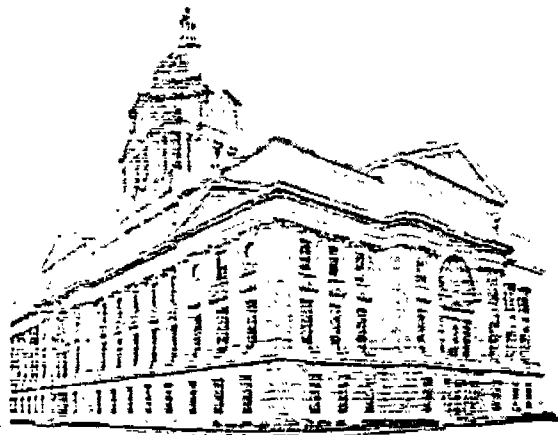


New England Jury Verdict Review and Analysis

A MONTHLY REVIEW OF NEW ENGLAND STATE
AND FEDERAL COURT CIVIL JURY VERDICTS
WITH PROFESSIONAL COMMENTARY AND ANALYSIS



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The cases summarized herein are obtained and selected from a current and ongoing survey of the State and the Federal Courts in New England. However members of the bar are encouraged to advise this publication of any current plaintiff or defendant jury verdict they believe to be of sufficient interest to warrant publication.

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Table of Contents

	Page
\$3,000,000 Verdict - Med Mal - Failure to timely diagnose breast cancer results in 2 year delay in treatment - Death.....	1
Defendant's Verdict - Dental Mal - Alleged unnecessary removal of molar without consent - Loss of function.....	3
Defendant's Verdict - Products Liability - Alleged failure to warn & breach of warranty - Copper 7 IUD causes sterility....	4
\$550,000 Verdict - Breach of contract - Insurance carrier refuses to pay on life insurance invoking suicide exclusion.....	6
Defendant's Verdict - Products Liability - Negligence - Alleged defective braking system and negligent repairs.....	8
\$550,000 Verdict - Premises Liability - Failure to provide demolition contractor with pertinent information.....	9
Defendant's Verdict - Auto/Train collision - Alleged failure to maintain adequate crossing protection - Wrongful death....	11
Plaintiff's Verdict - Liability only - Alleged willful infringement on patented method of cancer detection.....	12
\$105,000 Verdict - Head on Auto Collision - Passenger sustains lumbosacral sprains and cervical strains.....	13
Defendant's Verdict - Alleged defamation and interference with contractual relations.....	14
Verdicts—At—A—Glance.....	15

\$3,000,000 VERDICT - MEDICAL MALPRACTICE - ALLEGED NEGLIGENT FAILURE TO TIMELY DIAGNOSE BREAST CANCER RESULTS IN 2 YEAR DELAY OF NECESSARY TREATMENT - PAIN AND SUFFERING - WRONGFUL DEATH. This was a medical malpractice action brought by the estate of the 59 year old female decedent against the defendant general surgeon for negligent failure to timely diagnose breast cancer in the decedent's left breast when she presented to him complaining of swelling or thickening in the breast on 8 occasions within a 2 year time period. As a result, the cancer in the breast was allowed to progress and metastasize until 2 years after the initial visit when the defendant finally performed a biopsy on the abnormal breast which was positive for breast cancer. The decedent thereafter underwent a mastectomy and chemotherapy treatments, but she died of breast cancer 3 years subsequent to the diagnosis. The plaintiff additionally named as a defendant the treating ob/gyn who had examined the decedent on several occasions during

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the critical 2 year period, claiming that he negligently failed to detect the abnormality and refer her for testing. The co-defendant ob/gyn and the defendant general surgeon were brothers.

The decedent initially presented to the defendant surgeon in August of 1979 with complaints of an abnormality in her left breast. Upon examination of the breast, the defendant noted a slight swelling or thickening, whereupon he had the decedent undergo a mammogram which was negative for breast cancer. The defendant made a diagnosis of fibrosis of the left breast at that time. The plaintiff related that the defendant performed no other diagnostic tests on the decedent, but continued to follow the decedent for 2 years within which time he made note in the office records kept on the decedent of the continued presence of the thickening in the left breast. The plaintiff related that despite the existence of this continuing abnormality, the defendant negligently failed to order a follow-up mammogram to be performed and negligently failed to perform a biopsy on the breast until 2 years after the initial visit, which was positive for Stage II breast cancer.

The plaintiff's expert opined that in view of the abnormality noted in 1979 and the stage to which the cancer had progressed 2 years later, the breast cancer was undoubtedly present at an early stage in August of 1979. The plaintiff's expert oncologist maintained that the defendant's care and treatment of the decedent deviated from the standard in his failure to perform a biopsy on the left breast much sooner, especially taking into consideration the particular circumstances of the persistent abnormality and the fact that the decedent was in the age group most susceptible to developing breast cancer. The plaintiff's expert oncologist further maintained that the defendant was negligent in relying solely on a mammogram for such diagnostic purposes because of the high inaccuracy rate of the mammogram. The plaintiff's expert related that a biopsy, on the other hand, is 100% accurate and should unquestionably have been performed on the decedent's left breast much earlier in the face of the persistent abnormality, despite the negative mammogram.

The defendant general surgeon denied negligence and contended that because the abnormality in the left breast was not a discrete mass, but merely a swelling or a thickening, it did not require a biopsy. The defendant further maintained that the decedent exhibited classic signs and symptoms of fibrocystic disease and in the face of the negative mammogram, the defendant's diagnosis of fibrocystic disease was completely reasonable under the circumstances. The co-defendant ob/gyn denied that his care and treatment of the plaintiff deviated from standard and maintained that on each and every office visit, he rendered a thorough and complete examination of the decedent's breasts, but that he had detected no abnormality. The defendant ob/gyn further denied the existence of proximate cause between his alleged negligent actions or inactions and the resulting injury on the basis that if he had detected the abnormality, he would have referred her to his brother, the defendant general surgeon.

The plaintiff presented testimony from family members who vividly described the adverse reactions experienced by the decedent as a result of the chemotherapy treatments, specifically that she became very weak and she lost almost all of her hair. The family members further described the emotional trauma suffered by the decedent as a result of her knowing that death from the cancer was inevitable and described the severe and unrelenting pain experienced by the decedent prior to her death, particularly in the last months as the cancer had spread throughout her body, finally invading her lungs causing her to gasp for each breath, until she finally suffocated. The decedent left a husband and 6 adult children. The jury found the defendant ob/gyn negligent, but also found that his negligence was not the proximate cause of the injuries complained of, thereby exonerating this defendant. The jury found for the plaintiff against the defendant general surgeon and awarded \$3,000,000 plus interest. The case is presently on appeal. Case no. 63471; Judge Barbara Rouse, 6-85. Attorneys for plaintiff: Philip J. Crowe, Jr. and Elizabeth Mulvey of Lubin & Meyer in Boston; Attorney for defendant general surgeon: Jim Anderson of Boston; Attorney for the defendant ob/gyn: Ed Crosse of Boston.

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COMMENTARY: The plaintiff was able to prevail notwithstanding the fact that the defendant surgeon had actually taken a mammogram, which was negative, during the alleged offending period of misdiagnosis. The plaintiff established liability by the introduction of evidence that the decedent had presented to the defendant on numerous occasions over a 2 year period of time complaining of an obvious abnormality, which the defendant himself examined and noted. that the plaintiff was in the age group most susceptible to developing breast cancer, and that there was a diagnostic technique available which was 100% accurate in the diagnosis of breast cancer of which the defendant chose not to avail himself. The defendant ob/gyn was able to prevail on the proximate cause issue by asserting that had he detected the abnormality, he would have referred the decedent to his brother, the defendant general surgeon. The substantial damage award to the estate of a 58 year old woman whose 6 children had reached majority age probably reflected the prolonged pain and suffering experienced by the decedent as a result of the debilitating disease itself as well as the painful course of chemotherapy treatment over the 3 year time period prior to her death.

DEFENDANT'S VERDICT - DENTAL MALPRACTICE - ALLEGED UN-NECESSARY REMOVAL OF MOLAR WITHOUT CONSENT - LOSS OF Rhode Island FUNCTION - EMOTIONAL DISTRESS. This was a dental malpractice action brought by the 50 year old female plaintiff against the defendant general dentist in which it was contended that the defendant was negligent in unnecessarily extracting the plaintiff's molar without first attempting less drastic alternatives and in doing so without the plaintiff's informed consent and, alternatively, in doing so without any consent whatsoever. As a result, the plaintiff sustained a permanent loss of function of the tooth, pain and suffering, and emotional distress.

It was undisputed that the defendant general dentist had treated the plaintiff in 1972 and during the 5 year period between 1977 and 1982. On her last visit to the defendant in 6- 82, the defendant examined a molar which the plaintiff complained was bothering her. The defendant was familiar with this molar as he had worked on the tooth before. The defendant related that he had previously filled the tooth, but problems developed with the filling necessitating an attempted root canal. The root canal, which was attempted approximately one year prior to the molar's extraction, was unsuccessful and the defendant determined that a pulpotomy should be performed, an alternative procedure to root canal or extraction whereby the nerves are severed from the crown of the tooth. Some time after the pulpotomy, the plaintiff again began complaining of discomfort at the location of the molar and the defendant determined on the plaintiff's last visit that extraction was necessary.

The plaintiff's expert general dentist maintained that based on his review of the plaintiff's records and the facts as related by the plaintiff, the defendant general dentist was negligent in electing to extract the molar, as the removal was medically unnecessary. The plaintiff's expert opined that the plaintiff's molar could probably have been saved with a properly performed root canal. The plaintiff's expert further contended that the defendant general dentist was negligent in failing to explain all the options to the plaintiff in detail prior to the extraction. The defendant's expert general dentist countered that a general dentist cannot accurately determine whether or not extraction of a tooth was necessary after the fact. The defendant's expert explained that making the decision whether or not to remove a tooth is a judgment call and there are a number of practical considerations which go into the decision making process. The defendant's expert maintained that the defendant dentist was in a much better position, having worked on the tooth for years and having examined it numerous times, to evaluate the need to extract the tooth as opposed to the plaintiff's expert, who has made an after-the-fact determination based simply upon the plaintiff's records and the plaintiff's recounting of the events leading up to the extraction without the practical considerations which the defendant had before him prior to the extraction.

On the issue of consent, the plaintiff's expert general dentist opined, based on the office records on the date of extraction and based upon the plaintiff's testimony as to what she was told by the defendant on the day the tooth was extracted, that the defendant did not give an informed consent prior to the removal of the molar. The defendant's expert general dentist agreed that if the plaintiff had been told nothing regarding the extraction, then the defendant general dentist was negligent in

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PAGE 3

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