

Case Weaknesses

This case, of course, has weaknesses that must be attended to. We believe that all of them can be mitigated to some degree, greatly enhancing our position. We would like to discuss the following weaknesses.

- 1. The primary weakness to this case is that most jurors perceived this as a child's life being at stake and they specifically expressed a requirement for perfect care.** In our proposed defense argument, we specifically pointed out that we used ordinary and average care. This will never do at trial. Jurors will not, under any circumstances, allow us to get away with ordinary and average care in the treatment of a critically ill child. Legally, that is all that is required, but we will not have a jury of attorneys. The jurors need to be told that we have provided exceptional care for this child. The efforts of the employees of CHUSA provided care that was far above ordinary and average. We should then follow up by pointing out the qualifications and experience of the nurses and identify some of the specialized equipment used by CHUSA employees.
- 2. The extent of Jenny's disabilities.** It is clear that Jenny is severely disabled, with no real possibility of improving. This will naturally stimulate genuine sympathy and perhaps the notion that someone needs to pay. There is, in fact, not very much that can be done to mitigate these reactions. There may, however, be an unintended consequence of the plaintiff side emphasizing and illustrating Jenny's disabilities. Almost all of the jurors accepted the defense premise that Jenny's life expectancy is severely shortened and watching the DVD only reinforced this point. It is, of course, a very sensitive issue and the jurors quickly came to this conclusion without it being overly emphasized by the defense. Obviously, if the jurors accept the idea of a shortened life span, the computation of any possible damage awards is affected.
- 3. When it comes to awarding damages, jurors will always err on the side of the child in a case such as this.** We must be aware, prior to making a settlement offer or going to trial, that jurors will settle all arguments in favor of Jenny. Particularly when it comes to financial needs; they will not want to take the chance that Jenny will be left without sufficient funds. If typical jury behavior is followed at this trial, the jurors will take any amount we counter-offer and use that as an absolute base number. They will then move upward toward the plaintiff's figure.
- 4. The jurors view punitive damages as a fine against the company.** Two of the three juries said they needed to assess money against the company to save the lives of other children. Many jurors mentioned that CHUSA, and

companies like it, also provide nursing care for the elderly. The juries clearly wanted to put all agencies on notice that only superior care will be tolerated. There is a high probability that the jurors will find there was gross negligence as a result of the combination of actions and inactions by CHUSA and Nurse Tyler. The actual determination of what punitive damages will be assessed will be controlled, to a great extent, by how the company balance sheet is presented to jurors.

5. **Nurse Tyler should have expected airway blockage due to phlegm.** The defense has offered testimony that this child is in a condition that blockage due to phlegm is a predictable result of her condition. Unfortunately, the jurors turned this around and pointed out that because the blockage is predictable, Nurse Tyler should have been trained and tested on her ability to clear such a blockage. Nurse Tyler was trained in the use of the equipment used to clear such blockages. The problem arose when she followed the prescribed procedures and the blockage simply would not clear.
6. **The jurors saw Nurse Tyler as a professional who panicked.** The 911 recording convinced 65% of the jurors that Nurse Tyler was panicked during the phone call. Several of the defense jurors referred to Nurse Tyler as being frantic, but not panicked. Of course she was frantic, she followed the emergency procedures and this child did not respond. We should also revisit Nurse Tyler and the possibility of doing compressions and simply not remembering. In the background on the 911 recording, she is clearly counting something and the rhythm is consistent with a person counting compressions. It appears that her training kicked in; she automatically performed the compressions, just did not remember doing so. This recording should be reviewed with her to refresh her memory.
7. **Nurse Tyler apparently did not check her equipment at the start of her shift.** This was particularly noted by one of our jurors, who was a firefighter. Firefighters and anyone involved in safety or dangerous occupations will be aware that prior to starting any shift, you always check your equipment and never take anyone's word that the equipment has been checked. You always check for yourself. Additionally, there are no ventilator records for that day. Much will be made of this by the plaintiff attorney and he will surely leave the jurors suspicious of the records' absence. Again, this needs to be discussed in detail with Nurse Tyler. We need to determine whether or not she had a start-of-shift procedure she always follows, in which she would check ventilator settings, sound and check the alarms, and make sure everything worked as advertised.

- 8. Many jurors were convinced that Nurse Tyler was not attending to this child for a substantial period of time.** The jurors pointed out that it takes some time for a child to become breathless, lifeless and lose their pulse. This is not something that happens in one or two minutes. They felt this child must have been left alone for a substantial number of minutes for this to have occurred. They supported this by stating that Jenny had some use of her arms and she had to be struggling when she could not take a breath. Such struggling in the stander should have been easily noted by a nurse who was even halfway paying attention. **We must educate the jurors that asphyxiation is a silent killer. Children often slip into unconsciousness without a great deal of visual struggling and, because of the size of their organs, they advance to unconsciousness at a fairly rapid speed.**
- 9. Jurors were surprised at the lack of memory on the part of Nurse Tyler.** We must point out at opening statement and, if possible, during voir dire, that nurses will be testifying from notes they made 15 years ago. We are recommending that a graphic be prepared that reflects the number of babies who have probably been assisted by Nurse Tyler in that time. We believe this should be used to help explain why she cannot remember this child from 15 years ago.
- 10. Nurse Tyler was an exceptionally bad witness.** Most witnesses can have substantial behavioral changes if properly prepared. We recommend that a competent trial consultant be assigned to work with Nurse Tyler to improve her presentation. We recommend that she be subjected to examination while being videotaped so she can later go through the painful experience of seeing what she looks like when she answers questions. In almost all cases, this causes vast improvement.
- 11. Charts for the day in question have numbers written over that have obviously been changed.** If we do not point this out, the other side will. We should prepare large foam core blow-ups of these charts to specifically point out where we think numbers were changed and why we believe they were changed. At a casual glance, it looks like “1730” was changed to “1930”. That is perfectly explainable: 1930 translates to 7:30 in civilian time. It would not be a difficult error to begin to write 1730 because it is actually 7:30. It appears this is an error that was initialed at the time the correction was made. This only becomes a case weakness if we allow it to become one. If possible, it would be good to work this graphic into a voir dire question. We could show the graphic during voir dire and tell the jurors that plausible explanations will be given for write-overs on the chart. We then question if there are any jurors who are predisposed to not accept reasonable explanations of write-overs on charts.

- 12. This is a case about what Children’s Healthcare USA and its employee did wrong.** The jurors were critical about the hiring procedures, the retention procedures, the evaluations, the lack of testing, promises made to the clients and the poor on-scene performance of their employee, both before and during the emergency. At trial, we must show that Children’s Healthcare USA is not a certifying agency. As an employer, CHUSA has a right to rely upon the approved government entities that grant certification and licenses. Nurse Tyler was licensed in accordance with the laws of the State of New York. Nurse Tyler has various certifications and coursework from certified institutions showing that she is qualified to work with special needs children and she is qualified in basic life support. Children’s Healthcare USA is not a school, it is an agency that provides professional service. One of the problems we must be prepared for with this defense is the comparison of CHUSA to other service providers. Organizations such as police departments, fire departments and airlines hire people who have graduated from schools and have been certified. However, they then have various forms of in-house examination and supervised probation.
- 13. The jurors expect nurses to have their abilities tested by their employer prior to sending them out to someone’s home.** It appears that no effort was made to test the ability of the nurse in something as critical as CPR. As previously stated, we must convince the jurors that we are a service provider and not a training institution. We have a right to rely on state-certified agencies to teach and test nurses prior to certifying them.
- 14. The jurors perceived Nurse Tyler’s evaluation as just “rubber stamping”.** The jurors stated that Nurse Tyler’s evaluations were just paperwork to the CHUSA supervisors; they simply filled in the blocks. Worse, they believed that her elevation from evaluation 2s to evaluation 3s was an attempt by the company to protect itself by rating her very highly after this tragedy. Many jurors felt that the company probably wanted to fire her, but they needed to support her so they would not look bad.
- 15. The jurors perceived the company as having a laissez-faire attitude with its nurses.** The jurors used such words as “laid back”, “mundane” and “status quo” when they talked about the attitude of this company. All three panels of jurors believed the company had the attitude of “because things were not going wrong, nothing *would* go wrong.” We must take substantial steps to show that complacency has no place at Children’s Healthcare USA. Training and compliance supervisors should be re-interviewed so they can make a detailed list of all the steps that are taken to ensure that the nurses’ training is maintained and examined. We should stress to the jury exactly what

continuing education is required of nurses by the licensing agency and CHUSA.

- 16. This nurse did not meet the requirements for hire.** The jurors noted that the company makes guarantees to clients in their advertisements, and then they do not follow through. The jurors approached a condition of outrage that a company would have specific requirements and then try to say they are simply guidelines. **Pointing out that there is a shortage of qualified nurses simply did not work with these jurors and will not work with a trial jury. In most cases, there is no productive way for a company to explain that it has minimum requirements for hiring and they overlooked those requirements.**

- 17. The ventilator low minute volume alarm was turned off.** The alarm was turned off at the time it was examined by the company that made the equipment. This has no correlation to the condition of the alarm on the day in question at the scene of this tragedy. The position of the alarm switch at the pertinent time is clearly unknown.

- 18. There is a very strong emotional component in this case.** The jurors may well be inclined to compensate the plaintiff simply out of sympathy. **The defense needs to consistently re-frame the significant issues in this case. The actions of the nurse had nothing to do with what happened to Jenny. This child had several medical issues, and this incident was merely an expected complication of those problems.**

Case Strengths

In addition to the case weaknesses, this case also had some strengths which should be heavily relied upon during our presentation at trial. The following case strengths should be considered:

- 1. The attending physician is truly the captain of the ship and if he felt Jenny should be under direct observation in the stander, it should have been written in his orders.** There are procedures in which doctors want direct eye-to-eye observation and when they want such observation, they write it into their orders; this was not the case. **We should try to determine whether or not the doctor would agree that it is okay, generally, to leave a patient such as Jenny for short periods of time while she is in the stander. We should also ask him if that would be desirable if this makes it easier for Jenny to tolerate the stander.**

2. **All three juries spontaneously questioned why the mother waited 11 years to file the lawsuit.** Because this happened in all three panels of surrogate jurors, we feel it will also be a question for your trial jury. Herein lies a fertile area for suspicion of the mother and her motives. While we would not recommend that the mother be directly attacked in any way, we are sure that skilled attorneys can lay just a little bit of groundwork for the trial jurors to question motive.
3. **The jurors did not believe Jenny was going to live until she was 40 to 50 years old.** Most jurors did not believe she was going to die within the next few years, but they clearly believed her prognosis for a long life was not accurate. They saw it simply as hopeful. *In spite of the fact that they do not believe this life expectancy, we must remember that the tendency will be to err on the side of the child. It may be effective in planting a seed that the family will be enriched by an early death. This can be done rather casually by asking an expert to explain how excess funds are dealt with in an annuity versus what happens to damage awards if a large sum is simply provided for Jenny and she dies at an early age. We should address this carefully, only touch upon it once and leave it for the jurors to figure out.*
4. **The jurors believe that large awards make insurance rates go up.** In these difficult economic times, more than ever before, jurors are becoming cost-conscious. Several jurors expressed that if a large award is given, they, the jurors, will pay a share of it.
5. **Surprisingly, every jury, and almost every juror to a person, stated that Jenny can work.** Clearly, they were informed that everyone agreed she was unable to work. In spite of that, the jurors still felt that she was capable of gainful employment. They pointed out that Jenny's mother said she can speak over the telephone and you would not know she was handicapped and she can type with one finger. The jurors are well aware that there are many telemarketing positions and many jobs which could be filled by such a person. We therefore believe that you should not give in completely to the concept of zero future wages. A jury in this venue will accept that she is capable of working.
6. **These jurors were well-versed in various methods of the generosity of the government.** Even though the issue was never brought up in presentation, many jurors talked about the amount of government aide and family help that is available to assist this family. The jurors will not believe that this child is left without treatment unless they give damages. Many jurors felt the plaintiff was overreaching in the damages requested. As a cautionary note, we would

like to point out that they considered a non-overreaching figure of being in the area of \$2,000,000-\$3,000,000.

- 7. Jenny tolerates the stander better when no one is watching her.** It is clear from other nurses and her parents that Jenny probably did not like the stander and misbehaved in an effort to be taken out of it. A method of controlling this misbehavior, which was used by all involved in Jenny's care, was to put Jenny in the stander and then not let her see you watching her. This would therefore be an ideal time to attend to other duties and be out of Jenny's eyesight. **We must be careful of a plaintiff attorney who will agree that one should be out of sight while Jenny is in the stander, but that Jenny should never be out of sight of the medical provider. One can always find a location where they can observe Jenny without being seen by Jenny.**
- 8. One of the strengths that was relied upon by defense jurors to gain control of their counterparts is the issue of causation.** Over and again, we watched defense jurors who would use the tactic of admitting there may have been negligence, but then pointed out that there was no causal relationship. In fact, during deliberations in Jury One, this tactic was used to change a 7-3 plaintiff jury into a 9-1 defense jury in a matter of two or three minutes. We strongly recommend that this point be hammered home at every opportunity and that the formula of negligence continuing to causation and ending up as damage be shown to the jurors graphically.