Does a plaintiff in a malpractice case have a right to be present in the courtroom even if her physical or mental condition will create bias or elicit overt sympathy from the jury when those conditions may have nothing to do with whether the defendant provided negligent treatment? That was the question in Kesterson v Jarrett, 728 SE2d 557 (Georgia Supreme Court, June 18, 2012). Simply put, the plaintiff was born with cerebral palsy that was claimed to have been caused by the defendants’ negligence just before delivery. The defendants argued that her conditions were caused by factors other than their treatment. Her injuries, as described in the court’s opinion, were that she was unable to control her movements and is confined to a special wheelchair, she has a feeding tube inserted into her stomach, her airway must be suctioned several times a day, she has bladder and bowel dysfunction, she suffers frequent seizures, she has severely limited cognitive function, and she cannot speak.

At her initial trial, the judge used his discretion and allowed the plaintiff to be introduced to the jury during the opening argument but precluded her from being present during the phase of the trial determining whether the defendants were liable. This decision was based on the judge’s belief that her presence would unduly influence the jury and prejudice the defendant’s opportunity to a fair trial owing to excessive juror sympathy and that her condition precluded her from helping to participate in her own defense. The jury found for the defendants, and the plaintiff appealed.

The appellate court affirmed the trial court, ruling that the plaintiff could not meaningfully participate in and understand the proceedings. The court also agreed that her condition would elicit such overt sympathy that the defendants might not be able to receive a fair trial. Previous case law had determined that such bias could be inferred, and the plaintiff excluded from the proceedings, when the following elements were found to be present (Cit. Omit.):

1. The plaintiff is severely injured;
2. The plaintiff attributes those injuries to the conduct of the defendant(s);
3. There is a substantial likelihood that the plaintiff’s presence in the courtroom will cause the jury to be biased toward the plaintiff on the basis of sympathy rather than the evidence such that the jury would be prevented or substantially impaired from performing its duty;
4. The plaintiff is unable to communicate with counsel or participate in the trial in any meaningful way; and
5. The plaintiff is unable to comprehend the proceedings.

Once again, the plaintiff appealed, this time to the Supreme Court, which reversed the determinations of the lower courts, finding that the plaintiff did indeed have a right to be present. The court noted that state law going as far back as 1852 holds that a defendant “...has the right to be present, and see and hear, all the proceedings which are had against him on the trial before the court” (Cit. Omit.). The court stated that the right to be present at trial is held by that party, though it is not absolute. The right to be present may be waived, sequestration of witnesses may be in order, and obstructive or obstructive decorum are a few examples relating to one being precluded from attendance at their trial.

The court adroitly addressed the fact that the plaintiff was excluded because of concern that “…her physical and mental condition would cause the jury to be unduly sympathetic toward her.” The court stated that everyone is entitled to a fair trial that is based on the evidence and the evidence alone, irrespective of prejudices that may come into play. However, the court also discussed that inappropriate sympathy is a factor that often has to be dealt with. In civil cases, the injuries may be horrendous, whereas in criminal cases, the acts may reek of savagery.

The court noted that there are a number of established methods for dealing with the potential of juror bias, such as the exclusion of jurors for cause or peremptorily during voir dire; excluding evidence when its prejudicial value outweighs its probative value owing to sympathy or hostility; restrictions on what can be said during opening or closing arguments; and more to the

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point, that juries can be told in no uncertain terms to disregard and not consider sympathy in its deliberations. This last method can be accomplished by a judge’s admonitions or by appropriate massaging of the language used in jury instructions. The final means of dealing with this issue is the appeals process, wherein the appellate courts can review a jury’s verdict to ensure that it is based solely on the facts, the evidence, and the applicable law and not on any type of bias. The court then gave an example of a jury instruction to address this issue; it reads as follows:

Your verdict should be a true verdict based upon your opinion of the evidence according to the laws given you in this charge. You are not to show favor or sympathy to one party or the other. It is your duty to consider the facts objectively without favor, affection, or sympathy to either party.

In deciding this case, you should not be influenced by sympathy or prejudice because of race, creed, color, religion, national origin, sexual preference, local or remote residence, economic (or corporate) status for or against either party.

In support of its own position that “…a person does not sacrifice her right to prosecute in person that person’s own cause …just because she is unattractive, or disfigured, or handicapped…,” the court then looked at cases from New York and Florida and cited the following verbiage:

We find no authority for the proposition that a party may be excluded solely by reason of his disfigurement. [E]xcluding a party from a trial based on his physical appearance would be “fraught with danger in its implications. [T]he right to be present in court should not be tempered by the physical condition of the liti-gant. It would be strange, indeed, to promulgate a rule that a plaintiff’s right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the court room if he happened to be unsightly from injuries which he was trying to prove the defendant negligently caused. (Cits. Omit.)

COMMENTARY

Suppose you are a defendant in a malpractice suit. The plaintiff claims that she lost the 6 maxillary anterior teeth because of your negligence; trust me, I’ve seen a number of these cases. Two more teeth, the first premolars, are significantly compromised. It’s one thing to have photographs or x-ray images showing the gaps where the teeth once were; it’s quite something else to have an attractive 16-year-old girl, the plaintiff, sitting in court with a huge anterior open bite devoid of anything white, and who, when called upon to testify, speaks with a pronounced lisp and maybe a drop or 2 of drool. Or, maybe it’s an orthognathic case gone awry. Again, maybe it’s a significant facial asymmetry or an open bite, something also disfiguring. Talk about sympathy.

When this stuff happens—and it does, fortunately rarely—it may be time to think hard about settling the case. Your insurance carrier will look at it from the financial perspective. How defensible is it? What are the chances for success? What will it cost to defend vs the settlement demand? You have to look at it from the angst, the damage to your reputation, the lost time out of the office, or the potential for negative publicity, all of which gets pitted against your personal and professional ego, not to mention the fact that you honestly believe you didn’t do anything wrong. Sometimes bad things just happen.

This is why you carry malpractice insurance. This is why you should be taking continuing education courses on an ongoing basis. This is why you should be keeping up with the current literature. This is why good judgment is so important. Going after every impacted whatever because you once saw a case where the outcome was successful is not a guarantee of success, nor is it judicious thinking, nor is it particularly safe for the patient. My wife tells me all the time, “Just because something can be done doesn’t mean it should be done.”

I tell my residents all the time that as far as the clinical arena is concerned, the winner is the guy who makes the fewest mistakes. Clinical and exper-i-mental prudence goes a long way. No, I’m not a coward. I do some pretty funky stuff in the clinic. I’ve been on the cutting edge of developing orthodontic appliances, and when you are on the cutting edge, you have to expect to bleed once in a while. But in the end, my triple-beam balance scale always tilts in favor of engaging in a course of therapy that has the potential to inflict the least amount of harm to a patient. In my head, I keep hearing Laurence Olivier asking Dustin Hoffman in the movie Marathon Man, “Is it safe?”