



MondayMonday

A Tale of Two Plaintiffs

March 13, 2017

We attended the theater last week. No, not Broadway or even Off-Broadway. It was a play at our local schoolhouse. Now, we make full disclosure here. Though we are way past the time when our own children were in elementary school, we do serve on a local school board. These were no less our children and these observations may well be clouded by the bias that such a connection creates.

Something happens to a child on the stage; something that happens right in front of your eyes. We can't really define it, but we know it when we see it. It's a coming out; a declaration of sorts to the outside world: Here I am. See how marvelous I am. Let me share in your enjoyment of me. Give me your applause and send me home the victor. Interesting as well is that the word "me" in the lines you just read freely interchanges with the word "us." At once, the play is about the ensemble and the individual. If you find that confusing, you just haven't ever set foot on that stage.

We did, many years ago, and the experience changed us forever. No memory is as vivid; no experience as formative; no honor as well-earned as the applause we still can hear. On stage, the child moves out in front of his or her life to take the lead, protected only by what's behind and driven only by what's inside. In an instant, there is success or failure, and the very speed at which that determination is made confirms its value. You say the final line, sing the final song, play the final death scene, take the final bow



and it is done. Game, set and match in a split second of a lifetime.

To what value? We'd love to tell you we know, but we don't. It's not STEM education, but there's certainly something real important going on here. Perhaps it's a different kind of space exploration—inner space. We cast ourselves upon the stage, prepared with our lines, rehearsed in our roles, and hope we don't screw up. Whether it's the Sea of Tranquility or the West Side Story, it's still that same small scary step which, in its taking, defines us as human.

When the trial lawyer dreams at night, what does she want to be? For one day, what could her Fairy Godmother provide? To be a judge; to take the bench, rather than stand before it; to right the wrongs that are thrust upon her by judges every day. Well, for the appellate lawyer, it's quite the same thing.

Two cases last week brought that dream to mind. Both involved damages and, in both cases, we knew that were we given the one day to right wrongs, we would start there. In the first case, *Estevez v. Tam*, 2017 NY Slip Op 01675 (2d Dep't 3/8/17), the court affirmed a jury's decision that the death of a father was worthless; in the second, *Sawh v. Bally Contr. Contracting Corp.*, 2017 NY Slip Op 01724 (2d Dep't 3/8/17), the court looked at the injuries to a 12-year old child, rejected

the determination of a jury as to their value, and substituted its own. If we were given that one magical day, we would reconcile this judicial dissonance.

In *Sawh*, the child sustained a bimalleolar fracture (ankle), multiple fractures of the fibula and tibia damaging his growth plate, suffered three surgeries involving hardware, missed months of school, dealt with increasing pain, developed deformities requiring now a fourth surgery, had to wear a brace while running and could no longer run fast, stand too long, walk for distances or participate in sports. While the decision does not dare state the amount the Queens jury awarded the child, the AD increases the award to \$100K for past and \$300K for future pain and suffering.

In *Estevez*, where the jury awarded nothing for the loss of the father's parental guidance, the AD affirmed, noting that the wrongful death law in our state only awards pecuniary damages, nonetheless recognizes that among those damages are the increased costs of replacing the "services" the father was able to provide during his life. The court affirms the valuelessness of the decedent's life by reminding that the determination of such damages are "peculiarly within the province of the jury."

Appellate courts approach damage appeals with, it would appear, great reserve. While they grudgingly grant additurs in situations where we all know the value of pain and suffering is unrealistically low, or ignore the antique and artificial limits on losses in wrongful death, there does not seem to be the same reserve when it comes to slashing generous jury awards that reflect the community's sense of reasonable compensation.