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When Non-Economic Damages Pack a Real Economic Wallop

In part two of our conversation with Bob Tyson of Tyson & Mendes about defending against nuclear verdicts, we hone in the root of many high dollar damages awards: non-economic damages.

By Ross Todd
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Today we pick up with the second part of our conversation with **Bob Tyson**, founding partner of 200-lawyer insurance defense law firm **Tyson & Mendes**. Tyson is author of a book about defending against nuclear verdicts, which was the basis for a defense-side workshop on that topic last month.

In yesterday's column, we focused on Tyson's thoughts about how defense lawyers need to change up their tactics to address approaches adopted by plaintiffs counsel over the past decade and a half to tap into juror anger. In the second half of our conversation, we discussed non-economic damages, the discretionary portion of a case where that anger is often felt most intensely by defendants. The following has been edited for length and clarity.

Lit Daily: You point out in your book that non-economic damages is where most verdicts that "go nuclear" actually go nuclear. So why do you think so many defense lawyers are bad at addressing them?

Bob Tyson: Because it doesn't fit their personalities. It doesn't fit who they are. Defense lawyers by nature are rule followers, as am I. Plaintiffs lawyers are not born more creative than us. They just become that, right?

For instance, in the first day [of the workshop] we had a psychologist at our defense institute lead a two- or three-hour session on anger and how to deal with it. And one defense lawyer by the end of that first day said he was fully on board and got a lot out of it. But he said, "Hey, our hands are tied. Jurors expect us to wear dark suits and to stick to the facts and be very regimented and present our case very formally and comport with the evidentiary rules."

And the psychologist said, "Look, I don't have those perceptions of you. If I was to show up, I'd be just like any other juror. I have no idea what color suit you're supposed to wear, or how you're supposed to act. I would show up and I would see how you act." So a lot of these restrictions that defense lawyers are feeling are self-imposed and there's no need for them. There's no need for it. Plaintiffs are being aggressive? We need to be aggressive. Plaintiffs are being creative? We need to be creative.

Courtesy photo

Bob Tyson of Tyson & Mendes

Judges are letting them be creative. They're going to let us be creative. You just need to do it. You just need to bust through your uncomfortableness. The other thing is that we defense lawyers run away from the toughest part of our cases. Like you just said, often it's non-economic damages. You can't run away from it. You have to address it.

First of all, most defense lawyers don't know how to argue them, so they're not comfortable with it. They're very comfortable with arguing the science and the medicine and relying upon doctors and researchers and making those medical arguments or legal arguments. But then when it comes to the touchy-feely loss of love and companionship, pain and suffering, losing the essence of who that person was, you don't know what to do with it.

You say the crux of arguing non-economic damages is to talk about the impact of money on the plaintiff's life. I'm curious, how do you do that, especially in a case involving plaintiffs who have very little means, without coming across as crass or craven when representing largely corporate defendants?

First of all, go back to the number one principle, which is be a good human being. Don't be a jerk about it. Don't be like, "Well, they didn't have much money before. They don't deserve much money after." No. That's not the case. They deserve a fair and reasonable sum.

Our method is we want it to be relatable to this plaintiff, because that's where the compensation is going. The compensation is going to the plaintiff. Now the plaintiffs bar doesn't want to talk about that, right? They use all these different examples of money in other people's lives. They give these examples of a famous athlete. They're talking a lot about how much the Kardashians make and other movie stars. Literally, there's closing arguments where they talk about the Kardashians or they'll talk about how much LeBron James makes, but they don't talk about the plaintiff. And the reality is that this money is for the plaintiff.

And you know what? The plaintiff deserves to have this money have an impact on them, because they've gone through something tragic. So, you have to talk about how this money can help them because that's what the jury is trying to do. The jurors want to go home to their families and say, "I awarded a large sum—now granted, not as large as plaintiffs counsel wanted—and it's going to have an impact on this plaintiff. And let me tell you what the plaintiff went through and why they deserve this money."

So it has to be reasonable, and it has to be fair, and it has to have a significant impact on the plaintiff because they did go through a lot.

The one thing you note that comes up in non-economic damages and arguments about pain and suffering a lot is that a plaintiff's injury has affected their ability to go camping. Can you explain why that comes up so often?

Well look, I'm from New York City. I went camping like once with the Boy Scouts. I liked it. We went somewhere down the Delaware River. But, in general, I'm not a big camper.

Plaintiffs all seem to like camping because it's physical. You're going to have to lug your stuff. There's a lot of schlepping when you're camping. And it also makes you seem kind of simple. Very few plaintiffs walk in and show up at court driving a Ferrari and have all kinds of jewelry on. The plaintiffs lawyers want to make their clients seem like simple folks. And I think that's some of the reasons they choose camping.

Have any of your clients been subjected to a nuclear verdict while you were representing them at trial?

No. Not me.

Credit: Bigstock

Do you think writing the book and holding the institute makes you more of a target in the plaintiffs bar for lizard brain techniques?

Absolutely. Listen, I'm in this for justice. I'm in this for fairness, fair awards. It's a hard job. It's a hard job on both sides. But it's a competition. Plaintiffs lawyers may say they're fighting for justice. I may say I'm fighting for justice. We're fighting each other in a respectful and collegial way. But it's a competition, which is why a lot of people like it. I used to play sports when I was growing up and I still get to compete as an adult in my job. A lot of people don't get to compete in their job.

We definitely have a target on our back having written this. But some of these verdicts: $50 million, $100 million, $10 million, whatever it might be … they're not fair.

At some point, you have to remember why you went to law school and why you wanted to become a lawyer. There was a fairness and right versus wrong part of it.

Is part of what's going on with nuclear verdicts, an imbalance in publicity? You wrote that the biggest wins of your career—cases where the verdict was many millions dollars less than what your client offered in settlement—never really make the news.

I would say that our message does not fit on a bumper sticker. Our message needs to be explained. The plaintiffs' arguments just fit better, and make quicker sound bites. They have more to gain. They have better media contacts. I don't know what it is. But think about it: We just had a case come in for $300,000. The ask was $30 million at trial last month—$30 million by a law firm that hit for $70 million the month before. So this $30 million ask wasn't that outrageous.

No one picked it up. No one in your organization. No one anywhere picked it up. Because why is the $300,000 verdict relevant? Well, it's relevant because it's justice. But the press doesn't pick up our wins. It's not newsworthy.