

Damages in spine-injury cases

How to argue large damages at trial, and what to be mindful of during trial to protect your verdict after trial

By Robert T. Simon

I want to start by acknowledging that yes, this article is likely going to be attached to a motion in limine by the defense bar. And I welcome it.

Everything I am about to tell you is not only ethical, above board, and proper, but should significantly increase your ability to obtain large recoveries for your clients.

So, "Hello, your Honor! If you are reading this, it is a pleasure to be in your courtroom and I promise to play by the rules of law and of your courtroom. Also, I am willing to bet that the prophylactic muzzle the defense is trying to put on me is completely improper!"

Okay. Now that the above is out of the way, let's continue.

The "do not do" list

Any trial lawyers worth their salt will tell you that it is one thing to get a large verdict, but it is quite another to protect your record and keep it. We all must be mindful of what you are *not* allowed to do during trial.

Improper preconditioning during jury selection

Disobeying your judge's courtroom rules is a good way to lose a verdict. Pay attention to them. While we all have briefs showing that we should be allowed to ask jurors how they feel about a specific dollar figure, in reality about 25% of judges will not let you do it. Section 222.5 of the Code of Civil Procedure, along with California Rules of Court, Standards of

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Judicial Administration Title 3, Standard 3.25 (f) give the court the ability to restrain any pre-conditioning of the jury. While there is nothing specific here about asking for dollar figures, be careful! If your judge specifically says this is disallowed in his or her courtroom, do not do it. It is a good way to turn the judge against you from the beginning and gives the court a peg to hang its hat on with any post-trial motion. If this arbitrary restriction is imposed by your judge, be prepared to talk conceptually about pain and suffering money damages with the jurors.

Practice Pointer: Never give a fixed number in mini opening, jury selection, or opening unless you are sure your client has not lied about anything, and there are not any potential land mines out there. You lose all credibility if you say this case is worth $10M and you will prove it to them, then half-way through trial you see a video of your client squatting 450 pounds.

Improper "Golden Rule" arguments

It is "improper to make argument to the jury that gives the impression that 'emotion may reign over reason,' and to present 'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." (*People v. Redd* (2010) 48 Cal.4th 691, 742.) It is also improper to appeal to jurors to attempt to measure damages as if they or a loved one were the injured party. (*Horn v. Atchison, Topeka & Santa Fe Ry. Co* (1964) 61 Cal.2d 602, 609.) This is known as the Golden Rule. Pretty much do *not* ask the jury to put themselves in your client's shoes. Do not ask the jury to put their Uncle Jesse or Aunt Becky in your client's shoes.

Now, recently, I have seen new-trial motions trying to overturn verdicts based on the use of pronouns! The defense bar is trying to stop us from using the word "you" in closing argument! I kid you not. A practice tip I have learned, and that I employ during my trials, is when I am telling a story to the jury, or asking for compensation, I tell them that the stories I am telling them are very specific to my client and his or her injuries only.

Punishment damages

If you are trying a case that does not involve punitive damages, or a liability dispute, a great way to get your hard-earned jury verdict overturned is to say things like "we must punish them." Or "let's send a message." Just do not do it. Please.

Large damages in spine-injury cases

I have tried about 30 spine-surgery cases in the past handful of years, learning many lessons on what is powerful to juries; what works, what doesn't, and the common mistakes. I could write an entire book on this issue, but I will try and give you a snap-chat in my philosophy and a pinch of my recipe for some "damages soup." (*I stole that term from a lawyer in my office. Thanks!*) I admit very little if any evidence during trial. I will publish a fair amount for sure, but I am a big believer in less is more.

PowerPoint and exhibit use

I am a big fan of super preparation. My PowerPoints are done in advance, shared with opposing counsel, and my trial exhibits are already done, marked, and used during expert discovery. I freely give my work product; just ask. Here are highlights of some exhibits I use in every spine surgery case:

Medical timelines – You should have one that is just black and white, of every medical visit your client ever had. Before and after the crash. To show what life has become for your client. Also easy-to-explain gaps in treatment and why. Every juror needs this visual.

Surgery illustrations – Whether proposed surgery, or one they already had, it is a great idea to invest in these for your trial. I prefer boards over animations because you can admit these into evidence and the jury can consult them back in the room with them. It is also easier for the jury to understand what happened while your expert is testifying.

Surgery reports – Actually read them because they can win your case for you. There are signs of trauma in the report. Get the surgeon to lay the foundation for their report to admit it into evidence (in compliance with *Sanchez*). Another practice point is to never have the treater or surgeon as your expert. They should always be separate.

X-Rays, MRIs, CT scan still shots – Ask your experts to pull the most powerful ones to prove your case. These are very helpful for the jury. You also need to show not only the point that proves trauma, but also the one showing the hardware now in your client's spine.

Medical bill breakdown – You should have your *Pebley* numbers broken down by provider, and have your expert go over the reasonable costs, to present to the jury. It is always a good idea to be reasonable and reduce the unreasonably high bills. Do not lose credibility over an extra $10K.

Before and after photos – You should have family photos, active photos, work photos, etc., to show how your client's life has changed.

Symbolic photos – The most powerful photos are ones your client is not in. The things he or she missed out on. A trip to Disneyland with everyone but him or her. They are photos to show the struggle. Medications lined up next to bed. Sleeping devices. Walkers. Toilet help. They are a symbol of what was taken. Her dog next to her cowboy boots. A dusty surfboard. The pristine unused Baby Bjorn carrier. To me, these are by far the most powerful for a jury. It also allows elite story telling.

Know the science

To be a master in these cases you need to learn. You should know every nuance of the spine. Know what terms mean. Be able to describe it for the jury using a spine model. You develop that trust by knowing your stuff. Attend as many expert depositions and seminars as possible and learn. We have many of our attorneys watch our videotaped depositions remotely to learn.

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Damages witnesses

Your client should never be on the stand giving the "woe is me" story. Your client's story should be somber, matter of fact, the struggle, but attempting to get better at all costs. A story of success no matter what, a story that makes the jury want to help them. The talk about their daily struggles should come from damages witnesses. These should be people who know the plaintiff before and after, and who have witnessed the pain and struggle. These witnesses are critical to your recovery. You should have co-workers, friends, family, etc. They all should have different things to talk about and use different exhibit images to tell their story.

Practice Pointer: Affirmatively disclose them way in advance. If up against a trial date, disclose them and offer them for deposition. The last thing you want is a judge excluding them for failure to disclose.

Use of jury instructions

Take the time to read the following jury instructions and make sure they are in every one of your closing arguments: CACI 430, 3927, 3928, 3905A. These must all be highlighted for the jury, to educate and empower your jury. They follow the law, you win.

Life-long chronic pain

We are not trying an isolated spine injury and surgery case. These injuries cause chronic pain, lifelong struggle, problems with family, depression and disability. The verdict rendered must be fair today, tomorrow and twenty-five years from now. You must show the jury lifetime timelines and how long your client will struggle. And what the "golden years" will be like.

Your client

You need to really know your clients to know how their injuries are affecting them. You must go to their homes. Multiple times. Look around. See that hook that makes their condition or loss special for you. This will allow you to relate to them, which will allow you to portray that to the jury. By going to their homes, you can get those symbolic photos that show the jury the real story. Believe it or not, most of the time the experts cancel each other out, and it is just the treaters, the plaintiff and damage witnesses that count. If these people are believable, the rest does not matter.

The ask

If you have prepared your case, told the story, used these exhibits, empowered the jury with the instructions that provide you the win, it is time to drive it home with the "ask." You should have credibility by now because you did not overreach. You proved everything you said you would. You know the science. The jury is ready to follow you and is looking for your advice. All you have to do is *ask*. I graphically tell them everything my client has gone through since the crash, what the future looks like for them, and I ask. Look them in the eyes, tell them this is what it is worth to suffer like your client has and will into the future. Do it with conviction and passion. With certainty.

I am not one to break it down per category. I just use whole numbers "5 million past pain and suffering, and 10 million for the future." I know what you are thinking. You read this whole article and that was it? That is your advice? Is it that simple? Yep. Jurors have no idea the value for chronic pain. It is up to the trusted professional to guide them. That better be you!

Rationalization of the ask

Usually in rebuttal, after the defense says the "ask" is crazy high, I rationalize with the jury about why it is not. Use the amounts they paid their experts. Use the value of sports contracts. Heck, they have volition to sign those contracts, and they are only for five years! Your client had no choice and it is life-long!


Simon

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