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COMMENTARY

Tips and Strategies to Avoid Runaway Verdicts

In my last article, I discussed how to mitigate runaway verdicts by taking accountability and giving the jury a specific and reasonable damages number. This article will focus on ways to deal with the largest component of runaway verdicts: noneconomic damages (“pain and suffering damages”).

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By Jerry Hamilton | November 10, 2022 at 09:29 AM

Lately there has been a lot of press surrounding sensational “runaway” verdicts. That is verdicts, which are disproportionate, unreasonable, or outrageous given the factual circumstances of a case. There is not a defense attorney in the bar that does not worry about being the next recipient of a runaway verdict. This article is a part of a series of articles that will offer tips and strategies that defense attorneys should employ to combat a potential runaway verdict.

In my last article, I discussed how to mitigate runaway verdicts by taking accountability and giving the jury a specific and reasonable damages number. This article will focus on ways to deal with the largest component of runaway verdicts: noneconomic damages (“pain and suffering damages”).

How Do Plaintiffs Argue Pain and Suffering Damages?

We all know that there is no precise way to calculate a person’s pain and suffering and mental anguish from a personal injury. Given its fluid and amorphous nature, plaintiffs can employ all sorts of strategies to suggest to juries how they should award these damages. For example, plaintiffs frequently:

- Argue pain and suffering can be calculated as amount per minute/day and multiplying that amount by the plaintiff’s life expectancy;
- Create analogies to expensive items such as the Mona Lisa or a fighter jet stating that life is more precious than these \$100 million objects;
- Compare what celebrities or sport figures make and say that their client’s pain is worth no less than the value of those persons who are humans, too.

These strategies can be very effective in guiding juries on how they should compute pain and suffering damages. It gives jurors method on how to think about these damages—something that jurors always request in jury selection.

What do we do as defense lawyers when it comes to arguing pain and suffering—generally nothing. There lies one of the fundamental building blocks of a runaway verdict.

The Defense Must Address Pain and Suffering

As defense lawyers we ignore pain and suffering at our own peril. So how do we address it?

Bring the Jury Back to Reality

Bring the jury back to reality. Remind the jury that they must come to an award based on what would fairly and adequately compensate the plaintiff for what has happened. Not based on anger or sympathy.

Tell your side of the story. Let the jury know that this was an accident, and no one intended to hurt the plaintiff. Speak about the positive developments in the plaintiff’s life and how a reasonable verdict will help them to achieve their goals. We are a “can do” society. We find ways to overcome challenges and not dwell in grief or despair. Tie in how fair and adequate compensation fits into their life. Accentuate how the plaintiff’s joy in life can be returned based on the number being suggested. For example, if the plaintiff enjoyed theme parks, the defense can show the amount being suggested by the defense (this is the discussion on anchoring in the previous article) can pay, not only for a lifetime of the plaintiff going to theme parks, but for their entire family, with transportation and hotels included. It will be critical you learn this information in discovery. Show the jury how much the plaintiff has improved and is expected to improve and what the plaintiff can still do even with their injury. And most importantly, do it with empathy and sincerity. Nothing will anger a jury more if they perceive you are insincere about what the plaintiff is going through and that you are pivoting to the unrealistic optimism of life.

Make Money Real

The impact that an amount of money can have on the plaintiff’s life can often get lost on the jury. Especially when the plaintiff’s counsel frequently suggests that the plaintiff should be awarded tens of millions of dollars. There starts to be a disconnect between what money can do for a plaintiff and the amount of money needed for just compensation. The defense must make money both real and tangible to the jury. Giving value to and realistic applications of a sum of money to the plaintiff’s life will help mitigate against these large and unreasonable awards.

How do we do this? First, the defense must give a reasonable and specific damages number for pain and suffering. This is no different from what our colleagues do on the other side. This number must be tied into who the plaintiff was before the injury and what the amount of money being suggested can do. In order to present this to the jury you must know beforehand what were the plaintiff’s hobbies and pastimes. Why did the plaintiff enjoy doing these activities? What brought the plaintiff happiness and joy? How much did the plaintiff’s injury affect them doing these activities? How can money be used in creative ways to replace what was lost. Find out

what the plaintiff believes the defendant took from them. What would the plaintiff say defines them as a person? It is important to know the plaintiff because plaintiffs' counsel will be sure to discuss how the case is more about damages, and about the plaintiff losing the essence of who they are. The defense must be prepared to address it.

Second, we need to spend time presenting to the jury the time value of money. There is a jury instruction, which gets gloss over, relating to the present value of money. The defense needs to talk about it in the context of what it means to have money now and how it looks into the future. Retaining the right economic expert to talk about the impact the money would have on plaintiff's life is key. Giving real world and actual examples of how a sum of money can be used by the plaintiff will help ground the jurors back to reality and get them refocused on what is fair and reasonable. While we know the plaintiff may no longer do certain activities, the plaintiff can do so many more activities with the sum of money suggested by the defendant.

Lastly, debunk the plaintiffs arguments on what the jury should use as guidelines for pain and suffering. In the advent of medicine and therapies, we as humans do not need to live in constant pain and anguish. Similarly, the case is not about high value pieces of art or celebrities. Point out that these are all attempts to inflate damages in an unrealistic way. Show that your position is more grounded in the facts and evidence. A reasonable jury should hopefully see that you are being straight with them and decide an award that fairly and justly compensates the plaintiff.

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