A DEFENSE ATTORNEY'S GUIDE TO SUCCESSFULLY ARGUING DAMAGES

LAW360

This article originally appeared on Law360

https://www.law360.com/classaction/articles/1133149/a-defense-attorney-s-guide-to-successfully-arguing-damages

BY: BOB TYSON

With more and more nuclear verdicts being awarded at trial — especially in products liability cases — can the defense afford not to argue damages with a jury? It may be unconventional, but something has to be done to turn the tide of runaway jury verdicts sweeping the nation.

It is a long-held belief that if a company wants a defense verdict in a products liability case, the defense better not give the jury a damages number, or even argue damages. As explained herein, this belief is wrong. The defense can argue damages to a jury, even give a defense number, and still obtain a defense verdict.

Giving the jury a defense number early and often, even while arguing for no liability, can still result in a defense verdict. Given the tens, and hundreds of millions of dollars at stake in many bellwether trials and multidistrict litigation cases, the question really is: Can corporate defendants afford not to argue damages?

THE PROBLEM

In the last year alone, dozens of corporations have shelled out hundreds of millions of dollars in damages after unsuccessful attempts to defend their products in court. These include a $68 million jury verdict for pelvic mesh, $247 million for a defective hip implant, $289 million for weed killer, and the list goes on and on. Most recently, Johnson & Johnson was hit with a products liability verdict of $4.7 billion after a civil jury found its talc powder caused ovarian cancer in nearly two dozen women, making it one of the largest personal injury awards to date.

The problem is real. And it is bigger than just the bellwether cases that make it to trial. The ramifications of large jury verdicts on hundreds of other cases to follow can be just as devastating — if not more so — to a company. Of course, a company wants a defense verdict for its product. But if the jury disagrees and finds liability, the jury typically only has one astronomical number to consider when it comes to awarding damages — a number sponsored by a plaintiffs lawyer.

It should be obvious that a corporate defendant would prefer an adverse verdict of $2 million rather than being forced to pay $30, $50 or $100+ million. Especially if the defense offered more than $2 million before the bellwether trial and when there are potentially tens, or hundreds or thousands of cases stacked up behind it.

What if the defense could take this approach and still obtain a defense verdict?

THE SOLUTION

As a corporate defendant, you must hedge your bets. You must limit your company's risk. If your product is found to be defective, you may not be able to afford a jury verdict for the plaintiff's massive damages number. You definitely may not be able to afford the tens or hundreds of products cases that are sure to follow it.

SO WHAT DO YOU DO?

Well, you definitely have to do more! You have to address and argue damages with the jury at trial.

The traditional defense approach is no longer effective. The plaintiffs bar has evolved tremendously over the last decade. Use of the so-called reptile theory and other psychological studies have led to novel and creative trial strategies by plaintiffs counsel. Conversely, there has been no innovative response from the defense. Nothing. The defense bar continues to defend cases the way it has always done: fight liability at all cost and hope the jury never gets to damages.

The defense must try something new. In response to the plaintiffs bar's evolving tactics, the defense must be creative, too. One way to avoid runaway jury verdicts is to argue damages, even when going for a defense verdict. Here is how you do it.

ALWAYS GIVE A DEFENSE NUMBER 1st

Most jurors never walk into a courtroom thinking anything is worth $20 million or more. Even only "decent" plaintiffs attorneys know that asking for a large verdict from the beginning of trial can get them big results. It is almost unheard of for a jury to award a large verdict without hearing a proposed dollar amount from plaintiffs counsel. But, after hearing plaintiffs counsel talk about a huge number in voir dire, and then for the next few weeks of trial and closing argument, that astronomical number becomes more reasonable to jurors by the time deliberation begins. Especially if the plaintiff's damages number is the only number they have heard during the trial.

Moreover, inflated verdicts do not always demonstrate the intent of the jury. Juries will sometimes award half of what the plaintiff is seeking and believe a defendant will be happy with the result. However, 50 percent of a $25 million, $50 million or $100 million request is still a significant jury award.

With this in mind, it is imperative that defense counsel combat the plaintiffs' damages request at trial with a number of their own. Give your number to the jury early, give it often, and never increase it.

YOU CAN STILL OBTAIN A DEFENSE VERDICT

This strategy may initially seem counterintuitive. If you want a defense verdict from a jury, why give them a number? How can you get a defense verdict if you are arguing damages? Surely asking for both a defense verdict and a dollar amount would be confusing to a jury or be a sign of weakness, right? Wrong.

First of all, the defense is already arguing damages! In just about every products liability trial, the defense is also disputing the extent of injuries from the product, the reasonableness of the medical care, and the need for any future care. The jury is hearing from defense experts about damages in almost every case. Since you are already disputing damages when you are requesting a defense verdict, is that confusing to a jury? In fact, why have any medical experts at all if you are seeking a defense verdict? Are you sending the jury a mixed message if you really believe your product was safe by hiring numerous expert witnesses and conducting independent medical examinations?

More importantly, if you are already calling experts to dispute the plaintiff's claims of medical treatment and injuries, why not go one step further and show the jury what a reasonable dollar amount is for these claims? Sponsoring a defense damages number at trial is no more confusing to a jury who knows you are fighting for a defense verdict over the course of a monthlong products liability trial, than spending a week of that time putting on medical experts to refute the plaintiff's medical damages.

Also, studies have shown it is not a concession of liability in the jury's eyes when the defense sponsors a damages number at trial.[1] The jury knows you want a defense verdict, regardless of whether you fight damages or give a number.

> Giving a defense number is neither confusing to a jury **NOR A SIGN OF WEAKNESS.**

WHY GIVE A NUMBER?

The psychology behind giving a number is fairly simple. Jurors are conditioned by arguments and evidence repeated throughout trial, and, over time, jurors grow comfortable with a number — no matter how outrageous it may seem when first introduced. Plaintiffs counsel is very familiar with this concept, known as priming.[2] The most skilled plaintiffs attorneys use priming, repeating their large numbers over the course of multiweek or monthslong trials, to influence attention and memory.

This concept of priming is not a "plaintiff's" psychological term. A plaintiffs lawyer did not invent priming. It comes from the study of human behavior, not plaintiffs' behavior. So priming works for the defense too! Giving a number works just as well for the defense as it does for plaintiffs. It is critical to give the jury a counter-anchor,[3] another number to consider — early and often. The examples of runaway juries finding a product to be defective, and then only

having the plaintiff's outrageous number to consider, are numerous. Priming works and is a tool that must be used by anyone in the business of evaluating risk. Hedge your bets, or you may be betting the company!

HOW DO YOU GIVE A NUMBER?

The defense must give a damages number when first picking a jury, in opening and closing, and with witnesses throughout the trial. Explain at the outset that although you believe there is no reason for the jury to ever get to the point of determining damages, it is your duty to address all the issues and evidence presented in trial.

The jury will be instructed as to the applicable law for damages and will receive questions about damages on the special verdict form. While you believe the evidence supports a defense verdict and jurors will never need to consider damages, if for some reason they do address damages, the evidence will show a fair and reasonable award is the defense number you have proposed. The jury will understand you are requesting a defense verdict and they will not interpret giving a number as weakness.

ARGUE NONECONOMIC DAMAGES! 2nd

The largest component of most runaway jury verdicts is often noneconomic damages, or "pain and suffering." This is the great unknown. How does one assign a value to a human life, a disfigurement, a leg or a back?

No one questions why a seriously incapacitated plaintiff receives an award for millions of dollars for future medical care — someone who is seriously injured should have their medical needs covered. However, it is alarming when plaintiffs are awarded tens of millions of dollars for pain and suffering that seem out of proportion to their physical injuries and necessary treatment.

[THIS IS A RUNAWAY JURY VERDICT.]

Again, you are already arguing damages in most products liability trials. You are disputing the extent of the plaintiff's injuries, whether they needed the claimed medical treatment, and whether they will need future treatment. Why not also argue the biggest component of most catastrophic injury cases? Argue the value of a leg, or a brain or a life. Do not leave the biggest component of your case to plaintiffs attorney and the jury!

HOW DO YOU ARGUE PAIN & SUFFERING?

The typical defense approach in a runaway jury verdict is to ignore pain and suffering. When a defense attorney does argue noneconomic damages, he or she typically tells a jury to follow the law and that the damages should be fair and reasonable. This is not an argument.

So how should the defense argue noneconomic damages in a products liability case? That could be another article entirely, but here are two methods to start:

First, the defense must discuss with the jury the impact of the accident on the plaintiff's life — what is the plaintiff's life really like after the accident?

Second, the defense must argue to the jury the impact of money on the plaintiff's life — what is the value of money to the plaintiff?

[Defense counsel must show the jury HOW THE PLAINTIFF'S LIFE will be made whole by the defense number recommended for pain and suffering.]

If the defense uses these two methods, a jury will have a clear path to returning a just and reasonable verdict, if they even get to damages.

IN CONCLUSION

The traditional defense approach is no longer working. As plaintiffs' arguments constantly evolve, so too must the defense arguments in order to beat them. Companies who challenge their defense counsel to give a number and argue pain and suffering, even when going for a defense verdict, will significantly minimize the risk of a runaway jury verdict. In light of the runaway jury verdicts in products liability trials in just the last year, the question really is: Can you afford not to argue damages?

---

[1] Campbell, J., Chao, B., Robertson, C., & Yokum, D. (2016). Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments. Retrieved from https://ilr.law.uiowa.edu/print/volume-101-issue-2/countering-the-plaintiffs-anchor-jury-simulations-to-evaluate-damages-arguments/

[2] Kanasky, Bill, Jr., Ph.D. (April 2014). Debunking and Redefining the Plaintiff Reptile Theory. For the Defense, 18.

[3] Miller, K. (2017). Anchoring Your Argument: How to Use The 'Anchoring Effect' to Persuade. Retrieved from https://courtroomlogic.com/2017/11/08/anchoring-effect/

TYSON & MENDES
WWW.TYSON&MENDES.COM