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Setting up and arguing non-economic damages at trial

A LOOK AT THE F.L.P. STRATEGY OF PRESENTING NON-ECONOMIC OR “PAIN AND SUFFERING” DAMAGES

In personal-injury jury trials, non-economic damages are vital to securing a large verdict. Although specific claims like loss of consortium can have their own types of non-economic damages, CACI 3905A carves out the specific non-economic damages that plaintiffs can claim as losses in personal injury cases. These damages include both past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress.

Although these damages typically are the most important, they also have proven to be the most difficult to prove at trial. Why? When proving economic damages like past and future loss of earnings or medical bills, jurors are given specific amounts that are objective in nature. For example, if the past medical bills are \$300,000, jurors can objectively see that the amount of the jury award for past medical bills of \$300,000 is going directly to those bills. Aside from defense arguing that the amount billed is not the “reasonable value,” the billed amount is completely objective. However, with non-economic damages, due to the subjective nature of proving these losses, jurors can be more reluctant to award large amounts for various reasons.

Why are jurors more reluctant to award large amounts for non-economic damages (a/k/a “general damages”)? The obvious answer is that awards of money for non-economic damages don’t particularly fix anything. This concept can play into the psyche of jurors, causing them to not want to award significant non-economic damages because the human mind likes to see something more tangible and objective.

Another reason for a jury’s reluctance to award large amounts of non-economic damages is that jurors simply are not accustomed to awarding money for things like pain, suffering, etc. It is our duty as trial attorneys to put the jury in the best position to award fair and just non-economic damages for our clients.

So how do we prime jurors to do this? Over the years, I have tried several approaches to arguing non-economic damages at trial. The strategy that works best for me I call F.L.P. (pronounced “Flip”). F.L.P. stands for Familiarize, Legitimize, and Personalize. I utilize F.L.P. in all my trials to set up my arguments for non-economic damages and to effectively argue during closing.

Presenting the concept of non-economic damages

Voir dire

As you can imagine, the road map to the verdict you want starts in jury selection and ends in the deliberation room. Thus, the process of familiarizing the jury with non-economic damages starts in voir dire. In a case where you are going to be asking for a large amount of money during closing, it is imperative that you discuss large amounts in jury selection. Although you have a right to discuss specific dollar amounts in jury selection, in many cases



judges still restrict you from stating specific amounts to the jury. In those cases, it is best to discuss the concept of awarding large amounts without stating a specific dollar amount to both adhere to the court’s ruling and to start your case effectively.

In the process of discussing this with the jury, it is first important to inform the jury that the law says that if someone is responsible for a harm, that person should fix that harm and that the jury must use money to do so as best as possible. It is also important to start showing the jury why the large amounts are justified. Because non-economic damages are typically our most important, you must begin to familiarize the jury during jury selection with the concept of non-economic damages.

CACI 3905 sets forth that “No fixed standard exists for declaring the amount of these noneconomic damages” and that the jury must use their own judgment to decide what a reasonable amount is based on the evidence and their common sense. Using one’s own common sense for a determination is another way of saying it’s purely subjective. So, it is important to utilize this opportunity in jury selection to walk jurors through every single non-economic category that you will be asking for in closing.

Think of it this way: Imagine trying to grow several plants in your yard. You must first know the pots exist before you can start

filling them with the necessary elements to grow the plants. The same goes with the various non-economic damage categories facing the jury. You want to create a pot for each category of non-economic damage and then identify those pots to the jury so that they understand they exist. Otherwise, when you start your case in chief and you start to place information (soil and water for the plant) into the pots, the jurors will not understand where to place the information. In other words, when your witness is on the stand and you elicit testimony regarding loss of enjoyment of life or inconvenience, the jury will not know why it's relevant.

Thus, we must inform the jury of each category and talk about those categories in detail during jury selection. Some judges may restrict time during jury selection, and in those cases, I will often choose to spend most of my time going through the entire list of non-economic damages because I want the jury to know that when they hear evidence about inconvenience to the plaintiff, the law says the jury is to compensate monetarily for that inconvenience. Don't miss this golden opportunity to educate the jury about all the non-economic damage categories and familiarize them with how those relate to your case.

Opening statements

After voir dire, opening statements are our very next opportunity to really put everything in perspective. After we have established the existence of the pots during voir dire, our opening statement serves to fill the soil and plant the seeds that we will later water throughout trial to prove our case. During opening statements, I find it very effective to discuss the various forms of non-economic damages again. Here we are attempting to directly correlate these damages with the evidence we plan to show. We must clearly road map the growth process of the plant so that the jury can begin to feel that the plant is already alive. This means we must go into the details of each non-economic damage category to show the jury why at the end

of the case, they should rule in our favor, awarding the amount we request during closings.

Evidence and witnesses

Once we call our first witness, it's all about watering the soil and the seeds that we have placed in the pots. Each witness we call to the stand can be used in some form to argue our non-economic damages in trial. Our liability experts not only establish how the incident occurred, but at the same time they can also establish the traumatic event that resulted in our client's injuries. It is imperative to elicit testimony to show the emotional distress, humiliation, physical pain, and any other form of damages through the liability experts if possible. I do not suggest that you ask specific questions about these damages, but rather that you have the liability experts be very descriptive of the trauma involved in the incident.

Medical expert witnesses and treating physicians will also serve to draw out the non-economic damages. Often, we have hundreds (if not thousands) of pages of medical records for our client's treatment related to their injuries in the case. Through the consistent treatment with physicians, we are able to paint a picture of pain and suffering from a medical perspective.

At trial, treating physicians offer the jury an unbiased perspective of the client's injuries. When we call treating physicians to the stand, we should be walking them through the treatment to offer opinions regarding causation and damages. This means that when we have a treating physician who testifies that our client has suffered a spinal injury, we also elicit testimony from the treating physicians about the effect it has had on our client's activities of daily living.

Yes, the spinal injury may be the significant injury, but it would be an extreme loss not to elicit testimony that you can later argue shows a loss of enjoyment of life. Did the client tell the doctor they can't go hiking? Or that they can't play with their newborn child? Did the client lose their ability to partake in certain hobbies that offered the client

solitude and happiness? Often, this information is discussed with treating physicians and it's important to have the treating physicians talk about this in detail while they are on the witness stand.

The plaintiff's testimony

The plaintiff's testimony at trial, for many jurors, can be the deciding factor on whether a jury awards a large non-economic verdict. Simply put: "Do we believe you?" Every once in a while, I have a plaintiff who is very descriptive and can articulate their injuries and what they have been through to the jury. In the vast majority of my trials, unfortunately, that's not the case. Nevertheless, you can work to get your clients "witness stand" ready.

I believe this process starts well before trial. It should really start during the initial conversations with the client about the case. However, the majority of my cases are received during litigation or close to trial. I therefore start an immediate plan to help clients articulate their experiences. I typically will have a conversation over the phone to explain the importance of being descriptive and open about their experiences. Most people have never sat on a witness stand and will find talking about their personal life in front of strangers extremely daunting. So, in the initial conversations, I take the time to explain the process and why it's important to be able to do so.

The next step is to either go to the client's home or meet them in person in my office. I prefer to go to the client's home because I can learn things about the client that I would not otherwise have learned if the client only came to my office. As my client's storyteller I must become connected to my clients in a way that allows me to tell their stories effectively. In doing so, it also further equips me as the attorney with the ability to pull facts and information out of my client while they are on the witness stand.

During my meeting with my clients, I usually stand up and start arguing non-economic damages as if I were in trial – no notes or script – simply stating the general facts and the specific effects it has

had on my client's life. In many circumstances my client will begin to cry as I describe their trauma and experience. I find that when they see me argue it in detail, it helps them to articulate their experiences a lot better.

After you have spent a good amount of time preparing your client on non-economic damages, you have to make a decision on the level of detail you want your client to go into. Some clients, no matter what you do to help them, simply don't open up, and in those cases, you may decide to just get them on and off the witness stand. Whether you are satisfied with your client's ability to testify or not, it is always a great idea to have damages witnesses testify as well.

Utilizing damages witnesses at trial is an effective way of eliciting testimony from someone other than the plaintiff about the many ways the negligence of the defendant has affected the plaintiff's life. These witnesses can be a spouse, sibling, parent, child, friend, colleagues, or anyone else who has knowledge of how the plaintiff's life has changed due to the defendant's negligence. Regardless of the relationship, the idea is to have someone testify under oath about what they observe on a daily, weekly, or monthly basis.

Even if the plaintiff is a good witness, the damages witnesses add more validity to the claimed injuries and are at least one step removed from the jury's general perceived bias of a plaintiff testifying about their own injuries. When we have damages witnesses on the stand, it's important to go into details about specific events that they remember before the incident took place. The objective is to make sure the jury understands that the plaintiff's life before the incident was significantly better than it has been since the incident.

It is not enough to have the witness just say the plaintiff was happy before and sad after. It's not enough to say the plaintiff used to go hiking before and now can't hike. Draw out the details from the witnesses in a way that almost makes the jury live those positive experiences just as you would with the plaintiff on the stand.

Familiarize, legitimize, and personalize (F.L.P.) during closing argument

Now that we have introduced the jury to non-economic damages in jury selection, worked our way through the evidence and watered the seeds and watched the plants in the various pots grow, we can bring it all together in closing arguments. I look at non-economic damages arguments as a way of assigning value to each damage category. It is important to understand that the familiarizing process is not yet complete, and that closing argument is where I can apply the three-step approach – F.L.P. – to non-economic damages.

Familiarize

The beauty of what we do is that there are many ways to reach the same goal. Although I have heard many trial attorneys indicate they stay away from mentioning items of low value in their plaintiff's case and closings, I find it very effective to do so. During closing arguments on non-economic damages, we must first familiarize jurors and make jurors understand that they are here to assign monetary value to the losses that plaintiff has suffered and will continue to suffer as a result of the defendant's negligence. It is important to remind jurors that they are accustomed to assigning values every day in their ordinary life. I typically will use at least three examples of jurors assigning value to things every day.

One example would be when jurors go to the grocery store and decide not to purchase apples today because last week, they could buy two for the price of one. So, they decided instead to wait until they go on sale again. This is assigning a monetary value to an apple, a process jurors engage in every day of their lives. I usually also use the example of purchasing a car and negotiating the price of the car with different car dealerships. My objective is to make sure the jury is not only comfortable with assigning monetary value to things, but that they truly

understand they already do this every single day of their lives.

Legitimize

I find that the biggest challenge is to take the jury from being comfortable with assigning value, to being comfortable with assigning significant amounts of monetary value to things. This is the subjective component of non-economic damages that makes it difficult. Because the jury likely has not applied significant monetary value to a person's life and experiences before, we have to legitimize assigning large amounts of monetary value to things before we actually do it in the case. This is the moment that I will use the stealth bomber in a wrongful-death case, or the various paintings that we all have heard others using in closing arguments.

The bridge here is to take them from assigning value for apples to realizing that as a society, we assign significantly more value to life than to some of the most expensive things in the world, like a billion-dollar stealth bomber or a \$400,000,000 painting. I sometimes also use professional sports athletes' salaries and endorsements as another example of society valuing subjective things in the hundreds of millions, if not more.

Discussing the various types of examples to the jury definitely works to desensitize them before I ask for the amount that is reasonable and just for my client's injuries. However, before I take the last step of asking the jury for money, I must personalize value with the jury.

Personalize

Personalizing the jury with value means to find something that jurors all truly value. Something that all the jurors would prize as extremely important in life. When I get to this moment in closing, I typically will say something that connects all the jurors to my client. It would typically be something like, "Regardless of our many differences in this world. Regardless of our race, our religion, our gender. Regardless of our social economic status, or culture, we all *value* one thing the most, and that one thing that we value the most is our health.

So, what's the value of life? What's the value of the ability to be pain free? The ability to ..." I then walk the jury through a list of what my client has lost and show pictures and images that came into evidence.

This typically becomes the culminating moment during trial when I can see tears in the eyes of jurors. Using health as the dot that connects the jurors personally to the plaintiff's trauma has been very effective for many trial lawyers. Although jurors are instructed not to make their decision based on sympathy, connecting the dots with health personalizes the matter in a way that allows jurors to be empathetic, which is perfectly fine.

Strategies for calculating non-economic damages

If F.L.P. is performed effectively, when you arrive at the moment to calculate and ask for your past and future non-economic damages, you should feel very comfortable and confident in what you are asking for. There are three methods of calculating non-economic damages that I have used at trial depending on the case.

The first would be splitting up each category and calculating an amount per hour for every day. I typically employ this strategy if I want to request a significant

amount from the jury. Applying this method allows me to mention lower amounts since I am calculating per hours of a day as compared to simply giving an amount per day. For instance, if I was requesting damages for physical pain, mental suffering, loss of enjoyment of life, anxiety, and emotional distress, I would give an amount for each category based on what I believe has been most impacted. Let's just say that equaled \$50 per hour for physical pain, \$40 per hour for mental suffering, \$30 per hour for loss of enjoyment of life, \$25 per hour for anxiety, \$25 per hour for emotional distress. The total amount of these damages would be \$170 per hour totaling \$4,080 per day. I find it more effective to explain to the jury the smaller amounts and their allocation as compared to simply telling them \$4,080 per day because just telling them this larger amount may be harder for them to digest.

A second strategy I have used is when I still want to break down the numbers, but maybe request a lower overall amount. When this is the case, I will skip the per-hour breakdown and just do a fixed amount per day. I use this method when I am requesting a high six-figure or low seven-figure non-economic damage award because I prefer not to request amounts like \$1 or \$2 an hour when calculating future damages. So, in these

cases I will simply give a per-day amount that I believe is proportionate and reasonable for our client's injuries.

The third way would be simply to request an overall amount without a specific breakdown. This is a strategy I don't favor unless the amount I am requesting is so high that it becomes less beneficial to break down numbers and more beneficial to simply state an amount. This would be a very fact-specific case and probably headed towards a nine-figure range.

Conclusion

While there is no perfect way to argue for damages, there are strategies you can employ and tailor towards your specific style of advocacy. Employing these tools can be beneficial to lining up your trial to deliver an impactful closing argument on non-economic damages. It is however, important to constantly explore different ways to argue your case to the jury, and it is equally important that we share these experiences with each other.

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