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Nature of Action: Liability under medical negligence/informed consent; value of damages under post-Guzman damages caps

Injuries: Birth trauma; external cephalic version prior to C-section delivery; spinal injuries (paraplegia)

Case name: E.J. v. John Doe, M.D., et al.

Verdict or settlement: Settlement

Original offer: pre-Guzman; \$800,000

Amount: \$1.5 million total settlement including limited repayment of State of Wisconsin subrogation of \$90,000; mediation with James Doyle nearly produced a settlement, including a \$95,000 settlement previously with the C-section surgeon and the defendants assigned approximately \$55,000 in costs in addition to a \$1.35 million payment to resolve the case entirely (these amounts were placed in a combination of special needs trust and structured settlement with a value in excess of \$5 million due to the rated age of the plaintiff E.J. via plaintiff structured settlement broker Charles Derenne).

Plaintiff's attorney: Jay Urban, Urban Taylor & Stawski Ltd., Milwaukee

Defendant's attorney: Curtis Swanson, Madison (Dr. Doe) and James Gutglass, Milwaukee (Wisconsin Patients Compensation Fund) for defendants

Plaintiff's expert: Wm. Shannon, M.D. (plaintiffs physiatrist)

Plaintiff counsel's summary of the facts: E.J. and his family made a medical malpractice claim against Dr. Doe arising out of a pre-birth external cephalic version surgery upon an in utero baby in May 1996. Plaintiffs claim of negligence on the version procedure Dr. Doe's manipulative force to E.J.'s head and neck in utero caused a traumatic lesion to his spinal cord resulting in permanent paraplegia. The family doctor followed the entire pregnancy. In May of 1996, the mother presented for her 36-38 week check-up. At that visit, it was noted that E.J. was breech and therefore scheduled for an x-ray. That film shows that E.J. was hyper-extended (greater than 90 degrees), in a double-footling, breech presentation.

Because of this presentation, E.J. was referred for a version consultation with Dr. Doe, an OB/GYN physician who had marketed himself as someone experience in a "version"

procedure to turn babies in utero for a vaginal delivery. Dr. Doe was over 30 minutes late for this consultation. Moreover, he never obtained the medical chart. If he had done any of these things, he would have learned of E.J.'s position and his mother's bicornuate (or heart-shaped) uterine anomaly. Instead, the technicians administered Terbutaline before Dr. Doe's arrival. Dr. Doe contends that he gave an informed consent of approximately one minute on arrival and started the procedures upon getting an ultrasound for womb.

Depending on which deposition of Dr. Doe, he attempted to turn E.J. three times, once one way and twice another. In the record, he indicated that he moved E.J.'s head two times into the pelvis, and that mother likely had a uterine anomaly preventing a successful version. It was the plaintiffs' position that the most logical inference is that he went clockwise twice, counter-clockwise once and then Dr. Doe aborted the surgery. In order to do so, he must have pushed the head backwards (clockwise) because with her bicornuate uterus, E.J.'s head could not have passed through the fundus and then back again two times. In summary, plaintiffs contended that Dr. Doe bent E.J.'s head backward - further hyper-extending it - toward his heels.

E.J. was born by C-section a few days later in May, 1996. The doctor that performed the procedure noted that mother had three previous miscarriages with a successful Csection for breech presentation on her older child (she subsequently gave birth to a third child - a daughter - by C-section while the case was pending). During the C-section, the doctor did have some trouble with his nuchal arms where she questioned a possible clavicle fracture (which turned out negative). Of note, during delivery it was noted that "the typical heart-shape of a bicornuate uterus was found."

Shortly after his birth, E.J. was referred to Children's Hospital in Milwaukee for evaluation because of decreased tone and periodic respiratory distress. However, the diagnosis was merely lower extremity weakness. E.J.'s paralysis was not diagnosed until a few months later as he failed to develop. MRI scans confirmed spinal cord lesion at the lower cervical cord. At the cervicothoracic junction, the MRI report suggests that there is a compression of the cord of unknown etiology. The radiologist made a finding that there was an atrial thick cord at C7 through T2 levels and tethering. This suggested to the radiologist prior insult with marked scar formation, and tethering along the posterior aspect of the spinal canal.

At this time, E.J. was referred to a pediatric neurologist, Richard Jacobson, M.D., who opined that E.J. sustained a spinal cord lesion of unknown etiology in the cervical/thoracic region, and he thought it was a hemorrhage or infarct. Later, this physician evaluated E.J.'s injury and concluded that the lesion was produced by trauma and that no malformation or other condition was likely, and then concluded that the lesion was secondary to trauma as part of the version in consultation a pediatric neurosurgeon, David McClone, M.D., with Children's Hospital in Chicago, who reviewed the MRI films and met with the plaintiffs.

Plaintiffs' claims of negligence included the following:

1. Failure to review x-ray or chart prior to version attempt.
2. Failure to give an adequate informed consent before medication.
3. Failure to obtain a history of two breeches in a row (and two miscarriages) suggestive of uterine anomaly and C-section candidate.
4. Failure to ascertain that E.J. was in the same position for a long time.
5. Failure to observe E.J.'s head in extreme hyperextension, which is a contraindication for a version, as could be seen on the x-ray.
6. Failure to determine the presenting parts (feet in birth canal).

In short, plaintiffs experts Drs. Allan Charles and James Dolan (OB/GYN) maintained that it would have been impossible for Dr. Doe to do the front roll that he said he did and get this baby into the cephalic position to bounce back, so that means he must have done a back roll in violation of the standard of care.

The defense negligence position, propounded by Steven Fortunato, M.D. and Chester Martin, M.D., was that this hyperextension was not a contraindication for this version, and that the baby was adequately seen on ultrasound films. They also opined that E.J. was moving in utero up until the time of birth. Dr. Martin took the position that from the ultrasound E.J.'s position was the opposite of the x-ray, and thus the version was appropriate.

On cause, Drs. Jacobson and McClone both testified on the mechanism of injury being the bleed caused from the trauma of the version.

In response, Dr. Doe and the Fund mounted a substantial causation defense. E.J. was born with a lesion of the upper thoracic/cervical spinal cord between C7 and T2, which the treating physicians diagnosed the lesion was the result of "a prior insult, which occurred at the time of or shortly before birth." The MRI studies of October 1996 showed a tethering of the distal cord along the posterior aspect of the spinal canal. According to the plaintiff experts, this opinion was supported by two uncontested factors: first, the complete obliteration or destruction of the cord at the point of wedging suggests trauma rather than a bleed at various levels; second, the mechanism of injury suggests trauma rather than any other vascular or other etiology. In summary, plaintiffs' experts on cause will testify along the following lines:

1. Vascular malformation or lesion and lack of adequate blood flow can be ruled out because there is an insult with scarring on the MRI.
2. There are no other spinal cord abnormalities other than a spinal cord lesion or "wedging" indicative of trauma.
3. The lesion looks like other lesions caused by flexion trauma that they have seen in clinic; and
4. This is not consistent with a traction injury.

In other words, the hyperextension with compression caused spinal injury. A fracture of T1 on the MR shows that the cord was "squeezed" between C7 and T2 impinging on the cord at most probably the time of the version trauma.

For defense causation, Lucy Rorke, M.D. a neuropathologist and Barry Pressman, M.D., a neuroradiologist, testified that due to the long-standing position of E.J. his spinal cord was damaged, causing an infarct or bleed. Dr. Pressman also says E.J. was in the position for a long time to accrue a severe ischemia that totally transected the cord. Another defense position was to allege that the C-section surgeon may have caused this injury.

Plaintiffs had a neuroradiologist in rebuttal who was not needed because the matter settled.

Special damages were calculated to exceed \$320,000. Non-economic damages were capped by Wisconsin Statute. Because of E.J.'s need for future surgeries to rod his spine due to scoliosis, as a direct result of his spinal cord injury, plaintiffs' predicted future surgical interventions throughout minority, with an eventual total spine fusion upon E.J.'s complete growth. Plaintiffs' life care plan with our economist calculations places future losses in the range of over \$2 million.