



Practice Tips: Closing Argument in *Ryan Hill v. Northwestern Memorial Hospital* - a Birth Injury Case

by Christopher T. Hurley

As with many cases that get tried, we had our share of problems in *Hill v. Northwestern*. But sometimes the defense is so focused on the problems with the plaintiff's case—i.e., causation—that they overlook their own problems.

Problems with the Plaintiff's Case

The reason we almost decided to reject this case was because it met none of the “essential” American College of Obstetricians and Gynecologists (ACOG) criteria. In January 2003, ACOG published a monograph entitled “Neonatal Encephalopathy and Cerebral Palsy: Defining the Pathogenesis and Pathophysiology.” According to ACOG, in order for a plaintiff to prove a causal connection between a delayed delivery and brain damage the following must be true:

1. Cord blood gas pH of less than 7.0.
2. The child experienced an early onset of severe neonatal encephalopathy.
3. The child suffers from a diagnosis of spastic quadriplegia.
4. All other causes must be excluded.

In addition to the “essential criteria,” ACOG lists other “non-essential” criteria: 1) A sentinel hypoxic event occurring immediately before or during labor (examples of such events, according to ACOG, are ruptured uterus, placental abruption, umbilical cord prolapse, amniotic fluid embolus, maternal cardiopulmonary arrest, or massive fetomaternal hemorrhage), 2) sudden and sustained fetal bradycardia or the absence of fetal heart rate

variability in the presence of persistent, late, or variable decelerations, 3) Apgar scores of 0-3 beyond 5 minutes, 4) onset of multisystem involvement within 72 hours of birth, 5) early imaging study showing evidence of acute nonfocal (symmetric and diffuse) cerebral abnormality. The non-essential criteria suggest the possibility of hypoxic brain injury occurring near delivery, but are non-specific and can be explained by other causes. If you meet only some of the non-essential criteria then the defense experts will say the brain injury was caused by something other than hypoxia near the delivery. If your case meets none of the essential or non-essential criteria then there will definitely be a trial, so plan on sitting through several days of highly qualified defense experts explaining why there is no proximate cause.

ACOG's sole purpose for creating and distributing these criteria is to create a “get out of jail free card” for defendants in birth injury cases. In ACOG's view, no matter how egregious the defendant's conduct, if the baby does not meet all of the “essential” criteria, then the defense wins. Of course, ACOG is a group of politically active obstetricians with an agenda. They are not neurologists and there is no reason the plaintiff's bar should defer to self-serving criteria that are designed to make proximate cause impossible to prove in all but the worst cases. There are experts that have the courage to disagree with ACOG. But you will be in for an expensive fight.

In our case, an early CT scan stated that the newborn had an “infarct” on one side of his brain. The

lack of symmetry and the word infarct are often used to describe stroke. This initially gave even us doubts about proximate cause. In fact, the defendants argued at trial that the child suffered a stroke based on this CT scan. But there was no other evidence of stroke in the record and later MRI's showed more global damage consistent with hypoxia. A key realization for us was that “infarct” does not mean “stroke,” it means “dead brain” which can be caused by hypoxia as well as stroke. Also, CT scans done within the first 24 hours after an injury do not show the full extent of the damage.

Another major problem was that the obstetrical expert we inherited from the referring lawyer had been sanctioned by ACOG on two separate occasions for testimony he gave on behalf of plaintiffs. Believe it or not - we came to believe that this was a blessing in disguise. We brought the sanctions out on our direct examination of the expert, and from then on we dealt with ACOG aggressively. ACOG never has and never will sanction a defense expert, and the procedure they follow to sanction plaintiff's experts lacks anything resembling due process. By overreaching in this way, ACOG has turned itself into a partisan advocate instead of an independent research organization, and that makes it easier to attack the scientific integrity of the criteria listed above.

Finally, on paper our child only exhibited slight developmental delays. His special education grades were quite high, and he appeared so healthy that we could not use a day in the life video at trial.



Strengths of the Plaintiff's Case

The parents of our injured child are a mixed race couple. The father is African American and the mother is Caucasian. Our pretrial nervousness about how juries in Chicago receive mixed race couples in the 21st century turned out to be completely unfounded. The Hills are among the most caring and hardworking parents we have ever represented, and that became apparent to the jury early in the case. If we did not have parents like the Hills whose love, intelligence and dedication to their son was so readily apparent, this case would have gone nowhere.

There were three critically important medical records—including hours of nursing notes and a biophysical profile—that were either lost or deliberately destroyed by the defendants. Neither defendant had a credible explanation for why these records were missing. The trial judge gave us an I.P.I. 5.01 instruction. This created a key opening for us on liability while hurting the defendants' credibility.

On the stand, the hospital's labor and delivery nurses conceded that the fetal heart monitor strips displayed before the jury showed that the mother's uterus was hyperstimulated with Pitocin for many hours before delivery. The continued use of Pitocin in the presence of hyperstimulation was a clear violation of the hospital's obstetrical unit policies and procedures. This helped us explain that the proximate cause of the child's brain injury was a prolonged partial hypoxia—not the sudden event required by ACOG.

The defense underestimated the damages. While the child can walk and talk and go to school, he is in special education and will never be able to live alone. His parents and teachers were able to bring his deficits to life at trial in a way that his high special education grades did not.

Settlement Negotiations

The defendants never made a settlement offer before trial. On the night before closing arguments the

hospital offered \$500,000 to settle. Since our costs were over \$200,000 we did not take this offer seriously. The verdict against all defendants was \$14,128,008.

PLAINTIFF'S CLOSING ARGUMENT

Good morning. Something Dr. Sabbagha said on the day that he was testifying made me think of a book I read once about these mountain climbers that climbed Mount Everest. The gist of what Dr. Sabbagha said was that, you know, we don't want to give up on everything we've worked for in this labor and go to C-section, we want to try and keep the labor going.

And it made me think of this book because these people that climb these mountains are very focused people and they have their eye on a goal, a summit that they want to reach, and they want to reach it no matter what sometimes. But the problem with Mount Everest, the highest mountain in the world, is that – it can become

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quite treacherous when the weather changes, and so the climbers know that if the weather changes and it changes severely, they can get caught too high up on the mountain in a place where they can't be rescued because the helicopters can't reach certain altitudes, and you can get up there too high.

Now, these climbers climb in teams. The team is supposed to watch the signs. They're supposed to watch the weather. And everyone on the team plays a role. And some guys might get too focused on the summit and not be able to take their eye off that summit and go in the face of bad weather. The

other team members are supposed to step in and say, hey, things are changing, it could turn against us, it could get too dangerous, we need to stop, we need to go back. Well, sometimes they do and sometimes they don't, and sometimes when they don't and the weather goes against them, they die. They die at the top of the mountain. They die because they can't make it down. But that's the risk they choose to take for themselves.

Here we have a case where risks were taken for Ryan Hill. People chose to take risks and ignore signs, ignore rules to get to a goal that they had that Ryan Hill didn't have. They chose to take risks on his behalf. He didn't

choose these risks.

Now, when Jennifer Hill went in to see Dr. Sabbagha that night of October 26th, she was past due, and when she's past due that means that her placenta was wearing out. Everyone knows that. There's no dispute about that. The placenta is past its prime. The placenta is the organ that gives the oxygen to the baby. When it can no longer transfer the oxygen as well or as efficiently, the baby starts to suffer. In the face of this worn out placenta, the doctors and the delivery team decided to pour on Pitocin, which is like gasoline on a fire. I think Dr. Sabbagha maybe is the one that said it that way.

You're cranking up that uterus to contract more efficiently and more frequently. And what happens when the uterus contracts -- it's a big muscle, squeezing the baby, and every time it squeezes, it squeezes all the blood and oxygen out of the placenta. And for the time that it's squeezing, the baby is without oxygen. Now, a fresh placenta that's not past its prime and a baby that's been in a uterine environment that's not past its prime can handle the contractions. We're all meant to handle contractions. And we know from the non-stress test that was given that the placenta was past its time.

But we also know that when the contractions come too frequently, the baby doesn't have time to recover in between them. So we showed you that with these boards. We showed how contractions were coming too frequently for hours during this labor -- not just a few minutes, not for a small segment of time, but for hours. From at least 8:30 at night until 1:30 in the morning -- that's five hours -- the contractions were coming too quickly, and that means the baby can't respond or doesn't have time to recover between contractions. And just like if your big brother or the neighborhood bully takes you in the swimming pool and dunks you, you can handle it once, you can handle it twice, but can you handle it for hours? The answer is no. Ryan

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Hill couldn't handle it for hours.

So the brain damage that Ryan experienced in this case is from a prolonged partial hypoxia which is exactly what happens when the tachysystole is taking place -- too many contractions over too long of a period of time. And the radiology reports that we discussed tell us exactly what happened. The first radiology report was the CT scan done at Northwestern. You recall a couple things about CT scans. One is they're not as good as the MRI, and two is that it takes about 24 hours for any results to be seen on those. That's a really important fact which was brought out, I believe, with the radiologist that the defense brought in. He made the observation that, you know, you don't always see stuff for at least 24 hours on a CT scan.

Well, what do we see on this CT scan? We see a suspicion of low density in the area of the left posterior temporal parietal occipital regions. So that's the rear of the brain, and it's just a suspicion. And in this report, there's no mention of damage to the front

of the brain, which we know we have on both sides. And why is that? It's because this CT scan was done less than 24 hours after Ryan was born and the findings weren't there yet, they weren't obvious yet. And while they paid somebody to come in here and say, oh, they're obvious, they're not obvious. The person that first saw it -- the person that works for one of the defendants didn't see it. And that means they were new. They were recent damages. They happened in the last 24 hours, not three to five days before when a mystery stroke happened for no apparent reason for a perfectly healthy pregnancy, but within the last 24 hours -- which is critically important.

And the second radiology report that really locks in our case is the MRI from October 6th, 2006, and that's the one where the word that they dread shows up. It's the word watershed. What it says is, impression, findings are consistent with watershed infarcts involving the frontal lobes bilaterally -- the front on both sides -- and the left occipital lobe which is the back. So

now, later we can see the damage to the brain. It's not just in the back. It's in the front and the back, and it's in the watershed areas.

Now, remember what one of the experts said about the watershed areas. It's like when you're sprinkling your lawn, and if the supply of blood and oxygen stops being able to reach the farther parts away and along, those are the parts that die first. So that's what the watershed areas are. Those are the parts of the brain that are distant from the central arteries. They get the least amount of blood, and when the blood supply and the oxygen is not reaching, those are the first parts to die. And that happens when there's prolonged partial hypoxia or prolonged partial deprivation of oxygen. So when these watershed areas are affected, we know it's from lack of oxygen.

And nowhere of course in any of the radiology reports or in any of the neonatal intensive care records -- or in any record actually is there a mention that this baby suffered a blood clot, let

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alone three blood clots, let alone the hundreds of blood clots you would need to wipe out the watershed areas. Because as you recall, the watershed areas are where all the little tiny arteries are. So you'd have to have dozens and dozens and dozens of blood clots in these areas to cause this injury, which doesn't make sense because it didn't happen.

If you recall, after ten days in the neonatal intensive care unit, they didn't do a single test to discover if there was a clotting disorder in this child, if there's a clotting disorder in the mom, if the baby still had risk of clots. I mean, wouldn't you think if the baby had one clot, he might have another, we should think about this, we should talk to the parents about it, we should worry about it? No, nothing.

The only thing in the neonatal records is that the baby was born acidotic. And acidotic means the baby hadn't been getting enough oxygen. But they paid a guy \$40,000 to come in here and say that it's not watershed because they're deathly afraid of the word watershed because watershed means there's no clot here, this is lack of oxygen. Ryan Hill is permanently brain damaged because he didn't get enough oxygen over hours of the last part of his labor.

So when did the negligence start here? It started on October 26th in the afternoon. Mrs. Hill goes in to see Dr. Sabbagha, a non-stress test is done, it's not reactive. It causes Dr. Sabbagha to send her to get a biophysical profile. Okay. Here's the first warning sign of bad weather ahead. The non-stress test is non-reactive. The weather is not going our way. Maybe we'll go a little further so we get the biophysical profile, and while we don't have the biophysical profile because it's gone, we know it must not have been reassuring because she's admitted.

Now, you heard the doctors testify that if that biophysical number is too low, you need to go right to the

hospital. You also heard that in the hospital at about noon after Jennifer's labor started, they went in, and they broke her bag of waters with the knitting needle, and in doing that, no fluid came out. Now, the biophysical profile would have tested for fluid. If we had that result, I suggest to you it would have shown that there was no fluid on the night of the 26th and she should have gone right into the hospital. But we don't have the result. The result is gone.

But waiting 12 more hours to admit Jennifer for induction really only leaves her and her baby with a placenta that's worn out for 12 more hours. There's no reason for it. There's no justification for it. There's nothing to be gained by prolonging this pregnancy 12 more hours in an environment that you know is bad. And so then labor begins the next morning and labor goes slowly. You'll recall the testimony that a normal labor will progress at about 1 centimeter an hour after the active phase of labor starts. In Jennifer's case, she progressed at the rate of about 2 centimeters in six hours. That's too slow. Here's another warning sign of bad weather ahead. When it's this slow, it means there's going to be problems down the line.

And so what do they do to, you know, manage this slow labor? They start to crank up the Pitocin which is the gasoline on the fire. And the Pitocin starts the tachysystole, and the tachysystole, as we've discussed, is too many contractions that the baby can't respond to.

Now, there's a team climbing this mountain, and the team includes the nurses. And the nurses know it's their duty to advocate for this baby. It's not optional. It's not optional for the nurses to advocate for this child, not optional for the nurses to follow their own rules. And there is a rule on tachysystole, isn't there? The rule says that if there's more than nine contractions in a 20-minute period, you're to turn down the oxytocin or the Pitocin. That's not

optional. That doesn't say, if you want to. It doesn't say anything about being optional. It says do it.

Wouldn't you think that if you're going to go against your policy and your procedure that you've been trained on or if the doctor tells you you must ignore it, you'd at least make a note saying, I told the doctor that we had tachysystole, and he said push on. There's no note in there because no one was watching for this weather. So this tachysystole happens for hours. And here's now the blizzard coming in, and they're toward the summit, and the snow is coming down hard, and you're just going to keep on going. And that's what they did.

And now a fever comes along at about 6:00 o'clock at night. Here's another sign. And now the wind and the snow are both coming in strong. And now it's a fever, and what are we going to do with a fever? We're just going to keep on going. Even though we know the fever might mean infection -- and I don't know if there's an infection here or not. They don't even know. But it might be. An infection might mean that the placenta is even less able to feed the baby. Fever might mean that the labor is going to be even less efficient. But they ignore the fever. Another warning sign ignored.

And now it's time for the team to talk about whether we can reach this summit. And the team in this case happens to be the doctors, the nurses, and the parents. And at 9:00 o'clock, they should have said to mom and dad, you know, if we're going forward, it means taking risks, are these risks you're comfortable with or do you want us to do something different? Here's our options, one option is go to C-section. That conversation never took place because they weren't treated like members of the team.

They were treated like spectators. They were treated like children. And so now the fetal heart strips start to look bad. And how do we know the fetal



heart strips look bad? Dr. Sabbagha said it in his procedure report. One of the reasons he went in with the forceps was because the strips started to look bad. But the last expert they brought in here, Dr. Wiener, said, yeah, at -- 12:14 at night, the strips started to look bad, that's right. And so at 12:14 at night, Dr. Sabbagha says, all right, I'm going to intervene, I've got to get up this mountain faster, I'm going to use forceps to do it. And so he does.

He uses forceps at 12:15. But keep in mind, the last witness they brought in -- because at 12:14, he acknowledges that he thinks the baby's pH would have been about 7.11 which is acidotic -- another hour and ten minutes before the baby is delivered. Dr. Sabbagha recognized the baby wasn't doing well. That's why he intervened after only 45 minutes of pushing because as you recall, they'll usually let a mom push for two hours who is a first-time mom and who is on an epidural. So Dr. Sabbagha intervened in 45 minutes, and that's because the baby's heart rate wasn't looking good. Another warning sign. And the way to address it was he tried to pull the baby out with the forceps. That fails. Okay. That's another warning sign that you're not going to make it. Now it's time to turn back and get down the mountain. You're taking too many risks.

But he can't let go so he goes for a vacuum. He tries to pull the baby out

with the vacuum now. And that fails. And the baby is not getting better. We're bad, but this isn't beyond salvage. We're bad, but it's going to only get worse. So now we try with forceps, we fail at 12:15. By 12:30, we're trying vacuum. We fail. By 12:36, you're done with forceps and vacuum. You failed. Get the baby out now. You can do it in ten minutes. No one disagreed with that.

It doesn't take ten minutes. It takes 50 minutes -- 50 minutes. Well, what were they doing in those 50 minutes? Well, wouldn't I like to know that? And how would I know it? I would know it if I had the nurses' notes which are gone.

So let's talk about missing records. The law says you hold on to your medical records. The Northwestern policy says hold on to the medical records, protect the medical records. The medical records are important. Everyone knows that. And so when you have things like a biophysical profile disappearing, you've got -- Mrs. Hill is sent for five ultrasound examinations to the defendant's father's office down the hall -- five examinations. Examination one, two, three, and four are all in the records, all available. The most important one, five -- gone. No excuse for it. You can infer that that record would have supported Ryan Hill's case. You'll be instructed on that by the judge.

The nursing notes -- remember

this testimony. Jennifer Hill brought her son to the neurologist on December 22nd. She wasn't happy with the neurologist. She didn't like him. She wanted a new doctor. She knew she needed the records. So she called Northwestern within 24 hours of that visit on the 22nd -- so she called Northwestern on the 23rd and said, I want my records. They told her, send something in writing. We finally get the records, and when we get them, what do we find? The single most important nursing note record, the record that covers the last three hours of labor from 10:30 to 1:30 in the morning, is gone. And we're told that's because maybe a microfilm company three years later lost one piece of paper out of a chart of a hundred pages.

You don't have to buy that. When a record of that importance disappears for a reason that doesn't make any sense, you can infer that the testimony or the evidence on that record would have supported Ryan's case. You'll be instructed on that by the judge.

And last but not least on the issue of records is the procedure report dictated by Dr. Sabbagha. This is the last page of Dr. Sabbagha's procedure report pertaining to the day of the C-section. And what we can see is that it was dictated on December 27th, 1998 -- December 27th, 1998. Remember when Mrs. Hill called for her records on December 23rd, 1998. And somehow Dr. Sabbagha decides he needs to dictate a second report. You saw the videotape where Dr. Sabbagha said he believed he dictated a prior report. He came into court saying, oh, this must be the right report.

I don't know what to believe, but I know this. He dictated this report four days after this lady called looking for her medical records. He just suddenly decided two months after this procedure he had to dictate a new report. You don't have to buy that. These records have been cleansed.

Now, the plaintiff has the burden of proof in this case, and what that



means is it's our burden to prove that the issues of negligence that we've put forth to you are more probably true than not true. And the important thing to remember about burden of proof is it's not beyond a reasonable doubt. So this is not a criminal case where you're going to send somebody to the electric chair or put them in jail for life. This is a civil case, and what the law requires us to prove is more likely than not which is more like 51 percent, 49 percent. It's not beyond a reasonable doubt, which is what you get in a criminal case. I submit to you that we've done that and more.

You're going to be instructed on the issue of proximate cause. Proximate cause is a legal term. The most important thing you need to understand about proximate cause is that there can be many, many different proximate causes. There can be hundreds of different proximate causes. The only thing that matters is if one of the causes in this case was the negligence of the defendants, it's

enough for us to have met our burden on that issue. It's not a defense that something else might also have been a cause.

So, for example, in this case the issue of infection -- again, the baby didn't culture positive for any infections. Some people said, well, maybe there's an infection, some said maybe there's not. Well, maybe there was. It doesn't matter as far as we're concerned because if there was an infection and there was also the negligence of the defendants which caused this injury -- if the infection was a cause and if negligence was a cause, we meet our burden. So you don't have to show that it was the only thing.

Now, there are issues that we will -- that we're arguing the defendants were negligent on, and the first -- you'll be getting two issues instructions, one issue for Dr. Sabbagha and one issue for Northwestern. So first as to Dr. Sabbagha, we've got five issues which we believe we've proven. The first is that Dr. Sabbagha should have

admitted Jennifer the night of the 26th. The second is that Dr. Sabbagha should have discontinued Pitocin at around 9:00 o'clock on the 27th. The third is that he failed to discuss cesarean section with the parents by 9:00 o'clock on the 27th. The fourth is that he failed to immediately begin a cesarean section by 11:30 on the 27th. And the last is that he failed to immediately proceed to cesarean section after the failed forceps and the failed vacuum. There was too much of a delay.

So those are the five things we've submitted. The absolutely most important thing about this is you only need to find one of those has been proven. You may find all five have been proven, you may find three out of five have been proven, you may find only one has been proven, but if you find that one of those has been proven, you can stop there and go on to the question of whether it was a cause of the injury and there was an injury. You don't need to prove all five of these.

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So for Northwestern, there's only two issues that we submitted on this point. What we said is that the agents of Northwestern, which are the nurses, failed to reduce the Pitocin at 8:30 as their policy required, and finally, that there was a delay in making sure Mrs. Hill got to the operating room quickly enough. Again, we only need to prove one of those and you can hold -- we've met our burden on the issue, then we prove that it's the proximate cause and the damages.

Now, there's another way that Northwestern can be held liable. So with Northwestern -- with Northwestern, if you find that the nurses failed to follow their own policy, then you found them directly responsible, you go on to decide proximate cause and damages. Another way Northwestern can be held liable is by what's called apparent agency. You'll get an instruction on that. What that means is that -- you heard testimony -- you may have wondered why you were hearing it, but there was a reason.

You heard testimony from Mrs. Hill that she saw advertisements for Northwestern on TV and radio, they were holding themselves out as an excellent provider of comprehensive care, she believed that they were -- she saw their website where they were saying they had the best doctors around, and in that, she relied upon that and plus people telling her Northwestern is a good hospital, she wanted her baby delivered at Northwestern. So when somebody does that, and they go to Northwestern and then Northwestern refers them to a doctor who refers them to Dr. Sabbagha, Jennifer Hill thought that Dr. Sabbagha was an employee of Northwestern, which many people would. And in doing that, she relied upon Northwestern's reputation in using Dr. Sabbagha.

I don't think there's really any contradiction to that testimony. So what that means is this. If you find Dr. Sabbagha is liable for the injuries to Ryan Hill, then by virtue of the fact that Northwestern held themselves out -- they basically vouched for Dr.

Sabbagha -- then Northwestern is also liable because if you -- think of it this way. It's not fair for an institution to promote itself as this provider of these comprehensive services where we have all these great doctors and then, you know, coax people into the hospital saying, okay, that sounds good to me, that's what I want for my baby, people come in in reliance on that, and then when things go wrong say, oh, wait a minute, he's not our doctor, he doesn't work for us. The law says, hey, no dice on that. That's an apparent agent, you put him out as if he's one of yours, you're going to have to stand by him now.

So Northwestern and Dr. Sabbagha go together. But you can find Northwestern liable two ways, as a direct defendant for the care provided by their nurses or because Dr. Sabbagha was negligent, and he was their apparent agent.

There's an affirmative defense in this case. Now, this affirmative defense is a defense put forth by Northwestern, and what it is is this: In Illinois there's



a law that says that if you want to bring a medical malpractice case or a medical negligence case for a child, you have to do it within eight years of the occurrence. Okay. So that would be when Ryan Hill was eight years old, you would have to bring your lawsuit against Northwestern. Well, the lawsuit in this case wasn't brought until eight years and six months later. So Northwestern says because of that law, we're out -- we're not liable for anything because of that law. The problem is this: The law has an exception in it which is quite clear. The law does not apply to people that are disabled.

So the judge is going to instruct you on this law. What it basically says is what I just told you, that you have to bring a case within eight years. Well, we didn't do that. We brought it in eight years and six months. Okay. But Paragraph 2 is what's important. It says that if Ryan Hill was under a legal disability other than being under the age of 18 at the time the act or omission occurred -- so that would be at the time of his

birth -- which gave rise to his cause of action against Northwestern Hospital, then the period of limitations does not begin to run until his disability is removed. So that's the key.

And so then your question is, well, is Ryan Hill disabled? Was he disabled after he was brain damaged at birth, and did he remain disabled until he was eight years old? And the answer to that is yes, he is, he was, and he always will be disabled.

So what we know about Ryan Hill is that he follows directions at a second grade level, he can't keep track of multiple things going on, he has a poor memory and can't remember new information, he remembers only fragments of things, he has a poor ability to process new information. He's slow and inaccurate in his math and reading skills, he has impaired fine motor skills, he has impaired speech, he has poor logical reasoning and decision making.

Although he's 14 years old, he doesn't understand why he came into this courtroom that day. He can't cross

the street alone. He can't adapt to any change in routine without a whole new set of training. He's not able to drive a car. He's never going to be able to have a normal job. He doesn't understand why he doesn't have any friends. There's no consistency at all in his schoolwork. He's never going to be able to live alone safely. And probably most importantly, he's too trusting. He is and will be too easily taken advantage of. Ryan Hill is permanently disabled. His brain damage renders him that. He's incapable of managing his person and property.

So the judge is going to tell you, what is a disabled person, and the definition is given to you. It says, a person is legally disabled if he is incapable of managing his person or property and cannot comprehend his rights or the nature of the act giving rise to his cause of action. Is Northwestern really suggesting to you that Ryan Hill understands that the nurses failed to follow their protocol and gave him too much Pitocin such that his

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contractions became tachysystole? Is he really supposed to be able to understand that based on what you've heard? Are they really suggesting that he understands the nature of medical malpractice litigation, that he would be able to do this, figure this out? This is a disingenuous defense. The exception applies.

Ryan Hill is disabled. And you'll get a special interrogatory which will ask you the following question: Was Ryan Hill under a legal disability for reasons other than his age at the time he turned eight years old? The answer to that question is yes. The correct answer is yes.

Now, the negligence of the defendants has had consequence. In this case Ryan Hill and his family are enduring that consequence. You'll get a verdict form. The first thing you want to do on it is select Verdict Form A. Verdict Form A is we, the jury, find for Ryan Hill, a minor, through Jennifer Hill, his mother and next friend, and against the following defendants. You

want to check yes for Dr. Sabbagha and yes for Northwestern. And with regard to damages Ryan has experienced, there are five elements that the law allows us to recover. The most important thing to remember about these elements is this: Every element for which there is evidence, you must award damages. Sometimes people are like, oh, I don't believe in this damage, I don't believe in that damage, I don't want to give it, I just want to give it all to lost income or something like that. Well, that's not how it's supposed to be done. It's supposed to be that if we presented evidence of one of these elements, you must make an award for that element.

If the evidence shows that the element of damages was proven and there's evidence that it should be given, you should give it. And so with respect to the reasonable expense of necessary medical care, we presented an amount that has been spent on Ryan's behalf, and that is an amount of \$128,008.

With regard to the present cash value of reasonable expenses and care and services reasonably certain to be

received in the future, Ryan you heard is never going to live alone. You heard that -- Dr. Burke testify that if he lives in a house that has assistance in it that has the ability to give medical care, one way -- one thing he did was he found out what they charged for the average home like that in New Jersey. Dr. Burke gave you a number of \$168 a day. That works out to about \$60,000 a year. Ryan is going to live for -- between 57 and 63 years, depending on how you average it out. And he gave you a present cash value of that of \$6.5 million.

That would suggest that Ryan is going to move into some sort of a facility -- a living facility -- before trial. Well, we know he hasn't done that, and frankly, I know he's not going to do that. I also know this. His parents aren't going to be able to take care of him forever. His parents might deserve a break from having to take care of him forever. And he may actually at some point want some level of independence that doesn't involve living at home. It's very difficult to say when this is going to happen, but I think it would



be reasonable to suggest that by the time he's 25, maybe in about 10 years, some sort of a living facility might be worked out for him. There's going to be a cost for that. There might be places that cost a whole lot more than \$168 a day, which would be perfect for him. There might be places that are cheaper. Maybe it will be cheaper to have somebody live in a house with him. I don't know. It's difficult to solve these problems in the future. We don't know. But we do know this. Whatever living arrangement Ryan needs is going to need money, money that he's going to need because of the negligence of the defendants.

And so I would submit that you should probably reduce Dr. Burke's number by at least \$700,000 and project that maybe in the future in about ten years Ryan gets in a living arrangement that is outside the home. But I think that's going to cost something -- I think a fair award on that line would be \$5.8 million.

Now, the next element of damages in this case is the loss of a

normal life. People are entitled to a normal life when they're born. And a loss of a normal life in the past. So for the last 14 years, this child hasn't had a normal life, and for the next 60 years, he's not going to have a normal life. This is a catastrophic loss for this child. It's the most tragic loss of potential I have ever seen. This is a boy that was going to go to college. This is a boy that was going to have a destiny in his own hands. He could have chosen to be a truck driver, he could have chosen to be a salesman, an engineer, a doctor, a lawyer. The sky was the limit for this child, and it's lost. The world has lost this child, his parents lost him, and worst of all, he lost himself. He knows he's not like everybody else, and that is the worst part of it. He's never going to have a normal job. He's never going to raise a family. He's going to be dependent. Who wants to be dependent on people forever? He's going to watch his brother and sister pass him by. He's living that bad dream every day where he just can't quite get there. Remember what his grandfather

said, I wish my brain worked like my brother's. He just can't reach it and never will. And so for the loss of normal life, I ask for \$5 million.

Ryan Hill also has lost earnings. As I mentioned, his parents went to college, his grandparents -- all of his grandparents went to college. Ryan Hill would have gone to college. Whether that's good or bad doesn't matter to me, but it has an impact on how much people earn. Ryan Hill statistically if he'd have gone to college would have earned -- if he worked until he was 67 years old, he would have earned \$4.8 million. If he worked until he was 63, he would have earned \$4 million. I think an award in that range would be reasonable.

And the last element of damages which we've proven should be awarded is pain and suffering. And so what goes into that? One of the things that goes into pain and suffering is knowing that you are not the same as the rest of us. Being isolated in our society is potentially the worst thing. People who

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are segregated out suffer more than the rest of us. But the fear of being different, the fear of your next seizure, the vomiting, the falling, the soiling himself, never knowing when the next one is coming -- his entire life is going to be spent wishing he was somebody else. That's pain and suffering. I request 5 million for that element of damages.

So the total line -- you add up what's on this -- on these damages, and my request is that it's something between \$20,728,008 and \$19,928,008. I think that's a reasonable award given this case. The award you give to Ryan -- this case is brought on Ryan's behalf. It's not brought by his parents. That's important. His parents don't get the money. Ryan does. It's managed by court order and only goes out under court order for his benefit only. I appreciate your attention. Thank you.

PLAINTIFF'S REBUTTAL

So the first thing I want to address with you is the fact that, you know, when you represent real people, individuals like the Hills in cases like this, they don't have family, friends that can come in and testify on their behalf. They don't have an organization created -- or which takes on the load of creating a nice get-out-of-jail-free card like the defense has.

So we have ACOG in this case which has taken it upon itself to do everything it can to discredit somebody that's got the guts to come in here and testify against a doctor with these trumped up claims of false testimony. And ACOG then creates -- a bunch of doctors at ACOG get together and vote on some criteria that make it impossible to have a brain damaged child win a case in court. And they decide that's the get-out-of-jail-free card that we're going to use.

They even made an exhibit that looks like a ticket for the Monopoly game with all the X's. It doesn't matter how negligent we were, it doesn't matter

how many records disappear, we get out of jail free just with this because we all got together and voted on that's how you have to beat us. What if everybody that owned a BMW got together and voted that they shouldn't get any tickets unless these four criteria are met? Are we obligated to go with that? Do we have to go with what they vote? I don't think so.

You're the jury. You've heard the whole case. ACOG doesn't tell you what to do. You decide. You have the power now. You've heard the case. ACOG does not have the power in this room. You do.

We send people -- we send -- a doctor goes to Vietnam to teach about the right protocols, the right way to

treat moms who are having babies. We have a protocol in this case -- we have a rule in this case that says tachysystole is too many contractions. When there's too many contractions, that's bad for the baby, you must stop it. And they want to come in and say that's just a guideline, we don't do that, we don't have to do everything. The reason they teach this in countries that don't have our medical system is because it saves babies and it saves moms. You can't now just say, now America is going to take ten steps back and not follow the guidelines that we set up, a guideline that was signed off on by the head of obstetrics at Northwestern, the head doctor. It got passed around to the

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whole department. They all agreed it's what they wanted to do, but now in a courtroom, it's just a guideline, we're not going to follow it.

The issue of asymmetrical brain damage -- interesting issue. If the deprivation of oxygen had gone on longer, it would have encompassed the entire brain, and then Ryan would not have walked in this room. He would have been wheeled in, and he would have been on a ventilator because his entire brain would have been destroyed. All you can say about the fact that the damage is not symmetrical is that they didn't deprive him of so much oxygen that they completely ruined his entire brain. They only ruined part of his brain, and that's why he does have function. So to suggest that just because it's not symmetrical that that proves that it's not from lack of oxygen -- no, that just proves it's a partial prolonged hypoxia which began to destroy parts of the brain and was arrested before it wiped out the whole brain. The key point on that is that the damage is in the watershed regions which are the regions first affected by lack of oxygen.

And the stroke -- the stroke is a miracle stroke, this blood clot which somehow came upon this woman who was perfectly healthy, never had a problem. Somehow a clot comes from nowhere and goes nowhere. Where is the clot now? Why was that not shown on an imaging study? Where is there evidence of a clot before or after? There's none. It's in the watershed region.

There's a little bit of a selective memory, by the way, on the experts. As you recall, our radiologist is actually working for Mr. Donohue now, and Dr. Upton who gets raked over the coals by Mr. Donohue has worked for his former partner. And while the experts might disagree on what should be done, the policy and procedure is something that was done well ahead of time.

I'm going to talk a little bit about

what Ms. Clausing said about Ryan Hill's abilities. I'm going to put this special interrogatory up. You're going to get this special interrogatory. The question is: Was Ryan Hill under a legal disability for reasons other than his age at the time he turned eight? The answer is yes. There's not a chance that Ryan Hill could manage his person and property and understand the consequences of what we're doing in this room. We've proven that. That's the reason you mark that one yes.

And finally on the question of the agency of Dr. Sabbagha, a couple of things. Dr. Sabbagha has a medical chart that he uses in his office. This is Dr. Sabbagha's office chart. Dr. Sabbagha is supposedly not an agent of Northwestern. Dr. Sabbagha's own office chart at the top -- Northwestern Memorial Hospital. Look at the last page of his flow sheet on the Elmo. This is Dr. Sabbagha's office chart. Northwestern Memorial Hospital provides the paper he uses for his chart. The office is full of posters from Northwestern. Northwestern is where Jennifer Hill believed he worked. And then the last thing is on missing medical records. Jennifer Hill asked for her records in writing and never received them. Now, there are records that are missing long before any microfilm company got its hand on the records. Thank you for your attention.

Christopher T. Hurley is the founding partner of Hurley McKenna & Mertz in Chicago. He concentrates his practice on personal injury, wrongful death and professional negligence cases. He is 3rd Vice President of the Illinois Trial Lawyers Association. Mr. Hurley is a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers. He is also a member of the Illinois State Bar Association's Board of Governors. Mr. Hurley is a frequent speaker and published author regarding trial practice.

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