The Damages Dilemma

Trial lawyers and clients can face a difficult dilemma about whether to call a damages expert for a defendant. Imagine that you represent a corporate defendant and you believe the plaintiff has a weak liability case – in fact you think there is a 70% chance that a jury will find no liability. But the plaintiff will undoubtedly get to a jury, and it has an expert witness who will testify that the plaintiff has $3 million in damages. You have retained an expert who will give the opinion that plaintiff's damages do not exceed $1.75 million. Your motion to bifurcate the trial into liability and damages phases was denied.

You are concerned that if you call your expert, the jury might make a negative inference about your damages evidence and interpret it as a concession of liability. This could inadvertently open the door to a damage award. Should you stay focused on your strong liability case and rely on the cross-examination of the plaintiff's expert or should you call your expert and fight the battle on all fronts?

If you look to the leading trial practice manuals (at my last review), you will find neither guidance nor discussion of the issue. If you talk to practitioners, the advice you hear mostly is that it is "situational." This article seeks to explore the various risks and issues presented by each strategy. I offer no all-purpose answer.

Why Not to Call the Expert

What are the reasons against using your damage expert? First, in calling the expert a jury may see you as "sponsoring" or validating the existence of damages. This may entail a re-weighting of the evidence by the jury so as to strengthen the materiality of damages and overshadow the plaintiff's weak liability. While this may be tactically harmful, it is not necessarily fatal. The far bigger risk is if the jury interprets you calling a damages witness as tantamount to conceding liability to the plaintiff. That one element of proof could poison your liability defense and expose you to a large award.

The jury's liability inference will not be made in a vacuum. There will be plenty to stir it up. After watching the direct, cross and redirect of your expert for two or three hours, a jury is not going to simply ignore the damages evidence. One juror may turn to another and say, "Well, maybe there's something there after all."

The plaintiff attorney's closing argument might go as follows: "Now the defendant has vigorously claimed it did nothing wrong and should not be liable for any damages, and yet it has retained, at great expense, an expert on damages. Why would it do this if it did nothing wrong? The defendant is very clearly making a second and independent argument that my client's damages have been exaggerated or overstated and that you should only award a part of those damages…." Some courts

may sustain an objection to so direct an argument, but would probably not to this softer one: "The defendant claims no liability but its own expert has conceded that my client has suffered $1,750,000 in damages…"

Will this argument fool jurors? Do they in fact make the negative inference? If they do, will it be inconsequential? I don't think anyone knows for sure. We are not aware of anyone who has really studied the issue except perhaps defense counsel in the Pennzoil v. Texaco case. They elected not to call a damages expert and the jury awarded the $10 billion that Pennzoil was claiming as damages.

Why to Call the Expert

What are the arguments in favor of calling your expert? One reason is that your expert will introduce a figure that is $1,250,000 lower than the plaintiff's number. That is a lot of money to put at risk by withholding it as evidence. While you can argue that you are potentially putting $3,000,000 at risk by calling the damages witness in the first place, it requires a sophisticated business client to appreciate these tradeoffs in hindsight.

A second reason to call the expert is that you may otherwise forfeit a basis of appeal. As the Seventh Circuit observed in Gorlikowski v. Tolbert, 52 F. 3d 1439:

"When a defendant goes for broke, staking its all on convincing the jury to award zero damages – fearing otherwise a compromise verdict – it risks being hit with a verdict much larger than if it had offered the jury an alternative estimate of damages to the plaintiff's. It should not expect the appellate court to relieve it from the consequences of its gamble. Apparently Tolbert gambled and lost. Because his side of the ledger is blank, Gorlikowski's evidence justifies the jury's verdict."

A third reason is that your client may not be sophisticated about juries or trials and may have a low risk tolerance for even the remote possibility of a $3,000,000 award. Finally, if you don't do it, you may lay yourself open to second-guessing and criticism by your client. Although you will have advised the client of the tactical risks and obtained its (equivocal) consent that will not immunize you to later criticism: "the $3 million number was the only number the jury had and we never gave them our lower figure!" In the event of a large plaintiff recovery, you could jeopardize the client relationship and expose yourself to a malpractice claim.

When Not to Call the Expert

In the face of these fairly compelling arguments, are there circumstances where it still makes sense not to call your expert? I think so. Remember that you have a very strong liability defense. Let's assume a few other things. The jury seems intelligent and fair-minded and the jurisdiction is not known for run-away verdicts. The plaintiff is a corporation and the damages are for lost profits. You have listened to opposing counsel's opening statement and you're not particularly impressed with his skill level. The judge seems favorably disposed to your case. The plaintiff's damage expert is a classic hired gun and, though he has a likeable personality, you believe your cross-examination thoroughly discredited his testimony. You heard a few jurors chortle and shake their heads at the expert during your cross.

Conservatively, you think the worst case scenario is that the jury would cut the plaintiff's number in half and award $1,500,000. That is $250,000 less than your own expert's number (which you risk sponsoring). The more likely award in your judgment, if you did lose liability, would be $500,000. Your client is an experienced hand at litigation and is associate general counsel at a multinational company. You write him a letter laying out all of the pros and cons.

Your assessment is that you have a 70% probability of winning liability, but if you don't prevail, the most likely range of jury awards will be $300,000 to $750,000. If you call your expert, you fear you may diminish your chances of winning liability to 50% because the jury may make a negative inference. You write your client that you recommend against calling the expert for all these reasons, but if they are not comfortable with the trial risk, you will, of course, use him. Under these circumstances I suspect there are good odds that you will not need to call the expert.

How to Manage the Risks

Let's assume that you decide to call the witness and are looking for ways to manage the negative inference risk as best you can. Here are seven things to consider.

1. Do not mention your damage expert in your opening statement even if you have firmly committed to calling him or her. Keep your case focused on liability. Do not bring any more attention to damages than you must.

2. Alternatively, if you must mention damages in your opening, even briefly, consider doing it in the middle somewhere before finishing liability. It may minimize the appearance of inconsistent arguments.

3. In closing arguments consider if it makes sense to be candid with the jury about your motives for calling the witness; that you were reluctant to call him but felt you had to because "the plaintiff is asking for so much money and I can't read your minds."

4. Request the strongest possible jury instruction against drawing a negative inference.

5. Be sure that there is an instruction about keeping liability and damages separate (e.g. "You should not interpret the fact that you have been instructed about the plaintiff's damages as an indication that it should, or should not, win this case…").

6. In your closing, warn the jury about making such an inference and say, "As the judge will instruct you later, you are not to interpret any evidence of damages (put on by my client) as an indication of whether the plaintiff should win this case…"

Conclusion

A defendant can face a tactical dilemma whether to call a damages expert in situations where the damage exposure is large but the liability defense is strong. There are no simple answers. It is a careful balancing of many case factors. Here are some important ones:

- The wider the spread between the two experts' damage numbers the greater the potential benefit in calling your witness. If there is only a $250,000 difference, there may not be enough benefit, given the risk of weakening your liability case.

- If the plaintiff is a corporation and the damages are economic, and there is no sympathy or claims of fraud or bad faith, a jury may be less disposed to make the negative inference (cf. Pennzoil v. Texaco)

- The skill of opposing counsel and the credibility of plaintiff's expert are important factors.

- The client's sophistication and risk tolerance is paramount.

Above all else, trial counsel should give the client a clear and written explanation of the tactical tradeoffs, whatever course is advised or decided.