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# ARE YOU LIABLE FOR A COLLEAGUE'S NEGLIGENCE?

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If this chilling malpractice verdict is upheld, a doctor's legal woes could have a domino effect on the hospital staff.

By Mark Crane SENIOR EDITOR

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**W**hen a New Jersey jury recently returned a \$13 million judgment against three physicians, the whopping award almost doubled the state's highest previous medical-malpractice verdict. More significantly, the case broke new legal ground in holding that an individual member of a hospital's medical

staff—not just its board of trustees—may be held personally liable for the acts of an errant doctor.

If the verdict is upheld, two of the defendants may be forced to declare bankruptcy, their lawyers say, and the judgment could even reach beyond the grave to tap the estate of the third, who died before the lawsuit was filed. Already, several department heads at other hospitals throughout the state have threatened to resign unless they're given protection from similar suits.

In this precedent-setting case, a six-member jury in Gloucester County, N.J., found that pediatrician Christos C. Gekas negligently treated newborn Kristy N. Marchini, causing mental retardation, blindness, and quadriplegia. But also snared in the verdict were the hospital's chief of pediatrics and its medical staff chairman: They were found negligent in their administrative capacities, on grounds that they should have known of Gekas' alleged incompetence and taken action against him.

### **How the dominoes started falling**

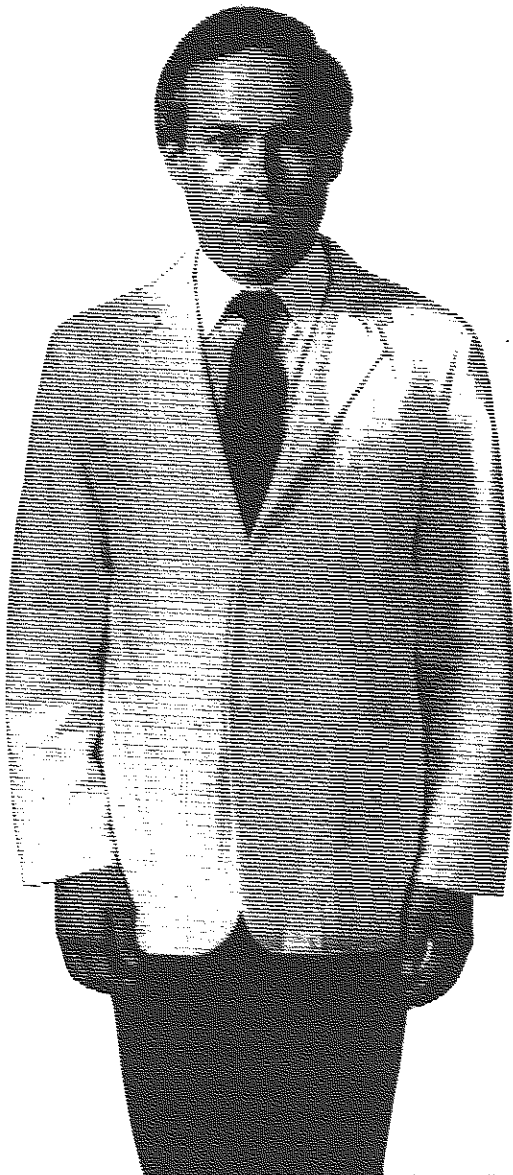
Kristy Marchini weighed 4 pounds, 2 ounces when she was born Aug. 9, 1977, at Underwood-Memorial Hospital in

Woodbury, at a gestational age of 38 weeks. The lawsuit charged that pediatrician Gekas failed to diagnose and treat the child's hypoglycemia, which led to her later problems. Within 48 hours of her birth, the child was transferred to Hahnemann University Hospital in nearby Philadelphia, where she was treated by neonatologists for two weeks. She was returned to Gekas' care for three months, until a pediatric neurologist diagnosed brain damage.

In 1983, when Kristy was 6, her parents, Deborah and Ronald Marchini, sued Gekas. The suit also named as defendants Underwood Hospital, administrator William Thompson, and nurse Patricia Branco.

Two years later, Dominic F. Carlino, who'd served as the unpaid chief of the five-man pediatric division from 1973 to 1980, and the estate of Richard DuPree, the deceased former chairman of the department of medicine, were added to the suit. Citing two previous instances of alleged negligence by Gekas, both of which had been settled out of court, the Marchinis charged that the department heads knew or should have known of Gekas' substandard care, and should have had him retrained or recommended his removal from the staff.

Neither Carlino nor DuPree had ever seen the Marchini child



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while she was at Underwood. But they had deeper pockets than Gekas or the hospital. "Gekas had a malpractice policy of only \$300,000," says Richard Hoffman, the plaintiffs' local counsel. "And under the state's charitable immunity law, the hospital's liability was limited to \$10,000." Carlino and DuPree, on the other hand, each had \$1 million in coverage from the state's doctor-owned carrier.

### How the case was lost in the courtroom

During the trial, expert witnesses offered contradictory versions of the medical evidence. A neonatologist testified that Gekas' failure to test for hypoglycemia was a departure from the accepted standard of care, a departure that had caused a seizure resulting in the child's brain damage.

A pediatrician testified for the defense that the child's handicaps stemmed instead

from conditions occurring before she was born. "I believe the baby had an intrauterine infection, and that was the primary factor in this baby's damage," he testified. "We had a mother who stopped gaining weight, a mother whose uterus stopped growing, and a mother who had hypertension. This wasn't a pediatric problem."

Carlino defended his own actions as chief of pediatrics. His main responsibilities, he testified, consisted of scheduling and running the division meetings, forwarding minutes of the meetings to the department head, and scheduling continuing education seminars.

"I never sought this position," he said in a recent interview. "The previous chairman of medicine asked me to take it in 1973 because I was one of only two board-certified pediatricians on the staff at the time. I didn't make rounds on other doctors' patients—and I wasn't

expected to—unless a specific problem was brought to my attention. I never heard the name Marchini until a process server showed up at my door in 1985."

In court, Carlino acknowledged that he'd employed Gekas as an associate in his practice for two years before he became pediatrics chief. Yes, he conceded, he'd had concerns about Gekas' deficiencies in several areas, including infant seizure management, starting intravenous solutions, charting orders, and making differential diagnoses.

"I felt he transferred too many patients to Hahnemann for conditions that could have been handled at Underwood," Carlino told *MEDICAL ECONOMICS*. "But that's no crime. If a physician feels uncomfortable with certain problems, transferring the patient to a more sophisticated facility is the correct thing to do."

Carlino also testified that he had recommended that Gekas secure remedial training and had written memos to DuPree, the medical department chairman, about Gekas' shortcomings. "I thought Gekas needed some help, but I never believed he was incompetent or should have his privileges revoked," says Carlino. Indeed, Carlino testified that Gekas practiced uneventfully between 1973 and Kristy's birth in 1977. Gekas is still on staff at Underwood with

no restrictions on his privileges.

Another expert witness with hospital administrative experience testified that Carlino and DuPree, who held part-time, unpaid volunteer positions, did not have the duty or authority to require that a staff physician take remedial training. That responsibility, she asserted, rested with the hospital's board of trustees.

But her argument was severely damaged by plaintiffs' witness William Bason, a former chief of pediatrics at Navy hospitals. He testified that Carlino had "every responsibility to oversee the care of patients within that institution" and was directly responsible to require "some corrective action when he noted deficiencies."

Bason said the deficiencies that Carlino attributed to Gekas involved skills "that the most basic pediatric resident must attain and must master." Had Dr. Carlino acted appropriately, he said, "... it is my firm belief that what happened to Kristy Marchini would not have happened."

If that testimony wasn't damaging enough, what happened next was devastating: The child herself appeared in court. The 9-year-old girl, whose palsied body was strapped into a narrow wheelchair and supported by braces, cried and grimaced while another physician witness

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told the jury about the care she'd require for the rest of her life.

"Four jurors, the court stenographer, and a few of the lawyers openly wept at the sight of this child," recalls Yves Veenstra, the attorney for DuPree's estate. Carlino immediately saw what had happened to his case. "I knew it was lost the second they brought her into the courtroom," he says.

### **Why the judge ruled against the doctors**

At the end of testimony, the attorneys for DuPree and Carlino asked Judge John S. Holston Jr. to dismiss the complaints against their clients. "No decision from any jurisdiction has held that an individual member of a medical staff may be liable for the negligence of another staff physician," they argued.

Holston denied the request in a 23-page opinion that all attorneys in the case concede ex-

pands existing law—and perhaps creates new law. Holston based his decision in part on the landmark case of Corleto vs. Shore Memorial Hospital. In that 1975 New Jersey case, the court ruled that a hospital and the members of its board of trustees could be held liable for allowing an allegedly unqualified physician to remain on the medical staff and practice beyond the sphere of his competence.

Holston ruled that it was a "logical extension" of the Corleto decision that liability could extend to individual staff physicians as well. He agreed with arguments of plaintiff's attorney S. Gerald Litvin that while the board of trustees may have *ultimate* responsibility for the removal of an inept physician, it can act only if department and division chiefs with the expertise to evaluate a patient's care provide the hospital's board with complete and accurate in-

**T**his is a landmark case. The size of the verdict is staggering, and it greatly expands the liability of medical staffs."

formation. Those department heads, whether salaried or not, have a duty to apprise the hospital's governing board of substandard performance.

In effect, Holston reasoned that department heads act as agents for the governing board. He cited the testimony of pediatrician William Bason that both Carlino and DuPree failed to provide Gekas with remedial training in his areas of deficiency. "If this training was unsuccessful, then Dr. Carlino and Dr. DuPree had a further duty to take affirmative measures to supervise Dr. Gekas in the newborn nursery, or restrict his privileges therein," Holston ruled.

The hospital and its administrator had been dismissed from the suit shortly before trial. At the close of testimony, the complaint against nurse Patricia Branco was also dismissed. Following eight weeks of testimony and legal arguments, the jury

deliberated for some six hours and found each of the remaining defendants negligent. The panel awarded \$5.5 million to the child to compensate for her pain and suffering and loss of future earning capacity, and \$7.5 million to her parents for medical and rehabilitative expenses for her care. With interest, the award now stands at more than \$15 million. The jury also determined that Gekas was 70 percent responsible for the child's condition, Carlino 20 percent, and DuPree 10 percent.

However, under the state's joint and several liability law, the plaintiffs are allowed to collect the entire award from any of the defendants.

#### **How the verdict may affect other doctors**

An appeal is expected to take between two and four years to reach the state's highest court. The key to the appeal: The trial judge misinterpreted the Cor-

leto decision, declares Richard Grossman, Carlino's attorney. "If any division chief is to be liable for the acts of another doctor, it can only be for the incompetence of that doctor," he argues. "The word incompetence implies continued inability to perform duties, as opposed to one, or even several, isolated acts of negligence. Incompetence on the part of Dr. Gekas was not proven."

Attorney Leonard Horn, who represented nurse Branco in this case and the hospital's board of trustees in the landmark Corleto decision, points out that the jury was never asked to determine Gekas' overall competence, only his negligence in one particular case. "For Carlino and DuPree to be held accountable for Gekas' negligence, the jury would have had to find that Gekas was incompetent and the other doctors knew it," says Horn. "But that question was never before the panel."

Horn notes that even if Carlino and DuPree had believed Gekas incompetent, they would have been hard-pressed to remove him from the staff or restrict his privileges before the Marchini baby was born. "It takes years of hearings within the hospital and then the courts before a physician's privileges can be curtailed," he says.

The plaintiff's attorneys dis-