

Attacking Damages in the Catastrophic Injury Case

Part I

by J. Ric Gass

This is the first of a three-part series on damages by the author. Here, the author describes the relation between the liability and damages phases of a personal injury trial.

strategy
2 planning in any field; a carefully devised plan of action to achieve a goal, or the art of developing or carrying out such a plan.

How to Box Them Off—Isolate Them

The Changeable Slightly Favorable Juror Attitudes

How to Give Them Portable Arguments Convert the Middle

How to Solidify Them

Unchangeable Juror Attitudes Unfavorable to the Defense

Going Into a Trial You Have Identify

Unchangeable Juror Attitudes Favorable to the Defense

Up Them Spreading Poison

How to Move Them

The Changeable Slightly Unfavorable Juror Attitudes

How



It is tempting to think of “damages” as a discrete part of a case. Conceptually and logically they are discrete. In the eyes, head, heart and gut of jurors, however, it is quite a different matter. There they are even more than intertwined, interwoven and integral.

Indeed, liability and damages are symbiotic.

The intimate living together of two organisms; especially where such relationship is of mutual advantage; a relationship in which there is dependency on another.

The defense rightfully worries that bad damages will influence a jury to find liability when there is none. But the defense also needs to worry that if an attack is mounted on damages when the defense has a chance to prevail on liability that the presentation of a damages defense may cause the jury to doubt the credibility of the defense liability position. Jury research teaches that the closer the issue of liability, the more careful the defense needs to be in how it attacks damages. If liability is a 60–40 toss-up, the attack must become less frontal, less advocating and sponsoring of a number, and more of a pointing the jury in the right direction.

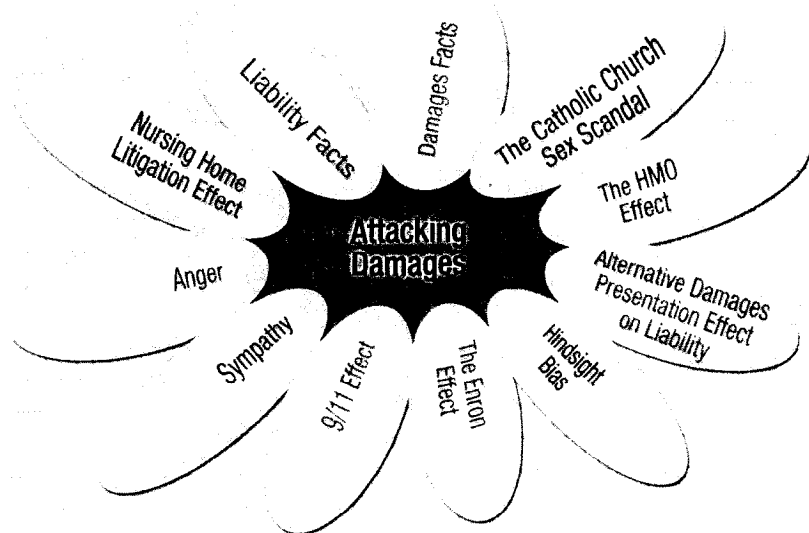
It becomes even dicier to craft a damages defense if the “liability” defense is not on negligence (or defectiveness if a products case) but rather is on causation.

Beyond the interactions of *liability—negligence—cause—damages*, jurors have human reactions to evidence provocative of anger and sympathy, which come into play and which must be dealt with. And, jurors



J. Ric Gass is a senior shareholder in the Milwaukee law firm of Kravit, Gass, Hovel & Leitner, S.C. He is a Past President of the Federation of Defense and Corporate Counsel, a past DRI Board member, and currently serves as President of Lawyers for Civil Justice. Mr. Gass practices as national trial counsel and national coordinating counsel for major corporations and insurers in catastrophic injury cases.

Figure 1. Attacking Damages



do not exist in the cocoon environment of a courtroom. They carry the emotions of September 11, the anger of Enron and the Roman Catholic church scandals, and the hindsight bias of knowing the injurious results of the underlying human conduct.

So, when it is suggested “let’s attack damages in this catastrophic case,” while such an attack includes presenting a life care planner, a life expectancy expert, a defense economist and annuitist, and a defense IME, a major decision remains whether to sponsor a specific damages number through those witnesses. It is also much more than that. It is dealing with all of the other emotional influences and the crafting of a defense damages position that does not adversely affect liability.

Attacking damages is not discrete in another sense. There is probably no part of litigation in general, but for the defense in particular, that is more important than a *theme*—a story above the evidence. Somehow, some way, the case theme has to deal

with the damages. They are part of the story of the case. They cannot be ignored.

Figure 1 (above) illustrates the inter-related nature of these topics and considerations.

Reasons for Attacking Damages

It almost seems rhetorical to ask why are we attacking damages. It almost seems self-evident. But is it? Is it merely to reduce the amount of damages? If we plan to win on liability, why even comment on damages? Do the reasons and methods vary by the liability scenario?

No Available Liability Defense

The Attack on Damages Spectrum

- Admitting total liability?
 - Or only negligence
 - Still contesting causation
- Will any liability facts/evidence still come in?
 - Will they provoke anger?
- Will the judge instruct that there is no liability issue and that’s the end of it?
 - Do you want that?
 - Do you want an opportunity to apologize and show that you are taking responsibility?
 - Do you want/need to do a “soft admission”?
- If admitting and apologizing, you must:
 - take responsibility
 - show regret and remorse
 - provide a remedy

The No Liability Defense Scenario

This scenario, where there is no defense on liability and the defense attorney is attacking damages because there is no other alternative, appears to be easily analyzed. It is apparently the only way to pay less.

What needs to be recognized, however, is that how we handle the concession of liability will have an impact on the damages. It is a part of "attacking damages." Of course, the real reason that the defense may admit or concede liability is the hope of being treated more fairly on damages. This is another example of the symbiotic relationship of liability and damages.

There is a major strategic decision to be made if liability, or a part thereof, is being conceded. Will it be a formal concession or a "soft admission"? Is it just a concession of negligence with a defense on cause or an admission of total liability? Do we seek a court instruction on the absence of a liability issue with no further evidence or commenting by counsel, or will some liability facts still come in? Or do we want or need a procedural posture whereby we can "apologize" or demonstrate that we are "taking responsibility"?

To be perceived as truly sorry, a party must demonstrate the **Four Rs** of apologizing:

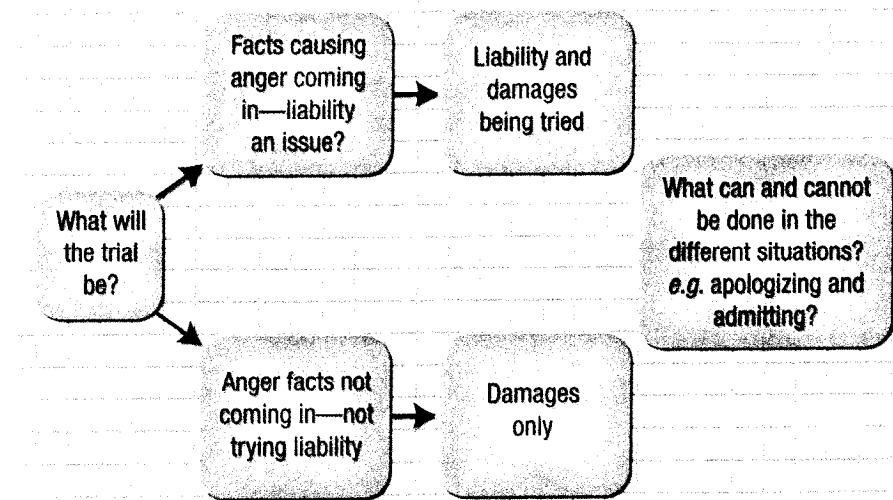
- Take Responsibility
- Show Regret and Remorse
- Provide a Remedy

What appears at first blush in the no-liability-defense situation to be an easy decision and course of action is actually a spectrum of nuances and tough choices. It is as much art as science. Once beyond the nuance of the admission, however, it's easy. The defense attorney can do a complete damages defense: call expert witnesses and sponsor a number.

The Slam Dunk Liability Case

In this scenario, the liability is greatly in the defense's favor—virtually a slam dunk. Why even touch damages? Won't a damages defense erode your credibility on liability?

First, the Ghost of *Pennzoil v. Texaco* rears its ugly head. Texaco felt it had an unbeatable case on liability and didn't put on a damages defense. When, what was thought to be only a remote possibility—a liability finding for the plaintiff—happened, the jurors had nothing to work with on damages except



the plaintiff's number and evidence, and the result was catastrophic—billions of dollars in compensatory and punitive damages. So, one reason for attacking damages in the slam dunk case is to put a collar on the remote possibility of an adverse result on liability.

But, it has to be done artfully so that the defense on damages doesn't erode credibility on liability. Generally, that can be done by adhering to one central tenet: do not sponsor a number, *i.e.*, don't suggest a specific amount for a damages award and then insist that only that number will be acceptable to the defense. Attack the plaintiff's damage experts on cross-examination and put on your own experts. But just educate and provide a path for the jurors to come to their own damages number. Do not force feed them. You are demonstrating exaggerations and not putting your credibility on the line as an advocate.

There is, however, yet another reason for attacking damages in the slam dunk liability case. It is the well-founded fear that the damages will sway the jury. In medical malpractice cases, research shows that permanent injury and severity are the dominant predictors of a plaintiff's verdict.

A study by the Harvard School of Public Health, and published in the *New England Journal of Medicine* in December 1996, asked jurors what was the most significant factor in reaching a plaintiff's verdict. They responded that it was not whether the injury was due to medical treatment. Nor was it whether the medical treatment was admin-

istered negligently. Instead, the most significant factor was whether the patient was permanently injured.

The Dominant Issue in Medical Malpractice Cases

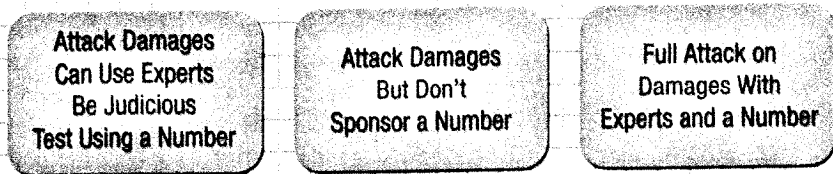
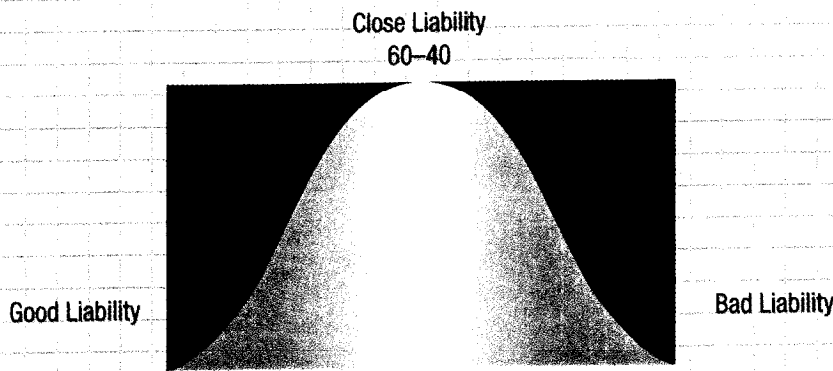
The only statistically significant factor

- Not: "Was the injury due to medical treatment?"
- Not: "Was the medical treatment negligent?"
- Rather: "Was the patient permanently injured?"

If there is one dominant emotion driver for jurors, it is the extent of functional impairment. Severe physical impairment carries with it images of severe functional impairment. For example, jurors assume that people with spinal cord injury (SCI) suffer substantial functional harm. Yet, the reality is that people with SCI do virtually everything that those without SCI do—only differently.

Research corroborates that the dominant emotional driver of jurors is the amount of harm and whether the harm can be undone. Usually there is no way to reverse the *physical* harm. However, more important to jurors is the *functional* harm: the way the physical injury interferes on a day-to-day basis. If the defense can "attack damages" by demonstrating less functional harm or ways it can be "undone" or reduced, we are not only affecting the amount of damages, but containing jury emotions that might spill over to the liability determination.

The Interplay Between Liability and Damages



tiptoe toward sponsoring a number, but are very, very careful about advocating an actual number. Maybe we use ranges or examples, but we stay just shy of the line of becoming an advocate of a specific number. Chalk on our shoes? Probably. But not over “the number” line.

How to Make These Determinations

Test, Test, Test. Focus groups are the answer. The testing gives us the attitudes, favorable and unfavorable, that are not likely to change. That also tells us what issues we don't need to spend much time on. And, it gives us the battleground attitudes and issues: those that could change either way.

After identifying those changeable attitudes, then we have to test the words, themes, evidence, arguments and presentations that will make the jurors break our way.

Jury Research on the Dominant Issues in Catastrophic Injury Cases

- Jury research shows:
 - Angry juries are bad defense juries
 - Level of anger increases with the level of damage
- Level of anger influenced by:
 - Whether done intentionally or by mistake
 - Whether the harm could have been prevented
 - Whether the plaintiff should have anticipated the harm
 - Whether the harm can be undone

Functional harm or impairment as opposed to physical impairment is what needs to be addressed as much as possible—but not just to get rid of bad mental images and inferences and emotional drivers. Defusing functional impairment has an impact on dollars in the right way. It relieves the *need* for dollars by demonstrating less functional harm rather than as a mere haggling over the *price* of the harm.

The Most Difficult Case

It is in the close liability case—the 60–40 case—where the damages decisions become the most dicey. When the jury could go either way, the stakes and the credibility of the liability defense is most at risk. The fear of jury emotions tipping the scale is

even higher. And, since the chance of an adverse liability finding is a distinct possibility, the jurors cannot be left adrift with no damages defense.

Yet, the defense knows that a hard fight on liability is going to produce compromises on both liability and damages. We have to give jurors the evidence and arguments for compromise. Artfully we cross-examine their experts, put up our own and

Conclusion

There's more to “attacking damages” than meets the eye. To do it successfully requires awareness of the symbiotic relationship between damages and liability. It also requires recognition of the current environment of lack of trust and cynicism.

In the next installment of this three-part series, we shall look at the three levels of thinking about attacking damages. **FD**

Using Focus Groups to Define the Trial Battlefield

