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DPT Victim's Presence At Hearing Assists Vaccine Injury Case

By J. Stratton Shartel

For the victims of the DPT vaccine and their families, help may be more closely within their reach than they realize. "Many victims may not even be aware that an alternative to extended litigation exists," commented Kenneth Moll of Chicago's McDowell & Colantoni. The opportunity to which he was referring is filing a claim under the National Vaccine Injury Compensation Program, which was set up in 1988 to implement Congress' intent to create a federal no-fault program through which persons injured by certain types of vaccines may receive compensation "quickly" and with "generosity."

On April 12 of this year, Special Master Brian J. Bernstein awarded Colleen Nuzzo \$4.5 million in what may be the largest award under the program since its inception. The money will be used to pay for rehabilitation and care for Colleen's two-year-old son, Andrew, who was rendered developmentally disabled after he received two routine DPT immunizations in 1986. (*Nuzzo v. Secretary of the Department of Health and Human Services*, No. 88-74-V, United States Claims Court, April 12, 1990.)

Andrew received his first DPT immunization when he was two months old. The next day, he screamed constantly except when he slept. His parents observed that he was drawing or "jerking" his knees up to his waist and he was glassy-eyed. Despite these symptoms, he was given a second injection when he was four months old. Thereafter, he became listless and suffered a variety of seizures. The two immunizations left Andrew with brain damage, residual seizure disorder, and shock.

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MONDAY MORNING QUARTERBACK

DPT Vaccine Verdict

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The Compensation Program

The Nuzzos were referred to Moll, who had successfully represented couples in two other cases for claims under the National Vaccine Injury Compensation Program. The need for the program grew out of a series of events beginning in 1984. In that year, at least one DTP vaccine manufacturer withdrew temporarily from the market because of its inability to obtain liability insurance. This occurrence, plus the increasing numbers of lawsuits filed on behalf of children injured by the vaccine against manufacturers, led other manufacturers to threaten to go out of business. Because of the relatively small number of vaccine manufacturers, Congress was urged to act to prevent vaccine shortages and increased disease among children. Moll explained that Congress set up the program to provide compensation to the victims of vaccine injuries. A trust fund was established through surcharges on eight vaccines, including the DPT type and those to prevent mumps, measles, rubella, and polio.

Section 42 U.S.C. 300aa-13(a) of the National Childhood Vaccine Injury Act states that a claimant shall be awarded compensation if he or she demonstrates by a preponderance of the evidence that the injured party (1) received a vaccine listed in the Vaccine Injury Table, Section 300aa-14 (see the "Lines of Attack" column in this issue), (2) suffered a listed injury within the specified time period following the administration of the vaccine, (3) suffered the residual effects of the injury for at least six months, and (4) incurred unreimbursable expenses of at least \$1,000 or died from receiving the vaccine and has not collected compensation for the injury or death from a civil suit.

Pursuant to the program, petitions for compensation are assigned to special masters who are required to issue findings within 240 days. They may require the submission of evidence, information and testimony, and conduct informal and nonadversarial hearings as needed. The special masters are not bound by the Rules of Evidence, but their decisions become final judgments unless either party appeals to the U.S. Claims Court.

Once the petitioner has demonstrated a prima facie case, the respondent can defeat eligibility only by showing that the injury or death complained of was due to factors unrelated to the administration of the vaccine.



Kenneth Moll believes that there may be victims of vaccine injuries who are not aware of the compensation program.

The Plaintiffs' Strategy

The Nuzzos filed for compensation, and the Department of Health and Human Services (HHS) answered the petition by denying the facts alleged, the Nuzzos' eligibility to recover, the presence of a supporting preponderance of evidence, and the

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court's jurisdiction. Curiously, Barbara Hudson, the government's attorney, withdrew her appearance. Moll explained that when claims under the act started to be filed, the government complained that defending them was too much work. "This was the first time the government was not represented throughout the entire proceeding," Moll remarked.

He noted that this resulted in the special masters playing an increasingly active role in the hearings, which sometimes included lengthy questioning of witnesses. (The proceeding was divided into two hearings: one in Pittsburgh for the Nuzzos' benefit and a second in Chicago.) John Euler, deputy director of the Civil Division with the Justice Department, stated that early in the program, the government did not have the resources to contest every petition for compensation. Since that time, however, government attorneys have been present throughout the proceedings.

The most important obstacle in proving the claim, according to Moll, was the requirement that the symptoms of Andrew's illness had to have been manifest within three days of receiving the vaccine. "Often, the symptoms of a serious reaction may not be immediately recognized by the child's parents," Moll noted. A sudden stiffening of the legs, for example, could be misread as a normal reaction to a cold baby wipe. Other physical signs such as excessive crying could be attributed to colic. Given the importance of contemporaneous observation, Moll decided to call Colleen Nuzzo and Gina Nuzzo, a relative who had babysat Andrew, as his first witnesses to testify as to their observations of Andrew shortly after each immunization.

The choice proved to be a wise one. In his written opinion, Special Master Bernstein noted the unquestioned integrity of Mrs. Nuzzo's testimony. Where he found conflicts between medical records made after the immunization and the Nuzzos' direct observations, he resolved them in the Nuzzos' favor. Moll's third witness was Dr. Mark Geier, an expert in genetics and application of the Vaccine Compensation Act, from Bethesda, Md. He opined that Andrew's screaming was evidence of encephalopathy and his jerking legs represented convulsions. He said that based on Colleen Nuzzo's testimony, he believed that, to a reasonable degree of medical certainty, Andrew's condition was caused by the shot.

First-Hand Observation

But perhaps the most significant factor in the case was Moll's decision to bring three-year-old Andrew to the first hearing to let the special master observe how his disabilities affected him. Moll noted that Andrew arrived strapped into his stroller and wearing glasses and a helmet for his own protection. Special Master Bernstein noted that

since the proceeding was for Andrew's benefit, he had a right to be present in the hearing room. During the proceeding, the child's helmet and glasses were removed and he was unstrapped. He screamed and suffered a seizure. Thereafter, as he was looking at the American flag in the room, he had a photosensitivity seizure, characterized by a long, blank stare. Midway through Moll's opening statement in the case, Andrew was excused from the proceeding.

The value of having the victim of the vaccine present in the courtroom was immeasurable, according to Moll. He believes that this was the first time it had ever been done. "The special master indicated that he had never seen anything like the illness before," Moll commented.

Since causation need not be proven, plaintiffs do not need to present the testimony of large numbers of experts.

At the second hearing, Moll presented several expert witnesses including Dr. Alan Spector, a specialist in the field of physical and mental handicaps, from Chicago, and Dr. Marcel Kinsbourne, a pediatric neurologist from Boston. Dr. Patricia Crumrine, Andrew's pediatrician, was questioned as an adverse witness. To prove damages, Moll called Dr. Arthur Dobbelaere, a well-known economist, who estimated the present value of the future cost of the care Andrew would need. Finally, Moll arranged for three witnesses to testify by telephone. They included Carol Morris, an occupational therapist, Kathleen Turnbull, a speech and language pathologist, and Michael Casey, an annuitist, who gave evidence of the premium values of annuities given different estimates of future inflation.

A Favorable Outcome

In view of the evidence presented, the special master found that Colleen Nuzzo had adequately shown a vaccine-related injury within three days of receipt of the vaccine as required under the Vaccine Injury Table. He concluded that she was therefore entitled to compensation under the act. Furthermore, he found that no evidence had been presented showing that the injuries were due to any alternative cause.

Moll cited the many advantages for the plaintiff of this type of evidentiary proceeding before a special master. "This type of proceeding does not ask whether DPT caused the disease," he noted. "There are at least two big advantages in this. First,

it amounts to a 'no fault' system for plaintiffs. Second, since causation need not be proven, plaintiffs do not need to present the testimony of large numbers of experts. Consequently, the hearings are substantially shorter than full-blown trials would be."

With regard to damages, Bernstein directed that the government pay (1) \$4.5 million for future care plus \$30,000 for lost income to the petitioner, or (2) \$30,000 for lost income and purchase an annuity to provide Andrew Nuzzo with structured payments. The amount of compensation is for future medical care, which was determined to be \$67,000 annually while Andrew is a child and \$102,000 annually when he becomes an adult. The special master's provision of a choice between lump sum payments or an annuity may have been the result of pressure by Moll to set a precedent in this type of hearing. "We argued strenuously with the Nuzzos' support that an annuity would provide more financial security for both Andrew and his parents and prevent the money from being spent too quickly. The optional form of award set a precedent in this type of case for the benefit of other claimants."

Euler says that the Justice Department has filed a motion for review in the case. Plaintiffs have 30 days to respond after which time a claims court judge will listen to the motion.

Moll and his client remain concerned about other potential litigants who are not aware that they might have claims or who brought their claims after the expiration of the statute of limitations and do not know about the revival provision in the statute. Any person who suffered injury or death from a listed vaccine administered before October 1, 1988 may seek compensation under the program instead of going to court. However, such petitions must be filed by October 1, 1990, and the number of awards for such injuries and deaths is capped at 3500. For those injuries or deaths related to a listed vaccine given after October 1, 1988, the victim must file a petition under the program before pursuing civil tort remedies.

Meanwhile, a new study conducted by Dr. Michael Pichichero, a Rochester, N.Y., pediatrician and infectious diseases specialist, has found that a Japanese pertussis acellular vaccine may be safer than the whole-cell vaccine in the United States and five to 10 times more effective at preventing whooping cough. The acellular vaccine, unlike the whole-cell type, does not contain endotoxins that can cause the serious reactions. Dr. Pichichero will report his findings to the Sixth Annual Pertussis Symposium in Washington, D.C., in September. Moll stated that the federal Food and Drug Administration may license the Japanese vaccine this year, but only for use in "booster" shots at selected ages.

Use of Flight Recording, Visual Exhibits Instrumental In Wrongful Death Award

A dramatic cockpit flight recording and corresponding visual exhibits enabled plaintiffs to overcome the difficult burden of proving that three officers of an airline company had been grossly negligent for failing to inform a co-pilot of the presence of a device in the cockpit that jammed the aircraft's controls causing it to crash.

On April 18, 1990, a jury awarded \$10.1 million, believed to be the highest aviation wrongful death award ever, to the widow of the co-pilot killed in the crash. The award included \$7.3 million in compensatory damages and \$2.8 in punitive damages. (*DeCenzo v. Langton*, No. 87-43321 CA 18, Dade County Circuit Court.)

An Unsuspected Problem

Co-pilot Phillip DeCenzo, 30, along with a captain and first officer, all employees of Southern Air Transport, took off in a Lockheed L-382G Hercules airplane carrying military supplies from Kelly Air Force Base in San Antonio to a base in Georgia. Once airborne, the crew immediately recognized that the plane was climbing too quickly. The pilots frantically ran a check to determine the problem. A nonapproved six-inch-by-nine-inch aluminum elevator control block, used during loading to hold up the aircraft's tail flaps, had fallen from its place half way up the control-yoke stem into the base of the stem. As a result, it had jammed the controls. By the time the crew freed the block from the controls, it was too late to regain control of the aircraft. It crashed, killing all three men.

The DeCenzo family contacted the law firm of Howard Dillman P.C. in Miami. Howard Dillman, Marc Sarnoff, and Neil Bayer of the firm turned to Roger Blackburn of Miami's Leesfield and Blackburn P.A. to assemble a litigation team. Although Southern Air Transport was immune from suit under workers' compensation laws, plaintiffs sued William Langton, the president of the corporation, the senior vice president, and the vice president, alleging gross negligence in that defendants knew or should have known of the presence of the control device in the plane and should have trained DeCenzo in its use.

To establish defendants' duties, plaintiffs pointed to 14 C.F.R. §121.59, which requires qualified management personnel to provide the highest degree of safety in the airline's operations. Section 121.315 outlines cockpit check procedures and requires checking ". . . any safety item" on the aircraft before takeoff. Plaintiffs introduced evidence that the removal and stowage of the elevator

control block did not appear on the checklist as it should have. Additionally, plaintiffs used the airline's own general operations manual, which outlined the individual duties of the officers regarding training and procedures and specifically required the president of the airline to coordinate safety procedures. To enhance the meaningfulness of the language in the regulations and operations manual, plaintiffs' counsel arranged to have them blown up and mounted as exhibits for the jury.



Roger Blackburn states that plaintiffs were able to stimulate the jurors' sense of sight and sound.

The defense contended that defendants were too important or busy to be concerned with the presence of an unapproved device in the airline's system or the details of training and procedures. Additionally, defendants alleged that the decedents had been negligent for not discovering the source of the problem sooner.

Of particular significance were portions of an investigation report published by the National Transportation Safety Board (NTSB), which speculated on the role the elevator control block had played in the crash. Despite defendants' vigorous objections, certain portions of the report were admitted into evidence relating to how the control block was found and the evidence of its role in the crash. The court ruled, however, that conclusions in the report were not admissible.

Putting the Jury in the Cockpit

In order to give the jury a better picture of what the crew members were faced with in the cockpit, Blackburn turned to Leonard DeSilvestro of American Legal Graphics. DeSilvestro constructed a life-size mockup of the instrument console and controls in the cockpit for use by witnesses in court. The

model was raised to the appropriate height and movable controls made of wood and rubber were installed. Chairs from the courtroom were used for the crew members seats, and plaintiffs also positioned silhouette cutouts of the crew in their places during the flight. Using this exhibit, plaintiffs demonstrated how the control block bar had fallen to the cockpit floor and became jammed between the control yoke and a floor piece.

DeSilvestro also built a three-dimensional model of the runway and path of the plane so that the jurors could look down on a view of the runway during testimony. A piece of red metal wire traced the plane's flight path and velcro tabs containing comments made by the crew in the seconds before the crash were posted at the corresponding points when they were made. The console and flight-path exhibits were used in conjunction with the testimony of some of the 34 witnesses called by the plaintiffs in a four-week trial.

Perhaps the evidence that had the most impact on the jurors was the cockpit voice recording, which, when matched with the visual exhibits, provided a near total picture of the last seconds of the flight. Blackburn noted that crew members voices could be heard growing increasingly tense as they searched for the source of the problem. Close to the end of the recording, a crew member exclaimed "We're dead." Blackburn believes that the speed with which the crew discovered the problem in the cockpit convinced the jury that the crew had not been negligent as the defendants had claimed.

Plaintiffs retained various noteworthy experts for the trial. First, Blackburn questioned Robert Ruddich from Alexandria, Va., who testified on the interpretation of the crew members' voices from the flight recorder. Additionally, John McWhorter, an expert on accident reconstruction from Miami, helped re-create the scene in the cockpit. Finally, economist Thomas Natiello, also from Miami, assisted in proving damages.

Seeking to prove that DeCenzo had been aware of the control block device in the plane contrary to plaintiffs' assertions, defendants brought in four employees of Southern Air who testified that during a ground-training course that DeCenzo and they had attended, mention had been made of the control block.

Defense Errors

Blackburn noted that defendants may have fumbled somewhat during the trial in at least two ways. First, they assumed that plaintiff's demonstrative exhibit of the cockpit would be available for their use during examination of their experts. However, when plaintiffs' finished their case, they took the exhibit with them. Blackburn recalls a