Developing the case for large economic damages

A look at the strategies and recent case law useful to maximize economic damages at trial

By Olivier Taillieu

I am a firm believer that economic damages should not dictate, or even correlate, with the non-economic damage aspects of one's case. In fact, in cases where the economic damages are very low but the human damages very high, I will often waive past or even future economic damages altogether.

However, there are cases that demand significant economic damages to provide full justice to an injured client. Additionally, some cases may have a very tenuous comparative-liability picture and therefore, your client would benefit from having a large economic damage award to collect jointly and severally.

This article addresses such cases and in it, some of the strategies that I use to do just that. Like everything else, some of these strategies may apply to some cases but not others. Nonetheless, this should provide a good set of tools for those who want to maximize the economic portion of their case,

Understand the injury

One of the first keys to developing your economic damages is understanding the full scope of the injuries at play. Some clients receive very good acute care and thus get a good picture early on of the scope of their injuries. Some clients, sadly, do not – and in fact receive substandard acute care. For those clients especially, it is of the utmost importance that all their injuries be identified, treated, and ultimately planned for.

Pay close attention to the emergency room records, create and have your client fill out a Client's Symptoms List that identifies all their ailments, communicate often with your client to make sure he or she is following up with treatment. Make sure that you discuss with your client the importance of identifying and noting all the body parts that are suffering in every physician's client information sheet they fill out. I have seen too many files where clients have omitted their low-back complaint to the shoulder surgeon, for example. By taking these measures, you can ensure to stay abreast of your client's needs and make sure that the medical records truly reflect the state of your client's injuries.

Stay current with the treatment of your client

Most of our clients are busy and have a lot on their plates. It's not always easy for them to make time to get the treatment

they need. Yet it is very important for both their recovery and their case that they do. Defense lawyers love gaps in treatment, so stay in touch with your client and make sure that he or she makes all their appointments.

Also, it is important to review all the reports drafted by the medical providers and to make sure that your client follows all of the recommendations for future treatment. There is nothing more damaging than a physician prescribing some helpful therapy only to have your client ignore it. This can actually get challenging if your client is treating by way of workers' compensation, as the Claimant's Attorney does not automatically receive the reports. Thus, although treatment may be recommended and approved, you may never know about it unless you stay on top of it. Again, frequent communication with your client will help alleviate any of these issues.

Understand the medical records

Every case should have a detailed medical chronology – preferably based on the records subpoenaed by the defense. That medical chronology serves many purposes. First, it keeps track of all the treatment, which ensures that all of the past medical care is accounted for in the case and ultimately recovered. This is particularly important if you are going to have a physician testify as to the reasonableness of the costs. You want to make it as easy as possible for the physician to have access to that information (rather than fishing through reams of papers at his or her deposition).

Second, it makes for a comprehensive overview of the medical care received and helps you identify any potential *Sanchez* issues during trial (discussed below). Third, it gives you a chance to "go deep" into the medical records and identify all the issues and recommendations made by all the providers.

Finally, it helps you identify what is potentially missing – including particular treatments, records, or bills. Use the medical chronology as a "living document" that gets updated as the treatment continues. It is probably one of the most important aspects of the damages portion of your case. If kept well, it can easily be converted into your exhibit list at the time of trial binder preparation.

Think about the future

Injuries to nearly all body parts have long-term consequences that affect other parts of the body. One of the most common examples is "adjoining disc disease" in the case of a spinal fusion. Lower-extremity injuries create low-back issues. Upper-extremity injuries can create shoulder, back, or neck issues.

In a recent trial, my client had suffered an ankle injury that will eventually require a subtalar fusion (fusion of the calcaneus bone to the talus bone). At trial, I introduced evidence that both her knee and her low back would ultimately become problematic even if she got the fusion because of an altered gait. In fact, she had already started complaining about low-back pain and she was only 22. I had a spine specialist come to trial and discuss some of these issues and make recommendations for future treatment.

Although some of these consequences may not always rise to the "probable" standard, thus making future economic damages for those ailments technically out of reach, introducing evidence of additional affected areas impresses upon the jury the severity of the injury and can help build a stronger non-economic case later.

Additionally, evidence of these types of long-term issues can support the need for less aggressive types of remedies (such as long-term physical therapy and injections) that a life care planner can include into a life care plan.

Sprinkle damage evidence through the entire trial

I try to deliver damage evidence throughout the entire trial – hopefully through every witness. That includes non-economic as well as economic damage evidence – even through liability experts.

For example, I think it's important to re-create as much as possible the chaos of a collision. Demonstrative animations can be helpful if the case is significant enough, but in my opinion are generally too sterile to really demonstrate the true force of an impact. Therefore I try, as much as possible, to have the liability experts use and rely on real life crash test data and videos as "foundation" for their opinions. The more realistic the better. I find that this gives a jury a better understanding of what happens in a vehicle when it is impacted at a significant speed.

In cases where the impact may not be so severe, I look for clues in the auto body repair records (plaintiff's and/or defendant's) to find evidence of frame damage or bent steel. If such evidence exists, I will bring the piece of metal in question and demonstrate how stiff and strong that metal is to impress upon the jury the forces involved.

Similarly, if mechanism of injury is an issue, I try to use the biomechanical expert to discuss severity of impact and the effects of force on the body. If the case warrants it, I will generally prepare an animation that focuses on the impact of the blow focusing on the body part(s) at issue. It's another way to discuss the impact of the collision on the body and if done well, will properly convey just how impactful the event was.

Additionally, I will typically go over every injury at issue and have the expert correlate how the injury happened during the crash. You can get into a lot of detail and thus get into some of the smaller, yet still significant injuries that might have already resolved by the time of trial.

I will also lay the groundwork with every physician about the severity of the injury and its effects on my client, or people in general. For instance, if relevant, I will include a discussion of the

McGill Pain Index with both my experts and the defense's experts. I will also typically ask every physician (defense or plaintiff) if the plaintiff's pain complaints are commensurate with his or her injuries. I will also ask them if my client was straightforward with the physician or whether he or she was exaggerating or embellishing.

When cross-examining defense doctors, I will talk about limitations that my client will have in the future that the physician has (hopefully) already admitted to at deposition. The point is to draw out, as much as possible, the human costs of the injury through the physical damage inflicted on my client and his or her property.

Develop loss-of-earning-capacity evidence

In my opinion, one of the most underused tools in personal-injury cases is the development of loss-of-earning-capacity evidence. A healthy human body without work restrictions will work longer, more productively, and over the course of one's life, will make significantly more money than an injured human. There is very good data available to prove that point.

Any mobility restriction will increase that gap even more. A good portion of my clients who suffer orthopedic or spine injuries tend to be involved in some form of manual labor. Having a mobility restriction will significantly reduce their ability to earn. Similarly, clients who drive for a living (especially large trucks) have difficulties maintaining that type of employment with even minor restrictions.

The census bureau data, as interpreted by a vocational rehabilitation expert, supports significant future economic damages for such injuries. Take advantage of it and make sure your client receives fair compensation for those future losses. This can be a very valuable part of your case.

Prepare for *Sanchez* objections and call the necessary witnesses to trial

A full discussion on *Sanchez* (*People v. Sanchez* (2016) 63 Cal.4th 665) is not appropriate here. Generally speaking, though, *Sanchez* stands for the proposition that an expert cannot simply regurgitate case-specific hearsay during trial. *Sanchez* takes away one of the defense's favorite tools – the picking and choosing of out-of-context statements made in medical records. In most cases, if we have prepared properly, *Sanchez* helps us.

I would caution anyone against mutually waiving *Sanchez* objections. But to successfully navigate *Sanchez*, you need to make sure that you have the right witnesses lined up. Almost any *Sanchez* issue can be avoided if the right witness is called.

I discussed, above, using the vehicle-repair records to show that a car frame was damaged, or some other metal bent. To do that, you must subpoena the repair-shop employee who wrote that report. Better yet, sometimes the defense insurance property adjuster will prepare that report and so you subpoena him or her. Your expert can no longer just volunteer that fact.

Similarly, if there is some particularly helpful information in the medical records from treating physicians early on, make sure that you depose these physicians as soon as you can by way of video deposition, along with the proper notice that said video may be used at trial. Attending physicians, fellows, interns, and residents in emergency rooms often rotate, or move out of state. If the records note a helpful fact, you will need that deposition to state that fact at trial. This applies to all treating physicians whose reports you intend to rely on.

Do not overlook imaging reports. Oftentimes, the emergency room records will incorporate the CT scan or MRI reports. That is not enough. You need to get the actual films and have them reviewed by your own radiologist or other qualified physician or depose the radiologist who has written the report. Having a complete medical chronology as discussed above will help you sort out what you have and what you still need to prove your damages case.

Use current case law to limit introduction of bad damage evidence

There is now some well-established case law that is helpful in proving economic damages in cases that involve medical care. Cases like *Howell*, *Ochoa*, *Bermudez*, *Correnbaum*, *Katiuzhinsky* and recently *Pebley* (*Pebley v. Santa Clara Organics, Inc.* (2018) __ Cal.App.5th __ (Second Dist., Div. 6)). *Pebley* stands for the proposition that even an insured plaintiff who has chosen to be treated with doctors and medical-facility providers outside his insurance plan (i.e., on lien) shall be considered uninsured, as opposed to insured, for the purpose of determining medical-expense damages. This allows you to recover the reasonable value of medical care obtained on lien and in most cases, to prevent the defense from mentioning liens altogether.

Use those cases and the arguments made within to defeat the defense's argument before trial even begins. You can make significant progress before you even pick a jury. Also, make sure that you preempt the defense's arguments that only MediCal or Medicare rates should apply, or even insurance-reimbursement rates. Preempt arguments that these insurance plans were even available to your client, and as such are not relevant to any of the issues in your case. Take advantage of the available resources either in the document bank or from other CAALA members and file motions in limine to ensure that you get to present evidence of the full value of the reasonable costs of your client's medical care. Also, file motions

to prevent the defense from minimizing your client's economic damages by relying on improper cost analysis.

If the defense is being somewhat reasonable with the cost of medical care, see if you can get them to admit to reasonable numbers for the procedures your client received during the defense doctor deposition. In some cases, their numbers will not be that different from yours and you can often get stipulations on actual numbers for trial – it becomes one less thing you have to prove and helps you focus on the other issues in your case.

Defeat defense's attempt to minimize damages

The defense will always try to minimize the value of the past or future cost of care. If by expert, the defense will typically have an expert testify to costs in the 50th or other percentile – less than full value. In one of my last cases, I explained what that means by using a graph with a standard bell curve and a line down the middle signifying the 50th percentile. I cross-examined the defense life care planner and laid out that by her calculation, my client could only afford the care given by doctors who charged less than the 50th percentile – thereby excluding all the doctors that charged more. I then asked her where she thought the best doctors stood on that graph – above or below the 50th percentile? It did not matter what her answer was. My point was made. I also made it clear that if my client chose a more expensive doctor for one procedure, he could no longer afford another doctor's 50th percentile rate due to the imbalance.

The point here is that the defense will always make cruel and absurd arguments when it comes to the care of our clients. Whatever those arguments are, take them and turn them against them to show the jury their true colors.

Provide the right context

When explaining the need for future care to the jury, make sure you provide the right context. The amount of money they award for future care or other economic damage is to provide for your client for however many years he or she has left. In some instances, that is decades. Explain that your client does not get to come back and have a second jury trial. This is all they will ever get to care for their injuries and it needs to be enough.

Also make sure that you remind the jury that the money for medical care is not for the plaintiff to have. That money must be saved and in cases where present value had to be established, it needs to be invested, to come to full fruition and provide for all the care that your client will need.

Conclusion

Not every case will have a meaningful economic damage component. For those that do, if the proper steps are taken during treatment and discovery, you can have a significant impact on the amount of such damages. Use the facts of your case to figure out what the best arguments are and develop those throughout the case, including at trial.


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