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Exploring the Defense Arsenal

How to attack inflated damages in professional malpractice and catastrophic injury cases

By Daniel P. Fallon , Kelly Hopper Moore

With the rising costs of medical, rehabilitation, and long-term care, the increase in special damages can be exponentially impactful to jury verdicts and settlements. The gross exposure from cases not only affects carriers, but also creates concerns for policyholders relative to policy limits, premiums, and professional reputations. Accordingly, heightened approaches are more critical than ever to effectively defend professional malpractice and catastrophic injury cases. The defense roadmap is multi-variate, involving defense of each element of exaggerated special damages, jurisdictional expertise, and taking steps to defuse extreme emotions that can be manipulated to elicit extraordinary reactions to ordinary fact patterns.

Before selecting specific tools to attack inflated damages, it is important to strategize how to present a case from an emotional standpoint to optimize those arsenal resources. The primary emotion causing runaway jury verdicts is anger. When people are angry, they think and act irrationally. It is imperative to defuse anger or, preferably, preclude its onset so a case determination can be based on merits, allowing for a rational outcome. The strategy to optimize outcomes starts with managing emotions—including attacking the "reptile theory," which is approach to exploit primitive instincts of safety—and moves into planning defenses of each damages element.

Prevent or Defuse Anger

Always give a number—even when seeking a defense verdict—to mitigate exposure. Give it early, give it often, and never increase it. Providing an alternative gives the triers of fact something to hang their hat on if they believe the plaintiff's number is too high. They are not familiar with values, which means they often are not comfortable selecting their own number. Even if arguing for a defense verdict, giving a number provides an alternative for consideration and can be clarified as presentation of a ceiling only, with the defense verdict as the floor.

Accept responsibility for something. Saying you are sorry for someone's loss or situation is not an admission of liability and shows empathy. Accepting some responsibility in larger cases conveys moral character and signals that the defendant will take greater care in the future, thus no need to "punish" the defendant.

Argue pain and suffering. Differentiate the impact of the accident on plaintiff's life with money sought in litigation. Note any positives and tie the fair and reasonable defense number to the impact of the money on plaintiff's life.

Defend the Reptile Theory

Here are a few steps you can take to defend against the use of the reptile theory by plaintiffs' attorneys.

Exhibit the seminal guidebook, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Ball, Keenan 2009) to highlight plaintiff counsel's overt manipulation attempts to jurors.

In voir dire, question prospective jurors on how they felt when wrongly accused or characterized in order to plant the seed of empathy for the defendant.

File motions in limine to preclude inflammatory words designed to activate a primal response (dangerous, willful, disregard) and argue that they exceed the legal standard for negligence and conflate the punitive and general damages standards.

Establish evidence that the plaintiff is not active in the community, thus not genuinely interested in protecting that community (social media searches, organization memberships, etc.).

Continually point out plaintiff's counsel's manipulation plan to the jury during opening, direct, cross-examination, and closing. Particularly during opening statement, warn the jury what to watch for and why, and confirm the need for the warning during closing.

Jurisdictional Expertise

Personal injury attorneys can take a formulaic approach to building special damages, especially in jurisdictions with non-economic damages caps. A systematic approach in the same manner that attacks the "reasonable necessity," "necessary and customary costs," and basis of future care opinions can best serve the defense. File applicable motions within the jurisdiction for any cap or damages limitation. Specific recommended approaches include:

Address Medical Bills. Be clear that the defenses asserted are to avoid inflated, unnecessary, or unrelated bills, and not to attack reasonable, related costs of care.

Subpoena all records. With some plaintiffs abrogating available insurance to treat on a lien basis, billing records are key to determine compensability and any failure to mitigate damages.

Retain an expert for each area of treatment to assess reasonableness and necessity of treatment. Secure a medical billing expert to help attorneys navigate confounding medical billing processes and explain to a jury why the plaintiff's claimed medical costs are unreasonable.

Depose the plan administrator and/or medical provider to establish their standard reimbursement rates, their record regarding compromise of rates, and whether the liens are collateralized. Motions to limit amounts should be filed where appropriate.

Life Care Plans

As with inflated past medical bills, life care plans blackboarded by plaintiffs' attorneys involve speculatively high numbers with a "plug-and-play" nature. There are several tools to mitigate special damages in this area.

Vocational rehabilitation expert. Establish a course of therapy to generate income in a different vocational arena based upon the plaintiff's abilities. With professions increasingly digital and home-based, the probability of an alternative occupation continues to increase.

Physical rehabilitation expert. The extent of injury and ability to engage in activities of daily living can be optimized for plaintiffs with physical rehabilitation. After appropriate care, a stronger baseline is established to decrease future care needs.

Life care planner. An expert to review plaintiff's life care plan provides a line-by-line assessment of each element of damages and temporal need for same.

Plaintiff's life care planner discovery. Review prior depositions and plans for rote approaches and regularly inflated aspects. Depose the PMD with knowledge of probable categories to be included in the plan, where its beneficial.

Also consider timeline exhibits, which create a visual imprint emphasizing the pre-incident baseline and when plaintiff's reasonable needs have been met.

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The state of New York on Monday launched its virtual hearings option for injured workers and their attorneys, according to an announcement issued by the state Workers' Compensation Board.

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Income and Benefit Reduction

Consider the following strategies to aid in the determination of income and benefits.

Hire economist experts. They can help determine the fair value of earning capacity. It may be necessary to retain a business evaluation expert knowledgeable in market forces and employment opportunities.

Obtain partnership and employment agreements. Review for any pattern of contributions, cut-offs, disability benefits, and trend toward elimination of benefits.

Discovery of tax returns to assess any non-disclosure of income. Review state and federal records for any financial interest in companies or joint ventures for various types of remuneration.

Result of the Defense Arsenal

The above practice pointers help mitigate damages exposure via evidentiary details and emotional overlays. They enable the defense to provide the jury a positive road to recovery and defuse anger sought by plaintiff's attorneys, thereby mitigating damages.

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