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DAMAGES

Barry Werth

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DAMAGES

BARRY WERTH

"Damages is a meticulous, detailed and yet highly readable account of how the lives of one family that suffered a great tragedy intersected with those of doctors and lawyers....An important and powerful book."

— JONATHAN HARR, *A Civil Action*



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1 of 1 people found the following review helpful. I highly recommend this bookBy CandidReviewsThis is a thoughtfully-written, highly detailed account of the legal maneuvering that goes on for years, following a disastrousoutcome in a hospital's delivery room. The author spent time with the parties involved on both sides of the lawsuit.The reader gets to know the various lawyers as people who had lives prior to going into law.Whether a person

works in medicine or not, "Damages" illustrates how a clinician's culpability is not always the most important factor in determining who the plaintiff's lawyers will "go after." Many strategic considerations come into play. We get a behind the scenes look at the experts hired to testify and what the limits of their usefulness are. I highly recommend this book. 0 of 0 people found the following review helpful. A Lawyer Recommends for General Reading. By DirtlawyerA very broad view of a med mal case, including medicine, law, damages, burden on the injured parties, and a bunch of other stuff. Well worth reading. 0 of 0 people found the following review helpful. Informative medical malpractice thriller. By Ira defriez For those of you who are interested in medical malpractice this is the book for you! Detailed legal reading thriller.

DAMAGES is the riveting true story of one family's legal struggles in the world of medicine. At the urging of a friend, the Sabias filed a medical malpractice lawsuit against Dr. Humes and Norwalk Hospital. Barry Werth takes us through the seven-year lawsuit, allowing us to see the legal strategy plotted by the Sabias' attorneys, Connecticut's premier medical malpractice law firm.

.com On April 1, 1984, Donna Sabia went into labor expecting twins. But one of the babies arrived stillborn, while the other--Anthony Jr.--was barely alive, with an Apgar score (rating newborn vitality on a scale of 0 to 10) of 1. In the following years, he suffered from spastic quadriplegia, cerebral palsy, and cortical blindness, and would require lifelong medical attention costing millions of dollars just to survive. The Sabias' lawyers faulted Donna's maternity clinic and the delivering physician for her son's condition, initiating a 7-year lawsuit on the claim that a simple \$40 ultrasound could have eliminated incalculable suffering and catastrophic expense. Damages is a careful analysis of how the fields of law and medicine intersect in the realm of medical malpractice, where lawyers sue not only to redress suffering but to make sure that doctors and hospitals are more vigilant in the future, if only to avoid being sued again. Werth leads readers carefully through the litigation, from the deposing of expert witnesses, through the preparation for trial, to the posturing of settlement negotiations. Always firmly aware that lawyers sue doctors on behalf of human beings, however, he reveals the emotional and psychological consequences of a civil justice system that is often neither civil nor just. Werth explains esoteric legal and medical procedures in understandable terms that laypeople will not find condescending, while describing the human side of the Sabias' case without patronizing attorneys and physicians. Ultimately, Damages is the chronicle of a devoted family braving a medical malpractice industry in which the decision-making process on both sides is governed by a cost-benefit analysis that leads, perhaps inevitably, to the commodification of human life. "Even after a big verdict," Werth quotes one malpractice lawyer, "I'm suffering because all I could get my clients, who've been brutalized by the most appalling malpractice, was money." --Tim Hogan From Library Journal Werth (The Billion Dollar Molecule, LJ 2/1/94) integrates the story of one family's travails after the birth of a profoundly disabled son with an unbiased view of medical and legal issues. Werth reviewed files and interviewed most of the people involved in the medical malpractice case brought by the parents of Tony John Sabio. This meticulous, even-handed approach results in a book that is both an engrossing look at the experiences of one family and a serious glimpse into the American medical malpractice industry. It also touches on the serious question of whether, given the competing interests involved, a medical malpractice suit can be an effective tool to discover the truth or achieve justice. This is the book that Jonathan Harr's A Civil Action (LJ 9/15/95) aspired to be but was not because Harr did not put that particular lawsuit into the larger context. Recommended for any library where medical and/or legal true stories are in demand. ?Suzanne Pierce Dyer, Alameda Cty. Law Lib., Oakland, Cal. Copyright 1998 Reed Business Information, Inc. From The New England Journal of Medicine For readers steeped in the literature of medical malpractice, this excellent, well-written book takes a novel, insightful, and humane approach. On the basis of records and detailed interviews with physicians, lawyers, other experts, and insurance representatives as well as the parties involved in the case, the book covers approximately 10 years of a lawsuit and the life of the participants, from its beginning in March 1983 with the birth of twins, one dead, the other severely disabled, until its resolution in December 1993. The book documents the agony of the family, which suffered a severe medical misfortune, and the anguish of the defendants, who suffered complete disarray of their professional and personal lives, great injury to their self-esteem, and substantial harm to their reputations. Unlike so many works on the subject of medicine and the law, this book neither exalts nor demonizes the lawyers and physicians who were cast as opponents by circumstances and events. Anthony and Donna Sabia were in their mid-20s when they met and got married. In March 1983, at the end of what appeared to be a normal and uneventful pregnancy, Donna went to Norwalk Hospital in Norwalk, Connecticut, for the delivery of her twins. Until then she had been a patient at a local maternity clinic because money was in short supply. The Norwalk Maternity Clinic was staffed by nurse midwives. It had no regular in-house physicians, and the 12 affiliated obstetrician-gynecologists saw clinic patients only about five days a year and on weekends, but only if they were called for deliveries. From the very first, one twin weighed 18 percent more than the other twin. An ultrasound examination on January 27 showed that everything was normal. Although twins are likely to be born after 37 weeks of pregnancy, Donna went into labor at the end of the 38th week, 1 week late. Dr. Maryellen Humes, a knowledgeable and respected physician, was called in for the delivery. She had never seen Donna

before. Donna was in such a state of agitation that she was practically unmanageable, and Humes, who had other tasks to perform in addition to the delivery of Donna's children, could not consider any late-stage intrauterine monitoring or, in what became a legal question later, a cesarean section. Before any other decision could be made, Donna delivered spontaneously. The first twin was born dead, and had apparently been dead for 18 to 24 hours before birth. The other twin was born in very poor condition, with an Apgar score of 1, the lowest score on this scale of viability, on which 0 indicates death. The Sabias, saddened by the death of one of their twins, appeared not to have been told about and did not comprehend the disabilities of the second twin, "little Tony," when he was born. It took them a year to realize what a sick child they had. They did not realize that little Tony was blind. They did not think of complaining or of bringing any kind of action against Humes or the hospital until Tony was about two years old, when Donna met another mother whose child had cerebral palsy as a result of a birth injury. It was only after talking to this acquaintance -- another patient of Humes's -- that she began to realize that Tony's limited responses, his failure to gain weight and to suck adequately, his tiny size, and his frequent seizures showed how wrong things were. When Tony was 15 months old, he weighed less than 12 pounds, the circumference of his head was below the 5th percentile for his age, and he suffered from "breath-holding spells." He had been sent home with instructions for a high-calorie diet; Donna and Anthony had never received a diagnosis from the hospital. It was only later that the hospital informed Donna that Tony had cerebral palsy, encephalopathy, and postseizure disorders. At this early stage, Tony had some minimal reactions, which were taken as signs of progress by his parents, but they did not understand the gravity of his condition until after they terminated their connection with Norwalk Hospital and consulted a private pediatrician. The child's disabilities were overwhelming. He was blind, quadriplegic, and mentally retarded. He was unable to eat, speak, or control his bodily functions, and he had the intelligence of only a very young infant. He had to be fed through a valve in his stomach, and it was clear that he had no way of recognizing the presence of his parents or other persons nearby. There was evidence that he was capable of some physical satisfactions when he was free of seizures and of pain and when his physical needs were met by his father and mother. Anthony and Donna had another child after Tony was born. Anthony was working 80 hours a week and Donna tried to hold several jobs while tied to Tony and his continuing helplessness and needs. The enormous pressures, both emotional and economic, took their toll and almost wrecked the marriage. The Sabias were referred to the prominent "med-mal" law firm of Koskoff, Koskoff Bieder by the same acquaintance who had first alerted them to Tony's serious problems. The book recounts in great detail the legal steps taken during the next eight years, avoiding a dry account of the technicalities of medical malpractice law but explaining the rationale and structure of this lawsuit. Even though the lawsuit ended in a settlement after mediation, the success of the mediation and the ultimate results of the lawsuit depended on detailed preparation for the trial and the conscientious pretrial depositions of some of the leading specialists in the management of risky pregnancies. The expertise that had to be arrayed to explain and recount Donna Sabia's pregnancy and delivery is most impressive. The enormous effort on the part of the lawyers to bring a successful action in a difficult medical-malpractice case, or to defend such an action successfully, demonstrates that both physicians and lawyers make their living honestly. In general, a plaintiff's suit for medical malpractice alleges negligence on the part of the physician or hospital and cites a series of failures to meet the standards of practice and failures to take the necessary steps in the care of a patient, as in this case of a high-risk pregnancy. Beginning early in Donna's pregnancy, there was a discordancy in the twins' weights, which should have been taken as a warning of substantial problems, but no clinical studies were performed. At the end of her term, about a week before the delivery, Donna was seen by a nurse midwife, who heard two fetal heartbeats and did not suspect or report anything wrong. Donna was not seen by Humes until a week later, when she went into labor at more than 38 weeks' gestation. At that time, Humes, who had not seen her before, found only one fetal heartbeat. The twin who was born barely alive suffered from anemia and hypoxia; the dead twin was growth-retarded. The departures from the standard of care, plaintiffs asserted, were failure to perform an ultrasound examination in the third trimester and to perform studies of fetal well-being and serial nonstress tests because of the discordancy in the twins' weights. Another alleged failure was the absence of experienced medical personnel until the time of delivery; the physician had to carry out a complicated delivery without any previous knowledge of the patient. Another claimed omission was the failure to do electronic fetal monitoring in the last trimester. Although there was a question as to whether electronic fetal monitoring was the standard of practice in 1983, the procedure was available and should have been used in this high-risk situation. It was also claimed that the hospital failed to follow its own standards of procedure, which called for greater physician involvement in complicated pregnancies. Had all of this been done, the twins could have been delivered by cesarean section before the death of Michael Sabia, the stillborn twin. Michael's death resulted in a drop in blood pressure caused by bleeding from the live twin to the dead twin. This shock caused the hypoxia, leading to brain damage and ultimately cerebral palsy and other severe disabilities. The evidence was that the dead twin had an inadequate share of the placental surface and a velamentous cord connection and thus was at imminent risk of death. The case for the defense was that neither these preventive measures nor an intervention by cesarean section would have made any difference, because the problem was a cord accident -- Michael's velamentous cord insertion -- that was no one's fault and that killed Michael, leading to catastrophic consequences for his twin. The defense thus differed with the plaintiff on actual causation, asserting that nothing could have been done to prevent this outcome, even if

some of the preventive measures urged by the plaintiff had been taken. The case against Humes had been settled for \$1.3 million before the mediation with Norwalk Hospital. The case against Humes was not as strong as the case against the hospital, because Humes had become involved only at the time of Donna Sabia's labor. The plaintiffs sought a "unified" theory, making both Humes and the hospital liable for the entire course of events: Humes could have decided on a cesarean section earlier, and she could have insisted on intrauterine monitoring in the circumstances. Although she strongly asserted her lack of responsibility or liability, she was persuaded to settle for an amount that was less than her full insurance coverage of \$2 million, because of the risks of litigation in a case of serious injury in which the jury's sympathies would be with the severely damaged child and his family. In our society, there are no remedies available for such cases of catastrophic birth injury other than medical-malpractice actions. The result of the delivery of a "bad" baby is invariably a lawsuit against the physician or the hospital, because there is no way in which the high cost of caring for an infant for years can be met without relying on money from the hospital or the physician's medical-malpractice insurance. Although lawyers are keenly interested in their fees (usually one third of the proceeds of litigation or settlement), they also accept their responsibility to help their clients meet crushing costs. In cases such as the Sabias', there is no other way to compensate families for the enormous economic pressures and the disruption of their lives and marriages, even though the sadness cannot be relieved by money damages alone. There are many considerations in assessing the worth of a case. When Anthony and Donna Sabia were close to breaking up their marriage, the possibility of their separation became an important factor in concluding the cases: juries do not like to award damages to separated couples because of the reasonable assumption that much of the award would be dissipated in the fight between the parents. Here, the substantial settlement with the hospital of about \$6.5 million did help the marriage to stay together. In addition, the parents' insistence on keeping Tony at home and continuing to care for him for the foreseeable future was a factor in the substantial settlement. Another bizarre and gruesome aspect of the settlement was the fear that the disabled twin would have an early death. From the insurer's point of view, a dead infant is less of a liability than a severely disabled infant who is cared for by responsible parents, such as Anthony and Donna Sabia. In the epilogue the author notes that, amazingly, life goes on. Humes continues to practice medicine and does well. The Sabias' great loss can never be repaired, but it is made more bearable because they have been relieved of the costs of Tony's care and have been able to put their personal lives in order to the fullest extent possible. Although our society does not yet have a sensible, rational way of protecting people against personal medical disasters, it has developed an indirect but expensive approach: our economic system provides for the social distribution of costs. Physicians and hospitals pass along the cost of medical-malpractice insurance to the public (because it is deductible on income-tax returns), and this insurance cost is also considered in the calculation of Medicare and Medicaid reimbursements. Finally, although it is not the most effective or reasonable method for the social apportionment of costs, all of us, by paying our taxes and our medical bills, share in carrying the costs of damages in cases such as that of the Sabias. Among many imperfect resolutions of problems, it is not the worst. ed by Frank P. Grad, LL.B. Copyright 1998 Massachusetts Medical Society. All rights reserved. The New England Journal of Medicine is a registered trademark of the MMS.