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spotlight]

Clamp Manufacturer Pursued for Botched Circumcision

Hall v. Pickett, No. BC415097 (Cal., Los Angeles Co. Super. July 18, 2011).

Often when a patient is injured during a common medical procedure, the logical step is to sue the doctor for medical malpractice. But faced with an uphill battle to recover damages from a doctor who performed a botched circumcision, attorneys Browne Greene, Daniel Balaban, and Andrew Spielberger, all of Santa Monica, California, were forced to explore other avenues, and they learned that the real culprit was the circumcision tool.

Terrel Hall was only days old when, during a routine circumcision, Dr. Anthony Pickett cut off most of the tip of his penis. In the eight years since, he has undergone three surgeries, including a graft using tissue from his mouth. Although he is able to urinate, doctors aren't sure whether he'll be able to have an erection or how much feeling he'll have if he is able to have sexual intercourse.

Terrel's original attorneys sued Pickett for medical malpractice, but after several years of litigation, they had been offered only $30,000. When they got the case, Greene, Balaban, and Spielberger decided to research the circumcision device itself, a tool known as the Mogen clamp.

"People look at circumcision as a routine medical procedure, and if something bad happens, they think it must have been the doctor's fault because it's such a rare event," said Greene. "Looking at the challenges of a medical malpractice case with medical malpractice caps to begin with, plus an uninsured doctor, caused us to look in other directions. Necessity breeds ingenuity."

Their investigation revealed that the Mogen clamp has been linked to numerous penile amputations. Unlike other circumcision tools, the Mogen clamp has no protection shield for the head of the penis and is built so that the physician cannot see the head when applying the scalpel to the foreskin.

The device's manufacturer and distributor, Miltex, Inc., removed it from the market in 1994 after one injury report, but it didn't recall the clamp or send doctors a warning letter. In 2000, the FDA told Miltex to warn all doctors like Pickett who might be using the clamp, but the company didn't do it.

"The product is used in only 10 percent of circumcisions but is responsible for 100 percent of the amputations," said Balaban. "That kind of says it all."

After they added Miltex to the case, the team held a mock trial to determine how much blame a jury would place on the doctor over the product manufacturer. The defense argued that Pickett was, in a way, a victim himself because he had not been warned that the device he was using was dangerous. The plaintiff instructed the mock jurors that if they found Pickett liable, they should limit his fault to 10 percent. When the jury returned a verdict with 90 percent of the blame for Miltex and the remainder for Pickett, the attorneys knew they had a strong case against Miltex.

The mock jurors would have awarded an average of $13 million in compensatory damages and $30 million in punitive damages, easing the team's fears that a jury wouldn't put a high enough value on the case.

"We knew this was going to be primarily a general damages case," said Balaban. "Terrel looks good, he's a straight-A student, he has a great family, and we were concerned that the amount

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of general damages on a case like this could be low."

"There is a lot of psychological damage here that really gets underestimated unless it's presented effectively to the jury," agreed Spielberger. "There are multiple layers of psychological and emotional injuries that could play out for someone like this."

They got another break when the court granted Pickett summary judgment, which was unopposed by the plaintiff. That meant that under California law, Miltex would be precluded from mentioning liability on the doctor's part.

Armed with a stronger case, the attorneys began settlement negotiations, where they had one more surprise for the defense: While digging through documents related to circumcision clamps, Balaban had come across a 2006 patent application filed by the defense liability expert for a new clamp. In the application, the expert discussed other clamps on the market and specifically said that the Mogen clamp was dangerous.

Presented with that evidence, and knowing that it would have a hard time blaming the doctor at trial, Miltex agreed to a settlement of $4.6 million. Of that, $2.8 million will be structured and paid out in annuities over Terrel's lifetime, for a value of about $10 million. The family will also receive a cash payment of about $270,000 so that Terrel can immediately begin therapy to help him deal with issues that will arise during puberty.

Greene said this case is a perfect example of what trial lawyers hope to accomplish.

"We took a case that came to us in such a woeful condition and moved it into a different area of the law, and now this child has been helped," he said. "You can't give up hope because quite often in cases, there are other pathways that will make the case work a lot better. That's the art of what we do."