

**FAST FACTS AND CONCEPTS #63
THE LEGAL LIABILITY OF UNDER-TREATMENT OF PAIN**

Eric J Warm MD and David E Weissman MD

Background It is well recognized that physician's fear of regulatory scrutiny (DEA, state medical boards), is a major contributor to the problem of under treatment of pain. A landmark lawsuit (*Bergman v. Chin*) should be a wake-up call for all physicians that this type of practice poses its own legal liability. An 85-year-old California man with metastatic lung carcinoma spent the final week of his life in severe pain. Three years after his death his children sued his doctor alleging that that the physician had failed to prescribe drugs powerful enough to relieve their father's suffering. This was one of the first U.S. cases in which a doctor has gone on trial for allegedly under-treating a patient's pain. By a 9 to 3 vote the jury decided that the physician's lack of attention to pain constituted elder abuse, awarding the family \$1.5 million (the amount was reduced to \$250,000). To win, lawyers convinced the jury that under-treatment of pain was 'reckless negligence.' Prior to this case, many lawyers may have considered such a suit unwinnable. Given politically savvy aging baby boomers, as well as the preponderance of sound scientific evidence for the proper assessment and treatment of pain, similar verdicts are expected. Indeed, similar subsequent cases have led to settlements in favor of bereaved family members of deceased patients who received substandard pain management at the end of life, more firmly establishing pain control at the end of life as a new tort.

Practical Advice Here are some tips for how physicians can better protect themselves from charges of under-treatment of pain:

- Basic knowledge of the medicolegal aspects of care is necessary for all clinicians caring for patients with serious or terminal illness. As such, clinicians should know that sufficient pain control is accepted as a legal standard for end of life care.
- Take accountability of your knowledge and skills in pain assessment and treatment. Some states, such as California, now require mandatory pain CME to ensure that clinicians are updating their pain management skills in an ongoing fashion
- Learn about and utilize your local consultation resources for pain management.
- Improve your knowledge and skills in assessing substance abuse disorders; learn about and utilize your local resources for substance abuse referrals and treatment. There are several online continuing medical education activities available such as www.scopeofpain.com.
- Improve your understanding of the drug regulatory system and how it functions. Learn about the common triggers for regulatory review. Go to The Pain and Policy Study Group (<http://www.painpolicy.wisc.edu/>) for information about federal and state regulatory laws and regulations.
- Become active in your hospital pain improvement efforts. Check with your hospital Quality Improvement department and their efforts to meet The Joint Commission pain guidelines.

Summary Ideally physicians should not use the fear of lawsuits to help guide medical care, but evidence shows that they do. In a way, this attention on improved pain management may become a silver lining in the black cloud of our litigious society.

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