

duced to the plaintiff's objection. The plaintiff argued that since the defendant had moved his truck prior to the arrival of the investigating police officer, the diagram was not based on observations personally made by the officer and should not have been introduced. The report also contained a reference to the defendant's statement as to the cause of the accident, which was consistent to his testimony at trial. The plaintiff argued that since the plaintiff did not attack the defendant's trial testimony as a recent fabrication, the introduction of this evidence contained in the police report was improper. The Appellate Division accepted these arguments and ordered this new trial.

The jury in this re-trial found that although the plaintiff was comparatively negligent, there was an absence of proximate cause and assessed 100% negligence against the defendant. In this regard, the jury apparently believed that although the plaintiff, who was described by the independent eyewitness as traveling at approximately 35 mph on the interstate highway during snowy conditions, was traveling too rapidly, the

defendant should have been able to avoid striking her as had both the independent eyewitness and the other driver who left shortly after the accident. Additionally, the plaintiff undermined the testimony of the defendant that the plaintiff had apparently struck the barrier to the right and ricocheted back into his path by stressing that this testimony was at odds with that of the independent eyewitness and by stressing that the marking on the barrier were consistent with the testimony of the eyewitness that she had, in fact, struck this barrier when she moved to the right to avoid the plaintiff.

Regarding damages, the jury rendered the largest portion of the award for past pain and suffering. In this regard, the graphic nature of the severe fractures on x-rays was thought to be very helpful to the plaintiff's case and underscored the description of the injury, need for the fasciotomy, and of the painful and difficult recuperation period experienced by this plaintiff and was particularly helpful in view of the relatively overstated nature of the plaintiff in her testimony. □

## **\$750,000 RECOVERY PLUS WAIVER OF \$450,000 MEDICAID LIEN - MEDICAL MALPRACTICE - UNNECESSARY USE OF HEPARIN - HEMORRHAGIC STROKE - DIFFICULTIES AMBULATING WITHOUT WHEELCHAIR.**

*New York County*

This was a medical malpractice action in which the female plaintiff contended that approximately ten hours after she suffered a minor ischemic stroke that was caused by a clot, the residents on staff at the defendant hospital negligently instituted Heparin without ascertaining if the levels of the slow acting Coumadan previously given had continued to increase as the plaintiff contended would be expected. The plaintiff maintained that as a result, the patient was unnecessarily subjected to the risks of excessive bleeding associated with Heparin and that she suffered a hemorrhagic stroke. The plaintiff contended that the initial ischemic stroke, which was not caused by negligence, resulted in only transient symptoms from which she essentially recovered over the course of several hours and that the record documented such recovery. The plaintiff maintained that the hemorrhagic stroke, which was allegedly the result of the defendants' negligence, caused a permanent, severe loss of use of the left arm and leg and that she will have permanent difficulties ambulating without a wheelchair. The plaintiff suffered no cognitive deficits as a result of the stroke. There was no evidence that the combination of the Heparin and Coumadan caused a synergistic effect and the plaintiff's case was based upon the contention that it is very difficult to predict the extent to which Heparin will effect the blood and that the plaintiff should not have been subjected to its dangers unless it was demonstrated that the Coumadan was not providing sufficient protection. There was no claim of inadequate supervi-

sion on the part of attending physicians at the City hospital and the plaintiff contended that the residents should have been aware of the absence of an indication for Heparin.

The plaintiff had been admitted to treat a condition of cysts which formed on her liver, spleen and kidney. The underlying conditions in the liver and kidney resolved and the spleen was removed. The plaintiff developed a blood clot sometime after the surgery and a program of anti-coagulation therapy consisting of Heparin and Coumadan was begun and continued for several days. Heparin was withdrawn two days earlier. The plaintiff suffered the minor ischemic stroke caused by a clot at approximately 10:00 A.M. on June, 28. The plaintiff contended that the Coumadan levels were measured at 11:00 A.M. and that although they were at the very low end of the therapeutic range, the levels had increased significantly from the time the last pill had been given the night before. The defendant reinstated Heparin, which was administered by way of I.V. at approximately 7:00 P.M. that evening and before any further testing of the Coumadan levels was done. The plaintiff suffered the hemorrhagic stroke shortly after 10:00 P.M. that night.

The plaintiff's expert internist contended that it should have been anticipated that the Coumadan levels would continue to increase. The expert contended that the use of Heparin at this time would pose a clear danger and administering it without ascertaining if the Coumadan had continued to increase, rendering the Heparin unnecessary,

constituted a deviation. The defendants countered that in view of the fact that the Coumedan had not prevented the ischemic stroke at 10:00 A.M., it was clear that further intervention was warranted. The plaintiff countered that the defendants should not have administered the faster acting and stronger Heparin until they ascertained the extent to which the Coumedan levels rose.

The plaintiff contended that when blood testing was taken after the hemorrhagic stroke, it was determined that the Coumedan level was then at the high end of therapeutic range and that it was clear that Heparin was not necessary. The plaintiff also established that at this time, the Heparin level was so high that it could not be measured. The plaintiff maintained that it is impossible to predict the level of anti-coagulation based upon the dose of Heparin administered and that because of this factor, it should not have been used when the Coumedan was providing protection. The plaintiff's expert maintained that it should have been clear to the defendants that the Coumedan levels would have continued to increase after the 11:00 A.M. reading and that administering Heparin before another test was taken constituted a clear deviation.

The plaintiff further contended that once the Heparin was instituted by I.V. at approximately 7:00 P.M., the defendants should have monitored it. The plaintiff contended that had they done so, they could have withdrawn it before the bleed occurred at 10:00 and the hemorrhagic stroke avoided. The defendants maintained that Heparin cannot be monitored for four hours because of the fact that a larger loading dose is used when instituted and that any test taken after a short time would show a hypercoagulative effect. The plaintiff would have argued that if this testimony was valid, such a strong loading dose rendered it even more important to avoid administering Heparin unless absolutely necessary.

The plaintiff contended that she suffered a severe loss of use of the left arm and left leg and maintained that although she can walk short distances in her apartment, she is essentially confined to a wheelchair. The plaintiff contended that she will require attendant care six hours per day for the remainder of her life and the plaintiff introduced evidence of approximately \$1,000,000 in the costs of such care over the remainder of a 20 year life expectancy prior to discounting to present value. The plaintiff contended that she has already incurred more than \$400,000 in past costs during the 12 years between the stroke and trial. The plaintiff, who had previously earned approximately \$15,000 per year in a laundry, also contended that she would have earned between \$100,000 and \$150,000 between the time of the stroke and trial and \$20,000 in the future.

The plaintiff contended that she requires help to and from bed, sits in a special chair to eat breakfast and can walk to a different chair in which she sits while spending large amounts of time watching TV. The plaintiff related that she usually has assistance with her wheelchair when she goes shopping and to doctors' visits.

The case settled immediately prior to summations for \$750,000 plus a waiver of the \$450,000 in past costs of care.

#### REFERENCE

Plaintiff's internist: Louis Vorhaus from Manhattan.  
Plaintiff's economist: Andrew Gluck from Manhattan.

Hernandez vs. NYCHHC. Judge Robert D. Lippmann, 4-15-98.

Attorney for plaintiff: Robert M. Ginsberg of Ginsberg & Broome in Manhattan.

#### COMMENTARY:

The defendant had maintained that it was confronted with the clear risks of continued clotting because of the initial ischemic stroke and that the institution of Heparin constituted a judgmental decision. The plaintiff countered this position by arguing that the defendants did not ascertain whether the levels of the safer Coumedan, which had been noted to have been increasing as of the 11:00 A.M. testing, were continuing to increase, providing satisfactory anti-coagulative therapy without resorting to the dangers of adding Heparin, which it was contended led to the hemorrhagic stroke. In this regard, the plaintiff would have argued that the defendants had not obtained sufficient information on which to base a valid judgmental defense, that the Coumedan levels when ultimately tested after the hemorrhagic stroke confirmed that the levels had increased to the extent that further medication was clearly not necessary, and that the defendants' position in this regard should clearly be rejected. Additionally, the evidence that when ultimately tested, the levels of Heparin were higher than could be measured, undoubtedly underscored the plaintiff's contentions that it would be next to impossible to predict the effect of the Heparin administration and that she should not have been subjected to this risk. Further, the plaintiff maintained that the defendant residents had acted without the requisite knowledge, pointing to evidence that the day after the hemorrhagic stroke, a resident had ordered that Heparin be reinstated. The plaintiff would have argued that this order was highly improper and underscored the plaintiff's position that knowledgeable care was not provided, notwithstanding that the order was countermanded and that the plaintiff was not given the drug at this time. □