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# Family wins \$15M suit against Children's Hospital physicians

by Justin Rebello

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A Suffolk County Superior Court jury in Boston has awarded \$15 million to the parents of a young child who died following a series of complications from a catheterization procedure.

Jurors found that two doctors at Children's Hospital Boston, Dr. James A. DiNardo, an anesthesiologist, and Dr. James Lock, the hospital's former physician-in-chief, caused the death of three-year-old Jason Fox.

Jason died in December 2004, a year and a half after he was treated at the hospital for a birth defect. Jason's father Brian, an attorney in Pennsylvania, said the basis for the complaint was that Lock and DiNardo lied about their actions when treating his son, and attempted to cover up mistakes that were made during and after the procedure.

"We knew pretty early on after the procedure that Jason was very adversely affected," said Brian Fox. "Before the procedure he was extremely interactive and engaging, then after he stopped talking, couldn't walk independently. The doctors continued to insist he would just get better."

Brian's cousin, Sherman Oaks, Calif.-based James Fox, one of the attorneys that represented Jason's family, said that his biggest challenge at trial was convincing jurors that such respected physicians would lie and deceive the parents of a patient. To do this, he structured his case around chipping away at the mystique surrounding the physicians.

Attorneys for the defense could not be reached for comment.

### Preventing similar suits

Risk management consultant Jim Vaccarino, who practices in the Healthgroup at The Hays Companies, said he believes that the doctors were sued in the

first place because Jason's parents did not feel they were open about the complications that arose from their son's procedure.

"The worse thing you can do is not be forthright with a family and then try to ... cover up your mistake" said Vaccarino. He noted that many physicians are prone to panic if a patient or his or her family accuses them of malpractice.

"You should speak to an advisor or a lawyer on your hospital's staff before you do anything," recommended Vaccarino.

Vaccarino said doctors can side-step potential med-mal lawsuits early by being completely upfront about the procedure (particularly a risky one, like the one undergone by Jason Fox), and providing all of the risks in writing.

He suggests establishing "a rapport with a patient [or] a patient's parents, and letting them know the risks, [including] long-term disability, death and complications, such as infection."

On the patient's chart, it is also essential to make sure each step of the procedure is outlined.

"If a doctor is accused of something, he might feel obligated to get rid of a part of the chart. ... [But] that [could be the] part another doctor [or expert will] point to and say you didn't deviate from the normal standard of care," Vaccarino said.

Martin Foster, a med-mal defense attorney at Foster & Eldridge in Cambridge, agreed that the way the chart and accompanying documents are written is critical.

"You want a detailed narrative that explains what decisions you made, when you made them and why," said Foster. "Especially when it involves a relatively new or advanced procedure, the first thing people are going to look at in the aftermath of an adverse outcome is what did the [patients] know beforehand."

### **Birth defect**

Jason Fox was born in July 2001 with a birth defect called Tetralogy of Fallot, which restricted the flow of blood through his heart. In Jason's case, the defect prevented his blood from carrying enough oxygen to his organs and limbs.

By the time he was two, Brian Fox said his son had already undergone seven cardiac catheterizations at Children's Hospital of Philadelphia to widen the arteries that carry blood to his lungs.

Doctors in Philadelphia finally referred Jason to Lock, a physician widely considered a pioneer in the use of catheterization to repair cardiac birth defects. On April 18, 2003, Jason went into Children's Hospital Boston for his second catheterization there.

Hours after the procedure, he suffered a seizure. According to a subsequent CAT scan, contrast dye had leaked into his brain.

After the initial seizure, two MRIs were done to determine the extent of brain damage. The first MRI showed that a tiny piece of metal had become lodged in Jason's brain, which the lawsuit alleged was caused by carelessness with one of the instruments used during the catheterization. During the second MRI, Jason's heart rate dropped and doctors had to resuscitate him.

He was discharged three weeks after the surgery with severe brain injuries, and died in December 2004.

### **Records altered**

The pivotal documents in the case, according to James Fox, were the anesthesia record and Jason's medical record.

Fox said there were a number of inconsistencies that stuck out, including the fact that the anesthesia record had been signed off on by a physician who wasn't present during the administration of Propofol, an intravenously induced anesthetic. (The drug gained notoriety after allegations that Michael Jackson abused it prior to his death.)

Another inconsistency came to light in Jason's electronic medical record. One attending physician revealed during his deposition that he had made note of several key events during Jason's stay, but those weren't evident in the record. The physician insisted he made them electronically, and later provided a printed copy of the electronic record.

"When we saw it, it was identical to the printed record, but there were ten additional lines," said James Fox. "So we started looking at the electronic record for dates and times when the information was put in, and we could see on a number of occasions that doctors had logged in [afterward] and changed the information."

According to James Fox, the records included an adjustment in the dosage of epinephrine during resuscitation, which the complaint alleged had been botched.

The plaintiffs also uncovered a cardiologist's note from the hospital's ICU diagnosing Jason with "contrast toxicity due to high contrast load."

"They screwed with major parts of the record, especially the ICU note," charged James Fox. "That was a very damning indictment of Dr. Lock, and that note became the centerpiece of our liability argument against him."

### **Doctor on the stand**

According to both James and Brian Fox, jurors informed them after the trial that they were displeased with the arrogance Drs. Lock and DiNardo displayed over the course of the trial.

James Fox said that his strategy was to get jurors to see that despite their admirable credentials (both men have been cited in hundreds of publications and written textbooks), the doctors had made a mistake and simply assumed that their clout would get them off the hook.

Both doctors took the stand. James Fox said that he made it a point to cover even the smallest details of the procedure performed on Jason.

"I grilled [Dr.] Lock for a good day, going into a lot of detail," said Fox. "I asked how you set up the infusion pump. I asked him if he gave .3 ccs or .03 ccs. He kept getting more and more frustrated until he yelled out, 'I don't make mistakes!'"

After six weeks of trial and four days of deliberations, the jury awarded \$5 million for Jason's pain and suffering, \$5 million for his parents' loss of their child and \$5 million for wrongful death.

But James Fox said they won't see the entire \$15 million because the parties agreed to a high-low agreement during jury deliberations. He declined to elaborate on the specifics of the settlement. MMLR

Questions or comments should be directed to the editor at: reni.gertner@mamedicalaw.com

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