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Maximizing recovery for even the little losses

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A couple of weeks ago, my then 2-year-old daughter, Lily, took a pair of scissors and chopped off significant chunks of her hair. My poor wife, who had conscientiously tended to Lily's fine, blonde head of hair in hopes of capturing a photo with Lily at 3 and with her long mane tucked behind her ears, shrieked when she saw what Lily had done. "Not a big deal," you say? Well, when you are almost 3 years old, 36 inches tall and lose a significant portion of the length of your hair (against the wishes of your mother) it is quite the life-changing experience. OK, "life-changing" might be a bit of an exaggeration, but it sure feels like we all have been walking on eggshells whenever this topic comes up at home.

As usual, I could not help but correlate this internal family drama to the practice of law. This time, the concept of maximizing damages for unexpected loss, no matter how minimal, came to mind. To effectively educate a jury when it comes to damages, the trial attorney must not be afraid to "step outside the box" and get those creative juices flowing. For example, consider this scenario from a somewhat recent case. A client sustained an eye injury in a motor vehicle accident, resulting in 5 percent vision loss in her right eye. At the evidence deposition of the defense's expert ophthalmologist (who coincidentally was a math major), I questioned him on the significance of that 5 percent loss. Not surprisingly, the expert contended that the loss was minimal at best. Not great news for my client? During cross-examination, I used this line of questioning to demonstrate how significant my client's loss actually was:

Doctor, please look at the clock on your desk. Now, imagine that the clock's minute hand is off by 5 percent from the actual time. Tomorrow at this time, when you return to your office, the clock will be 72 minutes behind, correct? The next day, 144 minutes behind, correct? Four days from now your clock will be almost five hours behind, correct? A 5 percent time loss can turn into a pretty big discrepancy, right doctor? Well, surely, you would agree that a 5 percent disability to that clock is significant?

At that point, I could care less how he responded to the question. I had made my point to the trier of fact.

We all look forward to and plan for certain events in our life. Some of the big ones include graduations, vacationing overseas, marriage, buying a home, retiring. Some of the little ones (that's not to say less important ones) include baseball games (I'm that dad), school pictures, dance recitals and summer breaks. How do we adjust when someone else's negligence throws a wrench in even the best laid plans? Tort victims, like the client that suffers a 5 percent disability, will be unable to engage in some of these activities as planned. Many become unhappy and depressed, lost in a life that focuses only on the pain and suffering that was so unnecessarily thrust upon them. As a result, many seek out personal injury attorneys to assist their family in recovering medical expenses and lost wages and to find compensation for their noneconomic losses. I have seen firsthand how clients will explore each and every avenue that could potentially lead them back to where they used to be — on a road to recovery, attempting to find some semblance of the place where they used to be happy. It's a pretty subjective road, with many plaintiffs placing their hopes and dreams on the deliberations of a jury comprised of 12 unknown people that will decide how that road will end, at least monetarily. Thankfully, studies of real jury deliberations have shown that jurors "[take] their task very seriously, often to the extent of calculating and arguing down to the last dollar." *Tort Damages and the New Science of Happiness*, 85 Ind. L.J. 553, 590 (Spring 2010).

Sadly, when disability or chronic pain and suffering strike, that bell often cannot be unrung. I recently read the disheartening news that even the "prospect of recovery" can hinder an individual's adaptability to an injury. *Id.* at 567. This is why the trial attorney must find creative ways to impart understanding of the meaning of awarding noneconomic damages for disability, pain and suffering, disfigurement, etc.

People who suffer disabilities due to negligence often have a host of problems post-accident, including unemployment issues, which can have lifelong effects on a person's ability to enjoy life. What to do? "[E]mpirical data of psychological scarring and permanent emotional harm due to unemployment even after ... [plaintiffs] become re-employed implies that such individuals also should receive additional compensation for their noneconomic losses." *Id.* at 570. Based on my 20-something years of experience, I believe this to be true. Some defense attorneys, I'm sure, have a diverging opinion.

In any event, the injured often become further victimized by the reality of the civil justice system. I recently saw the trailer for a new HBO documentary called "Hot Coffee," which airs later this month. The documentary, like "Food, Inc." and "Super Size Me" before it, purportedly provides an educated opinion on a topic that is otherwise confusing (or ignored) by the public, all while exploring corporate influences on public perceptions. One of the quotes from the trailer stuck with me. An unseen man says, "Going to court to gain justice is heroic." For years, large insurance companies and powerful corporations have been writing blank checks to induce the general public into believing that personal injury verdicts and settlements are the reason why our economy is suffering. That is just plain wrong. They have painted attorneys as greedy and untrustworthy. They have painted my injured clients as malingerers or money hungry. They have unjustly attacked those of us in the personal injury world that truly fight to protect the rights of victims of negligence. In a perfect world, my injured clients would return

to their preaccident state of health at (or prior to) the close of their case. However, that is rarely an available option. While some may recover their health and receive compensation for their loss, it is not too dramatic to say that a part of the person died forever on the day of the injury-causing occurrence.

After putting the kids to bed the evening that my daughter took the scissors to her hair, my wife and I sat down for a glass of wine. Having the luxury of not being completely exasperated by a long, trying day with a 2-year-old, I joked, "hair today, gone tomorrow." For me, it was easy to be nonchalant about Lily's hair loss — it's not forever. If she learned her lesson (and we can successfully keep scissors out of her hands), I'm sure she will have lovely, long hair in a few months. However, when it comes to even the slightest loss suffered by clients, there is no place for nonchalance. With the proper care and attention given to maximizing monetary damages, I know that there will be less incentive for others to commit torts in the future and possibly a sense of ease to my clients' pain.

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