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## Malpractice case intense for counsel

BY GAIL J. COHEN  
Law Times



Although Crawford was disorganized, it was a serious case Robert Roth was willing to take on.

The case may be remembered by most as having the largest personal injury award in Canadian history at \$10 million, but for the lawyers involved in the case it was simply the largest case in their history.

"It was one of the most intense personal and professional cases of my career, and I've done more than a few of these," says Domenic A. Crolla, who represented the defendant doctors Brian J. Penney and Greg Healey, in *Crawford v. Penney*.

It's a medical malpractice suit revolving around Melissa Crawford's 1983 catastrophic birth, during which she was deprived of oxygen for 15 minutes resulting in extensive and

permanent brain injuries.

The case languished for about 10 years as Crawford's original counsel in Ottawa sat on the case and didn't do much. Robert Roth and his partner Richard Sommers, of Sommers & Roth in Toronto, got involved in the case when Crawford was 10 or 11 years old. They were approached by the family to take on the case and Roth says it was like starting from scratch.

There were no medical reports, no expert opinions, but there was a statement of claim and it was set for discovery, he says. While it was totally disorganized, he says, "it was a serious case so I was willing to take it on."

At issue in the case was whether Smith Falls, Ont., general practitioner Penney consulted

an obstetrician and, along with Healey, a physician at the local hospital who practised obstetrics, took special precautions with Jeanette Crawford, who was overweight, 40 years old at the time of the birth, and because the baby was abnormally large.

After the head delivered, Crawford's shoulders became impacted in the birth canal and, for a critical period of time, her brain was starved of oxygen resulting in serious brain injuries.

It was still almost another decade after Roth took on the case before it went to trial. A number of issues had to be sorted out including whether to add another senior doctor from Ottawa to the case.

"It would have been a complete defence for Penney if he'd

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### Quote of the week

"In some other common law jurisdictions there's no doubt that a deadlocked jury would result automatically in a stay of proceedings."

— Greg Goulin  
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# Big, lengthy trials have many challenges

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been advised by a senior doctor," Roth points out, so it was imperative to establish what kind of contact the two doctors had. According to the Court of Appeal ruling, Penney did not in fact ever consult with the head of the Obstetrical Ultrasound Section at the Ottawa General Hospital as he'd claimed during discoveries.

It was a big trial with several hundred pages of written submissions and 300 exhibits, says Roth. With such big trials it's hard to schedule them. Currently in Toronto it takes about two years to get a trial date but in Ottawa it was only about a year.

"So with a big trial, you can't get a speedy trial," he says.

Once the hearing finally began, in May 2001, it was still a lengthy slog. The 60 trial days were spread from May to February the following year.

"A 60-day trial has a lot of personal challenges," says Crolla. "Apart from some time off in the summer, it was a full-time job, working around the clock."

Both sides agree it was not a run-of-the-mill case.

"You go through a lot with the client," says Roth. "Particularly since this is over such a long period of time."

"They are fine people and they have given up a tremendous amount to look after their daughter," he says.

It's taken a great toll on the family and he felt he really

wanted to help them. "The grinding is the wait." Nonetheless, he says, you can't get too emotionally involved and must remain objective and professional.

In such cases, you have to be judicious about what you say in court, says Roth. Some things don't have to be said, he notes, adding he also won't bring children into court.

"It's not a circus, it's not a sideshow," he says. "We'd make a day-in-the-life video versus hauling them into court."

Beyond the emotional aspect of it, there were extensive medical and legal issues, says Roth. "Everything was in dispute. No one agreed on anything."

For Crolla, and co-counsel Daniel Boivin, one of the greatest challenges was finding experts who had been practising at the time but also were authoritative at the time. It was a "fairly select group."

Crolla says he read hundreds of articles about the science surrounding the case, which has been active and continuing over the years he's been working on the case.

"It starts with getting a good handle on the medical and scientific issues. It was tough here because the knowledge has developed a lot over 20 years," he says.

The topic is so ingrained after such a long time that Crolla still finds himself reading about obstetrics even as the case winds down.



Domenic Crolla says Crawford was a full-time, around-the-clock job.

Although the events happened years ago, Roth says he had no problems litigating something so old because it was based on findings of fact from reams of documents such as Penney's charts and notes.

"The strategy of the defence was to try and negate the information that [Penney] put in the chart himself. All the information was in the documents" but much of what Penney said was in conflict with his chart and notes, says Roth.

Crolla, who got involved in Crawford in 1994, has defended many doctors in malpractice suits but says there's never been one like this one.

"It was longer, more evidence, more experts, more

complicated issues, science much more up in the air than in a great number of other medical malpractice suits," he says.

Dragging the case out even more, Justice Denis J. Power's 127-page decision wasn't released until Jan. 15, 2003, and it took almost nine months for the trial transcripts to be prepared before Crolla and Boivin could perfect their appeal.

The appeal was heard in June and the ruling released on Sept. 10.

The appeal panel of justices Jean-Marc Labrosse, Robert J. Sharpe, and Eleanore Cronk upheld the trial judge's decision that the delivery doctors were the cause of Crawford's injuries and his complex and detailed damages award of almost \$10 million. Of that, the Ontario government will recover \$1 million, Crawford's

parents will be awarded \$1 million, and the remainder will go to the young woman to pay for her continuing, around-the-clock care.

While the damages are high, Roth says they're not extraordinary as Crawford can't do anything for herself and also has a life expectancy of about 56, therefore requiring almost 40 years of high-level care.

"This case was based on worth and a mathematical calculation," he says.

Crolla says he's not sure whether his clients — both of whom are still practising medicine, although Penney has given up obstetrics — will seek leave to appeal to the Supreme Court of Canada because they had not yet met to discuss the ruling.

"My clients are naturally disappointed in the outcome," he says. "We'll reflect on the decision very carefully and then make a decision. . . ."

## No public defenders, promises Bryant

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The definition of parent also needs revision, said Bryant, especially with respect to assisted reproduction.

"I'm not interested in having a bunch of antiquated laws sitting on the books on this," he said. "We need to get ahead of it."

He also made a pitch for lawyers to do more *pro bono*, carefully noting that it should not be a "tricky substitute for a healthy legal aid system." He said the AG's office is looking for a way to extend *pro bono* assistance, particularly in remote communities, by boosting legal education so that there is more public awareness of legal rights and alternatives.

"I'm hoping this will be by example," he said, for instance, by prompting firms, especially larger ones, to institute systems that ensure lawyers are not penalized for doing *pro bono* work. That said, he noted, legal aid should not be undermined.

"There will be no public defenders office in Ontario as long as I'm here," he said.

Bryant also spoke with conviction about domestic and sexual violence and noted that governments are "foolish and quite wrong" if they try to avoid the reality that the overwhelming majority of these victims are women. In addition to funding for frontline services like shelters and counselling for victims of such assaults, Bryant stressed the need for second-stage housing support for women and children.

It is key, he suggested, to "give those women who have been abused in their relationships a second chance at a normal life, a chance to get their lives back. We are deeply, deeply committed to making investments to make that happen and to do it in a way that is not a band-aid solution, but a comprehensive approach."

In closing, Bryant noted that the current majority government will be in office at least until October 2007. During that time, he said, "I would love to do a lot," adding that he wants to be as activist as possible, particularly in the area of family law.

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