

# Maximizing Damages for Emotional Distress

By Allen P. Wilkinson & Reza Torkzadeh

In most – if not all – personal injury cases, the complaint will allege that the plaintiff suffered “severe emotional distress” and “mental anguish” as a result of the negligence or other wrongful conduct of the defendant. In most personal injury cases damages for pain and suffering (non-economic damages) will be greater – often significantly so – than economic damages for such things as medical bills and lost wages. The sole exception, of course, is in medical malpractice cases, where non-economic damages are statutorily limited to \$250,000. (Code Civ. Proc. § 3333.2(b).)



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Severe emotional distress and mental anguish can exist even where the physical injuries are slight. In many cases the psychological damages are far greater in the long run than the physical injuries. For instance, a father and his 16-year-old daughter went out for a drive, with the girl's 15-year-old cousin in the back seat. They were involved in a horrific automobile accident, in which the father and his daughter, who were sitting in the front seat, were seriously injured. The 15-year-old cousin, however, who was sitting in the back seat, was uninjured except for some bumps and bruises. The newspaper called her the “miracle child.”

Fast forward six months: The father and daughter were recovering nicely from their injuries and starting to lead normal lives again. The 15-year-old cousin, however, was not doing so well. Shortly after the accident, the girl began having a deep fear of riding in an automobile. She tried taking the bus but even that caused her severe anxiety. Ultimately the girl was unable to ride in any kind of vehicle and could travel no farther than her feet could take her. But even that became too much for her and she developed a fear of leaving the house, a condition known as agoraphobia.

So while the critically injured father and daughter were making an excellent recovery from their injuries, the 15-year-old “miracle child” could barely leave her house, even for short distances. She was unable to attend school or engage in any of the activities she used to enjoy. To overcome her fears, the girl will require intensive and possibly lengthy psychotherapy, as well as psychoactive drugs. This case should serve as a warning to plaintiffs' lawyers not to settle a case too quickly but

wait until a sufficient period has passed so that all of the victim's injuries – physical as well as emotional – have manifested themselves.

In the landmark decision of *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, the California Supreme Court ruled that a plaintiff could recover for “serious” emotional injuries without having suffered any physical injury. The high court stated that serious emotional distress “may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” (*Molien v. Kaiser Foundation Hospitals, supra*, 27 Cal.3d at pp. 927-928, quoting *Rodrigues v. State* (1970) 52 Haw. 156, 173.)

## Is it recoverable?

Serious, or severe, emotional distress means emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it. It may consist of all highly unpleasant mental reactions such as fright, grief, horror, shame, loss of enjoyment of life, humiliation, nervousness, anxiety, embarrassment, anger, chagrin, disappointment, worry, indignity, or nausea, as well as physical suffering. The intensity and the duration of the distress are factors to be considered in determining its severity. (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452; *Schild v. Ruybin* (1991) 232 Cal.App.3d 755, 762-763.)

Allegations that the wrongful conduct of the defendant caused severe emotional distress, resulting in depression, anxiety

and physical illness, including vomiting, stomach cramps, and diarrhea demonstrate that the plaintiff's emotional distress was neither fleeting nor insignificant. (*Hailey v. California Physicians' Service, supra*, 158 Cal.App.4th 452.)

### In what amounts?

As for the amount of damages that are recoverable for emotional distress, the Supreme Court has stated that general compensatory damages for emotional distress are not pecuniarily measurable, defy a fixed rule of quantification, and are awarded without proof of pecuniary loss. The court has also noted that, in seeking to place a dollar value on a plaintiff's mental and emotional injuries, there is little in legal authority to guide it, because it has traditionally been left to the sound discretion of the trier of fact to assess the degree of harm suffered and to fix a monetary amount as just compensation therefore. (*Walnut Creek Manor v. Fair Employment* (1991) 54 Cal.3d 245, 263.)

Of the difficulty of putting a price on emotional distress and mental anguish, the Supreme Court stated that "[o]ne of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering." As the court noted, "[n]o method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter." Rather, "[i]n a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy." As the court explained, "'Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable.... The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury.'" (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 172.)

It has long been established that lay witnesses can testify to the plaintiff's

involuntary declarations and expressions of pain. (See, e.g., *Green v. Pacific Lumber Co.* (1900) 130 Cal. 435, 440-441.) The plaintiff's own testimony and the testimony of the plaintiff's spouse, children, parents, close friends, and co-workers commonly establish non-economic damages, especially in ordinary cases that do not involve severe and crippling psychic damage. Thus, while expert testimony may undoubtedly be helpful in many cases, it is not necessary to establish a

basis for an award for pain; lay testimony suffices. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889.)

However, where the plaintiff's pain and suffering is especially severe, the testimony of a psychologist, psychiatrist, or other mental health professional may be extremely helpful in getting the jury to understand the extent of the plaintiff's pain and suffering and its financial and emotional toll on the plaintiff and result in a larger award.

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## Voir dire

The time to start building the case for a monetary award that the injured plaintiff should receive for pain and suffering and other non-economic damages is during voir dire. Many people are skeptical of claims for pain and suffering and may believe the plaintiff is exaggerating or even completely fabricating their mental anguish just to get a larger award. Suppose your client is suffering from clinical depression as a result of the defendant's negligence, and spends the greater part of the day lying in bed, feeling hopeless and helpless. The plaintiff's counsel would want to inquire of a prospective jurors whether they believe a person who has no energy suffers from a real mental disorder or is a malingerer who could be doing anything she wanted if she really put her mind to it and is just trying to take advantage of the system.

## The trial

Once the trial begins, you should bring up the issues of emotional distress and pain and suffering during the opening statement. Following opening statement, you should address non-economic damages during the case in chief. In cases where the emotional distress is extreme, you should present expert mental health testimony to establish the reality of the pain and suffering, its intensity and duration, the costs of psychotherapy, medications, and other expenses, the plaintiff's loss of enjoyment of life, the likelihood of a complete recovery with proper treatment, and the likelihood of an incomplete recovery or relapse.

The psychiatrist or psychologist can determine the type and extent of the plaintiff's emotional injuries, the types of treatment for it, the length of time and amount of therapy that the client will need to get back to functioning on a reasonably normal level, and the cost of therapy and any psychoactive medication. Every person is unique. Some may be able to bounce back to normal functioning in a relatively short period of time, while others may require years of intensive treatment.

## Experts

Emotional distress and mental anguish can be made more real to and understandable

by a jury if a psychiatrist or psychologist explains to the jury in language they can understand the clinical disorders from which the victim suffers. For instance, if the victim of a violent fiery motor vehicle accident suffers from terrifying nightmares, is frightened by sudden noises, etc., a mental health professional can evaluate the patient and testify before the jury that the victim is suffering from the specific mental disorder of posttraumatic stress disorder, rather than some vague "emotional distress." The mental health professional can also testify as to the course and treatment of the mental disorder, the type and length of treatment involved, its cost, as well as its daily effect upon the client.

## Making it real

Emotional distress and mental anguish include the inability to engage in pleasurable activities that the plaintiff was able to engage in before the incident. For instance, if the plaintiff worked during the week and was a "weekend warrior" who participated in such things as playing golf or tennis, going mountain-biking, or swimming with the children, all of these should be introduced into evidence at the trial to establish the extent of the plaintiff's loss of enjoyment of life caused by their physical injuries. A father who has lost his arm due to another person's negligence and is no longer able to play catch with his seven-year-old son – an activity they engaged in every night when the father came home from work – suffers a real loss of enjoyment of life. A woman whose hand has been crushed in an accident, preventing her from engaging in her passion of knitting, deserves to be fairly compensated for this.

Any and all pleasurable activities and pastimes the plaintiff is no longer able to do or take part in because of the defendant's negligence should be presented to the jury. In the last two decades or so, the science of mental disorders has advanced greatly, and now it is possible to put a name on many manifestations of "emotional suffering" and "mental anguish." The diagnostic mental health care "Bible" for defining emotional and mental disorders is the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (DSM-IV-TR).

This manual was originally published in 2000, and a completely new and revised Fifth Edition is due out in 2012. Every personal injury lawyer should have this book.

## Common conditions

Here are some common DSM-IV-TR psychological conditions (i.e., emotional distress) that can arise from being the victim of another person's negligence:

- Posttraumatic stress disorder (PTSD) arising from, for example, a violent automobile or bus crash or a blazing fire that jeopardized the victim's life. While PTSD is often associated with a person who was in military combat ("shell shock" after World War I, "battle fatigue" after World War II, and PTSD after the Vietnam war), the disorder applies to any extreme traumatic stressor involving direct personal experience that involves actual or threatened death or serious injury, or other threat to one's physical integrity, such as a severe automobile accident.
- Major depression: The victim may become depressed because of being unable to do all the things they did before the incident, feel sluggish and fatigued most of the time, unable to gain pleasure out of things they once enjoyed (anhedonia), and may even become suicidal. Antidepressant medication and psychotherapy will be necessary to improve the plaintiff's mood. In some cases – especially where the plaintiff poses a threat of suicide – hospitalization and around-the-clock supervision may be required.
- Anxiety disorder: The victim may be on "high alert" for any type of accident or injury and be in a constant state of worry and anticipation that something bad is going to happen.
- Panic disorder: The victim may suffer panic attacks as a result of the injury. Panic attacks are a severe mental and physical condition in which the victim's heart speeds up, is unable to breathe normally, may feel a tightening or pain in the chest, and may believe that they are having a heart attack, is going to



faint, lose control, “go crazy,” or embarrass themselves. Panic attacks, which seem to “come out of the blue,” put the person in an extreme state of fear. Panic disorder may stop the victim from enjoying activities and, as in the case illustration at the beginning of this article, the victim may become housebound (agoraphobic).

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You may use the “per diem” argument, in which you ask for a daily sum for the emotional suffering the injured plaintiff must endure for the rest of their life.

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Having a psychologist or psychiatrist testify using DSM-IV-TR criteria makes the mental injury and emotional distress much more real and believable to the jury. Skeptical jurors may change their mind about mental and psychological injuries when the expert mental health witness is holding the thick book while testifying. The defense, in turn, may argue that the plaintiff is simply a malingerer who is trying to take advantage of the legal system. Qualified mental health care providers and forensic psychiatrists and psychologists testifying on behalf of the plaintiff can explain to the jury the methods that are used to assess a person’s mental state and reach an objective diagnosis, and can discuss the types and length of therapies the injured person will have to get better to return to their old self. In most cases of “severe emotional distress” and a diagnosable mental disorder, the injured party often will never return to being the person they were before the tortious incident.

The difference between a client testifying about their own emotional suffering as a result of the defendant’s wrongful conduct and a psychologist or psychiatrist testifying as to the emotional and mental impact the incident had on the plaintiff’s mental well-being can result in tens, even hundreds of thousands of dollars or more. Jurors are impressed by an experienced

psychiatrist’s or psychologist’s educational background and clinical experience treating victims of another person’s misconduct, and the mental health expert can testify in terms the jury will understand of the mental health diagnosis the plaintiff suffers from as a result of the incident, how it has affected their life.

The mental health care professional can testify to a reasonable certainty, based upon years of training and practicing and evaluation of the injured plaintiff, regarding the injured plaintiff’s mental distress, how long it will take to treat the injury, and whether there will be lasting consequences of the emotional disorder.

However, no witness, including expert witnesses such as psychiatrist and psychologists, as well as forensic economists and accountants, can testify as to a dollar amount the plaintiff’s non-economic damages will amount to over a lifetime. While the judge can instruct the jury on the right of the plaintiff to be compensated for pain and suffering and other non-economic damages, the judge cannot give the jury an instruction on the range of amounts that the plaintiff is entitled to recover for non-economic damages. Amounts from other cases cannot be brought up at trial to help to establish the monetary amount of the plaintiff’s pain and suffering. The award for emotional harm suffered by plaintiff is not easily quantifiable and is left to the sound discretion of the jury. (*Young v. Bank of America Nat’l Trust & Sav. Ass’n* (1983) 141 Cal.App.3d 108, 115.)

It is said that the jurors are best situated to determine and to what extent the defendant’s conduct caused the emotional distress, by referring to their own experience. A jury is more likely to believe the testimony of a psychologist or psychiatrist who has treated the plaintiff, as it may think a plaintiff’s testimony to the extent of their pain and suffering is exaggerated or fabricated.

The appropriate compensation for mental anguish cannot be determined by an objective standard capable of consistent and predictable application. In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy. (*Balmoral Hotel Tenants Ass’n v. Lee* (1990) 226 Cal.App.3d 686.)

## Closing argument

During closing arguments, you may not argue the “golden rule” – how much would a juror think would be fair and appropriate if the juror would charge to undergo equivalent pain and suffering? – but may use the “per diem” argument, in which you ask for a daily sum for the emotional suffering the injured plaintiff must endure for the rest of their life. (*Beagle v. Vasold* (1966) 65 Cal.2d 166, at pp. 181-182; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 860; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757.)

There is no definite or fixed standard or method of calculation prescribed by law by which to fix reasonable compensation for pain and suffering. The jurors must use their own judgment to decide a reasonable amount based on the evidence and their common sense. In making the award for pain and suffering, the jury must use its authority with calm and reasonable judgment, and the damages the jury fixes must be just and reasonable in the light of the evidence. The award for non-economic damages should not be reduced to present cash value. (*Loth v. Truck-A-Way Corp.*, *supra*, 60 Cal.App.4th at p. 769.)

## Appeal

The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently see the injury and impairment that has resulted. As a result, all presumptions are in favor of the decision of the trial court. An appellate court may not disturb an award of non-economic damages unless the amount is, at first blush, so disproportionate to the injuries suffered that the result reached may be said to shock the conscience and suggests passion, prejudice or corruption on the part of the jury. If the verdict did not shock the sense of justice in light of the victim’s life expectancy, severity of injuries and suffering, there is no basis upon which an appellate court, as a matter of law, can disagree. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61; *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-508.) ■