

Medical Jurisprudence

**Behavioral Sciences Term
St. Georges University
School of Medicine**

**Visiting Professor
Thaddeus Pope, JD, PhD**

Segment

4 of 8

Medical Malpractice

Objectives

1. What is the prevalence of medical error?
2. What are the main types of medical error?
3. How is the standard of care typically established

4. What are 4 ways in which the standard of care is **geographically** defined
5. Other than through expert witnesses, how **else** is the standard of care defined

6. What is a “school of thought”
7. What is the role of expert witnesses in medical malpractice litigation

Medical Error (prevalence)

iatrogenic

injuries


iatros = physician

genic = produced by

Injuries induced by physician,
medical treatment, or
diagnostic procedures

1999

FIRST, DO NO HARM



TO ERR IS HUMAN

BUILDING A SAFER HEALTH SYSTEM

INSTITUTE OF MEDICINE

98,000 deaths
each year from
preventable
medical error

2010

Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

**ADVERSE EVENTS IN HOSPITALS:
NATIONAL INCIDENCE AMONG
MEDICARE BENEFICIARIES**



**Daniel R. Levinson
Inspector General**

November 2010
OEI-06-09-00090

Injured

1.4 million

Killed

180,000

2013

REVIEW ARTICLE

A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care

John T. James, PhD

400,000

premature deaths from
preventable harm to patients

Heart disease

597,689

Cancer

574,743



COPD

138,080

Stroke

129,476

Accidents

120,859

Adverse Health Events in Minnesota



Eighth Annual Public Report
JANUARY 2012

2011

316 adverse
health events

135 hospitals

59 ASCs

3 million surgeries

AE = 1 in 50,000

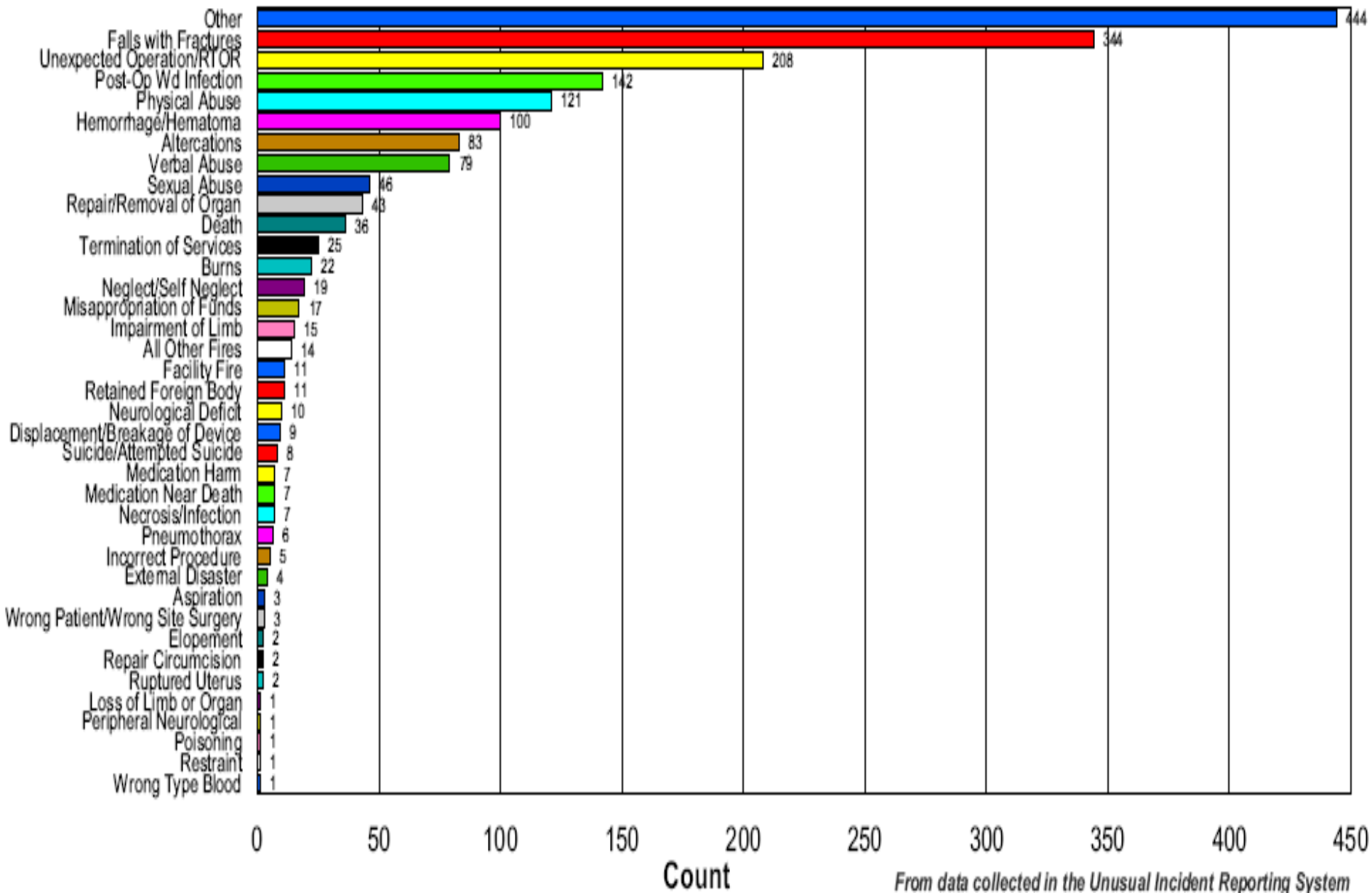
invasive procedures

Medical Error (types)

Malpractice allegation group	n (%)	Mean, US\$
Diagnosis related	100249 (28.6)	386849
Treatment related	95635 (27.2)	196960
Surgery related	84980 (24.2)	280257
Obstetrics related	22951 (6.5)	651670
Medication related	18697 (5.3)	257333
Anesthesia related	10525 (3)	419126
Monitoring related	7101 (2)	354131
Other miscellaneous	6929 (2)	176781
Equipment/product related	1872 (0.5)	128204
Intravenous and blood-products related	1080 (0.3)	294011
Behavioural health related	687 (0.1)	212494
Total	350706 (100)	313813

Unusual Event Reports

Statewide Distribution of Primary Occurrence Code by Provider Type



Wrong

site

EENY, MEENY, MINY..





U.S. surgeons operate on the wrong person or body part as often as 40 times a week.

SOME PEOPLE MIGHT SAY *this is overly cautious.*



WE SAY *in surgery, there's no such thing.*

**Wrong
patient**



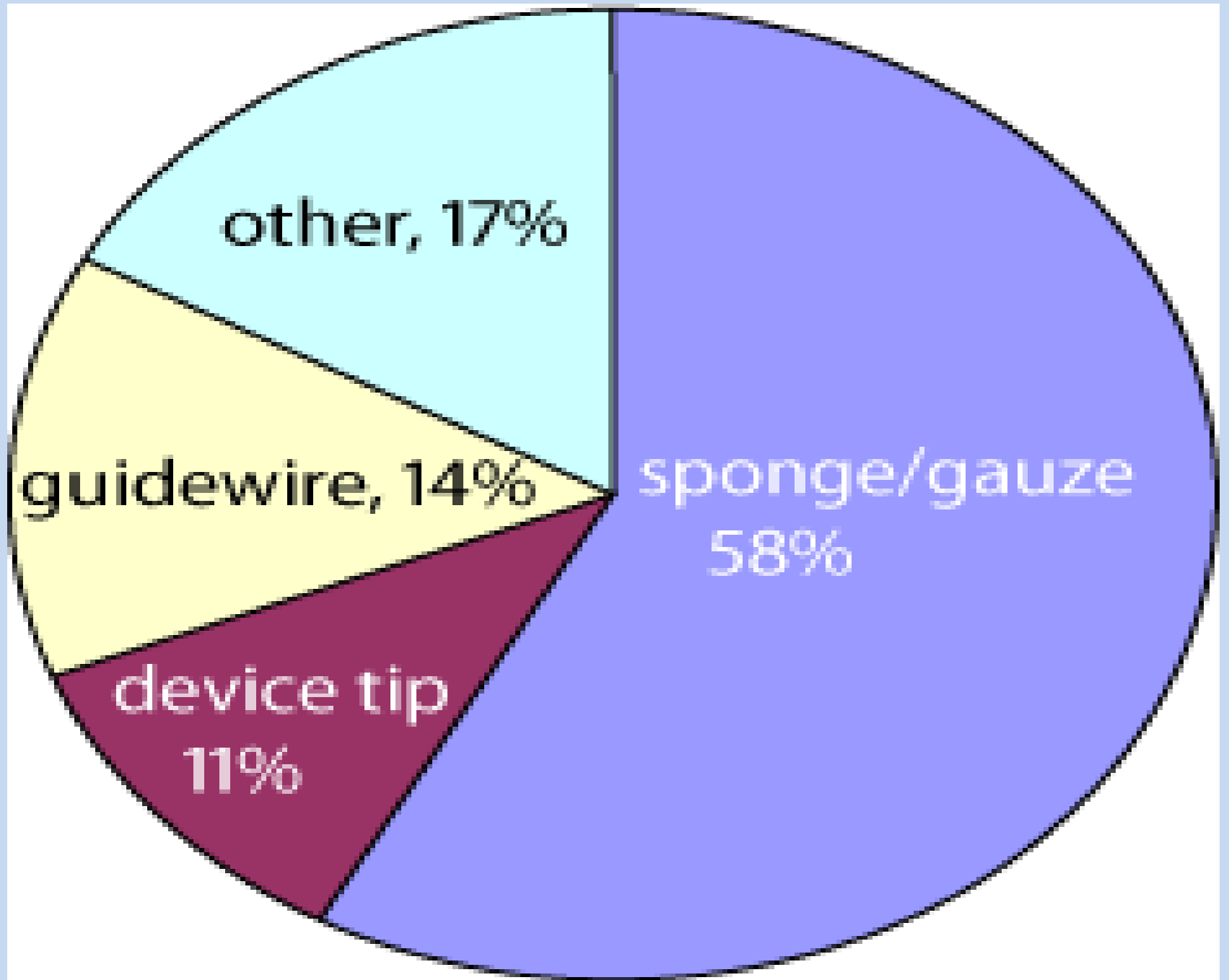
" Goodness! Not only did we cut off the wrong toe - - - it's the wrong guy! "

**Foreign
object**



39 times

per week



Falls



Malpractice

Litigation

(basic nature)

Goals

Deter unsafe practices

Compensate the injured

Errors

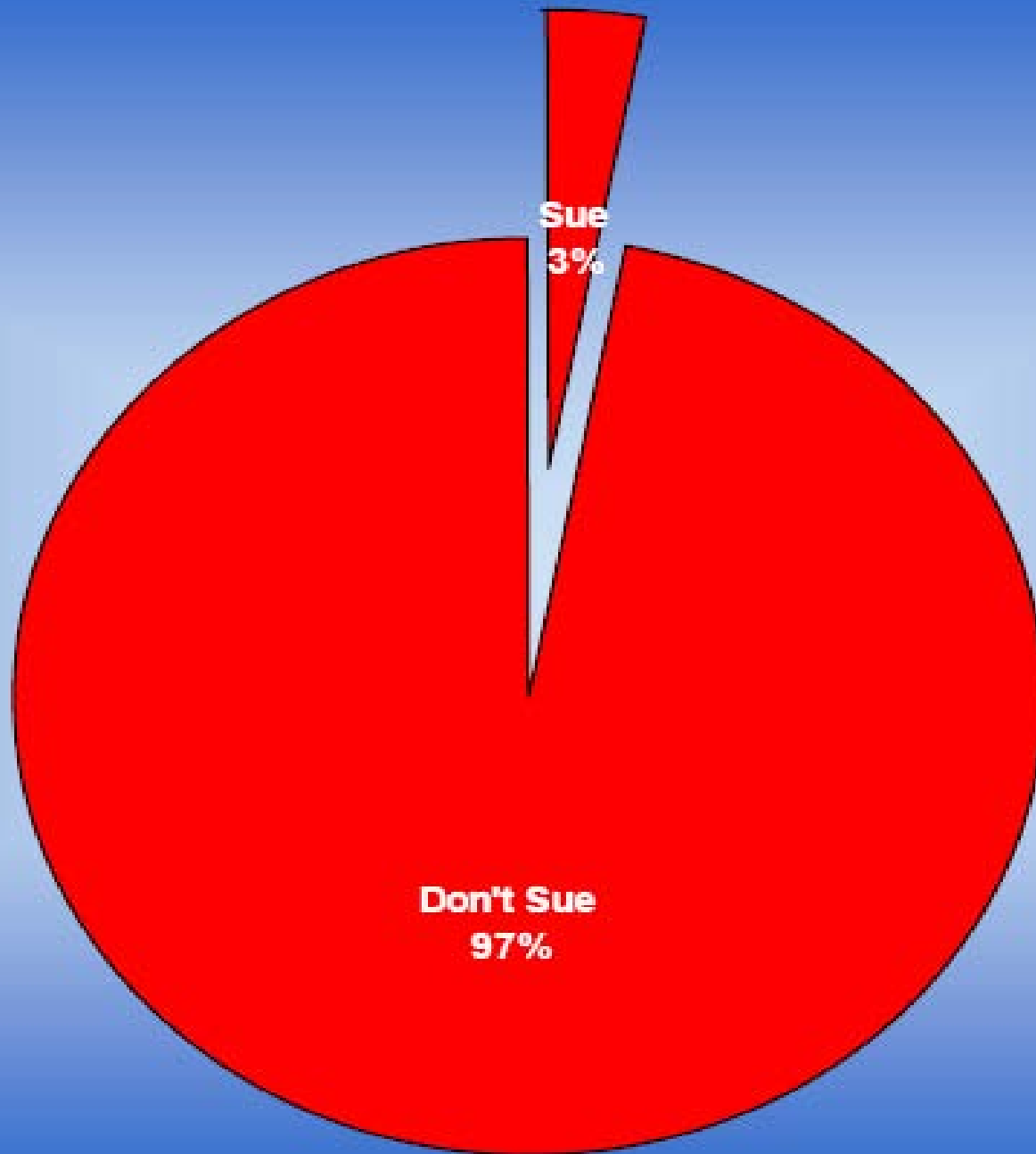
Negligent
errors

A Venn diagram on a light blue background. A large red circle is labeled 'Errors'. Inside it, a smaller dark blue circle is labeled 'Negligent errors'. A green rectangle is labeled 'Injuries' and overlaps with the bottom of the 'Negligent errors' circle.

Errors

Negligent
errors

Injuries



Errors

Injuries

Negligent
errors

Paid

100,000 patients

4000 adverse events

1000 from malpractice

125 claims (only)

60 compensation

(+ to some of 3000

non-negligent)

60 compensated claims

20 before lawsuit

35 after lawsuit filed

5 at trial

Malpractice

Litigation

(prevalence)

760,000 civil cases

Tort = 50% = 380,000

Med Mal = 2.5% = 18,000

DOJ 1992 study 75 large counties

10,000 paid claims per year

the DataBank

NATIONAL PRACTITIONER

Specialty**5%****10%****15%****20%**

Neurosurgery

3.1

19.1

Thoracic-cardiovascular
surgery

3.8

18.9

General surgery

4.2

15.3

Orthopedic surgery

3.9

14.2

Plastic surgery

2.8

12.7

Gastroenterology

1.3

11.6

Obstetrics-gynecology

2.9

11.0

Urology

2.5

10.5

Pulmonary medicine

0.9

9.3

Oncology

1.9

9.1

Cardiology

1.0

8.6

Gynecology

3.2

8.3

Neurology

1.4

7.8

LAWSUITS BY SPECIALTY

A new study shows how often physicians by specialty are sued annually and how many end up making payments to plaintiffs who have sued them.

SOURCE: "MALPRACTICE RISK ACCORDING TO PHYSICIAN SPECIALTY,"
THE NEW ENGLAND JOURNAL OF MEDICINE, AUG. 18
([HTTP://WWW.NCBI.NLM.NIH.GOV/PUBMED/21848463/](http://www.ncbi.nlm.nih.gov/pubmed/21848463/))

Standard of Care

Analogize to
informed
consent

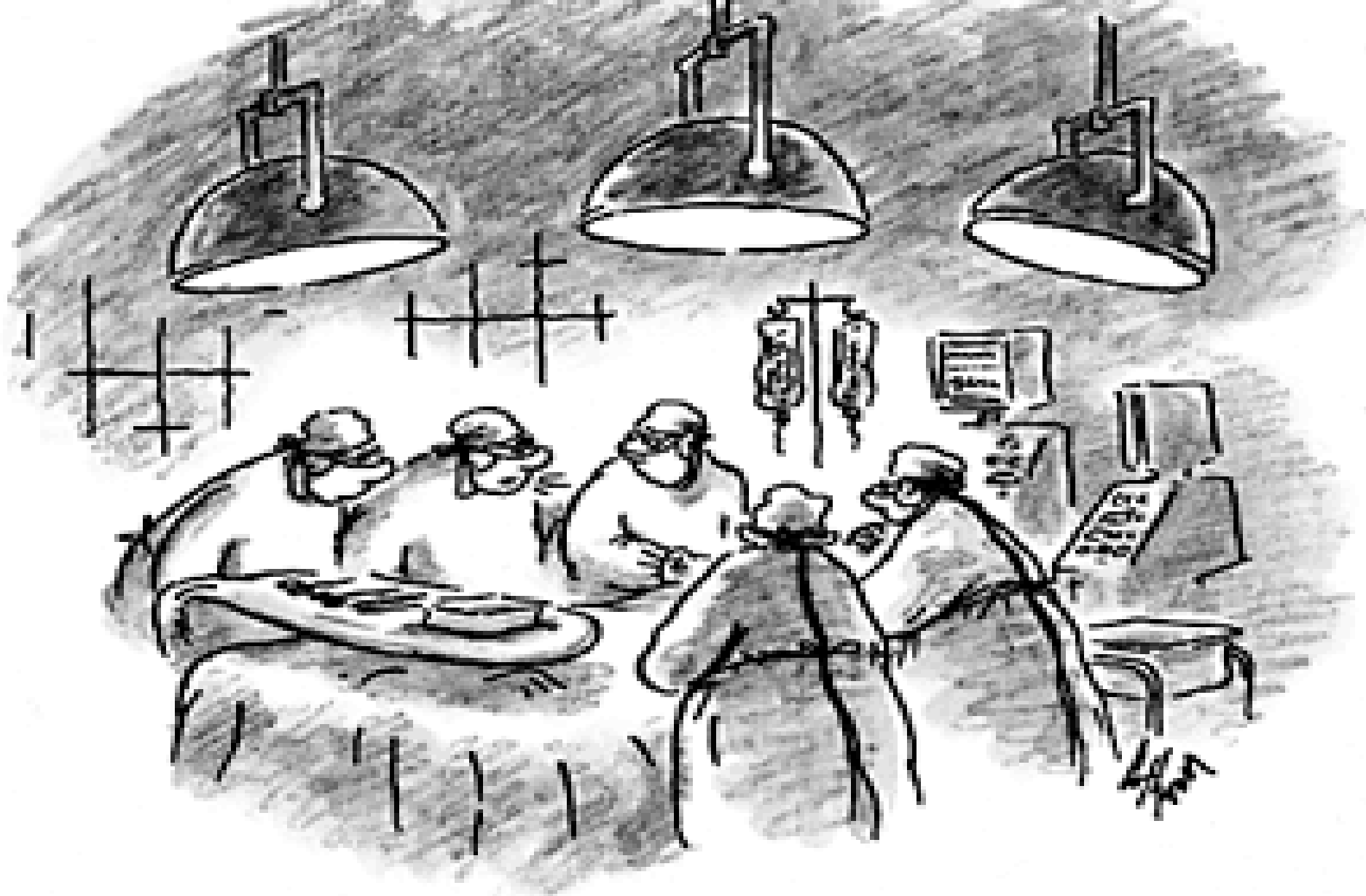
PTF claims DEF failed
to disclose X

PTF must establish
that had **duty** to
disclose X

PTF claims DEF deviated
from standard of care

PTF must establish SOC

Almost always,
PTF needs **expert**
witness to
establish SOC



“You’re doing it wrong.”

Basic

Flowcharts:

Establishing

SOC

No expert \rightarrow no SOC

No SOC \rightarrow no breach

No breach \rightarrow no case

What would the
reasonable
physician have
done in the
circumstances

7A²

DEPARTMENT OF EDUCATION
THE CITY OF NEW YORK

Borough of Manh.

REPORT CARD

P. S. 64 Boys' Dept.

Pupil Alexander Waters

Term beginning Feb. 1913 Grade 9²

J. Coombs Teacher.

SATISFACTORY: A—EXCELLENT; B—GOOD,
UNSATISFACTORY: C—POOR; D—BAD.

MONTHS

	1 st	2 ^d	3 ^d	4 th	5 th
EFFORT.....	B	B+	A	A	A
PROFICIENCY	B	B+	A	A	A
DAYS ABSENT ..	1 1/2	0	1/2	0	0
TIMES LATE	0	0	0	0	0
DEPARTMENT	A	A	A	A	A

DEFICIENT IN

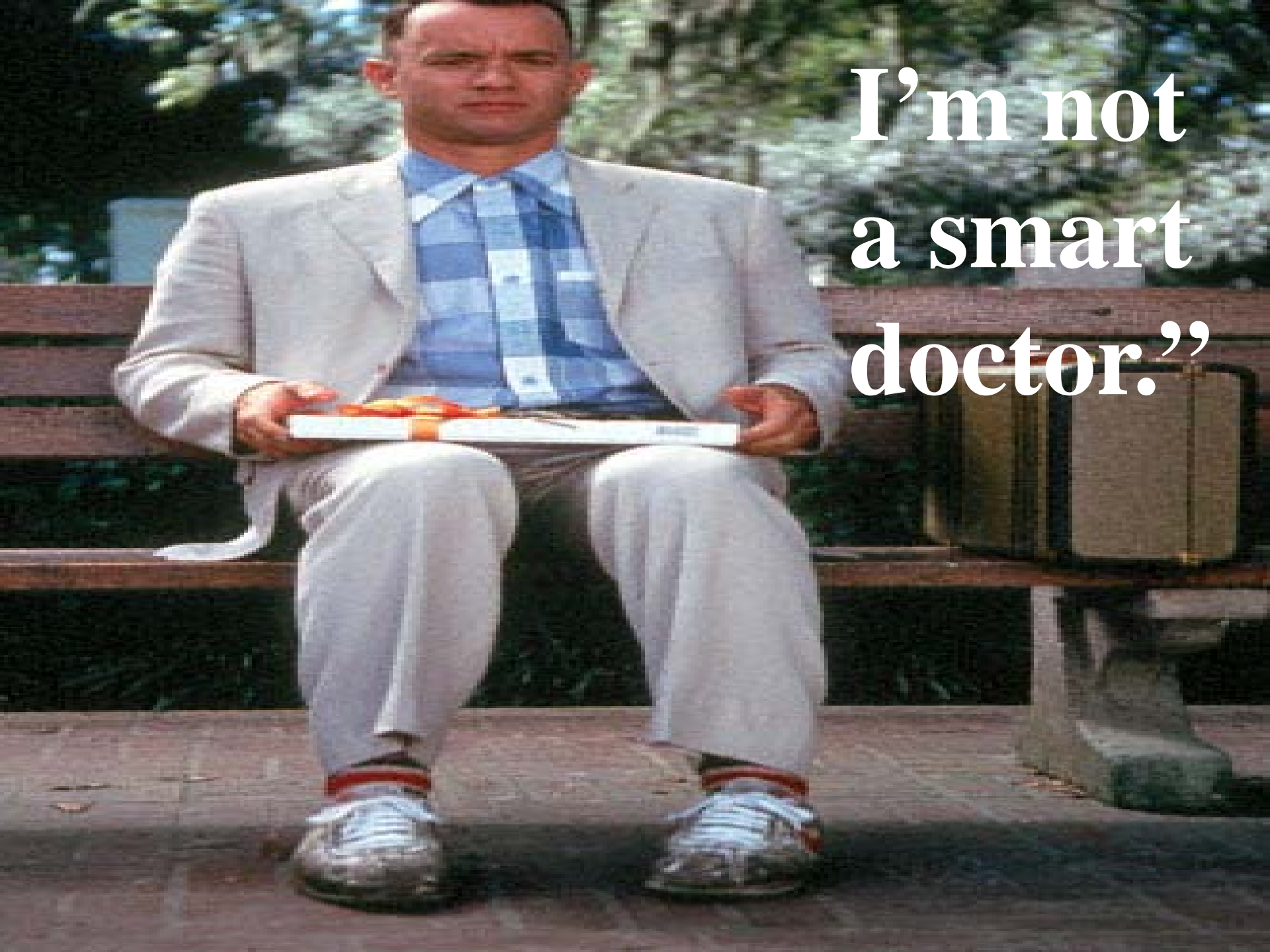
- 1st Month _____
- 2d " _____
- 3d " _____
- 4th " _____
- 5th " _____

Very excellent boy. (OVER)

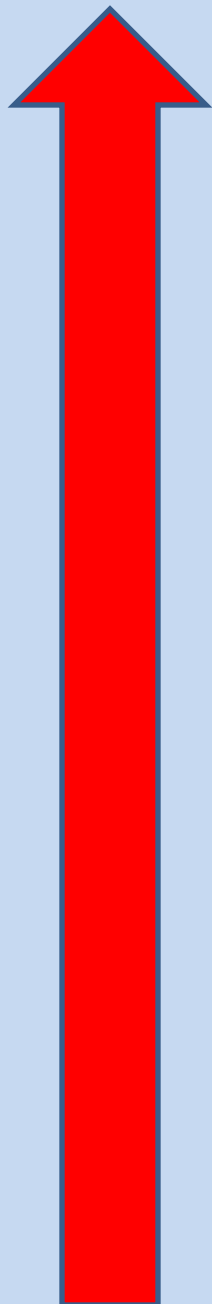
Objective
standard:
effort does
not matter

All physicians held to
same standard (but see
variations)

No Forrest Gump
defense

A man in a white suit, blue and white checkered shirt, and blue tie is sitting on a wooden park bench. He is holding a pizza in his lap. He is wearing white socks and white sneakers with red and blue stripes. A brown suitcase is on the bench to his right. The background shows green trees and a blue sky.

I'm not
a smart
doctor."



Optimal care

Very good care

Good care

Average Care

Substandard care

Negligence

Reckless care

Gross incompetence

Locke

v.

Pachman

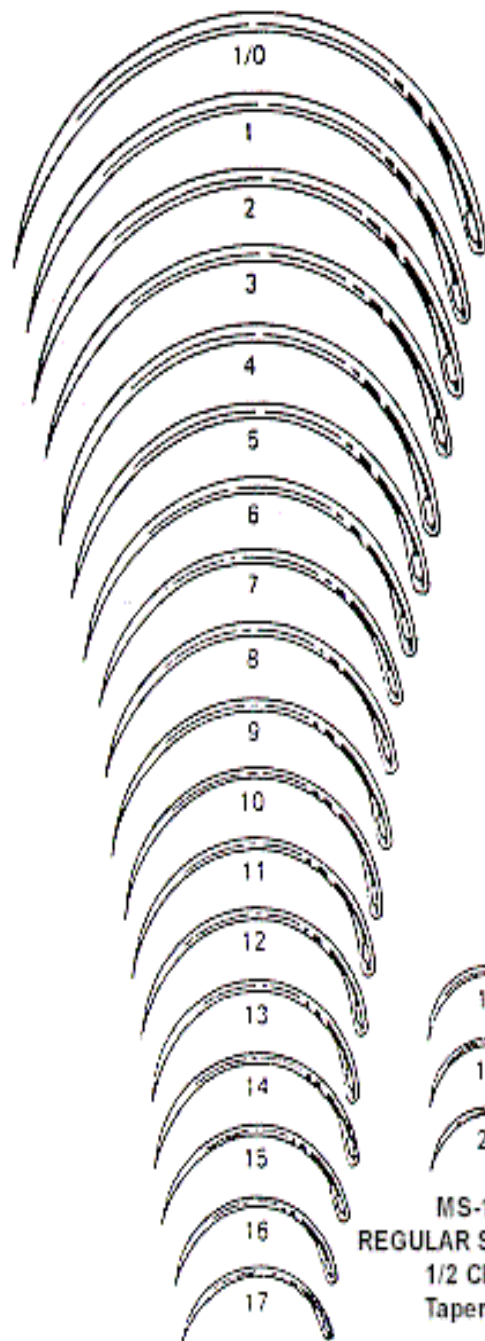


SPECTRUM

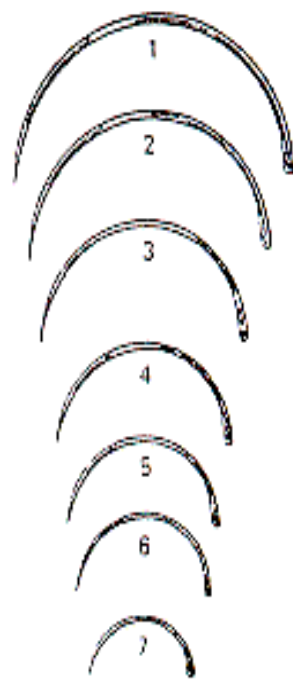
Surgical Instruments, Repairs, Instrument Accessories



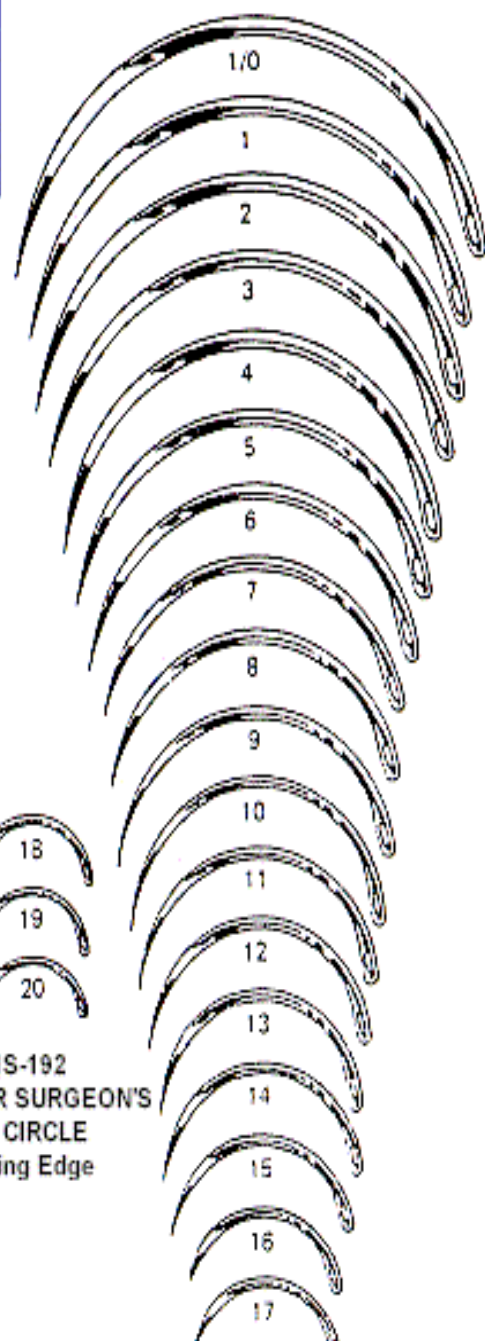
STAINLESS STEEL reusable SURGICAL NEEDLES



MS-192A
REGULAR SURGEON'S
1/2 CIRCLE
Taper Point



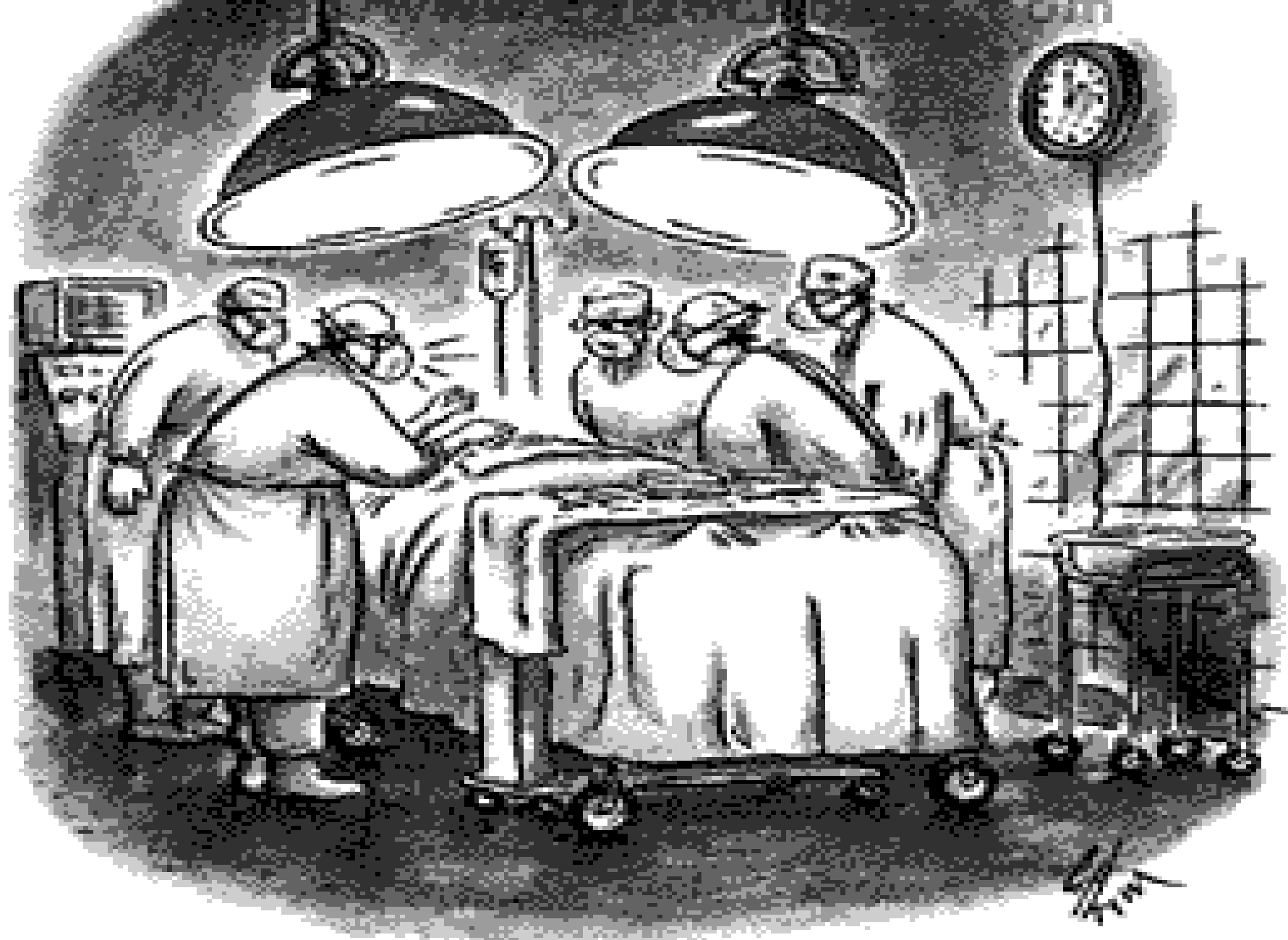
MS-150
ROUND BODIED
1/2 CIRCLE
Taper Point



MS-192
REGULAR SURGEON'S
1/2 CIRCLE
Cutting Edge

INCHES

MILLIMETERS



"If I knew where I'd lost the sponge, it wouldn't be lost, now, would it?"

PTF claims:

Wrong size needle

Used it wrong

Should have found it

But PTF expert
testified “it
happens”

“Oh, don’t worry about it . . . I will take care of you. I have **malpractice** insurance. I did something **freaky** to you. I **fucked you up.**”

Standard of Care

(variations)

There is no single
standard of care
applicable to all
physicians

Geography

Economic factors

Specialization

School of thought

Judicial

CPG

Geographical

SOC

variations

DEF measured
against the
**reasonable
physician**

What would the
reasonable
physician have
done in the
circumstances

But **which**

reasonable

physician

The reasonable
physician

where

1. Strict locality
2. Statewide
3. Same or similar
4. National

MD in locality

MD in state

MD in same/similar

MD in USA

62 PAGES OF EVERY NEW MODEL ON SALE!

CAR AND DRIVER

SEPTEMBER 2012

INTELLECTUAL INDEPENDENCE. EXPERIENCE.

NEW CARS

for

2013

**BEST NEW
VEHICLE
SAFETY
RATINGS
AWARDED
AHEAD**



FORD MUSTANG



CADILLAC ATS



FORD FOCUS ST

Strict

locality

Used to be the rule
everywhere

No longer followed
anywhere, except
Idaho

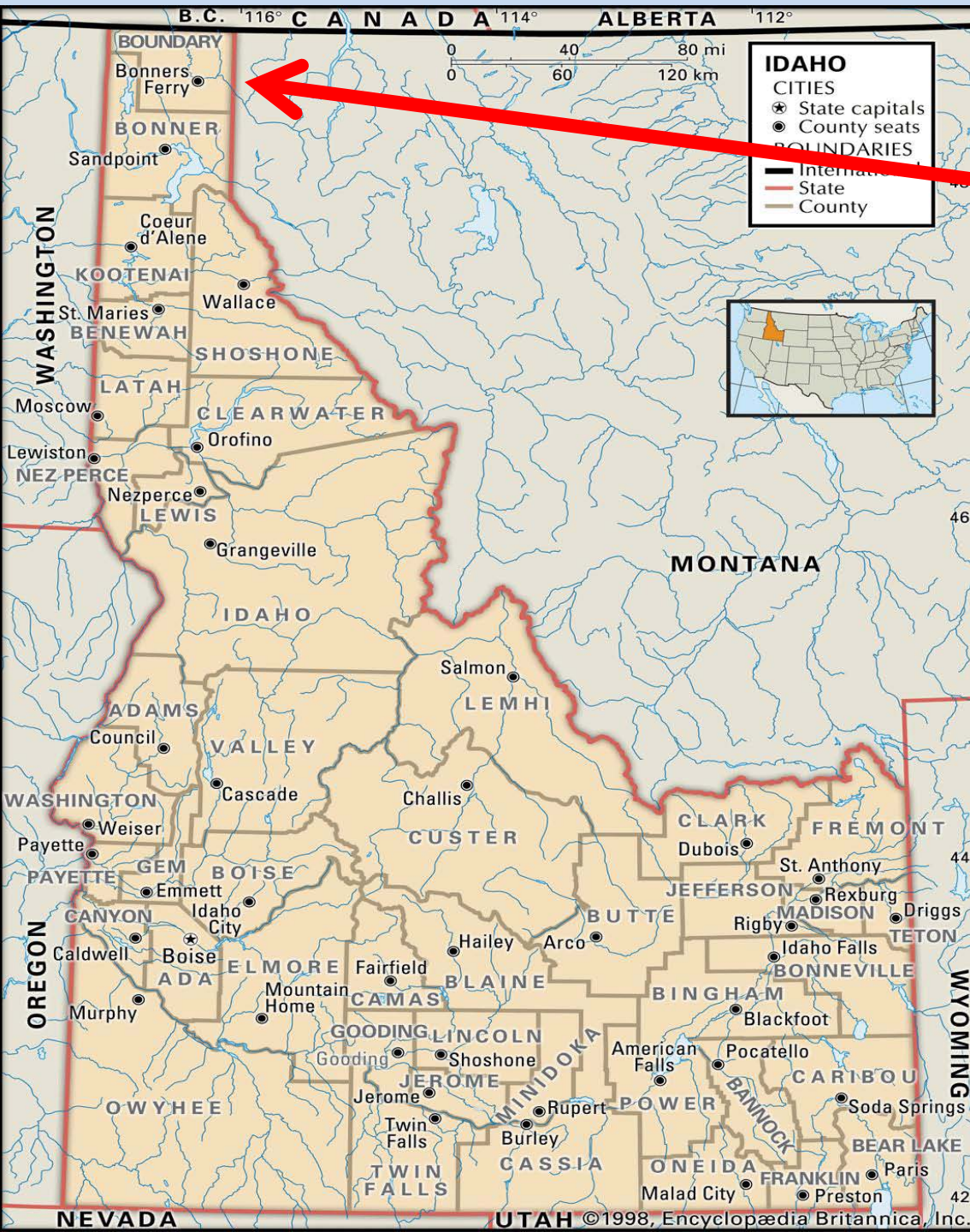
Idaho Stat.
6-1012



IDAHO

“... as an essential part of his or her case in chief ... negligently failed to meet the applicable standard of health care practice **of the community** in which such care allegedly was or should have been provided ...”

“in comparison with similarly trained . . . providers . . . in the **same community, . . . that geographical area . . .** nearest to which such care was or allegedly should have been provided.”



MD in
Bonner's
Ferry held
to
reasonable
physician in
Bonner's
Ferry

VERY few
physicians know
the standard of
care in specific
Idaho towns

IDAHO



Mass General
expert **can**
know SOC

Formerly Boise

Learns it - for
the case

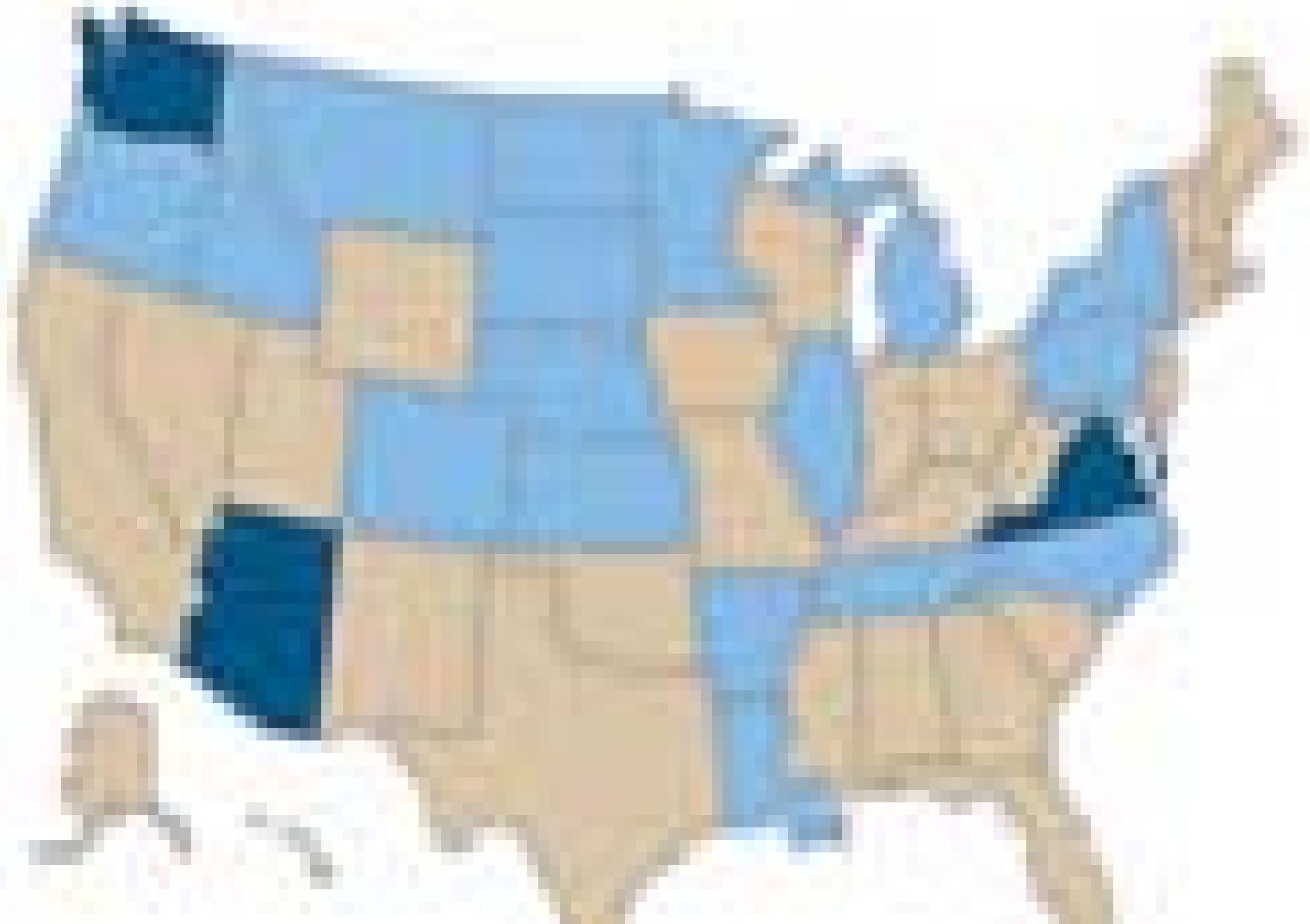
Statewide

Statewide Standard#

Arizona: Ariz Rev Stat §12-563 (2005)

Virginia: Va Code Ann §8.01-581.20 (2006)

Washington: Wash Rev Code §7.70.040 (2006)



DEF duty =
reasonable MD
in **state** of DEF



Dr.
Merenstein
followed
EBM

Yet he still
loses

Same or

similar

Same or Similar Community Standard¶

Arkansas: Ark Code Ann §16-114-206 (2006)

Illinois: *Jinkins v Lee*, 209 Ill2d 320, 282 Ill Dec 787, 807 NE2d 411 (2004)

Kansas: *Tompkins v Bise*, 259 Kan 39, 910 P2d 185 (1996)

Maryland: Md Code Ann, [Cts & Jud Proc] §3-2A-02(c) (2006)

Michigan: Mich Comp Laws Serv §600.2169 (2006)

Minnesota: *Lundgren v Eustermann*, 370 NW2d 877 (Minn 1985)

Nebraska: Neb Rev Stat §44-2810 (2006)

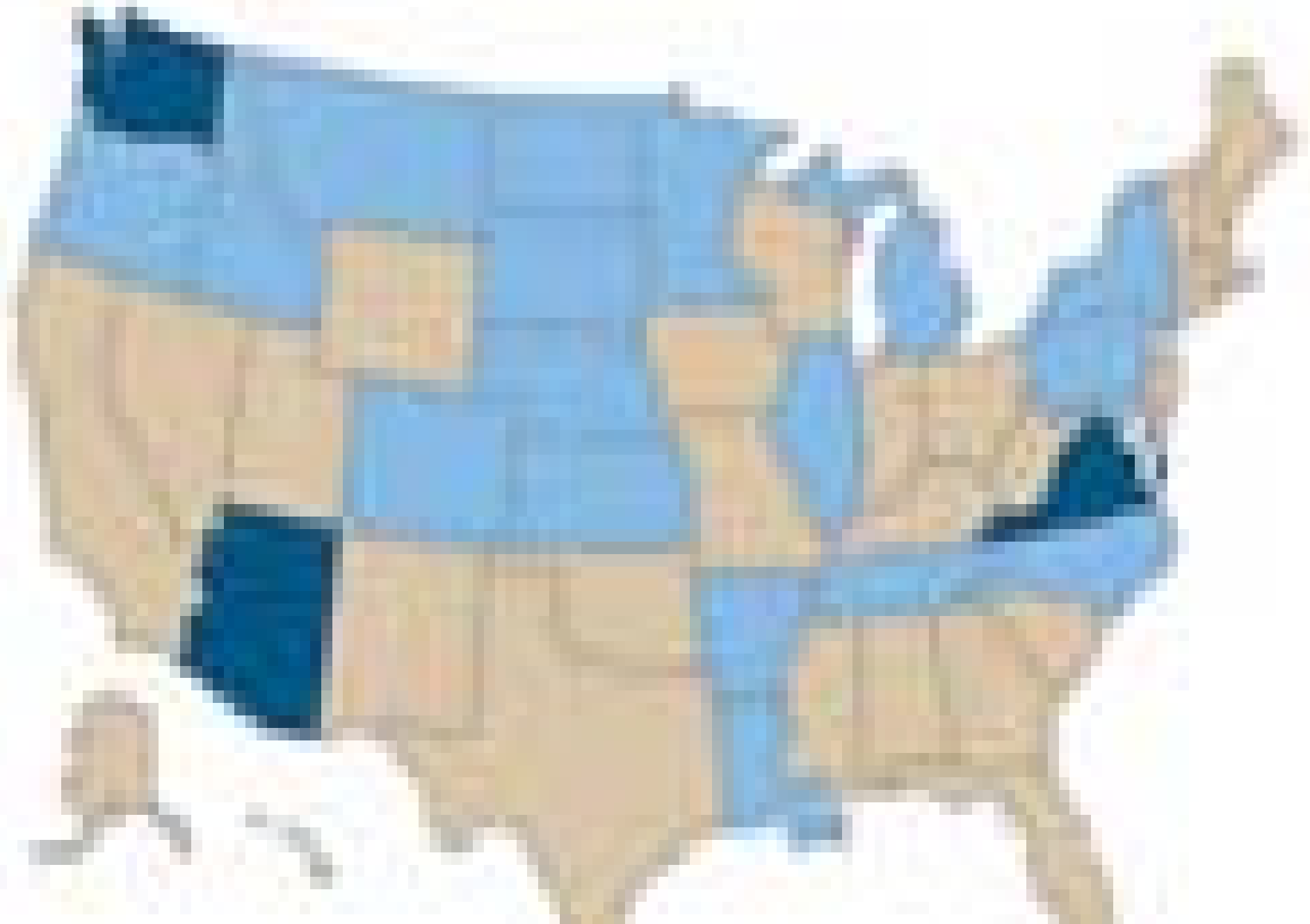
North Carolina: NC Gen Stat §90-21.12 (2006)

North Dakota: *Winkjer v Herr*, 277 NW2d 579 (ND 1979)

Oregon: Or Rev Stat §677.095 (2006)

Tennessee: Tenn Code Ann §29-26-115 (2005)

South Carolina: SC Code Ann §16-16-10 (2006)



DEF duty to act as
reasonable physician
in DEF community
or one similar to it

Community size

Hospital size

Number & type medical
facilities

Discussed with providers

Visited hospital

Johnson v. Richardson (Tenn. App. 2010)

Tennessee is a “same or similar jurisdiction”

Expert: Springfield, MO

Defendant: Memphis, TN

This is a qualification issue

A question for the court

Chapel

v.

Alison

DEF

Livingston, MT
GP

PTF
expert

Denman, MA
Orthopedic
surgeon

PTF expert need not
be from Bozemon

PTF expert must be
familiar with SOC in
place like Bozemon

Expert can acquire that
knowledge specifically for
litigation

e.g. visit Bozemon (or
similar)

National

National Standard†

Alabama: Ala Code §6-5-548 (2005)

Alaska: Alaska Stat §09.55.540 (2006)

California: *Barris v County of Los Angeles*, 20 Cal 4th 101, 972 P2d 966, 83 Cal Rptr 145 (1999)

Connecticut: Conn Gen Stat §52-184c (2006)

Delaware: Del Code Ann, tit 18, §6801 (2006)

Florida: Fla Stat §766.102 (2006)

Georgia: *McDaniel v Hendrix*, 260 Ga 857, 401 SE2d 260 (1991)

Hawaii: *Hirahara v Tanaka*, 87 Haw 460, 959 P2d 830 (1998)

Indiana: *Vergara v Doan*, 593 NE2d 185 (Ind 1992)

Iowa: *Estate of Hagedorn ex rel Hagedorn v Peterson*, 690 NW2d 84 (Iowa 2004)

Kentucky: *Branham v Nazar*, 2004 Ky App LEXIS 312

Maine: *Downer v Veilleux*, 322 A2d 82 (Me 1974)

Massachusetts: *Brune v Belinkoff*, 354 Mass 102, 235 NE2d 793 (1968)

Mississippi: *Hall v Hilbun*, 466 S2d 856 (Miss 1985)

Missouri: Mo Rev Stat §538.225 (2006)

Nevada: Nev Rev Stat Ann §41A.009 (2006)

New Hampshire: NH Rev Stat Ann §507-C:2 (2006)

New Jersey: *Velazquez v Portadin*, 163 NJ 677, 751 A2d 102 (2000)

New Mexico: *Pharmaseal Laboratories Inc v Goffe*, 90 NM 753, 568 P2d 589 (1977)

Ohio: *Bruni v Tatsumi*, 46 Ohio St 2d 127, 346 NE2d 673 (1976)

Oklahoma: Okla Stat tit 76, §20.1 (2005)

Rhode Island: *Sheeley v Memorial Hospital*, 710 A2d 161 (RI 1998)

South Carolina: *Durham v Vinson*, 360 SC 639, 602 SE2d 760 (2004)

Texas: *Am Transitional Care Centers of Tex Inc v Palacios*, 44 Tex Sup Ct J 720, 46 SW3d 873 (2001)

Utah: *Dalley v Utah Valley Regional Medical Center*, 791 P2d 193 (Utah 1993)

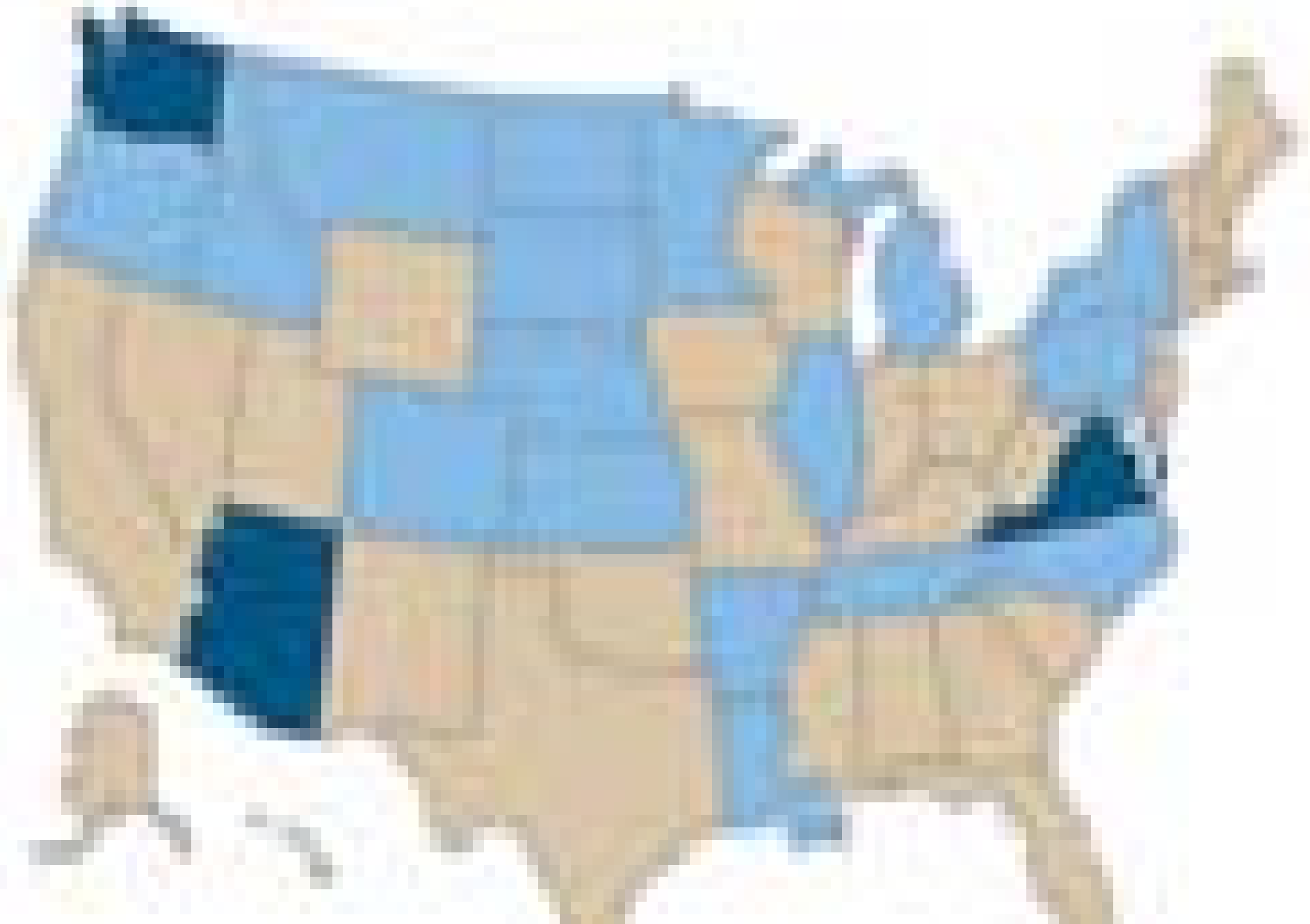
Vermont: Vt Stat Ann tit 12, §1908 (2006)

Washington, DC: *Morrison v MacNamara*, 407 A2d 555 (DC 1979)

West Virginia: W Va Code §55-7B-3 (2006)

Wisconsin: *Phelps v Physicians Ins Co of Wis Inc*, 282 Wis2d 69, 698 NW2d 643 (2005)

Wyoming: Wyo Stat Ann §1-12-601 (2006)



DEF duty to act as
reasonable physician
in USA

(majority standard)

Physician expected to possess
medical **knowledge** and to
exercise medical **judgment** as
possessed by reasonable
doctor **anywhere in the**
United States



POPULATED PLACES

- 1,000,000 and over
- 500,000 - 999,999
- 100,000 - 499,999
- 25,000 - 99,999
- 2,500 and less
- National capital
- State or provincial capital
- Urban area

- Chicago
- Seattle
- Osaka
- Frankfurt
- Geneva
- Washington
- Albany

TRANSPORTATION

- Interstate limited access highway
- Other principal highway
- Road
- Railroad

PHYSICAL FEATURES

- Stream, perennial, intermittent
- Lake, perennial, intermittent
- Railway (meter)

Highest elevation in state: three
Other elevations: three
Feet color



Compiled by U.S. Geological Survey
2001

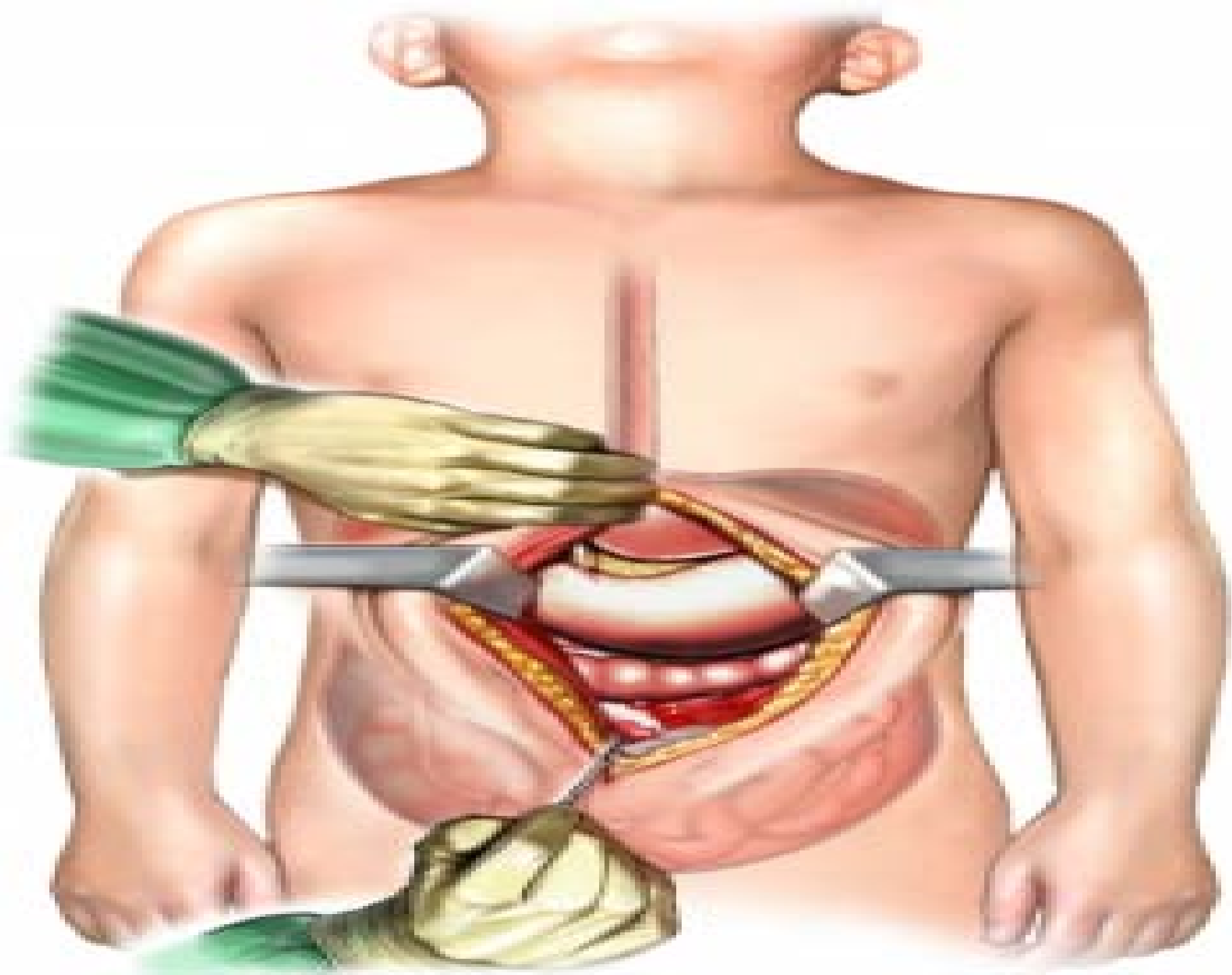


Hall

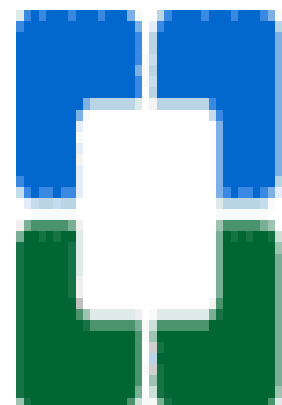
v.

Hillbun





1. Decision to operate
2. Surgery itself
3. Post-op care
4. Sponge left



Cleveland Clinic

Ranked among America's Top Hospitals
by U.S. News & World Report

Economic

SOC

Variations

This is a variation
ONLY when already
using **national**
standard

Assumes **single**
SOC for USA

But DEF can argue
variation for
resource reasons

**Standard of care
adjustment for
economic
reasons**

Still a **national**
standard re
knowledge &
judgment

But physician only
must use **resources**
as are reasonably
available

Jurisdiction

```
graph TD; A[Jurisdiction] --> B[Statewide]; A --> C[Same or similar]; A --> D[National]; D --> E[Can still argue resources]
```

Statewide

National

Same or
similar

Can still argue
resources

Specialization

SOC variations

**Standard of care
adjustment for
medical
credentials**



American Board of Medical Specialties

Higher standards. Better care.®

Board Certification goes beyond
basic medical licensure

3-6 years of training
Examination

Dermatology

Emergency Medicine

Surgery

Orthopedic surgery

Pediatrics

Anesthesiology

Board certified

always held to

national

standard

Even in

Idaho (strict locality)

Minnesota (same or
similar jurisdictions)

Virginia (statewide)

Standard = what is
“held out,” not
actual credentials

Geography

Recap

Assume expert is
from Mayo Clinic
(Rochester, MN)

DEF in Boise



DEF in Seattle



DEF in Grand Marais



DEF in St. Louis



Strict locality

Statewide

Same or similar

Nationwide

May be

same

standard

But still an important rule
of **evidence** re: how
standard established

**Standard of care
variations by
school of
thought**

A black and white close-up portrait of a man with dark, wavy hair and a mustache. He is wearing round, thin-rimmed glasses and looking directly at the camera with a neutral expression. The background is a dark, solid color.

**You may say I'm a SOC,
but I'm not the only one.**

Standard of care

established


through PTF

experts



SOC 2

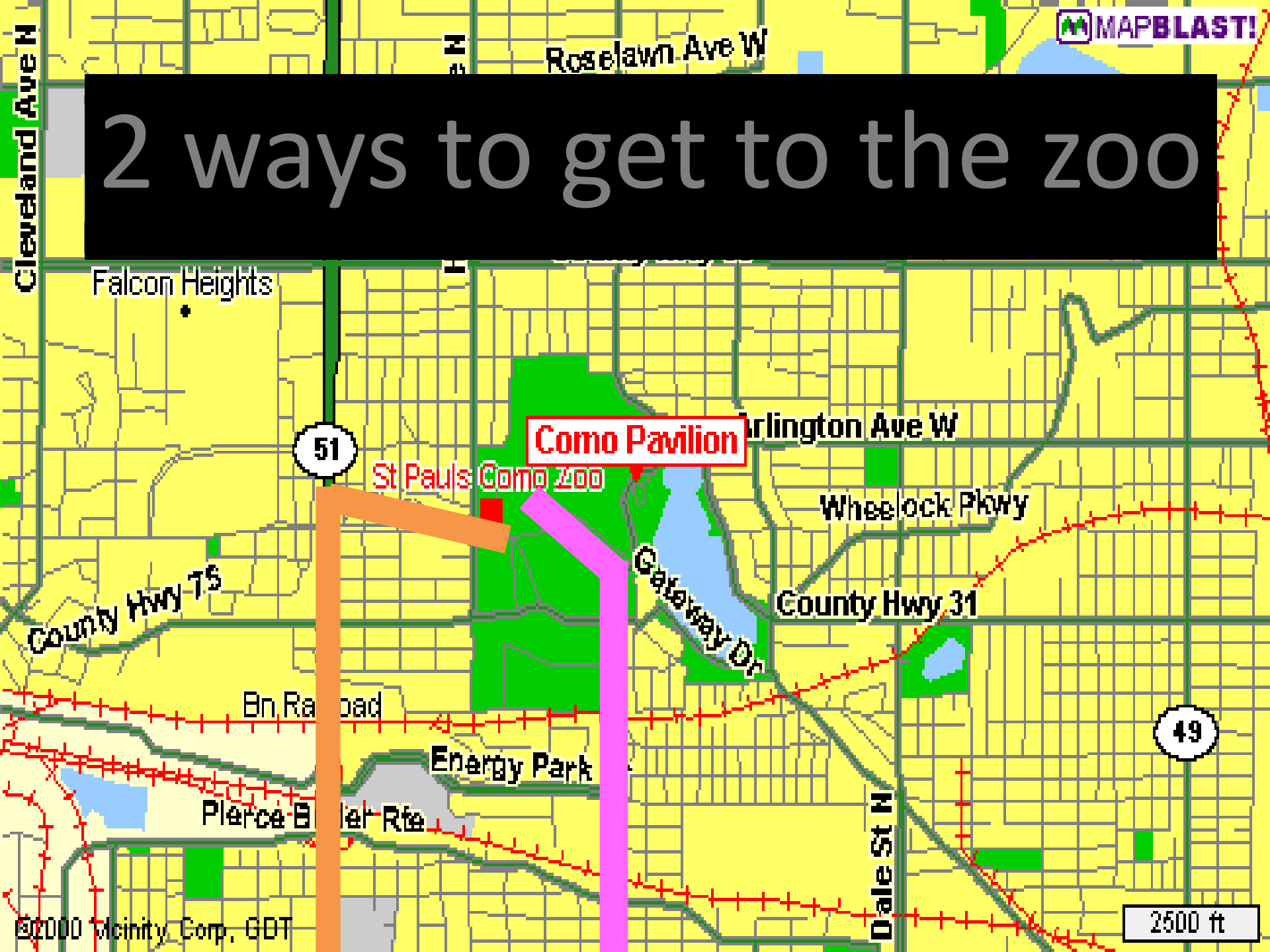
Established
by DEF experts



SOC 1

Established
by PTF experts

2 ways to get to the zoo



Como Pavilion

St Pauls Como Zoo

51

49

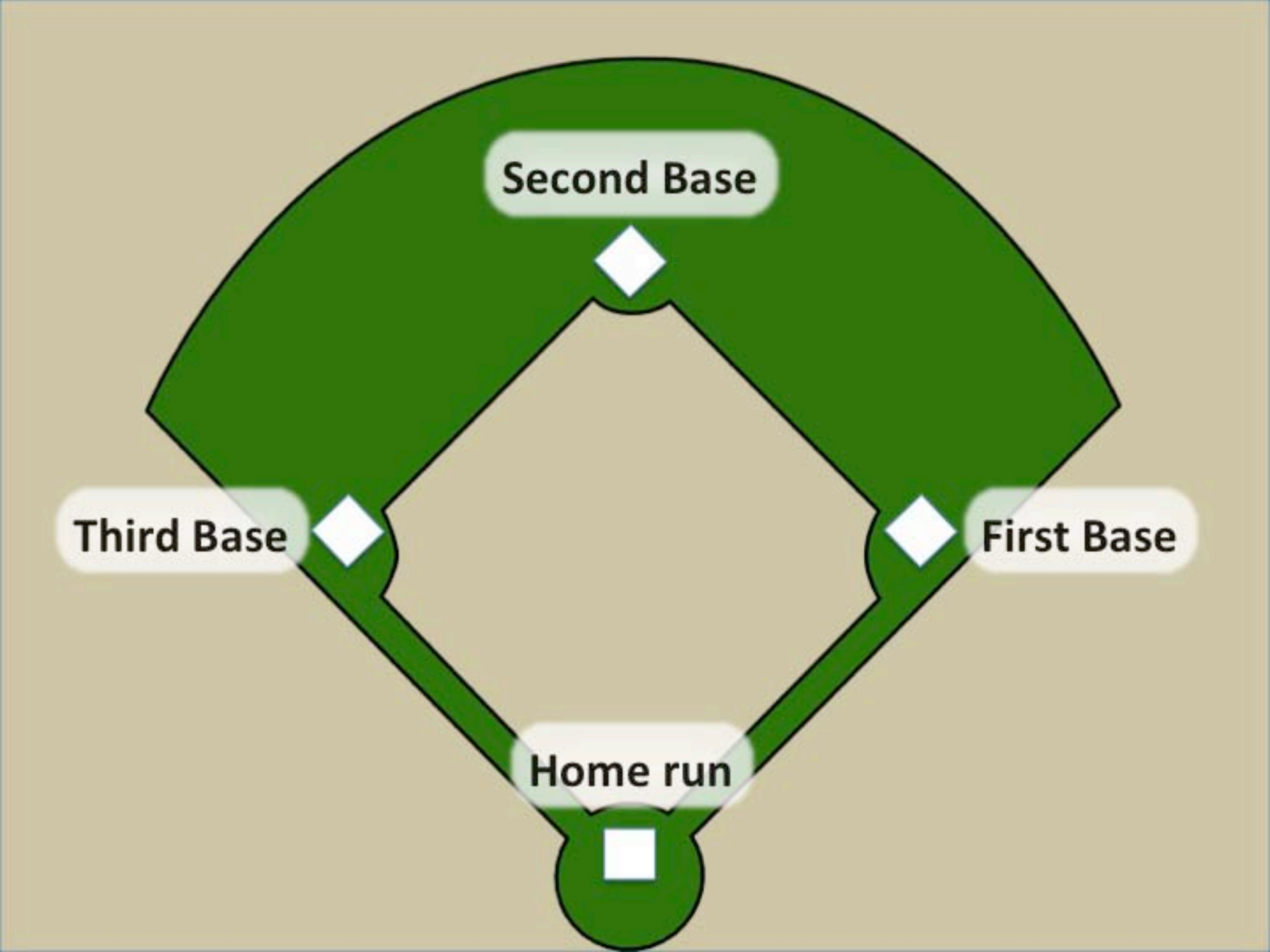
2500 ft



Dignity
2012

THE CAMPAIGN FOR
DEATH WITH DIGNITY

Sufficient that
DEF conduct
complies with
either one



Second Base

Third Base

First Base

Home run



Compliance with
SOT **as good as**
compliance with
SOC established
by PTF

Jury does **not**
determine
which SOC is
“better”

Jury instruction:

Sufficient that DEF
complied with **either**
school of thought if has
“respected advocates
and followers”

DEF has **burden** to
establish SOT

How does she do
that?

All physicians

Minority, but
Non-insignificant

BOTH

Reputable and
respected

AND

Considerable
number

SOT can be used in
any jurisdiction -- no
matter how SOC is
established

DEF must establish
SOT in the **same way**
PTF establishes SOC
(e.g. geographical)

In Arizona

(reputable & respected
in Arizona)

+

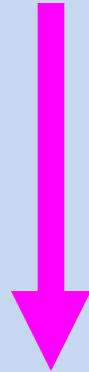
(considerable number
in Arizona)

Statewide



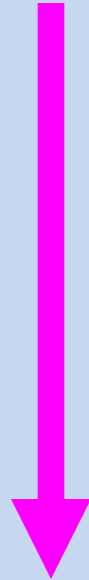
DEF can
argue
statewide
SOT

Same or
similar



DEF can argue
same or sim
SOT

National



DEF can
argue
national
SOT

Jandre

v.

WIPFCF



FACE.



Has their face fallen on
one side?
Can they smile?

ARMS.



Can they raise both
arms and keep
them there?

SPEECH.



Is their
speech slurred?

St. Joseph Hospital



Auscultate the carotid artery to determine if a bruit (blowing, swishing sound indicating blood flow turbulence)



Bell's Palsy

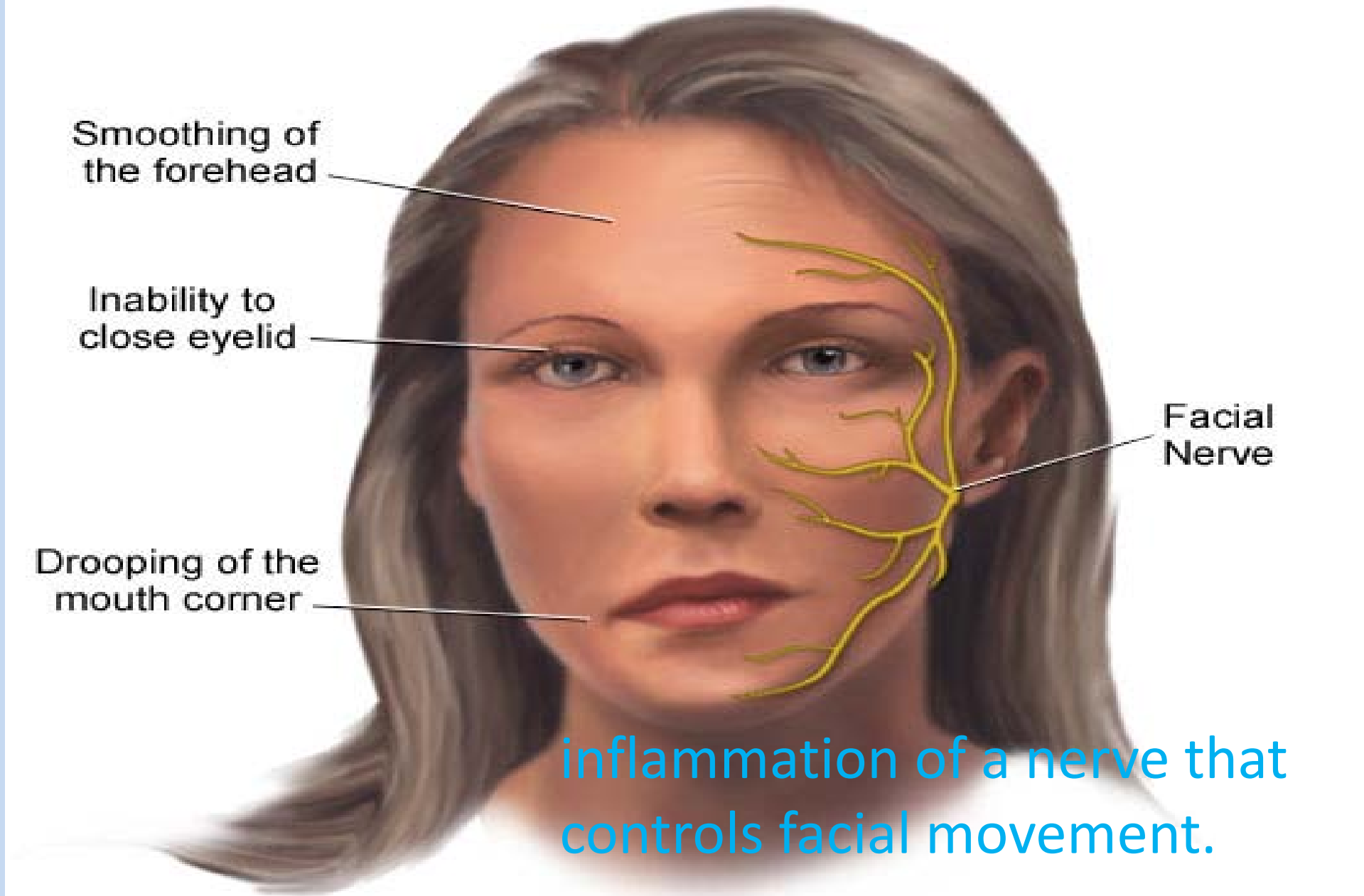
Smoothing of
the forehead

Inability to
close eyelid

Drooping of the
mouth corner

Facial
Nerve

inflammation of a nerve that
controls facial movement.



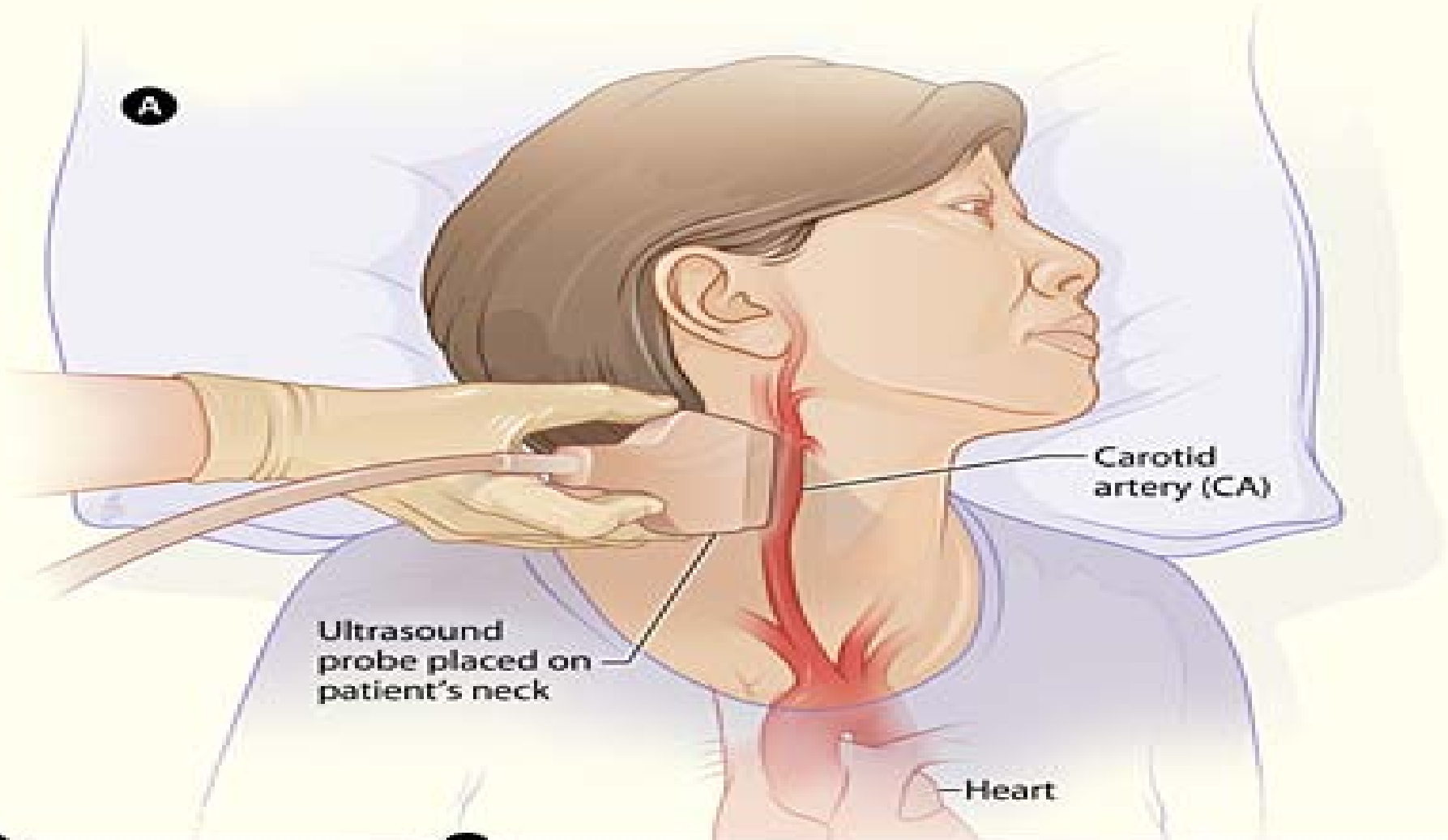


Reduced
blood flow

Blood
clot

Massive stroke days later

A

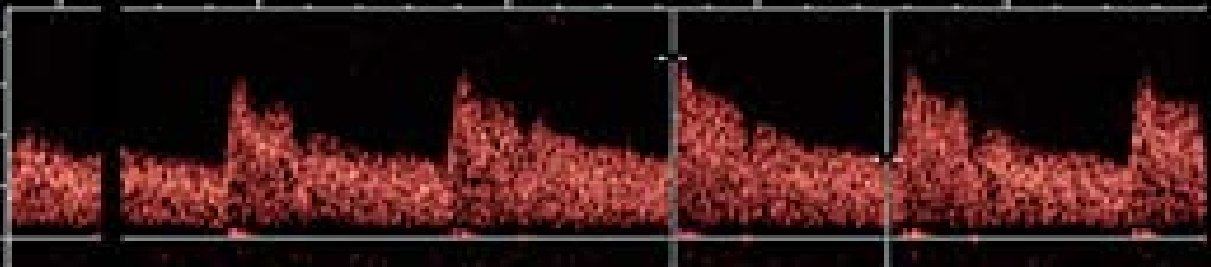


B



Color ultrasound image

C



Sound waveform of flowing blood

Not negligent to arrive at the wrong diagnosis.

DEF can do everything “right” and come up with the wrong answer.



Recap

Malpractice duty: do
what **reasonable**
physician would do in
circumstances

Lay juries do not
know what
reasonable
physician
would do

Need **expert**

witnesses to

establish SOC

almost always

2 **OTHER** ways

to set

standard of

care



Court / Judicial

CPG

**Judicial (court)
set standards
of care**



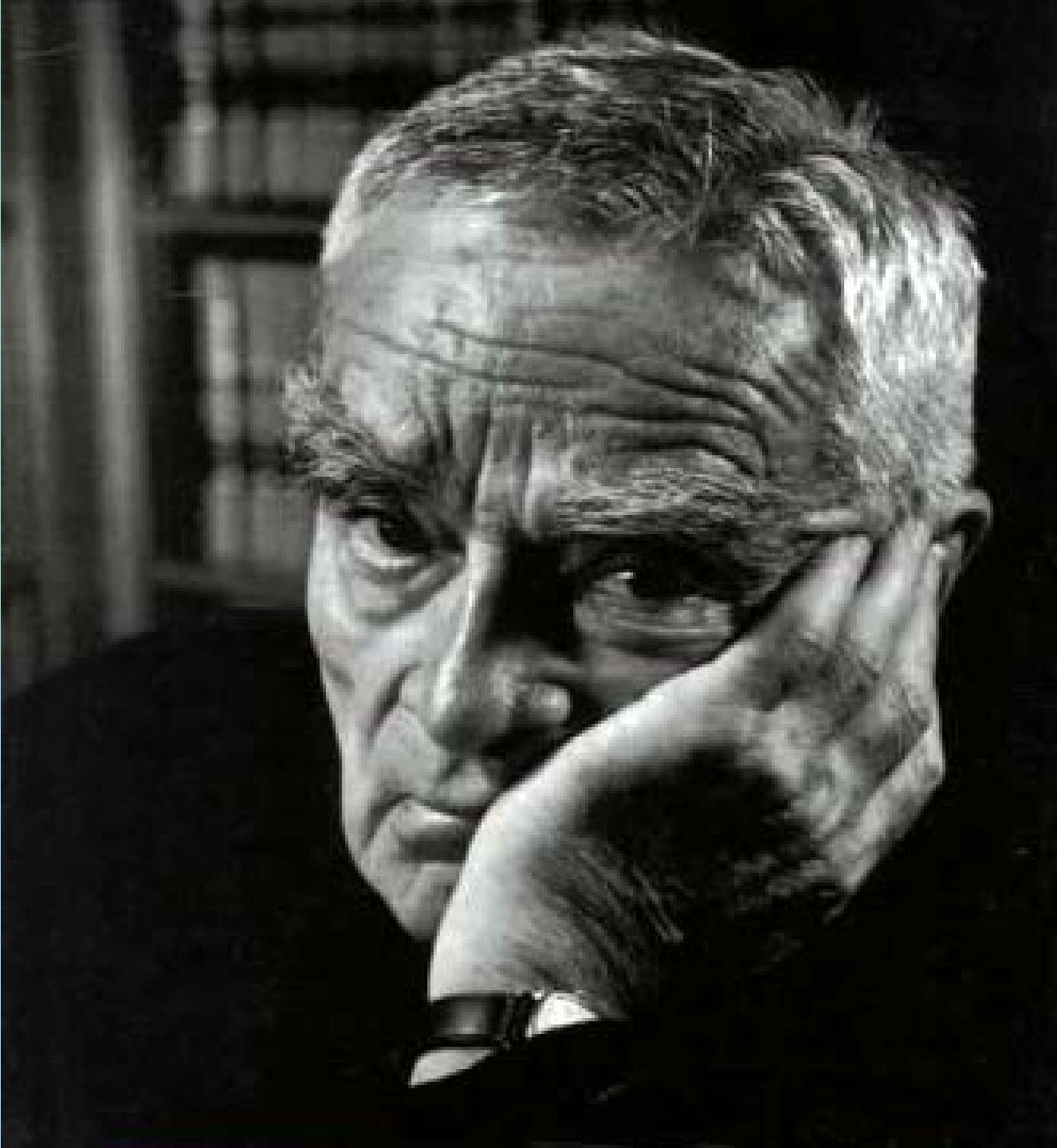
The T.J. Hooper (2d Cir. 1932)

A black and white photograph of the New York City skyline, featuring the Empire State Building as the central focus. In the foreground, several tugboats are on the water, with one in the lower center pulling a long barge and emitting a thick plume of white smoke. The sky is overcast and hazy.

GEORGE MATTESON

TUGBOATS of NEW YORK

An Illustrated History



“In most cases reasonable prudence is in fact **common prudence**, but strictly it is never its measure.”

“A **whole calling** may have unduly lagged in the adoption of new and available devices.”

Rest. Torts 2d § 285(c)

The standard of conduct . . .
may be established by
judicial decision

Extremely

rare in

med mal



Helling

v.

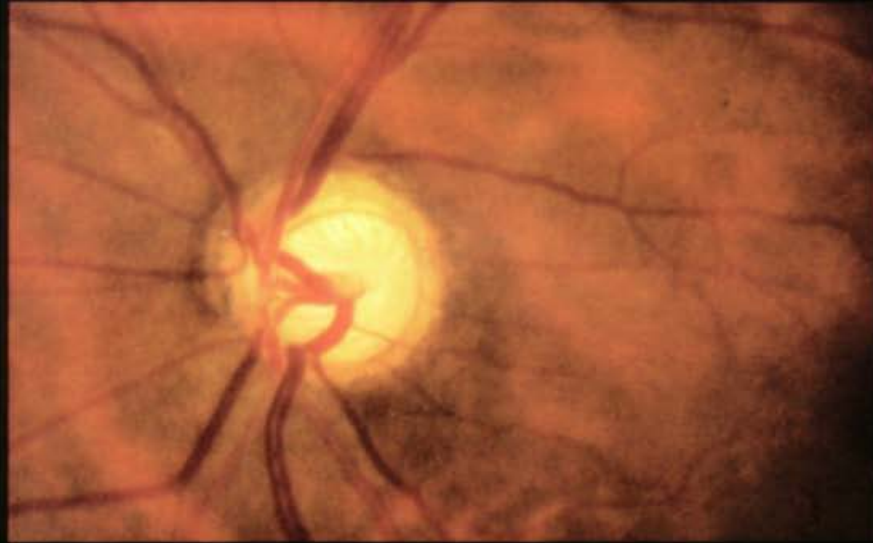
Carey

Infamous

Much criticized

Glaucoma...

...afflicts 3 million Americans...



...but half of them haven't been diagnosed because they haven't had an eye exam.



Expert witnesses

“SOC is **not** to test
for glaucoma
under age 40”

NORMALLY

“**compliance** with . . .
standard of the
profession . . .
insulates from liability”

SCOW: “Who
cares! They
should test the
under 40s.”

But Helling rare,
rare exception

With the medical profession common prudence “strictly is the measure” of the standard of care

Conformance to
their own rules,
protocols, practices
is a complete
defense for clinician

Delegation of
rulemaking power
to the medical
profession

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"I do not think I'm God. God-like, yes, but not God."

**Standard of
care set
with CPGs**

CPG

Clinical
practice
guideline

Guideline based
on **systematic**
review of clinical
evidence.

Legislature

comply with

CPG = safe

harbor

Expert

Witnesses

Main way to
establish SOC

Let's examine
further



“Testifying against another doctor would violate my ethics, so I’ll have to charge double.”

2 main
issues

Qualification

Credibility &
weight

Qualification
determined by
judge

Does expert even
get to testify

Qualification by
geography (know
SOC that applies
to DEF)

Qualification by
expertise

Before we get started, can I take a closer look at your credentials?



Thompson

v.

Carter

Bactrim

Sulfamethoxazole

+ Trimethoprim

200/40 mg

100 mg/20 mg



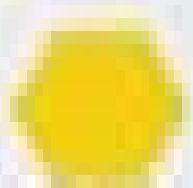
Bactrim

Sulfamethoxazole

+ Trimethoprim

400/80 mg

100 mg/20 mg



Experts should normally be
of the **same** specialty

But title and degrees do not
matter as much as
knowledge and training

There have been many courtroom dramas
that have glorified
The Great American Legal System.

This is not one of them.

MY COUSIN
VINNY

A COMEDY BY TIM GONTSIS

Look to **specific** issue at hand

General surgeon can testify against **plastic** surgeon re general surgical issues

Jones

v.

Bogalkotalkar

DEF

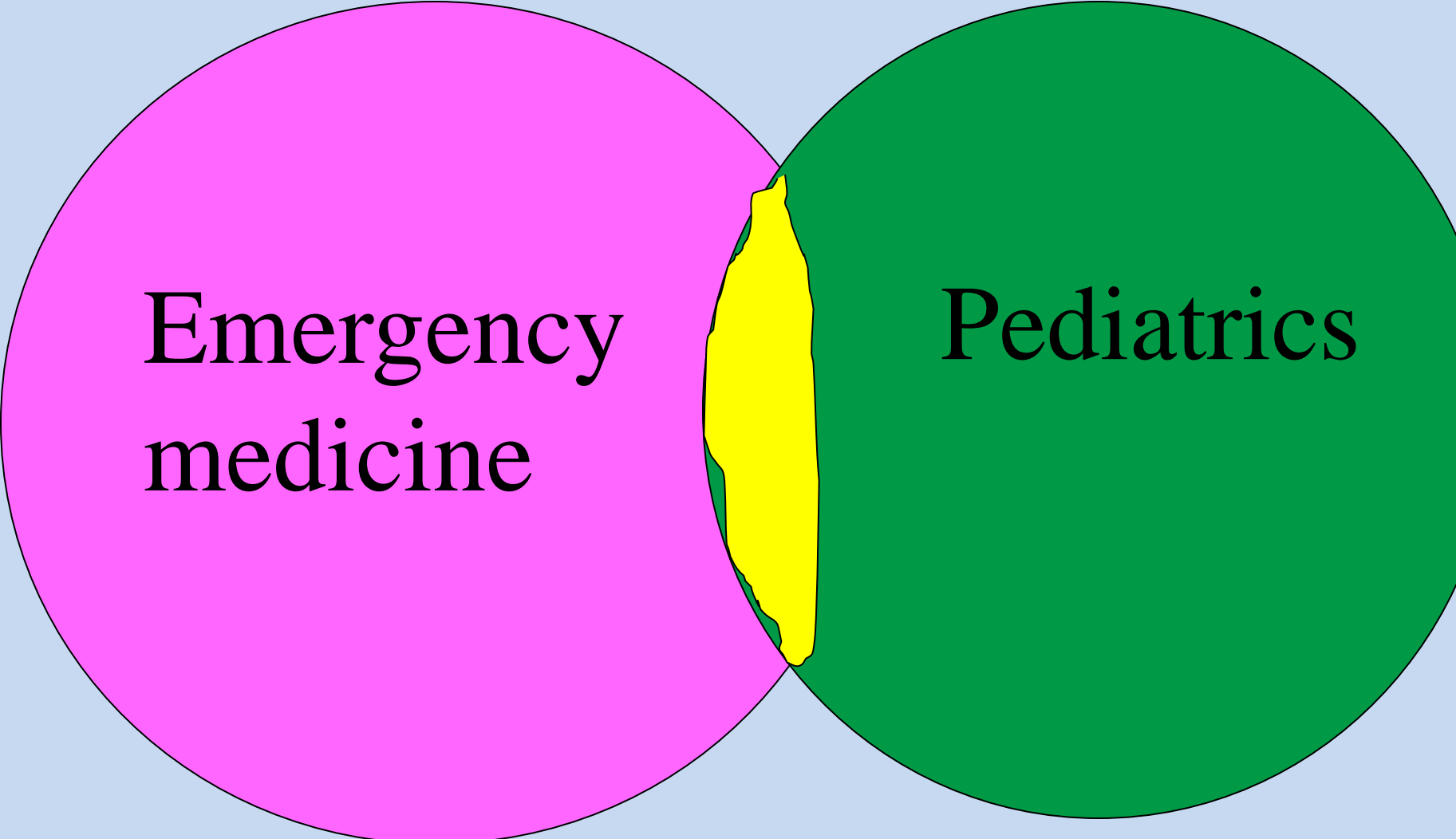
Dr. White

Board-certified internist

PTF expert

Dr. Krenytzky

Board-certified pediatrician



Emergency
medicine

Pediatrics

DeMuth v. Strong (Md. App. 2012)

Vascular surgeon testified that
orthopedic surgeon breached SOC

In the context of post-op
treatment, these specialties
overlap

Cornfeldt v. Tongen (Minn. 1977)

Nurse could testify
against physician
re anesthesia

Experts

Credibility & weight

Frank Galvin Has One Last Chance At A Big Case.

The doctors want to settle,
the Church wants to settle,
their lawyers want to settle,
and even his own clients
are desperate to settle.

But Galvin is determined
to defy them all.
He will try the case.

THE VERDICT

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READ THE BANTAM BOOK

R RESTRICTED
UNDER 17 REQUIRES ACCOMPANIMENT
PARENTS STRONGLY CAUTIONED

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Cross-examiner:

"Are you being paid for your testimony?"

Witness:

"I am being paid for my time, experience, expertise and out-of-pocket expense."



Wyeth[®]

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