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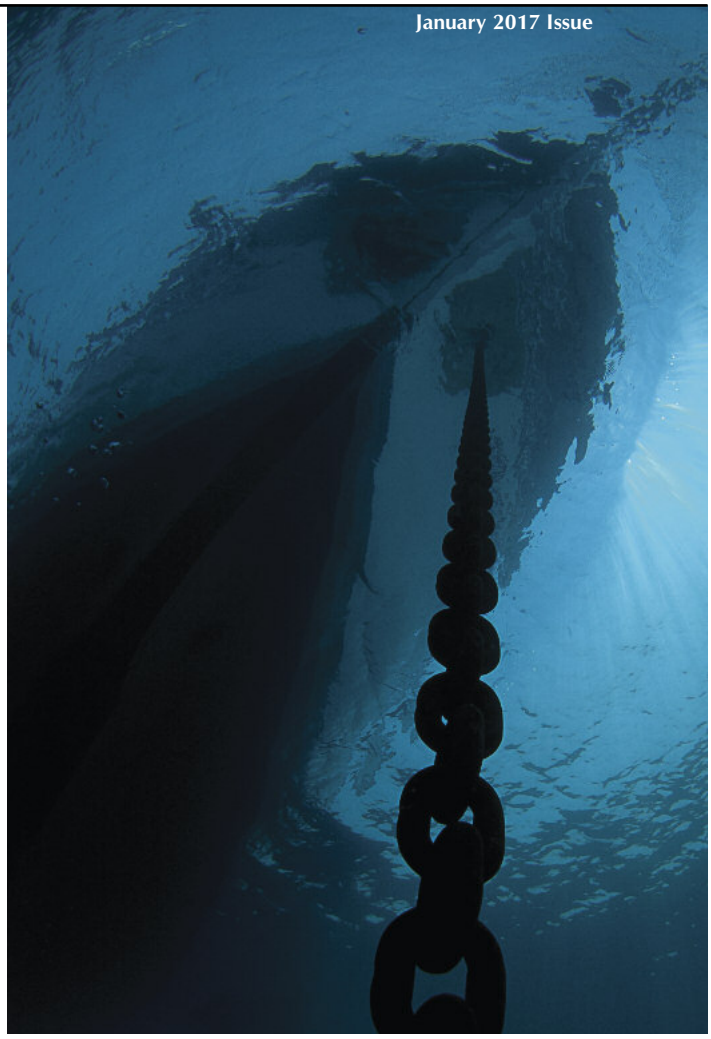

Arguing general damages to the jury

DISCUSSING MONEY WITH JURORS USING FINANCIAL "ANCHORS" THAT MAKE SENSE TO THEM

There are fundamental principles for closing argument. In this article we will get into some tips, structural ideas, and different approaches to discussing money with jurors. But the first thing I focus on is the goal. Trial lawyers should remember what this is all about:

- You talk
- They listen
- They understand
- They are persuaded
- They believe
- They react

This sounds simple but it is simply critical to remember that in closing, the art of communication is key. Whatever tone of voice you take, wherever you choose to stand or sit or how you move, whatever you wear and how you cut your hair, whether or not you wear the fancy watch or shoes, and all that other "window dressing" I hear so many discuss, the essence never changes.

Your audience, the jury, is listening. Watch them. Don't yell at them. Share your eye contact. Trust them. Make sense to them. Help them. Believe what you say. Be sincere. Speak in plain and concise English. And if you sense they are listening, please take the time to use enough explanation and logic so they understand your point of view. This is so important.

Once you make that connection, you'll know intuitively that they are being persuaded. Not everything requires huge explanations. Sometimes there are a few issues, a few key witnesses. You'll know. Persuade and if you do, their collective belief will empower the jurors to react with a verdict that is fair. You must make this connection and ensure that the jurors are listening to you, being persuaded about what matters.

If you have bonded with the jurors in voir dire, this gives strength to you throughout the trial, and when closing argument comes, and you look at them, they welcome hearing your summary of thoughts. Get out from behind the podium. Use very few notes to the extent possible. Engage with and communicate to your jurors. And don't be shy about what you say and why you believe it. If you don't seem to believe what you say in your heart and express it with conviction, then to a jury that means you don't believe it yourself. Then why should they?

Participating in a meaningful verdict

One of the great trial lawyers, Moe Levine, stated the beautiful concept regarding closing argument, the concept of a juror being motivated by participating in a meaningful verdict he or she could be proud of. Here is his quote:

> I struggled with this for many years, and finally I decided, and I have applied this decision to many cases, that a meaningful verdict is a verdict in which the juror, when he is allowed to talk about the case after he has decided it, can go

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back home and say to his wife, children, and neighbors, 'Neighbors, I was just on a case. These were the facts. This is the decision I made,' with the expectation that the decision he rendered upon the facts and arguments that he will present will be acceptable to his community.

The concept of the jury being the conscience of the community is not new. It has been a central concept to our justice system since it began. Especially on liability, the jurors can and should say what conduct is acceptable, or not, in our community. When it comes to damages, they must be fair.

Talk to the jury about the case they see, not the one you see

Although this sounds very simple, we lawyers generally don't see the world like jurors, and if we're arguing the case we see, rather than the one they see, we're not connecting, and they have no motive to follow your argument's call to action.

This is why focus groups are so important. By focus-grouping your case pre-trial, you learn which words matter, and which injuries matter and why. You can learn about subtleties in the case that you might overlook. There are various kinds of focus groups you can learn from. Present your issues. Get their feedback. Give the defense perspective and see their reaction. Consider playing your plaintiff's videotaped deposition in part to get feedback on how sympathetic, or not, they are and how others are persuaded by their testimony. Sometimes you'd be surprised what others not involved in the case think about key photos or a day-in-the-life video or an animation. The general-damages argument is completely tied into the case as a whole. Jurors don't see these as separate components the way many lawyers discuss their cases. All the evidence will relate to what money the jury is willing to put on a case.

For example, a jury might see an overweight plaintiff, complaining about having blown out a knee after falling on a bus, as a whiner trying to make other people pay for the consequences of their "weight problem" and genetics. But by acknowledging this preexisting condition and explaining why it made them more predisposed to injury, and that the injury and pain only started with the defendant's negligence, you confront and embrace this prejudice. And this gives you credibility.

Likewise, by ignoring subsequent injuries, like a TBI plaintiff getting in subsequent fistfights and being knocked out, you play into the defense's hands. Explaining these events were caused by a change in the ability to regulate emotions, and being straight about their consequences, keeps people listening and hopefully being persuaded by the truth of your arguments.

Working with the situation

You're ready to give the greatest closing ever, so logical, so passionate, so prepared, but….the judge sets time limits. You have 30 minutes to do this, or an hour if you're really lucky…..so know what you *need* to say and what the jury *needs* to understand.

To me, there is no way to do this by reading off an outline or otherwise interrupting the communication. Using a PowerPoint is fine, but let them see, read, drink in a slide, then communicate again. Don't talk while you're telling the jury to read the slide. Sounds basic, but I have seen really experienced lawyers do this. And worse! I have seen so-called great trial lawyers with their back to a jury reading off a PowerPoint, which to me is about as lousy a form of communication as could be imagined.

Time management, requires you to be aware of the timing of each element of your argument. If, for example, you have 30 or 45 minutes, you need to allot time to: (1) jury instructions; (2) special verdict form; (3) discussion of witnesses; (4) discussion of documents and visuals, and (5) persuading the jury on liability and damages. Whether or not you're boxed in on time, though, the centerpiece of the argument has to be explaining why your plaintiff should get compensated for their pain. In the typical "PI" case this is the most important element.

How much money is fair?

Keeping in mind the above ideas on effective communication, the general-damages aspect of the closing has to make sense; the "alchemy" of what we all do as trial lawyers. They broke her arm, they've got to pay. Quoting the Bible or a great and historical person or poetry or using rhetorical turns can be helpful if used sincerely and logically. Otherwise you risk being perceived as a phony, pandering to jurors, trying to play them. And if that happens, they'll shut you down.

At some point, you need to give the jury your evaluation, right? Some trial lawyers say no, but it seems more reasonable to give the jury help in coming to the number which is fair. Otherwise, what do they have to go on? Unless you want the jury simply guessing at what might be fair – with no idea, no professional background – you need to help them.

I gave an example of how to use logic and persuasion on the money to a trial lawyer recently. It was a knee case. How many steps does the average American take every day? 5,000, I said. So, every time that person takes a step it hurts. 2,500 times a day it hurts: From the first step out of bed to the last one, getting back into bed. They don't do some things they love because it hurts. Dodger games and trips to the mall are now almost terrifying because of the pain it'll bring. They need to cut the pain down with pills. They experience a loss of pleasure and a cycle of pain. Sleep interruption. They no longer get the most out of things.

If the person is on their feet at work, it is crushing: a daily drumbeat of pain, depression and aching. So isn't that worth maybe a dime for every step of pain? If it is, then multiply that dime by 2,500 and that's $250 a day to balance those harms and losses – times 365; times expected years of life. It adds up.

The newspaper analogy

Use the local newspaper and tell them, "If there was an advertisement for a position at a company in the L.A.

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Times and it said, we'll pay you $250 a day for your time, but here's what you need to do to qualify. And then explain the injury-producing incident, and use the senses. Make the jury feel what the person you're fighting for is feeling; what they've lived with since, and will continue to live with. And then ask, is that worth $250 a day? Who would go apply for that job?

Use your hands. David Ball teaches us to anchor the concept of balancing the harms and losses by using our hands. Like the scales of justice. The opening statement is storytelling, for sure, and the closing argument is also some storytelling, but it is also the bill coming due. Holding the defendant accountable. Show you care; this is real.

Consider some psychodramatic techniques if you can do so genuinely. What is a day like now for Maria? For Paul? Not letting them get away with paying less than the damage they have caused. Empowering the jurors to enforce fairness.

Ask for one lump sum or break it down?

If your approach is to ask for a lump sum, you need to do the math for the jury, not leave that to them, and your explanation must make sense, be grounded in logic. It ought to have a ring of fairness to it, and connect to actual testimony from the witnesses and the medicine.

Some do a "bracket" request, saying that the fair verdict ought to be, for example, between $350,000 and $500,000. Jurors tend to anchor towards the lower number, but this gives two different groups within the jury a few numbers to horse trade if that's likely. A trial lawyer may lend credibility to the numbers presented by encouraging the jurors to modify the numbers as they see fit, but to consider your analysis.

Wrongful-death cases are very challenging in their own right when it comes to the value of the loss. An effective approach is to reinforce the idea that the value is not for the loss of life itself, but instead the loss of comfort, emotional, and financial support for those left behind who relied on the decedent or who suffered that harm.

Using specifics such as birthdays, family reunions and weekly phone calls that can be discussed and incorporated into visuals helps greatly. Videos of the decedent where they are seen moving and heard talking, laughing or singing, cradling a loved one – just being themselves – are very powerful tools for the argument.

Anchoring the analysis

I have used many techniques to anchor a per-diem analysis for the jurors. Consider the following: Minimum wage is $10.00 and people can see that as a "low number." If the plaintiff has brain trauma and it is something I think the jury will relate to, I can use several ways to calculate what is fair.

CACI 3905A says, "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal…."

So, I might say that if my plaintiff has true cognitive damage due to frontal lobe injury from diffuse axonal shear injury, and it affects their thinking and causes them anxiety, fear, nervousness, and the other elements I have told the jury about, then I can offer a scenario like this:

We are awake 16 hours a day. Every hour this injury affects John. If we were to compensate John just minimum wage for this brain injury, the emotional toll, the depression, the anxiety, and left aside the headaches, the vision issues, the other pain and just focused on the brain injury itself and just on what is beyond reasonable argument,

$10.00 x 16 hours a day x 365 days a year x 40 years of life he will live with this, and again leaving aside the increased risk of seizures, early onset of Alzheimer's and stroke risks, leave that all aside, $10.00 x 16 x 365 x 40 = $2,336,000.

I can ask for such a number and sound completely reasonable. I could ask for such a number for each element and build a case for it. $2,336,600 for the fright of being brain damaged, untrustworthy and disorganized, less safe. John can forget why he is somewhere, forget a critical doctor appointment. He can become angry for no good reason and thereby destroy relationships with loved ones and friends.

Similar and unique arguments can be built for nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror and ordeal. That type of argument is logical and makes sense.

Using medical charges as anchors

You can take some of the medical charges themselves and use them as barometers. Every time physical therapy was provided the charge was $220. And it helped. Took pain away, let's say in a back-injury case where there is no question the incident led to significant pain and a real change in lifestyle and activity. Is $220 fair for a therapy session that is done right and helps so much? Everyone agrees it is fair.

So is $220 a day for all the damages to Tom fair? He is simply not the same person he was in so many ways, ever since the brutal accident when the forklift load fell against his back due to the carelessness of the Bottle Company. $220 a day x 365 x 40 years is $3,212,000.

This is simply an exercise in anchoring the number, but you can see how this can make sense. The defense orthopedic doctor charges $800/hour to provide review of records and opinions. If we were to compensate Tom $800 a day, that's $11,680,000.

So find anchors that make sense to you and then test them in focus groups. Ordinary people who are your focus-group jurors will tell you what makes sense, what they need to know: What works for them as fair and what is outrageous. You need to be "on key" with your analysis and the numbers.

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How you say it, matters

I am not talking about your tone of voice, where in the courtroom you say it, what you wear and how you look. I am talking simply about your word choice. Communicating effectively is done in many ways. Repeating a key phrase three times. Giving a memorable quote. Using a Father's Day card. Reading a poignant biblical quote. Something MLK said that seems appropriate and inspirational, not plucked from the internet to play on people's emotions and pander. It must be authentically consistent with your voice and personality.

A key phrase can make the whole pitch for damages stick. Painting the picture of the depth of pain; using a montage of photos or a video snippet. This can be beyond words if done right — a gesture towards the surviving family, or holding up the blankets she knitted for the children. The smell of the food she used to cook in the kitchen. Awakening the senses and activating the minds of the jurors. Followed by silence. Letting them drink it in. Making it memorable.

You don't need a ton of words. You need to be logical, grounded in evidence and the law, and believable. You must connect to the jurors and empower them and their verdict to follow your call to action: To be the conscience of the community; to fix this situation; to do their jobs. And not get persuaded by unfair bias or excuses the defendant makes to do less.

This is what they did: What is that worth?

She is now paralyzed. He had his leg ripped off just below the hip and will never have a day without pain and crying for his loss again. It will only get worse. The burns on this child's leg will leave damaged tissues and scars that look like this for the rest of his life. The whirlpool treatments (for burns) were like how we hear Hell described, or the worst thing on Earth.

This type of case is large in compensatory value by its very nature. To say the loss of a leg – aside from a life-care plan and explanation of the pain, the surgery, the rehabilitation, the adjustment to prosthetics and wheelchairs – is not worth $20 million over a long life is a burden the defense will have to address.

Some injuries and damages are easily felt by jurors to be massive losses. Others, like a lost life, are large losses but the idea of compensating for them in the first place, where "the money won't bring the person back" prejudice is in play, is the real challenge for the trial lawyer. Each case has its own calculus, and a good pretrial strategy is to discuss your case with other trial lawyers, especially those who have tried similar cases to verdict, to get a few ideas for your approach.

What good is it to give them money?

Jurors ask this question. Let them know that the money you're seeking in compensation will restore a family to a functional situation. That there's a proportionality to it; that it makes sense. If you've had a theme in the trial, something you've woven through the words since opening statement, use it. Do your best to be pain-spoken, humble and having a discussion, instead of preaching.

Lawyers use words like "pain and suffering," not people in the community. Use simple themes we can all understand. When your back hurts all the time, you can't think straight. You can't sleep well. Your work suffers. Your relationships deteriorate. It is not just a bad-back case, it is a change-in-one's life case. And as Moe Levine makes clear, your argument should not be so much focusing on the injury and what it means, but instead on the whole person, and what they have to live with now.

Levine says, "the destruction of part of a whole man has destroyed in part *all of him*. … It is so true that it requires no discussion. A headache does not just affect the head. It affects the whole man. Similarly, a sprained ankle, and a splinter in the finger affects the whole man." And the focus on the person cannot be simply focused on injuries and medical terms. It has to be human.

In the holistic approach to the discussion of damages, one subject too many lawyers leave unspoken, because they tend to overly focus on the injuries, is the loss of joy, the addition of stress, the effect of injuries on the whole life. Moe Levine said that "the greatest injury you can inflict upon a human being is the impairment of the enjoyment of living." According to Mr. Levine, this is "the most serious of all damages."

When discussing the damage done to a person's life and the loss of joy, he quotes Ecclesiastes where it says "it is right and good that when a man has finished his day's labors, he shall enjoy living." After all, it is the whole life that is affected, not just doctor visits and lost wages. My older sister once said "I work to live. I don't live to work." Most people are like that and we need to remember, as Levine concludes that "if all that is left in this tense world of ours is survival, who needs it? Who needs just survival? Just labor. Just work. No pleasure. No enjoyment of living. Is there a worse injury than the impairment of the enjoyment of living?"

In a TBI case it was necessary to be specific as to the damage done to the brain, and why it was debilitating, why that person could not do their job anymore, and why their life was so often miserable, and permanently so, now. This had to be explained in contrast to the fully working brain and full life they had before. Without specifics, my argument would be hollow and sound more like money for nothing. But with specifics, the jury understood *how* the brain was damaged and *why* the verdict we sought was fair. However, to really make the argument work, the effect of the brain injury on a typical day, on the relationships with family, the whole person, was required. It is not simply a brain injury. The whole person was injured.

Waiving past specials: ignoring small numbers that distract

If you're looking for compensation in a case with very significant damages, one that is certain to be a large number, bear in mind that discussing small numbers in the same argument can completely weaken the logic you advance. For example, waiver of past medical bills is wise in many cases. Otherwise, there is the whole "*Howell*" battle over what are

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"legitimate" past medical bills, an argument that gets too much focus, and why? Half the time you're fighting for people aside from your client (the lienholders) in seeking such medical bill compensation, and that makes little sense.

Why seek reimbursement for a $15,000 funeral bill in a case where you're looking for millions to compensate for the loss of a life? Think hard before you put too many numbers before a jury. And be specific as to what you seek and why. Jurors are, generally speaking, bored by us and jury trials. Work with their short attention spans and give them the information they want, honestly, and in a logical sequence that gives them the roadmap to act on providing justice as you see it.

Why should we give her that much money?

Anticipate and answer the question: Why should we give her that much money? The defense will argue that the plaintiff is a very nice lady. That you're pandering to their sympathy and just seeking an emotionally based, illogical "litigation lottery / jackpot justice" kind of verdict. That cynical approach will come, rest assured. Anticipate it and get there first. Let the jury know you're not seeking a penny for sympathy. The time for sympathy is long gone. The defendant never said they were sorry, never visited them in the hospital, didn't even send them flowers or a card. They turned their back on them once the cars were towed off that highway. And hid from responsibility until now.

The money is not at all emotionally based, though you can and should be emotional about the harm caused and the humanity of it all. The money logically balances what the defendant did, the consequences now and forever, if applicable. It is important to be strong in this regard, be able to look the jurors in the eye and make sense of what you're seeking and why that is fair. You need to believe it first.

First-person advocacy: sometimes this is very persuasive if done with authenticity

The whole foundation for general damages is establishing what happened to the person you're fighting for, what they endured, the shock, the depth of pain, what changes they went through. You are at the conclusion of the trial now. The plaintiff has testified. You led them through direct, they survived cross examination. The experts have testified. The jury has seen and heard the evidence. Now it is time to put the picture before them. They have seen the individual pieces, but do they see the picture you know is the truth?

Live the event and retell it through the eyes and with the voice of the plaintiff. Waking up in the hospital. Can't feel my feet. My mother is crying. Why is she crying? Why am I here? The doctor comes in to talk to me, "I have some tough news to share with you and I don't know any other way to say it: You're going to have to learn new things and work hard with us because your spinal cord was damaged." The thoughts race through my mind. How will I work? What about the kids? Janie? Is this true?

It is something to think about. You need to be natural, authentic, and be a conduit for the truth. Sometimes it is better not to be the lawyer discussing another's pain and the changes in their life, and instead consider truly being the voice of those who have been so damaged.

Final thought

Start writing your closing argument early and revise it during trial so you're complete and ready when your time comes to shine. You already know who the witnesses will be. You have a good idea what they'll say. You know your best visuals and documentary evidence. If you're going to be using a PowerPoint during closing, you can outline the closing to a large extent even before trial starts, and be refining it as testimony comes in. Why wait?

Editor's note: This article was first presented at the 2016 CAALA Convention in Las Vegas.

Joseph M. Barrett served as 2015 President of the Consumer Attorneys Association of Los Angeles. He is a partner at Layfield & Barrett *specializing in major, complex cases concerning catastrophic injury or death and impact litigation across the diverse fields of tort law including civil rights, insurance bad faith, product liability, professional negligence, vehicle and premises liability and road design. Mr. Barrett served the Consumer Attorneys Association of Los Angeles* (*CAALA*) *as the President in 2015 and is a member and supporter of the American Association for Justice.*