COMMENTARY

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Pa. Courts Make the Case for Detailed Damages Arguments

Many defense attorneys feel that mounting an affirmative damages case is problematic. By proffering its own damages number through evidence and testimony, the thinking apparently goes, the defense lays down a damages floor below which the jury will not venture. These attorneys simply attack the plaintiffs damages experts and hope for a defense verdict.

Jury consultants dispute this theory. When asked if the defense should present its own damages testimony at trial, Arthur H. Patterson, senior vice president at the jury consulting firm DecisionQuest, said, "Absolutely and unequivocally, otherwise the only number the jury has is from the plaintiff."

Ample further evidence that the defense should mount its own case on damages, rather than attempting to only impeach the plaintiff's arguments, has been provided by the Pennsylvania courts in a series of appellate-level cases.

In Pennsylvania, economic-damages arguments must be presented with clarity and specificity, and a jury's verdict must reflect trial testimony, including a jury's assessment on economic damages. Courts have warned defendants that failure to mount clear arguments on damages may result in a new trial on the issue of damages. The latest such warning was issued by the Pennsylvania Superior Court in 2010 in *Schroth v. Karounos*, No. 1012 EDA 20210, Pa. Superior Court, Nov. 10, 2010. In this wrongful-death action brought by the husband of the decedent, the defendant neglected to dispute the plaintiff's claim for $695,000 in lost household services, paving the way for a new trial on damages.

The jury returned a $0 verdict on the lost-services claim. The plaintiff objected at trial, arguing that the verdict was inadequate and requested a new trial on damages. The trial court refused to order the new trial and the plaintiff appealed.

In ordering the new trial on damages, the Superior Court noted that a jury's award must bear a reasonable relationship to the evidence at trial. Since the plaintiff had proffered testimony on the lost services and the defendant had offered neither counter-testimony nor had it cross-examined the plaintiff's damages witness on lost household services, the verdict was indeed inadequate, even though the defense disputed, via cross-examination, the plaintiff's claims for lost earning capacity.

Schroth stresses the fact that the defense must specifically contradict the plaintiff's claim for damages. If not, the jury's award must reflect the plaintiff's evidence as to damages, or a new trial is warranted.

> The presentation of an affirmative damages argument by the defense is not an admission of liability.

In this medical malpractice case, the plaintiff's economist valued the decedent's lost earning capacity at $509,000, and, alternatively, assuming she did not work and remained at home, the damages for the loss of her household services would be $695,000. The jury awarded $75,000 for past medical expenses under the survival claim, and nothing to the decedent's husband for lost household services under the wrongful-death claim.

The defense did not challenge the plaintiff's economist's testimony as to the decedent's possible return to the workforce or the decedent's household services, but rather focused on the probability of the decedent completing college — a peripheral issue that did not adequately "controvert" the plaintiff's evidence. "[T]he jury is not free to disregard proven damages," the *Schroth* court held.

While *Schroth* is a memorandum opinion and designated as nonprecedential, the court cites several Pennsylvania opinions clearly holding that juries are not free to disregard evidence on damages where it is offered and where there is no opposition on the particular item of damages in question.

In *Kiser v. Schulte*, 538 Pa. 219, 648 A.2d, the Pennsylvania Supreme Court held that a jury verdict of only $25,000 for wrongful-death and survival claims was so low as to be "shocking," and, because the defense had not offered any contrary testimony or argument, ordered a new trial on damages.

The plaintiff's expert economist in *Kiser* testified that the decedent, an 18-year-old woman, had projected lifetime earnings of $792,352 as a high-school graduate. After adding fringe benefits and household services and subtracting personal maintenance, which he estimated would be 40 percent of income, the plaintiff's economist put total damages for the claim at $571,659 as a high-school graduate and provided a second estimate of net economic loss of $756,081 as a college graduate.

On cross-examination, the plaintiff's economist calculated damages assuming the decedent's earnings would be commensurate with those of high-school graduates and that she would take some time off from the workforce to raise a family, and also assuming a 70 percent maintenance rate. He put damages under that scenario at $232,400.

The expert put loss of services to the Kiser family (under the wrongful-death claim) at $11,862 to $18,980.

The plaintiffs objected when the jury returned a verdict of only $25,000, but the trial court refused to order a new trial on damages. The Supreme Court found the trial court had abused its discretion, holding that the jury verdict was "clearly inadequate." The Supreme Court concluded that "it is plausible that the $25,000 award represented an award for funeral costs and loss of service," but that would be an award under the wrongful-death claim (loss to family members) and would ignore the survival claim (loss to the decedent's estate). The decedent's estate is entitled to receive her lost future earning capacity, minus maintenance. Even assuming that part of the $25,000 award was intended by the jury to go toward the survival claim, the award would be inadequate in that it would have no basis in trial testimony. A verdict must bear a "reasonable resemblance to proven damages" and the defense had not presented any expert testimony on any other evidence contradicting the plaintiff's damages claim — "even under the scrutiny of extensive cross-examination," the Supreme Court notes, "[the plaintiff's economist's] calculations yielded a net economic loss figure of $232,400. [T]he jury totally disregarded the only evidence presented on the question of damages and settled on the somewhat capricious and inadequate amount of $25,000."

In *Rettger v. UPMC Shadyside*, 991 A2d 915 (Pa. Superior Court 2010), the court held that, while cross-examination of the plaintiff's economist placed some of the economist's assumptions in doubt, the cross-examination did not adequately address the issues of the decedent's work-life expectancy or earning capacity, and therefore the award of no damages was contradictory to the evidence. The plaintiffs' claims were based on economic testimony assuming the decedent would become an accountant. The decedent had passed three of the four parts of the certified public accountant exams and had been employed as an accountant at the time of his death. The only contrary testimony was cross-examination by the defense focused on the fact that the decedent's eyesight was poor, an issue that, the Superior Court noted, would have little impact on his earning capacity as an accountant. Cross-examination on peripheral damages issues leaves the plaintiff's main claims "uncontroverted," and the jury award must therefore reflect the plaintiff's damages evidence or be deemed inadequate.

These cases offer convincing evidence that courts prefer a vigorous, affirmative defense on all aspects of a damages claim, and mere cross-examination on some aspects of the claim may not be sufficient to place the plaintiff's damages claim in dispute. The presentation of an affirmative damages argument by the defense is not an admission of liability. Rather, it should be considered a necessary tactic to defend a claim in Pennsylvania. Placing all your chips on the bet of a defense verdict in the absence of a vigorous, comprehensive defense on the damages claim is risky. Even if the jury disagrees with the plaintiff's claim, the court might not if the defense fails to adequately present an alternative damages case clearly and completely. •

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