

## Editorial

# Sham Peer Review: the Shocking Story of Raymond A. Long, M.D.

Lawrence R. Huntoon, M.D., Ph.D.

---

It was a story that rocked the little town of St. Albans, Vermont: “Surgeon Accuses St. Albans Hospital of Deliberately Infecting His Patients.”<sup>1</sup>

According to the statewide news website, VTDigger.org, “An orthopedic surgeon is suing Northwestern Medical Center in St. Albans for allegedly infecting his patients with bacteria in an effort to ‘destroy his career and falsely blame him for the infections,’ court records show.... Long says he told hospital doctors in 2002 that he was considering adding an MRI machine to his office. At the time, he alleges, Northwestern was involved in ‘an illegal kickback scheme with respect to X-ray facilities’ and the hospital was planning to have a new MRI machine built for its facilities.”<sup>1</sup>

The “Factual Background” contained in a lawsuit, for which an Amended Complaint was filed on Sep 28, 2006, also contained hundreds of numbered paragraphs describing the nightmare of events that Dr. Long claimed he experienced at the hands of the hospital and other physicians on staff.<sup>2</sup>

### Northwestern Medical Center Enters into Settlement Agreement with Government

On Aug 16, 2007, the U.S. Attorney’s Office issued a press release stating: “The United States Attorney’s Office announced today that it has entered into a settlement with Northwestern Medical Center, the hospital in St. Albans, resolving the hospital’s potential liability for violating the federal anti-kickback and related laws.”<sup>3</sup> Although the hospital faced a potential liability of having to pay triple the amount collected from federal health programs, the government agreed to settle for a mere \$30,000.<sup>3</sup>

The press release went on to state: “Northwest Medical Center brought this matter to the Government’s attention in the Spring of 2006, when it acknowledged paying above-market rent to an orthopedic doctors’ office [competitors of Dr. Long] in St. Albans in exchange for the doctors providing the hospital with a space within their office in which the hospital provided x-ray services to the doctors’ patients. Because the hospital was paying the doctors more than the market would normally justify, the anti-kickback laws were implicated.”<sup>3</sup>

The press release praised the hospital for its good faith voluntary disclosure: “United States Attorney Thomas D. Anderson complimented the hospital on its approach to this issue, noting that such self-disclosure was evidence of the hospital’s good faith in trying to address and correct its past mistakes, factors that weighed very much in the hospital’s favor and the United States’ decision to resolve the matter without litigation.”<sup>3</sup> However, according to the lawsuit filed by Dr. Long, “NMC [Northwestern Medical Center] disclosed its illegal conduct only because a lawsuit that Plaintiff had commenced in 2005 was likely going to end up revealing the scheme.”<sup>4, p 3</sup>

### Lawsuit Alleges Threat Made against Dr. Long If He Refused to Resign

According to the Amended Complaint (Sep 28, 2006), the CEO of the hospital, Peter A. Hofstetter, allegedly told Dr. Long that he “did not fit in at NMC,” and he demanded that Dr. Long resign.<sup>2, pp 36-37</sup> The Amended Complaint adds, “When Dr. Long refused to resign, Defendant Hofstetter angrily asked Dr. Long, ‘Aren’t you afraid of me?’”<sup>2, p 37</sup>

### Unusual, Rare, Post-Surgical Infections Began to Occur

In November and December of 2003 and in early January 2004, four of Dr. Long’s patients (R.A. Long, personal communication, 2015), experienced “life-and-limb-threatening post-surgical infections” after undergoing arthroscopic shoulder surgery.<sup>2, p 48</sup> Prior to that time, Dr. Long had never experienced such a postoperative infection following arthroscopic shoulder surgery.<sup>2, p 49</sup> The bacteria identified included *Staphylococcus aureus*, *Serratia marcescens* and *Pseudomonas aeruginosa*, all believed to be exceedingly rare following arthroscopic shoulder surgery.<sup>2, p 49</sup>

Dr. Long was the only surgeon using lactated Ringer’s solution as an irrigation solution at the hospital on the days the patients became infected.<sup>2, p 56</sup> Seeking to determine the source of these rare and highly unusual infections, Dr. Long demanded that the hospital engage a forensic infectious disease specialist (as is standard with a cluster of surgical site infections). According to Dr. Long, when it became clear that the hospital was doing nothing to determine the cause of the infections, Dr. Long undertook his own investigation. He had a circulating nurse take a sample of the irrigation solution provided by NMC prior to performing surgery on a patient.<sup>2, p 56</sup> He then asked the circulating nurse to use a new irrigation solution and successfully completed the surgery.<sup>2, p 56</sup>

According to the Amended Complaint (Sep 28, 2006), “Dr. Long submitted the sample to Fletcher Allen Health Care (‘FAHC’) for testing. On or about February 8, 2004, FAHC advised Dr. Long that testing conclusively established that the sample of irrigation solution was heavily contaminated [800 CFU/ml] with coagulase positive *Staphylococcus aureus*, a deadly infectious agent....”<sup>2, p 56</sup> Subsequent testing of NMC’s irrigation solutions revealed that the contamination of the solution provided by NMC for plaintiff’s surgery on February 6, 2004, had not occurred at the manufacturing facility.”<sup>2, p 56</sup>

Curiously, after a “final” report was rendered on Feb 19, 2004, a “supplementary report” (“final,” Mar 29, 2004) from FAHC lab stated: “Unable to reisolate organism from original specimen.”<sup>5</sup> It is not clear why any further testing would be needed after rendering a “final” report on Feb 19,

2004. According to Dr. Long, the supplementary report was generated after a pathologist at FAHC contacted him and expressed that he was very upset that Dr. Long had sent the specimen for testing to the FAHC lab. Dr. Long indicated that despite his demand that the sample be preserved as part of a criminal investigation into the contamination of the irrigation solutions, the pathologist stated that he was going to destroy the sample. The sample was destroyed.

### **Dr. Long Takes Steps to Protect His Patients**

Following the revelation that the irrigation solution he was using at the hospital was heavily contaminated, Dr. Long's attorney reported the situation to the Vermont attorney general. The AG's office instructed Dr. Long not to report anything to the hospital, but to return to work there and set up surveillance on the surgical fluids (R. A. Long, personal communication, 2015). Upon returning to the hospital with this mandate, Dr. Long also took action to protect his patients. He switched to a different irrigation solution used by all surgeons every day (and which could not be individually targeted) and began using surgical instruments that were sterilized immediately prior to surgery.<sup>2, P 54</sup> After taking those and other precautions, Dr. Long's surgical infection rate immediately returned to zero.<sup>2, P 54</sup>

### **Request for Corrective Action and Psychiatric Evaluation**

According to the Amended Complaint (Sep 28, 2006), "Unknown to Dr. Long, by letter dated March 8, 2004 to Defendant Duncan, Defendant Hofstetter wrongfully and without justification requested that Defendant Duncan consider initiating a corrective action against Dr. Long pursuant to the Medical Staff Bylaws falsely alleging disruptions of NMC's surgical and radiology departments by Dr. Long and citing the fact that NMC was under investigation by the Vermont Attorney General's Office."<sup>2, P 57</sup>

According to the Amended Complaint (Sep 28, 2006), instead of investigating the post-surgical infections, the hospital sought to portray Dr. Long as psychiatrically impaired: "Despite the ongoing risk to patient safety and welfare posed by the life-threatening infections, the SSSQA [Surgical Services Subcommittee for Quality Assurance], under the guidance of Defendant Salomone, did not even consider—much less investigate—the life-threatening infections or any other documented concern raised by Dr. Long.... The MEC, under the guidance of Defendant Duncan, further acknowledged Dr. Long's repeated demands for a fair hearing. The MEC, under the guidance of Defendant Duncan, expressed concern that Dr. Long had contacted JCAHO and that JCAHO would conduct an unannounced inspection of NMC.... Instead of conducting an investigation of the aforesaid documented matters or granting Dr. Long a fair hearing, as was his right, the MEC, under the guidance of Defendant Duncan, without foundation and in bad faith queried whether they could compel Dr. Long to undergo a psychiatric evaluation."<sup>2, pp 52-53</sup>

According to Dr. Long, at no time did the hospital or any of its committees consult a forensic infectious disease expert to determine the cause of the unusual infections

that had occurred in Dr. Long's patients (R.A. Long, personal communication, 2015).

An ad hoc committee (AHC) was appointed to investigate Dr. Long. According to the Complaint, "The AHC also concluded that Dr. Long would no longer be allowed to take the protective measures which had to that point successfully prevented further infected surgeries.... [AHC recommended] that Dr. Long undergo a psychiatric evaluation citing the protective measures taken by Dr. Long to protect his patients from further infections as 'disruptive and problematic' behavior."<sup>2, P 63</sup>

According to the Amended Complaint (Sep 28, 2006), "On March 22, 2004, the MEC [Medical Executive Committee], chaired by Defendant Duncan and attended by Defendant Salomone, met and accepted the AHC's unfounded and malicious recommendations that, *inter alia*, Dr. Long undergo a psychiatric evaluation, that he be prevented from taking measures to prevent further infections and that Dr. Long's surgical cases—which had been found by the SSSQA to have met the standard of care—be reviewed by outside experts."<sup>2, P 64</sup>

### **Dr. Long Placed in Untenable Position, Resigns from Hospital**

According to the Amended Complaint (Sep 28, 2006), "Dr. Long was, therefore, faced with a serious dilemma affecting patient safety and welfare in that, as the possessor of active staff privileges at NMC, he was required to continue performing emergency surgeries when he was on the emergency call schedule. Nevertheless, Dr. Long was now placed in a position where, if he did perform emergency surgeries, he would not be permitted to take the simple but effective steps that he had instituted to prevent further infections."<sup>2, P 69</sup> Moreover, according to his lawsuit, the hospital had taken no steps to determine the actual cause of the infections.<sup>2, pp 65, 66, 68</sup>

Thus, being placed in an untenable situation, Dr. Long resigned from the hospital on Apr 7, 2004. Although the hospital reported to the National Practitioner Data Bank (NPDB) that Dr. Long "voluntarily" surrendered his clinical privileges while under, or to avoid, investigation relating to professional competence or conduct, another Complaint, dated Jul 2, 2013, (see below) stated: "Plaintiff resigned because someone at NMC was deliberately contaminating his surgical cases and Defendant NMC (i) had refused to properly investigate the deliberate contaminations of Plaintiff's surgeries, (ii) was, instead, attempting to falsely blame him for the infections that resulted from the deliberate contaminations, and (iii) had demanded that he cease using the protective measures that had prevented further deliberate contaminations of his surgeries."<sup>4, P 9</sup> Around the time of his resignation, Dr. Long went to public media to expose the events that had occurred at the hospital.<sup>6</sup>

### **Vermont Attorney General "Investigates"**

Following the lab report from FAHC,<sup>5</sup> which demonstrated heavy contamination of irrigation fluid that was to be used by Dr. Long in surgery at the hospital, the Vermont AG informed Dr.

Long's lawyer that his office was intensively investigating the case (R. A. Long, personal communication, 2015). As referenced in a court document of Jun 15, 2007, NMC claimed that "neither the state Health Department nor the Attorney General's office found evidence to support Dr. Long's incredible allegations of intentional contamination." (Response, p. 6).<sup>7</sup> However, in response to a request for documents, the AG's Office admitted that it only had investigator notes and did not have a comprehensive investigative report in this case. In a letter dated Jul 25, 2006, Assistant Attorney General Cindy J. Maguire stated: "I would also like to note and reiterate that we have agreed to turn over our investigator's notes, and now a transcription of the same, because of the absence of a comprehensive investigative report in this case."<sup>7</sup> Exhibit A Readers are invited to review the AG's investigative notes and decide for themselves whether a comprehensive investigation was conducted or not.

It is noteworthy that, according to Dr. Long, he had advised the investigators from the AG's office, including Assistant Attorney General Maguire, that they should determine whether the hospital had purchased similar bacteria during the period prior to the infections, something the AG's office did not do. Dr. Long stated that had the AG's investigators followed his advice, they would have rapidly determined that the hospital did indeed purchase the same pan-sensitive bacteria that caused the infections in his patients—and they could have engaged a forensic expert to match the purchased bacteria with the infected cases.<sup>8</sup> Dr. Long also stated that he told the AG's office that he suspected the hospital was engaged in Medicare violations and that the events leading up to and including the infections may have been staged to force him out of the hospital to prevent those violations from coming to light (R.A. Long, personal communication, 2015).

Further, said Dr. Long, it finally became clear to him that the AG's office was doing nothing substantial to investigate the infections. Suspecting that law enforcement was covering up for the hospital, Dr. Long thus challenged Vermont Attorney General William Sorrell during public debates leading up to the 2004 election. During a debate broadcast by NPR/Vermont Public Radio, Dr. Long called in to the station during the question-and-answer period and asked Sorrell whom he was protecting. Sorrell responded that his office had extensively investigated the matter and "found no evidence of wrongdoing." (R.A. Long, personal communication, 2015)

Similarly, Dr. Long stated that he challenged Sorrell from the audience during a filmed debate at Johnson State College, and received the same response, and that Sorrell took a similar position on other occasions in response to questions from media. Additionally, Dr. Long stated that NMC apparently relied on Sorrell's statements for its own media statements on several occasions including that described in an article published by *The Taos News*.<sup>9</sup>

According to a news report on Oct. 13, 2004:

[Dr. Ray Long] said he presented Sorrell's office with physical evidence that someone had tried to sabotage his surgeries by infecting solutions used during the procedures with bacteria. After Long's lawyer reported the problem to the attorney general last winter, Long and Carver [Republican candidate for AG] have charged that rather than set up surveillance

to catch the saboteur, Sorrell notified the hospital management, spoiling any chance of catching someone. Sorrell said his office consulted with the state Health Department and Board of Medical Practice in the case. "We did not find evidence of tampering," he said. "We found no ongoing risk to patient care. And there's been no re-occurrence of the problems that were experienced—that you brought to our attention," he told Long.<sup>10</sup>

### Strange Occurrences during Litigation

In an interview with me, Dr. Long reported experiencing a number of highly unusual events during litigation against the hospital. He noted that the tires on his car had been slashed on three separate occasions. The cuts in the sidewall of his tires appeared to have been made by a box cutter. He was followed and often harassed by those following him. On one occasion, a stranger pulled up alongside Dr. Long's vehicle and asked, "Are you Italian?" Later that same day, another stranger in a car pulled alongside him while he was walking and asked the same question, "Are you Italian?" Similar events occurred throughout this period, in various settings around Montreal.

A private investigator showed up late one night at his parents' house in California asking for the doctor, stating they were looking for him "for his high school reunion." His parents also received multiple phone calls asking about him, including one call at 6 a.m. saying they were "looking for Ray Long." Dr. Long stated these events seemed to be designed to send a message that his adversaries knew where his parents lived, and Dr. Long perceived them to be a threat.

Dr. Long told me that his car was broken into on three occasions in the garage of his condominium complex in Montreal, including one occasion on which someone threw a brick through his car window. In one of the break-ins, a laptop computer and a briefcase were stolen.

Dr. Long found a man with multiple tattoos loitering outside the rear entrance to his office, and his house was apparently entered illegally on a number of occasions. When he returned home in the dead of winter he found windows opened that he had previously locked, or things moved from one place to another—actions he viewed as psychological harassment designed to make him look paranoid.

Two weeks after he filed suit against the hospital, Dr. Long invited an executive and his woman friend to his home to visit. Dr. Long and the woman had orange juice to drink, but the executive declined. Shortly after drinking the juice, both Dr. Long and the woman became quite ill. On testing, the orange juice was found to contain mercury, lithium, and methamphetamine—all substances that can cause paranoia. Dr. Long queried his next-door neighbor, who told him that she had seen several men enter Dr. Long's house during the period surrounding the orange-juice incident and at other times. Since they were entering by the front door, she assumed they were acquaintances of Dr. Long, and she had no reason to suspect something amiss. The police were contacted but showed little or no interest in investigating the matter.

Around the time of the spiked orange-juice incident, Dr. Long noticed that his BMW would not unlock with the remote. He took his car to a car-repair shop and was told that someone had apparently taken off the door panel and had broken part of the mechanism that worked the remote lock. Dr. Long surmised that whoever had spiked the orange juice may have been planning to set him up by planting drugs in the door panel of his car. As Dr. Long had been traveling back and forth across the Canadian border from a home he had in Montreal, planted drugs potentially could have been discovered in his car. And, if Border Patrol agents tested his urine following the orange-juice incident, they might have found evidence of methamphetamine in his urine—all supportive of an agenda to discredit him and make him look mentally unstable or paranoid secondary to drug abuse.

According to Dr. Long, NMC wanted to require him to be evaluated by a particular psychiatrist, one who specializes in “co-occurring severe mental illness and substance abuse,” despite the fact that there was no history or evidence of substance abuse. Considering the psychiatrist’s specialty, it is predictable that he would have ordered a drug screening test. Dr. Long stated given the fact that NMC had provided contaminated irrigation fluids for his surgeries, and in light of the orange-juice incident, he could only speculate what such a test might have revealed and how that might have been used to discredit him.

Dr. Long also learned that the hospital had hired approximately 19 private investigators, including one whose job it was to follow Dr. Long in the hospital (R.A. Long, personal communication, 2015).

### **Jarvis Report Establishes Deliberate Contamination of Surgical Irrigation Fluids**

In 2011, Dr. Long hired a former Centers for Disease Control and Prevention infection investigator, William R. Jarvis, M.D. From 1980 to 2003, Dr. Jarvis held a number of leadership positions at CDC including Chief, Epidemiology Branch; Chief, Investigation and Prevention Branch; Assistant Chief, National Nosocomial Infections Surveillance (NNIS) system; Acting Director of the Hospital Infections Program (HIP), CDC; and Director for Extramural Research, Office of the Director, National Center for Infectious Diseases. For 17 years, Dr. Jarvis was in charge of the supervision of the conduct of outbreak investigations and epidemiologic studies in healthcare facilities. In his report, Dr. Jarvis stated: “During this time, we conducted 100s of on-site outbreak investigations, solved them all and published > 90% of them.”<sup>11</sup>

On Aug 5, 2011, Dr. Jarvis issued his report<sup>11</sup> concerning the unusual surgical site infections affecting Dr. Long’s patients. Dr. Jarvis reviewed four of Dr. Long’s cases.

In one case, Dr. Jarvis reported: “A nearly pan-sensitive (especially to penicillin) *S. aureus* strain like [patient’s] is exceedingly unusual. This is even more true of *S. aureus* strains causing HAIs [healthcare-associated infections] rather than community acquired infections.”<sup>11, p 5</sup>

In another case, Dr. Jarvis reported: “SSIs [surgical site infections] following arthroscopic joint procedures are very uncommon (< 1% of procedures). Even more uncommon

is Gram-negative bacterial infections of arthroscopic joint procedures. Even rarer is polymicrobial Gram-negative bacterial infections of arthroscopic joint procedures.”<sup>11 pp 7-8</sup> *Serratia marcescens* and *Pseudomonas aeruginosa* were the gram negative organisms that caused at least one of the infections in Dr. Long’s patients as proven by cultures from post-operative joint aspiration.

In yet another case, Dr. Jarvis found evidence of possible tampering with Dr. Long’s operative report: “Although an injection of Depo-Medrol is mentioned in the Operative Report under ‘Procedure,’ there is no mention of such an injection in the dictated operative note (unlike all the other Dr. Long operative reports) and Dr. Long states that he would not give such an injection of steroids in this type of procedure, raising the possibility that Dr. Long’s dictated operative notes were modified by someone other than himself.”<sup>11, p 8</sup>

The Jarvis Report goes on to state:

Personnel from NMC have acknowledged that personnel at NMC had purchased ATCC [an organization that provides standard reference microorganisms to labs] strains of *S. aureus*, coagulase-negative staphylococci (CNS) and *Pseudomonas aeruginosa* isolates for quality control purposes for the NMC laboratory. In addition, they testified that they also obtained *S. marcescens* isolates that were used in the microbiology laboratory for quality control purposes. Therefore, all the bacterial species that caused SSIs [surgical site infections] in Dr. Long’s patients were available in the NMC microbiology laboratory. The *S. aureus* strain (ATCC #25923) was purchased in November 2003 [see Ref #8], days to weeks before [patients’] surgery. Furthermore, the ATCC #25923 *S. aureus* strain has an antimicrobial susceptibility to all agents commonly tested, including ampicillin, penicillin, cefazolin, clindamycin, erythromycin, ceftioxin (methicillin), tetracycline, and sulfamethoxazole similar to the susceptibility of the *S. aureus* isolated from [patient’s] SSI.... In addition, the quality control *P. aeruginosa* isolate was purchased in August 2003, before [patient’s] surgery on December 23, 2003. Interestingly, the antibiotic susceptibility pattern of the ATCC strain #27853 (*P. aeruginosa*), which was purchased by NMC, supposedly for laboratory quality control purposes, had the same antibiotic susceptibility pattern (of the agents to which both isolates were tested) as that of the *P. aeruginosa* strain recovered from the SSI of [the patient].<sup>11 pp. 9-10</sup>

The Jarvis Report also addressed cultures taken from an irrigation solution that was about to be used in a patient surgery on Feb 6, 2004:

Cultures obtained from previously unopened bottle of irrigation fluid (that was about to be hung in the NMC operating room for use in Dr. Long’s surgical patient) by Dr. Long on February 6, 2004 grew 800 colony forming units/ml of *S. aureus* (two morphologies). Given that this was a bottle of irrigation fluid provided by NMC operating room personnel for use by Dr. Long in that surgical procedure, it is highly

suspicious. Intrinsic contamination (i.e., that occurring at the time of manufacture) of such manufactured fluids is < 1 in a million—an exceedingly rare and unlikely event. Since no other clusters of infections or outbreaks associated with this manufacturer’s irrigation fluid were reported at around this time and no FDA recall of these fluids occurred around this time, the likelihood of intrinsic contamination is very, very unlikely. In contrast, given that two different morphologies of *S. aureus* and 800 CFU/ml were recovered, I believe that the likelihood of extrinsic contamination (i.e., contamination after manufacture and most likely at NMC) is much more likely.<sup>11, p 10</sup>

Dr. Jarvis also commented on the hospital peer review related to these highly unusual infections:

Given the circumstances occurring at NMC at around December 2003—February 2004 (i.e., the cluster of very unusual SSIs—both in terms of SSIs occurring in very low-risk arthroscopic joint procedures and the types of organisms involved in Dr. Long’s patients), the likelihood that these SSIs were caused by: a) the patient’s flora; b) contaminated surgical equipment, c) Dr. Long’s surgical technique, d) breaks in sterile technique by other operative room personnel, or e) contamination of Marcaine placed in pain pumps, as hypothesized by Dr. Corsetti in his peer review of these cases is exceedingly unlikely.<sup>11, p 12</sup>

Dr. Jarvis concluded that patients were intentionally infected through the use of deliberately contaminated irrigation solutions:

A much more likely explanation of how the operating room irrigation fluid became contaminated and how the 3-4 SSIs above occurred is that the patients were intentionally infected through extrinsically and intentionally contaminated irrigation fluid (or other fluids, medications, equipment or materials) provided by NMC personnel and used by Dr. Long in the surgical procedures of these patients.<sup>11, p 13</sup>

### **2005 Lawsuit Settles for \$4 Million, Hospital CEO Moves on to Another Hospital**

The lawsuit filed by Dr. Long in 2005 eventually settled in 2008 for \$4 million, and shortly thereafter NMC CEO Peter A. Hofstetter moved on to a new job as CEO of Holy Cross Hospital in Taos, New Mexico,<sup>9</sup> and, according to Dr. Long, subsequently to Willamette Valley Medical Center in McMinnville, Oregon.

### **Long Attempts to Get NPDB Report Removed**

In August 2011, Dr. Long requested that NMC void the Adverse Action Report it filed against him in the National Practitioner Data Bank (NPDB). The hospital refused to do so. In November 2011, Dr. Long filed a request for Health and Human Services (HHS) Secretarial Review. Unfortunately, a Secretarial Review of a NPDB report does not involve a review of the correctness or fairness of an adverse action taken against a physician, nor does it review whether due process was provided

or not. Issues such as that are determined to be “outside the scope of review.”

In responding to the Secretary’s request for information regarding the NPDB report filed by NMC, the hospital submitted documents relating to actions Dr. Long had taken to protect his patients, deemed to be “disruptive,” and a requirement that Dr. Long submit to a psychiatric evaluation due to his “apparent conviction that he is a victim of a criminal conspiracy on the part of the hospital CEO (and unidentified others).”<sup>4, p 5</sup>

In a letter dated Feb 27, 2012, Dr. Long was notified that his request to have the Adverse Action Report on him voided was denied. The notice also advised: “After review of the available information, the Secretary determined that some of the issues raised by the practitioner are beyond the scope of the Secretary’s review authority.”<sup>4 Exhibits, pp 27-32</sup> Unfortunately, despite some carefully worded disclaimer language, the statement the Secretary added to the NPDB report makes it sound as though the Secretary determined that the hospital’s report was accurate even though the Secretary did not investigate the legitimacy or truthfulness of information provided by the hospital: “...the Secretary determined that there is no basis to conclude that the report should not have been filed or that for agency purposes it is not accurate, complete, timely or relevant.”<sup>4 Exhibits, p 31</sup>

### **Dr. Long Files Second Lawsuit against NMC and Quorum Health**

In 2013 Dr. Long filed a lawsuit against Quorum Health Resources (the company providing management services to NMC) and NMC, claiming, among other things, that NMC’s response to the NPDB’s request for information was libelous *per se*.<sup>4, p 9</sup>

The Complaint argued that actions taken by NMC against Dr. Long did not constitute a legitimate peer review: “The ‘peer review’ and the actions taken by Defendant NMC subsequent to the ‘peer review’ were not, for the reasons stated above, taken (a) in the reasonable belief that the action was in the furtherance of quality health care, (b) after a reasonable effort to obtain the facts of the matter, and (c) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts.”<sup>4, p 6</sup>

### **Court Dismisses Lawsuit; Dr. Long Loses on Appeal**

On May 6, 2014, the district court dismissed the case, citing *res judicata* and “invited harm.”<sup>12</sup> Dr. Long immediately filed an appeal.<sup>13</sup> The appeal argued that alleged defamatory statements made by NMC via their response to the Secretary of HHS (Secretarial Review) occurred after the settlement of 2008 and, therefore, *res judicata* would not apply.<sup>13, p 4</sup> The appeal also argued that the principle of “invited defamation” (“invited harm”) is not a justifiable reason to dismiss Dr. Long’s suit because “under Vermont precedent, a defamatory statement made in response to a good faith inquiry by a plaintiff is actionable as libel.”<sup>13, p 4</sup>

On Jan 22, 2015, the U.S. Court of Appeals for the Second Circuit affirmed the judgment of the district court: “We affirm on the basis that Dr. Long invited the harm.”<sup>14</sup> The Court

reasoned that Dr. Long could have anticipated the transmission of information he considered defamatory: “Before petitioning HHS, Dr. Long expressly requested that the Medical Center admit its error and void the AAR, and the Medical Center refused. That the Medical Center might be asked by HHS for information that Dr. Long considered defamatory was made clear to him in a letter from HHS stating, ‘[i]f we need additional information, the assigned Disputes Resolution Manager may contact you and/or the entity that filed the report under review.’ ...The doctrine of invited harm is merely a variant of the well-established rule that consent is an absolute defense to defamation.”<sup>14, p 3</sup>

## The Doctrine of Invited Harm—Implications for Physicians

The legal doctrine of invited harm dates back to a case involving a suicide that occurred nearly three decades ago. A District of Columbia Court of Appeals decision of Mar 3, 1999, held: “On March 20, 1986, Devora Johnson jumped from the subway station platform into the path of an oncoming WMATA [Washington Metropolitan Area Transit Authority] train. The parties do not contest that Ms. Johnson jumped of her own volition and with the intention of committing suicide.”<sup>15</sup>

Ms. Johnson’s estate sued WMATA claiming that, based on the legal doctrine of Last Clear Chance, had the train operator not been impaired by ingesting illegal drugs, there would have been sufficient time to stop the train before it hit and killed Ms. Johnson.<sup>16</sup> A jury agreed and found for plaintiffs. The decision was appealed.

The Appeals Court found for defendants concluding that: “[Ms. Johnson] voluntarily invited the particular harm that occurred [and that this was a case of] a deliberately invited death.”<sup>15</sup>

Thus, the Jan 22, 2015, U.S. Court of Appeals decision affirming the District Court ruling in the Long case,<sup>14</sup> citing invited harm, sets a new precedent whereby a physician who in good faith asks for a Secretarial Review of an alleged false and defamatory entry by a hospital in the NPDB can be equated with a person who jumps off a subway platform into the path of an oncoming train.

As stated in Dr. Long’s appeal brief, dated Sep 5, 2014:

Because HHS does not inquire into the merits of a hospital’s submission—in particular, whether an investigation was a legitimate ‘peer review’ as defined by the HCQIA—it is implicit that such merits must be decided by the courts. A ruling for Defendants would have the effect of creating an absolute privilege, where none was intended, for a hospital to submit virtually any documentation it wishes in response to an inquiry from HHS, as long as the process described therein meets the structural formalities of a peer review. In other words, if Defendants’ view of the review process is correct, there is no forum whatsoever for reviewing the merits of such a submission. Hospitals would be free to conduct fraudulent ‘peer reviews,’ predicated on deliberately harming patients—as NMC did in this case—and thereby render meaningless the requirement that peer review activities be conducted, *inter alia*, in the interest of patient welfare and safety.<sup>17, p 14</sup>

## Conclusions

In the words of the 2006 Amended Complaint,<sup>2, p 92</sup> Defendants engaged in “extreme and outrageous conduct, which was beyond all possible bounds of decency, and which may be regarded as atrocious and utterly intolerable in a civilized society.”

The finding of invited harm by the District Court and U.S. Court of Appeals for the 2nd Circuit adds insult to injury and will strongly dissuade physicians from requesting a Secretarial Review.

**Lawrence R. Huntoon, M.D., Ph.D.**, is a practicing neurologist and editor-in-chief of the *Journal of American Physicians and Surgeons*. Contact: editor@jpands.org.

## REFERENCES

1. Stein A. Surgeon accuses St. Albans Hospital of deliberately infecting his patients. *VTDigger*, Aug 12, 2013. Available at: <http://vtdigger.org/2013/08/12/surgeon-accuses-st-albans-hospital-of-deliberately-infecting-his-patients/>. Accessed Mar 16, 2015.
2. Amended Civil Action. *Raymond A. Long, M.D. vs. Triad Hospitals, Inc. and Quorum Health Resources, L.L.C. and Northwestern Medical Center, Inc. and Peter A. Hofstetter and Jacques M. Archambault, M.D. and Michael Burfoot, B.M., B.C.H. and Joseph Salomone, M.D. and James Duncan, M.D. and Stephen Mason, M.D.* United States District Court of the District of Vermont, No. 2:05-CV-21. Filed Sep 28, 2006. Available at: <http://jpands.org/ral02.pdf>. Accessed May 11, 2015.
3. U.S. Attorney’s Office, District of Vermont. St. Albans Hospital settles with United States regarding potential liability for violation of anti-kickback and related laws. Press Release, Aug 16, 2007. Available at: <http://jpands.org/ral03.pdf>. Accessed May 11, 2015.
4. Complaint with Jury Trial Demand. *Raymond A. Long, M.D. vs. Quorum Health Resources, LLC, and Northwestern Medical Center, Inc.* U.S. District Court for the District of Vermont, Docket No. 2:13-cv-189. Filed Jul 2, 2013. Available at: <http://jpands.org/ral04.pdf>. Accessed May 11, 2015.
5. Fletcher Allen Laboratory. Interim laboratory report (“report status: final”), Feb 19, 2004. Available at: <http://jpands.org/ral05.pdf>. Accessed May 11, 2015.
6. Joyce B. Harming patients? *WCAX.com* Available at: <http://www.wcax.com/story/1763776/harming-patients>. Accessed May 6, 2015.
7. Plaintiff’s Reply to Northwestern Medical Center, Inc.’s Response to Plaintiff’s Motion for Order to Show Cause. Why Defendants and Their Counsel Should Not Be Held in Contempt. *Raymond A. Long, M.D. vs. Triad Hospitals, Inc., Quorum Health Resources, LLC, Northwestern Medical Center, Inc., et al.* U.S. District Court for the District of Vermont, No. 2:05-CV-21. Filed Jun 15, 2007. Available at: <http://jpands.org/ral07.pdf>. Accessed May 11, 2015.
8. Bacterial fingerprint of purchased bacteria compared with culture growth result from patient. Available at: <http://jpands.org/ral08.pdf>. Accessed May 11, 2015.
9. Johnson C. New hospital CEO to arrive with baggage. *Taos News*, Apr 17, 2009. Available at: <http://www.taosnews.com/news/article-745076e1-26f6-5188-b0bc-ae4b4ccb5f51.html>. Accessed Apr 2, 2015.
10. Anon. Sorrell takes heat in AG debate on radio show. *Barre Montpelier Times Argus*, Oct 13, 2004. Available at: <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20041013/NEWS/410130344/1002/NEWS01>. Accessed May 15, 2015.
11. Jarvis WR. Letter to Herbert G. Ogden, Ogden Law Offices, Aug 5, 2011. Available at: <http://jpands.org/ral11.pdf>. Accessed May 11, 2015.
12. Opinion and Order. *Raymond A. Long, M.D. vs. Quorum Health Resources, LLC and Northwestern Medical Center, Inc.* United States District Court for the District of Vermont. Docket No. 2:13-cv-189. Filed May 6, 2014. Available at: <http://jpands.org/ral12.pdf>. Accessed May 11, 2015.
13. Brief for Plaintiff-Appellant. *Raymond A. Long, M.D. v. Quorum Health Resources, LLC, and Northwestern Medical Center, Inc.* U.S. Court of Appeals 2nd Cir. Case 14-1998. Filed Jul 18, 2014. Available at: <http://jpands.org/ral13.pdf>. Accessed May 11, 2015.
14. Summary Order. *Raymond A. Long, M.D. v. Quorum Health Resources, L.L.C. and Northwestern Medical Center, Inc.*, Case No. 14-1998, Jan 22, 2015. Available at: <http://jpands.org/ral14.pdf>. Accessed May 11, 2015.
15. *Washington Metropolitan Area Transit Authority v. Johnson*. District of Columbia Court of Appeals, No. 96-SP-1784. Filed Mar 3, 1999. Available at: <http://caselaw.findlaw.com/dc-court-of-appeals/1414881.html>. Accessed Apr 2, 2015.
16. *Johnson v. Washington Metro Area Transit Authority*. U.S. District Court for the District of Columbia, 901 F. Supp. 1 (D.D.C. 1995). Available at: <http://law.justia.com/cases/federal/district-courts/FSupp/901/1/1529983/>. Accessed Apr 2, 2015.
17. Reply Brief for Plaintiff-Appellant. *Raymond A. Long, M.D. v. Quorum Health Resources, LLC, Northwestern Medical Center, Inc.* Case No. 14-1998-cv, Sep 5, 2014. Available at: <http://jpands.org/ral17.pdf>. Accessed May 11, 2015.