

Defending Damages in Asbestos

The Best Defense is a Good Defense

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Table of Contents

| | | |
|-------------|---|----|
| I. | Introduction | 4 |
| II. | No Bright Line Rule | 5 |
| A. | Disease and Decision | 5 |
| III. | Prepare your Damages Defense | 6 |
| A. | Build your Case Early | 6 |
| B. | Depose the spouse | 8 |
| C. | Get the Right Experts Early | 8 |
| D. | Medical Experts – Not just for the alleged disease | 9 |
| E. | Depose Plaintiff’s Experts | 10 |
| IV. | Punitive Damages – The Boogeyman | 11 |
| V. | Time for Trial | 12 |
| A. | File Pre-Trial Motions | 12 |
| B. | Voir Dire – You Never Get a Second Chance to Make a First Impression | 13 |
| C. | Opening Statement – Lay the Groundwork | 13 |
| D. | Trial - Fight Fire with Fire | 14 |
| E. | Closing Argument – You Can’t Always Get What You Want | 15 |
| VI. | Conclusion | 16 |

I. Introduction

Asbestos litigation has spawned tens of thousands of lawsuits over the past three decades. What was once touted as a miracle fiber has now provided ample fodder for runaway jury verdicts and an explosion of litigation. Jurisdictions had to set up complex litigation centers specifically to handle the burdensome dockets. Defending asbestos cases is not a one-size fits all proposition. There are several diseases associated with exposure to asbestos and each disease requires a different defense strategy.

The least severe asbestos disease is pleural plaques, or calcified scar tissue on the pleura, the outer lining of the lungs. In many cases, it causes no discernable injury and is usually only detectable through x-rays. In fact, it is so benign that some jurisdictions do not allow causes of action for it. More severe is asbestosis, which is actual scarring of the lung tissue. It often produces a restrictive effect on the lungs making it difficult for the lungs to expand fully. There are medical and liability defenses available in these cases that do not exist in the more severe asbestos disease cases. As a result, addressing damages is more discretionary.

Even more severe are the asbestos-related lung cancers. Adenocarcinoma, more commonly referred to as “lung cancer” is often difficult to attribute solely to asbestos-exposure. Often, a Plaintiff will have an extensive smoking history or exposure to other known carcinogens which affect the lung. Mesothelioma is a rare cancer, often of the pleura, but occasionally of the peritoneum which is most commonly associated with exposure to asbestos. Unlike adenocarcinoma, which has several causes, it is often difficult to defend a mesothelioma case on the medicine. Instead, one must rely on a liability defense, if one is actually available, or instead, confront damages head-on. And the damages in a mesothelioma case can be extensive.

Mesothelioma is a swift killer. It is 100% lethal and prognosis from date of diagnosis is often measured in weeks or months. As a result, there is a tremendous amount of sympathy that Plaintiffs attorneys can use to their benefit at trial. You can count on seeing Day in the Life videos played at trial and it is a good bet that the Plaintiff will not live to see his/her day in court. Weeping family members are common. Mesothelioma has a latency period of 20-50 years after exposure. Our firm has had cases with Plaintiffs as young as 28 and as old as 90.

Some defense lawyers may balk at addressing damages because it could concede liability. This is a risky strategy – if you lose on liability you now have nothing standing between the Plaintiff and a runaway jury verdict. Instead, put the idea of money and fairness in the jurors’ minds. To ignore damages in an asbestos malignancy case, or any significant injury case, could be grounds for a malpractice suit.

You will want to explain to the jury the value of money. You will need to put a human face on a corporation. Most importantly, you will need to take the sting out of the parade of sympathetic witnesses Plaintiff’s counsel will put on the stand. If you present a realistic portrait of Plaintiff’s actual damages you will find that you can get a jury to respond. This article will address how to attack damages in a mass tort case in the context of asbestos-related disease with our focus on mesothelioma as that is the most serious and difficult case to defend.

II. No Bright Line Rule

A. Disease and Decision

The first decision one must confront in an asbestos-related personal injury case is whether damages will be at issue from the defense perspective. Even in the least serious medical case, the decision needs to be analyzed at the beginning, then again several times during the workup of the case. More importantly, you must consider all perspectives before concluding that it might have a detrimental effect on your other defenses.

For pleural plaques cases, focusing on damages can assist with the medical defense of the case. In other words, if a Plaintiff testifies that he or she can no longer do the types of activities he or she was previously able to perform because of his/her alleged pleural condition, you may be able to show that Plaintiff's inability to perform those activities has nothing to do with his/her alleged asbestos-related pleural plaques, but rather is associated with his/her other medical problems, like a heart condition, diabetes, weight, smoking, etc. As you can imagine, Plaintiff will attempt to gain the sympathy of the jury by showing that he or she can no longer perform the same activities he or she previously was capable of performing now that he or she suffers from his/her asbestos-related pleural plaques. Thus, although you may not believe you are defending Plaintiff's damages claims, you are! Part of your defense is a direct and pointed attack on Plaintiff's credibility or claimed association between his/her disabilities and his/her asbestos-related condition.

When asbestosis is the alleged condition, you must focus more on the degree of the condition, the claimed impairment and whether your expert(s) will support a medical defense or not. If your expert(s) will support a total medical defense to the claimed condition and the impairment, your approach will be similar to that for pleural plaques as described above. However, if your expert(s) confirm the diagnosis and degree of impairment, a concise and systematic damage defense must be prepared. We will discuss with more specificity the best approaches to prepare your damages defense in following pages. However, you must make your decision as soon as possible as to what extent you will be preparing a damages defense. Factors to weigh include, what if any other medical conditions are suffered by Plaintiff, the age and level of the damages claimed, and other potential confounding factors.

In those cases when lung cancer is claimed, a decision regarding defending from a damages perspective may rest on some or all of the following:

1. whether there is underlying asbestosis;
2. whether there is a fiber burden analysis showing a level exposure as that which would be associated with asbestosis;
3. whether Plaintiff has any objective findings of an asbestos-related impairment;
4. whether Plaintiff has a significant smoking history;
5. whether Plaintiff has any objective findings of a significant smoking history;
6. whether Plaintiff has any other exposures which can be associated with the development of lung cancer;
7. whether Plaintiff has any other cancer which may have metastasized to the lungs;

8. whether Plaintiff has any other medical conditions; and,
9. whether there are any other factors that may impact on the potential damages in the case.

When Plaintiff suffers from or has died from mesothelioma, more likely than not, damages should be part of your defense. This does not suggest that there are not other issues in your defense arsenal or that damages will be the main focus of your defense. In some jurisdictions, like Philadelphia, where a mesothelioma case is tried in a reverse bifurcated fashion with damages and medical causation first, the only issues you will be able to defend are those that effect damages. In Philadelphia, for instance, you are not afforded an opportunity to defend your product or even utilize the “fiber defense” or “low dose” defense until the second phase of the trial. The only medical defenses you may put forth during the first phase of the trial is that the Plaintiff does not suffer from mesothelioma or the mesothelioma is not caused by asbestos. When you weigh the risks involved in putting forth these defenses alone in Phase one, you will most likely decide to put up a defense focusing on the damages Plaintiff alleges are associated with his/her condition.

In most other jurisdictions there will only be one trial for all issues. In those jurisdictions, damages will likely be defended as well. Even when the focus of your defense is that your client’s product did not substantially contribute to the development of the Plaintiff’s mesothelioma, you should still consider attacking or minimizing Plaintiff’s damages evidence.

III. Prepare your Damages Defense

A. Build your Case Early

Trial is too late to address damages in a personal injury asbestos case. The jury will have heard heart-wrenching testimony from Plaintiff’s witnesses. They will have heard Plaintiff’s counsel’s sanctimonious opening and closing arguments. Off the cuff argument regarding damages or reliance on Plaintiff’s evidence to support a closing argument on damages could ring hollow with a jury that has built up sympathy for the Plaintiff. Thus, the key to neutralizing this natural sympathy is to attack damages from the time discovery begins. Once you have enough discovery to paint a more accurate, less emotional picture of the Plaintiff, you will be in a better position to address the issue of fairness in putting a number on the case.

At Plaintiff’s deposition, inquire about the “nitty-gritty” details of his/her life before injury. If the Plaintiff says that he or she used to fish, ask him/her how often, with whom, what kind of rod was used, what was the preferred bait or lure, did Plaintiff wade into the water or stand on the shore; ask if Plaintiff used a boat and if that boat had a name. Test his/her story. If there is a loss of consortium claim and Plaintiff opens the door about marital relations, do not be afraid to question him/her about intimate details of his/her marriage. Ask about any medications he or she may have required regarding the consortium issues. Also remember that a man is more likely to exaggerate about his experiences in this regard. If Plaintiff seems like he is exaggerating or bragging, you might want to follow up with a question like, “Well, Sir, if we brought your wife in here how many times per week would SHE say you have sex.” You might

find that the Plaintiff backs away from his previous testimony and gives you a more realistic answer.

Examine Plaintiff's asbestos-related medical care. While there is no cure for an asbestos-related injury, there are treatments that may alleviate symptoms or reduce pain and suffering. If it is a cancer case, find out how many radiation treatments he or she had. Find out what chemotherapy regimen he or she may have tried. Find out what effect these treatments had on his/her life as well as the lives of those in his/her household. Most importantly, ask him/her about palliative care. Pain management is a "hot-button" issue in modern medicine and you might be able to reduce pain & suffering damages if you can show that Plaintiff's pain was well-managed. Obtain hospice care records and hospitalization records and pay close attention to the nurses' notes. They will provide a day to day analysis of Plaintiff that a heavily edited video will not.

Obtain all of Plaintiff's medical records, not just the ones from the date of diagnosis onward. You might find that Plaintiff has a family history of cancer. You might find that he or she had a significant chronic illness that, while not life threatening, did reduce his/her enjoyment of life. You may even find that he or she did have some other life threatening illness that he or she was not treating properly. Plaintiff's attorney usually presents a Day in the Life video that will emphasize Plaintiff's hardships related to mesothelioma, but if you conduct the right discovery early, you might be able to counter that video with evidence that Plaintiff always has had trouble walking or taking care of himself/herself in the same way shown on the video.

Records collection agencies are a good way to obtain most medical records, but do not rely on them 100%. Look through the medical records and written discovery and find out every doctor who may have ever had contact with Plaintiff. Then find out every hospital or medical treatment center Plaintiff may have visited. Follow-up with the medical providers to see if, in fact, the records collection agency obtained every possible record on Plaintiff. You might be surprised in what you find and you will be grateful down the road at trial if you have these records. In a case alleging an asbestos-caused cancer, pathology is vitally important. Without obtaining all pathology, you may not find the tissue sample that your expert needs to conclude that the mesothelioma is not mesothelioma at all, or that the cancer metastasized from another organ, or that Plaintiff is not suffering from any cancer of the lung or pleura. Do not restrict your inquiry to the pathology reviewed by Plaintiff's experts. Find all the pathology available.

Defense Attorneys should obtain Plaintiff's Social Security records before Plaintiff's deposition and examine them for any discrepancies in his/her earnings, especially if the Plaintiff was ever self-employed. At deposition, question the self-employed Plaintiff on his/her business and do not be afraid to dig deeply. Find out if there were any bankruptcies, problems with creditors, health problems other than his/her alleged asbestos-related condition which may have impacted his/her business and earnings, personal problems which may have impacted earnings, or lawsuits brought against him/her for any reason. Plaintiff's economic expert will try to paint as rosy a picture as possible in presenting a wage loss claim and it is your job to strip the veneer off the report and get to the heart of the matter. If he or she was not self-employed, ask about layoffs and their frequency. Essentially, you will want to paint a picture that Plaintiff's earnings were not always steady and hence not a great future indicator of earnings. You may even find

that the industry in which Plaintiff was employed was having a down turn and that his/her current income is more than he or she will make in the future based upon economic indicators. If you can reduce the economic loss claim, you will have a better shot at reducing the non-economic loss claim. These two go together in what is frequently called “the multiplier effect.”

B. Depose the spouse

A crying wife talking about how she watched her husband deteriorate from mesothelioma has the potential to increase the jury’s sympathy and the verdict. How should you counter this argument? Depose the spouse as close to trial as your jurisdiction’s scheduling order will allow. Get her talking about her husband, how they met, how much they loved each other and yes, his illness and its impact upon her. Most spouses find this cathartic. By the time trial comes and they testify live, they will be less likely to break down and cry on the stand. The testimony will still be emotional, but you will have decreased the punch with most spouses. Every so often you will come across the “professional” witness, but you will not know this unless you take her deposition.

During the deposition, explore Plaintiff’s role in “household services.” Plaintiff’s counsel may try to introduce evidence that Plaintiff always painted or always mowed the lawn but you might be surprised at what contradictory testimony you can get from a spouse. If Plaintiff is older, maybe he hired a neighborhood kid to mow the lawn. Maybe Plaintiff used to do the painting around the house but had not done so in ten years. Take Plaintiff’s deposition with you and explore his testimony with the spouse.

C. Get the Right Experts Early

Plaintiff is going to line up an economic expert so why should defense counsel do differently? A Plaintiff’s economic expert is going to base his/her report on assumptions most favorable to the Plaintiff. If you look closely at their reports, these experts typically will not address Plaintiff’s chronic health conditions which may limit Plaintiff’s remaining worklife. If you provide your economic expert with Plaintiff’s medical history, especially if he or she has chronic conditions which may impact his/her ability to work, you can limit the scope of damages early on in the case. Again, assumptions made by Plaintiff’s economic expert may be flawed or inaccurate or not based upon economic models. As an attorney we may not be properly educated in these matters, but we can hire someone with that education and background.

There are other assumptions which need to be challenged in an economic expert report. Defense counsel will need to find its own expert to testify about inflation, the value of household services, savings rates, and the impact of pensions or other retirement plans. For instance, if you find that Plaintiff has significant retirement savings, you might be able to find an expert who can testify that similarly situated Plaintiffs retire earlier than the Plaintiff’s expert’s assumed retirement age. Also, find out if Plaintiff’s employer had a mandatory retirement age. If the Plaintiff was a government employee you might find that these age caps were in place and not taken into account in Plaintiff’s expert report. When using an economic expert to review Plaintiff’s economic reports, your expert may find simple math errors that when used in some of

the equations could result in significant mistakes. Remember your attack during the trial is to get the jury to question whether they should rely on any of Plaintiff's economic expert's opinions.

It is important to reduce the "multiplier effect" when it comes to economic damages. The "multiplier effect" is the idea that non-economic damages, such as pain & suffering, will follow some formula based on the economic damages – such as 3x economic loss. For instance, if you have a case with an alleged loss of \$1 million you could be facing \$3 million in non-economic damages. If your expert can get that number down to even \$750,000 then you've already saved your client \$1,000,000 in possible damages. In a mesothelioma case where damages may be the only significant issue at trial, to do anything less than fight the "hard number" of an economic loss report would be foolish.

D. Medical Experts – Not just for the alleged disease

In a mesothelioma case, it is an automatic reflex to find a medical expert to challenge the Plaintiff's diagnosis. There are cases where the pleural tumors may be secondary and you will want to have an expert lined up to testify that the primary tumor was located elsewhere and was not caused by asbestos. That approach is fine if you think you have one of the rare cases where there is a medical defense but it is an incomplete approach to preparing the damages case. Since the medical defense is not always apparent at the beginning of the case, you must always approach the preparation as if you will attach damages.

As a result of long latency periods in asbestos-related disease, Plaintiffs tend to be in their 40's to 80's. Someone in that age range has certainly had enough time to generate a significant amount of medical records. Your goal should be to thoroughly examine those records and find any chronic illnesses or significant medical problems which may have impacted Plaintiff even if he or she did not develop an asbestos-related condition.

For instance, perhaps you find in his/her medical records that Plaintiff suffered from a congenital heart problem which required several surgeries. You should find a cardiologist who can testify about the nature and extent of this particular problem and the life expectancy of someone suffering from it. You should also have this expert testify as to how such a heart problem can impact the quality of life. Remember, the heart works in conjunction with the lungs to distribute oxygen. Perhaps this particular heart problem would lead to a deficiency in oxygenated blood. Your expert should be prepared to testify that such a deficiency could cause exhaustion or lack of energy. Plaintiff may have testified that he or she could no longer "country line" dance with his/her spouse because of his/her asbestos-related condition but your expert could say that someone with a heart condition such as that would have had to stop dancing anyway.

Perhaps the Plaintiff is unfortunate enough to have an illness which requires a transplant. You should find an expert on that particular organ who can testify both to the effects of the illness and to the risks associated with a transplant for someone similarly situated. If Plaintiff's chances of receiving a new heart or kidneys were slim then the jury should hear that. Plaintiff's counsel will argue that Plaintiff could have lived a long and healthy life but for cancer but your

expert would be able to tell the jury that Plaintiff would have been lucky to see 2008 because of his/her other non-asbestos-related conditions.

Two very common chronic illnesses to look for in any case with elderly Plaintiffs are diabetes and kidney failure. The rate of adult diabetes is on the rise in the United States. If Plaintiff did not follow a healthy diet, smoked cigarettes or was an alcoholic for many years then there is a good chance that he or she may develop diabetes. Defense counsel will want to examine medical witnesses on the effects of any illness left untreated, but especially diabetes. Untreated diabetes can lead to loss of vision, amputation and even death. The jury should hear this information, especially if there is evidence in the medical records that Plaintiff was not diligent in treating this illness.

Similar to the diabetes example above, you will want to look at the effects of kidney failure. Kidney failure requires dialysis, which is a long and time-consuming treatment. Plaintiff may have testified that he or she enjoyed traveling but no longer could take long vacations because of his/her cancer. If you find the right kidney expert, you can counter this testimony with testimony regarding the normal course of treatment for kidney failure and the limitations that it imposes on the lives of the people who suffer from it.

Do not focus solely on the physical ailments. You should examine Plaintiff's medical records, Plaintiff and any witnesses to his/her lifestyle regarding any mental illnesses. Depression is a common long-term mental illness which clearly impacts quality of life. Unfortunately, Alzheimer's is another illness which affects the mind as well as the body. These illnesses can affect Plaintiff's outlook on life or even his/her awareness of his/her illness. You as the defense attorney should be prepared to present to the jury what impact this can have.

Life care experts are another potent weapon in your arsenal. Plaintiff may present in his/her Day in the Life video a portrait of all of the devices needed for daily living. Remember that Plaintiff will want to emphasize the suffering so you should be prepared to lessen the impact and the play on the jury's sympathy. Your life care expert may be able to testify that alterations to a house may not have been necessary for Plaintiff to live a comfortable life with his/her illness. Your goal with this expert will be to show the jury that Plaintiff or Plaintiff's Counsel is exaggerating the impact of the illness upon his/her life. An expert such as this may also be able to present a videotape which counters the Plaintiff's Day in the Life video. These videos can show people with similar illnesses living fulfilling lives and not letting the injury get in the way of enjoyment. For instance, musician Warren Zevon, known for hits like "Werewolves in London," was diagnosed with mesothelioma in 2002. Between the time of diagnosis and the time of his death in September 2003, he recorded and released his final and possibly his greatest album, *The Wind*. He refused to let his illness get in the way of his art. Incidentally, he never filed an asbestos lawsuit, either.

None of these above-mentioned medical experts will be the slam-dunk which eliminates Plaintiff's damages. Your goal should be to chip away at the assumptions Plaintiff makes about the nature and extent of his/her damages and reduce that number for your client.

E. Depose Plaintiff's Experts

When you are deposing Plaintiff's medical experts, do not just limit your inquiry to their reports or medical causation. Delve into their understanding of pain management and how the treating physicians are always concerned with relieving Plaintiff's pain as much as possible. Ask the Plaintiff's expert whether he or she has reviewed the medical records. If he or she says he or she has then get him/her to agree that Plaintiff's treating doctors did their best to relieve the pain and in fact did a commendable job in reaching that goal. Always review the medical records before you begin this inquiry and make sure Plaintiff's treating doctors did in fact relieve the pain of the Plaintiff. Otherwise, you should still see if the expert is familiar with the records and ask for his/her evaluation of the treatment. Notwithstanding the fact that we as Defendants are responsible for the malpractice or lack of adequate care of Plaintiff's treating physicians, it still may help to get the expert to explain that had the doctors been more diligent Plaintiff would not have been in such pain, thereby allowing the jury to focus their anger on the doctors and not the Defendants. As is always the case when taking a deposition, it is always best to know what the witness will say so that you can properly evaluate the case for your client.

Additionally, many of the Plaintiff's expert witnesses like to show the jury just how smart they are regarding their profession. You can often get those experts to provide substantial information regarding Plaintiff's other medical conditions if the questions are phrased properly. Thus, you can use Plaintiff's experts to magnify the other, non-asbestos, medical conditions suffered by Plaintiff. Again, ask these questions at the deposition so you know how the expert will respond before you are standing in the courtroom in the presence of the jury.

IV. Punitive Damages – The Boogeyman

All defense counsel should be rightfully concerned about punitive damages. Not only do they cost your client millions of dollars in judgment but they also have a bad habit of making the newspapers. The threat of punitives is sometimes enough to induce settlement. How then should a defense attorney address punitive damages at trial? If your jurisdiction permits the "state of the art" defense then you should absolutely get a state of the art expert. Very generally, a state of the art defense focuses on what was known in the technical, scientific and medical communities at the time a product left the control of the manufacturer. It serves as a defense to negligence but also serves the dual purpose of defending against punitive damages. An effective state of the art defense backed up by the right expert can mean the difference between Plaintiff proving willful, wanton and malicious conduct on the part of the manufacturer and Defendant presenting blameless lack of knowledge. What is often attempted by Plaintiff's experts is to say that all Defendants that made, sold or distributed asbestos-containing products knew about the dangers of asbestos at the same time, or should have known. Most Defendants who are being named and sued in these asbestos-related personal injury cases are not the manufacturers of thermal insulation products. Many of these Defendants have the ability to defend state-of-the-art testimony as their industry was not part of the conspiracy to hide the detrimental effects of asbestos, but rather were victims just like the Plaintiffs allege.

In the asbestos context, evolution of knowledge of the hazards of asbestos was a long process and the information was known only to a handful of manufacturers, most of which are

now bankrupt. Defense counsel should put on evidence that there was no way that the Defendant could have known about the specific hazard alleged to have caused the specific illness at the time of the alleged exposure. In addition, defense counsel should present state of the art testimony on industrial hygiene practices at the time of the alleged exposure. If it was scientifically accepted that at the time of the alleged exposure that a specific exposure level was thought not to cause injury then the jury should hear this testimony. Even if it does not counter negligence, it could counter the necessary elements for punitives and save your client a lot of money, not to mention face.

Defense counsel may also want to consider a fairness argument to the jury regarding punitive damages. There are a number of ways to approach this. You can point out that it's the government's job to punish individuals and corporations. In the asbestos context, you might mention that asbestos is no longer used in products and that punitive damages are supposed to prevent *future* conduct. Also, put a human face on the corporation. Show that it is a company of individuals and, if applicable, a public corporation owned by shareholders. In asbestos-related disease or other latent disease cases it is quite possible that the corporate officers who ran your client or the directors who sat on the board at the time of the alleged exposure are no longer with the company. It would be unfair to punish people who had nothing to do with decisions at that time.

V. Time for Trial

A. File Pre-Trial Motions

If your jurisdiction allows for the recovery of punitive damages, you will absolutely want to file the appropriate pre-trial motions. In asbestos cases, defense counsel often file motions for summary judgment based on a lack of specific product identification or a lack of nexus between a product and exposure. Often overlooked is the motion for summary judgment on issues like punitive damages. Some states require that the conduct required for punitive damages must be properly pled in the complaint. Assuming the case is properly pled, in most states Plaintiff has a high burden of proof for punitive damages. In asbestos litigation, Plaintiffs' attorneys often offer vague proffers of evidence of malice or willful and wanton conduct, if they proffer any evidence at all. Hammer them on this point in your motion.

Do not stop the punitive damages fight with the motion for summary judgment. File a motion in limine to exclude any testimony or evidence related to punitive damages. The evidence may be inadmissible. Some courts may see this as attempting two bites at the apple, but if you couch your motion in limine in the proper evidentiary terms you may just succeed. Again, if Plaintiffs have not properly pled the case or proffered any evidence, do not let them off the hook.

Make sure the opinions of Plaintiff's experts are well grounded in the medical and science community. If they are not, file a motion to preclude, limit or challenge the opinion. A Daubert or Frye challenge may be appropriate at this time. It is incumbent upon each of us to evaluate the experts and confirm that the damages are associated with the injured Plaintiff. We were involved with a case where one of the experts offered opinions as to the needs of Plaintiff's

disabled child. The witness was a life care expert but did not offer opinions regarding the Plaintiff's needs. His opinions focused on the needs of the son. At trial, we were able to preclude this witness from testifying because even without Plaintiff's mesothelioma, he was not in a position to provide the significant financial needs of his son. It was similar to a person asking for a Porsche, when all they can afford is a Neon. We can never forget that the case is about what the injured Plaintiff can no longer do or provide because of his injuries, and not about what the family would like to receive.

B. Voir Dire – You Never Get a Second Chance to Make a First Impression

This is your first chance to plant the idea of fairness in the jurors' minds. You can count on the fact that Plaintiff's counsel will try to introduce ideas about his/her client's suffering or the heartless actions of the faceless corporations. Use voir dire to establish a trust relationship with the jury. This will pay off during closing arguments when you make your final thrust at attacking damages in the case. If you have not established trust from the beginning, you could very well come off as just another corporate lawyer as heartless as how your client has been portrayed by Plaintiff's counsel.

You must also pull the jurors' sympathy, prejudice or passion into check. We all know that the Judge will instruct the jurors that these factors should not enter into their verdict. However, if we do not address this in voir dire, we may end up with jurors whose emotions can never be controlled. It has been shown that emotional jurors have a disproportionate influence on other jurors. The problem is that the other jurors do not have the ability to offer an argument to restrain a highly emotional juror. Most jurors fail to remind the other jurors of the Court's instruction, or even if argued by defense counsel during closings, it is hard for the less emotional jurors to reel the emotional ones in to following the instruction. Thus, the compromise by the less emotional jurors is upward in their award than they would otherwise find.

There is one technique that can be offered during voir dire to try and emphasize this issue from the beginning. Try and encourage potential jurors to express their feelings about doctors, hospitals, injuries, children, and the like. You advise the panel of the Court's instruction and how it is so important for them to be able to follow that instruction. You should draw a box on the right side of your chart paper and write Sympathy, Prejudice and Passion outside of the box. You then advise the panel that there are only two things that they can use to base their verdict and you write the words Evidence and Law inside the box. You ask each juror if they can base their verdict on only those two factors, and set aside any sympathy, prejudice and passion.

You should also ask potential jurors if they will commit to the proposition that Defendants can talk about damages without that argument being an admission as to liability or causation. It is important for them to understand that damages must be reasonable and limited to need and not just big dollars. You may remind the jurors that a dollar in the courtroom is the same dollar they use everyday in their daily lives. By entering the Courtroom, the dollar has not changed into something different. It has not become any less important or any more important. It still has a picture of George Washington on it and it has the same value.

C. Opening Statement – Lay the Groundwork

This is the time when the jury will be most neutral to the defense. It will be the first time they can evaluate your defense and your honesty. You must address damages in your opening if damages are part of your defense. You must be concise, logical and appropriate for the case. You must project competence, confidence and concern for Defendant's cause. Use the opening to educate the jury as to where the issues will be fought regarding damages, and why the evidence you will offer should affect the Plaintiff's damages claims. Remind the jurors that Plaintiff only offers one side of the total picture and map out for them why it is so important for them to wait and listen to your evidence before they can truly analyze damages.

Fair and reasonable means that the jury must be educated that fairness must be looked at from the perspective of the Defendant, as well as the Plaintiff. Voir Dire gives you yet another occasion to allow the jury to empathize with a Defendant.

Remember that jurors want to believe someone and so give them reasons to believe you. Credibility is the key. Do not be afraid to point out the weakness in your case. This way you will beat the Plaintiff to the punch and diffuse the impact of the weakness. Describe the damages as honestly as possible; do not undersell the Plaintiff's position as that will provide fodder for your opponent. When possible tease the jurors about some testimony they are expected to hear from your witnesses, so that they are looking forward to your case, and will not want to make any decisions from the Plaintiff's evidence alone.

D. Trial - Fight Fire with Fire.

Plaintiff's counsel will argue, often melodramatically, about how injured the Plaintiff is. They will have their Day in the Life videos. They will try to get Plaintiff to testify on video or live at trial, if he or she is fortunate to still be alive, about the extent of his/her suffering, his/her fears for his/her life and his/her family's lives, and the dreams and goals he or she will never attain because his/her life will be cut short by his/her asbestos-related disease.

Do not fear that you might concede liability if you try to attack this testimony. During voir dire you should have already received the juror's agreement that you can attack damages without conceding liability. By trial, you will have completed discovery that can establish facts that will counter Plaintiff's portrayal of his/her suffering.

Cross-examine each of Plaintiff's witnesses with the information you accumulated during discovery. Highlight the holes in Plaintiff's economic expert's testimony. How assumptions are the basis of each calculation. If there are math errors point those out as well. Do not accept what the economist is saying, just as you do not expect the jurors to accept the testimony. Ask the economist if he or she is aware of the other medical conditions suffered by the Plaintiff, which are not related to his/her asbestos exposure.

One difficult decision you will have to make is whether you will call an economic expert. As previously discussed, hiring an economic expert to assist with crossing Plaintiff's economic expert should be done in every case where you intend to fight damages. However, it is another analysis that you must go through to determine if you will call an economic witness in your case.

Besides the typical concerns that a defense attorney has that a jury may conclude that the Defendant is not very confident in his/her liability defense if he or she calls an economist, or that the Defendant is concerned about damages, you have to also be concerned that without a defense economist, the jury only has one expert to rely upon if damages are awarded – the Plaintiff's economic expert.

The first factor you should consider is the demeanor of your economic expert. If your expert is viewed as making light of Plaintiff's injuries or otherwise attacking the Plaintiff, his/her testimony will be disregarded and Plaintiff's expert will most likely be followed even if less than logical or reasonable. As with other experts, your economist cannot be arrogant or aloof. Your expert should first explain what testimony was reasonable that was offered by the Plaintiff's expert. Then when the expert points out inaccuracies or improper assumptions, this testimony may be accepted as trying to be fair, instead of being cheap.

The other reason you might want to call a defense economic expert is to remind the jury that Plaintiff did not provide proper offset for what the Plaintiff would have incurred in costs had they never been injured. Thus the Plaintiff's expert was unreasonable in their conclusions and should not be accepted.

As with your cross-examination of Plaintiff's witnesses, do not fail to offer testimony from your medical experts regarding Plaintiff's other significant medical conditions and their impact on his/her quality of life and life expectancy. Allow your expert(s) to show how well Plaintiff's pain was managed and that the goal of all physicians is to prevent as much pain as possible.

E. Closing Argument – You Can't Always Get What You Want

Closing arguments are your last chance to impart to the jury the concept of fairness and the idea of the value of money. One common closing argument theme is "Just because Plaintiff is asking for something, doesn't mean he or she should get it."

Now is the time to call in your markers with the jury – those agreements that you received during voir dire that they will not allow sympathy, bias and prejudice to affect their verdict and that they will be reasonable and fair to everyone, including the Defendants. They each agreed to follow the law and now is the time for them to live up to their promise. Just as you approached each and every witness you crossed and presented, you must show the jury how to be reasonable and fair to the Defendants. Do not be afraid to point out why the Plaintiff's suggestion at an award is not grounded in fairness or reasonableness. Remind the jurors how the value of a dollar has not changed and should be considered the same dollar they discuss with their children, spouses and family. The Plaintiff is asking for something that they want, but not what they need. It is up to you to use the evidence to illustrate that what the jurors are supposed to do is give the Plaintiff what he or she needs. If you suggest a number that is so low that it shocks the conscience of the jury, it will backfire. At the time the jurors are discussing damages, they have already found against you on liability, so do not throw your last chance to receive a fair verdict out the window.

Your closing should follow the theme of your case. You cannot offer an argument in your closing that was not part of your case during trial. The ground work you laid starting with voir dire, to gain the juror's trust can be lost with one unsupported, off the cuff argument. Resist that temptation. What took months to years to develop in your case should not be risked for a fleeting thought during closing. If you are well prepared and have followed your theme, make your argument and sit down.

VI. Conclusion

A jury is normally asked to consider three distinct questions during their deliberations: 1) Does the Plaintiff have an asbestos-related condition, 2) Did the Defendant(s) products contribute to the development of the asbestos-related condition, and if yes, 3) How much money do you award in damages. Damages are a substantial part of the jury's deliberations, and should be a substantial part of your consideration when preparing your defense. Deciding whether to attack damages will not be the easiest decision you will have to make during the workup of a case. Since your decision can realistically be changed many times during the workup of the matter, it is this author's recommendation that you begin your preparation planning to attack damages and set up a Good Defense which will be your Best Defense.