

## Catastrophic Burn Injury Cases: Assessing Claims, Litigating, Negotiating Settlements

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Today's faculty features:

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# **Catastrophic Burn Injury Cases: Assessing Claims, Litigating, Negotiating Settlements**

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# Assessing Cases

## Interviewing Clients

- Building Trust and Understanding
  - Make sure your client and his/her family is getting the proper care and information
    - ABA: certified burn centers
    - Social workers & nurses at the hospital have information to help families
      - Accommodations for family
    - Get client's master provider agreement for his/her health insurance carrier.

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- Know your resources for help:
    - Phoenix Society for Burn Survivors
    - American Association for Justice
    - American Burn Association
    - National Fire Protection Association
    - Regional burn survivor and prevention groups



- Move quickly to preserve evidence and interview witnesses
- Consider damages
  - Burn cases can be costly to prove.
  - What degree are the burns?
  - Body surface area?
    - ABA considers a burn patient to be “severely burned” when she has 2nd or 3rd degree burns over 20% or more of her body surface area.

## **Reviewing insurance coverage**



# Reviewing Insurance Coverage

- Work Injury?
- Negligence claim?
- Health Insurance?
  - Get master provider agreement



# Proving Liability

## Theories of Liability

- Negligence
- Products liability
  - You will be arguing the product was not reasonably safe for its intended purpose because of:
    - Manufacturing defect;
    - Failure to adequately warn or instruct; or
    - Design defect.
- Workers' Comp
  - Know your state's WC statute.
  - Benefits will generally include wage replacement and medical expense coverage.
  - Disfigurement benefits may only be available where burn injury was to the face, head or neck.



## **Establishing or challenging causation**

- Get good experts!
- Have defective products inspected and tested immediately and then preserve it in the same condition so the other side can test.
- NFPA 921 = peer reviewed document that establishes “guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents.”

## **Common Defenses**

- No forensic proof.
- Burn was Plaintiff’s fault.
- Plaintiff assumed the risk and knew burns could result.
- No generally accepted industry standards.
  - i.e., coffee temps range from 170-205.
- Plaintiff spoliated evidence.

# Evidentiary Challenges

- **Daubert v. Merrell Dow Pharmaceuticals, Inc.**
  - 509 U.S. 579 (1993)
- **F.R.E. 702 – Testimony by Experts**
  - A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
    - Expert’s scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue;
    - Testimony is based on sufficient facts or data;
    - Testimony is the product of reliable principles and methods; and
    - Expert has reliably applied the principles and methods to facts of the case.
- **Spoliation**

# Calculating Damages



## Plaintiff strategies

- Physical injuries:
  - External physical injuries?
    - **VIDEOS & PHOTOS**
  - Smoke inhalation injuries?
  - Organ damage?
  - Surgeries?
  - Joints fused?
  - Nerve damage?
  - Amputations?
  - Skin grafting?
    - Donor site pain = 2nd degree burn.
- Medical personnel will be focusing on saving the patient's life – not on documenting her pain. Family should keep journals and take photos to document pain.
- Have an experienced burn nurse review the records to explain the pain the patient would have suffered during the hospital stay.
- Wound dressing changes?
- Itching?
- Skin contractures?
- Infections to wounds?
- Loss of motion?
- Pressure garments?

- Psychological damage?
  - General guideline is that psychological care should start 3 months after injury.
  - Symptoms to look out for:
    - Fear
    - Anxiety
    - Intrusive memories
    - Difficulty concentrating
    - Uncooperative with treatment
    - PTSD
- Economic damage?
  - Wages?
  - Vocational evaluator?
- Life care plan?
  - Prosthetics?
  - In-home assistive devices?
- Loss of Consortium
  - Spouse may move closer to burn center, leaving children at home.
  - Spouse may have to stop working.
  - When discharged from care, spouse is the nurse.
  - Intimacy

## Defense Strategies

- Burn was self-inflicted.
  - 2nd degree burns often take time to show.
    - Doesn't take long to feel them, though.
- Comparative negligence
  - Plaintiff knew he or she could get burned.
- Minimize or devalue “hidden burns.”
- Prior psychological problems.
- Marriage on the rocks before injury.
- Plaintiff can still work.
- Plaintiff overstated economic loss and life care plan.
- Third-party practice – the damage would not have been as severe if not for the doctor's mistake.



# **Negotiating with Insurance Adjusters**

# Find your winning strategy

- Be strategic
- Be visual
- Be confident
- Be polite
- Be prepared to go to trial

# CATASTROPHIC BURN INJURY CASES

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**Chief Scientist and Technical Director**

**IRSA**

# **CATASTROPHIC BURN INJURY CASES**

**PERFORM A QUANTITATIVE RISK ASSESSMENT TO ASSIST IN:**

**DOCUMENTING THEORY(IES) OF LIABILITY,  
FORMULATING LEGAL AND TECHNICAL STRATEGIES,  
IDENTIFYING POTENTIAL RESPONSIBLE PARTIES, AND  
QUANTIFYING POTENTIAL DAMAGE.**

## **DOCUMENT IMMEDIATELY AND IN DETAIL:**

**THE SITE, AND**

**ALL COMPONENTS WITHIN & ADJACENT TO SITE USING:**

**PHOTOS, VIDEOS, AND 3D SCANS,**

**DRONES, IF POSSIBLE,**

**OBTAIN VIDEOS FROM OFFSITE & ONSITE LOCATIONS,**

**WHAT DID THE NEWS MEDIA REPORT, AND**

**CHEMICAL ANALYSES.**



## **DETERMINE AND QUANTIFY:**

**NATURE AND EXTENT OF INJURY(IES)**

**DOLLAR COST OF DAMAGE**

**DIRECT COSTS & SECONDARY COSTS**

**EVENT(S) THAT CAUSED BURN INJURY(IES)**

**BUILD AN EVENT TREE**

**IDENTIFY FACTOR(S) LEADING TO BURN INJURY, E.G.,**

**DESIGN FAILURE**

**HUMAN ERROR**

**NATURAL/ENVIRONMENTAL EVENT**

**HUMAN INDUCED EXTERNAL EVENT**

**STEPS TAKEN TO HAVE MITIGATED RISK PRIOR TO EVENT**

**EFFECTIVENESS OF THESE MEASURES**

## **STEPS TO MITIGATE INJURIES & PROPERTY LOSS POST EVENT**

### **IDENTIFY OTHER INJURIES, E.G.,**

**FALLING OBJECTS,**

**EXPOSURE TO RADIATION,**

**EXPOSURE TO CHEMICALS,**

**LIGHT FLASH,**

**SOUND FLASH,**

**ETC.**