

Emergency Room Wait Costs Hospital \$11 Million

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A New York jury has awarded \$10.7 million to a 66 year-old woman who lapsed into a coma after waiting two hours in an emergency room.

She initially went to the ER after falling down the stairs and hitting her head, but she left the hospital permanently paralyzed on the left side after emergency brain surgery.

"It was clear that they forgot about this woman," said winning attorney Philip Russotti, a partner with Wingate, Russotti & Shapiro in New York.

There were two key moments at trial: admissions by defense witnesses that the standard of care was breached and that the defense expert was not an expert in the type of brain trauma suffered by the plaintiff.

After closing arguments, the hospital offered to settle the case for \$1 million, then upped the offer to \$3 million soon after, according to Russotti, who was willing to settle for \$4 million.

While the parties bargained over the price tag, the jury came back with its verdict – more than doubling what the plaintiff was willing to settle for.

The hospital's attorney, Michael Holohan of Giesler & Gabriele in Garden City, N.Y., did not return a call to his office. Russotti said the defense is moving to reduce the verdict.

Delayed brain scan

The plaintiff, Candida Diego, went by ambulance to the emergency room at New York Hospital Medical Center of Queens after falling down a flight of stairs at the drugstore where she worked.

A physician's assistant examined her, noting that she had vomited once and was unable to recall the accident, but was otherwise alert. He ordered a CAT scan at 1:15 p.m. in order to rule out internal bleeding because of her age and the fact that she had suffered a head injury.

But it was 3:30 p.m. when the attending physician finally saw Diego and immediately gave her the scan.

Although the hospital argued that the ER was a busy place, it introduced no evidence about the number of patients admitted that day, how many doctors were on duty or that two hours was a normal waiting period.

"We showed that there were two CAT scans at the facility, and I got all the doctors to admit that if they wanted to get a CAT scan done immediately, a doctor could get it done," said Russotti.

It did not help that the physician's assistant who ordered the scan testified that he deviated from the standard of care by not getting the CAT scan done immediately.

Once the scan was completed, Diego lapsed into a coma, was stabilized and then operated on at 5:50 p.m.

The plaintiff's expert testified that the bleeding in her brain caused pressure that created a condition called "uncal herniation," where the brain became so swollen that one side of the brain is forced into the other, damaging the brain stem and brain fibers.

Russotti argued that even if Diego had waited for one hour instead of two hours and received the CAT scan at 2:30 instead of 3:30, she would have been saved from the permanent paralysis she now suffers.

This was disputed by the defense expert, a neurologist, who testified that the bleeding was so abnormal that the result would have been the same even if the CAT scan had been done earlier.

But Russotti pressed him on cross-examination to admit that he was not an expert on uncal herniation. Russotti paraphrased that testimony below:

Q: You don't operate on people?

A: No.

Q: What we're talking about in this case is the surgical outcome of uncal herniation?

A: Yes.

Q: You wrote a book with a chapter on brain trauma.

A: Yes.

Q: But you didn't write about uncal herniation, or the surgical outcome of uncal herniation?

A: No.

Q: You've written article and given lectures?

A: Yes.

Q: But you've never written an article or been invited to give a lecture on uncal herniation?

A: No.

Q: Because you're not an expert on uncal herniation?

A: Right.

Russotti argued to the jury that the very reason a brain scan must be done right away is to eliminate the risk of bleeding and prevent what happened.

"Everybody admitted she was at a greater risk for bleeding in the brain. Once you admit that, how can you justify letting her sit around? They knew this outcome could have happened. It could have happened in one hour or 5 hours. That's why she needed the CAT scan," he said.

Tough climate

After a 15 day trial, a diverse jury of three men (one white, two African-American) and three women (Latina, Jewish and Asian) came back with a verdict of \$10.7 million.

Russotti said he has been careful when picking the jury to weed out anyone that might "have an axe to grind."

"It's a tough climate out there. There's a lot of prejudice out there against plaintiffs. They think people are just looking for a buck," he said.

During voir dire, for example, he asked "Do you think a doctor can be guilty of malpractice?" and "If you find that a doctor made a mistake, do you have a problem giving a lot of money [to the patient]?"

Lawyers may be surprised at jurors' honesty.

"Some people will say: 'The system is out of whack. There is too much money being given. The McDonald's case is ridiculous,'" Russotti said.

In some cases, jurors are willing to find malpractice, but are unwilling to award large damages for pain and suffering, he added.

Not in this case.

The jury's award covers \$2 million in past pain and suffering, \$5 million for future pain and suffering and \$2 million for Diego's husband's past and future lost services claim. The remainder of the award is for rehabilitation and custodial care.

Plaintiff's attorney: Philip Russotti of Wingate, Russotti & Shapiro in New York

Defense attorney: Michael Holohan of Giesler & Gabriele in Garden City, N.Y.

Case: *Diego v. New York Hospital Medical Center of Queens*; Oct. 15, 2008; Supreme Court, Queens County, N.Y.; Judge James Dollard.

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