

MINNESOTA LAWYER

Periodicals Postage Part 1 of 2

February 20, 2012

minnlawyer.com

THE DOLAN
COMPANY

Vol. 16, No. 8 | \$6.00

Mother prevails over grandmother in custody dispute

By Jay Donald Jerde
Special to Minnesota Lawyer

The adults played a “constant tug of war” against each other. The children were “pawns.” The grandmother lost custody because the District Court believed the mother would be better for the children.

The unpublished Minnesota Court of Appeals decision on Feb. 13 of *Trimbo v. Trimbo* (*In re Custody of Y.R., J.R. & I.S.B.-T.*) affirmed the Sibley County District Court’s modification of custody in favor of the children’s mother, Kathleen Anne Trimbo.

“I really hope that the end is near after this,” said the mother’s attorney, Ted J. Han-

Verdicts & Settlements

N.D. jury awards \$4 million in birth malpractice

By Jane Pribek
Special to Minnesota Lawyer

Odds are that any attorney who tries cases will lose about half of them. But the chances of success are even tougher for medical malpractice plaintiffs.

Statistics from the largest professional liability insurance consortium, the Physicians’ Insurers’ Association of America, show that just 5 percent of all claims are tried, and that the defense prevails in 90 percent of those trials.

Those are nationwide statistics. It’s probably even harder for plaintiffs in North Dakota, hypothesizes Lee Bissonette.

“They’re a pretty conservative lot,” said Bissonette of Edina. “They just think people make mistakes and life goes on.”

Yet he and co-counsel

Christian Mester of Silver Spring, Md., beat those odds with a Nov. 18, 2011, verdict of \$4 million for their clients, Jeri Benson and her teenage son, A.B., stemming from the negligence of a nurse midwife during A.B.’s delivery in April 1998.

To the best of Bissonette’s knowledge, accumulated after about a quarter-century of practicing in North Dakota and following his colleagues’ cases, it’s the first plaintiff medical malpractice verdict in Bismarck in many decades — or possibly ever.

Minneapolis attorney Peter Schmit agrees that North Dakota is a tough venue for a plaintiff. “I’ve been practicing in plaintiffs’ medical malpractice for 23 years now in



Lee Bissonette



Christian Mester



Verdict Child was born with severe brain damage and will need lifelong care

Continued from page 1

Minnesota and North Dakota, and I went to law school in North Dakota. Plaintiff verdicts in medical malpractice are very rare in North Dakota. I had one back in 2007 in Fargo, and two others in Fargo. One was tried to the court versus a jury, and the other involved a burn to an infant. So they are extremely rare in North Dakota."

'As close to death as a baby can be'

Benson was 19 when she gave birth, and very trusting of all medical providers, Bissonette said.

Her primary care physician referred her to two nurse midwives, Gloria Berg and Patricia Richter in Minot, who provided all prenatal care and were anticipated to deliver the baby.

But at 41 weeks and one day, Benson started developing signs of preeclampsia. She was admitted, and Berg began inducing labor.

After one day, Richter took over and saw the induction and 15 hours' active labor through until A.B. was ultimately delivered via a non-emergency C-section, 62 hours after Benson's admission. About a dozen hours before the birth, Benson developed a fever, a clear indicator of infection, but Richter prescribed the wrong antibiotic.

A.B.'s Apgar score was zero, "as close to death as a baby can be," Bissonette said. An attending neonatologist diagnosed perinatal asphyxia, or oxygen deprivation. In addition, the placenta showed signs of infection.

Benson had asked for a C-section at least twice but was ignored, he added. Moreover, once she started spiking a fever, she should have been prescribed a broad-spectrum antibiotic, he argued.

All along the induction was not following what's known as the "Friedman Curve," Mester added — Benson was not dilating at the rate it suggests. Ignoring it clearly fell below the standard of care, he said. Likewise, the baby's tracings clearly indicated distress, but

they were disregarded.

The principal result of A.B.'s birth injury was severe, permanent brain damage, with low cognitive functioning and impulsive behavior, including kicking, hitting, biting and screaming.

"He's literally out of control all the time," Bissonette said. Two of their experts — both treaters — concluded he will never be able to live independently. Another recommended three people providing eight-hour shifts of care every 24 hours for the rest of his life.

From talking to a focus group before trial, Bissonette and Mester learned that jurors would be curious about why it took so long to bring a claim.

Mester said Benson did not realize the extent of A.B.'s injuries initially because he was generally meeting the physical development milestones. While pediatricians all along had told her they suspected he'd have serious issues, and she was aware of his behavioral issues early on, she kept on hoping he would improve as he grew.

It wasn't until 2005, after he had started seizing and was hospitalized, that an MRI conclusively showed a frontal-lobe injury likely dating back to his birth that she finally understood just how bleak his condition was and started considering the possibility that their caregivers at his birth were responsible.

"That MRI was really important in this case," Mester said. "It showed the

injuries and that they were due to an injury that occurred at or around the time of birth. The defense just couldn't get away from those films, as much as they tried."

Bissonette became involved in 2007 and spent almost two years investigating the case before filing it in summer 2009. Then it took two more years to complete discovery, including 30-plus expert depositions and extensive pre-trial motions.

The trial spanned 23 days. Both sides presented testimony from about 15 experts each. At no point before or during trial had the defense made any settlement offers.

Mester said A.B. came to the trial briefly for jurors to observe how he interacts. "He wasn't in there for more than a minute. He said 'hi' to the jury, and then he immediately started doing other things. It was exactly what a doctor had just told the jury."

After 10 and half hours of deliberation, the jury found Richter 70 percent at fault. Its \$4 million award included zero for noneconomic damages, and the plaintiffs did not emphasize that element. The case settled for \$2.8 million (70 percent of \$4 million) after the plaintiff waived costs and the carrier paid \$800,000 over its limits and agreed not to appeal.

Angela Lord of Fargo defended the case. She did not return a call seeking comment.

Lessons learned


Bissonette said don't be afraid of trying the right case, even in a very conservative venue.

"I've been handling cases in North Dakota for well over 25 years. Frankly, I really like people from North Dakota. People talk about 'Minnesota nice,' but it doesn't even come close to 'North Dakota nice.' So as a trial lawyer, you have to remember they are not punitive or mean — their first reaction might be to forgive someone — 'it was a mistake; let's give them another chance.' And they don't like confrontation; you can't start yelling at an expert on cross-examination, even if you know they're lying through their teeth."

Along these lines, he said it's certainly appropriate to ask for noneconomic damages, but be careful not to spark notions of "jackpot justice." Emphasize what the injured plaintiff needs to survive, rather than what the parents have endured. "We just wanted it to be all about A.B.," Mester said.

In addition to a focus group of North Dakota residents, they used a jury consultant. Both were helpful; especially for framing the issues and keeping it simple. Throughout the trial, they continually returned to the themes that this delivery lasted too long and that a vaginal delivery was given higher priority than a safe delivery, Bissonette said.

Finally, birth-injury cases are tough because the medicine is complicated, Mester said. If jurors are at all confused or feel like it's even close to a 50-50 call, they tend to give the health care provider the benefit of the doubt.

"This jury paid attention every single day. From talking with them afterward, they understood every nuance. And they did the right thing — they did justice for A.B." 



Verdicts & Settlements

If you have an interesting verdict or settlement, don't be shy about it. Even if the sum is confidential, we may still be interested in the details. Contact Barb Jones at 612-584-1543 or Barbara.Jones@minnlawyer.com. 