

Creativity in Expert Selection for Birth Trauma Cases

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Birth trauma cases are among the most esoteric and labor-intensive cases we undertake as medical malpractice lawyers. Proper expert selection is a critical component for success. Certificate of Merit questions aside, each case presents its own issues that require a plaintiff's lawyer to carefully evaluate the array of experts needed to cover all the bases. It is not as simple as ensuring you have retained a liability, a causation and a damages expert. Rather, there are seemingly endless specialty areas, medical and non-medical, that must be considered when selecting the right experts to maximize the strength of your case.

In birth trauma cases, the fetus sustains a life-altering injury either *in utero*, during or sometimes right after delivery. In many cases, the baby will suffer an anoxic or hypoxic brain injury. Assuming the baby survives, he or she will undergo intensive neonatal treatment, and upon hospital discharge will be followed by multiple specialties during childhood and beyond. Many of these children are diagnosed with compromising, life-long afflictions such as cerebral palsy and spastic quadriplegia.

Analyzing a birth trauma case requires a serious commitment of time and brainstorming when selecting experts. This article will discuss various experts to consider when tackling a birth trauma case.

Liability

The most common liability expert in these cases is an obstetrician. For high-risk pregnancies, an obstetrician certified as a maternal fetal medicine specialist is recommended. The obstetrician can opine against anyone on the "delivery team;" however, if your case focuses on the liability of a non-physician, a nurse midwife, labor and delivery nurse or other appropriate practitioner should be retained.

Labor and delivery nurses, much more so than physicians, are the providers consistently at the patient's bedside. If your case involves fetal heart rate monitoring, you should retain both an obstetrician and an OB nurse to review and comment on the strips.

Focused discovery requests can generate critical documents separate and apart from the medical record including policy and procedure manuals, audit trails and metadata. Every so often, the "smoking gun" is found in these alternative data sources. If the practitioners violated their hospital's policies and procedures, an expert in hospital administration may be an important cog to strengthen your liability argument. Likewise, informatics and forensic experts can use metadata and audit trails to uncover alterations to the medical record or prove a physician did in fact view a critical radiology study, for example.

It is also critical to determine the communication system between providers. For example, if the on-call OB/GYN is not physically present in the hospital, request telephone records to determine whether the delivery team was in contact with the physician during the pertinent times during labor. A forensic expert in this regard can prove quite useful in pinning the defendants down.

Finally, consider retaining redundant experts on liability. Producing consistent reports from multiple obstetricians only strengthens the case, even if only one is ultimately going to testify at trial.

Causation

Causation is the area in birth trauma cases where lawyers can be most creative in terms of expert selection. Here is an unexhaustive list of physician specialty areas to consider for your birth injury case:

a. Pediatric Neurologist

Pediatric neurologists are experts on brain abnormalities and therefore vital to retain. Neurologists not only evaluate the circumstances behind the labor and delivery to determine the cause of the child's injuries, but also evaluate the child to discuss the extent of injury, comment on life expectancy, and assist the life care planner in crafting a detailed plan for the child's future medical needs. A neurologist is recommended for every birth injury case.

b. Pediatric Neuroradiologist

Particularly in hypoxic brain injury cases, a neuroradiologist is crucial to evaluate the pertinent imaging studies and relate the findings to the alleged injuries. Neuroradiologists will (hopefully) confirm that the pattern of brain injury is in fact that typically associated with an hypoxic ischemic injury and evaluate the timing of the brain insult.

c. Pediatric Infectious Disease Physician

When there is an underlying infection such as Group B streptococcus or chorioamnionitis, the defense will certainly argue that infection caused the child's injuries, as opposed to the failure to provide obstetrically appropriate care. When there is such an underlying infection, a smart prophylactic measure in the plaintiff's lawyer's tool kit is to retain a pediatric infectious disease physician to rule out maternal and/or fetal infection as a proximate cause of the child's injuries.

d. Placental Pathologist

After delivery, the placenta goes to pathology for forensic examination. Specimens are typically retained by the hospital for some finite period thereafter. Unless obtained pre-litigation, placental pathology slides should be immediately requested in initial discovery demands. The placenta can tell a pathologist quite a bit about the pregnancy and the health of both mother and fetus. In the event of an existing infection in the mother, a pathologist examining the placenta can determine whether that infection played a role in the subject injury to the fetus.

e. Neonatologist

In cases involving neonatal injuries such as hypoxic ischemic encephalopathy, a neonatologist is a valuable resource. In high-risk deliveries, neonatal intensive care ("NICU") teams are called into the delivery or operating room. Neonatologists lead this team. Thus, neonatologists provide keen insight as to why a poor outcome occurred neonatally. Alternatively, in a case where the plaintiff alleges an *in utero* injury, a neonatologist can rule out an extraneous neonatal cause.

f. Geneticist

A genetics expert can help separate fact from fiction. For example, a child diagnosed with hypoxic ischemic encephalopathy undergoes subsequent genetic studies. The microarray reveals a microdeletion suggestive of a disorder known to cause global delay. The smart defense attorney will try to link the brain injury to the genetic abnormality. It is imperative that a geneticist is retained to exclude the abnormality as a cause of the child's brain damage. A geneticist can also perform genetic testing on the child to prophylactically rule out any chromosomal abnormalities which can muddy the causation waters.

g. Pediatric Orthopedic Surgeon

Shoulder dystocia cases are common birth injury cases involving injury to the newborn's brachial plexus nerves during delivery. These children should be evaluated by pediatric orthopedic surgeons specializing in the treatment and surgical repair of brachial plexus injuries.

Damages

Damages experts increase the value of the case and enable you to craft a justified demand. Creativity and an "outside the box" mentality will benefit your client's case. Below are some damages experts to consider for your case.

a. Life Care Planner

A life care planner, often a nurse, evaluates all medical records and interviews the child and his or her family in order to outline the child's future medical needs. The expert develops an integrated "plan"

that includes items and services required, along with their specific costs. This individual should coordinate efforts with the experts discussed *infra*.

b. Physical Therapist

Consider a physical therapist to discuss the special rehabilitation needs the child will require as he or she grows.

c. Developmental Psychologist

This expert therapist can evaluate the child and propose a plan focusing on physical, cognitive, social, intellectual and perceptual growth. In extraordinary cases this expert can provide a window to alternative areas of damages.

d. Vocational Rehabilitation Specialist

A vocational rehabilitation specialist is hired to discuss the child's potential future employability, the skills required in various sectors of the job market and accommodations the child may need in an occupation. This expert should be considered in cases where the disabled child has at least reached early adolescence.

e. Economist

An economist or actuary is critical to reduce the life care planner's lifetime cost estimates to their present value. Do not forget to retain an economist in every birth injury case.

f. "Day in the Life" Videographer

While not technically an "expert" in the way we traditionally think of them, a savvy videographer is indispensable for your case. The videographer will film what we refer to as a "day in the life" video to visually document a child's typical day. The finished product will be a well-edited chronicling of the challenges of routine daily activities, including but not limited to dressing, changing, bathing, transporting and the provision of at-home medical care. The video will highlight the variety of medical equipment needed to help sustain the child's life. These videos are quite helpful for mediation and are typically admitted at trial.

Conclusion

The more experts retained, the higher case costs will obviously rise. Should the case proceed to trial expert costs alone can be massive. However, when first deciding whether to take on a birth injury case, you must consider potential value along with chance of success. The variety of experts needed will be a continuous process during the discovery period. Most cases will justify the lofty expenditure. The "leaving

no stone unturned" approach ensures all relevant issues on standard of care, causation and damages issues are considered.

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