

Talking to jurors about damages in a down economy

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How has the recession affected jurors' thinking about harm, damages, and fair compensation? Are they more sympathetic to others' suffering, or less? A jury consultant looks at the research and finds some surprising answers.

These are tough times. In parts of the country, the unemployment rate is in double digits, and the news is filled with stories about record numbers of bankruptcies, foreclosures, and wildly seesawing financial markets.

As a result, people are paying more attention to money—their own and others'. And understandably, they've become more fiscally conservative. Americans are spending less, and the average personal savings rate has climbed to the highest level in 15 years, according to the federal government.¹

Given this trend toward cutting back or going without, it's no surprise that two of the questions trial consultants hear most often from trial lawyers are

- How is the current economic climate affecting jury verdicts in personal injury cases?

- Should I be doing anything different now to ensure that my clients get the recovery they deserve?

At this point, we have only anecdotal data to guide our analysis, and that data suggests that the economic downturn may be influencing jurors' decisions about damages in both expected and unexpected ways.² For example, in the past year, my consulting firm has seen the following:

- In an obstetrics case, mock jurors rejected out of hand the defense argument that state-funded services for the

disabled would take care of the injured plaintiff. They all agreed the state's budget deficit would result in such services being cut.

- Trial jurors awarded a plaintiff in an employment case substantial compensation for wage loss but none for noneconomic harm.³

- In a consumer class action, mock jurors wanted to assess a multimillion-dollar punitive damages penalty against a corporate defendant who appeared indifferent to having overcharged each consumer, even though the extra charge was less than \$20.

A panel at the national conference of the American Society of Trial Consultants (ASTC) in June attracted a geographically diverse audience of researchers with a common interest in identifying any emerging trends. Many panelists and audience members reported changes in insurers' and institutional clients' views of the risks, costs, and benefits of going to trial.

Those factors may well be affecting verdict trends, but only one person reported observing any fundamental shifts in jurors' decisions about money. It may simply be too soon to gauge the downturn's impact on jurors, or it may be that there is not going to be a simple answer.

If we think back to the time just after the 9/11 attacks, we were in much the

same position. Plaintiff attorneys were trying to evaluate how the horrific trauma, pain, and suffering caused by that tragedy would influence jurors' assessments of harm to their clients. Jury consultants conducted pre- and post-trial research, and public commentators advanced a variety of theories based on polling data that monitored significant changes in consumer spending habits.

After a while, we began to understand that there would be no simple answer to the question of how 9/11 affected jury decision-making about harm, loss, and compensation. Then, as now, the anecdotal evidence ranged from reports of no discernable influence, to "trauma fatigue," to greater empathy for those who had suffered loss.

But there were two fairly widespread observations: First, many people seemed more motivated to be of service to their community by serving as jurors; and second, high levels of negative prejudice were being directed at litigants who appeared to be of Middle Eastern descent. Unfortunately, the former has disappeared while the latter has continued.

Since the fall of 2008, both the trial consultants gathered at the ASTC conference and the jury system consultants at organizations like the National Center for State Courts have found that courts are facing increased difficulty empanelling juries.⁴ The spike in the number of jurors asking to be excused for hardship includes not only the unemployed but also those who fear they may be setting themselves up for unemployment by being absent more than a week, or because an employer is already short-staffed because of layoffs.⁵

Jurors who are under economic stress, resentful at having to serve, or already embittered by job loss have always posed a threat to injured plaintiffs seeking full and fair compensation. But now there are more prospective jurors in all of those categories. And many judges are more willing to recognize that trying to talk those jurors into serving would be a futile effort.

Even if a request to be excused for hardship is rejected, jurors who are themselves suffering the significant

emotional distress of being threatened with job loss or who have already lost a job or home will often say they won't even consider compensating an injured plaintiff for noneconomic damages. Their thinking goes, "We've all suffered loss. We all have to cope with emotional distress. That's just become a fact of life."

We have always seen some jurors express skepticism or even opposition to the idea of compensating plaintiffs for noneconomic harm, and that number grew over two decades of tort "reform"

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attacks. But now we're seeing more of this juror behavior.

For example, in one California case, 20 jurors were excused for cause—15 on the basis that they were unwilling to even consider awarding noneconomic damages.⁶ And while some of those jurors may have known that expressing that position would keep them off the jury, the judge was apparently satisfied that their statements were not manufactured for that purpose.

This was not an isolated incident. When attorneys explore this topic, they often find large numbers of jurors who say they would not consider compensating plaintiffs for noneconomic harm.⁷

It's how—not what—you ask

In many ways, plaintiff lawyers' most important conversations with jurors about money now take place in voir dire. Remember, the way you ask the question often determines the way it's answered. If jurors are lectured about fairness or following the law before they are asked for their opinions, they may feel obligated to play along and give lip service to the plaintiff's rights. But that lip service isn't likely to go any further than jury selection, and a promise to "follow

the law" that a juror does not agree with is not worth the time and effort it takes to extract.

It is your job to give prospective jurors the opportunity to express their views candidly and to make it easy for a juror opposed to compensating noneconomic harm to say so. You can do this with a question along these lines: "Many people these days feel that no one should expect to be compensated for all aspects of an injury because so many people are suffering, and some people would limit compensation to out-of-pocket expenses.

How many of you share that view?"

You may worry that the remaining jurors will be "poisoned" by hearing some of their peers say they categorically oppose payment for noneconomic harm. You might even be thinking that it would be better to move this question up to the bench, to avoid tainting the venire. But that move could backfire if the jurors feel too intimidated or confused to speak freely.

Using a written questionnaire to identify which jurors to query on this issue is a better solution—and it should reduce (but not eliminate) the level of exposure to negative opinions. To be sure that everyone who holds this view is excused for cause, you need to do everything you can to encourage those jurors to speak up.

What about the remaining jurors? Step back for a moment, and look at this through their eyes. Each time they see that a fellow juror is excused for refusing to consider noneconomic damages, they start to think that this is important, that it *must* be considered, and that

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properly compensating an injured plaintiff means more than just covering his or her out-of-pocket expenses. The message they get is that tough times don't change the rules—or the law.

During voir dire, keep three things in mind. First, using the shorthand of “noneconomic harm” defines the injury by what it is not and can inadvertently convey the message that economic harm is more important. Instead, use what David Ball has called a “reptilian” approach: Frame the injury and the resulting harm on its own terms—for in-

tal harm *caused by* the defendant's negligence or wrongdoing.” This keeps the rationale for compensating these injuries front and center: The defendant had the power to control and prevent the plaintiff's injury and failed to do so. Keep making this causal connection—not only in jury selection but throughout the trial.

In some cases, jurors might feel they have to limit damages because they're concerned that large verdicts may threaten the jobs of employees at the defendant company. It's not that the ju-

explains why some jurors—the same ones who might once have rejected a claim for punitive damages—are now willing to punish what they see as corporate indifference or deliberate disregard for the public.¹⁰ For that reason, you must distinguish noneconomic harm from punitive damages when you question jurors about their attitudes. In jury research, we often see jurors who placed a nominal value on compensating physical and mental harm become some of the strongest advocates for substantial punitive damages.

This is not to suggest that jurors should be asked in voir dire to make a commitment to assessing punitive damages or to return a large verdict “if the evidence supports it.” Many jurors report after trial that they found such questions offensive and contrary to the concept of impartiality, and in the current economic climate, “commitment” questions are even more likely to evoke a negative response if the juror thinks the plaintiff is claiming extra entitlements. A better approach is to focus on the jurors' opinions about the purpose and concept of punitive damages and to make it clear that you are only asking whether they would refuse to consider such a claim.

One more point on punitive damages is worth remembering. Jurors assess punitive damages as a penalty for wrongdoing—they don't award them as a bonus to the plaintiff. Your language should always be consistent with that punitive purpose.

Once jurors have been excused for hardship or gotten themselves excused for cause, a different conversation can begin with the remaining jurors. Use the excused-for-cause jurors' answers as a starting point:

■ Can physical and mental harm caused by wrongdoing be objectively evaluated and separated from the general stress many people feel from their own economic pressures?

■ Why should the community hold accountable those whose negligence caused someone physical pain and mental suffering?

■ Do you view being physically and socially isolated from the community, when it's the result of negligence, as a

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stance, list each of the plaintiff's injuries individually (“physical pain, immobility, and isolation”).⁸ This gives each type of harm equal weight.

Second, always connect the physical and mental harm to the wrongful conduct. Use the phrase “physical and men-

ror opposes compensating noneconomic harm; it could be that this is the easiest (or only) category to cut. This can be a big problem when the defendant is a government entity struggling with well-publicized budget cuts.

When that's the case, frame the issue of full compensation in terms of achieving safety and accountability.⁹ For many people, the lack of control over the market that created the economic downturn fueled a desire for increased accountability. Help jurors see their task as taking back that control and ensuring that the community holds its institutions accountable, and motivate them to make defendants pay for the full consequences of their wrongdoing.

Framing the decision as making the defendant accountable for its misconduct, as opposed to what the plaintiff is entitled to get for suffering, reduces jurors' resistance to the idea of compensation. Stressing entitlement has never been a good way to motivate jurors, but in the current context, it is almost guaranteed to trigger a negative backlash. We can all hope for better times, but at the moment, it is abundantly clear that in most jurors' minds, no one is entitled to much of anything.

The desire for greater accountability

AAJ Resources

More on damages

Visit the Web sites below for additional information.

■ AAJ Education program: “Mega Seminar: Overcoming Jury Bias, ‘Rules of the Road,’ and Damages,” Oct. 23-25, 2009, Las Vegas

www.justice.org/education/megaseminar

■ Litigation Packets: “Voir Dire and Jury Selection,” “Top Verdicts of 2007: Opening Statements and Closing Arguments,” “Prove Damages Using Opening Statements and Closing Arguments”

www.justice.org/exchange (click on “Litigation Packets”)

■ Jury Bias Litigation Group www.justice.org/litgroups

serious harm?

Your challenge here is to assess the remaining jurors' openness to fully compensating injuries, without identifying the plaintiff's strongest potential advocates. Keep the questions closed-ended; these won't allow jurors to give detailed responses that might reveal their potential to be the plaintiff's supporters.

Expert skepticism

Once the trial is under way, the next discussion about money is usually with expert witnesses. Jurors who were bombarded for months on end with media reports on the economy that proved to be wrong have good reason to be skeptical of economic experts.

Attorneys can no longer assume that jurors believe economists can provide reliable projections of inflation, interest rates, and wages. As recent experiences in jury research and at trial have shown, jurors will not hesitate to substitute their own beliefs about any of those factors when an expert appears oblivious to current conditions.

In jurisdictions where jurors are permitted to ask questions, economic experts should be prepared to testify with this backdrop of skepticism in mind. When the jurors can't submit questions, you should consider giving voice to the doubts that are likely to be lurking in the back of their minds. These are the questions we often hear in research:

■ How do you know that these projections of inflation and interest rates are reliable?

■ How can you rely on past trends when we are in the midst of such unprecedented economic turmoil?

■ How do you know the plaintiff would have maintained her job if she hadn't been injured, when there have been such massive layoffs?

■ How do you know medical inflation will continue to be higher than general inflation when we are going to have health care reform?

By putting those questions on the table and allowing the plaintiff's expert to address them head-on, you can avoid having jurors debate these questions in deliberation. Your expert's answers may not satisfy or persuade all the jurors, but

at least the plaintiff's advocates on the jury will be armed for further debate.

The good news here is that the skepticism about economic experts applies to the experts for both sides. You can assume the jurors will listen to the defendant's economist with an equally critical ear. They'll be less likely to be swayed by unrealistic or erroneous economic projections. In jury research on cases involving catastrophic injuries, my firm has seen jurors reject the opinions of defense experts who assume that government services will meet the needs of the disabled. Cuts in government services are at the top of many jurors' minds, and they harbor no illusions about the future.

The holes in the safety net are already apparent, and most jurors know they are only going to get bigger. Since the fall of 2008, we have not heard jurors argue that investing a much smaller amount than the plaintiffs are requesting would earn enough interest to meet the plaintiffs' long-term needs. If it is possible to think of an upside to the economic challenges we face, it is that the reality of economic insecurity for unemployed and disabled plaintiffs is now well understood by most jurors.

'It could go either way'

With no end to the downturn in sight, we will continue looking for trends in jury research and in posttrial interviews to learn how economic conditions are shaping jurors' attitudes and assumptions about compensation. When a recent mock jury panel in Michigan was asked to discuss this issue, half the panel said economic conditions should have no effect in cases where negligence has been established, reflecting some internal conflict as to whether it actually would.¹¹ One man said, "It could go either way, based on the individual juror's life and opinions."

The other half of the panel—those who said the recession should affect compensation—illustrated his point: They were evenly divided on the question of the impact. Half said it would decrease compensation, giving answers like, "Money is tight," with some adding, "even for insurance companies."

The comments of those who thought

compensation should increase were all variations of one woman's explanation: "You need more when the economy is down and prices keep going up."

As these responses suggest, we are not going to find any simple answers. But one basic fact remains unchanged: The raw material for the case story—and the way in which that story is told—will have the most significant influence on jurors' decisions. ■

Notes

1. U.S. Dept. Commerce, Bureau Econ. Analysis, Press Release, *Personal Income and Outlays: April 2009* (June 1, 2009), www.bea.gov/newsreleases/national/pi/2009/pi0409.htm; see also Jeannine Aversa, *U.S. Consumer Spending Dips; Savings Rate Surges*, Associated Press (June 1, 2009), <http://tinyurl.com/nfpg8u>.

2. As of this writing, a search of academic literature and interviews with prominent researchers who specialize in studying juror decision-making on damages did not produce any scientific study of shifts in jurors' attitudes toward compensation.

3. See *Jadwin v. County of Kern*, 610 F. Supp. 2d 1129 (E.D. Cal. 2009). This citation refers to summary judgment, not damages or the outcome of the trial.

4. Natl. Ctr. St. Cts., *Are Hardship Juror Excusal Requests Rising?* Jur-E Bull. (Mar. 20, 2009), www.ncsconline.org/Newsletters/jur-e/index.asp.

5. Brian Haas, *Economy Making It Harder to Get Jurors for Trials*, Sun-Sentinel (Mar. 13, 2009), <http://tinyurl.com/dx7no7>; Correy E. Stephenson, *Jurors Increasingly Seek Recusal for Financial Hardship*, Va. Laws. Wkly. (Apr. 20, 2009), <http://tinyurl.com/cd8kex>.

6. *Thomas v. Lincoln Elec. Co.*, No. RG06272122 (Cal., Alameda Co. Super. filed May 26, 2006).

7. Susan E. Jones, *Judge vs. Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & Human Behavior 131, 135-36 (1987).

8. Don Keenan & David Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (Balloon Press 2009); see also David Ball, *Damages and the Reptilian Brain*, on page 24 of this issue.

9. *Id.*

10. See e.g. Edie Greene, *Jury Damage Awards in Times of Recession*, The Jury Expert (July 2009), <http://tiny.cc/AOUHH>; Sylvia Hsieh, *Are Juries Angrier Than Ever?*, LawyersUSA (Oct. 20, 2008), available to subscribers at www.lawyersusaonline.com/?article=432070; Thomas B. Scheffey, *Hard Times Make Juries Unpredictable*, Conn. L. Trib. (Feb. 16, 2009); Michelle Lore, *Corporate Lawyers Expect a Rise in Lawsuits*, Minn. Lawyer (Jan. 5, 2009).

11. All the jurors on the panel were employed, but several jurors' employers had "downsized" because of the collapse of the auto industry. They were equally divided as to race and were a representative sample of the educational and occupational subgroups in that jurisdiction.