

Jury Finds Doctors Did Not Commit Malpractice But New York's Highest Appeals Court Orders New Trial Because Trial Judge Did Not Poll the Jury

Posted on April 5, 2009 by [John Hochfelder](#)

Nine years after the fact and 2 1/2 years after the jury verdict, all of the parties in a medical malpractice case have been ordered back to court for a **retrial** because of the trial judge's error in refusing to ask the jurors individually whether in fact their unanimous, individually signed written jury verdict exonerating the defendant doctors of any fault was in fact their verdict.

This case has drawn the attention of the press (for example, [here](#)) and bloggers such as New York medical malpractice lawyer [Eric Turkewitz](#).

In a decision last week by New York's highest court, the Court of Appeals held in [Duffy v. Vogel](#) that **parties in a civil lawsuit have an absolute right to have the judge poll the jury** (i.e., ask each juror, after the foreman reads aloud their verdict, whether he consents to the verdict) and that whenever that requirement is not met a new trial must be held - no matter how harmless it may appear to have been. The high court overturned an intermediate appellate court's 3-2 decision reinstating the jury verdict.

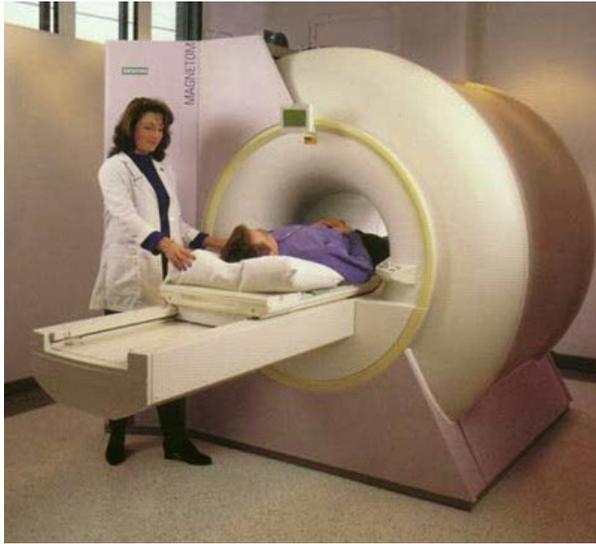
This decision breaks new ground in New York. There is an existing statute in the Criminal Procedure Law (Section 310.80) that requires polling in criminal cases; however, the requirement to poll juries in civil cases has no statutory basis and courts have applied the rule over the years but did not mandate a new trial for failing to poll a jury when the failure was found to be harmless error. The Court of Appeals has now effectively usurped the legislature and written new law. That argument was persuasively made by [Daniel S. Ratner](#), the highly esteemed appellate counsel for Dr. Jacobs, but to no avail.

Who will be the new jurors and will they make the same findings?

Eleanor Duffy is a 52 year old woman with permanent fecal incontinence and permanent nerve damage in her vagina which she believes were caused by the malpractice of two physicians - her internist James Vogel, M.D. and her gynecologic oncologist Allan Jacobs, M.D. She sued them both in 2002 claiming that her injuries stemmed from their failures two years earlier when they treated her for complaints of pain in her pelvic area. She said that the doctors should have diagnosed a subsequently discovered tumor in her pelvis that would have been apparent had they ordered imaging studies such as an MRI, performed a biopsy and more thoroughly examined her.



An MRI study may have avoided the litany of litigation and, more importantly, Ms. Duffy's tragic injuries



After four years of litigation and a three week trial, on November 17, 2006, a jury in Manhattan answered "no" to each of many questions put to them regarding whether Drs. Vogel and Jacobs committed malpractice. **Drs. Vogel and Jacobs were thus exonerated.**

That should have been the end of it. Case closed. But in its 11 page verdict sheet (on which the trial judge told the jury to insert yes/no type answers to 21 listed questions), **the jury stated that two other doctors (Arie Liebskind, M.D. and Martin Feuer, M.D.), who had also treated Ms. Vogel over the years, committed malpractice** that caused Ms. Duffy's injuries and the jury then calculated plaintiff's pain and suffering **damages as \$1,500,000.**

The **problem** is that neither Dr. Liebskind (a radiologist from 1996) nor Dr. Feuer (an internist) were sued by Ms. Vogel and they were not defendants in this lawsuit. And, the jury was specifically told by the judge in advance to disregard the damages question should they (as they ultimately did) find that the defendants (Drs. Vogel and Jacobs) had not committed malpractice.

- **The jury did find that there was malpractice: but only by non-parties Drs. Liebskind and Feuer**

Insider's Information:

- The fault of the non-party doctors was discussed at trial because it would be relevant if, but only if, there was fault on the part of the defendant doctors (the percentage of responsibility for payment of damages by defendants found liable is adjusted downward when there are non-party persons who are found to be at fault as well)
- Dr. Liebskind was not sued because the 2 1/2 years **statute of limitations had run** as against him

- It's not clear why Dr. Feuer was never sued - given the jury's finding that he committed malpractice in April 2000 by failing to order imaging tests such as an MRI. Perhaps he should have been sued and **perhaps plaintiff's attorney was negligent** in not adding him to the lawsuit - irony indeed.
- The jury's confusion became apparent when during deliberations they sent out a note to the judge asking: "If we find named non-parties liable for her damages, are they responsible for any, if any of the compensation?"
- Instead of answering directly, the judge then told the jury: "The percentage that is attributed to whoever you do attribute to ... then becomes a factor that is used as to that person's responsibility towards the total amount of whatever the damages are."
- **The judge was Donna M. Mills** who was a year earlier censured by the New York State Commission on Judicial Conduct for acting inappropriately following her arrest for DWI (for which she was acquitted) and for conduct that undermined public confidence in the judiciary.
- **The judge could easily have avoided all of the post-verdict appeals and the upcoming retrial** had she simply polled the jury as plaintiff's attorney had requested. All she had to do was ask each juror: "Was the verdict just announced by the foreman in all respects your verdict?" No doubt, each juror would have said "yes" since each had already signed the verdict sheet.

Clearly, **plaintiff and her attorney are elated** with the current appeals court decision. They believe that the jury intended to award her money damages and they will now get a second chance to try to convince a jury that Drs. Vogel and Jacobs committed malpractice (though there's still no way to sue Dr. Liebskind because the statute of limitations ran against him and now the same is true as to Dr. Feuer).

The **defendants and their attorneys are upset and rightfully so**. They prevailed in a 16 day trial with 11 expert witnesses and it was clear that the jury exonerated them completely. Now, they must prepare again for trial, this time with a new jury (and we know how different jurors can come to stunningly different verdicts even though the facts and the parties are the same).

As the **dissenting judge** in the Court of Appeals said: **requiring a new trial is a "gross injustice"** and a "nightmarish result." Defense counsel went further, calling the order for a new trial so that jurors can be polled "a travesty of justice."

We will follow this case and report on developments.

- **Prediction:** The case will not settle and will be retried. The **defendants will prevail. Again.**