

Dolan v Choudhri

2007 NY Slip Op 31262(U)

May 15, 2007

Supreme Court, New York County

Docket Number: 0120086/2003

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART **A** Part 16

Index Number : 120086/2003

INDEX NO. _____

DOLAN, THOMAS

MOTION DATE _____

vs

CHOUDHRI, TANVIR M.D.

MOTION SEQ. NO. _____

Sequence Number : 003

MOTION CAL. NO. _____

SUMMARY JUDGMENT

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAY 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

MAY 15 2007

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
THOMAS DOLAN and JANE DOLAN,

Plaintiffs,

-against -

Index No.120086/03

TANVIR CHOUDHRI, M.D., MARCI MALONE, M.D.,
and THE MT. SINAI HOSPITAL,

Mot. Seq. Nos. 003 & 004

Defendants.

SCHLESINGER, J:

FILED
MAY 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

On November 21, 2006, the jury hearing this medical malpractice case returned a verdict finding both of the defendant doctors responsible for the injury suffered by Thomas Dolan on June 19, 2003. The injury to Mr. Dolan occurred during the course of lumbar surgery when his common iliac artery was cut. The jury found Dr. Marci Malone, the anesthesiologist attending at the surgery, 70% responsible for failing to communicate abnormal vital signs, including blood loss, to the surgeon Dr. Tanvir Choudhri. Dr. Choudhri, the neurosurgeon performing the surgery, was found 30% responsible for the manner in which he performed this surgery in the actual cutting of this artery.

The plaintiff Thomas Dolan was awarded one million dollars for past pain and suffering and two million dollars for future pain and suffering for a period of 20.9 years. His wife Jane Dolan, via her derivative action, was awarded \$500,000 for past pain and suffering and one million dollars for 33 years in the future. Thus, the award, in its aggregate was four and one-half million dollars.

Both defendants are moving to set aside the verdict and dismiss the complaint, the latter relief for having failed to establish a prima facie case. Alternatively, they are moving

for a new trial on both liability and damages, or as to damages alone, unless the plaintiffs stipulate to substantial reductions in the awards. The plaintiffs, via their counsel, strenuously oppose any of the requested relief except for an acknowledgment that Mrs. Dolan's future award must be reduced because the number of years for which damages were awarded exceeded Mr. Dolan's life span.

With regard to Dr. Choudhri, his attorney argues first that the evidence was legally insufficient either to sustain a liability award or to show a causal connection between the initial injury and the claimed hypoxic encephalopathy resulting in cognitive deficits and memory loss.

As to the request for a new trial, counsel argues the verdict was against the "overwhelming weight of the evidence" and that this Court made several erroneous rulings. Those rulings generally fall into two major categories. The first deals with the defendant himself and the Court's limitation of his testimony. Specifically, Dr. Choudhri argues that he was not permitted to demonstrate how he performed the surgery and that he was not allowed to give opinions on his direct testimony as to issues in the case. The second deals with plaintiff's expert, Dr. Richard Goodman, a board certified orthopedic surgeon. Here, the defendant argues that Dr. Goodman should not have been allowed to testify in the first instance and second, that despite the witness not recognizing any medical articles or textbooks as "authoritative," counsel still should have been allowed to question Dr. Goodman on these texts. Defense counsel also argues that it was error to have precluded him from calling a neuropsychologist.

I disagree with all of these arguments. I believe that plaintiff clearly made out a prima facie case of negligence against Dr. Choudhri. This is not to suggest for one

moment that the defendant surgeon is not a well-trained, caring and skilled doctor. I believe strongly that he is all of those things. However, the evidence was certainly there to prove that not only did Dr. Choudhri cut the iliac artery, an injury which necessitated a second extensive life-saving surgery for the plaintiff, but that this incident was something other than a mere risk of this procedure, the argument which defense counsel put forth throughout the trial and repeats in these papers.

While Dr. Goodman was the one who actually opined on the specific departure, I believe it was the extremely effective cross-examination of Dr. Choudhri himself that provided ample support for the jury's findings of responsibility. Plaintiffs' counsel was able, via the use of defense exhibit "C" and the surgical tools provided by the defendant, to show convincingly that the surgeon cut this artery by inserting his instrument approximately 30 millimeters into the surgical site to a place at the ventral part of the disc, through the annulus which is adjacent to the artery, and into the artery. It was also shown that Dr. Choudhri's entrance was through the dorsal side because the excision of the disc material was in that area. Therefore, there seemed no good reason for him to be in the ventral part.

The fact that the defendant acknowledged that his visibility was extremely limited and that the surgery itself was difficult and complicated only supported the argument by plaintiff's counsel that Dr. Choudhri had to use extreme care in not going too far into this space, particularly in an area, the ventral space, where he was not focusing his work and where the artery was located.

With regard to Dr. Goodman, defense counsel was certainly allowed to question him at length as to his credentials, his lack of relevant experience in 20 years and his

knowledge of the literature. He also was free to denigrate all of these things to the jury, which he did.

However, the fact remains that Dr. Goodman was a board certified orthopedic surgeon, a field of medicine, together with neurosurgery, that performs this kind of disc surgery. He had been chairman of a department of surgery at a university hospital and has reviewed cases at Long Island Jewish North Shore Hospital for complications arising from surgery. He also has been employed by the Office of Professional Misconduct to review the conduct of surgeons and he has been in practice over 40 years.

I believed then and continue to believe today that Dr. Goodman possessed the necessary qualifications to present his opinions to the jury as to issues in this case. The fact that he had not performed this surgery in 20 years went to the weight which the jury chose to give to those opinions. However, Dr. Goodman still professed to be well acquainted with the anatomy of the lumbar region. In fact, no one disagreed with his discussion of where the significant structures lay, as well as the opinion that a surgeon working in that area had to proceed with extreme caution.

Defense counsel was properly precluded from introducing literature which was not recognized as authoritative. Presumably that literature stood for the position repeatedly taken by the defense that this surgical procedure was risky. It should be noted here that similarly, plaintiff's counsel was not permitted to use the book, Fundamentals of Operative Techniques in Neurosurgery, written in 2002 and co-edited by Dr. Choudhri because the defendant, Dr. Choudhri did not recognize a chapter in his own book, discussing posterior lumbar surgery, as authoritative. Therefore, there was a consistency to the rulings, both of which were in accord with well recognized evidentiary law.

With regard to the alleged limitation(s) on testimony given by Dr. Choudhri, I have reviewed the trial transcript of his testimony. After doing so, I believe strongly that Dr. Choudhri was given every opportunity to fully discuss what he did during the surgery and why he did it. His testimony was quite exhaustive on this as well as other related subjects. He was asked to and did elaborately testify as to the anatomical issues connected with the surgery and the problems he was faced with.

Ultimately, Dr. Choudhri's position was that while he acknowledged that it was his actions that caused the transection of the iliac artery, he did not know to this day how precisely this happened. Therefore, there was no probative value to be served in allowing him to demonstrate with a piece of cardboard how he conducted the surgery. First of all, such a demonstration could not possibly be a fair simulation of what occurred. Nor would it have provided relevant information on the ultimate issue of how the cut to the artery occurred. It could not do this because, again, Dr. Choudhri did not himself know.

The only time that Dr. Choudhri was stifled from giving an explicit opinion was on the issue of whether his patient, Thomas Dolan suffered an hypoxic event causing cognitive impairment as a result of the enormous blood loss he experienced during and after surgeries. There are times when a defendant doctor can be asked to opine on the issues. This was not one of them. First of all, it was unnecessary; the facts, one could say, spoke for themselves. Those facts were according to Dr. Choudhri's recollection and his records, that there was no sign or complaint of these memory symptoms until December, after the lawsuit had begun. Second, if Dr. Choudhri was now being offered as an expert in the field of neurology, as a neurosurgeon to give opinions about the mechanism and development of a hypoxic brain injury, then defense was obligated to give

some notice of that to the plaintiff. As it was, no defense witness was proffered to opine as to whether Mr. Dolan's present complaints were or were not causally related to the events of the surgeries and sustained blood loss. Merely arguing that Dr. Choudhri, as Mr. Dolan's treating physician should have been able to opine on this subject, was insufficient to have him testify beyond what he remembered of his patient. The defense had an opportunity to call a defense examining physician to testify to this if it chose to. It did not.

This gets us to the last point, not including damages, that the defense urges, namely that the Court improvidently exercised its discretion by not allowing it to call their own neuropsychologist. The proffer, vis-a-vis this expert, was that there was no proof that the plaintiff had undergone cognitive testing. However, this was not entirely true, or at least not the entire story. After the trial had begun, plaintiff's counsel belatedly sent defense counsel a copy of a report from a Dr. Schippa which, according to plaintiff, showed that Mr. Dolan had been cognitively tested, but according to the defense showed that he had merely been administered an IQ test. The defense objected to this witness being called. I sustained the objection but also said that I would not allow the defense to present a witness to testify that no testing occurred because, in fact we knew that at some level, testing had occurred. I left it up to defense counsel to choose, i.e., either both could testify or neither. Finally, I offered the defense the option of having the plaintiff examined during trial by a neuropsychologist, but this offer was declined.

Self-serving, though it may be, I felt my decisions on this issue were fair and reasonable. Certainly defendant pointed out during the testimony and during his summation that there was no objective testing to prove the existence of brain damage. It

was also pointed out that Mr. Dolan could have had additional testing but chose not to, ostensibly for no good reason.

With regard to Dr. Marci Malone, her attorney makes the same legal arguments as Dr. Choudhri, but includes an additional one, that the apportionment of liability as between the defendants, 70% against her, was against the weight of the evidence. However, I believe the evidence was overwhelming in support of the verdict against her. Plaintiff, in the first instance called a well-qualified, board-certified anesthesiologist to testify, Dr. Zvi Herschman. Dr. Herschman clearly delineated the role of an anesthesiologist in the operating room and the relationship between that person and the surgeon. It was a team effort where communication between the two was vitally important, communication which in this operation did not occur. Dr. Malone was obligated to watch Mr. Dolan carefully and make sure he remained comfortable and pain free. But she also had to make sure he remained hemodynamically stable and in the event he did not, she was obligated to inform the surgeon, whose concentration was on other things. Dr. Hirschman detailed where and when Dr. Malone failed in these duties. He opined, that at approximately 2:30 to 3:00 p.m. according to the records, this significant event occurred. It is without dispute that Dr. Malone never informed Dr. Choudhri of any of the events she was monitoring, though she did herself try to stabilize the patient with such things as additional fluids. These interventions were not attacked.

Simply, Dr. Malone's actions were not enough. She was obliged to do more and to tell the surgeon what she had noted. Dr. Malone was called by the plaintiff to testify. She did not make a good witness on her own behalf. She admitted that she did not tell Dr. Choudhri of any compromising events during the operation, but stated she believed

there was no need to as long as she could correct the situation. She acknowledged not being board certified, indicating that she had failed her written exam twice. Dr. Malone also testified as part of the defense case.

Finally, the defense called Dr. John Herbert, also a well-credentialed, board-certified anesthesiologist. He disagreed with Dr. Herschman and stated that every minor detail need not be communicated. Needless to say, it was the plaintiff's position that the information that had to be communicated here was not of a minor nature. And as pointed out by counsel for the plaintiff, Dr. Herbert did acknowledge a hypotensive event lasting approximately 20 to 25 minutes. But still he insisted it was not necessarily bad practice to fail to tell the surgeon, though it was not necessarily good practice either! He even suggested that it was up to the surgeon to somehow listen to the beats from the machines to get the necessary information, in the midst of concentrating on this complicated surgery. This position seemed almost ludicrous. I believe it was the general impression in the court that when this witness had completed his testimony, Dr. Malone's case had not been helped.

As to the apportionment, I believe it is sustainable. That is so because despite the fact that Dr. Choudhri inflicted the actual injury, the extraordinarily serious manifestations of that injury arguably were preventable if Dr. Malone had fulfilled her responsibility and given him the information he needed at the proper time. Dr. Choudhri undoubtedly then would have taken steps during the surgery to ascertain the bleed and immediately repair the injury. Mr. Dolan would not then have sustained the loss of almost all of his blood, which happened after he was turned over and brought to the recovery room. And of course, he would not have been subjected to the second surgery wherein Dr. Victoria

Teodorescu intervened and saved his life.

However, while I am sustaining the verdict and the apportionment, I do believe the award for damages is excessive in all categories except for Thomas Dolan's past pain and suffering, that award of one million dollars. As alluded to earlier, Mr. Dolan was forced to undergo a second emergency surgery, wherein it was documented that he went into cardiac arrest. During that surgery he received multiple transfusions because of the loss, according to Dr. Teodorescu, of approximately 10,000 cc's of blood. In the course of that second surgery, the vascular surgeon used a dacron graft to restore the integrity of the vessel because the edges of the transected artery were not strong enough to hold sutures. A graft could cause complications such as infection and blockage from scar tissue, and Dr. Teodorescu testified that she discussed these complications with Mr. Dolan. However, they were remote.

After the surgery, Mr. Dolan was removed to ICU where his wife described him as looking like the Michelin Man, completely swollen with tubes all over, blood coming out of his mouth, slits for eyes. He was sedated but conscious. He and his wife cried. He had bruises all over his body. Mr. Dolan testified that when he woke, he thought he had been hit by a freight train. And though much of his first hospitalization was a blur, he remembers he was in severe pain. He spent 4 days in ICU and was given morphine during that time and after he was moved to a regular room. Upon his discharge he was given pain medication and a prescription.

His troubles were far from over, because the day after his discharge, which was on a Friday, he began vomiting. This became constant and violent and went on all night long. The next morning, Dr. Choudhri was called and he told Mrs. Dolan to bring her husband

back to the hospital. At this point Mr. Dolan was extraordinarily weak. Upon admission he continued to vomit, could not walk and was moaning from the pain. He spent 14 days at Mount Sinai this time, 12 of those days on an NG tube. He was diagnosed with a small bowel obstruction. This was a result of the life-saving second surgery as his intestines had been displaced in an attempt to remove blood from his abdomen. After the discharge, his physical recovery was slow as he was extremely weak from the multiple insults to his body. He continued to take pain medication as needed. About 2 months later, he could again drive his car.

However, while the physical suffering ended, it was noted by both Dolans that Mr. Dolan began suffering from fear, depression and sleep deprivation. He would often cry during the night. This took him to a psychiatrist, a Dr. Sacks. This was the first time he had ever seen a psychiatrist who prescribed anti-depressants and sleep medication. Dolan felt he could not work anymore. He had been a manager with Verizon for many years, but felt he had no choice but to accept a retirement package. He was 55 at the time.

Finally, despite the defense position that a cognitive brain injury was not sufficiently proven, both Dolans, particularly Jane Dolan, described how soon after the surgery her husband experienced memory problems. She testified that he seemed to forget chunks of time, he failed to recognize people, he could no longer do simple mental tasks, he could not help his children with their homework, and he kept forgetting things and repeating himself.

Dr. Carey Dolgin, a board certified vascular surgeon testified at the trial after having reviewed all of Mr. Dolan's hospital and medical records. He opined that Mr. Dolan did suffer from shock, hemorrhagic shock from the severe loss of blood from the disc surgery.

He pointed to entries in the Mt. Sinai records which supported his opinion. He also believed that the loss of blood and the documented cardiac arrests resulted in a reduction of oxygen to Mr. Dolan's brain.

On cross-examination, Dr. Dolgin stated that his opinion was based solely on the records in that he had never examined the plaintiff. He conceded that it is possible not to suffer a brain injury from the events but believed here that the plaintiff did. Sometimes testing can show brain tissue damage and sometimes it cannot. However, the injury is generally fixed within a short time of its occurrence.

Finally, Dr. Weintraub, a board certified neurologist and Thomas Dolan's treating physician since February of 2004, testified. In the years he has treated him, he had ordered a battery of tests, as much to rule out certain conditions, such as a stroke, as to decide on a proper diagnosis. The tests, EEG and MRI taken first in February of 2004 were normal. Later MRI's were also normal.

However, despite this absence of corroboration, Dr. Weintraub was adamant in his opinion that Mr. Dolan has suffered some cognitive impairment due to an hypoxic brain injury suffered as a result of the severe and sustained blood loss in June of 2003. He insisted Mr. Dolan was not embellishing or exaggerating his symptoms. And despite his prescribing various medications, Dr. Weintraub believes they are not really working. Mr. Dolan's prognosis is guarded.

Dr. Weintraub was well credentialed and came across as a caring doctor and a credible witness. Therefore, pursuant to the above summary of physical and emotional suffering that Mr. Dolan has experienced in the 3 ½ years from the disc surgery to the trial, I find that the \$1 million award does not deviate materially from comparable awards.

However, as to future pain and suffering, I feel differently. The jury awarded Mr. Dolan \$2 million for the next 20.9 years. This would be exclusively for the dementia he now suffers from and the substantial change it has had on him and his relationship with his children. There is no further physical injury except for the extensive scarring from the second surgery which extends from his chest down his abdomen. Therefore, I am directing a new trial on future damages for Thomas Dolan unless the parties stipulate to a reduction for future pain and suffering to \$750,000.

With regard to Jane Dolan, the jury awarded her \$500,000 for loss of spousal services to the time of trial and \$1 million dollars for a future of 33 years. Of course, this was an error because of their earlier finding that her husband would live 20.9 years. So a reduction for that reason alone is mandated. However, while I find that Mrs. Dolan credibly testified that her husband's relationship vis-a-vis her and their children has been altered drastically, including very definitely their sexual relations, I also believe the awards here are excessive. Therefore, after reviewing cases cited in this Department, I am setting the matter down for a new trial on loss of services to Mrs. Dolan unless the parties stipulate to \$200,000 for the past and \$250,000 for the future damages.

Counsel shall submit a stipulation to the Court or a written request for a new trial date within thirty days hereof.

This constitutes the decision and order of this Court.

Dated: May 15, 2007

MAY 15 2007



J.S.C.
ALICE SCHLESINGER

FILED
MAY 18 2007
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