



NEW YORK STATE

JURY VERDICT

REVIEW & ANALYSIS®

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SUMMARIES WITH TRIAL ANALYSIS

**Volume 23, Issue 3
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A monthly review of New England State and Federal Civil Jury Verdicts with professional analysis and commentary.

The New England cases summarized in detail herein are obtained from an ongoing monthly survey of the State and Federal Courts in New England.

VERDICTS BY CATEGORY

A capsulized regional Northeast summary of significant verdicts from our companion publications in NJ, NY and PA is also included.

Published monthly

\$3,500,000 Recovery – Medical malpractice – Emergency Room – Failure to perform blood enzyme tests in the face of a normal EKG upon presentation of obese patient who was a smoker with complaints of chest pain while walking – Cardiac death of 30-year-old mother of four. 2

\$2,950,000 Recovery reached during deliberations – Medical malpractice – Cardiology – Failure to recognize unstable angina and appreciate cardiac risk facing 33-year-old female patient – Failure to place patient on cardiac monitor and institute medication – Cardiac death of mother of two. 3

\$1,950,000 Recovery – Medical malpractice – Radiology – Approx. one-year delay in diagnosis of breast cancer – Mammogram taken shortly before diagnosis refers to increase in nodule size as compared to previous exam – Plaintiff alleges delay reduced chance of survival from more than 90% to less than 75%. 5

\$2,768,000 Verdict, including \$2,268,000 to plaintiff cab passenger and \$500,000 to second plaintiff cab passenger – Motor vehicle negligence – Multi-vehicle collision – Host cab swerving to avoid phantom driver loses control, strikes bus operated by codefendant – Bus jutting into travel portion of highway while stopped on crosshatch area – Bus company found 40% liable – Retrial. 6

\$2,120,000 Recovery after beginning of damages trial – Motor vehicle negligence – Intersection collision – Road construction flag person waves codefendant pickup truck driver to make left turn into intersection as plaintiff driver enters intersection – Plaintiff suffers lumbar and cervical herniations first diagnosed five years following collision – Plaintiff contends herniations visible on MRI taken shortly after accident, but not properly seen when read by physician – Lumbar hemilaminectomy and cervical fusion. 7

\$1,500,000 Recovery – Labor Law – Sec. 240 (1) – Summary judgment on liability granted to plaintiff who fell 15 ft. while preparing to paint Kosciusko Bridge – Defendant State fails to provide protective devices to prevent fall – Tarsal tunnel syndrome, PTSD – Fear of heights. 9

\$700,000 Verdict – Premises liability – Hazardous premises – Landlord negligently installed sink that fell onto minor child – Lacerations to right thigh and left hip leaving substantial scarring. 10

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thetia. The plaintiff planned on spending one night in the hospital. The plaintiff maintained that the respiratory distress progressed to respiratory failure, requiring a ventilator for six days. The plaintiff did not sustain permanent respiratory injuries.

The defendant maintained that the surgery was properly performed and that the patient suffered an ileus, or a failure of the bowels to regain their normal functioning, which is a known complication following general anesthesia. The defendant contended that because of the abdominoplasty, the fluids and air which would otherwise be expected to back-up into the abdominal area, began compressing the diaphragm, causing the respiratory distress. The defendant maintained that all of the records reflected that there were no breathing difficulties for more than 20 hours following the surgery and maintained that if the plaintiff's theory was accurate, such respiratory complaints would have commenced immediately after the surgery.

The jury found for the defendant.

REFERENCE

Boyle vs. Hassan. Index no. 015423/03; 8-05.

Attorney for defendant: Christopher P. Keenan, Esq. of Westermann Hamilton Sheehy Aydelott & Keenan in White Plains, NY. □

Surgery

DEFENDANT'S VERDICT

Defendant vascular surgeon performing carotid endarterectomy allegedly uses too large a catheter to address blood clot found above area of plaque – Defendant allegedly ventures too far into artery – Cavernous fistula in sinus area places pressure on optic nerve – Swelling and paralysis of eye – Initial surgery appears to substantially resolve condition until formation of aneurism necessitates additional surgery which is successful.

Erie County

The plaintiff, who was undergoing a carotid endarterectomy, a procedure which removes atherosclerotic plaque from the walls of a carotid artery, reducing the risk of stroke or transient ischemic attack (TIA), contended that after removing the plaque, the defendant vascular surgeon, who noted a blood clot, utilized a catheter that was too large and ventured too far into the artery, causing a cavernous fistula in the area through which the optic nerve passes.

The plaintiff maintained that the pressure on the optic nerve resulted in swelling and paralysis of the eye. The condition appeared to substantially resolve with the surgery until the diagnosis of an aneurism that necessitated additional surgery in the Summer of 2004. This surgery appears to have been successful.

The defendant contended that the catheter size and the distance into the artery in which the defendant advanced the catheter were the subjects of permissible medical judgments. The defendant acknowledged that the size of the catheter and the distance ventured increased the risk of a fistula, but contended that a failure to proceed in this manner increased the likelihood of failing to remove the blood clot and would therefore increase the risk of stroke after normal blood flow was restored.

The jury found for the defendant.

REFERENCE

Plaintiff's expert vascular surgeon: Richard Hurwitz from Virginia Beach, VA. Defendant's expert vascular surgeon: Linda Harris from Buffalo, NY.

Kless vs. Lee Index no. 008247/98; Judge Donna M. Siwek, 5-05.

Attorney for defendant: John P. Danieu of Roach Brown McCarthy & Gruber, PC in Buffalo, NY. □

DEFENDANT'S VERDICT

Alleged negligent failure of defendant surgeon to refer plaintiff for sentinel node biopsy involving removal of one node only – Alleged lymphedema stemming from axillary node dissection.

Kings County

The plaintiff, in her 40s, who had been diagnosed with Stage 1 breast cancer and underwent a lumpectomy in February 2002, contended that the defendant general surgeon who performed an axillary node dissection involving the removal of a large number of lymph nodes, should have referred the patient for a sentinel node biopsy. In this procedure, a blue dye and/or a radioactive substance is initially injected into the breast to determine which lymph nodes are the first to receive drainage from the breast and that a negative finding of this node would obviate the need for the removal of additional nodes. The lymph nodes that were removed after the axillary node dissection were negative for cancer.

The plaintiff also contended that the defendant negligently performed the axillary node dissection and removed an excessive number of nodes. The plaintiff maintained that she suffered lymphedema involving significant swelling of the left, non-dominant arm that is permanent in nature.

The defendant denied that a sentinel node biopsy was required by the standard of care prevailing at the time and maintained that the axillary node dissection was properly performed. The defendant also questioned whether the node dissection occasioned lymphedema, contending that although the plaintiff complained of swelling for some time,

the condition was not objectively measured or observed by subsequent treating physicians for approximately one year.

The jury found for the defendant.

REFERENCE

Plaintiff's expert general surgeon: David Mayer from Huntington, NY. Defendant's expert breast surgeon: Hannah Brooks from Brooklyn, NY.

Cruz vs. Benedicto, et al. Index no. 036074/02; Judge Michelle Weston Paterson, 8-05.

Attorney for defendant: Jonathan S. Erman of Amabile & Erman in Staten Island, NY. □

Urology

DEFENDANT'S VERDICT

Defendant urologic surgeon performing microsurgery because of recurrent varicocele allegedly injures two vasal veins causing ischemia – Loss of one testicle – Pelvic Pain Syndrome.

New York County

The plaintiff contended that the defendant urologic surgeon, who performed microsurgery to treat a recurrent varicocele approximately nine months after the initial surgery by another physician, negligently severed the vasal veins which were intended to be preserved as the only drainage to the left testicle. The plaintiff maintained that this resulted in an ischemic injury causing excruciating pain and eventual necrosis of the left testis. Although the testicle was subsequently removed, the plaintiff went on to develop a chronic, pelvic pain syndrome (PPS), which he claimed resulted in severe pain, despite some improvement with extensive physical therapy.

The plaintiff also contended that he suffered a severe psychological reaction to the unremitting pain. The plaintiff's treating psychologist described acute suicidal tendencies which abated over some months with treatment and therapy.

The defendant denied that the surgery was improperly performed. The defendant maintained that his microsurgical plan entailed tying-off veins that were distal to the varicocele and the site of the original surgery. He explained that the resulting ischemia was caused by scar tissue occluding the vasal veins at the site of the original surgery, a fact that was undetectable at the time of the repeat varicocelectomy. Further, the defendant documented extensively the pre-operative discussions with both the patient and his mother that the proposed surgery could result in worsening of his condition, no change in his condition or improvement.

During the course of the trial, the defendant made extensive use of anatomical charts during his testimony.

The jury found for the defendant.

REFERENCE

Plaintiff's expert urologist: Malcolm Schwartz from NJ. Defendant's expert urologist: Arnold Melman from Montefiore Hospital, New York, NY.

Friedman vs. Schlegel. Index no. 112991/02; Judge LeLand DeGrasse, 8-05.

Attorney for defendant: Elizabeth Cornacchio of Heidell Pittoni Murphy & Bach in Manhattan. □

PRODUCTS LIABILITY

Manufacturing Defect

DEFENDANT'S VERDICT

Alleged presence of glass in pre-packaged ice cream cone – Temporary physical complaints – PTSD allegedly results in irritable bowel syndrome.

Orange County

The plaintiff, in her mid-30s, contended that when she started to eat one of the defendant's pre-packaged ice cream cones, she bit into a hard object, swallowed, and coughed-up two glass fragments. The plaintiff maintained that she then went to the emergency room where she coughed-up a third fragment in the presence of an Emergency Room physician.

The plaintiff maintained that several days later she found blood and glass fragments in her stools. The plaintiff contended that although the direct physical consequences of the episode substantially resolved, she suffered post-traumatic stress disorder (PTSD) which will cause permanent symptoms and which also caused irritable bowel syndrome that is permanent, as well.

The defendant denied that the plaintiff's claims of ingesting glass when she began eating the ice cream cone should be accepted.

The E.R. physician who allegedly witnessed the plaintiff cough-up glass produced medical records that reflected a history that was consistent with the plaintiff's version. The physician, who did not have an independent recollection of the event, testified that if he had actually witnessed such an event, he would have made such a mention. This physician also testified that if he had believed that the plaintiff was malingering, he would have so indicated.

The defendant also pointed out that although the plaintiff indicated that she retained both the bloody stool sample and the ice cream cone, neither piece of evidence was submitted for analysis. The defendant further maintained that the plaintiff had a history of both gastric and psychological