

Malpractice Review Problem

Pope, Health Law (Oct. 27, 2011)

On the afternoon of August 31, 2009, Mindy suffered a hypoglycemic event that caused her to run her car into a utility pole at 45 m.p.h. She was taken by ambulance to the emergency room at State Medical Center (SMC), a hospital in a hypothetical 51st state. Having visible lacerations on her face from the car accident, Mindy was given a neurological assessment upon arrival, at around 4:00 p.m., and a computerized tomography (CT) scan of her brain about an hour later. These tests were overseen or authorized by Dr. Grantham, who was charged with Mindy's care at SMC on August 31. The results were normal.

Following those neurological tests, however, Mindy reported and was observed to have neurological symptoms, including being wobbly on her feet and having severe pain after being administered pain medication. Dr. Grantham informed one of Mindy's sons, by phone that he would carry out another neurological assessment before discharging her. He did not. Instead, he prescribed a narcotic, Darvocet, and sent Mindy home with her husband. At that point, Mindy could not walk herself to or from the car and had to be carried to bed by her husband when they arrived home. Neither Mindy nor her husband was given discharge instructions that included specific information about head injuries.

Mindy was again transported to SMC by ambulance just after 7:00 a.m. on September 1, 2004, because her husband was concerned that she remained very lethargic through the night. Dr. Dawson was the attending emergency room physician that morning. By around 9:30 a.m., Mindy was diagnosed as having a stroke. Specifically, she was first found to have an "evolving infarct . . . in the right middle cerebral artery territory," which relates to a cause of a stroke. A magnetic resonance imaging (MRI) examination, performed shortly after 9:30 a.m., confirmed that Mindy was in fact having a stroke.

Mindy suffered a trauma-induced stroke and is now permanently disabled. She is now permanently brain damaged; a quarter to a third of her brain tissue was destroyed. In particular, the portions of her brain that were damaged are involved with motor control, sensation, and spatial reasoning.

Mindy filed a lawsuit against Dr. Grantham on August 31, 2011. She retained three experts. Plaintiff expert 1 from Johns Hopkins (in Baltimore, Maryland) testified that she knows the prevailing standard of care in the United States. She testified that Dr. Grantham failed to comply with the standard of care. Had he complied, Mindy would probably not have suffered a stroke.

Plaintiff expert 2 from UMDNJ testified (with supporting evidence) that New Brunswick, New Jersey (where UMDNJ is) is similar to the medium-sized town where SMC is located. She testified that since she knows the standard for New Brunswick,

she knows the standard for SMC. She also testified that had Grantham complied with the standard of care, Mindy would probably not have suffered a stroke.

Plaintiff expert 3 is from State University (in the hypothetical State) and is familiar with the standard of care in State. She testified that once given a narcotic, Mindy should not have been discharged but observed overnight. Had Mindy been held overnight, her neurological deficits would have been earlier discovered to be a stroke and that anticoagulants, antiplatelet agents, and general brain protective could have been provided to reduce the damage caused by strokes. But Plaintiff expert 3 testified that there are "no guarantees." While earlier is better, she could not say that early intervention would have avoided Mindy's injury. She testified that had Dr. Grantham complied with the standard of care, Mindy would have had a 40% chance of a better outcome (no disability or significantly less disability).

DR. Grantham had one expert witness. Defense expert from the Mayo Clinic (in Rochester, Minnesota) testified that she and hundreds of other respected emergency room physicians across the country regularly treat patients with Mindy's presentation in just the way that Dr. Grantham did (discharge with pain medication). Their protocol has been published in the *Journal of the Emergency Medical Association*.

This State includes the following potentially, but not necessarily, applicable law:

1. Two-year statute of repose
2. One-year statute of limitations
3. Statewide locality standard of care (WA, VA, AZ)
4. Allows lost chance causation
5. Common law res ipsa

Practice Malpractice Problem

On an exam, the practice problem that we worked through on Thursday, October 27th might be a 50-minute essay problem. The point allocation might be **roughly** as follows.

PRIMA FACIE CASE

DUTY

Qualification standard (statewide)	2
Expert 1 not qualified	2
Expert 2 not qualified	2
Expert 3 qualified	4

BREACH

DEF did not comply with SOC	2
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CAUSATION

Expert 3 is the only qualified expert	2
Expert 3 establishes only lost chance causation	4
That is sufficient in this state	2

DAMAGES

PTF is injured	2
PTF can recover only 40% of damages	4

AFFIRMATIVE DEFENSES

SOL

Lawsuit filed > 1 year after discovery	4
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SOR

Lawsuit filed within 2 years of event	4
If one course of treatment	4