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Damages: What to expect from the defense in contesting damages

Be prepared for defendant's "canned" arguments and the reliance on "averages." Is your client "average"?

In this article I will provide an overview of what trial lawyers can expect from the defense when it comes to litigating the damages issues in a case. Because I am a plaintiff's lawyer, this topic can be more accurately described as the plaintiff's perspective about what to expect from the defense. But since I started my career doing defense work, I think I can shed some light on how defense lawyers typically approach damages throughout a case and in trial.

The defense fallacy of probabilities and averages

In most automobile personal-injury cases, the insurance carriers will rely on someone from their roster of biomechanical/accident reconstruction experts to attack your damages claim. Aside from the obvious areas of cross-examination (bias towards the defense, having testified hundreds of times only for the defense, having earned hundreds of thousands of dollars, if not millions, doing so, etc.), typically these experts attempt to opine about the "probability of injuries" and "causation" in light of various studies of accident statistics, including crash tests.

However, such opinions also are based on a fallacious principle, shown by the following example of a defense argument:

- Statistical studies show that for impacts of similar parameters, the typical level of injuries and medical expenses are only X.
- Plaintiff's claimed injuries and corresponded medical expenses are X + Y.
- Therefore, plaintiff's damages are exaggerated.

First, in truth, this type of opinion is really just a backhanded way of saying that your client is lying. You should bring this to the surface and ask the expert if that's what they are really saying. For example:

Q: Mr. Smith, isn't it true that what you are telling this jury is that because people in other, similar accidents, according to your studies, were not hurt as badly as my client, then you would not have expected my client to suffer injuries more serious than those other people, correct?
A: Correct.
Q: Now, are you actually saying that my client is lying?
A: No, I've never met your client before.
Q: But you're certainly suggesting to this jury that when my client says she suffered certain injuries and felt a certain amount of pain, they should question that testimony because your studies show that someone in that type of accident shouldn't typically have been as badly hurt, right?
A: Right. I'm looking at scientific probabilities, and those scientific probabilities show that the injuries should have been more minimal than what your client is claiming.

So the expert will likely concede that they are not outright claiming that your client is lying, but that they want the jury to infer that what your client is claiming isn't consistent with the expert's statistics and the resulting averages, and therefore she should be discredited.

But here is the problem with that argument: an *average* outcome, whether it is related to injuries resulting from a certain magnitude of impact, or for any kind of statistic, is necessarily a result of numbers which are *both* higher and lower than the average. So for example, let's say that for an impact of 20 mph between vehicles of a certain size going at a certain speed, the defense's statistics state that the typical victim required $7,500 worth of medical care. Assuming that is a valid statement (and of course, there are many ways to attack this premise itself, given the parameters involved, how the statistics were collected, the ages of the persons studied, the locale where they were treated, etc.), what that expert *cannot* say, if they want to follow the rules of logic and common sense, is that no accident with those same parameters can result in more than $7,500 in damages, nor can they necessarily say that your client is less likely to have suffered $15,000 (or any amount more than $7,500) of medical expenses than they are to suffer $7,500. If they do say this, you need to go on the attack and expose their logical flaws.

To show the fallacy at work, let's use a non-legal example. If you studied the statistics of all the players in the NBA, you could easily figure out what the average points per game scored per player (add the total amount of points scored for all games, divided by the number of players and then divided by the number of games). Let's assume that the average NBA player scores 9.5 points per game. According to the defense argument, Kobe Bryant should not ever score 30 points per game, and is more likely to score 9.5 per game each night than he is to score 30. According to the defense, anyone who argues that Kobe will likely score 30 points per game is either lying or should not be believed, because statistically the average player scores much less than that.

Of course, this conclusion is perfectly wrong. We know that Kobe Bryant does in fact score 30 points per game on average. We also can deduce from that that a number of other players must score less than 9.5 points per game in order for the average to be 9.5 overall. But the fact that overall, the average player scores only 9.5 points per game tells us *nothing* about what we should expect from Kobe Bryant each game. In fact, if you were to place a bet in Vegas, based on the statistical scoring averages, hoping that Kobe will score only 9.5 points per game, you would lose a lot of money!

In short, what the defense often attempts to do is to claim as valid only

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those damage amounts that fall *below* the average and exclude all of those claims exceeding the average. By claiming that it is unlikely that your client should suffer damages greater than the average, they are asserting a fallacy no different than saying that Kobe Bryant will never score more than 9.5 points per game or that he is somehow more likely to score only 9.5 points, rather than 30. Instead, the fact that your client's amount of damages exceeds the average is completely normal and expected, statistically speaking, since as stated above, to get to the average, by definition, there must be results both higher and lower than the average. If you can expose the defense expert as relying on this fallacy, you can undermine their opinion completely.

Use the "Reverse Triangle" technique

A little over one hundred years ago, in 1911 in New York City, there was a fire at the Triangle Shirtwaist Factory which took the lives of 146 people, mostly young women. The owners of the building had locked the doors to prevent the girls from taking unauthorized breaks, but as a result, when the fire broke out, many of the workers could not escape the building and died. The owners were prosecuted, but were famously acquitted. Many attribute the acquittal to the cross-examination of one of the prosecution's key witnesses by defense lawyer Max Steuer. This witness was one of the young girls who managed to escape, and when she initially told her story to the jury of the horrors that she observed, it was a very dramatic, moving account with many jurors brought to tears. But the defense kept asking her to repeat her story, time and again. Each time she retold her story, she used very similar terms and repeated herself almost word for word. Her testimony then started to sound canned and prepared, and the emotional aspect was completely drained out. All the drama was now lost, and the jury perhaps felt like they had been manipulated. After hearing from 103 prosecution witnesses and 52 defense witnesses, the jury deliberated for only two hours and acquitted the defendants. (Note – despite the number of witnesses presented, the trial lasted only from December 4, 1911, until December 27, 1911. It is hard to imagine such a trial being completed today in little over three weeks!)

The lesson from the Triangle Fire trial is that juries do not take kindly to scripted, prepared testimony and argument, nor do they like to feel that a lawyer or witness has been toying with their emotions unnecessarily. There are several relevant applications to our cases today, but here is a smattering of those lessons as they relate to damages:

First, be careful not to over-prepare your clients for their testimony. Make sure they use their own words and don't appear to be trying to remember what to say. As Mark Twain once said, "If you tell the truth, you don't have to remember anything." Prepare your client enough to ensure that the important information is conveyed, but if it seems memorized or coached, you will lose the jury.

Use other witnesses to convey the impact on your client so that you are not relying solely on your client to explain their hardship. Before and after witnesses, such as spouses, friends, and co-workers can sometimes be even more effective than your client at providing anecdotes showing the impact on your client's life.

Lastly, use what I refer to as the "Reverse Triangle" technique, which is a way of taking the defense's canned arguments and evidence and using it against them. It's important to understand that the typical defense attorney handles hundreds of files at a time, and often simply is not able to become thoroughly engaged in a case until it is close to trial. As a result, defense lawyers will often make the same arguments, use the same experts, and follow essentially the same script in each case to make up for this lack of time. You can use this to your advantage by pre-empting what you expect them to do, perhaps warning the jury in advance whether in voir dire or opening statement, and stealing their thunder, so to speak.

Two typical defense themes

Usually you will hear one of two assertions by the defense:

- If liability is clear, then they will argue that Plaintiff is overreaching on damages.
- If liability is tough, then the defense will claim that your case is frivolous.

You must be prepared to address either of these at trial, and if possible, frame these issues for the jury in your own way, *before the defense has their opportunity to do so*.

For example, if liability is clear and the trial will be about the extent of the plaintiff's damages, you need to make sure that you give the jury a *rationale* for the damages you are requesting. Frame your damage requests in a way that shows them to be reasonable and in the middle of the road, rather than everything you could have asked for.

Perhaps in closing, talk about how medical costs are rising each year, but explain that you have to base your damages on today's costs and that if medical expenses skyrocket in the future, you can't come back and ask for more. Thus, in the context of inflation and rising health-care costs, your requests are quite reasonable. (Most jurors probably have first-hand experience with rising medical costs, so this should resonate with most panels.)

Also, keep in mind what I call the "slingshot effect." If you seem like you are stretching to explain your damages, the jury is more likely to rein them in. On the other hand, if you come across as being inherently reasonable, whereas the defense appears to be taking too hard of a line, the jury will likely react in the opposite way.

I like to think of the analogy of selling a house. I knew someone who listed their house at $800,000 when they were told that it was really worth about $750,000. They received no offers. Another person whose house was also worth $750,000 instead listed it for $725,000. They received multiple offers, and then a bidding war ensued, pushing the price up to $800,000. Thus, by slightly underselling the price of the house, they were able to slingshot the value to well over what the market was bearing. They created a situation where the psychology of the potential buyers changed, so that a person who would have never initially offered to pay $800,000 was now fighting for the honor of doing so. I

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believe many times you can do the same with a jury, changing their psychology, by being a little more modest with what you request, but making it clear that the case could very well be worth more than that and telling the jury that they should award what they believe is the fair amount, more or less, based on the evidence. I believe most jurors want to do what they feel is right. If you push them too far, they will push back. But if you show them that there might actually be a vacuum in terms of full and complete justice, jurors may wish to fill that vacuum by supplementing your damages in their verdict.

With regard to the defense theme that your case is frivolous, there are several things that can be done to pre-empt such an argument. For one, take measures to make sure the jury understands that by being at trial, the plaintiff is more inconvenienced than them, and thus, would have no incentive for bringing a claim to trial unless it had merit. Your client must be present every day unless there are truly extenuating circumstances, and if they cannot attend, you need to make sure the jury understands why. If you know in advance that your client may have to miss some days of trial, you may be able to address this in voir dire, particularly if the reason is medical in nature. Also, the jurors must feel that the plaintiff did everything they could to make things better, but nevertheless remained injured and needs to be fully compensated. Thus, they tried to work as best they can, but fell short. They saw their doctors and followed their advice, but still didn't heal as they had hoped. They must come across as reluctant to have filed a lawsuit. They must come across as being closer to humble and understated, rather than someone who feels they are entitled something. On the other hand, if the jury feels that your client didn't do everything they could to make the best of their situation, the jury may react with resentment.

In addressing the accusations of "frivolous lawsuits," you may also wish to use some of your voir dire to ask jurors about frivolous defenses. Sometimes I like to ask jurors if they ever heard of the "Twinkie Defense." Usually someone will raise their hand and talk about the man who shot Harvey Milk and was acquitted because his doctor said that eating too many Twinkies essentially made him insane. In actuality, this is not what was really argued in that case, but that is how the case is often remembered, much like how the McDonald's coffee case is also misunderstood and misrepresented. Either way, use examples like this to explain that there are both frivolous lawsuits *and* frivolous defenses, and that neither is acceptable.

Get the jury to agree that if someone has a valid claim, it's not right for the defendant to abuse the court system to avoid paying them. This usually ties in well in closing argument once you've cross-examined their experts and shown how they've testified hundreds of times for the defense and on each of those occasions offered opinions which are based on fallacies and misrepresentations.

Lastly, be clear in the very beginning, during voir dire and opening statements that you are going to be asking for money. Rather than be coy about it, I think you should address this head on. In doing so, though, make sure to set their expectations early. If you're going to be blackboarding millions of dollars of damages, be sure to make that clear in voir dire and opening. If you're not going to be asking for millions or hundreds of thousands of dollars, make that clear, too. You may explain that they'll probably be disappointed to learn that this case does not involve millions of dollars, but nevertheless, involves something that is very important to your client. Either way, you don't want the jury to be surprised by what you ask for. If you establish reasonable expectations up front, and then meet those expectations with your evidence, you should get favorable results.

Conclusion

If you plan ahead and anticipate what the defense will do in trial with regard to your damages, you can neutralize their impact and in some instances, use them in your favor.

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