

MEDICAL MALPRACTICE UPDATE

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THE UNIQUE CHALLENGES TO LITIGATING CLAIMS INVOLVING CHILDREN: THE DEFENSE LAWYER'S PERSPECTIVE

By Joe Belsito, Stephanie Neal and Cindy Boer

Defending claims involving children requires an appreciation of some of the legal and factual issues unique to these claims. From a treatment perspective, there are the risks inherent to the treatment of children. For example, younger children are often unable to express how they feel, which can create diagnostic and treatment challenges. Treatment decisions require parental understanding and compliance. Because of their small size and different metabolism, and because drug dosages often must be individually calibrated, children can be vulnerable to medication errors. Damages generated by the disability of a child can create the potential for huge awards. Child plaintiffs are especially sympathetic to juries, who tend to err on the side of compensation when a child is involved. All of these factors can make defending pediatric claims quite challenging. What follows is a summary of some of the legal issues peculiar to defending these claims.

Statute of Limitations

Generally, Michigan law requires a plaintiff to file a medical malpractice claim within two years from the date the malpractice allegedly occurred, or within six months after the plaintiff discovers or should have discovered the claim. MCL §600.5805(6), 5838a(2). However, there is a "statute of repose" in Michigan which imposes a maximum time limit for filing a lawsuit. Regardless of when the claim is discovered, a plaintiff may not file a lawsuit more than six years after the alleged malpractice. MCL §600.5838a(2).

Special rules apply to minors and to minors who bring medical malpractice claims. Generally, minors (persons under the age of 18 years) have until the age of 19 to file a personal injury lawsuit. *See* MCL § 600.5851(1). For minors who have potential medical malpractice claims, Michigan law states that if the minor has not yet reached her eighth birthday when the malpractice occurs, she must file the lawsuit on or before her tenth birthday, or

within six months after they discover or should have discovered the claim. MCL §600.5851(7). If the minor is eight years old or older when the malpractice occurs, she is subject to the two-year statute of limitations for medical malpractice claims described above. A special statute of limitations applies to minors who suffer injury to their reproductive system. MCL §600.5851(8).

Admissibility of Parents' Comparative Fault

There may be situations where a parent or caregiver failed to comply with a child's treatment plan or made other decisions that resulted in a poor outcome. As a result of Michigan tort reform, defendants may introduce evidence of the fault of any person (even non-parties) who contributed to the plaintiff's damages. For example, in a medical malpractice case, a defendant may introduce evidence that the child's caregiver was negligent and this caused injury to the child.

However, even if a caregiver was partially to blame for the child's injuries, as a practical matter this will have little effect on the outcome. Under tort reform, defendants in medical malpractice cases are liable for the full amount of the verdict, even if other persons are also at fault (a concept known as "joint and several liability.") A defendant's liability will be limited to their own percentage of fault (i.e., they will be "severally liable") only when the plaintiff is partially to blame for their own injuries. (This is unlikely when the plaintiff is a child). In addition, depending on the facts of the case, an attempt to shift blame to a family member may not be well received by a jury. The family member may respond with allegations that treatment or discharge instructions were poorly communicated. Therefore, whether to request allocation of fault to a family member as a "non-party" requires careful consideration.

Economic Damages

Cases involving minors typically include claims for substantial economic damages. Like adults, an injured minor may recover damages for impaired earning capacity. However, Michigan law limits this recovery to the loss of earning capacity after the age of 18. (The loss of earning capacity before the age of 18 belongs to the child's parents.)

Generally, juries arrive at damage awards for lost earnings capacity by calculating the child's estimated yearly earnings through the end of the child's work life expectancy, adjusted for inflation, and then reduced to present value. However, predicting a minor's anticipated future earnings is not a precise science and is often a topic of dispute in medical malpractice lawsuits. Ultimately, the value of a claim for lost earning capacity will depend upon the evidence introduced at trial, including the educational and employment background of the child's parents, socio-economic background, geography, the level of impairment, pre-injury school performance, and national economic data for various professions and vocations. Both sides typically use specialists in the field of vocational rehabilitation to assist with this analysis.

When a child is catastrophically injured, future medical expenses can be substantial. Typically, the plaintiff and defendant will retain life care planners to estimate future medical needs. Economists also play a role by factoring in the future inflation of health care costs.

Settling Claims Involving Minors

Care must be taken when settling claims with minors because of special procedural rules requiring court approval for a judgment or settlement. Claims should not be settled directly with a minor because minors' contracts are generally "voidable" and, therefore, subject to being rescinded at the election of the minor upon reaching the age of majority. A parent, as a general rule, has no authority to settle claims on behalf of their child. Instead, a next friend, guardian or conservator (who may also be the parent) must be appointed. Even settlements reached with a minor's next friend, guardian or conservator may not be valid if the court rules governing settlements for minors are not followed. The court must be given an opportunity to review the fairness of the settlement and determine if it is in the minor's best interest. *See* MCR 2.420(B). Several procedural safeguards are put in place under the court rule:

- If the claim involves personal injury, the minor must appear in court to give the judge the opportunity to observe the nature of the injury. The judge can waive this requirement at his or her own

discretion, for good cause. The judge may also require medical testimony if not satisfied of the extent of the injury.

- If the next friend, guardian or conservator is a person who has made a claim in the same action and will share in the settlement or judgment of the minor, then a guardian ad litem must be appointed. The guardian ad litem represents the minor child by acting as the child's legal advocate for purposes of the proceedings.
- If a next friend, guardian or conservator has been appointed by a probate court, the trial court may approve the payment arrangement upon a finding that it is in the best interests of the minor and that certain other conditions, such as payment of a bond, have been satisfied at the probate court level.
- Settlements or judgments that do not require payment of more than \$5,000 to the minor in any single year may be made to (i) the minor if married; (ii) an individual having care and custody of the minor with whom the minor resides – such as custodial parent; (iii) guardian of minor; or (iv) financial institution incident to a deposit in a state or federally insured savings account in the sole name of the minor with notice of deposit to the minor. MCL 700.5102
- A conservator must be appointed by the probate court, before the entry of judgment in or dismissal of a lawsuit, if the settlement or judgment requires payment of more than \$5,000 to the minor (whether a lump sum or installments) in any single year.
- If the settlement or judgment provides for the creation of a trust for the minor, the trial court shall order the amount to be paid to the trust. However, the trust cannot be funded until it has been approved by the probate court after notice to all "interested persons" and a hearing.

Conclusion

Malpractice claims brought on behalf of children may encompass complex medical liability facts and causation issues and present substantial damage exposure. As shown above, they also require an appreciation of some of the legal issues unique to pediatric claims. Careful consideration of all of these factors is essential to making strategic decisions regarding trial and settlement.

CASE LAW UPDATE

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COURT OF APPEALS

Published Decisions

Braverman v Garden City Hosp (August 15, 2006)

In this wrongful death action, the initial personal representative of the estate filed a Notice of Intent to File Claim, then resigned as personal representative before a Complaint was filed or served. The successor personal representative served a Complaint, and the defendants filed a motion to dismiss based on case law requiring that the Notice of Intent and Complaint be filed by the same “person” rather than two distinct individuals. While declaring a conflict with earlier decisions in this area, the Court of Appeals reversed the trial court’s denial of the motion, holding that the same person requirement espoused in earlier decisions had to be read to include the circumstances of this case.

Kuznar v Raksha Corp (August 22, 2006)

The defendant operated a group of pharmacies, one of which was alleged to have improperly filled a prescription. The plaintiff filed a Complaint alleging general negligence, and defendant moved to dismiss, asserting that the claim sounded in medical malpractice. Examining the language of the statute setting forth who may be subject to claims of malpractice, the Court concluded that pharmacies are not licensed under the relevant chapter of the Public Health Code and, therefore, may not be sued for medical malpractice. The Court also concluded that pharmacists are licensed health providers under the statute and may be sued for medical malpractice. As a result of this ruling, it appears that all pharmacy claims may be brought under theories of general negligence, except in cases where the pharmacy is merely vicariously liable for the acts of the licensed pharmacist.

Vance v Henry Ford Health System (October 17, 2006) Plaintiff, as personal representative of her deceased son’s estate, brought her claim within 10 years of the date of his birth. In doing so, she relied upon statutory language permitting minor plaintiffs to file before their tenth birthday. Defendants challenged the timeliness of this action, alleging that plaintiff was required to bring the claim within two years of the date of the appointment of the personal representative in any wrongful death action, and that the minor’s death prevented the personal representative from relying upon the statute allowing claims to be brought before

the tenth birthday. The trial court denied the motion to dismiss based on the statute of limitations, but the Court of Appeals held that for purposes of calculating when a wrongful death claim may be brought, a person does not continue to age after his death. Thus, plaintiff could not rely upon the “tenth birthday” language in MCL 600.5851(7) to extend the time for filing a wrongful death claim involving a minor.

David v Sternberg (October 10, 2006)

Plaintiff’s claim was dismissed after she failed to file an affidavit of merit with her Complaint. Before her claim was dismissed, she moved to amend her Complaint to add a claim of ordinary negligence. The defendants asserted that the ordinary negligence claim should be dismissed because the claim involved medical malpractice and was untimely. The Court of Appeals affirmed the trial court’s dismissal, determining that the central claim – improperly applying a bandage and diagnosis of pressure sores – inherently involved questions of medical judgment.

Wood v Bediako (October 26, 2006)

Plaintiff’s counsel prepared three original Affidavits of Merit, and plaintiff’s expert signed all three originals. Only two of the original affidavits were notarized, and inexplicably, plaintiff’s counsel filed the unnotarized affidavit with the Complaint and served a copy on the defendants. After the statute of limitations expired, the defendants moved for summary disposition, citing the failure to file a properly notarized affidavit. The plaintiff argued that the filing of an original, notarized affidavit before the statute of limitations expired had corrected the nonconforming pleading and prevented dismissal. The trial court refused to address the effect that the notarized affidavit had on the initial failure to comply with the statute, and dismissed the case. On appeal, the Court of Appeals concluded that the filing of the properly notarized affidavit cured the initial defect and reversed the dismissal.

Boodt v Borgess Medical Center (October 31, 2006)

The defendants challenged the propriety of the Notice of Intent to File Claim. The trial court found that the notice was non-specific as to all the parties and dismissed the case. The Court of Appeals reversed this decision, finding that as a whole, the notice was sufficient to inform the defendant doctor of the claims against him; however, the claims against his professional corporation and Borgess Medical Center were dismissed because the notice failed to identify the basis for the claims contemplated against them.

The Court then turned to the issue whether the dismissal of Borgess and the professional corporation should be with prejudice. Concluding that it was bound to follow the more recent precedent interpreting the ability of successor personal representatives, the Court dismissed the case with prejudice, but declared a conflict with McLean v McElhaney.

Ward v Siano (November 14, 2006)

The Court of Appeals, sitting as a conflict resolution panel, held that equitable tolling could not be invoked to avoid the retroactive application of the Waltz v Wyse decision. That decision held that plaintiffs could not toll the wrongful death savings provision by filing a Notice of Intent to File a Claim.

MICHIGAN COURT OF APPEALS

Unpublished Decisions

Jackson v Harper Hosp (September 12, 2006)

The plaintiff filed her claim alleging ordinary negligence after she fell from her hospital bed during the night. She alleged that the nurses were improperly trained, that they failed to make the hospital room accident-free, and that a nurse failed to replace the bedrails on her bed after lowering them to check her vital signs during the night. The defendant moved for summary disposition, asserting that the claims alleged medical malpractice and were therefore brought after the statute of limitations had expired. The trial court denied the motion, and the Court of Appeals granted leave to appeal. Finding that two of the three claims could proceed, the court reasoned that even though the failure to train claim involved medical malpractice, it was brought before the Supreme Court issued its decision clarifying the test for medical malpractice claims and could therefore proceed. The court also concluded that the failure to replace the bedrails claim sounded in ordinary negligence, because it was within the common understanding of a layperson that if the rails were placed when the nurse began her exam, they should be replaced after she concluded it. The final claim was found to constitute an assertion of strict liability and was dismissed.

Kurz v Detroit Osteopathic Hosp. (September 26, 2006)

Plaintiff filed a Complaint with an affidavit of merit signed by a physician who was board certified in internal medicine and emergency medicine. Based upon information gathered from the defendant hospital, plaintiff believed that the defendant physician was a board certified internal medicine physician practicing in an emergency room setting, and therefore the affidavit referred to the standard of care as that of

an internal medicine physician. After the Complaint was filed, the defendant physician was discovered to be a board-certified emergency medicine physician, and defendant moved for summary disposition, asserting that the claim should be dismissed because the affidavit of merit stated the wrong standard of care applicable to the case. The trial court agreed, and dismissed the case without prejudice. The Court of Appeals reversed the decision, concluding that the plaintiff's expert was qualified pursuant to the relevant statutes to testify to the standard of care, that the plaintiff had a reasonable belief that the defendant physician was an internal medicine physician, and that the defendants' failure to comply with the statute requiring a response to the Notice of Intent should be taken into account when considering the circumstances of the case, as a response would likely have informed plaintiff of the fact that the defendant was an emergency medicine physician.

Schneemilch v Shields (October 17, 2006)

Plaintiff filed this claim alleging that her breast cancer diagnosis was delayed by the negligence of the radiologist interpreting her mammograms. The defendants filed a motion for summary disposition, asserting that the affidavit of merit was inadequate with regard to how the alleged negligence caused her any injury. The proximate cause portion of the affidavit of merit stated:

Had J.J. Shields, M.D., acted properly and within the standard of care, the abnormalities present in Ms. Schneemilch's left breast would have been noted, further diagnostic studies performed and early medical/surgical intervention would have been carried out.

The Court of Appeals upheld the dismissal of the Complaint with prejudice based on the failure to file an adequately specific affidavit of merit.

Hunter v Madison Comm Hosp (December 28, 2006)

In this wrongful death action, the plaintiff alleged that a psychiatrist's failure to admit a patient to an inpatient counseling program led to his suicide the day after the decision not to admit was made. Defendants moved for summary disposition based on the plaintiff's expert's failure to state with medical certainty what would have happened had the decedent been admitted on the day in question. The plaintiff's expert also refused to state that it was more probable than not that the decision not to admit the decedent caused the suicide. The Court of Appeals upheld the trial court's dismissal based on a failure to establish any causation in this matter.

Latham v Providence Hosp and Medical Center
(December 28, 2006)

In this medical malpractice case, the plaintiff, who claimed that her minor child suffered birth trauma injuries, retained Dr. Ronald Gabriel as the sole causation expert. He opined that hyperstimulation, abnormal uterine pressures, decelerations, and use of a

vacuum extractor caused mechanical trauma to the child's head during birth which led to bleeding and reduced arterial blood flow to the brain. Examining the basis for this opinion, both the trial court and Court of Appeals concluded that it did not meet the threshold for reliable testimony and that it was properly excluded from trial.

NEWS AND SUCCESS



Richard Kraus, a shareholder in the firm's East Lansing office, has been honored by *Michigan Lawyers' Weekly* as one of Michigan's "2006 Lawyers of the Year." Each year, the editors of the Michigan Lawyers' Weekly select just 10 honorees from among the state's 37,000 attorneys based on their contributions and commitment to Michigan law. The award highlighted Richard's representation of the University of Michigan Health System in the case of *Woodard v. Custer*. In that case, the Michigan Supreme Court ruled for the first time that expert witnesses in medical malpractice actions must possess the same subspecialty as the defendant before their testimony can be admitted. The award also recognized his successful representation of the State Bar of Michigan in several federal court cases challenging the constitutionality of Michigan's bar admission process. Richard has extensive experience handling appeals in both federal and state courts. He also focuses his practice on representing clients in health care matters, including professional licensing, fraud and abuse, regulatory matters, and privacy. He currently serves as special master for the United States District Court.



Cindy Boer was recently elected a shareholder of the firm. Cindy specializes in medical malpractice defense, and is a member of the Michigan Defense Lawyers Association, Defense Research Institute, Michigan Society of Healthcare Risk Management, and American Society for Healthcare Risk Management. She received her Bachelors of Arts degree in English from Calvin College in Grand Rapids, Michigan. She graduated *summa cum laude* from Thomas M. Cooley Law School in Lansing, Michigan, where she was also an editor for the law review and an intern for federal judge David McKeague.



Carol Carlson received summary disposition in *Boodt v Borgess Medical Center, et al*, by challenging the sufficiency of plaintiff's Notice of Intent. The hospital was named in the Notice, as was a physician. After arguing that the allegations lacked any specificity whatsoever as to the hospital, the trial court agreed. That decision was appealed, **Bill Henn** handled the appeal and the dismissal was affirmed as to the hospital.



In October, **Chris Genter** and **Kevin Lesperance** presented a series of mock deposition education programs to groups of obstetrical nurses and physicians at Metro Health Hospital. The programs focused on strategies for defending commonly encountered birth trauma issues.



Bill Jewell and **Cindy Boer** obtained summary disposition of claims against a hospital for damages resulting from a sponge left behind after abdominal surgery. The plaintiff's attorney used an out-of-state surgeon to sign the affidavit of merit, but failed to attach a certificate of the notary's authority as required by the *Apsey* decision. In addition, the plaintiff's attorney failed to provide any affidavit of merit by a nurse in support of nursing negligence claims. When faced with these procedural defects, the plaintiff argued that the case really sounded in ordinary negligence, so that an affidavit of merit was not even required. However, the court held that it should be treated as a medical malpractice case, because the surgeon was informed that the sponge count was off and the steps that should be taken to rule in or rule out a retained sponge required medical judgment.



Richard Kraus filed an amicus curiae brief on behalf of the University of Michigan Health System before the conflicts panel in *Ward v Siano*. Our position—that equitable tolling cannot be used to avoid the retroactive effect of *Waltz v Wyse*—was accepted by the conflicts panel.



Jason Sebolt was recently granted summary disposition for a hospital client in a medical malpractice claim. Plaintiff was allegedly injured as a result of an apparent assault by another patient. Plaintiff brought suit under an ordinary negligence theory

arguing that the hospital failed to keep her safe from other patients. Jason filed a motion for summary disposition on the basis that plaintiff’s claims were really medical malpractice claims disguised as ordinary negligence. In his motion and at the hearing, Jason argued that a plaintiff cannot circumvent the medical malpractice statutes by framing a medical malpractice case as one sounding in ordinary negligence. The judge agreed with Jason’s position and dismissed plaintiff’s claims against the client.

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