

The background of the entire image is a space-themed scene. It features a dark upper portion filled with numerous small, bright stars of varying colors (white, blue, orange). Below this, a bright, glowing horizon line, likely representing the edge of a planet or a nebula, curves across the frame. The colors transition from a deep orange and red near the horizon to a lighter, almost white glow in the center, and then back to a dark, starry space at the top.

# **DAMAGES** *EVOLVING*

DAVID BALL, ARTEMIS MALEKPOUR,  
COURTNEY ROWLEY & NICHOLAS ROWLEY

# PRAISE FOR *DAMAGES EVOLVING*

“No one needs to be reminded how *David Ball on Damages* revolutionized the way plaintiffs’ lawyers approach their cases. This book is *Damages* on steroids. It will make anyone a better lawyer.”

—Rick Friedman, author of *The Way of the Trial Lawyer*, coauthor of *Rules of the Road*, and member of the Inner Circle of Advocates

“*Damages Evolving* is an excellent, comprehensive book about proving damages at trial. It combines creative thought with very practical suggestions. Valuable insight is provided concerning de-emphasizing economic damages, as well as the importance of the loss of mobility and the loss of the freedom to choose how we live our lives. Important innovations are offered, including what David Ball calls ‘flashpoints’ and ‘alignment.’ This book teaches numerous important trial lessons, such as our need to act with respect at all times in the courtroom. I highly recommend it for all trial lawyers, regardless of their level of experience.”

—Mark Mandell, author of *Case Framing* and *Advanced Case Framing* and member of the Inner Circle of Advocates

“If you want unlimited returns on an investment, buy *Damages Evolving*. It is the true heart and soul of how to achieve a full recovery for our clients. The combination of Nick, Courtney, David, and Artemis is pure genius.”

—Gary C. Johnson, created Judo Law, won the largest verdict in Kentucky, and is listed as a Kentucky Super Lawyer

“Here, in one volume, you will find the collective experience and trial wisdom of an amazing team of experts outlining the steps for getting full-value damages in your cases. In clear, understandable language they outline strategies and concepts that they have proven by experience work. I highly recommend it.”

—Paul Luvera, past president of the Inner Circle of Advocates, coauthor of *Luvera on Advocacy*

“Four great authors with hundreds of new ideas and ways of thinking about damages. Thank you, David, Artemis, Courtney, and Nick. Why has it taken so long for the four of you to write this book? So many great ideas about damages to steal—and all from one place. *Damages Evolving* helps us empower the jury to fight for justice for those who entrust their futures to us. Just doing that makes it worthwhile reading—and rereading. But *Damages Evolving* empowers us, too, to keep evolving and struggling against the dangerous complacency of old habits.”

—Donald H. Beskind, trial lawyer and full-time law professor at Duke Law

“These authors have written several comprehensive books on trials and jury science. I thought there would be very little left to say. But I was wrong. There are practical, creative, and easily adopted suggestions for every aspect of a trial from beginning to end. Trying cases is almost always a gamble, but you can significantly increase your odds of winning an adequate verdict for your clients by absorbing the advice in this excellent book. I have been a trial lawyer for 55 years and I learned something new and useful in every single chapter. This is simply the best book I have ever read on how to win cases for injured people.”

—Roxanne Conlin, member of the Inner Circle of Advocates, first woman president of the AAJ, partner/owner of Roxanne Conlin & Associates, P.C.

“The collective wisdom of my friends David, Artemis, Courtney, and Nick is staggering, so I expected great things. Beyond the fantastic insights, what struck me was the courage on every page. It takes courage and conviction to pursue maximum justice. It is easier to teach strategies than to dare delve into those core elements. This book is like having a gathering of wizards join in an epic quest where right and wrong hang in the balance. For the sake of us all, please read this fabulous book.”

—Keith Mitnik, author of *Don't Eat the Bruises* and *Deeper Cuts*, and senior trial counsel at Morgan & Morgan, the largest personal injury firm in the country

“For those of us who were raised with the belief that it was not polite to talk about money, this book is the perfect antidote. This dream team of trial consultants and trial lawyers shares wisdom learned over years working inside and outside the courtroom with focus groups. They raise, and help you answer, the hard questions that stand between you and a fair verdict. What good will the money do? How lost earning capacity and future potential is so much greater than a mere calculation of lost wages. How a verdict can result in justice. Whether you’ve struggled when asking for money or just need a new approach to damages, you need this brilliant book.”

—Randi McGinn, first woman president of Inner Circle of advocates and author of *Changing Laws, Saving Lives*

“What a team: proven and experienced top-of-their game Artemis Malekpour and David Ball are joined by rising superstars Courtney and Nick Rowley, with one creative idea after another. And along the way, they encourage us to be brave, inventive, and bold. I never try a case without a re-read of *Damages 3*, and it is typically thoughtful of Ball to provide an Appendix A with a cut and paste set of updates for my dog-eared copy. But perhaps a waste of paper, David, as *Damages Evolving* is certain to replace it as my new go-to.”

—Ann Oldfather, member of the Inner Circle member, regularly rated in the top ten or top three trial lawyers in Kentucky by *Super Lawyers*, listed in *Best Lawyers* since 1993

“In this highly accessible book, these authors explain everything you need to know about damages. We have all struggled with the best way to present damages and this great read provides the key to success. Everything is covered from ‘what good with the money do’ to (my personal favorite) ‘kindness’ (thanks Artemis). It is as if these brilliant authors have analyzed why trial lawyers failed in their presentations of damages and have given us the magic answers. I never thought any book could top David Ball’s book on damages but this book is the magical twin of *Damages 3*. A must read for all trial lawyers that want to up their game on damages!”

—Lisa Blue, past president of the AAJ and coauthor of *Preparing for Voir Dire* and *Conducting Voir Dire*

“In their new book, *Damages Evolving*, David, Artemis, Nick, and Courtney prove there is no one way to prove damages. This book gives their individual and collaborative viewpoints on proving damages in an everchanging world. As times change, our ways of proving damages must change. These authors not only explain and teach more effective ways to prove damages today, they foresee what proving damages into the future will look like. Absolutely brilliant!”

—Edward Capozzi, president of the New Jersey Association for Justice  
and author of *The Domino Theory*

“*Damages Evolving* provides innovative yet timeless insight into presenting all types of damages to a jury. It’s especially enlightening for those representing survivors of brain injury, which is uniquely difficult to communicate. This book reminds us why we do what we do, what we value, and how we convey that to a jury. I highly recommend adding this book to your arsenal.”

—Shana De Caro, chairwoman of the Brain Injury Association of America, past chair of the AAJ Traumatic Brain Injury Litigation Group, vice president of the American Academy of Brain Injury Attorneys, and member of the Board of Directors of the New York State Academy of Trial Lawyers

“This book is a rare treasure, in which Nick and Courtney do what David and Artemis teach and David and Artemis teach what Nick and Courtney do. What this book does differently is collect a vast array of tools, techniques, and different perspectives all in one place. Artemis brings the jurors’ perspective to the fore, David’s historical knowledge spans time and depth, while Nick and Courtney’s embodiment of the trial lawyers’ lens before and during trial jumps off each page. This book has been on my shelf for four weeks and I find myself reaching for it on a daily basis when editing opening statements, listing topics for witness examinations, drafting closing arguments, and reframing landmines, in addition to the moments when I simply need a nudge to get the creative juices going. This is the ultimate reference for plaintiffs’ trial attorneys and consultants, providing up-to-date strategies, storylines, and tried-and-true approaches for the unique challenges we face with today’s jurors.”

—Amy Pardieck, trial consultant at Perceptual Litigation, LLC

“This book is pure gold. David, Artemis, Courtney, and Nick synthesize the top trial strategies of our times, give credit where credit is due, and acknowledge there are differences and that is okay. They also weave in new turbo-charged methods that will help us teach jurors how to avoid the traps of tribalism and divisiveness and bring juries together to obtain justice for our clients.”

—Katie Bertram, 2018 and 2019 top medical malpractice verdicts in DC and Virginia

“Since the publication of his seminal work, *David Ball on Damages*, David Ball’s teachings have been required reading for trial lawyers. In the last 20 years, I have never prepared for trial without consulting and re-reading *Damages*. With *Damages Evolving*, David has combined with his longtime colleague, Artemis Malekpour, and the incredible trial lawyers Nick and Courtney Rowley to move the needle even further. *Damages Evolving* belongs on the desk, not bookshelf, of every trial lawyer.”

—Patrick Regan, fellow of the American College of Trial Lawyers, and member of the Board of Governors for the AAJ

“*Damages Evolving* turns the adage ‘you can’t teach an old dog new tricks’ on its head. *Damages Evolving* is for every trial lawyer, experienced and novice, who wants to be the best and satisfy the only goal of trial—to get money for your client. As an ‘old dog’ who learned new tricks from ideas sparked by reading *Damages Evolving*, especially chapter 10, I say thanks to Artemis, Courtney, Nick, and David for sharing. I love that the sections stand alone, which allowed me to quickly find what was needed as I prepared for trial without having to read every preceding word.”

—Karen Evans, past president of the National Black Lawyers Top 100, and past president of the Trial Lawyers Association of Metropolitan Washington, DC

“This is a book for those of us who seek civil justice for our clients from a jury. Trials are not won using paint-by-number formulas but by critically thinking through the strategies for a particular case. David et al. set forth ideas, tactics, strategies, and philosophies that are meant to be considered, learned, and modified. This stuff rings true. Check for example jurors as appraisers and alignment (on steroids). Having tried cases for over 40 years, I could not put the book down.”

—Charles Zauzig, past president of the Virginia Trial Lawyers Association and fellow of the American College of trial lawyers

“*Damages Evolving* helps trial lawyers feel their way into the hearts of their clients’ damages stories and explores the moral value of assessing human damages so that juries can provide righteous justice. A must read.”

—Karen Koehler, founder of the Velvet Hammer and past president of the Washington State Association for Justice

“*Damages Evolving* is an excellent addition to the research on litigation theory, particularly the chapters discussing building rapport with clients, presenting clients as exhibits (while protecting them from further harm), and respect and disrespect. David and Artemis continue to build on their well-developed empirical research on how best to communicate with juries, while Courtney and Nicholas demonstrate how they have deployed these strategies to secure record-breaking outcomes. This book is essential reading for trial lawyers committed to bearing witness to justice at the highest level.”

—Jalil Dozier, trial lawyer, Dozier Law Firm PLLC

“For many years now, David Ball’s books on damages have been the authoritative text and mandatory reading for us trial lawyers. Now with the changing times, this new book is again required reading. With his coauthors sharing additional viewpoints, the reader will feel like being in the middle of a ‘trial advocacy critical thinking’ master class. We all owe Ball, Malekpour, and the Rowleys a big debt of gratitude for writing this book.”

—Ernie Teitell, lawyer of the year for Medical Malpractice Law—Plaintiffs, Stamford, CT, 2021 and adjunct professor at Quinnipiac University School of Law

“I find it hard to accept that *Damages Evolving* may be David Ball’s last, as he proclaims. . . . [W]ith this extraordinary ‘last’ effort he brings the outstanding talents and vision of Artemis Malekpour, Courtney Rowley, and Nick Rowley. This will ensure the ‘evolution’ continues. Any trial lawyer, whether new to the pursuit of justice for the harms caused by others or a seasoned veteran will benefit enormously from *Damages Evolving*. Our gratitude to David for providing his brilliance for all of us in these pages and for bringing along with him such extraordinary talents.”

—Todd Smith, past president of American Association of Justice and member of the Inner Circle of Advocates

# DAMAGES *EVOLVING*

By David Ball, Artemis Malekpour,  
Courtney Rowley & Nicholas Rowley





Trial Guides, LLC, Portland, Oregon 97210

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*For Susan, more amazing every day.*

—David Ball

*To the most supportive and loving parents a daughter could have. My sweet Mom, the loss of you breaks my heart each day.*

—Artemis Malekpour

*To our children and yours.*

—Courtney Rowley and Nicholas Rowley



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# PUBLISHER'S NOTE

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This book is intended for practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

Many of the cases described in this book are actual cases, and the names and other identifying details of participants, litigants, witnesses and counsel have been fictionalized except where the case is identified by its principal parties, venue, and case number.

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# FOREWORD

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*By Rick Friedman*

In the year 2001, *David Ball on Damages* took our community of approximately 100,000 plaintiffs' lawyers by storm. It is fair to say that, with one little noticed exception,<sup>1</sup> *Damages* was the first book to provide us with comprehensive strategic advice on how to deal with the complex issues we face when we try injury cases. The advice was not only comprehensive, but spot-on.

After working for years with many of the best trial lawyers in the country, it would have been understandable if David had kept what he learned to himself. Instead, he took the best techniques and solutions he had developed and wrote an accessible, practical guide for plaintiffs' lawyers of all levels of experience, in all practice areas, in all regions of the country. Almost overnight, he raised the level of practice of the plaintiffs' bar. And almost overnight, lawyers began referring to *Damages* as the "Bible" of the plaintiffs' bar.

David went on to develop the Reptile system of advocacy with his friend Don Keenan, become a mentor to *Rules of the Road*, and write two more highly successful editions of *Damages*.

He could have stopped there. Or, he could have coasted along, writing additional editions of *Damages* on his own, while continuing his highly successful consulting business. But David is too intellectually curious and too intellectually generous to do that. Instead, he wanted to take his ground-breaking body of work to a new level.

Who better to help than his long-time protégé, Artemis Malekpour, and two of the most creative trial lawyers of our time, Courtney and Nick Rowley? These three had already taken David's ideas and pushed them into new incarnations, while coming up with innovations of their own. This was a recipe for an extraordinary book; but for added spice,

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1. The exception is Bill Barton's book, *Recovering for Psychological Injuries*, which was not properly marketed and never got the attention it deserved.



three more legal pioneers were asked to contribute: Dorothy Clay Sims, Aaron Broussard, and Pate Skene.

This book lives up to the reputations of its authors. If you are reading this, you want to be a better trial lawyer. Maybe you have tried a hundred cases, maybe none, but the fact that you are reading this book sets you apart from the majority of plaintiffs' lawyers—perhaps only 10 percent actually read books on trial practice. You want to learn litigation and trial tactics that will cause you to settle more favorably or win more often. You think reading this book can help you do that, and you are right.

What you hold in your hand is an extraordinary toolbox of trial tactics and techniques. Importantly, you are given not just the techniques—solutions to the problems we face—but also the reasoning of the authors as to why these techniques work. This gives you an opportunity many “how-to” legal books don't give: an opportunity to cultivate and advance your own emotional intelligence.

What is on display here is the emotional intelligence of some of the best legal strategists of our time. As they exchange views about some of the vexing issues we face, you will see not just *how* they solve a particular problem, but *why* that particular solution makes sense to them.

Great advocates have always known, even if they couldn't put it into words, that cases are not usually won by clever arguments but by a jury's emotional connection to the people and issues in the case. As you read this book, pay attention not just to the techniques being discussed but to the explanations given by these super-stars. You will get a good, long look at what has made them so successful.

Can emotional intelligence be taught or learned? I believe so. We learn what we pay attention to. So, as you read this smorgasbord of trial techniques, pay attention to the humanity that drives the techniques. You will be looking at the psyches of these authors—the fountainhead of their brilliance and success. Do not overlook it, it is a great gift they have given us.

Rick Friedman  
Bremerton, Washington  
September, 2021

# ACKNOWLEDGMENTS

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*By David Ball, Artemis Malekpour, Courtney Rowley & Nicholas Rowley*

## David Ball

Trial Guides' editor Tina Ricks has more patience, wisdom, and skill than any author deserves. Travis Kremer, Tina's follow-up editor who ushers Trial Guides' books through their complex and all-important final stages, has once again done his superb job on this one. Trial Guides and its founder, Aaron DeShaw, have armed, honed, and inspired more plaintiffs' attorneys than anything else this century. TG's multitude of authors generously share their best with all of us in their books and articles, blogs, seminars, workshops, webinars, Listservs, and informal assistance. Coauthor Nick Rowley has taught me things I'm ashamed to admit that at my age I still needed to learn. Coauthor Courtney Rowley . . . well, Courtney Rowley has become, of all things, a kind of role model for me. Coauthor and my JuryWatch partner, Artemis Malekpour, is among the best human beings I've ever known, and one of the best trial consultants. Without all these folks, this book—and I—would be far less.

## Artemis Malekpour

David Ball, my ever wise and generous mentor—your incredible support, trusted partnership, and true friendship over two decades has meant everything. No idea where I would even be without you. Dear Susan Chapek Pochapsky—you've done more than we ever should have requested or expected, and I'm in awe of the serenity and sanity you

lend to any situation as you've kept this train on track all these years. Courtney and Nick Rowley—what a treat and great honor it's been to collaborate with you both. My admiration has only deepened as I've watched you work, think, and share your vast experiences and intense passion, striving for a more fair, just, and better world.

Tina Ricks—I'm so thankful for how you put up with us through this project, always with a positive, encouraging mindset. Your guidance and insight have been invaluable as you've navigated us through so we could all be proud of what we released. Heather Sharfeddin—thank you for the time you took to get this collaboration rolling. Travis Kremer—thank you for pulling us across the finish line to produce an honest-to-goodness book (cover art and all). Aaron DeShaw—my gratitude for providing such an amazing, innovative platform for the legal community to constantly learn from one another and including me in it. Your commitment to maintaining top-tier quality extends to the Trial Guides team you've assembled, and I very much appreciate how hard you all always work.

So many law firms, trial lawyer associations, consultants, and sponsors to acknowledge in this limited space—I'm grateful for the relationships we've developed, the ideas shared, and the friendships I've gained. And to all you lawyers and legal teams fighting the good fight—thank you for having the strength and fortitude to stay in the ring and do all the heavy lifting, time and time again.

## Courtney Rowley

I am so grateful to this beautiful group of people. Getting to write a book with you: David, Artemis, Nick, Tina, and Aaron, it's beyond special. Tina, thank you for your calls, your friendship, and for having the courage to go first and report back for all of us. Aaron, thank you for showing up, constantly, and putting it all on the line for our profession. David, I love the way you question, re-evaluate, and laugh. And

Artemis, you oracle, you always know what we (humans, me) need, especially when we don't know it ourselves. My husband, my babies, my family, and my brother, thank you for editing the shit out of my writing and my self-doubt. Nick, thank you. For all of it.

## Nicholas Rowley

Courtney Rowley. You are my moon, my stars, my universe, my everything. The lights came on when we got together, and I have been in love with you since the very first time we met in Dubois, Wyoming. Your courage, loving heart, and work to make this world a better place for our children is something I see every day. You have no idea how proud I am to be your husband and that I get to practice law and try cases with you and live this life with you. You are the best trial lawyer I have ever seen in a courtroom; I look up to you, always have, always will.

Aaron DeShaw. You have created a platform that restored balance to the force. I am the trial lawyer and human I am today very much because of you and Trial Guides. I have seen you stand up for people and do what is right when others won't, many times. My appreciation and respect for you has been there since the beginning, and it grows more and more as the years go by. Thank you.

Each of our children, the Rowleys! Tristan, Corban, Nicholas Jr., Evan, Elan, Finlay, Cora, Emma, Odan, Greta, Una. I love each and every one of you so much and am so proud of you. And, Ethan. I never got to know you, you were only here for a few days' time after you were born. Your memory and never forgetting what happened to you has driven me to work hard to make the world a safer place.

Tina Ricks. Nothing happens without you. You are the foundation for what we do and work harder than anybody we know. This project is proof of that, along with every other book Trial Guides has published. Thank you, thank you, thank you, and thank you for being our friend and somebody we know we can always count on.

David and Artemis. Thank you for doing this project with us. We are so honored. If somebody would have said that I get to write a book with you and Artemis thirteen years ago, I would have said “No... Way.” Even sitting here now, the thought of it is mind-blowing. I look up to you both so much. When I started practicing law, I had no clue what I was doing when it came to damages and how to present a case to a jury. I have read every published word you have written and absorbed your teachings like a sponge. You are always working to evolve and setting an example for us. You have both become dear friends, and that means the world to me. Thank you for being you.

Rick Friedman. You have been a mentor, friend, and helped me evolve in ways nobody else has. You calmed me down—you and Gary Dordick, actually. I wouldn't listen to him at first, but then I did after that phone call that you made to me on a hot summer's day in Decorah, Iowa. I remember where I was, sitting on the porch in my backyard, and the talk we had. Since then, you have been somebody I have been able to call on for advice, and a person I am proud to call my friend. I read everything you write and reread it. Your books and teachings are second to none. I would not be the me I am now without you.

Gary and Nava Dordick. You are our big brother and big sister. Gary, you are the best of the best, and have had such a tremendous influence on my career. Nava, I cannot wait to see you in a courtroom, I am so proud that you are in law school. You both have loved us so much, mentored us as lawyers, spouses, and parents, and have been our biggest supporters all along the way. You mean the world to us. Thank you for being in our lives. We love you.

Carney Shegerian. I love you and respect you so much, brother. I've learned so much trying cases with you, and I have never seen a lawyer so respected and loved by judges and juries. You have had a tremendous influence on me.

Keith Mitnik. Man, oh man. I could go on about you forever. And I know you would love that! When your book, *Don't Eat the Bruises*, came out, I looked at it and said, “What the heck is that?” I bought it with a chuckle. Man, oh man. Career changing! Your podcasts, webinars,

and book have changed lives, especially ours. Thank you so much for all you do for so many.

My partners in business, in law firms, and on trials the past twenty years. My time with you will always be in my mind and heart.



# DO WE AGREE?

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*By David Ball, Artemis Malekpour, Courtney Rowley & Nicholas Rowley*

Most of the time we're all in agreement. But not always. In this book we don't try to be. We're not a committee. We're not a jury deliberating the more-likely-than-right best way to do things, because there is no one best way. Agreement among us would have led to compromise, and compromised strategy makes for compromised quality. So we each speak for ourselves and read each other for enlightenment. As should you. In this book you are going to learn different strategies and finish with different tools to add to your toolbox, to use at different times, on different cases, at different skill levels, and at different stages of your career.

When you spot a disagreement among us, it's not an aha! moment. It's evolution. Not everything that flourishes evolves the same way.

That said, we mostly agree with each other because we see the big picture in much the same way. But when we don't agree, you should not take sides. Instead, take heart. Choosing one favorite way and sticking to it stops your own evolution dead in its tracks. Don't be dead in your tracks. When we disagree, use it: master both ways. Find an even better way and share it with us. See what best fits you in each particular case.

In other words, always evolve—and do it together with us.





# INTRODUCTION

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*By David Ball, Artemis Malekpour, Courtney Rowley & Nicholas Rowley*

## Cognitive Dissonance

*(Courtney Rowley & Nicholas Rowley)*

Let's talk about the pain of our landscape and our cognitive dissonance. *Cognitive dissonance* is defined as the state of having inconsistent thoughts, beliefs, or attitudes, especially as relating to behavioral decisions and attitude change. We have become so divided as a country; we are inundated with information, much of which is unreliable at best and deceptive at worst. When people don't like the news, they call it "fake." We believe what we want to believe, not what is real or true. We have never been more divided in the modern era. Jurors bring this division and cognitive dissonance with them when they come into the courtroom. A lot of people feel that because of political and religious beliefs, the most important thing is who we—the lawyers, the judge, our clients, and other jurors—support or don't support politically. But that isn't what matters. While we must acknowledge that which divides us outside of the courtroom and talk about it, it's our job to bring our jurors together as members of one community. We must help them understand and commit to leaving our differences outside the courtroom and finding the common threads that weave us together as caring human beings. One of the reasons we are so divided is that we all care as much as we do! We are all Americans here, regardless of our religious or political beliefs, and we come to the courtroom with a shared belief of the fundamental right to life, liberty, and the pursuit of happiness. We all have so much more in common than we have differences. When tragedy and catastrophe strike, humans come together. We see this when communities are ravaged by hurricanes, floods, and terrorist

attacks. All of a sudden, people band together for the greater good. It happens every time, and this is what jury trials are about, the greater good and achieving justice.

Jury trials are one of the last public places where people work together to achieve a common goal. It is our job to preserve and better the jury trial method of achieving civil justice and a fairly balanced criminal justice system.

We are certain that these revolutionary divisive times will work to our advantage because people across the board are, frankly, sick and tired of the bullshit. In our trials we get to cut through the bullshit with real evidence and real human stories and give jurors real power. People actually long for what we get to do in the courtroom—provide actual evidence, truth, justice, and the ability to vote and make a real difference.

We should always honor what is going on in the world—not in an exploitive way, but by way of exploring and acknowledging what our jurors are feeling. We need to ensure that they are able to work together with other humans to do the job that is required of them. Many people feel powerless right now, but in courtrooms we get to change that. By framing our cases the right way and empowering our jurors, we have the opportunity to give ordinary people the power to act—to actually make change, participate, and effectuate justice. The American jury has a uniquely individual power to make decisions that matter, and it's the only place in the world where ordinary citizens have such power. Now more than ever is the time to remind our jurors that this case is the one place in America where their individual vote matters in a visible, verifiable way.

In this book we talk about how we can help jurors recognize and erase the divisiveness and become unified for justice. We must always stress the importance to jurors of following the rules and the court's instructions and not looking one another up online to find out who aligns with their personal beliefs and who doesn't. Ask jurors for their commitment not to do that, and be specific. It is our job to help jurors see that this only deepens division, and division blunts justice.

We will teach you how to stop framing cases in terms of “economic damages.” That method is outdated and shortchanges the true value of civil justice for our clients while playing right into the hands of our opponents. Using economic damages as the foundation for our cases was and is a huge mistake. In fact, when we base the value of our cases on the socioeconomic status of our clients, we are complicit in a system wrought with socioeconomic, racial, and gender discrimination.

When we insist on values for our cases based on the human losses, the noneconomic losses, we bypass the societal bias and begin to rebuild a system where cases are valued on humanity and story, not income, job status, or opportunity (or lack thereof). It’s up to us to lead the charge together to refocus what damages are, and the true value of human loss, by using jury instructions and the power of the human story. We can ensure that jurors value cases based on what truly matters to people: their most valuable assets, the noneconomic ones.

Noneconomic damages, assets, and human stories must become the heart and center of our cases and trial strategy. A reasonable jury verdict is one that accounts for every dollar of the full value of damages, harm, and destruction of every noneconomic asset that belonged to our clients.

Trial lawyers are tasked with empowering ordinary people to write the ending chapter and assign value to stories of real human loss and tragedy. Their unified decision becomes a permanent record that exists forever. This is human, and the humans involved can go back to their children or their grandchildren—ten, twenty-five, or fifty years from now—and say, “This is what the power of the jury decided. This is what members of the community had to say. We are proud of what we did and being part of the justice system.”

# Who We Are

David Ball

*It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change.*

—Charles Darwin

An asteroid extinctified the dinosaurs—not by landing on their heads but by changing their world’s conditions so quickly and severely that nary a dino could survive.

Evolution requires the rare ability to adapt to surrounding conditions quickly and well enough to survive them. One of the things that’s been changing in our world is the nature of juries. As of this writing at the end of 2020, we’ve had three major changes with a likely fourth on the horizon. And more on the way.

So come evolve with us. The alternative is unthinkable.

## Why a New Damages Book?

For more than a decade, people have told me, “*David Ball on Damages* is the plaintiff’s Bible!” Yeah, well, thanks but not quite. Bibles don’t evolve; trial advocacy books must. This normally means a new edition. And in the decade since the third edition of *Damages* came out, especially over the last couple of years, Artemis and I have developed and tested a raft of new approaches, strategies, and methods. One striking example is the addition of new and severe noneconomic harms. Much of the new stuff comes from what science has been learning about the kinds of things that highly impact people and how people make decisions. More was based on what experience has been teaching us about changes in decision-making. And we had refinements to some of *Damages*’s strategies. So Artemis

and I began thinking about *Artemis Malekpour & David Ball on Damages*, 4th Edition.

The problem was this: Most of *Damages 3* is more essential than ever. A *Damages 4* would necessarily replace #3. That means #4 would have to include more than four hundred pages right out of #3. And most attorneys had filled their copies of *Damages 3* with their own highlights and marginal notes, so there was really no replacing it.

So what to do? A supplement? I hate book supplements, and there was too much new for a supplement. Newsletters? Blog? Seminars? Workshops? *Damages 3* and *4* in print at once?

While we were mulling this over, Nick called. Nick suggested that he, Courtney, Artemis, and I write a book about the *evolution* of damages strategies.

Bingo!

A few years earlier, Artemis and I had been hearing about the astonishing Rowleys, who'd been bringing in a string of uniquely high verdicts. We'd asked ourselves what they were doing—what *could* they be doing—to make such a difference. Magic? So we looked into it. We read, we watched, we analyzed. At first I thought it was just plain charisma, of which the Rowleys have plenty. And charisma is important—so important that it's the subject of my next book. But charisma did not turn out to be the whole answer to the Rowley puzzle. Charisma, after all, is kind of useless unless you know what you're doing and why you're doing it. So they had to have some other secret.

Turns out it's no secret, because they'd been teaching it to lots of others. And the most important parts were the parts they invented.

What inventions they were!

So when Nick suggested we do a damages book with them, we thoughtfully considered for, well, about fifteen seconds, and then jumped in. Such a book would house the new material Artemis and I had been developing and the necessary *Damages 3* updates to keep *Damages 3* as current as if we'd just written it—and combine it with the rich input of fundamental thinking and brilliant strategy from the Rowleys on how—and why—they do cases.

After all, things had evolved. So we'd call the book *Damages: the Evolution*. But as we learned during the unruly upheavals of 2020, things—including things in the jury—were still evolving, and at an increasingly faster rate than ever. Hence our more accurate title: *Damages Evolving*. We'd not only cover what we all know right now but also how to adjust and prepare for the future unforeseeable changes inevitably coming—including some that came along even as we were writing.

Damages are especially sensitive to these ongoing, unpredictable changes; attitudes about who is deserving and why, who is not and why not, and what constitutes responsibility are almost weathervanes of social change. While the world has understood negligence for eons without much change, attitudes toward reparation have always been quick to change with the nature of the times. So we must constantly adjust, modify, and reevaluate our damages strategies.

When it comes to strategy, there are only two ways for us to prepare you for the unforeseeable:

1. Provide strategies and frameworks that will probably survive the unforeseeable. This requires concepts based on fundamental human nature, which does not change as the world changes around us. The *alignment* method in chapters 14 and 15 will survive whatever changes the future throws at us because it is rooted in exactly how the brain makes decisions. And the book's new understanding of the power of respect versus disrespect is rooted in basic human survival, so it won't likely change either.
2. Show you when and how to adapt the book's ways on your own for whatever those changes might be. Some strategies that are ideal for today may need changing as time goes on.

*Damages Evolving* wants to keep you ahead of the curve as our world—and thus our jurors—undergo faster and more abrupt changes than we've ever seen. Trial lawyers must be armed and ready. Evolution, after all, is the survival of the fittest.

So joining forces with Nick and Courtney, and with my ever-astonishing partner, Artemis, seemed the most useful thing I could do at this stage of a long career. And we want you to come with us on this voyage, because there's more at stake than any of us know.

## David's Final Book?

Not quite. One more book to come: *Magic and Charisma*. But that'll be it.

I'll continue working on cases, not books. But there'll be no shortage of good new strategy books, because so many good strategists are writing. The next generation has taken the ball, so to speak, and they're running with it better than I ever hoped they would. *That's* evolution.

Three of the best evolvers are this book's coauthors. Nick and the amazing Courtney are as good as trial lawyers get, and Artemis—also a lawyer—is as good as trial consultants get. All three are obsessed with helping others be that good, too. And all three have the track records to prove they're always on the right track.

I like to think, however immodestly, that I had something to do with unleashing today's wealth of trial strategy approaches, books, seminars, and webinars. When I started my first strategy book in 1993, I was told, "People don't write about strategy! Write about trial law, kid. Now there's the ticket!" Yeah, well I'd just spent two full-time years watching trials. Every day in court, every glance at juries, every juror who told me their reaction, made the lack of persuasive advocacy strategy astonishingly obvious. So I wrote strategy. It worked out pretty well. And it demonstrated to publishers the wisdom of issuing strategy books.

So just one more book from me but many others from writers to come. But I'll keep working on cases so I can go on learning every day from folks like you—and from my coauthors. The Rowleys—the Jessica Tandy and Hume Cronyn of trial teams—are not only amazing trial lawyers but amazing human beings. (I was going to tell a story here about Nick and me and error and anger and regret and my ego and time passing and forgiveness and the evolution of our relationship and



my own evolution. But I'll spare you, other than to say that evolution required either Nick or me to be an amazing human, and it wasn't me.)

And with Artemis, I followed the maxim to team up only with people smarter than me, though I'd never intended to follow the maxim quite that much. Just a bit smarter would have been enough. She's been the best possible research, strategy, and consulting teammate, and now team leader. No one's better suited to outrun me with the ball.

As for my other best teachers, meaning *you* in the trenches: I never thought I'd love a profession as much as I once loved working in theater, but y'all have made me love this one more. Your hallmark is your obsessive dedication to a near-impossible field.

I love having helped a little.

## Artemis Malekpour

I was in law school when I first heard of some guy named David Ball. I was sitting in the office of the only member of the law school faculty who was actually a social psychologist, asking him what I could do to combine my love of psychology with my fascination with law that did not directly involve representing people (as that summer internship after my 1L year had confirmed that the weight of my intense, almost irrational degree of empathy would certainly crush me in a traditional advocacy role). That's where I learned of this thing called "jury consulting," and fortunately this Ball person happened to be in Durham, North Carolina, doing just that.

So I reached out to David, we met up at Elmo's Diner on Ninth Street, and I still had no idea who he was or what he did by the end of that meal. He invited me to a focus group he was conducting, then threw me (an introvert who's got documentation dating back to kindergarten of "tummy aches" when having to do anything new) into moderating a discussion with a group of strangers after David's case presentation. The exhilaration I felt on that ride home, recounting all the opinions these participants had shared, how they interacted with

each other, their efforts to sway, and what conclusions we could make to help those lawyers and their client—David might as well have pushed me off a cliff into the most giant pile of feathery pillows submerged in lavender scent. I was hooked—I knew I wanted to do what David did. And he was beyond generous to take me on as an intern, even though it was probably the last thing he wanted to do, assume responsibility yet again for training someone toward (hopefully) a successful career.

It was a full year before I figured out this David dude was actually kind of a big deal in the legal world, and some book that he had written (at that point, the second edition of *Damages*) was considered the Bible of the plaintiffs' bar. Because—no matter how many jokes even he likes to tell of having some immense ego—ultimately, for David, his heart and his life's mission are to do whatever he can to help people. Sure, the praise is nice, but it's not his purpose. He is itching to problem-solve and do good for others. That's what he's done for me every day I've known him. And that's what he's been doing for you, all these decades, using that crazy wicked-quick brain of his to come up with the most effective strategies to get justice for your clients. You cannot have a better, more loyal champion in your corner, and you and I are incredibly lucky that he's in ours.

I was introduced to Courtney and Nick maybe a decade ago. It was initially by reputation only—there was some young lawyer on the West Coast who was doing these amazing things and getting really big verdicts across the country. Then I found out that actually he wasn't doing it alone—he had this partner (both professionally and personally) who was carrying half of that heavy load, and they were running with it. I briefly met Nick first, as he showed up to provide support and wisdom on a case where the attorneys had brought me in for jury selection. It was enough to make an impression—young face, tattooed arms, kind smile, supersmart observations—but too quick an interaction to get to know him or really see him work. How he was able to connect so well to cases, clients, and jurors still remained a mystery.

My next opportunity, I got to meet both Rowleys. And very frankly, as curious as I still was to figure out who this successful Nick fellow

was and get to know him beyond the pages of his fascinating *Trial by Human* book, it was Courtney who instantly stole my attention.<sup>1</sup> And that's when I got it. You want real, brutal honesty, delivered with such sincere warmth, care, and humanity, look no further. Within minutes, I understood why these two brilliant trial lawyers, each alone and both together, commanded great respect and admiration from their peers. Courtney and Nick have this innate ability to cut through the mess of weeds and get right to the heart of the matter, to what's important, and to make others feel important and valued. And the fight in them, identifying injustices in the system, taking those tough battles head-on, and refusing to back down until good work is done so good people prevail—good grief, you better get out of their way. They have shared so much of their time and knowledge with so many, and been so successful in their right, I'm often perplexed how they're able to do it all. But—same as David—it comes from this place of wanting to give, to have a meaningful impact on their community and watch others thrive.

That's the spirit and intent behind this labor of love that is *Damages Evolving*. It wasn't the easiest book to write—multiple authors with varying skill sets, each holding strong views, in a world turning upside down, causing us to question and explore everything from all different angles. Our initial goal with this project was not to agree for agreement's sake, but to challenge each other, and you the reader, to consider different approaches and dare to get beyond a template. To (yes) evolve with the times and the unique experiences our jurors—these humans—are having. Going in, we did not realize how essential that task would be for all of us. Emerging out, it's my hope this collaboration gives you the tools, strength, and grace to see your cases, clients, communities, and even yourself through wiser eyes and a more enlightened perspective, recognizing that we've all gone through some things that have shaped who we are, how we think, and what we do. From that space of great patience and understanding, do good and go advocate.

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1. Nicholas Rowley and Steven Halteman, *Trial by Human* (Portland, OR: Trial Guides, 2013).

## Courtney Rowley

When I tried my first civil case, I knew nothing about the structure of a civil trial. Up to that point, I had only done criminal defense trials. I had never gone first, never put a client on the stand, and never ever asked for money. But I had a client, someone whose case no one else would take, and I had David Ball. Someone gave me a copy of the first edition of *Damages*. I read it, reread it, and made my trial notes in it. To this day, I have my coffee-stained, dog-eared copy of *Damages* that I turn to when I am writing an opening, putting together a cross, or trying to get my thoughts in order for trial. With *Damages*, I didn't need to be part of a fancy firm; I didn't need someone else's permission. Because of the outlines and resources in that book, I was able to competently and effectively try my client's case, on my own terms, and many, many more after that.

I met Artemis a few years later. I was immediately blown away by her mind, her clarity, and her calm, steady energy. I loved, and still love, talking with that shamanic woman. I love her depth and her passion for understanding how people think, what they care about, and how they make decisions. Her unique and measured insight is always crazy helpful because it is full of empathy and understanding. She loves people. You can feel it in her voice. With her years and years of deep, curious, compassionate listening to *real people*, she helps us unlock our intuition and gives us courage.

Imagine what we could do with a little more compassion, a little more curiosity—for ourselves, for the people we represent, for our jurors. Imagine the effect that could have on our cases, in our lives, in the world.

All lawyers are civil rights lawyers. We are all responsible for the care and betterment of our justice system. How we value our cases will affect the rights and value of cases to come. When we base the value of our cases on the socioeconomic status of our clients, when we base the value of our cases on economic damages, we are complicit in a system wrought with discrimination. The path to change, the path

to fully valuing all humans, the path back to equal civil rights, is with noneconomic damages. And we find that path with empathy, compassion, and listening.

## Nicholas Rowley

I remember the day in 2002 when David Ball came into my life. I was a certified law student making court appearances, trying cases, and waiting on bar results. I was preparing for a jury trial on a medical malpractice wrongful death case, and I asked for advice from a respected trial lawyer who told me to get this new book called *Damages*, put out (at the time) by the National Institute for Trial Advocacy. I ordered it the next day, and it changed my life. David Ball and his partner, Artemis, have been with me every step of my career. I am indebted to them, as are the humans I have had the honor and privilege of representing the past twenty years. Without David and Artemis, I would have nowhere near the courtroom success I have had. The first *Damages* book taught me to spend at least half of my time with the jury focusing on damages and provided me with basic tools I had never heard of. It provided guidance and a step-by-step approach to simplifying the legal mumbo-jumbo and jury instructions, discussing damages in a way that made sense. I carried this little *Damages* book with me everywhere I went—depositions, court appearances, jury trials.

It's been twenty years since that first introduction to *Damages*, and I've remained a student of *Damages*, and David and Artemis. Even today, when other lawyers ask me what a lawyer needs to do to get big jury verdicts and have great success in the courtroom, my answer is, "Read or reread *Damages*." I could have never imagined having the honor and privilege to coauthor a book with them.

Using what I learned over the years and testing those theories and methods in more than 150 jury trials, I am proud to be part of the evolution. I am proud to help you learn how to better frame and value your clients' cases through the human stories of their noneconomic

assets and damage to those assets. What should the reasonable value be for loss of life, liberty, or pursuit of happiness when a person's body (neck, back, leg, face, hand, arm, or brain) was permanently damaged by negligence? What is a reasonable dollar value for the loss of love, companionship, comfort, society, and fellowship of a spouse, sibling, parent, or child who is negligently killed? How do we get jurors to deeply care and understand that the defense is wrong, that they're adding insult to injury by saying the case is worth less and by frivolously defending the case? What are the human stories that illustrate the pricelessness of noneconomic damages, and how do we weave it all together with jury instructions and with expert and lay witnesses, so that a small group of humans have the courage to sign their names to a large verdict that proudly respects and honors the people who trusted us to be their trial lawyer. Roll this around in your mind, your heart, your soul, and stay tuned, because you are starting to evolve already.

## ***Trial by Human Lawyers***

*(Courtney Rowley & Nicholas Rowley)*

Trial by Human is not a method; it's a call to action to fight for real people—to stand up for civil rights and promise to never sell out cheap. We don't represent insurance companies, big corporations, or the government. We also don't run settlement mills and advertise to lure masses of people into our offices, turn them into a file number, and process them like widgets! We believe the practice of law is a calling and duty more than it is a business and that a rewarding successful career comes from putting our heart and soul into caring greatly about the humans we represent, helping them achieve justice and restore balance to the damages that have been done to their lives. When life and non-economic assets are damaged (hurt, destroyed, or killed), our job is to discover the human stories and make them the centerpieces of the case.

We get to be a part of something extraordinary as trial lawyers. We are the ones who lead the way and motivate everyday, ordinary people (jurors) to make the rich (insurance companies, big corporations, and the government) pay the civil justice that is due to injury victims and families. The conglomerate elite and those in power would do nothing to provide recompense to injury victims and families if they could get away with it. Our job is to make sure they are held fully accountable and that every dollar of civil justice under the law that is available is paid to the humans who deserve it.

## Achieving Justice through Jury Trials

Defense teams—insurance, corporate, and government claims adjusters and defense lawyers—make decisions based on selfishness and greed. They are often despicably behaved and uncaring. When they tell you that they care, don't believe them. Tell them to put their money where their mouth is. Their actions will always show you the falsity of their cheap, self-serving words. These desplicables take advantage of and prey on people's fear. They treat good people and human loss cheaply, employ frivolous defenses and delay tactics because of greed and selfishness to protect the bottom line, and become more gluttonous. These bullies have gotten away with their bad behavior for far too long, and we must teach them that they cannot get away with it anymore. Together, we are the ones who will teach them a lesson over and over again as long and as many times as it will take.

## The Trial by Human Listserv

Our tribe of Trial by Human lawyers ([trialbyhuman.com](http://trialbyhuman.com)) is growing, and anybody who is part of our Listserv will tell you that we are accomplishing more as a team than we are as individuals. Our Listserv connects lawyers from the East Coast through the Midwest to the West

Coast, as far north as Alaska and west to Hawaii. Use it to ask questions, find your courage and motivation, or to find somebody to jump into a trial with you at the last minute if you need help. Most importantly, share your stories in a safe, privileged forum where lawyers just like you need help.

## The Cases in This Book

*(Courtney Rowley & Nicholas Rowley)*

Throughout this book, we refer to different cases and experiences. In addition, we provide transcripts and in-depth, case-specific examples. These examples focus on a few specific cases—*DeJongh*, *Guzman*, *Huitt*, *Lyons*, and *Pellock*—as well as excerpts from several other cases not listed here. Some of these cases are also used in Nick and Courtney’s recent book with Wendy Saxon, *Voir Dire and Opening Statement*.<sup>2</sup> These are a variety of different kinds of cases.

It is important to know that the four of us have all done—and continue to do—many smaller cases. We got where we are today by doing smaller cases that resulted in much smaller jury awards. Nick and Courtney tried case after case and applied the techniques and strategies you’ll see in this book on those smaller-dollar cases. We believe that taking five- and six-figure cases to trial are just as important, and often more difficult, than the larger cases. Trying tough cases that don’t sound glamorous is important to gaining experience. All trial lawyers should continue to do it throughout their careers. What might seem small to one person can be a catastrophic, life-changing event to another. The insurance companies considered each of our example cases as low or even zero-value cases—compared to the results in trial.

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2. Nicholas Rowley, Courtney Rowley, and Wendy Saxon, *Voir Dire and Opening Statement* (Portland, OR: Trial Guides, 2020).



## The Transcripts in This Book

Selected excerpts of the trial transcripts from the following cases and others are used throughout this book to demonstrate the principles that Nick and Courtney use and recommend. These excerpts are abridged for readability and context, and they do not always appear in order. We indicate omitted content with ellipses (. . .) and clarifying additions with brackets [ ]. Juror names—which were used during voir dire—have been omitted for privacy. Some defendants’ names, such as in the *Guzman* case, have also been omitted to preserve privacy or comply with prior agreements.

### The *DeJongh* Case

*Medical malpractice, wrongful death: healthy forty-two-year-old wife and mother dies from allergic reaction to contrast dye during a routine CT scan.*<sup>3</sup>

The *DeJongh* case was a medical malpractice, wrongful death case we tried in 2018 in a courthouse in Orange City, a small Dutch Reform town in very conservative Northwest Iowa. It is a place where there are no oranges and where the insurance company was confident it would win—another place no one in history had ever won a medical malpractice case or a large jury verdict. The jury deliberated for less than three hours and returned a record noneconomic damages verdict of \$29.5 million, every dollar we told the jury they should give. Carrie DeJongh, who was negligently killed, was a stay-at-home wife on a small farm and mother of four children. She was forty-two years old and died after suffering a severe, but treatable, allergic reaction to contrast dye that was injected into her body for a routine CT scan.

The children Carrie left behind are Anna, Beau, Mandi, and Jaelyn—the youngest was just four years old when Carrie died. Carrie was married to her best friend Jeff DeJongh for eighteen years. She was

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3. *DeJongh v. Sioux Center Health*, Sioux County, Iowa, Case No. LACV026141.

physically present for every one of her children's school and sporting events, she helped them with their homework, and except for a couple short vacations with Jeff, she never spent a night away from them.

After Carrie's death, her oldest daughter, Anna, had to take on the responsibility of caring for her younger brother and sisters. Jeff described the change in his daughter Anna's life as immediately jumping into the role of being a parent. She cooked and did laundry, helping her father with the household and the farm. The youngest, Jaelyn, barely remembers her mother. Now when Jaelyn needs help with her homework, she goes to people outside the family. She sees Anna as more of a mother than a sister.

Carrie should be alive today. All it would have taken was one injection of life-saving medication (epinephrine) to save her. She died because of clear and egregious medical negligence. While the antidote for anaphylactic shock sat on the counter next to her, Carrie went in and out of consciousness and struggled to breathe. The emergency room doctor failed to give her the medication she needed until it was twenty-five minutes too late, and after her heart stopped, starving her brain of oxygen. The defenses at trial, told through three separate top-notch university professor experts hired by Midwest Medical Insurance Company (MMIC) and their lawyers, were absolutely frivolous. We had a single expert, an old emergency room doctor, whose experience came from the trenches, versus their three fancy-pants down-talkers.

We were brought into the case as trial counsel because the insurance company, MMIC, and its claims manager Dawn Domsten refused to make a reasonable settlement offer to the family prior to trial. While we are very proud of our work, our clients, and the unanimous jury who set the record straight, trying the case was absolutely heartbreaking.

## The *Guzman* Case

*Traffic crash, wrongful death: immigrant farmworker is killed by a truck driver.*<sup>4</sup>

*Guzman* was a wrongful death case with disputed liability until mid-way through jury selection. We tried this case in 2018 in Modesto, California. After deliberating for approximately forty-five minutes, the jury returned a unanimous record-setting noneconomic damages verdict opposite one of the best defense attorneys on the West Coast, Scott MacDonald, of \$14.6 million. This verdict was for the two adult daughters and surviving wife of a fifty-four-year-old Mexican immigrant farmworker. Noneconomic damages included loss of love, comfort, protection, assistance, moral support, and society.

Luis Guzman was a dedicated husband, father, and grandfather, and he worked hard his entire life. On September 9, 2015, Luis dropped off his son at work, then drove southbound on Highway 33 in Stanislaus County to the farm where he was employed. It was 5:54 a.m. As he slowed to make a left turn onto Lemon Street, he was hit from behind by a 26,000-pound commercial truck. Luis's vehicle was pushed into oncoming traffic where it was struck by another vehicle, killing him and injuring the other driver. He was pronounced dead at the scene.

The lawsuit was brought against the company that owned the commercial vehicle that hit Luis. However, it was ultimately the insurance company that was in control of whether the Guzman family would be paid reasonable compensation under the law. Our opinion about why the case went all the way to trial is that the insurance company was apparently confident that conservative jurors in Stanislaus County would not return a large verdict for the family of an immigrant farmworker.

The evidence at trial showed that Luis Guzman did not have or hang out with friends. After work each day, he went straight home and spent his time with his family. One of his daughters and her children lived with Luis and his wife, and his other daughter lived less than ten

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4. *Guzman v. Holt of California*, Superior Court of the State of California for the County of Stanislaus, Case No. 2017785 (consolidated with Case No. 2026560).

minutes away. Having supper together as a family was an everyday event, and on Sundays—every Sunday—Luis Guzman got up early to make pancakes for the entire family. He married his wife in 1983, and once they were settled in Modesto, they never spent a night apart. This family would give back every dollar of the verdict just to have Luis back in their lives for even a month. They never got a chance to say goodbye to him. While the verdict will never come close to replacing their loved one, it holds those responsible for his wrongful death accountable and makes the insurance companies involved pay.

This is still a very emotional case for us. It was about a family that lost a husband and father. Not only did the unexpected loss of a loved one put a tremendous financial burden on a family but the impact on every member of the Guzman family will be present for the rest of their lives. The jury could feel the love this family had for their husband and father and returned a verdict accordingly. In a statement after the verdict was received, Courtney, who represented Luis Guzman's two adult daughters at trial, said, "The relationship between a father and child, and the loss of the love and companionship of a father who is negligently taken, is something that the law honors. We were confident that a jury of good 'salt of the earth' people in Modesto would put a great value on this case. The jury did just that, and we hope that this changes the way insurance companies value loss, not only in conservative Stanislaus County but across the country."

## The *Huitt* Case

*Medical malpractice: unnecessary prostatectomy renders sixty-five-year-old man incontinent, with loss of erections.*<sup>5</sup>

At age sixty-five, Rick Huitt had just retired after forty-one years as a welder at John Deere. He and his wife of forty-five years, Judy, were looking forward to spending their golden years enjoying their family

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5. *Huitt v. The Iowa Clinic*, Iowa District Court for Polk County, Law.: LACL139726.

and living life. But during a prostate cancer screening, his physician noted a spike in his prostate-specific antigens (PSA) and a firmness to one side of the prostate. He was referred to a urologist, Dr. Carl Meyer at the Iowa Clinic, where he underwent a biopsy. The biopsy specimens were sent to the Iowa Clinic's pathology lab for testing, and a couple days later, he had cancer—a large amount—in his prostate. So much, in fact, that Dr. Meyer told him that without surgery, he might have five years to live. With surgery, Rick could enjoy a normal life expectancy, but would most certainly have erectile dysfunction and incontinence. Faced with these choices, Rick chose to live and be with his family.

On April 3, 2017, Rick underwent a radical prostatectomy, and everything went fine. Because of the amount of cancer set forth in the pathology report, Dr. Meyer was unable to preserve the nerves necessary for an erection or the muscles affecting urinary continence. On April 26, 2017, Rick and Judy received devastating news: the pathologist who examined Rick's removed prostate did not find cancer! To make sure, Rick's prostate and the needle biopsies were sent to the Mayo Clinic where they confirmed that he did not have cancer.

Today, Rick suffers from erectile dysfunction and incontinence, and he will live with these conditions for the rest of his life. It was painfully obvious that this was a major screwup by pathologist Dr. Joy Trueblood. Dr. Meyer wrote in a note of April 26 that the pathologist apparently switched the names on the reports indicating that Mr. Huitt had cancer when in fact he did not. Rick and Judy hired two really great Iowa lawyers, Mark Hedberg and Randy Shanks, to represent them. To avoid embarrassment, Randy contacted the Iowa Clinic and was directed to its insurance adjustor at Midwest Medical Insurance Company (MMIC), Nicole Graziano. After some discussion, Ms. Graziano informed Randy that these types of cases had a settlement value of \$350,000 in the conservative state of Iowa. The Huitt's filed suit against the Iowa Clinic and Dr. Trueblood.

I first heard about Rick Huitt's case on a Saturday night from my friends Mark and Randy who called wondering if I could jump in

on the case. I was with Courtney and our children at our home in California, looking forward to a couple of quiet long-overdue weeks together. I told Courtney about the case that night, and she asked, “When is the trial?”

I said, “Monday morning.”

She simply said, “You have to go help this man and his wife.”

I flew out the next day to my home state of Iowa with my partner John Kuwai, and we picked the jury on Monday morning. My hope was that me showing up would get the clients more money and I could go back home to my kids. I was tired. But MMIC didn’t care; the rich insurance company and its claims manager Ms. Graziano were behaving cheaply again. I sent the following settlement opportunity letter for the policy limits of \$7 million before jury selection started. Instead of responding and working to resolve the case, MMIC picked up the phone and called one of the top medical malpractice defense attorneys in the Midwest, Jack Hilmes. This was MMIC’s opportunity to beat me. It ended up being their third record-setting loss in Iowa in over a year and a half. Here is my letter:

Dear MMIC Insurance Company, any other Insurance Companies, Defense Counsel, The Iowa Clinic, and Dr. Trueblood:

Please accept this as a one-time settlement opportunity to resolve this case for the \$7 million policy limits which have been disclosed in this case. The demand increases to \$15 million after 12 p.m.

This is a tragic case, one of clear 100 percent negligence, and a jury is going to be outraged.

Any counteroffer shall constitute a rejection.

This is a case that will go to verdict and set a precedent and record and is one which Justices in the Iowa Court of Appeals and the Iowa Supreme Court will uphold.

Think about it, this is an injury and the worst negligence imaginable, having a body part cut out because you were mixed up as the wrong patient.

Dr. Trueblood and The Iowa Clinic have the right to independent counsel if their insurance company decision-makers are going to expose them to the risk of this trial and the consequences of a verdict and judgment in excess of the policy limits.

This case is already being covered in the news and will be bad press for everybody involved.

I was first called about this case Saturday evening, jumped on a plane yesterday, have fully reviewed the case and prepared the opening statement, and will be seeing you all in a few minutes.

I have a lot of respect for MMIC and Nicole Graziano and Nick Ghiselli, and that is why I am providing this one-time opportunity for MMIC to protect its insureds, avoid this trial, and stop a very large public jury verdict from coming in this week.

The judge only allowed me to discuss numbers up to \$15 million—remember we don't "ask jurors for money"—we "tell them what the case is worth and why, based on the evidence and the law." The jury delivered a verdict in favor of Mr. and Mrs. Huitt in the amount of \$12.25 million.

After the trial and final resolution of the case, the head of the pathology lab, Dr. Joy Trueblood, had me represent her in a lawsuit against MMIC and Nicole Graziano for failing to settle the case, leaving her exposed and destroying her reputation and career. Dr. Trueblood had offered to put up \$200,000 of her own money to settle the case, but the insurance company refused.

## The Lyons Case

*Traumatic brain injury, negligent supervision: schoolmate drops child on his head during a playground game.*<sup>6</sup>

The *Lyons* case was a traumatic brain injury case that went to trial in June 2019. Liam was a first-grader (the smallest boy in his class) and was dropped on his head during recess by a fourth-grader (the biggest in his class). The older boy had been running around on the hard blacktop, carrying Liam in a dangerous prohibited game called Octopus. This is a game the kids played regularly on the blacktop while under the supervision of teachers and aides. The rules were supposed to be (1) that this game wasn't played and (2) that older, bigger kids were separated from the younger and smaller kids. These two rules were in place to prevent exactly what happened to Liam. When Liam was dropped on his head, none of the eight adults supervising the playground saw it happen, although they would later testify that they did. A group of kids had to walk Liam, who had temporarily lost consciousness, up to an aide to get medical attention. The school nurse saw Liam and sent him back to class. He was in tears, holding his head in class because he had a brain hemorrhage.

After he wouldn't stop crying and holding his head, he was sent back to the nurse, and the school finally called his mother. Nobody called 911. Liam waited at school in pain, crying, with a slowly bleeding brain for his mother to pick him up. When his mom showed up, the teachers and the school nurse downplayed what happened. Fortunately, Liam's mom had the wherewithal to take him directly to the pediatrician who noticed something wasn't right and got Liam to the emergency room for a CT scan. The scan showed the bleed, which had progressed, and Liam was transferred to Children's Hospital of Los Angeles. It was at Children's that he had his first seizure.

After countless visits with neurologists and speech therapists, Liam had a good recovery but still suffers permanent impairment from brain

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6. *Lyons v. Los Angeles Unified School District*, Superior Court of California, Los Angeles County, Case No. BC624654.



injury and a risk of seizures. The case was a zero-offer case. During trial, the school district agreed to pay \$9 million. Honorable Gary Tanaka (a superstar human being and judge) put in a lot of time working to get the case resolved. If it were not for Judge Tanaka, we would have never discussed settlement and the case would have gone to verdict. The jury was with Liam when we spoke to them after the case settled.

## The *Pellock* Case

*Medical malpractice, wrongful death: eighty-year-old cancer patient died because of negligent intubation by nurse anesthetist.*<sup>7</sup>

The *Pellock* case was a medical malpractice, wrongful death case that we tried in 2017 in Northeast Iowa, in a courthouse where nobody had ever won a medical malpractice case or a large jury verdict. The case went all the way to verdict without the defense offering a single penny. The unanimous verdict, after three days of trial and an hour-and-a-half of deliberations, was a record-setting \$10 million in noneconomic damages. We had told the jury the case was worth \$15 million. That is what we believed.

Richard Pellock was an eighty-year-old husband and father to one adult son who was in his fifties. Richard died during a bowel repair surgery a few days after his bladder had been completely removed because of cancer. His life expectancy without the cancer was seven-and-a-half years according to the jury instructions. Once again, our friend, Midwest Medical Insurance Holding Co. (MMIC), was the insurance company in control of the case. This billion-dollar corporation valued the case as a defense verdict, that is, zero.

Our case was against two surgeons and Certified Registered Nurse Anesthetist (CRNA) James Weiters. As we met the individual defendants, we checked in with ourselves—gut and heart—and we didn't feel that the two surgeons were responsible for killing Mr. Pellock.

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7. *Pellock v. Mississippi Valley Anesthesiology, P.C.*, Dubuque County, Iowa Case No. LACV103756.

You have to constantly ask yourself at any stage of the case, “Do I need this particular defendant in the case, or can I accomplish my goal for the family or injury victim I represent by going after fewer defendants than I’ve named?” We could have proceeded with our case against the surgeons, but it just didn’t feel right. This was an anesthesiology negligence case, not a surgical malpractice case. So we released all but James Weiters, CRNA, and his employer, Mississippi Valley Medical, during jury selection.

Richard Pellock’s death was entirely preventable—it should not have occurred—he should still be alive today. He was married to Joanne—his beloved wife—for fifty-four years, and they were scheduled to celebrate their fifty-fifth wedding anniversary on May 14, 2015. Joanne, and her son, never had the opportunity to say goodbye to her husband and best friend.



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# PART ONE

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## *Navigating Damages*



# MONEY DAMAGES EQUAL CIVIL JUSTICE

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*By David Ball, Artemis Malekpour, Courtney Rowley & Nicholas Rowley*

*In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law.*

—United States Constitution, Amendment VII

## Civil Trials Are Part of the Constitution

*(Courtney Rowley & Nicholas Rowley)*

When we pursue a case to win money damages for our clients, what we are doing comes directly from our Constitution and Bill of Rights. Handling civil cases is something to be very proud of.

Without the system of civil justice that we have in America, there would be chaos, revenge, and civil unrest. Frame your mind and core beliefs to be proud of your work. Winning money for your clients is not greedy; it's constitutional!

One state bar defines what we do as:

Protecting the public and enhancing the administration of justice.

Imagine that. Protectors of the public. Enhancers of justice. We are being called upon not just to uphold the values and principles of our democracy, but to take an active role in creating the future of that democracy. We start in the courtroom.

A civil jury trial is an exercise in public education. What an opportunity! And how do we educate? We start with the jury, one by one, starting with voir dire. We let our honesty lead, we don't overreach, we don't overstate. We prove our cases and show them our caring passion. And then, using the evidence and the law, we show them what the *full value* is of what the human being we represent has lost or had harmed.

Moving forward, we need to do that job a bit differently. What has happened over the past year, or the past five years with the Trump era actually, sets the perfect tone for us to do just that.

## The Erosion of Economic Damages

*(Courtney Rowley)*

The way I was trained—the way you were trained—to value a case is to add up the economic damages and multiply that by three. If there's something really egregious, maybe even four. The defense response is to take that draconian metric and knock it in half because, as they

have done for thirty years, the majority of plaintiff's lawyers agree to that settlement number.

The only way to disrupt this system is to deconstruct it. In doing so, we are confronted with the inherent chauvinism and patriarchy that has shaped and dominated the way we as a society have significantly and unreasonably undervalued human beings.

What are *economic damages*? They are, as David Ball so importantly framed it in *Damages 3*, “the things you can calculate on a calculator.” But economics aren’t “hard numbers” anymore. Think about it. The defense has systematically, and quite successfully, undermined that concept over the last decade. I’m not speaking esoterically. These days, not only do doctors have to wear multiple hats so they can defend *their* numbers, but we have to hire “medical billing experts,” “vocational rehabilitation experts,” even experts in Obamacare in order to overcome motions, legislation, post-judgment reductions, and so on, to hold on to whatever paltry sum is left when all is said and done.

This results in the *economics trap*. If we allow the defense to value our cases based on economics, or worse, if we do it ourselves, we start believing our cases are “small” or worth less than they really are.

It’s time to change how we look at economic damages. Economic damages are the easy part and, oftentimes, the irrelevant part of our cases. In the end, those numbers go to the doctors and hospitals, the people who take care of your client, even when it is future care. And that’s how Nick and I talk about it with the jurors:

**COURTNEY:** All this money you see here, this all goes to other people. It makes *third parties* whole. It doesn’t make my client whole. And this is why we’re talking about noneconomic damages.

When we stop clinging to the false security of economic damages, we are free to embrace and explore the real losses in our cases:



noneconomic damages. Noneconomic damages are the only way to understand and acknowledge the true value of our clients' losses. They are also the key to protecting not only our clients but our country's civil rights.

## You Are a Civil Rights Attorney

*(Courtney Rowley)*

Our democracy is in crisis. Belief in our system of government is dwindling, and as a result, our justice system is under threat. It's time to reframe how we see our profession, our calling: in our hearts, in our communities, and in the language we use with jurors. We are *all* civil rights attorneys. How do I know? Because *civil justice is civil rights*.

What are civil rights? To paraphrase the Bible (and our beloved friend Keith Mitnik), Cain rose up against Abel and violated his civil rights. Civil rights are the right not to have your sibling or neighbor smash your head in with a rock and the right to not have a bus run over your kid because the corporation let the lady addicted to the painkillers who can barely see drive it. It's the right not to have your father taken from you because his employer has faulty machinery. It's the right to enjoyment of life and liberty, and to not be negligently sentenced to live a life or any time period of your life with suffering, inconvenience, and pain. And it's the right, if a loved one is wrongfully taken from you, to be entitled to *full* justice, even if your loved one is an immigrant farmworker, a retired eighty-year-old, or a stay-at-home mom.

Importantly, we have the right to be valued based on who we are as humans, not who we are economically! This is one of the most precious and deep-rooted American values: our civil rights are *not* limited by our economic assets. There is nothing in the Constitution or in the Bill of Rights that honors freedom or the pursuit of happiness *more* when it comes to people who earn a bigger paycheck. Or, for that matter, who

earn a paycheck at all. Our value, if we are real Americans, is not based on the color of our skin, our religion, our political affiliation, our sexuality or gender, or the size of our pocketbook.

When we use economic damages as our metric, we are reducing—and thereby denying—justice to a whole lot of people. Let's take the example of mothers. We represented a young mother in northeastern Iowa who was killed by medical negligence. She lived on her family farm with her husband and definitely did her fair share of work: getting the kids ready in the morning, telling them stories at night, mucking the pig sties, cooking for the workers and her family, helping plant seeds with her husband when he fell ill, and so on. However, she was not an employee of the farm. She did not receive a paycheck. Not for ten years. So, by the defense's measurements (their actual evidence as presented by an economist, in a suit, under oath), she had "no economic value." (Luckily for us, they used about this much tact in front of the jury.) We have seen this argument made out loud, subtly, and even subconsciously, in just about every one of our cases.

It wasn't always like this. As America emerged from the Industrial Revolution, folks like Henry Ford started creating retirement plans, healthcare systems, and other safeguards to protect and take care of the health and well-being of employees, which set the model for American industry. But with the rise of corporations and public stock offerings and as the notion of the "bottom line" took hold, there was a shift. An undercurrent in our culture was activated that moved away from valuing the worker, the human being, the family, to valuing the success, the income, the status. Now, advertisements and commercials show us how to be "complete" and "more," implying that we are neither of these things without status and certain possessions. In and out of the courtroom, the defense game is to arouse that deep prejudice, that dark side of the subconscious, to protect its own bottom line by devaluing people with lower verdicts.

The only way to achieve full value for your clients is with non-economic damages. Large, justified, noneconomic damages say more

about who we are as human beings than it does about what corporations and insurance companies think cases are worth, and will shape how we value our neighbors, one another, and ourselves.

## Get Right with Yourself First

We can't communicate anything we don't truly believe ourselves. Many of us feel uncomfortable with money for pain and suffering, and we find it difficult to ask for that money. It carries shame or embarrassment. That is a natural human response and part of our socialization as a human on this planet. Many of us have been raised to believe that asking for money is taboo. In order to truly show up for our clients and seek full value in the courtroom, we have to call our feelings about money to the surface and look at that part of ourselves openly and honestly. No matter where or how we grew up, we all have to open a dialogue with that part of us at some point in our practice.

A lot of people believe that receiving money for getting hurt is unethical, wrong, or dirty. But many times, the justice our society finally sees only happens in the trial courts. Especially right now with the uptick in corporate-driven protectionist legislation that seeks to further erode and take away civil rights and deny people justice. The defense often seeks jurors who don't believe in money damages for pain and suffering, but they're not just *looking* for them, they are *making* them. Since the 1970s, the defense industry has been intentionally and actively educating—propagandizing—the public on this subject. They've created a lot of information and spent a hell of a lot of money to convince the public that lawsuits are wrong and money for pain and suffering is bad. And it has worked! Those corporations are organized, much more so than we “do-gooders” have been. So, understand what it is we're standing up to when we walk into a courtroom. But we aren't victims. We are leaders. That means it's our job to educate not only the jurors, sure, but also, in many cases, the judge. Kindly. With

compassion. But not quietly. Money for pain and suffering—for non-economic damages—is not just ethical, it’s our duty.

In America we believe in accountability and, therefore, consequences. That’s what sets us apart from every other country in the world and what makes America special—our belief in civil rights. A trial is not simply about getting money for someone; it’s about replacing—making right—what was taken away. Ours is a money justice system. Not eye for an eye, neck for a neck, toe for a toe, or life for a life; that would be barbarism. Instead, money is civility and dignity—through monetary penance. The dignity belongs to the person who is righted through the monetary award, and dignity is likewise extended to the offending party upon payment of assessment. But we can achieve this equanimity only if we are brutally honest about the full value of that assessment.

Keith Mitnik, in his fabulous podcast, discusses the *dignity of damages* and finding the dignity within yourself to stand before a jury and ask for money.<sup>1</sup> When you ask for a number, you have to be 100 percent right with it. If there’s a scintilla of doubt, it’s not going to work. I can attest to this through (painful) experience. We must tap into our own belief system and get right with what we’re doing. We must choose conviction.

## Conviction Defines Credibility

To get right with what you’re asking the jurors to do doesn’t mean asking for less money just because that’s more comfortable for you. We see that happen all the time. No, it’s having the courage to ask for *more* to protect these values—these American civil rights. For those who have seen Nick in trial, one of the most incredible things they notice is that he doesn’t just believe in the value of noneconomic damages, he speaks with conviction that comes from deep within. When he tells the jury how much damages should be worth and

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1. Keith Mitnik’s podcast is *Mitnik’s Brushstrokes*, available on Apple Podcasts, Soundcloud, and at [keithmitnik.com](http://keithmitnik.com).

puts up numbers—and it’s not about the numbers, by the way—that deep-rooted conviction goes straight to establishing his credibility and empowering and motivating jurors.

Noneconomic damages are the civil justice in your case. We all have rights under our laws, our Constitution, our Bill of Rights, and the Declaration of Independence to live free of physical pain, suffering, loss of life’s enjoyment, disfigurement, physical impairment, and so on. When we suffer harms to these assets because of others’ wrongdoing, we have a civil right to collect damages, past and future. How do we know this to be true? Because it’s all spelled out for us and memorialized by our communities in the form of jury instructions.

## De-emphasizing Economic Damages

*(David Ball & Artemis Malekpour)*

The Rowleys’ concept of framing your damages case around noneconomic damages and de-emphasizing or even omitting all economic damages is revolutionary. We fully embrace this, though it flies in the face of traditional advice and teaching and actually scares older attorneys. But traditional advice and teachings that feel safe often cause unnecessary limitations. Emphasizing economic damages and using them as a baseline for noneconomics might have been right for an earlier time, but now it can benefit insurance companies, not us.

De-emphasizing economic damages does not necessarily mean omitting them. It just means getting jurors’ attention off them and onto noneconomics. So spend less time on economics, use few if any exhibits about them, and treat them as if they are givens.

**Caveat:** When you plan to omit economic damages, get your client’s approval in writing. Otherwise, you might be the subject of your client’s next lawsuit.

**Caveat:** To de-emphasize or omit economic damages, you must know how to pursue noneconomic damages better, perhaps, than you've ever done. Helping you do this—as Nick does below—is among this book's main purposes.

## ***Rant: No Fear, No Shame***

*(Nicholas Rowley)*

I have had an ongoing dialogue with my dear friend and contributor to this book, Aaron Broussard, about why lawyers beat around the bush when it comes to damages, and how lawyers talk about “making the ask,” which we have concluded is not the best way to empower a jury to render the right verdict. For some reason, when it comes time to talk about money damages, lawyers get nervous and apologetic rather than putting up the numbers with conviction. Lawyers often try to justify having to “ask for money” and go on long diatribes about how damages are fair. One thing I love and appreciate about Aaron is the time he spends thinking about things, delving deep into the abysses of *why* lawyers do what they do. Evolving is much easier when we understand why and where things come from deep within us. Many of us are the victims of shame when it comes to money. Ask yourself why you feel shame until you get to the answer.

Was it the way you were raised, or something that happened to you? For me, I was raised to never ask anybody for money. Money is always earned through hard work. It's impolite and rude to talk about money or ask somebody for money. I grew up very poor, in a family where we did not have money.

Some lawyers are afraid of being humiliated or exposed because their brutally honest truth is that they need, or want, a lot of money. In their minds, they have already spent the money they hope to make on the case, or they have taken loans out against the case or a portfolio

of cases. Then, there are some lawyers who are in fact greedy and don't care a lick about their clients.

I do care, greatly; nonetheless, I had to get past my fear of jurors thinking I am in it for the money. When I finally just embraced this fact and was brutally honest, my fears went away.

That being said, in brutal honesty, the jurors are right. *Yes*, I am in this for the money. One hundred percent, actually, and there is nothing wrong with that. In fact, everything is right about it because I absolutely believe in civil rights and the importance of trial lawyers who are willing to represent people on contingency. I am even in it for the money on the pro bono cases I do, because the money is the justice; the money is what goes to the clients to make up for the civil injustice. I am super proud of what I do, and have no shame because I do great things with the money I make. I know what it is to lose and to work for free. I am able to do the pro bono work I do because of the money I make slaying big corporate, government, and insurance company dragons. And, when I do make a big fee on a case, I pay my taxes, invest in my communities, and put most everything else back into other cases so that other deserving humans get representation in the civil justice system. No sir, no ma'am, I have no shame or guilt. I do hope we win and, in turn, that I get paid.

## Are You in This for the Money?

Try rolling this around in your head, and if anything fits for you, develop it further with some good, old-fashioned, brutal honesty. I always anticipate that some or all of the jurors suspect or believe that we trial lawyers are "in it for the money." That's okay because it's the truth! If it's not, if you are doing the case not hoping to get reimbursed and paid for your work, there is still nothing you can do to change that belief. Let's explore this a bit; stay with me here.

- Are you in it for the money? Yes or no?
  - » Let's start with a yes. Imagine that you are in this for the money, and let's explore that for a bit.
  
- What, if anything, is wrong with you being in it for the money?
  
- If the only civil justice available is money damages, do you want to get your client a lot or a little?
  
- Do you put hundreds, sometimes thousands, of hours into cases you handle? Yes or no?
  
- Have you risked tens or hundreds of thousands of dollars of your own money, or is your credit on the line with the risk of never getting it back, or never getting paid a single penny if you lose the case? Yes or no?
  
- Is that scary as hell? Yes or no?
  
- So, what's wrong with being in it for the money?
  - » You cannot bring your client's dead loved one back who was negligently killed or undo the injuries that were negligently inflicted.
  
- Who in the courtroom is working pro bono?
  - » Is the judge?
  - » Is the clerk?
  - » What about the expert witnesses?
  - » How about the court reporter who bills by the word or page and for every copy of the transcript?
  - » What about the copy service?
  - » What about the company making the demonstrative exhibits?
  
- Who in the world does jury trials pro bono?



- If the money verdict is low, have you won the case for your client or lost it?
- What are the consequences of a defense verdict to your client, any lienholders, your investment into the case, your practice, or your life?

The bottom line is that you need to get past any shame you have about money when it comes to handling civil justice cases. We are dragon slayers, and when we slay a big ole nasty dragon, we sometimes get to keep the horns, maybe the tail, and some of the meat. Be proud of that.

If a juror or judge says, “*You are hoping to make a bunch of money on this, aren’t you? You get a percentage?*” don’t hesitate. Look that human right in the eye with a soft smile and be thankful—you have been given a gift! Your response could be something like what I have said in those situations:

**NICK:** Thank you. You are absolutely right. I sure hope so! If we lose, I don’t get reimbursed or paid a single dollar. I’m a lawyer on the plaintiff’s/petitioner’s side of the case, and that means I only get reimbursed and paid if I do a good job, if the case I am handling is righteous, and if we win. I have a whole lot invested here, and I am really appreciative that you brought this up. It’s oftentimes an elephant in the room. I bet others have the same thing rolling around in their heads. Who else has thought about that? Mrs. Jones, Mr. Brown, anybody, please share your thoughts about that. How might this truth impact you being a juror on this case, where a major issue is appraising the value of what happened to my clients, Mrs. Pellock and her son?<sup>2</sup>

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2. For more information, see “The Pellock Case,” on page xviii.

## Greed?

Some very famous lawyers have said, “*Yes, I am a greedy lawyer; I am greedy for justice.*” That just doesn’t resonate with me, not one bit. Don’t ever be greedy or say you are greedy. Greed and an inflated ego have been the downfall of many talented humans. Always be generous, overly generous when you can. Give more than you take in this world in all that you do. Never be greedy.

Working hard to get deserving humans what they are legally entitled to under the law, and not settling for less than the true and priceless value of that, is not greedy in any way whatsoever.

In my experience with civil cases, the greed can often be found on the defense side. Rich insurance corporations and their employed adjusters and lawyers act with greed by holding on to money that belongs to your clients. Greedy corporations and the people who run them delay paying what is due and try every shenanigan possible to get away with paying less. Greedy people take more than they give; they hold back what is due. Trying your cases with love, caring, and compassion will show the jury that there is more to it than money, that you believe in the case, you believe in your clients, and you are putting it all on the line. When those jurors start to care, they will be in it for the money too, because that is all they have the power to give when it comes to civil justice.

Being a civil defense attorney or claims adjuster is an easier job. They risk nothing of their own, and they always get paid. More than that, they implicitly, and sometimes expressly, try to lead the jury into believing that the insured defendant, sitting there as a pawn, is the one on trial, the one who will end up paying any verdict. What a sham. Trust that your jurors will see the truth; do the work to make sure the defendant sitting there at trial gets no sympathy.

We have a duty to fight hard for every dollar that our clients are entitled to. Because they cannot pay us for our time by the hour, the way insurance company lawyers get paid, there is no shame in getting a fair share of the case.

# Noneconomic Damages Mean Equality & Dignity

*(Courtney Rowley)*

Economic damages are limited to who we are in society. Warren Buffett is worth more than a farmworker from Mexico whose daughters I represented; that's how economics work. But who is Warren Buffett as a father? Could he even hold a feather to the father and grandfather that Mr. Guzman was to his family? A person may have earned something, or had a good "providing" father or one who will leave a good inheritance, or a person might have been the best stay-at-home parent a kid could ever hope for. If you are the kind of person who reads this book, you already understand the danger of getting sucked into valuing human beings by their economic status—something which (if you look at the research) is mostly beyond our control. There is no equality under the law when we value our cases based on economic damages. Instead, there are politics and prejudices.

Noneconomic damages, on the other hand, are entirely about equality and human dignity. This is where a human's case has real value under our civil justice system.

When we focus on the full value of noneconomic damages, a person's worth is not determined by what job they do or how much they have earned, but rather by how they have affected the lives around them. That value system transcends politics because we can all connect with it. It is deep inside us as human beings, and it is the world we are all striving for. This is the guiding principle of the world we want to live in and place our faith in. Every single juror also wants to live in that world. When we find our clients' human story—the pieces that make them relatable—we find an intrinsic human experience. He was a good grandfather not because he was a farmworker but because he spent time with his adopted autistic grandchild, telling him stories, practicing language, and looking at butterflies—that's who this man truly was. These

things transcend economics, and that's why noneconomic damages are so important. That's how we connect with the jurors. Maybe one of those jurors is an accountant or an architect or an engineer, and we're afraid he can't connect with our immigrant client. But with noneconomic damages we still have a level playing field.

Andrew Wyeth's painting *Christine's World* is a very famous and much-beloved American painting. It depicts a young, crippled woman. It very powerfully translates Wyeth's love for Christine—we are able to love her through him. And this is one of the things we do as lawyers; we become the conduit to help others love our clients and do something about the harm they have suffered.

## You, Your Client & the Jury Are Civil Justice

Civil rights and civil justice will cease to exist and not be worth more than words on paper unless we exercise them and stand up for their true and often priceless value. Abraham Lincoln fought a trial to free two Black women who were enslaved. He was an abolitionist. What's the difference between someone who was anti-slavery and someone who was an abolitionist? Someone who was anti-slavery would have said, "I don't believe in it. I would never enslave a person. I think enslavers are crazy, bad, wrong." This is anti-slavery, but not what makes an abolitionist.

Being an abolitionist meant going to court and trying a case for two women to live in freedom for the rest of their lives, even if it also meant risking social status, acceptance, and reputation. It meant connecting to the underground railroad. Being anti-slavery didn't mean a person was doing anything to effectuate change. Words are cheap; action is what makes a difference. Civil justice doesn't exist without the action of civil jury trials. Without jury trials, our civil rights get decided by politicians, insurance companies, the government, and big corporations.

In the jury trial system, human decisions are made by human beings, but we have to be the ones to initiate the action. At trial, real

people decide how others get valued and treated. In the United States, there are two places where every American is supposed to be equal: at the ballot box and in the courtroom.

John Adams wrote:

Representative government and trial by jury are the heart and lungs of liberty.

Isn't that beautiful? I sometimes read this to juries in closing argument. Adams continues:

Without them we have no other fortification against being ridden like horses.

*Ridden like horses.*

Ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.<sup>3</sup>

And that is just what happened in our country during, and after, John Adams's time. Without civil rights, we are uncivil; we are animals and treat others like animals. Our nation is religiously pluralistic and always has been. We believe that God granted the rights of life, liberty, and the pursuit of happiness to *all*, not some. To the detriment of far too many, it took our nation, our legislatures, and our courts far too long to reflect these values, and we still have a long way to go. It is our role to keep working, to be active in our stand against undervaluing human beings.

We must have a deep commitment to full value for all. When I say *we*, I mean all of us, no matter who you are. We cannot allow the defense, the corporations, the lobbyists, the politicians, the self-interested

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3. Scott J. Hammond, Howard Leslie Lubert, and Kevin R. Hardwick, ed., *Classics of American Political and Constitutional Thought, Volume 1: Origins through the Civil War* (Indianapolis: Hackett Publishing Company, Inc., 2007), 185.

to convince us that these values and principles are obsolete or should be subject to preset, one-size-fits-all damages caps.

Marcus Aurelius said, “What’s bad for the hive is bad for the bee.” A society that is indifferent to the rights of any destroys the rights of all.

As Americans, all humans deserve the dignity and freedom to live in their rights, and we must protect those rights fiercely, vigilantly, and with grace.

## Lawyers Are Leaders

We are being called to take action not only inside the courtroom but outside as well. Politically, we are seeing significant shifts across the country when it comes to unfair and outdated caps, while at the same time elected officials are appointing appellate and even Supreme Court justices with literally no judicial experience whatsoever. As leaders, we can’t afford to sit on the sidelines. It’s our duty to educate ourselves and our communities on how to get active and build a better future.

As trial lawyers, we are public educators. We inform with our verdicts, with our example, and with our conversations. Start talking to your kids, your neighbors, your dinner guests. If we don’t help people learn more about the Constitution, American values, and civil rights, people won’t know to be horrified when those rights and values are violated or taken away. It’s okay if we don’t always get it right, because we won’t. The point is to take action, even when it’s scary, even when we aren’t certain about what it is we are supposed to do.

We start by getting clear with what these rights mean—to us, to our families, and to the future. When we are firmly rooted in the meaning of these principles and values in ourselves, we are able to communicate how they have been damaged and what it will take to make them right for another. Ask yourself: What are my values? How do I embody them? How do I protect my energy? My health? My heart? My credibility? What are my noneconomic assets?

What matters most to us, as human beings, are rarely the things we can buy (though those things can alleviate a lot of suffering and can certainly bring us joy.) What sets us, as a country, apart from the others, are our values and our civil rights. We, as a nation, fought many wars and made many sacrifices in order to protect the non-economic assets of everyone, of each of us. They are the most important, the most precious, and the most valuable assets we have. Once we understand these values in the context of our own lives, and then in the context of our laws, we are better suited to lead the people, communities, and juries around us.

## Trial Example

*(Nicholas Rowley)*

If we are doing our jobs correctly, our questions are the jurors' questions—especially during direct and cross-examination. Witnesses who refuse to answer questions straight, by evading or dismissing the questions as unimportant, are demonstrating disrespect toward the jurors. How often do we encounter defense expert witnesses who attempt to muddy the waters with medical jargon or complex statements designed to sidestep the question and create confusion? Our approach is to stay calm, remain polite, and repeat the question as many times as necessary. Repeating the same question over and over again reveals the intent of the witness to be evasive. Whether the witness ultimately answers the question is sometimes less important than showing jurors what the witness is doing. When we are connected to our jurors, we can trust that they will get it. And a witness who refuses to answer the jurors' questions will make those jurors feel personally disrespected.

## The *DeJongh* Case

*Medical malpractice, wrongful death: healthy forty-two-year-old wife and mother dies from allergic reaction to contrast dye during a routine CT scan.*<sup>4</sup>

In the *DeJongh* case, Dr. Heegaard was an experienced defense expert who persistently attempted to confuse the jury with complicated or evasive answers. The following excerpt is from cross-examination:

**NICK:** So, there's no blood pressure until—if the reaction happened at 11:24, there's no blood pressure for fifteen minutes, true?

The witness first attempted to dismiss the question by providing information I was not asking for, but in an elementary way—as if I (and, consequently, the jurors) didn't understand.

**DR. HEEGAARD:** So, break it down. If some of it happens in the CT scan, you're going not to have it. It's going to take you one to two minutes.

**NICK:** That's not my question. My question is, . . . if the reaction happened at 11:24, at 11:39, there's fifteen minutes that passed that nobody gets a blood pressure on . . . Mrs. DeJongh, true?

**DR. HEEGAARD:** So, we have in Dr. Slice's answer, in his written thing, he says blood pressure's okay. You don't have a recorded blood pressure.

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4. For more information, see “The *DeJongh* Case” on page xl.



**NICK:** Okay. Blood pressure okay when, according to his note?

**DR. HEEGAARD:** It was right after he got in—as you're going along, says in the emergency department he evaluates it, gives the Benadryl and Solu-Medrol and then says BP's okay.

**NICK:** You're basing that—let's look at his note on page 21.

**DR. HEEGAARD:** Mm-hmm (Yes).

**NICK:** You're saying—does that give us a time for the blood pressure?

The witness tried to make it seem okay that a note written hours later was sufficient, but in doing so, he was evading the question. To help the jurors understand what was happening, I simply stated that that was not my question every time he did this.

**DR. HEEGAARD:** So, as I've said on this case, you have to actually go through and try to give that.

**NICK:** That wasn't my question. My question was, . . . what he wrote later on at 4:10 p.m. after the patient's been life flighted away, does he note what time the blood pressure was that he's talking about?

**DR. HEEGAARD:** He does not give a time.

**NICK:** Does he state what the blood pressure was?

**DR. HEEGAARD:** He says blood pressure's okay.

**NICK:** Numbers matter, true?

**DR. HEEGAARD:** In a clinical matter, you're right.

To shift the focus away from my question, Dr. Heegaard answered it by making it seem equal to the defense's position.

**NICK:** In emergency medicine, numbers matter, true?

**DR. HEEGAARD:** So, I would say absolutely numbers matter and clinical assessments matter.

**NICK:** I'm not asking you about clinical assessment. My question, sir, is very specific. Numbers matter in emergency room medicine, true?

**DR. HEEGAARD:** I guess I can't answer that right now then.

**NICK:** I'm sorry.

**DR. HEEGAARD:** That's all right.

Dr. Heegaard was skilled at testifying. I politely repeated the question and did not allow him to ramble his way out of it. He became aware of how he appeared and attempted to address that. This can be bait if you are not careful. Let it go and stay focused on the question.

**NICK:** Seconds matter, don't they?

**DR. HEEGAARD:** In the context, it matters.

**NICK:** Minutes are important, aren't they?

**DR. HEEGAARD:** So—I'm not trying to be coy or tricky. I'm just not going to—it's always in the context of what it is. So, what matters was assessing someone and trying to make a determination. That matters.

**NICK:** And minutes can mean a difference between life and death in the emergency room, true?

**DR. HEEGAARD:** Minutes can matter. Decisions on those minutes matter more.

**NICK:** Well, we agree on that.

**DR. HEEGAARD:** Good.

The most challenging witnesses can often become the ones who tip the jury's opinion in your favor. If you are frustrated with the witness, don't show that frustration; allow the jurors to become frustrated for you. When that happens, as your defense team loses credibility, your damages case increases in value. Don't let your own frustration show. Instead, calmly repeat the question until the witness either answers it or demonstrates a level of disrespect by not answering it. The witness may think he's showing *you* disrespect, but that disrespect extends to the jurors themselves.

# Disrespect

(Courtney Rowley)

Insurance defense lawyers, insurance company decision-makers, and defense experts who disrespect us and our clients is are things Nick and I have dealt with since the beginning. We deal with it differently now than we used to. When David talks about disrespect, I think about the many times I have listened to a defense lawyer berate and belittle my clients, the times a defense expert has refused to answer my questions. Ten years ago, we were more apt to slide into the media-driven image of the cross-examin-ATOR: tough, concise, unyielding, escalating. And it felt *justified*. In fact, I remember learning somewhere that I could escalate my aggression once I “knew” the jurors felt the same way. After a decade of trying cases, I can say with painful confidence that, as much as I wish I was, I am definitely not a clairvoyant. In my experience, we tend to confuse our fear, power struggles, and insecurities with feeling “justified,” and in doing so, we lose touch with the jurors.

It turns out the best lessons were the ones we learned from our grandparents, long before law school, long before courtrooms: when you lie with pigs, you get muddy. Rick Friedman’s insights in *Polarizing the Case* extend to our behavior in the courtroom.<sup>5</sup> When we maintain our dignity and respect, it serves to underscore the disrespect and bad behavior of the other side. In *Dejongh* with Dr. Heegaard, I watched Nick draw on his hundreds of trials’ worth of experience to maintain his equanimity in order to expose the disrespect and evasion coming from the other side.

Disrespect resonates with jurors because it causes bad feelings that we can all empathize with. We often encounter disrespect during trial, so consider the following:

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5. Rick Friedman, *Polarizing the Case: Exposing and Defeating the Malingering Myth* (Portland, OR: Trial Guides, 2007).

- Disrespect is one of the most common and effective ways of hurting others.
- Disrespect feels demeaning, shaming, brutal, and honor-destroying. It can be dangerously stressful and can fester for a lifetime.
- A jury can instantly fix the harm of disrespect with a full and fair verdict that serves as a public announcement that your client did not deserve the disrespect.
- The king of disrespect is the refusal to redress, and jurors villainize non-redressers. They consider it a willful exacerbation of injury.
- Witnesses who evade questions or act as if they are unimportant are demonstrating disrespect toward the jurors, which draws them to your side of the case and increases the chances of winning. Stay calm and repeat the question until it is clear that the witness is being disrespectful. Then trust the jurors to recognize it.

## Conclusion

*(Courtney Rowley & Nicholas Rowley)*

As trial lawyers, we protect the public and enhance the administration of justice. Winning a damages case requires sharing and spreading the beliefs that have now been shared with you. As you move forward, consider the following:

- Civil justice = civil rights. Money for pain and suffering is not unethical, wrong, or greedy. It's constitutional and a fundamental part of our system of government and civil justice.

- It may be uncomfortable to ask for money—to tell judges and jurors cases are worth a lot of money—but if we have belief and conviction about what we are doing and why we are doing it, and the great and often priceless value of our civil rights and noneconomic assets, we give others permission and the courage to state their similar beliefs.
- A human being’s value cannot be determined by the color of their skin, by their gender, or by how much money they make, have made, or will make. Our job is to find the brutally honest, 100 percent true value of what has been lost or damaged for the human beings we represent, regardless of their economic assets. When we do this, we become *actionists*, and we create a better justice system for everyone.
- The value of a case shouldn’t be based on any economic damages or multiplier of what a medical bill or lost paycheck might be; that’s something we never do.
- The most important assets any of us have are our noneconomic assets.
- When an opponent says, “That is a lot of money,” you tell them, “No, it’s not” or “Yes, it is, but it’s a drop in the bucket compared to the value of my client’s case.” Then you tell them why!

