

HEADLINE: Dealing With Damages in Voir Dire and Summation

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BODY:

In any personal injury case, a victory is a Pyrrhic one, unless the plaintiff receives all the damages he is entitled to under the law. To lay the groundwork for a successful result, the trial lawyer must first select a jury which understands and embraces its function in awarding damages and does not enter the courtroom with a bias against large damages awards, regardless of the proof presented. At the end of the case, the skilled attorney must tie together the proof in the case with the commitments obtained from the jurors in voir dire to follow the court's instructions on damages, wherever it may lead.

Voir Dire

Jury selection involves many skill sets: questioning potential jurors on their background to determine their abilities to decide the case fairly, educating them as to their role in the case and ensuring that they are open to awarding damages if the facts support such a finding. Many prospective jurors think they are only deciding liability issues, and are surprised that determining the amount of the award is within their province. Convincing them they are competent to make such an award, and showing them how to do it, is the job of the trial lawyer.

To begin, you must first determine if they agree that negligent parties who cause injury should be the ones who pay for the costs of those injuries. Find out how the individual jurors feel about awarding money for an injury; how they feel about awarding damages for diminution of earning capacity; what they think of an injured person's entitlement to be compensated for his medical costs, past and into the future. Most importantly, find out if they agree with the civil justice system's premise that injured people are entitled to be awarded for their pain and suffering if caused through negligent conduct. Prospective jurors who disagree with these premises should be questioned regarding their ability to fairly decide the damages issues and apply the law as charged by the court or challenged for cause.

With respect to jurors who remain on the panel, you must obtain assurances that if you prove these elements of damages, then they will not hesitate to make an appropriate award. In fairness, if the damages claims go unproven, the jurors should commit to awarding no damages.

Summation

Summation, of course, is the time to put together all of your damages proof and compel the jury to make a substantial award. Always separate the elements of compensation in discussing the amount of damages the jury should award. After discussing the liability issues and why your claim is meritorious, articulating the special damages is usually the best way to begin your request for compensation.

Loss of Earnings. Let's take a typical case involving a laborer who sustained herniated discs requiring surgery with continual radiculopathy and a torn meniscus in a motor vehicle accident. Assume he is totally unable to work as a result of the injuries sustained in the accident. You must tie in your evidence with a reason why a substantial award is warranted in the case:

Mr. Lopez isn't Donald Trump. He didn't earn billions of dollars. He did, however, have a steady job as a superintendent of an apartment building. Each and every day prior to this accident, he took care of a five story walk-up. He made sure the boiler worked, shoveled the common areas and steps in snow storms, cleaned the storm drains, was able to crawl under sinks to fix pipes. He was able to climb up ladders to paint the walls and ceilings of his tenants' apartments. This was not some job where he sat behind a desk--Mr. Lopez's livelihood depended upon his physical capabilities in order to perform routine tasks. The herniated disc in his lower back makes him unable to bend without intense pain. Once his disc ruptured and the nucleus pulposus oozed out leaning on his sciatic nerve, he really didn't stand a chance at working at the high physical level he once did. And even despite undergoing the surgery that his orthopedist recommended, the nerve damage he sustained has been severe and permanent. And the arthritis that has already set in within his knee joint from the surgical removal of his meniscus prevents him from climbing stairs and ladders, and squatting under pipes as he once did.

So what we must give him--at a minimum--is his lost earnings: \$40,000 per year for the next 25 years until he is 65 years old. But just multiplying that amount times 25 years would be inadequate. Because as the economist told you, his salary would have increased 4 percent per year, compounded, which would amount to over \$1.4 million dollars over the course of his work-life expectancy. But we know that is not enough to fairly and justly compensate him. Because he had great fringe benefits: health insurance for his family, dental insurance, vacation time and a pension. And Dr. Eco told you that the value of those fringe benefits was worth 40 percent of his earnings. So that he never really earned \$40,000 per year, but \$56,000 per year with fringes.

Medical Costs. The cost of medical care should be another "given" by the time you stand up to sum-up in the case. You must remind the jury of the necessity for your client's future medical care and the cost of it that you proved on your direct case.

Just because Mr. Lopez will never get better, it is critical that he not get worse. Without the physical therapy that his orthopedist says he will need for the rest of his life, Mr. Lopez will

be doomed to a life of degenerative arthritic changes and inactivity. Although the physical therapy will be just maintenance therapy, unlike physical therapy we are more familiar with for the acute stages of injury, it is very important nonetheless. It will strengthen the musculature around his lower back and prevent his right leg where he has the radiating pain from atrophying or wasting away. Just as importantly, he needs constant strengthening of the area around his left knee including his quadriceps and his tibial antalis muscle to make up for his weak cruciate ligaments and his missing medial meniscus. The costs are \$300 per week, 50 weeks for the rest of his life. With the undisputed medical growth rate added, that comes to \$2.5 million dollars. Do you think he wants to spend all of this time in therapy? Of course not. Does he need it? Yes. Otherwise his body will just waste away. And his pain will become even worse than it is now.

Often, an analogy is helpful to bring home the point:

What if, instead of Mr. Lopez being injured in that accident, the defendants instead destroyed a famous painting like a Rembrandt or Picasso? And to repair and restore that painting, there was proof that it would cost \$2.5 million. Is there one of you who wouldn't say, "Of course the owner of that Picasso is entitled to the cost of reparation from the defendants"? Well Mr. Lopez isn't a painting, but as a human being, his body's mechanisms are just as beautiful, just as precious. And shouldn't he be just as entitled to repair his body as best as can be done? Of course he is.

A Lifetime of Pain and Suffering. It is very important to communicate the difference between the two concepts: pain and suffering. Although the concepts are included in one charge, along with loss of enjoyment of life, it is good to discuss them as separate categories of damages when speaking with the jury at the end of the case. Compare these general damages to the special damages of medical costs and lost earnings, and let the jury know that the special damages are the smallest part of the case.

So now we have 1.7 million in future loss of earnings. And 2.5 million in future medical or rehabilitation costs. And that is merely to compensate him for what he's lost in economic terms or dollar amounts. Amounts he would have earned. And amounts that he needs to pay for medical care just to keep him in the status quo. And I'm telling you now that those special damages are in fact the smallest part of the case.

I'm going to talk to you about the greatest part of the case, and what he's lost in human terms: I'm going to talk to you about his pain, and his suffering and his loss of enjoyment of life:

Mr. Lopez is in pain each and every day of his life. Pain he cannot get away from; pain that he will have forever. Each day he will have stabbing pain in his back. Each day he will endure pain that shoots down his right leg into his foot. Each day his right leg will alternate sensations of pain, then pins and needles, then burning and then numbness. He cannot sit because of the pressure on his lumbar spine; he cannot stand because of the spasm that occurs in his lower back. He cannot run, play sports, play with his little boy, or coach his little league team. And on the days that his back pain relents, he has the acute, knife-like

pain in his left knee. Because of that he has pain in both sides of his body. Both legs hurt, but from entirely different mechanisms: one leg from an injury to the spinal nerves; the other from an injury to the knee joint. Both are bad separately. When they act in concert, they are debilitating and torturous.

And speaking of torture, let's look at our great American Constitution. We can have capital punishment, but we can't torture people. That's considered cruel and unusual punishment. We can have people put to death, but we cannot put them into pain. But isn't that what the defendants did to Mr. Lopez? Didn't they, through their negligence, inflict pain on him. Not just for one day, but for every day: and for the rest of his life.

But this isn't pain that was just there on the day of the accident. This isn't pain that went away. Nor will it ever go away. Because he will have this pain every day for the rest of his life. So you must understand that you are not compensating him for just one day, but for all days, all the time, for the rest of his life. So your verdict on pain and suffering must stand for all time, for the remainder of his life.

Pain and Suffering of Short Duration. One of the difficult awards to procure is for pain and suffering of short duration prior to death. Nonetheless, with proper explanation and argument, a jury must be made to understand the basis for the award. For example, in a death case, where a person died after just a few moments after a fire-filled explosion in an automobile accident, the need for a substantial award can cry out:

So here sat Mr. Stanton, in this automobile accident, trapped in the back seat behind his brother, with the car on fire originating under his seat near the gas tank. The fire started on his legs, crept its way up his body, searing his flesh. It put him in the worst possible pain imaginable. First, burning his outer layer of skin, the epidermis; it continued moving up higher and higher on his body. It then burned his flesh deeper and deeper, piercing the dermis and burning his body, not just in a small area, but from toe to head--all while he is totally conscious.

And if that weren't bad enough, the blast of heat inside the car caused his throat to close from the body's protective mechanism to protect the lungs from scorching. This laryngospasm, similar to the mechanism in drowning closed his larynx so that he could no longer breathe. So for the five to ten minutes that he was alive and conscious trapped in the back seat while his flesh was burning, his body was on fire and he was suffocating. If we were to play that fiction many do either philosophically or as children, which way would someone least like to die? By fire? Or suffocation? Mr. Stanton died from both. And did he suffer.

For those people who have burned their finger on a stove top, or burned the top of their hands taking bread out of the toaster oven, they know how painful burns can be. But to James Stanton, his whole body was burned. First through the first layer, then the second, then finally down to his nerves where mercifully they were damaged to the point where hopefully he could no longer feel pain. Not just his finger, not just the top of his hand, not just his legs, but his whole body and even his face and skull.

Don't forget the inside of the car got so hot that his blood actually began to boil. How could it not? If that weren't bad enough, the man couldn't breathe. He was choking. Suffocating. As if drowning in the ocean, but instead, he drowned in a sea of fire.

And people who are in great pain--who suffer tremendously--they sometimes beg for death. They pray that death comes swiftly. But they never, ever, pray for pain. And Mr. Stanton did not have this pain before this accident. Before the negligence of the defendants.

Here is the key: You must underscore the concept that although pain is one thing, suffering is quite another:

So now we touch upon just some of the pain James went through in the five minutes he was screaming and then the next five minutes he was suffocating because he could not suck in oxygen. But as painful as those burns were, and as painful as not being able to breathe must have been, that was nowhere near the absolute suffering he must have felt knowing he was going to die. Knowing that he would never see his little boy again. Wondering how his son would cope with his absence. Thinking how he would feel when hearing of his death. What would the rest of his childhood be like without him there?

Lest you have any doubt of just how significant the manner of this death was, any time a tragedy like this occurs, friends and family members are called and notified of their loss. Their one universal question always is: did he suffer? Here, there could be no disguising the harsh reality.

Tying in the Summation With Jury Selection. Summation is the time to remind the jurors of the discussion you had with them during jury selection. It is the time to invoke the assurances they made about their agreement with the civil justice system in general and the elements of damages in particular:

We spent a lot of time talking to each other in jury selection about the elements of damages in this case. I asked you if you agreed with the civil justice system, which stands for the proposition that negligent parties who cause injuries should pay for those injuries, and you all agreed. And you all assured me that if we proved all the elements of damages you would make an award for each item. And finally, I asked you that if you decided in our favor, and added up the elements of damages, and they came to a substantial sum of money, whether you would, in fact, award a substantial sum of money if the evidence warranted it. And didn't I prove these elements of damages? And don't they amount to a substantial sum of money? When you all agreed with this during jury selection, I couldn't look into your hearts and I couldn't look into your minds, but I believed you. So these are the numbers. All proven.

Conclusion

To procure a substantial damages award, more is needed than just proof. An effective voir dire that explains and validates the elements of damages is essential. Ensuring that jurors

are committed to following the dictates of our law regarding damages, and identifying those who are not, is crucial to the end result. Above all, you must deliver a summation that reminds jurors of that promise they made to follow the law and compels them to act with a moral mandate for a decision in your client's favor.

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