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ASKED & ANSWERED

Brian McKeen on medical malpractice suit

By STEVE THORPE
Legal News

A Genesee County jury recently awarded a woman nearly \$13 million in her medical malpractice lawsuit against Genesys Regional Medical Center. In the suit, Libbey Bryson claimed that because of preventable medical errors, her daughter was born without the use of her right arm and with other deformities. Brian McKeen is managing partner and founder of McKeen & Associates. His primary areas of practice are personal injury litigation, medical malpractice and drug product liability. He has tried cases throughout the United States and currently sits on the executive boards of the Michigan Association for Justice (MAJ) and the American Association for Justice (AAJ).



McKEEN

McKeen formerly served as chair of the AAJ Professional Negligence Section, Medical Negligence Exchange Group and Birth Trauma Litigation Group (BTLG). He represented Libbey Bryson in her lawsuit against Genesys Regional Medical Center.

Thorpe: Can you give us a basic outline of the case?

McKeen: The mother presented to the hospital for induction of labor at term. She was a gestational diabetic and had a large baby, 8 pounds, 8 ounces. During delivery, there were some worrisome indications on the electronic fetal monitor. Additionally, the baby was not descending down the birth canal. But the physician nevertheless forged ahead with the induction rather than offer the mother a Caesarian section delivery.

At the time of the delivery, the baby's shoulder got caught under the mother's pubic bone, which is known as shoulder dystocia. Then the resident intern pulled excessively hard on the head causing this permanent brachial plexus injury.

Thorpe: What are the causes and effects of Erb's Palsy?

McKeen: The cause is excessive, downward lateral traction during delivery on the brachial plexus. Pulling on the baby's head and neck is what causes this injury.

The effect, depending upon the severity, is paralysis of the arm and, in some cases, hand. So this child had extensive brachial plexus injury, which resulted in permanent limited mobility arm and some function of loss in her hand. She already has undergone two surgeries performed and will require continued therapy and assistance in order to complete daily tasks, such as brushing her hair or getting dressed.

Thorpe: How often does this sort of birth injury occur?

McKeen: While brachial plexus injuries are one of the most common birth trauma claims that I handle, this type of injury happens in about 1 in 10,000 births.

This is not an injury that occurs in utero. It occurs only at delivery if a doctor uses excessive traction. One of the reasons we are seeing more injuries like this occurring is due to the fact that women are giving birth to larger babies, which are more apt to get caught under the pubic bone.

Thorpe: These sorts of birth injuries were once attributed to the normal forces of labor. How has that theory been discredited?

McKeen: On the contrary. Historically, this sort of birth injury has been related to excessive traction at the time of delivery when the physician acts to disimpact the shoulder.

But in the last 20 years, there was a small group of so-called experts, who are frequent testifiers in malpractice cases and cite each other in support of their opinion. They are the ones who wrote these articles stating that these birth injuries could happen from in utero forces and independent of the physician's actions.

This theory is simply not true and is backed up by additional evidence stating that brachial plexus is an iatrogenic, or physician-induced, injury.

Thorpe: The judge said that the award was (See ASKED & ANSWERED, Page 2)

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the biggest he's seen in his court. Why do you think the jury was so generous?

McKeen: I don't know if it is a matter of generosity as much as it is the appropriate level of compensation given the severity of the injury. The truth is that most malpractice cases never even go to verdict. They generally get resolved. This is probably the largest this judge has seen because no one has ever tried a malpractice case in his courtroom like this that included such substantial damages.

The defense attorneys try to hand select the cases to try where the plaintiffs are likely to lose, or,

if the plaintiffs are going to win, they will win just a little amount.

Brachial plexus injuries are severe injuries that have lifelong consequences to the child both economically and non-economically. When these cases occur, these children are entitled to substantial compensation. Too many cases have gone undercompensated.

Thorpe: The award will likely be reduced by Michigan law. How does that work?

McKeen: The future damages get reduced to the present cash value and then the money is allocated to non-economic damages (i.e., pain and suffering), which is capped.