How Oregon’s strict liability expansion threatens access to care

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A pregnant woman presented at an Oregon hospital’s emergency department where the anti-nausea medication ondansetron (marketed as Zofran by GSK) was administered, and the hospital billed her. The woman then alleged the Zofran caused her child to be born with irreparable heart defects.

Now an Oregon appellate court has agreed that the hospital should be held liable under Oregon’s strict liability statute, ORS 30.92, which was created in the mid-20th century to allow consumers to sue product manufacturers directly and allow liability without a finding fault.

Physicians say that if the ruling in Brown v. GlaxoSmithKline and Providence Health System–Oregon is allowed to stand, it would create a new legal theory that would open up medical facilities and, in turn physicians, to liability for claims that arise from defective medical devices and prescription drugs even if the medical care provided meets all aspects of the professional standard.

The Litigation Center of the American Medical Association and State Medical Societies and the Oregon Medical Association (OMA) argue in an amicus brief that the court ruling is an unjustified expansion of the products statute and an unintended expansion of liability for Oregon physicians that will have negative consequences for patients. They are urging the Oregon Supreme Court to reverse the appellate decision.

“The Brown decision is bad law that will lead to bad policy,” the brief says. “If this court reverses the Brown decision, it will not deprive injured patients of a remedy for negligent medical care. But if this court does not reverse the Brown decision, it may well deprive many more Oregonians of access to affordable and effective medical care.”

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Law gives patients other remedies

In *Brown*, the court of appeals said that medical facilities can be strictly liable as "sellers" of products under the Oregon law ruling that a hospital was the "seller" of a medication because it “transferred ownership of “the "product."

But in their brief, the AMA Litigation Center and OMA explain that goes “far beyond the scope” that state lawmakers intended. They outline the law’s legislative history and provide the Oregon Supreme Court with four takeaways, including testimony from Oregon Trial Lawyers Association representative that hospitals, like doctors, are typically not "sellers" of the products they use in medical procedures for purposes of strict liability. Instead, they are subject to liability for medical negligence.

The brief also points out that the strict-liability statute at issue in *Brown* arose in the mid-20th century to create a remedy for consumers where one otherwise didn’t exist.

“By the time that the courts were evolving strict liability against manufacturers and sellers of dangerous products, the common-law action for medical negligence was already over 100 years old,” the brief tells the court.

Impact on Oregonians’ access to care

The Oregon strict-liability law exempts physicians who provide direct patient care; however, it doesn’t specifically exempt hospitals or physicians who own clinics and surgical centers “where much if not most of health care is actually delivered,” the brief says.

In Oregon, about 36% of physicians were practice owners in 2020. The rate of ownership has declined over the past few decades as drops in payment and increases in administrative burdens have pushed doctors in the state and across the nation to become employees rather than owners.

“Now, in Oregon, *Brown* can be expected to accelerate the trend even further,” the brief says. “The Court of Appeals’ decision applies on its face only to hospitals. But there is no reason to believe that a physician-owned practice would be treated differently. Like hospitals, physician-owned practices maintain stocks of medications, administer those medications to patients, and then ‘charge patients for the drug as part of [the] medical services it provided.’”

It “makes no sense” that if the medication is deemed “defective” that the physician practice will be liable for the patients’ damage even if all standards of care were met, the brief says.
“Penalizing a medical practice (or hospital) for an error of the manufacturer or regulator serves no valid public policy goal. On the contrary, it will have significant adverse effect,” according to the brief. Namely, it will stifle medical innovation and some physicians will be discouraged from starting or joining physicians-owned practices in a state that already has a shortage of primary care physicians.