

Closing argument in a personal-injury case

General principles that apply to all closing arguments in personal-injury cases

By Mike Alder

At the close of the trial, the plaintiff's attorney must convince the jury that the injured plaintiff is entitled to win and should be awarded money damages. While every trial will vary based on the facts and the plaintiff's injuries, there are some general principles that apply to all closing arguments in personal-injury cases.

Explaining jury instructions

Use the jury instructions to set out the elements of your client's claim and explain the elements to the jury. This will be the first time that most jurors have been asked to determine liability and award damages to a plaintiff. They will need guidance, and the jury instructions are the best place to start. Referring to the jury instructions also reminds the jury that this is "the law" that they promised to follow when they became jurors. In most PI cases, CACI 400 series will be the jury instructions provided by the court. Start by simply showing the jury CACI 400 and explaining that they must decide whether the defendant was negligent, whether the plaintiff was harmed, and whether the defendant's negligence was a substantial factor in causing the plaintiff's harm.

Most jurors will have no idea what "negligence" means, and this is not something you want them debating during deliberations, so show them CACI 401 that defines negligence as the "failure to use reasonable care to prevent harm to oneself or to others." Do not spend a lot of time summarizing all the evidence, but instead explain how the instructions apply to the facts of your case and how the defendant's conduct was not "reasonable." Do not go through the trial day-by-day and provide a list of who testified and what they said. Instead, remind the jurors of the testimony that most supports your position that the defendant's conduct was unreasonable and explain why it entitles your client to a favorable verdict.

In every PI case, you should also spend time in your closing argument explaining causation. Show the jurors CACI 430 and explain what "substantial factor" means: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." You must plan to spend time explaining CACI 430 to the jurors, especially in cases where the defendant has presented biomechanical or medical experts to testify that the accident could not have caused plaintiff's injuries. Make sure the jurors understand the definition of "substantial factor."

Jury instructions regarding damages

Use the jury instructions to explain the damages to which the injured plaintiff is entitled. Do not ever feel uncomfortable arguing for damages. This is why we go to trial. A personal-injury plaintiff is made whole by being awarded *money*. Do not act shy about it in front of the jury. When you start addressing damages, remind the jury that you asked them some questions about this in voir dire (make sure you've done that) and remind them that they all agreed that, if the evidence warranted it, they would award damages to your client. Tell them that the time has now come for them to honor this agreement and to award the plaintiff damages. Point out that this is the one chance the plaintiff has to be made whole, so they must award the plaintiff all damages to which he or she is entitled. Show them CACI 3900 and the court's instruction to them that they must decide "how much money will reasonably compensate plaintiff for the harm."

It is often very difficult for jurors to come up with a single dollar figure to award to a plaintiff, so CACI breaks it down into economic damages and non-economic damages. You should also do this during your closing argument. It is much easier for jurors to think about damages in smaller portions than to come up with a single dollar figure. Use this to your client's advantage.

Economic damages and *Howell*

In all PI cases, there should be past medical specials and in most PI cases, there will be future medical expenses. There should have been expert testimony on these issues, so remind the jurors which witnesses testified about the amount of these damages, which will likely be a medical doctor, a life-care planner, and/or an economist. If the court permits, write these figures on a board in front of the jury so the figures are there for them to see as you continue closing argument.

One issue to consider in light of *Howell* is whether to present your client's past medical specials to the jury. I have had cases where a seriously injured client had MediCal and the *Howell* meds were so insignificant to the overall damages that I decided not to even ask for them. This is a decision you have to make with your client, but sometimes a very small

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amount of past medical expenses can suggest to unfavorable jurors that the injury was actually not that significant and the jurors can end up spending too much time during deliberations wondering why that amount is so low. In such a situation, it may be best not to ask for those damages, which will free you up during closing argument to focus on the larger elements of damages.

In a personal-injury case with substantial injuries, a very large portion of the economic damages will likely be future medical costs based on the testimony and report of a life-care planner and the calculations of an economist.

During closing argument, you must remind the jurors of the testimony of the life-care planner and the medical testimony on which the life-care plan was based. You must spend enough time on this element of damages to make sure that the favorable jurors are comfortable with the report. You should not, however, spend an inordinate amount of time going through the life-care plan, but instead spend just enough time to convince the jurors that the plan is reasonable and that the care set out in the plan is necessary. I rarely ask a jury to award the amount of the life-care plan penny-for-penny. For example, if the life-care plan total is $25,921,500, I will typically ask the jury to award damages for future medical care in the range of $25 million.

In every life-care plan there will be some items that jurors (and defense counsel) will question the most; you do not want the jurors to spend time arguing in deliberations about whether cotton swabs should be included in the life-care plan. By rounding down the value of the plan, you are making room for the elements that some jurors may find questionable without giving up too much for your client.

It is sometimes helpful to go through and find the most unusual or questionable items in the life-care plan and address it before defense counsel does. If, for example, the plan calls for membership in a spa or a home Jacuzzi, point those items out to the jury and say that it's certainly reasonable but if the jurors don't think so, they can disregard that item but accept the rest of the plan. In my experience, almost every juror will challenge some item in the plan, so it's better to go ahead and acknowledge that some of the smaller items may be open for debate but that the major items in the plan must be funded through the verdict.

Non-economic damages

In any personal-injury case, you will need to spend a substantial part of your closing argument discussing non-economic damages. I believe that the best starting point to discuss non-economic damages is, once again, the jury instruction on the issue. CACI 3905A provides that the plaintiff is entitled to damages for past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress. The instruction further states that there is not a "fixed standard" but instead the jurors must use their "judgment" based upon not only the evidence, but their "common sense." Remind the jury of this. Jurors feel empowered when they are able to use their own "common sense" and do not have to rely on a specific instruction from the court.

You cannot give an effective closing argument in a PI case unless you spend enough time discussing non-economic damages with the jury. Many jurors, even if they are on your side, have a difficult time assessing non-economic damages and deciding how much to award a plaintiff. Make sure you provide them with the ammunition they need to give your client the award he deserves. Do not make them have to guess about how much to award. In every PI case, there is usually one item of non-economic damages that will be most pertinent.

For example, in a case where the plaintiff sustained a burn injury, you may focus most on the disfigurement element of non-economic damages. In a case where the plaintiff's injury has rendered him unable to provide for his family, you may focus on the anxiety and humiliation elements. Before beginning your closing argument, examine these elements and decide the ones on which you will focus the most.

Quantifying non-economic damages

There are many different methods that can be used to try to quantify non-economic damages in a personal injury closing argument. I am very hesitant to rely only on one method or one type of argument because jurors may not react favorably to it and my client may suffer because of it. In addition, I do not always find these quantitative methods helpful in PI cases with substantial damages because you are typically discussing very small amounts and trying to build them up to larger damages. If your client has significant enough injuries that you are asking for big damages, then using some of these methods may actually backfire and devalue the case.

When arguing for non-economic damages, I typically prefer to briefly discuss several different methods that can be used to quantify non-economic damages and then tell the jurors that no one method is correct but that all can be used in some way to help them during deliberations. For example, a popular argument is to point out that people pay money not to have pain, whether it be over-the-counter Tylenol or prescription narcotics, so there is a value to being pain-free, and then try to break it down into small increments, like $10.00 an hour.

Another option is to look at the "big picture." If the plaintiff has a remaining life expectancy of 25 years and he is in pain every day of his life due to his injury, then it may be better to point out how long 25 years is – a quarter of a century, enough time to be born and become a lawyer or get an MBA, or enough time to get married and celebrate a silver wedding anniversary. Focus on the length of time rather than trying to break it down into smaller increments; everything is

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geared toward the larger number and the larger damages.

Another frequently used method is to suggest that plaintiff's attributes are all in a bowl, and his life is complete or "whole" only when that bowl is full. Once certain things are taken out of that bowl, like the ability to travel or the ability to pick up his children, then his life is no longer whole. Each of those elements has to be worth something, and you can tell the jury that they must decide how much value to place on something like being able to lift your child. You may prefer not to place a specific value on these attributes but instead to give the range and ask the jury rhetorically what the value of the plaintiff not being able to walk his daughter down the aisle on her wedding day is or what the value of the plaintiff not being able to ever engage in her favorite hobby again is: $10,000? $100,000? $1,000,000? This will force the jurors right then to think about a dollar figure and be engaged in your closing argument.

Another method frequently used in closing arguments is to point out the value society places on things, such as a work of art that recently sold for a high price or a contract recently entered into by an NBA player or an annual bonus paid to the defendant's CEO. The concept is to remind the jurors that many things are worth a lot of money in today's world, and your client's health and happiness do have value. These things were *taken away* from plaintiff by the defendant's acts, and the defendant should have to pay to make plaintiff whole again.

I recommend that you briefly refer to a mixture of potential methods the jury can use to arrive at an award of non-economic damages but point out that they should use whatever method feels best for them and that these are only suggestions. In addition, you must have practiced these arguments and thoroughly evaluated them before presenting them at trial. Have several alternatives planned that you *may* use during closing argument, but remember that you do not have to use them all.

Fill in the verdict form

Even the most observant and diligent jurors sometimes have difficulty figuring out how to fill out the verdict from. Show them how to do it. Place the verdict form on an overhead projector or have a blow up of the verdict form. Take them through it, and show them where to check "yes" on the liability questions and how to fill in the dollar amounts on the damages questions. Again, when you are discussing damages, you can provide a range for the non-economic damages when you write them on the verdict form.

Have an amount in mind, but be flexible

Based upon the testimony you expect to present at trial, you should have a range of damages in mind before you begin the trial. The key, however, is to have a range, not a firm amount. For example, if your economic damages are $100,000, you may plan to ask for damages ranging from $300,000 to $1 million. The final determination, however, should not be made until after all the evidence has been presented. If your witnesses do exceptionally well and you feel the jurors are leaning your way, then you may decide to ask for $1 million. If your witnesses do not do well and you think the jurors are leaning toward the defense, you may want to ask for a lower amount. These are decisions that cannot be determined until after all the evidence has been presented and you are able to assess how the evidence and the witnesses have been received by the jurors. At that point, you are ready to make a final determination of the amount of damages to request and to discuss this with your client.

Caution: Never overreach when asking for damages in closing argument. If you think you are asking for too much money, you probably are. If you are uncertain, get feedback from your colleagues. Asking for too much money can be fatal to your case; you will completely lose the defense-oriented jurors and may alienate your favorable jurors. Do not ask for double the amount of damages you want simply because this is what you would do in settlement discussions. You are not negotiating with the jurors; your credibility is key and you must not risk losing your credibility by asking for too much money.

Before I decide on an amount to request during closing argument, I typically ask several people for their opinion and see how many people think a value is too low or too high. From talking to several people, I can get a feel of where the midpoint is and decide from there how much to ask the jury to award to my client.

Empower your favorable jurors

When discussing damages, you are not trying to convince the undecided juror as much as you are trying to empower the favorable juror to fight for your client during deliberations. By the time you present your closing argument, you will probably have a good idea of the jurors who are leaning your way or who appear to be in favor of awarding damages to the plaintiff. These jurors must fight for your client during jury deliberations, so give them the tools and the arguments to use during deliberations.

You are not presenting a statement – you are making an argument and you must *persuade* jurors that your client is entitled to money damages. Do not be shy or apologize for asking for substantial dollar figures. A criminal prosecutor's job is to convince a jury to put the defendant in jail; your job is to convince a jury to make the defendant pay money to the plaintiff. Look directly at the jurors – particularly the favorable ones – and tell them that they all said, under oath, during voir dire that they could award money damages if the evidence supported it, and now they have a duty to follow through with that promise and award those damages to the plaintiff.

Save time for rebuttal

Always reserve enough time to rebut the defense counsel's argument. When you are giving rebuttal argument, never

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simply reiterate the points you made during your closing argument. It is imperative that you specifically address defense counsel's argument head-on and show the jurors why they should not follow the defense attorney's suggestions.
I think rebuttal is extremely important, and you lose this weapon if you waste time going back over your arguments without addressing the points made by the defendant. During defense counsel's argument, make a list of the points being made and when defense counsel finishes, immediately stand up and address each of them and actually rebut them. This is a very powerful tool, and you must use it effectively.

In some cases, defense counsel will not address damages but will instead focus solely on liability and then state that since he is certain the verdict will be for the defense, he will not waste time discussing damages. This is a gift, and if it happens, make sure you discuss it during rebuttal. Point out that defense counsel has not challenged your assessment of damages so if the jury finds in plaintiff's favor, defendant does not disagree with plaintiff's request for damages.

In a case with big damages, most defense attorneys will spend time discussing damages and state that, should the jury find in favor of plaintiff, the amount requested by plaintiff is "outrageous" and instead a much smaller amount should be awarded. Defense may have presented testimony of a life-care planner, a vocational expert, and/or an economist and will point out that their experts arrived at much lower figures and that plaintiff is seeking a "windfall." The goal is to make the plaintiff seem greedy, or in some cases, make the plaintiff's attorney seem to be out for money and not the client's best interest. You must immediately stand up in rebuttal and counter these arguments. You must show the jury that defense counsel's comments are insulting and that the only reason the plaintiff is in court is because the defendant was negligent and caused the plaintiff to be injured but refused to take responsibility for its own actions.

Save some of your best argument for rebuttal. For example, during rebuttal come right out and say that the plaintiff would rather be anywhere today than in court and it is only because of defendant's wrongdoing that he is forced to be here. Your client would rather be working or fishing or riding her bike as opposed to having surgeries or going through physical therapy. Make sure the jury realizes that the plaintiff is not here for a "windfall" or to seek "big money," but instead, the only reason the plaintiff is in court is because the defendant hurt her.

Restate your dollar figure range during rebuttal

You must ask the jury to award your client a dollar amount, and you must be sincere and unapologetic when you do it. Remember to always state the amount you are requesting during the first part of your closing argument and not wait until rebuttal. But during rebuttal, state it again. Always provide them with a range of damages to consider.

Be credible and be yourself

Finally, always be yourself and be credible. Jurors these days are very educated. Most of them have seen too many movies or TV shows involving trials and closing arguments, and they will recognize any tricks you try to pull. Your credibility is absolutely priceless. Be yourself; don't try to mimic someone else's style or be something that you are not. If the jurors find you sincere and credible, they are more likely to respect what you are saying during closing argument.

Additional tips for closing argument

- Do not stand behind the podium; walk away from it and get closer to the jurors (if the judge allows it).
- Have a good outline for closing argument but not a script; do not read from a prepared argument, but follow your outline to make sure that you address every point necessary.
- Refer to your client by his name and not just "plaintiff" or "my client."
- Thank the jurors for their time and their service on the jury and let them know you realize this has been inconvenient for them but their service is appreciated.
- Never, ever bore the jury during closing argument; keep them engaged by asking a few rhetorical questions ("Does everyone remember Dr. X who testified on Monday?") or using interesting analogies.
- Remember the Golden Rule: never ask the jurors to place themselves in the plaintiff's shoes.


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