Liability In The Perinatal Setting

Jennifer Brennan, JD

Rebecca Cypher, MSN, PNNP
Health Care Industry: Storm at High Tide

“Perfect” outcome
Angry distrustful patients
Scrutinized healthcare
Evidence-based quality care
Wave of malpractice
Cost of liability insurance
EXPERIENCE

Led by Charles Thronson, the Personal Injury practice group at Parsons Behie & Latimer has more than thirty years of experience representing clients in birth injury, cerebral palsy, and severe child injury cases.

LEARN ABOUT CHARLES THRONSON

Finding the Right Utah Birth Injury Attorney

Count on Siegfried and Jensen's experienced birth injury and medical malpractice lawyers to fight for you. If your child was injured during delivery (e.g., brachial palsy, cerebral palsy, or brain damage), you should talk to a medical malpractice attorney immediately. Medical malpractice cases can be very complex, and it takes specialized legal and medical expertise to prove liability on the part of the healthcare provider.

When you work with our experienced birth injury attorneys, you can expect the best:

- We'll answer your questions and address your concerns throughout the entire process.
- We'll pull together the information needed to build your case, including medical records, insurance policies, expert testimony, etc.
- We'll make sure that everybody plays by the rules and treats you and your child fairly.
- We'll help you get what you and your child need to move forward and create a good life.
OB Claims Are Costly

5th largest category of professional liability claims
4th highest category of indemnity payments
OB claims are often high-severity, resulting in the death of mother, baby, or both

IHC To Pay $9.7M in Malpractice Case

A Salt Lake County jury handed a record $9.7 million award to the family of an 8-year-old girl born with crippling cerebral palsy, ruling that Intermountain Health Care provided negligent prenatal care that caused the girl's lifelong medical problems.
Impact of Liability Claims

Provider burnout: stress and suicide
Women can’t find providers for care/delivery
  ◦ Rural health care in crisis mode
  ◦ Vaginal Birth After Cesarean

Women’s access to OB-GYN care threatened
Less investment in new technology/medications
  ◦ Off label use of medications
Impact on Nursing

Fewer physicians within our healthcare setting

Limited backup for advanced practice nurses
  ◦ Rising cost for malpractice premiums

Lack of prenatal care/testing
  ◦ Higher likelihood of caring for high-risk patient
  ◦ Higher acuity level of patient
Elements of a Malpractice Claim
Duty

Legal or moral obligation owed by one party to another party

Accept responsibility
- Care & treatment

How to satisfy duty
- Established relationship
Breach of Duty
A failure to perform a legal or moral duty

Failure to do what a reasonable prudent nurse would do

Determine Standard of Care
  ◦ Omission
    ◦ Fail to do the right thing (delay in treatment)
  ◦ Commission
    ◦ Doing something wrong (wrong dose)
  ◦ Compare to Nurse Practice Act

Vanderbilt ex-nurse indicted on reckless homicide charge after deadly medication swap

Kimberly Hiatt, a longtime critical care nurse at Seattle Children's Hospital, committed suicide in April, seven months after accidentally overdosing a fragile baby.
Causation
An action that causes a reaction or other effect

Cause is evident
Reasonable connection
Acts of negligence and damages

**Damages/Harm**

Injury incurred by a party
Most often expressed as monetary compensation to an injured party
Compensation for What?

Economic
- Lost wages
- Medical expenses
- Household help

Non-economic
- Pain, suffering, loss of companionship

Punitive
- Punish the wrongdoer

LIFE CARE PLANNER.......
<table>
<thead>
<tr>
<th>ITEM/SERVICE/EQUIPMENT</th>
<th>PURPOSE/FUNCTION</th>
<th>SOURCE/VENDOR</th>
<th>BASE/UNIT COST</th>
<th>REPLACEMENT/FREQUENCY SCHEDULE</th>
<th>LIFETIME COSTS</th>
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<tbody>
<tr>
<td>Gastro Tubing</td>
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<td>Southwest Memorial</td>
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<td>monthly</td>
<td>9,240.00</td>
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<td>Monitor Medical</td>
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<tr>
<td>(changed daily)</td>
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<td></td>
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<tr>
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<td>Suctioning</td>
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<td>72.00</td>
<td>monthly</td>
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<tr>
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<td>Irrigate feeding tube</td>
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<td>weekly</td>
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<td>Medical supp.</td>
<td>Monitor Medical</td>
<td>15.00</td>
<td>monthly</td>
<td>3,960.00</td>
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</table>
Why Can’t We Do the Right Thing All The Time and Every Time?

Distractions (Personal/Unit)  Brain “freeze”
Stress                      Inadequate training
Fatigue                     Inadequate experience
Memory Lapse                Unanticipated complications
Common OB Claims

- Birth asphyxia (HIE)
- Shoulder dystocia
- Fetal demise
- Maternal hemorrhage or infertility
Recurrent Litigation Themes

Miscommunication

Provider Discord

Problematic Documentation
  ◦ Informed Consent
  ◦ Incomplete/Incorrect charting
Communication Breakdowns

Chain of command
  ◦ Should have policy for keeping attending informed

Speak the same language
  ◦ All providers should use consistent terminology

Consent

Care transitions

Discharge instructions
Clinician Discord

Settling scores or blaming other providers/service lines
Disrespectful communications can destroy careers
Emails, texts, pages are all discoverable in litigation
CRICO Strategies

Miscommunication (36%)
Technical Error (26%)
Inadequate documentation (26%)
Administrative Failures (23%)
Ineffective supervision (15%)
## Liability in Obstetrics

<table>
<thead>
<tr>
<th>Type</th>
<th>Percentage</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>Birth Asphyxia</td>
<td>27%</td>
<td>$1,431,000</td>
</tr>
<tr>
<td>Shoulder Dystocia</td>
<td>18%</td>
<td>$559,000</td>
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<tr>
<td>Intrauterine Fetal Death</td>
<td>6%</td>
<td>$373,000</td>
</tr>
<tr>
<td>Maternal Hemorrhage</td>
<td>4%</td>
<td>$305,000</td>
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</table>

CRICO Strategies 2010 Annual Benchmarking Report
Review of 882 obstetric claims between 2007-2014

http://www.thedoctors.com/
Most Common Obstetric Allegations: 59%

22%: Treatment delay Category II / III FHR
  ◦ Interpretation disagreement between MD/RN who doesn’t assess the patient
  ◦ 20%: Improper vaginal delivery
    ◦ Shoulder dystocia, OVD

17%: Improper pregnancy management
  ◦ Pre-eclampsia = stroke
472 OB Claims

486 CLAIMS
More than one claim

Inappropriate L&D management: 37%
Inappropriate pregnancy management: 14%
Negligent patient monitoring: 12%
Cesarean section delay: 11%

Clinical Judgment: 53%
Communication: 13%
Documentation: 8%

Technical Skill
Human Factors
Clinical Systems
Administrative
Behavior Related
Legal Perspectives on Documentation

If it isn’t charted, it didn’t happen.
  ◦ Perhaps but not necessarily true

Poorly documented = poorly done
Incorrectly documented = fraudulent
The Record

Critical Thinking

**Assessment**: Encompasses everything

**Communication**: What I tell others

**Documentation**: What is recorded

- Must accurately reflect occurrence and sequence of events
- Will be subject to keen scrutiny by experts
Documentation

Should be: respectful, professional, objective
- Identify the provider by name
- Place patient/family statements in quotes
- If orders are questioned, document
  - clarification was sought and discussed

Should not: place blame, make assumptions, criticize other providers
Documentation must be “CLEAR”

Contemporaneous
Logical
Explicit
Accurate
Readable

Miller, Miller & Cypher, 2017
Contemporaneous

Written around or near time of occurrence or intervention

No legal standard

Use common sense

Records must be transparent

No harm in a proper “late” entry
Assessment of EFM tracings infers that there is **BEDSIDE** visual review of a paper tracing or labor room computer screen.
On Occasion

Tracing analysis from a remote location necessary

Staffing ratios do not allow for a bedside evaluation

Remote tracing review from an operating room during critical situation (i.e. emergent cesarean)
Logical

Plain and unambiguous

Show a clear plan related to patient assessment/status

- Don’t be afraid of narrative notes

Gradual FHR baseline increase from 120 to 155 bpm over an hour. Irregular contractions with Montevideo units <130 mm Hg. Normal vital signs. Dr Navarre notified of baseline change/vital signs; will review tracing remotely from clinic.
Avoid vague or ambiguous terms
FHR and uterine activity,
◦ Use components rather than categories
10 years from now
◦ If you know components you can apply the summary terms, but the reverse is not!
Nurse at bedside; fetal heart rate appears sketchy; toco not picking up contractions; patient requests pain medication; midwife Duncan called for orders.

Nurse at bedside; unable to interpret fetal heart rate data due to noncontiguous tracing related to maternal body habitus; firm contractions palpable every 2-3 minutes; monitors readjusted patient requests pain medication; pain scale 7 of 10; midwife Duncan called for pain medication orders and fetal spiral electrode/intrauterine pressure catheter placement.
Accurate

Timing of notes, interventions, occurrences
Use correct terminology
Notes must provide a truthful representation of what happened
Avoid allegations of spoliation
<table>
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<th>Display Time</th>
<th>User</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>08:45:00</td>
<td></td>
<td>Cervical consistency: medium</td>
</tr>
<tr>
<td>08:45:00</td>
<td></td>
<td>Cervical position: midposition</td>
</tr>
<tr>
<td>08:45:00</td>
<td></td>
<td>Contraction frequency: 7 / 10 min in last 15 minutes</td>
</tr>
<tr>
<td>08:45:00</td>
<td></td>
<td>Average contraction duration: 71 seconds in last 15 minutes</td>
</tr>
<tr>
<td>08:45:00</td>
<td></td>
<td>Contraction intensity: 37 in last 15 minutes</td>
</tr>
<tr>
<td>08:49:25</td>
<td></td>
<td>FHR 1: Baseline: 128 bpm in last 15 minutes</td>
</tr>
<tr>
<td>08:49:25</td>
<td></td>
<td>Maternal heart rate (SpO2): 80 BPM</td>
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<tr>
<td>08:49:25</td>
<td></td>
<td>Maternal SpO2: 97%</td>
</tr>
<tr>
<td>08:54:32</td>
<td></td>
<td>Maternal heart rate (SpO2): 87 BPM</td>
</tr>
</tbody>
</table>
Altering the record:
  ◦ Late entry can be ok if reason is explained
  ◦ Changing record to cover up a problem will make it worse

Audit trails show **ALL** changes to the EMR and are discoverable!
Late entry due to urgency of patient care situation. At 22:10 patient had increasing pelvic pressure and bloody show. Fetal heart rate baseline 145 bpm, moderate variability, intermittent variable decelerations. Firm contractions every 2-4 minutes lasting 70-90 seconds. Vaginal examination by CNM Zemmer: 6/100%/-1. Approximately 10 minutes later, involuntary pushing noted, followed by a 5-minute prolonged deceleration to 90 beats per minute. Patient turned to right side. Repeat examination by this nurse 10/100%/+4. CNM Zemmer called to room for delivery. Head out at 22:32, followed by shoulder dystocia. Time of birth 22:38.
Social Media Pitfalls

Do not:
- Share work experiences on any social media sites
- Reveal information that can identify a patient
- Give medical advice
- Share experiences on challenging patients
- Share experiences on an interesting medical problem

Violating HIPAA regulations: fines as high as $250,000 and jail time

Good rule of thumb: would I be comfortable with this item being shared in a public forum with my employer, patients and colleagues?
The Three “D”s

**Disclosure**: A family’s story will be affected by disclosure conversations following an unexpected outcome.

- *Do not underestimate the impact of this conversation.*

**Documentation**: Records will become a sword for the plaintiffs or a shield for the defense.

**Deposition**: Closely related to documentation, what is testified to at deposition will be the basis of trial testimony and may impact settlement.
Disclosure

Involve your organization’s Risk Management or legal department

Talk with family
- “I am so sorry this happened.”
- “We weren’t expecting this to happen.”
- “We are going to look into what happened.”

Avoid speculation, misstatements, or finger pointing
- For instance, do not say “it was all pediatrics’ fault” or “it was the wrong drug” or “we made a mistake”
Deposition

Same as if you were testifying live in court

Your organization or insurance carrier will provide you with legal representation

Depositions can often be more important than trial, because most cases do not get that far

Take the process seriously, ask for as much prep as you feel you need
Questions?