



Preventing Nuclear Verdicts: Argue Pain and Suffering

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Webinar

Narrative

I. Mitigate Damages and Defuse Anger

Defense attorneys have watched for years as creative plaintiff's lawyers have manipulated juries into giving out larger and larger verdicts in even the most benign cases. Although jury verdicts have skyrocketed over the years, the defense industry has not changed its approach to defending cases. Defense attorneys continue to fight everything at all costs and shy away from the certain aspects of their cases—particularly, damages.ⁱ

Anger is the number one motivator of runaway jury verdicts in America. When juries sympathize with plaintiff, they may be more likely to give plaintiff a favorable verdict. However, when juries become angry on behalf of plaintiff, those verdicts may become nuclear, as juries take out their anger on defendant. Anger causes the jury to pivot from the case-specific evidence and focus on punishing a "bad" defendant.ⁱⁱ

Tyson & Mendes methods provide successful strategies defense lawyers and adjusters should use in every case. The insurance defense industry is a slow-moving behemoth and does not quickly embrace change. In fact, insurance adjusters and defense counsel regularly receive pushback for attempting to make any changes to the traditional method of defense in a jury trial... even when the traditional methods do more harm than good.

a. Argue Noneconomic Damages

If there is no pre-trial report, then get your team and defense lawyers thinking about all the things their opponent is going to use against them in an upcoming trial. Start the process of change, today!

Testimony regarding plaintiff's pain and suffering will incite the jury's sympathy towards plaintiff and anger towards defendant. Plaintiffs' attorneys will take advantage of plaintiff's pain and suffering as an opportunity to stoke juror emotions and provoke a nuclear verdict.

The largest component of most runaway jury verdicts is often noneconomic damages, or "pain and suffering." This is the great unknown. How does one assign a value to a human life, a

disfigurement, a leg, or a back? What strategies can defense attorneys use to argue against pain and suffering?

No one questions why a seriously incapacitated plaintiff receives an award for millions of dollars for future medical care—someone who is seriously injured should have their medical needs covered. However, it is alarming when plaintiffs are awarded tens of millions of dollars for pain and suffering which seems out of proportion to their physical injuries and necessary treatment. This is a runaway jury verdict.

Despite defense counsel's best attempts to avoid the topic, defense attorneys will have to argue damages in almost every trial. This may involve disputing the extent of plaintiff's injuries, whether they needed the claimed medical treatment, and whether they will need future treatment. Why not also argue the biggest component of most catastrophic injury cases? Argue the value of a leg, or a brain, or a life. It is possible to make these arguments in a tactful, compassionate way which raises the issue of damages without devaluing a human life. Do not leave the biggest component of your case to plaintiff's attorney and the jury!ⁱⁱⁱ

II. Always Give a Number

Always give a number to mitigate exposure—even when seeking a defense verdict. Give it early, give it often, and never increase it. Providing an alternative gives the triers of fact something to hang their hat on if they believe plaintiff's number is too high. They are not familiar with values, which means they often are not comfortable selecting their own number. Even if arguing for a defense verdict, giving a number provides an alternative for consideration and can be clarified as presentation of a ceiling only, with the defense verdict as the floor.^{iv}

a. Psychological Studies

Plaintiff's attorneys often use psychological tricks to control the jury's interpretation of the evidence presented during trial. For example, plaintiff's attorneys use the psychological effects of "priming" and "recency bias" during their opening statements to sway the jury towards a plaintiff-friendly verdict from the first minute of trial. These psychological weapons, typically used by plaintiffs' counsels, have specific and targeted effects on jurors and their decision-making. "Priming" is a psychological phenomenon where individuals tend to place more importance on the pieces of information they hear first. These early bits of information "prime" the listener, setting the stage for how they will interpret whatever comes next. Plaintiff's attorneys use this tactic on juries by beginning their opening statement with a dramatic story regarding plaintiff's injury, effectively "priming" the jury to vividly recall details of plaintiff's injury throughout the duration of the trial. Plaintiff's attorneys also employ the "recency effect" during opening statements, where a listener is more likely to recall information they just heard. Plaintiff's attorneys use this psychological weapon in an attempt to weaken the defense's opening before it even begins by ending their opening statement with powerful language about plaintiff's injury and defendant's fault. This tactic forces the defense attorney to begin their opening statement while the jury is still ruminating on the possibly graphic nature of plaintiff's injury.^v

Another psychological technique used by plaintiffs is anchoring and adjustment, which influences the way jurors assess estimates, or damages. “Anchoring” is a psychological tactic which influences how people judge the value of money. When trying to determine the appropriate valuation for an item, people often start with a suggested value (the anchor), then negotiate up or down from there (the adjustment). The sticker price of a new car, an offered starting salary, and the listed price of a house are all examples of “anchors.” Even though these items are typically negotiated, the ultimate price always stays fairly close to the anchor price. Plaintiff’s attorneys use this same tactic during trial. For example, plaintiff attorney might say the number “\$50 million” repeatedly throughout trial. Later, while the jury is deliberating on the proper calculation of damages for the trial, the jury may first think of \$50 million.^{vi}

To combat the effects of plaintiff’s tactics including anchoring, it is important to remove the anchor and provide a counter-anchor by giving a defense number. When giving a defense number, counsel must give it early, often, and the number must never go up. In trial, this might mean telling the jury we have an obligation to argue liability, causation, and damages. Defense counsel could say, for example, “We do not believe you will ever get there, but if you find our client is liable, the evidence shows the reasonable value of plaintiff’s claim to be X.” Defense and their counsel should then explain how the evidence supports this new number and continue to return and repeat the number throughout trial often. By providing a defense number, the defense will be able to effectively combat plaintiff’s attempt to anchor the jury.

For example, imagine a case in which plaintiff’s attorney continually tells the jury plaintiff’s damages should be \$50 million. The jury does not totally buy plaintiff’s argument, but they do believe defendant was somewhat negligent, and want to award plaintiff a small award as a result. If the jury has only ever heard plaintiff’s attorney say the case is worth \$50 million, the jury may decide to cut the damages by half, and the jury may determine \$25 million is an appropriate calculation of damages.

Now imagine the same case, if the defense attorney had provided their own number early and often. The defense attorney argues the case should only be valued at \$2 million. Now, when the jury is deciding the amount of damages to award, they will be more likely to consider a much smaller sum. By providing a defense number, the defense can successfully counter plaintiff attorney’s strategy, and help the jury find a more realistic, reasonable calculation of damages free from psychological tricks and manipulation.

III. How do we come up with a number?

a. What Can You Do?

Tyson & Mendes developed a framework for arguing general damages. This framework is a critical component of the firm’s defense philosophy to avoid runaway jury awards. The key to arguing personal injury damages is to put the value of money in a common sense perspective for the jury and later, if necessary, the judge. This is accomplished by developing and arguing a defense damages number from jury selection through closing argument, even when liability is contested, and a defense verdict is sought.^{vii}

IV. Argue Pain and Suffering

Pain and suffering is typically the largest element of nuclear verdicts. Plaintiff's counsel typically argues pain and suffering by itemizing each element of damages. Plaintiff's counsel also argues pain and suffering by answering ads and framing large sums of money in abstract terms. They will provide examples such as stealth bombers, Picasso paintings, and compare plaintiff's value of life to those of famous athletes and celebrities.

a. How Does the Defense Traditionally Argue Pain and Suffering?

The typical defense approach in a runaway jury verdict is to ignore pain and suffering. When a defense attorney does argue noneconomic damages, he or she typically tells a jury to follow the law and damages should be fair and reasonable. This is not an argument.

b. Two Elements

So how should the defense argue noneconomic damages in a products liability case? Here are two methods to start:

First, the defense must discuss with the jury the impact of the accident on plaintiff's life—what is plaintiff's life really like after the accident?

Second, the defense must argue to the jury the impact of money on plaintiff's life—what is the value of money to plaintiff? Defense counsel must show the jury how plaintiff's life will be made whole by the defense number recommended for pain and suffering.

Defense counsel must begin using these two methods early in the case during discovery so it becomes incorporated into the defense narrative. If the defense uses this strategy, a jury will have a clear path to returning a just and reasonable verdict, if they even get to damages.^{viii}

c. Impact of the Incident on Plaintiff's Life

To determine a defense value for general damages, counsel must first explore the impact of the accident on plaintiff's life. Plaintiff's deposition is an opportunity to develop a personality and financial profile of plaintiff. Examine plaintiff's educational background, work history, hobbies, and interests and explore the depth of their personal relationships. The goal is to find out what constitutes quality of life for plaintiff and what causes them stress and worry. Invariably, most plaintiffs emphasize spending time with family as important to their quality of life. This kind of testimony provides a great foundation for a reasonable defense number for general damages.^{ix}

d. Impact of money on the plaintiff's life

Plaintiff's deposition may also be used to establish the second critical prong of a reasonable general damages figure: the impact of money on plaintiff's life. How much money does plaintiff make per year – both before and after the accident? What does plaintiff spend their money on: cars, clothes, jewelry, art, vacations? What financial stressors does plaintiff have: mortgage, credit-card debt, student loans, tax debt? By rooting a value for general damages in plaintiff's life experience, defense counsel can establish a value for the jury which is fair and reasonable to every party.^x

e. *Sample Deposition Questions*

- i. Take any vacations or trips since accident?
- ii. Where do you traditionally go for vacation? With whom?
- iii. What is your passion?
- iv. What are your hobbies?
- v. What do you like to do for fun?
- vi. How much does this hobby, passion, or fun cost?
- vii. How much money do you make a year?
- viii. Accident cause you any other financial hardships?
- ix. Do you own your home?
- x. What worries you most about your recovery from this accident?
- xi. How else has the accident impacted you financially?
- xii. What do you spend money on for enjoyment?
- xiii. Why did you file the lawsuit?
- xiv. What do you hope to get out of this lawsuit?
- xv. How would (defense number) impact your life?

f. *What can you do?*

- i. Leverage your knowledge and assessment of plaintiff.
 1. What is plaintiff's life REALLY like now after the incident? What is the good news?
 2. What is truly meaningful in plaintiff's life?
 3. What do your colleagues, friends, and family think about this case?
 4. What damages award for pain and suffering would make the jury feel good about compensating plaintiff and making her "whole" again? How can you justify that number has having a meaningful impact on plaintiff's life?
 5. Ask your defense counsel how they are going to develop these arguments in discovery and with what witnesses at trial.

V. Recap: How Do You Get in the Game?

- a. Remember... YOU have the power!
- b. Ask defense counsel how they will:
 - i. Defeat the reptile
 - ii. Personalize the corporate defendant
 - iii. Accept responsibility
 - iv. Argue damages:
 1. What is our number?
 2. How will you justify this number to a jury?
 3. How will you argue pain and suffering?
- c. Recommended Supplements to Pre-Trial Reporting

ⁱ Robert F. Tyson, *Stop Nuclear Verdicts: Hire Plaintiff Lawyers*, CARRIER MANAGEMENT, Aug. 28, 2020, <https://www.carriermanagement.com/features/2020/08/28/210724.htm?bypass=0b4850430c55e340bb6f6ecc7a8cea44>

ⁱⁱ Cheryl Wilson & Ashley Kaye, *Nuclear Verdicts and the Emotions of the Jury*, TYSON & MENDES, Jan. 26, 2021, <https://www.tysonmendes.com/nuclear-verdicts-and-the-emotions-of-the-jury/>

ⁱⁱⁱ *A Defense Attorney's Guide To Successfully Arguing Damages*, LAW360, Mar. 1, 2019, <https://www.law360.com/articles/1133149/a-defense-attorney-s-guide-to-successfully-arguing-damages>

^{iv} *Exploring the Defense Arsenal*, CLM, Sep. 10, 2018, <https://www.theclm.org/Magazine/articles/Exploring-the-Defense-Arsenal/1679>

^v Bill Kanasky, *The Primacy and Recency Effects: The Secret Weapons of Opening Statements*, CSI, THE ADVOCATE QUARTERLY, Summer 2014.

^{vi} *How to Counteract the Anchoring Effects of a Plaintiff's Damages Request*, LITIGATION INSIGHTS, Aug. 15, 2019, <https://www.litigationinsights.com/counteract-anchoring-effects/>

^{vii} David Kahn, *Money Can Buy Happiness: Arguing Damages Is Critical to Avoiding Excessive Damage Awards*, TYSON & MENDES, Jul. 29, 2016, <https://www.tysonmendes.com/happiness-critical-excessive/>

^{viii} *A Defense Attorney's Guide To Successfully Arguing Damages*, LAW360, *supra*.

^{ix} David Kahn, *Money Can Buy Happiness*, *supra*.

^x *Id.*