SHE SAID, HE SAID: PLAINTIFF AND DEFENSE PERSPECTIVES ON DAMAGES

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> It is "the guiding principle of Texas tort law: '*The thing to be kept in view is that the party shall be compensated for the injury done*.'"
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> *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 676 (Tex. 2016) (italics in original).

The typical automobile crash lawsuit involves various items of damage, which are recoverable. This article is to examine the most typical damages from the perspective of Plaintiff's counsel ("She Said") and from the standpoint of Defense counsel ("He Said").

This paper hits the high points. Books upon books dedicated to the subject. Entire CLEs are focused on the topic, or, even, one sub-topic of damages. But, a typical car wreck trials a "high points" endeavor. We often have a morning to voir dire and open our cases. Then, we're closing and handing them off to the jury 24-hours later. We have to hit our high points.

We will begin where the trial begins with the two perspectives on voir dire.

I. VOIR DIRE ISSUES

She said: The Plaintiff's Perspective

Damages and closing argument starts in voir dire. In many car wreck cases, our clients suffer soft tissue injuries, sometimes with limited physical damage to their cars. In voir dire, find

those who can be open to the idea that little visible damage doesn't mean the body didn't take a hit. Many jurors can relate to getting a car back from a body shop and it never quite driving right again. Can they see that, even though their car looked great from the outside and even though the repair shop said all the parts were "good as new," it was just not the same as before?

Whether your goal is to find those venire members you wish to strike or those you wish to keep, you want to educate them all. Effective questioning can get the venire thinking, opening up, and listening. For example, a loose, typical voir dire question:

> On a scale of 1 to 4, with 1-"I absolutely would never" to 4-"I would always" where do you fall on, if the evidence is sufficient, I can award money for mental anguish.

Well, you may as well substitute "write a screenplay" or "fill my car up with gas" in the place of "mental anguish." The average person has no idea what "mental anguish" means.

> Throw them a lifeline:
>
> The Texas Supreme Court says mental anguish is things like headaches, nightmares, or inability to concentrate because of the wreck, not wanting to socialize with friends as you did before, sudden anger, being afraid to drive. The Texas Supreme Court says you don't have to go to a therapist or a psychologist. It doesn't have to be a desperate depression. It's disruptive to your life following the wreck because of the wreck. Knowing that, on a scale of 1 to 4, with 1-"I absolutely would never" to 4-"I would always" where do you fall on, if the evidence is sufficient, I can award money for mental anguish.
>
> Have a trial brief ready on what are permissible commitment questions.

He said: The Defense Perspective

Defense counsel should let potential jurors know in voir dire they will hear evidence regarding damages. Prospective jurors should be asked if they would be willing to refuse to award the plaintiff any damages if the evidence showed the plaintiff was not injured because of the incident complained of. The idea is to get the jury committed to sense of fairness to each side of the controversy.

In this way the defense counsel also introduces the idea during voir dire that the plaintiff may have suffered no injuries because of the car crash and lays a predicate that defendant's counsel will be attempting to impeach evidence regarding the various elements of damages the plaintiff will be seeking. At a bare minimum, establishing there may be questionable evidence regarding the plaintiff's damages will make the chosen jury members pay close attention to the damage evidence elicited as they consider the burden of proof, which will be discussed at length by both sides, in the voir dire.

The typical car crash case involves soft damages, such a chiropractic treatments, massages, hot pack, and stretching. Where there are clearly objective injuries, such as broken bones and scarring, the defense counsel should tread lightly regarding getting a jury to commit they could award no damages on a clearly objective injury. In such a case, defense counsel should admit

there is an objective injury and ask if the venire can consider both sides of the dispute regarding the value of the damage element.

II. THE DAMAGE ISSUES

The typical body of damages in automobile crash cases involves economic damages and non-economic damages for what are typically called hard damages and soft damages. Economic damages or "hard" damages consist of property loss, medical care, loss of earnings or earning capacity. The typical non-economic or "soft" damages are physical pain and suffering, physical impairment, and mental anguish.

A. PROPERTY LOSS

Net property loss sustained because of a wreck is recoverable as part of plaintiff's compensatory damages. *See Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474 (Tex. 2014); *Cont'l County Mut. Ins. Co. v. Ivy*, 256 S.W.2d 640 (Tex. Civ. App.—Beaumont 1953, writ dism'd); *Jones v. Wallingsford*, 921 S.W.2d 463 (Tex. App.—Eastland 1996, no writ).

The damages suffered by a plaintiff in a property loss case are most likely to a car or vehicle. In an action for damage to a vehicle, a plaintiff elects between two methods of measuring the property loss:

- Option 1: A plaintiff may recover diminished value (the difference in the value of the property immediately before and immediately after the accident).
- Option 2: A plaintiff may elect to recover the reasonable costs of repair if repairs are feasible.

Jones, 921 S.W.2d at 464 (relying on RESTATEMENT (SECOND) OF TORTS § 928 (1991); *Pasadena State Bank v. Isaac*, 149 Tex. 47, 228 S.W.2d 127 (1950)).

The law allows the plaintiff to testify to the value of his own property if he can establish that he is familiar with its market value at the time and place of the accident. *Foxx v. DeRobbio*, 224 S.W.3d 263, 268 (Tex. App.—El Paso 2005, no pet.); *Cortez v. Mascarro*, 412 S.W.2d 342 (Tex. App.—San Antonio 1967, no writ); *Cont'l County Mut. Ins. Co.*, 256 S.W.2d at 642 (holding "an ordinary layman who can testify that he knows the value of automobiles and can give satisfactory facts in support of his statement that he has such knowledge is ordinarily qualified to testify as to value of personal property.").

The Jones car was seven years old and had over 100,000 miles on it. *Jones*, 921 S.W.2d at 464. Mr. Jones said before the wreck, his car was worth over $6,000. *Id.* After the wreck, he said his car was worth between $1,500–$2,000 unrepaired. *Id.* But, he had it repaired and agreed the market value was $3,000. *Id.* The jury, having heard the testimony and seen the scene photos showing the car as it was towed from the scene, awarded $0. *Id.* at 465. The Eastland court, reversing and remanding, held "the jury's finding that Jones suffered no damage to her car is so against the great weight and preponderance of the evidence as to be manifestly unjust." *Id.*

Title search: She Said, He Said: Plaintiff and Defense Perspectives on Damages

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