Special Considerations for the Representation of Injured Children in the Birth Injury Case

By Bruce J. Babij and Ellen B. Flynn

Assuming the responsibility of representing of a child afflicted with a birth injury presents unique challenges for even the experienced trial attorney. Given the potential pitfalls and often extraordinary costs associated with litigating a complex birth injury case, it is generally wise for the inexperienced attorney or an attorney unfamiliar with the myriad complexities associated with birth-injury litigation to consider partnering with counsel who has proven experience. Mastering the birth injury case requires a fundamental understanding by the attorney of the multiple causes of *in utero* fetal injury that can occur, ranging from the mismanagement of a patient's pre-natal obstetrical care in the weeks preceding delivery; the negligent management of the patient's labor and/or the baby's delivery; the negligent interpretation of fetal monitoring tracings; to the negligent management of the baby's resuscitation after birth and ensuing neonatal care. In almost every birth injury case, determinations of negligence and causation will depend upon the birth injury attorney being capable of independently assessing and understanding the significance and implications of the tests' results. This includes fetal surveillance testing, obstetrical ultrasound studies, placental pathology results, neonatal hematology and blood gas study results, neonatal brain neuroimaging studies and the multiple other maternal, fetal and newborn clinical, laboratory and radiological tests, studies and assessments that are typically performed in every significant birth injury case. The inexperienced attorney who expects their expert witnesses to tutor them on such intricacies is ripe for obtaining a very expensive, and too often unhelpful and misleading lesson.

Birth injury litigation represents perhaps the most interesting, demanding, expensive and yet most gratifying and rewarding legal work in the arena of medical malpractice. The risks and stakes are markedly higher than in other conventional personal injury and malpractice cases, both for the birth-injured child consigned to suffer life-long challenges, the child's parents, and for the Defendant doctor or hospital and their insurers. Plaintiffs' attorneys are frequently drawn to birth injury cases because of the perception of a potentially large recovery but funding a properly litigated birth injury case is expensive, with litigation costs often exceeding several hundred thousand dollars to bring a case through to trial. Because of the shenanigans often employed by the defense, including the legions of defense expert witnesses and the pre-trial posturing, birth injury cases may take several years to litigate. If there is an appeal of a successful verdict, it is not unusual that it may take a decade or longer before any monies can be distributed to a deserving birth injured child. Failing to properly identify

the meritorious case, to be able to fully fund litigation and to support it with the appropriate staff, experts and other essential resources will not provide a favorable outcome. It will result in a low-ball settlement offer or a lengthy, expensive and risky trial. Failing to understand and appreciate the profound differences between a birth injury case and other personal injury and malpractices cases has led many an inexperienced attorney down a litigation road no one wants to go.

Who is the Client in the Birth Injury Case?

Before you invest a great deal of your time and resources in a potential birth injury case, verify that the individuals seeking your representation have proper legal capacity to be a party or to proceed on behalf of the injured child. The biological mother may have her own claims for personal injury arising from such obstetrical complications as uterine rupture, placental abruption, post-partum hemorrhage and, still too frequently, maternal death. The birth mother's claims will typically be subject to a three-year statute of limitations in Maryland, regardless of whether a separate claim is eventually made for any injury to her baby. If the claims for mother and baby are asserted in the same complaint, care must be taken when pleading to distinguish the minor's claims, and the alleged damages related thereto, from those of the mother. Also, consideration must be given to whether and how the pre-majority medical expenses incurred by and on behalf of the child can be recovered. In general, a claim for the recovery of a minor's pre-majority medical expenses is considered in Maryland to be the parent's claim, and thus may be subject to the parental 3-year statute of limitations. But, as is set forth in the case of *Johns Hopkins v. Pepper*, 346 Md. 679 (1997), under certain circumstances, there are several exceptions to this general rule permitting a minor to recover for his own pre-majority medical expenses. For example, when the parental three-year statute of limitations has run in Maryland, the potential recovery of a minor's pre-majority medical expenses may hinge upon several factors. These include determination of parental financial resources, and whether the minor's medical bills were paid by Medicaid versus private insurance. Close attention to this potential pitfall must be given since the defense will often argue in cases in which the recovery of pre-majority medical expenses is precluded that any component of a proposed life care plan for the injured child (including the provision of pre-majority medical expenses will), correspondingly, also be precluded. If successfully argued, this may represent a substantial loss of the child's potentially recoverable economic damages.

The representation of non-nuclear families in birth injury litigation requires additional legwork and analgesics. Although often taken for granted, always verify who is the legal custodial parent or guardian by obtaining all court records concerning the child and the biological parents. Too often, the individuals seeking representation of the birth injured child from a disrupted family are unclear about court ordered designations of parental custody or the establishment of a guardianship. Spending precious time and resources representing a child on behalf of someone who is later found to be neither the custodial parent or guardian should be avoided. Even if the biological parents are not together, an effort should be made to have both parents execute any retainer agreement if only to avoid potential disputes between the parents down the road. Such disputes will often involve additional counsel, sometimes making parental consensus and the prospects for amicable cooperation and agreement more difficult. Emphasize to the parents that everyone's best interests, and especially that of their child, will be served by their cooperating with each other in the litigation. Defendants will attempt take full advantage of disputing parents who often can't even agree on their child's limitations and needs. In some cases, the parental situation is so toxic and potentially harmful to the child's case that establishing a non-parental guardianship for the purposes of the litigation is often essential. Even if the parents are cooperative, but especially if they are not, obtaining an independent legal guardian to represent the child's interests early in the case may provide key advantages throughout. This is especially true when the parents' personal and legal histories are such as to make it likely that the injured child's case will be contaminated solely by parental malfeasance. A guardian can execute answers to interrogatories on behalf of the child, and potentially also serve as a witness to testify to the child's injuries and disabilities and associated life care needs.

An independent guardian can also serve to mitigate defense suggestions that a monetary award to the injured child will be misappropriated. If the case goes to trial, the guardian can appear in court on behalf of the injured child, and the jury can be informed through the testimony of the guardian that any recovery will be protected and preserved solely for the child's benefit and will not be subject to dissipation by a less than exemplary parent. Having a guardianship established for this purpose acts to shield both the parents and the injured child from the

inappropriate assumptions that juries often make about how and by whom any jury award will be controlled. Although a guardian does not necessarily have to be an attorney, a competent attorney guardian can also assist in establishing a special needs trust on behalf of the injured child. They can apply for additional benefits to which the child may be entitled, including social security disability benefits, thus maximizing the child's ultimate recovery.

Proving the Birth Injury

The investigation of any potential birth injury case presents considerable challenges. Your primary client, the injured baby, is going to be singularly unhelpful in explaining to you how, when and by whom he or she may have been injured. Your client's parents, often participants and eyewitnesses to the acts or omission leading to injury, will typically have little to no idea about what happened to their baby or what may have caused their baby to be injured. It is not uncommon for parents to relate that they were told and understood that everything was always "okay" and were then offered no explanation for their baby's devastating outcome. And what about the medical records? In this era of electronic medical records, unless one is experienced in finding the chart entry needle hidden in the haystack of electronic medical record verbiage, they often present a substantial impediment to understanding how, when and by whom your client may have been injured.

Given these impediments, obtaining a detailed, focused history from the parents is the critical first step to gaining insight into the multiple factors that typically conspire to cause a birth injury. Information regarding a mother's prior obstetrical, surgical and medical history should be obtained. Because healthcare providers and their medical record copy surrogates typically do not confirm the production of complete medical records in response to pre-suit medical record requests, a diligent and close review of any medical records provided is essential. Reviews should be performed by an attorney or staff member who has the experience to immediately identify those categories of medical and nursing records that were not produced. Examples of the production of woefully incomplete medical records are legion. Assiduous follow-up and not-too-gentle "reminders" to healthcare provider defendants of their legal obligations to produce their patient's complete medical records are frequently required.

In addition to acquiring relevant pre-pregnancy maternal records, medical record requests should include the production of all pre-natal records, pre-natal fetal assessment and testing records, reports of obstetrical ultrasound studies and fetal heart monitor tracings, both in paper format and electronic stored format. The mother's complete labor and delivery admission records must also be acquired, including the fetal heart monitor tracings, any intrapartum obstetrical ultrasound study results, and any placental pathology report.

The fetal heart monitor tracings often provide the most critical information on the baby's status prior to delivery and during labor. Carefully review the fetal heart rate and uterine contraction patterns during labor to discern significant variations from normal patterns potentially indicative of actual or impending fetal injury. A close review of the fetal heart rate and uterine contraction patterns would include assessments of the fetal heart rate baseline, the presence or absence of accelerations of the fetal heart rate, fetal heart rate variability, and the determination of the existence, type and severity of any decelerations of the fetal heart rate. The presence of abnormal uterine contraction patterns during labor, especially during inductions of labor, may alone provide critical information pointing to the medically probable mechanism and timing of fetal injury.

The requests for the baby's records should include the complete newborn and neonatal hospital admission records. These records should be confirmed to include all laboratory studies (including umbilical cord and arterial blood gas studies), complete blood counts, blood chemistries, and other hematologic and microbiology studies. Reports of all neuroimaging studies should be obtained and closely reviewed. The neuroimaging reports will often provide critical information reflecting both the mechanism and timing of fetal brain injury. In most birth injury cases, the course and conduct of the immediate neonatal resuscitation and the later provision of neonatal hypothermia therapies may also provide important indicators of the probable mechanisms and timing of either a fetal, *in utero*, neurologic injury or post-delivery injury. A negligently performed resuscitation of an at-risk baby can often be the proximate cause of neurologic injury. In other cases, the failure to timely order and perform neonatal hypothermia therapies for suspected hypoxic ischemic encephalopathy may also contribute to a baby's ultimate neurologic injury. It again bears emphasizing that an experienced birth injury attorney will have the experience to identify and synthesize these disparate pieces of the complex birth injury puzzle allowing them to evaluate the potential viability of a birth injury case well before consulting competent expert witnesses.

Once suit is filed, acquire all photographs and videos taken of the baby after birth and while in the nursery or neonatal intensive care unit. Post-delivery photographs and videos may depict the extent and location of bruising, swelling and lacerations which, in certain cases, may aide in the determination of injury causation. In many assisted vaginal delivery cases where forceps or a vacuum extractor is used, the areas of visible discoloration or injury to the baby's head and face may confirm the improper placement or positioning of such devices during the delivery process. All such evidence must be identified and secured before it is lost, discarded or erased. Relying upon the deposition testimony of nurses, physicians and family members, which is often taken years after an injured baby's birth, to fill in the evidentiary blanks will rarely provide an adequate substitute for contemporaneously generated evidence.

Generally, the failure to recognize indicators of non-reassuring fetal or maternal status, and to appropriately and timely intervene to prevent fetal injury are the over-arching themes of an obstetrical negligence case. A common cause of traumatic birth injury from obstetrical negligence arises from fetal shoulder dystocia, a complication where, during attempted vaginal delivery, the baby's shoulder becomes impacted or "stuck" against the maternal bony pelvis. When a shoulder dystocia occurs, instead of calmly using well-accepted interventions and maneuvers to safely release the impacted shoulder before delivering the baby, the negligent obstetrician will often apply lateral traction to the baby's head directly. This often causes stretching and the complete avulsion of the nerves comprising the baby's brachial plexus, resulting in grievous upper extremity neurologic injuries in many cases. Frequently, the delivering obstetrician or midwife will fail to recognize that the baby's shoulder is impacted. This can lead to the same unfortunate outcome when vaginal delivery is attempted before the impacted shoulder being safely released. In other cases, the negligent failure to assess and intervene in response to signs of developing fetal hypoxia during labor can lead to fetal asphyxia and hypoxic ischemic encephalopathy. Fetal distress can also be caused by placental abruption, placental insufficiency, umbilical cord compression and any number of complications or conditions impairing placental function or fetal/placental blood flow. Recognizing and distinguishing among such potential causes to prove both the mechanism and timing of a birth injury, and its causal connection to any alleged negligence, is the foundation of any successful birth injury case.

Proving the Damages from the Birth Injury

The cast of expert witnesses required to prove a child's neurological, developmental, behavioral and/or cognitive deficits resulting from a birth injury is extensive. Adult or older children clients who have suffered a neurologic injury after having attained a certain level of schooling and academic achievement with a demonstrated functional capacity are markedly different. The multiple deficits arising from a brain injury at birth cannot simply be compared to any "pre-injury" level of baseline function that is easily presented to the jury. Thus, depending on the extent of the underlying brain injury and the deficits arising therefrom, a birth injury case may require engaging damage experts. Their knowledge in specialties and sub-specialties such as developmental pediatrics, pediatric neuropsychology, neonatal and pediatric neurology, pediatric physiatry, pediatric orthopedics, pediatric vocational, speech and language and occupational therapy, and life care planning is essential to the case. Formal neuropsychological testing, which is sometimes used to more definitively establish the child's deficits, often cannot be performed until the child is older. However, delaying the filing of an otherwise meritorious suit, potentially for several years, to confirm the full extent of a child's neurodevelopmental impairments through formal neuropsychological testing is often not an option and the delay alone may have a significant negative impact on the potential value of the case. Thus, engaging well qualified damage experts, who have the training and experience to reasonably explain to the jury the gamut of both short and long-term deficits and disabilities that a brain injured baby will face, is a key to success.

Another method of demonstrating an injured child's motor and functional deficits can be a "day-in-the-life" video. As powerful as a single picture may be, a well-crafted video of an injured child striving and often failing to function normally may be the best means of confirming to a jury the significance of the child's underlying neurologic injury. The "day in the life" video can also be used to fairly demonstrate the immense burden family members often carry simply to meet the myriad daily care needs of their injured child or sibling. A focused video presentation of a brain injured child will often depict basic activities of daily living, portraying typical morning and night-time routines including bathing, eating, transporting the child to and from school or therapy, and interactions with family members and teachers. These videos may not necessarily be admissible in their entirety but can be

viewed and relied upon by expert witnesses, including the life care planner tasked with putting together the services that the child needs. They are also useful at mediation, especially if the injured child's degree of cognitive or motor function, or her ability to spontaneously interact with her environment, are subject to dispute.

Formal educational programs and occupational therapy, speech therapy and physical therapy can be initiated early in the child's life. Federal and state-run programs for children with cognitive deficits typically operate under the American with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). The public-school system may provide certain therapy services to disabled children, but such services are typically limited and are subject to the constant funding pressures that the public schools typically face. As a result, brain injured children rarely are provided the therapy services they require and deserve. Despite this, defendants in a birth injury case will typically argue that all of the brain injured child's therapy needs can be provided "free of charge" by the school system or by charitable organizations such as United Cerebral Palsy or Easter Seals, thus rendering any additional services, to be paid for by the defendants, unnecessary and unhelpful. The defendants' damages mantra of: "A brain injured child shall only get what she needs, and she needs only what she gets" is invoked to distract a jury from providing full and fair compensation to permit the provision of therapy services designed to maximize the child's potential. An injured child deserves more than the bare minimum services provided by overburdened, underfunded governmental programs. Further belying the defense mantra that all necessary therapy services are and will be provided to the brain injured child by our compassionate, caring government - "free of charge" - is the fact that many of the therapy and related services provided by schools are being billed to Medicaid and are then added to their lien, which the injured Plaintiff is then required to pay back from any recovery.

A child's educational records will frequently not provide an accurate or complete picture of deficits. IEP's and 504 plans can sometimes help or more frequently hurt a case given their limited purpose and focus. Make sure that the parents and guardian understand that participating in advocating for these services is important even if necessary services are not provided. If the IEP or 504 plan underestimates the child's deficits and/or fails to provide for obviously needed additional services, the institutional constraints and the motivations for educators to underestimate needs should be explored and explained. Expert witnesses must know what is in the 504 and IEP plans, and how and why these plans differ from the child's life care plan. Many times, conscientious educators will concede when deposed that their school system simply doesn't have the staff, resources, budget or facilities to provide brain injured children with all the therapies and related services they require.

There are many more important aspects of representing clients in birth injury cases that are well beyond the scope of this article. The competent representation of these too often tragically injured children is demanding and requires diligence and a close attention to detail at every stage of the case investigation and litigation. A commitment to learning the medicine, reading and understanding the topical medical and nursing journals and identifying and marshalling the support of experts in multiple specialties is essential. Often, it is just the tip of the legal representation iceberg in any birth injury case. Beyond the strictly legal and academic, however, compassion for these faultless children and their families in need drives our representation. These injured children deserve and should receive our best efforts. There is perhaps nothing more professionally gratifying than providing the monetary resources to a child needlessly injured at birth to help her achieve the best life still possible.

Biographies

Bruce J. Babij is a partner and principal at Dugan, Babij, Tolley Kohler, LLC. Bruce has served an attorney since 1985 and has won numerous cases and awards. He primarily devotes his practice to the representation of infants and children who have suffered birth trauma and birth related injuries caused by obstetrical or neonatal malpractice. Bruce has successfully litigated such cases on behalf of these most innocent of victims across the United States, recovering hundreds of millions of dollars in compensation on their behalf.

Ellen B. Flynn is an attorney at Dugan, Babij, Tolley Kohler, LLC with 20 years of experience litigating complex personal injury, medical negligence and commercial cases in the state and federal courts of Maryland, the District of Columbia and Connecticut. She is currently on the MAJ Board of Governors, serves as the co-chair of the Nursing Home Section and the Trial Reporter Committee. Ellen is also slated as the 2018-2019 President-Elect of MAJ.