

7. Children Injury and Wrongful Death Damages

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WELCOME TO THE REVOLUTION

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Damages in a child injury case present a unique challenge for plaintiff counsel. Most jurors can understand and empathize with damages in adult injury cases; however, child injury cases can pose a difficult transition. When is the last time you’ve viewed the world through the eyes of a five-year old? Do you remember the time in your life when you were afraid to turn off the light in the bedroom? Do you recall the terror you felt as an 8-year-old when a white uniform nurse was about to plunge a hypodermic needle into your buttocks? Can you recall when you skinned your knee as a four-year old and thought it was life threatening? Simply stated, the success of a child injury case occurs when the lawyer and, ultimately, the jury thinks, feels and reacts through the eyes of a child.

Several major truths are evident as follows:

MAJOR TRUTH NO. 1: Walk the mile in the child’s moccasins

Begin in voir dire to frame the jury’s mind to think like a child by asking similar questions as posed above. With proper questioning, it doesn’t take much for the jury to revert back to the times when the world was very different.

Not only is it important to have the jury walk the mile in the child’s moccasins, but also to understand the difference between a damaged child and a normal child. “Ladies and gentlemen, how many of you have changed the diaper on a 12-year-old unable to control is bowel and bladder?” “Please tell me, have any of you had to brush the teeth of an 8-year-old who was unable to hold a toothbrush in his hand and understand the hand movements necessary to clean his teeth?” “How many of you know of a child who must sit on her front porch in a wheelchair and watch the neighborhood children play their childhood games?”

MAJOR TRUTH NO. 2: Overcome and deal with the parents and treating doctors’ optimism

In the face of a catastrophic child injury, the parents always want to think for the best and doctors are always overly optimistic. The plaintiff lawyer must however be the most realistic

in the situation and deal with the real truth. There will be permanency. The permanency will affect the child everyday of his/her life. The damage will make the child different.

Often, the litigation path creates a painful realization for the parents. Although not intending to, the physicians often are not realistic about the extent of the damages. They hope against hope in circumstances where there simply is no hope.

MAJOR TRUTH NO. 3: Opening statement should begin with damage

“Ladies and gentlemen, about five miles away from this courthouse is a subdivision known as Greenleaf and if you’ll go with me to Alison Drive to the fourth house on the right, you will see it as a normal house, it has a nice front porch, it looks the same as all the others on the street, however, it is different. Inside, there’s a little child who will never walk, who will never talk, and who will always be in diapers. Thank goodness, this house has strong wall because it blocks the sound of the parents crying at night and no one sees the heartbreak in this home. Ladies and gentlemen, this didn’t have to happen. We are here because doctors were careless. We are here because the standard of good medical care was not met. Permit me now to overview the mistakes made by the doctors.”

MAJOR TRUTH NO. 4: Begin the trial with damage witnesses

Often we begin the medical obstetrical case with the paramedic or helicopter life support person who came to the hospital to airlift the child out of the Level I hospital to the remote neonatal intensive care centers. Or, the paramedics who arrived at the scene right after the child were severely burned.

These witnesses provide powerful testimony regarding the severity of injuries and the extent of damages and, oftentimes, are uncross-examinable.

MAJOR TRUTH NO. 5: Justify every element of the life care plan

In catastrophic injury cases, a medical physiatrist or vocational rehab specialist will act as the life care planner. This individual’s role is to provide a plan for all therapies, treatment equipment, institutional care, hospitalizations, etc. throughout the life of the child. Often these plans contain astronomical figures because an entire life must be cared for.

The only way to have the jury accept the reasonableness of a life care plan is to provide detailed explanation and a “show and tell” of all items listed on the life care plan. Photographs, videotapes or even the actual equipment are necessary in the courtroom.

After the jury hears several hours’ worth of testimony complete with visual aids, the reasonability of the life care plan will become clear, although the total amount can stagger many a juror’s imagination.

MAJOR TRUTH NO. 6: Sympathy is not needed

Often plaintiff counsel makes the mistake of painting a “doom and gloom” approach to damages. Jurors will understand the severity and longevity of the damages based on their life experiences. They want instead to know what they can do to help.

A successful plaintiff case will be upbeat and optimistic and will ask the jury simply to give the parents the tools to provide a maximum quality of life for the child. The jury will become involved with the child’s future and will feel a definite purpose in their verdict.

MAJOR TRUTH NO. 7: Subtlety is often key

There will often be a subtle piece of evidence, which speaks volumes in terms of damages. A mother of ours was faced with a chorus of medical doctors telling her that her child would never talk and would require institutionalization. The mother instead kept the child at home and purchased a talking “Big Bird” and strapped her little girl on an exercise ball each day in front of Big Bird and for several hours a day, this bird would sing “Farmer in the Del” and other tunes while the lips of the mechanical Big Bird would move. It took well over a year but the young child finally begins to mouth the words of Big Bird. Thus, this yellow bird became central in the presentation of the damages and symbolized the will and character of the mother and, most importantly, if she could produce words in her child by using a \$49.00 toy think of the progress and quality of life that would be available if the jury were to award the entire life care plan complete with therapies, rehab treatments and quality care.

It should come as no surprise that Big Bird sat on counsel’s table throughout the trial and was perched on the jury rail during closing argument.

MAJOR TRUTH NO. 8: *Damages in addition to the life care plan can be difficult*

Once the jury fully understands the life care plan and agrees with its reasonability, often jurors want to stop, given the size of the figure. Thus, it becomes difficult for plaintiff counsel to convince juries of additional funds beyond the life care plan. Counsel must argue that all damage, particularly, severe catastrophic damage is nothing but a promissory note which needs to be repaid. Those damages while intangible have value and it is simply repugnant in our democracy to accept the defense contention that the intangibles should not be compensated.

In the early legal systems, the rule of Hammurabi was the norm: An eye for an eye. No one suggests that the doctor should be rendered brain injured or the CEO of the product manufacture should be blinded. Instead, the only method of justice available to the child is a monetary verdict. Failure to assign a just and reasonable monetary figure is to say that the child damages have no value. Care must be taken and suggesting a reasonable figure to the jury. Counsel must repeatedly tell the jury that “you are the boss and whatever you say is the law.” Empowering the jury is important in the award of intangible damages and must be handled with care and sensitivity, not a dogmatic “take it or leave it approach.”

MAJOR TRUTH NO. 9: *Virtually all parents are incapable of being the proper party plaintiff for the child*

Fortunately, the law of Georgia provides a two-part guardian ad litem or next friend for the child. The first category is a guardian of “the person” of the child and the latter is the guardian of “the property.”

The counsel must remove from the jury’s consideration questions such as “who will manage the money;” “are the parents capable of handling the huge dollar figure.” Having the parents petition the Court to have an institutional guardian appointed over “the property” of the child can solve all of this. Many local banks are quite willing to assume the guardian ad litem of the property of the child in advance of litigation and to become the actual plaintiff in the lawsuit.

The parents still maintain all of the parental rights and responsibilities as guardian of “the person” of the child to include medical treatment, choices, education, religion and all other aspects of parental care.

Proceeding with an institutional plaintiff removes from the jury the consideration of where the money will go and provides the parents with a professional money manager when a verdict is returned.

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All of the above MAJOR TRUTHS are confronted in the child injury case and all must be addressed in order to have a successful outcome. The child injury case presents unique challenges and solid unique solutions to each of those problems.