



PRESENTING AND A DAMAGES

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Asking a jury for money for “pain and suffering” can be intimidating. How do you prove intangible, squishy, subjective, and mostly invisible damages to a group of twelve strangers and also get them to care enough about a dispute between parties they have never met to quantify those damages into a significant amount of money?

Early on in your case, start developing your themes and the evidence you will use to prove your client’s non-economic damages. By laying the foundation and providing the evidence of your client’s non-economic damages early in the case, you will be better prepared to articulate a fair and reasonable basis for a significant verdict when the time comes.

I have tried several spine injury cases in the past couple of years - big and small. Along the way, I have learned some lessons on what works and what does not work. Below are some practical tips that you may find helpful to prove large non-economic damages in your next spine injury trial.

ARGUING NON-ECONOMIC IN SPINE INJURY TRIALS

Review the Jury Charges on Damages

"Actual" damages in South Carolina are comprised of economic and non-economic damages. Economic damages, like medical bills and lost income, have a readily ascertainable monetary value that do not require a law degree to prove. Your client hires you, in large part, to obtain the fair value for the harm that cannot be seen by the naked eye. Early in the case, identify which elements of non-economic damages permitted under South Carolina law apply to the case. Most judges will instruct the jury that they may consider all of the following items to compensate your client: disfigurement, loss of family services, deprivation of normal life expectancy, alteration of lifestyle, psychological trauma, mental anguish, mental distress, apprehension, anxiety, emotional injury, psychological injury, depression, sexual dysfunction, pain and suffering, and loss of enjoyment of life. ¶ 13-3 Damages - Elements of Actual Damages in Negligence Cases, Anderson, S.C. Requests to Charge - Civil, 13-3. It is proper for the jury to consider and award past, present and future damages for each of those items. Look up the definitions of each category and see how they apply to your client. Then, ask your client for detailed examples of situations where he struggled due to his injuries. The more specific the examples are, the better you will be able to illustrate the harms and losses and bring them to life for the jury. As the case goes on, see if those issues get better, worse, or stay the same. At trial, you can share how somethings got better, and how some did not, despite the fact that your client did everything that his treating physicians asked him to do.

Lay Witnesses

No one wants to hear a plaintiff complain on the witness stand. Jurors like underdogs. Jurors like people who have gone through adversity and made the best of it. The best way to tell your client's story is through other people who know him from different areas of his life.

Ask your client to identify people who knew him before and after the incident. These people must be credible, articulate, and make a good appearance in front of a jury. These people can be the most important witnesses in the case. Competing experts can cancel each other out. Many jurors may make decisions based on who they like, believe, and trust. Ordinary, everyday people - with no dog in the fight - can carry the day.

Explain to the lay witnesses where they fit in the grand scheme of the trial. It is incumbent upon you to screen these individuals, meet with them in person, and make sure the stories they tell are consistent and not cumulative in light of the other lay witnesses. Identify them in discovery responses early so that the defense has an opportunity to take their depositions, if they elect to do so.

At trial, its usually wise to call several damage witnesses, but try to limit the damage testimony from your client's family members to only one or two people. The defense will suggest that family members are biased because they may receive a financial gain from the verdict. This is why neighbors, church members, and friends can be great witnesses. Neighbors, who may not be

especially close with the plaintiff, may testify how they have observed him struggle to get in and out of his car, or how he stopped mowing the lawn, or how they do not see him taking his bike out any more.

Co-workers and supervisors see your client on a daily basis. These potential witnesses can articulate their observations about your client's work ethic. They can testify about how his injuries have interfered with his work. After all, we work to live - we do not live to work. There is dignity in work. Physically demanding jobs are hard enough without underlying spine injuries. Co-workers can also share how your client has tried to work through the pain, or embarrassingly asked for help for a small, yet physically demanding task. Did they hear your client cry out in pain, or could they simply see it on his face? Has your client's demeanor changed? Is his attitude now more negative? Is he quick to anger or easily frustrated now because of the underlying injuries? If your client is gutting it out every day at work, does he have anything left in the tank when he gets home? Or does he try to recover for a few hours before bed instead of using his free time for what he loves to do? There is a monetary value that can be assigned to all of those negative changes.

Confirm that these witnesses can explain there was an immediate onset of pain at the time of the incident. Establish that your client was healthy, happy, and active before the incident. Now, the situation is very different. Have these witnesses explain what the plaintiff can do, what he struggles with, what he avoids doing, and how he is fatigued, sore, or in pain after attempting to do certain activities. If you are able to find a witness who only knew your client after the incident, have her testify about her impressions of your client after some of the other lay witnesses. The jury will reach their own conclusions by comparing the before witnesses with the person who only knew your client after he was injured. You do not need to tell the jury what to think. They will get it.

Photographs

As the saying goes, a picture is worth a thousand words. Give the jury something to look at as you tell the story through testimony. Obtain pictures of your client before and after the incident. At trial, you can have witnesses explain where the picture was taken, who is in the picture and what is going on in the picture. Pictures and the accompanying stories behind them show that your client is a real person with a real life outside of the courtroom, not a greedy opportunist as the defense may want the jury to believe.

Opening Statement

Your opening statement is an important time to begin framing support for non-economic damages. Typically, after establishing the evidence you intend to present on liability and medical causation, you should spend a significant amount of time in your opening statement explaining the evidence that will prove your client's non-economic damages. Many lawyers spend only the last few minutes of opening statement on non-economic damages. That is a mistake. It is usually the most disputed yet most important part of the case. The amount of time you spend on an issue is an indication to the jury of what you think they should spend their time evaluating.

Most jurors have no idea how to evaluate non-economic damages. However, it is the jury's job to assign a monetary value to them. You can alleviate some of the jury's anxiety about its task by reminding them that, at the end of the case, the judge will instruct them on the law and the things they can consider in reaching a verdict, but along the way, you will show them evidence to support a non-economic damage award. In your opening, it is helpful to specifically tell the jury which witnesses will be testifying about non-economic damages, what those witnesses will say, and why they may want to listen closely to the testimony. Try to use the language of the expected jury charges so it is easy for the jury to apply the facts to the law in the deliberation room. Also, explain how that evidence will meet the burden of proof necessary for the jury to award money for non-economic damages.

While it is important not to argue your case in an opening statement, you should tell the jury that you believe the evidence will show that **the value of your client's harms and losses are far more important to him than the amount of the medical bills.** Inform the jury that in closing, both sides will share their thoughts on how to measure and evaluate the damages, but it will be completely up to the jury to make the decision.

Discuss Money in Opening

You must explain to the jury that you are there for money. That is the truth. Do not hide from the purpose of the trial. Embrace it. How and when you address the issue of money will depend on your case and your personal style, but if you do not address money in your opening, the defense attorney certainly will. In his opening statement, the defense attorney will tell the jury that the trial is "all about money." While he is right, the defense attorney's ability to frame the issue of money in the minds of

the jurors - before you do - can be damaging. The defense attorney will also likely suggest, directly or indirectly, that you and your client are unreasonable, that you have sued the defendant to take his money, the case has questionable merit, and that you and your client forced the jurors to take time away from their jobs and families because both of you are greedy. It is the primary theme of the defense in nearly every case. Do not let the defense portray themselves as the victim, and do not let them convince the jurors that they, too, are now victims of your client's lawsuit.

Get out in front of the money issue and diffuse it in your opening statement. One approach used by legendary trial lawyer Brian Panish, of Panish, O'Shea and Boyle in Los Angeles, California, is to explain to the jury that you are there to simply collect a debt. A debt has been created and a debt is owed. You may explain:

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Just like in a business or contract dispute, where one business says the other owes them money, we are here because the defense owes us a debt. In fact, the defense agrees there is a debt, they just dispute how much they should have to pay. Your job, as jurors, is to assess a fair and reasonable value of the debt. My job, as the attorney, is to present evidence in order to collect what we believe is the full value of the debt. The parties could not agree on the amount of the debt before trial, so now we need you, the jury, to appraise the fair market value of the debt. In an injury case like this one, the debt is the value of the "harms and losses"¹ inflicted on my client's health, well-being, and ability to live his life without pain. That can sometimes be difficult to quantify. And really, we do not need you to add up all of the medical bills and lost income, that is simple addition.² What we really need you to do, and what we expect the judge will tell you one of your jobs will be, is to determine the amount of the debt that is most disputed – the non-

economic damages – through testimony from the people that know my client and observed the negative consequences to his health and well-being. To prove those damages, we will show you photographs and tell you about his life, not for sympathy, but to help you evaluate the fair-trade value of his damages. In order to know what a man has lost, you need know what his life was like before the incident: how he lived, how he operated in his daily activities, how he did his job, what he liked to do for fun, and how he spent time with his family. The evidence will show that those are the things my client valued most in life, and you will be presented with evidence to prove how those things were taken away from my client due to the defendant's negligence.

When the issue of non-economic damages is framed in a way that provides a rational basis for non-economic damages from the outset, the jury can then assess the evidence through that lens as the evidence comes in.

Suggesting a Specific Number in Opening?

There are many different opinions as to whether you should broadcast the amount of money you will ask for in closing argument during your opening statement. Some attorneys feel strongly that you must tell the jury that you are seeking a specific dollar amount, or at least a range. Others think that is risky. Judges may have differing opinions on what you can and cannot say. However, you can always tell the jury that at the end of the case you will be asking them for an amount of money that matches the level of harms and losses caused by the defendant. Nothing more, nothing less. Anything else would not be justice. If you intend to ask for six or seven-figures, but do not feel comfortable giving an exact number, you may consider telling the jury in the opening statement "we believe the evidence will show that at the end of the day the damages are in the millions of dollars" or "a number many times greater than the medical bills" to set the tone.

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Trial Presentation

Typically, your client should not be the first witness called to the stand. It helps to develop the story of damages through the doctors and the lay witnesses before your client testifies. After the doctors and lay witnesses testify, and the jury has had a chance to hear what they had to say, your client will not be forced to “complain.” Instead, your client can testify about what he still does despite his injuries. He can confirm and elaborate on what the other witnesses said. He can explain to the jury that he tries to do the best that he can under the circumstances. A plaintiff that tries to make the best out of a bad situation can motivate the jury to award non-economic damages. Many successful trial attorneys now believe you should spend time with your client outside of your office. I recommend you make time for that prior to trial. Have your client over for dinner. Go to your client’s house and spend time with him and his family. Listen to their stories. Get to know them. The more you can understand and connect with your client and what his life is now like, the better you will be able to communicate the story to the jury.

Visual aids are helpful. While you may elect to publish documents to the jury to aid with witness testimony, these documents do not necessarily need to be admitted into evidence. Most jurors are not accustomed to making decisions by reading medical records and bills. Most jurors will remember visual aids. They also like to “size-up” the witness, listen to what they have to say, and come up with their own evaluation. People believe their own conclusions far more than what they are told they should believe by others. This is especially true with lawyers. Your job during trial is to provide the jury with the ammunition that they need to reach their own conclusions in your favor, not tell them what to think.

Medical Timelines

A medical timeline does not need to be fancy. Create a timeline for before and after the incident. Large gaps in time before the incident with little or no medical appointments followed

by 50+ medical appointments after the incident shows a real change in your client’s life. Each appointment represents not only a continuation of ongoing pain and limitations, but also shows each time your client drove to the doctor, waited in the waiting room, filed out forms, underwent an examination and/or treatment, and drove home. Again and again, day after day, year after year. Would somebody faking or exaggerating his injuries go through all of that? Would someone who is not getting any relief after 50+ appointments continue to keep going? Or would he stop and try to live with the pain? If gaps in treatment are an issue in your case, use the timeline to point out what was going on and why the client stopped getting treatment. Usually, there is a very rational explanation. The insurance adjuster and defense attorney may not acknowledge it, but the humans on the jury know the real-life issues that might have caused your client to stop going to the doctor for a period of time.

Medical Illustrations

A black-and-white MRI scan may be difficult to read unless a disc herniation is huge. Even so, the definition and ability of the jury to accurately observe a large disc bulge may be compromised by the courtroom equipment or their vantage point. An MRI scan that is colorized to enhance the affected region, and to educate the jury on the anatomy and mechanism of injury, is an effective tool to explain your client’s diagnosis.

Surgical Animations

Similarly, if your client has undergone a surgery, a surgical animation can be a useful tool to help explain to the jury the nature and extent of the surgery. Telling the jury that your client had a neck surgery is not particularly informative. It does not convey the substantial risks and intricacies of what was done to your client to try to fix the harm that the defendant caused. A microdiscectomy is different than a three-level fusion. Most jurors may not understand or care about the highly technical medical testimony, but anyone can understand what they see with their eyes when a doctor cuts a person’s neck open and implants hardware.

Symbolic Imagery

In addition to photos of your client before and after the crash, symbolic imagery can be very powerful. Robert Simon, of the Simon Law Group in Newport Beach, California, suggests using a photograph of your client's medicine cabinet. A picture depicting bottle after bottle of pain relief medication, anti-inflammatory medication, sleep medication, etc., helps convey the daily and tedious requirements that your client must now incorporate into his daily life. A picture from a family camping trip that your client did not attend because he cannot sleep on the ground, or a picture of a family visit to a theme park when your client did not ride the roller coasters because of his spine injury can help illustrate the loss of enjoyment of life.

Closing Argument

By the time you reach closing argument, all of the heavy lifting is done and your job is simply to confirm the beliefs that the jury has hopefully already reached on their own. Now is the time to motivate and explain why the jury should award a significant amount of money.

If the court provides you with the jury charges before your closing argument, carefully review them and use them in closing. Be clear in telling the jury that the court will instruct them on the law, but explain and educate the jury on how the charges apply to your case. Explain how it is appropriate for the jury to award a specific amount of money for each element of non-economic damages – and how this is the law, not just what a lawyer is asking them to do. The sum total of those numbers can quickly amount to a very large verdict. Past damages may be smaller because they have only lasted a few years. If your client has a permanent injury and a life expectancy of 20, 30, or 40+ years, a small yet reasonable number multiplied over those years can be suggested as a fair number for a lifetime of hardship.

Spine injuries often cause a lifetime of chronic pain. A timeline showing the date of the incident, the duration of the damages up until

the point of trial, and the lengthy duration of your client's life expectancy can help the jury visualize why a large amount of money is appropriate compensation for a permanent injury.

There are many ways to quantify non-economic damages. Using analogies, per diem arguments, various damages models, and other formulas can be used to suggest why you believe the case is worth a specific dollar amount. While not discussed at length here, there is no one-size-fits-all approach. Damages 3, by David Ball, Don't Eat the Bruises, by Keith Mitnik, and many other resources provide creative ways to quantify damages.

Whatever method you decide to use, it is important to remind the jury that you are only providing your suggestions, and that whatever they decide is solely within their purview. "There is no impropriety in counsel's use of a blackboard, during summation, for the purpose of fairly illustrating points that are properly arguable. (footnote omitted). However, the jury should be instructed that the calculations made on the blackboard are to be considered as merely argumentative, and not as evidence." [The Lost Art: An Advocate's Guide to Opening Statement and Closing Argument, by Judge Joseph F. Anderson, Jr., (Fourth Edition), p. 119 (citing *Johnson v. Charleston & Western Carolina Ry. Co.*, 108 S.E.2d 777 S.C. 1959). As a trial attorney you can offer your opinion regarding the value of the case, but make it clear that it is only your opinion and that the jury's job is to determine the value based solely on the evidence. While it may seem obvious that you are offering your opinion on the case value and not instructing the jury on the law, do not give the defense attorney a basis to interfere with your closing.

Final Thoughts

No book or seminar can substitute for actually trying cases and getting in front of a jury. You must be confident in whatever amount you ask from the jury. If you have any doubts or reservations about the amount, even if you try to hide it, the jury will sense it. You cannot fool them. Do not ask for a number that you, as a juror would, not award. Explain why you believe that the number you are asking for is fair and reasonable. If you have prepared your case and told the story of your client through the witnesses and exhibits, the hard work is already done. Closing argument is not the time to rehash everything that happened at trial. It is not the time to address every single point the defense raised. Spend the necessary time to go over the strong points of your case and explain how you have met the burden of proof, despite the defense arguments. If you proved everything you said you would in opening, and you maintained your credibility, the jury will be open to listen to you and consider your recommendations about the value of the non-economic damages.

That's it. There are no magic words or special formulas. Be honest, do not violate the "Golden Rule" and ask for a fair and reasonable amount of money with confidence. Acknowledge that sometimes what is fair and reasonable is a very large number when the injuries and damages are significant. If you ask for a large number, tell the jury that you know it is a lot of money, but a significant injury cannot be compensated with an insignificant amount of money.

I hope the ideas set forth in this article help you in your next spine injury trial. Go try cases. Fight the good fight. Be honest, honorable, and fair, and have faith in the best civil justice system in the world.



¹ See *Damages 3*, by David Ball.

² See *Don't Eat the Bruises*, by Keith Mitnik



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Mark Bringardner is a trial lawyer at Joye Law Firm in North Charleston, South Carolina, and is the host of "The Sidebar" Podcast. From 2016 to the present, Mark has been listed as a "Supers Lawyer - Rising Star". He has also earned the distinction of being named in the Top 40 under 40 and the Top 100 Trial Lawyers in South Carolina by the National Trial Lawyers. Mark is licensed in South Carolina and California.