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USA: Trends & Developments

Fred E. (Trey) Bourn III, Luther T. Munford and John P. (J.P.) Brown
Butler Snow LLP

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Trends and Developments

Contributed by:
Fred E. (Trey) Bourn III, Luther T. Munford and John P. (J.P.) Brown
Butler Snow LLP see p.5

Non-economic Damages Without Medical Specials: A New Plaintiffs' Strategy?

The doctrine that allows the recovery of non-economic damages in a product liability suit defies the principle that legal rules should be fixed and predictable.Fixed and predictable rules help businesses plan; treat all similarly situated companies the same; and protect parties in court from venue prejudice, jury sympathies and judicial caprice. They promote the "rule of law" in a competitive, free-enterprise society.

The doctrine that allows the recovery of non-economic damage in a product liability suit is neither fixed nor predictable and, thus, does none of these things. The term "non-economic damages" covers those injuries that defy quantification: pain and suffering, loss of enjoyment of life, disfigurement, emotional distress, and other similar harms. These are harms not amenable to ready calculation, and, to the extent courts have tried to calculate them with reference to the medical bills an injured person has incurred, they are being frustrated by a new strategy: not putting on proof of medical bills at all.

When confronted with a non-economic damage claim, juries are asked to put a dollar amount on these harms even though they are inherently unquantifiable and, in some cases, may be fabricated. In his novel, *Love in the Ruins*, Walker Percy describes a fictional device, called an Ontological Lapsometer, which can read minds and diagnose thoughts. Until such a device becomes a reality, all an observer can do to detect another's pain is to make an educated guess.

The traditional limit on excessive non-economic damages is the practice of remittitur that allows a trial judge or an appellate court to "remit" non-economic damages to a lower amount, which the person suing must accept or undergo a new trial. The standards for remittitur are typically quite general – eg, an amount that is "the highest a reasonable juror could have awarded" or one that does not "shock the conscience." Attempts are made to look for amounts juries have awarded, or courts have rejected, in similar cases.

Medical specials as yardstick

The amount of "medical specials" (ie, past and future bills for medical treatment) has traditionally served as a metric for non-economic damages. In his 1970 book, *Settled out of Court*, H. Laurence Ross studied litigation and settlements in personal injury cases in New York and Pennsylvania. He found that plaintiffs' counsel and insurance company adjusters could frequently settle claims and cases by offering to pay two-to-five times the amount of medical bills.

This made sense for several reasons. The fact of medical treatment helped confirm the fact of injury. Also, an amount of that size would be sufficient to allow the attorney a contingent fee of one third of the total damage award while leaving something left over for the pain and suffering of the person who sued. As Ross put it, "one third to the lawyer, one third to the physician and one third to the claimant." The formula, he said, "provides a conventional measurement for phenomena that are so difficult to evaluate as to be almost unmeasurable." See also Luther Munford, "Peacemaker Test: Application and Comparison", 80 Miss. L. J. 639, 654–56 (2010) (advocating non-economic damages as a multiple of a reasonable attorneys' fee).

Tort reform

But the roughness of that calculation –and some courts' rejection of it – led to "tort reform" statutes, limiting the recovery of non-economic damages. For example, Idaho in 1987 enacted its statutory cap on non-economic damages. See Ch. 278 § 1, 1987 Idaho Session Laws 571 (codified as amended at Idaho Code Ann. § 6-1603). As presently codified, § 6-1603 caps non-economic damages at USD250,000. Similarly, in 2003, Ohio enacted a statute that limited non-economic damages in medical malpractice cases to the greater amount of USD250,000 or up to three times economic damages not to exceed USD350,000 for each plaintiff or USD500,000 for each occurrence. Ohio Rev. Code Ann. § 2323.43 (West, Westlaw through File 30 of the 133rd Gen. Assembly (2019-2020)). Today, 23 states have some form of statutory limit on non-economic damages.

In other states, however, and in states where courts have held that such limits violate their state constitutions, such as Illinois and New Hampshire, remittitur remains the only check. See Lebron v Gottlieb Mem'l Hosp, 930 N.E.2d 895, 914 (Ill. 2010) (holding "that the limitation on noneconomic damages in medical malpractice actions set forth in section 2–1706.5 of the [Illinois] Code violates the separation of powers clause of the Illinois Constitution (Ill. Const. 1970, art. II, § 1) and is invalid."); Brannigan v Usitalo, 587 A.2d 1232, 1233 (N.H. 1991) (holding that a statutory cap of USD875,000 for non-economic loss in personal injury action violates the state equal protection

clause). This makes the medical special damages yardstick even more important.

Awards for non-economic damages

It is for this disturbing reason that not only have medical special damages become less influential in remittitur practice, but also some lawyers for injured persons have adopted a strategy of not putting on any evidence of them at all. In a number of product liability trials against nationally known manufacturers, plaintiffs' counsel have chosen not to introduce any evidence of medical specials. Not only have the juries nevertheless given multimillion-dollar awards for non-economic damages, but the courts have also refused to remit those awards.

In Kerrivan v R.J. Reynolds Tobacco, 953 F.3d 1196 (11th Cir. 2020), the jury applied Florida law and awarded USD15.8 million to a smoker who suffered from chronic obstructive pulmonary disease. The award was for "pain and suffering, disability, physical impairment, mental anguish, inconvenience and loss of capacity for the enjoyment of life sustained in the past and to be sustained in the future." The verdict form sent to the jury made no mention of medical specials, and apparently none were claimed. The United States Court of Appeals for the Eleventh Circuit affirmed.

In Kaiser v Johnson & Johnson, 947 F.3d 996 (7th Cir. 2020), a pelvic mesh case in which attorneys from this firm were counsel to the defendant, the jury awarded USD10 million in what the appellate brief called "purely non-economic compensatory damages." In fact, the trial transcript shows the plaintiff testified she took only over-the-counter medication and had not seen a physician in two years. The Seventh Circuit found that the verdict was not excessive under Indiana law.

In Guzman v Boeing Co, 366 F. Supp 3d 219 (D. Mass. 2019), a passenger in an airplane whose cabin decompressed sued for post-traumatic stress disorder, decompression sickness, and depression. She recovered damages of just over USD2.27 million without any claim for medical special damages. She offered evidence that she refused to take medicine because she was afraid of its side effects.

These decisions are unusual, and remittitur has been granted in other similar cases. For example, in Izell v Union Carbide Corp, 231 Cal. App. 4th 962, 180 Cal. Rptr. 3d 382 (Cal. App. __ Dist. 2014), a mesothelioma case in which there was no claim for economic damages, the jury award a husband and wife USD15 million each in non-economic damages. The trial court remitted the amount to USD6 million total, and the appellate court affirmed, saying the damages were on the "high end."

And in Barba v Bos Sci Corp, No. CV N11C-08-050 MMJ, 2015 WL 6336151, at *2 (Del. Super. Ct. Oct. 9, 2015), another pelvic mesh case, the jury awarded USD25 million in compensatory damages, which the trial court reduced to USD2.5 million. Medical expenses in the amount of USD45,259.90 were offered as evidence, making the ratio of medical specials to compensatory damages approximately 1 to 50.

Why not include medical bills?

The logical question, however, is why, in a case where medical bills were obviously paid, counsel for an injured party would not put them into evidence? If a person who claims pain and suffering does not even claim the price of an aspirin, then an astute jury might question whether the pain and suffering was real. Alternatively, failure to seek treatment could be seen as a failure to mitigate damages.

The answer may lie in what psychologists call "heuristics," or rules of thumb, that people use in estimating risk. Those rules of thumb, mental shortcuts, lead to mistakes. They include biases against man-made risks, against risks that cannot be controlled, and against risks that do not provide much benefit. These rules of thumb explain why people are afraid to fly rather than drive, even when flying the same distance has consistently been proven safer. Another shortcut is "availability" – meaning a bias in favour of available evidence – which lawyers understand as the power of "primacy" and "recency" in argument. See Victor J. Gold, "Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence", 58 Wash. L. Rev. 497, 500 (1983).

Likewise, "anchoring" is the tendency to focus on an available number, whether or not it is relevant to the amount to be calculated. In its decision, In re DePuy Orthopaedics, Inc Pinnacle Hip Implant Product Litigation, 888 F.3d 753 (5th Cir. 2018), the United States Court of Appeals for the Fifth Circuit criticised an attorney who had argued that the jury should calculate pain and suffering by multiplying the plaintiff's life expectancy by a defence expert's hourly rate. This, the court said, was "meant simultaneously to activate the jury's passions and to anchor their minds to a salient, inflated, and irrelevant dollar figure." Id. at 787 n.71.

If a lawyer believes in "anchoring" and wants a large jury award for non-economic damages, then the lawyer may not want real world numbers before the jury, such as the price of an aspirin or even the prices of pain killers and psychiatric treatment. In jurisdictions where lawyers may request a specific amount in non-economic damages from a jury, the number, no matter how calculated, could carry more credibility if it is not impeached by real-world figures. At the same time, in a jurisdiction that does not allow such calculations, the lawyer may "anchor" a million-

dollar figure in the minds of the jurors by offering evidence of some other number, such as the amount the defendant spent on marketing its products.

Defence strategy

There are ways to combat such a strategy, but none of them are fool proof. Defence counsel may cross-examine the plaintiff on the refusal to seek past treatment or to plan for it in the future. Defence counsel could object to the irrelevant numbers because of the unfair prejudice that anchoring could create. Defence counsel could also, at least in theory, offer the plaintiff's medical bills into evidence or put on evidence of the cost of future treatment: a heavy lift for a defendant denying liability.

There are also other comparisons that can be made part of a remittitur motion. The verdict can be compared to those listed for similar injuries in an American Law Reports annotation, some of which can be quite specific. See Annot., 13 A.L.R. 4th 183 (2020) (injuries to or conditions induced in sexual organs). Past awards can be made more credible by indexing them for inflation. Comparisons can also be made to recoveries allowed under a state workers' compensation scheme or to statutes that compensates persons wrongly convicted and incarcerated for a crime. If the case is in federal court, then at the end of the appellate road is an appeal to what the Fifth Circuit calls its "maximum recovery rule:" no more than one and a half times the highest comparable award in the state where the plaintiff was injured. See, for example, Puga v RCX Sols, Inc, 922 F.3d 285 (5th Cir. 2019).

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Whether any such comparison would be persuasive remains to be seen. But cutting non-economic damages loose from real world numbers, such as medical specials, poses a danger to more than just product liability defendants. The injuries in these cases are no more painful or longer lasting than the potential injuries in a car crash. If non-economic damages are separated from medical specials, an ordinary driver's insurance policy would not be enough to cover the risk of merely starting a car, considering the very real risk of bankruptcy he or she might incur at the next stoplight.

Butler Snow LLP is a full-service law firm with nearly 400 attorneys and advisors who collaborate across a network of more than 25 offices in the USA, Europe and Asia. Butler Snow has a long history of successfully defending product liability claims on a regional and national basis. The firm represents manufacturers, distributors and service providers from an array of industries, including leading pharmaceutical and medical device companies, automotive and recreational vehicle manufacturers, and manufacturers of agricultural and industrial chemicals. Butler Snow's product liability litigators are regularly called upon to lead trial teams in some of the most challenging jurisdictions nationwide.

Authors

Fred E. (Trey) Bourn III serves as practice group leader for Butler Snow's product liability, toxic tort and environmental group. His practice is focused on defending product liability litigation in various state and federal venues throughout the country. He also counsels manufacturers on risk management, including product safety, recalls, and compliance matters. He chaired the 2019 Product Liability Conference for the Defense Research Institute (DRI) and is active in the International Association of Defense Counsel (IADC), where he serves on the Board of Editors. Bourn received the 2017 IADC Yancey Memorial Award, which is given to acknowledge excellence in academic writing.

John P. (J.P.) Brown is a member of Butler Snow's litigation department and practises within the product liability, toxic tort and environmental group. Prior to joining Butler Snow, J.P. served as the judicial clerk to the Honorable Henry E. Hudson, US District Judge for the Eastern District of Virginia. He also served as the judicial clerk for multiple Virginia judges in both the Circuit Court of Henrico County and the Court of Appeals of Virginia. Before commencing his legal career, J.P. served as an Officer in the United States Marine Corps.

Luther T. Munford is a member of Butler Snow's appellate and written advocacy group and concentrates his practice on appellate matters, media law, constitutional law, professional liability and product liability defence. He is a frequent author and speaker on litigation-related topics. Luther previously served on the Advisory Committee on Appellate Rules to the Judicial Conference of the United States and the Lawyers' Advisory Committee to the United States Court of Appeals for the Fifth Circuit. He is past-president of the American Academy of Appellate Lawyers and past-chair of the Mississippi Code of Judicial Conduct Study Committee.

Butler Snow LLP

1020 Highland Colony Parkway
Suite 1400
Ridgeland
MS 39157

Tel: (601) 948-5711
Fax: (601) 985-4500
Email: info@butlersnow.com
Web: www.butlersnow.com

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