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Damages: Thinking outside the box to hit it out of the park

A case of severe disfigurement with Prop 51 liability issues reveals why damages are limited only by facts, imagination and tenacity



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Recoverable damages are only limited by the facts of your case and your imagination. Creativity and tenacity are your greatest allies. Civil litigators face a myriad of opportunities to increase and recover damages; taking advantage of these opportunities requires careful consideration of the substantive law, jury instructions, venue and jury pool, and often Proposition 51 issues. Through a dog bite case study, this article attempts to demonstrate creative thought to the pursuit and presentation of damages.

A couple of years ago, a stunningly beautiful (inside and out) early 30s Sri Lankan woman was referred to me following failed mediation. Fatima [not her real name] had suffered facial disfigurement when bitten by a German Shepherd. The dog owner was a young, uninsured professional with little to no assets. His attorney had offered a modest settlement on a payment plan. The plaintiff's attorney recognized he could not settle for this small offer, leading him to call me.

The dog bite

Fatima was extremely beautiful despite the disfigurement. It was imperative we find another defendant and maximize special damages due to the probability the dog owner would have substantial proportionate fault for the incident.

At the time of the dog bite, the owner lived at a large apartment complex. Assigning blame to the corporate entity that owned the apartment complex and establishing a large percentage of blame was vital to recovery given Prop 51.

Fatima moved to the Bay Area to attend USF to pursue an MBA. She already had undergraduate and master's degrees in microbiology and cellular sciences respectively. Fatima was working in the Life Sciences industry doing inside sales but was uncertain of her future career path post-MBA.

Fatima suffered a full thickness laceration from the left corner of her mouth in a curvilinear fashion down below her mandible. Prior to repair, Fatima's lower lip hung open exposing her lower teeth. She also suffered a wedge laceration to her lower lip; and injuries to her nose and left ear.



Prior to the incident, Fatima was a vivacious, outgoing, charming, confident and energetic young woman. She literally lit up a room. Now, she was withdrawn, borderline depressed, lacked confidence, felt unworthy of dating and was filled with self-doubt.

Damages considerations

This case presented numerous difficult considerations and issues: How best to seek compensation for disfigurement when Fatima was still gorgeous? What was the preferred juror demographic? How would females react to claims for large damages for disfigurement? How to “quantify” disfigurement? How to best and delicately prove looks matter when it comes to income? What career path would lead to greatest damages? How to handle Prop 51 issues? What could be done from a plastic surgery/cosmetic standpoint?

Most are aware there is a correlation between looks and income. Economists have written books on it. However, how could we best present this issue and what was the full spectrum of issues raised by disfigurement?

Plaintiff retained Nancy Etkoff, Ph.D., a Harvard Professor and the author of *Survival of the Prettiest*. Dr. Etkoff is the leading authority in the nation related to psychology of appearance. Dr. Etkoff explained practitioners familiar with disfigurement use an acronym, SCARED, to explain the impact upon both the disfigured person and those interacting with them. Dr. Etkoff had never previously been retained. Notwithstanding, she is ideal for disfigurement cases.

Based upon Dr. Etkoff’s explanation, plaintiff also retained and sought counseling from a psychiatrist. Dr. Etkoff would present the impact of Fatima’s disfigurement upon third parties and the psychiatrist would explain the impact upon Fatima.

Establishing impact of disfigurement

Presenting damages always poses the risk your client is overreaching or

“whiney.” Here, we were trying to establish an extremely beautiful woman was entitled to tremendous damages because of her disfigurement despite the fact she remained stunning. So, it was paramount to delicately present these arguments.

David Ball teaches us not to allow our client to come across as “whiney.” Use other witnesses to establish damages and then have plaintiff “mop up” and validate these points. To establish the full effect of disfigurement required evidence of both Fatima’s perception as well as those of third parties with whom she would interact. Dr. Etkoff’s explanation of SCARED was a perfect stepping-off point.

SCARED

Both the victims of facial disfigurement and the third-parties with whom they interact are profoundly affected. For third parties, they serially experience the following consecutive emotions when observing a disfigured person:

Sorrow;
Curiosity;
Anxiety;
Repulsion;
Embarrassment, followed by
Disgust.

Upon perceiving a disfigured person, people initially feel sorrow – sadness for the disfigured person. Next, the person is curious about how the disfigurement occurred. What impact is it having on the disfigured person? Then, the person becomes anxious about the situation. Can I ask about it? How will the person react, if I do? Could that happen to me? These conflicting and uncomfortable questions make the third person repulsed by the disfigured person. The person then becomes embarrassed at their own reaction knowing they should have sympathy but are unable to reconcile these emotions. Finally, the person becomes disgusted with the entire situation and wants to avoid it.

For disfigured people, they too serially experience emotions related to their plight: Self Consciousness; Conspicuousness; Anxiety; Rejection; Embarrassment; and “feeling” Different.

Disfigured people inherently recognize their changed appearance and its impact. This makes them self-conscious. Likewise, the way people react to them is palpably different. So, disfigured people feel “like they stand out/are shunned.” This creates anxiety in general as well as during third-party interactions. This also creates a feeling of rejection as others seek to avoid interacting and experiencing the emotions outlined above. All of this leads to the disfigured person feeling embarrassed about their situation and a profound recognition they are different and third-party interactions are permanently altered.

Loss of earnings capacity

The impact of disfigurement upon one’s earnings is dramatic. Literature establishes it can be as high as 13 percent. Much of this stems from the analysis above: the interaction between a disfigured person and a third party is profoundly and fundamentally different.

Literature establishes people comprehend less and retain less when listening to a disfigured person speak. The audience becomes focused upon the disfigurement and either loses concentration or tunes out altogether. Literature also establishes this is subconscious. Scientific testing refuted participants’ claims they did not focus upon facial scarring. Pupil-tracking software established participants’ eyes did not move about the disfigured person’s fashion in a natural, predictable fashion. Rather, the participants repeatedly returned to the disfigurement. The subconscious nature of this phenomenon helped rebut the predictable defense argument discrimination laws would prevent impact on earnings.

Impact on earnings is driven by many variables: frequency of interaction with third parties; frequency of interaction with different third parties; any variable compensation package dependent upon sales; lateral moves; number of steps on the career rung, etc. So, we had Fatima assume a career path with greatest likelihood for impact – Account Manager,



responsible for in-person sales calls. While the sales force is the “face of the company,” this face was going to have a giant scar upon it. We then set about marshaling evidence to establish the prejudice and loss Fatima would experience in the role of Account Manager.

Although Fatima’s employer refused to divulge compensation package information, we deposed former Account Managers that worked for them who testified regarding their compensation package. Industry personnel testified Account Managers make “sales pitches” to multiple personnel within a company, including top executives to close a deal. We also accessed industry Chat Boards which listed compensation packages for multiple employers in the Life Sciences industry in various positions. We then had witnesses validate Chat Board information to lay foundation for reliance by a forensic economist.

Dr. Etcoff testified Fatima would suffer discrimination and economic loss from her disfigurement at each stage of the employment process: delayed hiring; lower base pay; reduced commissions; delayed lateral moves; and delayed advancement. This impact stems from innate, subconscious responses of third parties. Dr. Etcoff had citations to copious literature to support her assertions. Ultimately, Dr. Etcoff testified Fatima would reasonably expect to suffer a 6-8 percent income loss throughout her career. Given compensation packages for Account Managers, this was in excess of \$200,000 over her work life.

Psychiatric evaluation

Because Fatima was so full of life and resilient, this incident did not throw her into deep depression. Notwithstanding, she did suffer. Initially, she was reluctant and friends and family had to insist she attend counseling. As she opened up, it was apparent the profound effect this incident had upon her. The psychiatrist was then able to recount the impact without Fatima appearing “whiney.”

The psychiatrist also testified regarding future psychiatric treatment needs and costs throughout life. In sum, she explained Fatima was now a psychological “egg shell.” Thus, foreseeable life events such as loss of her parents and other things would likely necessitate psychotherapy that would otherwise be unnecessary or shorter in duration. Thus, we were able to establish the need for future psychiatric care to further increase economic loss.

Finally, the psychiatrist was able to testify Fatima would suffer future general damages from future encounters with third parties. These predictable encounters and relationships were likely to be impacted. Fatima would recognize it and continue to suffer from “feeling” different.

Lay witness testimony

To demonstrate the impact of the disfigurement upon Fatima as well as avoid her seeming “whiney,” we had friends and acquaintances testify regarding changes in her personality and anecdotal evidence of third-party reactions. Universally, Fatima’s friends and family explained she became extremely withdrawn and self-conscious after the incident. She declined invitations to go out. She was prone to crying. Each witness also had compelling examples of negative third-party interactions: a young child pointing at Fatima, causing her to cry; people in Sri Lanka, where social mores are different, asking her probing questions about the scars; and people either overtly staring at Fatima or seeking to avoid her.

A boyfriend was prepared to testify he and Fatima broke up because of her insecurities about her appearance. No matter what he did to reassure her that he thought she was still beautiful, Fatima still felt doubt. Friends testified Fatima sought to avoid meeting new people, one of her prior pleasures. She styled her hair differently trying to cover her scars and tried to position herself to avoid perception of her scars. Fatima also preferred smaller, dimly lit environments.

Future medical care costs

Sri Lankans are predisposed to development of thick, ropey scars. In addition, Fatima’s biggest scar transected muscle and was adjacent to nerves. So, plastic surgery options were rather limited. In addition, none was likely to be successful in materially improving the appearance. Rather, subtle lipectomies could be performed to ameliorate the prominence of tissue above scar to provide a smoother appearance. While this meant relatively smaller future medical costs, future earnings potential loss as well as future general damages remained unaffected despite inclusion of future medical care.

Fault to corporate defendant

In any dog bite case, the owner is strictly liable. Jurors are naturally inclined to assign the lion’s share of fault to the dog owner. As was said earlier, and owing to Prop 51, assigning a large percentage of blame to the corporation was vital to recovery. General damages were sure to be extraordinary, but we feared that only a small percentage would fall upon the corporation, minimizing recovery. We had to change this.

Evidence showed the apartment complex violated its own rules by allowing this particular breed of dog. This was a safety rule – the decision to ban German Shepherds and other large aggressive dogs with the reputation for inflicting severe injury. From there, it was necessary to establish the corporation had an ongoing duty to remove the dog during the seven-month tenancy before the incident.

Discovery revealed industry standard to provide apartment employees reduced market rents to have them on premises and nearby at all times. The dog owner routinely walked his dog through the lobby and near the rental offices providing additional opportunity for corporate intervention to avoid the incident. Discovery also established multiple profit motives: the corporation enjoyed the rent;



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the rental agent received a commission for each approved application; and the property manager's compensation was tied to profitability of the complex.

Finally, the corporate owner initially amended its rules to allow pets following the Dot-Com crash in order to recruit and retain new apartment tenants. Combined, we had motive and the ammunition to argue the corporation had many months and many opportunities to prevent this incident. The argument followed that each failure increased the proportionate fault.

Punitive damages

Once we established the safety rule behind banning certain breeds of dogs, it was easy to argue a violation was conscious disregard. The corporation had to explain why it primarily chose to prohibit

large, aggressive breeds with propensity to inflict severe injuries. The low-level corporate personnel admitted this early on – it was to avoid serious injury to tenants as well as any of their visitors and indeed anyone at the complex. From there, the “Managing Agents” were unable to avoid similar admissions. So, on the eve of trial, we moved to amend to add a claim for punitive damages. Despite case law directly on point that the landlord had no liability (*Chee v. Amanda Goldt Property Management*, (2006) 143 Cal.App.4th 1360), we reached a confidential settlement during the second day of jury selection.

Conclusion

Be creative and relentless in pursuit of damages theories. Consider consultations with experts in obscure fields.

Marshal evidence to support your claims with an eye towards avoiding the perception that plaintiff is overreaching or “whiney.” Be mindful of comparative fault arguments to minimize impact of Prop 51. Do not be deterred by difficult cases. You and your clients will be pleased with the results.



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