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Hospital Residents Held to Same Standard of Care as Specialists

But court ruling leaves standard for unlicensed residents unclear

BY HENRY GOTTLIEB

Hospital residents working under supervision must be held to the same standard of care as specialists in their fields, an appeals court ruled Wednesday in the first New Jersey case on the issue.

A doctor, once licensed, gets no leniency from malpractice claims while training. "Defendants held themselves out as doctors and should be held to the standard of care they claim to profess," Judges Steven Lefelt, Anthony Parrillo and Paulette Sapp-Peterson wrote in a per curiam, unpublished opinion, *Clark v. University Hospital-UMDNJ*, A-0257-05.

The defense had sought reversal of a \$3 million malpractice verdict against two residents at University Hospital in Newark on the ground that the trial judge instructed the jury to treat the defendants as they would average physicians.

Residents required to practice under the supervision of an attending physician "must be judged by the standard particular to the resident at that particular point in his or her training," argued defense lawyer Louis Ruprecht, of Ruprecht, Hart & Weeks in Millburn.

But reducing the standard of care



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for licensed doctors would be a "problematic precedent," the appeals judges said. "For example, should we reduce the standard for doctors who are inexperienced in a particular procedure that they negligently performed? Or should we also reduce the standard of care for doctors who graduated in the lower third of their medical school?"

The decision comports with a state court ruling in Louisiana and federal court rulings in Connecticut and South Carolina. State court rulings in Wisconsin and Ohio that went the other way don't apply because the defendants were unlicensed interns. In New Jersey, residents are required to serve an internship and pass the state licensing exam.

The plaintiff in *Clark* is the widow of an automobile accident victim who

came under the care of defendants Raquel Forsythe, a fourth-year surgical resident, and Thomas Chido, a second-year surgical resident. Chido had completed training in general anesthesia and had experience inserting breathing tubes in patients.

The doctors inserted a tube through William Clark's mouth to drain fluids from his stomach and when he pulled it out, they put in a second tube. But when he pulled out that one, too, they decided not to insert a third tube. As a result, the fluids built up in his stomach, migrated to his lungs and caused asphyxia, which was followed by cardiac arrest and death, according to trial evidence submitted by the plaintiffs' lawyer, David Mazie of Roseland's Nagel Rice & Mazie.

In June 2005, an Essex County jury awarded \$3 million, including \$2 million for Clark's pain and suffering in the four minutes between the time he aspirated and the time he lost consciousness.

The appeals court rejected the argument that the pain and suffering award was excessive and said Essex County Superior Court Judge Stephen Bernstein got it right when he rejected a defense proposal that he instruct the jury to hold the residents to a lesser standard.

The argument had worked in a case against a first-year unlicensed resident, *Phelps v. Physicians Ins. Co. of Wis. Inc.*, 698 N.W.2d 642 (Wis. 2005), and a case against an unlicensed intern, *Rush v. Akron Gen. Hosp.*, 171 N.E.2d 378 (Ohio Ct. App.1957).

But in federal decisions that the New Jersey court followed, a first-year resident and an intern who had

completed one month were held to the same standards as doctors. In a Louisiana state court case, a foreign doctor employed under temporary permit was held to the higher standard.

Ruprecht's receptionist said he would be on vacation until Monday and that no one else at the firm could speak about whether review by the Supreme Court will be sought.

Stephen Baker, chairman of UMDNJ's radiology department and director of the department's residency program, says the opinion is important because it reminds attending physicians to monitor residents carefully.

Baker, a member of the committee that sets standards for residents for the Radiology Society of North America, urges a rule requiring strict supervision and says, "This opinion will make it

easier for us to implement that rule."

The opinion is good because varying standards for levels of training would have a damaging affect on doctors and patients, Baker says. At the same time, he is troubled that the opinion glosses over the fact that residents aren't always licensed physicians. Large numbers of residents, particularly those in their first year, have not yet taken the licensing exam. Foreign-trained doctors are barred from becoming licensed until they have completed their residencies, Baker says.

In *Clark*, both defendants were licensed. Even so, the opinion appears to stand for the proposition that the test isn't whether residents are licensed; it's whether they hold themselves out as doctors, as they did in *Clark*.

Plaintiff's lawyer Mazie says

that's the central point, not whether residents are licensed. "What do you say to patients? 'This doctor who doesn't have as much experience is going to operate on you,' and then do you give that doctor a free pass on liability? It's crazy. It's against public policy," he says.

By Mazie's reckoning, the ruling on residents isn't even the most important part of the opinion. He says lawyers will be more interested in the finding that a \$2 million award for pain and suffering isn't excessive.

Bernstein ruled that the award didn't "shock the conscience of the court," but Ruprecht argued on appeal the correct test was whether the award was "clearly excessive." The appeals court says there's no difference between the two. ■