

Making the Invisible, Visible: Proving Unseen Pain and Suffering at Trial

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September 10, 2026

I joined my firm after serving as a homicide prosecutor in Brooklyn. I never confronted the challenge of a jury not being able to see what happened to the victim. There was generally a photograph and some testimony from a witness at the scene about the deceased. There was always expert testimony from a forensic pathologist about the injuries that were sustained and ultimately what the cause of death was. Frequently, other experts were called to illuminate the injuries the victim sustained.

But, as a plaintiff personal injury attorney for more than two decades now, I've had clients come to me with a wide range of injuries. When clients enter the courtroom suffering from paraplegia, or the diagnostic studies show they sustained multiple fractures to different bones, their injuries are immediately apparent to the jurors. They can plainly see that person was seriously injured in an accident.

It's much more challenging to bring a plaintiff who looks no different than everyone else before the jury and explain how that person's life has drastically changed. Understandably, most of us are less inclined to believe what we can't see. While it may make your job as a plaintiff's personal injury attorney more challenging, it doesn't make your client's suffering any less real.

The New York Pattern Jury Instructions (PJI) do not provide much guidance to jurors for awarding pain and suffering damages. A trial attorney's job is to provide everyone in the courtroom a roadmap for return-



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ing a favorable decision for your client. That means your responsibility includes persuading the jury, but also the judge, defense attorney, and any insurance representative overseeing the case.

A seasoned lawyer's goal should be to position the case for settlement while also setting the table for a significant jury verdict. Realizing that goal requires you to establish the extent of your client's injuries and illustrate how those injuries affect all aspects of their life. These are some of the techniques I've used at trial to make my message clear.

Identifying Jurors with Firsthand Experience

It's difficult to understand the toll stabbing or chronic pain can have on a person's physical and mental well-being if you've never experienced it. Many jurors, however, have dealt with pain and injury before, experiencing it themselves or seeing it through the lens of a loved one. This proximity to pain often makes jurors

more able to understand a plaintiff's suffering, and those are the jurors you want on your case.

To start, in voir dire, I ask the potential jury pool if they or anyone they know is dealing with severe or chronic pain. People inevitably raise their hands, inviting me to then ask: Can you always tell? Can you see the pain? Most of the time, people don't always recognize when a loved one is struggling.

I ask the potential jurors to explore the idea that people walking around in our everyday lives may be dealing with trauma, injury, or disability, and most of us would never know. But the absence of visible trauma doesn't mean the absence of pain or suffering. Most jurors embrace this concept. Thus, it follows that the same consideration they extend to a loved one should also, then, be extended to the plaintiff in the case.

I also make direct points of comparison between jurors and my client. Establishing commonalities helps foster empathy and encourages jurors to put themselves in the same position as my client.

The colloquy depends on what I learn about the passions and interests of the jurors. For example, I might say, how would you feel if you could no longer play golf or go fishing with your friends on weekends? What would change if you could no longer work at the job you've been at for 20 years? What is lost when you can't teach your child to ride a bike or take them on an annual summer vacation?

Identifying the jurors who understand this pain helps ensure a fair result for clients in any personal injury trial.

Using Data to Corroborate the Narrative

Even the most compassionate juror will turn skeptical if you don't have the facts to back up your story.

It's my job as an attorney to earn the jury's trust. I need to show them why I've taken my position and prove that the pain I referenced my client enduring in jury selection is real. The most objective way to do this is through medical records, experts, and independent corroboration. It cannot merely be, "Please take my word and simply accept my client's testimony."

Medical Records

First, I need to demonstrate that a plaintiff's complaints mirror the medical findings. Generally, this is

persuasive because the tests are objective: they don't favor one side or the other in a lawsuit.

Sometimes, the evidence takes the form of an MRI or other diagnostic scan which, when interpreted by an expert, can show evidence of injury.

Another common test our clients may undergo is an EMG, which identifies issues with nerves and muscles by measuring how they respond to electrical activity. Such test results enable me to tell a jury that a client's injury has been verified by independent factors.

Beyond tests, I also craft arguments using documents like doctors' notes, 911 call transcripts, prescription medication histories, or EMS reports taken from the scene of an accident.

Detailed notes from emergency physicians can be especially persuasive, because the doctor has generally no connection to the case and therefore no reason to lie. Say, for example, a doctor leaves a note on a plaintiff's chart, recording a muscle spasm in the back felt during an initial examination. Muscle spasms can't be measured by a scan, but they also can't be fabricated – they're an automatic pain response. The doctor's note confirms the existence of an injury. You may also be able to buttress your client's claims from witness testimony, particularly an independent witness. Another person supporting your client's medical case is often very helpful.

Additional Data

Part of establishing pain and suffering to the jury is highlighting exactly what a client lost, both physically and emotionally. This loss can often be conveyed through hard data.

I've represented many plaintiffs who valued physical activity and exercise before their accidents. Until the incident, they regularly worked out, went on hikes, played sports, and lived otherwise active lifestyles. After their accidents, their injuries forced them to curtail or even cease these activities.

If my client belonged to a gym, I could use the gym's check-in records to show how frequently my client attended before and after an accident. If my client used a fitness watch to track jogs or bike rides, I could use data from the watch to show the average duration, length, and intensity of the workouts. I'll then contrast that story with a current day-in-the-life video of my client, which might show them struggling

to climb stairs without assistance or stuck in bed due to pain. I may also use post-accident data from gym attendance records or a fitness watch that illustrates a dramatic change from before the accident to now.

This before-and-after approach also helps rebut one of the defense's most common arguments: the injuries are not accident-related; they're degenerative.

Rather than fighting the defense on this matter, I've found it better to concede their point that a client has some degree of degeneration that is evident in a diagnostic test. Many of our clients are construction workers whose bodies have endured significant wear-and-tear after years of hard labor. They've likely had some degenerative conditions for a long time, often very long.

But these conditions, if present, did not markedly affect plaintiffs *before* the accident. The changes to the plaintiffs' lives—the pain, the loss of work, the loss of hobbies—were not present until after the accident occurred. This, when paired with the plaintiff's personal narrative, further corroborates the claims of pain and suffering and establishes that the accident was the inciting cause.

Sharing Personal Stories Through Testimony

Plaintiff testimony is also a form of evidence. Though perhaps not the gold standard of objectivity, it is one of the strongest tools we have to make a client's injuries real for the jury. A client who can talk about his or her profound loss honestly and openly—but also persuasively—can be more effective than any number or document, because such testimony humanizes the plaintiff and the pain. It gives shape to all the data.

It takes guidance to help my clients tell their stories to the best of their abilities. While I might be accustomed to speaking in court, I can't expect my clients to have that same level of comfort without preparation.

When preparing for trial, I try to help clients tell their stories in a way that's natural, specific, and honest. I encourage them to spare no detail, because those

details can help make a story impossible to dismiss. Conversely, omitting information or glossing over facts can immediately raise suspicion, especially among New Yorkers, who are particularly adept at discerning lies.

Witnesses can also bolster these stories, especially when they know the plaintiff well. I've had many loved ones take the stand to talk about how their hardworking husband stopped taking extra hours on a jobsite, or how their once-social child has withdrawn from friends and school. This evidence further corroborates my client's claims. It goes a long way if the jury likes your client and their loved ones.

Helping Juries Put a Number on Damages

Juries are not given specific instructions when determining damages on a case. It's difficult for them to assign a clear number to something as nebulous as pain or suffering, and so it's my job to make those concepts as easy to appreciate as possible.

I'll often ask jurors to embrace the emotional element of these significant losses. I ask them, what does work represent, empirically, to a person? How does it enrich their lives? What does it mean to miss out on your child's milestones? What kind of value do you place on these losses?

There's never one exact answer to these questions. But giving the jurors an opportunity to reflect on these questions helps them arrive at a fair decision. I want the jurors to feel confident in their reward, and I want them to understand why the numbers I presented make sense for the plaintiff. I can only do that if I've given them the tools to understand the entirety of my client's story.

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