

**MASSACHUSETTS SCHOOL OF LAW  
MEDICAL MALPRACTICE  
CLOSED BOOK FINAL EXAMINATION  
DECEMBER 17, 2003  
PROFESSOR TIMOTHY CAGLE**

**DO NOT OPEN THIS BOOKLET UNTIL TOLD TO DO SO.**

**WRITE YOUR SOCIAL SECURITY NUMBER:**

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This is a three-hour examination consisting of two questions. No materials of any type are to be used in this examination. Your answers are to be recorded only in a blue book. At the end of the examination, you will turn in both the exam and blue book. Make sure your social security number, **NOT YOUR NAME**, is on both the examination and blue book.

Question will be weighed as follows:

<b>QUESTION 1</b>	<b>66 2/3 %</b>
<b>QUESTION 2</b>	<b>33 1/3 %</b>

**THE FOLLOWING FACT PATTERN IS APPLICABLE TO ALL QUESTIONS**

In 2001, Anna Phylaxis, a 28 year old mother of two healthy children was awaiting the birth of her third child. She received pre-natal care from Dr. Sal Pingo and Dr. I. M. Pergonol, who practiced together in a group known as OB Associates, P.C. Anna's first visit to the group was in May, 2001. According to the records, her last menstrual period had been on March 14, 2001, and her estimated due date was December 26, 2001. In her 19th week of pregnancy, on July 24, 2001, Anna reported to Dr. Pingo that she was leaking vaginal fluid. Dr. Pingo instructed her to stay on bed rest for two days, informing Anna that she could continue working after that. Dr. Pergonol requested an ultrasound (diagnostic test) on July 25, 2001, and the report of the ultrasound confirmed a condition known as oligohydramnios, or decreased amniotic fluid. The records of Anna's visit on this day note to "watch" and repeat the ultrasound in three weeks. Neither Dr. Pergonol nor Dr. Pingo recommended treatment, and neither of these physicians gave Anna instructions for continuing bed rest.

Dr. Pingo ordered a second ultrasound, which was performed on August 15, 2001, and revealed that the amniotic fluid was still moderately decreased. Again, Dr. Pingo failed to recommend continued bed rest for Ms. Phylaxis, as did Dr. Pergonol. A third ultrasound was performed at Dr. Pingo's request on September 5, 2001, which showed that the amniotic fluid was near normal. However, a doctor's note written on September 19, 2001, documented that Ms. Phylaxis was still leaking fluid. Again, no further treatment was recommended by either physician and no instructions for bed rest were documented.

On September 29, 2001, Anna went into premature labor and was admitted to St. Timothy the Benevolent Hospital in Boston at approximately 4:30 AM. Dr. Pergonol was the admitting physician. Delivery occurred via cesarean section at 5:06 AM. While performing the cesarean section, Dr. Pergonol also performed a tubal ligation (surgical sterilization procedure). Anna had signed a consent form for the cesarean section and the tubal ligation was not mentioned in the consent form.

After the birth, the baby, Albert Phylaxis, required immediate medical attention and was transferred to Pediatric Hospital in Boston. Despite the efforts to treat him by the staff at Pediatric Hospital, Albert died several hours later.

You are consulted by Anna Phylaxis on December 17, 2003, coincidentally at 4:30 PM. Anna informs you that you were recommended to her by Attorney Timothy Cagle, before he was recently found floating face down in the Charles River. It appears that Mr. Cagle was executed, gangland-style, and his body was discovered bound and gagged, with several copies of the Federal Rules of Evidence stuffed very creatively into multiple body orifices. The district attorney has called for a full investigation of all recent MSL Evidence students, although several defense firms and insurance executives have stepped forward to gleefully claim responsibility. Upon hearing of Mr. Cagle's demise, the American Medical Association issued a jubilant three word response, "God love America!"

**QUESTION ONE**

- A. LIST THE STEPS THAT YOU WOULD TAKE TO EVALUATE THE CASE IN ORDER TO DETERMINE WHETHER OR NOT MEDICAL MALPRACTICE IS PRESENT AND THE FACTORS YOU WOULD CONSIDER IN DECIDING WHETHER OR NOT TO TAKE THE CASE.**
- B. GIVE THE THEORY(IES) OF LIABILITY UNDER WHICH YOU WOULD PROCEED, LISTING THE PROBABLE PLAINTIFF(S), DEFENDANT(S) AND DEFENSE(S)**
- C. DISCUSS THE RIGHTS AND LIABILITIES OF ALL THE PARTIES.**
- D. DESCRIBE THE STEPS THAT MUST BE FOLLOWED IN MASSACHUSETTS FOR LITIGATION OF A MEDICAL MALPRACTICE CASE.**
- E. ADVISE ANNA OF THE MASSACHUSETTS STATUTE OF LIMITATIONS**
- F. ADVISE ANNA WHETHER THERE ARE ANY LIMITATIONS ON DAMAGES IN MASSACHUSETTS**
- G. ADVISE ANNA WHETHER THERE ARE ANY LIMITATIONS ON ATTORNEYS FEES IN MASSACHUSETTS**

**QUESTION TWO**

Anna decided to have her medical records reviewed prior to proceeding in this case. She presents you with the enclosed letter from Dr. Phil Lopian, along with Dr. Lopian's curriculum vitae.

PRESUME THAT A MEETING WITH DR. PHIL LOPIAN IS SCHEDULED FOR THE FOLLOWING WEEK. LIST THE QUESTIONS THAT YOU WOULD ANTICIPATE THE DEFENSE WILL ASK ON CROSS-EXAMINATION IN ORDER THAT YOU MAY INTERROGATE DR. LOPIAN AT THE MEETING.

**(FOR QUESTION 2, YOU ARE LIMITED TO TWENTY (20) QUESTIONS. IF YOU WRITE MORE THAN TWENTY, ONLY THE FIRST TWENTY WILL BE CONSIDERED FOR CREDIT)**

Phil Lopian, M.D., F.A.C.O.G  
Diplomate of the American Board of  
Obstetrics and Gynecology  
Board Certified Maternal Fetal Medicine

November 30, 2003

Re: Anna Phylaxis

Dear Sir/Madam:

I am a physician licensed to practice medicine in the States of New York, Maryland and New Jersey. I am certified by the American Board of Obstetrics and Gynecology in obstetrics, gynecology, and maternal-fetal medicine. I am a fellow of the American College of OB-GYN. I am familiar with the standard of care as it pertained to obstetricians in Massachusetts in 2001. I have attached my curriculum vitae.

At your request, I have reviewed the pertinent medical records of Anna Phylaxis, including the following: OB Associates office records from 2001, St. Timothy's Hospital from 9/29/01 to 10/4/01, St. Timothy's Hospital Newborn records from 9/29/01, Pediatric Hospital from 9/29/01, the autopsy report of Albert Phylaxis and the affidavit from Anna Phylaxis.

In 2001, Anna Phylaxis was a 28 year old mother of two healthy children, expecting her third child. According to Ms. Phylaxis' affidavit, Ms. Phylaxis received her prenatal care from Sal Pingo M.D., and I. M. Pergonol, M.D., at the OB Health Associates, Inc. from May of 1901 through September of 2001.

According to the OB Associates, Inc's office records, Anna's last menstrual period was 3/14/01, and estimated due date was 12/26/01. In her 19th week of pregnancy, on 7/24/01, Anna visited the office of OB Associates, Inc., and reported that she was leaking vaginal fluid. According to Anna's affidavit, Dr. Pingo was aware of this complaint, and instructed Anna to stay on bed rest for only two days, informing her that she could continue working after that. Dr. Pingo requested an ultrasound on July 25, 2001, and the ultrasound was performed on this day. The report of July 26, 2001, confirmed oligohydramnios (decreased amniotic fluid). The office records from this day merely note to "watch", and repeat the ultrasound in three weeks. Neither Dr. Pingo, nor Dr. Pergonol, the other physician responsible for Anna's prenatal care, recommended treatment, and neither of the physicians gave Anna instructions for continuing bed rest.

Dr. Pingo ordered a second ultrasound, which was performed on 8/15/01, and which noted that the amniotic fluid was still moderately decreased. Again, Dr. Pingo failed to recommend continued bed rest for Anna as did Dr. Pergonol. A third ultrasound was performed at Dr. Pingo's request on 9/5/01 which noted that the amniotic fluid was near normal. However, the 9/19/01 doctor's note (it is not clear which doctor wrote this note) documented that Anna was still leaking fluid. Once again no further treatment was recommended by Dr. Pingo or Pergonol, and no instructions for bed rest were documented.

According to the medical records, Anna went into premature labor on 9/29/01, and was admitted under Dr. Pergonol to St. Timothy's Hospital at approximately 4:30 AM. Delivery occurred via cesarean section at 5:06 a.m. While performing the cesarean section, Dr. Pergonol also performed a tubal ligation. However, the signed consent form is for a cesarean section only. There is no signed consent form for a tubal ligation.

Albert Phylaxis' Apgars were noted at 2-5-6. He required immediate intubation and was transferred to Pediatric Hospital. Despite the rigorous efforts, he died 15 hours later. The autopsy report noted sepsis, oligohydramnios, hyaline membrane disease and an intraventricular hemorrhage.

#### Discussion:

It is well recognized today, as it was in 2001, that preterm rupture of membranes and/or preterm leaking of amniotic fluid are associated with increased perinatal morbidity and mortality. The standard of care in 2001 and to the present requires obstetricians caring for patients with leaking amniotic fluid or preterm rupture of membranes to treat the patient as a high-risk pregnancy including transfer to a high-risk center and referral to a perinatologist to monitor fetal well-being. The standard of care also requires obstetricians to instruct such patients to remain on strict bed rest at home from the first episode of leaking amniotic fluid until the 23rd-24th week gestation. After this time, the standard of care requires the obstetrician to admit the patient to the hospital, where she would be maintained on strict bed rest with close maternal-fetal monitoring by trained medical personnel and may be treated with steroids to hasten the baby's lung maturity. These measures offer the best opportunity to sustain a healthy gestation and minimize injury to the fetus.

A tubal ligation is a permanent sterilization procedure that involves removing a piece of each fallopian tube and permanently closing the ends. The standard of care from 2001 to the present requires obstetricians to fully explain the permanent nature of this procedure to the patient and obtain a signed consent from the patient before performing any surgical procedure, including a tubal ligation. In addition, when the circumstances of the delivery change, such as in the case of Albert, where there was a probability that he would not survive, the standard of care requires the obstetrician to re-evaluate the situation and again fully explain the permanent nature of the tubal ligation, and obtain a signed consent from the patient.

In my professional opinion, to a reasonable degree of medical certainty, the care and treatment rendered to Anna Phylaxis in 2001, by Sal Pingo, M.D., and I. M. Pergonol, two physicians responsible for her prenatal care, fell below the accepted standard of care at the time for the average qualified obstetrician in the following ways:

1. by failing to treat Anna as a high-risk pregnancy, including transfer to a high-risk center and referral to a perinatologist;
2. by failing to instruct Anna to remain on bed rest at home from the first instance of leaking amniotic fluid, on 7/24/01, until her 23rd-24th week gestation.

3. by failing to admit Anna to the hospital from her 23rd-24th week, until the time of delivery, with bed rest with close maternal-fetal monitoring.

As a direct result of Dr. Pingo and Dr. Pergonol's failure to provide care within the above-described accepted standard, Anna was not afforded the measures which would have monitored fetal well-being and prolonged her pregnancy and which would have improved Albert's lung maturation. As a direct result, Albert was born very prematurely, at 27 weeks, and died from complications of infection and prematurity. In my professional opinion, to a reasonable degree of medical certainty, had Dr. Pingo or Dr. Pergonol provided care in accordance with the accepted standards as described above, pregnancy would have been prolonged, the fetal well-being could have been evaluated and Albert would not have died.

In addition, in my professional opinion, to a reasonable degree of medical certainty, the care and treatment rendered to Anna Phylaxis by I. M. Pergonol, M.D. on 9/29/01 fell below the accepted standard of care at the time for the average qualified obstetrician when Dr. Pergonol performed a tubal ligation during an emergency cesarean section when there was a high likelihood that the infant would not survive, and when she failed to obtain a signed consent for the tubal ligation. As a direct result, a tubal ligation was performed without Anna being afforded the opportunity to make an informed decision, and as a direct result, she will probably not be able to conceive another child. To a reasonable degree of medical certainty, had Dr. Pergonol provided care in accordance with the accepted standard as described above, a tubal ligation would not have been performed on 9/29/01 and Anna would have been able to conceive another child.

In conclusion, the care and treatment rendered to by Anna Phylaxis by Sal Pingo, M.D., and I. M. Pergonol, M.D., fell below the accepted standard of care at the time of the average qualified obstetrician resulting in Albert Phylaxis' death. In addition, the care and treatment rendered to Anna Phylaxis by I. M. Pergonol, M.D. also fell below the accepted standard of care at the time for the average qualified obstetrician resulting in permanent sterilization of Anna Phylaxis.

Sincerely,

Phil Lopian, M.D.

CURRICULUM VITAE

NAME: Phil Lopian M.D.

HOME ADDRESS:

20 East 68th Street  
New York, NY 10023

OFFICE ADDRESS

One Madison Avenue  
New York, NY 10023

DATE AND PLACE OF BIRTH:

July 31, 1940 - New York City

EDUCATION:

Cornell University (Pre-Medical)  
July 1958 - June 1962

McGill University Medical College  
June 1967 - M.D.

POSTDOCTORAL TRAINING

Internship

Michael Reese Hospital (Rotating)  
1967 - 1968

New York Hospital-Cornell (Surgery)  
1968 - 1971

Residency

Assistant Resident (Urology)  
New York Hospital-Cornell

Woman's Hospital  
(Obstetrics and Gynecology)  
1971 - 1973

Woman's Hospital  
(Obstetrics and Gynecology)  
1973 - 1974

Military

Chief of Obstetrics and Gynecology  
Northeast Air Command  
1974 - 1976

LICENSED TO PRACTICE

New York, Maryland, New Jersey

ACADEMIC APPOINTMENTS

Assistant Professor  
Clinical Obstetrics and Gynecology  
NY University Medical College  
1977 - present

CERTIFICATION AND DATE:

Diplomate  
American Board of Obstetrics and  
Gynecology  
April 1976

SOCIETIES

American Medical Association  
  
Fellow, American College of  
Obstetricians and Gynecologists  
  
Fellow, American College of Surgeons  
  
New York State and County Medical  
Society  
  
Fellow, New York Academy of Medicine  
  
New York Gynecologic Society  
  
Member, The New York Academy of  
Sciences  
  
Member, American Assoc. of Gyn.  
Laparoscopists

CURRENT EXTRAMURAL  
ASSIGNMENTS:

Associate Attending  
Obstetrics and Gynecology  
NY Hospital  
1979 -

Director of Gynecology  
Hospital for Joint Diseases,  
1980 - 1984

Chief, Obstetrical Service  
Woman's Hospital  
Center,  
January 1, 1985 - January 1, 1987

CURRENT EXTRAMURAL  
ASSIGNMENTS: cont'd

Senior Attending .....  
Obstetrics and Gynecology

Senior Attending .....  
Obstetrics and Gynecology

Nassau County Medical Society  
Grievance Subcommittee  
1981 - 1989  
Public Relations Committee  
1989 - 1990  
Committee of Public Health  
Subcommittee on Infant Mortality  
1991 -  
Insurance Review Subcommittee  
of Peer Review  
1991 -92

Visiting Scholar, The Eastings Center  
Institute of Society, Ethics and the  
Life Sciences  
1982