



Trying plaintiffs' cases when the economy is on everyone's mind

In hard economic times, the attorney must give extra attention to the factors affecting jurors' judgment when it comes to damages.

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We are in the midst of an economic meltdown which has a long reach into the pockets and the psyche of the jury pool. We are witnessing larger numbers of people than usual asking to be excused from jury duty for hardship because their family has suffered the loss of an income, their jury service is not paid by their employer, or they are actively in the job-hunt market. Even if employed, many fear that a prolonged absence from work will cause the boss to figure out that the company can do without them and their job will be eliminated.

Many self-employed people never wanted to serve, and now with their incomes cut by 20 to 75 percent, they are begging to be released. The jury pool is often reduced to the retired, those who have lost hope of finding a job, government employees and a handful of people who work for large employers who still pay for prolonged jury service.

Now more than ever, we should press the legislature to pay jurors a living wage (not \$15/day and transportation one way,

as is done in California today)¹ and to expand source lists to make jury pools more expansive and reflect the true demographic characteristics of the community.²

In this economic meltdown there is a parting of the waters. For the middle class and upper middle class, the meltdown is a collective hit to self esteem and self confidence. As fear takes root, generosity goes out the window. Making the monthly payment on a house no longer worth the mortgage is troubling indeed. Any financial cushion that was expected – some disposable income to pay for a new car, iPhone, computer, flat-screen television, home renovations, and tuition for the kids – is no longer certain, and financing purchases with a mountain of debt has lost some of its appeal.

For people more familiar with a life of economic struggle, poverty gets worse, blue collar jobs disappear even faster than before and the hope of moving out of poverty grows dimmer. Some have observed, "Here in the ghetto where everyone is poor no one is grumbling about the economic crisis," and, "I don't believe there really is much of a crisis. It's just that many people who have had much more than their share for generations are

losing a little of the excess they are used to. Here in the trailer park, we have been living like this all along."

So where does this leave plaintiffs' lawyers?

This is the time to lean more heavily on themes of responsibility and paying a fair share. Often cases involve multiple causes (whether there are actually multiple defendants in court or not), and the concept of substantial factor is a bit elusive for some jurors. Plaintiffs' lawyers must make sure that jurors understand that substantial factor means "a" and not "the" substantial factor. They must help jurors understand that when there are multiple causes, there can be no "but for" factor. Sharing responsibility with others does not exempt these defendants of responsibility.

One way of talking about this includes the concept of contribution: it took all of these circumstances coming together at the same time to create this injury or harm; every factor (or exposure) matters and every factor helped tip the scale.

Responsibility/Fair share

The task of a plaintiff's lawyer is to communicate the responsibility of the de-



fendant(s) for their “fair share” of what happened. Injury and damage are not enough no matter how catastrophic they may be. Jurors still want to know why *this defendant* is responsible and accountable for this injury.

The choice model

The story must revolve around the understanding that this defendant did not do what it was supposed to do, that it made the wrong choices. How many warnings did the defendant ignore? How many indications of harm did the defendant *decide were acceptable risks* within their business model? What options did the defendant have to do it differently, and why did he or she choose not to? Whose interest did the defendant put first, and whose interest did the defendant choose to put second? How did those *bad choices* (using the nomenclature of a middle school principal) lead to this unacceptable outcome?

Graphics depicting the defendant’s bad choices projected one by one on a screen as you present your case may help, or a roadmap which shows each wrong turn and suggests what the alternative might have been. Clearly demonstrating that the defendant had opportunities to make different choices will supply talking points for jurors to use in the deliberations.

What will money accomplish?

Compensation for tangible damages makes sense to most people. Money to cover the expenses they would otherwise not have endured has always had appeal. But what must be better communicated in these difficult times is why monetary compensation for *suffering* is also necessary. This requires the ability to *communicate what suffering really is and how money would help to relieve it*. Medical bills add insult to the injury, but the injury is not the fact that there are medical bills to be paid. A compensatory award for medical bills helps remedy a financial expense but not the life change that has occurred,

the time taken away from living life as the person knew it — damage to the person vs. the pocketbook as David Ball calls it.

By way of example, a young boy, Christopher Rodriguez, was shot and paralyzed while taking a piano lesson in Oakland when a neighboring gas station was held up. The bullet pierced the wall of the piano studio and struck his spine. We all agree that a person paralyzed in any accident should be compensated for a lifetime of medical costs, the costs of home renovation and physical and psychological therapy. But this compensation does not address his suffering — the physical pain and discomfort and the emotional suffering of a life so suddenly and profoundly changed. We applaud his heroic spirit, but we all know that this life is forever changed by one man’s bad choice.

How we communicate the scope of suffering and the dignity of clients’ lives in civil lawsuits becomes the challenge. The defendant’s *bad choice* has a real impact on the quality of the plaintiff’s life, on what the plaintiff must endure. When juries award money for non-material losses they communicate to the injured party that their suffering means something. The plaintiff is acknowledged not just as a mountain of bills, but as a person. The defendant’s bad choice was not an acceptable risk to take with someone else’s well being. Discomfort and suffering rob a person of many of life’s ordinary pleasures, complicate even the simplest of daily tasks and profoundly affect how people feel about themselves and how others regard them — changes that were caused by the actions of the defendant. The losses must not be discussed separately from the defendant’s actions.

Explaining a life

Social histories tell the story of a plaintiff’s life and circumstances. In several cases in which plaintiffs were so profoundly injured that they could no longer speak (one in which a 35-year-old

man was in a vegetative state and, according to the defense, incapable of suffering; and another in which an older woman suffered disfiguring burns and a more significant inhalation injury which required residence in a nursing home), plaintiffs’ lawyers effectively conveyed their life stories through witnesses and important personal memorabilia. Items presented included photographs of life before the injuries, of lives interrupted — strapping, handsome people enjoying something ordinary, a client’s 12-string guitar and the figurines he painted with his stepchildren, the disassembled pocket watches he planned to repair; her North Beach bohemian life, the notes of radio broadcasts she worked on, items found in a storage locker, shoes left under the bed and clothes still hanging in a closet.

These snapshots of lives prior to injury require more than a passing effort at capturing jurors’ attention.

Harnessing anger

The public is angry at and at the same time protective of big business. In recent months many a juror has remarked in voir dire, “How could anyone trust large corporations now?” Many of these individuals are removed by the defense with a peremptory challenge or a successful cause challenge. However, it is possible to harness this sense of resentment toward corporations who abuse workers, the environment and the economy and turn resentment and distrust into verdicts and decent damage awards for plaintiffs.

In the past, some defense attorneys would infer that severely injured people (especially children) would be “taken care of” by government social programs. Now, more jurors are keenly aware that government safety nets are in danger and cannot be counted on.

On the other hand, many jurors are afraid that large awards will only further weaken business and cause more job and economic losses. In response, plaintiffs’ lawyers must remind jurors about the



Damage awards must be earned and jurors need to know how money will make a difference

In personal injury cases, given the current economic climate, it seems like a hard time to talk about large multi-million dollar damage awards in voir dire. Generally large damages have to be earned, and too many jurors already think plaintiffs are in the courtroom to pick a corporate pocket. Discussion regarding damage awards needs to be based on the idea that the plaintiff has proven the liability claim. But plaintiffs must identify the cynics in the crowd.

So you might say –

It is a little awkward to talk to you about money damages before you have heard the evidence about the defendant's responsibility for what happened to [plaintiff], but this is our only chance to talk with you about your feelings about our civil justice system and the monetary awards that result. So, can you tell me your feelings about how you think the civil justice system is working and what you think should be changed?

Of course in order to get to awarding damages, the jury would have to have found that [defendant] caused harm to [plaintiff]. And you understand if we can't prove that to you, you'd have to say no to a monetary award. So let's assume for a moment that we can prove our case about [the defendant]'s responsibility, and the nature and extent of the harm it caused [plaintiff], would you be hesitant to provide full compensation to [plaintiff]?

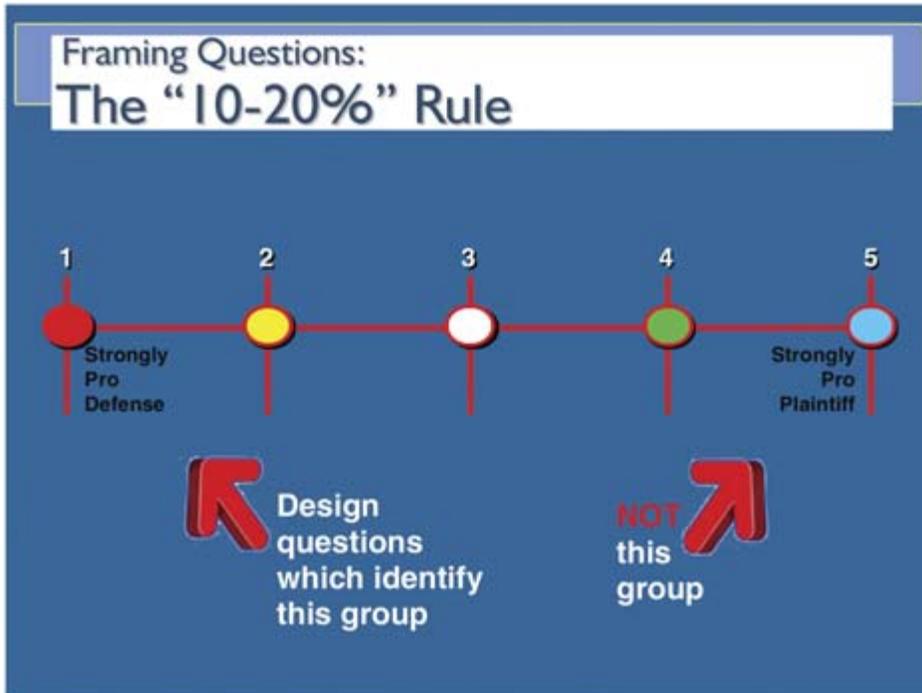
By that I mean for medical costs and lost wages?

For therapy and home renovations that may be required?

How about for physical pain and discomfort that comes from this injury/disease?

What do you think about a monetary award for suffering and the emotional distress such injuries cause?

Do you think someone who has been injured or harmed by another person deserves anything more than to have their medical



Chart

widespread understanding that the economic meltdown is the result of a series of bad choices made by business entities who considered the risks acceptable because the upside seemed so great, that long term stability was sacrificed for short term gain. Thus plaintiffs' interests can become aligned with jurors' interests.

Identify who's against you, not who's for you

These days, folks who are angry about corporate malfeasance and similar wrongdoings are numerous and frequently quite vocal in voir dire. Some declare their anti-corporate sentiments early and often, making the defense task of identifying these people easy picking.

In constructing a voir dire questionnaire or voir dire questions, carefully think through the effect of each question: who the question really identifies. Questions which reveal pro-plaintiff jurors should be avoided. That is the de-

fendant's task, and we ought not to help them with it. Think of it as the 10 percent rule. Plaintiffs' lawyers want questions to identify the 10 to 20 percent of jurors who are strongly pro-defense and do not want to elicit much from the strongly pro-plaintiff or neutral jurors.

Plaintiffs need to identify the people who are skeptical about their claims, think the civil justice system unfairly rewards plaintiffs or amounts to a lottery, believe plaintiffs' claims are exaggerated, feel people should just be grateful for a job or their life, or think Rush Limbaugh has it right. You do not want to identify those who subscribe to corporate watchdog magazines, thought Erin Brockovich was terrific, listen to the local Pacifica radio affiliate, give money to MoveOn.org or think corporations can't be trusted. If questions are revealing pro-plaintiff types and allowing pro-defense jurors to lie in wait, you are asking the wrong question.



bills and lost wages paid?

[Plaintiff's husband/wife is also suing for the harm the injury has caused to their life together. Do you think s/he could be entitled to separate compensation for those kinds of losses?

And if those losses taken all together for [plaintiff and spouse] added up to a sum in the tens of millions of dollars, would you be reluctant to make that kind of an award?

In asking jurors to respond to each of the separate items of damages, you can more clearly identify those jurors who reject the concept of non-tangible damages. These jurors also tend to be more pro-defense on liability issues.

Your goal is to identify those jurors who will most harm your chances at trial, not to talk them out of their feelings and opinions. Try to develop successful challenges for cause and prioritize your exercise of peremptory challenges.

While jury selection is an important part of a winning effort, plaintiffs' lawyers must still present a case that can best appeal to the broadest cross section of the jury, telling the story of de-



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fendant's bad choices to whoever is on the jury.

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Endnotes:

¹ Economic factors have a significant impact on jury composition. The most important determinant of whether a juror seeks to be excused is his or her employer's policy on paying employees during jury service. Those with lower annual incomes are particularly underrepresented, even more so than African Americans, Latinos, or women as a whole. People of color of lower social-economic status are the most underrepresented group on jury panels.

California courts pay jurors at the rate of \$15 per day, an amount that may barely cover out-of-pocket expenses but certainly does not compensate for lost income. According to a California survey of jurors, 1/3 of employers reported that they pay employees for 5 or fewer days of jury service; only 40% of employers reported paying employees for 11 days or more of jury service. Lower income earners, particularly hourly wage earners, have significantly fewer paid days.

At least 31 states and the Federal courts pay jurors fees greater than California (e.g. Colorado, Connecticut, Massachusetts, North Dakota and South Dakota pay \$50/day). In several states, employers are required to pay for the first three days of jury service after which the State pays for all days at the rate of \$50/day (e.g. Colorado and Massachusetts). New York requires employers with at least 20 employees to pay for jury service. In other states, jury fees increase after a set number of days of jury service (e.g. Florida, Michigan, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Texas, and Utah). In New Mexico, jurors are paid the hourly minimum wage.

² **Limited Source Lists:** California courts currently rely solely on voter registration and DMV lists to create jury source lists. In contrast, to increase the diversity of the venire, New York added lists from state income tax payers, state unemployment and welfare rolls. California law already allows courts to use other source lists, see Code of Civil Procedure 197(a). Jury commissioners should be encouraged to do so.

Limited Address Verification: Only some California courts report using the National Change of Address Registry (NCAR) to update addresses prior to mailing summonses. Other courts report that when a summons is returned as undeliverable, they take no action.

