



## Non-economic damages: from voir dire to closing argument

OFTEN THE MOST CHALLENGING DAMAGES TO PRESENT AT TRIAL,  
HERE IS A STEP-BY-STEP GUIDE LEADING UP TO YOUR CLOSING ARGUMENT

Perhaps the most important category of damages in a personal-injury or wrongful-death trial is non-economic, and yet, it is usually the most difficult evidence to put on at trial. Why is that? With economic damages, jurors can objectively see exactly what their award is paying for, whether it's medical bills, lost wages or lost profits. There is an objective basis for their award. But jurors are generally more reluctant to award significant non-economic damages for a number of reasons. Besides the tort-reform jurors who think that all non-economic damages should be capped or banned, even otherwise well-intentioned jurors can have difficulty awarding significant non-economic damages.

Usually, the reason behind the reluctance is a general feeling that any award of non-economic damages will not bring the decedent back. Your job as a trial lawyer is to get the jury motivated to award a fair non-economic damages award during closing argument. But getting jurors to that point starts at the beginning of trial during voir dire, continues through the presentation of evidence, and culminates during closing argument.

### Voir dire

You really can't expect a juror to award the non-economic damages that you will be asking for in closing unless you have properly laid the foundation during voir dire. This is your only opportunity to talk to jurors about their feelings regarding non-economic damages. And when I say "talk" to jurors, I mean *listen* to jurors. Don't ask the standard "Can you be fair and impartial?" or "Can you promise to follow the law?" Inevitably, even the most callous tort reformers will tell you that they can be fair and follow the law.

I start every voir dire telling jurors that they don't owe me *anything*, nothing at all, with one exception. That is, their brutal honesty. I also start by explaining that everyone has prejudices, and that's OK. Some prejudices we have are because of where or how we were raised, while others have been formed through life experiences. After getting the jurors comfortable to understand that all you really want is their honest views about things, ask them open-ended questions and don't be afraid about the answers you'll get. Ask jurors questions like: "What do you think about our jury system that allows for compensation for the loss of the love of family member or for physical pain and suffering?"; "Do you like that idea? If so, why?"; "Do you not like that idea? If not, why not?" Try to get jurors talking about their views on non-economic damages. You will learn far more about potential jurors by listening to their answers than you will getting simple "yes" or "no" answers to loaded questions.

Of course, if you're able to get jurors talking about their feelings about non-economic damages you'll inevitably reveal some really bad, and some really good, potential jurors. Don't worry about those jurors. None of them will likely make the panel anyway. It's the jurors who are in between that you need to focus on. Within that group, make sure that you identify the leaders from the followers. Obviously, the leaders who are bad potential jurors are the ones to get rid of first.

At a minimum, the jurors who remain on the panel should be ready, willing and able to follow the evidence *wherever it takes them*. I think it is a good idea to tell jurors up front that if they don't think you've proved your case, then they must be prepared to look your client

in the eye and give him/her nothing, nothing at all. But, on the other hand, if that same juror thinks that you did prove your case, they also need to be ready, willing and able to render an appropriate and fair award; an award that simply equals and matches the harm presented by the evidence. It comes back to the brutal honesty that you're asking the jury to give you, nothing more and nothing less.

Finally, since a verdict literally means to "speak the truth," jurors should understand from the very beginning that there will be things that they are *supposed* to consider in rendering a verdict, as well as things they are *not supposed* to consider. This will become important later during closing argument, as discussed below, when going through the jury instructions. But it is imperative that the jurors understand the concept that there is stuff that must be considered as part of their verdict, and stuff that cannot be considered. The only way a truthful and honest verdict can be reached is if the rules are followed. If not, a dishonest verdict will result, and the jury needs to understand that up front.

### Opening statement

One of the biggest mistakes lawyers make is to remind jurors that their opening statement is not evidence. Really, why do that? There's an instruction that tells them that anyway and it's inviting the jury to tune out, "because it's not evidence." Instead, tell the jury that "Everything I'm about to tell you we will prove to you with the evidence in this case." Of course, don't overstate your case, but don't understate it either. Be frank, up front, and organized in telling your client's story. Most importantly, keep it simple and to the point. Jurors

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will appreciate your preparation which will give you credibility, which you will need when asking for non-economic damages later.

In addition to telling your client's story, the opening statement is a time for you to continue to establish the theme for your case. You should be able to succinctly tell the jury what the case is about. For example, a common theme in wrongful death cases is "taking responsibility" or, to put it more accurately, "taking *full* responsibility." This theme applies not only to the liability aspects of the case, but the damages as well. This theme must be reinforced during voir dire, opening statement, during evidence, and in closing. Awarding less than the full damages is not making the defendant take "full" responsibility.

Take time during your opening statement to talk about the damages your client has suffered just like you talk about the liability parts of your case. Explain the magnitude of the loss your client has suffered and the impact the death of the decedent has had on your clients. Further, explain that the award you will ultimately be seeking will be a fair one. In order to be fair, the award must simply match and equal the harm that's been caused to your client, nothing more and nothing less, which is all you expect from the jury.

### Witnesses to establish non-economic damages

When putting on evidence of non-economic damages in trial, identify witnesses other than your client who can verbalize the loss that your client has endured. Spend time during discovery identifying who such witnesses could be. It could be a parent, a sibling, a best friend, a boss, or a co-worker. Work with your client to identify such possible witnesses and then interview them so you can decide which are the best witnesses and then properly disclose them during discovery. Testimony coming from such non-party witnesses is very effective because it comes from someone who does not have a stake in the outcome and who has seen first-hand the impact that the wrongful death or injury has had on your client.

### Photos and "day in the life" videos

Photographs are very powerful tools in presenting non-economic damages. You want to identify the best photos you can find to put in perspective your client's loss. For example, look for photos where your client and the decedent are extremely happy like a wedding photo, birthday party, vacation, etc. Then contrast that with explaining how your client's life has been devastated by the loss. As we all know, a photograph can speak a thousand words.

In some cases, there may be family videos which are helpful for the jury to really understand your client's loss. This is especially true in wrongful-death cases. Try to have the video last no more than 10 to 15 minutes and show it only once so that you don't "over-bake the cake." This will have the most impact with the jury because after talking about the loss your client has suffered during trial, the video will give the jury a better feel for the magnitude of the loss first hand.

### Closing argument

By the time you get to closing argument, you should have set the stage in voir dire for the jury to understand that their award of non-economic damages must equal and match the harm your client has suffered. You should tell the jury that before they can decide how much money to award in non-economic damages, they must first consider the level of harm that your client has suffered in the past, and will continue to suffer in the future. Go over the harm in detail before you ask for money. While the award must not *exceed* the amount of the harm, it should not be *less* than the harm either. Especially in wrongful-death or catastrophic-injury cases, don't be shy about acknowledging that you are asking for a lot of money from the very beginning. The reason? Because your client's harm is so significant and the award must equal and match the harm.

Address the common human reaction that "it's just too much money for one person," by telling the jury that if that's the case, "then it is just too much harm for one person too." But your

client doesn't have a choice on the level of harm they will endure, that's established and out of the jury's control. Rather, what the jury *does* control is to make sure that their award equals and matches the harm. Again, nothing more and nothing less should be expected from the jury.

### What they must consider in awarding damages

Closing argument is also the time to remind the jury of your discussion during voir dire that there are factors they *must* consider in rendering their non-economic award, and that there are things that they *must not* consider. First, the stuff they must consider is contained in the jury instructions. In a wrongful-death case, that would include "the loss of decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support." (CACI 3921). In a personal injury case, it is the past and future "physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress." (CACI 3905A).

Don't gloss over these instructions. Break them down and talk to the jury about each one separately.

### Diffusing jurors' reluctance to award non-economic damages

Once you've gone over what the jury *must* consider, turn your focus to talk about what they *must not* consider. When you get to this part of the closing, slow down, draw particular attention to it, and tell them that this is one of the most important things you will talk about in your closing. Why? Because you're about to diffuse the reasons why most jurors are reluctant to give money for non-economic damages.

Be honest with the jury and tell them that you understand human nature and it's easy to want to consider such other factors like, "Who is going to pay for these damages?; How can the defendant afford to pay these damages?; When will it get paid? How much will get paid?"

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or How will awarding such damages make the plaintiff better?." *Nowhere* in the instructions are these factors listed as things for the jury to consider.

I tell the jury that if they let these inappropriate factors affect their verdict, it poisons their deliberations and leads to a dishonest verdict. You should tell the jurors that the lawyers and the judge will deal with such issues post-trial (so they know that someone will address those issues), but remind them that it's not part of their job to consider such non-factors and it would be unfair and improper to inject them into the deliberations. Rather, their deliberations should be pristine, fair and simply follow the law. Show them the following jury instructions to drive your point home:

"Do not allow anything that happens *outside this courtroom* to affect your decision."  
 (CACI 100)

"You must not let *bias, sympathy, prejudice, or public opinion* influence your decision."  
 (CACI 5000)

"...And, I repeat, your verdict must be based *only on the evidence* that you hear or see in this courtroom. *Do not*

*let bias, sympathy, prejudice, or public opinion influence your verdict.*"  
 (CACI 100)

"You must not consider whether any of the parties in this case has insurance. The presence or absence of insurance is totally *irrelevant*. You must decide this case based only on the law and the evidence."  
 (CACI 105 & 5001)

Notably, the instruction of not letting "bias, sympathy, prejudice or public opinion" influence the verdict is repeated. Because you know the defense will argue the issue of sympathy, hit it head on in your closing. Tell the jury that sympathy is *not* what you're looking for and, frankly, sympathy is inadequate.

Instead, what you want is justice and what's fair. That simply means that the award for non-economic damages must equal and match the harm. Not a penny more and not a penny less. You're asking the jury to conduct a "fair and square" deliberation that considers all of the appropriate factors under the law. If the defense urges the jury to consider other inappropriate factors in their argument, point out in rebuttal that

they are trying to get a dishonest and compromised verdict. That is not "speaking the truth" which is what a verdict should do. The goal is to get the jury to really feel the loss your client has endured so they can translate that into a just and fair verdict on damages: a verdict that will make the defendant not just take responsibility, but take *full* responsibility.

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*Ricardo Echeverria is a trial attorney with Shernoff Bidart Echeverria LLP, where he handles both insurance bad-faith and catastrophic personal-injury cases. He is currently the incoming President of CAALA and was named the 2010 CAALA Trial Lawyer of the Year, the 2011 Jennifer Brooks Lawyer of the Year by the Western San Bernardino County Bar Association, and a 2012 Outstanding Trial Lawyer by the Consumer Attorneys of San Diego. He was also a finalist for the CAOC Consumer Attorney of the Year Award in both 2007 and 2009, and is also a member of ABOTA and the American College of Trial Lawyers.* ☒