



[Print](#) :: [Close](#)

## FAST FACTS AND CONCEPTS #63

**Author(s):** 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 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.' Until recently, lawyers would have considered such a suit un-winnable. Given politically savvy aging baby boomers, as well as the preponderance of sound scientific evidence for the proper assessment and treatment of pain, we can probably expect more such verdicts.

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

- Review your own practice – are you currently meeting The Joint Commission (JCAHO; <http://www.jointcommission.org/> ) pain guidelines?
- Improve your knowledge and skills in pain assessment and treatment. Some states, such as California, now require mandatory pain CME.
- 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.
- 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.
- Become active with your state Cancer Pain Initiative; go to the Alliance of State Pain Initiatives (<http://aspi.wisc.edu/>) to find information about your state activities.

**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.

**2009 Update:** See Reference (7) for a discussion of more recent developments in the tort for under-treated pain.

## References

1. Stieg RL, et al: Roadblocks to effective pain treatment. *Med Clin N Amer*, 1999;83(3): 809-821.
2. Okie S. Doctor's Duty to Ease Pain At Issue in Calif. Lawsuit. *Washington Post*. Monday, May 7, 2001: Page A03.
3. Crane M, Treating pain: damned if you don't? *Med Economics*. Nov 19, 2001: pp 67-69.

4. Weissman DE. Doctors, Opioids and the law: The Effect of Drug Regulations on Cancer Pain Management. *Semin Oncol.* 1993; 20(Suppl A):53-58.
5. Gilson AM, Joranson DE. Controlled substances and pain management: Changes in knowledge and attitudes of state medical regulators. *J Pain Symptom Manage.* 2001; 21(3):227-237.
6. Joranson DE, Maurer MA, Gilson AM, Ryan KM, Nischik JA. Annual review of state pain policies, 2000. Madison, WI: Pain & Policy Studies Group, University of Wisconsin Comprehensive Cancer Center; 2001.
7. Kollas CD, Boyer-Kollas B. Evolving medicolegal issues in palliative medicine. *J Palliat Med.* 2007; 10:1395-1401. Available at: <http://dx.doi.org/doi:10.1089/jpm.2007.0092>.

**Fast Facts and Concepts** are edited by Drew A. Rosielle MD, Palliative Care Center, Medical College of Wisconsin. For more information write to: [drosiell@mcw.edu](mailto:drosiell@mcw.edu). More information, as well as the complete set of Fast Facts, are available at EPERC: [www.eperc.mcw.edu](http://www.eperc.mcw.edu).

**Version History:** This Fast Fact was originally edited by David E Weissman MD. 2nd Edition published July 2006. Current version re-copy-edited April 2009; web-sites updated and reference to updates in the tort for under-treatment of pain added.

**Copyright/Referencing Information:** Users are free to download and distribute Fast Facts for educational purposes only. Warm EJ, Weissman DE. *The Legal Liability of Under-treatment of Pain, 2nd Edition. Fast Facts and Concepts.* July 2006; 63. Available at: [http://www.eperc.mcw.edu/fastfact/ff\\_063.htm](http://www.eperc.mcw.edu/fastfact/ff_063.htm).

**Disclaimer:** Fast Facts and Concepts provide educational information. This information is not medical advice. Health care providers should exercise their own independent clinical judgment. Some Fast Facts cite the use of a product in a dosage, for an indication, or in a manner other than that recommended in the product labeling. Accordingly, the official prescribing information should be consulted before any such product is used.

**ACGME Competencies:** Medical Knowledge

**Keyword(s):** Pain – Evaluation; Ethics, Law, Policy Health Systems

© 2008 Medical College of Wisconsin

---

**Medical College of Wisconsin**

8701 Watertown Plank Road, Milwaukee, WI 53226

[www.mcw.edu](http://www.mcw.edu) | 414.456.8296

[Print](#) :: [Close](#)