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Damages: The Litigation Environment

Stephen D. Easton

Damages is, at least in part, the story of a lawsuit. In some ways, it is a fairly typical lawsuit. In other ways, it is rather unusual, due to the significant damages potential of the suit. Therefore, some of the lessons to be learned from the story of this lawsuit may be applicable to lawsuits in general or, at least, to "typical" civil suits, while others may not.

In this portion of the symposium materials, we will explore the litigation process that led to the settlement in the case. Because other portions of the symposium will focus on the negotiations among the parties and the attempts to resolve the dispute through mediation, this portion will focus on the formal and informal pretrial litigation process. While this discussion will not ignore the official rules of litigation, it will focus on the unofficial rules, mores, and practices followed by the attorneys in this and other civil suits.

Although the dispute among the Sabias, Dr. Maryellen Humes, and Norwalk Hospital was ultimately settled "out of court," the formal litigation process played an important role in this resolution. Indeed, it is difficult to imagine how the Sabias could have received any compensation for their damages without at least threatening to pursue their claims through the formal litigation process, including, if necessary, a trial and perhaps even post-trial appeals. Therefore, an understanding of the dynamics of the dispute and its resolution requires some understanding of the formal litigation process that at times provides the framework for the processing of the dispute and, at other times (including negotiation and mediation), provides the background for the resolution of the dispute.

I. LITIGATION AS FRAMER OF DISPUTE RESOLUTION

To attorneys, law students, legal academics, and others who study and care about the resolution of civil disputes and the interaction among disputants, the formal litigation system is such a familiar part of this process that we sometimes forget that it is present and playing a role in the resolution of disputes. This is particularly true when the parties ultimately resolve disputes without a trial or other court-annexed dispute resolution mechanisms.

Even when parties resolve civil disputes without ever filing suit or otherwise taking a single step in the formal litigation process, that formal process influences the parties' efforts to resolve their disputes and, at a fundamental level, makes resolution of disputes possible, by making consideration of disputes possible. Without the threat of litigation, would-be plaintiffs would not be able to even get
potential defendants to consider compensating them. This is a lesson quickly learned by a would-be plaintiff who has allowed the statute of limitations to run before attempting to recover from potential defendants. If Donna Sabia had not experienced the basically chance encounter with Mary Gay outside the summer camp for children with disabilities, in all likelihood there would never have been any recovery from, or even any conversations with, Humes or Norwalk Hospital. In today’s America, a person or entity who seeks recovery from another person or entity simply has no bargaining power in the absence of a realistic threat to sue.

Furthermore, a threat to sue, standing alone, does not provide sufficient bargaining power for a person seeking recovery, if she seeks something more than a “nuisance value” settlement. Instead, the person seeking recovery must be able to establish a realistic threat of recovering in the formal litigation process. Inside or outside the formal litigation process (or, perhaps more correctly stated, before or during the formal litigation process), negotiations are based on threats. Those threats, in turn, are based primarily, though certainly not exclusively, on potential jury verdicts.

To get defendants (or potential defendants) to make serious settlement offers, a plaintiff (or potential plaintiff) must present a realistic threat of a significant verdict. A plaintiff’s verdict has three essential elements: (a) a finding that the defendant violated some legal duty to the plaintiff; (b) a finding that the defendant’s wrongful conduct (or omission) caused (i.e., “proximately caused”) the plaintiff’s injuries; and (c) a finding that the plaintiff is entitled to recover damages. Collectively, attorneys refer to findings (a) and (b) as “liability.” Throughout Damages, we see the plaintiffs’ attorneys attempting to acquire evidence to establish these three elements of a successful suit. At various intervals, they also seek to convince the defendants that they will be able to establish these three elements at trial.

At the same time, to get plaintiffs (or potential plaintiffs) to lower their settlement demands, a defendant (or potential defendant) must present a realistic threat of a defense (i.e., no liability) verdict or a verdict for an amount of damages substantially lower than the amount demanded. Again, we see the Damages defense attorneys attempting to acquire evidence to establish the absence of a violation of the standard of care and causation, as well as evidence limiting the plaintiffs’ damages, with only occasional success.

Therefore, although the vast majority of civil suits never proceed to a jury verdict, the potential jury verdict is the dominant factor influencing settlements. As author Barry Werth notes in his pre-epilogue concluding paragraph, “[C]ivil justice was virtual now. Almost all malpractice cases were decided not on the basis of fact but on the perception of what a jury was likely to think was fact. You didn’t need a trial anymore. You just needed to make the other side imagine one.”

2. Id. at 37-40.
3. Id. at 53, 251, 370.
4. Id. at 246.
5. Id. at 285.
6. Id. at 178.
7. Id. at 365.
8. Id. at 206-07, 370.
Of course, the potential verdict is not the only factor driving settlement. Many other factors affect the parties' willingness to give up a portion of their claims in exchange for a more certain recovery (or, from the perspective of the defendant, payment). Several of these factors also result from the formal litigation process. These factors include the expense and discomfort of the discovery and trial process, the potentially public nature of at least some aspects of formal litigation, the time during which recovery (or payment) will be delayed by discovery and other pretrial processes, and the risks (to an insurance company) of a bad faith claim for failure to settle. Therefore, an understanding of these aspects of formal litigation also informs the reader of *Damages* (or the student of any other lawsuit resolved short of trial) about the dynamics of the dispute resolution process.

II. A Suit in Search of a Theory

Although solid arguments regarding both liability and damages will ultimately be needed to secure a substantial settlement from a defendant, these two components of a valuable case are not necessarily equally important to a plaintiffs’ attorney who is considering whether to take on a new case. Often the most significant factor to a plaintiffs’ attorney considering taking on a case is the damages potential of that case. Plaintiffs’ attorneys who practice in areas that require a substantial investment of resources often decline suits where liability might, or even almost certainly could, be established, because the limited damages potential of such potential actions renders litigation economically unwise.

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9. Id. at 204.
10. Id.
11. Id. at 198.
12. Id. at 184, 198, 322.
13. Bill Doyle, attorney for Norwalk Hospital, uses the phrase “a case in search of a theory.” Id. at 263.
14. This “substantial investment” is often in the form of expert witness fees, which can constitute the largest expenditure in a lawsuit. See generally Stephen D. Easton, *Damages: Expert Witnesses*, 2004 *J. Disp. Resol.* 37.
15. In part, the Koskoff firm’s decision to not sue to recover damages for Michael’s death is one such example because this decision stemmed largely from the firm’s recognition of the relatively low verdict potential of wrongful death cases for infants. WERTH, *supra* note 1, at 63. This decision did not stem solely from a comparison of the costs of a suit on Michael’s behalf to the potential value of the suit, of course. The decision also resulted from the Koskoffs’ desire as trial attorneys to simplify their case. Id. at 64, 262-63.

In fact, in this instance, pursuing a suit on Michael’s behalf would have added little to the expenses of litigation for the Sabias and the Koskoff firm, because almost all of the expenses that they would have incurred in pursuing such a suit were already incurred in their suit on behalf of Little Tony. As it turned out, their theory against Norwalk Hospital required them to establish that Michael’s death was preventable through additional monitoring. See *infra* Parts II.C.4, VII. Although the Koskoff firm presumably did not realize the full extent of the causal relationship between Michael’s death and Little Tony’s condition when it decided to sue for Little Tony’s injuries, but not for Michael’s death, it certainly realized that the claims on behalf of the two twins were quite closely related. Therefore, it is fair to assume that the Koskoff firm was operating under the presumption that the liability cases on behalf of the two twins were roughly equivalent. In other words, if the firm felt that Little Tony’s liability case was strong enough to merit suit, it presumably also felt that Michael’s liability case was strong enough to merit suit. Therefore, the firm’s decision to take Little Tony’s case and turn down
A. The (Potentially Dangerous) Allure of a Mega-Damages Case without a Clear Liability Theory

At the same time, a plaintiffs' attorney might be willing to take on a suit with tremendous damages potential, even if she is significantly less certain that she will ultimately be able to establish that the defendants engaged in malfeasance or that this malfeasance proximately caused the plaintiff's damages. Indeed, it is not unusual for a plaintiffs' attorney to commit to filing suit in a "mega-damages" case without first having developed a firm theory of what the defendants did (or did not do) to cause the plaintiff's damages.

The Sabias' claims against Humes and Norwalk Hospital constitute this type of case. In the cold-hearted world of evaluating the damages potential of a personal injury suit, there is no more valuable suit than one involving serious brain damage to an infant who has a normal or near-normal life expectancy. The "special" damages alone (i.e., medical and other care costs, lost wages, and other relatively quantifiable losses) are staggering. The emotional value of having a family devote its collective life to the care of what is colloquially and rather indelicately referred to as a "bad bab[y]," makes the pain and suffering potential perhaps even more staggering. Looking at a case purely from the perspective of damages, it does not get any better than the Sabia case for plaintiffs' attorneys like the Koskoffs. Indeed, it was "the biggest malpractice case in Connecticut history."

As is common with "ideal" damages cases, though, the Sabia facts did not present a clear liability case when the Koskoff firm first evaluated them. The firm had to decide to take the case and, therefore, to take on the representation of the Sabias, before it had developed a clear theory of what Humes and Norwalk Hospital did wrong and how those mistakes caused Little Tony's brain damage. Even when the damages potential of a case is substantial, deciding to take the case presents several problems for a plaintiffs' attorney.

1. The Plaintiffs' Attorney's Commitment to Her Client

First, the attorney should consider the substantial commitment involved in agreeing to represent a particular client. Once the attorney agrees to represent a client, she has entered into a client-attorney relationship covered by Rule 1.2 and the other Model Rules of Professional Conduct and becomes potentially liable to the client for malpractice if her representation damages the client. If the attorney

Michael's case is an example of damages being more important than liability for plaintiffs' attorneys considering taking on new cases.

16. Id. at 62, 128, 160, 177, 285-86.
17. Id. at 63, 159-60.
18. Id. at 33.
19. Id. at 63, 106.
20. Trial attorneys commonly refer to such a suit as a "retirement case." Note the reference to "buying a place in the Bahamas." Id. at 52.
21. Id. at 64, 141, 294-95.
22. Id. at 160.
23. See id. at 65-66.

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later determines that the case has little merit, she may nonetheless be required to pursue it to some resolution.\(^{24}\)

Furthermore, any resolution of the case short of trial (and perhaps an appeal) will take place only if the client approves, because the Model Rules of Professional Conduct state that the "lawyer shall abide by a client's decision whether to settle a matter."\(^{25}\) A lawyer theoretically has the right to withdraw from representing a client when the "client insists upon taking action that the lawyer considers repugnant" or when "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client."\(^{26}\) However, these permissive withdrawals are subject to the court's granting of an attorney's motion to withdraw.\(^{27}\) Many judges would consider a potential disagreement about whether a proposed settlement should be accepted, with the attendant requirement of additional attorney time and other resources to continue to pursue the case, a matter that a plaintiffs' attorney should consider when taking a case in the first place. Therefore, a plaintiffs' attorney considering taking a case in the absence of a firmly established liability theory should realize that she might soon (or, perhaps worse, not-so-soon) be stuck with a case with only a weak liability theory and a client who is not willing to settle for a nominal amount.\(^{28}\)

2. Time Pressure on the Plaintiffs' Attorney

Second, the combination of the statute of limitations and the attorney's duty to bring only meritorious actions presents at least a theoretical problem for the attorney who is considering taking a suit in the absence of a firm liability theory. In many jurisdictions, medical malpractice actions have relatively short statutes of

\(^{24}\) See Model Rules of Prof'l Conduct R. 1.3 cmt. 4 (2002). "Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client."  ld.

\(^{25}\) ld. at R. 1.2(a).

\(^{26}\) ld. at R. 1.16(b)(4), (6).

\(^{27}\) ld. at R. 1.16(c).

\(^{28}\) If the attorney ultimately determines that the case has no merit whatsoever, she might argue that Model Rule 3.1 (limiting attorneys to meritorious claims and contentions) prevents her from continuing to represent the plaintiff, because doing so would require her to violate Model Rule 3.1 by pursuing a meritless claim. ld. at R. 3.1. Under the rules, an attorney must seek to withdraw if "the representation will result in violation of the rules of professional conduct." ld. at R. 1.16(a)(1).

This will provide little relief in the typical case originally undertaken without a firmly established liability theory, however. Usually the attorney will not conclude that the case is totally without merit, but, instead, that the liability case is not as strong as she had hoped when she first accepted it. Under Model Rule 3.1, the standard for "merit" is quite low, because this rule allows an attorney to pursue a claim or contention when "there is a basis in law and fact for doing so that is not frivolous." ld. at R. 3.1.

Even if the attorney later felt that the suit bordered on the frivolous, she would be in a difficult position. Even an attorney who is seeking to withdraw when required to do so by Model Rule 1.16(a)(1) must seek the court's permission to withdraw. ld. at R. 1.16(a), (c). If the attorney's reason for seeking to withdraw is her belated conclusion that the suit does not meet the "non-frivolous" merit standard under Model Rule 3.1, she might face a very hostile court. After all, when she filed the suit in the first instance, she indicated to the court that it had merit, due to her obligations to only file non-frivolous suits under Model Rule 3.1 and to only sign pleadings supported by the facts under Rule 11 of the Federal Rules of Civil Procedure or, perhaps, a similar state rule. In the absence of a significant change in the core facts, an attorney who would seek to withdraw on the basis that the suit is "no longer" meritorious arguably would be admitting that the suit was not meritorious when she filed it.
limitations. Connecticut had a fairly typical two-year statute of limitations. As a result, a plaintiffs' attorney considering filing suit often must decide whether to file before she has developed a firm theory identifying what the defendant did wrong and how these errors caused the plaintiff's damages. This was the case for the Koskoff firm as it considered whether to sue Humes and Norwalk Hospital.

In theory, the statute of limitations should not be the only legal principle putting pressure on the plaintiffs' attorney in this situation. Under the rules, "[a] lawyer shall not bring ... a proceeding ... unless there is a basis in law and fact for doing so that is not frivolous ..." The Federal Rules of Civil Procedure probably provide a higher standard by stating that an attorney's filing of a complaint carries with it her representation that "the allegations and other factual contentions have evidentiary support." Many, though not all, states have adopted standards similar to Rule 11 of the Federal Rules of Civil Procedure. Under Model Rule 3.1 and Federal Rule 11 or an equivalent state mandate, can a plaintiffs' attorney file a complaint in the absence of a firm liability theory? If expert testimony will be required to survive a motion for dismissal or summary judgment (as it is in medical malpractice cases in many jurisdictions), can the plaintiffs' attorney file suit before receiving confirmation from a qualified expert that there is a meritorious liability theory? Although a few decisions under a previous version of the federal rule suggest this requirement, these questions do not appear to present a major barrier for plaintiffs' attorneys who are otherwise considering suit.

3. Costs of Prosecuting a Mega-Damages Case

The final barrier seems to be the one that stops more potential suits than the requirement that the suit have merit. That barrier is the potential cost of pursuing...
the suit. For almost every case with a staggering verdict potential, the expenses to a plaintiffs' attorney of pursuing the case are themselves staggering. In a perhaps unexpected way, the potential for a large verdict drives up the costs of litigation for plaintiffs, largely because of the customary defense approach to these cases. In a more typical low- or mid-level damages case, the costs of defense might cause a defendant to take a reasonable negotiating position relatively early in the litigation process (or, sometimes, before formal litigation is even commenced). In such a case, the defendant will be at least somewhat motivated to keep the attorneys' fees, expert witness fees, discovery and investigation expenses, and other costs of defense as low as possible. An early settlement will often save the defendant costs of defense that are quite significant, when compared to the amount paid to settle the case.

Saving defense costs is a far less substantial motivator in mega-damages cases. In such cases, the costs of defense pale in comparison to the staggering costs of settling the case. Therefore, defendants are willing to pay investigators or legal assistants to find every possible helpful fact witness, to pay experts in every conceivably relevant field to attempt to find an explanation for a plaintiff's injuries that is not related to the defendant, and to pay lawyers to depose every possible witness, file every non-frivolous (or occasionally frivolous) motion, and make every conceivable argument for dismissal.

One example of this phenomenon is Travelers' retention of Dr. Robert Greenstein, the pediatric genetics expert, to explore possible genetic explanations for Little Tony's condition. Although the chances of this tactic resulting in a successful defense were minimal, and the tactic ultimately was unsuccessful, Travelers was willing to undertake the significant expense of pursuing this possibility. If it had worked, it could have saved Travelers millions of dollars. In the same vein, April Haskell sent a paralegal to "try to track down anyone who worked at the summer camp where Donna met Mary Gay in 1986" to try to strengthen Humes' statute of limitations defense. She also recommended that St. Paul try to locate Donna's natural parents, siblings, and ex-husband, in an effort to pin blame for Little Tony's condition on genetics. She even considered the option of asking the court to order Little Tony to stop taking vitamins for several months, so that genetic tests would yield more accurate results.

The damages potential of a case is not the only factor motivating defendants to pay these defense costs. The likelihood that a jury will find the defendant liable

35. Note, for example, Travelers' willingness to pay attorney Bill Doyle's high hourly rate in Sabia, and Protection Mutual's hiring of him with "an unlimited budget" in a $62.5 million arson case. WERTH, supra note 1, at 256-57.
36. Id. at 149, 158, 258.
37. Id. at 126-28. See also id. at 91-96, 99-100 (asking deposition questions about Little Tony's genetics).
38. Id. at 156-57.
39. It is sometimes said that some plaintiffs treat the American personal injury recovery system as a lottery. Generally, this is understood to refer to an individual "purchasing" a lottery ticket by being injured. Defendants and their insurers, too, occasionally purchase those lottery tickets, as Travelers did in this instance, even when those lottery tickets are quite expensive, if the potential payout to a winner is also significant.
40. Id. at 149.
41. Id. at 158.
42. Id. at 200.
is another factor. Holding the damages potential of a given case constant, the defendant sometimes is willing to take on more defense costs when it believes there is a substantial chance that a jury would return a verdict finding it liable. Thus, ironically and arguably somewhat perversely, a plaintiffs’ attorney who is fortunate enough to handle a case with both substantial damages and a strong liability theory may face a lengthy, exhausting, and potentially financially draining path from the filing of suit to the first day of trial (or a settlement which is reached only when the trial is imminent, as in Damages).

In most personal injury litigation, a plaintiffs’ firm working under a contingency fee pays the discovery and other litigation expenses directly related to the case, subject to repayment out of the funds ultimately (and, from the plaintiffs’ attorney’s perspective, hopefully) collected from the defendant. Therefore, a plaintiffs’ attorney who is considering taking on a mega-damages case must be prepared not only for the contingency that the case might turn out to be a weak liability case, but also for the contingency that the case might turn out to be a strong liability case. Many a plaintiffs’ attorney has been ruined not by a meritless “big” case, but by a big case with significant merit. For a well-known example, see Jonathan Harr’s *A Civil Action*, which opens with the repossession of plaintiffs’ attorney Jan Schlichtmann’s car, an event that resulted from his having the misfortune of taking on a mega-damages case that, at least if the book is to be believed, had considerable merit.

**B. The Koskoff Firm’s Screening of Malpractice Cases**

As the leading plaintiffs’ firm in Connecticut, the Koskoff firm is well aware of these dynamics. That is why it undertakes such a thorough review of a file before it makes a commitment to a potential client’s case. It is significant to note that the Koskoffs are so concerned about evaluating potential cases up front that they are not only willing to devote significant firm person power to this task (in the person of Joel Lichtenstein, who apparently devotes almost all of his time to evaluating potential cases and who has developed considerable skill in this task), but also to spend the firm’s money in the form of substantial fees to an expert whose sole task is the evaluation of whether the case is worth bringing.

It is also important to note what else Lichtenstein’s screening task represents. Only a firm like the Koskoff firm, which has a substantial “inventory” of large cases, can realistically afford to take on a mega-damages case. The Koskoff firm understands that it might not recover any of the out-of-pocket expenses and attorney and non-attorney time it devotes to any particular case, because there might be a defense verdict (or some other resolution of the case, like a voluntarily or forced dismissal, that results in no recovery). In an economically driven thought process that is not unlike that of the insurance companies from whom they derive most of their income, the Koskoff firm is willing to take on this risk in an individual case, because it believes that enough of the cases it does take will result in sufficient

43. See *supra* text accompanying notes 13-23.
45. WERTH, *supra* note 1, at 50-54.
46. Id. at 43.
47. Id. at 52.
recovery to pay for its out-of-pocket and opportunity costs for its entire inventory of cases, including those that turn out to be losers. However, a smaller, less economically stable, or otherwise less well-positioned plaintiffs’ firm would be taking a risk that would endanger the firm’s existence by taking on any individual mega-damages case.

Therefore, the Sabias, like any other potential mega-damages plaintiffs in Connecticut, will not recover for their losses unless they can convince either the Koskoff firm or another similarly positioned firm to take their case. As a practical matter, the list of similarly situated firms is probably pretty short, and perhaps even non-existent. Therefore, what may at first appear to be a relatively unimportant administrative task, Lichtenstein’s evaluation of the case for the Koskoff firm, is arguably the most important event on the Sabias’ road to recovering their substantial losses. As Werth notes, the Koskoff firm turns down ninety-five percent of the medical malpractice cases it screens.

C. The Sabia Plaintiffs’ Attorneys’ and Experts’ Search for a Liability Theory

Notwithstanding its screening of the case, the Koskoff firm did not develop a solid theory tying the defendants to Little Tony’s condition until years after it took the case and drafted the complaint.

1. Tentative Theory One: Blaming Humes (and, to a Lesser Extent, Norwalk Hospital) for Botching the Labor and Delivery

As Bill Doyle noted years later, the Koskoffs “lurched over the years from one theory to another.” However, as Doyle also noted, “At first the Koskoffs had primarily blamed Humes for the damage to Little Tony.” At the same time, the hospital and Humes were blamed for not conducting electronic fetal monitoring of both twins.
2. Tentative Theory Two: Blaming the Norwalk Hospital Clinic for Not Conducting Serial Ultrasounds That Should Have Led to Early Delivery Due to Discordance, and Blaming Humes for Not Delivering Little Tony via C-section, Which Would Have Prevented His Most Serious Injuries, Because They Occurred Just before Birth

Three years after the case had been filed, Michael Koskoff brought his cousin, Christopher Bernard, into it, "to try to unify the case"—come up with an explanation that held both Humes and the hospital accountable."55 Bernard’s first theory combined the opinion of Dr. Kurt Benirschke, who said Little Tony’s brain damage most likely resulted from an acute event,56 with Dr. Marcus Hermansen’s initial statement that the most serious damage in fetal asphyxia occurred at the end, just before death.57 Bernard’s initial theory was that Norwalk Hospital "failed to anticipate Michael’s distress and Little Tony’s vulnerability" and therefore failed to adequately monitor (presumably through ultrasound) Donna’s pregnancy after her last clinic visit two days before the birth, and that Humes could have stopped most of the damage to Little Tony even as late as her arrival at the hospital (presumably by delivering him via C-section).58

After consulting with Dr. Thomas Murray, the Koskoff theory was:

With serial ultrasounds in the last trimester, which any reasonably competent ob-gyn would have performed under the standard of care, her doctors would have known to deliver the twins as much as a week and a half earlier because they were thriving unequally . . . . Humes, also by failing to monitor the twins, finished the job on Little Tony. As Murray would put it, Little Tony’s life was ruined by a “cumulative series of mistakes during pregnancy and childbirth.”59

3. Tentative Theory Three: Blaming the Norwalk Hospital Clinic for Not Conducting Nonstress Tests That Would Have Led to a C-section before Michael’s Death, but Also Blaming Humes for Not Preventing Some Damage to Little Tony by Delivering Him via C-section after Additional Monitoring

As outlined by Dr. Barry Schifrin some time later, the theory became:

Since the one thing that absolutely would have saved Little Tony was not having his twin brother die, and since the only thing that could have prevented that from happening was if Michael Sabia was delivered on the day of Donna’s last clinic visit [March 30] or sooner; and since what

55. Id. at 142.
56. Id. at 144.
57. Id. at 145.
58. Id. at 146.
59. Id. at 163. The plaintiffs’ second theory is summarized as “the injuries to Little Tony first sustained on Saturday [when Michael died and Tony bled into Michael] were worsened by a prolonged delivery.” Id. at 263.
would have been necessary for doctors to decide to take the twins early by C-section was some medical justification for doing so, the key question was: "Is it more probable than not that Baby B would have had an abnormal heart rate on March 30?" Absolutely [according to] Schifrin. . . . Because Michael Sabia was a pound lighter than Little Tony at birth, he said, the child was probably protected by less fetal water than his brother. Since this disparity would have shown up on an ultrasound, the hospital probably would have done a nonstress test, to see if the deprived twin was okay. Since he probably wasn’t, his heart rate probably would have been abnormal.  

Nonetheless, even at this point, the plaintiffs’ liability theory did not completely absolve Humes of responsibility, because the plaintiffs’ attorneys and experts still believed she contributed to Little Tony’s condition by failing to monitor adequately, discover the death of Michael and the stress to Little Tony, and perform an emergency C-section. As the plaintiffs’ theory thus evolved (and as it became clear that Humes’ malpractice policy limits of $2 million were not enough to cover Little Tony’s substantial damages), Humes went from being the target defendant to being “in the way” of the Koskoff firm’s efforts to recover from Norwalk Hospital.

4. Final Theory (Four): Blaming the Norwalk Hospital Clinic for Not Preventing All of Little Tony’s Injuries by Conducting Nonstress Tests That Would Have Led to a C-section before Michael’s Death

After Humes settled out of the case, the plaintiffs’ star witness opined that Donna’s labor and the twins’ delivery did not contribute to Little Tony’s condition. As Norwalk Hospital attorney Beverly Hunt reported to her boss, Pat Ryan, after learning of this development during Dr. Kurt Benirschke’s deposition, "the labor and delivery issue they’d dreaded defending for five years. . . . was ‘totally gone.’" Instead, the plaintiffs’ attorneys focused on establishing that Norwalk Hospital could have prevented Michael’s death through better monitoring of the twins during the last days of pregnancy, and thereby prevented Tony’s loss of blood from twin-to-twin transfusion.

Even at this point, the plaintiffs’ theory was not entirely “firm.” Although the primary theory was that a velamentous cord insertion caused Michael’s death, plaintiffs’ expert Dr. Iffy later testified that his death resulted from “growth retardation.”

60. Id. at 175.
61. Id. at 176.
62. Id. at 205-06.
63. Id. at 212.
64. Id. at 220.
65. Id. at 223.
66. Id. at 221, 224-26.
67. For a summary of the Plaintiffs’ final theory, see infra App.
68. WERTH, supra note 1, at 282-85.
D. The Effect of Theory Switching on Defense Attorneys

If plaintiffs’ attorney Michael Koskoff is to be believed, the search for a firm liability theory perhaps is not a major concern for plaintiffs’ medical malpractice attorneys: "He claimed never to be concerned when one of [the experts he consulted] refuted him; he could always find others, just as credible, to agree." 69

Instead, the absence of a solid liability theory may have a greater effect on the defendants and their attorneys. Perhaps most obviously, defendants and their attorneys cannot evaluate the verdict potential (and, therefore, the settlement value) of a case until the plaintiffs’ attorney identifies the liability theory upon which the jury will (hypothetically or actually) evaluate the case.

Defense attorneys and experts also cannot respond to a liability theory until the plaintiffs’ attorneys disclose it to them, so their defense always contains an element of guesswork until the final theory is identified. 70

In addition, every switch in theories by the plaintiffs’ attorney will require the defense attorneys and experts to prepare to meet the new theory, thereby driving up the costs of defense. 71

Perhaps less obviously, defense attorneys must be cautious while they observe the plaintiffs’ attorney advancing liability theories. During almost any point before a trial, they must realize that the theory currently being advanced by the plaintiffs’ attorney might be withdrawn and replaced by another theory. 72

To understand the effect of this possibility upon defense attorneys, assume a relatively simple case where the plaintiffs’ attorney advances "theory A," then withdraws it and replaces it with "theory B," even though this understates the number of theories that might be advanced by plaintiffs’ attorneys in a given case, including the ones described in Damages. 73 During the stage of discovery when the plaintiffs’ attorney is advancing theory A, a defense attorney must be careful in her response. If the defense attorney believes that her client is either not guilty of malpractice or that her client’s malpractice did not cause the plaintiff’s injuries, she would like the plaintiffs’ attorney to present the weakest possible theory on these issues to the jury and, therefore, to the defendant in the course of settlement. Thus, the defense attorney might have to consider thwarting her trial attorney instinct to conclusively establish the weaknesses in theory A. While establishing the weaknesses in theory A might lead to a more favorable settlement under theory A, it might also lead to the abandonment of theory A in favor of theory B. Even worse, the defendant might make some assertion while defending theory A that could come back to haunt it while defending theory B. 74 Therefore, it is not

69. Id. at 173.
70. For example, note defense attorney Beverly Hunt’s guessing about the liability theory before the deposition of Dr. Kurt Benirschke. Id. at 218. Also note that Dr. Schifrin’s testimony “surprised her.” Id. at 229.
71. Note that Norwalk Hospital attorney Bill Doyle told plaintiffs’ attorney Christopher Bernard that he would not prepare to defend the hospital regarding the labor and delivery unless the plaintiffs’ attorneys “attack[ed]” the hospital regarding these items. Id. at 276.
72. Note how the possibility of labor and delivery issues re-entering the case concerned Bill Doyle during his expert’s deposition. Id. at 276-77.
73. See supra Part II.C.
74. While it might, at first glance, seem that a switch in theories would create a greater risk of admissions that are harmful to the later theory for plaintiffs than for defendants, this usually is not the
surprising that civil defense attorneys are frustrated by the ability of plaintiffs’ attorneys to shift theories after the commencement of formal litigation and related negotiations.

III. WHAT ABOUT THE TRUTH?\textsuperscript{75}

Like any other book written with purpose and passion, \textit{Damages} contains several themes. One of the book’s recurring themes is the author’s belief that the civil justice system, its counterparts, and its technicians (particularly lawyers) do not seek a solution based on the truth. Author Barry Werth uses his own narrator’s voice,\textsuperscript{76} and the voices of several of the expert witnesses,\textsuperscript{77} to express dismay at the willingness of lawyers and the legal system to sacrifice a search for truth in favor of other ends, primarily winning. While this criticism is not wholly without merit, it is not clear that Werth understands the role of the truth in the civil justice system and the role of competing values.

When a plaintiff shifts from theory A to theory B, the switch in theories is often accompanied by the firing of the expert who propounded theory A in favor of the expert who will propound theory B. When the defendant attempts to inform the jury of the switch in theories by presenting testimony from the plaintiff’s expert who propounded theory A, she may run into resistance from courts that believe a party should not be able to introduce the opinions of experts who have been “withdrawn” by the parties originally retaining them. \textit{See, e.g.}, \textit{In re Hidden Lake Ltd. P’ship}, 247 B.R. 722, 724 (Bankr. S.D. Ohio 2000); \textit{Lehan v. Ambassador Programs, Inc.}, 190 F.R.D. 670 (E.D. Wash. 2000); \textit{Ferguson v. Michael Foods Inc.}, 189 F.R.D. 408 (D. Minn. 1999); \textit{In re Vestavia Assocs. Ltd. P’ship}, 105 B.R. 680 (Bankr. M.D. Fla. 1989); \textit{Taylor v. Kohli}, 642 N.E.2d 467, 468 (Ill. 1994) (excluding deposition testimony where the parties agreed that an expert witness “may be formally abandoned” under state law). \textit{Cf.} \textit{Peterson v. Willie}, 81 F.3d 1033, 1037 (11th Cir. 1996) (reviewing previous decisions); Stephen D. Easton, “\textit{Red Rover, Red Rover, Send That Expert Right Over}”: Clearing the Way for Parties to Introduce the Testimony of Their Opponent’s Expert Witnesses, 55 SMU L. Rev. 1427 (2002) [hereinafter Easton, \textit{Red Rover}]. Therefore, it is not at all clear, despite Norwalk Hospital attorney Bill Doyle’s claim, that he would be able to introduce evidence establishing the plaintiffs’ changing liability theories. \textit{WERTH, supra} note 1, at 358.

While defendants might also be able to fire retained experts who are no longer needed to thwart theory A, they do not have the same luxury with regard to defendants who are themselves experts. As an example, if a defendant doctor (or an agent of the hospital) makes a statement that helps to rebut theory A, she can expect that statement to be introduced by the plaintiff if it arguably helps the plaintiff to establish theory B. A plaintiff might also see her statements in support of theory A introduced by a defendant who is fighting theory B, but this is a substantially less likely occurrence. First, the plaintiff is a witness only as to “purely” factual matters, so her statement is less likely to be relevant than the statement of a physician defendant in a medical malpractice case (or an engineer employed by the defendant in a products liability case). Also, it is the plaintiffs’ attorney who decides to switch from theory A to theory B, and who decides what theory B will be. If the plaintiff has made a statement that will significantly reduce her chance of success under a possible new theory, that possible new theory will probably not be advanced by her attorney.

Although the plaintiffs’ attorney’s ability to switch theories often creates more problems for defendants than for plaintiffs, it is interesting to note that, in the \textit{Sabia} case, problems associated with developing liability theories after the filing of a case and trying to maintain the viability of those theories may have led to the plaintiffs’ attorney’s almost certainly mistaken decision to refrain from depositing a potentially valuable witness, nurse Mollie Fortuna. \textit{Id.} at 139.

75. This subsection is based in part upon an outline of truth-related issues in \textit{Damages} compiled by Professor Melody Daily, which Professor Daily graciously made available to her colleagues on the \textit{Damages} project.

76. \textit{WERTH, supra} note 1, at 54, 88, 309, 355.

77. \textit{Id.} at 77 (Dr. Alan Pinshaw); \textit{Id.} at 216-17, 308 (Dr. Kurt Benirschke); \textit{Id.} at 278 (Dr. Charles Lockwood); \textit{Id.} at 347 (Dr. Richard Jones III).
It would probably be a misinterpretation to intimate that Werth is claiming that truth plays no role in the civil justice system—so bold a suggestion would be a significant overstatement. Taken as a whole, the civil justice system does value the truth, to at least some extent. In presumably all, or at least almost all, jury trials, the judge instructs the jury that it must resolve the factual issues disputed by the parties. In other words, the jury is told that its job is to determine the truth. To the extent that civil disputes resolved short of trial are usually settled largely on the basis of the expected jury verdict, the settlement process at least indirectly is based on the truth about what happened to cause plaintiff’s injuries and what should have happened to prevent (or at least lessen) those injuries.

A. Circumstances Where the Civil Justice System Allows the Truth to Be Trumped by Other Values

Nonetheless, although we do expect juries to determine the truth, we sometimes prevent them from acquiring some information that would help them make that determination. Included within the information that is kept from jurors is “truthful” information. Therefore, since history’s first evidence ruling excluding some portion of the truth from jurors to the present, it has never really been correct to suggest to jurors that they are receiving “the truth, the whole truth, and nothing but the truth.” It would be more accurate to tell jurors that they will receive “those portions of the truth that we believe are most helpful to their determination of the truth” and that they will not receive “those portions of the truth that we believe we should keep from you.”

Federal and state rules of evidence and related statutes and case law keep some portions of the truth from jurors. In addition, the rules of civil procedure and related statutes and case law effectively keep some other portions of the truth from jurors, by limiting disclosure and discovery and therefore preventing the attorney who would bring that portion of the truth to the jurors from herself ac-

quir-

ning it. Any doctrine that makes certain types of evidence inadmissible or puts them outside the scope of discovery represents a judgment that the “truth-finding” value of that information is outweighed by other values. Werth generally either fails to recognize or gives short shrift to these competing values.

The Sabia litigation, like many civil suits, involved several pieces of information that are placed outside the discovery process. For example, Werth notes that peer reviews are “confidential.” The states that do not allow discovery of peer

78. But see id. at 54 (“Trials, as any courtroom lawyer knows, are only nominally about law and truth.”).
80. For example, the defendants and, ultimately and theoretically, the jurors, would receive more of the truth if the defendants were allowed to discover the conversations between the Sabias and their attorneys, including the conversation where attorney Lichtenstein told Donna to discontinue her journal because it might be discoverable. WERTH, supra note 1, at 68. Similarly, the plaintiffs and, ultimately, the jury, would have received more of the truth (including Humes’ at least somewhat inconsistent statements regarding the reason for the lack of fetal monitoring) if the plaintiffs would have been allowed to discover information about the peer review process. Id. at 47, 121.
81. Id. at 47, 121.
Damages: The Litigation Environment

review information have determined that health care will ultimately be improved if health care providers review problem cases, and they fear that allowing discovery of the peer review process will discourage providers from conducting thorough peer reviews. 82 Werth also notes that the Sabias' health insurance coverage of Little Tony's "most vital expenses" would be inadmissible. 83 States following the collateral source rule believe that persons who purchase or otherwise obtain insurance coverage should not be punished for doing so, because such coverage should be encouraged. 84

Of course, the legal system has not necessarily resolved the conflict between the "truth potential" of these types of information and the competing value that has resulted in its exclusion from evidence or discovery. By jolting us into a reevaluation of these competing values, Werth is performing a potentially valuable service. Perhaps we have overvalued the benefits of confidentiality in attorney-client communications or in the peer-review process, and undervalued the truth. That, however, is a very different (and more interesting) argument than the blunt suggestion that attorneys and the legal system place little or no value on the truth.

In our reevaluation of the effects of truth-hiding doctrines, however, we should remember that in almost every instance of an application of a truth-hiding rule, it will at first blush appear to lead to an unjust result. When looking at only such an instance of the hiding of an important truth, one cannot help but be swayed by the potential impact of the hidden information. If one makes Werth's mistake of looking only at the fact that a client tells an attorney that she committed a crime or a tort, that the peer-review committee concluded that a serious infraction occurred, or that an item outside the scope of discovery would have established liability (or its absence), one hardly can escape the conclusion that the truth-hiding rule leads to injustice. In most instances, the benefits that allegedly come from hiding the truth are more amorphous systemic values (like the value of frank attorney-client communications or thorough peer reviews) that we might be tempted to forfeit if we focus exclusively on an individual case. Again, this does not mean that we should not eliminate or limit some of our truth-hiding doctrines. 85 Before we do so, however, we should attempt to widen our focus from a single case to the system as a whole.

82. Id. at 48.
83. Id. at 160.
84. Health insurance is sometimes obtained as an employment benefit, for example.
B. Permitted Truth-Hiding Tactics

In addition to those situations where evidence or civil procedure law automatically hides some portion of the truth from opposing counsel and/or jurors, there are circumstances where correctly stated and followed legal advice might prevent opposing parties, and therefore jurors, from obtaining portions of the truth. By limiting protection to those clients who receive and follow truth-hiding legal advice, instead of automatically extending it to all parties, the legal system implicitly places less value on the confidentiality of this information. Therefore, these circumstances are perhaps even more worthy of re-examination of our balancing of the competing values of secrecy and truth.

Damages contains several accounts of circumstances where lawyers were able to structure information in a way that allowed it to be kept from opposing counsel or made it more difficult for counsel to obtain the information. For example, plaintiffs’ attorney Joel Liechtenstein’s suggestion that Donna Sabia discontinue her journal, 86 prevented the creation of a discoverable document that would have made it easier for the defense attorneys to acquire information about Little Tony’s condition and the Sabias’ activities on a given day, but it did not prevent the defense attorneys from attempting to acquire this information by sending interrogatories to Donna or asking her questions at her deposition about Little Tony’s condition and the Sabias’ activities. Similarly, Karen Koskoff’s statement that she expected to receive “very little” information in formal discovery, 87 reflects the common understanding among civil attorneys that opposing counsel will structure formal discovery responses to reveal as little information as possible. 88 When April Haskell avoids showing Humes’ first letter reviewing the events surrounding the babies’ birth to her retained expert witnesses, she avoids the possibility that it will be discoverable as an item relied upon or reviewed by the expert. 89 Several attorneys objected to deposition questions, thereby sending signals to their witnesses to answer carefully. 90 At least once, an attorney objected to a question and instructed the witness not to answer it. 91

C. Lying and Other Disallowed Truth-Hiding Tactics

Parties and attorneys do not always limit themselves to tactics allowed by the law, of course. Sometimes they also lie or otherwise engage in other truth-hiding tactics that violate the rules of engagement for civil suits.

Damages contains several accounts of this type of unlawful activity. During her deposition, Donna falsely denied the existence of her journal when asked if she kept “any records or any notes or any diary or any writings about any of this

86. WERTH, supra note 1, at 68.
87. Id. at 79.
88. Id. at 79-80.
89. Id. at 186. Several courts have found that an attorney who shares a document with her retained expert must disclose the document to her opponent. See Easton, Ammunition, supra note 85, at 533-34, 537-40.
90. WERTH, supra note 1, at 117, 220, 282, 284.
91. Id. at 121.
entire experience." When denying her role as a primary care-giver, midwife Barbara McManamy was less than honest. Werth rather charitably says, "McManamy wasn’t lying, but she wasn’t telling the truth either," but his quotations from her deposition transcript suggest that she may have been closer to the "lying" end of the spectrum.

The undeniable reality that some persons cheat and profit from their cheating does not establish that the system does not value the truth. If parties have to cheat to hide the truth, by definition the system has some rule in place that values the truth. To take the most obvious example, as almost every student of late twentieth century American history now realizes, lying under oath in a civil deposition is a crime. While it may perhaps be correct to assert that the legal system does not adequately prosecute this crime and therefore does not place enough value on the truth, the fact that perjury is a crime establishes that the system at least attempts to place some value on the truth.

D. Incorrect Memories and Statements

Until this point, we have been assuming that the information hidden by legal doctrine, attorney tactics, or blatant dishonesty is factually correct information. In other words, the discussion to this point has assumed that the information that would have been provided would have been accurate.

In any system run by, and dealing with, human beings, this will of course not always be the case. By definition, a fact witness relies upon her memory of her observations. Therefore, a variety of problems can result in testimony that is incorrect, including (but certainly not limited to): problems with the initial observation; problems in storing the initial observation in the witness’s memory; and problems in retrieving the memory. All of these problems can be caused or exacerbated by the stake a witness holds in the outcome of the case or other biases. In other words, even when a witness is making a diligent effort to accurately state her recollection of an event, that recollection is often inaccurate.

Although Damages, as the story of a malpractice case, concentrates on expert witnesses, it also outlines a few examples of disagreement among witnesses regarding facts. For example, while Humes believes that Donna was so agitated during labor that some options (perhaps including electronic monitoring of both...
fetal hearts) were unavailable, Donna seems to have a far different recollection of the extent of her agitation.98 In addition, Humes recalls meeting and talking with Tony and Donna before the births, but they do not remember talking with her until after the births.99 Humes and the Sabias also have substantially different recollections about their post-birth discussion, because the Sabias (and midwife McManamy)100 recall Humes mentioning twin-to-twin transfusion (or "gestation").101

Factual disagreements were not limited to different recollections by Humes and the Sabias.102 The two participants in the telephone call asking Humes to report to the hospital, i.e., midwife Barbara McManamy and Humes, seemed to have different recollections103 of whether McManamy reported or implied that both fetal heart rates were normal.104

There are several possible explanations for these differing recollections. It is of course possible that one (or perhaps more than one) of the witnesses is actively lying, i.e., misstating her memory. It is also possible that each witness is honestly stating her recollection, but the recollection of at least one witness is not consistent with what actually occurred.

Critical events are not always observed by more than one person. Because the instances of vastly different recollections noted above establish that witnesses may be either lying or honestly reporting incorrect memories, it is entirely possible that the claimed memory of a solo witness is also incorrect. Perhaps this is why experienced trial attorneys are so wary about eyewitness testimony, and why experts tend to eschew eyewitness recollections and prefer to base their opinions upon physical evidence.105

98. WERTH, supra note 1, at 46, 95, 116-17.
99. Id. at 116.
100. Id. at 136.
101. See id. at 20-21, 122.
102. Actually, factual disputes are not even limited to differing recollections by different witnesses. Sometimes a single witness's recollection changes over time. Humes' recollection seemed to change between her writing of the first letter explaining the birth and her writing of a second such letter some time later. Id. at 186.
103. Id. at 114-15.
104. Note that plaintiffs' attorney Karen Koskoff "thought she'd never know what Humes and McManamy had said to one another," because "[u]nrecorded phone conversations are notoriously difficult to reconstruct." Id. at 114.
105. For example, Dr. Benirschke uses the condition of the placenta to make determinations about what happened in labor, rather than relying upon the recollections of Donna Sabia and other witnesses. Id. at 143, 215-16. Humes agreed that the pregnancy's problems could be best understood through a careful examination of the placenta. Id. at 121, 167.

Also, when asked if Michael was functioning, Dr. Benirschke pointed to physical evidence: "[I]t urinated, because there is amniotic fluid present. And since there is meconium present, it must have been able to defecate, so was functioning there. . . . It was smaller, but it functioned to some extent." Id. at 219.

Another example, presumably far less popular in the eyes of physicians delivering babies, is the electronic fetal monitoring strips used by medical malpractice plaintiffs' attorneys and experts to try to show that a physician had botched a delivery. Id. at 171-72.
IV. DISPUTED ISSUES

As in any other lawsuit, the parties in *Damages* have differing views on a wide variety of issues. Given the shifting liability theories propounded by the Koskoff firm on behalf of the Sabias' and the defendants' efforts to respond to these theories, it is not surprising that the issues in dispute change as the case proceeds through the discovery process.

Nonetheless, those issues can be divided into two categories, though not into the two categories that law students, their instructors, and lawyers generally use, i.e., factual issues and legal issues. In litigation, the latter category does not really exist, because there are few, if any, purely legal issues. Instead, the facts (or the factual issues, when the facts are disputed) determine which legal issues are relevant. For example, even if there was a hot dispute about the correct interpretation of the Rule Against Perpetuities in Connecticut at the time of the Sabias' suit, that dispute did not affect the case, because it was not a property case.

To state a closer example, there is no "legal" dispute in the case about what the Connecticut two-year medical malpractice limitations statute meant when it stated that the limitations period for some suits starts when an injury is "sustained," because the facts did not require the parties to dispute this issue. Given Little Tony's condition at birth, there was no room for the Sabias to argue that he was not injured at birth, an event that took place two and a half years before they consulted a lawyer. Fortunately for the Sabias, however, the Connecticut statute contained an alternative starting time for the two-year limitations period, i.e., the date on which an injury was "discovered or . . . should have been discovered." The parties apparently disputed the correct interpretation of this portion of the Connecticut statute. While many would classify this statutory interpretation dispute as a "legal" issue, it is tied directly to underlying facts of the case. In other words, the legal issues in a case usually cannot be resolved without some reference to the facts of the case.

This principle does not operate with the same force in the opposite direction. While it is certainly true that the law determines which factual issues are relevant, some of those issues are disputes about historical fact that can (or at least could) be resolved without reference to the law that makes them relevant. For example, in the early stages of the Sabia suit, one of the most hotly contested issues was whether there was a pre-birth transfusion of blood from Little Tony to his twin brother Michael. That issue theoretically could be resolved by a fact-finder without any reference whatsoever to the law that makes it important. Therefore, the two categories of issues in this and any other case are "purely" factual issues and mixed issues of fact and law.

106. *Id.* at 44.
107. *Id.*
108. *Id.*
109. *Id.* at 83, 86-87, 88-89, 98-100, 316.
110. For another example, note Norwalk Hospital attorney Bill Doyle's threat to attempt to dismiss Donna's damages claims. *Id.* at 316-17. Doyle asserted that the Connecticut Supreme Court had ruled that a "bystander to medical malpractice may not recover for emotional distress." *Id.* at 317. This seemingly purely legal issue is actually tied directly to an issue that is, in part, a factual issue—was Donna a "bystander"?
Issues of fact can be further categorized. Some issues of fact are issues of historical fact, i.e., questions about whether a particular event did or did not take place. When stated precisely, a question of historical fact can have only one correct answer. The question of whether Tony’s blood was transfused into his brother is a prime example. That transfusion either occurred or it did not occur. If one highly qualified expert answers the question “yes” and another highly qualified expert answers the question “no,” one of the experts is right and the other is wrong.

Other issues of fact are issues of hypothetical or future fact. Hypothetical factual issues are issues that arise when a party claims that, if certain events had taken place, certain other events would have resulted. They cannot be resolved merely by determining what actually took place. For example, in the final version of the Koskoff firm’s liability theory, the firm claimed, in part, that (a) the standard of care required Norwalk Hospital to conduct nonstress tests, and (b) these nonstress tests would have yielded “abnormal” results. Issue (a) is a mixed issue of fact and law. Issue (b) however, is an issue of hypothetical fact. Even if perfect evidence of what actually did occur existed (a condition that, of course, is never present), an issue of hypothetical fact might not be capable of absolute resolution solely by reference to this historical record.

Issues of future fact are similarly unresolvable with absolute certainty by a mere reference to the historical record. For example, one of the primary issues in the Sabia suit is Little Tony’s life expectancy, which is a matter of future fact. Regardless of how much evidence, including expert testimony, is gathered, one cannot be certain about a future event like the date of Little Tony’s death.

Because matters of hypothetical and future fact generally (or perhaps always) are incapable of resolution with certainty, one is tempted to say that, unlike matters of historical fact, these matters cannot be stated in a way that makes only one answer correct. This view, itself, is not absolutely correct, at least in some instances. For example, assume that a question of future fact was stated in a precise manner like, “Will Little Tony live for at least ten more years?” While it is cor-

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111. Note that Michael Koskoff apparently referred to the first portion of the trial as “the historical phase.” *Id.* at 328.

112. See Easton, *Ammunition*, supra note 85, at 509-23 (referring to “a precise question with . . . one correct answer”).

113. One might at first be tempted to respond, “Not necessarily. Maybe there was a transfusion of blood, but only a minor one.” Upon further reflection, one realizes that this is not an adequate response. As to the question of whether the transfusion occurred, there can be only one correct answer. Either the transfusion did occur, even in a tiny amount, or it did not occur.

If it is determined that a transfusion did occur, the fact-finder might then wish to determine the amount of blood transfused from Little Tony to Michael. If the question is framed in vague terms, there will not necessarily be only one correct answer. For example, consider the question, “Did Little Tony transfuse a large amount of blood to Michael?” That question will not necessarily have only one correct answer, because it is not a precisely framed question. Even among experts, there may be differing opinions regarding what amount of transfused blood would be considered a “large” amount. At trial, such a question might be objected to as imprecise or not answered by a careful expert witness.

Instead, assume that the second question was, “Did Little Tony transfuse at least two milliliters of blood to Michael?” Now we again have a precisely framed question of historical fact that has only one correct answer. Either Little Tony transfused at least two milliliters of blood to Michael, or he did not.

114. *WERTH*, supra note 1, at 250.

115. See infra notes 118-22 and accompanying text.
rect that we cannot, at the time the question is asked, answer the question correctly with absolutely certainty, there is only one correct answer. Either Little Tony will live at least ten more years, or he will die before ten years have passed. Ten years after asking the question, we would know the answer to the question posed ten years earlier.

The same principle applies to questions of hypothetical fact. If the question is stated precisely enough, it has only one correct answer. While I must admit that I do not have enough background in medical matters to achieve the task of asking question (b) precisely enough, it might look something like: "If the [insert brand name] nonstress test equipment had been attached to Donna’s [insert applicable body part] at 2:00 p.m. on March 30, 1984, while she was reclined on her right side on the Norwalk Hospital clinic examining table, would it have shown [insert the precise test result]?"

At this point, you might be posing another question: Who cares? But questions of hypothetical and future fact can have substantial impact on lawsuits, so we should handle them correctly. While it is correct to assert that such questions cannot be answered with absolute certainty, it is not correct to therefore conclude that all proposed answers (including those proposed in expert testimony) to these questions are equally legitimate.

The same cannot necessarily be said of mixed issues of law and fact. For example, in many medical malpractice cases, perhaps the most hotly contested mixed issue of law and fact is the appropriate standard of care. In part, this is a legal issue, because Connecticut law requires the plaintiff to establish that her care was below the standard. At the same time, this is also an issue of fact, because the parties will present conflicting evidence in an effort to convince the jury what the standard of care was at the time of the care. In Damages, the various attorneys and their expert witnesses spend a great deal of time and effort disputing and trying to establish the standard of care at the time of Donna’s pregnancy.

Mixed issues of law and fact are often imprecise questions that might have more than one correct answer. In Damages, it appears that there is at least some support among the experts and the medical literature for the idea that the standard of care required ultrasounds, nonstress tests, and electronic fetal monitoring under Donna Sabia’s circumstances, as well as some support for the proposition that the

116. For example, the answer to hypothetical factual question (b), i.e., whether nonstress testing would have yielded abnormal results (that would have led to a C-section prior to Michael’s death), was a critical issue in the Sabia suit. WERTH, supra note 1, at 250. The answer to the future factual issue of Little Tony’s life expectancy was another critical issue. Id.

117. See supra note 113 and accompanying text.

118. WERTH, supra note 1, at 52, 148, 200-01, 230, 252, 346 (explaining that counsel for all parties spent considerable time and resources to establish the standard of care and to determine if, when, and by whom that standard was breached).

119. Id. at 179-88, 181, 227-28, 247-49, 272-76, 292 (explaining that defense counsel worked to demonstrate that neither Humes nor the hospital breached any standard of care while plaintiffs’ counsel attempted to demonstrate that certain procedures could have been taken to prevent Little Tony’s full injuries).

120. At the same time, it is important to note that the imprecise mixed questions of fact and law do not always have more than one arguably correct answer. See Easton, Ammunition, supra note 85, at 525-26. Sometimes attorneys and experts take advantage of the ambiguity in these questions. For example, in a given medical malpractice case, the standard of care might be well-established, but an attorney might still be able to find an expert who will testify to a different standard of care.
standard of care did not require this monitoring.\textsuperscript{121} As one of the experts suggests (in Werth's paraphrase), "a single, articulable standard of care [is] more a legal construct than a medical one."\textsuperscript{122}

Because so many of the questions that occur in lawsuits, especially the suits that are hotly contested enough to find their way into the appellate court opinions read by law students and their instructors, are mixed issues of fact and law, we lawyers, law students, and law professors tend to view all disputed issues as those where each of two differing positions is entitled to equal respect. While it is undoubtedly correct that in many disputes over hotly contested issues in litigation both sides are taking an equally reasonable position, this is not always the case. As noted above, when issues of fact are framed with precise questions, only one answer is correct. In such circumstances, one of the litigants is taking an incorrect position, and often supporting that position with incorrect expert testimony.\textsuperscript{123}

Short of summary judgment, which usually will not be available when the party advancing the incorrect position is able to support that position with expert testimony, the legal system has no readily available pretrial mechanism for sorting out incorrect contentions. In the vast majority of cases, the civil justice system relies upon the fact-finder, which is often a jury, to identify the correct position and reject the incorrect position.\textsuperscript{124}

When the parties take positions on critical issues that are polar opposites and support these positions with the testimony of well-qualified experts, how does the jury go about deciding which position is correct? By reviewing and evaluating the evidence that it receives, even when that evidence is rather incomplete and, at least at first blush, inconclusive.\textsuperscript{125} That evidence consists of fact witness testimony, physical evidence, other exhibits, and expert witness opinions. Jurors may not be as prone to reject fact witness testimony as experts, but physical evidence is often critical. However, jurors often lack the skills needed to evaluate the physical evidence. For example, if the Damages case had gone to trial, it is unlikely that any juror would have known what happened to Michael by looking at the condition of the placenta. That, of course is where expert witnesses enter the picture. Though it is far from her only task, an expert often helps the jury interpret the evidence it receives. While the ordinary juror does not know how to look at a placenta to determine whether twin-to-twin transfusion took place, Dr. Kurt Benirschke has made just such a study his life's work.\textsuperscript{126}

V. CONCLUSION: AT WHAT COST SETTLEMENT? AT WHAT COST TRIAL?

While this discussion raises and explores some of the effects of the formal litigation system on the resolution of civil disputes like the Sabias' claim against
Humes and Norwalk Hospital, time and space limitations prevent discussion of several other similar issues. For example, *Damages* includes numerous accounts of attorneys gaming the formal (and informal) litigation rules to secure advantages for their clients.\(^{127}\) Perhaps the most dramatic example is the Koskoff firm's settling with Humes before the deposition of plaintiffs' expert Dr. Kurt Benirschke, who said ""If the doctor's in, . . . I don't want to have anything to do with it.""\(^{128}\) The book also documents the uneasy, shifting, complicated, and therefore fragile relationship between co-defendants who are, at once, allies and enemies.\(^{129}\)

Perhaps most significantly, a fundamental question has remained, to this point, unasked. Given that a trial is the paradigmatic, though now relatively unusual, dispute resolution mechanism of the formal litigation system, would a trial have been ""better"" than the negotiated resolution of this case? It is an intriguing question without a readily apparent answer.\(^{130}\)

Of the four primary litigants (Tony and Donna Sabia, Maryellen Humes, and Norwalk Hospital), two repeatedly and rather defiantly stated that they wanted a trial.\(^{131}\) Both Tony,\(^{132}\) and Humes believed that a trial was their only hope for the vindication they each thought they deserved, though Humes later and somewhat intermittently retreated from this position, because she wanted the case out of her life.

Even if a trial had reached the result he desired, however, Tony probably would not have received the vindication he felt he deserved. Tony's primary desire seemed to be some recognition of his efforts, and those of his wife, to care for Little Tony and keep his family together in the face of overwhelming odds.\(^{133}\)

Although most readers of *Damages* would agree that Tony deserved significant credit for his devotion to his family, a trial would not have given it to him, because that devotion would not have been a central issue in the case. It is difficult to imagine how even a substantial plaintiffs' verdict would have given Tony the particular affirmation he desired, though it might have lessened his ""Why me? What'd I do?"" thinking.\(^{134}\) Indeed, Tony expressed frustration that all Norwalk Hospital attorney Bill Doyle ""seemed to care about was whether Norwalk Hospital could be held in for Little Tony's injuries.""\(^{135}\) This would have been the precise issue to be determined at a trial, once Humes had settled. Thus, although a trial might have given Tony and his family additional resources to care for Little Tony, it would not have given him his desired vindication. Of course, the trial might also have resulted in a defense verdict, which would have left Tony with substantially fewer resources. One suspects that Tony would have interpreted a defense verdict as simply another slap in the face to him and his family. All in all,

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127. *Id.* at 80-81, 82-83, 123, 164, 168, 261-63, 266-67, 276-77, 297, 298-99, 326, 340-42.
128. *Id.* at 188; see also *id.* at 206.
129. *Id.* at 48, 50, 78, 85-86, 120, 130-38, 156-57, 177, 184-85, 187.
130. *Id.* at 368-70.
131. After Travelers settled the case on its behalf, Norwalk Hospital’s public position was that it ""regretted that it wouldn’t have the chance to be vindicated in court."" *Id.* at 368. Werth seems to doubt the sincerity of this claim. *Id.*
132. *Id.* at 298, 312, 319.
133. See *id.* at 298, 324-25, 356, 359-60.
134. *Id.* at 311.
135. *Id.* at 359.
a trial was not a very good place for Tony to obtain the personal vindication he desired and almost certainly deserved.

On the other hand, a trial very well might have given Humes the vindication she desired. Though nothing is certain in litigation, *Damages* suggests that a trial probably would have resulted in a defense verdict for Humes (though not necessarily a defense verdict for Norwalk Hospital). After she settled out of the case, the experts started to agree that nothing that she did contributed to Little Tony’s condition. Even plaintiffs’ attorney Michael Koskoff later conceded, “She wasn’t responsible for the injury . . . .” His client, Tony, agreed. Instead of receiving a defense verdict at trial, Humes endured the frustration of a $1.35 million settlement being paid on her behalf. As Werth notes, “[m]ost people construe[] the act of settling as a tacit admission of guilt.” The settlement also will have more tangible consequences for Humes. She presumably will be required to report this settlement for the remainder of her professional career in various circumstances, including every time she applies for malpractice insurance. If she is fortunate enough to obtain insurance, her malpractice premiums will be driven upward by a settlement for damages that, if the experts are to be believed, she did not cause. Perhaps Humes would have been better served by a trial.

If we turn our attention from the concrete concerns of the parties to the more esoteric concerns discussed here, the answer to the question is no more clear. Would a trial have been a better or a worse forum for determining “the truth” about what happened and how it did or did not affect Little Tony? Would forcing a jury to resolve the issues disputed by the parties been preferable to, or worse than, compromising those issues? When a disputed issue has only one correct answer, does “compromising” of that issue compromise its importance? Would the expertise contributed by the wealth of medical talent have been better used at trial, or did the settlement reflect the collective wisdom of the physicians? Even if

136. *Id.* at 220. Even an expert who had nothing to do with the case, who was apparently contacted by Werth in his research for the book, agreed that Little Tony’s injuries were probably complete before Humes was involved in Donna’s labor. *Id.* at 225. According to this expert, by the time Humes entered the picture, “the game was over.” *Id.* at 226.

137. *Id.* at 226. Koskoff added “through no fault of her own,” suggesting that he believed that she was guilty of malpractice, but that malpractice did not contribute to Little Tony’s injuries. *Id.* If he is correct and if a jury had been asked to return a special instead of a general verdict, Humes’ vindication may have been incomplete, because the jury might have found that she committed malpractice, but that her malpractice did not contribute to Little Tony’s condition. Perhaps that is a distinction that is more important to lawyers than to litigants, however.

Attorney Bill Doyle, who entered the case substantially later on behalf of Norwalk Hospital, somewhat similarly “thought Humes had been screwed, paying $1.35 million ‘for nothing.’” *Id.* at 263.

138. *Id.* at 311.

139. *Id.* at 211.

140. *Id.* at 368.

141. *Id.* at 198.

142. *Id.* at 201.

143. Presumably Humes’ view of the lawsuit did not change from her initial assessment: “[T]he tragedy was, she thought, it had nothing to do with who she was, or what kind of doctor she was, or even what she may or may not have done during the two and a half hours she was in charge of Donna Sabia’s care.” *Id.* at 75. The same might be said about the settlement paid to the Sabias on her behalf.

https://scholarship.law.missouri.edu/jdr/vol2004/iss1/8
a trial has some advantages over a settlement, do those advantages outweigh the expense, delay, anxiety and pain caused by a trial? 

VI. STUDY QUESTIONS

The following questions are intended to further your understanding of these materials.

A. The Truth

1. From your reading of Damages, please identify the truth-hiding legal doctrine that you found the most frustrating (or would be most in favor of eliminating) and state why you chose this rule.

2. From your reading of Damages, please identify the truth-hiding behavior (lawful or unlawful) that you found the most distasteful and state why you chose this behavior.

3. From your reading of Damages, please identify a statement of a fact witness (including the parties) that is, in your view, incorrect, and state why you believe it is incorrect. [Note: Do not list a “lie,” i.e., a witness’s knowing misstatement of her recollection. Instead, list a statement the witness believes to be correct that actually is not correct.]

B. Theories and Contested Issues

The “flowchart” at the Appendix outlines the plaintiffs’ final theory of the case. Each link in the logic represents an issue that could be disputed, though most of the links in the logic were not in dispute by the time the case was settled.

Please review this chart, and do the following:

1. Categorize these issues by placing one of the following abbreviations in the lower right corner of each box: “HIST” for issues of historical fact; “HYPO” for issues of hypothetical fact; “FUTURE” for issues of future fact; or “MIXED” for mixed issues of fact and law.

2. Put a star (*) by those issues that were disputed in the negotiations between the plaintiffs and Norwalk Hospital. Were there other factors (in addition

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144. While a trial does, without a doubt, add to the expense of resolving a case, it is easy to overestimate the extent of this added cost in relationship to the overall cost of litigation. In a case like the one outlined in Damages, where the parties spent more than six years incurring discovery and other pretrial litigation expenses prior to settling just before a scheduled trial, the parties incur the bulk of the expenses before the trial. Nonetheless, it cannot be disputed that a trial would have increased the expense (and time) required to reach a resolution.

145. Id. at 42.

146. Id. at 327, 340-41, 362.

147. Id. at 344.

148. Id. at 204.

149. For clues regarding which issues factored prominently into the difficulty in getting the case settled, see id. at 56-60, 315-17.
to the issues listed on the chart) that hindered settlement? If so, list the most significant other factors somewhere on the chart.

3. Circle the primary issues that would have been in dispute if the case had gone to trial.\footnote{150}

4. Decide which issues you would have disputed if you had represented Norwalk Hospital and taken the case to trial. Mark these with "NH" for Norwalk Hospital.

5. Before the Koskoff firm finalized its theory, it considered other theories, most prominently those that attributed Little Tony’s problems to the handling of the labor and delivery process by Norwalk Hospital and Humes. Consider how the changes in the plaintiffs’ theory affected the case. Did these shifting theories distract the attention of the attorneys? Who did the shifts in theories hurt the most?: (a) the Sabias and their lawyers? (b) Humes and her lawyers? (c) Norwalk Hospital and its lawyers? In what specific ways did the changes in theory affect them?

To assist you in answering this question, you might want to review the following list of issues that were, at one time, considered prominent or, at least, significant, but were later abandoned:

- Should Norwalk Hospital have conducted an ultrasound immediately after Donna came to the hospital for labor, or after nurse Mollie Fortuna could not hear a second heartbeat?\footnote{151}
- When did nurse Fortuna (or someone else at Norwalk Hospital) first learn of the absence of a heartbeat for Michael?\footnote{152}
- Did nurse Fortuna tell midwife Barbara McManamy that she had not been able to locate a second fetal heart rate?\footnote{153}
- Did Norwalk Hospital electronically monitor the heart rates of both twins?\footnote{154}
- Was Michael dead before midwife McManamy called Humes and asked her to report to the hospital?\footnote{155}
- When midwife McManamy called Humes, did she report that all parameters were normal, thereby implying that two fetal heartbeats had been checked and found to be normal?\footnote{156}
- Did midwife McManamy and/or nurse Fortuna withhold information from Humes about problems in Donna’s labor?\footnote{157}
- Did Humes ask the nurses or the midwife if there was any difficulty in monitoring the fetal heart rates?\footnote{158}

\footnote{150. In most trials, there are only a few issues that are disputed. For hints about which issues the defense attorneys might have contested, you might want to review Pat Ryan’s reaction to Michael Koskoff’s presentation to Norwalk Hospital, and Bill Doyle’s trial preparation. \textit{Id.} at 252 (Pat Ryan); \textit{Id.} at 329-30, 340-41 (Bill Doyle).
151. \textit{Id.} at 134-35.
152. \textit{Id.} at 87.
153. \textit{Id.} at 22, 139.
154. \textit{Id.} at 115-16, 134.
156. \textit{Id.} at 114.
157. \textit{Id.} at 46, 249.
158. \textit{Id.} at 117.}
Did Humes wait too long to examine Donna? Had she “futzed around”? Did Humes wait too long to examine Donna? Had she “futzed around”? Did Humes have left the labor room to telephone radiology, pediatrics, and anesthesiology, to discharge patients, and for other brief exits? Who was responsible for managing Donna’s labor (midwife McManamy, Humes, or both)? Should Humes have ordered an ultrasound shortly after arriving? If Humes had ordered an ultrasound, should/would Humes have delivered both twins by C-section immediately after the ultrasound? If Humes had done an ultrasound and discovered that Michael was dead, would it have made any difference? In other words, if she had done an immediate C-section, would Little Tony’s condition have been better? Should Humes, as the physician, have made certain the nurses were electronically monitoring the fetal heart rates? After nurse Mollie Fortuna could not find a heartbeat at 9:30 a.m. (or as a matter of routine practice), should there have been fetal heart monitoring of both twins until they were delivered? In other words, did the standard of care require electronic monitoring of fetal heart rates? Was fetal monitoring impossible due to Donna’s “lack of cooperation”? Would electronic fetal monitoring have led to findings that would have resulted in a decision to do a C-section? When a fetus is starved of oxygen, is most of the brain damage done just before death? Was this the case for Little Tony? If Humes had performed a C-section shortly after arriving at the hospital, would Tony’s condition have been better (or, alternatively, was it too late because the significant blood loss had occurred earlier)? Shortly after the labor, did Humes tell Tony and Donna there was “twin-to-twin gestation” (i.e., transfusion) from Little Tony to Michael? Was Humes an agent of Norwalk Hospital? Was Norwalk Hospital obligated to indemnify Humes?

159. Id. at 113.
160. Id. at 18-19, 77, 123.
161. Id. at 132-36, 180, 199-201.
162. Id. at 82, 163, 188.
163. Id. at 90.
164. Id. at 82, 124, 145, 188, 200.
165. Id. at 17, 77, 97, 123, 133, 169, 173, 188, 200-01.
166. Id. at 52, 66 (referencing the complaint allegations); Id. at 90 (referencing Donna’s deposition); Id. at 97, 115 (referencing Humes’ deposition); Id. at 135 (referencing McManamy’s deposition). See also id. at 169, 173-74, 200-01.
167. Id. at 46, 95, 116-17.
168. Id. at 346-47.
169. Id. at 145-46.
170. Id. at 78, 124, 157, 173, 180, 182-83, 188, 200, 279-80.
171. Id. at 20-21, 88.
172. Id. at 187.
173. Id. at 199.
## VII. APPENDIX: PLAINTIFFS’ FINAL THEORY

1. During the second and third trimesters, Michael was about seventeen to eighteen percent smaller than Little Tony. *Id.* at 14, 246, 247-48.

2. In December 1983, and January 1984, ultrasounds indicated that Michael was about seventeen to eighteen percent smaller than Little Tony. The Norwalk Hospital clinic also found polyhydramnios (increased amniotic fluid). *Id.* at 14, 246, 247-48, 316, 328, 350.

3. Discordance and polyhydramnios were known risk factors for twin pregnancies. *Id.* at 246, 247.

4. On March 30, 1984, Donna was one week past the thirty-seven week term for twin pregnancies. *Id.* at 246.

5. Norwalk Hospital protocol “D” required management by a physician when multiple pregnancies were past term. *Id.* at 66, 247, 328.

6. Nonetheless, the clinic assigned her to treatment by a nurse midwife on alternating visits, and did not assign a physician to be in charge of her pregnancy or consult with a high-risk pregnancy specialist to determine what procedures were needed. *Id.* at 246, 247, 249, 328.


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174. This chart is primarily based upon Michael Koskoff’s presentation to Norwalk Hospital, which is quoted and paraphrased in the chart. See WERTH, supra note 1, at 245-51.

9. As Michael grew in size, he put mounting pressure on the velamentous cord. *Id.* at 302-04.

8. Michael suffered from ongoing growth retardation. *Id.* at 282-85.

10. This progressively increasing strain eventually resulted in a velamentous cord insertion. *Id.* at 302-08.

11. The velamentous cord insertion cut off Michael’s blood supply and killed him. *Id.* at 119, 218, 250, 277, 279, 282-85, 294, 302-08.

12. The 1984 standard of care required serial ultrasounds in the third trimester in this kind of high-risk pregnancy. *Id.* at 247-48, 249-50.

13. Serial ultrasounds would have revealed continued seventeen to eighteen percent discordance. *Id.* at 248, 249-50.


15. Due to the continued seventeen to eighteen percent discordance, the 1984 standard of care required third trimester fetal well-being studies (serial nonstress tests). *Id.* at 249

16. If fetal well-being studies had been done, they would have revealed indicators that would have led a physician to diagnose Michael’s stress. *Id.* at 221-23, 225, 227, 249-50, 273, 275, 277-80, 294, 302-09, 316, 358.
14. Under the 1984 standard of care, a physician would have done a C-section due to seventeen to eighteen percent discordance. Id. at 78, 162-63, 174, 220, 246-50, 263, 273, 277, 328, 330-31, 350-51, 353, 358-59.

16. If fetal well-being studies had been done, they would have revealed indicators that would have led a physician to diagnose Michael's stress. Id. at 221-23, 225, 227, 249-50, 273, 275, 277-80, 294, 302-09, 316, 358.

17. With these indicators of fetal stress, the 1984 standard of care required a C-section. Id. at 222-23, 227, 249-50, 273, 275, 277-80, 294, 302-09, 316, 358.

18. Norwalk Hospital did not perform the required C-section before Michael's death. Id. at 249-50.

19. Michael died eighteen to twenty-four hours before Little Tony's birth. Id. at 249.

20. Michael's blood pressure dropped after his death. Id. at 249.

21. In this pregnancy (and some other twin pregnancies), a loss of blood pressure in one twin resulted in bleeding from the twin with higher blood pressure into the twin with lower blood pressure. Id. at 249, 280.

22. Little Tony bled into Michael. Id. at 121, 143-44, 149, 215, 218-19, 224-25, 249, 280, 302.

23. Little Tony's blood pressure decreased dramatically. Id. at 121, 143-44, 149, 215, 218-19, 224, 25, 249, 280, 302.

24. This loss of blood pressure starved Little Tony's brain of oxygen. Id. at 215, 219, 225, 249, 280, 302.
24. This loss of blood pressure starved Little Tony’s brain of oxygen. \textit{Id.} at 215, 219, 225, 249, 280, 302.

25. Just before Little Tony would have died from oxygen starvation, no more blood could be absorbed by Michael’s body, so the twin-to-twin transfusion ended. \textit{Id.} at 225.

26. The loss of oxygen to Little Tony’s brain during the period of twin-to-twin transfusion caused Little Tony’s cerebral palsy and other related conditions. \textit{Id.} at 249.

27. Little Tony is a mentally retarded spastic quadriplegic suffering from cerebral palsy and debilitating and life threatening grand mal seizures. He is legally blind, totally incontinent of urine and feces, and unable to communicate. He has leg braces and hand splints to prevent contractures. \textit{Id.} at 245.

28. These mental conditions will require substantial medical and other care. \textit{Id.} at 159-60, 199-200, 245, 249-51, 252, 266-68, 268-72, 290-91, 328, 341.

29. Little Tony has also suffered lost earning capacity. \textit{Id.} at 160, 250-51, 252.


32. The $22.2 million in total damages accounts for:
   - $10.1 million for medical and other care;
   - $2.1 million for lost earning capacity;
   - $5 million for loss of enjoyment of life; and
   - $5 million for pain and suffering.
\textit{Id.} at 251.