



your client has been wronged should be used to show the jury how much your client has lost. In short, tell them the *story* of your client's damages.

The ubiquitous damages expert—a forensic accountant, an investment banker, or, drier of all, an economist—is rarely the right storyteller. Such a witness may be necessary in a damages case, but rarely should you think of the damages expert as the only vehicle through which the damages case will be presented. In describing lost sales, for example, you are often better served by a series of fact witnesses—typically sales personnel—who describe in relatively brief examinations the travails visited upon them by the defendant's wrongdoing. They can recount in some detail, for example, the anguish they felt when they arrived at their customers' offices only to have doors slammed repeatedly in their faces because of the defendant's tortious interference. The personal impact—lost commissions and the daily humiliations your client's personnel had to endure—drive home the story of your client's damages far more dramatically than any damages expert can. Then the expert's arithmetic has much more meaning to the jury.

The defense lawyer, meanwhile, hardly can sit by while the plaintiff plays Mark Twain. The defense must tell the other side of the story in comparably dramatic fashion. This means, for example, that other causes of the plaintiff's alleged economic losses cannot be rattled off to the jury as if being read from the Dow Jones broadtape. Instead, you must become the trial bar's answer to a Broadway producer, bringing before the jury others in the plaintiff's industry who can describe the series of events that engulfed them (and the plaintiff), causing the losses the plaintiff now asks the jury to attribute to the defendant. Dramatize the facts with fact witnesses before trotting out the cold, unrelenting economic data. The jury—and, with luck, your client—will thank you for it.

Do not negotiate with the jury. Nothing makes a jury more suspicious than hearing an inflated demand for damages. Some plaintiffs' lawyers approach the argument for damages the same way they approach settlement negotiations—always, to the bitter end, aiming higher than they expect to recover. Although this may work in some personal injury cases, it is a dangerous tactic in commercial cases, where damages can be measured more precisely. Inflated damages claims in a commercial case are easier to rebut than unliquidated personal injury claims. In many commercial cases, not every penny that might theoretically be recoverable can be demanded without infecting the case with an unsavory aroma of greed. Demanding \$10 million in lost profits for a plaintiff company that previously never earned a penny, or seeking out-of-pocket expenses for the flights to Hawaii in a failed deal for a company located in Alaska, are claims that smack of greed.

Ultimately, it is dangerous for a plaintiff's attorney to overreach with a jury in any kind of case, because credibility may be sacrificed in the bid for inflated damages. This process can become a slippery slope, and there is no telling where it might end. If your \$10 million demand has no credibility with the jury, they might cut it to \$5 million, or whack it all the way down to zero. Compromise is the jury's prerogative and, in

many cases, its *modus vivendi*. Jurors may tailor a recovery to their collective view of the evidence and the equities. But this is not really negotiation. The plaintiff's lawyer who thinks it is, and opens the bidding above what can be proved, risks losing everything.

The defendant faced with an overreaching plaintiff should pounce on him the way a spaniel pounces on a thrown ball. Parade the unsupportable damage claims as evidence of greed. Show it to the jury as often as possible. Push the plaintiff down that slippery slope, and, before you know it, the plaintiff will have fallen out of sight.

Avoid blunders by your expert. The simplest flaw in your expert's damages theory or methodology can be fatal, especially to the commercial plaintiff's case. Even a mundane arithmetical error—otherwise harmless and easily correctable—can poison a jury. "Sir, do plaintiff's numbers even add up?" One of our associates posed that question to our client's damages expert after the plaintiff's expert testified in a multimillion-dollar breach-of-contract case. In fact, the column of figures did not add up, and the harm to the plaintiff's case was immense. The plaintiff's expert had been eloquent, but he had made a simple error that overstated the claimed damages. Once it was revealed, this miscalculation ruined the jury's regard for this expert. The jury threw him and his client out on their collective ears and awarded our client every penny of its counterclaim.

Errors are often difficult to weed out. We once had an experienced, polished investment banker testify in an arbitration concerning the acquisition of a company. Our expert neglected to consider in his calculation that a leap year added a day to February, resulting in a modest shortfall in his calculation of a setoff to which the other side was entitled. Only after the arbitration ended, with a recovery somewhat less than we expected, did we realize how much this relatively innocuous error had impacted our witness's reliability in the eyes of the arbitration panel.

The conscientious plaintiff's lawyer in a commercial case sits with a damages expert and does everything humanly possible to ensure the integrity of the numbers. It is tedious, mind-numbing detail work, much like the work of rocket scientists. Consider, however, that a simple mistake like confusing meters and yards recently caused an American satellite to hurtle helplessly past Mars. Less spectacular, perhaps, would be an expert accountant's confusion between wet tons and dry tons in calculating timber tonnage; but it would reduce the accountant's reliability to that of a drunken sailor, and possibly push the case way off course.

Why are such relatively minor errors often so damaging to the plaintiff's expert in a commercial lawsuit? Like the ads for Smith Barney used to say, the commercial plaintiff must earn a skeptical jury's respect every day. Sloppy errors by an expert lessen that respect and create the distrustful feeling that more errors lie elsewhere, even if they have not been detected. A jury that does not trust the plaintiff rarely returns a generous award.

Similarly, jurors distrust a lawyer who is sloppy in the presentation of evidence, such as documents with missing pages

and demonstrative exhibits not sufficiently prepared or explained. In one jury summation, for example, we listed the reasons why the jurors should not trust the defendant's exhibits and said they might find other defects if they took the time. After a half-day of deliberation, the jury's first question pertained to one of the defendant's exhibits. Naturally enough, this drove our trial team crazy until we found that the exhibit was missing some annexes. The jury had indeed found other reasons not to trust the defendant's exhibits and returned a multimillion-dollar award in our client's favor.

Oddly, the defendant in a commercial case can get away with minor errors by its experts more easily than a plaintiff can. The reason is that the defendant in a commercial case has only to succeed on one issue in order to gut the plaintiff's entire case. On the other hand, the plaintiff must prevail on all the issues. Jurors sitting on a commercial case—who often exhibit instinctive reluctance to award compensation for a failed business venture—rarely let themselves be blinded by emotion and miss the visible flaws in a plaintiff's case.

Concede where your proof has failed. No matter how well-intentioned and well-prepared your claims may be at the outset, if a few crates fall off the truck during your journey to

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market, acknowledge the loss. Be as straightforward as possible. Do not insult the jurors' intelligence by trying to convince them you carry all the freight you promised to deliver. And pray they don't push you down that slippery slope to zero.

No one, especially a juror, likes to hear bad news told in the stumbling, bashful manner of a sheepish schoolboy trying to explain the cigarette smoke wafting behind his head. Just as it is better not to negotiate with a jury, it is also wise not to sugarcoat or soft-pedal a shortfall in your proof. "Ladies and gentlemen, I told you in my opening that my client would prove to you that it lost sales in Albuquerque as a result of the defendant's breach. Well, folks, the proof I anticipated on that point did not come out as I expected, so it would be wrong for you to compensate my client for those losses." Put a pleasant face on the situation, smile until your hair hurts to show how little it matters to your overall case. But don't try to hide it or run from it. You will be dangerously close to that slippery slope.

If the defendant can point out the shortfall before the plaintiff has an opportunity to gloss it over, that may spell the end of the plaintiff's case. Cross-examination should be used offensively to edge the plaintiff toward that slippery slope as early in the trial as possible. However, defendants should pick only the most opportune times to attack the plaintiff's case. Questioning every nickel and dime will risk

boring the jurors or, even worse, angering them. When my colleague asked, "Do the numbers even add up?" he did so only after establishing substantive flaws in those numbers. A 10-cent error, by itself, is not going to shipwreck a plaintiff's case and can make you look petty.

But do not hold back if you have the ammunition to blow a hole in the expert's side and watch him sink. In one case where a single error doomed the plaintiff's case, a Middle Eastern beverage company sought more than \$100 million from our client following the termination of a bottling contract. The plaintiff's expert failed to reveal in his report that a written agreement his client had entered into with another company for substitute bottles had been backdated several years. The backdating made the entire agreement suspect and certainly called into question the plaintiff's damages. Despite months of investigation and several trips to the Middle East, the expert had failed to uncover this undisputed fact—a fact that entirely undermined the plaintiff's integrity. When the expert learned this crucial fact in the first question of cross-examination, he almost started to cry. So did the plaintiff and his lawyers.

Avoid hyperbole and histrionics. For centuries, trial lawyers have sought to emulate the courtroom styles and tactics of legendary masters of the bar. Indeed, many trial lawyers dream, if only occasionally, that one day they will be the subject of stories of great courtroom exploits, stories that will be handed down from generation to generation. The high-flown, metaphorical summations of Clarence Darrow or the brilliant, incisive cross-examinations of Edward Bennett Williams are examples of the level of advocacy to which trial lawyers naturally aspire.

Commercial trial lawyers, please remember when next you stand before judge or jury: You are not Clarence Darrow! You are not Edward Bennett Williams! You are trying a breach-of-contract case. It is serious enough stuff and vitally important to you and your client. But the heralds who create folk legends are undoubtedly looking elsewhere.

Even if you were Clarence Darrow, you'd be out of place in a commercial case. As a commercial trial lawyer, you've got to avoid puffing and strutting about the courtroom as if a breach of contract were capital murder.

This is not to denigrate the skills required for successfully trying large commercial disputes. It is a calling to be proud of. On occasion, it provides opportunities for compelling, intellectually satisfying arguments and dramatic, memorable cross-examinations. But it is not life and death, and juries know it. Juries in commercial cases, we are convinced, want to do the right thing just as much as jurors in criminal cases. They simply view the cases—as they should—more objectively, more clinically, more skeptically. Any lawyer who steps up on a soapbox in such a case and reaches for the emotional heights of Darrow and Williams likely will earn only smirks (or worse) from the modern juror. And it's almost guaranteed that he or she will not earn a substantial recovery or a defense verdict.

Be true to your own objective reaction to your client's case. Tell your client's story in your own way, with feeling and spice, and make it a fascinating whodunit, as best you can. But don't

expect tears to well up in the eyes of the jurors. As Shakespeare said, "An honest tale speeds best being plainly told."

## Punitive Damages

Once the actual damages are determined, you may be extremely happy, or sad, to face a very different subject—punitive damages. The plaintiff's burden here is by far the easier. In the case of a bifurcated trial, the jury has already determined that the defendant engaged in sufficiently reprehensible conduct to render it liable for punishment, and the question in the second phase is simply "how much?" In the case of a unitary trial, the often emotional arguments for severe punishment nicely complement the arguments for liability.

In either event, there is a pattern that successful plaintiffs' lawyers follow in seeking large punitive damages. That pattern has, in essence, two components. The first is to revisit and reemphasize all the conduct the jury is being asked to find (or has found) to embody wanton disregard of the rights of the injured plaintiff. In cases with multiple persons affected by the same conduct—say, consumer fraud or product liability—counsel will wish to focus the jury on all the potential victims of the defendant's misconduct, including those who are not present in the action to receive compensation. If the victims are poor, elderly, or otherwise vulnerable, that point also is worth stressing.

The second element of the plaintiff's argument focuses on the defendant's finances. Although pegging punitive damages to a corporate defendant's financial status is wholly unwarranted in principle (more about this later), it is a valid consideration under the law of all but three states that allow punitive damages—Alabama, Kentucky, and North Dakota—and is unquestionably the strongest weapon in the plaintiff's arsenal. This is because the jurors usually lack a frame of reference for setting a punitive amount. What is severe, moderate, or mild punishment? Corporate "wealth" supplies a frame of reference, and it is one that generally places very large numbers indeed before the jury.

Typically, then, plaintiff's counsel urges the jury to frame its punitive award in terms of the defendant's net worth, income, or revenues, arguing that a company of such large size needs a commensurate sanction in order to make it pay attention. For example: "The XYZ company earns \$10 million a day, and this trial took 10 days; surely, a punishment amounting to just half of what it earned during this period would be reasonable." Or, "If your neighbor was making \$50,000 per year and committed a similarly harmful act, would you view \$5,000 to be an excessive punishment? The XYZ Company has sales of \$500 million each year. Surely it should not be treated better than your neighbor simply because it is a large, greedy corporation. A comparable penalty would be \$50 million." This line of argument is especially beneficial to the plaintiff because it does not call for punishment relative to the measure of misconduct or the harm inflicted.

The task of the defendant's attorney is far more difficult. This attorney typically faces a hostile jury whose collective head is spinning with the huge numbers of the defendant's

finances. How can this be effectively countered to produce a relatively moderate punitive damages amount?

There is no single, simple strategy. And, although it is in some sense trivial to say so, the answer depends to a considerable extent on the circumstances of the case. Does it involve a single, isolated instance, or conduct that may affect whole populations? Are the compensatory damages large or small? Has the defendant altered or ceased the conduct found punishable by the jury? Does the defendant have any credibility left?

It appears that large punitive damages verdicts often occur in cases in which the defense has devoted relatively little effort to mitigating the size of any punitive verdict. From a psychological standpoint, at least, this is entirely understandable. Counsel who are focused on defeating liability altogether are simply unlikely to give the requisite attention to keeping down their losses. But, in fact, there are a host of issues to consider and strategies to pursue in seeking to avoid the worst-case outcome. Here, in a nutshell, are a few of the recurring points.

First, to bifurcate or not to bifurcate. In most states, the defendant is entitled to have a bifurcated proceeding consisting of a first phase in which all issues are tried except amount of punitive damages, and a second, depending on the verdict, in which the amount of punitive damages is set. Where there is a choice, a tactical decision must be made whether to seek a unitary or bifurcated trial.

This is not necessarily an easy choice. Many defense lawyers dislike bifurcated proceedings because they believe bifurcation reduces the leverage of pro-defense jurors to secure a compromise in which liability is found but few or no punitive damages are imposed. In addition, if the second phase consists of nothing more than evidence of the defendant's finances and closing arguments, that may prove to be a formula for disaster, focusing the jury's attention on the large financial numbers.

On the other hand, a unitary trial can have even more severe disadvantages for the defense. It is entirely consistent with the plaintiff's case to hammer away at the defendant's conduct and demand a severe punishment; conversely, it is virtually impossible to put on much of a defense against large punitives when liability is being contested, just as it would be difficult for a criminal defendant to address sentencing issues before guilt has been adjudicated. For example, a defendant might find it advantageous with respect to punitive amount to show that it has already been subjected to substantial punitive damages in other cases for the same conduct, but it could hardly do so while underlying liability remains in dispute. On the other hand, there may be a tactical advantage to a unitary proceeding. If favorable evidence of subsequent remedial measures is allowed at a unitary trial, it could be materially helpful to the defense at the liability stage.

One final point regarding this subject: The common mode of bifurcation is not the only possibility. In some cases, where it is allowed, it makes sense to separate the adjudication of punitive liability from that of compensatory liability. Given the often inflammatory nature of evidence relating to punitive liability, a strong case frequently can be made that it is unrea-

sonable and unduly prejudicial to try the two issues together. In such cases, a “trifurcated” trial may be appropriate: first compensatory liability, then punitive liability, and, if both have been found against the defendant, punitive amount. In any event, this is a fruitful topic for creative lawyering.

Before trial, defendant’s counsel may attempt to keep out the most potentially harmful evidence and arguments regarding punitive damages through a motion in limine. The most harmful evidence to exclude is evidence of wealth and arguments seeking to base punishment affirmatively on the defendant’s finances. The plaintiff’s rationale for considering the defendant’s wealth is twofold. First, it takes a larger punishment to deter a wealthier defendant; second, the punishment should not be so large as to cripple a defendant financially.

This reasoning is sound in those cases where the defendants—almost always individuals—committed torts that are not economically motivated, such as assault or nuisance. Effective deterrence depends in such cases on “monetizing” the value to the defendant of the misconduct; it will take a larger fine to discourage a millionaire from poisoning his neighbor’s dogs than it will to deter a person of ordinary means. Almost all independent economists agree, however, that the same reasoning is wholly inapplicable to economically motivated torts. Where profit maximization is the motive, companies will respond to monetary sanctions in relation to how they affect the profitability calculus, not in relation to what the overall size of the company may be.

Support for the view that corporate finances are an inappropriate standard for setting punitive damages may be found in the Supreme Court’s decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). In each case, the defendant’s finances played no role in the constitutional excessiveness inquiry. Some lower courts have derived from that the conclusion that juries should not be permitted to base punishment on wealth in such circumstances and have deemed wealth evidence inadmissible.

Because it is so difficult to stand up and object during opposing counsel’s closing argument and because punitive damages are an emotional subject that seems especially likely to generate arguments that cross the line, it also is advisable to move the court to bar plaintiff’s counsel from making arguments that seek to capitalize on the defendant’s corporate status or on local bias against outsiders. Examples include arguments about “soulless corporations whose blood runs green” or how “executives will be popping champagne corks at their country clubs if the verdict isn’t in the tens of millions,” as well as suggestions of punitive damages at a level that would be excessive if the jury actually awarded it. Empirical studies have shown that such suggestions have an “anchoring” effect on juries’ punitive verdicts, causing them to be far higher than they would otherwise be. See Sunstein, et al., *Punitive Damages: How Juries Decide*, 62-74 (U. Chi. Press 2002). Motions to limit these kinds of arguments, even if unsuccessful with the trial court, may be the best way, if disaster does strike, to preserve for appeal objections to inflammatory arguments by plaintiff’s counsel.

In most states, the pattern jury instructions on punitive damages are woefully inadequate to give the jury meaningful guidance and to offer any hope of producing reasonably consistent verdicts from different juries deciding similar cases. Also, where the defendant’s financial condition is prominently referenced in the jury charge, the plaintiff’s ability to establish a large-numbers frame of reference for the jury is enhanced. It is essential for defense strategy to provide a frame of reference that produces more moderate numbers. Space does not permit a full discussion of the wide variety of instructions that correctly state the law and are helpful to the defense in moderating any tendency to return a whopping punitive verdict. But a few highlights are worth mentioning:

- At least in cases in which the plaintiff’s compensatory damages are relatively low, the defendant should seek an instruction that punitive damages must bear a reasonable relationship to actual damages.
- In determining a reasonable relationship between actual and punitive damages, it should be made clear that the punishment is being imposed for the plaintiff’s own injuries and not those of others. Or, at a minimum, the jury should be instructed that it may not punish for harms suffered by persons outside the state.
- If finances are put to the jury as a punishment criterion, the defense should seek an instruction advising the jury that it is not to punish the defendant simply for its size. Ideally, the jury would be instructed that size should be considered solely as a check to ensure that a punishment set on the basis of other criteria does not exceed the defendant’s capacity to pay.
- Where there is evidence of civil penalties or criminal fines for comparable conduct, the jury should be instructed that, although not strictly bound by them, it is to consider such penalties in setting punitive damages.

Perhaps the most challenging aspect of punitive damages defense, and plainly *terra incognita* for most defendants, is the development of an effective evidentiary presentation in opposition to large punitive damages. It is very difficult to generalize about this subject because so much depends on the particular circumstances of the case. Moreover, many of the points that might be made are not necessarily readily understood by lay jurors. Visualize, for example, an economist trying to explain to a jury why corporate finances are not relevant to achieving proper deterrence; how corporations are organized to respond to economic incentives so that even moderate, profit-extracting punishment will be effective; why corporations should engage in cost-benefit analysis; or why over-deterrence is socially undesirable. And when the plaintiff has attacked the defendant’s greed and its pursuit of profits at the expense of safety or of the consumer’s pocketbook, how do you effectively explain that the profit motive is the foundation of our economic system without appearing to defend untrammelled greed? Yet translating these concepts into images and metaphors that jurors can understand and accept may be essential to an effective defense.

The second challenge for the punitive damages defendant is to provide the jury with a numerical frame of reference that, unlike corporate financials, produces a moderate range within which punishment can be set. Where there is a moderate civil penalty set by statute or regulation, this can provide a powerful tool to bring the inquiry down to earth. Relatedly, it may be worthwhile to compile evidence regarding the civil penalties actually imposed by regulators for comparable conduct, because the theoretical maximums sometimes are both astro-

nomical and never applied in practice. And where compensatory damages are low, it is important to stress the principle that punitive damages must bear a reasonable relationship to actual harm to the plaintiff.

Overall, however, there has been little work done to obtain meaningful insight into effective means for defending against large punitives. This remains a fertile field for creative lawyering. □