

## **A \$58 Million Delivery**

Jury awards staggering total after birth leaves boy with cerebral palsy

By THOMAS B. SCHEFFEY

The judge seemed to be studying the verdict form for an interminable amount of time. After weeks of testimony in an emotional and hard-fought malpractice case, the lawyers on both sides wanted to know the results.

“It’s a very nerve-wracking moment when other people know what the result is, and you have no idea,” said plaintiffs’ attorney James Horwitz.

“I though my heart was going to explode right out of my chest,” said Kathleen Natri, who is Horowitz’s colleague at Koskoff, Koskoff & Bieder in Bridgeport.

Finally, Waterbury Superior Court Judge Kevin Dubay handed the document to his clerk, who announced the Lotto-like total: \$58 million. That amount, awarded last week to a family of a boy who has cerebral palsy after a chaotic birth eight years ago, is believed to be the largest medical malpractice award in Connecticut history.

Because the plaintiffs made an offer of judgment for less than the verdict amount back in 2005, interest could add about \$30 million to the total verdict, Natri said. However, the plaintiffs acknowledge that the total might not be collectable.

Natri and Horwitz convinced the jury that Stamford gynecologist Richard Viscarello, of Maternal-Fetal Care P.C., had not provided acceptable standards of care because he failed to start a cesarean section delivery in time.

But defense lawyer James Rosenblum, of Stamford’s Rosenblum Newfield, continues to claim that his client was not negligent when he delivered Daniel D’Attilio, of Norwalk.

Rosenblum said the jury was “overcome by emotion. This verdict is not supported by the evidence in any respect.” He contended that no malpractice was proven at any level, and that the verdict is against the weight of the evidence and must be thrown out. He vowed vigorous post-verdict motions and an appeal, if necessary.

“If you presented this case to any ten reputable obstetricians,” Rosenblum said, “all would say that my client was not negligent by any stretch of the imagination.”

The doctor’s \$2 million malpractice policy limit was belatedly offered by the defense, after the plaintiff’s demand period expired, according to the plaintiffs’ lawyers. That means the case may raise issues of bad faith refusal to settle on the part of the insurer.

## **A Fluid Situation**

Dr. Viscarello, who specializes in complicated deliveries, had been treating Cathy D'Attilo since July 2002. By Jan. 31, 2003, she was in her 39th week of pregnancy. The defense contended that under Stamford Hospital rules, and other practice guidelines, an elective cesarean section should not be performed before 40 weeks of gestation.

But the plaintiffs' attorneys presented expert testimony that the mother's amniotic fluid, as measured by ultrasound observation, was half the normal volume, creating urgent conditions requiring cesarean delivery. It was not clear whether the mother was leaking fluid, or not producing enough.

"Amniotic fluid is basically the baby's urine, and for some reason he wasn't producing enough urine," Nastri explained. "The fluid supports the baby's well-being by keeping the baby cushioned, by keeping the umbilical cord from being compressed, and keeps the baby safe from trauma in utero. Our expert said that with that kind of drop in the fluid, you have to deliver this baby."

Rosenblum's experts countered that Dr. Viscarello's decision to send the mother home on that last day of January, a Friday, was within the standard of care.

On Sunday, Feb. 2, 2003, the mother began labor, which complicated an already complex birth. She had an oddly-shaped, double-chambered uterus, and the infant was in a breach position – feet first -- when she reached the delivery table.

The plaintiffs contended that not only was the caesarean begun too late, but that the doctor put the incisions in the wrong places to deliver the baby quickly. The mother, Cathy D'Attilo, was accompanied in the delivery room by her husband, Dominic, who used a video camera to record the birth, including sound.

At one point on the soundtrack, said Nastri, "the doctor says 'Holy sh--!' And the Mom says, 'Holy sh--? That can't be good.' And the doctor says, 'Your baby is really in there.' And for the next three or four minutes they struggled to get the baby out. When he was born, his only sign of life was a heartbeat. He wasn't breathing, he wasn't moving, he was pale and he was essentially lifeless. They resuscitated him, but he developed cerebral palsy."

The defense case painted a different picture. Rosenblum said the baby's heart rate was over 100 beats per minute one minute after delivery. Four specialized experts testified that the infant's brain damage was actually caused by fetal inflammatory response syndrome. It's a condition in which the infant's white cells and immune system are triggered to attack a disease, causing brain damage in the resulting immunological battle.

Nastri and Horwitz spent little time countering this defense, calculating, apparently correctly, that the jury would not find it compelling.

## **Reluctant Witness**

The obstetrician himself was the plaintiffs' first witness. He was followed by a Yale neonatologist, Richard Ehrenkranz.

"He was a very reluctant witness," Nastri said. "He knew some of the experts involved, and he knew the defendant from the time when they were training at Yale. He was not an enthusiastic witness, but he was a very honest and compelling witness on the issue of what had caused Danny's cerebral palsy. It was clear from his testimony that this was an event at the time of delivery that deprived Danny of blood and oxygen to his brain."

Horwitz and Nastri divided the closing arguments, with Horwitz discussing the damages. He said he did not request any specific figure, or give the jury a formula to use to calculate damages. The jury interrogatories were simple: Was the doctor negligent on Friday, Jan. 31, when he chose not to operate? Was he negligent on Sunday, during delivery?

The jury found negligence and causation on both days.

Three years before, the same case was presented to a Waterbury jury and Superior Court Judge Jane Scholl. That trial ended with a deadlocked jury, creating a mistrial.

In the most recent trial, the jury deliberated for two-and-a-half days. During the deliberations, the jurors had some questions, but they did not give a clue whether a defense or plaintiff's verdict was in the works. Last Wednesday, the jury was told it could go to lunch. But members asked to deliberate further, because they were about to return a verdict.

Nastri said "we took that as a good sign." The jury, it appeared, was checking over its calculations. "You don't have to check your work if the answer is no," she said.

Still, there were those tense moments before the verdict was announced.

The \$58 million exceeds a \$38 million obstetrical verdict won in 2008 by David Golub of Stamford's Silver, Golub & Teitell; Rosenblum was also the defense lawyer in that case, which is currently on appeal.

As for 8-year-old Daniel D'Attilo, the child needs extensive home care.

"They take great care of him, but they need a lot of help," said Nastri. "The father came to America from Italy with his family as a child, and works as a mason contractor. Mom stays home and takes care of Danny." •