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Our Most Recent Medical Malpractice Trial

By Taylor Asen, Esq. and Trevor D. Savage, Esq.

In March, we tried a medical malpractice case in Penobscot County. After five days of trial, the Jury returned a verdict against the hospital defendant, Northern Light Eastern Maine Medical Center, in the amount of \$2.4 million. Interestingly, the jury found liability, but no causation, as to the other defendant, a nurse anesthetist who worked at EMMC as an independent contractor.

Factual Summary

On February 13, 2019, Louise underwent an endoscopic retrograde cholangiopancreatography (ERCP) at Northern Light Eastern Maine Medical Center (EMMC). An ERCP is performed on a fluoroscopy table. The table itself comprises two parts: a top portion, designed to move side-to-side during the procedure; and a bottom portion that remains fixed in place. Louise was placed on the fluoroscopy table in the prone position.

However, rather than securing Louise's arms to prevent them from falling off the side of the table, Louise's left arm was left unsecured, up by her head. This was a result of a miscommunication between members of the team involved in the procedure, including a nurse anesthetist who was relatively new to the hospital and was unaware of EMMC's unwritten policy that a patient's arms should be secured by their side.

The procedure took about fifteen minutes. During that period, Louise's left arm fell off the side of the moving table and was crushed. After the procedure was complete, the circulating nurse found that Louise's arm was trapped. The team was not able to extricate her arm without moving the table.

Louise's arm was badly crushed. Her arm worsened over time. She experienced ongoing and unrelenting pain.



Two years after her injury, we sent Louise to a prominent, out-of-state pain management physician. He diagnosed Louise with complex regional pain syndrome ("CRPS"), a chronic and debilitating medical condition characterized by excruciating pain.

There were two Defendants in the case: EMMC, the employer of all but

one of the persons involved in Louise's ERCP; and Stacey Bruckler, CRNA, who was responsible for administering anesthesia during the procedure.

Framing the Case for Trial—System Failure

At trial, we argued that all of the persons involved in the procedure -- from the gastroenterologist, to the nurse anesthetists, to the nurses -- were liable for Louise's injuries. However, our focus was not on the mistakes of the individual practitioners and nurses, but on the systemic negligence of the hospital itself.

Our liability expert focused on the failure of EMMC to have proper policies in place regarding patient positioning; the failure of EMMC to properly train the nurse anesthetist; and the failure of the team to perform a proper "time out" before the procedure. From focus grouping this case, we knew that the system failures of the hospital were more compelling to jurors than the individual mistakes of providers and nurses. This theory also got a boost from the nurse anesthetist's own liability expert -- an expert on hospital safety -- who also criticized many of EMMC's systemic problems as our expert did.

Damages

CRPS is a chronic pain syndrome that typically affects the arms or legs. The disease is thought to be caused by the interaction of different pathogenic mechanisms, including neurological dysfunction, neurogenic inflammation, and deprivation of sufficient oxygen to the skin. CRPS can be present with evidence of peripheral nerve injury (Type II) or without evidence of peripheral nerve injury (Type I). There is no meaningful distinction in the signs and symptoms of Types I and II CRPS.

CRPS is a diagnosis of exclusion that can be clinically diagnosed in patients who meet some or all of the so-called "Budapest Criteria":

Louise had signs and symptoms from each of these categories: she had pain from light touch; her arms were different temperatures;

she had swelling on the affected arm; she had marked weakness in her affected arm.

CRPS is always a difficult diagnosis to prove to a jury. There is no test or imaging that can conclusively prove the existence of the condition, and the public is not familiar with the disease. In this case, there were particular facts that made proving that Louise had CRPS difficult: as Defendants reminded

the jury throughout the trial, the first person to diagnose Louise with CRPS was an expert hired by her lawyers.

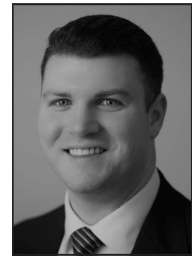
But we had several things going for us as well. First and foremost, we had a charismatic, highly credentialed pain management expert who was unequivocal about the nature of Louise's condition. The expert, Pradeep Chopra, M.D., saw Louise twice, and on the second visit, he took photographs demonstrating that Louise's arms were markedly different temperatures. He also took photographs that showed that Louise's affected arm was atrophying. These photographs became critical to our case: they made it difficult for Defendants to rebut Dr. Chopra's assertion that something remained wrong with Louise's left arm.

During our expert's direct examination, we used an animation that explained how CRPS developed. In essence, the animation showed how a trauma such as the one Louise went through could rewire the brain in a manner, so it continued to send pain signals even after the trauma had receded.

In addition to attempting to prove that Louise had CRPS, we made sure to point



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out to the jury that, at the end of the day, the exact nature of Louise's injury was not particularly important. Defendant's causation expert, Wilfred Hynes, M.D., was also a highly credentialed pain management expert. He cast doubt on Louise's CRPS diagnosis, opining that Louise likely had neuralgia (nerve pain) in her ulnar nerve distribution. We pushed back against this assertion during the trial. But in our summation, we embraced Defendants' expert, at least partially.

Here is a brief excerpt from Taylor's closing:

"But on every other important matter in this case, when you take away all the nonsense, Dr. Hynes and Dr. Chopra are actually pretty much in agreement. Dr. Hynes agrees that Louise has a serious pain

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Image 1 shows normal pain signals following Louise's trauma.



Image 2 shows pain signals from CRPS, after the trauma has receded

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condition. He agrees that the condition is a result of what happened in Room Two at Eastern Maine Medical Center. And Dr. Hynes agreed that the condition is permanent.

"Now Dr. Hynes claims that Louise has an ulnar neuralgia. What difference does it make? Whether Dr. Chopra was right, or Dr. Hynes is right about what we call it, Louise has a debilitating pain condition that is going to affect her for the rest of her life. Both experts agree on that."

Sub Rosa Evidence

We rested mid-day of our fourth day of trial, and Defendants put on their first witness that afternoon. As far as we knew, they had only one other expert to call on the fifth day of trial, and then closings.

After the last witness on the fourth day of trial, we were in the judge's chambers discussing jury instructions when the defense attorneys informed us (and the Court) that they planned to call a second witness the following day: a private investigator, previously undisclosed to us, who would authenticate previously undisclosed "surveillance" photographs of our client using her injured arm.

We fought to keep the evidence out, but it quickly became clear to us that it was coming in as impeachment evidence. (The legal issues surrounding the admission of this evidence are complicated and interesting, but due to spatial constraints, we will save them for another day.)

Our first impulse was to panic. Out of that panic, Taylor began devising a plan to defend against the evidence by expressing outrage to the jury. Luckily,

he had the good sense to call his partner Ben, who had some distance from the case.

"That's a terrible idea," Ben replied when Taylor laid out his plan. "You need to do the opposite of that. From what you've told me, it sounds like the private investigator simply found evidence of what Louise already told the jury: that she tries to use her left arm when she can, even though it hurts. Don't show the jury that you are the least bit troubled by this development."

That night, we went back to our war room and looked over the photos and video taken by the private investigator. We quickly realized Ben was right: the photos Defendants planned to introduce simply showed Louise doing exactly what she had testified to doing: using her left arm whenever she could, so that it wouldn't continue to atrophy.

The Court had forced the defense attorneys to turn over not just the photos and video they planned to use, but also the video they didn't plan to use, as well as invoices from the private investigator. As we looked through the discovery, we realized we actually had a fair amount to work with.

Trevor, who is far calmer than Taylor, cross examined the private investigator. During that cross-examination, the private investigator conceded: (1) Defendants had crushed Louise's arm; (2) although they were healthcare providers, Defendants had asked him to follow one of their patients to find out if she was faking her injuries; (3) at Defendants' direction, he had followed Louise for 143 hours and billed Defendants' \$13,331.87; (4) of that 143 hours, Defendants sought to admit *less than four minutes of surveillance video* and only a few photographs; (5) those photographs and video showed Louise attempting to use her left arm to perform everyday tasks, as she had previously testified to; and (6) there were many other photos

and video clips -- which Defendants did not intend to show the jury -- supporting Louise's testimony that she often did not like to use her left arm and would instead use her right arm to lift or carry things, when possible.

Thus, although the Court sustained an objection to Trevor's question, "I'm sorry, respectfully, what do you understand your purpose to be here today?" the effect was clear: the surveillance video did nothing to bolster Defendants' contention that Louise was faking her injuries, and instead, merely showed the depths to which they would stoop to avoid taking responsibility.

To that end, although we smartly discarded our initial plan of leading with outrage, Taylor used the *sub rosa* evidence in his summation to undermine EMMC's claim -- which they first made in openings -- that it was taking responsibility for Louise's injuries:

"I want to stop for a moment and talk to you about the question of taking responsibility. Because Eastern Maine Medical Center told you on the first day of this trial, 'We take responsibility for what we did to Louise Brown.' Has what you've seen in this courtroom looked like taking responsibility to you? Is this how you were raised to take responsibility, or how you raise your kids to do it? ...

"To top it all off, they hired a private investigator to spy on Louise Brown. Please just let that sink in for a moment. This isn't a cigarette company, or a big oil company. This is a hospital. They're supposed to take care of people. They hurt this woman. And then they go and spy on her."

Did the surveillance evidence from the private investigator hurt us? Did it help us?

Or was it a wash? There is no way to know for certain, of course. But looking back on the trial, we feel like we handled it as well as we could have. And although we hope never to be surprised by surveillance evidence ever again (on the second-to-last day of trial, no less), it was certainly a learning exercise on how -- and how not to -- handle this type of situation if it arises again in the future.

Taylor Asen earned his JD from the Yale Law School and served as law clerk to a judge on the Federal Court. Before leaving to open Gideon Asen LLC, in November 2020, Asen was an associate at the Lewiston based law firm, Berman & Simmons PA.

Savage's practice with the firm involves medical malpractice, trucking accidents, and other complex personal injury cases.

He is a 2017 graduate of Maine Law and worked for a Portland-based litigation firm for several years before joining Gideon Asen in January 2023.

Both Savage and Asen run Gideon Asen's Trucking Group.

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