REVIEWING THE GAME FILMS:
Mistakes to Avoid in the Preparation of the Damages Case From Claim Inception to Closing Argument

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Sports teams do it after every game. They watch the films from the previous game. Win or lose. Athletes readily recognize that hindsight is 20/20, perfect vision. With the clarity of knowing the outcome, they can better judge every decision they made, every act and omission, to learn from it, improve on it, and win the next game. Lawyers and risk management personnel should do likewise. Review case preparation, settlement negotiations and trials, asking at each stage of the proceedings, "what does this mean"; "what have I learned"; and "how can I use this in future proceedings to improve the outcome?"

The following discussion is put forth in an effort to help the defense team (trial counsel, claims and risk management) consider, plan for and face what is ultimately the greatest foe: DAMAGES. The focus is on "full-court traps" and offering specific approaches to damages dilemmas, which, while not "traditional", have been trial-tested.

1. Don't play plaintiff's game; Play from your own playbook.

A key to understanding how to approach damages involves the recognition that jurors don't naturally distinguish between liability and damages. While defense trial lawyers are trained to be acutely aware of the dichotomy between the "liability case" and the "damages case", jurors, by and large, have no such inbred predilection or understanding. This fundamental ignorance of proper analytical decorum is not lost on plaintiff's attorneys who do their best to create a "mish-mosh" of issues, which focuses on the rallying cry of our litigious society, i.e. "He's hurt, so someone must pay". Indeed, more than a few strong damages cases have flamed out due to defense counsel's failure to recognize the need to draw clear lines of demarcation. Consequently, unless special care is given by defense counsel to defining for the jury the manner by which it should discriminate between these two trial elements, the damages cart will threaten to drive the liability horse. Don't fall prey to plaintiff's game of confusing liability and

damages; play your own game in which the demarcation is abundantly clear long before the jury retires to deliberate.

The greatest lessons come from everyday, out of the courtroom, happenings. Experience has shown that when we discuss cases with non-lawyer friends (and sometimes even "non-trial lawyers") the first reactions uttered deal with damages, e.g. "Oh, but I bet that person's family is really going to need money now!" “Wow, that’s horrible. No amount of money could ever be enough for me to give up my sight.” Sound familiar? Why would the trial experience deviate from this typical pattern? As trial advocates, it is not difficult to get caught up in the emotions of the game and lose sight of the fact that plaintiff is putting up big numbers in the "confusion of issues" game.

Consequently, it becomes the unique role of defense counsel to educate the jury as to its obligation to treat the elements of liability and damages separately. This education process begins with jury selection and ends with the jury instructions that follow closing arguments. This is simply a matter of telling the jury early and often that the law requires that they will have no occasion to consider the question of damages until the plaintiff has satisfied her burden of proof on numerous other issues.

2. Don’t turn a two million dollar case into a twenty million dollar production.

Failing to recognize that the manner in which the liability case is tried will impact the damages awarded. Big trial staff. Big production. Fancy presentation. These factors can all indicate that big dollars are at stake. It does not take an incredible measure of insight to realize that if a lot of money is being spent by the defendant, it must be plenty worried about the plaintiff’s case. Each of these things can also adversely impact the damages award in other ways. While it is crucial to have the proper staffing and exhaustive preparation, counsel needs to be cognizant of the jury’s perception of the trappings of the courtroom. Always ask, “What is the jury seeing?” By asking this simple question, much of what otherwise can appear as a major production can be shoved behind the scenes. One of the glories of modern technological courtroom tools is that in the hands of a practiced user, the impact is great, the efficiency is enhanced, but the production can be small.

Choose all experts carefully. The use of the $50,000 expert is likely to be taken as a sign that $50,000 is not considered a lot of money in a courtroom.

The credibility of the messenger has a huge impact on the message. The more messengers there are, the greater the chance for message dilution. Seek to have the jurors invest themselves in a single trial attorney’s credibility. While many, including the writer, would argue with the words of Rufus Choate that “a jury consists of twelve persons chosen to decide who has the best lawyer”, there is a great deal of truth in the understanding that jurors tend to go with the lawyer who

has won the credibility battle. It only stands to reason that jurors are not nearly as taxed by the efforts of a single person to gain their trust as they are by the advances of numerous suitors.

3. Don't wait for the fourth quarter to play the game.

Too many game films show defense counsel running out the clock on the liability case, and one last desperate half-court shot at the basket in the final seconds of the game. The problem is that defense counsel has spent so much time and energy implementing the liability trial strategy, little energy is left at the end of the game to muster an effective or credible expository damages argument.

Forensic psychologists teach the importance of the principle of recency. This principle recognizes that people tend to remember longest those things which they hear last. Damages arguments tend to finish off the trial. Thus, while the beginning of the trial is of great importance in fashioning the jury's thoughts about the case, the end must be given equal consideration. A weak or impromptu damages defense becomes a waste of the crucial last minutes of the game and can adversely flavor an otherwise solid performance on liability. The primary antidote to this is a well-planned damages strategy that has been laid out in advance of trial and constructed, perhaps rather quietly, throughout the evidentiary phase of the case.

4. Play "man-to-man" defense.

Perhaps the most common defense damages blunder occurs due to the failure to realize, and consequently plan for, the full scope of awardable damages that any given jury is likely to be asked to consider. The initial step in any damages preparation is to review standard instructions and otherwise gain a full appreciation for all damages elements potentially allowable in the jurisdiction.

Most states allow recovery for past and future medical bills and lost income. However, some jurisdictions add unique twists to these rather broad concepts. For example, more than one unwary defense lawyer, brimming with confidence over his lock solid plan for destroying plaintiff's "lost wages" claim has found himself babbling like a brook when trying to fashion an "off the cuff" argument to defeat plaintiff's instructed claim for "loss of earning capacity" or "loss of economic advantage"(which rely for analysis primarily on the peculiar talents that the individual plaintiff brings to the marketplace rather than on any provable actual lost wages.) Of course, the surprise could have been avoided had counsel anticipated in advance of the final jury instruction conference, the jury instructions likely to be given at trial and focused discovery on those permissible elements of damages. Similarly, while counsel may be fully prepared to argue why plaintiff has no "disability or disfigurement", what if the particular jurisdiction allows recovery beyond these traditional elements in favor of the damages elements of "loss of a normal life" or "loss of enjoyment of life"? In

every sport, a sound game plan evaluates the strength of each player on the opposing team and matches a player against each team member. Likewise, every sound game plan begins with an understanding of what damages can be awarded and the preparation of a defense to each damages element based on the assumption that the jury will be allowed to consider each of them when determining the verdict potential of the case.

5. Bring all the equipment to the game.

You wouldn't play basketball without a ball -- an essential element to accomplish the purpose of the game. Likewise, arguing damages without determining the baseline of plaintiff pre-injury is ill-advised. Too many lawyers fail to construct a specific game plan for each prospective damages element because they fail to lay the foundation of what plaintiff's "normal life" looked like before the accident.

Defense lawyers, by nature, tend to focus on the tangible elements of damages (medical bills, lost income) and leave ruminations on ill-defined subjective elements of recovery to those who by their very nature concentrate on recovery based largely on speculation, i.e. plaintiff's attorneys. What this tendency ignores is the practical fact that there will be blank lines for these "existential" damages on the verdict form, which beg to be filled in with a large monetary award. Unless counsel has planned a strategy for attacking each damages element both by foundational evidence and cogent reasoning, his closing argument will present the jury with no understandable basis for denying plaintiff these damages. Without a plan, securing evidence will likely be a hit-and-miss proposition. Failing to elicit foundational evidence during discovery and trial, to argue effectively against non-economic, rather amorphous, damages categories like "loss of a normal life", "pain and suffering" and "disability and disfigurement" can be costly by leaving the defendant's damages argument thin.

In fashioning a game plan for these less concrete damages, be careful not to lose sight of the obvious: the "loss of a normal life" requires as a predicate fact either a "normal" pre-morbid life or a picture of what was normal for the plaintiff before the subject occurrence. Even the most plaintiff-minded jurors will not expect the defendant to pay money for a diminution in lifestyle based upon an inaccurate baseline. It is, however, incumbent on defense counsel to provide an accurate picture of what "normal" truly was or the jury will, perhaps even unwittingly, do just that. If the plaintiff was a vagrant, chronic drinker, he should not be provided a windfall since his "normal life" was well below what one might ordinarily consider normal.

Divining sufficient evidence to support an effective damages defense requires proactive forethought throughout the discovery process. While it is a relatively rote practice to file interrogatories and a production request, to take the plaintiff's deposition and to order plaintiff's disclosed medical records in an injury case,

other potentially fruitful damages discovery avenues exist. These are just a few examples of possible helpful approaches:

Tax Records

Basic case preparation includes ordering tax returns to learn prior earnings history and thereby seek to challenge the legitimacy of plaintiff's lost income claim. However, a common mistake is the failure to look beyond the return itself for other damages-impacting evidence in tax documents. Often helpful material is found in the W-2 statements, the plaintiff's description of his or her occupation or in supplements or schedules describing "other sources of income". Past searches of such records have revealed a truck driver who described himself as an entertainer/actor (which created a damages theme of its own), and a W-2 form without any accompanying return revealed that a plaintiff who had sustained a hangman's fracture of his odontoid process requiring a halo, wiring and cervical fusion, had undisclosed post-accident employment as a male dancer/stripper at the "Sugar Shack" in Lake Geneva, Wisconsin. A word of caution, don't accept plaintiff's unsigned or uncertified copy. Send a proper authorization to the IRS to get the complete return, all W-2 forms identifying all sources of reported income, and all attached schedules, including those identifying other sources of income such as real estate (are they managing property on the side?) and hobbies (web site design? jewelry design? bookkeeping services?).

Employment Records

Similarly useful is an exhaustive search of past and present employment documents. In response to subpoenas, many companies will respond simply with payroll records, which can be valuable for confirming or disputing income losses. However, the damages search should not stop there. Often, more valuable information is contained in personnel records, which may be kept separately. Signed employment applications may reveal attestations of "no physical restrictions"(although this is becoming less common in the age of ADA regulations). Union records may reveal otherwise undisclosed jobsite work during periods of claimed disability. These records may contain other health-related claims, worker's compensation claims, disciplinary reports, or changes in life insurance beneficiaries (possibly reflecting pre-injury marital discord).

Medical Records

Far too often, medical records are obtained from the date of the occurrence forward, forgetting that for the same money, time and effort, all records from medical personnel could be obtained, which may reveal significant pre-injury information that minimizes damages. Worse yet, too many defense teams accept the record excerpts furnished by plaintiff's counsel, rather than obtaining a complete set from the service provider, insuring completeness of the record. High on the list of mistakes is the failure to issue requests for supplemental records from all service providers, particularly health clinics and hospitals near plaintiff's residence. Just because plaintiff claims she has not sought further treatment, does not mean she should be taken at her word. Last but not least, accepting plaintiff's claim of complete disclosure of the identities of all medical care providers ranks up there with the credibility of the claim of "ocean front property" for sale in south Florida. With the vast resources of the internet, IDEX, references in records to other medical personnel and services like TraceAmerica (small fee; identifies all facilities within radius around plaintiff where plaintiff received medical care, was employed or went to school), the defense team has no excuse for defending damages with an incomplete medical picture of the plaintiff.

Surveillance

Many defense counsel fear that jurors will be angered by surreptitiously acquired videotape of the plaintiff. This is much less of a concern, in reality, than many lawyers fear. Jurors welcome information that reflects a stark contrast between what is being claimed and what is going on outside the courtroom. The keys to the use of such films are: (1) no editing, and (2) only using them when they graphically show that the plaintiff is lying about physical or cognitive functioning. If they are relatively benign, or if the film requires the jury to infer what is not clearly shown, they can be of greater harm than good. Surveillance films are especially useful to contradict plaintiff's use of a "day-in-the-life" film, which is usually a staged production of limited portions of the day, focusing on the few difficult parts of a day and not a fair representation of the highs and lows of plaintiff's normal routine. In this circumstance, there is virtually no risk that the jury will perceive any invasion of privacy. To minimize any privacy concern, videotaping should be done in public view. For a general discussion see *Jones, GT, Lex, Lies & Videotape, 180 Ark.Little Rock L.J. 613 (1996); and Eyelhoff v. Holt, 875 S.W.2d 543 (Mo. 1994).*

Garbage detail

It is always the greatest challenge to determine whether someone who claims a cognitive injury is actually functioning normally, behind closed doors. Defense counsel can, however, learn a valuable lesson from T.V. detectives like Jim Rockford, who never had a problem "going through the trash". Anecdotally, plaintiff's who have convinced well-qualified neuropsychologists of their extreme cognitive impairments have been found to have subscribed to the Wall Street Journal, Kiplinger's, and Mac World, and to have received letters from admirers praising them for their wisdom and delicate prose. Once it's in the garbage, it's free game.

Computer detail

The computer age brings with it sources of evidence previously not available in personal injury litigation. Plaintiffs using PCs for entertainment are creating date and time logs of their thoughts, feelings, interests and activities. A standard request for production should seek a copy of the hard drive of any PC or laptop used by plaintiff post-injury. For a few hundred dollars the hard drive can be copied and searched for emails, internet trails and chat room dialogue that opens an entirely new avenue of information about the real nature of plaintiff's injury claim.

Once the jurors have before them evidence of plaintiff's true pre-injury baseline functioning or provable post-accident condition, defense counsel has ammunition with which to seek a reduced award or no award at all.

6. Don't give your playbook to your opponent a/k/a showing your trick play during warmups.

Sometimes it is difficult to refrain from making a devastating damages point during the discovery process. Yet, many times, effective trial damages tactics are blown before the trial even begins because a member of the defense team could not contain the confidentiality of a fact, which if played out at trial would undercut the credibility of plaintiff's damages case.

Consider the following true-life illustration, a quadriplegia case where plaintiff retained the services of well-known physiatrist/life-care planner and his equally evil (and biased) twin, Mr. Economist. Dr. Physiatrist produced his typical report on future medical care in which he made an error in calculation, which was small enough to elude his discovery. This small error, when placed in the hands of Mr. Economist, was multiplied many times over, based upon plaintiff's anticipated life expectancy, resulting in a net error totaling $1.2 million. The experts' collective lack of carefulness or mindlessness of the significance of their errors

infecting plaintiff's entire argument would have made a great cross-examination and closing argument theme. Unfortunately, the error could never be used. Overanxiousness prevailed and co-defendant's counsel showed the playbook to the plaintiff. At deposition, the co-defense counsel pointed out the error to Dr. Physiatrist and beamed with pride at having done so. The expert promptly issued a supplemental corrected report, the defect was cured, Mr. Economist was not pinned down on faulty assumptions and analysis, and the argument was gone.

Poor planning and/or the lack of strategy makes this problem an all too frequent occurrence. To prevent it from happening, defense counsel need to huddle prior to expert depositions to determine what won't be done as well as what will be done. When spending an hour in the office preparing for the deposition, devote five minutes to discuss with co-defense counsel how impeachment should play out at the deposition. A simple effort could preserve a critical strategic play for trial.

In summary, while it is important to look for damages opportunities, it is also important to strategically time their use.

7. Failing to rally the crowd.

The spectators at a basketball game quickly learn to yell "shoot", "foul" and "defense" because they are instructed in what to think and guided in when to think it by the pep squad. At trial, defense counsel must help the jury recognize when to cry "foul" and when to seize on an opportunity to "shoot". To do this, at the earliest stage of trial, counsel must begin identifying what is improper and will not be permitted to form a basis for the jury's decision, such as sympathy, bias and prejudice. One must help the jury recognize when such improper innuendo is being placed before them, and the appropriate reaction at such times. Several of such issues are discussed in detail below.

A. Sympathy

Some would argue that defendants in significant injury cases begin the game in serious foul trouble given the natural empathy felt by most jurors for the plaintiff's suffering. Staying in the game in spite of this impediment cannot be accomplished simply through defense proclamations of innocence. A successful global defense requires an early recognition of the impact that the plaintiff's injuries can have on the jury's overall perception of the defense's case. This recognition, combined with early planning will greatly increase the defendant's chances for avoiding that last foul.

1. Don't concede sympathy to the plaintiff

Just because plaintiffs claim sympathy by arbitrary fiat, doesn't mean that defendants have to accept such a construct. To "sympathize" simply means: "to

have common feelings with". Webster's Ninth New Collegiate Dictionary. Often, we easily fall into the belief that sympathy necessarily means: "to feel sorry for". It is the challenge of defense counsel to seize sympathy as a teammate . . . to give the jury information about the defendant that shows a commonality with the jurors, thereby helping to blunt any willingness to make their kindred pay a large verdict.

In a medical negligence case, it may be focusing on the doctor's long career dedicated to helping little children survive to adulthood in spite of bad hearts. In a drug case, the commonality of purpose may be in the defendant's historical discoveries of life-saving treatments. In the right case, it may be the defendant's retooling of an entire manufacturing plant and production process to aid in a national war effort.

Jurors think twice about "going deep" against a defendant with a demonstrated moral or nationalistic conscience. Sympathy doesn't have to be "warm and fuzzy". If "tough and practical" have historically led to commonly appreciated products or outcomes, sympathy can be engendered.

Recognition of the need to seize the sympathy playground must come early in the game. Every defendant needs somebody to "tell the company's story". Humanizing the corporate defendant, by placing the face of a "real person" in the minds of a jury can help control any desire to over-inflate a damage award. Particularly compelling can be the testimony of retired product inventors, innovators or original craftspeople. The pride that these people naturally exude when discussing their mechanical/electrical/pneumatic "babies" can melt the heart of even the toughest referee. Without exception, the front-line employees are the defense witnesses with whom the jurors most easily connect. Their investment of pride and energy is not easily dismissed. Their spirit is part of the conduct at issue.

Plaintiff's attorneys never hesitate to tell the jury that "This is the plaintiff's only chance for compensation." Defense attorneys need to remind the jury that the trial is defendant's only chance to keep its reputation from being defiled or being made to pay when it has done nothing wrong and is not responsible for plaintiff's injuries.

Thus, rather than becoming defensive about sympathy, just play the game better than the plaintiff. You may find that aggravated plaintiff's attorneys will do most of the work for you, by criticizing your appeal to sympathy. This has the double effect of reminding the jury not to focus on plaintiff's naturally sympathy-producing injuries, and reminding them of the men and women who have invested their hearts and lives in the issues before them.

2. Explain the role of sympathy.

The potential for a meaningless trial in which the jury has decided the outcome based on the emotional impact of plaintiff's injuries alone, before hearing a shred of evidence, is real if certain issues are not addressed in the initial trial phase of voir dire. As with arguing damages at all, many defense counsel fear that too much time spent on damages, especially during jury selection, will paint the liability defense in a bad light. In fact, there is no analytical data to support such a perspective, although anecdotal tales are historically pervasive. Damages inquiry and education during jury selection, if properly focused, can go a long way toward focusing the jury on the overall merits of defendant's case.

For example, the jurors should understand at the first opportunity, that they will likely witness emotional outbursts during the trial (crying, anger, outward signs of grief, loss) or find that their hearts go out to the injured plaintiff or surviving family, but that these outbursts and feelings, while understandable and uncontrollable (because after all, they are driven by emotion), are manifestations feelings which are not compensable in the case. The jury needs to understand that when it sees such a display, it is human and acceptable to empathize with the person, but that the display of tears is not a measure of the facts, or evidence on which the jury's decision must be based. The jury should feel comfortable knowing that it can empathize with plaintiff's loss without awarding money.

Even in those instances where the defense will strongly dispute the existence of any injury to plaintiff, learning jurors' attitudes about deciding the case on the law and the evidence as opposed to the three demons of "sympathy, bias and prejudice" can provide a lot of insight into the jury's likely approach to the defendant's case in general. Potential jurors professing difficulty in putting aside sympathy for the plaintiff, are more likely to have no room for the defendant's case.

Addressing sympathy with prospective panelists in a known injury case is, however, crucial to the defendant's chances of impressing the jury with the stellar liability case. It is too little to simply ask the potential juror whether he can put sympathy aside and find for the defendant on the evidence he hears from the witness stand. With the exception of emotionally fragile jurors and those who are seeking a "for cause" excusal, nearly everyone will proudly profess their ability to leave sympathy out of the deliberation room. This issue should be addressed with each juror individually, eliciting, in effect, an oath to disregard such non-evidentiary appeals, which will later allow defense counsel to "call in her marker" on the sympathy issue during closing argument. If allowed, jurors should be questioned in light of the possibility that other co-jurors may find themselves unable, in practice, to put sympathy aside, even with their best intentions and efforts. Each juror should be questioned as to whether he or she can stand up to the tremendous pressure of others who may try to decide the case based an sympathy for the injured plaintiff. Regardless of the approach taken, counsel cannot give short shrift to this important inquiry.

B. Money

Failing to determine and shape juror's attitudes about money and value is a mistake. It has now become commonplace for plaintiff's attorneys to voir dire jurors on their individual attitudes about and abilities to award "substantial monetary compensation" in the event of an adverse verdict. This is in recognition of the teaching of experienced trial masters, who have learned that early discussion about money by plaintiff's counsel, if placed within the context of the plaintiff having satisfied the burden of proof, has the effect of cornering and leading a jury into awarding a large judgment. In response to this virtual truism, it is becoming increasingly important for defense counsel to become comfortable with "discussing" the question of monetary awards and the nature of "courtroom money" with prospective jurors.

The defense approach to the subject of money at the beginning of a trial, where defense counsel hopes to focus primarily on the flaws in plaintiff's liability case or the manifest safety of defendant's product or the reasonableness of defendant's actions, is obviously a delicate one. Delicacy, however, in dealing with difficult matters, is the peculiar realm of an accomplished defense trial attorney and counsel can hardly afford to shy away from this damages challenge because of inexperience.

Successful defense trial lawyers begin by advising the potential members of the jury that even though they are hearing a lot about money, before they have heard any of the evidence, the defendant knows that it is not responsible for plaintiff's claimed losses and will be asking the jury to never even get to the question of money damages. The next step in the defense's process of selecting an educated jury is to remind the venire, through questioning, of the fact that while a courtroom is a unique place, to be revered as a last bastion for truth, it does not have the power to change concrete items, that people in the real world commonly understand, into inflated commodities. Put simply, and to be expressed in simple terms to the prospective jurors, is the fact that a dollar does not change its nature simply by coming into a courtroom.

A dollar that they know and appreciate is the same dollar whether it is being discussed in a courtroom or at their kitchen table. Generally attributed to Abraham Lincoln is the rhetorical question as to whether if one chooses to call a dog's tail a leg would that mean that you would have a five legged dog? Most would acknowledge that you would still have a four-legged creature regardless of what you chose to call it's tail. Similarly, one can choose to talk about one dollar as if it was one thousand dollars, but the discussion should not magically change the nature of the one-dollar bill. Counsel may wish to ask prospective jurors if they felt different when they walked into the courtroom. Many jurors will say that they felt the importance of the place. Counsel should then further inquire as to whether the jurors themselves had changed simply by walking through the door

of the courtroom. Most jurors will admit that they had not . . . that they were just the same as when they woke up that morning. With a little more coaching, the point has been made.

While wary counsel might believe this to be so obvious as to be unworthy of discussion with the venire, that belief will be dashed quickly when faced with a runaway verdict that defies an explanation other than the jury's loss of an understanding of the realness of the money being awarded. The money becomes "funny" unless the jury is reminded at the beginning that it is anything but. Having discussed the issue of money damages in broad philosophical terms allows for an easier path to a closing argument discussion of damages in the context of a strong liability defense argument.

C. Credibility

At the time of trial, the damages shot clock can be a tremendous enemy of the defense because of the jury's natural affinity with the injured plaintiff. Many sage basketball coaches emphasize the critical importance of the first five minutes of the game. This is the time when the opposition is most vulnerable and the fans are most attentive. This same philosophy can be applied to trial strategy. Jury consultants have universally found that jurors are highly influenced by what they hear in the first ten minutes of one's presentation to them at the beginning of the trial. Indeed, some have suggested that jurors tend to fix on a winner within this brief initial time period. Antithetically, many defense trial opening statements concentrate solely on attacking liability issues, with the defense plan calling for waiting until the end of the trial to swing the focus to damages. However, with an understanding that jurors' opinions tend to be fashioned much earlier in the game, counsel's initial silence is often taken as acquiescence in plaintiff's damages claims. Failing to establish early credibility as to damages can infect the rest of the trial. Failing to build damages credibility early in the trial results in the loss of critical momentum.

In those cases where liability will be the primary focus of the trial, defense counsel should properly keep that focus during opening statements. However, some early effort needs to be given to letting the jury know that the defendant appreciates and respects the scope of the devastating injuries suffered by plaintiff. For example, in the case of a deceased family member, no harm is done to defendant's case letting the jury know, for instance, that the case involves a loving mother and father who lost an angel. Such a statement lets the jury know that the defendant appreciates the significance of the trial to the plaintiffs. Such proclamations can then quickly be followed by other direct statements that are designed to let the jury know that the evidence will tell them that the case is really about the defense's liability theory of the case. A long time is likely to pass before the defendant again has an opportunity to address damages with the jury. Still, the jury will remember that defense counsel has a respect for the plaintiff's losses and will listen to damages argument in that light.

8. Don’t be influenced by plaintiff’s trash talk; speak for yourself.

Perhaps the single most dramatic and effective piece of damages evidence for a plaintiff’s attorney in the trial of a severe burn case, brain injury or quadriplegia case is the jury’s first viewing of the severely injured plaintiff. A wise plaintiff’s attorney will recognize this and employ the technique of understatement, whereby the jury is only allowed to see the plaintiff for a brief viewing in order to witness the devastation allegedly brought to bear by the negligent defendant. Oftentimes, the jury will only again see the plaintiff in a day-in-the-life film until closing argument. This understatement (the equivalent of “trash talk”) leaves the plaintiff’s alleged injuries mysterious and horrifying. When the jurors are left to “imagine” what life must be like for someone in plaintiff’s condition, there is less need for plaintiff’s counsel to paint a verbal picture of devastation. In order to challenge this potent presentation, the defendant must make every effort to let the jury see the plaintiff as much as possible throughout the trial. By doing so, the jury is given the opportunity to grow as comfortable as possible with the plaintiff’s disabling condition. Familiarity can help to drive away the visual horror that jurors explain leads to big verdicts. Only with familiarity can the defendant hope for jurors to make an honest appraisal of the “reasonable value” of the plaintiff’s disability.

To help build this level of familiarity, defense counsel should consider starting by asking the judge to allow a showing of the day-in-the-life film to all prospective jurors during the voir dire process. See, *Roberts v. Sisters of Saint Francis Health Services, Inc., 198 Ill. App. 3d 891 (1990)[*recognizing that the use of such films in voir dire permits a jury's better understanding of the extent of injuries to be claimed*]*. The scope of voir dire is generally held to be within the full discretion of the trial judge. Once the jury has a “heads-up” as to what it will see more graphically during trial, defense counsel has started the process of breeding jury familiarity with the injury, and is also in a better position to effectively weed-out those venire-persons who are obviously predisposed to large verdict awards. Prospective jurors tend to be much more likely to confess their lack of objectivity once they have actually viewed the severely injured plaintiff.

Some defendants have also successfully blunted the trial shock of a token appearance by a terribly injured plaintiff by requesting the court, in limine, for an order requiring the plaintiff's presence in the courtroom during voir dire examination. See for example, *Luke v. Cleveland Clinic Foundation, 1996 Ohio App. LEXIS 1202 (1996).*

Don’t shy away from further use of such films during the evidentiary phase by using excerpts as demonstrative aids in cross-examining plaintiff’s witnesses or

when explaining the testimony of defense experts. If defense counsel is not afraid of the damages evidence then the jurors are less likely to be so as well.

9. Failing to keep it simple.

Let's face it, while many studies have shown that jurors can, in fact, grasp difficult concepts, why force them to do so in an arena where they tend to have little patience, i.e. damages?

> In 1966, Tom Nissalke, the new head coach of the NBA's Houston Rockets, was asked during his initial question and answer session with a group of fans how he pronounced his name. He wisely responded, "Tom".

Coach Nissalke got it right. By the end of the trial, the jurors have been asked to absorb a lot of technical information. In some cases, they have been asked to take a short course in physics, engineering and/or biochemistry, without being able to ask questions, and have been told that there are two diametrically opposed ways of looking at these scientific principles. After such a challenge, it is too much to ask them to deal with a complicated damages argument.

One area where defense lawyers tend to make damages too complicated is during the cross-examination of plaintiff's damages witness, usually an economist. It is here that defense counsel's best points should be common-sensical and practical. As a practical matter, no one gives economists money to invest . . . and for good reason. Their advocated investments (usually short-term, absolutely safe, Treasury bills), which they call risk-free, are so conservative that no one would rationally dedicate their portfolios in such a fashion, especially given the volatility risk of a dedicated bond portfolio and the lack of any hedge against inflationary pressures. This obvious concept (that no one would even think of asking plaintiff's expert, or any person with his background and experience, to manage their money) is a simple one that is not lost on jurors. Further, it is universally the case that plaintiff's economists themselves, usually with families to feed and mortgages to pay off, do not dedicate their personal portfolios to these low interest risk-free investment vehicles. Rhetorically, if they don't do it, why should the jury accept it as "fair and reasonable". Keep in mind that most jurors are instructed that they are to make damages awards based on what is fair and reasonable . . . not on what is absolutely safe. "Absolutely safe" and "risk-free" are not typically phrases included in jury instructions.

Be wary of the natural compulsion to parry with the plaintiff's economic expert on minutia. The jury will be baffled and assume that the expert is smarter than the lawyer. Keep it simple.

10. Shoot the ball.

For many years the prevailing wisdom was for the defense to never suggest a damages number to the jury in anticipation of an adverse verdict. The genesis of

this argument was the belief that suggesting a figure "watered down the liability case". Perhaps in an age where damages caps were upheld by state supreme courts, loss of a normal life, hedonic damages, and wrongful death loss of society claims were not cognizable elements of damage, and some semblance of sanity could be found in monetary awards, such a philosophy was well-conceived. Few defense trial lawyers today would argue, however, that calm and thoughtful damages awards are the rule. Defense attorneys today take a great risk in clinging to this ancient wisdom. Especially in injury cases involving the "blackboarding" of enormous future medical care claims, jurors seek some balance. If they are offered nothing in retort, they often perceive a defense concession to the accuracy, and perhaps righteousness, of plaintiff's request for compensation.

The defense cannot score points if it never shoots the ball into the basket. Help the jury aim for a target if it's going to shoot at all. Plaintiff's attorneys now routinely blow up the plaintiff's verdict form and use it as an aid to argue damages. While it is rarely done, nothing prevents the defense from following in like kind. Such a methodology serves two purposes. First, it forces the defense lawyer to address the damages elements separately and in a logical fashion. Too often, defense suggestions as to damages are given little credence (other than to serve as a boundary to fashion a compromise) because the numbers have been given no meat and appear arbitrary. Second, using a verdict form as a guide matches the plaintiff toe to toe and suggests to the jury a confidence in the suggested figure(s). A common mistake is to suggest a round number. Jury consultants have long suggested that jurors are more accepting of suggested figures that appear to be well-crafted and not nicely rounded. Indeed, the more peculiar the number, the better it will be received.

11. Insist that the game be played by the rules.

Interestingly, some adverse verdict forms appear more likely to invite a larger verdict than others. Experience suggests that the advent of the "itemized verdict form" (which is now nearly universally accepted) which allows for line item segregation of the various damages elements leads to higher verdicts since jurors are forced by the form's construct to award individual damage amounts which when added together are higher than would have been awarded in a lump sum. Given the wide approval for these forms (and their mandated use in many jurisdictions) fighting the concept is generally a waste of effort. That is not to say that the defense should not, however, insist on strict compliance with pattern instructions on itemized verdicts since modifications can also lead to inflated awards. For example, in many jurisdictions, pattern jury instructions and verdict forms are required to be used. Often attempted by plaintiffs, however, are some rather subtle, and often overlooked modifications. Pattern forms tend to require the jury to insert a lump sum verdict amount at the top of the form and then itemize that amount to fit the various categories of compensable damages. Clever plaintiff's attorneys will submit a form that places the line for the insertion of the total award at the bottom of the itemized damages. This basically flips the verdict

form upside down resulting in the jury not fully considering the fairness of the total award since the total amount is not even seen until the sum is computed. When the jury visually is forced to reach the lump sum total first and then divvy it up, there is a greater likelihood of the verdict being held in check.

Another common trick advanced by plaintiff's attorneys is to break pattern descriptions of elements into separate components (e.g. "disability and disfigurement" or "past and future" damages or "pain and suffering"). Obviously, the more itemized lines to fill in, the better it is for the plaintiff and the worse it is for the defendant.

12. Don't concede the game until the final buzzer sounds.

There is a pervasive, yet vastly uninformed view among defense teams, that a disabled person's life is over because of a disability. Yet reliable, published studies of severely injured and disabled individuals indicate that within a relatively rapid period of time, disabled individuals function with the same levels of satisfaction with life and its challenges as the so-called "normal" population. The defense must disavow the notion that disabled means dead.

Failing to challenge the extent to which a disabled plaintiff can live a "normal" life is one of the most costly mistakes the defense team can make. Discovery must focus on all aspects of plaintiff's life before the injury, to determine the extent to which the means exist to still accomplish plaintiff's pre-occurrence goals. Merely accepting plaintiff's claim without challenge is akin to walking off the court before the final game buzzer sounds.

The means and methods to develop a complete picture of plaintiff's life are easily at defense counsel's disposal: obtain records, interview family, friends, neighbors, teachers and co-workers, and ask plaintiff. Then look to the resources available to help meet plaintiff's goals, and find out if plaintiff took any steps to avail himself of those resources, such as college programs for the handicapped to meet career goals or train for a new career, modified vehicles to enhance mobility, universally designed homes to live independently, clubs with activities for impaired individuals, and the like. Given the widespread innovations to help physically and mentally challenged individuals adjust to society, plaintiff will be hard-pressed to claim complete helplessness in life (in all but the most extreme injury case) in the face of actual, real life alternatives.

CONCLUSION

The depth of juror's fundamental attitudes about helping the injured plaintiff should not be overlooked by defense trial counsel. It creeps into every aspect of the trial. Failing to account for the impact of damages on the entire case can lead to runaway verdicts. Thoughtful preparation that accounts for all factors

impacting the damages picture can help to keep adverse awards in check and keep defendants in the game.

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