In some cases, it may take a long time before a parent finds the right way to memorialize the child. Some people have naming or farewell ceremonies for babies who died ten or twenty years ago. One woman asked her priest to say a Mass for a stillborn daughter, a baby who had been dead for seven years. When he refused, she kept looking until she found a priest who thought it was an excellent idea. The woman mentioned the upcoming Mass to friends in a support group and the word was spread. By the time the Mass was held, dozens of families had come forward to take part, to memorialize their babies, some of whom had died more than thirty years earlier.

Another woman, who was still in the hospital when her husband buried their two-day-old baby, remembers:

It took me two full years before I could bring myself to visit the cemetery. I guess I was afraid of breaking down there. But I always wished I could have made a service for him. One day I finally decided to go see where he was buried. It was terribly hard the first time. But I was also surprised to see what a beautiful shaded spot he’s buried in. It was peaceful there, and I felt glad that at least he was in a pretty location. Now I go about once a year to visit and to bring flowers. At least I have this to hold on to.

"They killed my baby. It was all their fault. I’ll never be satisfied until I have my revenge."

Parents are furious when their baby dies. They blame themselves, they blame fate or God, and often they blame the doctor for not having been all-powerful. Sometimes this anger leads them to consider a malpractice suit; it seems to be the only concrete step they can take in response to their frustration.

On some occasions, there is a basis for a suit; negligence on the part of a physician or hospital staff member did cause the infant’s death. The parents feel that the trust they placed in their doctor during the months of pregnancy has been violated. Their suspicions of malpractice increase if the doctor responds with evasion or even hostility to their questions. They wonder why information has been withheld, what is being hidden. Disillusioned and angry, some couples seek out a lawyer. A lawsuit can never make up for the loss, but when malpractice has occurred, it is the parents’ major means of legal recourse.

Bringing a malpractice suit is very difficult even when there is evidence of blatant misconduct. Families suffer the exhausting emotional trauma of reliving the experience of their baby’s death for the years that litigation can take. In many cases, parents cannot find an experienced malpractice lawyer who will agree to represent them. If they do hire a lawyer and if they win the case
or settle out of court, the amount of money they receive is likely to be small. After all the expenses are paid, there may be little or nothing left for the family. This is particularly true for a miscarriage, stillbirth, or an early infant death. Large amounts of money are usually awarded only in the case of damaged children who survive.

Despite these obstacles, many parents feel that they want to sue anyway. There is a deep-seated anger toward a presumably incompetent physician, and they feel that he or she should be made to pay. The following is a case in point:

After the baby died, I was willing for a long time to believe that it was just a freak accident. My husband and the rest of my family were furious at the doctor and believed we should sue so that everyone would know how incompetent he is. I didn’t think a suit could hurt his reputation. But, most of all, I couldn’t bear the thought of making money from the death of our precious baby. And I knew that going to court would mean more grief—I felt I had plenty already. Over time, though, as I thought again and again about what had happened, and as I talked with other doctors who felt the baby had received the wrong treatment, I slowly began to realize that my family was right. My baby didn’t have to die! The thought of suing became an obsession. No matter how much it would take of my time and energy, I owed it to that baby to make sure that this terrible mistake would never happen again. And the doctor owed us something too. We could use the money for our other children.

Family members have conflicting emotions and motivations as they begin litigation. They are rarely prepared, however, for the difficulties and the frustrations they will face at almost every stage of the process.

The first difficulty is simply establishing that a baby’s death was actually due to malpractice. The fact that a baby has died or was seriously impaired does not necessarily mean that anyone is at fault—no one can guarantee the health of a child. To prove malpractice, clear evidence must be established to show that the doctor, nurse, or hospital was negligent and did not provide the accepted standard of medical care. Simply documenting that the baby would have survived under a different treatment program is not sufficient to prove fault. A doctor who makes an error of judgment is not liable, unless the error is so extreme that no reasonable medical professional would have acted in the same way under the same circumstances. Furthermore, it must be proved that negligence directly caused the problem.

The instances in which a family might suspect negligence are varied. For instance, the development of a normal fetus can be harmed by the use of drugs, anesthesia, or X rays. The drug thalidomide, once prescribed for pregnant women, was found to cause severe deformities such as the absence or malformation of limbs. But it was not until many similar cases appeared that a causal connection could be shown between the drug and the defects. Occasionally such situations lead many affected families to act together in bringing class-action suits against drug companies and hospitals as well as physicians.

Another type of suit might be brought if the doctor’s actions during delivery have possibly resulted in injury to the baby. Most frequent are the instances where improper treatment leads to a reduction in oxygen to the infant, thereby causing permanent damage. This type of case is very hard to prove because it must be demonstrated that the oxygen deficiency occurred at the time of birth and not earlier and that the doctor could have prevented it from happening. An added difficulty is that doctors often disagree about what steps should be taken if the baby is in distress, as in the controversy over when emergency Caesareans should be performed.

A third kind of case might arise when a physician fails to diagnose an illness in the mother that could damage the child or, having diagnosed it, fails to take the necessary steps to prevent the damage. For example, a mother who exhibits signs of diabetes must be carefully monitored, since her baby is in a very high risk category.

Another basis for suing is the failure of the physician to inform a woman who has a high risk of bearing an abnormal child of this possibility and of the procedures available to detect problems. In one such case, a doctor was taken to court because he failed to warn a thirty-eight-year-old woman that, due to her
age, she had a higher-than-average risk of bearing a child with
Down's syndrome or to tell her about prenatal diagnosis.

If parents suspect that their child's death or deformity was the
result of malpractice, they must decide whether to sue. There is a
time limit for filing a suit which varies by state. This "statute of
limitations" is usually two to three years, and there is a trend
now in a number of states toward shortening the time allowed.

Before contacting a lawyer, a person may first try to see the
medical records and make a preliminary evaluation of the facts.
Very few states have laws that mandate access to medical rec-
ords, so this information may not be easy to obtain. Even
though a review of the records can often allay suspicions and
prevent suits, doctors and hospitals are reluctant to open their
files to patients. It may be necessary to hire a lawyer and
threaten a lawsuit simply to obtain a copy of the records. One
father described his efforts to obtain his wife's records:

First I called the doctor's office, but I was told that they would
send the file only to another physician. I said it was ours, we
should have a right to get it directly, but they refused. Then I
went to the hospital records office to see about her hospital chart.
They said the doctor would have to review it first. I seriously
wondered what he might change or take out first. You would
think I was a criminal, trying to steal something that wasn't
mine! Finally I had to ask a friend who is a lawyer to write a
letter in order to get the records. I still wonder if they're com-
plete. After all that, I was upset to get a bill for photocopying—
$1.00 a page!

Some attorneys recommend that parents try first to get their
own records and that they not mention the possibility of a suit.
They worry that a request from a lawyer will scare physicians
into removing important documentation. Fortunately, in many
states, obtaining records is becoming easier. The American Hos-
pital Association has endorsed this access as one of a patient's
rights, and continued consumer pressure is likely to promote it
further in the future.

Once the parents have the records, it is not always easy to
understand them. Most often they receive forms filled with the
scrawled notes of a variety of people. Once these are deciphered,
the medical terminology is likely to be meaningless to the aver-
age person. It may require extra effort and expense to find a
physician who is willing to interpret the records.

Often families choose to go to a lawyer to discuss the case,
either before or after getting the records, to find out if the laws
in their state make it possible for them to consider a suit. How-
ever, finding a qualified malpractice lawyer who will accept
the case is surprisingly difficult. While there is an abundance of
attorneys, few are knowledgeable in the area of medical
malpractice, and even fewer have experience with obstetrics. A
lawyer with no experience in the field might do the client a
disservice by taking the case, but many times this is the only
option available to families.

One of the best ways to find a good lawyer is by referral,
either from other attorneys, legal referral services, or the state
bar association. The Martindale-Hubbell Law Directory, which
can be found in most law school or courthouse libraries, lists
attorneys along with their credentials and specialties. Mem-
bership in a state or national Association of Trial Lawyers may be
one indication of a lawyer's experience in the courtroom.

Finding a lawyer is only the first step. Experienced malprac-
tice lawyers reject more than seventy-five percent of the cases
that are brought to them. They know the difficulties of winning
such cases and select only those that they consider have a chance
of success.

One woman who believed that her child's death was the
doctor's fault recounted her agonizing efforts in trying to find a
lawyer who would accept her case:

I was sure I had a good case, but I didn't know where to turn.
Friends would recommend this lawyer or that lawyer, but how
was I to know if they were any good? I eventually went to three
different lawyers. With each one, I would go through hours of
describing my situation and filling out forms. One told me fairly
soon that the doctor was a friend of his and he wouldn't want to
see him. Another said he was busy and wasn't sure if I had a
good case. The last one was much more thorough and obtained a
medical opinion, but finally he said no also. And then he charged
me $500 for the privilege of being turned down! I finally had to give up.

Most attorneys review the medical records and obtain a physician's opinion before deciding whether to accept a case. Some charge the client for this time and for expenses incurred, while others do not; the client should inquire about these possible charges during the first conversation.

If a lawyer rejects the case, it is important to know his or her reason before looking for another lawyer. If the reason for refusing is a personal conflict, or if the attorney accepts only cases with very high monetary claims, another lawyer may be able to provide the help needed. On the other hand, where the evidence, the laws, or case precedents suggest that the family is unlikely to win, it may be necessary to abandon the idea of a suit.

A lawyer may choose not to represent someone in a particular suit if negligence cannot be proved. The major method of proving negligence is through expert testimony of other physicians, yet many doctors are not willing to testify against other doctors. In a survey of Boston physicians, for instance, seventy percent said that they would not testify even against a surgeon who had removed the wrong kidney. Although it has become somewhat easier to find experts to testify since this survey was carried out in the 1960s, expert witnesses are still hard to find and often costly to hire.

Most lawyers agree that medical malpractice cases are not won or lost on the evidence alone. The outcome often depends on the persuasiveness of the expert witness. Both parties present expert witnesses during the trial, and it is not unusual for two experts to contradict each other. The problem with some witnesses was mentioned by one experienced malpractice attorney:

It is not what happened or what should have happened, but what you can prove happened. You can only do that through a witness, and a very persuasive witness can be lying. However, if the jury believes this person, then that is what happened.

If there is a jury trial, the decision is affected by the biases and backgrounds of individual jurors. Lawyers know that some cases will win in one county but lose in another.

Another major reason lawyers reject most malpractice cases is that the monetary award is not high enough to make their time and effort worthwhile. Many will not accept a case unless they expect the damages to be at least $100,000.

There are two kinds of awards which parents might claim: on their own behalf—for their pain and suffering, or medical expenses; and on behalf of the child—for loss of life and income. The right to recover for any of these reasons varies considerably from one state to another; for instance, in some states there is no way to sue for grief or mental anguish after a wrongful death.

In some states, the courts do not even allow action to be brought on behalf of a child if the death occurred in the mother's womb. The fetus is not considered to have been a person but only a part of the mother. Therefore, in those states, the fetus has no legal existence, and there can be no compensation for the loss of life.

An Illinois case started the trend that has been changing this. The court ruled that a fetus must be seen as a life distinct from the mother when it reaches the stage at which it could survive outside the womb. It found further that it is illogical for the case to depend on whether death occurred just before birth or just after birth. A court in Georgia went further, ruling that a suit may be brought for the loss of an unborn child even if it would not have been able to survive outside the womb, as long as it had shown signs of life by moving in the mother's womb. This decision would cover late miscarriages as well as stillbirth.

Even where parents are entitled to claim damages, the awards are usually very small. Perhaps the parents' grief is not thought to be substantial. The future earnings of a fetus or infant are also difficult to calculate.

It is important for the lawyer who accepts a case to explain to the client what will happen, how long it will take, and what costs will be involved. As one lawyer said:

I tell people how difficult and long the process is. I want them to understand that everyone is interested in suing in the beginning, but as time goes on, it gets rough, and many people want to quit. If people say yes to me, they are obliging themselves to follow
through. When it is time to go to court, they have to be willing to
spend at least two weeks there—they cannot back down at that
point.

Before going to trial, a malpractice lawyer spends an average
of 400 hours preparing a case. Testimony has to be taken from
every member of the hospital staff who had anything to do with
the patient during the birth to uncover all the information, some
of which may not have been written down in the medical rec-
ords. This in itself takes days and sometimes weeks. Legal and
medical research must be documented, and the proper experts
have to be enlisted.

It could take several years from the time a person goes to a
lawyer until the case is resolved. In some states it takes over a
year simply to get the case on the court calendar. The trial could
take anywhere from two days to a month. If the decision is
appealed, another eighteen months might pass before there is a
final ruling.

In some states, before a case goes to trial, it must be heard by
a screening panel, which consists of a lawyer or judge, a physi-
cian, and sometimes a layperson. These panels help to deter-
mine the merits of a case and serve as a means of weeding out
frivolous claims. They can, on the other hand, also discourage a
claimant by adding one more step to the process. The proceed-
ings of these panels vary considerably from one state to another.
In some states their findings are admitted during the court trial;
in others they are not.

Because malpractice suits are long and complicated, the ex-
penses can be enormous. Most such cases are accepted by the
lawyer on a contingent-fee basis. This means the lawyer gets a
certain percentage of the client’s total award as payment for his
or her services. This fee, however, does not include the family’s
expenses for court costs, the services of expert witnesses, examina-
tions by doctors, sheriff’s fees, etc., which may run as high as
$10,000 to $15,000. Juries are not told how much money a
person owes in costs and attorney’s fees nor are they supposed
to take this into account when they make their decision. There-
fore, money awarded for medical bills and for pain and suffer-
ing may go instead to pay the lawyer’s fee and related expenses.

In many states, the contingent-fee percentage is restricted by
law. Some states have a graduated scale which allows a smaller
percentage as the award becomes higher. This is intended to
encourage lawyers to accept cases with small award potential.
Other states allow one standard rate, usually ranging from one-
third to one-half of the recovery.

Since very few people could afford to pay a lawyer’s hourly
rate plus expenses, the contingent-fee system allows more people
to sue. It also encourages lawyers to try to get as large amounts
for clients as possible. However, the major disadvantage to this
method is that lawyers will seldom take cases that are likely to
win small monetary awards.

Although the lawyer takes care of getting expert testimony
and preparing the case, it is by no means an easy experience for
family members involved. The fight is long and bitter. They have
to expose their painful birth experience to lawyers, judges, doc-
tors, and perhaps to the public if the case goes to trial. For all
that time they have to relive the terrible experience of their
baby’s death, recalling every feeling and every detail for the
many questioners. They have a lot at stake—money, time, and
energy—and they feel very vulnerable.

One mother who decided to sue told what happened after she
found an experienced attorney:

I think when we started we were hoping that an out-of-court
settlement would be made. The lawyer warned us, however, that
we might have to go to trial and should prepare for that possibil-
ity. The trial date was set for months away, and all that time I
worried constantly. I would go over and over in my mind the
events of my pregnancy and the birth. I would think about all the
questions the doctor’s lawyer might ask. As the time for the trial
approached, we discussed with the lawyer what would go on
there and what questions we might expect. I would practice
questions and answers with my husband. I could hardly do
anything else—it was the only thing on my mind.

On the day of the trial the lawyer told us that the doctor’s
insurance company had offered to settle with us out of court for
$7,000. As much as we wanted to avoid a trial, we just couldn’t
accept so little money—our expenses alone were more than that.
We made a counteroffer, which they refused, so we had to go to
court.
I was almost paralyzed with fear when the trial started. I knew that I wouldn't be called on the stand the first day, but seeing the doctor in the courtroom was devastating. I couldn't look at him. I looked instead at the jury and thought about how each of them would judge us. When the trial finally started, it moved slowly—there were constant objections and conferences and confusing maneuvers on each side.

The time came for me to testify and I can't even remember now what I said. At times I could hardly speak, and I broke down and cried. It was so humiliating. The doctor's attorney asked me many questions that insinuated that I did something early in my pregnancy that caused the baby's death. He kept asking if I took any medications. Did I have a cold? What did I take for it? Did I smoke? I felt he was trying to trick me. When I finally got out of that chair, my lawyers said I did just fine. I was glad at least that part was over.

The trial lasted three weeks, and then the jury went out. After what seemed an infinite amount of time, they came back and awarded us damages of $20,000. We were disappointed. We knew we owed the lawyer a third of that and that our expenses were $8,000. We were left with a little over $5,000 for our pain and suffering.

It was so long and hard, and we didn't win very much, but we felt that we were vindicated. Even though I knew the doctor was at fault, at times I couldn't help doubting my own feelings. But now I had the satisfaction of knowing I wasn't crazy and that in some small way he was being punished for what he did.

The majority of malpractice cases are settled out of court, but of those that do go to trial, most are won by the doctor. That can be a discouraging and costly ending to a lengthy, tedious, and emotion-filled process. Parents must decide if money and vindication can ever make up for the pain of losing a child or alleviate their anger. They must consider whether they can endure the rigors and expense of a trial. But if they undertake a suit, knowing all that is involved, they should be encouraged for pursuing what they believe to be their right.

Parents who wish to sue after a miscarriage, ectopic pregnancy, stillbirth, or early infant death have in some ways been at a particular disadvantage in our legal system. Fortunately, this situation is slowly changing. The courts in some states are begin-ning to recognize the right of parents to sue for the wrongful death of their expected baby.

Nevertheless, as long as many of the laws and practices involved in medical malpractice suits continue to discourage people from suing, those who believe they have been wronged should have the possibility of recourse to a different procedure, one that has been designed for cases with small financial awards. In these cases, some approach such as binding arbitration might work best. At present, arbitration is not often used in malpractice cases.

Parents who feel they want to sue should consult a lawyer and explore all their options, given their particular situation and the state in which they live. If a legal solution is not possible simply because the laws of their state do not allow for a suit or because there may not be sufficient awards to justify the cost, there are other possible courses of action open. They could file complaints with state and county medical societies, ethics panels where they exist, or with the hospital administration. They might obtain some satisfaction with the help of local health and consumer groups. Otherwise, until the circumstances involving medical malpractice cases are changed, many families with legitimate grievances are likely to be deprived of justice through the courts.