

"Elements of a \$12 Million Personal Injury Case"

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A young Streamwood, Ill., mother and her two young sons were driving south on a four-lane highway in the family Datsun. A semi-tractor trailer truck, weighing 28,000 pounds, heading north, crossed the center line. Without slowing down or sounding his horn, the truck driver crashed into the Datsun, killing the mother, Carol Rickerson, and 8-year-old Scott. Steven, 10, was rendered a spastic, brain-damaged quadriplegic. That was 1981.

The father, David Rickerson, sued the H.J. Jeffries Truck Lines for two wrongful deaths and the permanent disability of young Steven. Their lawyer was Thomas A. Demetrio, of Chicago's Corboy & Demetrio, P.C. Two months before trial, Demetrio turned down an \$8 million settlement offer and tried the case in a Cook County courtroom. After presenting 23 witnesses and 380 exhibits over a three-week period, the jury of eight women and four men rendered the following three verdicts:

The Estate of Carol Rickerson--\$800,000

The Estate of Scott Rickerson--\$200,000

Steven Rickerson--\$10,876,000

Past medical expenses--\$276,000

Present cash value of future medical expenses--\$6,000,000

Disability--\$2,500,000

Present cash value of lost income--\$600,000

Disfigurement--\$500,000

Pain and suffering--\$1,000,000

The defendants appealed, but recently settled the case for \$12 million, the largest paid verdict in Illinois history. Rickerson v. H.J. Jeffries Truck Lines Inc., 81L-28628, Circuit Court of Cook County, Ill., Illinois Appellate Court No. 84-1468.

Attorneys

- Thomas A. Demetrio

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An inadequate offer

Not many lawyers would turn down an \$8 million settlement offer. In an interview with Janine Warsaw, Demetrio discusses some of the problems he faced in trying the case.

Why did you turn down the settlement?

I just felt I could get a better verdict. Based on the future medical care needs of Steven and the significant residual injuries he sustained, my professional judgment was that \$8 million would have been easy and perhaps even a "good result." I chose not to take the easy way out, but instead to seek fair, just and complete compensation. The only way to realize that goal was to rely on our jury system.

How did you prepare yourself for the Rickerson trial? I had two major concerns. The first was that one of the defenses to the lawsuit was: "We hurt this little boy so badly that he's going to be dead within 10 years." The defendants, therefore, were going to argue that Steven would not need any money after that 10-year period.

The other major concern was how to determine what type of person would sit on a jury and award more than \$10 million to a boy who was so horribly injured that he obviously would never be able to enjoy the money.

Those two novel problems led me to seek the help of Leo Shapiro and Associates, a Chicago marketing research firm. I knew of them just through word-of-mouth—I knew they worked on another case. Really any lawyer could just pick up the phone and ask an established personal injury lawyer for a researcher's name.

Juror survey

The Shapiro firm did an extensive survey of 1,001 registered voters in Cook County. Using a questionnaire, they elicited the background information from the participants such as education, occupation, religious and political affiliation, hobbies, what kind of car they drove, ages of their spouses and children, how much time they spent with their family and what type of activities they did as a family unit. Most of the questions were the typical voir dire questions asked of prospective jurors, plus a lot of family oriented questions. An exhibit book was given to the participants that showed a story of an incident exactly like the Rickerson one. Another questionnaire was used to elicit the participant's reaction to the accident and its aftermath. They had to explain what they thought happened and how they felt about the accident. They were then asked if they were sitting on a jury in this type of case, would they find the truck driver responsible for the deaths and injuries that took place. If they found him responsible, would they be able to compensate the husband and father fully for his loss and provide for his injured son? Could they award \$15 million? Is that amount enough? Too much? Not enough?

The market researcher compared the reactions to the exhibit book with the questionnaires the participants had answered and, two months before the trial, we knew the type of person the survey recommended to sit on this particular jury: women who were Democrats, 34 years old and younger, high school graduates,

married with three or four children, who thought abortion should be illegal. Their children should be involved in sports and the women should take pride in their homes and their families.

After the results of the four-month survey were computed, I received a "Juror Scoring Summary" which supplied me, on a scale of one to 10, a detailed analysis of the type of potential juror I did not want, statistically, serving on the Rickerson case.

In addition to the help I received from the market research, which cost \$28,000, I was helped by a Chicago cab driver. Chicago is a very large city and a lawyer, unless he or she has been a longtime cab driver as well, cannot possibly know every nook and cranny of the city. During my lunch hours and in the evening, I huddled with this cab driver and became educated. He was able to give me remarkable insights into what type of neighborhoods potential jurors lived in.

Gut feelings

I did not blindly follow the recommendations of the market research firm. In fact, I deviated from the "Juror Scoring Summary" on four separate occasions in favor of my own gut feelings. For example, the survey showed that I should challenge women from 35 to 49, who were college graduates earning over \$40,000, with no children.

The reasoning was that people without children would not have an affinity for the plight of the Rickersons. But I took two such women, who worked for financial institutions, because I had good initial and natural feelings about them and because they were familiar with the daily handling of large amounts of money.

There are tools out there to help lawyers; some are expensive, some, like the cab driver, not so expensive. The main thing is to take advantage and use them! But you must have confidence in your own gut feeling whenever there is doubt about whether or not you should accept or reject a potential juror.

What other aspects of the jury selection process are important? Lawyers should not believe for one minute that they are really capable of selecting a jury. I have neither met nor heard of a lawyer who was able to select a jury that was biased in favor of his or her client.

Once lawyers realize it can't be done, they will no longer concentrate on picking or "selecting" a jury, but rather they will properly attempt to "de-select" the jury. This is the best thing we can do for our client. We have to get rid of (de-select) those jurors who are going to be harmful to our case and then, with the start of opening statements, begin the task of persuading those remaining jurors that our client is on the right side of the lawsuit.

Some lawyers believe the importance of an opening statement is exaggerated. Do you agree?

No. Regardless of the type of case, I advocate a comprehensive opening statement which details specific facts. In the Rickerson case, there had been six operations performed on this boy.

During my 90-minute opening statement, I recited the time of day that each of the operations began, the time the anesthetic was given, when he came out of the anesthesia and other details that one wouldn't ordinarily recite in an opening statement.

First impressions

I was detailed for one reason. After my opening statement, I wanted the jurors to say to themselves: "That lawyer is prepared and confident." As the plaintiff's lawyer, I'm the first one to address the jury. Some studies tell us that 80 percent of all jurors form a lasting opinion as to which side should prevail on the basis of the opening statement. I'm going to take full advantage of that statistic.

I don't dwell on the damage portion of my case in this opening statement. In a personal injury lawsuit, the plaintiff's opening statement should be geared primarily toward establishing liability. Damages will be covered fully and extensively during final argument.

Never forget, you have to first persuade the jury that you are entitled to damages. Touch on the damages during opening statement, but don't gild the lily.

A lawyer should be forceful during the opening statement. A lawyer should be positive and say things like: "the evidence will establish. . ." and "the defendant, on the date of this occurrence, did violate a specific statute that provided for. . ." In other words, take the offense.

Don't apologize

I think that too frequently defense lawyers get up and the first thing they do is apologize: "What I'm about to say isn't evidence." That's like saying that what you are about to tell them isn't very important. Defense lawyers seem to give very short opening statements. They say: "Mr. Demetrio has to prove what he just said." That's vague. If the jury sees aggressiveness, forcefulness, on one hand—and then a lawyer who says, "Well, let's just see what the evidence shows"—of course those jurors are going to make up their minds early!

Defense lawyers should start taking advantage of the opening statement opportunities. They too should come on strong and be aggressive and show the jury that there are two sides to the story. Let them know what the true issues are right away. If this is accomplished in a credible way, I firmly believe that more and more jurors will wait until all the evidence has been presented and they have been instructed on the law before they really do make up their minds.

Are videotapes helpful to you in the courtroom?

Yes. In many jurisdictions there is a distinction between a discovery deposition and an evidence deposition. The discovery deposition is just what it implies—one discovers information. That deposition cannot be used at trial other than to impeach the witness. Unlike some jurisdictions, where one deposition serves all purposes, you must take an evidence deposition in Illinois in order to use that testimony at trial.

In Rickerson, the defendant truck driver lost control of his rig, went across the center line and struck the Rickerson car. When it was time for the driver's deposition, I took a video discovery deposition. I did it for two reasons.

Video discovery

One, knowing I'd have him on the witness stand, I wanted to be able to study him and see where he was weak and get a feel for his personality and nature. Secondly, if I needed to impeach him, I wanted to impeach him through the use of a video deposition. When the jurors see him on tape saying one thing after having just heard him in court say something else, that is much more effective than simply impeaching him from a written discovery deposition. In short, I believe lawyers should use video depositions more often in discovery.

We lawyers should start appreciating what advertisers have known for years: people believe what they see on television. I have often purposely will not have a key witness testify in the courtroom. Rather, I will take his video deposition and introduce it at trial. It breaks up the routine of a trial. The jurors will be glued to the screen and they'll pay close attention to that particular testimony. Always provide two television monitors for the jurors and a third monitor for the judge.

I believe that "day in the life" films are overused—a videotape has to be used with discretion—it can't be a film that goes on endlessly. It is much more effective to photograph a day in the life of an individual.

Day in the life

In Rickerson, I used more than 200 blown-up photographs of this little boy. During the testimony of a registered nurse, I showed the jury more than 100 photographs. The photographs showed the typical nursing day in the life of this little boy. The beauty of using photographs is that they can be used over and over during the trial, and they also go into the jury room during the deliberations. I have never know of a "day in the life" film being allowed into the jury room.

Steven was being treated in Boston while the trial was taking place in Chicago in the dead of winter. Although I wanted the jury to see Steven, I thought I would be criticized by the jury for bringing him to Chicago, especially since he could not talk or do anything other than simply lay there. In addition, it would have allowed the defense counsel to accuse me—justifiably—of merely looking for sympathy.

Besides using photographs, my only responsible option was to allow the jury to see Steven on tape. Therefore, I did film and use a portion of a typical day in Steven's life. If you show that it accurately depicts and portrays the incident you want explained to the jury by way of witness testimony, the judge should admit it.

In Rickerson, I chose to use a typical occupational therapy session. My very first trial witness was the occupational therapist, who was seen working with Steven in the 23-minute film. She laid the foundation. While she was testifying, the tape was played to explain to the jury why she had to do certain things that

were depicted on the tape. The film was admitted into evidence during her testimony and served many purposes.

Educating the jury

The beauty of the occupational therapy tape was that it clearly showed that Steven was not about to die. It showed how well he had been taken care of and that the occupational therapy he was getting was necessary. It showed how dedicated his occupational therapist was.

This was important because eventually I was going to ask the jury to award substantial money damages that would be used to supply Steven with occupational therapy for the rest of his life. Having seen a typical session, the jury would appreciate the need and importance for this therapy. Part of the tape was shown to the jury a second time while a treating doctor was testifying.

It was also used, in part, during my final argument, again to show the jury how horribly injured Steven was and also to show that he was going to be living for many, many years, contrary to what the defense maintained. It clearly showed that he was entitled to substantial compensation for his disability.

How do you select your witnesses?

Lawyers must learn when to use and when not to use a particular witness. For instance, I de-selected three treating doctors in Rickerson. My feeling was that although they were important in the medical care and treatment of Steven, their testimony would be cumulative and repetitive of what other doctors were going to testify to.

One of Steven's best friends testified. I wanted the jury to see what Steven would have looked like today, but for the negligence of the defendants. I really wanted the jury to look at Steven's best friend and say to themselves, "There's a healthy Steven Rickerson." When this boy arrived in my office he was wearing dirty blue jeans and a T-shirt. I had someone from my office take him to a nearby store and buy him a blazer, shirt, a tie and a pair of slacks. After all, when you present a witness in court, you should do so in a dignified manner. The lawyer must take the initiative and leave nothing to chance.

Sixth sense

Lawyers must develop a sixth sense that tells them when to rest their case. I intended to use six more witnesses in Rickerson, but instead, I rested. I simply felt that the jury was getting tired and that the time had come to rest. When you sense that they're getting tired, you quit.

Did you have difficulty finding experts for the Rickerson case?

No. When seeking experts, my philosophy is simple: go with the very best. Don't feel as though you, the lawyer, are limited by geography. There are many excellent doctors who are willing to get involved in litigation, especially if the medical case is challenging.

I asked: Whom would I want to be taking care of one of my daughters if she were as horribly brain-damaged as this little boy? Although Steven was chronologically 13 years old, because of the trauma he was left with the mentality of a 2-year-old. His father sought out the finest pediatric physiatrist in the country, who was found at Tufts New England Medical Center in Boston. He agreed to see Steven at Tufts and gave him a two-week work-up. This doctor ultimately became Steven's treating doctor and testified favorably at his trial.

How did you prepare for the cross-examination of the defense expert?

The defense hired a doctor who testified that, in his opinion, Steven would be dead in 10 years. He was disclosed shortly before the start of the trial. I got right on the phone and asked a lawyer friend from Denver, where this doctor lived, to help me investigate the doctor's background. We checked him out 98 different ways.

It turned out that he was a "professional" witness. He spent the majority of time traveling around the country examining injured plaintiffs on behalf of insurance companies and then testifying in court. We obtained and dissected speeches he had given to the insurance industry.

Impeaching a doctor

He was effectively impeached in this case through the use of his own speeches and prior depositions.

If an opposing testimony is going to hurt you, as presumably it will, I recommend that the lawyer acquire prior trial and deposition transcripts, speeches and articles. It costs nothing to check an opposing witness's background—it takes time. You simply call or write lawyers—law school friends, well-known lawyers, whomever—and ask, "Do you know Dr. so-and-so? Did you ever have a case with him?" You'd be amazed at the response. Within days you will receive a phone call or letter back, describing their experiences. The time will be well spent.

What suggestions do you have that will help trial lawyers improve their skills?

One, try lawsuits. There is no substitute for experience. Two, observe the trial techniques of mentors and proven trial craftsmen. Three, read trial transcripts, articles and books on trial practice. Four, attend seminars that are dedicated to giving lawyers practical information. Lastly, I believe that a trial lawyer can best learn what his or her deficiencies are by having jurors interviewed after the trial.

I personally do not talk to jurors after a trial because I believe they will simply tell me what they think I want to hear. It makes sense to have someone else do the questioning. You can get a friend or investigator to perform the interviews. Naturally, you must make sure that there are no local court rules prohibiting post-trial interviews of jurors. Jurors will usually be candid about what they perceived regarding your capabilities and weaknesses.

Remember, jurors never miss a trick. The jury system works. If you, the trial lawyer, are well prepared, competent, credible, confident, and if you treat the court and jury with respect, you can be assured that justice will prevail.

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