

PROVING NONECONOMIC DAMAGES AT TRIAL

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I. Proving Noneconomic Damages at Trial Is a Process of Show and Tell

1. Show the jury the damages with medical illustrations, X-rays, CTs, MRIs, photographs, videos, the life care plan, and excerpts of medical records.
2. Tell the jury the damages with testimony of the plaintiff, plaintiff's family, friends, coworkers, doctors, and therapists, and with admissions of the defendants and their experts.

The process begins during jury selection and continues through opening statement, plaintiff's case in chief, cross-examination of the defendants and their experts, and closing argument.

II. Jury Selection

1. Tell the prospective jurors what the injury is and ask them to share their experiences with such injuries.

Example:

Defendant tore a hole in plaintiff's spinal cord with a steel wire the size of a bicycle spoke. That caused permanent damage to plaintiff's spinal cord and he is now paralyzed. Have you or anyone close to you suffered a spinal cord injury? What happened? How soon was the injury recognized? How was the injury discovered? How was it treated? How did it affect you/your family member/friend? How are you/your family member/friend now doing? Have you ever taken care of someone with a spinal cord injury or permanent paralysis? Please explain.

2. Tell the prospective jurors that plaintiff's medical care has been extensive and

expensive, and ask them to share their experiences with such medical care.

Example:

Plaintiff requires a lifetime of medical care. That medical care is extensive and expensive. For the rest of his life, plaintiff will need physical therapy, occupational therapy, speech therapy, and multiple hospitalizations and surgeries. Those therapies, hospitalizations, and surgeries will cost tens of thousands/hundreds of thousands/millions of dollars. Has anyone close to you required lifetime or ongoing medical care? Please explain. Has anyone close to you required lifetime or ongoing therapy of any kind? Please explain. Have you ever helped take care of a person who needed lifetime or ongoing medical care? Please explain.

3. Tell the prospective jurors the number and kind of doctors and therapists plaintiff has seen and will continue to see, and ask them to share their experiences with such specialists.

Example:

Plaintiff has seen several doctors and therapists. Plaintiff sees a neurologist for his seizures, a rehabilitation physician for his paralysis, a gastroenterologist to monitor his nutrition and feeding tube, a physical therapist to prevent contractures, an occupational therapist to help move his hands and fingers and operate his wheelchair, and a speech therapist to help him learn to eat and speak. Have you or anyone close to you had experience with obtaining treatment from a neurologist, rehabilitation physician, gastroenterologist, and so forth? Please explain. Have your children had to see such specialists? Please explain. Have you ever helped take care of a child who needed such specialists? Please explain.

4. The foregoing questions tell the jury what plaintiff's injury and damages are *and* allow the jurors to learn *from their fellow jurors* how serious, painful, and debilitating plaintiff's injuries are to plaintiff and to plaintiff's family.

III. Opening Statement

1. Show the jury with demonstrative exhibits what the injury is and what the damages are. Tell the jury what the experts, family, friends, coworkers, and so on will say about the injury.
2. What is the injury and where is it?
 - Frank H. Netter's anatomic illustrations
 - Anatomic models
 - Photographic reprints of X-rays, CTs, MRIs
 - Photos and videos of injury
 - Consider benefits and drawbacks of using enlargements mounted on poster board versus presenting exhibits with ELMO device versus projecting exhibits simply as images on a large screen. Enlargements on poster board can be marked and taken into the jury room. ELMO device allows the jury to see that you are presenting the genuine original. A computer is quick, but cannot be taken to the jury room.
3. How has the injury damaged plaintiff?
 - "Before" or "after" (but probably not both at this point) videos of the plaintiff—show and tell the jury: We are going to be talking a lot about how this injury has affected plaintiff, and I want you to see who he was before this happened/a preview of what we are going to be talking about.
 - Day-in-the-life video of plaintiff dealing with the injury—show and tell the jury: We are going to be talking a lot about how this injury affected the plaintiff and I want to give you a preview of what we are going to be talking about.
 - In a death case, photos of the decedent—show and tell the jury: This is the plaintiff.
 - In a death case, photos of memorial—show and tell the jury: We are going to be talking a lot about who plaintiff was and what she meant to her community. This memorial says something about that.
 - Particularly in a catastrophic injury case, such as a child with cerebral palsy, show a photograph of the child standing in a supportive walker or sitting in a wheelchair.
4. What the witnesses will say about plaintiff's injury and damages

Example:

Dr. X is a pediatric neurologist. He is a specialist in taking care of children with the kind of neurologic injury/paralysis that plaintiff has. He will tell you that this injury (refer at this point to your demonstrative exhibits) has this effect: (describe).

Example:

Jane Doe is a physical therapist. She works at Doernbecher Children's Hospital right here in (insert name of your community). She is the director of the Children's Therapy Program. For the past 20 years, she has spent every working day helping children just like plaintiff learn to move, walk, and so forth. She has been plaintiff's therapist for ____ months/years. She will tell you that plaintiff's injury has this effect: (describe).

Example:

John Doe is plaintiff's best friend. They have known each other for ____ years. John has spent many days helping plaintiff with chores plaintiff cannot do anymore and many nights just listening to his friend and trying to help him cope with the emotional toll of this injury. I have asked John to come here and share with you what changes he has seen in his friend on account of this injury.

Example:

Plaintiff's paralysis affects him throughout his entire day, at home and at work. I have asked some of the people who work with plaintiff to come here and share with you the things they do for plaintiff to help him make it through his day at work. They will describe for you how they help him (describe activities).

IV. Plaintiff's Case-in-Chief

As the saying goes: "In opening statement, tell the jury what you are going to tell them. In your case-in-chief, tell them. In closing argument, tell them what you told them." In plaintiff's case-in-chief, show and tell the jury again, but with more depth and detail, what the injuries and damages are.

- \$ Anatomic illustrations and models, X-rays, CTs, MRIs, photographs—each must now be reviewed carefully and in detail with all appropriate experts.
- \$ Photo album of plaintiff interacting with family and friends—family and friends describe and reminisce.
- \$ Unique arts/crafts—family and friends describe what plaintiff enjoyed doing and reminisce.
- \$ Surgical videos—plaintiff’s medical experts narrate the injury or the repair as it happens.
- \$ Photos of memorials—family and friends describe and reminisce.
- \$ Therapy videos—therapists and other medical experts narrate and describe significance.
- \$ Day-in-the-life videos—therapists, medical experts, family, and friends narrate and describe.
- \$ Medical and therapeutic appliances and equipment—therapists, medical experts, family, and friends describe.
- \$ Life care plan—care planner, therapists, and medical experts describe and explain. Summarize only the minuscule, similar items (such as special kitchen utensils); otherwise, describe and explain need for *every* other item in the care plan.
- \$ Anatomic illustrations serve multiple purposes: They show what the injury is and where it is located. They also show adjacent structures that were disrupted and/or injured *and* how a discrete injury can cause manifold damage.
- \$ Neuropsychologist—especially helpful in proving practical, everyday significance of neurologic injury, which jurors often cannot see.

Example: Neuropsychologist showed and explained testing to jury and then told jury that plaintiff’s injury had this effect upon child: “It’s like she lives in China, but she does not speak Chinese.”
- \$ Physical capacities therapist—performs objective strength and movement testing and measurements and photographs to validate severity of impairment, particularly in paralysis injury.
- \$ Items to identify in your case-in-chief but not use until closing:
 - \$ Baby book
 - \$ Powerful videos

§ Necessary witnesses: physicians (treating and expert), therapists, family, friends, coworkers, plaintiff.

V. Cross-Examination of Defendants and Defendants' Experts

When the matter is undeniable and/or you have obtained the following testimony during deposition, ask defendants and defendants' experts: Do you agree this is plaintiff's injury? Plaintiff's injury is permanent? This is a catastrophe? Plaintiff is permanently impaired/paralyzed/etc.? Plaintiff requires lifetime care? Plaintiff will never be able to _____? For the remainder of his life, plaintiff will need help to _____?

Defendants' DME

- Prevent defendants' DME altogether if defendants' examining physician is not licensed in your state.
- Refute defendant's DME with the examining physician's own admission that he or she examined plaintiff only one time and additional evidence that plaintiff's physicians and experts examined and treated plaintiff over an extended period of time.
- Show the jury an enlarged list of every date of every visit of plaintiff with plaintiff's doctor and therapists.

VI. Closing Argument

Tell the jury what you told them: Review the exhibits and testimony that show and explain plaintiff's injury and damages.

Show and describe the exhibits that you identified and that were received in evidence, but which you have not yet shown to the jury.

Example: Baby book for deceased child: It's beautiful, but it's empty.

Example: Play powerful video which was offered and received in your case-in-chief but which the jury has not seen until now.