

Changes in attitudes: how jurors view damages in a down economy

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The economic downturn has forced nearly everyone to tighten their belts. When jurors have had to make do with less, how do you ask them to award your client fair compensation—which in many cases is a substantial sum of money? First, you have to know what they're thinking, and recent research can help with that.

We're more than two years into the worst financial downturn this country has seen in recent history, and many Americans are reeling from its impact. With an unemployment rate close to 10 percent, families are having to make difficult decisions about household budgeting; the long-term unemployed—desperate for work—are taking jobs that require them to become “super-commuters” or take significant pay cuts; and day-to-day expenses, including health care, are becoming more than some can bear.

What people experience outside the courtroom—as always—plays a considerable role in how they weigh evidence in it, and research indicates that the recent recession and our painfully slow emergence from it are affecting how jurors view plaintiffs and whether they deserve the compensation they seek.

Independent surveys of jury-eligible individuals in 2008 and 2009 revealed a sense of optimism about an economic recovery. This is not surprising given that many Americans have a positive outlook generally—they tend to think that “things may be bad now, but we can overcome this and ultimately everything will be OK.”¹

About 57 percent of those surveyed agreed that the economy was likely to turn around and improve sooner rather than later. When asked the same question in 2010, even more people agreed with that sentiment.²

This persistent optimism exists among potential jurors despite several contrary studies showing that Americans think the economic recovery is probably not going to be realized for another two years at least.³ Even if people are more optimistic today than they were a year or two ago, many accept that things may not go back to the way they once were, especially not soon. As the downturn continues, people are starting to realize there is no quick fix to the current economic situation.

Not surprisingly, a person's political affiliation tends to correlate with their economic outlook. The 2010 study showed that supporters of the Obama administration are among the most optimistic about economic recovery, while Republicans are the least optimistic.⁴ Another study revealed that people generally accepted that it would take longer than the first year of Obama's term to see improvements in the economy.⁵

The current recession is not like earlier ones because its effects are being felt more broadly, reaching all levels of the socioeconomic and occupational scales. The 2010 study showed that white-collar professionals are just as likely to have filed for unemployment benefits as service workers and semi-skilled laborers. However, these groups differ widely in their views about the economy. The study revealed that white-collar professionals had a better outlook on the success of an eventual financial recovery than did service and skilled blue-collar workers.⁶

That finding is significant because those with the least positive outlook on their own financial situation are among the most critical of damages awards, usually believing that they are too high.⁷ Among these jurors, there is a sense of “no one is helping me,” and they wonder, “Where is my bailout?” The most bitter are inclined to be conservative in awards rather than give the plaintiff an “undeserved” recovery.

Even among decidedly pro-plaintiff jurors, there is a “no one deserves a windfall from an unfortunate event” attitude in the awarding of damages. This has been clearly seen during the deliberative process, particularly in the areas of future pain and suffering and future medical expenses.⁸

Another interesting insight into how juror views on damages have changed came from comparing what jurors thought about awards over the last five years—a period covering economic highs and lows. In 2005 and 2006, studies showed that less than 10 percent of jurors thought damages awards were too low.⁹ In fact, a slight majority thought awards were where they should be, and about 40 percent thought awards were too high.¹⁰ This was in contrast to what jurors began to think as the economic crisis was erupting, when there was a jump in the number of jurors who thought awards were too low.¹¹

The 2010 survey revealed a shift back to pre-crisis perceptions of damages.¹² Now, people may be more likely to keep awards in check or question whether they are warranted.

Awards in medical malpractice cases may also demonstrate how jurors’ changing perceptions of the economy change what they think about damages.¹³ While there is not enough empirical data available for a definitive trend as of 2010, mock trial research and posttrial interviews indicate juror desire to award lower noneconomic damages.

Overall, the way jurors discuss damages in injury cases is different today. When considering line items such as future loss of income, more jurors seriously consider limiting awards because “no one is guaranteed a job for XX years” and “no one works for the same employer for YY years.”¹⁴

On the other hand, jurors’ suspicion of corporate conduct can weigh in a plaintiff’s favor. In cases involving corporate malfeasance, observations indicate that jurors attempt to arrive at damages awards that include a punitive element.¹⁵ Even in medical malpractice cases, where punitive damages may not exist as a specific category, many jurors will funnel their anger into higher awards in the available damages categories.

Proactive reaction

Given these findings, there are steps plaintiff attorneys can take to prepare their clients for litigation and to position their cases to achieve the best possible results.

Client expectations. First, attorneys should take steps to adjust their client’s expectations. They should counsel clients that jurors generally may be less tolerant of large requests for damages and caution them against expecting too much.

Voir dire. Attorneys also need to make some changes in how they conduct voir dire. For example, they should add questions asking what jurors think about the economy, what their experiences have been, and how they have handled any personal difficulties caused by the downturn.

Attorneys must then evaluate the answers in light of the research showing how the recession has affected juror attitudes. Jurors who express frustration or bitterness over financial loss, for example, may have a much different outlook on the case than jurors who express acceptance of a change in their circumstances.

Future medical care. Mock trial research and posttrial interviews for medical malpractice cases after October 2008 reveal that jurors spend considerable time scrutinizing and evaluating the testimony of economists and other experts who testify regarding future medical care. While older jurors are more aware of the rising costs of health care than younger jurors and therefore may be less prone to “sticker shock,”¹⁶ more jurors are loath to simply award what a plaintiff has requested for future medical care.

It is essential to demonstrate to jurors that the amount the plaintiff is requesting is not “padded” in any way and is not meant to pay for some types of care, like extended postsurgical hospital stays, that would not be available to the jurors themselves. We have learned from posttrial interviews that given these difficult economic times, jurors want to know if the numbers put forth by the plaintiff reflect “absolutely necessary” costs. For example, is transportation to physical therapy four times a week absolutely necessary, or can therapy be performed three times a week with the plaintiff doing some work at home on the fourth day?

Many jurors are giving greater consideration to the reports submitted by the defense economist when determining future medical expenses. If the defense numbers are more in line with juror perceptions of an “economy plan” for future medical expenses, jurors are inclined to award either the figure calculated by the defense economist or an amount that is slightly higher.

Demonstrating that plaintiff experts have economized where possible and have forecast a conservative rate of growth can help mirror what jurors are doing in their own lives to adjust to changes created by the recession.

Positive plaintiff. Attorneys should weave a theme throughout the case that their client was and still is a resilient person who seeks to overcome obstacles. The client needs to come across as a positive person who, in the face of the injury, is adjusting to difficulties, just as jurors may be doing in their own lives.

Jurors are interested not only in what steps the plaintiff is taking to mitigate pain and suffering caused by an injury but also in what he or she did before an injury that might have contributed to the pain and suffering. Did the plaintiff smoke? Was he or she morbidly obese? Would the client have needed the surgery that resulted in injury had he or she followed earlier medical advice?

Similarly, jurors want to know more about what the plaintiff has done since the injury occurred. The plaintiff should be prepared to offer examples of how he or she is making the best of a bad situation by demonstrating a sincere attempt to continue confronting the obstacles created by the injury.

How has the plaintiff minimized the impact of the injury on his or her quality of life? Is the plaintiff following medical advice in order to remain healthy? If the injury prevents the plaintiff from returning to work, has he or she enrolled in a training program to prepare for a different career?

In cases where the answers to these questions are no or jurors determine that there is more that the plaintiff can do to improve his or her quality of life, economic damages awards have been considerably lower than they were before the recession started.¹⁷

Wage loss. Mock trial research uncovered that in those venues most affected by the economic downturn, jurors questioned claims for lost wages more than they had in the past.¹⁸ Many jurors are out of work or underemployed because of the recession and therefore no longer assume that a person's work history and compensation will remain constant or increase over his or her lifetime. Jurors who had a negative outlook on their own employment prospects took the position that claims for wage loss were artificially inflated and suggested to their fellow jurors that awards should be lower.

Attorneys can address this perception by showing that the amount the plaintiff is claiming for future loss of wages is reasonable and appropriate. An example is a damages claim for the years the plaintiff expected to work before retirement. If the injury is so severe that the plaintiff cannot return to the same position of employment, attorneys must make it clear that, but for the injury, there were no extraneous reasons—such as poor health before the injury occurred—that would have curtailed the plaintiff's employment in that position.

Demonstrative evidence. Jurors crave details of the incident, as these help them evaluate what is reasonable in terms of damages. The more information they have, the more likely they are to award full compensation. Demonstrative evidence can help.

Visual exhibits give jurors a better sense of what the defendant did to cause the incident, what the plaintiff experienced during the incident, and the extent of the plaintiff's pain and suffering as a result. This all helps to lay a framework for a damages claim for future pain and suffering.

A "day in the life" video can show the difficulties the plaintiff experiences each day, but it should also illustrate the efforts the plaintiff has made to adjust to them. Jurors often report that these videos seem self-serving and a play for sympathy, so if the plaintiff has a spouse or partner, consider having that person describe what the plaintiff is going through. This can move jurors to factor in compensation for the spouse, regardless of whether there is a line item on the verdict form for loss of society.

Closing. In closing argument, attorneys should remind jurors that the trial is the plaintiff's only chance of recovering damages and that the cost estimates in the plaintiff's life-care plan are based on projections of the rising costs of medical care and are appropriate, as the experts have testified. Emphasizing the rising future costs of medical care is key, especially if the jury includes older members, who understand this well.

As a result of the recent downturn, the subject of money has never been more sensitive among jurors than it is today. Their own experiences will influence how they decide your case and how comfortable they are awarding your client damages.

These are tough economic times, and, like everyone, jurors are having to make difficult changes and adapt to new realities. You and the clients you represent must adapt too.

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