



ROBINS KAPLAN JUSTICE REPORT

WINTER 2016 | VOL. 10 NO. 1

ROBINS  KAPLAN_{LLP}

REWRITING THE ODDS

INSIDE THIS ISSUE

- | | |
|---|--|
| 1. OBSTETRIC MALPRACTICE AND BIRTH INJURIES | 5. OTHER DRUG AND DEVICE INVESTIGATIONS |
| 2. SELECTED RESULTS | 6. KATHLEEN FLYNN PETERSON ELECTED TO BOARD OF REGENTS OF AMERICAN COLLEGE OF TRIAL LAWYERS |
| 3. WHAT IS A MULTIDISTRICT LITIGATION (MDL)? | 7. ROBINS KAPLAN LLP HOSTS TRIAL ADVOCACY SEMINAR |
| 4. ROBINS KAPLAN ATTORNEYS APPOINTED TO HELP LEAD MORCELLATOR AND ZOFRAN LITIGATIONS | |
-

OBSTETRIC MALPRACTICE AND BIRTH INJURIES

BY COLIN PETERSON

In the complex legal world of medical malpractice, birth injury cases are among the most challenging. The complexity of these cases is largely a consequence of the collaborative way obstetric care is provided and the catastrophic injuries that can result from negligent obstetric care. Despite the challenges, Robins Kaplan LLP dedicates itself to representing families of injured children and using the law to make a real difference in the lives of those who need it the most.

Safe labor and delivery care depends on a properly organized system made up of competent health care providers. During labor and delivery—when the stakes are highest—the safety of the mother and baby is the shared responsibility of the delivery team. Coordination, communication, and quality care among multiple providers, including labor and delivery nurses, midwives, physicians, anesthesia, the surgical team, the resuscitation team, and others, is critical.

Any breakdown in this complex and collaborative system poses a threat to patient safety. When patient safety is jeopardized during labor and delivery care, the consequences can be tragic. Some birth injuries are unavoidable, but too often they result from preventable failures of individuals and health care systems.

When a birth injury occurs as a result of medical negligence, the specific failures are not always immediately apparent. Human error, communication breakdowns, or substandard policies and procedures can all contribute to adverse outcomes. Because of the collaborative nature of labor and delivery care, the negligence will often involve multiple providers at different points in the process. As a result, every aspect of the care must be thoroughly reviewed when evaluating a birth injury claim.

Even if negligence can be identified, causation often proves to be the greatest challenge in the case. The difficulty establishing the cause of a birth injury is a consequence of the complex interplay between maternal and fetal factors during pregnancy, the need to use multiple experts from various fields of medicine to piece together the chain of causation, and a host of literature published by medical organizations meant to cast doubt on the causes of birth injuries. Firms must spend considerable resources to ensure a causation theory can withstand the inevitable attacks from the defense.

In any medical malpractice claim, the odds are stacked heavily against the plaintiff. Birth injury cases in particular are difficult to pursue because the significant damages involved correspond with the likelihood of costly litigation. Defendants facing these levels of financial exposure defend cases aggressively and on all fronts—standard of care, causation, and damages. It is always an uphill battle, but a battle that is worth fighting.

[Continued on Page 6 >](#)

SELECTED RESULTS

\$5.6 MILLION SETTLEMENT FOLLOWING IMPROPER DELIVERY



**KATHLEEN
FLYNN PETERSON**



**COLIN
PETERSON**

Kathleen Flynn Peterson and Colin Peterson obtained a settlement for a three-year-old child who suffered a hypoxic brain injury during her birth. When labor stalled, the obstetrician made repeated attempts at a vacuum delivery. When these attempts failed, instead of ordering an immediate C-section, the obstetrician had the exhausted mother continue to push for another 30 minutes. During this time, the baby's heart rate continued to drop and she was born in distress. An MRI confirmed that she had suffered a hypoxic brain injury that resulted in cerebral palsy, permanent neurological injuries, and developmental delays. This North Dakota case settled at mediation for \$5.6 million, an amount that will allow the child's parents to provide the care this child will require for the rest of her life.

\$9.1 MILLION VERDICT FOR PARALYSIS VICTIM



**BRANDON
THOMPSON**

Brandon Thompson and Colin Peterson represented a 51-year-old Minneapolis man who was paralyzed from the waist down following surgery for a perforated bowel. The man suffered a prolonged drop in blood pressure after receiving anesthesia, causing a critical lack of blood flow to his spinal cord that resulted in permanent damage and paralysis. After a nine-day trial, the jury found that the anesthesiologist's negligence had contributed to the man's injuries. The jury awarded \$9.1 million, an amount that will allow him to live more independently and to receive rehabilitation that may eventually allow him to walk again.

\$4.25 MILLION SETTLEMENT FOR BIRTH INJURIES LEADING TO CEREBRAL PALSY

Kathleen Flynn Peterson and Brandon Thompson settled a medical negligence case involving a Midwest hospital, wherein the released parties' alleged care and treatment of a mother during labor and delivery resulted in developmental delays and cerebral palsy for their child. The case settled for \$4.25 million.

SURVIVING HUSBAND AND DAUGHTERS V. DISTRACTED DRIVER



**CHRIS
MESSERLY**

A man was driving a pickup truck on a sunny day down a lonely country highway. He chose to look at this cell phone and did not see a young mother riding her bike. Tragically, he struck her, killing her instantly. The mother left behind her husband and two daughters, ages one and four. Chris Messerly was successful in helping the family by settling the case for \$6 million without the need to start a lawsuit. One of the things the family plans to do with the money is pay for the construction of a bike trail so families can more safely enjoy bike rides.

SURVIVING WIFE AND THREE CHILDREN V. DOCTOR

A man in his late forties with a family history of heart disease went to his regular doctor for chest pain. The doctor sent him home with antacids. Shortly thereafter, the man died of a heart attack at home in front of his daughter. He was survived by his wife and his three kids. Without the need to start a lawsuit, Chris Messerly settled the case for the family for \$2.75 million.

SURVIVING WIFE V. HEALTH CARE PROVIDERS

An elderly man was hospitalized for care of his terminal cancer. His doctor made a note in the man's chart that he should get a blood thinner to prevent a clot, but the doctor forgot to write a formal order for the drug. The man was not given a blood thinner, and he died of a clot. In order to provide for the wife's future, Chris Messerly obtained a settlement of \$440,000 without the need to start a lawsuit.

WHAT IS A MULTIDISTRICT LITIGATION (MDL)?

BY RAYNA KESSLER



RAYNA
KESSLER

In the United States, multidistrict litigation (MDL) is a special legal procedure established by 28 U.S.C. §1407, in which cases across different federal jurisdictions are transferred and consolidated before one court. The Judicial Panel on Multidistrict Litigation (JPML) determines whether cases should become consolidated in an MDL and to which federal jurisdiction and judge the cases should be sent.

Because the creation of an MDL depends on common questions of fact, MDL plaintiffs generally are those injured by the same conduct of a defendant, such as by environmental disasters, price fixing, or unsafe drug or medical devices. Once an MDL is created, the JPML will transfer any similar case filed in federal court to the MDL court, though there is a procedure to object to a case being included. MDLs are designed to increase the efficiency of complex cases by helping to eliminate duplication in discovery, to avoid inconsistent pretrial rulings, and to conserve the resources of parties, counsel, and the courts. Once created, MDLs typically involve hundreds, if not thousands, of cases—either individual cases or class actions.

The transferee MDL court establishes procedures to streamline discovery and pretrial proceedings. For example, in drug and medical device cases, both sides are often asked to standardize the written discovery by developing fact sheets in lieu of interrogatories or other discovery. Fact sheets are completed by defendants and by each individual plaintiff. The fact sheets are intended to collect relevant information, and are usually the result of extensive negotiations between the parties as to the content, scope, and number of questions. The court must approve the proposed fact sheets, and each litigant must complete and serve the final, approved version of the fact sheet. MDL courts also rule on all evidentiary and dispositive motions, and often conduct one or more “bellwether” trials in drug and device cases. Sometimes, bellwether trials result in a global settlement or settlement of certain categories of cases, but individual cases may also be remanded to their home jurisdiction for trial if settlement does not occur.

Some state courts, such as New Jersey and California, have similar legal procedures to consolidate multi-county litigation.

ROBINS KAPLAN ATTORNEYS APPOINTED TO HELP LEAD MORCELLATOR AND ZOFRAN LITIGATIONS



MEGAN
MCKENZIE

In November 2015, Judge Kathryn H. Vratil (D. Kansas) appointed Robins Kaplan LLP associate Megan J. McKenzie to help lead the power morcellator litigation as a member of the Plaintiffs’ Steering Committee (PSC). After previously noting the historical lack of female leadership in MDLs, Judge Vratil appointed the first-ever PSC composed of a majority of female attorneys in this multi-district litigation.



KATE
JAYCOX

In December 2015, Judge F. Dennis Saylor IV (D. Mass.) appointed Robins Kaplan LLP principal Kate Jaycox to help lead the Zofran litigation as a member of the Plaintiffs’ Steering Committee.

OTHER DRUG AND DEVICE INVESTIGATIONS

Robins Kaplan LLP is currently investigating many new potential cases. Please contact our Mass Tort team if you have any questions or know of any individuals whose case should be evaluated.

- **Abilify** – Health Canada recently issued a Safety Alert advising that this atypical antipsychotic—used to treat a variety of disorders, including schizophrenia, bipolar, and depression—may cause impulse-control behaviors, including compulsive gambling. While the drug sold in Canada is now labeled with this warning, no such warning exists on the drug sold in the United States.¹
- **Benicar** – Popular blood pressure medication can cause intestinal problems known as sprue-like enteropathy, with chronic diarrhea, weight loss, nausea, and vomiting.²
- **GranuFlo and Naturalyte Dialysis Products** – Recalled products used in kidney dialysis that can cause metabolic alkalosis, which can lead to cardiopulmonary arrest and death.³
- **Hip Implants** – Metallosis and premature device failure with damage to bone or tissue can occur with certain hip implants.⁴ Litigating cases involving DePuy ASR, DePuy Pinnacle, Stryker Rejuvenate, Wright Profemur, Wright Conserve, and Biomet M2a-Magnum.
- **Invokana, Farxiga, and Jardiance** – These Type 2 Diabetes drugs can cause ketoacidosis—very elevated blood acid levels – which may require hospitalization.⁵
- **Power Morcellator** – Surgical tool used in hysterectomies and fibroid removal procedures that may promote the spread of undetected uterine cancer.⁶
- **Viagra** – Use is associated with increased risk of melanoma.⁷
- **Xarelto** – Anticoagulant (blood thinner) linked to serious bleeding complications, intracranial hemorrhaging, gastrointestinal bleeding, wound infections from inhibited clotting, and lack of effectiveness in preventing dangerous clotting.⁸
- **Zofran** – This anti-nausea drug is not FDA-approved for use during pregnancy but is often prescribed “off label” for morning sickness and is associated with increased risk of cleft palate and congenital heart defects.⁹

1. <http://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2015/55668a-eng.php>

2. <http://www.fda.gov/Drugs/DrugSafety/ucm359477.htm>; <http://www.ncbi.nlm.nih.gov/pubmed/22728033>

3. *Dialysate Concentrates Used in Hemodialysis: Safety Communication – Alkali Dosing Errors*, available at www.fda.gov

4. *Concerns about Metal-on-Metal Implants*, available at www.fda.gov

5. <http://www.fda.gov/drugs/drugsafety/ucm446845.htm>

6. FDA discourages use of laparoscopic power morcellation for removal of uterus of uterine fibroids, available at www.fda.gov

7. Wen-Qing Li, et al. *Sildenafil Use and Increased Risk of Incident Melanoma in U.S. Men: A Prospective Cohort Study*. JAMA Intern. Med. (June 2014)

8. Lassar, M.R., et al. Rivaroxaban versus Enoxaparin for Thromboprophylaxis after Total Knee Arthroplasty. N. Engl. J. Med. 2008; 358:2776-86; Kakkar, A.K., et al. Extended duration rivaroxaban versus short-term enoxaparin for the prevention of venous thromboembolism after total hip arthroplasty. Lancet 2008; 372:31-39; Erickson, B.I., et al. Rivaroxaban versus Enoxaparin for Thromboprophylaxis after Hip Arthroplasty. N. Engl. J. Med. 2008; 358:2765-75; Jameson SS, et al. Wound complications following rivaroxaban administration. J. Bone Joint Surg. Am. 2012; 1554-8.

9. M. Anderka et al. *Medications Used to Treat Nausea and Vomiting of Pregnancy and Risk of Selected Birth Defects*. Birth Defects Res A Clin Mol Teratol. (Jan. 2012); JT Anderson et al. *Ondansetron use in Early Pregnancy and the Risk of Congenital Malformations – A Register Based Nationwide Cohort Study*. Pharmacoepidemiology and Drug Safety. (Oct. 2013)

KATHLEEN FLYNN PETERSON ELECTED TO BOARD OF REGENTS OF AMERICAN COLLEGE OF TRIAL LAWYERS



The American College of Trial Lawyers recently elected Kathleen Flynn Peterson, a partner at Robins Kaplan LLP, to its board of regents. Kathleen joins five officers and 14 other regents to serve as the managing body of the College.

The American College of Trial Lawyers is an honorary association comprising experienced trial lawyers in the United States, Canada, and Puerto Rico who have mastered the art of advocacy and adhere to the highest standards of ethical conduct and professionalism. Membership is by invitation only, and comprises just one percent of the attorneys in any individual state or province.

An accomplished trial attorney, Kathleen focuses her practice on the representation of individuals and families who have experienced injury or death as a result of medical negligence. She has received numerous recognitions and awards for her contributions to the legal profession, including *Minnesota Lawyer's* 2015 "Circle of Excellence," honoring the multiple years the publication has named her an "Attorney of the Year."

Kathleen has served as a leader in a variety of professional organizations. She has previously served as the president of the Minnesota Association for Justice, the Minnesota Chapter of the American Board of Trial Attorneys, and American Association for Justice, the nation's largest plaintiffs' trial bar.

< Continued From Page 2

At Robins Kaplan LLP, we have over 50 years of experience evaluating, litigating, and successfully resolving some of the most complex birth injury cases in the country. We are able to leverage our unique position as a plaintiff's medical malpractice group within a large national firm to pursue these cases despite the risks involved. When clients come to us after their child has suffered a devastating birth injury, we draw upon our unique experience, insights, and resources to provide these families with the answers they seek and the justice they deserve.

We overcome the challenges inherent in birth injury cases by careful case evaluation and a team-centered approach. Our medical malpractice group consists of experienced attorneys who work with in-house registered nurses, an Obstetrician/Gynecologist, a forensic pathologist, and knowledgeable support staff. Our team members are involved in national organizations focused on birth injury litigation and obstetrics. The reputation we have developed allows us to establish relationships with experts across the country at the top of their fields. We put all of our resources to bear in cutting through the complexity of birth injury cases and present the strongest possible case for our clients.

Children who sustain birth injuries due to medical negligence often require millions of dollars in lifetime care and assistance. A medical malpractice case is typically a family's only chance to get the resources they need. Our work in this area over the past several decades has helped shape the legal environment and remove the barriers that historically prevented parents of injured children from getting the full amount of compensation they deserve.

In just the past few years, our team has resolved several multi-million dollar birth injury cases across the Midwest. The financial resources that we have helped our clients obtain will ensure that their child will receive the best care money can buy while living as independently as possible.

Though we can't turn back the clock and prevent these injuries from happening, we can provide hope and security for families as they move forward past these tragic events. It is a privilege to do this work.

ROBINS KAPLAN LLP HOSTS TRIAL ADVOCACY SEMINAR

On October 6, Robins Kaplan LLP hosted the 2015 Trial Advocacy Seminar, a conference focused on developing advocacy skills in the courtroom. This year's seminar was themed "Advocating from a New Perspective," and many of the presenters discussed new skills, new tools, and the many ways they can be applied in our era of lightning-quick technology and age-old injustices.

Presentations during the full-day event included drug safety advocate **Kim Witczak's** discussion on working with clients to effect meaningful legal changes for patient safety in "**Advocacy Beyond Litigation.**" Other presentations included:

"YEAH, BUT I DIDN'T REALLY MEAN THAT...": HOW TO EFFECTIVELY USE SOCIAL MEDIA POSTINGS AT TRIAL

Chris Madel, *Robins Kaplan LLP*

LESSONS FROM THE BIG SCREEN: STORYTELLING IN THE COURTROOM

Brandon Thompson, *Partner, Robins Kaplan LLP*

CYBERBULLYING - A 21ST CENTURY LITIGATION WAVE?

Kate Jaycox, *Principal, Robins Kaplan LLP*

CYBER WARS: STRATEGIES AND DEVELOPMENTS IN THE DISCOVERY OF SOCIAL MEDIA CONTENT

MODERATOR:

Brandon Vaughn, *Associate, Robins Kaplan LLP*

PANEL:

Hon. Daniel O'Fallon, *State of Minnesota District Court, 10th Judicial District*

Phil Sieff, *Partner, Robins Kaplan LLP*

A MINDFUL APPROACH TO ADVOCACY

Kathleen Flynn Peterson, *Partner, Robins Kaplan LLP*

The keynote address, delivered by attorney and trial professor **Alejandro Blanco**, was titled "**The Ultimate Technological Machine: You, The Trial Lawyer.**" This presentation offered an insightful look into the psychological factors at play in a courtroom setting.

Held at the Radisson Blu in Minneapolis, the event was attended by nearly 300 people. The attorneys of Robins Kaplan LLP would like to thank all those whose presence and participation made the seminar a success.



ATLANTA

1201 West Peachtree Street
Suite 2200
Atlanta, GA 30309
404 760 4300 TEL

MOUNTAIN VIEW

2440 West El Camino Real
Suite 100
Mountain View, CA 94040
650 784 4040 TEL

BOSTON

800 Boylston Street
Suite 2500
Boston, MA 02199
617 267 2300 TEL

NAPLES

711 Fifth Avenue South
Suite 201
Naples, FL 34102
239 430 7070 TEL

LOS ANGELES

2019 Century Park East
Suite 3400
Los Angeles, CA 90067
310 552 0130 TEL

NEW YORK

601 Lexington Avenue
Suite 3400
New York, NY 10022
212 980 7400 TEL

MINNEAPOLIS

800 LaSalle Avenue
Suite 2800
Minneapolis, MN 55402
612 349 8500 TEL

Past results are reported to provide the reader with an indication of the type of litigation in which we practice and does not and should not be construed to create an expectation of result in any other case as all cases are dependent upon their own unique fact situation and applicable law. This publication is not intended as, and should not be used by you as, legal advice, but rather as a touchstone for reflection and discussion with others about these important issues. Pursuant to requirements related to practice before the U. S. Internal Revenue Service, any tax advice contained in this communication is not intended to be used, and cannot be used, for purposes of (i) avoiding penalties imposed under the U. S. Internal Revenue Code or (ii) promoting, marketing or recommending to another person any tax-related matter.

ROBINS  KAPLAN LLP

REWRITING THE ODDS