

Verdicts & Settlements

Boy hit by falling merchandise suffers brain damage – Defendant: injuries were physical only; \$2.1 million settlement

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A 6-year-old boy was struck on the head and knocked to the floor after merchandise fell from a store shelf.

Initial CT scans were reported as negative. He was discharged and returned to school a few days later. In the weeks subsequent to the accident, his grades and conduct remained similar to previous levels.

The child had an Individualized Education Plan in place for several years before the incident. In conjunction with the IEP, a neuropsychological exam was performed a few months after the incident, which demonstrated that the child was at average or above grade level in many substantive areas.

Despite evidence to the contrary, the child's parents reported that their son was not "himself" and was demonstrating unusual behavior, including "acting out" in class.

The school system maintained its position that the child had always been a slow learner and that he had poor grades prior to the incident. The defense quickly adopted that position as well, arguing that there was no evidence of long-term damage as a result of the accident.

Based on the parents' concerns and working with the child's pediatrician, an independent neuropsychological examination consisting of multiple separate tests – far more detailed than those ordered by the school during the IEP process – was ordered and performed. The examination revealed that the child had difficulty with processing speed and other functions controlled by the frontal lobe of the brain, and deficits consistent with a frontal lobe injury – the area of the direct impact to the child's skull.



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Armed with the new report, the plaintiffs were able to convince the school administration to provide multiple services to the child's IEP.

Plaintiffs' counsel obtained several statements from friends, neighbors and teachers documenting dramatic changes in the child's behavior and temperament. Again, in conjunction with his treating physicians and noting the child's changes in behavior, temperament and educational abilities, the child's treatment plan was expanded to further diagnose and determine the nature and extent of his injuries.

Referrals to specialists at a prominent Boston pediatric neurological center were obtained. After an initially negative EEG, a 48-hour ambulatory EEG suggested some mild irregularity regarding electrical impulses in the brain. The medical evidence led to the conclusion that the child was indeed suffering from some kind of mild traumatic brain injury.

Given that evidence, counsel argued that the child had suffered a direct brain injury as well as diffuse axonal injury, all of which would progressively worsen over time and would result in ongoing educational, emotional and behavioral deficits.

A pediatric life care plan was prepared that documented the need for specialized education and rehabilitative care.

The defendant argued that the child's injuries were limited to the immediate physical injuries only.

The defense had the child examined by a board-certified pediatric neurologist who agreed with the child's school neuropsychologist that there was no evidence of brain damage or cognitive deficiencies that could be causally related to the incident.

The defense further retained multiple experts in education, pediatrics and neuropsychology to rebut the plaintiffs' claims.

The weight and credibility of the medical evidence and the multiple statements from people who knew the child in various capacities developed by counsel provided the plaintiffs with an ample basis to argue permanent brain injury.

The case settled after a private mediation session and two settlement conferences.

Type of action: Negligence & tort

Injuries alleged: Brain injury

Name of case: Withheld

Court/case no.: Withheld

Tried before judge or jury: N/A (mediated)

Amount of settlement: \$2.1 million

Date: Jan. 21, 2009

Attorneys: Douglas K. Sheff and Frank J.

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