



PRESENTING AND A DAMAGES

By: Mark Bringardner, Esquire
Joye Law Firm, North Charleston

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:

DID YOU KNOW?



\$3,000 ANNUALLY
(CAN BE CHARGED MONTHLY)

- ★ 50% discount on SCAJ Convention and Auto Torts Registration fee
- ★ Invitation to December Legislative Auto Torts Breakfast
- ★ Invitation to SC Legislative Leadership Luncheons
- ★ Opportunity to be selected for Ritz Carlton Club Level room at the SCAJ room rate for Auto Torts Seminar*
- ★ Recognition by name and photograph in the SCAJ quarterly magazine and all seminar manuals
- ★ Recognition on the SCAJ Website
- ★ Appreciation trophy and lapel pin for display in your office



\$2,000 ANNUALLY
(CAN BE CHARGED MONTHLY)

- ★ 25% discount on SCAJ Convention and Auto Torts Registration fees
- ★ Invitation to December Legislative Auto Torts Breakfast
- ★ Invitation to SC Legislative Leadership Luncheons
- ★ Recognition by name in the SCAJ quarterly magazine and all seminar manuals
- ★ Recognition on the SCAJ Website
- ★ Appreciation trophy and lapel pin for display in your office

**Limited number of rooms available.*

Upgrade your Membership Today!