KEEPING OUT OF THE WEEDS:

DEFENSE SHOULD FOCUS ON WINNING LIABILITY INSTEAD OF DAMAGES AT TRIAL

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While trials are on the decline, the pressures associated with trials are ever-present. Naturally, defense attorneys in personal injury and wrongful death cases are forced to make difficult decisions as to what to emphasize at trial. This, of course, can often be a difficult decision, especially considering that by the time the defense presents its case, the jury has already heard about the plaintiff's theory of liability as well as the plaintiff's injuries and damages. Among all the competing areas of emphasis, one of the most important trial strategy decisions is how much emphasis should be placed on liability versus damages during the defense case. Predictably, the appropriate defense strategy regarding the plaintiff's injuries and damages is not one-size-fits-all.

For example, imagine the following in a complex product liability case where liability is hotly contested and the injuries to the plaintiff are catastrophic. At trial, the plaintiff splits the trial testimony about 50-50 between liability-related issues and the plaintiff's injuries and damages. There is a significant amount of testimony related to the hardship that the plaintiff has endured as a result of her injuries, pain and suffering, and economic damages. By the time the plaintiff has rested her case, the jury has heard hours and hours of testimony related to her injuries and damages, emphasizing how sympathetic a figure she is and how her life has been changed by a truly catastrophic event.

Now it is the defense's turn to present their evidence. But which evidence should it present in order to

maximize the chance of prevailing on liability and obtaining a defense verdict? While the defense has evidence that the plaintiff is exaggerating her damages—e.g., she can still perform certain jobs undercutting her loss of earnings claim, she doesn't need all the medical care that the plaintiff claims, the evidence of expenses for future medical care were not reasonable and customary, and so on—the defense must decide what evidence is most likely to sway the jury in the defense's favor on liability.

While it may be a bit axiomatic, the defense must focus on liability rather than damages, despite the temptation to fight over injuries and damages. The reason for resisting this urge is simple—if the jury doesn't buy the defense's liability case, they aren't likely to buy the defense's damages case. Furthermore, in catastrophic injury or wrongful death cases, damages can be an all-or-nothing proposition. While there may be disputes, for instance, over the allocation of general damages or how economic methods were applied to determine the future value of money in a life plan, defendants know that if they lose on the liability question, they are likely to suffer a significant verdict. And while every dollar counts, the difference between a verdict of $10 million and $9.5 million is relatively insignificant. Particularly in those cases, the emphasis must overwhelmingly be on liability.

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Furthermore, there is concern that by vehemently contesting the specifics of a plaintiff's injuries damages during the defense case, a jury may view that as a concession that the defendant is liable and that the plaintiff is entitled to damages. This tactic may cause the jury to focus on the damages award rather than the question of whether the defendant is liable at all. While the "concession effect" may ultimately have less impact than one might think, the concern is real. For these reasons, it is often advisable to spend less time on the damages questions and focus the bulk of the defense team's energy and resources on the liability issues. One of the key ways to do this is by scoring the defense's damages "points" on cross-examination with the plaintiff's witnesses. This practice also avoids defense experts being used as pawns by plaintiffs' lawyers to reaffirm the undisputed components of a plaintiff's damages for use in closing. Instead of trotting out damages experts, the defense can use cross-examination to

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get the limited concessions they need and not take up time in presenting their case.

Obviously, ignoring damages altogether would be a mistake. Studies have shown that ignoring damages is less effective than providing a tailored and efficient counter to the plaintiff's claimed injuries and damages.[1] One 2014 study identified that the best strategy—without assessing the emphasis in the context of a trial as a whole—was to counter the plaintiff's high damages demand with a suggested defense damages award of their own.[2] A counterproposal of $50,000 to the plaintiff's demand of $250,000 resulted in a 43 percent lower expected case value. This data suggests it is a sound strategy for the defense to include a counter to a plaintiff's damage request that gives the jury a more reasonable number on which to peg any potential damages award. This request can be easily generated on cross-examinations with the plaintiff's own damages expert. For instance, if the plaintiff puts up an economist to opine as to current value the loss of earnings capacity claim, on cross-examination it is easy to get testimony as to what those damages calculations would be with different inputs (discount rates, etc.). The expert will almost always be able to adjust the calculations on the witness stand, giving the defense the numbers it wants. Similar points can be scored with a life care planner or other damages experts. This is an opportunity for the defense to provide the counter-anchor to the plaintiff's damages request without spending significant time focusing on damages.

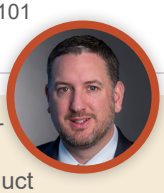
Another helpful observation from the 2014 study was that the participants of the study did not view a defendant's proposal of a damages counter-anchor as necessarily being a concession of liability. This doesn't mean that the defense should focus on damages, but should assuage concerns that any discussion of damages will be taken as a concession of liability. In fact, the study's scenario, in which the defense had the greatest chance of winning on liability, was the one in which the defense countered with its own damages number. In contrast, when the defense completely ignored the plaintiff's number, its win rate on liability actually declined by nearly 20 percent. So, while a defense team needs to craft its strategy on a case-specific basis and should focus primarily on the liability issues in the case, it should be mindful of the potential effects of ignoring the plaintiff's damages claims altogether.

The takeaway for defense attorneys should be:

1. Spend the bulk of your resources on contesting liability;
2. Present limited evidence contesting damages, focusing the credibility and reasonableness of the plaintiff's presentation; and
3. Respond to the plaintiff's damages request with a counter-anchor.

At least in cases where there are solid defenses to liability, a defense team should avoid the temptation of getting into a food fight with a plaintiff regarding injuries and damages. Instead, defendants will put themselves in the best position to win, or least reduce damages, if they keep the jury focused on liability and include a limited presentation of evidence related to damages. **NL**

1. John Campbell et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments,* 101 Iowa L. Rev. 543 (2016); Kagel, J., *Damages: The Defense Attorney's Dilemma,* The Jury Expert 22 (1), 40-45 (2010); see also Bornstein, B., *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments,* Journal of Applied Social Psychology 28 (16), 1477-1502 (1998).
2. John Campbell et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments,* 101 Iowa L. Rev. 543 (2016).



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