

## SELECT CASES & RESULTS



### KATHLEEN FLYNN PETERSON AND BRANDON THOMPSON

\$1 million settlement in medical malpractice case involving death of 6-day-old infant as result of a medical procedure.

\$4.6 million verdict in a medical malpractice suit claiming negligence for death of 36-year-old woman who bled to death following the birth of her first child. The verdict was affirmed by the Court of Appeals, and the Supreme Court denied review.



### PETER SCHMIT

\$975,000 settlement for negligent surgical event resulting in a 5 month hospitalization for a 66-year-old woman.

\$700,000 settlement for failure to diagnose and treat carotid artery disease resulting in a catastrophic stroke. (Assisted by Brandon Vaughn)

\$375,000 settlement for failure to timely diagnose and treat cancer in a man whose PSA test was normal and whose cancer is currently in remission.

\$350,000 settlement for failure to properly manage airway leading to death in a man with a severely reduced life expectancy.



### CHRIS MESSERLY AND MELISSA WENDLAND

\$500,000 settlement for coronary artery disease resulting in death which could have been treated had it been properly diagnosed.



### CHRIS MESSERLY, PHILIP SIEFF, AND DAVID BLAND

After years of federal court litigation, undisclosed settlement amount for an infant baby who ignited into flames in a hospital's newborn nursery resulting in facial, scalp, torso and limb burns.

## THE EVOLUTION OF CASES INVOLVING THE WRONGFUL DEATH OF CHILDREN

By Brandon Thompson



Not that long ago, wrongful death cases involving children were considered by many lawyers to be essentially worthless. Children typically do not contribute financially to their families, and because Minnesota's wrongful death law does not allow recovery of emotional distress damages many lawyers (and judges) felt that there simply was no compensable loss for the death of a child.

That began to change in 1961, thanks in large part to Solly Robins. Representing the family of a 19-year-old girl named Sandra Fussner, he faced a trial judge who insisted that the only damage in the case was "the present monetary value of any future contributions in money or services" Sandra would have made. With this instruction, the jury awarded only a few thousand dollars.

Solly found this to be patently unfair, and appealed to the Minnesota Supreme Court. In the landmark case *Fussner v. Andert*, the Court recognized that there is more to "pecuniary loss" than the loss of financial contributions. As Solly argued, a child provides intangible benefits to those she loves – things like aid, comfort, society, and companionship that are no less "valuable" than bringing home a paycheck. The Supreme Court agreed, noting that those intangibles, "while not having an easily determined market value, are fully justified since they are elements of loss for which money can supply a practical substitute." This was a big step forward in achieving compensation for families who had lost a child – but the battle was only beginning.

For the next half-century, the lawyers at Robins, Kaplan, Miller & Ciresi L.L.P. followed the trail blazed by Solly Robins. Slowly, the notion that cases involving the wrongful death of children have little "value" began to change. We have worked tirelessly over the years to convince defense attorneys and insurance adjusters that the loss of a child deserves fair compensation, and this has allowed us to achieve some excellent results for our clients. In the last few years we have seen families who lose teenagers like Sandra Fussner recover damages that would have been unheard of even a decade ago. Even cases involving very young children – like the \$1.25 million verdict Terry Wade obtained in 2009 for the wrongful death of a 21-month-old – have seen a dramatic increase in value.

While cases involving the death of teenagers and children have historically been a struggle, cases involving the death of infants have been even more difficult. More than any other, these types of cases have traditionally been undervalued by defense lawyers and adjusters. Their mindset has been that infants have not yet bonded with their parents, and so the loss to the family is far less significant.

In reality, however, the death of an infant can be even more tragic because the family was given so little time with their child. This is a concept that we have been fighting for ever since Kathleen Flynn Peterson obtained one of the first medical malpractice infant death jury verdicts in 1986. It has been a long battle, but one we feel plaintiffs are finally beginning to win.

Kathleen's 1986 verdict was for \$55,000. That was considered an extraordinary sum for this type of case, and for many years after that it was thought impossible to recover six figures for the wrongful death of an infant. After years of working to educate the defense about the true loss these families have suffered, however, we now often resolve these cases for hundreds of thousands of dollars. In what may prove to be yet another landmark in this area of law, Kathleen and Brandon Thompson recently settled a case involving the death of a six-day-old during a medical procedure for \$1 million.

No matter what we do, of course, we can never give these children back to their families. But we are often able to get some measure of justice for the tragic loss they have suffered. This is a battle that we will be proud to continue to fight.

# MDLs 101: Primer on Multi-District Litigation

By Kate Jaycox



Our mass tort department often litigates cases in Multi-District Litigations (MDLs), but MDLs may be a foreign concept if you have never been involved in one. Our firm is currently litigating or investigating the following drugs, devices, or products which have been – or likely will be – consolidated into MDLs: Fosamax, GranuFlo and Naturalyte Dialysates, Zimmer NexGen Knee Replacements, Imprelis Herbicide, and various metal-on-metal hip implant devices, including DePuy ASR, DePuy Pinnacle, Zimmer Durom Cup, Wright Profemur and Conserve, Biomet M2a-Magnum, Smith & Nephew R3, and Stryker Rejuvenate and ABG II.

## What is an MDL?

In an MDL, related federal civil cases in different jurisdictions are transferred to one judge for consolidated pretrial proceedings via 28 U.S.C. §1407. Cases may be consolidated if they involve one or more common questions of fact, for the convenience of the parties and witnesses, and to promote just and efficient conduct of the case. The goal of MDLs is to avoid discovery duplication, prevent inconsistent pretrial rulings, and conserve the resources of the parties and the judiciary in similar cases. As of July 2012, 308 different MDL dockets are being heard in 56 different transferee districts, with over 59,000 actions currently pending.

## Who decides whether a case will be consolidated into an MDL?

Enacted by Congress in 1968, 28 U.S.C. §1407 created the Judicial Panel on Multidistrict Litigation (JPMDL) which decides whether a case should be consolidated and if so, to which court and judge to transfer the cases. The JPMDL consists of seven sitting federal judges, appointed by the Chief Justice of the United States Supreme Court, none of whom may be from the same judicial circuit. No statutory term limits exist for JPMDL members, but in 2000, Chief Justice William H. Rehnquist established a policy of seven-year staggered terms for each member. Chief Justice John G. Roberts, Jr. has continued that policy. Current JPMDL members are: Chairman Hon. John G. Heyburn II (W.D. Ky.), Hon. Paul J. Barbadoro (D. NH), Hon. Charles R. Breyer (N.D. Cal.), Hon. W. Royal Furgeson, Jr., (N.D. Tex.), Hon. Marjorie O. Rendell (3rd Cir.), and Hon. Kathryn H. Vratil (D. Ks.).

## How is an MDL created?

Any party can petition the JPMDL to have a group of cases consolidated, or the JPMDL can do so on its own initiative. The JPMDL holds regular hearings throughout the country every two months to consider MDL petitions. At each hearing, the JPMDL usually considers 15 to 20 motions for creation of new MDLs. Parties appear for oral arguments, with some motions having 20 or more attorneys argue. If the Panel grants the motion to consolidate, pending cases are transferred to a transferee court, and substantially similar cases filed later are transferred to that MDL court as “tag-along” actions.

## What type of cases can be consolidated into an MDL?

Either class action or individual lawsuits, or a combination of both, can be consolidated into one MDL. MDLs can involve many types of cases, like patent validity and infringement; antitrust price fixing; securities fraud; employment practices; or mass torts, such as mass disasters like airplane crashes, train wrecks, or hotel fires; or toxic torts like asbestos or environmental contaminants; or products liability cases like medical devices, pharmaceuticals, or other types of products.

## What powers does the MDL Transferee Court have?

MDL courts are tasked with overseeing all pretrial proceedings, including discovery, class certification issues, and evidentiary and dispositive motions, and may exercise all the powers available to a federal judge in any other case. If an action survives dispositive motions, 28 U.S.C. §1407 provides that actions “shall be” remanded back to their original districts at the conclusion of pretrial proceedings. In practice, however, many MDL courts conduct one or more bellwether trials through various methods, such as having the parties consent to trial in the transferee MDL court. While cases do occasionally get remanded, the JPMDL has recognized that most often, MDL cases will settle in the transferee court.

### References:

The Judicial Panel on Multidistrict Litigation's website: [www.jpml.uscourts.gov](http://www.jpml.uscourts.gov)

Hon. John G. Hayburn, II, *A View from the Panel: Part of the Solution*, Tulane Law Review, Vol. 82: 2225-44 (2008).

Hon. John G. Heyburn, II, *Judicial Panel on Multidistrict Litigation: "Reflections on the Panel's Work,"* January 2012, available at [www.americanbar.org](http://www.americanbar.org)

Hon. Barbara J. Rothstein and Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, Federal Judicial Center, JPMDL, 2011, available at [www.fjcc.com](http://www.fjcc.com).

## THIS ISSUE'S SPOTLIGHT

In each issue of *The Robins Justice Report* we highlight our people – both an attorney and another professional – so that you can learn more about our skill sets and backgrounds. More than 25 attorneys are in the Personal Injury, Medical Malpractice and Mass Tort practice groups at Robins, Kaplan, Miller & Ciresi L.L.P. We hope you enjoy getting to know us better!



Brandon Thompson

### BRANDON THOMPSON, ASSOCIATE

Brandon is a Minnesota native with blue-collar roots – his grandfather was a refrigerator repairman, and his dad worked at the Ford plant in St. Paul. The oldest of three, Brandon was the first member of his extended family to attend college. His passion for hard work led him to law school at the University of Minnesota. His passion for helping the little guy led him to plaintiffs' trial work.

After spending five years as a partner in a three-lawyer personal injury firm, Brandon jumped at the chance to join the medical malpractice group at Robins, Kaplan, Miller & Ciresi L.L.P. He handles a diverse set of cases, but has developed a special focus in obstetrical and chiropractic negligence. He is the chair of AAJ's Chiropractic Malpractice Litigation Group.

Brandon loves the outdoors, and before getting married he spent the majority of his spare time hiking and mountain climbing. He has been to the highest point of each of the fifty states. Now that he has one young child and another on the way, he gets his outdoor fix mostly by dreaming about the day when his sons can join him on some far-away expedition – or at least camp with him in the backyard.



Nancy Molina

### NANCY MOLINA, SENIOR PARALEGAL

Nancy is a Duluth native who moved to the Twin Cities following graduation from high school. She has a B.A. in Journalism and Mass Communication from the University of Minnesota. While attending school, she worked in a personal injury law firm and discovered that law was what interested her and where she would have the opportunity to offer help to those in need.

Before she joined Robins, Kaplan, Miller & Ciresi L.L.P. as a paralegal in 2003, she had worked for many years in litigation support as a paralegal for several small personal injury firms. Over the years she has prepared for and assisted attorneys at many jury trials involving medical malpractice, wrongful death, product liability and automobile accident cases.

Nancy focuses on medical malpractice and mass tort cases. She works directly with injured clients and family members and assists in gathering evidence and organizing damage documents and personal information relative to their cases. She is available to answer their questions and guide them through the complicated process of preparing their cases for trial. Every case brings a new and rewarding challenge.