

Walking the Line in Damages Arguments in Child Cases

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Walking the Line in Damages Arguments in Child Cases

I. Introduction

Arguing damages in a significant injury case involving a minor can be daunting. Defense counsel would generally prefer to address only issues of liability in an effort to win the case. Most defense counsel recognize that evidence of damages potentially cloud the judgment of the average juror. Unfortunately, the opportunity to bifurcate issues of liability from issues of damages when trying personal injury or wrongful death claims is rarely available. Plaintiff's counsel will routinely oppose any attempt to seek bifurcation. The "sympathy" factor in significant and catastrophic injury and death claims involving minors is far more important to plaintiff's counsel than a fair and impartial assessment of damages separate and apart from a determination of liability. In fact, attorneys for claimants often push the damage aspect of cases when liability may be questionable. Thus, defense counsel faces handling the defense of the damage claim while maintaining a vigorous defense on liability issues. For many, this creates an inherent conflict in planning and managing the defense of these cases. This problem significantly heightens when defending claims of catastrophic injury or death involving a minor.

This paper will attempt to provide ideas to effectively deal with the complex question of damages in a contested liability case involving serious or fatal injury to a minor. The focus will be placed on the minor's claims for damages and how one can navigate the minefield of jury sympathy and empathy for the child and his or her family who has been severely or fatally injured in an accident.

In general, an aggressive defense must be maintained without appearing callous or indifferent in matters involving life and limb. More art than science, the skilled defense attorney must navigate the rolling and often violent seas as advocate and counselor. Most of what occurs in the courtroom involves being an advocate for the rights of a client while counseling the jury on the course of justice. One must always consider the courtroom as a theater with the jury as an audience. Like a good dramatic play, the actors, in this case the witnesses and the trial lawyers, must often force the jury to suspend disbelief and form conclusions soundly based upon the law and reasoned judgment. Too often, juries take the easier path – one involving acceptance of the horrific injury without the balance of fairness and reasonableness required by law. Sometimes getting the jury to the path less traveled will be the job of defense counsel.

In starting this journey, it is important to establish a baseline as to the nature of damages in these types of cases. One must appreciate the elements of damages before considering the defense of those claims. The make-up of juries and their likely response to damage testimony will be addressed. You must know your audience before crafting your defense. Finally, we will examine the techniques mostly likely to best serve the defense in cases involving severe and fatal injuries to children.

II. The Nature of Damages in Cases Involving Minors

A. Damages in Injury Cases

It is critical to develop a theme as early as *voir dire* regarding damages, if any, being limited to reasonable and fair compensation. Most jurisdictions include such non-economic elements of damages as past and future pain and suffering, disfigurement, past and future disability, loss of a normal life experienced and reasonably certain to be experienced in the future, and past and future emotional distress. In addition, economic losses in minor cases usually include the reasonable expense of necessary medical care, treatment, and services

received and reasonably certain to be received in the future. Finally, some jurisdictions may permit an argument to include the value of time, earnings, salaries, and benefits reasonably certain to be lost in the future notwithstanding the inherent speculative nature of such damages.

B. Damages in Death Cases

Damages to the estate of a minor in a wrongful death case will largely involve non-economic issues that are grossly emotional in nature. These create severe difficulties for defense counsel because of our common characteristics of human nature involving empathy and sympathy. It is difficult to imagine anyone other than one suffering from some psychological disorder not feeling sympathy in a death case of a minor.

The single most important component of damages in death cases involves a claim for loss of society. Loss of society, which has been defined as the mutual benefits each family member would have received from the continued existence of the decedent, including love, affection, care, attention, companionship, comfort, guidance and protection. Some jurisdictions include grief or sorrow experienced by the lineal next of kin as a separate element of damages in death cases.

These marginally speculative elements of damages create potentially large amounts of non-economic damages in those states where no caps or large caps exist. In dealing with juries on these issues, defense counsel must stress there is no economic "replacement cost" to love, affection, care, comfort and guidance. There is likewise no way to value grief and sorrow of the survivors. Plaintiff's counsel cannot be permitted to speculate wildly on such values in closing argument. One must emphasize the essential concepts of fairness and reasonableness. Defense counsel must find a way to soften the emotional firestorm created when discussing the value of a life. The jury must understand that placing a value on the loss suffered by the survivors is vastly different than valuing the loss of the decedent.

C. General Jury Consideration

Juries are always asked to consider damages in terms of their nature, extent and duration. The burden of proof regarding the nature, extent and duration of each element of damages is squarely placed on the plaintiff. This is a ripe battleground when addressing the plaintiff's damages. Be prepared to assess and argue that the nature of the injury is not as it appears. Use expert testimony to evaluate the true nature of the injury and its effect on the child. A severe and disfiguring scar on the leg of a young boy may be quite different from a lesser scar on the lower leg of a young girl whose mother had an established career in modeling. The nature of the injury, the background of the minor plaintiff and how he or she may fit into the traditional role of family is likely to impact the jury's evaluation of damages.

The extent of the injury deals with severity, permanency, and its effect on the expected normal life of the child. Some years ago, a prominent trial attorney in Chicago successfully argued that loss of an arm in a traumatic accident actually "aided" the plaintiff considering that the accident resulted in the plaintiff quitting a menial labor job and enrolling in law school. Great care must be taken before one argues that an injured party is "better off" as a result of an accident. However, creative innuendo in the argument of counsel can sometimes lead a jury to that very result. The steps taken to address the extent of the injury can often substantially decrease the exposure to the defendant.

Duration of an injury provides another key aspect to the plaintiff's ability to post a large number on a blackboard in front of the jury. While most jurisdictions either prohibit or minimize a plaintiff's ability to argue for *per diem* damages, plaintiff's counsel can certainly direct the jury's attention to the length of time the plaintiff has suffered and is likely to suffer in the future. The admissibility of governmental life tables is fairly

universal in establishing life expectancies. The “duration” of the injury, and your ability to reduce it, will have a substantial impact on the size of the verdict.

Carefully examine whether the plaintiff presented adequate proof to argue the duration of the injury. Is proof of duration of the injury based upon testimony of an expert who established the reasonable certainty of events in the future? Is plaintiff’s counsel attempting to drive the jury to speculate about the uncertainty of future events? Has defense counsel provided possible alternative explanations and likely outcomes to offset the conjecture from the plaintiff’s side? While the defendant has no burden of proof on the issue of damages, it cannot be overstated that the jury expects the defendant to explain its position on causation and damages. Avoiding a discussion of causation and damages often results in unsuccessful outcomes. Defense counsel will have failed in their obligation of sincerity and trustworthiness before the jury. While no formal burden of proof exists for the defendant, the jury expects to learn and is likely entitled to know how and why a verdict of no damages or significantly less damages is appropriate.

Juries expect defense counsel to address whether the plaintiff’s proof is reasonable and credible involving the likelihood of future pain and suffering. Common human experience teaches that people adjust to adversity and ailments by forming a new and revised baseline of normalcy. In this light, the plaintiff’s damage claim should not be presented in a vacuum. Others have experienced problems similar to the plaintiff, whether by trauma or otherwise. Many of those individuals have proceeded to productive and satisfying lives. Perhaps such individuals have sufficient education, training and experience to serve as witnesses in the case. Would an amputee provide some balance as a witness of life after amputation? Would a blind individual be best able to explain life’s trials and tribulations?

This author is not suggesting that defense counsel adopt an attitude that the plaintiff will learn to live with pain and disability so why bother compensating the child for what will become his or her normal life. On the other hand, the defendant wants the jury to think that people not involved in accidents still must learn to deal with life’s problems and setbacks. No one lives a perfect existence. Without fault or blame, people get sick, face debilitating illnesses, suffer trauma to themselves or loved ones. Defense counsel must address the common affairs of life as the jury looks to the future where the big numbers lie. The only certainty about the future is uncertainty. War, poverty, sickness, homelessness, and unemployment are inescapable realities for far too many of the people of this country. Who can say that the people in the courtroom will not suffer from such tragedies?

Finally, while most jurisdictions do not limit or reduce future non-economic losses to present cash values, the vast majority requires that claims for future economic losses be reduced to present cash value. The law applicable to jury instructions relating to “present cash value” must be consulted in the jurisdiction where the case is pending to determine whether certain types of damages must be reduced to present cash value. This is a critical consideration, as forcing a plaintiff to reduce economic losses to present cash value will dramatically affect the bottom line on such claims. An examination of market forces, even in difficult economic times, will assist in demonstrating this effect to the jury. Expert testimony may aid in a jury’s understanding of these complex economic factors. Do not allow the plaintiff to take the easy road by simply arguing that the discount rate is essentially equal to the inflationary rate thus allowing a simple mathematical calibration of “dollars per year times the number of years equals damages.” It is and has to be more complicated and the jury needs to know how and why.

III. Selection of Jurors

A detailed discussion of jury selection and jury considerations is well beyond the scope of this paper. However, a discussion of how best to minimize or at least address damages in a difficult case cannot take place without some dialogue on jury selection. A juror's perception of damages and the factors that will cause a certain individual to curtail or minimize an otherwise large award for a minor is an important consideration in minor's injury and death claims.

A. A Jury of One's Peers

A jury of the plaintiff's peers will not try the case. No minors will serve on the jury. However, all of the jurors will have successfully completed childhood. While obvious, defense counsel must not lose sight of the commonality of interest that many jurors will feel for the minor plaintiff. They may reflect back on their own childhood. The case will force jurors to remember both pleasant and unpleasant aspect of childhood. Such memories will project onto their feelings for the plaintiff. They may put themselves into the shoes of the injured party creating sympathy that cannot be ameliorated by the evidence. These potentially harmful "plaintiff jurors" need to be identified and removed. There is little that can be done to modify those feeling of sympathy during the course of the trial. Depending on the size of the jury in certain jurisdictions, a follower who is sympathetic can be offset by a leader who is not. Exercise great care with the overly sympathetic juror. Such an individual will often ignore the court's instructions in order to do the right thing in the mind of that juror. Do not overlook the need to use one's best efforts to establish a challenge for cause with such individuals.

B. Family Relationships

The other connection that members of the venire will have towards the plaintiff involves family. Members of the venire will have spouses and siblings. They may have close relationships with their parents. They may children of their own. These relationships create special bonds that the defendant's evidence may not overcome. Keep in mind that plaintiff's counsel will be doing his or her best to foster these thoughts of relationships on the issue of damages. In a wrongful death action brought by the parents of a young girl, the plaintiff's counsel will argue that the surviving parents will never see their daughter in her prom dress, never see her accept a diploma at her college graduation, never see her walk down the aisle at her wedding, and never share the joy of holding their grandchild. Defense counsel must ask whether the prospective juror in question can appropriately respond to such pandering.

C. The Injury

Consider the impact of the disfiguring or debilitating injury on the jury. Discussions of such injuries during *voir dire* will have limited effect compared to vivid photographs, a "day in the life" video, or a courtroom visit by the injured minor plaintiff. Prepare the jury for the visual barrage of the injury. Show the photographs during jury selection to read the reactions of the prospective panel. Request the opportunity to view the "day in the life" video during *voir dire*. Demand the presence of the child in the courtroom during jury selection. Taking such steps fleshes out unexpected or unanticipated reactions of the more emotional jurors well in advance of selection. Getting the "bad stuff" in front of the jury early in the process serves to desensitize the jury. Having a severely injured plaintiff in court during the trial allows a jury to get comfortable with that individual. There must be some reasonable measure and judgment on the part of defense counsel on far to proceed down this path, as the risk of an adverse reaction clearly exists. Nonetheless, these tactics often soften the risk of an emotionally charged jury surprised when confronting such matters later in the trial.

D. Personality

Identify the personality type of the prospective juror. Optimists tend to be better plaintiff's juror than pessimists. An award of a substantial verdict may do some good in the eyes of the optimist. It is the "cup half full" problem. Pessimists are more unwilling to suspend disbelief. They will question the veracity of plaintiff's claims.

Young parents who care for young children or middle-aged adults who care for their elderly parents understand the need to care for those who have been injured. Such caring individuals will naturally be sympathetic to parents who have lost a child or who must care for a severely injured child. People not engaged in care giving tend to be more independent and more willing to accept the notion that everyone must assume responsibility for themselves. The giving of money will receive a critical reception by people who are self-made and self-reliant.

Is the prospective juror a right-brained or left-brained individual? Does the person make decisions logically or emotionally? Is he or she artistic or concrete in their thinking? The better defense juror of the two is the more logical, concrete person who will not allow emotions to play an important part in deliberations. These types of individuals are difficult to find in a limited *voir dire*. Try to get a sense from patterns of speech, voice inflection, and body mannerisms. As defense attorneys by nature tend to be more logical and concrete in their thought process, it may be difficult to even perceive the type of person being described here. Jury selection consultants or even a spouse or good friend may better perceive the "emotional" type.

It is generally believed that corporate types, professionals, business executives and the like make better defense jurors. The average person who merely earns a livable wage, struggles to make ends meet, and has negative experiences with the "establishment" is more inclined to "even the playing field" by feeling good about awarding a large sum to an injured party. Once again, this is an area involving complex analysis where time may not be available during *voir dire*. People by nature are complex and one cannot generalize by saying, on one hand, that a CEO of a publicly traded company is certain to give a defense verdict or that an unemployed grocery clerk who lives alone in a studio apartment is going to be a plaintiff's juror. Defense counsel must take all factors into account in de-selecting potentially unfavorable jurors in minor's cases.

IV. Damage-Reducing Techniques

A detailed analysis of the plaintiff's damages is critical before one can develop a strategy designed to minimize those damages. An assessment of the jury instructions in the subject jurisdiction provides a framework for dealing with damages. Decide what elements of damages can be challenged and which elements must be conceded. Once defense counsel has identified the weak links in the damage claim, develop a strategy to attack those points.

As damage-reducing techniques are discussed, the credibility, sincerity and integrity of defense counsel is vital to whether defense arguments on damages are accepted. One cannot engage in "mud slinging" and expect to win over a jury. Utilize careful and precise rhetoric to avoid the appearance of dancing on the grave of the departed. There is little hope for defense counsel who leaves the jury with such a bad taste. Sincerity throughout the process is the key. Develop rapport and demonstrate sincerity during *voir dire*, lay the groundwork for your defense arguments in opening statement, and continue to develop your theme through the testimony of witnesses.

The jury is more inclined to accept the arguments of an individual they like and respect. The development of such feelings begins with the attitude of defense counsel. Trustworthiness, likeability, and sincerity will give defense counsel an open door to the jury. The sincerity demonstrated by defense counsel during the entire

trial will unavoidably lead to the confidence to deliver a closing argument consistent with the defense themes in the case.

These ideas are never more important than in cases involving minors. People will be very sensitive to the treatment of children and their families. A firm but honest approach will be well received. Defense counsel need not retreat when faced with a potentially hostile jury who has developed anger with the defendant. Separate the issues of wrongful conduct with the assessment of damages. Enlighten the jury regarding the improper belief that the defendant must be punished and keep their focus on “fair and reasonable compensation.”

Here are some ideas or themes that can be employed at various times in the right case when trying to “walk the line” in addressing damages.

A. Empathy

Bad or catastrophic injuries deserve empathy, but not sympathy. Sympathy must be left in the corridor and not brought back to jury deliberations.

It is easy to assess the facts from the perspective of compassion, care, concern, kindness, and sympathy. Human nature being what it is, as people, we are far more likely to feel badly about someone who has been hurt or lost his or her life. It is far more difficult to make the “tough call,” that is not allowing sympathy or prejudice to affect one’s ability to make a fair and impartial decision.

Being on a jury is hard work—that is exactly what is expected of the jury under the law. Stress the fact that we have a system built on laws and not on emotion. The system requires an umpire who is not passionate or emotional. If we allow sympathy to play a part in our jury system, the very fabric of our democracy will breakdown.

Admit, as defense counsel, that you personally feel empathy for the child and his family. Express how you “feel bad” about the injuries in this case. Explain; however, that the mere fact that someone was injured or killed does not mean someone has to pay money. Everyone will be familiar with the expression “bad things happen to good people.” Unfortunately, it is commonplace that injuries, suffering and death occur without any blame, fault or recourse. The jury must understand that their job is not about awarding damages but rather about determining if there has been a wrong, and, if so, determining fair and reasonable compensation in a manner set out by the court.

B. Burden of Proof

The burden of proof in a civil case is an aid to the defense. The defendant has no obligation to prove any fact regarding damages. The plaintiff has the sole burden of proof regarding damages. Most jurisdictions accept the common definition that holds that the plaintiff has the obligation and duty to persuade the jury that any proposition on which the plaintiff has the burden of proof is more probably true than not true. Competent defense counsel can and should argue this concept of “preponderance of the evidence” from *voir dire* to closing argument.

Careful consideration of the burden of proof in a case involving significant damages bring us back to the elements of damages. The plaintiff must first prove that each element of damage is more probably true than not true. Then, the plaintiff is bound to ask for no more than fair and reasonable compensation. Undoubtedly, plaintiff’s counsel will ask for more than supported by the evidence and far more than is fair and reasonable. Be aggressive in attacking plaintiff’s counsel for such disregard of the jury.

Sincerity requires defense counsel to acknowledge that fair and reasonable compensation should be awarded if the plaintiff has met all aspects of the burden of proof on all issues of liability and damages. To state

otherwise would be insincere and lack credibility. If defense counsel maintains credibility and makes concessions where necessary, the jury is more inclined to give weight to the defense arguments and carefully assess the damage claim as suggested by defense counsel.

The jury instructions, coupled with the burden of proof, can be the friend of defense counsel. For example, when dealing with future damages that could be extensive, the plaintiff has the burden to prove that such damages are “reasonably certain to be experienced” in the future. Defense counsel must distinguish reasonable certainty, a high standard, from guess, speculation and conjecture. Most jurisdictions will specifically admonish juries to disregard evidence based upon guess, speculation and conjecture. A strong argument in this area can substantially diminish future damages.

C. Discussion of Damages as an Admission

Many defense attorneys fail to address damages in cases involving contested liability. All of the defendant’s eggs are thereby placed in the liability basket. In this writer’s opinion, such a tactic fails to consider the substantial benefits gained by attacking all aspects of the plaintiff’s case. Clearly, one should not question whether the decedent is really dead when autopsy photographs suggest otherwise. However, the nature and extent of the damages, whether for death or injury claims, is always open to interpretation. These matters are usually open to attack because plaintiff’s counsel will necessarily overreach in an attempt to secure a substantial verdict.

Many defense attorneys often express concern by thinking “I admit liability if I discuss damages.” Such concerns are baseless if counsel addresses the issue during *voir dire*, opening statement, and during witness examination. In fact, the lack of a bifurcated trial gives defense counsel the opportunity to address specifically the contested nature of both liability and damages. The jury should be conditioned to accept the fact that defense counsel will be addressing damages because defense counsel is obligated to do so. The jury should also be informed that any discussion of damages by defense counsel is not and should not be an admission of liability or even a concession that there might be liability. Competent defense counsel cannot allow the plaintiff’s claim for damages to be unchallenged even in cases where the likelihood of a verdict for plaintiff is remote. Too often, we hear about supposed “no liability” cases where the verdict for plaintiff goes beyond anyone’s anticipated outcome. Such unfortunate outcomes usually follow from defendant’s refusal to address damages.

D. Claims on behalf of Children

Claims on behalf of children as compared with severe or fatal injuries in adults present unique challenges. There is no magic bullet or secret formula in handling these difficult cases. Many trial techniques applicable to the defense of adult claims can be used in these cases. However, to many, significant injuries to children are truly tragic. The idea of having a child endure life while crippled or severely debilitated is very distasteful. Suggesting to a child and his family that he is not entitled to compensation in such cases is quite complex. In death cases, losing a child for a parent is outside the natural order. No parent should ever be asked to bury a son or daughter. Yet, these will be the touchstones of plaintiff’s counsel during opening and closing. Plaintiff will work hard to appeal to the jury’s sense of goodness and humanity. Counsel’s words will not be directed to “fair and reasonable compensation.” Counsel will attempt to suggest that the jury can make things right, can fix things, with an award of substantial dollars.

In cases involving children, defense counsel must teach the jury that it does not have god-like powers to make all right with the natural process of life. The jury’s verdict will not reverse the harm or unring the bell. The job of the jury is not to fix things. Rather, the jury is expected to fairly and reasonably fix a sum of damages to assist the child and/or his family. This is very difficult for juries. Most want to do the right thing. Most will do

the right thing, within reason, if defense counsel provides them with information about the process and gives them the confidence to make informed decisions.

As the defense attorney in a case involving claims made on behalf of children, it is important to keep the jury aware that it sits in the role as umpire, as impartial arbiter of the facts. It cannot and should not develop a closeness or fondness for either party. To do so would result in a loss of objectivity. If that happens, the jury may become too emotionally bound in the facts of the case and the defense counsel will likely face a very bad outcome involving substantial damages. In some very bad cases, there may be no way to avoid it.

Attorneys handling large exposure cases often have little to work with in defending the claims brought on behalf of children. Bad cases bring bad outcomes. There may be no defense to the liability issues. The reasonably necessary future medical care may exceed \$20 million or more. Suggesting settlement may be the only logical path for the defense attorney in such cases. In those cases involving overreaching by the plaintiff even with a difficult liability defense; however, juries often return a verdict that is “fair and reasonable.” Defense counsel can affect the outcome by providing a jury with the tools to reach a fair result.

V. Conclusion

Take a tough stand on damages. A bright, competent and well-prepared defense counsel always has something to say on damages. Rarely does one concede the nature, extent and duration of damages. Plaintiff’s counsel invariably seeks a larger verdict than one justified by the evidence. The plaintiff is entitled only to fair and reasonable compensation. An unfortunate claim must not be allowed to create a lottery mentality.

While the job of defense counsel is made more difficult in cases involving minors, the general rules of trial advocacy continue to apply. Address those points that are subject to attack. Concede where no reasonable alternative argument exists. Give the jury a sense of reality about the real world so it is not trapped in the surreal environment created by a courtroom. Take a stand with confidence and sincerity. Finally, remember that the courtroom is a theater with an interactive audience. Engage your audience on the difficult issue of damages and it will likely respond with a result that is acceptable to your client.

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