

Practice Pointer



Trying a death case

A family's loss of a 16-year-old girl

Recently I had the unfortunate privilege of representing the parents of Sydney Aichs, a 16-year-old honors student killed by a tractor trailer in Albemarle County. Sydney was completing her junior year at Albemarle County High School at the time of her death. Sydney's parents were utterly devastated at the sudden, unexpected end of their daughter's life.

This short piece contains some thoughts that I humbly offer to those who may have to try a wrongful death case of a child.

The defendants in the Aichs' case believed they could win on a contributory negligence defense. Sydney entered Route 29 on a left turn arrow on her way to take an Advanced Placement History exam on May 9, 2008. As she crossed over the northbound highway, a northbound tractor trailer obliterated her car, never slowing as it entered the intersection. Eyewitnesses estimated the tractor's light was red for 5-7 seconds prior to impact, and the light was yellow for 5 seconds before that. Sydney did not "jump" her light. Nor did she do anything wrong (*e.g.*, talking or texting on her cell phone). An eyewitness confirmed that Sydney did absolutely nothing wrong except be in the wrong place at the wrong time.

I learned or affirmed ten basic litigation and trial concepts during this case:

1. The sudden and unexpected death of a child is one of the - if not the single most - painful experiences a person, certainly a parent, can ever endure. This loss should never be underestimated, and the value of a wrongful death case involving the loss of a teenaged child should never be unreasonably discounted.

The primary factors that made this wrongful death case more poignant and understandable for the jury were the relationships within the family: father and daughter; mother and daughter; brother and sister; father and mother; and father, mother and the surviving brother. The key is to have your client(s) be able and willing to articulate, with passion and credibility, the immense depth of what has occurred to their relationships. In my experience, not every family can or will adequately articulate those emotions - grief, solace, loss. The Aichs family could and did articulate their devastation, and the jury clearly understood the immense loss that they suffered. This was evidenced by at least three jury members crying at various points during the trial, especially when the mother, brother, and father testified. It was further evidenced when the jury returned a verdict for \$5.265 million.

2. Meet often. In order to know whether your client(s) can adequately convey their loss, many meetings with them, together and individually, are needed. Meet them in their home. The first indication that Sydney's loss to her mother and father was extraordinary was that every time I met with them, they actively fought to hold back tears and emotions. Most times they were unsuccessful. I, in turn, was impacted emotionally. From this I knew that I would be able to convey their emotions to the jury. I felt it at every single meeting, and I left every single meeting wanting to go home and hug my own children.
3. Talk to close family friends. I asked each of Sydney's parents to give me a "top five" list of the most important people in their lives outside of family. These were to be people that knew them well enough to be able to articulate their respective losses. After I spoke with the individuals from those lists, I asked for another set of top five lists. After each meeting or discussion I gave the witness a grade ranging from an "A" to an "F". I wanted only "A" witnesses, and I wanted only one or two to testify at trial (to avoid cumulative testimony) that were close to each parent. Each friend - a male for Clint (the father) and a female for Michele (the mother) - had a unique perspective on how the dynamics within the Aichs family were impacted by Sydney's death. And, not only was the perspective unique with regard to each parent, but each witness was able to offer a different perspective on the other parent and how the family interacted. Each witness painted a bright line separating the parents before and after Sydney's death. This was critical.
4. Talk to friends of the child. I talked to several friends of Sydney's, who were in college at that point, who knew her parents and brother, Kyle, and had remained in contact with the grieving family in an effort to try and help them through the grieving process. Several of these friends actually visited the Aichs' home on a number of occasions after the crash, visited Sydney's room and reminisced about the joy of Sydney's life with her parents. I elected not to have any of these friends testify for a number of reasons that I will not address here; however, what those interviews did do was enlighten me on certain areas to explore with Clint, Michele and Kyle. More specifically, they opened up areas regarding how Sydney's friends, the local community and the high school had helped the Aichs family through the grieving process. These areas allowed me to show the scope and magnitude of Sydney's death

to the jury, as well as how many people in the community, especially wonderful young people, loved Sydney. Their love for her and the family was so great that they were able to help the surviving family members grieve and put one foot in front of the other. Showing the importance of this impact to the jury was paramount.

As a result of the interviews with Sydney's parents' friends and Sydney's friends, I was able to craft relatively effective direct examinations of the family. Those friends painted visual images for me that opened up areas I had not thought of, both with regard to damages and liability. I have never felt as comfortable with direct examinations as I have doing cross-examinations, so I put considerable effort into creating a comprehensive outline for the direct examinations of my damage witnesses, including the surviving family and the two adult friends who testified.

5. I am a firm believer that aggravated or egregious liability, even if it does not rise to a punitive damages level, can drive damages and act as a multiplier. Never underestimate the power of the defendant's bad conduct on a jury; sometimes the defense lawyer and insurance adjustor do not fully appreciate their client's conduct, perhaps because they have become jaded or numb to such behavior. Therefore it takes a jury to maximize the family's recovery. I attempted to make these points at every opportunity during the trial. To the fullest extent reasonable and possible, highlight the egregious nature of the defendant's conduct (if the facts permit), the choices made by the defendant, the rules of the road broken by the defendant, and weave those into your damages case. David Ball's excellent book on damages and his recent book concerning the "reptilian mind" are must reads for any trial lawyer. I firmly believe in David's teachings. Moreover, I attempted to convey to the jury that the defendants' behavior a community threat, causing a community loss, which required and appropriate verdict.
6. Do not ignore your damages case. Spend a lot of time on the damages portion of the case. I trudged to meet many of the witnesses I talked to, hoping to mine some nugget of information that could make a substantial difference in the outcome of the case. Do not be reluctant to get out from behind your desk and expend some shoe leather. It is easy to rely on an associate, investigator or even a paralegal to interview witnesses, and sometimes this may be appropriate. But, in my experience, it is, in most cases, much better if the trial lawyer spends quality time with a witness at least once.
7. Talk to other lawyers about your case. Talk to your staff about your case. Talk to your friends about your case (if appropriate under the circumstances). Try out "mini focus groups". Find out where your weak points are. I was concerned about the fact that I had no special damages and a contributory negligence problem. I talked to everyone willing to listen about these issues, trying to find out what facts were important, what nuances might make a difference. I was concerned about the problem all lawyers have when representing the estate of a deceased child in a wrongful death case – no objective damages to blackboard. The damages are intangible and everything is a loss that cannot be easily quantified. Talking to other lawyers allows one to assess the value of the case or get a range from which to work. Other lawyers, whether in your firm or friends with another practice, are invaluable resources that should be relied upon. You should learn the good, the bad and the ugly about your case so that that you may more effectively evaluate the possibilities and advise your clients.
8. Have a second chair on the case if resources and manpower permit. Having another set of eyes and ears on witnesses and evidence is very important. It is very difficult for one person to catch everything during a trial, so having help is critical. If you are a sole practitioner, you may want to associate another trial lawyer just for your trial.
9. Make every reasonable effort to settle the case for the sake of the family. I had a nationally known trial attorney, who has nearly \$2 billion in verdicts and settlements to his credit, tell me something startling one time: it is our job, as trial lawyers, to get the case in the best posture possible to settle – maximizing settlement value as best we can. Some trial lawyers like to thump their chests and talk about how many cases they take to a jury; the goal should be to eliminate the risk of trial if at all possible and settle for the highest number you can obtain for your client (provided your client is satisfied with the amount). You have to be prepared to try the case in order to maximize settlement. Sometimes, however, the case cannot be settled, which is what happened in Sydney Aichs' case.
10. A trial lawyer needs to know – or feel – when it is right to let a jury decide the case. The "gut instinct" should not be overlooked, but it should not be relied upon to the exclusion of reason and counsel of other trusted trial lawyers. Use all of your resources, including trial lawyer friends, non lawyer friends and professional consultants if your case merits the expense. I also used a focus group for evaluation of the Aichs case. I believed in the case, although I had a healthy respect for the possibility that I could lose. I also satisfied myself knowing that I had done everything possible to settle the matter, and that a settlement amount that was acceptable to my clients, and myself, could not be obtained. When the latter occurs, that is how verdicts are made.

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SETTLEMENTS AND VERDICTS IN ALL CASES DEPEND ON VARIOUS FACTORS AND CIRCUMSTANCES WHICH ARE UNIQUE TO EACH CASE. THEREFORE, PAST RESULTS IN CASES ARE NOT A GUARANTEE OR PREDICTION OF SIMILAR RESULTS IN FUTURE CASES WHICH THE MICHIEHAMLETT FIRM AND ITS LAWYERS MAY UNDERTAKE.