

## Jurors Ask: "How Do You Determine Damages For Emotion?"

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*"On the outskirts of every agony sits some observant fellow who points."*  
Virginia Woolf, English author  
1882-1941

The subject of pain and suffering damages seems to cause some jurors their own bout of pain and suffering, so to speak. They express a wide range of feelings from apprehension on how to properly approach the task of calculating a fair award to outright refusal to do so.

What is it that sparks such varying juror emotions? Generally, plaintiff jurors maintain that pain and suffering encompasses emotional *and* physical conditions, whereas the defense jurors counter that emotional distress is too intangible, too hard to determine or too specious a concept to estimate.

This newsletter presents jurors' opinions about pain and suffering damages stated during voir dire, on the prospective juror questionnaire and in post-trial interviews. As indicated below, jurors' beliefs on this subject appear to show some distinctive patterns from which counsel may be able to adjust their case strategy.

### **A Credible Injury and Deserving Plaintiff**

Whether prospective jurors ultimately vote for or against pain and suffering damages, the commonality of words used by jurors in articulating their requirements for said damages are "reasonable," "fair" and "justified." Based on that, injury must be proven. "...*really injured—mental, physical or otherwise, including any trauma that could result in mental problems.*" [Sonoma County female juror] Hence, the credibility of plaintiff and the level of suffering caused by the injury validate what jurors' search for in their preliminary analysis. A "fraudulent" plaintiff will have "exaggerated" harm or experienced an "insubstantial pain," as defined by jurors.

*"I look at their honesty, credibility, trustworthiness, openness and truthfulness."* Mendocino County male juror

A jury angered by defendant's actions will give more pain and suffering damages. Therefore, defendant's bad act must correspond to a claim for pain and suffering. Disclosure of the "before" and "after" well-being of plaintiff that reveals some measurable difference in plaintiff's emotional state serves to define the enormity of the bad act. Accordingly, plaintiff's claims can be validated by the explanation from the psychological and economic expert testimony.

*"First and foremost would be the evidence itself and the way the evidence related to the injured party. Closely related to that would be the intent of the person who is being sued. Additionally, I would have to understand how the act as defined by the evidence coupled with the intent, caused pain and suffering. Finally, there would have to be some quantifiable way to present to me the damage caused."* Yolo County male juror

### **Plaintiff Jurors Endorse Pain and Suffering As Real**

Those jurors who have experienced, or know of someone who has experienced an episode of emotional distress, but overcame it, can be an advocate for emotional distress damages. In effect, they approach the case without skepticism or cynicism and harbor no ill will about the legal system generally.

*"I believe in emotional distress damages because I know of someone who had therapy, and it was helpful."* Alameda County male juror

*"My father was a farmer in Oklahoma. My parents lost everything in the drought, then moved to California and worked for ranchers. I am inclined to award emotional distress damages."* Stanislaus County male juror

Often, middle aged and older jurors express beliefs that pain and suffering may be comparable to maturity and experiencing ordeals in life.

*"Two jurors tossed a figure of \$500 or \$1,000 [for pain and suffering]. My feeling was that no one ever experienced any pain and suffering. Sonja mentioned her car accident but at that age you walk away. As you get older, your body changes. I could identify with pain and suffering."* San Francisco female juror

### **Defense Jurors Express Skepticism**

Jurors who may ultimately vote against awarding pain and suffering damages often demand a higher level of proof for how the specific injury affected plaintiff. Indeed, they argue that a pain and suffering award may not be merited if the experience failed to present extraordinary affliction.

*"Few people make it through life without suffering, so if it seemed that the suffering was within the 'normal' range (to me) or seemed to be exaggerated, I would hesitate to award damages."* Mendocino County female juror #1

*"Okay, if the injured party's day-to-day life was impacted and influenced in a dramatic and life-altering manner."* Mendocino County female juror #2

Likely defense jurors express a philosophy about life that appears to be black and white, with no gray area in between. They reason that "No life is free from pain;" or "No one is guaranteed a risk-free life." They may have had a life experience that was traumatic and one in which they were forced to cope with the residual effects. They received nothing for their significant pain and feel that as a survivor no one else should benefit monetarily when they did not.

*"If something is too much for you, then you need to move on."* Alameda County female juror

*"As for pain and suffering damages, in some cases it seems that people would rather sue than take responsibility for their own part in an accident."* Tulare County female juror

### **Jurors Seek "Guidance" from Counsel**

Jurors seek help from both sides before assessing a pain and suffering award. They recommend that counsel provide a monetary "guideline" in the closing argument, supported by expert opinion presented earlier at trial. The guideline includes a formula or other basis that the jury uses to rationalize the worthiness of their damage award for plaintiff's benefit. In the absence of guidelines from counsel, the intensity of debate in deliberations can delay or prevent consensus among jurors.

*"For non-economic, we pulled numbers out of the air. A few jurors wanted the amount that the defense stated he deserved. As for the strengths of each side's evidence, nothing stood out in terms of strength. In terms of weaknesses for the defense, they did not bring out a good economist to help us. Everyone agreed right away on economic damages. We agreed because it was hard figures. Non-economic is harder."* Los Angeles County male juror

### **Jurors' Concerns About Awarding Millions**

In these economic times, with jurors feeling insecure and financially squeezed by spikes in prices for gasoline, natural gas, food, and housing, certain jurors [both plaintiff and defendant] refuse to make a plaintiff rich with pain and suffering damages and set limits on the size of the award.

*"I have concerns about instant millionaires. A jury should reimburse for medical care, future employment, opportunities lost, and pain and suffering, if reasonable."* Yolo County male juror

*"I believe in pain and suffering damages, where a reasonable amount is acceptable but not to make a plaintiff wealthy. If not able to work or perform duties, and need money compensation to help, then a fair amount is due plaintiff."* Nevada County male juror

Thus, straight reimbursement for past and future wages and medical expenses fits within their perception and scope of a damage award; that is, to serve a purpose. Counsel must take a perceived intangible (emotional trauma, suffering, loss) and realistically portray it as something tangible and measurable as it relates to the emotional harm experienced by plaintiff.

*"With pain and suffering, it is hard to talk in the millions because you can't see the damage."* Alameda County male juror

*"We figured \$3 million in lost and future wages. Everything financial, and he's done. But he's not a paraplegic and not a quadriplegic. The millions in pain and suffering, I was totally against it. Giving millions for what? Future pain and suffering was on him. We took care of him with the medicals. But with the suffering, I thought that was completely up to him."* Los Angeles female juror

At the far end of the opinion spectrum, some jurors have expressed that a pain and suffering damage award could result in collateral economic damage to their lives. For instance, the small business owner will personalize the effects of a pain and suffering award for plaintiff and argue against damages because of a perceived widespread impact to others.

*"It is my opinion that such awards hurt our economy and cause damage to my own profession."* San Joaquin County male juror

*"I believe many awards have been too large which is affecting my employer workers comp premiums many times as much as 200% to 300% increase."* Tulare County male juror

Likewise a juror who believes that his/her occupation faces frequent lawsuits or threats of suit will reason that the "frivolous lawsuit" captures higher, unrealistic awards. Hence, a lawsuit seeking pain and suffering damages initially alerts some likely defense jurors that the case before them may be a frivolous lawsuit with money requested for something less tangible. This conservative black and white approach appears to have evolved alongside the tort reform movement, promoted by certain media outlets, special interest groups and political organizations. Whereas "frivolous" is often spoken by jurors, "tort reform" rarely generates a mention because they generally do not grasp what it means exactly. Regardless, the movement has reached some impressionable jurors who might otherwise have been more approachable about awarding pain and suffering damages.

### **Conclusion**

Jurors admit that the task of figuring a pain and suffering damage award is daunting. For this reason, counsel must review and clarify the instructions for non-economic damages. Both sides can effectively persuade if a jury approaches their deliberations with a keen understanding of how this award correlates to the case story. Hence, jurors can walk out of deliberations with the confidence that their verdict is "reasonable," "fair" and "justified."

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