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BATTLE TESTED Attorney goes to bat for malpractice victims

BY SHEILA PURSGLOVE
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Medical malpractice lawsuits have become much more difficult as a result of procedural hoops attorneys have to jump through—including severe restrictions on expert witness qualifications.

“Today, you need three experts instead of one,” explains Brian McKeen, one of Michigan’s foremost medical malpractice attorneys—adding that, as a result, fewer lawyers are willing to take on the risks, expense and workload.

But a successful result is well worth the battle.

“The ultimate satisfaction is achieving a recovery for the client,” McKeen says. “While it can never replace the loss of a loved one, or take away from a permanent injury, the goal is to do as much as possible within the limita-

tions of our civil justice system to provide them with full recompense.”

The founder and managing partner of McKeen & Associates in Detroit, McKeen finds successful birth trauma cases particularly satisfying.

“Clients are so grateful for the help we’ve given them and their families, and deeply appreciative of the passion we put into a case, our expertise and the result we’ve attained. A successful outcome makes a real difference in their lives—they can get more therapies for their child, build barrier-free homes, and have equipment for transportation they did not have before. This really makes the difference in terms of minimizing the disability and maximizing the residual ability a person has.”

Since 2001, McKeen & Associates has generated the year’s top verdict in Michigan four times, including the state’s largest medical malpractice verdict on record—\$55 mil-

lion in a 2001 case against Henry Ford Health System, after a 5-year-old girl suffered severe brain damage from improper treatment for respiratory arrest.

“This was certainly one of my career highlights, and was a particularly gratifying case to win because it was brought to me by an attorney who was having difficulty putting the case together,” McKeen says.

The treating physician postulated the child had hypocalcemia from nutritional rickets, causing a spasm of the airway and cutting off the air supply.

“This was something never described in the history of medical literature—a unique event, and the defense tried to portray this as an unforeseeable or unpredictable event,” McKeen explains.

According to McKeen, the child should have been diagnosed with nutritional rickets as evidenced by a chest X-ray.

“But because the defense was so hell-bent on portraying this as an unforeseeable event, it took the tack of telling the jury about RSV—respiratory syncytial virus—a very common illness in newborns and not infrequently associated with respiratory arrest.”

McKeen argued it did not matter whether the arrest was due to RSV or nutritional rickets. What mattered was that the child was brought to the hospital with respiratory difficulty, and hospital staff sent her home. While defendants protested that vital signs had been normal, McKeen argued that when a mother repeatedly brings her child back with

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McKEEN: Attorney disappointed by caps on damages in Mich.

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complaints of respiratory difficulties, the child should be admitted.

"If they had merely done that, the respiratory arrest probably would have been avoided, or would have been in an environment where the child could have been properly resuscitated," he says.

In another tragic case, a pregnant 21-year-old aerobics instructor presented at term to a hospital in Flint with complaints of abdominal pain and decreased fetal movement, and was found to have severe hypertension.

"The defendants failed to diagnose placental abruption, the obvious cause that led to the infant's death," McKeen says.

The mother developed Disseminated Intravascular Coagulation (DIC), when the body uses up its intrinsic supply of clotting factors to stop the bleeding from the abruption. According to McKeen, the attending physician overlooked this and just gave the woman fluids to support her low blood pressure.

"After leaving hospital, she arrested and suffered severe anoxic brain damage, leaving her a paraplegic and cortically blind," he says. "There was no question it was the doctor's fault, but the hospital tried to escape liability by saying the doctor was an independent contractor."

McKeen countered that the nurses should have pursued a chain of command when there was an obvious problem with the patient's clotting profile.

"The nurses are there to do more than just carry out the orders of the physician—they also must exercise their own independent professional judgment," he says. "This was a preventable tragedy."

The case was settled before the last two days of trial.

"I'm sure it was a record settlement, but it's disappointing to go that far and not let the jury decide," McKeen says. "When enough money was put on the table so every need this woman could possibly have would be fully met, the client felt—and I support the client's decision—the time was right to make the settlement so they could go on with their lives."

Some cases rack up legal bills reaching into hundreds of thousands of dollars.

"If it were not for the contingency system and law firms willing to take on that risk, people would have no hope, no chance," McKeen says.

His own clients virtually never have resources necessary to fund litigation.

"It falls upon our shoulders," he says. "Fortunately, we've been successful and have had the financial wherewithal to spend whatever is necessary to provide our clients with their best chance at recovering and achieving a verdict."

McKeen is disappointed that Michigan now has caps on damages—adding that many families are shocked and dismayed to discover this. Many states don't have caps, he explains—others don't have the difficult procedural steps required in Michigan; and some have a more favorable, or more balanced,

appellate process.

"It's certainly refreshing to litigate a case in a state where you don't have draconian limits on damages and things of that nature," he says. "It will be nice to think that one day Michigan will restore its civil justice system and truly reform."

One of the biggest regrets in his career, he notes, is that the insurance industry was allowed to propagate a myth of tort reform.

"They weren't reforming anything. There was no reform of health care, no reform of doctors providing negligent care—it was just limitations on damages," he says.

While McKeen was totally on board with anything that would weed out frivolous cases, the economic realities of the marketplace are that attorneys can't afford to take such cases, he notes.

"So they forced this tort reform under the idea of deterring frivolous cases, but capping damages only affects the most meritorious cases because those are the ones where you get judgments in excess of the cap."

Recently inducted to The Inner Circle of Advocates, and named among Top Attorneys in Michigan, McKeen was drawn to his niche while a student at Cooley Law School; clerking for Oakland County Circuit Court Judge Robert C. Anderson, he had the opportunity to watch trials including medical malpractice cases.

"It was such an interesting subject matter and I realized what a tremendous variety of work there was—the issues were rarely exactly the same," he says. "I found this intellectually stimulating and knew I'd never get bored and it would always be interesting. Sure, it would take some skill and finesse as a litigator to handle, but these were some of the best lawyers I've ever seen. I saw this on both sides of the courtroom. I knew these people would need excellent lawyers in this realm if they wanted to win."

A member of the executive boards of the American Association of Justice (AAJ), and the Michigan Association for Justice (MAJ), in August, he was honored with the Dan Cullan Memorial Award from the AAJ Birth Trauma Litigation Group.

"Dan Cullan was a great doctor lawyer and someone to whom I was very close," he says. "I'm very close now to his sons, who also are doctors and lawyers, and carrying on his legacy. To receive an award from that group, which includes some of the best birth trauma litigators, and have Dan Cullen's name on the award, is really special and a very important honor to me."

An avid golfer, the Bloomfield Hills resident enjoys playing tournament golf when his work allows; a number of years ago he qualified for the Golf Association of Michigan Championship and continues to hold a single-digit handicap. He is sometimes joined on the links by his 14-year-old son, Alex, and 12-year-old daughter, Alaina.

"My wife Brenda and I take great joy in watching their activities and trying to attend as many games as we can," he says.