

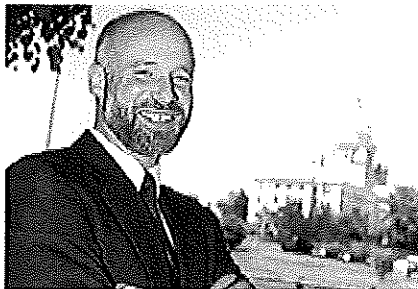
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RHODE ISLAND LAWYERS WEEKLY

June 16, 1997

News Story

Birth Injuries Lead To \$3.6 Million Award Causation, Delay Were Largest Obstacles



Providence lawyer David Morowitz convinced a Washington County jury that a child's catastrophic injuries resulted from 20 minutes of lost care.

By Mark A. Cohen

After more than a decade of winding its way through the Rhode Island court system, a medical-malpractice case handled by plaintiffs' attorney David Morowitz of Providence all came down to 20 crucial minutes.

That's how long the plaintiff mother alleged that the Westerly Hospital delayed in performing an emergency Caesarean section on an early July morning in 1983. And it was during that 20 minutes, the plaintiff argued, that any chance her

child had to live a normal, healthy life evaporated.

The hospital countered that it had provided prompt care to the mother, who nevertheless gave birth to a 27-week-old infant with severe brain damage and quadriplegia.

Despite the passage of 13 years since the day in question and the deaths or relocations of a number of witnesses, Morowitz was able to prove to the satisfaction of the six-person Washington County jury that his version of events was the correct one, and thereby secured a verdict that, with interest, totaled \$3.6 million.

The case -- *Dowd v. Westerly Hospital* -- appears as a trial report in this issue of Lawyers Weekly.

Causation Battle

Observing that both sides recognized the catastrophic nature of the child's injuries, Morowitz emphasized that the major obstacle in the case was proving causation.

Defense experts interpreted prenatal tests as showing some pre-birth brain damage in the fetus. In addition, the defense presented testimony that the child's condition stabilized and did not start to worsen until after the child's birth, while she was in the care of a different hospital.

"[The defendant hospital] said [the child's] injuries occurred before birth and after birth," Morowitz noted, adding that the plaintiff had to show the oxygen deprivation that injured the child occurred *during her birth* in order to hold the hospital liable.

Morowitz argued that it made little sense for the defense to exclude the complications surrounding birth as a cause of the child's injuries.

"I told the jury it's like hearing a bomb go off," he said. "The next day, you find a crater. The defense was saying the crater must have already been there before the explosion. Or if it wasn't there before the boom, it must have formed some time afterward. We were saying that the crater was formed when the bomb went off."

According to Morowitz, the "key" to his success was the testimony of two experts -- a pediatric neurologist and a nursing professor -- who helped trace the injuries to oxygen deprivation at the time of birth.

And Morowitz himself also kept hammering on the alleged 20 minutes of "missing" time in the plaintiff's treatment records.

But Providence attorney Dennis McCarten, who represented the hospital, remains unconvinced.

"We had a very strong case on causation," observed McCarten, who has filed motions for a new trial and for a reduction in the amount of prejudgment interest. "But 13 years had come and gone, memories had faded. We couldn't recreate 20 minutes of a day 13 years ago. We could only offer a competing inference."

McCarten said that he was "surprised and disappointed" by the jury's decision, which, he asserted, probably resulted from prejudice toward a very sympathetic plaintiff.

Emergency C-Section

At about 5:00 a.m. on July 5, 1984, plaintiff Elizabeth Dowd -- who was then seven months pregnant -- was rushed to defendant Westerly Hospital, suffering vaginal bleeding and extreme abdominal pain.

The plaintiff alleged that the hospital kept her waiting too long for a necessary emergency Caesarean section procedure. To bolster this claim, the plaintiff asserted that the hospital was unable to account for 20 minutes of "lost time" in performing the operation.

After the child was removed from the plaintiff's womb, she was quickly transferred to Yale Medical Center. The defense later based its argument that the child had suffered a pre-birth injury on tests taken at Yale. The defense further contended that bleeding in the child when she was in the care of Yale was also a cause of her injuries.

In 1986, the plaintiff filed suit in Providence County against the hospital and the obstetrician who treated her during her pregnancy. The obstetrician later settled with the plaintiff for an undisclosed amount.

A Change Of Venue

In 1992, it was determined that Washington County was the appropriate venue for the action. When the parties moved the case to Washington County, the court gave the case a 1992 docket number rather than a 1986 one. As a result, the case was treated by the court system

as if it had only been on file since 1992, according to McCarten.

Further delaying things, McCarten stated, the plaintiff sought to add to the case new defendants, who were ultimately successful in arguing that the action against them was untimely. The plaintiff pursued an appeal of the decision, and lost.

Morowitz, who works at the Providence law firm of DeCof and Grimm, took over the case about a year ago. Morowitz is a transplant to Rhode Island, who previously practiced in Florida.

Last month, the case finally came up for trial.

McCarten successfully requested that -- on the day of jury selection -- plaintiff's counsel be made to show five minutes of the 20-minute "day-in-the-life" video which the plaintiff had planned to present during trial. Prospective jurors could then be asked whether they felt that they could be fair and impartial in a case where the injuries to a child were so great.

"We originally wanted the child to be in court on the day of jury selection," McCarten observed. "But [plaintiff's counsel] did not bring the child that day. It was cloudy out and he said that the mother didn't want to risk taking the child out in the rain. That's when we asked for a few minutes of the video to be shown."

Morowitz was concerned that the defense's strategy would neutralize the effectiveness of the video by forcing him to show it in two installments. As soon as the trial got underway, he began his case with showing the rest of the video so that jurors would have a fresh memory of the first part.

McCarten asserted that the large jury verdict showed that -- despite the ploy of showing the video portion during jury selection -- he was not able to screen out juror prejudice.

But Morowitz disagreed, contending that he assiduously avoided parading the severely injured child in front of the jury to evoke sympathy.

"[The child] was before the jury for a total of about three minutes," he observed. "One of the experts [had the child] demonstrate her limited mobility in explaining his testimony to the jury."

Morowitz observed that -- despite the complex nature of the causation issues -- he did not use a lot of demonstrative evidence in presenting his case, mostly a few blow ups of medical records.

"These were difficult concepts," he acknowledged. "I have to make sure I understand the subject matter myself before I can make the jurors understand. Then I break it down to its lowest common denominator.... I don't use a lot of big words."

The damages, in contrast, were easy to demonstrate, according to Morowitz.

"[The child, who is now 13] has an IQ of about 20, has no control over bodily functions and cannot communicate in any meaningful way," he said. "If you place her on her back, she can sort of propel herself across the floor."

The Verdict

After a full day of deliberations, the jury returned a plaintiff's verdict, broken down as follows:

- \$740,000 for future health-care costs;
- \$225,000 for past health-care costs;
- \$440,000 for pain and suffering;
- \$272,000 in loss of future economic wages; and
- \$83,000 for loss of consortium.

The jury concluded that the hospital was 80 percent negligent and the obstetrician, with whom the plaintiff had previously settled, was 20 percent negligent. The hospital's total share of the award was therefore found to be \$1.4 million, with another \$2.2 million in prejudgment interest.

Besides seeking a new trial, the defense now contends that the plaintiff should not be awarded interest for the years that the case was delayed while the plaintiff unsuccessfully sought to add additional defendants.

Despite the sizable verdict, Morowitz is still not completely satisfied.

"My economic expert testified that [the child] would have \$2 million in future medical care alone," he observed. "The jury obviously did not feel [the child's] life expectancy is as great as the expert said it was."

The plaintiff's expert testified at trial that the child would live to be 35 to 40 years old.

Lawyers Weekly, Inc., 41 West Street, Boston, Massachusetts, 02111, (800) 444-5297

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