Judge Margaret L. Oldendorf (Ret.)

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A judge's perspective on personal-injury damages

APPROACHING DAMAGES IN TRIAL AND IN MEDIATION AND ARBITRATION

You are in the final stages of preparing for your first personal-injury trial. The case involves a rear-end accident on the freeway. Your client, the driver of the vehicle that was hit, is a 50-year-old man who sustained back and neck injuries when he was struck by a large pickup truck that was going 30 miles an hour at the time of impact. Liability is not in dispute. The client had some pre-existing problems with the same body parts; and his course of treatment after the current accident has been difficult and complicated. It is now three years after the incident, and he has not fully recovered. He has had difficulty returning to his full-time job as a graphic designer.

How do you approach the question of damages? What points do you emphasize with the judge who is going to try the case, and with the potential jurors during jury selection? How do you handle your closing argument? Do you take an extreme, swing-for-the-fences strategy in the hope that the jury gives your client the highest award possible; or do you take a more moderate approach, and advocate for "reasonable" compensation for the injured plaintiff?

In this article, I will discuss some legal principles that you will want to bear in mind as you prepare the damages part of your case. I will also share some ideas and suggestions that you may wish to consider as you decide how to maximize your client's chances for a successful recovery. Sometimes, the best approach in a given case may not be the most aggressive.

Some starters

As an advocate in the civil justice system, you are of course obligated to present your client's personal-injury case in a way that is consistent with the law, court rules, and applicable standards of practice. Keep in mind, too, the qualities of the bench officer who presides over your matter. They may have a fairly relaxed style, giving you great leeway as to how you put on your case. Or, they might be extremely strict, and very "hands on." In either instance, they are going to be constrained by the same laws and rules that pertain to damages. Trial judges are very concerned about making a decision – or allowing an argument – that may constitute reversible error. Therefore, even if you think your judge might allow you to "push the envelope" on a particular damages argument, you might want to think twice before making it. In the end it might come back to haunt you (and, more importantly, your client). This is one reason why it is essential to take the time to develop an overall strategy and approach to damages in your case.

You will also want to reacquaint yourself with the black-letter law regarding economic ("special") damages, including medical expenses and past and future lost earnings; and the various elements of noneconomic ("general") damages. You may have issues in your case that involve aggravation of a preexisting condition, a so-called "eggshell" plaintiff, mitigation of damages, and rules regarding life expectancy.

One excellent way to do this is to review the California Civil Jury Instructions (CACI) on damages, starting with CACI 3900. This includes the "Directions for Use" and the "Sources and Authority" sections that accompany the instructions. These resources can provide invaluable guidance. The bench officer who is trying your case will also want to closely track (if not exclusively use) these approved instructions.

This article is not the proper vehicle to discuss in depth all aspects of the rules regarding personal-injury damages. However, it is helpful to review some basics.

Civil Code section 3333 provides that the measure of damages in a tort case is typically "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Civil Code section 3359 provides that the damage award "must, in all cases, be reasonable." These compensatory damages may include both economic and noneconomic damages. (CACI 3902.)

Past medical expenses must be "reasonable"

One of the most common elements of economic damages involves past and future medical expenses. With respect to past medical expenses, an injured plaintiff will be entitled to compensation if they establish four things by a preponderance of the evidence. They may recover: (1) *reasonable* expenses; (2) for services that were *actually rendered*; (3) that were *reasonably necessary*; and (4) that were *caused by* the accident. (*Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 73; see also CACI 3903A.) Although the plaintiff may be able to testify about what services were actually rendered, in most instances you will need to present the rest of this evidence through competent expert testimony.

The question of what constitutes a "reasonable" medical expense has been heavily litigated. In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, the California Supreme Court established that reasonable compensation for past medical expenses cannot exceed the amount actually paid or incurred: "a personal injury plaintiff may recover the lesser of (a) the amount paid or incurred for medical services, and (b) the reasonable value of the services." (*Id.* at p. 556.)

In cases where the plaintiff has medical insurance and the treatment provider has accepted an amount from the insurer that is *less* than the "ordinary" rate the provider charges – even if the ordinary rate is considered "reasonable" – the plaintiff can only recover the amount the insurer paid. This rule would also apply to expenses actually paid by

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Medi-Cal or Medicare. Under many circumstances, past medical expenses are fairly easy to establish; and counsel often stipulate to what have come to be known as "the *Howell* numbers."

If a past medical expense has *not yet* been paid, the plaintiff must prove that a particular expense was in fact incurred, and that the expense was reasonable. (See *Bermudez v. Ciolek* (2015) 237 Cal. App.4th 1311, 1328-1340.) This is the case whether there is insurance or not. (See *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1276-1277.) Thus, if a plaintiff chooses for some reason not to use their health insurance for a particular treatment or service, or if the provider is outside the insurance "network," plaintiff must nevertheless prove the "incurred" and "reasonable value" requirements. By the same token, the defendant should not be entitled to argue that the plaintiff has failed to mitigate his damages if he did not seek payment from available insurance. (*Id*. at 1277.)

Future medical expenses

With regard to future medical expenses, a plaintiff is entitled to recover: (1) the *reasonable value* of medical services; (2) that are *reasonably certain* to be needed in the future; and (3) that are *attributable* to the accident. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330; see also CACI 3903A.)

Your case may involve questions as to what constitutes the "reasonable value" of a medical service or procedure. The *Bermudez* court observed that the answer to this question "will usually turn on a wide ranging inquiry." (*Bermudez*, 237 Cal.App.4th at 1331.) Depending upon the facts of your case and the foundation for a particular piece of evidence, this could potentially include information regarding what constitutes the so-called "market" or "exchange" value of a service; "private pay" versus "cash pay" patients; and comparisons to Medicare reimbursement rates. (See, e.g., *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 183; *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050; *Bermudez*, 237 Cal.App.4th at 1331-1340.)

The rules concerning past and future lost earnings, and the separate issue of lost earning capacity, are set forth in CACI 3903C and 3903D. The focus for future losses is on what the plaintiff is reasonably certain to lose, or reasonably certain to have earned, as a result of the injury. In this area, expert testimony is not required; lay witness testimony, including from the plaintiff, may be sufficient. (See *Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 892.) And, it is now explicitly clear that jurors are prohibited from using a plaintiff's race, ethnicity, or gender as a basis to reduce earnings damages. (CACI 3906 (added November 2020).)

"General" or pain and suffering damages

Noneconomic damages – also referred to as "general" damages or damages for "pain and suffering" – are much more loosely defined. Jurors are told that there is "no fixed standard" for deciding this amount. They are simply instructed to "use [their] judgment to decide a reasonable amount based on the evidence and [their] common sense." (CACI 3905A.)

CACI 3905A contains a number of specific types or forms of noneconomic damages. These should be tailored to track the evidence in your particular case. Also – again depending upon the evidence – the plaintiff is permitted to seek compensation for future noneconomic damages if they can establish that they are reasonably certain to suffer that harm. (*Ibid*.)

Some strategy from the bench

Both aspects of personal-injury damages present challenges for the plaintiff's lawyer. In the hypothetical that I mentioned at the beginning of this article, there may be important questions concerning causation, and whether the plaintiff's medical history and age will complicate your medical expert's testimony. If the plaintiff, for whatever reason, did not have significant earnings in his graphic design job at the time he was injured, perhaps you will want to forgo any claim for past or future lost earnings or lost earning capacity because it will bog down the case. If the plaintiff has had to endure several medical procedures since the accident and has struggled with pain and changes in his activity level and quality of life, perhaps you may decide to emphasize future pain-and-suffering damages.

As a former trial judge who has presided over a significant number of personal-injury trials, and observed the behavior of jurors and the verdicts they have rendered, I believe there are two critical things that should guide you as you present your case. First, work from the outset to establish jurors' trust. Second, do not inflate or over-promise things to them. Jurors are by and large skeptical and sophisticated. You can lose them – or never get them in your corner in the first place – if you say things about your client's damages claims that are not supported by the evidence or are implausible. You obviously want to be a confident, vigorous advocate. But you need to find ways to advocate that make the jury feel comfortable with your side. The following are some specific ways these precepts can apply.

During voir dire, you may believe that it is important to try to introduce the venire to a specific, very high damages figure that you tell them you can prove. You may want to do this to determine whether they are resistant to the possibility of a significant award, so that you can excuse a particular potential juror on a peremptory challenge. You may want to do it in order to try to "anchor" the venire to the highest possible award, in hopes that they will at least be thinking about a verdict in that ballpark as they start to hear the evidence.

Both motivations are valid and understandable. Assuming the trial judge allows you to identify a specific damages figure during voir dire (some bench officers will only allow you to use general descriptions, such as "significant" or

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"substantial"), you need to consider how the high dollar "promise" will be received by the members of the venire. Will it turn too many of them off? Is there a different way to convey the information that achieves your goals but enhances your chances of building trust?

Also, jury selection is your first opportunity to have contact with your jurors. Starting then and throughout the trial, be sure that you (or someone on your team) are *watching* the jurors. You have so many things to think about when you are in the middle of a trial; and it is easy to get "lost" in your case and all of its detail. You still need to be able to "read the room," and observe how the jurors are reacting to what you and your witnesses are saying. This is important in all stages of your case, but especially when the subject is damages.

When you are delivering your opening statement, you face challenges similar to those you face during jury selection. As you tell the jury what you expect the evidence to show, be mindful about overstating damages figures. It is of course appropriate to tell the jury that, at the conclusion of the case when you present your closing argument, you will ask them for a substantial award; or that you believe the evidence will support a verdict that is significant. The latter phrasing is slightly less assertive, but it might actually be received better by the listener.

Don't get in the way of your evidence

During presentation of the damages aspects of your case, try to let the witnesses' own words paint the picture. *Don't get in the way of your evidence*: resist the urge to ask long questions that contain exaggerated or inflated descriptions about the plaintiff's treatment or pain. This is an area where thorough witness preparation is critical. The jury is far more likely to be persuaded by the testimony of a sincere plaintiff or a knowledgeable doctor than the statements of counsel.

Also, consider structuring your questions in ways that fit the unique facts of the case. For example, if you have a case involving a plaintiff who went through multiple painful surgeries after an accident, or encountered numerous setbacks, you might take the witness through that history by asking short, focused questions in a low-key style without any flowery language, letting the information itself "build" into a compelling and emotional narrative. If, on the other hand, you have a case where the plaintiff underwent some relatively straightforward treatment in a short period of time, you might need to pack a little more "punch" into your questions. Always be careful, however, about characterizing the case beyond what the evidence fairly supports.

Let's seal the deal

Your closing argument is your opportunity to "seal the deal" with your jury. Be methodical (but not too lengthy or repetitive) as you review the elements of your client's economic damages. Provide them with plausible, rational explanations on every important issue. If causation is a big problem for you, carefully review the evidence in that area, and tell them why your version makes sense. By conceding an issue that looks like a loser, you can enhance your credibility. Resist the urge to mock or belittle the lawyers or witnesses on the other side, or to display inappropriate anger or extreme indignance. It can backfire and turn the jury off.

In discussing noneconomic damages, here again, sometimes less can mean more. There are so many ways available to you to argue noneconomic damages. But subtlety and sincerity, combined with carefully chosen words and well-placed pauses, can be incredibly effective. If your case genuinely supports a request for a significant award for pain and suffering, consider giving the jury a dollar range rather than a specific number. Also, consider giving them more than one method for formulating the award. You can go "big picture," and ask them to place a dollar value on the loss of years of good health and good quality of life. You can offer a "per diem" rate that you think is reasonable for every day the plaintiff has experienced pain. You can argue that the jury should consider a separate dollar award for each form of noneconomic damage that your plaintiff has suffered (e.g., separate amounts each for physical pain, mental suffering, etc.).

By offering the jury alternatives rather than one set methodology, you can empower them and reinforce their feeling that they are respected, and the true decisionmakers. Beware of demanding a general damages award that is far out of proportion to the economic damages. It is a high-risk strategy that fails much more often than it succeeds.

Damages in mediation and arbitration

When you are working with a neutral as opposed to a jury, your "audience" is obviously different, and your goals might be as well. You are likely dealing with experienced former judges, commissioners, and lawyers. Your opposing counsel (and insurance adjusters) may also be seasoned. You can afford to be a lot more direct about your case. You should also be realistic about your damages valuations.

If you are trying to settle your case in a mediation, it can be very helpful to research recent verdicts on similar cases in your jurisdiction. This may give you needed support when you advocate for a high settlement demand. (It can also give you a sense of whether you might be asking for too much.) It is also very important to be knowledgeable about the specific facts and details of your case, so that you can demonstrate to the neutral and the other side that you know how to get the award you are seeking if you are forced to try the case.

If you are presenting your case in an arbitration, you will want to think carefully about how much to ask for, especially with regard to noneconomic damages. You want to request an amount that the arbitrator feels comfortable awarding. You are far less likely to hit the jackpot in an arbitration. While there are occasional "runaway" or "nuclear" jury verdicts, they are rare in arbitrations.

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Closing thoughts

The damages part of a personal injury case is really where the rubber meets the road. It requires thoughtful, diligent preparation and strategy. And, it requires you to carefully consider your particular "audience." Each case is different, and you will want to find the best way to advocate for your client and maximize their recovery. This takes time and preparation.

Good luck!

For nearly 20 years, the Hon. Margaret Oldendorf sat as a judge of the Superior Court for the County of Los Angeles. During the last nine years of her judicial career, she presided over a Civil Independent Calendar Court and a Civil Trial Court in Pasadena, overseeing numerous jury and court trials. Her numerous contributions to the legal community have gained widespread recognition. In 2018 she won the Judicial Civility Award from the Los Angeles Chapter of the American Board of Trial Advocates (ABOTA), and in 2019 she was awarded the Trial Judge of the Year award by the Consumer Attorneys Association of Los Angeles (CAALA).

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