I. THE STANDARD OF CARE

A. ESTABLISHING THE STANDARD OF CARE

HALL v. **HILBUN Supreme Court of Mississippi, 1985. 466 So.2d 856.**

ROBERTSON, JUSTICE, for the Court:

I.

This matter is before the Court on Petition for Rehearing presenting primarily the question whether we should, as a necessary incident to a just adjudication of the case at bar , refine and elaborate upon our law regarding (a) the standard of care applicable to physicians in medical malpractice cases and (b) the matter of how expert witnesses may be qualified in such litigation.

* * *

When this matter was before the Court on direct appeal, we determined that the judgment below in favor of the surgeon, Dr. Glyn R. Hilbun, rendered following the granting of a motion for a directed verdict, had been correctly entered. * * *

For the reasons set forth below, we now regard that our original decision was incorrect. * * *

II.

Terry 0. Hall was admitted to the Singing River Hospital in Jackson County, Mississippi, in the early morning hours of May 18, 1978, complaining of abdominal discomfort. Because he was of the opinion his patient had a surgical problem, Dr. R.D. Ward, her physician, requested Dr. Glyn R. Hilbun, a general surgeon, to enter the case for consultation. Examination suggested that the discomfort and illness were probably caused by an obstruction of the small bowel. Dr. Hilbun recommended an exploratory laparotomy [sic]. Con- sent being given, Dr. Hilbun performed the surgery "about noon on May 20, 1978, with apparent success.

Following surgery Mrs. Hall was moved to a recovery room at 1:35 p.m., where Dr. Hilbun remained in attendance with her until about 2:50 p.m. At that time Mrs. Hall was alert and communicating with him. All vital signs were stable. Mrs. Hall was then moved to a private room where she expired some 14 hours later.

On May 19, 1980, Glenn Hall commenced this wrongful death action by the filing of his complaint * * * .

* * *

At trial Glenn Hall, plaintiff below and appellant here, described the fact of the surgery .He then testified that he remained with his wife in her hospital room from the time of her arrival from the recovery room at approximately 3:00 p.m. on May 20, 1978, until she ultimately expired at approximately 5:00 a.m. on the morning of May 21. Hall stated that his wife complained of pain at about 9:00 p.m. and was given morphine for relief, after which she fell asleep. Thereafter, Hall observed that his wife had difficulty in breathing which he reported to the nurses. He inquired if: something was wrong and was told his wife was all right and that such breathing was not unusual following surgery .The labored breathing then subsided for an hour or more. Later, Mrs. Hall awakened and again complained of pain in her abdomen and requested a sedative, which was administered following which she fell asleep. Mrs. Hall experienced further difficulty in breathing, and her husband reported this, too. Again, a nurse told Hall that such was normal, that patients sometimes make a lot of noise after surgery.

After the nurse left the following occurred, according to Hall. At this time I followed her [the nurse] into the hall and walked in the hall a minute. Then I walked back into the room, and walked back out in the hall. Then I walked into the room again and I walked over to my wife and put my hand on her arm because she had stopped making that noise. Then I bent over and flipped the light on and got closer to her where I could see her, and it looked like she was having a real hard problem breathing and she was turning pale or a bluish color. And I went to screaming.

Dr. Hilbun was called and came to the hospital immediately only to find his patient had expired. The cause of the death of Terry 0. Hall was subsequently determined to be adult respiratory distress syndrome (cardio- respiratory failure).

Dr. Hilbun was called as an adverse witness and gave testimony largely in accord with that above. * * *.

Dr. Hilbun stated the surgery was performed on a Saturday. Following the patient's removal to her room, he "went home and was on call that weekend for anything that might come up." Dr. Hilbun made no follow-up contacts with his patient, nor did he make any inquiry that evening regarding Mrs. Hall's post-operative progress. Moreover, he was *not* contacted by the nursing staff or others concerning Mrs. Hall's condition during the afternoon or evening of May 20 following surgery, or the early morning hours of May 21, although the exhibits introduced at trial disclose fluctuations in the vital signs late in the evening of May 20 and more so, in the early morning hours of May 21. Dr. Hilbun's next contact with his patient came when he was called by Glenn Hall about 4:55 or 5:00 that morning. By then it was too late.

* * *

The autopsy performed upon Mrs. Hall's body revealed the cause of death and, additionally, disclosed that a laparotomy [sic] sponge had been left in the patient's abdominal cavity. The evidence, however, without contradiction establishes that the sponge did not contribute to Mrs. Hall's death. Although the sponge may ultimately have caused illness, this possibility was foreclosed by the patient's untimely death.

Plaintiff's theory of the case centered around the post-operative care provided by Dr. Hilbun. Two areas of fault suggested were Dr. Hilbun's failure to make inquiry regarding his patient's post-operative course prior to his retiring on the night of May 20 and his alleged failure to give appropriate post-operative instructions to the hospital nursing staff.

When questioned at trial, Dr. Hilbun first stated that he had practiced for 16 years in the Singing River Hospital and was familiar with the routine of making surgical notes, i.e., a history of the surgery .He explained that the post-operative orders were noted on the record out of courtesy by Dr. Judy Fabian, the anesthesiologist on the case. He stated. such orders were customarily approved by his signature or he would add or subtract from the record to reflect the exact situation.

[Dr. Hilbun testified as to the post-operative orders noted in the medical records as of May 20, 1978. Mrs. Hall had a nasogastric tube, an i.v., a catheter; she was receiving medications for pain, nausea, and infections.] His testimony continued:

Q. Now after this surgery, while Mrs. Hall was in the recovery room did I understand you to say earlier that you checked on her there?

A. When I got through operating on Mrs. Hall, with this major surgical procedure in an emergency situation-and 1 always do-l went to the recovery room with Mrs. Hall, stayed in the recovery room with Mrs. Hall, listened to her chest, took her vital signs, stayed there with her and discharged her to the floor. The only time I left the recovery room was to go into the waiting room and tell Mr. Hall. Mrs. Hall waked up, I talked to her, she said she was cold. She was completely alert-

* * *

Q. Now, you went to the recovery room to see her because you were still her physician following her post-surgery?

I A. I was one of her physicians. I operated on her, and I go to the recovery room with everybody.

Q. Okay. You were the surgeon and you were concerned about the surgical procedures and how she was doing post-operatively, or either you are not concerned with your patients, how they do post-operatively? A. As I said, I go to the recovery room with every one of my patients. Q. Then you are still the doctor? A. I was one of her physicians.

Q. Okay. And you customarily follow your patients following the surgery to see how they are doing as a result of the surgery , because you are the surgeon. Is that correct? A. Yes.

* * *

Q. How long 4° you follow a patient like Terry Hall? A. Until she leaves the hospital.

Q. Okay. So ever how long she is in the hospital, you are going to continue to see her?

A. As long as my services are needed.

Insofar as the record reflects, Dr. Hilbun gave the nursing staff no instructions regarding the post-operative monitoring and care of Mrs. Hall beyond those [summarized above]. Dr. Hilbun had no contact with Mrs. Hall after 3:00 p.m. on May 20. Fourteen hours later she was dead.

The plaintiff called Dr. S.O. Hoerr, a retired surgeon of Cleveland, Ohio, as an expert witness. The record reflects that Dr. Hoerr is a *cum laude* graduate of the Harvard Medical School, enjoys the respect of his peers, and has had many years of surgical practice. Through him the plaintiff sought to establish that there is a national standard of surgical practice and surgical care of patients in the United States to which all surgeons, including Dr. Hilbun, are obligated to adhere. Dr. Hoerr conceded that he did not know for a fact the standard of professional skill, including surgical skills and post- operative care, practiced by general surgeons in Pascagoula, Mississippi, but that he did know what the standard should have been.

* * * [T]he trial court ruled that Dr. Hoerr was not qualified to give an opinion as to whether Dr. Hilbun's post-operative regimen departed from the obligatory standard of care. * * *.

* * *

Parts of Dr. Hoerr's testimony excluded under the trial judge's ruling follow:

A. My opinion is that she [Mrs. Hall] did not receive the type of care that she should have received from the general surgical specialist and that he [Dr. Hilbun] was negligent in not following this patient; contacting, checking on the condition of his patient sometime in the evening of May 20th. *It is important in the post-operative care of patients to remember that very serious complications can follow abdominal operations, in particular in the first few hours after a surgical procedure.* And this can be inward bleeding; it can be an explosive development in an infection; or *it can be the development of a serious pulmonary complication, as it was in this patient. As a result of her condition, it is my opinion that he lost the opportunity to diagnose a condition, which in all probability could have been diagnosed at the time by an experienced general surgeon, one with expertise in thoracic surgery. And then appropriate treatment could have been undertaken to abort the complications and save her life.*

There are different ways that a surgeon can keep track of his patient-"follow her" as the expression goes-besides a bedside visit, which is the best way and which need not be very long at all, in which the vital signs are checked over. The surgeon gets a general impression of what's going on. He can delegate this responsibility to a competent physician, who need not be a surgeon but could be a knowledgeable family practitioner. He could call in and ask to speak to the registered nurse in charge of the patient and determine through her what the vital signs are, and if she is an experienced Registered Nurse what her evaluation of the patient is. *From my review of the record, none of these things took place, and there is no effort as far as I can see that Dr. Hilbun made any effort to find out what was going on with this patient during that period of time.* I might say or add an additional belief that I felt that the nursing responsibility which should have been exercised was not exercised, particularly at the 4:00 a.m. level when the pulse rate was recorded at 140 per minute without any effort as far as I can see to have any physician see the patient or to get in touch with the operating surgeon and so on.

There is an additional thing that Dr. Hilbun could have done if he felt that the nursing services might be spotty-sometimes good, some- times bad. This is commonly done in Columbus, Ohio, in Ashtabula, Pascagoula, etcetera. *He could put limits on the degree in which the vital signs can vary, expressing the order that he should be called if they exceeded that.* Examples would be: Call me if the pulse rate goes over 110; call me if the temperature exceeds 101; call me if the blood pressure drops below 100. There is a simple way of spelling out for the nursing services what the limits of discretion belong to them and the point at which the doctor should be called.

* * * Dr. Hilbun did not place any orders on the chart for the nurses to call
him in the event of a change in the vital signs of Mrs. Hall. He normally made afternoon rounds between 4:00 and 5:00 p.m. but didn't recall whether he went by to see her before going home. Dr. Hilbun was on call at the hospital that weekend for anything which might come up. Subsequent to the operation and previous to Mrs. Hall's death, he was called about one other person on the same ward, one door down, twice during the night. He made no inquiry concerning Mrs. Hall, nor did he see or communicate with her .

Dr. Donald Dohn, of expertise unquestioned by plaintiff and with years of practical experience, gave testimony for the defendant. He had practiced on the staff at the Cleveland Clinic Foundation in Cleveland, Ohio, beginning in 1958. Fortuitously, he had moved to Pascagoula, Mississippi, about one month before the trial. Dr. Dohn stated he had practiced in the Singing River Hospital for a short time and there was a great difference in the standard of care in medical procedures in Cleveland, Ohio, and those in Pascagoula, Mississippi. Although he had practiced three weeks in Pascagoula, he was still in the process of acquainting himself with the local conditions. He explained the differences as follows:

Well, there are personnel differences. There are equipment differences. There are diagnostic differences. There are differences in staff responsibility and so on. For example, at the Cleveland Clinic on our service we had ten residents that we were training. They worked with us as our right hands. Here we have no staff, So it is up to us to do the things that our residents would have done there. There we had a team of five or six nurses and other personnel in the operating room to help us. Here we have nurses in the operating room, but there is no assigned team. You get the luck of the draw that day. I am finding out these things myself. Up there it is a big center; a thousand beds, and it is a regional center. We have tremendous advantages with technical systems, various types of x-ray equipment that is [sic] sophisticated. Also in terms of the intensive care unit, we had a Neurosurgical Intensive Care with people who were specially trained as a team to work there. From my standpoint personally, I seldom had to do much paperwork there as compared to what I have to do now. I have to dictate everything and take all my notes. So, as you can see, there is a difference.

Finally, he again stated the standard of care in Ohio and the standard of care
in the Singing River Hospital are very different, although it is obvious to the careful reader of Dr. Dohn's testimony that in so doing he had reference to the differences in equipment, personnel and resources and not differences in the standards of skill, medical knowledge and general medical competence a physician could be expected to bring to bear upon the treatment of a patient.

At the conclusion of the plaintiffs case, defendant moved for a directed verdict on the obvious grounds that, the testimony of Drs. Hoerr and Sachs having been excluded, the Plaintiff had failed to present a legally sufficient quantum of evidence to establish a prima facie case. The Circuit Court granted the motion. * * *