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MAJOR ISSUES THAT ARISE WHEN HANDLING MINORS' CLAIMS: Strategies for Attributing Fault, Contesting Liability, Limiting Damages, and Settling Claims

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The issues and strategic decisions involved in the defense of minor-plaintiff claims are, in many ways, similar to those that arise in the defense of similar claims by adult plaintiffs. But there are some important distinctions. This paper will discuss some of those unique challenges and issues that can arise in the context of defending minor-plaintiff claims.

1. Allocating Fault to Others

Parental Immunity

For over a century, American courts have been hesitant to interfere in the daily life of the family. Courts have reasoned that the importance of maintaining familial harmony outweighs the potential benefits of imposing liability on parents. The Supreme Court of Mississippi began this movement for parental immunity in 1891. Soon thereafter, state after state began to implement varying degrees of parental immunity.[1] Courts feared that the imposition of fault to a parent in a negligence action by a child would impede on parental discretion in the care or discipline of their children. Courts took solace in this approach because the criminal laws of states protect a child's welfare.

Although the parental-immunity doctrine originally was intended to prevent parents from being liable in damages to their children, its scope has expended. In many jurisdictions, courts interpreted parental immunity to prevent the parent's liability from being submitted to the jury even when the case was against a third party.

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[1] *Gibson v. Gibson* provides a historical perspective on the development of parental immunity doctrine in American courts. *See generally* 3 Cal. 3d 914 (Cal. 1971).

States vary widely in not only whether a parent can be comparatively negligent, but also on whether a parent's fault can be submitted to a jury. Some states allow a defendant to submit a parent's fault to the jury; some allow a parent to be comparatively negligent; while others maintain the historical doctrine of parental immunity.

In Texas, for example, the parental-immunity doctrine is in effect, and a child's recovery from other defendants will not be reduced by his parents' percentage of fault.[2] The implications of this rule can be significant. In a products-liability case, for example, where the parents blatantly misused the product and failed to follow warnings, the only liability question that would go to the jury is whether a product defect was a producing cause of the incident. Parental immunity would preclude the jury from even considering the parents' fault. That was the case until recently, when a court allowed a defendant to use Texas' responsible third party statute to get around the parental-immunity bar and allow the jury to apportion fault to the parents. However, for this work, the defense has to file a timely motion—at least 60 days before trial. And without being aware of the need to designate the parents, who are presumably already parties to the case, as responsible third parties, a defendant can miss out on a valuable opportunity to be able to place fault on the parents.

In Florida, a parent's negligence is not imputed to a child plaintiff. Essentially, the parent's negligence cannot reduce or bar a minor child's recovery. However, Florida has adopted the doctrine of comparative negligence. As such, a child's award of damages can be reduced by the percentage of fault, if any, that is assigned to a negligent parent.[3] In practice, this means that the name of a negligent parent will be allowed on a jury charge.

In contrast, New Jersey courts hold that the doctrine of parental immunity is a bar to a suit alleging negligent supervision, however, parental immunity doesn't protect a parent who has acted willfully or wantonly in the supervision of his or her child.[4] Under New Jersey law, the finder of fact is obligated to allocate fault to the parent that is found to have acted willfully or wantonly.[5]

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[2] *See Shoemake v. Fogel, Ltd.*, 826 S. W.2d 933 (Tex. 1992); *see also Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000).

[3] *See generally Y.H Investments, Inc. v. Godales*, 690 So.2d 1273 (Fla. 1997).

[4] *See Foldi v. Jeffries*, 461 A.2d 1145, 1152-1154 (N.J. 1983); *see also Buono v. Scalia*, A.2d 1120 (N.J. 2004) (affirming the doctrine of parental immunity articulated in *Foldi*)

[5] N.J. Stat. § 2A:15-5.1.

In New York, the general rule is that a parent in not liable for negligent supervision. Put another way, New York has adopted the parental immunity doctrine with limited exceptions.[6]

In Pennsylvania, a parent's negligence will bar or reduce the parent's own recovery.[7] However, the parent's negligence is not imputed on the child to diminish the child's own recovery.[8]

As you can see, states have adopted parental immunity in various degrees. Knowing your jurisdiction's application of the parental immunity doctrine is critical in developing a sound defense strategy.

Placing Fault on a Sibling or other Minor

Historically, in many jurisdictions, courts held that a child under the age of seven cannot be negligent. Children between the age of seven and fourteen have a rebuttable presumption that they are incapable of being negligent. And children above age fourteen have a rebuttable presumption that they are capable of being negligent. Many courts today use a subjective test to determine the capacity of a particular child to commit a negligent act. This test considers factors such as a child's age, intelligence, and experience.[9]

Practical Concerns in Blaming a Parent or Sibling

Assuming the jurisdiction imposes liability on a negligent parent, the benefits of potentially reducing the damages a child plaintiff can recover by blaming the parent or sibling is worth the slight risk of a negative jury reaction. Further, blaming the parent may trigger the culpable parent's liability coverage for certain negligence actions. However, a jurisdiction's reputation or the sensitive nature of a matter may encourage a defendant to refrain from blaming a parent or sibling for the incident. This type of issue requires a defendant and its counsel to maintain constant communication regarding the pros and cons of seeking to hold a negligent parent responsible for her portion of fault. If done right, and if the law allows it, asserting liability against a negligent parent can be a useful tool in limiting the amount a child plaintiff recovers.

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[6] *See Holodook v. Spencer*, 324 N.E.2d 338, 340-341 (N.Y. 1974); *see generally LaTorre v. Genesee Mgmt.*, 687 N.E.2d 1284 (N.Y. 1997) (outlining the court's ruling in *Holodook*); *See Rios v. Smith*, 744 N.E.2d 1156, 1159-60 (N.Y. 2001); citing *Nolechek v. Gesuale*, 385 N.E.2d 1268 (exception to *Holodook* general rule for parental immunity).

[7] *Connelly v. Kaufmann & Baer Co.*, 37 A.2d 125 (Pa. 1944).

[8] *Greene v. Basti*, 391 F.2d 892 (3d Cir. 1968).

[9] See, e.g., *In re Std. Jury Instructions in Civil Cases* – Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So.3d 666, 685-86 (Fla. 2010).

2. Approaching Long-Term Damages for Minors

Strategies for Determining the Extent of a Child's Alleged Long-Term Damages

Plaintiffs routinely assert that both physical and psychological injuries get worse over the course of time. Some strategies allow a defendant to combat this notion of worsening injuries over time and demonstrate that the child's injuries are more likely to improve rather than worsen. Obtaining medical records or school records is one way to demonstrate a child's condition is in fact improving, or at least not getting any worse. Interviewing teachers and coaches at the child's school can give some valuable insight into whether the child's demeanor has changed after the incident.

Independent medical examinations (IMEs) are already used commonly in cases, but timing it right can improve the defensibility of the case. In cases where the plaintiff's story is that the minor's problems have not yet manifested, an early IME where the defense expert did not find observe anything of concern may be of limited use at trial. Consider asking the Court to allow multiples IMEs at different points of the case, with the last one being as close to trial as possible.

Lastly, defense counsel and the claims professionals should determine early on whether their case is one where the future-damages opinions seem susceptible to a *Daubert* or similar challenge. Most jurisdictions require a plaintiff to prove that damages to a reasonable degree of probability—*i.e.*, more likely than not. In cases involving claims that problems will manifest themselves later in the future, determine through discovery whether the plaintiff's experts have a reliable basis for reaching that opinion, and if they don't, move to exclude their opinions.

3. Statute of Limitations

All states require actions to be filed within a certain period. Whether a contractual claim, a personal-injury claim, or a malpractice claim, states place time limits on an injured party's claim in the interest of fairness and predictability. As for personal injury actions, every state has enacted its own statute of limitations, requiring any personal injury suit to be filed in a court within a set time after the incident or injury. Most states have statutorily enacted a two-year statute of limitations for personal injury actions.[10] Unless an exception applies, a person has two years to bring a personal injury action in most states. However, one such exception exists in many states that tolls the statute of limitations for a minor until she reaches the age of majority.

[10] Cal. Civ. P. Code § 335.1; 12 Okl. St. § 95; Tex. Civ. Prac. & Rem. Code § 16.003. Florida has a four year statute of limitations for personal injury actions. Fla. Stat. Ann. § 95.11.

Minors are considered to have a legal disability until reaching the age of majority. Because of a minor's unique position, states have enacted laws that allow a minor's statute of limitations to toll until she reaches the age of majority. In effect, the child's statute of limitations doesn't begin until the child has reached the age of eighteen. For states that have enacted a two-year statute of limitations for personal injury actions, the child has until her twentieth birthday to file a personal-injury suit that arose when she was a child.[11] However, a defendant should be mindful of certain injuries that are caused at birth as some states have very differing tolling of limitations for such injuries. For example, limitations are only tolled until a child reaches the age of six or thirteen in some jurisdictions when the injury occurred at birth.[12]

The long statute of limitations poses some practical challenges when planning the defense of a minor-plaintiff case. For example, a defendant may receive notice of a claim soon after it happens, but then not hear anything further for several years. What is the prudent course of action in those situations? Should the defendant take a purely reactive approach, waiting to see if the plaintiff files suit? If there is the possibility of tendering the claim to a third party, when to do that? How do you set reserves for such cases? Providing answers to each of those questions and scenarios is beyond the scope of this paper. However, you should be aware of your options and make a strategic choice based on the nature of your claim. For example, a serious claim may warrant substantial fact investigation or even pre-suit discovery, where allowed, to build up evidence that could otherwise be lost over time. But on less serious claims, that expense may be difficult to justify when it is not yet known whether there will be a lawsuit.

4. Strategic Use of Liability and Other Experts

Liability experts can make a significant difference in determining whether a defendant's conduct, product, *etc.* actually caused the incident and a child's alleged injury. In product-defect cases, design experts or mechanical engineers are commonly used to demonstrate the product design was not the cause of the minor's injury. Jurors are generally capable of understanding and appreciating how the physical capabilities and tendencies of adults, but whether a child is strong enough or capable of getting out of an infant seat, for example, may not be readily apparent to jurors. That's where the use of surrogate testing and computer modeling can help. A good example of this is a series of cases that one of the authors of this paper has defended involving an infant seat. The allegation in those cases is generally that the child fell out of the seat, and that the fall occurred instantaneously and without warning. Surrogate testing—obviously, with the seat being used on the floor—allowed the defense to show the jury that a child did not

[11] N.J. Stat. § 2A:14-21; Tex. Civ. Prac. & Rem. Code § 16.001.

[12] Cal. Civ. P. Code § 352; N.J. Stat. § 2A:14-21.

get out of the seat when leaning and stretching in every direction; it took a lot of purposeful effort to get out—something any parent standing nearby would notice and stop.

Injury statistics are another tool a practitioner can use to contest liability. This sort of evidence can be used to refute a plaintiff's case theme and reframe the risks associated with a product or activity. One way to obtain injury statistics is through the U.S. Consumer Products Safety Commission (CPSC) injury database called National Electronic Injury Surveillance System (NEISS). This database obtains data of consumer product-related emergency-room visits from a set of statistically valid hospitals across the U.S. and its territories. The hospitals are selected in a way such that the data from those facilities can be aggregated to come up with statistically valid national totals. Several variables are tracked in the data, including: the date of the incident; location of the incident; the product involved; age and sex of the child; diagnosis of the injury; the body part involved; and the disposition. With the help of the right expert, defendants can use this data to come up with a variety of national-injury statistics that help their position. These statistics can then be used to refute several of the plaintiff's case themes and make affirmative points as well, such as comparing the safety of the product at issue to other products in that general category.

5. Settling a Minor's Claim

Once a minor's case has settled, there can be a multitude of issues that need to be addressed prior to obtaining court approval. The large majority of these cases involve a structured settlement that is crafted with the agreement of the guardian *ad litem*, parent, guardian, *etc*.

The injuries sustained, future-treatment needs, and the likelihood of future public assistance can also dictate the need of a Special-Needs Trust (SNT) or some other type of trust vehicle. An SNT blended with a structured settlement is a way to maximize financial output, protection from dissipation and enabling future public assistance (Medicare/Medicaid). Medicare set-aside allocations and professional administration services can also be blended into the Trust. In these cases, the payee from the annuity proceeds is the Trust and not the individual.

A structured settlement, whether or not combined with an SNT, can be designed to address a multitude of future needs including education, future medicals or surgeries, and continuous long-term care (home or facility). Payments can be made monthly or annually in equal installments for a period certain or for lifetime with or without a cost of living adjustment (COLA). Guaranteed lump sums can be used for big-ticket items or as an alternative to combat inflation. A sample structured-settlement proposal is included at the end of this paper

The usage/need of a Guardian ad Litem varies state by state. In several states, the amount of the settlement and condition of the minor child will factor into this decision, with many states having a minimum amount where court approval is needed—generally ranging from $10,000 to $15,000. In some states, the costs of a guardian *ad litem* gets deducted from the settlement proceeds; in others, the practice is to tax the *ad litem*'s fees as court costs, which then get taxed to the defense.

To obtain court approval of a proposed structured settlement, a key factor in many jurisdictions is the financial strength and ratings of the life company being used. Most courts prefer those life companies with a rating of A+15 or higher. In larger settlements, the courts also like to see "split funding" where more than one life company is used.

Finally, one of the most important elements to include in settlement or probate documents is anti-factoring language. Each state has anti-factoring rules or laws on all cases, but in particular for minor-plaintiff cases. This is critical in preventing any settlement proceeds falling under the predatory practices of factoring companies, particularly before the child reaches the age of majority.

6. Conclusion

Being aware of the ways in which minor-plaintiff claims differ from similar cases brought by adults will allow carriers and defense counsel to plan an effective defense for such claims, and hopefully bring them to a prompt and favorable resolution.