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# Tort Law - Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services

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# TORT LAW—Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages: *Lopez v. Southwest Community Health Services*

## I. INTRODUCTION

In *Lopez v. Southwest Community Health Services*,[1] the New Mexico Court of Appeals decided for the first time that a minor can recover for her or his own future medical and non-medical expenses.[2] The court found no legitimate reason why recovery for medical damages should belong only to the parent, as long as the tortfeasors are protected against double recovery.[3] In tort cases decided prior to *Lopez*, minor plaintiffs apparently did not recover damages in their own capacity; instead their future medical expenses were awarded to their parents who are legally responsible for payment of those expenses.[4] The *Lopez* decision did not eliminate the role of the parents; instead *Lopez* allows *either* the parent or the child to sue and recover the damage award.[5] While the court also wrote on three other issues,[6] this casenote focuses on the implications for attorneys of the court's ruling that either the minor or a parent may sue for the child's future medical expenses.

## II. STATEMENT OF THE CASE

Rudy and Dorothy Lopez, parents of Adam Lopez, brought a medical malpractice action in their representative capacity against Southwest Community Health Services and the physician who delivered their son. Neither Dorothy nor Rudy Lopez asserted any claims on their own behalf; instead they participated in the lawsuit as representatives of their son.[7] The claim

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1. 114 N.M. 2, 833 P.2d 1183, *cert. denied*, 831 P.2d 989 (1992).

2. Adam Lopez as a minor has a right to recover damages for medical, custodial and related expenses. *Id.* at 4, 833 P.2d at 1185. Presumably, also, Adam can recover for lost earning capacity and pain and suffering. *See* Collins v. Perrine, 108 N.M. 714, 720, 778 P.2d 912, 918 (Ct. App. 1989), *cert. denied*, 108 N.M. 681, 777 P.2d 1325 (1989) (the court awarded the injured minor through his parents damages for pain and suffering, loss of enjoyment of life, and shortened life opportunity).

3. *Lopez*, 114 N.M. at 4, 833 P.2d at 1185.

4. *See e.g.*, Collins v. Tabet, 111 N.M. 391, 393, 806 P.2d 40, 42 (1991); Walters v. Hastings, 84 N.M. 101, 500 P.2d 186 (1972).

5. *Lopez*, 114 N.M. at 11, 833 P.2d at 1192.

6. First, the court affirmed the jury finding that the conduct of the defendant Hospital was a proximate cause of the physician's decision to deliver Adam which ultimately lead to his present condition. *Id.* at 5-7, 833 P.2d at 1186-88. Second, the court found that allegedly inflammatory remarks made by the plaintiff's counsel in closing argument, while "forceful to the extreme" did not create excessive prejudice toward the jury or violate any ethical considerations so as to require reversal of the verdict. *Id.* at 7-10, 833 P.2d at 1188-91. Last, the court upheld the trial court's ruling that evidence regarding an individual's insurance liability in a negligence case may be admissible if counsel is attempting to show the bias or prejudice of a witness. *Id.* at 12-13, 833 P.2d at 1193-94.

7. *Id.* at 114, 833 P.2d at 1185.

stemmed from the premature birth of Adam, which left him with severe physical and mental disabilities.[8]

The jury found both defendants liable, allocating seventy percent of the fault to the physician and thirty percent to the hospital, and awarding Adam $1.25 million for future medical expenses and $1 million for future non-medical expenses.[9] The hospital was liable for thirty percent of those amounts.[10]

On appeal, the hospital asserted that as a matter of law, Adam Lopez could not recover for his own medical expenses because they are the legal responsibility of his parents. The court of appeals rejected the hospital's argument. The court held that a minor does have the right to recover her own medical expenses as long as there is no double recovery from the defendant.[11]

## III. ANALYSIS

After *Lopez*, in New Mexico, either a parent or a child can sue for a cause of action to recover a minor's future medical and non-medical expenses stemming from a tort claim.[12] This rule is not new to Indiana or California, two jurisdictions *Lopez* relied upon to support its holding. In Indiana, the defendant in *Scott County School District 1 v. Asher*,[13] objected at trial to a jury instruction that allowed the minor plaintiff the right to recover his own medical expenses.[14] The objection was overruled by the trial judge. The issue on appeal was whether a minor can recover for his medical expenses resulting from injuries caused by defendant's negligence.[15] The court held that either the parents or the child may recover for the child's medical bills, reasoning that parents of a minor can sue for the child's medical expenses because they have a legal obligation to provide the necessary and reasonable medical services to a child.[16] The court stated, "[t]he parent is . . . liable because of his common law and, in some instances, statutory duty to support and maintain his child."[17] However, the court did not limit the ability to sue to the child's parents. The court affirmed the trial court ruling allowing the minor to recover his future medical expenses in his own name, noting that the minor child is *also* liable for medical expenses because those expenses are "necessaries" for which even an infant is personally liable.[18]

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8. Adam Lopez was born at least nine weeks premature. *Id.* Due to the risks of delivering a premature baby, Adam was born a quadriplegic, deaf, blind, mute, subject to seizures, and has a shunt in his head. *Id.* at 6, 833 P.2d at 1187.

9. *Id.*

10. *Id.* Both defendants appealed. However, the Lopez family settled with the physician. The court decision only addresses the issues raised by the Hospital.

11. *Id.* at 4, 833 P.2d at 1185.

12. *Id.* at 10, 833 P.2d at 1191.

13. 324 N.E.2d 496 (Ind. 1975).

14. *Id.* at 498.

15. *Id.*

16. *Id.* at 499.

17. *Id.*

18. *Id.* at 497.

Therefore, it follows that "both parent and child are liable upon suit by the doctor or the hospital, and consequently either may be compensated for the reasonable value of medical expenses."[19] Since both the parents and the child are liable for future medical expenses, *Scott* held that *either* the parents or the child can sue for medical damages and divide the proceeds however they want so long as the defendant does not pay the plaintiffs twice.[20]

*Lopez* also cites three California cases in support of its conclusion that the minor can sue for her own medical expenses. In *White v. Moreno Valley Unified School District*,[21] the minor, through her father as guardian ad litem, and her mother filed a complaint in which both sought damages against the Moreno Valley School District.[22] The complaint specified one cause of action for the minor plaintiff for medical and future medical expenses, and a separate cause of action for plaintiff's mother for recovery of medical and incidental expenses incurred and to be incurred in the future as a result of her daughter's injury.[23] When the child reached majority during the pendency of the proceedings, the complaint was amended to delete the father as guardian ad litem and the mother voluntarily deleted her cause of action for medical expenses, leaving only the daughter as the claimant.[24] At trial, the court granted the defendant's motion to exclude all evidence of the amount of medical expenses incurred to the time of trial because the bills had all been paid by plaintiff's mother.[25] The court of appeals rejected the contention that since the mother incurred the medical expenses and paid the bills, the right of action to recover this loss was hers and not the plaintiffs.[26] Instead the court concluded that the trial court was wrong to exclude the evidence of the child's medical expenses, and the child's claim was sufficient to support her own cause of action for medical expenses.[27] Ultimately, the court held that a cause of action to recover for a minor's medical expenses belongs to both the parents and the child and they become co-owners of the right of action to recover.[28]

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19. *Id.* at 499.
20. *Id.*
21. 226 Cal. Rptr. 742 (1986).
22. *Id.* at 744.
23. *Id.*
24. *Id.*
25. *Id.* at 745. "The court's ruling was based on its conclusion that the tort claim presented to School District on behalf of plaintiff did not include any claim on her part for medical expenses; that, on the contrary, in the claim that was presented only plaintiff's mother claimed medical expense damages; and that in fact the mother's claim was included in the complaint filed against the School District but the mother's cause of action was subsequently voluntarily dismissed."
26. *Id.*
27. *Id.* at 748.
28. *Id.* at 746; *see also Lopez*, 114 N.M. at 11, 833 P.2d at 1192.

The *White* court based its opinion on an earlier California case, Bauman v. San Francisco, 108 P.2d 989 (Cal. App. 1940). *Bauman* stressed that where the injured child is living with his or her parents, and they are the primary care takers of the child, then it follows that the expenses incurred to care for the child rest with the parents and not the minor. *Bauman* also provides that this rule is not without exception. The child is also allowed to recover for the reasonable value of the medical expenses. *Id.* at 999.

In *Wiley v. Southern Pacific Transportation Co.*,[29] a minor plaintiff, through his guardian ad litem, filed a complaint against the defendant for damages resulting from an injury he received while climbing on defendant's train.[30] The plaintiff's father did not file a separate claim to recover any damages or medical expenses. The jury found against the defendant and assessed its negligence at twenty-five percent and the plaintiff's comparative negligence at seventy-five percent. The jury awarded the plaintiff $54,000 for medical expenses.[31] The jury did not reduce the medical expenses award by the percentage of plaintiff's comparative fault.[32] The defendant contended that since the complaint was only brought by the minor, the award of medical expenses should have been reduced by the percentage of damages attributable to his negligence. The court of appeals agreed, and ordered a new trial with instructions that the judgment for plaintiff's medical expenses be apportioned according to the percentage of comparative negligence of the child.[33]

The court saw no issue regarding the parents' right to recover for the medical expenses since the cause of action was clearly asserted as the minor plaintiff's right to recover his own medical expenses. *Wiley* affirmed the law in California that an injured minor can recover her or his own medical expenses.[34] The court stated that, "[b]oth a minor and his or her parents have standing to sue for the child's medical expenses resulting from a defendant's tortious conduct."[35] The court acknowledged that the parents and the child have a joint right to bring a lawsuit against the defendant.[36]

Finally, in *Anisodon v. Superior Court*[37] the minor, through her mother as guardian ad litem, alleged her own cause of action for medical malpractice.[38] Plaintiff's mother also asserted a cause of action on her own behalf. The mother's claim sought recovery for the mother's emotional distress as a result of the negligently performed delivery of her daughter.[39] The trial court sustained the defendant's demurrers and found that the mother could not recover emotional distress damages.[40] The court of appeals overturned the decision not to award damages for distress and allowed the mother her own cause of action for negligent infliction

29. 269 Cal. Rptr. 240 (Ct. App. 1990).
30. *Id.* at 245.
31. *Id.*
32. *Id.* at 249. In appropriating fault, seventy-five percent went to the minor plaintiff. Before apportionment, the jury awarded the child $125,000 and $53,366 for medical expenses. The court entered a judgment for $84,616 by subtracting seventy-five percent fault from the $125,000 to get $31,250, and then added $53,366 for medical expenses.
33. *Id.* at 249-50.
34. *Id.* at 249.
35. *Id.*
36. *Id.*
37. 285 Cal. Rptr. 539 (Ct. App. 1991), *review granted*, 819 P.2d 842 (Cal. 1991).
38. *Id.* at 541.
39. *Id.* The father also alleged his own complaint of negligent infliction of emotional distress even though he was not a patient of the physician.
40. *Id.* at 542. The court's reasoning was based on the lack of contemporaneous perception observed by the parents to the injury.

of emotional distress.[41] The court reasoned that the minor can sue on her own behalf and recover medical expenses so long as the minor and her parents do not recover the same expenses and recover twice from the defendant.[42] Accordingly, the court stated that the cause of action to recover medical expenses belongs to both the parents and the child.[43] The minor plaintiff had asserted her own cause of action for medical expenses and loss of earning capacity, but this did not deprive the mother of her separate claim for her emotional distress since the combination of the claims would not lead to double recovery for the child's medical expenses.[44]

From these precedents, the *Lopez* court concluded that a claim for medical expenses can be brought by either the parent or the child. The court acknowledged that double recovery would be improper, however, and ruled that the parents are barred from recovering from the defendant the expenses incurred by the minor if the minor has already recovered for those expenses.[45] The court decided that, so long as the defendant is protected against double recovery, either a minor or a parent should be able to recover medical expenses.[46] Furthermore, since a parent acting as a guardian or next friend can waive the right[47] to sue for the recovery of the child's medical expenses, whenever the parent, as guardian ad litem sues for medical expenses on behalf of the child, the judgment awarded to the minor is a bar to any subsequent action by the parent to recover the same items or losses.

## IV. DISCUSSION

At first glance, the court's ruling that either a parent or a minor can sue to recover the minor's medical and other expenses in a tort action seems relatively unimportant. The hospital raised the issue in an attempt to reverse the damage award given to Adam Lopez, only in response to plaintiff's counsel's stated intention to file a separate lawsuit to recover damages for the parents of Adam Lopez.[48] In response, the court of

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41. *Id.* at 550.

42. *Id.*

43. *Id.* at 547 (citing White v. Moreno Valley Unified Sch. Dist., 226 Cal. Rptr. 742, 746 (Cal. App. 1986)).

44. *Anisodon*, 285 Cal. Rptr. at 548.

45. *Lopez*, 114 N.M. at 11, 833 P.2d at 1192.

46. *Id.*

47. *Lopez* ". . . agree[s] with California's . . . rule providing that the right to recover a minor's medical expenses belongs to the parent but can be waived in favor of the minor." *Lopez*, 114 N.M. at 11, 833 P.2d at 1192. Furthermore, *Lopez* emphasized that the issue of waiver should only arise if the parent *also* seeks to recover the minor's medical expenses. *Id.* If so, the parent has then waived the right to recover the medical expenses and will be estopped from seeking double recovery. *Id.* at 11-12, 833 P.2d at 1192-93.

48. *See* Appellant's Reply Brief at 21-22, Lopez v. Southwest Community Health Services, 114 N.M. 2, 833 P.2d 1183 (1992), *cert. denied*, 831 P.2d 989 (1992). The hospital-defendant asserted that the traditional rule that parents recover for medical expenses is the better rule, especially since plaintiff's counsel advised defendant's counsel of his intent to file a separate lawsuit on behalf of Mr. and Mrs. Lopez for recovery of damages. The basis for a separate lawsuit for the parents is unclear. Perhaps they were contemplating a suit for their emotional distress. *See* Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983); Folz v. State, 110 N.M. 457, 797 P.2d 246 (1990).

appeals rejected defendant's argument that minors are not allowed to sue for medical expenses just because the expenses are the legal responsibility of the parents.[49] Since the hospital will be protected against double recovery, the court saw no reason to limit a recovery of medical damages only to Adam's parents, especially when the caption of the lawsuit clearly identified Adam Lopez as the claimant.[50] Nevertheless, *Lopez* is significant to attorneys who represent both the minor and the parents. The freedom to assign the claim for medical expenses to either the parents or the child presents important new choices and tactical considerations unavailable to attorneys prior to *Lopez*.[51]

### *A. Statute of Limitations Ramifications*

*Lopez* impacts three New Mexico statutes of limitation in personal injury cases.[52] Each provision grants a minor more time than an adult to initiate a claim.[53] After *Lopez*, the attorney can either sue for the minor's medical expenses in the name of the parents and commence an action within the normal limitation period, or wait, allow the injuries to fully manifest themselves over time, and then file suit on behalf of the child for medical and other expenses, using the extended limitation period provided for minors' lawsuits.[54] This choice was not available prior to *Lopez* because the claim for medical expenses was thought to reside solely with the parents.

### *B. Post-Majority Recovery Issues*

*Lopez* raises a question regarding how long parents can recover for future medical expenses. The reason for permitting parental recovery is that parents are liable for the medical expenses of children.[55] Their

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49. *Lopez*, 114 N.M. at 10, 833 P.2d at 1191.

50. *Id.* at 2, 833 P.2d at 1183.

51. New Mexico's principles of comparative negligence and several liability *preclude* any tactical advantages that one might seek to obtain by assigning the claim to, for example, the innocent child instead of to a parent who was guilty of some negligence in the transaction. Even when the claim is pursued by the innocent minor, the parent's negligence will reduce the verdict for the minor by the percentage of the fault attributable to the parent. *See* N.M. STAT. ANN. § 41-3-1 (Repl. Pamp. 1989); Collins v. Tabet, 111 N.M. 391, 394, 806 P.2d 40, 43 (1991) (child's recovery for medical expenses was reduced by seven percent to reflect the father's comparative negligence).

52. The three statutes of limitation are: (a) general personal injury, N.M. STAT. ANN. § 37-1-8 (Repl. Pamp. 1990); (b) Medical Malpractice Act, N.M. STAT. ANN. § 41-5-13 (Repl. Pamp. 1989); and (c) Tort Claims Act, N.M. STAT. ANN. § 41-4-15 (Repl. Pamp. 1989).

53. Under the general personal injury statute of limitation, an adult suing for personal injury has three years to commence an action, while minors are given one year after the age of majority to bring a claim. N.M. STAT. ANN. § 37-1-10 (Repl. Pamp. 1990). The purpose for the different standard is to allow the minor an opportunity to act for himself or herself after minority has been removed. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970). Under the Medical Malpractice Act, an adult has three years to sue and a minor under the age of six has until his ninth birthday to file a personal injury claim. N.M. STAT. ANN. § 41-5-13 (Repl. Pamp. 1989). Finally, the Tort Claims Act permits an adult two years to file, and a minor under the age of seven until his ninth birthday to file a personal injury claim. N.M. STAT. ANN. § 41-4-15 (Repl. Pamp. 1989).

54. If the attorney decides to wait to see how the child's injury develops, however, she may confront difficulty proving her prima facie case.

55. *See supra* text accompanying notes 13-20.

obligation normally ends when the child reaches age 18.[56] Future medical expenses, therefore, should be awarded to parents only for expenses to be incurred until the child has reached majority.[57] Post-majority medical expenses, therefore, belong only to the child and should not be awarded to parents. This provides plaintiff's counsel with a compelling reason to sue for at least post-majority medical expenses in the name of the child.

There is, however, one exception to this general rule that parental rights and responsibilities are severed when the child reaches majority. If a child who reaches majority is incapable of caring for herself, her parents are then bound by law to continue supporting the child.[58] For example, since Adam Lopez is permanently incapacitated, his parents will be legally required to support him after the age of eighteen. It follows that all the medical expenses to be incurred on behalf of Adam Lopez could be recovered by his parents in a suit brought to recover for themselves the future medical expenses of Adam.

Where, as in the case of Adam Lopez, it is virtually certain that the child will be disabled past the age of majority, there is no difficulty in assigning to the parents the claim for all future medical expenses. The parents, liable for a lifetime of medical expenses, have standing to sue in their own names for all those expenses. When, in contrast, the child will not be disabled at majority but will incur post-majority medical expenses, problems do arise unless the child sues in her own name for all of the future medical bills. The parents can only sue in their name for pre-majority expenses because they are liable for nothing more. The child will have to file a claim on her own behalf to recover compensation for post-majority expenses because only the child and not the parents will be legally responsible for them. This bifurcation of the claim into separate pre-and post-majority units creates an additional factual issue for jury resolution. The jury must decide how much of the future medical bills are attributable to pre-majority expenses and thus compensable to the parents, and how much was to be awarded to the child for post-majority expenses. To avoid this problem, the attorney should sue for all future medical expenses in the name of the child alone when it is likely that the child will not be disabled at majority but will incur post-majority medical expenses.

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56. *See* N.M. STAT. ANN. § 28-6-1 (Repl. Pamp. 1991) (person at the age of eighteen is an adult).

57. *See* Lovelace Medical Ctr. v. Mendez, 111 N.M. 336, 344-45, 805 P.2d 603, 611-12 (1991) (citing Marciniak v. Lundborg, 450 N.W.2d 243, 246 (1990)). The court held that Lovelace's negligence—failure to properly perform plaintiff's sterilization operation—was an invasion that entitled the plaintiff to recover damages up to the child's majority.

58. Fitzgerald v. Valdez, 77 N.M. 769, 776, 427 P.2d 655, 659 (1967). This exception applies "where there is infirmity of body or mind rendering the child unable to take care of itself [sic] and requiring the child to remain with the parent." Gillikin v. Burbage, 139 S.E.2d 753, 758 (N.C. 1965). *See also* Parker v. Parker, 94 S.E.2d 12, 13 (S.C. 1956) (absent any disorder, illness or sickness where the child is unable to take care for herself, emancipation of the child begins at majority). *See generally* Peer v. City of Newark, 176 A.2d 249, 261 (N.J. 1961) (future medical bills should be awarded to parents "perhaps even after [majority] if the young man should not be restored to health and should be dependent upon his father for aid").

### C. *Assuring that the Proceeds Will be Available to Pay Future Medical Expenses*

When the child sues in her own name for medical expenses, the recovery is hers, not her parents. Because the child is a minor and thus unable to manage the proceeds herself, the plaintiff's attorney should appoint a conservator,[59] create a trust,[60] or take other steps to assure that the proceeds are properly managed and used for their designated purpose. This process also will protect the recovery from creditors of the parents.

In contrast, if the attorney assigns the claim for medical expenses to the parents, the proceeds will belong to the parents and not the child. The New York Court of Appeals[61] has described the potential unfortunate consequences that flow from a parental recovery of sums for future medical expenses or increased care and maintenance of the child:

> He [the parent] can do with it as he sees fit. He can will it away, or if he dies without a will, it becomes part of the estate. In either case, the infant might receive little or no benefit from it. The natural instinct of a parent to properly support his infant children does not always prevail.[62]

Attorneys representing plaintiffs suing for injuries to minors should not assume that parents will put the money aside and use it only for their child's medical care. Parents might spend it other things or they may get into financial difficulty and creditors of the parents may look to the proceeds of the litigation to satisfy parental debts not related to the child's medical care.[63] If the parents die intestate the child is assured

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59. Under N.M. STAT. ANN. § 45-5-401 (Repl. Pamp. 1989) a conservator may be appointed upon a petition to the court. The court will appoint a conservator to oversee the affairs of a minor if the court finds that the minor's property requires management or protection which cannot otherwise be provided, N.M. STAT. ANN. § 45-5-401(A)(1); if the minor's business affairs are "jeopardized or prevented by his majority," N.M. STAT. ANN. § 45-5-401(A)(2); or "funds are needed for a minor's support and education and that protection is necessary or desirable to obtain or provide funds," N.M. STAT. ANN. § 45-5-401(A)(3). Any person interested in the minor's estate can be appointed as a conservator including a parent, guardian or custodian. N.M. STAT. ANN. § 45-5-404(A)(2) (Repl. Pamp. 1989).

60. To create a trust for the child, the trial judge may order the defendants to transfer the minor's medical expenses and non-medical expenses (pain and suffering and lost earning capacity) into the court account until the representative for the minor comes forward with proof that he or she has established a trust fund in the minor's name which will adequately protect the child's interests. Moreover, the court may require court approval for withdrawals made from the trust. This approach has been followed in Kansas where the parents recovered damages on behalf of their child's tort claim. In Arche v. United States Dep't of Army, 798 P.2d 477, 486 (Kan. 1990), the court recognized the concern of the possible "unjust use of any damage award received by parents in a wrongful birth case." *Id.* The court noted that concerns of misuse by parents of a child's damage award could be avoided if the money was secured in trust. *Id. Arche* stated, "[b]oth parties agreed money would be placed in trust and money disbursed as needed to pay for the costs of the child's care." *Id.* at 487 (noting Robak v. United States, 503 F. Supp. 982 (N.D. Ill. 1980), *aff'd in part, rev'd in part* 658 F.2d 471 (7th Cir. 1981) which also suggested the establishment of a trust for the payment of an award for a child's wrongful birth).

61. Clarke v. Eighth Ave. R. Co., 144 N.E. 516 (N.Y. 1924).

62. *Id.* at 517-18.

63. If the parents set up a trust in the child's name then creditors would be prohibited from acquiring any of the trust property. "[C]reditors have no rights or remedies as far as the trust property [is concerned]." GEORGE GLEASON BOGERT, TRUSTS AND TRUSTEES § 227 (2d ed. 1979).

to receive a portion of the moneys remaining from the litigation, but other heirs may also receive some of the damages which were supposed to pay for the child's medical expenses. To avoid these problems, the plaintiff's attorney should consider pleading the claim for future medical expenses as a part of the child's cause of action rather than that of the parents. In addition, plaintiff's attorney should also ensure that the proceeds are set apart from the assets of the parents and a reasonable amount of the damage award is specifically designated to the minor and used for expenses related to medical and non-medical care.[64]

There is one situation, however, where it is proper for the parents to recover medical expenses in their own name. This is appropriate where the parents have already spent money for the child's medical care before damages were awarded. In such cases, it is fitting to allow them to collect for already incurred and paid medical expenses. In New York, for example, the court decided that the father was allowed to recover for paid past medical expenses.[65] The plaintiff's attorney in New Mexico can and should reserve for the parents the claim for past paid medical bills.

There is precedent, however, for granting the child even the claim for past medical expenses already incurred and paid for by the parents. In an early California case, *Aubel v. Sosso*,[66] the court held that a child living under the care of his parents may recover for the medical expenses already paid by the father.[67] The court found no reason why the child should not be responsible for and thus entitled to recover his own medical expenses, even those paid previously by his parents.[68]

### *D. Maximizing Recovery Under the Tort Claims Act*

Lopez may impact plaintiffs' recovery under the pre-1992 version of the New Mexico Tort Claims Act (Act).[69] In an attempt to maximize the amount recoverable under the Act, the attorney may decide to allocate the claim for future medical expenses to either the parent or the child in such a way as to avoid the cap on recovery for "any [one] person."[70] For example, the minor can recover a maximum of only $300,000 even if her future medical bills are in excess of this amount. The Act also allows maximum recovery of $500,000 for "all claims" arising out of a single occurrence,[71] thereby giving other persons, such as the parents, an

64. *See supra* notes 59-60 for a discussion of how a conservator might be appointed or a trust fund established for the child.

65. Clarke v. Eighth Ave. R. Co., 144 N.E. 516, 517 (N.Y. 1924).

66. 236 P. 319 (Cal. 1925).

67. *Id.* at 321; *see also* White v. Moreno Valley Sch. Dist., 226 Cal. Rptr. 742 (Cal. App. 1986).

68. *Id.* at 321. The court said, "[i]f the contract for such necessities [medical expenses] on the part of the minor is valid the fact that the obligation has been met by advancements on the part of the parent prior to the trial of the case is no defense to the recovery of special damages . . . ." The court did not discuss the issue of double recovery.

69. N.M. STAT. ANN. § 41-4-1 to § 41-4-29 (Repl. Pamp. 1989).

70. N.M. STAT. ANN. § 41-4-19(2) (Repl. Pamp. 1989) of the Tort Claims Act places a cap of $300,000 "to any one person."

71. N.M. STAT. ANN. § 41-4-19(3) (Repl. Pamp. 1989).

opportunity to recover when the child's claim is capped at $300,000. Plaintiff's attorney could assign to the parents all future medical expenses when the child's recovery for pain and suffering and lost earning capacity exceeds the cap. Arguably the parents, as co-plaintiffs with their own claim for future medical expenses for the child could recover a separate award of $200,000 under the Act. In this way parents and child could receive $500,000 for injuries to the child arising from a single occurrence.[72] The cap provisions of the Act were amended, effective July 1, 1992.[73] The new provisions are worded differently and may preclude this strategy from working.[74]

## V. ETHICAL ISSUES FOR PLAINTIFFS' ATTORNEY

*Lopez* illustrates that an attorney employed by parents to recover damages for their child's injury has two clients—the parents and the child. The attorney must allocate damage claims between the parents and the child when filing the complaint. Some choices will be easy. The child possesses the right to recover for the child's pain and suffering and lost earning capacity. The parents have the right to recover for past medical expenses paid by them on behalf of the child[75] and any damages caused by negligent infliction of emotional distress to the parents.[76] More difficult, after *Lopez*, is the assignment of the claim for future medical expenses of the child. That claim can now be pursued by either the parents or the child. The lawyer who must choose whether to plead the claim as that of the parents or the child may well confront ethical problems in making that choice.

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72. The possibilities for maximizing recovery extend beyond just the Tort Claims Act. Personal auto insurance policies generally operate under the same guidelines. If the personal auto insurance policy has an express inclusion of liability coverage for family members and friends, then a minor and his or her parents could maximize their recover similar to the analysis found under the Tort Claims Act. However, many personal auto insurance policies have exclusion clauses that exclude certain persons or classes of persons from recovery under the insurance. For example, policies often state that the liability insurance "does not apply to bodily injury to any insured or any member of the family or an insured residing in the same household as the insured." *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE FOR FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 4.9(c), at 392-95 (1988). "Provisions which exclude coverage for family members, and in some instances friends as well, were designed with a view to protecting insurers from collusive suits." *Id.* at 393. Exclusion policies have been the subject of much criticism, and jurisdictions have found the family member exclusion clauses against public policy and invalid. *Id.* at 394-95.

73. N.M. STAT. ANN. § 41-4-19 (Cum. Supp. 1992).

74. The Act as amended caps damages at $300,000 for all past and future medical expenses without including language that refers "to any[one] person." *See* N.M. STAT. ANN. § 41-4-19 (Cum. Supp. 1992). The exclusion of "any[one] person" suggests that both parents and child may not be able to recover for the child's injuries under the Act to maximize their recovery. The provision as it reads in the Act's amended version only applies to a single occurrence.

75. *See supra* note 61 for a discussion on allowing the parents recovery for past paid medical expenses.

76. *See supra* note 48 for a discussion on potential parental recovery under negligent infliction of emotional distress.

Parents have a right to believe that the decision of who recovers future medical expenses rests with them.[77] However, the attorney may believe that it is her duty to ensure that both the parents and the child receive a fair outcome. If the parents choose to give the cause of action to the child, then no conflict will arise between the attorney and the parents. If, on the other hand, the parents want to the keep the cause of action for future medical expenses and the attorney recognizes that this decision may be detrimental to the interests of child, then the attorney faces a conflict of interest.[78] The interests of the attorney and the parents are now in opposition because the attorney does not believe that the parents' decision to keep the claim for future medical expenses is in the best interest of her other client, the child.[79]

When faced with a conflict between clients, an attorney can only represent both if she believes the representation of one will not harm the relationship with the other.[80] It is fair to conclude that the attorney's opposition to the parents' decision to keep the cause of action for future medical expenses is a conflict that will adversely affect their attorney-client relationship. To continue to represent both the parents and the child in the presence of this conflict, the attorney needs consent from both clients.[81] An infant is unable to give consent to the dual representation, and there lies a dilemma.

The attorney has three available options to solve this problem. If the attorney cannot strike a compromise with the parents or if the attorney decides the parents' decision is just plain wrong, then she can withdraw from the case. To withdraw the attorney is required to show that her client insisted upon pursuing a goal which the attorney found "repugnant" or "imprudent."[82] Second, the attorney can choose to represent the child

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77. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT Rule 16-102(A) (Repl. Pamp. 1991). The rule states that "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."

78. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT Rule 16-107 (Repl. Pamp. 1991).

> A. A lawyer shall not represent a client if the representation of the client will be directly or substantially adverse to another client; unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation . . . .
>
> B. . . . A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's representation to another client or to a third person . . . .

*Id.*

79. The interests between the attorney and the parent may diverge if the attorney understands that the parents will not spend the money to pay for their child's medical care, but instead use the money for other purposes. *See supra* text accompanying notes 59-64.

80. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT, at 16-107(A)(1) (Repl. Pamp. 1991).

81. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT, at 16-107(A)(2) (Repl. Pamp. 1991).

82. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT Rule 16-116(B)(3) (Repl. Pamp. 1991). Rule 16-116(B) states that it is permissible for an attorney to withdraw from representing a client if it will not harm the interests of the client or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." *Id.* at 16-116(B)(3). If the attorney withdraws from the case, she will realize that the parents are entitled to hire another attorney and create the same situation over again. Under Model Rule 16-106 (Confidentiality of information) the attorney is

and risk the probability that the parents will discharge the attorney and take the case somewhere else.[83] The parents may be able to discharge the attorney who was to represent the child if it was clear at the beginning of the relationship that the minor was under the direction and authority of the parents.[84] This would leave the principal attorney without either client.

Last, if the attorney decides that the best alternative is to remain as counsel for the parents, then consideration must be given to finding legal representation for the child. In determining who shall represent the child, the attorney has two alternatives. She can either ask the court to appoint a guardian ad litem,[85] or she can arrange for the child to obtain a private attorney.

The possible dilemma that plaintiffs' counsel faces after *Lopez* is analogous to one confronted by plaintiffs' counsel in *Collins ex rel. Collins v. Tabet*.[86] Mr. and Mrs. Collins brought action against the guardian ad litem appointed for their son for damages for alleged malpractice in settling a medical malpractice suit.[87] The Collinses initially retained an attorney to pursue a medical malpractice claim against tortfeasors who failed to diagnose their child's spinal meningitis. A settlement agreement was reached and during this process the Collinses' attorney agreed that a guardian ad litem should be appointed for their child.[88]

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barred from revealing any information relating to the representation of the clients without their consent. The attorney would be unable to discuss with the second counsel the reasons why the conflict arose because it is privileged information.

83. If the circumstances were such that the attorney continued to represent only the child, she should not fear potential sanctions from the parents because her conduct is protected under the New Mexico Model Rules of Professional Conduct. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT Rule 16-116 (Repl. Pamp. 1991). The rule allows an attorney to terminate any representation with clients if she is in violation of a Rule of Professional Conduct. In the situation above, the attorney is confronted with a conflict of interest and she would violate Rule 16-107 if she represented both the parent and the child.

84. If the parents' hire the attorney to represent both the parent and the child then under Model Rule 16-102(A) the parents have the ultimate decision to discharge the attorney. *See* N.M. MODEL RULES OF PROFESSIONAL CONDUCT RULE 16-102(A) (Repl. Pamp. 1991). However, to avoid a confrontation between the attorney and the parents because the parents want to discharge the attorney who was hired to represent the child, the attorney should make certain at the beginning of the relationship that compensation from the parents is for the purpose of representing the child, and any decisions made for the child is on behalf of his or her best interest.

85. *See* N.M. STAT. ANN. § 38-4-10 (Repl. Pamp. 1987) and N.M. R. CIV. P. 1-017(c). Appointment of a guardian ad litem is made by a court in which the suit is pending. Written request may be made by the minor if he or she is over fourteen. If the minor is under fifteen then the request can come from a friend, any competent person, or the proposed guardian ad litem herself. The request and consent of the guardian ad litem is filed in the clerk's office of the court. N.M. STAT. ANN. § 38-4-10 (Repl. Pamp. 1987). "The guardian ad litem so appearing in any action or proceeding for and on behalf of an incapacitated person [or minor] shall have power to compromise the same and to agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending." N.M. STAT. ANN. § 38-4-16 (Repl. Pamp. 1987). *See also* N.M. STAT. ANN. § 45-5-303.1 (Repl. Pamp. 1989) (allows a guardian ad litem to be appointed by a judge for probate matters when in probate court); N.M. STAT. ANN. § 32-1-27 (Repl. Pamp. 1989) (allows appointment of a guardian ad litem in children's court under the Children's Code).

86. 111 N.M. 391, 806 P.2d 40 (1991).

87. *Id.* at 393, 806 P.2d at 43.

88. *Id.*

The plaintiffs' attorney in the legal malpractice claim asserted that the original attorney, representing both the injured child and the parents, found himself in a conflict position when the settlement agreement was being negotiated because defendants offered a lump sum settlement and plaintiffs' attorney had to apportion it between the parents and the child.[89] The attorney arguably realized he could no longer represent both the interests of the minor and the parent because he was not in a position to determine how to divide the lump sum settlement offer between the child and the parents.[90] As a result, a guardian ad litem was appointed to represent the best interests of the minor.

These facts asserted by the plaintiffs were part of the Supreme Court's consideration in determining the outcome of the legal malpractice case. The court faced the issue of whether the guardian ad litem was acting as an arm of the court with judicial immunity or as a private advocate without judicial immunity.[91] The judgment was vacated and remanded to the district court with instructions to determine whether the guardian ad litem was acting on behalf of the court and entitled to immunity from a malpractice claim.[92] The case was settled before the district court resolved the matter.

The choice to assign the claim for future medical expenses to the parents or to the child in *Lopez* creates a potential conflict of interest as did the lump sum settlement offer to the parents and child in *Collins*. In either a *Lopez* or a *Collins* situation, if a guardian ad litem is appointed, the child's guardian or private attorney may agree with the parents that the parents should have the cause of action for future medical expenses. If this is the outcome, then there is no conflict between the parents and the child, speaking through the guardian ad litem, and the parents' attorney should proceed with a suit in the name of the parents. However, if the child's guardian ad litem determines that the child should recover his or her own future medical expenses, then the impasse is not yet resolved. *Lopez* neither contemplated this problem nor suggests a means for resolution. To avoid any conflict between the parents and the guardian ad litem over a cause of action for the child, the attorney should engage the parents in objective and reasonable counseling at the point at which an impasse over future medical expenses surfaces. The attorney has the opportunity to foresee some of the problems that may affect her representation with parents in a tort claim, and to realize that effective counseling with the parents as to the benefits of giving the cause of action to the child may prevent ethical problems from arising and possibly impairing the best interests of the injured child.

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89. *Id.* at 399, 806 P.2d at 48.
90. *Id.*
91. *Id.* at 393, 806 P.2d at 43.
92. *Id.* at 405, 806 P.2d at 54.

## VI. CONCLUSION

The court of appeals decision sought to give plaintiffs' attorneys and families more flexibility in pursuing a personal injury claim for injuries to a minor. The court broke from the traditional rule that parents alone have the right to recover for the minor's future medical expenses and gave either the parent or the child the right to claim such damages. The ruling provides additional options for the attorney seeking to recover a minor's future medical expenses and provides additional opportunities to assure full compensation for the child, but the effect of the decision can be to create a serious problem of conflict of interest which may be harmful to the minor's best interests.

It may have been preferable had the court granted to the child alone the cause of action for future medical expenses rather than providing that either the parents or the child may pursue a claim. Requiring the plaintiff's attorney to file the cause of action in the name of the child would always result in the application of the longer statute of limitations, would avoid difficult jury determinations of the future competency of the child at age eighteen, and would be most likely to assure that the proceeds were protected from the parents' creditors or parental mismanagement.[93] Most importantly, such a ruling would have avoided the difficult conflict of interest and ethical problems that can now confront the attorney who must decide whether to sue on behalf of the parents or the child.

Having decided that the parents do not have the sole right to sue for the child's future medical bills, the court might next consider whether the best solution is to provide that the claim for future medical expenses must in all cases be brought in the child's name.

JESSICA SUTIN

93. The one area that is not beneficial to a family if the cause of action is in the child's name alone is recovery under the N.M. Tort Claims Act. N.M. STAT. ANN. § 41-4-19(2) & (3) (Repl. Pamp. 1989). *See supra* part IV(4). Even this potential benefit from the right to choose between the parents and the child may have been negated by the 1992 amendment to the Act; *see* N.M. STAT. ANN. § 41-4-19 (Cum. Supp. 1992).