HEARTACHES
MEDIATION

Confidential Information for
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You have worked for American Hospital Insurance Corporation ("AHIC") for the last twelve years, rising from claims representative to an Associate Vice President. You take responsibility for analyzing and managing claims flagged as potentially involving multiple plaintiffs or a broad range of practices and people at an insured hospital.

Your previous work was at a larger, less specialized insurance company, in the bodily injury liability area. You moved to AHIC because of an increasing interest in medical insurance issues, perhaps foreshadowed by your brief stint as an E.M.T. after college. You are 41 years old, married, with two young children.

AHIC was put on notice of the Fairday claim prior to commencement of suit. Apparently, AHIC's insured, Farmington Hospital, suspected trouble when its CEO received a highly aggressive letter from a plaintiff's attorney. The letter threatened a malpractice action against the hospital and several of its nurses and physicians and described the suffering of the parents of a deceased child, Joshua Fairday. The child had died at 6 ½ months following Arterial Switch surgery to correct a congenital heart defect known as "Transposition of the Great Arteries" ("TGA"). The CEO investigated and learned that the child's heart condition was unusually complex; he was in greatly weakened condition before surgery. While the hospital and the surgeon, Dr. Dellahunt, would have hoped for a better result, some risks cannot be avoided and some surgery cannot succeed, even with the most expert care.

The CEO reported that the plaintiff's attorney is one of the state's more aggressive and successful medical malpractice litigators. AHIC was soon formally notified that suit had been filed against the hospital and Dr. Dellahunt. Seeing no coverage issues and aiming to save on fees, AHIC agreed to retain Attorney E.F. Adams (chosen by the hospital) jointly with Dr. Dellahunt.

After an initial meeting with the hospital, Attorney Adams alerted AHIC that "there may be other cases over the horizon." He explained that the local Farmington paper had printed a column a little while ago, apparently prompted by Dr. Wilson, reporting on his allegations of substandard care in pediatric cardiac surgery at Farmington Hospital, and the hospital's efforts to cover it up by terminating Dr. Wilson. Hardly an in-depth report, the article cited an anonymous nurse who stated that it was not responsible to use the same ICU and the same surgeons for tiny babies as for adults, and that they were constantly depressed from seeing so many babies die on the operating table. "Yes, it's part of the risk you take when you work in the ICU she said, but there seems to be a curse on Farmington." The balance of the article quoted the Medical Staff Director and other hospital officials who asserted that, while they couldn't comment on particulars, "It should be obvious to the public that Dr. Wilson is a bitter and justly terminated former employee, pointing fingers at everyone else."

More recently, just before suit was filed, the local paper published a letter by Joshua Fairday's parents, purporting to "warn the community of danger at Farmington," alleging incompetence in pediatric cardiac surgery, and notifying parents that mortality percentages were "worse at Farmington than in other quality hospitals."

Shortly after that, the hospital's public relations director fielded a call from a local reporter indicating they were considering a more thorough investigation. Fortunately, hospital's public relations director tactfully suggested that grieving parents of a child who had died from a serious heart congenital heart defect might understandably not be objective sources of information. The same can be said of a terminated, disgruntled, former employee. She noted that the story in this case (and any others) was in technical physiology and surgical details, which would not make interesting newspaper copy. The reporter backed off. You are not aware of any further reporting.

The letter and column apparently led to half a dozen or so calls from parents of children scheduled for cardiac surgery at Farmington Hospital within the next few months. The CEO instructed all staff to recommend these parents talk to their cardiologists and surgeons, and make their own decisions, but also to assure them the hospital was committed to the best care, particularly for young patients with heart problems.

Once it was clear that the Fairday case may be linked to others, the claim was given to you. Even if potential liability on this case should be modest, it may be part of a larger problem.

In preparation for mediation, you met with Attorney Adams to review the status of the case. Both sides have now investigated facts and liability issues and retained experts to review relevant hospital records. You recommended a semi-retired cardiologist in the area, often consulted by AHIC, as an expert to review Joshua Fairday's medical records. He concluded that this was an unusually complex TGA defect, with a larger than average hole between the heart's chambers, and that his heart muscle appeared to have been in weakened condition prior to surgery. The expert indicated that the autopsy report included no evidence that the surgical technique fell below the standard of care. You also had someone in-house at AHIC (a former RN) review the record for any indication of substandard care by the hospital. She did not see anything. Your position is that the hospital is not liable, absent a credible explanation of how any hospital action led to this patient's death.

Not surprisingly, the experts retained by the plaintiff's experts - a well-respected pediatric cardiologist and a surgeon at Harvard Medical School and Boston Children's Hospital - disagreed. While agreeing that TGA is a serious heart defect and Joshua's case was not uncomplicated, they opined that his TGA was not worse than most others repaired in Arterial Switch surgery. They also reviewed Joshua's vital signs and test results from doctor's visits in the months prior to surgery and on the morning of his admission. They disagreed with any notion that Joshua was in a weakened condition prior to surgery, though he noted that waiting 6 ½ months for the Arterial Switch is a bit long and can take its toll on a patient. They also disagreed with Dr. Dellahunt's notation of Joshua being "pink" and having gone through surgery well, based upon his troubling vital signs in the ICU immediately after surgery. They dismissed the idea that the cardiologist's reports and tests

had missed subtle aspects of Joshua's heart defect, making them unforeseeable to Dr. Dellahunt. "Dr. Dellahunt may not have studied the reports or the ultrasound pictures carefully enough, but to an experienced reader of such documents, all of the necessary information was present." Finally, the surgical expert was particularly troubled by the excessive length of the surgery – 7 hours under general anesthesia in the operating theater and 6 ½ hours on the heart lung machine. (Dellahunt arrived ½ hour late.) He noted that the surgery's duration reflects the surgeon's or surgical team's lack of skill or experience, and "falls below the current standard of care barring unforeseeable or unusual characteristics of the TGA defect."

Despite the positive nature of your expert report, you anticipate the plaintiffs will attack your expert's credentials. While a perfectly fine cardiologist, his credentials are not as "blue chip" as some. Still, that shouldn't invalidate his findings.

You know the Fairdays will also be using, directly or indirectly, data gathered by Dr. Wilson regarding the mortality percentages for Arterial Switch and AVSD surgery performed at Farmington Hospital, particularly by Dr. Dellahunt. As Attorney Adams explained, the numbers look bad: the mortality percentages at Farmington for the past 2 years in Arterial Switch surgery have been 35-40% compared to percentages in most larger centers of 20-21% and, recently, as low as 15% in some. You know from the complaint that Dr. Wilson is alleged to have presented these statistics to others on the surgical team in the context of a morbidity conference, following the death of another infant in Arterial Switch back surgery.

Attorney Adams informed you that these numbers did not look good for Farmington. The hospital's CEO consulted with the Chief of Surgery, Dr. Knowles, who continues to stand with the surgeons' explanation that Farmington had an unusual run of very difficult cases. While that is possible, the attorney decided to look further. He retained a statistics professor from the local college to review the likelihood that this discrepancy could have been due to random variation, given the smaller number of surgeries performed at Farmington and the larger numbers in the general statistics. He did not ask for a formal report, just a review of the data and discussion of the results, on a confidential basis. Based on their rough-cut analysis, the professor reports: while the differences in rates could have occurred by chance, it is at least 85% likely that is not the case here. In short, chances are that something is not going well at Farmington.

At Attorney Adams' suggestion, the CEO also looked into the medical staff credentialing and peer review process at Farmington, and the last report by JCAHO, as well as how Dr. Dellahunt was hired, granted privileges, and reviewed, and how it was that Farmington began pediatric cardiac surgery.

The CEO explained that, three years ago, Farmington hatched its business plan to stay competitive by expanding ob-gyn, surgery (including cardiac surgery), and pediatrics. It obtained JCAHO's tentative approval of the concept. JCAHO agreed the community would be well served by expansion of those practice areas. JCAHO is a bit behind schedule in its review inspections, so its last review at Farmington was approximately 2 ½ years ago. At that time, while the hospital had begun its expanded operations in ob-gyn, surgery, and

pediatrics, it had not yet undertaken pediatric cardiac surgery**.** JCAHO is due to come in for a regular accreditation review within the next few months.

The Attorney reviewed the hospital's medical staff by laws and confirmed that they require regular peer reviews. According to the CEO, this occurs approximately once every two years at Farmington. Dr. Dellahunt had not undergone their 2-year review at the time this case was filed. And, because of liability concerns and the pending suit, the Chief of Surgery, Dr. Knowles agreed with staff to delay Dr. Dellahunt's review. However, even without formal review, there would certainly be awareness among medical staff if a doctor were not performing competently.

Farmington does maintain a policy of convening "morbidity" conferences whenever there is an adverse outcome: death or serious effects from surgery or other medical decisions. A morbidity conference is purposely designed as informal. It is intended to allow a medical or surgical team to review and discuss the surgery or treatment and to learn from what occurred. Dr. Knowles assured the CEO that morbidity conferences do occur among the pediatric cardiac surgery team, whenever a child died after surgery. In those conferences, the doctors must explain what caused the death. If Dr. Knowles or any member of the team thought that the surgeon was not performing competently, it would have been incumbent upon them to call for independent outside review.[1] Dr. Knowles attended these conferences, at least most of the time.

In fact, Dr. Knowles presided at a morbidity conference following an earlier infant death in Arterial Switch surgery performed by Dr. Dellahunt, at which Dr. Wilson proposed and argued that Dr. Dellahunt should be prevented from performing any more of these surgeries, including Joshua Fairday's. Dr. Knowles said they and other surgical team doctors were satisfied with Dr. Dellahunt's explanation, which confirmed Dellahunt's strong knowledge of surgical techniques and strategies. They overwhelmingly voted down Dr. Wilson's proposal.

Attorney Adams also asked the CEO if there were any concerns about Dr. Dellahunt's or the other pediatric cardiac surgeons' training or credentials. The CEO explained that, when the hospital expanded its surgical capacity, it brought on two new surgeons: Dr. Dellahunt and Dr. Rashesh. Dr. Rashesh had completed residencies in general surgery and cardiac surgery and a fellowship in pediatric cardiac surgery. Dr. Dellahunt first spent several years performing general surgery, and then largely adult cardiac surgery in a hospital in Arkansas before moving to Ohio. Dr. Dellahunt had completed residencies in both specialties, after medical school at the University of Arkansas. Before Farmington operated on its first infant heart, both doctors were sent to training sessions on the latest techniques in pediatric cardiac surgery. Other members of the ICU and surgical teams who were likely to be working on any pediatric surgery were sent to specialized programs to learn the additional challenges of pediatric care. New ICU and surgical equipment was purchased, or older machines were updated and retrofitted for pediatric needs.

[1] Autopsies are routinely performed, but the results are not necessarily compared with the conclusions reached in morbidity conferences.

You believe the hospital has a good chance of winning on the claims made against it. Neither the hospital nor the surgeon caused Joshua Fairday to be born with transposed great arteries in his heart. The Arterial Switch operation is difficult, delicate, and highly risky, no matter how expert the surgeon or hospital care. You know juries are loathe to find against community hospitals. Any mistake or substandard care (the length of the surgery is a bit troubling) rests with Dr. Dellahunt. On the other hand, Attorney Adams expressed concern that the hospital might be on the hook for negligent credentialling, or for Dr. Knowles' failure to restrict Dr. Dellahunt's surgical privileges based upon mortality rates (reflected in the numbers), or at least for permitting Dellahunt to operate on Fairday. You frankly think the lawyer is trying to soften you up before mediation. Why should anyone believe that good faith, discretionary management decisions will lead to a malpractice liability verdict?

The hospital's malpractice insurance is in place, with policy limits of $3 million per occurrence. Coverage is not an issue. You are determined not to overpay, indeed, not to pay much at all unless someone can articulate a plausible theory of liability against the hospital or its staff.

On the other hand, failure to settle will force the case to trial. The CEO and the attorney have emphasized that nothing would be worse for the hospital than this case going to trial or hitting the papers, particularly with Dr. Wilson's statistics. Fear or even uncertainty about the quality of care for their children will send parents far away from Farmington for pediatric surgery. The CEO is concerned that it could also affect all non-emergency admissions in adult cardiac surgery, general pediatrics, and adult cardiac surgery. A severe admissions decline would threaten the hospital's future.

You are mindful that settlement with the Fairdays may increase the chances of more claims being filed by parents of other children who died after heart surgery at Farmington. You don't know how, but it would be in the hospital's interest to discourage more filings or at least to know who's planning to sue and to reduce publicity and financial damage.

From AHIC's perspective, while you don't want to overpay, you do want to keep Farmington as an insured, premium-paying client. Moreover, hospitals talk; AHIC could lose other hospital accounts if it stands in the way of a favorable settlement for Farmington.

While you have a great deal of authority as an AHIC Assoc. VP, you will have to justify any settlement to an AHIC claims committee. You initially set a reserve of $50,000 on the claim, on the theory that it was worth no more than $150,000 and that the hospital should not pay more than 1/3. If, during the mediation, you are persuaded that the hospital's share should be higher or the total should be adjusted, you have discretion to change these parameters. But the higher you go, the more forceful a presentation you will have to make to the committee. Whether or not it's technically needed, you may want to get formal approval before agreeing to any settlement far from these numbers.