Protecting Parents: Breaking Through Juror Bias in Children's Cases

Introduction.

There's a Chinese proverb that says a child needs two things: roots and wings. In the case of a severely injured child, whether by medical negligence, a dangerous product or by some other negligence, it's the alliance of parents and the child's lawyer from which those roots and wings derive. Parenting an injured child is no easy task; neither is representing a family devastated by the loss of what should have been. For better or worse, parents bring their abundant love, grief, rage and personal demons to the litigation process. The challenge we face in representing parents of injured children is to channel their devotion and energy toward the best outcome, and to protect them against juror bias arising out of those human shortcomings every parent knows and owns.

Case Evaluation -- Vetting the Family.

It goes without saying that every preliminary case evaluation includes assessment of the parents. Family dynamics are unique. The time to vet those dynamics is not while sitting next to the parents at their depositions or in the heat of trial preparation. Control over that which can be controlled must start early and continue throughout the case.

The initial substantive conversation with parents typically focuses on what happened to their baby and what events caused them to contact a lawyer in the first place. Medical records obtained after that preliminary client meeting may be the first appearance of issues that, at a minimum, are likely to appeal to defense

lawyers, and maximally may result in a plaintiff's lawyer's decision to reject the case.

The most serious issue is of course maternal noncompliance which nurses, residents and attending physicians seem to document in minute detail. Most maternal noncompliance can be dealt with through the plaintiff's expert witnesses' testimony on the standard of care and causation, since noncompliance is a nonissue if any impact on the outcome is speculative, which it typically is. Other maternal issues that may appear in the medical records include prior abortions, paternity issues, chemical dependency or a psychiatric history that may lead to defense discovery requests for counseling, therapy and prescription records. Other parental issues of concern relate to criminal history, employment history, immigration status, or a history of prior unrelated legal claims.

Know and Protect the Records.

Before either agreeing to defense medical authorizations or responding to a compel order for the client's medical records, it's critically important to know what's in them. Assume at the outset that all medical records may be disclosed, and take a detailed history from the client of all related and unrelated medical and psychological contacts in the recent past. Full knowledge of the records' contents should trigger specific motions in limine to exclude medical information not causally or historically related to the case, as well as the ability to adequately prepare and protect the client for what's coming in her discovery deposition and on cross examination at trial. Defense medical authorizations for the plaintiff's

medical records must identify the specific health care provider and time frame. Defense requests for blank authorizations that are not appropriately limited violate the physician-patient privilege.[1]

Educate Parents About the Concept of "Discoverable" Things.

Significant and serious injuries require ongoing medical care and result in established relationships with subsequent treating health care providers. Educate the parents that the treating medical records are a critical element of the plaintiff's case. Missed physician visits and therapy sessions must be kept to a minimum and for good cause only. Parents should be instructed that attorney/client discussions are privileged and not to be shared with anyone, including the plaintiff's health care providers. Parents should also be educated to prepare for every physician and therapy visit with a detailed problem list regarding all ongoing pain, disability or disfigurements the child continues to endure as a consequence of the permanent injury. Parents should be made aware that while everyone is gratified when the child's condition improves, everything they relate to the child's providers becomes part of the child's record, including statements such as "parents are thrilled with the patient's condition." Since parents don't have the opportunity to participate in the mechanical creation of the medical record, it's incumbent upon the family's lawyers to educate the parents about the basics of medical record-keeping, and what parents can do to assure that their child's medical records accurately depict their child's condition and experiences.

Additionally, because of the prevalence of smart phones, this is undoubtedly an age of digital preservation and digital sharing. Inquire early in the case whether the parents or anyone in the family recorded of any event relevant to the case – before, during or after the event leading to the injury occurred. Extended family may be present at any point along the timeline of the child's case, and even a video of a birthday party long after the injury may yield important evidence.

The same inquiry should be made concerning the existence of logs, blogs, diaries or journals. For example, in a recent case, a family member of the plaintiff was present at the difficult, traumatic birth. As a registered nurse, she understood the importance of documentation and after the delivery wrote a detailed summary of what she saw. When she disclosed the existence of the written summary to the defense at her deposition, they vigorously pursued its discovery, and upon receipt, just as vigorously pursued its exclusion at trial.

The scope of digital sharing necessarily extends to social media: Facebook, MySpace, LinkedIn, Twitter, SnapChat, Blogger, Flikr and YouTube constitute a vast data base of everyday life. Two critical points should be made with parents at the outset of the case: everything they publish on the internet is potentially discoverable, and destruction of any existing posts could be sanctionable conduct.

Parents should be advised to stay off social media during the pendency of the case or at least restrict their activity to a minimum. Ohio courts have taken a

mixed approach to how far discovery extends into the world of social media. For example, the Eleventh District of Ohio noted:

> [W]ith respect to her MySpace account, appellant admitted in open court that she wrote these on-line blogs and that these writings were open to the public to view. Thus, she can hardly claim an expectation of privacy regarding these writings.[2]

Ohio's Eleventh District joined a number of other jurisdictions who similarly held that a plaintiff's voluntary sharing of personal information on social media constituted a waiver of any privacy concerns.[3] However, Ohio's Fifth District approached the admissibility issue from a different perspective, holding:

> We find the trial court did not abuse its discretion in excluding the photographs because there was no evidence presented as to where and when the [Facebook] photographs were taken or that the photographs are accurate representations of the scene which they portray.[4]

Ohio's Fifth District relied upon the Ohio Rules of Evidence as the basis for excluding Facebook photographs that could not be authenticated with "evidence sufficient to support a finding that the matter in question is what its proponent claims."[5]

Parents as Party Plaintiffs – Yes or No?

Since a minor child can't bring an action on her own behalf, a threshold question is who should? The quick answer is the natural guardian, the legal guardian, or both. If the parents are likeable, reliable adults, by all means, name them as plaintiffs and next friends on behalf of the minor plaintiff. If naming the parents opens them to scrutiny likely to detract from the merits of the child's case, take steps pre-suit to appoint a legal guardian of the child's estate only.

There are multiple permutations of adult plaintiffs bringing the case on behalf of the minor. The first approach is for the parents to bring the case on the child's behalf with all of the child's claims, and with the parents' claims for loss of consortium, medical expenses and lack of informed consent, if applicable. In this setting, the parents are involved in the litigation process, including sitting at trial table and acting as legal guardians through the probate approval of the distribution of a settlement or verdict.

The next option is to name the parents as plaintiffs bringing the minor's action but contemporaneously open an estate, appoint a legal guardian, and omit any claim for the parents' loss of consortium. Under this approach, the jury is advised that the parents bring the claim only in the capacity as the child's guardians. While the parents may still sit at the trial table, omitting the loss of services claim allows for argument that everyone is working toward one goal – protecting the child's future with money damages that will benefit the child and only the child.

Finally, another option is to obtain a legal guardian for the child's estate only. The case is then brought with the legal guardian as the named plaintiff along with the minor child. Naming an independent legal guardian is helpful in circumstances where either or both parents' health or background prevent their meaningful, active participant in the litigation. The parents retain their status as guardians of the child's person.

Whether the parents remain as party plaintiffs or not, an independent legal guardian is an invaluable trial witness called for the purpose of informing the jury

that their verdict in favor of the child will be protected by an independent probate court and an independent officer of the court – the child's legal guardian.

Deposition Preparation, Preparation, Preparation.

Parents must be knowledgeable about a plaintiff's burden of proof in order to be expected to perform well at their depositions. The prep session should not only include an explanation of the roles of the individuals present at the deposition, but likewise that all of the questions posed to them should relate to an element of the lawsuit – negligence, causation or damages. Discussions about the facts necessary to support each of those elements should include consideration of the best and most truthful answers to the toughest questions.

Plaintiff's lawyers are child advocates, but the role necessarily requires protection of the parents, particularly the mother, from irrelevant, harassing questions. In her deposition preparation, the mother should be forewarned she'll be instructed not to answer certain questions concerning subject areas that have no bearing on the litigation and improperly invade her privacy: abortions, the identity of other fathers of nonparty siblings, sexually transmitted diseases, smoking, alcohol consumption/drug use during any time other than pregnancy, tattoos, psychiatric history, financial problems, refusal of care, unemployment, insurance or lack of, or inadmissible criminal history. Exception to this list, of course, is any of the foregoing having relevance to the case. Fairness and courtesy argue against a double standard applying to the background questions a plaintiff's lawyer would refrain from posing to a physician or nurse, and the

background questions defense counsel routinely pose to the parent of an injured child.

Finally, statistically and tragically, it is not uncommon for marriages of parents of disabled children to fail. Ultimately, a jury should see the child and her family as heroes in their struggle to overcome the challenges they face on a day to day basis.[6] Thus, negativity between parents has no place in a child's story, and should never be an element of the damages. Rather, parents should commit to maintain a joint venture to protect their child's future.

Divorce is a good segue to the next topic of dealing with the difficult parent in the litigation process -- "difficult" used broadly since raising a child with a permanent disability because of human carelessness understandably invokes immense grief, deep anger and fierce devotion. When these issues become a stumbling block in the case's progress, the plaintiff's lawyer shouldn't hesitate to seek outside assistance from a qualified witness consultant, the penultimate expert in identifying barriers to a parent's effectiveness as a witness at deposition or trial.[7] Through role-playing and other techniques, a witness consultant is a valuable resource to help the parents of a catastrophically injured child find their voices in a productive and meaningful way.

Parent Topics for Pretrial Motions in Limine.

Topics to consider for pretrial motions in limine about parents fall in two main categories: noncompliance and everything else. Turning first to "everything else," a thorough and complete pretrial omnibus motion in limine should anticipate and prohibit reference to any irrelevant, unfavorable matters:

holiday greeting/thank you cards from the plaintiff to the defendant, voluntary dismissals, prior lawyers, prior lawsuits, prior marriages, divorces, smoking, abortions, alcohol/recreational drug use, unfavorable immigration status, domestic violence, or any other petty offenses. The list should be exhaustive -- not only to shut down the introduction of inadmissible evidence but to alert the trial judge of hot button issues that may arise.

In the face of a child's catastrophic disability, rarely is there disagreement about the existence or permanency of the injury. Rather, the typical defenses focus on causation, and/or the injury's nature and extent (i.e., value). Defense experts often point fingers at the mother for exacerbating her child's injury with her noncompliance in following medical advice, attending scheduled office visits, and timely or consistently seeking specialty care, surgery and/or therapy.

The intervening negligence of a parent does not relieve a defendant of liability if the injuries at issue are clearly a result of defendant's own conduct, and "if the intervening cause was set in motion by the defendant."[8] To successfully break the chain of causation, a defendant must not only prove that the parent's conduct was disconnected from his own original negligence, but also that the parent's conduct was not foreseeable when the original negligent conduct occurred.[9] Only superseding intervening causes break the chain of causation.[10] An alleged superseding cause does not cut off liability when it is itself foreseeable. If there is competent, credible evidence to support the finding that parent's conduct was necessitated by or connected to the defendant's negligence, it fails to stand as an independent act sufficient to break the chain of

causation and relieve the defendant from liability, and thus grounds for a motion in limine to exclude it.[11]

Omitting any parent's claim for damages has a protective effect because in that circumstance whether or not she is negligent has no bearing on her child's claims. As a general matter, the negligence of a parent is not imputed to her child.[12] In a negligence action brought on behalf of a child, the affirmative defense of contributory negligence is available against the parent only so far as she is the beneficiary of a derivative claim.[13] If there is no derivative claim, there is no "noncompliance" defense.

In holding that a parent's negligence cannot be imputed to a child of tender years, the Supreme Court of Ohio has stated:

> [W]here the proof shows that the boy is of that age, education and experience, to justify the submission of the question of his contributory negligence to the jury, as appeared in this case, the determination of that question by the jury, where no special finding is required or returned, establishing the conclusion of the jury that the boy because of his age, education and experience was not capable of guilt of contributory negligence, effectually covers the element of contributory negligence applied to the particular accident of the particular case. ****
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> ***[The] contributory negligence of the father or mother or both, as the question is raised in the record, has no relevancy except as it may affect their right of recovery as beneficiaries***.[14]

The Supreme Court applied an identical analysis in the more recent case of *Shinaver v. Szymanski*, a personal injury action arising out of an automobile accident where the plaintiffs were the driver and his children who were passengers in the car.[15] Mr. Shinaver was found to be contributorily negligent,

however, that finding was “a partial defense only as to his share of the right to a recovery of damages, but [did] not constitute a defense to the right of his children to recover damages.” [16] Thus, the Court concluded that the contributory negligence of one plaintiff is a partial defense ***only as to that plaintiff’s injuries***, but is not a defense against other “non-negligent” plaintiffs.[17]

Additionally, children of a certain age cannot be found contributorily negligent for their injuries and damages as a matter of law. In general, although children are required to exercise ordinary care to avoid the injuries of which they complain, “they are not chargeable with the same care as persons of mature years.”[18] They are required to exercise the ordinary care of children of similar age.[19] Subsequent to its decision in *Grambo,* the Supreme Court of Ohio held that “the protection is even greater for younger children.”[20] "[A] child under seven years of age is, as a matter of law, incapable of negligence."[21] The submission of contributory negligence claim against a child of that age constitutes reversible error.[22]

Evidence of maternal noncompliance carries a high risk of angering or biasing a jury to find against the plaintiffs or to discount a plaintiff’s verdict on account of it. Use of such evidence for that purpose is improper and should be grounds for a motion to exclude it.

The Parents as the Child’s Voice at Trial

Giving a human voice to the child’s life at trial is probably the most profound and important role of a parent in a child’s case. Only a mother or a father can describe the sleepless nights, post operative pain, and extended

hospitalizations. These are important experiences to share with the jury. But it's the parents' real life stories about their son's isolation and exclusion from normal childhood, as well as the real life stories about his bravery and perseverance in overcoming those obstacles that provide the jury a window into the child's past, present and future.

Conclusion.

There is an ocean dividing sympathy from empathy. Sympathy is how one person ***witnesses*** another person's suffering. Empathy is how a person ***experiences*** another's suffering.

In a child's case, it's the plaintiff's lawyer duty to prevent the defense from projecting a distorted or unfair picture of the family, especially the parents. The lawyer's role requires extensive knowledge of the records and events before, during and after the defendant's conduct which led to the injury. It also requires frequent and detailed communication with the family (and extended family) to assure that everyone is clear about each step in the litigation and about the importance of the family's full and active participation. Prevention of a negative narrative about the family is critical to the success of a child's lawsuit.

Our goal is to achieve the ultimate protection for an injured child with an uncertain future, one that would not otherwise include personal autonomy or the best quality of life. A jury is more likely to participate in our goal if we ground our message in the perseverance, optimism, integrity and inner strength of the parents who included us in their journey.

[1] R.C. §2317.02(B). See also, *Folmar v. Griffin* (5th Dist. 2006), 2006-Ohio-1849; *Thompson v. Chapman* (5th Dist. 2008), 2008-Ohio-2282; *Patterson v. Zdanski* (7th Dist. 2003), Belmont App. No. 03BE1, 2003-Ohio-5464, 2003 WL 22339492; *Neftzer v. Neftzer* (12th Dist. 2000), 140 Ohio App.3d 618**,** 748 N.E.2d 608; *Nester v. Lima Mem. Hosp.* (3d Dist. 2000), 139 Ohio App.3d 883**,** 745 N.E.2d 1153; *Menda v. Springfield Radiologists, Inc.* (2d Dist. 2000), 136 Ohio App.3d 656**,** 737 N.E.2d 590**;** *Rinaldi v. City View Nursing & Rehab. Ctr., Inc.* (8th Dist. 2005), 2005-Ohio-6360, 2005 WL 3215146; *Wooten et al. v. Westfield Ins. Co.* (8th Dist. 2009), 2009-Ohio 494; *Sweet v. Sweet* (11th Dist. 2005), 2005-Ohio-7060, 2005 WL 3610481.
[2] *Dexter v. Dexter*, 11th Dist. No. 2006-P-0051, 2007 WL 1532084, fn. 4 (May 25, 2007).
[3] *Beye vs. Horizon Blue Cross Blue Shield of New Jersey*, 568 F.Supp.2d 556, fn. 3 (D.N.J. 2008); *Largent v. Reed*, Pa.C.P. Franklin County No. 2009-1823 (November 8, 2011); *McMillen v. Hummingbird Speedway, Inc*., Pa.C.P. Jefferson County No. 113-2010 CD (September 9, 2010).
[4] *Oliver v. Oliver*, 2013-Ohio-4389, 2012 AP 11 0067, ¶ 65 (5th Dist. 2013).
[5] Ohio Evid.R. 901(A).
[6] *Twelve Heroes, One Voice,* Carl Bettinger, Trial Guides LLC 2011.
[7] *Preparing The Parents of The Child Client,* Katherine James, ACT of Communication Website Knowledge Tank, March 2011.
[8] *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.* (1995), 73 Ohio St.3d 609, 619, quoting *Mouse v. Cent. Sav. & Trust Co.* (1929), 120 Ohio St. 599, paragraph one of the syllabus.
[9] *Queen City Terminals*, 73 Ohio St.3d at 619-620; *Berdyck,* 66 Ohio St.3d at 584-85; *Reed v. Weber* (1992), 83 Ohio App.3d 437, 441-442.
[10] *Id.*; *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282; *Turner v. Children's Hosp., Inc.* (1991), 76 Ohio App.3d 541, 558. See also *Taylor v. Webster* (1967), 12 Ohio St.2d 53, 56; Cascone v. Herb Kay Co. (1983), 6 Ohio St.3d 155; *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 768.
[11] *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77; *Shinaver v. Szymanski* (1984), 14 Ohio St.3d 51; *Grange Mut. Cas. Co. v. Fleming* (1982), 8 Ohio App.3d 164; *State Farm Mut. Auto. Ins. Co. v. VanHoessen* (1996), 114 Ohio App.3d 108.
[12] *Wolf v. Lake Erie & Western Ry. Co.* (1896), 55 Ohio St. 517, 520.
[13] *Id.* at paragraph 3.
[14] *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Grambo* (1921), 103 Ohio St. 471, 477. Emphasis added.
[15] *Shinaver v. Szymanski* (1984), 14 Ohio St.3d 51
[16] *Shinaver*, 14 Ohio St.3d at 52.
[17] *Id.* at paragraph 3 of the syllabus.
[18] *Grambo,* 103 Ohio St. at par. 1 of the syllabus.
[19] *Id.*
[20] *Gentry v. Craycraft* (2004), 101 Ohio St.3d 141, 146.
[21] *DeLuca v. Bowden* (1975), 42 Ohio St.2d 392, paragraph one of the syllabus.
[22] *Holbrock v. Hamilton Distributing, Inc*. (1967), 11 Ohio St.2d 185, 189.