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Damages in Children Death Cases

By

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It is hard to imagine a loss more tragic than the death of a young child or baby. Just because a child is "young," he or she is no less a "person" and is subject to the same protection and remedies of an adult "person" who has suffered a wrongful death. (Even a viable fetus is now a "person" under the Tennessee Wrongful Death Statute. T.C.A. 20-5-106.) Yet in Tennessee, recovery in infant and children's death cases routinely are low in comparison to the wrongful death cases of adults. (See *Tennessee Personal Injury Verdicts and Settlements*, 120-121, by Lewis Laska). Why is this so and what can be done to improve this past trend?

The figure finally agreed upon to settle any case depends upon many factors. One of the most important factors is prior jury verdicts for similar injuries to similar victims. Jury verdicts for the death of children historically are less than jury verdicts for death of adults. Being aware of the historical trend, plaintiffs' attorneys no doubt feel comfortable suggesting a lower recovery figure for the death of a five year old than they would suggest for the death of a 50 year old person. An examination of court approved damages in child death cases contained in 8 *Tenn. Digest*, "Death" 99(3), shows the following information:

Year	Age	Approved Award
1897	12 years	\$ 3,000
1900	17 years	7,500
1914	3 years	2,500
1917	6 years	12,500
1926	12 years	7,500
1928	15 years	10,000
1929	7 years	5,000
1930	6 years	2,500
1934	5½ years	6,500
1941	5 years	7,500
1946	13 years	5,000
1951	6 years	20,000
1952	8 years	15,000
1956	8 years	20,000
1960	11 years	22,500
1961	3 years	17,500
1961	16 years	19,000
1963	22 months	25,000
1963	4 years	10,000
1965	9 years	50,000
1966	11 years	20,000
1976	11 years	75,000
1979	2 years	150,000

With the exception of the 1976 and 1979 cases, the figures have been low. The 1976 \$75,000.00 verdict for the death of an 11 year old was in *Strother vs. Lane*, 554 S.W. 2d 631

(Tenn. App. 1976). There an 11 year old boy was run over by a bus, and the jury found the deceased guilty of remote contributory negligence which probably decreased the award. Notwithstanding the jury verdict and its approval by the trial court, one of the appellate judges dissented from the opinion of the other two appellate judges in respect to the award, indicating that in his opinion the verdict was excessive. *Strother vs. Lane*, 554 S.W. 2d 631, Todd, J. partially dissenting at 637. He suggested a remittitur of \$25,000.00. Judge Todd's reasoning was based upon his independent review of prior children's death verdicts. He declared that "the limited recovery allowed by statute should not be permitted to expand beyond the bounds of reason and the intent of the statute." *Id.* at 637.

"Jury verdicts for the death of children historically are less than jury verdicts for death of adults."

The 1979 case in which the court approved a \$150,000.00 judgment was *Jenkins vs. Commodore Corp. Southern*, 584 S.W. 2d 773 (Tenn. 1979). In this case a two year old boy was burned to death in a mobile home fire. A Cocke County jury returned a verdict of \$250,000.00 which the trial court found excessive and suggested a remittitur of \$100,000.00. The remittitur was accepted by the plaintiff, but the defendant appealed the judgment. The Court of Appeals reversed the judgment stating that the verdict was "so shockingly excessive and the result of such apparently brief deliberation as to evidence jury misconduct." *Jenkins vs. Commodore Corp. Southern*, 584 S.W. 2d at 776. The Tennessee Supreme Court also was of the opinion that the jury verdict was excessive, but stated that the verdict was one which could probably be corrected by the use of the broad powers of remittitur. *Id.*

To date the \$150,000.00 award in *Jenkins vs. Commodore Corp. Southern* is the largest damage award reported for a young child's death in Tennessee case law. This is a sad state of affairs because children are worth much more.

One of the problems facing plaintiffs' attorneys in these cases is judicial precedent in reducing jury verdicts by the vehicle of remittitur. The first and best example of judicial interference (via remittitur) with a jury verdict in a child's death case is *Heggie vs. Barley*, 5 Tenn. C.C.A. 78 [Higgins] (Tenn. App. 1914). In that case, a horse-drawn delivery wagon ran over a three and a half

year old boy and killed him. The jury awarded \$5,000.00. The trial judge suggested a remittitur of \$1,500.00, which was accepted. Then the Court of Appeals reduced the judgment even further by declaring, "[W]e are of opinion that any amount in excess of \$2,500.00 evinces passion, prejudice or caprice, and for that reason a further remittitur of \$1,000.00 is suggested." 5 Tenn. C.C.A. 86-87.

"...the jury must learn of the reality of the suffering the child experienced."

The opinion in *Heggie vs. Barley* served as precedent for later unfortunate reductions in jury verdicts. Among those cases are: *Garis vs. Eberling*, 71 S.W. 2d 215 (Tenn. App. 1934), where a jury verdict of \$10,000.00 was reduced to \$6,500.00 by the Court of Appeals because in "looking to consensus of judicial opinion . . . as reflecting the 'aggregate social consciousness' with respect to the 'standards which time and experience have approved' . . . we are of the opinion that the amount of the present verdict is excessive to the extent of \$3,500.00;" *Management Services vs. Hellman*, 289 S.W. 2d 711 (Tenn. App. 1955), a 1955 case where the Court of Appeals actually cited a case *decided in 1900* as part of its authority for holding that a remittitur of \$15,000.00 was appropriate when the jury had awarded \$35,000.00 for the death of a six year old child; *Methodist Hospital vs. Ball*, 362 S.W. 2d 475 (Tenn. App. 1961), a medical malpractice case where the Court of Appeals ruled that a jury verdict of \$25,000 was excessive by \$6,000 for the death of a 16 year old boy; the court simply stated that although it was true there was testimony that the child probably would have lived had he received proper medical treatment, it knew "from human experience that it is also possible he would not have lived if he had been given the very best treatment . . ." *Id.* at 489.

The issue of the "discretionary" use of remittitur and additur received close attention by the Tennessee Supreme Court in *Smith vs. Shelton*, 569 S.W. 2d 421 (Tenn. 1978) and *Foster vs. Amcon Intern., Inc.*, 621 S.W. 2d 142 (Tenn. 1981). In those two cases, the court bridled to some extent the improper judicial use of remittiturs and additurs. A plaintiff's attorney who undertakes to handle a child's death case should become thoroughly familiar with these two decisions:

"*Shelton* tells the trial judge that he is *without authority* to reduce or increase jury verdicts that are between the upper and lower limits of the range of reasonableness established by the credible proof." *Foster vs. Amcon. Intern., Inc.*, 621 S.W. 2d at 146. [Emphasis added.]

In other words, if a jury verdict in a child's death case rests between some lower limit of the "range of reasonableness" and the upper limit of same, the Tennessee Supreme Court has announced that the trial judge has no authority to disturb the verdict.

The Tennessee Supreme Court reminded the Court of Appeals that throughout the appellate review process, "the jury's determination should be given primary weight and the trial judge's secondary weight." *Smith vs. Shelton*, 569 S.W. 2d at 427. And when the trial judge has approved the verdict, the review in the Court of Appeals is controlled by the rule "that if there is any material evidence to support the award, it should not be disturbed." *Foster vs. Amcon, Inc.*, 621 S.W. 2d at 146. Thus it is quite apparent that the chances of keeping a substantial jury verdict intact are significantly increased if the plaintiff's attorney convinces the trial court that the verdict lies within the mysterious "range of reasonableness."

Knowing in advance of trial that the plaintiff's attorney will have to convince the trial judge that any jury verdict rendered falls within the range of reasonableness, the attorney must diligently prepare for trial by securing the evidence needed to support a good verdict. In the process of gathering all the proof necessary, the attorney can at the same time build his case for settlement. If a fair settlement is going to be achieved in a child's death case, the adverse party and his representatives will have to be convinced that you have the ammunition necessary to support a high verdict.

Evidence Needed and Trial Tactics

In a wrongful death case there are two classes of damages allowed. The first class of damages include the following: (1) the mental and physical suffering actually endured by the injured child between the injury and death, (2) medical expenses necessitated by the injury, (3) reasonable funeral expenses. Tennessee Pattern Jury Instructions, Civil No. 14.10.

"What has been lost is 70 years of life."

The second and third categories under the first class of damages are easy to prove. Simply prove funeral expenses and medical expenses as you would in any other personal injury case. Effectively proving mental and physical suffering of a child is limited only by the imagination of the plaintiff's attorney. If the child lived after the injury and was not instantly killed, a description by one of the parents of what the child had to endure could substantially increase the verdict. The use of attending physicians to describe the extent of pain involved naturally would be helpful. Discover if there exist any photographs of the child in a hospital or other clinical setting. What-

ever method is used, the jury must learn of the reality of the suffering the child experienced. Trial judges are people too, and if you show the judge that the child experienced terrible pain and suffering, there probably will be reluctance to disturb an adequate jury verdict.

“Bring the child to life before the jury so the full significance of the loss can be understood.”

Most child death cases do not involve substantial or prolonged pain and suffering. Some catastrophic event usually takes their lives quickly. Therefore, the question of damages usually boils down to the pecuniary value of the life of the child. The appropriate jury instruction as to the pecuniary value of the life of the child is contained in Tennessee Pattern Jury Instructions—Civil No., 14, 10, which states:

“The second class of damages that may be awarded is the pecuniary value of the life of the deceased. In determining this value, you should take into consideration the following:

1. The age of the deceased.
2. The condition of the health of the deceased.
3. The life expectancy of the deceased.
4. The strength and capacity for work and for earning money through skill in an art, trade, profession, occupation or business of the deceased.
5. The personal habits of the deceased as to sobriety and industry.”

If the five categories of this class of damages are closely examined, it can be seen that the previous judicial trend of considering the worth of children as something less than the worth of adults is greatly misplaced and incorrect. According to mortality tables, a four year old girl has a life expectancy of 70 years. When a careless driver kills a healthy four year old girl, he has taken 70 years of a person's life! That, in and of itself is a terrible injury. What has been lost is 70 years of life. Compare that loss to the loss when a 60 year old woman has been killed by the same negligent driver. There what is lost is 21 years of life expectancy. Yet prior case law indicates that the appellate courts would feel that the loss were greater for the 60 year old woman than the four year old child.

If the child was healthy, put on the appropriate evidence. Call the child's pediatrician to show that this was a healthy child. Show through some of the child's friends that the child was active. Call relatives other than the parents to describe the activities of the child.

Submit photographs of the child. Bring the child to life before the jury so the full significance of the loss can be understood.

If the child had any special talents, such as drawing, show those talents to the jury. For example, the jury could be shown drawings by the child even though the drawings were made when the child was only four years old. If the child had started school, show school grades. Demonstrate through teachers how the child related to other school children

Even though a child had never been employed, this does not mean that the child had no capacity to earn money. “Capacity” means, among other things, “potentiality” and “capability.” Webster's New World Dictionary Second Edition. Of course, it would not be proper to try to show that a young child would enter a specific occupation, but the jury can hear proof of the occupation of the child's parents. Courts will permit proof concerning the background of the parents, their standard of living, earnings and expenses. This is not allowed upon the theory that the deceased child would have followed in his parents' footsteps, but would be introduced to show how the child would have been raised and what opportunities would have been available to the child.

Experts of many types can show that statistics reveal that the male child of a working father and homemaker mother probably would make more in his own life than his father. Thus, the wages of the father become relevant. In closing argument the attorney should not argue the most optimistic conclusion, but only a reasonable conclusion, that being, “At least the child had the capacity to earn as much as his father earned.” With the statistical evidence supporting the argument as to the probabilities, the trial judge should permit the evidence to be admitted.

Likewise, the educational achievements of the parents should be shown. If the parents attended college, it is not unfair for the jury to find that the probabilities are that the deceased would have attended college. If neither of the parents attended college, be frank with the jury and do not argue that it could be expected that this child would have attended college.

“Courts will permit proof concerning the background of the parents, their standard of living, earnings and expenses.”

If defense counsel is on his toes, he will introduce proof of the probable living expenses the deceased would have incurred had he lived. The Tennessee Supreme Court has held that in wrongful death cases there should be a deduction for the probable living expenses the deceased would have incurred had he lived. *Wallace vs. Couch*, 642

S.W. 2d 141 (Tenn. 1982). The plaintiff's attorney should prepare his witnesses for questions upon cross examination as to living expenses. The plaintiff's attorney should argue forthrightly to the jury that there indeed should be a deduction for probable living expenses, but since income exceeds living expenses, the verdict will be higher than if no proof had been offered on the issue of earning capacity.

Settlement Techniques

Do not be afraid to show your hand to adverse counsel prior to trial. Show him the statistics about which your experts will testify. Give him reports of your experts. Supply him with photographs of the child, drawings by the child or art objects which the child made and which you intend to introduce into evidence. Show him that this child, although young, was a real person. Demonstrate that if the offer is unreasonable, you are ready to try the case rather than mar the child's memory by accepting a low sum. Your

clients will admire you for it as they, like you, would rather try the case and lose than accept a dishonorable settlement.



ABOUT THE AUTHOR . . .

Randall L. Kinnard is with the firm of Randall L. Kinnard & Associates in Nashville, Tennessee. A member of TTLA's Board of Directors, Randy specializes in representing plaintiffs in medical malpractice cases. He received his B.S. from the United States Military Academy and his J.D. from Memphis State University School of Law, where he served on the Law Review.