



VERDICT

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Arguing Damages for an Elderly Client

By Anita L. Pitock, Esquire

In recognition of National Elder Law Month, we have decided to devote this issue of the *Verdict* to articles that may be of interest in representing our elderly clients. ♦

Embracing your client is the key to successfully representing an elderly individual. Belief in your client begins with you. Before jurors will award substantial damages, it is essential that they empathize, feel, and experience what your client has had to endure. You want them to feel as if they know your client. Your closing can accomplish this.

A closing argument is the attorney's opportunity to establish a link between the jurors and the client so the jurors better understand the impact of what has occurred. While many attorneys approach the elderly client with trepidation because of shortened life expectancy and limited economic damages, the elderly client's life has much to draw on for revealing the devastation that has occurred. Photographs are an excellent resource, and they are helpful in supporting your words in closing. Show the dichotomy of the man before and the man after. Address openly the health concerns of the client and deal

with any medical issues with specificity and without hesitation.

Richard Weiss ABSOLUTELY had severe renal dysfunction, congestive heart failure, cardiomyopathy, hypercholesterolemia, hypertension, heart disease, stroke, peripheral vascular disease, diabetic neuropathy, diabetic retinopathy however, he was not on death's door, as defense counsel would like you to believe. That is not the truth --- we have seen the truth through the pictures. We have seen how Mr. Weiss was living 01his life. We have seen that he was mowing his lawn with a garden tractor, shoveling snow, hanging his Christmas decorations and caring for his granddaughter, Zoe, since she was a newborn infant. Rich was Pat's husband of 40 years, dad to Valerie, Richard and Gary, and Pop-Pop to his nine granddaughters.

As the closing is being presented, use a power point presentation to show the images of Mr. Weiss, seamlessly without pause. Juror retention is increased from 3 hours to 72 hours if the jurors are visually stimulated at the same time they are hearing the closing. At this point during argument,

there should be no written words; the portrayal of Mr. Weiss should be as if you have known him all of his life. Keep it personal. If you "believe," the jury will believe.

Discuss the medical and negligence issues clearly and succinctly. Briefly review the key points of the fact and expert witnesses. Emphasize your strengths and address your weaknesses. Use the medical records to support your case, utilizing a well designed Power Point to highlight key documents and show why they are important. As you use documents, find a single point to focus on, have it enlarged and set apart. Address it and move on. But do not show every-single document that has been introduced; this is not the time to retry the entire case. Consider using timelines or charts to show relationships or changes. Not only do they keep the jury on focus, they can serve to keep the attorney on track without relying on notes.

Damages are strategic in a case involving an elderly individual. In many closing arguments an attorney will lump the client's "pain and suffering" as if they were one item, assuming the jury understands. Pain and suffering

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are two very distinct and important facets. They should be explained separately to the jury and never be understated.

Pain is a symptom of physical hurt or emotional distress. It is the sensation when we stub our toe. While pain is something we all fear, suffering is far worse and more devastating. Suffering means to tolerate, to endure, to sustain a loss. Suffering surpasses pain and encompasses many facets of life **after an injury**, and can be independent of physical and emotional pain. Suffering has a life of its own and can grow. Pain and suffering have to be dealt with on an individual basis and in great detail illustrating the ultimate effects on the life of

the patient. Suffering can result from the humiliation of being a burden on friends and family, the frustration of losing mobility and independence, the anger of not being able to honor obligations, the resentment of losing opportunities and fearing one's future.

Pain was the sharp, burning sensation Mr. Weiss felt when the pressure sore that was open to his bone was cleaned daily despite the tender care of his wife; pain was the crushing and breathtaking sensation he felt when his granddaughter, Zoe, hugged him . . . but, although his pain was intense, the suffering Mr. Weiss endured was far worse. Mr. Weiss felt humiliation of being

no longer able to walk, his body crippled by severe contractures of being a burden on his wife, Pat; the desolation of lying in bed at night unable to turn or move without crying out to his wife who lies sleeping on the floor next to him on their living room floor so she can respond quickly to his needs. Mr. Weiss endured this for eighteen months, but during those months he wasn't counting the months. In his moments alone at night, he counted the minutes.

It is important to accurately depict your client. If defense counsel dwells on pre-existing injuries -- tell the jury why. Let the jurors know that defense

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counsel is attempting to distract them. Then, review with the jury the charge to be given by the judge, and note the instruction on the law that holds 'you must take the plaintiff as you find him' and assure that they have a thorough understanding.

Life tables are statistics, numbers, calculations. The client is not a number, not a statistic, but a human being. Never let that fact leave the juror's mind. If defense counsel attempts to minimize the life expectancy through statistics, refocus. Look to the client's family -- how long did they live, did they surpass life expectancies. Look to the client's state of health prior to the negligence. Understand the statistics and separate your client from mere statistics.

Yes, Dr. Ryans, the defense cardiologist, explains there is a statistic that patients with congestive heart disease have a median lifespan of 5 years. However, Dr. Ryan is NOT looking at Mr. Weiss and that's what doctors are SUPPOSED

to do. Mr. Weiss had an ejection fraction, an objective measure of 40%. Remember what Dr. Charash, plaintiff's cardiologist, said: you have to look at the pump, his heart and his ejection fraction is telling you his heart is still working effectively. While defense counsel asks you to rely on generalized numbers, we ask you to look at Mr. Weiss and his state of health.

Use carefully the 'golden years' argument. Remember, in selecting your jury, you will be looking for jurors who are elderly. Senior citizens often understand first hand that the so-called 'golden years' are not always what they are cracked up to be. Demonstrate who your client was and how his life has been affected. Talk about what your client lost personally. Never downplay the quality of life, because this is an intensely personal and variable concept.

The elderly are a unique group of clients --- they are important and they are vulnerable. Know what makes them different and

special. Set them apart. When you finish your closing, the jurors should feel as if they know your client, are able to feel his pain, appreciate the degree of his suffering and understand the negligence of the physicians caring for him. Cases involving the elderly must be tried with passion; but they are not about sympathy.

Mr. Weiss was an active man, a Pop-Pop doing circles in the snow with granddaughter Zoe. Now Pop-Pop is in the wheelchair being pushed by his granddaughters. Mr. Weiss is not asking for your sympathy, he and his family are asking for justice. ♦

Anita L. Pitock is an attorney with the firm of Anapol, Schwartz, Weiss, Cohan, Feldman and Smalley, and also a registered nurse with 20 years of experience in the medical field. Her representation of Pat and Richard Weiss resulted in a jury verdict for the plaintiff in the amount of \$1,151,038.

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events but occur over a number of days in plain view of care providers). In some extreme instances there may also be punitive damages awardable.

Anyone undertaking a case against a nursing home or assisted living facility must become familiar with federal and state regulations found in 42 CFR §483.1 *et. seq.* and 28 Pa. Code §201.1 *et. seq.* Regulations

regarding Personal Care Homes (an older term for Assisted Living) can be found at 55 Pa. Code §2620.1 *et. seq.* Familiarity with all of the regulations is the first step in properly evaluating and litigating these cases.

Representing victims of failures in long term care can be personally and professionally rewarding. Despite the strong similarity to other medical negligence cases,

there are certain pitfalls that must be avoided and other opportunities that can be exploited. The abuse and neglect of elders is a matter of importance to society and worthy of our attention as trial lawyers. ♦

Martin S. Kardon is a shareholder in the Philadelphia firm of Kanter, Bernstein and Kardon, P.C., with a practice focusing on nursing home abuse and neglect.