Edited

BENJAMIN R. NOVOTNY & ADAM R. SATIN

For Andrea and Timothy Larkin, it should have been the happiest time of their lives. Instead, within hours of giving birth to their first child, Andrea suffered a rupture of a "venous varix," essentially an aneurysm, in her brain, forever altering their lives.

A few years earlier, the varix had been detected through an MRI at Massachusetts General Hospital. Her primary care doctor, an employee of defendant Dedham Medical Associates, was informed of its existence. But that doctor failed to note the varix on Andrea's "problem list," and thus her obstetricians were unaware of a condition that likely would have led them to counsel her to deliver the baby by Cesarean section.

A former elementary school teacher, exercise class instructor and marathon runner, Andrea has been left paralyzed and requires around-the-clock care.

The Larkins sued Dedham Medical Associates, and after a two-week trial in 2015, a jury awarded them $35.4 million.

In post-trial motions and then in a petition to the Appeals Court, Dedham Medical Associates challenged the trial judge's ruling not to allow it to amend its pleadings to invoke as an affirmative defense G.L.c. 231, §85K, the state's charitable liability cap, which could have reduced the judgment to a mere $20,000.

However, the Appeals Court ruled that the charitable liability cap is an affirmative defense that must be pleaded. The court rejected the appeal, preserving the efforts of Adam R. Satin and Benjamin R. Novotny and others at Boston law firm Lubin & Meyer to ensure that Andrea Larkin will be taken care of for the rest of her life.

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BENJAMIN R. NOVOTNY (LEFT) AND ADAM R. SATIN Photos by Merrill Shea

Ben, you tried this case with your colleague Karen A. Zahka. How did you obtain the initial verdict?

BN: The benefit is always having unbelievable clients. [Andrea Larkin] was awesome — master's degree, fifth-grade teacher, yoga-Pilates instructor. Perfect health is always a good place to start in a malpractice case.

The best part of the whole trial was when, three hours [into deliberations], the jury asked for a calculator. That was my fondest moment of the whole trial.

But then the issue of the charitable cap comes up late in the game.

BN: They asked us to stipulate to that early on, and we ignored the request, which actually helped in the appeal part because it showed the judge and the court that we weren't agreeing to waive that as an issue.

The defendant produced a state certificate attesting to its nonprofit status. Why is that not dispositive of its entitlement to the charitable cap?

AS: It's only a piece of evidence of a defense that they have an entitlement to. When Ben said they tried to get us to agree to it "early on," he's talking about early on in the trial. So it's years and years while this case has been litigated and discovery is over.

There are elements that are factual in nature that you have to prove in order to make out that affirmative defense. We didn't have the opportunity — because they didn't plead it — to develop our counter evidence to that.

Adam's name appeared in the tragic story in Boston Globe Magazine about Laura Levis, who died of an asthma attack outside Somerville Hospital, in the context of having to inform her husband that there was no way around the $100,000 damages cap. Have these laws outlived their usefulness?

AS: [Though] that's a different liability cap — one is for governmental employee immunity, and the other is for charitable immunity — in the end it's the same thing. That body of law really comes from just an outdated, unfair common law that then was put into statutory form. You used to not be able to sue the king. The way the law ultimately progressed was the Legislature said, "OK, you can sue the king but not for much."

We just don't feel that the way [modern] organizations run, and the revenues that they generate certainly, call for that kind of overbroad protection without any commonsense sort of escape hatch for the truly tragic cases.

Your adversaries wrote to Lawyers Weekly, taking issue with your contention that their failure to plead the cap was something other than an inadvertent oversight. Do you wish to modify your comments?

BN: I think it's a tough argument for them to make when they pleaded eight other affirmative defenses. How can they just say, "We left out No. 9"? Did you leave out No. 10?

They are experienced trial lawyers; they've been in dozens and dozens and dozens of cases. If they wanted to plead it, they would have pleaded it.

AS: In addition, the trial record doesn't really have anything about why this wasn't pled. You didn't get an affidavit from some employee saying, "I was told to do this and I forgot to put it in and it was missed." You didn't get an affidavit from the lawyer saying, "We reviewed the defenses and knew we had to do this, but it got cut and pasted wrong," or something.

What has happened since the Appeals Court's decision?

AS: At some point, we were able to settle with the doctor in the case but not Dedham Medical Associates. In addition, we filed yet another piece of litigation against the insurance company for a number of violations of Chapter 93A.

Ultimately, what we ended up having was a high-low agreement on the outcome of the appeal. If we won, we would collect $38.6 million. Everyone wanted everything wrapped up. The case had taken years and years to that point. So, in the end, we got [$5 million] more than what the judgment would have entitled us to and spared the client needing to litigate the 93A claims.

How is the Larkin family doing?

BN: They are so salt of the earth. [The settlement] hasn't changed their day-to-day lives. He still goes to work. He still takes care of his daughter. And nothing's going to change what Andrea's going through; she's going to be paralyzed for the rest of her life. But it's given them peace of mind knowing, no matter what happens to them, she'll be taken care of for the rest of her life.

— Kris Olson

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