DAMAGES: THE DEFENSE ATTORNEY'S DILEMMA

by Jeri Kagel

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Dilemma: a situation in which a difficult choice has to be made between two or more alternatives, especially undesirable ones. (Oxford American Dictionaries)

In every serious injury or death case, defense counsel faces the dilemma of whether, and how, to confront the issue of damages. Talking to the jury about gruesome injuries or the death of a loved one taps into every defense attorney's fear of appearing callous or cold-hearted.

Defense attorneys most often prefer juries to decide in favor of their client on issues of liability. Consequently, many believe that they are ceding liability if they talk about damages. Even in cases where defense counsel concedes liability, either by admission or tacitly, and damages take center stage, defense counsel often tread lightly on the issue of money out of a fear of appearing insensitive.

While I understand these fears, shying away from damages in catastrophic cases – or even in smaller cases – gives far too much power to the Plaintiff over the seminal issue in a case. Because of defense counsel's reluctance to argue damages, the only "damage story" jurors get to hear and evaluate is plaintiff's story. It is critical that defense counsel make damages part of their story and talk directly to the jury about money. With the right tools, defense counsel can openly discuss the issues of damages with integrity and compassion at the same time he or she convinces the jury to award less money or none at all.

Imagine for a moment that you are counsel for the defense in a personal injury case. It may be a vehicular accident, a medical malpractice case, product liability or simple negligence. The plaintiff has been injured or killed. The parties have been unable to reach a settlement and as a result, the case is going to be tried. Perhaps you have even done a mock trial or focus group to learn what does and does not matter to people whose attitudes reflect those of jurors likely to hear this case. At issue are your client's liability, the plaintiff's alleged injury, and the amount of damages the jury might award should there be a plaintiff's verdict.

Plaintiff's counsel will argue all issues, including damages, through creative voir dire questions, a strong heartfelt opening statement and thorough, passionate closing argument. Plaintiff's attorney does all this to register to jurors why their client deserves a lot of money and to insure, as best he or she can, that jurors understand the importance and reasonableness of what they are being asked to decide – including damages.

What's a defense attorney to do?

Over the last twenty years, I have heard a host of reasons defense attorneys choose NOT to argue damages, including:

> *"If I start talking to the jury about money, they'll think I've ceded liability!"*
>
> *"Won't I be 'devaluing' the plaintiff's injury if I argue money? What will the jury think of me? If they think I'm heartless, won't they attribute that to my client as well?"*
>
> *"It's too dangerous. Once I talk about damages, that's all the jury will think about and it will take away my credibility on liability."*
>
> *"I don't want to suggest what a 'reasonable amount of damages' is when I think we have a strong case on liability and I don't think the jury should get to damages at all."*

However, countless juries have proven these assumptions wrong. They are common misconceptions grounded in fears that may have sprouted from other lawyers' "war stories," personal experiences or even a plot on a TV legal drama. There may be a grain of truth in these fears. It may be that what did not work for another attorney will not work for you; it may be that there are dangerous ways to talk about damages; it might even be true that sometimes jurors will not resonate with your argument on damages. However, these same "truths" are also true when it comes to arguing liability. Some jurors will accept what you have to say, some won't, and some others may strongly disagree. Yet defense attorneys going to trial work to overcome those obstacles everyday. On liability.

Defense attorneys figure out ways to maneuver around possible negative juror reactions to their ideas about liability. They advocate for their clients even if theirs is a difficult story to tell or a difficult defendant to represent.

The same does not hold true for damages. With damages, defense attorneys are more comfortable opting out. It is my belief, and it has been my experience, that defense attorneys are *not at risk* if they argue damages, even dollar amounts. As we poll jurors, we learn that defense attorneys who confront the issue of damages head-on, and in ways I will talk about below, successfully obtain defense verdicts or significantly reduce the amount of money awarded *without* alienating the jury. In fact, jurors have often told us that they feel grateful to defense attorneys who have helped them put a voice to, and a "vote" for, their own discomfort with awarding either the amount plaintiffs were asking for, or any money at all. Once defense attorneys are willing to act differently by confronting the issue of "how much money," then our discussion moves from "whether to do it" to "how to do it."

We know a variety of ways that people (jurors) digest, comprehend and incorporate information provided to them generally and at trial more specifically. We know about the "primacy-recency" effect; we know about the importance of "repetition;" the importance of acknowledging 'the grain of truth' in your opponent's argument before debunking its most troubling aspects, and finally we know the importance of using the tools of good storytellers to engage jurors' hearts and minds. These and other communication skills work. Their importance is paramount when deciding how to present your case.

These tools, important when arguing liability, remain critical – and effective - when defense attorneys decide to address damages. This article explores four opportunities for defense counsel to address damages: Voir Dire, Opening Statements, Witness Testimony and Closing Arguments.

Start Addressing Damages In Voir Dire

Local rules often restrain attorneys' first interactions with jurors and each individual judge may have a unique way of structuring voir dire, including the kinds of questions and the amount of follow-up questions allowed. Still, voir dire is the first time that you, as defense counsel, can begin to build a rapport with the jury. Building a rapport translates into jurors trusting what the attorney says, his or her interpretation of facts and events, and believing that the attorney has cause to question an opposing witness's testimony. Good will toward defense counsel can also transfer (to some degree) back to the defendant. During voir dire, building a relationship with the jury is as important as uncovering bias and educating them about your case.

Many of us are familiar with, and use, voir dire questions designed to discover the "punitive damage juror," questions to find jurors who are more likely to demonstrate sympathy for an injured plaintiff or the family of the deceased, and/or questions drafted to find those people more likely to decide against your client, whether it is because they are a corporate defendant, government agency or member of a despised industry. These questions, rightly so, are asked to uncover jurors' attitudes and/or life experiences.

Talking directly about money is an uncomfortable topic – between friends, family and certainly strangers. In addition to the issues just described, here are two additional ways of using jury selection as an opportunity to begin to educate your jury about damages.

Voir Dire Quick Tips:

1. *ASK THE PLAINTIFF'S OPPOSITE*

It is always important to listen to the plaintiff attorney's voir dire questions. When plaintiffs ask voir dire questions designed to identify those jurors who are going to be less likely to award a large sum of money with questions such as, "How many of you have an amount of money – a ceiling – beyond which you would not award my client," then you ask, "Plaintiff asked you whether you had a ceiling above which you wouldn't award damages. I need to ask you the opposite - How many of you have an amount of money that you wouldn't go below?" Asked another way, "How many of you will award damages just because the plaintiff was injured?

Similarly, it makes sense to think about asking "opposite questions" to plaintiff's attempts to malign your client, your client's industry or only put responsibility on your client. A question like, "How many of you believe that manufacturer's are more concerned with profits than protecting consumers," can be followed with the opposite, such as, "How many of you think that in order for manufacturers to make a profit, their products need to be safe enough for people to buy them ?" or a question that, instead of focusing on the defendant, focuses on the plaintiff, "How many of you think that a manufacturer cannot guarantee how a consumer might decide to use their products? That there are times that consumers operate products in ways that are not safe?"

2. *SPEAK YOUR TRUTH*

It may sound hokey but it works.When asking direct questions about money or a person's attitude toward awarding money makes you uncomfortable, it is important to remember that the jury is not your enemy. When you are willing to display some vulnerability, jurors often are open to responding more genuinely. Incorporate your discomfort into you voir dire, by asking, in some form, "The plaintiff suffered a bad injury/plaintiff's son died. I know that you are all good people and likely to feel compassion for each of them. I need to know if you think you can walk out of this courtroom at the end of this trial and not give any money to plaintiffs if the evidence shows that my client, ABC corporation, did not cause plaintiffs' accident?"

Create a Map In Opening Statements

An attorney I worked with years ago gave me an analogy for opening statements: "Jurors are like people suddenly dropped in the middle of a strange forest; they do not know how to get out. Suddenly from the left appears someone who says, "Follow me through the forest. I'll get you out of here." They listen and begin to walk in that direction. Then, from the right, appears another stranger who says, "No, don't follow in that direction. I know a better way out of here. Follow me through the forest. I'll get you to the end. "

In my opinion, the map/story/directions presented by the defense during opening statement should be complete. You cannot take your jurors through the "forest" of liability issues, only to leave them to fend for themselves about damages. Just as the defense wants to highlight its slant on the facts, so it is important to provide the jury with some guidance about how to think about, and even decide, damages.

Opening statement is the time to be forthright; it is time to teach.

Opening Statement Quick Tips:

1. *BE AS FORTHRIGHT AS POSSIBLE*

Every defense attorney will have to decide for him or herself what they are most comfortable saying to the jury. My advice is to begin by telling the jury what you know they are facing and what you are truly asking them to do. Below is a sample opening for a defendant corporation or government entity. The same can be used for individual defendants. For openings similar to this, jurors have told us they thought the opening "helped them out," and "was persuasive, yet compassionate and understanding." Defense counsel begins,

> *"We are here today because of a tragic accident that occurred at 2:30 in the morning on Oak Road. The driver, Bob, was killed and his passenger, Jim suffered, as Ms. Smith told you, a traumatic brain injury. Understandably, everyone here sympathizes with Bob's parents who are here today. And everyone commiserates with Jim and his wife for the injury he continues to live with.*
>
> *But – as jurors – you are not being called upon to decide if this was a bad accident. You are not here to decide if these plaintiffs deserve your sympathy. You are here today to decide whether my client, ABC and the men and women who "built" this (product) are responsible for this accident and whether ABC should be obligated to pay millions of dollar to Jim for his injuries and the Brown family millions of dollars for their son's death.*
>
> *I am proud to stand in front of you and represent the men and women who work for the ABC and I want you to know that on their behalf, I am asking you to understand the pain and suffering plaintiffs have suffered.*
> *But, I'm also asking you to walk out of this courtroom without giving either plaintiff any money. That is a hard thing to do – to sympathize, to understand their pain and their desire to blame someone, but to not give them any money. But the evidence will show, as you will learn over the next week, that is the right thing to do because my client, ABC did not cause this accident, should not be blamed for it, nor forced to pay."*

Then, tell your story.

Follow Through With Witnesses

Most defense attorneys with whom I have worked are comfortable making decisions about damage testimony. Their decisions about using their own damage witnesses (lay and/or expert) as witnesses or as "off stage" consultants, as well as how to cross examine plaintiff's damages witnesses (lay and/or expert) have been aptly based on how any particular witness or testimony best fits into their overall defense story.

My recommendations regarding witnesses and damages tend to be much more case-specific than more general teachings for voir dire, opening statements and closing arguments. However, the similarity that runs through my suggestions for all aspects of a trial is to allow for the possibility of presenting damages information to the jury and to work on "how" to do it, rather than questioning whether to do it at all.

Structure Your Closing Arguments Effectively

Defense attorneys fear that presenting an alternative dollar amount to jurors in closing argument conveys that there should be an award of damages and the award should be in the range between the defendant's low number and the plaintiff's high one. In addition, as with their objections to talking about damages in their openings, many defense attorneys fear that giving a low dollar amount in closing will appear callous or coldhearted. While that argument makes some sense, omitting any mention of money leaves the jury with only plaintiff's number from which to calculate a damage award, should they believe there is some liability on the part of your client. That gives the plaintiff the power to define and instruct jurors what to do about damages.

Closing Argument Quick Tips:

1. *TEACH ABOUT YOUR DISCOMFORT WHILE DECONSTRUCTING PLAINTIFF'S DAMAGES ARGUMENT*

Defense attorneys do not have to give the plaintiff the last word on damages. They can teach the jury why to distrust plaintiff's damages position, how to think about damages, and how, for the defense, arguing damages is a necessity.

We have found that the most successful closing arguments begin with arguing liability, followed by arguing damages and coming full circle and ending on liability. Although each case is going to have its own unique arguments, one successful structure for closing arguments follows the pattern set out here.

***** Start with liability. Your liability argument forms the basis of the attorney's closing, lays the groundwork for what follows, and creates the chorus/repetition from which the jury digests information.

*****After arguing liability, talk about damages.

"I don't think you ever reach the question of damages, for all the reasons I have just stated. But plaintiff has spent a good portion of this trial and his closing argument talking about plaintiff's injuries and the money they are asking you to award. I don't think you ever reach the issues of deciding damages, but I wouldn't be doing my job for ABC if I did not address this issue at all. And so, let's talk … (this portion of your argument can capture any of a variety of issues – plaintiff has made a good recovery, plaintiff had pre-existing injuries or similar shortcomings, etc. before this incident, the expense of the life care or rehabilitation plans, reasons to discount aspects of plaintiff's damages (expert or lay) witnesses, etc.)

*Then, back to liability.

"But again, I don't think you ever have to reach these issues. "

Repeat your strongest liability arguments.

*Finish with what you said in your opening. Acknowledge that what you are asking the jury to do (walk out without giving the plaintiff any money) may be hard, but …

*Finally, ask for a defense verdict.

Choice: The act of selecting or making a decision when confronted with two or more possibilities. The right or ability to make such a selection. (Oxford American Dictionary)

Damages may be a dilemma for defense attorneys. However, there are ways to address damages over the course of a trial that are definitely effective and worthwhile. Understanding and becoming adept at making these choices provides defense counsel with several strong arguments and often leads to significantly reducing a plaintiff's damage award or strengthening the chances of a defense verdict.

Asking defense counsel to choose to talk about damages is akin to asking jurors to leave the courtroom without awarding any damages to plaintiff. It is difficult to do. Make this difficult choice. The defense attorney who confronts this dilemma and chooses to do what is difficult is actually helping his or her jury make their difficult choice.

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Editor's Note

Wow. Every issue I say to myself "This is our best issue yet!". I'm saying it again. It's amazing to watch an issue come together and I am grateful to all our authors, consultant-authors and consultant-respondents for contributing to yet another terrific issue of *The Jury Expert*.

We have articles on corporate defense strategies after a decade of corporate malfeasance, how to use simple rules for better jury selection, the legal and ethical implications of using trial consultants for witness preparation, specifics on how to prepare your witness to answer the "were you prepared" question, implications of the heightened use of images/graphics in the courtroom, skin color bias, and how defense attorneys can present damages issues effectively. Eighty-one pages of awesomeness!

I hope you find this issue useful AND if you do, please comment on our website. I know (courtesy of Google Analytics) how many of you read every issue. Comment! Or blog. And if you blog, let me know so I can link to your blog. Think of it as a small thing you can do to thank the authors who work hard to give us practical, relevant ideas to improve your litigation advocacy.

Happy January! And for those of you in snow-bound places--spring is a LONG ways away. So make some hot chocolate and hunker down and read *The Jury Expert*.

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