Praise for *David Ball on Damages 3*

"As is his custom, David Ball has brought his brilliance to bear once again to offer new and important insights into the evaluation and proof of damages in the third edition of *David Ball on Damages.* The most important aspect of the new edition is that it coalesces the timely and valuable wisdom of [the] Rules, Reptile, and Ball Damages methods and blends them seamlessly into techniques for influencing today's jurors. Once again, David's analytical skills are exceeded only by his ability to reduce the complex to simple, usable form. The book is a must read for trial lawyers."

—Howard L. Nations, Trial Lawyer Hall of Fame inductee, recipient of the American Association for Justice Heavy Lifting Award

"David Ball's *Damages 3* is appropriately named. It has at least three times the information of the earlier editions. David is constantly in touch with hundreds of lawyers and trials in addition to ongoing focus group research. This new edition is an absolute must."

—Jude Basile, member of the Inner Circle of Advocates, president of the Trial Lawyers College

"It's hard to improve on a masterpiece like *Damages 2*, but *Damages 3* completely refines and improves the previous edition through teaching by example and by easy, step-by-step instructions with clear explanations. What you immediately notice about *Damages 3* is how clearly the principles are explained with new and improved techniques. In just one volume, David Ball has managed to bring together and refine the techniques of the Rules, Reptile, and Ball Damages methods. This book is a dramatic expansion of the previous edition. This updated and improved edition is a must."

—Paul Luvera, member of the Inner Circle of Advocates, fellow of the American College of Trial Lawyers

"There are a few people whose arrival on the scene irrevocably changes it. 'Game changers.' From his first book on how stories need to be told in a courtroom, David Ball's commanding gifts of strategic analysis, audaciously original intelligence, penetrating understanding of the what/when/how of jurors' needs, [and] his investigations have changed how we speak to jurors (and to each other) on the subject of damages. If David Ball is reporting his latest research and results on how attorneys can help those who've suffered 'harms and losses' at the hands of others . . . read it."

—Joshua Karton, Communication Arts for the Professional, Gerry Spence Trial Lawyers College, and California Western School of Law

"*David Ball on Damages,* 3rd edition, is a must have. It might be malpractice not to know this book."

—Robert T. Hall, author of *Grief and Loss,* former president of the International Academy of Trial Lawyers

"*David Ball on Damages,* 3rd edition, is an invaluable source. Any trial lawyer who does not take the time to read this new edition is not adequately arming himself or herself to best represent their clients."

—Joseph A. Quinn, member of the Inner Circle of Trial Advocates, fellow of the International Academy of Trial Lawyers and the American College of Trial Lawyers

"*David Ball on Damages 3* is a must read for anyone seriously trying cases today. If you are still relying on *Damages 2,* you are out of date. *Damages 3* contains five years of additional research and incorporates lessons learned from *Reptile* and *Rules of the Road.* It is required reading."

—Bruce H. Stern, author of *Litigating Brain Injury Cases,* listed in *Best Lawyers in America* and *Who's Who in the Law*

"The third edition is essential reading and rereading before every trial and even pretrial proceedings."

—Ernie Teitel, fellow of the International Academy of Trial Lawyers, member of the American Board of Trial Advocates

"[*David Ball on Damages,* 3rd edition], is every plaintiff lawyer's bible."

—Jerome F. O'Neill, listed in *Best Lawyers in America,* member of the International Society of Barristers and the American Board of Trial Advocates

"Some works are timely; others are timeless. David Ball's *Damages 3* is both. The inimitable Dr. Ball has produced his best and latest work in *Damages 3.* Without learning the techniques and rules taught by *Damages 3,* you should not try a case. I used *Damages 3* in discovery in a recent case. The settlement was fifteen times higher than the offer before I was associated with the case. Almost the entire focus of my discovery was directed to [the] defendant's conduct, applying the rules and techniques taught in *Damages 3*."

—Guy R. Bucci, member of the American Association for Justice

"*David Ball on Damages,* 3rd edition, is essential for every plaintiffs' trial lawyer's toolbox. Not only has Ball moved his own work to the next level and refined it, but he has also expanded his vision to integrate all of the latest knowledge and cutting-edge techniques. And it's all in one book! Step by step, he explains how to do it and how to make it work for you. This third edition is the Rosetta stone of modern trial practice guides. Don't try another case without it."

—Thomas Penfield, adjunct professor of law, University of San Diego Law School; listed in *Best Lawyers in America*

David Ball on Damages

Third Edition

David Ball, PhD

Trial Guides, LLC

Trial Guides, LLC, Portland, Oregon 97210

ISBN: 978-1-934833-84-1

Library of Congress Control Number: 2012947080

Trial Guides, LLC
Attn: Permissions
2350 NW York Street
Portland, OR 97210
(800) 309-6845
www.trialguides.com

Printed and bound in the United States of America.

This book is printed on acid-free paper.

10 9 8 7 6 5 4 3 2 1

Contents

Supplements

Supplement A. Jury Voir Dire

Supplement G. Pitfalls: A Primer for the New Lawyer; A Reminder for the Not-So-New

Supplement H. Virtual Reality: How Jurors Finding Information Online Can Swing Your Case

Publisher's Note

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.

All references to the trademarks of third parties are strictly informational and for purposes of commentary. No sponsorship or endorsement by, or affiliation with, the trademark owners is claimed or implied by the author or publisher of this book.

The author and publisher disclaim any liability or responsibility for loss or damage resulting from the use of this book or the information, ideas, or opinions contained in this book.

Foreword to the Third Edition

Gary C. Johnson

Two decades ago, I went to an ATLA (now AAJ) advocacy college, where I met a new trial consultant named David Ball. Since then, I have watched his consulting, writing, and teaching change the world of trial advocacy. At that time, his background was in professional theater, and he had some unusual things to say. An instant decision (blink) was made to hire him to assist in a very difficult case. Naturally, this difficult case with David's help was a record verdict for its time and place.

David says I was the first attorney ever to hire him to consult on a case. So I now think of myself as the casting director who discovered Marlon Brando—or, maybe more appropriately given the forcefulness of David's work, Clint Eastwood. Though David looks a lot more like Woody Allen.

David and I learned a lot over the years as we worked together on everything from small ordinary cases to a case that resulted in one of the largest verdicts ever received in this country for an individual. As he sat alongside me in most of my important trials, I saw his damages concepts and other approaches develop in leaps and bounds, and I'm proud and lucky to have been the guinea pig among the first to field-test much of his work. He moved his work to a new level when he brought together attorneys Jim Fitzgerald, Don Keenan, and myself to participate with him in research to see if there was a way to deal with the devastation that had been created by tort "reform." The group expanded to include attorneys Rick Friedman and Charles Allen. Naturally, David's brilliant partner Artemis Malekpour was crucial in analyzing and interpreting the research material. The end result of David's initiative is the nation's signature methodology of trial advocacy—the Reptile. This method is defining the future of trial advocacy, turning much of the old advice on its ear, showing why much current "advice" is irrelevant, and explaining why the methods of past masters worked. It is now providing the guidance we need to put an end to the tort "reform" menace.

By now, with this third edition of *David Ball on Damages*, David has obviously become the most influential current voice in the field of plaintiff's advocacy, and quite possibly in its history. Good trial attorneys are a pragmatic lot: they use only what is useful, and they use David's ideas, approaches, books, seminars, and workshops in numbers far exceeding anyone else's. More good verdicts and settlements have been credited to the second edition of *David Ball on Damages* than to every other resource combined. If there are any trial attorneys left who do not heavily rely on David's work, they need to immediately immerse themselves in it.

This third edition is updated with another five years of David's research and experience. It is the only guide that integrates *David Ball on Damages*, *Rules of the Road* (Friedman and Malone), and *Reptile* (Ball and Keenan).

David Ball is the most intelligent person I have ever met. His grasp of social and emotional intelligence is without peer. This old theater hand is now our masterful, reliable guide. He's almost single-handedly led trial advocacy out of its dark ages and into a new world of advocacy that combines real science, real art, and real results. Most of all, he is my friend.

Preface

Over the past few years at my damages seminars, I have asked thousands of personal injury attorneys, "How many of you tell jurors that preponderance applies not only to liability, but also to verdict size?" Fewer than 2 percent raise their hands. Traditionally, plaintiff's attorneys have thought so little about damages that they have not mentioned the burden for decision making about money.

As a result, a common juror comment in deliberations is: "Well, I'm just not completely convinced that the verdict should be $_____. They didn't absolutely prove it." Not even the most favorable plaintiff's jurors argue with that, because they don't know that they should and they don't know how.

This failure is a perfect example of how attorneys ignore damages. Until this book's first edition in 2001, books, articles, CLE seminars, and law schools had little to say about damages persuasion—despite the fact that a plaintiff's injury attorney has no other purpose. Damages was treated like pornography—something to be ashamed of. Bogus theories sprang up: "Don't talk about damages until after you convince the jury of liability." "Don't mention a specific figure; leave it to the jurors." "Do liability witnesses first, then damages witnesses."

Every one, gifts to the defense. If you have not yet joined our damages revolution, I hope this book will enlist you now.

Caveat Number 1: This is no cookbook. It's not a compendium of tricks. You need to understand the principles that underlie the methods. This will prepare you to best use the methods and develop more of your own.

Caveat Number 2: Michigan trial consultant Eric Oliver points out that "It's not what you say, it's how you say it." When using the techniques in the chapters below, keep in mind that the way things are worded is important. It is not enough to learn just the concepts. The way you say them is crucial. The more closely you use the words I suggest, the more effective the techniques will be.

Acknowledgments for the Third Edition

This edition far surpasses what I'd have been able to make it without the meticulous, wise, and beyond-the-call-of-duty input of my cherished companion, Susan Chapek Pochapsky. She guarded and bolstered the book's quality every step, every sentence, every thought of the way. She may have been somewhat less successful in protecting my sanity en route.

Attorneys Don Beskind (Raleigh, North Carolina, and Duke University), Don Keenan (Atlanta), and Ernie Teitel (Stamford, Connecticut) provided me with a level of expertise and input that only the finest lawyers can provide and only the most fortunate of writers get.

Kentucky's Gary Johnson has spent two decades demonstrating how brilliance and common sense require each other and ultimately are one and the same. Without Gary, *David Ball on Damages* would more appropriately be entitled *Just Another Trial Strategy Book.*

My senior partner Artemis Malekpour continues as the nation's most qualified trial consultant in applying and teaching this book's methods. And along with the National Jury Project's brilliant Susan Macpherson, she has helped make this book better with each succeeding edition.

Rick Friedman and Pat Malone have been of enormous help, forever having improved plaintiff's trial advocacy (and my work) with *Rules of the Road.* Rick's additional input to my thinking remains a constant challenge and inspiration.

I owe Duke University's Institute for Brain Sciences an unpayable debt. They've been allowing me to attend an endless number of seminars on the frontiers of the neurosciences and made it possible for me to pick the minds of some of the world's foremost neuroscientists.

I am indebted to many hundreds of complete strangers in shopping malls and other public places around the country, who for twenty years have granted me in-depth interviews about their attitudes and feelings—in return for no more than a lunch, dinner, or a drink or two.

Members of the Inner Circle of Advocates have long been generous with their input and support, showing me over and over that the best impulse of many of the best attorneys is to share the best of what they know. In particular, I (and the profession) am indebted to the willingness of Paul Luvera (Seattle) to share and inspire; and to the extraordinary Jim Fitzgerald (Cheyenne), a pillar of our tiny group that created Reptilian advocacy.

During all the years since this book's first edition was issued, AAJ's (née ATLA) Executive Vice President Anji Jesseramsing has done more than anyone else to provide it with the best of teaching and workshop platforms. Without her, the quality of plaintiff's advocacy would be nowhere near as good as it is. Nor would AAJ.

Mark Davis (Honolulu) provided some essential fast-turnaround advice for this edition. Chuck Zauzig (Woodbridge, Virginia) has remained a wellspring of great new ideas. Forensic Epidemiologist Michael Freeman (Oregon Health and Science University) has shown me a whole new world of trial weapons. Dorothy Clay Sims (Ocala, Florida) has given the defense bar's bottomless pit of lying "experts" a lot to worry about, ended the careers and made miserable the lives of many of those "experts," and helped me understand how to do both. Aaron DeShaw and Trial Guides have rapidly become the seminal purveyors of the most important of the new plaintiff's trial advocacy approaches, including much of my own work. Steven L. Langer (Valparaiso, Indiana) has provided me with years of input and essential admonitions that have heavily influenced this edition. Sonia Chaisson (Los Angeles) keeps me always aware that the best of advocacy can come from the best of human beings.

The late and beloved Howard Twiggs (Raleigh) was the first to launch my work from local to national, so I am ever grateful for his foresight—though others might call it one of his rare blunders.

Chris Conklin of Punch Buggy Design has provided cover art proving, in its simplicity and directness, that less is more. If only I could persuade every attorney that that's also the gold standard for trials!

Finally, I want to acknowledge you, the reader, in advance for your careful reading, study, and eventual mastery of this new edition. Without you, this nation would be in big trouble. So I'm grateful that you're taking the trouble to get better and better at what you do.

David Ball

Durham, NC

2010

Introduction to the Third Edition, 2010

I'm often asked: "David, your books and seminars are about damages *and* liability, so why call them just 'Damages'?" Good question. Answer: Because the way you do liability controls verdict size. This is truer than ever with the advent of this book's two companion volumes, essential for not only personal injury/wrongful death attorneys, but any plaintiff's attorney. Together, the essential trilogy arms you in ways the defense can do little about.

In addition to this book, the essential trilogy's companion volumes are:

Rules of the Road by Pat Malone and Rick Friedman (Trial Guides)

Reptile by David Ball and Don Keenan (Balloon Press)

It makes no difference which you read first, as long as you master all three.

To start the learning curve:

1. Read all three books. Highlight, underline, tab.
2. Before you begin litigating each new case, review all three books. This helps you re-absorb the material within the framework of the new case. When possible, do this even before filing the case.
3. Apply what you learn as precisely as you can. As with any valuable skill, doing it partway, or just "sort of" doing it "more or less," yields lesser results.

Along the way, seek out seminars, workshops, blogs, and Web sites that continue you on the road to mastering these techniques. American Association of Justice (AAJ) workshops along with ReptileKeenanBall.com seminars and workshops, and other resources, are available.

I don't just want readers. I want people who read and then proceed to do all it takes to become masters. Those are the lawyers who have done well over the decade since this book's first edition, and those are the lawyers who will do well over the next decade. The new decade will see unprecedented spending by the forces of tort "reform." If you master the essential trilogy and keep up with our continuing new developments, we will see you through in great shape.

This new edition of *David Ball on Damages* comes five years after the second edition. I hope you'll find that it contains five years' worth of good new advice.

David Ball
Durham, NC
2010

Chapter One

Fundamentals

You have to monitor your fundamentals
constantly because the only thing that changes
will be your attention to them.
The fundamentals will never change.

— Michael Jordan, basketball player

Introduction: The Poisoned Pool

Jurors rarely deliberate about how badly the plaintiff was harmed. They mostly say things like this:

"A big verdict will drive up insurance prices."

"All that money will make lawyers rich and drive companies around here out of business."

"Why should one person get all that money?"

"Her health insurance probably paid for it."

"Her health insurance will continue to pay for it."

"No one deserves a windfall just because they got hurt."

"Money won't bring back the dead."

"You can't put a price on pain [death]."

"Money won't make the pain go away."

"Too much money will ruin his life."

"You know who'll be paying for this! [Us.]"

"I have pain, too, and no one paid me for it."

"My dad was killed when I was twelve; no one paid *me* for it."

"I have this huge jagged scar right here on my left butt, see? And my butt hurts every day! No one paid *me* for it."

These comments are some of the fruits of tort "reform," the multi-million-dollar fraud perpetrated by insurance companies, chambers of commerce, domestic (and more recently, better-funded international) corporations, and politicians. It has been the most potent jury-pool poisoning in American history. It has made more than a third of the population fear and hate you. There's a middle third almost as bad. And most of the "best" third tolerates, but does not like you. You have no strong friends to offset your zealous enemies.

The 2009–10 health-care "debate" made things worse: forces on both sides blame attorneys for the high cost of medical care. Even the most liberal of pundits—and President Obama—have swallowed the myth that medical lawsuits cause "defensive medicine." This "proves" to much of the population that *all* plaintiff's lawyers—not just med mal lawyers—are a serious threat.

I believe I have spoken in depth with more tort-"reformed" Americans than anyone else. This is why I can report that the techniques in this book, along with those in its two companion books, are bringing the blistering power of tort "reform" to an end.

So welcome to the plaintiff's revolution!

To join the revolution, first learn the fundamentals of juror decision making about money. That will launch you on the path of mastering the entire new advocacy.[1]

1. At the same time we fight tort "reform" in trial, we must also combat it in society and in the legislatures. This is more easily done that you may think. We don't need the wealth of the tort-"reform" forces. Nor should we or our organizations continue to emit embarrassingly self-serving "messages" and "communications" to "set the record straight." It's too late for that. By now, our "communications" and "messaging," when that's all we deploy, cause more harm. Luckily the news media rarely pick them up. Be sure to see chapter nine to learn about the practical methods—beyond the impotence of nothing but words and framings and announcements—that we need to employ to overcome the myths that turned public opinion against us.

Fundamental One

Juror Self-Protection

> *Put your own oxygen mask on before helping others.*
>
> —American Airlines

Protection of self and offspring is the unbeatable decision-making force, incapable of compromise. Without enlisting this force, you remain at the mercy of tort "reform," which itself is driven by that very force. Every case—no matter how small—offers jurors the opportunity to make their dangerous world safer. Controlling this force is *Reptile*'s[2] main topic. The methods presented in the chapters below enable you to make best use of *Reptile*.

2. David Ball and Don Keenan (Balloon Press 2009).

Fundamental Two

Proportion of Time on Harms and Losses

. . . O, I have taken
Too little care of this!
—Shakespeare, *King Lear*

A book, a play, a trial, a sermon, a TV show, or a movie is about *whatever it spends its time being about*. It can't be about what it spends little time on.

Shakespeare's *Hamlet* has about twenty seconds of dialogue that some English professors think shows Hamlet wanting sex with his mother. So they insist the play is about an Oedipus complex. Well, no. Even if that brief dialogue did show Hamlet wanting to have sex with his mom (it does not), the play would still not be about an Oedipus complex. An entire department of English professors stamping their feet and insisting that the play is about an Oedipus complex—as frightening as such a gathering might be—cannot change what the audience experiences: only a few seconds of anything even remotely related to Oedipus. The rest of the play's several hours is about revenge. So to the audience, the play is about revenge.

Similarly, an entire table of plaintiff's attorneys stamping their feet and insisting that their trial is about damages cannot make it so—unless they spend much of the trial time on damages.

A sprinkling of testimony about damages followed by a quick mention of damages in closing leaves the focus on liability. Jurors base their decisions on the information made available to them. So proportion your time well. For most cases, spend a third of your overall time on harms and losses. Half in your jury voir dire. A third in your opening. Lots of (brief) damages fact witnesses. Use every expert—on both sides—for damages, no matter why they were called (*see* section 7-2, p. 206, hitchhiking). And in most cases, spend at least a third of closing on damages.

Don't abbreviate liability,
but don't skimp damages.

Caveat: Don't stuff the trial with filler. This book will help you fill trial time—even during the defense case—with effective damages content.

Exception: In cases of minimal harms and losses, especially when using the methods outlined in *Reptile*, focus more heavily on liability, such as the violated safety rules. You still need enough damages time for jurors to allow[3] money. But when the seriousness of the negligence steeply outweighs the level of the harms and losses, you want jurors to focus on the dangers created by the defendant's kind of negligence.

3. Jurors don't "give" money. As Kentucky attorney Gary C. Johnson points out, they "allow" it. So that is how you should refer to it in trial.

Fundamental Three

You

I am what I am.

—Popeye

You better not be.

—Olive Oyl

Tort "reform" has convinced many jurors to try to defeat you—by making them believe that your greed and dishonesty endanger them *personally*.

When you fight this publicly or in trial by talking about justice, you convince such jurors that you are not only a personal danger, but a hypocrite, too. Their synonym for "attorney" is "greedy bastard."

You already know the obvious ways to deal with this: don't do anything that confirms the ugly stereotype. No expensive pens or jewelry in trial. Don't drive your Jaguar to trial. If you live in a small town, don't even own one. Send it to me.

Jurors notice *everything*, in and out of trial. They go online to look for more things to notice about you, as well as your case, your client, and all else they can find. (*See* Fundamental Ten, pp. 33*ff*.) So make sure you are in control of all that they notice—especially about you, and especially all the time and everywhere, not just in trial.

Fundamental Four

Client's Point of View

Try to see it my way.

—Paul McCartney, John Lennon

Jurors perceive the full weight of harm only when they walk in your client's shoes. That means subjectively, not from the outside.

Pay particular attention to the technique, illustrated in supplement F, of first-person narrative in closing argument. This can put jurors right into your client's shoes so they can comprehend the harms in the way your client feels them. (Just don't do it in opening!)

Isolation and Lack of Mobility

Lawyers customarily focus on physical pain as a major "noneconomic" harm. Of greater persuasive weight is your client's isolation from other people and his loss of mobility. The observer's brain actually experiences some of another person's feelings of isolation and lack of mobility, but not her physical pain. (*See Reptile* for more of what you need to know about isolation and mobility.)

Danger

Look carefully for all the ways in which your client's injuries have placed him in danger. There's a lot wrong with being unable to walk, but among the worst is the inability to escape danger.

Brain damage is also lethally dangerous. A normal brain allows for a fast, safe decision of how to get out of a burning house. A damaged brain might not.

Showing dangers gives jurors a concrete understanding of what the harm has done—something they can identify with instead of just feel sorry about.

Learning the Harm

Stamford, Connecticut, attorney Ernie Teitel, one of the northeast's premiere attorneys, advises that from the moment you take a case, start working with your medical and life-care-planning experts. When possible, a member of the trial team should completely take over this continuing responsibility so she can focus exclusively on damages without distraction. If you can't make

this kind of personnel division, at least make gathering the damages information its own high-priority task.

And it is a wide-ranging task. You need to talk to neighbors, the dry cleaner, the minister, fellow churchgoers, the grocer, bus drivers, fellow carpoolers, acquaintances from the PTA and school yards—folks from every place your client frequented. The list will almost always be long. You'll get quotes as good as the one Ernie got from a dry cleaner: "Joe used to give me great stock market tips. Now he comes in and can't even count his change."

But all that is still not enough. You need to develop a personal and genuine emotional attachment to the reality and significance of your client's harms. You can't get that by sitting in your office, sending out investigators, making phone calls, listening to doctors, debriefing colleagues, and writing down answers to your questions. You must put yourself physically into your client's personal world. For days, not hours.

North Carolina attorney—and Duke's remarkable advocacy professor—Donald H. Beskind routinely spends a day or more in his clients' homes. This is not to talk business, but to learn and experience what it's like to be the client(s).

Ernie Teitel does the same. Don and Ernie see and hear things no one would have mentioned in an office interview or a few hours of discussion. *And they come to feel those things.* They get there by shedding their lawyer's skin and putting themselves into their client's skin.

In one case, Ernie learned his bedridden client's deepest secret terror: if some night there were a fire, her children would surely die trying to rescue her because she could not get out on her own. Ernie would never have learned so well-guarded a personal fear except within the intimacy of the home. More importantly, because Ernie heard it from his bedridden client in the very room in which she feared that her children would be killed, he felt its emotional power fully enough to convey it to a jury.

It's not an office matter. When it comes to the power of damages, not much is. Holding heart-to-hearts with your client and her family members, visiting the cemetery in wrongful death cases, trying on braces and using other necessary equipment yourself, spending quiet time with your client and her family, holding your client's hand through the pangs of searing pain—these are some of the ways you emotionally "learn" enough to put jurors into your client's shoes.

The most effective program that teaches how to walk in your client's shoes is Gerry Spence's Trial Lawyers College—not only the extended sessions, but even the abbreviated weekend sessions. You can also get individual assistance from a superb consultant: Joshua Karton. He consults out of Los Angeles,

and a day or two with him can work wonders for your ability to convey harms and losses to a jury.

Do not underestimate the importance of this aspect of advocacy. Regardless of case size, you cannot do it well enough until you have made your client's harms part of your own experience. Even with nothing but a broken arm, until you feel what it's like to live with it, you can't make jurors feel it.

Fundamental Five

Defendant Conduct

When you do the things you shouldn't do

Peek-a-boo, I'm watchin' you!

—The Cadillacs, 1958

Kentucky's legendary Gary C. Johnson teaches that verdict size depends heavily on how bad the defendant's actions were. This is partly why you cannot separate liability from damages. Even with stipulated negligence, you'll see below that you can (and must) focus on defendant conduct.

Rule Violations

Our most useful way to show the egregiousness of the defendant's actions is to frame them as safety-rule violations.[4] No case is about its own topic (such as medicine, the nature of a product, the science, or the technology); **it is always about safety-rule violations**. Every case. Always. When jurors describe your case months later, if they do not say, "It was about some company [*or driver or doctor or whatever*] that violated safety rules," then—brutally but accurately put—you blew it.

So your main theme is safety rules. Your subthemes are safety rules. And everything you present should directly support your rules-violation case.

Why?

Because Americans—especially when they are jurors—easily forgive errors and misjudgments. They know that no matter how careful people are, inadvertence, mistake, or misjudgment is inevitable. To err is human. "Whoops" is one of life's most common events. By their own experiences, jurors know (and they are right) that there's no way to prevent "whoopses." You know it, too. So jurors are reluctant to punish or even blame anyone for them.

Besides, a high verdict can't reduce the number or severity of inadvertent acts. Result: a defense or low verdict.

In contrast, jurors find it worthwhile to blame and punish people who violate safety rules.

4. For complete guidance, *see* Rick Friedman & Patrick Malone, Rules of the Road (Trial Guides 2006). It is about every kind of case, not just highway cases.

Not coincidentally, that is also the most important part of tort law's public policy purpose: safety. Even when you cannot explicitly make that argument, it is so inherent to the birth of the justice system and the nature of a trial that when you present the case in terms of rules, jurors will figure it out for themselves.[5]

So never again say or even imply "accident" or "error" or "misjudgment" when referring to what the defendant did. "The trucker missing the red light" is inadvertence, which is useless. But jurors who won't allow much money for inadvertence will want to yank a physician's license for violating a safety rule.

Ignoring the distinction between inadvertence and safety-rule violation is among the most common causes of poor verdicts.

Loser argument: "The physician mistakenly diagnosed infection."

Winner argument: "The physician violated the patient-safety rule requiring the doctor to immediately treat or rule out every urgent danger."

Loser: "The defendant made the wrong judgment."

Winner: "The defendant made a judgment that needlessly endangered the patient." (It's generally better to avoid a theory of the case that involves judgment, unless you cannot avoid a "best judgment" instruction as a defense.)

Loser: "The trucker missed the light."

Winner: "The trucker violated the safety rule requiring him to look where he was going."

Every act of negligence violates some safety rule that the defense must agree with or make himself seem unacceptably dangerous or evasive.

What follows is a brief summary and adaptation of the Rules of the Road methodology you'll need for applying many of the methods in this book. (You still need to read *Rules of the Road*.)

1) Applying the Rules

Here are the requirements for each rule:

A) Defense must agree. You craft rules the defense must either agree with or seem dishonest or dangerous. As you'll see, this is a lot easier than it sounds.

5. *See* REPTILE, chapter six.

B) **Rule = what someone is or is not allowed to do.** "Driving drunk is dangerous" is not a rule. It does not tell us what someone can or cannot do. "No one is allowed to drive drunk" does, so it's a rule.

Similarly, "Safety is more important than profit" is not a rule. But it is easily turned into a rule with which the defendant must agree: "A company is not allowed to make profit more important than safety."

C) **Rules derive from** common sense, industry standards, policy guides, regulations, law, manuals, etc., ad infinitum.

D) **Must be a safety rule.** Violation of the rule must allow or increase danger.

E) **Plain English.** Just like everything else you say in trial.

F) **Crystal clear.** Just like everything else you say in trial.

2) The Umbrella Rule for Every Case: "Needless Danger"

"A [*doctor, manufacturer, driver, whatever*] is never allowed to needlessly endanger anyone."

Alternate wording:

"A [*doctor, manufacturer, driver, whatever*] is never allowed to make a choice that needlessly endangers anyone."

Always include the phrase "needlessly endangers." It makes the statement true, persuasive, and significant. Needless endangerment is the threshold, because **every needless endangerment is negligence, and every negligent act is needlessly dangerous**. There are no exceptions. Unless a rule prevents *needless* danger, violating the rule is not negligent.

Out of the umbrella rule flows every other rule in the case. So:

A physician must follow the rules of a differential diagnosis, or **she is needlessly endangering her patient.**

A manufacturing company must provide danger warnings, or **the company is needlessly endangering the public.**

A driver must maintain attention at all times, or **he needlessly endangers others on the road.**

3) The Only Permissible Choice: The Safest

Now for the best part:

Once the defense agrees to the umbrella rule (no needless danger allowed), you have changed the playing field. Here's how. Follow the logic carefully:

a) Needless endangerment is *always* negligent or otherwise culpable. So:

i) There's no such thing as ordinary care that needlessly endangers; if it does, it's not ordinary *care*.

ii) There's no such thing as a standard of care that needlessly endangers; if it does, it's not a standard of *care*.

iii) There's no such thing as a product fit for its intended use that needlessly endangers; if it does, it is not fit for its intended use.

So at defense depositions and in trial, ask defense witnesses, including the defendant, the umbrella question:

> "Mr. Taxi Driver, a driver is not allowed to needlessly endanger the public, is he?"

Insofar as he waffles, he alienates jurors, because jurors already know that the only acceptable answer is: "Of course not."

b) Whenever there are two available choices of how to accomplish *the same thing*, the second-safest choice—by definition—contains some danger that the first-safest does not. That makes the danger needless, since there is a safer choice. So:

> "Doctor [*or whatever*], when there are two available ways to accomplish the same benefit, if a physician chooses the more dangerous way, that would needlessly endanger the patient, right?"
>
> "Safer is better?"
>
> "So second safest is not enough."

The greater danger inherent in making the second-safest choice is *always* unnecessary. Unnecessary endangerment is negligence.

"Safe enough" does not count. Nothing is "safe enough" if it allows danger when a safer available (practical, at-hand, etc.) choice can achieve the identical benefit.[6]

In a defendant's view it may be "safe enough" for the doctor to get to the patient's room in an hour. But when it's safer—and possible—to get there in thirty minutes, taking an hour is negligent. It makes no difference what the defense says the standard of care is, because the overriding standard of

6. If there are shifting levels of benefit to the various choices of action, the situation becomes more complex. But most of the time, the benefit—to get to the other end of the road, to save the patient's life, to keep users safe—is identical for each available choice.

care is always to abide by a risk/benefit analysis safer to the patient—which is another way of saying "no needless danger." So even when the law allows "alternative choices," physicians cannot choose an alternative that needlessly endangers. It also falls well below the level of care every juror wants for herself and her family.

In a defendant's view it may be "safe enough" to put a warning in the manual only. But if it's safer to put that warning where a user will see it while using the product, then a warning only in the manual allows needless danger. And that equals negligent or otherwise culpable conduct.

So goodbye to most standard-of-care and other "it was safe enough" defenses. Neither the law nor the jury tolerates anyone choosing needless danger. How many patients would sit in a waiting room that has a wall sign reading:

> *This clinic needlessly endangers patients!*

Who would sign a form seeking consent to "needless danger"?

Who would ride in a cab that had a sign reading:

> *This cab company and its driver needlessly endanger passengers and the public!*

Who would buy a product that carried the warning:

> *This product needlessly endangers anyone who uses it!*

Perhaps best of all, this approach couches all negligence as the result of an intentional choice.

Defining Negligence as Outrageous

Here's another essential safety rule:

> The *more dangerous* something is, the more careful a [*doctor, manufacturer, driver, whatever*] must be. (For example, "The more dangerous driving is on ice, the more careful a driver must be." Or, "The more dangerous a surgery can be, the more careful the surgeon must be.")

Jurors rarely understand this axiom of negligence law, so even jurors who listen intently to the court's instructions make fundamental errors. For example, jurors can easily think that the driver of an eighteen-wheeler needs to be no more careful than the driver of a car. But an eighteen-wheeler is more dangerous—it can do a lot more harm—so it must be driven more carefully. Jurors will demand greater care once you get them to understand the law—and how needlessly dangerous its violation can be.

The judge is usually powerless to convey the principle that greater danger requires greater safety. So it becomes your job. Do it by getting the defense to agree—as it must—that the more dangerous something is, the more careful one must be when doing it. It's not merely the law; it's common sense, the standard in every field and industry, and the foundation of all safety rules and safety training. So it is allowable testimony even when a judge does not want witnesses talking about the law. That means you can force the defense to admit it.

(Of course, care is a two-way street: it is also demanded of your client. However, *Reptile*'s methods turn it into a nonissue, since "reptilianized" jurors find little or no reason to factor in your client's carelessness. For more, see *Reptile*, p. 73.)

Here's a memorable analogy to explain that greater danger requires greater care: "If a snake handler walks through a crowd carrying a dead rattlesnake, it's not dangerous, so the handler need not be careful. But carrying a live rattlesnake through a crowd is very dangerous, so the handler must be very careful." That turns the rule into easily understood common sense. (I don't remember who I stole this analogy from, but thank you, whoever you are!)

"Ordinary" Care

Don't get caught in the common trap of misunderstanding the phrase "ordinary" care. "Ordinary" does not mean average or C+. Ordinary care is the level of care that the normally *careful* person uses in situations with a given level of danger. **A normally careful person or company—an "ordinarily" careful person or company—does not allow needless danger.**

"Reasonable" Care

No matter how tempting money or convenience or anything else might be, every person and company must be as careful as they "reasonably" can be to prevent a danger from causing harm. But be wary. Reasonable does not mean "moderate." It means "using reason": What does *reason* tell us the appropriate level of safety is for the circumstance?[7] Anything less is negligence.

7. *United States v. Carroll Towing Co.*, 59 F.2d 169 (2d Cir. 1947). Judge Learned Hand's decision established the "reasonable man" standard (the "Hand Rule") for both law and economics. It involves algebraic analysis of 1) the probability of a harmful outcome, 2) the degree of harm it could cause, and 3) the consequent level of care that must be taken. **It holds that the required level of care is that which helps keep the community safe, not merely that which the average person might want to exercise.**

Which is why there's no such thing as reasonable care that needlessly endangers.

Products Liability

When it is technologically and financially feasible to make a product safer, the maker must make it safer no matter how safe it already is. In other words, there is no such thing as a product fit for its purpose that needlessly endangers anyone.

"All the Other Kids Do It!"

The defense often argues that others are just as careless as the defendant was. "Lots of people carry live rattlesnakes the same way!" "Lots of doctors do it that way." "Lots of other SUVs roll over."

Makes no difference. When Ford says, "The Ford Explorer rolls over only as much as the Subaru," it is irrelevant unless Ford proves that the Subaru is safe. **Being as dangerous as something needlessly dangerous is not a defense to negligence.** Even where judges allow so ridiculous a defense, when you word it that way, jurors are not likely to put up with it.

Explain that no one—not Ford, not Toyota, not nobody—is allowed to needlessly endanger the public. If twenty other companies needlessly endanger the public, they are all negligent. If everyone allows needless danger, then everyone is negligent. In fact, when the defense offers such a bogus defense, you can empower the jury to make the world safer simply by means of a simple and proper compensation verdict in this case: "They're watching to see how far Durham County jurors will let a company go in needlessly endangering the public before making the company pay for the harm they did." This is not a punitive damages argument. It is a response to the defense's attempt to get off on the basis of being no more dangerous than everyone else—an attempt that should pass neither legal nor juror muster.

This expresses the public policy necessity of preventing a nation in which every vehicle rolls over because all the others do. Juries and even judges often miss this point.

"Everyone" speeds, but it's still negligent. Why? Because even when everyone else speeds, "prudent" drivers do not. No one being prudent or using reasonable or ordinary care speeds (i.e., needlessly endangers) just because others do. I cannot say, "I was going 85, but so was everyone else." Well, I can say it, but it does not excuse me.

When the defense talks about others who do the same bad act, it is relevant only if the defense proves that those others are prudent. The defense

can never do this because, as you now know, prudent people and companies never allow or create needless danger.

Egregious Conduct Does Not Stop with the Negligent Act

Always find out what the defendant did afterward.

Did a trucker sit in his truck talking by cell phone to his boss and waiting for instructions while Jane was bleeding in the road? *Yes*. Did he go out in the rain to wave traffic away so Jane would not get run over again? *No*. Hold an umbrella over her? *No*. Help in any way? *No*. Call 911? Apologize?[8] Ask how Jane was afterward? *No, no,* and *no*. Those are examples of outrageous conduct. They make the plaintiff's suffering more real to jurors. And the plaintiff's awareness of these things exacerbates her suffering, so should be admissible for the purpose of damages. (After all, your client's failure to mitigate her harms would get into evidence; similarly, so should anything the defendant does to make those harms worse.)

In a hospital case, who showed up first in your client's room after the negligence? A social worker to help the family deal with what had happened? A doctor or nurse bringing solace or explanation? Or instead did the hospital's risk manager rush in to put a lid on things? Where was the doctor? What did she say when she realized what had happened? Did she disappear? Did the hospital hide anything? And for how long? Did it take discovery to get the truth for the family? (This is a primary reason many plaintiffs looked for a lawyer in the first place. It's often the only way to find out what happened.)

Look for the outrages. What machinations has the defense used to escape responsibility? Did the railway "lose" the speed records? *Outrageous*. Did the defense stipulate to liability the day before trial—as a trial tactic? *Outrageous*. (And it goes to your client's emotional suffering, so you should be able to get it in.) By denying responsibility all this time, did the defendant deprive your client of funds needed for his care and safety? (Be careful, though, not to open a collateral-source door.) Or make him worry he'd never get the money needed for his care? *Outrageous*. Is the defense now adding insult to injury by attacking your client's good name by saying he's lying, exaggerating his injuries, or malingering?

A defendant's refusal to accept responsibility (which means full compensation) adds to the plaintiff's suffering. Your client's pain and disability are bad enough, but are even harder to bear when the defendant says, "Not our fault" or "Your harm is meaningless to us."

8. Raleigh attorney and Duke law professor Don Beskind points out that many states now bar a doctor's apology from being admitted into evidence. Don suggests that you might be able to point out that a doctor did *not* apologize despite knowing it could do him no harm in court.

It's worse when the defense stipulates to fault, but still won't meet its responsibility. That says, "Yeah, we did it, and we don't care." It's even worse when they say that—and then blame the plaintiff for what happened!

Be thorough in your search for outrageous acts. Point out, for example, that the defendant's company representative at trial knows nothing about the case. "They didn't care then; they don't care now."

Harm upon Harm

A defendant's outrageous acts after the initial negligence constitute harm piled upon harm. Positioned correctly, those added harms can be seen as proximately caused by the initial negligence, so they might help you claim a higher verdict. When the defense wants to yank the child out of her mother's arms and send him to an institution far from family, it's piling harm upon harm.

Anger

Jurors who are angry at a defendant provide more money. Greater anger = more money. Jurors can become angry not only at a defendant's wrongdoing, but also at her pretrial and in-court behavior (lies, evasions, delay, refusal to accept responsibility, being more careful now about protecting her money than she was then about protecting people, etc.). Jurors get angry when a defendant corporation seems to not take the case seriously, such as when the defendant sends a representative who knows little about the case. (So consider calling that uninformed representative as an adverse witness in your case-in-chief before he has a chance to get comfortable or learn about the case from the proceedings. You might even call him first, if you are experienced enough to handle anything he says. If his ignorance angers jurors from the start, they may see the rest of the case through those anger lenses.)

Motivations

Go beneath the wrongdoing to show (or at least suggest) the defendant's motivations. Jurors are angered by negligence motivated by greed, dishonesty, hostility, corruption, callousness, laziness, or selfishness. Beyond angering the jurors, these things show jurors what drove the defendant to do what he did. Showing motivation makes it easier for jurors to believe that the defendant really did what you say he did.[9]

Make sure the motivations you offer are believable. When you say that a failure to warn was driven by the motivation to save a penny or two per $600 unit, it's hard to believe. Sure, you can multiply it out by the number of

9. *See* David Ball, Theater Tips & Strategies, 187 (NITA 2003).

units, but the total remains comparatively trivial. So jurors are unconvinced that the lack of label was due to a nefarious cause.

In reality, the choice to omit the warning label was likely driven by a far stronger motivation: manufacturers don't want warnings when competing products don't have them. If the Ajax mower has a warning, customers tend to buy another company's—one without the warning. Every warning is an added marketing demerit, so no manufacturer wants to be first with any of them. (This is why manufacturers don't care as much when the government forces everyone to add a warning label.)

Look for and find persuasive motivations for the defendant's behavior. They will convince jurors that the defendant did what you say he did.

Caveat: Do not raise a suggested motivation to the level of a "must-believe." For example, say in closing:

> We don't know whether the prison guard choked John because the guard was angry, or had been drinking, or was doing a favor for another prisoner, or had some other reason. And the guard won't tell us. But we know that for whatever reason, he choked John.

This conveys the possible motivations as suggestions, not must-believes, so jurors will use whichever they like—or none. But they won't decide that you should lose on the grounds that they disagree with the motivations you suggest. In other words, don't try to prove what you needn't prove.

Defense Counsel

Defense counsel can anger jurors. Questionable tactics, making too many objections that jurors find pointless, bullying a witness, and other such practices can lead some jurors to express their anger in verdict size.

You

For the same reasons, jurors can get angry at you. That can minimize the verdict. For example, being nasty or overbearing to a witness may feel good, but it is almost always a blunder. One of the country's otherwise finest plaintiff's attorneys regularly irritates jurors with his unrelenting, biting, often pointless sarcasm and anger on cross: he's unbearably rude. He gets great results because he makes up for his behavior with extraordinary work in other ways. But for him, as well as every other attorney, jurors who are repeatedly annoyed at counsel are less enthusiastic about making counsel happy. That great attorney could be doing even better.

You won't get a jury angry (except at you) by showing your own anger. Instead, show the facts that got you angry. With few exceptions, there is nothing as annoying and unpersuasive as an angry plaintiff's attorney.

F. Lee Bailey could read when his jurors were angry at the witness. I have watched him reflect that level of anger (not a jot more) in his own tone and behavior. He did not try to get jurors angry or angrier by acting in a way they were not already feeling. So always show less anger than you are certain the jury already has. That's the gold standard for your use of anger in trial.

Make Defendant Face Responsibility

Jurors tend to allow more money when they understand that the defendant is trying to use the trial to evade responsibility. Jurors know it is proper for a defendant to defend himself, but not to evade responsibility.

In closing, argue:

> It's fine to defend yourself when you've done nothing wrong. But when you're wrong, you are supposed to stand up and accept responsibility—not sidestep responsibility at the further expense of the person you hurt.
>
> First, Defendant Smith failed in his responsibility by not looking where he was driving. Then he refused to accept responsibility for more than two years, depriving John of the care he needed and forcing us to come to trial.[10] Now you have seen the defendant spend ten days in front of you trying to evade his responsibility—permanently.
>
> He does not want to fix, help, and make up for anything. He only wants to escape his responsibility. So it's up to you to determine how far someone can go in violating public safety rules and hurting members of the community before he is required to pay full and fair compensation.

You may want to add an aggressive ending:

> If you decide on less than full and fair compensation, then after you've announced your verdict, when you're walking through the parking lot to your car to go home, you'll see the defendant and his lawyers congratulating each other for having permanently escaped responsibility.[11]

10. Don't say this if it opens a collateral-source door.
11. If you are the one who suggested this to me, please let me know.

Last-Minute Stipulated Negligence

When a judge tries to bar evidence of the defendant's conduct after the injury, argue that the judge has grounds to do that only with respect to liability, not damages. Point out that the plaintiff's post-injury acts would be relevant if those acts constituted a failure to mitigate harms and losses. By the same token, a defendant's post-injury acts are relevant when those acts make any harms or losses worse. Then explain how the needlessly delayed admission of liability added to your client's emotional suffering. Your client will almost always be able to say this truthfully, as will any psychologist and even your client's physician. A defendant's delay in accepting responsibility creates real and unnecessary anguish—especially when all along the refusal has been groundless (as we see by the fact that the defense stipulated to liability despite having no new information).

Tell jurors:

> After two years, they finally admitted last night that they were negligent—even though they knew everything two years ago that they knew last night. So why did they wait? To wear John down so he'd walk away. Why did they finally admit it last night? Because they knew they had to face you this morning.
>
> Now they brag that they've admitted their responsibility. But taking responsibility is more than a legal maneuver.

Be on the alert for penalties a late stipulation might lead to. If the defense denied your request for admissions concerning negligence, only to admit it at the last minute, you may be entitled in some states to costs and attorney's fees.

For additional help with stipulated negligence, see *Reptile*, chapter twenty.

Lack of Remorse (Crocodile Tears)

Americans love remorse. A death-penalty jury is far more likely to give life than death when they see the murderer is remorseful. In the same way, civil jurors allow less money in the rare instances when they see the defendant is remorseful for her wrongdoing.

On the other hand, false remorse or a lack of remorse can anger jurors. Few defendants or their lawyers know how to be remorseful and defend their case at the same time.

Lack of remorse is easily found in defendant's post-injury behavior.

False remorse is easily shown by pointing out that if the remorse had been real, the defendant would have expressed it long before trial. If it had been real, the truck driver would not have stayed in his truck after the wreck talking to

his boss; he'd have gotten out to help your client, visited him later in the hospital, or done something else that showed remorse. In closing, show that the defendant's last-minute "remorse" is a cynical maneuver—and that nothing is worse than fake remorse.

To lay the groundwork for showing that the remorse and responsibility implied by a last-minute stipulation are fake, in depositions ask:

"Are you sorry for what you did?"

"Are you saying you did nothing wrong?"

"Were you negligent?"

"Are you being unfairly accused?"

Attacks on Your Client

When the defense attacks your client in any way, argue that it is salt on the wound. First the obstetrician's negligence killed the baby, and now—to evade responsibility—the doctor blames Mom, knowing she'll forever have to live with having been accused on a permanent public record of killing her own infant.

Malingering and Exaggeration of Symptoms

When the defense claims your client is malingering or exaggerating symptoms, point out that publicly branding her a liar is literally adding insult to injury. Jurors do not automatically see the malevolence or the destructiveness of such attacks. Emphasize it, so if jurors decide the defendant is liable, they will more likely make her pay full compensation. (*See* section 8-23, p. 247*ff.*, "The Gift of Malingering.")[12]

12. Malingering or exaggeration implications are so common and usually so fraudulent that they deserve entire books. Fortunately there are two great ones: Rick Friedman's *Polarizing the Case* (Trial Guides) and Dorothy Sims's *Exposing Deceptive Defense Doctors* (James Publishing).

Fundamental Six

Inadvertent Wrongdoing

Baby, baby, baby, I didn't mean to do you wrong!

—Fifteen percent of all country songs

Mommy, I didn't mean to spill my milk.

Then don't worry about it, dear. It's OK. It was an ***accident****.*

—Mom teaching little girl to grow up into a terrible plaintiff's juror.

Many jurors believe that inadvertent error should be treated mildly or even forgiven: "Accidents, mistakes, errors, misjudgments—they happen, it's human, nothing can prevent them." Don't feed these *he-didn't-mean-to-hurt-her* jurors, or at best you can expect a smaller verdict or a lost case.

Do not allow the concept of inadvertence to get into trial, at least not through you. There's nothing inadvertent about choosing to violate a safety rule. Keep in mind that every act of negligence is the result of a choice to violate a safety rule. I have yet to hear of an exception. (*See* section 4-13, p. 102, and *Rules of the Road*.)

Jurors know you cannot make people stop making errors, mistakes, and misjudgments—so regardless of the harm the error caused, jurors are not strongly moved to allow a lot of money for it. But once jurors see that the negligence was a voluntary choice, they will see that in the future such choices can be prevented—and understand that full compensation will help make their own community safer. In fact, this is part of the public policy of tort law, so in most venues you can even argue it.

Rule of thumb: Refer to everything the defendant did as a choice, and never let it drop out of the framework of a violated safety rule.

Fundamental Seven

Worthwhileness of Money

> *Money is like manure; it's not worth a thing unless it's spread around encouraging young things to grow.*
>
> —Dolly Levi (Thornton Wilder's *The Matchmaker*)

For years, the National Jury Project and others have taught that jurors resist allowing money unless it will serve a worthwhile purpose. Arguments that your client "deserves" money or that money equals justice in themselves have little persuasive power. Jurors allow money for worthwhile purposes such as paying medical bills or providing for surviving children. Like shoppers, jurors want something for the money.

So what makes the expenditure worthwhile?

When a juror says, "Money can't bring back the dead" or "Money won't make the pain go away"—common in deliberations—that juror is arguing for a small verdict on the grounds that money can serve no purpose. "What's the point?" So the amounts allowed in wrongful death verdicts are usually smaller than those in injury verdicts in which money serves the purpose of, say, care. Unlike noneconomic damages, economic damages seem worthwhile.[13]

Money cannot help hopeless situations, so jurors tend not to allow money for them. Sometimes in your zeal to show how bad the harm is, you paint a totally bleak picture: unbearable and endless pain, no family, incapacity to do anything, no way to improve the situation. Result: No reason to allow money.

As soon as you take in each case, tune your antennae to anything that can be positioned as purpose or hope—especially hope that can be fulfilled or encouraged by means of a fair damages verdict.

Especially in cases with no permanent injury, many jurors have trouble understanding how money for noneconomic damages can be worthwhile. Money for last year's pain seems to serve no purpose.

13. Never use the phrase "economic damages." It sounds like it means "requiring no money."

Many of the techniques throughout this book help provide worthwhile purposes—beyond "justice" —for noneconomic damages. And the companion book *Reptile* shows you how to make it primary.

Unclear Purpose

Jurors are reluctant to pay for treatment and care they do not understand. It is not enough for an expert merely to say, "He needs muscle therapy." Explain:

- What it is
- How it works
- Who does it
- Why it is needed
- How it will help
- And critically important: *What will happen if it is not provided*

Show videos of the therapy, photos of the clinic, a video or model of the muscles the therapy will strengthen, and visuals that show what will happen if the care is not provided (such as an atrophied muscle).

Future Medical Inventions

Some jurors think medical science will eventually develop a cure for the "permanent" problem, so why pay for a lifetime with the permanent problem?

Turn this to your favor: Your experts should explain that if any "cure" is invented, it is not likely to be a complete cure, it will be painful and costly, and the minimum life-care plan (*see* section 6-15, pp. 189*ff.*) contains no money for it.

Money Not Necessary

Jurors often think that some of the money you want is unnecessary.

For example, a life-care planner may specify a swimming pool for recreation and therapy. Even with explanation, it can seem an unnecessary frill when there's a city pool or YWCA nearby. That can make jurors suspicious of the whole minimum life-care plan. So with or without a minimum life-care plan, avoid asking for anything that jurors can interpret as frivolous or padding. It's not worth the risk of undermining the rest of the plan.

Getting Along Fine without Money

The defendants have been forcing your client to survive without money. Then they claim she is doing fine without money.

Even when the defense does not say this, some jurors think it on their own. So show that your client is not doing well without money. Do this during your opening, or it can color juror decision making throughout trial.

For example, jurors often think, "Her parents are taking care of her, aren't they? So she's fine as is." So you need to explain not only that this is unfair for the parents (a weak argument), but that it is dangerous to rely on them because 1) they're not trained, 2) they're not part of a group that can provide an immediate replacement if anything happens to them, 3) there are some kinds of care that cannot be done properly by a relative—such as causing the necessary level of pain that some kinds of physical therapy require, and 4) as the family caregivers get older, they won't be able to continue providing care—right when care needs will be increasing and getting more complex.

Other Sources of Money

Jurors often assume that there are other sources of money: health insurance, social security, savings, workers' comp. "She was a teacher; they all have plenty of insurance." You need to offset this assumption in three ways:

First: Try to get into evidence that she has no source of money. Explain to the judge that it goes to suffering because, for example, she has been without the care and comfort that money could have provided. You just want to tell the jury, "She had no way to pay for the pain medications, so she could not get any."

Second: Explain to the jury that the community should not have to bear any of the cost of care for what the defendant has done. (Don't mention past care if it would open a collateral-source door.) In itself this is not all that powerful an argument, but within a "reptilian" context (*see Reptile*), it is bull's eye: A community (town, city, county, state, nation) has limited resources to care for people. When those resources are used to pay for what the defendant should pay for, everyone is deprived.

Third (and most important): Motivate and arm the jurors who will be on your side to enforce the law during deliberations—that the only money factors jurors are allowed to consider are the levels of harms and losses the defendant caused, not the outside-the-box factor of whether there might be other sources of money. (*See* section 8-4, p. 218.)

Come Back for More

Some jurors think the plaintiff can come back for more money. On that basis they reduce the verdict.

Make sure jurors know this is Jane's only opportunity. Explain that she should not have to gamble on whether or not certain things will be provided if they are needed. The defendant put her in this position, so the defendant is the one who should be required to take any necessary gamble.

Fundamental Eight

Fix, Help, Make Up For

"Fix, help, and make up for" provides an effective framework for all your damages evidence and arguments. And it gives jurors a focused three-part structure for the jury's task:

1. *To* fix *what can be fixed*—some losses can be 100 percent fixed, such as repayment of medical bills or lost wages. (Point out that every cent of medical money goes to others—but again, don't open a collateral-source door.)

2. *To* help *what can be helped*—such as by paying for care that will help, but not cure; or for vocational courses to make a new career possible because Jane can no longer pursue the old one.

3. *To* make up for *(balance) what cannot be fixed or helped*—such as past pain or untreatable disabilities that won't get better.

To Fix

Money to fix serves a clear purpose, so jurors have the least trouble with it. Money can "fix" losses accrued due to the costs of care, treatment, and lost employment. Show jurors that 1) money *fixes* those losses, but 2) that all that money for care and treatment goes to others, not to your client, and 3) money for lost income just makes him even with where he'd have been if the defendant had not injured him in the first place. So money to fix is only one part of what a defendant must do to meet his responsibility for hurting a member of the community.

When jurors want to allow less money, they argue that income loss is just speculative: *How do we know he wouldn't have lost his job for some other reason?* Be especially wary of this in times of high unemployment. To offset this argument, show that his field of work is secure, or that the quality of his work made him the least likely to be fired, or whatever else you have that can show that he'd have kept his job. Also argue that the law says to provide money for the harm the negligence actually caused and not to take into account harm that something else only might have done.

To leapfrog it altogether, use the methods in *Reptile* so jurors will have no motive to minimize any part of the verdict.

To Help

Some harms and losses cannot be fixed; they can only be helped. Rehabilitation, for example, will strengthen the leg, but not restore it to its original state. The paraplegic can't walk again, but money for mobility aids will help her get around and keep her safe in emergencies. The dead cannot be brought back to life, but money will support the children.

> NB: Never use terms such as "economic" or "noneconomic" or "damages." They are legal jargon. Some attorneys misguidedly think there is some advantage to using the language of the instructions. This is a myth. Instead, legal terms are usually misunderstood in ways that hurt you—even if you explain them. Jurors don't learn much vocabulary during trial. During closing you will relate the nonlegal language with the legal. (*See* section 8-11, p. 235.)

Familiarity

Present the fixes and helps in ways familiar to jurors. Jurors allow money for a child because they are familiar with the financial needs of children. Carefully explain less familiar needs and try to find analogies familiar to the jurors. For example, some jurors may not easily provide for speech therapy unless you teach them what it is, why it is needed, how it will heal or help, *and what will happen without it*. So analogize to physical therapy, which helps people walk better, just as speech therapy helps them talk better.

Most people think "occupational therapy" is to help a person return to work. The term is particularly puzzling when you've told jurors that your client can never work again. *Result:* You get no money for rehabilitating the skills of daily living because jurors don't know that that's what you asked for.

Anchoring

In cases with significant economic damages, the economic total can serve as an anchor or benchmark for noneconomic damages: "John's pain is a far greater harm than just the million dollars in medical bills . . . ."

Negative Anchoring

With low economic damages, an economic-damages anchor can work against you. Low economic figures lead to low noneconomic figures. So if you have a realistic hope for high noneconomic damages, consider leaving

out your low economic figures. Don't claim them. You don't want to lessen your chances of a $5 million verdict for the sake of only $45,000 in medicals or $6,585 for a funeral.

Sometimes you may have to show low economic damages for other purposes, such as meeting a threshold for an intentional inflicting of emotional distress claim. But nothing says you have to claim money for them. Similarly, you might want to show how little medical science was able to do about your client's condition; just don't claim money for those small expenses.

To Balance (To Make Up For)

Some harms—such as permanent injury and death—can be neither fixed nor helped. They can only be made up for. "To balance" is usually your largest damages request.

But on their own, jurors often withhold money for whatever cannot be fixed or helped. This kind of nullification has always been around, but tort "reform" has made it ubiquitous. Instead of talking about how much money it will take to follow the law, many jurors say, "If the pain can't be diminished, why pay for it?" "How can we put a price on it?" "It would just be a prize for getting hurt."

To offset this, show jurors why making up for such harms is the most important part of their job. Then teach them how to do it. As you will see in the chapters that follow, this trial-long task starts in jury voir dire (*see* chapter four) or, where lawyer-conducted voir dire is not allowed, in opening.

Reptile's community-safety approach provides worthwhile—indeed, essential—reasons to allow money for noneconomic damages.

No matter how you frame your appeal for noneconomic damages, in every case you must accomplish the following four steps:

1. In jury voir dire, identify and try to remove prospective jurors who will resist noneconomic damages. (*See* section 4-5, pp. 87*ff*.)
2. Teach seated jurors that making up for harm is required by law.
3. In voir dire (or opening, if you get no voir dire), promise that you will explain in closing how to figure out money for harms that cannot be fixed or helped (noneconomic damages, though you will not ever use that term). (*See* section 4-5-5, p. 91.) Do not say nonsense such as, "No one can help you figure out how to do it—not me, not the judge," etc. This is not only a false statement, but also makes noneconomic damages seem illegitimate. Worse, as National Jury Project's Susan Macpherson

points out, it gives jurors a convenient excuse not to grapple with noneconomic damages. Zero is an easy out.

4. In closing, show that time is an easily calculable component of all intangible losses. You can do this even where per diem arguments, which are not all that effective anyway, are barred. (*See* section 8-14, pp. 238*ff.* and the noneconomic damages arguments in chapter two.) Get your client, family and friends, others who know her, and experts to figure out how much time your client has to spend "working for the defendant"—i.e., how much time does she lose to dealing with her injuries and disabilities? Brushing her teeth used to take two minutes; now it takes six. If she brushes twice a day, that's eight extra minutes a day times 365 days a year times life expectancy = a lot of hours for which she should be paid, including at time and a half when appropriate, and based on her old wage rate. Extend that into every minute she has to spend doing things—even resting—that she would not have had to do but for the harms the defendant caused.

Get time estimates from your client and experts. Have defense experts—including causation experts—corroborate that those are reasonable times with the kinds of injuries you are claiming.

Community Losses

When an injury has taken something away from a community, such as the good works your client used to do, the pleasure your client or his survivors used to get from those good works is usually compensable and often somewhat replaceable. Replaceable = fixable.

For example, your client has *lost the pleasure* of knowing that some elderly folks were eating well because she used to deliver meals to them. She *deeply worries* about those folks. She *misses their company*. That's three different emotional harms. Two can be *fixed*—turned off—if the jury simply allows money to hire folks to deliver those meals.

This shows that the defendant's violation of the safety rules has deprived the community of more than safety.

Fundamental Nine

Degree of Harms and Losses

The degree of harms and losses rarely drives an appropriate verdict. But your failure to provide a thorough harms and losses case can keep anything else from helping.

Unfortunately, many an attorney never learns enough about the harms and losses in a case to present them well or thoroughly. The first step—before worrying about how to present them—is to gather the information. Seek out the harms and losses at least as vigorously, concretely, and thoroughly as you pursue anything else in discovery.

I once asked an attorney for a complete list of the harms and losses in his wrongful death case. He gave me the following:

1. Death
2. Lost husband
3. Lost father

A guy dies and the whole loss takes five words!

Learn the full range and depth of harms and losses. Potential sources of that information include the client; people who know or knew him such as those who worked with him, live(d) near him, help(ed) him, or observe(d) him; and experts (whether or not they will testify, they can still be useful) such as social workers, pain counselors, grief counselors,[14] and others who work with victims of similar harms and losses. Consult books and Web sites that describe the full range of consequences of various injuries. Even your own earlier clients can help you better understand the consequences.

14. *See* Robert T. Hall & Mila Ruiz Tecala, Grief and Loss (Trial Guides, 2010).

Fundamental Ten

Who Gets the Money?

The way jurors feel about your client and how she comes across in trial are so important that you cannot gauge the value of your case in advance by comparing it to similar cases. No two clients are alike, so no two cases are alike. You must factor in—sometimes heavily—the impressions all parties make on the jury.

Client Characteristics

Jurors tend to withhold money from someone they see as a "bad" plaintiff, even when the "bad" is unrelated to the case. So when your client has down sides you can't keep out, maximize the good sides: having done good works, having accomplishments, working hard, being a dedicated parent, helping others, being honest, maintaining a stable home against the odds, etc. Kids turned out great? Good. Problems with kids? Good—just show how your client sticks by them and works (or worked) hard to help them turn out well. Client abused drugs? But then she worked hard to overcome it. Had brushes with the law? Yes, but once her daughter was born she reformed her life.

Jurors, as Don Beskind wisely teaches, love redemption stories.

Ask your client what she's most proud of. Interview friends, family, and employers.

Vignettes

The most effective way to present this kind of information is by means of witness vignettes—brief stories that illustrate the client's good qualities (*see* section 6-9, p. 185). Even when a client has no bad qualities, emphasizing the good ones is still important.

Stereotypes

Stereotypes can be your best friend or worst enemy.

Stereotypes are mental shortcuts created by a deeply inbred sophisticated neurological mechanism for information storage, instant retrieval, and near-permanent application. They are pre-logical—meaning that by the time you use logic to show that a stereotype (such as "fat people are lazy") is false, it's too late. Unless you have a few years and a strong will, you can't dislodge a stereotype—not even from your own brain.

Stereotyping is a defense mechanism. It drives—often on its own—a lot of decision making. Mostly without realizing it, we use stereotypes all the time. We prefer to think of ourselves as logical beings whose decisions are driven by conscious thinking. That's probably the falsest stereotype of all.

Negative Stereotypes

Some jurors will think your client is not worth investing in if she falls into a devalued stereotype (minority member, old person, immigrant, obese, foreigner, druggie, etc.). Judgments driven by stereotypes are lightning fast and set in stone.

The National Jury Project's Susan Macpherson (Minneapolis) is the go-to expert on dealing with stereotypes. She teaches you to show how your client is an *exception* to the stereotype. So if the stereotype's characteristics include 1) stupid, 2) lazy, and 3) unreliable, have witnesses show your client's 1) knowledge, 2) diligence, and 3) honesty. If jurors might stereotype your client as, say, a "welfare queen," list for yourself that stereotype's characteristics and then have witnesses show that she does not match those negatives. Do this subtly—just show the characteristics that don't match, but do not talk about welfare queens or their characteristics. (*See also Reptile*, chapter seven—codes.)

Positive Stereotypes

Positive stereotypes can help you almost as much as negative ones can hurt. Positive stereotypes provide one of the best ways to deal with negative ones. "Hardworking mom" is a readily recognizable, very positive stereotype. If you show that that's what your client is, jurors will think well of her. And "hardworking mom" is a powerful offset to the negative "lazy" stereotype attached to obese women.

Is your client someone who "works by the sweat of his brow"? Or does he have the characteristics of "salt of the earth"? Is he a "self-sacrificing parent"? Find out—not from your client, but from everyone who knows your client.

Once a juror assigns a stereotype to a client, the juror will believe that all the characteristics of that stereotype apply. (Obese = not only lazy, but also self-indulgent, greedy, smelly, uncaring, etc.) This mental mechanism can kill a verdict when the stereotype is bad and breathe life into your case when the stereotype is good. Think this through carefully when you have a client who can fall into any kind of stereotype, good or bad. It is often the most important factor in determining verdict size.

Normal Behavior

What was your client doing when she got hurt? Try to show that she was following her normal routine: "She did exactly what she had been doing at work every day for years." In contrast, show that the defendant's behavior was unusual.

Avoiding the Harm

Jurors often think that they'd have kept themselves safer than your client did. This is partly because random, unavoidable harm is frightening to jurors, so they persuade themselves that they'd have done something to avoid it. For an extreme example, after 9/11 many Americans said they'd never have taken a job working in buildings like the Twin Towers. This self-deceptive belief leads jurors to blame your client even when there's no contributory or comparative negligence claim: "I would not have done it that way"; "Dark or not, I'd have seen that black boulder in the road"; "My kid wouldn't have been using that kind of lawn mower"; "If I were sixty and my doc told me my prostate was fine, I'd say, 'OK, Doc, but I want a second opinion. Who can I get to do the test again?'" Such thoughts drive defense verdicts. At best, they drive down damages by making your client seem complicit in what happened.

Irrelevant Considerations

Some jurors find fault with things your client did that were neither wrong nor even relevant: "If you're going to live around here, you have to expect drivers like that." Even U.S. Supreme Court Justice Clarence Thomas has advised—in a case decision—that people who don't like the situation they live in (a town where the school strip-searches young girls) can avoid it by moving to another town. If a Supreme Court Justice can have such absurd thoughts, so can jurors.[15]

In-Trial Impression

Jury feelings about your client can be shaped by the demeanor and visual appearance of your client, his family, and his friends. Your co-counsel or paralegal must subtly but continually monitor that behavior. Facially acting out in response to defense testimony, snoozing, schmoozing, having too good a time, being too happy to see each other, staring at jurors, reading or texting during testimony, and other common behaviors can hurt you. Even crying!

15. *Safford Unified Sch. Dist. #1 v. Redding,* 129 S. Ct. 2633, 2656 (2009) (Thomas, J., concurring and dissenting).

Monitor these folks in the hallways and at lunch, too. Talk to your client's family and friends about appropriate behavior—not just in the courtroom, but in hallways, lavatories, parking lots, and driving to and from court. Even well-meaning people do the damnedest things, some of which can undermine the case. If you are not in 100 percent control of the impressions these folks make, make them stay home. Cases can be lost because of things they do that jurors see both in an out of the courthouse—things you will often never even know about.

Even when you are in control of these folks, strictly limit their number to two or three; others should be there only after they have just testified. More than that makes jurors think those people are vying for their cut of the verdict pie.

The only exception is when more people are necessary to provide the level of support your client needs. A good family turns out when one of their own is going through a difficult experience. But be sure to monitor them constantly.

Some attorneys resist changing how a plaintiff dresses or does her hair or makeup. They fear that the defense will call attention to the changes. Make the changes anyway. Your client is your most emphatic visual exhibit. Defense counsel's snide remarks about changed appearance are momentary; your client's appearance is stage center throughout.

(If the defense attorney does refer to the change, respond that the case is so important that your client wanted to look her best. I learned this from the inspirational attorney Rikki Klieman, who learned it from a client who said it—spontaneously—on the stand. And in some situations you can point out that your client has changed her appearance to try to offset the visible harm the defendant did to her—such as scarring or an awkward-looking brace.)

Client in Trial?

In many cases, your client should rarely or never come to court (*see* section 6-18, pp. 194*ff.*). This is especially true when your client looks to be in better condition than she actually is, as brain-damaged clients, for example, often do.

No severely injured client should be there throughout trial. It cannot possibly help you, and in many unpredictable ways can hurt a lot.

Client Preparation

Some kinds of problems require competent client preparation—not only for trial, but as importantly for deposition. Few attorneys know how to do it. It is antithetical to the normal skill set. Since good client preparation is essential to every case, you need to learn how to do it.

Here are three ways. You need all three.

First, read what the specialists have written. By far the best approach to client preparation is Don Keenan's chapter in *Reptile* (chapter seventeen) as well as his instructional video (at ReptileKeenanBall.com). You can learn to use Don's method to great effect.

Second, see chapter two in *Theater Tips and Strategies for Jury Trials*.[16]

Third, consider using a specialist to help prepare your client.[17] This will not only result in a client doing far better in testimony, but show you first-hand how to go about the process. (If you use a specialist, be certain to have her help your client understand how to answer questions about the preparation. It rarely comes up, but it can. In fact, ask the specialist in advance how she helps the client handle such questions. If she has no good answer, don't hire her.)

The vast majority of attorneys relegate client preparation to low priority: an hour or two of rushed work just before trial, admonitions of "Don't do this! Don't do that! And for God's sake, if you say X, you will lose the case for us!" A client unprepared to be clear, confident, and eager to testify can undermine your case in ways you might never be aware of—even as they unfold in front of you. And there's nothing that can take a verdict down like a client who has not been properly prepared. It is well worth your trouble to master this difficult area.

There is no client who cannot be improved: made clearer, more credible, more confident, less susceptible to cross-exam tactics. But many lawyers don't know how.

Out-of-Court Behavior

Constantly remind your client and her family and friends that they are on display from the time they leave their homes in the morning until returning home at night—even when they are nowhere near the courthouse and even on weekends. You never know when a juror is around. Jurors will even drive by the house to check it out, so your client must not be out there shoveling snow if there's a bad-back claim. She must not smoke where anyone can see, regardless of the nature of the claim. Smoking will turn some jurors against her, even when smoking has nothing to do with anything.

16. David Ball, Theater Tips and Strategies for Jury Trials (NITA 2003).
17. Joshua Karton in Los Angeles; Gillian Drake in Chevy Chase, Maryland.

Driving

This can be difficult to enforce, but *your client must not be driving if her claim includes anything that could make driving dangerous*.

Arguing that "driving is the only thing she has left" is a pathetic excuse for allowing your client to be a public menace. Jurors don't want to help plaintiffs who endanger the public, and who can blame them? (This is common in brain-damage cases, where brain damage has rendered the client dangerous to herself and others because she cannot make decisions in emergencies—yet she's driving!)

What's Online?

Before accepting a case, and again before trial, find everything a thorough search can possibly find online about your client and the family—or that can be mistaken for being about them. How you deal with what you find will depend on what you find. But not knowing about it can result in your losing your case. It can even damage your own reputation ("local attorney argues millions for child-molester").

Pay particular attention to social and business networking sites (Facebook, LinkedIn) as well as to sites where clients might have posted their injuries, such as CaringBridge.org.

Jurors will even look up your client's children on Facebook and other social networking sites. They'll look up your kids, too. We no longer live in a private world. For better or worse, the "community" is back the way small villages were in the early days of American jurisprudence—everyone knows everything, including a lot of things that are unflattering or just plain wrong. So you better know what the "neighbors" are thinking and why. And you better see what's out there that you can get rid of before trial.

This goes beyond your client. Many jurors Google the parties and families, as well as the lawyers and their firms, the experts and fact witnesses, the judge, topics of fact and expert testimony, the law, your marketing Web site (such as your counterproductive site that brags about your track record, implying that you know how to play the system to win lots of cases), professional organizations to which you or your client may (or may not) belong, and whatever else is out there, correct or incorrect. Even political contributions! Google Earth can show your house (or your client's house), along with its four-car garage and Olympic-size swimming pool. If you don't know what's out there, you don't know what the jurors might be thinking . . . so you don't even try to do anything about it. The most common result: you lose the case and never know why.

For example, even if defense counsel has not found it, chances are high that the jurors will know that your expert belongs to the same advocacy group you do. It's amazing how many otherwise smart attorneys hire such experts! To jurors, it's as sleazy as you can get.

So learn what's out there, and fix what can be fixed. Avoid the traps. And keep all this in mind when you (or your family or client or client's family) post anything online, put up a Web site, or donate to anything that can be publicly reported.

In one case, a juror found a plaintiff's expert's Web site that promised he'd make sure you win even when the facts are against you. To this day that attorney believes he lost for other reasons.

In another case, a Wikipedia entry agreed more with the defense expert than with the plaintiff's. Jurors took Wikipedia to be a neutral voice, so decided in favor of the defense. This was an avoidable loss because the plaintiff's expert could easily have shown what was wrong with what Wikipedia said, but plaintiff's counsel had not done her online homework.

Finally: You can count on the defense (including the insurance companies and various corporations and interest groups) to make things even worse by planting bogus information for jurors to see. Kinda disgusting, but it's being done, and you need to know about it.

Be sure to see Supplement H, "Virtual Reality," to gain control of this dangerous and ubiquitous new problem.

Who *Really* Gets the Money?

Jurors worry about money getting into the wrong hands. They might agree that the injured child needs treatment, but they think Dad might grab the money and run. Or that Mom and Dad could get run over by a bus, leaving Uncle Benny to grab the money and run. Or that you will grab the money and run—a concern created not solely by the forces of tort "reform," but by the handful of attorneys who did grab fistfuls of money and run. Jurors want to know that the money will go where it's supposed to. Otherwise they can suspect it will go to a nonworthwhile use.

For every case potentially involving a significant verdict for a child, establish a trust account so jurors know the money will go for its intended *worthwhile* purposes. If possible, name the trust holder as a plaintiff: *First National Bank and Bobby Smith v. Acme Trucking*. Make sure you do this in the way permitted by your jurisdiction. This allows the trust officer to testify to how the money will be controlled for Bobby's benefit. (Given the banking industry's recent

history, have the trust officer describe how your client's money is protected no matter what happens to the institution.)

You can accomplish the same thing with an appropriate guardian or conservator.

Not as effective, but adequate, is to explain or have the judge explain that the court will control the money. If the defense or the judge balks at allowing jurors to hear this, argue that the consequences of not doing so would be prejudicial solely to the child. Point out that the only reason the defense would argue against it is that they know it would be prejudicial against the child to hide the fact that the money is being protected. And there is nothing prejudicial to the defense in revealing it.

With adults as well, jurors often keep verdicts low out of worry over who will really get the money. Will the quadriplegic's attractive young wife grab it and run? Consider carefully what factors might make the jury think this way and offset them—for example, by showing the selfless devotion of the attractive young wife.

Fighting Spirit

Rather than focusing on how injuries have burdened your client, we advise attorneys to focus on how their clients have striven to overcome their injuries. Don't say, "Despite all that therapy, she can't walk a hundred feet on her own." Say, "After months of hard work, she can now walk a hundred feet on her own!" So she's no quitter. Jurors allow verdict money when a plaintiff keeps fighting no matter how hard or hopeless it is. Americans love a fighting spirit that refuses to give in.

If the harm is all in the past, show how your client strove and prevailed. If the harm is continuing, counsel your client to engage *right away* in activities that are as optimistic and hopeful as possible and show a continuing refusal to give in. If the client cannot work, perhaps she can volunteer a few hours a week. If she cannot get out of the house, maybe she can use e-mail and the Internet to stay in touch with people and the world in general. She might even be able to do something constructive and helpful on the Internet—such as helping others get through similar difficulties.[18] Counseling your client to strive in such ways will not only motivate jurors to allow money; it will also improve the quality of your client's life—which is, after all, the primary goal.

18. But caution your client not to counsel others on how to get an attorney to get money. Jurors might see it. And if your client has a Web site, check to be sure it's OK for the jurors to see.

Be sure your client does not fall into the opposite kinds of behavior, such as not getting treatment, missing therapy sessions, or quitting rehabilitation. That's a gift to the defense. If your client has done those things, explain why. Not enough money can be a great explanation, if it's true.

Even with a minor injury, show how your client tried to cope and overcome instead of lying down and waiting to get better. (Just be careful not to turn this into her harming herself by trying to do too much too soon.)