

DAILY JOURNAL

VERDICTS & SETTLEMENTS

Special Issue: Medical Malpractice

[PHOTO NOT SHOWN] caption:

QUOTABLE

‘I’ve been here 13 years, and I’ve never seen morale so low.’

Willis Shalita, the union president in San Francisco and a State Bar investigator.

Today’s issue of Verdicts and Settlements profiles Bruce G. Fagel, left, of Bruce G. Fagel & Associates, and, in another case, Mark V. Franzen of Baker, Silberberg & Keener. Fagel won a \$4.25 million settlement for a burned boy left brain damaged after his airway collapsed upon extubation. Re-intubation took 10 minutes. Franzen successfully defended a doctor whose diabetic patient died after being sent home with a misdiagnosed kidney infection.

Also in today’s issue:

- Steven E. Lerner and Lawrence A. Baskin discuss employing medical experts properly and effectively.
- In every issue of V&S: Recent jury verdicts, bench verdicts, arbitration awards and settlements in all areas of civil litigation including business law, employment law, insurance law and personal injury.

LITIGATOR STRATEGY

Medical Training Gives

A Leg Up in Courtroom

Name: Bruce G. Fagel, M.D., J.D.

Firm: Law Offices of Bruce G. Fagel and Associates, Beverly Hills.

Background: Fagel was born and raised in Chicago. He received his bachelor’s degree from the University of Illinois at Champagne and his medical degree from the University of Illinois in Chicago. He went on to obtain his law degree from Whittier School of Law. Fagel is married and has been practicing for 15 years, exclusively in the area of medical malpractice.

Had you planned to do litigation coming out of law school?

“Well, once I got through law school, I planned to go into litigation. Actually, I did my first case the day I was sworn in as an attorney. It was a Kaiser arbitration with Judge [Joseph A.] Wapner as the neutral arbitrator.”

Wapner? As in the “People’s Court”?

“Yes. ... This was before he became famous.”

So you walk out of being sworn in and into arbitration. How did that turn out?

“I got a \$400,000 arbitration award on behalf of a woman who lost her husband. ... I did five other trials my first year, so I got a lot of experience very quickly.”

Your opposing counsel must approach you differently because you are also a doctor.

“Somewhat, yeah. They know, at least their experts know, they can’t fool me. One of the things on cross-examination of a medical expert is medical experts know how to kind of twist the words and go off on a tangent, and they can’t do that with me, because I can follow them, figure out where they are going and pull them back to where I need them.”

When the plaintiff in the Case in Focus arrived at the first hospital, what kind of condition was he in?

“He was conscious. He had obvious evidence of smoke inhalation, but he had regained consciousness in the ambulance, and the emergency room physician properly decided that until they could determine the extent of any injury to his airway or to his lungs, they needed to intubate him to secure his airway. So, that’s what they did, and they gave him medication, essentially, to knock him out so he would not fight the tube.”

How long did they keep him there?

“At the first hospital — just for a few hours. Then he was transported to the [defendant] hospital because they have a hyperbaric oxygen chamber, and that is used sometimes when somebody has carbon monoxide poisoning which usually goes along with smoke inhalation. If there is smoke inhalation, there is usually some element of carbon monoxide which is very dangerous, and so they sent him to [defendant hospital] for treatments. That was very successful. In fact, he didn’t even complete the series because what little carbon monoxide he had in his system was cleared after the first treatment.”

[PHOTO NOT SHOWN] caption: **DON’T TRY THIS IN COURT** — “Medical experts know how to kind of twist the words and go off on a tangent, and they can’t do that with me, because I can follow them, figure out where they are going and pull them back to where I need them,” Bruce G. Fagel says.

Now the incident that was the subject of the litigation happened five days after the accident.

“Right. The last thing they were going to do was to remove the tube and then let him go home the next day.”

So, he was ready to go home. What type of condition was he in?

“He was awake. He couldn’t talk, because he had a tube in his mouth, but he was awake and responsive. They explained to him what they were going to do, and he nodded and shook his head. He understood. He was perfectly mentally competent.”

The resident had ordered the tube removed.

“Yes.”

And what is the normal procedure you would follow to do that?

“Well, one of the procedures is that it is normally done when you have got full staff including the attending physician.”

Is there some recognized risk involved in doing this procedure?

“There is. It’s small, but it is a recognized risk that if you remove the tube, there is a possibility of the airway shutting down suddenly and you need to very quickly reintubate, and that requires a very skilled individual. The problem was the attending pediatrician of the intensive care unit was not there in the hospital at that point. He was in his car on the way to the hospital. So, one of the questions is since there was no urgency to remove this tube, why didn’t they wait until the attending doctor got there? Then, when the tube was removed, and this problem occurred, they never called for an anesthesiologist who was right there in the hospital. Instead, they tried to do it themselves, and it took them more than 10 minutes to try and get the tube back in.”

What happened once the tube was removed?

“Once the tube was removed, what was present underneath was the airway was swollen as a result of the smoke inhalation — super heated air causes swelling. You know, like when you get burned, there is a blister and this was actually in the airway. So, when they removed the tube, the airway just collapsed, because it was swollen all around the airway.”

Is this something the attending physician would have recognized or been aware of had he been there?

“Well, there was evidence on some earlier studies that it was present, but they never repeated the studies before they removed the tube. Several of our experts testified that this was something that they should have readily anticipated from studies they had done in the intervening five days.”

The respiratory therapist — was this a procedure he or she would have regularly done before?

“Respiratory therapists are not quite on the same level. Normally, respiratory therapists, while they are trained to intubate and treat people who are on a ventilator, they are not the *most* skilled individuals when it comes to emergency intubation. In the emergency room, I did hundreds, thousands of intubations, most of which were fairly simple and easy but a lot were very difficult.”

So, the concern arises during this procedure when there is a complication?

“Exactly. When you’ve got something that is very difficult, you want the most skilled person handling it. It is not a respiratory therapist, and it is not a pediatric resident. It is either the attending physician in the intensive care unit or an anesthesiologist — neither one of which were there, and an anesthesiologist, who is there in the hospital 24 hours of the day, was never called.”

The tube was taken out and what exactly happened?

“What happened was if you make a circle of your thumb and forefinger, and you imagine that if you squeeze real tight, there is no hole. Well, if you have something in there that is holding that open, when you pull it out, the hole disappears, and that’s what happened.”

And then the pediatric resident tried to reinsert the tube?

“The pediatric resident tried several times. It was finally the respiratory therapist who took a smaller tube and got the smaller tube in. The pediatric resident had tried several times to put the same size tube in and that was part of the problem. ... It was just a matter of experience. She

hadn't done this enough so when there *was* a problem she thought, 'Well, all I have got to do is just put a smaller tube in.'

What happened in that 10 minutes?

"Ten minutes without oxygen will pretty much fry a brain."

What other litigation professionals say about this attorney: Attorney Alan Rushfeldt of Rushfeldt, Shelley & Drake in Sherman Oaks says: "I have had a lot of cases with Bruce in the malpractice field, and he is one of the best plaintiff's lawyers in the state as far as I am concerned. ... He is a very hard working guy and is very, very competent. Rushfeldt adds: "If he has got a case against you, you *know* you have a worthy opponent. If you are going to go to trial, he is going to give you a real hard battle for who the jury is going to find for." Attorney David J. O'Keefe of Bonnie, Bridges, Mueller, O'Keefe & Nichols in Los Angeles has been Fagel's opposing counsel on a number of cases and also describes Fagel as "one of the best plaintiff's medical malpractice defense lawyers in Southern California if not the state. ... He is a very strong advocate for his clients. He is a vigorous adversary." — **Kathy Kinsey**