

Laura Kos et al. v. Lawrence Memorial Hospital et al. Medical Malpractice

**Brief Summary:** Plaintiff sought to recover damages for medical malpractice for injuries suffered following an episiotomy repair from the defendant. Jury was given alternative approach instructions and rendered a verdict in favor of the defendant. Plaintiff argued the instructions were improper. Supreme court held the instructions were improper as this case did not involve an expert testifying that both methods were acceptable, rather it involved experts with conflicting opinions about the proper approach under the circumstances. However, the court held the error was harmless as it did not confuse or mislead the jury because a finding that the defendant breached the standard of care due to the approach required the jury to find that the plaintiff suffered a fourth degree episiotomy extension, which they did not.

Laura Kos (the plaintiff) gave birth to her son at Lawrence + Memorial Hospital in New London. Around two hours into labor the physician, Elisa Marie Girard (the defendant), used a vacuum to assist in the delivery. When this was unsuccessful, she performed a median episiotomy—a surgical cut in the perineum (muscular area between the vagina and anus). An inspection after the birth revealed that Kos had suffered an injury to the anal sphincter. Girard then diagnosed her with a third degree extension of the episiotomy, which she then repaired. After the repair she conducted a digital rectum exam and testified that she performed it after the repair because she was trained to do so. The next day Kos complained of discharging stool or gas from her vagina. She then had a follow-up examination with another physician who found that she had the symptoms (discharge and smell) of a rectovaginal fistula and suffered a sphincter separation. She also experienced concerns of infection, pain and redness. She then underwent surgery to repair the rectovaginal fistula and suffered a sphincter separation.

Kos and her husband subsequently filed a medical malpractice claim against Girard. The complaint alleged Girard was negligent by failing to identify the fourth degree extension of the median episiotomy, failed to perform the proper adequate episiotomy repair, and failed to properly examine the repair upon completion. The plaintiffs also filed a vicarious liability claim against the hospital which was not at issue here. At the close of evidence, the defendants requested that the trial court include a charge on the acceptable alternatives doctrine concerning the standard of care for conducting the digital rectal exam. Despite the plaintiffs' objections the court gave the requested charge. The jury reached a verdict favoring the defendant finding that although the plaintiffs established the standard of care, they failed to establish that Girard breached the standard of care. The case was then appealed to the Appellate court and transferred to the Supreme Court of Connecticut pursuant General Statutes § 51-199 (c) and Practice Book § 65-1.

The issues on appeal were: (1) whether the acceptable alternative charge was improper because an expert did not testify that there was more than one acceptable method of inspection; (2) if the instruction was improper whether it harmed the outcome of the case and; (3) whether the acceptable alternative doctrine ought to be abolished. The court agreed with the plaintiffs that the acceptable alternative charge was improper; disagreed with the plaintiff that the error was harmful and declined to use this appeal as an opportunity to assess the validity of the acceptable alternative doctrine. Thus, the ruling of the trial court was affirmed.

The acceptable alternative doctrine states that where the treatment or procedure is one of choice among competent physicians, a physician cannot be held guilty of malpractice in selecting the one which according to their best judgment is best suited for the patients needs. Whether it could be supported by experts with differing opinions was an issue of first impression. The court

relied on their reasoning in *Wasfi* where they held that the school of thoughts doctrine requires testimony that different schools of thought exist and what each school of thought requires regarding a treatment. The court followed this logic because both doctrines indicate that there may be more than one acceptable treatment in a patient's case, thus, the doctrines should have similar requirements.

Next the court addressed whether the instruction was improper under the facts of the case. The court held that the instruction was improper because no expert testimony established that conducting the digital rectal exam either before or after the episiotomy repair was an acceptable method of diagnosing the level of degree of extension. Instead, the plaintiff's expert, Young, testified that the only acceptable method was to do the examination prior to the repair. In contrast, the defense expert, Ling, testified that the prerepair examination is not encouraged and is only acceptable if the physician was negligent in performing the repair. Additionally, neither party argued that Girard chose between two alternatives. Both sides argued that there was only one acceptable method. Therefore, the requirements for the acceptable alternative doctrine were not met, thus, the court then had to assess whether the instructions harmed the verdict.

Before a party is entitled to a new trial, they have the burden of demonstrating that the error was harmful. An error in instructions is harmful if it is likely that it affected the verdict. To assess the harm the court looks at not only the nature of the error, including its natural and probable effect on a party's ability to place their full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence; (2) the effect of other instructions; (3) the effect of counsel's arguments and; (4) any indications by the jury itself that it was misled. Inapplicable doctrines in the instructions have

been held as harmful when they affect the jury's determination of liability. Thus, the court looked at whether the impact affected the determination of liability.

All the experts at trial agreed that if there had been a fourth degree extension of the episiotomy, the standard of care required the defendant to diagnose it, and to repair it as a fourth degree extension regardless of whether the exam was performed or after the repair. Young also conceded that if there was a third degree extension, the repair was proper. Thus, the deciding issue in this case was not whether the inspection should have been done before or after, rather, whether the plaintiff suffered a fourth degree extension because only then would Girard had breached the standard of care by diagnosing it as a third degree extension. Furthermore, the court rejected the plaintiffs' argument that the error confused the jury because the instructions clearly indicated that the basis of the verdict was the degree on the episiotomy extension. Lastly, the courts rejected the plaintiff's argument that the instruction exculpated the defendant and confused the jury because they were not required to reach the issue of the acceptable method unless they found that the plaintiff suffered a fourth degree episiotomy, which they did not. Thus, the court concluded that the instructional error was harmless.

The key takeaway from this case is that the acceptable alternative charge requires an expert to testify that there is more than one acceptable method. Additionally, this case serves as a reminder that finding an error may not be enough to have an unfavorable decision overturned.