



Techniques for arguing damages to a jury

Establish rapport, frame your argument, link the money to wrongdoing and ask for what your client deserves.

BY J. GARY GWILLIAM

I have been trying plaintiffs' personal injury cases for over 45 years and have asked jurors for money well over 150 times. I have found that the process of translating injuries or emotional distress damages into money is the most difficult part of the trial.

Establish rapport with the jury

Virtually every great trial lawyer and legal commentator commenting on the subject of arguing damages stresses the importance of establishing a rapport with the jury from the beginning of the trial. You begin this process during voir dire, building on it through the opening statement and reinforcing it as you present your evidence and question witnesses.

Everything you do must advance this goal, and you must always be honest and straightforward with the jury. As you present your case, you must have a clear vision of how you will ask for damages during your final argument. You must feel comfortable with the jury and with yourself, and to achieve that goal, you must never make arguments that you do not believe in.

Some well-worn generalities bear repeating regarding establishing a rapport with the jury. Be yourself. Be honest. Be comfortable. Be in touch with your client.

Moreover, you must remember it is your client's case, not yours, so try to keep your ego out of the process.

How to ask the jury to award damages

In thinking about how to ask your jury to award damages to your client, you have to remember that jurors see the process holistically. They do not separate liability issues from the legal issues or the damages. They simply see your client's case.

Your client is asking for money as compensation for a loss. Do the jurors want to award money damages? What is the right and fair thing to do? Jurors will always try to do the right thing because justice is important to them.

When asking for damages, keep it simple. Do not separate the evidence of liability from your argument for damages. The two are much more closely related than many lawyers think.

Money awarded is linked to wrongdoing

The amount of money a jury will award depends on how the jury feels about their perception of the defendant's wrongdoing. If the jury is angered by, or gains a negative impression about the defendant at trial because of the defendant's bad conduct, the defense attorney's mistreatment of the plaintiff, the overuse of defense objections or the

defendant's attempt to hide evidence, jurors deciding on a damages award will most likely take this into consideration.

Damages in aggravated liability cases

Published year-end summaries of the largest verdicts in the nation demonstrate that jurors often award large verdicts in aggravated cases of liability. Learn from these cases and tie your client's claim for damages to how the jury feels about the defendant's liability.

Framing your damages argument

In framing your damages argument, carefully and logically lay out the liability facts first. Then turn to the subject of damages and discuss not only the special damages, but more importantly, your client. Tell the jury the details of your client's story. Bring the client's loss to life and remind the jury about specific points given in testimony. Show photos. Get jurors to not only like, but to bond with your client. The more the jurors do this, the more comfortable they will be in awarding damages.

Getting the jury to bond with your client

How do you persuade the jury to like your client, bond with your client and award appropriate damages?



First, you have to be convinced of the merit of your client's claims. It is almost impossible to get a just award if you do not fully believe in your client's case.

Second, you have to like your client (or do the very best you can to like the parts of your client that you represent to the jury). Let the jury know how you feel about your client. One way to do this is by using your client's first name. Put your hand on their shoulder during argument, if appropriate.

Third, let the jury know that your client deserves justice. When you project your own feelings about the justness of your client's case, those feelings are often reflected in the jury's verdict.

Needs vs. Deserves

When you make your closing argument, you must let the jury know that your client deserves the award. Arguing for what the client *may* need is usually the defense position. Be sure to reiterate to the jurors that giving your client a fair award is the just and right thing to do.

Also, emphasize that your client does not need the juror's sympathy, but that your client does deserve their empathy. Point out that it is the job of the jurors, who are acting as judges of the case, to fully understand your client's pain, suffering and emotional distress.

I feel strongly that the request for money should come at the end of your opening argument and again in your closing argument. Once you have talked about your client, the defendant's liability and your client's damages, you need to ask the key question: What is a fair award?

What is a fair damage award?

Remind jurors that in this country, juries have been making this determination for over 200 years, that it is a common process and that there is nothing complicated about it. Tell the members of the jury that they are not doing anything different or unusual than what other jurors have done – they are simply doing their job.

I believe you have to ask the jury for money damages in an amount that you think your client deserves in order to get it. Start by honestly stating what you think the case is worth. As you do this, look each juror in the eye and speak from the heart.

I am not a fan of arguing for per diem damages. I have never been comfortable trying to translate a client's injuries into an amount of money the jury should award for every hour, day, week or month of pain and suffering or emotional distress. I like to ask for a specific figure or range of figures and stick with it.

I usually do not make up my mind about what the case is exactly worth until shortly before closing argument. For me, the specific amount I ask for depends on how well the trial has gone and, once again, how comfortable I feel about asking for that amount.

You have to believe in your heart that the amount is just. It may be on the high end of what the case is worth – that's OK. However, you have to be able to look at each juror and say, "This is a fair award for this case," and mean it. Do not ask them for two or three times as much as you think the case is really worth in case they cut you back. That is bargaining, not arguing.

Winning strategies in asking for damages

Every plaintiff trial lawyer knows we live in an era of "tort reform." Some jurors think that there are too many lawsuits and that juries often award plaintiffs too much money. The media may have convinced these jurors that juries award astronomically large amounts of money for relatively minor injuries. This, of course, is not true.

Here is one way to argue this:

Ladies and gentlemen, what is a fair verdict for the general damages? You have to use your common experience to answer that question. Thirty years ago, million-dollar verdicts were big news. Now, they are

more common. You may have read about a large award in the newspaper or seen one reported on television.

Large verdicts are now often awarded in cases, like this one, where the plaintiff has been severely injured. This is not a case of a phony injury or a minor whiplash. This is a very serious injury and is deserving of a large award.

It is too bad that we could not call judges or lawyers as expert witnesses to evaluate the plaintiff's claims and give you their opinions as to what the case is worth. That is not done in these types of cases. You have to draw on your own experience to determine what a case like this is worth.

Is it worth \$1 million? I would suggest to you that this is, indeed, a million-dollar case. My client's injuries are real and devastating. She will have permanent pain for the rest of her life. If there was ever a case worth \$1 million or more, it is this one. Any reasonable jury today would award at least \$1 million as fair compensation for my client's loss.

In the above example, I used the figure "\$1 million" several times. You should not be afraid to use your own figure and state it three or four times. By doing this, you will become more comfortable with it, and so will the jury. You should repeat this argument again in your rebuttal. Remind jurors that the amount your client is asking for is fair and reasonable when compared to what jurors usually award in similar cases.

The defendant may object to this argument on the basis that there are no facts to support the comparison. If this happens, tell the court that you are not arguing about the facts or the evidence in the case. Say you are only stating something that is commonly known and what is almost invariably discussed in jury voir dire. Tell the court that you are simply asking jurors to base their award on what they know from experience, background and current events. Once the argument is framed that way, the court may find that it is not objectionable.



Be comfortable with your request

Another example of how to ask for damages comes from a products liability case I tried with my partner some years ago.

In this case, the defendant was a company that manufactured an extension ladder that had failed, causing my client to fall about 15 feet and badly fracture his ankle. My client was in his sixties and did not have any wage loss. However, he had incurred \$25,000 in medical expenses and would probably need future surgery on the ankle.

General damages were significant because he suffered permanent pain and had a significant limp. The ladder was clearly defective and our expert witness was prepared to testify about similar failures of ladders made by the company. At that time, the defendant company had a policy of hiring one Chicago law firm to defend all of its ladder cases around the country. The defense lawyers, notoriously hard-nosed, would typically offer little or nothing to settle a case. Instead, they would contend that the person using the ladder had been solely at fault.

The defense attorney in our case offered \$10,000, which my client rejected. The defense attorney then proceeded to attack the plaintiff and his witnesses relentlessly throughout the trial, even though the evidence was very strong that the ladder failed because the two parts of the extension separated the first time my client used the ladder.

When it came time to argue damages, my partner and I discussed at some length a figure that we felt was justified by the evidence and that I could argue to the jury as a single, fair non-negotiable amount. We settled on \$800,000.

During trial, introduce strong evidence of liability. I could tell that the jurors had become angry at the ladder company as well as at the defense attorney for his overly aggressive conduct. I stayed with the agreed-on figure in opening and rebuttal arguments and was fortunate enough to receive a verdict for that amount.

Given that, this is one of the few times in my legal career that a jury has awarded exactly what my client asked for. I attribute this primarily to being completely comfortable with the amount we asked for and not feeling that I had overstated the case in any way. The trial judge upheld the verdict, which that defendant paid off in full.

The bell-shaped curve argument

The bell-shaped curve argument is also an effective technique when arguing damages. In a hand injury case I had, a woman ran a red light, hitting the car driven by my client and seriously injuring his hand. Despite this serious injury, my client returned to his job working at a television studio four months after the accident. The evidence showed he would have severe pain and dysfunction for the rest of his life and would probably need multiple, extensive surgeries.

The jury panel included some “scientific minded” jurors. One was a middle-aged woman who worked in a chemistry lab and was not someone you would think was a “people person.”

I decided to frame my damages argument to see if I could appeal to her and a few of the other jurors with scientific backgrounds. During my damages argument, I drew a very simple bell-shaped curve on the board. Then I explained that every case has a range of value that would be considered reasonable for my client’s type of an injury.

I suggested that at the very bottom of the curve would be a verdict of \$100,000. Slightly higher on the curve, I suggested an amount of \$1 million. Inching higher, I suggested \$2.5 million. Nearly at the top of the curve, I wrote the figure \$5 million, then \$7.5 million, and at the high end of the curve, I wrote \$10 million.

I told the jury that \$10 million was too high for the case and that \$1 million was too low. I told them that a fair award would be a sum between \$2.5 million and \$7.5 million and that \$5 million would be appropriate.

The jury ultimately awarded \$2.75 million in general damages. Later, the middle-aged female juror told me that since the defense did not rebut my argument of the bell-shaped curve, the jurors felt that they should award at least what I thought was the minimal amount. The jurors felt that this approach was “scientific” and that they were being conservative in awarding the amount they did. The trial court upheld the jury’s verdict, and the defendant’s insurance company paid the award.

Conclusion

These are examples of some successful strategies, but, of course, each damages argument must take into consideration the individual facts of the case and how the trial went. Do not be afraid to ask for a large verdict, but only if you feel in your heart that this is the right thing to do. There is no one right way to make an argument for damages, but it has to be honest and it has to come from your heart. Look each juror in the eye, talk to each as if he or she were the only person in the room, and explain why your client deserves the amount requested. If you can do this comfortably and believe it, you have done all you can.

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