

# MEDICAL MALPRACTICE UPDATE

June 2007

## LOST EARNINGS CLAIMS IN SHOULDER DYSTOCIA CASES Making the Case that Economic Damages are Speculative

By Cindy C. Boer

Shoulder dystocia and brachial plexus injuries are obstetrical complications that occur in 0.5% to 1.5% of all births. Shoulder dystocia happens when, after delivery of the infant's head, one of the shoulders becomes trapped behind the mother's pelvis. When this happens, additional obstetrical maneuvers may be required to deliver the infant. In some cases, an injury to the brachial plexus can result. If the injury is permanent, a lawsuit may follow.

There are a number of defenses available with respect to liability and causation in these cases, including the defense that the appropriate obstetrical maneuvers were used and these injuries can occur in the absence of excess traction by the health care provider. However, while these liability and causation defenses are certainly essential, defending the case from the damages angle should not be overlooked.

In cases where a brachial plexus injury is alleged, it is not uncommon to receive a report from the plaintiff's damages expert blackboarding millions of dollars in future lost earnings. While the severity of the child's impairment varies from case to case, the defense should be able to significantly minimize the damages claim by demonstrating that the prospect of future economic damages, and in particular future lost earnings, is remote and the plaintiff's proofs are speculative. A child with a brachial plexus injury who is intellectually, socially, and otherwise physically intact should not have any future lost earnings capacity.

### The Nature of the Injury

The brachial plexus is a network of nerves that conducts signals from the spine to the shoulder, arm, and hand. Brachial plexus injuries are caused by damage to those nerves. Symptoms may include a limp or paralyzed arm, lack of muscle control in the arm, hand, or wrist, or lack of feeling or sensation in the arm or hand.

There are four types of brachial plexus injuries:

- Avulsion, the most severe type, in which the nerve is torn from the spine;
- Rupture, in which the nerve is torn but not at the spinal attachment;
- Neuroma, in which the nerve has tried to heal itself but scar tissue has grown around the injury; and
- Neuropraxia or stretch, in which the nerve has been damaged but not torn. Neuropraxia is the most common type of brachial plexus injury.

Permanent brachial plexus injuries, also known as "Erb's Palsy," are typically associated with shoulder weakness and a corresponding inability to lift the arm above the head or the inability to turn the hand over so that the palm faces up ("supination"). Some individuals have no muscle control in the affected arm and no feeling in their arm or hand. Others can move their arm, but they have little control over their wrist and hand. Still others can use their hand well, but not their shoulder or elbow muscles.

When these claims are litigated, the plaintiff often contends that the brachial plexus injury will severely restrict the child's employment opportunities as an adult, especially in occupations requiring bimanual skills or the use of two strong, functioning arms. The plaintiff will argue that the child's earning capacity is significantly reduced as a result.

### Rebutting the Lost Future Earnings Claim

In most cases, if the child has normal mental functioning, a permanent brachial plexus injury should not result in any lost earnings capacity and the child should have a wide range of employment opportunities in the future. These opportunities are enhanced if the child is steered toward post-high school education. Retaining the proper

expert witnesses to present these theories to the jury is essential to defending these claims. A certified vocational rehabilitation counselor can testify as to the child's potential earnings pre- and post-injury, as well as the resources available to the child through governmental agencies, including vocational rehabilitation services. An occupational therapist can provide testimony about the child's abilities, therapies, and devices that can improve functioning at home and in the work place. While retaining these experts adds to the expense of defending the claim, it is money well spent and can result in significant savings down the road.

Most of these children are able to learn to write or draw using their dominant, unaffected hand. They may use their affected arm as a stabilizer or helper. If necessary, assistive technology is available to allow for the one-handed use of computer software or keyboards. There are a number of such devices on the market, including keyboards designed for one-handed individuals. Vehicle modifications, including steering devices, are also readily available. Thus, most of these children should eventually be able to write, type and drive – skills that will provide access to the workforce.

With proper education, occupational therapy, and vocational training and rehabilitation, not to mention the numerous adaptive devices on the market for one-handed individuals, there are numerous opportunities for employment in occupations such as data entry, accounts receivable or accounts payable, customer service, quality assurance and inspection, and retail sales. Further, should the child obtain a bachelor's degree, there are numerous professions available, including teaching, sales, engineering, marketing, health care, realty, graphic

arts, accounting, management, human resources, retail sales, transportation, contracting, foreman, architecture, and landscape design.

Damages experts who testify on behalf of the plaintiff should (but will not always) concede that there are many

employment opportunities available to individuals with these injuries. For example, in one case, the plaintiff's expert testified:

Q. Do you have an understanding as to whether she would qualify for Social Security disability?

A. She clearly would not.

Q. Why would that be?

A. Because in order to be a recipient of either Social Security disability benefits or supplemental security income, you must be 18 years of age or older and you must be able to demonstrate that you are unable to perform any type of substantial gainful work activity and she clearly does not meet that definition. *She will retain the capacity to perform a wide range of different occupations as an adult.*

(Deposition of Anthony Gamboa, Jr., Ph.D., 2/7/06)  
The fact that the plaintiff should not be able to prove a significant future lost earnings claim is reflected in the published data on settlements and verdicts in cases involving brachial plexus injury, for which the lower cap on non-economic

damages (currently about \$400,000) applies. With two exceptions, these cases resulted in a finding of no liability or a verdict/settlement in the range of \$40,000 to \$500,000.

<b>Adaptive Devices for One-Handed Individuals</b>	
<b>Driving</b>	Automatic transmission, steering devices, reduced effort steering, modified gear shifters, and modified secondary controls (turn signals, dimmers).
<b>Working With Tools</b>	Tool balancers, tool holders, and ergonomic/pneumatic tools.
<b>Carrying Items</b>	Lightweight carts, shoulder bags, powered carts or scooters with carrying baskets, personal utility pouches.
<b>Dressing</b>	Button hooks, zipper pulls, Velcro.
<b>Lifting Materials or Products</b>	Compact lifting devices, vacuum material handling, winches.
<b>Data Entry</b>	One-handed keyboards, expanded keyboards, miniature keyboards, conversion software, speech recognition software.
<b>Manipulating Office Equipment</b>	Large button telephones, voice activated databases, page turners, bookholders, recording devices, speaker phones, phone holders, telephone headsets.

**Shoulder Dystocia/Brachial Plexus Injury Published  
Jury Verdicts and Settlements  
Michigan 1989-2005**

Year	County	Outcome
2005	Kent	\$40,000 settlement
2005	Macomb	\$75,000
2004	Macomb	\$165,000
2004	Chippewa	No cause
2003	Washtenaw	No cause
2003	Kent	\$510,000 settlement
2002	Wayne	\$1,200,000 verdict *Subject to high-low settlement \$200,000/\$50,000
2000	Macomb	\$1,000,000 settlement
1998	Wayne	No cause
1997	Wayne	\$500,000 settlement
1994	Wayne	No cause
1993	Oakland	\$466,000 verdict
1989	Wayne	No cause

In conclusion, the importance of mounting a vigorous defense with respect to a claim for lost earning capacity in a case involving brachial plexus injury cannot be over-emphasized. The time and effort spent in refuting the claim for economic damages will be time and effort well spent.

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## CASE LAW UPDATE

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### Supreme Court Decisions

#### *Out-of-State Affidavit Certification*

##### Apsey v Memorial Hospital (May 1, 2007)

In this case, the Supreme Court finally resolved the issue regarding whether an affidavit notarized by an out-of-state notary must be certified by the “clerk of any court of record in the county where such affidavit shall be taken, under seal of said court.” MCL 600.2102. The Court of Appeals previously ruled that such affidavits had to comply with MCL 600.2102. This ruling proved problematic because, among other things, some states did not have procedures in place so that litigants could comply with the statute. On appeal to the Supreme Court, plaintiffs argued that the Uniform Recognition of Acknowledgments Act (URAA) was equally applicable to recognizing out-of-state affidavits in medical malpractice actions. The URAA states that “notarial acts” performed outside of Michigan have equal force in the state as long as the acts are performed by a “notary... authorized to perform notarial acts in the place in which the act is performed.” The Supreme Court found that the two statutes did not conflict, and that it was error for the Court of Appeals to rule that an affidavit notarized out-of-state must be certified under MCL 600.2102. Instead, the Supreme Court found that litigants could rely upon either MCL 600.2102 or the URAA when using an affidavit notarized by an out-of-state notary.

#### *Vicarious Liability*

##### Al-Shimmari v Detroit Medical Ctr. (May 2, 2007).

After undergoing back surgery that did not resolve his pain complaints, plaintiff treated with a second surgeon who concluded that plaintiff suffered a nerve injury during the initial surgery. In addition to suing the physician who performed the initial surgery, plaintiff also brought suit against institutional defendants on vicarious liability theories, among others. Plaintiff failed to properly serve the surgeon with the Complaint prior to the expiration of the statute of limitations and, thus, the surgeon’s motion for summary disposition was granted. The trial court also found that dismissal of the claims against the surgeon extinguished the vicarious liability claims against the institutional defendants. Plaintiff appealed to the Court of Appeals, which reversed the trial court. The institutional defendants appealed to the Supreme Court, which noted that plaintiff was required to demonstrate that the surgeon was negligent in order for the institutional defendants to be found vicariously liable for his actions. However, the dismissal against the surgeon operated as an adjudication on the merits of the claims against him. Consequently, plaintiff could not show that the institutional defendants were vicariously liable for the acts of the surgeon, because the dismissal of the claims against him prevented plaintiff from arguing the merits of the negligence claim against the surgeon. Thus, the Court reinstated the trial court’s dismissal of the vicarious

liability claims.

### ***Affidavit of Merit – Duty to Answer or Otherwise Respond***

#### Saffian v Simmons (February 6, 2007)

Plaintiff filed suit against the defendant dentist, filing an Affidavit of Merit signed by an endodontist. Defendant failed to respond to the Complaint, and the trial court entered a default against the dentist. At the hearing on defendant's motion to set aside the default judgment, the defendant claimed that failed communication between the dentist and his insurer led to the failure to respond. The trial court originally set aside the default, reasoning that the failure of communication was sufficient to set aside the default. The defendant then filed an answer and a motion for summary disposition, asserting that plaintiff's affidavit of merit was insufficient to commence the claim because it was signed by an endodontist rather than a dentist. While that motion was pending, further discovery revealed that the representations by defendant regarding attempts to notify his insurer were untrue. Based on the new discovery, the trial court reinstated the default against defendant and denied the motion for summary disposition. The defendant appealed, and the Court of Appeals affirmed the trial court's refusal to set aside the default, with the entire panel rejecting defendant's claim that there was never a duty to answer the Complaint because the affidavit was faulty. The Supreme Court took the case and issued a per curiam opinion without formally granting leave to appeal. Affirming the Court of Appeals, the Supreme Court stated that when an affidavit is filed with a Complaint, it is presumed valid until and unless a subsequent judicial proceeding declares otherwise. However, if no affidavit is filed, no such presumption arises. The Court also affirmed the refusal to set aside the default, holding that a defendant's unilateral belief that the affidavit of merit does not conform to the statutory requirements does not constitute good cause for failing to respond to the Complaint.

### **Court of Appeals Decisions**

#### ***Affidavit of Merit***

#### Gonzalez v St. John Hosp & Medical Center (April 19, 2007) (Published Opinion)

A patient underwent surgery by a third-year surgical resident. After the patient died, her estate sued the resident (and supervising surgeon), alleging that her death was caused by complications from the surgery. Plaintiff's affidavit of merit was authored by a board certified general surgeon. Defendants argued that plaintiff's expert was not qualified to testify against the resident under MCL 600.2169 because the expert was a specialist and the resident was a general practitioner.

Relying on *Woodard v Custer*, the Court of Appeals found that, "those physicians who are residents that limit their training to a particular branch of medicine or surgery and who can potentially become board certified in that specialty are specialists for the purposes of analysis under the framework provided in MCL 600.2169(1)." The Court further stated that for the purposes of a matching specialty analysis under MCL 600.2169(1)(a), "there is no difference between a defendant physician who is board certified in a specialty but is practicing outside of that specialty at the time of the alleged malpractice and a physician, like [the resident] who can potentially become board certified that is practicing in a specialty but is not board certified in that specialty."

#### Carter v Wilson, M.D. (May 8, 2007) (Unpublished Opinion)

Plaintiff sued defendant following complications from a "face lift." Defendant physician considered himself a plastic surgeon, but was not board certified in that specialty. Plaintiff's expert performed a spectrum of cosmetic surgical procedures as a board certified dermatologist. The trial court granted summary disposition on the basis that plaintiff's expert's qualifications did not match the defendant's and, thus, the affidavit of merit was defective. The Court of Appeals reversed, indicating that the "important focus for... matching of specialties is based on the actual area of practice and similarity of medical procedures being performed at the time of the alleged malpractice." On that point, the Court noted that while not board certified in cosmetic surgery, defendant practiced that specialty and was eligible for certification in the specialty. On the other hand, although board certified in dermatology, plaintiff's expert practiced outside his certification when he performed cosmetic surgical procedures, and he was also eligible for certification in cosmetic surgery. After comparing the qualifications of the physicians, the court found that they were sufficiently matched by their sub-specialty practice (cosmetic surgery) that plaintiff's affidavit of merit complied with the statutory requirements.

#### ***Sufficiency of Notice of Intent***

#### Tousey v Brennan (May 15, 2007) (Published Opinion)

Defendant moved for summary disposition arguing that plaintiff's NOI was deficient in that it failed to adequately set forth the "manner" in which any alleged breach in the standard of care was a proximate cause of the decedent's death. The trial court granted the motion and plaintiff appealed. The Court of Appeals reversed noting, "this Court recently held that in determining whether a plaintiff has satisfied the requirements of MCL 600.2912b, the question is whether the *notice*

contains the required information, not whether any *specific portion* of the notice does.” The Court found that when read in its entirety, the NOI sufficiently put defendant on notice of the manner in which it was claimed that the alleged negligence caused the death.

### ***Wrongful Conduct Rule***

Graham v Secure Care, Inc. (January 18, 2007) (Unpublished Opinion)

Plaintiff’s decedent died from cocaine intoxication while in custody of the Washtenaw County Sheriff’s Department. The decedent died after ingesting one ounce of cocaine during an arrest for marijuana possession. He was taken to jail, and repeatedly failed to disclose his ingestion of cocaine despite questions by deputies and the jail nurse. After his death, his estate filed suit against the defendant, which was contracted to provide nursing care at the jail. Defendant filed a motion for summary disposition, alleging that the decedent’s own wrongful conduct – possessing, swallowing, and concealing his possession of controlled substances – barred any claim. The trial court agreed and dismissed plaintiff’s claim. On appeal, the Court of Appeals affirmed the trial court, reasoning that an estate may not recover for the death of a person who “ingests lethal amounts of illegal drugs and then conceals that conduct to those who repeatedly attempt to provide him medical care.”

### ***Wrongful Death – Successor Personal Representative – Addition of Parties***

Shanes v Shaikh (February 20, 2007) (Unpublished Opinion)

VanDam, the original personal representative in this lawsuit, filed a timely Complaint against the defendant hospital. After doing so, VanDam resigned as personal representative and her brother, Shanes, was appointed as the successor personal representative. Shanes then filed the necessary notices of intent and amended his complaint naming physicians as added parties. The physicians moved for summary disposition, asserting that the period of limitations had expired as to them because the claims were not filed within two years of the appointment of VanDam as personal representative. The trial court agreed with defendants and dismissed the claims against the physicians. Plaintiff appealed and the Court of Appeals reversed. The Court first noted that this case was different than many other cases involving successor personal representatives because in this case a timely Complaint had been filed. However, the Court also noted that as to the newly added parties, the Amended Complaint was the commencement of the action against them. Concluding that the period of limitations for the added parties began to run from the

date of the successor’s appointment, the Court reasoned that there were no acts by VanDam against the physician defendants to trigger the period of limitations, and thus the earliest date on which the claim could arise under the wrongful death savings provision was the date of appointment of the successor personal representative. For that reason, the Court of Appeals reversed the trial court and reinstated the claims against the added parties.

### ***Affidavit of Merit – Statutory Requirements***

Glisson v Gerrity (March 6, 2007) (Published Opinion)

The defendant, an individual physician named in the Notice of Intent and Complaint but not identified in the Affidavit of Merit, appealed from the trial court’s denial of summary disposition and order allowing plaintiff to amend the Affidavit of Merit to include claims against the defendant. The Court of Appeals found that the Affidavit of Merit was nonconforming due to the failure to include specific claims against the defendant. The Court went on to find that the trial court’s order allowing amendment of the Affidavit was improper, and that dismissal with prejudice was the appropriate remedy.

### ***Medical Malpractice v Ordinary Negligence***

Harrier v Oakwood Skilled Nursing Center (March 27, 2007) (Unpublished Opinion)

The plaintiff’s fall at an assisted-living center caused a wrist fracture and broken ribs. She was treated at a hospital, then released to the defendant facility. Her initial assessment at the center noted that she was dependent on assistance for all personal care, including toiletry. However, shortly after she was admitted to the defendant facility, she was left unattended while using the toilet (notwithstanding a nurse’s instruction to an aide to assist plaintiff and return her to bed). Plaintiff fell and broke her hip while attempting to return to bed. Plaintiff alleged that the claim was ordinary negligence rather than malpractice. The defendant challenged the allegations, and the trial court agreed with the defendant that the claim sounded in medical malpractice. On appeal, the Court of Appeals reversed, concluding that no expert testimony was necessary to show that the defendant acted negligently by failing to respond to the knowledge that plaintiff was prone to falling and that the aide was negligent by abandoning the plaintiff in the face of the known risk.

# NEWS AND SUCCESS

After a recent five day jury trial in Kent County Circuit Court, **Joe Engel** and **Cindy Boer** obtained a unanimous no cause verdict last month on behalf of a family physician and his professional corporation. In a somewhat unique factual scenario involving records and communication issues, the defense proofs focused not only on compliance with the standard of care, but further, incorporated a formal claim of non-party at fault against two absent tortfeasors and also raised the plaintiff's substantial, comparative conduct under *Shinholster*. The jury, which was out less than two hours, concluded that the physician met the standard of care but went on to observe that the "empty chair" defense, and plaintiff's conduct, played a significant role in how they viewed the case.

In April, **John Kruis** and **Kevin Lesperance** tried a mock medical malpractice case against one another as a demonstration for the Spectrum Health surgical residents.

In May, **Chris Genther** and **Kevin Lesperance** presented a series of mock deposition education programs to the Metro Health Hospital nursing staff. The

programs focused on common nursing issues which arise in malpractice cases and the strategies which can be used to both avoid such lawsuits and effectively defend them in a deposition setting.

In May, **Chris Genther** presented an education program to the Metro Health Hospital obstetrical resident physicians. The program focused on the commonly encountered birth trauma issues and the strategies to both avoid and defend same.

In June, **Kevin Lesperance** will be speaking at a seminar for hospital risk managers sponsored by the Risk Management & Patient Safety Institute.

**Jason Sebolt** joined the Government Affairs Committee of the Michigan Society of Healthcare Risk Management.

**Cara Nieboer** has completed her first semester as an adjunct professor of Health Law and Ethics at Grand Valley State University. **Bill Jewell** is also an adjunct professor at the university.

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