Demystifying Pain and Suffering Damages

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How jurors decide non-economic damages like pain and suffering may appear somewhat mysterious and random. Nonetheless, jurors use systematic processes when determining damage awards, even the elusive non-economic damages of pain and suffering.

These decision-making processes may not be fully predictable, easy to identify, or what the lawyer or statute drafter might expect. But they are real. Think about an example: the damages awarded in a case involving paraplegia compared to case involving a broken hand. More severe injuries result in greater total money awards. Not a surprising result. However, new research from Cornell University finds injury severity alone does not correlate with increased awards for pain and suffering. This research discusses three factors which influence jurors’ decision-making processes in pain and suffering awards. [[2]](#footnote-2)

**Interference**

Jurors want to know how the pain or suffering caused by the injury *interferes* with the plaintiff’s life, not just how bad the injury is. They seek evidence beyond the pain’s severity to the pain’s impact. In the study, the more jurors mentioned the injury’s interference with the plaintiff’s life, the more money they awarded for pain and suffering. Assessing the severity of the pain experienced or the suffering endured is only a first step in the juror’s decision-making process.

Identifiable interference in the plaintiff’s life can appear more objective to jurors and therefore translate easier to a monetary number (as least on a general level). Jurors may be attempting to reduce the subjective nature of the claim to make it more quantifiable. Lawyers can positively influence the damage award by describing ways in which the emotional suffering or the physical pain hinder, disturb, or change the plaintiff’s life and routines.

**Anchor**

Introducing an anchor number correlates with higher awards for pain and suffering. Sometimes lawyers wonder whether or not they should recommend an amount for non-economic damages for fear of introducing an amount lower than the jurors would determine on their own. This worry is unfounded. It is well recognized that a numerical anchor influences a juror’s judgment about money damages even if they do not recognize the value affected their decision. An anchor can be particularly helpful with non-economic damages such as pain and suffering since most jurors are unfamiliar or uncomfortable with quantifying these kinds of harms. Translating non-economic harms into monetary numbers poses a great challenge for jurors. Provide guidance with an anchor.

**Fusion and Perception of Parties**

How jurors view the plaintiff and defendant affects pain and suffering money values. Jurors fuse their thoughts about liability and damages despite the legal distinction. Even jurors who aren’t supposed to consider attributions of fault (i.e. admitted liability) still provide more money for pain and suffering when they believe the defendant has greater responsibility. Similarly, those jurors who view the plaintiff as contributing to his or her predicament (regardless of whether a contributory negligence claim is made) will reduce the plaintiff’s damages by the jurors’ perceived attribution of fault. Jurors don’t view liability and damages as two separate pieces of a whole, but as two overlapping and interdependent pieces.

**Interaction of these Factors**

Think about both fusion and interference when selecting an anchor number. How the pain or suffering interferes with the plaintiff’s life provides meaning to the number and support for the anchor selected. Fusion affects how jurors adjust the pain and suffering anchor number. Jurors account for and increase the amount of money by the egregiousness of the defendant’s actions, yet they also reduce money by the plaintiff’s responsibility. At times jurors do this intuitively, not realizing they have done it. Lawyers will want to understand how the jurors might adjust the anchor and set a meaningful anchor accordingly.

For higher pain and suffering money damages consider doing the following:

1. Vividly describe the pain (or suffering) with action words which reflect the severity of the pain, then show how that experience ***interferes*** with the plaintiff’s life.
2. Offer a **meaningful number** (one tied to a case relevant reference point) for pain and suffering for jurors to anchor upon before they adjust. Avoid forcing jurors to determine a starting number from nothing.
3. **Facilitate or account for fusion**:
* Weave the defendant’s wrongdoing into the damages’ discussion.
* Minimize or mitigate the plaintiff’s responsibility whenever possible (even in cases not involving contributory negligence.)
* Set the anchor figure to account for the possible reduction due to plaintiff’s responsibility.

As research continues to identify and confirm the factors which influence how jurors translate their impressions into dollar figures, non-economic damages like pain and suffering will become less mysterious.

1. Submitted to Trial Magazine January 2, 2020 [↑](#footnote-ref-1)
2. Reed, K., Hans, V. P., & Reyna, V. F. (2019). Accounting for Awards: An Examination of Juror Reasoning behind Pain and Suffering Damage Award Decisions. *Denv. L. Rev., 96,* 841 [↑](#footnote-ref-2)