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# A REVIEW OF OKLAHOMA'S 2003 AND 2004 TORT REFORM

BETH REYNOLDS\*

## *I. Introduction*

Tort reform in Oklahoma has undergone numerous changes over the past few years. In 2003, the Oklahoma legislature developed the Affordable Access to Health Care Act<sup>1</sup> to expand the availability of health care services to Oklahomans by (1) ensuring sufficient compensation for health care related claims, and (2) decreasing the cost of medical liability insurance. In an effort to address additional tort law concerns, the legislature amended the Act in 2004.

This Article identifies and discusses sections of tort reform legislation implemented in 2003 and 2004. Part II addresses the Affordable Access to Health Care Act and outlines some of the provisions of the Act, such as the affidavit requirement, caps placed on noneconomic damages, and the collateral source rule. Part III then discusses the 2004 legislation, including some of the most recent changes enacted by the Oklahoma legislature.

## *II. Affordable Access to Health Care Act of 2003*

For the 2003 legislative session, Governor Brad Henry appointed members to a task force<sup>2</sup> created to address the growing medical malpractice liability issues in Oklahoma.<sup>3</sup> Several factors, including rising reinsurance costs and falling investment income, have contributed to recent increases in medical malpractice premiums for doctors and hospitals. Substantial losses in medical liability cases have also significantly contributed to increased insurance premium rates.<sup>4</sup>

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1. 63 OKLA. STAT. §§ 1-1708.1 to 1-1708.1G (Supp. 2003).

2. The Governor's task force included members from the legal profession, medical community, and nursing home industry. OKLA. STATE S. LEGIS. BR. ON TORT REFORM (Aug. 2003), available at [http://www.oksenate.gov/publications/legislative\\_briefs/legis\\_brief\\_2003/tort\\_reform.pdf](http://www.oksenate.gov/publications/legislative_briefs/legis_brief_2003/tort_reform.pdf).

3. *Id.*

4. U.S. GAO HIGHLIGHTS, GAO-03-702, MEDICAL MALPRACTICE INSURANCE: MULTIPLE

After much heated debate, a compromise version of Senate Bill 629 established the Affordable Access to Health Care Act, which took effect on July 1, 2003.<sup>5</sup> Its purpose was to “implement reasonable, comprehensive, and effective medical liability reforms designed to:” (1) “[l]ower the cost of medical liability insurance;” (2) improve access to health care services; (3) ensure fair and adequate compensation for health care claims; and (4) “[i]mprove the cost-effectiveness of [Oklahoma’s] current medical liability system . . . .”<sup>6</sup> In an effort to accomplish these goals, the 2003 Act requires affidavits for medical liability actions, caps on noneconomic damages, and changes to the collateral source rule.

### A. Affidavit Requirement

The Act requires petitions in medical liability actions to include an affidavit.<sup>7</sup> Specifically, the affiant must attest that (1) the plaintiff has consulted with and reviewed the facts of her claim with a *qualified* expert; (2) the plaintiff has acquired a written opinion from a *qualified* expert; and (3) the plaintiff has concluded that the claim is meritorious based on good cause as established by the *qualified* expert’s review and consultation.<sup>8</sup> The qualified expert’s written opinion must identify the plaintiff and conclude that “based upon a review of the available medical records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the health care provider against whom the action is brought constituted professional negligence . . . .”<sup>9</sup> If the plaintiff files a medical liability action without the required affidavit and the court has not extended the plaintiff’s time to submit the affidavit, the court, upon motion by the defendant in the case, must dismiss the action without prejudice.<sup>10</sup>

In addition to dismissing a cause of action for failing to attach an affidavit, a court may also dismiss an action if the plaintiff’s expert is not qualified to testify on the issues in the case pursuant to the following definition:

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FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (June 2003), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=d03702.pdf&directory=/diskb/wais/data/gao>.

5. See 63 OKLA. STAT. § 1-1708.1A.

6. *Id.* § 1-1708.1B; see also OKLA. H.R. MEDIA DIV., SUMMARY OF HOUSE FLOOR ACTIVITY MAY 22-27 (2003), *available at* <http://www.lsb.state.ok.us/house/NEWS6291.htm>.

7. OKLA. H.R., *Judiciary*, HIGHLIGHTS OF LEGISLATION, July 2003, at 24 [hereinafter *Judiciary*]. The opposing party cannot later use these affidavits to impeach the affiant.

8. 63 OKLA. STAT. § 1-1708.1E(A)(1) (emphasis added).

9. *Id.*

10. *Id.* § 1-1708.1E(A)(2).

6. "Qualified expert" means a *health care provider* who has knowledge of standards of care for the diagnosis, assessment, prevention, treatment or care of the illness, disease, injury or condition involved in the medical liability action. In a case involving a claim for negligent credentialing or corporate negligence, a "qualified expert" means a physician or administrator who has or has had responsibility for credentialing or served on a medical staff committee involved in a credentialing process at the licensed health care entity.<sup>11</sup>

For this reason, a plaintiff's case may be dismissed if her expert witness fails to satisfy the "qualified expert" requirement of title 63, section 1-1708.1E of the Oklahoma Statutes and its governing definitions in section 1-1708.1C.

### *B. Caps on Noneconomic Damages*

The Act also places a \$300,000 cap on noneconomic damages, which are damages that cannot be objectively measured because they are nonquantifiable. The Act defines noneconomic damages as "all subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, emotional distress, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation and humiliation . . ." <sup>12</sup> The court, however, may lift the noneconomic damages cap if it finds clear and convincing evidence of negligence.<sup>13</sup>

The cap's applicability also has other limitations. First, the Act's cap only applies to obstetric and emergency room cases.<sup>14</sup> Second, the noneconomic damages cap does not apply to medical liability cases involving wrongful death claims.<sup>15</sup> Third, the cap applies regardless of the number of parties or the number of actions brought relating to the injury at issue in the lawsuit.<sup>16</sup>

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11. *Id.* § 1-1708.1C(6) (emphasis added). The statute defines a health care provider as "any person or other entity who is licensed pursuant to the provisions of Title 59 or Title 63 of the Oklahoma Statutes, or pursuant to the laws of another state, to render health care services in the practice of a profession or in the ordinary course of business . . ." *Id.* § 1-1708.1C(1).

12. *Id.* § 1-1708.1C(4).

13. *Id.* § 1-1708.1F(B). If the court makes such a finding, it must specifically enunciate its findings into the record of the case out of the presence of the jury. *Id.*

14. *Judiciary*, *supra* note 7.

15. 63 OKLA. STAT. § 1-1708.1F(D). A noneconomic damages cap in a wrongful death case would violate the Oklahoma Constitution, which bars setting any limits on damages in wrongful death cases except in those cases dealing with workers' compensation and governmental tort claims. OKLA. CONST., art. 23, § 7.

16. 63 OKLA. STAT. § 1-1708.1F(A).

The cap's purpose is to strike a balance between a plaintiff's right to be compensated for her losses and the need to stabilize increasing costs associated with medical liability. Currently, health care providers may perform precautionary tests, or defensive medicine, in an attempt to protect themselves from expensive lawsuits. Because it will lessen the total amount of recoverable damages, limiting noneconomic damages will contribute to lowering medical liability costs as well as the incidence of defensive medicine associated with the fear of expensive lawsuits.

### C. Collateral Source Rule

The 2003 Act also includes a provision altering the application of the collateral source rule.<sup>17</sup> The Act requires the court to admit evidence of payments made to the plaintiff from collateral sources unless the court determines that "any such payment is subject to subrogation or other right of recovery."<sup>18</sup>

The collateral source rule prohibits parties in civil lawsuits from introducing evidence showing that the plaintiff received payments for her losses from another collateral source, such as the plaintiff's workers' compensation or a health or disability insurance company.<sup>19</sup> Even though compensatory damages are only intended to restore injured parties to their preinjury position or to make plaintiffs "whole,"<sup>20</sup> the collateral source rule potentially allows plaintiffs to recover twice for the same injury.

Because the collateral source rule allows plaintiffs double recovery, tort reform proponents argued that the rule significantly contributed to increased health care costs. To resolve the problem of potential double recovery, the Oklahoma legislature drafted a provision that allows admission of evidence

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17. *Id.* § 1-1708.1D. Specifically, this provision provides:

A. In every medical liability action, the court shall admit evidence of payments of medical bills made to the injured party, unless the court makes the finding described in paragraph B of this section.

B. In any medical liability action, upon application of a party, the court shall make a determination whether amounts claimed by a health care provider to be a payment of medical bills from a collateral source is subject to subrogation or other right of recovery. If the court makes a determination that any such payment is subject to subrogation or other right of recovery, evidence of the payment from the collateral source and subject to subrogation or other right of recovery shall not be admitted.

*Id.*

18. *Id.*

19. *Weatherly v. Flournoy*, 1996 OK CIV APP 109, ¶ 6, 929 P.2d 296, 298-99.

20. *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1033-34 (N.D. Okla. 1991).

of payments of medical bills made to the injured party, unless the payment is subject to subrogation or some other right of recovery.<sup>21</sup>

The 2003 Act provided important first steps toward true tort reform in Oklahoma. Nevertheless, it was clear that more would be necessary, and the legislature attempted to address these additional concerns in 2004.

### *III. New Provisions and Changes in the 2004 Tort Reform Legislation*

In 2004, continuing public concern over providing liability relief to medical providers, supplying some level of protection to Physicians Liability Insurance Company, and confronting several other tort law concerns, prompted the Oklahoma legislature to amend the 2003 Affordable Access to Health Care Act.<sup>22</sup> Identified below are some of the changes recently passed by the legislature in response to these concerns.

#### *A. "I'm Sorry" Provision*

This new provision allows health care providers to express sympathy or apologize without having it used against them at trial.<sup>23</sup> Under the prior, unwritten rule, health care providers did not talk to patients or family members about events potentially leading to a lawsuit out of fear the conversation may be used against them later in court.<sup>24</sup> The statute states in pertinent part:

In any medical liability action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the plaintiff, a relative of the plaintiff, or a representative of the plaintiff and which relate solely to discomfort, pain, suffering, injury, or death as the result of the unanticipated outcome of the medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.<sup>25</sup>

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21. 63 OKLA. STAT. § 1-1708.1D.

22. OKLA. H.R. SESSION OVERVIEW 10 (2004), available at <http://www.lsb.state.ok.us/house/session%20overview%20final.pdf>.

23. *A Message from the OSMA Executive Committee: H.B. 2661: Is It Going to Divide Us or Unite Us?*, June 3, 2004, available at <http://www.okmed.org/userfiles/documents/letter.pdf>.

24. Rachel Zimmerman, *Doctors' New Tool to Fight Lawsuits: Saying "I'm Sorry,"* WALL STREET J., May 18, 2004, at A1.

25. 63 OKLA. STAT. § 1-1708.1H.

Thus, the “I’m Sorry” provision makes any expression of sympathy by a health care provider to a patient or patient’s relatives inadmissible as evidence of an admission of liability.<sup>26</sup>

Some commentators view the apology provision as a potential resolution to the continuing rising medical costs each year.<sup>27</sup> Although reducing the amounts of settlement and judgments in medical liability cases is helpful, it is better if health care providers are not sued at all. Many supporters of the provision believe that one of the best methods for preventing lawsuits against health care providers is as easy as allowing them to express sympathy or apologize to the patient or family when there is a negative result.<sup>28</sup>

### *B. Caps on Noneconomic Damages*

The 2004 bill extends the 2003 damages caps to the year 2010 for cases arising from obstetrics-gynecology and emergency room care.<sup>29</sup> The new bill also provides for a \$300,000 cap in all other medical liability actions, excluding wrongful death cases.<sup>30</sup> The cap, however, does not apply except under certain criteria.

#### *1. Applying the Cap*

To apply the cap, the defendant must have made an offer of judgment, and the amount of the verdict must be less than one and one-half times the amount of the final offer of judgment.<sup>31</sup> For example, if the defendant makes an offer of judgment of \$100,000, the verdict must be less than \$150,000 for the cap to apply.

#### *2. Lifting the Cap*

In the event the defendant satisfies the offer of judgment criteria, the judge must then decide if a jury could reasonably make a finding that (1) the defendant committed negligence by clear and convincing evidence, a higher standard than is usually applied, or (2) the defendant’s conduct was willful or wanton, as judged by the preponderance of the evidence.<sup>32</sup> If the judge first makes this determination, and nine or more jury members also find that the

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26. *Id.*

27. *See, e.g.,* Zimmerman, *supra* note 24.

28. *See id.*

29. 63 OKLA. STAT. § 1-1708.1F.

30. *Id.*

31. *Id.* § 1-1708.1F-1.

32. *Id.*

defendant committed negligence or was willful or wanton, the judge may lift the cap.<sup>33</sup>

### 3. *Timing Issues for Provisions*

The 2004 caps apply only to actions that accrue on or after November 1, 2004.<sup>34</sup> Furthermore, without positive legislative action to extend or amend their application, the new caps will terminate on November 1, 2010.<sup>35</sup>

### C. *Joint and Several Liability*

Under the 2004 Act, the legislature passed a provision on joint and several liability that will hopefully reduce a health care provider's exposure to liability for the acts of others. Specifically, the new law provides that in civil actions based on fault and not arising out of contract, a defendant can only be held 100% liable for an award if the court determines that the defendant contributed greater than 50% to the liability.<sup>36</sup> If there is more than one defendant — for example, a doctor and a hospital — the jury will have to find that the hospital was 51% or more liable for it to be responsible for the whole verdict. Otherwise, the court will only hold the hospital liable for its respective percentage of the verdict. This provision, however, applies only when a plaintiff has also been found to be comparatively negligent.<sup>37</sup>

### D. *Dismissals*

Under the Act, a medical liability case shall only be dismissed under three statutory conditions.<sup>38</sup> First, the plaintiff may dismiss a medical liability action either before the completion of discovery or before a ruling on a motion for summary judgment, whichever comes later. Second, where there has not been an intervention or the submission of an answer raising affirmative defenses, an action may be dismissed by the plaintiff. This second condition also allows for dismissal by either plaintiffs, defendants, or intervenors at any time before trial so long as costs are paid.<sup>39</sup> Finally, if prior to trial all parties are in

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33. *Id.*

34. *Id.*

35. *Id.*

36. 23 OKLA. STAT. § 15 (Supp. 2004).

37. *Id.* § 15(D).

38. 12 OKLA. STAT. § 684.1 (Supp. 2004).

39. *Id.* Dismissal under this subsection does not require an order of the court, and in no way should such dismissal by a plaintiff prejudice the rights of a defendant or intervenor to proceed. *Id.*



agreement in a medical liability case, it may be dismissed.<sup>40</sup> In other words, under the new statute, a plaintiff no longer has the sole discretion to dismiss a medical liability action after a trial has started.

#### *E. Volunteer Medical Professional Service Immunity Act*

For many years, physicians have expressed liability concerns when providing medical services on a volunteer basis. Therefore, the 2004 reforms created the Volunteer Medical Professional Services Immunity Act to (1) protect volunteer medical professionals, and (2) provide immunity from liability for services provided at a free clinic or when the patient was referred from a free clinic or one participating in a Medical Reserve Corps.<sup>41</sup> Thus, a volunteer medical professional giving treatment at a free clinic is immune from liability in a civil action on the basis of any act or omission of that volunteer, which results in injury, but only if the free clinic provided the services and certain other conditions are met.<sup>42</sup> For immunity to apply, the statute requires the patient to sign a written statement acknowledging that the physician is voluntarily providing care and that immunity applies.<sup>43</sup>

Immunity also applies under certain other conditions. For example, if a volunteer medical professional refers a patient to another physician, the consulting physician also receives immunity when certain conditions are met.<sup>44</sup> Additionally, immunity now applies to those physicians providing disaster relief as part of the Medical Reserve Corps, so long as they are acting in good faith and within the scope of their official duties.<sup>45</sup>

#### *F. Venue for Medical Liability Actions*

In the past, plaintiffs' attorneys have tried to bring their cases in the most favorable forum. In an effort to prevent such "forum shopping," the legislature passed a statute addressing venue in medical liability actions.<sup>46</sup> Oklahoma law now specifically provides that medical liability cases shall be brought in the county where the cause of action, or any portion thereof, arose or where any of the defendants reside.<sup>47</sup> In the case of a corporate defendant,

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40. *Id.*

41. 76 OKLA. STAT. § 32 (Supp. 2004).

42. *Id.* § 32(B).

43. *Id.*

44. *Id.* § 32. For example, the patient must sign a written statement acknowledging that the physician is acting as a volunteer and that immunity applies.

45. *Id.* § 32(G).

46. 12 OKLA. STAT. § 130 (Supp. 2004).

47. *Id.*

venue is appropriate in the county in which the corporation is situated, where it has its principal place of business, or where a codefendant of a corporation may be sued.<sup>48</sup>

### G. Expert Testimony

The legislature added special criteria for determining whether an expert is qualified to testify in a medical liability case, which will help further define title 12, section 2702 of the Oklahoma Statutes.<sup>49</sup> Title 12, section 2702 provides that expert testimony is admissible “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” provided that the “witness [is] qualified as an expert by knowledge, skill, experience, training or education . . . .”<sup>50</sup> The court may only depart from these criteria if it finds good cause to admit the expert’s testimony.<sup>51</sup>

The statutory criteria for determining whether an expert is qualified to testify in a particular medical malpractice case are as follows:

1. [The expert] [i]s licensed to practice medicine or has other substantial training or experience, in any area of health care relevant to the claim; and
2. [The expert] [i]s actively practicing or retired from practicing health care in any area of health care services relevant to the claim.<sup>52</sup>

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>53</sup> and *Kumho Tire Co. v. Carmichael*,<sup>54</sup> the U.S. Supreme Court explained that the trial court is charged with a “gatekeeping function” when determining the admissibility of expert testimony pursuant to Federal Rule of Evidence 702.<sup>55</sup> As gatekeeper, the trial judge must “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”<sup>56</sup> The trial court’s threshold determination in deciding the admissibility of expert testimony is whether the individual

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48. *Id.*

49. 63 OKLA. STAT. § 1-1708.1I (Supp. 2003).

50. 12 OKLA. STAT. § 2702 (2001).

51. 63 OKLA. STAT. § 1-1708.1I(A).

52. *Id.* § 1-1708.1I(B).

53. 509 U.S. 579 (1993).

54. 526 U.S. 137 (1999).

55. See *Kumho Tire Co.*, 526 U.S. at 141-42; *Daubert*, 509 U.S. at 589-97. In *Kumho Tire*, the Court held that the standards set forth in *Daubert* apply equally to the admission of all scientific and technical expert testimony. *Kumho Tire Co.*, 526 U.S. at 149.

56. *Daubert*, 509 U.S. at 589.

expert is qualified in the specific field in which she is offering an expert opinion.<sup>57</sup> While an expert may be sufficiently qualified in one area of expertise, the same expert may be precluded from offering opinions beyond that area or in another area of expertise because of a lack of qualifications.<sup>58</sup>

Moreover, in a relatively recent case decided by the Oklahoma Supreme Court,<sup>59</sup> the court adopted the use of *Daubert* and *Kumho Tire* in a civil proceeding when determining the admissibility of an expert's opinion.<sup>60</sup> In its opinion, the court cited to *Weisgram v. Marley Co.*,<sup>61</sup> where the U.S. Supreme Court stated that "[i]nadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis.'"<sup>62</sup>

Thus, it is undeniably the responsibility of the Oklahoma trial judge to filter such expert testimony and to exclude it where it is conjectural. For expert testimony to be useful in assisting the trier of fact, the expert must necessarily be qualified in the particular field at issue by virtue of her education, training, or experience. Otherwise, instead of assisting the jury, the testimony would more likely be prejudicial, confusing, and misleading. Thus, the new statute will help further clarify existing law, prevent unqualified experts from testifying in medical liability cases, and curtail trial lawyers from using "professional" expert witnesses.

#### *H. Frivolous Claims and Defenses*

Finally, in a separate bill, the legislature enacted a statute that allows for parties prevailing on a motion to dismiss or motion for summary judgment to recover their costs and attorney fees if the court finds that the nonprevailing party's claim or defense was frivolous.<sup>63</sup> The purpose of this provision is to prevent and deter the filing of frivolous medical malpractice claims by making it costly to file. The legislature defines "frivolous" to mean that "the action was knowingly asserted in bad faith, was unsupported by any credible

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57. FED. R. EVID. 702; 12 OKLA. STAT. § 2702 (2001); *see also* *Polaino v. Bayer Corp.*, 122 F. Supp. 2d 63, 66 (D. Mass. 2000); *Everett v. Georgia-Pacific Corp.*, 949 F. Supp. 856, 857 (S.D. Ga. 1996).

58. *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 766 (N.D. Iowa 1999).

59. *Christian v. Gray*, 2003 OK 10, 65 P.3d 591.

60. *Id.* ¶ 53, 65 P.3d at 612.

61. 528 U.S. 440 (2000).

62. *Id.* at 454 (quoting FED. R. CIV. P. 50(a)); *see also* *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

63. 12 OKLA. STAT. § 2011.1 (Supp. 2004).

evidence, was not grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law."<sup>64</sup>

If the court determines that a lawsuit is "frivolous," the court must order the nonprevailing party to reimburse the prevailing party for reasonable costs, including attorney fees incurred respecting such claim or defense.<sup>65</sup> Furthermore, the court may prescribe any sanction in accordance with title 12, section 2011 of the Oklahoma Statutes.<sup>66</sup>

#### *IV. Conclusion*

This Article only discusses those portions of tort reform implemented in 2003 and 2004, which many commentators believe are inadequate to truly reverse the course of medical liability in Oklahoma. Consequently, the Oklahoma House of Representatives recently passed House Bill 2047 calling for more tort reform in 2005. In fact, House Bill 2047 or what was renamed, "Engrossed House Bill 1554," covered several topics, including: capping noneconomic damages at \$300,000 in all noncontract actions except wrongful death, codifying *Daubert* principles for expert witnesses, placing more restrictions on punitive damages, and abolishing the collateral source rule as well as joint liability. Even though this bill died in conference at the end of the legislative session, it seems likely that a similar version of this bill will reappear in 2006. Tort reform definitely has been a hot area of debate over the past couple of years and will undoubtedly continue to evolve in years to come.

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64. *Id.*

65. *Id.*

66. *Id.*

