

# TACTICAL EDGE...

*The Law Offices of*

STEINBRECHER  
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SERIOUS INJURY LITIGATION

*Dear Friends and Colleagues:*

*Large non-economic awards are possible for injured clients without a record of high earnings even when pain and suffering have been substantially negated due to medical treatment. The key in such cases is "loss of choice."*

*The attached article illustrates the type of cases where arguing loss of choice may succeed. Arguing "loss of choice" can help a jury understand the consequences of serious injury when conventional concepts are lacking.*

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*- Ed Steinbrecher*

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Los Angeles Daily Journal - October 13, 2000

Negative damage factors, such as speculative loss of earnings or limited pain and suffering can be turned to the plaintiff's advantage by advocating a 'loss of choice' approach.

By Edward Steinbrecher

A useful new technique for arguing non-economic damages has emerged recently. A technique that turns trial challenges into big results. Often, future loss of earning capacity for plaintiffs may be speculative, making a large demand a difficult sell for a jury. Pain and suffering may have substantially decreased once the injured victim has had appropriate medical treatment. In some instances, there is debate over whether the injured victim is able to appreciate pain. These seemingly negative damage factors can be turned to the plaintiff's advantage to enhance non-economic damages by advocating "loss of choice."

## JURORS AND CHOICE

Focus groups, observed through years of experience, show that all potential jurors have made choices that have affected their lives. They have made choices in

the schools they have attended; the curriculum they have pursued; their hobbies, recreation, personal and professional lives. It is easy for counsel to convert any single person's experiences to the most basic common denominator - a

choice the individual has made. A person's right to choose to pursue a particular activity, whether it be recreational, social or

academic, is important to that individual. If that choice was taken away or limited, it would unquestionably cause emotional distress. Inarguably, the individual would suffer a sense of loss.

Loss of a dream or choice is an element of non-economic damage. English v. Lin, 26 Cal. App. 4th 1358 (1994), codified at BAR number 14.13, which discusses reasonable compensation for emotional distress suffered by the plaintiff, past and future. No definite standard or method of calculation is prescribed, nor is the opinion of any witness required. Non-economic damages are left to the reasonable judgment of the jury to fix the award in light of the evidence.

## PURSUING GOALS

Loss of choice is closely related to loss of dreams or goals. Not every dream or goal is realistic. The fact that a plaintiff wants to be a professional basketball player or Formula One race-car driver

or a leading actor does not mean that these dreams or goals are achievable. Nonetheless, a person has the right

to try to pursue these dreams and goals. Facts and circumstances distinguish dreams and goals that are highly speculative from those which are realistic. Two trial examples exemplify the value of arguing loss of choice in achieving

adequate non-economic damages awards. In Borgia v. Auranco/Coachman Industries, a 25-year-old aspiring musician-songwriter-

entertainer, with no track record of earnings to speak of, was seriously injured.

## THE BORGIA CASE

The plaintiff had played the guitar, a vital part of his life, since age 6. He had dropped out of college after one year to pursue his professional ambitions in the music business. He had recorded three songs and been photographed in an attempt to win a recording deal for himself, with no success, however. Up to the time of the automobile accident that rendered him a quadriplegic, he worked a few months each year as a stage manager for an illusionist, earning no more than \$10,000 per year. There was no credible evidence to prove that he would have become a successful musician, songwriter

or entertainer. His future loss of earning capacity was speculative, at best.

## DAMAGES CHALLENGES IN BORGIA

At trial, counsel presented evidence to the jury that the plaintiff had lost his ability to pursue his choices in life.

## The Borgia Case

There was no credible evidence to prove that he would have become a successful musician...

Counsel presented evidence to the jury that the plaintiff had lost his ability to pursue his choice in life.

## The Borgia Verdict

The jury awarded \$35 million in damages, \$22.5 million of which was non-economic.

Before the accident, he had the choice to pursue his dreams and goals, but his choice was taken away because of serious brain injuries.

In Borgia, counsel displayed numerous photographs of the plaintiff, through the years, with his guitar. Counsel also made a compact disc of

the plaintiff's three songs, and played them for the jury. Witnesses testified about his dreams and goals of writing music, singing and entertaining. Evidence showed that the plaintiff was taking all the necessary steps to pursue his dreams and goals.

Although no one really knows whether he would have succeeded, nevertheless, his choice to pursue this career in the arts was taken away. The jury awarded \$35 million in damages, \$22.5 million of which was non-economic.

## OTHER CHALLENGES

Dwayne Williams v. Dinwiddie Construction and Brunton Enterprises is another example of loss of choice motivating a jury to award substantial non-economic damages.

Dwayne Williams was 22 years old, working as a secu-

rity guard at the Getty Museum, when a wrought iron gate fell on him, fracturing his right elbow. He had two elbow surgeries and was off work for a year before returning to the Getty, earning more money than before the accident. His elbow

## The Williams Case

There was certainly no guarantee that he could ever achieve his dreams and goals of becoming a sheriff's deputy...

His choice was taken away because of continual residual elbow restrictions.

healed to the point that his loss of motion was only 10 percent of extension and flexion, with little residual pain. The challenge is how to get substantial non-economic

damages under these facts. The answer lies in the plaintiff's dreams and goals of becoming a sheriff's deputy.

The plaintiff

was an Explorer Scout for five years, with low scores at the explorer academy. He graduated in the bottom 10 percent of his high-school class. He took the Sheriff's Department entrance exam three times and failed it each time. Although there was certainly no guarantee that he could ever achieve his dreams and goals of becoming a sheriff's deputy, his choice was taken away because of the continuing residual elbow restrictions. The jury awarded \$1.5 million in damages, \$1 million of which was non-economic damages.

## WORKING THROUGH JURY SELECTION

Loss of choice applies to the freedom to choose in education, career and every other aspect of life, and jury selection is where counsel should introduce the jury

pool to the concept of loss of choice. Counsel should ask

jurors what they do with their free time or what their hobbies are. Whatever the answer, follow up with questions regarding how they

would feel if they were unable to pursue that choice of activity.

## The Williams Verdict

The jury awarded \$1.5 million in damages, \$1 million of which was non-economic.

Ask any juror how important it is to them to make choices about what they do and the pursuit of their dreams and goals. Ask them if their dreams and goals were taken away, would they feel a sense of loss? Would it cause them emotional distress?

## PRESENTING EVIDENCE

During the evidentiary phase, medical opinion is required to prove that plaintiff is unable to do what he intended to do. Counsel should emphasize the steps that plaintiff took to pursue his dreams and goals. Use photographs and video evidence, if it exists. Bring in family members and lay witnesses to testify about plaintiff's pursuit of his dreams and goals. Emphasize plaintiff's talents or assets.

Counsel must continuously remind the court, opposing counsel and the jury that the issue is not whether the plaintiff would have actually succeeded in his dreams or goals leading to future loss of earnings capacity. Rather, the focus is on the fact that his choice to pursue his dreams and goals has been taken away, causing emotional distress. Jurors readily identify with this concept, and counsel should use focus groups to test the evidence for any particular case.

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