

Torts Tutorial Chapter 10 – Medical Malpractice

INTRODUCTION

This program is designed to provide a review of basic concepts covered in a first-year torts class and is based on DeWolf, Cases and Materials on Torts (<http://guweb2.gonzaga.edu/~dewolf/torts/text>). You have accessed the tutorial for Chapter 10, "Medical Malpractice." Prior to doing these exercises you should read the relevant material in DeWolf, Cases and Materials on Torts. A brief overview of this Chapter is provided below.

OVERVIEW

Ch. 10. Medical Malpractice

Medical malpractice law is based on ordinary negligence principles, with two major variations: First, in determining the standard of reasonable care, expert testimony is required as to what the reasonably prudent physician *in those circumstances* would have done. The circumstances include the physician's degree of specialization and the resources available in the community. However, differences of opinion about alternative therapies (*e.g.*, Sabin vaccine v. Salk vaccine) do not allow the jury to find that one therapy is "correct" and the other is negligent. The second variation concerns "informed consent." A patient has a right to choose whether or not to undergo a medical procedure, even if a reasonably prudent person would have chosen it, and even though the physician acts with reasonable care in performing it. Although originally considered part of the law of battery (since it is an "unconsented" touching), modern approaches to informed



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consent consider failure to provide informed consent as a form of negligence. The standard is whether the patient was informed of all material facts connected with the treatment, including the risks and benefits of alternative approaches.

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EXERCISE

Each question gives you a fact pattern, and then you must choose an answer that best reflects the law as you understand it. Be careful to read the question and the suggested answers thoroughly. Select your answer by clicking on it. If you give an incorrect answer, you will be given feedback on what was wrong with your answer. By clicking on the feedback you will be taken back to the question to try again. Once a correct answer is selected, click on the feedback to go to the next question.

You may begin the exercise by click on a question number below. Throughout the tutorial three Shortcut Buttons will be located in the bottom right-hand corner of each page. The Return Button  brings you back to this page allowing you jump to questions of your choice if you prefer. The Information Button  takes you to the Torts Glossary. The Home Button  takes you to the Torts Tutorial Home Page.

Questions:

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Question #1

Dr. Spector, an orthopedic surgeon, had a successful practice in Fubar, Columbia. She performed surgery on Mike Donohue's elbow. Now Mike can't bend his arm past an arc of 20 (normally it is 170 degrees). Mike would be able to recover damages from Dr. Spector if:

- (1) Dr. Spector assured him that he would recover full use of his elbow;
- (2) Reasonably prudent doctors usually get better results from the surgery than Dr. Spector;
- (3) Dr. Spector didn't use a technique that might have given him greater movement;
- (4) Dr. Spector usually operated on knees, rather than elbows.



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Dr. Spector, an orthopedic surgeon, had a successful practice in Fubar, Columbia. She performed surgery on Mike Donohue's elbow. Now Mike can't bend his arm past an arc of 20 (normally it is 170 degrees). Mike would be able to recover damages from Dr. Spector if:

- (1) **Dr. Spector assured him that he would recover full use of his elbow;**
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- (3) Dr. Spector didn't use a technique that might have given him greater movement;
- (4) Dr. Spector usually operated on knees, rather than elbows.

That's correct. Most doctors are cautious about giving any sort of "warranty" for their work, and instead will suggest that there are risks associated with the procedure, even if the risks are remote. In fact, the failure to disclose other risks is a breach of the duty of informed consent. If Spector had said, "You'll probably recover use of your elbow," she wouldn't be liable unless she were negligent. But a flat-out statement that he will recover full use would subject her to liability.



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- (4) Dr. Spector usually operated on knees, rather than elbows.

Sorry, that's incorrect. Even if Dr. Spector herself usually gets better results, it doesn't establish that she was negligent. Poor outcomes alone are not enough; liability for medical malpractice is only imposed where the poor outcome was a result of failing to use reasonable care or where there was a failure to supply informed consent. Try again.



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Sorry, that's incorrect. Doctors are entitled to disagree with one another on which technique is preferable. If Dr. Spector failed to explain the other options, she might be negligent for failing to provide informed consent. However, the fact that she chose one option rather than another doesn't mean she was negligent. Try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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- (4) Dr. Spector usually operated on knees, rather than elbows.**

Sorry, that's incorrect. Although a doctor may commit medical malpractice by performing a procedure for which she isn't qualified, there is no showing that Dr. Spector wasn't qualified to do elbow surgery. Moreover, the mere fact that it was a bad outcome doesn't establish that she performed the procedure negligently. Try again.



Question #2

Craig Cathcart is a radiologist in Winslow, South Hampshire. One of his patients dies from cancer after Cathcart examined her X-rays. To show Cathcart was negligent, in most jurisdictions the patient would be required to produce an expert who is:

- (1) Familiar with the standard of care observed by other physicians practicing the same specialty in Winslow;
- (2) Familiar with the standard of care observed by radiologists in South Hampshire;
- (3) Prepared to testify that Cathcart violated the standard of care recommended by the National Society of Radiologists.
- (4) Prepared to testify that Cathcart didn't provide adequate information concerning alternatives to the prepared treatment.



Torts Tutorial Chapter 10 – Medical Malpractice

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Sorry, that's incorrect. At one time most jurisdictions used a standard based upon the locality in which the doctor practiced. However, that has been set aside in most jurisdictions in favor of a standard that will allow doctors from other localities to testify concerning whether the doctor acted with reasonable care. Try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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That's correct. Although some jurisdictions use a nationwide standard, most jurisdictions judge a doctor's conduct by the standard of care observed in the state in which the doctor practices. This allows a reasonable selection of expert witnesses (not limited just to the locality). Remember too that the standard is based upon a doctor *in the same circumstances*. Thus, less will be expected of a radiologist in a rural setting than a doctor who has all of the amenities of an urban setting at her disposal.



Torts Tutorial Chapter 10 – Medical Malpractice

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Sorry, that's incorrect. Although the standard observed by the specialty to which Dr. Cathcart belongs is relevant, it may not be used as the standard to judge his behavior. The professional society may have a higher standard of care (because most of their members practice in more sophisticated setting); or the whole field may lag behind reasonable care (remember *Helling v. Carey*).



Torts Tutorial Chapter 10 – Medical Malpractice

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- (4)Prepared to testify that Cathcart didn't provide adequate information concerning alternatives to the prepared treatment.**

Sorry, that's incorrect. Although a physician can commit malpractice by failing to provide informed consent, most professional negligence cases revolve around whether or not the doctor's care conformed to the standard of care observed in the relevant area. Try again.



Question #3

Roy Firth went to Molly Burton, an ophthalmologist, for treatment of astigmatism. Molly told him about an experimental treatment that involved burning selected areas with powerful laser beams. She also explained about the conventional treatment, regular medication, which was less risky, but also less promising. Roy chose the experimental treatment. After he was treated he suffered from permanent burns caused by the laser beams. Roy could successfully sue Dr. Burton for malpractice, if:

- (1) Yes if, more probably than not, Roy's injuries would not have occurred if he had been treated conventionally;
- (2) Yes if, Dr. Burton failed to disclose risks associated with the laser treatment, but only if they were material;
- (3) No unless, Dr. Burton failed to disclose a risk, even if unknown at the time of treatment;
- (4) No unless, Dr. Burton recommended the laser treatment.



Torts Tutorial Chapter 10 – Medical Malpractice

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(3) No unless, Dr. Burton failed to disclose a risk, even if unknown at the time of treatment;

(4) No unless, Dr. Burton recommended the laser treatment.

Sorry, that's incorrect. The decision to have the laser surgery was Roy's, and he made it after having risks disclosed. Even if a reasonable person might have chosen the other treatment, the right to informed consent means that the patient gets to choose which treatment he prefers. He can't later blame the doctor for his own choice, so long as he was fully informed and the doctor performs the procedure with reasonable skill. Try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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(4) No unless, Dr. Burton recommended the laser treatment.

That's correct. A violation of the patient's right to informed consent is malpractice. However, the patient has a right to know of material risks. If a risk is so remote that a reasonable person wouldn't take it into account in making a decision, then the risk is not material.



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Sorry, that's incorrect. The doctor can't be expected to disclose all risks; she isn't made strictly liable, but rather is expected only to act with reasonable care. Try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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- (4) No unless, Dr. Burton recommended the laser treatment.**

Sorry, that's incorrect. Nothing in the facts indicates that recommending the laser treatment was necessarily negligent. Simply getting a bad outcome doesn't indicate medical malpractice.



Question #4

Rosie Garcia was treated by Dr. Blaylock in 1980 for appendicitis. After exploratory surgery, her appendix was removed. Six months ago Rosie had kidney problems, and after some tests it was discovered that Dr. Blaylock had inadvertently left a sponge in her abdomen, which caused permanent kidney damage. Pursuant to the Washington Medical Negligence statute, RCW 4.16.350; and RCW 7.70 (it can be accessed by clicking on *Statute--Alt-S--below*), would Rosie be able to sue?

- (1) Yes.
- (2) Yes, unless Rosie was an adult, in which case her claim would be barred.
- (3) No, because more than eight years had elapsed since the time of the procedure.
- (4) No, because it had been more than three years since the procedure.



Torts Tutorial Chapter 10 – Medical Malpractice

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That's correct. One of the exceptions to the three year, one year and eight year limitations is that the statute is tolled (i.e., it doesn't start running) when a foreign body is left in the patient. Since that is the case here, the statute didn't start running against Rosie until she discovered the sponge. This is the discovery rule.



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Sorry, that's incorrect. Typically the statute of limitation for most tort cases doesn't begin to run on a minor plaintiff; here, however, the statute makes no exception based upon whether or not the patient was a minor at the time of the procedure. Reread the statute and try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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- (3) No, because more than eight years had elapsed since the time of the procedure.**
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Sorry, that's incorrect. Although the statute usually places an outside limit of eight years for the time that the plaintiff can sue, the statute is tolled (that is, it doesn't start to run) under certain conditions. Reread 4.16.350 and try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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Sorry, that's incorrect. The statute gives a patient three years from the time of the procedure to file suit, but that limitation is subject to exceptions. Try again.



Question #5

Arnold Weissenaker was injured in an automobile accident, causing profuse bleeding and unconsciousness. When Nurse Roble arrived at the scene he decided that an immediate transfusion of blood was necessary. Once at the hospital, Roble discovered that (through no fault of his) the blood had been contaminated, leading to serious injury. When Arnold regained consciousness, he informed the hospital that he had religious objections to blood transfusions and would not have consented to the previous transfusion. Can Arnold recover from Roble?

- (1) Yes, if he can show that he really would have refused the transfusion even at the risk of his own life;
- (2) Yes, because a reasonably prudent person with his religious beliefs would have refused the transfusion;
- (3) No, because a reasonably prudent person would have consented to the blood transfusion.
- (4) No, because Arnold's consent would be implied.



Torts Tutorial Chapter 10 – Medical Malpractice

Arnold Weissenaker was injured in an automobile accident, causing profuse bleeding and unconsciousness. When Nurse Roble arrived at the scene he decided that an immediate transfusion of blood was necessary. Once at the hospital, Roble discovered that (through no fault of his) the blood had been contaminated, leading to serious injury. When Arnold regained consciousness, he informed the hospital that he had religious objections to blood transfusions and would not have consented to the previous transfusion. Can Arnold recover from Roble?

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(3)No, because a reasonably prudent person would have consented to the blood transfusion.

(4)No, because Arnold's consent would be implied.

Sorry, that's incorrect. Even if Arnold might have refused the transfusion if conscious, the medical personnel have no way of knowing that when they are confronted with an emergency. Try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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(3) No, because a reasonably prudent person would have consented to the blood transfusion.

(4) No, because Arnold's consent would be implied.

Sorry, that's incorrect. Even though Arnold has the right to refuse a transfusion if he were conscious (and can hold the medical personnel liable if they ignore his wishes), when he is unconscious it is a different story. The medical personnel cannot be expected to guess Arnold's choice if he were conscious.



Torts Tutorial Chapter 10 – Medical Malpractice

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Sorry, that's incorrect. Although Arnold's beliefs are unusual, they may not simply be ignored by the medical personnel based upon what a reasonable person would do in Arnold's shoes. Try again.



Torts Tutorial Chapter 10 – Medical Malpractice

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That's correct. In a medical emergency, where the patient is unable to give consent, the requisite consent will be implied.

You have now completed the exercises for Chapter 10. You will now be returned to the menu.



Medical Malpractice Statute, RCW 4.16 and 7.70

4.16.350 Actions for injuries resulting from health care or related services--Physicians, dentists, nurses, etc.--Hospitals, clinics, nursing homes, etc. Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:



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- 1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;
- (2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or
- (3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;



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based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: Provided, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.



4.28.360 Personal injury actions--Complaint not to include statement of damages--Request for statement. In any civil action for personal injuries, the complaint shall not contain a statement of the damages sought but shall contain a prayer for damages as shall be determined. A defendant in such action may at any time request a statement from the plaintiff setting forth separately the amounts of any special damages and general damages sought. Not later than fifteen days after service of such request to the plaintiff, the plaintiff shall have served the defendant with such statement.



7.70.010 Declaration of modification of actions for damages based upon injuries resulting from health care. The state of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of all civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.



7.70.020 Definitions. As used in this chapter "health care provider" means either:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a certified acupuncturist, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, midwife, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including in the event such officer, director, employee, or agent is deceased, his estate or personal representative.



7.70.030 Propositions required to be established--Burden of proof. No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976, unless the plaintiff establishes one or more of the following propositions:

- (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
- (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.



7.70.040 Necessary elements of proof that injury resulted from failure to follow accepted standard of care. The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.



7.70.050 Failure to secure informed consent--Necessary elements of proof--Emergency situations. (1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his representatives against a health care provider:

- (a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;
- (b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;
- (c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;
- (d) That the treatment in question proximately caused injury to the patient.



(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his consent to required treatment will be implied.



7.70.060 Consent form--Contents--Prima facie evidence--Failure to use. If a patient while legally competent, or his representative if he is not competent, signs a consent form which sets forth the following, the signed consent form shall constitute prima facie evidence that the patient gave his informed consent to the treatment administered and the patient has the burden of rebutting this by a preponderance of the evidence:

(1) A description, in language the patient could reasonably be expected to understand, of:

(a) The nature and character of the proposed treatment;

(b) The anticipated results of the proposed treatment;

(c) The recognized possible alternative forms of treatment; and

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment and in the recognized possible alternative forms of treatment, including nontreatment;

(2) Or as an alternative, a statement that the patient elects not to be informed of the elements set forth in subsection (1) of this section.

Failure to use a form shall not be admissible as evidence of failure to obtain informed consent.



7.70.065 Informed consent--Persons authorized to provide for patients who are not competent--Priority. (1) Informed consent for health care for a patient who is not competent, as defined in RCW 11.88.010(1)(b), to consent may be obtained from a person authorized to consent on behalf of such patient. Persons authorized to provide informed consent to health care on behalf of a patient who is not competent to consent shall be a member of one of the following classes of persons in the following order of priority:

- (a) The appointed guardian of the patient, if any;
- (b) The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions;
- (c) The patient's spouse;
- (d) Children of the patient who are at least eighteen years of age;
- (e) Parents of the patient; and
- (f) Adult brothers and sisters of the patient.



(2) If the physician seeking informed consent for proposed health care of the patient who is not competent to consent makes reasonable efforts to locate and secure authorization from a competent person in the first or succeeding class and finds no such person available, authorization may be given by any person in the next class in the order of descending priority. However, no person under this section may provide informed consent to health care: / (a) If a person of higher priority under this section has refused to give such authorization; or (b) If there are two or more individuals in the same class and the decision is not unanimous among all available members of that class.

(3) Before any person authorized to provide informed consent on behalf of a patient not competent to consent exercises that authority, the person must first determine in good faith that that patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient's best interests.



7.70.070 Attorneys' fees. The court shall, in any action under this chapter, determine the reasonableness of each party's attorneys fees. The court shall take into consideration the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) Whether the fee is fixed or contingent.



7.70.080 Evidence of compensation from other source. Any party may present evidence to the trier of fact that the patient has already been compensated for the injury complained of from any source except the assets of the patient, his representative, or his immediate family, or insurance purchased with such assets. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation. Insurance bargained for or provided on behalf of an employee shall be considered insurance purchased with the assets of the employee. Compensation as used in this section shall mean payment of money or other property to or on behalf of the patient, rendering of services to the patient free of charge to the patient, or indemnification of expenses incurred by or on behalf of the patient. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.



END

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