

Artfully Conceding Liability Can Offer Defendants 3 Benefits

By **Ken Broda-Bahm** (January 24, 2025)

There is a lot of discussion of pardons in the news lately, from former President Joe Biden's pardon of his son Hunter and his "preemptive" pardons of others, to President Donald Trump's pardoning of Jan. 6 rioters.

Ultimately, a pardon removes one issue from the table. In civil litigation, we don't get pardons, but we do have to sometimes rely on other ways of removing an issue from the table. Conceding liability is one such way.



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Sometimes in civil cases, the plaintiff's liability claim is opportunistic, wishful or factually weak. Other times, it is real. Someone didn't do their job, a danger was missed, or — in that Olympic champion of passive-voice phrases — "mistakes were made."

In this kind of situation, the question of whether to contest or concede liability is often a serious conversation for the defense team. In that discussion, it is natural to think it might be worth it to aim for the small chance of success in fighting liability, in the spirit of, "Why not give it a try?"

The reason is that trying comes at a cost. When you make an argument, only to have it be slammed by the jury, you have less credibility, potentially making the jury angrier and exacerbating an impression that your client is not taking responsibility and just "doesn't get it." That can set the stage for greater damages.

That said, it is often a big step for the defense team to agree to a concession. Sometimes, when the team doesn't agree or doesn't fully commit, you get what I consider to be the worst of all possible postures: kind of conceding but also kind of contesting liability.

The defendant might accept responsibility at a broad level, while still denying that they did anything wrong on the specifics. They might soft-pedal the liability defenses but still trot them out, not having the boldness to clearly state, "We are liable."

I call that in-between stance the worst because you end up with all the harms of admitting liability, without any of the credibility advantage. You're wearing the target of blame, but without the small bit of armor that comes from an honest acknowledgment.

When accepting liability, it pays to treat it like you're crossing the Rubicon: Don't just wade in or mess around in the current; instead, make sure you're clearly landing and planting your flag on the other side.

It isn't for every case, by a long shot, but when you have made the strategic decision to admit liability, and you do so clearly and consistently, you stand to realize three main benefits.

1. The Legal Benefit

Lawyers, being lawyers, are likely to key in on this one first.

When you concede liability, you give yourself a good argument for keeping out a solid chunk of the documents and testimony that could serve to make jurors angry.

You narrow the case to just the questions of causation and damages, which can not only shorten and focus the trial, but also transform the jury's task from assessing a broad morality play to conducting a specific logical or financial analysis.

The plaintiffs will still have every motivation to say, "But judge, we still need to tell the whole story and put this in context." And to a degree, there's some risk that the judge will agree. But legally, evidence should only come in if it helps the jury resolve a contested issue.

2. The Framing Benefit

From the jury's perspective, what is the case about? The most pragmatic answer is that it is about whatever they spend most of their time discussing.

When you contest liability but have slim chances of winning, then the dominant focus of their conversations will be the poor choices and irresponsible actions of your client. The frame for their attention is one of irresponsibility, error and negligence.

When you concede liability, you are still admitting error, but there is a difference between jurors logically knowing that you're at fault, and jurors psychologically spending all of their time, focus and effort on all the ways and reasons you're at fault.

If that liability focus is more likely than not to put you in a negative frame, then you might consider the advantages of a frame that would reorient the jury to spend all of that focus instead on the logic of causation or the analysis of damages.

3. The Motivational Benefit

It pays to think of the motivations that drive jurors. They aren't doing the hard work of paying attention, remembering, arguing and deciding just because the judge and the instructions ask them to.

Instead, they're also implicitly following some idea of social good. They take a position because they think some benefit comes out of that position.

A company that is denying or minimizing fault, when it is at fault, is a company in denial — a company that is responsible not just for the injury, but for a lack of awareness about it. It is a company that doesn't get it.

The resulting perceived irresponsibility can, in turn, motivate jurors to award a number that will cause them to get it — i.e., it can motivate jurors to send a message.

Alternately, when the company concedes liability, this can convey that it has already gotten the message — a stance that drains jurors' motivation to excessively punish the company through a number at the bottom of a verdict form.

Conclusion

We have also increasingly seen one post-pandemic reality: Jurors can get a little ticked off with the idea of powerful entities playing fast and loose with honesty, responsibility and

safety. Punishment-oriented thinking increases the likelihood and severity of nuclear verdicts.

There is, of course, a big disadvantage in conceding liability: You're at fault, with no opportunity for jurors to see it any other way.

But when you've done your own case research and analysis, and when you have good reason to believe that result is likely anyway, then you might have a good reason to at least reap some of the benefits that can come from conceding liability.

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