

Los Angeles Business Journal  
March 7, 2005

## **Judging the Doctors**

### **Conflicting sympathies, complex cases mark malpractice law**

By AMANDA BRONSTAD

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[PHOTO NOT SHOWN] caption: Results: Malpractice attorneys on both sides struggle to assess value.

Fifteen hours after a 35-year-old woman was admitted to an Orange County hospital to have a benign cyst removed by a gynecological surgeon, her lungs failed and she ended up brain damaged.

“On the face of it, that doesn’t make sense,” said Bruce Fagel, the attorney who filed a lawsuit on behalf of the woman’s family.

But proving something went wrong turned out to be more complicated. Fagel rejected three settlement offers, which he called “low ball,” and hired 11 medical and economic experts in developing a case. In all, 28 witness depositions this month must convince an Orange County Superior Court jury that a doctor’s critical mistake — and nothing else — led to the woman’s brain damage.

“You can’t just go in front of a jury and say, ‘Look how terrible this is, somebody must have done something wrong, give us money,’” he said. “That only works in the movies — and probably not even there.”

Medical malpractice lawsuits are among the most heart-wrenching stories filed in the courts — a baby suffers brain damage after losing oxygen during birth, a doctor fails to diagnose a problem that leads to a stroke, an adult ends up brain-damaged while under anesthesia.

But for the lawyers, proving medical malpractice is more economics than emotion. Brain-damaged babies usually involve the highest verdicts, while an older person who dies from a surgical slipup might not merit a lawsuit because, even with a victory, the damage awards are often too low.

[PHOTO NOT SHOWN] caption: Defense: Denise Taylor said she’s heard about cases of doctors who committed suicide after being sued.

Most of the cases end before trial, in a conference room where lawyers on both sides haggle about the value of a patient’s life. Often, they ask that the patient be present, brain damaged or not.

Of the small percentage of cases ending up in front of a jury, the vast majority favor the defense. But when the plaintiff does win, the awards can be high, sometimes in the tens of millions of dollars.

Those high verdicts have not gone unnoticed by the Bush administration, which has lobbied Congress to pass legislation that would cap damages for pain and suffering in medical malpractice awards. The administration claims that the cap would reduce skyrocketing insurance premium costs for doctors hurt by “junk” lawsuits.

Opponents contend that the caps would benefit insurance carriers and hurt injured plaintiffs.

### **Baby cases**

For California, the national debate has had little impact. In 1975, the state imposed a cap on damages for pain and suffering in medical malpractice suits when it passed the Medical Injury Compensation Reform Act, or MICRA. Whether those caps have reduced overall costs is debatable, but few would deny that the law has changed the way lawyers view medical malpractice.

In Los Angeles, less than a dozen attorneys on either side take the most damaging cases.

Fagel, a father of three, entered the spotlight in 1990 after filing a \$32.5 million lawsuit on behalf of the family of Hank Gathers, a Loyola Marymount University basketball player who collapsed on the court and later died of a heart disorder. He was 23.

Trained as a doctor in Illinois with a specialty in emergency medicine, Fagel specializes in brain-damaged babies. It's a focus made obvious by the plastic models of a woman's womb and a baby that sit in his Beverly Hills office.

"I've settled cases with Bruce Fagel before he's really even filed because it was a very bad case," said Denise Taylor, a defense lawyer and partner at Bonne Bridges Mueller O'Keefe & Nichols.

Taylor, whose first medical malpractice trial was in 1982, also specializes in brain-damaged baby cases. The daughter of a general surgeon, she has defended UCLA Medical Center and Cedars-Sinai, as well as surgeons and doctors throughout Southern California. Of the 44 trials she managed during the past 12 years, Taylor has not suffered a single jury verdict.

"There are a lot of memorable cases," she said, skimming through a stapled packet of papers in her Koreatown office.

Neither attorney lets emotion get the best of them — even if emotion routinely surrounds them.

Fagel said the families will often arrive at his office scared and with little idea of how their child suffered such a terrible fate. Many blame themselves for something they did or did not do. "I try not to put myself in the situation of those parents because I could never survive that way," he said.

Doctors are emotional, too. Taylor said one of her partners has had doctors commit suicide after being sued for malpractice. Sometimes they just decide to stop practicing because of the damage to their reputations.

"To be accused of causing somebody to be brain damaged or dead or maimed is a burden for them," she said. "They need somebody who believes in them, who will defend their rights in court. And that's really my job to do that, and humanize them as much as possible."

Still, most of the cases come down to money. Since MICRA limits pain and suffering damages to \$250,000, larger awards rely on a plaintiff's lawyer proving economic damages, such as lost earnings or long-term medical expenses.

Meeting this criteria are the cases of brain-damaged babies who have lost the ability to ever earn a living and face astronomical medical costs for the rest of their lives. Other types of brain damage, either from neurosurgery or anesthesia cases, also result in large awards.

To take cases with only the pain and suffering damage cap of \$250,000 is a more calculated process. Here's a rule of thumb for the plaintiff — don't bother to sue if the cost of the case itself exceeds five percent to 10 percent of the recovery.

If a surgeon leaves an instrument or sponge in the body, for example, negligence may be easy to prove but the case is worth relatively little. The patient will likely recover and the time lost from work will be minimal. And as brutal as this sounds, a dead baby is also considered a bad legal bet because he or she is considered — for legal purposes anyway — to have no economic value.

Then comes time to consider who is at fault — and it's seldom a black and white matter.

Most of Fagel's cases involve what he calls "systems errors," or circumstances in which several nurses, doctors, surgeons or hospital staff — not just one person — failed to communicate.

"Systems errors don't have to do with individual bad doctors or individual bad nurses, which are the extreme edge of some of the cases," he said. "Most of the cases we see with catastrophic injury or death are when multiple layers of a very intricate system fall apart."

To find negligence, he mostly reviews medical records and depositions, although shield laws for hospitals sometimes make the process difficult. "Unlike product liability or personal injury cases, where the information is out there and you just have to gather it, here the information is all behind closed doors," he said. "I can't send a set of questions to the defense to say, 'Give me these documents.' It's figuring out what happened, not so much from what they say as from what they don't say."

For Taylor, records are supplemented with medical tests, where the case may ultimately hinge. For brain-damaged babies, she looks at three medical tests. First, the fetal monitor strip, which is hooked by a belt around the mother's abdomen or attached to the baby's scalp and monitors the baby's heart rate. An abnormal deceleration of the heart rate often indicates there may have been a problem. There is also the Apgar score, which measures a newborn's condition one minute and five minutes after birth. Finally, she looks at the cord blood.

If the tests appear normal, she may defend the case. Bad tests usually result in a settlement. Oftentimes, test results are mixed. "There are reasons you settle cases, and not just because the doctor 'made a mistake,'" said Taylor, citing iffy facts and talented opponents, among other factors.

### **The settlement question**

Fagel said that even in cases involving devastating injuries he will sometimes settle because no evidence of malpractice can be identified. If the delivery was uneventful and the prenatal care was appropriate, whom do you blame?

To determine the amount of a settlement offer, he starts with the doctor's insurance policy — usually \$1 million. "We can prove damages of \$4 million to \$5 million in present cash value, and the doctor has a \$1 million policy," he said. "Guess what the case settles for? A million dollars."

Typically, plaintiff's lawyers make the first offer.

"They will call me up and say, 'You know this is a really bad case. Do you want to go to mediation?'" Taylor said. "If I agree, I'll say, 'Let's go to mediation instead of spending all the money to take all the doctors' depositions.' We do that a lot."

Settlement discussions usually take place with the lawyers on both sides, along with a representative of the insurance carrier and a private mediator. The plaintiff usually attends because the insurance carrier wants to see the person; the doctor rarely is present. It usually takes only three to four hours.

"You talk numbers back and forth," Taylor said. "It's a game of chicken."

Many doctors settle for \$29,999, the highest amount they pay to avoid reporting a settlement directly to the Medical Board of California. Some plaintiff's lawyers are willing to settle for \$600,000 (including economic damages) because in higher awards a plaintiff's attorney cannot earn more than 15 percent of the damages based on a sliding scale of attorneys' fees.

Clients often are the wild card. Fagel said he had a case in which the client had sued a doctor with a \$2 million insurance policy but took a \$1 million offer to settle. He told his client to wait a bit longer because he believed he could get \$5 million if the case went to trial. His client did not want to wait.

"The defense played her," he said. "It's bad enough these things happen but when they turn on unsophisticated people and they're able to play them and get away with things they wouldn't otherwise be able to do, it's a shame."

A settlement falls apart when one side believes the other has miscalculated the value of the case. Fagel said 5 percent to 10 percent of his cases end up going to trial.

The trials are long, typically lasting several weeks, and they can be grueling. Jurors listen to testimony from scores of expert witnesses who speak at length on complex medical terms and procedures they are unlikely to understand.

Fagel said he tends to focus on what jurors can grasp: miscommunication, lack of documentation, inconsistencies.

"I'm under no illusions the jury is going to understand most of what we're talking about, especially when you get down to details of anatomy, physiology, that sort of stuff," he said. "But what a jury can understand is how this picture fits together."

From the outset, Fagel's chances of winning in the courtroom are slim: 70 percent of medical malpractice juries favor the defense. To make his case, he repeats information to make sure he makes a connection with the jury.

And he hires lots of experts — in the case of a brain-damaged baby, a dozen or more. These could include a neonatologist, radiologist, neurologist, rehabilitation physician and an economist.

Taylor said she tries to eliminate jurors who may make decisions based on emotions. She warns them that they will feel sympathy for the plaintiff but must listen to the evidence and base their decision on facts, not feelings. "A lot of people in this day and age have respect for doctors and the medical profession," she said. "They like doctors. They want to believe a doctor isn't trying to hurt someone."

But what about her? Taylor, who has no children and has never been married, says she knows she must show empathy and compassion to a jury, but views medicine as a "gray area."

"It's really easy to personalize these cases and let your emotions get the best of you," she acknowledged. "I don't mean emotions, like you feel sorry for the plaintiff or your client, but you get so angry at the plaintiff's lawyer for what you perceive to be shenanigans."

Fagel, whose wife sometimes goes to his trials, also steers clear of emotion so he can help his clients go through the various stages of a lawsuit. But he acknowledged that he gets concerned by what he calls the "politics" in medicine.

"I've seen cases where I know the obstetrician is delaying," he said, "knowing that if a baby comes out brain damaged, he's got a big problem, whereas, if he waits a little bit longer, the baby will be stillborn."

[PHOTO NOT SHOWN] caption: Deducing: Bruce Fagel figures out what happened from what doctors don't say.

SIDEBAR:

**Landmark Battles**

Some of the biggest medical malpractice cases in Southern California's recent history.

**Willie Shoemaker (1993):** The former jockey filed a \$50 million lawsuit against Glendora Community Hospital and the seven doctors who treated him after he drove his Ford Bronco off a 30-foot embankment. The accident rendered him a paraplegic. His suit against the California Highway Department for not having a guardrail was ultimately dropped. In 1997, he settled with Ford Motor Co. for \$2.5 million and negotiated a confidential settlement with the doctors and the hospital.

**Hank Gathers (1990):** The family of the Loyola Marymount University basketball star sued the school's coach, trainer and athletic director, seven doctors and three medical practices after Gathers collapsed on the court and later died from a heart disorder. Eleven defendants settled, including Gathers' cardiologist, for \$1 million. Loyola's insurance carrier settled for \$1.4 million. The case was ultimately dismissed against Kerlan-Jobe Orthopedic Group of Inglewood and two doctors who treated Gathers that night.

**Ashley Hughes (1987):** The family of newborn Hughes sued the doctor at Pomona Valley Community Hospital who twisted her spinal cord with forceps during her delivery, rendering her a quadriplegic. The hospital settled early in the case. In 1991, a Los Angeles jury awarded Hughes' family \$21 million, or \$460 million paid over her lifetime, the largest malpractice award in California at the time.

**Harry Jordan (1982):** The owner of an insurance agency was awarded \$5.2 million three years after doctors removed his healthy left kidney instead of his cancerous right one. He and his wife sued six doctors, two medical groups and Long Beach Community Hospital, where the surgery occurred. The jury verdict was awarded against four of the doctors and Grobert-Sawyer Medical Corp.