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Is It Possible To Collect Large Damages For Elderly Plaintiffs?

Yes -- If Certain 'Special Steps' Are Followed

By [Lynn Patrick Ingram](#)

While attorneys may believe it is difficult to get significant damages for elderly plaintiffs because of their life expectancy, it *is* possible but only if "special steps" are taken, practitioners tell *Lawyers Weekly*.

Southfield attorney Steven M. Gursten, who handles cases for elderly plaintiffs, said that lawyers must first realize these cases are different.

He said that cases involving elderly plaintiffs are particularly challenging because attorneys "are asking a more conservative jury pool to award large pain and suffering verdicts for plaintiffs who are less active and with only a few remaining years left to enjoy."

Therefore, "attorneys must take special steps in order to handle these cases successfully," Gursten observed.

Detroit attorney Michael S. Cafferty, who also represents elderly plaintiffs, agreed.

"These cases certainly present significant obstacles," Cafferty noted. "But these obstacles can be overcome if lawyers take the right steps."

These steps include:

- get elderly people on the jury;
- remind jurors that they "take the plaintiff as they find him";
- focus on the plaintiff's "golden years" of life;
- be sophisticated with the medical evidence; and
- project sincerity to the jury.

The 'Golden Years'

Mortality tables and the idea that an elderly person's suffering is worth less are the two biggest obstacles facing plaintiffs' attorneys in these cases, according to practitioners.

"Our outdated and terribly unfair mortality tables show only a few remaining years for plaintiffs in verdict forms," Gursten explained.

This "restricts an attorney's ability to justify large awards using per diem arguments," Cafferty said, adding that "it is much easier to justify a big number with younger clients."

But there are ways to overcome these obstacles, practitioners noted.

"You have to focus on the counter argument that, while the client may not have long to live, he was looking forward to enjoying the golden years a nice retirement, cruises and so forth," Cafferty explained. "Now that's been taken away."

He added that "you have to focus on the idea that elderly people can still suffer loss of enjoyment of life."

Gursten made similar observations.

"Analogies are one of the most effective weapons of advocacy," Gursten said. "Explain to the jury how the value of a few remaining days means more, not less, to someone."

For example, "use the analogy of someone who has only one eye or one leg and ask, 'What is the value now if that person loses that remaining eye or remaining leg?'" Gursten suggested.

"You must show the jurors that these are the golden years," he emphasized. "You must show that your plaintiff worked hard all his life to enjoy these last remaining years and the defendant took these last, best years away from him through negligence."

Gursten also advised lawyers to look at the big picture.

"You overcome these problems by continuing to bang away and by achieving excellent results," Gursten observed.

As an example, he pointed to attendant care claims.

"At first, the insurance companies simply believed that these cases were worthless," Gursten said. "As a result, we were forced to bring the cases to trial and we've been killing them."

Now, the insurance companies "are recognizing the value of these claims and, in an increasing number of cases, are taking very substantial steps to settle them," Gursten noted.

In With The Old

Cafferty also said it's important to seat elderly people on the jury.

"The voir dire process is very important because you really need to get a jury that will be sympathetic to your client," he explained. "Then, when the other side argues, 'Hey, this person is old,' it backfires."

Cafferty said it's not difficult to get a jury composed of elderly people because they are "less reluctant to be on juries."

He suggested that, "if you're trying a case like this, use your peremptory challenges to strike younger people who might have a bias toward older people."

Novi attorney Matt Savich agreed.

"Voir dire becomes even more important in cases like these," Savich observed. "Make sure you do your homework."

According to Gursten, practitioners can also use what appears to be a weakness in their favor.

"Aristotle wrote that the fourth and highest level of advocacy is using that which hurts your case to help you," Gursten said.

Thus, "if a defense lawyer wants to spend all of her time attacking the pre-existing problems of your elderly client, let her," he noted. "Use the jury instructions and the law that says 'you must take the plaintiff as you find him.' Explain to the jury that predisposition to an injury and pre-existing medical problems are all part of the give and take of life and that our law takes that into account to protect all of us."

Further, lawyers need to show the jury "how the defendant, by attacking the plaintiff, is simply refusing to take responsibility for his actions," Gursten said.

Sophisticated Evidence

Practitioners also pointed to the importance of medical evidence in these cases.

"You must be sophisticated with the medicals to adequately represent elderly clients," Gursten observed.

"We have taken cases that other attorneys would settle for a few thousand dollars for soft-tissue injuries and, by properly documenting and explaining these injuries, we were able to increase the value many times over," he said.

Gursten suggested using various experts to strengthen the case.

"Use a rheumatologist, who can be an incredible asset to you, to show the jury that the plaintiff suffered an aggravation of a previously asymptomatic degenerative disc disease or arthritis," Gursten advised. "Explain to the jury that people can walk around with the types of changes that the insurance doctors inevitably find in their X-rays and never have pain until a traumatic event activates this underlying condition."

Also, "use neuropsychologists to explain how an elderly person's brain is less able to compensate after a traumatic injury," Gursten continued. "Explain how it is less able to create new neural connections, and explain reserve brain capacity and how it can compound the effects of what may have been a relatively minor injury to a younger person many times over to your plaintiff."

Finally, Gursten suggested using a gerontologist to combat the "unfair and outdated" statutory mortality tables.

"Everybody realizes and understands that people simply are living longer than the existing mortality tables," he explained. "Use a gerontologist. Put on members of the family to talk about the age that the person's mother and father lived to and how healthy they were in later years."

Southfield lawyer Jason A. Waechter agreed.

"There have been vast medical improvements and people are living much longer," Waechter noted. "Therefore, you must use different tables and an expert to opine how long your client will live, and compare his life before and after the accident."

Waechter said that current life expectancies generally surpass the mortality tables.

"Have the personal physician write a narrative as to whether the patient/victim looked, acted and did activities of a much younger individual," he said. "Then take this narrative and applicable medical records to a certified geriatric specialist and have them give an opinion as to the life expectancy. This will typically be over and above the tables."

Be Sincere

Gursten also advised lawyers to be sincere.

"Most importantly, you must project sincerity," Gursten said. "If you are handling these cases only for the dollars and you don't believe in what you are saying, it will show."

According to Gursten, "you must convey an overpowering commitment to and belief in the plaintiff at all times."

Finally, "you must convey passion, you must believe in the principles of our civil justice system, you must truly like people and want to help them," Gursten concluded. "If you don't, it will show and both you and your client will be punished for it."

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