

# VALLEY LAWYER

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A Publication of the San Fernando Valley Bar Association

## Hidden Secret Among Lawyers Stress, Anxiety and Addictions

Earn MCLE Credit

Q&A with Judge  
Jay C. Gandhi

Alternative  
Careers for JDs

Sherman Oaks Lawyer  
Wins \$15 Million  
Verdict in Boston

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# Sherman Oaks Lawyer Wins \$15 Million Verdict in Boston for Medical Malpractice



By James E. Fox

**T**HE CONVENTIONAL WISDOM IS THAT LAWYERS should not represent relatives nor take out-of-town cases. SFVBA member James E. Fox violated both rules.

When he first received the call for help from his cousin, Brian, in 2004, his first reaction was “No way.” Fox had heard of “pro hac vice” but never thought it could ever apply to him.

Four years later, after 45 depositions and 150,000 frequent flier miles, a Boston jury found two prominent Harvard physicians guilty of malpractice and awarded \$15,000,000 in damages for the death of 3-year-old Jason Fox.

The case had been rejected by four prominent Boston plaintiff firms and the statute of limitations was about to expire. The plaintiff had no place to turn. Of course, the Sherman Oaks cousin who specializes in malpractice trials wanted to help. Brian was “family.” Brian lived in Philadelphia and the claimed malpractice occurred in Boston and involved troubling questions about negligence, causation and damages. There were many reasons to avoid this case, but a malpractice case against Harvard physicians with international reputations (textbook authors with heavy CVs) had a magnetic appeal.

Jason had been born with a very serious heart defect – several holes in the heart and an absent pulmonary artery. His long-term survival was in doubt. Because of his condition, Jason had complex cardiac surgery in Philadelphia, but his doctors in Philadelphia were concerned that even though Jason survived this initial surgery, along with multiple catheterizations, he needed more skilled care. They referred Jason and the family to Dr. James Lock, a renowned pediatric heart specialist in Boston.

Dr. Lock was a Harvard professor and Physician-in-Chief at the famed Boston Children’s Hospital. He told Jason’s parents that he could help Jason and do what the doctors in Philadelphia were unable to do. The parents had been encouraged and eager to travel to the renowned Harvard Hospital. The parents agreed to the recommendation of Dr. Lock, who performed the complex cardiac procedure involving catheterization of Jason’s tiny arteries. Unknown

to Jason’s parents, Dr. Lock conducted a risky aggressive procedure using multiple injections of contrast dye. So much dye was injected into Jason’s heart and lungs that it leaked into his brain, causing seizures.

Although Jason survived the dye overdose, he suffered another trauma when he was given a powerful sedative, Propofol, by Harvard Professor James DiNardo, an anesthesiologist, during an MRI. Jason stopped breathing inside the MRI tunnel, and although he was resuscitated, he never again either spoke or crawled even though he survived for another year before his death at age 3.

Drs. Lock and DiNardo both denied any improper medical conduct, and claimed that Jason’s pre-existing cardiac defects justified the procedures they performed. They claimed that without them Jason would not have survived childhood.

It was understandable why many Boston lawyers had rejected the case. The trial would be on the defendants’ “home turf.” The defendants had top flight Boston medical malpractice defense firm, Sloane & Walsh, and trial counsel William Dailey, Jr. (who had never lost a malpractice case).

In the beginning, the Sherman Oaks’ lawyer did not foresee taking 45 depositions at cities throughout the United States, nor the years of bitter law and motion activity. Half the battle was obtaining qualified experts who were willing to travel to Boston and take on the Harvard establishment. It was a six week jury trial. (More than 30 large cartons of documents had to be shipped to Boston for the trial). The road to that verdict was long, tough and very expensive. Here are a few of the highlights:

Two years into discovery, plaintiffs uncovered the existence of an electronic medical record that proved that the original printed record had been materially altered. This was a huge development impacting on the credibility of the defense. Defendants’ lack of credibility, despite their Harvard pedigrees, became the central theme of the plaintiffs’ case.

Dr. Lock claimed it was essential to administer to Jason a large dose of contrast media (double the amount

recommended by the manufacturer). He said this dose was needed to better visualize the arteries during heart catheterization. But plaintiffs proved that Dr. Lock was engaged in product research and development of a device he intended to implant in Jason and eventually received huge royalties for this device. At trial, plaintiffs argued that Dr. Lock was using Jason as a “guinea pig” (the jury apparently agreed). A plaintiffs’ expert from a Midwest hospital courageously testified that defendant Lock used dangerously excessive amounts of contrast dye.

Jason’s post-catheterization MRI and Dr. DiNardo’s use of Propofol during the procedure proved to be a major element of the case. At issue was this question: Did Dr. DiNardo shut off the Propofol infusion pump during the code resuscitation? Plaintiffs claimed that he neglected to do so and that the resulting lack of oxygen from prolonged Propofol-induced bradycardia caused Jason permanent brain damage. And even though Jason did live for approximately one year after this event, plaintiffs claimed he was never the same as he was before the Propofol-induced arrest. From that time until his death, Jason remained non-responsive, nonverbal and with little physical movement.

It was argued to the jury that the Propofol disaster was the real and final cause of his death. Plaintiffs presented convincing evidence of record alterations that had been obtained during the four years of pre-trial discovery. In Houston, Texas, despite stiff defense opposition, plaintiffs located and deposed of the anesthesia “fellow” who actually wrote the anesthesia record concerning the Propofol infusion. She admitted that she was not in the operating room during the procedure and did not witness the administration of anesthesia. Plaintiffs argued the anesthesia record was concocted and falsified and the jury agreed. This concocted anesthesia record cast serious doubt on the competence of Dr. DiNardo, and credibility of the entire defense case.

At trial the seven defendant doctors were all represented by the same lawyer – a unified defense. The plaintiffs exploited the unified defense and charged that the defendants’ stories were coordinated and lacked credibility. The jury agreed. The defense was so neatly coordinated that it backfired. The jury simply did not believe the defendant’s testimony. Those 45 depositions around the country paid off, as plaintiffs were able to develop inconsistent stories over four years of discovery. At trial, several of the defendants “flip-flopped” on their deposition testimony so they would be consistent with each other.

Once in a while, Valley practitioners should step out of their comfort zone. Take an out-of-state case! It’s different! It’s challenging! It is one of the benefits to being a solo or small firm lawyer – Yes, you can! 🏹

**James E. Fox** practice areas include medical malpractice, legal malpractice, products liability, personal injury and wrongful death. Since 1957, the law firm of Fox and Fox has been providing legal representation to victims of catastrophic injuries. Fox can be reached at (818) 986-4494 or foxandfox@sbcglobal.net.



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**Judicate West congratulates Hon. Judith C. Chirlin for her 24 years of distinguished service on the Los Angeles Superior Court. We are privileged to welcome her to our distinguished Panel of Neutrals**



Judge Chirlin has handled Law & Motion, Civil Trials, and MSC’s while on the bench. As a litigator for over 10 years, she practiced business and employment litigation. Throughout the years she has frequently traveled to several countries for special programs designed to educate students, lawyers, judges, and governmental agencies.

Judge Chirlin has been the recipient of numerous awards by various bar groups including “Trial Judge of the Year” by the Los Angeles County Bar Association. Attorneys who have appeared before her praise her courteous and respectful judicial demeanor, intelligence, and fairness.

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