

MAXIMIZING DAMAGES IN A TORT CASE

The Plaintiff's Perspective

*By David Marsh
Marsh, Rickard & Bryan, P.C.
Birmingham, Alabama*

I. PRESENTATION OF THE CASE AND PRACTICAL ISSUES

The responsibility that comes with representing a plaintiff who sustained significant and profound injuries is enormous. What his or her lawyer does or doesn't in preparing the case and presenting it effectively to a jury will have a profound effect on the client's future and, quite often, the future of his or her family.

At trial, the plaintiff's counsel is faced with the "balancing act" of presenting all of the damages and injuries to the jury for it to consider on the one hand and preserving the client's dignity on the other. Common questions include: "Do I really need a damage expert with injuries this apparent?"; "Do I have to use an economist?"; "How can I talk to this jury about millions of dollars when many of them are low income or middle income people who are not able to relate to huge sums of money?"; and "When do I begin discussing damages - early in the case or during closing argument?" In the pages that follow, I will share

with you some practical suggestions for preparing and trying the case.

II. DEVELOP A THEME

It is not enough to simply call experts to testify and prove damages on a blackboard. Every case must be based on a theme that the jury can understand and that will rebut predictable defenses. The theme supports the case and holds it together. Common themes are "Compensation," "Punishment," "Prevention" and "Profit." Finding the right theme is critical and usually depends on the facts of the case. For example, in a recent case, a defendant manufacturer knew of several technologically and economically feasible safety devices that would prevent the ignition of flammable vapors in the vicinity of a water heater manufactured by the defendant. The end result would be fewer ignitions, fewer fires, fewer injuries and fewer deaths. The parents of the young victim knew that the floor-mounted water heater was in their utility room. They also knew that common household substances, many of which were flammable, were stored in the same utility room on shelves that had been placed there by the previous owner. The room also was used to store cans of paint and mineral spirits, as well as gasoline used to operate a lawn mower. The defense was plain and simple - that the parents were to blame for the horrible tragedy that occurred when their three-year-old child accidentally tipped over a can of gasoline

inside the utility room. The child was engulfed in flames when the vapors from the gasoline were ignited by the floor-level flame inside the water heater.

The manufacture's counsel took the position that the parents were responsible for their child and the manufacturer was responsible for its water heater. Thus, the theme in this case became "knowledge." The manufacturer had knowledge of thousands of previous horrible burn injuries and deaths that occurred when flammable vapors were ignited by the flames in the water heaters. The manufacturer also had knowledge of basic design changes that would substantially reduce those injuries and deaths. The parents had no similar knowledge. Who had the knowledge here? Who failed to put some effort into trying to prevent the tragedy? Who had access to the knowledge? Who had knowledge of the statistics? Who had knowledge of the earlier lawsuits? Who had knowledge of design and manufacturing changes that were feasible for many years prior to the tragedy? The parents had no knowledge of the hazard or the many deaths and injuries that had been caused by the hazard or the economically feasible methods of eliminating the hazard. The manufacturer had a wealth of knowledge and the economic and technical capability to prevent a child's horrible burns and eventual death, but it did nothing.

Once the theme is established the rest is easy. Visual aids and exhibits can be based on the theme. A good theme will

support and be useful in all stages of the case, including voir dire, opening statement and closing argument.

III. VOIR DIRE

Voir dire should be used to: (1) introduce the client to the prospective jurors; (2) reveal the nature of the injuries and damages for the first time; (3) identify jurors who may be biased or "poisoned;" and (4) eliminate undesirable jurors for cause or by way of peremptory strikes.

The voir dire questions also should be designed to reveal and build upon the theme discussed in the previous section. For example, if the theme is "knowledge," the following questions may be appropriate:

- "Does any of you have knowledge of the specific hazards presented by the floor mounted water heaters located in your homes?"
- "Please explain."
- "Does any of you have knowledge of how many serious burn injuries or deaths have occurred in this country during the past 10 years as a result of floor mounted gas water heaters?"
- "Does any of you have knowledge of studies that have been conducted by private and governmental entities concerning the hazards presented by floor mounted gas water heaters?"
- "Do you believe that a manufacturer who has knowledge of deaths and injuries caused by its product has a responsibility to analyze the design of its product to see if the hazard can be reduced or eliminated?"

- "Do you believe that a manufacturer with knowledge of a design defect in its product should take reasonable steps to eliminate the hazard if feasible?"

It is important during voir dire to begin some discussion of damages and to let the prospective jurors know that they will be asked to return a large compensatory and/or punitive award. Potential jurors who adamantly are opposed to large verdicts or to punitive damages can usually be identified. During the voir dire process, an open and credible discussion of damages and the jurors' proper role in returning a large award is essential in a case with a profoundly injured plaintiff. If the plaintiff's lawyer can establish a commitment from potential jurors to return a large verdict if the evidence supports it, that commitment can and should be emphasized effectively during closing argument.

IV. OPENING STATEMENT

The opening statement is arguably the most important stage of a trial, especially if you represent the plaintiff. An effective opening statement can and will persuade the jury. There is nothing wrong with this. This persuasion can take place within the bounds of ethics and within the particular fact situation involved. "As to opening statements, the rule approved by this Court is that in it the parties are entitled to outline what they expect to prove unless it is manifest that such proof is incompetent." *Mazer v. Brown*, 66 So. 2d 561, 565 (Ala. 1953)

"On this subject much is left to the discretion of the trial court whose discretion is subject to review only when abused to the prejudice of the complaining party." *Horton v. Continental Volkswagen, Inc.*, 382 So. 2d 551, 552 (Ala. 1980).

The importance of this first impression cannot be overstated. It is a fact that human beings usually believe what they hear first about a given subject. Studies show that 80 percent of jurors make up their minds during opening statement. Therefore, the time provided for opening statement should not be wasted. Start strong. Your purpose should be to persuade from the first sentence.

While there are many goals that you should hope to accomplish during your opening statement, these are some of the most important:

- It should be your primary goal to persuade the jury.
- Be creative at the beginning of your opening statement.
- Be creative with the use of statistics or learned treatises.
- Establish a theme. You should establish the theme of your case in opening statement and build upon that theme during the trial. If your case involves simple carelessness or negligence by a defendant, your damage theme should be that of compensation as opposed to punishment. On the other hand, if your case involves reckless or wanton conduct, but small damages, your theme should be one of punishment or, even better, prevention.

- Tell the jury in clear and concise terminology what the case is about and what you are asking them to do.
- "Take away" the defendant's bombshells. The plaintiff's counsel should openly discuss the defenses put forth by the defendant. The plaintiff's counsel also should discuss any weaknesses or problem areas in the case and the plaintiff's answers to those weaknesses. Plaintiff's counsel will begin to establish credibility by being open with the jury.
- Establish credibility. The jury must feel as though they can believe you before they will vote for your client. Credibility is established in several ways:
 1. Demeanor.
 2. Never overstate.
 3. Never exaggerate.
 4. Explain or minimize weaknesses.
- Your opening statement should serve as an outline or foundation for closing argument.
- The opening statement should serve as the attorney's promise to the jury and begin to establish trust that can be capitalized upon during closing argument.

V. NEVER IGNORE THE NEED TO PROVE LIABILITY

While much of the plaintiff's focus in a case should be placed upon presenting damages, proving the liability aspects of the case should never be ignored. It is usually fatal to "guild the lily" by focusing solely on your client's injuries, as horrible as they may be, and failing to present credible evidence that the defendant is responsible for those injuries. Never start the trial of a case by jumping right into evidence of

damages. This will usually backfire unless liability is undisputed.

VI. KNOW WHEN TO STOP

Effective presentation of the case involves knowing when to stop. While it is important that the jury understands the nature and extent of the plaintiff's injuries and the effect that those injuries will have upon the plaintiff for the rest of his or her life, there also is a point at which the jury does not want to hear or see anymore. I have found that jurors actually resent the plaintiff's attorney who subjects the plaintiff to overly graphic or lengthy discussions about injuries and damages. If the injuries are strikingly apparent, such as burn injuries, amputation or disfigurement, the jury does not need a lawyer repeatedly telling them how bad it is. By tastefully presenting evidence from economists, life care planning experts and physicians, the plaintiff's counsel can establish the severity of the injuries, medical bills and other real costs. The plaintiff's lawyer then can abbreviate the damage testimony elicited from the plaintiff and thereby gain credibility with the jury. Then, the plaintiff's counsel can argue sincerely and effectively to the jury that he or she has attempted to place the facts before them, while at the same time preserving the dignity of the plaintiff.

VII. DAY-IN-THE-LIFE PORTRAYALS

Day-in-the-life videos can vividly show jurors the full extent of the plaintiff's daily pain and suffering. A well-done day-in-the-life video can show the jury, first-hand, what the profoundly injured plaintiff experiences when attempting to carry out simple daily tasks such as brushing our teeth, turning on a radio, buttoning a shirt or turning off a light.

I also recommend spending the day with the client while making the day-in-the-life video. Learn what the client goes through from the time he or she wakes up and attempts to get out of bed until he or she is placed back into bed at night - or for the remainder of the day.

While day-in-the-life videos can be very moving and credible, plaintiff's counsel should again be mindful of how much the jury wants to see and hear. I believe that it is possible to create a day-in-the-life video that is too "polished" or "glitzy." Usually, a silent video production that accurately depicts the stark realities of the plaintiff's life is sufficient to get the point across in a case involving profound injuries.

VIII. LIFE-CARE PLANS AND LIFE-EXPECTANCY ISSUES

Once liability has been established, jurors will award more money when they know why the money is needed and the purposes for which it will be used. With respect to a profoundly injured

plaintiff, someone in the jury room invariably will ask: "What good will the money do?" Ironically, the more catastrophic the injury, the greater the likelihood someone serving as a juror will consider the victim's situation hopeless and make the argument that, "a lot of money is not going to do anything for this poor person." That attitude can be dispelled through the presentation of a carefully drafted life-care plan which addresses medical and support needs of the plaintiff. The life-care plan should be prepared by a competent planner who is well-experienced in evaluating the long-term needs of catastrophically injured people. I often try to obtain a life-care plan from a competent planner who historically has done work for the defendant or its attorneys. Keep in mind that it is not necessary (nor would you want) to stretch or exaggerate damages in a profound injury case.

The plaintiff should be interviewed at length by the life-care planner before the plan is drafted. If the plaintiff is a child, his or her parents should also be interviewed at length by the life-care planner and the plan should be explained carefully to the parents once it is finalized. If at all possible, the plan should be endorsed by the plaintiff's own physicians or therapists.

Unnecessary, duplicative or questionable items should be omitted from the plan. This enables the plaintiff's counsel to

argue that the plan gives the defendant the benefit of the doubt and is in all likelihood an understatement, but the minimum necessary to maintain some quality of life. By omitting unnecessary, duplicative or questionable items, the plaintiff's counsel establishes credibility and prevents effective cross examination of the expert.

IX. VIDEOTAPE ALL DEPOSITIONS OF THE PLAINTIFF'S PHYSICIANS AND OTHER HEALTH-CARE PROVIDERS

I believe that the depositions of all physicians and health care providers should be videotaped. Of course, this is permitted under both the Federal and the Alabama Rules of Civil Procedure. Fed. R. Civ. P. 30(b)(3); Ala. R. Civ. P. 30(b)(4). If the plaintiff's injuries truly are profound, there is little that a physician (regardless of how conservative he or she may be) can say to hurt the case. The video deposition will have a much greater impact on the jury than simply reading the deposition testimony. Also, video taping the deposition allows the physician to use X-rays, charts, diagrams and anatomical models to explain the mechanism and the severity of the plaintiff's injury during the deposition. Always videotape the medical depositions in a profound-injury case.

X. ECONOMIC TESTIMONY

The team of experts in a profound-injury case usually consists of: (1) treating physicians and health care professionals; (2) a qualified life-care-plan expert; and (3) a credible economist. However, there is no requirement under Alabama law that an economist be used. "Alabama does not require that the plaintiff submit expert testimony concerning the mathematical procedure for reducing the loss of future earnings to present value." M. Roberts & G. Cusimano, *Alabama Tort Law*, § 40.05 (4th ed. 2004), citing *Mullins v. Summers*, 485 So. 2d 1126 (Ala. 1986), and *Louisville & N. R.R. v. Grizzard*, 238 Ala. 49, 189 So. 203 (1939). The future damage value issue is often addressed by presenting to the jury mortality tables, of which the trial court may take judicial notice. See Ala. Code §§ 35-16-1 through 35-16-4.

Attorneys may address the issue of interest in closing argument and elect to rely on the jury's common experience, in lieu of presenting an expert on the subject. Alabama Pattern Jury Instruction Number 11.11 (2007 Cum. Supp.), which incorporates and summarizes the various aspects of Alabama law relating to "Loss of Future Earnings or Future Earning Capacity," tells the jury how it should go about reducing a compensatory damages award to "present cash value."

While I believe that economists can be valuable in profound-injury cases, I also believe that they are sometimes used unnecessarily. From a tactical standpoint, it often is better to list all of the damages, including life-care-plan numbers, and let the defense counsel attempt to reduce the numbers. "This court has sanctioned the use of blackboards and charts for us in clarification, explanation and use of counsel in drawing inferences of making calculations based upon matters in evidence." *Southern Cement Co. v. Patterson*, 122 So. 2d 386, 391 (Ala. 1960).

Any attempt by the defense counsel, through argument, to refute those "blackboard numbers" usually can be rebutted effectively, as discussed below.

XI. HOW TO DEAL WITH "THE MONEY WILL GROW" ARGUMENT

A defendant's counsel may argue that a lump sum amount of money, say \$250,000, will provide the plaintiff \$20,000 to \$25,000 a year to live on if he or she invests it at some imagined rate of interest. Defense counsel also may argue that the plaintiff will still have the \$250,000 at the end of 30 years. This can be a very effective argument, especially when made to a jury consisting of middle- to low-income people.

Plaintiff's counsel can rebut such an argument effectively by talking to the jury about the real world and inflation.

Inflation is a fact of life. An item you can buy today for only \$1.00 will cost \$1.75 in 5 years. The rate of inflation has averaged 7½ to 8½ percent over the last 10 years. At the end of 25 years, \$20,000 will pay about \$3,000 worth of bills, in today's dollars. And the \$250,000 will purchase approximately \$32,000 worth of goods and services, in today's dollars. That amount realistically would not cover a plaintiff's one-week stay in the hospital.

You also should bear in mind that, during closing argument, "[d]efendants' counsel could not make a mathematical calculation [concerning present value] based on an interest rate that was not in evidence." *Crescent Transit, Inc. v. Varnes*, 399 So. 2d 233, 236 (Ala. 1981).

If properly presented, an illustration to show the decrease in real purchasing power over time effectively will rebut any argument that the plaintiff will be "made rich" with a \$250,000 verdict.

XII. CONCLUSION

During closing arguments, the plaintiff's counsel should continue to advance the theme of the case that was set forth in the opening statement and established by way of the evidence presented. If the opening statement was properly organized and delivered, it serves as a basic outline for closing argument.

In closing arguments, "counsel may not argue as a fact that which is not a fact in evidence, but he may state or comment on all proper inferences from the evidence and may draw conclusions from the evidence based on his own reasoning." *Osborn v. Brown*, 361 So. 2d 82, 86 (Ala. 1978).

An effective closing argument will take the jurors back to the opening statement and remind of the promises they made and promises to be kept, as well as addressing damages discussions that took place during voir dire. During closing arguments, plaintiff's counsel should attempt to summarize all of the evidence in a straightforward and common-sense manner (without discussing each and every witness in excruciating detail), while emphasizing the theme of the case and concluding with a credible request for damages that is in line with the damages proven and the theme of the case.