



Gathering the evidence of general damages and selling it to the jury

NOT ALL PHYSICAL EVIDENCE SHOULD BE INTRODUCED, AND NOT ALL POSSIBLE WITNESSES SHOULD BE PART OF YOUR CASE

Yogi Berra is correct: “You’ve got to be very careful if you don’t know where you are going, because you might not get there.”

Before you set out to gather evidence of general damages you need to know the elements of general damages. In a personal-injury case the judge will read from CACI 3905A, advising the jury they can award damages for past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, humiliation and emotional distress.

In a wrongful-death action the judge will read from CACI 3921, advising the jurors that they can award damages for the loss of decedent’s love, companionship, comfort, care, assistance, protection, affection, society, moral support, enjoyment of sexual relations, and loss of decedent’s training and guidance.

Here we address the type of evidence that supports general damages; how to find it; considerations on whether to use the evidence; and if so, how to use it. The evidence that one should use to support general damages will depend upon the general damages in question. The two general categories of evidence that support general damages are testimonial and documentary evidence. Use the jury instructions as your guide for determining which witnesses and exhibits you want to use.

The plaintiff as a witness

The attorney’s job is to determine which witnesses will be the best to describe the pain, suffering and loss of enjoyment of life your client has sustained. In most personal-injury and wrongful-death cases the typical lay witnesses called to testify on general damages are the plaintiff, and his or her family, friends and co-workers.

The attorney must decide which of these witnesses should be called to testify and what they should testify about. The default choice many attorneys adopt is to rely on the plaintiff. The reasons for this

choice include the fact that plaintiff is the person most available to the attorney and knows the most about the impact of the injury on his or her life. Unfortunately, the default choice may not be the best choice.

Relying on plaintiff to sell the case can backfire. First, jurors expect plaintiffs to exaggerate their suffering. Second, when plaintiffs adequately describe their damages, the jurors may perceive them as whiners. Jurors are not sympathetic to whiners. Relying upon the plaintiff to establish the general damages creates this Catch-22 dilemma.

Consider calling the plaintiff after other lay witnesses have described the injury and the effects of that injury on the plaintiff. Their testimony will provide the story so that when plaintiff testifies, the testimony won’t come across as whining.

The witness list

Create a list of possible witnesses by asking the plaintiff, as well as family and co-workers for the names and phone numbers of people who could testify on the plaintiff’s behalf. Ask the person giving you the names to describe the testimony they believe the witness can give, the relationship between the witness and the plaintiff, and how long the witness has known the plaintiff.

Once you have the list of potential witnesses, you need to decide which witnesses you will call to testify. Don’t rely on the plaintiff, your paralegal, your associate or even your partner to make the decision. *You*, the trial attorney, must interview and vet the witnesses. When speaking to these witnesses ask yourself the following questions:

(1.) Do I believe this witness?
(2.) How often did the witness interact with the plaintiff before the injury?
(3.) How often has the witness interacted with the plaintiff after the injury?
(4.) Does the witness have personal knowledge of the substance to support the testimony?
(5.) Does the witness have any “story” to tell about the plaintiff, either before or after the injury?

(6.) On cross-examination, will the witness be easily led or confused?

(7.) Does the witness come across as an advocate?

Sometimes the most unlikely witness will be the most believable witness. Does the plaintiff have an ex-spouse who can testify about the plaintiff’s character or pre-injury activities? If there is an ex-spouse who can and is willing to testify, check out the dissolution file. Make sure there are no declarations the ex-spouse filed that could be embarrassing or detrimental to the case.

Preparing witnesses

Whoever you decide to call, it’s the attorney’s responsibility to prepare the witness. It is not enough to prepare the witness for the intended direct examination. The witness needs to be prepared for unexpected questions on cross. The defense attorney may ask if this witness who claims to have substantial knowledge about the plaintiff is aware of the plaintiff’s prior injuries, health conditions or lay-offs. If the witness denies knowledge of some facts when the witness should have that knowledge, it will undermine the witness’s credibility. Caution the lay witness not to agree with the defense attorney’s questions just because the attorney says, “Isn’t it true?” Make sure the lay witness understands that admitting that the witness doesn’t know the answer is better than guessing and guessing wrong.

If you plan on using multiple lay witnesses to testify on the issues of general damages, expect that the defense will object that the testimony is cumulative. To counter this objection, be prepared to tell the judge that you don’t intend to have the testimony to be repetitive. The judge may require you to explain how the testimony will be different. Be prepared to provide a concise statement as to how the testimony will not be duplicative.

Using CACI 3905A as a guide, you can advise the judge that witness White

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will testify about plaintiff's physical impairment; witness Brown will testify about plaintiff's physical pain; witness Green will testify about plaintiff's activities before and after the injury to demonstrate plaintiff's loss of enjoyment of life. Consider breaking up the testimony by having one witness testify about plaintiff's work life; another witness testify about plaintiff's family life; and another witness testify about plaintiff's social life outside of work and home.

Most judges will delay ruling on a pre-trial objection that the testimony will be cumulative, but will caution you against cumulative testimony. You should consider putting your best lay witnesses on first, rather than at the end when the judge may rule the testimony is cumulative.

Bringing in experts

Expert witnesses are invaluable in establishing general damages because their testimony will provide objective evidence as to why the plaintiff is in pain; depressed; unable to do certain activities; or why the plaintiff is able to perform certain functions but has to do them differently. Prepare the expert in advance to provide this type of testimony.

Cross-examination of defense experts can elicit significant evidence of general damages. Rather than attacking the expert's opinions head on, thereby giving the expert an opportunity to re-explain and reinforce the damaging testimony given on direct, spend your time asking questions that the expert cannot refute.

For example:

Q. Dr., turn to Exhibit 12. This is Dr. Smith's note of September 28?

Q. Dr. Smith documents that Mr. Jones has difficulty lifting his right arm above his head?

Q. Dr. Smith notes that this impairment interferes with Mr. Jones' ability to play golf?

Q. Turn to Exhibit 26-6. This is the therapist note of February 15. The therapist

also notes that Mr. Jones was complaining about his inability to play golf?

Q. Look at the therapist's note of April 3. Doesn't the treating therapist state that Mr. Jones attempted to play golf but he had to quit after 4 holes?

Q. Turn to Exhibit 8-2. This is Dr. Black's referral to Dr. White. Doesn't Dr. Black tell Dr. White that Mr. Jones is concerned that he will never be able to play golf again?

Q. Dr., you know that golf was an important part of Mr. Jones' life?

Q. Please turn to page 3 of your own report. Didn't you write "Mr. Jones says that he has been depressed because he is no longer able to golf?"

Using this technique allows you to reinforce the evidence of general damages with the defense doctor.

Plaintiff's counsel are frequently too concerned that the plaintiff is not a candidate for surgery. Surgery is intended to either fix the injury, reduce pain, or improve function. If the surgery is successful, the plaintiff's future damages will be less. If the plaintiff cannot have surgery, the future general damages will increase.

Exhibits

Demonstrative exhibits can be extremely effective in conveying the nature and extent of the plaintiff's general damages. Unlike testimony that describes the plaintiff's physical pain, emotional suffering and loss of enjoyment of life, exhibits allow jurors to reach the conclusions on their own.

There are a variety of demonstrative exhibits that can be used to show and reinforce general damages. Photographs, videos, letters, anniversary cards, timelines, animations, medical illustrations and medical records can all provide visual guides to assist the jurors in determining the extent or value of plaintiff's general damage.

Photographs of the plaintiff's injuries are useful to show the nature and

extent of the injuries. If there is a particularly gruesome photograph, ask your experts before their deposition if the photograph is helpful in forming their opinions about the nature and extent of plaintiff's injuries. If the answer is yes, have the witness say so during the deposition so that you invite the judge's attention to the page and line numbers of the deposition when making your offer of proof.

Pre-injury photographs effectively compare the plaintiff's pre-accident enjoyment of life to life after the accident. If the plaintiff loved to travel before the injury but can no longer travel, consider using postcards sent to family members from different cities and countries, or travel photographs. A photograph of the plaintiff at the top of a mountain in ski clothes with a big smile is more powerful than testimony that the plaintiff loved to ski.

The "cumulative" objection

Defendants will also object that the photographs are cumulative. A response to that objection is that it would take the witness much longer to describe the testimony in detail than to make a brief statement describing the circumstances surrounding a photograph. Another method of blunting the effect of the cumulative objection is to have four witnesses each talk about three photographs rather than one witness speak about 12 photographs.

For example, use one witness to speak about the plaintiff's love of golf and only use golf photographs with that witness. Use another witness to speak about the plaintiff's hobby of repairing cars by authenticating photographs of cars the plaintiff worked on. Use another witness to speak about the plaintiff's activities with his or her children by showing photographs of these activities.

Another technique to avoid or defeat a cumulative objection is to place three or four photographs on one page as one exhibit. Once the one-page exhibit is admitted, you can show each photograph individually.

Because the right photographs can be more powerful than testimony, the

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time to find these photographs is at the beginning of the case, not the day before the exhibit list is due.

Photos to tell the accident story

Photographs that convey the extent of the plaintiff's general damages are not limited to photographs of the plaintiff. A photograph of the plaintiff's severely damaged car will cause the jurors to wonder why the plaintiff wasn't injured more severely. A photograph of the staircase where the plaintiff fell will cause the jury to wonder why the fall wasn't fatal. In an admitted-liability case the defendant may object that these types of photographs are irrelevant or more prejudicial than probative. Explain to the judge that although the defendant has stipulated to liability the defendant has contested the nature and extent of the injuries.

If the injury is a broken bone, a plain X-ray can tell the story. If the radiologic image is something that only a physician can see, a medical illustration should be used. Post-surgery X-rays are the best if instrumentation has been used to make the repair. The hardware can be very dramatic on a black and white X-ray.

Medical illustrations are effective in the jury's understanding of the plaintiff's pain. A word of caution is appropriate. The illustration should not be argumentative. Don't show blood unless it is a necessary element of the point you are trying to illustrate.

Timelines can also graphically demonstrate general damages. If the plaintiff has been on a number of narcotic pain medications, consider creating a board depicting all of the medication that has been taken over the last three years.

If the plaintiff's post-injury life has been consumed with visits to doctors, therapists and hospitals consider conveying this with a calendar for each month since the accident. You can enter a shorthand symbol for the visit such as DR for a doctor's visit, an H for a hospitalization, and a PT for a therapy visit. Consider using a different color for each type of visit: red for DR, black for H, green for PT. To establish the admissibility of the exhibit a witness will need to

testify that, based on a review of the medical records, the chart accurately reflects the day of the visit and the type of visit. If the plaintiff is able to establish the accuracy, use the plaintiff to lay the foundation. If not, consider using a spouse or adult child or an expert witness.

Medical records

Medical records can be boring and the handwritten notes can be difficult to decipher. Many attorneys read only the physician records and only the records that are typewritten. The gems, however, can be found buried in the minutiae. To find the gems you have to spend the time to look for them. Look for pain drawings that the plaintiff filled out. Enlarging the drawing for the jury is more effective in explaining general damages than having your client verbally describing the pain when the chart was prepared years earlier.

Nursing notes and therapy notes often contain unvarnished comments about how then-plaintiff felt or what the plaintiff's concerns were about the future. Statements such as: "he is fearful he won't get better," "morphine injection has had no effect," "unable to complete therapy today because of increased pain," or "found patient in bed crying" can have a great impact on the jury.

A referral from the physician for an MRI or an EMG often contains a statement as to the reason for the exam: "chronic unrelenting back pain," "shooting pain down the leg," or "burning on the sole of the foot."

Day-in-the-life videos

Day-in-the-life videos are often used in cases involving significant injuries and disabilities. When planning to do this kind of video you need to determine whether it is for settlement purposes or for trial. The format for each is significantly different. The settlement video has narration. The settlement video has music. The settlement video has statements from friends and family members discussing how the plaintiff was before and after the injury. A video

for trial has no music unless it is background music during the filming. The only words the jury will hear will be the therapist asking the plaintiff to move, or the spouse asking the plaintiff to open his mouth to be fed.

Before a day-in-the-life video is shown to the jury the witnesses and the plaintiff have already testified. The jury already knows what the plaintiff's pre-injury life was. The video is used to graphically compare and contrast life before and after the injury. The video is used to convey to the jury that the plaintiff needs the recommended treatment. The video is used to show that neither the plaintiff nor the plaintiff's family have given up.

Conclusion

What general-damage evidence you choose to present will be limited to the evidence you have obtained. Your job will be much easier if you have gathered a wealth of evidence that allows you to choose only the best evidence to prove your point.

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

John F. Denove specializes in major injury cases, product liability, medical malpractice and insurance bad faith litigation. He was named Consumer Attorneys Association of Los Angeles' Trial Lawyer of the Year in 1993 and received the Ted Horn Memorial Award in 2001. He also received the CAOC/CTLA Presidential Award of Merit in 1994, 1996, 2000, 2008 and 2013; CAOC's Outstanding President of the Year Award in 2000 and the Edward I. Pollock Award in 2006. It was his honor to serve as President of the following associations: CAALA, the Los Angeles Chapter of the American Board of Trial Advocates (ABOTA), the Italian Lawyers Association and the Cowboy Lawyers Association. He currently serves on CAOC's Board of Directors. He is a Diplomat of the American Board of Trial Advocates and is a member of American Association for Justice (AAJ) and Public Justice.