MASSACHUSETTS
LAWYERS WEEKLY
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From the January 17, 2005 Massachusetts Lawyers Weekly.

Feature Story

'He Changed Her Life Forever'

A Truck Driver's Accident Renders A Victim A Paraplegic; And A Jury Responds

By John O. Cunningham

$9.41 MILLION

* RHODES , et al. v. ZALEWSKI, et al.

* Norfolk Superior Court, No. MCV2002-01159

* Date of verdict: Sept. 15, 2004

* Plaintiffs' attorneys: M. Frederick Pritzker, Margaret M. Pinkham, Carlotta M. Patten and Daniel J. Brown, all of Brown, Rudnick, Berlack, Israels, Boston

Marcia Rhodes never had a chance.

On Jan. 9, 2002, an 18-wheeler carrying 40,000 pounds of liquid asphalt roared into sight in her rear view mirror and slammed into the back of her car on Route 109 in Medway.

The then-46-year-old mother's spine literally exploded on impact, leaving her essentially lifeless from the waist down.

Someone was responsible, but who? The truck driver, his employer, the building materials company who leased the truck and the truck owner all initially pointed to each other, then impleaded a tree service company that was working on the side of the road.

One defendant settled and another was released, but three of the defendants decided to take their chances with a Norfolk County jury on the issue of damages.

While they accepted the plaintiff's submission of $911,000 in injury-related expenses, they argued that she was overstating her case for $2.2 million in estimated costs of future care, in part because she was a paraplegic with a limited life expectancy.

After less than four hours of deliberation, the jury delivered its reply: a verdict against three of the defendants for more than $9.4 million in damages, including $2 million for loss of consortium for the victim's husband and child.

In his opening and closing, M. Frederick Pritzker of Boston, lead counsel for the plaintiffs, summed up the case against the driver, his employer and the building materials company that hired them.

Pritzker told the jury: "After reaching the crest [in the highway], the truck driver had 12 seconds and 800 feet of straight road downhill with no obstructions to view between him and [the plaintiff's car]. There was nobody between the truck and the car. He did not stop or even slow down, and within that period of 12 seconds he changed Marcia Rhodes ' life forever."

Despite the sympathetic appeal of this tragedy, however, co-counsel Margaret M. Pinkham says the plaintiffs' lawyers had reasons for concern.

The plaintiffs' damages included loss of consortium, pain and suffering, and other elements that juries often view with skepticism, particularly in light of media attacks by proponents of tort reform.

"Our biggest fear was the jury coming in with a $2 million verdict they thought was a lot of money, but would be insufficient to take care of that family," Pinkham recalls.

Wrong Place, Wrong Time

Before the accident, the plaintiff was an antiques dealer and part-time instructor at Mt. Ida College who also devoted significant time to her husband and only daughter.

On the day of the accident, she had stopped on a section of Route 109 waiting for a traffic cop to wave her through an area where roadside trees were being removed.

As she glanced in her rear view mirror, she saw a tanker truck barreling down on her and she steered her wheels to one side to avoid being pushed into the police officer, possibly saving his life.

Unfortunately, the plaintiff's life was irrevocably altered. She spent nearly three months in the hospital and was confined to bed for nearly a year as a result of post-surgical complications.

Fragments of her shattered T-12 vertebra went everywhere inside her body; doctors had to use a steel rod to stabilize her backbone.

As medical bills mounted and the permanent effects from the accident became obvious, a family friend suggested that the plaintiffs consult with Pritzker and Pinkham.

Aggressive Strategy

Pritzker's strategy was to keep the case simple, but he had an anticipated response for every countermove by the defense, and he moved aggressively toward trial.

"Some people are worried about antagonizing insurers, but there is no reason to wait," he says, noting that insurance companies hire counsel right away and the plaintiff begins to accrue prejudgment interest at 12 percent a year only when suit is filed.

He adds that this aggressive approach has already triggered roughly $2.5 million in interest owed to the plaintiffs because suit was filed within six months of the accident.

Pritzker notes that his four-lawyer team was also ready for trial sooner than the defense, and the plaintiff got her day in court less than 26 months after filing suit despite defense requests for continuance.

The advantage to more aggressive preparation may also have played out at trial where the results were devastating for the defense.

Pritzker's first strategic decision involved determination of which defendants were essential to the case.

Prior to trial, he and Pinkham had concluded that the tree service company had no major role to play and would only serve to distract the jury.

So they utilized a sometimes overlooked section of the contribution statute, G.L. c. 231B, Sect. 4(b), to release the tree company in exchange for $550,000 that would ultimately be credited toward the total liability of all defendants.

The plaintiffs' team also had to decide what to do with the remaining defendants, three of who

would stipulate to liability because they did not want the plaintiff to recount her incredible memory of the nightmarish accident.

Pritzker knew from discovery that the fourth defendant, Penske Truck Leasing, was probably in the case because the driver was blaming the accident on bad brakes.

The lawyers also knew that, despite a police report regarding some deficiency in one of the brakes, Penske was not likely a significant contributor to the accident and the jury could be confused by its presence in court.

So they left the truck leasing company in the case just through the liability phase of the trial, releasing it by agreement only after the stunning testimony by witnesses to the accident, including the police officer who was directing traffic.

But the damages phase would present the greater challenge, and the plaintiffs' team elected to focus the jury on a chalk that broke down the elements of the victim's damages into medical bills, future personal care, and pain and suffering.

They got full cooperation from the plaintiff's husband on medical bills, who kept track of every dollar spent, and they obtained the necessary certified statements from every health care provider on every invoice.

"There were more than 70 vendors, and we had to treat this just like a major document production in any business case," recalls Pinkham.

The bills also tied in to every painful element of rehabilitation and medical therapy that the plaintiff had to endure in recovery.

The proof of medical costs was so thorough that there was no room for dispute, but there was a big discrepancy on the issue of life care planning.

"We were very careful to choose a life care planner who was a good expert with a medical background and specific history in determining the needs of paraplegics," says Pritzker.

"We were also very careful not to oversell the life care plan," he adds, noting that the plan did not list futuristic stem cell treatments or other items for which the husband held optimistic hope.

"If the jury questions one part of your evidence, they can question your whole case," warns Pritzker.

Pinkham recalls the stark contrast with the defense's life care planner.

"Their planner wanted no modifications to the house for handicap access," she says, noting the planner's suggestion that the plaintiff could spend the rest of her life sleeping in the family's living room rather than constructing access to her second-floor bedroom.

Pinkham says the defense planner also suggested that there was virtually no need for a home health aid. "They were basically saying she could just ask people to help her at the grocery store," the plaintiffs' lawyer recalls.

The defense also fell into one other trap.

Pritzker did not address the plaintiff's possibly diminished life expectancy in arguing for a life plan, leaving the opposing side with the unsavory task of arguing for a discount based on studies done many years ago.

Pain And Suffering

Pinkham recalls that Pritzker ridiculed the defense when it actually sought "discounts" for diminished life expectancy.

The plaintiffs' team essentially argued that the defense could not look to shorten its exposure without compensating the victim for loss of enjoyment of life.

But it was testimony regarding loss of consortium, the plaintiff's emotional distress and impairment of normal functioning that really brought the house down.

"We wanted to teach the jury about the consequences of paraplegia through the details of the family's testimony," recalls Pritzker.

He says the testimony on damages was "largely done through the husband's eyes as caretaker" with the help of a "day-in-the-life" video depicting three different days in the plaintiff's recovery.

The video that Pritzker proposed to use started with the plaintiff's improvement after rehabilitation, but then reverted back to the arduous road to recovery with a voice-over narrative.

The defense objected to the video, in part because of the audio portion, so the judge ordered the plaintiffs to delete the sound.

But Pritzker was ready with a back-up plan. He ran the film on a screen — without the audio — as a backdrop during the examination of husband Harold, which was carefully conducted so as to provide a substitute narrative.

Pinkham said the effect was stunning. "You could hear people choking in the courtroom, and at one point when Harold was testifying about [personal care issues], there was actually an audible gasp from one of the defense counsel."

It was Pinkham who then handled the examination of 13-year-old daughter Rebecca — an examination that Pritzker says was made possible not by good lawyering but by a good lawyer spending days getting a small child comfortable with the idea of testifying.

"The time Margaret spent visiting with Rebecca was crucial because it got her comfortable talking about everything," says Pritzker.

Pinkham learned that Rebecca and her mother had done everything together prior to the accident and shared all kinds of stories in an incredible kind of "Gilmore Girls" relationship.

Pinkham asserts that Rebecca — a "tiny little girl" — was basically withdrawn and unemotional leading up to trial, but very intelligent and coherent.

"She was never emotional until she started to take the stand ... [and] I told her, 'Just look at me when it gets tough,'" Pinkham recalls.

Rebecca struggled a bit, but let her emotions go for the first time when Pinkham asked her if she still shared her "growing up" anxieties and stories with her mother.

After a pregnant pause, Rebecca stammered: "How can I possibly do that when my problems are so small in comparison to hers?"

Pinkham wanted to rush to the stand to comfort her, but the judge fortunately called a recess.

It was then that Pinkham noticed the jurors were crying, a stenographer was crying, and even people at the defense table were glassy eyed.

The defense on cross gently pointed out that Rebecca still went to the movies with her mother and shared meals with her, a tactic that Pritzker would not forget in closing.

Pinkham recalls that Pritzker was emotionally charged himself when he told the jury that "loss of consortium is not about whether you go to the movies with your mom, but it's about the fabric of relationships that were ripped apart by this event."

Pritzker also attacked the defendants' trial mantra about limiting personal care costs to what is "fair and reasonable."

He asked the jury if it was "fair and reasonable" for the defendants to change the plaintiff's life and then impose upon her to sleep in the living room or ask for help in grocery shopping every week.

Pritzker reminded the jury that the defendants had argued it was "fair and reasonable" to reduce the plaintiff's future personal care estimates based upon reduced life expectancy.

Then, he offered his reply: "Think about what they are saying. They are taking 10 years off her life span, but how can they do that without compensating her for loss of enjoyment of her life?"

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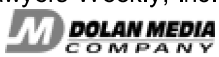

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