# IRSA Update

Januarv 30. 2003

## ACOUSTIC NEUROMA COURT CASE

***Note: IRSA has made every effort to ensure the accuracy of the contents herein. The information is printed here as provided by the court without edit. Additional comments are provided by the Attorney of record.***

**THE FOLLOWING WAS PREPARED BY THE COURT**

Subject: #89204 v1 - Luis/Ebin verdict facts

M. LOUIS and R. EBIN (Husband) v.
CHARLES KIMMELMAN, M.D. 119956/97 14-day trial

Verdict on November 8, 2002 New York Supreme Court

Judge: Donna M. Mills
Verdict: $2,000,000 for M. Louis (6/0).
Breakdown: $1,250,000 for past pain and suffering; $750,000 for future pain and suffering.
$200,000 for R. Ebin, all for loss of services (6/0).
Jury: one male, five female.
Plaintiffs' Attorneys: April L. Strang-Kutay of Goldberg, Katzman, and Shipman, P.C. Harrisburg, Pennsylvania, James E. Colleran of the Law Offices of James E. Colleran, Philadelphia, Pennsylvania
Defendant's Attorney: Lewis Rosenberg of Shapiro, Beilly, Rosenberg, Aronowitz, Levy and Fox, L.L.P., Manhattan

FACTS:

On 12/28/94, Plaintiff, a 44-year old attorney, presented to defendant doctor at his Manhattan Office complaining of hearing loss, constant ringing, and occasional pain in her right ear. Defendants conducted tests and confirmed that she had suffered a hearing loss in her right ear. Plaintiff returned to Defendant's office on 4/8/97, and was informed, after tests, that her hearing loss had worsened. Defendant also ordered an MRI which was performed on 5/22/97. The MRI revealed an acoustic neuroma. Due to the configuration of the tumor, as well as the association of pronounced, very painful trigeminal symptoms, it was impractical to remove the tumor non-invasively, such that micro-surgical excision was undertaken, causing permanent hearing loss in Plaintiff's right ear, as well as new onset balance/vertigo disturbance, exacerbation of pre-existing tinnitus, as well as the complication known as the "sub-occipital headache syndrome."

Plaintiff claimed that had Defendant diagnosed the acoustic neuroma in 1994, when she first presented to him with symptoms characteristic of this tumor, the lesion could have been treated without causing hearing loss, and the further complications associated with invasive brain surgery could have been avoided. She claimed that if the acoustic neuroma had been diagnosed

in 1994, it could have been removed via Gamma Knife, a non-surgical, non-invasive, procedure that would not have caused her the complained of injuries.

Defendant denied Plaintiff's allegation and claimed that her injuries were the result of her choosing not to seek treatment. Defendant contended that he recommended that Plaintiff get an MRI in 1994 and she refused. Plaintiff denied this contention.

Plaintiff complained that she suffered a permanent hearing loss in her right ear, continuous roaring in her head, headaches, imbalance in walking and vertigo, as well as general pain and suffering. Defendant conceded that Plaintiff suffered a hearing loss, but contended that there was no medical proof that the acoustic neuroma had caused her other injuries.

Demonstrative Evidence: Anatomical chart showing the inner ear; anatomical model of the inner ear; MRI; audiograms and enlarged audiograms; Defendant's office records; hospital charts.

Jury Deliberation: Seven hours over two days.

Carrier: MLM

Commentary: It is clear from the award in this case that the jury became convinced throughout the presentation of expert testimony that had the Plaintiff been able to choose Gamma Knife treatment to address her tumor, the outcome of her treatment would have been far superior to that which she sustained undergoing conventional micro-surgery. The jurors appeared to appreciate the quality of life issues presented, and seem to have been empathetic to the difficulties encountered in being rendered a unilateral listener, as well as to suffer the refractory medical problem of severe tinnitus, accompanied by post-operative headache, which symptoms require life-long dependence on medications to control.

## A WORD FROM THE PLAINTIFFS' ATTORNEY

When a court case spans three weeks of trial testimony, it is very difficult for a brief summary to accurately sum up the flavor of the facts conveyed, and the arguments advanced. Given the radiosurgical communities' interest in this case, I believe it is important for there to be an understanding of the information that was conveyed to the jurors, which allowed them to formulate their own opinions, and, ultimately, to render a verdict in the case.

Essential to note, I believe, is the manner in which gamma knife radiosurgery was portrayed by the expert knowledgeable in this field. In the particular circumstance evaluated, the expert testified that because the patient's tumor, at the time of diagnosis in 1997, was then causing disabling trigeminal symptoms, the patient warranted surgical decompression of the tumor, and was best suited to undergo microsurgery.

Further testimony was advanced that had this tumor been diagnosed and addressed in 1994, and had the patient opted to be treated at an experienced center, like Pittsburgh, she would have had a better opportunity to preserve her hearing, and may have minimized the amount of tinnitus from which she now suffers. The expert also indicated that the vertigo issues, in conjunction with the immediate affects of therapy, could also have been lessened. The expert, in response to cross-

examination questions, testified that the long-term results of radiosurgery are, as yet, unknown, and that the patient must understand these risks before embarking on treatment. The expert testified that the tumor remains in place, and may or may not decrease in size, with the goal of radiosurgery being tumor control, and not tumor removal. The expert spoke, very realistically, about avoiding invasive surgery by submission to radiosurgery, and avoidance of the potential complications which can go along with microsurgery like reactions to general anesthesia, bleeding, and infection. Radiosurgery was very accurately described, with the use of demonstrative exhibits, and with precise scientific explanation. The jury fully understood that this therapy does not remove the tumor, but is designed to control tumor growth, with the objective being to halt growth of the tumor and corresponding progression of symptoms.

At trial, the patient testified most convincingly, and never suggested that she had not been told of all of the potential consequences of microsurgical removal of her tumor. On the contrary, she explained to the jury that she had understood all of these risks, and consented to them. The surgical team which addressed this patient's tumor was excellent, and achieved a very desirable result, in view of the size of the tumor. The surgeons were never defendants in the suit, and were not criticized in any way. The trial was based on a delay in diagnosis by the ENT physician of record.

With a realistic explanation of the pros and cons of both radiosurgery, and micro-surgery, the jurors were well educated to ponder these treatment modalities and to understand that both modalities are valid methods to address acoustic tumors, and, that, often times in modern medicine, it is the patient's ultimate choice to determine the mode of treatment from a menu of acceptable alternatives. With regard to the liability issues presented at trial, the Plaintiff was able to successfully prove that the ENT physician in question had misinterpreted her 1994 audiogram study, such that he confused the ears, due to a lack of understanding with regard to contralateral reflex testing. Although the patient had presented to his office, complaining of unilateral right-sided hearing loss, unilateral right-sided tinnitus, and unilateral right-sided aural fullness, all of which was well documented by the physician, the physician's conclusion, after reviewing the audiogram, was that the patient had normal hearing in the right ear, but a minor decrease in hearing, related to the higher frequencies, attributable to the left ear only. Audiological testimony from a well-qualified expert in this field was convincing that the ENT surgeon had, unfortunately, not understood the significance of this audiogram portrait, and, so, did not appreciate the immediate need to order an imaging study.

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