduct criminal?

What was he thinking?

Criminal malpractice is characterized by the same four elements as civil malpractice, and adds a fifth element: The physician's state of



To the four core elements of civil malpractice (duty, breach, damages, and causation), add a fifth—your state of mind—in criminal malpractice



The heinous aspects of criminal malpractice

- ▶ Willful, reckless endangerment
- ▶ Wanton disregard of past negative outcomes
- ▶ Lack of timely response
- ▶ Improper motive
- ▶ Depraved indifference to human life
- ▶ Gross negligence
- ▶ Intoxication
- ▶ Deception
- ▶ Unjustifiable risk

mind (in legal terminology, *mens rea*). That state of mind can range from inattention to premeditation.

Here's an example: One of Klvana's residency faculty testified that the defendant-physician was "cavalier and casual in his approach and his duties." Klvana's training and experience should have been enough to alert him to the need for appropriate monitoring during augmented labor but, apparently, he chose to ignore these accepted standards of practice. He had, for example, used oxytocin stimulation by direct infusion and without fetal monitoring (and in his office, not the hospital) for a postdate gravida who had had two prior cesarean sections. Her newborn died of perinatal asphyxia.

Klvana repeatedly used this risky, life-endangering protocol, exhibiting what can be called a "wanton disregard for human life" and an indifference to his patients' safety. His preference for more precarious, office-based delivery may have been the result of his dif-

ficulty obtaining admitting privileges.

Similarly, Benjamin may have been motivated by greed when he chose to perform an abortion on a second patient instead of attending to the patient who was bleeding to death in the corridor after an earlier procedure.

The standard of care

In some prosecuted cases, the level of gross negligence is so high that proving that a departure from the standard of care has occurred is unnecessary. A case in point is the growing number of physicians who are under the influence of drugs or alcohol when they treat patients. As early as 1887, courts recognized as grossly negligent surgeons who operated while drunk.¹¹ It is estimated that 10% to 15% of American doctors have had, or will have, a substance abuse problem sometime in their life. Many continue practicing while undergoing treatment for the illness.¹²

Note that chemical impairment is no longer accepted as an excuse for error. Just as a charge of driving while intoxicated that involves bodily injury may be tried as a felony, surgical damage done while intoxicated is now generally prosecuted as criminal negligence.³

In most criminal prosecutions for malpractice, however, expert testimony is required to 1) attest to the relevant standard of care and 2) characterize the defendant's actions as a marked departure from such a standard. Deviating from accepted modes of treatment, or employing dubious approaches known to be highly risky, constitutes such a departure.

The applicable standard of care is defined locally and varies from jurisdiction to jurisdiction. Each societal unit determines and defines the limits of acceptable conduct by its professional members, beyond which certain actions become intolerable. (An example of this variability is that, in 1991, an ObGyn in the United States had, on average, been sued three times, but the typical ObGyn in the State of New York had been sued eight times.¹³)

Furthermore, those societal definitions of "acceptable conduct" may be influenced by prevailing social attitudes about such charged

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Repetitive negligent behavior, constituting a pattern that can be documented, is an invitation to any prosecutor who is considering criminal charges

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What might the future of criminal malpractice be?

More recent criminal prosecutions may give “good-faith” physicians pause and make them wary of entering into particularly troubled areas of medical practice:

- ▶ **Chronic pain** Fear of prosecution by the US Drug Enforcement Administration (DEA) has had a chilling effect on the practice of physicians who prescribe opioids for chronic pain.
- ▶ **Late-term abortions** Federal legislation criminalizing so-called partial-birth abortions has, similarly, influenced the performance of all second-trimester abortion.
- ▶ **End-of-life care** Dispute over the legitimacy of terminal sedation has placed hospice physicians in legal jeopardy in some jurisdictions.
- ▶ **Physician-assisted suicide** Legal only in the state of Oregon, this practice has already sent its most prominent practitioner to jail. Legislation to legalize the highly controversial procedure has been introduced in other state legislatures.
- ▶ **Prosecutors building support for re-election** This appears to have been the impetus for Louisiana’s Attorney General charging Anna Pou, MD, with murder in the deaths of four elderly New Orleans nursing home patients stranded by Hurricane Katrina in 2005. Dr. Pou administered to her patients what she believed to be pain relief and comfort in the form of morphine and midazolam. The grand jury refused to return the indictment.¹

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issues as abortion, sexual promiscuity, faith healing, or sedation at end of life.

Repeat performances

Physicians who have been found guilty of criminal malpractice don’t seem to learn from experience. They continue to produce similar adverse results when they treat particular medical problems. Consider Benjamin: Five times, he caused a life-endangering uterine perforation during gynecologic procedures before the fatal episode described earlier occurred. And Kvlana: nine stillborn and neonatal demises in 11 years as he persisted in his grossly deficient practice of managing labor. This sort of repetitive behavior, constituting a pattern of negligence, is another invitation to criminal prosecution.

Depraved indifference; reckless endangerment

The unwarranted delay in dealing with a postabortal hemorrhage led, in Benjamin’s case, directly to the patient’s death. Such a delay displays either a lack of understanding of basic physiology or a depraved indifference to human life. Benjamin’s behavior was not simply a matter of faulty medical judgment; it was a willful repetition of precarious substandard practices that constituted reckless endangerment. His criminally culpable error was twofold: the recurrence of uterine perforation (a risk he should have been aware of because it had happened in prior surgeries) and, more so, his willful neglect of a bleeding patient.

Is criminal prosecution necessary?

The legitimate desire of society **1)** for its members to receive diligent treatment and **2)** to prevent the repetition of inept or dangerous medical practices is central to the question posed atop this section. Consumers of health care are, increasingly, aware that the usual processes of professional discipline and state regulation do not always protect patients from harm: Dangerous physicians have eluded attempts to discipline them by

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Dangerous physicians may elude discipline by moving to a different jurisdiction; that’s one reason civil malpractice suits aren’t always a deterrent to bad behavior



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moving from one jurisdiction to another, always a step ahead of attempts to control them. A civil malpractice suit, however large the settlement sometimes is, does not always deter a defendant from repeat performances of his or her negligent behavior.

It is reasonable to expect prosecutors to become more active in filing criminal charges as public frustration with inadequate self-policing grows.¹⁴ The Benjamin and Klvana cases are striking instances of the failure of government licensing agencies to take timely action to protect the public from harm. And, so, in the most egregious cases of physician misconduct, society resorts to criminal prosecution. Will such prosecutions become more frequent? The answer depends on how effectively quality assurance measures in health care are implemented.

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Avoid prosecution with “quality medicine”

The best way to avoid criminal prosecution is, of course, to practice good medicine. Quality medicine rests on the principle that caregivers respond to patients’ needs in a timely, appropriate manner. Your patients will, of course, come to the end of their life sooner or later. But patients in the hands of a good physician will not have that end hastened by disregard for sound medical practices.

In 1980, the Massachusetts Supreme Judicial Court enunciated a standard for physicians that no honorable physician would have difficulty meeting: “A doctor will be protected,” the court said, “if he acts on a good faith judgment that is not grievously unreasonable by medical standards.”¹⁵

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It’s reasonable to think that prosecutors will grow more active in filing criminal charges as the public becomes more frustrated with inadequate self-policing

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