



Nuclear Verdicts™ Trial Academy

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Chicago, IL

Session Two: Defending Against Plaintiff's Valuation of Pain and Suffering Damages

How Plaintiffs Argue Pain and Suffering

Plaintiff's attorneys argue pain and suffering in three main ways. First, they ask the jurors to imagine they are answering a want ad. Plaintiff's attorneys try and get the jury to place themselves in the plaintiff's shoes by asking them how much they would want if they suffered an accident/injury.

Second, they break down the total pain and suffering number into days, hours, minutes, and seconds. For example, plaintiff's attorneys ask jurors whether what the pain and suffering the plaintiff is experiencing is worth \$20 or \$75 dollars an hour, and then multiply their answer by their expected lifetime hours.

Third, plaintiff's attorneys put a dollar amount on each element of the pain-and-suffering jury instruction. Under California law, there are ten categories of pain and suffering: (1) past and future physical pain; (2) mental suffering; (3) loss of enjoyment of life; (4) disfigurement; (5) physical impairment; (6) inconvenience; (7) grief; (8) anxiety; (9) humiliation; and (10) emotional distress.¹ Plaintiff's counsel will pick each element and tell the jury how much money should be awarded for each element. There may be various numbers because plaintiff's counsel is asking for past and future pain-and-suffering for each element.

Additionally, plaintiff's attorneys compare the case to expensive things in society like the income of celebrities. Plaintiff's attorneys compare the plaintiff's pain and suffering to salaries of celebrities, expensive pieces of art, or other expensive items. The argument is the value of a life is priceless and worth more than something extravagant the jury knows the value of.

How Claims Adjusters and Defense Counsel Defeats Plaintiff's Arguments

First, to defeat the “answer an ad” approach, the defense counsel must address the fact advertisers must tell the truth. The flaw in this argument is the defense counsel is not telling the truth, because these types of advertisement arguments do not reflect reality. The argument has nothing to do with the present case – no one took out an advertisement. The plaintiff had an accident, and it was not purposefully done by the defendant. Defense counsel can also show comparing this situation to an advertisement is likely done to stir up the juror's anger, sympathy, and emotion.

Second, quantifying pain and suffering in terms of minutes, hours, and days, defense counsel should point out the many flaws inherent in this argument. Not every minute of the plaintiff's life contains pain and suffering; while some and maybe most days contain pain and suffering, plaintiff's also have good days, or partially good and bad days.

Third, when addressing the elements of pain and suffering, defense counsel should embrace and discuss the most difficult parts of the case. Discuss how the law does not say the jury “must” award the plaintiff for each element. Defense counsel should point out the reasons why plaintiffs counsel would want to present damages this way (e.g., to display a lot of high numbers).

Finally, when plaintiff's counsel compares the case to high valued artwork or successful celebrity incomes, it is important to point out this is not evidence. The case has nothing to do with an expensive painting or how much a celebrity makes in a year.

Educate

Members of the jury are often unfamiliar with formal jury instructions, so it is important for defense counsel to educate the jury about the content of the instructions.ⁱⁱ Attorneys must discuss the jury instructions accurately and must not distort their contents in their favor.

Concepts such as “negligence,” “proximate cause,” and “burden of proof,” are examples of legal concepts that should be explained in greater detail. Illustrating these concepts through simple examples is an effective way in demonstrating their meaning to the jury.

Get to Know Plaintiff

During discovery and deposition, defense counsel must ask questions about who the plaintiff really is. What are their passions? What do they like to do for fun? What did they enjoy doing before their incident? What does the plaintiff believe the defendant took from them? What would the plaintiff say defines them as a person? It is important to know the plaintiff because plaintiffs' counsel will be sure to discuss how the case is more about damages, and about the plaintiff losing the essence of who they are.

Instructions From the Court

When ascertaining the proper pain and suffering damages, it is often helpful to consult jury instructions. Jury instructions also indicate whether the claimed pain and suffering damages are recognized by the state. Jury instructions should be reviewed early so defense counsel has time to prepare a concise explanation of the instructions to the jury and why they should find in their client's favor. When deciding damages, the jury instructions are the only guidance given to the jury. Research demonstrates the wording of jury instructions can have a large impact on the jury's award. Some instructions have resulted in pain and suffering awards twice the amount due to the wording of other instructions. Jury instructions must emphasize only fair and reasonable damages should be awarded, and bias, prejudice, or sympathy cannot play a role in the decision of the juror. Defense counsel should also ensure to tell jurors the law requires them to only award the plaintiff to the extent of what is necessary to compensate them for their pain and suffering.

Sample Deposition Questions

The deposition questions should seek to answer (1) what is the impact of the accident on the plaintiff's life – what is the plaintiff's life really like after the accident; and (2) what is the impact of money on the plaintiff's life – what is the value of money to the plaintiff?

Sample Questions

1. You are seeking monetary damages, correct?
 - a. How much for
 - i. Medical bills

ii. Pain and Suffering / non-economic damages

2. Any other damages for which you are seeking money?
3. Any other expenses related to the accident or treatment?
4. List all the ways your life has changed since the accident.
 - a. How did it affect you emotionally?
5. Have you taken any vacations or trips since the accident?
 - a. Have you gone to any amusement parks?
 - b. Have you been to any live shows?
 - c. Have you taken any weekend trips?
 - d. Have you been to any sporting events?
 - e. Where do you traditionally go for vacation?
 - f. With whom?
6. What is your passion?
 - a. What are your hobbies?
 - b. What do you like to do for fun?
 - c. How much does this hobby, passion, or fun cost?
 - d. What do you spend money on for enjoyment?
7. How much money do you make a year?
8. Did the accident cause you any other financial hardships?
9. Do you own your home?
10. What worries you most about recovery from this accident?
 - a. Kid's college tuition, car payment, mortgage payment, taking care of aging parents, retirement?
11. Does anything keep you up at night because of this accident?
12. Why did you file the lawsuit?
 - a. What do you hope to get out of this lawsuit?
 - b. When did you first talk to a lawyer about this incident?
 - c. Was there any particular change to your lifestyle that prompted you to get help from a lawyer?
13. Do you believe any other party is liable for this accident?
14. Do you feel like you have been getting better since the accident?

- a. Do you feel like you will get better in the future?

Defeating Plaintiff's Arguments at Trial

Plaintiff's arguments tend to revolve around the reptile theory. Plaintiff's counsel frames issues and evidence and makes arguments to convince the jury the defendant violated a safety rule, endangering the community. Plaintiff's counsel's goal is to trigger the emotional part of the brain in hopes of making the jury angry at the defendant. One way to overcome this argument is by identifying specific evidence or arguments that can be excluded. Making motions in limine broadly targeting the reptile tactic will typically be denied. As to combating the reptile argument itself, the defense must maintain their client acted reasonable and did everything in their power to comply with safety rules and regulations. Defense counsel must also point out the questions that focus on hypothetical harm rather than harm to the plaintiff are often improper. These "golden rule" arguments have often been ruled as irrelevant to the actual damages alleged and may likely prejudice the jury because they are now thinking of their own personal interest rather than making a decision based on the evidence. Defense counsel must also ensure the jury is reminded of the standard of care because plaintiff's counsel will often describe it in a way skewed in a light most favorable to them.ⁱⁱⁱ

What to Do if Plaintiff's Attorneys Object

First, pivot and discuss the impact an award will have on the plaintiff's life. Defense counsel must remain grounded in the evidence and facts of the case. The award a plaintiff receives is to help bring them back the shared experiences they had with friends and family before the accident.

Industry Standards for Pain and Suffering

Plaintiffs are entitled to recover damages for mental suffering due to their physical injury.^{iv} Pain and suffering encompass the physical pain and emotional trauma from the injury. Loss of enjoyment of life is another factor used to determine the damages. Pain and suffering also encompasses fright, nervousness, grief, anxiety worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal. Lay people may testify to provide a finding of pain and suffering. The injured party may also testify as to their injuries. Common

experience of jury members also may provide a basis for pain and suffering if it the type of injury that common sense shows the plaintiff is experiencing pain and suffering. Additionally, arguments that appeal to community values or arguments about jurors being the community's conscience are typically impermissible. Defense counsel must discuss how these arguments appeal to the jurors' bias and sympathy.^v

The Truth in Advertising

One common plaintiff argument for pain and suffering is “answer a want ad.” The premise of the “answer an ad” argument is to encourage the jurors to think from the perspective of the plaintiff.^{vi} The argument typically takes the form by plaintiff's counsel asking jurors to imagine they are answering an advertisement that asks is they would accept a job knowing one day they would get into a serious accident after which their life would not be the same. To counter this argument, defense counsel must remind the jury one of the key principles of advertising is honesty. No one would accept such a job, and it is an unfair advertisement of such a position. No single juror or person in general would sign up for a job knowing they will be hurt. These incidents are accidents that no one in the court room wants to occur.

ⁱ CACI 3905A

ⁱⁱ C. Barry Montgomery, Bradley C. Nahrstadt, *Complete and Thorough Preparation is Essential – Crafting a Successful Closing Argument*, 51 No. 9 DRI For Def. 54 (2009).

ⁱⁱⁱ Elaine M Stoll, *Rein in the “Reptile” at Trial – Strategies for More Effective Motions in Limine*, 59 No. 12 DRI For Def. 63 (2017).

^{iv} Michael Paul Thomas, *Pain and Suffering*, Cal. Civ. Prac. Torts 5:11, (2021).

^v William Lindsley, *Pain and Suffering*, 23 Cal. Jur. 3d Damages 64, (2021).

^{vi} Robert F. Tyson, Jr., *Nuclear Verdicts: Defending Justice for All*, 65 (2020).