

MedMal Matters > column



By Thomas A. Demetrio
Corboy & Demetrio



By Kenneth T. Lumb
Corboy & Demetrio

The fragile patient safety triad

Patient safety has historically been protected by a trio of checks and balances. When the system works, state medical boards ensure that only competent physicians receive and retain a medical license; hospitals ensure that only competent physicians receive and retain privileges; and the civil justice system keeps physicians and hospitals honest. When one or more of the legs of that triad are weakened, however, patient safety suffers.

According to the news magazine *Texas Observer*, that is exactly the situation in Texas. The *Observer* reported on a Texas neurosurgeon whose case illustrates the dangers of medical deregulation that can surface in any state that weakens its civil justice system. From late 2010, when Dr. Christopher Duntsch arrived in Dallas to set up a neurosurgical practice, until the Texas Medical Board revoked his license in June, multiple physicians complained about him to the board. According to the *Observer*, the weakness of Texas' "unregulated system of health care" allowed Duntsch to continue practicing.

Before 2003, the *Observer* reports, Texas medical care was regulated by an interconnected "web of regulation," consisting of hospital management, the civil justice system and the Texas Medical Board. In 2003, however, the Texas legislature imposed a draconian \$250,000 cap on damages in medical negligence cases. The legislature also insulated hospitals from failing to properly police clinical privileges by creating a "malice" standard for negligent credentialing cases.

As the article puts it: "Hospitals can get all the benefit of an expensive surgeon practicing in their facility and little of the exposure. This has freed hospitals from the fear of litigation, but it's also removed the financial motivation for policing their own physicians."

With the civil justice system gutted and hospital oversight muted, only the Texas Medical Board stood between patients and dangerous doctors. According to the *Observer*, however, the board is hampered by its own rules. In most states, the right to practice a profession is considered a privilege. The Texas Medical Practice Act, however, specifically notes that a doctor's license is a "hard-won, valuable credential." Patients' rights take a backseat to the protection of that valuable credential to the extent that the board cannot revoke a license without "overwhelming" evidence. Illinois' standard is probably not much better. The point of our article is that patient safety requires a strong civil justice system.

According to the Texas Medical Board, from February 2012 to June 2013, Duntsch's treatment of four patients "significantly violated the standard of care."

In February, March and July of 2012 and June of 2013, Duntsch failed to recognize and immediately correct post-operative spinal cord compression, leading to quadriplegia; failed to recognize post-operative hemorrhage, leading to death; injured a patient's vertebral artery by removing bone from an inappropriate area, leading to death; and demonstrated insufficient knowledge of relevant anatomy and persisted in attempting to enter a disk space in spite of complications which compromised the procedure.

In 2012, according to the *Observer*, Baylor suspended Duntsch for 30 days and then prohibited him from operating unsupervised. The supervision requirement was not enforced, however, and he continued to operate. After the first death, Duntsch resigned from Baylor Regional Medical Center and applied for privileges at Dallas Medical Center.

According to the *Observer*, the Texas Med-

ical Board was aware of concerns about Duntsch's competence but could not open an investigation until a written complaint was filed. During the summer of 2012, a physician filed one. The board's investigation moved along at the pace required by procedural and substantive rules while Duntsch continued to operate. Board records reflect that his license was not suspended until June.

According to the board, Duntsch had shown a pattern of failing to engage in proper pre-operative planning and failing to recognize and respond to surgical and post-surgical complications. A lawsuit filed by Mary Erfurd claims that during the procedure that left her mostly confined to a wheelchair, Duntsch was distracted and disoriented — at one point leaving the operating room. He ignored multiple members of the surgical team who voiced concerns and seemed to be under the influence of alcohol or drugs, according to the board.

One might be tempted to conclude that the board's employees were overworked or lazy or incompetent. According to the *Observer*, however, the system worked exactly as designed. As a former board employee put it, according to the *Observer*, the board could be the size of the Texas Department of Public Safety, "but the state doesn't want that. It's more or less satisfied with the way that things work."

Fortunately, the civil justice arm of Illinois' patient safety triad remains strong. Hospitals have a duty to act as reasonably careful institutions should in granting and renewing privileges. Regardless of the aggressiveness of the Illinois Department of Financial and Professional Regulation, health-care institutions in Illinois will always have a financial motive to protect patients from bad doctors. ■

TAD@corboydemetrio.com
KTL@corboydemetrio.com