

Dead Children

The Case: Chrissy is the mother of three children: Mary, 17 months; Joey, four years old; and Tim, eight years old. Chrissy's husband worked the evening shift at a paper mill. In July, she was contacted by the medical unit at the mill and told her husband had been seriously injured at work and was being transferred by ambulance to the university hospital in town. His injuries were not immediately life-threatening; however, he was seriously injured and would be admitted. It was approximately 7:30pm and Chrissy wanted to proceed to the hospital immediately. She called her best friend, Alice, who lived in a nearby apartment complex, and asked her to please watch the children while she went to be with her husband. Alice immediately came to Chrissy's house and picked up the children; she then took the children to her apartment. Alice and her husband lived in a moderately upscale apartment complex that had a large swimming pool and spa. Officially, the pool and spa hours terminated at 10:00pm, but it was an unwritten rule that as long as people did not make noise and bother other residents, they were free to use the pool as late as they wished. At approximately 9:40, Alice and her husband took the three children down to the swimming pool. After about an hour, the infant, Mary, became cranky and Alice's husband decided she needed to be changed and put to bed. Alice's husband, John, was sitting with his feet in the spa while he held the infant and Joey was sitting next to him. Alice was in the swimming pool with the eldest boy. John went to the edge of the pool and told his wife he was going to put the baby to bed and he would see her in the apartment in a little while. Still carrying the infant, he walked to the gate and Joey walked with him. At the gate, he stopped and told Joey, "You stay here with Alice and come up when she comes up." John then went upstairs and left Joey behind; he believed Alice was aware that Joey was left at the gate. Alice was unaware Joey had been left poolside, and she continued to play with the eldest boy in the pool. Approximately, ten minutes later, Joey's body was found floating in the spa. Paramedics were summoned, but Joey was pronounced dead on arrival at the university hospital.

A sheriff's homicide team conducted an investigation and determined that Joey had died of an accidental drowning when he fell into the unlit spa. No criminal charges were brought against anyone.

The design of the swimming pool area was intentionally low-light. There were no traditional deck lights lighting the walking area around the swimming pool and the pool relied on three underwater lights and one underwater light in the nearby spa. The only other lighting available was low-voltage light located amongst shrubbery around the fenced area. This left the pool area generally dark, even with the underwater lights on. On the night in question, none of the pool or spa lights were operating due to an electrical problem. The management at the apartment complex was aware of the light problem and had been trying to get it fixed for over a week. As the civil suit progressed, depositions were given by other apartment residents. These depositions brought forth testimony that the lights usually did not work and several complaints had been made to management over the prior three months.

The Research: The research for this case was undertaken by looking at the case from the plaintiff point of view. The financial circumstances were very clear: Alice and John had no funds and the apartment complex had the deep pockets. Plaintiffs would surely want to increase the size of the damage and increase the comparative fault, as much as possible, onto the apartment. This jurisdiction does not have joint and severable liability. That portion of the damages assessed against the young couple would be uncollectible funds.

The designed research showed there was liability on the part of the young couple, Alice and John, for several reasons.

1. The couple did not maintain positive communication as to who had control of Joey in the dangerous environment of the dark swimming pool.
2. It was late at night, when the children should have been in bed, rather than outside on a dark evening.
3. Both Alice and her husband admittedly consumed several drinks throughout the course of the evening; however, neither appeared to be intoxicated.

Liability on the apartment complex existed because of the unsafe lighting conditions. Governmental code requires that semi-public pools be sufficiently lit from underwater; the same rule applies for spas. The apartment complex had known for, at least, several days that the lights were not working, and may have known for as long as several months and failed to act appropriately.

The research design was a four-panel study, with the first two panels receiving the facts of the case. The presentation was then modified based upon the discovered strengths and weaknesses and presented to the second two panels a week later.

The first study showed an award slightly in excess of one million dollars, with comparative fault of 50% on each party. It was clear the surrogate jurors saw this as a tragic accident and were not particularly angered. Also, as they often do, the jurors decided that each side had some fault and therefore “split the baby” and divided the fault equally.

The second presentation was modified and the results were startling. Surrogate jurors in the first simulation wanted to know more about the details of maintenance records over the six-month period leading up to Joey’s death. Their interest was to establish whether or not it could be proven that the apartment complex had been advised of the lighting problems several months before the death. An examination of these records revealed that several of the work orders for that period of time could not be accounted for. They were simply blank, with all information missing. This information was presented to the second group of surrogate jurors, with the inference that it was very convenient for the apartment complex that this information was now lost. Additionally, jurors were told there is an instruction in this venue that if records are lost, jurors must assume the records would be harmful to the defense. Surrogate jurors made the easy leap that someone had destroyed records pertaining to complaints about the lights in the pool area. The first surrogate juries also wondered, during the course of their deliberations, why the pool was not shut down when the lights were not working. This tactic was well-used in the second group: the inference was made that the apartment complex, in an effort to keep the apartments filled, kept the swimming pool open even in dangerous conditions. Maintenance personnel did have a length of chain and a lock which could have been used to secure the pool gate so no one could have gone in on the night of the drowning. The plaintiff’s attorney showed the surrogate jurors the length of chain and its lock and told them, “If someone had just put this chain on the gate, Joey would still be alive.” These two items were enough to cause anger among the surrogate jurors and the award substantially increased.

During their deliberations, the second group of surrogate jurors independently arrived at the conclusion that this was not a traditional drowning. A traditional drowning occurs when people are purposefully in or on the water. This was a case of a child, lost in the dark, who fell into a hole in the ground that was filled with water and called a spa. The surrogate jurors decided the child was simply walking away from the pool and, in the dark, tumbled into the hole. They decided this was not a drowning, but a death caused by the neglect of the apartment complex. If appropriate deck lights had been in use, Alice would have seen the child was left behind. If the spa had been lit, Joey would have seen the hole and not fallen in. To make matters worse, the maintenance records had been destroyed by someone in management to try to cover their tracks. Several surrogate jurors stated, over and over, “All they had to do was lock the gate.”

Case Findings: The second set of surrogate jurors awarded more than five million dollars, with 80% responsibility on the apartment complex. This research design clearly illustrates the need to present a case to learn about its weaknesses; then re-present the material, including these weaknesses, to another group of surrogates. In this case, the research increased the plaintiff’s value of the case from \$500,000 to four million dollars.

When designing your research strategy, you should always consider performing research based upon the best defense case; then re-present the case as a plaintiff’s best case. This will clearly disclose the strengths

and weaknesses of each side. This will give a consultant the necessary tools to guide their client to the best decision: trial or settlement. A clear, clinical picture must be presented to the client so they can make the best business decision available. Pride and ego must be discounted; only the cold facts should be used in the decision-making process.

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