

In Catastrophic Injury Cases: Consider Moving to Exclude the Plaintiff from Attending the Trial

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Many defense attorneys will ultimately face the challenge of trying a case against an overly sympathetic plaintiff and the question will loom: how do we keep the jury focused on the facts of the case and not the plaintiff's disability? It is natural for anyone, even a defense attorney, to develop sympathies for a plaintiff suffering from a catastrophic condition; however, it is unjust to allow a plaintiff's condition to prevent a defendant from receiving a fair trial based on the merits of the case. To level the playing field, a defense attorney may consider moving the court to exclude the plaintiff from attending the trial because of the overwhelming prejudicial effect the plaintiff's condition would have on a jury.

Moving to exclude the plaintiff from the courtroom during his or her trial based on the prejudicial nature of the plaintiff's presence is not a novel concept. See *Dickson v. Bober*, 269 Minn. 334 (1964); *Morley v. Superior Court of Arizona*, 131 Ariz. 85 (1982); *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985); *In Re Richardson-Merrell, Inc.*, 624 F.Supp. 1212 (S.D. Ohio 1985); *Bremner v. Charles*, 312 Or. 274 (1991); *Caputo v. Sarcona Trucking Company*, 204 A.D. 507 (N.Y. 1994); *Reems v. St. Joseph's Hospital and Health Center*, 536 N.W.2d 666 (N.D. 1995); and *Green v. North Arundel Hospital Association*, 366 Md. 597 (Ct. App. 1999). Trial courts have the authority to manage litigation to ensure that all litigants receive a fair trial. A fair trial contemplates fairness to plaintiffs and defendants alike and contrary to many people's understanding, a plaintiff in a civil action does not have a constitutional right to be personally present during his or her trial. *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 217 (6th Cir. 1985); *Faucher v. Lopez*, 411 F.2d 992, 996.

In a recent trial, we had to consider the impact that an eight year old girl suffering from profound cerebral palsy would have on the jury. Our goal was to keep the jury focused on the facts of the case and not the plaintiff's sympathetic condition. The plaintiff was severely disabled -- she was wheel chair bound; needed to be suctioned several times a day; had a feeding tube in her stomach; was incontinent; had unexpected seizures and lacked cognitive functioning. Previously, the trial court had issued an order bifurcating the trial into liability and damages phases in an effort to prevent the plaintiff's condition from improperly influencing the jury's determination of liability. However, we believed that the mere presence of the plaintiff in the courtroom during the liability phase thwarted the judge's bifurcation order and made damages a component of the liability phase of the trial. To ensure that our client received the fairest trial possible, we moved the court to exclude the plaintiff from attending the liability phase of the trial. The court granted our motion with limited exceptions, and, ultimately, the jury was never charged to consider damages.

Many courts around the country have reviewed the issue of whether it is appropriate to exclude a plaintiff from attending his or her own trial. The seminal nationwide case on this issue is *Dickson v. Bober*, 269 Minn. 334 (1964). In that case, the plaintiff sustained catastrophic injuries in a motor vehicle accident including severe loss of mental capacity. The trial court excluded the plaintiff from appearing at the trial because of the depressing nature of the plaintiff's condition and his inability to understand the trial proceedings. The appellate court held that the trial court did not err in excluding the plaintiff from the trial, finding that the plaintiff did not have an absolute right to be present during his civil trial. *Id.* at 337. The court found that the plaintiff, who was a minor, was protected at trial by his guardian who brought the action for him and by the attorney selected to represent his interests during trial. *Id.*

In *Morley v. Superior Court of Arizona*, 131 Ariz. 85 (1982), the court excluded a severely disabled and comatose plaintiff from attending the trial, reasoning that the plaintiff was not able to assist in the presentation of his case and his presence would prejudice the jury and evoke sympathy for him. The Arizona Supreme Court affirmed, stating: "A plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial. If in addition the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally irrelevant to the liability issue." *Id.* at 88.

In *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), the federal appellate court consolidated the *Dickson* and *Morely* decisions, and established a two prong test to determine whether a severely disabled plaintiff should be excluded from his or her trial:

1. Does the party's presence unfairly prejudice the proceedings in his or her favor or substantially impair the jury's performance of its fact finding task; and
2. Does the party understand the proceedings and is the party able to aid counsel in the presentation of the case.

Id. at 217 -218.

If both prongs were satisfied, the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability. *Id.* at 217. The court also found that neither the Fifth Amendment's due process clause nor the Seventh Amendment's guarantee of a jury trial grants a civil litigant the absolute right to be present personally during the trial of his or her case and, thus, exclusion was not prohibited. *Id.* at 213.

A trial in a personal injury action is intended to flush out the facts to determine liability and, if necessary, damages. Just as it is appropriate for a court to bifurcate a trial into liability and damages phases to prevent unnecessary co-mingling of issues, it is equally appropriate for a court to exclude a disabled plaintiff from the liability phase of his or her trial to avoid improperly influencing the jury based on emotions rather than facts.

The decision to move to exclude a plaintiff from attending his or her own trial must be made on a case-by-case basis. One must consider both the positive and negative impact that excluding a plaintiff could have on the defense of the case. Factors that should be considered include: (1) if liability is likely, is it in the best interest of the case for the jury to see the plaintiff during the liability phase of the trial in hopes that the jury will become desensitized to the plaintiff's condition; (2) if liability is found, would the jury be too overwhelmed to see the plaintiff for the first time during the damages phase and award damages commensurate with their shock level; and (3) during *voir dire* should the plaintiff be presented or a "day-in-the-life" video shown so that overly sympathetic jurors could be screened out. Overall, the decision to move to exclude a plaintiff from attending his or her trial must be made with careful planning, preparation, and with the goal of obtaining the fairest possible trial for your client.

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