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Non-economic damages: Destination to a fair outcome

Strategies for substantial non-economic damages begin at early client meetings and continue through closing argument

One of the challenges that plaintiffs' attorneys face is getting a jury to award full and fair monetary compensation for non-economic damages. It is almost counterintuitive, if the damages are "non-economic," how could they be worth a lot of money? While compensation for physical pain and suffering is a concept that often appeals to juries where our clients are physically injured, the challenge becomes heightened when seeking damages for seemingly intangible losses such as emotional distress, humiliation, loss of reputation, or the loss of love, comfort and society in a wrongful-death case.

A compelling story, a likeable client, and bad acts by the defendant can all help to persuade a jury to award substantial non-economic damages. But what are some of the things we as trial lawyers can do to put our clients in the best position of receiving full and fair compensation? This article explores litigation and courtroom strategies for maximizing damages.

The early game

The strategy to achieve substantial non-economic damages begins at the initial meeting with the client. In cases where liability is going to hinge on your client's credibility, it is of the utmost

importance for them to be reasonable, likeable, and capable of answering questions articulately. But sometimes our clients come to us so emotionally damaged and angered at what has occurred that it is difficult to see them as likeable. By being patient in the initial interview, you can start to mold the client and case into one that will resonate with a future jury.

In early meetings with your client, the goal is to help them to refocus their anger to a more constructive direction. It is good to acknowledge that they are justifiably angry because someone hurt

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them. I often explain to my clients that it is natural to be angry when we are wronged, but that juries respond more favorably when they observe someone who has been hurt.

Time with the client is time well spent. It is important in that initial interview to explore all of the ways the conduct of the defendant harmed them. Establish a rapport and find out about their life and how the injury limits them. How often do they think about the incident? When they think about it, how does it make them feel? What type of activities did they enjoy before the incident? What can't they do anymore? Did emotional distress cause physical problems or pain in any parts of their body? Did it impact their sleep patterns, their appetite, or their relationships with family and friends?

Your client inquiry will be guided by the type of case you are taking on. If it is an injury case, you will want to explore all of the life activities your client can no longer engage in or which cause pain. These activities can range from basic household chores to things the client does for fun.

In an employment case or any case where a client lost his or her employment as a result of an injury, speak to the client about his or her job. What did the job mean to the client? How much time a day did they spend at the job? How many years of dedication did it take to get to where they were in the company? Did they go to school or get trained for the position? What social activities inside and outside the work place did they enjoy with co-employees?

In a wrongful-death case, the emphasis is often on the loss of love and companionship. Explore what the client will miss about the loss of their loved one, including all of their qualities. Get photographs, videos, cards and any other items for use as demonstrative evidence at trial.

Explore the client's use of social media and make sure they understand that anything they post can and will be used against them, so they just should refrain from actively using social media

while the case is pending. But social media can be used to support a case too; for example, if photos and posts showed an active life style before the incident which is now curtailed because of an injury or other harm.

Dig deeper

In some cases, the emotional harm suffered rises to the level of a severe psychological injury. Sometimes even a client without any physical injury can be extremely traumatized. For example, the false arrest of someone even for one night in jail can cause someone to suffer panic attacks and become fearful of leaving the house. Firing someone who is disabled and relying on medical insurance for needed surgery or treatment can be traumatizing as well.

If there is psychological harm or severe emotional distress, assist in getting the client evaluated and/or treated. If there is no insurance, find a sliding-scale facility or pay for an expert evaluation. It is often good to speak with the therapist and let them know about the case. Make sure they are comfortable with your client possibly filing a lawsuit and explain the difference between harm from the underlying conduct versus stress from the lawsuit. Explain that to your client and make sure in therapy sessions that he or she emphasizes the incident that is the subject of your case and caused them to seek therapy.

It is also very important in the early stages to find out the impact on your client's family. Meet the family members even if it takes going to their homes. Find out who will be good witnesses and spend some time with them to find out how the incident or injury impacts your client.

Evaluate these questions as you start to formulate how you are going to communicate the harm to your client to a jury. What are all the ways my client has been harmed? How bad is the harm? How long will it last? How much does that harm interfere with my client's functioning and enjoyment of life?

You also want to explore prior stressors. Did the wrongful conduct of the

defendant exacerbate a prior problem or injury? Be prepared to obtain evidence so you can use CACI 3927, *Aggravation of Preexisting Condition or Disability* and CACI 3928, *Unusually Susceptible Plaintiff*. It is always important to get an authorization for release of medical records the first day you meet a client, get clients to list all of their doctors and to request all medical records — even if the client insists that those records are not relevant. Evaluate whether your client was vulnerable to physical, psychological or emotional injury.

Make sure that the client is attempting to mitigate damages in other ways and looking for jobs if there is a loss-of-earnings claim. Emphasize the importance of documenting that job search. In cases which involve physical injuries, check in with the doctors, see what recommendations are being made and make sure your client is getting the necessary follow-up care and following the recommendations such as home exercise. Juries want to see people who are doing their best to overcome the harm to which they have been subjected and it is all too easy for the defense to claim they are "malingering" if the client doesn't do what it takes to help him or herself.

Litigating damages

It is important to identify all damage witnesses early in the case, especially in federal court, so you will have the option to use them at trial. In federal court you must include these witnesses on your Rule 26 disclosures. If the defendants depose these witnesses, I agree to represent them at deposition so what we speak about is confidential. This allows us to meet before the deposition and explore all the harm to our client without defense counsel inquiring into the contents of our conversation.

In preparing a client for a deposition, it is important to go through all the steps outlined above to reevaluate the harm. Set up the first deposition-prep meeting far enough in advance to have time to set up a second and third meeting. I tell my clients that no matter how

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fast opposing counsel is asking questions, its more helpful to slow things down — especially when discussing harm. I tell them to take a deep breath and put themselves back into the place and time when the events of the case happened, or when they felt the worst about what happened.

For example, in a disability case, where the Human Resources representative terminated my client's employment, causing her to lose the health insurance that was necessary for the treatment she needed, I had my client go back to the time she learned of the decision and her rejected attempts to get the company to reconsider. I counseled her that when she is addressing the issue in deposition to transport herself back to the time when the events occurred and respond in a manner which conveys the emotion she felt at the time. In one such case, showing my client's videotaped testimony to the mediator resulted in a settlement we could not pass up.

Again, it is good to get the client to consider and illustrate how they have been harmed, so ask the following questions: How often do you think about the incident? When you think about it, what are you thinking? When do you think about it, time of day, things you are doing? How do you feel when you are thinking about the incident?

There may be some cases that warrant it, but I have never stipulated that my client has "garden variety" emotional distress. Much like "non-economic" damages, the term "garden variety" should be avoided at all costs. It sounds so pleasant, our client's emotional state compared to a nice little garden.

And what is the implication of this so-called "garden variety" stipulation? Section 2032.320, subdivision (c) of the Code of Civil Procedure allows a party to avoid a mental examination by stipulating (1) not to claim emotional distress above that usually associated with the physical injuries claimed, and (2) not to present expert testimony regarding the level of distress. Yes, your client is spared having to meet with the defendant's expert psychiatrist. But, there is no

litmus test for what emotional distress is usually associated with an injury. I would be concerned that if the defendants read such a stipulation to the jury that it could dampen a non-economic damages award and if you do get a good verdict, the defendants would probably use the stipulation as a basis to reduce the verdict by the trial or appellate court.

In fact, the term "emotional distress" may be inherently problematic. It may be so overused so as to result in jury desensitization and underestimation of its value. Thus, it is helpful to broaden the focus by emphasizing your client's emotional harm, mental suffering, fear, worry, anxiety, depression, humiliation, and grief.

Turn the spotlight onto the defendant

One of the most effective strategies to get substantial non-economic damages is to show that the defendant's conduct harmed your client and the defendant made a deliberate choice to break the rules knowing such conduct would in all probability harm your client. Obtain policies and documents pertaining to the industry standards. Find out if there are any public records showing that the defendants previously broke these rules. Get training materials and find out what seminars the defendants attend and see if you can obtain the materials from those seminars. These materials can help establish the rules that apply to your defendant.

Spend time reading books on how to convey these rules to the jury such as *On Damages* by David Ball, *Rules of the Road* by Rick Friedman and *The Reptile* by Don Keenan.

Once you establish what rules the defendants broke when they harmed your client, show how this rule is important because it protects all of us and our families, which include, of course, our juries.

For example, in a disability case, explain how the company has rules to make sure that their employees who become disabled, but can still work, are given the opportunity to get the job done. The rules are important because a person who experiences a disability, whether temporary or permanent, is

under a great deal of stress and pressure due to the disability.

The disabled employee's focus should be on recovery and not being tossed aside by their employer. Losing their job because of the disability can cause great harm to the employee and their families. The rules state that companies must reasonably accommodate their employees, so they can perform their job duties. A reasonable accommodation can include allowing an employee to take a leave in order to recuperate or to seek curative treatment for the disabling medical condition.

In this case, the defendant broke their rules by refusing to allow for the reasonable accommodation of an extended leave. Why is this rule important? Anyone can become disabled: we can, our parents can, our children can, and any of our loved ones might. The rules are based on laws and the laws were established to protect all of us.

In most of our cases, these types of themes can be developed so the jury is receptive to compensate your clients for the harm they have experienced.

Preparing the client

Every trial involves a multitude of tasks. It is therefore very important to meet with your client and develop a direct examination well in advance of trial. I will often meet my client with a jury consultant to help prepare the testimony. It is important for the client to feel a sense of calm and confidence so you can focus on trying the case. We talk about the three confidences: confidence in your case, confidence in the jury and confidence in your attorneys.

Bring out the positive qualities and virtues of your client. If possible, show the jury that your client is a giving person who helps others. In one case I had, the consensus, from those who met my client, was that the jury would not like her. In preparing my client for trial, I found out that she would serve food to the homeless on Thanksgiving and organize sweater drives with her actress friends and then would go to skid row to

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distribute the sweaters. After her false arrest, panic attacks prevented her from doing those things. Facts like these can be immensely helpful in getting a jury to recognize your client's virtues and value your client's harm.

Also, I discuss with my client the differences between direct and cross-examination. In direct examination, it's good for the client to look at the jury when explaining the harm and to try to make eye contact with everyone on the jury at some point, taking time while answering questions to show that a thoughtful response is being given. Cross-examination should be as unmemorable as possible, with polite short answers and eye contact with the defense counsel, but not the plaintiff's attorney or the jury. I instruct my clients to never start to argue with opposing counsel.

Even with these admonitions, the client may become unhinged during cross examination. In that same false-arrest case, my client started sparring with opposing counsel early in the examination. Before that went on too long, we thankfully had a break. I took her to a different floor of the courthouse and asked her what she wanted more, the jury to know she was smarter than opposing counsel or for them to award her substantial compensation for her harm. Based on our preparation, she quickly got the point and the rest of the cross went much better.

Finally, I explain to my client that I will have an opportunity to do a re-direct examination to clear up any discrepancies that occurred during cross examination. The client must have confidence that anything that needs to be explained will be explained on redirect and it is good to focus on harm questions in redirect when completing the plaintiff's examination.

Voir dire

The opportunity to voir dire your jury venire is priceless. No matter how little time a judge gives you, the questions must focus on the types of non-economic damages. With a nod to David Ball, ask open-ended question such as: "Some people cannot agree with the idea

of providing money damages for mental or emotional harm, others think that full compensation for mental and emotional harm is fair, which view are you closer to?" And, of course, it is important to follow up with the all-important question, "Why do you feel that way?"

In a defamation case I handled using these types of questions with the jury to explore what it meant when someone's reputation is damaged helped result in a substantial non-economic damages award where the jury awarded our client only \$2 in economic damages.

One of the biggest drawbacks of federal court trial is that most federal judges will not allow voir dire by the lawyers. This not only makes it more difficult to establish a rapport with the jury, but you are often left wondering what the attitude of jurors is towards non-economic damages. The National Jury Project reports that a juror's attitude towards non-economic damages is the most reliable predictor on how a juror will respond to liability questions. Thus, in federal court trials, try to get the judge to ask questions on non-economic damages.

Time permitting, it's good to convey to the jury how important their role is with questions such as: "Some people say juries are a waste of resources, take up too much time, and some people believe that the right to a jury trial is one of the rights that make our country great. Are you a little closer to those who believe juries are not a good way to decide disputes or a little closer to those who believe a jury trial is a fair way to resolve a dispute?"

Consider ending voir dire with these questions: "If you sit on this jury, and the evidence warrants it, you will have the power to provide my client millions of dollars in compensation; is anyone uncomfortable with that power?" And, "Is there anyone who would not be able to agree to an award which provides compensation in the millions of dollars?"

Jury instructions and closing argument

One of the most important jury instructions in any case is CACI 3901,

Introduction to Tort Damages. The jury is instructed that if liability is found "you also *must* decide how much money will reasonably compensate plaintiff for the harm. This compensation is called 'damages.'" The jury's duty to award these damages is mandatory and it's good to remind them that each of them agreed to follow the law. CACI 3901 goes on to state that, "The amount of damages *must* include an award for each item of harm that was caused by defendant, even if the particular harm could not have been anticipated."

Show these instructions to the jury in closing argument along with CACI 3905, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* and make sure every element of harm your client might have suffered is on the list.

If the jury has been engaged in the trial, they will want to feel they are doing the right thing, so in closing argument it is important to empower the jury by explaining that providing full and fair compensation is the right thing to do.

Explain that *compensate* means to equalize the money and harm and nothing else can be part of the equation. Compensate means to balance the scales. Just as we do in voir dire when explaining the preponderance of evidence burden of proof standard, hold your arms out to the jury emulating the scales of justice. Explain that one side of the scales holds the harms and the other side holds what it will take to fairly compensate for the harms. Let the jury know when they are considering reasonable compensation, no outside reasons must be on the scale. David Ball recommends telling the jury that "The law in every courthouse in the United States of America says nothing goes on those scales except the losses and harms caused by the defendants."

Explain that as jurors you cannot allow any outside reason such as lowering the amount of money because you feel sorry for one of the defendants or stating that this is too much money for one person. Those are outside reasons and jurors must not allow other jurors to take any of

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those outside reasons in to consideration. So, in deliberations if any outside reasons come up in the discussions, let the jurors know they can state to the other jurors, remember “only the loss and harms.”

Let the jury know that when they award damages and, after the trial, they are asked how you could award a substantial sum of money for damages, they can say, “We had to balance the harm.” Of course, it is important to reiterate how much harm was suffered by the client.

Empower your jury by letting them know that nobody had held the defendants accountable and the only chance your client has for justice is for the jury to hold them accountable. Tell the jury that after the trial is over, no one is going to tell them that they made the right decision or the wrong decision. It is their decision alone to make. And there are no limits on what the jury can award. Let them know that yes, indeed, they can award more compensation than you are suggesting. As part of the community, it's for the jury to determine what is full and fair compensation in the United States of America in 2014 for the harm your client suffered.

Most important, if you want the jury to award substantial non-economic damages, you have to ask for it. I prefer to give the jury a range, for example, what is full and fair compensation when someone's life is turned upside down by the wrongful conduct of the defendants. For example, I will ask, “Is the harm worth \$2 million, \$3 million, \$5 million, more? That is for you and you alone to decide.”

When I was sitting in the courtroom getting ready for closing arguments in the false arrest case referenced earlier, I explained to a savvy, well-respected CAALA lawyer that my client had been falsely arrested and spent one night in jail. He asked me, “So what is that worth? \$75,000?” I gulped, knowing that I was about to ask the jury to award seven figures on a case that everyone I spoke to told me was worth low six figures, at most. We had no economic damages, no physical injury, and a client who had claimed similar mental distress injuries in two prior lawsuits. But the defendants had acted egregiously and, indeed, our client's life was turned upside down after

this arrest. The jury came back with an award of \$2.1 million, a wonderful result under any circumstances. While it felt great in the moment, I knew that it was the long litigation journey we traveled to establish damages that made it possible to arrive at that destination.

V. James DeSimone has been a Partner for twenty-five years with Schonbrun DeSimone et al. LLP, a civil rights law firm that handles employment discrimination, sexual harassment, wage and hour class action, and police misconduct cases. In 2014, he received the CLAY Award for California Civil Rights Lawyer of the Year. In 2013, he was honored as a Top 100 SuperLawyer in Southern California. In 2009, 2010, 2011, 2013, and 2014, he was honored as a California Top 10 or 25 Plaintiff Labor and Employment Lawyer by the Daily Journal. In 2008, Jim was a finalist for CAALA's Trial Lawyer of the Year. He is a SuperLawyer in the area of civil rights and employment 2009 through 2014. Jim would like to thank Lisa Holder, Esq. for her invaluable assistance in editing this article. ☺