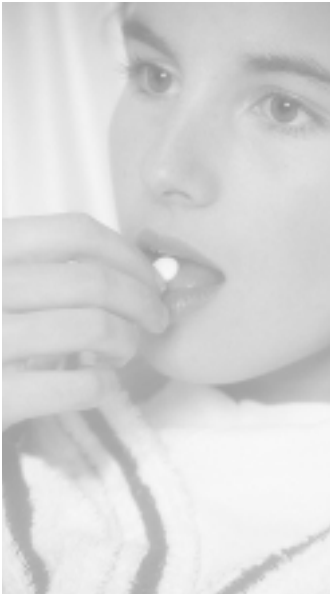


# Strategy 3

## Litigation and Legal Liability



# Litigation and Legal Liability

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## Introduction

Litigation is another tool that could be used to improve hospital policies on providing emergency contraception to sexual assault survivors. A successful lawsuit over a hospital's failure to provide a rape victim with access to emergency contraception could prompt other hospitals to change their policies for fear of being sued.

This approach may be the most effective way to improve access to EC in states where legislation or administrative action has little chance of success and hospitals are intransigent in their refusal to provide EC to sexual assault survivors. However, advocacy groups considering litigation should be aware that it can be time-consuming and costly. Moreover, the success of such a lawsuit will rest not only on proving that EC is the standard of care, but also on finding a plaintiff who has become pregnant from a rape after not being informed about or offered EC at a hospital ER, and who is willing to describe the damage she suffered from the pregnancy (such as having to undergo an abortion).

It is worth noting, though, that even the *prospect* of a lawsuit may be enough to convince some hospital administrators and their attorneys to improve EC in the ER policies. Some advocacy groups have provided hospital administrators with materials showing that providing information about and access to EC is now endorsed by medical associations and pointed out the potential legal liability in failing to follow this standard.

## Advantages:

- A successful lawsuit could prompt other hospitals to change their policies on EC.
- The threat of legal liability could be the only way to improve rape survivors' access to EC in states where legislative or administrative approaches are not likely to succeed.

## Disadvantages:

- It is difficult to find a plaintiff who is willing to pursue a lawsuit.
- Litigation can be time-consuming process.
- There is no guarantee of success, and an unsuccessful lawsuit could even hurt the cause.

## The Brownfield case: A rape survivor's lawsuit

*Brownfield v. Daniel Freeman Marina Hospital*,<sup>1</sup> is the only reported case in which a sexual assault survivor sued over a hospital's failure to counsel her about and provide access to emergency contraception. The plaintiff in the case, Kathleen Brownfield, sued the Daniel Freeman Marina Hospital, a Catholic-owned facility in California, after she was treated in the hospital's emergency department following a sexual assault and was not offered information about or access to emergency contraception.

<sup>1</sup> *Brownfield v. Daniel Freeman Marina Hospital*, 208 Cal. App. 3d 405 (1989).

Court papers give the following account of her treatment:

Her mother asked for information concerning the “morning-after pill,” a “pregnancy prevention treatment.” Respondent hospital refused to provide information concerning this treatment, despite the fact that the appellant was at risk of pregnancy, because it was “a Catholic hospital.” It also allegedly failed to inform appellant that if she chose to receive the treatment she should immediately contact her doctor or another emergency room in order to obtain it within the 72-hour period in which such treatment is effective. Appellant stated that she did not see her family doctor until more than 72 hours after the rape.

Although she did not become pregnant from the rape, Brownfield was upset that the hospital had placed her at risk of pregnancy because of its policy of not to offer sexual assault victims information about or access to emergency contraception. She filed suit seeking an injunction that would require the hospital to either stop treating rape patients or to counsel such patients about EC and provide access to the medication.

The court ruled that Brownfield would have had a viable claim for malpractice if she could show that emergency contraception was the standard of care, she would have taken the medication and she had been harmed by the hospital’s failure. The court in this case equated harm with becoming pregnant from the rape.

In its decision, the court found that a hospital’s duty to counsel a rape survivor about emergency contraception was based on a patient’s right to self-determination. “The duty to disclose such information arises from the fact that an adult of sound mind has ‘the right, in the exercise of control over [her] own body, to determine whether or not to submit to lawful medical treatment.’ Meaningful exercise of this right is possible only to the extent that patients are provided with adequate information upon which to base an intelligent decision with regard to the option available.”<sup>2</sup>

Although Brownfield did not ultimately win the lawsuit, the case puts hospitals on notice that a failure to counsel rape patients about EC and make it available exposes health care providers to legal liability.

## Establishing a Legal Claim

Whether a lawsuit can be brought over a failure to make EC available or counsel a rape survivor about EC depends on state law. Each state has differing laws on the time frames in which a case can be brought, the evidence that can be admitted, against whom claims can be brought and what claims can be brought. For that reason this section is not intended to serve as legal advice or guarantee a favorable outcome in any case that may be brought.

## Informed Consent

While the specific claims will vary depending on state law, a rape survivor who is not counseled about EC and becomes pregnant as a result of the rape may be able to file a lawsuit based on a lack of informed consent. The doctrine of informed consent is based on a patient’s right to determine what happens to her or his body. This doctrine requires a physician or hospital to disclose enough information about medically relevant options and their risks so that a patient is offered “an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.”<sup>3</sup>

<sup>2</sup> In this case the court noted that access to emergency contraception could have been ensured by transferring the patient to another medical facility or physician. A plaintiff may be able to show that providing a referral to another provider or offering a prescription does not constitute adequate care because EC is most effective the sooner it is taken.

<sup>3</sup> *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

Failure to counsel a sexual assault survivor about EC should be considered a breach of a patient's right to informed consent and a violation of a physician's duty to disclose all medically relevant treatment options, since it deprives a patient of information about an important and medically relevant option.

### **A Failure to Meet the Standard of Care**

A patient may also be able to sue the treating physician and/or the hospital for failure to provide treatment that meets the standard of care. Typically, in order to win a malpractice suit claiming a patient was harmed by a failure to provide treatment meeting the accepted standard of care, four elements must be proven:

**1 The patient was owed a duty of care.**

This element is easy to establish. Doctors owe their patients a duty of care, especially emergency care, as do the hospitals that treat them. A patient should be able to show that the treating physician and/or hospital owed her a duty of care.

**2 The duty of care was breached.**

To meet this element of a claim, the plaintiff would need to first prove that *counseling a sexual assault patient about EC* is the standard of care, and that this standard was not met. In some cases, it may also be possible to show that *providing EC to a sexual assault victim* is also a standard of care, and that this standard was not met.

**3 The patient was harmed by the failure to meet the standard of care.**

To show that she was harmed by the failure to provide treatment meeting the standard of care, a patient would quite likely need to show that she had become pregnant as a result of the rape. While a woman may have a good argument that the worry of becoming pregnant is harm, the court in the Brownfield case found this was insufficient.<sup>4</sup>

**4 The harm was caused by the breach.**

To prove this element, a plaintiff would need to show that the harm (pregnancy resulting from the rape) was caused by the failure to be counseled on or offered EC. Because EC is highly effective in preventing pregnancy, especially if taken soon after unprotected intercourse, a victim would have a strong argument that harm was caused by the lost chance to prevent pregnancy from occurring.

### **Can a religious hospital be exempt from liability for refusing to make EC available?**

A religious hospital may claim that counseling a rape survivor about EC or providing EC violates its religious beliefs. Such a claim should not be viewed as a barrier to litigation. Although the hospital in the Brownfield case was a Catholic institution, the court ruled that the institution's religious beliefs did not outweigh the woman's need for medical care, saying: "Implicit in the allegations of her complaint is the contention that appellant's right to control her treatment must prevail over respondent's moral and religious convictions. We agree."

Although it is not possible to predict how a given court may rule, it is important to remember that there are interests at stake other than a hospital's religious beliefs, including a patient's right to give informed consent and receive medically appropriate care. In any case in which competing interests are

<sup>4</sup> There may also be other bases for litigation found in consumer protection statutes such as unfair or deceptive practices. For more information on the use of consumer protection laws, see Elena N. Cohen & Alison Sclater, "Truth or Consequences: Using Consumer Protection Laws to Expose Institutional Restrictions on Reproductive and Other Health Care" (Washington, DC: National Women's Law Center, October 2003).

at stake, the court must weigh the interests when coming to its decision. The court in the Brownfield case decided that the patient's right to receive appropriate medical care outweighed the hospital's religious beliefs. Other courts, however, may reach different outcomes.

### Can a religious refusal clause exempt a hospital from liability?

Most states have some form of refusal clause (often called a conscience clause) that allows medical institutions or providers (such as a doctor or nurse) to refuse to provide medical services to which they have a religious or moral objection. These refusal clauses generally allow providers to refuse to offer abortion or sterilization, although a few states have much broader clauses covering other types of medical treatment.

“ In the Brownfield case the court ruled that the state law allowing hospitals to refuse to provide abortion did not apply to emergency contraception, because it is a contraceptive. ”

Laws that allow hospitals to refuse to provide abortions should not insulate a hospital from liability for its failure to counsel a rape survivor and provide her access to emergency contraception. For example, in the Brownfield case the court ruled that the state law allowing hospitals to refuse to provide abortion did not apply to emergency contraception, because it is a contraceptive.

The court also noted that the state's exemption did not apply in emergency situations. Although there are some people and religious organizations that believe EC and other contraceptive medications are the equivalent of abortifacients, this is not accurate. Religious beliefs cannot change medical facts or definitions. The Resource section of this Toolkit includes authoritative sources that make it clear that EC is a contraceptive medication, not an abortifacient.

Even when a refusal clause is broad, and seemingly allows health care providers to refuse to provide any service to which they object, a court may interpret the statute in a way that avoids giving a hospital immunity from liability when a patient is harmed by a refusal to provide needed care. For example, a court may say the clause was not intended to apply to emergency room settings where the care needed is of a time-sensitive nature and the patient may not have a choice of where she is brought.<sup>5</sup> Courts may also conclude that broad refusal clauses should not apply to public hospitals or quasi-public hospitals.

### The disadvantages of litigation

Although litigation is a potential tool in improving rape survivors' access to emergency contraception, it is a difficult approach to use for several reasons.

One limiting factor is the time in which a lawsuit must be filed. Although this is determined by state law, the time period in which suit must be filed is generally limited. Because of the trauma experienced by survivors of sexual assault, many women do not feel emotionally ready to sue in the allowed time frames.

<sup>5</sup>For more information on narrow judicial interpretations of refusal clauses, see "Religious Refusals and Reproductive Rights," ACLU Reproductive Freedom Project, 2002.

Another issue involves confidentiality. Some rape survivors wish to have their assault remain a private matter and would not want to expose themselves to the publicity a lawsuit may attract. (A rape survivor, however, may be able to file a lawsuit under a pseudonym to preserve her privacy.)

Litigation is also time consuming. Lawsuits can take several years to be resolved, especially given the appeals that are likely when the litigation involves controversial issues.

The risk of losing is also a disadvantage that must be considered. An unsuccessful suit could embolden bad behavior and create further obstacles to access. If a court finds that EC is not the standard of care, hospitals could refuse to offer it.

Still another issue concerns the goal of litigation. A rape survivor who may be interested in pursuing legal action should be aware that a successful lawsuit is unlikely to result in a large financial award. Advocates should explain that compensation from a successful lawsuit would be limited.

For these reasons, a rape survivor should never be badgered to file suit or made to feel guilty if she is not interested in pursuing legal action. For some women, however, litigation - and the potential to improve medical care for other sexual assault survivors - could be part of the healing process.

### **Assistance may be available to survivors who seek to file a lawsuit**

Cost concerns may also deter some survivors from filing suit. Litigation can be expensive and the monetary relief from a successful suit is not likely to be great. Concern about legal costs should not, however, prevent a woman from proceeding; there are public interest law firms that would take a promising case without charging a fee.

If you should know of a survivor who may be interested in filing a lawsuit over a hospital's failure to offer EC, please contact MergerWatch at [info@mergerwatch.org](mailto:info@mergerwatch.org), for further information.

### **When a lawsuit isn't a possibility: Raising the issue of legal liability**

While it may not be possible to find a plaintiff or to bring a lawsuit, advocates can raise the issue of potential liability with hospital administrators and attorneys. As the acceptance of EC as the standard of care among professional medical associations has grown, so too has the potential for a hospital to incur liability when those standards are not met. Advocates can raise the issue of liability when meeting with or writing to hospital administrators and attorneys. The risk of being sued, and the resultant bad publicity, may be enough of a deterrent to convince risk-averse hospital administrators to adopt policies that ensure sexual assault victims are counseled about and offered EC when they are treated in the hospital.

In order to show that providing EC at the time of treatment is an essential aspect of the care of rape survivors, advocates can discuss the timely nature of EC; it is more effective the sooner it is taken. Unnecessary delay in obtaining the medication increases the risk that a rape survivor may become pregnant due to the assault.

Advocates should also discuss the problems that a woman may face in obtaining the medication on a timely basis. Showing that a rape survivor may not be able to obtain EC in a timely manner will illustrate the importance of providing it at the time of treatment. For example, does the community have 24-hour pharmacies? Are there local pharmacists who refuse to dispense the medication? Which medications do local pharmacies stock?

In New York, advocates sent their survey materials to hospital CEOs and attorneys as well as to emergency department and nursing personnel. Advocates included hospital CEOs in the mailing to make sure they were aware of new state protocols that required hospitals either to provide emergency contraception to rape survivors at the time of treatment or ensure that the patient is able to obtain EC on a timely basis and to alert them to potential liability.<sup>6</sup> The cover letter sent to each hospital included the following warning:

The New York State Coalition Against Sexual Assault and Family Planning  
Advocates believe the best and most responsible course of action for any hospital will be to immediately provide emergency contraception on site to any sexual assault survivor who elects to use the medication after being fully informed about her treatment options. Failure to do so will cause an unnecessary delay in treatment, increase the risk that the survivor will become pregnant and potentially expose the hospital to legal liability.

A number of hospitals reported that they were upgrading their policies on providing EC to rape victims after having received the survey. It is unknown how many of those changes were prompted by the liability warning.

### **Training medical professionals about the liability risks**

One obstacle to patient access to EC is a lack of knowledge among medical professionals who treat rape victims. Educating medical professionals about EC and the risk of liability for not providing it may encourage these practitioners to adopt new protocols.

The Mississippi Coalition Against Sexual Assault has used a voluntary approach to ensure that rape survivors are counseled about EC when treated in the emergency department. (See the section on “Voluntary Change” for more information.) In training rape crisis workers and emergency department staff, the coalition discusses EC and how a failure to offer the medication may expose a health care provider to legal liability.

Similarly, a Sexual Assault Nurse Examiner (SANE) program based in an Ohio hospital trains emergency room residents on caring for sexual assault survivors. Part of the training curriculum includes a discussion of liability for not meeting the hospital’s accepted standards of care. The SANE program teaches residents that if they have a personal objection to providing EC, there must be arrangements in place to ensure that patients are offered EC, in order to insulate the hospital and physician from liability.

Coordinators of the programs in Mississippi and Ohio have reported that hospital administrators and health care providers can often be convinced to update their policies when they are made aware of the guidelines issued by professional medical organizations that call for giving rape victims access to EC.

<sup>6</sup>The New York legislature has since passed legislation that requires hospitals to provide EC to those rape survivors who wish to take the medication.