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Maximizing non-economic damages in wrongful-death trials

A METHODOICAL OVERVIEW OF SUCCESSFUL METHODS EMPLOYED BY TRIAL LAWYERS TO EMPOWER JURORS TO AWARD SUBSTANTIAL VERDICTS IN WRONGFUL-DEATH CASES

Non-economic damages essentially task jurors with assigning tangible values to things that are intrinsically intangible, such as love, affection and care. Most jurors tasked with this assignment will find it challenging, but it is a particular struggle for jurors in wrongful-death cases. The reasons for this are complex and multi-factorial, but it partly has to do with the fact that the person most affected by the underlying harm, the decedent, is not in the courtroom.

Jurors commonly declare during voir dire that they don't believe in awarding non-economic damages in wrongful-death cases since no amount of money will bring the decedent back to their loved ones. Others – many of whom have lost family members of their own and weren't compensated – will state that since death is inevitable, nobody should be compensated for it. This article's purpose is to provide some guidance to plaintiffs' trial lawyers on how to navigate and overcome some of these challenges to maximize non-economic damages awards during a wrongful-death trial.

Maximizing non-economic damages at trial begins with the complaint

Maximizing your damages award starts at the complaint phase. For those wrongful-death actions where the death was not instantaneous, Code of Civil Procedure section 377.34 permits the estate of the decedent to seek recovery for pain, suffering, or disfigurement, as a survival action pled alongside a negligence wrongful-death claim. This new language applies to all survival actions filed on or after January 1, 2022 and before January 1, 2026. Depending on the specific facts of the

case, pursuing damages for the decedent's pain, suffering, or disfigurement in addition to the heirs' wrongful death non-economic damages at the outset can position the case for maximum recovery at trial.

Voir dire

Assuming that you have gathered all the evidence that you need (i.e., photos, witnesses, sentimental text messages/ letters, etc.) and are ready to try the case, the first step is to weed out the unfavorable jurors during voir dire. The questions you ask should be catered to the specific facts of your case. Most importantly, you should ask questions that identify the unfavorable jurors and not highlight the favorable jurors for the defense to target and strike.

For example, during voir dire in a wrongful-death case we recently tried involving a decedent grandfather with health issues leaving behind seven adult children, we asked the potential jurors: *How many of you feel that it's wrong to file a lawsuit over a death? Do/did any of your parents have any health conditions? Does anyone think that the value of the relationship that a child has with their parents is worth any less because the parent has a health condition? Does anyone think that a damages award for wrongful death should be no larger if the decedent has seven kids instead of 1 or 2? Does anyone believe that family members who receive compensation for someone getting killed is getting a "windfall" or that the family is somehow lucky to trade the life of a loved one for money? Is anyone expecting old age to be difficult, depressing, or not worth living?*

It's surprising how many jurors will answer affirmatively to these questions. As plaintiffs' attorneys, when we get affirmative responses to these types of questions, it is critical to elicit from the

jurors as much detail as possible and confirm that these are strongly held beliefs that the juror is basing on their individual life experience which prevents them from being *entirely impartial* and following the judge's instructions. It is important to have each unfavorable juror confirm that they cannot set aside their biases or preferences elicited from them so that the defense or judge cannot later rehabilitate them after they have been exposed.

Another line of inquiry to explore is asking jurors about their relationship with their own parent, wife, or child, depending on the relationship at issue in your case. Jurors with a detached or negative relationship with their own family may not be the best jurors to adjudicate the value of the relationship of your clients' family. Most importantly, this list of questions is by no means exhaustive. Depending upon the facts of your case, it is critical to brainstorm about other, case-specific issues that may impact the jury's assessment of the case. This includes prejudicial evidence you know the defense will attempt to use to create a bias against your clients and diminish the value of the relationship between plaintiffs and the decedent.

Know the law regarding wrongful-death damages

Of utmost importance is to know the law of what is and what is not recoverable as wrongful death non-economic damages. CACI 3291 is very clear that grief and sorrow are not recoverable as wrongful-death non-economic damages so those words should never be spoken by you or your clients during trial. The only non-economic damages recoverable are the loss of the decedent's love,

companionship, comfort, care, assistance, protection, affection, society, moral support, training, guidance or sexual enjoyment.

From a practical standpoint it is hard to draw a distinction between the recoverable losses articulated in CACI 3291 and non-recoverable grief or sorrow. That being said, what is important is that you explain this CACI instruction to your clients and counsel them on the appropriate way to frame their testimony so that they are able to explain their losses in a recoverable manner to the jury, rather than simply testifying about how sad they are or how much they miss their loved one.

One successful method to help clients testify effectively is to teach them to express themselves by incorporating the exact language from CACI 3291 into their testimony. Another effective method is for the plaintiffs' attorney themselves to ask questions using the exact language of the CACI instruction. For example:

Did your dad protect you? How so? How does it feel to lose your dad's love? How have you coped with the loss of your dad's companionship?

Make sure your clients build on the themes discussed during voir dire. For example, in our recent wrongful-death trial where decedent had a health condition, our clients testified about how decedent's health condition did not affect how much they loved him. They also testified how they wanted to take care of the decedent despite his health problems and were deprived of that opportunity.

Moreover, while it is important to talk about the past, you also want to elicit testimony about the things that the heirs and the decedent planned on doing in the future. For example, make sure your clients testify about the frequency with which they would see their father or communicate with him, whether it was daily, multiple times a week, or multiple times a month. If your case involves facts where your clients did not frequently communicate with the decedent, focus

your questioning on family gatherings that won't happen anymore and opportunities lost.

Read wrongful-death trial transcripts

If you're trying your first wrongful-death case, it is very important to read as many trial transcripts from as many successful wrongful-death trials as you can find. Fortunately, plaintiffs' attorneys are one of the most generous groups of professionals, willing to help each other by sharing their work-product, examination outlines, or providing support and advice as your trial unfolds. Lawyers trying their first wrongful-death case should make use of that generosity. There is a wealth of information in trial transcripts, including creative questions that one would not think to ask or arguments that you can use in closing to explain damages in a unique and novel way that you wouldn't have come up with on your own. For example, some unique questions to use while examining your clients that are a little outside-the-box are: *If your dad walked into this courtroom right now, what would you say to him? Do you ever have dreams about your dad? Do you still talk to your dad? What was his laugh like? What was his smell like? What did it feel like to hug your dad?*

Photographs/videos

Photographs and videos are a powerful tool to give the jury a firsthand experience of bringing the decedent into the courtroom. Be sure to collect as much of this type of evidence as you can from your clients throughout the case and put as many photographs and videos as possible in your evidence binder. Many judges vary on how many photographs you can use and/or which photographs you can use.

For example, in our recent wrongful death trial we were prepared to show over 60 photographs and 12 videos, but were ultimately limited to six photographs and no videos because the photographs depicted people in addition to our clients, who were not parties to the action.

Accordingly, always be prepared to use a fraction of the evidence available, which is why it is critical to have as many photographs as possible, preferably those depicting only the heirs and the decedent.

While photographs and videos are very impactful, you want to be careful with how you use them. For example, we recently only used one photograph during opening statements. From our experience, avoid using the same photograph or video more than once during trial because it desensitizes the jury to the evidence and runs the risk of numbing the jury to the case. There are different strategies when it comes to evidence relating to liability versus damages. With liability, it's important to reiterate themes and possibly use the same piece of evidence with multiple witnesses to drive the point home.

With damages evidence, the opposite is true. You want to keep the jury as engaged as possible and the way to do this is to keep the evidence as fresh as possible. You never want to publish to the jury the same emotional photograph or video with different witnesses on the stand. Make sure to divide the evidence that you will use for your damages presentation as equally as possible between your witnesses. Use photographs as memory cues with your witnesses to tie into their stories about their relationship with the decedent to give the jurors a visual as your client is storytelling.

Cultural details

Sometimes, your clients' culture or heritage is relevant to assessing damages in your case. Different cultures put varying importance on the relationship at issue that could have bearing on your wrongful death case and the losses sustained by your clients. For example, the Filipino culture has a deep respect for their elders, treating them in an almost holy manner. They place their elders' hands on the family member's foreheads when they greet them, a practice called

“mano,” which is a gesture to show honor and respect to their elders. It’s also a way for the elder to give the young person a blessing.

In our last trial, we presented evidence as to these culturally significant traditions to explain to the jury that although the decedent was elderly and had some health complications, the bond and respect between him and the plaintiffs was unwavering. We also highlighted that our clients’ culture and reverence for their elderly family members was something that they, as children, looked forward to experiencing with their father so that they could return the care that he gave them when they were children.

Life expectancy

There are two critical issues in every wrongful-death case: The life expectancy of the decedent notwithstanding the incident, and the life expectancy of the heirs. If your decedent was in perfect health, you may want to use the CACI Life Expectancy Tables as the baseline life expectancy to present at trial. Alternatively, you may want to retain an expert to argue that the decedent could have exceeded the average life expectancy. It’s important to note that the CACI Life Expectancy Tables only show the average life expectancy, not someone who is necessarily in perfect health for their age.

In those cases where the decedent had health issues, you will want experts specializing in the decedent’s particular health condition to testify regarding his or her life expectancy, which will be disputed and countered by defendant’s expert who will argue that the decedent’s health condition would have cut his or her life short.

One approach we found effective in situations where life expectancy is disputed is to avoid marrying ourselves to any life expectancy number until closing argument to see the full universe of evidence before taking a position. If you get the impression that the jury may have taken issue with your expert’s life-

expectancy opinion, you can offer a middle ground during closing arguments and show that you are taking a reasonable position.

For example, if the defense expert testified that an elderly decedent would have lived a maximum of five more years and your expert testified that the decedent would have lived another 27 years, you can say to the jury “Listen, I don’t know if the decedent would have lived 27 years but I definitely know he wouldn’t have lived only five years like the defense is saying. I think a reasonable approach based on modern medicine and the evidence we heard is that the decedent would have lived another 17 years, and we are trying to be reasonable.”

Often attorneys believe that to get large awards for their clients at trial, they cannot concede anything that hurts them. The opposite is true. When juries award large verdicts, they believe that the award is reasonable and that the attorney requesting the award is being reasonable. If the jury believes that you are being unreasonable on one issue, you lose credibility on other issues which may affect the size of the award. Keeping that in mind, it is important to concede and find middle ground where you can during your presentation to the jury.

Verdict form

In those cases with multiple plaintiffs and a unity of interest with your office, the portion of the verdict form that deals with the damages award is critical. First and foremost, the non-economic damages portion of the verdict form should list each of the losses contained in CACI 3291 so that the jury is reminded of each category for which they are considering to award to the plaintiffs. Not all judges will allow you to do this.

The second hurdle is getting each of the plaintiffs’ names listed separately on the verdict form in the non-economic-damages section. Code of Civil Procedure section 377.61 states that the “court shall determine the respective rights in an award of the persons entitled to assert” a wrongful-death cause of action. However,

the California Supreme Court has expressly characterized section 377 as a “procedural” and “not jurisdictional” statute, whose procedural provisions can be waived. (*Cross v. Pacific Gas Elec. Co.* (1964) 60 Cal.2d 690, 692-94.) As a result, “where all plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts.” (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 536.) The best way to effectuate the waiver of Code of Civil Procedure section 377.61 is by stipulation signed by all of the plaintiffs with reference to the authority cited above.

The benefit of having the jury handle apportionment at the verdict stage is to avoid complications or issues down the line when the court would typically apportion the verdict after post-trial motions are heard. Typically, by the time post-trial motions are heard, there is a high likelihood the judge has forgotten relevant information about the case, making delayed apportionment by the court, as opposed to at the time of the verdict, less than ideal. Additionally, since the jury is charged with receiving and weighing all of the evidence, from a practical standpoint, the jury is in an ideal position to assess specific awards for each heir.

Nevertheless, do not worry if the judge does not allow separate awards or the damages wording from CACI 3291 on the verdict form as that will usually not stop a large award for a wrongful-death client if the case is deserving of such an award. In our recent trial the judge did not permit language from CACI 3291 to be on the verdict form nor did he permit each of our clients to be separately listed on the verdict form and the jury still rendered a substantial verdict for our clients.

Closing arguments

Before formulating your approach to closing arguments, it is important to know what you can and cannot argue to the jury. For example, you cannot

measure non-economic damages by the market value of expensive or exotic goods (i.e., a Picasso painting or rare sports car). (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 765, 767.)

Once you know the law, you can package the case together in a way that will not draw objections. One method we recently used in closing arguments was to begin by discussing the value that society places on life and relationships before we began discussing the facts regarding our specific case. For example, by illustration, firefighters will run into a burning home to save a person but not to save a priceless work of art. Why? Because society places a higher value on human life than it does on any material item, regardless of the monetary value.

Using examples like this gives the jury context and reminds them that what they are evaluating is the most valuable thing that can possibly be valued. Another example commonly used by plaintiffs' attorneys is that despite the astronomical cost of fighter jets, military pilots are all trained to eject from the plane if it poses a life-threatening risk rather than try to save the plane because society places a higher value for the life of the pilot over the value of the jet. Reminding the jury of these examples at the beginning of your closing argument without violating *Loth* helps frame the jury's thought process when evaluating non-economic damages.

Closing argument is also the time to drive home the specifics of each of your clients' losses, focusing on the language directly from CACI 3291 and avoiding the words grief and sorrow. You want to talk about each plaintiff individually and their unique relationship with the decedent. You will also want to tie in the photographs and/or videos that were admitted into evidence that show past activities that they used to do together and remind the jury of the thousands of photos that we will never see because of the untimely death of the decedent.

Finally, at the conclusion of your closing, comes the "ask" to the jury. When justifying a large ask, it's effective to give jurors multiple methodologies of arriving

at the same sum that you are requesting. One methodology is to itemize an annual value for each of the losses articulated in CACI 3291 and multiply that value for each year of the decedent's life expectancy. There are 11 different recoverable losses in CACI 3291 and not every loss may apply to your case, so it is critical not to ask to be compensated for categories that do not apply. For example, in a case of a parent losing a young child, the parent may not seek compensation for loss of protection.

It is also helpful to explain to the jury what some of the losses mean since they are not always self-evident. An example of this is loss of society, which can be explained as the loss of enjoying the decedent out in society, at a restaurant or gathering for example. It's the pride of enjoying the relationship in public. Each of these losses carries a huge value on a yearly basis, arguably hundreds of thousands of dollars, and in a worthwhile case, it can justify an ask of over a million dollars a year.

Another method that we recently employed is explaining to the jury the concept of "million-dollar moments." This is the concept that some moments with a loved one are so special that it touches a child, parent or spouse's soul, and the value of that moment is at least a million dollars. For example, a tender moment between a husband and wife during a difficult time, or a child hearing from their parent they were proud of them after achieving a milestone, or a parent teaching their child how to cook a recipe passed down through generations. Each of these can be considered a million-dollar moment. Typically, there are multiple million-dollar moments every year among loved ones but every year there is at least one. This is another methodology you use to argue that the value of each year lost between members of a close-knit family should be a million dollars a year for each plaintiff for whatever life expectancy that applies.

In closing argument most defense attorneys will argue two things: (1) to be "reasonable"; and (2) the plaintiffs'

losses are mostly grief and sorrow, which are not recoverable. The topic of "reasonableness" should be discussed with the jury in voir dire and in your rebuttal. You should remind the jury that being reasonable also means not to award too little. Also, in rebuttal you should remind the jury that at no time throughout trial did you or your clients use the words "grief" or "sorrow" and that the only evidence that they heard in the case was testimony related to recoverable losses under CACI 3291.

Finally, as in all personal-injury cases, the best way to maximize non-economic damages is to become an expert in the story of your clients. With wrongful-death cases, this requires you to become an expert in your clients' families and most importantly their family history. You should spend countless hours with your clients learning their entire family history, both good and bad, so that you can be prepared to address anything that comes up at trial and assist them in storytelling.

Most defense lawyers uncover very little about your clients' relationship with the decedent during depositions and it provides us, as plaintiffs' lawyers, an enormous advantage during trial to discuss material that the defense is ill-equipped to handle. In the end, the best trial lawyers are effective storytellers. By learning the entire story of your clients' family you can do what the jury needs from you most for a large non-economic recovery award, which is to bring the decedent into the courtroom.

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