

The American way and righteousness of money damages

Seeking non-economic damages for life, liberty and the pursuit of happiness

By Nicholas Rowley

We should all believe in the righteousness of money damages. Money damages and the ability to pursue them are fundamental rights and liberties guaranteed to us in America. What is worth more? What has greater value? Our financial and economic assets or our quality of life, happiness and fundamental freedoms? In America, people are guaranteed the fundamental rights of life, liberty, and the pursuit of happiness. It is absolutely un-American to have a problem with money damages, especially non-economic damages. In this article I share my views about money damages, the process I go through when evaluating a case and preparing to talk to a jury, and the core beliefs that serve as my foundation as a national trial lawyer and civil rights advocate.

Lawyers who pursue non-economic damages are civil rights lawyers

Lawyers who pursue justice for individuals who have had their lives, liberties and pursuits of happiness taken away, damaged, or destroyed, are in fact civil-rights lawyers. Sadly, the cheesy billboards we see everywhere fail to demonstrate and represent what real personal-injury lawyers actually do and stand for. I hope to see a billboard someday that properly educates the public about what we stand for, instead of looking more like a promotion for a Subway sandwich.

Employment-law cases are founded upon violations of the Civil Rights Act because employees have the civil right to work in environments that are free from unlawful discrimination. In America, hardworking people have the civil right to be safe and protected at work and to keep their jobs so that they can provide for themselves and the people they love. When those civil rights are trampled upon or damaged, our civil justice system and civil rights lawyers

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are there to find a remedy and make things right.

For those who do not believe that personal-injury and medical-malpractice plaintiff attorneys are civil-rights lawyers, there is something that I hope you will consider. Insurance companies, corporations, and even the government value cases differently based upon the race, ethnicity, religion, sexuality, and ages of the people we represent. Anybody who does the work we do knows this truth. Despite law and jury instructions that say it's unlawful, this discrimination is an everyday occurrence in every state in this country. Anyone who denies this has little to no experience or their head is in the sand.

The defense's offer for non-economic damages on a case involving a white schoolteacher is going to be more than what is offered for an injured person who is overweight, a stay-at-home parent, and member of a minority group. It is our job as civil trial lawyers to fight against this discrimination and make sure that our clients get everything they are entitled to despite what language they speak, what color their skin is, what god they believe in, and what their gender identity or sexuality happens to be.

When evaluating damages and what a case is worth, make sure you yourself do not discriminate. If you are a lawyer who will do everything it takes to get people who are unemployed, old, who don't speak English, who are "different," as much money as the perfect plaintiff out of central casting, then you are a civil rights lawyer, and I am grateful for you.

Now that you are a fellow civil rights lawyer, let's get into how I look at the righteousness of money damages, specifically non-economic damages. Because economic damages are easy to put up on the board, I waive them more than half the time. Never value non-economic damages and the full value of a case based on what the economic damages are and stop overreaching and building economic-damages cases that the defense can tear apart; that only results in destruction of your credibility. If your focus is on the human story and fundamental human rights of people, you'll do a much better job representing those who have chosen to trust you with their cases.

Quality of Life

Life is defined as "the condition that distinguishes animals and plants from inorganic matter, including the capacity for growth, reproduction, functional activity, continual change preceding death." Then, there is "quality of life," our overall well-being that considers our physical, mental and social health. We all know what life is like when we or someone we love falls ill and is confined to a home or bedroom. We know how awful the human experience is when we are unable to function and engage in our activities of daily living, the times where life is the opposite of the pursuit of happiness. What does life mean to you? What do you love most about life? When has your life been negatively impacted in a way that limits your ability to function and be the you that you and your community love most?

Recently, I had umbilical stem cells injected into my left hip joint capsule and the left side of my low back. The pain was 10/10 for almost three days. I was given IV morphine and it didn't even touch the pain. I was unable to move by myself and had to ask others to help me lift my leg to get in and out of bed or off the couch. I was on crutches. I could not sleep. It was a horrible experience, but one that I chose to go through to hopefully lessen chronic pain that I have experienced off and on in my left lower back and hip for over 25 years. I could not play with my kids, I could not drive, I was unable to do much of anything. Life really sucked and if I had to live that way forever, I would choose not to live.

We are more compassionate and humane when it comes to our pets than we are each other. We do not allow our pets to suffer in agony; we give them a shot and put them to sleep. We would never keep a pet alive with locked-in syndrome or in a permanent vegetative state. To me, life is the ability to move my body, and to go outside. I love the outdoors and am outside whenever I get the chance. Because of the severe pain I was experiencing I could not go outside. I was trapped, imprisoned in pain. Thank the heavens it only lasted three days.

Take inventory of what adds up to personally define life for you and then do the same for the humans you represent. It is not until we understand what life means to another human that we can begin to fathom what the damage to their quality of life is. Feel free to explore what life means to jurors during voir dire and with witnesses who take the stand. During trial discuss what life is like for the humans you represent and have them and collateral sources witnesses compare and contrast what life, or rather, quality of life was like before the life-changing event. Ask yourself what the value of life and quality of life are. If you were forced to put a dollar value on a year of good quality of life, if it were your job to come up with a value, what would it be? You cannot say priceless. It is your job to come up with a number for one year of good, quality of life.

Liberty

Let's talk about this beautiful word and what it means. Liberty is the power or scope to act as one pleases, to pursue one's interests and preferences. What does an injury do to a human's liberties? When I had bouts of low-back pain, I was unable to act as I pleased and enjoy my own interests and preferences. Pain hurt my life and liberty. Pain and suffering limited my ability to positively experience life. Fortunately, after many years of core-strengthening, I rarely have low-back problems anymore, but I did live a life where I experienced damage to my experience of quality of life and liberty for many years. It was awful, to say the least, and I would have spent any amount of money, short of depriving my family of a home and good food, to not endure what I had to go through.

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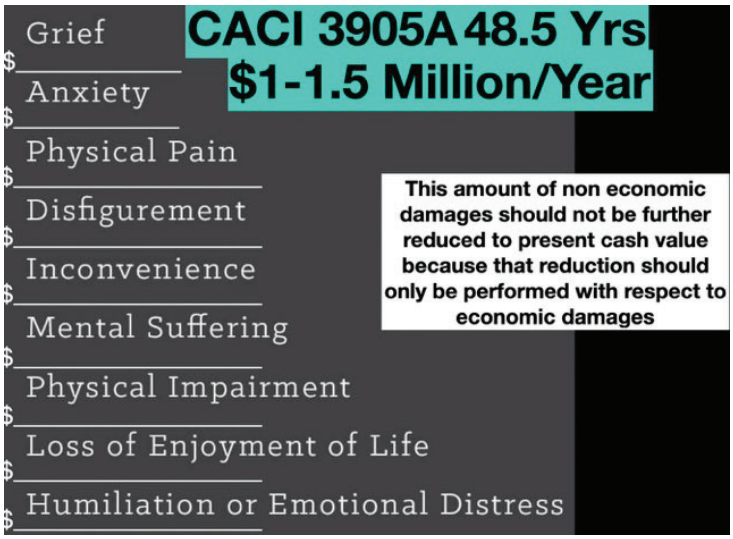
905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

ert number, e.g., "1."] **[Past] [and] [future] [physical pain/mental 'ering/loss of enjoyment of life/disfigurement/physical impairment/ nvenience/grief/anxiety/humiliation/emotional distress/**[*insert other ıages*]].

fixed standard exists for deciding the amount of these noneconomic ıages. You must use your judgment to decide a reasonable amount ed on the evidence and your common sense.

recover for future [*insert item of pain and suffering*], [*name of plaintiff*] **st prove that [he/she/***nonbinary pronoun***] is reasonably certain to suffer harm.**

future [*insert item of pain and suffering*], **determine the amount in rent dollars paid at the time of judgment that will compensate** [*name laintiff*] **for future** [*insert item of pain and suffering*]**. [This amount of economic damages should not be further reduced to present cash ıe because that reduction should only be performed with respect to ıomic damages.]]**



To me, liberty also means freedom. Freedom to do what I want with my own mind and body. The definition of freedom that aligns for me is my power, right and ability to act, speak, and think without hindrance or restraint. I have seen countless people spend days, months, weeks, years, and even the rest of their lives deprived of their freedoms. I have seen countless people who live a life that is imprisoned by pain, suffering, physical impairment, emotional distress, psychological/psychiatric injury, and disability. If you are reading this and are a lawyer who represents injury victims, you have also most likely seen humans who have suffered a deprivation of their freedoms.

Most of us have personally experienced loss of freedom and know what it is to be imprisoned in pain, suffering, physical impairment and yes, we also know what it is to be imprisoned in our minds. Freedom is a priceless asset, wouldn't you agree? What is freedom to you, your mind, and body? Roll it around in your mind, heart, your gut. Think of a place in time where you experienced liberty and freedom. Where are you and who are you with? What do liberty and freedom feel like? Smell like? Look like?

Sit outside where you have fresh air. Close your eyes. Take some breaths, breathing in for five seconds, holding for five seconds, breathing out for five seconds and holding at the bottom of your breath for five seconds. Welcome to box breathing; do it regularly, especially when you cannot fall asleep. Go to the place where you have experienced liberty and freedom in your mind and body. Find where that place is so you can go back and be in touch with liberty and freedom in the future. Write down your memory and your experience.

Now, write down what it's worth. If you were forced to put a dollar value on a year of good liberty and freedom, if it were your job to come up with a value, what would it be? Even though it's probably priceless, it is now your job to come up with a brutally honest number that represents one year of liberty and freedom.

Now let's do the reverse and feel the experience of the opposite of liberty and freedom. Go through the process again in your mind. Write down your experience where you or someone you love lost liberty and freedom.

The pursuit of happiness

"Happiness" is defined as a state of well-being and contentment as well as an emotional state characterized by feelings of joy, satisfaction, contentment, and fulfillment. Think of a time in your life where you have experienced the utmost happiness. Feel that happiness. Where are you? Who are you with? What does the air feel and smell like? How does your skin feel? Re-experience that happiness by first smiling and then closing your eyes. Go through a few rounds of the four-part five-second breathing you just practiced. When you open your eyes, write down the value of that happiness and put a dollar value on it. How much would you take to erase that experience of happiness such that you never had that experience?

Let's reverse things again and go to a place where you remember an experience that is the opposite of happiness. Where are you in place and time? Who are you with? Why is this experience the opposite of happiness? How does your body feel? How are you breathing? What are the sounds around you or is there any sound at all? This memory and experience of the opposite of happiness has already occurred in your life.

Now imagine that you are going to have to re-experience this opposite of happiness all over again. What would it be worth to you to be handed a magic wand that you could wave in the air and magically avoid this awful re-experience? What would it be worth if you could not only avoid it again but erase the experience from your past? If you had a blank check or vault of money accessible to you, what would you pay in exchange to be able to replace the bad experience with another experience of pure

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happiness? When a person's mind and/or body are damaged so is their ability to pursue and experience of happiness. Happiness, along with life and liberty/freedom are fundamental non-economic assets.

CACI 3905A

When handling a civil case for an injured/damaged human or a family who has lost a loved one (wrongful death cases) we should always begin by looking at the jury instruction on non-economic damages. In California the jury instruction for non-economic damages in a personal injury case is 3905A (see above).

The equal trade dollar value of pain

The opposite of back pain for me is a good therapeutic massage which costs at least $100 per hour. When I have experienced bad bouts of low-back pain, if I had the money available, I would certainly trade $100 for an hour of full relief from that pain. There is no doubt that I would trade $2,400 to take that pain away for 24 hours, if I had the money. In my first book, "Trial By Human," I wrote about the importance of Golden Ruling yourself, which is what I have been doing since the beginning of my career.

I remember a judge pulling me aside after a trial and curiously asking me: "Mr. Rowley, how did you come up with the numbers you asked the jury for." I responded, "Your Honor, I didn't ask the jury for anything, asking didn't work! What I did was tell the jury what the case was worth and why. The numbers added up to the amount of money I would personally consider fair and reasonable if I had to endure the same injuries and damages and go through the same horrible experiences my client has had to endure and will have to experience for the rest of her life."

It is absolutely improper to tell the jury to put themselves in the same shoes as your client and to deliver the verdict they would personally want. But it is not improper to tell the jury that reasonable compensation is the amount of money that *your client* would take in exchange for going back to the scene of the injury and waving a magic wand to undo everything, and experience the opposite of what that human has had to experience and endure during the relevant damages time period.

We therefore take pain and break it down by the hour, or the week, or month, or year, and decide what the reasonable dollar value is. It must be an equal trade in dollars, compensation, for this specific item of harm to be reasonable. If the pain is worse during certain times of the applicable damages period, then the number should be more. Be open and honest with the jury about the pain and never make it out to be worse than it really is. Tell the jury what the pain is worth. Tell the jury the why and how behind your calculation. Tell the jury that anything less than an equal trade in terms of dollar value, is not reasonable compensation – therefore, a verdict for less than full justice will be an injustice.

The equal trade dollar value of suffering

Suffering is different than pain. We euthanize our pets to end their suffering. In hospice, we give the people we love morphine to quicken their passing and lessen their suffering. It's a mistake to take pain and suffering and link them together. Pain certainly causes suffering, and they often go hand in hand, but they are two different things.

We must go through the same analysis with suffering that we have with pain to determine what dollar amount is equal to reasonable compensation. When I was experiencing the hip pain after the stem cells were injected, I was not only in pain, but I was also suffering. The pain prevented me from being able to sleep. The medication I was on stole my appetite. I was unable to shower and bathe like normal. I couldn't play with my kids or go outside for a walk. I was bed- or couch-ridden, and it took a heck of a lot to get me from one spot to another. Life sucked for those three days because I was suffering.

I had to euthanize a dog last year because he kept getting urinary tract infections that would spread to his kidneys. His kidneys were the size of a small cat. The vet told us that he would continue to suffer and experience pain and that there was nothing that could keep his kidneys from shutting down, short of having the dog live on IV antibiotics. Yama was suffering and the poor pup had no idea why. His tail would droop, and he would become lethargic, and he would look at me with these sad eyes. The more time we kept him alive, taking him back and forth to the vet, the more he suffered. Suffering is the opposite of happiness. Find the stories of suffering that illustrate what your clients have gone through. Discuss suffering with lay witnesses and expert witnesses and put this separate item of non-economic harm into context.

Determine the equal trade dollar value of each and every separate item of non-economic harm

Cement in your mind and belief system and make sure to tell the judge and jury that CACI 3900 says a verdict *must* include an award for each separate item of harm experienced by your client. Above is a slide from my last jury trial against Dana Fox, Mike Schonbuch, and Eddie Ward, where the top offer before trial was a few million, but the verdict was more than four times that. The ultimate result was many millions, and an agreed payout of much more because of 998 prejudgment interest and costs.

Go through the same valuation process for grief, anxiety, disfigurement, inconvenience, mental suffering, physical impairment, loss of enjoyment of life, humiliation and emotional distress as you separately do for pain and suffering. Bring non-economic damages to life by breaking each and every separate item of harm down and providing the jury with a

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separate definition and real-life examples of what the humans you represent have had to live with. Make sure to tell the jury that a verdict that does not include a dollar figure for each and every separate item of harm is an unjust and unreasonable verdict. Jurors have a tough job to do, but my experience is that they make the right decision most of the time, especially when they are given what they need to do justice.

The importance and appropriateness of addressing money damages during voir dire

Lastly, discussing money damages and ranges of dollar figures in voir dire is absolutely essential to ensure that you have a fair and impartial money damages jury. Sadly, a minority of judges in California will preclude lawyers from discussing any dollar figures or money with jurors during jury selection. There are also a few judges who even preclude lawyers from telling jurors what the non-economic damages verdict should be in opening statement. These judges are wrong. These judges are either uneducated or biased, in that their rulings help the defense greatly.

Precluding lawyers from discussing money during voir dire and telling jurors what the damages verdict should be during opening statement will hurt the plaintiff's case because prospective jurors who have prejudices and attitudes against large non-economic damages verdicts end up getting on the jury and become angry when they hear large dollar figures for the first time in closing argument.

I have had jurors tell me at the end of a trial that they would never have agreed to sit on the jury had they known the verdict we were swinging for was millions of dollars. I have written on this specific topic before in *Advocate* and have received great feedback from judges who read the article. Judge J. Stephen Czuleger, one of the longest-sitting and most experienced trial judges in California, addressed this important topic in response to defense counsel Dana Fox's inquiry (Mr. Fox was hoping I would be precluded from discussing dollar figures with jurors).

Judge Czuleger's words are something I hope other judges will listen to because he correctly states, on the record, that there is a great danger in precluding lawyers from discussing dollar figures with jurors who might have a visceral reaction to large amounts of money justice. Here is the transcript of that recent discussion, and the words from his honor on January 14, 2025:

> MR. FOX: What's the Court's position on Counsel indoctrinating or using or preconditioning numbers in voir dire?
>
> THE COURT: Do I allow damages to be brought up, numbers?
>
> MR. FOX: Yes, I would love to know.
>
> THE COURT: The answer is yes, I do. I know there's a split of feelings. As long as it's not a – you're not arguing that this case is worth $20 million. I think it's appropriate to be using some figures. The reason is a fairly simple one. Some people, the thought of awarding $10,000, they're aghast at that. And you need to get some kind of response. Is that a lot of money to you? Other people will say, $100 million, what's the big deal?
>
> So, I don't allow – it's usually Plaintiff – to argue, we want this amount of money, but *I will allow in general terms figures to be used to see if there's a visceral reaction from the jurors.*
>
> MR. FOX: In the context of how it's asked, usually when I hear it's asked, or the objection is, we believe the evidence will support a finding of "X" million dollars, and does anyone have a problem with that?
>
> THE COURT: The way to ask it, I think, is if we were to talk about this case being in the millions of dollars, will that offend any of you?
>
> Would the fact that the Plaintiff believes – well, I don't have a problem with figures being used as long as it is not an argument, that you're not arguing it, but I don't have a problem with the figures, in general, being used.
>
> MR. FOX: In general, I don't either.
>
> THE COURT: Yeah. If someone says, we're going to ask for millions or tens of millions, that's different than saying, we are going to ask for $62 million and we think the evidence is going to support $90 million. Who couldn't do that?
>
> That, I think, becomes asking for them to commit to an outcome and that's what's improper.
>
> THE COURT: I'll –
>
> MR. ROWLEY: That's not what I'll be doing.
>
> THE COURT: What?
>
> MR. ROWLEY: That's not what I'll be doing.
>
> THE COURT: Oh, then we know. Then you pop up and you say, if there's – if there's no evidence to support that there should be any damages awarded, could you come back and award no damages. So – but, no, I think it's appropriate. *I know some judges think no figure should be used. I think that leaves a lot – an awful lot of danger because you've got people out there that have varying views of money*. [Emphasis added.]

Remember, section 222.5 of the Code of Civil Procedure expressly directs that "the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court." Plainly, this includes probing the prospective jurors' "views of money" as Judge Czuleger correctly framed it.


Rowley

Nicholas Rowley is an award-winning, national trial lawyer, a published author, national speaker, and founder of Trial By Human, a program dedicated to helping people become better trial lawyers, and even better humans. Nick dedicates his time and resources to protecting and advancing our justice systems in America.

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