Child or Chattel? Minor's Claims for Medical Expenses

by Nicholas Bernard, Esq. and Charles Thronson, Esq.

In a common law system like that found in the United States, the rate of change tends to be slow. It can take decades or centuries before principles of law underlying a particular decision are reexamined or overruled. Naturally, this tendency toward judicial inertia can be a bit of a mixed bag. Adherence to doctrine and precedent prevents the whims of a particular time pulling the law in a direction it was not meant to go, and protects the continuity and stability of the rule of law. If taken too far, however, the common law enforces outdated ideas for no reason other than "that's the way it's always been." For instance, the concept of "coverture," in which a newly married woman loses her legal existence to her husband, was not wholly repudiated in the United States until a few decades ago, when the Supreme Court invalidated a statute in Louisiana "that gave a husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent."[1]

Another realm in which the common law has been slow to evolve is the rights of children. Ancient legal systems conveyed an understanding that children were essentially the property of their parents, who not only exercised nearly absolute control over the children, but who were also entitled to dispose of the child's earnings and legal claims. While the law's views on children have changed in a number of areas, some holdovers of this archaic conception exist. One of the most prominent occurs in the context of personal injury or medical malpractice lawsuits in which the victim is a child who seeks recovery of medical expenses. In those cases, a strange bifurcation occurs under the common law, in which the child's injury gives rise to "two independent causes of action: one on behalf of the child for such damages as pain and suffering, permanent injury, post-majority impairment of earning capacity, and post-majority medical expenses; the other on behalf of the parents for such damages as loss of services during minority and pre-majority medical expenses."[2] This bifurcation "appears to have been the creation of common law judges interested in 'spinning out a symmetrical pattern of rights and duties,'"[3] matching the parents' duty to provide for their child with the right of those parents to assert their own claims if the child was injured.

The idea of allowing parents, as providers and guardians, to directly recover expenses incurred in caring for their child seems sensible enough on its face. However, limiting such claims to parents, rather than allowing them to be asserted by the child as well, can lead to absurd and inequitable outcomes. For instance, the statute of limitations is tolled on a child's claims while that child is under the age of eighteen.[4] No such tolling applies to a parent's claims arising out of the same injury to the child. If the parent is unaware of the legal ramifications of the child's injury, therefore, the statute of limitations may operate to prevent the assertion of any medical expenses a child might incur prior to the child's eighteenth birthday – even though that child has no ability to assert claims on his or her own behalf, and even though the lawsuit is filed well before the child reaches the age of majority.

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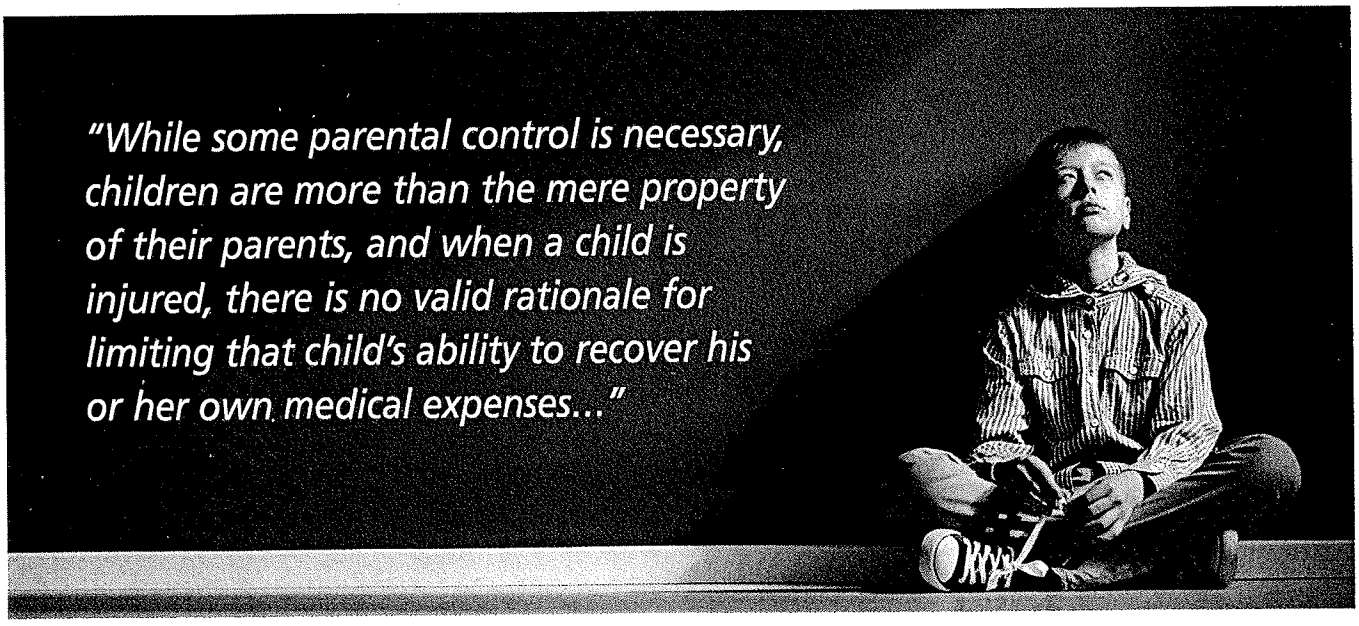
This outcome is especially unjust in cases of serious injuries to infants and very young children. Consider, for instance, a birth injury case. The statute of limitations for any and all claims related to the child's injury begins to run on the day she is born. Under Utah's Health Care Malpractice Act, no claim may be asserted for medical malpractice more than four years after the date of the injury, whether or not the child or her parents knew that they had a legal claim.[5] If the parents do not file a lawsuit until the child is five years old, neither they nor the child can recover any expenses they already incurred, nor any expenses they will incur between during the fourteen-year gap between the running of the statute of limitations and the child's eighteenth birthday. Essentially, the family is on its own – relying on some combination of health insurance, out-of-pocket spending, and government assistance through Medicaid and other public funding – for all of the medical care the child needs during her entire childhood, even though that medical care is the result of the same injury for which the statute of limitations is tolled regarding other expenses. The tortfeasor, meanwhile, escapes liability for nearly two decades of the consequences of its wrongdoing, just because "that's the way it's always been."

Fortunately, the tide seems to be turning against this anachronism of the common law, and a number of courts have begun to recognize that the common law rule is "no longer just or consistent with sound policy."[6] The reexamination of the rule began over four decades ago, when the Supreme Court of Indiana found that a simple prohibition on double recovery served the same purpose as the common law rule – that is, ensuring that a parent could recover expenses she has already paid, while preventing the tortfeasor from being held liable twice for the same injury – without unjustly preventing children and their families from recovering medical costs suffered as a result of a child's injury.[7]

Once the Indiana court opened the door, other jurisdictions began to reexamine the logic and equity – or lack thereof – inherent in the common law rule. A court in California deemed the common law rule a legal fiction and held that the cause of action for a child's medical expenses belongs to both parents and children.[8] A court in New Mexico found "no principled reason why the right to recover a minor's future medical expenses should lie exclusively with the parents."[9] And the West Virginia Supreme Court held it "absurd that two separate actions for a child's medical expenses…arise from the same allegedly tortious conduct."[10]

Other courts, while not rejecting the common law altogether, have applied exceptions to the rule to avoid the worst inequities of its application. Courts in Kansas, South Carolina, and Delaware have opted to treat a parent's failure to timely assert her claims for the child's medical expenses as a waiver, automatically vesting those claims in the child.[11] Maryland courts have gone a different route, holding that the doctrine of necessaries – under which a child may be liable for his own medical expenses – requires a corresponding right of recovery to prevent children from being "twice victimized – once at the hands of the tortfeasor, and once by parents who, for whatever reason, failed to timely prosecute their



claims for medical expenses."[12]

The idea that a child may be responsible for medical expenses he suffers raises the question of whether Medicaid expenses paid on behalf of a child – for which the child may be required to reimburse the government out of any judgment or settlement – create a similar exception to the common law rule. At least one court has found this to be the case, writing that allowing a child to recover for pre-majority expenses paid by Medicaid serves a "dual function" of protecting taxpayers by reimbursing Medicaid funds, "while not detracting from the minor's recovery."[13]

Despite the many different approaches to the question of minority medical expenses, Utah has neither joined the wave rejecting or limiting the common law rule, nor expressed a commitment to retaining it. In fact, the Utah Supreme Court's only ruling touching on the subject in a significant way was issued nearly sixty years ago, and even that decision provides little guidance. In *Ostertag v. Lamont*, an injured child asserted claims for medical expenses, which his father had already paid.[14] The Court, citing an American Law Reports section giving the common law rule, held that these expenses could not be considered in calculating the child's damages, because "The father, not [the child], suffered damages when he necessarily incurred these expenses, and the action for their recovery must be brought, if at all, by him."

The Court's short paragraph in *Ostertag* is thus far the only meaningful endorsement of the common law rule in Utah appellate courts. It says nothing about the rationale underlying the common law rule, nor does it address any potential exceptions to the rule. The only expenses incurred were relatively minor and had already been paid in full; no prospective treatment was contemplated. Without further clarification, it could be argued that *Ostertag* is broad enough to constitute a wholesale endorsement of the common law rule, or narrow enough to suggest that only those medical expenses already paid in full by the parent rightfully belonged to the parent. No subsequent decision has offered such clarification, so the state of the law in Utah remains in limbo.

Despite the lack of guidance from Utah's courts, however, the trend and the equities are clear. While some parental control is necessary, children are more than the mere property of their parents, and when a child is injured, there is no valid rationale for limiting that child's ability to recover his or her own medical expenses, regardless of the parents' ability or inclination to file suit in the immediate aftermath. Where the common law is an anachronism, a court's "oath is to do justice, not to perpetuate error."[15] Allowing tortfeasors to escape liability for injuring a child, and instead placing the financial burden of their wrongdoing on the child, the parent, or the taxpayer, requires a better justification than "that's the way it's always been." If none can be found, the common law should be abandoned.

1. *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981).
2. *State ex rel. Packard v. Perry*, 221 W. Va. 526, 532, 655 S.E.2d 548 (2007) (citations omitted).
3. *DeSantis v. Yaw*, 290 Pa. Super. 535, 536-37, 434 A.2d 1273 (1981) (citing *Reciprocity of Rights and Duties Between Parent and Child*, 42 HARV. L. REV. 112 (1928)).
4. Utah Code § 78B-2-108.
5. Utah Code § 78B-3-404.
6. *Estate of DeSela v. Prescott Unified Sch. Dist.* No. 1, 226 Ariz. 387, 390, 249 P.3d 767 (2011).
7. *Scott Cty. Sch. Dist. 1 v. Asher*, 263 Ind. 47, 52-53, 324 N.E.2d 496 (1975).
8. *White v. Moreno Valley Unified Sch. Dist.*, 181 Cal.App.3d 1024, 1030 (1986).
9. *Lopez v. Sw. Cmty. Health Servs.*, 1992-NMCA-040, 114 N.M. 2, 833 P.2d 1183.
10. *Packard v. Perry*, 221 W.Va. at 538.
11. *McNeill v. U.S.*, 519 F.Supp. 283, 290-91 (D.S.C. 1981); *Sox v. U.S.*, 187 F.Supp. 465, 469-70 (E.D.S.C. 1960); *Betz v. Farm Bureau Mut. Ins. Agency of Kansas, Inc.*, 259 Kan. 554, 560, 8 P.3d 756 (2000); *Myer v. Dyer*, 643 A.2d 1382, 1387 (Del. Super. Ct. 1993).
12. *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 694-95, 679 A.2d 1358 (Md. App. 1997); *see also Garay v. Overholtzer*, 332 Md. 339, 631 A.2d 429 (Md. App. 1993).
13. *Shaffer-Doan ex rel. Doan v. Com., Dep't of Pub. Welfare*, 960 A.2d 500, 512-13 (Pa. Commw. Ct. 2008).
14. 9 Utah 2d 130, 136, 339 P.2d 1022 (1959).
15. *Montgomery v. Stephan*, 359 Mich. 33, 38, 101 N.W.2d 227 (1960).