

A special thanks to **Kentucky Trial Court Review** for allowing us to provide you with the following case synopsis that was reported in the September 2008 issue. Please be sure to visit Kentucky Trial Court Review's website or contact them at (877) 313-1944 to order your own subscription and start receiving The Most Current and Complete Summary of Kentucky Jury Verdicts.

**Medical Negligence - During a complex but otherwise routine brain surgery, the plaintiff suffered a respiratory problem that proved fatal - his estate alleged error by his neurosurgeon and other anesthesia defendants for having bungled the response to the crisis.**

*Carroll v. Hornung et al, 04-2212*

Plaintiff: Hans G. Poppe, *Poppe Law Firm*, Louisville

Defense: Ronald Sheffer, *Sheffer Law Firm*, Louisville for Barry, Wheelless and MCA

James P. Grohmann and Katherine Vesely, *O'Bryan Brown & Toner*, Louisville for Morassutti

Sean Ragland, *Phillips Parker Orberson & Moore*, Louisville for Lowe

Richard P. Schiller and Kimberly S. Naber, *Schiller Osbourn Barnes & Maloney*, Louisville for Hornung

Verdict: \$5,096,632 for plaintiff assessed 60% to Barry, 20% to Morassutti and 10% each to Lowe and MCA; Defense verdict for Hornung and Wheelless.

Circuit: **Jefferson**, J. McDonald-Burkman, 8-29-08

Norman Carroll, age 75 and a carpenter, was suffering from Parkinson's Disease. [He is the brother of former Kentucky Governor Julian Carroll.] A procedure known as deep brain stimulation has proven to frequently relieve symptoms. While it is a complex procedure, almost always it is safe.

Carroll's neurosurgeon, Dr. Dante Morassutti, has performed hundreds of these procedures without incident. Deep brain stimulation is accomplished by drilling directly into the brain and installing an electrical pacemaker of sorts that stimulates affected areas of the brain and relieves or eliminates Parkinson's symptoms. But because of the sensitive nature of the brain, before the drilling begins, the patient's head is literally bolted to a frame so that the head remains perfectly still. Except for local anesthesia, the patient is awake and fully conscious during the procedure. However because of the abovementioned head-is-bolted-to-a-frame business, the patient is also immobilized.

This deep brain stimulation started at 11:15 or so in the morning on 1-28-03 at Jewish Hospital. While Morassutti handled the drilling, he was assisted by an anesthesiologist, Dr. Keith Hornung, who was supervising a CRNA, Carolyn Lowe. Hornung left at 1:30 in the afternoon and Dr. Atul Barry, Anesthesia, took over for him. Later at 2:45 in the afternoon, a second CRNA, Carson Wheelless, came to relieve Lowe.

The final party in this action was Medical Center Anesthesia (MCA). It holds an exclusive contract to provide and assign anesthesia services at Jewish Hospital. Barry and Wheelless were employees of MCA - Hornung and Lowe were just temporary contract employees of MCA.

Three hours into the surgery at 2:15 in the afternoon (Hornung was long gone), Carroll began to complain of shortness of breath. He also had chest pain, increased blood pressure and decreased oxygen saturations. Lowe informed Morassutti. He instructed her to give medications to lower the blood pressure and to call for the now-supervising Barry.

The first of several fact disputes began at this juncture. Lowe claimed that she did call Barry and he

arrived at 2:30. A discussion ensued on whether to continue the surgery. A decision was made to go on and Barry administered Fentanyl to Carroll. [This drug has an effect of continuing to depress respiration.]

Barry for his part denied that he came at 2:30 and thus as he wasn't there, he didn't order Fentanyl. However Lowe charted that he had come and a circulating nurse and other witnesses placed Barry as present. Barry continued to insist he had not arrived until 2:50.

Whether he was there or not, Carroll did not improve. At 2:45, Wheelless came to relieve Lowe. He described that it was immediately obvious to him that Carroll was in bad shape and needed to be intubated. Morassutti replied that he needed 45 more minutes according to Wheelless – Morassutti adamantly denied this.

Wheelless then put out two calls for anesthesia, the second being STAT. Barry arrived at 2:50. [Lowe too was still present.] By the arrival at 2:50, Wheelless explained that in his judgment, Carroll had gone from bad to horrible. It was clear to all now that Carroll needed an immediate intubation.

However that was made difficult as the head frame could not be removed. This took several minutes (some suggested as many as ten) to accomplish and the head frame was only partially removed. Wheelless then jumped on top of Carroll and achieved an apparently successful intubation. He called to Lowe who was manning a CO<sub>2</sub> machine – she said there was no reading. Morassutti then completed an emergency tracheotomy and again the report from Lowe was that there was no CO<sub>2</sub>. [In the process of this tracheotomy, Morassutti struck the jugular vein and blood was everywhere.] At this juncture, Wheelless took a closer look at the CO<sub>2</sub> machine – it wasn't turned on. During this entire process, Carroll was fully conscious.

Finally a code was called and other medical professionals came to the room and performed a proper tracheotomy. However for some indeterminate period, Carroll was oxygen-deprived. He went into a coma and stayed in that condition for six days before he died. Carroll was survived by his wife, Retha.

The irony of the case was the ultimate cause of the respiration depression. Carroll had developed a complication during the surgery, a venous air embolism. It was simply not detected. Had it been noted, the embolism could possibly have been relieved by simply tilting the surgical table. No one thought to do this at the time and the intubation circus ensued.

From these facts, Carroll's estate sued the medical defendants as already introduced. In order from appearance, Hornung was blamed for not having a plan in place to respond to a respiratory emergency, especially as Carroll's head was in the frame. He was also blamed for missing signs of the CO<sub>2</sub> that would have revealed the venous embolism.

As to Lowe, the estate blamed her for (1) not monitoring the CO<sub>2</sub>, (2) not understanding how the head frame worked, (3) not calling Barry at 2:15 (if Barry is to be believed), and (4) failing to turn on the monitor during the intubation.

Then to Morassutti, the estate was critical of him for not conversing about anesthesia issues before the surgery. Then it took too long when the emergency began to get the head frame off, there being a suggestion that at one point, Morassutti was manipulating the screws the wrong way. Finally he was also blamed for not stopping immediately as asked by Wheelless at 2:45.

Barry too was blamed for not stopping the surgery when he arrived at 2:15 or alternatively, if there was a call and he didn't come (Barry said he didn't), it was a deviation to not come to the room. Then as the intubation was begun, he didn't see that the CO<sub>2</sub> monitor was turned on.

Wheelless was implicated for not turning on the monitor and as well, if Morassutti was believed, he had not secured an airway quickly enough. Finally as to MCA, it was involved in two ways, (1)

vicariously as the employer of Wheelless and Barry, and then independently, (2) for assigning an inexperienced team (with head frames) to a deep brain stimulation procedure.

Experts for the estate were Dr. Elizabeth Frost, Anesthesia, New York, NY, Dr. Ronald Alterman, Neurosurgery, New York, NY, Michael Kremer, CRNA, Chicago, IL and Dr. George Nichols, Pathology, Louisville. If the estate prevailed, it sought Carroll's medicals of \$96,632, plus \$5,000,000 for his conscious suffering. His wife sought \$3.5 million more for her consortium interest in the intervening six days until he passed.

In the same order as the criticisms were presented, Hornung defended that he was gone by 1:30 and thus thereafter, any error that occurred rested with Barry. He also replied to the planning criticism that Lowe was competent and he had a right to rely upon her. His expert was Dr. Richard Dutton, Anesthesia, Maryland.

Lowe defended that she made the call of anesthesia at 2:15 and thereafter, Carroll's care was supervised by both Barry and Morassutti. The doctors were fully alerted, Lowe explaining in a sense, that she was too far down the food chain to question their judgment or control Carroll's care. She did not have an expert. Lowe died before the case came to trial, but her testimony was preserved when this case was first mistried in May of 2007.

Morassutti too defended that he acted appropriately. He did not have an expert. Barry for his part also denied any error and blamed Lowe for not turning on the monitor. His expert was Dr. Keith Ruskin, Anesthesia, Yale. Finally Wheelless painted himself as the hero, the situation being bad when he arrived, he taking efforts in an attempt to save Carroll. In this case and as developed in this report, there were numerous fact disputes regarding the conduct of the defendants.

Tried for two weeks, the verdict was mixed on fault. It found fault with Morassutti, Barry, MCA and Lowe. Hornung and Wheelless were exonerated. In apportioning fault, it was assigned 60% to Barry, 20% to Morassutti and 10% each to both Lowe and MCA.

Then to damages, the estate took the medicals as claimed, plus \$3.5 million for Carroll's suffering. His wife took \$1.5 million more for her consortium interest. The verdict totaled \$5,096,632 and was assessed consistently in the court's judgment.

During the course of this trial, the individual jurors asked numerous factbased questions. However none were asked during deliberations. There was also interesting voir dire practice. So many jurors were struck for cause (several explaining they would hold the plaintiff to a higher standard than a preponderance of the evidence), that to impanel twelve and an alternate, the plaintiff had to agree to withdraw a peremptory challenge. The estate did so and jury selection was completed.

**Ed. Note** - A week after the trial, the Courier-Journal ran a story on this case and cited me (Shannon Ragland) as an expert. The jury foreman immediately sent me an e-mail to explain the verdict and the jury process.

Regarding the consortium award to the wife (the largest in Kentucky since the KTCR has tracked these awards since 1997), he focused that it was the deception of the doctors in telling her what had happened that motivated the jurors. He repeatedly focused on deception and derivatives, i.e., deceived, lied to and callousness. In reaching \$1.5 million as a number, he explained there was a bidding process of sorts and a compromise was reached.

The jury was initially split 6-6 on Hornung. But fearing a mistrial, the 6 jurors against Hornung switched to make it 12-0 for the doctor as a compromise. It was their belief that the end result (especially as Hornung was least culpable), was equitable. As the jury deliberated (this was a civil trial), they rued that the instructions did not permit them to consider incarceration of the doctor defendants. There was a particular perception not just that the doctors were arrogant, but that they

had flat out lied. As the juror explained, after the bad result in the operating room, “the lights came on and the cockroaches starting running.”