2018 Management & Professional Liability Conference
June 20-22, 2018
Boston, MA

Exploring the Defense Arsenal: How to Attack Damages in Professional Malpractice and Catastrophic Injury Cases

I. Common elements of Exaggerated Special Damages:

Personal injury attorneys are now more than ever using a formulaic approach to building consequential special damage cases. This is especially true in jurisdictions with non-economic damages caps. Defense attorneys would be best served by systematically approaching special damages in the same manner, attacking the "reasonable necessity," "reasonable and customary costs" and the basis of future care opinions. Below are the most common reservoirs for enhanced special damages and the recommended approach to attacking them.

Medical Bills

To defend against inflated medical bills, the defense must:

1) Subpoena everything

2) Provide to analogous expert

3) Use Medical-Billing expert

4) Take depositions of plan administrator and/or provider to establish reimbursement rates, willingness to compromise, whether liens are collateralized, and bias

Life Care Plans

The defense must find and use Life Care Planner depositions and prior plans, which will reveal the "plug and play" nature of the plans. Take depositions of the PMD with knowledge of probable categories to be included in plan. Establish a pre-incident baseline and that plaintiff getting everything that reasonably needs. In addition, the defense must take depositions of treating specialists only if can confirm will be beneficial or later if designated as a retained or non-retained expert. Depending on case, it may be appropriate to create a "Rebuttal Plan" opposite the "Defense Life Care Plan."

Lost Income

The first way to combat against unreasonable lost income damages is to hire an economist to provide the fair value of plaintiff's earning capacity. When necessary, a business evaluation expert knowledgeable in market forces and employment opportunities.

Lost Benefits

The defense must obtain partnership and employment agreements and seek a pattern of contributions, cut-offs, disability benefits, and any trend toward elimination of benefits.

II. Know Your Jurisdiction

General Damage Caps in Medical Malpractice Cases

California's Medical Injury Compensation Reform Act of 1975 ("MICRA") limits jury awards in medical malpractice cases to $250,000 for non-economic damages, allows awards of $50,000 or more for future medical expenses and wage loss to be paid at regular intervals over the life of the injured plaintiff, and allows defendant physicians to introduce evidence of a plaintiff's health care coverage for medical and hospital expenses incurred by the plaintiff.

From 2004-2017, Florida imposed caps on non-economic damages in medical malpractice cases by statute. However, in 2017 The Florida Supreme Court ruled statutory cap on wrongful death noneconomic damages recoverable in medical malpractice actions violates the right to equal protection under state constitution. (*Estate of McCall v. U.S.*, 134 So.3d 894 [2014]).

In Texas, a medical malpractice action filed on or after September 1, 2003, regardless of the number of causes of action asserted, non-economic damages are limited to a total of $250,000 from all doctors and other individuals. Non-economic damages are limited to $250,000 from each hospital or other institution and a total of $500,000 from all institutions. Tex. Civ. Prac. & Rem. Code. § 74.301 (Westlaw 2007). The cap applies to each "claimant," which includes everyone seeking damages due to one person's injury or death. *Id.*; Tex. Civ. Prac. & Rem. Code. § 74.001(a)(2) (Westlaw 2007). A constitutional amendment authorizes this legislation. Tex. Const. art. III, § 66.

III. Anger is the #1 emotion causing runaway jury verdicts

Why is Anger So Dangerous to the Defense?

Of all emotions, anger is the most dangerous amongst jurors. Not surprisingly, recent research confirms the number one motivator of large jury verdicts is anger towards defendants, rather than sympathy for plaintiffs. When you are angry, your limbic system overrides the rational, conscious mind, thereby sustaining bias and emotion. (Haddleton, Shrand, 2014). A juror experiencing anger is much more likely to make punitive attributions towards a defendant compared to an individual who is not. (Lerner, Goldberg, & Tetlock, 1998). When a juror feels angry, his or her ability to empathize with a defendant is greatly hindered. (Winterich, 2010). Countless runaway verdicts attributed to plaintiff's "reptile theory" tactics show the power behind an angry jury.

How the Defense Defuse Juror Anger

Say you are sorry. Your client should say it and your defense attorney should say it. Say it early. Mean it. Saying you are sorry works. Not only is this evidenced by reasonable jury verdicts, but psychological studies also support these methods.

Specifically, while empirical evidence suggests an apology may increase perceptions of liability, an appropriate apology based on the strength of a case can lead to positive results. On the one hand, a simple expression of remorse for the plaintiff without accepting liability is best used when the severity of plaintiff's injuries is minimal, and the strength of plaintiff's case is limited.

On the other hand, a full apology and acceptance of responsibility is best used when the injuries are severe, and the strength of evidence is clearly against your client. (Boully, 2015). In both scenarios, the defense benefits from accepting responsibility for something.

When appropriate, empirical research also shows defendants who offer full apologies and take full responsibility are perceived as having greater moral character. In these scenarios, jurors feel as though the defendant will take greater care in the future to ensure such incident will not happen again, removing the need to "punish" the individual or company. A full apology may also lead to a greater chance of acceptance of settlement offers. (Robbennolt, 2003). Just like in life outside of the courtroom, taking responsibility for your actions is the first step towards disarming anger and lessening strong feelings.

IV. Strategy 1: Give a Defense Number Even When Seeking A Defense Verdict

Why Should the Defense Give a Number?

The best plaintiff's attorneys in the country know asking for a large verdict from the beginning of trial can get them big results - $25 million, $50 million, or even over $100 million. Jurors are conditioned by arguments and evidence presented throughout trial. The jury grows comfortable with a number over time, no matter how outrageous it may seem when first introduced. This is especially true as skilled plaintiff's counsel repeat their large numbers over the course of multi-week or months long trials. It is imperative the jury get comfortable with a defense number as well.

It is almost unheard of for a jury to award a large, "runaway" verdict without hearing a proposed dollar amount from plaintiff's counsel. Most jurors never walk into a courtroom thinking anything is worth $20 million or more. But after plaintiff's counsel starts talking about a huge number in voir dire and then for the next few weeks of evidence through closing argument, it does not seem so outrageous to jurors by the time deliberation begins.

Plaintiff's counsel will "prime" the jury by repeating a large number they are asking the jury to award. The psychology of "priming" is explained as follows:

> Priming is a technique used to influence (i.e., control) attention and memory, and it can have significant impacts on decision-making. Specifically, priming is an implicit memory effect in which exposure to a stimulus influences a response to a later stimulus. This means that later experiences of the stimulus will be processed more quickly by the brain.
>
> Kanasky, Bill, Jr., Ph.D. (April 2014). Debunking and Redefining the Plaintiff Reptile Theory. *For the Defense*, 18.

In the context of determining a damages award, a jury which has been primed by repeatedly hearing plaintiff's requested verdict will be more likely to arrive at an award close to plaintiff's number. Thus, it is important to give the jury another number to consider. Then, jurors deliberating damages will be equally primed with plaintiff's number and defendant's more reasonable number.

How Should the Defense Give a Number?

Many throughout the defense bar see it as a sign of weakness to introduce a defense number. In one instance, this is correct. For example, in a three-week jury trial the defense argues for no liability the whole time. If the first time the jury hears a number is in closing, it will present as a sign of weakness signaling the defense has heard something in the last three weeks that has concerned it enough to give the jury a number for the first time.

This is why the defense must give a number early and often. You cannot give your number for the first time in closing argument and expect a jury to take the defense number seriously.

Is It Possible to Give a Number and Still Obtain a Defense Verdict?

Yes! In fact, it is not that difficult. First, explain that although you believe there is no reason for the jury to ever get to the point of determining damages, it is your duty to your client to address all the issues in this trial. The jury will be instructed as to the applicable law for damages and will see there are questions about damages on the special verdict form they will receive. While you think they never get to damages, if for some reason they do, you believe the evidence will show a fair and reasonable award is your number. The jury will understand you want a defense verdict and they will not think you are weak.

V. Strategy 2: Accept Responsibility for Something

Why Accept Responsibility?

"Accepting responsibility" does not simply mean accepting full liability for the incident or for the injuries alleged by plaintiff. It also does not require the defense to accept any liability at all. The degree and manner of responsibility accepted depends on each individual case, but the strategy must be applied in some variation.

First, taking responsibility makes a defendant seem reasonable. Generally, people are more inclined to listen to reasonable people as opposed to unreasonable people. This is even more true during a jury trial. When a defense attorney denies all responsibility, the jury will constantly look for any hole in defendant's argument. Once there is a perceived a flaw in defendant's argument, the credibility of defendant begins to erode. When a jury finds multiple arguments unreasonable, they will likely also find the party presenting these arguments to be unreasonable.

A second major advantage to accepting responsibility is it defuses juror anger. The goal of most plaintiff's attorneys is simple: sympathy will get a plaintiff paid, but the real payday comes when a plaintiff's attorney can get a jury angry at the defendant. Anger is the number one motivator of runaway jury verdicts in America. For this reason, plaintiff's attorneys will constantly attempt to enrage and provoke these extreme emotions from jurors.

A third major advantage to accepting responsibility is it shifts the jury's focus to any other party's potential comparative fault. Accepting responsibility does not leave all other parties blameless. Indeed, this strategy allows the jury to assess the culpability of other parties, including the plaintiff, who has failed to accept responsibility for anything. When the focus is

shifted to plaintiff's actions early, the jury will more closely scrutinize plaintiff's arguments and identify more problems with plaintiff's case and credibility.

How Does the Defense Accept Responsibility When Seeking a Defense Verdict?

Defense attorneys, insured clients, and insurance professionals often find it difficult to embrace the strategy of accepting responsibility while also vigorously defending a case and asking the jury to award a defense verdict. In many cases, the defense has strong evidence and argument it complied with the standard of care. Nevertheless, it is especially important to accept responsibility in these cases as well.

It may be difficult, but defense counsel cannot go to trial without accepting responsibility for something. Examples of accepting responsibility, without accepting liability, include:

- Accept responsibility for putting a safe product in the stream of commerce;
- Accept responsibility for maintaining a safe premises;
- Accept responsibility for defendant's response to alleged harassment in compliance with our own employment manual; or
- Accept responsibility for providing sound professional advice.

Accepting responsibility must be done as early as possible, whether it be voir dire, mini opening, or defendant's opening statement. In voir dire, defense counsel must ask the jurors about the importance of taking responsibility for their actions.

In addition to voir dire and opening, it is also important to sprinkle in questions on cross-examination and direct regarding both parts of responsibility: acceptance and accountability. By asking these questions throughout trial, a defense attorney will be able to seamlessly argue responsibility in closing.

VI. Strategy 3: Argue Pain and Suffering

The Necessity of Arguing Pain and Suffering

Verdicts in which the jury awards plaintiff millions of dollars for pain and suffering – $10,000,000, $20,000,000, $50,000,000 – are breaking news. Based on transcripts obtained from closing arguments in these runaway verdicts, the defense typically fails to give a number and fails to sufficiently address pain and suffering for the jury. In these cases, defense counsel commonly states plaintiff's proposed noneconomic damages award is simply too high; it is not "fair and reasonable." But when a jury awards $50,000,000, it shows the jurors believed plaintiff's number was very fair and reasonable.

Noneconomic damages are the biggest element of every runaway jury verdict. Your defense counsel must be ready to argue it! In fact, your defense counsel must be able to argue noneconomic damages even when seeking a defense verdict.

How to Argue Pain and Suffering

Defense counsel should suggest jurors consider two things when awarding damages for noneconomic damages:

1) The impact of the accident on plaintiff's life – what is plaintiff's life really like after the accident?
2) The impact of money on plaintiff's life – what is the value of money to this plaintiff?

First, defense counsel must paint a picture for the jury detailing what plaintiff's life is really like now and what it may realistically look like in the future. Look at what plaintiff could do before the accident versus what she cannot do after the accident; before and after she was terminated by us from her job; before and after she received our alleged negligent advice; etc.

The defense must find a way to paint a positive story of plaintiff's life. Defense counsel must analyze plaintiff's post-accident life and tie in any defense number for pain and suffering.

The second element of arguing pain and suffering is the most important. What is the impact of money on plaintiff's life? What is the value of money to plaintiff? Defendants commonly hear plaintiff's counsel state we "take the plaintiff as we find them" when arguing the defense is responsible for injuries sustained by an "unusually susceptible plaintiff." (CACI 3928.) While this is true with respect to medical damages, it is also true when it comes to a jury awarding pain and suffering. Specifically, any dollar amount the jury awards must be fair and reasonable to this particular plaintiff based on the impact of the money on plaintiff's life.

VII. Conclusion

These defense strategies apply broadly across all jurisdictions and practice areas. When deployed correctly, this approach will help to mitigate damages and avoid runaway jury verdicts.