



Med-mal win suggests lawyers rethink strategy

Jury awards \$15M in case seen as loser

By Julia Reischel

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California lawyer James E. Fox won last month's \$15 million award against Children's Hospital - the state's largest medical-malpractice verdict in 2009 - by not talking about medicine.

"I did not try this as a malpractice case," Fox says of Fox, et al. v. Boston Scientific Corporation, et al. "I tried this as an obstruction-of-justice case. That was the only way."

The strategy allowed Fox, along with local counsel Karen L. Kruskal of Cambridge and David B. Chaffin of Boston, to convince a young, mostly female jury that two doctors at the Boston hospital covered up medical errors that ultimately led to the death of a toddler. The victory, in a case that some of the state's top med-mal lawyers turned down, upends conventional wisdom, attorneys say, by showing that juries are willing to award large sums for dead victims and that they will seek to punish doctors who have falsified records even if there is little medical evidence of wrongdoing.

"We can learn from this case the fact that a jury is willing to recognize the value of the loss of a child to a parent," said med-mal plaintiffs' lawyer Andrew C. Meyer, who had rejected the case. "Historically, death claims have not brought in [as] large verdicts as significant injury claims."

Elizabeth N. Mulvey, a medical-malpractice litigator at Crowe & Mulvey in Boston who declined to say if she had been approached to take the case, said the verdict proves that juries abhor cover-ups.

"Based only on what I've heard about the verdict, if the jury thinks that the doctors are lying or covering up their mistakes, that's a really bad thing," she said. "I think that affects not only damages, but liability. It's the cover-up that gets you."

Surprise verdict

Before 3-year-old Jason Fox died in December 2004, he could not walk or speak - a condition he had been plagued with ever since his surgery at Children's Hospital 18 months earlier for a severe birth defect involving his heart.

According to Jason's lawyers, the doctors at Children's Hospital had damaged Jason's brain during the procedure and hastened his death by injecting him with too much contrast dye and by giving him too much anesthesia.

When four different Boston law firms refused to take the case (some citing the fact that they had used the defendants as expert witnesses in other trials), Jason's father sought out his cousin, James Fox, a med-mal attorney in Sherman Oaks, Calif. Fox conducted 44 depositions in the case, about four times the average number of depositions taken in Massachusetts med-mal cases, he said.

Instead of building his case around a piece of metal found embedded in Jason Fox's brain, allegedly left there during the procedure at Children's Hospital, James Fox settled with Boston Scientific, the medical-device company accused of manufacturing the instrument that shed the shard.

Fox also settled with Mallinckrodt, the manufacturer of the contrast dye.

During the Suffolk County Superior Court trial last November, Fox based his case against the doctors on evidence of inconsistencies in the boy's medical records. He claimed there were several instances of fudged records, including one in which the doctors had ordered another staffer to write a record of Jason's treatment for them and another in which a note from a cardiologist in the intensive care unit disappeared.

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

According to Fox, defense counsel William J. Dailey Jr., of Sloane & Walsh in Boston, responded by arguing that the medical records had been handled properly, focusing instead on the importance of Children's Hospital to the Boston community. (Dailey did not return a call from Lawyers Weekly seeking comment.)

After six weeks of trial, as the jury's deliberations spilled into day four, Children's Hospital, which previously had made no settlement offers, came to Fox with a deal: a promise of minimum damages in exchange for a maximum cap.

Negotiations stretched into the night, and the next day, on Dec. 18, Fox agreed. Hours later, the jury returned with a \$15 million verdict: \$5 million for the boy's pain and suffering, \$5 million for the parents' loss of their child, and \$5 million for wrongful death.

Although Fox will not reveal the amount of the high-low agreement, he said his clients will walk away with a seven-figure sum.

'Something to hide'

According to Meyer, of Boston's Lubin & Meyer, Fox played his cards masterfully by shifting the trial away from evidence of medical malpractice and toward the doctors' records.

"I think juries have a tendency to believe if somebody is covering something up and not telling the truth, that they have something to hide," Meyer said. "That gets one over the hurdles of liability reasonably well."

Meyer added that focusing on medicine is a common mistake.

"That's why so many of these cases are lost at trial," he said. "It's because the people trying them often believe that it's the battle of the experts."

Max Borten, a med-mal plaintiffs' lawyer at Gorovitz & Borten in Waltham, agrees that, for many juries, the medicine is simply not persuasive on its own.

"Medical malpractice distills down to whether a medical provider did what he or she was supposed to do, or did something that he or she was not supposed to do, and as a result, a patient sustained damages," Borten said. "In my naiveté, I believed that having those parameters was enough to carry a case. It is not. It's the surrounding aspects that will or will not resonate with the jury."

But it can require a lot of digging to find evidence that a hospital's records have been doctored, Fox cautioned.

"If somebody else is crazy enough to take 40 to 50 depositions, they might come up with something," he said.

'Beyond anything material'

According to Mulvey, the Fox case should send a clear message to med-mal practitioners: "Juries place a very high value on human life."

"I think sometimes insurance companies and defense lawyers tend to think that if somebody isn't in perfect health, or if they have a limited life expectancy, or if they're old and disabled, then their lives aren't, quote, worth anything," she said. But the Fox verdict shows that "juries think that if somebody dies, that's a really bad thing."

Fox said he was warned before the trial that New England juries do not value pain and suffering. So when he advised the jurors on how much to award his client, he told them "the damages sustained by the family were beyond anything material that we could identify."

When the jury came back with \$15 million, the California lawyer was stunned. "I have no idea where that number came from," he said.

Later, he learned that that number was a compromise: One juror had wanted to award his clients \$50 million per count.

Meyer said that the size of the verdict is a sign that New England juries are shedding their stoic stereotype.

"It's heartening to see that jurors are beginning to recognize the significance of any loss regardless of any ongoing economic loss," he said.

Lawyers USA reporter Justin Rebello contributed to this story.