*The Most Difficult Argument*

# Putting a Number or Value on the Non-Economic Loss

by C. Barry Montgomery and Bradley C. Nahrstadt

Compensation for non-pecuniary losses is one of the most controversial components of tort liability. One commentator has noted that the process by which pain and suffering damages are awarded in the United States has been aptly called "procedurally simple but analytically impenetrable." Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U.L.Rev. 256, 265 (1989). That same author goes on to say that "(t)he law provides no guidance, in terms of any benchmark, standard figure, or method of analysis, to aid the jury in the process of determining an appropriate award." *Id.*

The very real problem associated with the uncertainties in the process of awarding pain and suffering damages is the prospect of receiving an inordinately large verdict, especially since pain and suffering damages account for about half of the total damages paid in all products liability and medical malpractice cases. 2 American Law Institute Reporters' Study, *Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 201 (1991).

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In the last 10 years, verdicts in catastrophic injury cases have risen dramatically. In 1993 one author reported court decisions sustaining $19 million awards and trial court verdicts of "record breaking" nine-figure awards. North, *Damages Update—1993*, 24 Trial Lawyers Quarterly 85 (Fall 1993). According to Jury Verdict Research Company (Horschman, Pennsylvania), juries in 1994 awarded $5 million or more in at least 25 percent of the surveyed cases involving brain damage, quadriplegia, catastrophic burns, paraplegia, and dual leg amputation. In 1995, North again reported on several personal injury cases in the $3 million to $10 million range. North, *Damages Update 1995–1996*, 26 Trial Lawyers Quarterly 48 (Fall 1995).

In November of 2001, a plaintiff in a medical malpractice action was awarded $115 million, which included $100 million for pain and suffering. The pain and suffering award was 10 times greater than the plaintiff's attorney requested. Schwartz and Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 South Carolina Law Review 47 (Fall 2002). In September of 2001, a Mississippi jury awarded $100 billion in compensatory damages to 10 plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid. No individual plaintiff's actual out-of-pocket damages exceeded $700. *Id.* In February of 2002, a New York jury awarded the family of a deceased brake mechanic $53 million in compensatory damages, including $17 million for pain and suffering, for asbestos-related injuries. *Id.* And just last fall, the *National Law Journal* reported on a $28 billion award to a dying California smoker and a $271 million award to a Kentucky man who was burned in a pump-house gas explosion. Baldas, *Verdicts Swelling from Big to Bigger*, 25 The National Law Journal 14, p.1 (November 25, 2002).

The damage awards that were a significant concern at the end of the 20th century certainly continue as we begin the 21st century. Whatever the political/legal climate may be that contributes to the upward trend in the overall numbers, the trial lawyer must do his or her part to help the client avoid being another statistic in the American damages landscape. The fight to keep a lid on damages must begin long before trial, during discovery. Where a wrongful death or catastrophic injury is involved, the defense practitioner must aim not only to obtain a defense verdict, but also to contain damages to fair and reasonable compensation if liability is found.

## Taking a Proactive Approach to Damages

Much of what is written on this topic falls under the rubric of "defending" damages. Looking at damages only as an issue to be "defended" at trial can lead to a weak, reactive approach. Instead, defense lawyers must look at damages as an issue that requires proactive efforts. Careful scrutiny of the plaintiff's damages claim requires examining each element of damages to determine if the damages can be challenged on legal grounds or be defeated factually and how the damages can be minimized through trial advocacy.

"The three most important weapons for the plaintiff's lawyer [in the presentation of damage in any catastrophic or significant injury case] are the evil triumvirate: sympathy, bias and prejudice." Robitzek, *Proving Damages: The Plaintiff's Perspective*, 14 Maine Bar J. 242 (1999). ATLA teaches its members that the defense in a catastrophic injury case will concentrate on trial techniques aimed at neutralizing jury sympathy and apathy for the plaintiff. ATLA seminars teach plaintiffs' counsel to counteract that by painting a picture of disabled individuals whose aspirations and goals

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can no longer be accomplished, who have been stripped of their happiness and dignity, and who have been sentenced to a lifetime of excruciating pain and debilitating suffering. Beyond just neutralizing sympathy, these tactics must be effectively and factually countered for the defense to make an impact on the size of the damage award.

The presentation of a cohesive, proactive damages defense offers a number of benefits, including the opportunity to explain to the jury that fairness in awarding damages is not a one-sided coin or that a number lower than that recommended by planitiff's counsel is more reasonable compensation for pain and suffering. It also increases the defense's potential control of the damages case. Moreover, critically attacking and analyzing damages assists defense counsel and the client to evaluate fair and reasonable compensation for the plaintiff where settlement is desirable.

## Pre-Trial Steps to Reduce or Eliminate Pain and Suffering Damages

Defense counsel cannot wait until the time of trial to address the issue of plaintiff's pain and suffering damages. Pain and suffering must be addressed during the discovery phase of the case. By laying the proper foundation during discovery, defense counsel will be able to provide the jury with the information it needs to return a fair and sensible pain and suffering award.

From the beginning, defense counsel must give special thought to the issue of damages, including what the legally recoverable damages are within that jurisdiction and whether the recoverable damages are limited by damages caps. Many states have some limitation on the damages which can be recovered in medical malpractice cases and several have specific restrictions on the amount of non-economic damages that can be recovered by plaintiffs.

The next defense step should be an analysis of the pleadings to ascertain whether the damages claimed can legally flow from the allegations made. Consulting the Pattern Jury Instructions is often the easiest way to determine the type of damages recognized by the law of that state. Once the analysis is complete, the decision is whether pleading strategies (motions to dismiss, affirmative defenses, etc.) can eliminate claims not recognized by law. For example, emotional distress damages are typically not allowed in breach of contract actions. In addition, some states do not allow compensation for pain and suffering of the decedent or for the grief and sorrow of the next of kin in wrongful death actions. *Bowler v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228 (1984). Other courts have held that damages for the loss of "enjoyment of life" (also referred to as "hedonic damages") cannot be recovered. *Murcato v. Hamed*, 974 F.2d 863 (7th Cir. 1992); *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372 (1989).

Now the defense is ready to engage in discovery designed to identify and explore the plaintiff's damages. Written discovery can identify the plaintiff's complete pre- and post-occurrence medical and psychological history. It should also identify plaintiff's pre-occurrence activities, hobbies, friends and family, to explore ways to minimize the impact the injury has had on the plaintiff's life. It is important to not be swayed, as is often the case, into taking the plaintiff's damage claims at his or her word. Take statements from acquaintances and/or co-workers, who can testify as to the plaintiff's purported physical limitations, pain, and physical or mental suffering. Depositions are best, of course, to make the witnesses commit to a position. Requests to produce will also serve to identify any and all records that will have an impact on the plaintiff's pain and suffering claim.

**Motions *in limine* should be brought to exclude other evidence that tends to inflate damage awards.**

Don't have qualms about aggressively and extensively pursuing all avenues of discovery—notwithstanding that it may alienate the plaintiff and his or her attorney. Your only important audience at the discovery stage is yourself and the client. By the time the jury is your audience, you will have distilled the obtained information to the evidence you will actually present during the trial and will present it in the manner you think best.

During the deposition, the plaintiff must be questioned about each of the elements of his or her claimed damages. As to pain and suffering, the questions should cover the nature and extent of the pain, the duration of the pain, any treatment that he or she receives for the pain, and other related questions. Activity change questions should cover what the plaintiff can no longer do, the frequency with which he or she performed the activities in the past, interests and hobbies, how leisure time was spent before the occurrence, how it is spent now, what vacations have been taken, and whether the plaintiff uses any medical devices or aids in an effort to control the pain.

Examination of other family members, in-laws, caretakers, co-workers or friends of the plaintiff is often helpful to the defense. Inevitably, these witnesses tend to view the plaintiff's recovery and ability to cope with pain and suffering in a more positive light since they tend to see the plaintiff on a less frequent and often social basis. If there is good evidence to be developed through these witnesses, their depositions should also be taken.

Once discovery is completed, consider the feasibility of any pre-trial motions attacking part or all of the damage claims. Pre-trial motions for partial summary judgment can help narrow the allowable damages by eliminating certain damage claims before they ever go to the jury. Likewise, if a claim for pain and suffering is not supported by the evidence, a motion for partial summary judgment should be brought. For example, most states require that a plaintiff prove that an individual suffered some conscious pain in order to support an award for pain and suffering. *See*, *Ballou v. Henry Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981); *Rivera v. Eastern Paramedics, Inc.*, 267 A.D.2d 1029, 702 N.Y.S. 2d 724 (1999); *Williams v. SEPTA*, 741 A.2d 848 (Pa. 1999). If there is no evidence that the plaintiff or the plaintiff's decedent suffered some conscious pain (as in cases of instantaneous death or prolonged coma), then a motion for partial summary judgment should be filed relating to the issue of pain and suffering damages.

Of course, defense counsel should attempt to dispose of as many of the plaintiff's economic damages claims before trial as possible, since the elimination of economic damages often results in a proportionate reduction of the plaintiff's non-economic damages. This is due to the so-called "multiplier effect." The non-economic damages award is frequently some multiple of the economic damages. Thus, every reduction of the plaintiff's economic damages figures usually translates into an even greater reduction of the non-economic awarded.

Even if a motion for partial summary judgment on the issue of damages is unsuccessful, the arguments developed in that motion may

later support a pre-trial motion *in limine* to exclude the same evidence. Motions *in limine* should also be considered to preclude the plaintiff from introducing evidence of inflammatory issues, like corporate wrongdoing. Evidence of purported corporate wrongdoing is not relevant to the appropriate amount of compensation for past and future pain and suffering, and yet plaintiffs' lawyers often attempt to introduce such evidence at trial in the hopes of angering the jury and convincing them to award large awards for pain and suffering in order to punish the defendant. Likewise, motions *in limine* should be brought to exclude other evidence that tends to inflate damage awards, such as multiple photographs of a gruesome injury, day-in-the-life videos that are too graphic or one-sided, or videos containing narratives or demonstrations in which the defendant did not participate.

Finally, before the case actually goes to trial, explore the possibility of presenting the defense's damage arguments to focus groups. Jurors are sometimes apt to focus on different issues than the trial lawyer and often invent unexpected issues that need to be addressed. Many such issues will not be on the defense counsel's radar screen unless and until field research is conducted within the venue. Trial attorneys should "get a feel" for the jurors by recruiting panels for trial simulations in the venue, trying new approaches, discarding what does not work and retaining what does, until a maximally effective message regarding damages is forged. Speckart and McLennan, *Excessive Damages Awards and Tactics for Containment,* 44 For The Defense 11, p. 16 (November 2002).

## Reducing or Eliminating Pain and Suffering Damages at Trial

Plaintiff's lawyers spend a significant amount of time at trial discussing the nature and extent of the plaintiff's injuries and what amount of money is necessary to compensate the plaintiff for those injuries.

Defense lawyers are often reticent to discuss damages because to discuss damages is to concede (or appear to concede) liability. This reticence is usually wrong and ill-advised. There are two components to every lawsuit-liability and damages. The jury expects the defense's trial attorney to challenge each aspect of plaintiff's case. If defense counsel explains to the jury that they are duty-bound to address all aspects of the plaintiff's claim, including damages, there should be no false implication of conceding liability.

### *Voir dire*

*Voir dire* is an excellent opportunity to begin to develop a rapport with the jury and have the jury repose its trust and confidence in defense counsel. The jury is very interested in the individuals who have taken them away from their families and jobs. They are watching all the lawyers very carefully and evaluating them. Be prepared, be confident, and be courteous.

Use *voir dire* to prepare the jury for its reaction to the plaintiff's injuries. Alert the jury that it is natural to feel sympathy for the plaintiff, but sympathy may not form the basis for their verdict. Advise the jury that only certain types of damages are recoverable by the applicable law and that those damages must be fair and reasonable. Ask the potential jurors if they can set aside sympathy in order to determine the damages issues with fairness and reason. Following such a procedure accomplishes two objectives. First, the emphasis on requiring the jurors to be honest and fair reflects back on defense counsel—a person who demands that others be honest and fair is usually a fair and honest person as well. Second, members of the jury will now feel that they were selected because defense counsel believed that they would follow the law and put their sympathies aside. They will feel that the defense counsel has relied on them when they were chosen to sit in judgment of the defendant. This lays the groundwork for the closing argument, during which defense counsel will remind the jury of those promises.

### Opening Statement

Opening statement is the next opportunity to present the defense damages case to the jury. Opening statement is also a time to firmly establish how the jury will feel about defense counsel personally. Although the jurors will be watching defense counsel from the moment she arrives in the courtroom, opening statement is their first chance to fully hear defense counsel's side of the story. The damage narrative should be logical, consistent, and appropriate to the case, while stressing concern for the defendant's cause.

Tell the jury specifically what the damages issues are, including the nature of the plaintiff's injuries, the plaintiff's claims of pain and suffering, and the plaintiff's quality of life. The jury should be told that the plaintiff is going to present only one side of the picture, a very negative side, about the impact the injury has had on his life. The jury should also be told that the defendant will present the complete picture, identifying the specific evidence the jury will hear on mitigation of damages.

### Presenting the Defendant's Case

It is important to educate the jury that fairness must be viewed from the defendant's perspective, as well as from the perspective of the plaintiff, and to follow that by showing the fairness and credibility of the defendant that comes with revealing any weaknesses in the defendant's case. Do not exaggerate the defendant's case or belittle the plaintiff's. Describe legitimate damages accurately. Present a positive, assured statement of damages incurred by the plaintiff.

To accomplish persuasion on all these elements of the opening, use the following techniques:

- Identify yourself with the client by use of "we" and "us" in referring to the defendant.
- Use demonstrative evidence and visual aids appropriately and selectively.
- Speak in plain English. Talk in the jury's language rather than legal or medical jargon. Define crucial terminology before the jury hears it from a witness.
- Warn the jury about the red herrings—how they can be misled during the case.
- Tantalize the jury about testimony they will hear during the trial. Make the jury eagerly anticipate the testimony that will be genuinely interesting and important.
- Avoid telling the jury what they will decide or believe. Let them decide.

When it comes time to examine the plaintiff, the following guidelines should be given special consideration by defense counsel:

- Ask for a recess, particularly if the direct examination was emotionally charged. This should allow the plaintiff time to compose himself and reset the mood in the courtroom.
- Know the purpose of the examination and stop once the goal has been accomplished.
- Impeach only on major points. Juries generally dislike quibbling or nitpicking.
- Phrase questions so as not to elicit an emotional response.

The basic principles of cross-examination should not be abandoned. These principles include:

- Ask short leading questions and use plain words.

- Impeach the witness only on major points.
- Do not restate bad testimony (of which there will be a great deal on damages).
- Do not attack the witness.
- Listen carefully to the witnesses' answers.
- End on a high note and then stop.

If defense counsel is unsure as to whether to continue with a potentially sensitive line of questions, err on the side of fewer questions and less emotion. Do not help plaintiff's counsel escalate a tidal wave of sympathy for the plaintiff.

If the groundwork has been properly laid, and the inevitable conclusion is that it would be disastrous for defense counsel to cross-examine the plaintiff, then the following alternatives to cross-examination should be considered:

- If possible, read from the plaintiff's deposition during the defendant's case-in-chief. Transcripts do not depict anguished expressions or tears and thus the jury will only hear the printed words, absent any emotions.
- Introduce evidence from documents to impeach the plaintiff, such as: requests to admit facts, answers to interrogatories, photographs, diaries, and other tangible records that display the plaintiff's true physical and emotional condition.
- Use witnesses other than the plaintiff who are less emotional to establish key facts.

### Experts

The defendant should not simply attack the plaintiff's experts, but in most cases should present its own experts to offer the jury evidence of the nature and extent of the plaintiff's injuries. Submitting the defense's own experts is particularly important in light of certain studies suggesting that if the plaintiff alone provides expert testimony on damages, juries will tend to adopt that testimony when awarding damages. Raitz, Greene, Goodman & Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 Journal of Law & Human Behavior 385 (August 1990). In a study reported in the *Journal of Law and Behavior* it was reported that if a plaintiff's expert and a defendant's expert testify as to damages, many jurors will adopt either of the plaintiff's or the defendant's expert's suggested award, rather than award a compromised figure. *Id.* 394. Accepting the study, it is clear that it is essential not only to discredit the plaintiff's expert but also to establish credible defense expert testimony on the issue of damages.

Retain medical experts who can specifically and factually address the plaintiff's pain and suffering damages. If the plaintiff is in a vegetative state, a medical expert may be able to provide testimony that the plaintiff cannot feel any pain and, therefore, pain and suffering damages are not appropriate. Likewise, if the plaintiff is a quadriplegic or a paraplegic and has no feeling below his or her neck or waist, the defendant's medical expert may also be able to provide testimony that the amount of pain and suffering that the plaintiff experiences is severely reduced.

**Provide the jury with a complete picture of the plaintiff's injuries and damages.**

Some defense attorneys have begun to use medical experts (and sometimes rehabilitation experts) to authenticate and corroborate a defense video to counteract the plaintiff's day-in-the-life video. One author suggests it be called a "Choices and Challenges" video. Gass, *Defending Against Catastrophic Damages "Challenges and Choices,"* 39 For The Defense 10 (June 1997). The video offers the positive perspective of a person living with a disability or a catastrophic injury. The video can reflect activities the person can perform and modifications that can be made to accommodate the plaintiff's special needs. The point is again to provide the jury with a complete picture of the plaintiff's injuries and damages. By seeing the whole story, the jury will not only have a thorough, more reasonable view of the damages, but will be less susceptible to sympathy ploys by the plaintiff's attorney.

### Closing Argument

Closing argument is the last chance to persuade the jury regarding the damages aspect of the case. Defense lawyers make a critical mistake when they do not discuss damages in the closing argument. By the time of closing, the defense lawyer should have already educated the jury that damages are a separate element of the plaintiff's case that the lawyer must address. From this vantage point, the jury should not view a discussion of damages as a concession of liability, but, rather, as an aspect of the case warranting argument.

Defense counsel are often reluctant to give the jury a recommended damage figure. This can be a mistake in some cases. Consider the effect of leaving the jurors with only the plaintiff's suggestions of damages emblazoned on their minds. There are numerous anecdotal stories about juries who awarded plaintiff exactly the amount of damages the plaintiff's attorney asked for in closing arguments. When questioned about the verdict, the jurors responded that the defense did not object to or disagree with the proposed amount, hence the jury took it to mean assent by the defense of the plaintiff's proposed value of the case.

A member of ATLA has given the following advice to plaintiffs' lawyers concerning how to "inspire jurors" to award high pain and suffering damages through closing arguments:

> You should consider challenging defense counsel to give a number to the jury. Defense counsel who fails to respond may be seen by the jury as being unfair or afraid—or even as passively admitting the validity of the plaintiff's request. On the other hand, if defense counsel gives a ridiculously low number, this provides you the opportunity to display righteous indignation in rebuttal.

Stewart, *Arguing Pain and Suffering Damages in Summation, How to Inspire Jurors,* 28 Trial 55 (March 1992).

Do not let the plaintiff's lawyer be proven right. Defense counsel should have a number or range of numbers in mind to present to the jury. The jury needs to be reminded that "fairness" and "reasonableness" should be viewed from both the plaintiff's and the defendant's perspectives. Defense counsel should suggest fair numbers for each element of the plaintiff's damages, including pain and suffering.

Simply put, by addressing damages in closing argument, the defense lawyer can explain to the jury why the plaintiff's proposed verdict is anything but fair and can demonstrate why a lower number is reasonable. By not addressing damages, defense counsel may leave his or her client vulnerable to whatever claim the plaintiff asserts.

Plaintiff's counsel will often use a large sheet of paper or chalkboard to write down the figures he or she thinks should be awarded by the jury for each element of the plaintiff's damages, including pain and suffering. The jury inevitably writes down everything suggested by the plaintiff's attorney. Do the exact same thing. A copy of the verdict form that delineates each item of special damages should be

blown up and shown to the jury. During closing argument defense counsel should write down his suggested figures for each element of the plaintiff's damages and contrast them with the plaintiff's figures. Although defense counsel's figures will serve as a floor for the damages to be awarded, it is much better to concede a floor than to be at the mercy of the jury who has only the plaintiff's numbers for consideration.

During the closing argument, defense counsel should remind the jury that the purpose of a damage award is to compensate the plaintiff during his or her lifetime. Consequently, the damage award is limited to the amount of money the plaintiff is likely to spend during the remaining years of his or her life. When the jury is informed of this fact, the plaintiff's lawyer's suggestion that the plaintiff should receive $25 million for pain and suffering seems outrageous.

Years ago, plaintiffs' attorneys were hesitant to provide juries with large numbers for each element of the plaintiff's damages claim, fearing that to do so would appear to be overreaching. Those days are long gone. Today, in a catastrophic injury case, it is not unusual for a plaintiff's attorney to ask the jury to award $10 million or $20 million or more for the plaintiff's pain and suffering. In order to counter that kind of valuation, defense counsel has to make a damages argument that is logical and makes sense to the jury—and that argument must include a discussion of the value of a dollar.

After hearing the plaintiff's attorney's suggestion that tens or hundreds of millions of dollars should be awarded to the plaintiff, the jurors often lose track of the significance between $10 thousand and $10 million. Defense counsel has the task of bringing the jurors back to reality. And one of the best ways to do that is to show the jury the value of a dollar.

Explain to the jury that the dollars they will be awarding for damages are the same dollars they use to buy food for their families. The value of the dollar does not change when the jurors enter the jury box.

As part of this argument, defense counsel should give the jurors an illustration of just how much a million dollars is. If the average wage for a family of four in the United States is $50,000, it would take that family 20 years to earn a million dollars. If the plaintiff's counsel has suggested that the plaintiff be awarded $10 million for his pain and suffering, remind the jury that it would take that family of four 200 years to earn the same amount of money the plaintiff is asking for—just for one item of damages. Arguments such as these can successfully remind the jury that the compensation they award must be fair and reasonable.

Defense counsel must pay special attention to the potentially improper arguments made by the plaintiff's counsel during closing arguments, including the *per diem* and "Golden Rule" arguments. The *per diem* argument is the most commonly used technique to offer the jury a formula for calculating monetary awards. The plaintiff argues that she is no longer able to lead the life to which she had become accustomed—there is a loss of enjoyment of life due to pain and suffering which now occurs each and every day of the plaintiff's life. A value is set for one day of pain and suffering. The plaintiff's attorney then multiplies the life expectancy of the plaintiff, measured in days, by the *per diem* value for pain and suffering to determine the value of this element of the plaintiff's claim. The courts in some states have held that the per diem argument is inappropriate and cannot be made. *See, Henman v. Glinger*, 409 P.2d 631 (Wyo.).

When a plaintiff's attorney makes the "Golden Rule" argument, the jurors are urged to place themselves in the shoes of the injured party and award an amount commensurate with what they would charge to undergo the disability and pain and suffering that the plaintiff has experienced. Most courts have held that this type of argument is inappropriate *See*, *Brokopp v. Ford Motor Co.*, 71 Cal.App.3d 841, 139 Cal.Rptr. 888 (1977); *Offutt v. Pennoyer Merchants Transfer Co.*, 36 Ill.App.3d 194, 343 N.E.2d 665 (1st Dist. 1976).

### Jury Instructions

Once defense counsel has completed closing arguments, the job with regard to pain and suffering damages is still not complete. One last task remains: formulating an appropriate instruction for the jury to use in determining the amount of the plaintiff's pain and suffering damages.

Too often, defense counsel does not look at or think about the instructions which the jury will ultimately be receiving until it is too late. The night before the jury instruction conference is set to take place is not the time to be looking at the instructions for the first time. The only guidance that the jury is going to have in deciding the case—including damages—is what is contained in the jury instructions. As a result, it is important that defense counsel spend the appropriate amount of time necessary to draft proper damages instructions. This point is dramatically illustrated by a recent study which shows that the way in which jury instructions are worded may have a substantial impact on the amount of compensation that jurors award, with some instructions yielding a compensatory pain and suffering award twice as great as the amount yielded by other instructions. McCaffery, *et al.*, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 Va. L. Rev. (1995).

Jury instructions that inform the jury to only award damages which are "fair and reasonable," "consistent with the evidence," and/or "in accordance with the law," and to not let "bias, prejudice or sympathy" play a part in their consideration, should be emphasized and discussed during closing argument.

In those jurisdictions where specific instructions regarding pain and suffering are not available, or in those jurisdictions where the court will entertain non-pattern jury instructions, defense counsel should attempt to persuade the court to use instructions which provide detailed guidance regarding the issue of pain and suffering damages. Consider using the following:

> "In this difficult task of putting a money figure on an aspect of injury that does not readily lend itself to an evaluation in terms of money, you should try to be as objective, calm and dispassionate as the situation will permit, and not to be unduly swayed by considerations of sympathy."

In addition, defense counsel should attempt to make sure that jurors are instructed that the law requires them to consider only what is necessary to compensate the plaintiff for his or her pain and suffering. Jurors should be told they are not to consider any alleged "guilt" or "misconduct" of the defendant when setting damages.

### Conclusion

Having taken advantage of pre-trial discovery and motion practice, having employed appropriate experts, and having developed the damages theme throughout trial, the defense lawyer can confidently try any case in which there is an issue regarding the plaintiff's alleged pain and suffering. By focusing on this unique item of damages, and by providing the jury with appropriate information on which to base a realistic figure for such damages, defense counsel will have provided an extremely valuable service to his or her client by keeping a lid on these types of damages. FD