

Internist Gerald Einaugler is facing 52 consecutive weekends in New York's notorious Riker's Island jail because he was slow to hospitalize a terminally ill nursing-home patient. A jury convicted the Brooklyn physician last June of reckless endangerment and willful neglect, both misdemeanors. He has lost his privileges at a hospital and two nursing homes, and has been disqualified as a Medicaid provider. He may also lose his medical license. What he considered conservative management, a prosecutor saw as criminal neglect, a deliberate attempt to thwart appropriate treatment.

Could a clinical mistake land you in jail?

The case began during a weekend in May 1990. The doctor has admitted that he mistook a peritoneal-dialysis catheter for a feeding tube. However, he wasn't prosecuted for that mistake, but for a 10-hour delay in ordering the patient's hospital admission—even though she was stable when the error was discovered and her nephrologist had agreed there was no emergency.

"This is like being in the middle of a Kafka novel," the 49-year-old internist says. "I've been punished for a clinical judgment that any doctor might have made. Before the trial, the prosecutor offered a plea bargain that would have resulted in no jail time and no jeopardy to my license. But I refused to plead guilty when I'd done nothing wrong."

Still, Einaugler may be lucky. Authorities initially wanted to charge him with manslaughter, a felony, but a grand jury refused to indict on that charge. That decision "may well have resulted from the grand jury's exercise of its 'mercy-dispensing' power, rather than its rejection of the

cause-of-death testimony," argues Edward J. Kuriansky, the special state prosecutor who handles cases involving nursing homes.

The case contains several puzzling aspects: Nurses who admitted destroying clinical records were granted immunity from prosecution. A medical examiner testified about the cause of death without having performed an autopsy. A few words of testimony that might have altered the outcome of the trial were apparently omitted from the court stenographer's transcript. Einaugler's attorney and the prosecutors have accused each other of violating judicial ethics by "trying the case in the media."

More important, the verdict has some frightening ramifications because it criminalizes a physician's exercise of clinical judgment, warns the Medical Society of the State of New York. MSSNY filed a "friend of the court" brief, along with the American Medical Association and two other medical groups.

"[In] essence, Dr. Einaugler was convicted of having cho-

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Gerald Einaugler (left) and attorney James Harmon

sen to hospitalize an elderly nursing-home patient later rather than earlier in the day," the society argues. "If this conviction is upheld, the practice of medicine in New York will be irreparably chilled. No professional . . . can function efficiently with the Damoclean sword of criminal liability looming over his head." Beyond the legal issues, the society found no fault with Einaugler's treatment of the patient and has established a defense fund for him.

The prosecutor disagrees that the verdict punishes the doctor for errors in medical judgment. After Einaugler's "grossly negligent conduct placed the patient in mortal danger, he prevented the treatment which he knew was necessary," argues a legal brief filed by Kuransky. A jury found that Einaugler's "disregard of

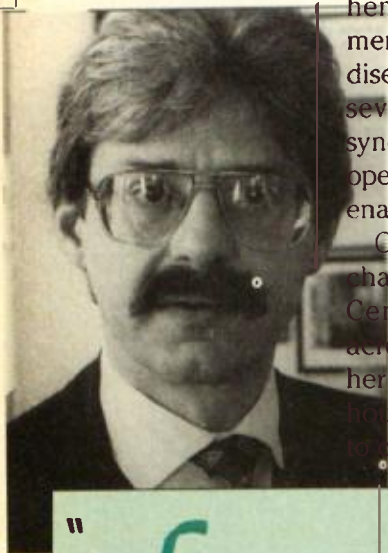
another human being was so reckless and so neglectful as to render him criminally culpable," the prosecutor wrote in a letter to *The Wall Street Journal*. "That is the simple message of this verdict"

Little about the case appears to be simple, though. Did the state act properly in treating Einaugler as a dangerous physician? Or is this case an example, as some medical leaders have charged, of ambitious prosecutors wanting to promote their careers and protect their turf at the expense of an innocent man?

Nurses discover a serious mistake

Alida Lamour, a frail 78-year-old woman, was admitted to Brooklyn's Interfaith Medical Center on March 29, 1990, because of an infected AV graft used for

side the Brooklyn, N.Y., home where Einaugler's patient had been admitted.



"Einaugler's disregard of another human being was so reckless and so neglectful as to render him criminally culpable."

—Edward J. Kuriansky
N.Y. State Special Prosecutor
for Medicaid Fraud Control

hemodialysis, according to court documents. She suffered from end-stage renal disease, cardiovascular disease, diabetes, severe retinopathy, and organic brain syndrome. When her shunt wouldn't stay open, a Tenckoff catheter was implanted to enable her to undergo peritoneal dialysis.

On Friday, May 18, 1990, she was discharged to Jewish Hospital and Medical Center of Brooklyn, a nursing home across the street. Neither the patient nor her legal representative was given the 24-hour notice required by state health rules to challenge the discharge.

A series of blunders and unfortunate coincidences contributed to Einaugler's legal problems. The dialysis catheter wasn't identified or secured by a sterile dressing, according to court records. Einaugler testified that paperwork that accompanied the patient omitted vital information, including orders that she was to be fed a renal diet by mouth. The prosecution argued that the document containing that information had been faxed to the nursing home, but that Einaugler "didn't take the time to locate it." The hospital's dialysis nurse who usually handled this was off that day. Moreover, no one at the nursing home had ever treated a patient with a Tenckoff catheter.

The doctor also had never encountered one. He knew the patient was receiving intermittent peritoneal dialysis and had concluded that it was by the repeated-puncture method.

Because of the catheter's location to the right of the umbilicus, he believed it was a feeding tube. Several experts later testified that a Tenckoff catheter and a feeding tube are similar in appearance.

Einaugler phoned the hospital's dialysis unit for more information, but the doctors had just left for the weekend. Einaugler then ordered feedings, with a water

flush before and after each.

The nurses immediately had problems. The catheter and feeding-line connectors both had male ends. A charge nurse snapped off the catheter's cap, which contained a lock, and used a universal connector to attach it to the feeding bag. Over the next 36 hours, several nurses expressed suspicions about the catheter, and one tried calling the dialysis unit, which was closed. However, no one contacted Einaugler.

At 1 a.m. Sunday, nurses decided against administering another feeding because Mrs. Lamour's abdomen was distended. Three hours later, a nurse who thought the catheter looked "different" told her supervisor that she believed it was for dialysis. They opened the catheter and permitted 2 liters of feeding solution to flow into a beaker. The patient's condition soon improved, with no abdominal distention. Her vital signs were within the normal ranges, the nurses later testified.

The doctor is notified

At about 6 a.m., the supervisor phoned Einaugler at home and told him of his mistaken order and the nurses' response to it. The doctor called Irving Dunn, Interfaith's chief of nephrology, who'd been treating Mrs. Lamour for the past two years. Einaugler, who'd known Dunn since becoming a physician, informed him of the mix-up with the catheter and relayed the nurses' observations that the patient wasn't in distress.

From this point on, Einaugler and the prosecutor tell different versions of what happened. The doctor says Dunn agreed that there was no emergency and the patient should receive dialysis at Interfaith the next morning, when any residual fluid would also be drained from the abdomen. At 7 a.m. Sunday, Einaugler drove to the nursing home to examine the patient himself. He confirmed that there



"This was a mean-spirited attempt by prosecutors to enhance their own standing in the legal community. We intend to fight this decision."

—Morton Kurtz, M.D.,
Immediate past president of the
Medical Society of the State of
New York

were no peritoneal signs, and again relayed that information to Dunn.

Einaugler later contacted the nursing home's medical director, Albert Khaski. While Khaski testified that he said the patient should be hospitalized, he didn't issue a direct order or say that an immediate transfer was required. Einaugler says Khaski didn't suggest transferring the patient at all. The prosecutor alleged that both Dunn and Khaski told Einaugler to transfer the patient immediately, but that he refused.

Einaugler checked on the patient again at 2:30 p.m. and found her stable condition unchanged, he testified. Two hours later, a nurse called him and reported that Mrs. Lamour was less responsive and seemed weaker. Einaugler then ordered the patient transferred to the hospital.

Einaugler met her in the emergency room at 5:25 p.m. and gave her history to the residents there. A diagnostic lavage of the fluid in the peritoneal cavity was done, and the patient was admitted to Dunn's service.

The dialysis and further lavage weren't performed until the following morning. While the patient tolerated the procedure well, according to Dunn, she died four days later. But of what? A medical examiner testified that the immediate cause of death was chemical peritonitis following the infusion of liquid feedings through the dialysis catheter. However, other experts disputed that the feeding solution caused her death, in view of her poor general

health. Since no autopsy was performed, the cause of death may never be accurately determined, they testified.

The grand jury hears the case

Under New York law, the mistake involving the dialysis catheter had to be report-

ed to the state Health Department, which referred the matter to Special Prosecutor Kuriansky. A grand jury was impaneled. At least six nurses were granted immunity from prosecution. Einaugler waived immunity and testified voluntarily.

Several nurses admitted having destroyed and rewritten some of the original clinical records. It wasn't possible to tell who had administered the feeding solution through the catheter, how much had been administered, and whether or not medication had been given the patient as ordered. Kuriansky declines to comment on why the nurses were granted immunity or whether any action has been taken against their licenses.

While the grand jury was instructed on the law for a homicide indictment, it didn't return that charge. Instead, two years after the patient died, it indicted Einaugler on two misdemeanor counts, including reckless endangerment: "The defendant became aware that the patient required immediate hospitalization to treat the effects of the introduction of the feeding solution to the peritoneum. The defendant did not order such hospitalization until late in the afternoon of that day, thereby creating a substantial risk of serious physical injury."

Einaugler was also charged with neglect, in that he was aware of the need to hospitalize the patient immediately and "knowingly failed to do so."

The doctor is put on trial

When the trial began last May, Einaugler's defense attorney, James D. Harmon Jr., tried to exclude from evidence any mention that the patient had died. He unsuccessfully argued that it was prejudicial and irrelevant to the misdemeanor charges.

"My client wasn't accused of causing the patient's death," Harmon says. "The grand jury expressly rejected that

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charge. By permitting testimony from the medical examiner, the court in effect let the prosecution place Einaugler on trial for homicide without the nicety of an indictment. Legally, whatever happened after the patient left Einaugler's care had nothing to do with what he was indicted for. But it was extremely difficult to overcome the sympathy the jury felt toward her."

If the jury hadn't been allowed to hear testimony about the cause of death, it "would have been left with the false impression that the defendant's recklessness had had no long-range consequences," the prosecution argued.

The effect of the feeding solution was hotly contested. Medical Examiner Jonathan Arden testified that the immediate cause of death was chemical peritonitis due to the liquid feedings. He also cited as other "significant conditions" the patient's arteriosclerosis and diabetes. Arden reached his findings by reviewing hospital and nursing-home charts for the patient's last six days of life. He didn't review her prior history or speak to any of her doctors.

On cross-examination, Harmon attacked Arden for not citing end-stage renal disease as a contributing factor. Arden also wasn't aware that the patient had developed pneumonia during her final hospitalization, Harmon charged.

Arden's testimony was rebutted by Michael Baden, a medical examiner for the New York State Police and a nationally known forensic pathologist. Arden had violated the fundamental legal obligation of the medical examiner to "take charge of the body" and conduct an autopsy, Baden testified.

He disputed Arden's finding that the patient had died of chemical peritonitis. "My opinion is that she died of the pro-

gressive natural diseases she suffered from," he said. "An autopsy would have resolved that issue."

Another prosecution expert witness endorsed Arden's view, while two defense experts testified that the patient had only mild peritonitis and that waiting until Sunday afternoon to hospitalize her hadn't posed a substantial risk.

In a legal brief filed after the trial, the medical examiner's office defended its handling of the case. An autopsy wasn't performed because the prosecutor hadn't notified the office until nearly a year after Mrs. Lamour died. Since there were extensive records of the circumstances prior to her death, Arden was able to reach a conclusion without performing an autopsy. "There would be no significant gain in exhuming Mrs. Lamour's body and performing an autopsy on her remains," the brief stated.

Crucial testimony is apparently lost

During the trial, Judge Neil J. Firetog himself posed one of the important issues. He asked nephrologist Dunn if he had directed Einaugler to have the patient sent to the hospital *immediately*. According to the transcript, Dunn responded: "I directed . . . Dr. Einaugler to have the patient admitted, period. I meant it should be done in urgent fashion, which would probably be that day. . . . As indeed the patient was admitted to the hospital that day . . . If it took 10 or 11 hours I would not tear my hair out and rant and rave. So be it. I felt that it was in the realm of the window that I had to work with."

The accuracy of the transcript is in dispute, however. Harmon recalls that Dunn turned to the judge and said, "If you didn't put that word in the question, the word immediate." He then continued with his answer. But the sentence isn't in the transcript.

This omission became critical because