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## Major Medical Malpractice Decision: *Robertson v. B.O.*

I had initially planned to discuss the law on expert testimony by way of the recent Court of Appeals medical malpractice case *Carter v. Robinson* decided on Tuesday. However, the following day on Halloween the Indiana Supreme Court handed down another medical malpractice decision the weight of which vastly eclipses the *Carter* decision. The case, *Robertson v. B.O.*, has led to much excitement among the plaintiff's bar. A quick summary of the holding was provided by Justice Massa in authoring the unanimous (4-0) decision.

In defending against a petition to recover excess damages arising from a medical malpractice action, may the Indiana Patient's Compensation Fund—after the healthcare provider settles with the plaintiff and admits liability—present evidence to dispute the existence or cause of the plaintiff's injury? In some types of cases, we have previously said yes. In the type of case before us today, however, we say no.

For those of you wondering why the five justice Court had a unanimous decision with only four justices, the answer is because Justice Rush has not yet taken her seat upon the bench, but is expected to do so next week.

Though we do not always delve into the specific facts of a case in our posts, this case is one in which such a review is necessary. Plaintiff, B.O., is a child who was diagnosed with spastic diplegia – a form of cerebral palsy – when he was four.

B.O.'s parents filed a claim for medical malpractice owing to the negligence of the healthcare personnel during B.O.'s delivery. The specific negligence was alleged to be "fail[ure] to adequately monitor his condition during labor and delivery and then fail[ure] to respond [to] signs of fetal distress[.]" On the eve of trial, the case was settled.

While in most types of cases the settlement would have ended the matter. However, that is not how medical malpractice works in Indiana. In Indiana, there is a cap on how much a plaintiff may recover. That cap is set at \$1.25 million. However, it gets even more complex as to how that cap works. A plaintiff may recover the first \$250,000 from the negligent healthcare provider. However, the next \$1 million must be sought from the Indiana Patient's Compensation Fund (PCF).

B.O. filed his petition with the PCF to seek payment for the excess damages. In response, the PCF identified expert witnesses who may testify that either the child did not have spastic diplegia or that even if he did, it was not due to the negligence of the doctors and nurses during his delivery. In response, B.O. sought a determination by Marion County Superior Court Judge S.K. Reid – the trial court judge – that this expert testimony could not come in after the fact. Judge Reid agreed and issued partial summary judgment for B.O. on that issue. The basic argument was that the issue of liability had already been established but what remained was a determination of the amount that could be awarded from the fund for B.O.'s life altering injuries. Dissatisfied with Judge Reid's ruling, the PCF appealed. The Court of Appeals, with Judge Patricia Riley authoring the opinion, reversed. B.O. then sought, and was granted to transfer to the Indiana Supreme Court.

Before the Supreme Court there was one primary issue to be determined – whether liability had been established. In order to answer that question, the Court had to determine what "liability" meant in the context of Indiana's Medical Malpractice Act. The Act does not define the meaning of the word "liability." This was not a new challenge for the Court. It had previously looked to this issue in the case *Atterholt v. Herbst*. In *Herbst*, the Court recognized that the Act provides that where there is no definition assigned to a term then it shall "have the meaning consistent with the common law."

As you may have guessed, the next step was to look at how the common law identifies liability. The traditional definition of negligence requires a showing of: "(1) a duty owed by the tortfeasor to the tort victim, (2) a breach of that duty, and (3) an injury to the tort victim proximately caused by the breach." Once these three elements have been established, then the defendant is "liable" and the only thing

that remains is to determine the damages.

Using this definition, the Court determined two relevant criteria for this case.

First, “[i]t is axiomatic that, before liability can be imposed, there must be proof that the defendant’s negligence proximately caused the plaintiff’s harm.” Likewise, in order to establish liability, a plaintiff must demonstrate an injury; without a connection between the breach of duty and the injury, causation fails.

Because these two aspects are so interwoven, the Court found that the finding of liability against the defendant healthcare providers in the settlement, necessarily, provided a determination of an existence of injury to B.O. That is to say, that by settling the claims and identifying the reason as being for the spastic diplegia, the health care providers admitted to the existence of the spastic diplegia and that it was the result of their negligence.

The Court conceded that it might seem unfair that the PCF is bound to something that was not determined at a trial. However, that unfairness is what the Indiana legislature permitted in drafting the Medical Malpractice Act. The Court further, and importantly, noted:

In an effort to control the costs associated with medical malpractice claims, the General Assembly placed numerous constraints on plaintiffs such as a statute of limitations, the use of medical review panels, caps on recoverable damages, and retention of the contributory negligence defense. Perhaps in an effort to balance this sweeping reform, the legislature chose to provide plaintiffs with the benefit of final and established liability when the healthcare provider chooses to settle. It is not our place to upset that balance.

To summarize, the Court actually found that while it may on the surface seem unfair to the PCF, the entire system is stacked against the plaintiff to begin with.

This result is a fantastic one for not only B.O. but also for other persons who must seek a legal remedy for their serious injuries stemming from medical malpractice. On the surface, as a dispassionate observer, you may find such a result unjust – not permitting the PCF to contest the injuries. However, it is necessary to understand that in order to defend against the position of the PCF, B.O. would have had to spend several if not tens of thousands of dollars to pay for experts to contradict the testimony of the PCF’s experts. Now, you may be thinking, that B.O. with the \$250,000 settlement has plenty of money to spend in this case. But realize

that to get to the settlement stage, on the eve of trial, B.O. has already expended tens of thousands of dollars on medical experts and depositions just to get his case as far as it did.

So what does this mean? When you actually think about what happened here, you realize that a child will spend his entire life suffering from a form of cerebral palsy. That's not just a week, or a month, or even several years. It is a lifetime. According to the CDC's 2008 Life Expectancy Tables, the average life expectancy of a newborn American male is 75.6 years. This child will live more than 70 years without ever getting to be free of his condition. Even in a world in which he was not required to expend a great deal of any recovery to get even a cent for his injuries, we would be talking \$1.25 million. Certainly, that is no small amount. But would you take \$1.25 million to spend even a year with this child's condition let alone more than 70?

Join us again next time for another discussion on the complexities of the law and further developments.

### Sources

- *Carter v. Robinson*, 977 N.E.2d 448 (Ind. Ct. App. 2012).
- *Robertson v. B.O.*, 977 N.E.2d 341 (Ind. Oct. 2012).
- *Robertson v. B.O.*, 949 N.E.2d 404 (Ind. Ct. App. 2011), *trans. granted* (Ind. 2012).
- Indiana Medical Malpractice Act – Ind. Code article 34-18.
- *Atterholt v. Herbst*, 902 N.E.2d 220 (Ind. 2009).

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