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Physician Not Liable for Undertaking Particular Mode of Treatment If Reasonable and Prudent Practitioner Would Have Followed Same Procedure under Similar Circumstances.

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is particularly devastating because it generally cannot be appealed except on grounds of fraud or mistake.[54] The *Hollen* decision should serve as a warning to attorneys lest they find themselves in the predicament of having inadvertently disposed of their client's cause of action.

Cathleen G. Randall

MEDICAL MALPRACTICE—Standard of Care—Physician Not Liable for Undertaking Particular Mode of Treatment If Reasonable and Prudent Practitioner Would Have Followed Same Procedure Under Similar Circumstances

Hood v. Phillips,
554 S.W.2d 160 (Tex. 1977).

Sheldon D. Hood brought suit against Dr. John R. Phillips, alleging that he had sustained injuries as a result of surgery which was not a medically acceptable form of treatment for emphysema. Dr. Phillips testified that he had performed this surgery for years, achieving beneficial results for eighty-five percent of his patients. He did, however, concede that this mode of treatment was highly controversial and not generally accepted by the medical profession. Expert testimony revealed that the usual treatment for emphysema was nonsurgical, and that Dr. Phillips' method had been abandoned as ineffectual. The trial court entered judgment for Dr. Phillips after the jury refused to find him grossly negligent. The court of civil appeals reversed and remanded, holding that the case should have been submitted on a theory of ordinary negligence.[1] Both parties appealed to the Texas Supreme Court. Held—*Affirmed on other grounds.* A physician undertaking a particular mode of treatment is not liable for harm caused thereby if a reasonable and prudent medical practitioner would have followed the same procedure under similar circumstances.[2]

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proval of counsel will not be permitted to override or supersede positive recitals of judgment itself, so as to convert it into judgment by consent).

54. Gravel v. Alaskan Village, Inc., 409 P.2d 983, 986 (Alaska 1966); Rocks v. Brosius, 217 A.2d 531, 541 (Md. 1966); Boyd v. Boyd, 545 S.W.2d 520, 523 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ); Akin v. Akin, 417 S.W.2d 882, 885 (Tex. Civ. App.—Austin 1967, no writ); Alexander v. Alexander, 373 S.W.2d 800, 805 (Tex. Civ. App.—Corpus Christi 1963, no writ).

1. Hood v. Phillips, 537 S.W.2d 291, 294 (Tex. Civ. App.—Beaumont 1976), *aff'd on other grounds*, 554 S.W.2d 160 (Tex. 1977). The court also held that a physician is not liable for using a form of treatment which has been adopted by a respectable minority of the profession. *Id.* at 294.

2. Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977).

Every physician treating a patient is required to conform to a standard of care.[3] This standard requires that a physician have a reasonable degree of skill, and that he exercise that skill with ordinary care in the diagnosis or treatment of the patient.[4] Historically, the doctrine has been qualified by the "locality rule" and the "same school rule."[5] Under the locality rule, a physician need only exercise that degree of skill possessed by doctors in his community or in a similar one.[6] The "same school rule," which today could more aptly be considered the "same medical specialty rule," requires that a medical practitioner exercise the ordinary skill possessed by others in his same school or specialty of practice.[7] With these somewhat eroded

3. *See* Edwards v. United States, 519 F.2d 1137, 1139 (5th Cir. 1975) (physician required to exercise degree of skill ordinarily possessed by other members of the profession), *cert. denied*, 425 U.S. 972 (1976); Wilson v. Scott, 412 S.W.2d 299, 302 (Tex. 1967) (failure of physician to conform to medical standards in obtaining patient's consent); Turner v. Stoker, 289 S.W. 190, 194 (Tex. Civ. App.—Eastland 1926, writ ref'd) (physician under duty to exercise that degree of care possessed and exercised by other practitioners in good standing). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-66 (4th ed. 1971); McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 558-60 (1959).

4. *See* Graham v. Gautier, 21 Tex. 112, 120 (1858) (physician required to exercise degree of skill ordinarily possessed by other members of the profession); Bowles v. Bourdon, 213 S.W.2d 713, 715 (Tex. Civ. App.—Galveston 1948) (physician exercising ordinary care and diligence not responsible for mistake in judgment), *aff'd*, 148 Tex. 1, 219 S.W.2d 779 (1949); Perdue, *The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 1, 22 (1973).

5. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 163-64 (4th ed. 1971).

6. Karp v. Cooley, 349 F. Supp. 827, 836 (S.D. Tex. 1972), *aff'd*, 493 F.2d 408 (5th Cir.), *cert. denied*, 419 U.S. 845 (1974); Rose v. Friddell, 423 S.W.2d 658, 660 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.); Levermann v. Cartall, 393 S.W.2d 931, 935 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.). *But see* King v. Flamm, 442 S.W.2d 679 (Tex. 1969). In holding a general practitioner to the standard of care of a reasonably prudent general practitioner under the same or similar circumstances, the court omitted reference to the same or a similar community. *Id.* at 681; *accord*, Christian v. Jeter, 445 S.W.2d 51, 54 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.) (reasons for locality rule have disappeared with advent of modern transportation and communication); *Symposium-A Study of Medical Malpractice in Texas*, 7 ST. MARY'S L.J. 732, 736 (1976). Formerly, a physician was required to exercise only that degree of skill possessed by other practitioners in his community. Subsequently, the rule was extended to include communities similar to those of the defendant physician. Recent cases, however, indicate that the locality rule is no longer strictly followed. *Id.* at 744-46.

7. *See, e.g.*, Karp. v. Cooley, 493 F.2d 408, 420, 423 (5th Cir.) (thoracic surgeon), *cert. denied*, 419 U.S. 845 (1974); Hart v. Van Zandt, 399 S.W.2d 791, 797 (Tex. 1965) (surgeon); Bowles v. Bourdon, 148 Tex. 1, 5, 219 S.W.2d 779, 782 (1949) (general practitioner); Welch v. Shaver, 351 S.W.2d 588, 590 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.) (osteopath). There are, however, two exceptions to the doctrine. First, a doctor's conduct is not required to be measured by the standard of care exercised by other physicians of his same school of practice where the subject of inquiry is common to other schools of practice, and second, where the subject of inquiry relates to the manner of use of electrical appliances which are of common use in two or more schools of practice. *See* Puryear v. Porter, 153 Tex. 82, 87, 262 S.W.2d 933, 936 (1953).

Some jurisdictions apply a third corollary to the standard, holding that physicians are obligated to keep abreast of progress within the profession. *E.g.*, Naccarato v. Grob, 180

qualifications, negligence has been defined as a failure to use that degree of care that physicians of ordinary knowledge and skill would have used in the diagnosis or treatment of patients, under the same or similar circumstances.[8] In order to hold a physician liable for want of the requisite degree of care, Texas courts have consistently required expert medical testimony to determine how a reasonable and prudent physician would have acted under the same or similar circumstances.[9]

The negligence of physicians can be divided into the following categories: failure to make a correct diagnosis,[10] negligent administration of treatment,[11] failure to make a reasonable disclosure of risks incident to a proposed form of treatment,[12] failure to consult a specialist,[13] and undertaking a method of treatment that is improper or unnecessary.[14] In medical

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N.W.2d 788, 791 (Mich. 1970) (practicing specialist must treat patients "in light of present day scientific knowledge"); Smith v. Yohe, 194 A.2d 167, 170 (Pa. 1963) (failure to take X-rays in treatment of fractured hip); Kelly v. Carroll, 219 P.2d 79, 85 (Wash.) (doctor may not take refuge in the practices of the medical dark ages), *cert. denied*, 340 U.S. 892 (1950); *see* D. LOUISELL & H. WILLIAMS, 1 MEDICAL MALPRACTICE ¶ 8.05, at 209 (1973).

8. Karp v. Cooley, 349 F. Supp. 827, 836 (S.D. Tex. 1972), *aff'd*, 493 F.2d 408 (5th Cir.), *cert. denied*, 419 U.S. 845 (1974); *see* Burks v. Meredith, 546 S.W.2d 366, 370 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (general practitioner not responsible for error in judgment if he exercises the care and skill of other physicians similarly situated); Allison v. Blewett, 348 S.W.2d 182, 184 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) (negligence of physician consists of failing to do something he should have done under the circumstances).

9. *See* Edwards v. United States, 519 F.2d 1137, 1139 (5th Cir. 1975) (in treating diabetes), *cert. denied*, 425 U.S. 972 (1976); King v. Flamm, 442 S.W.2d 679, 681 (Tex. 1969) (failure to consult a specialist); Wilson v. Scott, 412 S.W.2d 299, 302 (Tex. 1967) (failure to make reasonable disclosure of risks incident to an operation). An exception to the requirement of expert testimony has been recognized where the injuries sustained are within the common knowledge of laymen. Harle v. Krchnak, 422 S.W.2d 810, 815 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.) (sponge left in body of patient after surgery); Nicodeme v. Bailey, 243 S.W.2d 397, 400 (Tex. Civ. App.—El Paso 1951, writ ref'd n.r.e.) (expert testimony not required where doctor neglects to diagnose patient before administering treatment).

10. *E.g.*, Bender v. Dingwerth, 425 F.2d 378, 379 (5th Cir. 1970) (failure to diagnose heart disease); Prestegord v. Glenn, 441 S.W.2d 185, 186-87 (Tex. 1969) (failure to correctly diagnose post-operative complication); Levermann v. Cartall, 393 S.W.2d 931, 933 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (failure to correctly diagnose a head injury).

11. Hart v. Van Zandt, 399 S.W.2d 791, 792 (Tex. 1965) (negligence in performing back operation); Bowles v. Bourdon, 148 Tex. 1, 5, 219 S.W.2d 779, 782 (1949) (negligence in treating elbow fracture).

12. *See* Wilson v. Scott, 412 S.W.2d 299, 302 (Tex. 1967). Although earlier informed consent cases were tried on a theory of assault and battery, this case held that failure to disclose reasonable risks incident to an operation properly may be treated as negligence actions. *Id.* at 302; *accord*, Wilkinson v. Vesey, 295 A.2d 676, 686 (R.I. 1972); ZeBarth v. Swedish Hosp., 499 P.2d 1, 10 (Wash. 1972); Trogun v. Fruchtman, 207 N.W.2d 297, 313 (Wis. 1973).

13. King v. Flamm, 442 S.W.2d 679, 681 (Tex. 1969) (general practitioner's failure to consult internist); Burks v. Meredith, 546 S.W.2d 366, 370 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (general practitioner's failure to consult surgeon).

14. Hunt v. Bradshaw, 251 F.2d 103, 108-09 (4th Cir. 1958) (unnecessary operation to

malpractice cases involving an allegation that the form of treatment was improper, at least four different standards have been applied.[15] Courts adopting the "respectable minority" standard generally have held that where there is more than one possible method of treatment a doctor will not be liable for a patient's injuries as long as the treatment employed is followed by a respectable minority of the profession.[16] The considerable number standard, a slightly different test, dictates that where competent medical authority is divided as to the proper manner of treatment in a particular case, a physician will not be liable for malpractice if he adopts a mode of treatment advocated by a "considerable number" of physicians.[17] A few early cases applied a much stricter test, holding that a doctor is liable for "any variance" from a generally accepted manner of treatment.[18] More recently, several jurisdictions have maintained that when "reasonable physicians would disagree" as to the best of several modes of treatment, a physician who uses his best judgment will not be liable for negligence, even though it may later prove that he was mistaken.[19]

In *Hood v. Phillips*[20] there was no claim that the surgery was unskillfully or negligently performed, nor was it alleged that the diagnosis of emphysema was incorrect. Rather, the plaintiff's claim was predicated upon the contention that this particular surgical procedure was not a proper one.[21]

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remove piece of metal from neck); Hoglin v. Brown, 481 P.2d 458, 461 (Wash. Ct. App. 1971) (unnecessary exploratory surgery).

15. Hood v. Phillips, 554 S.W.2d 160, 164-65 (Tex. 1977).

16. *See, e.g.*, Leech v. Bralliar, 275 F. Supp. 897, 902 (D. Ariz. 1967) (mode of treatment adopted by sixty-five physicians in country held to constitute respectable minority); Baldor v. Rogers, 81 So. 2d 658, 660 (Fla. 1954) (difference of opinion in treatment of cancer); Dahl v. Wagner, 151 P. 1079, 1080 (Wash. 1915) (difference in medical opinion as to treatment of bone dislocation). Two jurisdictions have held the test to be whether the method of treatment employed was followed by a "respectable portion" of the medical profession. *See* Walkenhorst v. Kesler, 67 P.2d 654, 668 (Utah 1937); Smith v. Beard, 110 P.2d 260, 270 (Wyo. 1941).

17. *See, e.g.*, Fritz v. Parke-Davis & Co., 152 N.W.2d 129, 131 (Minn. 1967) (difference of medical opinion in treatment of epilepsy); Duckworth v. Bennett, 181 A. 558, 559 (Pa. 1935) (competent medical authority divided as to treatment of patient's hip injury); Gresham v. Ford, 241 S.W.2d 408, 411 (Tenn. 1951) (difference in medical opinion as to proper treatment of patient's injured arm). The court in Schueler v. Strelinger, 204 A.2d 577, 585 (N.J. 1964) held the test to be whether the form of treatment adopted had "substantial support" within the medical profession.

18. *See* Jackson v. Burnham, 39 P. 577, 580 (Colo. 1895) (physician who departs from accepted mode of treatment does so at his peril); Allen v. Voje, 89 N.W. 924, 931 (Wis. 1902) (departure from approved methods will render physician liable notwithstanding that new method might be improved one).

19. *See, e.g.*, Graham v. Alcoa S.S. Co., 201 F.2d 423, 426 (3d Cir.) (disagreement as to proper treatment of hernia), *cert. denied*, 346 U.S. 832 (1953); Ricket v. Hayes, 511 S.W.2d 187, 194 (Ark. 1974) (disagreement as to proper treatment of fractured jaw); Haase v. Garfinkel, 418 S.W.2d 108, 114 (Mo. 1967) (disagreement among physicians in treatment of heart disease).

20. 554 S.W.2d 160 (Tex. 1977).

21. *Id.* at 164.

Therefore, the Texas Supreme Court was presented with the unique question of what standard applies to a negligence suit based on allegations that the form of medical treatment was not a proper remedy for the diagnosed condition.[22] In formulating its decision, the court reviewed the various standards applied by other jurisdictions.[23] It concluded that the "reasonable and prudent doctor" standard would best serve the objective of protecting the competent and careful physician and permitting a cause of action against one who is not.[24] Further, the test adopted was felt to be most compatible with certain policy considerations. The court recognized the importance of allowing physicians to exercise their professional judgment in selecting a method of treatment[25] and noted the importance of experimentation in order to achieve medical progress.[26]

The court expressed concern that the "respectable minority" and the "considerable number" standards might convey to the factfinder the incorrect notion that malpractice is to be determined by a poll of the medical profession.[27] Conceivably, under the respectable minority test a physician could adopt a method of treatment that has either been rejected by the medical profession or has become outmoded,[28] provided a respectable minority of practitioners follow the same procedure.[29] The same argument could apply equally against the considerable number test, for a physician undertaking an outmoded or rejected form of treatment would likewise be shielded from liability if he could establish that a considerable number of physicians use the same method of treatment.[30] Under the reasonable and prudent doctor standard adopted in *Hood* such a result would be unlikely. The number of physicians who employ a particular method of treatment would be immaterial; rather, liability would depend on whether the form of treatment undertaken is an acceptable procedure in light of the means available to the physician,[31] the health of the patient,[32] and the state of

22. Hood v. Philips, 537 S.W.2d 291, 292 (Tex. Civ. App.—Beaumont 1976), *aff'd on other grounds*, 554 S.W.2d 160 (Tex. 1977).

23. Hood v. Phillips, 554 S.W.2d 160, 164-65 (Tex. 1977).

24. *Id.* at 165.

25. *Id.* at 165.

26. *Id.* at 165.

27. *Id.* at 165.

28. Although the instant case involves the sole issue of "rejected" mode of treatment, the court expressly held that the standard would apply whether the "form of treatment is experimental, outmoded, or rejected." *Id.* at 165.

29. *See* Dahl v. Wagner, 151 P. 1079, 1080 (Wash. 1915) (doctor not liable for negligence if treatment employed is followed by respectable minority of practitioners, despite fact that more modern methods of treatment are available); Comment, *Unnecessary Surgery: Doctor and Hospital Liability*, 61 GEO. L.J. 807, 813-14 n.39 (1973).

30. *See* Duckworth v. Bennett, 181 A. 558 (Pa. 1935) (court refused to find the defendant negligent for failure to use an X-ray in treatment of a patient's fractured hip).

31. Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977); *see* Webb v. Jorns, 488 S.W.2d 407, 411 (Tex. 1972) (rural physician not required to possess the skills or resources of sophisticated clinic). Although the court does not expressly abandon the locality rule, the holding in

medical knowledge.[33] This objective standard should discourage the utilization of "outmoded" or "rejected" methods, and thereby encourage physicians to keep abreast of current developments within the profession.[34]

A situation closely analogous to the instant case is one involving experimental medicine. Although traditionally categorized as a separate basis of liability, experimental cases pose the related question of what standard should be applied to a malpractice action based on an assertion that the method of treatment undertaken was an untried and hence unacceptable procedure.[35] Early cases held that a physician who used experimental methods did so at his peril.[36] Recently, however, one court has rejected this doctrine.[37] In *Karp v. Cooley*[38] the defendant made medical history when he implanted the first totally mechanical heart in an individual. The patient died shortly thereafter, giving rise to a malpractice suit based on an allegation of experimentation. A unanimous court reasoned that an action for experimentation should be measured by conventional malpractice standards.[39] Thus, it was held that in order to prove a physician guilty of actionable experimentation, expert testimony must establish how a reasonable and prudent doctor would have acted under the same or similar circumstances.[40]

The impracticability of allowing one test for cases involving experimen-

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the instant case is in accord with other jurisdictions which treat locality as merely one factor to be considered in applying the standard of care. *See, e.g.*, Brune v. Belinkoff, 235 N.E.2d 793, 798 (Mass. 1968); Tallbull v. Whitney, 564 P.2d 162, 165-66 (Mont. 1977); Pederson v. Dumouchel, 431 P.2d 973, 978 (Wash. 1967).

32. Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977); *see* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959). Courts generally have been more lenient in allowing experimentation when the patient is near death or seriously ill and accepted methods have proved unsuccessful. *Id.* at 581-86.

33. Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977); *see* Naccarato v. Grob, 180 N.W.2d 788, 791 (Mich. 1970) (practicing specialist must treat patients "in light of present day scientific knowledge"); Smith v. Yohe, 194 A.2d 167, 170 (Pa. 1963) (failure to take X-rays in treatment of fractured hip); Hodgson v. Bigelow, 7 A.2d 338, 342 (Pa. 1939) (failure to administer tetanus shot to patient who had sustained a cut).

34. *See* Comment, *Unnecessary Surgery: Doctor and Hospital Liability*, 61 GEO. L.J. 807, 813 (1973) (doctor neglecting to keep abreast of current surgical procedures has breached duty to practice as a reasonable physician).

35. *See* Perdue, *The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 1, 21 (1973).

36. *See, e.g.*, Owens v. McCleary, 281 S.W. 682, 685 (Mo. 1926) (law does not tolerate experimentation by physicians); Carpenter v. Blake, 60 Barb. 488, 524 (1871) (departure from established mode of treatment renders physician liable for injury resulting therefrom), *rev'd on other grounds*, 50 N.Y. 696 (1872); Slater v. Baker, 95 Eng. Rep. 860, 862-63 (1767) (novel method of treating facture); Note, *Torts: Physicians and Surgeons: Malpractice: Liability for Medical Experimentation*, 40 CAL. L. REV. 159, 161 (1952).

37. Karp v. Cooley, 493 F.2d 408, 423 (5th Cir.) (applying Texas law), *cert. denied*, 419 U.S. 845 (1974).

38. *Id.* at 408.

39. *Id.* at 423-24.

40. *Id.* at 423.

tation and a different test for cases involving improper mode of treatment has been perceived in an argument against adoption of the respectable minority standard.[41] Under this dichotomy a doctor could be absolved from liability if a form of treatment was experimental or a respectable minority of physicians supported it.[42] Since the question of what constitutes a respectable minority remains unsettled,[43] a problem lies in determining at what point a new procedure ceased being experimental, and became one followed by a respectable minority.[44] Consequently, a physician undertaking a form of treatment that can no longer be considered experimental does so at his peril, unless he can establish that a respectable minority of practitioners have adopted such a procedure.[45] Progress and innovation in medical science could thereby be discouraged.[46] Similarly, the more rigid "any variance" test would be inconsistent with the policy of encouraging experimentation in order to achieve medical progress.[47]

In adopting the reasonable and prudent doctor standard,[48] the Texas Supreme Court avoided the anomalous situation of having a different test for experimental medicine than for other malpractice cases where an improper form of treatment is alleged. Moreover, the holding is in accord with the more recent cases in other jurisdictions, which also have recognized the importance of allowing physicians a wide range in the exercise of their

41. Hood v. Phillips, 537 S.W.2d 291, 296-97 (Tex. Civ. App.—Beaumont 1976) (dissenting opinion), *aff'd on other grounds*, 554 S.W.2d 160 (Tex. 1977).

42. *Id.* at 296.

43. *See* Hood v. Phillips, 537 S.W.2d 291, 293 (Tex. Civ. App.—Beaumont 1976) (problem with the standard is in defining what constitutes a respectable minority), *aff'd on other grounds*, 554 S.W.2d 160 (Tex. 1977); Leech v. Bralliar, 275 F. Supp. 897, 902 (D. Ariz. 1967) (mode of treatment adopted by 65 physicians in country held to constitute respectable minority).

44. Hood v. Phillips, 537 S.W.2d 291, 296 (Tex. Civ. App.—Beaumont 1976) (dissenting opinion), *aff'd on other grounds*, 554 S.W.2d 160 (Tex. 1977).

45. *Id.* at 296. The identical argument could be made against adoption of the considerable number test, for until a considerable number of physicians employed a new form of treatment, liability would arise once it ceased being experimental.

46. *Id.* at 296.

47. *See* Allen v. Voje, 89 N.W. 924, 931 (Wis. 1902) (departure from approved methods will render physician liable, even though such a departure represents an improved procedure).

48. Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977). The court omitted the qualification requiring a physician to possess only that degree of skill as others in his same school of practice. Thus, although the rule was not expressly rejected, the holding implicitly recognizes the fact that the same school doctrine is of minimal importance today. *See* Drummond v. Hodges, 417 S.W.2d 740, 746 (Tex. Civ. App.—Dallas 1967, no writ) (osteopaths and allopaths study same textbooks and are required to take same state examination in order to obtain a license); Perdue, *The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 1 (1973). The author points out that since medical schools throughout the country teach the same procedures, and licensing requirements are uniform nationwide, most cases will come under the exception which precludes application of the rule where the subject of inquiry is common to other schools of practice. *Id.* at 31-32.