Medical Malpractice Trial, Part 2: Pretrial

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Recap of Last Month

Johnny Dalton presented to the emergency department (ED) at St. Jacob's Hospital after ingesting liquid methadone, a long-acting opioid. Responsive Emergency Medicine and Dr. Beth Ange evaluated and monitored Johnny for nearly 12 hours and discharged him home. Johnny was found dead by his family approximately 20 hours after discharge.

- **Case name:** *John and Cathy Dalton v. Dr. Beth Ange and Responsive Emergency Medicine*
- **Decedent:** Johnny Trey Dalton
- **Attorney for plaintiff:** Bernard Elliot Greyson, MD, JD
- **Attorney for defendants:** Cristy Chait, Esq.

Filing the Suit

The lawsuit was filed in Maricopa Superior Court, and our group was served by courier on January 22, 2013. Plaintiffs alleged that the St. Jacob's Hospital and Dr. Ange violated the applicable standard of care while Johnny was in the ED by not admitting him to the hospital and by discharging him home after his presentation with an overdose of methadone and related symptoms.

Response of St. Jacob's Hospital and Responsive Emergency Medicine

St. Jacob's, Dr. Ange, and Responsive Emergency Medicine all deny wrongdoing and assert that Johnny's treatment conformed to the standard of care. In addition, the defendants assert that the injuries and damages alleged by plaintiff were not the result of any negligent act or omission.

Commentary

Up this this point, everything about the case was fairly standard.

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A 21-year-old died shortly after discharge from the ED; someone is obviously to blame.

I have told providers for years that medical-malpractice plaintiff attorneys do not take cases with bad facts or sketchy plaintiffs. It cost approximately $60,000 to $100,000 to bring a case to trial, and most attorneys simply cannot afford to roll the dice on anything other than a sure thing.

A very well respected medical-malpractice plaintiff's attorney once told me that he takes only 1 or 2 cases out of 100 that present to his firm. So generally speaking, the vast majority of medical-malpractice cases that are pursued have at least some merit on some level.

Plaintiff's Experts

In many jurisdictions, in order to file a medical-malpractice case, an attorney has to file an affidavit by a physician that attests to the merits of the case. The goal of this is to prevent frivolous lawsuits.

In this instance, the plaintiff retained a number of experts, including an emergency medicine physician for standard of care, a pharmacist for causation, a drug addiction specialist, a pathologist, an intensivist, and someone who claimed to do forensic analysis of electronic health records. The 2 principle experts were the emergency medicine physician, who testified that all people with methadone overdoses must be admitted, and the pharmacist, who opined on all sorts of things, including postmortem drug distribution and the pharmacologic effects of methadone.

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In short, the emergency medicine physician testified that Johnny's death was due to the overdose of methadone consumed 33 hours earlier, because of to a heretofore-unknown bimodal secondary effect or a very prolonged (30-plus-hour) primary respiratory depression. He also opined that despite minimal findings in the ED (somnolence and a respiratory rate measured one time at 11 breaths/minute), Johnny should have been admitted to the hospital, as opposed to simply being observed in the ED for 11 hours. From the testimony transcript:

21 Q. And you're saying, based on this graph, that
22 the respiratory effects of methadone, the respiratory
23 depressant effects, can peak at 24 hours after
24 ingestion?
25 A. That's correct.

The pharmacist testified about causation, saying that not admitting the patient to the hospital caused his death. In addition, he held forth that the large amount of methadone found in the patient's stomach after his death was from postmortem redistribution caused by the *initial ingestion* occurring 33 hours prior. In his testimony, he implied that an article and chapter he authored on the subject of redistribution offered evidence to support this high level of methadone. However, the article he referenced never even mentions the drug methadone.

13 So the finding of the metabolite as well as the
14 active methadone is consistent with an
15 additional dose of methadone being taken after
16 he left the emergency room, correct?
17 A. Incorrect. That would be consistent with the
18 drug moving. Again, it's a one-way street so
19 it had to have moved backward.
20 Q. So after death the methadone moved backwards
21 into the stomach in your opinion?
22 A. Not my opinion. There's post-mortem
23 redistribution literature that would support
24 that, that's correct, based on the properties
25 of methadone.

In the end, the pathologist, the information technology expert, the addictionologist, and the intensivist added little to the case, but because they were presented as experts, we had to depose them.

Defense Experts

The defense was fortunate to get 2 experts who were simply the gold standard. The ED physician was an academician out of a large California university and emergency medicine program, and the toxicologist literally wrote the book on toxicology. He was also the head of the California Poison Control System. Likely in an effort to save money (the side deposing the experts pays for their time and expense), the plaintiff's attorney never deposed the 2 defense experts, so other than what was contained in their disclosures, he had no idea what they were going to say.

New Facts

During the 2 years between serving the defendants and the trial, a number of very interesting facts came to light that I believed altered the very fabric of the case for the plaintiffs. These facts certainly made their case more difficult to present, inasmuch as the new information painted their client in a much less favorable light:

1. Johnny had a large amount of methadone in his stomach at the time of his death.
2. Johnny had tested positive for cocaine, opiates, and marijuana on prior ED visits.
3. Johnny had been arrested for domestic violence approximately 5 months prior to his death. The police report stated that according to his mother, he was buying and selling drugs in the neighborhood.
4. Johnny had 2 empty bottles of lorazepam in his room at the time of death that together had contained 150 pills and were both now empty. Also, lorazepam and its metabolite found in his blood on repeated analysis that specifically tested for the medication.
5. Postmortem toxicology screen results were as follows:
   - Methadone: 16,000 ng/mL in gastric fluid
   - Lorazepam: 5 ng/mL in iliac blood
   - Methadone: 450 ng/mL in iliac blood
   - EDDP (2-ethylidene-1, 5-dimethyl-3, 3-diphenylpyrrolidine): 75 ng/mL in iliac blood

Pretrial Motion Practice

As was his custom, the plaintiff's attorney made many pretrial motions. Some of them were as follows:

1. Not allowing the jury to know he was also a physician
2. Making a motion to disallow admission of evidence of prior arrests, domestic violence, drug use, or positive findings on drug screens from previous admissions
3. Making a motion to disallow further toxicologic testing specific for Lorazepam

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4. Making a motion alleging punitive damages and hedonic damages
5. Making a motion to lower the burden of proof from clear and convincing to preponderance of the evidence. In Arizona, there is a specific statute that provides that care in an ED is held to a higher standard of proof for malpractice. In other words, the elements to prove malpractice must be grounded in clear and convincing evidence.

Commentary

With each new revelation of a fact—the previous drug use, the police report detailing domestic violence, the large amount of methadone in Johnny's stomach on postmortem analysis, and the lorazepam in his system—I firmly believed that Greyson would drop the case. However, each time a seemingly adverse fact was revealed, Greyson doubled down and his experts found new theories that supported the new facts. At the same time, the plaintiffs made overtures to settle the case, with decreasing demands every time.

St. Jacob's submitted an offer of judgment for $2500, which the plaintiffs accepted. An offer of judgment, if not accepted, obligates the opposing party to pay for all costs and fees if the verdict comes in at an amount less than the offer. For example, if an offer of judgment is made for $10,000 by the defendants that the plaintiffs refuse, then the plaintiffs are liable for all costs and fees that occur after the offer is made if the verdict is for less than $10,000. Upon plaintiff's acceptance, St. Jacob's was no longer a party to the case.

Responsive Emergency Medicine and Dr. Ange made an offer of judgment for $10,000, which was refused by the plaintiffs. In addition, Responsive Emergency Medicine and Dr. Ange agreed to settle case for a nominal amount that was well below the plaintiffs' cost. The plaintiffs refused the offer, and we continued our trial preparation.

Next month, I will recount the trial and the outcome, and I will comment on the state of medical malpractice in the United States. ■