

## **SUGGESTIONS FOR MAXIMIZING YOUR MEDICAL EXPENSES CLAIM IN YOUR AUTO NEGLIGENCE CASE**

Economic damages continue to be the reference figure against which ratios of non-economic damages and case values are estimated by defense attorneys, adjusters and mediators. Perhaps more importantly, juries will often use them as an anchor for determining what to award for non-economic damages. Therefore, one should explore all credible claims for economic damages their client may have, and consider how defense counsel will challenge each claim. The limitations of this article do not allow for a discussion of every type of potential economic damages claim which could be potentially brought in an automobile negligence claim (ie. past and future lost income, lost earning capacity, caregiver and life care expenses, loss of household services, etc.).<sup>1</sup> Here are some general suggestions for maximizing damages in your automobile negligence case.

**1. Jury Bias:** I believe that you can't discuss the topic of damages without addressing the issue of jury bias. The tort reformers have done significant damage to us and have, for some, forever changed perceptions of lawyers and the civil justice system. The American Association for Justice first began focus grouping and developing The Jury Bias Model™ in 1994. AAJ Education has spent a considerable amount of time and resources uncovering the types of hostile juror attitudes, and developing a model which can be used to combat it. The five general categories of jury bias are: (1) personal responsibility; (2) stuff happens; (3) victimization; (4) anti-plaintiff bias; and (5) suspicion. It is not possible to explain each of these bias categories in this lone article

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<sup>1</sup> For an excellent discussion of making a Loss of Household Services Claim, see Alison D. Kohler's article in the Fall 2001 volume of the Trial Reporter (available online at the MAJ website, [marylandassociationforjustice.com](http://marylandassociationforjustice.com))

but, in my opinion, you must study and understand them in order to effectively present your trial story and sequence the evidence presented in order to maximize your damages award. I recommend attending an Overcoming Jury Bias program and/or buying the tape sets at [www.justice.org](http://www.justice.org).

You must try your case on both liability and damages with the understanding that prospective jurors will apply a higher standard of personal responsibility to the plaintiff than they will to the defendant. You should remember that if the jury does not perceive the plaintiff's conduct as "normal" (ie. suspicion bias), every part of your case will suffer including the most straightforward pieces of your damages claim. Moreover, the evidence you present must show the plaintiff to be personally responsible (ie. personal responsibility bias) in the choices they have made since he or she was injured.

Strategically, you should look at your own client first to determine what aspect of your client's conduct might raise suspicion with the jurors and mistrust of the plaintiff and, thus, the case generally. Develop checklists of everything in the plaintiff's life that is consistent with acting responsibly. Develop facts to show the plaintiff is a fighter, self-reliant and self-disciplined.

The bottom line is that the plaintiff's story must be consistent with jurors life experiences to be believable. For example, if the plaintiff does not have a reasonable explanation for going to a health care provider recommended by their lawyer, your medical expenses claim is in serious jeopardy. Likewise, if the jury doesn't believe the plaintiff was personally responsible in exploring any reasonable accommodations at their place of employment in an effort to get back to work, your lost wage claim will likewise be in peril.

Understanding the biases the jury will have against you and your client before the trial begins is critical, and has to be considered with every step of your presentation of the evidence.

**2. New Terminology:** One of the most important books out there for the plaintiff's lawyer is *David Ball On Damages: The Essential Update*. If you try cases, this cannot be a book that you will "get around to" reading someday. It will change the way you try a case.

*Ball* teaches that you can no longer try a case and ask for damages for "pain and suffering." Those are overused buzz words of the tort-reformers. It is a gift to the defense. With regard to economic damages specifically, *Ball* spends a significant amount of time in his book teaching how to effectively communicate to juries the necessity for awarding economic damages.

The framework *Ball* advocates is simple. First, you must explain to the jury that they will be asked to determine and value the degree of harms and losses suffered by the plaintiff. The term non-economic damages is useless according to *Ball*. Second, you must address the jury and define their job to them as being: "to fix what can be fixed, to help what can be helped, and to make up for what cannot be fixed or helped." In other words, when addressing economic damages in a typical automobile case, you may ask the jury to fix the financial harms and losses of the plaintiff by restoring them, financially, to their position before the collision by providing an award for past medical expenses and lost income. You may ask the jury to help what can be helped by providing additional money for future physical therapy which the plaintiff's treating doctor or physical therapy

expert testifies is necessary to maintain a certain level of function, or to help fix the pain by providing money for a future surgery.

*Ball* spends a significant amount of time suggesting how to persuade the jury of the worthwhileness of the money they are being asked to provide to fix, to help or to make up for what cannot be fixed or helped. It is a must read for any plaintiff's lawyer. *David Ball on Damages* can be found online with a simple Google search. Once you start reading it you will, like me, wonder what took you so long to buy it.

**3. Past Medical Expenses:** Asking the jury to make the plaintiff whole for their incurred medical expenses is often a straightforward task. The elementary requirements of proof are: (1) proof of the fact of past loss; (2) proof of the causal linkage between the past loss and the tortfeasor's misconduct; and (3) proof of the reasonable value of each existing or anticipated loss.<sup>2</sup> Unfortunately, we've all had the experience of putting on the required expert testimony, moving the (redacted) bills into evidence, addressing the bills in summation and then assuming we are at home base on that issue. Then the bills get cut by the jury.

The most common areas of attack for the defense is the suspicion bias and personal responsibility bias. If vulnerable, they will attack your doctor and argue the medical care was attorney directed and/or the charges or medical care was excessive. If there are "gaps" in care, they will argue the plaintiff was not personally responsible and did not mitigate their damages. As a consequence, they argue, the medical bills are inflated (ie. for coming to court and asking you – the jury- for money). They ask the jury

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<sup>2</sup> The Maryland cases on the foundation requirements of reasonableness and necessity for proving past medical expenses are *Wolf v. Levitt & Sons, Inc.*, 267 Md. 623, 298 A.2d 374 (1973), and *Kujawa v. Baltimore Transit Company*, 224 Md. 194, 167 2.2d 96 (1961).

to use their common sense, and to be “fair” to the defendant in determining what they are truly responsible for.

Attorney Referral to Treating Doctor: Our clients are not immune to the health care crisis and the number of uninsured in this country. In a significant number of cases you will be faced with the dilemma of finding a health care provider to treat your client if they have no health insurance coverage and/or don't have a family doctor. If this is done, you must prepare your client to articulate a reason for why they chose their treating doctor. The reason must be repeated in deposition, at the exam of the defense medical doctor, and at trial. If there is no explanation offered, it is a gift for the defense. The explanation to the jury must be reasonable, seem personally responsible, and be consistent with the life experiences of your jurors.

I suggest providing your client with a list of doctors and options for care that are geographically desirable, either to their home or place of work (if they are working). The list should be designated as an attorney-client communication and should be discussed with your client in person, or by telephone. Your client should be able to explain that they had no doctor of their own, they were given a list of specialists to choose from and they wanted to go to a place that was close to home or work because of transportation concerns and/or to minimize the possibility of missing appointments. If your client was referred to a doctor in the discharge documents from the Hospital's Emergency Department, then he or she must explain they didn't know that doctor and decided to choose one that was closer to their home or place of work. If they have a family doctor, tell your client to see them and ask for a list of specialists to which they can be referred. If your client, or their family member, previously treated with an orthopedic surgeon or

some other health care provider for muscle or joint problems, suggest that your client return to that office for treatment or a referral.

Excessive Charges: Your medical expert must be prepared to justify the treatment plan and the charges for the care received. As for the latter, and if the amount charged is being challenged, your expert should testify to what the CPT codes are and that the doctors charges are within the standards in the industry. If x-rays were ordered during the initial clinical visit, your orthopedic expert must explain that the standard of care required that they take duplicative x-rays since they, not radiologists, specialize in diseases and conditions of the musculoskeletal system, and that they may see something clinically relevant that the hospital radiologist missed.

Excessive Care: Your medical expert must explain the type of care prescribed, why it was prescribed, and the goals of the treatment plan. If your orthopedic expert prescribed a lengthy course of physical therapy, consider calling the physical therapist to provide expert testimony. These hands-on witnesses are trained to educate patients on the type of modalities being employed, the goals of the care and the reasons for the length of care. They usually have detailed notes regarding the plaintiff's physical condition when they began treatment, the degree of pain and difficulty, and their diminished function. They are usually great educators in the courtroom and virtually untouchable on cross-examination. Physical therapists are often willing to testify for little or no compensation at all.

Gaps: The so called "gaps" in care argument must be turned around on defense counsel by re-framing the debate. You must prepare your client to explain any significant period of time when they were not receiving medical care and for them to

repeat their explanation at least four times: to their doctor in any subsequent doctors visits, in their deposition, at the time of the Defense Medical Exam (DME), and at trial. Reasonable explanations for the gaps in your client's care could be articulated as either a time period when the plaintiff was feeling better and hoping they were on the road to recovery, a time period when the plaintiff was living with the pain and trying to move on with life, or due to the plaintiff's concerns about the mounting medical expenses. The plaintiff must explain that the physical pain and impairment did not go away, and that therefore, they needed to return for additional medical care. As *Ball* points out, juries like "strivers and survivors, not whiners and quitters." You must present a picture of a plaintiff struggling to get back to their life as it was before, and only seeking additional care when it became absolutely necessary.

Again, consider using additional treating experts if you perceive you that your main treating doctor, the person directing the care, is vulnerable to cross-examination on these issues. For example, the defense may argue that the treating doctor, "a plaintiff attorney's doctor," has an enormous bill and will simply keep running it up to make more money. In a recent case, we were able to overcome a similar argument by calling the treating physical therapist who explained that when the plaintiff was originally discharged her level of function was only at fifty (50%) percent, and she still had a significant amount of pain. The physical therapist was able to corroborate our trial story that the plaintiff was personally responsible, and exhausted all conservative treatment first, and then had to return for more extensive, and more expensive treatment after trying to heal on her own with time and home remedies.

**4. Future Medical Care:** Is there a way to fix or help the plaintiff's pain or

level of impairment?

The basic foundational requirements are the same as with each of the elements for past medical expenses, but there are a few extra considerations surrounding the area of medical necessity. The character of the future medical expenses and associated treatment must only be shown with reasonable certainty (ie. that it is probable the loss will occur).<sup>3</sup> Expert testimony is required to prove causation of the care, probable necessity and the reasonableness of the care.

In order to persuade the jury to provide an award money for future medical expenses, you must establish the worthwhileness of the future care. You must establish through your expert:

- why the future treatment is necessary;
- what the goals are;
- how the care will be delivered; and
- why it will help the plaintiff's level of functioning and relieve pain.

The jury will decide to provide money to fix or help only if they are persuaded that such an award will be worthwhile. Obviously, the types of future care required by the plaintiff can vary. In a chronic pain case, the care can consist of future pain management including prescription medications, injections, or medical devices (ie. morphine pump). The future care may consist of surgery and/or physical therapy care.

One often overlooked type of future economic loss is a claim for the future cost of prescription medication. If you have a client who is permanently impaired and will be required to take anti-inflammatory or pain medication on a regular basis for the rest of their life, you should attempt to have their treating doctor opine as to what medication

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<sup>3</sup> *Lewin Realty v. Brooks*, 138 Md. App. 244, 771 A.2d 446 (2002).

they will permanently need, and why. The cost of prescription medication on a permanent basis will be significant. You should obtain all information on file at your client's pharmacy. In order to properly present a future medical care claim, you may also have to retain a life care planner to testify to the cost of the medical care, medical equipment, therapeutic modalities, prescription medication, etc.<sup>4</sup> Or you could have the life care planner prepare a summary of the cost of the prescriptions, and provide this summary to your medical expert to rely upon.

Finally, and perhaps most importantly, your client will have to be prepared to explain that he or she plans to receive the future care as recommended by their treating doctors. Again, your client will have to explain how they will follow their doctors instructions and recommendations on when and what type of future care will be necessary at least four times: to their doctor in any subsequent doctors visits, in their deposition, at the time of the Defense Medical Exam (DME), and at trial

In order to persuade the jury to provide your client with money for future medical expenses, you must establish the worthwhileness of the future care. You must establish through your expert: why it necessary; what the goals are; why it will help the plaintiff's level of functioning and relieve pain; and your expert must explain how the care will be provided. The jury will decide to provide money to fix or help only if they are persuaded that such an award will be worthwhile.

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<sup>4</sup> In a personal injury case that is not a wrongful death case, it is not required that a future medical expenses claim be reduced to present value by an economist at trial. *Hutzell v. Boyer*, 252 Md. 227, 238, 249 A.2d 449, 455 (Md. 1969) (explaining that reduction of damages to present value is not customary in Maryland, except in cases of wrongful death). However, if the defense hires an economist to reduce your claim to present value, you may also want to do so since the opposing experts numbers may be significantly lower than one that would testify on behalf of your client.

**Conclusion:** Jurors will often arrive at a non-economic damages amount by using their economic damages award as an anchor. Hopefully, using some of these suggested strategies will allow you to increase the value of your economic damages claim and, consequently, the overall damages awarded for harms and losses.