

ARGUING DAMAGES FOR INJURIES  
BY: PAUL N. LUVERA, ESQ.  
LUVERA LAW FIRM

**[Ed. Note: This presentation was made at CAALA's 26<sup>th</sup> Annual Convention in Law Vegas.]**

Money makes the world go around, the world go around, the world go around,

Money makes the world go around, it makes the world go around  
– From the musical Cabaret

The best things in life are free, but you can keep the birds and the bees  
Now give me money, that's what I want...

– *Sung by the Beatles in 1963*

It's a very personal, very important thing. Hell, it's a family motto. Now are you ready?...OHHH! SHOW ME THE MONEY! Doesn't that make you feel good just to say that Jerry. Say it with me one time brother...

– *Cuba Goodling, Jr. (Movie Jerry Maguire 1996)*

**What is the purpose of civil tort law anyway?**

Is the sole objective of a civil tort action really just the money? Is it the primary role of the advocate for the injured to be an instrument to collect as much as he or she can from a defendant being sued? Do we measure and compare success of civil trial lawyers by the amount of the verdict they are able to achieve? If so, our professional role is comparable to a door-to-door siding salesperson. The exclusive role of the advocate in a civil tort case is to achieve justice for his or her client. Under our system, justice in such a case is measured by a verdict of money, for those who are legally entitled to it, which represents a sum equal to harm done. If the harm is slight, the verdict in dollars should be slight. If the harm is great, the verdict in dollars should be great.

However, the purpose of civil tort law includes more than simply determining the sum of money that is equal to the harm.

The law of torts serves two basic functions: it seeks to prevent future harm through the deterring effect of potential liability and it provides a remedy for damages suffered. (*Medina v Pub. Util. Dist. No. 1 of Benton County* (2002) 147 Wash.2d 303 324 [53 P.3d 995]; See also: *Babcock v State by and through Dept. of Health & Soc. Svcs.* (1989) 112 Wash.2d 113 [768 P.2d 481].)

Justice, under civil tort law, is intended to discourage future conduct through a finding of fault and to reasonably and fairly compensate the injured person for the damages sustained. Every tort rule, to some extent, is intended to both deter other wrongdoers as well as to compensate the injured person. (Restatement 2<sup>nd</sup> Conflicts of Law sec 1456 p. 416) This is true irrespective of

whether the law allows punitive damages or not. It is an inherent part of our tort law.

In London, at the corner of St. James Street, there is a very old building, the Norwich Union Insurance building. At the top of the building stands a large statue of a blindfolded woman holding in one hand the scales of justice and in the other a large sword. Huddled beneath her and under protection are a man and a woman who look frightened. She stands as their protector: A symbol of the role of justice and the civil justice system.

The concept of justice has occupied man over the centuries. Plato & Aristotle identified four virtues as the most important among people in ethical behavior. One of them was justice. Aristotle centered his teaching of ethics upon these four virtues. Thomas Aquinas referred to them as *cardinal* virtues because he taught that they were of the highest importance in our moral life.

Justice, they taught, involved the idea that if one has wrongfully deprived another of something of value, he is obligated to restore it. That is, justice demands the restoration of what has been wrongfully taken away. Accordingly, if one has wrongfully caused injury to another, justice remains unsatisfied until proper compensation has been paid to restore the previous balance of equity. In fact, the word *justice* is from the Latin word *jus* from which we derive such words as *just* and *justice*. *Right* is also used as the equivalent of justice; that is, *right* is correlative of *duty*. People are obligated with the duty to do justice and to do what is right. This concept is an essential part of our civil tort law.

### **The connection between justice and the verdict amount**

We have seen that there is only one reason why the civil justice system exists and that is to do justice. Justice in a civil tort case is potentially a two-part procedure. The first duty is to determine the facts and law. If the plaintiff is entitled to a verdict, the next duty is to determine the amount of the verdict. The only way justice can be achieved, in that instance, is by a money verdict in a reasonable and fair amount. While the law speaks about restoring injured people to their original situation through the verdict, we know that in tort cases the money will not restore life or limb. However, it does follow that therefore, no money should be provided or only the bills should be imposed on verdicts. Nor has a jury fulfilled its duty by a verdict which is less than full justice because anything less than full justice is an injustice.

But how should a jury evaluate what full justice is? It can only be done by comparing the harm done to a sum of money which reasonably and fairly equals the harm. It is only when the scale is actually balanced with money on one side and the extent of harm on the other. That requires careful examination of each element of damage which the law provides. It means each element must be individually weighed from a dollar standpoint until the money and harm are equal.

It's done objectively without regard to reservations on the total so long as it is reasonable and fair considering the facts, evidence and harm done.

This consideration requires breaking the evaluation process down into legal categories. The first category is time – past and future. Evaluation of damages should be done in two separate time periods of past and future. Past damages may and probably do differ from the effect of future damages over remaining life. More importantly, since the plaintiff is entitled to only one day in court – one time for a jury verdict – the damages must cover his or her entire life and not just the present moment.

Damages also differ in type. One category is economic damages. Those damages are those capable of calculation for such things as wage loss, medical bills, property damage and the like. Another category is non-economic damages: Those damages which represent the effect upon the injured person. They include such things as the nature and extent of injury, disability, disfigurement, pain and suffering and the loss of employment of life. The fact that there is no convenient yardstick by which to measure these damages does not allow the jury to ignore them or treat them as impossible because to do so would result in an injustice under the law.

In order to achieve full justice, it is essential the jury understands the two time periods and the fact there are two kinds of damages: economic and non-economic. The jury must be told these are very different. Economic damages are based upon need and specific dollar expenses. Don't let defense counsel confuse the jury that the only role of damages is to pay bills or to suggest that the jury should evaluate what the "needs" of the plaintiff are in dollars. Non-economic damages have nothing to do with needs, bills or specific economic issues. They only have to do with making the dollars equal to the harm irrespective of such economic needs. To the extent you can make the jury understand this vital point and award full justice in dollars you have done your job as a plaintiff's attorney in a tort damage case.

A basic outline of damage argument might look like this:

- *Introduction to damages*
  - What is justice
  - Explanation of how justice is accomplished
- *Review of jury instructions*
  - Damage instruction
  - Mortality instruction regarding future damages
  - Present value instruction on reducing damages to present value
  - Particular damage instructions to your case
- *Applying above to your case*
  - Reviewing facts of case regarding damage issues
  - Explaining there are two time periods: Past and future

Explaining there are two kinds of damages: Economic and Noneconomic

Reviewing damage concepts

Applying concepts to suggested verdict

Show jury how you believe jury verdict should be filled in

- *Conclusion*  
Concluding argument

The conclusion of your argument is important. The rule of primacy is that what we hear first we tend to believe longer and the rule of recency is what we hear last we tend to remember longer. As a result of the rules of human nature, the conclusion is important. After you have outlined your basic argument, you need to have a strong final conclusion before sitting down.

Think about it. This is one part of argument you may want to memorize. Exhibit confidence in the jury doing justice. Say something that communicates a call to a high level of doing the right thing. Use eloquence in your closing.

Communicate the fact they possess the power to do justice. It is a right as significant as that of the power of the judge. Let them know you trust their doing the right thing. Remind them of the importance of the case not just to the individuals involved, but to the broader meaning of justice. Close with passion and power.

### **Alternative arguments for money damages**

There are many approaches to arguing damages. Keep in mind, however, that in some states lawyers are not allowed to suggest a dollar amount as a jury verdict. California allows lawyers to do so. Some of the more common ways of arguing damages in California are:

- ***Lump sum:*** Simply suggesting a total amount to be awarded without breaking it down. Here the lawyer either assigns a single total dollar value to the entire case without any specific dollar break down. Taking into consideration all the injuries, past and future, all the bills and all the elements of damage allowed by law, a total is suggested to the jury for the entire verdict. In very major injury cases, this may be an effective way to argue.
- ***Damage ranges:*** Suggesting a low and high range for the case or for each element of damage. One can also argue a range of verdict from a minimum to a maximum range which is argued reasonable. This can be done for the entire verdict, for each element of damage, for each injury sustained, etc. Ranges are sometimes an effective way to argue damages where there is difficulty trying to evaluate what the injuries consist of and there is uncertainty as to the jury attitude.
- ***Elements of damages:*** Assigning dollar amounts to each element of damage allowed in the jury instruction. In this case, the advocate

takes each element of damages, such as pain and suffering. The damage period is divided between past and future. A dollar amount is assigned to that element for those two periods of time and added together. That total represents the suggested amount for that particular element of damage.

- **Damages per injury:** assigning damages to each particular injury received. One may chart each injury the client received. For each injury a dollar amount is assigned, past and future. The total of all injuries represents the total verdict.
- **Giving no dollar suggestion:** Not giving the jury any number and letting them decide for themselves. The advocate reviews the evidence and the law relating to damages, discusses the effect of injuries and damages generally, but tells the jury he or she plans to leave it to the jury to decide. The general wisdom among advocates is that if you are permitted to argue dollar amounts to a jury as a verdict, you should always do so. The jury wants and needs direction. Yes, it is possible to offend the jury by the amount argued where it is extremely inconsistent with their perception of the case. But, you should argue what you sincerely believe anyway, provided it is based upon some rational facts.

Remember to explain how the injury or harm is translated in the real world regarding the client's right to enjoy life in an injury case. To do that you need to understand what has happened to your client. You need to completely and fully appreciate, to the extent it is possible, what the harm has meant to this person's life. Who was this person before and who is this person now? If you haven't crawled inside their skin, you won't be able to speak for them and explain what justice means in this case.

### **Concepts about justice in a civil damage case**

Think about concepts of justice. Be prepared to explain the verdict as full justice and not as some legal abstract. Think deeply about the jury's role, about the system which we believe is the best in the world to achieve fair and full justice and about the need in America for justice.

When Martin Luther King became an activist for civil rights, he began to receive nightly phone calls threatening death to his family. Unable to sleep, tormented by visions of his family suffering harm, King broke down one night in his kitchen. As David Garrow writes in his biography of King, at that moment King hear an inner voice saying, "Stand up for justice, stand up for truth..." From that point forward, the voice in the kitchen was King's personal anchor of faith, the message that enabled him to overcome the most dire threats. What had once been an intellectual creed had now become personal, deep, and overpowering faith and drive for justice for all. The concept of justice being due as money is due in a promissory note fits well within our law relating to damages.

The great advocate Moe Levine has given trial lawyers wonderful ideas for arguing damages. Some of these ideas include the following, taken from an argument on behalf of a young woman who suffered injuries:

- There is no way of knowing whether she would have been a great actress. It is speculative as to whether she would have been successful. We just don't know. What do we know? We know we will never know because she never had a chance to find out for herself.
- Jenny O'Neil doesn't even exist anymore. She has been replaced with a new person. Maybe it's not inferior to the old one. Maybe it's superior, but the person who existed before this injury doesn't exist now. A violinist with a finger cut off is no longer the same violinist that existed before the injury.
- What damages do you arrive at for destroying her dreams, her right to choose her own lifestyle. This has been taken away from her against her will and without her consent. There must be compensation for this.
- I anticipate that someone on this jury will say: "What good will the money her? Will it cure her?" and the answer is, "No, it won't cure her." Then why award money? The answer is that the defendant is lucky this proceeding is not taking place in the code of justice of old where there was an eye for an eye. Justice today is civilized – money is in the form of justice administered. There is no alternative except money. You cannot restore her to where she was. You cannot undo what has been done to her. Life has not been kind to her. Life has rejected her. Will you reject her too? A verdict of money will restore her dignity. It will be some acknowledgement of the harm that has been done to her.
- She has done nothing to deserve this. Nothing to be punished for. She was innocent.
- I pray that your verdict will reflect your ideal of justice born of your reason and sanctified by your conscience.

### **Concepts about the effect of injuries**

Take the time to think about the effect of injury upon people. For example, we know that it is not possible to just injure a part of a person. Injury affects every part of the human being. A headache can rob a day of sunshine. Pain in a foot isn't limited just to the foot. It affects everything a person does.

Injuries cause real devastation to a person's life. This includes:

- Their past because who we are involves who we have been. If our past is one of pain and disability, it is a part of who we are today.
- Their role in life. People all have roles. They are husband, wife, child. They are carpenter, lawyer or doctor. They fulfill roles that give them significance. Injuries impair those roles and change who they are.

- Their relationship with others. Injuries change relationships. A disabled husband does not have the same relationship with his wife and children as he did before injury. A disabled worker does not have the same relationship with his fellow workers. Injuries change relationships.
- Their activities. Injuries impair activities. The runner with an injured leg can't run. The wife with an injured back can't participate in family activities. Injuries impair activities.
- Their relationship to their own body. Injuries change a person's relationship to their own body. A scar changes how a person may relate to his or her body. A person on crutches has a changed relationship to the previously active body. Injuries impair relationships with one's own body.
- Their secret dreams. Everyone has secret dreams or goals. Things they hope for. But injuries take away this hope and those dreams. They alter how people see their future options and damage their hope.

Injuries can and often do result in feelings of:

- Hopelessness
- Fear of future
- Loss of independence
- Shame of being different
- Worry

### **Dealing with conservative jurors**

We all know the problems of dealing with the conservative jurors we find on our panels. Every panel has them. So what are the ways to deal with them? To start with, considerable study has been made of what motivates the conservative juror and what appeals to their value systems. The research about the "reptilian brain" confirms the fact that survival is one of the most basic of the human instincts. This drive operates on a subconscious level and overrides conscious decision making as a general proposition. For the reptilian brain, rules are the primary way to survive in a hostile world. Anything that promotes order in a dangerous world aids survival. Jury verdicts are seen as a means of enforcing rules by establishing community standards for conduct. Making people accountable reinforces rules and promotes safety. Emphasizing rules is consistent with the subconscious drive for survival.

Complex situations are dangerous because there are unseen and non-understood parts to a complex situation. Keeping things simple means safety. Keeping issues and your case simple are compatible with the drive for survival.

Significant life experiences are recorded in our minds and influence our views. These experiences are powerful enough to override even reptilian subconscious drives. When someone has had a life-changing experience, it stays with them and is superior to any conscious logical thinking to the contrary.

Most conservatives have commonly held ideas about values. Research has indicated these ideas include such things as the importance of duty, responsibility and enforcement of the law rules. Family values and being accountable are also important. Therefore, people who think this way are motivated to follow a law they don't fully agree with. Emphasizing the jury instructions fits this thinking process.

Most conservatives believe that people and corporations should be responsible for their actions. They think America is made stronger when people and corporations are held accountable. Most believe the jury system is a powerful tool for positive changes.

### **Communication concepts**

We know that most of our communication is non verbal. In fact, research shows that seven percent of our communication is by words we use. Thirty-eight percent by the way we talk and 55 percent by the way we look or act. That means that 93 percent of our communication is non verbal.

### **Argument factors to consider**

It's important to keep in mind that a trial is not a battle of logic. It is, instead, a battle of impression. People form opinions and draw conclusions at a subconscious level on the basis of multiple impressions they receive and only then rationalize those opinions or conclusions by logical process. Once they form these opinions or impressions, they tend to filter out anything that conflicts with them. Focus on the impression and not the logic. Think about the issues and people's basic values. Consider how your client's case would look to a group of people who don't know them the way you do.

Cases have themes whether you give them one or not. If you don't try to frame the theme of your case for the jury, they will do it for you. The statement: "this case is about..." is part of the mental process the jury will go through in evaluating your client's case. What is the fundamental issue the case presents? What is your claim about the fault and the damages? Expressing this in a short sentence and identifying the basic theme are important steps in the presentation of damages to the jury.

A trial should be a story and not a chronology. People think in stories. They learn by stories and they decide by stories. Tell your damages as a story to the jury and not as simply a chronology of facts. Make it compelling. Give it human interest. Don't just describe the injury, but explain what difference that injury makes.